Rebalancing the Scales:
The Need for a Limited and Nonpartisan Supreme Court Amid Threats to Its Legitimacy and Impartiality

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Marshall University
Dan O'Hanlon Essay Competition, Fall 2019

Introduction

The image of a young woman with a scrap of fabric covering her eyes is one prevalent in Western culture. The woman stands poised, swathed in robes with her head held high, and has served as the embodiment of justice for over three thousand years – so much so that she is categorized and recognized solely as Justice, or Lady Justice. The image can be traced back to the classical Roman figure, Justitia, who was often equated with the Greek Goddess of fairness, Thetis. In these representations, Justice is holding a sword, pointed downward, in her left hand, while her right arm is outstretched, holding aloft a set of scales that are perfectly balanced. Missing from these earlier depictions, however, is Justice's blindfold – this feature was not added to representations until the early sixteenth century (Curtis and Resnik, 2007, p. 160). Despite this, the blindfold is the physical feature most commonly associated with Lady Justice, giving birth to the popular platitude "justice is blind," a concept originally meant to underscore the traits of impartiality and objectivity associated with justice.

This "blindness" has since been subject to scrutiny which is, perhaps, best explained by the prevalent fear and mistrust of blindfolds which predated the inclusion of it early images. Western European societies believed blindfolds were a symbol of deception which worked to negate any attempts at impartiality (Curtis and Resnik, 2007, p. 159) by blinding Justice from the plights and wills of the majority and instead fostering greed and self-gain. Given the current state of our nation's judiciary, however, especially the current state of the highest representation of this judiciary, the Supreme Court, this relatively modern preoccupation with Lady Justice's blindness is somewhat unsurprising.

One of the most recent and profound examples of this is the confirmation of Supreme Court Justice nominee Brett Kavanaugh. Following the retirement of Justice Anthony Kennedy

in 2018, Kavanaugh's confirmation would mark the second Supreme Court Justice successfully nominated to the bench by President Donald Trump following Justice Neil Gorsuch's confirmation in 2017. Kavanaugh's confirmation, then, would lead to an overwhelming Republican majority on the bench, the first one in over half a century (Bartles, 2018). Such a majority would guarantee the Supreme Court, the country's highest court, would vote conservatively on many of the nation's biggest issues, something which possesses the potential to become even more likely when considering the possibility of Trump securing an additional one to two Supreme Court nominations before the end of his term(s). Understandably, Democratic politicians and lawmakers attempted to block Kavanaugh's nomination in hopes of leveling the playing field; despite this and the sexual assault allegations which plagued Kavanaugh's hearing, however, he was sworn in on October 4, 2018.

That Kavanaugh was not merely nominated, but confirmed, despite the horrendous allegations against him, is proof of the blindness which plagues the nation's judicial system. His appointment is evidence that the securing of a justice who shares one's own political ideology outweighs the appropriateness or qualifications of the nominees – after all, one of the guidelines justices must adhere to, as put forth in the Constitution, is "good behavior" (U.S. Const. art. III, § 1). It is apparent, then, that the confirmation process – and, in fact, the Supreme Court itself – has become highly politicized, so much so that the presence or lack thereof of a particular political party outweighs the protection of the best interests of the people. Such political polarization goes against the purpose and function of the Supreme Court, as outlined by Alexander Hamilton in Federalist No. 78 (1788), in which he posits that the Supreme Court is tasked with the defense of individual rights and liberties through their upholding of the Constitution. This defense was made possible through the power of judicial review granted later

in the 1803 *Marbury v. Madison* decision. Hamilton also argues that such protections are not possible if the judiciary establishes "a union with either of the other departments" (Hamilton, 1788, par. 9), referring to the executive and legislative branches. The judiciary branch, then, as represented by the Supreme Court and its justices, must remain impartial and impervious to outside influences – a feat which is clearly becoming more and more difficult given the rise in the justices' habit of voting along party lines and the utilization of a nomination to the court being used as ammunition in an ongoing and vicious political battle between the Democratic and Republican parties. Each of these instances also illustrates the manner in which the Supreme Court has, in fact, become united with the legislative and executive branches, as the ongoing adherence to party affiliation creates political factions made up of opposing members of both parties who, among the three separate branches, engage in political warfare meant to best the other – a notable detraction from the court's true purpose of unbiased review.

