

High court is indeed activist, bar panel says

BY DANNY JACOBS

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OCEAN CITY — The U.S. Supreme Court has not hesitated in recent years to go above and beyond the cases before it to make bold and sweeping changes to the law, three veteran court watchers said Thursday.

"This court's habits are very injurious to its reputation that it reacts instead of pro-acts," said Lyle Denniston, who has covered the court for more than 50 years. "This is an institution that has a very deep sense of its own consequences."

Chief Justice John G. Roberts Jr. is misleading when he calls his philosophy "judicial minimalism," added Dahlia Lithwick, a senior editor and legal correspondent for Slate.

"I think the court is very delusional in saying that it's not activist," she said.

Denniston, Lithwick and Alan B. Morrison, a law professor who has argued more than 20 cases before the court, discussed recent court opinions and previewed some of the cases to come at a panel discussion at the **Maryland State Bar Association's** annual meeting sponsored by the Appellate Litigation Committee.

Maryland has a connection to the most high-profile case of the current term and possibly the next term. The court's 8-1 decision allowing a Kansas church to picket outside a Marine's funeral in Westminster highlighted a "banner year for the First Amendment," Lithwick said.

While the outcome of the case was never in doubt, Lithwick pointed to



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Panelists (from left) Lyle Denniston, Dahlia Lithwick, Alan B. Morrison and moderator Andrew H. Baida at Thursday's panel discussion.

Justice Stephen Breyer's concurring opinion wondering about a "new world of the First Amendment" with the Internet.

"It used to be yelling 'fire' in a crowded theater was a crime," she said. "Now the whole world is a crowded theater."

Denniston said the pending petition to watch is *Williams v. Maryland*, where the court would be asked to decide if a state law prohibiting the carrying of a handgun outside of the home violates the "right to bear arms" guaranteed by the Second Amendment. The Maryland **Court of Appeals** in January unanimously held it does not.

Court of Appeals Judges Glenn T. Harrell Jr. and Mary Ellen Barbera were among those attending the discussion.

The Supreme Court asked lawyers for the state to file a reply brief by the middle of next month after they initially declined to file one, according to Denniston.

"This is the big, big, big Second Amendment case," he said, adding he believed the court would continue expanding the reach of the Second Amendment.

Morrison, of The George Washington University Law School, said the court could take up health care reform before next summer, but that it "has been really tough on standing and ripeness," he said.

Lithwick said a year ago, court watchers believed an opinion upholding the law would be an 8-1 vote or 7-2 vote "if you're drunk." But that has turned into speculation about a 5-4 decision, with observers wondering how Justice Anthony Kennedy will vote.

"I've never seen it happen so quickly," she said.

A massive class-action lawsuit alleging gender discrimination by Wal-Mart, by contrast, is a decade old and still in the class certification stage. The Supreme Court heard arguments on the topic in March, and Morrison said he was "almost certain" it would reverse an appellate decision allowing the case to go forward as a class-action lawsuit.

"It's possible this will be the *Bush v. Gore* of class-action suits because it is so big," he said.

One issue that will not be appearing before the nation's highest court is a challenge to President Barack Obama's American citizenship. The court has already rejected several appeals related to the

issue.

"I hope people keep bringing them because it makes good news copy," Denniston said.

