

## **Document 1 - The Supreme Court America's highest court needs term limits**

*The Economist*, September 15, 2018

### *Deepening partisanship is bad for the court and bad for America*

THE judiciary, wrote Alexander Hamilton in Federalist Paper 78, “may truly be said to have neither FORCE nor WILL, but merely judgment...[It] is beyond comparison the weakest of the three departments of power.” For much of American history, politicians saw the Supreme Court as a backwater. John Rutledge, one of the first justices appointed by George Washington, resigned to become chief justice of South Carolina. Not until 1935 did the court have a building of its own. Today it occupies a central and increasingly untenable position in American life.

The centrality stems largely from gridlock. As Congress has grown incapable of passing laws involving even straightforward political trade-offs, power has flowed to the executive and judicial branches. Political questions best settled by the ballot box—about abortion, for instance, or gay marriage—have become legal ones settled by nine unelected judges.

The untenability stems from the court's growing partisanship. It was not always thus. Republican presidents appointed three of the 20th century's greatest liberal jurists—Earl Warren, William Brennan and Harry Blackmun—as well as Anthony Kennedy, the recently retired “swing vote”. But today the court's four conservative justices were all appointed by Republican presidents, the four liberals by Democratic ones. The nomination process has grown ever more poisonous.

Like a bar fight, it is hard to be sure who started it, but each punch leads to retaliation. Republicans point to Democratic tactics during the hearing for Robert Bork, a Reagan nominee. Democrats are the victims of the most recent blow—which was also the most shameless. In 2016 Republicans refused even to hold a hearing for Merrick Garland, whom Barack Obama had nominated, denying the president a power that is granted to him under the constitution, and allowing Donald Trump to fill the seat instead.

Mr Trump's second Supreme Court justice, Brett Kavanaugh, will be confirmed only because Republicans hold a two-seat majority in the Senate. Should they lose that majority in the Senate this autumn, and should another Supreme Court seat before long open up, Democrats will probably prevent Mr Trump from filling it. The norms that Republicans created for Mr Garland will be used to justify their behaviour. And on it will go. This partisan ratchet is bad for the judiciary and bad for the country. It risks hobbling the court, in two ways. First, if the only time a president can fill a seat is when his party controls the Senate, then the court will spend long periods at less than full strength. Second, the court's legitimacy depends on its reputation as a credible neutral arbiter.

The judgments of a court seen as just another nakedly political body, no different from Congress or the presidency, can easily be dismissed—or fought. Franklin Roosevelt mulled packing the court in the 1930s when it frustrated his New Deal ambitions. It is not hard to imagine a Democratic president and Congress doing the same in four years' time, if five Republican-appointed justices repeatedly strike down the ambitious social programmes these politicians promised.

Breaking this cycle requires reform. Some have proposed radical solutions, such as making all of the roughly 180 federal appellate judges associate justices, and having nine of them drawn at random to hear and choose cases at the Supreme Court for a limited period—a term, at most. Defenders argue that this would make the court more deferential to precedent, and any one judge less able to spend years cutting a partisan path across the nation's highest court. But it could also just push the political brawling down a level, so that every appellate nomination becomes a bloodsport. In any case, it is probably too drastic a change to be feasible.

A more workable change would be to appoint justices for single 18-year terms—staggered, so that each president gets two appointments per term—rather than for life. Each presidential term would thus leave an equal mark on the court, and no single justice would remain on the bench for 30 or 40 years. New blood would make the court more vital and dynamic. A poll taken in July showed widespread bipartisan support for term limits. So long as former justices were prevented from standing for office, becoming lobbyists or lawyers after stepping down from the court, this would be an improvement.

Some fear that term limits would simply entrench the court's political centrality by making it an issue in every election. But that bridge has already been crossed. "You have to vote for me," Mr Trump told a rally in 2016. "You know why? Supreme Court judges. Have no choice." What better way for Americans to start finding a path back towards civil politics than reminding themselves that bipartisan institutional reform remains possible?

## **Document 2 - Enlarging the Supreme Court is the only answer to the right's judicial radicalism**

*The Washington Post*, by E.J.Dionne Jr, October 25, 2020

There is only one good thing that can come from the power-mad Republican rush to jam Amy Coney Barrett onto the Supreme Court before Election Day: Of a sudden, as the late Daniel Patrick Moynihan used to say, Americans in the tens of millions now know that our country faces a crisis of democracy triggered by the right wing's quest for unchecked judicial dominance.

Barrett's testimony before the Senate Judiciary Committee, and President Trump's comments before nominating her, brought home just how dangerously disrespectful of democratic norms the enlarged conservative majority on the court threatens to be.

