

“Building Confidence in the Supreme Court Through Ethics and Recusal Reform”

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Introduction

“If men were angels,” wrote James Madison, “no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.”¹ Those controls include the separation of powers into three branches, with checks and balances between them, and a judiciary designed to be the “weakest” and “least dangerous branch.”² In this system, the “complete independence of the courts” is “peculiarly essential.”³

No one, however, likes to be told that they may not do something, least of all Congress or a president intent on pushing a political agenda. The separation of powers, judicial independence, and other features of our system of government designed to limit power easily become restraints to overcome rather than principles to be embraced. There is an active campaign underway today to promote the view that the Supreme Court is an inherently political institution, to denounce unfavorable decisions as necessarily “partisan,” and even to demonize individual Justices deemed less likely to favor certain political interests. This campaign cloaks itself in the rhetoric of “reform,” “ethics,” or “balance,” taking advantage of the public’s shallow knowledge of our system of government in general, and of the judiciary in particular.

That campaign appears to be working. Two recent polls found that more than 60 percent of Americans believe that the Supreme Court decides cases primarily by politics rather than law,⁴

¹ The Federalist No.51 (Madison).

² The Federalist No.78 (Hamilton).

³ *Id.*

⁴ See John Kruzel, Solid Majority Believes Supreme Court Rulings Based More on Politics Than Law, The Hill, October 20, 2021 (Grinnell College poll), <https://thehill.com/regulation/court-battles/577444-solid-majority-believes-supreme-court-rulings-based-more-on-politics/>; Bryan Metzger and Oma Seddiq, More Than 60% of Americans Say the Supreme Court is Motivated By Politics, While Just 32% Believe They Rule Based on Law: Poll, Business Insider, November 19, 2021 (Quinnipiac poll), <https://www.businessinsider.com/61-percent-think-supreme-court-motivated-politics-not-law-poll-2021-11>.

while overall approval of the Supreme Court is at its lowest level in decades.⁵ In addition, the trend continues toward believing that the Supreme Court should base its rulings on “what the Constitution means in current times.”⁶ These developments contribute to viewing judicial independence as optional rather than necessary, as a means to an end rather than an end in itself.

The Separation of Powers and Judicial Independence

Justice Antonin Scalia wrote that America’s founders “viewed the principle of separation of powers as the absolutely central guarantee of a just government.”⁷ He echoed James Madison, who wrote in *The Federalist* No.47 that “[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty.”⁸ The Massachusetts Constitution affirms that it is the difference between a “government of laws” and one “of men.”⁹ In addition to the general separation of powers, the Founders saw judicial independence as critical to the liberty that the system of government they designed was to promote.

Attempts to manipulate the judiciary were among the “injuries and usurpations” by the King of Great Britain that justified the United States declaring independence in 1776.¹⁰ It has also been called “the most essential characteristics of a free society,”¹¹ the “backbone of the American democracy,”¹² and one of the “crown jewels” of our system of government.¹³ The Constitution addresses King George’s threats by providing that federal judges’ terms are unlimited¹⁴ and that Congress may not diminish judicial compensation.¹⁵ As the judiciary has become much more powerful than it was designed to be, however, threats to its independence have multiplied in number, some of them sophisticated and others threatening brute political force.

Threats to Judicial Independence

Court-Packing, Chapter 1. Court-packing involves Congress creating additional, but unnecessary, Supreme Court seats that can be quickly filled with Justices likely to decide certain

⁵ See Jeffrey M. Jones, Approval of U.S. Supreme Court Down to 40%, a New Low, Gallup News, September 23, 2021, <https://news.gallup.com/poll/354908/approval-supreme-court-down-new-low.aspx>.

⁶ See Kristen Bialik, Growing Share of Americans Say Supreme Court Should Base Its rulings on What Constitution Means Today, Pew Research Center, May 11, 2018, <https://www.pewresearch.org/fact-tank/2018/05/11/growing-share-of-americans-say-supreme-court-should-base-its-rulings-on-what-constitution-means-today/>. This result is up from a similar poll in 2011. See Tanya Roth, Pew Poll: How Should SCOTUS Interpret the Constitution?, FindLaw, July 8, 2011, <https://www.findlaw.com/legalblogs/supreme-court/pew-poll-how-should-scotus-interpret-the-us-constitution/>.

