

What's Going On?
CI 98 and the Importance of an Independent Judiciary ¹
By Justice John Warner ²

I have a question. It is: Just what's going on here? It's normal for right wing zealots, extreme left wing types, and almost all politicians, to attack lawyers, and trial lawyers in particular, by saying that they cause too much trouble and make too much money. But what's the deal with the attack on the judges? Why the attempt to intimidate judges and talk the citizens into altering the whole fabric of our system of justice?

We now have a crisis with the independent judiciary in South Dakota, and with CI 98 having qualified to be placed on the ballot, the beginnings of what has to be considered a serious challenge to judicial independence in Montana.

First, some housekeeping matters.

I must make it clear that what I express is my opinion. My opinion is not that of the Montana Supreme Court or any other member of the Court. I can say, as a matter of fact, established beyond a reasonable doubt, that the other members of the Court always feel totally free to disagree with me. And, as is easily seen by reading the Court's opinions, the other Justices do disagree with me from time to time.

Also, I have recused myself from consideration of pending litigation concerning CI 98. Not so I could make these remarks, but because during the campaign to retain my seat, and before any litigation commenced concerning CI 98, I was several times questioned concerning its effect, and merit. In making my previous comments concerning this measure I have made it clear that I intend to be impartial. But, those comments may have been taken otherwise. And, for myself, no matter what the U.S. Supreme Court may have written in *Republican Party of Minnesota v. White*,³ I have determined that it would be best if I not sit on cases involving CI-98. I do, however, intend to cast my ballot on the measure, and will do my best to influence my wife's vote.

I first will to go into a bit of history concerning judicial independence, to sort of set the scene. Then, mention a bit about what I have seen is going on here in Montana. I believe the attack on judicial independence is intensifying nationwide. But, I limit my comments to Montana. And, finally I will make a few comments about what I and my colleagues can do, and what you can do, to hopefully preserve one of the most necessary features of our system of government.

Judicial independence is one of the cornerstones of our personal freedoms. I remind you that one of the most important reasons our ancestors revolted and declared independence from England, was that King George III:

. . . made Judges dependent on his Will alone for the tenure of their offices, and the amount and payment of their salaries. ⁴

When the American revolution was successful, which was by the way anything but a sure thing, James Madison and Alexander Hamilton very eloquently carried the theme of judicial independence into the Federalist papers, which were distributed to the several states. Their thesis was that judges had to be independent, free from the whims of politics, and not dependent on the government, for the tenure of their offices and the payment of their salaries. It would be wonderful if we had someone as articulate as James Madison to express the need for judicial independence now.

¹ These remarks are a slightly edited version of a presentation made at the MTLA convention in Polson on July 27, 2006.

² Justice John Warner is a sitting Justice of the Montana Supreme Court. He is running unopposed to retain his seat.

³ 536 U.S. 765 (2002).

⁴ *Declaration of Independence*, July 4, 1776, at ¶ 11.

It was in the famous case of *Marbury v. Madison*,⁵ where Chief Justice John Marshall exercised judicial independence and first established the concept of judicial review of the actions of the other two branches of government. Of course, this doctrine was at that time unique in the governmental systems of the world. It is still rare, and while it is in my opinion an excellent concept, it has always caused problems. A court, a few judges, have the authority to tell the chief executive, or the legislature, what it can and can't do under the U.S. and State Constitutions. Of course, this has caused some tension between the judiciary and the other branches of government both in the nation and in Montana.

John Marshall was clever in how he established the doctrine of judicial review. He most certainly knew the politics of the time. The decision in *Marbury v. Madison* lectured President Jefferson, but didn't require him to do anything. So, the principle was established, Marshall wasn't impeached or shot, and the government didn't fold.

However, it was not long before the principle of judicial review of legislative acts, and along with it the concept of judicial independence, came within a hair's breadth of being obliterated.

Justice Samuel Chase made some decisions that outraged the Republican Congress. Now, there is some support for the proposition that the outrage was justified. Be that as it may, Chase was easily impeached in the House of Representatives; and then went on trial in the Senate. The reason given for the impeachment was that his decisions were politically motivated, and he should be impeached for the sole reason that he made these decisions.

At the time, John Marshall, who I think all of us would agree was a pretty good judge, was the chief advocate of judicial independence, and of judicial review. He also knew that if Chase was convicted and removed from office, which was likely, he'd probably be next. I can't help but wonder how the history of our country would have been different if that had happened.

In any event, the point of this story is that John Marshall was apparently willing to compromise, and give up judicial independence as we know it, rather than have judges removed for the sole reason that their decisions were unpopular. He wrote to Justice Chase on January 23, 1805, that:

. . . I think the modern doctrine of impeachment should yield to an appellate jurisdiction with the legislature. A reversal of those opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than a removal of the Judge who has rendered them unknowing of his fault. ⁶

In other words, if a judge were to render a politically unacceptable decision, it would be better to have a further appeal to the legislature, such as the law lords of Great Brittan, than to impeach the judge. Even Marshall, if he had to, was willing to give up the ability of the judiciary to make a final decision, rather than have the judge removed because he made the wrong decision.

As it turned out, Chase was acquitted, and Marshall took the thought no further. However, it was purely political luck of the draw that Chase was acquitted. Enough senators voted against the impeachment to cause it to fail, not because they cared for Justice Chase, or gave a wit about judicial independence. They voted to acquit Chase because they didn't want the main proponent of the impeachment bill to have the stature and prestige of having been able to remove a Supreme Court Justice. They didn't want him to become president. It was politics that saved judicial review and judicial independence. It was not the philosophy that an independent judiciary was worth saving. Now, that was a close call. Over the next two centuries judicial independence, while often attacked, has become a mainstay of our democracy, just as James Madison envisioned it.

