



FAQ: IN THE MIDST OF RENEWED CONCERNS OVER BIDEN'S FITNESS TO LEAD THE NATION, DOES THE TICKET REMAIN IN PLACE?

- Barring unexpected developments (including his decision to voluntarily step aside, which at this point I would view as unlikely, and therefore unexpected), Joe Biden will lead the Democratic presidential ticket in the 2024 election.
- That said, the Special Counsel report releases last week has resurrected widespread public questioning about a Democratic Party Plan B (including among the party faithful). There has been equally forceful pushback.
- Were the President to step aside, there are different processes that would become operative (and potentially different outcomes) depending on when (and, obviously, if) that decision were to be made.

Last week, Special Counsel Robert Hur released his [report](#) on President Biden's handling of classified materials, which prompted doomsday reports in the media and rekindled questions about Joe Biden's mental fitness to serve a second term. Significant doubts raised about mental acuity overshadowed what should have been the central thrust of the report and was set out on page 345 – “no criminal charges are warranted.” The report has triggered an outpouring of criticism from Democratic ranks directed at the Special Counsel for gratuitous comments about the President's mental acuity (and an angry public rebuttal from the President). The party largely has rallied around the President in public, and there is scant evidence of a groundswell within the ranks to call for Biden to step aside now or to find an alternative ticket. That is not to say that the concerns over the President's age among the electorate have subsided – those concerns are pervasive.

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But first, ...

Putting the Age Issue into Context

There are legitimate concerns regarding the toll the presidency takes on any one who serves (compare the photos of Obama at the beginning and the end of his term), all the more so when the candidate is 81 years old, and there are a host of legitimate concerns about whether the Biden campaign is appropriately factoring in the mood among key constituents needed to reach 270 electoral college votes (whether young people, Black men or Hispanics). The campaign will need to continue to shore up support across all key constituencies, and as part of that the campaign will need to let Joe be Joe. The best way to counter the age issue is to let the public see, and hear from, the President.

The Special Counsel report landed last week like a bombshell and, in all likelihood, that was the intention. The media obliged by highlighting the age issue, rather than highlighting what



should have been the sole message of the report, namely that criminal charges would not be brought against the President, and largely failing to question the propriety of the comments about mental acuity in a report that read more like an internal DoJ memorandum setting out the pros and cons of criminal charges, rather than a public confirmation that the case against Joe Biden was now closed and no charges would be brought.

The report leaves the impression that that the country has been at risk for 37 months because the President is unfit to serve. The evidence on this though is clear – and it points in a very different direction. As political commentator Brian Tyler Cohen succinctly put it in a [post](#) on X (as quoted by Heather Cox Richardson), “The thing about Biden’s memory is that he presided over the addition of ~15 million jobs and 800k manufacturing jobs, 23 straight months of sub-4% unemployment, surging consumer sentiment, wages outpacing inflation, the American Rescue Plan, Inflation Reduction Act, CHIPs Act, PACT Act, infrastructure law, gun safety, VAWA [Violence Against Women Act], codified marriage equality, cancelled \$136 billion in student loan debt for 3.7 billion, bolstered NATO, and presided over electoral wins in ’20, ’22 and ’23.” I would add to that litany the over 40 special elections since the midterms won by Democrats, including this week’s victories in the New York 3rd Congressional District (that 53.9% win representing a swing in favor of the Democrats from -7.6 to +7.8) and in Pennsylvania’s House District 140. Senator Chris Coons, on [ABC News](#), spoke of the President (who admittedly has a decades-long history of gaffes) meeting with a delegation that had just returned from Israel for 2½ hours starting at 7:00 pm and leading a detailed and comprehensive conversation that covered a plethora of issues relating to the Israel-Gaza conflict and broader regional implications. There are countless other examples to cite.

If the President in discharging his duties were showing signs of senility or had veered off the rails, I could understand why media would be laser-focused on his mental acuity, perhaps combined with calls for the 25th Amendment to be invoked. But that is not what has prompted the breathless coverage – rather it is that we are in an election year, and the President is running for re-election. I can understand that, but then where is the wall-to-wall coverage of the dangers that awaits us if Donald Trump were to once again sit behind the Resolute Desk?

