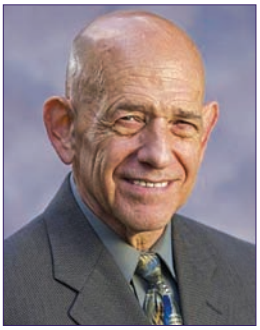

BY ROBERT A. LEVY

CHAIRMAN'S MESSAGE

Good News and Bad News

> "The federal judiciary has also become more engaged in binding the political branches with the chains of the Constitution."

First, the bad news. Arguably the greatest threat to freedom in the United States is the continued growth of the federal government. Entitlement spending is out of control, taxes are confiscatory, regulations are pervasive, and economic liberties—especially property rights and freedom of contract—have been consigned to second-class status. Equally troublesome, many of our political leaders—even those who question the efficacy of government in domestic matters—seem eager to embrace government intervention overseas.

From a constitutional perspective, the accelerating delegation of lawmaking power to administrative agencies is particularly alarming. Our Framers vested all legislative power in Congress. They knew that the potential for tyranny would be reduced if legislative and executive powers were separated. Yet Congress persists in writing murky laws and then authorizing one or more of the 300-plus regulatory agencies in Washington, D.C., to flesh out the details. Those agencies now dwarf Congress when it comes to making rules controlling what Americans can do.

That said, there's good news to report as well. State legislatures—with a push from groups such as Cato and the Institute for Justice—have curbed the worst abuses of eminent domain and civil asset forfeiture. Homeowners now have greater assurance that their property will not be seized for private development, and innocent parties can more easily reclaim assets that, without the owner's knowledge or consent, have allegedly "facilitated" commission of a crime.

The federal judiciary has also become more engaged in binding the political branches with the chains of the Constitution. For example, when Texas and 25 other states challenged President Obama's executive order on immigration, a federal judge ruled that it was is a "complete abdication" of the president's duty to enforce the laws—"not simply. . . inadequate enforcement; [but] non-enforcement. . . that contradicts Congress's goals."

On the Supreme Court front, despite occasional backsliding, the Court has issued several key decisions vindicating individual rights and constraining government powers.

- In *Heller v. District of Columbia* (2008) and *McDonald v. Chicago* (2010), the Court rejected the collectivist, militia-only view of the Second Amendment and secured an individual right to bear arms.
- In *Citizens United v. Federal Election Commission* (2010), The Court overturned provisions of the McCain-Feingold campaign finance law, thereby extending First Amendment protection to corporate and union-sponsored political advocacy.
- In *National Federation of Independent Business v. Sebelius* (2012), notwithstanding Chief Justice Roberts' inexplicable opinion upholding Obamacare, the Court instituted two significant limitations on federal power. First, Congress may not bootstrap its authority under the Commerce Clause—by compelling persons to engage in commerce and then asserting regulatory dominion triggered by that engagement. Second, Congress may not coerce states to participate in federal programs by imposing onerous conditions on the receipt of federal funds.
- In the Defense of Marriage Act case, *United States v. Windsor* (2013), the Court barred the federal government from discriminating against married same-sex couples. In *Obergefell v. Hodges*, the Court went even further—applying the Fourteenth Amendment to establish a gender-neutral "fundamental right to marry."

This coming term, the Court will have at least two opportunities to reverse long-standing precedents that have restricted personal freedom. Friends of liberty are guardedly optimistic.

- In *Friedrichs v. California Teachers Association*, the plaintiff argues she should not be required to pay union dues if she's not a union member. Mandatory dues are essentially compelled speech that subsidize public advocacy.
- In *Fisher v. University of Texas*, the Court will have yet another chance to rein in racial preferences.

All told, a decidedly mixed bag for libertarians. The executive branch has been a consistent disappointment. Congress has enlarged federal power no matter which party controls the agenda. Only a handful of states and the federal courts have sporadically moved the country in a pro-liberty direction. That certainly underscores the critical importance of judicial appointments by the next president.

Robert A Levy