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Why not to expect a scorched earth fight over Breyer's replacement

Operatives concede that the political drama isn't quite there, at least compared to recent battles.

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The conservative movement has, for decades, prioritized Supreme Court fights over nearly all other forms of political battle.

But a survey on Wednesday of some of the top officials and activists in that universe indicates that they aren't planning a vicious political fight over President Joe Biden's pick to replace retiring Justice Steven Breyer. At least not yet.

Top officials at conservative judicial groups said they viewed the current landscape as less than conducive to a successful bare-knuckled confirmation fight. A Breyer retirement was long expected, Republicans do not control the Senate and, most importantly, a new justice would not shift the court's ideological balance, let alone its majority.

"The stakes just aren't quite as urgent — the left or the right" compared to the fight to replace the late Justice Ginsburg, said Josh Blackman, a law professor and a legal expert with the conservative Federalist Society and an adjunct scholar at the Cato Institute. "This just seems more of a — it's how many political points you can score."

A spokesperson for The Federalist Society said it "does not take a position on the vacancy."

In interviews hours after news broke that Breyer would be stepping down in the coming months, conservative judicial operatives said they were surprised by the timing of the Breyer news. They were not the only ones caught off guard, either. A source close to several justices said that after the story was leaked, Justice Breyer himself reached out to colleagues to express regret about how the process unfolded.

"I was not expecting an announcement today and part of my reasoning behind that is historically the earliest announcements have been made is late March or April," the source said.

As members of the Senate took stock of the confirmation fight to come, those in the conservative judicial network said they saw an opening to generate enthusiasm among Republican voters ahead of the midterms. They said they plan to tap into the same organizing efforts they used to push through justices Amy Coney Barrett, Neil Gorsuch, and Brett Kavanaugh onto the Supreme Court during the Trump administration. And they pledged that their efforts would be amplified depending on how far out of the mainstream they viewed Biden's pick.

But the immediate response to the forthcoming vacancy was one of implicit acceptance that there was little they could do to stop confirmation.

"I think it's an even trade. What we can hope for is that the president will appoint a thoughtful moderate and someone who is a real constitutionalist and will look at the case in front of them," said Penny Nance, the president and CEO of conservative group Concerned Women for America. "We're going to wait and see who the president puts forward but we're not going to ignore it or dial it in. We're going to be active in it."

Court confirmations have, in recent decades, been some of the most piqued battles in politics, with procedural one-upmanship and dark money groups entering the fray to influence lawmakers. The Trump years witnessed an escalation in three acts.

Gorsuch's nomination drew howls of disapproval from Democrats who argued that the seat he was filling had been unfairly held open under Barack Obama's presidency. Kavanaugh's confirmation drew intensely sharp emotions and political fireworks after he was accused by a high school acquaintance, Christine Blasey Ford, of sexual assault. And Barrett's nomination didn't just come weeks before the 2020 elections but in response to the death of a liberal icon: Ruth Bader Ginsburg.

There's at least some hope for conservatives that whomever Biden nominates could be tripped up. Leaders on the right pointed to Democratic Sens. Kyrsten Sinema (Ariz.) and Joe Manchin (W.Va.), who have stifled the President's agenda during his first year in office, as potential votes against a Supreme Court nominee who may be framed as too liberal.

"Does a full-throated support of Biden's Supreme Court nominee get you out of danger?" said Jessica Anderson, the executive director of Heritage Action, of Manchin and Sinema's political futures. "The political fallout of this will be interesting. If Sinema and Manchin are ungettable — and I don't think we'll know any of that until we have a name — then the pressure will be on Republicans like Collins or Murkowski. What do they do?"

On the 2020 campaign trail, Biden promised that he would nominate a Black woman to the highest court. Among the names that have been floated include Judge Ketanji Brown Jackson of the D.C. Circuit Court (who replaced Attorney General Merrick Garland), Leandra Kruger, an associate justice of the California Supreme Court, J. Michelle Childs, a District Court judge in South Carolina, and Leslie Abrams Gardner, a District Court judge in Georgia.

Neither Manchin nor Sinema have voted against any of Biden's lower court nominees, and they've already given support to some of the names on that shortlist.

“Chances are given where things stand they’ll vote for whomever president nominates. The argument they can make is the argument many Republicans have made, which is unless the nominee is outside the bounds then they’ll defer to the president,” said the source close to the court. “I think that Republican Senate leadership is extremely skillful and very pragmatic and they understand at the end of the day if the Democrats want to confirm a Biden nominee, they’ll be able to get that done.”

The conservative legal group Judicial Crisis Network spent millions to support Barrett’s confirmation in 2020. Now, on the defensive, the group said it is looking to highlight “dark money” behind the effort to confirm a new justice to the court, a theme that the group has echoed throughout the Biden administration’s first year.

“We definitely are going to be focused on highlighting the corruption of the Biden administration and the dark money ties that have characterized his judicial nominees to date,” said Carrie Severino, president of the Judicial Crisis Network, which as a 501(c)(4) group does not have to disclose its donors.

Severino also conceded that Republicans did not have control of the Senate. Instead, she noted, “It’s going to be up to people like Joe Manchin and Kyrsten Sinema whether they want to continue to endorse Biden's agenda on this front.”