



Posted on: Monday, April 28, 2003

LAW WEEK

Being independent is critical

This is the second of several articles written by state judges commemorating Law Day (May 1) in Hawai'i.

By Joel August
Circuit Court judge on Maui

The Judiciary is the smallest of our three branches of government, but it is the most influential in assuring that the past influences our development as a society. The extent of this conservative influence is dependent upon the degree of independence of our judges.

An independent judiciary decides cases brought before it purely on the basis of the law (in the form of constitutions, statutes or cases) and the facts forming the background of the controversy in issue. A truly independent judge, in making her decision, is not to be influenced by any factor extrinsic to the controversy, such as the will of the majority, the recommendation of a particularly influential corporation, or the political philosophy of an elected official.

In places where judges are elected, a circumstance we in Hawai'i have been spared, it means the judge is to disregard the desires of his campaign contributors.

When construing a statute, Hawai'i's appellate courts have consistently ruled that a judge's foremost obligation is to ascertain and give effect to the intention of the Legislature. The starting (and usually ending) point is the language of the statute itself. The duty is to give effect to the plain and obvious meaning of the text.

In this regard, all judges, in the words of Justice Antonin Scalia of the U.S. Supreme Court, should be "textualists."

Only when particular statutory language is ambiguous within the context of the entire statute do Hawai'i's courts get into the business of interpreting and divining what the Legislature intended. At this point, a court would look to the reasons for the enactment and inquire into a state's legislative history to render an opinion consistent with the Legislature's design and purpose.

Some jurists, like Justice Scalia, only look at the words as they were promulgated and refuse to consider any intent of the legislators contained within the history of the legislation.

Contrary to popular belief, judges do not make law. This is the job of legislators, who pass laws suggested by their constituents, by special interest groups or by the executive branch of government.

Most judges readily acknowledge that they would make terrible legislators — they usually do not have broad backgrounds in business, and they are reluctant to compromise a deeply held belief for the sake of gaining support for a popular objective. Because each case has unique facts, the decisions of judges tend to shape, as opposed to create, the legal fabric that holds our society together.

In matters involving essential liberties (freedom of speech, press, religion and assembly; deprivation of life, liberty, or property without due process of law; denial of equal protection of the laws; discrimination; protection against unreasonable searches and seizures, etc.) the ultimate rear-view mirrors for courts are state and federal constitutions.

The Bill of Rights of the U.S. Constitution was passed with a dual purpose, and those objectives have not changed since their inception. One was to keep the government off the backs of the people. The other was to provide an immutable foundation to guide future generations.

While the issues that courts face have changed (assuredly in 1791 no original framer of the federal Constitution was concerned about discrimination in the workplace, Miranda warnings and abortion rights), the meaning and spirit of the original language has not

changed.

Referring back to existing constitutions, statutes and cases for guidance in deciding current controversies, rather than bowing to current opinions expressed by various segments of the public, ensures conservation of the rule of law. The benefits are that each claim stands or falls on its own merits, and judges are free from the undue influence of those who may have a personal stake in the outcome.

Correction: A previous version of this column contained an error that changed the meaning of a sentence. The sentence quoting Justice Antonin Scalia should have read: In this regard, all judges, in the words of Justice Antonin Scalia of the U.S. Supreme Court, should be "textualists."