

Preserving the Courts

**A Comprehensive Review of How President Trump's
Attacks on the Courts Threaten Democracy**



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I. Introduction

The Trump administration's persistent and unprecedented attacks on the legitimacy and independence of the federal judiciary present a serious threat to our democracy. The Founders gave an independent judiciary a crucial role in protecting our constitutional order. The courts preserve the intricate balance of power between the branches of our government by ensuring that Congress and executive branch officials abide by the law and do not abuse their authority. The courts also provide a forum for vindicating fundamental civil rights and civil liberties – particularly those held by disempowered groups who may have no other way to remedy violations of their constitutional rights.

As Alexander Hamilton explained in [The Federalist No. 78](#), “the general liberty of the people can never be endangered . . . so long as the judiciary remains truly distinct from both the legislature and the Executive.” But without an independent judiciary, the rights of the people would no longer be guaranteed, and “all the reservations of particular rights or privileges would amount to nothing.”

And yet, as Hamilton also noted, “the judiciary is beyond comparison the weakest of the three departments of power.” The judicial branch has no enforcement capability of its own, relying on the executive branch to obey its orders and enforce them when necessary.

Americans take it for granted that the executive branch will accept and implement the rulings of the federal courts. But this is a norm, without an official enforcement mechanism. And Trump has repeatedly shown that he is willing to shatter the norms that protect our democracy when it suits him.

It may seem unthinkable that President Trump would openly defy a court order. But it's not. Although every modern president has accepted the courts' constitutional supremacy, history teaches us that this is not a foregone conclusion. In the early days of the republic, Andrew Jackson famously engaged in a [constitutional standoff](#) with the Supreme Court over his belief in the President's power to interpret the Constitution differently than the Court and his resistance to enforcing the Court's decision invalidating the government seizure of Indian land. Notably, Jackson is often cited as Trump's favorite president and role model.

Trump has already attacked the judiciary in ways that are simply unprecedented, even as compared to Jackson. Jackson's critiques of the courts were based on [“constitutional, rather than political or personal, grounds.”](#) Trump, on the other hand, continually rebukes the judges ruling

against him in a profoundly personal and incendiary manner. Rather than engaging in a productive democratic debate about the role of the courts or the merits of a court’s legal reasoning, Trump personally attacks judges who rule against him, calling them out by name and accusing them of being biased and unfair. He assails judges who have found his actions to be unlawful, condemning them as “so-called” and “unelected” judges, and questioning whether they are entitled to review the constitutionality of his conduct. And he threatens judges, claiming the courts will be to blame for future crimes and terrorist attacks if they rule against his policies.

These verbal assaults are deeply concerning because they seek to delegitimize and intimidate the judges who are charged with determining whether the President’s actions are lawful. Even more troubling, they cast doubt on the courts’ authority to fulfill its core duty: to say what the law is, and to ensure that no one, including the President, stands above the law.

Over time, the President’s assaults on the judiciary have escalated from derogatory tweets and remarks to concrete action. The President’s pardon of former Arizona sheriff Joe Arpaio in the midst of Arpaio’s judicial contempt proceedings is a stunning rebuke to the legitimacy of the courts. By absolving Arpaio for flouting a federal court order, Trump showed his willingness to overrule judges’ rulings – and to sabotage their power to enforce them.

Each of Trump’s attacks on the judiciary is troubling. But they are considerably more alarming when viewed in context – as part of a pattern of undermining the bulwark of our constitutional democracy, and quite possibly as the precursor to outright defiance.

The efforts of authoritarian leaders abroad to undermine the courts help explain the grave threat to democracy posed by Trump’s assaults on the judiciary. Around the world, when democracies have deteriorated into authoritarian states, there is a common pattern: sustained attacks on the judiciary lead to diminished independence of the courts, which in turn leads to the erosion of democracy. Authoritarian leaders recognize the independent judiciary as a threat because it restrains their ability to abuse their power. So they neutralize it – with rhetoric and with action. President Trump’s assaults on our courts follow this international authoritarian playbook.

All Americans need to understand Trump’s comments and actions in context and realize that our nation could be one tweet away from a constitutional crisis. We need to recognize Trump’s attacks on the courts for what they are – an effort to neutralize one of the key constitutional institutions that the Founders entrusted to protect our republic. Then we can come together to make clear that these attacks are unacceptable and that ignoring a court order would cross a bright red line.¹

¹ Protect Democracy would like to thank Dan Fromkin for his important contributions to this white paper.

