

# History of the Supreme Court Configuration, Nomination & Confirmation

A golden gavel is positioned diagonally across the center of the image, resting on a golden sound block. In the background, a golden statue of Lady Justice is visible, holding a scale of justice and a sword. The scene is set against a dark blue background with a golden diagonal band.

Hon. Phillip B. Journey  
Div.1 18<sup>th</sup> Judicial District  
Wichita Pachyderm Club  
10/16/20

# A Constitutional Creation



- Article III of the US Constitution
- “The judicial Power of the United States, shall be vested in one Supreme Court,…”
- Our Nation’s Founding Fathers installed one of the checks in our system of checks and balances

## Trusting the Finite Wisdom of Congress

- “...and in such inferior Courts as the Congress may from time to time ordain and establish....”
- Congress has the authority to create lower Courts and define their jurisdiction by Statute
- Congress by legislative Act modified the Court several times





# Judiciary Act of 1789

## Process of Creation

- Signed into law by President George Washington on September 24, 1789
- Established the structure and jurisdiction of the federal court system and created the position of Attorney General.
- Supreme Court, 5 Assoc. Justices & 1 Chief Justice
- Justices were required to ride the Circuit and try cases.



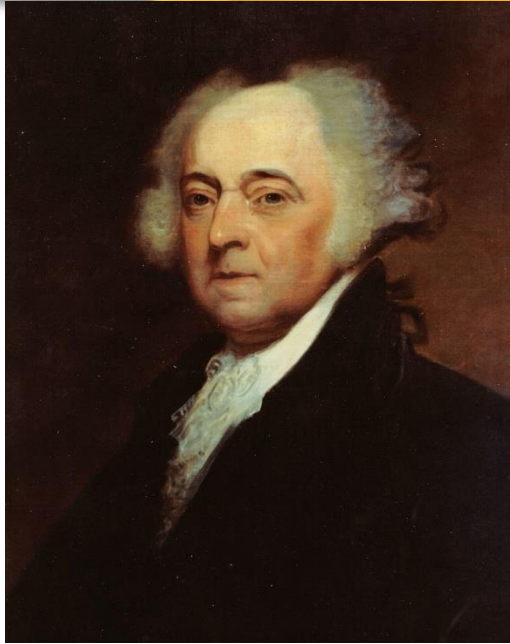
# The Election of 1800

- Jefferson is elected by the House of Representatives on the 36<sup>th</sup> ballot.
- Lifelong friends turned into opponents lead to unprecedented acrimony.
- Aaron Burr and Jefferson were on the same ticket, they tied in electoral votes
- Hamilton a Federalist persuaded 2 to switch sides voting for Jefferson and Burr was Vice President.

# Judiciary Act of 1801

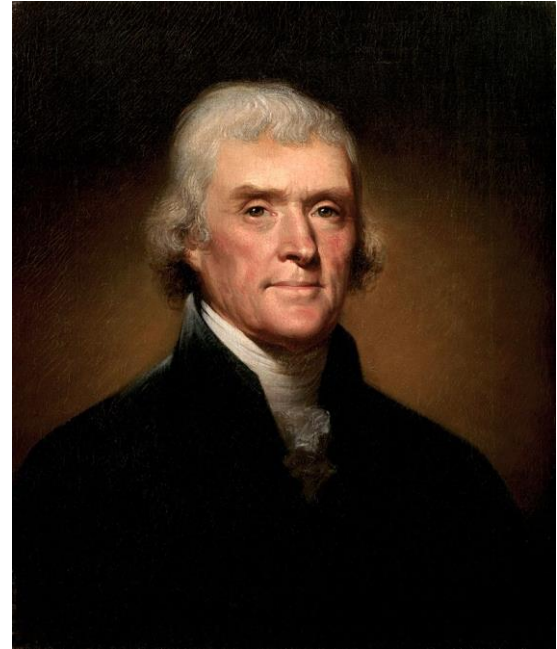
- Was commonly referred to as the “Midnight Judges Act”
- President Adams was up till midnight filling judicial appointments for newly created Circuit Judge positions
- Reduced the number of Assoc. Justices to 4
- Enacted by Lame Duck Congress
- They did not want to give Jefferson the opportunity to make a nomination





President John Adams was defeated by his Vice President Thomas Jefferson

Jefferson could not make a nomination to the Supreme Court until 2 left office. Sitting Justices were appointed for life.



