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## Filling a Supreme Court Vacancy: The Legality of Confirming Amy Coney Barrett during an Election Year

Ryan Krutz\*

The United States of America experienced a devastating loss on September 18, 2020, when Supreme Court Justice Ruth Bader Ginsburg – the longest serving woman on the Court, a strong liberal voice on issues dividing the nation, and a trailblazing advocate for gender equality – died at the age of eighty-seven.<sup>1</sup> With Ginsburg’s seat on the Court opening less than two months away from the presidential election and only four years after Senate Republicans refused to hold a hearing on President Barack Obama’s nominee, Merrick Garland, filling the vacancy has and will continue to be very contentious between Republicans and Democrats.<sup>2</sup>

Although a Supreme Court Justice has never been nominated and confirmed so close to a presidential election,<sup>3</sup> President Donald Trump was not deterred from nominating Judge Amy Coney Barrett, whose confirmation would solidify the Court’s conservative majority, and would possibly reshape the trajectory of American law on health care, guns, abortion rights, as well as many other crucial topics in American life.<sup>4</sup> This possible ideological reshaping of the Court has produced differing views from both political parties. Democrats, including former Vice President Joe Biden, argue that the winner of the upcoming Presidential election should decide the next justice, while Republicans argue they have the ability to appoint and confirm *now* due to holding both the Presidency and the Senate.<sup>5</sup> In this article I will *strictly* address the legality of the current

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<sup>1</sup> *Supreme Court Justice Ruth Bader Ginsburg, champion of women’s rights, has died at 87*, CBS NEWS (Sept. 19, 2020), <https://www.cbsnews.com/news/ruth-bader-ginsburg-dies-age-87-supreme-court-justice-court/>.

<sup>2</sup> Sam Gringlas, *Trump Announces Amy Coney Barrett As His Supreme Court Nominee*, NPR (Sept. 26, 2020), <https://www.npr.org/sections/supreme-court-nomination/2020/09/26/916921211/trump-set-to-formally-announce-his-supreme-court-nominee>.

<sup>3</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>4</sup> Gringlas, *supra* note 2.

<sup>5</sup> *Id.*

majority Republican Senate confirming Trump's nominee Amy Coney Barrett. What I will *not address* is if the Republicans *should* do this or if confirming a nominee in a presidential election year looks hypocritical after 2016.

The Constitution of the United States provides the legal framework for filling a Supreme Court vacancy. This process, which gives the President the power to nominate and the Senate the power to confirm, is outlined in Article II of the Constitution of the United States: “[The President] shall nominate . . . with Advice and Consent of the Senate . . . Judges of the supreme Court.”<sup>6</sup> While the Constitution lacks an explanation of the process of confirmation, the norm which has developed over time is the questioning of the Supreme Court nominee before the Senate Judiciary Committee, which then decides whether or not to recommend a general vote on the nominee's acceptability.<sup>7</sup> Once just a procedural process, over time the confirmation process has become highly politicized and contentious.<sup>8</sup> Although filling a Supreme Court vacancy produces political strife when the same political party holds both the Presidency and the Senate, the level increases when there is a divided Senate and Presidency, and is exponentially higher when a vacancy can be filled during a presidential election year.

Nevertheless, when a divided government exists in a presidential election year, each party's comments echo the same conclusion when discussing the confirmation of a Supreme Court nominee: in a divided Government, the Senate is entitled to reject the nominees of a President who may be attempting to remake the Court in a way in which it disagrees with, and the American people should decide which party should fill vacancy through voting in the Presidential election.<sup>9</sup> In 1992, when Democrats controlled the Senate and Republican George H.W. Bush was President, Joe Biden, head of the Judiciary Committee, said: “The public [had] not given either party a

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<sup>6</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>7</sup> *A Quick Overview on Filling of Vacancies*, LAWS (Sept. 19, 2020), <https://constitution.laws.com/the-supreme-court/filling-of-vacancies>.

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

<sup>9</sup> Dan McLaughlin, *History is on the Side of Republicans Filling a Supreme Court Vacancy in 2020*, NATIONAL REVIEW (Aug. 7, 2020), <https://www.nationalreview.com/2020/08/history-is-on-the-side-of-republicans-filling-a-supreme-court-vacancy-in-2020/>.

mandate to remake the Court into a body reflective of a strong vision of our respective philosophies,”<sup>10</sup> and “it is my view that if a Supreme Court justice resigns tomorrow or within the next several weeks, or resigns at the end of the summer [of 1992], President Bush should . . . not name a nominee until after the November election is completed.”<sup>11</sup> Similarly, in 2016, Republican Senate Majority Leader Mitch McConnell invoked Biden’s comments in his initial press conference after Justice Scalia’s death when he said: “The next president should make this nomination. . . . [T]he nomination should be made by the president the people elect in the election that’s underway right now, [and] . . . [t]hat was [also] the view of Joe Biden when he was chairman of the Judiciary Committee in 1992.”<sup>12</sup>

Therefore, both parties can be cited to leaning on the same standard for filling a Supreme Court vacancy when there is a divided government in presidential election years. However, the current situation in 2020 differs from 1992 and 2016 as there is a Republican Senate *and* a Republican President. And if a president and the Senate agree on a Supreme Court nominee, timing has never stopped them.<sup>13</sup> In the absence of divided government, election-year nominees are confirmed regardless of which party is in power.<sup>14</sup> Between 1796 and 1968, there have been 10 different times Presidents have sought to fill a Supreme Court vacancy in a presidential election year while their party controlled the senate.<sup>15</sup> Nine of those ten appointments were successful with the only failure being the bipartisan filibuster of Abe Fortas as Chief Justice in 1968.<sup>16</sup>

So, does the current Majority Republican Senate have the legal authority to fill the current vacancy? Yes. Republicans have both the Constitution and historical precedent on their side. Under Article II of the Constitution, President Trump is within his power to nominate someone to fill the

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<sup>10</sup> *Id.*

<sup>11</sup> David M. Herszenhorn & Julie H. David, *Joe Biden Speech from 1992 Gives G.O.P. Fodder in Court Fight*, THE NEW YORK TIMES (Feb. 22, 2016), <https://www.nytimes.com/2016/02/23/us/politics/joe-biden-speech-from-1992-gives-gop-fodder-in-court-fight.html>.

<sup>12</sup> McLaughlin, *supra* note 9.

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

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

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

<sup>16</sup> *Id.*

vacancy and the Senate is within its power to confirm. In addition, confirming a Supreme Court justice without a divided government during an election year is seen throughout American history. Although the optics of comments made by prominent Senate Republicans in 2016 may hinder public opinion of the Republican Party, I do not see a *legal argument* against them filling this vacancy.

Edited by Ben Davisson