II. An Independent Judiciary is a Hallmark of American Constitutional Democracy

The independence of the judiciary is a cornerstone of our democracy, with roots that trace back to English Common Law. With the Act of Settlement of 1701, England made its first step toward the notion that the judiciary need not be controlled by the government. The Act stripped the monarchy of its former “unbridled power to punish judges who refused to accede to its wishes or approve the legality of its every action,” [establishing](#) the rule that royal judges should serve during good behavior, and not at the King’s pleasure. The Act, however, did not apply to the American colonies, (a legal reality that John Adams frequently [lamented](#)), and consequently, colonial judges were considered agents of the King.

The Founders recognized the importance of judicial independence as they prepared to break with England. King George III would not allow courts of justice to be established, and colonial judges were paid at the King’s discretion, thereby limiting their impartiality. Among the grievances enumerated in the [Declaration of Independence](#) were charges that the King had “obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers,” and “made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries.”

John Adams [called](#) the lack of judicial independence in the colonies a “horrid fragment of the feudal despotism” and questioned why King George’s declaration “that the independency and uprightness of the Judges ... was essential to the impartial administration of justice” did not apply to the colonies. After the war, Alexander Hamilton [wrote](#) that there was “no motive which induced me to put my life at hazard through our revolutionary war” more than the “defence of the independence of the judiciary.”

As ratification of the Constitution was being debated, the authors of The Federalist Papers fiercely advocated the need for a federal judiciary to be independent from the executive and legislative branches of government. James Madison [wrote](#) that this would allow judicial decisions to “be impartially made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality.”

Hamilton [recognized](#) that with this independence came potential threats. “[F]rom the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced

by its co-ordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office,” he wrote.

As a result, [Article III of the Constitution](#) provides three concrete guarantees of independence to the courts: the entire judicial power of the federal government is vested in the judicial branch; judges have life tenure during good behavior; and judicial salaries shall not be diminished.

Each feature exists to insulate the judiciary from political influence and maintain the courts’ independence from elected officials.

III. Trump's Anti-Judicial Rhetoric Undermines the Legitimacy and Independence of the Courts and Damages Our Democracy

In his comments and tweets – starting during his presidential campaign, and only accelerating during his presidency – Trump has attacked federal judges personally and institutionally in ways that no president has ever even approached before. He says he knows he's not supposed to criticize the courts – “I would never want to do that,” [he says](#) – then he does. We've compiled this [tracker](#) outlining Trump's longstanding assault on the courts.

It reveals the frequency with which Trump personally ridicules judges who defy him. He calls them out by name, claims they are unfair, and declares that they are biased because of their ethnic backgrounds.

He demeans judges who rule against him and questions their authority to review executive actions. He labels adverse judicial opinions as “ridiculous” and “disgraceful.”

He threatens judges who limit his power by saying they'll be to blame in the case of a terrorist attack. He mocks the federal court system as inept.

A. Personal Attacks

Trump's readiness to attack federal judges on account of their personal backgrounds first came to widespread public attention in February 2016, when he unleashed a series of attacks on Judge Gonzalo Curiel, who was presiding over two civil fraud lawsuits against the defunct Trump University in the U.S. District Court in San Diego.

At a political rally in Arkansas, [Trump complained](#): “Because it was me, and because there's a hostility toward me by the judge – tremendous hostility, beyond belief – I believe he happens to be Spanish, which is fine. He's Hispanic, which is fine. And we haven't asked for a recusal, which we may do. But we have a judge who's very hostile.”

He later [said](#): “I’ve been treated very unfairly by this judge. Now, this judge is of Mexican heritage, I’m building a wall!” He elaborated: “He’s a member of a society where – you know – very pro-Mexico and that’s fine, it’s all fine, but I think – I think – he should recuse himself.”

Curiel was born in Indiana to Mexican parents. Visiting Curiel’s home town of San Diego in May, Trump [called him](#) “a hater of Donald Trump” and called for Curiel to be investigated: “This court system, the judges in this court system, federal court. They ought to look into Judge Curiel because what Judge Curiel is doing is a total disgrace.”

Trump [later said](#) Curiel had “an absolute conflict” in presiding over the litigation given that he was “of Mexican heritage” and a member of the San Diego La Raza Lawyers Association. According to [its website](#), the association’s “purpose is to advance the cause of equality, empowerment and justice for Latino attorneys and the Latino community in San Diego County through service and advocacy.”

Facing public outcry and accusations of racism, Trump ordered his top supporters to challenge Curiel's credibility and accuse reporters of being the true racists, Bloomberg [reported](#).

The campaign released a long [statement](#) in June under Trump’s name saying he hadn’t intended his comments as an attack against all Mexicans, but that, “[d]ue to what I believe are unfair and mistaken rulings in this case and the Judge’s reported associations with certain professional organizations, questions were raised regarding the Obama appointed Judge’s impartiality. It is a fair question. I hope it is not the case.”

