



TO: Interested Parties
FROM: Future Majority
DATE: March 4, 2020
RE: The Courts in 2020: What's at stake

When most people hear “2020,” they likely think Trump and the handful of Democratic presidential hopefuls. While the White House is the big-ticket item at stake this year, the fabric of our country could be fundamentally altered by a series of decisions in the courts and the judges who make them up. **With two liberal stalwarts on the Supreme Court in their eighties -- Ruth Bader Ginsburg and Stephen Breyer -- there is a very real possibility that if re-elected, Trump will have the opportunity to appoint two new ultra-conservative and relatively young justices to the Supreme Court.** And if Clarence Thomas (age 71) retires, that will give Trump a total of five of the nine Justices on the high courts, solidifying a lopsided Republican majority for generations.

Conservatives have long understood the importance of the courts and have built an entire ecosystem to achieve and maintain conservative majorities on the bench, often promoting judges with extreme views that are not aligned with mainstream opinions held by the majority of Americans. Spending and activism from conservative groups like the Federalist Society and the Heritage Foundation have cemented a pipeline of conservative judges from the lower courts all the way up to the Supreme Court.

Democrats, on the other hand, have been behind the eight ball on the courts. The party has lacked an infrastructure to compete with Republicans and the conservative movement, and in turn, voters and elected leaders alike rarely elevate judicial issues. As Jeffery Toobin noted in the *New Yorker*, many of the leading Democratic presidential candidates do not even mention Supreme Court nominations on their campaign websites.

Future Majority is taking a look at what is at stake in the courts this year, and how Democrats can start to fight back.

The Big Picture

The conventional wisdom has been that Democratic voters are more motivated by political and social issues and less so by the courts themselves. Democrats view the courts, especially the Supreme Court, as institutions outside the realm of politics, while Republicans have cleverly made them an election issue and successfully turned out single-issue voters who vote care about conservatism in the courts. Of course, the political and social issues Democrats care about — choice, healthcare, and civil rights to name a few — are inextricably linked and often shaped by the courts.

Democrats have all but ceded efforts to make gains in the lower courts as well. As of the date of this memo, the U.S. Senate has confirmed nearly 200 judges nominated by President Trump.

The clip of Trump and McConnell's success with judges is striking: a quarter of all current U.S. circuit court judges have been appointed by Trump. At the important federal circuit level, three such courts have flipped from a majority of Democrat-appointed judges to a majority of Republican-appointed Judges in the Trump era alone (for reference, there are a total of 13 federal circuit courts).

Senate Majority Leader Mitch McConnell and Judiciary Chairmen Chuck Grassley and Lindsey Graham have been the architects of the conservative takeover of the federal courts. We likely don't need to remind you that hostility reached a fever pitch when McConnell withheld hearings and any votes on President Obama's nomination of Merrick Garland to the Supreme Court -- for 293 days.

While Merrick Garland was arguably the most egregious case, McConnell slowed down confirmations of judges to a 60-year low during Obama's tenure, perpetuating an already historic amount of openings in the courts. Trump picked up right where the Republican Senate left off, promising to wield McConnell's power to get ultra-conservative judges confirmed. To expedite the confirmation process for the Republican president, McConnell activated "the nuclear option" to allow Trump nominations to pass with a simple Senate majority, as opposed to the standard 60-vote bar.

As we look to cases in front of the courts in 2020, one thing becomes very clear: the future of the many issues that Democrats fight for is at stake. As the assault on reproductive rights continues and the Equal Rights Amendment makes its way through the courts, it is also clear that the future of women's equality in this country that women have long fought for is at stake. And a potential Trump re-election poses a potentially insurmountable threat. But the tide may be beginning to turn, as Democrats become wary of the McConnell confirmation machine and voters and activists continue to express anger over Brett Kavanaugh's nomination in 2018.

