**How Should We Choose Judges?**

**The Legacy of Justice Breyer in the Post-Trump Era**

Now that Supreme Court Justice Stephen Breyer has announced his retirement at the end of this term, we are brought to ask this question anew.

It seems we have gone off the track recently in the way we choose federal judges. The jumping of the tracks has occurred mostly in the Trump administration, but began before that in 2016, with the U.S. Senate, under the leadership of Mitch McConnell, choosing to ignore for nine months President Obama’s nomination on March 16th of Merritt Garland to the Court to replace Antonin Scalia.

This was followed by three of the closest fought Supreme Court confirmation battles in U.S. Senate history, aided by more shenanigans by Senator McConnell, this time carving out an exception in the Senate filibuster rule for the confirmation of judges, thus allowing three judges to squeak by, passing by narrow margins: first Neil Gorsuch, 54-45 in 2017, with the support of all Republican senators plus three Democrats; then Brett Kavanaugh, 50-48, in 2018, with the aid of one Democratic senator (Joe Manchin) despite one dissenting Republican (Lisa Murkowski of Alaska); and finally Amy Coney Barrett, rushed through just before the presidential elections, with no support from the minority party for the first time since 1870, and one Republican senator opposed (Susan Collins of Maine).

In the century before this, Supreme Court nominations typically went smoothy and with at least some votes on both sides of the aisle, the biggest controversies swirling around the nominations of Clarence Thomas (1991), during the George H. W. Bush administration; and Robert Bork (1987), during the Reagan administration. Although many were privately concerned about his conservative political stands, opposition to Thomas, who eventually passed 52-48, with two dissenting Republicans and eleven Democrats in support, was focused mainly on allegations – credible ones - of sexual harassment. The opponents of Bork, who was rejected 42-58 with two Democrats in favor and six Republicans in dissent, focused more on evidence regarding Bork’s judicial and political philosophy, which to many leaned precipitously in an anti-democratic direction. It didn’t help that Bork was still remembered as President Nixon’s henchman during Nixon’s last days, when he was at his worst and few others were willing to do his nefarious bidding.

Less well remembered are two of Nixon’s own nominations rejected in 1969 and 1970, in succession: Clement Haynesworth (45-55) and G. Harrold Carswell (45-51) respectively, two segregationists Nixon may well have offered up as symbolic thanksgiving to southern supporters without expectation they would be confirmed. After all, Nixon had just successfully with practically no opposition nominated Republican Warren Burger to replace Democrat Earl Warren, and directly after these two rejections offered Harry Blackmun, who passed 94-0. Nixon would go on to successfully nominate two more Supreme Court judges for a total of four.

Going all the way back before the cases just mentioned, there were several ways nominees were eventually blocked from ever becoming Supreme Court Justices. Not counting procedural delays, there have been twenty-one individual nominees who by a variety of means never made it to the highest court: rejection in the Senate (6), withdrawal of the nomination (5), allowing the nomination to lapse (5), indefinite postponement (1), or a combination of the above (4). Some presidents have had it worse than others, with Millard Fillmore only gaining one appointment out of four nominations and John Tyler only one out of nine!

The nomination process was also affected in the first century of the country’s existence by the allowed number of justices, which began in 1789 at six, moved to seven in 1807, nine in 1837, ten in 1863, then finally, after having been tapered down to eight, being returned to nine by the Judiciary Act of 1869, where it has stayed ever since.

While the nomination process for the Supreme Court has not always been smooth, most confirmations have been routine, at least not strictly along party lines, and not overtly based on politics. Although no president has ever nominated someone from an opposing party, a vote to confirm has not usually implied a vote in agreement of the political positions of the nominee.

Many of us sense that something has gone wrong with the selection process; that Senate action or inaction on Supreme Court nominees has become driven so narrowly by crass political intent that we are choosing candidates who, regardless of their politics, are unsuitable; or choosing judges for reasons not relevant to the profession and unrelated to consensus standards of the judiciary profession; or without any basis in moral character. Still others among us have so fully been caught up in the politics of the process that they have given in to it, enough to deride the soon-to-be-retire Justice Stephen Breyer as naïve for espousing a non-political vision of his profession, they complaining that this only makes him and the rest of us even more vulnerable to being eaten alive by more unabashedly political judges on the right.

In a recent commentary titled “Identity Politics and the Supreme Court”, conservative polemicist Jay Ambrose of the Tribune News Service lashes out at President Biden for insisting that the next Supreme Court justice be a black woman, provoking the reader saucily with the charge that “the social justice crowd now thinks skin color can be more important than merit” in choosing judges. The allegation here is that of double reverse discrimination: against non-blacks and men, a recycling of an old plaint against remedial affirmative action. The fact that he goes on to stress only the racial portion of this allegation makes clear his race-baiting purposes, seeking to rile up an already groomed audience without further alienating the women among them.

Nonetheless, it is important to point out that the demography of judicial nominees may in fact be one of their most relevant traits. The Sixth Amendment of the Bill of Rights is widely understood as asserted the right of every defendant to a trial by a “jury of one’s peers”. This language dates to the Magna Carta (of 1215), a cornerstone of the British democracy movement and from which the movement for American democratic independence eventually took root and is accepted as entailing that jurors be selected from a broad spectrum of the population, particularly of race, national origin, and gender. If justice requires a demographically balanced jury pool at every level, then why should it not also require a demographically balanced judiciary at every level? Juries don’t get to decide every case, especially at the appeals level and in civil law. What sense would there be to calling for demographic balance in only one part of the decision-making apparatus of the judiciary?