Removal of a judge for an unpopular decision is exactly what is proposed in CI 98. From what I have seen, it is pure politics that is in play today in Montana.

⁵ *Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137 (1803).

⁶ To Samuel Chase, in the Papers of John Marshall vol. VI, at 347 (Charles F. Hobson, et al. eds., U.N.C. Press 1990).

Do not to take from my remarks that I think the political process is the wrong way to make the decision whether judicial independence shall remain intact in Montana. The political process, consideration of CI 98 by the electorate, is how the decision must be made. ⁷

No less a person than George Washington said:

The basis of our political systems is the right of the people to make and to alter their constitutions of government. ⁸

The Montana Constitution, Article II, Section I states:

All political power is vested in and derived from the people. All government of right originates with the people, is founded upon their will only, and is instituted for the good of the whole.

The political process is at work. A person may legitimately take either side of the issue.

The question for me as a judge is: Should I feel threatened? I make tough calls for a living. I do my best. I face the possibility of an opponent in an election cycle that is set by the Constitution, as well as a retention election when there is no opponent. The political system will remove me if it wants to. Still, as I'm human, I'm forced to admit that I don't really want to gear up in opposition to a recall election during my term just because I'm doing my job. It is a bit threatening to face a recall simply because the law requires me to make an unpopular decision, because the law requires me to decide that an individual needs to have his or her rights protected in an unpopular case, or that the Constitution says I must call "foul" on a legislative act.

What's going on? There doesn't seem to be any more dissatisfaction with the Courts than is usual, for a branch of government that must make decisions that someone must disagree with. And, just who is it that is so dissatisfied with the system the way it is, granting me and my colleagues reasonable independence from the political winds? I do not know the answers to these questions.

I know the challenge is very serious. I know that the system is at risk. CI-98 qualified for the ballot even without the votes from one of the largest counties, Cascade County. But, there is a certain mystery about what's behind it. There seems to be this vague coalition, or even one person, from some unknown place, behind it. But, the impetus doesn't seem to be from Montana. I don't think the citizens of Montana are tired of being treated fairly, nor do I think that they are being treated unfairly.

I've spent my adult life in the courtrooms in Montana, and I sure want to keep justice impartial. Well, like I said before, come November 7, I'll cast my vote.

What can be done – by the judges, and by you, to legitimately influence the political process?

What I cannot do, and will not do, is bow to the pressure in any way. With me, I made the promise to myself 18 years ago when I first assumed judicial office that I would do the best I can, be fair and impartial, and call 'em the way I see 'em, no matter what the consequences. A judge can never count the votes before he rules. I think that goes without saying. And, if it costs me my job – so be it. I know of no judge or justice in Montana that feels differently than I do.

⁷ That having been said, it is essential that the law be followed in placing an initiative on the ballot. District Judge Dirk Sandefur recently ruled that the law wasn't followed in regards to the signature gathering process for CI-98, as well CI-97 and I-154. See *Montanans for Justice, et al. v. State of Montana, et al.*, CDV-06-1162(a), Order dated September 13, 2006. Judge Sandefur's ruling is presently on appeal to the Montana Supreme Court, from which case I have recused myself.

⁸ Washington's Farewell Address of 1796; see J.D. Richardson, ed., *Compilation of Messages and Papers of the Presidents*, vol. 1. at p. 213 (1907).

A judge can work hard, take the job seriously, make well reasoned decisions, and give the reasons for those decisions in a way that they can be understood. Most of the time, this engenders confidence in the system, even in those that are unsuccessful.

A judge can treat everyone that comes before the Court with respect. This includes the lawyers, the jurors, and the litigants. Most people, actually everyone, will be favorably impressed if they are treated with courtesy and respect.

As Thomas Jefferson said, “When a man assumes a public trust, he should consider himself as public property.”⁹

A judge can conduct himself or herself, in their public and in their private lives, so as to bring respect to the office. I am here to tell you, as a former chairman of the judicial standards commission, that it is a political reality that the public expects, and demands, that anyone who dares to put on a black robe and sit on a courtroom bench had best walk the line. I’m not being moralistic and telling judges what they should do to get to heaven, that’s for an even higher authority. But, we should mind our p’s and q’s for the good of the judiciary.

And, my colleagues and I can come down from the benches, and explain to the people what we do, and why it is not a good idea that we be subject to the current political fashion. In order to protect the individual, the little guy, from the “tyranny of the majority,” as Hamilton put it, we have to be protected from the majority ourselves. The members of the bar can go the citizens and explain what is happening. However, there are only 49 judges of courts of record in Montana. There are thousands of lawyers.

This isn’t only an MTLA issue. This is an issue of political philosophy that concerns how we want to conduct our government. I suggest, and if I had the jurisdiction to do so, I’d demand, that each member of the bar make up his or her mind concerning CI 98, and go out and make it a personal goal to convince 50 to 100 people that your opinion is the correct one, whatever that opinion is.

Lawyers can get to the teachers, the mayors, the county commissioners, the legislators, the doctors, mechanics, electricians, and the plumbers. Members of the bar can get to the tinkers, tailors, soldiers, and the sailors; the rich men, poor men, beggar men and even the thieves. Lawyers are trained advocates and if they cannot influence the political process, who can?

In summary, and finally, I urge you to pick a side and do something. Like Sherlock Holmes said to Dr Watson, “Come Watson, the game is afoot.” Get in the game.

⁹ Attributed to Jefferson in conversation with Baron Humboldt. See Rayner’s “Life of Jefferson,” p. 356 (Boston, 1834).