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Maintaining Judicial Independence and the Rule of Law: Examining the Causes and
Consequences of Court Capture

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My name is Tom Ginsburg and I am the Leo Spitz Professor at the University of Chicago Law School. I am grateful to Chairman Johnson, Ranking Member Roby, and the other Members of the Subcommittee for the opportunity to discuss a topic I have been researching for many years. I work on the origins, maintenance, and decline of constitutional democracy around the world. That work has taken me to dozens of countries, where I have worked with governments and development agencies on judicial independence, the rule of law, and constitutional reform.

I appear before you at a time when many Americans are worried about the quality of our own democracy, and when the appointment of a Supreme Court Justice is again going to be a major topic of discussion during our presidential election campaign. It is a good time to be thinking about the role of courts in democracy, and how to ensure a high-quality judiciary that can fulfill its responsibilities under our Constitution. At the same time, this is a moment of some risk. Major battles over judicial appointments risk politicizing the courts, depriving them of the legitimacy that is essential for their functioning. Furthermore, such battles channel legislative energy away from discussions of policy. Our era is a highly polarized one, with declining levels of public trust in government, and a number of analysts even believe that our democracy is at risk.

I believe that a key objective for Congress in future years should be to reduce the stakes of appointments to the Federal bench. Lowering the temperature of judicial appointments will be good for our judiciary and good for our democracy. One way to do this is to regularize the appointments process. A second important objective is focus the judiciary on a mission of protecting democratic institutions. This will safeguard the broader structure of American democracy, and reduce the judiciary's ability to plunge into squarely political matters.

Background

Before addressing specifics, let me set the stage by identifying two global trends that are relevant to the topic. Since the end of the Cold War, we have witnessed what scholars call the "judicialization of politics" in many countries around the world. This phrase refers to the fact that courts have assumed a major role in deciding issues of grave social and political import. Many courts acquired the power of constitutional review of legislation, now found in nearly 150 countries. In many places, courts have found themselves resolving high-profile cases that Professor Ran Hirschl calls "Mega-Politics."¹ Courts in dozens of countries have had to decide cases like *Bush v. Gore*, in which a judicial decision determined the result of a national election.² This means that the stakes of judicial decision-making have grown increasingly high.

One consequence of this development is what might be called the politicization of the judiciary, in which outside actors seek to influence courts, by controlling appointments, abusing systems of judicial discipline, and putting other forms of pressure on judges. The term "capture" comes from literature on the regulatory state, and refers to instances in which an agency is too aligned

¹ Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, ANNUAL REVIEW OF POLITICAL SCIENCE, Vol. 11, 2008.

² Id.

with the interests that it is supposed to represent.³ But the larger problem is the attempt to capture courts by political forces around the world, as well as to influence their decision-making.

The second trend of our era is what we call democratic backsliding: the decline in the number of democracies around the world, and the decline in the quality of established democracies. Political scientists who measure these things tell us that the number of democracies peaked in around 2006, and has declined in every year since that.⁴ Furthermore, there has been a decline in the *quality* of established democracies. This trend of democratic backsliding interacts with the first trend because the judiciary has become a target of leaders who wish to take over their political systems.

In some cases, such attempts are brazen. For example, upon taking power in Venezuela, for example, Hugo Chavez created a judicial disciplinary commission that fired hundreds of judges, and introduced a system of provisional contracts for those that remained in office.⁵ He openly encouraged the public to disregard rulings he disagreed with. Similarly, Turkey's Recep Tayyip Erdogan moved decisively to reshape the Constitutional Court while he was Prime Minister, and subsequently arrested many judges of the ordinary courts that he thought were hostile to him. Viktor Orbán in Hungary passed a new constitution that gave him the ability to appoint members of the Constitutional Court, while erasing the entire jurisprudence of the prior Court.

In Poland, a crisis occurred in 2015 when the Civic Platform Party, anticipating an electoral loss, tried to pack the constitutional court with a slate of last-minute appointees. When in October the Law and Justice Party took over it refused to seat these "Midnight Judges" appointed by the prior government. It then passed a law to reorganize the constitutional court to require a higher threshold to declare laws unconstitutional. A messy set of legal maneuvers followed, but the result is that the Constitutional Court is now firmly in the hands of a single party in Poland.⁶ There followed a successful takeover of the council for judicial appointments, and a controversial set of laws to lower the mandatory retirement age for the judiciary so as to eliminate its senior leadership. While those laws were ultimately suspended after pressure from the European Union, observers believe that it is just a matter of time before the judiciary is controlled by one political party.⁷

³ J. Jonas Anderson, *Court Capture*, 59 B.C. L. REV. 1543 (2018).

