

# US Supreme Court Justice Stephen Breyer retires

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Justice Stephen Breyer announced Thursday that he will retire from the US Supreme Court after the conclusion of the current session, which ends in late June or early July, giving President Joe Biden his first opportunity to appoint a new justice to fill a vacancy on the highest court.

Breyer, at 83, is the oldest justice, with the second-longest tenure, behind only the arch-reactionary Clarence Thomas. He was nominated in 1994 by President Bill Clinton, and is the oldest of the three Democratic appointees who comprise the moderate-liberal minority on the court, along with Sonya Sotomayor and Elena Kagan.

Breyer appeared alongside Biden at the White House Thursday afternoon, giving brief remarks that were notable for indicating concern over the permanence of what he called “the American experiment” in democracy and the rule of law.

Breyer quoted from the Gettysburg Address, focusing on Lincoln’s words: “And we are now engaged in a great civil war to determine whether that nation or any nation so conceived and so dedicated, can long endure.”

This was his oblique allusion to the mounting threat of ultra-right authoritarianism, demonstrated for all the world to see in the attack on the US Capitol on January 6, 2021.

Biden’s remarks were equally brief, consisting mainly of effusive praise for Breyer’s five decades in the federal government, including the executive, legislative and judicial branches, and the reiteration of a campaign pledge to nominate a black woman to fill the first vacancy on the Supreme Court that occurred during his term in office—a bow to the central role of identity politics in the Democratic Party.

The replacement of Breyer by any of the half dozen or so judges now being widely mentioned in the corporate media will not change the balance of power on the court, where six conservatives, most of them identified with the

far right of the Republican Party, outnumber the three moderate liberals.

All the likely replacements, such as Ketanji Brown Jackson of the DC Court of Appeals, Leondra Kruger of the California Supreme Court, and J. Michelle Childs, a federal District Court judge in South Carolina, are long-time figures in the judicial apparatus of the capitalist state. Their class position is what is critical, not their race or gender, as is demonstrated by the example of Kruger. She served in the Department of Justice in the Obama administration, when it was engaged in justifying the “right” of the US president to carry out drone-missile assassinations.

Breyer was arguably the most right-wing figure among the moderate-liberal bloc on the court. A reliable vote for corporate power and business interests, as well as for the national-security state, he was a liberal only on questions of race, gender, abortion rights and democratic rights in general—the last only inconsistently. He did, however, express himself with increasing hostility toward the open politicization of the court as it became packed with right-wing ideologues of the type of Thomas, Antonin Scalia, Samuel Alito and Neil Gorsuch.

His main concern was not so much the impact of reactionary and arbitrary court rulings on the interests of working people and victims of state oppression and violence, as the discrediting of the court in the eyes of the population, as the court became more and more viewed as the direct instrument of the political right.

Breyer was himself confirmed to his position on the court by a vote of 87–9 in the Senate, a year after the Senate approved Ruth Bader Ginsburg by a vote of 96–3. Since then, however, confirmation votes have become vicious mudslinging affairs decided by virtually party-line votes. Trump’s three nominees were all confirmed by narrow margins: Gorsuch by 54–45, Kavanaugh by 50–48, Barrett by 52–48.

The closeness of the votes does not indicate any real struggle by the Democratic Party, which has avoided highlighting the dangers to democratic rights represented by the packing of the court with diehard reactionaries in favor of complaints about process or alleged personal misconduct.

Gorsuch was chosen for the seat held open for a year by Senate Republican Leader Mitch McConnell to ensure a Republican president could fill the vacancy. Barrett's nomination was rammed through only days before the presidential election. Kavanaugh was the target of a campaign of vilification based on unprovable allegations of sexual assault brought forward 30 years after the fact.

The Democrats proceeded in this way in order to avoid alerting the American people about the growing danger of right-wing authoritarianism and to avoid undermining any further the dwindling popular respect for the Supreme Court as an institution.

Despite the efforts of the Democrats and allied groups to portray the Supreme Court as a bastion of democratic and constitutional rights, the moderate-liberal wing of the court has itself moved steadily to the right over the past half century, and throughout that period never constituted more than four out of the nine members of the court.

Since the 1990s, the role of "swing" or "middle" justice was always played by a conservative Republican: first Sandra Day O'Connor, later supplanted by Anthony Kennedy, then Chief Justice John Roberts, as the center of gravity on the high court steadily shifted to the right.

With the death of Ruth Bader Ginsburg and Trump's selection of Amy Coney Barrett, the open reactionaries now constitute six out of nine justices. The role of "swing" justice, now an almost meaningless term, apparently devolves on Brett Kavanaugh, a longtime Republican partisan, member of the Federalist Society and central figure in the Starr inquiry that led to the impeachment of Clinton.

Whoever Biden nominates must win confirmation in the 50–50 Senate, with Vice President Kamala Harris potentially casting a tie-breaking vote. The two right-wing Democrats who torpedoed Biden's "Build Back Better" legislation and voting rights bill, Kyrsten Sinema and Joe Manchin, have never voted against any of Biden's nominees for district or appeals court judgeships, and have previously voted for several of those reputed to be on Biden's short list when they were nominated for lower court positions.

Within hours of news of Breyer's retirement there was already speculation in Washington about whether his

replacement by a black woman would benefit the Democrats politically in the November midterm elections.

Typical was Dan Balz in the *Washington Post*, who wrote: "If Biden fulfills his pledge to nominate an African American woman and thereby make history on the court, he could go a long way to patching up relations with Black voters—a critically important constituency for Democrats, one that has been disappointed at the lack of progress on voting rights and what it views as Biden's other still-unfulfilled promises."

Democratic Representative Ro Khanna of California, former co-chair of the Bernie Sanders presidential campaign, speaking with the *New York Times*, said of the prospective nomination, "My first thought is just that it moves us one step closer in a long journey towards racial justice." He added that he hoped the vacancy would be a "galvanizing" moment for Democratic voters.

There is a strong element of desperation in such comments, and in the preceding campaign, waged by a number of Democratic Party-allied groups, imploring Breyer to retire before the November election, when the Democrats could well lose their Senate majority and therefore the ability to confirm Biden's nominee.

Having completely failed to bring the coronavirus pandemic under control, instead embracing the "herd immunity" policy first adopted by the Trump administration, and in the midst of mounting economic crisis and social decay, the Democrats express the hope that exchanging an elderly white male for a younger black female on a Supreme Court that has become largely discredited will somehow boost their popular standing. This is truly clutching at straws.



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