

**Developments in American Politics 9**  
**The Politics of the Courts: The Trump Era and the Federal Judiciary**  
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Introduction

The four years of the Trump Administration saw significant changes within the US federal court system. Trump appointed almost a quarter of all lower federal court judges, an opportunity afforded by several years of Senate Republicans' refusal to hold hearings for President Obama's nominees. These judges serve for life and their influence is likely to stretch well into the future. Trump also found himself with the opportunity to appoint three new Supreme Court Justices. While appointing a third of the nation's highest court would be significant enough, the nature of those appointments had outsized importance, providing the first chance in decades to decisively shift the balance on the Court to the conservatives. The combination of life tenure and his appointees' relative youth means Trump's impact on the Court will remain current even as historians look to write their first assessments of his Administration.

But perhaps more significant than the impact of new personnel on the work of the courts is Trump's impact on the culture of the judiciary. The lasting legacy of the Trump Administration may well be the deepening politicization of the courts. Trump and his supporters, more than any previous administration, treated the courts as the spoils of electoral victory, another branch of government over which they could expect control and from which they expected cooperation. The two Supreme Court appointments which bookended his presidency revealed this clearly. But at the same time, when rulings did not go his way, Trump attacked individual judges and their courts, and interpreted their actions as challenges to his own personal power and authority. In this he echoed other areas of his presidency where dissent was considered disloyalty and challenges were interpreted as the work of the political forces ranged against

him. In relation to the courts, Trump exacerbated, although he did not create, a growing trend to see judges as political actors and their rulings primarily in the context of their significance for policy questions. Such perception of the work of the courts, especially of the Supreme Court, is dangerous to the institutional legitimacy on which the Court relies for its authority. The long term significance of this politicization, however, may rest in the actions of Democrats and the administration of President Joe Biden.

### The Politics of Judicial Appointments I: The Political Spoils

Treating the Supreme Court as part of the political spoils associated with winning the election campaign was one of the ways in which Trump and the Republicans deepened the politicization of the federal judiciary. Although using language which sought to distance themselves from obvious partisanship, a comparison of the events of 2016 and 2020 reveals the politics behind their actions. In 2016, following the death of conservative icon Justice Antonin Scalia, Republicans, determined to prevent President Obama making a third appointment to the Court, announced that they would not hold hearings on any nominee put forward by the Administration. The election was then nine months away and they duly did as they promised: they delayed holding hearings on Obama's nominee, Judge Merrick Garland, for a record-breaking 293 days until his nomination lapsed with the end of the 114<sup>th</sup> Congress. In contrast, Scalia's successor, Justice Neil Gorsuch, moved from nomination to appointment in sixty-six days. In 2020, when liberal icon Justice Ruth Bader Ginsburg died less than two months before the election, Trump and Senate Republicans moved to appoint Amy Coney Barrett to the Court in under six weeks. When she took office on 27 October 2020, the presidential election was two weeks away. The contrast between the inaction in 2016 and the subsequent speedy response in 2020 highlights the fact that, regardless of the political rhetoric, the different

approaches were about ensuring Republicans the opportunity to fill the vacancies on the Supreme Court.

Leading Republicans supported and defended their actions in terms which treated Court appointments as simply one more benefit of winning at the ballot box, although they wrapped it in language of deference to the will of the people. “The American people shouldn’t be denied a voice,” declared Senator, and Chair of the Senate Judiciary Committee, Chuck Grassley (R-IA) in March 2016. More than twenty Republican Senators defended the refusal to hold hearings on Garland on the grounds of the people’s right to have a say in the direction of the Court by waiting until after the election. Then only a candidate, Trump also played his part, using tweets and speeches to emphasise the importance of the Court to the election and to the nation. “Hopefully the Republican Party can come together and have a big WIN in November, paving the way for many great Supreme Court Justices!” he tweeted in March 2016. Four years later Trump repeated the message: “We were put in this position of power and importance to make decisions for the people who so proudly elected us, the most important of which has long been considered to be the selection of United States Supreme Court Justices. We have this obligation, without delay!” Senate Majority Leader, and architect of all three of Trump’s Court appointments, Mitch McConnell (R-KY) agreed, arguing: “... Americans reelected our majority in 2016 and expanded it in 2018 because we pledged to work with President Trump and support his agenda, particularly his outstanding appointments to the federal judiciary.”

