



# THE DECLARATION AND JUDICIAL INDEPENDENCE

ADVANCING AMERICAN  
FREEDOM FOUNDATION

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## HIGHLIGHTS:

- Attempts to control the courts were among the abuses that led to declaring independence from Great Britain.
- Judicial independence includes both independence *from* external political control or influence and independence *to* properly exercise judicial power.
- Schemes to change judicial decisions by manipulating the judiciary undermine the judicial independence that is necessary for liberty.

## INTRODUCTION:

The Declaration of Independence's list of "injuries and usurpations" causing the colonists to separate from Great Britain includes two ways that King George III undermined the independence of the courts: "He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." In a recent interview about his new book on the Declaration, Supreme Court Justice Neil Gorsuch explained that America's Founders "fought a revolution against a king who had taken control of the judiciary himself."<sup>1</sup>

The Constitution addressed those specific abuses, but the political impulse to control judicial decisions by manipulating the judiciary itself continues. So-called "court-packing" is a familiar, but not the only, scheme with this objective. This *Legal Report* looks at how America's founders prioritized judicial independence as a critical component of the system of government they established and examines attempts to politically control how the courts exercise judicial power. Since judicial independence is essential for limiting government, undermining judicial independence compromises our liberty.

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<sup>1</sup> Quoted in Nina Golgowski, Justice Gorsuch Touts Importance of Independent Judges While Plugging New Children's Book, <https://www.msn.com/en-us/news/politics/justice-gorsuch-touts-importance-of-independent-judges-while-plugging-new-children-s-book/ar-AA22nqbJ?ocid=BingNewsSerp>.

## The Founders and Judicial Independence

Meeting in the Pennsylvania State House, the Second Continental Congress unanimously adopted the Declaration of Independence on July 4, 1776.<sup>2</sup> Noting that the “Laws of Nature and of Nature’s God” entitle people to “dissolve the political bands which have connected them to another,” the Declaration lists “the causes which impell[ed] them to the separation.” Together, those causes constituted a “long train of abuses and usurpations” by King George III, “all having as their object the establishment of an absolute Tyranny over these states.” Among them were the king’s attempts to control the judiciary. The Framers addressed this in several ways.

First, the Constitution they drafted in 1787 corrected the specific abuses cited in the Declaration. Article III provides that judges appointed to the Supreme Court and to “such inferior Courts as the Congress may from time to time ordain and establish”<sup>3</sup> serve “during good Behaviour.” This protection allows judges on these courts to serve until they choose to leave or are removed by House impeachment and Senate conviction.<sup>4</sup> In addition, “their Compensation...shall not be diminished during their Continuance in office.”<sup>5</sup>

Second, the judiciary is one of the three branches that the Framers believed must be separated to limit government and protect liberty. James Madison wrote that “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands...may justly be pronounced the very definition of tyranny.”<sup>6</sup> Separating those powers, the Framers believed, is “the absolutely central guarantee of a just government”<sup>7</sup> and is necessary “to ensure the protection of ‘our fundamental liberties.’”<sup>8</sup> To that end, apart from constitutionally prescribed checks and balances, the branches exercise their powers independently of the others.<sup>9</sup>

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<sup>2</sup> Most of the 56 men who signed the Declaration would do so on August 2, 1776. They ranged in age from 26 (Edward Rutledge of South Carolina) to 70 (Benjamin Franklin of Pennsylvania) and included lawyers, merchants, physicians, ministers, scientists, and printers. See National Archives, America’s Founding Documents, Signers of the Declaration of Independence, <https://www.archives.gov/founding-docs/signers-factsheet>.

<sup>3</sup> U.S. Const., art. III, §1.

<sup>4</sup> U.S. Const., art. II, §4. Impeachable offenses include “Treason, Bribery, or other high Crimes and Misdemeanors.” Fifteen of the 21 individuals impeached by the House of Representatives have been federal judges; eight were convicted by the Senate, four were acquitted, and three resigned before the conclusion of the Senate trial. See Federal Judicial Center, Impeachments of Federal Judges, <https://www.fjc.gov/history/judges/impeachments-federal-judges>.

<sup>5</sup> U.S. Const., art. III, §1.

<sup>6</sup> The Federalist No. 47 (James Madison), [https://avalon.law.yale.edu/18th\\_century/fed47.asp](https://avalon.law.yale.edu/18th_century/fed47.asp).

<sup>7</sup> Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

<sup>8</sup> Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985)). See also Steve Simpson & Jessica Thompson, *The Messenger: The Separation of Powers is the Foundation of Liberty*, June 25, 2023, <https://pacificlegal.org/the-messenger-the-separation-of-powers-is-the-foundation-of-american-liberty/>.

<sup>9</sup> State constitutions also distribute government powers among three branches and even explicitly prohibit each branch from exercising the powers of the others. See, e.g., Ga. Const., art. I, § 2, ¶ 3 (“The legislative, judicial, and executive powers shall forever remain separate and distinct; and no person

In addition, the Framers argued that the nature of the judiciary's role requires its independence.<sup>10</sup> Writing in *The Federalist* No.78, for example, Alexander Hamilton argued that “[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution.”<sup>11</sup> Hamilton explained that the Constitution's limits on government power “can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.”<sup>12</sup> It is axiomatic, therefore, that the judiciary must be independent of the political branches.