Consequently, it is apparent that change is necessary if the Supreme Court is to function as originally intended by the forefathers of our nation. If the Court continues to operate as it is, it faces the potential of losing its legitimacy in the eyes of the very people it is meant to serve and protect. Following the confirmation of Kavanaugh, in fact, this lack of public faith in the judicial branch was made apparent by the public backlash which occurred. This backlash is documented by Washington Post reporter Jennifer Rubin, who discusses Kavanaugh's low approval rating in the weeks leading up to and immediately following his confirmation (Rubin, 2018) as well as the public outcry which occurred on social media during Kavanaugh's trial. Resultant from this public disapproval is the realization that the Supreme Court is on the brink of losing the faith of the American people, without which it lacks the very power and integrity instilled in it by the Constitution and associated with it by Hamilton and his peers. Since the very threat to its

legitimacy is its increasing political polarization, the only obvious solution is to bring equilibrium to the Supreme Court bench. To do this, we, as a nation, must put behind us the blinders which we have long associated with Justice and instead focus on its most powerful and important feature: the balanced scales.

In this paper, I will argue that the best manner in which to bring about this balance – and thus preserve the integrity of the court and the freedom and interests of the people – is by removing the deep political divide which exists among the justices. This is something I argue will be best achieved through both the expansion of the number of judges serving on the Court and the implementation of new criteria for potential nominees which sets the precedent of having an equal number of conservative, liberal, and independent justices. I will also explore previous attempts to achieve similar changes to the Court in addition to how such changes could be implemented and whether or not such changes would be constitutional – all in an attempt to illustrate that, without these changes, the United States risks the degradation and corruption of its best means of defense against the distortion of our Constitution and the stripping away of individual liberties.

The History of Similar Proposals

Change in Size and Court Packing

Court packing, in general, refers to the expansion of the size of the Supreme Court through the appointment of additional justices (U.S. Legal, 2019). This is a feat which has occurred periodically since the establishment of the Supreme Court following the Judiciary Act of 1789, after which the Court had only six justices. In the following two decades, the number changed sporadically, decreasing to five following John Adams' Judiciary Act of 1801 and then

back to six again after Jefferson and the then-Congress repealed the act. The number of justices then increased to seven following Thomas Jefferson's addition of a seventh federal circuit court, and, finally, to nine following Congress's addition of the eighth and ninth federal circuit courts, after which Andrew Jackson added two more justices in 1837 (Frazin, 2018). While the number continued to increase and decrease occasionally in the years that followed – notably increasing, once, to ten justices during the short-lived addition of the tenth federal circuit court during the Civil War – the number has since remained relatively stable at nine, a standard which has not changed since the Judiciary Act of 1869 (Frazin, 2018).

The most infamous example of court packing also marks the most prolific attempt at changing the number of sitting Supreme Court Justices since the end of Reconstruction: Franklin Delano Roosevelt's proposed Judicial Procedures Reform Bill of 1937. With this bill, Roosevelt, in addition to the presidents who would have succeeded him, would have been granted the ability to appoint one justice – with a maximum appointment ability of six justices – for every serving justice over the age of seventy who did not retire (Turley, 2004, p. 159). The motivation behind Roosevelt's proposed bill was the assurance of the much-needed judicial support for his New Deal, as, by hand-picking up to six new justices, Roosevelt would have possessed the ability to appoint individuals who would have been guaranteed to approve his plan. Understandably, the Judicial Procedures Reform Bill of 1937 was eventually withdrawn from Roosevelt after an outcry of public concerns that the bill would be an overstep of Roosevelt's Constitutional powers (Turley 2004, p. 160) and upset the balance of the Supreme Court for the president's personal gain.

Changing Appointment Criteria

In the years that followed Roosevelt's failed Judicial Reform Bill of 1937, there have been numerous proposals to once again expand the size of the Supreme Court. While several of these attempts closely resemble Roosevelt's court packing proposal, the majority of them also include the altering or inclusion of appointment guidelines. These new criteria are most prevalent among proposals put forth by current 2020 Democratic presidential candidates, for whom, after the 2016 blocking of Obama nominee Merrick Garland as well as the 2018 Kavanaugh confirmation, Supreme Court reform has become a key running point.

