

The reason Supreme Court vacancies are getting so heated is because Congress can't get anything done, according to one legal expert

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Ruth Bader Ginsburg and other Supreme Court Justices attend Neil Gorsuch's judicial oath ceremony in 2017.

- [Justice Ruth Bader Ginsburg's death](#) and Trump's expected nomination of Judge [Amy Coney Barrett](#) has ignited the third contentious showdown over a Supreme Court vacancy in just four years.
- Republicans say the seat should be filled, Democrats say voters should choose, and both parties have made arguments they were on the opposite side of in previous years.
- Vacancy battles have been political since America's founding days, but are more so recently thanks to an increasingly gridlocked Congress, according to Ilya Shapiro of the libertarian Cato Institute.
- Shapiro blamed the scappier fights on Congress being unwilling to compromise and partisan judicial philosophies "at a time when the parties are more ideologically sorted than at least since the Civil War."

Less than two hours after Supreme Court Justice Ruth Bader Ginsburg's death was announced, Senate Majority Leader [Mitch McConnell declared](#) that President Donald Trump's nominee to replace her "will receive a vote on the floor of the US Senate."

An hour before that, Senate Minority Leader [Chuck Schumer took the opposite stance](#), saying: "The American people 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."

The original source of Schumer's statement? McConnell's exact words in 2016, [just hours after the death](#) of Justice Antonin Scalia, where he pledged to block anyone then-President Barack Obama nominated to fill that vacancy.

As support for his argument, McConnell pointed to a 1992 speech by then-Senator Joe Biden. (Though political historians say [McConnell exaggerated](#) the so-called "Biden rule" — there was no "rule" and Biden left open the possibility of divided branches of government filling a vacancy after the election).

Over the years, Republicans and Democrats have both claimed to have precedent and political norms on their side — only to reverse their positions when the circumstances around a vacancy flip.

"Politics has been part of the nomination and confirmation process from the very beginning," Ilya Shapiro, a constitutional law scholar at the Cato Institute, a libertarian think tank, told Business Insider.

"George Washington had a nominee rejected. About half of our presidents have trouble filling seats for one reason or another," Shapiro said.

But in recent decades, there have been more heated fights over nominees such as: Clarence Thomas, who [Anita Hill had accused of sexual harassment](#); Abe Fortas, whose [opponents alleged cronyism](#) on the part of President Lyndon B. Johnson, who nominated him, also during an election year; and Robert Bork, whose conservative views on issues like civil rights and gender equality prompted liberal backlash that [ultimately tanked his nomination](#). Tom Goldstein, editor of the popular site SCOTUSblog, [told NPR in 2012](#) that things really escalated after Bork, saying it "legitimized scorched-earth ideological wars over nominations at the Supreme Court, and to this day both sides remain completely convinced they were right."

Shapiro said there are two related factors that help explain why vacancy battles today are so incendiary: the Supreme Court and executive branch becoming more powerful — and therefore more politically important — and increasingly polarized political parties.

"The centralization of power in Washington and within the federal government is skewing the power towards the executive branch and administrative agencies as Congress doesn't resolve political differences or culture clashes or policy views," he said. Instead, Congress "passes broad legislation that ultimately agencies have to implement, and then they get sued, and that gets thrown to the court."

Indeed, as both Trump and Obama have made greater use of unilateral executive actions in the face of gridlock or partisan opposition in Congress, there has been a growing trend of attorneys general [banding together to sue federal agencies](#).

Both parties' growing recognition of the challenges getting things done in Congress gets to the second issue, according to Shapiro, which is that judges' own views on how to interpret the Constitution are looking more partisan.

Importantly, he said, those judicial philosophies "map onto partisan preferences at a time when the parties are more ideologically sorted than at least since the Civil War."

"You take those two things, and of course there's going to be a huge battle every time there's a vacancy," Shapiro added.