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Court-packing: Rebirth of political plans to expand the Supreme Court of the United States

I. Introduction

In the recent past, with the utmost politization of judge selection to the United States Supreme Court, several developments profoundly altered the confirmation process.[2] Although the confirmation process leading to the appointment of a Justice to the Supreme Court includes several steps that have been, to a varying degree, altered along the 230-year history of the Court, the two most important measures are, without a doubt, nomination of the candidate Justice by the sitting President of the United States and confirmation by the Senate, i. e. the upper House of Congress. The process to be followed is described in the Constitution of the United States[3] but tradition played a non-negligible role in shaping current formalities. Undoubtedly, the „grilling" before the Judiciary Committee of the Senate provides the nominee with the most substantive opportunity to impress legislators.

Up until 1975, Senate rules included an optional requirement of a two-third majority to advance nominations for executive, judicial and Supreme Court benches to a vote. This regulation was changed to a 60% majority required for a filibuster[4] in 1975. However, after less than four decades, in 2013, the Democratic majority of the Senate excluded the applicability of a filibuster from the confirmation processes of executive branch and judicial nominees. It has to be noted that this momentous legislative step, although did not incorporate similar alterations to the confirmation process of prospective Supreme Court judges, certainly served as a welcome point of reference to Republicans in 2017. At that time, Republicans, holding a majority in the Senate, introduced rules by which filibuster efforts could be neutralized by a simple majority, i. e. 51 votes. This is called the nuclear option, referring, by analogy, to the fact that nuclear arms are the most efficient class of offensive warfare. In a similar fashion, nuclear option is a forceful parliamentary procedure that, by a mere 51-vote majority overrides the need for a 60-vote majority to conclude deliberations in the Senate.[5]

Taken altogether, according to current regulation, a successful appointment to the United States Supreme Court essentially does not require more than a presidential nomination of a reasonably suitable candidate and a concurring Senate supporting the nomination of the proposed Justice. In other words, a party holding the Presidency as well as a majority in the Senate does not need bipartisan support to elevate new members to the Supreme Court. This fact is reflected in the Senate confirmation vote counts of the three Associate Justices

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[2] The term „confirmation process", as used in current review, encompasses the procedurally separate steps of nomination, confirmation, and appointment.

[3] Article II, Section 2, Clause 2 of the Constitution of the United States. This clause is frequently referred to as the Appointments Clause, demonstrating a clear example of checks and balances put forward by the Constitution of the United States.

[4] With the Senate reasonably balanced (less than 60 votes for either Republicans or Democrats), a successful filibuster prevents the Senate from voting on the nominee. This way, a filibuster could indefinitely prolong the confirmation process and, ultimately, prevent the candidate from joining the Supreme Court.

[5] More on filibuster and the nuclear option: Gregory J. Wawro, Eric Schickler: Reid's Rules: Filibusters, the Nuclear Option, and Path Dependence in the US Senate. Legislature Studies Quarterly, 2018 November, Vol. 43, No. 4, pp. 619-647.

appointed to the Supreme Court since 2017: Neil Gorsuch (confirmation: April 7, 2017, vote: 54-45), Brett Kavanaugh (October 6, 2018, vote: 50-48), and most recently, on October 26, 2020, Amy Coney Barrett (vote: 52-48). All three votes happened, with minor exceptions, along party lines, with all three Associate Justices having been nominated by the Republican Donald J. Trump, 45th President of the United States, bringing up the number of Republican-nominated Supreme Court Justices to six, while the number of Justices nominated by Democratic presidents currently remains at three. Although there have been notable exceptions to this rule,[6] it is fair to state that during their tenure on the Supreme Court, a substantial majority of Justices displayed a world view that was fairly close to their respective nominating President's political program. Based on the momentous role of the Supreme Court in the political, economic, and societal life of the United States in the last nearly two-and-a-half centuries, and considering the composition and expected life span of current Justices, one could easily conclude that the upcoming decades will be, without a doubt, an era of judicial conservativism of the Supreme Court.

