



## **Biden's influence on federal judiciary may be limited despite liberals' talk of 'court-packing'**

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President Donald Trump will be out of a job next year, but the life tenure enjoyed by his three Supreme Court justices and 230 lower court judges will cement his legacy and create a major obstacle for President-elect Joe Biden.

A concerted effort by Senate Republicans that began before Trump even was elected left him more than 100 federal court vacancies to fill upon entering office in 2017 – a vacuum Trump and GOP leaders made sure not to leave Biden entering 2021.

If Republicans retain their Senate majority by winning at least one of two runoff elections in Georgia on Jan. 5, they also will be in a position to block much of Biden's policy agenda. That could lead the new president to use executive actions rather than going through Congress – and those could get blocked in the very courts Trump has stacked.

“The legacy of Trump’s judicial nominations is going to be a barrier not just to Biden but Democratic presidents for a long time,” says Brian Fallon, executive director of the liberal advocacy group Demand Justice and former press secretary for Hillary Clinton's 2016 presidential campaign. “We are behind the eight ball for years to come.”

The Trump judicial juggernaut began in 2016, when Senate Majority Leader Mitch McConnell, R-Ky., and allies preserved the Supreme Court seat left open by Associate Justice Antonin Scalia's death as well as scores of federal circuit and district court vacancies.

Over the next four years, the White House and Senate Republicans confirmed conservative Associate Justices Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett to the Supreme Court, along with 54 appeals court judges, 173 district court judges and three to the Court of International Trade.

Associate Justices Neil Gorsuch and Brett Kavanaugh solidified the Supreme Court's conservative majority under President Donald Trump.

Those are near-record numbers. President Richard Nixon was the last to name four Supreme Court justices during his first term. President Jimmy Carter named 262 federal judges in his single term, but more than half of those were to new judgeships created by Congress.

The influence of Trump's Supreme Court justices will be felt in years to come, now that Barrett's replacement in October of the late Associate Justice Ruth Bader Ginsburg has given conservatives a 6-3 majority. But it's already being felt in the nation's regional circuit courts, where 99% of federal appeals are decided.

When Trump took office, nine of the nation's 13 circuit courts were dominated by Democratic presidents' appointees. He flipped three of them: the 2nd Circuit based in New York, the 3rd Circuit based in Philadelphia, and the 11th Circuit based in Atlanta. Even the sprawling, San Francisco-based 9th Circuit bears his imprint, having gone from a 19-9 majority of Democratic presidents' nominees to 16-13.

“Progressives are waking up to how critical the courts are,” says Marge Baker, executive vice president of the liberal advocacy group People for the American Way. “They’re getting demonstrations every day about the harm Trump’s judges can cause from the bench.”

Those judges are overwhelmingly young, male and white. Most are in their 40s or 50s, giving them decades to influence and shape federal law. About 75% are men, and nearly 85% are white.

### **Biden will be 'cabined'**

The death in September of liberal Associate Justice Ruth Bader Ginsburg, here being mourned by Joe Biden during the 2020 presidential campaign, eliminated the president-elect's opportunity to maintain a smaller 5-4 conservative majority on the Supreme Court.

Biden is certain to reduce those percentages, having committed himself to naming the first African American woman to the Supreme Court and to appointing more Blacks and Hispanics to lower courts.

In addition, progressive interest groups are pressing the incoming administration to choose judges from a wider range of backgrounds than the usual prosecutors and corporate lawyers. They have presented the incoming administration with more than 100 names, including public defenders, civil rights advocates and labor lawyers.

Beyond demographics and job experiences, however, Biden's influence on the judiciary is not likely to be as dramatic as Trump's has been.

President Donald Trump nominated Amy Coney Barrett in October to fill the Supreme Court set left vacant after the death of Associate Justice Ruth Bader Ginsburg.

His first problem is the Senate, which is likely to remain in Republican hands unless Democrats pull off two upset wins in Georgia. Even then, the Senate would be tied at 50-50, with Vice President-elect Kamala Harris able to break ties.

One opportunity for the new administration could arise if Supreme Court Associate Justice Stephen Breyer, 82, chooses to retire. Breyer, who joined the court the year after Ginsburg in 1994, knows that her refusal to step down before Republicans won the Senate in 2014 and the White House two years later ultimately resulted in the new 6-3 conservative majority.

Republicans who blocked President Barack Obama as a lame duck from replacing Scalia in 2016 are unlikely to be able to block Biden for two or more years if Breyer steps down before 2024. But whomever Biden might nominate – 44-year-old California Supreme Court Justice Leandra Kruger, who is Black, is perhaps the leading candidate – merely would maintain the current liberal minority.

Biden isn't likely to get a chance to narrow that gap. The oldest conservatives on the court are Associate Justices Clarence Thomas, 72, and Samuel Alito, 70. Chief Justice John Roberts is 65,

and Trump's nominees range from 48 to 55. None of them is expected to step down voluntarily while a Democrat is in the White House.

The nation's federal appeals courts are nearly full, thanks to McConnell's vow to "leave no vacancy behind." There are 95 Republican presidents' nominees and 81 Democratic presidents' nominees; some in the latter group will retire or take senior status, a form of semi-retirement, once a Democrat is in the White House.

"The president's going to be cabined by both a divided government and by a federal judiciary that's zealously guarding Americans' rights and liberties," says Mike Davis, a conservative former nominations counsel at the Senate Judiciary Committee.

### **Let's make a deal**

Then-Vice President Joe Biden ceremonially swore in Senate Majority Leader Mitch McConnell, R-Ky., in January 2015 following Republicans' Senate takeover.

Both liberal and conservative activists say that if the Senate stays in Republicans' hands, getting Biden's nominees confirmed will require negotiation, often including other policy issues.

"The question is, will Biden try to push the envelope ideologically? That will determine how much of a fight there will be in the Senate," says Ilya Shapiro of the libertarian Cato Institute, author of "Supreme Disorder: Judicial Nominations and the Politics of America's Highest Court."

"Republicans will want amendments to legislation. They'll want dams. They'll want funding for programs," says Nan Aron, president of the liberal Alliance for Justice. "Judges have to be an essential component of any conversation that takes place between Republican senators and the White House."

The crown jewel for liberals – adding seats to the Supreme Court, which was labeled "court-packing" when Franklin Roosevelt failed to achieve it – has all but disappeared from public debate.

Biden himself never was a fan, fearing it would lead to retaliation by Republicans when they regained power. Since Democrats failed to win Senate control in November, attention has turned to less bold proposals.

The Judicial Conference, a panel of federal judges that sets administrative policies, 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 Democratic Party included that proposal in its platform last summer.

"We're overdue by any neutral evaluation, in terms of cases per judge," Shapiro says, noting the size of the federal judiciary has been static since the Clinton administration. A push for additional lower court judges, he says, "has a greater chance of success."

Biden has pledged to establish a commission to study possible changes to the federal judiciary. That, Fallon says, will be "a venue that we can organize around."