Final Session

1. Whatever else we've learned, The Chief is a lifelong conservative and will in all likelihood remain so, but he is certainly more moderate than Justices Alito and Thomas. Justices Goresuch and Kavanaugh have served too briefly to provide a definitive predictive record but their history suggests no basis to expect either to bring a more moderate impulse to the 5/4 partisan decisions. But Roberts is also an institutionalist and obviously does not want his Court to bear the stigma of being remembered as a political appendage of the Republican right, as evidenced by his support of the ACA and his voting with the liberals on the census question.

2. Adam Liptak points out that important issues are still unresolved and others will no doubt arise in the future. Moreover despite backing the administration more than was necessary, as illustrated in Linda Greenhouse's article, none of the Justices would appear enamored of Trump's authoritarian ways and since each Justice has life tenure, none is under political pressure to accommodate bullying or threats to the democratic spirit that animates the Constitution.

3. So although the future now looks bleak on partisan issues, the liberals appear to have some negotiating leverage at the margins and in John Roberts someone willing to negotiate. Still, their ability to change the Court through packing or otherwise looks pretty slim.

On the Border Wall, the Supreme Court Caves to Trump

Linda Greenhouse in The New York Times August1, 2019

Last February, in declaring a national emergency that he said authorized him to spend money that Congress had refused to give him on his border wall, President Trump predicted, "We will then be sued." But not to worry, he went on: "And we will possibly get a bad ruling, and then we will get another bad ruling, and then we will end up in the Supreme Court, and hopefully we will get a fair shake and win in the Supreme Court, just like" the Muslim travel ban. And guess what: he was right.

The news cycle moves at supersonic speed in the Age of Trump. It's hard to remember, through the din of the president's insulting the city of Baltimore and one of its members of Congress, Elijah Cummings, that not even a week ago, after the close of business last Friday, the Supreme Court permitted the Trump

administration to violate a federal statute and quite likely the Constitution itself.

The court did this in response to a request the administration styled as an emergency. The court acted without a public hearing, without a signed opinion and over the dissenting votes of the four liberal justices. As a result, although the case is still on appeal to a federal appeals court, the administration can now sign contracts for 100 miles of a 30-foot-high steel wall in five locations where Congress prohibited construction, using money that Congress refused to allocate for that purpose.

To be sure, it was a victory for the president, as he promptly tweeted. But it was a cheap victory — and cheap doesn't mean free. There will be a price to pay, if not by the administration in its relationship with

Congress, then certainly by a Supreme Court moving closer to an identity as the administration's lap dog.

In my most recent column, I cited statistics compiled by Prof. Stephen Vladeck of the University of Texas School of Law in Austin on the dramatic spike in the number of emergency requests to the Supreme Court made by this administration, compared with its recent predecessors. While the justices don't always give the administration everything it asks for, at least not right away, they grant some form of relief often enough to make it apparent that the administration comes to the court in a favored position. Following the court's action on the border wall, Professor Vladeck summarized his findings in a post on Scotusblog, adding: "Most alarmingly, the court's conduct gives rise at least to the appearance of inequity — that the court is willing to suspend regular order whenever the government asks (or, worse, when certain administrations ask), but almost never in any other case, regardless of the circumstances." In the border wall case, the question for the court was basically a procedural one: whether the administration was entitled to a stay of an injunction a federal district judge issued in June to block the Defense Department from moving $2.5 billion dollars from one account, where the department's 2019 appropriations act had placed the money, into a different account that fell far short of the president's budget request. The president had wanted $5.7 billion, to be used to build or fortify a border wall in 10 locations. Congress

appropriated only $1.375 billion and specified that the money was to be spent only in eastern Texas. In claiming the right to divert money from elsewhere in the Defense Department's appropriation, the administration boldly announced that it would build in places in New Mexico, Arizona and California where, it said, the Department of Homeland Security needed help in "combating the enormous flow of illegal narcotics."

In responding to a lawsuit brought by the Sierra Club, which said that construction would imperil a fragile landscape that its members enjoyed for recreational purposes, the administration claimed it had "express statutory authority" for the transfer under the 2019 appropriations act. Whether the administration reads that law correctly is at the heart of the case, although in deciding whether the administration was entitled to a stay, the justices did not need to resolve that question and didn't do so.

Nonetheless, it's worth unpacking the statutory issue to understand the constitutional dimensions of a case that does not, on the surface, present a constitutional question. Section 8005 of the Defense Department appropriations act did authorize some transfers but set two requirements that must be met: the move must be in response to "unforeseen military requirements," and can occur "in no case where the item for which funds are requested has been denied by Congress." In granting the injunction, the District Court found that the supposed need for the wall was not unforeseen and that the congressional refusal to grant the president's budget request operated as a denial.

The United States Court of Appeals for the Ninth Circuit agreed with that interpretation and strongly suggested that without statutory authority, the administration was venturing into unconstitutional territory. It declined to grant a stay pending the administration's appeal. In doing so, the appeals court cited Article I of the Constitution, Section 9, Clause 7: "No money shall be drawn from the Treasury, but in consequence of appropriations made by law." In other words, if the expenditure is not "made by law" — authorized by Congress — it violates the constitutional separation of powers.

