

The Risks to Judicial Independence

We hear a lot about judicial independence these days.

ABA leaders speak about it. Our committees concern themselves with it. Editorial writers opine about it. Politicians declaim on it. Is it just rhetoric? Is the independence of judges at risk? Why does the ABA get so stirred up about it? Let me speak plainly.

Our Founders created an independent judiciary as part of our constitutional system of checks and balances for good reason. Power, they knew, tends to expand. It is the very nature of the executive branch to extend its authority. And legislatures invariably seek to enlarge power in the name of the majority. With brilliant insight, the framers of the Constitution saw the judiciary as a check on the powers of the executive and legislative branches. Though the judiciary is the weakest branch of government, its authority comes from its independence and its power of judicial review.

Put succinctly, an independent judiciary is the measure of an effective separation of powers in our democracy. It stands as the ultimate protector of our constitutional rights and liberties against the power of the executive or the will of the legislature. It is the foundation that underlies a rule of law.

Threats That We Must Address

What are the threats to the independence of the judiciary today? Here are a few of the principal ones.

Threats of Impeachment: These threats come largely from extremist quarters. Not because of judicial misconduct but because of judicial decisions that are disliked, frequently in the area of criminal law or where a legislative act is struck down. Such threats are an encroachment on judicial independence. They are usually politically motivated and mean-spirited. These threats won't go anywhere. But they can and do have a chilling effect on judges, which is precisely how they are intended. Those who hurl such threats are no friends of the American constitutional system.

The Charge of Activism: We often hear harangues about "activist" judges. And federal judicial vacancies remain unfilled on the claim that nominees must be screened for so-called activism. The term is a sham. The charge of judicial activism is employed mostly by ideologues who dislike a judge's opinion and make political capital out of attacking the judge. The judge who delayed implementation of the California ballot initiative denying benefits to immigrants was labeled an activist by those opposing such benefits. But these



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critics offered no similar calls against the judge who delayed Oregon's voter-approved physician-assisted suicide law. Last term, the Supreme Court struck down a number of congressional acts. Did it therefore become an "activist" Court?

Those who use the "activist" pejorative usually have a political agenda, not a jurisprudential one. We should expose these tactics for what they are.

Problems in State and Local Courts

Despite all the attention paid to the actions in Washington, D.C., threats to judicial independence are actually more pronounced on the state and local levels.

Threats of Violence: Threats of physical violence against judges are on the rise. An example is the menacing messages to the chief justice of Oklahoma by organized militia groups angered by the court's decisions limiting the ability of such groups to act illegally. Obviously, this has a chilling effect on the court.

Distorted Campaigns: In some states, single-issue campaigns are ignited to punish judges for disfavored opinions. Justice Penny White of Tennessee, an outstanding jurist, was defeated in a retention race, largely through a campaign of hate directed by persons who blamed her for the court's actions in a death penalty case. Here was a clear signal to other Tennessee judges about actions that might be perceived as "soft on crime." There are many other examples.

Politicization of the Judiciary: The entire process of choosing judges by election, rather than by merit selection, threatens to undermine their independence. Such judges are forced into election campaigns involving money that will

be raised from persons with special interests. Say what you will, a judge who owes a seat to contributions from politicians, labor leaders, corporate executives or lawyers suffers from a tarnished independence.

To be sure, reasoned criticism of judicial decisions is perfectly acceptable. But misleading demagoguery, threats and political intimidation distort the public's view of the judicial process, undermine public confidence in the justice system, and have a chilling effect on judges. The result is an undermining of our independent judiciary.

The ABA is committed to judicial independence—we work hard for it, we seek to reason with detractors, and we enlist bar associations and the public in the cause. There are many fronts to defend and many affronts to redress. Judges can't speak out for themselves. But we can. We should. We must. ■