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The Supreme Court must avoid partisan overreach on election cases

Trump plans to take election disputes to the Supreme Court, but the court must be wary of becoming the president's tool.

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The United States political system is in a precarious place, with a presidential election hanging in the balance and a slew of key states having razor-thin margins, along with a president trying to block the counting of millions of legitimate votes. There is at least one recount in the offing, in Wisconsin, and more perhaps to follow. Several states face legal challenges that could rival Florida in 2000, with deadlines looming for the certification of electors and the electors meeting and voting their presidential and vice presidential choices.

If ever there were a time for the U.S. Supreme Court to act with restraint, this is that time. President Trump is clinging to his promise to win the election in court. The future of our democracy depends on the Supreme Court refusing to be pulled into the same vortex that has tarnished so many other reputations over the past four years.

Trump's declarations

On the morning after the polls closed, with significant mailed-in ballot counting underway in key battleground states, Trump declared the election "a major fraud" and said, "We'll be going to the U.S. Supreme Court. We want all voting to stop."

Trump's plan has been hiding in plain sight for months. On September 23, 2020 — five days after Justice Ruth Bader Ginsburg's death — the president announced that he wanted a replacement confirmed quickly in case the Court had to resolve battleground state election litigation contests. At a Pennsylvania rally on Nov. 1, he made a heavily freighted remark: "[I]f we win on Tuesday, or thank you very much, Supreme Court shortly thereafter."

These statements foreshadowed highly charged partisan litigation, dangerously jeopardizing public perceptions of the Court's neutrality.

The Court has already experienced harm from being viewed as a partisan actor. Shortly before his death, retired Justice John Paul Stevens wrote in his memoir: "The Court has not fully recovered from the damage it inflicted on itself in Bush v. Gore."

Nothing in the law compelled the Court to intervene in that case or apply the reasoning that it used. In our system of federalism, state governments have broad authority to enact, interpret and apply their election laws. The Constitution gives states control over selecting presidential

Electors and over the time, place, and manner of holding Congressional elections. And any questions about electors are to be resolved in Congress, under both the Constitution and the Electoral Count Act.

If the justices play a role in deciding this election, their rulings must be scrupulously principled, avoiding any partisan appearance that undermines trust in the Court — as by preventing voters from having proper votes counted

Public trust in the fairness of the courts is the bedrock on which their authority rests. After all, the judiciary lacks the power to raise armies or taxes. President Andrew Jackson made the point emphatically in 1832 after Chief Justice Marshall's majority defied Jackson by upholding important rights of the Cherokee nation: "John Marshall has made his decision; now let him enforce it."

In our current political maelstrom, there need be no damage to the Supreme Court's authority. In election contest litigation, the Court should defer to state courts regarding decisions on how to fairly administer their state's voting procedures — at least in the absence of categorical constitutional violations. As Yale law professor Akhil Amar and other experts have shown, none of the recent challenges against state interpretations of their voting laws come close to meeting that standard for federal judicial intervention.

Law professor and Cato Institute scholar Ilya Somin has written that the more the justices act as self-restrained neutrals "rather than foot soldiers in Team Red's war against Team Blue, the better their odds of avoiding a legitimacy crisis."

How the court should act in order to avoid crisis

There are at least three sound reasons for the Court to focus on this danger.

First, acting judiciously can help quell a broader crisis in governance. Though public respect for the Court has declined in the last generation, respect remains higher for the Court than for the other branches.The Court could greatly calm stormy waters roiling much of American government and society by sending a message of impartiality.

Second, acting in ways that demonstrate the Court's nonpartisanship would create enormous capital for moments when controversial opinions come, as they always do. Deferring to state courts on issues that determine the outcome of a presidential election would frame America's perception that the new conservative majority is judicious and above the political fray.

Third, such a course could lessen calls for the more extreme proposed "fixes" to the Court's composition and structure. Those calls arise from a widespread impression of naked partisanship fed by President Trump's overt reliance on "my judges" to secure his re-election, and by Senator McConnell's management of the Garland, Kavanaugh and Barrett nominations.

In 1937, Justice Owen Roberts abandoned activist constitutional theories that had voided major New Deal legislation, and voted to uphold minimum wage laws. Justice Roberts' shift defused Court-packing political pressures and became known in the lore as "the switch in time that saved nine." In the current heated circumstances, it requires no switch to reject the president's

regrettable public claim on the Court to ensure his re-election. It takes only deference to other constitutional decision-makers.

Avoiding federal judicial activism is a longstanding article of faith among those most supportive of the justices in today's Court majority. In this fraught presidential election, it is vital to our democracy for the U.S. Supreme Court to keep its own faith.