Unless, of course, the composition of the Supreme Court could somehow be altered resulting in a more left-leaning judicial body. This manuscript reviews the past and possible future of one of the legislative tools the Democrats likely will consider utilizing in their effort to alter the political inclination of the Supreme Court: *court-packing*.

II. Composition of the Supreme Court in a historic perspective. Court-packing in the 19th century

The Supreme Court of the United States was created by the Constitution of the country in 1789. Importantly, the Supreme Court is the only judicial body specifically established by the Constitution. However, the Constitution does not include regulations regarding the number of Justices serving on the Court.

The size of the Supreme Court was, in fact, initially determined by the Judiciary Act of 1789 that set the number of sitting Justices at six. As the number of Justices is not determined by an explicit regulation in the Constitution, altering the size of the Court does not necessitate a lengthy process involving the amendment the Constitution. Consequently, the number of Justices was altered numerous times in the history of the Supreme Court, by laws that required only a simple majority in the Houses of Congress. After an inconsequential switch to five Justices in 1801 and a return to six members in 1802, the Court's size was increased to seven in 1807, to nine in 1837, and to ten in 1863. In 1866, legislation was passed to decrease the number of Justices to seven, but this was replaced within three years by the Judiciary Act of 1869 that contains legislation pegging down the number of Supreme Court Justices to nine (the Chief Justice and eight Associate Justices) up until current times.[7]

Some of the above-mentioned changes in the number of Supreme Court Justices in the 19th century were likely due to political reasons. In particular, the expansion of the

[6] Chief Justice Earl Warren was nominated by President Dwight Eisenhower, but, contrary to expectations, Warren served as one of the most liberal Chief Justices in the history of the Supreme Court. Eisenhower later called the nomination of Warren "the biggest damn fool mistake I ever made". See in Michael O'Donnell: Commander v. Chief. The lessons of Eisenhower's civil-rights struggle with his Chief Justice Earl Warren. The Atlantic, April 2018.
Available at: https://www.theatlantic.com/magazine/archive/2018/04/commander-v-chief/554045/. Last accessed on November 13, 2020.

[7] „Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Supreme Court of the United States shall hereafter consist of the Chief Justice of the United States and eight Associate Justices, any six of whom shall constitute a quorum; and for the purposes of this act there shall be appointed an additional associate justice of said court." *Judiciary Act of 1869, §1.*

membership of the Supreme Court from nine to ten in 1863 (in the midst of the Civil War!) is well documented and is, at the same time, called the first court-packing plan.[8] Briefly, first as a prelude to the 1863 court-packing, vacancies on the Supreme Court made it possible for President Abraham Lincoln to appoint Justices supporting the preservation of the Union and the abolition of slavery in 1862. Later, with the help of Congress, he was able to reduce the number of Southern Justices on the Court to 2, and finally, in March 1863 the number of Supreme Court Judges was increased from nine to ten, providing Lincoln and the Republican Congress with another opportunity to appoint a Judge sympathetic to their cause. After the successful efforts by Lincoln in 1863, there were no attempts to pack the Court, up until the presidency of Roosevelt.

III. Roosevelt and his attempt at court-packing

In 1932, both Franklin Delano Roosevelt and the Democratic Party won a landslide victory, undoubtedly at least in part due to the devastating implications of the global economic crisis. The President, as well as the newly elected Senate and House of Representatives emphasized the need for an enhanced role of the central government in the efforts against the global economic crisis. Already in the campaign leading up to the 1932 Presidential election, Roosevelt explicitly outlined the need for what he simply called the New Deal: „I pledge you, I pledge myself, to a new deal for the American people."[9]

Implementation of the goals of the New Deal necessitated tremendous legislative efforts. Landmark legislation that was created within the framework of the New Deal included an entirely novel and historic approach to social welfare (Social Security Act) as well as to personal finances (establishment of the Federal Deposit Insurance Corporation and strengthening the supervisory and regulatory role of the Federal Reserve).[10] In 1934, the Securities and Exchange Commission was created to supervise stock exchange activities (to prevent the practice of insider trading, among others). New Deal legislation, however, did not only concentrate on areas of social security and state supervision of financial life but regulated wide aspects of citizens' lives (e. g. Home Owners' Refinancing Act, Farm Mortgage Foreclosure Act, Farm Mortgage Refinancing Act, or the Public Utilities Holding Company Act).

