



Biden Win May Lead To First Black Female Justice

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President-elect Joe Biden's victory makes his promise of appointing the nation's first African American woman to the U.S. Supreme Court that much closer to reality, although whether he succeeds will likely come down to who has control of the Senate. Here, Law360 looks at some of the potential candidates.

Biden won the presidency Saturday with his apparent victories in Pennsylvania and Nevada, while President Donald Trump vowed to continue fighting the results in court. But with control of the U.S. Senate coming down to razor-thin margins, Democratic hopes that Biden would sign major "court-packing," or court reform, legislation are all but dashed. However, the president-elect has pledged at least one historic change that could still be on the table: nominating a Black woman to the Supreme Court for the first time in the institution's 230-year history.

If 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 decision-making," said Myesha Braden, an attorney for the progressive group Alliance for Justice.

Biden said over the summer that he was putting together a list of qualified candidates, but unlike President Donald Trump, he has not yet released it publicly. Outside groups like AFJ have encouraged Biden to broaden his search beyond the usual suspects of federal circuit judges, of which only four are African American women and all are over 60; indeed, eight of the nine current justices were elevated from the federal circuit bench.

Instead, Democrats and progressives 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.

But like President Barack Obama, Biden may find it difficult to appoint who he wants unless Democrats can win a pair of run-off elections expected for Georgia's two Senate seats in January, giving them 50 seats and Vice President-elect Kamala Harris' tie-breaking vote.

Often mentioned in the group of possible Biden nominees is U.S. District Judge Ketanji B. Jackson, an Obama appointee who sits on the federal trial court in Washington, D.C. Though Judge Jackson is not an appellate judge, she has had her fair share of high-profile cases and could leapfrog the circuit bench for a seat on the Supreme Court under a Biden presidency.

In one prominent decision, she blocked the Trump administration from expanding fast-tracked

deportation proceedings, a decision reversed by a three-judge D.C. Circuit panel that is now on appeal before the full circuit. Judge Jackson also made headlines with her order for former White House Counsel Don McGahn to comply with a subpoena from Congress. That ruling, too, was overturned by a panel, before being reinstated by the full D.C. Circuit in August.

Legal commentators predict Biden's first Supreme Court appointment could be to replace Bill Clinton-appointed Justice Stephen G. Breyer, now 82, and likely looking to retire under a Democratic president.

"Justice [Stephen] Breyer is likely to retire in the next four years," said Ilya Shapiro of the Cato Institute. "He's 82, clearly waiting for a Democratic president. I don't see why he wouldn't. Beyond that I wouldn't expect any other retirements ... [Justices Samuel] Alito and [Clarence] Thomas have been talked about but ... they're young enough to wait out until the next president."

Judge Jackson, 50, clerked for Justice Breyer during the 1999 term after graduating from Harvard Law School. She had two earlier clerkships at the federal district and circuit levels.

After her clerkships, Judge Jackson worked at two law firms before becoming an assistant public defender in D.C.'s federal public defender's office. She later spent three years as of counsel at Morrison & Foerster LLP, developing a civil and criminal appellate practice, before becoming Vice Chair and Commissioner on the U.S. Sentencing Commission. She was nominated by Obama in September 2012 to a seat on the U.S. District Court for the District of Columbia, but wasn't confirmed by the Senate until March 2013 in a voice vote.

Another contender for Biden's first Supreme Court nomination is 44-year-old California Supreme Court Associate Justice Leondra R. Kruger, a former U.S. Department of Justice official. Justice Kruger argued 12 cases in the U.S. Supreme Court as an assistant to the U.S. solicitor general between 2007 and 2013. She later became the deputy assistant attorney general for the Office of Legal Counsel.

A Los Angeles-area native, Justice Kruger received her law degree from Yale Law School and went on to clerk for Judge David S. Tatel on the D.C. Circuit and Justice John Paul Stevens on the U.S. Supreme Court. She was appointed to the California Supreme Court in 2015 by then-Gov. Jerry Brown, a Democrat.

According to Shapiro, 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."

With Justice Ruth Bader Ginsburg's death, Braden noted, the Supreme Court no longer has anyone who came from a civil rights background, like Justice Thurgood Marshall before her. "The idea that there is not a civil rights attorney on the Supreme Court at all is honestly frightening to me and should be frightening to many," she said.

In that vein, the group Demand Justice has named Sherrilyn Ifill, the president of the NAACP Legal Defense and Educational Fund, as a possible nominee for a Supreme Court seat. A book author and former law professor, the 57-year-old is among the most well-known civil rights lawyers in the country, leading the same organization that Justice Marshall founded in 1940.

Braden, who leads the AFJ's Building the Bench project, is careful not to name individual lawyers who might be on Biden's shortlist of potential nominees, emphasizing that "we need to focus on the fact that there is so much talent."

The Supreme Court, Braden said, should just be a starting point for Biden to make his judicial appointees look more like the country they serve.

"I'd like to think because Biden has been clear of his desire to restore the strength and integrity of our government and our government institutions, there's so much value to him thinking beyond the Supreme Court when it comes to appointing black women [to the bench], who have long had the talent and long lacked the opportunities as others," she said.