



— LEGAL POLICY FOCUS —

Court-Packing Plans and Judicial Independence

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EXECUTIVE SUMMARY

- In 2004, Venezuelan dictator Hugo Chavez added twelve new seats to his country's Supreme Court. He did this in order to ensure that the Venezuelan judiciary would not stand in the way of his attempts to consolidate power and confiscate thousands of private businesses. The expanded Venezuelan court then stood by as Chavez and his successor imposed socialism and deprived citizens of basic rights.
- Similarly, some American politicians want to “expand” or “restructure” the U.S. Supreme Court in order to control the outcome of Court rulings.
- Changing the structure of the Court to achieve certain results is known as Court-packing, and it is a brazen attack on the rule of law.
- Tampering with the Court will effectively eliminate the power of judicial review, which provides a critical check on the abuse of power by the legislature or the executive.
- Court-packing will destroy the independence of the federal judiciary and turn it into a subordinate instrument of the political branches of government.
- Threats to pack the Court are a direct assault on our system of checks and balances and pose grave danger to the rights of all Americans.

MORE INFORMATION

What You Should Know

“Court-packing” refers to attempts by politicians to tamper with the size of the Supreme Court for political purposes. This can occur when the political party in power (1) alters the size of the Court in an attempt to influence the outcome of future decisions or (2) restructures the Court in retaliation for the opposing party’s most recent nomination or nominations.

Why You Should Care

- **The separation of powers and an independent judiciary are the cornerstones 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. 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 is so important that Article III of the Constitution gives federal judges lifetime appointments.
- **Changing the number of justices to achieve certain outcomes will destroy our system of checks and balances.** Those who want to enlarge the Court are essentially saying, “If the Court doesn’t vote our way, we will fill it with justices who will.” This blatant attempt to turn our independent judiciary into a dependent and subordinate instrument of politicians violates the separation of powers and destroys our constitutional system of checks and balances.
- **The late Justice Ruth Bader Ginsburg understood the grave threat to our constitutional system posed by Court-packing schemes.** In an interview with **NPR** in 2019, Ginsburg warned that changing the number of justices would politicize the Court, threaten its independence, and undermine its institutional legitimacy.

Background

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.¹ Once seated, members of the federal judiciary occupy a separate branch of

¹ Because Supreme Court justices (like all federal judges) serve for life, a president can only appoint a new justice when a sitting justice resigns, retires, or dies. This inevitably means that, while some presidents may have the opportunity to appoint multiple members of the Court, others may appoint no justices. For example, Presidents William Henry Harrison, Zachary Taylor, Andrew Johnson, and Jimmy Carter **did not have the opportunity to appoint any justices** during their time in office.

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 non-partisan 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, the Court has **since 1869** consisted of nine members (eight associate justices and one chief justice).

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The complete independence of the courts of justice is peculiarly essential in a limited Constitution.
— Alexander Hamilton

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.

FDR’s Court-Packing Plan

In 1937, after the Court struck down as unconstitutional several pieces of New Deal legislation, **President Franklin D. Roosevelt** famously 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 go ahead and appoint an additional judge to that particular court. At the time, six of the Supreme Court justices were over 70, and the Congress was controlled by Roosevelt’s Democratic party. Thus, 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. The plan, however, was immediately understood as a ruse to appoint jurists who would

rubber-stamp New Deal legislation. The American **public** strongly opposed the measure. 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).

And 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.”

Opposition was so fierce that, ultimately, Roosevelt backed down. But the attempt to undermine the judiciary was not without consequences. In the **1938 mid-term election**, Democrats lost six Senate seats and 71 House seats, not to mention a dozen governorships.²

Modern Court-Packing Plans

Today, 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, 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 socialist policies with the approval of his country’s packed Supreme Court. In 2017, the Venezuelan court declared the legislature illegitimate and transferred all law-making power to itself. When riots ensued, the packed court backed down. But it has continued to allow Maduro to rule without consulting the legislature.

