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More Judicial Activism Needed, Not Less

By Sarah McIntosh

Shawnee — In these times of derisive party politics it may be tough to find something both sides agree on—but not impossible. There is at least one thing both parties agree on, which is that judicial activism is an unbridled iniquity. That’s about as far as their agreement extends, though. Both sides disagree on exactly why judicial activism is so bad.

But what is judicial activism? The definitions vary. For some it means the judiciary striking down too much legislation. For others it means that the judiciary steps beyond its bounds of power. According to Randy Barnett, a constitutional law scholar at Georgetown Law Center, the reason for this confusion is simple. Judicial activism, he argues, “typically means judicial opinions with which they disagree.”

So, is judicial activism really all that bad? Sure it is—when you disagree with the decision made. But we have a judiciary for a reason. When the founders were forming this nation they decided to vest separate powers in three different branches of government: the executive, the legislative and the judiciary. For them, concentration of power in one person or one group of people was a threat to liberty. Hence Article I of the Constitution addresses the powers of Congress, Article II the powers of the executive, and Article III those powers of the judiciary. By separating these powers between different branches, the founders hoped to create a system of checks and balances.

More than 200 years ago, in the case of *Marbury v. Madison*, Justice Marshall asserted the Court’s power of judicial review. That is the power to declare laws contrary to the Constitution as void. Indeed, as some scholars have argued, Justice Marshall did not create the concept of judicial review, rather the founders intended the Court to have the power to nullify legislation. Language supporting this proposition can be found during the constitutional convention, state conventions, and after ratification.

So why all this disgust for judges who use this power? To some, the Supreme Court is not a representation of the people because they are not elected by the people. But to the founders this was precisely the point. Supreme Court justices are nominated by the president and confirmed by the Senate—so in a way they are chosen by the people because the public votes knowing of this power. But the Supreme Court is intentionally removed from direct influence of the public for a reason. Once appointed, justices have life tenure. Because of this they are to be independent and constant protectors of the Constitution. They should not be bullied by public opinion nor should they always side with the majority of the public. The justices sometimes

serve to protect the rights of the minority, vindicating individual liberties, but they are always to serve as constitutional stalwarts.

Clint Bolick, one of the nation's leading constitutional litigators and author of the recently published book, "David's Hammer: The Case for an Activist Judiciary," argues that the ideal judge "is one who broadly interprets both constitutional liberties and limits on government power, regardless of the context" and that "judicial protection of individual rights exists not too much but far too little."

So despite the fact that both parties agree that judicial activism is abhorrent, perhaps they are both wrong. Perhaps they both misunderstand the value of a branch of government not directly tied to the latest election or influenced by the latest poll. Or, perhaps they understand it all too well, and have grown weary of the checks and balances of the system the founders established to limit the accumulation of excess power. Instead of less judicial activism, maybe what we really need is more judicial activism.

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