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Senate Republicans were always going to do whatever they wanted with the Supreme Court vacancy

Their actions are deeply hypocritical — but unsurprising.

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Senate Republicans' approach to the Supreme Court vacancy created by Justice Ruth Bader Ginsburg's death may reek of hypocrisy, but it's consistent with how the party has advanced its preferred judicial nominees over the past four years: Ultimately, because they can, Republicans just end up doing whatever they want.

Sen. Lamar Alexander (R-TN) spelled out this position in a statement he issued last weekend supporting Senate Majority Leader Mitch McConnell's plans to move ahead with a vote on whoever President Donald Trump nominates, despite Republicans having argued in 2016 that filling a Supreme Court seat in an election year is undemocratic.

“No one should be surprised that a Republican Senate majority would vote on a Republican President's Supreme Court nomination, even during a presidential election year,” Alexander said plainly. “The Constitution gives senators the power to do it. The voters who elected them expect it.”

Since then, the bulk of the Senate Republican conference has backed McConnell's plan, with many reversing positions they took when the GOP refused to consider President Barack Obama's nominee for the late Justice Antonin Scalia's seat in 2016. This year, a new Supreme Court vacancy emerged even closer to the general election, which is less than 40 days away, but the GOP is taking a decidedly different tack.

While this Republican reversal is, of course, contradictory and partisan, it is in line with the broader focus the GOP has put on remaking the federal judiciary while they continue to hold the Senate majority. “My motto for the year is ‘leave no vacancy behind’,” McConnell said earlier this year. “That hasn't changed. The pandemic will not prevent us from achieving that goal.”

Senate Republicans' position on this nominee is very different from the one they took on Merrick Garland in 2016

Senate Republicans' plan to conduct a vote on Trump's nominee is just the latest example of their willingness to defy norms that they've claimed deserve to be upheld in the past.

Their dedication to doing so, particularly with respect to the Supreme Court, is unsurprising. McConnell, when he was asked about a hypothetical pre-election Supreme Court opening last year, had already signaled that he'd seat a new justice. "Oh, we'd fill it," **he said at an event in 2019.**

This stance is notably different from how Republicans behaved in 2016 when they said they wouldn't be able to advance Obama's nominee, Merrick Garland, in a presidential election year. "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," McConnell **said that year.**

McConnell's announcement came in February of 2016, shortly after Scalia's passing — and more than seven months before the election. (Ginsburg's death occurred less than seven weeks before this year's is set to take place.)

"Within hours of Scalia's death, McConnell announced that the court vacancy should be filled by the winner of the presidential election rather than a lame-duck president in his last year in office," former McConnell aide Josh Holmes **wrote in a 2017 Politico piece.** "McConnell then went about convincing the large number of Senate Republicans who were up for reelection in 2016 that this issue would help, not hurt, their election chances by motivating conservatives to turn out."

His move was both unprecedented and risky. At the time, the Republican presidential nominee had yet to be determined, and if Hillary Clinton were to win, it's likely she would have advanced a liberal option for the high court. But the stakes were significant for Republicans: if an Obama pick had filled Scalia's seat, the balance of power on the Court would have shifted 5-4 in favor of Democrats' appointees.

"It was a big gamble and it happened to pay off," says John Malcolm, the director of the Edwin Meese Center for Legal and Judicial Studies at the Heritage Foundation.

Back then, McConnell referred to this policy as the "Biden rule," which referenced comments that Biden had made as a **senator in June 1992** when there was no Supreme Court vacancy. In those statements, Biden had argued that President George H.W. Bush should wait until after Election Day to proceed with a Supreme Court nominee, should one arise in the summer ahead of the November contest.

By refusing to consider any nominee before the election, McConnell banked on Republicans potentially retaking the presidency and an open Supreme Court seat firing up voters. The move also enabled Republicans to maintain a united front on the subject, **though 19 Republicans** including Sens. Chuck Grassley, Lisa Murkowski, and Susan Collins, remained open to meeting with Garland after his nomination was announced in March.

Had Garland been able to undergo the confirmation process, it's possible he would have swayed some Republicans to support him, though it's unclear if he would have reached the 60-vote threshold needed to advance in the case of a filibuster. Senate Republicans had a 54-46 majority

in 2016, which meant that Democrats would have needed 14 senators to join them in supporting Garland to get to 60 votes.

