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RESTORING TRUST IN THE JUDICIARY: A CRITICAL, HIGH-PRIORITY PROJECT FOR THE BIDEN ADMINISTRATION

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We have been experiencing "climate change" in America, but not only of the type the scientists are telling us about. By 2015, the public's perception of the judiciary, particularly the Supreme Court, had become sharply negative.[1] It is surely no coincidence that in re-

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[1] *See Negative Views of Supreme Court at Record High, Driven by Republican Dissatisfaction*, PEW RESEARCH CENTER (July 29, 2015), https://www.pewresearch.org/politics/2015/07/29/negative-views-of-supreme-court-at-record-high-driven-by-republican-dissatisfaction. That shift was reported in 2015, following major rulings on the Affordable Care Act and same-sex marriage, but before the election of Donald Trump. *Id.* *See* LOGAN CORNETT & NATALIE KNOWLTON, PUBLIC PERSPECTIVES ON TRUST AND CONFIDENCE IN THE COURTS (June 2020), https://iaals.du.edu/sites/default/files/documents/publications/public_perspectives_on_trust_and_confidence_in_the_courts.pdf.

> Concerns about the fundamental fairness of the court system persisted into 2020—and not merely on the part of Republicans. *Id.* "A majority of participants [in an IAALS survey] expressed concerns . . . many of which centered on perception of systemic racial or gender bias, differential treatment based on financial ability, and judicial bias. . . . Perceptions of bias in many forms in the system, including political influence, have been well-documented . . . . Among those who did not trust their local judges, most shared a perception that judges are biased. For most of those participants, the issue was judges' political affiliations. . . . [We] asked participants about their perceptions of the United States Supreme Court. . . . A majority shared concerns that the Supreme Court has been overly politicized. As one participant phrased it,

cent years public officials were dismantling long-established safeguards to minimize political influence upon the courts, and were directly attacking and undercutting the independence and integrity of the judiciary.

Because these developments threaten survival of the rule of law, one of our foundational principles, the Biden administration must make one of its highest priorities the restoration of the courts' independence and the public's confidence in them.

An act that directly undercut the courts' independence was President Trump's decision in 2017 to outsource to an outside organization the most consequential power of a president, to select federal judges, including Supreme Court justices. That organization, the Federalist Society, has unshakable conservative views on a number of controversial political and social issues, and makes the ideological credentials of judicial candidates "central to the nominating process."[2] It has been regarded as the "de facto selector of Supreme Court Justices."[3] In the first year of his presidency, Mr. Trump announced that "we are going to have great judges, all picked by the Federalist Society."[4]

For more than 50 years, the American Bar Association's Standing Committee on the Judiciary, with appreciation from presidents of both parties, had been rating individuals previously identified by presidents and their advisors as potential judicial appointees, doing so by focusing solely upon their "professional competence, in-

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'[The Supreme Court is] dysfunctional. I think it's a politically motivated organization. I don't think it's impartial." *Id.*

[2] Lawrence Baum & Neal Davis, *How the Federalist Society became the de facto selector of Republican Supreme Court justices*, SLATE (Jan. 31, 2017, 10:12 AM), https://slate.com/news-and-politics/2017/01/how-the-federalist-society-became-the-de-facto-selector-of-republican-supreme-court-justices.html.

[3] *Id. See also* Jason Zengerle, *How the Trump Administration is Remaking the Courts*, N.Y. TIMES MAG. (Aug. 22, 2018), https://www.nytimes.com/2018/08/22/magazine/trump-remaking-courts-judiciary.html; *See* Adam Liptak, *A Conservative Group's Closed-Door Training of Judicial Clerks Draws Concern*, N.Y. TIMES MAG. (Oct. 18, 2018), https://www.nytimes.com/2018/10/18/us/politics/heritage-foundation-clerks-judges-training.html.

[4] Linda Greenhouse, *A Conservative Plan to Weaponize the Federal Judiciary*, N.Y. TIMES MAG. (Nov. 23, 2017) https://www.nytimes.com/2017/11/23/opinion/conservatives-weaponize-federal-courts.html.

tegrity and judicial temperament,"[5] but neither it, nor any other outside organization, had ever assumed the role of selecting candidates and submitting their names to the White House.[6]

Authorizing the Federalist Society to choose federal judges severely damaged the judicial selection process. An impartial and independent judiciary could never come out of such a process. Nor could that decision ameliorate the serious concerns expressed by Americans about the judiciary's fundamental fairness.

