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We must restore Americans' faith in our federal bench

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A. Benjamin Spencer, opinion contributor

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With the dust settling from this month's elections, it's time for policy proposals to flow forth. If President-elect Joe Biden truly wants to help unite the country, reforming the federal judiciary in ways that would restore public faith in its independence would be a great place to start.

First, Biden should embrace a meaningful commitment to appoint independent judges without the application of litmus tests. For too long, both Republicans and Democrats have been willing to appoint only judges who are reliably conservative or liberal in their outlook. The goal should be to find competent, unaligned lawyers and judges who have demonstrated that they take an unbiased, honest approach to the task of legal analysis and constitutional interpretation.

Second, Biden should urge the Senate to honor objections from home-state senators for both district and circuit court nominees and restore the practice of requiring 60 votes to end debate on all judicial nominees, something that was eliminated after efforts by Democrats in 2013 and by Republicans in 2017. While this would be a reform against

Biden's partisan interests — it could make it more difficult for his nominees to gain confirmation — it would show that his commitment is not to party politics but to ensuring that independent-minded, consensus nominees are presented and confirmed.

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Third, we must find creative ways to lower the stakes associated with each appointee to the Supreme Court or federal appeals courts. Part of why the stakes are so high is the importance of the legal questions that our federal courts resolve. That is not likely to change. However, there are ways to lessen the impact that any particular judge might have.

One way to do this is to revisit the question of tenure for federal judges. Although an end to life tenure for federal judges is not likely, given the need to amend the Constitution, that doesn't mean the concept of abbreviating the active tenure of federal judges should be dismissed. Currently, federal judges can take senior status once they reach a certain age and length of service, a move that is voluntary. Biden should pursue legislation that would automatically convert federal judges to senior status upon reaching these designated milestones. These judges would be capable of hearing cases, but their conversion to senior status would open up their seats for new appointments. This change would lessen the generational impact of judicial appointments without taking away the independence that life tenure was designed to protect.

Another reform the Biden administration should pursue is requiring more consensus-based rulings from the Supreme Court and federal appeals courts. Majority rule permits decisions impacting consequential issues to be decided on the basis of a single vote. Given the importance of the legal questions resolved by appeals courts and the Supreme Court — and the need for the public to have confidence in decisions rendered — requiring some form of supermajority outcome in a case would go a long way toward forcing judges to reach agreement on legal pronouncements.

Across the country, unanimity or supermajority requirements are imposed for jury convictions in criminal cases, in furtherance of ensuring that there is no reasonable doubt. Yet in our federal appeals courts — including the Supreme Court — we effectively permit a simple majority to govern legal decisions that affect millions of people and bear on some of the most significant questions of governmental authority and power. Instead, we could require circuit courts of appeals to have unanimous decisions for three-judge panels, or use five-judge panels and require three of the five to concur. At the Supreme Court level, requiring six of the nine justices to agree should not be too much to ask; 5-4 decisions that split upon predictable ideological lines do not do much to bolster the perception of the rule of law.

Biden repeatedly has pledged to bring the country together. A vital part of that undertaking will be to restore faith in the independence of our federal judiciary. By pressing Congress to enact these commonsense reforms, he can make the progress that we need.

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