

Public Response to Proposals to Reform the Supreme Court*

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Summary

Eliminating life tenure for justices and expanding the size of the Court are “reform” proposals that have been batted around for years.¹ But today, in the aftermath of Republican success at blocking Merrick Garland, confirming Brett Kavanaugh amid charges of sexual assault, and nominating a replacement for RBG, the proposals have unusual momentum. Progressive groups, politicians, and commentators are pushing them;² and the 2020 Democratic Party platform includes language endorsing “structural court reforms.”³

What does the public think? Gallup polls from 1936-37 show that never did a majority of Americans support Democrats’ court-curbing proposals (chiefly to limit judicial review and increase the size of the Court).⁴ A nationally-representative survey (see the Appendix) shows that today’s public is both more and less supportive of reforms, depending on the specific proposal.

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¹See, e.g., Tom Clark, *The Limits of Judicial Independence* (2011); Jeffrey A. Segal, Chad Westerland, & Stefanie A. Lindquist, “Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model,” 55 *American Journal of Political Science*, 89 (2010).

²See, e.g., Holly Otterbein, “[Liberal Groups Back Plan to Expand Supreme Court](#),” *Politico*, June 11, 2020; Astead W. Herndon and Maggie Astor, “[Ruth Bader Ginsburgs Death Revives Talk of Court Packing](#),” *New York Times*, September 25, 2020.

³2020 Democratic Party Platform, 58.

⁴The polls are available at the [Roper Center for Public Opinion Research](#).

1. Regarding overall support for court-reform proposals (Section 1):
 - (a) A far smaller percentage of Americans today favor plans to enlarge the Court than in the 1930s.
 - (b) But 60% support eliminating life tenure for justices; and a near majority would make it harder for the Court to invalidate federal laws.
 - (c) All in all, of the five Court-curbing proposals queried in the survey, about 75% of respondents favored at least one, suggesting substantial support for fundamental changes in the structure (and perhaps the function) of the U.S. Supreme Court.
2. Regarding support by partisan identity and ideology (Section 2):
 - (a) On proposals to expand the bench, a 10.5 percentage-point gap exists between Republicans and Democrats but support falls far short of a majority on either side (19.2% for the Republicans, 29.7% for the Democrats). The gap is larger between liberals and conservatives but, again, not even most liberals support expanding the Court (37.8% of liberals versus 15.0% of conservatives).
 - (b) In contrast, a majority of Democrats/liberals and Republicans/conservatives support term limits for justices.
3. Whether these percentages will change—or the gaps between Democrats and Republicans will grow—in light of unfolding events (e.g., Barrett’s potential appointment), the data do not allow us to say.⁵

1 Overall Support for Court-Reform Proposals

Respondents were asked about five possible structural changes to the Supreme Court, reflecting contemporary pitches for reform, as well as historically common proposals.⁶

1. **Eliminate Judicial Review.** “Eliminate the ability of the Supreme Court to declare laws passed by Congress unconstitutional”
2. **Expand Size of Court.** “Increase the size of the Supreme Court from 9 to 18 justices”
3. **Elect Justices.** “Having justices elected by the people rather than appointed by the president”
4. **Require a Supermajority for Judicial Review.** “Require at least seven members of the Supreme Court to agree before issuing any decision declaring a law passed by Congress unconstitutional”
5. **Fix Terms of Service.** “Have justices serve a fixed term on the Supreme Court—like six or eight years—rather than serving life terms”

⁵In part, because the survey was conducted in July 2020 before RBG’s death and Barrett’s nomination.

⁶See, e.g., Clark, *The Limits of Judicial Independence*, note 1.