In today's climate, we do not often hear major political actors—leaders of public opinion—speak of judicial independence, but we do hear "chatter" from speakers promoting or opposing a candidate because they claim to "know" how he or she will rule on particular issues of public interest.[7] People in high and low places today fre-

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[5] *Standing Committee on the Federal Judiciary*, A.B.A., https://www.abanet.org/scfedjud (Last visited Nov. 11, 2020). *See* Madison Alder, *Another ABA 'Unqualified' Trump Nominee Confirmed as Judge*, BLOOMBERG LAW (Dec. 4, 2019), https://news.bloomberglaw.com/us-law-week/unqualified-anti-abortion-advocate-confirmed-as-federal-judge. Except for the George W. Bush administration, screening ordinarily took place prior to the public announcement of a candidate's nomination, allowing most presidents, quietly and without embarrassment, to abandon candidates who did not receive a "well-qualified" or "qualified" rating from the ABA. During the Bush administration the ABA was only given access to candidates' applications and supporting materials after their nominations were made and announced. The Trump administration decided to follow that practice. Mr. Bush, like most presidents before him, did not pursue appointment of candidates rated "unqualified" by the ABA, but Mr. Trump did, and at least ten of them were thereafter confirmed and are now on the bench for life. *Id.*

[6] *See* Laura E. Little, *The ABA's Role in Prescreening Federal Judicial Candidates: Are We Ready to Give Up on the Lawyers?* 10 WM. & MARY BILL RTS. J. 37, 48 n.52 (2001), https://scholarship.law.wm.edu/wmborj/vol10/iss1/4. In 1989, President Biden, then Chairman of the Senate Committee on the Judiciary, stated that "the 'ABA has the clout it has' because the press and the public consider it to be one of the least political organizations." *Id.*

[7] Carle Hulse, *Barrett, Vowing Independence, is Haunted by Trump's Demands,* N.Y. TIMES, Oct. 14, 2020, at A1 ("Judge Barrett has struggled over two days to separate herself from the trove of tweets and other pronouncements by Mr. Trump on his legal views and demands."[relating, in part, to the cases destined for the Court in which the president and his political allies were seeking to set aside the results of the 2020 election]); Elizabeth Dias & Adam Liptak, *To Conservatives, Barrett Has "Perfect Combination" of Attributes for Supreme Court*, N.Y. TIMES, Sept. 20, 2020, at A19 ('She is the perfect combination of brilliant jurist and a woman who brings the argument to the court that is potentially the contrary to the views of the sitting women justices,' said Marjorie Dannenfelser, the president of the Susan B. Anthony List, an anti-abortion political group."). After her confirmation, Justice Barrett joined a unanimous Court in declining to grant relief to Presi-

quently see judges as political actors, not as impartial thinkers. Two years ago, reacting to a statement of President Trump, Chief Justice Roberts felt the need to state that "we do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them."[8] The Chief Justice was articulating a view of the judicial system that is as old as the Constitution itself.

Alexander Hamilton, in *Federalist No. 78*, envisioned the system described by the Chief Justice two centuries later, saying plainly that "there is no liberty if the power of judging be not separated from the legislative and executive powers." Without independence, he said, the judiciary could not perform its role as "the citadel of the public justice and the public security." James Madison, in Federalist No. 51, explained why the judicial branch of government was different from the other two: judges were to be selected by a method that "best secures [the] peculiar qualifications" required of them, and would have lifetime tenure, which would "soon destroy all sense of dependence on the authority" responsible for their appointment.

Despite the hopes and intentions of our founders and the Chief Justice's wistful (or wishful) comments, judges—state and federal—are increasingly seen by others and by themselves as "politicians in robes."[9] We have come a long way from the ringing words "*All Rise*" in every courtroom in America, that each day signified our

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dent Trump in the two election cases that he had referred to. Kelly v. Pennsylvania, 592 U.S.____ (2020), 2020 U.S. LEXIS 5986 (Dec. 8, 2020); Texas v. Pennsylvania, 592 U.S. ____ (2020), 2020 U.S. LEXIS 2994 (Dec. 11, 2020). Whether her presence on the Court will change views that the Court is "a politically motivated organization," *see supra* note 1, and accompanying text, is at present unclear.

