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Even if Democrats win, Trump has them beat on the courts

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Democrats could win the House on Tuesday. They may recapture the Senate and White House in 2020. But they're losing the federal courts for the long term, as President Donald Trump is rapidly ensconcing a conservative judiciary that will have the power to knock down liberal policies for decades to come.

The White House's relentless focus on remaking the nation's courts has injected a new and permanent strain of conservatism into the judiciary, seating dozens of Republican judges positioned to play a pivotal role in the most contentious cases of the next four decades — from abortion rights and affirmative action to environmental protections, financial regulations and presidential power. Some of the judges may even help decide whether Trump can unilaterally eliminate the birthright citizenship of undocumented immigrants' U.S.-born children.

And if Republicans maintain control of the Senate on Tuesday, as they're widely expected to, Trump will have free rein to continue naming conservatives to lifetime appointments on the bench.

The result is the prospect of a lasting conservative imprint on the judiciary, fulfilling a true long play led by Trump and Senate Majority Leader Mitch McConnell.

Nan Aron, president of the liberal Alliance for Justice, called it a rueful moment for liberals.

"No longer will Democratic organizations, progressives, even independent groups, take the courts for granted," she said.

It's a stark turnabout from what Democrats expected just two years ago, when polls were predicting a Hillary Clinton victory and an era of an increasingly liberal judiciary appeared on the horizon. And it's a vindication for Trump's electoral strategy in 2016, when he appealed to conservative voters by making an explicit promise to name like-minded judges.

"The president only has power to do so many impactful things on his own," said Randy Barnett, a libertarian legal scholar and Georgetown Law professor. "This was a pivotal moment for the conservative legal movement. They have new life."

Aside from the Supreme Court, where Trump named Justices Neil Gorsuch and Brett Kavanaugh, the rightward shift may be most momentous in the 12 regional circuit courts that hear appeals, set binding precedents and often have the final say in the many cases the high court never takes up.

Trump has already placed 1-in-6 judges on the circuit courts, some of which are closely divided between Republican and Democratic appointees. Those 29 appointments are the most by any modern president in his first two years.

Counting both federal trial and appellate courts, Trump's 84 judicial appointments to date far exceed the pace set by President Barack Obama in his first two years.

Lower courts have provided repeated roadblocks to the GOP agenda in the past two years, rejecting various versions of Trump's travel ban, declaring Republican-drawn congressional maps unconstitutional, upholding the right of transgender people to serve in the military and — just this past week — ordering Ohio to allow purged voters to cast provisional ballots. Having more Republican judges means fewer such obstacles for Trump.

“He has a very clear plan to take over the federal courts, from top to bottom,” said Kristine Lucius, a former Democratic Senate Judiciary Committee aide. “It really will change the power dynamics.”

The highest-profile seats in play are ones Democrats believe should have been theirs. Even before they blocked Obama's nomination of Merrick Garland for the Supreme Court in 2016, Republicans used Senate procedures to slow confirmations toward the end of his presidency. In its final two years, the Obama administration won confirmation of the fewest judges in the last two years of a presidency since Harry Truman.

When Trump entered the Oval Office, he was greeted by an open Supreme Court seat, 106 other judicial vacancies and a Senate Republican conference willing to bust through the chamber's bipartisan customs to overhaul the courts at record speed.

The consequences over the next several decades could be profound, legal analysts say, and perhaps nowhere are the implications more apparent than in the fight over abortion.

Kavanaugh's appointment energized an anti-abortion movement that now believes it has the five conservative justices needed to overturn *Roe v. Wade*, the 1973 case establishing the right to abort a pregnancy. Several cases winding through lower courts could soon provide that opportunity.

One case in Iowa would ban abortions at about six weeks, a clear challenge to *Roe*, which granted abortion rights up to viability which is generally considered around 23 or 24 weeks. Other states' restrictions aim to chip away at abortion protections more gradually, offering the Supreme Court the more politically palatable option of overturning more recent decisions first.