It is no exaggeration to state that the New Deal aimed to transform essentially all aspects of life in the United States. Herbert H. Hoover, previous Republican President of the United States likened the New Deal to the policies implemented by European authoritarian (socialistic or fascistic) regimes and expressed his major misgivings about the New Deal, Roosevelt's all-encompassing plan: "… the New Deal is a definite attempt to replace the American system of freedom with some sort of European planned existence. … Legislatures were told they "must" delegate their authorities. ...They all adopt Planned Economy. They regimented industry and agriculture.... They engaged in gigantic government expenditures. ... If there are any items in the stage in the march of European collectivism that the New Deal has not imitated it must have been an oversight."[11]

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[8] Timothy Huebner: The First Court-packing Plan, SCOTUSblog, July 3, 2013. Available at: https://www.scotusblog.com/2013/07/the-first-court-packing-plan/. Last accessed on November 13, 2020.

[9] Roosevelt's acceptance speech at the Democratic Convention on July 2, 1932. Available at: https://www.fdrlibrary.org/dnc-curriculum-hub. Last accessed on November 13, 2020.

[10] „…there must be a strict supervision of all banking and credits and investments; there must be an end to speculation with other people's money…". First inaugural address of Roosevelt, March 4th, 1933. Available at: http://www.historyplace.com/speeches/fdr-first-inaug.htm. Last accessed on November 13, 2020.

[11] Herbert H. Hoover: Crisis to Free Men. Address to the Republican National Convention, June 10, 1936. Available at: https://publicpolicy.pepperdine.edu/academics/research/faculty-research/new-deal/hoover-

At this point, Republicans, condemned to a minority role by the 1932 elections, saw their most potent ally against Roosevelt and the Democrats in the Supreme Court that seemed to be the most effective force to derail or at least hinder the New Deal. The stance of the Supreme Court in the mid-1930s was without a doubt right-leaning,[12] and at the same time utterly critical of New Deal legislation. Between January 7, 1935 and June 1, 1936 the Supreme Court repealed numerous legislative acts that would have played substantive roles in the implementation of the principles of the New Deal.[13] Reviewing the outcome of all these decisions, the Republican politician Hoover, understandably, expressed his gratitude and admiration towards the Court: „The American people should thank Almighty God for the Constitution and the Supreme Court."[14]

The repeal of numerous key legislative acts of the New Deal raised major concern among the Democrats. Unsurprisingly, after the landslide victory of President Roosevelt in the 1936 elections, the time of reckoning arrived,[15] with the explicit goal of altering the composition of the Supreme Court. Roosevelt, realizing of course that upon their confirmation, Justices of the Supreme Court are appointed for life terms, and removing them is a lengthy process with unpredictable results,[16] decided to search for other options.

In his Fireside Chat on March 9, 1937,[17] Roosevelt explained his decision to alter the composition of the Supreme Court: "In the last four years ... The Court has been acting not as a judicial body, but as a policy-making body. ... We have, therefore, reached the point as a nation where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself. We want a Supreme Court which will do justice under the Constitution and not over it. In forty-five out of the forty-eight States of the Union, judges are chosen not for life but for a period of years. In many States Judges must retire at the age of seventy. ... But all Federal Judges, once appointed, can, if they choose, hold office for life, no matter how old they may get to be. What is my proposal? It is simply this: whenever a judge or justice of any Federal

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speeches/hh061036.htm. Last accessed on November 13, 2020.

