

# Dems wrestle with whether to nudge a justice off the Supreme Court

Neither Democratic lawmakers nor President Joe Biden is putting overt retirement pressure on the Supreme Court justice — yet, anyway.



Even as some liberal groups boot up a “Breyer Retire” campaign, the Democratic Party is sensitive to the justice’s predicament. | Steven Senn/AP Photo

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Democrats are grappling with judicial *déjà vu*: an aging liberal Supreme Court justice, a paper-thin Senate majority and activist pressure to swing the bench leftward.

Justice is 82 and Democrats are a single Senate seat away from ceding control back to Republicans. It’s a familiar and uncomfortable bind for a party that barely nudged former Justice Ruth Bader Ginsburg to retire the last time they controlled

both the Senate and the White House — then watched the Supreme Court veer to the right.

But even as some liberal groups boot up a “Breyer Retire” campaign, the Democratic Party is sensitive to the justice’s predicament. That’s why neither Democratic lawmakers nor President Joe Biden are putting overt retirement pressure on the Bill Clinton appointee while their party still holds the Senate. But Breyer’s future is on everyone’s minds, maybe even the justice’s own.

Sen. Richard Blumenthal (D-Conn.) said he would “never presume to tell a Supreme Court justice to retire,” but that Breyer himself “is very familiar with the potential risks of a Republican president appointing his successor.”

“He is well familiar with the way judicial appointments work, and I believe strongly he has in mind the best interests of the country and will make the right decision,” said Blumenthal, a member of the Judiciary Committee. “There are political realities that I hope judges will perceive.”

A single Senate vacancy could plunge the future of the Biden-era high court into uncertainty, given Democrats’ tenuous 50-50 majority. Yet despite that risk, and the obvious consequences of Ginsburg’s decision to stay on after 2014, Supreme Court retirements remain a third rail in Democratic politics — at least publicly.

Many of the party’s senators declined to predict whether or not a justice would step aside this year, although they’re acutely aware of the stakes of Breyer’s decision-making after watching Senate Republicans fill three Supreme Court seats in just four years.

“It’s self-evident that if you care at all about the balance of power on the Supreme Court then you have to not hang on until the very last moment,” one Democratic senator said of Breyer.

“He should enjoy his retirement and allow us to put in a talented younger jurist that can serve for decades.”

This Democratic majority is five seats smaller than 2014’s, with an active progressive base pushing the party to wage judicial fights as bare-knuckled as the GOP’s. Brian Fallon, the executive director of liberal judicial group Demand Justice, said that the reality of Breyer’s future — as the high court’s oldest member by a decade — means “people need to stop being sheepish about this.”

“The longer that goes by without word from Breyer that he intends to step down at the end of this term, the more reckless it is,” Fallon said. “Mitch McConnell was not above directly calling judges to urge them to retire last year, so senators should not be so reluctant to state the obvious of what is at risk if Breyer does not take this opportunity to step down.”

Democratic senators are aware of that dynamic even as they approach Breyer much as they did Ginsburg seven years ago. Sen. Sheldon Whitehouse (D-R.I.) surmised that “it’s not clear that we will avoid a repeat” of the past.

“We always worry about that. And it’s unpredictable,” said Senate Judiciary Chairman Dick Durbin (D-Ill.).

There is some precedent for senatorial speculation on federal bench vacancies, including the Supreme Court. In March 2018, then-Sen. Dean Heller (R-Nev.) correctly predicted that Justice Anthony Kennedy, a key swing vote, would retire that summer, while Sen. Chuck Grassley (R-Iowa) nudged potential retirees to move quickly. Kennedy was 81 when he stepped down.

Ginsburg acknowledged the pressure she faced to retire, particularly during Barack Obama’s second White House term — and even had lunch with the then-president in 2013, when he reportedly raised concerns that Democrats could lose the Senate. But in a 2014 interview with Reuters, Ginsburg asked: “Tell me who the president could have nominated this spring that you would rather see on the court than me?”

While Biden is not explicitly pressuring Breyer to retire, he has at least a professional connection to the justice, having helped shepherd Breyer’s 1994 confirmation as chair of the Senate Judiciary Committee. But Biden also had a brief tiff with the nominee that year, labeling Breyer’s analysis of American cultural values as “elitist.”

Given that Ginsburg’s seat ended up filled by conservative Justice Amy Coney Barrett, activists are taking a more aggressive tack with Breyer. Both Cliff Albright, co-founder of Black Voters Matter, and Rachel O’Leary Carmona, executive director of Women’s March, said that Breyer needs to step down before the 2022 midterms.

“We do think it’s time for him to retire,” said O’Leary Carmona. “What he can do

to cement his career as a champion for women is ... step down and make sure that so much of the progress that he helped women achieve through court victories isn't lost."

If Republicans take control of the Senate in 2022, she added, progressives fear that "Mitch McConnell will do everything and anything that he can to stop a justice who supports women's rights from being confirmed."

Albright, whose group mobilizes voters in Southern states, said replacing Breyer is "not even a chance to balance out the court" but simply an opportunity to cement its current balance with a younger judge.

"We don't want to end up with the same situation that we ended up with Justice Ginsburg," he said. "If you're somebody who cares about voting rights, you've got to care about the future of the Supreme Court. This is the most immediate potential vacancy affecting that future."

And though not all social justice groups are explicitly calling on Breyer to retire, their leaders hope he considers the court's ability to preserve a legacy he helped build on issues like civil rights.

"The decision by a justice to retire is deeply personal but should take into account the long-term impact on what the justice has stood for," said National Urban League President Marc Morial, emphasizing Breyer's record on race and civil rights. "We hope that the justice weighs the impact of his choices on the maintenance of that legacy on the future Supreme Court."

The growing conversation about Breyer's potential retirement comes as Democrats continue to jostle over whether to attempt Supreme Court reform, responding to a progressive push for changes as far-reaching as expansion. Breyer himself recently cautioned against the idea for fear it would further hurt public confidence in the institution, but that's not silencing some Democrats who want an overhaul. Sen. Ed Markey (D-Mass.) said that despite Breyer's views, "we should move to expand the Supreme Court. That's my position."

The White House last week rolled out a bipartisan commission to study potential changes to the Supreme Court and, during his campaign, Biden pledged to nominate a Black woman to the nation's highest bench should a vacancy arise.

The three Supreme Court confirmations during Trump's presidency crescendoed to complete partisanship, with Barrett failing to receive a single Democratic vote. So if Breyer does step down and give Biden a chance to make his mark on the court in the coming months, Democrats are hoping to put a different stamp.

"My expectation is that if there is a vacancy, that President Biden will put forward a name where there can be bipartisan support," said Sen. Mazie Hirono (D-Hawaii). "Trying to get people on the Supreme Court with purely Republican or Democratic votes does not do service to that court."

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