I am not talking about foggy thinking that Biden is accused of, but rather the crystal clear roadmap to autocracy as set out in countless dangerously reckless threats – to quote Nikki Haley (and not Nancy Pelosi) [referring](#) to Trump on Fox News “that’s what you’re going to get, unhinged chaos.” Forget about Trump’s equivalent gaffes, though they too are legion, but what about the threats to prosecute his political opponents, the threats to pardon the January 6th hostages, the [open invitation](#) to Russia to attack NATO members.

Perhaps it is that there are so many, that we all too frequently forget about what came before, appalling as they may have been. As New Republic editor Michael Tomasky called out (“[The Only Mental Acuity I’m Questioning These Days Is the Mainstream Media’s](#)”), “What’s the greater potential for havoc and destruction of our way of life – the things Biden forgets, or the things Trump remembers?” Were Trump to return to the White House and declare martial law on Inauguration Day, will we not all wish for Biden, memory lapses, hesitant gait, gaffes and all?



In their stinging critique of what last week was saturated media coverage, the Biden campaign noted that while the Sunday news shows spent close to six minutes on Trump's NATO comments, they devoted over 21 minutes to Biden's age. As for the print media, the Washington Post, the New York Times and the Wall Street Journal carried respectively 33, 30 and 18 stories on the Biden age issue, compared to 10, 11 and 2 stories on Trump's NATO threat. And that is the responsible media, for on the other side of the sanity divide is the right-wing media whose interests, as Tomasky put it, "is not legitimate dialogue but the utter destruction of [Biden]." He continued, that "dwelling on Biden's capacity or lack thereof will frame this discussion in such a way that will accomplish only one thing, it will elect the man who just gave Vladimir Putin a green light to invade NATO allies."

As Ja'han Jones succinctly summed up in his MSNBC post ("[Hysteria over Biden's age is a distraction from Trump's authoritarianism](#)") "the stakes of this presidential are unchanged from what they were [before the Hur report was released] – I'd argue they're unchanged from what they were *four years ago* – a choice between the Republican Party that stands for white Christian nationalism and a Democratic Party that stands for liberal democracy." Obsessing about Biden's forgetfulness is "a distraction" from our potential descent into authoritarianism."

The Special Counsel Report

I had not intended to spend too much time on the Special Counsel's report, but what stands out is yet further confirmation of the tendency of significant portions of the media to focus on the wrong issues. There are a number of media reports that characterize the report as finding that Biden wilfully retained classified documents and conclude that the Special Counsel decided only as matter of discretion not to pursue criminal charges due to Biden's age and alleged infirmity. This is incorrect. Note that for breach of the law, a court would have to find that the President acted wilfully (that is, with the intent to breach the law). And, needless to say, the responses of Biden versus the responses of Trump in respect of possession of classified material could hardly have been more different.

Legal commentators question why the report, which should have answered one question, whether the President should be charged for illegally retained classified material, was 340 pages long.

As Dennis Aftergut and Frederick Baron argue in "[The Special Counsel's Biden Comments Were a Political Hit Job](#)," the focus on Biden's memory as the justification for the determination to pursue criminal charges is "misguided." The central reason is Biden's "lack of culpability." Biden cooperated fully in retrieving classified documents in his possession when the materials were discovered by Biden's counsel, turning them over to the FBI and cooperating fully with the investigation. In short, he did not obstruct justice. Trump in contrast was [charged](#) with obstructing efforts to retrieve the documents in his possession (in legal parlance, he obstructed justice), going so far as to allegedly have staff remove evidence and make false statements to the grand jury and the FBI. Biden made no effort to assert executive privilege, and sat for five hours of interviews days after the October 7th attacks. Recall, Trump's frequent (and unsuccessful) assertion of executive privilege and his refusal to be interviewed by Robertt Mueller during the Russian collusion investigation.



The Making of a Presidential Ticket

In response in large part to the questions I have been fielding on the nominations process, I set out answers to the most frequently asked questions.

Is there a mechanism to replace Biden as the Democratic candidate?

