

## Judges on Judicial Independence

Thursday, April 3, 2025

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**[00:00:03.2] Jeffrey Rosen:** Hello, friends. I'm Jeffrey Rosen, President and CEO of the National Constitution Center, and welcome to We the People. A weekly show of constitutional debate. The National Constitution Center is a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people. This week, the National Constitution Center hosted the Federal Judges Association for a conversation about judicial independence and the rule of law. It was an honor to talk with Judge J. Michelle Childs of the US Court of Appeals for the DC Circuit, Judge M. Margaret McKeown of the US Court of Appeals for the Ninth Circuit, Judge Beth Bloom of the US District Court, Southern District of Florida, and Judge Stephen R. Bough of the US District Court, Western District of Missouri. In this conversation, we explored why judicial independence matters and the importance of civic education in maintaining the rule of law. Enjoy the show.

**[00:01:00.4] Jeffrey Rosen:** Judge Childs, it's such an honor and a pleasure to welcome you to the NCC. You are an eloquent defender of judicial independence. You just gave a talk yesterday at the Robert Jackson Center about its importance. Why is it important for the FJA to talk about judicial independence, and give us a sense of what you said at the Jackson Center about judicial independence. Why is it important?

**[00:01:23.5] Judge J. Michelle Childs:** First, let me thank you all for this opportunity for the Federal Judges Association to actually be here at the National Constitution Center. We are actually holding our meeting this weekend in conjunction with the center. Thank you so much for the opportunity for the space. The Federal Judges Association was founded in the 1980s, and we were founded on issues related to threats to judicial independence, as well as to gather issues with respect to fair compensation and other threats to judicial independence. Yesterday I spoke a lot about threats to judicial independence, reminding ourselves that these threats come from the founding of our Constitution. The Constitution, in terms of the framers, had in mind separation of powers. That we are a co-equal branch of government, and we were never structured to be a dictatorship. If we look back on history, think about the time of early Britain where we have King Charles I, who basically was set up in such a way that you would not have any ruling without the consent of Parliament. Think about Hitler and the Nazi regime where judges had to swear themselves to Hitler. Think about South Africa, where you actually had to delegitimize the courts and then reconstitute those courts with respect to the Constitution.

**[00:02:49.6] Judge J. Michelle Childs:** So we are very proud in terms of the regime that the Constitution has set us up as separation of powers and we want to remain the co-equal, independent branch of the judiciary.

**[00:03:00.7] Jeffrey Rosen:** Beautifully said. Thank you so much for sharing that, and please make sure to check out the transcript of Judge Childs' eloquent speech. Judge McKeown, you've done a lot of work with international rule of law values, and you have also talked about the urgent importance for the public to support nonpartisan judicial legitimacy. Give us a sense of why it is important.

**[00:03:22.4] Judge M. Margaret McKeown:** Well, of course, it's important because always, since the foundation of the country, I think the legitimacy of the judiciary has rested on the trust of the public. And so it's so important for us to have that trust. I think we can learn a lot from the international scene. For many, many years, American judges and lawyers have been very involved in working with judges and lawyers overseas on everything from human trafficking to judicial independence, to money laundering to transnational crime. Working with countries as they've transitioned to a more transparent judiciary. I think there's some interesting history here, to kind of segue from Judge Childs' mention of the Nazis. After the fall of the Berlin Wall, there was a huge resurgence of democracy. Of course, in Eastern Europe. And American judges and lawyers were invited to work with judges there. And that really spawned a cottage industry that has continued to this day. Through the American Bar Association Rule of Law Initiative. Through organizations like Lawyers Without Borders. Through the Justice Department's international program. And that is working. So we're not exporting American values other than we are all in favor of judicial independence. There have been some changes, however. Sad to report that in the last decade, particularly the last five years, we've seen a total backsliding worldwide in terms of judicial independence.

**[00:05:00.5] Judge M. Margaret McKeown:** And we've seen this incremental erosion of democracies. We've seen the rise of authoritarianism. And a lot of this we've been able to document. There's an organization, The World Justice Project. Puts out a report every year, does a rule of law index in 142 countries and they've been able to document this slide. The countries that come out on top would probably not surprise you. Denmark, Norway, Finland. The United States is not in the top 10. We're in the top 26. Countries at the bottom also probably would not surprise you. That would be Venezuela, Afghanistan, and Cambodia. But we've seen these attacks on judiciaries worldwide, whether it's in Guatemala and firing of the judges or judges fleeing because of security concerns. Or in Turkey where they imprisoned thousands of judges and prosecutors. We've also seen some positive signs. Poland, for example, has had a resurgence and it's now on the uptick in terms of rule of law and judicial independence. So I think we have a worldwide landscape. We've worked with judges and lawyers worldwide. We can learn a lot from them. We can look to see what are the indicators when there are incursions into an independent judiciary.

**[00:06:28.0] Judge M. Margaret McKeown:** And of course, it often comes from the executive. It can also come from the executive branch. And sometimes it comes because the public has lost trust. So you ask, what can the public do? I think it's really important for the public to express what we all know. And that's this bedrock principle of separation of powers. That's how we were

founded. That's how we've continued to operate. And I think that the judiciary being an independent branch, it's just not something we say, but it's something that I think we all believe in from the foundation of the Constitution. Just sort of our sentiment of who we are and what we stand for.

