Alabama Supreme Court Justice Harold See:

His Twelve-Year Legacy

A Special Issue Report by E. Berton Spence

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Alabama Supreme Court Justice Harold See's decision not to seek a third term means that a staunch proponent of the philosophy of judicial restraint will be gone after January 2009. Whether interpreting statutes, constitutions, private contracts, common law, or the Alabama Supreme Court's own rules, Justice See's opinions show a pattern of applying preexisting rules when interpreting cases. This is the case even when the result is to markedly decrease the power of the court. The growth in judicial restraint on the Alabama Supreme Court has been identified by some as having reduced the incidence of novel and unexpected approaches to tort liability, which prompted a few multinational companies, such as Mercedes, Hyundai, Honda, and ThyssenKrupp, to establish a presence in the state.

I. What Is Judicial Restraint?

Judicial "restraint" and its opposite, "activism," have been buzzwords in legal circles for many years and have framed debates about the proper role of judges at national and local levels. In common usage, "restrained" refers to judges who apply the law as it is written; "activist" is a label for judges who seek to impose their own will over that of the legislature (when interpreting statutes), over the people (when interpreting constitutions), over private individuals (when interpreting contracts), over well-settled rules of law (when interpreting the common law), and over other judges (when interpreting court rules). Activism is equated with a judge's improper use of bias and prejudice; i.e., desires for specific outcomes that have their origins outside the bounds of the dispute the judge is deciding.

Chief Justice Sue Bell Cobb of the Alabama Supreme Court defined "judicial activism" in a recent case called *Edwards v. Kia Motors of America, Inc.*, stating that it,

> implies a willingness on the part of the Court to invade, improperly, the province of the legislature by refusing to apply the plain meaning of the statute before us in favor of substituting language and meaning that are not otherwise present. Thus, the Court becomes a sort of 'superlegislature' that imposes its particular agenda on the citizens of our State without the benefit of the usual legislative process. Certainly this is a bad thing. Not only does the Court disregard its obligations under the state and federal constitutions, but it also demonstrates an abandonment of principles that are absolutely critical to an effective system of justice. 'Our system relies for its validity on the confidence of society; without a belief by the people that the system is just and impartial, the concept of the rule of law cannot survive.' [quoting from another case].[1]

Judicial activism thus, by definition, tends to increase the power of the court at the expense of other branches of government and the people themselves. In contrast, judicial restraint and strict interpretation of laws tends to decrease the power of the court. Courts that explicitly defer to the power of the legislature to write laws are not taking power away from legislatures. Judges who respect the rights of individuals to enter into contracts which will then be enforced as written are engaged in preserving a basic power for the people themselves. When parties know that the laws in existence when their dispute arose are the same laws that will be applied if their case goes to court, they can often "judge" the outcome of any such dispute in advance and settle their differences without resorting to the courts. Thus, in any struggle to determine whether a court opinion is the product of judicial restraint, one indicator is whether the decision enlarges or restricts the power of the court making the decision.

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II. Traditional Rules, Statutes, Constitutions, Contracts and Court Rules Solidly Followed in See Opinions

Use of the defining factors discussed above, in looking at some examples of Justice See's opinions, reveals the clear signs of judicial restraint. The following examples provide a qualitative analysis of See's treatment of legislation, constitutional provisions, common law, private contracts and even court-made procedural rules.

A. The Traditional Laws of "Fraud"

Justice See took office as a member of the Supreme Court of Alabama in January 1997. Very shortly thereafter, in *Foremost Ins. Co. v. Parham*,[2] the supreme court struck down a change in the law of fraud that a previous embodiment of the same court had implemented a few years previously. For over one-hundred years before abandonment of the traditional rule, state law had required that anyone accusing another of fraud show that he had reasonably relied on the other's allegedly fraudulent statement. In place of this traditional rule, the earlier supreme court had changed the law to, in effect, remove the requirement that a fraud plaintiff use any degree of reason in deciding to rely on the statement of another. Instead, the new rule required that jurors—never the court—determine all questions of reliance, and that the jurors not judge the question by whether the reliance was reasonable. Under this standard, it no longer mattered whether there was any reason to believe what the alleged fraudster said.