Federal judicial appointments are, of course, inherently connected to electoral outcomes. Under the terms of Article 2, Section 2 of the Constitution, candidates are nominated by the president and appointed with the advice and consent of the Senate, inextricably linking appointments to election results. So the actions of Trump and the Republicans connecting the

two vacancies on the Court at either end of his term of office to the respective elections were, in some ways, a simple recognition of the reality: the party and individual who holds office has control over appointments. But the unprecedented refusal to hold hearings in 2016, and then the speed with which hearings took place four years later, spoke more of a deliberate attempt to manipulate the timeline to achieve desired outcomes. Trump and McConnell's decision to ignore the fact that the 2018 elections had returned the House to Democratic control and thus somewhat muddied the waters when it came to the "will of the people," spoke to similar intent. Republicans were blatantly playing politics with the Court while denying doing anything of the sort.

The politics of both appointments occasionally leaked out in Republican comments about the respective nominations, however. Ironically Republicans in 2016 offered the Biden Rule in defence of delaying hearings. In a 1992 Senate speech, Biden had stated: "once the political season is under way ... action on a Supreme Court nomination must be put off until after the election campaign is over." The purpose of this, Biden made clear, was to avoid partisanship creeping into a nomination process already under scrutiny after the bitter hearings over the nomination of Clarence Thomas. The absence of Republican discussion of this element of Biden's speech was important in changing the context of the Biden Rule: far from avoiding divisive partisanship, quoting the sitting Vice President while obstructing President Obama seemed designed to deepen such divisions. Similar partisan sentiments were evident elsewhere. "The Senate Republican majority was elected to be a check and balance to President Obama," declared Senator John Thune (R-SD), echoing indirectly McConnell's widely quoted 2010 declaration that, "The single most important thing we want to achieve is for President Obama to be a one-term president." In 2020, President Trump warned his supporters that Joe Biden and "far-left lunatics" would be in charge of the Supreme Court should Republicans not

turn out to vote: “Biden will destroy the United States Supreme Court. Don’t let this happen!” Indirectly, then, the president and other leading Republicans made clear that their actions regarding the appointments of Gorsuch in 2016 and Barrett in 2020 were deeply motivated by the very partisan politics Joe Biden had spoken of trying to avoid.

In 2020, however, Democrats also linked election results and the Court vacancy. Biden, now Democratic candidate for the presidency, and Senate Minority Leader Chuck Schumer (D-NY) echoed Republicans’ arguments about democratic legitimacy and argued the voice of the American people “should be heard.” Such arguments carried equally little weight to those offered by Republicans: both parties were looking for the opportunity to fill the vacancy. But the Democrats’ arguments in 2020 suggest that the explicit linking of the Court and electoral politics may have become a widespread trend. Even if the battles of 2016 and 2020 were unusual in offering two election year vacancies so close together, and allowing that election year nomination battles heighten the connections of the Court to the election in ways not seen at other times, the willingness of both parties to make the connections is a potentially worrying development for the institutional legitimacy of the Court. If the Court is increasingly seen as filled by Justices appointed via unfair practices or packed with politically-motivated appointees, the legitimacy of their rulings may well also come into question.

### The Politics of Judicial Appointments II: Shaping the Court

The second way in which the Trump Administration and leading Republicans risked deepening the politicization of the judiciary’s work was in the nature of the appointments themselves. In this, the historical moment played a significant role. On a Court finely balanced between liberals and conservatives for decades, each new appointment held the possibility of shifting

the balance decisively one way or the other, heightening the political tensions around each Court vacancy.

It is widely accepted by scholars and commentators that presidents seek to appoint Justices to the Supreme Court whose ideology broadly aligns with theirs (Nemacheck 2008). This phenomenon is not new. In 1800, President John Adams appointed Chief Justice John Marshall to the Court in large part because, as a Federalist, Adams hoped Marshall might act as a restraint on the incoming Republican Administration of Thomas Jefferson. Justices are often assessed by how closely or not their opinions over their careers aligned with the ideologies of the presidents who appointed them. So there has long been an understanding that presidents may, broadly, seek to shape the ideological makeup of the Supreme Court through the nomination process.

