THE NEW YORKER

Will Republicans Fight to Shrink the Supreme Court?

Jeff Shesol

October 31, 2016

1936, as President Franklin D. Roosevelt was campaigning for reëlection, the fate of the New Deal appeared to be up in the air. During the preceding few years, the Supreme Court's conservative majority had, in a series of rulings—many of them five to four—knocked down the central pillars of Roosevelt's recovery program. F.D.R. had denounced the decisions, charging the Court with placing a "dead hand" on social progress, and many people on both sides of the struggle felt that nothing less than the survival of democracy was at stake. This made the issue of the Court "the most deadly dynamite" of that election year, as *The Nation* put it at the time. Roosevelt was developing a plan to flip the balance of the Court by increasing the number of Justices and packing the new seats with liberals. But he kept his plans to himself until the election had passed. Even his closest aides were in the dark. On the campaign trail, he dodged the issue nimbly—and completely.

Until very recently, today's crop of Senate Republicans appeared to be following Roosevelt's eighty-year-old playbook: waiting out the election while keeping mum about a radical plan to reshape the Court. The story begins in February, after the death of Justice Antonin Scalia. For a moment, Scalia's passing seemed to promise what liberals had long sought—an end to decades of conservative dominance of the Court. That moment lasted a few hours. Shortly after Scalia's death was confirmed, Mitch McConnell, the Senate Majority Leader, announced his intention to deny President Obama, who had nearly a year left in office, the chance to pick a new Justice. "The American people should have a voice in the selection of their next Supreme Court justice," McConnell said in a statement. "This vacancy should not be filled until we have a new President." One after another, Republican senators stepped forward to echo McConnell. "Trust the American people and allow them to weigh in," Rob Portman, of Ohio, declared. Obama was out of luck—as was the man he nominated a month later, Judge Merrick Garland.

From an ideological perspective, the Republican strategy made obvious sense. Since Warren Burger succeeded Earl Warren as Chief Justice, in 1969, the G.O.P. has relied heavily on the Court to accomplish what Party leaders could only rarely push through the Congress: the deregulation of campaign-finance laws and the scaling back of voting rights, reproductive rights, and consumer protections. But from a political perspective it appeared, at least initially, as if the Republicans had overreached. In late February, Public Policy Polling saw trouble ahead for swing-state incumbents who didn't "change their tune": fifty-two per cent of Ohio voters said they would be less likely to vote for Portman if he remained unwilling to confirm a successor to

Scalia. The numbers were the same for Pat Toomey, of Pennsylvania, another senator facing a tough fight for reëlection. Commentators said that the G.O.P., by refusing to hold confirmation hearings for Garland, had given Democrats a campaign issue and an improved shot at winning back the Senate. Harry Reid, the Senate Minority Leader, declared that Republicans had a "death wish."

The summer proved these predictions wrong. Republicans successfully avoided talking about Garland, and Donald Trump showed little interest in raising the issue on the campaign trail. Even Democrats dropped it when they proved unable to keep the public or the media engaged. "Merrick Garland MIA on Campaign Trail," Politico observed in September, noting that not one of the two dozen Democratic senators and candidates who spoke at the Party's convention, in July, had mentioned the Senate's shutdown of the confirmation process.

Suddenly, however, Senate Republicans are talking about the Court again. As the prospect of a Clinton Presidency has increased, G.O.P. lawmakers have made it clear that the Garland blockade was only a proof of concept. (Disclosure: I worked as a speechwriter for Bill Clinton, and earlier this year I gave unpaid speechwriting advice to the Hillary Clinton campaign.) In blocking Garland, they have prevented President Obama from appointing a third Justice to the Court. Now they're raising the prospect of preventing a President Clinton from making any appointments at all. At a debate on October 10th, Senator John McCain, of Arizona, said flatly, "I would much rather have eight Supreme Court Justices than a [ninth] Justice who is liberal." A week later, in a radio interview, he made that a "promise," telling listeners that "we will be united against any Supreme Court nominee that Hillary Clinton, if she were President, would put up." McCain later tried to soften his stance, issuing a statement in which he pledged to "thoroughly examine" any nominee. By most indications, that examination would be especially intense. Earlier this month, Utah's Senator Orrin Hatch's chief of staff, Rob Porter, told the Salt Lake *Tribune* that "close scrutiny of any future Hillary Clinton nominee will be particularly critical since she has advocated shifting the court to the left and has a history of politicizing judicial matters." And Charles Grassley, of Iowa, suggested on October 20th that if a majority of senators are predisposed against a nominee, confirmation hearings would be a waste of time and taxpayer money.

