Prepared Statement of Gene Schaerr[1]
Before the Subcommittee on Courts of the House Judiciary Committee
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Chairman Issa, Ranking Member Johnson, Chairman Jordan, Ranking Member Raskin, and distinguished members of the Subcommittee, thank you for this opportunity to address recent proposals for "packing" the U.S. Supreme Court—an issue of enormous importance to all who care about the rule of law, as I do and I know you do as well.

In 1983, a well-known Democratic politician pointedly referred to Franklin D. Roosevelt's 1937 attempt at packing the Supreme Court "a terrible mistake" and a "bone-head[ed] idea."[2] He even quoted Congressional Democrats of the FDR era to the effect that Court-packing was "dangerous."[3]

That politician, as you may have guessed, was then-Senator Joe Biden. And not only did he adhere to that position as President, but his position on the "bone-headedness" of Court-packing has been reaffirmed by numerous respected Democratic politicians, including Nancy Pelosi and Dick Durbin.[4] That view has also been supported by every Democratic-appointed Supreme Court Justice that has addressed the issue.

So why exactly is packing the Supreme Court a "bone-headed idea" today? Let me offer five reasons.

The factual justification for Court-packing is incorrect.

First, the Court-packing proposals we hear today are based on an incorrect factual premise—that the Roberts Court is unprecedentedly partisan and consistently conservative. And that incorrect premise remains the animating belief of the activist wing of the Democratic Party, pushing elected leaders to pack the Supreme Court.

This began in response to Justice Amy Coney Barrett's confirmation, when Rep. Alexandria Ocasio Cortez posted on X, "Expand the Court."[5] Senator Ed Markey

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[2] Presidential Nominations to the Civil Rights Commission: Hearings Before the S. Comm. on the Judiciary, 98th Cong. 54–55 (1983) (statement of Sen. Joseph R. Biden, Jr.) ("President Roosevelt clearly had the right to send to the United States Senate and the United States Congress a proposal to pack the Court. . . . [B]ut it was a bone-head idea. It was a terrible, terrible mistake to make . . . .").

[3] S. Rep. No. 75-711, at 23 (1937) (describing Roosevelt's proposal as a "needless, futile, and utterly dangerous abandonment of constitutional principle"); see also Press Release, Sen. James Lankford, Lankford Quotes Then-Senator Biden's Own Words to Oppose Packing the Supreme Court (Apr. 23, 2021).

[4] Sahil Kapur, Democrats Introduce Bill to Expand Supreme Court from 9 to 13 Justices, NBC News (Apr. 15, 2021) (reporting that Speaker Nancy Pelosi said she had "no plans to bring it to the floor" and that Senate Judiciary Chairman Dick Durbin said President Biden's Supreme Court commission was "the right move").

[5] Alexandria Ocasio-Cortez (@AOC), X (Oct. 26, 2020, 9:28 PM), https://x.com/AOC/status/1320881248861126663 ("Expand the court."); see also David Brand, AOC Says Expand the Supreme Court. Meeks, Meng and Jeffries Say

similarly wrote that the Court should be expanded because "Republicans stole the Court's majority, with Justice Amy Coney Barrett's confirmation completing their crime spree."[6] And Democratic political consultant James Carville captured the voice of the activist wing when he recently said, "If the Democrats win the presidency and both houses of Congress, I think on day one … they should expand the Supreme Court to 13"—adding, with an expletive, that Republicans should "[e]at our dust."[7]

These advocates for Court-packing focus on decisions they don't like, such as the Court's opinion in *Citizens United v. FEC*, which recognized First Amendment limitations on the government's ability to curb or regulate political speech.[8] They're also incensed by the Court's decision in *Dobbs v. Jackson Women's Health,*[9] which overruled *Roe v. Wade*,[10] returning the ability to regulate abortion to the States. And they claim the Court has "gutted" the Voting Rights Act in such decisions as *Louisiana v. Callais*.[11] And yes, each of these decisions was reasonably seen as favoring conservative positions often espoused by Republicans.

But in reality, the Roberts Court – often joined by some of President Trump's own nominees – has also ruled *against* Republican or conservative interests in several hotly contested cases.

