

#1372 The Supreme Court. Before, During and After Ruth Bader Ginsburg.

JAY TOMLINSON - HOST, BEST OF THE LEFT: Welcome to this episode of the award-winning Best of the Left podcast, in which we shall learn about the legacy of RBG from her time before and as justice of the Supreme Court, as well as the fight ahead against the threat of an unbreakable extreme conservative majority on the court. Clips today are from Democracy Now!, the Thom Hartmann Program, The Majority Report, and Last Week Tonight.

"RBG": Film Director Reflects on Ruth Bader Ginsburg's Lifelong Fight for Gender Equity - What Trump Can Teach Us About Con Law - Air Date 9-25-20

AMY GOODMAN - HOST, DEMOCRACY NOW!: We continue to look at the life and legacy of Supreme Court Justice Ruth Bader Ginsburg, who, by the end of her life, was internationally known simply by her initials—RBG—or, as one best-selling biography put it, “The Notorious RBG.” In a 2018 documentary film about her legal career, personal history and unexpected celebrity premiered at Sundance and became a surprise smash hit. It’s called *RBG*. This is the film’s trailer.

JUSTICE RUTH BADER GINSBURG: “I ask no favor for my sex. All I ask of our brethren is that they take their feet off our necks.”

ANNOUNCER: We welcome today Justice Ruth Bader Ginsburg.

NINA TOTENBERG: She’s become such an icon.

FAN: Would you mind signing this copy?

JUSTICE RUTH BADER GINSBURG: I am 84 years old, and everyone wants to take a picture with me.

UNIDENTIFIED: Notorious RBG. Yeah, yeah.

GLORIA STEINEM: When you come right down to it, the closest thing to a superhero I know.

NINA TOTENBERG: Ruth Bader Ginsburg changed the way the world is for American women.

JUSTICE RUTH BADER GINSBURG: I became a lawyer when women were not wanted by the legal profession.

NINA TOTENBERG: Thousands of state and federal laws discriminated on the basis of gender. She was following in the footsteps of the battle for racial equality. She wanted equal protection for women.

RUTH BADER GINSBURG: Men and women are persons of equal dignity, and they should count equally before the law.

NINA TOTENBERG: She captured for the male members of the court what it was like to be a second-class citizen.

RUTH BADER GINSBURG: The point is that the discriminatory line almost inevitably hurts women.

JUSTICE RUTH BADER GINSBURG: I did see myself as kind of a kindergarten teacher in those days, because the judges didn't think sex discrimination existed.

JUDGE RUTH BADER GINSBURG: I have had the great good fortune to share life with a partner, truly extraordinary for his generation.

JUSTICE RUTH BADER GINSBURG: He was the first boy I ever knew who cared that I had a brain.

ARTHUR R. MILLER: She is a center of power, on and off the court.

IRIN CARMON: Every time Justice Ginsburg wrote a dissent, the internet would explode.

AMINATOU SOW: I came up with a couple slogans. "You can't spell truth without Ruth."

JUDGE RUTH BADER GINSBURG: I surely would not be in this room today without the determined efforts of men and women who kept dreams alive.

AMY GOODMAN - HOST, DEMOCRACY NOW!: That's the trailer for the Oscar-nominated documentary *RBG*. In this clip from the film, Justice Ginsburg talks about the first time she argued before the Supreme Court, in the case *Frontiero v. Richardson* in 1972, centering on a female Air Force lieutenant who had been denied the same housing and medical benefits as her male colleagues. Ginsburg argued the Air Force's statute for housing allowances treated women as inferior, and the Supreme Court ruled in her favor 8 to 1.

JUSTICE RUTH BADER GINSBURG: There was not a single question. I just went on speaking. And I, at the time, wondered, "Are they just indulging me and not listening, or am I telling them something they haven't heard before, and are they paying attention?"

BRENDA FEIGEN: The justices were just glued to her. I don't think they were expecting to have to deal with something as powerful as a sheer force of her argument, that was just all-encompassing. And they were there to talk about a little statute in the government code. I mean, it was just—we seized the moment to change American society.

RUTH BADER GINSBURG: In asking the court to declare sex a suspect criterion, we urge a position forcibly stated in 1837 by Sarah Grimké, noted abolitionist and advocate of equal rights for men and women. She said, "I ask no favor for my sex. All I ask of our brethren is that they take their feet off our necks."

AMY GOODMAN - HOST, DEMOCRACY NOW!: Ruth Bader Ginsburg. And we're joined by Julie Cohen, who, along with Betsy West, is director and producer of the Academy Award-nominated documentary *RBG*.

Julie, welcome back to Democracy Now! We had you on when the film premiered at the Sundance Film Festival. We had you on through the health challenges that Justice Ginsburg has faced, and now, sadly, today, in the aftermath of her death. Can you talk about what we

don't know about Ruth Bader Ginsburg, how she was shaped, her early years and those cases she argued before the Supreme Court?

JULIE COHEN: Sure. I need to gather myself a bit, because, actually, listening to that, those clips of Justice Ginsburg, feel a bit emotional in this context. I haven't been able to watch the film again since hearing of her death on Friday evening. And just listening to that quiet but centered and super-determined voice is—I found it moving in life, and now that she's passed away, is moving, as well.

Justice Ginsburg was shaped hugely, like many of us are, by her mother. You know, both her parents were from immigrant families, both from extremely modest backgrounds. And RBG's mom—at the time she was Ruth Bader, obviously—got cancer when Ruth Bader was in high school, and was quite ill for a period of time. And RBG was so close to her mother and so saddened by her mom's impending death. But her mother really used the opportunity to impart a lot of life lessons to a young Ruth Bader, to really instill in her a deep, deep ambition, a desire to put her all into education. You know, her mom told her, like, “Go find love. For sure, that's important, but don't rely—you need to be independent. Don't rely on a man to bring you what you need in your life. You actually need to make sure you can fend for yourself.” And she also had sort of some life philosophies, which were basically, “Don't waste your time on useless emotions—anger, envy, or guilt. You know, forget those things.” And RBG really took that advice to heart. I'm not saying she never got angry. Surely she did, everyone does, but her inclination, based on what her mom said, was always to moderate that anger and really to try not to show it, to look for peace and conciliation and stability wherever she could find it.

We spoke to her—in our documentary, we had a number of clips of her arguing those early cases for gender equality before the Supreme Court in the 1970s. She's arguing at this point before this group of nine male justices, who—you have to put yourself in the context of back at that time. Women's rights, when it first came out, people really didn't get it. Like, “I don't understand. What are women complaining about? We open the door for them. We treat them very politely. We give them rings when we propose to them. We just don't—we just don't see why a woman would be complaining about her treatment in any way.” And they often not only were obtuse about her arguments, but were also quite condescending to her while she was—you know, here she is, an esteemed lawyer, arguing cases before the highest court in the land, and they're kind of making fun of her at times. And she just took it, you know, like water off a duck's back. She never let that condescension get her down.

She told us that she liked to think of herself as a kindergarten teacher—not just a teacher, but a kindergarten teacher. And that's how she—she looked at these Supreme Court justices as kindergarten students who just needed to be schooled. And she did indeed school them and, I think, moved on, later in her career and as she's become this public figure of “The Notorious RBG,” to kind of schooling a lot of us. Not only about legal and constitutional principles, but about how to handle the tricky emotional challenges that come up for all of us, particularly people that are fighting for their rights.

AMY GOODMAN - HOST, DEMOCRACY NOW!: And the case *United States v. Virginia*, the cases also where—and we're going to talk about this in a minute—where she used a man to demonstrate what inequality was all about.

JULIE COHEN: Yeah, I mean, such a clever—you know, she was a deeply strategic person. She was not choosing what cases to pursue just on a whim or, that sounds like a good, cool case. She was thinking, “How might I win?”

And, by the way, she was very consciously modeling her strategy after one that had happened 10 or 15 years before she was arguing her cases, with the string of Supreme Court cases argued by a young Thurgood Marshall, before he was a justice, when he was a young lawyer taking cases for racial equality. Thurgood Marshall, I believe, argued more than 30 cases before the Supreme Court, had an extraordinary win record. And the reason that he achieved so much for racial equality and for forwarding the idea of racial equality under the 14th Amendment of the Constitution, particularly, was by being strategic. He did not take every case. He looked at cases that he thought were winnable and, incremental, one little step at a time. Justice Ginsburg was a student of what Supreme Court jurisprudence—she was aware of what Thurgood Marshall had achieved. And when she started to look into gender equality cases, she wanted to be like Thurgood Marshall in terms of picking cases very strategically.

