Written Testimony of Erin Morrow Hawley and Jennifer C. Braceras
Independent Women's Law Center
for the
Presidential Commission
on the Supreme Court of the United States
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We write today on behalf of Independent Women's Forum (IWF) and Independent Women's Law Center (IWLC). For almost 30 years, IWF has been the leading national women's organization dedicated to enhancing women's freedom, lives, and well-being. Independent Women's Law Center supports that mission by advocating, in the courts and before Congress, for individual liberty and equal opportunity.

IWF and IWLC urge the Commission to reject any and all proposals to add additional seats to the Supreme Court. Court packing is a threat to an independent and nonpartisan judiciary.

An Independent Judiciary is a Cornerstone of American Democracy.

By dividing power between three co-equal and independent branches of government (the executive, legislative, and judicial), our founders sought to prevent any one person or entity from amassing too much power. Indeed, so important is the separation of powers that James Madison devoted no less than five Federalist Papers (Federalist 47-51) to defending the constitution's trifurcated powers.

In Federalist 48, for example, Madison wrote that constitutional checks and balances are "essential to a free government." Madison warned against the exercise of government power in any way that—directly or indirectly—might exercise "an overruling influence" on another branch. *Id*. In fact, Madison worried specifically that the legislative branch—a branch with extensive and yet imprecise powers— might surreptitiously intrude upon the other spheres of government. *Id*. ("Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments."). Separated powers were intended to preserve liberty—it was only when all three branches acted together that individual liberty might be constrained.

President George Washington also emphasized the importance of our constitutional system of checks and balances. In his Farewell Address, Washington spoke of the "necessity of reciprocal checks of political power" and argued that preserving those checks and balances was as necessary "as to institute them."

The Constitution thus creates the federal judiciary as an independent co-equal branch of government insulated from direct political pressure. Judicial independence isn't an abstract concept—it's a rule that protects federal judges from interference by politicians and safeguards the separation of powers. Judicial independence was so important to the Founders that Article III of the Constitution gives federal judges lifetime appointments and salary protections.

Article II of the U.S. Constitution gives the president the power to appoint federal judges and justices of the Supreme Court with the "advice and consent" of the Senate. Once seated, members of the federal judiciary occupy a separate branch of government and are fully independent of both the president who appointed them and the Senate that confirmed them. Thus, while judicial nominations and confirmations are inherently political processes, the judicial function itself is set up to be nonpartisan and apolitical.

Article III of the Constitution provides that "the judicial Power of the United States shall be vested in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish." Although the Constitution does not dictate the number of Supreme Court justices, since 1869 the Court has consisted of nine members (eight associate justices and one chief justice).

In order to protect the independence of the federal judiciary, Article III provides that federal judges "hold their Offices during good Behaviour" and "receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." In other words, federal judges are entitled to serve for life and can never have their pay reduced. This job security insulates judges not only from the other two political branches of government but also from general public pressures. This allows federal judges to render impartial decisions on the basis of law and fact, rather than out of concern for the political, social, or economic consequences of their rulings.

Court Packing Is An Attack on the Independence of the Judiciary.

Although there is nothing magical about the number nine, our founders did not anticipate the other branches tampering with a co-equal branch of government for political gain. Tampering with the structure of the Court to obtain political objectives undermines the independence of the judiciary and threatens the checks and balances that are the cornerstones of our system of governance. The Supreme Court, for instance, has long held that, while Congress has constitutional authority over much of the structure of the federal judiciary, it cannot intrude upon the authority of the federal courts to decide cases independently. *United States v. Klein*, 80 U.S. 128 (1871).

The Supreme Court is not supposed to operate, like some federal commissions do, with a "balance" of members from the two major political parties. Nor is it supposed to advance certain policy positions. Calls for "balance" on the Court create the false impression that the Court is supposed to behave as a political, policy-making body where two sides work together to forge compromise. This distorts the role of the Court. In a democratic society, the role of the Court is to apply the law as written, not to cut deals or strike compromises.

Adding seats to the federal bench so that the party in power can fill them with judges who will rubber-stamp a particular legislative agenda is an attempt to turn our judiciary into just another

political branch. Attempts by the political branches to influence the outcome of cases by packing the courts undermines the independence of the judiciary.

Further, packing the Court would result in a judicial arms race, where the party in power would seek to add justices to the Court whenever the Court rules against that party's positions. Ultimately, this never-ending cycle of one-upmanship would turn the Court into a brazenly partisan and unwieldy organization with dozens, if not hundreds, of members.

While members of the legislative and executive branches derive their legitimacy from the people who elected them, judges derive their legitimacy from their competence, limited power, and apolitical role. As Justice Ginsburg noted, "[i]f anything would make the court look partisan, . . .it would be that—one side saying, 'When we're in power, we're going to enlarge the number of judges, so we would have more people who would vote the way we want them to.'" This would undermine the Court's legitimacy and its authority with unpredictable consequences for the rule of law.

