



How to Talk About:  
**COURT-PACKING**

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# Table of Contents

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- 3** Five Key Points About Court Packing
- 4** Misperceptions v. Facts
- 8** Quiz
- 9** Quiz Answers
- 12** Social Media Kit

# Five Key Points About Court-Packing

1

**An independent judiciary is the cornerstone of American democracy.**

Judicial independence isn't an abstract concept—it's a rule that protects federal judges from interference by politicians. Judicial independence is so important that Article III of the Constitution gives federal judges lifetime appointments.

2

**Expanding the size of the Court to achieve certain outcomes is an unconstitutional attack on judicial independence and our system of checks and balances.**

Those who want to enlarge the Court are essentially saying, "If the Court doesn't vote our way, we will fill it with justices who will." This is a direct attack on the separation of powers that will turn our independent judiciary into a dependent and subordinate instrument of politicians.

3

**Court-packing will turn the Court into a political see-saw.** Adding justices to the Court will set off a **judicial arms race** where each party adds new members whenever it is in power. On a Court with dozens of members, justices will likely behave like legislators, building coalitions and cutting deals, rather than deciding cases according to the law.

4

**Even FDR's Democratic allies in Congress understood that packing the Court would destroy our constitutional structure.** When President Franklin Roosevelt attempted to add additional justices to the Court in 1937, the Democratic controlled **Senate Judiciary Committee** rejected his scheme, referring to it as an "abandonment of constitutional principle" and an "invasion of judicial power."

5

**Today, court-packing is a tool of authoritarian dictators.** Authoritarian dictators often seek to pack the courts with justices who will rubber stamp their actions. In 2004, Venezuelan president Hugo Chavez added justices to his country's Supreme Court to consolidate power and **implement socialism.**

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## 1. MISPERCEPTION: Expanding the size of the Court is not “Court-packing.”

**FACT:** “Court-packing” refers to attempts to increase the number of justices on the Supreme Court for political gain. This can occur (1) when the political party in power tries to add justices in retaliation

for the opposing party’s most recent nomination or nominations; or (2) when elected officials increase the size of the Court in an attempt to influence the outcome of future decisions.

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## 2. MISPERCEPTION: Politicians are not supposed to have any influence over the Court.

**FACT:** Our Constitution permits politicians to influence the Court by winning elections and then appointing and confirming justices that share their judicial philosophy. Politicians may also try to influence the direction of the Court by filing persuasive and compelling legal briefs for the Court’s consideration. These rules allow politicians to influence the

general direction of the Court without controlling the Court, manipulating the justices, or imposing certain outcomes.

**FACT:** Just because one party or the other has failed to influence the Court under this set of constitutional rules does not mean it can **change the rules of the game** by tampering with a coequal branch of government.

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## 3. MISPERCEPTION: A president who nominates justices who share his judicial philosophy is “Court-packing.”

**FACT:** When the president nominates and the Senate confirms individuals to judicial vacancies they are “filling a seat”, not “packing the Court.”

**FACT:** There is nothing unusual about a president filling a vacancy with someone who shares his or her judicial philosophy. This is the natural by-product of the voters’ electoral choices.

**FACT:** Filling open vacancies is a **legitimate role** of the president and Congress. Describing this constitutionally permissible behavior as “Court-packing” is like saying that electing Nancy Pelosi speaker is “House Packing.”

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#### **4. MISPERCEPTION: When the president and the Senate try to rush through a nomination during an election year they are “Court-packing.”**

**FACT:** The federal government does not stop working simply because it is an election year. Up until the very last day of a president’s four-year term, the president may sign legislation into law, issue executive orders, approve new regulations, order troops into battle, issue pardons, and take any number of constitutionally

permissible actions. Likewise, the Congress may pass legislation during an election year up until the very last day of the session. The nomination and confirmation of federal judges is no different. The president and the Senate have the power to nominate and confirm judges up until the last minute of a duly elected term of office.

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#### **5. MISPERCEPTION: The Constitution allows Court-packing.**

**FACT:** Our founders knew that they could not possibly anticipate the growth of our country, and so they left the composition of the judicial branch to Congress to flesh out over time. Although there is nothing magical about the number nine, our founders did *not* intend for politicians to be able tamper with a coequal branch of government for political gain.

**FACT:** Court-packing undermines the independence of the judiciary. It is a direct attack on our Constitution’s separation of powers. The structural Constitution provides for a divided government, complete with checks and balances. Preserving the structure of our federal government means setting limits on manipulation of a co-equal branch by a majority in Congress.