Her silence on the most basic issues of republican self-rule tells us to be ready for the worst. She wouldn't say if voter intimidation is illegal, even though it plainly is. She wouldn't say if a president has the power to postpone an election, even though he doesn't. She wouldn't even say that a president should commit himself to a peaceful transfer of power, telling Sen. Cory Booker (D-N.J.) that "to the extent that this is a political controversy right now, as a judge I want to stay out of it."

What, pray, is controversial in a democratic republic about the peaceful transfer of power? It's hard to escape the conclusion that she was nodding to the president who nominated her. He said he wanted a friendly judge on the court to deal with electoral matters, and he continues to signal that one of the most hallowed concepts of a free republic is inoperative when it comes to himself.

Rushing to confirm such a nominee just in time to rule on any election controversies (from which she refused to commit to recusing herself) would be troubling enough. But it is all the worse for being part of a tangle of excesses by the Republican Party and the conservative movement.

The truly scandalous lack of institutional patriotism on the right has finally led many of the most sober liberals and moderates to ponder what they opposed even a month ago: The only genuinely practical and proper remedy to conservative court-packing is to undo its impact by enlarging the court.

Note the language I just used. Court-packing is now a fact. It was carried out by a Republican Senate that was cynically inconsistent when it came to the question of filling a court seat during an election year. A Democratic president could not get a hearing on Judge Merrick Garland. A Republican president got express delivery on Judge Barrett.

That's two seats flipped. Then consider the lawless 5-to-4 *Bush v. Gore* ruling by

conservative justices in 2000 that stopped the Florida recount and let George W. Bush become president. (Oh, yes, and Chief Justice John G. Roberts Jr., Justice Brett M. Kavanaugh and Barrett were all Bush lawyers in that fight. All in the family.) After winning reelection the normal way, Bush appointed Roberts and then Samuel A. Alito Jr. to the high court in 2005.

That's four seats out of nine.

It's not court enlargement that's radical. Balancing a stacked court is a necessary response to the right's radicalism and (apologies, Thomas Jefferson) to its long train of abuses. And conservatives are as hypocritical about court enlargement as they are about Garland and Barrett: In 2016, Republicans expanded the state supreme courts of Georgia and Arizona to enhance their party's philosophical sway.

Democracy itself is at stake here. If the oligarchy-enhancing Citizens United decision and the gutting of the Voting Rights Act in the Shelby County ruling don't convince you of this, reflect on a study by the pro-enlargement group Take Back the Court. In 175 election-related cases this year, it found that Republican appointees interpreted the law in ways that impeded access to the ballot 80 percent of the time, compared with 37 percent for Democratic appointees. (The group pegged the "anti-democracy" score of Trump appointees at 86 percent.)

Court enlargement will be a long battle, but those of us who support it should be encouraged, not discouraged, by Joe Biden's call for a bipartisan commission to study a court system that is, as Biden put it, "getting out of whack."

Biden is a long-standing opponent of enlargement, so his statement is an acknowledgment that this crisis can't be avoided. His commission would help the public, which usually doesn't want to worry about judges, understand the danger of a judiciary dominated by reactionaries.

Sadly, the best case for enlargement is likely to be made by the court's conservative judicial activists themselves. It would be good for democracy if they showed some restraint. But everything about this struggle so far tells us that restraint is no longer a word in their vocabulary, and that prudence is not a virtue they honor anymore.

### **Document 3 - High-stakes election disputes headed for Supreme Court**

*The Hill*, by John Kruzel, October 2, 2020

The Supreme Court this week faced Republican requests to review voting rules disputes in key battleground states that could potentially shape the contours of the presidential race.

The justices on Friday agreed to hear a GOP bid to revive voting limits in Arizona, the first election-related fight to be taken up by the court following the death of Justice Ruth Bader Ginsburg, a stalwart liberal and fierce defender of voting rights.

Legal experts say the Arizona case is unlikely to be decided until after the Nov. 3 election. But also pending before the court are petitions from Republicans and their allies to take up cases concerning voting rules in Pennsylvania and South Carolina, and a dispute from Wisconsin may not be far behind.

Hundreds of election-related fights are currently playing out in lower courts in what is the most intensely litigated election in U.S. history. Broadly speaking, they encompass how ballots are cast and how votes will be counted, with disputes over everything from whether a witness must be present when completing an absentee ballot, to fights about mail ballot due dates.

The Republican National Committee has pledged \$20 million this cycle to oppose Democratic-backed efforts to ease voting restrictions while Biden said his campaign has assembled 600 attorneys for election-related lawsuits.

The Supreme Court has already taken action — or refused to act — on several election-related cases this cycle, with the court's majority generally choosing to defer to the wishes of state and local officials over voting rules.

Those cases were handled before Ginsburg's death left the court with just three liberal justices. The court is now poised to shift further to the right with the anticipated arrival of President Trump's third Supreme Court nominee, Judge Amy Coney Barrett, whose confirmation would cement a 6-3 conservative majority.