The Ninth Circuit, having refused to grant a stay, will hear the administration's appeal on the merits in the fall; final briefs are due in October. That's not fast

enough, the administration told the Supreme Court. With the end of the fiscal year approaching on Sept. 30, it explained, appropriations authority will expire along with the chance to go ahead with the projects this year even if the administration eventually wins on appeal. Perhaps sensing a weakness in the statutory argument, Solicitor General Noel Francisco also argued strenuously that the Sierra Club lacked standing to bring the lawsuit in the first place.

It was on this last argument that the Supreme Court's majority hung its decision to grant the stay. The court's one-paragraph unsigned order said only that "among the reasons" for lifting the injunction "is that the government has made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review of the acting secretary's compliance with Section 8005. " There is much that's highly questionable about the court's behavior in this case. When a court confronts the question of whether to grant a stay, the issue comes down to what courts call a "balance of the equities." Which side will suffer the most from a suspension of the judgment, the winning side or the side that failed to make its case and wants another chance? Which side is most likely to suffer irreparable injury? In this case, the Sierra Club argued that if construction goes ahead, the damage will be done; the government will have won on the ground even if it ultimately loses in court. As for the administration's claim of imminent harm, it can always try again in the next fiscal year.

The likelihood that the party requesting a stay will ultimately prevail on the merits is another factor that courts take into account. That the administration's case on the merits is far from a winning one is, of course, no guarantee that it can't win at the Supreme Court, but the justices will have to do some heavy lifting to make that happen. The House of Representatives filed a strong friend-of-the-court brief, reminding the justices that the "power of the purse is an essential element of the checks and balances built into our Constitution — even the monarchs of England learned long ago that they could not spend funds over the opposition of Parliament." The House brief continued: "The administration's attempt to insulate its conduct from judicial review cannot be reconciled with "'the strong presumpon that Congress intends judicial review of administrative action.'" (The quotation was from a 1986 8-to-0 Supreme Court opinion written by Justice John Paul Stevens.)

What's most troubling about the court's action is that even if five justices found the administration's argument attractive or even compelling, the court's unconditional surrender (even issuing the stay on the precise date the administration requested, July 26, and not a day later) was simply unnecessary...

A gun law case before the US Supreme Court has Americans up in arms

By Ephrat Livni • Quartz August 17, 2019

The US Supreme Court will soon consider the right to bear arms, something it hasn't done for nearly a decade. Whether it should is up for debate, and the arguments are getting heated—fast. At stake: the extent of limits that localities can place on gun owners. The case in question has pitted New York City against the New York State transporting guns. It's up for review in the high court and scheduled for arguments in October.

The twist here is that New York City, and its many legal allies, say the case is actually moot. They argue that there's no live controversy for the court to resolve because the law in question has already been adjusted. So, complaints that the pistol association had about its constitutionality are no longer valid. The petitioners argued in the lower courts that they should be able to transport guns to second homes, shooting ranges, and shooting competitions, among other places. And now they can, based on updated legislation.

However, the rifle association says there is still a live controversy and is eager for the high court to opine on the matter. The new law, they argue, offers no clarity on whether they can also stop for "coffee breaks" while traveling, or take their firearms to other vacation spots and not just their second properties, for example.

Everyone wants in on the fight, it seems, firing off amicus briefs telling the court why it should or should not be taking the case. More than 30 "friend of the court" briefs have been filed already, including from the Department of Justice, states, educators, gun-rights groups, gun-control activists, police,

constitutional law professors, and even linguists. Some of the filings have been friendlier than others.

On Aug. 12, Democratic senators Sheldon Whitehouse of Rhode Island, Mazie Hirono of Hawaii, Richard Blumenthal of Connecticut, Richard Durbin of Illinois, and Kirsten Gillibrand of New York joined the fray with an amicus filing that the Wall Street Journal editorial board dubbed an "enemy of the court" brief. The lawmakers argue that if the high court decides to opine on gun rights, despite the mootness, it'll be proving it is just a Republican party tool, controlled by the conservative legal group the Federalist Society, and working on an NRA project to expand gun rights.

The senators' brief argues that conservatives generally, and the National Rifle Association and Federalist Society specifically, have been waiting for the court to be packed with enough reliably Republican justices to continue the "project" of bringing a case to the high court that will expand cities to maintain safety. With justice Anthony Kennedy's retirement last year and the confirmation of Brett Kavanaugh, the timing was right, say the senators, citing NRA and Republican party advertisements ahead of Kavanaugh's confirmation and after that show the controversial justice would prevent the political left from taking away the public's guns.

The senators warn that if the high court rules on the constitutional issues even though there is no live controversy, it will only further erode the institution's authority and the public's trust in its commitment to justice over politics. Citing a poll about the public's view of the court's political neutrality, which showed that 55% of Americans believe justices are political actors, the senators write, "To stem the growing public belief that its decisions are 'motivated mainly by politics,' the Court should decline invitations like this to engage in 'projects."...