A recent example was the Court's decision in the *Learning Resources* case, striking down most of the tariffs imposed by President Trump.[12] Another was the Court's decision in *Obergefell v. Hodges*, which ruled that States are constitutionally forbidden from limiting the definition of marriage to man-woman unions.[13] Then there was *Bostock v. Clayton County*, which extended Title VII's protections against discrimination to gay, lesbian and transgender people.[14] And don't forget the Court's earlier decision in *NFIB v. Sebelius*, upholding the "individual mandate" that was the heart of Obamacare.[15]

They Are Open to Dramatic Reforms, Queens Daily Eagle (Oct. 27, 2020), https://queenseagle.com/all/aoc-says-pack-the-supreme-court-meeks-meng-and-jeffries-say-they-are-open-to-dramatic-reforms.

[6] Press Release, Sen. Edward J. Markey, Expand the Supreme Court: Senator Markey and Reps. Nadler, Johnson, and Jones Introduce Legislation to Restore Justice and Democracy to Judicial System (Apr. 15, 2021), https://www.markey.senate.gov/news/press-releases/expand-the-supreme-court-senator-markey-and-reps-nadler-johnson-and-jones-introduce-legislation-to-restore-justice-and-democracy-to-judicial-system.

[7] Alexander Hall, Carville Tells Dems to Quietly Prepare Power Grab with D.C., Puerto Rico Statehood and Supreme Court Packing, Fox News (Apr. 17, 2026), https://www.foxnews.com/media/carville-tells-dems-quietly-prepare-power-grab-dc-puerto-rico-statehood-supreme-court-packing.

[8] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

[9] *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

[10] *Roe v. Wade*, 410 U.S. 113 (1973).

[11] See Press Release, Sen. Mazie K. Hirono, Hirono Statement on Supreme Court Further Gutting Voting Rights Act (Apr. 29, 2026) (describing Louisiana v. Callais as "further gutting" the Voting Rights Act); see also Sen. Raphael Warnock, "The Democracy Doesn't Belong to the Politicians": Warnock Stands with Faith Leaders to Decry Gutting of Voting Rights Act (May 11, 2026) (describing the Supreme Court's decision in Louisiana v. Callais as "gutting" the Voting Rights Act).

[12] *Learning Res., Inc. v. Trump*, 607 U.S. ___ (2026).

[13] *Obergefell v. Hodges*, 576 U.S. 644 (2015).

[14] *Bostock v. Clayton County*, 590 U.S. 644 (2020).

[15] *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

Politically, each of these decisions favored Democratic and progressive interests at the expense of conservative interests. And therefore the claim that the Roberts Court is somehow in the pocket of conservatives or Republicans simply does not square with that Court's record.

Court-packing rests on an unrealistic predictive judgment about how additional Justices would vote.

Another reason Court-packing is a "bone-headed" idea is that it rests on an erroneous *predictive* judgment about how newly appointed Justices are likely to rule in controversial cases.

While the House of Representatives is, by design, a sensitive barometer of public opinion – in which Members must face the voters every two years – the Founders used an opposite design for the Supreme Court. With lifetime tenure, the Founders deliberately insulated Justices from political pressure and majoritarian impulses. This has given Justices, once installed at the apex of the judiciary, to exercise their independence in ways that continue to surprise observers.

Consider Earl Warren, the Republican California governor appointed by President Eisenhower in 1953 to serve as Chief Justice. At the time of his death in 1974, Warren was described by *The New York Times* as a "liberal reformist judge." *The Times* noted: "Privately, President Eisenhower made clear in later years he had been surprised and not always pleased by the judicial record of the man he moved from the governorship of California to the Supreme Court."[16]

Or consider how key votes in favor of abortion in *Roe v. Wade* came from Justices appointed by the conservative Nixon, while one of the most vocal dissents was from Justice Byron White, appointed by the more liberal Kennedy. Similarly, many conservatives rued the day they supported President Gerald Ford's nominee, John Paul Stevens, as well as President George H.W. Bush's first nominee, David Souter. And President Trump has famously expressed frustration with the votes of some of his nominees—most recently in the tariff decision.

To be sure, Justices Elena Kagan and Sonia Sotomayor, both nominated by President Barack Obama, have been relatively more reliable in favoring the positions advanced by the party of the president who appointed them. But that has not kept them from siding with the more conservative majority in a number of hotly contested cases. The most recent example was this very Term in *Chiles v. Salazar*, in which they both—correctly in my view—supported a Christian counselor who challenged Colorado's ban on "conversion therapy."[17]

[16] John D. Pomfret, Earl Warren, 83, Who Led High Court in Time of Vast Social Change, Is Dead, N.Y. Times (July 10, 1974), https://www.nytimes.com/1974/07/10/archives/earl-warren-83-who-led-high-court-in-time-of-vast-social-change-is.html.

[17] *Chiles v. Salazar*, 146 S. Ct. 1010 (2026).

