NATIONAL REVIEW

Republicans Should Not Pack the Courts

Josh Blackman

November 28, 2017

Earlier this month, a law professor and his former student urged Republicans to increase the size of the federal judiciary by 33 percent, allowing President Trump to appoint 261 new judges, on a party-line vote if necessary. Like most legal scholarship, this proposal was destined to fall by the wayside, but for the identity of its lead author: Steven G. Calabresi, a law professor at Northwestern University, and the co-founder and chairman of the Federalist Society. Yes, the same Federalist Society that has played an essential role in President Trump's highly successful judicial-nomination strategy. Were Calabresi's memorandum in fact the official position of the Society, it would indeed be huge news. But it's not. Not even close. As a non-profit organization, the Society does not, and indeed cannot, lobby in support of legislation. More foundationally, Calabresi's position does not have anywhere near the monolithic support in conservative legal circles that editorialists in the New York Times, Washington Post, and Slate would suggest. As a member of the Federalist Society who often speaks at its events, I can write in complete candor that this proposal is ill-considered and should be discarded.

Calabresi's primary argument is that that the administration of justice could be improved by reducing the workload of our increasingly taxed judiciary. No argument there, but the size and scope of the expansion he proposes — whereby a single President could transform the judiciary in short order — is entirely disproportionate to the nature of the problem. Second, unlike past such proposals, which were extensively debated and passed through Congress with bipartisan support, Calabresi wants his plan to be rammed through using the reconciliation process, which would bypass the filibuster and the need it creates to consult with Democrats. In 2020 and beyond, Democrats would show no restraint in accelerating this race to the jurisprudential bottom. Third, and most importantly, Calabresi's explicit coupling of the creation of judgeships with "undoing the judicial legacy of President Barack Obama" undermines the memorandum's neutral justifications. Conservatives who care about the federal judiciary should disavow this proposal.

Citing an increasingly large caseload, Professor Calabresi posits that the solution to an overworked judiciary is the appointment of new judges. On the district-court level — the trial level in the federal judiciary — there are currently 673 approved judgeships. On the circuit-court level — the intermediary level below the Supreme Court — there are currently 167 approved judgeships. Based on Calabresi's calculations, optimally, there should be 185 new district judges and 262 new circuit judges, though, to his credit, he dials back these numbers significantly. In 1978, Congress enacted the Omnibus Judgeship Act of 1978. This Carter-era bill increased the

number of district judges from 394 to 510, and the number of circuit judges from 97 to 132. Using this history as a baseline, Calabresi proposes the creation of 200 district judgeships and 61 circuit judgeships.

If your eyes haven't glazed over by this point, allow me to summarize the change in more understandable terms. In their eight-year terms, Presidents Clinton, Bush, and Obama were able to confirm 66, 62, and 55 judges to the courts of appeals, respectively. Under Calabresi's proposal, in only four years, Trump could potentially confirm more than 100 appellate judges. While the circuits are now roughly balanced between judges appointed by Republican and Democratic presidents, Calabresi's proposal would instantly change the composition of each circuit. Further, due to the abolition of the judicial filibuster by Senator Harry Reid in 2013, and the slow demise of the "Blue Slip" process, the only constraint on filling the courts would be how quickly the Senate could schedule hearings.

There is another huge distinction between the 1978 bill and Calabresi's proposal: The former was bipartisan and the latter is anything but. After extensive debates about how to allocate the seats — primarily in the fast-growing Fifth and Ninth Circuits — the Omnibus bill, co-sponsored by three Republicans, passed the House by a 319–80 bipartisan vote. It cleared the Senate with only 15 no votes. Further, with the filibuster and blue-slip process still on the table at the time, by my count, the Democratic-controlled Senate confirmed about 30 circuit judges to these seats in two years.

Calabresi expressly calls for Senate Republicans to pass his bill with only 51 votes through the reconciliation process, which would obviate the need to seek any input from Democrats. Putting aside the question of whether his proposal even meets the persnickety parliamentary requirements for the reconciliation process, using this route would trigger a race to the bottom. In 2020, nothing would stop Democrats from citing this precedent to fill the courts with a new phalanx of nominees in the mold of Justice Sotomayor, rather than Justice Gorsuch. Any short-term gains would soon be eviscerated. Generally, an eye for an eye really will make the whole world blind. But with the judiciary, this downward spiral has the exact oppose effect.