[8] Robert Barnes, *Rebuking Trump's Criticism of 'Obama Judge,' Chief Judge Roberts defends judiciary as 'independent',* WASH. POST (Nov. 21, 2018 6:21 PM), https://www.washingtonpost.com/politics/rebuking-trumps-criticism-of-obama-judge-chief-justice-roberts-defends-judiciary-as-independent/2018/11/21/6383c7b2-edb7-11e8-96d4-0d23f2aaad09_story.html.

[9] *See* Sanford Levinson, *Return of Legal Realism*, THE NATION (Jan. 8, 2001), https://www.thenation.com/article/archive/return-legal-realism/. Fred Rodell, one of my favorite law professors and one of the era's foremost firebrands, is credited as the originator of this phrase. The cited article stated that Rodell viewed judges "as no more than politicians in robes using legalistic mumbo-jumbo to write their politics into law." *See also supra* note 1.

respect for a judiciary that was generally regarded as able and willing to decide cases impartially.

The outcome of the recent presidential election provides the opportunity to restore and protect the independence of judges as our founders demanded. It is imperative to avail ourselves of it, for another reason.

During a good part of our history, but more intensively during the last 60 years, the courts have been asked to resolve some of the most intractable public policy issues America has faced. Abortion, school prayer, gun rights, campaign finance, and racial discrimination, among other important issues, have been ruled upon by the courts.[10] Resolving each of them has required judges to make policy choices, and choices made in such cases affect the lives of millions of Americans, who remain sharply divided on those very issues. In addition to being called upon to decide future legal disputes involving public policy, courts may be called upon to revisit some of the ones that were previously decided. (*Roe v. Wade* has been the subject of many pressures for reconsideration since it was decided in 1973).[11]

In such "political question" or "public policy" cases, and in the overlapping group of cases raising abuse of government power claims that Hamilton intended the courts to review, a judge's ideology is most likely to skew the result. Thus, today, it is arguably more critical than it has ever been that we have effective procedures in place to eliminate ideological selection of judges and insulate judges from political influence once they take their places on the bench.[12]

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[10] The cases referred to are Roe v. Wade, 410 U.S. 113 (1973) (abortion); Engel v. Vitale, 370 U.S. 421 (1962) (school prayer); District of Columbia v. Heller, 554 U.S. 570 (2008) (2d Amendment); Citizens United v. Federal Election Commission, 558 U.S. 310 (2010) (campaign finance); and Brown v. Board of Education, 387 U.S. 483 (1954) (school segregation).

[11] *See* Planned Parenthood of Southeastern Pa. v. Casey, 905 U.S. 833 (1992); Gonzales v. Carhart, 550 U.S. 124 (2007).

[12] Such a project is easier said than done. On January 21, 2020, the U.S. Judicial Conference proposed Advisory Opinion No. 117, which would have ruled that a federal judge's "formal affiliation with the Federalist Society or the American Constitution Society" (a liberal-leaning organization) "whether as a member or in a leadership role," is inconsistent with certain provisions of the Code of Conduct for United States Judges. Guide to Judiciary Policy, Vol. 2B, Ch. 2 (Jan. 2020), http://eppc.org/wp-content/uploads/2020/01/Guide-Vol02B-Ch02-AdvOp11720OGC-ETH-2020-01-20-EXP-1.pdf. During a 120-day comment period, the Conference received comments from about 300 judges, many strongly opposing the rule, and on July 30, the proposed opinion was withdrawn. *Id. See*

Now, despite loud protestations against judges' "legislating from the bench," an act that Richard Posner and Benjamin Cardozo, two of the nation's most respected jurists, found both necessary and honorable,[13] conservatives and liberals alike seem to agree that the courts can properly be involved in the making of public policy, a/k/a "legislating."[14] The fact that so many partisan issues now find their

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Debra Cassens Weis, *US judiciary drops draft opinion telling judges they can't be Federalist Society members*, A.B.A. (July 31, 2020, 10:04 AM), https://www.abajournal.com/news/article/us-judiciary-drops-draft-opinion-telling-judges-they-cant-be-federalist-society-members.