The new Circuit Judges were supposed to relieve the Justices of the burden of riding the Circuits

A golden statue of Lady Justice, blindfolded and holding a scale of justice, is visible in the background of the top banner.

# March 4, 1801

- Jefferson inaugurated, Adams did not attend
- Democrat-Republican majority sworn into Congress
- They went to work undoing Adams and the Federalists' legislation
- The famous case Marbury v. Madison came from this chaos



# Judiciary Act of 1802

- Enacted April 29, 1802
- Cancelled the reduction of Assoc. Justices
- 1807 7<sup>th</sup> Circuit added and another Justice to ride it. Others were put back on the road too.





## Federalist Assoc. Justice Samuel Chase Impeached

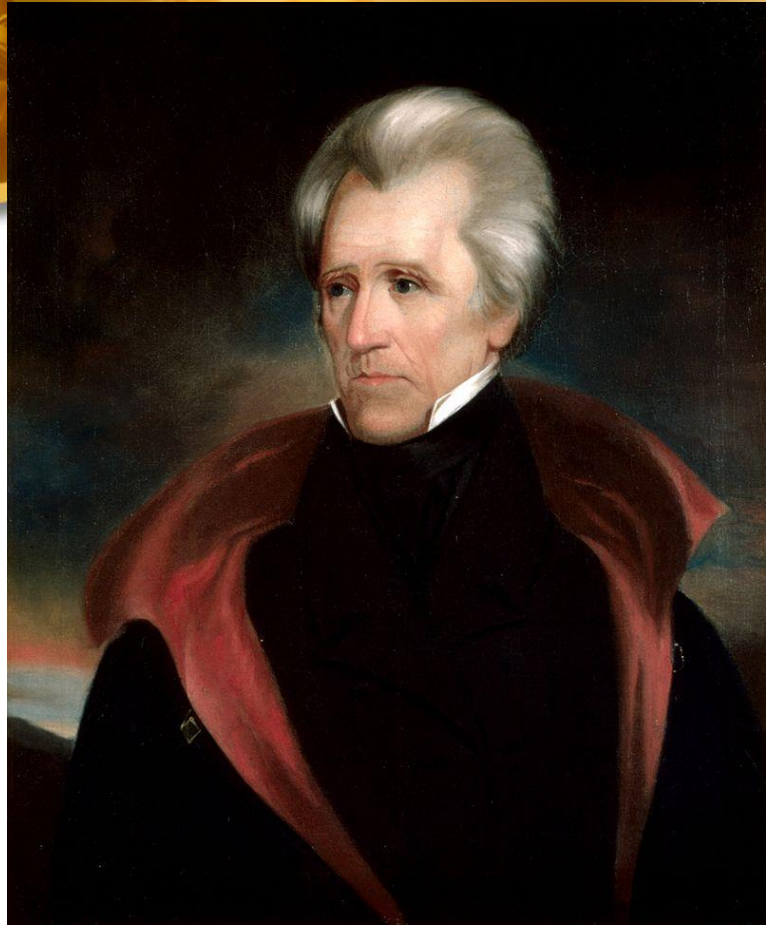
- Chase is the only Justice to be impeached
- He publicly attacked the repeal of the Midnight Judges Act in 1803
- Jefferson said: "Ought the seditious and official attack...[on] our Constitution...go unpunished?"
- Chase was acquitted in the Senate