And it occurred to her that there were a number of ways having to do—I mean, Stephen Wiesenfeld is going to tell you about his own case having to do with the death benefits that a man gets as a widower versus what a woman would get as a widow—that there were instances where—you know, say, a man having leave for child care, that kind of thing, that there were instances where men also were victimized by gender discrimination. And her view was people should be taken on their own terms. Let’s view people as individuals, not as representatives of their gender and she thought that was going to be a point that might be able to sink in to some of these male justices, who just hadn’t thought through the idea about women’s rights at all.

AMY GOODMAN - HOST, DEMOCRACY NOW!: And finally, 30 seconds, Julie, on your thoughts on her passing and what happens next.

JULIE COHEN: I am incredibly sad about her passing. I would hope, as I know, Justice Ginsburg hoped, that some of these fiery dissents that she’s been writing particularly over the past 10 years would ultimately become the basis of later Supreme Court, majority opinions where her thoughts and her legal ideas become the law of the land.

Dahlia Lithwick: How to understand RBG's complicated legacy - Democracy Now! - Air Date 9-21-20

AMY GOODMAN - HOST, DEMOCRACY NOW!: But, Dahlia Lithwick, she certainly wasn’t the most progressive member — probably Sonia Sotomayor is. And in the last years, she sided with the conservative majority when it came to building a natural gas pipeline, when it came to approving the Trump administration’s policy of expediting deportation of people seeking asylum, even, well, ultimately apologized for calling Colin Kaepernick’s move to take a knee “dumb.”

DAHLIA LITHWICK: I think that the ways that we misapprehend Ruth Bader Ginsburg are really at the core of what you just said, which is I really truly believe that she was the most small-C conservative radical on the court, and that if you thought she was out on the

hustings burning her bra, breaking things down, taking things apart, then you kind of missed the real story, because she was fundamentally a creature of the 1950s and '60s. She was very, very much not a '70s radical, certainly not a pink pussy hat radical.

She was someone who, when she was on the D.C. Circuit Court of Appeals, the lower federal court, aligned her votes with Robert Bork and Antonin Scalia, more than anyone else. She was fundamentally a moderate centrist, often conservative, jurist. She was very, very, very much given a knock for not hiring nearly enough minority clerks. All of that is part of the picture.

AMY GOODMAN - HOST, DEMOCRACY NOW!: Had one African American clerk as a Supreme Court justice.

DAHLIA LITHWICK: And I think we have to be very, very honest about the fact that she was both the architect of the gender equality world we live in now, and also that she was very, very effective, in part, because she was a get-along person. She was very much conciliatory, always cared about decorum, meeting people where they were. She was both those things, Amy. And I think in some ways we have to respect both parts of it.

Justice Ginsburg's Replacement Could Change Everything - Thom Hartmann Program - Air Date 9-21-20

THOM HARTMANN - HOST, THE THOM HARTMANN PROGRAM: While everybody is focusing on abortion, the Supreme Court, I mean, if you look back at the history of the Supreme Court and what the Supreme Court did the last time it was seriously hardcore conservative, which was in the years leading up to 1937, what was referred to as the Lochner court. It started with this Lochner decision, as I recall in 1905 and although the Lochner court is generally viewed as kind of moralless broadly in that time, it could do massive damage to the entire spectrum of American life.

Ever since the 1930s, the Social Security Act was signed, as I recall, in 1935, literally since that day, Republicans have been trying to destroy social security. Donald Trump now says if he's reelected president, that within three years social security will be dead cause he's going to cut off its funding. And that doesn't seem to be bothering Republicans. I mean, this is kind of mind boggling really, but he might not even have to wait three years if he gets a right wing Supreme Court justice. Because, you know, the Supreme Court could easily say, "there's nothing in the constitution that mentioned social security. Yeah, it does talk about the general welfare, in fact, several times, but hey, we get to decide what that means."

I mean, since the 1960s, Medicare and Medicaid, these two healthcare programs that Lyndon Johnson and the Democrats, without a single Republican vote as I recall, I may be wrong on that but I'm pretty sure at the very least, very few Republican votes, Medicare and Medicaid were passed. And Republicans ever since then have been saying that that's socialism.

And not only that, right now this administration, the Trump administration, along with 20 other Republican secretaries of state or attorney generals or governors, I believe it's AGs and

governors, have a lawsuit before the Supreme Court that they were supposed to hear this spring. And as a giant wet kiss to Donald Trump, John Roberts said, "you know, we'll just postpone hearing this case until after the election." But it's basically a case that says that Obamacare is wrong. And that's one that's particularly mind boggling because if Obamacare gets blown up by this decision, and by the way, it went to the Fifth Circuit Court, that's a Texas judge, a Texas appeals court, said yes, the entire thing is unconstitutional. It's unconstitutional to force insurance companies to pay claims for people who have preexisting condition. It's unconstitutional to tell insurance companies that they can't collude with hospitals to engage in surprise billing of people. It's unconstitutional to tell insurance companies that they can't have higher prices for women than for men. It's unconstitutional to say that insurance companies have to cover kids, even non-dependent kids until they're 27 years old. All those things, all that stuff in the Affordable Care Act, it's unconstitutional for the government to help pay part of your health insurance costs. All of that stuff is unconstitutional. So this lower court blew up literally the entire Affordable Care Act, including the protections for people who have preexisting conditions. And by the way, we now have several million people in America with COVID, which is now a preexisting condition.

So, and this decision, this case is going to be heard by the Supreme Court after the election. And right now there's eight justices on the court. And even if Roberts joins the liberals, the three liberals Breyer, Kagan, and Sotomayor, even if Roberts joins them so it's a four to four decision, that means that the court basically doesn't decide, which means that that lower court decision, which eliminated a Obamacare altogether, including the protections for preexisting conditions, that ruling will stand. No more Obamacare.

But it goes beyond that. I mean I think that this court could take out Medicare and Medicaid. Numerous Republicans, Rand Paul's kind of at the forefront of this, but this has become Republican ideology. Of course, you know, David Koch ran for [vice] president on this back in 1980s: end all the minimum wage laws, end longterm unemployment insurance, end the child labor laws. The new excuse that Republicans are using is the old excuse, "well, what about kids who grow up on farms?" That was the excuse that they used to say we shouldn't have child labor laws back in the 1930s when the Supreme Court struck down child labor laws. And now they're at it again.

Since the Reagan revolution, Republicans have systematically torn apart our public schools. The state of Michigan we're Betsy DeVos is from and where her money has huge political influence, over half their schools have now been privatized in Michigan. With a conservative court we could see basically the end of any sort of reasonably functioning public school system nationwide.

Are you concerned about climate change driving massive fires, storms, hurricanes? A conservative court could rule that any law, or any policy for that matter, designed to reduce carbon emissions are an unlawful violation of refiner's and driller's and fracker's constitutional right to do business.

With a truly conservative court, and frankly, I think with at least several of these women that Donald Trump has considering, you could lose your right to be protected from being ripped off by a bank—that's the the Consumer Protection Bureau. You could lose your right to be protected by government from your insurance company ripping you off. You could lose what

few rights you have left to prevent yourself from getting ripped off by your internet service provider, or even your utilities if they're for profit corporations. They could roll back gay marriage and invalidate a whole bunch of marriages all across the United States. They could end all together the right of labor unions, even to exist—take us back to where we were before the passage of the Wagner Act in the early 1930s, the National Labor Relations Act. They could endorse privatization of the post office.

I mean, literally all of these are positions that are currently held by various high profile conservative think tanks and movement leaders, and they all reflect positions that David Koch ran for vice president on in 1980, and that are now embraced by some of these hardcore Republicans, including some currently in Congress.

Voting Is Not Enough: Help Flip the Senate via @SwingLeft - Best of the Left

AMANDA HOFFMAN - ACTIVISM, BEST OF THE LEFT: You've reached the activism portion of today's show. Now that you're informed and angry, here's what you can do about it. Today's activism: Voting Is Not Enough: Help Flip the Senate.

As of the publishing of this episode, we have exactly ONE month left until Election Day. Just 28 days.

Visit BestoftheLeft.com/2020action to explore our Election Action Guide, which we're calling "Voting Is Not Enough." Because...it's just not.

From the last two years of Obama's presidency through today, we've witnessed the true power of Senate control. Besides his unprecedented refusal to confirm Merrick Garland, Mitch McConnell made it his life's mission to block Obama's district and circuit judge appointments. Then, he helped Trump ram 50 of them through - many unqualified, including Amy Coney Barrett. Only a tiny percentage of cases get to the Supreme Court and the appellate courts are the filter, making the quality and fitness of those judges critical to a healthy judiciary branch.

