

BusinessWorld

Nomination sensations

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US Supreme Court Justice Ruth Bader Ginsburg died last week. The only member of the Court not coming from either Yale or Harvard law schools, her death prompted numerous tributes, particularly as to her status as a “feminist icon.”

In her earlier years, Justice Ginsburg was known as a highly experienced litigator. But it is her work of the past 27 years, as a member of the Supreme Court, that her legacy will likely be most measured.

It is also, perhaps, where things get complicated.

To put it tersely: she was a judge. Yet to be remembered for advocating from the bench her own brand of progressive legal philosophy seems disconnected to the identity and functions that a member of the judiciary is supposed to exhibit.

Not the least of which is objectivity.

Supreme Court justices are not supposed to engage in policy. As one commentator wrote: it is not “the job of a judge to make the world a better place.”

No. As previously discussed here (“A Supreme but humble Court,” June 7, 2018), the “Supreme Court has a far narrower function: decide cases and determine constitutionality of laws. That is the reason why justices are all lawyers and are not subject to shorter terms (justices serve until 70 years old, provided they remain on ‘good behavior’).”

“Unlike Congress, the Supreme Court is NOT mandated to engage in policy. The dispensing of wisdom and expertise in political, scientific, social, economic, security, etc., are not primarily asked of Supreme Court justices.

“Because, if policy wisdom and expertise are indeed needed, then why limit membership to lawyers? There are many intelligent, experienced, and astute businessmen, economists, doctors, soldiers, etc.

“That such are not needed of justices is precisely because the Supreme Court’s function is limited to the legal. Its warrant is narrow, albeit complicated and highly technical.”

For someone in a supposedly pedantic, technically focused office, Justice Ginsburg’s death nevertheless set off a political firestorm, with many on the Left hysterically promising apocalypse should US President Donald Trump nominate her replacement.

The American Spectator's Doug Bandow framed the situation correctly: "It is sad that a life so well lived did not benefit from even the shortest decent interval before considering the politics." But ironically, it was precisely Justice Ginsburg's progressive politics that is to be blamed for this.

Because of the Left, "politics [has become] impossible to ignore." "Modern liberals... abandoned fidelity to the rule of law in reality if not rhetoric. Their commitment to a 'living constitution' — the evolving meaning of which depended upon any number of factors, including, it sometimes seemed, sunspots and the phase of the moon — turned them into politicians and the courts into continuing constitutional conventions."

Put another way: liberal progressive insistence of a "living constitution" led to politicizing the court and in judicial activism.

It also had the effect of converting the Supreme Court appointment process into a war of attrition.

It wasn't always like this. For the first 199 years of US existence under its Constitution, Supreme Court appointments were usually sober inquiries into the nominee's expertise. That is until the Left — motivated purely by power politics — decided to unjustly harass and torpedo the 1987 Supreme Court nomination of the highly respected and qualified Robert Bork.

In any event, President Trump's constitutional duty (US Constitution, Article II) is clear cut: he is the president for four years (unless re-elected in November) and is tasked to "nominate, and by and with the Advice and Consent of the Senate, shall appoint... Judges of the Supreme Court."

Hopefully, he appoints a textualist/originalist to the Supreme Court, one deciding cases in accordance with what the Constitution says rather than imposing his or her personal politics under the guise of a "living" or evolving constitution.

Anyway, Philippine Supreme Court appointments tend to be smooth affairs. There is also the supposedly non-political Judicial and Bar Council process (the benefits of which really remain to be seen).

One notable exception was the appointment made by President Gloria Arroyo following Chief Justice Reynato Puno's retirement on May 17, 2010, just a few days after the presidential elections of May 10, 2010.

Inasmuch as the Constitution's Article VII.15 prohibits appointments "two months immediately before the next presidential elections and up to the end of his term," was President Arroyo still entitled to appoint a Supreme Court justice "within 90 days from the occurrence" of the vacancy, as required by Article VIII.4.1?

The Supreme Court (in *De Castro vs JBC*, 2010) said yes, pointing out that "had the framers intended to extend the prohibition contained in Section 15, Article VII to the appointment of Members of the Supreme Court, they could have explicitly done so." Thus, the appointment ban "does not refer to the Members of the Supreme Court."

Which hasn't prevented, though, Supreme Court justices from being removed by impeachment or quo warranto. But that's another discussion.