[13] *See* RICHARD A. POSNER, HOW JUDGES THINK 112 (2008). Judge Richard Posner, a widely respected former federal circuit judge, agrees that judges are occasional "legislators," who, "like other people who have to make decisions under uncertainty, act in good faith but rely heavily on intuition, and also on emotion both as shaping intuition and as an independent influence of decision making." BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921). Cardozo, who served with great distinction on the New York Court of Appeals and the United States Supreme Court, said that the power of judges to declare the law "carries with it the power, and within limits the duty, to make law where none exists." Cardozo liked to quote the famed Yale Law School Professor Arthur Corbin, who had said that "it is the function of our courts to keep the [legal] doctrines up to date with the mores by continual restatement and by giving them a continual new content. This is judicial legislation, and the judge legislates at his peril. Nevertheless, it is the necessity and duty of such legislation that gives to judicial office its highest honor; and no brave and honest judge shirks the duty or fears the peril." Cardozo believed that when "legislating" a judge has a "narrow range of choice," but "social justice" was the end to be attained.

[14] In 2005, future Justice Neil Gorsuch published an article in the National Review endorsing the statement that American liberals "had become addicted to the courtroom, relying on judges and lawyers, rather than elected leaders and the ballot box, as the primary means of effecting their social agenda." Neil Gorsuch, *Liberals'N'Lawsuits*, NATIONAL REVIEW (Feb. 7, 2005 12:42 PM), https://www.nationalreview.com/2005/02/liberalsnlawsuits-joseph-6/. In the years that followed, conservatives began to engage in the same practice, winning through the courts a significant number of victories. *See* District of Columbia v. Heller, 554 U.S. 570 (2008) (interpreting the Second Amendment as creating an individual right to bear arms); Burwell v. Hobby Lobby, 573 U.S. 682 (2014) (favoring an employer's religious choices over the right of his company's employees to have birth control covered by their employer-provided health insurance); Citizens United v. FEC, 558 U.S. 510 (2010) (invalidating on First Amendment grounds a federal law that prohibited corporations or unions from expending funds for an "electioneering communication" advocating the election or defeat of a candidate within 90 days of a primary election; and Shelby County v. Holder, 570 U.S. 529 (2013) (eliminating the "preclearance" provision of the Voting Rights Act of 1964). George F. Will, in THE CONSERVATIVE SENSIBILITY, rued that "for many years and for several reasons, too many conservatives have unreflectively and imprudently

way into the courts has undoubtedly caused many political leaders to view judges as soldiers in the culture wars. The danger that Hamilton and Madison saw in a partisan judiciary has now exponentially increased, because a significant part of its business is deciding partisan issues.

Suits to alter or abolish contentious policies are often filed at a time and in a place such that the court to hear it will be dominated by judges whose perceived political views are favorable to those of the filer. Deliberately submitting a case to a partisan judge or group of judges because they are partisan is as antithetical to the stated ideals of the bar and of the justice system as is the initial appointment of those judges to the bench because of their "ideological purity." Those stated ideals are usually crystallized in the phrases "judicial independence" and "adherence to the rule of law." To return to Chief Justice John Roberts and paraphrase his comments on another subject, the only way we can uphold those ideals and avoid the selection of partisan judges is to uphold those ideals and avoid the selection of partisan judges.[15]

We must ensure that judges are not screened for ideological purity or placed on the bench with any explicit or implicit understanding that in their rulings they will be expected to advance causes they fought for as politicians. The process and the standards by which they are selected set the tone for the way they will perform their duties, how they will see themselves, and how people will see them during all the years of their career. Judges cannot retain the respect and deference that enable them to effectively perform their critical role, unless they are chosen in a transparent process devoid of partisan taint and are able to fully put aside their political preferences during their service.[16]

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celebrated 'judicial restraint.'" GEORGE F. WILL, THE CONSERVATIVE SENSIBILITY 113 (Hachette Book Group, 2019).

[15] In *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 748 (2007), the Chief Justice wrote, "The way to stop discriminating on the basis of race is to stop discriminating on the basis of race."