Trump's vitriolic attacks on Curiel spoke volumes about Trump’s temperament and bias: Instead of arguing the facts, he lashed out at Judge Curiel in shockingly personal and racial terms, calling him a “hater” and a “disgrace” and suggesting that he was incapable of rendering a fair judgment simply because of the color of his skin or the national origin of his parents. Arguing that adverse court decisions reflect bias merely because of a judge’s heritage is a direct and stark attack on the judicial role.

B. Accusations of Illegitimacy

Trump not only personally attacks judges who defy him – he goes so far as to assert that they are fundamentally illegitimate.

When George W. Bush appointee James Robart in Seattle blocked enforcement of Trump’s travel ban aimed at predominantly Muslim countries, Trump lashed out [on Twitter](#): “The opinion

of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned!”

There is no such thing, of course, as a “so-called” federal judge. And the suggestion that federal judges would somehow be more legitimate if they were elected flies in the face of the Constitution, which insists that federal judges be appointed for life, precisely so they can maintain their independence from the other branches of government.

Even worse, Trump and some of his top aides have repeatedly expressed the view that federal judges shouldn’t – or don’t – have the right to block members of the Trump administration from doing what they think is necessary.

About a week after the Robart injunction, Trump senior adviser Stephen Miller [told Fox News](#): “An unelected judge does not have the right to remake the immigration laws and policies for the entire United States of America.”

Trump then sent Miller out to do all the Sunday morning news shows, where he repeatedly [expressed the view](#) that there is “no such thing as judicial supremacy” and that the judges enjoining the ban “[took] power for themselves that belongs squarely in the hands of the president of the United States.”

He [told Fox News](#): “The president’s powers here are beyond question.”

“The end result of this, though, is that our opponents, the media and the whole world will soon see as we begin to take further actions, that the powers of the president to protect our country are very substantial and will not be questioned,” he [explained on CBS](#).

Trump then [tweeted](#): “Congratulations Stephen Miller- on representing me this morning on the various Sunday morning shows. Great job!”

Similarly, in April, after San Francisco District Court Judge William H. Orrick blocked Trump from taking away funds from cities that offer sanctuary from some immigration enforcement, a furious official [White House statement](#) repeatedly questioned Orrick’s authority to defy the president.

“Today, the rule of law suffered another blow, as an unelected judge unilaterally rewrote immigration policy for our Nation,” the statement said. “Once again, a single district judge – this time in San Francisco – has ignored Federal immigration law to set a new immigration policy for the entire country.”

“This case is yet one more example of egregious overreach by a single, unelected district judge,” the statement continued, before concluding: “Today’s ruling undermines faith in our legal system....”

Similarly, about a month after Judge Derrick Watson of Hawaii blocked the second travel ban, Attorney General Jeff Sessions said in an [interview](#) on talk radio: “I really am amazed that a judge sitting on an island in the Pacific can issue an order that stops the president of the United States from what appears to be clearly his statutory and constitutional power.”

Sessions later [told](#) senators that “judges need to be careful that they’re not setting policy in using their power to block the president’s ability to protect America.”

Trump’s supporters are often said to take him “seriously but not literally.” On this point, his message to those supporters is clear: Judges who defy him should not be entitled to the power that the U.S. Constitution so explicitly grants them.

The Trump administration’s critiques of the courts’ authority to judge the constitutionality of the Administration’s immigration policies are all the more dangerous in light of recent revelations that the Trump administration appears to be trying to [cover up](#) evidence that it violated court orders related to the travel ban. At the request of Congress, the Department of Homeland Security’s Office of Inspector General initiated a [review](#) of the Administration’s implementation of the travel ban and drafted a lengthy report which found, among other things, that U.S. Customs and Border Protection took actions that violated two separate court orders. The Trump administration is refusing to disclose the report to Congress and the American people, thereby preventing any meaningful review of the extent to which the Administration may have violated court orders, and quashing its own internal checks and balances.

C. Intimidation and Incitement

Trump doesn’t just cast aspersions on judges and their right to review his actions, he frequently claims that the courts’ adherence to constitutional mandates is itself making the country less safe.

After calling him a “so-called judge,” Trump began threatening Judge Robart with public censure. In [one tweet](#), Trump wrote: “Just cannot believe a judge would put our country in such peril. If something happens blame him and court system. People pouring in. Bad!” In [another](#): “The judge opens up our country to potential terrorists and others that do not have our best interests at heart. Bad people are very happy!”

He later [tweeted](#): “Our legal system is broken! ‘77% of refugees allowed into U.S. since travel reprieve hail from seven suspect countries.’ (WT) SO DANGEROUS!”

