

Role of the Courts

The Founders envisioned the judiciary to be the “least dangerous branch,” but activist judges have transformed the courts into a policymaking body that wields wide-ranging power reaching virtually all aspects of American life. Rather than fulfilling their duty to interpret the Constitution and laws as they are written, judges increasingly seek to impose their own policy preferences on the nation. Disturbingly, some judges have begun to rely upon foreign law to modify the requirements of the Constitution. The Supreme Court has overstepped its bounds in many areas, even asserting its authority to strike down national security measures that are clearly to be left to the President as Commander in Chief. In order to restore the rule of law in America, elected officials, legal experts, and concerned citizens must oppose judicial activism and encourage the President to select constitutionalist judges.

Judicial activism occurs when judges write subjective policy preferences into the law rather than apply the law impartially according to its original meaning. While some who attempt to justify judicial activism argue that activism is simply the striking down of any law, or reaching a bad policy conclusion—it is not. A judge acting properly must strike down laws that violate the Constitution, and, in applying the law dutifully, a judge could very well reach conclusions that may be perceived to be bad policy but are nonetheless correctly decided according to the law’s original meaning.

A **constitutionalist judge**, by contrast, interprets the laws as they are written, regardless of whether they personally approve of the laws or whether they would prefer a different outcome in the case. As Chief Justice John Roberts insightfully explained in his confirmation hearing: “Judges are like umpires. Umpires don’t make the rules; they apply them.” This is how the American Founders understood the judicial role.

By engaging in judicial activism, judges undermine the rule of law and the ability of the people to decide important issues through their elected representatives. In short, judicial activism undermines the democratic process that is vital to our system of government.

Several egregious examples of this have occurred over the past decade in all levels of the judiciary. In the case of *Kelo v. City of New*

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London, the Supreme Court interpreted the Takings Clause of the Constitution to allow government to seize citizens' homes—not to build a road or fulfill some other public use—but to transfer the property to a private corporation because it could pay more taxes. In the area of gun rights, the Second Circuit Court of Appeals ruled that the Second Amendment does not apply to the states through the Fourteenth Amendment and does not even implicate a fundamental right, and four Supreme Court justices would have held that the Second Amendment did not prevent the District of Columbia from completely banning handguns. Such activism has occurred on the state level as well. Last year, the California Supreme Court created a right to same-sex marriage from whole cloth, only to be overturned by the people through a state constitutional amendment.

Unfortunately, President Obama has said that he wants to appoint judges who will make decisions based upon empathy, rather than based upon what the law as it is written requires. His appointment of Justice Sonia Sotomayor—whose prior judicial record includes a case that would permit states to completely ban guns, a dissent arguing that a double cop killer has a right to vote as an incarcerated felon, and the famous *Ricci* case, in which the Supreme Court overturned her dismissive opinion finding that a city could throw out a neutral firefighters' promotion exam because it did not yield enough minority promotions—demonstrates the kind of liberal judges he is seeking for the bench.

RECOMMENDATIONS

Federal and State Level

1. Elected officials should seek to promote robust dialogue about the importance of putting constitutionalist judges on the bench.

They should seek to educate the American people concerning the threat of judicial activism and pledge to promote the appointment, or in states where applicable, election, of constitutionalist judges.

2. Public officials should help to ensure that those selected to be judges will faithfully interpret the Constitution and laws as written.

This means that the judge will follow and apply the text's public meaning at the time of its enactment, regardless of whether the judge personally approves of the outcome or would prefer a different outcome. At the federal level, the President should nominate and Senators should confirm only such faithful constitutionalists to the bench. At the state level, officials with appointing authority should do the same. In states with an elected judiciary, public officials should encourage citizens to seriously evaluate judicial candidates' approach to judging, including helping them to evaluate a candidate's record of fidelity to the constitution and laws as written.

Federal Level Recommendations

1. Senators should vigorously question a judicial nominee regarding his or her philosophy of judging. Senators have the duty to gauge whether a nominee will be faithful to the original meaning of the Constitution and laws. Senators should ask the nominee what role, if any, empathy will play in their decision-making. They should ask the nominee if he or she will interpret the Constitution according to its original meaning or according to their own personal view of “evolving standards.” Additionally, they should question a nominee’s views of the role that foreign law should play in interpreting the U.S. Constitution and laws.