The candidates are split fairly evenly over the issue of simple expansion, with presidential hopefuls such as New Jersey Senator Cory Booker and New York Senator Kirsten Gillibrand voicing their support for a general expansion while both Vermont Senator Bernie Sanders and former U.S. Representative Beto O'Rourke fear that court packing would create a cycle in which each political party would add as many justices as possible when they possess the power and position to do so (Urchmacher, Schaul, & Stein, 2019), thus disrupting the Court's function. Many more, however, are in favor of an expansion accompanied by appointment guidelines, the most popular of which have been highlighted by Massachusetts Senator Elizabeth Warren and South Bend, Indiana mayor Pete Buttigieg. Warren, in particular, supports the implementation of term limits, a policy that a little over half of the current candidates also support. Under the most commonly agreed-upon version of a term limits proposal, the sitting president would be required to appoint two justices during each of his/her term in office (Willis, 2019, par. 2). Upon each appointment, the longest-serving justice at that time would then be granted senior status, retaining the title and salary of Supreme Court Justice but no longer hearing or deciding cases. This senior status would include the ability to act as a temporary

substitute in the event of the death or retirement of any of the serving justices (Willis, 2019, par. 2). Buttigieg, on the other hand, has revealed that though he is open to term limits, he prefers a mass restructuring of the Supreme Court which would attempt to depolarize the institution through the appointment of an unbiased or largely apolitical pool of fifteen justices (Urchmacher, Schaul, & Stein, 2019).

My Proposal

While the establishment of term limits for Supreme Court justices appears to be the most popular reform proposal suggested by the nation's leading Democrats, I do not believe it is the solution needed to rectify the Court's political rift and underlying issues. Many proponents of the proposal point out that term limits for the judiciary are the norm for every other first world country (Drutman, 2018), and thus it does not make sense that the United States, long considered to be the leader of first world nations, operates so differently. Gabe Roth, the leader of the nonprofit organization Fix the Court, argues that term limits would force Supreme Court Justices to become more accountable by limiting their power, as they would no longer have the guarantee of lifetime service (Willis, 2019). Furthermore, Roth argues that term limits – specifically one of the more popular proposed limits of eighteen years – would help avoid the chaos which periodically ensues following the unexpected death or retirement of a justice (Willis, 2019). In other words, term limits would increase the stability and predictability of the Supreme Court's appointment process.

I believe that there is much to be said, however, about the timeline of a decision. As highlighted by Professor Suzanna Sherry and Ph.D candidate Christopher Sundby, both of whom work at Vanderbilt University, in their forthcoming article in the *Texas Law Review* titled "Term Limits and Turmoil: *Roe v. Wade*'s Whiplash" (Sherry and Sundby, 2019), oftentimes, a bill or

case can appear before the Supreme Court multiple times over the course of, potentially, decades. If term limits were imposed upon Supreme Court Justices, then, Sherry and Sundby argue that *Roe v. Wade*, which was decided in 1973, would have been overruled and reinstated multiple times in the years since then as a result of the fluctuation in the power and presence of the two political parties, setting the precedent for what they call "constitutional zigzagging" (Sherry and Sundby, 2019, p. 23). The result of this back and forth is constitutional and legal instability which has the potential to further harm the credibility of the court and detract from the sense of authority and finality which accompanies the decisions of the court, leading citizens to defy these decisions.

In addition to the potential instability of the court's decisions, term limits also pose the risk of furthering the politicization of the justices by opening them up to a career beyond the bench. In other words, by imposing term limits upon the justices who hitherto have been guaranteed a lifelong position upon their appointment to the court, these justices must now consider what comes after their designated time as a justice. This point is raised by attorney Jeff Willis in his article for GQ, "Why a Radical Supreme Court Reform Is Catching On," in which he predicts that ex-justices will likely want to run for office or begin careers as appellate litigators (Willis, 2019, par. 11). This, then, would mark a foray into follow-up careers made possible by the political trajectory started by their appointment to the court and their decisions involving highly politicized cases and issues. With this possible future ahead of them, it is possible that justices with an imposed term limit may allow their decisions on the bench to be swayed, voting in a way that would secure supporters within a certain group or political party so that they are able to garner the support needed to relaunch their careers.

