

NATIONAL REVIEW

[Judicial Independence is under Attack](#)

By Matt Sandgren | Friday, March 29, 2024

Those dissatisfied with rulings from the courts, especially the Supreme Court, are now targeting the judiciary itself. It's time to push back.

Legal experts often refer to Congress and the presidency as the “[political branches](#).” This phrase reflects a widely shared understanding that these two branches are expected to be — and indeed designed to be — inherently political. Their members are elected by voters, have fixed terms of office, must stand for reelection if they wish to remain in office, and are constantly attuned to the sways of public opinion.

The third branch of government — the judiciary — is different. At the federal level, its members are appointed for life, hold office “[during good behavior](#),” and are supposed to be *insulated* from politics so they can decide cases based on the law and Constitution, not public opinion.

Central to the judiciary's special role is the idea of judicial independence. This concept says judges must be independent both from politics and from the other branches. Judges must not be swayed by the politics of the moment because political trends are unstable and can lead to rash decisions. Justice must depend on the facts of each case, not the political popularity of the parties.

Independence from the other branches is also essential. There are times when one or both political branches may want to do something inconsistent with the Constitution or a statute, perhaps for political reasons, or perhaps based on an honest misreading of the law. In such

instances, the judiciary is an essential bulwark against efforts to ignore what the law requires. It also keeps the other branches in check by preventing them from taking power that the Constitution doesn't grant.

Unfortunately, judicial independence today is under sustained attack. Opponents are seeking to tear down both aspects of this critical safeguard.

First, some members of Congress and prominent outside voices are attempting to bring greater political pressure on judges to issue rulings that those voices favor. This pressure campaign is particularly focused on the Supreme Court. When the Court heard arguments in a case that carried the potential to limit abortion access, Senate Democratic Leader Chuck Schumer (D., N.Y.) stood on the steps of the Court and called out Justices Gorsuch and Kavanaugh by name. "You have released the whirlwind," [he warned](#), "and you will pay the price."

When protesters began marching outside justices' homes — a significant escalation in pressure tactics — Attorney General Merrick Garland [refused](#) to order marshals to enforce a federal law that prohibits such activity. Activists [doxed](#) justices by releasing their home addresses and other private information after the Court issued its ruling overturning *Roe v. Wade*. One man was even [arrested](#) near Justice Kavanaugh's home with weapons that he planned to use to kill the justice.

These tactics are plainly intended to sway the justices' approach to deciding cases, or at the very least punish them for issuing decisions that activists don't like. Legal persuasion is supposed to take place through briefs and arguments, not threats. When the battlefield moves from the courtroom to justices' homes — and when congressional leaders egg on such attacks — judicial independence comes under direct attack.

Second, opponents of the current Court are seeking to tear down institutional safeguards that preserve the Court's independence from the political branches. Perhaps the most well-known piece of this campaign is the effort to "[pack the Court](#)" by expanding the size of the Supreme Court and appointing new justices who would issue decisions more in line with liberal goals. This would break the [150-year-tradition](#) of a Court with nine justices and

constitute a direct assault on judicial independence. Congress and the president would be restructuring the Court based on their dissatisfaction with recent decisions. The idea of the Court as an independent arbiter separate from politics would be gone.

Other important pieces of this campaign are the blatantly political attacks on justices' travel and outside income and attempts to impose a congressionally mandated "ethics code" on the Court.

As to the former, biased reporters and their allies in Congress have suggested that justices' acceptance of privately funded travel should call into question their integrity and even constitute grounds for [impeachment](#). Left unsaid in these breathless reports is that privately funded travel by judges to conferences and other events is both common and expressly [permitted](#) by judicial codes of conduct. Ruth Bader Ginsburg took [hundreds](#) of privately funded trips during her time on the Court, including one [paid for](#) by an Israeli billionaire who'd had business before the Court.

Activists have also criticized Amy Coney Barrett's [book deal](#), ignoring that fellow justice Sonia Sotomayor has earned [far more](#) for her own book deals and that Sotomayor's staff urged schools and libraries to purchase Sotomayor's books.

Congressional Democrats in turn have tried to use these blatantly biased reports as justification for imposing a new, congressionally created "ethics code" on the Supreme Court. Although this may sound at first like simple good government — who could be opposed to ethics? — there is far more to this scheme than meets the eye.

To start, it's an attempt by members of Congress to regulate judicial conduct. But the judiciary is supposed to be *independent* from Congress and other outside influences. Hence life tenure and a [guaranteed salary](#) that Congress can't reduce. Next, the Supreme Court has adopted its [own](#) code of conduct, which includes provisions about travel and outside income. There is no need for Congress to attempt to bigfoot the Court. Finally, adopting a congressionally created code of conduct would lend credence to the scurrilous attacks

described above whose obvious goal is to undermine the integrity of the Court and lay the groundwork for future impeachment.

Rather than give in to these plainly political efforts to weaken judicial independence, we should be doing what we can to shore up this essential bulwark. We should denounce efforts to improperly pressure judges through protests and threats to reach particular outcomes. We should see through efforts to pack the Court and impose politically motivated “ethics codes” as what they really are — sheer power politics.

Judicial independence is one of the crown jewels of our system of government. It’s worth doing everything we can to preserve it.

Matt Sandgren is the executive director of the [Orrin G. Hatch Foundation](#). A 125-year veteran of Capitol Hill, he served as a senior counsel on the Senate Judiciary Committee and as Senator Orrin Hatch’s chief of staff.