

MEMO FROM THE DESK OF

[REDACTED]

September 21, 1991

Mr. Lamb:

President Roosevelt's bill failed in committee, 10-8 and it is true that the majority report, a pertinent part of which is included in Mr. Gunther's book, did say that the bill sought to do "that which was unconstitutional".

It is indeed ironic, however, in the light of the current and immediate past efforts of President Bush and President <sup>Reagan</sup> <sub>1</sub> to do in effect what is obviously "pack" the Court, that the report continued, "Its /the bill/ practical operation would be to make the Constitution what the executive or legislative branches of the Government choose to say it is .....". (Emphasis added).

[REDACTED]

cc: [REDACTED] ✓

September 21, 1991

Mr. Brian Lamb  
C-SPAN  
400 N. Capitol Street, N.W.  
Washington, D.C.

Dear Mr. Lamb:

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This refers to the talk show which aired at approximately 9:00 A.M. on Friday September 20th with three gentlemen discussing the politics involved in Supreme Court nominations.

I would like to take the strongest possible exception to the comment of one participant who said that a constitutional amendment would be required to increase the membership of the Supreme Court. This is just not so. There is nothing in the Constitution (Article III, Section 1) which defines or limits the membership of the Supreme Court, and indeed the number of its members was changed several times early in its history. While President Roosevelt's plan was defeated in 1937, it was defeated solely on philosophical grounds and in no respect on constitutional although a small minority may have utilized this basis to influence their decision in the Congress. While the debate on the bill was proceeding, because of the resignation of one member and the fact that the Court, seeing the handwriting on the wall, engaged in a retreat in sufficient numbers to generate a moderate majority on the Court, the proposed legislation, in effect, became somewhat redundant.

Obviously, one could always make the claim of unconstitutionality; however I doubt that there is any reputable constitutional scholar who would give its merit any credence whatsoever.

To quote a comment from perhaps the most respected college American History text, The Growth of the American Republic, "The bill raised no constitutional question, for the power of Congress to control membership was clear. Nor was its method without precedent; the number of judges had been changed six times in the past." (Morrison, S. C. & Commager, H. S., GROWTH OF THE AMERICAN REPUBLIC; New York: Oxford University Press, 5th Ed., Vol 2 at p. 734, (1962).)

I was unable to find any particular references to the question in what constitutional texts that I have probably because the constitutionality of the point is so firmly settled. The background of President Roosevelt's Court "Packing" bill was discussed in Gunther's Constitutional Law case book and in absolutely no respect did Mr. Gunther comment or intimate in any manner that the bill was other than than the appropriate exercise of a power of Congress granted by the Constitution. (Gunther, Gerald, CASES and MATERIALS on CONSTITUTIONAL LAW, Mineola, N.Y.: Foundation Press, 10th Ed., at p. 150-152, (1980).)

I would appreciate it if you would make a comment on a future program and correct the obviously erroneous impression that the gentleman may have left with some of your listeners.

I wanted to call, but I have something of a speech impediment and I was afraid that I would not be able to get my point across. Thank you.

Sincerely yours,

( [REDACTED]  
[REDACTED]  
Waynesboro, Virginia 22980)