What's at Stake: Supreme Court

Reproductive and Women's Rights

- In what could be a major threat to *Roe v. Wade*, the Supreme Court will hear a challenge to a Louisiana law that requires doctors who perform abortions have admitting privileges to hospitals within 30 miles of their clinic. Four years ago, the Supreme Court struck down a similar law out of Texas for placing an undue burden on women seeking reproductive health care, with Justice Anthony Kennedy voting with the liberal wing of the court. Trump Justices Neil Gorsuch and Brett Kavanaugh will have their first opportunity to rule on a case impacting a woman's right to choose.
- In January, the Democratic-led Virginia legislature became the 38th state to pass the Equal Rights Amendment, becoming the last state needed to ratify the Amendment. But as Republican-led states file lawsuits that argue the deadline for ratification has passed, the fate of women's equality under the law will likely make its way up to the Supreme Court.

Smart Capitalism

- The Justices will decide whether the Consumer Financial Protection Bureau -- the agency created in 2011 in response to the Great Recession -- is constitutionally viable. Since Republicans have been calling for the end of the CFPB since its creation, the Bill Barr-led Department of Justice won't be defending the Bureau in the case.
- The Justices are set to decide if federal law that forbids employers from discriminating based on a worker's sex also would bar discrimination based on sexual orientation and transgender status. It's one of three SCOTUS cases that will impact how LGBT individuals are protected in the workplace.

Strong Democracy

- SCOTUS will hear three cases on one of the most fundamental tenets of our democracy: the separation of powers. The Justices will decide just how powerful the executive branch is, and if congressional oversight and state prosecutorial power can compel Trump to release his financial records and tax returns.
- Remember Bridgegate? One of the Chris Christie aides who was convicted for closing traffic toll lanes to hurt the former New Jersey Governor's political rivals will have her appeal heard in the Supreme Court. The question surrounds public corruption broadly, as the Justices decide if a public official lying about his or her motive for an official action is a violation of federal corruption laws. Over time, we have seen a narrowing of public corruption laws that put a greater burden on prosecutors to prove public officials have committed legal wrongdoing, making it harder for the public to hold elected officials accountable

Healthcare

- House Democrats, joined by 20 Democratic-led states, asked the Supreme Court for an expedited review of a December decision out of a federal appellate court that ruled the individual mandate in the Affordable Care Act as unconstitutional, but the Court turned down their request. As of this week, the Supreme Court announced it will hear the Republican challenge to the ACA in its normal course, with arguments likely this fall and a decision in the spring or summer of 2021. The question before the court will be if the individual mandate can be severed from the act, or if the entire ACA is deemed unconstitutional based on a if lower court's ruling. At stake is healthcare coverage for millions of Americans. As a reminder, the Republican-led Congress already eliminated the individual mandate tax penalty, and have been eager to see the ACA fail for a decade.

Climate Change

- The Supreme Court recently heard arguments on the Atlantic Coast Pipeline development -- a project that would impact the Appalachian Trail. The developers of the pipeline, Duke Energy and Dominion Energy, are appealing a lower court decision that barred them from obtaining a permit to allow the pipeline to cut into the Appalachian

Trail. Environmental activists argue that the Appalachian Trail is part of the National Park System and is therefore protected from such developments.

What We're Tracking: Lower Courts

Reproductive Rights

- The 9th Circuit Court of Appeals recently upheld a rule that bars taxpayer-funded family-planning clinics from referring patients for abortions. Starting in March, the rules will also prohibit clinics that receive federal funding from sharing office space with abortion [providers](#). This case could be appealed at the U.S. Supreme Court level but it is likely to end its proceedings.
- Not every lower court is siding with the Trump administration, demonstrated by the 5th Circuit Court of Appeals' decision over Mississippi's law banning abortions at the detection of a fetal heartbeat. This was the first abortion ban passed in 2019 that was blocked at the lower courts [level](#). The state has yet to announce whether it will appeal this ruling at the U.S. Supreme Court.

Smart Capitalism

- The Ninth Circuit Court of Appeals in San Francisco ruled that employers may not rely on employees' past salaries to pay women less than men, pushing us closer to closing the gender wage gap. This case was reviewed once before in April 2018, but the ruling was published 11 days after the lead author's death. This ruling upheld the Equal Pay Act of 1963, citing that it was intended to "eradicate the practice of paying women less simply because they are women."