**[00:07:09.4] Jeffrey Rosen:** Thank you for that crucially important international perspective and for emphasizing the importance of the separation of powers. Judge Bloom, you've eloquently said that one great threat to democracy is a lack of civic education. And there's a ray of light here. The Federal Judicial Association and the NCC are having a wonderful collaboration around civics and helping judges educate kids about the Constitution. Tell us about that amazing initiative.

**[00:07:38.0] Judge Beth Bloom:** And we're very excited. And I don't want to discount it because we do educate adults. But this program is focused on educating our youth. So there's a challenge in our country. I think we're all aware. We may not be aware specifically in terms of the statistics. But the majority of Americans, as we know, do not know what our government does and how it works. More than half of the people surveyed did not know the number of members in Congress. One in three could not name or explain the work of our three branches of government. And when it comes to our high school students, only 29% of high school teachers' primary responsibility is teaching civics. And there is a direct correlation, as we know, between civic learning programs and increased civics engagement. And that's why we created the Civics Challenge. The Civics Challenge is to increase civics engagement, the knowledge of our high school students in US history and government. And appreciation for our country's citizenship process. It has educated and inspired our students year-round. We have the program in honor of Constitution Day on September 17th and Law Day on May 1st. And what the program is, is we know that teachers are the primary guardians of democracy.

**[00:08:56.9] Judge Beth Bloom:** So through the teachers' knowledge and skill, they're able to teach this next generation of students. The Civics Challenge allows the teachers to access the resources. And the resources include the civics test. And as we know, individuals that want to become naturalized in our country go through a process where the citizens must demonstrate their knowledge and understanding of the fundamentals of history, the principles, and form of government, and we give the students the same civics test. The teacher accesses the resources and then teaches the students, and the teachers and the students become invested in the program. And then the teacher then gives the students the 100-question civics test that naturalized citizens take. And if they receive 90% or better, then the Federal Judges Association then gives them an excellent citizen certificate, and we invite them to a local naturalization ceremony in their district. Now, we know the reality and we've been able to do this for many students, but the reality is that not every judge holds a naturalization ceremony, and not every student lives close to the courthouse. So that's where our partnership with the national Constitution comes in.

**[00:10:13.2] Judge Beth Bloom:** We created a partnership where the judges are involved in teaching the students and will be involved in your scholars' exchange. And in exchange, you will be able to help us by getting the information out to the teachers about this wonderful program. A little bit about the program itself. About 300 students so far have been awarded these excellent citizen certificates from high schools throughout the country. Montana, Louisiana, New Jersey,

Pennsylvania, California, Georgia. And the civics test itself, for those of us that may not know, has three main parts. It teaches all about American government, American history, and integrated civics. Geography, symbols, and holidays. And that's what's so special about this program, is that the students take the test, but they also practice with the teacher. And then the teacher then becomes invested in teaching civics. And that's really our goal, is to reach out to as many high schools as we can, award as many excellent citizen certificates to as many high school students, and to be able to change the civics illiteracy to civics literacy in our country.

**[00:11:28.4] Jeffrey Rosen:** It's so inspiring to hear you talk about the program, and to see those judges on the scholar exchanges using National Constitution Center material to answer questions from middle and high school kids about the Constitution. And to do that uniting classrooms across the country. A marvelous initiative, a great ray of light. And of course, those naturalization ceremonies are among the most inspiring that all of us are involved with. Judge Bough, you've written and of course, held important opinions about due process and the rule of law. And you also gave some great testimony about the importance of not convicting people based on previously sentenced conduct. Why is due process so important to the rule of law, and how do judges protect it?

**[00:12:17.7] Judge Stephen R. Bough:** Thank you so much for having us here. I know this is the Constitution Center, but I'm going to take us back just a little bit further. When we look at the Declaration of Independence. Throughout that document, the founding fathers were really upset with the king, and Judge Childs hit on some of this. But they'd come into your house and take things. There'd be trials that the king's side always won. Materials would be confiscated to support the king. And our citizens were enormously upset. This was not how a process should happen. And so multiple times throughout that Declaration of Independence were complaints about, we need jurors, we need our own citizens deciding these things. We need impartial judges deciding these things. We don't need a rubber stamp for the king. That's not a judicial system. And so we saw that play out all the way into the Constitution. And due process is one of those big-picture ideas that run throughout the Constitution, predominantly in the Fifth Amendment. And it's so hard to get people to understand this could be you. These bare minimums, these are not high ideals. These are the absolute bare minimums that our country has envisioned for us.

**[00:13:39.3] Judge Stephen R. Bough:** They've envisioned that Article 3 should be in tension with Article 1 and Article 2. The judiciary should be guaranteeing those basic minimums. And that's against someone above that and one or two that's pushing against us. And so throughout our country, we have had this necessary attention that has been envisioned by our Founding Fathers. But making people understand that due process is just the rights, the process that is due you as a citizen. That you have a right to be heard, you have a right to know the complaint read against you. You have a right to hear that evidence and to cross-examine those individuals. You have a right to subpoena documents and witnesses to come to tell your other half of the story. Because none of us want to be put on a plane and dropped into a prison and never have an opportunity to be heard. None of us think that is fair. Whether it's your two kids fighting and you're telling one kid, I don't want to hear you, and listening to the other side. We all understand, at a very minimum, we have a right to be heard and to tell our side of the story.