⁷ *Morrison v. Olson*, 487 U.S. 654,697 (1988) (Scalia, J., dissenting).

⁸ *The Federalist* No.47 (Madison).

⁹ Quoted in *Morrison*, 487 U.S. at 697.

¹⁰ Declaration of Independence.

¹¹ Sam J. Ervin, Jr., Separation of Powers: Judicial Independence, 35 *Law & Contemp. Probs.* 108,121 (1970).

¹² Penny J. White, An American Without Judicial Independence, 80 *Judicature* 174,174 (1997).

¹³ William H. Rehnquist, The Future of the Federal Courts, Washington College of Law Centennial Celebration, April 9, 1996, <https://www.law.cornell.edu/supct/justices/rehnau96.htm>.

¹⁴ U.S. Constitution, Article III, Section 1. Judges on courts created by Congress under the authority granted by Article III of the Constitution serve “during good Behaviour.” See David F. Forte, Good Behavior Clause, Heritage Guide to the Constitution, <https://www.heritage.org/constitution/#!/articles/3/essays/104/good-behavior-clause>.

¹⁵ U.S. Constitution, Article III, Section 1. See David F. Forte, Judicial Compensation Clause, Heritage Guide to the Constitution, <https://www.heritage.org/constitution/#!/articles/3/essays/105/judicial-compensation-clause>.

cases, involving particular issues, in a politically more favorable way. American history has witnessed three chapters in this strategy to change the Supreme Court as an institution in order to change its decisions.

Chapter 1 began when President John Adams and the Federalists lost the election of 1800 and, before leaving office the next March, quickly passed the Judiciary Act of 1801. It created new lower court positions and reduced the Supreme Court from six to five seats by providing that the next vacancy remain unfilled. A year later, as President Thomas Jefferson and the Democrat-Republican congressional majority discussed legislation to repeal the earlier Judiciary Act, Rep. John Bacon of Massachusetts proposed going a step further by adding two or three more Supreme Court seats. Both sides soundly rejected the idea because, as Senator Williams Wells, a Federalist from Delaware, put it, the plan would “destroy the independence of the judges.”

Court-Packing, Chapter 2. Chapter 2, which is much more familiar to many Americans, opened with the 1932 election of President Franklin Roosevelt. During his first term, the Supreme Court declared unconstitutional several significant laws enacted to address the Great Depression.¹⁶ In May 1935, four days after the Court unanimously struck down the National Industrial Recovery Act, Roosevelt held a press conference in which he criticized the Court for refusing to interpret the Constitution “in the light of present-day civilization.” He wanted the Court to “create or enlarge constitutional power” so that Congress could achieve its objectives.¹⁷

The 1936 election delivered a landslide re-election and overwhelming Democratic majorities in Congress. Roosevelt determined that if the Supreme Court would not comply on its own, he would create a Court that would. He proposed adding up to six more Supreme Court seats. Roosevelt did not see any obstacles to such legislation; Senate Democrats exceeded the two-thirds threshold for avoiding a filibuster than required by Senate rules.

In June 1937, however, the Senate Judiciary Committee, which had a 14-4 Democratic majority, opposed Roosevelt’s bill for same reason that both parties had done so in 1802. The committee report recommended rejecting the bill because it would “undermine the independence of the courts”¹⁸ and “expand political control over the judicial department.”¹⁹ Significantly, the report clarified the purpose behind Court-packing and emphasized the importance of judicial independence.

The committee report candidly identified what everyone understood to be the objective of Court-packing: “neutralizing the views of some” justices by “overwhelm[ing] them with new

¹⁶ These include *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (provision of the National Industrial Recovery Act); *Railroad Retirement Bd. v. Alton Railway Co.*, 295 U.S. 330 (1935) (Railroad Pension Act); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (National Industrial Recovery Act); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) (Frazier-Lemke Act); *United States v. Butler*, 297 U.S. 1 (1936) (provision of the Agricultural Adjustment Act); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (Bituminous Coal Conservation Act).

