

9-30-2020

## Raising the Stakes: When a Supreme Court Justice Dies during an Election Year

Erin O'Leary  
*Saint Louis University School of Law*

Follow this and additional works at: <https://scholarship.law.slu.edu/lawjournalonline>



Part of the [Law Commons](#)

---

### Recommended Citation

O'Leary, Erin, "Raising the Stakes: When a Supreme Court Justice Dies during an Election Year" (2020).  
*SLU Law Journal Online*. 49.  
<https://scholarship.law.slu.edu/lawjournalonline/49>

This Article is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in SLU Law Journal Online by an authorized administrator of Scholarship Commons. For more information, please contact [erika.cohn@slu.edu](mailto:erika.cohn@slu.edu), [ingah.daviscrawford@slu.edu](mailto:ingah.daviscrawford@slu.edu).

## Raising the Stakes: When a Supreme Court Justice Dies during an Election Year

Erin O'Leary\*

The death of Ruth Bader Ginsburg marked the end of a groundbreaking legal career that spanned decades as well as the hierarchy of the U.S. Federal Court system<sup>1</sup>. Ginsburg's legacy is that of a pioneer who fought for equal protection and paved the way for women in the law<sup>2</sup>. By passing on the eve of Rosh Hashanah, she is regarded as a *zaddika*, or a righteous person, in her Jewish faith<sup>3</sup>. However, the loss of the head of the liberal wing of the Supreme Court<sup>4</sup> materialized the fears of progressives across the country. About an hour and a half after the Justice died, Senate Majority Leader Mitch McConnell released a statement and announced his intent for President Trump's nominee to receive a vote on the Senate floor<sup>5</sup>. With Ginsburg passing forty-five days before the conclusion of a high-stakes election cycle<sup>6</sup>, her death may feel less like a nightmare for liberals and more like *déjà vu*.

Antonin Scalia died nine months before the 2016 Presidential election, and on that same day McConnell announced that there would not be a vote for

---

\* J.D. Candidate, 2022, Saint Louis University School of Law.

<sup>1</sup> *Ruth Bader Ginsburg's Legacy*, N.Y. TIMES (Sept. 19, 2020), <https://www.nytimes.com/2020/09/19/opinion/ruth-bader-ginsburg-legacy.html>.

<sup>2</sup> *Id.*

<sup>3</sup> Danya Ruttenberg, *Jewish Tradition Calls on the Rest of Us to Act in Ginsburg's Memory*, WASH. POST (Sept. 22, 2020), <https://www.washingtonpost.com/outlook/2020/09/22/ginsburg-rosh-hashanah-tzaddik/>.

<sup>4</sup> Interview by Audie Cornish with Nina Totenberg, Legal Affairs Correspondent, NPR (Sept. 18, 2020); *What Does Ruth Bader Ginsburg's Death Mean For The Court?* National Public Radio (Sept. 18, 2020), available at <https://www.npr.org/2020/09/18/914635066/what-does-ruth-bader-ginsburgs-death-mean-for-the-court>

<sup>5</sup> Dana Milbank, *They Couldn't Even Wait until Ruth Bader Ginsburg Was in Her Grave*, WASH. POST (Sept. 20, 2020), <https://www.washingtonpost.com/opinions/2020/09/20/they-couldnt-even-wait-until-ruth-bader-ginsburg-was-her-grave/>.

<sup>6</sup> Jeffery Toobin, *Can Trump and McConnell Push Through a Successor to Ruth Bader Ginsburg?* THE NEW YORKER (Sept. 19, 2020), <https://www.newyorker.com/news/daily-comment/can-trump-and-mcconnell-push-through-a-successor-to-ruth-bader-ginsburg>.

former President Obama's nominee.<sup>7</sup> Rather, McConnell asserted the next elected President should make the decision instead of a lame-duck president near the end of his term.<sup>8</sup> Keeping his word, Obama's nominee Merrick Garland never received a hearing or vote.<sup>9</sup> Anticipating criticism for this seemingly blatant hypocrisy, McConnell attempted to distinguish the circumstances surrounding Scalia and Ginsburg's death in his initial statement<sup>10</sup>. He stated that in 2016, the White House and the Senate were controlled by different parties, while today both are controlled by the Republican Party.<sup>11</sup> Further defending his position in floor remarks, McConnell argued that historical precedent shows that no Senate committee has failed to confirm a nominee in these circumstances.<sup>12</sup> However, Senate Minority Leader Chuck Schumer was quick to rebut that never in Senate history has a nominee been confirmed so close to a presidential election.<sup>13</sup>

Despite McConnell's historical revisionism of the Supreme Court, the Senate Majority Leader will face the challenge of confirming Trump's nominee in time. McConnell seemed confident in his ability to do so, citing to the fact that Justice Sandra Day O'Connor was confirmed within thirty-three days of her nomination.<sup>14</sup> However, McConnell failed to point out that O'Connor's nomination was approved unanimously.<sup>15</sup> This is a stark contrast to the confirmation of President Trump's second Supreme Court nominee, Justice Brett Kavanaugh. In comparison, Kavanaugh was confirmed four months after his nomination on a 50–48 vote after extensive hearings that heavily focused on sexual assault allegations against the Justice<sup>16</sup>. Given the outrage by his Democratic colleagues as well as the

