

## INDEPENDENT FROM WHAT?

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### An Essay on Judicial Independence

I have seen reports in the press suggesting that I am part of a movement to elect “right-wing judges” and that this threatens the independence and impartiality of the judiciary. That is categorically false and betrays a failure to understand the constitutional role of an independent judiciary.

First, I am not running for the Court of Appeals with a political agenda and would vigorously oppose any candidate that was doing so. I am running to restore impartial justice to our courts and to stop the agenda-driven judicial activism that is now occurring. The constitutional role of a judge is to apply the Constitution and other law as written and, where interpretation is necessary, to interpret it according to its original purposes. Whether that leads to liberal or conservative results in an individual case is not my concern. In my view, the Constitution is more important than my personal political ideology and trumps all other considerations.

Second, the fact that I have attempted to hold my opponent accountable for her activist decisions does not threaten the independence of the judiciary unless one believes that the judiciary ought to be independent of the people that elect them and, perhaps, independent of the Constitution and the law. In this state, our Constitution provides for the election of judges, and demonstrates that the people do not want a judiciary that is completely independent of them.

Judicial independence, as Madison discussed it in Federalist 47, means that Judges are to be independent of the executive and legislative branches of the government—not independent from the people or the Constitution. Governments derive their just powers from the consent of the governed and all political authority ulti-

mately flows from the people. Madison discussed the separation of powers as follows:

No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty than that on which the objection is founded. The accumulation of all powers, legislative, executive, and judiciary, in one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.

THE FEDERALIST, NO. 47 (James Madison)(emphasis supplied). Madison went on to quote Montesquieu for the proposition that, “There can be no liberty . . . if the power of judging be not separated from the legislative and executive powers[.]” Id. Judges, whether elected or appointed, should not be subject to excessive control by the political branches. That is a deep and fundamental principle of our constitutional system. It was threatened when President Franklin Roosevelt attempted to pack the Supreme Court to prevent his New Deal legislation from being declared unconstitutional. Mary Murphy Schroeder, *The Ninth Circuit and Judicial Independence: It Can’t Be Politics as Usual*, 37 ARIZ. ST. L. J. 1, 4-5 (2005)(giving a short history of the court packing attempt and how the President did not want to be held to the “horse and buggy days” of the Court’s interpretation of the Constitution).

My opponent quotes Justice O’Connor for the proposition that, “we must be ever-vigilant against those who would strongarm the judiciary into adopting their preferred policies.” Judge Becker suggests that Justice O’Connor was warning that public criticism of courts and judges threatens judicial independence. But what did Justice O’Connor mean by “strongarm the judiciary”? Justice O’Connor said that judges have the power to make Presidents, or the Congress or governors, “really, really an-

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gry” and advised against reform proposals such as massive impeachments of judges, stripping the courts of jurisdiction, and cutting judicial budgets to punish offending judges. “Any of these might be debatable,” she said, “as long as they are not retaliation for decisions that political leaders disagree with.”

In other words, Justice O’Connor was simply suggesting that such extraordinary measures by the political branches of government could threaten the independence of the judiciary from the other branches. The classic historical example of such a “strongarm” effort was President Roosevelt’s attempt to pack the Supreme Court in order to further his legislative goals. Justice O’Connor was not suggesting that merely criticizing judicial decisions somehow threatened judicial independence. I wholeheartedly agree with Justice O’Connor’s warning but do not believe that it supports the conclusion that Judge Becker suggests.

Justice Anthony Kennedy is fond of saying that, “Judges must be independent not so they can do as they choose, they’re independent so they can do as they must[.]” Alexandra Abboud, The Rule of Law Provides Foundation for Democracy (quoting Justice Anthony Kennedy), <http://usinfo.state.gov/dhr/Archive/2006/Jan/19-995963.html> (as of July 12, 2006). Too many judges in this state are doing as they choose and then complaining that their judicial independence is threatened when they are criticized for it.

The framers of our state Constitution reserved to the people the right to hire and fire their judges. If a judge proves unable or unwilling to follow the law, the people can and should replace him/her during elections. That idea does not threaten the constitutional independence of the judiciary in any way.

In addition to judicial independence, our Constitution envisions legislative independence in the realm of making law. James Madison was concerned about the encroachment of the judiciary on the legislative power. He again quoted Montesquieu:

Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator.

THE FEDERALIST, NO. 47 (James Madison)(quoting Montesquieu). Alexander Hamilton similarly said that, “The courts must declare the sense of the law; and if they 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 FEDERALIST, NO. 78 (Alexander Hamilton). In simple terms, the architects of our federal Constitution thought that it was dangerous to our liberty for judges to legislate from the bench. I agree. The Constitution is our contract with our government. It represents a limited delegation of our freedom and our sovereignty. If judges are not faithful to the understanding of the Constitution that we intended, they usurp the sovereignty of the people.

**I reject the undemocratic idea that our justice system cannot tolerate criticism of judges and their decisions. A healthy debate about judicial philosophy and the written record of a judge can only help the people to make more informed decisions in judicial elections. Judicial independence does not limit the First Amendment and should not become a convenient excuse for judges to avoid public scrutiny of their decisions or efforts to defeat them in elections.**