



Safeguarding Judicial Independence

As law school graduates, we were probably educated to believe that judges should decide each case by applying pertinent law to the facts revealed by the evidence, without regard to forces outside the court room. Not all of our fellow citizens agree, and some have organized to gut the very essence of the judicial system we have long taken for granted. Syndicated columnists Steve and Cokie Roberts accused the radical right of "trying to car bomb the cornerstone of the American political system, an independent judiciary."

Whether those efforts come from the radical right, the radical left, or the indifferent middle, lawyers should be alarmed at any movement to make the judicial branch of government subservient to either the legislative branch or to popular sentiment. Judges must be able to decide our cases free from political pressure and without pandering to a popularity contest.

Two bills introduced in the 2005 Legislature were designed specifically to undermine the independence of Kansas judges. SCR 1606 calls for Senate confirmation of appellate court appointments, much like the federal system. Of course, the selection process in Kansas is entirely different than in Washington. Applicants for a Kansas appellate court seat are thoroughly vetted by a nine-member judicial nominating commission composed of four lay members, four lawyers, and a lawyer chairman. A panel of three of the best and the brightest from among the applicants is recommended to the governor, who selects one for the position.

At the federal level, the president may nominate virtually anyone for a federal judgeship. It is up to the U.S. Senate to pass on the qualifications of the nominee because no one else (except the ABA) does it. Once appointed, a federal judge sits for life, barring the rare impeachment. By contrast, Kansas appellate judges must stand for retention every few years on a statewide ballot, thus, providing a safety valve against the possibility of incompetence. Believing that judges should not be the product of political litmus tests, the KBA testified against SCR 1606. The bill was not brought up for a vote on the Senate floor, despite initial sponsorship by a majority of senators.

The other 2005 bill, HCR 5012, provides for statewide direct elections for Kansas Supreme Court justices. Anyone who has been admitted to practice law for five years could

run. This legislation was the product of conservatives who told the House committee they wanted to make judges accountable for interpreting and protecting the constitution. One of the House committee members expressed support for the bill as a way to deal with activist judges. Again, the KBA appeared in opposition to the legislation and it was not voted out of committee. Either bill could be back on the calendar for a vote during the 2006 Legislature.

The running joke is that an activist judge is one who decides the case in your opponent's favor. In fact, many of those who decry activist judges — including, alarmingly, several legislators

— have apparently forgotten fundamental principles of civics and the U.S. Constitution, such as separation of powers and the independence of the judicial branch. They

ferently believe that judges should be elected to carry out the will of the people, just like the Legislature.

Much of this sentiment is fueled by misinformation, which, in an Internet age, spreads like wildfire. An excellent example is the chorus of objections to the U.S. Supreme Court decision in *Roper v. Simmons*, in which the Court ruled that it was unconstitutional to impose the death penalty on a defendant who was less than 18 years of age at the time of commission of a capital crime. Critics clamored for removal of the justices who supposedly based the Court's opinion on international law instead of the U.S. Constitution.

A reading of the opinion reveals that the decision is actually based on the application of traditional U.S. constitutional principles to the facts of the case. Having decided that execution of 16 and 17 year olds was barred by the Constitution, the Court then looked to the practices of other nations in confirmation of the decision already reached. There was no actual basis for the criticism that the Supreme Court had sold out our Constitution to the internationalists.

During the coming year, the KBA will actively work to counter such misinformation and to oppose those who attempt to turn the state judiciary into a political football. Members of our Association will be given opportunities to join in these efforts in the halls of the Legislature and in op-ed pages, schools, churches, and civic clubs. We owe it to our children to ensure that our heritage of an independent judiciary is passed intact to the next generations. ■

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