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August 13, 2021

The Presidential Commission on the
Supreme Court of the United States

Electronically submitted

Dear Commissioners:

I appreciate the opportunity to provide this Comment. This Comment discusses several historical moments during which Congress altered, or considered altering, the shape of the federal judiciary, and addresses those moments' continuing relevance. That historical record counsels against *any* significant legislative changes to the Supreme Court without first going to the greatest lengths to ensure both the perception and the reality that the changes are neutral responses to long-term problems of judicial administration rather than the product of short-term political agendas. Caution and careful deliberation are essential to preserving the independence of our judicial system, which the many members of the Chamber of Commerce of the United States of America ("U.S. Chamber") rely upon to apply the rule of law in disputes large and small across the country every day.

The U.S. Chamber is the world's largest business organization representing companies of all sizes across every sector of the economy. Our members range from the small businesses and local chambers of commerce that line the Main Streets of America to leading industry associations and large corporations. They all share one thing: They count on the U.S. Chamber to be their voice in Washington, across the country, and around the world. For more than 100 years, we have advocated for pro-business policies that help businesses create jobs and grow our economy. An important function of the U.S. Chamber is to represent the interests of our members on issues regarding the rule of law, upon which the well-being of the nation and of its private sector depend.

Since 1789, Congress's stewardship of the federal judiciary, and particularly the Supreme Court, has reflected a remarkable and sustained commitment to impartial, apolitical, and objectively beneficial innovations and reforms that aim to have stabilizing effects. Congress has resisted repeated entreaties to use its authority over the Supreme Court's structure or jurisdiction to achieve goals that are partisan, impermanent, or motivated by a preference for particular jurisprudential outcomes, as any present attempt to expand the Supreme Court and add new justices immediately would be. History has judged poorly those rare occasions on which Congress has succumbed to political pressure, and those occasions generated counter-productive results.

The historical episodes that this Comment discusses, even where familiar, collectively form a heritage that cannot be overemphasized. The most extraordinary part of that heritage is what it lacks: any sustained record, during the past 230 years, of bending the judiciary to the political branches' will, despite frequent and often forceful temptations to do so. These lessons counsel strongly against yielding to the political winds of this particular moment, which has included calls to "expand the number of justices" and to impose other dramatic "overhauls to the Supreme Court."[1]

My hope is that the Commission will urge Congress and the President to once again stand firm. Moments like these present the opportunity for today's political leaders to reaffirm their predecessors' unwillingness to achieve fleeting political or policy gains by sacrificing the integrity and independence of institutions envied around the world. And they present an opportunity to enrich our American legacy of judicial independence and to add our generation's experience to the record that future generations will consult.

A. Midnight Judges

In 1801, early in our nation's Constitutional history, Congress tried to advance a host of desirable judicial reforms, like ending circuit riding for Supreme Court Justices. But it linked those reforms with the first example of overtly political "court-packing," which caused the overall endeavor to fail *for a century*. Congress's early and unsuccessful attempt at court packing has taught that injecting rank partisanship into judicial affairs can set back even other, worthy reforms.

This episode occurred against the backdrop of the Judiciary Act of 1789, one of the first of the First Congress's significant enactments. It created the statutory foundation for our judicial system, and it remains the basis for the federal judiciary today. But, understandably enough, implementation over the 1790s revealed some deficiencies and inefficiencies. Circuit riding was one example. It seemed sensible enough in 1789—the itinerant Justices initially had few appellate cases, and the Justices' work in the field as messengers for the new federal government was another plus, as they helped bring the Constitution to the people.[2] But this work was inefficient and arduous, and Justices who rode circuit would later have to hear appeals of their own rulings. The Justices soon wrote to President Washington, suggesting that circuit-riding was constitutionally doubtful and seeking relief from its burdens.[3]

The final Federalist Congress passed "An act to provide for the more convenient organization of the Courts of the United States" in February 1801, less than a month before President Jefferson's inauguration.[4] Among the Act's measures was the elimination of circuit-riding duties. To replace

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[1] https://www.nytimes.com/2021/04/15/us/politics/supreme-court-commission.html.

