

Judicial independence, judicial accountability and activist judges

By Terry Lewis, MY VIEW
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In an Oct. 30 *My View* column about the marriage amendment, Orlando attorney John Stemberger referred to “unelected, activist judges” trying to force their views upon society. In a subsequent letter (Nov. 8) James Vaught complained about judges who don't just interpret the law, but rewrite it.

As a judge, and a citizen who respects the unique and important role of the judicial branch of government, I offer a few observations about some oft-used, but misunderstood terms:

Judicial independence means to me the freedom to decide a case based upon a good-faith attempt to discern what the law is, and apply that law without regard to personal preferences or external pressure, and without fear of adverse personal consequences. It does not mean the freedom to decide a case based on what you think the law should be.

Judicial accountability means taking responsibility and being answerable for the intellectual integrity of your decisions, i.e., demonstrating that they are the result of a good-faith effort to discern and apply the law as noted above. It does not mean doing what the legislative or executive branches want you to do, or what might be overwhelmingly popular at the time.

Judicial activism means deciding a case based upon your personal philosophy or preferences, demonstrating a willingness to ignore legal precedent and principles in order to reach a desired result. It is not synonymous with judicial independence, but rather its opposite.

The framers of our constitution realized that if we were to be a nation of laws, we would need a way to resolve disputes over the meaning of those laws. They also understood the danger of combining this function, the judicial power, with either the executive or legislative branches. They felt that the best way to insure the fair and impartial administration of the laws was with a separate, independent judicial branch.

James Madison, when proposing the bill of rights, noted: “Independent tribunals of justice will consider themselves in a peculiar manner guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive.”

Yes, yes, you say, but what about judges who are not content to simply interpret the law, but want to make law?

The problem with that analysis is that every time a court interprets a law, it makes law. For example, the first amendment provides: “Congress shall make no lawabridging the freedom of speech. . . ”

One view is that it means what it says - no law. Another view is that certain speech, such as obscenity, or the shouting of "fire" in a crowded theater, is not protected speech. Whichever interpretation the court applies, it makes law. It is, of course, the latter view which prevailed in the Supreme Court and is now the law of the land.

Whether or not you think a particular decision correctly interpreted the law, it becomes legal precedent that, as a judge, you must apply to cases before you. Even the deciding court can not recede from its decisions except under the most compelling

circumstances. Thus, those who advocate for the selection of judges they believe will “overturn” some previous decision, are, in effect, advocating judicial activism.

For those judges who ignore legal precedent and are interested only in reaching a desired result, regardless of the law, there are safeguards and remedies: Rulings that are out of hand can be appealed; the law can be revised to make its meaning more clear; and state court judges can be challenged at the next election.

Most importantly, we should be careful to select persons of integrity who we believe will exercise independence and impartiality in their decision making.

An equally important question is, how do we maintain judicial independence when judges are elected and can thus be voted out of office for unpopular decisions?

For that we must rely on two things: 1. the courage and integrity of individual judges, and 2. an informed electorate committed to the principle of judicial independence, and willing to defend it against unfair criticism.

Our system of government provides a very good framework for the protection of individual liberties. An integral part of that system is an independent judiciary accountable to the public to be independent. It is our burden, and our responsibility as citizens, to insure that it remains so.

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