For each proposal, respondents could select one of five options:⁷ Strongly Support, Support, Uncertain, Oppose, Strongly Oppose. Figure 1 shows the percentage of respondents expressing Strong Support or Support, with the caveat that the percentages should not be taken to mean that the remaining respondents oppose the proposal. To the contrary: they could be either opposed or uncertain.⁸

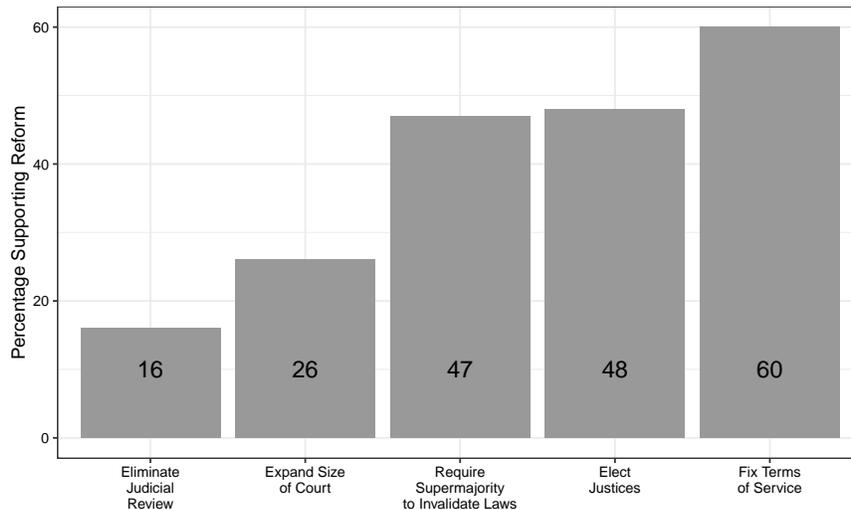


Figure 1. Public Support for Five Proposals to Reform the U.S. Supreme Court, 2020. “Support” is the percentage of respondents expressing strong support or support for the proposal. Weighted $N \approx 1,000$

With that caveat, note that respondents had very different reactions to the two items on judicial review. Clearly they do not favor eliminating the power altogether, but nearly half endorse supermajority agreement before the justices could invalidate a federal law. This is somewhat surprising considering that not many, if any, prominent progressives today advocate a supermajority rule (it was popular among conservatives in the 1970s and 1980s) despite its potential to constrain the conservative Court from invalidating liberal laws enacted by future regimes.

The remaining three proposals relate to the composition of the Court. Just as Americans approve of elections for state judges,⁹ a near-majority would also support the opportunity to pick their own Supreme Court justices and to hold them accountable at the ballot box.

As to fixing terms and expanding the bench: They receive the lion’s share of attention today, but they elicit divergent responses. 60% of Americans favor replacing life tenure with fixed terms of eight or even six years. That percentage falls short of the support required to amend

⁷Technically, this is a five-point Likert response set.

⁸*E.g.*, with regard to fixing terms, 60% support the proposal as shown in Figure 1; 19% oppose the proposal and 21% are uncertain.

⁹*E.g.*, James L. Gibson, *Electing Judges: The Surprising Effects of Campaigning on Judicial Legitimacy* (2012).

the Constitution (perhaps necessary to eliminate life tenure¹⁰) but it is more than double the percentage favoring bench expansion. Actually, support for enlarging the Court today is about 20 percentage points *lower* than support for FDR’s 1937 Court-packing plan¹¹—a plan so derided that it has long served as a cautionary note about efforts to mess with the size the Court.¹²

Based on these results, the late Justice Ginsburg may have spoken for the majority of Americans—Democrats and Republicans alike—when she declared “Nine seems to be a good number. Its been that way for a long time.”¹³ More generally the data suggest high hurdles for advocates of Court-curbing measures, especially bench expansion. Then again, the results could be seen to create room for optimism among reformers: A surprisingly large fraction of Americans support fundamental changes in the Court’s structure (and perhaps its function), with *over 75% of respondents favoring at least one the five proposals for change.*

2 Support for Court-Reform Proposals by Partisan Identity and Ideology

Because progressive groups and Democratic politicians are today’s advocates for Court reform, it’s possible that the results in Figure 1 differ by respondents’ partisan identity or ideology. The data provide only marginal support for this proposition.