[2] Clare Cushman, *Courtwatchers: Eyewitness Accounts in Supreme Court History* 31-32 (2011).

[3] *Id.* at 35; *see* Letter from the Justices of the Supreme Court to George Washington (ca. Sept. 13, 1790), in *2 The Documentary History of the Supreme Court of the United States, 1789-1800*, at 89 (Maeva Marcus ed., 1988).

[4] Act of Feb. 13, 1801, ch. 4, 2 Stat. 89.

circuit riding, Congress created free-standing Circuit Courts, to be permanently staffed by circuit judges. The Act offered another improvement, too, by granting general federal-question jurisdiction, which the earlier Judiciary Act had omitted. The 1801 Act also sought to fix the Supreme Court at an odd number of Justices, thus reducing the risk of tie votes that inhered in the original Judiciary Act; it did so by reducing the number of Justices from six to five, a reduction that could take effect only "from and after the next vacancy" on the Court.[5]

By themselves, these changes were improvements: freestanding circuit courts, no more circuit riding by Justices, federal-question jurisdiction, and an odd number of Justices. Indeed, each of them is now a long-fixed attribute of the federal judiciary. But *none* traces its force to 1801: *all* of them were quickly repealed.

Why? Not because those salutary reforms were undesirable, but mostly because the 1801 Act combined them with one important catch: the instant creation of sixteen new circuit judgeships. The Act empowered President Adams to fill each and every new seat during his final days in office. Hence the popular name for the statute: the "Midnight Judges Act." The unfairness of the attempt to expand the judiciary substantially by having those expanded seats filled immediately for partisan reasons polluted the entire project. The power-grab spurred Jefferson and his party to repeal the *entire* Act, both baby and bathwater, less than a year later.

Ultimately, it was only in 1869 that Congress allowed any circuit judges to be appointed, although even then not enough to eliminate Supreme Court Justices' circuit-riding obligations entirely. General federal-question jurisdiction did not come until 1875. And the circuit courts were established as fully-staffed entities only in 1891. Ninety years after Congress's ill-starred effort, that statute—the Evarts Act of 1891—finally gave Justices the option to essentially stop circuit-riding, and the practice was not actually abolished until *1911*.

This early episode shows that even prudent reforms cannot overcome their association with politically-motivated meddling with the judiciary. The unwise actions of Congress in 1801 might be partially excused by how early in our history that episode took place. No such excuse exists 220 years later.

B. Impeachment of Justice Chase

Jeffersonian anger at the Midnight Judges Act did not stop with the Act's repeal. Instead, it nearly veered into a disastrous intervention into the judiciary that would have set a precedent for Congress to routinely impeach and remove from office Justices who were out of favor with the majority party in Congress. Thankfully, the opening impeachment effort failed because President Jefferson's own party ultimately lacked the appetite for such a destruction of judicial independence. The lesson for today is that Congress's self-restraint, even when in possession of a partisan super-majority, is an essential ingredient for judicial independence and the rule of law.

But it did not initially seem that way to President Jefferson. He and many loyal to him viewed with fury both the Federalists' attempt to pack the judiciary and what Jeffersonians saw as existing

[5] *Id.*

courts' inhospitableness to their political agenda. Unsatisfied with reversing the Federalists' enactments, they perceived a chance at their *own* partisan takeover of the courts. The House of Representatives impeached Justice Samuel Chase, one of the most outspoken Federalist judges, in 1804. Jefferson's party controlled the Senate by a nearly 3:1 margin—Justice Chase's conviction seemed more than likely. And after him, presumably, the Congress could impeach and remove other justices, including and especially Chief Justice John Marshall.

