THE BAR'S ROLE IN RESPONDING TO ATTACKS ON THE COURT

BENJAMIN M. FLOWERS*

Recent stories portraying the Court as a corrupt institution are false. More concerning, they threaten our constitutional system. In this little essay, I hope to persuade more lawyers to say so.

We are fallen creatures. Ever since Eve grabbed hold of that fruit, people have exhibited an unfortunate tendency to exceed their authority. Americans have long understood this. That is why their experiment with self-governance has flourished. The Founders, rather than creating a government for angels, found a way to use the all-too-human lust for power. I speak of checks and balances. Our Constitution gives every branch the tools it needs to stop the other branches' overreach. Human nature supplies the motive: the same lust for power that drives officials to exceed their authority will drive them to protect their own authority against abuses and encroachments by the others.

The separation of powers, not the Bill of Rights, is the guarantor of Americans' freedom. Justice Scalia was fond of noting that oppressive regimes throughout the world boast extravagant bills of rights.[1] (Go look at the former Soviet Union's, he would say.)[2] Without checks and balances, lists of rights, however grand are nothing more than words on paper. Unenforced limits on government power are worthless, and limits will never be enforced if the legislative, executive, and judicial functions are intermingled.

Recent attacks on the Supreme Court jeopardize this system by weakening the judiciary's ability to check overreach by Congress and the President. If that pillar of our constitutional system falls, we will lose, probably forever, a tool vital to protecting our rights.

By way of background, "judicial review" is the means by which the courts prevent overreach by the other branches. It is the byproduct of adjudication in a constitutional system. Courts must apply the law in deciding cases. The Constitution, our most fundamental law, trumps contrary legislation. So, when the Constitution conflicts with ordinary legislation, the Constitution provides the law courts must apply. To say that a court "struck down" a law is simply to say that the court declined to give the law effect in deciding the case before it.

This is a rather modest check, because the courts depend on the other branches to *enforce* their judgments. Legend has it that, upon learning of a Supreme Court ruling he disliked, President Andrew Jackson responded: "[Chief Justice] John Marshall has made his decision; now let him

* Solicitor General of Ohio. All views expressed in this piece are the author's alone.

[1] *See* Considering the Role of Judges Under the Constitution of the United States: Hearing before the S. Comm. on the Judiciary, 112th Cong. 6 (2011) (statement of Antonin Scalia, Assoc. Just. of the U.S. Sup. Ct.).

[2] *See* ANTONIN SCALIA, THE ESSENTIAL SCALIA: ON THE CONSTITUTION, THE COURTS, AND THE RULE OF LAW, 36–37 (2020, eds. Sutton & Whelan).

enforce it!" Jackson probably never said that. But the story illustrates my point: the judiciary's check works only if the other branches adhere to and enforce its rulings. And they are not likely to do so unless the public is willing to insist on acquiescence.

A small (but growing and vocal) minority is targeting the public's willingness to insist on acquiescence. Why? Because the Court is using judicial review to enforce the Constitution as written. For much of the past century, the Supreme Court looked skeptically at the Constitution's written limits on government power. For decades after the New Deal, the Court embraced very broad readings of the limited powers our constitution gives to Congress—readings that gave Congress much broader authority than it had previously been understood to possess. In the same era, the Court either narrowly construed, or declined to enforce, rights enumerated in the Constitution. (Prime examples include the right to keep and bear arms, and the criminal defendant's right to confront the witnesses against him.) The Court's jurisprudence diminished these enumerated rights at the same time the Court was vigorously enforcing *unenumerated* rights—in other words, rights not found in the Constitution. The right to abortion, which the Court announced in *Roe v. Wade*, is the quintessential example.[3]

By and large, this approach to judicial review benefitted progressives. By ignoring constitutional limits on government power, the Court allowed the size of government to grow. By recognizing unenumerated rights such as abortion, the Court allowed progressives to achieve their policy goals without having to do the hard work of convincing Congress or state legislatures to pass a law.

Times have changed. Today, the Supreme Court is less interested in creating rights, and more interested in applying the limits on government power as they appear in the Constitution's text.