And he [called](#) the ruling “unsafe” juxtaposing the courts with his Administration, which, “is working night and day to keep you safe....”

Discussing the oral arguments about the travel ban before the 9th Circuit Court of Appeals, Trump told a [police chief convention](#) that the judiciary is tying their hands. “I listened to a bunch of stuff last night on television that was disgraceful. It was disgraceful ... they’re taking away our weapons one by one, that’s what they’re doing,” he said.

“And we have to give you the weapons that you need. And this is a weapon that you need. And they’re trying to take it away from you, maybe because of politics or maybe because of political views. We can’t let that happen.”

In response to the filing by U.S. Attorneys of [federal charges](#) against the driver in the Manhattan truck attack that killed eight people on Halloween night, [Trump said](#) the U.S. has to “come up with punishment that’s far quicker and far greater than the punishment these animals are getting right now. They’ll go through court for years. And at the end, they’ll be – who knows what happens.”

He continued: “We need quick justice and we need strong justice – much quicker and much stronger than we have right now. Because what we have right now is a joke and it’s a laughingstock. And no wonder so much of this stuff takes place.”

Trump’s repeated admonitions that the judicial process is itself putting the country in peril is a significant attack on the legitimacy and integrity of the courts.

IV: Trump's Pardoning of Sheriff Joe Arpaio Escalated Trump's Attack on the Judiciary from Words to Actions

The August 25, 2017, [presidential pardon](#) of former Arizona sheriff Joe Arpaio marked a major escalation in Trump's attacks on the judiciary. His words had become action.

Trump's pardon essentially erased a federal court ruling he didn't like, while at the same time undermining an essential power of the judiciary: to hold people who flout its orders in contempt.

Arpaio, who has been widely criticized for his [lawless approach](#) to law enforcement, had been sued by Latino residents in 2007. The plaintiffs said his deputies racially profiled Latinos and detained them, without suspicion of any crime, while checking their immigration status. After four years of legal wrangling, U.S. District Judge G. Murray Snow ordered Arpaio to stop detaining anyone not suspected of a state or federal crime.

Over the next five years Arpaio openly flouted the ruling, leading Judge G. Murray Snow to [rule](#) in 2016 that Arpaio had “engaged in multiple acts of misconduct, dishonesty, and bad faith,” “made multiple intentional misstatements of fact while under oath,” and “demonstrated a persistent disregard for the orders of this Court.”

Snow then referred Arpaio and three of his aides to the U.S. Attorney's Office, requesting that they be prosecuted for criminal contempt of court. In [a July ruling](#) that quoted Arpaio's own words more than 20 times, U.S. District Judge Susan Bolton found him guilty.

The Arpaio pardon was a presidential endorsement of unconstitutional actions, empowering people in law enforcement to violate certain constitutional rights with less fear of negative repercussions.

But beyond that, it was an assault on the rule of law. Trump was basically refusing to accept the federal judiciary as having the last word on what is constitutional.

"[W]as Sheriff Joe convicted for doing his job?" Trump asked at a [political rally](#) three days before he issued the pardon. This is a dangerous view of the role of public officials – it is in fact their job to respect the Constitution and separation of powers. It is in their oath.

Pardoning Arpaio for repeatedly and unrepentantly refusing to obey the court's order strikes at the heart of integrity of the judiciary. The Supreme Court has long acknowledged how crucial the power of contempt is to the judiciary. In [Young v. United States ex rel. Vuitton et Fils](#) in 1987, the Supreme Court majority explained that "The ability to punish disobedience to judicial orders is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches."

The Court cited several earlier rulings, including the 1911 [Gompers v. Bucks Stove & Range Co.](#) decision, where the justices wrote that without the power to punish for contempt, the federal courts "are mere boards of arbitration whose judgments and decrees would be only advisory."

The pardon also flouts the Constitution's separation of powers.

As Protect Democracy explained in an [amicus brief](#) we filed in the proceedings against Arpaio, Article II of the Constitution grants the president the power to grant pardons "for Offenses against the United States."

But the criminal contempt order against Arpaio stemmed from a civil suit brought by Latino residents and the criminal contempt finding was "aimed at vindicating the power of the courts to protect private litigants – not just a public interest of the United States."

"The Arpaio Pardon seeks to prevent this Court from taking the steps necessary to vindicate the constitutional rights of private litigants." In doing so, Trump overstepped into Article III territory.

By publicly rewarding Arpaio for flouting the court order, Trump moved beyond verbal attacks – he took action to to weaken a key authority of the judicial branch.²

² Protect Democracy has joined with Free Speech for People; the Coalition to Preserve, Protect, and Defend; and the Roderick and Solange MacArthur Justice Center in asking the Ninth Circuit to appoint a private attorney under Federal Rule of Criminal Procedure 42 to perform the function the Department of Justice is declining to by continuing to prosecute the validity of Arpaio's conviction and the unconstitutionality of the President's pardon.