Trump, for his part, has predicted the Supreme Court will play a major role beyond the Nov. 3 Election Day. He has repeatedly claimed, without basis in fact, that an increase in mailed-in ballots will invite widespread voter fraud that require litigation to resolve.

"We need nine justices," Trump told reporters at the White House four days after the Sept. 18 death of Ginsburg. "You need that with the unsolicited millions of ballots that they're sending. It's a scam."

The election-related disputes present the first tests of how the rightward-shifting court will approach voting rights. With the election a little more than a month away, it remains to be seen whether the court will resolve these or other election-related disputes before Nov. 3.

On Monday, Pennsylvania Republicans asked the justices to halt a major state court ruling that extended the due date for mail ballots. If it's allowed to stand, the Pennsylvania Supreme Court's ruling could help shape the race between Trump and Biden in the Keystone State, which the president won by just over 44,000 votes in 2016.

The Pennsylvania court's decision earlier this month requires election officials to accept ballots postmarked by Election Day, as long as they arrive within three days. The ruling was seen as a win for Democrats, since Biden voters are more likely than Trump supporters to vote by mail.

In court filings, top officials from Pennsylvania's GOP-held legislature and state Republican Party members asked the U.S. Supreme Court to pause the ruling while they formally appeal to the justices. The court set an upcoming Monday deadline for a reply brief.

The Arizona voting rights case was filed months ago but was discussed for the first time on Tuesday when the justices gathered privately for the first meeting of the new term.

The case concerns a bid by Republicans to reinstate a pair of Arizona voting restrictions that a lower court struck down as racially discriminatory. In ruling against the GOP, the 9th Circuit Court of Appeals said the voting limits had the potential to make it harder for people of color to cast ballots in the Grand Canyon State.

One of the disputed policies deals with how Arizona election administrators must handle ballots that are cast at the wrong polling place, or precinct. Under Arizona's out-of-precinct rule, which has its roots in a policy that dates back to the 1970s, administrators are required to throw away any miscast ballot in its entirety.

Arizona Republicans say out-of-precinct policies are common across the U.S. and help ensure ineligible voters do not cast ballots in local races for officeholders who are running to represent a different geographic area.

But the 9th Circuit Court of Appeals found that in recent elections the rule disproportionately harmed Arizona's minority populations, who tend to vote Democratic.

The second voting restriction at issue is a 2016 Arizona law that criminalizes the collection and delivery of another person's ballot, a service which minority voters are overwhelmingly more likely to rely on than white voters. Republicans have also asked the Supreme Court to reverse the 9th Circuit Court's decision to strike down the state restriction on the practice, which is sometimes referred to as "ballot harvesting."

On Thursday, South Carolina Republicans asked the Supreme Court to reinstate a witness requirement for mail ballots. The court may also soon receive a GOP bid to reverse a ruling in Wisconsin that pushed back the battleground state's mail-vote due date.

Biden allies may also ask the Supreme Court to review a pivotal court loss for Democrats

in Florida. The case concerns a Florida law requiring nearly 800,000 felons in the state who have completed their sentences to settle their court debt before they regain the right to vote, even if they are unable to pay. Of the affected would-be Floridian voters with felony records, an estimated two-thirds of whom are Black, who tend to lean Democratic.

