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Strongly opposing opinions shape 'activist' judge debate

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Gov. Matt Blunt has promised Missourians he won't appoint any "activist" judges to the state's courts.

"I define activist as when you make the law rather than interpret the law or apply it," Blunt told reporters last week, as he answered questions about his plans to fill a Supreme Court vacancy created by former Chief Justice Ronnie M. White's resignation.

Under the Missouri Constitution's Nonpartisan Court Plan, first-approved by voters in 1940, the governor appoints all judges to the Supreme and appeals courts, and he names judges to trial courts in the St. Louis and Kansas City areas. He also fills judicial vacancies whenever they occur throughout the state in otherwise directly elected judgeships.

But Blunt's definition of activism isn't the only one that Missourians, who watch the state's judicial system, are using.

Supreme Court Chief Justice Laura Denvir Stith said: "In general, judicial activism has been defined as a court reaching a result based either on the personal views of the members of the court - or on the views of others, such as special interest groups or popular opinion - rather than based on the facts and the law. As a practical matter, though, people do not give the term activist a static, or consistent, definition.

"Instead, politicians and others usually use the term activist to describe any particular judicial decision with which they disagree, without regard to the underlying facts and law of the case."

But John Elliott of the Adam Smith Foundation and St. Louis lawyer Bill Placke, president of the St. Louis Federalist Society, both said "Black's Law Dictionary" provides a legal definition all should follow, that judicial activism is "a philosophy of decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decision."

Placke, who emphasized his responses to the News Tribune questionnaire were his own, and not the Federalist Society's opinions, also noted the definition on the Internet encyclopedia, Wikipedia (www.wikipedia.org).

It says judicial activism is "a term used by political commentators to describe a tendency by judges to consider outcomes, attitudinal preferences, and other public policy issues in interpreting applicable existing law. ... It is also used pejoratively to describe judges who endorse a particular agenda."

Missouri Bar President Ron Baird, a Springfield attorney, agreed with Stith.

"When a judge makes a decision that someone doesn't like (and in every case there is a winner and a loser), that judge is sometimes unfairly labeled as activist. The same goes for a court," he wrote. "The term is an attempt to label judges for political reasons by one group or another."

Sara Schuett, director of the Missouri Association of Trial Lawyers, noted: "Strictly speaking, an activist judge misinterprets or ignores the law (or legal precedence) due to personal opinion or agenda.

"Too often - and for purely political reasons - the term is incorrectly applied to a member of the judiciary who has handed down a decision with which the critic disagrees."

Judge Roy Richter of the Eastern District Appeals Court in St. Louis, wrote: "Seemingly, any decision that reverses prior case law (absent some intervening statutory change) would constitute activism."

But Charley German, president of the Kansas City Metropolitan Bar Association, said: "The phrase activist judges has ... no definition and doesn't deserve one - it really means only that the person using that invective doesn't like a particular court decision."

Gary Lynch, chief judge of the Court of Appeals Southern District in Springfield, wrote that activism is hard to see in the work of any appellate court.

"We speak about a case only through our written opinion, which is voted upon by at least three judges," he explained. "Our opinion describes the relevant facts drawn from the trial record submitted to us."

"We cite the published constitutional, statutory or case law relevant to those facts. Finally, we analyze how that specific law applies to those specific facts, to determine if the trial court's actions followed the law."

Victor Howard, Chief Judge of the Western District Appeals Court in Kansas City, added: "Much of our work as judges does not involve easy, either-or decisions. We must apply the law to fact situations that are often difficult and complicated."

Howard said not all laws are written clearly, and may be "vague, ambiguous or in conflict with other statutes. Consequently interpreting the statute can be difficult. ... But politics or personal interest has no role in our analysis."

Stith, who served both as a private practice lawyer and an appeals court judge before joining the high court in 2001, added: "The Supreme Court usually hears only the most difficult - and sometimes the most controversial - legal issues. ... Judges must, and do, decide these cases based on the law, even if they do not personally agree with that law."

As one example, she noted that former Judge Charles Blackmar - who served on the high court from 1982-92 and who died early this year - "personally was opposed to the death penalty, yet he upheld death sentences on many occasions because that is what the law and the facts of those particular cases required."

Placke said activist courts can be either liberal or conservative.

But, he said, Missouri's Supreme Court "has become known as one of the most activist state courts in the country."

The Adam Smith Foundation's Elliott agreed: "Missouri's judiciary is no stranger to judges who have embraced the role of activist."

However, state Bar President Baird countered: "Missouri courts have a reputation for basing their decisions on the case before them and the laws that are applicable."

And Richter, of the St. Louis Appeals Court, wrote: "If there is an activist court - I haven't seen it. Unless a judge is in the majority (of the appeals court's opinion), it doesn't matter what they wish to propose in a dissent."