



THE FUTURE OF THE U.S. SUPREME COURT

A BRIEFING NOTE
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With the passing of Ruth Bader Ginsburg, one of the most notorious and respected US Supreme Court justices there has ever been, we mark a very significant day.

Ruth was one of my inspirations for going into law. She put her passion for helping people and fighting for equality above all else, and was one of the best legal and moral authorities we have ever seen. It is very sad to see her pass away.

One cannot help but wonder, in line with her Jewish faith, that her passing on the eve of Rosh Hashanah (the Jewish new year) can only confirm one thing - she was indeed a person of great righteousness. I wish her family the best at what must be a very difficult time.

The response from both main US presidential candidates has been equally self-effacing, with notable differences only coming when the topic of her replacement is raised, such is the impact that Ruth Bader Ginsburg (commonly referred to as RBG) has had in her wonderful and meaningful life.

Whilst Donald Trump has confirmed that he will nominate a replacement for RBG before the presidential election, Joe Biden has said that he would like the selection to be made following the November 3rd election.

Once again, they are at odds with each other.

The reason for this is simple. Nominate and have approved a judge ahead of the election, and Trump achieves a 6-3 Republican balance on the Supreme Court (SCOTUS) benches. Do this after the election and he risks a Biden appointee keeping the numbers at a 5-4 Republican balance, with possible Democrat appointees coming during the next presidential term depending on the circumstances.

Biden has pledged not to pack the Supreme Court with additional, Democrat justices should he be elected (it is traditional for there to be only nine justices, in line with the US Judiciary Act 1869, so the Democrats would have to pass an act of Congress); one can see how a 6-3 Republican balance could potentially change his mind.

Taking all of this into account, a lot of Senators will have to take a very difficult decision on this, but they can only blame the difficulty they find themselves in on themselves.

One such Senator is Mitch McConnell, Republican Majority Leader in the Senate. "The American people should have a voice in the selection of their next Supreme Court Justice. Therefore, this vacancy should not be filled until we have a new president" was what he said back in 2016 when Barack Obama nominated Merrick Garland to replace Antonin Scalia, following his passing.

In fact, [seventeen other Republican Senators](#) came out at the time to say that it is wrong that a Supreme Court Justice should be selected during an election year. Indeed, they torpedoed Garland's nomination by sitting on it for ten months, before the election of Trump made the nomination null and expired.

Of course, many of those have backtracked since then. Mitch McConnell has done so pretty spectacularly, and has in my view actually managed to justify it:

"In the last midterm election before Justice Scalia's death in 2016, Americans elected a Republican Senate majority because we pledged to check and balance the last days of a lame-duck president's second term. We kept our promise," McConnell continued. "Since the 1880s, no Senate has confirmed an opposite-party president's Supreme Court nominee in a presidential election year."

McConnell added that "by contrast, Americans reelected our majority in 2016 and expanded it in 2018 because we pledged to work with President Trump and support his agenda, particularly his outstanding appointments to the federal judiciary."

"Once again, we will keep our promise," he said. "President Trump's nominee will receive a vote on the floor of the United States Senate."

"You have to go back to 1880s to find the last time a Senate controlled by a party different from the president filled a vacancy on the Supreme Court that was created in the middle of a presidential election year," McConnell told Fox News.

I can see his point here. Trump's nomination will receive a vote on the floor of the Senate before the election. However, it is not a done deal that approval will follow.

Due to complex constitutional reasons, it could actually depend on when the vote is held.

If Democrat challenger Mark Kelly wins in Arizona, John McCain's former seat, he will constitutionally be able to take his seat on November 30th, meaning there may be one less Republican in the Senate to back the judicial nominee, should they get through the Senate scrutiny committee.

This is because Republican Senator Martha McSally was appointed via special election following the death of Senator McCain, meaning she is only eligible to hold the seat until immediately after the succeeding election.

I think we can safely say that there is a steadfast Republican majority in the Senate at the moment (53-47). But even this is no guarantee of success.

Some could rebel, some could abstain. During the confirmation of Trump's first appointee to the Supreme Court, Justice Neil Gorsuch, the split was 54-45, with 51 Republicans backing Gorsuch and three Democrats rebelling to vote in his favour as well.

During the controversial confirmation of Justice Kavanaugh, Trump's second SCOTUS nomination, the numbers were split right down party lines, with a 50-48 pro-confirmation vote. Republican Lisa Murkowski voted against, with Democrat Joe Manchin voting in favour.

Lisa Murkowski has already confirmed she will not vote to confirm a nominee before the election. With other Senators still deciding, this could make for a very nervy process for the President.

We already know from comments following the death of RBG that Republican Senator Susan Collins disapproves of a vote before the election, and that Republican Senator Mitt Romney is also another likely defection.

Should there be a 50-50 tie, Vice-President Mike Pence will break the deadlock with a pro-nominee vote. I.e, the Republicans need three or fewer rebels in their ranks.

They already have one confirmed, with at least two more potential defections very clear to see.

Traditionally a supermajority of two thirds is required to pass a nominee. However in recent years, the Senate has 'gone nuclear', changing the rules to require only a simple majority. It has worked so far with Trump's past two nominees, but will it work this time?

The outcome will be very simple to interpret, in terms of Trump's record as President.

If the nomination goes through, he will have successfully nominated three SCOTUS judges, solidifying a Republican majority in the Supreme Court for potentially decades to come.

The last three presidents will each have nominated three Supreme Court Justices. It remains to be seen whether Trump's latest will pass, or come up short like with Obama's nomination of Merrick Garland in the final year of his presidency.

He does have a relatively friendly Senate on his side though, unlike his predecessor.

The full Senate, in their confirmation vote, traditionally respect the recommendation (to accept or reject the nominee) put forward by the Senate Judiciary Committee, who question the nominee before the full vote. However in recent years, this has been less of the case. The last bi-partisan, healthy margin was for Obama's nomination of Elena Kagan, passing by 63-37, back in 2010, nearly ten and a half years ago.

Whatever your stance on Trump, I think we can all agree that the Democrats have done nothing but try to stop anything he has tried to do in its tracks. This will be no different.

Reports have it that many Republicans are not particularly keen on replacing RBG before the election, especially when you look at their comments about replacing Judge Scalia in 2016. However, this was under a lame duck president, and the circumstances, with their increased Senate majority thanks to the midterms, are very different.

Republicans now have the chance to solidify a big traditionalist majority in the Supreme Court for decades to come.

Their biggest challenge? Their own benches.

Over the coming 44 or so days, they will undoubtedly force challenger Biden's hand, asking awkward questions about potential nominees, his position on packing the Supreme Court and his true motives for wanting to wait until after the election to select a replacement for the inspirational RBG.

He has to tread carefully - he may have a lot to lose. Should Trump be unable to confirm a nominee, his first act as President in the event of an election victory may well be to restore a 5-4 minority in the Supreme Court.

It is election year after all, and with November 3rd fast approaching this may be perhaps the most delicate time for something so big to be happening. Whatever happens, whatever is done, whatever is said could either win or lose the election for either side.

The October Surprise has come early this year.