It's not sexy, but the Left MUST care about the courts. The Senate's control of the judicial confirmation process makes its power immense. McConnell has abused this power to the full extent, subverting the Constitution and trampling norms. If he still leads the Senate under a Joe Biden administration, we know exactly what we're in for. So, today we are focusing on what it will take to flip the Senate, because - with everything we have to fix and protect and the looming threat of a hard right court - electing Joe Biden without flipping the Senate would be nothing short of a disaster.

The good thing is that the Senate advantage is with Democrats this year, as Republicans have to defend 23 seats - twice that of Democrats.

Swing Left, the political action organization that helped deliver the Blue Wave in the 2018 midterms, has a plan. They call it the Super State Strategy - focusing on 12 states that are each critical to the flipping the White House, the Senate and the state houses key to rolling back Republican gerrymandering.

These states are Arizona, Colorado, Florida, Georgia, Iowa, Maine, Michigan, North Carolina, Ohio, Pennsylvania, Texas and Wisconsin.

In addition to volunteering your time with Swing Left to phone bank, text and write letters, you can also donate strategically. Donate to the Swing Left Immediate Impact Fund which sends your donations to the candidates in the closest races among the Super States, or choose a Super State and your donations will support races up and down the ballot in that state.

Beyond the Super States, there are some surprisingly close Senate polls coming out of other very red states. The Democratic Senate candidates in Alaska, Montana, South Carolina, and Mississippi are all within 1 percentage point of Republican incumbents in the polls. In Kansas, the open seat Senate race was within 2 points until the Koch Brothers' group dropped a giant cash infusion. Turnout in these states is key and a little momentum could go a long way.

In terms of defending Democratic seats, Senator Doug Jones will likely lose in Alabama. But in Michigan, Senator Gary Peters just took back a lead in the polls.

And finally, although Trump's Supreme Court nominee's confirmation looks very likely - it's not a done deal yet. According to Indivisible's Senate Whip Count, there are still 13 Senators who's confirmation vote is undecided or unknown. Go to [ScotusWhipCount.org](https://scotuswhipcount.org) to see the latest and use the tools to contact those on the fence.

So, here's the bottom line: any hope of a real course correction depends on winning not just the White House, but the Senate too. And as long as we do the necessary work, it's within reach. Don't wait. Get involved today.

The segment notes include all the links to this information as well as additional resources, and, once again, this segment is available on the "Voting is Not Enough" page at BestoftheLeft.com/2020action.

So, if making sure we don't start the post-Trump era with a lame duck Democratic president is important to you, be sure to spread the word about helping flip the Senate via Swing Left so that others in your network can spread the word too.

How "Extremist" Amy Coney Barrett Could Reshape the Supreme Court & Hand Trump the Election - Democracy Now! - Air Date 9-28-20

AMY GOODMAN - HOST, DEMOCRACY NOW!: President Trump has nominated the conservative, federal judge Amy Coney Barrett to the Supreme Court to fill Ruth Bader Ginsburg's seat. Barrett is a 48-year-old former Notre Dame law professor who clerked for the late Supreme Court Justice Antonin Scalia. On Saturday, Barrett spoke alongside President Trump at the White House.

JUDGE AMY CONEY BARRETT: I clerked for Justice Scalia more than 20 years ago, but the lessons I learned still resonate. His judicial philosophy is mine, too: A judge must apply the

law as written. Judges are not policymakers, and they must be resolute in setting aside any policy views they might hold.

AMY GOODMAN - HOST, DEMOCRACY NOW!: Senate Democrats have slammed Senate Majority Leader Mitch McConnell for proceeding on Barrett's nomination so close to the election. In 2016, McConnell refused to hold confirmation hearings for Merrick Garland, President Obama's pick to replace Scalia, who had died nearly nine months before the election. At the time, McConnell said, "The American people should have a voice in the selection of their next Supreme Court justice."

but now Republicans are racing to get Barrett confirmed at a time when early voting has already begun in some states. The Senate Judiciary Committee plans to start Barrett's confirmation hearing on October 12th. A full Senate vote could occur as soon as October 22nd. If Barrett is confirmed by Election Day, she'll immediately take part in a major case that could determine the future of the Affordable Care Act. On November 10th, the oral arguments will be heard.

Three years ago, she wrote a law review article criticizing Chief Justice John Roberts upholding the ACA, writing, "Chief Justice Roberts pushed the Affordable Care Act beyond its plausible meaning to save the statute."

Well, on Sunday, Democratic presidential nominee Joe Biden criticized Trump's nomination of Barrett.

JOE BIDEN: There's no mystery about what's happening here. President Trump is trying to throw out the Affordable Care Act. He's been trying to do it for the last four years.

AMY GOODMAN - HOST, DEMOCRACY NOW!: Amy Coney Barrett could also help decide who wins the presidential election. Last week, Trump said he expects the election to end up before the Supreme Court, saying that's why he's pushing the Senate to rapidly confirm a replacement for Ginsburg. Twenty years ago, Barrett worked with George W. Bush's legal team on the contested Florida recount. Two other future Supreme Court justices at the time, John Roberts and Brett Kavanaugh, also helped Bush's team, which actively worked to stop a recount.

Amy Coney Barrett has a record of taking conservative stances on abortion, gun rights and immigration. She once called abortion "always immoral." The Human Rights Campaign has called her an "absolute threat to LGBTQ rights." During her confirmation hearing, Senate Democrats are also expected to ask questions about her membership in a secretive Catholic group called People of Praise. Members of the group pledge a lifelong loyalty oath to the group, which assigns each member a personal adviser, known as "heads," for men, and, until recently, "handmaids," for women.

In a moment, we're going to Alexis McGill Johnson, president and CEO of Planned Parenthood, but we are staying with Elie Mystal for a few minutes right now, The Nation's justice correspondent. Elie, you wrote a piece that is headlined "Amy Coney Barrett Is an Extremist—Just Not the Kind You Think." Explain.

ELIE MYSTAL: Yeah. So, there are a lot of people who kind of started where you ended, Amy, where they have focused on her religious conservatism and her membership in this group,

and the fact that she has written extensive law review articles about what Catholic judges should do and shouldn't do while on the bench. And so people have kind of focused in on the religious conservatism of her nomination. And I just wanted to focus people on the issue that her religious conservatism is not what's extreme about her. It's her actual judicial opinions. In fact, she only uses the religion card, the religion angle, when it serves her particular purpose in terms of policy against abortion rights or LGBTQ rights. Overall, she does not use her religion to guide her through her decisions; she uses her extremist conservative views to guide her through her decisions.

It's not a religious position to deny people seeking public assistance a green card; it's Amy Coney Barrett's position to do that. That's her deal. It's not a religious position to ignore the deliberate indifference to human life when a prison guard shoots shotgun shells into a crowded cafeteria; that's Amy Coney Barrett's position to ignore the deliberate indifference to human life.

So, she has a bunch of extreme conservative positions make her a problematic nominee far beyond religious affiliations and whatever. Quite frankly, I don't care about her religion. I care about her decisions.

AMY GOODMAN - HOST, DEMOCRACY NOW!: Of course, she can also weigh in on the election, if in fact the presidential election goes to the Supreme Court.

ELIE MYSTAL: Yes. To be clear, Donald Trump could have nominated Atticus Finch, and I would oppose the nominee, because having a nominee to take office in the middle of an election—I mean, people are saying, like, "Oh, right before the election." It's not right before the election; the election has started. People are voting. Right? So, what Trump is trying to do is pick his own judge in a contested election about his own presidency, that, as we talked about in the last second, he kind of has to win, or else he's going to jail. Right? So, that is not how the system of laws and government is supposed to work. So, there is no person that I think Trump should be allowed to nominate in these circumstances, because of the election issue and because of the timing of the nomination.

Amy Coney Barrett is—of the people that Trump could have nominated, Amy Coney Barrett is one of the most extreme people that he could have nominated, as opposed to a kind of moderate, middle-of-the-road person. And so, obviously, I think there's a lot of justified concern that if she gets to the court, she will be a fifth vote in favor of handing Donald Trump the presidency.

AMY GOODMAN - HOST, DEMOCRACY NOW!: We're going to talk with Alexis McGill Johnson, head of Planned Parenthood, in just a minute, about abortion and Obamacare, which is going before the Supreme Court on November 10th. But I wanted to ask you, Elie, about one major case set to come before the court, *Fulton v. Philadelphia*, which involves religious freedom and gay rights, that could have much broader implications—the case brought by Catholic Social Services, a faith-based group, which refuses the placement of foster children to same-sex couples. The group was one of 30 agencies that the city of Philadelphia contracted with to place abused and neglected children in foster homes, but the city ended the contract after learning that CSS denied placement of children with same-sex couples. And the charity then sued Philadelphia, citing a violation of free religious exercise and free speech if they were forced to provide services to LGBTQ couples. Oral arguments scheduled for November 4th. Explain the significance of this case.

