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ON THE U.S. SUPREME COURT

Don't pack the court

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When Ruth Bader Ginsburg died in September, Democratic Senate Leader Chuck Schumer warned that “**nothing is off the table**” if Republicans filled her seat before Inauguration Day. Thus, when Amy Coney Barrett was sworn in little more than a month later, the drumbeats resumed for court packing: adding seats to “rebalance” the court. Although presidents had always made nominations to Supreme Court vacancies arising in election years, and their success hinged almost entirely on whether their party controlled the Senate, there had never been a confirmation so close to an election. And this one came four years after Republicans had declined to take up Merrick Garland’s nomination to the opening left by Antonin Scalia’s death, allowing President Donald Trump to appoint Neil Gorsuch.

These calls for court packing didn’t start last fall, but grew from 2016 through the polarizing confirmation of Brett Kavanaugh, and played a major role in the Democratic presidential primaries. Indeed, most of those running expressed a willingness to add justices, with Pete Buttigieg, now the secretary of transportation, adopting a **more nuanced proposal** to have five justices picked by each party, who then would have to unanimously agree on another five. Of course, trying to depoliticize the court by affixing scarlet partisan letters to two-thirds of its members is too clever by half.

Joe Biden declined to join most of his fellow candidates in endorsing court packing and stayed coy on the issue during the general election, ultimately proposing a bipartisan commission to study judicial reform because “**the court system ... is getting out of whack.**” This commission is **apparently staffing up**, with four names floated in public. One of those names is Caroline Fredrickson, who was until recently president of the American Constitution Society (lefty counterpart to the Federalist Society). She **noted in the early primaries** that “the Kavanaugh nomination has put a fire under progressives” and that it’s “not written in stone that the court has nine seats.”

Indeed, not even constitutional parchment specifies the number of justices, but historically, each expansion of the court was accompanied by political mischief. As the country grew, Congress created new circuits, with new justices appointed to each one — additions that **didn’t always inure to the nation’s benefit**. In 1869, after a Congress hostile to Andrew Johnson had actually *cut* seats to prevent his filling them, the Circuit Judges Act fixed the high bench at nine seats, a number that has survived 150 years and allowed the court to gain stability and prestige.

The most famous example of attempted court packing is, of course, the Judicial Procedures Reform Bill of 1937. Fresh off a massive reelection and unhappy about a series of rulings against

his New Deal programs, President Franklin Delano Roosevelt proposed adding a new justice for every sitting justice older than 70½, up to a maximum bench of 15. The plan met heavy, bipartisan resistance and faced public opposition even from Vice President John Nance Garner and Roosevelt ally Justice Louis Brandeis. The plan led to enormous Democratic losses in the 1938 midterms.

No real calls for court packing have come between FDR's time and now, though there were calls to "Impeach Earl Warren" in the Jim Crow South. As with most such proposals in our history, the partisan appeal is both evident and heavy-handed.

Yet there's nothing inherently ideological about a larger Supreme Court. Presidents of both parties nominate however many justices there are. In addition to issues of judicial administration — maybe the court could hear more cases with more personnel — there would be less significance to each of, say, 19 seats than 9 (and presumably fewer decisions with one-vote margins), so there would be less of a battle royal over each vacancy. The problem comes in getting to the new number, whatever it is. If we were passing the first judiciary act, we could implement whatever structure we thought best. But we're not, so how do you get to an expansion of any kind that won't result in a similar expansion the next time the opposing party is in power?

Presumably you'd need a transition period, such that the reform only takes effect far enough into the future that we don't know who'll be in the White House. Politicos tend to be risk-averse, so I'm not sure this is viable, but even if a "delayed packing" plan went through, it wouldn't address the complaints of those who want the court changed now, rather than some hypothetical time in the future.

Moreover, it's unlikely that the judicial reform commission, if it truly represents the range of expert opinion, would agree on much. If a major proposal somehow came out of it, a 50-50 Senate where key Democrats Joe Manchin and Kyrsten Sinema have ruled out eliminating the filibuster would make it a nonstarter. Even adding (or moving around) *lower court* judges, given the growth in cases in some parts of the country since district judgeships were last created in 2002 and circuit judgeships in 1990, would be a hard lift because Republicans want not to repeat the late 1970s, when Jimmy Carter got scores of new robes to fill — which turned out to be a consolation for not having any Supreme Court vacancies on his watch.

If Democrats think they'd be "uniting" the country by compensating for Republican-appointed justices they consider to be illegitimate, then they deserve the political losses that such ends-justify-the-means radicalism has historically caused. And if they think that packing the court would restore "norms," then they really don't understand the nature of governance. **To quote Bernie Sanders**, of all people, "My worry is that the next time the Republicans are in power they will do the same thing."

Underlying both the standard and creative court-packing proposals is a problem with the proponents' premise: that the court needs reforming in the first place. The court isn't in crisis, but progressives — and especially legal elites — are *very* unhappy with its nascent conservative majority. And yet the Supreme Court is **more respected than any federal institution** save the military, and **more popular than it's been in over a decade**. Toning down judicial confirmations and having justices seen less through partisan lenses are laudable goals, but they'll only be reached when the court itself is less important. Don't rebalance the court, rebalance our

constitutional order so Washington — and, within Washington, the executive branch — isn't making so many big decisions for such a large, diverse, pluralistic country.

In the end, Democrats ought to draw a less-obvious lesson from FDR's experience. By mid-1941, just four years after court packing failed, only two justices remained whom Roosevelt hadn't appointed — and one of those, Harlan Stone, he had elevated to chief justice. In a very real sense, then, FDR packed the court the old-fashioned way, by maintaining control of the White House and Senate and waiting for natural attrition. Joe Biden, take note.

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