There essentially is no mechanism under party rules to force a change in the ticket before the national convention. (For readers familiar with the British system, there is no US equivalent of a vote of no confidence, or threat thereof, followed by a leadership contest.) The only reason the President would not lead the ticket is if he decides not to (for health or other reasons) or if he dies. It has happened before: facing an unpopular war, rising casualties, significant divisions at home, a divided Democratic Party and the primary challenge launched by Bobby Kennedy, Lyndon Johnson [decided](#) not to run for a second term and made his wholly [unexpected](#) announcement to that effect on March 31, 1968 (“I shall not seek – and will not accept – the nomination of my party for another term as your president”) in a televised address to the nation about the Vietnam War. Other one-term presidents who chose not to run again were James Polk, James Buchanan, Rutherford Hayes, Calvin Coolidge and Harry Truman; Teddy Roosevelt declined to run again (as a Republican) in 1908, but ran, and lost to Woodrow Wilson, in 1912 as a third party candidate (in the then newly formed Progressive Party).

While DNC rules address replacing a nominee if there is a vacancy, for example, if the nominee dies, is incapacitated or withdraws following the convention, there are no provisions to replace a presumptive nominee before the party’s national convention. At the August convention, in theory delegates could desert Biden, but that is highly unlikely as the delegates would have pledged their support for Biden and would likely be Biden loyalists. (This is in contrast to 1968, where there were far fewer pledged delegates as there were primaries only in 13 states; today delegates are pledged based on primary results. As noted by Ed Kilgore writing in his *Intelligencer* column (“[It’s Too Late for Biden to Have an ‘LBJ Moment’](#)”), within a week after Super Tuesday on March 5, 48% of pledged delegates will have been chosen.

In her memoir “Hacks: The Inside Story of the Break-ins and Breakdowns That Put Donald Trump in the White House,” then DNC Chair Donna Brazile (newly installed after the resignation of Debbie Wasserman Schultz during the 2016 convention) reports she considered setting in motion a process to replace Hillary Clinton and Tim Kaine after Clinton appeared unsteady and stumbled leaving a 9/11 memorial service at Ground Zero in New York City.

Could another candidate mount a primary challenge?

While only a few states have held primaries so far, filing deadlines for many of the remaining primaries have already passed (the deadline for 31 states was January 5, another ten had deadlines during the balance of January, eight have deadlines in February and a further eight have deadlines in March or later). The last group of states will hold primaries on June 4.

Admittedly, a write-in campaign could be launched in states that permit write-ins and the DNC could seek to change the rules to facilitate another primary challenger, but typically the



White House controls the process when the incumbent is a Democrat (and running for re-election), and Biden supporters comprise the bulk of the members of the DNC Rules and Bylaws Committee. Also, there is a joint fundraising agreement between the DNC and the Biden-Harris campaign, which has put the DNC's national machinery behind the campaign.

None of the potential contenders were Biden to step aside would launch an insurgent effort without his approval (and stated intention to step aside). In sum, there is no path for any insurgent campaign.

What happens if Biden does step aside before or at the convention?

Were the President to step aside before or at the convention, the convention delegates would select a new presidential candidate at an "open convention." He could do so, for example, after the last of the states hold their primaries on June 4. The convention starts August 19.

At this point, the delegates would become "uncommitted" delegates, free to vote as they saw fit. Following a change in rules after the 2016 convention, the convention's 700 "superdelegates" – lawmakers and other luminaries in the party – may vote only if no candidate wins a majority of the approximately 4,000 pledged delegates on the first ballot. Under the DNC [Call for Convention](#), new candidates each would need at least 300 delegate signatures (and not more than 50 from any one delegation) to be nominated.

Candidates would lobby for support along the lines of the process in place before 1972, at a time when primaries played a less significant role in the nominations process and delegates were chosen at state or district conventions or via state party central committees (*see* "[Choosing Presidential Candidates](#)"). Ironically, the modern primary process in place today was chosen in reaction to the chaos at the Chicago 1968 convention that followed Lyndon Johnson's March 31 announcement that he would not run again. LBJ's vice president, Hubert Humphrey, won the nomination without having run in any of the 13 Democratic primaries, while pitched battles between protesters and police on Chicago streets played out on national television.

ABC News, in its January 8 reporting ("[What if Biden or Trump suddenly leaves the 2024 race?](#)"), reminds us that the last time the Democrats or Republicans needed more than one ballot to nominate a presidential candidate was in 1952, when three ballots were needed to nominate Gov. Adlai Stevenson of Illinois, again in Chicago (Stevenson edged out Estes Kefauver in a move engineered by the Party establishment and Truman, who had declined to run again, but lost to Dwight Eisenhower in the general election). (In 1956, chastened, the Democrats and the Republicans changed rules to bind delegates to the winners of the state primaries.)

