

Rather than packing the Supreme Court, make judging impartial

by Lev Tsitrin



Another day, another Biden initiative – this time, as the *New York Times* informs us, “Biden Creating Commission to Study Expanding the Supreme Court” <https://alibi.com/news/61032/Judicial-Fraud-Impacts-Americans.html>. The mechanism of injecting judges’ own views into decision-making process is simple: while judges take for adjudication parties’ argument, it is not what they adjudicate. The argument they actually adjudicate is very different indeed – it is judges’ own argument. This is acted out right in the open by the Supreme Court. The only reason decisions of the Court are not unanimous, but are often split 4-to-5 is that justices come up with their own argument for, and against the plaintiff’s and defendant’s positions, acting as lawyers first, and judges afterwards – to cast their vote

for the argument that is irresistibly convincing – because it is their own argument.

This is course if a far cry from impartiality. An impartial judge cannot be a party to the case, he cannot be a lawyer for the side he wants to win. That's why there is recusal. Of course we hear that judges neither pitch nor bat, but only call balls and strikes, as Chief Justice Roberts assured us during his nomination. This line serves well for getting nominated – but upon nomination, gets instantly forgotten. Check who pitched the argument that individual mandate is tax – the argument that saved Obamacare. If I recall correctly, this was not Obama's argument – he faced re-election and did not want to highlight the fact that he raised taxes. Nor was it Obamacare opponents' argument – it worked against them, not for them. It was Chief Justice Roberts' argument, as he acted as a lawyer for the Obama administration before acting as a judge. If Roberts neither pitched nor batted, there would be no Obamacare.

And this is how it works, case after case. I am not even talking of SCOTUS' lack of sheer capacity to hear cases – it acts as a single judge, and this is what determines its capacity. It gets 10,000 petitions annually, but it can only hear some 200, with a result that, a century ago, SCOTUS was allowed to choose its cases. So despite our pride in our three-tier system of justice, we only have a 2.02-tier system, since the Supreme Court can hardly be said to exist – only 2% of its cases are decided by justices themselves; the fate of what goes in, and what gets tossed, is decided by justices' clerks