⁴ See sources in Tom Ginsburg and Aziz Z. Huq, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* (University of Chicago Press, 2018); Freedom House, *FREEDOM IN THE WORLD 2019: DEMOCRACY IN RETREAT* (2019).

⁵ International Commission of Jurists, *Venezuela: Court Structure* (Nov. 14, 2014), available at <https://www.icj.org/cijlcountryprofiles/venezuela/venezuela-introduction/venezuela-court-structure/>; see also Jenna Eyrich, "Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela," 36 LOYOLA L.A. INT'L COMP. L. REV 1477-1503, 1480 (2014).

⁶ Wojciech Sadurski, *POLAND'S CONSTITUTIONAL BREAKDOWN* (Oxford University Press 2019).

⁷ Id.

The United States is not Venezuela or Hungary and will not become so. But some of the broader dynamics of democratic backsliding are present in our country, as many observers have argued.⁸ It is therefore urgent to reverse efforts to politicize the judiciary and to avoid a situation in which candidates must signal a particular set of partisan ideological commitments in order to join the federal bench, which is already quite narrow in terms of the backgrounds of judges.

Importantly, it is not just academics or journalists, but Americans themselves who are concerned with the quality of our democracy and the role of courts in it. A project called Bright Line Watch, created by several political scientists, measures perceptions of the public and experts along twenty dimensions of democratic performance. For most of these dimension, less than half of Americans believe that the US fully or partly meets democratic standards. The project's survey of March 2020 showed that less than 50% of Americans believe that the US meets the standard of an independent judiciary. This is true among both supporters and opponents of President Trump. Furthermore, these numbers had declined from a year earlier.⁹ The survey also shows that public and expert confidence that the judiciary can limit the executive is in decline. In other words, just when the judiciary might be most needed to help stave off democratic decline, its ability to do so may be diminished.

How did we get here? And what can be done?

Historians can trace the importance of the judiciary in our electoral politics all the way back to the appointment of “Midnight Judges” by the administration of John Adams just before handing over the presidency to Thomas Jefferson. The *Lochner* era, the New Deal, and Civil Rights era all saw battles over the proper role of the Supreme Court. Yet our era has seen a renewed ferocity over these issues. Televised confirmation hearings at the Supreme Court have become must-watch theatre, but do little to illuminate a candidates' views on jurisprudential issues. Scorched-earth battles like that over Justice Kavanaugh in 2018 leave no one happy, and the public embittered.

In my view, our present situation has resulted because the stakes of judicial appointments are too high. American judges serve for a very long time, with terms averaging 25 years on the Supreme Court at present. In most other countries, judges who nominally serve for life are subject to a mandatory retirement age, but not in the United States. Countries with constitutional courts typically provide them with terms ranging from nine to fifteen years, long enough to insulate judges from partisan pressures but not so long as to lock in particular positions for long periods. Furthermore, the search for ever-younger candidates who can stay in office for many decades means that American judges have less experience than they might have in a system of fixed

⁸ According the Economist Intelligence Unit, the United States slipped from being a “full democracy” to a “flawed democracy” beginning around 2016. See Elena Holodny, “The US has Been Downgraded to a ‘Flawed Democracy,’ ” *Business Insider*, January 27, 2017, online at <http://www.businessinsider.com/economist-intelligence-unit-downgrades-united-states-to-flawed-democracy-2017-1>. The formula they use is complex, but our system of running elections seems to be at the heart to the matter. Other ratings systems have similarly downgraded American democracy. GINSBURG AND HUQ, note 4

⁹ *Bright Line Watch*, March 2020 Survey results, available at <http://brightlinewatch.org/impeachment-and-the-state-of-u-s-democracy-bright-line-watch-march-march-2020-survey/>

terms, with appointments later in life. This may have an effect on the quality of judicial decision-making. It also means that the incoming judges have less extensive public records on which the public can base a prediction of future behavior.

