



Road to Nowhere: Reform of the United States Supreme Court

Mateusz Piotrowski

Progressive members of the Democratic Party in the United States Congress are striving to expand the Supreme Court. After President Donald Trump appointed three justices, the conservatives gained the upper hand on the court. In the opinion of the progressives, this threatens to block flagship postulates of social reforms in the U.S. and exacerbate ideological divides. President Joe Biden has not been in favour of expanding the court, fearing following conservative administrations would just do the same. This internal party dispute may further weaken the Democrats' chances of maintaining a majority in the elections to both chambers of Congress in 2022.

The Importance and Role of the U.S. Supreme Court. In the American legal system, the U.S. Supreme Court plays a double role: not only does it adjudicate on the basis of applicable law, but also participates in its creation through interpretation. In addition, the legal regime is hierarchical and consists of an overarching federal system and the legal systems of the 50 states, the District of Columbia, and dependent territories, all of which are subordinate to the federal judiciary. The highest judicial organ is the U.S. Supreme Court, which can be a court of first instance (e.g., in cases to which one of the states is a party) but also an appellate court reviewing rulings of lower federal courts and state courts. In addition, the Supreme Court checks the compliance of law (state and federal) with the federal Constitution.

For these reasons, Supreme Court rulings have serious political consequences, sometimes deciding on issues polarising society, such as the right to keep and bear arms, abortion, LGBTQ+ rights, or religious freedom. From the perspective of the current priorities of the Democratic Party, especially its progressive faction, the conservative Supreme Court may threaten especially their plans to extend health and social care (if states or organisations challenge them, as in the case of Obamacare), strengthen environmental protection, or extend voting rights.

Nomination of Justices and Calls for Reform. The Supreme Court, together with its Chief Justice, were established by the U.S.

Constitution, which, however, does not specify the number of Associate Justices of the court. The powers in this regard were assumed by Congress, which has changed the number of justices on the Supreme Court several times: Historically, it consisted of a maximum of 10 justices, but continuously since 1869 there have been nine. They have a life term or until their resignation, official retirement (at the age of at least 65 and after 15 years of sitting on the Supreme Court), or removal from office. The president nominates candidates for open justice seats and the Senate approves them by a simple majority, 51 votes. The president has a lot of freedom in this regard, as there are no formal requirements. Supreme Court justices have been judges of state and federal courts, attorneys, academics, representatives and senators, members of the federal administration, and even a former president. The review process of nominees usually includes the political beliefs of the candidates because justices in their decisions are guided both by their knowledge of the law based on applicable regulations and other rulings, but also by their personal beliefs. In recent decades, the partisan leaning of the nominees has followed the party holding the Senate majority, for example, Democratic presidents (Bill Clinton, Barack Obama) chose liberal candidates, while Republicans (George W. Bush and Trump) nominated conservatives.

During his tenure, Trump was able to fill three vacancies on the Supreme Court, an unusually high number. At the very beginning of his presidency, Trump named a replacement for Antonin Scalia, who had died in early 2016 (followed by Republicans using a threat of filibuster to block Obama's candidate Merrick Garland, now the attorney general, until Trump was in office), then in 2018, after Anthony Kennedy retired, and in 2020 after Ruth Bader Ginsburg's death. The nomination of three conservative justices—Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett—created a distinct advantage on the Supreme Court for the conservatives (6-3). This triggered a debate in the Democratic Party on expanding the court to include additional judges, which presumably would be more favourable to the political concepts of the Democrats and to carry out other reforms of the court.

Reform Ideas. The first proposal, strongly supported by progressives, envisages expanding the Supreme Court by as many justices as needed to give liberals an advantage. In practice, this would mean an increase in the number of justices to at least 13 and the appointment by the president of four new justices, for whom there would be no doubt as to their liberal political beliefs (this idea was supported by then candidate and now Vice President Kamala Harris in last year's election campaign). Some Democrats, however, are concerned that doing this opens the door to further expansion after each change of power (when both chambers of Congress are controlled by a future president's party). A proposal to expand the Supreme Court to 15 justices was promoted by Pete Buttigieg (as a candidate, now transport secretary) in the 2020 election campaign, but it also assumed a change in the justice nomination system to avoid politicisation of the institution. Democrats and Republicans would nominate five justices to the Supreme Court each, with a life term. These 10 justices would then vote on the election of another five justices, elected two years in advance of taking their seat for a one-year, non-renewable term of office (failure to fill all seats would result in the absence of a Supreme Court quorum). Another proposal discussed among Democrats is the limitation of the term of office of Supreme Court justices, with a proposed period of 18 years appearing in the public debate for several years now. The implementation of this latter proposal would make the process of selecting justices more predictable and result in a reduction of political tensions (every two years, one of the nine justice positions would be filled through an election and serve an 18-year term). In the public debate, there has also been a proposal to increase the number of required votes to a qualified majority of the court (at least 7-2) in cases concerning the compliance of federal law with the Constitution.

Biden's Attitude Towards the Supreme Court. During the election campaign, Biden did not support expanding the court but committed to appoint a commission of experts after becoming president that would present guidelines to the administration regarding the broadly understood concept of reform of the Supreme Court. In April, Biden issued an executive order on this matter, obliging the commission to present its guidelines within 180 days of its first hearing (which was held in October). The commission is bipartisan and is composed of experts and

academics. Therefore, it is unlikely that it will present recommendations related to deep reform or even a simple increase in the number of justices, which is seen as a one-party idea (Democrats). However, progressives are determined to eliminate the advantage of the conservatives on the Supreme Court as soon as possible: last year they drafted a bill limiting Supreme Court justices' term to 18 years, and in April this year they presented a proposal to increase the number of Supreme Court justices to 13.

The progressives idea to only increase the number of justices would clearly politicise the process of their appointment and the institution of the Supreme Court. Therefore, it is unlikely that the expert commission will recommend such a solution or that Biden would act on it, as it would be a decision motivated by current political needs with long-term consequences for the system. Any proposal to change the election system for justices that contravenes the president and Senate's current powers, would require the adoption of a constitutional amendment, a highly complicated process that requires a two-thirds majority vote in both chambers of Congress and ratification by at least three-fourths of state legislatures. Limiting the term of Supreme Court justices probably also would require an amendment.

Undertaking changes to the Supreme Court or wider reforms of the federal judicial system could lead to allegations of the politicisation of the American judiciary, also formulated in international forums. This in the short term could, for example, result in less certainty on the part of EU states and institutions regarding the stability of the U.S. judicial system. In this case, failure to act on reform of the Supreme Court, which paradoxically may lead to stronger intraparty tensions, would be more beneficial from the perspective of the U.S. image in the international arena.

Consequences for the Democratic Party. The lack of any real action by Biden to eliminate the conservatives' advantage on the Supreme Court will be one of the disputes between the president and his administration, and progressives. This stems from the lack of wider acceptance—even within the Democratic Party—of the left-wing proposals pushed by progressives. The expansion of the Supreme Court is further perceived negatively as just the implementation of the progressives own political postulates, rather than an attempt to respond to the broader expectations of Democratic Party voters. Ignoring the issue of balance on the Supreme Court will increase tensions within the party and may result in more competition in the primaries, with progressives trying to win nominations for seats currently held by the centrists before the midterm elections to Congress (November 2022). At the same time, the Democratic Party leadership will try to present the party as centrist in order to maintain the support of independent voters, whose loss may mean failure for the party in the elections and handing over control of the Congress to the Republicans, which in turn will make it very difficult for Biden to exercise his powers as president for the last two years of his term and could reduce his chances of being re-elected in the 2024 presidential election.