V. Trump's Judicial Assaults Are Corrosive to Our Democracy and Echo Those Occurring in Other Countries Experiencing the Rise of Authoritarianism

Trump's attacks on the judiciary are so dangerous because they breach a hallmark of U.S. democracy and are reminiscent of troubling patterns we've seen from authoritarians abroad. Would-be strongmen recognize that the devolution from a democratic state into an authoritarian one simply cannot take place as long as there is an independent judiciary that protects the rights of the people regardless of political pressure.

As a result, undermining the independence of the judiciary has become an essential part of the script authoritarian rulers follow as they consolidate their power.

It has happened time and again, and although it takes different forms in each context, history is clear that when the executive unleashes a campaign of rhetorical assaults on the courts and begins blaming the judiciary for society's problems, it's an alarm that must be heeded. When the alarm has gone unheeded, authoritarians have been successful in aggrandizing their power and undermining the courts' ability to act as a constitutional guardrail by, among other things, purging the courts and appointing loyalist judges³, limiting the courts' jurisdiction, and refusing to abide by court orders.

There are cautionary tales from all over: wherever elements of democracy have taken hold and then receded. Just recently, strongmen in Turkey, Hungary, and Poland have taken their countries in authoritarian directions – in illuminating ways. We've mapped these leaders' campaigns against the courts in the Appendix.

³ Although not the focus of this paper, the judicial nomination process is important to monitor, especially in light of the Administration's [decision](#) to bypass the ABA process; reports about President Trump's demands for "[loyalty](#)" from his nominees; and proposals for a [court packing plan](#).

In Turkey, President Recep Tayyip Erdoğan's moves to delegitimize and defang the judiciary [dramatically accelerated](#) after he and his inner circle were implicated in a [massive embezzlement scheme](#).

Erdoğan responded by declaring a national security threat from a “[parallel state](#)” attempting to topple the elected government from within. And he specifically accused the Gülen movement, a religious-based organization formerly allied with the ruling party, of infiltrating the judiciary and other segments of civil society. After alleging that the courts engaged in a “[judicial coup](#),” he took swift steps to transfer, outright dismiss, and even detain police officers, prosecutors, and judges. Erdoğan has made no secret of his desire to purge the courts, [declaring that](#) “[f]or a great Turkey, for a new Turkey, we must cleanse all our institutions of cancer cells, starting with our justice system.”

Then, after a failed military coup in July 2016, Erdoğan's government placed at least 2,200 judges and prosecutors in [pretrial detention](#) on suspicion that they were members of a terrorist organization or were involved in the coup attempt. Over one-fifth of Turkey's judiciary has been removed.

While purging the courts of judges who might dissent from the ruling party's tactics, Erdoğan has simultaneously been [packing](#) the court with party loyalists. As a result, the judicial system has now become one of Erdoğan's most crucial tools when it comes to [limiting free speech](#) and dissent, including the imprisonment of dozens of journalists and the sealing of their court records.

In an April 2017 referendum, Erdoğan won approval for constitutional amendments that further [consolidated his power](#), allowed him to rule for two more terms, and gave him the ability to handpick members of the Constitutional Court.

Trump was the first Western leader to [congratulate him](#).

In Hungary, Prime Minister Viktor Orbán has persistently denounced and then refused to follow court orders against the government. Orbán and his ruling Fidesz party have called court decisions “[scandalous](#),” “[cowardly](#),” and “[irresponsible](#).” They have said that they will [refuse to accept](#) certain decisions or that such decisions are illegitimate because the judge was personally [biased](#) against Fidesz. And they have claimed that rulings checking the government raise “[uncertainties](#)” about the courts.

Orbán has been true to his word, openly [flouting](#) a court decision rejecting the government's institution of a judicial retirement age, and effectively reversing others key rulings by constitutional fiat. Fidesz came into power with supermajority control in Parliament, giving them the ability to pass a whole new constitution. Fidesz used that power to [reinstate](#)

government policies found unconstitutional and [prevent](#) the courts from reviewing the constitutionality of these or any other new laws.

In July 2016, Orbán endorsed Trump's campaign, making him the [first leader](#) of an EU or NATO country to do so.

The ruling party in Poland, which came to power in 2015, five years after Orbán's party came to power in Hungary, is "following the same template," according to Stanford international studies professor [Anna Grzymala-Busse](#): "First, target the highest courts and the judiciary, then restrict the independence of the media and civil society, and finally transform the constitutional framework and electoral laws in ways that enshrine their hold on power."