[12] Judges generally thought of as potential supporters of the New Deal were „The Three Musketeers", i. e. Associate Justices Louis Brandeis (1856-1941), Benjamin Cardozo (1870-1938), and Harlan Fiske Stone (1872-1946). „The Four Horseman", i. e. Associate Justices Pierce Butler (1866-1939), George Sutherland (1862-1942), Willis Van Devanter (1859-1941), and James Clark McReynolds (1862-1946) were thought to be mainly against the policies of Roosevelt, while Chief Justice Charles Evans Hughes (1862-1948) and Associate Justice Owen Roberts (1875-1955) were considered swing votes of the Court.

[13] These were: *Panama Refining Co. v. Ryan* (vote 8:1, repealed act: National Industrial Recovery Act), *Railroad Retirement Board v. Alton R. Co.* (vote 5:4, repealed act: Railroad Retirement Act), *Schechter Poultry Corp. v. United States* (vote 9:0, repealed act: National Industrial Recovery Act), *Louisville Joint Stock Land Bank v. Radford* (vote 9:0, repealed act: Frazier-Lemke Act), *Humphrey's Executor v. United States* (vote 9:0), *United States v. Butler* (vote 6:3, repealed act: Agricultural Adjustment Act), *Carter v. Carter Coal Company* (vote 5:4, repealed act: Bituminous Coal Conservation Act, 1935), *Ashton v. Cameron County Water Improvement Dist. No. 1* (vote 5:4, repealed act: Municipal Bankruptcy Act, 1934), *Morehead v. New York ex rel. Tipaldo* (vote 5:4, repealed act: New York Minimal Wage Statute, 1933).

[14] Herbert H. Hoover: Crisis to Free Men. Address to the Republican National Convention, June 10, 1936. Available at: https://publicpolicy.pepperdine.edu/academics/research/faculty-research/new-deal/hoover-speeches/hh061036.htm. Last accessed on November 13, 2020.

[15] Mogyorósi András: Roosevelt és a Legfelsőbb Bíróság küzdelme a New Deal fölött. In Jogelméleti Szemle, 2012/3, pp. 53-59. Available at: http://jesz.ajk.elte.hu/mogyorosi51.pdf. Last accessed on November 13, 2020.

[16] The House of Representatives has "the sole power of impeachment" according to Article I, Section 2, Clause 5 of the Constitution of the United States, while the Senate exercises "sole Power to try all Impeachments" according to Article I, Section 3, Clause 6. The only member of the Supreme Court ever impeached in the 230-year history of the Court was Justice Samuel Chase in 1804. Ultimately, he was found to be not guilty in 1805 and continued his Supreme Court term until his death 6 years later.

[17] Franklin D. Roosevelt: Fireside Chat 9: On „Court-Packing". March 9, 1937. Available at: https://millercenter.org/the-presidency/presidential-speeches/march-9-1937-fireside-chat-9-court-packing. Last accessed on November 13, 2020.

Court has reached the age of seventy and does not avail himself of the opportunity to retire on a pension, a new member shall be appointed by the President then in office, with the approval, as required by the Constitution, of the Senate of the United States. There is nothing novel or radical about this idea. ... It has been discussed and approved by many persons of high authority ever since a similar proposal passed the House of Representatives in 1869."

Roosevelt's overwhelming victory in the 1936 Presidential election,[18] his obvious popular appeal, as well as his court-packing plan all likely played a significant role in the Supreme Court's about-face regarding its approach towards the New Deal. In the spring of 1937, numerous Acts submitted to the Supreme Court for repeal were left in effect after deliberations by the Supreme Court19. In fact, starting 1937 not a single legislative act tied to the New Deal was repealed by the Supreme Court. In several deliberations, Justice Owen Roberts' vote was decisive in tipping the balance of the vote towards approval. With these decisions, the Court essentially prevented further vigorous efforts by Roosevelt to change the Court by court-packing.[20] Of course, the retirement of Justice van Devanter just a short time after above landmark decisions as well as the subsequent confirmation of Hugo Black as Associate Justice in the summer of 1937 effectively shifted the balance of the Court anyway. In fact, by 1941, Roosevelt appointed seven Supreme Court Justices and elevated Associate Justice Harlan Fiske Stone to Chief Justice.