The blockade of Garland is looking more and more like an "opening act," as Carrie Severino, the chief counsel of the conservative Judicial Crisis Network, described it to the Washington *Post* back in February. Republicans have been emboldened by their success in shutting down the Garland nomination. So have several conservative interest groups, such as J.C.N., that play a big role in the politics of judicial appointments. Heritage Action, another such organization, recently issued a fund-raising appeal touting its success in "stiffen[ing] the spines" of senators. The Garland freeze-out, the letter reads, has "proven we can win on this issue"—that is, stopping liberal nominees. Establishment Republicans, too, are on board with this strategy. Last week, a lawyer who served in senior roles in the Administrations of Ronald Reagan and George H. W. Bush told me that he has participated in conversations in which "Republicans of a philosophically conservative bent—not the movement people, but the Federalist Society types, the intellectuals—[expressed] worry that the Supreme Court is slipping away. They are saying to each other, 'If only the Republican leadership had balls, it would simply say no to any nominee.' " What they want, this lawyer added, is for senators to say, "We have the constitutional right to advise and consent, and we are not consenting."

Conservatives have also begun making the case that the Court is just fine with fewer than nine justices. Senator Ted Cruz, of Texas, sees a "long historical precedent" for a slimmer Supreme Court. Ilya Shapiro, a senior fellow at the Cato Institute, published an article on Wednesday contending that "the Senate is fully within its powers to let the Supreme Court literally die out." The Constitution, he wrote, "is completely silent on this." This is true—and misleading. Over the years, the Court has had as few as five members and as many as ten. But the size of the bench has always been determined by a formal act of Congress, not by the whims of the Senate majority (much less its minority). The number nine was set in the Judiciary Act of 1869. It is not, therefore, a constitutional requirement. Neither is it a mere suggestion. Regardless, among Republicans, the idea that eight Justices (or perhaps seven or six) is enough has gained an instant currency. "We could go another term—at least—with eight justices," a prominent D.C. attorney who served as a senior official in the first Bush Administration told me last week. "The republic will survive."

As the new term begins, the Supreme Court has been shuffling along, hearing cases and deciding most of them. No less an authority than Justice Stephen Breyer has pointed out that only a handful of cases each term, maybe four or five out of seventy or so, are affected by the lack of a ninth vote. (Cruz seized on Breyer's comment this week, and he won't be the last Republican to do so.) Justice Sonia Sotomayor sees it differently. "It's much more difficult for us to do our job if we are not what we are intended to be: a court of nine," she said during a talk in Minnesota, earlier this month. When the Court splits four to four—as it did, last term, on cases concerning the rights of public-sector unions, access to birth control under the Affordable Care Act, and President Obama's executive action on undocumented immigrants—it leaves precedent unsettled and major issues unresolved. In the last of those cases, it also left in limbo the fate of millions of people. The Court is granting review to fewer cases and, according to the National Constitution Center, it's avoiding or slow-walking those that seem likely to divide it down the middle. Justice Clarence Thomas is lining up with Sotomayor (which might be news in itself): on Wednesday, when asked about the court vacancy, Thomas told an audience in Washington that the confirmation battle underscores how "the city is broken in some ways.… At some point, we have got to recognize that we're destroying our institutions."

The results of the election could alter these dynamics dramatically. If Clinton wins the White House and Democrats take back the Senate, McConnell and his colleagues will have only one reliable recourse to stop a nominee: a filibuster. (Under no scenario will the Democrats win a filibuster-proof majority of sixty.) In 2013, when Democrats last ran the Senate, Harry Reid changed the rules to prevent the use of the filibuster to block any judicial nomination short of the Supreme Court. Now Reid—who will retire in January—is urging his potential successor as leader, Chuck Schumer, to finish the job and allow nominees to the high court to be confirmed by a simple majority vote. If Republicans "mess with the Supreme Court," Reid told an interviewer recently, the rules would be changed "just like that." This, the so-called "nuclear" option, is a strong possibility—a near-certainty, Senator Tim Kaine, Clinton's Vice-Presidential nominee, said on Thursday. Schumer, for his part, has said that "a progressive Supreme Court" is his "No. 1 goal."

But to deploy the "nuclear" option Democrats will have to retake the Senate on November 8th. If Republicans hang on to their majority, McCain's promise to block court appointments will almost certainly become Clinton's reality. Roosevelt, in the heat of his Supreme Court fight,

complained that the conservative justices had drawn “the boundaries of a ‘no man’s land’ where no government can function.” That struggle ended when a swing justice, Owen Roberts, sided with the liberals—the famous “switch in time that saved nine.” But that was a provisional victory. What really resolved the crisis was the retirement of Willis Van Devanter, one of the conservative justices, and his replacement by Senator Hugo Black, who tipped the balance of the Court for more than a generation. Black was a stalwart New Dealer, a defender of Roosevelt, and deeply unpopular among his Senate colleagues. He was confirmed in five days.