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Judicial influence

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Democrats' court-packing proposal appears dead in the water. But is it influencing the conservative justices now?

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A new congressional measure to expand the United States Supreme Court from nine justices to 13 isn't going anywhere. But the proposal might exert political pressure on the court and on President Joe Biden in other ways.

Democratic lawmakers introduced the bill on April 15 to expand the Supreme Court, but they lack support from Biden, who as a presidential candidate opposed packing the court.

"We add three justices, next time around, we lose control, they add three justices," Biden said at a primary debate. "We begin to lose any credibility the court has at all."

Instead, Biden created an academic commission to study possible Supreme Court reforms, essentially shelving the issue. Experts don't expect anything workable to come from the 36-member commission, which largely consists of liberal law professors with a few conservatives sprinkled in.

House Speaker Nancy Pelosi also said she would not bring the court-packing bill to the floor, indicating Democrats don't have the votes to pass it. Key Senate Democrats Joe Manchin and Kyrsten Sinema also oppose the measure. Senate Minority Leader Mitch McConnell called the bill "insane."

"If the Congress just increases or decreases the number of justices whenever it's unhappy with the Supreme Court, then the Supreme Court really can't be an effective check on the power of the Congress," said Kim Colby, who has years of experience handling Supreme Court cases for the Christian Legal Society.

The Supreme Court has fluctuated between five and 10 justices, but Congress has kept it at nine since 1869. The most famous modern attempt at change was in 1937 when President Franklin D. Roosevelt, riding a wave of popularity, attempted to pack the court with six additional justices. Congressional and public opposition forced Roosevelt to abandon the plan.

In April, Justice Stephen Breyer, part of the court's liberal wing, denounced the idea of expanding the court in a speech at Harvard Law School, saying Americans would view it as politically motivated, "further eroding trust" in the institution.

Justice Ruth Bader Ginsburg said the same before her death. “If anything would make the court appear partisan, it would be that,” she said in a 2019 interview with NPR.

Breyer, Ginsburg, and other justices agreed that the Supreme Court’s power depends on public trust. The court has “no troops” and no “power of the purse,” Ginsburg said in her 2019 interview.

“A push to increase [the number of justices] now, for obviously ideological reasons, would endanger the court’s reputation and role,” said Rick Garnett, a constitutional scholar at Notre Dame Law School. “It seems very unlikely that President Biden’s commission will recommend such an increase and also unlikely that it would ever be enacted. It is more likely that the Democrats in Congress will seek to add, and to fill, lower-court judgeships.”

Raising the number of justices could create chaos in Supreme Court arguments and opinions.

“It’s hard enough for an advocate to interact with nine justices,” Colby said. Lawyers usually only have an hour for arguments. Thirteen justices would also “diminish the likelihood of consensus,” she said. The nine justices sometimes issue five or six opinions on a particular case. Having 13 justices split into multiple camps wouldn’t provide helpful guidance to lower courts, the main job of the Supreme Court.

But even if dead in the water, the court-packing measure could influence the high court. Colby thinks Democrats can use Biden’s lack of support for court packing to push him to deliver on other progressive priorities like “more radical judges.”

“It’s a win-win for the proponents of court packing,” said Colby. “They have to realize politically right now they can’t succeed.” But introducing the legislation normalizes the idea to the public. Colby thinks the measure is really about pressuring Chief Justice John Roberts not to make decisions that appear political.

“They’re saying, ‘If you do these conservative things, you’ll be calling into question the legitimacy of the court,’” said Colby. “The only reason it’s calling into question the legitimacy of the court is because these proponents of court packing are calling into question the legitimacy of the court.”

Ilya Shapiro, a constitutional expert at the Cato Institute, agreed that such measures influence the court. In comments at Colorado Christian University, he pointed out the court is avoiding hot-button cases such as gun rights and abortion. But he added that it’s not just Roberts who may feel pressure.

The court has enough conservative justices to agree to hear a case even without Roberts’ vote. Shapiro thinks other justices are avoiding hot-button issues. But the court has several such cases to consider before the end of its term in June, so whether it will wade into those issues or avoid them will be clearer by the summer.