

## Biden flirting with destruction of judiciary

David Harsanyi

October 12, 2020

Joe Biden says, "You'll know my opinion on court-packing when the election is over." To this point, Biden hasn't offered any position on court-packing, one of the gravest threats to the constitutional order in modern American history. Whether he is too scared of offending a significant faction of his party or he believes it's an idea worth considering, his silence is a reflection of a dangerous shift on the left.

Progressives, of course, have a point. If the Supreme Court adheres to even the most rudimentary constitutional limits on state power, rather than surrendering to the impulses of majoritarian politics, it's going to be a huge impediment to their agenda. Indeed, they have the same motivation as President Franklin Roosevelt had when he attempted to expand the Court in 1937: One-party rule.

FDR revived a Woodrow Wilson plan to arbitrarily place political allies into the courts, one for every judge over 70 years old, which would have meant 50 additional political allies on the federal bench, and six additional Supreme Court justices. Like today's Democrats, he first softened up the public by attempting to delegitimize the Court -- claiming, for instance, that the justices were incompetent geriatric cases incapable of performing their duties. (It is somewhat ironic that the most reliably pro-New Deal justice at the time, Louis Brandeis, was the only octogenarian on the Court.)

In those days, there were still enough politicians who valued the separation of powers to stop him. Of the 10 members of the Senate Judiciary Committee who signed a document opposing FDR's scheme, seven were Democrats. They didn't merely maintain that FDR was wrong or misguided; they argued that the court-packing plan was an "utterly dangerous abandonment of constitutional principle," a transparent scheme to punish justices whose opinions diverged from the executive branch, and "an invasion of judicial power such as has never before been attempted in this country."

If enacted, the senators wrote, court-packing would create a "vicious precedent which must necessarily undermine our system." They concluded that the plan "should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America."

FDR, whose popularity would plummet to historic lows after the court-packing threat, ultimately went on to appoint eight justices, and to largely have his way in fundamentally changing American governance. But he was prevented from destroying the Court as an institution, and modern-day Democrats are now seeking to finish that job.

Today, every instance in which Democrats are denied a political victory is immediately transformed into a national "crisis" in which the public has "lost faith" in a system that worked perfectly fine when they were in power. Not that long ago, self-interest was a motivation for

defending deliberative politics and republican order. But these days, undeterred by reality, partisans have convinced themselves they'll be in power forever.

It's not merely the progressive fringe that demands Democrats blow up the courts. It is the partisan, self-proclaimed defenders of "norms." In a recent piece in *The Atlantic*, the nation's leading periodical of intellectual anti-constitutionalism, *Lawfare's* Quinta Jurecic and Susan Hennessey argue that "if Republicans continue the smash-and-grab approach to confirming Barrett," court-packing "may be the only way for Democrats to save the Court."

The duly elected president and the duly elected Senate are observing the constitutionally stipulated guidelines for placing a highly qualified jurist on the Court. Someone will need to do a better job of explaining how dismantling the Court will "save" it. Now, perhaps if you've lost the ability to differentiate between ends and means, the idea makes intuitive sense to you. Perhaps you nod along as Biden spuriously argues that Amy Coney Barrett's nomination is nothing more than the exploitation of a "loophole" to undo the Affordable Care Act, ignoring the fact that we don't know how she'll rule on the Obamacare lawsuit. But back here in the real world, we know that court-packing would be far more destructive to our political order than anything Donald Trump has done, Barrett's nomination very much included.

The notion that the Senate shouldn't confirm Trump's nominee because Biden might win the election or Trump lost the "popular vote" is highly dubious. Justices do not need the consent of the majority, nor should they seek it. As Clark Neily, the vice president for criminal justice at the Cato Institute, recently noted, some of the Supreme Court's "most reviled cases -- including *Dred Scott* (slavery), *Plessy* (separate-but-equal), and *Buck v. Bell* (eugenics) -- involved acceding to democratically enacted policies. I can think of no higher compliment to pay a judge than to characterize her as antidemocratic."

And that's if Democrats take the charge seriously, which all evidence suggests they don't: Remember, they had no problem with this "anti-democratic" institution when it was creating constitutional rights to gay marriage and abortion. It only becomes a problem for them when it threatens to defend the Bill of Rights.