¹⁷ Press Conference #209, transcript at 2 (March 31, 1935).

¹⁸ *Reorganization of the Federal Judiciary*, Hearing before the Senate Committee on the Judiciary, 75th Congress, 1st Session, Report No.711 (June 76, 1937), at 1.

¹⁹ *Id.*

members.”²⁰ The report firmly stated, however, that the long-term independence of the judiciary was more important than the current legislative agenda. “Even if every charge brought against the so-called ‘reactionary’ members of this Court be true,” the Judiciary Committee said, “[it] is immeasurably more important...than the immediate adoption of any legislation however beneficial.”²¹

As an aside, Roosevelt did not have wait long to change the Supreme Court through the normal appointment process. In less than six years, he replaced eight of the nine Supreme Court justices appointed by previous presidents, including the justices, dubbed the “Four Horsemen,”²² who most consistently resisted changing the Constitution’s meaning to facilitate Roosevelt’s expansive federal economic agenda.

Twice, in 1802 and in 1937, Congress rejected the same proposal – adding Supreme Court seats not to facilitate the Court’s work but to change its decisions – for the same reason, because judicial independence is more important than the politics of the moment. Destroying an essential feature of our system of government, the cornerstone of our constitutional system, was too high a price for some short-term political objectives.

Court-Packing, Chapter 3. Unfortunately, those chapters were not enough to permanently close the book on Court-packing. A real commitment to the separation of powers and judicial independence should mean that Congress seeks to do its work within those constraints. Instead, current Court-packing advocates want to forge a Supreme Court that will facilitate the left’s political agenda. To that end, members of Congress have recently introduced legislation to add four seats to the Supreme Court.²³

The Court-packing schemes promoted in 1937 and today have three parallels and two differences. The first parallel is the most obvious. Court-packing has a single purpose, reacting to unfavorable Supreme Court decisions by proposing to change the Supreme Court itself as quickly as possible. Second, Roosevelt urged that the Supreme Court interpret the Constitution “in light of present-day civilization,” the same view that, according to the polls cited above, a majority of Americans now appear to hold. Third, today as in 1937, the public’s belief that the Supreme Court should adjust its approach to constitutional interpretation does not extend to changing the Supreme Court as an institution. A February 1937 Gallup poll showed that Americans were evenly divided on Roosevelt’s plan,²⁴ and opinion trended against it thereafter.²⁵

²⁰ *Id.* at 14.

²¹ *Id.* at 8.

²² These were Justices Willis Van Devanter, appointed in 1911 by President William Howard Taft; James McReynolds, appointed in 1914 by President Woodrow Wilson; George Sutherland, appointed in 1922 by President Warren G. Harding; and Pierce Butler, appointed in 1923 by Harding.

²³ H.R. 2584 and S. 1141, the Judiciary Act of 2021, were both introduced on April 15, 2021.

²⁴ See Gregory A. Caldeira, FDR’s Court-Packing Plan in the Court of Public Opinion, Appendix I (Aug. 4, 2004), available at <http://epstein.wustl.edu/research/courses.LAPSCaldeira.pdf>.

²⁵ *Id.* at Appendix III.

Contemporary polls show opposition has risen from 54 percent in September 2020²⁶ to 66 percent in November 2021.²⁷

One difference between the Court-packing schemes is the support of the President. Roosevelt himself initiated the 1937 legislation and publicly campaigned for it.²⁸ President Joe Biden, however, opposed Court-packing as a Senator, calling it a “terrible, terrible mistake” and a “bonehead idea.” During most of the 2020 presidential campaign, Biden appeared to reject Court-packing, even saying that it would make the Court lose “any credibility.”²⁹ And the Supreme Court Commission that he appointed last year not only failed to endorse Court-packing, but its hearings and final report highlighted longstanding arguments against it.³⁰