Strong Democracy

- Democratic lawmakers recently attempted to sue Donald Trump for illegally profiting off of his private businesses while in office, but the appeals court in D.C. threw out the lawsuit. This cause was brought to the courts in 2017, but the theme is likely to see a resurgence with Trump's recent exorbitant expenditures through the Secret Service staying at his [properties](#).
- Trump has still yet to release his tax returns, but an appeals court ruled that the Manhattan DA can subpoena Trump's tax returns. While this is a win for anti-corruption, the DA's office agreed to not enforce the subpoena until the Supreme Court issues a final determination in the [case](#).

Healthcare

- Back in December, the 5th Circuit Court of Appeals ruled in a split decision that the ACA's individual mandate is unconstitutional, but the judges did not invalidate the entire law. As mentioned above, the case will now be moving up to the Supreme Court but it won't put the case on an accelerated schedule. The court will decide the fate of the ACA after the 2020 presidential election in the court's next term.

Climate Change

- In late 2019, a federal appeals court dismissed litigation brought by a group of young activists seeking a ruling to push the federal government to reduce emissions. This federal court decision could determine the fate of two lawsuits in California where a group of California communities is suing fossil fuel companies for their contributions to climate change and the consequences. The Ninth Circuit Court of Appeals is scheduled to hear the [arguments](#), which could lead to similar cases across the US depending on the ruling.

Recommendations

- 1. Public opinion polling is on the Democrat's side. Lean into it.** When it comes to blockbuster issues in front of the courts, public opinion tends to support Democratic positions. 67% of adults in the U.S. support the Equal Rights Amendment and 73% of Americans believe there should be a federal law ensuring equal rights for men and women, compared to 17% opposed. The Affordable Care Act continues to be popular with a majority of Americans, and support for legal abortion in many polls is at all-time highs. Democrats should continue to lean into these issues that are at stake in the courts and are threatened by Trump's conservative judges.
- 2. Make the courts, and Trump's mishandling of them, an election issue.** Democrats should hammer two things. 1) An outside group, the Federalist Society, is having more say over the judges that will rule on the issues that affect American's lives than the people themselves. It's hardly an independent judiciary, and Democrats should call into question Federalist Society judges impartiality. And the numbers show Democratic voters are motivated by this: Only 23% of likely Democratic voters approve of the Supreme Court's job performance, and 73% of likely Dem voters believe the Kavanaugh confirmation demonstrates the Supreme Court is just another partisan political body. 2) Democrats can motivate both the base and persuadable women that Trump is creating a judiciary and his image and his image only. 91% of his judicial nominees are white and 81% are men. They in no way look like America. These issues will motivate the Democratic base and turn them out, as Republicans have with their base for decades.
- 3. Use the momentum of recent activism and outrages to build a judicial infrastructure that can compete.** If Democrats lean into positions that are popular, and make the courts an election issue, they will continue to bolster an already growing grassroots movement to compete with Republicans in shaping the courts. The Kavanaugh outrage has put a spotlight on the fact that the Trump-packed courts are not only deeply politicized but also a threat to many American's rights. Out of this awakening, Democrats can begin to rebuild a national infrastructure to compete with the conservative movement in the courts.

Conclusion

With a dysfunctional Congress, the courts set American policy. Democrats need to demonstrate that they have a plan to take back the courts and protect American's rights: to marry whom you love, breathe clean air, drink clean water, determine your reproductive rights, to be equal under



Let's Build: Freedom. Fair Shot. Future

the law, have access to affordable healthcare, retire with dignity, have trust in public officials and elections, and much, much more. Future Majority is building the narrative, the message, and creating the ecosystem to drive this into the bloodstream. Our affiliate, America's Future Majority Fund, is taking the message to suburban women voters in the states that will decide this election — and the makeup of the courts for decades to come.

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