What are those who cheered the *ancien regime* to do? First, some tried intimidation. In the years and months preceding the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, which overruled *Roe v. Wade*, activists attempted to intimidate the Court. In 2020, speaking at a pro-choice rally on the Supreme Court's steps, a prominent senator cautioned Justices Gorsuch and Kavanaugh that they would "pay the price"—they would not "know what hit" them—if they voted to overrule *Roe*.[4] After the leak of the *Dobbs* opinion, the intimidation efforts reached unprecedented heights. Some activists picketed night and day outside the Justices' homes—illegally, but the Department of Justice did nothing to stop it. Others circulated information concerning the whereabouts of the Justices' minor children.[5] Legislators opposed to overruling *Roe* delayed in passing a bill to improve the Justices' security.[6] And a deranged Californian traveled to Maryland hoping to kill Justice Kavanaugh and his family.[7]

---

[3] Roe v. Wade, 410 U.S. 113 (1973).

[4] J. Edward Moreno, *Schumer warns Kavanaugh and Gorsuch they will 'pay the price'*, THE HILL (Mar. 04, 2020, 4:53 PM) https://thehill.com/homenews/senate/486007-schumer-warns-kavanaugh-and-gorsuch-they-will-pay-the-price/.

[5] Arjun Singh, *Pro-Abortion Group 'Ruth Sent Us' Suggests Targeting Amy Coney Barrett's Children*, YAHOO! NEWS (June 10, 2022) https://news.yahoo.com/pro-choice-group-ruth-sent-174411398.html.

[6] *Mitch McConnell bashed the House for not yet passing legislation bosting security for Supreme Court justices and their families*, POLITICO (June 8, 2022, 11:23 AM) https://www.politico.com/minutes/congress/06-8-2022/mcconnell-on-scotus-security/.

[7] Melissa Quinn & Scott Macfarlane, *Man arrested near Kavanaugh's home charged with attempting to murder Supreme Court justice*, CBS NEWS (June 9, 2022, 7:46 AM) https://www.cbsnews.com/news/nicholas-roske-brett-kavanaugh-attempted-murder/.

The intimidation effort failed; the Court is not composed of cowards.

At that point, some who opposed the Court's judicial philosophy took a new tack. Having failed to intimidate the Court, they set about to discredit it. The effort unfolded as a steady stream of seemingly coordinated media reports, all written to leave lay readers with the misimpression that the Supreme Court is corruptly doing the bidding of wealthy and influential benefactors. None of the stories reveals any evidence of corruption. But each omits or obscures facts that would dispel the contrary impression. ProPublica kicked things off by reporting that Justice Thomas failed to disclose travel paid for by a close friend; but its report obscures the fact that Justice Thomas had no obligation to disclose the travel (the law does not require disclosing gifts of "personal hospitality"[8]), or that the friend who paid for the travel had no business before the Court.[9] ABC News reported that Justice Barrett hosted a baby shower for a law professor whose husband signed a brief in a recent case; but the outlet failed to mention that Barrett hosted the shower over two decades ago, when she and the professor were law clerks.[10] And a recent exposé in the New York Times misleadingly suggested that Antonin Scalia Law School conducted an improper influence campaign by helping Justice Gorsuch find his DC-area home; only a very discerning reader would see that a former law clerk to Justice Gorsuch who happens to teach at the school, not the school itself, helped the Justice.[11]

The point of this smear campaign is obvious. By painting the Court as a corrupt institution, those who disagree with the Court's approach to constitutional interpretation can prime the public to accept radical "reforms." Sitting representatives and senators have publicly called on President Biden to simply ignore judgments with which they disagree. Others support legislation to pack the Court with justices whose jurisprudence better resembles that of the post-New Deal courts. There is not yet political support for these measures. But the false accusations of corruption risk changing that. After all, if the Court *really were* corrupt, these measures might seem like harsh-but-justified responses.

