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A Better Prescription Than Packing the Courts

Instead of burning down what's left of bipartisan dialogue, Democratic senators should take the high road and a long view by working with Republicans to create a binding set of nonpartisan rules for the confirmation process.

BY **JIM WALDEN AND JO WU**

As the Republican-controlled Senate clears the path for Judge Amy Coney Barrett to occupy a seat on the U.S. Supreme Court, Democrats have sounded a war cry to retaliate by adding seats to the court if they retake the White House and the Senate. This kind of court-packing would be the final coup de grâce in the current collapse of bipartisan governance in America, and in our two-party system itself. There is an alternative, though, that brings sanity and due process back to the Senate's constitutional duty to give advice and consent on a president's Supreme Court nominees. In order to implement an enduring solution, we need to understand how we got to this sorry state.

Photo: Diego M. Radzinschi/ALM

The U.S. Supreme Court building in Washington, D.C., on Wednesday, Sept. 23, 2020.

Partisan gamesmanship over the Supreme Court is nothing new, and the notion of court-packing is not a newly minted idea. As early as 1795, the Senate rejected President George Washington's nomination of John Rutledge as chief justice on political grounds, despite his superlative qualifications. In 1863, Congress stretched the court to 10 seats to help President Abraham Lincoln appoint judges from the north who would uphold his agenda of preserving the union and ending slavery. In 1866, Congress reduced the court to seven seats to block President Andrew Johnson from filling vacancies with Southern justices, and then increased it to nine again in 1869 to allow President Ulysses S. Grant to appoint pro-Reconstruction justices. And, in 1937, President Franklin D. Roosevelt attempted an audacious court-packing plan to sustain his New Deal, but the Senate shot it down by a wide margin.

But prior court-packing plans are not the cause of the current acrimony. Four recent incarnations of constitutional shenanigans define the roots of the problem. The first is procedural hijacking, when a party with a slim majority changes the voting rules to get their candidates through. Both Democrats and Republicans have used this trick. Second, the Senate simply refuses to fill judicial vacancies in an attempt to keep disfavored nominees, liberal

or conservative, off the bench. Democrats did this to President George W. Bush, and Republicans returned the favor during Barack Obama's presidency, and both sides cried foul when on the receiving end. Third, senators in the minority have turned confirmation hearings into embarrassing, unfair and toxic show trials intended to oust candidates through public shaming, a sad practice that more often affects Republican nominees. Finally, the Senate has abandoned its own rules in naked hypocrisy, including the current Republican about-face in fast-tracking Barrett two weeks before an election, after refusing to consider Merrick Garland in 2016 citing proximity to an election that was eight months away. The public should recognize these tricks for what they are: dangerous partisan attempts to erode the separation of powers by seizing control of the judiciary. Democratic frustration over the Republican's Garland-Barrett double standard is justified, but their simmering anger over it ignores their own role in the erosion of fair play in the confirmation process. That anger now foreshadows the first successful court-packing plan in 130 years.

There is a better way forward. Instead of burning down what's left of bipartisan dialogue, Democratic senators should take the high road and a long view by working with Republicans to create a binding set of nonpartisan rules for the confirmation process. This is a more viable prescription for both the independence of our courts and the health of our democracy.

Congress should appoint a bipartisan commission to study critical rule changes to correct the problems that have emerged. The rules could require timely consideration of all nominees, even late-stage ones, articulating a clear deadline for consideration of nominees in presidential election years. The rules could also direct the Senate Judiciary Committee to revert to the practice followed for over 100 years of conducting nominee evaluations in private rather than in public spectacles. The commission could prohibit litmus tests, asking how a nominee would vote in a particular case. The rules could, however, require nominees to answer whether certain prior cases were decided correctly or not, and why, which is not the same as a litmus test as judges often rely on a specific judicial doctrine (stare decisis) to uphold even wrongly decided cases in deference to prior courts. The commission should also examine the recent practice of nominating younger judges with less experience as a way to have lasting control over outcomes, as this too has become a favored form of court-packing.

There is an urgent need to restore functionality to Congress and fairness to the judicial confirmation process. Establishing a commission to create binding, nonpartisan rules governing the composition of the Supreme Court is a long-overdue but important first step in preserving the independence of the judiciary and reviving a spirit of civility and compromise within our political system. If Democrats choose to pack the court instead, they will be pouring gas on a fire already out of control.

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