**[00:14:51.9] Judge Stephen R. Bough:** And that's even more so on the federal side because of those bare minimums. And at least in the criminal law perspective, this is where the rubber meets the road. This is where all of our constitutional vision is set forth. That we shouldn't be taking life and liberty and property without the opportunity to be heard. And so to be able to talk about that and to be able to talk about it here is a great privilege. So thank you for having us.

**[00:15:18.8] Jeffrey Rosen:** Beautifully put. You so powerfully reminded us that defending due process was the essence of the American Revolution. King George can't take people off to be tried in England without giving them an opportunity to be heard. And that value is just as important today. People can't be put on planes and put in prison without an opportunity to be heard. And it is crucial to maintain the separation of powers that prevents the President from being a king and throwing people in jail without giving them an opportunity to be heard. And that's the essence of the Constitution. Let's now talk about specific threats to judicial independence. Chief Justice Roberts in his year-end report on the judiciary in December identified four threats to judicial independence that I'd like to discuss. First, violence, second, intimidation. Third, disinformation, and fourth threats to defy lawfully entered judgments. Judge Childs, you have personally experienced some of these threats. I'd like you to talk about your recent experience and also other examples around the country as well. We might start with Chief Justice Roberts first to threats of violence and intimidation of judges. How is it taking place?

**[00:16:42.6] Judge J. Michelle Childs:** Well, I'd first like to say that the federal judges have come out with their own statement supporting Chief Justice Roberts' 2024 Year End Report with respect to any threats. Judges are fair and neutral arbitrators of the law. That's our job to just adjudicate the facts of the law with respect to any case. We need to be able to do so without fear or favor, without any bias, without any concern for political expediency. Anything of that nature. And to do so with respect to physical threats to ourselves, to our families, is just unacceptable. And unfortunately, we've had that experience. Years ago there were experiences in that regard and many of you might recall our dear friend Esther Salas out of New Jersey whose son was killed right in her front door and then whose husband was seriously injured as well, having over 15 surgeries. Luckily, she is out there constantly with all her will and might, still talking about this and helping us with respect to getting things done. We have been supported by various groups in that regard. We've got the Daniel A. Claitor Judicial Security and Privacy Act passed so that we can have our personally identifiable information scrubbed from the internet because she had that happen to her just as a result of a litigant finding her information on the internet and coming to her home because of them being upset about a decision.

**[00:18:23.0] Judge J. Michelle Childs:** And that has happened in other instances, but at least we got that passed. We're working through the states to also get that done, because as you realize, once something's on the internet, it just carries on and on and on, and you have to kind of trace yourself through the various states to get that done. We've also had other situations where recently you all might have heard about Domino's Pizza coming to judges' houses who have ruled against the current administration. And that happened to me. Just being home on a Saturday night, my husband goes to the door and said, did you order Domino's Pizza? And I really am not one who orders food at home. My daughter does from time to time when she says, well, you didn't have anything in the refrigerator, and she just happened to be away at the beach with some of her friends. So we called her to say, did you order something? And you forgot to

change something on the app about the address. It wasn't her. Then I go into a federal judges' meeting later on in that week, and I just kind of mention it, just thinking something felt odd about it. I didn't know why. And then a couple of weeks later, we get some information from the marshals service saying pizzas are being delivered to federal judges home.

**[00:19:27.0] Judge J. Michelle Childs:** And then maybe a couple of weeks later, there's a national news article that says, we know where you live. And so it's very alarming to think that all we're doing is our job and that we have to fear that. And it goes back to your original statements about judicial independence. We should not have to fear that. We don't want judges worried about the decisions that they'll make in any particular case. It's not fair to the litigants. It's not fair to the system. And again, we are a co-equal branch of government and should never have to do our jobs with any sense of intimidation.

**[00:20:12.9] Jeffrey Rosen:** Hear, hear. Judge McKeown, examples of violence, intimidation, disinformation, or threats to defy lawfully entered judgments?

**[00:20:23.4] Judge M. Margaret McKeown:** Well, first of all, I think one of the biggest threats in an effort of intimidation is this call to impeach judges because someone disagrees with their decision. And there I do hearken back to some history. I think Oliver Wendell Holmes said that an ounce of history is worth a pound of logic. And I think Chief Justice Roberts took that to heart because he made a statement that said, for two centuries we've had this principle that it's not acceptable to try to impeach a judge, simply because you disagree with the decision. Now, we know this is not a popularity contest that we've entered into, and it's totally fair for the public, for elected officials, and others to criticize rulings. But it's another thing to say, and you're going to be impeached because I disagree. If we look at history, only eight judges have been impeached over the course of time. And it was not for their decision. It was for bribery, it was for aiding armed insurrection, it was for embezzlement, and the like. It was a high crime and misdemeanor. So I think that threat of impeachment is really not just something that rolls off somebody's tongue, but it's a very real threat that's going on now.