Consequent from each of these points is the understanding that the imposition of term limits for Supreme Court justices is a solution which would, in effect, do little to depoliticize the court; rather, it would usher in a new era of judicial instability in which opposing parties battle during their respective fluxes in power and representation while justices are granted the potential of pursuing a career in politics – not to mention the questionable constitutionality of such limits. I suggest that term limits be abandoned as a long-term, fix-all solution for the growing polarization of the court. Instead, we must turn to a solution which would attempt to balance the political leanings of the bench, one which relies on the restructuring of the Supreme Court as a whole.

In order to ensure that true political balance is established and maintained within the Supreme Court, it is imperative that an equal number of justices along the political spectrum be appointed. While this is not feasible with the nine-justice bench which has been the norm for over a century, it would, however, be possible with a modified court. To simply have an even number of conservative-leaning and liberal-leaning justices, however, would undermine the operation of the court as a judicial institution, making the possibility of majority rule impossible. The solution to this issue, then, is to provide additional representation for a group of justices who fall at a different point on the political spectrum: true moderates who, before their nomination and appointment, must agree to maintain their politically neutral status or else risk impeachment. By residing in the center of the political spectrum, moderate justices will vote in a manner which does not consistently favor one political group or ideology over another, therefore being more likely to vote merely with the intention of upholding the Constitution. Furthermore, the perspectives and opinions offered by moderate justices possess the potential to aid in the temperament of more radical liberal and conservative justices, ensuring that they are voting with

their intended roles in mind rather than the goals of their respective political parties – a feat which would subsequently aid in the depolarization of the Supreme Court. For this reason, however, it is important that the moderate justices appointed be, indeed, true moderates, or at least made up of moderates who lean as little to one side of the political spectrum as possible so that the balance is not disrupted.

My proposal, then, is to establish a bench which is made up of an even number of moderate, liberal, and conservative justices, thus creating the sort of balance which would assuage the warring ideologies which introduce conflict to the bench. With the existing nine-justice system, then, there would be three liberal, three conservative, and three moderate justices at play at all times, meaning that the current bench, which features five conservative justices and four liberal justices, would be forced to cut ties with at least three of the judges, something which is constitutionally questionable given the right to lifetime appointment which is guaranteed to justices upon good behavior in Article III, Section I of the U.S. Constitution. Instead, then, the court must be expanded to a fifteen-person bench, allowing for five conservative, five liberal, and five moderate justices, a plan which would allow for the retention of current justices. It would also allow the equal representation of varying ideologies in addition to a larger pool of opinions and expertise regarding the issues which appear before the Supreme Court. Furthermore, a court in which the parties are evenly split would minimize – and potentially eliminate – the chaos which inevitably ensues upon the death or retirement of a justice, as there would be no need for the president or the Senate to go to great lengths to secure a member of their own party as the new nominee in order to ensure their party's views are represented and taken into account.

The plan I am proposing is one which is reflected in presidential candidate Pete Buttigieg's stance on the Supreme Court, as previously mentioned, and which has been discussed, in part, by several experts and lawmakers, illustrating the growing public support behind the effort to depolarize the court. Most notable is the plan put forth by Daniel Epps, an associate professor of law at Washington University and the former clerk to Justice Anthony Kennedy. Together with Ganesh Sitaraman, a law professor at Vanderbilt University, Epps authored "How to Save the Supreme Court" (2019), an article forthcoming in the *Yale Law Journal*. In the article, Epps and Sitaraman similarly propose a restructuring of the court characterized by an equal number of justices from either end of the political spectrum who are then mitigated by a group of centrist justices, the latter of whom must be chosen by the ten conservative and liberal justices through unanimous decision (2019, pg. 26). While I find the latter half of this proposal to be questionable regarding both the likelihood of its success and the constitutionality of assigning the power of nomination and eventual appointment to anyone who is not the sitting president, as outlined in Article II, Section 2, Clause 2 of the Constitution, upon the confirmation of candidate by the Senate, I am confident that the organizational foundation of this plan, with the original nomination and confirmation process in place, is the best solution.

To test and illustrate the effectiveness of this proposal, Epps and Sitaraman conducted an experiment in which a mock court was evenly divided along party lines. Over the course of the experiment, the two found that, under these new conditions, justices came to decisions more consensually, with a much narrower decision margin (Epps and Sitaraman, 2019, p. 30). Consequent from this is the underscoring of the fact that an evenly divided court is one in which it is impossible for the political party which makes up the majority among the currently-serving justices to stick to and enforce unwavering ideological agendas which sway the decision-making

process of the court as a whole, as predicted by a colleague of the two professors, Eric Segal, who has similarly put forth a plan in which the court would be comprised of an equal number of left-leaning and right-leaning justices (Epps and Sitaraman, 2019, p. 29).