---

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Marianne Levine, *McConnell Fends Off Accusations of Hypocrisy over Holding Supreme Court Vote*, POLITICO (Sept. 21, 2020), <https://www.politico.com/news/2020/09/21/mcconnell-pushes-back-hypocrisy-supreme-court-419569>.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Sophie Tatum, *Brett Kavanaugh's Nomination: A Timeline*, CNN, <https://www.cnn.com/interactive/2018/10/politics/timeline-kavanaugh/> (last visited Sept. 30, 2020).

high-stakes, the notion that McConnell will enjoy a thirty-three day confirmation process is wishful thinking. However, it is not to say that it is impossible for McConnell to push the nominee through in time. Democrat Senators have a few procedural tools that they may employ to delay the vote, but they alone are not enough to impede it completely.<sup>17</sup>

While securing the vote in time will be a challenge, accruing the votes to confirm Trump's nominee likely will not. The Senate is currently controlled by McConnell's party, with only a few potential "swing" voters. These key Republican voters include Senator Susan Collins (R-ME), Lisa Murkowski (R-AK), and Mitt Romney, (R-UT)<sup>18</sup>. Collins and Murkowski were critical voters in the confirmation of Justice Kavanaugh, and Murkowski was the only Republican Senator to oppose the nomination.<sup>19</sup> Both Senator Collins and Murkowski have since indicated that they would not support a Senate vote for President Trump's nominee.<sup>20</sup> Senator Romney was the only Republican to vote to convict President Trump in his impeachment trial, and he was celebrated by liberals for his seeming dedication to country over party.<sup>21</sup> However, Romney seems to only display righteousness when it does not actually count, as he has indicated he would not oppose a vote for President Trump's nominee.<sup>22</sup> In addition to Senators Collins and Murkowski, Democrats will need two more Republican Senators to indicate they will not support a vote for a nominee before the election in order to successfully block President Trump's nominee<sup>23</sup>. While there are some Republican Senators up for re-election in blue states that may feel the pressure, none have yet indicated that they will oppose President Trump's nominee<sup>24</sup>.

---

<sup>17</sup> Toobin, *supra* note 6.

<sup>18</sup> Andrew Desiderio, *The 6 Republican Senators Who Will Decide the Supreme Court Fight*, POLITICO (Sept. 19, 2020), <https://www.politico.com/news/2020/09/19/6-republican-senators-decide-supreme-court-fight-418352>.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Catherine Kim & Andrew McGill, *Two GOP Senators Say They'll Wait to Replace RBG*, POLITICO (Sept. 21, 2020), <https://www.politico.com/interactives/2020/rbg-senate-scotus-vote-gop-election-tracker/>.

<sup>24</sup> *Id.*

President Trump has released a short list of possible Supreme Court nominees, and Judge Amy Coney Barrett is viewed as the front-runner<sup>25</sup>. Barrett is a favorite among conservatives for her anti-abortion record and criticism of *Roe v. Wade*.<sup>26</sup> While Barrett has recognized that a woman's right to abortion in itself is unlikely to change, she suggested that the Court could give states latitude in making an abortion more difficult to obtain through restrictions on clinics.<sup>27</sup> She would be a stark contrast from her possible predecessor Ruth Bader Ginsburg, who stated in one of her many famous dissents that "legal challenges to undue restrictions on abortion procedures . . . center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizen statute."<sup>28</sup> If confirmed, Barrett would be the youngest justice on the Supreme Court and would likely enjoy the ability to reshape the law for decades to come.<sup>29</sup> In addition to abortion rights, a 6–3 conservative advantage on the Supreme Court would likely also threaten affirmative action and the Affordable Care Act.<sup>30</sup>

There are many possible consequences to both the Supreme Court and the Senate as the result of Ruth Bader Ginsburg's death. What those consequences will ultimately be will depend on both procedure and politics. The stakes have again been raised in the sequel to the most contentious U.S. presidential election in history.

Edited by Ben Davisson

---

<sup>25</sup> Nina Totenberg & Domenico Montanaro, *Who Is Amy Coney Barrett, Front-Runner for The Supreme Court Nomination?* NATIONAL PUBLIC RADIO (Sept. 24, 2020), <https://www.npr.org/2020/09/24/915781077/conenator-who-is-amy-coney-barrett-front-runner-for-supreme-court-nomination>.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007).

<sup>29</sup> Totenberg & Montanaro, *supra* note 25.

<sup>30</sup> Liz Goodwin, *Another Conservative Justice on the Supreme Court Could Mean Big Changes for Abortion and Affirmative Action Cases*, BOS. GLOBE (Sept. 23, 2020), <https://www.bostonglobe.com/2020/09/23/nation/another-conservative-justice-supreme-court-could-mean-big-changes-abortion-affirmative-action-cases/>.