Two factors raised the stakes for Trump's appointees. First, it has become increasingly common among scholars, politicians, and the media to discuss the Court more explicitly in partisan terms. In 1993, Jeffrey Segal and Harold Spaeth (1993, 2002) asserted that Justices were policy makers who, more often than not, voted for results in cases that aligned with their personal political views. The Justices themselves have consistently resisted this portrayal of their work. Although widely derided, then-nominee for Chief Justice John Roberts commented in 2005: "Judges and justices are servants of the law, not the other way around ... Judges are like umpires. Umpires don't make the rules; they apply them." More than a decade later, lamenting the partisan nomination process, Justice Elena Kagan argued, "it makes the world think we are sort of junior varsity politicians. I think that's not the way we think of ourselves, even given the fact that we disagree." While scholars have suggested the influence of, among others, public opinion, the need for institutional balance, and pragmatism on judicial decision-

making, the Justices themselves argue the overriding factors are the law, legal interpretation, and precedent. But Segal and Spaeth's theory has proved consequential, shaping not only scholarly work on the Court but public discussions too. Thus references to "liberal" or "conservative" Justices, which once meant the broad judicial philosophies and approaches of the members of the Supreme Court, have increasingly (and misleadingly) come to be shorthand for rulings and approaches which appear to favour Democrats or Republicans. Discussions among scholars, commentators, the media, and politicians have in recent decades thus deepened this perception of Justices as partisan political actors, despite repeated denials from Justices on both sides of the political sphere that this is how they operate.

The ideological balance on the Court in 2016 only heightened the significance of this understanding. Following Earl Warren's retirement as Chief Justice in 1969, the very liberal Court slowly became more conservative, the legacy of more appointments by Republican presidents. By the 1980s the Court was balanced between liberals and conservatives with Justice Sandra Day O'Connor in the centre. Following O'Connor, Justice Anthony Kennedy and then, after 2018, Chief Justice John Roberts occupied the role as "swing Justice": judicially conservative but willing, on occasion, to vote with the Court's liberal members to determine the outcome of cases. On abortion, gay rights, and Obamacare, each had, in turn, disappointed political conservatives. The opportunity to appoint new Justices offered Republicans the opportunity to fundamentally shift the ideological balance on the Court to conservatives, fulfilling a decades-long project by establishing a decisive, dependable conservative majority (Teles 2008; Bennett 2017).

In this light, the battles over Court vacancies in 2016 and 2020 were mirror images of each other. In 2016, a Democratic president sought to replace a leading conservative jurist with a

(moderate) liberal; in 2020 a Republican president had the opportunity to replace a leading liberal jurist with what, most suspected, would be a deeply conservative jurist. Either would tilt the balance on the Court. The delay in the former case and the hurry in the latter indicated that control of the Court's ideological makeup was crucial to the actions of Republicans and the Trump Administration and to the outrage felt by Democrats who accused their political opponents of "stealing" the nominations. Such motives were reflected in their language. "We cannot afford to lose the Supreme Court for generations to come," stated then-presidential hopeful Ted Cruz (R-TX) in March 2016. "President Obama," echoed Senator Richard Shelby (R-AL), "is attempting to solidify his liberal agenda by drastically changing the direction of the Court for decades to come." Eschewing the overt politics, McConnell and Grassley also made references to "change" on the Court if Garland was appointed. In 2020, Cruz again warned the nation was, "one vote away from losing our fundamental constitutional liberties," while Senator Kelly Loeffler (R-GA) declared, "Our country's future is at stake." Both appeared to have taken cues from the President who tweeted frequently about the threat to the Court and to American liberties, offering on 21 October: "The first thing Washington Democrats will do if Biden is elected is pack the Supreme Court with radical left judges who will eliminate your 2nd Amendment." Democrats also drew on the political consequences of Barrett's appointment, emphasising threats from a conservative Court to the availability of abortion, marriage equality, and federal healthcare provision. Perhaps most obviously, Democratic members of the Senate Judiciary Committee boycotted the committee vote on Barrett, which they could not win, instead leaving pictures of those they claimed had been aided by the now-threatened Affordable Care Act.