A second difference is the involvement of outside organizations. The American Bar Association led the national opposition to Roosevelt’s Court-packing plan and appointed a special committee to present its views to the Senate Judiciary Committee. Sylvester C. Smith, chairman of that committee, presented the results of its polling of lawyers in every state: 86 percent of ABA members,³¹ and 77 percent of nonmembers,³² opposed Roosevelt’s Court-packing scheme. The primary objection, Smith explained, was that it “violates of necessity the spirit of judicial independence, the basis of our Constitution.”³³

Today, the ABA won’t take a position on Court-packing. Instead, a coalition of left-wing groups demand that new Justices be added to change Supreme Court decisions on issues from union organizing and voting rights to abortion, LGBTQ rights, climate change, health care, and the Second Amendment.³⁴ In other words, they want to expand the Supreme Court for the very reason that Congress and the American people rejected doing so in the past: to remove judicial independence as an obstacle to a political agenda.

The ABA’s silence is disturbing not only because it contrasts so sharply with its opposition to Roosevelt’s Court-packing plan, but also because the ABA more recently has been a strong defender of judicial independence. Concerns about judicial independence led to it creating the ABA Commission on Separation of Powers and Judicial Independence. Its July 1997 report outlined new developments that might undermine judicial independence such as “strident criticism” of judicial decisions by public officials, including the Senate Majority Leader,

²⁶ See *Sept. 21-24, 2020, Washington Post-ABC News Poll*, September 27, 2020, <https://wapo.st/3CdDBqE>.

²⁷ See James Freeman, *Mason-Dix Poll: Americans Still Don’t Like Court-Packing*, *Wall Street Journal*, November 10, 2021, at <https://www.wsj.com/articles/mason-dixon-poll-americans-still-dont-like-court-packing-11636576314>.

²⁸ Thomas Jipping, *Court Reform Commissions, Past and Present*, Legal Memorandum No.287, July 15, 2021, at 8.

²⁹ The October Democratic Debate Transcript, Wash. Post (Oct. 16, 2019), <https://www.washingtonpost.com/politics/2019/10/15/october-democratic-debate-transcript/> (last accessed June 21, 2021). Biden’s position became murkier during the campaign’s final month, with him alternately saying that he was “not a fan of court-packing” and that “you will know my opinion on court-packing the minute the election is over.” See Jipping, *supra* note 28, at 8-9.

³⁰ Presidential Commission on the Supreme Court of the United States, Final Report, December 2021, <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf>.

³¹ *Reorganization of the Federal Judiciary: Hearing on S. 1392 Before the S. Comm. on the Judiciary, 75th Cong., Part 5 (1937)*, at 1459.

³² *Id.* at 1460.

³³ *Id.* at 1461.

³⁴ Press Release, Reform the Supreme Court to Rebuild America, <https://bit.ly/3ttcCn2>.

followed by calls for certain judges to resign or be impeached.³⁵ The ABA report also warned of increasing calls for “congressional micro-management of the judiciary.” A quarter-century later, these warnings appear almost prescient as even bolder efforts are now underway.

Threatening the Supreme Court. While Roosevelt wanted to change the Supreme Court’s overall approach to interpreting the Constitution, he expressed this view in reaction to decisions that had already been made. Today, advocates are threatening Court-packing if the Supreme Court does not decide *pending* cases to their liking. In August 2019, for example, five Democratic Senators filed an amicus brief in a case that, in its current form, challenges New York’s requirement that law-abiding citizens have “proper cause” to carry a firearm outside the home without a license. The Senators’ brief closed with these ominous words: “The Supreme Court is not well. And the people know it. Perhaps the Court can heal itself before the public demands it be ‘restructured in order to reduce the influence of politics.’ Particularly on the urgent issue of gun control, a nation desperately need it to heal.”³⁶

This statement is reflective of the current campaign against judicial independence in two ways. First, it asserts that any decision that these Senators would consider unfavorable must have been the result of “the influence of politics.” The possibility that an impartial interpretation and application of the Second Amendment would lead to a different outcome simply does not exist. Second, these Senators claim that the “public knows” this. This framing tries to tap into, but also promotes, the view that the Supreme Court and, by extension, other courts decide cases based on politics rather than the law. Third, this brief attempts to make its threat sound less serious by calling Court-packing “restructuring,” as if they seek simply to rearrange what exists rather than create something entirely new. Strangely, however, none of the Senators who signed onto this brief have co-sponsored the Judiciary Act of 2021, the current bill that would add four seats to the Supreme Court.

