

# Widener University Commonwealth Law School

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## Lawyers Hold the Key: Attacks on Judicial Independence Are Based on Ignorance and are Best Parried by Lawyers Themselves

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*By John L. Gedit*

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In the past 10 years, purely political, structural attacks on the judicial branch have increased in frequency and intensity. The judiciary is the “least dangerous branch,”<sup>1</sup> but it is crucial to our system of constitutional government. Because we are educated in the law, we must speak out to protect the independence of the judiciary.

As lawyers, we are aware of the crucial connections between the rule of law and judicial independence. Judicial independence assures “that judges decide according to the law, rather than according to their own whims or to the will of the political branches of government.”<sup>2</sup> Judicial independence is the means to ensure the rule of law. Judges are insulated from political and other pressures so that they will be free to decide whether power asserted against citizens is consistent with law and the Constitution.<sup>3</sup>

Unfortunately, most citizens are “illiterate” about judicial independence and the rule of law.<sup>4</sup> Some false assumptions asserted frequently by citizens are that:

- “Judges decide cases in accordance with their ideology or political allegiance.
- “Judges decide cases in accordance with their personal or financial interests.
- “Judges favor certain individuals or classes of litigants.
- “Judges usurp the legislative role and the will of the populace by creating laws.
- “Judicial independence accords judges the latitude to subvert the will of the people and the authority of the legislature without accountability.”<sup>5</sup>

In the legal profession we are aware of the oath that judges take to decide cases according to law and the Constitution, of the canons of judicial ethics, and of the disciplinary machinery for judges that exists in most states. These safeguards address most of the first three false citizen assumptions listed above, particularly those involving favoritism, bias, and personal interest. The fourth and fifth assumptions are attacks directed against the judicial *institution*. They are particularly damaging and rarely answered.

The misconception that judges must have less independence because they are “making law” through interpretation contains just enough resemblance to what courts do to lend an aura of persuasiveness to nonlawyers. After all, judges construe statutes in connection with particular cases, and the judicial decision about the meaning of statutory language often determines the outcome of the case. To a nonlawyer, that is “making law.”

However, in deciding a case, it is hornbook law that a judge is bound to give effect to the will of the legislature expressed in an applicable statute. The bases of judicial

decisions are binding and nonbinding precedent, statute, regulation, and constitution, all of which the judge is bound to consider, if applicable.<sup>6</sup>

The courts’ task in cases involving statutory interpretation is particularly difficult because of two types of cases regularly brought before the courts. First, new, unique factual situations involving statutes frequently arise. With unique facts, it is often unclear how the statute should be applied. Second, many statutes are drafted in broad language, so that it is not clear how they should be applied. Nevertheless, in cases involving these problems the judge must render a decision consistent with the will of the legislature as expressed in the applicable statute. Reasonable minds often

## APPROACHING THE BENCH

*Widener Law consistently exceeds the national average for placement of judicial clerks.*

Judicial clerkships are among the most prized positions sought by law school graduates, and for good reason. In assisting judges with researching issues and writing opinions, clerks play a key role in the judicial system and earn high-level experience that serves to expand greatly their future professional prospects.



Karl Geschwindt '07, clerk for Hon. Renée Cohn Jubelirer, Commonwealth Court, Allentown, PA

Sixty-eight members of the Class of 2006, the last year for which data is available, obtained clerkships.

“There is a lot of good preparation that happens here at the Law School,” says LeaNora Ruffin, the School’s assistant dean for career development. “In the classroom, our students get good foundational skills in legal research and writing, and for students who are inclined to go into clerkships after graduation, having the third semester in legal writing gives them an extra boost.”

Ms. Ruffin cites other reasons for Widener’s success in placing judicial clerks. The Law School’s well-established judicial externship program allows students to earn credits while working for judges in capacities that are similar to those of clerkships. With Widener externs serving in federal, appellate, and trial courts, Ms. Ruffin says, “it’s a great exposure to many areas of the judiciary.”

Additionally, the School’s locations in and proximity to states with large numbers of judicial clerkships provide lots of opportunity. Many faculty members are former judicial clerks themselves and eagerly share the benefits of their experiences with their students, encouraging them to seek out clerkships. And the School’s close ties to the judiciaries of Delaware and Pennsylvania expose a wide variety of judges to the high quality of a Widener Law education.

“The judges who have taught here, who speak here, or have Wolcott Fellows (see Page 8) are inviting our students into their chambers,” says Ms. Ruffin. “It’s easy for them to say they want to open their doors when they see their resumes cross their desk for clerkships.”