# Andrew Jackson

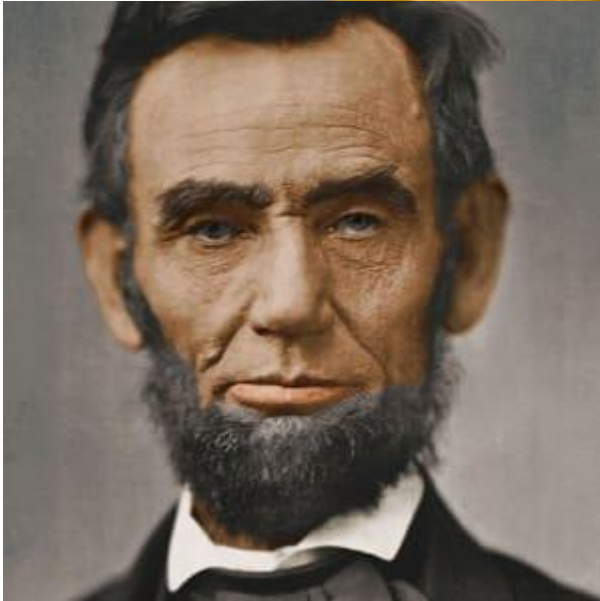
2 States added to the Union, Arkansas and Minnesota

Their addition required the creation of 2 new Circuits and 2 new Justices

Now the Court had 9 members in 1837



# Abraham Lincoln



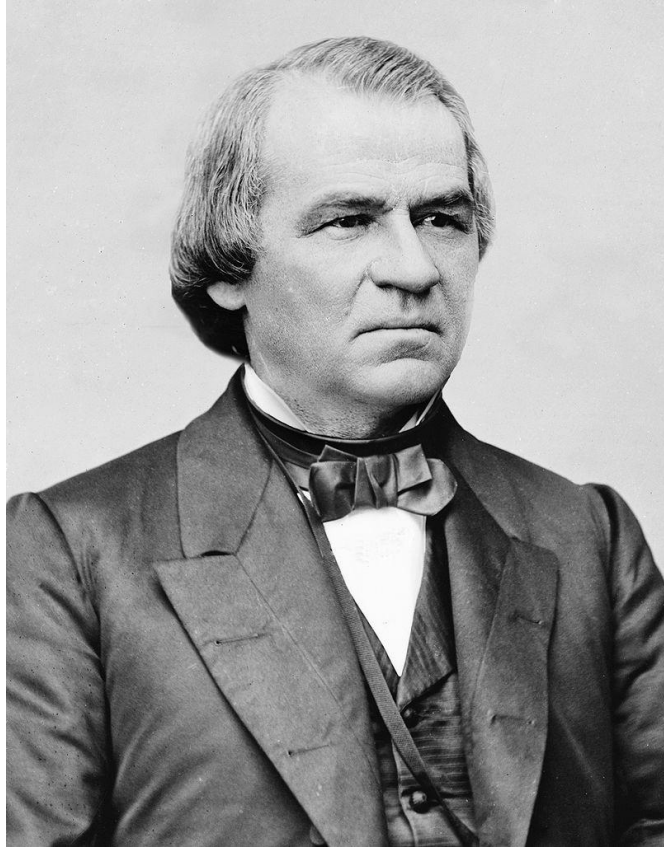
The election of 1860 was a 4 way race. Lincoln won with 180/303 electoral votes. He received less than 40% of the popular vote.

During the Civil War another Circuit was added as a result of the Kansas-Nebraska Act

The Court was expanded to 10 justices in 1863

He was assassinated on April 14, 1865

# Andrew Johnson



- With the Assassination of Lincoln, the Presidency fell upon an old-fashioned southern Jacksonian Democrat with a pronounced states' rights view. Although an honest and honorable man, Andrew Johnson was one of the most unfortunate of Presidents. Arrayed against him were the Radical Republicans in Congress, brilliantly led and ruthless in their tactics. Johnson was no match for them.