Several ideas have emerged about appointments to the Federal bench that would lower the stakes of appointments. There is a good deal of constitutional flexibility in this regard. The Constitution requires the creation of one Supreme Court, but does not state the number of members it must have, and that number has fluctuated in the course of American history. The lower courts are a creature of the various incarnations of the Judiciary Act, and within the control of Congress to experiment with.

Again, we need not pretend that we are facing a unique challenge. There has been a good deal of thinking around the world as to how to ensure judicial independence, through insulating judicial appointments, protecting judicial salaries, and providing protections from arbitrary removal.¹⁰ The Federal bench is institutionally quite independent. But the increasing power to judges also implies some need for judicial accountability. While judicial independence has been widely studied, accountability has been the subject of much less inquiry.¹¹ Accountability requires that the judiciary as a whole maintain some level of responsiveness to society, as well as a high level of professionalism and quality on the part of its members.

Reforms of judicial appointments and management reflect something of a dialectic tension between the need to depoliticize the judiciary and the trend toward judicializing politics. Independence is surely needed, but once given independence, judges may be asked to resolve an ever-expanding range of more important disputes. Should the judiciary begin to take over functions from democratic processes, pressure for greater accountability mounts.¹² This means that there is rarely a perfectly settled system of judicial appointments or accountability. Our own history of experimentation at the state level, where appointments systems vary widely and have changed over time, is evidence of this. In many countries we see tinkering with the system, and we should not be afraid to tinker with ours, within constitutional boundaries.

What reforms might we undertake? There are a number of proposals, on which I take no position. But would say that I would favor any plan that restores a degree of bipartisanship to the process and reduces the stakes of individual appointments. One might imagine an effort to restore the *status quo ante* of a filibuster rule, but encourage appointments to the federal courts in groups, so that both sides of the aisle would agree on a package of judges they would approve; the president could then pick who to nominate from this set of judges who had been pre-screened for bipartisan support. One could also imagine a political compromise in which both political

¹⁰ James Melton and Tom Ginsburg, *Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence*, JOURNAL OF LAW AND COURTS 2: 187-217 (Fall 2014); Stephen B. Burbank, *The Architecture of Judicial Independence*, SOUTHERN CALIFORNIA LAW REVIEW 72: 315-51 (1999); John A. Ferejohn and Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, NEW YORK UNIVERSITY LAW REVIEW 77: 962-1038 (2002).

¹¹David Kosar, *The Least Accountable Branch*, INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 11: 234-60 (2013).

¹² Nuno Garoupa and Tom Ginsburg, JUDICIAL REPUTATION (University of Chicago Press, 2015).

parties agree to allow the presidential nominations of the other party to get a fair hearing, election year notwithstanding. But as it is, the situation has escalated severely, and will likely continue to do so until Supreme Court seats can only be filled when the Presidency and Senate are in the hands of the same party. Each side will then seek young, identifiably partisan candidates. This will not be good for the Court, the country, or our democracy.

At a minimum, we should seek procedural regularity in the process of appointments to the Federal bench. Right now the process is governed by Senate Rules and the Constitution, which provides only minimal guidance. While the Constitution speaks to the roles of the president and a Senate majority, it does not stipulate that these are exclusive. If the parties could come to terms on issues such as that before us today—whether a nomination should proceed in the period immediately before an election—they might codify rules in a statute, which would tend to channel disputes into the merits of particular candidates rather than the process itself. The statute could stipulate timelines for hearings, so that there would be no “Midnight Judges” appointed without scrutiny. There is also the possibility of seeking outside information about judges. From the mid-1950s until the presidency of George W. Bush, the American Bar Association (ABA) provided a recommendation about the suitability of all nominees as part of the process. That rating process is now an informal one. In my view, the ABA rating system—or an equivalent—provides valuable information to the public, and I note that the Senate itself has recently rejected some of the candidates rated “unqualified” by the ABA.

Another way of ensuring broader accountability would be for Congress to require qualifications for judges. At present, to my knowledge federal judges need not have a law degree, or litigation experience of any kind. This makes us something of an outlier in comparative perspective, as I have not been able to identify another common law country which lacks the requirement that prospective judges have been admitted to practice before courts.