**[00:21:50.4] Judge M. Margaret McKeown:** And I think that we want to reinforce from the judge's point of view that we speak through our opinions. So we usually are not speaking out because somebody has attacked us. That's why it goes back to civics education, it goes back to public trust. But I think you can think, well, how is this different from history? What has happened? So go back in time. Go back to Abraham Lincoln, for example, and the Dred Scott decision where the court had said it's unconstitutional to prohibit slavery in the territories. Totally at odds with what Abraham Lincoln believed. He did not say we should impeach the judiciary, but he hoped that he could appoint judges who would understand this principle. And ultimately we went on to adopt the 13th Amendment, abolishing slavery. But there has been from time immemorial tension between the executive and the judiciary. And there's nothing wrong with that. Recall FDR, Franklin Delano Roosevelt. He had a proposal to pack the court, add a bunch of more justices to the Supreme Court because he was unhappy with some of the rulings coming out of the Supreme Court that were ruling against some of his favorite policies.

**[00:23:16.9] Judge M. Margaret McKeown:** That was shut down fairly quickly by Congress and the public. So there have been efforts before where there's been tension. But I think we

haven't seen this personal attack on individual judges. We haven't seen the calls for impeachment. And one of the things that has dramatically changed since Abraham Lincoln and President Roosevelt is the internet. Because all of a sudden, social media has given a platform to this heated rhetoric. And you can do it anonymously. So that is one of the both advantages and disadvantages of the internet. But having literally worldwide media in the form of the internet has been a game changer because you can put judges' names, their home addresses, and their photos on the internet. And there are all kinds of websites that are really set up to attack judges. And I'm not talking about the dark web, where hardly any of us would ever go. I'm just talking about the regular internet. So I think it's really, really important there that we stand up and say it's important that we have an independent judiciary and we pride ourselves in the ability to make decisions. Sometimes people will agree and sometimes they'll disagree.

**[00:24:42.1] Judge M. Margaret McKeown:** There's probably only two things we do that everybody loves. We do the immigration ceremonies. And we do weddings from time to time. But then we do have to make some hard decisions. And judges wrestle with these. These are not done without thought and research. And importantly, in the US System, they're not done without reference to precedent, which has really been a large part of giving us the longevity of our system. Contrast that with some of the other countries that don't have a precedential system or are willing to just toss overboard years or decades of history. I think it's important from the judge's perspective that we recognize that you can send sticks and stones our way. But I think the threat to impeach is really an effort too far.

**[00:25:39.4] Jeffrey Rosen:** Such a powerful distillation of the lessons of history. You taught us that of the eight judges who've been impeached throughout American history, none has been impeached because of disagreement with their rulings, but instead for corruption or malfeasance. You noted that Chief Justice Roberts said this is a 200-year tradition ever since Justice Samuel Chase was impeached because of disagreement with his partisan rulings but was acquitted. We've established the precedent that you don't impeach judges because of disagreement. And then you talked about these new technologies on the internet that have increased threats and made it easier to intimidate judges because of disagreement with their rulings. Judge Bloom, maybe some more thoughts about the technologies. Chief Justice Roberts mentioned this new technique of doxxing, the practice of releasing otherwise private information like addresses and phone numbers, as well as disinformation. Distortion of the factual or legal basis for a ruling which can undermine confidence in the court system. How are these new technologies increasing threats to the judiciary? And how can civic education correct them?

**[00:26:49.9] Judge Beth Bloom:** Thank you for the question, what Judge McKeown said that judges speak through their opinions is so important. Because we can't go out, and we should never go out and speak about issues that are before the court. But when it comes to social media, the internet, even conventional news. Sometimes there's information that's provided that is either misinformation and sometimes, unfortunately, disinformation. Misinformation in the sense that the public doesn't understand that we are a co-equal branch of government and there should be that healthy tension. But statements that are made need a response and need a response from partners throughout our country because we're all invested in our government. We all believe in our Constitution, our form of government, and the challenges to our government now. And I'll speak of the judiciary. Is because sometimes there's misinformation that becomes the narrative.

For example, a judge handpicks cases and the public doesn't truly understand how a judge receives a particular case in order to handle that case. Or with regard to judges being partisan. And I think a lot of that is a misunderstanding of the public that we have state and federal judges and there are some states that have partisan races.

**[00:28:23.0] Judge Beth Bloom:** The Supreme Court election that just took place in Wisconsin is actually a nonpartisan race, but it became partisan. And the public believes that we're political and we're not. The process of becoming a federal judge may be political because we need the nomination from the president and we need the advice and consent from the Senate. But the job of judging is not political. And the lack of confidence in our court system is due to the public not understanding. And I must say that we also live in a country where 30%, less than 30% of our legislators went to law school. So there is a true misunderstanding of how our court works. And that's our job. Our job is to educate the public. And those that know should go out and be an ambassador and educate those that may not understand. So they truly understand that we're not political. We speak through our opinions. We certainly can't respond to cases that are before us. And we don't hand-pick cases. Cases are blind filed. And sometimes we have a case that is a run-of-the-mill case, and sometimes we have a case that may be a high-profile case. But we handle it the same way that we would in any other case.

