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The Court-Packing Coup

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Biden's "Commission on the Court" quietly sets the terms for the next power grab.

In December 2021, Joe Biden's Presidential Commission on the Supreme Court released its Draft Final Report, running over 200 pages, to no fanfare. Few commentators noticed the report's existence. Even fewer read the report—let alone carefully analyzed it.

Over the past weeks, as I have followed the Commission's footsteps,

I've seen signs that I am among a small group of lawyers and legal scholars to have studied the report closely. Each of the Commission's six public meetings have been streamed on the White House's official YouTube channel. But at the time of this writing, none of these videos has over 2,300 views.

If you've heard secondhand characterizations of the report in recent months, those characterizations likely originated from a handful of actual readers. This helps explain why many descriptions of the report have been so grossly inaccurate.

Commentators have—for the most part—described the Commission report as bland, noncommittal, and generally unthreatening. These assessments evidently came from readers who downplayed or were blind to the report's overriding purpose, which is to legitimize expansion of the Supreme Court—otherwise known as Court-packing.

To support the legality of Court-packing, the Commission weaves an invented history of Supreme Court politics, sometimes abusing its sources in apparent bad faith. At the same time, the Commission affects an air of soft-spoken neutrality, portraying its outlandish conclusions as moderate and centrist.

The report's true purpose will become apparent if—God forbid—it is one day publicly cited by Joe Biden or by a future Democratic president. We will then understand that, under a false veneer of detached scholarship, Biden's Commission has quietly laid down the legal-theoretical groundwork for a totalitarian regime in which progressives would be empowered to repress their enemies unencumbered by the rule of law.

The rising threat of Court-packing

Since Trump's election in 2016, many progressives have discussed various ways to circumvent the American system of government and assume absolute power over their political adversaries. The most popular proposal is "to pack the Court." This means that Democrats would add new seats to the Supreme Court—enough seats to load the Court with justices who will rubber-stamp their agenda.

The *New York Times* has spent years trying to prepare its readers to support Court-packing, pushing the idea through opinion columns and book reviews. In 2019, a group of Democratic senators filed an ominous legal brief before the Supreme Court, threatening to "restructure" the Court if the justices did not limit Second Amendment rights: a thinly-veiled reference to packing the Court.

When Joe Biden ran for president in 2020, he virtually promised that he would pack the Supreme Court. "You'll know my opinion on Court-packing when the election is over," he said openly. "The moment I answer that question, the headline in every one of your papers is going to be about that."

During the Vice-Presidential debate, Mike Pence pointedly asked Kamala Harris about Court-packing. Harris sneered and cackled, conspicuously refusing to give any straight answer. "If you haven't figured it out yet," Pence told the audience, "the straight answer is *they are* going to pack the Supreme Court."

Most Americans simply do not grasp what this maneuver would mean. In our ignorance of civics, Americans might not realize—until it is too late—that Court-packing is the end of constitutional government. This blind spot is precisely what makes Court-packing a compelling route to totalitarian power for the Left.

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function. Many conservatives, after all, can only name two or three Supreme Court cases: usually cases in which the Court has been accused of "legislating from the bench." When conservatives imagine Court-packing, then, they often fear merely that a packed Court would issue more such decisions.

If you understood the basic function of the Court, however, "legislating from the bench" would be the last thing you were afraid of. The real threat of a packed Court is not what it will do, but what it will not do: enforce the Constitution against the other branches of government.

What would happen if the Court were packed?

The Supreme Court plays a frequent and critical role in protecting Americans' fundamental rights from the elected branches. Conservatives simply tend not to hear about the cases that we win.

In the *Heller* and *McDonald* cases, the Supreme Court held that the Second Amendment protects individual firearms ownership. If these cases had differed by one vote, the Second Amendment would already be unenforceable in any U.S. court. Barack Obama could have begun an incremental program of nationwide gun confiscation during the 111th Congress.

Likewise, secular progressives increasingly believe that traditional Christians should not be tolerated in American society. Without Supreme Court decisions applying the Free Exercise Clause, like *Hosanna-Tabor* and *Lukumi*, the government could force Christian organizations to hire non-Christian leaders—systematically eradicating public manifestations of organized Christianity.

And don't forget the Speech Clause of the First Amendment. If the Court is packed, it is only a matter of time—probably much less than

Court is packed, it is only a matter of time—probably much less than you think—until the Court holds that the First Amendment does not protect "hate speech," however defined.

Court-packing is unconstitutional

The unprecedented nature of Court-packing points to an important consequence of the scheme: once the Court is packed, there is no going back. From then on, a ruling party would be able to unilaterally remake the Court to its liking at any time.

