

On the Notion of Court Packing

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With what appears to be ever-increasing support for court packing, one may wonder what the reasons for slow change in the area are. Obstacles include history as well as the lack of support from current leadership in both Congress and the White House.

Although the winds of change appear to bluster mightily in the direction of revisiting the concept of court packing, both those in favor and opposed may yet find that the political branches of our federal government are hesitant to be blown off course and pursue tangible action on the subject. Partially, institutional inertia can be pointed to as a contributing factor for this. For over a century and a half the number of justices on the Supreme Court has held steady at nine, though not without attempted adjustments to this structure, most notably President Franklin Delano Roosevelt's Judicial Procedures Reform Bill of 1937.

Many of us today view Roosevelt's court packing plan as a partisan attempt to politicize the Supreme Court, and indeed, contextual evidence supports this notion. Having received an overwhelming mandate from voters in his reelection but frustrated he could not deliver on his New Deal promises, Roosevelt saw a potential path to policy implementation by adding an additional justice for every justice over 70 ½ with a maximum of 15. Congress and even Vice President Garner rightfully opposed such action, and Democrats suffered significant losses in the 1938 midterm elections.

While there were no truly substantive calls to reshape the court in the decades since, Roosevelt's court packing plan is merely the most notable in a history of assaults on the integrity of our nation's highest court. While those in favor of court packing are correct that nothing in the Constitution requires nine justices, there is some inherent irony in that argument - the reason there are nine seats at present is the consequence of a deliberate legislative truce and an attempt to prevent partisan attacks on the judiciary: after a Congress unfriendly to President Andrew Johnson reduced the number of justices so as to stop him from filling them, Congress passed the Circuit Judges Act in 1869 in an effort to develop legitimacy, consistency and stability for the Supreme Court.

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As Aaron Belkin, founder of advocacy organization Take Back the Court notes, a majority of Democratic voters currently favor expanding the number of justices and Democrats did not see backlash at the polls when they embraced the idea (at least in 2020). Naturally, this begs the question: with Democratic control of both chambers of Congress as well as the White House, what's causing the holdup?

As with many issues in politics, the answer can often be found by scrutinizing who wields the relevant decision-making authority. In this case, even though there has been an upswell of support for the concept of court packing among both grassroots activists and rank-and-file Democratic legislators, leadership has quickly (and rather definitively) thrown cold water on this newly revitalized passion. Although President Biden has announced a commission to study the subject, he has signaled he's not a fan of court packing, and his decision not to address the matter by adding to his long list of Executive Orders since taking office is telling. Speaker Pelosi, as well as the second-ranking Democrat in the Senate, Sen. Durbin have both openly rejected the notion that any sweeping, drastic change would soon be considered, much less have a chance of becoming law. As such, for now the matter of court packing seems likely to remain yet another issue that is normatively easily achievable, yet remains stuck in the procedural purgatory of Congress.

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