



## **Breyer retirement watch: Supreme Court term's final decisions mark crucial milestone in justice's choice**

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On the final Thursday in June 2018 – shortly after the Supreme Court issued its final opinions of the term – former Justice Anthony Kennedy announced his retirement, opening a seat that former President Trump would fill with Justice Brett Kavanaugh.

Now, with the Supreme Court expected to resolve its final cases of the 2020-2021 term Thursday, many on the left are hoping that Justice Stephen Breyer, 82, will follow in his former colleague's footsteps and open his seat for a President Biden appointee.

"Supreme Court Justice Stephen Breyer should immediately announce his intent to retire from the bench," a slate of progressive organizations, led by the group Demand Justice, said in a statement earlier this month. "With future control of the closely divided Senate uncertain, President Biden must have the opportunity to nominate a successor without delay and fulfill his pledge to put the first Black woman on the Supreme Court."

Previous justices have also used the end of a term as a natural time to retire. Former Justice David Souter stepped down at the end of the 2008-2009 Supreme Court term, although he announced his intention to do so in May. Former Justice John Paul Stevens did the same, announcing his retirement in April. Former Justice Harry Blackmun announced his retirement in April of 1994.

This pattern indicates that if Breyer doesn't announce his retirement within a few days of the end of the current term, he will likely stay on for the next one, which begins in October.

"I expect that any retirement announcement, while not necessarily coming right after the last opinion hand-down tomorrow – Justice Kennedy waited a few hours – would come by the end of this week at the latest," Ilya Shapiro, the vice president and director of the libertarian Cato Institute's Robert A. Levy Center for Constitutional Studies, told Fox News.

"[B]arring a midterm health concern or other unexpected development, justices, like professional athletes, have always tended to retire during the 'offseason,'" Shapiro also said.

University of Richmond Law School Williams Chair in Law Carl Tobias told Fox News that justices "prefer" to retire near the end of a term because "it seems to be least disruptive and gives the president and the Senate time to plan and attempt to have as smooth as possible nomination and confirmation processes."

Tobias added that it is likely true that Breyer will stay on for at least another year if he doesn't announce his retirement in the next few days, but noted that he could change his mind for myriad reasons because retirement "is one of the most important and difficult decisions that most people make."

Breyer's refusal to step down and his vocal opposition to progressives' court packing plans have been a continued source of exasperation for liberals. Many are still smarting over the fact late Justice Ruth Bader Ginsburg was replaced by Trump appointee Justice Amy Coney Barrett last year.

Ginsburg – also an opponent of court packing – resisted calls for her retirement during former President Obama's tenure. Now they fear the same result with Breyer. The Senate balance of power is a razor-thin 50-50 which could tip in favor of Republicans during the midterms.

This would allow Republicans, if they remain united, to either exercise veto power over a Biden nominee or block one entirely. Senate Minority Leader Mitch McConnell, R-Ky., also said in a recent interview he would stonewall a Biden Supreme Court pick if the vacancy arises in 2024 and Republicans are in the majority.

"In fact, no, I don't think either party if it controlled, if it were different from the president, would confirm a Supreme Court nominee in the middle of an election," McConnell said on the Hugh Hewitt radio show this month. "What was different in 2020 was we were of the same party as the president."

That comment from the minority leader spurred a bevy of liberal activists and officials to renew their calls for Breyer to step down.

"When I became the first person in Congress to call for Justice Breyer to retire now, while President Biden can still appoint a successor, some people asked whether it was necessary," Rep. Mondaire Jones, D-N.Y., tweeted, linking to a story about the McConnell comments. "Yes. Yes, it is."

Shapiro told Fox News that he does not expect Breyer is factoring in progressives calls to step down into his decision-making, although they "may marginally make him less likely to leave sooner."

Conservative Judicial Crisis Network President Carrie Severino, meanwhile, said that she hopes progressives aren't "rewarded" with an opportunity to replace Breyer this year.

"The level of pressure that left-wing dark-money groups have exerted against Justice Breyer to attempt to strongarm him into retiring has been shameful and disrespectful," she told Fox News. "It's even more ominous that the Left's intimidation campaign shifted into high gear just after

Breyer spoke publicly about his concerns about the politicization of the Court through court packing."

The two cases the Supreme Court is likely to decide Thursday are a challenge to Arizona's voting laws, including a ban on ballot harvesting, and a freedom of association case about a California law requiring charities to share the names of their donors with the government. The decisions the justices make on those cases have the potential to shape the law in a major way.

But it's possible the most important Supreme Court decision Thursday comes from Breyer alone.