

THE CONSTITUTION PROJECT



Safeguarding Liberty, Justice & the Rule of Law

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Contact: Larry Akey, Director of Communications, (202)580-6922 [o] or (202)580-9313 [c], lakey@constitutionproject.org

Statement of The Constitution Project's Board of Directors

RECENT ATTACKS ON JUDICIAL INDEPENDENCE

In recent weeks there have been an increasing number of attacks on federal judges for their decisions in a variety of cases. That is neither new nor of itself cause for concern; from the earliest years of the Republic, controversial decisions from the courts have generated healthy opposition from across the ideological spectrum. But The Constitution Project (TCP) is alarmed by recent proposals to punish judges who author such decisions, including through impeachment and related forms of removal from office, hauling judges before Congress to explain their reasoning in particular cases, and eliminating their constitutionally enshrined right to tenure during good behavior. TCP condemns such proposals, which if enacted would strike at a bedrock principle of our constitutional democracy: judicial independence.

As we explained in *Uncertain Justice: Politics and America's Courts* (2000), a compilation of reports by four bipartisan task forces of our Courts Committee, judicial independence derives from three provisions of Article III of the Constitution: the "judicial power" clause, which delegates to the judicial branch alone the power to decide individual cases; the "good behavior" clause, which guarantees federal judges life tenure, subject only to removal following impeachment for "treason, bribery, and other high crimes and misdemeanors"; and the "compensation" clause, which guarantees that federal judges' compensation may not be diminished during their time in office.

James Madison's notes of the constitutional convention and Alexander Hamilton's defense of Article III in the *The Federalist Papers* make clear that these provisions were designed to provide for an independent judicial branch comprised of independent judges. The purpose of that independence is to enable judges to render impartial justice -- to decide cases according to the law as they conceive it to be written, without fear of reprisal -- and thereby safeguard individual and collective rights.

Recent calls to combat controversial judicial decisions by removing judges from office (through impeachment or abolishing judgeships altogether), requiring them to defend their reasoning before Congress and risk reprimand, or stripping them of life tenure during good behavior amount to judicial intimidation and are deeply troubling. The specter of these proposed disciplinary measures may cause some judges to think twice before adopting what they believe is the best interpretation of a law when that interpretation dictates an unpopular result. And even if judges in fact exercise independent judgment, the possibility of harsh discipline may fuel public perception to the contrary, thereby undermining public confidence in the courts and the appearance of a fair and impartial justice system. Indeed, in order to avoid either problem, the federal statute that regulates judicial

misconduct calls for dismissal of any complaint based on the substance of a judge's decision.

Let us be clear: the principle of judicial independence does not shield judges from harsh criticism, nor should it. It is every citizen's First Amendment right to speak out, for example, when a judge decides a controversial case, presses the limits of his or her constitutional power, or makes a mistake. Such criticism promotes judicial accountability and is instrumental to good government.

But when legitimate judicial criticism degenerates into a form of intimidation it threatens not only judicial independence, but also our individual rights and freedoms that only independent judges -- operating as part of a third and co-equal branch of government -- can protect.

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[About The Constitution Project](#)

Created out the belief that we must cast aside the labels that divide us in order to keep our democracy strong, The Constitution Project (TCP) brings together policy experts and legal practitioners from across the political spectrum to foster consensus-based solutions to the most difficult constitutional challenges of our time. TCP seeks to reform the nation's broken criminal justice system and to strengthen the rule of law through scholarship, advocacy, policy reform and public education initiatives. Established in 1997, TCP is based in Washington, D.C.



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