

Supreme Court: Playing for Time vs. Advise and Consent

“The American people,” US Senate Majority Leader Mitch McConnell (R-KY) said in 2016, “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.” McConnell took that position in response to President Barack Obama’s nomination of Merrick Garland to replace the late Antonin Scalia.

While he subsequently offered other justifications, revolving around whether or not the same party controls both the Senate and the White House (“[s]ince the 1880s, no Senate has confirmed an opposite-party president’s Supreme Court nominee in a presidential election year”), the top political selling point of argument was clear:

With a presidential election less than a year away, better to await the voters’ decision on who should appoint a new member of the Supreme Court.

Now, with the death of Associate Justice Ruth Bader Ginsburg, McConnell’s political tune shifts its main melody to those other excuses. The new chorus: “President Trump’s nominee will receive a vote on the floor of the United States Senate.”

The Democrats have changed their tune too. They were all for a vote to confirm Merrick Garland in 2016. They’re dead set against a vote to confirm whomever President Donald Trump nominates in 2020.

Democratic arguments against a swift replacement for Ginsburg are pretty weak as well.

First, they say Ginsburg expressed a “final wish” that her replacement wait until after the election. That’s a strange one. In what universe do dying (or retiring) Supreme Court justices get to dictate the terms of their replacement?

Second, they raise the usual hue and cry: A Republican-appointed court might overturn *Roe v. Wade*. That claim ignores some inconvenient facts.

Such as that *Roe v. Wade* was written by a Republican-appointed justice. And that all five Republican-appointed justices on the Court at that time voted for it. And that half of the four Democrat-appointed justices voted against it. And that subsequent Republican-majority Courts have preserved it. Republican politicians talk a great anti-*Roe* game, but at the judicial level Republicans created *Roe* and Republicans have perpetuated *Roe*.

The first Supreme Court justice, John Jay, was nominated by President George Washington on September 24, 1789. He was confirmed by the US Senate two days later. Twelve years after that, the Senate dragged its feet for a whole week before confirming Chief Justice

John Marshall.

These days, far more is both knowable and known about prospective Supreme Court nominees well in advance of their nominations. Yet the process has mutated from “advise and consent” to “multi-month political campaign.”

There’s no taking politics out of the matter, but the whole thing could be better handled with a White House policy of nominating replacements within seven days of a death or retirement, and a Senate rule requiring an up-or-down confirmation vote within seven days of nomination. Let the voters judge what was done, not who might do what.

Instead, the legacy of Ruth Bader Ginsburg is yet another bear-on-a-unicycle ring added to an already far too crazy 2020 political circus.