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#### **6. MISPERCEPTION: Republicans “politicized the Court” when they refused to confirm President Obama’s nomination of [Judge Merrick Garland](#).**

**FACT:** This argument confuses the selection *process* with the role of the judiciary itself. The nomination and confirmation of federal judges is, inevitably and inherently, political. The behavior of elected officials may be political, but it does not “politicize

the Court.” Once confirmed, life tenure ensures that the justices are beholden to no one. This enables them to rise above the politics of the confirmation process and to withstand any outside influence, ensuring a truly independent Court.

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**FACT:** In 2016, Republicans controlled the Senate. Although the Senate certainly had a *right* to confirm the nomination of Judge Garland to the Supreme Court in an election year, it had no obligation to do so. In fact, it is highly unusual for the Senate to confirm a Supreme Court nominee chosen by a president of the opposing party during an election year. (Throughout history, the Senate has confirmed **only one** such nominee prior to election day.)

The decision by the Senate not to move forward with the Garland nomination in 2016 is thus consistent both with the Constitution and with historical precedent.

**FACT:** Long before President Obama nominated Judge Garland to the Supreme Court, Democrats **wielded their political power** to block or try to block a number of Republican judicial nominations.

- The first time in the modern era that the Senate refused to confirm a qualified nominee to the Supreme Court solely on ideological grounds was in 1987. When President Ronald Reagan, a Republican, nominated **Judge Robert Bork** to the Supreme Court, Senate Democrats used their political muscle to reject the nomination.
- In 1991, Democrats tried to block the confirmation of **Justice Clarence Thomas** with an eleventh hour unsubstantiated allegation of sexual harassment.
- Subsequently, in 2003, Democrats used the Senate filibuster to block the nomination to the U.S. Court of Appeals for the District of Columbia of the eminently qualified **Miguel Estrada** on the grounds that “**he is Latino**”.

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## **7. MISPERCEPTION: The Court should be expanded in order to create balance.**

**FACT:** The Supreme Court is not supposed to operate, like some federal commissions do, with a “balance” of members from the two major political parties. Calls for “balance” on the Court create the false impression that the Court is supposed to behave as a political, policy-making body that requires representation by two sides in order to forge compromise. This distorts the role

of the Court. In a democratic society, the role of the Court is to apply the law as written, not to cut deals in order to reach policy compromises.

**FACT:** Proponents of Court-packing are not really interested in “balance.” They are interested in control—that is, in ensuring that the Court rules in ways that serve their personal political interests.

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**8. MISPERCEPTION:** Adding justices to the Court will “depoliticize” the Court and restore its “legitimacy.”

**FACT:** Unlike politicians, who derive their legitimacy from the people, courts derive their legitimacy from their independence. Because federal judges, including justices, serve for life, they are beholden to no one. Those who argue that the Court has become “politicized” or that it has lost its “legitimacy” are really saying that they do not like the political ramifications of certain Court rulings and that, therefore, they personally no longer respect the Court.

**FACT:** Expanding the number of justices on the Court will not “depoliticize” it—it will do just the opposite. As **Justice Ruth Bader Ginsburg** noted, “If anything would

make the court look partisan, . . . it would be that—one side saying, ‘When we’re in power, we’re going to enlarge the number of judges, so we would have more people who would vote the way we want them to.’”

**FACT:** The best ways to ensure that the Court does not become politicized are: (1) to protect the independence of the judiciary from Congressional meddling; and (2) to appoint and confirm justices who will act with restraint, limiting their decisions to the cases and controversies before them, and tethering their rulings to the original meaning of the law, not to the political winds of the moment.

# Quiz: Court-Packing

**1** How many justices sit on the U.S. Supreme Court?

- A. It depends on how many federal judges show up
- B. 27
- C. 13
- D. 9

**2** Is the Court supposed to be politically “balanced”?

- A. Yes, balance is the goal, and there should be a relatively even number of Democratic appointees and Republican appointees to the Supreme Court at all times.
- B. No, justices should be guided by the law as written, not by political affiliation. Therefore, it is not necessary to ensure partisan balance on the Court.

**3** TRUE or FALE: Since the Supreme Court determines so many important issues in American life, we should expand the number of justices to better reflect the views of the American people.

- A. True
- B. False

**4** Which of the following is likely to occur if one party increases the size of the Court?

- A. It will transform the Court into a partisan mega-legislature.
- B. It will make the Court less likely to stand up for the minority against the political branches.
- C. It will violate the separation of powers upon which our government is based.
- D. All of the above.