But despite its overwhelming partisan alignment, the Senate acquitted Justice Chase. That acquittal forestalled what today seems unthinkable but could otherwise have become inevitable—the utter domination of the judicial branch by any unified Congress. The Senate relied on principle rather than politics. The Senate's commitment to the separation of powers during Chase's trial secured an independent judiciary for centuries to come and brought the system back from the brink of an early collapse.[6]

Indeed, both early episodes—the 1801 Act and the 1804 impeachment—were near-misses for our system. The 1801 Act had many positives, but the swift repudiation of the "midnight judges" undermined any precedent for partisan packing of the courts. Both episodes show how easily the passions of a moment can create a cascade of retaliation once control of the other branches changes hands.

C. Adding Justices and Circuits

Despite the turmoil of the first few years of the nineteenth century, over the next few decades Congress—without rancor—increased the number of circuits and, at the same time, the number of Justices. That numerical alignment reflected nothing about the Justices' work *as Supreme Court Justices*, but was instead a necessary consequence of requiring circuit riding. As Congress gradually reduced that burden, the link between the number of circuits and the number of Justices disappeared. But during the years in which the link remained, changes in the Court's size flowed from dispassionate analysis based on neutral factors, including geographical parity and the desire to maintain an odd number of Justices.

The beginning of the nineteenth century saw the country growing rapidly. In 1807, Congress responded by creating a new circuit, with a new Supreme Court seat associated with it. The country continued to grow—but the circuits and the Supreme Court did not. New states were kept out of the existing system (and thus had to conduct federal trials without visiting Supreme Court Justices) until 1837. Congress then added *two* new circuits and *two* new Justices, thus maintaining an odd number while still ensuring that every circuit had a Justice.

The increase in Justices addressed circuit-riding responsibilities, but adding Justices did not bring any better administration to the Supreme Court itself. At least, that was Justice Joseph Story's firm conviction following the addition of the new Justices added in 1837:

[6] *See* William H. Rehnquist, *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* 113 (1992).

> We made very slow progress, and did less in the same time than I ever knew. The addition to our numbers has most sensibly affected our facility as well as rapidity of doing business. Many men of many minds require a great deal of discussion to compel them to come to definite results; and we found ourselves often involved in long and very tedious debates.[7]

Justice Story then stated:

> I verily believe, if there were twelve judges, we should do no business at all, or at least very little.[8]

The practice of adding a new Supreme Court seat for every new circuit paused in 1855, when Congress added a circuit judge for California without adding a new seat to the Court. But eight years later, with the Civil War at its apex and amid great pressure to keep California in the Union, Congress expanded the new circuit to the Oregon Territory and added a new Justice to cover it.

The short-lived expansion to ten Justices—seemingly a return to the numerical bond between circuits and Justices—in fact marked the end of that linkage. During Reconstruction, President Andrew Johnson signed an Act that "provided for the gradual elimination of seats on the Supreme Court until there would be seven justices rather than the ten authorized" under the 1863 Act.[9] The potential reduction to seven, of course, prevented Johnson from filling any vacancies.[10] But "[a]lthough often described as an effort to restrict President Andrew Johnson's power, in fact the statute was probably designed chiefly to produce a Court of more manageable size and to make it easier for Congress to raise judicial salaries."[11] While the Court dropped to nine early in Johnson's tenure, and dropped to eight in July 1867, it never actually dropped to seven. In 1869, Congress quickly reversed course and restored nine as the official number, where it has been ever since. From 1837 until today, therefore, with only this brief and quickly reversed exception during the Civil War and Reconstruction, the total number of Justices has held at nine.

Notably, the restoration to nine Justices in 1869 "provoked absolutely no controversy"[12] and

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[7] 2 William Story, *Life and Letters of Joseph Story* 315-16 (Boston, 1851) (quoting a March 1838 letter from Justice Story to (future Senator) Charles Sumner).

[8] *Id.*

[9] Federal Judicial Center, *Landmark Legislation: Circuit Reorganization*, https://www.fjc.gov/history/legislation/landmark-legislation-circuit-reorganization.

