

## ***The “Jewish Seat” on The Supreme Court***

One of the first legal articles that I had published was entitled, “Will a Jewish American Fill the Next Vacancy on the United States Supreme Court?” The history of the article’s publication is somewhat curious.

I first submitted the article to the Pennsylvania Trial Lawyers Association’s magazine, the Barrister. It was turned down. “Too Jewish” some of the Jewish members of this editorial acceptance committee said.

However, the article was rescued by the good Presbyterian Lee C. Swartz. In subsequent years, he became a great mentor and friend, recently retiring from the Pennsylvania Supreme Court’s eminent Standard Jury Instruction Committee where he served as Chairperson.

The article was published, but not before I sent it to the judges written about in the article. One of the stories that I had heard from a federal judge, and reprinted, was that Arlin Adams of the United States Court of Appeals of the Third Circuit, an extremely qualified and eminent judge, was to receive a Supreme Court nomination. At the last minute, Richard Nixon changed his mind and instead appointed William Rehnquist, who went on to serve for many years. The judge who told me the story claimed that Nixon made his decision based upon anti-Semitism and that at the time Nixon changed his mind, the press, including Walter Cronkite, was actually at Adam’s home to report on the story of his appointment.

One of the people I sent the article to was Nixon’s successor, Gerald R. Ford. Ford responded February 6, 1990, in a letter, which still hangs on a wall in my office, in part, as follows:

When Justice William O. Douglas resigned by the Supreme Court, I had the opportunity as President to make the nomination to fill the vacancy. Attorney General Edward Levi, as my principal advisor, was extremely helpful in establishing a proper procedure to handle this vacancy in a fair and responsible manner. Former Court of Appeals Judge Arlin Adams was a top finalist.

Ford extolled Adam’s virtues as a jurist, outstanding citizen and community leader.

While Ford refrained from commenting directly on Nixon’s decision, he nevertheless asked for a copy of the article to be placed in the Gerald R. Ford Library in Ann Arbor, Michigan, where it resides today.

With Judge Breyer’s departure from the United States Supreme Court, there will still be one Jewish member of the Court, Justice Elena Kagan. Breyer’s departure was preceded by the death of Justice Ruth Bader Ginsburg. One may still be willing to posit that the “Jewish Seat” is alive and well, albeit reduced from 3 to 1 with the passing of Justice Ginsburg and Justice Breyer’s departure.

President Biden has already publicly announced that the seat will go to an African American woman.

Should there be a reserved “seat” for any particular color, religion or other aspect of an individual? The debate has gone on almost since the founding of the institution. Initially the question was whether Presidents would appoint federalists or anti-federalists. It was a federalist who helped shape the direction of the early court.

Politics is still the turnstile issue for who will get the nomination to the United States Supreme Court. However, religion also had a place at an early time. Would Catholics, Jews or certain denominations of Protestants and even Quakers receive Supreme Court nominations? A marvelous trivia question for the next Shabbat dinner would be: “Who was the first Jew nominated for the United States Supreme Court?” Most people would raise their hands and say “Justice Brandeis.” Of course, they would be wrong. The first Jew seriously considered for the United States Supreme Court was none other than Judah Benjamin, the southerner who was nominated prior to the outbreak of the Civil War. He declined the nomination from President Millard Fillmore to remain in the Senate. A number of good volumes have been written on the subject and make for interesting reading.

Brandeis was the first successful Jewish nominee for the Court. He was followed by Cardozo, Frankfurter and other justices of renown.

Different justices broke different barriers, such as Justice Thomas and Justice Sotomayor. Perhaps even Justice Coney Barrett broke a barrier, considering her Evangelical Christian views, proudly displayed at her confirmation hearing.

My question is whether the idea of a “Jewish Seat” may soon be an antique from another era? What about an Asian seat? There are plenty of minority groups in this country who would like claim a seat on the United States Supreme Court.

Sooner or later there will be a transgender nominee to the nation’s highest tribunal.

Once, when I was being considered for a vacancy on the federal court, I was asked outright why I, a Jewish male, should receive the Presidential nomination rather than say a woman? I was not shocked by the question and I answered by asserting that merit should be the first criterion for judicial appointment, but that ultimately the federal judiciary should “look like America.” I did not get the nomination.

My guess is that it will be a long time before we see another professed member of the Jewish faith nominated for the United States Supreme Court. Of course, that transgender person, African American or Asian could be Jewish. We do not have any color or other barrier to being Jewish. I have stood at the Western Wall and prayed with people of every kind and description.

The question as to what role ethnicity or other factors play in the United States Supreme Court nomination is a subject that will never go away. Identity politics, as

some would call it, is not a new phenomenon but clearly, has become an integral part of the complex American conversation concerning right of entry to our most august institutions, whether that be colleges, universities, court appointments or elective office. Clearly, inclusion is better than exclusion and bigotry, but that also creates a feeling of unfairness to those who are allegedly “overrepresented.” This is, in particular, a Jewish question and ultimately a Jewish problem.

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