

# **Ruth Bader Ginsburg's Death and the Senate Races**

## **Background**

Let's start with some background, because the narrative is shifting and it is important to get the facts straight.

Sometime in 2010, in the context of a Supreme Court seat that eventually went to Elena Kagan, Senator Warren Hatch (R-UT, who had been Chairman of the Senate Judiciary Committee) said of Judge Merrick Garland that if he had been nominated there would have been a consensus nominee and that there was no question he would have been confirmed.

Within that context, when Justice Antonin Scalia died in February 2016, President Obama nominated Merrick Garland. Indeed, after Scalia died, Orin Hatch once more praised Garland, and opined that Obama would probably nominate someone very liberal instead of someone Republicans could support, like Garland.

Mitch McConnell, as Senate Majority Leader, refused to let the vote come to the floor. His rationale at the time was simply that Obama was a lame duck and that the American people deserved to have a say in the next Justice through their November vote (nine months away).

Of note, legal scholars point out that before 2016, there were two such precedents for one party confirming the judicial nominee of another party. The situation arose in 1895, when a Republican-led Senate confirmed Democrat Grover Cleveland's nomination of Rufus Wheeler Packham to the Court; and in 1988 a Democratic-led Senate had confirmed Republican Ronald Reagan's nomination of Anthony Kennedy.

## **The So-Called Biden Rule**

Over time Republicans have tried to justify the Garland action with the so-called Biden Rule. This goes back to something Senator Joe Biden said in June 1992, shortly after the very fractious Clarence Thomas hearings.

With the 1992 election approaching, then-Senator Biden (Chair of the Senate Judiciary Committee at the time) said that – should a vacancy appear during the summer – President George H. W. Bush should wait until after the election to appoint a replacement, or should appoint a moderate acceptable to the then-Democratic Senate.

Most legal scholars take issue with the GOP's use of this to block Garland for the following reasons:

- First, Biden's speech was later in the election year than when the GOP blocked Garland;
- Second, there was no Supreme Court vacancy and no nominee under consideration;
- Third, Biden did not object to Bush nominating judicial nominees after Election Day;
- And finally, the Democratic-led Senate never adopted this as a rule.

Mitch McConnell has actually backed away from the Biden Rule recently, stating just that when the American people elected a Republican Senate in 2016, and increased its numbers in 2018, they were saying they wanted conservative judges.

### **Timing**

So Mitch McConnell is determined to move forward now, but at the very least he may have timing problems. Should Trump actually nominate someone before the election:

- McConnell can have hearings before the election, or after the election.
- If he has hearings before the election, he can schedule a vote before the election or after the election.

All of these options have some challenges related to the Senate.

## **Weak Links in the Chain**

At this point there are at least four Republican Senators who are on record as having said this vote should not occur before the election.

1. Lisa Murkowski (R-AK): Two hours before news of Justice Ginsburg's death, Senator Murkowski said in an interview that she would not vote to confirm any Supreme Court nominee ahead of the election. She has reiterated this since then.

2. Susan Collins (R-ME): Collins has publicly stated – as recently as two days ago – that whoever wins the November election should be the one to nominate a replacement for Justice Ginsburg.

3. Chuck Grassley (R-IA): Grassley, the former Chair of the Senate Judiciary Committee, said, "If I were chairman of the committee and this vacancy occurred, I would not have a hearing on it because that's what I promised the people in 2016."

4. Lindsey Graham (R-SC): Back in 2016 Lindsey Graham famously said (captured on video): "I want you to use my words against me. If there's a Republican president in 2016 and a vacancy occurs in the last year of the first term, you can say Lindsey Graham said let's let the next president, whoever it might be, make that nomination." As you might expect, he is furiously back peddling on that now.

Mitt Romney (R-UT) may also play a role. He has a strong sense of fairness, and little love for Trump. There may be one or two others in that camp.

## **The Judiciary Committee**

The current Senate Judiciary committee has three Republican members who are up for re-election this year and who are having difficulties. Any hearing before the election will pull them away from their campaigns.

1. Lindsey Graham (R-SC): As stated above, Lindsey Graham is doing a complete flip-flop on the issue. He is currently having difficulties in his re-election campaign...the last two Quinnipiac polls (very highly-rated polls) show him evenly

tied with his Democratic challenger, Jaime Harrison. FEC fundraising numbers are stale at this point (30 June), but Harrison's informal news releases show he is bringing in donations hand over fist.

