

December 12, 2022

WHAT SENATOR SINEMA'S PARTY SWITCH MEANS FOR THE SENATE

To Our Clients and Friends:

Senator Kyrsten Sinema (I-AZ) announced on December 9, 2022, that she would change her party registration from the Democratic Party to Independent. In an [interview](#) with *CNN*'s Jake Tapper, she explained: "I know some people might be a little bit surprised by this, but actually, I think it makes a lot of sense." Elaborating in an [op-ed](#) in the *Arizona Republic*, Senator Sinema declared that she "never fit in perfectly with either national party," and pledged to "to continue doing exactly what I promised—to be an independent voice for Arizona."

As a result of the party switch, the question arises whether Senate Democrats will have 51 seats in the Senate (technically 48 Democrats and three Independents who caucus with the Democrats) as expected after the Georgia runoff. The answer is Senator Sinema's switch does not necessarily change the Senate's voting math. As detailed below, we explain what may have motivated Senator Sinema to identify as an Independent and how her switch impacts the Senate's business going forward. In short, Senator Sinema's switch likely won't impact the Democrats' narrow control of the Senate.

Background on Senator Sinema's Party Switch

Senator Sinema's party switch—timed to be announced after Senator Raphael Warnock's (D-GA) runoff victory in Georgia—likely has to do with the changing politics in Arizona and Senator Sinema's attempt to secure her own re-election in 2024. It may be an attempt to thread the needle of maintaining political support from Senate Democrats' campaign resources while heading off a party primary challenge from the progressive left.

Democratic Primary:

Senator Sinema's decision likely turned on concerns about a strong primary challenger from within the Democratic Party, bolstered by concerns that her recent votes have motivated the party's campaign arm to throw its support behind a challenger. Recent polling suggests that Senator Sinema's next primary race may be a close one, as her numbers have steadily declined with Democrats in her home state. No candidates have formally announced challenges to Senator Sinema, but Phoenix-area Representative Ruben Gallego (D-AZ) has been publicly [forecasting](#) a primary run for some time.

By leaving the Democratic Party, Senator Sinema avoids a primary challenge and possibly puts herself in a three-way general election in November 2024. The assumption may be that positioning herself as an "Independent," rather than a Democrat, may allow her to fare better with Republican and Democratic voters in a general election and force Democrats to support her campaign. But it also runs the risk that a three-way race may lead to a Republican being elected senator from Arizona in 2024. Indeed, by

GIBSON DUNN

abandoning the Democratic Party, a question arises whether Senator Sinema will further alienate the voters that used to be her base. And the National Democratic Party will have a decision to make on whether to support a “Democrat” in the 2024 Arizona Senate election or to back Senator Sinema. But backing Senator Sinema could upset the Democratic base who may or may not turn out to support an “Independent” and cost Democrats a U.S. Senate seat in Arizona.

Arizona:

Demographic changes and shifting ideological blocs have redrawn the map of Democratic focus—and no state perhaps better exemplifies that shift than Arizona. The state has become a critical focus for Democrats in recent years. Arizona is the most recent Sun Belt state to morph from a solidly red state to a critical purple pickup for Democrats—beginning with Senator Sinema’s own narrow defeat of then-sitting Senator Martha McSally in 2018. That victory marked Democrats’ first win of an open Arizona Senate seat since 1976, and signaled to national party leadership, *per the New York Times*, “a remarkable shift in Arizona’s political landscape,” after the state had been a “Republican bastion for decades.”^[1]

Democrats’ strategic reorientation towards Arizona has already paid dividends. This midterm cycle, Democrats invested major talent and resources to successfully protect an endangered Senate seat, as Senator Mark Kelly (D-AZ) kept the seat he won in 2020’s special election, and even more remarkably for the once solidly-red state, picked up a governorship with the election of Secretary of State Katie Hobbs (D-AZ), with whom Senator Sinema has maintained a close relationship for years.

Senator Sinema no doubt understands these changes and the need to appeal to Independents and moderate Republicans in her state. Indeed, more than a third of Arizona’s voters identify as “other” and Republicans outnumber Democrats by more than 166,000.

Party Resources:

Senator Sinema’s move will have major consequences for continued party investments in Arizona, especially in her upcoming reelection bid. Party leadership could choose to 1) continue to back Senator Sinema, as they do with Maine’s Independent Senator Angus King, 2) sit back and watch or 3) actively support a Democratic challenger. Now that she’s formally renounced her party membership, at least nominally, the Democratic Senatorial Campaign Committee (DSCC), Senate Majority PAC, and other party campaign instruments may not support her in 2024, or choose to invest resources in a party challenger instead. However, the fact that Senate Democratic leadership is not seeking to punish Senator Sinema for her switch may suggest that—at least as of now—the DSCC is likely to back her again in 2024.

