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## Creating a friendly Supreme Court

Steve Bakke  September 2, 2024



**Editorial cartoon depicting Franklin Roosevelt attempting to pack the Supreme Court in 1937**

The temptation to question the Founders' wisdom regarding the Supreme Court's lifetime tenure hasn't been limited to one party, but right now it seems the democrats are more than ready to tinker.

The U.S. Constitution states: "The judges.....shall hold their offices during good behaviour....." So, what's the issue? That's pretty clear, isn't it? They keep their job as long as they behave – no term limits, or that would have been clearly stated.

Some dissatisfied politicians boldly assert that we should simply amend the Constitution to remove lifetime appointments. Others claim the Founders weren't actually enthusiastic about the idea anyway. We've recently observed lawmakers dreaming up a way to put old judges on "virtual retirement" while claiming Constitutional compliance.

Impatient politicians suggest simply adding the number of politically friendly justices necessary to be assured of more friendly rulings. However, that could happen only if the White House and both houses of Congress were controlled by one party. That's referred to as "packing the Court."

In any case it appears the Supreme Court is sure to be "under siege" if democrats sweep the November elections. The nature of democrat politics and governance in recent years guarantees they won't ignore an opportunity to change the rules. And motivated by displeasure of recent SCOTUS rulings, democrats will probably focus first on packing the Court with progressive justices.

Creating a friendly majority by changing the number of justices has happened six times since America's founding. That number has gone up and down for political reasons when the reigning president could get it done. There is no constitutional barrier to changing the number of justices. The Constitution doesn't mandate the number of SCOTUS justices, but it would be a significant challenge to get that approved by Congress.

Democrats are also considering a different method of transforming the court. They envision establishing term limits of 18 years rather than lifetime appointments. Biden

suggested that each term of a presidency could appoint two replacement justices. Some progressive “pundits” are claiming they can structure it in a way that complies with our Constitutional.

I wouldn't be so confident of the democrats' intentions were it not for the politicization of the Supreme Court over the last several decades. Over those years we began seeing vast philosophical differences developing between our two major political parties. The stakes have gotten very high.

For me, the problems really started with the brutal way Court nominee Robert Bork was rejected by the democrats in 1987. He wasn't just rejected, his reputation was brutally and unfairly pilloried. Before these modern political divisions, SCOTUS nominations had been fairly routine.

Reasons abound for this political division. At the most basic level the two parties have developed very different policy ideals and styles of governance. These differences are so great, legislation has become difficult to pass. As Congress became frustrated in their legislative role, they chose to rely more on Supreme Court challenges and decisions. SCOTUS was brought into the role of quasi-legislators. Some consider *Roe v. Wade* in 1973 to be an example.

Packing the Court is legal but difficult to pull off. For me, it doesn't contain a sliver of common sense.” It was attempted by FDR in 1937, and democrats have talked seriously of attempting to do so again. That would initiate the chaos of a herky-jerky back and forth fight between the parties to maintain influence in the Court. If the concern is politicizing the Court, this method is as foolhardy as anything could be.

Consider the desire to remove the practice of lifetime appointments in favor of some sort of term limit or rotation. Any argument that the Constitution doesn't actually require lifetime tenure is naïve. And to pretend that the Founders weren't really committed to establishing lifetime tenure is equally mistaken. Federalist 78 make very clear that “the convention acted wisely.....[to establish] GOOD BEHAVIOR as the tenure of their judicial offices.”

I can't imagine any American, even after observing the last few decades, could suggest the U.S. would be better off after reforming the Court in the manner discussed here. Most of the tinkering described would simply lead to more politicizing of our Supreme Court, and that's what we must avoid.