[10] That President Johnson readily signed the Act—he employed no pocket veto or other measure to oppose it—rebuts the notion that the Act aimed exclusively to limit Johnson's appointments. Some evidence indicates that the Court's members, including Chief Justice Salmon P. Chase, supported proposals that would reduce the number of Justices, *id.* at 53-55, further illustrating that, as Justice Story's letter quoted above suggests, fewer Justices may have been accepted as better.

[11] Russell R. Wheeler & Cynthia Harrison, *Creating the Federal Judicial System* 9 (Federal Judicial Center, 3d ed., 2005), https://www.fjc.gov/sites/default/files/2012/Creat3ed.pdf, (citing Stanley I. Kutler, *Judicial Power and Reconstruction Politics* 49 (1968)).

[12] *Id.* at 57.

prevented the politicization of the number of Justices—until, as described below, President Franklin Roosevelt's impatience led to another such effort. The lesson for today remains clear:

while stabilizing ends may justify structural reforms of the Supreme Court, rank partisanship must not.

D. Civil War & Reconstruction Limits on the Court

The Civil War and Reconstruction era is instructive on another front. The Supreme Court's *Dred Scott* decision, its most shameful moment, had provoked great national anger and contributed to the discord leading to the Civil War. The Reconstruction Congress could easily have exacted retribution on the Court. But, perhaps learning from the examples of the early nineteenth century, Congress exercised self-restraint. In turn, that respect for judicial independence provides an example relevant to today and in future eras of political tension.

Congress's structural attention to the Supreme Court during the Civil War and Reconstruction era was limited to the slight fluctuations in the Court's number described above and a few exercises of its constitutional authority to make "exceptions" to the Supreme Court's appellate jurisdiction. The latter changes were comparatively minor, and the Court largely acquiesced in them. In *Ex parte McCardle* (1868), for example, the Court readily acceded to Congress's repeal of the statutory text that authorized Supreme Court review in certain habeas corpus cases.

The "Radical Republican" Congress was hardly cautious as a general matter, but it remained notably restrained in its strikes against the Court. A less far-sighted Congress may have attacked the Court's jurisdiction in a much broader category of cases, or imposed other controls on its membership or authority, which would have risked significant harm to our legal system for the rest of our history.

E. The Failed Court-Packing Plan

Frustrated by what he saw as an unduly conservative Supreme Court that had held key provisions of the New Deal unconstitutional—and emboldened by an overwhelming reelection along with super-majorities in both Houses of Congress[13]—President Franklin D. Roosevelt in 1937 launched one of the most notable attacks on the Supreme Court's independence in American history. He sought to add up to six new Justices, and thus impose a majority that would uphold legislation he championed. His outcome-based motive was transparent—indeed, too transparent even for President Roosevelt's own party. The court-packing plan suffered a total collapse, which was attributable solely to congressional Democrats' refusal to accommodate political goals—even goals that they themselves cherished—at the cost of judicial independence.

The President's thin excuse for his plan to add new Justices was that it was just a helpful, neutral

[13] In the Senate, Democrats enjoyed a majority of more than 3:1 against all parties, and more than 4:1 against Republicans (there were 76 Democrats and only 16 Republicans among the 96 Senators). The numbers were similar in the House, where 333 out of 435 Representatives were Democrats (and where only 89 of 435 Representatives were Republicans).

remedy for an overworked Supreme Court that was languishing under the supervision of aged jurists. Neither he nor many others really believed that. Indeed, neither excuse was true. The Court kept up with its docket, which had a substantial number of mandatory appeals; and when it denied certiorari review, the reason was typically that a petition did not require the Court's attention, not that the Court had no attention to give.[14] Nor was age a limiting factor. Justice Holmes served on the Court into his nineties, and Brandeis into his eighties, without any reduction in output or vigor. That the plan's use of age was pretextual was also evident because it contained no provision to keep what would become a fifteen-member Court from being composed entirely of septuagenarians.