Independents have traditionally faced an uphill battle in national politics—from fundraising to organizing to marshalling the support of elected officials—that Senator Sinema herself is likely familiar with (the now-U.S. Senator ran for the Arizona House of Representatives as an Independent and lost). While Senator Sinema is known as a strong fundraiser, the DSCC standing back *would mean* “she would lack party resources—like a ground game—that are critical for voter turnout, particularly in a sprawling state like Arizona.”

GIBSON DUNN

As described above, by positioning herself as an Independent, Senator Sinema is betting that the Democratic Party will eventually support her, but if she loses that bet and the Party supports a “Democrat” and not her, she runs the risk of allowing a Republican to win the Senate race.

Personal Brand:

Senator Sinema actively practices bipartisanship, from friendships with Republican senators to playing a key role in advancing bipartisan legislation to President Biden’s desk this Congress. Her commitment to bipartisanship may also have motivated her party switch decision. In her op-ed explaining her decision, Senator Sinema wrote, “[i]n catering to the fringes, neither party has demonstrated much tolerance for diversity of thought. Bipartisan compromise is seen as a rarely acceptable last resort, rather than the best way to achieve lasting progress.”

These words are consistent with Senator Sinema’s past positions since she ran for the U.S. Senate. From her first election to the Senate, she has sworn to “be an independent voice for all Arizonans.” In her announcement interview with Tapper, she reiterated: “I’ve never fit neatly into any party box. Removing myself from the partisan structure—not only is it true to who I am and how I operate, I also think it’ll provide a place of belonging for many folks across the state and the country, who also are tired of the partisanship.”

Even before running for the Senate, Senator Sinema has done things her own way, from the beginnings of her career as a Green Party activist to more recent moves sending Democrats in the Senate back to the drawing board to gain her support for key legislation. Once a staffer on Ralph Nader’s 2000 presidential campaign, Senator Sinema has become progressively more moderate as she climbed from a 2004 win in the Arizona House of Representatives to a 2010 Arizona Senate seat, then a 2012 U.S. House of Representatives win. Senator Sinema won each of those races as a Democrat.

What This Means for the Senate

To understand the potential importance of Senator Sinema’s switch to being an Independent on the U.S. Senate, one must first understand how the change from a 50-50 Senate to a 51-49 Senate would change the overall dynamics of the institution. The Georgia U.S. Senate runoff led to a 51-49 U.S. Senate, which was supposed to change the chamber and firm up Democratic control in several ways:

- **Establish a real majority in committees.** Democrats have chaired Senate committees the past two years, but there was equal representation on committees, which increased the chances of a tie vote that required time-consuming “discharge” votes on the Senate floor. It also meant that Democratic committee chairs could not issue subpoenas without Republican support. As a result, subpoenas were not used by Senate committees in the 117th Congress. With a 51-49 Senate, Democrats would have one more member than Republicans on all committees, ensuring legislation and nominees would advance if all Democratic caucus members stick together. Democrats would now also have a larger budget and bigger staffs.
- **Advancing judicial and executive nominations.** For the last two years, with a 50-50 Senate, Republicans were able to slow down the nominations process since the committees had equal

GIBSON DUNN

representation. If a tie vote occurred in committee, the full Senate must first vote to bring the nomination to the Senate floor and then vote on the nomination itself. Now, with a 51-49 Senate, a Democratic-controlled Senate may be able to more quickly advance nominations through the confirmation process and have more cushion to deal with absences at full Senate confirmation votes on nominees.

- **Manchin and Sinema influence.** With Democrats having a 51 seat majority in the U.S. Senate, one theory is that Senators Joe Manchin (D-WV) and Sinema would have less influence over the legislative process. While 60 votes are usually required to advance most legislation in the Senate, certain items can pass on a simple majority vote using the budget reconciliation process or for nominations. But that forced Democrats to have no room for defections (or absences) and Senators Manchin and Sinema were at times difficult to win over. But with a 51 seat majority, it is more likely that Democrats can pass legislation or nominations without the support of either Manchin or Sinema if all other Democratic Senators are onboard.
- **Less reliance on the Vice President to break ties.** A 50-50 Senate has been a weight on Vice President Kamala Harris, who has had to limit her travel in order to be available for tiebreaking votes in the Senate. In fact, Vice President Harris has broken 26 ties in the last two years, the most by a Vice President in nearly 200 years. But a 51-49 Senate, after the Georgia runoff, was supposed to lessen the burden on the Vice President who the Senate may rely on less to break legislative ties in the Senate.