It is undeniable that Senate precedent concerning the appointment of judges has been steadily eroded over the past three decades. Before there was Merrick Garland there was Robert Bork. Before there was Goodwin Liu there was Miguel Estrada. As it stands now, President Trump's success in confirming nominees can be attributed to the elimination of the judicial filibuster, and the slow death of the blue-slip tradition. But, if the White House and Senate are controlled by different parties, I expect the pace of confirmations to slow to a crawl, if not a complete stop. In the event there is a Supreme Court vacancy the seat may remain empty until the next presidential election. If the future is so bleak, Calabresi's thinking goes, why not pump as many judges into the courthouses as possible while you're in power? After all, your opponents will do the same and worse when they take the reins of government back.

In this case, he's wrong. Generally, an eye for an eye really will make the whole world blind. But with the judiciary, this downward spiral has the exact opposite effect. Today, far too many Americans view the Supreme Court as a political institution. Most people are utterly unaware of the toils in the lower courts. Indeed, more than ninety percent of appellate decisions are rendered

unanimously, with judges appointed by both Republicans and Democrats taking the same side of the issue. Calabresi's proposal would upset that settlement in a deleterious way. To say nothing of the loss of collegiality, there would be an avulsive change in the case law, as old precedents could be discarded by the sheer number of votes.

I asked Professor Calabresi to respond to the charge that his plan is simply a court-packing scheme. He offered this response:

In fact, it is a court unpacking plan. It counter-acts Democratic court packing under President Carter and a Democratic Congress in 1978, which increased the size of the federal courts by 33%; and it counteracts the partisan effects on the judiciary of Senator [Harry Reid's] shameful filibustering of lower court federal judges under the younger President Bush and his abolition of the filibuster of lower court federal judges under President Obama.

I don't find these rationales persuasive. The impact of the Carter-era bill, nearly 40 years later, is no longer discernable. By my count, only three judges confirmed as a result of it are still in active service: Supreme Court Justices Ruth Bader Ginsburg and Stephen Breyer and Judge Stephen Reinhardt of the Ninth Circuit. Many of the seats created back then are now held by Reagan or Bush nominees. It is true that Senate Democrats' successful blockage of several of President George W. Bush's nominees is still felt today, but decreasingly so. And Republicans paid it forward, blocking numerous Obama nominees. As for Democrats' abolition of the filibuster in 2013, today Republicans are reaping the benefits of that decision in a big way: They have confirmed a modern-day-record number of judges in President Trump's first eight months. Yet, there is an important kernel of truth ensconced in Calabresi's thesis. He styles his plan as a way of "undoing the judicial legacy of President Barack Obama." Many of the decisions rendered by both Democratic and Republican-appointed judges lack even the faintest fidelity to the text and history of the Constitution. Calabresi's sincere suggestion comes from a desire to stop this assault on the Constitution. The easiest way to mitigate the damage caused by lawless judges, he thinks, is to appoint more lawful judges.

This is not a new idea. After his re-election in 1936, President Roosevelt proposed the Judicial Procedures Reform Bill of 1937, which would have allowed him to appoint a new justice for each justice over the age of 70. "The purpose of that feature," wrote Professor Richard Friedman, "of course, was very simply to pack the Court, to add enough new members to force it into submission." Specifically, FDR determined that it was easier to pack the Court than amend the Constitution. With new members, the votes of five conservative holdovers would be diminished. In his famous March 9 Fireside Chat, the first of his second term in office, Roosevelt made his point clearly: "We have, therefore, reached the point as a Nation where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself. We want a Supreme Court which will do justice under the Constitution — not over it. In our Courts we want a government of laws and not of men."

Calabresi is operating from a similar motivation: His vision of the Constitution is being thwarted by judges he disagrees with, just as Roosevelt's was. It is a completely understandable frustration, but his solution must be resisted. It would simply reinforce the perception that the

law is no more than politics; that the way to change the meaning of the Constitution is to simply appoint new judges. Now lower court judges would be viewed through the same jaundiced lens with which progressives sneer at Justice Gorsuch. In 1937, Roosevelt's scheme was quickly shot down by members of Congress on both sides of the aisle. Calabresi's proposal should meet the same fate.

Josh Blackman is a constitutional-law professor at the South Texas College of Law in Houston, an adjunct scholar at the Cato Institute, and the author of Unraveled: Obamacare, Religious Liberty, and Executive Power.