Presidential Commission on the Supreme Court of the United States

Written Testimony of Jeff Shesol
Author, *Supreme Power: Franklin Roosevelt vs. the Supreme Court*

August 27, 2021

DIAGNOSIS

The Real Mischief

In February 1937, when presenting his plan to pack the Supreme Court, Franklin Roosevelt offered a rationale: that the oldest justices had fallen behind in their work and fallen out of step with "modern complexities." The first of these was demonstrably false; the second was only partly true. This misdirection, Roosevelt later conceded, was a mistake. "I did not place enough emphasis on the real mischief—the kinds of decisions which, as a studied and continued policy, had been coming down from the Supreme Court."

What, we might ask in a similar spirit, is the real mischief today?

Or, put differently: what is the core problem this Commission should aim to address?

A review of testimony to date reveals a range of concerns: an entrenched majority of ideologically driven, outcome-oriented conservative justices; among those justices, an inconstant relationship with the principle of *stare decisis* and a willful blindness to "the plainest facts of our national life," as Chief Justice Charles Evans Hughes once put it; the systematic incapacitation of government at both the state and federal level to address mounting crises; a shattering of the norms of the judicial appointments process by Senate Republicans. This, of course, is a partial list.

A ranking of problems according to significance would surely put agenda-driven judicial activism at the top. The Supreme Court majority's power—matched, it seems, by its eagerness—to vitiate certain civic institutions, to override hard-won understandings and overturn long-held doctrines, and to deny citizens the ability to do much of anything about it is a destructive sort of mischief. And yet, regrettably, it lies beyond the reach of any reasonable reform. The right of judicial review remains unchallenged, and jurisdiction-stripping—removing realms of policy from consideration by the Court—is unpalatable and probably unworkable. It is still true that, as Justice Harlan Fiske Stone observed in the 1930s, "the only check upon our own exercise of power is our own sense of self-restraint."

I would propose, therefore, that the Commission focus on the mischief it might conceivably prevent: Senate Republicans' gaming of the system of Supreme Court appointments. What we are witnessing is a gross abuse of the Senate's constitutional responsibility to "advise and consent." In Republican hands, this power has become a partisan weapon, the key instrument in

a smash-and-grab approach to ensuring conservative dominance of the Court for the long term, defying, by design, the verdicts of the American electorate.

Consider the past three Supreme Court appointments. All three, as we know, were made during the one-term presidency of Donald Trump. But absent the machinations of the Senate Republican leader, Mitch McConnell, and his party, those three appointments would have been distributed across two or even three presidencies: the first would have been made when the vacancy occurred, with nearly a year left in Barack Obama's tenure; the second would have been made by President Trump; and the third, to fill the vacancy left by the death of Justice Ruth Bader Ginsburg in September 2020, might have been made by the Biden Administration instead of being jammed through scarcely a week before Election Day—to get ahead of the results, then perhaps to reverse them, as President Trump all but insisted his appointees should do.

From the nation's founding, the ebb and flow of judicial deaths and departures have frequently resulted in a lopsided Court, but in recent years Senate Republicans have learned how to engineer one—stacking the deck against administrations that believe in a more robust role for government and a Constitution that, as Chief Justice Edward Douglass White said in 1914, is not "a barrier to progress" but "the broad highway through which alone true progress may be enjoyed." Again, this has been done not in service of, but often in defiance of, the express wishes of the electorate.

McConnell's strategy, therefore, has been a triumph for the right. The consequences will be felt for the long term—most significantly in the Court's rulings, but also in the playbook that Senate Republicans will almost certainly use whenever a Democrat is president. In 2016, Carrie Severino of the conservative Judicial Crisis Network described the blockade of President Obama's nominee, Judge Merrick Garland, as an "opening act." Indeed, later that year, Republican leaders promised to deny Hillary Rodham Clinton even a single Supreme Court appointment if the voters made her president. Similar vows have been made since Joe Biden took office, and it would be naïve to dismiss them as bluster. It is likely that whenever Republicans hold power in the Senate, Democratic presidents will be reflexively, routinely denied their constitutional prerogative to name justices to the Court, even if this leaves the Court with fewer than nine members.

The Urgency of Action

Of course, this is not the first time that the Supreme Court has become a "storm center," in the memorable phrase of Justice Oliver Wendell Holmes. And storms have sometimes blown over. When the Court has found itself on a perilous course, as it did during the New Deal period, it has shown a capacity for self-correction—whether by a change in the direction of decisions, a change in personnel, or both.

Still, it would be a mistake to assume that given time, the situation will somehow improve of its own accord—that the balance will right itself, activist judges will curb themselves, and Republican senators, having enjoyed such success, will call it a day and restrain themselves. It is far more likely that the crisis will worsen. A 6-3 conservative majority, from the perspective of the right, is

a big improvement over 5-4, but an advantage of 7-2, 8-1, or 9-0 would be better still. The G.O.P., now flush with success and undeterred by its few remaining institutionalists, should be expected to pursue a larger majority at all costs.

