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## Judging Biden

Ilya Shapiro

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Judicial appointments are the brightest lights of Donald Trump's turbulent presidency. Long after his tax cuts have been reversed and regulatory reforms rescinded, indeed long after his tweets have been memory-holed, the youthful originalists Trump appointed to the bench, most notably three Supreme Court justices, will still affect our lives.

But that's actually one of the least surprising things about the Trump years, because presidents have few constitutional powers, at least in the domestic sphere, more important than appointing judges. Ruth Bader Ginsburg served nearly 30 years on the high court, giving President Bill Clinton's legal agenda a bridge to the 21st century. Antonin Scalia did the same for President Ronald Reagan.

As a new administration dawns, it pays to take a close look at what we can expect from Joe Biden, who on Inauguration Day will become not only the oldest president we've ever had, but the one most identified with judicial battles. Although Biden presents himself as a centrist unifier, on judicial nominations, he's been a partisan brawler. During a 36-year Senate career, the only Republican Supreme Court nominees he voted for were confirmed unanimously or nearly so. And that goes doubly for Vice President-elect Kamala Harris, who smeared Brett Kavanaugh with baseless innuendo and voted against more than 80% of Trump's judicial nominees.

Biden became Judiciary Committee chairman when the Democrats won back that chamber in the 1986 midterm elections, just in time to preside over the Robert Bork hearings. While Ted Kennedy led the anti-Bork demagoguery, Biden's sustained attacks were crucial to derailing the nomination. Four years later, Biden bizarrely went after Clarence Thomas for being too zealous in protecting individual rights. After Anita Hill's allegations of sexual harassment surfaced, Biden reopened the hearings and led what Thomas characterized as a "high-tech lynching." In April 2019, as he geared up for his presidential run, Biden called Hill to express "regret for what she endured." No apology to Justice Thomas has been forthcoming.

In June 1992, having failed to stop the Thomas confirmation and fearing further Republican appointments, Biden went to the Senate floor to urge President George H.W. Bush not to nominate anyone if a Supreme Court vacancy arose before that fall's election. That speech would resurface 24 years later, when President Barack Obama made a nomination in the final year of his second term, leading to debate over the "Biden rule."

In the meantime, Biden voted against John Roberts's Supreme Court nomination, which half the Democratic caucus supported, and Samuel Alito's, which, along with Obama, Hillary Clinton, and incoming Senate Majority Leader Chuck Schumer, he tried to filibuster. Schumer declared in July 2007 that the Senate should not confirm another George W. Bush nominee "except in

extraordinary circumstances” because the court was “dangerously out of balance.” That affirmation of the Biden rule would come back to bite the Democrats; after Scalia died in February 2016, then-Vice President Biden walked back his earlier position and said the president and Senate should “work together to overcome partisan differences.”

But that doesn’t mean he wants centrists on the high court. In December 2019, Biden said he’d appoint judges who see the Constitution as a “living document,” echoing his 30-year-old attacks on Bork and making clear that there would be no olive branch. He also declined to release a list of potential nominees, knowing that whomever he named could hurt him politically, just as Trump’s original list helped him win over swing voters in key states in 2016. Proving the point, the activist group Demand Justice put out a list of 32 names that was attacked for its radicalism, a “shortlist” that has since been expanded to 43 to reflect political realities.

Biden did famously pledge to appoint a black woman, which rather narrows the pool of plausible candidates. There are only four black, female federal appellate judges, the youngest of whom is 68, so talk quickly turned to three people: Ketanji Brown Jackson, a 50-year-old federal judge on the D.C. District Court; Leondra Kruger, a 44-year-old California Supreme Court justice; and Leslie Abrams Gardner, a federal district judge in Macon, Georgia, and the younger sister of Stacey Abrams, who became that state’s political queenmaker after losing her 2018 gubernatorial run. Jackson, whom Obama had interviewed for the ill-fated 2016 nomination, has previously gained support from former House Speaker Paul Ryan, whose brother-in-law is the twin brother of Jackson’s husband. Gardner, whose husband was falsely imprisoned in a West Virginia penitentiary for 26 years before they met, was recently in the news for a ruling that prevented the purging of voter rolls ahead of this month’s Senate runoffs.

