Letters

A Judiciary as Good as Its Promise

I was greatly impressed by one recent article in *Court Review*. The article by Judge Kevin S. Burke ("A Court and a Judiciary That Is as Good as Its Promise," Summer 2003) was so inspiring that I photocopied it and put it on our bulletin board.

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The Unchanging Role of the Judge

In response to Roger Hanson's Winter 2002 article ("The Changing Role of a Judge and its Implications"), a different perspective is herewith submitted.

When judges step out of their traditional role as interpreter of the plain meaning of the law and apply it strictly to the facts in an instant case, they invite justifiable criticism. Consideration of socially desirable consequences are better left to the other branches of government. Changing roles of judges, creation of new types of courts, becoming partners with social agencies to resolve social maladies can only dilute the court's effectiveness and make it merely another social agency.

Contrary to current thought, judges at the trial level become intimately involved with the knowledge of litigants and their circumstances through the evidence presented in court. This is a forum unlike the social agency, which receives much biased and self-serving information that often is unchallenged and accepted as fact.

Has the role of judges and the judiciary changed since the establishment of the Constitution of the United States? The Constitution provides separate, but not necessarily equal branches of the federal government. In logical sequence, it provides in Article I a legislature to make laws; Article II an executive to enforce laws; and Article III a judiciary to interpret and apply the laws.

Legislative law is created and enforced by the Executive Branch without interference of the judiciary, with some notable exceptions. Laws that are unconstitutional or executed in violation of the Constitution are set aside by the judiciary. Interpretation and application of the law when challenged in a court of jurisdiction is the proper function of the judiciary.

There are those both in and out of the legal community who believe it is the judge's role to adapt the law to changing circumstances and technologies, to consider socially desired consequences in resolving specific disputes. They deny the brilliance of our founding fathers, who provided no such thing with their Constitution. In their foresight, they established a government and a constitution that withstands time, changing circumstances, and technologies. They have even provided for amendment of this Constitution for a new and different one if we desire it and have the courage and fortitude of such beliefs.

For the first 150 years of our country, the judges confined themselves to interpreting the plain meaning of the law and applying it strictly to the facts in an instant case. This has been called exercising judicial restraint, which is a misnomer since judges were thoroughly exercising the powers granted by the Constitution. The courts were respected as the final word on the law and judges in general were held in high esteem. The law was certain and business dealings could rely on it, because precedents were given their just value and seldom overturned.

In the last 50 years, judges have turned away from their prior established principles and entered the fields of making law and reaching for socially acceptable results. Judges have stretched the plain language of the law to impose their beliefs in what may seem popular or desirable ways.

Those who are unable to convince the legislature that the people will buy their special interest have found a weakness in the government—the judiciary. Why try to convince Congress of a cause when a judge or judges already bent in your direction may willingly exceed the written law to attain the desired social result?

As a result, judges have become judicial activists disregarding the precedent and plain meaning of the law to obtain a socially desirable result. More cases are now filed. More meaningless and frivolous lawsuits are filed in the hope that a trial judge or a majority of appellate judges will determine that the end result justifies the means, even if it means stretching or disregarding the law.

If a statute or law is unacceptable, the court should properly point it out and recommend its change, but enforce it until it is properly changed. Activism for social change is a proper and needed function for the legislative and executive branches of government, but not the judiciary. Judges and the forum of the court should not be the vehicle for promoting social change, no matter how desirable.

Respect for the courts is diminished when controversial social changes are promoted. Because judges vacillate on applying the law, the law is no longer constant. Thus, the trial court proceeding, whether by judge or jury, is no longer honored. Participants in the court system just consider it as the first required procedure to obtain their desired result. They intend to appeal until a judge or court in the state or federal system will find in their favor.

Appellate judges should be looking to uphold the trial court or jury decision unless there has been a severe misapplication of the law. Appellate judges should not proceed as if the case were presented to them on first impression and disregard or hold little respect for the decision of the trier of fact.

Only those cases that are clearly unconstitutional or in which gross error has been committed should be overruled. Appellate judges should not substitute their discretion for that of the trial judge.

Analyzing the roles set forth in Roger Hanson's article, judges should be adjudicators, emphasizing deciding cases. In so doing, they should be law interpreters, not law makers, and should adhere to the Constitution. It goes without saying that judges should expedite cases and manage them in an efficient manner. Justice delayed is no justice at all.

The judge is not a mediator, peacekeeper, or policy maker. He is a law interpreter who decides cases. Who wants to change the role of a judge?

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