

COURT ACTIVISM IS INAPPROPRIATE

By: Idaho Supreme Court Justice Roger Burdick

The (Lewiston) Tribune's editorial of May 20 concludes, "If Idaho's Supreme Court declines to be an activist panel, who will force the lawmakers to act any differently?" Whether or not to be an activist panel is a decision that the State Supreme Court cannot make under our constitutional scheme. The Supreme Court is not a super legislature. It is a court and is required to play its constitutional role—to interpret the law, not to make it.

I doubt that most Idahoans want an activist Supreme Court justice—a person who would forge his own legal ground without concern for the Constitution and statutes of Idaho. If a judge is activist in state finance matters, he is likely to be an activist in other matters, including criminal cases. Let me portray what an activist might look like in the criminal justice area.

During his tenure, Judge Bradbury has made four decisions in criminal matters that were unanimously reversed on appeal. If the appellate courts had adopted Bradbury's view of the law, Idaho's death row would have been essentially emptied after 2003 and none of more than a dozen death row inmates could have been resentenced to death. Criminal defendants could have used lie detector test results to bolster their credibility. Police officers would not be able to use physical evidence, like an alcohol test collected at an Alcoholics Anonymous meeting, against drunk drivers. Idaho's alcohol enforcement statute prohibiting barkeeps from serving obviously intoxicated customers would have been declared unconstitutional and unenforceable. In each instance the appellate courts of Idaho firmly held that Bradbury's decisions were without merit and overruled them.

I wrote the decision overturning Bradbury's decision to allow criminal defendants to support their credibility by the use of lie detector test results. My opinion pointed out that Bradbury's decision was unprecedented and would allow unreliable evidence into a criminal proceeding." (State v. Perry, 139 Idaho 520).

In State v. Porter (140 Idaho 780), Judge Bradbury not only overturned the death sentence of a defendant who had beaten his girlfriend to death, but ruled that he could not be resentenced to death. Bradbury erroneously ruled that a 2002 U.S. Supreme Court decision, requiring jury sentencing in death cases, applied retroactively. He also mistakenly concluded that Idaho law prevented the defendant from being resentenced to death by a jury. If Bradbury had had his way, the death sentences of more than a dozen Idaho murderers would also have been overturned. The Idaho Supreme Court unanimously overruled Bradbury's decision.

In a 2008 decision, Judge Bradbury declared an alcohol control statute, prohibiting bars from serving customers who were obviously intoxicated, was unconstitutional because bartenders were not able to determine when a person was obviously intoxicated. Bradbury misunderstood Idaho law pertaining to deprivation of due process. The Idaho Supreme Court unanimously overturned Bradbury's decision in Alcohol Beverage Control v. Gordon J. Boyd, on April 23, 2010.

On March 3, 2010, the Idaho Court of Appeals overturned Bradbury's decision in State v. Ashworth. In that case, Judge Bradbury threw out evidence against a DUI defendant, Ashworth, because he was placed under arrest at an Alcoholics Anonymous meeting. Ashworth was reported to have driven to the meeting in an intoxicated condition, after having fired two shots at his home. When the officers arrived

at the meeting place, they were told that Ashworth was “four sheets to the wind, and really drunk.” Bradbury threw the blood alcohol test out, claiming it was a violation of Ashworth’s constitutional rights to take it at the meeting. The Idaho Court of Appeals unanimously held that Bradbury was wrong and that the evidence was admissible.

This is activism in action and it has no place on the Idaho Supreme Court—not in the public finance area and not in the criminal area.