You’ll be hearing those names a lot as pressure mounts on 82-year-old Justice Stephen Breyer to retire and avoid Ginsburg’s fate of being replaced by someone of a different jurisprudential stripe. If Democrats hadn’t swept both of those Georgia Senate seats and thus secured united control of the political branches — we haven’t had a Supreme Court confirmation process during divided government since 1991 — it’s possible that Breyer would’ve tried to stay on through the 2022 midterm elections, when Democrats face a favorable electoral map. Now, he doesn’t have that excuse, so expect the fourth Supreme Court fight in five years this summer.

Past this next vacancy, it’s unclear when the next opportunity to shape the high court will come, and whether it will be under President Biden. The next oldest justices are Thomas (72) and Alito (70). While there was speculation that they had been considering retirement in 2019, there’s no chance they’ll willingly depart during a Democratic administration. After that comes Sonia Sotomayor (66), but she’s only served 11 years and, despite living with diabetes, surely feels an obligation to hold up the court’s left wing.

Then there’s Chief Justice Roberts, who’s only 65 but has served 15 years — he was the youngest chief justice since John Marshall — and, with the confirmation of Amy Coney Barrett, is no longer the median vote. Legal scholar Josh Blackman (my friend and sometimes co-author) has suggested that Roberts may retire to lessen pressure on Biden to pack the court, but that seems unrealistic. So, I would expect the subsequent justice to be appointed by whoever wins the 2024 election, if not 2028. I could give you a list for that eventuality, but it would be outdated before becoming useful. For example, leading contender Sri Srinivasan, chief judge of the D.C. Circuit, turns 54 next month and so may miss his chance.

Of course, even as the Supreme Court gets all the attention, it only rules on about 70 cases a year (not counting emergency motions), compared to the 50,000 or so decided by the lower courts. All federal judges sit on those benches for life, affecting our law for decades. Every four-year term, the president typically appoints about a fifth of all federal judges. Trump's 234 put him at more than a quarter. The efficiency of Senate Majority Leader Mitch McConnell's confirmation machine has left only 46 Article III vacancies (as compared to the 105 that Trump had four years ago), almost all in the trial-level district courts. And more than half of those are in just three states, California, New Jersey, and Washington, where Democratic senators refused to negotiate any sort of deal, preferring to leave their states shorthanded rather than allowing Trump to get any say in their judges.

So, it would seem that Biden's judicial imprint will be muted, particularly if he ends up serving only one term. Indeed, it's a certainty that Biden won't have as much influence over the judiciary as his erstwhile running mate Obama. When Obama took office, only one of the 13 federal circuit courts had a majority of judges appointed by Democratic presidents. After his 55 appointments, nine did. Trump partly reversed that, "flipping" three circuits and getting a record 30 circuit judges confirmed in his first two years — about the same number as George W. Bush and Obama *combined* at that point in their presidencies. And 54 overall (with one nominee pending), better than anyone in one term except Jimmy Carter, for whom Congress created many new judgeships as a sort of consolation for not having any high court vacancies on his watch.

What can Biden do to reverse that? The answer depends on two obvious factors: (1) the number of seats to fill and (2) the power to get nominees confirmed. Regarding the latter, the 50-50 Senate, with Vice President Harris expecting to live at the Capitol breaking tie votes, means that Biden should be able to get confirmed even marginal nominees whose votes break down on party lines. And there may not be many of those, given the judicial voting records of centrist Republican Sens. Susan Collins and Lisa Murkowski.

