Statement by Senator Orrin G. Hatch
Senate Judiciary Committee
Subcommittee on Oversight, Agency Action, Federal Rights, and Federal Courts
Hearing: "With Prejudice: Supreme Court Activism and Possible Solutions"
Wednesday, July 22, 2015

I've been a member of this committee for a long time. I've participated in the confirmation of every single current member of the Supreme Court. I've spent many years following the Court, examining its decisions, and advising Presidents on potential nominees.

And I have to say, the problem of Supreme Court activism troubles me greatly. As the witnesses so ably explain in their written testimony, Supreme Court decisions that depart from the law and the text of the Constitution are enormously problematic because there are few, if any, real political checks on the Judiciary.

Alexander Hamilton famously called the Judiciary the "least dangerous branch." But this view was predicated on the notion that judges would exercise neither force nor will, but merely judgment. Hamilton himself admitted that if judges "should be disposed to exercise will instead of judgment, the consequence would equally be the substitution of their pleasure to that of the legislative body."

The difference between will and judgment is a difference between ends and means. The willful judge selects a favored policy outcome and bends the law to achieve that outcome. The judge who exercises judgment applies scrupulous tools of interpretation that remain consistent from case to case and that do not vary depending on the parties or the judge's preferred outcome. Judgment is about process. It is about consistency, honesty, and the rule of law. Will is about one thing: results.

Regrettably, far too often the Supreme Court has shown itself disposed to exercise will rather than judgment. Perhaps unsurprisingly, this tendency has been most apparent in politically charged cases. It is in those cases that the Justices have been most willing to disregard neutral principles and standard tools of interpretation in favor of airy proclamations about penumbras, evolving standards, and the mystery of life.

The temptation is, perhaps, understandable. When there's no one to prevent you from imposing your view of what's right on the country, there's going to be a tendency to want to do so. The only check is internal—what *you* think is proper. Or perhaps more candidly, what you think you can get away with.

All of this should be familiar to students of the Founding. As we all know, the Framers erected a system of checks and balances to prevent any one branch from imposing its unfettered will upon the others. But they did not, I don't think, foresee a Judiciary that would take upon itself the power to decide the fundamental political issues of the day.

The power the Supreme Court exercises today to override the body politic based not upon the words of the Constitution, but rather upon the content of the Justices' moral worldview is antidemocratic, antijudicial, and anticonstitutional. The power to pronounce a fundamental right to same-sex marriage that is found nowhere in the text or structure of the Constitution is the

same power to pronounce fundamental rights to welfare benefits, to taxpayer-funded abortion, to mandatory equal spending for public school districts, and to voting rights for illegal aliens. This power knows no limits, other than the Justices' personal beliefs and what they think they can get away with. It is, at base, a pure exercise of will.

I am deeply troubled by the Court's persistent belief that it is both legitimate and constitutional for Justices to enshrine their personal views as constitutional law. And I candidly admit that I do not know the solution. Perhaps term limits would help. Perhaps we need a concerted effort to create a mechanism by which Congress or the states can override the Supreme Court by means other than a constitutional amendment. Why should the Supreme Court—the least democratic, least accountable, least representative branch—alone have power to constitutionalize its policy preferences? Why should any branch, acting alone, have such power?

There is no easy answer to this problem. But we need to think about it, and we need to do so now.

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