Court-packing—that is, expanding the Court to take political control of it—has never occurred in American history. Yet, as the Commission and progressives in general are fond of pointing out, the size of the Court has indeed changed several times. Usually, this has been done for clearly territorial and administrative reasons, though some changes have involved mild political gamesmanship. Most notably, John Adams' Judiciary Act of 1801 reduced the size of the Court from six to five justices. In the words of Biden's Commission, this was likely done "to limit the ability" of Thomas Jefferson "to shape the Court."

Throughout early American history, however, it never seems to have seriously occurred to anyone to propose Court-packing. Even during the bitter tit-for-tat between Adams' Federalists and Jeffersons' Democratic Republicans, neither side ever proposed packing the Court. If they had, the scholars on Biden's Commission would surely have found out and eagerly told us.

Much later, of course, Court-packing was infamously proposed by Franklin Roosevelt. Yet, after Roosevelt's putsch floundered, a bipartisan consensus emerged that Court-packing would be clearly unconstitutional—a fact that the Commission takes pains to

conceal.

To see why Court-packing is unconstitutional, you only need to skim the Constitution's first three articles. Immediately after the Preamble, the Constitution sets to work creating three distinct branches of government and dividing enumerated powers between them. Article III creates the Supreme Court and gives it the unique power to decide legal cases "arising under this Constitution."

In other words, the entire structure of the Constitution assumes that the Court is an independent branch—not a mere tool of the party that has majoritarian control at any given moment.

It should go without saying that, if the Supreme Court is placed under absolute subjection to the momentary whims of the ruling party, it would cease to exist as a distinct third branch of government. Instead of a three-part government, we would have a binary government: an entirely different system than the one the states agreed to when they ratified the Constitution.

When a prominent congressional debate on Court-packing occurred in 1953, this view was expressed by both Democrats and Republicans. Democratic Senator Russell Long observed that to allow Court-packing would be to see the meaning of the Constitution "reversed completely." Republican Senator John Marshall Butler, then the leading opponent of Court-packing, put the same view more eloquently:

> It is not necessary to point out to this body… that a judiciary that is not independent of the legislative and executive branches would not meet the requirements [of the Constitution]. My colleagues well know that to Locke's 'Wherever law ends, tyranny begins' there always should be added the truism that, wherever courts suffer an invasion of

their independence, law ends.

Biden's Commission distorts early American history

Biden's Commission attempts to make hay of the fact that the size of the Court has repeatedly changed. The Commission assumes that, because Congress has frequently changed the Court's size, it follows Congress can legally change the Court's size whenever, however, and for whatever reason it chooses.

Although the Commission heard testimony opposing the constitutionality of Court-packing, the members of the Commission unanimously agreed that Court-packing is legal. Even Will Baude, a token moderate Republican on the Commission, stated that "I don't think there is a limit on Congress' ability to change the size of the Court."

The Commission says that its members disagreed only on "whether adding Justices to the Supreme Court *at this moment in time would be wise*"—a meaningless disagreement evidently touted to confer legitimacy on the Commission's conclusions. By framing Court-packing as—at worst—the violation of a mere "norm," the Commission has attempted to ensure that any future Court-packing debate will begin with Democrats on the high ground.

Court-packing is clearly permissible, the Commission argues, because many changes to the Court's size have been "motivated by a mix of institutional and political concerns." The report does not consider whether there is any relevant qualitative difference between Court-packing and other changes to the Court's size which, despite having some political motivations, were not Court-packing. Instead, the Commission's 200-page report simply assumes—or at best makes the conclusory assertion—that such a difference does not exist.

In fact, the historical examples cited by the Commission illustrate this crucial difference. For example, after Jefferson's Democratic-Republicans took control of Congress, they reversed Adams' Judiciary Act of 1801, passing their own Judiciary Act of 1802 and restoring the number of justices to six. Even if we grant that "political concerns" were the sole motive for this decision, the fact remains that the Judiciary Act of 1802 did not give Democratic-Republicans political control of the Supreme Court—and nobody thought it had done so. Jefferson himself complained bitterly that his political enemies, the Federalists, continued to control the Court. As the Commission notes elsewhere, "Jefferson charged the Federalists with having 'retired into the Judiciary as a strong hold' in order to entrench themselves in the face of electoral losses."

In its review of early American history, the Commission chiefly relies on two expansions of the Court: the expansions of 1807 and 1837. The Commission says that these changes show that Court-packing is permissible because "each expansion… served the interests of a political party."