In short, when it comes to nominees to the Court, the SEC-approved disclaimer applies: *Past performance is no guarantee of future results*. Even if the Court-packers got their way—and expanded the Court to 13—it would take only one "surprise," like Justice White, to swing the Court back to a majority that most progressives would find too conservative for their tastes. Accordingly, to have sufficient assurance of a Court willing to rule in their favor even most of the time, progressive majorities in Congress would probably have to expand the Court even more dramatically—probably to 15 or even 18. And even then there would be no assurance the Court majority would consistently vindicate their interests.

The Court packers ignore the inevitable effect on the incentives of the other side once they regain power.

The most bone-headed assumption of the court-packers—the third major flaw in their argument—is that one side or the other could ultimately win this judicial arms race. This optimism overlooks the principle of mutual assured destruction, with both sides and the American system as the ultimate target. Once a precedent is set, the other side is likely to resort to the same tactic the next time it's in power.

For example, one might assume that, if and when Democrats next sweep the White House and Congress, they might expand the court to 13 and call it a day. But Republicans likely wouldn't be satisfied with that outcome. With the election of the next Republican president and Congress after that, advocates would likely seek at least three more Justices to swing the Court back to the right.

This arms race could continue until the U.S. Supreme Court looks less like a group of legal scholars who, like Antonin Scalia and Ruth Bader Ginsburg,[18] were fierce but always genial debaters, and more like a college of partisans. Indeed, they could well become a whole busload of jurists who, because of their number, would require a dramatic widening of the existing Supreme Court Building on One First Street to accommodate their new, expanded bench. (Or perhaps the enlarged Court could make good daytime use of the White House's new ballroom.)

Calls for Court-packing distract from the real work of building the legislative coalitions needed to achieve each side's objectives.

The fourth fatal problem in the Court-packers' argument is that, like a magician's deception, it deflects attention and focus from the critical role this body and other legislative bodies can and should play in setting policy for the Nation.

Consider some of the recent Supreme Court decisions that seem to provoke the most ire in progressive circles. The most recent—*Callais*—was an interpretation of a statute, the Voting Rights Act. This body, therefore, could effectively reverse that decision

[18] Remarks for the Second Circuit Judicial Conference 8–9 (May 25, 2016), https://www.supremecourt.gov/publicinfo/speeches/remarks%20for%20the%20second%20circuit%20judicial%20conference%20may%2025%202016.pdf (quoting Justice Scalia as saying, "I attack ideas. I don't attack people. Some very good people have some very bad ideas.")

through a simple amendment, as it has done in response to prior Court interpretations of that same law.[19]

Or take *Dobbs*—the abortion decision. Many progressive and even not-so progressive states have already effectively neutered that decision within their boundaries simply by passing laws protecting abortion to an equal or greater extent than *Roe* once did. Whatever conservatives might think of the outcome, it's the political process at work.

And of course the same point holds on the other side: If Republicans don't like the tariff decision in *Learning Resources* or the LGBT protections adopted in *Bostock*, or the approval of the individual mandate in *NFIB v Sibelius,* the productive response is not to try to change the makeup of the Court that issued those decisions. The productive response is to develop the political allies and muscle necessary to amend the underlying statutes.

The point is further illustrated by the history of Franklin D. Roosevelt's Court-packing debacle. After the Supreme Court invalidated several New Deal programs during the 1930s, President Roosevelt made proposals that would have the practical effect of adding up to six additional Justices to the Court. Democrats who controlled the Senate Judiciary Committee released a report describing FDR's proposal as a "needless, futile, and utterly dangerous abandonment of constitutional principle."[20]

In their rebellion against an immensely popular president basking in his recent re-election, Democrats in Congress underscored the importance of their standing as the Article I institution. Senator Biden would later illustrate this point by quoting Arthur Schlesinger's observation that President Roosevelt's plan would likely have succeeded if the United States had a parliamentary system. But, as Schlesinger wrote, "the Founders envisioned a different kind of legislature, an independent institution that would think for itself."

What is notable about the Roosevelt history, then, is not merely that Roosevelt lost. It is that so many of his congressional allies thought for themselves. They ultimately understood that undermining the independence of the Supreme Court would have cheapened and devalued the independence of the Congress as well. They realized it is better to engage in traditional politics, to settle the issues of the day in Congress, than to rely on the Supreme Court to do it for them.[21]

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[19] See *City of Mobile v. Bolden*, 446 U.S. 55, 60–61, 66–74 (1980) (plurality opinion); Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified as amended at 52 U.S.C. § 10301); *Thornburg v. Gingles*, 478 U.S. 30, 35, 43–44 (1986); see also *Veasey v. Abbott*, 830 F.3d 216, 243–65 (5th Cir. 2016) (en banc).