Despite the threat to democracy posed by such schemes, an American special interest group, originally called “**Pack the Court**” but later rebranded as “Take Back the Court”, has been working diligently to take the idea mainstream. Led by Aaron Belkin, a political science professor at San Francisco State University, Take Back the Court advocates adding additional Supreme Court seats to effectively cancel out President Donald Trump’s nominations to the Court. Belkin has joined forces with **Harvard Law Professors Mark Tushnet and Larry Tribe**, who have proposed expanding the number

² Roosevelt eventually **replaced eight of the nine justices** without adding seats to the Court.

of judicial seats in the lower federal courts in addition to expanding the number of seats on the U.S. Supreme Court.

The group brags that it has successfully “put Court expansion on the map.” And, indeed, it has.

In August 2019, five U.S. Senators filed a “friend-of-the-court” *amicus* brief in a Second Amendment case. But friendly, it was not. To the contrary, the Senators’ brief warned 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.”

Moreover, during the **2020** Democratic presidential primary, Senators Kamala Harris, Elizabeth Warren, and Kirsten Gillibrand all expressed interest in enlarging the size of the Court. Former South Bend Mayor **Pete Buttigieg** floated a complex proposal to expand the number of justices to 15—five appointed by Republicans; five appointed by Democrats; and five selected by the ten appointed justices. And **Sen. Bernie Sanders** suggested giving the president the power to **rotate justices** off the Supreme Court to lower federal courts.

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Attempts by politicians to tamper with the structure of the Court should alarm all Americans, irrespective of party affiliation.

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In October 2020, within minutes of the confirmation of Justice Amy Coney Barrett, Senator Ed Markey and several other Democratic officials **tweeted** out calls for retaliatory Court-packing. For his part, Democratic presidential candidate Joe Biden says that, if elected, he will convene a **commission** to study the idea.

Misperceptions About the Supreme Court

Proposals to pack the Court have gained steam, in part, because of the prevalence of three major misperceptions about the role of the Court in our constitutional democracy.

MISPERCEPTION #1—The Supreme Court should never strike down popular, democratically enacted laws.

- A. Fundamental to our system of government is the idea that the Constitution is the supreme law of the land and that government must not act in ways that violate the Constitution.

- B. Since the beginning of our republic, U.S. courts have had the power of “**judicial review**”, meaning that federal judges have an obligation to determine whether a challenged policy comports with the Constitution, irrespective of whether a majority of the people support the policy.

MISPERCEPTION #2—The Supreme Court should be responsive to the will of the people.

- A. Federal judges are not supposed to respond to the will of the people nor are they supposed to update laws for the modern era. That is the job of our elected representatives.
- B. As Chief Justice Roberts famously noted, a federal judge is a neutral umpire, whose job it is to “**call balls and strikes . . . not to pitch or bat.**” In other words, the role of a judge is limited to interpreting the law as written and ensuring that laws passed by the political branches comply with the U.S. Constitution.
- C. Theoretically, this circumscribed role applies to all judges. Unfortunately, some progressives want to use the courts to score political “home runs” and reshape social policy. This is why they fight so bitterly to stop the confirmation of judges who understand the constitutional limitations of judicial power.

MISPERCEPTION #3—A “balanced” Court is a better Court.

- A. 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.
- B. Proponents of Court-packing are not really interested in “balance.” They are interested in control—that is, in ensuring that the Court rules in ways that serve their personal political interests.

Arguments Against Enlarging the Size of the Court

1. CONSTITUTIONAL STRUCTURE—Court-packing violates our Constitution’s separation of powers. Although there is nothing magical about the number nine, our founders did *not* intend for politicians to be able tamper with a co-equal branch of government for political gain. Tampering with the structure of the Court undermines the independence of the judiciary and threatens the checks and balances that are the cornerstones of our system of governance.

2. TRADITION—Since 1869, there have been nine justices on the U.S. Supreme Court. In a 2019 interview with **NPR**, the late Justice Ruth Bader Ginsburg acknowledged the importance of this tradition and warned against tampering with the norm of nine.

3. PRACTICALITY—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.

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4. LEGITIMACY—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.

5. JUDICIAL REVIEW—Packing the Court to prevent it from over-ruling federal legislation or regulations would eliminate the power of judicial review, essentially eliminating the role of federal courts in curbing government overreach and protecting the minority from the tyranny of the majority.

Conclusion

As Alexander Hamilton wrote in **Federalist 78**, “[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution.” Calls to pack the Court should alarm Americans of all political perspectives.