In 1807, with Thomas Jefferson still serving as President, the Democratic-Republican Congress created a seventh judicial circuit to account for the expanding size of the nation. At the same time, Congress added a seventh justice to the Court. Even the Commission acknowledges that this was done for basically territorial reasons, noting that the "size of the Court and the number of circuits were still understood as necessarily linked."

The Commission nonetheless claims this precedent supports Court-packing because Democratic-Republicans "controlled Congress and trusted their party leader—President Jefferson—to appoint the seventh Justice." What this analysis leaves out is that, even long after

1807, Federalists continued to control the Supreme Court. The infamously pro-Federalist decision *McCulloch v. Maryland*, for example, was decided in 1819.

Neither Jefferson's 1802 Act nor the 1807 expansion, then, does anything to tell us whether Court-packing—that is, expanding the Court for the purposes of taking control of it—is permissible. If anything, it is telling that Jefferson never attempted to add enough seats to the Court to capture it from his political enemies.

Decades later, President Andrew Jackson likewise presided over a still-growing nation—encompassing territory that Jackson himself had conquered as a military leader. In 1837, Jackson's Democratic Congress passed the Eighth and Ninth Circuits Act, adding two circuits to oversee newly-created western states and expanding the Supreme Court from seven to nine justices. The Commission avoids mentioning the name of this 1837 law, perhaps to downplay the relationship between the Court's size and the number of circuits.

Instead, the Commission emphasizes the supposed "political" implications of this Act—misleadingly claiming that "President Jackson was able to appoint so many Justices to the Court because… Congress, which was controlled by Jackson's Democratic Party, passed a new Judiciary Act." The Act, the Commission says, "consolidated the Democratic Party's control."

But this characterization of the Act is ridiculous. When the Eighth and Ninth Circuits Act was passed, Andrew Jackson had *already* made *five* successful appointments to the seven-member Supreme Court. Not only was the Court under firm Democratic control, but it was in no danger of being taken over by the Democrats' rivals, the Whigs. Additionally, the Eighth and Ninth Circuits Act simply was not the reason that "Jackson was able to appoint so many Justices"; the Act accounted for less than one-third of Jackson's total

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Andrew Jackson is, if possible, even more innocent of Court-packing than Thomas Jefferson. While Jefferson's expansions of the Court were insufficient to dislodge his Federalist enemies from power, Jackson had no conceivable need to expand the Court for political purposes. In either case, the fact that "political concerns" may have been some part of a "mix" of factors does nothing to support the legality of Court-packing—which, palpably unlike Jefferson or Jackson's changes to the Court, would permanently demote the Court into a mere instrument of a binary majoritarian state.

Biden's Commission lies about the 1950s Court-packing debate

In 1953—many years after Franklin Roosevelt's infamous attempt to pack the Court—Maryland Republican Senator John Marshall Butler sought to introduce a constitutional amendment to permanently fix the Supreme Court at nine justices. Senator Butler explained that he introduced this amendment precisely because the heated moment of Roosevelt's putsch attempt had cooled. It is wisest to protect liberty, Butler explained, "during the interludes of relative serenity."

As Butler prophetically warned: "The smoke has cleared long ago from the field of the 1937 [Roosevelt] battle, but there always is the danger of a renewal, sooner or later, of the campaign against judicial independence." Roosevelt's attempt to pack the Court—by then a dead letter—should nonetheless teach us that the Court's "defenses require reinforcement."

Butler's speech to the Senate in favor of his amendment is a masterpiece of both oratory and clear legal reasoning. If Biden's "nonpartisan" Commission had really had a nonpartisan bone in its body, it would have quoted Butler's speech at length—and I would not have had to look the speech up for myself in Congressional

not have had to look the speech up for myself in Congressional records.

Sadly, Biden's Commission appears to have purposefully lied about Butler's speech and the ensuing discussion, changing the facts to support the constitutionality of Court-packing. In the words of the Commission:

> Significantly, both supporters and opponents of [Butler's] proposed constitutional amendment shared one assumption: Congress has broad formal power to expand or contract the Supreme Court, such that the only way to freeze the size of the Court in place was through a constitutional amendment. But significant disagreement arose over whether fixing the size of the Court at nine members would be wise.

In support of this characterization, the Commission selectively quotes Butler and Senator Russell Long—a Democratic supporter of Butler's amendment—as saying that the amendment would close a "loophole" in the Constitution.

While Butler and Russell indeed used the word "loophole," however, neither of them thought that Court-packing would be constitutional. As we have already seen, Butler himself characterized Court-packing as the abolition of "judicial independence," the beginning of "tyranny," and the end of "law" itself.