This was not, of course, the first time the Supreme Court had been made a political issue. President Nixon's "law and order" campaign in 1968 was a barely concealed attack on the



criminal justice rulings of the Warren Court while President Reagan's promise to appoint only "strict constructionists," or those who would interpret the law narrowly, to the bench, was a coded message for seeking conservative judicial appointments. But Trump and leading Republicans employed this link more directly and blatantly than in any previous election, tying judicial appointments more deliberately and explicitly to partisan. At the same time, Democrats' willingness to engage in similar kinds of rhetoric, linking appointees explicitly with preferred legal and jurisprudential outcomes is deeply concerning as it suggests a new norm. The battles over both Gorsuch and Barrett reinforced the sense of Supreme Court Justices as political actors by debating their appointments in explicitly political terms. The risk is that their rulings come to be seen in the same light. Polls already suggest the American public see the Court as making political decisions (Pew 2015; Hartig 2020). If that continues, exacerbated by debates like those of 2016 and 2020, the risk is a shift from seeing judicial opinions as political to seeing them as illegitimate.

Aware of the heated political battles surrounding them, Gorsuch and Barrett were the models of judicial impartiality through the nomination and hearing processes. Both refused to be drawn on questions with political implications. Barrett in particular was criticised for being evasive and failing to answer even basic questions about her understanding of the law and the Constitution under the guise of remaining politically neutral. In his 2018 nomination hearings, by contrast, Brett Kavanaugh took a very different approach.

Kavanaugh's nomination avoided the electoral politics which dogged those of his colleagues, but was deeply enmeshed in the politics of the Court's ideological balance. Having sat at the Court's centre for more than a decade, Kennedy's retirement was a major blow to Democrats who had hoped he would remain on the bench until Trump left office. Permitting Trump to

appoint his successor would shift the balance on the Court further to the right and, without a Senate majority, Democrats were unable to block his appointment. Beyond this, however, the politics came from the nominee himself.

The catalyst for an unprecedented outburst of partisan politics from a judicial nominee was a leaked story that Kavanaugh had been accused of sexual assault. Initially intended to be private information, eventually Professor Christine Blasey Ford's name became public and, on 27 September 2018, she testified before the Senate Judiciary Committee that while they were both in high school, Kavanaugh had sexually assaulted her. In a lengthy opening statement, Kavanaugh denied the allegations. But in doing so he brought party politics to bear from the start. Referring to the investigation which had followed the initial leak of the allegations, he argued: "This whole two-week effort has been a calculated and orchestrated political hit, fuelled with apparent pent-up anger about President Trump and the 2016 election, fear that has been unfairly stoked about my judicial record, revenge on behalf of the Clintons and millions of dollars in money from outside left-wing opposition groups." Kavanaugh's statement brought presidential politics directly into the nomination hearings.

Using attack as a method of defence, Kavanaugh echoed the approach of his now-colleague, Justice Clarence Thomas who, in 1991, faced allegations of sexual harassment. Then, Thomas also criticised the hearings, all but daring the all-white Senate Judiciary Committee to find him unfit for the post: "It is a national disgrace. And from my standpoint, as a black American, as far as I am concerned, it is a high-tech lynching for uppity-blacks who in any way deign to think for themselves, to do for themselves, to have different ideas ...." Where Thomas drew on race, Kavanaugh drew on partisan politics, accusing his critics of opposing him for political reasons. Most surprising about his statement was how closely it echoed the sentiments

frequently expressed by President Trump, characterizing critics as opponents motivated by little more than political and personal animus. Allying himself so closely with the president's methods, Kavanaugh eschewed the more common approach of claiming judicial independence and drew directly on the politics of the debates around him as a defence strategy. Although Barrett's clear avoidance of such politics suggests that Kavanaugh did not start a trend, his actions nevertheless represented another way in which politics and the judiciary became more deeply intertwined in the era of Trump.

### Making It Personal: Trump and the Federal Judiciary

Trump's linking of the judiciary and legal rulings to electoral outcomes and partisan politics extended well beyond the Supreme Court nominations and appointments process. The federal judiciary generally was a target for both the president's ire and praise. Successes for the Administration's position were frequently claimed by Trump as political wins in language which implied the wins were for him personally or, at the very least, for him and his supporters. In contrast, decisions which went against Trump or the Administration were deemed "unfair," "ridiculous," and "disgraceful." Even the Supreme Court, to whom Trump frequently claimed the Administration would appeal, did not avoid claims of anti-Trump bias. After the Court in summer 2020 ruled that the Administration had offered insufficient justification for ending DACA, Trump tweeted: "Do you get the impression that the Supreme Court doesn't like me?," accusing the Court not only of making decisions to oppose Trump on personal grounds but also of making "horrible & politically charged decisions."