IV. Future of court-packing after the Presidential and Congressional elections of 2020

As noted earlier, after the appointment of Amy Coney Barrett to the Supreme Court, the balance of judges nominated by Republican and Democrat presidents, respectively, changed to 6:3. She was confirmed on October 26, 2020, a mere eight days before the 2020 Presidential elections in the United States. This (by historical standards very significant) shift in the composition of the Supreme Court of the United States caused an elemental uproar among members and supporters of the Democratic party. With the current two-third majority of Republican-nominated Justices on the Supreme Court, fears of the Democrats mainly center on the possibility that landmark decisions concerning certain acquired rights (for example, *Roe v. Wade*[21]) could be overturned, as well as on the less than remote possibility that the Supreme Court could essentially act as an extra-legislative force effectively defending or even promoting a conservative agenda in the United States. In addition, undoubtedly, the Court could have a significant role in the adjudication of disputed elections, just like it happened after the Presidential election in 2000, ultimately resulting in the victory of George W. Bush by a decision of the Supreme Court.[22]

These concerns gave major impetus to the Democrats' search for applicable means to alter the composition of the Supreme Court in their favor. Generally, without amending respective legislation, the number of sitting judges remains constant, and the President can

[18] The Presidential election of 1936 concluded with an overwhelming victory for Roosevelt. He won 523 electoral votes out of a total of 531, with a popular vote in excess of 60%.

[19] These were: on March 29, *West Coast Hotel Co. v. Parrish* (vote*:* 5:4, act: Washington State Minimum Wage Law), *Virginian Railway Co. v. Railway Employees* (vote: 9:0, act: Railway Labor Act), as well as *Wright v. Vinton Branch* (vote: 9:0, Frazier-Lemke Act), on April 12, *NLRB v. Friedman-Harry Marks Clothing Co., Associated Press v. NLRB, NLRB v. Fruehauf Trailer Co.*, *Washington Coach Co. v. NLRB* (votes: all 5:4, act: National Labor Relations Act), and on May 24, *Helvering v. Davis*, as well as *Steward Machine Company v. Davis* (vote: 5:4, act: Social Security Act).

[20] Jamie L. Carson, Benjamin A. Kleinerman: A switch in time saves nine: Institutions, strategic actors, and FDR's court-packing plan. Public Choice, 2002, Vol. 113, pp. 301-324.

[21] United States Supreme Court, *Roe v. Wade,* 410 U.S. 113 (1973).

[22] United States Supreme Court, *Bush v. Gore*, 531 U.S. 98 (2000).

only nominate new Justices if a vacancy on the Court opens up due to either resignation, retirement or death of an incumbent Justice or Justices.[23] These events, of course, are difficult to forecast. Consequently, while altering the composition of the Court (leaving alone the number of Justices) "only" necessitates the joint effort of the President and the Senate,[24] it is a highly unpredictable process.

On the other hand, there are numerous potential pathways that could theoretically lead to the correction of a perceived imbalance on the Court. A handful of pathways by which the composition of the Supreme Court can be altered has been reviewed recently.[25] Among these, court-packing, mainly because it does not necessitate an amendment of the US Constitution, seems to be and is generally considered the most likely one to yield results aimed at by the dominant political force. Court-packing, in fact, could alter the political direction of the Court at any time when respective efforts of the President are supported by a legislative majority in both Houses of Congress. Thus, in the case of court-packing, nomination and subsequent appointment of additional Justices to the Supreme Court by the President could happen after an amendment of the Judiciary Act of 1869 mandating an increase in the number of Justices on the Supreme Court.

Based on the afore-mentioned advantages of court-packing, might the United States Presidential and Congressional elections of 2020 result in a political landscape that could provide fertile grounds for a renewed interest in this method? To briefly review the results of the elections, it is important to start out with the fact that, on November 8th, major television networks and other media outlets announced the Democrat Joe Biden as the winner of the Presidential election. This has led to an avalanche of congratulations and good wishes by a whole host of statesmen from all around the world, addressed to Joe Biden. However, it has to be emphasized that the Electoral College will only vote on December 12th, 2020 to elect the next President of the United States. Until then, presumably, numerous lawsuits will be brought forward by Donald Trump and the Republican Party, with the ultimate goal of a favorable decision by the Supreme Court, overturning Joe Biden's announced victory. Reviewing the irregularities surrounding the 2020 Presidential elections is beyond the scope of this review, but it is safe to predict that there will be numerous alleged cases of possible election fraud to be reviewed by the Courts.

