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When the Homes of Justices Are Picketed

"Any encroachment on the right to protest threatens us all, especially in divisive times such as these."

By **Joel Cohen and Gerald B. Lefcourt** | May 31, 2022



Stephen Parlato, from Boulder, Colorado, stands outside the U.S. Supreme Court building holding a sign in support of abortion rights in the wake of a leaked draft opinion that suggests the Court would overturn 'Roe v. Wade', in Washington, D.C., on Wednesday, May 11, 2022. Photo: Diego M. Radzinski/ALM

There's a drastically new protest ritual underway. Of course, protest has been as American as apple pie since the dawn of the Republic. No disagreement there from

“decent” people. How better for the public to vibrantly exercise its First Amendment right to convey its views to potentially recalcitrant executives or legislators? Strident protesters, even better—especially if the president is at the White House, or the Congress is in session at the Capitol. Let them know exactly your feelings, en masse! It’s America!

Unquestionably, mass protest is far more telegenic than jamming inboxes, mailboxes, or phone lines of the object public officials. Indeed, the whole purpose of protest, typically, is to move thinking and motivate official action consistent with that thinking. They’re popularly elected, after all, and it’s an important obligation of elected officials to listen to their constituents. To embrace ‘60s phraseology: Right on!

Protest today, though, has maybe taken a potentially dangerously different turn. While we can probably agree that judges shouldn’t take direction from the public opinion du jour, the right wing of the Supreme Court is, indeed, seemingly out of touch with public sentiment over abortion. See, e.g., Pew Research, [Public Opinion on Abortion](#) (May 17, 2022). That is, if the famously leaked Alito draft accurately depicts that five justices would outright overturn *Roe v. Wade*. The question, however, is whether that state of affairs should open the door to protesting at the homes of justices in an effort to persuade them to change their votes to accommodate a majoritarian public sentiment. Contrarily, would it have been acceptable in 1954 to protest at the homes of the sitting justices if they showed, during oral argument, that the court was “out of touch” with the nation’s sentiment in leaning toward a decision in *Brown v. Board of Education* to desegregate the nation’s public schools?

We can agree, at least as lawyers, that society wouldn’t want justices to raise their moistened fingers to the breeze of popular opinion when deciding cases. There’s disaster written all over that. Still, to avoid any possibility of that occurrence, should there be a “no fly zone” that exempts the homes of sitting justices from First Amendment protection for the protesters, lest such protests aggressively move judicial opinion? Or wouldn’t that let the camel poke its nose inside the free speech tent?

Now, the estimable Professor Dershowitz, uncommonly for him, effectively proposes a compromise of sorts: Cut the baby in half. As a First Amendment hardliner who defended the protest rights of neo-Nazis in Skokie, Illinois nearly a half century ago, Dershowitz wants no *governmental* cutback on the right to peaceful protest at the justices’ homes. Instead, [he proposes](#) that “decent” people should condemn such protests as “immoral.”

Morality, with due respect, though, has nothing whatsoever to do with this. And it’s surprising that Dershowitz even advocates that position. Of course, the professor has a First Amendment right to say so and to condemn such protests, but doesn’t doing so undercut the right to protest that he claims to support? If the First Amendment allows the protests—as we all agree it does—why doesn’t he just let it be?

Dershowitz also argues that the protests may undermine democracy and obstruct justice. It's true that the real problem with such protests is the potential for intimidation. Indeed, some justices could theoretically be vulnerable, maybe even servile, in the face of protests, and fearful of retribution for decisions denounced by the strident protesters. Dershowitz extolls "decent" people to condemn such protests. Yes, "decent" people (whatever that term means) may choose to condemn such protests, but protesters committed to a cause will typically tune out the "decency" for which Dershowitz argues anyway.

So, why, one must ask, are the protesters protesting anyway, particularly at the home of Justice Alito, and likely, in the future, at the homes of those who would ultimately sign on to Alito's draft, if that time comes? No one really thinks Justice Alito, in particular, will change his mind. But maybe the protesters, maybe correctly so, think that other vacillating justices will back away from Alito's intention to outright overturn *Roe*; fearing aggressive protests at their own homes if they end up siding with Alito's draft in the end, they'll compromise. Yes, admittedly that's certainly possible.

Maybe, however, their protest is a way to vent anger. They may literally want to take the justice off the planet if they could for what he's doing. They can't, so they express their anger this way. Safety valves can sometimes be important.

It's just like liberals who support the liberal wing of the court on most issues certainly wouldn't want liberal justices knuckling under to potential raucous protests of Q-Anon and Proud Boy wannabes at the homes of Justices Sotomayor, Kagan and Jackson (and other liberals if they somehow ultimately replace the conservative wing in the years ahead). It's a reality, and our argument would be fallacious if we didn't acknowledge that potentiality. Maybe, actually, confirmation hearings should ask the nominees questions about their views on that, rather than some of the silly questions often asked. At the end of the day, however, we have to be ever mindful of the camel's nose.

To deal with this First Amendment exercise, though, we can't rely on Dershowitz's aspirational belief that condemning (or even excoriating) protesters who want to picket the home of justices will somehow discourage them from what they're doing. It won't work. We live in difficult times, and freedom requires that we just deal with it. You may want to condemn the Proud Boys, for example—the authors certainly do—but should mass condemnation of those who actually want to visit the homes of justices realistically be the antidote, as a means to preserving their First Amendment rights?

Undoubtedly, at the end of the day, we do need more marshals and police along with sufficiently wide safety zones around the homes of the justices. It's just the way it is. If we choose, however, to actually exempt the homes of justices (and all judges with controversial cases before them, if it goes in that direction) from public protest, America would be throwing out the baby with the bathwater on what the right to protest has meant since the days of the Boston Tea Party.

Lest it go unsaid, however, we certainly agree with Judge Esther Salas, whose son was murdered and husband badly shot, who strenuously argues that the government should never intentionally disclose the home addresses of judges, lest what happened to her family happen to other judges. Legislation to stop that from happening is hardly the same thing, though, as outright barring would-be protesters from the vicinity of the judges' homes if the protesters somehow come to independently learn the addresses.

To quote the ironic words of the king of protest, Abbie Hoffman, whom I (Lefcourt) represented many years ago, extremely relevant here: "There's no right to yell 'fire' in a crowded theater, but there's a right to yell 'theater' in a crowded fire." Any encroachment on the right to protest threatens us all, especially in divisive times such as these.

As a postscript of sorts, it is anticipated that the court may be "courting" yet other protests by seeming to pursue, too often, the agenda of the radical right, such as gun laws. That is, the type of gun laws that can only help result in the potential for horrendous mass murders such as that last week in Uvalde, Texas. Not to mention the court's potential cutback on privacy rights inasmuch as Justice Alito's abortion case draft notes that "privacy" isn't mentioned in the Constitution.

As mentioned above, the citizenry's ability to volubly protest wherever they seek to provides a vital safety valve for those Americans suffering under critical decisions that horrifically impact them—especially when the court seems so often out of step with the essential needs of large segments of society.

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