



Written by [John F. McManus](#) on April 25, 2021

Biden's Court Packing Scheme

In 1936, President Franklin Delano Roosevelt won reelection for his second four-year term. The victory wasn't even close: 27 million votes for Democrat FDR, 16 million for Republican Alf Landon. In the Electoral College, FDR triumphed 523 to 8.

With that kind of lopsided victory, Roosevelt's desire to expand government's reach, even into arenas where no federal government power had previously existed, seemed readily achievable. However, he did face one significant hurdle known as the Supreme Court, where some of his desires for our nation had already been declared invalid. A majority of conservative judges had already scuttled some of his plans, and it certainly looked like they would declare more of the FDR's socialism to be equally unconstitutional. Roosevelt and his team knew something had to be done to stop such interference. The president decided on a plan to "pack" the Supreme Court with more justices who agreed with his plans.



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Part of the agenda that Roosevelt announced in early 1937 called on the court's justices to retire when they reached their 70th birthday, something many would likely not do. The newly reelected president's plan additionally included naming a new justice for every sitting justices who would balk at any attempt to be forcibly retired. Supreme Court historians expected that this scheme, if not blocked somehow, would have led to as many as six new members of the court, thereby raising the panel's number to fifteen from nine.

The makeup of the court had consisted of nine members from the period after the Civil War. That number, decided alone by Congress because the Constitution says nothing about how many justices there shall be, had been settled except for a slight fluctuation in the turbulent post-Civil War years. The Roosevelt proposal, widely criticized as "court packing" by the voting public and many members of Congress, never reached Congress, where it could have been approved. And it likely would never have been approved by Congress anyway because members didn't want to be tar-brushed by the American people for supporting an overtly partisan scheme.

While discussion about the generally unpopular Roosevelt plan continued, several sitting justices suddenly became more liberal. The Roosevelt team found the need for legislation to change the court's leanings unnecessary. In addition to a new pro-FDR attitude among some of the justices, several others retired and the president was able to name more agreeable Roosevelt-style partisans to fill the vacancies.



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Joe Biden's presidency faces the same kind of Supreme Court Franklin Roosevelt faced in the earliest days of 1937. Before holding the high office for less than 100 days, Biden knew that the current makeup of the court doesn't favor his liberal agenda, much of which the current court would likely declare unconstitutional. While some of his congressional supporters have suggested that he pack the court with liberals, he is moving more slowly toward any such maneuver. In early April, with fewer than 100 days in office, he issued an executive order creating a special commission to look into possible changes in the court. Seeking to avoid the term "packing," his measure calls upon the individuals he will appoint to "analyze" the court and make recommendations about a justice's length of service, the number of justices comprising the court, and even case selection and methods of proceeding with the court's business. Biden has asked this commission to provide its report in six months.

Without doubt, the Biden-appointed panel will be top-heavy with partisans who favor the president's leftist views. But Biden himself is on record as referring to FDR's early court-packing plan as a "bonehead idea." Surprisingly, current Justice Stephen Breyer, rightly considered a partisan for Democratic-style plans for our country, cautioned against any form of court packing. And as recently as 2019, even the arch-liberal but recently deceased Justice Ruth Bader Ginsburg let it be known that she was also opposed to court packing.

Today, the Supreme Court contains three members selected by former President Trump, and each is generally thought to favor originalist (conservative) thinking about the U.S. Constitution. For the court as a whole, that means a 6-3 margin for conservatives. But one of the justices thought to be a conservative, Chief Justice Roberts, has regularly disappointed conservatives with his stances on a variety of rulings. And it's still too early to know what can be expected from Trump appointees Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett, although each of these Trump appointees is considered to lean toward the right.

Biden is determined to have his leftist thinking prevail. And the conclusions of the commission he has created to review how the Supreme Court will be staffed and how it will function may be acted on by Congress. But there are likely some Democrats in both Houses of Congress who will be seriously shy about siding with anything that links them to "court packing." It's safe to say that Biden's plan to alter the court faces serious opposition.



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