



Trump setbacks elevate Supreme Court as voting issue in the 2020 election

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Two legal setbacks for President Donald Trump this week are reigniting the Supreme Court as an issue in the 2020 election, given that the winner could pick one or more new justices.

Trump said Thursday that he will release a short list for the Supreme Court by Sept. 1. Democratic nominee-in-waiting Joe Biden has said only that he would put a Black woman on the court, without mentioning names. His campaign had no comment when asked whether he intends to release a list of prospects before the election Nov. 3.

The stakes are enormous.

Next year, Ruth Bader Ginsburg, the leader of the liberal wing, will turn 88. Stephen Breyer, also a Democratic appointee, will turn 82. The next oldest justices are Republican appointees Clarence Thomas, who will turn 72, and Samuel Alito, who will be 71.

"If Trump wins re-election, he'll probably get the chance to replace one or two liberal justices on the Supreme Court," said Adam Winkler, a constitutional law professor at UCLA School of Law. "You could imagine that Trump gains a supermajority on the court where the swing justice might be Brett Kavanaugh."

Trump's promise to release a new short list follows a similar gambit that paid off in 2016, rallying conservatives by embracing their judicial vision. He hopes to replicate the feat in 2020, using the two setbacks this week to motivate conservatives after the Supreme Court ruled to temporarily preserve the Deferred Action for Childhood Arrivals program for young immigrants and to uphold LGBTQ workplace rights.

"The recent Supreme Court decisions, not only on DACA, Sanctuary Cities, Census, and others, tell you only one thing, we need NEW JUSTICES of the Supreme Court," Trump said in a series of tweets, adding: "Based on decisions being rendered now, this list is more important than ever before (Second Amendment, Right to Life, Religious Liberty, etc.) – VOTE 2020."

Kavanaugh and another Trump-picked justice, Neil Gorsuch, have cemented a 5-4 Republican-appointed majority and have likely pushed the court to the right, because Kavanaugh replaced Anthony Kennedy, who sided with liberals on some major issues. Expanding that majority could yield conservative victories on issues from abortion rights and gun rights to civil rights and campaign finance.

Yet some conservatives worry that the immigration and LGBTQ rights rulings undermine Trump's pitch to evangelicals that he will install judges who advance their goals.

"I think each individual justice thinks they are doing the correct thing, but they are turning the law on its head and denying the will of the people as expressed in the 2016 election," said Dan Eberhart, a Republican donor and Trump supporter.

The liberal euphoria could be short-lived, as the Supreme Court has yet to rule on major cases involving abortion rights and Trump's tax returns. With some exceptions, the court has shifted rightward over the last decade and a half. Overall, Trump is outpacing presidents for the last 40 years in confirming judges.

"The decisions of the last few days should remind us all of the immense power of the Supreme Court — and the generational impact its justices can have," Biden tweeted Thursday evening. "We have the power to shape the Court's future this November — and we can't forget that."

Chris Kang, a former deputy counsel to President Barack Obama and co-founder of the progressive group Demand Justice, warned Democrats that more Trump court picks could set their goals back for years to come.

"The risk is that every single progressive attempt to address the pressing issues of our time is going to be undermined by a partisan, political Supreme Court," Kang said. "You're already seeing it in areas like voting rights, money in politics and partisan gerrymandering that make it harder to even elect Democrats in the first place."

The partisan wars have extended to the courts as the two parties increasingly appoint different types of judges. Whereas Republican nominees tend to see government authority as constrained by what the framers of the Constitution explicitly enumerated, Democratic nominees generally see a "living Constitution" crafted with broad language to adapt to changing times.

"Is the Constitution essentially a document of law, or is it a political document and an empty vessel to be filled by transient majorities?" asked Roger Pilon, a constitutional scholar at the libertarian Cato Institute. "The Trump judges — they are deeply schooled in all of this. They are mostly Federalist Society members."

Justice Antonin Scalia's unexpected death in early 2016 elevated the Supreme Court as an issue, and Trump won over some conservative skeptics by releasing a list of names from which he'd

pick a replacement. The list galvanized conservatives, who have been more attuned to the courts as a voting issue over the last generation.

"But for Justice Scalia's death and that list, he would not be president," said John McGinnis, a professor at Northwestern University's Pritzker School of Law and a member of the Federalist Society, some leaders of which have vetted and advised on Trump's court prospects.

The gambit worked after Senate Majority Leader Mitch McConnell, R-Ky., made the extraordinary decision to refuse to consider Obama Supreme Court nominee Merrick Garland, escalating a political war over the courts that began in the 1980s.

Winkler, describing the importance of elections on the courts, said McConnell's refusal to allow a vote on Garland shaped that race and the course of U.S. history.

"A court system that was about to make a strong turn to the left has been captured by the right and totally transformed," he said. "It's not just a stolen Supreme Court seat. It's a stolen branch of government."