

NPBA FOUNDATION

ESSAY TOPIC FOR 2021 SCHOLARSHIP COMPETITION

THE SUPREME COURT

This year's essay question concerns the Supreme Court of the United States, its significant role in our overall governance scheme and the importance of individual Justices in achieving the purposes and goals the Court is intended to serve. Specifically, we ask for your comments on recent calls to increase the number of Justices on the Court.

CONSTITUTIONAL AND OTHER BACKGROUND

Article III, Section 1 vests the **judicial power** of the country in a "supreme Court," and leaves it to the Congress to determine a variety of details, including the number of Justices and the number and jurisdictions of lower federal courts.

Article II, Section 1 vests the **executive power** of the country in a president; among other powers, the president ". . . by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court"

The Judiciary Act of 1789 provided ". . . the **supreme court of the United States shall consist of a chief justice and five associate justices**, any four of whom shall be a quorum."

The Judiciary Act of 1869 provided ". . . the **Supreme Court of the United States shall hereafter consist of the Chief Justice of the United States and eight associate justices**, any six of whom shall constitute a quorum."

The total number of Justices has remained at nine to the present day. However, there have been unsuccessful attempts to increase that number. One notable example occurred in 1937. To help the nation recover from the effects of the Great Depression, President Franklin Roosevelt had announced the "New Deal," a series of ambitious legislative and regulatory measures. After the Supreme Court declared some of the President's enabling legislation unconstitutional, he proposed to increase the number of Justices to fifteen. For a variety of reasons, including bi-partisan opposition to the President's proposal, it ultimately was rejected by the Senate. President Roosevelt's proposal came to be known as "Court packing."

In recent years, appointments to the Supreme Court have become highly politicized, especially when a sitting president nominates, and a Senate controlled by the president's party confirms candidates whose personal policy preferences align with those who hold executive and legislative power at the time, but also when a president of one party nominates a candidate that is not to the liking of the party controlling the Senate.

Less than ten days after her death, and less than two months before the 2020 presidential election, in September 2020, President Trump nominated a candidate to fill the vacancy on the Supreme Court created by the death of Associate Justice Ruth Bader Ginsburg. The Senate confirmed the nominee (52-48) -- essentially, a party-line vote.

Many objected to making that nomination so close to a presidential election, recalling that just four years earlier the Senate Majority Leader refused to consider a nomination made by a president of the other party to fill a vacancy created by the death of Associate Justice Antonin Scalia. Justice Scalia died over eight months before the presidential election of 2016, and the same Senate Majority Leader indicated that it would be inappropriate to consider such a nominated "so close to" a presidential election. In addition, opinions were expressed that the justice replaced Justice Ginsburg should endorse social, political and judicial philosophies similar to those of Justice Ginsburg (according to one legislator, "We need to hold the 'Ginsburg seat' "), and the President's

nominee did not satisfy that criterion. Similar concerns were expressed by others in 2016 about replacing the “Scalia seat” with a person having judicial philosophy similar to that of the late Justice Scalia.

Reflecting the views of a large number of colleagues in his party, Senate Minority Leader Schumer repeatedly announced that – if the Senate even considered the President’s nominee before the election – his party, if and when it holds a voting majority in the Senate, will seek to enact a number of reforms. One such reform may be to **increase the number of Justices from nine to eleven or thirteen.**

In addition to the foregoing, we offer the following for your consideration; we ask **only** that you assess their possible applicability as you evaluate the suitability and effects – short-term and long-term – of increasing the number of justices on the Supreme Court at this time:

* Among the Constitution’s underlying principles are the doctrines of separation of powers-checks and balances, intended to assure that no one branch of government is vested with or exercises too much power, in part by providing (i) that each branch serves as a “check” on the others and (ii) for public accountability of two branches -- presidents are elected for four-year terms, and members of the House and Senate are elected for two and six-year terms, respectively.

* Federal judges serve for life; they are not subject to re-confirmation hearings or to being removed by an electorate that may disagree with one or more of their decisions. By design, they are able to think and to act “independently” of the partisan interests and forces that influence the policies and votes of those who are directly responsible to constituents.

* Some lament that the Court has become too “liberal” or too “conservative”; often, those labels are thought to characterize a Justice’s **political** preferences. Properly understood, they are shorthand for a Justice’s **judicial** philosophy – for example, “Does this case involve subject matter or seek remedies for which the **judicial power** is intended?”; “**How** (by what principled thought processes) do I decide cases?”; and “What **limits**, if any, does the Constitution impose on the matters (including personal ideologies and beliefs) I may take into account to reach a decision?” For example, confusing as it may seem, a case may be decided by applying a conservative philosophy about what a court can and cannot do, but which upholds a liberal political preference.

The questioning during recent hearings on the confirmation of then-judge Barrett is illustrative. Some Senators were concerned that, if confirmed, she would vote to **overturn** certain long-standing decisions based on her personal philosophy about the policy outcomes resulting from those decisions and that in new cases, she might be so hostile to a policy outcome which might result from her decision that she would let her personal beliefs get in the way of providing a fair and reasoned decision. And all Senators were interested in her professional qualifications and in how she approaches decision-making.

WE ARE INTERESTED IN YOUR OPINIONS (THERE ARE NO “CORRECT” ANSWERS!) ABOUT INCREASING THE SIZE OF THE SUPREME COURT - SPECIFICALLY,

1/ Do you believe that increasing the size of the Supreme Court comports with and advances what you understand to be the constitutional plan for governing our republic – why or why not?

2/ Please state and advocate for YOUR personal opinion about the desirability of increasing the size of the Supreme Court; do you, a member of this society, think it is a good idea or a bad idea?