In the *Foremost* case, Justice See sided with the majority of justices in deciding to return the law to what it been for over a century. See explained that by striking down the traditional rule, the court made it possible to turn every contract dispute into a "fraud" claim simply by alleging that the other party said the contract would work differently than its written terms clearly showed:

> For example, Buyer and Seller voluntarily enter into an arm's length transaction for the purchase of insurance. Buyer wants the most coverage for the least premium, while Seller wants the most premium for the least coverage. The written contract plainly and clearly provides for $9,000 of coverage. Without reading it, Buyer signs the contract. Three years later Buyer suffers a loss, receives $9,000, and files a fraud claim alleging that Seller orally represented that the contract provided $10,000 of coverage. Should a court allow such a claim to go to a jury? 'Justifiable reliance' says 'Yes.' 'Reasonable reliance' says 'No.'

In reinstating the traditional rule, See participated in drawing the circle of the court's power over private relationships smaller rather than larger.

B. Strictly Construing Legislation: Can You Agree Not To Sue And Then Sue Anyway?

In the aforementioned case of *Edwards v. Kia Motors of America, Inc.*, Justice See analyzed a piece of legislation known as the Alabama Motor Vehicle Franchise Act. This law governs many aspects of the relationship between auto manufacturers and their dealers. It contains a section which prevents the parties from writing "waivers" into franchise agreements that would otherwise prevent one from suing the other for violations of other parts of the act. More simply, it prohibits the manufacturer and the dealer from agreeing in advance that the act will not apply to them.

In the *Edwards* case, it was claimed that this provision concerning "waivers" in the franchise agreement should be read to prohibit the effectiveness of a release that a manufacturer and dealer specifically negotiated, not in the franchise agreement, but at the end of their relationship when the dealer sought permission to transfer the franchise to another dealer. The dealer had agreed to release specific claims, but later claimed he felt "pressured" to enter into the release agreement. On this basis, he attempted to characterize the release as a waiver of the type disallowed by the act and claimed that the Alabama Motor Vehicle Franchise Act gave him the right to both (a) accept valuable consideration in return for a promise not to sue but then (b) sue anyway.

Justice See wrote that the Alabama Legislature's statement concerning "waivers" could not be expanded to include a subsequently-executed release. In so doing, he foreclosed what would otherwise have been perpetual court supervision of every aspect of the relationship between auto manufacturers and dealers. If no claim could ever be foreclosed by agreement of the parties, manufacturers and dealers could never have any certainty that any potential disputes between them had been settled. In fact, to read the statute this way would be to hold that manufacturers and dealers have

no ability to settle their claims, ever. No matter what one party agreed to, it would still be free to change its mind later and bring suit.

C. Preserving the Separateness and Equality of the Three Branches of Government

Justice See's invocations of the portions of the Alabama Constitution that separate the judicial, legislative and executive branches from one another; and provide that no branch shall exercise the powers of any other branch; are too numerous to catalog. See, for example, *Alabama Power Co. v. Citizens of Ala*, in which he quoted section 43 of the Alabama Constitution: " [the] judicial [department] shall never exercise the legislative... power[]; ... to the end that it may be a government of laws and not of men."[3]

In the so-called "Equity Funding Case," See's influence on this topic appears evident even though the decision was rendered by the court as a whole and not attributed to any single justice.[4] The written opinion was joined by four justices, including See, while others concurred in the result, creating a majority. This drawn-out case was brought by plaintiffs who sought to have Alabama's entire system of funding education declared unconstitutional primarily because different localities have different property tax rates, potentially resulting in unequal spending on education across the state. Unlike normal court cases in which private parties bring a genuine dispute to the courts, this case was brought primarily by citizens' groups against the various branches of government with responsibility for education funding and administration. It is not difficult to imagine that governmental entities might wish to raise taxes, but fear the political consequences of doing so openly. Thus, there was some doubt—expressed by the supreme court in opinions on earlier appeals in the case—as to whether this case represented a genuine dispute as opposed to a collusive, sleight-of-hand attempt to have the courts "order" a general tax increase for those localities deemed to have "too low" a rate.