The Democratic-controlled Senate Judiciary Committee's Adverse Report on President Roosevelt's plan concluded that "[n]o amount of sophistry can cover up" the plan's true aim: "to provide a forced retirement or, failing in this, to take from the Justices affected a free exercise of their independent judgment."[15]

A number of prominent Democrats recoiled from the naked partisanship of the plan. Roosevelt's own Vice President, John Nance Garner, was so contemptuous of it that he returned home while the plan was pending in the Senate——the first trip he had ever taken while Congress was in session.[16] The Chairman of the House Judiciary Committee refused even to hold hearings on the plan, which forced the President to turn first to the Senate.[17] But the Senate Judiciary Committee was also hostile. Senator Tom Connally of Texas described his opposition to the plan as follows, in remarks that are worth reprinting today:

> [L]et me make it clear that I am a devoted personal friend of the President of the United States. . . . [I]f this were a matter of personal friendship, I should be standing beside the President. . . . But . . . this question . . . is so fundamental that it transcends personal friendship. It is so vital and reaches down so far into the very structure and the very form of this Government and into the great traditions upon which it rests that it is deeper than partisan politics. It is not a partisan issue.
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> Some of those who favor the proposal boldly declare that their real purpose is to put on six new Judges with preconceived opinions, with preconceived views, with preconceived conceptions about certain questions that now are pending before the Court . . . and that the plan and purpose is to put those Judges on for the purpose of changing the complexion of the Court and reversing in the middle of the game while the players are on the field the courses of these decisions. . . . [I]f that be the

[14] S. Rep. No. 711, 75th Cong., 1st Sess., at 38 (1937).

[15] *Id.* at 9.

[16] Lionel V. Patenaude, *Garner, Sumners, and Connally: The Defeat of the Roosevelt Court Bill in 1937*, 74 Sw. Hist. Q. 47 (1970).

[17] *Id.* at 39. The Committee Chairman, Representative Sumners, is reported to have said: "I didn't care what the people in my district thought, I wasn't going to let that bill pass." Lionel V. Patenaude, *Texans, Politics, and the New Deal* 157 (1983).

> purpose, then that purpose would absolutely undermine and destroy the independence of the Court.
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> Let some reactionary administration obtain power and it would immediately say: "The Democrats stacked the court, and now we have as much right to restack as they have had, and we will thereby add enough judges so that we will have a responsive Court, a Court that will do the bidding of this reactionary administration, and . . . and repeal by judicial enactment all of the liberal laws placed on the statute books by this administration . . . ."[18]

The Chairman of the Senate Judiciary Committee, Senator Henry F. Ashurst of Arizona, also opposed the President's plan. He presided over lengthy hearings, during which more than eighty witnesses appeared and over a million words of testimony were given.[19] The hearings stretched from February through June.[20] Senator Ashurst then led the opposition to the plan in the Senate Judiciary Committee.

In the end, the Senate Judiciary Committee voted 10–8 against the President's plan, calling it "a needless, futile and utterly dangerous abandonment of constitutional principle . . . without precedent or justification."[21] The Committee's adverse report concluded that the plan was "a measure which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America."[22] The full Senate voted even more overwhelmingly—by a 70–20 vote—to send the bill that embodied the plan back to the Senate Judiciary Committee so that the court-packing provisions could be removed.[23]

This result represented an emphatic rejection of President Roosevelt's plan from his own party. More importantly, it reflects Congress's unwillingness to destroy the foundations of what was then an institution of less than 150 years' duration. Congress once again stepped back from the brink and exercised monumental restraint—despite having both intense political incentives to stand with the President and overwhelming numerical strength. Congress again refused to cross the Rubicon. Eighty-four years after the court-packing plan's defeat, the warrant for restraint can only be stronger.

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[18] 81 Cong. Rec., 75th Cong., 1st Sess., at 489-92 (1937).