## Lincoln's 2<sup>nd</sup> Vice President

- Johnson remained in the Senate even when Tennessee seceded, which made him a hero in the North and a traitor in the eyes of most Southerners. In 1862 President Lincoln appointed him Military Governor of Tennessee, and Johnson used the state as a laboratory for reconstruction. In 1864 the Republicans, contending that their National Union Party was for all loyal men, nominated Johnson, a Southerner and a Democrat, for Vice President.

## Johnson carried out Lincoln's Policies

- President Johnson proceeded to reconstruct the former Confederate States while Congress was not in session in 1865. He pardoned all who would take an oath of allegiance, but required leaders and men of wealth to obtain special Presidential pardons





## Republican members of Congress became apoplectic

- Congress met in December 1865, most southern states were reconstructed, slavery was being abolished, but “black codes” to regulate the freedmen were beginning to appear.
- They gained the support of northerners who were dismayed to see Southerners keeping many prewar leaders and imposing many prewar restrictions upon former slaves.



# Judicial Circuits Act of 1866

- Johnson signed the bill
- Reduced the Court to 6 Associates and the Chief Justice
- Setting Justices remained in office
- They did not want Johnson to have the opportunity to make a nomination
- The pending nomination of Henry Stanbery to the 10<sup>th</sup> seat was nullified





# Judiciary Act of 1869

- Changed the composition of the Court to 8 + 1
- Justices still had to ride the Circuit and conduct trials
- Prior to enactment the Court never dropped below 9
- Subsequently no further enactments modified the Court's number of Justices
- Judiciary Act of 1891 eliminated Circuit court riding

# FDR and the New Deal



Black Monday May 27, 1935

3 weeks after the New Deal railroad pension legislation was declared unconstitutional 3 more Acts were declared unconstitutional. Due primarily to poor drafting.

November 3, 1936 Kansas Governor Alf Landon was defeated 523 to 8 electoral votes. As goes Maine so Goes Vermont.

The top of the slide features a golden banner with a background image of a Roman Emperor statue. The statue is shown from the chest up, wearing a crown and holding a scepter. The banner is slightly curved and has a gradient from light to dark gold.

# There are no Secrets in Washington

- Prior to public release, Sen. Borah, at a Whitehouse dinner saw Roosevelt chatting with 2 Justices and observed, “That reminds me of the Roman Emperor who looked around the dinner table and began to laugh when he thought how many of those heads would be rolling on the morrow.”

## Consultation is better than Courtesy

- Roosevelt sent a aide to advise Justice Brandeis of the court packing bill.
- Upon reading the release he thanked the president for the courtesy and said, “tell your president, he has made a great mistake. All he had to do was wait a little while. I’m sorry for him.”





## February 5, 1937

President Roosevelt announces his judicial reform bill

March 29, 1937 the 9<sup>TH</sup> Fireside Chat

Roosevelt addressed the “Judicial Procedures Reform Act”

- Republicans wisely did not comment. Democrats became a house divided
- Legal observers speculated the Court would strike down the Social Security Act and the National Labor Relations Act
- The Court was the most elderly ever
- The book, “The Nine Old Men” was moving up the bestsellers list



# What they Said vs. what they Thought

Attorney General Homer Cummings said to Roosevelt after Black Monday.

“...they mean to destroy us...We will have to find a way to get rid of the present membership of the Supreme Court.”

- Roosevelt tried to create and then capitalize on the public’s concern regarding Justices’ age and the small number of cases reviewed by the Court.



## Congress after the 1936 Election

For Republicans it is hard  
to imagine

In the House they were  
outnumbered 4 to 1

In the Senate it was worse  
84 Democrats

16 Republicans

They were wise to sit this  
one out

- Time Magazine and others predicted “the bill would be passed without serious difficulty.”
- The Bill allowed the appointment of a new judge for each sitting judge that was over 70. The sitting judge could not be removed as they are appointed for life. They would be a nullity.