**[00:29:49.1] Judge Beth Bloom:** We apply the law to those facts. And I think that we have some work to do. And I'm so glad that we have our partnership with the National Constitution Center because there is a lot of work to do in terms of civics education. And it's important. And it's as important now as ever.

**[00:30:08.0] Jeffrey Rosen:** Absolutely. And just this superbly informative panel where each of you is explaining what judges do will play a crucial role in that civic enterprise. On Constitution Day two years ago, here on this stage. Judge Cheryl Krause and Judge Stephanos Bibas from the Third Circuit were here. And a student asked why the Third Circuit had ruled against President Trump in the election cases along with 80 other federal judges. And Judge Bibas said the president is not my boss. The Constitution is my boss. And making these crucially important points to educate the public is necessary to maintain the public legitimacy on which judicial independence depends. Judge Bough, as you hear the various threats that Chief Justice Roberts identifies from misinformation, violence, doxxing, and threats to impeach judges. How do these threaten due process and why is it important for Congress and the president to support due process?

**[00:31:20.6] Judge Stephen R. Bough:** One thing I think is important to remember is that this is bipartisan. Unfortunately, Judge Childs was not the first to receive a Domino's Pizza. We have individuals on the Supreme Court receiving those. Just this week, the individual that doxxed Justice Kavanaugh and went to his house prepared to kill him, pled guilty. We see Justice Amy Coney Barrett's sister being threatened. When you threaten someone's child or you threaten someone's sister that doesn't even live anywhere near you. That is clearly an effort to get you to change your decisions based upon threat to someone you love. None of us want that. I'll tell you a brief story from my home state of Missouri and Kansas City. Back in the '30s, we had a mobster guy named Pendergast that ran all of Kansas City and much of the entire state of Missouri. He had a huge gambling debt, \$500,000. And there was an important decision pending



in front of the Missouri Supreme Court affecting an insurance company from Chicago. And so if it was a 3-3 split and there's a new guy on the bench, what do you do? You go to Pendergast and say, there's this new Democrat on the bench. Get him to vote the way he was supposed to.

**[00:32:50.6] Judge Stephen R. Bough:** This new judge, an individual named James Douglas didn't vote the way Pendergast told him to vote. Pendergast ran someone against him in the Democratic primary for this particular Supreme Court race. And Judge Douglas stood up and did the right thing and said this is what was going on. I was told to vote this way and I didn't vote this way. And there's this half-a-million-dollar debt out there. Well, guess what? Pendergast didn't report this debt being paid off. And so the feds went after him and he got rung up for tax evasion and went to Leavenworth. At that same time, all the good government organizations came to the table and said, we can't handle this. We can't have him being knocked off on an election. We can't have Judge Douglas being pushed out. And so they got him reelected and came up with a nonpartisan court plan. And they did that because Missouri citizens, I think, are pretty wonderful. They're pretty common sense. And they decided that we don't want people having allegiance and having mobsters and having other people whispering in their ear about how these decisions should be made.

**[00:34:05.7] Judge Stephen R. Bough:** Unfortunately, the story doesn't stop there, because just a few years after that, Harry Truman, the vice president, some wonder how he got picked to be vice president, flew home for Pendergast's funeral. And that is surely not how we should decide important cases. By the influence of folks and the influence of the powerful. There's no doubt that Truman got to many of his places because of the support of Pendergast. Now, I love Harry Truman, he's from Kansas City. But I just think we need to understand this is not how we want our democracy run. These are the problems that we identified in the Declaration of Independence. If there's not a healthy tension between the judiciary and the other two branches of government, that is not what our founding fathers envisioned. They envisioned that we are to stand up for those minimum rights in the Declaration of Independence that were dreamed up in the Constitution. In the amendments. Those are the minimum rights that we are to ensure. The other two branches are there to represent the majority well. There's supposed to be a healthy tension, but when it comes to the point that we're going to use power and influence, as we did in this case involving a Missouri Supreme Court judge, we've lost our democracy.

**[00:35:28.0] Jeffrey Rosen:** Such a powerful story. Even Harry Truman, one of our greatest presidents can't escape the loyalty to the guy who helped get him appointed. And I can't help but think of the amazing conflict between President Truman and the Supreme Court. He wants to disclose the steel mills. Chief Justice Vinson tells him the court will bless this. And to his incredible surprise, the court rules against him and says that when he's not acting with congressional support, his power is at its lowest point. He's really upset about the rebuke. It was a different time. So Justice Hugo Black invites the president to his house to meet with the court after their case comes down. And Truman is sulking a little at the beginning, but finally, he says, "Hugo, I don't think much of your law, but by golly, this bourbon is good." Judge Childs, your speech yesterday was just amazing at the Jackson Center. Speaking of which of course the steel seizure concurrence was written by Judge Robert Jackson. Give us a sense of the case you made for judicial independence and what history can teach us about the dangers of abandoning it.

