



JUDICIAL INDEPENDENCE IN THE LINE OF FIRE: THE BATTLE FOR THE SOUL OF PAKISTAN

IFTIKHAR CHAUDHRY, CHIEF JUDGE

v.

PERVEZ MUSHARRAF, PRESIDENT-GENERAL

W. DENNIS DUGGAN, F.C.J.

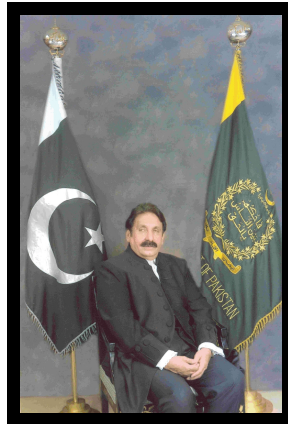
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Waterfront Hall, Belfast's convention center, sits on the west side of the Lagen River; Lagenside it is called. Off in the distance, looking like the Imperial Walkers from the Star War movies, one can see the giant cranes of the Harland and Wolff Shipyard. They stand like enormous guard dogs over Belfast harbor. Once they lifted into place the steel plates that would become the Titanic. I find myself standing next to Brian Kerr, the Lord Chief Justice of Northern Ireland. He is with a tall dark man with thick hair and an even thicker

moustache. I am introduced to the man by Lord Justice Kerr, but with the noise of the crowd and the accents of both Justice Kerr and the other man, I do not catch his name or official position—but I do make out the word Pakistan. The next day, at the formal opening of the XVII World Conference of the International Association of Juvenile and Family Court Judges and Magistrates, I can see from the program that I had been introduced the night before to the Chief Justice of Pakistan. I did not think too much about that at the time.

What if there was a judicial hall of fame, or a judicial Mount Rushmore. Whose face would be on such a monument. John Marshall, no doubt. How about Sir Thomas Moore, Lord Mansfield and Sir Edward Coke? Of course, other countries have judges, and great ones no doubt. But, our English common law system has placed great responsibilities in the hands of judges and so, at times, individual judges have done great things. It is also the system we are most familiar with. So this list means no disrespect to the French, German, Russian, Chinese, Japanese or other legal systems. But, perhaps it's time to branch out and nominate an "outsider". My vote today would go to the Chief Judge of Pakistan, Iftikhar Mohammad Chaudhry.



**IFTIKHAR MOHAMAD CHAUDHRY
CHIEF JUSTICE OF PAKISTAN**

But how to define greatness—other than we know it when we see it. Maybe it is about standing up to the amassed political power of the times at the risk of life and liberty and issuing a decision that stands that power on its head. The judges mentioned above have all done that. So here is my list for a Judicial Mount Rushmore.

John Marshall cemented the power of the Supreme Court to rule on the constitutionality of Federal laws in *Marbury v. Madison*. He did so at a point when the Supreme Court was its weakest in history. The impeachment of Judges was put on the table by Jefferson and his Republican party (we now call them Democrats). The same year that *Marbury* was decided, 1803, the Senate impeached, but did not convict, Supreme

Court Justice Samuel Chase. Marshall thought he was the next target for the Republican impeachment machine. So much so, that he broached the subject of giving the President a judicial veto over Supreme Court decisions. The Republican controlled Congress, being consumed with antipathy for the Federalist controlled Supreme Court, even cancelled a full term of the Court so that the *Marbury* decision could not be reached. Few can cite any decision written by Samuel Chase. Had John Marshall been cut of less sturdy cloth, the same may have been said of him. He was determined to create a strong judiciary and he did so at great risk to his career and the future of the Court.

Chief Justice Lord Mansfield (1705-1792) in June, 1772, issued the famous decision in *Somerset v. Stewart*, the case heard round the world. By this decision, he held that a slave could not be removed by force from England to another land. *Somerset* was widely interpreted to have abolished slavery in England. If one could not remove a slave to another land, what control could be exercised over any slave in England. Mansfield did everything he could to resolve the case short of trial but, being unsuccessful, remarked "let justice be done though the heavens may fall."

Sir Edward Coke (1552-1634, pronounced Cook), gave birth to "due process of law." Coke was the first person to carry the title "Lord Chief Justice of England." As Chief Judge of

the court of Common Pleas, he ruled in the *Fuller Case* that the Law Courts were the determiners of the jurisdiction of the ecclesiastical courts and that the King could not remove a case from the courts to judge it himself. Coke also ruled that the King could not amend the common law by proclamation nor could he create an *ex post facto* offense. These rulings by Coke put him in direct opposition to James I, the Church and Parliament. Often Coke stood alone in defending the "law of the land" and his "due process of law."

