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COMMENTARY

The Threat to Judicial Independence

By **SANDRA DAY O'CONNOR**
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In November, South Dakotans will vote on a state constitutional amendment being advocated by a national group called "JAIL 4 Judges." If the amendment passes, it would eliminate judicial immunity, and enable a special grand jury to censure judges for their official legal determinations. Although the amendment's supporters claim they seek a "judicial accountability initiative law" (JAIL), they aspire to something far more sinister -- judicial intimidation. Indeed, the national Web site of JAIL 4 Judges boasts with striking candor that the organization "has that intimidation factor flowing through the judicial system."

It is tempting to dismiss this proposed amendment as merely an isolated bout of anti-judge angst. But while the JAIL 4 Judges initiative is unusually venomous, it is far from alone in expressing skepticism of the judiciary. In addition to South Dakota, this election cycle has witnessed efforts in at least three other states that are designed to rein in judges who have supposedly "run amok."

Not to be completely outdone, Congress also has engaged in recent efforts to police the judiciary. Seeking to constrain the legal sources that are available to judges, some members of Congress have advocated measures that would forbid judges from citing foreign law when they are interpreting the Constitution. In addition, bills have been introduced in both houses of Congress supporting the creation of an inspector general to investigate and monitor the federal bench. Finally, the House of Representatives passed legislation over the summer that would prohibit the Supreme Court from considering whether the Pledge of Allegiance's inclusion of the words "under God" violates the First Amendment.

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Directing anger toward judges enjoys a long -- if not exactly venerable -- tradition in our nation. President Thomas Jefferson, for instance, was a particularly spirited antagonist of judges appointed by the Federalists. Moreover, President Franklin D. Roosevelt sought to increase the number of Supreme Court justices because the court invalidated several pieces of New Deal legislation. And I can distinctly remember seeing lawns and highways across the country that featured signs demanding the impeachment of Chief Justice Earl Warren.

But while scorn for certain judges is not an altogether new phenomenon, the breadth and intensity of rage currently being leveled at the judiciary may be unmatched in American history. The ubiquitous "activist judges" who "legislate from the bench" have become central villains on today's domestic political landscape. Elected officials routinely score cheap points by railing against the "elitist judges," who are purported to be of touch with ordinary citizens and their values. Several jeremiads are published every year warning of the dangers of judicial supremacy and judicial tyranny. Though these attacks generally emit more heat than light, using judges as punching bags presents a grave threat to the independent judiciary.

Troublingly, attacks on the judiciary are now being launched by judges themselves. Earlier this year, Alabama Supreme Court Justice Tom Parker excoriated his colleagues for faithfully applying the Supreme Court's precedent in *Roper v. Simmons*, which prohibited imposition of the death penalty for crimes committed by minors. Offering a bold reinterpretation of the Constitution's supremacy clause, Justice Parker advised state judges to avoid following Supreme Court opinions "simply because they are 'precedents.'" Justice Parker supported his criticism of "activist federal judges" by asserting that "the liberals on the U.S. Supreme Court . . . look down on the pro-family policies, Southern heritage, evangelical Christianity, and other blessings of our great state."

It should come as no surprise that the increased scapegoating of the judiciary has coincided with an increase in anger directed toward individual judges. In the last decade, threats and inappropriate communications directed toward the federal bench have

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more than quadrupled. According to the U.S. Marshals Service, complaints about such behavior were being logged at a record-setting pace this year. And while it is encouraging that Congress recently set aside funds for federal judges to have home security systems installed, it is deeply dispiriting that the demand for the systems among the judges was so high. Judge David B. Sentelle of the U.S. Court of Appeals for the D.C. Circuit was quite right when he observed, "Judges must be free to make judicial decisions without the fear of physical harm to themselves or to members of their families."

Given the escalating criticism that is leveled at judges, it seems appropriate to bear in mind the reasons that the Framers initially established an independent judicial branch. In Federalist No. 78, Alexander Hamilton explained why, in our constitutional system, "the complete independence of the courts of justice is peculiarly essential." Hamilton contended that the judiciary needed to be distinct from the legislative and executive branches because that was the best way to guarantee "a steady, upright, and impartial administration of the laws." Hamilton also believed that judicial independence was necessary in order to safeguard against "injury of the private rights of particular classes of citizens, by unjust and partial laws." It is well worth remembering that, far more often than not in modern times, the judiciary has admirably performed these two vital tasks: checking the other two branches and protecting minority rights.

An independent judiciary does not mean, of course, that it is somehow improper to criticize judicial decisions. To the contrary, it is a healthy sign for democracy that the public is engaged with the workings of the judicial system. Judges can -- and do -- sometimes render erroneous decisions, but that is why appeals are allowed to higher courts. Moreover, judges can be -- and are -- subjected to discipline for legitimate reasons. Members of the judiciary cannot sincerely believe that they should be regarded as above the very laws that they are charged with interpreting. Ours is, after all, a nation of laws, not men -- or even women.

Nonetheless, we must be more vigilant in making sure that criticism does not cross over into intimidation. Judges and lawyers certainly play essential roles in opposing attacks on the judiciary. Indeed, later this week, I -- along with Justice Stephen Breyer -- am co-chairing a conference on judicial independence at Georgetown University Law Center. But the legal community needs help from other sectors of society to ensure that the current mood of cynicism does not end up compromising the rule of law. This includes members of the business community. Adam Smith, writing in "The Wealth of Nations," well understood the importance of an independent judiciary: "[U]pon the impartial administration of justice depends the liberty of every individual, the sense which he has of his own security." Without judicial independence, Smith warned, "it is scarce[ly] possible that justice should not frequently be sacrificed to what is vulgarly called politics."

More broadly, of course, all of society has a keen interest in countering threats to judicial independence. Judges who are afraid -- whether they fear for their jobs or fear for their lives -- cannot adequately fulfill the considerable responsibilities that the position demands. In these challenging and difficult times, we must recommit ourselves to maintaining the independent judiciary that the Framers sought to establish.

Justice O'Connor is a retired associate justice of the Supreme Court of the United States.

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