



Supreme Court, federal judiciary rising as key issue in presidential, Senate elections

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The White House and Congress are up for grabs in this fall's elections, but influence on the nation's federal courts also hangs in the balance.

The platform approved during the Democratic National Convention this week calls for adding more judges to federal trial and appeals courts. That's one way to counter President Donald Trump's success in winning Senate confirmation of more than 200 conservative judges in the past 3½ years.

Some liberal groups want to go further and expand the size of the Supreme Court, a proposal that Democratic presidential nominee Joe Biden opposes. While that's a long shot, the makeup of the high court will be an issue because Associate Justice Ruth Bader Ginsburg's fight against cancer has fueled a debate over which president and political party might get to choose her successor.

For all those reasons, the future of federal courts will be prominent in this fall's presidential campaign, a fact that Senate Minority Leader Chuck Schumer emphasized Tuesday night.

"We will protect voting rights, fight systemic racism in the criminal justice system and in our economy, and restore a Supreme Court that looks out for people, not corporations," the New York Democrat vowed.

That will be easier said than done. Even if Biden wins the White House and Democrats assume control of the Senate by gaining at least three seats, the Supreme Court will retain its 5-4 conservative majority. The justices most likely to retire are Ginsburg, 87, and fellow liberal Associate Justice Stephen Breyer, 82.

Similarly, it would take time for Democrats to erase Trump's imprimatur on the federal courts. Together with Senate Republicans, the president has replaced two elderly conservative justices with Associate Justices Neil Gorsuch, 52, and Brett Kavanaugh, 55. He's put 53 judges on federal circuit courts and 146 on federal district courts, outpacing all recent presidents.

Republicans have more to gain if their focus on the courts, honed in 2016, translates into another victory this fall. That would put them in position to replace Ginsburg if she is unable to serve another four years, until age 91. No previous justice has remained on the nation's highest bench past 90.

Trump has said he will release a new list of potential Supreme Court nominees by Sept. 1, repeating a tactic he used in 2016 to bolster support among conservatives. Neither Gorsuch nor Kavanaugh made his initial list then, but both were added later on.

Groups such as the Heritage Foundation and Cato Institute have suggested some new names, including several judges Trump has put on appeals courts – even 38-year-old Justin Walker, who won't join the U.S. Court of Appeals for the District of Columbia Circuit until next month.

The liberal Supreme Court Voter project sought to energize Democrats on the issue Thursday night by running a cable television ad during the last night of the party's national convention. It warned that "the future of the Supreme Court is on the line."

"Donald Trump has hijacked our Supreme Court with far-right justices like Brett Kavanaugh, who will serve for decades after Trump leaves office," the ad intoned. "We can't afford any more Brett Kavanaughs, or our court will be his court."

Another ad released last month focused on Senate Majority Leader Mitch McConnell's refusal in 2016 to consider President Barack Obama's nominee to succeed the late Associate Justice Antonin Scalia. It had been more than 80 years, McConnell repeatedly said, since a high court vacancy arose and was filled in a presidential election year.

"Call your senator. No Supreme Court vote in a presidential year," the ad from the liberal group Fix Our Senate concluded. "Take a stance. Just like McConnell."

'Structural court reforms'

So far, efforts to prod Republicans to oppose filling a potential 2020 vacancy have proven difficult. Only one of the Senate's 53 Republicans, Sen. Lisa Murkowski of Alaska, has said she would not support filling the seat during the election year. Most others simply won't address the question.

Democrats' predicament is due to Ginsburg's decision not to retire while Obama was in office and Democrats controlled the Senate. Since Trump took office, she has vowed to stay on the bench as long as she can do the job "full steam." And with the election just 10 weeks away, she is potentially close to denying the president a third high court appointment in his first term.

That only raises the stakes for November. The next president and Senate majority will confront both a deeply divided Supreme Court and equally divided federal appeals courts that handle most of the nation's controversial legal issues. A second Trump term likely would produce solid conservative majorities.

Conservative voters made the courts a priority in 2016, and now liberals are seeking to do the same. The Democratic platform says the party "recognizes the need for structural court reforms to increase transparency and accountability."

That may be less than meets the eye, however. While some liberal groups want to expand the size of the Supreme Court, Democratic candidates for president splintered on the issue. The two finalists – Biden and Sen. Bernie Sanders, D-Vt. – opposed the idea, as did Ginsburg herself.

"If anything would make the court look partisan, it would be that – one side saying, 'When we're in power, we're going to enlarge the number of judges, so we would have more people who would vote the way we want them to,'" she said last year.

Still, those pushing for change are pleased that the Democratic platform addresses the issue after largely ignoring it four years ago, even in the midst of Republicans' refusal to consider Obama's Supreme Court nomination of federal appeals court Judge Merrick Garland.

"It represents a real escalation in how Democrats are approaching our judiciary after years of surrendering the issue to Republicans," said Brian Fallon, executive director of the liberal group Demand Justice. "It is now officially the position of the Democratic Party that the status quo of our politicized courts system is unacceptable, and the judiciary must be reformed."

The renewed activism on the left stems not only from the 2016 battle over Scalia's vacant high court seat but Trump's and McConnell's success in transforming the lower courts.

The president's 53 appeals court judges are just two short of Obama's tally over eight years. They have helped to "flip" three of the nation's regional appeals courts from being dominated by Democratic presidents' nominees to those of Republican presidents.

The Democratic platform says courts should be expanded "consistent with recommendations from the Judicial Conference," a panel of federal judges that sets administrative policies. The conference has urged Congress to create five new appeals court judgeships and 65 new district court judgeships, largely to handle a caseload that has grown over 30 years while the courts have not.

The addition of vice presidential nominee Kamala Harris to the Democratic ticket gives it new legal firepower. Harris, a California senator and former state attorney general, could lead a new administration's efforts to appoint liberal judges.

"If Kamala Harris were to be in charge of judges as part of her portfolio, I think that would be something that she would just crush," said Elizabeth Wydra, president of the liberal Constitutional Accountability Center. "Having someone like that in the White House is, I think, a real benefit to those of us who care about the courts."

The platform language was quickly lambasted by conservatives, who accused Democrats of endorsing the sort of court-packing that President Franklin Roosevelt failed to achieve in the 1930s.

"Have no doubt about what will happen if @JoeBiden is elected president in November," tweeted Carrie Severino, president of the conservative Judicial Crisis Network. "Democrats are now pushing to pack not just the Supreme Court, but also the lower district and appellate courts as well."