Threatening Supreme Court Justices. According to the American Bar Association, “Judicial independence means that judges are not subject to pressure and influence and are free to make impartial decisions based solely on fact and law.”³⁷ Criticizing judicial decisions does not, by itself, threaten judicial independence.³⁸ In fact, members of the Supreme Court have written that public scrutiny and potential criticism can encourage judges to be “careful in their decision and anxiously solicitous to do exact justice.”³⁹ It is not difficult, however, to see what falls on the other side of the line.

³⁵ An Independence Judiciary: Report of the ABA Commission on Separation of Powers and Judicial Independence, July 4, 1997, at i-ii,

https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/indepenjud.pdf.

³⁶ Brief of Senators Sheldon Whitehouse, Mazie Hirono, Richard Blumenthal, Richard Durbin, and Kirsten Gillibrand as Amicus Curiae in Support of Respondents in *New York State Rifle & Pistol Assoc., Inc. v. City of New York*, No.

18-280 (2019), at 18. Joining Senator Sheldon Whitehouse on this brief were Senators Mazie Hirono (D-HI), Richard Blumenthal (D-CT), Richard Durbin (D-IL), and Kirsten Gillibrand (D-NY).

³⁷ American Bar Association, *Rule of the Law and the Courts*, August 22, 2019, <https://bit.ly/3rQJyWE>.

³⁸ See Pat McGuigan, *The Right of the People to Critique Judicial Rulings: Implications for Citizen Activism*, 22 *Okla. City U. L. Rev.* 1223 (1997).

³⁹ Quoted *id.* at 1229 (Chief Justice William Howard Taft).

On March 4, 2020, for example, the Supreme Court heard arguments in *June Medical Services v. Russo*, a case challenging a Louisiana law requiring abortionists to have hospital admitting privileges. The same, as the argument was underway, current Senate Majority Leader Charles Schumer stood on the Supreme Court steps and shouted: “I want to tell you Gorsuch, I want to tell you Kavanaugh, you have unleashed the whirlwind and you will pay the price. You won’t know what hit you if you go forward with these awful decisions.”⁴⁰ This goes beyond the “strident criticism” by the Senate Majority Leader that concerned the ABA in 1997; this appears instead to be the judicial equivalent of jury-tampering.

The spin following Senator Schumer’s threat was more than a little strained. His spokesman claimed, for example, that by referring to “Gorsuch” and “Kavanaugh,” and by using “you” no less than seven times in two sentences, Senator Schumer was really speaking to Republican Senators about the election that was, at the time, still eight months away.⁴¹ The media were not fooled, reporting that Schumer’s threat was directed squarely at “President Donald Trump’s court appointees.”⁴² The next day, then-Majority Leader Mitch McConnell stated the obvious: “There is nothing to call this except a threat, and there is absolutely no question to whom...it was directed. Contrary to what the Democratic leader has since tried to claim, he very, very clearly was not addressing Republican lawmakers or anyone else. He literally directed the statement to the Justices by name.”⁴³

Attacks on individual Justices, like Schumer’s threats, may demand that they vote a particular way in a particular case. Others, however, seek to prevent Justices from participating in certain cases at all, to demonize their entire judicial service, or even to remove them from the bench. Rep. Alexandria Ocasio-Cortez (D-NY), for example, demanded that Thomas resign from the Court or face impeachment for declining a blanket recusal commitment from any case related to the 2020 election or the events of January 6, 2021.⁴⁴ Demands like this escalated with news media reports that Virginia “Ginni” Thomas had exchanged text messages with then-White House Chief of Staff Mark Meadows regarding efforts to resist accepting the 2020 election

⁴⁰ See Ian Millhiser, *The Controversy Over Chuck Schumer’s Attack on Gorsuch and Kavanaugh, Explained*, Vox, March 5, 2020, <https://www.vox.com/2020/3/5/21165479/chuck-schumer-neil-gorsuch-brett-kavanaugh-supreme-court-whirlwind-threat>.