This pattern of praise and criticism extended to individual judges and justices. On the former, sometimes Trump recognised them by name. For example, Judge Robert Payne of the District Court for the Eastern District of Pennsylvania, whose ruling on Virginia election laws was

widely interpreted as a defeat for the Never Trump movement in the 2016 election, and Megan King, whose 2019 campaign for Superior Court Judge in Pennsylvania received “Full and Total Endorsement” from Trump. Others were simply declared “highly respected.” For those who ruled against the president or the Administration, Trump’s favourite approach was to claim political or personal bias. When Judge Gonzalo Curiel of the District Court for the Southern District of California ruled against Trump University during the 2016 campaign, Trump used campaign rallies to attack him: “I have a judge who is a hater of Donald Trump, a hater,” he told a San Diego rally in May 2016. “His name is Gonzalo Curiel and he is not doing the right thing.” More common, however, was to associate those ruling against his interests with his political opponents. Curiel and others were labelled simply as “Obama judges.” Such a November 2018 criticism of Jon S. Tigar, of the United States District Court in San Francisco, to whose ruling on the administration’s immigration policy practices Trump objected, earned a rare rebuke from Chief Justice Roberts.

Roberts’ retort to the President’s criticism was important. “We do not have Obama judges or Trump judges, Bush judges or Clinton judges,” he said: “What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them.” Implicitly reasserting the position taken by many judges that they decide each case based on the specific facts and the law before them, Roberts challenged what had become, and ultimately remained, a common trend in Trump’s formal and informal responses to the judiciary: that rulings reflected, and judges acted based on, nothing more than personal or political opinions about the individuals who brought the cases before the court. Taken together we see that Trump’s approach to the judiciary differed little from that taken towards the other political branches. Judges, courts, and rulings which were in alignment with him and his preferred positions received praise and were aligned with him, his supporters, and their

interests. At the same time, those who ruled against Trump could be nothing other than aligned with his political opponents, working to undermine Trump and his supporters. Either way, Trump's comments were designed to paint the judiciary in political colours.

Arguing that judges make decisions as political actors was nothing new. But the barrage of such attacks throughout the administration is important for the judiciary in the longer term. Studies have shown that political messaging over time has cumulative and long-term effects on the public (Gotlieb et al 2017). Whether received by Trump supporters who hung on every word and tweet, or liberals fundamentally opposed to everything Trump stood for, the constant accusation of political decision making by the courts feeds into public consciousness and a general sense of the work of the judiciary. In combination with politically-charged nomination hearings and a culture increasingly willing to see judges and Justices as making political decisions, Trump's assault on the US judiciary represents a long term risk to the judiciary generally but to the Supreme Court in particular.

### The Trump Appointees and Supreme Court Rulings

There is no doubt that the conservative activists who have made control of the Supreme Court their mission and target for the last three decades or more hope that Trump's legacy will be a stream of rulings in closer accord with their political positions than current precedent on issues such as gun rights, abortion, free speech, religious liberty and church-state relations, and LGBTQ rights. And the result of Trump's appointees is that the current Supreme Court is the most conservative we have seen since the early 1930s when the so-called "Four Horsemen" (Justices Pierce Butler, James McReynolds, George Sutherland, and Willis VanDevanter) were supporting the doctrine of liberty of contract over Progressive-era employment reforms and striking down FDR's earliest New Deal legislation. Today Justices Clarence Thomas, Samuel

Alito, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett, as well as Chief Justice Roberts, all adhere, in the main, to conservative judicial approaches, although importantly they differ on what those are, while Justices Stephen Breyer, Elena Kagan, and Sonia Sotomayor constitute the Court's liberal-leaning bloc. Conservatives hope, liberals fear, and most commentators expect that the clear 6:3 conservative majority will mean a raft of decisions supporting conservative policy positions.

