

Widener University Delaware Law School

From the Selected Works of Alan E Garfield

November 18, 2005

Judge Judges on How They Use Their Power

Alan E Garfield



Available at: https://works.bepress.com/alan_garfield/24/

Judge judges on how they use their power

President Bush first reassured us that Harriet Miers

Delaware Voice

Alan E. Garfield

would "strictly interpret the Constitution," and now reassures us that her replacement, Samuel Alito, "under-

stands that judges are to interpret the laws, not to impose their preferences or priorities on the people." But can judges really apply the Constitution as written without injecting their own preferences?

Consider the First Amendment provision that Congress shall make no law abridging the freedom of speech. How would judges strictly construe this provision? Would they say that the president and state and local governments may censor speech because the prohibition applies only to Congress? Would they construe the phrase "shall make no law" to mean that laws punishing false advertising, perjury and threats are unconstitutional?

And how would judges strictly construe the 14th Amendment prohibition on denying persons "the equal protection of the laws?" Does this mean that laws must treat all people the same? What about laws permitting 16-year-olds to drive but not 15-year-olds? What about giving benefits unique to veterans or creating exemptions for the handicapped?

Nor is strict constructionism particularly helpful when it comes to interpreting Congress' powers. Everyone acknowledges that the framers intended the federal government to be a government of limited powers. But would strict constructionists really say that Congress could do only what the Constitution specifically authorizes? If so, then Congress might lack the power to protect the environment or provide for worker safety. Federal civil rights laws would be in jeopardy, as well as many federal criminal statutes.

Put simply, the notion that judges should allow only what the Constitution says is naïve at best, cynical at worst. Even President Bush counts on judges to look beyond the Constitution's text. In refusing to turn over Harriet Miers' White House papers, he invoked the doctrine of executive privilege. Nowhere does the Constitution mention such a privilege.

Perhaps the president was relying on the Supreme Court decision recognizing this privilege

— but that was an activist decision, a right not expressly stated in the Constitution.

In short, judges have little choice but to use discretion when interpreting the Constitution. The real question is what principles should guide that discretion. To answer that question, it is important to understand why our democracy allows a small group of lifetime judges to overturn laws enacted by elected representatives. How do we square this power of judicial review with our notion of popular governance? By what criteria should judges decide when to assert their power and when to leave matters to the political process?

Perhaps the best explanation is that judicial oversight is necessary when democratic processes are unlikely to generate a just outcome. For instance, unrestrained democratic processes are likely to produce a tyranny of the majority rather than an appropriate balance between constitutional liberties and majority will. Likewise, democratic processes are legitimate only if the ingredients of free and fair elections (protection of the right to vote and freedoms of speech, press and assembly) are secured.

Judicial oversight is also critical for ensuring that state power does not come crashing down on individuals for arbitrary reasons, or without adequate procedural protections.

So how then should senators evaluate a Supreme Court nominee? Instead of focusing on whether a nominee is a strict constructionist or an activist, they should consider whether a nominee is likely to use judicial power when it is most needed.

Will the nominee ensure that minority rights are not trampled by the majority? Will the nominee insist that the machinery of free and fair elections is protected? Will the nominee protect individuals from arbitrary abuses of governmental power?

If a nominee is unlikely to use judicial power to pursue these ends, then the nominee should be rejected. Our rights of liberty and equality, and our commitment to an open and accountable government, are too dependent on judicial oversight to be entrusted to a justice who would fail to fulfill the awesome responsibility of upholding our nation's core values.

Alan E. Garfield is a professor of law and the H. Albert Young Fellow in Constitutional Law at Widener University School of Law.