Defending judges

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President's Column

"Doubt is not a pleasant condition but certainty is absurd."

Voltaire

Have you noticed all the talk lately about "activist judges"?

It's brought to you by the same people who have promoted the myths of frivolous lawsuits and out-of-control litigation. And, let's be honest, it's strictly a pachyderm kind of thing.

Consider that in this session Congress has spent more time attempting to enact "tort reform" than debate the merits of the war and occupation of Iraq.

If you think attacks on judges are not a problem, you should reconsider. Or maybe you missed some of the following comments the first time around. For instance, Tom Delay, the ethically challenged then-house majority leader, howled in response to mostly Republican appointees on the federal bench who followed the law, stayed out of the Terri Schiavo debate, and were decidedly non-activist in their decisions about the matter. Delay described the Schiavo judges as "an arrogant, out-of-control judiciary that thumbed their nose at Congress and the President." And he further hectored "the time will come" for them to "answer for their behavior."

Soon after, Sen. John Cornyn of Texas suggested that murderous attacks on judges and their families occurred because "... where judges are making political decisions yet are unaccountable to the public, that it builds up to the point where some people engage in violence."

Not to be outdone, right-wing televangelist Pat Robertson said that federal judges are a more serious threat to America than Al Qaeda and the September 11 terrorists.

An out-of-control liberal judiciary—which would presumably include Justices Scalia and Thomas who voted multiple times to deny Schiavo's case federal review—is the worst threat America has faced in 400 years. Even worse than Nazi Germany. That's because such judges "are destroying the fabric that holds our nation together" and pose a threat "probably more serious than a few bearded terrorists who fly into buildings."

You might think that Delay, Cornyn, Robertson and their ilk each missed class in Civics 101 on the separation of powers and checks and balances. But what really happened is that they all took the same course of instruction from a playbook that you and I have never heard of or have never seen.

When Sen. Cornyn rationalized why extremists attack judges he added that the U.S. Supreme Court, instead of interpreting the constitution, should be an "enforcer of political decisions made by elected representatives of the people."

Failed Reagan Supreme Court nominee Robert Bork has written for decades that judges are actively and wrongly usurping the power of the people, which he contends contributes to the moral and cultural decay of our nation. Bork recommends "a constitutional amendment making any federal or state court decision subject to being overruled by a majority vote of each house of Congress." This kind of muddled thinking did not happen all of a sudden. The enthusiasm for unbridled democracy—a component of neo-conservatism—has been around for many years, funded by right-wing think tanks.

The essential elements of our justice system honor the separation of powers, allow for judicial independence and provide for the rule of law. By these means, our liberties outlined in the Declaration of Independence, the U. S. Constitution and the Bill of Rights are protected.

But neo-conservatives opposed to America's liberal traditions are, according to professor Shadia Drury, "smart enough to recognize that there is a gulf between democracy and liberty, and that the former can be used to defeat the latter." Drury writes that judicial review is an obstacle to the conservative revolution because "… (I)n a conservative or traditional society, the function of law is to uphold the prevailing morality. In a liberal society, the function of law is to prevent people from harming others, provide equal protection to all under the law, and, to the extent that it is possible, create the conditions of equality of opportunity."

Whether it's advancing social wedge issues or removing risks to corporate profits, control of the judiciary is key to achieving the agenda. It is also more difficult to control the judicial branch than the legislative or executive branches. For instance, special corporate interests have spent billions of dollars over decades on lobbying and campaign contributions to buy legislative and regulatory goodies. Many of these laws and rules are distinctly counter to the public interest: tax cuts for the rich, credit card debt exemptions from personal bankruptcy filings, corporate pension bailouts, exceptions for industrial polluters and restricting trade to benefit the drug companies. The special interest list of which laws money can buy goes on and on.

Substantial sums of money have been spent and continue to be used to sway public opinion about the legal system. But the Constitution and our judges who interpret it prevent special interests from achieving total domination.

When judicial review strikes down legislation that conflicts with the Constitution (the law of the land), then democratic rule is limited. The tyranny of the majority and in some instances the tyranny of the minority (as was seen in issues surrounding Terri Schiavo) are thwarted. This is exactly what the Founding Fathers intended.

As Alexander Hamilton explained in support of the Constitution in the journal Federalist No. 78 when writing about the judicial branch, "the general liberty of the people can never be endangered from that quarter."

But Hamilton also wrote, "the judiciary is beyond comparison the weakest of the three departments of power ... all possible care is requisite to enable it to defend itself against [the other two branches] attacks."

Recent public opinion polls show Hamilton's concerns in 1788 were prescient.

You are aware of the statistics: Businesses file four times more lawsuits than individuals do. Businesses are sanctioned more frequently than people as filers of frivolous lawsuits. The number of bench and jury trials has dropped in steady decline since the early '90s. Median damage awards are down from a decade ago.

But radical right-wing propaganda has achieved its intended effect. Facts be damned, the public believes there are too many frivolous lawsuits, litigation is out of control, judges and lawyers are in cahoots and judges are legislating from the bench.

Our Supreme Court justices have responded to the attacks. Justice Scalia recently told an audience, including members of Congress critical of the high court's references to foreign laws in its court opinions, "I don't think it's any of your business." And that's even though he agreed with them about the issue.

Near that same time Justice Ginsburg, responding to congressional proposals to create an inspector general to monitor the ethical behavior of federal judges, said, "(T)he judiciary is under assault in a way that I haven't seen before." And earlier this year, Justice O'Connor, a Reagan appointee, said, "(W)e must be ever vigilant against those who would strong-arm the judiciary." Responding to Tom Delay's call to impeach judges involved in the Schiavo case, the former justice declared such threats "pose a direct threat to our constitutional freedom."

But most important, she told lawyers in the audience, "I want you to tune your ears to these attacks." O'Connor issued the charge, "You have an obligation to speak up." And, "Statutes and constitutions do not protect judicial independence—people do."

Many polls, including some conducted for our association, show discouragement and concern about the public image of lawyers. But few of us worry about the public's view of judges, and that's too bad. Because the far right's campaign to affect public image also includes attacking judges.

So, do your part to educate your family, friends and co-workers about how our judicial system works and its role in our democracy. Explain to them so that they, too, can understand why Justice Joseph Story wrote: "The independence of the judges is the great bulwark of public liberty, and the great security of property."