What is the process to fill a vacancy in the ticket after the convention?

Once the convention has anointed a ticket, the power shifts from pledged delegates as proxies for the primary voters to the full DNC membership (483 members, representing the chair and vice chair of each state Democratic Party committee, plus members elected from the 56



states, D.C. and the territories, and Democrats Abroad). At this point, the primary results are no longer controlling.

If the President were to step aside after the convention, thus creating a vacancy, Jaime Harrison as DNC Chair would, as provided in the Call to Convention, call a special meeting of the DNC membership to fill the vacancy. The candidate winning the majority would head the ticket. In 1972, George McGovern's running mate Thomas Eagleton withdrew following revelations of treatment for depression and the special meeting confirmed McGovern's selection of Sargent Shriver to replace Eagleton on the ticket.

A vacancy could present a host of issues, including whether new ballots could be printed in time (even though as a technical matter voters vote for electors rather than the candidates themselves). Overseas ballots in some states are mailed not long after the convention, and early in-person voting begins in Minnesota and South Dakota on September 20. If ballots have already been printed, then voters would cast ballots for the Biden-Harris ticket even though the electors so chosen would vote in the Electoral College for the ticket that emerged from the DNC process. As for the electors themselves, in those states that require electors to vote for the winner of the popular vote in that state, rule changes might be needed if the withdrawal occurs before the Electoral College meets in December.

What would happen to the Vice President were the President to step aside at or after the convention?

While the Vice President would become the president were Biden to step down or die in office, she would not automatically step into the President's shoes on the ticket were he to step aside. Were the President to step aside at the convention, she would need to win a majority of votes cast by the delegates at the "open convention" to lead the ticket. Were he to step aside after the convention, she would need to win a majority of votes cast in the special meeting of the DNC membership.

For the sake of completeness, if the Biden-Harris ticket were to prevail on Election Day, and the President were to die or become incapacitated after Election Day but before the Electoral College meets on December 17, the electors pledged to the President would likely select the president. As the [ABC report](#) notes, states might have to change their "faithless elector" laws to permit this.

If the Biden-Harris ticket were to prevail on Election Day, and the President were to die or become incapacitated after December 17 but before Inauguration Day, under Section 3 of the 20th Amendment, the Vice President would be inaugurated as president on January 20.

Why are there no other viable candidates for president?

There, in fact, is a deep bench of potential Democratic presidential candidates, but aside from Congressman Dean Phillips, who has gained little traction, and self-help author Mariane Williamson, who has now bowed out, none has seen fit to challenge the President for the Democratic Party nomination.



Concluding Thoughts

Once upon a time, presidential campaigns were about issues. Now they are about age, or at least the age of one but not both candidates. John Kerry reminds us (quoted in POLITICO, “[Biden v. Trump: The battle over who’s too old, too forgetful or too confused](#)”) that, in 2008, when Biden was in his 60s, the media was hyper-focused on his penchant for gaffes. Biden managed to do fine as VP, and in fact he has managed superbly well as president. But, as POLITICO notes, it is open season on age (though I believe they mean Biden’s – Sidney Blumenthal, writing in the Guardian, [captured](#) it thus: “While Biden’s irrelevant gaffes have so far been held against him, Trump’s stream of semiconsciousness has been credited as a sign of vigor.”).

Some things one can change, others not. Biden cannot will himself to be younger, but he can change public perceptions. Political commentators are calling for Biden to engage more with the public – press conferences, town halls and interviews. He could also follow two of his predecessors in addressing the question head on – Jack Kennedy [addressed](#) his Catholic faith on September 12, 1960, and Barack Obama addressed race and politics in his [More Perfect Union](#) speech on March 18, 2008. Cast your mind back to the early days of the 2020 campaign; many underestimated Joe Biden’s ability to win the primary, let alone the general election.

As for the campaign, while the President (and the campaign behind him) is trying to address the age issue (among many others), in part by continuing to do his all-important day job, Trump’s response is not to exploit age, but rather to double down on his unhinged, extremist agenda (just this past week, by expressing his contempt for NATO, for the military and for bipartisan congressional efforts to address the border issues). The threats he issues regularly may be from a 77-year-old, but in his case age has nothing to do with it.

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