**[00:36:37.0] Judge J. Michelle Childs:** Well, the speech itself was called the Republic is safe as long as the courthouses remain open. And so again, it's a support for judicial independence. It's a support for us being a co-equal branch of government. I walked through a little bit about the history of some of these other times that we mentioned earlier and then just discussed how we as judges, of course, do our part by making sure that we are acknowledging that we need to continue to show to the public that we are being fair and impartial. That through our decisions we are articulating well-reasoned decisions. That we are not fearful of any criticism of our decision. And we recognize appeals, don't be fearful of appeals. That is everybody's right to have that. We acknowledge due process. We want people to be able to come to court. We want them to feel heard in that regard. And then we also acknowledge, because this particular group at the National Judicial College was a group of new judges who were coming through for their training. Then I expressed to them Canon 4 of our Judicial Code of Conduct, which allows us to speak out not on pending cases, but in any situation where we feel like lawyers or judges particularly are being persecuted around the world. As long as through our reasonable diligence and investigation that they are, then we can speak out.

**[00:38:09.0] Judge J. Michelle Childs:** And this is such a forum that anytime that we're talking about the fair administration of justice, we can discuss these issues. And I would suggest to you that judges being impeached, judges having personal threats to their decisions or to their person or family is such an issue. So I hope that you will join us through civics education, going to schools, going to community groups, and talking about just what we do. Because a lot of people just don't understand how these cases come to us, how we decide what issues are in front of us. Those are the types of things we do. But we can't do it by ourselves. We need the help of the bar. We need the help of general citizens to assist us in this regard and be reminded that we're that co-equal, independent branch of government and we cannot have threats to the judiciary because it weakens our democracy in general.

**[00:39:05.1] Judge M. Margaret McKeown:** So true. Could I jump in here? Because all of these comments also have an underlying sentiment about ethics. And Judge Childs mentions the canons of ethics. I think one thing that does distinguish federal judges along with state judges is that we have a code of ethics. We have guardrails. Guardrails so that we are not deciding cases where we might have prejudices. In cases like that, we should recuse ourselves. We are not contributing to any political campaigns. And we are making sure, of course, that we have a respectful workplace and respect for those in the courtroom. For all the litigants who come in and the lawyers. So I think that's really important. Now, we didn't always have a code of ethics. We all take an oath of office in which we pledge to be fair and independent. That's been there since the 1700s. But we really didn't get a code of ethics until long into the 20th century. And what happened was this. Baseball had a big scandal. The White Sox. They later called it Black Sox. It was a betting scandal. So they thought, well, we should clean this up. Who would be good to clean up the scandal? How about a federal judge? So they decided they would appoint a federal judge to be the commissioner of baseball and clean up the scandal.

**[00:40:40.6] Judge M. Margaret McKeown:** And then someone said, "Can you be a federal judge and the commissioner of baseball?" And somebody else said, "Well, no. We've never thought about that before because we don't have a code." So then Chief Justice Taft, who'd been the president, was appointed to put together the first code of ethics for judges. And since that

time, that's the code that we've been abiding by. And of course, now we know you cannot be the commissioner of baseball and a federal judge. I do want to say that he chose to be the commissioner, but in large part because it paid a much higher salary.

**[00:41:23.8] Jeffrey Rosen:** That's an amazing history. Great about Chief Justice Taft. And you helped work on some revisions of the Code of Ethics. What did you discover?

**[00:41:32.7] Judge M. Margaret McKeown:** Well, I think as time goes on, we discover that there's more and more issues that we need to look at, and one of those is a respectful workplace. And we have put into the Code of Ethics some additional obligations of judges in terms of running their chambers and having a respectful workplace. And I think we also discovered that sometimes, no surprise, there's antiquated words that need to be changed and need to be updated. So we do try to update the Code of Ethics from time to time. And we also have available in the federal system a code of conduct committee that can provide advice, informal advice to judges if they have questions. For example, can I participate in such and such a kind of activity? If we were to ask them, could we come to the National Constitution Center and have a nice discussion on the rule of law and judicial independence? The answer would be yes because that falls squarely within our remit to be able to do public education as well as public service. But as long as it doesn't conflict with what is our principal mission, which is deciding cases fairly and independently.

**[00:42:57.4] Jeffrey Rosen:** Judge Bloom, I think that this panel is so illuminating that judicial independence should be part of our civics outreach. The Constitution Center has an amazing Constitution 101 class online and also in partnership with Khan Academy. It would be great to introduce judicial independence units for our judge exchanges. What are the basic elements that we want to teach?

**[00:43:22.9] Judge Beth Bloom:** Oh, my goodness.

**[00:43:24.5] Jeffrey Rosen:** Kids about why judicial independence is important?

**[00:43:26.1] Judge Beth Bloom:** That would be, let's have another partnership. It would be a fabulous opportunity to speak not only about the rule of law, separation of powers, Marbury v. Madison. To teach the public, and it's not just the students. But to teach the public about our role. The judiciary's role in our government, and why our government works the way that it does. I think that we've all read the Constitution. We understand when we say we're Article 3 judges, but what does that really mean? A lot of people don't understand the difference between the federal system, the state system. When they hear about a judge running on a Democratic ticket because there still are some states that have that. They don't really understand. And I must say that it doesn't help. I don't know if it has a public value, but it's been used. What Judge McKeown said is we are judges that are independent, and it doesn't matter who appointed us. But oftentimes we hear, whether it's through electronic media or on the news, that an Obama judge or a Trump judge. That even heightens the misconception that somehow we are tied to a particular ideology.