Beginning with party, the survey asked respondents to identify their partisanship using the standard 7-point scale, ranging from Strong Democrat to Strong Republican. Collapsing the three categories of Democrats and Republicans, Figure 2 shows the percentage of Democrats, Republicans, and Independents favoring each reform proposal.

¹⁰*E.g.*, James DiTullio and John Schochet, “Saving This Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms,” 90 *Virginia Law Review* 1093 (2004). But see Fix The Court, “[Term Limits](#),” September 29, 2020.

¹¹45% of respondents in 1937 favored Roosevelt’s plan, according to survey data analyzed by Alex Badas, “Policy Disagreement and Judicial Legitimacy: Evidence from the 1937 Court-Packing Plan,” 48 *Journal of Legal Studies* 377 (2019).

¹²This is not to say that it failed altogether. FDR claimed that he lost the battle but won the war because of the Court began to uphold his New Deal legislation (the so-called “switch-in-time-that-saved-nine”); and many scholars agree. See, *e.g.*, Daniel E. Ho & Kevin M. Quinn, “Did a Switch in Time Save Nine?,” 2 *Journal of Legal Analysis* 60 (2010).

¹³Tucker Higgins, “[Ruth Bader Ginsburg Says She Opposes Proposals From 2020 Democrats to Expand the Supreme Court](#),” CNBC, July 24, 2019.

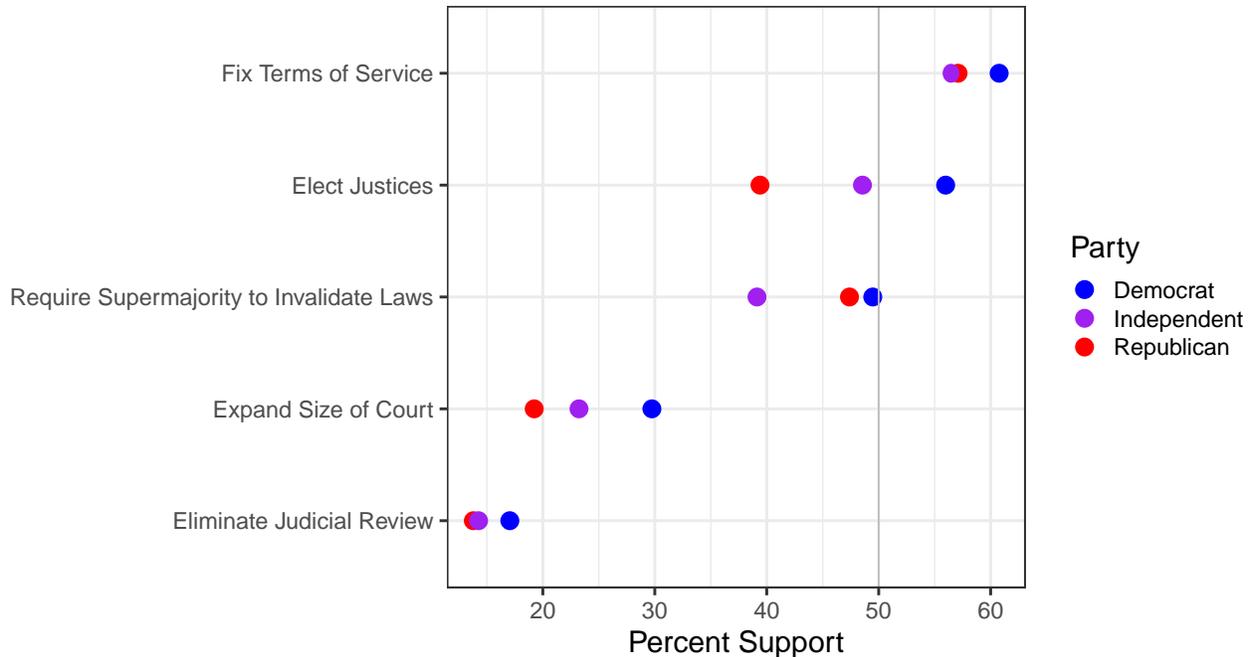


Figure 2. Public Support for Five Proposals to Reform the U.S. Supreme Court, by Partisan Identity, 2020. “Support” is the percentage of respondents expressing strong support or support for the proposal. “Partisan Identity” collapses the three Democrat categories (Strong Democrat, Weak Democrat, Lean Democrat) and the three Republican categories (Strong Republican, Weak Republican, Lean Republican). Weighted $N \approx 1,000$