Accountability would also be enhanced were Congress to expand the range of legal experience that comprises the Federal bench. The Supreme Court today has a notable lack of diversity in backgrounds. All current justices attended Harvard or Yale for law school, and all but one came from the courts of appeals. None has significant experience in elected office or in trial litigation. Whereas several members of the Supreme Court have served as prosecutors, the last one to have significant defense-side experience was Thurgood Marshall. Indeed, the judiciary as a whole is heavily concentrated among those with executive branch experience, which may mean that it is deferential to state power in critical cases. Former prosecutors outnumber former public defenders three to one.¹³ This has consequences for the enforcement of constitutional rights, whose violation is addressed by remedies that tend to be slow and weak.¹⁴ Examining slates of nominations for their effects on professional and ideological diversity would be a valuable function. A target of balance among prosecutors, state supreme court judges, trial judges, and defense lawyers would give the federal judiciary far more diversity than it has today, with positive consequences for the quality of decision-making.

¹³ Ginsburg and Huq, note 4, at 219.

¹⁴ Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies* DUKE LAW JOURNAL 65: 1–80(2015).

Finally, judicial ethics has largely been a matter of self-policing. Supreme Court justices, in particular, make their own decisions about recusal, presumably in conversation with each other. But Congress has adopted rules that require recusal in particular instances, such as when a justice “has a personal bias or prejudice concerning a party” or “a financial interest in the subject matter in controversy.”¹⁵ These rules should be regularly reviewed to make sure that Supreme Court justices avoid the “appearance of impropriety.” I note that H.R. 1, passed by the House in March 2019, would require the Judicial Conference of the United States to adopt ethics rules for Supreme Court Justices. This is a welcome proposal.

Judges in a Democracy

Many of the debates about the judiciary in the United States and abroad come down to a core question: What should be the role of judges in a constitutional democracy? I think of democracy as a system of resolving conflicts on the basis of relatively stable rules. There are at least three possible views of the roles judges should play in this system.

One common image is that judges are umpires or referees, making sure the rules of the game are observed. Justice Roberts invoked this image in his own confirmation hearing in which he said the job of the judge was to “call balls and strikes.”¹⁶ But this conception of the role of the judge creates some risks in a highly polarized era, given that the referee is essentially chosen by the players themselves. If the players can choose the referee without constraint, they will surely seek one who is biased toward their side. This in turn may allow them to influence the rules in ways that advantage them, so that they never lose. The increasingly partisan battles over confirmation in my view reflect an attempt to shade the judiciary toward one or the other side in conflicts that are squarely political, and might even lead, as they have in other countries, to serious erosion of our democracy.

A related problem is the incentive to send to the court political disputes that might be resolved otherwise. The Supreme Court recognized this risk in deciding *Trump v. Mazars*, the case involving the House’s subpoena of the Presidents financial documents this past Spring.¹⁷ Noting that Congress and the executive had traditionally resolved subpoena disputes through negotiation and compromise, the Court then recognized “that this dispute is the first of its kind to reach the Court; that such disputes can raise important issues concerning relations between the branches; that similar disputes recur on a regular basis, including in the context of deeply partisan controversy; and that Congress and the Executive have nonetheless managed for over two centuries to resolve these disputes among themselves without Supreme Court.”¹⁸ The Court seemed to be trying to fend off its politicization of the judiciary that would result from it having to play referee between the other branches. In short, while there is a superficial attraction to

¹⁵ 28 U.S.C. § 455.

¹⁶ “Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States,” *Hearings before the Committee on the Judiciary, United States Senate, 109th Congress*, U.S. Government Printing Office, 2005, 55-56.

¹⁷ *Trump v. Mazars, LLP*, 591 U.S. ____ (2020)

¹⁸ *Id.* at 10.

viewing the judge as a referee, and there is no doubt some accuracy in the image, in a polarized era it actually invites the parties to influence the referee.

Another vision of the role of judges is as a protector of minority rights, to compensate for those who are powerless. This vision goes back to the most famous footnote in constitutional law, found in the 1938 case of *Carolene Products*.¹⁹ In that case, Justice Harlan Fiske Stone noted that, while the court would be very deferential to the political branches as far as economic legislation was concerned, it would continue to exercise scrutiny in which rights were at issue, or when regulations targeted “discrete and insular minorities.” This came to stand for the idea that the Court would protect those who did not have a real possibility to exercise power through the political process. A generation later, this footnote justified the Warren Court’s expansion of constitutional protections for African-Americans, and a whole host of rights claims. But while this vision has attractions, it does not really address the major risk of our time, which is whether the political process it itself working.

