



Opinion: Packing the Supreme Court would lead to a slippery slope

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Nine seems to be a good number. It's been that way for a long time ... I think it was a bad idea when President Franklin Roosevelt tried to pack the court."

The words of the late Justice Ruth Bader Ginsburg in an NPR interview last year point up something important. Whatever you think of the politics, packing the Supreme Court would be bad for the law itself -- bad for the efficiency and quality of the court's work, bad for its credibility and public legitimacy. Ginsburg ardently favored a liberal turn in the law -- but not at the expense of an institution whose workings she loved and knew intimately.

Start with a simple truth of organizations: After a certain point, adding more members to a committee doesn't get its deliberations to work more smoothly.

As then-Chief Justice Charles Evans Hughes put it in an influential letter that helped sink Franklin D. Roosevelt's 1937 scheme to add justices, "There would be more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to decide."

Judges confer both in person as a group and by exchanging written drafts and comments. A single quibble of wording or other snag in communication between two of them can delay agreement until it is fixed. The chance of such a hitch rises geometrically with the count of judges. A nine-member court has the possibility of having 36 two-judge combinations to generate friction and misunderstanding. A 13-member court, as Sen. Chuck Schumer has been talking about pushing for, would have more than twice as many.

Each of the 50 states' highest courts has between five and nine justices. (Most have seven.) Nine is also a common number for highest or constitutional courts in countries such as Canada, Germany, and France. Where the number is much larger, courts tend either to have a more limited docket to begin with, or to break up into panels to hear cases.\

You see this also with our federal courts of appeal. The median federal circuit court has 12 judicial seats, but most cases before these courts are heard by three-judge panels. Only as an exception does the court convene its full roster of judges to rehear a case.

At the Supreme Court, by contrast, all justices hear all cases, and hardly anyone who has served on the court thinks it should begin doing its work in panels. The luck of who gets drawn for a panel, for example, would add uncertainty. Coherence would suffer.

Once the other branches of government openly begin treating the judiciary as an extension of party politics because some of the judges have been ruling the "wrong" way, it's hard to limit that to just the handful of hot-button issues that may have motivated the change. The "R" or the "D" after a judge's name will inevitably loom larger in the kind of results expected.

That imperils something vital. A much-envied feature of America's independent judiciary is that judges regularly rule against the parties and administrations that put them on the bench. It's happened through the years with jurists appointed by both Democratic and Republican presidents.

Last week a judge appointed by Donald Trump threw out a lawsuit filed by the Trump campaign against voting drop boxes in Pennsylvania, just as Trump's claims of privacy on tax returns had earlier run into trouble with justices he had appointed. The end of President Richard Nixon's presidency was signaled when the full Supreme Court, including his own appointees, rejected his claims of executive privilege over the release of the Watergate tapes. The landmark case in which the court curbed presidential power by striking down President Harry Truman's steel seizure was decided by a majority that included two Truman appointees. President Barack Obama was also checked many times by his own appointees.

Taking even deadlier aim at the court's legitimacy is the theory popular in some quarters of "stolen" seats. The idea is that one, two, or even more of today's Supreme Court seats are held illegitimately: the Justice Antonin Scalia seat because it should have been filled reasonably promptly after it opened up, Justice Ginsburg's seat because it should not be filled so promptly, and perhaps others because presidents making the appointments were elected with less than half the popular vote.

Marking out some justices' seats as "stolen" directly attacks the legitimacy of not just the work of those justices but the full court's work, so it's paradoxical that the usual remedy advanced is to stack the body with additional votes while leaving the supposed "thief" jurists in place to go right on authoring opinions and deciding close cases with their votes. (Of course, politics provides the most likely explanation: Calls to oust sitting justices from the court would fall flat except among the real ultras.)

Finally, court-packing would foster sudden lurches in the law. Although this can happen under the current set up too, the one-at-a-time replacement of justices tends to favor evolutionary, "salami-slice" case development, which can occasion less social disruption by signaling turns in advance.

Parachuting in multiple justices selected precisely for their willingness to deliver the goods on high-profile issues would all but guarantee big jolts.

And when you consider it, if the other side began plotting its own counter-pack up to 15 or 19 -- or whatever the number is to be after the next round -- then it could lead to repeated big lurches back and forth over time.

It's important that we not start.

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