Commentary

An Independent Judiciary or a Hidden-Agenda Judiciary?

By Justin A. Meyers

An editorial in the Dec. 19 issue of the *New Jersey Law Journal*, "Triumph or Tragedy?," criticized Newt Gingrich's attacks on *Marbury v. Madison* and purported to defend the independence of the Supreme Court and, more generally, the notion of an independent judiciary.

The editorial stated that "the Constitution, for better or for worse, means what the Court says it means." While I agree that our judiciary must uphold the law even in the face of overwhelming political pressure to ignore it, the editorial's imprecise statement is not only analytically flawed but profoundly dangerous.

Marbury clarified that the "judicial power of the United States" mentioned in Article 3, Section 1, of the Constitution reserves to the Supreme Court the power to say what laws are or are not constitutional.

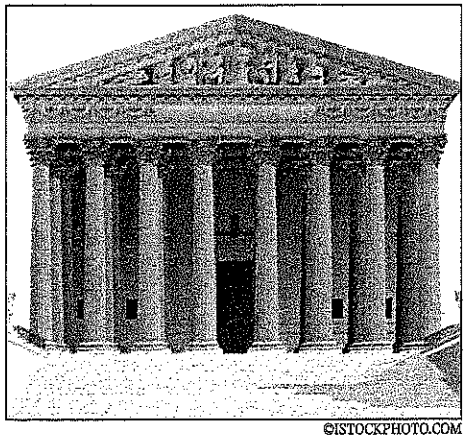
Clearly, the justices could not perform their task without first stating what they believe the Constitution means, but the editors seem to be implying something more — namely, that the Constitution is meaningless absent the definition the justices choose to give it. Were that so, the Supreme Court's authority would come from thin air; its power to decide what is and is not constitutional would arise not from the Constitution that created it in the first place, but from the collective obedience of the mob that chooses to obey it.

That cannot be. The problem is that the editors appear to have confused an independent judiciary with its sinister twin brother, a hidden-agenda judiciary. The authority of an independent judiciary comes straight from the Constitution itself, specifically from its system of checks and balances — the independence of the third branch is firmly rooted in the doctrine of separation of powers.

To the defenders of a hidden-agenda judiciary, on the other hand, judicial independence is merely a euphemism for collective obedience to a court that uses its powers to impose upon the people a private, hidden agenda chosen by a handful of elites.

Defenders of a hidden-agenda judiciary will seek to appoint justices who are most likely to share their sympathy for whatever agenda of social change they have been unable to advance through the Legislature.

Defenders of an independent judiciary will seek to appoint justices who are most likely to remain faithful to the plain text and original meaning of the Constitution and who will resist the temptation to turn it into an infinitely malleable agreement to agree. "Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law," as stated in *Osborn v. The Bank of the United States*, 9 Wheaton 738, 866, 6 L. Ed. 204, 234 (1824).



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The handiwork of the hidden-agenda judiciary takes one of two forms. When the Court creates rights neither arising from the original, plain meaning of the Constitution, it has usurped the power reserved to Congress under Article 1 and is legislating from the bench, a phenomenon also known as judicial activism.

Examples typically include rights that have failed to win legislative approval, such as the right to an abortion or the right to compel the people to hold monogamous homosexual relationships in the same esteem traditionally reserved for monogamous heterosexual relationships.

The other manifestation of the hidden-agenda judiciary is what I call judicial *inactivism*; namely, when the Court allows the denigration of rights firmly established by the plain text of the Constitution.

A few contemporary examples come to mind. The First Amendment states that freedom of speech shall not be abridged, yet four justices and the president believe it can be abridged so long as the speaker is a corporate entity.

Another is the Second Amendment right to bear arms, which has only recently been construed by the Supreme Court according to the original intent of the framers: as a right for individual Americans to arm themselves. Still another example may be the writ of habeas corpus.

Advocates of a hidden-agenda judiciary denigrate the responsibility entrusted to our courts and to our profession, and risk undermining the very authority of the branch of government they claim to be defending. Congress and the president ultimately answer to the people; not so for the judiciary. When a handful of justices turn the Supreme Court into an unbridled instrument of social engineering, they invite a political confrontation à la Mr. Gingrich that could forever upset the separation of powers. Defenders of the hidden-agenda judiciary fancy themselves riding a unicorn when in fact they are mounted on a tiger.

Judicial independence means something very different than a mob's fickle obedience to tyrants in black robes. That is why in a nation of laws, and not of men, judges and lawyers alike swear an oath to uphold and defend the Constitution — not to uphold and defend the federal judiciary. ■

Meyers is a civil litigator in Denville.

Sex-Segregated Schools:

call for divergent teaching styles: more confrontational for males, for example,

modes, the extent to which these may be inborn or acquired, and the relationship