**[00:44:48.5] Judge Beth Bloom:** I think, the American government, obviously, the Constitution. We can talk so much about our holidays. I think a lot of people don't understand some of the

holidays. We can talk about that and President's Day. What is President's Day? But that would be a great opportunity for us to work together and most importantly, to continue our education mission of civics education. To turn the numbers so that more individuals understand our Constitution, our democracy, and most importantly, have faith in the work that we do.

**[00:45:29.1] Jeffrey Rosen:** Absolutely. That's why this discussion is so constructive. We're just distilling to the essence what the basic principles of the Constitution are. Separation of powers, due process, the rule of law, and independent judiciary. Talking about history and teaching that to kids. Including that crucial principle that there are not Republican or Democratic judges, but just judges. Which also involves teaching the methodologies of legal interpretation so people understand that judges are ruled by the law and not by politics.

**[00:46:02.2] Judge Beth Bloom:** And I would also add that civility can be part of it too, because our world is divided in terms of a difference of opinion. But you can have a difference of opinion and disagree with the opinion. You can even attack the opinion. But not the person who holds a different opinion. Perhaps that's an area that we can also focus on.

**[00:46:24.7] Jeffrey Rosen:** Yes, there's a marvelous video that Justice Breyer has done on our Constitution 101 class, talking about civility. About disagreeing without being disagreeable. About listening to different points of view. About opening your mind to the possibility of embracing another point of view. And it's among the most widely trafficked videos because it's so powerful. And we're learning in this conversation that these are not platitudes, but there are two things the founders thought was necessary for the Republic to survive. Education in the principles of constitutional government, and education in the habits of civil dialogue. And that's exactly what we're doing together.

**[00:47:04.6] Judge Beth Bloom:** We also have the power of dissent. And on the international front, there's a number of countries that do not permit dissenting judicial opinions. So we take it for granted. We've had some very fabulous, and prolific dissenters both on the Supreme Court and in the lower federal courts. I think that also remains another place that a judge within the confines of ethics, and giving an opinion can state a disagreement.

**[00:47:33.9] Jeffrey Rosen:** That is amazing, although not surprising that some countries don't allow dissents. And in all of our Constitution classes, the team and I urge learners of all ages to read the majority opinion and the dissent before making up their own mind. And during one of our middle school classes, a kid put in the chat. I'm Bill. I'm 12. I'm not sure I can read the dissent. I'm like I know you can do it. And they can. It's amazing. At the earliest ages, citizens of all ages will rise to the challenge. And that's the essence of what makes the Constitution. Judge Bough, these are such practical suggestions that we're discussing together about how to increase public support for judicial independence and the rule of law. As you sit in your courtroom, what are some other suggestions that you have?

**[00:48:24.7] Judge Stephen R. Bough:** Well, I want to confess I felt like Bill before. Sometimes I can't understand some of the opinions. But I try. Second, as it comes to the education front. Sign me up, put me in a red coat. Put me in front of some kids, knock them out of their bed. Eat all the food out of the refrigerator, spend the night, and then get up and walk off.

Because that was 1775. And everyone understands that's not fair. And at our core, our justice system is really based upon fairness. And I think there's an enormous lack of empathy in the world, and maybe in this time. But all the problems that we see now are not that much different than what we saw in 1775 and why we needed to do certain things and why our country. And let me tell you, the world was not perfect based upon just the 1776 events. And we had a long way to go. And we're still trying to bend that arc of the moral universe. We're still pulling on that thing. But to step back and say, I don't want that guy in the red coat knocking me out of my bed, and eating all my food. And then walking out and not paying me a dime.

**[00:49:42.1] Judge Stephen R. Bough:** Well, that's the very core of what we're talking about. And it may not be what we're all just sitting around thinking about. Well, the US attorney charges somebody, and then the judge calculates the guidelines, and then we use 18 USC 3553 to come up with the sentencing factors. And now US v. Booker says they're advisory guidelines, not mandatory. We're not going to get people to talk about that, and that's okay. I was nominated by President Obama. I don't think President Obama should ever call me, and he should never have any input on any sentencing decision I've ever made. And for the record, he hasn't. I haven't talked to him during the nomination process and never talked to him since. I think the same is true for President Trump and President Bush and go through the whole list. That's not how our process works. And I've never known any of the judges that I've ever met to think that's the way it should work. And I think our kids when given that opportunity to do the things that Judge Bloom is talking about and doing the things that the National Constitution Center are talking about. Americans are great. We've got a great spirit and we've got a great heart, and we can do it.

**[00:51:06.9] Jeffrey Rosen:** Yes, they are. Americans are great and we can do it, is exactly right. And you're so right about the excitement and importance of learning about American history. We have been there before. And the Red Codes are not supposed to knock at our door or be quartered in our home and take away our liberties. And that's why learning about history together is so important. I've got to share this incredibly exciting new civic tour toolkit that the NCC is creating for America 250. Listen to this lineup of historians and scholars. Robbie George on liberty. Danielle Allen on equality. The great Gordon Wood on government by consent. Judge Jeff Sutton is going to write about federalism. Yuval Levin on the separation of powers. Mary Sarah Bilder on the Bill of Rights. Akhil Amar is going to annotate the entire declaration clause by clause. So we see how the list of grievances was linked to specific historical events like the trials in England. And there's so much more. And we're going to put this free and online and take this to schools and presidential libraries and community centers and just convene discussions about the American idea, bringing together people of different perspectives.

