UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
Joel W. Solomon United States Courthouse
900 Georgia Avenue
Chattanooga, Tennessee 37402

THE PUBLIC'S WILL AND THE RULE OF LAW: THE DIFFERENT ROLES OF DEMOCRACY'S KEY PRINCIPLES

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A foundational principle of our democratic republic is that the will of the people is the basis of the government's authority. This principle is one of the "self-evident" truths in the Declaration of Independence: "Governments are instituted among Men, deriving their just powers from the consent of the governed."

Because it is impractical for all of us to directly decide matters of government, we elect representatives to act on our behalf. Our representatives then try to ascertain our wishes and use their best judgment on courses of action to pursue. This process is sometimes referred to as following the will of the people. Following the will of the people, while important, is different than following the rule of law.

THE WILL OF THE PEOPLE.

Divining the will of the people is not an easy task. "The people" include a very large number of individuals with differing opinions, views, and wishes. Uniformity is rare. Even within a given constituency, opinions, views, and wishes on the same subjects will change over time. Sometimes views change rapidly.

Officials in the legislative and executive branches, whether they are elected or appointed, spend a considerable amount of time trying to gauge the "will of the people." They make this assessment through public polling, public and private meetings with constituents, town halls and public forums, office hours, meetings with civic organizations, and other means. Lobbyists make their living trying to persuade officials that their own constituents desire the actions that align with the lobbyists' goals. Individual citizens may write, call, or personally request that officials take certain actions. During campaigns, candidates actively seek support, including campaign contributions. Once elected officials think they have a handle on the public will, they make promises to carry out that will. Such actions are in keeping with the responsibility of elected officials to represent the people who elected them.

In short, elected officials are expected to listen to the people. That is one of the essential features of representative government. Such outreach and soliciting the opinions, views, and

wishes of the people by elected and appointed officials is necessary for the people to give consent to government. In fact, it is not only necessary, but commendable.

THE RULE OF LAW.

The interactions elected and appointed officials have with the public stand in sharp contrast to what we expect from the judicial branch. Judges do not represent the people. Judges represent the law, and their obligation is to the rule of law. This shows a key difference between the role and function of the judiciary and the role and function of the elected branches. The role and function of the judiciary is not to fulfill the momentary wishes of the public, but to apply the rule of law. The wishes of the public may be fickle. Law is not. It must be stable and predictable.

In deciding a case, the judge does not ask, "What does the public want me to decide?" Rather, the question the judge faces is "What does the law require?" We rightfully would be horrified if judges sought out the will of the people the way elected officials do. Where the public has a voice in a case is through a jury, properly constituted and sworn to apply the law as the judge explains it. But imagine if a judge held public town halls before making decisions and asked citizens how they thought a case should come out. Or if judges conducted public-opinion polls to determine how they should decide legal questions. Suppose a judge's decision changed because newspaper editorials, television coverage, public demonstrations, or opinion polling indicated that the public favored one result or one party over another. If a judge accepted calls or visits from interested parties in pending litigation, or welcomed lobbyists to advocate for an outcome, we would expect the judge to recuse him or herself from the case. And if a judge made promises as to how he or she planned to rule in a case, we would demand that the judge get off the case, if not resign from office entirely.

A judge who sought to ascertain the public's preferred outcome before deciding a case would be engaging in conduct fundamentally inconsistent with the role and function of the courts. The legitimacy of a judicial decision does not come from its popularity. It comes from its fidelity to the Constitution, statutes, precedent, procedure, and the fair and impartial application of law.

CONCLUSION.

Our constitutional system deliberately divides government power and separates government roles. The people elect legislators to make policy and enact laws. Executive officials administer and enforce those laws. In carrying out their responsibilities, the legislative and executive branches seek to fulfill the will of the people, while still honoring the rule of law.

Judicial officers, in contrast, must be insulated from the popular pressures that properly influence elected officials. Judges interpret and apply the law in particular cases. They must do so without regard to the public will, following only the rule of law. Judicial independence is not a privilege granted to judges for their personal benefit. It is a protection for the public from the arbitrary exercise of government power, because the popular decision today can run afoul of fundamental constitutional protections.

The founders understood this danger. A constitutional government requires institutions capable of saying "no" even when saying "no" is unpopular. The rule of law sometimes requires a judge to reach a result that will be criticized by newspapers, television, politicians, or even a majority of citizens. This is not a failure of democracy; on the contrary, it is one of democracy's strengths and safeguards. Both the will of the people and the rule of law strengthen our democracy, even—and perhaps especially—when they diverge at crucial moments or on polarizing issues.

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