The main question in Washington after Senator Sinema's announced party switch was how would her decision impact Democratic control over the U.S. Senate. In other words, would the Senate in fact still be a 51-49 Senate or would it go back to effectively being a 50-50 Senate, effectively denying the benefits Democrats expected after the Georgia runoff victory? While Senator Sinema's move generated significant news coverage, it is not expected to change the balance of power in the Senate. In an *interview with Politico*, Senator Sinema herself said, "I don't anticipate that anything will change about the Senate structure. I intend to show up to work, do the same work that I always do. I just intend to show up to work as an independent."

In the words of *Punchbowl News*, "Sinema declared that 'nothing will change about [her] values or behavior' in announcing her party switch, and top Democrats seem to have accepted that." Indeed, both the White House and Majority Leader Chuck Schumer (D-NY) have released conciliatory statements regarding the switch.

Most importantly, while Senator Sinema has declined to publicly say whether she will caucus with Senate Democrats, she has stated explicitly she would not caucus with Republicans. Senator Sinema has also indicated, and Leader Chuck Schumer (D-NY) has confirmed, that she will keep her current committee assignments. As *Punchbowl* put it, by keeping her committee assignments, "Sinema is effectively caucusing with the Democrats," even if she does not describe it that way.

The other two Senate Independents, Senators Angus King (I-ME) and Bernie Sanders (I-ME), both consistently vote, caucus with, and hold committee positions with Senate Democrats. At the same time,

GIBSON DUNN

Senator Sinema has said—unlike Senators King and Sanders—she won't attend weekly Democratic Caucus meetings (which she rarely did anyway), and isn't sure whether her desk will remain on the Democratic side of the Senate floor.

Senator Sinema is known for bucking her party and frequently allies with Republicans on various legislative efforts. She is currently engaged in last-minute bipartisan talks with Senator Thom Tillis (R-N) on an immigration deal that she hopes could pass in the lame duck session.

Nevertheless, a review of her voting record on the Bipartisan Safer Communities Act, the CHIPS and Science Act, the Respect for Marriage Act, and other legislation shows she is farther to the left than the Republican Party on social issues, even if she is farther to the right of Democrats on economic issues. For instance, Senator Sinema has voted with the Democratic Party 93% of the time, and has publicly stated she doesn't expect her voting record to change after her switch to become an Independent.

Moreover, Senator Sinema has supported every one of President Biden's judicial nominees—an unlikely position for a Senate Republican—not to mention voting to impeach then-President Donald Trump twice. Underscoring this, a top aide to Minority Leader Mitch McConnell (R-KY) sent a note to lobbyists and supporters after the party switch highlighting Senator Sinema's liberal voting record.

With Senator Sinema keeping her committee assignments, the day-to-day operation of the Senate is not expected to change. Following Senator Warnock's reelection in the Georgia runoff, Democrats will hold a majority in the Senate beginning on January 3, 2023, and that will not change. Likewise, even with Senator Sinema's switch, Democrats will be a majority on Senate committees—unlike in the current Congress, in which committees are tied. This means Senate Democrats will be able to move nominations more quickly, advance party legislative priorities out of committees with greater ease, and issue subpoenas without Republican support. Moreover, the Vice President will be needed less often to break tie votes.

[1] Senator Sinema's 2018 victory was particularly noteworthy in a midterm Senate cycle that saw the end of much of the caucus's moderate wing—Senators Joe Donnelly (D-IN), Heidi Heitkamp (D-ND), and Claire McCaskill (D-MO) each lost their seats after multiple terms in the Senate.



The following Gibson Dunn attorneys assisted in preparing this client update: Michael D. Bopp, Roscoe Jones, Jr., Daniel P. Smith, Amanda Neely, Wynne Leahy, and Alex Boudreau.

Gibson, Dunn & Crutcher's lawyers are available to assist in addressing any questions you may have regarding these issues. Please contact the Gibson Dunn lawyer with whom you usually work or the following lawyers in the firm's Congressional Investigations or Public Policy practice groups:

GIBSON DUNN

Michael D. Bopp – Chair, Congressional Investigations Group, Washington, D.C. (+1 202-955-8256, mbopp@gibsondunn.com)

Roscoe Jones, Jr. – Co-Chair, Public Policy Group, Washington, D.C. (+1 202-887-3530, rjones@gibsondunn.com)

Amanda H. Neely – Washington, D.C. (+1 202-777-9566, aneely@gibsondunn.com)

Daniel P. Smith – Washington, D.C. (+1 202-777-9549, dpsmith@gibsondunn.com)*

© 2022 Gibson, Dunn & Crutcher LLP

Attorney Advertising: The enclosed materials have been prepared for general informational purposes only and are not intended as legal advice.