[16] Adam Liptak, *In Unusually Political Speech, Alito Says Liberals Pose Threat to Liberties,* N.Y. TIMES (Nov. 13, 2020), https://www.nytimes.com/2020/11/13/us/samuel-alito-religious-liberty-free-speech.html. Justice Alito recently demonstrated that he does not believe that judges have any duty to put aside their political preferences. Addressing the Federalist Society in November, he is reported to have criticized liberals for posing a growing threat to religious liberty and free speech. *Id.* In criticizing what has been called "political correctness" on university campuses, he said that he is "all in favor

As Justice Anthony Kennedy pointed out, only neutrality by the courts engenders the public respect and allegiance that are essential to their legitimacy.[17]

The founders expected abuses of power by the two political branches of government, and specifically designed the federal courts to be an independent check upon them, a function that judges cannot perform if they remain in thrall to private or political interests.

Successive American leaders, presidents, prominent members of the judiciary and leaders of the Bar, have emphasized the importance of judges faithfully and impartially discharging their duties, to preserve the public's trust. As recently as December 2019, Chief Justice Roberts stressed the "ever more vital" need in this electronic age for the public to "understand our government, and the protections it provides." Stating that a strong and independent judiciary is a "key source of national unity and stability," he called upon members of the judiciary "to do our best to maintain the public's trust that we are faithfully discharging our solemn obligation to equal justice under law:"

> In our age, when social media can instantly spread rumor and false information on a grand scale, the public's need to understand our government, and the protections it provides, is vital. The judiciary has an important role to play in civic education.
>
> Chief Justice Warren illustrated the power of a judicial decision as a teaching tool in Brown v. Board of Education, the great school desegregation case. His unanimous opinion on the most pressing issue of the era was a mere 11 pages—short enough that newspapers could publish all or almost all of it and every citizen could understand the Court's rationale . . . .
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> We should … remember that justice is not inevitable. We should reflect on our duty to judge without fear or favor, deciding each matter with humility, integrity

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of preventing dangerous things issuing out of Cambridge [Massachusetts] and infecting the rest of the country and the world," and thus appeared to be endorsing political correctness himself. *Id.* He also issued a blanket condemnation of liberals for being religiously bigoted: "[F]or many today, religious liberty is not a cherished freedom; it's often just an excuse for bigotry, and it can't be tolerated." *Id.*

[17] Interview by Bill Moyer, *Frontline: Justice for Sale*, PBS (Nov. 23, 1999), https://www.pbs.org/wgbh/pages/frontline/shows/justice/etc/script.html.

> and dispatch . . . We should each resolve to do our best to maintain the public's trust that we are faithfully discharging our solemn obligation to equal justice under law.[18]

In 1955, President Dwight Eisenhower addressed the American Bar Association and honored the "reputation for greatness" of Chief Justice John Marshall, who, he said—

> established himself, in character, in wisdom, and in his clear insights into the requirements of government, as a shining example for all later members of his profession. . . . He made of the Constitution a vital, dynamic, deathless charter for free and orderly living in the United States. . . . One result of his work was to create among Americans a deep feeling of trust and respect for the judiciary. Rarely indeed has that respect been damaged or that trust betrayed by the judicial branch of our three-sided government.[19]

Eisenhower believed that a nonpartisan judiciary was essential to the courts' respect, and hence legitimacy. It was "obvious" to him that "a rough equality between the two great American political parties" should be maintained on the bench "to help assure that the judiciary will realistically appraise and apply precedent and principles in the light of current American thinking and will never become a repository of unbalanced partisan attitudes."[20]

That is not an unprecedented way of attempting to ensure nonpartisan membership of a body performing judicial functions. A number of independent federal agencies which make quasi-judicial

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[18] JOHN G. ROBERTS, JR., 2019 YEAR-END REPORT ON THE FEDERAL JUDICIARY 2-4 (2019), https://www.supremecourt.gov/publicinfo/year-end/2019year-endreport.pdf.

[19] Dwight D. Eisenhower, President, Spirit of Geneva during the Address at the Annual Convention of the American Bar Association in Philadelphia (Aug. 24, 1955), *in* Public Papers of the Presidents, Dwight D. Eisenhower, 1955, at 802-809, http://tucnak.fsv.cuni.cz/~calda/Documents/1950s/Ike_Geneva_55.html.