Yet Butler's speech was even more explicit, describing Court-packing as a method used "to reduce judiciaries independent on paper to subserviency to dictatorships." Specifically, Butler warned that Latin American countries had become dictatorships—and that "prewar Japan achieved fascism, with relatively little violation of the letter of their then written constitutions."

John Marshall Butler did not see Court-packing as compatible with any good faith reading of the Constitution. Nor did Butler think he was adding the concept of judicial independence into the Constitution for the first time; he was merely providing "reinforcement" to what the Constitution already established. In the concluding words of his speech, his amendment sought to leave the Court "free to do its work as an independent arm of the government."

Butler *did not* concede that the Constitution imbued Congress with "broad formal power" to engage in Court-packing, but was instead concerned that Court-packing might result from the *bad faith* exploitation of a wooden reading of the Constitution. In fact, Butler could not have made it clearer that he viewed Court-packing as an abolition of the basic structureof the Constitution and the ushering in of an entirely new form of government: "tyranny," "dictatorship," and "fascism," untethered from the very concept of "law" itself. This is virtually the opposite of the position that the Commission ascribes to Butler.

The Commission's suspicious quotation of Senator Russell Long is also revealing. To support the view that Court-packing is constitutional, Long is quoted as saying the following: "Undoubtedly, one of the weak links is the possibility that the Supreme Court could be packed. … [T]hat is one loophole which we should close in order to protect ourselves in the future." The Commission's ellipsis between these two sentences replaces exactly the following words: "and the meaning of our Constitution reversed completely by such unwise legislative action."

How Court-packing must be stopped

What are our options for stopping Court-packing? I will suggest two. The first is the simplest: ordinary Americans make as much noise about Court-packing as possible. If Court-packing is denounced loudly and often enough that most Americans grasp its significance, then its primary attraction to progressives—that most Americans might not perceive it for what it is—will be taken away. Progressives may then back down in favor of a less dangerous strategy.

Pressure alone, however, may not stop Court-packing. We must immediately begin preparing for a second option. If Democrats proceed with Court-packing, a significant group of states must file suit in the Supreme Court to seek an injunction blocking the expansion of the Court and the seating of any new justices. I will briefly explain why this strategy makes legal and political sense.

The states' argument in this suit will have two basic parts. First, the states will point out that the federal government is derived solely from the states' decision to ratify the U.S. Constitution. As James Madison wrote in his Report of 1800, "the Federal powers are derived from the Constitution, and… the Constitution is a compact to which the states are parties."

Secondly, when the states ratified the Constitution, they agreed to be subject only to the form of government it creates: a three-part government with certain powers reserved for the judicial branch. They did not assent to a binary government in which the judiciary can be arbitrarily remade at any given moment.

To demote the judiciary to the role of a mere functionary would impose a fundamentally new form of government on the states—violating the compact which the states created. Accordingly, the Court must issue an order holding the federal government to the terms of that compact. The Roberts Court may well grant this injunction. As I have argued in the past, many of Chief Justice

injunction. As I have argued in the past, many of Chief Justice Roberts' most controversial actions have been guided by his justified fear of Court-packing.

Like the first option, this strategy could potentially take the primary attraction of Court-packing away from Democrats. If the Court is packed in defiance of a Supreme Court injunction, progressives will be unable to disguise the fact that what they are doing is a coup. They may back down, giving the country more time to devise other means of accommodating our differences.

But even if the Court does not grant the injunction—or if Democrats proceed to pack the Court anyway—the states' lawsuit will still have helped. Such a high-profile lawsuit by the states would awaken many people to the fact that this new, binary form of government would be an alien parasite: a regime which the states never assented to, which would have no legitimate authority to intervene in their affairs. This knowledge could lead the American people to peacefully assert, through their state governments, sufficient autonomy to protect fundamental liberties in large parts of the United States.

However a Court-packing attempt is defeated, it will only be because of decisive action by state governments. It is the states that will have standing to sue to enforce the terms of the Constitution against the federal government—and it is only the states that are likely to intercede in favor of basic liberties if the constitutional system fails.

This makes it important that the political Right, immediately, pivot its political and legal resources towards a greater focus on the states. The time to begin mobilizing state governments is now, while we still enjoy—in Senator Butler's words—"relative serenity." If the Right's resources are fixed overwhelmingly on federal politics at the moment that a Court-packing putsch finally arrives, it may be too

late to steer the ship away from the storm.

These tactics may or may not work. Still, it is our God-given duty to do everything we can to avoid both the suffering of civil conflict and the far worse suffering of totalitarian power. If a packed Court is seated, and is not immediately and forcefully rejected as illegitimate by multiple states, there will be no turning back.

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