2. Thom Tillis (R-NC): On Saturday, Tillis indicated his support for Trump and McConnell on moving forward with this, stating it is different from 2016 because then the government was divided, and now it is not. Republicans have characterized this race as a knife fight in a phone booth until the very end, and this issue is sure to exacerbate it. Tillis's Democratic opponent, Cal Cunningham, is strong, and 25 polls going back to late-July have all been in Cunningham's favor. The weighted averages over the last 10 polls going back to 30 August are:

Cunningham: 45.7  
Tillis: 42.8

3. Joni Ernst (R-IA): Joni Ernst previously said, " (If) it is a lame-duck session, I would support going ahead with any hearings that we might have. And if it comes to an appointment prior to the end of the year, I would be supportive of that." She is currently under fire for having sent a fundraising appeal just 10 minutes after Ginsburg's death. The latest Iowa poll – just released yesterday – put Joni Ernst three points behind Theresa Greenfield (42 to 45), and the weighted averages over the last nine polls going back to 10 June are:

Greenfield: 45.1  
Ernst: 42.5

Again, all three of these Senate Judiciary members are having serious challenges back home, and hearings before the election would almost certainly detract from their ability to campaign effectively.

### **Special Elections**

Winners in special elections are often seated as quickly as possible. There are two this year that could have an impact on this situation:

Arizona: If Mark Kelly wins the special election against appointed-Senator Martha McSally, he could be seated by late-November. Of all the Senate races pitting

Democrats against GOP incumbents this year, Kelly is deemed most likely to flip the seat.

Georgia: This special election is a bit more complicated. If no one wins over 50% of the vote on Election Day, it goes to a top-two runoff in January. Right now there are 21 candidates from various parties, including eight Democrats. The Reverend Raphael Warnock could conceivably eke out a November win if other Democrats coalesced around him, but that is not happening at this point. Matt Lieberman, the son of former Senator Joe Lieberman (D-CT), is running as a Democrat and does not appear inclined to do this.

### **The 2022 Race**

Yes, some Senators are looking beyond 2020 to their own re-election campaigns in 2022. On the GOP side, potentially competitive seats up for election in 2022 include:

- Marco Rubio (FL)
- Chuck Grassley (IA)
- Richard Burr (NC)
- Rob Portman (OH)
- Pat Toomey (PA)
- Ron Johnson (WI)

It's impossible to say what the dominant issues of the day will be in the autumn of 2022, but character always has a place (except in the case of Mitch McConnell and Lindsey Graham).

Regarding Merrick Garland in 2016, for example, Rob Portman (R-OH) is on record as having said, "During a very partisan year and a presidential election year, that both for the sake of the court and the integrity of the court and the legitimacy of the candidate, it's better to have this occur after we're passed this presidential election." Is he willing to backtrack on that when his own re-election is just around the corner?

Chuck Grassley (R-IA) will be in essentially the same position, and I'm sure a little research would show that a few others are, too.

## **The Trump Conundrum**

And then there's Trump.

Much of Trump's hopes for reelection revolve around suppressing voters and dampening participation. If he were to think about it, he would realize that nominating someone before the election is sure to mobilize Democratic voters in a large number of states that he really wants: Arizona, North Carolina, Georgia, even Texas. From that point of view, he would be wise to postpone the nomination (but then again, no one ever accused Trump or his people of being wise).

Also, there is a school of thought that says that Trump's only purpose to the GOP is to unquestioningly nominate the candidates proposed by The Federalist Society. Many Republicans have said they don't really like him, but as long as he's nominating the right judges they'll stay with him. Should he nominate someone acceptable before the election, it is just possible that a number of Republicans may decide he has fulfilled his role and that his value is over, and just stay home.

## **Timing...Revisited**

So some of the things that must be weighing on McConnell's mind are:

If Trump nominates someone, and if McConnell schedules the hearings before the election, he will be taking three at-risk members of his caucus out of their campaigns.

If he schedules hearings and then a vote before the elections, he might not have the votes he needs (Murkowski, Collins, Grassley, possibly Romney and others).

If he waits until after the elections, he will almost certainly have one additional Democrat in the chamber (from Arizona) and possibly two (if the Democrats in Georgia and get their act together).

Furthermore, if he waits until after the election and the GOP has taken a big hit, some of the potentially vulnerable 2022 Senators may not be totally onboard.

## Bottom Line

It is impossible to say how things might play out over the coming days and weeks. From a Senate race point of view, there are a lot of dynamics in this race.

*Within that context, I still believe **Theresa Greenfield, in Iowa**, is the best Democratic candidate to support right now.*

I think this is a competitive seat, but Greenfield still needs help, especially with her opponent being on the Senate Judiciary Committee.

Mark Kelly in Arizona and John Hickenlooper in Colorado are doing fine.

Sara Gideon is not quite as far ahead in the polls against Susan Collins, but I think this Supreme Court thing is a no-win situation for Collins, and Sara Gideon is far enough ahead that this race can be considered OK.

*My second recommendation for additional support right now is **Cal Cunningham, in North Carolina**.*

I think Justice Ginsburg's death is upping the ante in North Carolina because of Thom Tillis's place on the Senate Judiciary Committee, and although Cunningham has been doing fine, I don't think we can be complacent.

I do believe Montana is still in play, but polling in Montana is (and has been) incredibly sparse, and in light of the current situation it is hard to justify putting effort there in lieu of North Carolina.

Next week: Back to the regular report