This institutional independence, however, is not an end in itself, giving judges a license to act in any way they choose without consequence.<sup>13</sup> Instead, it is a means to the end of judges properly exercising the power the Constitution provides, and the Framers were clear about how judges should do so. Article III provides that the Supreme Court and “inferior Courts”<sup>14</sup> that Congress may establish have the power to decide “cases” and “controversies.”<sup>15</sup> Justice Clarence Thomas has explained that the judicial role is to “interpret[] and apply[] written law to the facts of particular cases.”<sup>16</sup> Interpreting written law, in turn, requires ascertaining the meaning of the text intended by the “authority that made it.”<sup>17</sup>

In the system the Framers established, government must have the power to fulfill its purpose of, according to the Declaration, “secur[ing] unalienable rights,” but not so much power as to destroy those same rights. The separation of government powers, and judicial independence as part of it, is necessary to maintain the right balance. These principles are just as compelling today as at the Founding, as threats to judicial independence continue. Those attempting to manipulate the judiciary in order to control its decisions see judicial independence – and, therefore, the liberty that judicial independence supports – as an obstacle to overcome rather than a principle to defend. So-called “court-packing,” or manipulating the structure of courts with the goal of changing judicial decisions, is one strategy that has been rejected repeatedly throughout American history.

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discharging the duties of one shall at the same time exercise the functions of either of the others except as provided herein”); Mich. Const., §2, Sec. 2 (“The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.”); Ill. Const., art. II, Sec. 1 (“The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another.”). The constitutions of 37 other states contain similar language.

<sup>10</sup> See generally MARTIN N. RADISH, JUDICIAL INDEPENDENCE AND THE AMERICAN CONSTITUTION: A DEMOCRATIC PARADOX (2017).

<sup>11</sup> *The Federalist* No. 78 (Alexander Hamilton).

<sup>12</sup> *Id.*

<sup>13</sup> See generally Thomas Jipping, Legislating from the Bench: The Greatest Threat to Judicial Independence, 43 S. TEX. L. REV. 141 (2001).

<sup>14</sup> U.S. Const., art. III, §1.

<sup>15</sup> *Id.*

<sup>16</sup> *Gamble v. United States*, 587 U.S. 678, 717 (2019) (Thomas, J., concurring).

<sup>17</sup> *VanHorne's Lessee v. Dorrance*, 2 U.S. 304, 308 (1795).

## Court-Packing

**Round 1.** The Framers' deliberate steps to protect judicial independence in the Constitution did not extinguish the political impulse to interfere with how the courts exercise their constitutional authority. Little more than a decade after the Constitution's ratification, in the 1800 election, President John Adams and his Federalists lost control of the executive and legislative branches, and they enacted the Judiciary Act of 1801 as a parting shot. The Act created new lower court positions, which Adams moved quickly to fill,<sup>18</sup> and prospectively reduced the size of the Supreme Court from six to five justices by providing that the next vacancy would remain unfilled.<sup>19</sup>

President Thomas Jefferson and his congressional allies prepared to repeal the Judiciary Act a year later. Republican Rep. John Bacon of Massachusetts suggested that Congress do to the Supreme Court what the Judiciary Act had done to the lower courts by creating additional positions for the president to fill. Both sides soundly rejected the idea because, as Senator William Wells, a Federalist from Delaware, put it, the plan would "destroy the independence of the judges."<sup>20</sup>

**Round 2.** The 1932 election put Franklin Roosevelt in the White House and Democrats in control of Congress, both promising to pull the country out of the Great Depression with bold national economic policies. The federal government, however, may exercise only the "definite" and "limited" powers actually enumerated in the Constitution.<sup>21</sup> For 150 years, consistent with the Framers' instructions, the Supreme Court insisted, "with almost uninterrupted regularity, that the end and object of constitutional construction is the discovery of the intention of those persons who formulated an instrument or of the people who adopted it."<sup>22</sup> During Roosevelt's first

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<sup>18</sup> Adams nominated William Marbury to be a Justice of the Peace for the District of Columbia, one of the newly created positions, on March 2, 1801, and the Senate confirmed the nomination the next day, which was Adams' last day in office. Adams signed Marbury's commission but it was not delivered before Adams' term officially expired. Marbury sued James Madison, the new Secretary of State, after he refused to deliver the commission. See Federal Judicial Center, *Marbury v. Madison* (1803), <https://www.fjc.gov/history/cases/cases-that-shaped-the-federal-courts/marbury-v-madison>.

<sup>19</sup> See Federal Judicial Center, Landmark Legislation: Judiciary Act of 1801, <https://www.fjc.gov/history/legislation/landmark-legislation-judiciary-act-1801/>.

<sup>20</sup> See Thomas Jipping and David Bainbridge, Strike 3: Why Biden Commission Should Reject Court Packing, Daily Signal (June 29, 2021), <https://www.dailysignal.com/2021/06/29/strike-three-why-the-biden-commission-should-reject-court-packing/>.

<sup>21</sup> See, e.g., *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819) ("This government is acknowledged by all to be one of enumerated powers"); *Kansas v. Colorado*, 206 U.S. 46, 81-82 (1907) (same); *New York v. United States* 505 U.S. 144, 156 (1992) ("Being an instrument of limited and enumerated powers, it follow irresistibly, that what is not conferred, is withheld, and belongs to the state authorities," quoting 3 Joseph Story, *Commentaries on the Constitution of the United States* 752 (1833); *United States v. Lopez*, 514 U.S. 549, 552 (1995) ("The Constitution creates a Federal Government of enumerated powers"); *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.") *Nat'l Fed. Ind. Business v. Sebelius*, 567 U.S. 519, 534 (2012), quoting *McCulloch*, 17 U.S. at 405.