2. Senators should carefully examine their role in the “advice and consent” process. The President has the constitutional duty of nominating judges to the federal courts, but the Senators have a constitutional duty to advise him and give their consent to the appointment of these judges. In addition to considering a nominee’s experience, intelligence, and integrity, Senators should seriously consider whether a nominee demonstrates that he or she will apply the laws as they are written. In casting their votes, Senators must keep in mind their own oath to protect and defend the Constitution.

3. Members of Congress should work to ensure fairness in any legislation that is passed to expand the number of federal judgeships. Unprecedented efforts were taken by liberals in the Senate—including then-Senator Obama—to delay judicial confirmations through means such as the extraordinary use of the filibuster against circuit court nominees. But with a new Administration there is an effort to pass legislation to increase the number of federal judges, and thereby to reward those who stalled with still more appointments. Given the tactics used against the prior Administration, Members of Congress should be careful to avoid any new gamesmanship. Any attempt to expand the number of judgeships should be based on neutral criteria—not to reward a particular party. If new judgeships are created by legislation, those positions should not go into effect until after the 2016 elections—a date sufficiently far in the future that Members will find it difficult to vote simply on the basis of supporting spoils for their party.

FACTS AND FIGURES

Public Opinion

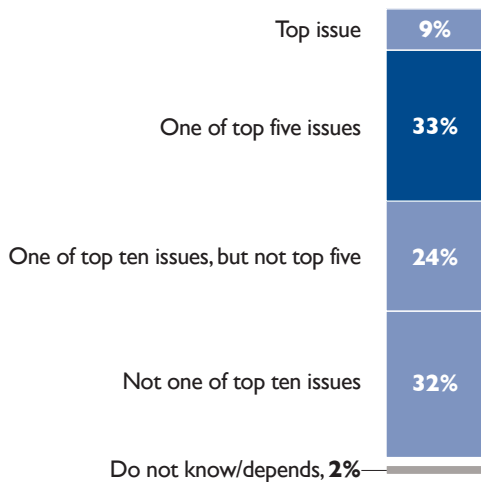
■ In a national survey of 800 actual voters conducted by The Polling Company for The Federalist Society, 70 percent of voters surveyed prefer Supreme Court justices and other federal judges “who will interpret and apply the law as it is written and not take into account their own viewpoints and experiences.”

- When asked what qualities Senators should consider most in the advice and consent process, 41 percent of those surveyed answered that the most important consideration should be whether a nominee has a record of “interpreting the law as it is written in past rulings.” According to the survey, this is even more important to voters than the nominee’s “past experience as a judge.”
- Thirty-three percent of those surveyed reported that the nomination of federal judges was among the top five issues they considered when deciding which presidential candidate to vote for.

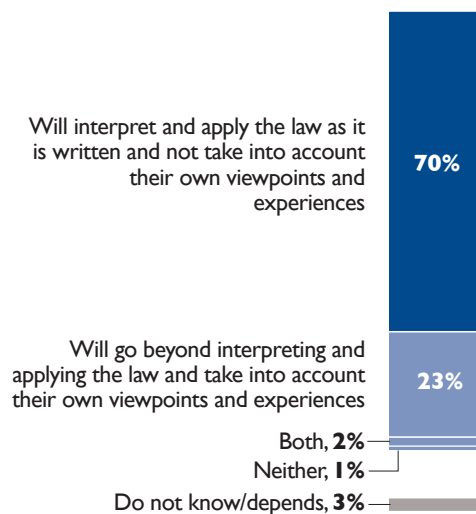
Survey Responses on Judicial Nominations

From a nationwide survey of 800 actual voters conducted during and after the 2008 election:

Q: When you decided for whom you would vote for President of the United States, how important was it to you whom that person might nominate to serve as Justice on the United States Supreme Court and other federal courts relative to other issues?



Q: Regardless of whom you voted for, would you prefer a President nominate Justices to the United States Supreme Court and judges to federal courts who ... ?



Source: Poll of 800 actual voters, conducted November 4–5, 2008, by the Polling Company, Inc. for The Federalist Society; margin of error is plus or minus 3.5 percentage points; figures may not sum to 100 due to rounding.

The Supreme Court

- Sonia Sotomayor received the highest number of “no” votes of any confirmed Supreme Court nominee from a Democratic President in U.S. history. In voting against her, Senators rightly cited her activist record on the bench, and her disturbing public statements.
- The Supreme Court currently hangs in a delicate balance. Only four of the nine current justices on the bench have demonstrated that they are

usually faithful and consistent constitutionalists. The others are either hard-core liberal activists or inconsistent in their approach, and the newest justice has a record of activism from her time on the Second Circuit Court of Appeals.