One likely target is the Supreme Court's 5-to-3 ruling in 2016 in the case *Whole Woman's Health v. Hellerstedt*, in which the justices rejected a set of Texas' restrictions on abortion clinics. Lower federal courts had issued divided rulings on similar restrictions in other states.

“That was the last happy day pro-choice people have had dealing with the courts,” said Carol Sanger, a Columbia Law School professor and abortion law expert, of the *Whole Woman's Health* decision. “There are all kinds of techniques being used to find little crannies where you could say, oh, here's a good place for regulation that will make it harder for women to get an abortion.”

The Supreme Court's conservative majority could also make for a rightward turn on issues like affirmative action, gun control and campaign finance restrictions — areas where the GOP has bristled at federal involvement.

“They’re going to continue to restrain Congress’ regulation of campaign finance,” Barnett said. “And I think there’ll be renewed skepticism of affirmative action.”

One case still in limbo is a challenge to Harvard’s affirmative action policies, being argued in a U.S. district court in Massachusetts. Both sides and the judge herself have predicted it will ultimately end up at the Supreme Court.

And in the lower courts, the growing ranks of Trump appointees are likely to impose higher hurdles for citizens seeking to challenge government actions under foundational environmental laws like the Clean Water Act, swinging the legal odds toward big business even under the most progressive future Democratic presidents.

For example, conservative judges are more likely to require local environmental groups to show they have suffered direct harm before they can challenge permits allowing power plants to emit air pollution or discharge waste into waterways. These lawsuits have driven major changes in how the government applies environmental laws, much to the dislike of businesses and Republicans who call the suits frivolous.

The agencies creating the regulations could face more hostile treatment too, amid a push by conservative legal scholars to rein in the executive branch’s ability to write rules unless Congress has explicitly called for them. Notably, Kavanaugh has spent years throwing his weight behind empowering judges to crack down on agencies.

“Judges, he has written, need to work harder to understand what the law is actually saying and not just throw up their hands and say, ‘This is ambiguous,’ and rule in favor of the agencies,” said Ilya Shapiro, a senior fellow in constitutional studies at the libertarian Cato Institute.

Obama-era financial rules have already seen some of that pushback. A judge appointed by President George W. Bush ruled in June that the single-director system at the Consumer Financial Protection Bureau is unconstitutional, siding with Republicans who say the agency has abused its power. An appellate court recently came to the same conclusion about the federal agency that oversees mortgage titans Fannie Mae and Freddie Mac.

Some Trump judges have already made their presence felt.

Amy Coney Barrett, a 2017 appointee on the Chicago-based 7th U.S. Circuit Court of Appeals, joined four other Republican-appointed judges in blocking federal efforts to stop an employer from transferring employees based on their race or ethnicity. (She is also on Trump’s short list for the Supreme Court.) Another 2017 appointee, Judge Amul Thapar of the Cincinnati-based 6th Circuit, helped rule in favor of a Michigan county government’s practice of opening sessions with Christian prayers.

But that represents just a preview of the Trump-era influence that could color court rulings for years to come.

Trump’s judicial picks are more conservative than most, say supporters and critics alike. And in many cases they are younger than the norm, meaning some could sit on the federal bench for the

next 40 years or more. In October, Senate Republicans advanced the appellate court nomination of Allison Jones Rushing, who graduated from law school a little more than a decade ago and at age 36 is one of nation's youngest judicial appointees.

Advocates for transgender rights have expressed particular alarm that a more conservative slate of judges will make it harder for transgender students to use bathrooms and locker rooms that align with their gender identity.

In a reversal of Obama's policies, Trump Education Secretary Betsy DeVos and her department have stopped investigating civil rights complaints filed by transgender students seeking bathroom access. Those students have achieved some federal court victories in recent years, but their supporters worry the tide may be about to change.

"Trump has nominated a litany of candidates from anti-LGBTQ groups," said Gillian Branstetter, a spokesperson for the National Center for Transgender Equality. "It's clearly an attempt to flood the courts with judges who would rewrite the national understanding of federal civil rights law to fit their own bias and prejudice against transgender people."