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SIDEBAR

The Precedent, and Perils, of Court Packing

As the Senate begins hearings for Judge Amy Coney Barrett, some liberals say expanding the size of the Supreme Court would be a fitting response to recent Republican moves in the confirmation wars.

By Adam Liptak

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WASHINGTON — There have been nine seats on the Supreme Court for a long time. Could that change?

The Constitution allows Congress to add or subtract seats, and it has done so several times, though not since 1869. Over the years, Congress has reduced the number of seats to as few as five and increased it to as many as 10. The changes were often made for partisan advantage.

There are contemporary analogies, too. In the past decade, according to a recent study, legislation was introduced in at least 10 state legislatures, most controlled by Republicans, to change the size of their highest courts. In Arizona and Georgia, the proposals succeeded. The two states were controlled by Republicans, and the moves made the courts more conservative.

“At the very least, that practice is in tension with the current Republican claim that court packing is an affront to separation of powers and must be off the table,” said Marin K. Levy, a law professor at Duke and the author of the study, which was published in *The William & Mary Law Review*.

The recent confirmation wars at the federal level have prompted calls to increase the size of the U.S. Supreme Court should Democrats capture the White House and Congress in the election next month.

Some liberals say it would be a fitting response to the Republican blockade of President Barack Obama’s nomination of Judge Merrick B. Garland in 2016, which effectively reduced the number of seats on the court to eight for more than a year on the premise that an opening in an election year should be filled by the new president. The rush now to confirm Judge Amy Coney Barrett, whose hearings begin Monday, before the election has only deepened anger on the left.

“The size of the court has changed six times in American history, and the Constitution clearly gives Congress the right to shape the contours of the court,” said Aaron Belkin, the director of Take Back the Court, which he described as “a campaign to inform public opinion about the urgency of court expansion as a necessary step to restore democracy.”

No president has tried to change the size of the court since 1937, when Franklin D. Roosevelt introduced what came to be known as his court-packing plan. It failed in the immediate sense: The number of justices stayed steady at nine. But it seemed to exert pressure on the court, which began to uphold progressive New Deal legislation.

Still, the experiment discouraged serious discussion of changing the size of the court. Indeed, court packing turned into an all-purpose response to efforts to shape the judiciary; Republicans accused Mr. Obama of it in 2013, when he sought to fill three existing vacancies on the U.S. Court of Appeals for the District of Columbia Circuit.

Popular support for expanding the Supreme Court remains low, which may explain the refusal of the Democratic presidential nominee, Joseph R. Biden Jr., to take a position on it. A survey taken in July, before the death of Justice Ruth Bader Ginsburg last month, found that 19 percent of Republicans and 30 percent of Democrats favored expanding the court.

The authors of an accompanying report — Lee Epstein and James L. Gibson of Washington University in St. Louis and Michael J. Nelson of Pennsylvania State University — said those numbers were telling.

“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 size the court,” they wrote.

But Mr. Belkin said public opinion was shifting fast. “There’s been incredible momentum for court expansion, especially when you consider that two years ago there was zero support for it,” he said.

In the recent survey, there was substantially more support for imposing term limits on Supreme Court justices, but that would probably require a constitutional amendment.

A bipartisan group of former state attorneys general, calling themselves Keep Nine, have proposed a different constitutional amendment, one that would fix the court’s size at nine members.

“We want to do what most everyone probably thought was in the Constitution but was not,” said Paul G. Summers, a former attorney general of Tennessee. The proposed amendment, he said, would help insulate the Supreme Court from politics.

In an interview with NPR last year, Justice Ginsburg said she opposed changing the size of her court. “Nine seems to be a good number,” she said. “It’s been that way for a long time.”

“I have heard that there are some people on the Democratic side who would like to increase the number of judges,” she said. “I think that was a bad idea when President Franklin Delano Roosevelt tried to pack the court.”

Professor Epstein said there were reasons to question that analysis.

“The late Justice Ginsburg may have thought that reform was unnecessary and perhaps even detrimental to the court,” she said. “But that need not be the case. Today’s Americans, Democrats and Republicans alike, who support structural changes to the court may be seeking to enhance the court’s legitimacy, not harm it.”