Despite the headlines and discussions of divided Courts, however, the bulk of the work done by the Court does not reveal ideological divides. In some areas, then, the impact of the new Justices is likely to be less significant than anticipated. For example, in *City of Chicago v. Fulton*, decided in January 2021, the Court ruled 8:0 that Chicago did not have to return residents' impounded cars under a reading of the Bankruptcy Code. Such cases, perhaps unsurprisingly, hardly hit the national headlines. But the larger point is that a significant number of cases each year are decided unanimously or by large majorities. As Table 1 shows, although the percentage of decisions has fallen in the last few years, nevertheless roughly half of the Court's cases are decided unanimously or by large majorities. Equally, not all 5:4 decisions divide along ideological lines. *Salinas v. US Railroad Retirement Board*, decided in February 2021, saw the Court split narrowly on a jurisdictional question of the Board's authority. The majority comprised liberals Sotomayor (who wrote the opinion), Breyer, and Kagan, and conservatives Roberts and Kavanaugh. Both types of cases often involve technical legal issues, and are more often a question of legislative interpretation than constitutional questions, but they are the bulk of the Court's work and are largely, although not exclusively, non-ideological. When discussing the Court and politics it is important to remember that a large part of the Court's work is not dominated by the question of ideological division. As such, the impact of Trump's appointees in these areas is likely to be less dramatic.

<b>Table 1</b>			
<b>Percentage of Each Term's Cases Decided By Unanimous or Large Majority Vote</b>			
	9-0	8-1	7-2
2010 Term	46%	12%	15%
2011 Term	45%	11%	8%
2012 Term	49%	5%	9%
2013 Term	66%	3%	10%
2014 Term	41%	7%	12%
2015 Term	48%	11%	20%
2016 Term	59%	9%	17%
2017 Term	39%	8%	15%
2018 Term	39%	7%	11%
2019 Term	36%	6%	20%

\* Data adapted from SCOTUSBlog Stat Pack, October 2019 Term, p.17 (<https://www.scotusblog.com/wp-content/uploads/2020/07/Final-Statpack-7.20.2020.pdf>).

That said, a small number of cases can have an outsized influence on people's lives and on public perception of the Court. Those cases disproportionately involve questions of constitutional interpretation and attract significant, and usually divided, political attention. And it is here where we can understand why, in particular, Republicans worked so hard to ensure Barrett's appointment before the 2020 election and why that appointment could be so important.

Months before the 2020 election, conservatives had reason to cheer. In the previous two terms the Court had upheld a version of the president's travel ban (*Trump v. Hawaii*, 2018), refused

to uphold the finding of discrimination against a baker who refused to bake a wedding cake for a gay couple (*Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 2018), declined to intervene in instances of political gerrymandering (*Rucho v. Common Cause*, 2019), and held that a war memorial in the shape of a cross on government land did not violate the separation of church and state (*The American Legion v. American Humanist Association*, 2019). The 2019 Term had also seen the Court increase protections for religious organisations from otherwise generally applicable laws in cases involving contraception provision (*Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania* and *Trump v. Pennsylvania*, 2020), employment discrimination (*Our Lady of Guadalupe School v. Morrissey-Berru*, 2020), and scholarship programmes (*Espinoza v. Montana Department of Revenue*, 2020).

But summer 2020 brought a number of unpleasant surprises for those who had argued that Trump's Court appointees were a major achievement of his administration and would help reshape the law in a conservative direction for generations. Within the space of a couple of months the Court had refused the opportunity to significantly expand gun rights (*New York State Rifle & Pistol Association v. City of New York*), expanded legal protections for LGBTQ workers (*Bostock v. Clayton County*), rebuked the administration over its handling of DACA (*Dept. of Homeland Security v. Regents of the University of California*), struck down one of the nation's most restrictive abortion regulations in Louisiana (*June Medical Services v. Russo*), and rejected the president's claims to keep private all of his financial information (*Trump v. Vance*). Perhaps most disheartening for the president's supporters was that Gorsuch and Kavanaugh joined Roberts to require the president to release some of his financial information, and, of all people, Gorsuch had written the opinion (for a 6:3 majority) that expanded application of Title VII of the 1964 Civil Rights Act to protect gay and transgender employees from employment discrimination. As the 2020 election campaign moved from



primary season into the general election, the Court, which had been such a success for Trump in 2016, and which Republicans had, quite reasonably in light of two new appointments, hoped to make a key part of the 2020 campaign, thus appeared a more difficult issue on which to make a claim of “success.” In light of this, it is hardly unsurprising that many Republicans greeted a third vacancy on the Court with barely concealed glee: a third conservative appointment offered the possibility of shifting the “unreliable” Roberts from his spot at the centre and actually solidifying the Court’s conservative majority.

While the full impact of Barrett’s appointment on such topics will remain unclear for some time, two issues which arose shortly after her appointment provide some hint of what might be to come.

