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July 10, 2019  
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### Why I Could Not Support the Governor's Nominee for Chief Justice

Many Granite Staters have approached me questioning Gordon MacDonald's qualifications to be the state's top judge, our Supreme Court's chief justice. They asked about his lack of judicial experience and the fact that he has not tried a single jury trial. They questioned whether MacDonald can overcome his partisan past. They expressed concern about the unprecedented campaign organized to secure his nomination and worried about MacDonald's management of the Department of Justice as our state's Attorney General. All of these questions, coupled with my own concerns, led me to oppose his confirmation.

MacDonald is a smart lawyer. His volunteer work for New Hampshire Legal Assistance and on behalf of domestic violence victims is commendable, but I also considered his work to deny women's reproductive rights, undermine voting rights and advance the appointment of Republican judges. Mr. MacDonald has a demonstrated 30-year record of working for politicians with shockingly extreme views. This included his positions as legislative director and chief of staff for Senator Gordon Humphrey who sought to amend the Constitution to exclude reproductive protections. Mr. MacDonald's support for these aggressively partisan views continued through at least the 2016 Republican convention. Knowing this, I asked Mr. MacDonald if he had ever voiced more moderate positions. He could not cite any examples of when he had.

Mr. MacDonald had the opportunity during his confirmation hearing to acknowledge how extreme his prior positions were and to step away from them. He did not do so. Instead, he promised, if confirmed, to follow the "rule of law." This phrase was repeated over and over as if it was a protective talisman. But, the talisman no longer works because we live in the age of Trump and McConnell, of Gorsuch and Kavanaugh, and of the legislatures in Alabama, Georgia, Missouri, and Utah—all of whom are committed to overturning the rule of law. As an Executive Councilor with the responsibility to confirm judges, I cannot assume the rule of law will hold. Nothing in the Constitution is sacred. No civil right is safe from abandonment. No voter is protected. Environmental regulations may be undone because science is not trusted. And, this is all aided and abetted by judges. MacDonald supporters cannot ask me to confirm him because he will obey the rule of law while they actively work to undermine that same rule of law.

Lawyers and judges, many my friends, have asked me to support Mr. MacDonald, but I cannot because I have seen Mr. MacDonald's politicize his office. Last year, for example, our legislature debated school vouchers. The bill was heavily supported by the Governor and by the Koch Brothers funded Josiah Bartlett Center, on whose board MacDonald sat for seven years. The bill allowed parents to spend state-funded vouchers on religious education. Associate Attorney General Anne Edwards raised concerns about the constitutionality of vouchers used in

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this fashion citing the federal and state constitutions. She did so in multiple appearances before the Legislature. The constitutional issues jeopardized the bill's passage.

Then, suddenly, three days after Christmas, Ms. Edwards reversed course and proclaimed the voucher bill was constitutional. She did this in a private three-line email to the House Speaker. The email did not explain her rationale. It did mention that she consulted with Attorney General MacDonald. In his hearing testimony last week, MacDonald mentioned that the email came just after he met with the Republican House Caucus. When I asked Mr. MacDonald about this series of events, he read from a memo and said that the change in position was the result of the United States Supreme Court's Trinity Lutheran decision, but he could not answer my questions about the case because he did not know it well enough. Mr. MacDonald promised Ms. Edwards would explain her analysis, but she did not mention it in her testimony. I asked for a copy of the memo—it has not been produced.

Being a judge requires unique abilities; key among them is the ability to maintain an unbiased and open-minded approach to each case. Once a nominee is confirmed, there is little opportunity for recall. A judge is a judge in New Hampshire until mandatory retirement at age 70. The norm across America is to nominate appellate judges from the ranks of experienced judges who have established their ability to set aside personal bias. New Hampshire is fortunate to have two well-respected non-partisan chief judges who have long and distinguished judicial careers: Judge Tina Nadeau of the Superior Court and Judge David King of the Circuit Court. Both should be considered for appointment to the Supreme Court.

The Governor's Judicial Selection Commission has now recommended three Supreme Court nominees without prior judicial experience. All three have extensive partisan political credentials. The Governor did not consult with the Executive Council before he nominated any of them. There was no collaboration. Despite this, the other Councilors and I stand ready to provide advice, to cooperate with the Governor in the selection of our next Supreme Court justice and to work collaboratively for the people of our state. It is our duty to do so.