## THE LAW IN ACTION

### *Delaware Supreme Court's visit to Widener inspires inaugural Judges' Day.*

The Delaware Supreme Court's visit to the Delaware Campus on April 8 will bring an impressive opportunity for Widener Law students to see the court in action. And this year, the benefits will be further enhanced, as the school plans to declare it Judges' Day on campus.

The inaugural Judges' Day will bring a host of state and local jurists to the school, where they will be invited to join students in listening to the Supreme Court arguments. The judges will also be invited to guest-lecture in classes that day, giving them an opportunity to share some of their experiences and insights from the bench.

Other special events are planned, and the whole experience should give students a chance to network with, and gain new insights from, the judges. At the same time, the judges will get the chance to connect with the Law School community and, especially, the students.

"This initiative is a terrific opportunity for Widener and one we hope will become an annual tradition," Dean Linda L. Ammons said. "The Law School enjoys a collegial relationship with judges from around the region, and we want them to feel welcome and appreciated. It means a great deal to us to have them share their time and talents for a day."

differ over the correct outcome of this difficult and complicated judicial task. So it simply does not follow that, if you do not agree with the outcome in a particular case involving interpretation, the judge is "making law," creating new law to suit his whim, or frustrating the will of the legislature. Exactly the opposite is true. We lawyers need to explain this to nonlawyers.

A related argument often heard is that the United States or a particular state is full of "activist judges" who subvert the will of the people and the legislature.<sup>7</sup> The Terry Schiavo case is a perfect illustration of this phenomenon: Not only did numerous state officials attack the courts involved in the case, but the Majority Leader of the United States House of Representatives and some federal legislators also attacked the judiciary.<sup>8</sup> Were these attacks justified?

Once sworn into office, a judge must discharge the duties he undertook in his oath of office: to decide cases and controversies in an objective, fair, and impartial manner. More importantly, a court *must* decide a case or controversy brought before it by a proper party within the court's jurisdiction. A prominent jurist recently stated in response to the "activist" attack that

it is inappropriate to view such a judge as an "activist" when the judge is necessarily deciding an issue, because

to avoid a decision would be to abdicate the judge's duties and responsibilities of office.<sup>9</sup>

That, it seems to me, is a transparent, effective answer to the activist argument. This also needs to be explained to nonlawyers.

Judges interpreting statutes or applying them to new fact situations exercise discretion. That, however, is not an argument that the judiciary is doing anything wrong or improper. Cases and controversies by definition involve different parties arguing that uncertainty in interpretation or application should be resolved in their favor. One of the most important judicial functions is resolution to reach an outcome in situations where there is more than one correct possible outcome. Resolution of cases and controversies thus involves discretion to decide in more than one way. While exercising that decisional discretion, a judge is controlled, guided, and bounded by precedent, by statutory language, and, as Karl Llewellyn pointed out, by the training of lawyers to work from principle and precedent. We could abolish judicial discretion only if we could eliminate uncertainty about law or facts in connection with cases and controversies, an outcome which is impossible. So it is inaccurate—or even unfair—to chastise the judiciary for exercising discretion, for that is a principal function of the judicial branch.

In this age of attacks on the judicial branch, we should defend the courts through our bar associations. Whenever possible, as individual lawyers we should explain the faulty assumptions that citizens make, and demagogues use, to attack the judiciary. In particular, the attacks that judges regularly make or invent law through interpretation and that they are "activist" are unfounded, but rarely answered or explained. We need to educate the public about the "least dangerous branch." ■



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<sup>1</sup> *The Federalist* No. 78 (Alexander Hamilton).

<sup>2</sup> Justice Stephen G. Breyer, *Judicial Independence in the United States*, 40 *St. Louis U.L.J.* 989, 989 (1996).

<sup>3</sup> Carolyn Dineen King, *Challenges to Judicial Independence and the Rule of Law*, 90 *Marq. L. Rev.* 765, 771 (2007).

<sup>4</sup> Judge Julie A. Robinson, *Judicial Independence: the Need for Education about the Role of the Judiciary*, 46 *Washburn L. J.* 535 (2007).

<sup>5</sup> *Id.* at 536.

<sup>6</sup> *Id.* at 542.

<sup>7</sup> See Angry at Rulings, Some Judge the Judges, ABC News, May 1, 2005, <http://abcnews.go.com/Nightline/LegalCenter/story?id=1028391&page=1> for a nonexhaustive review of attacks on the judicial branch or institution.

<sup>8</sup> *Id.* Former House Majority Leader Tom DeLay stated that the courts are "out of control."

<sup>9</sup> Julie A. Robinson, *Judicial Independence*, *supra* n. 4, at 541.