Predicting the number of seats that will be available for filling is more of a parlor game, the key consideration being the potential for judges to take advantage of what is known as "senior status." This status is governed by the so-called Rule of 80: A federal judge who is at least 65 years old has the option of going into semiretirement once the judge's combined age and years on the bench add up to 80.

The decision to take senior status has significant consequences: Judges have the option of presiding over reduced caseloads while maintaining their full salaries. In effect, whatever work they do is voluntary at that point because they get their full salary in retirement regardless, so we should be grateful to them for picking up that slack. For those who consider interpreting the law and deciding cases to be a labor of love, doing less work for the same pay can prove enticing. Most relevant to a president wishing to leave a lasting mark on the courts is that these senior judges don't count against the 179 total appellate judgeships authorized by Congress.

There are now only two circuit vacancies: one in the Boston-based 1st Circuit, which is already heavily skewed toward Democratic appointees, and one in the Chicago-based 7th Circuit, which is equally skewed toward Republican appointees. Beyond those, as of this writing, there are an amazing 61 circuit judges, more than a third of the total, eligible for senior status. Thirty-five of those are Democratic appointees (counting two appointed by George W. Bush as unrequited gestures of goodwill), and it's a fair bet that most of those will give way, allowing Biden to restock the Democratic bench with younger judges.

As for the 26 Republican appointees, five are over 80, including one nonagenarian, and another six are in their 70s. If all of them went senior and were replaced by the Biden White House, the only significant shift would be on the 7th Circuit, which would go from an 8R-2D ratio to a 6D-5R one (counting the aforementioned vacancy). But that's a big if.

Regardless of ideological balance, one court to watch will be the D.C. Circuit, considered to be the second-most prestigious after the Supreme Court. It decides most appeals of federal agency action and sends a disproportionate number of judges to higher office (including three sitting justices, Roberts, Thomas, and Kavanaugh). There will already be one vacancy once Merrick Garland is confirmed as attorney general, and another one when 81-year-old Judith Rogers undoubtedly retires. The jockeying for those slots has already begun among Washington lawyers, but putting one of the three black female shortlisters on it would signal where Biden's preferences for future elevation may lie.

More broadly, what kinds of judges will the incoming president pick? The Democrats' 2020 platform asserted that Trump "has packed our federal courts with unqualified, partisan judges who consistently rule for corporations, the wealthy, and Republican interests" and pledged to "appoint people to the bench who are committed to seeing justice be served, and treating each case on its merits." Belying those ideological commitments, however, Democratic presidents have put a premium on checking demographic boxes. Clinton and Obama each built on Carter's nomination of women and racial minorities, though they were criticized for appointments that weren't as jurisprudentially strong as they could be, or liberal enough, which is, of course, the trade-off for a focus on demographics. Nevertheless, we can expect Biden to be focused on both issue advocacy and identitarian concerns.

Finally, in addition to personnel, the new president faces calls to "rebalance" the Supreme Court, with Democratic elites questioning the legitimacy of all six Republican-appointed justices for various reasons. Although Biden was against court-packing during the primaries, he stayed coy on the issue during the general election, ultimately proposing a bipartisan commission to study judicial reform. It's unlikely that such a commission, if truly representing the range of expert opinion, would agree on much, or that the Senate would eliminate the legislative filibuster to restructure the judiciary radically. Still, it's more likely than not that Congress would take up an expansion of the lower courts. Despite increased caseload driven by population growth, no new district judgeships have been created since 2002 and no new circuit judgeships since 1990.

In the end, the slew of legislative and regulatory priorities Democrats have after four years of frustration may mean that, even as Biden fills what vacancies arise, judges become a back-burner issue early on, as they initially were for Obama. But a lot will depend on the court rulings we see in response to those policy initiatives, as well as what controversy the Supreme Court stirs up with its term-ending decisions this June.

*Ilya Shapiro is director of the Robert A. Levy Center for Constitutional Studies at the Cato Institute and author of Supreme Disorder: Judicial Nominations and the Politics of America's Highest Court.*