

Viewpoint

## Persky's Move: A Reaction to the Reactionary

Richard Zitrin, The Recorder

September 1, 2016



Richard Zitrin Jason Doiy / The Recorder

This past week, Santa Clara Judge Aaron Persky bowed to pressure from many quarters and asked to be transferred from a criminal to a civil department in San Jose. Assuming the transfer was voluntary, as presiding Judge Risë Pichon reported, it's hard to blame Persky one bit. After he sentenced star Stanford University swimmer Brock Turner to a six-month sentence for the sexual assault of an unconscious woman, Persky has faced:

- A website, [www.recallaaronpersky.com](http://www.recallaaronpersky.com), organized and co-sponsored by the National Organization for Women, Advocates for Youth, and others;
- A recall petition organized by Change.org with 1.3 million signatures;
- Three similar petitions from the progressive organization MoveOn, which then refused to promote a counter-petition supporting judicial independence;
- Vitriolic TV news segments, print articles and headlines from across the country.

It's obvious that Turner's sentence was a light one. It's even more obvious that Turner's crime was appalling. Turner's father's treachery plea for leniency, widely reported in the press, made his son look even worse. But the misguided efforts to remove Persky from the bench overlook both

the judge's record and, even more importantly, the basic American principle of judicial independence.

As for the judge himself, he's an ex-DA who specialized in prosecuting sex crimes and hate crimes. As a private practitioner, he was awarded the state's highest award for pro bono work, the Wiley Manuel Award. He has ably served both the Support Network for Battered Women and the Santa Clara County Network for a Hate Free Community on his own time.

In the Turner case, Persky did not come up with his six-month sentence on his own. Persky actually accepted the sentencing recommendation of the county probation department. Their pre-sentencing report, prepared by a female probation officer, noted Turner's youth, clean record, intoxication and remorse, and recommended the same six months that Persky ultimately imposed. Light? Yes. Unprecedented? Not at all. Wrong? Perhaps. But in order to reach the conclusion that this sentence merits Persky's removal, it's necessary to conflate a single decision into a litmus test.

That's the same tactic long used by the political right to attack judicial independence of judges who favored choice or opposed the death penalty. Or have we forgotten the recall of Chief Justice Rose Bird and her two excellent Supreme Court associate justices, Joe Grodin and Cruz Reynoso? If we were to take the single worst decision that even the best jurists have made and throw them off the bench for it, we would have perhaps three judges left in the whole state.

What's particularly disturbing this time is that the majority of those leading the charge to recall Persky are progressives. Frankly, they should know better.

By and large, progressives have remained protective of the civil rights of all Americans in these days of fear of terrorism. Many, though, may have forgotten another civics lesson: that along with free speech and freedom of the press, an independent judiciary is a paramount necessity for a free society. It's not an exaggeration to say that without judicial independence, we would have a police state.

MoveOn, an organization I have admired, is one example of a progressive organization gone awry. One of its petitions, with over 200,000 signatures, was given prominent play on its website and in emails to all subscribers, including me. It read, "Judge Aaron Persky's failure to hold Brock Turner accountable for the rape and his dismissive comments at sentencing show that he cannot be trusted to dispense justice. He must be removed from the bench immediately."

Other MoveOn members proposed a counter-petition about judicial independence (any member may propose one) that made this point:

"Judges have a duty to apply the law to the facts and evidence before them, regardless of public opinion or political pressure ... We have seen no credible assertions that in issuing the sentence, Judge Persky violated the law or his ethical obligations or acted in bad faith ... Seeking to punish a judge under these circumstances presents a threat to judicial independence."

MoveOn's reaction was to put a notification ribbon on the top of that petition page that reads: "MoveOn volunteers reviewed this petition and determined that it either may not reflect MoveOn members' progressive values, or that MoveOn members may disagree about whether to support this petition. MoveOn will not promote the petition beyond hosting it on our site."

Is this well-regarded progressive organization not both promoting a reactive position and stifling dissent because some of its members "may disagree" about another petition's content?

Perhaps it's not fair to single out MoveOn, at least without noting that its stance seems to be emblematic of many progressive organizations that have taken the same short-sighted position. Asking for a judge's head because of one decision clearly within his discretion is the prototypical definition of "reactionary." I suggest we leave such reactions to others, and that progressives re-think the principles they have long fought for before jumping off the deep end of dogmatism to take positions antithetical to many of their own core beliefs.

*Richard Zitrin is a professor at UC Hastings and principal of San Francisco's Zitrin Law Office. He is the lead author of three books on legal ethics, including "The Moral Compass of the American Lawyer," and the 4th edition of "Legal Ethics in the Practice of Law."*