ELIE MYSTAL: This is one of the most important cases on the Supreme Court docket, and it goes right to the heart of LGBTQ rights and LGBTQ adoption privileges. But it also goes to the heart of a new and, I think, dangerous trend in our First Amendment jurisprudence. The First Amendment's protection of freedom of religion is supposed to be a shield. Right? It's supposed to protect me, a religious observer, to allow me to act and support my faith in the privacy of my own home and in my public space. Right? What the religious right is trying to do to the First Amendment is to change it from a shield to protect people to a sword to go after people who don't agree with their preferred religion. Right? Like, that's completely flipping the First Amendment on its head.

And so, what the issue in this Fulton County case is, is the group who discriminates against gay people in adoption—that's just what they do and they're allowed to do that because that's—freedom of religion means freedom to hate people that you don't like, and so they can hate them or whatever. But what they want to do is to force the city of Philadelphia to adopt that discrimination, to adopt that bigotry, and make it part of city policy by allowing them to continue to place foster children, who are wards of the state, based on the Catholic services' bigoted decision-making in terms of who is able to adopt. Now, so it's a critically important case for those reasons.

The problem is, and the reason why Amy Coney Barrett doesn't, to me, so much play into this, is that liberals were going to lose that case already. There aren't five votes against this kind of corruption of the First Amendment. I don't know that—with Ruth Bader Ginsburg passing away, I don't know that there were two votes, because in the past, cases like this, this version of the First Amendment, both Justice Stephen Breyer and Elena Kagan have joined the religious conservatives for this, again, I think, corruption of the First Amendment. So, with RBG gone, I really think it's going to be an 8-1 case with only Sonia Sotomayor standing opposed.

AMY GOODMAN - HOST, DEMOCRACY NOW!: Elie, we just have 30 seconds. What do you think Democrats should be doing right now?

ELIE MYSTAL: Everything except for adding legitimacy to the process. You cannot go to these hearings. You cannot add your voice to these processes. You have to do everything you can to delay, and then win the White House and win the Senate and expand the court, because that's the only way that — that's the only thing that you can do.

How To Pack The Supreme Court - The Majority Report w/ Sam Seder - Air Date 3-22-20

SAM SEDER - HOST, THE MAJORITY REPORT: But what can we do in terms of reform? Let's say that President Sanders gets in and says, I saw Brian Fallon, and he's my guy. I'm not only going to take his list, but whatever he says in terms of reforming the court, if he's got ideas, I'll do it. What would those ideas be?

BRIAN FALLON: First of all, we have to pack it. And I said, we have to pack it. Not because I want to be some kind of FDR, partisan hack it's because packing the court is actually the only constitutional tool available. The problem with Pete Buttigieg's plan, the problem with a lot of other really interesting, cool reform ideas is that the constitution is very clear. The number

of Supreme Court justices is not set in the constitution, but who gets to appoint them is, that's the President. That they are allowed to serve for life is very clear in the constitution. So all of your ideas about term limits or what have you, those are constitutionally questionable.

And I, as I said, in my piece, we have to remember that any Supreme Court reform plan will ultimately be ruled on by the Supreme Court, stacked as it is with Republicans. So if there's any legal, whatever, we can assume that Republicans will protect themselves on the Supreme Court and will not authorize any of these novel interesting, reform plans.

The one clear constitutional tool that we have is to increase the number of justices. It has been done multiple times in American history, mainly before the Civil War. I think we started with six and we went to ten and then we're back to nine. And, quite frankly, we've already changed the number of the justices of the Supreme Court in my lifetime because Mitch McConnell decided that we could have eight justices instead of nine, as long as the Democrat was president. So we have to change the number.

Let

SAM SEDER - HOST, THE MAJORITY REPORT: me ask you one question about the lifetime appointment. I think a Buttigieg's plan had this, and I think Matt Ford's from TNR, like I mentioned, had this a feature where it says lifetime appointment to the judiciary. Is it specifically to the Supreme Court? Because there is a theory anyways, that what you could do is say, okay, you get to spend eight years or 16 years on the Supreme Court, and then you go back to the appeals court. You're there for a lifetime, you're a judge for life, but you go back to the appeals court. Is that too hazy? Do we have to do that the second bite after we pack the court, then we go back to them with this reform movement?

BRIAN FALLON: I think that theory is exactly right. It's a theory that's been promoted by professor Larry Tribe at Harvard Law School, constitutional scholar. I agree with it, Roberts isn't going to agree. That's the real.

SAM SEDER - HOST, THE MAJORITY REPORT: He's just calling balls and strikes anyways.

BRIAN FALLON: Right, right. The realpolitik of it is that if you go through John Roberts and you say, we need to make this reform, so basically you Republicans have less power. He's gonna say no. And he's the final arbiter on whether or not this theory is constitutional or not. As long as Roberts has the majority, you can't get a novel reform package through him. So I agree that term limits should be theoretically constitutionally possible without a constitutional amendment, but I don't know that I can get five Republicans to agree with me. And if I can't get those at least one of the five Republicans to agree with me, then it doesn't freaking matter what I think. Right?

So that's my problem with term limits and that's how I get back to court packing. They don't have the option to disagree with court packing cause it's spelled out directly in the damn document itself. Right? So I say we got to pack the courts, but how we pack the courts I think is important. You know there are plans that are just like, let's just add two because Gorsuch's illegitimate, Kavanaugh's accused of rape, attempted rape.

I don't think that purely partisan court packing works. I want to blow it up. I want to go to 10 more justices. So those Supreme Court has 19 people as opposed to nine, and basically make

the Supreme Court look much more like all the other federal courts. People forget, nine is not a magic number. The Circuit Court of Appeals from the ninth circuit out in California, they have 29 justices. Right? Second circuit where I live, 15. Fifth circuit in Texas, 17.

More justices is a feature throughout our system, except for on the Supreme Court. When you have more justices, that's how you get more moderate opinions. If you're actually interested in moderation, the way you get more moderate opinions is not to find this mythical unicorn, moderate judge. It's to have judges who are trying to write opinions that are going to build a coalition, not for of their buddies from the hunting lodge, but actually ten entirely distinct legal individuals. That by its own nature will moderate and circumscribe the opinions on the Supreme Court.

SAM SEDER - HOST, THE MAJORITY REPORT: I should just say, it's a recognition. That there is politicking going on there. And instead of just making it like a back room type of situation, I mean, we're still talking well in 19 people, but it definitely opens it up more.

BRIAN FALLON: It opens it up more. It makes each—one of the things I've said, not in this piece, but I said in general, is you can't decrease the power of the Supreme Court, but you can nerf the power of any individual judge. Right now, if one of the justices dies, it's kind of political malpractice to support a judge of the opposite party because they are so powerful and they're going to be there for 30 years, frustrating your agenda, potentially the entire time. If you have 19 judges and you think about the vagaries of retirement and death with 19 octogenarians, you know, if somebody passes away, and you don't happen to be in power at that moment, that's a bad day, but it's survivable. It's politically survivable, right?

Because each individual judge is not going to be as critically important to upholding your agenda. Right now, women's rights hangs on the shoulders of an 87 year old three time cancer survivor. It should never be like that. It shouldn't ever be down to just one. And I think if you have 19 justices, you greatly decrease the chances of that happening.

That's only the first part, that's the tip of the spear. The shaft, I got to say, Sam, we desperately need ethics reform on the Supreme Court. I've said this and it shocks people who don't know when I say it. The Supreme Court is the only court in the entire nation that operates under no ethics rules. Every other court, there are ethical grounds outlines of the judges must follow except for the Supreme Court. Which is, I think in a post or during a "me too" era, is particularly just, "are you kidding me?"

there's got to be some rule that says just because you're a member of Supreme Court does not give you a licensed to sexually harass people for the rest of your life without accountability. Brett Kavanaugh, in addition to his alleged rape allegations, was subjected to 83 separate ethics complaints about him that were thrown out once he got to the Supreme Court, because the Supreme Court has no ethics rules.

SAM SEDER - HOST, THE MAJORITY REPORT: It could have been a coincidence.

BRIAN FALLON: What?

SAM SEDER - HOST, THE MAJORITY REPORT: [Sarcasm] It could have been a coincidence. Right? I mean, if you're not in triple digits, if you're not in triple digits in terms of sexual harassment complaints, it's probably just a coincidence.

BRIAN FALLON: [Sarcasm] I mean, 150 and then I start to worry! But 83!?