⁴¹ See Zack Budryk, *Schumer’s Office Says He Was Referencing Justices Paying “Political Price,”* The Hill, March 4, 2020, <https://thehill.com/homenews/senate/486029-schumers-office-says-he-was-referencing-justices-paying-political-price/>.

⁴² See, e.g., Pete Williams, *In Rare Rebuke, Chief Justice Roberts Slams Schumer for “Threatening” Comments*, NBC News, March 4, 2020, <https://www.nbcnews.com/politics/supreme-court/rare-rebuke-chief-justice-roberts-slams-schumer-threatening-comments-n1150036>.

⁴³ Congressional Record, March 5, 2020, at S1509. Chief Justice John Roberts responded: “Justices know that criticism comes with the territory, but threatening statements of this sort from the highest levels of government are not only inappropriate, they are dangerous.” Office of Public Information, *Statement from Chief Justice John G. Roberts, Jr.*, March 4, 2020, at <https://www.scotusblog.com/wp-content/uploads/2020/03/CJ-Statement-re-Schumer-remarks.pdf>.

⁴⁴ See John Kruzell, *Ocasio-Cortez to Clarence Thomas: Resign or Face Impeachment*, The Hill, March 29, 2022, <https://thehill.com/homenews/house/600145-ocasio-cortez-to-clarence-thomas-resign-or-face-impeachment/>.

results; none of those messages, however, mentioned Justice Thomas or the Supreme Court.⁴⁵ A spouse's views or activities that are entirely divorced from any specific case do not approach even potentially constituting a Justice's own "Treason, Bribery, or other high Crimes and Misdemeanors," the Constitution's sole impeachment standard.⁴⁶ Ocasio-Cortez no doubt would prefer that Thomas was not on the Supreme Court, but her reckless demand is completely unconnected to the Constitution that she has sworn to support and defend.

Unlike the legislative branch, which has the power of the purse, or the executive branch, which has the power of the sword, the judicial branch must rely for its authority on "the perceived legitimacy of the courts and their role in our system of government."⁴⁷ This legitimacy, in turn, "rests in large part on the knowledge that the Court is not composed of unelected judges free to write their policy views into law."⁴⁸ The title of this hearing implies that there is some kind of pre-existing lack of public confidence in the Supreme Court that requires "ethics and recusal reform" to address. The truth is that creating a false narrative about supposed ethics and recusal issues negatively affects public confidence in the Court.

The public, for example, has been led to believe that Congress has applied no recusal standards to the Supreme Court. Yet a federal statute, 28 U.S.C. §455, requires "[a]ny justice, judge, or magistrate judge of the United States [to] disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The statute actually lists specific categories of situations that require recusal.⁴⁹ The statute, however, focuses on the facts of particular cases rather than broad issues, subject matter, or connecting a dozen dots to create an imaginary connection to a case. That is the law on the books today.

Calls for Court "Reform." Eighty-five years ago, Attorney General Homer Cummings testified before the Senate Judiciary Committee in favor of President Franklin Roosevelt's Court-packing plan. He said: "The question of judicial reform is not a new one. Eminent judges, lawyers, statesmen, and publicists over periods of many years have complained of the defects of our judicial system and have sought to find remedies."⁵⁰

⁴⁵ See Analisa Novak, Why Ginni Thomas' Texts with Mark Meadows Could Be "A Tricky Area" for Congressional Investigators, CBS News, March 25, 2022, <https://www.cbsnews.com/news/ginni-thomas-mark-meadows-text-messages/>.

⁴⁶ U.S. Constitution, Article II, Section 4. See Stephen B. Presser, Standard for Impeachment, Heritage Guide to the Constitution, <https://www.heritage.org/constitution/#!/articles/2/essays/100/standards-for-impeachment>.

⁴⁷ Frances Kahn Zemans, The Accountable Judge: Guardian of Judicial Independence, 72 S. Cal. L. Rev. 625,626 (1999).

⁴⁸ Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 Wash. & Lee L. Rev. 281,286-87 (1990).

