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# The size of the Supreme Court is only part of the problem

Opinion by Judith Resnik

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Opinion

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**Editor's Note:** Judith Resnik is the Arthur Liman professor of law at Yale Law School and author of the essay, "Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure." The views expressed in this commentary are her own. View [more opinion](#) at CNN.

**(CNN)** — As the Senate Judiciary Committee begins hearings over Judge Amy Coney Barrett's appointment to the US Supreme Court, the size of the nine-member court has become an [election issue](#). If, as expected, Barrett is confirmed, the toxic polarization gripping the nation could be further mirrored in federal courts, which are supposed to be places where open-minded judges aim to treat all people equally and render just decisions.



Judith Resnik

However, to focus only on the number of Supreme Court justices is to miss the systemic issues essential to a fair judiciary. Tens of hundreds of judges in lower courts — both with and without life tenure — decide the vast bulk of the country's cases. To decide what needs to be changed, it is essential to know how these judges are selected, how long they stay in power and how the Supreme Court gets its cases.

## What the federal courts actually look like

The federal courts are usually depicted as a three-tiered pyramid of life-tenured judges at the district, appellate and Supreme Court. But, in fact, hundreds of federal judges do not have life tenure. In the 1960s and 1980s, Congress [enacted laws](#) that added two new judicial positions: magistrate and bankruptcy judges.

Magistrate judges, selected by life-tenured district court judges, have eight-year renewable terms. Bankruptcy judges, chosen by appellate court judges, have 14-year terms. In practice, almost all are renewed. When the sets' numbers are added together, these non-life tenured judges number around 950 — about [100 more](#) than their life-tenured counterparts.

Their titles may make their work seem quotidian. Not so. Some of the major issues of today — like the [bankruptcy of opiate manufacturers](#) — are pending before judges without life tenure.



Other federal adjudicators sit in agencies. [About 2,000](#) are called administrative law judges; thousands more are hearing officers. They are part of the federal government's civil service, and they rule on scores of cases about Social Security, veteran benefits, labor immigration and other hot button issues.

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In addition, states have thousands more judges getting their jobs through a variety of methods, from merit selection panels to executive or legislature appointments to direct voting — and more.

This array demonstrates, first, that because in this democracy, all of us are eligible to seek relief in courts for our many rights, we need large numbers of judges to hear claims. Second, democracy does not dictate any one method for selecting judges.

But democracy does tell us what we want: fair and equal treatment of all people. It also tells us what we don't want: a small cadre of political partisans deciding who holds the power of judgment for decades.

## Re-envisioning the federal judiciary

The numbers make plain that the Supreme Court has only a slice of the action. That court decides [about 80 cases](#) a year. Federal appellate courts (usually working as panels of three) hear [about 50,000 cases](#) a year. And huge power resides at the trial level, where individual judges are the gatekeepers to the system. [About 360,000](#) civil and criminal cases come in yearly, in addition to about 853,000 bankruptcy petitions.

These numbers represent a small fraction of the caseload, because it is state courts where [tens of millions](#) of cases are filed annually.

Rather than bemoan the volume of filings, this volume should be viewed as a marker of success: people believe that courts are places that can provide remedies.

What are the problems then? Too few people — many life-tenured judges — hold too much power for too long. And just because life tenure dates back to the founding does not mean it is operating in the same way now as it was then, which is another reason reform is needed.

I [learned](#) from delving into the early days of the US that from 1789 to 1809, 63 life-tenured judges sat on all the federal courts across the (much smaller) United States. On

average, Supreme Court justices held that office for 14 years, and lower court judges served for 16 years. Fast forward to the end of the 20th century. Between 1983 and 2003, 530 sitting life-tenured jurists were on the bench for 24 years, on average. Many factors account for the increased length of service, including appointing people at earlier ages, longer life expectancies and promotions of judges from one level to another.

Rethinking what life tenure means is therefore in order. The Constitution [guarantees](#) a term of office for Supreme and lower court judges "during good Behavior." That phrasing has been interpreted to mean staying in office until a judge retires (sometimes strategically) or dies. But that reading is not inevitable. The 1780 Constitution of the Commonwealth of Massachusetts, for example, [uses similar words](#), and the state had a mandatory age-based retirement.

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Moreover, constitutional courts in several other countries (like [Italy](#) and [Germany](#)) come with fixed terms or with mandatory age-based retirement ([Canada](#) and [the UK](#)). In short, ensuring judicial independence through unqualified terms for a person's life is not the only way to get accomplished and able judges.

Another way to reallocate power is to have judges appointed to the federal courts not be locked into one slot. A version of this practice exists now. Retired Supreme Court justices [occasionally sit](#) on appellate courts — for example, [Justice David Souter](#) on the First Circuit — and lower court judges regularly sit "by designation" on appellate courts or move from one district because help is needed to staff the cases.

A related reform would be for confirmation to the Supreme Court to come with a cap — pegged to ensure that every four years, a president has the opportunity to nominate a justice, or to intervals when the US Senate membership shifts. Justices who cycle off the high court would still be life-tenured, and they would move to sit on lower federal courts.

Adding judges has a useful function because, when the numbers go up, the stakes of any one position go down. Expanding the number of seats on the Supreme or other courts should also entail retooling the process for deciding and choosing cases, all to dilute the concentration of power in any one individual.

Critics say that too many judges cannot work together and that the law gets too messy. But disagreement about law is the lifeblood of vibrant democracies. Ideas about how to have larger groups of justices work constructively together come from constitutional democracies that, like the US, are committed to judicial independence and excellence. For example, the UK's Supreme Court has a bench of 12 justices, [who sit](#) on panels of five or more. Were the US to add justices and use panels, predicting 5-4 or 6-3 outcomes would no longer be possible.

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No discussion of power on the Supreme Court should miss a key facet: the court's control over the docket. During the 20th century, the court gained authority to set its own agenda — four justices can put a case onto the calendar. This means that justices can shop for facts and issues to pursue legal agendas. An alternative exists, [as suggested](#) by a group of law professors some years ago: Congress can create or the Supreme Court could delegate to a rotating body of lower court judges the primary role in selecting the cases to be

heard by the high court and thereby lower the risk of politicization in case selection.

These proposals are but some of the many ideas about how to redeem and liberate the country from the democratic deficits in the Senate and the presidency. To revive American democracy requires that a small group of people not be able to entrench their views of law's obligations and close off opportunities to debate the meaning and impact of our norms.

Democracy may not instruct us specifically on how to pick judges, but it does tell us a good deal about securing rights to justice, equality before the law and constraints on state power. And those precepts mean that no one person ought to hold too much power for too long.

 

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