This effort is dangerous because these radical reforms would imperil judicial review. If one President refuses to enforce or abide by a court order limiting his power, other Presidents will have cover to do the same. And once one Congress packs the court with jurists it thinks are likely to advance its preferred policies, future Congresses will follow suit. In the end, the judiciary's power to prevent unconstitutional acts by the other branches would wither. So too would the separation of powers that has preserved Americans' freedom since the Constitution's ratification.

---

[8] 5 U.S.C. § 13104(a)(2)(A).

[9] Joshua Kaplan, Justin Elliott and Alex Mierjeski, *Clarence Thomas and the Billionaire*, PRO PUBLICA (Apr. 6, 2023) ("Crow and his firm have not had a case before the Supreme Court since Thomas joined it…"); *see also* AG, *AG Report 4.27.2023* ("CNN published a piece going back after Thomas by claiming that a company related to his friend, Harlan Crow, had business before the Supreme Court," but "Crow's company had nothing to do with the case. Instead, one of the companies that was party to the case has a parent company that Harlan Crow's family has a minority interest in") https://aghamilton29.substack.com/p/ag-report -4272023?utm_source=%2Fsearch%2Fharland%2520crow&utm_medium=reader2.

[10] John Nagy, *The Education of Amy Coney Barrett*, NOTRE DAME MAG. (Winter 2020–21) https://magazine.nd.edu/stories/the-education-of-amy-coney-barrett/; *see also* Lucien Bruggeman, *'Inside baseball': Critics say academia has 'troubling' influence with the Supreme Court*, ABC NEWS (Apr. 27, 2023, 6:59 AM) https://abcnews.go.com/US/inside-baseball-critics-academia-troubling-influence-supreme-court/story?id=98849111.

[11] David Bernstein, *Just How Bad was that New York Times Piece on Supreme Court Justices Teaching at Scalia Law*, VOLOKH CONSPIRACY (May 1, 2023, 7:19 AM) https://reason.com/volokh/2023/05/01/just-how-bad-was-that-new-york-times-piece-on-supreme-court-justices-teaching-at-scalia-law/.

Lawyers understand these dangers. At least, they should. And those who practice before the Court know the accusations of corruption are bogus. Supreme Court practitioners (in private, at least) pull no punches when criticizing the Court's decisions or a Justice's jurisprudence. Yet I have never in my life heard a Supreme Court litigator, even in moments of profound frustration or disappointment, question a Justice's personal integrity.

That is why it is so frustrating how few members of the Supreme Court bar have made a peep. These lawyers do not think the Court is corrupt and they know the danger of suggestions to the contrary, yet few have spoken out.

Perhaps some stay quiet for fear that talking politics is bad for business. But then why do they and their firms provide *pro bono* services in cases involving abortion, affirmative action, same-sex marriage, and other hot-button issues?[12]

Maybe others think Congress should adopt some ethics-related reforms to preserve, rather than restore, the Court's integrity. But if they think that, they should say so, while rejecting the baseless accusations of corruption and acknowledging the practical and legal difficulties of responding to such accusations by imposing new, heightened ethics requirements on the Justices. (Practically, rewarding this slander will only generate more of the same, further diminishing the Court's public standing. Legally, because the Supreme Court cannot be made inferior to any other court, there is no constitutional means for *enforcing* an ethics code aside from the one the Constitution provides already: impeachment.).

Finally, and most discouraging of all, some lawyers are perhaps saying nothing because they disagree with the Court's emerging jurisprudence and are willing to tolerate an attempt to discredit the Court with innuendo if that would slow or reverse the trend. They ought to know better. A functioning separation of powers—the guarantor of our freedoms—is more important than the near-term resolution of constitutional cases. That separation of powers is under attack. It is time for the bar to start acting like it.

[12] *See, e.g.*, Stephanie Russell-Kraft, *Big Law Pro Bono Takes on "Heartbeat" Abortion Restrictions*, BLOOMBERG L. (June 17, 2019), https://news.bloomberglaw.com/us-law-week/big-law-pro-bono-takes-on-heartbeat-abortion-restrictions; *see also* Obergefell v. Hodges, 576 U. S. 644, 717 n.18 (2015) (Scalia, J., dissenting).