

Biden admits that there is no due process in judicial decision-making process. And that he is not trying to fix that.

By Lev Tsitrin

Biden is doing something truly fascinating: he is trying to solve a problem without knowing (or at least telling us) what that problem is. Surely, [he trumpets](#) what to him is a symptom that something is amiss with the Supreme Court (“This Court has gutted civil rights protections, taken away a woman’s right to choose, and now granted Presidents broad immunity from prosecution for crimes they commit in office”). Because its decisions are not to Biden’s liking, the fundamental setup of the court must be wrong, and is in need of fixing.

He is not wrong about the latter – though the trigger for his decision to reform the court makes no sense at all: people go to court to battle it out and inevitably, while one party wins, the other loses, so unhappiness is just the natural part of the situation. This unhappiness turns into a problem for a court only when the loser feels that he lost unfairly, that the court put a thumb on the scale instead of doing the Lady Justice-like, impartial, blindfolded weighing of one party’s argument against that of the opponent. It becomes a problem only when judge’s blindfold falls off, when the judge rigs his “scale of justice.”

Put simply, the problem is with the process – because the outcome is shaped by the process. The proper process would lead to the proper outcome – the outcome which, to be clear,

the losing party will still hate but won't be able to say that it is unfair, and therefore won't be able to claim that the court is not impartial and is unjust – i.e., corrupt.

Biden skips the part of diagnosing the problem, going straight to the proposed “solutions”: term limits for the Supreme Court justices, and the ethics code that would require justices to disclose gifts, and recuse themselves when they have a personal interest in an outcome.

Does any of this matter given that there is not a word in Biden's missive about changing the way by which judging is done, that there is no plan to bring judicial decision-making process into compliance with the “due process of the law”? Yet this is where the problem is. Put simply, the problem is that there is no “due process” in judicial decision-making process. Here is how the present-day “process” “works”: the parties spend tens of thousands of dollars on lawyers who articulate their grievance, do the requisite legal research, and rebut the counter-argument from the opposite party – in short, put together the package that should go for weighing on the “scale of justice.” All that judges should do – according to “due process of the law” that forbids judges from being parties to the case (if they find that they are, judges must recuse themselves) – is impartially weigh one set of parties' argument against the other – or as Chief Justice Roberts memorably put it during his nomination process, judges “neither pitch nor bat, but call balls and strikes.” “Pitching and batting” is the parties' part of “due process.”

But this is not at all what happens in practice. In real life, judges don't place parties' argument on their scale, but, routinely, throw it into the garbage, and use completely bogus argument – that of judges' own concoction – to adjudicate a case, which they do by agreeing with their own argument produced out of thin air not in their capacity of a judge (judges are forbidden to do the lawyering for parties since that would turn them into parties to the case, requiring

recusal) – but in a self-assigned capacity of being the lawyers to the party they want to win. Yes, judges do “call balls and strikes” – but not infrequently those are the “balls and strikes” of judges’ own “pitching and batting” (which they try to hide by using a Latin term “sua spontism” – for respectability, and to blow smoke into parties’ eyes. But a spade is still a spade – no matter what language is used to denote it; call it “pitching and batting,” or “sua sponting,” it is plainly illegal, even per Chief Justice Roberts himself – though he just loves to do it, as he did in tilting the Obamacare case for Obama by invoking a decisive argument that wasn’t argued by either party!)

Yet, the absence of “due process” from the judicial decision-making process is not part of Biden’s diagnosis of the problem. In fact, there is no diagnosis at all – he just jumps from the symptoms (that are not even symptoms) to the cure that is no cure, given that the disease is the arbitrary, un-procedural, lawless judging. All he hopes is that his “cure” would make the present-day fraudulent, arbitrary, illegal judging work for his party, helping advance its “woke” and “progressive” agenda – not that judging will become honest.

Nor is he addressing federal judges’ justification for their utterly fraudulent mode of judging: sue federal judges for fraud, and they will reply that in *Pierson v Ray* federal judges gave themselves the right to act from the bench “maliciously and corruptly,” thus obviating the need for merely “calling balls and strikes.” Judicial “corruption and malice” is lawful, if you listen to the Supreme Court – and therefore, “due process” is merely optional.

But, all three branches of government being co-equal, why should it be unlawful for presidents – who head the executive branch – to also act “maliciously and corruptly,” just as federal judges do? Yet this, somehow, does not sit well with Biden who, in the same initiative, declares that he will push for “No One Is Above the Law Amendment” which would target

presidents but not the judges, still leaving the federal judiciary “above the law,” excluded from the seemingly all-encompassing set of “No One.”

What a fool’s errand! Biden should direct what energies he still has for some better uses than promoting a “fix” that won’t fix anything, and that fails to even name the real problem of arbitrary judging – a problem which he, along with America’s academe and mainstream media, refuses to see. Or maybe, he should just go a normal route, diagnosing the problem before trying to fix it? I can surely help him with that!

Lev Tsitrin is the author of “[Why Do Judges Act as Lawyers?: A Guide to What’s Wrong with American Law](#)”