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Biden is right to be leery of court-packing

A fight over the Supreme Court would devour political bandwidth, endangering more important Democratic priorities.

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With Amy Coney Barrett's swearing-in on Monday, the Supreme Court is back to its full complement of nine justices. The size of the high court is mandated not by the Constitution but by Congress, which fixed the number of justices at nine in the Judiciary Act of 1869. Anytime Congress wants to change that number, it can do so — and many Democrats, seething because Barrett's confirmation was pushed through by Republicans within days of an election that may cost the GOP the White House and its Senate majority, want Congress to do so ASAP.

Moments after the Senate voted to confirm Barrett, a slew of liberal Democrats, including Representative Alexandria Ocasio-Cortez and Senator Ed Markey, were tweeting: “Expand the court.” But calls by Democrats to “pack” the Supreme Court — to enact a law increasing the number of justices if their party wins the presidency and control of Congress — began long before Barrett's nomination. When asked about court-packing during the presidential primaries last year, Senators Elizabeth Warren, Amy Klobuchar, Cory Booker, Kamala Harris, and Kirsten Gillibrand all said they were “open to the idea.” One Democrat *not* open to the idea was Joe Biden. “I would not pack the court,” he said in a debate last October.

Now, under pressure from his party's hard-left flank, Biden has softened his opposition. For a few weeks, he declined to answer when asked whether he would support court-packing as president. Last week he said he'd appoint a bipartisan commission to study the issue for six months. Biden plainly doesn't relish the idea of rejiggering the Supreme Court's ideological balance by changing its size, and instinctively rejects it as unwise.

To begin with, if Biden is elected, he will almost certainly have the opportunity to put his stamp on the court in the usual way. Only one president since the Civil War (Jimmy Carter) had no vacancy to fill. Three of the current justices are in their 70s or 80s, and while some justices, such as Ruth Bader Ginsburg, have served until their deaths, most retire voluntarily.

Democrats clamoring to pack the court anticipate that more liberal justices would mean more liberal rulings on hot-button issues. But even they don't argue that a larger bench would be good for the *court*.

“Nine seems to be a good number,” Ginsburg told NPR last year. “There are some people on the Democratic side who would like to increase the number of judges. . . . I am not at all in favor of that.” More justices would undermine the court's efficiency and internal workings. As legal scholar Walter Olson points out, there is a reason why no state supreme court has more than nine justices and why nine is commonly the size of top courts in advanced democracies like Canada, Germany, and France. There are no US Supreme Court “subcommittees” — all justices hear all cases and collaborate extensively in drafting opinions. Franklin Roosevelt's notorious court-

packing attempt in 1937 was sharply opposed by Chief Justice Charles Evans Hughes because of the detrimental effect it would have on the court's ability to function: "There would be more judges to hear," he wrote in a letter, "more judges to confer, more judges to discuss, more judges to be convinced and to decide."

Court-packing wouldn't only hurt the court. It would also hurt the Biden administration, and any hopes a new Democratic president might have to push historic legislation through Congress.

"Nothing is off the table for next year," Senate Democratic leader Chuck Schumer threatened as Republicans prepared to fill the vacancy caused by Ginsburg's death. But a fight over court-packing would devour massive political bandwidth, weakening support for almost every other Democratic priority: COVID-19 relief, the Green New Deal, immigration reform, gun control, health care, taxes, public works. Roosevelt's court-packing plan roiled Congress for months and wrecked his legislative mandate — *despite* his landslide victory in 1936 and the most lopsided Democratic supermajority in congressional history.

FDR's attempt to enlarge the court fatally drained momentum from the New Deal. It sent his popularity plunging and led to sweeping gains for Republicans in the 1938 midterms. Biden may not be a scholar of history. But he knows from a lifetime in politics, including eight years as vice president, that when presidents overreach, they often pay with a shellacking at the next election.

As a slogan, "Expand the court" may get progressive juices surging. As a priority in the next Congress, it would be disastrous — bad for the Supreme Court, bad for American politics, and bad for Biden's presidential agenda.