In an era of democratic erosion, we need a third vision of the role of courts in democracy, namely as a bulwark against democratic backsliding. The job of courts is not to decide substantive issues of policy, but it *does* have a role of ensuring that democratic institutions can operate so as to address issues of policy. Indeed, in comparative experience, we have several examples of courts that took effective action to save a democracy in danger of erosion.²⁰ I think the most appropriate way to think about it is that courts should not substitute judgment for elected officials, but should ensure that the elections for those officials have integrity.

Congress is not powerless to empower courts in this regard. American courts generally do well in enforcing the freedoms of speech and association in the First Amendment. But they do less well with the other essential democratic right, which is the right to vote. Voting, of course, is mainly handled by states in our system, but was federalized in the Fifteenth Amendment and the Voting Rights Act of 1965.

The 2013 case of *Shelby County v. Holder*²¹ provides an example of a consequential case that has led to infringements on the right to vote. The case concerned the scheme in the Voting Rights Act which required certain states, mainly in the Jim Crow South, to “preclear” changes to their voting rules so as to ensure they did not deny or abridge the right to vote. Those provisions were renewed by Congress as late as 2006. In a 5-4 opinion, the Supreme Court held that Congress did not have adequate data to support its judgment to extend the preclearance scheme, and struck down the formula in Section 4(b) of the Act. There has followed a host of efforts to make voting difficult in the states formerly covered by the preclearance regime, including closing of polling places in African-American neighborhoods. States have also begun to aggressively purge voter rolls. I simply cannot understand why the world’s oldest and most successful democracy would tolerate efforts to reduce the ability of its people to vote.

¹⁹ *United States v. Carolene Products Company*, 304 U.S. 144 (1938).

²⁰ Sri Lanka, Colombia and Malawi come to mind. See Tom Ginsburg and Aziz Huq, *Democracy’s Near Misses*, *JOURNAL OF DEMOCRACY* 29: 18-30 (2018).

²¹ *Shelby County v. Holder*, 570 U.S. 529 (2013).

There are several steps that could be taken in this regard. Congress could respond to this state of affairs by developing a new formula for Section 4 preclearance. It clearly has the power to do this under the Fifteenth Amendment. It could undertake various other efforts to facilitate voting, some of which are contained in H.R.1.

More broadly, Congress could pass rules of interpretation for constitutional rights that urge judges to decide claims in ways that give maximum effect to the right at issue. Many other democracies do this. Examples include the Bill of Rights Act of New Zealand, which does not empower the courts to strike down laws, but instructs courts that “(w)herever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.”²² Similarly, South Africa’s Constitution instructs courts that “(w)hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”²³ There have been proposals for Federal Rules of Statutory Interpretation of the kind that adopted in many U.S. states, and these could be used to protect the rights of individuals and groups in our constitutional order.²⁴ This in turn would deepen our democracy, and would be especially important in the realm of voting rights.

Conclusion

The United States is at a crucial juncture in terms of the quality of its democracy. One of the perversities of our constitutional system is that, with multiple veto points that make passage of legislation difficult, there is a tendency to turn to the courts to obtain political outcomes that are otherwise difficult to achieve. Of course, the United States has long had judicialized politics. As Alexis de Tocqueville famously said in 1835, “Scarcely any political question arises in the United States that is not resolved, sooner or later, into a subject of judicial debate.”²⁵ But the idea that judicial appointments would become a central issue in presidential election campaigns would be anathema to the founding fathers. Thomas Jefferson warned against judicialization when he wrote “there is no danger I apprehend so much as the consolidation of our government by the noiseless, and therefore unalarming, instrumentality of the Supreme Court.”²⁶ We simply must find ways to reduce the stakes of judicial appointments, and reduce the temptation to politicize the judiciary further.

²² BILL OF RIGHTS ACT Section 6 (N.Z.).

²³ SOUTH AFRICA CONST. Sec. 39(2).

²⁴ Nicholas Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002).

²⁵ Alexis De Tocqueville, DEMOCRACY IN AMERICA 309 (1835).

²⁶ *Letter to William Johnson, Mar. 1823*

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