**[00:52:18.6] Judge Beth Bloom:** That's so exciting.

**[00:52:18.7] Jeffrey Rosen:** Push that out with the Federal Judicial Center as part of our exchanges and spread a lot of light together. All right. I'm already getting excited about all the great work we're going to do together. And we have just five minutes. And we always end on time. Maybe just a few sentences from each of you about why judicial independence is important and what our great National Constitution Center audience can do. And I know how many thoughtful citizens are listening in, citizens of different perspectives, eager for your call to arms

about what each of them can do as thoughtful lifelong learners to defend judicial independence. Judge Childs.

**[00:53:00.2] Judge J. Michelle Childs:** I would just say that we're talking about the time that we're in now. But just recall during the civil rights moments when judges have had bombs at their homes. When they've had crosses burned at their homes for very difficult decisions that they've had to make. We are an independent branch of government. We are a co-equal branch of government, and we are armed with the Constitution. We have the ability to make these tough decisions. We have the ability to have the mentorship of our fellow colleagues to do what we believe is right and just whatever that individual judge believes based on that fact in the law. We shall get through this moment. We just need to be empowered and emboldened to just stay the course and do our job. The Republic is safe as long as the court doors remain open.

**[00:54:00.4] Judge M. Margaret McKeown:** That's so true.

**[00:54:04.8] Jeffrey Rosen:** Beautiful. Judge McKeown.

**[00:54:08.3] Judge M. Margaret McKeown:** I don't think I could add to that. I do want to say, though, that it is so exciting to have a place like the National Constitution Center. And I felt such pride walking in here today, even just being in Philadelphia and realizing how important history is to who we are. And so coming in here today, I just felt like I was a school kid again and going through the exhibit. I really want to thank the National Constitution Center for all you do, because you make the Constitution come alive. Day in and day out, we are interpreting the Constitution, and we need the public's support. We need the public's trust. We need the public's understanding. And I think that we have that. I think there is a real coalition in the United States among the public, the elected officials, and the appointed officials. Right now, the courts are under fire, but it isn't the first time, and it won't be the last time, and by any means. It is not somehow the erosion of independence that we've seen in other countries, necessarily. But we can't let it go unrecognized. And we really have to make sure that we recognize what's happening when the attacks of the court are undermining the court and what we do. Undermining the public trust. We do rely on the public, and we do speak to the public, because all of our cases, in the end, are about people.

**[00:55:45.7] Judge Beth Bloom:** That's right.

**[00:55:47.1] Jeffrey Rosen:** Wonderful. Judge Bloom.

**[00:55:49.8] Judge Beth Bloom:** First of all, thank you. Thank you for the work that you do. Thank you for allowing us the opportunity to speak. But I would also comment on the courthouse doors being open. They're not our courthouse doors. They're your courthouse doors. It's the public's courthouses. And the work that we do. We're public servants, and our job is to do just what we do. We apply the law and the facts, and we rule on a case, and that's our job. But the attacks on the judiciary, the attacks on our rule of law, the threat to our judicial independence, that's an attack on all of us because this is our government, this is the United States that we are so privileged to live in. So my hope is that it's not just the judges that are

speaking about this. It's the public at large. That we all are invested in making a change in where we are and where we need to be to protect our Constitution and our democracy.

**[00:56:48.7] Jeffrey Rosen:** Wonderful. Last word Judge Bough.

**[00:56:51.6] Judge Stephen R. Bough:** The concern has never really changed about how we protect our democracy and our republic. But first they come for the gays, then they come for the Jews, and then the gypsies. Then maybe it's the judiciary, so it's our turn to stand up. And I'm so proud of Chief Justice Roberts and the Supreme Court and the Circuit Courts and all my peers. And thank you for giving us this chance.

**[00:57:18.3] Jeffrey Rosen:** Friends. For their service to the Constitution and the rule of law, please join me in thanking our judges.

**[00:57:27.7] Jeffrey Rosen:** This episode was produced by Samson Mostashari and Bill Pollock. It was engineered by Bill Pollock, Kevin Kilburne, and Greg Sheckler. Research was provided by Samson Mostashari. Please recommend the show to friends, colleagues, or anyone anywhere who's eager for a weekly dose of civic education and constitutional debate. And who isn't. Check out the Constitution 101 class at [constitutioncenter.org/con101](https://constitutioncenter.org/con101). Look forward to the amazing civic toolkit I mentioned, which we're launching for America's 250. It's going to be so exciting. Sign up for the newsletter at [constitutioncenter.org/connect](https://constitutioncenter.org/connect). And always remember that the National Constitution Center is a private nonprofit. This podcast and all our work is possible only thanks to the generosity of people from across the country who are inspired by our nonpartisan mission of constitutional education and debate. Please consider supporting our efforts by donating today at [constitutioncenter.org/donate](https://constitutioncenter.org/donate). Any amount. \$5, \$10. Of course, more is so meaningful in signaling your support for the NCC. It's such an honor to have you as a member of our community of lifelong learners. On behalf of the National Constitution Center, I'm Jeffrey Rosen.