# The Opposition began to mobilize

- The issue dominated the news, the radio and filled the newsreels
- Rallies were held across the country
- Members of Congress were deluged with letters and telegrams
- Both sides believed the country was at stake.

# The Proponents

- Judges, appointed for life, are able to ignore popular will
- They declare unconstitutional programs vital to the well being of the Nation and
- Nullify the laws passed by Congress and the President who were elected by the People



# The Opponents

- Argued Roosevelt's Court packing plan would undermine the independence of the Judicial Branch
- It would create a precedent that could be carried farther by Presidents that followed
- Roosevelt's true motive was to configure the Court to support his programs



A golden statue of Lady Justice, blindfolded and holding a scale, is visible in the background of the title banner.

# Roosevelt Failed to plan legislative strategy

- The House of Representatives was generally the chamber of origin, they refused to hold hearings
- In the Senate the Vice President in the well of the chamber held his nose and gave a thumbs down.
- The Senate held hearings, the bill was in committee over 150 days

# Who Blinked?



- There is some dispute: While the bill was in committee one Justice went over to the New Deal side. In March the Court upheld a Washington Minimum wage law nearly identical to a New York law overturned the month before. 2 weeks later
- The Court upheld the National Labor Relations Act
- Then they upheld the Social Security Act

# What is Said



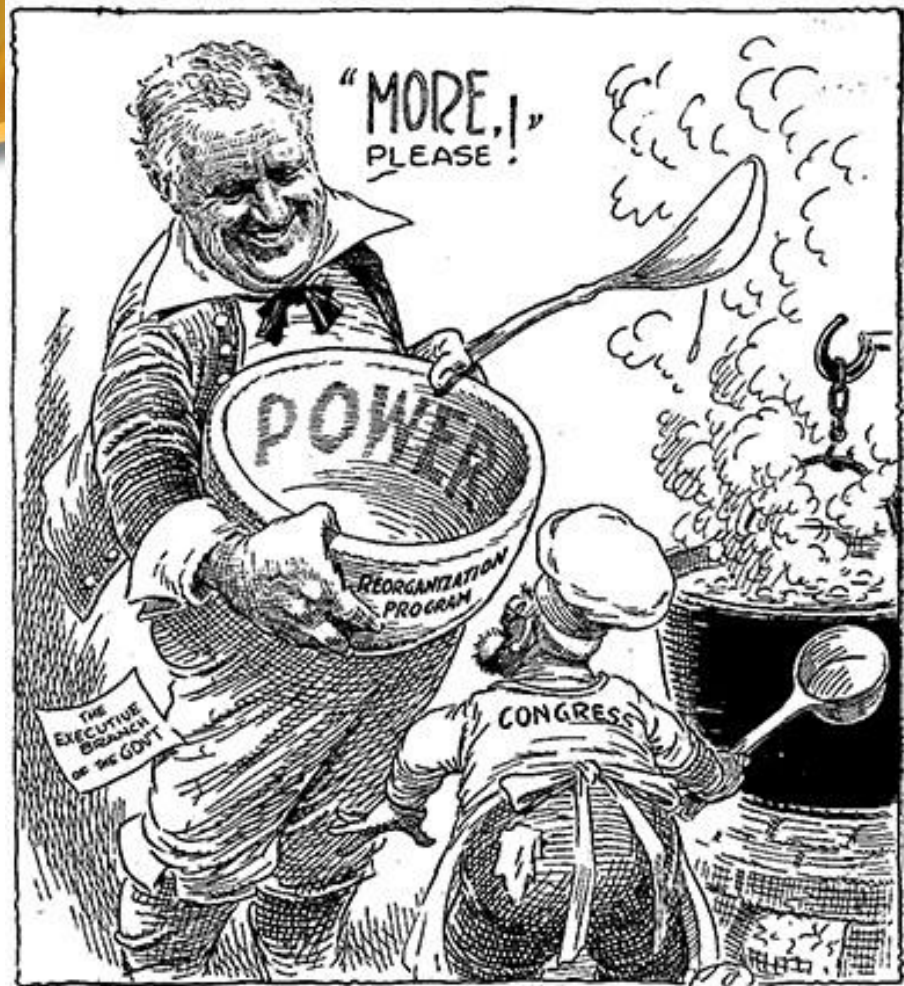
- When Justice Owen Roberts flipped it was dubbed, “the switch in time that saved nine.”
- Others argue he made up his mind much earlier and his vote was consistent with previous opinions. We will never know.
- He burned all his papers upon retirement