**5** Which of the following is an example of “court-packing”?

- A. As judicial vacancies arise, the president nominates and the Senate confirms judges and justices who share the president’s judicial philosophy.
- B. The president nominates, and the Senate confirms, a new justice shortly before a presidential election.
- C. Politicians increase the number of Supreme Court justices in order to “cancel out” the votes of justices recently appointed by the opposing party.

**6** TRUE OR FALSE: Court-packing is a tool of control used by authoritarian governments.

- A. True
- B. False

**7** What happened when President Franklin Roosevelt proposed enlarging the size of the Court in 1937?

- A. Prominent members of President Roosevelt’s own Democratic party opposed the scheme.
- B. The Senate Judiciary Committee described the plan as “dangerous” and as an “invasion of judicial power.”
- C. Roosevelt backed down.
- D. Court-packing was so unpopular that it cost Roosevelt’s Democratic party congressional seats in the 1938 midterm elections.
- E. All of the above.

**8** Do the American people want to enlarge the size of the Supreme Court?

- A. Yes
- B. No



# Quiz Answers

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## Q1 ANSWER: D

Since 1869, the Court has consisted of nine justices, eight associate justices and one chief justice. Over the past century and a half, Americans have accepted this norm of nine, and politicians from both sides of the aisle have condemned efforts to enlarge the Court as a threat to our separation of powers. [Sources: NBC News; National Constitution Center]

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## Q2 ANSWER: B

No. Judges and justices of the Supreme Court wear black robes, not red or blue jerseys. They are appointed for life and beholden to no politician and no political party. Therefore, it should not matter whether the Court has a balance of appointees from the major political parties. What matters is whether

the justices can put aside their personal political viewpoints and apply the law as it is written, even when the outcome is not what they would prefer it to be. [Sources: NPR; IWF]

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## Q3 ANSWER: B

False The Supreme Court is not supposed to reflect the will of the people. That job belongs to our elected representatives. As Chief Justice Roberts famously noted, a judge should act as an umpire, whose job it is to “call balls and strikes . . . not to pitch or bat.” When judges alter or update the law to reflect the will of the people, they usurp the power of the people’s representatives and undermine the legitimacy of the Court as a neutral arbiter. [Source: CNN]

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## Q4 ANSWER: C

All of the above. As Justice

Ginsburg noted, adding members to the Court would transform it into a brazenly partisan institution where each party, whenever it is in power, adds justices likely to vote its way. In such a large and unwieldy body, justices will, inevitably, focus on building coalitions and cutting deals, rather than on deciding particular cases or controversies. This undermines the role of the judiciary in protecting the rights of minorities against the tyranny of the elected majority. [Source: NPR; IWF]

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## Q5 ANSWER: C

Court-packing occurs when the political branches tamper with the size of the Court for political gain. Filling a vacancy that arises in the normal course is not “court-packing.” It is a legitimate use of the political power, granted to politicians by the voters.

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When the American people elect a president, they know they are giving that person the discretion to fill judicial vacancies for the next four years, consistent with his or her judicial philosophy. Likewise, when voters choose their senators, they know that they are giving them the power to decide how to handle the president's nominations during the entirety of their terms of office. [**Sources:** [National Constitution Center](#); [The American Prospect](#)]

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**Q6 ANSWER: A**

**True.** Political Scientist Gretchen Helmke has identified 36 separate instances of threats to change the composition of the courts within [Latin America](#) between 1985 and 2009. For example, in 2004 Venezuela, President Hugo Chavez increased the number of justices on the Venezuela Supreme

Court from 20 to 32 in order to consolidate power and **implement socialism**. Shortly thereafter, Chavez began confiscating thousands of private businesses and taking over the previously free press, the financial industry, energy companies, and the agricultural sector. Chavez's successor, Nicolas Maduro, continued these socialist policies, and in 2017, the packed Supreme Court declared the legislature illegitimate and transferred all law-making power to itself. Although the Court was forced to back down after riots ensued, it continued to allow Maduro to rule without consulting the legislature. [**Source:** [Human Rights Watch](#); [www.gretchenhelmke.com](#); [FOX](#)]

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**Q7 ANSWER: E**

**All of the above.**

Roosevelt's attempt to increase the number of

justices in order to protect his New Deal legislation from constitutional challenge was widely regarded as a gross violation of constitutional norms. Members of Roosevelt's own party condemned the plan as a threat to the independence of the judiciary. The Senate Judiciary Committee called it "a needless, futile and utterly dangerous abandonment of constitutional principle" and "an invasion of judicial power such as has never before been attempted in this country." The plan was so unpopular with the American people that the Democrats lost six Senate seats and 71 House seats, as well as a dozen governorships in the subsequent election. Although Roosevelt abandoned his scheme, some politicians today seem not to have learned the lesson that attempts to add justices to the