Though a higher percentage of Democrats support each proposal, in the context of this era of extreme polarization differences between partisans are relatively modest. For example, surveys show a 57 percentage-point gap between Democrats and Republicans on the question of whether global climate change should be a priority;¹⁴ and a 64 percentage-point difference on favorable views toward the NRA.¹⁵ More generally, a Pew Research Center survey reports a 39 percentage-point gap between Democrats and Republicans, on average, across 30 “political values.”¹⁶

By contrast, the largest gap in our data is 17 percentage points on electing versus appointing justices—a proposal that few groups and politicians are pushing today.¹⁷ Over the two reforms that have moved center stage, tenure and size, the differences are smaller (4 and 11 percentage points respectively). And note the general level of agreement: a majority of Republicans *and* Democrats favor term limits, while neither comes close to supporting bench expansion.

The picture is roughly similar for ideology, as Figure 3 shows. Although the gaps between

¹⁴Brian Kennedy and Courtney Jones, “More Americans See Climate Change as a Priority, but Democrats are Much More Concerned than Republicans.” *Pew Research Center*, February 28, 2020.

¹⁵R.J. Reinhart, “Record U.S. Partisan Divide on Views of the NRA,” *Gallup*, June 28, 2018.

¹⁶“In a Politically Polarized Era, Sharp Divides in Both Partisan Coalitions,” December 17, 2019.

¹⁷Interestingly, these data suggest that *Democrats* are more supportive of judicial elections than *Republicans*; at the state level, adoption of judicial elections has been pushed by conservative groups like the Federalist Society.

liberals and conservatives are generally larger than those between Democrats and Republicans,¹⁸ the differences may not amount to much for contemporary proposals: a majority of conservatives and liberals support eliminating life tenure but reject expanding the bench. *Whether either or both will change—or the gaps will grow—in light of unfolding events (e.g., Barrett’s potential appointment), we can’t say.*