In an April 2020 speech at Harvard Law School, Justice Stephen Breyer also spoke out against packing the Court. He argued that public trust in the court rests in the public's perception that "the court is guided by legal principle, not politics." That perception would be damaged were the court to be enlarged for political reasons. Further, Justice Breyer lamented the fact that Supreme Court Justices are often portrayed by the media as liberal or conservative, and thus their decisions as driven by politics, rather than legal principle. He was concerned that adding seats to the Supreme Court would "only feed that perception, further eroding that trust."

FDR's Court "Reform" Plan

Court packing has been tried before in the United States. In 1937, after the Court struck down as unconstitutional several pieces of New Deal legislation, President Franklin D. Roosevelt infamously attempted to enlarge the size of the Court in order to stack the bench with jurists sympathetic to his legislative agenda. Roosevelt proposed reorganizing the federal judiciary to set a mandatory retirement age of 70 for all federal judges. Under Roosevelt's proposed legislation, if a judge over the age of 70 declined to retire, the president could still appoint an additional judge to that particular court. At the time, *six* of the Supreme Court justices were over 70, and under the proposal, Roosevelt would have been able to appoint six new justices.

Roosevelt claimed his proposal would reduce the burden on an over-worked judiciary. But everyone knew the purpose of the plan was to appoint new justices who would rubber-stamp New Deal legislation. The American public strongly opposed the measure. And even influential members of Roosevelt's own Democratic party also objected to the plan. "A liberal cause was never won by stacking a deck of cards, by stuffing a ballot box, or by packing a court," said Sen. Burton Wheeler (D-MT). Similarly, the Democratic controlled Senate Judiciary Committee called Roosevelt's plan "a needless, futile and utterly dangerous abandonment of constitutional principle" and an "invasion of judicial power."

Just a few months after FDR announced his court-packing plan, the Supreme Court appeared to cave to political pressure. Prior to the announcement of FDR's court reform plan, the Court had often split

5-4 in striking down legislation which regulated the freedom to contract. Swing vote Justice Owen Roberts joined Justices Pierce Butler, James Clark McReynolds, George Sutherland and Willis Van Devanter, known as "The Four Horsemen," to repeatedly strike down federal and state legislation that sought to regulate economic interests, like FDR's New Deal legislation.

In what was widely regarded by the public as a strategic vote change in order to save a court of nine—the switch in time that saved nine—Justice Roberts changed his mind about the constitutionality of state minimum wage laws, a ruling that signaled the end of the Lochner Era and a path forward for FDR's ambitious New Deal legislation. Although Chief Justice Hughes later wrote that FDR's court-packing plan had not affected the Court's decision in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), at a minimum, that case signaled a monumental shift in the way the Supreme Court reviewed economic legislation.

In light of the Supreme Court's new-found rejection of substantive due process review of economic legislation and in the face of so much political opposition, Roosevelt backed down from his court reform proposal. But Roosevelt's attempt to undermine the judiciary nevertheless had political consequences. In the 1938 mid-term election, Democrats lost six Senate seats and 71 House seats, not to mention a dozen governorships.

Modern Court-Packing Plans are an Assault on Liberty.

Court-packing is a favorite tool of authoritarian dictators who seek to stack the bench with judges who will rubber-stamp their gross violations of liberty. Political Scientist Gretchen Helmke has identified 36 separate instances of threats to change the composition of the courts within Latin America between 1985 and 2009.

In 2004, for example, Venezuelan president Hugo Chavez increased the number of justices on his country's Supreme Court from 20 to 32 in order to consolidate power and implement socialism. Shortly thereafter, Chavez began confiscating thousands of private businesses and taking over the previously free press, the financial industry, energy companies, and the agricultural sector. Chavez's successor, Nicolas Maduro, continued these policies with the approval of his country's packed Supreme Court.

Fast-forward to 2017 when the Venezuelan high court declared the legislature illegitimate and transferred all lawmaking power to itself. When riots ensued, the packed court backed down. But it has continued to allow Maduro to rule without consulting the legislature.

While such extreme measures seem unlikely in the United States, there is no doubt that a ***substantive change in law*** is the objective of many court packing plans. In August 2019, for instance, five U.S. Senators filed a Supreme Court amicus brief in a Second Amendment case. This brief from members of a co-equal branch minced no words, warning the Court it could be "restructured" if it did not dismiss the case. In other words: "do as we say, or we will pack the Court with additional justices who will."

As Alexander Hamilton wrote in Federalist 78, "[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution." Any attempt to add seats to the Supreme Court undermines that independence.