Polish ruling party leader Jarosław Kaczyński [called the courts](#) "the bastion of everything in Poland that is bad" because "all our actions could be questioned for whatever reason."

"If we are to have a democratic state of law, no state authority, including the constitutional tribunal, can disregard legislation," [he said](#).

At the start of his term, PiS-aligned President Duda [refused](#) to swear in judges appointed to the constitutional tribunal by the previous government and instead appointed new PiS-selected judges. He then passed a suite of [legislation](#) to limit the court's power.

The biggest push to undermine Poland's judiciary began just two weeks after Trump visited Warsaw in early July 2017 and [praised](#) Poland for its ardent defense of Western values and democratic ideals.

Polish lawmakers passed a sweeping judicial reform bill that significantly curbs judicial independence, including [forcing](#) the current supreme court justices to resign, [increasing](#) the ruling party's role in the selection of judges, and [granting](#) the justice minister the power to fire judges.

Mass street protests broke out in opposition to these new laws and dominated the political discourse for several days, with the [New York Times](#) noting that "Poles, especially of the younger generation, [were] concerned about safeguarding the hard-won democratic progress the country has made since communism collapsed more than 25 years ago."

The EU also strongly [condemned](#) the measures, decrying that "[e]ach individual law, if adopted, would seriously erode the independence of the Polish judiciary. Collectively, they would abolish any remaining judicial independence and put the judiciary under full political control of the government."

In the face of this intense pressure, President Duda [vetoed](#) two of the most controversial bills dealing with the resignation of the existing Supreme Court Judges and ruling party's authority to appoint new judges.

He later drafted his [own version of the legislation](#) that ostensibly responds to the domestic and international condemnation of Parliament's original bill, but in reality, presents many of the same serious threats to judicial independence by forcing many, but not all, of the existing Supreme Court Judges to retire and altering the judicial nominations process to grant the ruling party great influence over court appointments. It would also create [two new chambers](#) within the Supreme Court – a Disciplinary Chamber to investigate and punish judges it suspects to be corrupt and an Extraordinary Chamber to reopen and conduct a system of [“extraordinary appeal”](#) of final judgments at the justice minister's discretion.

Meanwhile, the justice minister has been wielding his [newly granted power](#) under the provision of the original bill that Duda did not veto to “remove[] more than two dozen senior judges, including the head of a regional court that was deliberating a case involving his family.”

These examples from abroad show us that subverting an independent judiciary is a crucial step in the process of turning a democracy into an “illiberal state.” And once the judiciary has been weakened and no longer serves as a check on those in power, the road to political capture of the entire apparatus of government becomes much more clear.

VI. Conclusion

The challenges faced by struggling democracies around the world carry urgent warnings for America. They confirm a fact recognized by the Framers of our own constitutional structure: an independent judiciary is a bulwark of democracy. Against this backdrop, President Trump's persistent attacks on the legitimacy of the federal judiciary are especially alarming.

Might he reject the court's authority if a decision cuts too close? Given his overt hostility to judges who thwart him, his willingness to blame the judiciary for doing its job, the enthusiasm with which he pardoned a strongman called out for violating the Constitution, and the casualness with which he violates norms that have been taken for granted during past administrations, there is reason to worry that he might.

There are several checks and balances on the President that could be mobilized to prepare for – and ideally avoid – a constitutional clash between President Trump and the judiciary. Now is the time to think strategically about how members of the media, the public and civil society, the legal profession, the business community, Congress, and the President's own cabinet and Administration can work to prevent this type of profound attack on our constitutional structure; or in the immediate aftermath of such a move, to pressure the President to reverse course quickly.

Appendix: International Comparison

Attacking the Courts: Lessons from Overseas

Authoritarian leaders in Turkey, Hungary, and Poland have followed a similar pattern of verbally attacking the legitimacy of the courts when the judiciary takes steps to curb executive actions. These strongmen have then acted upon this dangerous anti-judicial rhetoric by purging the courts, increasing the ruling party's power to appoint loyalist judges, diminishing the courts' jurisdiction, and refusing to abide by adverse court orders. President Trump's attacks on the courts are alarming not only because they delegitimize the judiciary, but also because they resemble the scripts these authoritarian leaders have employed to pave the way for the demise of the courts and the decline of democracy in their regimes.