D. Applying Federal Law and the Case of Arbitration

When a Montgomery Circuit Court purported to order the legislature to create a new educational funding system that would eliminate alleged inequalities, the supreme court, on its own initiative, took jurisdiction of the case. Reasoning that it lacked the power to usurp the legislative function (as See had written many times in other opinions), the supreme court reversed the trial court and dismissed the entire case from any further consideration. Had the supreme court allowed this exercise of power, the education system in Alabama would have been supervised extensively. The courts would have had ultimate authority to order tax increases and specified funding levels, for example.

Because federal law is supreme to state law, the Federal Arbitration Act—in requiring enforcement of private agreements to submit disputes to an arbitrator regardless of whether the agreement preceded the dispute—supersedes any state laws to the contrary, including Alabama's Arbitration Act. But there is an important catch: the federal act only applies if the underlying relationship of the parties affects "interstate commerce."

Because the ability of the U.S. Congress to legislate is itself often dependent on whether Congress is exercising its constitutional power to regulate interstate commerce, this term has been the subject of thorough and critical explanation by the U.S. Supreme Court and has been given a scope so broad that almost no economic activity can be said to be outside the definition.

Even so, for a variety of reasons, numerous judges on the Alabama Supreme Court have—over the last 20 years or so—sought to use the "interstate commerce" issue to deny application of the Federal Arbitration Act, apply the Alabama act instead, and, in so doing, decline to enforce agreements in which people choose to ask privately-hired judges to decide their disputes instead of the judges who sit on our courts. Justice See, in contrast, has ruled in favor of the ability to use a private system of dispute resolution and to forego the courts altogether.

In a notable example, *Alafabco, Inc. v. Citizens Bank*, a solid majority of the Supreme Court of Alabama held that the "interstate commerce" requirement for invocation of the Federal Arbitration Act could only be met by showing that the individual transaction at issue "affected" interstate commerce.[5] Justice See, alone in dissenting, maintained that the U.S. Supreme Court's test was not whether the transaction itself affected interstate commerce, but whether the aggregate participation of the nation as a whole in that type of activity affects interstate commerce. Thus, while the

specific commercial loan transaction at issue in *Alafabco* might or might not have had an "interstate" character to it, commercial lending, on the whole, is the very lifeblood of interstate commerce. As such, See wrote that the Federal Arbitration Act controlled the outcome of the case and that the arbitration agreement was due to be enforced.

The U.S. Supreme Court accepted the *Alafabco* case and not only employed the test used by Justice See in his dissent, but referred to him by name in admonishing the rest of the Alabama Court to use the correct legal standard, calling the standard used by a majority of the Alabama justices "an *improperly* cramped view of Congress' Commerce Clause power."[6] Not simply an *incorrect* view, but an *improper* view.

E. The Ability Of Both *Parties To Be Heard Before Rulings Are Made*

A few years ago, it became common for certain Alabama trial judges to enter rulings against corporate defendants even before those defendants had been served with copies of the complaints. More particularly, in certain instances in which plaintiffs' trial lawyers sought to certify class actions, trial judges would certify the case as a class action before the defendant even knew that it had been sued.

In such instance, the defendant had no opportunity to argue that the case was not appropriate for class treatment. The difference between defending an individual action and a class action is tremendous. Faced with one—or even a few—identifiable plaintiffs, a defendant can investigate the claims, learn whether it has valid defenses, and proceed accordingly. Faced with an unnumbered, anonymous group of potential claimants, the defendant's abilities to disprove allegations are severely constrained. Thus, the question of class certification is extremely important to the life of the case.