It's unconscionable to me that we don't have ethics rules for these nine most powerful people. And if you had ethics rules, not only do you have some basic accountability when it comes to sexual harassment or abuse or whatever, you also, that is the way that you start to maybe break the stranglehold the Federalist Society has on these people. Right? Because any real ethics guidelines would try to punish or hold accountable judges who have shown bias. Right? So it shouldn't be ethical for, for instance, Brett Kavanaugh to do fundraiser for the Federalist Society while he is a sitting Supreme Court court judge, which he has done multiple times.

It shouldn't be ethical for say, Clarence Thomas's wife to be on the committee that Donald Trump is asking who needs to be purged from his administration, post the Ukraine scandal, which is what she is doing. Because at some point we're probably going to have a lawsuit about whether or not something's allowed to purge the government, and her husband will be one of the nine people empowered to make that decision.

These are some basic ethic rules that apply to a traffic court judge in Peoria that do not apply to the Supreme Court justices. And so changing ethics rules is part of the way to break the partisan stranglehold that the Fed Soc has over its people.

All right. Well, I'm convinced.

If you could tell Bernie for me, that'd be great.

Fighting For A Supreme Court Seat Might Seem Rude - The Majority Report w/ Sam Seder - Air Date 9-27-20

PRODUCER - THE MAJORITY REPORT: Do you think there's anything to the possibility of Democrats in committee just not even legitimising this nominee and not sitting in on a confirmation hearing that happens next month, so to say?

SAM SEDER - HOST, THE MAJORITY REPORT: I don't know. I would guess no. I mean, I think it's a legitimate move, but I think that they have firmly decided, it seems, and you can see this with Joe Biden and you can see it with all -- the plan is -- and I guess I can understand the logic here; I think it's a huge missed opportunity, I think it's a classic mistake that the Democratic establishment is making, which is, people don't like to see any conflict and there's no value in it, so what we're going to do is just really quietly be upset. And Joe Biden is not going to -- I mean, I do think that there is very little chance that a threat of court packing will do anything.

I think I would put that at around 0%. So I can understand why Biden's not necessarily embracing that. Keep your powder dry. It probably can only hurt him in the context of the election. I don't think that there are some low-information voters who are sitting on the sidelines who are looking for something that's going to inspire them to vote for Joe Biden and him saying court packing is the thing that's going to do it. Right? I mean, I think if he said, you're going to have healthcare and it's going to be free, that might do it. If he was to say federal \$15 minimum wage, that might do it. But I just don't think that a voter who is not terribly inclined to vote is sitting there going like, what we really need to do is curb the

authority, the jurisdiction of the courts and to court pack simultaneously. I just don't think that's happening.

PRODUCER - THE MAJORITY REPORT: Right.

SAM SEDER - HOST, THE MAJORITY REPORT: So I don't see any value there. But I do see value in the Democrats putting up a bigger fight than they have. There's two issues here: that I think we had a missed opportunity in the passing of this continuing resolution. Nancy Pelosi said it was only the exuberant left that wanted Nancy Pelosi to hold off on the continuing resolution as a leverage point. That may be the case. There's other parts of the left that want to save the Affordable Care Act. And there was an opportunity for Nancy Pelosi to have done that with the continuing resolution and she didn't do it.

I think there was a sense that there would be a little bit more time before they passed that continuing resolution. I think that they pushed that through quickly cause they didn't want the Democrats to sort of like glom onto this idea. Right now, as you know, there was a case out of Texas that challenged the individual mandate as being unconstitutional, and it was done so on the grounds that it was originally considered a tax by the Supreme Court. And that's why it was found to be constitutional. The Congress, when it was controlled by the Republicans, got rid of it, the penalty, essentially the tax associated with the individual mandate. So it was a taxless tax, which Texas and some other states claimed was unconstitutional. A district judge who was literally a former Republican staffer, deemed it unconstitutional, said the whole law is unconstitutional. That went up to an appellate court. They found that it is unconstitutional, but they sent it back down to the district judge to find out if that unconstitutional provision would sink the entire Affordable Care Act or whether it was severable. Can you take this one part of a law and say this part is unconstitutional, but the rest of the law is fine? Now that's a fairly obvious finding because Congress made that determination. Congress said that the entire law is not reliant on the mandate and they did so by making the mandate zero, the penalty is zero. So there was no mandate. Congress, in their action, they did not repeal the Affordable Care Act. They only repealed the mandate. And so they basically said they repealed the mandate effectively by saying that there is no penalty in not adhering to the mandate.

And nobody took this case seriously. But it did go up to the Supreme Court, because when you have a circuit court that determines that something is unconstitutional, that the Supreme Court has said is constitutional, those are the cases that they take.

The assumption was that John Roberts was going to rule with the four left-of-center justices and say, Maybe there's no even standing; like who is harmed by a mandate where there's no penalty for the mandate? Like, how do you go and make an argument in a court of law that you have standing that you've been harmed in some way by this, if you don't, you literally don't have to pay? So people thought maybe would be punted for standing or just general ridiculousness.

But now there is not four left-of-center justices. There are three. And there are five left of, or I should say right, far right of center justices. Even if Roberts was to side with the three left-of-center justices, it would then go down to the appellate court. That would hold that it was unconstitutional and they would wait still on this former Republican staffer/district judge to inform them whether he found it severable, and then it would work its way back up the

Supreme Court. But very easily could perceive this all as an assumed, this all would end in the ACA being trashed.

Nancy Pelosi could have saved us all the trouble by including in the continuing resolution a one-line amendment that would have basically rid us, or done a full repeal of, the individual mandate. Right? It exists still, but it has a penalty of \$0, which is not really a mandate, but the shell of it's there. They could have done a one line that said, "We repeal the individual mandate as part of the Affordable Care Act," the end. And the Republicans, the idea that they would have shut down the government -- in other words, not passed that bill that passed the House, but they wouldn't pass it in the Senate because of that one line -- is obviously ridiculous. You're not gonna have Mitch McConnell saying we're going to shut down the government because they're getting rid of the individual mandate. No. However, had a Pelosi put that in there and the Senate had passed it and the president had signed it, the individual mandate would be repealed. Then the entire case is moot because it doesn't exist anymore.

She didn't do it. I don't know why.

I don't know why. It's perhaps the threat to the Affordable Care Act is, we'll drive voters out. We now know that COVID could probably be considered a preexisting condition. I would be surprised if it wasn't. We know there are longterm implications for a lot of people with this. And to the extent that we don't know, insurance companies have the ability to reinstitute discriminating against people with preexisting conditions. They'll take that opportunity. So maybe it was just, let the Republicans own it. We shall see. Missed opportunity, one would think. There are many things that the Democrats could be doing unlikely to stop the hearings and the confirmation of a Supreme Court justice, but with the great possibility of indicating to the American public, that there's a problem here.

PRODUCER - THE MAJORITY REPORT: That's the thing that I feel like they always miss doing, is I don't think they signify to people what the actual stakes are.

SAM SEDER - HOST, THE MAJORITY REPORT: Absolutely. They do not believe in the value of losing a fight. They do not believe in the value of showing the American public, not just that they are willing to fight on their behalf, even if it means almost certain defeat. They also don't understand the value of communicating mistakes to people.

Right? I mean, they're like the whole William Wallace thing, where, you know, he dies and yells freedom at the end, that ultimately that becomes the watchword for everybody who fought on after him. I mean, if the Democrats were to engage in the fight, they are so afraid of coming off as caring about politics and how people are impacted by these things, to the rest of the population who barely tune in, except for like, you know, the week and a half after the week and a half leading up to the polls, they are so afraid of coming off as being fighters that they miss the entire opportunity to communicate to people what the stakes are here.

I mean, that's just the bottom line. Jeff Hauser has a great piece in the New Republic. He's from the Revolving Door Project. He wrote it, uh, I guess he wrote it yesterday. What a defiant Democratic party looks like. He readily admits that it's unlikely you're going to be able to stop this, but you could slow the process down. You could drag it out. You can't do, Mr. Smith Goes to Washington, you know, whatever it is, some long talking filibuster it's a three day window on debate. But he talks about you could object to unanimous consent in

the Senate, and force the Republicans, all of them, to show up with a 51 vote quorum to conduct any business. That would slow operations down.

Plus: anybody know how many incumbents Republicans have versus Democrats? It's like two times as many that are running for reelection. It would be pretty nice to have those people off the campaign trail when they need to be out there as much as they can.

You could also start to send up impeachment from the House. You could impeach Bill Barr, make the Senate deal with that. Mitch McConnell will get it out of the Senate. We may not even have hearings, right? They could just vote on it. No. But then you do Louie DeJoy says Hauser. And Alex Azar; anybody happy with the coronavirus response? Something like 65, 70% of the American public think it's problematic. You just keep throwing these up there.

I don't think there's a huge contingency out there going, Democrats are just not letting the Republicans have normal Senate procedure in these days, they're being really cumbersome.