<sup>22</sup> *Jacobus tenBroek, Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 27 CAL. L. REV. 399, 399 (1939).

term, applying that traditional approach, the Supreme Court declared unconstitutional several New Deal statutes, holding that the Constitution does not give Congress as much authority over the economy as Roosevelt's legislative agenda would require.<sup>23</sup>

In May 1935, four days after the Supreme Court unanimously struck down the National Industrial Recovery Act, Roosevelt criticized the Court for refusing to interpret the Constitution "in the light of present-day civilization."<sup>24</sup> In other words, he wanted the Court to abandon the meaning given the Constitution by "the authority that made it" and substitute a meaning that would facilitate his political agenda.

The 1936 election resulted in a landslide for Roosevelt and made Democrats' congressional majorities even larger.<sup>25</sup> Within days of his January 1937 inauguration, Roosevelt submitted to Congress legislation that would restructure the entire federal judiciary. The Judicial Procedures Reform Act, S. 1392, would allow the President to appoint "an additional judge to any court of the United States" whenever a judge on that court who had served for at least 10 years turned 70 but did not resign or retire.<sup>26</sup>

The plan allowed adding up to six seats to the Supreme Court, potentially making it larger than it had ever been.<sup>27</sup> It surely was no coincidence that each of the justices, together dubbed the "four Horsemen," who had most consistently found that New Deal legislation exceeded Congress' constitutional powers was older than 70 when Roosevelt proposed this legislation.<sup>28</sup>

During Senate Judiciary Committee hearings on the bill, Attorney General Homer Cummings offered four seemingly plausible reasons for this proposal: the "reckless use of injunctions in restraining the operation of Federal laws"; the "presence...of aged or infirm judges"; the "crowded condition of the Federal dockets...and the heavy burden imposed upon the Supreme Court"; and the "need...for the infusion of new blood into the judiciary."<sup>29</sup>

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<sup>23</sup> 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).

<sup>24</sup> White House, Press Conference 209, transcript at 2 (Mar. 31, 1935),

[http://www.fdrlibrary.marist.edu/\\_resources/images/pc/pc0022.pdf](http://www.fdrlibrary.marist.edu/_resources/images/pc/pc0022.pdf).

<sup>25</sup> In the 75<sup>th</sup> Congress, (1937-38), the Senate included 76 Democrats and four Senators of neither party who regularly supported Democrat positions. The House included 334 Democrats, 13 members who supported them, and 88 Republicans.

<sup>26</sup> See *Reorganization of the Federal Judiciary*, Hearings before the S. Comm. on the Judiciary, 75<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1 (1937).

<sup>27</sup> The Supreme Court had 10 seats from 1864 to 1868 and nine seats since then. See *Authorized Judgeships*, <https://www.uscourts.gov/sites/default/files/2025-01/allauth.pdf>.

<sup>28</sup> 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.

<sup>29</sup> *Reorganization of the Federal Judiciary*, *supra* note 26, at 4.

Few took these reasons seriously. If, for example, lower courts genuinely needed more judges to handle “crowded” dockets, the obvious solution was for Congress simply to create new judgeships where they were needed. Less than a year before Roosevelt proposed packing the entire federal judiciary, for example, Congress enacted multiple statutes creating additional U.S. District Court judgeships in states from Pennsylvania to Oklahoma.<sup>30</sup> In the 1930s alone, Congress expanded the judiciary by 28 percent.<sup>31</sup> Expanding courts that objectively need greater judicial capacity to do their work hardly required a complicated approach like the Roosevelt plan.

Second, Cummings offered no data or other facts to support his claim that lower court dockets were imposing a “heavy burden” on the Supreme Court, and the facts would similarly not support such a claim today. Since 1937, the federal judiciary has grown 40 percent faster than the United States population.<sup>32</sup> In the last several decades, the average number of cases per Supreme Court term decided after oral argument has dropped by 60 percent, and the average decided with full written opinions has declined by 67 percent.<sup>33</sup>

Nor did anyone wonder what Cummings really meant by “new blood into the judiciary.” Roosevelt, after all, had made it clear in his March 1935 press conference that he wanted the Supreme Court to “create or enlarge constitutional power” so that Congress could achieve his legislative agenda.<sup>34</sup> Clearly, Roosevelt proposed manipulating the judiciary with the goal of changing its decisions and, in particular, to fashion a Supreme Court more likely to render decisions that served his political interests.

Roosevelt did not want to wait for ordinary attrition to create appointment opportunities and gambled that his party’s political dominance, combined with the country’s economic woes, would be enough to speed up the process through his court-packing scheme. A Gallup poll in February 1937, however, showed that

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<sup>30</sup> See, e.g., Administrative Office of the U.S. Courts, Chronological History of authorized Judgeships – District Courts, <https://www.uscourts.gov/about-federal-courts/about-federal-judges/authorized-judgeships/chronological-history-authorized-judgeships-district-courts>.

<sup>31</sup> See Administrative Office of the U.S. Courts, Authorized Judgeships – From 1789 to Present, <https://www.uscourts.gov/sites/default/files/2025-01/allauth.pdf>.

<sup>32</sup> *Id.* Population figures used in this calculation can be found at <https://www.census.gov/programs-surveys/popest/data/tables.html>.

<sup>33</sup> While current calls for court-packing do not typically extend beyond the Supreme Court, this crowded-docket argument would be difficult to sustain if it were. Since Congress last created U.S. District Court positions in 2003, controlling for population growth, new annual filings have declined by 17 percent and pending cases have dropped by four percent. This calculation excludes five districts (Central District of California, District of New Jersey, Northern District of Illinois, and Southern and Western Districts of Texas) with caseload metrics more than four times the national average. Since Congress last created U.S. Court of Appeals positions in 1990, controlling for population growth, new annual filings have fallen by 32 percent, pending appeals have declined by 28 percent, and the average time from filing to disposition has dropped by seven percent.