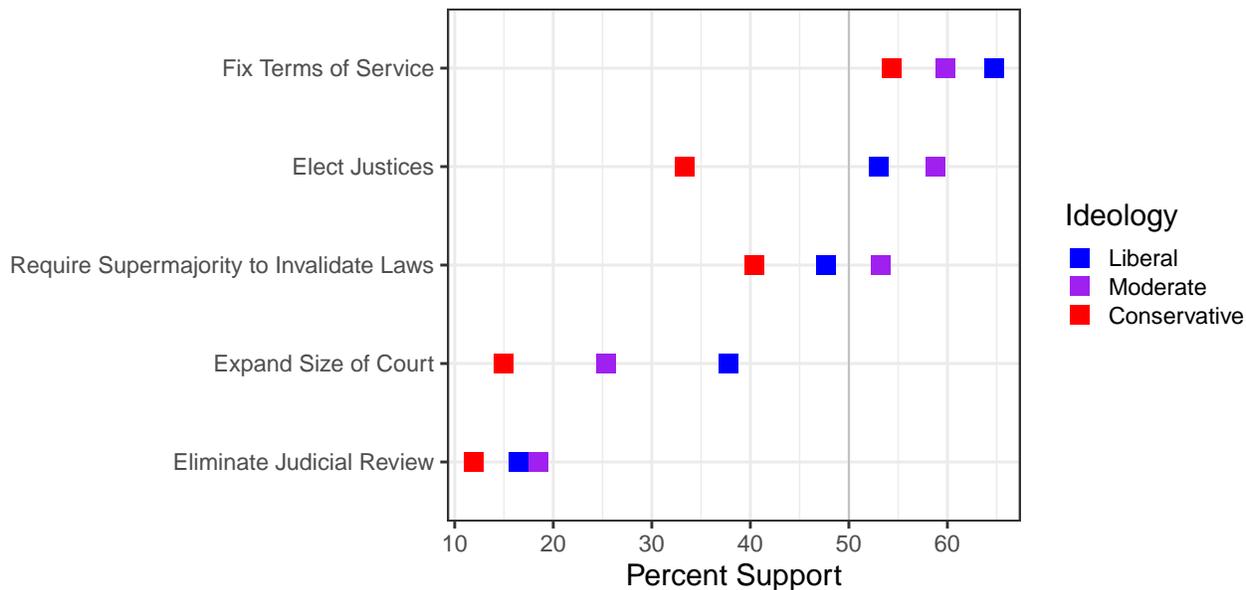


Figure 3. Public Support for Five Proposals to Reform the U.S. Supreme Court, by Ideology, 2020. “Support” is the percentage of respondents strongly supporting or supporting the proposal. “Ideology” collapses (on a 7-point scale) the three Liberal categories (Extremely Liberal, Liberal, Slightly Liberal) and the three Conservative categories (Extremely Conservative, Conservative, Slightly Conservative). Weighted N \approx 1,000

Appendix

The 2020 Washington University Freedom and Tolerance Survey

The fieldwork for the survey was conducted by NORC as part of its AmeriSpeak panel. Funded and operated by NORC at the University of Chicago, AmeriSpeak is a probability-based panel designed to be representative of the U.S. household population. Randomly selected U.S. households are sampled using area probability and address-based sampling, with a known, non-zero probability of selection from the NORC National Sample Frame. These sampled households are then contacted by U.S. mail, telephone, and field interviewers (face-to-face). The panel provides sample coverage of approximately 97% of the U.S.

¹⁸A multiple regression analysis, which includes other variables that might predict support for Court-curbing proposals, confirms this observation: predicted support for the proposals is remarkably similar for Democrats and Republicans, while ideological identification exerts a statistically significant effect.

household population. Those excluded from the sample include people with P.O. Box only addresses, some addresses not listed in the U.S.P.S. Delivery Sequence File, and some newly constructed dwellings. While most AmeriSpeak households participate in surveys by web, non-internet households can participate in AmeriSpeak surveys by telephone. Households without conventional internet access but having web access via smartphones are allowed to participate in AmeriSpeak surveys by web. AmeriSpeak panelists participate in NORC studies or studies conducted by NORC on behalf of governmental agencies, academic researchers, and media and commercial organizations.

A general population sample of U.S. adults age 18 and older was selected from NORC's AmeriSpeak Panel for this study. This survey was offered only in English and was administered on the web and over the phone. Invitations to participate in the survey were initiated on July 1, 2020, and the last interviews were completed on July 24, 2020. In total, NORC collected 1,006 interviews, 950 by web mode and 56 by phone mode.

To encourage study cooperation, NORC sent five email reminders to sampled web-mode respondents. Panelists were offered the cash equivalent of \$5 for completing the study. Interviewed respondents took 29 minutes (median) to complete the survey. NORC applied cleaning rules to the survey data for quality control by removing responses in the main study interview questions from non-eligible respondents. These respondents provided responses indicative of speeding through the survey and skipping survey questions. These respondents were not included in the final dataset. The data are weighted, with various factors going into the construction of the final study weight. These include: (1) panel base sampling weights, (2) final panel weights, (3) study-specific base sampling weights, and (4) nonresponse adjusted survey weights. The weighted AAPOR Response Rate #3 recruitment rate was 23.6%, with a weighted household retention rate of 84.8% and a survey completion rate of 28.4%. A weighted AAPOR Response Rate #3 cumulative response rate of 5.7% was achieved. The survey has a margin of error of 4.17%, and a design effect of 1.82.

For additional technical information about the sample or the study, email AmeriSpeak-BD@norc.org or visit AmeriSpeak.norc.org.