[20] S. Rep. No. 75-711, supra note 2, at 23.

[21] Ironically, as my friend and legal scholar Ilya Shapiro has noted, "By mid-1941, just four years after court-packing failed, only two Justices remained whom Roosevelt hadn't appointed – and one of those, Harlan Stone, he had elevated to Chief Justice. In a very real sense, then, FDR packed the court the old-fashioned way, by maintaining control of the White House and Senate and waiting for natural attrition." Ilya Shapiro, Don't Pack the Court, Cato Inst. (Mar. 12, 2021), https://www.cato.org/commentary/dont-pack-court.

Court-packing would erode public trust in the Court and, ultimately, in the entire federal Government.

The final flaw in the Court-packers' approach is the most important, namely, the erosion in the public's trust in the Court. As Justice Breyer succinctly put it in 2021, in a lecture at Harvard Law School, "Structural alteration motivated by the perception of political influence can only feed [the perception that the Supreme Court is political], further eroding that trust."[22]

Similarly, in 2019, the late Justice Ruth Bader Ginsburg told NPR: "Nine seems to be a good number. It's been that way for a long time. I think it was a bad idea when President Franklin Roosevelt tried to pack the Court. If anything, you would make the Court look partisan."[23]

These Justices' comments honor the integrity of the American judicial system. As a former clerk to Justices Warren Burger and Antonin Scalia, I learned, as have so many others, to hold the integrity of the Court somewhat in awe. For much of American history, ever since 1803 when *Marbury v. Madison* defined the role of the Supreme Court, it has occupied a unique position in the American system as a neutral arbiter of constitutional principle. While it has not always filled that role with perfection, I believe it has done so the vast majority of the time.

The Court, moreover, possesses neither the power of the purse nor the power of the sword. What it has is the prestige of impartiality. Its composition is influenced by elections, but Justices strive to remain above partisanship and generally refrain from commenting on controversial matters. The Court's authority ultimately depends on public confidence in its legitimacy as an institution dedicated to applying the law according to neutral principle rather than advancing purely political interests.

Confirmation battles already regularly resemble political campaigns, and many Americans view the confirmation process and Justices through ideological lenses. Yet court-packing would not reduce politicization. It would dramatically increase it.

In a democracy, the legitimacy of any institution rests on trust, which is always conditional and fragile. The Court has survived wars, economic crises, social upheavals, and bitter political disputes because Americans have generally accepted that judicial decisions should not be met with efforts to alter the structure of the Court whenever one party dislikes its rulings.

The intensified partisanship of such a new arrangement would become clear with every new appointment. Supreme Court vacancies currently occur unpredictably through retirement, death, or resignation. Political actors may fight like a pack of wolves over an open nomination, but the structure of the institution itself remains stable. Court-packing

[22] Press Release, S. Comm. on the Judiciary, Sitting Supreme Court Justices Denounce Court Packing. Will Judge Jackson? (Mar. 22, 2022), https://www.judiciary.senate.gov/press/rep/releases/sitting-supreme-court-justices-denounce-court-packing_-will-judge-jackson.
[23] Id.

would take a process of turnover that is predicated on chance and turn it into a process that is the result of political calculation.

Every election would become a battle over how many Justices should sit on the Court and which party should control those seats. Judicial independence would suffer because the public would increasingly perceive Justices not as interpreters of law but as political operators, as if they were running for office themselves. And those jurists who accepted these terms might well be compromised by this process, thinking of themselves in partisan terms rather than as independent judicial thinkers.

It is one thing for the Court to be perceived by some as a partisan entity. Once it actually became a partisan entity, the reputation of the Court would suffer in a way it never has before. This would further the coarsening of our national dialogue, further encouraging the view that the law is not a neutral arbiter, but a weapon to be wielded by the majority against the minority. Such a move would further reduce respect for the rule of law, replacing the words on the west pediment of the Court, "Equal Justice Under Law," with "*Cui bono*?"

Imagine a Court considering a politically sensitive case involving abortion, gun rights, religious liberty, executive authority, election law, or free speech. Or imagine the adjudication of *Bush v. Gore* in such an environment. If Justices know that adverse rulings could trigger efforts to add new members to the Court, the pressure on judicial decision-making becomes obvious. And even if no Justice consciously changes a vote due to such pressure, the public will still perceive that their votes are influenced by threats of institutional retaliation.