<sup>34</sup> White House, Press Conference 209, transcript at 2 (Mar. 31, 1935), [http://www.fdrlibrary.marist.edu/\\_resources/images/pc/pc0022.pdf](http://www.fdrlibrary.marist.edu/_resources/images/pc/pc0022.pdf).

Americans were initially evenly divided on restructuring the judiciary in this way, with 44.8 percent in favor and 45.1 percent opposed, and public opinion thereafter trended steadily against the plan.<sup>35</sup>

In the Senate Judiciary hearing on the bill, despite Cummings's attempted framing, witnesses voiced what everyone really knew. For example:

- **Princeton University** President H.W. Dodds described the bill as a means for the president to “control the opinions of the Court.”<sup>36</sup>
- **Yale Law School** Professor Edwin Borchard argued that “[j]udicial independence cannot be preserved if threats of removal or other prejudice are to become the new American custom. The Constitution tried to prevent this very coercion.”<sup>37</sup>
- **New York University School of Law** Dean Frank H. Sommer observed that “an independent judiciary is numbered among the essential elements and institutions of any constitutional government” and that Roosevelt’s proposal strikes a blow to judicial independence “based on resentment at the exercise of [judicial] power.”<sup>38</sup>
- **St. Louis University** Professor Linus Lilly was more blunt: “Every argument that has been offered in support of the Court packing plan can be easily analyzed into airy nothingness....It can serve no other purpose than that of encroaching upon judicial independence, making the courts, in some measure at least, subservient to Executive domination.”<sup>39</sup>

The American Bar Association vigorously opposed the court-packing bill. Sylvester C. Smith, who chaired a special committee on this issue, testified in the hearing about the ABA’s nationwide poll of lawyers. He explained that 80 percent of respondents, ABA members and nonmembers, opposed the court-packing bill and that “[t]he vote in every State was against the proposal.”<sup>40</sup> In fact, Smith said, “the lawyers of America in every section and State of the Union are more aroused over the Supreme Court proposal, and the threat to an independent judiciary, than they have been on any previous occasion since the Civil War.”<sup>41</sup> Smith framed the issue this way:

“Shall we retain an independent judiciary? Shall we keep the form of constitutional government, adopted by our forefathers, of three separate and independence branches? Shall we continue to rely upon our untrammled courts and reject force as the method for settling disputes between our citizens and our Government?”<sup>42</sup>

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<sup>35</sup> See Gregory A. Caldeira, FDR’s Court-Packing Plan in the Court of Public Opinion, Appendix III (Aug. 4, 2004), available at <http://epstein.wustl.edu/research/courses/LAPSCaldeira.pdf>.

<sup>36</sup> Reorganization of the Federal Judiciary, *supra* note 26, at 618.

<sup>37</sup> *Id.* at 826.

<sup>38</sup> *Id.* at 1019.

<sup>39</sup> *Id.* at 1424.

<sup>40</sup> *Id.* at 1459-60.

<sup>41</sup> *Id.* at 1460.

<sup>42</sup> *Id.* at 1462.

Despite its 14-4 Democratic majority at the time, the Senate Judiciary Committee recommended that the Senate reject the bill. Its June 1937 report described the legislation's objective as "neutralizing the views of some" justices.<sup>43</sup> The committee opposed the bill for the same reason that Congress refused to expand the Supreme Court in 1802: doing so would "undermine the independence of the court" and "expand political control over the judicial department."<sup>44</sup>

This legislation, the report said, is "an attempt to change the course of judicial decision"<sup>45</sup> by "neutralizing the views of some of the present members."<sup>46</sup> The committee concluded: "Even if every charge brought against the so-called 'reactionary' members of this Court be true, it is far better that we await orderly but inevitable change of personnel than that we impatiently overwhelm them with new members."<sup>47</sup> The separation and independence of the three branches is "immeasurably more important...than the immediate adoption of any legislation however beneficial."<sup>48</sup> On July 22, 1937, 70 Senators voted to send S. 1392 back to the Judiciary Committee; 53 were Democrats.<sup>49</sup>

**Round 3.** The suggestion in 1802 of expanding the Supreme Court did not appear to be a reaction to specific decisions or a means to achieve a specific objective, but to generally expand Jefferson's opportunity to impact the judiciary. Roosevelt's 1937 proposal did react to a series of decisions and was widely seen as a plan for changing the Supreme Court's overall approach to constitutional interpretation in order to make more likely decisions favorable to his political agenda. Still, at least initially, Roosevelt attempted to provide some cover by offering seemingly objective reasons for his plan and by including the Supreme Court as part of his broader plan to restructure the entire judiciary.

The most recent calls for court-packing abandon such pretense, singling out specific Supreme Court decisions, and even justices, for retaliation. The rhetorical strategy of those pursuing this objective is to claim that such decisions make the Supreme

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<sup>43</sup> Reorganization of the Federal Judiciary: Hearing before the S. Comm. on the Judiciary, United States Senate, 75th Congress, 1st Session, Report No. 711 (June 7, 1937), at 14.

<sup>44</sup> *Id.* at 3.

<sup>45</sup> *Id.* at 11.

<sup>46</sup> *Id.* at 14.