The first controversies involved Covid-19 restrictions and churches. This was a contentious topic from the introduction of restrictions on group gatherings in March 2020. Many religiously conservative churches claimed that laws which treated them like other mass gatherings, such as concerts and sports events, were tantamount to religious discrimination. That summer, with Ginsburg still serving, the Court largely upheld these state restrictions where there was no clear evidence that churches were actually being treated more harshly than similarly placed groups or individuals (*South Bay United Pentecostal Church v. Newsom*; *Calvary Chapel, Dayton Valley v. Sisolak et al*). But in late 2020 and early 2021, the Court struck down similar restrictions (*Roman Catholic Diocese of Brooklyn, New York v. Cuomo*; *Agudath Israel of America v. Cuomo*). Justice Alito, at the same time, in a speech to the conservative Federalist Society, lamented that religious liberty “is fast becoming a disfavored right.” Greater protection for religious conservatives has been a feature of the Court for at least

a decade, so in a sense this was not new. But the difference between the Ginsburg era and the Barrett era suggested the possibility of even more protection to come in this area.

The second highly watched area was the issue of abortion. When the Covid pandemic began, many states closed down abortion service providers, arguing they were not essential services. Pro-choice campaigners, not without reason, argued that such closings were simply abortion prevention by another name. On 12 January 2021, the Court, over the dissent of Sotomayor and Kagan, upheld an FDA regulation requiring women seeking an abortion drug to collect that prescription in person rather than permitting virtual prescription (*Food and Drug Administration v. American College of Obstetricians and Gynecologists*). With Roberts supporting the FDA, it is likely that the same result may have come even with Ginsburg still on the Court, but liberals are concerned that this too is a signal of what is to come.

It is important to note, though, that none of these cases was decided after full briefing and oral argument, but via emergency orders and applications. They thus do not have the same long-term legal weight. But as insights into the impact of Ginsburg's replacement with Barrett, they suggest liberals may have reason to be concerned, on these issues at least.

#### Gateway to the Supreme Court: Trump's Impact on the Lower Federal Courts

Trump's impact will also be felt for some time on the lower federal courts, the 94 US District Courts and the 13 US Circuit Courts of Appeal which sit below the US Supreme Court. Although discussed less often than the Supreme Court, the lower federal courts are important for understanding the work of the Supreme Court. During his term in office Trump appointed 54 federal appeals court judges, or 30% of the total number. To give some sense of scale, that number compared to 55 for Obama and 62 for George W. Bush in eight years of their respective

presidencies. Trump regularly boasted about the number of appointments made. Other Republicans also emphasised their success in appointing judges. In July 2020, as Congress adjourned for the summer recess, McConnell declared, “When we depart this chamber today, there will not be a single circuit court vacancy for the first time in at least 40 years.” As many commentators noted, however, Trump’s ability to appoint judges came in large part because of Republican success in blocking President Obama’s nominees for years, leaving vacancies of which Trump was able to take advantage.

The significance is not just in the number of appointments but the placement. Trump strengthened the number of Republican appointments on key appeals courts while his appointments also switched the balance on three from a majority of Democrat-appointed judges to a majority of Republican appointments: the Atlanta-based 11th Circuit, the Manhattan-based 2nd Circuit and the Philadelphia-based 3rd Circuit. On the 9<sup>th</sup> Circuit, described by Trump as “a complete and total disaster” and a “big thorn in our side,” the Democratic majority reduced from 18-7 to 16-13. Trump’s appointees have then strengthened the conservative presence within the federal judiciary.

All of this is significant because of the role that the federal appeals courts play as gatekeepers to the Supreme Court. When deciding whether to accept a case on a particular issue, one of the Court’s guiding principles is whether there is a lower court split. Before accepting the cases on marriage equality which became *Obergefell v. Hodges* in 2015, the Court had previously turned down a series of challenges to state marriage laws. While the Justices did not provide explanation for their subsequent acceptance of *Obergefell* and companion cases, in the interim the 6<sup>th</sup> Circuit had, in contrast to the other appeals courts, held that laws restricting marriage to one man and one woman did not violate the Constitution. This constituted a circuit split and

the Court subsequently accepted the case. With the influence of Trump's conservative appointees, circuit splits, even on politically controversial issues, may become more rare, making issues less likely to reach the Supreme Court.