Statements That Subvert the Courts

- **IN THE WAKE OF** a 2013 corruption scandal, Turkish President Recep Tayyip Erdoğan accused the courts of engaging in a “judicial coup” and seeking to develop a “parallel state” to overthrow his regime.
- **ERDOĞAN** mused that he would like to be able to supervise the judges:

“Now I ask: who will judge the [Supreme Council of Judges and Prosecutors]?...I

Actions That Undermine the Judiciary

REASSIGNING, DISMISSING, AND ARRESTING JUDGES

- **FOLLOWING DECEMBER 2013** corruption allegations, Erdoğan's ruling AKP party passed laws giving the justice minister greater authority over judicial operations, including appointing, promoting, transferring, disciplining, and dismissing judges.
- **SUBSEQUENTLY**, 45,000 police officers and 2,500 judges and prosecutors were reassigned to

Statements That Subvert the Courts

would like to judge them, if I would have adequate authority.”

- **ERDOĞAN OUTRIGHT defied** a 2014 ruling finding the construction of the presidential palace to be illegal:

“Let them tear it down if they can. They ordered suspension, yet they can’t stop this building. I’ll be opening it; I’ll be moving in and using it.”

- **ERDOĞAN denounced** a 2014 court order blocking legislation expanding the justice minister’s power over the courts, claiming that the ruling was political:

“If someone wants to be involved in politics, he should leave his chamber and put the robe away and start to do politics.”

- **SIMILARLY, JUSTICE Minister Bozdag said** he hoped that courts

“can be kept out of politics.”

- **ERDOĞAN dismissed** the courts as biased and compared them to a disease infecting the country:

“judges and prosecutors, who are at the disposal of certain powers instead of law and conscience, cannot maintain justice... For a great Turkey, for a new Turkey, we must cleanse all our institutions of cancer cells, starting with our justice system.”

- **ERDOĞAN cast doubt** on the court’s authority following its determination that the detention of two journalists was

Actions That Undermine the Judiciary

new jobs.

- **ALTHOUGH THE COURT LATER annulled** these legal changes, the government had already removed or reassigned a significant number of judges, and installed over 100 AKP-affiliated judges.

- **DESPITE THIS COURT RULING**, the trend of reassigning and removing judges continued for years. In 2016, the government issued a decree reassigning 3,750 judges and prosecutors, and promoting judges ruling in the government’s favor.

- **AFTER A FAILED 2016 COUP**, an additional 2,745 judges and prosecutors were suspended within hours of the failed coup.

- **AT LEAST 2,200 JUDGES** and prosecutors were placed in pretrial detention on suspicion that they were members of a terrorist organization, and 3,400 judges were permanently dismissed for the same reason.

- **IN ALL**, over one-fifth of Turkey’s judiciary has been removed.

LIMITING THE COURT’S AUTHORITY

- **FOLLOWING THE 2016 COUP ATTEMPT**, the government declared a state of emergency that remains ongoing.

- **THIS EMERGENCY** declaration grants the executive great power and prevents the courts from reviewing the president’s actions.

ENHANCING ERDOĞAN’S POWER TO SELECT JUDGES

- A 2017 law both reduced the number of judges and consolidated Erdoğan’s power to select judges. Erdoğan’s was granted greater power to appoint

Statements That Subvert the Courts

unconstitutional:

“I do not abide by the decision or respect it... The media should not have unlimited freedom.”

• **IN THAT SPEECH**, broadcast on live television, he also **warned** the court not to

“again attempt such ways which will open its existence and legitimacy up for debate[.]”

Actions That Undermine the Judiciary

judges and more influence over parliament, the other source of judicial appointments.



Hungary

Statements That Subvert the Courts

- **HUNGARIAN PRIME MINISTER VIKTOR ORBÁN** openly defied a 2012 court decision rejecting the government’s institution of a judicial retirement age, publicly stating that “the system remains.”

- **ORBÁN denounced** a 2013 decision overturning the government’s state-imposed natural gas price cuts:

“On behalf of the government I must say that the decision of the court is scandalous.”

He also said he would not accept the decision and would instead submit a proposal for even larger price cuts to parliament.

- **NUMEROUS LEADERS** within Orbán’s Fidesz party have condemned a 2013 ruling on foreign currency debt as “cowardly,” “irresponsible,” and raising “uncertainties” about the courts.

- **IN A 2014 speech** laying the foundation for building “an illiberal state,” Orbán derisively referenced that the U.S. courts could rule that the U.S. President had exceeded his power:

“Imagine this in Hungary, if Parliament were to sue the prime minister for encroaching on his power, and the court even sentenced him! For how much time can I stay in power in a situation like this?”

Actions That Undermine the Judiciary

FORCING JUDGES TO RETIRE

- **IN 2011, FIDESZ PASSED** a constitutional amendment instituting a judicial retirement age that forced nearly 300 judges into early retirement.

- **ALTHOUGH LATER annulled**, many judges were still removed from the courts prior to the ruling. (Notably, all of the judges appointed by Orbán dissented from the holding).

