

The Breakfast Club

Constitutional Minute for 25 January 2022

“With the Advice and Consent of the Senate”

“The President...shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... Judges of the supreme Court,....”ⁱ

After flirting with the idea that the Legislature should be the branch to appoint judges and justices, the delegates of 1787 finally gave the responsibility and power to the President. Since the national government went into operation in 1789, there have been 17 Chief Justices and 103 Associate Justices appointed to the Supreme Court.ⁱⁱ

In recent years the appointment of judges and justices has become highly partisan theater, chiefly because We the People have allowed and sometimes expected the court to become the “legislature of last resort.” U.S. courts have repeatedly been used to amend both the Constitution and the statute law which lies beneath it. Controversial policy changes, such as homosexual marriage, abortion, transexual “rights,” and others lacking majority popular support have become the law of the land. So much for majoritarianism.

Once again, a pending vacancy on the high court has brought the issue into the headlines. Stephen Breyer, at 83 the oldest jurist on the court, having decided cases since 1994, has announced he will retire when the current session ends in June. Breyer was bullied into retiring earlier than he wanted by various Left-wing groups, one ironically called “Demand Justice,”ⁱⁱⁱ in time to have his replacement in place before the mid-term elections in November. Democrats are beginning to see it as a near certainty that Republicans will retake the House and possibly also the Senate this Fall and they panicked at the possibility of not being able to confirm anything but a “plain-vanilla” justice should that happen.

Even still, their chances of getting a radical progressive judge through the vetting and “consent” process is slim. Senator Joe Manchin immediately announced there would be no “rubber-stamping” of the President’s nomination. Kirsten Sinema’s willingness to “go along to get along” with her fellow Democrats is also in question.

Should Democrats and Republicans hold to party unity there likely be a 50-50 tie on the Senate floor. Constitutional scholars have gone on record^{iv} as stating that the Constitution does not allow for the Vice President to cast a tie-breaking vote in this instance. At least that was what they said when a Republican President was facing the prospect of a tie vote. Alexander Hamilton confirmed that conclusion in [Federalist No. 69](#): *“In the national government, if the Senate should be divided, no appointment could be made.”* I’m going to go out on a limb here and predict that if it comes to a tie vote this time that Democrats will conveniently forget what their experts previously said and attempt to have Harris break the tie.

There is even further intrigue this time around because of rule changes in the Senate agreed to by Mitch McConnell and Senate Majority Leader Chuck Schumer a year ago.^v That agreement put eleven Democrats and eleven Republicans on the Senate Judiciary Committee. Why does that become important? When a nomination for a judge or justice comes to the senate for confirmation, the

Senate Judiciary Committee is given the task of holding a hearing on the nomination. The members then vote to report their findings to the full Senate. If the nominee suffers a tie vote in the committee, the nomination cannot be reported to the full Senate. If the nominee does obtain a majority vote of the Committee, only a simple majority vote of the full senate is then needed to confirm the nomination. If, however, the nomination is not reported out of committee due to a tie vote within the committee, the issue can still be brought directly to the Senate floor, but then the Cloture rule comes into effect and 60 votes become necessary to terminate debate and move to a vote of the full Senate, where the nomination still faces the possibility of a tie vote, theoretically not breakable by Kamala Harris. This could be a very interesting summer.

We all should know by now that Congress sets the number of Supreme Court Justices by simple statute law; the Constitution only requires there *be* a Supreme Court, period. But neither the Constitution nor statute law has ever established qualifications for the high bench. Any citizen (perhaps even a non-citizen) could be nominated by the President; the nominee need not even be a lawyer, let alone a previous judge. Various organizations, notably the American Bar Association will report their view of the nominee’s “readiness” for the appointment, but anyone with a pulse legally qualifies.

There have been many controversial judicial nominations, the nominations of Brett Kavanaugh and Amy Coney Barrett being fresh in our minds. The Left becomes apoplectic over the idea of adding a conservative to the bench, witness the lengths to which they went to block the nominations of Robert Bork (successfully) and Clarence Thomas (unsuccessfully). [This website](#), although somewhat dated, discusses some other controversial nominations.

It is impossible to predict the outcome of this summer’s “drama” other to say it has all the earmarks of being one of the most interesting in history. Joe Biden has pledged to nominate a black woman. Maybe he will try to keep that promise, maybe he won’t. Blacks make up 12.36% of the judgeships on the federal bench,^{vi} and women make up 35% of all federal judges, so there likely are some black women candidates. Seventy-eight percent of Joe Biden’s confirmations in his first year have been women, so he seems to be doing his best to put more women on the bench.

Email me if you have questions on this issue, and please, please, please keep your seat belts fastened and your arms and legs inside the vehicle at all times.

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ⁱ U.S. Constitution, Article II, Section 2, Clause 2

ⁱⁱ https://www.supremecourt.gov/about/members_text.aspx

ⁱⁱⁱ <https://demandjustice.org/>

^{iv} <https://legalinsurrection.com/2022/01/remember-when-liberal-law-profs-said-vp-cant-cast-tiebreaker-on-supreme-court-nominations-i-bet-mitch-does/>

^v https://resistthemainstream.org/mcconnell-could-stop-biden-from-replacing-justice-stephen-breyer-due-to-little-noticed-backroom-deal/?utm_source=telegram

^{vi} <https://www.acslaw.org/judicial-nominations/diversity-of-the-federal-bench/>