



Court-Packing: It's a Solution That Could Bite the Democrats. It Has Before

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From the moment President Trump nominated Amy Coney Barrett to the U.S. Supreme Court, Democrats threatened Republicans with potential consequences. And just as Barrett was about to be sworn in, Rep. Alexandria Ocasio-Cortez tweeted “Expand the Court,” summing up the Number One action item on the Democrats’ to-do list when it comes to the judicial branch.

But if they study their American history, they’ll discover court-packing can often cause the packers more trouble than it’s worth.

In the First Decades, Supreme Court Numbers Yo-Yoed Up & Down

In America’s early decades, politicians toyed time and again with changing the number of Supreme Court justices.

Prof. John Yoo of the UC Berkeley School of Law, speaking of the Founders, said with a laugh, “They set the initial number of judges at six, which almost guaranteed ties.”

The number was changed soon to five, but then back to six, up to seven, up to nine and even up to 10, but then back to nine in 1869, and that’s where it’s stayed for the last 151 years.

The idea of court-packing faded into the shadows for decades...until Franklin Delano Roosevelt was getting resistance from the justices to parts of his multi-pronged New Deal.

FDR in the 1930s Went Where Today’s Democrats Want to Go

“You might remember that FDR tried this in 1937 after winning a smashing reelection,” Yoo, author of *Defender in Chief*, stated. “With his party in control of two-thirds of the House and the Senate, FDR wanted to expand the Supreme Court to the exact same number you hear Democrats proposing today: to 15.”

Yoo continued, “He wanted to effectively increase the size of the Court by two-thirds because he didn’t like the way the Supreme Court was frustrating his New Deal.”

Or as the Cato Institute’s Ilya Shapiro said of FDR, “He thought he would ‘help out’ the old men on the Court by adding six more people to rule his way.”

Caused FDR’s Democrat Allies to Lose Big

But as this author of *Supreme Disorder* pointed out, FDR's court-packing plan was, "Hugely unpopular, even though he was personally popular. His vice president campaigned against it, the chief justice, even his ally Justice Louis Brandeis, a leading progressive, were all against it. And at the next mid-terms in 1938, the Democrats lost 80 seats in the House and eight in the Senate because of it."

Yoo recalled, "In the 1938 mid-term elections, FDR went and campaigned against the Democratic senators who had failed to support him. All but one of them were returned back to the Senate. So the American people spoke pretty clearly even then at the height of FDR's political powers and support, that they didn't want the size of the Supreme Court to be the subject of political manipulation."

If FDR had just Waited, Nature Took Its Course

The funny thing is, FDR did get to eventually put a whole bunch of new justices on the Court, but it was just the organic way. As Shapiro said of the Court, "A few years later, the old men had retired or died, and Roosevelt got to appoint seven or eight more in the next three years, replacing them...or 'packing' the old-fashioned way."

Both Sides Pointing Fingers

Today Republicans accuse Democrats of wanting to grow and pack the Court to protect a liberal agenda. Democrats shoot back they just want to rebalance the Court because Republicans have engineered a conservative takeover.

"Norms have been broken and the Court has been politicized," Shapiro said these Democrats complain. "Well, you're not going to heal norms or de-politicize the Court by breaking more norms and further politicizing it."

Yoo described what's likely to happen, saying, "In the end you're going to trigger escalation/retaliation: each party will start adding more justices when they win elections."

Bernie Sanders: 'In 50 Years, We'll Have 87 Justices. That's Crazy!'

"This might be the one thing that I agree with Bernie Sanders on," Shapiro told CBN News. "He was asked during the primaries what he thought of court-packing. He said he was against it because that meant the next time the Republicans were back in power – and, of course, they will be: we're in a cyclical type of system – they'll add two more, three more, however many to have the majority again. And I'm not going to do Sanders accent, but he said, 'In 50 years, we'll have 87 justices. That's crazy!'"

It could be even more. Yoo commented, "The last time I checked, I think the Chinese Supreme Court had 300 justices."

So he said of the Democrats' scheme, "You go to 15 – why wouldn't Republicans when they control the presidency, the House and the Senate, increase it to 21? And why wouldn't it keep going back and forth, back and forth until you get 300?"

How's About 1/3rd Republican, 1/3rd Democrat, 1/3rd Neutral?

Former presidential candidate Pete Buttigieg was pushing a different kind of Court reform during his campaign.

As Shapiro described it, “Expanding the Court, but denominating a third of the justices as Republican, a third as Democrat and a third as neutral that would have to be approved by a unanimous vote of the other justices.”

“It would certainly be a kind of balance,” Shapiro admits. “But I think the Court would be even more politicized if two-thirds of its members would have explicit partisan labels attached.”

How to Get Rid of the ‘Morbid Death Watches’

A better reform that might drain some of the drama would be term limits for the justices. Some suggest 10 years might be a good number.

“That would at least regularize when we had vacancies,” Shapiro argued. “We’d get rid of these morbid death watches of octogenarian justices or politically-timed retirements.”

Of the present Court makeup, Yoo pointed out, “Nine itself is not important. What’s important is not altering it all the time just because we think we can get it to, say, uphold *Roe vs. Wade* or overturn *Roe vs. Wade* if we could just get one more person or one less person on the Court.”

He added, “We’ve kept to nine since 1869, for 151 years. And the reason why is because as a country we’ve adopted the idea that we shouldn’t manipulate the number of judges on the Supreme Court just to get the results out of it that we want.”

The Solution That Can Come Back to Bite You

Shapiro suggested Democrats should learn from the way FDR’s court-packing attempt boomeranged on him and his fellow Democrats.

He said, “This has always been very controversial, very political and not benefitting the party that typically proposes it.”

And What About the Little Guy, the Little Gal?

And then there are the people who have to actually go before these courts, accused of wrongdoing or looking for justice. What will a more politicized court system mean for them?

“For Democrats who say they’re on the side of the little guy, the little woman, or who claim they’re worried about minority rights, the last thing you want is a court system that’s political,” Yoo argued. “You would want to have a Supreme Court that’s as independent and separate from politics as possible. Because when the majority wants to oppress someone’s religious rights or free speech rights, the only people who are going to be left to defend them from the majority are going to be the courts.”