⁴⁹ These include where the judge has a "personal bias or prejudice concerning a party," a former colleague served as a lawyer in the case, the judge had "expressed an opinion concerning the merits of the particular case" or has a financial interest in the case, or the judge or a spouse is a party, lawyer, or material witness in the case.

⁵⁰ *Reorganization of the Federal Judiciary: Hearing on S. 1392 Before the S. Comm. on the Judiciary*, 75th Cong. (1937) (statement of Attorney General Homer Cummings). <https://babel.hathitrust.org/cgi/pt?id=umn.31951d02113334i&view=1up&seq=5&q1=packing> (last accessed March 4, 2022).

Court reform ideas or proposals come from many sources and take many forms.⁵¹ Just last year, the Presidential Commission on the Supreme Court of the United States held multiple hearings with dozens of witnesses, and its report examined the debate over various reform ideas.⁵² Framing policy or institutional change in terms of “reform” implies, without establishing, that some kind of change needs to be made, that some problem needs to be addressed. But that is not always the case; sometimes, “reform” turns out to be a solution in search of a problem or, worse, cover for an underlying agenda. Advocates for reform not only bear the burden of establishing a genuine problem that needs addressing but, when it comes to the courts, that a proposed reform will not undermine the separation of powers in general, and judicial independence in particular.

Judges and Representation. In a 1995 speech, Justice Stephen Breyer explained that “[t]he good that proper adjudication can do...is only attainable...if judges actually decide according to law, and are perceived...to be deciding according to law, rather than according to their own whim.”⁵³ This requires a basic level of knowledge about our system of government in general, and the judiciary in particular, that current does not exist.

The latest annual survey by the Annenberg Public Policy Center, for example, showed that:

- Only a bare majority of Americans could name the three branches of government
- One-third knew the length of House and Senate members’ terms
- Nearly one-fifth could not name a single right protected by the First Amendment
- Nearly one-fifth believed that Supreme Court decisions decided by a 5-4 margin are sent to Congress “for reconsideration”⁵⁴

A public that knows little, or misunderstands a lot, about how the judiciary works is likely to evaluate courts and their decisions through the more familiar lens of politics and personal preference. This includes current demands for so-called “personal and professional diversity” in choosing judges. Biden has spoken in terms of groups being “represented” on the Supreme Court,⁵⁵ and Schumer argues that judges should apply the law “equitably” rather than “equally.”⁵⁶ While the oath of judicial office pledges a judge to “administer justice without respect to persons, and to...impartially discharge and perform all the duties incumbent upon me,”⁵⁷ Vice President Harris defines equity as ensuring that everyone ends up in “the same place.”⁵⁸ These are radically different concepts that a public unfamiliar with even the basics about the judiciary might fail to grasp.

⁵¹ See generally Jipping, *supra* note 28.

⁵² Presidential Commission on the Supreme Court of the United States, Final Report, December 2021, at <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf>.

⁵³ Quoted and cited in Thomas L. Jipping, *Legislating From the Bench: The Greatest Threat to Judicial Independence*, 43 S. Tex. L. Rev. 141,152 (2001).

⁵⁴ <https://www.annenbergpublicpolicycenter.org/2021-annenberg-constitution-day-civics-survey/>.

⁵⁵ See, e.g., Harper Neidig, *Biden Pledges to Nominate Black Woman to Supreme Court*, The Hill, February 25, 2020, <https://thehill.com/regulation/court-battles/484656-biden-pledges-to-nominate-black-woman-to-supreme-court/>.

⁵⁶ Congressional Record, February 3, 2022, at S504.

⁵⁷ 28 U.S.C. §453.

⁵⁸ Harris tweeted this statement on November 1, 2020.

Conclusion

Judicial independence is more important, and the explicit and subtle threats to it are more troubling, than ever. Undermining judicial independence would deprive “the rule of law” of its meaning and disable that essential feature that distinguishes our judiciary from most others around the world. Court-packing, threatening the Supreme Court, attempts to demonize individual Justices, and other strategies reject what the Founders new was “peculiarly essential” to this system of government that has provided unparalleled liberty.