PACKING THE COURTS WITH POLITICAL ALLIES

- **ANTICIPATING THE NEED** to fill the vacancies caused by forcing hundreds of judges to retire, Fidesz passed a 2011 law establishing a National Judicial Office (NJO), entrusting the power to appoint, transfer, and replace judges to a single individual closely aligned with Orbán.

- **FIDESZ ALSO MADE** a slew of legislative changes to appointment rules for the constitutional court to place their political allies on the court, including:

- Allowing the parliamentary majority to appoint new members without input from the minority
- Increasing the number of judges on the court from 11 to 15
- Increasing the newly appointed judges’ term from 9 to 12 years, and
- Eliminating the age limit for the court

Due to these changes, the Fidesz government unilaterally appointed all 11 judges put on the Constitutional Court between 2010 and 2014, and

Statements That Subvert the Courts

- **FIDESZ MINISTER JÁNOS LÁZÁR** ridiculed a 2017 ruling requiring the government to disclose information about the use of public funds as resulting from the judge's personal animus against the government.

- **FIDESZ MP GYULA BUDAI** criticized the judiciary as a whole saying,

"They're all communists."

Actions That Undermine the Judiciary

rulings in recent years have tended to favor the government.

LIMITING THE COURT'S AUTHORITY

- **THE GOVERNMENT AMENDED** the constitution to curtail the court's jurisdiction over certain budgetary and taxation matters.

- **IT ALSO** restricted the ways in which people can access the court.

- **IT LATER** prohibited the Constitutional Court from reviewing all future constitutional amendments and nullified legal decisions made prior to the newly enacted constitution.

UPDATING THE CONSTITUTION TO OVERRULE KEY COURT RULINGS

- **THE GOVERNMENT** has also added constitutional provisions regarding the criminalization of homelessness, the definition of family, and the registration process for churches, reversing previous court decisions on these matters.



Poland

Statements That Subvert the Courts

- **SHORTLY AFTER COMING** to power in 2015, Polish ruling party leader Jarosław Kaczyński attacked the courts as

“the bastion of everything in Poland that is bad” because “all our actions could be questioned for whatever reason.”

He elaborated,

“If we are to have a democratic state of law, no state authority, including the constitutional tribunal, can disregard legislation.”

- **PIS LEADERS** undermined the court’s review of PiS laws seeking to restructure the court and limit the court’s ability to review legislation, refusing to participate in the court hearing, and calling it a meeting over

“espresso and cakes.”

- **THE PIS JUSTICE MINISTER** announced that the decision finding the laws unconstitutional

“doesn’t have any legal force and is not legally binding.”

- **ANOTHER** PiS minister said after the verdict that the court’s president

“increasingly reminds me of an Iranian ayatollah.”

Actions That Undermine the Judiciary

INTERFERING WITH JUDICIAL APPOINTMENTS

- **AT THE START** of his 2015 term, PiS-aligned president Andrzej Duda, refused to swear in judges appointed to the constitutional tribunal by the previous government and instead appointed new PiS selected judges.

- **WHEN THE PRESIDENT** of the constitutional tribunal’s term expired in 2016, PiS was criticized for procedural irregularities surrounding its appointment of a new PiS-affiliated judge for this prominent post.

LIMITING THE COURT’S REVIEW

- **PIS PARLIAMENT** passed several pieces of legislation regarding the role and functioning of the constitutional tribunal that diminished its ability to review cases, including:

- Ending the court’s ability to hear more significant cases first and requiring the court to hear cases in chronological order
- Requiring a quorum of 13 of the tribunal’s 15 judges to hear cases
- Changing the definition of a majority needed for a verdict from one-half to two-thirds.

- **PIS THEN PASSED** additional legislation:

- Instituting an age limit that would force

Statements That Subvert the Courts

Actions That Undermine the Judiciary

all the existing Supreme Court judges to resign

- Granting the National Council for the Judiciary the power to appoint judges and ensuring that this Council is staffed with PiS appointees.
- Giving the justice minister the power to fire judges

• **THE STATUS** of these latest changes is uncertain because Duda vetoed the portions dealing with the resignation of the existing Supreme Court Judges and ruling party's unilateral authority to appoint new judges via the National Council.

• **HE LATER DRAFTED** his own version of the legislation that would:

- Impose a retirement age that would cause about 40% of the Supreme Court judges to resign
- Increase lawmakers' role in selecting judicial nominees
- Create a Disciplinary Chamber within the Supreme Court to sanction judges for suspected corruption
- Permit "extraordinary appeals" of final judgments at the discretion of the justice minister

REFUSING TO ABIDE BY COURT ORDERS

• **THE PIS** controlled printing press has refused to print several constitutional court rulings preventing them from taking legal effect