You could have the House Foreign Affairs Committee passing war powers resolutions for the dozen or so conflicts for which there is no congressional authorization that we're involved in. That is also -- and the reason why you would do that, and the reason why you do impeachment, is both of those are privileged, which means that the Senate has to dispense of them before they move on.

Now, none of this is likely to prevent the seating of this justice before, or certainly after, the election. But again, it is a way to communicate to the American public, "This is bad, what they're doing, and we're doing something extraordinary to prevent them from doing it." And if you don't communicate that by action, how can you justify it by lip service?

It just doesn't work.

The Supreme Court: Last Week Tonight with John Oliver - LastWeekTonight - Air Date 9-27-20

JOHN OLIVER - HOST, LAST WEEK TONIGHT: Look, this has been a very dark week for a lot of people. The Supreme Court is about to lurch to the right for the foreseeable future. And if things seem hopeless right now, it's because, to be completely honest, they basically are. This is a pivotal moment, and while we got here, a little bit by bad luck and bad timing, we also got here through diligent effort by Republican leadership, and crucially, some very big systemic problems which just have to be addressed.

So tonight, let's talk about that, specifically, how the fuck we got here and what the fuck we can possibly do next. And there are basically two major factors that brought us to this point. The first is this man, Mitch McConnell, the only thing to come out of Kentucky more shameless than the KFC menu. How do you want your chicken? Regular, crispy, Cheeto flavored, in a warm slurry, as bread? 'Cause it's all on the table. At KFC we promise maximum flavor for you, maximum disrespect for a chicken's memory. Reconfiguring America's courts has been a single-minded focus for McConnell. Trump once marveled to Bob Woodward that, "You know what Mitch's biggest thing is in the whole world? His judges." And his

obsession isn't just with the Supreme Court. McConnell's blockade of Merrick Garland justifiably got a lot of attention, but he also made sure that Trump could stack the lower courts with conservative judges, something Trump also explained to Woodward:

DONALD TRUMP: [RECORDING PLAYS] I'm going to be up to 280 judges very soon. Nobody's ever had that, 280. Obama gave us 142 judges when I came here. It's never happened. You'd never have . . . once . . . if you were a president, you'd have any federal, you know, they're like golden nuggets.

JOHN OLIVER - HOST, LAST WEEK TONIGHT: Okay. First, it's weird to refer to anything as golden nuggets unless you are talking about actual golden nuggets or you're describing you're husband's balls in the middle of his tiger-themed funeral while impersonating a priest. Those are the only two perfectly appropriate times.

But needless to say, Obama very much didn't deliberately leave those vacancies open for Trump. When Republicans took the Senate in 2014, Mitch McConnell began systematically blocking lower court appointees, so a future republican president could fill the seats later. So, Obama didn't give Trump those judges any more than the National Archives gave Nicholas Cage the Declaration of Independence. In fact, Obama's only ever given Trump two things: a brief tour of the White House, and a colossal inferiority complex that fueled Trump's rise to power and made him so furious he decided to turn America into an apocalyptic hellscape and destroy democracy as we know it. Really, just those two things.

And McConnell's willingness to go to the mat for judicial appointments was perhaps never more obvious than during the Kavanaugh hearings because, immediately after Christine Blasey Ford's gut-wrenching testimony, McConnell apparently had this conversation with the President:

PETER PAKER: both of them were kind of testing each other a little bit, "where are you at on this," you know, "How strong are you?" And McConnell basically says to the President, "You don't worry about me, I'm strong as mule piss." That's his quote. "I'm strong as mule piss." Uh, in other words, he's not gonna let up. He's not gonna give up, he's not gonna surrender.

JOHN OLIVER - HOST, LAST WEEK TONIGHT: Wow, that is extraordinary. Because it's easy to forget that after Blasey Ford's testimony Kavanaugh's confirmation felt a lot less certain, and to react to what she said with, "Don't worry, I'm strong as mule piss," is both horrendous and deeply weird.

Quick side note, I wasn't sure how strong mule piss actually is, and the internet is surprisingly short of videos of mules urinating, although, we did manage to find this stock footage titled, "Donkey who urine at sunset," and I have to say that is an impressively strong stream. So, I do totally get it now. And going forward, every time I think of Mitch McConnell, I will think of that donkey... who urine at sunset.

But as easy and fun as it is to blame Mitch McConnell and his mule piss for everything, it is a mistake to focus just on the people involved here. Because there is a whole system underneath them that has enabled them to do what they have done.

And that brings us to the second major factor that got us to where we are now. The deeply undemocratic nature of America's institutions. Because there is no doubt the Republican

party currently controls both the Senate and the White House. It's true, and they will argue that this gives them a mandate to do exactly what they're doing.

Ted Cruz: Chris, the Senate majority is performing our constitutional duty and fulfilling the mandate that the voters gave us. Voters have elected a Republican President, they've elected a Republican Senate, and I think Republicans need to keep their promises here, and that's what I intend to do. The American people elected President Trump and a Republican majority because we want the Constitution and Bill of Rights protected, and that is our job, it's what we need to do.

JOHN OLIVER - HOST, LAST WEEK TONIGHT: I do not like that man, Ted Cruz; I do not like his backward views. I do not like his stupid suits; I do not like his cowboy boots. I do not like him when he sneezes; I do not like him eating cheeses. I hate to see his dumb face smirking because his beard looks like a merkin.

But look, let's talk about that mandate. Because neither the presidency nor the Senate are nearly as reflective of the will of the American people as they are suggesting there. First, take the White House. A Democrat has won the national popular vote in four out of the last five elections, but we've spent 12 of the last 20 years with a Republican in office. And that is because the electoral college, with its winner-take-all approach in most states, can distort the will of the majority. On top of which, it grants disproportionate power to less-populous states which tend to be rural and more conservative, something which is even more pronounced in the Senate, where there are 15 states representing 38 million people that have 30 Republican senators even though that is less than the total population of California which has just two Democratic ones. And that's before we even get into the fact that places like Puerto Rico, Washington D.C., where the populations are largely Black or Hispanic, don't have representation in the Senate at all. In fact, if you take all of this together, the Senate gives the average Black American only 75% as much representation as the average White American and the average Hispanic American only 55% as much. And it's clearly not great when the best thing you can say about your representative democracy is, "Hey, at least Black people got above three-fifths this time. At this rate, they could count as 100% of a White person as early as 2408. Onwards and upwards, Black people! You truly are an inspiration to Hispanic half-people everywhere."

So the fact is, when Barrett is confirmed, a President who lost the popular vote will have picked a quarter of the federal judiciary and a third of the Supreme Court. And his choices will have been rubberstamped by a Senate Republican majority representing 15 million fewer people than the Democratic minority. And if that sounds absurd to you, it's 'cause it clearly is, especially when those courts have allowed Republicans to set wildly unpopular policy that wouldn't actually pass muster with voters.

And that brings us to our final question of what can now be done. Well, for Democrats, the first priority is to try to take control of the White House and both chambers of Congress this November which, given everything we've just discussed, is by no means a certainty. Not only could Trump win the election outright, even if he doesn't, he could, as he's repeatedly indicated, refuse to concede and force the result into the courts. And that possibility is clearly part of his haste to get a justice confirmed before the election. Because he's not even trying to hide it now.

DONALD TRUMP: We need nine justices. You need that. With the unsolicited millions of ballots that they're sending, it's a scam, it's a hoax. Everybody knows that. And the Democrats know it better than anybody else. So you're gonna need nine justices up there, I think it's gonna be very important.

JOHN OLIVER - HOST, LAST WEEK TONIGHT: Okay, there is a number of dark insinuations there, including, "it's important for us to choose the next justice so they can decide what the American people choose." And that makes it pretty clear that for Trump having an additional Supreme Court appointment is absolutely crucial to his re-election, as crucial, say, as angry White people wearing red hats, Facebook posts from undercover Russian operatives, and, based on his campaign's online store, selling Trump coloring books that even the kids in the ad look bored by. What is going on there? The younger kid isn't even paying attention, and the older one looks like he's trying to will the coloring book into becoming a Nintendo Switch with his eyes. Also, why aren't they coloring in the coloring book? The father seems to be reading it to his children which is objectively the one wrong way to enjoy a coloring book.

But look, let's say for the sake of argument, democrats do manage to sweep the upcoming election. The biggest mistake would be to think that has, in itself, fixed everything, or indeed, anything. Because there is no point getting power unless you're then willing to be bold enough to use it to make significant structural change. We've argued before that the filibuster should be abolished. That would allow legislation to get passed with a simple majority. It is admittedly risky, especially for a party that again, for structural reasons, can expect to be in the minority more often than it should. But those very factors make it extremely hard for Democrats to win a filibuster-proof supermajority and do anything meaningful.