Moreover, Alabama Rule of Civil Procedure 23 states that several factors must be met and demonstrated before a class can be certified. It was previously unprecedented for such a process to take place without the defendant's presence, prompting lawyers in the state to refer routinely to these one-sided affairs as "drive-by certifications."[7]

In *Ex parte Citicorp Acceptance Co.,* Justice See held that class actions could not be certified without notice to the defendant and an opportunity for the defendant to be heard, dealing a severe blow to the "drive-by" certification procedure.[8] This procedure was also, ultimately, prohibited by Alabama legislation.

III. Economic Expansion in Alabama

Determining causes and effects is tricky business, especially when the subject *is* business. Perhaps Alabama would have netted the same job creation in automotive and other industries even if Alabamians had not changed the composition of its court over the last decade-and-a-half.[9] But some legal commentators and business leaders have suggested otherwise.

Cumberland School of Law Professor Michael DeBow, in his 2004 whitepaper, *The Road Back From 'Tort Hell': The Alabama Supreme Court From 1994-2004,*[10] detailed the activist decisions that earned Alabama the nickname of "Tort Hell," as well as Alabama's return to restraint. At roughly the same time, the Business Council of Alabama published an article entitled *20 Years In The Trenches Proves Productive*, in which it detailed many of the efforts that led Alabama into the industrial and business development spotlight.[11] This is what it said about the courts in that article:

> In the mid-1980s, BCA led the charge to pass comprehensive legal reform, only to see its legislative victories dismantled a few years later by an activist Supreme Court. But, as Alabama was daily taking it on the chin as America's "Tort Hell," and companies were leaving the state in droves to find a safer place to work, the business community refused to back down. Business leaders set their sights on the courts, determined to help elect judges who would uphold the law, not rewrite it. The makeup of today's appellate courts reflects that determination.[12]

However, judicial restraint is hardly business-friendly; indeed, an anecdotal, and final, example of See's work shows how "strict construction" can gore the ox of business. In Justice See's opinion in *Ex parte Ocwen Federal Bank, FSB*, he refused to supplant the long-standing rule that in fraud cases against businesses, the plaintiff is entitled to search through the company's files and records looking for other instances in which the business has arguably committed a similar fraud to the one being alleged in the current case.[13] Known as "pattern and practice" evidence, this category of information can be used to argue for punitive damages

against fraud defendants, though many corporate attorneys have argued that no plaintiff should be able to prove that he was defrauded by dredging up allegations that *someone else* was defrauded. Applying the law as you find it, however, means just that, and the "pattern and practice" rule, bane of the existence of business defendants, lives on.

CONCLUSION

See's judicial career is long and nuanced. While it is difficult to sum up a person's work in one sentence, no study of Justice Harold See's twelve years on the Supreme Court of Alabama could fail to reveal that he has been a judge who ascribes to a philosophy of judging that constrains the power and authority of the judiciary. He has consistently argued for judicial restraint and strict construction during his soon-to-end tenure on the Supreme Court of Alabama.

Endnotes

1 Case no. 1061167 (May 16, 2008).

2 693 So. 2d 409 (Ala. 1997)

3 740 So. 2d 371, 381 (Ala. 1999)

4 Ex parte James, 863 So. 2d 813 (Ala. 2002).

5 872 So. 2d 798 (Ala. 2002),

6 539 U.S. 52.

7 The author has been one of many lawyers prompted to make this categorization.

8 715 So. 2d 199 (Ala. 1997).

9 The specifics of Alabama's industrial development efforts are beyond the scope of this article but are well-known to most Alabamians and can be researched in detail at the Business Council of Alabama (www.bcatoday.org), the Alabama Department of Economic and Community Affairs (www.adeca.alabama.gov), the Alabama Development Office (www.ado.state.al.us) and various chambers of commerce throughout the state.

10 *Available at* http://www.fed-soc.org/publications/pubID.92/pub_detail.asp.

11 Business Alabama 96 (Feb. 2006), *available at* http://www.bcatoday.org/uploadedFiles/BCA_Site/Home_Page/February%20issue.pdf).

12 *Id.* at 97.

13 872 So. 2d 810 (Ala. 2003).

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