[20] *Id.*

decisions are required by law to have bipartisan membership,[21] and there is no principled reason why we should not accord full-fledged judicial activities the same status. In fact, in New York for a number of years, a bipartisan effort was made to ensure that each of the two major political parties would be represented on the federal bench.[22]

However perfect or imperfect the judicial selection process may be, once judges take their place on the bench, they must leave their ideological and political preferences behind. It follows that public officials, using their respective "Bully Pulpits," should not undercut the independence required of judges; doing so clearly feeds public suspicion about their fairness.

President Trump demonstrated that he had no visible concern for that independence, when he famously demeaned members of the judiciary by calling them "so-called judges" if they rendered decisions that displeased him,[23] and when he issued a pardon to Arizona Sheriff Joe Arpaio, who was found guilty of criminal contempt for disobeying federal court orders directing him to cease targeting Latino drivers, an action that undercut the authority of those courts, which had been diligently trying to enforce important federal laws.[24]

Indeed, the 45th President's exercise of the pardon power, because it was unmistakably associated with his political preferences, had the effect (and possibly the intent) of circumventing, for impermissible reasons, the systems and structures that Americans have long depended upon to adjudicate difficult questions of guilt or innocence. President Trump pardoned three members of the armed forces

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[21] *See* Fed. Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 37 (1981) ("[T]he Commission is inherently bipartisan in that no more than three of its six voting members may be of the same political party.").

[22] Based upon the author's own knowledge of the practice, federal district court appointments were divided between the two major political parties. The White House would choose a candidate initially forwarded by one of the non-partisan screening committees set up by each of New York's two senators, which had evaluated the experience and professionalism of candidates they interviewed. With White House acquiescence, the senators, if from different political parties, divided the available judgeships between them, three for the senator aligned with the president's party and one for the senator aligned with the other.

[23] *Trump Lashes Out at 'So-Called' Judge who Revoked his Travel Ban*, POLITICO (Feb. 4, 2017, 9:36 AM), https://www.politico.com/story/2017/02/trump-judge-james-robart-234645.

[24] Simon Romero, *Latinos Express Outrage After Trump pardons Arpaio*, N.Y. TIMES, Apr. 25, 2017 at A 14, https://www.nytimes.com/2017/08/25/us/joe-arpaio-pardon-latinos.html.

convicted or accused of war crimes, saying that "when our soldiers have to fight for our country, I want to give them the confidence to fight." His decision was widely criticized as undermining the military justice system and ignoring the rule of law. The Washington Post reported that Pentagon leaders were "fuming" about the president's intervention to "overrule military justice." His action led to the departure of the Secretary of the Navy, who believed that it undercut the "good order and discipline" prized by the military.[25] District of Columbia Federal Judge Paul L. Friedman condemned the president for "violating democratic norms;"[26] and the New York Times editorial board strongly protested his action, stating "the United States military—and its civilian commander—doesn't have the luxury of simply asserting that it is morally superior to its enemies. It needs to be morally superior, which means abiding by the rule of law."[27]

It is relevant to this discussion to note that leaders of nations "experiencing the rise of authoritarianism"[28] often consider it necessary to preserving their own power to attack or eliminate the independence of judges. In 2017, China's Chief Justice Zhou Qiang, stated "We should resolutely resist erroneous influence from the West;

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[25] Luis Martinez, *3 More SEALS in Gallagher case will not lose their Trident pins: Navy*, ABC NEWS (Nov. 27, 2019, 6:05 PM), https://abcnews.go.com/Politics/seals-gallagher-case-lose-trident-pins-navy/story?id=67356682. Ironically, Defense Secretary Mark Esper, who carried out the President's order to fire the Secretary of the Navy for having stripped one of the three pardoned service members of his Trident pin contrary to the President's desires, was himself fired by the same President when he opposed the President's suggestion that the uniformed military be mobilized against unarmed American citizens carrying out peaceful protests in a public street. Helene Cooper, Eric Schmitt & Maggie Haberman, *Trump Fires Mark Esper, Defense Secretary Who Opposed Use of Troops on U.S. Streets,* N.Y. TIMES, Nov. 10, 2020, at page A1, https://www.nytimes.com/2020/11/09/us/politics/esper-defense-secretary.html.

[26] Katie Shepherd, *Trump 'violates all recognized democratic norms,' federal judge says in biting speech on judicial independence*, WASH. POST (Nov. 8, 2019, 6:41 AM), https://www.washingtonpost.com/nation/2019/11/08/judge-says-trump-violates-democratic-norms-judiciary-speech.

