

# THE CONSTITUTION PROJECT



*Safeguarding Liberty, Justice & the Rule of Law*

## The Vital Importance of Judicial Independence

### Statement of Members of the Board of Directors of The Constitution Project

Attacks on federal judges for their decisions is neither new nor of itself cause for concern; from the earliest years of the Republic, controversial decisions from the courts have generated healthy opposition from across the ideological spectrum. But the undersigned members of the Board of Directors of The Constitution Project (TCP) are alarmed by recent statements that judges should be precluded from sitting in certain cases simply because of their race, ethnicity, religion, and perhaps other background factors. Unless there is a clear and proven conflict of interest, litigants and others should refrain from criticizing judges based on these factors. The undersigned members of TCP's Board of Directors strongly condemn such statements, which if followed would strike at a bedrock principle of our constitutional democracy: judicial independence.

As TCP explained in [Uncertain Justice: Politics and America's Courts](#) (2000), a compilation of reports by four bipartisan task forces of our Courts Committee, judicial independence derives from three provisions of Article III of the Constitution: the "judicial power" clause, which delegates to the judicial branch alone the power to decide individual cases; the "good behavior" clause, which guarantees federal judges life tenure, subject only to removal following impeachment for "treason, bribery, and other high crimes and misdemeanors"; and the "compensation" clause, which guarantees that federal judges'

compensation may not be diminished during their time in office. A judge's race, ethnicity, gender, religion, etc. have no place in any discussion about whether a judge should sit in any particular case, and a litigant before a judge must not declare that, because the judge rules in a way that the litigant dislikes, the ruling is in any way related to the judge's background and the judge should be removed from the case.

James Madison's notes of the constitutional convention and Alexander Hamilton's defense of Article III in the *The Federalist Papers* make clear that these provisions were designed to provide for an independent judicial branch comprising independent judges. The purpose of that independence is to enable judges to render impartial justice -- to decide cases according to the law as they conceive it to be written, without fear of reprisal -- and thereby safeguard individual and collective rights. It is thus particularly inappropriate and deeply troubling for anyone running for or occupying a political office to make such statements.

The specter of these statements may cause some judges to think twice before adopting what they believe is the best interpretation of a law when that interpretation dictates an unpopular result or may be condemned by a political actor for improper reasons. And even if judges in fact exercise independent judgment, such statements may fuel public perception that judges' backgrounds should preclude them from sitting in a particular case. Such statements undermine public confidence in the courts and the appearance of a fair and impartial justice system.

Let us be clear: the principle of judicial independence does not shield judges from harsh criticism, nor should it. It is every citizen's First Amendment right to speak out, for example, when a judge decides a controversial case, presses the limits of his or her constitutional power, or makes a mistake. Such criticism promotes judicial accountability and is instrumental to good government.

But when legitimate judicial criticism degenerates into such statements, they become a form of intimidation that threatens not only judicial independence, but also our individual rights and freedoms that only independent judges -- operating as part of a third and co-equal branch of government -- can protect.

David Beier  
Bay City Capital, LLC

Lia Epperson  
American University Washington College of Law

Armando Gomez (Chair)  
Skadden Arps

Kristine Huskey

University of Arizona James E. Rogers College of Law

Michael S. Johnson  
The OB♦C Group, LLC

Timothy K. Lewis  
Schnader Harrison Segal & Lewis LLP

Steven Olikara  
Millennial Action Project

William S. Sessions\*  
Holland & Knight LLP

Jane C. Sherburne  
Sherburne PLLC

Bradley D. Simon  
Simon & Partners, LLP

Virginia Sloan  
The Constitution Project

*Affiliations are listed for identification purposes only.*

\* American Bar Association, Committee on Independence of the Judiciary, Initial Chair, 1997

Contact: Larry Akey, Director of Communications, (202)580-6922 [o] or (202)580-9313 [c]  
[lakey@constitutionproject.org](mailto:lakey@constitutionproject.org)

## The Constitution Project

Created out of the belief that we must cast aside the labels that divide us in order to keep our democracy strong, The Constitution Project brings together policy experts and legal practitioners from across the political spectrum to foster consensus-based solutions to the most difficult constitutional challenges of our time through scholarship, advocacy, policy reform and public education initiatives. Established in 1997, TCP is based in Washington, D.C.