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Court for political gain undermine the rule of law. [**Sources: The Ashbrook Center; National Constitution Center**]

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**Q8 ANSWER: B**

**No.** Americans do not support increasing the size of the Supreme Court. A survey taken in July 2020 found that only 26 percent of respondents favored increasing the number of justices. “Support for enlarging the court today is about **20 percentage points lower than support**

**for F.D.R.’s 1937 court-packing plan**—a plan so derided that it has long served as a cautionary note” about efforts to mess with the Court, wrote the authors of the survey and accompanying report. A recent Mason-Dixon Poll found that **54% of Americans** (and 54% of independent voters) oppose increasing the number of justices from 9 to 11 or 15. [**Sources: New York Times; First Liberty**]

## WHAT YOU CAN DO:

Speak up! Post the below messages, videos, and graphics to social media and make your voice heard.

Tag us so we can RT/Share your post:

- @IWV (Twitter)
- @IndependentWomensVoice (Facebook)
- @IndependentWomensVoice (Instagram)

Hashtags to include:

#WeNeed9

## VISUALS:

Graphics: [Download](#) these to include with any Twitter, Facebook or Instagram posts.

the situation

### COURT-PACKING AND JUDICIAL INDEPENDENCE

- 1 For more than 150 years, the U.S. Supreme Court has consisted of nine members (eight associate justices and one chief justice).
- 2 Some politicians want to increase the size of the Court, adding justices who support their policy agenda.
- 3 But the Court isn't supposed to take sides on policy debates.
- 4 Adding new justices in an attempt to control the Court will undermine the Court's independence.
- 5 And it will ignite a judicial arms race where each party seeks to add justices whenever it is in power.
- 6 Even Justice Ruth Bader Ginsburg was against increasing the size of the Court.

**Meddling with the size of the Court undermines our system of justice. Protect the judiciary. Stop Court-packing.**

visit [IWF.ORG](http://IWF.ORG) for more on court-packing and judicial independence

iwf.org Independent Women's Forum®

the situation

### NOMINATIONS TO THE U.S. SUPREME COURT

- 1 The Supreme Court is supposed to be above the political fray.
- 2 But elected officials are responsible for the nomination and confirmation of Supreme Court justices.
- 3 Under our Constitution, the president may nominate a justice for the Court whenever a vacancy arises.
- 4 Once the president nominates, the Senate may confirm, reject, or take no action on the nomination.
- 5 The Constitution makes no exception for an election year.

Constitutional and political norms dictate that elected officials may nominate and confirm a justice at any time during their duly-elected terms of office. The American people hold elected officials accountable for this process when they cast their ballots.

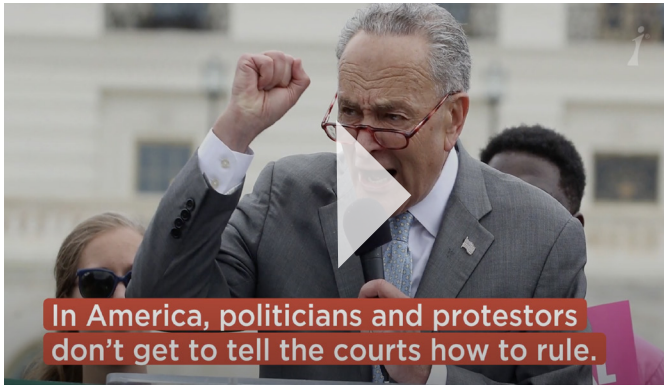
visit [IWF.ORG](http://IWF.ORG) for more on the U.S. Supreme Court

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## Videos (2):

Include these with any Twitter, Facebook or Instagram posts.



Court-Packing and the Rule of Law



A Dangerous Invasion of Judicial Power

## UNICORN FACT CHECK:

### Are Republicans “Stealing” Supreme Court Seats?

“If Leader McConnell presses forward, the Republican majority will have stolen two Supreme Court seats four years apart — using completely contradictory rationales.”

Senate Minority Leader Chuck Schumer, D-N.Y.



## SOCIAL MEDIA POSTS

- #RBG opposed #CourtPacking. #HonorHerWish #WeNeed9
- #TwoTruthsAndALie: #CourtPacking and Judicial Independence  
<https://www.iwf.org/2020/05/05/two-truths-and-a-lie-court-packing-and-judicial-independence/>
- #CourtPacking poses a dire threat to the #SeparationOfPowers.
- Leave the Court alone. #WeNeed9