- Of the decisions handed down in the past Supreme Court term, 29.1 percent were decided by a 5–4 vote, including *Ricci v. DeStefano*, the case overturning a Second Circuit decision allowing the City of New Haven to throw out the results of firefighters’ promotional exams because they did not yield enough high scores from minority firefighters.
- Some of the most significant decisions over the past few years have also been decided by 5–4 votes. These include: *D.C. v. Heller*, the case confirming an individual right to bear arms; *Kennedy v. Louisiana*, the notoriously activist case declaring that states’ imposition of the death penalty on child rapists violates the Constitution’s ban on cruel and unusual punishment; and *Boumediene v. Bush*, which declared the right of *habeas corpus* to the Guantanamo Bay detainees, one of several of the Court’s usurpations of national security authority.
- Unable to justify their desired outcomes with United States law, several justices have resorted to citing foreign law in interpreting our Constitution and laws. At least three of the current justices have publicly promoted this practice.
- President Obama may well replace at least two more Supreme Court justices within his four-year term.

The Federal Circuit Courts

- If Congress passes the proposed legislation that would create 12 new permanent court of appeals judgeships and 43 permanent district court judgeships, then it is likely that President Obama will replace one-third of the federal judiciary within this presidential term.
- Because the Supreme Court hears so few cases a year, the Circuit Courts are often the last resort for citizens challenging an injury.
- Several Circuit Courts currently hang in the balance. The Fourth Circuit, which was reputed to be a bastion of constitutionalist judges, currently has a large number of vacancies due to the refusal of Democrats to confirm President Bush’s nominees. These spots may be filled by activist judges during this Administration, which will undoubtedly swing the direction of the Circuit. Among other circuits that will likely take a sharp turn in the activist direction are the Second and Third Circuits.

The Judicial Confirmation Process

- The judicial confirmation process has become increasingly politicized. During the 110th Congress, only 57 of President Bush's nominees to the district and appeals courts received a hearing, the lowest total since the 94th Congress (1975–76). This number is almost half the average (102) since then.
- Only eight appeals court nominees received a hearing during the 110th Congress. This is the fewest since the 88th Congress (1963–64), and, with appropriate adjustments for the overall size of the judiciary, it was the fewest since the 82nd Congress (1951–52).
- President Bush appointed 327 judges to the federal courts, compared to 377 for President Clinton and 383 for President Reagan.

Notes

ADDITIONAL RESOURCES

The Heritage Foundation's Order in the Court Web Site

Profiles federal judges and judicial nominees, and provides analysis of current and historical court rulings

<http://www.OrderintheCourt.org>

Key Findings from a National Survey of 800 Actual Voters by The Polling Company for The Federalist Society, November 5, 2008, at http://www.fed-soc.org/publications/pubid.1183/pub_detail.asp

John McGinnis, "Advice and Consent: What the Constitution Says," Heritage Foundation *WebMemo* No. 800, July 19, 2005, at <http://www.heritage.org/Research/AmericanFoundingandHistory/wm800.cfm>

M. Edward Whelan, "The Appropriate Role of Foreign Judgments in the Interpretation of American Law," testimony before the United States House of Representatives Committee on the Judiciary, Subcommittee on the Constitution, July 19, 2005, http://www.eppc.org/programs/constitution/publications/pubID.2399,programID.39/pub_detail.asp

David F. Forte, "Appealing to the Judge's Better Angels," Heritage Foundation *Lecture* No. 1111, February 19, 2009, at <http://www.heritage.org/research/legalissues/hl1111.cfm>

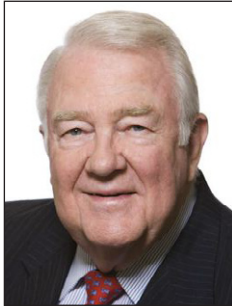
Edwin Meese III, "Would the Founders Recognize the Supreme Court Today?" remarks to the John M. Ashbrook Center for Public Affairs and the Federalist Society, October 6, 2008, at http://www.fedsoc.ashbrook.org/meese_speech.html

"The Presidency and the Courts" Conference: An Archive of Speeches on Originalism and the Judiciary, at <http://www.fedsoc.ashbrook.org>

HERITAGE EXPERTS



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