By contrasting qualifications of race and gender on the one hand with merit on the other, Ambrose is also trying to trick the reader into accepting that a choice based on gender or race is a choice against merit. He also must be hoping we are overlooking all the other ways recently that merit has been ignored in the selection and non-selection of judges on the right, including refusal to consider one particularly qualified nominee for nine months, in the full light of day proudly and deliberately allowing the nomination to lapse; or in the overly hasty confirmation of another judge, just in time to beat the buzzer, solely on the prospects of how she would decide cases on abortion law. Amy Coney Barrett’s confirmation eight days before the presidential election was the first time in American history any Congress had been so brazen to attempt a Supreme Court justice confirmation so late in a presidential and congressional term, based on how patently it violates the spirit of democratic process.

The way the three Trump Supreme Court nominees were forced through could reasonably be expected to have had the result of our being forced to suffer in terms of loss of the same judicial and moral merit Ambrose mendaciously mourns Biden trading away. If we are not looking for something in a candidate, we shouldn’t be surprised that it turns out not to be there. This is the typical result of narrowmindedness: its obsessive focus on one quality makes us blind to the presence or absence of other qualities – qualities that ordinarily we should insist on, say, in Supreme Court justices; values such as a basic consideration for other human beings that would prompt the ordinary person at least to mask up during a deadly pandemic when crowded indoors for long stretches with many speakers blowing water droplets out in the common air for everyone to breathe. Instead, we have been forced to live with the fact that one of these three Trump appointees happens to lack the decency to do so much, to the point where his misbehavior has forced another of our justices – Justice Elena Sotomayor - to participate only remotely in Supreme Court business for as long as Justice Gorsuch – the judge that we ended up because of Senator McConnell’s refusal for nine months to consider a candidate whom most would accept, even politics aside, as more qualified – decides to hold out, for his own private, undeclared reasons – on mask-wearing.

Justice Brett Kavanaugh was confirmed narrowly in 2018 despite numerous allegations, serious and credible, of sexual assault, and no less than 83 ethical complaints filed against him, and taken seriously by the courts who handled them, for his behavior and speech *during* his confirmation hearing. These complaints, alas, had to be dropped, per U.S. law, once he became instated into the Supreme Court, since the lower courts have no jurisdiction over the Supreme Court and its members. From then on Judge Kavanaugh has been the just about the most consistently divisive and unabashedly political, if not politicized of the judges we have had. His attitudes about women appear to border on misogyny, a trait he appears to share with his fellow Justice Clarence Thomas, also confirmed years before despite a steady wave of complaints of sexual misconduct. Kavanaugh’s attitude toward his credible accusers was undisguisably contemptuous, quite unlike what one would expect of someone innocently accused.

Despite the unmitigated rush to confirm Justice Amy Coney Barrett, I was ready to give her the benefit of the doubt, especially considering her attempts to distance herself from the image of being an idealogue. But then I was thrown for quite a loop, as we all should have been, for the blatant lack of judgment she showed not only in attending, along with her husband and nine children, what the entire country foresaw would be – and which very much turned out to be – a super-spreader event of a deadly pandemic with as yet no available vaccine, but also doing so - she, her husband and nine children - all unmasked, then returning home later and sending all her children back to their respective schools, still unmasked. Now, I do not fault her for attending a White House event held in her honor, but she had to know, as the rest of us did, that this event was going to be medically dangerous, and that she and her whole family were well-advised to wear masks, at the very least. Yes, we know that the president would have not liked the optics of that, and his people probably would have tried to discourage her. Nonetheless, as someone who is supposed to be judicious – is that not a quality we should expect and demand of judges? – she should have insisted; I hold it against her that she didn’t, and that in so doing she put herself and her entire family in danger, as well as possibly putting other attendants in danger as well.

This is what we get, Mr. Ambrose, when we choose judges for reasons other than qualities of merit and moral character – qualities I am confident we will see in the nation’s first black female Supreme Court Justice. Unlike our last president and unlike the former Senate Majority Leader, I have seen no evidence that the current president and Majority Leader are lacking in these concerns. Demographic balance, along with moral and professional integrity, are all key to judiciary justice.

Justice Breyer does well to hark us back to the only morally sustainable vision of the judiciary that can be had, and that is a non-political one. A non-political judiciary does not mean an apolitical one, unmoved by what is going on in politics. What it does mean is a judiciary that is not *biased* by what is going on in politics. Political bias corrupts our truth orientation as rational beings, making us unsuitable as just judges. Political thought does not have to coalesce or result in bias; it can thrive in genuine dialog, in which people on different sides of the table can learn from one another. To think that all political thought is biased is sheer cynicism, and cynicism ultimately favors falsehood over truth. The cynic begins by mourning the loss of innocence, then, giving up hope, gives itself over to corruption. Cynics on the left call Justice Breyer naïve, insisting that it is too late for us to play the game fairly when the other side has been cheating all along. But giving in to cheaters is just more cheating.

Judges should not be chosen by us by mere coincidence that they share our biases. Shared biases are not the basis of anything constructive since they are products of deception and only produce more of the same.

We must get back to playing this game fairly and openly, and the best way to do that is by achieving demographic balance in the judiciary while insisting on basic standards of moral character, solid peer-reviewed professionalism, and judiciousness: things we have seemingly forgotten about, or at least did not make time for, in the processing – or non-processing – of the past several Supreme Court nominations.