[19] Patenaude, *supra* note 16, at 45 n.45.

[20] *Id.* at 47.

[21] S. Rep. No. 711, 75th Cong., 1st Sess., at 23 (1937).

[22] *Id.*

[23] Jeff Shesol, *Supreme Power: Franklin Roosevelt vs. The Supreme Court* 500 (2010).

F. History's Lessons Applied

As the Commission prepares its report for the benefit of the political branches, these episodes offer an important set of factors that deserve careful consideration. When any particular intervention aims to achieve partisan ends, risks creating a cascade of retaliatory interventions, or relies on pretext, our constitutional history overwhelmingly disapproves it. These factors strongly suggest that any politically-inspired intervention today, including adding seats to the Court, would be essentially unprecedented, unnecessary, and imprudent, and would mark a deviation from the course set by prior Congresses.

The partisan political ends of the day are never an appropriate reason to adjust the Court's size or function. As Senator Connally underscored, a politically-motivated intervention to expand the Supreme Court would almost certainly beget escalations that undermine both the original intervention *and* the constitutional structure on which the nation depends.

President Roosevelt's plan was repudiated by both sides of the political aisle because it betrayed the separation of powers and threatened to reduce the Supreme Court to a mere extension of the Congress. Roosevelt could not disguise these ends behind paper-thin reasoning based on age and administrative efficiency. Partisan attempts to expand the Court should be addressed and responded to forthrightly. When adding seats has a partisan or ideological basis, as the 1937 episode reflects, it is unwise to pretend that some other and seemingly more justifiable motive is actually at work. This Commission's report should contribute to transparency rather than frustrate it.

Today's circumstances are quite unlike those that prevailed when the Court last gained seats, more than 150 years ago. The Justices no longer actually preside within the circuits to which they are assigned. Instead, the Justices are each assigned one or more circuits for which they perform administrative duties, like processing requests for extensions of time or receiving "shadow docket" motions that (if they have any heft) will be referred to the full Court. Any justification that relies on restoring the formal numerical link between circuits and Justices must be judged as pretextual.

And while Congress has, at various times, adjusted the Court's size to ensure an odd number of Justices, the number has now been fixed at nine for over 150 years—indeed, for 184 years, excepting the brief and largely theoretical changes that began and ended in the 1860s. The historical record contains no support for the idea that enlarging that number of Justices would assist the Court in more efficiently discharging its duties—Justice Story and Chief Justice Chase, at least, both believed that the current number actually is too high. No recent Justice has suggested any different conclusion; to the contrary, when they comment at all, they reiterate the propriety of nine, as Justice Ruth Bader Ginsburg did.[24] Although Congress is not necessarily bound to accept

[24] In an interview with Nina Totenberg, Justice Ginsburg invoked both history and President Roosevelt's court-packing effort in her support for nine Justices: "Nine seems to be a good number. It's been that way for a long time. . . . I think it was a bad idea when President Franklin Roosevelt tried to pack the court." Nina Totenberg, *Justice Ginsburg: 'I Am Very Much Alive'* (NPR broadcast of Morning Edition July 24, 2019), https://www.npr.org/2019/07/24/744633713/justice-ginsburg-i-am-very-much-alive.

that judgment forever, any change at this point would require substantial evidence and careful analysis to ensure that it was not, like President Roosevelt's plan, merely pretextual.

Conclusion

I thank the Commission for its work, and for the opportunity to submit this Comment. Americans treasure the nation's dedication to the rule of law. The Supreme Court plays an important role in transforming that formal commitment into a practical reality. Interventions in its size and affairs are to a large extent absent from the historical record, and for good reason. The Commission, Congress, and the country at large should not take this record for granted, nor should any citizen invite a course of action that would jeopardize the Court's independence.

I therefore urge the Commission to include in its report a statement of what our republic's remarkable history makes clear: no present circumstances justify any substantial modification of the Supreme Court's size or affairs.

Sincerely,