Also, importantly, Republicans have powerful allies in this campaign for control: the very justices they have helped install. Conservative justices and Senate Republicans are not only ideologically aligned, espousing the same originalist cant and showing a similar contempt for voting rights, civil rights, social programs, and the separation of church and state; they are also bound together in a system of mutual dependence and mutual reinforcement.

Consider that the past three appointees were nominated by a president who had lost the popular vote by a margin of three million and were confirmed by senators predominantly from a party that held a majority of seats despite representing a minority of the American people. (The Court is not the only institution with a countermajoritarian difficulty.) The Electoral College and the malapportionment of Senate seats, both created by the Constitution, are only the beginning of the problem. Numerous non-partisan analyses show how partisan gerrymandering heightens the overrepresentation of Republican officials, how the volumes of undisclosed "dark money" favor Republican candidates, and how restrictions on voting rights, by design, disproportionately affect populations that tend to vote Democratic.

All this has increased the conservative dominance of the Court. And conservative justices, once in place on the bench, do their part to perpetuate the cycle. Consistently they sanctify these same practices—partisan gerrymandering; the flow of money into politics; the organized suppression of voting rights—as expressions of constitutional principle, cementing the G.O.P.'s hold on power even as its electoral support has shrunk.

Thus the Court majority is both a product and sponsor of the partisan wars that define our times.

There might not be a strict uniformity of views among the Court's conservatives, and Republican officials might not always be happy with every opinion joined by every conservative justice, but these are family disputes; there can be no doubt that Republican politicians and their appointees play for the same team, to their mutual and abiding advantage.

The problem is one of surpassing urgency.

We cannot accept that senators' arrogation of power, more than the outcome of presidential elections, is the chief determinant of the Court's composition. We cannot abide that a party that speaks proudly of its adherence to the Framers' "original intent" is so profoundly at odds with it. Indeed, if this approach is allowed to continue unchecked, it will contort the Court even further, threatening its legitimacy as a dispassionate arbiter of the law and rendering it little more than an instrument of one party's agenda.

As Robert H. Jackson wrote in *The Struggle for Judicial Supremacy* (1941),

> The measure of success of a democratic system is found in the degree to which its elections really reflect rising discontent before it becomes unmanageable, by which government responds to it with timely redress, and by which losing groups are self-disciplined to accept election results.

The system fails, Jackson continues, when we

> set up the judiciary as a check on elections, a nullification of the process of government by consent of the governed. It leaves the grievances of the frustrated majority to grow, and more extreme remedies to commend themselves to those who would have been satisfied with more moderate, if more timely, ones.

Patience, at some point, is no longer a virtue: patience is acquiescence.

And patience, we see, is wearing thin.

So far, the degradation of norms has been a Republican project. Despite assertions by Republican politicians that both sides do it, the results speak for themselves. In the game of "constitutional hardball," the Democrats have yet to field a team. Still, we should not expect the party to endure these tactics eternally without mustering an equivalent response. Rising frustrations on the left, which have shown themselves most recently in calls to pack the Court, will find this or other avenues of expression. At stake, after all, is not only the membership of the Court, but the direction of the country, its faithfulness to the Constitution, and the lives and livelihoods of millions of our fellow citizens.

REMEDIES

It is one thing to suggest that the Supreme Court is ripe for reform, quite another to identify a reform that would solve the principal problem without creating unintended consequences that leave the country worse off. With that in mind, the remainder of this testimony is focused on what I believe to be the key question: of the many reforms being considered by the Commission, which would be most effective in curbing the real mischief?

Again, for purposes of clarity: I define the real mischief as the Senate's gaming of the system of appointments to strip opportunities from one administration and stack them up in another. (The greater problem, the sophistry of the Court's conservatives in pursuit of their ideological project, is not directly addressable by statute, constitutional amendment, or other means, though one of the reforms discussed below could, over time, have a salutary effect on Supreme Court decisions and the reasoning behind them.)

Below, I briefly examine the two ideas that appear to be emerging as the leading prospects: first, Court expansion; second, a "staggered terms" mandate of two appointments per presidential term, with each justice's tenure limited to 18 years.

Court Expansion

The appeal of Court expansion is straightforward and strong, as it was for Franklin Roosevelt.

It is constitutional, it is not without precedent (though such precedents are more than a century and a half old), it can (conceivably) be achieved quickly, and it can undo the gross imbalance on the Court. All these apparent virtues would be familiar to FDR. Other arguments are made by present-day proponents: that expanding the Court to outnumber its conservatives would stop or at least hinder the right's assault on democracy; that it would "reset" or "unpack" the Court to the balance it would have attained absent the G.O.P.'s machinations; that *not* to pack the Court would show a foolish, unilateral attachment to norms that Republicans have already shattered.

Each of these arguments has its merits. The support for court-packing offered by nearly the entire Democratic field in 2020—with the notable exception of the one who became president—attests to that. Yet it was clear then, and is worth acknowledging today, that the appeal of court-packing is not exclusively pragmatic. Court expansion is of course a brand of reform, but also a means of retribution—a meeting of hardball tactics with an even harder, well-deserved response.