The Court refusing to hear a case, known as 'denying cert', is also important. Although the denial does not create legal precedent, it does leave the lower court ruling in place. In effect, the more conservative Justices could avoid wading into politically controversial issues while still ensuring the operation of conservative legal reasoning by simply refusing to hear cases and leaving the lower court rulings in place. The Court avoids having to make controversial decisions which put it in the spotlight, while the practical reality is that a more conservative judicial reading of issues is in operation in parts of the country. In whichever way, Trump's appointment of so many federal appeals court judges is likely to have significant, if less widely commented upon, effects on the federal judiciary.

Recognising a judiciary less favourable to their understandings of the law, activists and lawyers may simply avoid bringing lawsuits at all. In the 1980s and 1990s, anti-abortion campaigners, recognising that the Supreme Court was increasingly unlikely to overturn *Roe v. Wade*, especially after its 1992 ruling in *Planned Parenthood v. Casey*, turned instead to state legislatures. They sought legislation which, while keeping to the letter of the law as set out in *Roe* and *Casey*, nevertheless worked in the grey areas around the edges of the rulings, making abortion access harder while never abolishing it outright. So-called TRAP laws (targeted restriction of abortion providers), almost all offered by state legislators as protection for women's health, in reality have been designed to restrict access to abortion providers. Anti-abortion campaigners have achieved enormous success in this. Liberal campaigners, fearing adverse rulings from lower courts or even the Supreme Court, which would be difficult to

eventually overturn, may then choose simply to bypass the courts and focus on legislatures instead. For those who argue that the courts should remain out of the business of making decisions on issues of political controversy, this result might represent the restoration of democratic debate and control and the limitation of a judiciary which has become too powerful and overstepped its role. But for heirs of the Civil Rights and Women's Rights Movements, for whom Supreme Court rulings helped pave the way and protected hard won gains, the loss of the courts as a potential venue to fight for rights is a significant one.

### The Biden Administration and the Trump Legacy

Although Biden's presidency is likely to see a reduction in the personal attacks on judges, there is a very real risk that Democrats' retaliation against Republicans over their treatment of the Supreme Court could further damage the Court's legitimacy and entrench the politicization of its work. The liberal movement to pack the Supreme Court gained momentum during the 2020 primary campaign. Long before the appointment of Justice Barrett, several leading liberal advocacy groups signed an open letter criticising "the Republican theft of the Supreme Court" and calling for an expansion in the number of Justices "to restore our democracy and protect the rights of all Americans." After the push to get Barrett appointed to the Court before the election, such claims gathered pace.

Democratic advocates of Court packing genuinely risk doing similar damage to the legitimacy of the Supreme Court as Republicans did under Trump. They risk, in Biden's words, "turn[ing] the Supreme Court into just a political football, whoever gets the most votes gets whatever they want." The liberal groups' open letter to Democratic candidates in summer 2020 framed the issue in relation to political and policy outcomes on reproductive freedom, LGBTQ rights, and gun control. Others spoke about the nomination in the same terms. Current Vice President

Kamala Harris called the Barrett hearings “a sham” which “shows how Republicans will stop at nothing to strip health care from millions of Americans with pre-existing conditions.” Openly gay, former presidential hopeful Pete Buttigieg commented: “My marriage might depend on what is about to happen in the Senate with regard to this justice.” Likely intended to encourage Democratic voters to the polls in November, the barrage of comments along these lines served only to reinforce the deepening politicization of the Court under Trump. Democrats argued for a right to retaliate in the face of outrageous Republican treatment of the Court. They associated Barrett and potential future nominees with desired issue-based outcomes. And they based their arguments on the assumption that the Court is part of the political spoils that comes with electoral success. All echoed comments made by Trump and McConnell, and if they continue, from whichever Party, they risk fundamentally damaging the Court’s ability to do its job.

President Biden has, however, resisted these calls. As Chairman or ranking member of the Senate Judiciary Committee for seventeen years, including presiding over the contentious nominations of Robert Bork and Clarence Thomas, Biden has long experience of dealing with the politics surrounding the Court. In late January 2021 he did what he said he would in an October 2020 interview with CBS *60 Minutes*: began appointing a bipartisan commission to consider, within a 180 day window, questions of court reform. That commission, and Biden’s resistance to dramatic changes to the courts, may ultimately prove to be the bulwark against further damage to the Court’s legitimacy.

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