



High Court Expansion Unlikely After Tight Election

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Democratic calls for President-elect Joe Biden to "pack" the U.S. Supreme Court appear to be dead on arrival with Democrats still struggling to gain even 50 votes in the chamber in this year's election, likely protecting the court's 6-3 conservative supermajority for the foreseeable future.

Biden won the presidency Saturday with projected victories in Pennsylvania and Nevada, but President Donald Trump has not conceded the race and instead vowed to continue fighting the results in court.

Prior to his win, Biden promised to form a bipartisan commission to study the issue of court reform, saying the judiciary has gotten "out of whack" after President Donald Trump's record number of judicial appointments during his first term.

While Biden has distanced himself from the idea of "court-packing," or adding seats to the court for partisan advantage, progressive Democrats and outside groups have pressured the former vice president to endorse the idea as a response to Republican hardball tactics concerning the courts.

"We must convince this commission to endorse the only idea that can actually restore balance and legitimacy to the Supreme Court: adding 4 seats," reads a court-packing plan from progressive judicial advocacy group Demand Justice.

Legislation to expand the court and give Biden four new Supreme Court appointments will almost certainly go nowhere under a Senate still controlled by Senate Majority Leader Mitch McConnell, R-Ky., who has made reshaping the judiciary in a conservative mold his most central legacy. Indeed, Senate Republicans have introduced constitutional amendments to cement the number of Supreme Court justices at nine in response to Democratic calls for court expansion.

That could very well be the case if Republicans win a pair of run-off elections expected for Georgia's two Senate seats in January, which would continue McConnell's control over the chamber. But even if Democrats can hold on to power with Vice President-elect Kamala Harris' tie-breaking vote, experts doubt that will create enough padding to eliminate the filibuster and ram through legislation as controversial as court expansion.

"I think that there's going to be some appetite in the Senate to do that but I don't know if every single member of the Democratic caucus is going to want to do that," said Daniel Epps, a law professor at Washington University in St. Louis School of Law and prominent supporter of court reform.

What's also unclear is whether Senate Republicans will be able to refuse to confirm Biden's Supreme Court nominee should a vacancy arise during his term. One possible scenario is that Justice Stephen Breyer, 82, decides to step down under Biden. Ilya Shapiro of the Cato Institute said the former President Bill Clinton appointee is "clearly waiting for a Democratic president" to retire, but isn't certain whether that preference would hold under a Republican Senate majority.

"It will be interesting because at that point, presumably, Breyer is going to try to live that out, I guess," said Shapiro. "We haven't had a Supreme Court confirmation hearing process battle with divided government since Clarence Thomas in 1991."

While Republicans controlled the Senate in the final years of President Barack Obama's tenure, they refused to meet with, much less hold a hearing, for his nominee, Judge Merrick Garland, to replace the conservative firebrand Justice Antonin Scalia.

Still, Shapiro doubted that Republicans could hold fast to blocking a moderate Biden pick who is nominated in the first half of his term. "I think Republicans would be very hard-pressed not to confirm that person."

Biden demurred on the issue of court expansion in the final weeks before the election, but the Democratic president-elect was clear about one change he would make: nominating a Black woman to the Supreme Court for the first time in the institution's 230-year history.

Shapiro said the optics of blocking the Supreme Court's first African American female justice would add pressure to Republicans to confirm Biden's nominee. Of course, that would depend on the nominee being a respected judge rather than a political operative, he clarified. "If it was Stacey Abrams, that would be different than Leondra Kruger of the California Supreme Court."

Democrats and progressive groups have asked Biden to expand his search for a Supreme Court nominee beyond the usual suspects of federal circuit judges, of which only four are African American women and all over 60. Indeed, eight of the nine current justices were elevated from the federal circuit bench.

Instead, they have floated the names of several Black women serving on state supreme courts, federal district courts, in the civil rights community and academia for a possible Supreme Court appointment should there be a vacancy during Biden's term in office.

"If Vice President Biden focuses on keeping his promise to make sure a Black woman is appointed to the Supreme Court, that's going to have a number of benefits in restoring the integrity of the court, both from the value of diversity in increasing public trust in the court, and improving actual quality of the decisionmaking," said Myesha Braden, an attorney for the progressive group Alliance for Justice.