

Point of View: Democrats shouldn't get mad about U.S. Supreme Court, they need to get even

Posted Jan 10, 2019 at 2:01 AM

Democrats shouldn't get mad over the Republicans' U.S. Supreme Court power grab, they should get even. All they have to do is take over the White House and the Senate in 2020, and enlarge the high court.

With a Democrat in the White House, the vice president would have the tie-breaking vote. And while it requires 60 votes to pass legislation in the Senate, it is possible to change a rule with only a majority.

They shouldn't fear accusations of "court-packing"? The Republicans have already done that. They did it by refusing to give President Barack Obama's nominee Merrick Garland a hearing for 11 months; and then substituting their own nominee, Brent Kavanaugh.

Plus, manipulation of the number of justices is an oft-told tale since the original Judiciary Act of 1789 set the size of the Court at six -- often for partisan reasons.

The first example occurred in 1800, when a lame-duck Federalist majority in Congress reduced the size of the Supreme Court to five in order to prevent President-elect Thomas Jefferson from making an appointment. (That act was repealed a year later.)

The number of justices was raised to seven in 1807, when a seventh federal judicial circuit was created. In those days. The number of justices was then raised to nine in 1837, and finally to 10 in 1866, when a 10th circuit was added.

The number was reduced again by Congress to seven in 1866, to prevent President Abraham Lincoln's despised successor Andrew Johnson from making an appointment. In 1869, with Johnson out of office, the number was raised again to nine.

It is true that an uproar was caused in 1937, when President Franklin D. Roosevelt tried to enlarge the high court because a conservative majority was blocking New Deal legislation. And although the "court-packing" plan was blocked, Roosevelt got the last laugh when several of the justices were persuaded to support FDR's legislation.

So when Democrats, after the 2020 election, move to enlarge the Supreme Court to create a liberal majority, who can blame them? The Republicans paved the way by (1) keeping Garland off the court, and (2) eliminated the filibuster, allowing the Senate to confirm a nomination with a bare majority vote.

If the Republicans want somebody to blame, I would suggest Mitch McConnell.

FRANK ASKIN, DELRAY BEACH

Editor's note: Askin is professor emeritus of the Rutgers University School of Law and general counsel emeritus of the American Civil Liberties Union. His memoir, "Defending Rights," is distributed by Prometheus Books.