Expanding the Court, moreover, would not reduce ideological conflict. It would spread the infectious contagion of partisanship to the judiciary itself. This could feed public cynicism that Washington is nothing but pure political theater. And, since the Supreme Court oversees and can overturn lower courts, the perception of partisanship would filter downward from the 13-Justice Court through the Circuits and the whole judicial branch.

The Court is the ultimate protector of our most basic rights—freedom of speech, religious liberty, privacy, criminal procedure protections, voting rights, restraints on executive power, and more. A constitutional democracy requires institutions that citizens regard as legitimate, even when they disagree with specific outcomes. Court-packing risks weakening that foundation of a democratic society.

Conclusion

Changing the rules has become a favorite tool of tyrannies around the world as a way to impose greater control while maintaining the façade of a democracy. For example, in 2004 under President Hugo Chavez, the Venezuela National Assembly dominated by that caudillo's allies expanded that nation's Supreme Tribunal of Justice from 20 to 32

members. With these new judges, and the addition of replacements for resignations, the court usually rubber-stamped whatever Chavez and his successor, Maduro, wanted.[24]

The same thing happened during the reign of Robert Mugabe in Zimbabwe. When that country's Supreme Court ruled against the government's land reform policies—which essentially took property from white citizens and gave it to black citizens—the government expanded the court from 5 to 8 justices, adding three new loyalists.[25] And in Hungary, former Prime Minister Viktor Orbán maintained his long hold on power in part by increasing the size of Hungary's Constitutional Court, while lowering the retirement age to push out judges the government did not want. Packed with loyalists, the Hungarian court propelled the political fortunes of Orbán's Fidesz party for years.[26]

These are not the machinations of great nations. And we cannot go down that path without risking the health of our republic. Which calls to mind the well-known event at the end of the Constitutional Convention in 1787, in which a Philadelphia socialite named Elizabeth Powel asked Benjamin Franklin, "Well, Doctor, what have we got, a republic or a monarchy?" And you recall the famous reply: "A republic—*if* you can keep it."[27] Fortunately, we've managed to keep our Republic for nearly 250 years since the Declaration of Independence in 1776, through a Civil War, two World Wars, and a Cold War. But let's not put all that at risk through a "boneheaded" Court-packing scheme.

That's not to say we shouldn't be critical of the Court when we disagree with its rulings. Throughout our history, citizens have rightly criticized the Court and sought to reverse its decisions through legislation and constitutional amendments – even as they accepted the legitimacy of those rulings in the interim. But expanding the Court to achieve a momentary partisan advantage would deepen politicization, invite retaliatory escalation, undermine judicial independence, weaken public confidence, and destabilize a stabilizing institution whose authority depends on its perceived legitimacy.

As my mentor and former boss, the late Antonin Scalia, wrote, "A Bill of Rights that means what a majority wants it to mean is worthless." And the same would be true of a Supreme Court whose size has been manipulated in hopes of reversing rulings with which one faction or another disagrees.

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[24] Venezuela: Judicial Independence Under Siege, Human Rights Watch (June 16, 2004), https://www.hrw.org/news/2004/06/16/venezuela-judicial-independence-under-siege; see also Venezuela: Chávez Allies Pack Supreme Court, Human Rights Watch (Dec. 13, 2004), https://www.hrw.org/news/2004/12/13/venezuela-chavez-allies-pack-supreme-court.

[25] U.S. Dep't of State, Zimbabwe: Country Reports on Human Rights Practices—2002 (Mar. 31, 2003), https://2001-2009.state.gov/g/drl/rls/hrrpt/2002/18234.htm.

[26] Johan Norberg, How Viktor Orbán's Hungary Eroded the Rule of Law and Free Markets, Cato Inst. (Mar. 31, 2026), https://www.cato.org/policy-analysis/how-viktor-orbans-hungary-eroded-rule-law-free-markets#dismantling-barriers.

[27] See September 17, 1787: A Republic, If You Can Keep It, Nat'l Park Serv. (Sept. 22, 2023), https://www.nps.gov/articles/000/constitutionalconvention-september17.htm; Julie Miller, "A Republic if You Can Keep It": Elizabeth Willing Powel, Benjamin Franklin, and the James McHenry Journal, Libr. of Cong. Blogs (Jan. 6, 2022), https://blogs.loc.gov/manuscripts/2022/01/a-republic-if-you-can-keep-it-elizabeth-willing-powel-benjamin-franklin-and-the-james-mchenry-journal/.