How Court-Packing Went From a Fringe Idea to a Serious Democratic Proposal

PEMA LEVY
Reporter Mother Jones

... In the last few days, Sens. Elizabeth Warren, Kirsten Gillibrand, and Kamala Harris have said they wouldn't rule out expanding the court if elected president. ..There's likely no going back on what is now a major theme of the Democratic primary and possibly the general election. Part of the debate is internal to the Democratic primary: To what degree is the court is a threat to Democrats' progressive policy goals? And part of the debate is a battle with the GOP over defining the last several years: Which party is trampling democratic norms—the one contemplating adding seats to the court to alter its makeup or the one that, in 2016, kept a seat open in order to deny President Barack Obama an appointment to the court?

The steps that Republicans have taken to shape the Supreme Court over the past few years have led some Democrats to believe that it's time to,,, fight back. After the death of Justice Antonin Scalia in February 2016, Senate Majority Leader Mitch McConnell held his seat vacant for over a year so that Merrick Garland, Obama's nominee, could not fill it. In 2017, McConnell and his GOP colleagues eliminated the filibuster for Supreme Court nominees in order to push through Trump's first nominee, Neil Gorsuch. Last fall, Senate Republicans rushed Brett Kavanaugh to confirmation.... But the battle over the Supreme Court is only the most visible conservative effort to shape the judiciary.

Sam Berger, a former policy adviser in the Obama White House, argues that over the past four years, conservatives have engaged in a more subtle form of court-packing, not just on the Supreme Court but throughout the federal judiciary—first by stalling or denying confirmation to Obama's nominees, then by pushing through Trump's. In just over two years, Trump has filled 10 percent of the federal bench and 20 percent of appellate judges. If McConnell follows through on his threat this month to reduce the Senate's allotted debate time per nominee from 30 hours to two, Berger says, Trump could end up appointing nearly a third of the judiciary before the 2020 election...

Progressive groups have successfully pushed the 2020 candidates to take on a topic that was off limits. Of course, there are huge political risks to promoting a radical court-packing scheme, and some liberals warn against it...In 1937, President Franklin Roosevelt faced a political quandary. The conservative majority on the Supreme Court was knocking down his New Deal reforms

nearly as rapidly as he signed them. Social Security and the National Labor Relations Act were poised to fall next. So, he hatched a plan to add six justices to the court—one for each sitting justice over 70 years old—under the pretense that the nine old men on the court were too old to shoulder the responsibility of running the nation's highest court. According to historian Jeff Shesol, the author of Supreme Power: Franklin Roosevelt v. the Supreme Court, it was the deviousness of the plan that shocked FDR's advisers. Cloaking a scheme about ideology as one about infirmity, they believed, was sure to backfire.

And it did. History books portray the disaster for FDR over the court-packing scheme as a warning to future generations that reforming the Supreme Court will end in political ruin. In 1938, the Democrats suffered a historic defeat in the midterms, effectively ending FDR's bold domestic agenda. But at the same time, the nine justices may have been cowed by the threat of court-packing, and they stopped overturning FDR's key legislative achievements...

Aware of the stigma attached to court-packing, Berger wants to flip the narrative. "This isn't a question about whether or not one party should initiate court-packing," he says. "It's about what we should be doing about the court-packing that is already occurring. That's a fundamentally different question than what was presented to FDR." It's here that the progressive consensus forming around Supreme Court reform splinters. The court in the 1930s was dismantling the New Deal and Roosevelt's efforts to bring the country out of the Great Depression. In the near future, he foresees a similar scenario in which Democrats, if they win in 2020, pass bold reforms like a Green New Deal or Medicare-for-All, only to see the Supreme Court knock them down. To him, this isn't just about righting the wrong done to Garland; it's also about stopping climate change and successfully enacting progressive legislation.

The stated reasons for judicial reform tend to shape the proposals for how to reform the court. Academics who believe that the court is on the precipice of a legitimacy crisis—one that has been building since a 5-4 majority put President George W. Bush in the White House in 2000—have proposed reforms aimed at fundamentally changing the nature of the court. Law professors Daniel Epps and Ganesh Sitaraman have outlined two options for saving the court's legitimacy in an upcoming Yale Law Review article and in Vox. One is to transform the court from a permanent court of nine to a rotating panel that

randomly selects nine justices from a pool of federal judges ... The other...would create a court of 15: five picked by Democrats, five picked by Republicans, and five chosen by the unanimous consensus of the 10 Democratic and Republican justices. Other academics have proposed term limits.

Most outside groups are hoping to find the best approach over the course of the campaign and have not endorsed any specific proposals. But Belkin is adamant that the only route is simply to add judges— ideally four of them. There is nothing in the Constitution limiting the Supreme Court to nine justices. The other proposals, by contrast, are likely unconstitutional, he argues, so they would be struck down in court if passed by Congress and would require a constitutional amendment. If Belkin's first step was to get the candidates to embrace reform, the next is to convince them to abandon the academic debate and use brute force to pack the court.

"The emergencies we're facing are so dire that we don't have time to have a multi-year conversation about the nuances of this judicial reform package versus that judicial reform package," he says. The only option, as he sees it, is to pick the option least likely to be struck down by the court he is trying to alter. And that's FDR-style court-packing."