



PERSPECTIVES

by Rinaldo S. Brutoco



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Packing the Court? Reform is Better than Revolution

What does it mean to “pack the court”? Despite popular misconceptions, the first “court packing” occurred in 1801 when Federalist John Adams stayed up all night signing dozens of judicial appointments in order to pack the entire Federal judiciary so that his successor, Thomas Jefferson, couldn’t appoint any. Many significant “court packing” incidents occurred from then through the Civil War (it went from nine Justices to ten in 1863, then back to nine in 1869), until 1937 when Franklin Delano Roosevelt sought to expand the Court to 15 Justices.

As wildly popular as FDR was after winning a landslide re-election, the measure failed for two reasons: 1) the Supreme Court changed its tactics from blocking all New Deal legislation to letting the Social Security Act and the National Labor Relations Act pass into law; and 2) the Senate, controlled by FDR’s party, determined it was no longer necessary because the Supreme Court began to regulate itself more appropriately. If the Court had not switched to supporting the New Deal (by just one vote), it is almost certain we would now have 15 Justices. FDR and many constitutional scholars believed the ultimate check on the Court was that it would not resist highly popular legislation merely for their own political interests. To do so they felt would subject the Court to ridicule and ultimately lose the “consent of the governed,” and thereby invite Congress to radically reform it. Note this was the remedy the Founding Father’s felt would address judicial misbehavior.

So, how did all this numbering of Justices start? The Judiciary Act of 1789 set the number of Justices at six. In 1807 that was increased to seven, partly due to population growth. In 1837 the number was bumped to nine (again in part due to changing demographics). Then it was bumped to ten in 1863 to accommodate Lincoln, until Congress moved it back to nine where it has stood since 1869.

From the brief history above, even the casual reader will see the number of Justices not only could change, but for many reasons did change. A static number remaining until the end of time makes no sense at all.

In 1869 when the number of Justices was last set by Congress at nine, the US population was only 31,443,322. Today it is literally ten times that large at 331,000,000. Why does that matter? It matters because the Federal judiciary system created in 1789 had as a key concept that every Justice would ride “Circuit” with judges arranged in their judicial territory (technically a circuit is a group of states that hear cases together); and, an Appeals division would sit for every Circuit, so each Circuit would report to one single Justice of the Supreme Court who “supervised” them. Viewed this way, the volume of work that was going to be created in the federal judiciary over time was seen as one way to gauge the appropriate number of judges and Justices. It was well reasoned that the bigger the population, the larger the core of Judges required in the Districts. Therefore, more Justices would be appointed to the Supreme Court so there would be one Justice for each Circuit. And this was the situation until 1980.

That’s when the Congress decided there were too many cases, and more judges and Circuits were needed. This was accomplished by breaking away a new Tenth Circuit from the Fifth and creating the D.C. Circuit with primary jurisdiction over Congress and the Executive branches. To be consistent with the Framers’ original intent, and prior US history, the Congress should have also added two new Justices to the Supreme Court—one each for the two new Circuits—putting the number at 11. It didn’t, so we have been stuck with an ever-growing Federal case load (the Federal Courts are jammed worse than ever), no direct “supervision” of the 11th and DC Circuits, and an abandonment of the Framers’ original logic. Will 2021 be the year we correct this anomalous situation?

In these superheated political times, we shouldn’t throw around loosely defined terms like “court packing,” a term that has meant many different things since 1801. No, the “hardball politics” played by Mitch McConnell in first blocking Merrick Garland’s nomination by refusing to even give him a hearing, and then violating his own rule to refrain from confirming a Justice in a presidential election year (Amy Coney Barrett was approved only a week before the 2020 election), should be the reason to reform the entire judiciary.

Adding a few Justices to the Court would be a great way to protect wildly popular programs like Obamacare, Roe v. Wade, and a legion of other measures the public is clamoring for. But that isn’t enough. Frankly, we need to add at least 100 more Federal judges – divided into five more Circuits – to keep up with the massive build up in the courts. Remember, “Justice delayed is justice denied.” Let’s get rid of the unconscionable backlog. And let’s return to the Founders’ initial wisdom of one sitting Supreme Court Justice for each Circuit to supervise and hear direct petitions from each Justice’s respective Circuit. Implementing those reasonable, historically sound, and prudent measures will in fact yield 15 Justices. And even then, when we consider the ratio of population in 1869 to 2021, the Federal judiciary will be grossly understaffed.

There are many other good suggestions to consider in reforming the Federal courts. Liberal Congressman Ro Khanna and the arch-conservative Federalist Society co-founder, Professor Steven G. Calabresi, both think an 18-year term limit cleverly woven around the “appointment for life” issues would be useful. Others believe setting new requirements like 2/3’s vote of all Justices to overrule the Congress on Constitutional grounds or submitting all such attempts to overrule Congress to a national popular vote. Those suggestions are just a few. Taken as a whole, what they say to me is that Joe Biden is right. The next President should appoint a scholarly commission with six months to report back on what comprehensive court reform would look like. That’s clearly better than a “knee jerk” response to “hardball politics.”

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