[27] Editorial, *The Moral Injury of Pardoning War Crimes*, N.Y. TIMES (Nov. 22, 2019), https://www.nytimes.com/2019/11/22/opinion/editorials/trump-gallagher-pardon-war-crimes.html.

[28] PROTECT DEMOCRACY, PRESERVING THE COURTS (2017), https://protectdemocracy.org/wp-content/uploads/2017/12/Preserving-the-Courts.pdf.

'constitutional democracy,' 'separation of powers' and 'independence of the judiciary'." That statement caused Jerome A. Cohen of the U.S.-Asia Law Institute of New York University, a long-time China scholar, to call Zhou's comments "the most enormous ideological setback for decades of halting, uneven progress toward the creation of a professional, impartial judiciary."[29] Similar attacks upon an independent court system have been made by "strongmen" in Turkey, Hungary, and Poland, who "have taken their countries in authoritarian directions."[30] Tolerance on our part for the politicization of our courts represents a significant risk that this country, too, is being taken in an authoritarian direction.

There are other ways that the courts' independence can be undermined. In a number of states, "recall" laws have been enacted, allowing a judge to be unseated at any time during his or her statutory term of office if a petition with sufficient voter signatures places the question on the ballot. Judges have been removed from the bench for unpopular decisions.[31]

As of April 2018, it was reported that legislators in 16 states were considering 51 bills to diminish or politicize the judiciary's role.[32] By the end of that year, ABA President Bob Carlson reported that those numbers had increased to 18 state legislatures and at least 60 bills which would politicize the judicial selection process by giving legislatures or governors more control over it, or "discourage independent decision-making" by increasing the likelihood of judges being impeached for unpopular decisions.[33]

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[29] Michael Forsythe, *China's Chief Justice Rejects an Independent Judiciary and Reformers Wince*, N.Y. TIMES, Jan. 19, 2017, at A8.

[30] PROTECT DEMOCRACY, PRESERVING THE COURTS, *supra* note 28.

[31] *Judges Shouldn't Be Partisan Punching Bags*, N.Y. TIMES (Apr. 9. 2018), http://www.nytimes.com/2018/04/08/opinion/judicial-independence.html. A recall election successfully removed Chief Judge Rose Bird of the California Supreme Court from the bench, apparently because of her "categorical opposition" to the death penalty, reflected in her vote to set it aside in all 61 capital cases that came before her. Mary Kate DeLucco, *The Campaign Against Rose Bird*, DEATH PENALTY FOCUS (Nov. 4, 2016), https://deathpenalty.org/blog/the-focus/campaign-rose-bird.

[32] *Judges Shouldn't be Partisan Punching Bags*, *supra* note 31.

[33] Statement of Bob Carlson, ABA President, Undermining Judicial Independence, A.B.A. (Feb. 29, 2019), https://www.americanbar.org/news/abanews/aba-news-archives/2019/02/statement-of-bob-carlson--aba-president-re--undermining-judicial/.

The federal courts and some state courts, including New York's, have long operated under a random case assignment system, that can be circumvented, particularly in federal judicial districts with multiple smaller divisions where at times only one judge may be assigned. Lawyers filing cases in such divisions are able, despite the random assignment system, to select a specific judge whom they know to have views sympathetic to those of their clients.[34]

A widely condemned act, followed by an inconsistent sequel four years later by the same political leader, made a major contribution to the politicization of our highest Court. The refusal of Senate Majority Leader Mitch McConnell in 2016 to allow the Senate to consider President Barack Obama's nomination of Circuit Judge Merrick Garland to the Supreme Court was a double abandonment of the rule of law: he prevented all 100 separately elected members of the United States Senate from performing their constitutional duty to consider and vote upon the confirmation of all duly nominated judges and left the Court one member short for nearly a year.

