

5. Restoring the Proper Role of the Courts

AMERICA'S democratic government is threatened by judges (both state and federal) who usurp the power of the political branches and impose their will instead of interpreting the laws as actually written. Although there is some cause for optimism that this trend can be reversed, we still see judges ruling far too often on the basis of their personal opinions or their view of the good society. In the process, courts regularly rule in ways that expand government power and diminish the authority of citizens to make democratic decisions or enjoy their individual freedoms.

As the courts have become more politicized, so has the judicial confirmation process. At the national level, the political views of judges—or their perceived views—rather than their proven adherence to the rule of law is becoming the criterion for many Senators. If we are to restore proper limits on government and protect our cherished freedoms, we must reverse this destructive understanding of the role of the courts before it becomes a self-fulfilling prophecy in which only activists become judges.

Americans are taught that ours is “a nation of laws and not of men.” This means that our Constitution and laws have fixed, objective meanings that do not vary depending on who is in power. While legal interpretation is sometimes difficult, that is no excuse to abandon an honest effort to follow the law as written.

Pursuant to the rule of law, the words of the Constitution, its amendments, and statutes must be given the ordinary meaning understood at the time of their adoption. Applying the original meaning of the Constitution and laws does not mean that the principles they incorporate are dead. The opposite is true: The Constitution is very much alive and relevant to the protection of our freedoms today. The enduring principles it embodies do not vary in meaning depending on the fashionable notions of any era. When judicial activists talk about a “living Constitution,” they are really referring to a system in which judges and other officials use reverence for the Constitution to mask their own policy preferences.

The appointments of Chief Justice John Roberts and Justice Samuel Alito were outstanding. Both Roberts and Alito explained during their confirmation hearings what a commitment to the rule of law means—and that they were devoted to it. When Roberts was asked to

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show more emotion (i.e., favoritism) for the “little guy” by two liberal Senators, he explained:

[I]f the Constitution says that the little guy should win, the little guy is going to win in court before me. But if the Constitution says that the big guy should win...then the big guy is going to win, because my obligation is to the Constitution.... The oath that a judge takes is not [to] look out for particular interests.... The oath is to uphold the Constitution and the laws of the United States, and that's what I will do.

In his opening statement before the Committee, Alito said that adherence to the traditional notion of the rule of law was the *only* responsibility of a judge and that “there is nothing more important for our republic than the rule of law.” More justices who adhere to these principles will go a long way toward reversing the activist trend.

Recommendations

1. Nominate and confirm only those who have a proven record of fidelity to the Constitution, the rule of law, and the proper role of a federal judge. The President and the Senate should inquire carefully into a potential federal judge’s judicial philosophy, or the methodology he would use when deciding cases. The Senate must look for evidence that the nominee truly understands and follows the rule of law. A record of scholarship, prior opinions, or a discussion of important constitutional provisions should be pursued to determine whether the nominee appreciates what the rule of law requires, which includes a commitment to interpret and apply the Constitution and laws as originally intended. Yet a nominee should not be asked about his political preferences or how he would rule in particular cases—legal litmus tests. (There should be equal vigilance concerning the fitness and qualification of state judges. Appointing officials should be held accountable for activism by state judges whom they have appointed. In states with an elected judiciary, citizens must educate themselves about the record of judicial candidates and should seek the advice of groups that are committed to the rule of law and proper interpretation of the Constitution and state laws.)

2. Change or clarify the rules of the Senate to prevent a minority of obstructionists from permanently blocking a majority from voting to confirm judicial nominees. During the confirmation process for Justice Alito, a number of liberal Senators attempted to filibuster, or prevent a final vote on, his nomination. In the previous Congress, a minority of Senators abused the rules of the Senate by filibustering the confirma-

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tion of 10 federal judicial candidates who had majority support. This was the first time in U.S. history that a permanent filibuster prevented a final vote on a judicial nominee. The Senate may establish almost any rule for the consideration of legislation, but a filibuster of judicial nominees violates the Senate's constitutional duty to provide its advice and/or consent to the President's nominees. It also violates the separation of powers because it thwarts the President's duty to make judicial appointments and hampers the administration of justice in the courts. The Senate should reform its rules, similar to the proposal outlined by President Bush in 2002, to require an up-or-down vote on each judicial nominee within six months of nomination. Failing that, a bare majority of the Senate should uphold a ruling by its presiding officer that filibusters of judicial nominees are unconstitutional.

3. Elected officials, in Congress and elsewhere, should criticize any policymaking from the bench that is disguised as judicial "interpretation." It is time to challenge a fundamental misconception that reasonable criticism endangers the independence of the courts. Judges' political or policy beliefs ought to play no role in deciding cases. The rule of law is premised on the bedrock principle that law can be objectively determined and fairly applied to all no matter what judge or other official is in power. Thus, the application of the law should not be based on personal ideology or elite trends. When judges' rulings appear to depart from this norm, they should be strongly criticized. The House and Senate Judiciary Committees should report annually on when the rule of law has been subverted by the rule of judges. In addition, the President, governors, Congressmen, and state legislators should routinely criticize decisions that are fundamentally wrong as a matter of law. Only through such vigilance will it be possible to reinvigorate the traditional constraints that encourage judges to render rulings based on the true meaning of the law rather than on what they want it to mean.

4. Re-limit the federal government to its limited and enumerated powers by enforcing the federalism and separation of powers mandated by the Constitution. Congress should cease passing laws that attempt to do something about a problem over which the national government has no authority to act. The federalization of crime is just one of many examples. A recent study estimates that there are now approximately 4,000 federal crimes, up from about 3,000 just 10 years ago. The Constitution makes reference to only three potential federal crimes, and most of Congress's recent criminal legislation simply duplicates state laws, undermines state accountability for crime control, and diverts federal law enforcement officials from more crucial responsibilities. However, courts have the ultimate responsibility to enforce federalism and the separation of powers. Invalidating congressional action is not just an option, but an obligation. If the courts do not curb Congress's

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ever-encroaching nature by delineating limits on its powers, the judges will have violated their oath to defend the Constitution. Citizens should be particularly insistent that any new justice appointed to the Supreme Court has the commitment and fortitude to do his or her duty.

Practical Applications: What the Rule of Law Requires

- Judges should not ban displays of the Ten Commandments or references to God in the Pledge of Allegiance as violating the Establishment Clause merely because they remind us of America's religious history or the foundations of our legal norms.
- Judges should enforce the Fifth Amendment's rules allowing the taking of private property only for public uses instead of the *Kelo* decision, which allowed private homes to be taken and sold to private developers.
- Judges should never rely on foreign or international law in interpreting the meaning of the U.S. Constitution. (They *sometimes* may do so when interpreting treaties the United States has ratified).
- Judges should strike down all pernicious racial preference and quota plans as violations of the Fourteenth Amendment, no matter how trendy they may be.
- Judges should strike down campaign finance laws that violate the freedom of speech and association, especially when they attempt to limit independent citizen voices.
- Judges should leave issues like assisted suicide and abortion to the political process in the states instead of finding invisible "penumbras" in the Constitution that preclude resolution by the people.

This chapter can be read online at issues2006.org/courts.

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Additional Reading

Edwin Meese III, Matthew Spalding, and David Forte, eds., *The Heritage Guide to the Constitution* (Washington, D.C.: The Heritage Foundation, 2005).