

The Role of the Federal Judiciary



By Paul Engel

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- What role does the judicial branch have in the federal government?
- Why is the speech that Justice Elena Kagan made at a recent judicial conference so dangerous?
- How can We the People protect ourselves from an out of control federal judicial system?

In Federalist Papers #78, Alexander Hamilton said the the federal judiciary would be the branch of government least dangerous to our rights. Is that how the courts are working in the 21st century? What makes the courts today so injurious to our rights? We get a clue from current Associate Justice Elena Kagan, in a speech she gave at a judicial conference in Montana this July. By comparing her statements to the Constitution and the writings of those who helped frame it, we should not only be able to answer what makes the court dangerous to our rights, but how to protect our rights from them.

Associate Justice Kagan made a statement that many probably took in stride, but for me was jaw dropping.

I'm not talking about any particular decision or even any particular series of decisions, but if over time the court loses all connection with the public and with public sentiment, that's a dangerous thing for a democracy,

Elena Kagan at a judicial conference in Montana

As I said, I expect most people to read this sentence and not give it a second thought, but when I read this, I see the failure of the republic. Let me explain.

Some of you may be thinking I'm pointing out the repeated lie that America is a democracy. We are not, we are a constitutional republic. While that fact is important to understanding just how jaw dropping Justice Kagan's statement is, it's nothing compared to heart of her error. Justice Kagan is concerned that the court may loose its connection with the public and public sentiment, but the court is not elected by the public, and for a very good reason. The court's job is not to court public opinion, but to decide controversies and criminal prosecutions based on the law.

That branch of government which is concerned in the trial and determination of controversies between parties, and of criminal prosecutions; the system of courts of justice in a government. An independent judiciary is the firmest bulwark of freedom.

JUDICIARY, noun – Webster's 1828 Dictionary

The fact that a judge can rise to the level of the Supreme Court of the United States and think that the court should be swayed by public opinion should scare the American people. The branch of government that represents the people and the states is Congress, not the courts. How can we say that we have a representative government if unelected judges can supersede the representative branch? We are not a nation of laws when those who are to apply the law think they can make it up for themselves. What Justice Kagan is describing is not a constitutional republic. It's not even a democracy. It's an oligarchy! She believes it's the role of the court to determine public sentiment, then apply that to the cases before them. But who decides what the "public sentiment" is?

According to Justice Kagan, it's the unelected members of the Supreme Court, the rulings of nine high priests in black robes. The very tyranny that we declared independence from?

The Role of The Judiciary

In his essay on the judiciary, which became known as Federalist Papers #78, Alexander Hamilton described the role of the courts within the central government plainly.

Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them...

[Alexander Hamilton, Federalist Papers #78](#)

Hamilton starts out by stating the judicial branch is the least dangerous to our rights, because they have the least capacity to injure us. Why is that? It seems today that the courts are frequently trampling our rights, so how can it be they are least able to injure us? The answer comes from the rest of the paragraph.

... The Executive not only dispenses the honors, but holds the sword of the community. ...

[Alexander Hamilton, Federalist Papers #78](#)

The President is not only responsible for the nomination of numerous officials, but the commissioning of all officers, both public and military.

... he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

[U.S. Constitution, Article II, Section 3](#)

The President helps choose who works in the Executive Branch, meaning all of those bureaucrats that pass rules and regulations that impact our lives every day.

... The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. ...

[Alexander Hamilton, Federalist Papers #78](#)

Congress controls the purse. They have the power to tax, spend, and even borrow against the credit of the United States. Furthermore, with the power to legislate means the power to make laws. These laws may impact everyone in America. But what about the courts?

... The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. ...

[Alexander Hamilton, Federalist Papers #78](#)

The courts are supposed to have no influence over either the sword (military and police) or the purse (the taxing and spending of money). Yet today courts claim the authority to tell the other branches how they can use the strength or wealth of society. Think about that last statement. Yes, a judge must sign a warrant, but the courts cannot execute it. A judge may even find a law unconstitutional, but they have no strength to make the other branches comply.

... [The judiciary] may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

[Alexander Hamilton, Federalist Papers #78](#)

Compare that to the view of the court Justice Kagan appears to

have. She wants the court to assume the will of the people, then use that to force others to comply. This is not the courts that our Founding Fathers envisioned. This is not a court that offers opinions and not rulings. This is not a court with mere judgment, but with power.

Overall, the way the court retains its legitimacy and fosters public confidence is by acting like a court, is by doing the kinds of things that do not seem to people political or partisan

[Elena Kagan at a judicial conference in Montana](#)

While Justice Kagan claims the court retains its legitimacy by acting like a court, her expectations that they enact the sentiment of the people would have them acting as a legislature not a court. Justice Kagan also claims she's is not referring to any recent decisions of the court, though I would remind the reader this is the justice who dissented in that same court's decision that would restore the abortion question to the people and their representatives. A justice who complained that the majority of the court read the actual language of the Constitution, as understood by the people who wrote and ratified the document. Does that sound like a court acting like a court? And lest we forget, this is the same justice who put her feelings about gun violence above the law.

The Solution

What can be done about a judicial branch occupied by would-be legislators in black robes? Let's return to the words of Alexander Hamilton for some advice.

According to the plan of the convention, all judges who may be appointed by the United States are to hold their offices DURING GOOD BEHAVIOR; ... The standard of good behavior for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government.

[Alexander Hamilton, Federalist Papers #78](#)

Contrary to popular belief, federal judges do not have lifetime appointments, they serve during their good behavior.

The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour,

[U.S. Constitution, Article III, Section 1](#)

But who decides what's good behavior for a judge? The first step is the House of Representatives.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

[U.S. Constitution, Article I, Section 2](#)

That means the power of impeachment rests in the hands of the representatives of the people, your employees in the federal government. This is followed by the Senate.

The Senate shall have the sole Power to try all Impeachments.

[U.S. Constitution, Article I, Section 3](#)

While the role of the Senate is to represent the states, since the ratification of the Seventeenth Amendment the people choose these representatives as well. That means the ultimate decider of what will be considered good behavior for federal judges is We the People.

Conclusion

During this talk, Justice Kagan made an important point: She said there were times when justices...

really just attempted to basically enact their own policy or political or social preferences

[Elena Kagan at a judicial conference in Montana](#)

I would suggest the justice heed her own counsel. Her position in recent cases before the court seem to be based more on her political or social preferences. They are supported not by the Constitution or laws of the United States, but by the previous opinions of judges, many of whom have been just as much political actors as Justice Kagan has been.

I hope by now you have seen the jaw-dropping arrogance of the little talked about words of Associate Justice Kagan. While experience tells me she is not likely to pay any price for her bad behavior, much less the oath she took to support the Constitution of the United States, I can only hope that the American people will take this lesson to heart. If we are to have a judiciary that is least able to injure our rights, we must make sure that those who sit on these courts be on their best behavior. And when they claim the power of the sword or the purse, that their bad behavior be appropriately punished.

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