<sup>47</sup> *Id.* This personnel change happened faster than anyone expected. In less than six years, Roosevelt replaced eight of the nine Supreme Court justices appointed by previous presidents, including the Four Horsemen. The Senate confirmed six of those eight nominees without any opposition, or even a recorded vote. This suggests that Roosevelt's *objective* of changing the Supreme Court's interpretive method in order to facilitate his political agenda may have been popular, even while his proposed *means* of achieving it was not.

<sup>48</sup> *Id.* at 8.

<sup>49</sup> Senate Vote #42 in 1937 (75th Congress), GovTrack.us, <https://www.govtrack.us/congress/votes/75-1/s42>.

Court, in some way, "partisan,"<sup>50</sup> "extreme,"<sup>51</sup> an "assault on American democracy,"<sup>52</sup> or "corrupt,"<sup>53</sup> fostering a "crisis of confidence and legitimacy" among the general public<sup>54</sup> and even "threaten[ing] democracy."<sup>55</sup> Members of Congress have introduced legislation to expand the Supreme Court. For example:

- **Judiciary Act of 2021/2023.** Senator Ed Markey (D-MA) introduced S. 1141 on April 15, 2021, providing for a Chief Justice and up to 12 Associate Justices.<sup>56</sup>
- **Judicial Modernization and Transparency Act.** Senator Ron Wyden (D-OR) introduced S. 5229 on September 25, 2024, providing for up to 14 Associate Justices and adding 101 new positions on the U.S. District Court around the country.<sup>57</sup>

Notably, advocates make no attempt to show how decisions they dislike actually are partisan, extreme, corrupt, or threatening to democracy. They simply characterize those decisions' results in unfavorable terms and make the accusations. More importantly, they ignore whether those decisions were right or wrong on the legal merits, saying nothing at all about how the Supreme Court actually interpreted and applied the law in each case. Their sole focus is on the outcome of particular cases and their possible political implications. The obvious, and no doubt intended, implications are that the courts exist to serve or promote certain political interests

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<sup>50</sup> See, e.g., See, e.g., Caitlin Huey-Burns, Why Some Democrats Want to See More Supreme Court Justices on the Court, CBS News, March 26, 2019, <https://www.cbsnews.com/news/supreme-court-justices-why-democrats-are-looking-to-completely-overhaul-the-supreme-court/?>; David Smith, Democrats Fight to Expand a "Broken and Illegitimate" Supreme Court, The Guardian, May 21, 2023, <https://www.theguardian.com/law/2023/may/21/supreme-court-expansion-democrats?>.

<sup>51</sup> See, e.g., "Republican-Controlled" Supreme Court, Pelosi Says, Achieved "Dark, Extreme Goal," Denver Gazette, June 24, 2022, <https://www.denvergazette.com/2022/06/24/republican-controlled-supreme-court-pelosi-says-achieved-dark-extreme-goal-cc08eb36-46d2-50f4-b7ac-2f854d77d774/?> (reacting to *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022)); Oriana Gonzalez, Democrats Say the Supreme Court's Immunity Ruling Proves Its Pro-Trump Bias, News of the United States, July 1, 2024, <https://www.notus.org/democrats/supreme-court-ethics-trump?> (Rep. Hakeem Jeffries criticizing the "extreme, far-right justices in the Supreme Court majority" in *Trump v. United States*, 603 U.S. 593 (2024)); David Smith, "A Mockery of Democracy": US Supreme Court in Question After Abortion Ruling, The Guardian, June 26, 2022,

<https://www.theguardian.com/law/2022/jun/26/us-supreme-court-abortion-ruling-democracy?>

<sup>52</sup> See, e.g., Gonzalez, *supra* note 51 (quoting Rep. Alexandria Ocasio-Cortez).

<sup>53</sup> See, e.g., Ben Burgis, Rashida Tlaib is Right: The Supreme Court is Corrupt, Jacobin, June 20, 2024,

<https://jacobin.com/2024/06/rashida-tlaib-supreme-court-alito-thomas?>

<sup>55</sup> See, e.g., See, e.g., Andrea Germanos, Warren Says Expand Supreme Court to Counter "Powerful Threat to Our Democracy," Common Dreams, Dec. 15, 2021,

<https://www.commondreams.org/news/2021/12/15/warren-says-expand-supreme-court-counter-powerful-threat-our-democracy?>; Joan E. Greve and Ed Pilkington, "Democracy Is at Risk: Inside the Fight for Supreme Court Reform," The Guardian, July 9, 2023,

<https://www.theguardian.com/law/2023/jul/09/supreme-court-reform-conservative-justices?>

<sup>56</sup> This bill had two co-sponsors and the companion House bill, H.R. 2584, introduced by Rep. Hank Johnson (D-GA) garnered 59. They introduced identical bills, S. 1616 and H.R. 3422, in the 118<sup>th</sup> Congress with a similar level of co-sponsor support.

<sup>57</sup> It would have allowed the U.S. Court of Appeals to "invalidate an Act of Congress" only by a unanimous three-judge panel or a 2/3 majority of a full circuit. It did not, however, place similar limitations on federal appeals courts' authority to invalidate state laws.

and that those ends justify whatever means might be necessary to achieve them, including compromising the judiciary's institutional and decisional independence.

Most Americans know too little about our system of government in general, and about the judiciary in particular to see just how radically this politicizing strategy departs from how that system is designed and from the judiciary's proper role in it.<sup>58</sup> Even well-established organizations seeking to promote greater civic knowledge can actually contribute to the problem. The Annenberg Public Policy Center's 2025 survey of civic knowledge, for example, asked respondents whether they "trust the Supreme Court to operate in the best interests" of either the American people or "people like you."<sup>59</sup> This clearly implies that operating in someone's "best interests" is the judiciary's proper role.