- To FURNISH THE SUPREME COURT PRACTICAL ASSISTANCE -

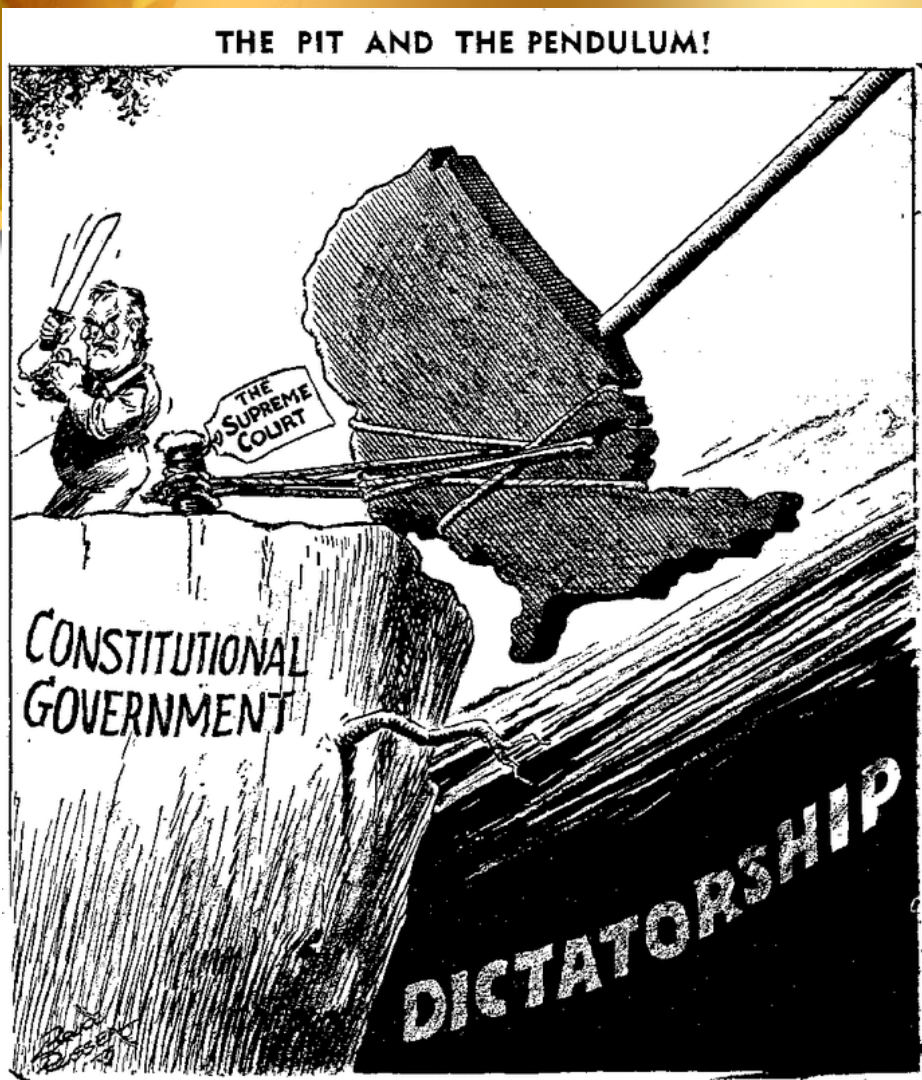


# OLIVER TWIST




Many editorial writers  
were opposed

They knew the age  
and case backlog  
issues were a ruse.  
That provided a line of  
attack that required  
Roosevelt to use a lot  
of political capital.