Even before the death of Justice Ruth Bader Ginsburg in September, 2020, McConnell made it known that if a Supreme Court vacancy should occur at any time during the last year of President Trump's term, and notwithstanding his contrary action four years before, he would press forward with Senate confirmation of any replacement.[35] And indeed, Justice Ginsburg's seat was filled with unseemly and hypocritical haste merely days before Election Day; when the Senate voted on Circuit Judge Amy Coney Barrett's nomination to the Court, early voting and absentee voting had already begun. The political motivation for that action was made clear by contemporaneous statements by the president and other public figures supporting Judge Barrett's nomination, stating their expectation that she would rule in President Trump's favor on any election case that might shortly be brought to the Court, and would vote to abolish the Affordable Care Act and overrule *Roe v. Wade*.[36] In addition to laying bare that motivation, those comments also undoubtedly placed

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[34] Adam Liptak, *Texas One-Stop shopping for Judge in Health Care Case*, N.Y. TIMES, Dec. 25, 2018, at A17; *See also* Alex Botoma, *Divisional Judge-Shopping*, 49 COLUM. HUMAN RIGHTS L. REV. 297, 297.

[35] Reis Thebault & Kayla Epstein, *McConnell says he will help Trump fill a Supreme Court vacancy in 2020 — after blocking Obama in 2016*, WASH. POST (May 29, 2019), https://www.washingtonpost.com/politics/2019/05/29/mcconnell-says-he-would-fill-supreme-court-vacancy.

[36] *See* Hulse, *supra* note 7.

excruciating pressures upon now-Justice Barrett herself, with which she will likely have to wrestle for many years.

The Constitution does not place time constraints upon a president's power to appoint justices of the Supreme Court, or on the Senate's duty to consider and vote upon confirmation of nominees for those positions. A debate can surely be had over whether a lifetime Supreme Court nomination should or should not be made and voted upon too close to an impending presidential election. As a matter of policy, perhaps such a vacancy should be filled by the winner of an imminent election; or perhaps the Constitution's silence on the subject dictates filling of a vacancy whenever it occurs. Such a debate should be had, followed by the adoption of a standing rule of the Senate, to be honored consistently no matter which party holds the majority in that body or the White House. Such a rule would permanently prevent arguments of convenience on the question from being freely bandied about in order to justify the self-serving purposes of a political party or faction.

Other actions in recent years have undermined both the perceived and actual legitimacy of the courts, including the Supreme Court.

For a long period of time, the Senate would not proceed with any confirmation without the approval of both senators from the nominee's state, which they signified by handing in a "blue slip." Whatever their political affiliation, senators most likely to be familiar with a candidate's work and reputation played a critical role at the beginning of the confirmation process.

Today, many senators no longer have active judicial screening committees. Majority Leader McConnell ended the "blue slip" practice. Time allotted for Senate floor debate on judicial nominations, formerly as much as 30 hours, is now as little as two hours.

In short, Eisenhower-era procedures have been effectively abandoned, and the selection process that has now been substituted will not produce judges who will be, or be seen by the public, to be "neutral," to use Justice Kennedy's word, which he surely intended to encompass independence from political bias.[37]

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[37] It is often difficult to know with confidence whether a candidate is too strongly wedded to partisan views to cast them aside after becoming a judge, but most members of two judicial screening committees upon which I served for some years were quite capable of delicately exploring that subject with any candidate we interviewed whose resumé suggested the need to do so. Those interchanges assumed

Loss of judicial neutrality remains a clear and present danger. If the present trends continue, the justice system will soon be fully politicized. The only way to prevent that devastating result is for the public to clearly see and understand what is happening and support the necessary steps to correct it.

The courts—provided they faithfully perform their duty to administer impartial justice and are widely seen as doing so—are our only effective bulwark against tyranny.[38] The Biden administration, respectfully, must make a strong and visible effort to remind the public of that foundational principle, and take actions as suggested above to enact, or reinstate and reinforce, the necessary rules and policies.

We must heed President Eisenhower's words and ensure that the judiciary never becomes "a repository of unbalanced partisan attitudes." If we do not—and I have little doubt about this—our democracy will not survive.

And that should be a matter of urgent concern—and attention—to us all.

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great importance as the committee members later deliberated whether to recommend that candidate to the appointing authority.

[38] The free press, as guaranteed by the First Amendment, is obviously a strong and necessary ally in any attempt to right the system, but it has few legal weapons available to assist it in performing its role, and, like the courts, depends upon public respect and support for its influence. Predictably, like the courts, it has been the subject of constant attacks by President Trump intended to delegitimize what he calls the "mainstream media" in the eyes of many citizens.