As a result, many citizens lack the knowledge and perspective they need to see that this view of the judiciary is radically out of step with the Framers' design and the principles necessary for the liberty we have long enjoyed. In such a vacuum, the public's view of the Supreme Court overall, and of individual decisions, is often based on personal feelings, political reactions to the results of decisions, or rhetoric from commentators or media outlets. Court-packing advocates exploit this uncritical, politically driven perspective to insist that the Supreme Court must be expanded.

### **Other Attacks on Judicial Independence**

Political schemes to control how judges exercise judicial power by manipulating the judiciary are outside the constitutionally prescribed "checks and balances" between the branches that help limit government.<sup>60</sup> Legitimate checks and balances are part of the system of separated powers the Framers established. Strategies such as court-packing, in contrast, attempt to bypass the separation of powers altogether and control how the courts exercise the judicial power the Constitution assigns to the judicial branch.

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<sup>58</sup> See Sean Salai, Constitutional Confusion: Americans Struggle with Basic Civic Knowledge as November election Looms, *Washington Times*, Sept. 16, 2024, Thomas Jipping, An Ignorant Public Poses a Threat to the Republic It Cannot Keep, *Daily Signal*, Dec. 11, 2023, <https://www.heritage.org/the-constitution/commentary/ignorant-public-poses-threat-the-republic-it-cannot-keep>; Valerie Strauss, For Constitution Day, A Sobering New Finding on 2021 Survey of Americans' Civics Knowledge, *Washington Post*, Sept. 17, 2021, <https://www.washingtonpost.com/education/2021/09/17/americans-civics-survey-sobering-insurrection/>; Thomas Jipping and Peyton Smith, Is America Turning Into a Nation of Dunces?, *Washington Times*, April 15, 2019, [https://www.washingtontimes.com/news/2019/apr/15/is-america-turning-into-a-nation-of-dunces/?utm\\_campaign=shareaholic&utm\\_medium=facebook&utm\\_source=socialnetwork](https://www.washingtontimes.com/news/2019/apr/15/is-america-turning-into-a-nation-of-dunces/?utm_campaign=shareaholic&utm_medium=facebook&utm_source=socialnetwork).

<sup>59</sup> Americans' Knowledge of Civics Increases, Annenberg Survey Finds," Sept. 11, 2025, <https://www.annenbergpublicpolicycenter.org/americans-knowledge-of-civics-increases-annenberg-survey-finds/>? Significantly, while a majority of respondents supposed some Supreme Court "reforms" such as term limits or a mandatory retirement age, fewer than one-third supported expanding the Court.

<sup>60</sup> See, e.g., U.S. Const., art. III, § 2 (regulating Supreme Court's appellate jurisdiction); U.S. Const., art. II, § 2 (Senate consent for judicial appointments).

Court-packing may be the most recognizable strategy to this end, but it is hardly the only one. Together, these strategies have the common objective of manipulating the courts and pressuring judges to issue decisions in particular kinds of cases that reliably serve or promote certain political interests. They include:

- During the 2020 presidential campaign, Senator Bernie Sanders proposed “rotating” Supreme Court justices onto lower courts so new justices could be appointed.<sup>61</sup>
- A friend-of-the-court brief filed with the Supreme Court by Democratic Senators in a case challenging a New York law restricting handgun ownership closed this way: “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.’”<sup>62</sup>
- In March 2020, then-Senate Majority Leader Chuck Schumer stood on the Supreme Court steps openly threatening individual justices that they would “pay the price” if they voted on certain issues in ways he did not like.
- The Presidential Commission on the Supreme Court of the United States, appointed by President Joe Biden, issued its final report in December 2021, discussing several so-called “reform” proposals, including expanding the number of justices and limiting their terms.<sup>63</sup>
- Democratic strategist James Carville recently said that, if they achieve unified political control after the 2028 election, Democrats should immediately add four seats to the Supreme Court.<sup>64</sup>
- On May 21, 2026, Rep. Steve Cohen (D-TN) introduced House Resolution 1309 to impeach Chief Justice John Roberts, accusing him of “fail[ing] to uphold the principles of impartiality and independence by allowing the Court to become a political instrument” and naming six Supreme Court decisions that Cohen found objectionable.<sup>65</sup>
- Liberal advocates and Democrats in Congress misrepresent the rules regarding Supreme Court justices’ financial reporting or recusal from individual

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<sup>61</sup> Justin Wise, Bernie Sanders Says He Would Move to “Rotate” Supreme Court Justices if elected, *The Hill*, June 27, 2019,

<sup>62</sup> 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.

<sup>63</sup> Final Report by the Presidential Commission on the Supreme Court (2021), <https://www.presidency.ucsb.edu/documents/final-report-the-presidential-commission-the-supreme-court-the-united-states>.

<sup>64</sup> See Jason Cohen, James Carville Says He’s “Bet A Lot Of Money” That Democrats will Pack the Supreme Court If They Regain Power, <https://www.msn.com/en-us/news/politics/james-carville-says-he-d-bet-a-lot-of-money-that-democrats-will-pack-supreme-court-if-they-regain-power/ar-AA1PW6Ky>.

<sup>65</sup> These are *Louisiana v. Callais*, No. 24-109 (April 29, 2026); *Rucho v. Common Cause*, 588 U.S. 684 (2019); *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010); *McCutcheon v. Federal Election Commission*, 572 U.S. 185 (2014); *Americans for Prosperity Foundation v. Bonta*, 141 S.Ct. 2373 (2021); and *Trump v. United States*, 603 U.S. 593 (2024).

cases,<sup>66</sup> trying to create a negative public impression of justices they think unlikely to vote in cases raising certain issues in a way that promotes their political interests.