The Constitutionality of The Proposal and Its Implementation

As explored previously during this paper's discussion of the history of attempts to pack the court, the Constitution does not require a certain number of justices to serve on the Supreme Court. Nor is there a limit to the number of justices that can be appointed, as made apparent by the frequent fluctuation of the court's numbers in the years preceding the Civil War; instead, it has always been left up to Congress to decide how many justices will sit on the court. Subsequently, the constitutionality of the expansion of the court to fifteen sitting justices is not in question and would merely require the approval of the plan by Congress. While there is no guarantee that Congress, which is even more politically divided than the Supreme Court, would come to a consensus on the issue immediately, the promise of equal ideological representation and the potential lessening of the struggle to gain the political majority within the Supreme Court possesses the capacity to act as a powerful point of persuasion, as both sides are aware of the threat they face from each other in regard to the appointment of a justice during a time in which they do not have a president of the same party in the White House. The passing of a new Judiciary Act by Congress, therefore, is the best way to go about approving and establishing a fifteen-member bench.

The only conceivable threat faced by this proposal in regard to its constitutionality, then, is the possibility that others may feel that it poses a challenge to the power of appointment granted to the president by the Constitution. In the Appointments Clause found in Article II,

Section 2, Clause 2 of the Constitution, the president, alone, is granted the power to nominate individuals to the Supreme Court, with the implication being that the president is free to nominate anyone of his/her choosing (U.S. Const. art. II, § 2, cl. 2.). As addressed by Epps and Sitaraman as well as opponents of Mayor Buttigieg's plan, the mandating of a certain number of justices from each political perspective would limit and thus potentially intrude upon the president's power of appointment (2019, p. 31). In this new system I am proposing, however the president would retain his/her right to choose the nominee, unlike the plan put forth by Epps or Buttigieg in which the court is granted the right of partial appointment. The president would merely be required to go with a judge who falls in line with one of the three ideological perspectives which will be represented within the court, having free reign to nominate anyone who meets this condition.

Moreover, I believe that because the Appointments Clause specifies that the president's ability to nominate and appoint justices is conditional upon the advice and approval of the Senate, that such a mandate does, indeed, possess the potential to be constitutional. As with the issue of an expanded court, the designation of justices from particular places along the political spectrum is something which could be achieved through the passage of the very same Judiciary Act, amended to specify that each of the court's new nominees must meet a certain criterion, a feat which could be interpreted as the Senate advising the president regarding his/her future nominees. In addition to this, Epps argues that there is precedent for the limiting of the president's power of appointment. According to laws in effect in the District of Columbia, the president is only allowed to nominate judges to D.C. courts that have been named to a pre-selected list of candidates. (Epps and Sitaraman, 2019, p. 31-2). The list is prepared by a group known as the District of Columbia Judicial Nomination Commission, illustrating that instances

in which the president's ability to appoint a judge are already in practice and deemed constitutional. The establishment of new rules for the appointment of judges to the Supreme Court, then, should similarly face no legal questioning and instead merely take the passage of an act by Congress to implement.

Conclusion

The main motivation of this proposal, as emphasized throughout this paper, is the ideological balancing of the Supreme Court with the aim of restoring the court to its intended purpose: the defense of the Constitution and the ability to impartially decide questions of legality and law. This is something which has become less of a priority in recent years as the court has undergone a dramatic party polarization which prompts justices to vote in line with their respective political parties rather than in accordance to what is right. I am confident that this proposal is one which will aid in this depoliticization of the court, aiding in the mitigation of the damage done by the warring political parties who have become blind to the concept of true justice and the betterment of the public and are instead more concerned with individual or party success. By implementing this fifteen-member court made up of five liberal, five conservative, and five moderate justices, I believe that the United States will have the best opportunity possible to restore the reputation and legitimacy of not merely the Supreme Court, but the judicial system as a whole, reassuring the public that, regardless of party or who is in control of the executive or legislative branches at any given time, the judicial branch, helmed by the Supreme Court and its justices, will vote on and decide cases with the best interest of the people in mind, thus preserving and furthering individual rights and liberties for all.

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