There is little doubt about the high likelihood for the House of Representatives to remain in the hands of the Democrats, although there will be a significantly smaller gap between the number of Representatives of the two parties after the Congressional elections of 2020. On the other hand, the battle for control of the Senate is still raging. Theoretically, if the results of the Presidential election would not be successfully challenged in court by the Republican Party, only Senate could resist potential court-packing efforts by the Democrats.[26] In other words, if Joe Biden were to withstand legal challenges to become the next President

[23] Despite this unpredictability, Jimmy Carter was the only President in the 20th century who did not have the opportunity to nominate at least one judge to the Supreme Court.

[24] Of course, if the President does not have a majority of the Senate on his side, nomination of a judge to the Supreme Court may lead to a major political defeat of the President, as it happened in 2016, when Senate refused to consider President Obama's nomination of Merrick Garland. This vacancy on the Court was ultimately filled by Neil Gorsuch, nominated by President Trump in 2017.

[25] Daniel Epps, Ganesh Sitaraman: How to Save the Supreme Court. The Yale Law Journal, 2019, Vol. 129, pp. 148-206.

[26] It is important to emphasize that, before the election, Joe Biden's stance on court-packing was deliberately ambiguous: „... the moment I answer that question, the headline in every one of your papers will be about that." Still, if he were to be inaugurated and his party controlled both Houses of Congress, it is fair to presume that he would probably support whatever decision were to be taken by the Democrats as a party. See in: C. Boyden Gray: Biden owes us an answer on court-packing. The Hill, October 18, 2020. Available at: https://www.thehill.com/opinion/judiciary/521560-biden-owes-us-an-answer-on-court-packing. Last accessed on November 13, 2020.

of the United States, Democrats would only need 50 votes, i. e. 50% of the Senate to exercise control with the Vice President's tie-breaking vote in case of an impasse brought about by a 50-50 equality. Whether Republicans will surpass the 50-vote margin necessary to retain control of the Senate depends on two highly contested run-off Senatorial elections in Georgia on January 5th, 2021. While it is certainly within the realm of possibility for the Democrats to win both Senate seats, the outcome is, at the minimum, uncertain. In addition, it seems to be highly questionable whether all Senators from the Democratic party would join the effort to pack the Court.[27]

V. Conclusion

Court-packing by increasing the number of United States Supreme Court Justices has long been a well-recognized potential legislative method that could alter the composition of the Court in favor of the party holding the Presidency as well as a majority of the Senate and of the House of Representatives. Still, in the last more than 150 years since the Judiciary Act of 1869 set the number of Supreme Court Justices at nine, no successful attempt at court-packing has been recorded in the United States.

The results of the Presidential and Congressional elections of 2020 (barring the success of numerous very significant legal challenges submitted to the judicial system) could create a political constellation in the United States that may theoretically lead to the amendment of the Judiciary Act of 1869 and to a subsequent successful effort to pack the Supreme Court. However, as reviewed, there are formidable obstacles on this road, and the odds are against the success of the Democrats' efforts to expand the Court. Still, the theoretical feasibility of court-packing has not been this substantial since Roosevelt's attempt, and from this perspective, the current political and legal battle for power in the United States is certainly of historic significance.

[27] Senator Joe Manchin from West Virginia, who was the only Democrat to vote for Brett Kavanaugh to become a Supreme Court Associate Justice in 2018, declared in an interview on November 9, 2020: “I will not vote to pack the courts…” Roll Call, November 9, 2020. Available at: https://www.rollcall.com/2020/11/09/joe-manchin-kills-dreams-of-expanding-supreme-court-eliminating-the-filibuster/. Last accessed on November 13, 2020.