## **Virginia Redistricting**

The latest effort to politically manipulate the courts is playing out in Virginia. In November 2020, voters amended the Virginia Constitution to create a bipartisan Redistricting Commission to draw maps for congressional and state legislative districts after each census. After gaining control of both the House of Delegates and Senate in the 2025 election, Democrats looked for a way that the legislature, rather than the commission, could redraw the congressional district lines immediately, rather than after the 2030 census. They proposed a map that would shift the Democrat/Republican balance in Virginia's congressional delegation from the current 6/5 to 10/1. Achieving that goal would require a constitutional amendment.

The Virginia Constitution provides that to propose a constitutional amendment to the voters, the General Assembly must pass an amendment resolution, wait for a general election to occur, and then pass the same measure at its next regular session.<sup>67</sup> Democrats called a special legislative session on October 31, 2025, four days before Election Day, and passed this proposed amendment on a party-line vote. They did so again after the regular legislative session began on January 14, 2026, and called for a referendum on the proposed amendment for April 21, 2026. The amendment passed by a 52%-48% margin, and several lawsuits followed.

On May 8, 2026, the Virginia Supreme Court held that the process for placing the redistricting referendum on the ballot violated the Virginia Constitution. Specifically, it held that the term "election" means the entire process whereby voters make their choice, rather than simply Election Day. The 2025 general election, therefore, began on September 19, 2025, when voters could start submitting their ballots,<sup>68</sup> and concluded on November 4, 2025, Election Day. The General Assembly, therefore, had not passed the redistricting resolution prior to the general election as the state constitution requires.

In response, Democrats in the Virginia legislature are considering a scheme to dismiss the entire Virginia Supreme Court and appoint new justices that would reconsider and reverse the prior decision, approving the new map in time for the November 2026 congressional election. Following a theory by a Michigan State

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<sup>66</sup> See, e.g., Philip Kolb, US Congressman Threatens SCOTUS Funding Over Alito's Son, <https://www.msn.com/en-us/news/politics/us-congressman-threatens-scotus-funding-over-alito-s-son-there-is-no-world-in-which-this-is-okay/ar-AA24xJee?ocid=entnewsntp&pc=U531&cvid=6a1d87339b4549bdab2923f2b78f8444&ei=35>.

<sup>67</sup> Va. Const., art. 12, § 1.

<sup>68</sup> In Virginia, an "absentee" ballot is one not cast in person on Election Day. Prior to 2020, voters needed a particular reason, such as illness or work conflict, to cast an absentee ballot. The General Assembly passed, and Democrat Governor Ralph Northam signed, a law allowing voters to cast an absentee ballot in person, and for any reason, starting 45 days before Election Day. That law became effective on July 1, 2020.

University law professor,<sup>69</sup> the legislature would lower the mandatory retirement age for justices from the current 73<sup>70</sup> to just 54,<sup>71</sup> and apply the new threshold retroactively. If successful, despite media reports that this scheme would remove the “conservatives” who voted to strike down the gerrymander referendum,<sup>72</sup> it would actually oust the entire Virginia Supreme Court since its youngest member is 54.

Professor Jonathan Turley has described this as a “sack-and-pack” gambit<sup>73</sup> and its result would be wildly out of step with every other state. While 33 states have a mandatory judicial retirement age, none is lower than 70.<sup>74</sup> In a column describing his theory, Professor Quinn Yeargain claimed that “[s]tates around the country with similar laws mandate retirement across a wide range of ages.”<sup>75</sup> His own linked source, however, does not support him.<sup>76</sup> According to Ballotpedia, 32 of the 33 states with a mandatory judicial retirement age set it between 70 and 75,<sup>77</sup> while 17 states have no mandatory retirement age at all. Even more importantly, no state requires judges younger than 70 to retire. It would be radical enough to lower the retirement age by nearly two decades, perhaps even more so for a state to set its first retirement age at 54. Either way, contrary to Yeargain's suggestion, this scheme would be radically out of step with every other state in the country.

In addition, retroactively imposing the new threshold would create a method for removing justices beyond the two provided by the Virginia Constitution.

- **Article VI** provides for creation of a Judicial Inquiry and Review Commission “to investigate charges which would be the basis for retirement, censure, or removal of a judge.”<sup>78</sup> These charges include “disability which is or is likely to be permanent and which seriously interferes with the performance by the judge of his duties...misconduct while in office... persistently failing] to perform the duties of his office, or...conduct prejudicial to the proper administration of justice.”

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<sup>69</sup> Professor Quinn Yeargain first explained his theory in the *Downballot* political newsletter. Quinn Yeargain, How Virginia Democrats Can Overturn the Redistricting Ruling: Retire the Supreme Court, *Downballot*, May 8, 2026, <https://www.the-downballot.com/p/how-virginia-democrats-can-overturn>.

<sup>70</sup> 2015 2015 Va. Acts ch. 762 & 773.

<sup>71</sup> See Sabrina Moreno, Virginia Dems Discussed Court Overhaul After Redistricting Ruling, *Axios*, May 11, 2026, <https://www.axios.com/local/richmond/2026/05/11/virginia-supreme-court-redistricting-fallout>.