A faint, golden-toned image of the Statue of Liberty is visible in the background of the top section of the slide.

Roosevelt frequently said, he had lost the battle but won the war.

- He got what he wanted a court that sustained his programs and orders. By election of 1940 2 justices died and 3 retired. Roosevelt replaced them all. The period from that election until Earl Warren was appointed by Eisenhower has been described as,
- “Incipient Liberalism”

# The Last 50 Years



Many say Republican nominees have on the whole received a rougher time

Biden was Chair of Judiciary in the Senate  
Pres. Carter did not get to nominate a Justice

- Robert Bork: Hearing so unfair a new verb is created
- Clarence Thomas: called it a lynching
- Senate rules eliminated in a Tit-for-Tat as parties change power of the majority




# The Real Story

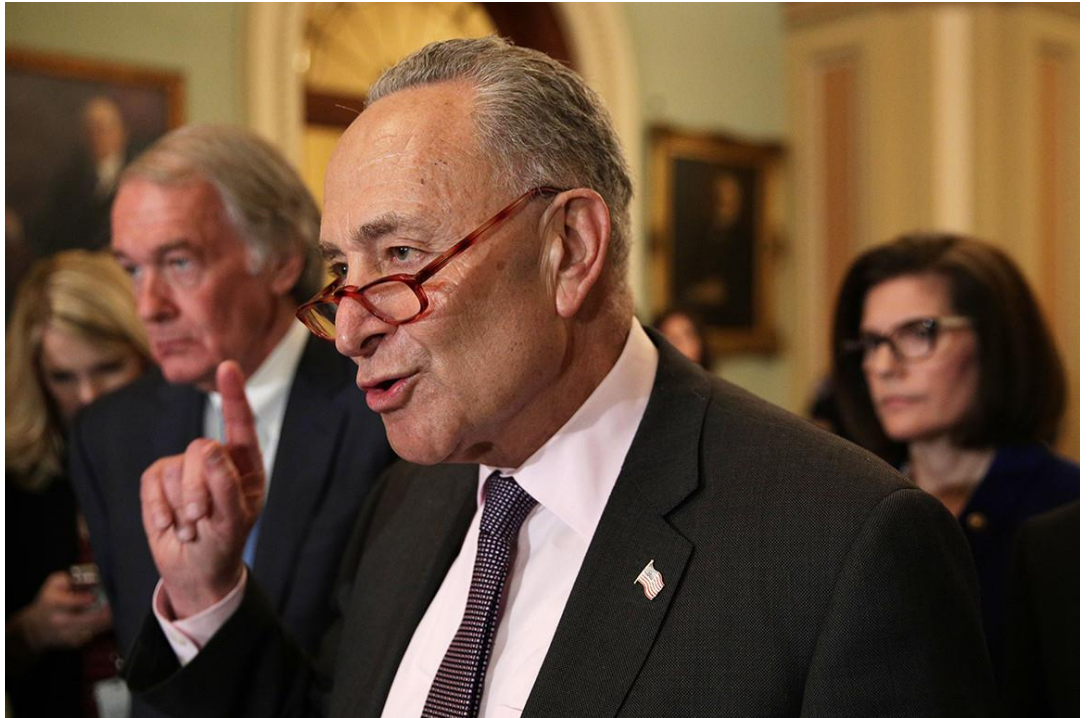
Under Obama, the then Senate Majority leader Charles Schumer lead the majority to eliminate the filibuster rule for the confirmation of trial judges.

