

## **Klarman Senate Testimony, What is Wrong with the Supreme Court? (March 2021)**

Thank you Chairman Whitehouse, Ranking Member Kennedy, members of the Subcommittee. This is my first time testifying before Congress and I am honored and humbled by this opportunity.

Democracy, as you know, is under threat around the world. Countries such as Poland, Hungary, Turkey, the Philippines, and Brazil have all experienced substantial deteriorations in their democracies over the last fifteen years or so. India no longer qualifies as a fully free country, according to the rankings of Freedom House, an American non-profit organization that conducts research and advocacy on democracy.

Incredibly, this degradation of democracy has even affected the United States, whose scores on the Freedom House democracy rating have fallen significantly over the last half decade.

The United States has just experienced four years in which its president displayed an openly authoritarian bent.

President Trump attacked the press as the “enemy of the people,” assailed judicial independence, politicized the Justice Department and the intelligence agencies, encouraged political violence, undermined fundamental norms of government transparency, delegitimized elections, called his political opponents “traitors,” and manifested a bizarre admiration for foreign autocrats.

Just in the last couple of months before the 2020 election, President Trump refused to commit to a peaceful transition of power, declined to condemn white supremacists, sowed groundless doubts about the reliability of mail-in voting, and insisted that the only way he could lose the election was through fraud.

And, of course, after the election, he endlessly propagated the Big Lie that the election had been stolen from him, solicited election fraud from the Georgia Secretary of State by demanding that he “find” enough votes to make Trump the victor, summoned Michigan Republican legislative leaders to the White House to try to dragoon them into allocating the state’s electoral votes to him, even though he lost the state by 150,000 votes, and on January 6<sup>th</sup> he incited a coup against the Capitol.

Essentially all of the behavior just described comes straight from the authoritarian playbook so familiar to students of international politics.

The Republican Party was mostly complicit with President Trump's authoritarian bent: Congressional Republicans did not want the 2016 Trump campaign's involvement with Russia investigated by Special Counsel Mueller, were untroubled by his systematic obstruction of that investigation, voted against his impeachment and removal from office over his shakedown phone call to the president of Ukraine requesting that he dig up dirt on his political opponent, and they did not seem to mind his systematic obstruction of congressional oversight.

After Trump's Senate acquittal, congressional Republicans acquiesced to his takeover of the intelligence establishment, his war against whistleblowers and inspectors general, his politicization of the Justice Department, and his catastrophic response to the coronavirus pandemic.

In addition, the Republican Party itself over the last 15 years has assailed democracy through a wide variety of state electoral practices.

Republican-controlled state governments have suppressed votes through restrictive voter identification laws and purges of the voter rolls.

They have grotesquely gerrymandered legislative districts, enabling Republicans to maintain control of state legislatures and the House of Representatives while failing to win majorities of the vote.

Republicans have also erected obstacles to college students' voting, delayed elections that they anticipated they would lose, eviscerated the powers of Democratic governors, rejected the results of voter initiatives of which they disapproved, imposed obstacles to putting such initiatives on the ballot in the first place, and have come close to criminalizing mass voter registration drives.

In the months prior to the 2020 election, Republican elected officials across the nation made it harder to vote during a once-in-a-lifetime pandemic: refusing in some states to expand excuse-based absentee balloting, restricting the availability of drop boxes to collect absentee ballots, refusing to relax witness-signature requirements for absentee ballots, and declining to allow the counting of absentee ballots postmarked but not received by Election Day.

Two factors mostly explain this relatively recent Republican assault on democracy at the state level. First, the national electorate today is more evenly divided than it was for much of the last century; thus, suppressing a few thousand votes here and there can affect the outcome of elections with enormous political consequences.

Second, dramatic demographic changes, together with increased secularization and

growing social liberalism, have led Republicans to conclude that their political agenda no longer commands majority support.

Recognizing that their party performs better when voter turnout decreases, Republicans have chosen to shrink the electorate rather than alter their party's agenda to make it more popular.

Republican Supreme Court Justices have been largely complicit with this assault on democracy.

In 2013, they effectively nullified the preclearance provision of the 1965 Voting Rights Act, which required mostly southern states to submit proposed changes to their voting practices to the federal government for advance approval to ensure the absence of a discriminatory racial purpose or a disparate racial impact on minority voters.

Republican Justices have also upheld strict voter identification laws and purges of the voter rolls on the basis of the state's interest in reducing voter fraud, which numerous studies have demonstrated is a virtually nonexistent problem.

In 2019, the Republican Justices refused to remedy the problem of partisan gerrymandering, which today mostly benefits Republicans.

They have also unleashed over the last four and a half decades a virtually unrestricted flow of money into politics on the basis of contrived constitutional rationales, which disproportionately benefits wealthy donors, corporations, and well-funded interest groups.

In the run-up to the 2020 election, the Justices deferred to Republican elected officials who sought political advantage by seeking to make it more difficult for citizens to vote during a once-in-a-century pandemic.

Rather than defending democracy, the Court under Republican control has become another engine of democratic degradation.

More generally, today's Republican Justices have aggressively advanced the agenda of the Republican Party.

In addition to upholding voter suppression, they have undermined labor unions, protected corporations from class action litigation and punitive damage awards, upheld arbitration agreements that prevent employees and customers from airing their grievances against corporations in court, curbed antitrust laws, eroded the constitutional right to abortion, invalidated gun control measures, struck down voluntary efforts by school boards to achieve integration through race-conscious means, and threatened to invalidate race-based affirmative action.

Studies have confirmed that today's Court is the most conservative in the last hundred years, and that today's Republican Justices are as friendly to the

Chamber of Commerce's agenda as any Court in history.  
Today's Supreme Court is a problem requiring a solution.  
Thank you very much.