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Judges and the Rule of Law

David Boaz - August 29, 2011



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Two weeks ago federal judge Nancy Freudenthal [ruled against](#) an Interior Department policy that rolled back exemptions from environmental review for certain oil-and-gas activities on federal lands. In “a setback for the [Obama](#) administration, which has sought to expand scrutiny of the environmental impact of oil-and-gas drilling,” she said that the policies were issued without proper public notice and comment.

Three months ago a Wisconsin judge [ruled](#) that Wisconsin’s controversial collective-bargaining had been passed improperly. (That ruling was reversed in June by the Wisconsin Supreme Court, and the law went into effect.)

Whatever you think about the substance of these laws, we should all be glad that there are independent judges, in both federal and state courts, prepared to strike down the actions of the legislative and executive branches when necessary. When liberal judges do that, conservatives disparage it as “[judicial activism](#).” When conservative judges do it, it’s liberals who complain about “judicial activism.” But everyone who believes in individual rights, limited government, and the rule of law should welcome a vigilant judiciary. It is the responsibility of judges to strike down laws, regulations, and executive and legislative actions that exceed the authorized powers of government, violate individual rights, or fail to adhere to the rules of due process.

In proposing the Bill of Rights in the House of Representatives, [James Madison](#) said that

independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.

And in [Federalist 78](#), [Alexander Hamilton](#) wrote that the judiciary would be the “least dangerous” branch of government because it possesses the power of neither sword nor purse.

Sometimes the courts live up to those aspirations, in cases from [Lochner](#) and [Brown v. Board](#) right up to the [last days](#) of the [past](#) Supreme Court [term](#). Sometimes not so much, as Robert A. Levy and William Mellor wrote in [The Dirty Dozen: How Twelve Supreme Court Cases Radically Expanded Government and Eroded Freedom](#). But as legal scholar Richard Epstein said in a 1984 [debate](#) with Judge Antonin Scalia, “the imperfections of the judicial system must be matched with the imperfections of the political branches of government.” And legislatures make plenty of mistakes.

Last summer Judge Andrew Napolitano concluded one of his [Freedom Watch](#) programs on the Fox Business Channel by hailing four federal judges who had courageously and correctly struck down state and federal laws:

- * Judge Martin L. C. Feldman, who [blocked](#) President Obama’s moratorium on oil drilling in the Gulf of Mexico;
- * Judge Susan Bolton, who [blocked](#) Arizona’s restrictive immigration law;
- * Judge Henry Hudson, who [refused](#) to dismiss Virginia’s challenge to the health care mandate; and
- * Judge Vaughn Walker, who [struck down](#) California’s Proposition 8 banning gay marriage.



U.S. Supreme Court building, Washington, D.C. Credit: Hisham F. Ibrahim/Getty Images

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It was a remarkable summer for judicial protection of individual rights and limited government.

One charge that's often raised in these politically polarized times is that judges simply rule on the basis of their partisan allegiance—Democratic-appointed judges uphold Obamacare, Republican-appointed judges rule against it. That would be a troubling pattern. One of the reasons we have life tenure for federal judges is to free them from such political pressures. Fortunately, the charge is not entirely true. Judge Jeffrey Sutton, a former law clerk to Justice Scalia who was vigorously opposed by liberals when President George W. Bush appointed him to the Sixth Circuit, [voted to uphold](#) the individual mandate. Judge Frank Hull, a Clinton appointee, voted in the 11th Circuit to [strike down](#) the law. Judge Freudenthal, who struck down the Obama administration's attempt to make oil and gas drilling on federal lands more difficult, is not only a Democrat; she was appointed to the bench in 2009 by President Obama while her husband Dave served as the Democratic governor of Wyoming. And perhaps most famously, Judge Vaughn Walker, who struck down Proposition 8, was appointed by President Reagan in 1987; his nomination was so effectively [opposed](#) by Rep. Nancy Pelosi, Sen. Edward M. Kennedy, the NAACP, and gay-rights groups that he had to be renominated two years later by another Republican president, George Bush.

Democrats and Republicans alike can read the Constitution. They both know that it says that "Congress shall make no law . . . abridging the freedom of speech, or of the press." They both know that the principal author of the Constitution, James Madison, wrote in Federalist 45, "The powers delegated by the proposed Constitution to the federal government are few and defined." They both know that American citizens, even those accused of terrorism, are entitled to their "[constitutional rights](#)—like habeas corpus, which requires the government to justify continued detentions, and the [Sixth Amendment](#), which assures a speedy and public jury trial with assistance of counsel."


The separation of powers, with an independent judiciary, is essential to the rule of law and the protection of freedom. It is refreshing to see how often judges do live up to the expectation that they would "be an impenetrable bulwark against every assumption of power in the legislative or executive."

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Michael Burns

I enjoy reading articles like this by [David Boaz](#) and find his insights always to be honest and refreshing. I do think that we have substantial problems within state and federal judiciaries that need and deserve far more attention than what we have presently in order to minimize partisanship from the bench and have them rule on cases in accordance with Madison, et al. One thing in particular that I would like to see more comment on is with regard to making the judiciary more accountable, by reframing 11th amendment immunity, and by ensuring that we have fully informed juries in order to help bring about a more level playing field.

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