<sup>72</sup> See, e.g., Amy DeLaura, Democrats Consider Plan to Wipe Conservatives Off Virginia Supreme Court: Report, *Washington Examiner*, <https://www.msn.com/en-us/news/politics/democrats-consider-plan-to-wipe-conservatives-off-virginia-supreme-court-report/ar-AA22UThJ>.

<sup>73</sup> Jonathan Turley, Sack and Pack: Law Professor Suggests Extreme Method to Save Virginia Redistricting, May 10, 2026, <https://jonathanturley.org/2026/05/10/gut-and-pack-law-professor-suggests-extreme-method-to-save-virginia-redistricting/>.

<sup>74</sup> See Ballotpedia, Mandatory Retirement, [https://ballotpedia.org/Mandatory\\_retirement](https://ballotpedia.org/Mandatory_retirement).

<sup>75</sup> <https://www.the-downballot.com/p/how-virginia-democrats-can-overturn>

<sup>76</sup> [https://ballotpedia.org/Mandatory\\_retirement](https://ballotpedia.org/Mandatory_retirement).

<sup>77</sup> Vermont requires judges still serving to retire at 90.

<sup>78</sup> Va. Const., art. VI, § 10.

- **Article IV** provides for impeachment by a majority of the House of Delegates and conviction by at least two-thirds of the Senate for “malfeasance in office, corruption, neglect of duty, or other high crime or misdemeanor.”<sup>79</sup>

These and other political schemes to manipulate the courts are having a devastating effect. A majority of Americans now believe that the U.S. Supreme Court decides cases based on politics rather than law.<sup>80</sup> A 2025 Pew Research poll found that while 92 percent of Americans say it is extremely or very important for judges to be fair and impartial, only 54 percent are even “somewhat” confident that this is, in fact, true about the current judiciary.<sup>81</sup>

As described above, the ABA led the opposition to Roosevelt’s court-packing plan. Since then, the ABA has warned about “politically inspired attempts to undermine [the judiciary’s] impartiality” as well as its “decisional” and “institutional” independence.<sup>82</sup> While the report of the 1997 ABA Commission on Separation of Powers and Judicial Independence outlined what it considered to be threats to each of these kinds of independence, none of those threats rose to the level of what Virginia Democrats are considering today. The report, however, did caution that “[i]f judicial independence is to be preserved, public confidence in the judiciary must be maintained.”<sup>83</sup> This, in turn, requires “a separation of powers system that is in good repair.”<sup>84</sup>

Five years later, the ABA formed the Commission on the 21<sup>st</sup> Century Judiciary, which focused on state courts, and the ABA House of Delegates adopted the commission’s final report in 2003.<sup>85</sup> In describing the “heightened politicization of state high courts,” the report noted “incidents in which legislators have sought to remove judges or justices for making unpopular decisions.”<sup>86</sup> The examples cited had that objective but used processes already established in state law. None of them attempted, as Virginia Democrats have considered, to create an entirely new mechanism for the wholesale removal of justices solely in retaliation for a particular decision.

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<sup>79</sup> Va. Const., art. IV, § 17.

<sup>80</sup> See e.g., New Marquette Law School Poll National Survey Finds approval of Supreme Court Edges Upward, But 55% Disapprove of the Court’s Work, Oct. 17, 2024, <https://www.marquette.edu/news-center/2024/national-survey-finds-approval-supreme-court-edges-upward-55-disapprove.php> (55% say justices motivated mainly by politics); <https://www.pbs.org/newshour/nation/new-poll-shows-majority-of-americans-believe-supreme-court-justices-put-ideology-over-impartiality> (70% say justices motivated by ideology).

<sup>81</sup> Pew Research Center, Views of Congress, Parties, and Court, April 23, 2025,

<https://www.pewresearch.org/politics/2025/04/23/views-of-congress-parties-and-courts/>.

<sup>82</sup> See, e.g., An Independent Judiciary: Report of the ABA Commission on Separation of Powers and Judicial Independence, July 4, 1997, at iii.

<sup>83</sup> *Id.* at 62.

<sup>84</sup> *Id.*

<sup>85</sup> Justice in Jeopardy: Report of the American Bar Association Commission on the 21<sup>st</sup> Century (2002).

<sup>86</sup> *Id.* at 44.

## **Conclusion**

The Declaration of Independence explains that establishing a new form of government involves “laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.” Those principles include that government needs enough power to fulfill its purpose of securing inalienable rights but not so much as to threaten those very rights. The separation of powers is necessary to strike that balance and, as part of that arrangement, the judiciary must be institutionally independent so that judges may properly exercise the power assigned to them.

The Declaration included efforts to politically manipulate the judiciary as among the reasons for establishing a new form of government. The Constitution addressed those specific abuses, defined judicial power, and placed the judiciary within a system of separated powers. Doing so established judicial independence as an essential element of the liberty that government exists to secure. Those who, in contrast, consider power more important than liberty have long tried various schemes to do what King George III did, that is, to manipulate the judiciary in order to control its decisions.

When he was a Senator in 1983, former President Joe Biden called court-packing a “bonehead idea” and said that Roosevelt’s attempt to do so in 1937 was a “terrible, terrible mistake” that undermined the Supreme Court’s independence.<sup>87</sup> Court-packing, however, is not the only political scheme aimed at changing judicial decisions by manipulating the judicial branch. Nor is it the most radical. All of these efforts, however, have the same aim and would have the same destructive impact on our liberty.

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<sup>87</sup> See Thomas Jipping, Court-Packing Is Still a “Bonehead Idea,” Mr. President, The Hill, Aug. 20, 2024, <https://thehill.com/opinion/judiciary/4834684-court-packing-is-still-a-bonehead-idea-mr-president/>.