



OPINION
GUEST ESSAY

A Judge Retires. Just How Political Is That Decision?

April 14, 2022



Illustration by The New York Times; Photograph via Getty

Give this article

By Eric Reinhart and Daniel L. Chen
The writers are researchers in the Data and Evidence for Justice Reform program at the World Bank.

The increasingly bitter partisan battles over Supreme Court nominations reflect the degree of influence that a single court of nine unelected judges exercises over life in America. As Ketanji Brown Jackson's confirmation hearing underscored, the role partisan politics plays on the court is an issue that is not going away.

Supreme Court justices and most other judges insist that politics do not enter into their work. But there is a straightforward metric available that reveals what appears to be a calculated political motivation in judicial decision-making: the timing of judges' retirements. And increasingly, federal judges have been calibrating their retirements so that their successors will be nominated by a president of the same party who nominated them. Given the lifetime tenure of federal judges, this pattern has long-term ramifications for the courts.

When asked, many judges say politics is not a reference point for them. Amy Coney Barrett, who took her seat on the Supreme Court in the fall of 2020 following the death of Justice Ruth Bader Ginsburg, told students at the University of Louisville last fall that political partisanship does not play a role in decision-making on the court. "Judicial philosophies are not the same as political parties," she said.

Justice Steven Breyer, 83, who was nominated to the court by President Bill Clinton, and whose impending retirement under another Democrat, President Biden, paved the way for Judge Jackson's nomination, also argued in a book last year that any differences among the justices were jurisprudential, not political. But that didn't stop liberal Democrats from urging [him to retire](#).

ADVERTISEMENT

Likewise, in the aftermath of Justice Ginsburg's death, many Democrats were sharply critical of her decision not to retire before Donald Trump was elected president. That would most likely have avoided the appointment of a conservative like Justice Barrett. Like Justice Breyer, Justice Ginsburg was also nominated by Mr. Clinton.

The idea that the justices are above politics is, of course, crucial to maintaining the veneer of impartiality that is the foundation of the court's legitimacy. That gloss appears increasingly tarnished. A [recent survey](#) by the Pew Research Center, completed before Justice Breyer announced his retirement, found that over the past three years, the share of Americans with a favorable view of the court has declined 15 percentage points, reflecting broad skepticism of the idea that the justices are not influenced by politics.

Did you know you can share 10 gift articles a month, even with nonsubscribers?
[Share this article.](#)

Numerous [studies](#) have found, perhaps unsurprisingly, that decisions by judges vary according to their gender, race, ethnicity and, notably, their party affiliation. One [study](#) published in 2006, for instance, analyzed thousands of judicial decisions and "found striking evidence of a relationship between the political party of the appointing president and judicial voting patterns."

Still, one might still say that judges are doing their best to be impartial and politically independent, and that these biases are simply reflective of unconscious dynamics, differences in philosophy or moral principle.

But retirement or resignation is typically a very carefully considered decision; it also carries substantial political consequences by conferring on the president the opportunity to select the replacement.

ADVERTISEMENT

A past survey of active and retired federal judges asked them to report the degree of importance they attached to the party of the president in power when deciding when to retire. [Nearly all judges reported](#) that they did not consider this as a factor in the timing of their retirement. A [study](#) published in 2006 concluded that judicial retirement patterns had to do with pension eligibility and that "By comparison, political and institutional factors appear to have little influence on turnover rates."

In [our study](#), a working paper on the role politics might play in retirements and resignations, we considered not just whether judges retired the year before or after an election, as other researchers had done, but also whether they retired in the first quarter before or after an election.

Using data from 1802 to 2019, we examined whether judges' resignations and retirements corresponded with electoral cycles. Between 1802 and 1975, we found that relative to the regular distribution of departures from the bench over time, an additional 6 percent of all judicial exits coincided with electoral cycles and appear to have been politically motivated. In other words, the political affiliations of the exiting judges, measured by the party of the president who appointed them, were the same as the sitting president's.

We saw a significant uptick in what appear to be politically motivated retirements since the 1970s — a historical inflection point coincident with Roe v. Wade and the ascent of [right-wing evangelical politics](#) — that has continued to intensify. Of 273 federal judicial retirements between 1976 and 2019, 14.7 percent, representing 40 lifelong appointments, deviated from the regular pattern of retirements in a way that ensured that the retiring judge's replacement would be nominated by a president who shared the judge's party affiliation. Such retirements are seen across both political parties, with Republican-affiliated judges slightly more likely to indulge in this partisan behavior.

Politically motivated departures from the bench are both a symptom and a cause of the increasing polarization of the courts, and there is no reason to believe this feedback loop can be changed without some mechanism to force it. Term limits for Supreme Court justices and federal judges, widely used around the world, would help counter the evaporating legitimacy of the courts. So too would staggering retirements randomly rather than leaving them up to judicial discretion. And proposals to increase the number of justices on the Supreme Court as a corrective to its [politically engineered](#) rightward drift should not be dismissed as radical.

It is vital that lawmakers and judges acknowledge that instituting [substantial changes to the Supreme Court](#) and the broader judiciary is not a threat to the integrity of American law. It is instead an essential step toward counteracting its accelerating demise and protecting the ideal of democracy it claims to support.

Eric Reinhart (@ [Eric Reinhart](#)) is a political anthropologist, psychoanalyst and resident physician at Northwestern University and a lead researcher in the Data and Evidence for Justice Reform program of the World Bank. Daniel L. Chen is a professor of law and economics at the Toulouse School of Economics and Institute for Advanced Study in Toulouse, France, and the lead principal investigator in the World Bank's justice reform program.

The Times is committed to publishing [a diversity of letters](#) to the editor. We'd like to hear what you think about this or any of our articles. Here are some [tips](#). And here's our email: [letters@nytimes.com](#).

Follow The New York Times Opinion section on [Facebook](#), [Twitter](#) (@NYTopinion) and [Instagram](#).

ADVERTISEMENT