# Is The Supreme Court's Independence Under Attack?

*By Chris Arledge*

When John Roberts and Samuel Alito claimed their seats on the United States Supreme Court, the media rushed to analyze how these new members would impact the Court's jurisprudence on the major issues of the day, such as abortion, affirmative action, and the president's war powers. But some equally interesting news might have been overlooked by many: the claim by a retiring justice that the Court itself is under attack. Freed from the Court—and therefore freed from a justice's usual reticence to speak publicly on political issues—retiring Justice Sandra Day O'Connor gave a series of speeches arguing that the Court's independence is at stake, and asking lawyers to come to the Court's aid. (For the transcript of one such speech, see www.appellateacademy.org/events/oconnor_remarks_110705.pdf.) Many have done so, including the American Bar Association and a number of local bar associations. The question, however, is whether Justice O'Connor is right. Is the Supreme Court's independence truly at risk?

In her speech to the American Academy of Appellate Lawyers on November 7 of last year, Justice O'Connor cited five threats to judicial independence: impeachments, jurisdiction stripping, death threats, judicial term limits, and, apparently, public criticism. Some of these threats are obvious and worth very little discussion here. Death threats, for example, are so clearly unacceptable that the issue merits no discussion here. (There is also no reason to believe the bar can put an end to them. Supreme Court justices are not alone in being targeted by crazies and criminals, and few people in either category are likely to be swayed by the solemn declarations of a local bar association.) Other alleged threats—including judicial term limits and measures to strip the federal courts of jurisdiction—are more serious issues and worthy of attention. I intend to leave those issues to a different (i.e. longer) article where they can receive the attention they deserve.

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But I do wish to give special attention to Justice O'Connor's stated argument that public criticism from the political branches is a threat to judicial independence. It is on this issue that I believe Justice O'Connor commits a serious error. And, I believe, the bar would be well-served to recognize the error and refuse Justice O'Connor's call to rally against public criticism of the Court.

Justice O'Connor transitioned into this important part of her speech by asserting that, "the value of judicial independence is a lesson that even some of our leaders perhaps have not learned." She honed in specifically on "a prominent House leader" (Tom DeLay) for remarks he made at a "conservative conference." Specifically, Mr. DeLay apparently stated that "[j]udicial independence does not equal judicial supremacy[,]" and he "faulted the courts for their decisions on abortion and school prayer and for improperly citing international law." Mr. DeLay even suggested that recent court actions "are not examples of a mature society, but of a judiciary run amok."

Mr. DeLay's comments are controversial, and no doubt intentionally provocative. But the real question—the one Justice O'Connor calls us to answer—is whether the comments constitute a legitimate threat to judicial independence. Justice O'Connor gives very little time to that question, at least, over and above the mere assertion that Mr. Delay's comments reflect a misunderstanding of the importance of judicial independence. It is troubling that Justice O'Connor was so cavalier on this point. Indeed, it seems strange even to suggest that comments like Mr. Delay's are somehow incompatible with our political system. After all, open debate on issues of national importance is the very bedrock of our system, a fact of which the Supreme Court itself has often reminded us. Indeed, the Supreme Court has told us that free speech is such an important public good that it requires us to tolerate Nazi parades, *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977), flag desecration, *Texas v. Johnson*, 491 U.S. 397 (1989), and

even virtual child pornography, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). Is it obvious that a political system founded on and apparently able to tolerate much in the name of free speech—including free speech that is offensive and seemingly has very little value—would implode if the free speech consists of strong criticism of important judicial decisions?

Certainly, the Supreme Court has weathered such criticism in the past. American history is rife with examples of our greatest political leaders challenging the Court: from Jefferson's criticism of *Marbury v. Madison*, to Lincoln's criticism of *Dred Scott*, to FDR's criticism of the Lochner line of cases. This is not to say, of course, that all of those criticisms were necessarily justified. But at the very least, Justice O'Connor must concede that public criticism of the Court by American political leaders has a long history, and yet the Court seems to exercise more power than ever before. So why is Tom DeLay's criticism more of a threat to the Court than Lincoln's criticism of *Dred Scott*? O'Connor offers no answer in her speech. She needs to.

