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## **The Distinction Between Law and Politics**

by

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[This short piece, adapted from my "Independence Day 2010" [message](#), was published by the Washington Times on July 7, 2010.]

In July 1776, when John Hancock and the other 55 signatories to the Declaration of Independence mutually pledged their "Lives, Fortunes and sacred Honor," the pledge was not to be taken lightly. By their act, their lives and fortunes were, indeed, put at risk.

Later that year, with the battlefield situation confronting George Washington's army dire, Thomas Paine stirred his fellow revolutionaries with these words from his broadside, "The Crisis":

"These are the times that try men's souls. The summer soldier and the sunshine patriot will, in this crisis, shrink from the service of their country; but he that stands by it now, deserves the love and thanks of man and woman. Tyranny, like hell, is not easily conquered; yet we have this consolation with us, that the harder the conflict, the more glorious the triumph."

The triumph was glorious. The Declaration of Independence was a gift, not only to us, but to freedom-loving people around the globe. There is nothing confronting us today comparable to the crisis of 1776. Nevertheless, we do face serious challenges that are worthy of invoking the spirit of '76.

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I remember an encounter with an airline passenger. I found myself seated next to a middle-aged woman traveling from Florida to Washington to attend a "tea party" demonstration. Despite the expense, this was the second time within a few months she had flown to Washington to participate in a tea party rally. She was motivated mainly by what she saw as the Obamacare proposal's overreaching.

I don't want to debate the merits of Obamacare, or of any other particular policy issue. What struck me most about our conversation was that my seatmate spoke as passionately about what she saw as Obamacare's constitutional infirmities as its policy ills. She talked about the commerce clause's limits, the 10th Amendment's reservation of power to the states and to the people, and the Fifth Amendment's "takings" clause. All the while, in her hand she held a pocket-sized copy of the Constitution.

My seatmate was not a lawyer. Her constitutional understanding may not square with that of the majority of this country's law professors or comport with the existing body of constitutional jurisprudence. So, in that sense she might well be "wrong." But for my purposes, the week of Independence Day, she was "right" in the important sense of thinking seriously about how the large issues of the day square with our constitutional charter.

Most of the mainstream press did a real disservice early by ignoring (at best) or denigrating (at worst) the tea party's rise. The tea party, a quintessentially American phenomenon, is fueled primarily by legitimate concerns over government's size and scope. The heightened interest it has spurred among its followers concerning our Constitution's meaning is a cause for celebration, not fear.

Of course, the meaning of many of the Constitution's most important provisions, including those cited by my tea party seatmate, is subject to differences in interpretation. In other words, the meaning of particular clauses, regardless of the interpretive theory employed, is contestable. Particular cases will be decided by the Supreme Court — now an often closely divided court — based on the justices' own constitutional understanding.

While the Supreme Court decides particular controversies, it does so, at least over time, in the context of the broad sweep of the American understanding of constitutional law. Elections inevitably influence the court's direction, both with respect to the choice of president who nominates the justices and the choice of the senators who advise and consent. This is as it should be in our democratic republic.

At bottom, this educational process, amidst what appears to be a period of elevated interest in the Constitution, is an essential prerequisite to a widespread appreciation of the crucial distinction between "law" and "politics." Unless there is at least a shared understanding of the importance of the law/politics distinction to proper constitutional interpretation, the individual rights that the Founders intended to be protected by our Constitution will be that much less secure.

After depicting in especially stark terms the difficult days ahead, at the end of "The Crisis," Paine wrote: "I thank God, that I fear not. I see no real cause for fear. I know our situation well, and can see the way out of it."

As long as we hold true to our constitutional principles, I too see no cause for fear.

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