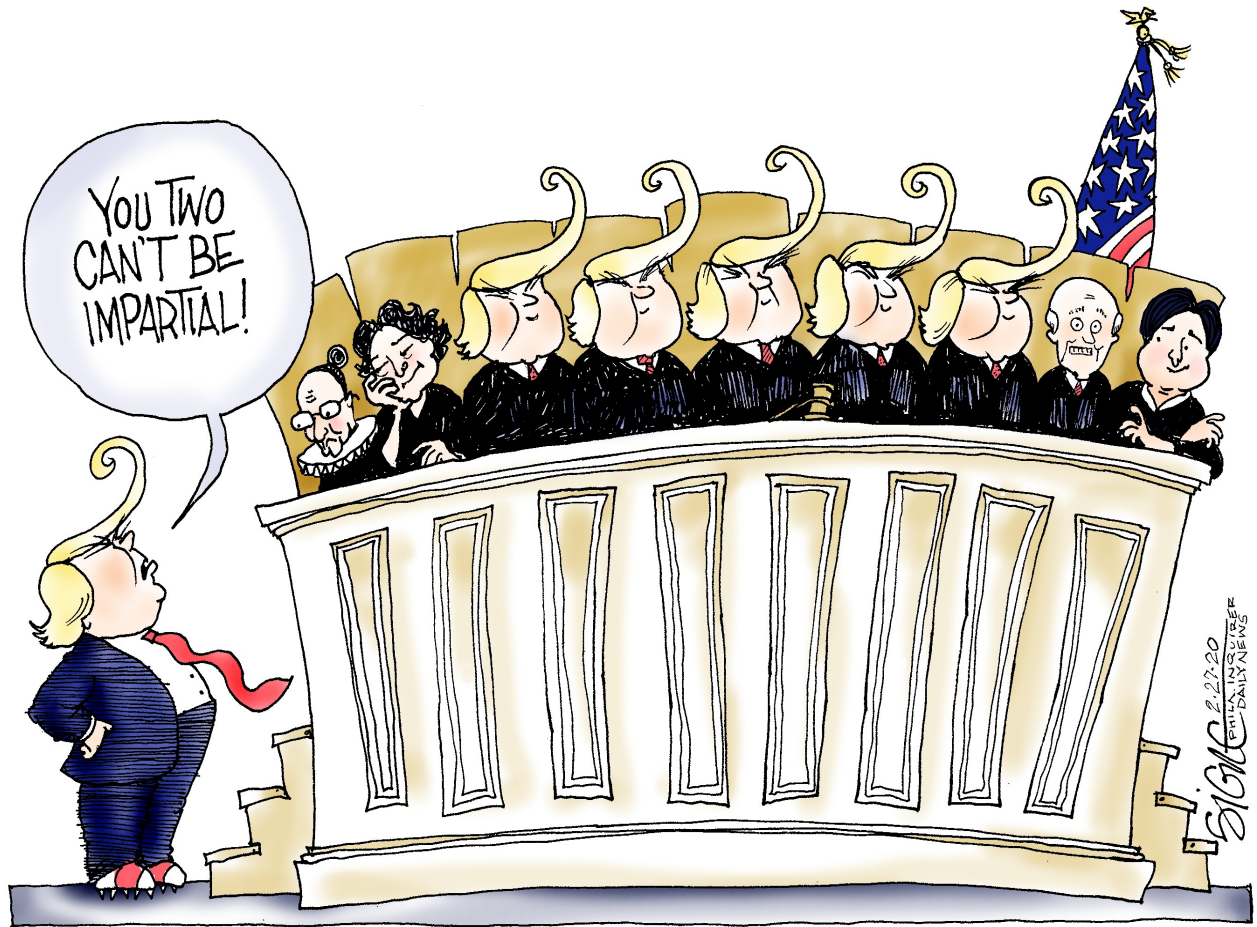
The Campaign Legal Center, a voting rights advocacy group that represents the challengers, told The Hill that it hasn't made a final decision on whether to pursue an appeal in the Supreme Court.

"All I can say is that we are waiting for the dust to settle," Paul Smith, the Campaign Legal Center's vice president for litigation and strategy, told The Hill.

The general consensus among court watchers is that Democrats and their allies have enjoyed a better win-loss record than Republicans and conservative groups when tallying up the avalanche of election litigation.

But according to Jason Snead of the Honest Elections Project, one of the most prominent conservative groups involved in litigation, Democratic-allied victories are merely provisional. Snead, the group's executive director, told The Hill this week that liberal wins are subject to appeal, and said he expects more cases to reach the high court.

"A lot of the lawsuits that the left has filed have been declared as victories. But they're still on appeal so we don't know how those are going to shape up," he said. "And we expect that a lot of stuff is going to work its way up through the circuit courts and Supreme Court too over the next few weeks."

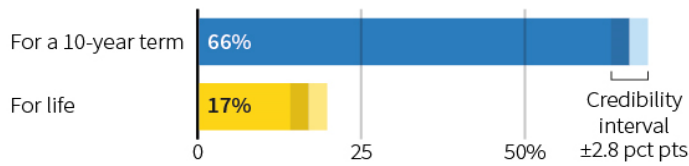




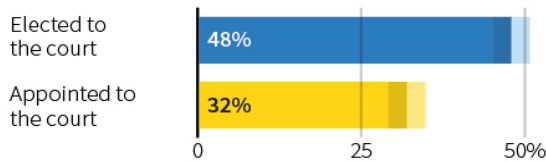
## Supreme Court appointments

Most Americans would support term limits for the nine U.S. Supreme Court justices, who now serve for life, a Reuters/Ipsos poll has found in the aftermath of major rulings by the court in late June on Obamacare and same-sex marriage.

### Should justices on the Supreme Court be on the court...



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Poll conducted between July 10 and July 17, 2015  
 Sample size = 1,611 adults  
 Source: Reuters/Ipsos

C. Chan, 17/07/2015



## There is bipartisan agreement that the US Supreme Court "gets too mixed up in politics"

Thinking about the current Supreme Court, please indicate if you agree or disagree with the following statement: **The Supreme Court gets too mixed up in politics** (%)

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Don't know
- Somewhat disagree
- Strongly disagree

US Adults



Democrats



Independents



Republicans