Maybe most importantly, if strong public criticism of the Court is inappropriate, what avenue remains for the other branches of government to check the power of the judiciary? O'Connor began her speech by mentioning the "elementary high-school civics" lesson that our three branches of government "regulate each other by an intricate system of checks and balances." She even opined that if the Court failed to step on the toes of Congress or the President from time-to-time, the Court probably isn't doing its job. But nowhere does Justice O'Connor articulate any means for the other branches of government to regulate the Court. Indeed, if public criticism is an unacceptable means of trying to rein in an out-of-control Court, what possible avenue remains open? Justice O'Connor has already expressed skepticism of strong measures like jurisdiction-stripping and term limits. If even public criticism is out, it is hard to envision any available checks on Court power whatsoever.

Justice O'Connor's position seems particularly remarkable in light of her view that the Court is often called to decide and put to rest the most contentious, divisive public issues of the day. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), Justices O'Connor, Kennedy, and Souter offered a lengthy justification for the Court's refusal to overrule *Roe v. Wade*. In that opinion, Justice O'Connor and the rest of the plurality argued that the Court is sometimes required to "call the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution." In other words, sometimes it is the Court's job to step into

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the middle of our most contentious political debates and declare a winner. You might think that the losing side in such a debate should at least be able to vent, maybe express strong concern about the Court's decision. But apparently not, as any such public outbursts would threaten the very independence of the Court.

Judicial independence is vital to the health of American democracy. The American people—particularly we lawyers—should be quick to remove obstacles to the Court's needed independence. But even independence has its limits. Many who will read this article are not troubled by the Court's exercise of its authority, and do not believe that the Court needs to be reined in. But other reasonable, educated people disagree, including some members of the Court itself. If judicial independence precludes those who believe the Court has expanded its power beyond the appropriate constitutional limits from even publicly criticizing the Court, then judicial independence has swallowed judicial accountability. The Court can do as it wishes; we can accept it without comment. Is this really what judicial independence requires? A weak, dependent judiciary would be a disaster; but it is hard to imagine that a dominant, unaccountable judiciary is in our nation's interests either.

Justice O'Connor closes her speech by calling on the legal profession to come to the Court's aid, warning that "[t]here is no natural constituency for judicial independence" except perhaps for the lawyer class. But as lawyers we should never forget that the powerful—be they presidents, senators or Supreme Court justices—by definition constitute a natural constituency concerned about protecting their own power. So long as the Supreme Court assumes the responsibility for resolving our nation's most contentious issues, the Court will and should be subject to public criticism from those who believe that the Court has overstepped its bounds. And if some members of the Court have trouble performing their duties in such a climate, the answer is not to stamp out such criticism, but rather for those members of the Court to take up a new line of work. I suspect there will be no shortage of qualified applicants interested in taking their place. **C**

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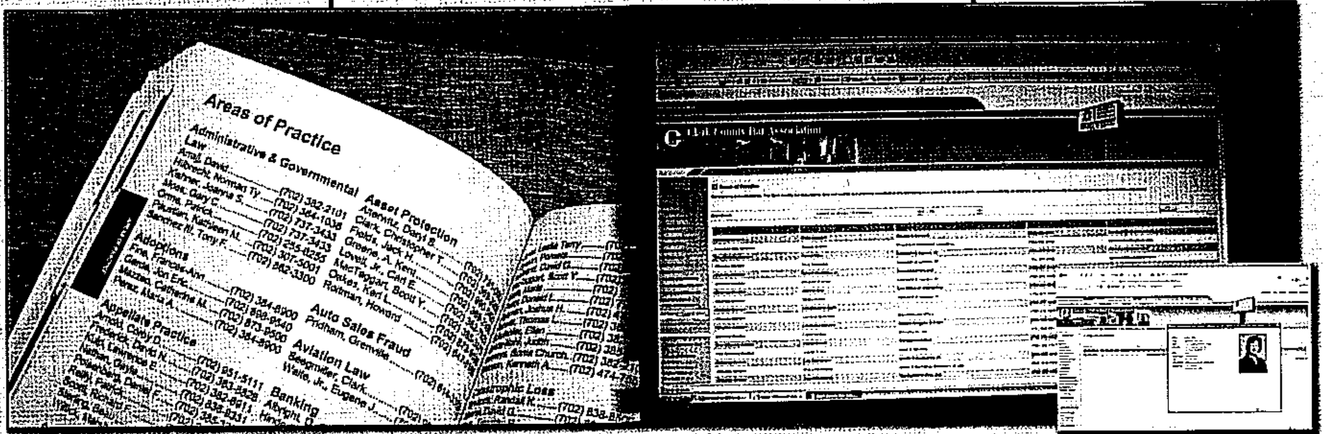


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