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Wednesday, July 25, 2012

Thank you for holding this hearing, Mr. Chairman. And I extend hearty greetings to Justice O'Connor for being with us today. You were not only the first woman to serve on the Supreme Court. You were the first Justice whose confirmation I voted for. Your performance justified the confidence that the Senate placed in you.

We would like to believe that our judges, whose independence is guaranteed by the Constitution, rule based only on the Constitution and not on their policy preferences. Judicial independence was established to make the courts independent of the other branches and independent of popular views. It is not designed to make the judges independent of the Constitution so that they can impose their policy preferences. We hear that if only our citizens properly understood the role of the courts, unprecedented attacks on judicial rulings would vanish.

This view is at odds with both current reality and the history of our country. In fact, the leading reason for the so-called attack on judicial independence is the judges themselves. Only last week, The New York Times reported that only a few weeks before the Court's health care decision, the public approved of the Supreme Court's performance by a 44-36 margin.

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But the article reported that after the ruling, as many Americans disapprove of the Supreme Court as approve of its performance. That decision, which some have speculated was issued, at least in part, to reduce political opposition to the Court, appears to have accomplished exactly the opposite result.

The article states that most Americans believe the decision was based mainly on the justices' personal or political views. Only about 30 percent of Americans say the decision was made mainly on legal analysis. For myself, I respect the decision, even if I am disappointed by it. And I question no one's motives. But I do not think that the poll results would be different if only the public had a better understanding of the Court. In fact, I think the poll reflects that the public does have reason to suspect that politics enters into some Justices' decisions. They accept them anyway, as shown by the polling on 18 earlier major cases presented in the article, two-thirds of which were unpopular with the population when they were decided.

Although unfortunate, this perception should not be a cause for alarm, so long as it does not lead to threats of violence, threats of impeachment, or threats to imprison judges for their rulings. Much more serious threats to judicial independence have occurred regularly in our history when the citizens were convinced that what courts presented as law was not constitutionally sound, such as when Andrew Jackson refused to be bound by the Supreme Court's opinion of the constitutionality of the Bank of the United States or its rulings on Indian rights. Or, when Abraham Lincoln said that the Dred Scott decision was "erroneous" and refused to accept it as a precedent because it reflected "apparent political bias." Or, when Theodore Roosevelt ran the most successful third party candidacy in our country's history on a platform of "restriction of the power of the courts [so] as to leave to the people the ultimate authority to determine fundamental questions of social welfare and public policy," including the ability of voters to overturn constitutional rulings of state courts. And, when Franklin Roosevelt tried to "pack" the Supreme Court because of its rulings striking down New Deal legislation. So let us keep perspective.

It is not a violation of judicial independence for a senator to criticize court rulings that he or she believes are incorrect. It is not a violation of judicial independence for a senator to conduct legitimate oversight of the judiciary. Those are appropriate ways of ensuring accountability.

But judicial independence could be jeopardized when a President at the State of the Union misstates the holding of a Supreme Court case in front of Justices when they cannot respond. Judicial independence could be threatened when, after a pending case is briefed or argued, the President publicly misstates the process of judicial review and claims that the Court's legitimacy, and a particular Justice's legacy, will be tainted unless the Court decides that case

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as the President wants. And judicial independence is certainly weakened if Justices give in to those attacks, rather than decide based on the Constitution, or appear to do so.

Finally, I appreciate Justice O'Connor's work in advancing civic education. I believe that all citizens in a democracy benefit from the participation of informed and active citizens. I think the ICivics site is a good one, although I wish CourtQuest told students that citizens can challenge laws on constitutional grounds in state as well as federal courts. It should also say that a trial held for violation of a state criminal law claimed to violate the federal Constitution would be held in state and not federal court. And, although I have supported federal efforts to promote greater understanding of our constitutional system, I do not believe that the federal government should develop and mandate civics standards. And I do not think the Framers of the Constitution thought they had given Congress the authority to impose such standards.

Justice O'Connor, I look forward to your testimony.