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5 on 45: Will partisan gerrymandering survive the Supreme Court?

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PITA: You're listening to 5 on 45 from the Brookings Podcast Network, analysis and commentary from Brookings experts on today's news regarding the Trump administration.

WHEELER: I'm Russell Wheeler, a visiting fellow in Brookings's Governance Studies program. On February 5th, the U.S. Supreme Court Justice Samuel Alito, a George W. Bush appointee, rejected a request by Republican state legislators in Pennsylvania to put on hold an order of that state's Supreme Court. Justice Alito hears emergency appeals from courts in the third Judicial Circuit which includes Pennsylvania.

The state court order directed the Republican-dominated legislature to redraw the boundaries of Pennsylvania's 18 U.S. House of Representatives districts because the map they drew for the 2016 elections was the product of extreme partisan gerrymandering—gerrymandering meaning drawing electoral districts based on other than neutral factors.

The map produced Republican victories in 13 of the 18 districts even though the aggregate votes cast in those 18 districts for House candidates were roughly half Democratic and half Republican. The Pennsylvania court, currently dominated by elected Democrats, ordered the Republican controlled Legislature to send a revised map to the Democratic governor by February 9th. If the governor and legislature can't agree, the court itself will redraw the boundaries, which could mean several Democratic pickups in the November midterms or control of the House now appears up for grabs.

The legislature is resisting the order including some unseemly calls to impeach the justices. Justice Alito gave no reason for rejecting the request but most likely it was because the state court's decision was based on the state constitution over which the U.S. Supreme Court normally has no jurisdiction. If it were a close call he probably would have referred the petition to the entire court, but he didn't.

Chief Justice Roberts on February 6 did refer the whole court a request by North Carolina Republican legislators to stay a federal district court order throwing out its state legislative map. In a partial victory for the legislators, the court in a split decision put a

temporary hold on several districts that the district court had struck down. The court will decide later whether to hear the state's for appeal.

Looming over all of this is a Wisconsin case before the court involving Republican partisan gerrymandering of state legislative districts, and a Maryland case involving Democratic partisan gerrymandering of a federal House district. The Supreme Court has ruled on redistricting challenges they claim improper racial gerrymandering, but has said claims of partisan gerrymandering are non-justiciable—incapable of judicial resolution. Why? Because most of the justices have believed, at least so far, that it is impossible to announce credible standards by which to determine when redistricting, which usually has some partisan considerations, become so partisan as to violate the First Amendment right of voters in the gerrymandered districts or their fourteenth amendment rights to equal protection of the laws.

Both cases, like the North Carolina case, come directly to the Supreme Court from three judge district courts especially impaneled ad hoc under statutory provisions to hear redistricting claims and usually consisting of one court of appeals judge and two district judges. The Maryland case set for oral argument in March will probably turn on the court's decision in the Wisconsin case argued last October. The Wisconsin District Court threw out the 2011 map of Wisconsin state legislative districts, which, as in Pennsylvania, is heavily Republican despite a close to even split in aggregate votes.

The case presents the Supreme Court with a variety of issues but the threshold question is whether the court should even entertain such challenges. Whether there is what Justice Kennedy described in 2004 as “a clear and precise standard” with which to evaluate partisan gerrymandering claims. That the court agreed to decide the case does not mean it's ready to find partisan gerrymandering justiciable. It only takes four votes to grant full review, and the court was divided during oral argument. Justice Breyer articulated what he thought was a workable standard. Chief Justice Roberts disagreed fearing an onslaught of partisan gerrymandering cases, and to boot, a loss in respect for the court if in the end the public saw its decision involving in part complicated statistical analyses as simply the court's preference for one political party over the other.

The response? Partisan gerrymandering, increasingly extreme, is a threat to democracy that the court should curtail, not fuel, with a decision upholding the Wisconsin legislative map. As is often true, the decision will probably turn on how Justice Kennedy votes.

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