What is frustrating is that some centrist Democrats like Joe Manchin honestly seem to think that even if they somehow significantly get more power the best way forward is to try to return to a more civilized, moderate era in American politics.

JOE MANCHIN: I will make every decision I can that keeps the Senate bipartisan. For simply that. We've got to fight for basically who we are as a Senate. Can we represent the people in a bipartisan way, Democrats and Republicans?

Oh, I've got an answer to that question for you, Joe. No, you can't! It seems the message Manchin would take from America surging to the left against the odds would be, "I think they want us to work with the Republicans." And that is not just dumb, that's dumb on the level of James Cameron going, "You know what people want? Four more Avatar movies." And to both of those men I say this... "No one wants that, stop talking about it, and just give us what we do want, one more good Terminator movie and a Green New Deal. I don't care which of you does which, just get it the fuck done."

Although, I will say, even if the Democrats sweep the election and even if they then get rid of the filibuster and then have the courage to pass major legislation, those laws are now increasingly vulnerable to a more conservative Supreme Court striking them down. And that has led some to suggest taking the more dramatic step of expanding the Supreme Court by adding justices. It is possible. The Constitution doesn't specify how many seats there should be, and it can and has been done in the past, through a simple act of Congress although there are real concerns about what the eventual blowback to that would be. Because it

doesn't take a genius to imagine what Republicans would do next time they took control of the government. Seriously, it doesn't take a genius.

DONALD TRUMP: They want to pack the Court. You know what that means? They want to put on a lot of justices. These are things that are just horrible, and I guess we could do that, too, right? We could do that, too.

JOHN OLIVER - HOST, LAST WEEK TONIGHT: Yeah, he's right. He could absolutely do that, which is undeniably chilling. Expanding the Court is a bit like doing yoga naked. One way to dampen your enthusiasm of the idea is to picture Donald Trump doing it, too. Court expansion could open the door to a never-ending cycle of both parties doing it which could permanently destabilize one of the bedrock institutions of American government.

Now, does that outweigh the potential for a court with Barrett on it? Undoing and blocking years of protections for our climate, healthcare, and civil women's rights? That is definitely worth considering. Nothing should be taken lightly here, though I will say there are some other steps we could take that should be impossible to argue with at this point. Steps that would make both the Senate and White House more representative of the electorates.

On the Senate side, you could grant statehood to Washington D.C. and, if voters there wanted, Puerto Rico. That would not only help balance out the Senate's bias towards White, rural voters, it's also the right fucking thing to do for the almost four million Americans who currently have no senatorial representation whatsoever which is just astonishing. That's roughly the population of Rhode Island, Maine, Montana and Wyoming combined.

Now, as for the presidency, we have to get rid of the electoral college which might sound radical but it really isn't. It's not even a new idea. In fact in the late '60s, it very nearly happened. Here's Birch Bayh, the senator who spearheaded those efforts making what is, in retrospect, a pretty convincing case.

BIRCH BAYE: There is a great danger with the present electoral college system of electing a minority or a non-plurality president, of electing a president who has fewer votes than the fella he's running against. When we have an electoral college system which threatens to elect a man who has fewer votes than his opponent, we tend to erode the confidence of the people of this country in their president and in their form of government.

JOHN OLIVER - HOST, LAST WEEK TONIGHT: Right. And as someone who has lived through the exact hypothetical he just described and twice, I can report that our confidence in the government hasn't been so much eroded -- erosion is a slow, dignified process -- as much as it's being hit by an asteroid full of sentient, nuclear jackhammers until it collapsed in on itself like a star inside a black hole. Back then, the idea of abolishing the electoral college had bipartisan support. Then, President Nixon even urged Congress to go through with it writing, every four years, the American democracy places a large, unacceptable and unnecessary wager that the electoral college will work one more time.

Which does make sense because if there's one thing we know Nixon was not a fan of, it's leaving elections up to chance. And there are six things we know he wasn't a fan of it's: Jews, Blacks, hippies, snitches, living Vietnamese people, and then leaving elections up to chance. Miss ya, Dick.

But obviously, we didn't end up doing away with the electoral college in 1970 because the legislation was ultimately blocked by, you guessed it, a fucking filibuster. And even today, the idea has widespread support with 61 percent of Americans saying we should abolish the electoral college. But Republicans will fiercely defend it. In fact, when a movement to switch to a national popular began picking up steam a decade ago, Mitch McConnell said Republicans need to, "kill it in the cradle before it grows up."

But the beauty is the movement McConnell was talking about there doesn't necessarily require his cooperation or indeed an act of Congress at all because a group of states have quietly signed on to an interesting potential workaround.

NARRATOR: Recently 15 states and the District of Columbia joined the National Popular Vote Interstate Compact. They're pledging to give their electoral votes to the candidate who wins the national popular vote rather than the person who wins the popular vote in their state. But this won't take effect until enough states adopt it, which so far hasn't happened.

JOHN OLIVER - HOST, LAST WEEK TONIGHT: Yeah. It's kind of amazing. Very basically, if enough states just pretend the electoral college doesn't exist, it could functionally disappear. It's the same approach every Harry Potter fan is currently trying to take towards J.K. Rowling. "Obliviate! You go; the books stay."

Now, for this idea to take effect, setting aside the legal hurdles it would almost certainly face, it would need states representing 270 electoral votes to sign on. It currently has 196 which is a lot, but needs 74 more which would be increasingly hard to get. And obviously, the better way to abolish the electoral college would be to do it through a constitutional amendment, but that is even harder. And I will say, there are other ideas for significant reform such as setting time limits for Supreme Court Justices which, we've argued before, we should absolutely do.

The point here is it is pass time for big change. And perhaps that's why Republicans like Kevin McCarthy already seem to be freaking out.

KEVIN McCARTHY: The Democrats believe it has to be their way or no way, but now it's a new extreme. They wanna expand the court; they wanna bring new states into the Union; anything that rigs the system on their behalf instead of believing in the rule of law.

Okay. First of all, fuck you, Kevin. If there's one group of people who don't get to complain about their opponents going to extremes to get what they want, it's congressional fucking Republicans. And secondly, we've expanded the court before and we've added states before. We added two states in 1959. We didn't fight World War II with 50 stars on the flag. America is constantly shifting, and granting DC and Puerto Rico statehood or ending the electoral college would actually make our system more democratic rather than less.

Because the unavoidable truth here is that the system is already rigged, and it's rigged in a way that has allowed a party without popular support to drastically reshape an entire branch of government for the foreseeable future by appealing almost exclusively to White voters in some of the least populous regions of the country. That is not a mandate, and it's not democracy; it's a fucking travesty. We are at the end of a generational battle, and the heartbreaking thing is we lost. And that hurts. It's gonna hurt for a long time for a lot of people in ways that could take a while to fully comprehend. But the next battle has to start

right now. And it will be long. We didn't get here overnight and we won't get out of here overnight. But we must be willing to fight tirelessly and with every tool and tactic at our disposal, because sometimes fighting fire with fire is not enough. You have to fight mule piss with mule piss.

Summary

JAY TOMLINSON - HOST, BEST OF THE LEFT: We've just heard clips today, starting with Democracy Now! speaking with the director of the documentary RBG about Ginsburg's life and legacy. Democracy Now! also spoke with Dahlia Lithwick about the myth of RPG's or radical progressivism. Thom Hartmann described many of the lesser known aspects of American life that the court may soon target. Democracy Now! also spoke with Elie Mystal about how Barrett's religion is actually one, the least concerning things about her record. And The Majority Report discussed one proposal to remake the Supreme Court by greatly expanding it.

All of that was available to everyone, but members also heard some bonus content that everyone else missed out on: The Majority Report also discussed why Democrats aren't fighting harder on the nomination fight so far. And Last Week Tonight laid out the long road ahead to undoing the damage done by a very focused and organized conservative movement. For non-members, those bonus clips are linked in the show notes, and they're part of the transcript for today's episode so you can still find it there if you want to make that effort. But to hear that and all of our bonus content delivered seamlessly into your podcast feed, sign up to support the show at bestoftheleft.com/support or request a financial hardship membership. Every request is granted, no questions asked.

And now we'll hear from you.

#SaveOurChildren - Tyler from Minneapolis

VOICEMAILER: TYLER FROM MINNEAPOLIS: This is Tyler Swanson calling from Minneapolis, Minnesota, Jay!, and I just listened to your episode on QAnon. One thing that was touched on, but I really want to go into detail on, is the insidiousness of the "save our children" hashtag. I tracked this kind of from the beginning, I saw it kind of pop up and it made me curious, and there was no news where this came from, and when I discovered that I had to do a QAnon I had myself a little bit of a crisis. But then the memes started to get more and more violent, and I feel like that is the sort of slow indoctrination of people into this conspiracy ideology to start sort of weaning them into a more violent mindset. To make them more likely to go out and commit acts like "pizza gate", where that place got shot up. So kind of watching this progress over the summer has been kind of bone chilling. Thank you for all that you do, and thank you for giving me all of this great information. I appreciate it.

