Statement of Senator Patrick Leahy (D-Vt.),
Ranking Member, Senate Judiciary Committee,
Hearing On "With Prejudice: Supreme Court Activism and Possible Solutions"
July 22, 2015

Former Supreme Court Chief Justice William Rehnquist once said, "The Constitution protects judicial independence not to benefit judges, but to promote the rule of law: Judges are expected to administer the law fairly, without regard to public reaction." Our Founders long understood that an independent judiciary was critical to our constitutional system of checks and balances and wisely designed our system to insulate our Federal judiciary from politics. Ignoring our history and Constitution, Senate Republicans have recently presented a series of proposals that would undermine the independence of our Third Branch and politicize the Federal courts.

These measures from the junior Senator from Texas include: (1) a constitutional amendment so that states may discriminate against lawfully married couples; (2) a bill that would strip the Federal courts of jurisdiction from adjudicating the constitutionality of marriage laws; and (3) a constitutional amendment to subject Supreme Court justices to judicial retention elections, injecting politics into this co-equal and independent branch. These proposals are contrary to what the Framers intended when they created the independent Third Branch in the Constitution.

The Court's decision last month in *Obergefell v. Hodges* is a shining example of what an independent judiciary is supposed to do: protect the rights of a minority regardless of public opinion. The Court protected a group that has long been discriminated against and treated unequally under the eyes of the law. Senate Republicans want our Supreme Court justices to face retaliation for prohibiting discrimination against LGBT families. This is wrong.

Nearly five decades ago in *Loving v. Virginia*, the Court ruled that states could not deny their citizens marriage based on the evil of racial discrimination. Should those Supreme Court justices have been subject to retention elections and been voted out of office for that ruling because many in the public at the time opposed the decision? And what about the Court's historic ruling in *Brown v. Board of Education* where the Court held that separate educational facilities for African-American children were inherently unequal. Should the justices of that Supreme Court been subject to retention elections and voted out of office?

After *Brown v. Board of Education* was decided, some Senators proposed court stripping bills to remove the Court's jurisdiction to hear cases involving school integration. There have also been bills to strip the court of its jurisdiction to hear cases involving abortion and school prayer. I, along with Senator Barry Goldwater, fought to defeat these court stripping measures in the 1980s. Senator Goldwater was an Arizona Republican who was once known as "Mr. Conservative." He did not believe in stripping the jurisdiction of our Federal courts to weaken their role and undermine its independence. But that is what the current set of measures that the Texas Senator has proposed would do. Some Senate Republicans appear to want to re-litigate issues that were settled in *Marbury v. Madison*, when Chief Justice Marshall said that it is "emphatically the province and duty of the judicial department to say what the law is."

When the Supreme Court's decisions served Republicans' political interests, I heard nothing about court stripping. For instance, in 2010, the Court departed from principles of judicial

restraint and decided to overturn an act of Congress under the broadest grounds possible, and in so doing, overruled a century of practice and decades of doctrine in *Citizens United v. FEC*. Similarly, in 2013, there were no cries of "judicial activism" or "judicial tyranny" from Senate Republicans when the Court gutted the heart of the Voting Rights Act, and in the process, disregarded an extensive record and an overwhelming Congressional vote for the 2006 reauthorization. In contrast, I do not recall Senate Democrats proposing to strip courts' jurisdiction for campaign finance and race discrimination cases or to subject the Supreme Court justices to judicial retention elections. What the Texas Senator's proposal regarding retention elections would do is to politicize the Court and threaten its independence. It would turn justices into politicians.

In the same remarks that former Chief Justice Rehnquist made about judicial independence, he also said the following: "[O]ur Constitution has struck a balance between judicial independence and accountability, giving individual judges secure tenure but making the Federal Judiciary subject ultimately to the popular will because judges are appointed and confirmed by elected officials. It is not a perfect system – vacancies do not occur on regular schedules, and judges do not always decide cases the way their appointers might have anticipated. But for over 200 years it has served our democracy well and ensured a commitment to the rule of law."

Elected officials and the general public have always criticized and debated the decisions of our Third Branch. It is a natural and healthy aspect of our democracy – and it is what our Framers' intended when they drafted Article III of our Constitution. The solution to disagreement, however, is not to destroy the Third Branch by undermining its role and its independence. And that is what these proposals would do.

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