For Trump's nominees Senate Majority Leader McConnell lead the majority to eliminate the filibuster for Gorsuch and Kavanaugh

- Unwinding the rules of the Senate
- Eliminating the mechanics of the body that by the numbers require some minority party support



As Schumer is  
poised to be  
Majority Leader  
again, he is  
threatening to  
eliminate the 60  
vote rule  
altogether.



## New Republic May 10, 2018

- Scott Lemieux wrote:...the decisive nominations would be a product of a Republican Senate refusing to allow a president who won two majorities to fill a vacancy, and then confirming multiple nominees of a president who lost the popular vote by a substantial margin. Court-packing is bad, but allowing an entrenched majority on the Supreme Court to represent a minority party that refuses to let Democratic governments govern would not be acceptable or democratically legitimate, either.





## Court Packing: [Counterpunch.org](https://www.counterpunch.org)

- Richard E. Rubenstein wrote on 07/09/2018
- “Suppose that in the next two national elections, the Democrats take control of Congress and the Presidency. If they can free themselves from excessive reverence for the Court – a big “if” – it will be a relatively simple matter to increase the number of Supreme Court Justices to a number sufficient to insure implementation of a progressive legal agenda.”

# A.K. (after Kavanaugh)



- Mother Jones March 22, 2019, Pema Levy
- Buttigieg is quoted, “In some ways, it’s no more a shattering of norms than what’s already been done to get the judiciary to where it is today.”, in response to a court packing question.

## Will Barrett be their tipping point?

- Levy describes the internal debate,
- “To what degree is the court is a threat to Democrats’ progressive policy goals?”
- After confirmation of Barrett the court will be seen as 6-3. They will know there will almost always be 5







## Like Lemmings

- CNN Town Hall 03/10/19 Beto O'Rourke said he was open to Supreme Court Reform. Warren, Gillibrand and Harris quickly followed.
- Biden did not he said Democrats would rue the day. Ultimately 11 (D) candidates said they "were open" to court reform and:
- That was before

# Ruth Bader Ginsburg

*“RBG” is not a new phenomenon. She was undeniably brilliant and had the courage of her convictions. A hero to the left, they feel entitled to her seat on the Court.*



## Mother Jones 09/19/20 Kara Voght

- “if he (Sen. McConnell) does succeed in putting a third Trump nominee on the court, the circumstances could be disastrous for would-be President Joe Biden, who would be facing a court stocked with justices hostile to the Affordable Care Act, abortion rights, gun restrictions, and COVID-19 precautions—in other words, everything on Biden’s wish list.





## What Candidates are saying

Trump and  
Pence are both  
alleging that  
Democrats want  
to pack the court

- Kamala Harris in the debate successfully avoided the question
- Biden said the American people don't deserve to know his position on the issue.



Daily Beast 09/23/19, Ronald Radash

- Today with some Democrats raising the specter that if they win the Whitehouse they forcibly take away people's gun's... Trump and his acolytes arguing that a Democratic victory would move toward making America a socialist country,

## Radash goes on to say 13 months ago

- “It is pure folly to give the GOP more ammunition by adding court-packing to their docket. That is the charge Donald Trump will make against whatever candidate wins the Democratic primaries. Democrats must ask: Do you really want to hand Trump another bludgeon to use”



## RBG's passing was a political earthquake

- In 48 hours after her passing Act Blue raised over 100 million
- Democratic Senate Candidates are reporting all time record donations in the last 90 days
- Jaime Harrison in SC raised \$57,000,000.
- Bollier raised over \$17 million, both all time records



# The Worst Case Scenario

- Trump and McConnell are successful confirming Barrett as an Associate Justice
- Democrats win the White House and a majority in the Senate.
- Kansas is the firewall in the Senate.
- Joe Biden is persuadable and can anyone deny it is likely he has decided and strategically refuses to answer?







## God Saved the Republic

- Should a court-packing bill be enacted
- The safety switches of the Constitution maybe switched off
- A precedent will be set and when the political pendulum swings, as Biden said Democrats will rue the day