Final comments on the emergency of legitimacy our country is facing

JAY TOMLINSON - HOST, BEST OF THE LEFT: Thanks for listening, everyone. Thanks to Deon Clark and Erin Clayton for their research work on the show. Thanks to the monosyllabic

transcriptionist trio Ben, Dan and Ken for their volunteer work helping put our transcripts together. Thanks to Amanda Hoffman for all of her work on our social media outlets and activism segments. And thanks to all those who called into the voicemail line or wrote in their messages to be played as voicemails. If you'd like to leave a comment or question of your own to be played on the show, you can send us a voice memo by email, record a message at (202) 999-3991 or simply write me a message at jay@bestoftheleft.com.

And just to wrap up today, I want to -- I'm sort of going to echo some things that John Oliver talks about in the clip that was only for members. If you're not a member and you didn't hear it, it's worth going and finding it and watching it on YouTube. What is at the heart of not just fights like this but the discussion about the Supreme Court or how it should be structured, how our government should be structured is at the heart of it is about designing a system that we can work within that people see as legitimate. It's sort of a sister concept to what I was talking about in a previous commentary recently about voting and how democracy is not really about laws and what's written on paper, it's about the perception of people and how the government derives its power from the consent of the governed. But you can only give your consent if you have a perception that it's going well and that it's legitimate because if it's illegitimate, then people are going to repeal their consent, basically. And that's when things get really, really, really bad.

And so, as we talk about the Supreme Court, if that's like the particular window through which we are looking at our government today, but at the heart of this discussion is about maintaining stability and legitimacy of our government. And it's awful that we even have to be having a conversation about stability and legitimacy but I think that that is what is at the core, like the lack of stability, the lack of the sense of legitimacy is very much at the core of why things just feel so bad all the time, why there is so much rancor, so much anger, so much partisanship, all of these things that makes American politics so poisonous right now. It all sort of stems from the cracks in the stability and legitimacy of our republic at the moment.

And so, other windows through which you could look at this would be through, you know, advocating for things like universal voting. If everyone can vote then that adds to the legitimacy of the system. If not everyone can vote and people are specifically excluded from voting, that chips away at the legitimacy.

Of course, the really particular example regarding voting is the electoral college. And there's nothing more egregious in a democratic republic than having the person who got less votes win the election. Like, there's just nothing worse than that. And so again, being in favor of the campaign for the national popular vote is adding legitimacy to the system; being opposed to a national popular vote, and people have their reasons -- they are able to convince themselves that no, but it's good for small states and you have to give extra weight to the small states, otherwise they'd be run over by the big states -- people can talk themselves into it. But, at the end of the day, what they are doing is supporting a policy that diminishes the legitimacy of our system. And there is nothing more destructive than that. Also, enfranchisement for all Americans should be obvious. It goes hand in hand with letting everyone vote, universal voting, but the fact that DC has more than 600,000 people living in it, and they just don't have actual representation in Congress is a giant gaping hole in the legitimacy of our system.

So again, being in favor of DC statehood; Puerto Rico is a little bit more nuanced. There are progressive reasons why people would, you know, living in Puerto Rico would not want to become a state; they may prefer to be independent, and that's, that's a whole other discussion. But being in favor of full enfranchisement for all American citizens, meaning that, whether it means full statehood or whatever other solution, you shouldn't be an American and not have full representation in Congress and have a full vote for president. It just doesn't make sense. And so it was talked about in today's show that purely partisan court packing is not a good idea. It's not going to work, and it is probably ultimately counterproductive, and the way that I would describe that is through the lens of legitimacy. Because we could convince ourselves and people have, I guess that, well, you know, they, they stole the seat from Merrick Garland. It should have been Merrick Garland's seat, and Obama should have gotten that Supreme Court nomination. And so we were going to take one back, and then, like for good measure, because Kavanaugh is so obviously problematic and has so many ethical complaints against him, that we should get another one for that, too. So let's go from nine to 11 now.

People who I listen to don't say things like that, but I guess people are sort of lashing out in frustration at the unfairness of the past several years and are throwing out ideas like that. And the reason why I played the clip I played is because it was really emphasized that purely partisan-hack-style court packing isn't going to work.

And that the only thing that can work is the ideas -- and, you know, there, there's not just one of them -- there's the one we heard in the show today. I've heard another one that was hoping for a total of 15 justices, and they wanted five to be appointed by each party and for the final five to be agreed upon by the justices themselves. So, it actually takes it out of the realm of politics entirely. I don't actually know that that's possible the way the Constitution is written. It may be a hard and fast rule that the President has to make the nomination. There may be a way to write that rule and sort of finagle it in there so that it's really up to the existing justices rather than the President or, you know, I guess if you just have a constitutional amendment, well, okay then, you can have whatever rule you want.

So, what is similar about all the good ideas is that they add to the legitimacy. They lower the rancor; they lower the hyperpartisanship and increase legitimacy because if the Supreme Court can be gamed through partisan hardball tactics like we've seen over the last five years, well then it's going to lose legitimacy, that the infrastructure of our government is going to lose legitimacy. People on the left who think that the Supreme Court has been stolen from them have a pretty good reason for feeling that way. Now, what do you think is going to happen? People are just gonna roll over and well, let's just play by the rules? Like, eventually, when you push people far enough, terrible things happen, and responsible advocacy, responsible governance, should push people towards not ending up in that eventuality and pushing for structural change, like massive structural change. That is not based purely on partisanship because that only serves to perpetuate the fractures in the system. Because of course the other side will get their response at some point, and they will feel entirely justified going way over the top in the same way that they will have felt like we went way over the top.

So, this is kind of a funny conversation to have, because we're talking about massive structural changes for the sake of moderation and stability. It's honestly a very strange conversation to talk about creating states that don't currently exist, to talk about working

around the electoral college, to talk about changing the makeup of the Supreme Court. These are enormous concepts. They are enormous ideas. And yet every single one of them, if done in the way that I would like to see it done, adds to stability and actually makes political life in America less interesting or at least less toxic. So, obviously we're in a moment where we're having legitimate discussions about major changes that need to be had. Yeah, they are they're happening, not just in the progressive echo chamber way over on the left, you know, democratic politicians in Congress are having these kinds of conversations. And so when you make an effort to support any ideas like that, I would urge everyone to think in the long term and to think, not how can we make progress and get our way in these next five years, but how can we help stabilize a system for the next fifty or a hundred years or more. Because frankly, my concern is that the conservative movement, which has enormous financial resources on its side, they are always going to have a much better ability to think long-term and plan long-term just as they have demonstrated over the last 40 or 50 years. They've had a plan and they have been working at it this whole time.

And we are basically at the end point of that strategy, and it has brought the country to the point of legitimate collapse where the structures of the government are all being questioned. Money in politics has horribly tainted Congress. The Supreme Court has been flipped by a ruling minority of people representing a very small minority of the country but who managed to wield power through the way the Senate functions, and two of the last three presidents got into office while losing the popular vote. Like, we are at a very dangerous point in the country, and it's not likely that the go-along, get-along, fair play, good government lefties are ever going to be able to match the right wing in their long-term planning to try to put the country back together in the same way that the right can long-term plan to, piece by piece, take the government apart.

And so, the only option we have is to implement structures that can withstand that long-term planning that the right is always going to have an advantage of. So, I'm in favor of some pretty radical changes being made to the design of our government, but we're going to get those sort of ideas passed by describing them as not the least bit radical and only trying to stabilize, legitimize and re-democratize the country. As always, I'd be happy to hear from you on this or anything else. Keep the comments coming in at (202) 999-3991 or by emailing me jay@bestoftheleft.com. That is going to be it for today. Thanks to everyone for listening. Thanks to those who support the show by becoming a member or purchasing gift memberships at bestoftheleft.com/support. That is absolutely how the program survives. Of course, everyone can support the show just by telling everyone you know about it and leaving us glowing reviews on Apple podcast and Facebook to help others find the show. For details on the show itself, including links to all of the sources and music used in this and every episode, all that information can always be found in the show notes on the blog and likely right on the device you're using to listen.

So, coming to you from far outside the conventional wisdom of Washington DC, my name is Jay, and this has been the Best of Left podcast coming to you twice weekly. Thanks entirely to the members and donors to the show from bestoftheleft.com.