St. Thomas More (1477-1535)

Thomas More might be the most accomplished judge who has ever lived. He was an author, philosopher, theologian, legal scholar, member of Parliament, Under-Sheriff of London, ambassador, Knight, Speaker of the House of Commons, privy councilor, High Steward of Cambridge University, and the first lay person to become the Chancellor of England. He could write and speak fluently in English, French, Greek and Latin. When Henry VIII declared himself the supreme head of the Church of England, More resigned in protest as Lord Chancellor. With this resignation, he lost all of his titles, lands and stipends. More was indicted for high treason on July 1, 1525, and imprisoned in the Tower of London. He was tried and beheaded five days later. His severed head was parboiled and exposed on London Bridge. A family friend bribed the caretaker of beheaded heads and thus saved it from being cast into the Thames. In 1824, heirs of that family friend found a leaden box in the family burial vaults that contained a head, presumably More's. More was canonized in 1935 by Pope Pius XI and is the patron saint of lawyers.

Iftikhar Mohammad Chaudhry.

Pakistan had a painful birth. After British rule of India ended in 1947, it was clear that the division of power between the majority Hindus and the minority Muslim population would be a continuing source of troubles. The situation was very similar to that of Iraq under Saddam, where the minority Sunni population controlled all the levers of power to rule the majority Shia population. In India, the Muslim minority had ruled the Hindu majority for more than six hundred years before the imposition of British rule. The answer was to create a Muslim state. But East and West Pakistan were separated by over 1,000 miles of India. After twenty-five years of internal political turmoil and confrontations with India, East Pakistan broke off in 1971 to create Bangladesh. However, the British did leave in place a strong civil service system, respect for an independent judiciary and the parliamentary system. It was out of this system that Chaudhry's legal career was born.

Chaudhry was born in 1948 in the western city of Quetta. After graduating from law school in 1974, he engaged in the private practice of law handling civil, criminal and other matters. In 1989, he was appointed a provincial advocate general and became a judge on the provincial high court the next year. In 1999 he became the chief justice of the provincial court. In 2000, he was appointed to the Supreme Court by General/President Musharraf who elevated him to chief justice in 2005.

While on the Supreme Court of Pakistan, Chaudhry showed few signs of deviating from the Musharraf program. He sat on four important cases that upheld expansions of the General's power. That changed when he became

Chief Justice. Chaudhry's court ruled unconstitutional an attempt by Musharraf to privatize the nations steel mills, a transfer that would have directly benefitted one of the General's benefactors. Chaudhry also started to investigate the four hundred "disappeareds," people suspected of being held in secret prisons by Pakistan's secret police.

In March, 2007, Musharraf suspended Chaudhry for allegations of corruption and nepotism. Chaudhry was "summoned" by Musharraf to meet with him at his Army residence. For back-up, the General called in his generals, the prime minister and other government officials. The General was in full military uniform when he "asked" Chaudhry to resign. Chaudhry refused. When he left the military compound, the Chief Judge's security detail had been dismissed and his flag and emblem had been removed from his car. He was then placed on house arrest for a week. His phone and cable service were disconnected and his staff was arrested and interrogated. A picture of the Chief justice sitting in front of the fully uniformed General that was released by the government backfired. Chaudhry looked like the Pakistani version of the young man staring down a tank in Tiananmen Square.

In the wake of Chaudhry's suspension, the Pakistani bar (80,000 strong) began protests and engaged in work stoppages. Eight judges resigned in protest. A judge ordered a sweep of judges' homes and offices for spying devices after the government submitted to the court "evidence" consisting of transcripts of conversations and photos taken inside the Chief Justice's residence.

After all this, Chaudhry became a folk hero and large crowds were present

wherever he went. On two occasions, bombs were exploded at places where he was to speak, resulting in a large loss of life. On May 12, 2007, riots erupted in Karachi after Chaudhry addressed the local Bar on the 50th anniversary of the creation of the Pakistani Supreme Court. Forty-two people were killed and 140 injured. The media were banned from covering Chaudhry speeches or having live talk shows about the issue.

No one seriously believes that Musharraf was suspending Chaudhry for corruption. Instead, the conventional wisdom is that the General is fearful that an independent Supreme Court will block his run for a third term.

On July 20, 2007, the Pakistan Supreme Court reinstated the Chief Judge. The stage is now set for a titanic battle between the General/Dictator/President and the Judiciary and Bar of the nation of Pakistan and the very independently minded Chief Judge who leads them. Pakistan is a nuclear power with antagonists on both borders. The Taliban effectively control two provinces in the West and substantial parts of neighboring Afghanistan. To the east is the giant nuclear power, India. The flash point there is the contested province of Kashmir. Within its borders, Pakistan has a large jihadist movement. Musharraf now has an approval rating of 34%. Seventy-two percent of Pakistanis opposed the President's suspension of the Chief Judge. Sixty-two percent feel Musharraf should resign as army chief. The World Bank has rated Pakistan in the bottom 10% for political stability and corruption. On August 11th, the Supreme Court ordered the Election Commission to register all eligible voters. In June, the Commission released a list of registered voters that contained 20

million fewer voters than registered five year ago. This would represent a 30% reduction in eligible voters.

Riaz Hussein Pirzada, a legislator and ally of Musharraf, is advocating for free and fair elections. To the New York Times he recently remarked: "The government is in a difficult position

because of the lawyers. They are in a very tough mood. I think it will be a difficult month for Pakistan." Indeed it will. And, no doubt, some aide has quoted Shakespeare to the General; "First thing we do, let's kill all the lawyers."