In that light, it can seem tedious or timid to raise concerns about court-packing, particularly when there is no other idea on the table that could yield such quick results and psychic satisfaction. Yet even if one brushes aside the institutionalist argument that was made successfully against FDR's plan—that adding seats in order to redirect the Court's decisions would undercut its legitimacy, its popular esteem, and its independence—court-packing is less of a solution than its advocates suggest.

Simply put, it won't stop the Senate from gaming the system.

There is wishful thinking to the notion that the Court can be "reset" and that the balance will hold. If a Court expansion bill were to pass a divided Senate, creating four seats for President Biden to fill (at present it would take four to shift the balance), a Republican crusade to "unpack the Court" would begin immediately, roiling the G.O.P. and consuming the Capitol. If the number of justices stands at thirteen, Republican presidential candidates will vow to increase it to, say, seventeen or more to erase the liberals' advantage.

In this inevitably toxic environment, the idea of a truce, a reset, or a breathing period also seems naïve. So does the notion that some advocates of court-packing have put forward, that a newly liberal Court, acting in parallel with progressive lawmakers, could act quickly—ahead of any retaliatory response by the G.O.P.—to "entrench" democracy. It is an appealing picture, but it reflects a misunderstanding of the ease or pace of legislative and jurisprudential change.

The Supreme Court, in sum, might be packed, but never fully or frequently enough to sustainably counter the radicalism and will to power of a Republican Party that has already held one seat open for nearly a year to deny a duly elected president the chance to fill it, then rushed to install a justice on the eve of an election in order to extend its advantage. Court expansion does nothing

to address the fact that the Senate's power to advise and consent is also its power to obstruct and confound. Republicans would continue to do this with relish.

That said: if no other outlet for reform can be found, the calls will intensify to smash the existing order. And court expansion is the bluntest instrument in our toolbox.

Staggered Term Limits

If any proposal is emerging as the chief contender on this Commission, it is the idea of setting term limits of 18 years for justices and mandating that two (and only two) appointments will occur during each four-year presidential term.

The potential virtues of such an approach—principally, the regular infusion of new blood, in FDR's phrase, into the Court, and the more even distribution of appointments across presidential terms, bring the composition of the Court into better alignment with the judgments of the electorate—have been well covered by previous testimony, and I won't attempt to review them here. Neither will I address concerns that I find unpersuasive—particularly the idea that ending life tenure will contort judicial decisions by exposing the justices to "politics" and the potential blandishments of a post-Court career. This concern is rooted, I think, in the wishful notion of the judiciary as a sort of secular priesthood, of investiture as a renunciation of all biases and partisan leanings. That idea was old-fashioned a century ago.

Instead, I will focus on the ability of this approach to curb the Senate's capacity to further corrupt the nomination process. In that light, this proposal has a great deal to recommend it. By removing the process from the realm of happenstance (deaths, departures) and putting it on a predictable and equitable timetable, a Supreme Court nomination might become less an earth-shaking event and more a routine step by a functioning government—a natural consequence of a presidential election, like Cabinet appointments (if generally more important).

And unlike court expansion, which benefits one side, a system of staggered appointments should be less vulnerable to that charge. Anyone, of either party, who wins a term as president will have an equal opportunity to appoint an equal number of justices.

That will not, of course, make the confirmation process any less contentious. The stakes of each appointment will continue to be high and the differences between the two sides will remain wide. But we are not looking to cure contentiousness. We are looking to repair a process that has been deliberately broken. To repair the Supreme Court nomination process, we need to reimagine it.

Staggered appointments and term limits, mandated (as they will have to be) by a constitutional amendment, would not be immune to the same sort of tactics that have brought us to this point. Any structural weakness in the approach will be exploited by the forces that made it necessary in the first place. The language of the amendment will need to take this into account and not to rest on an assumption of good faith by politicians. Safeguards should be provided against foot-dragging or obstruction by the Senate. Perhaps, as Vicki C. Jackson suggested in her testimony, a

"backup confirmation role" should be assigned to another body—for example, a panel of federal chief judges. Or perhaps, in the event of a stalemate, the power should default to the president, akin to the power of recess appointments. The point, again, is not to abrogate the Senate's power to advise and consent, but to prevent the continued corruption of that power.

Having made the charge above of wishful thinking, I don't want to suggest that it would be easy to amend the Constitution in this (or any) fashion. By design it is not. Indeed, one of the reasons that Roosevelt decided against curbing the Court by constitutional amendment was the relative ease of derailing such efforts. The practical difficulty of this path is so daunting, particularly in a divided country, that some might suggest avoiding amendments altogether.

That conversation is an essential one. But before we debate what is achievable, we should decide what is advisable. Then this Commission should throw its collective weight behind that solution—to make clear that it is the best of all options, an idea whose time has come, even if it takes years of effort to achieve.

# # #