Obama appeared to pick Garland, in part, because his nomination would **ramp up pressure on Republicans**. An older, more moderate nominee, Garland was more palatable to Republicans than other younger, more progressive options would have been. In 2010, Sen. Orrin Hatch, then a powerful member of the Judiciary Committee, had even **said there was “no question”** **Garland** would be confirmed if he were considered for the Supreme Court — though, of course, those comments were hypothetical back then.

Both Supreme Court nominees who preceded Garland had received some Republican support, though such votes had become increasingly polarizing by the time his nomination came up: Sonia Sotomayor was confirmed 68-31 in 2009, with nine Republicans backing her, and Elena Kagan was confirmed 63-37 in 2010, with five Republicans backing her.

Ilya Somin, a law professor at George Mason University, speculated that a strong performance by Garland during the confirmation process could have made it tougher for some Republicans, particularly those in closer reelection contests, to vote against him. “If they had held confirmation hearings, [Garland] might have looked good, and voting against him would have annoyed swing voters,” he said.

In 2016, 24 Republicans were defending their seats, while 10 Democrats were. By blocking the confirmation process altogether, McConnell enabled these lawmakers to avoid a tough vote — though some also faced heat for the conference’s decision to block Garland.

Ilya Shapiro, the director of the Robert Levy Center for Constitutional Studies at the Cato Institute, noted that “you can see vulnerable members potentially being hurt by that hardball tactic more than from having to take a tough vote.” He adds that McConnell’s efforts ultimately boosted Republicans, including Grassley, in some key states.

A major function of McConnell’s maneuver was that it made the Supreme Court — already a big priority for Republican voters — a top turnout issue. In addition to blocking Garland in the Senate, **McConnell pressed the Trump campaign** to put out a list of possible Supreme Court nominees, which was effective in firing up members of the GOP base.

“Keeping that vacancy so he could appoint someone from the list turned out to be a powerful motivating factor,” says Malcolm. That year, 70 percent of Trump voters cited Supreme Court appointments as an issue that was important to their vote, compared to 62 percent of Clinton voters, **according to a Pew study**.

By touting a policy about Supreme Court nominees and the proximity of a presidential election, however, Republicans look incredibly hypocritical with their decision to completely overlook it this cycle.

Much like Alexander, few Republicans have been perturbed by the inconsistency, though.

Sens. Susan Collins (R-ME) and Lisa Murkowski (R-AK) are the only two members of the conference who have stood by their previous statements and said they would prefer to vote on

the nominee after the presidential election in November. The broader Republican support for McConnell underscores how open members of the conference have been to breaking with prior practices in order to push through judicial nominees they favor.

Republicans' recent efforts on judges foreshadowed how they would treat this vacancy

Both political parties have engaged in increasingly escalatory tactics when it comes to judicial nominees, and Senate Republicans' approach while they've held power has only become more brazen.

Since 2016, **Republicans have reduced the vote threshold** needed to confirm Supreme Court nominees (**following a process that Democrats started to accelerate the confirmation of lower court nominees**), ignored the use of **blue slips on circuit court nominees** (which allowed senators from a nominee's home state to block their nomination), and **cut down the amount of time every judicial nominee** needs to be debated on the Senate floor.

As the party in power, these rule changes have all been within their abilities to advance — much like another Supreme Court nominee would be. As Alexander notes, there's little procedural recourse to block Republicans from doing what they want — though Democrats could try to **threaten to pack the Court** if and when they return to power, as one means of deterring them.

Republicans' tactics while pushing through more than 200 district and circuit court judges during Trump's term, as well as Supreme Court Justices Brett Kavanaugh and Neil Gorsuch, foreshadowed how they'd approach the latest Supreme Court vacancy.

A lot of arguments have been used to justify GOP actions

While the simplest explanation for the GOP's approach to the Supreme Court is that they want to and have the votes to fill the vacancy, lawmakers have tried to justify their push for a new justice by offering a series of different rationales.

One of these, which McConnell has offered, is that the same party currently controls the Senate and the White House, while this was not the case in 2016. "Since the 1880s, no Senate has confirmed an opposite-party president's Supreme Court nominee in a presidential election year," he said in a statement last Friday.

Although this explanation nods to the tensions that are at play when the Senate and White House are held by different parties, it doesn't provide much in the way of actual justification for the GOP behaving differently this year than they did four years ago based on the timing of an election.

Sen. Ted Cruz (R-TX) has also argued that Republicans should seat another justice ahead of the November election because it will be important to have a full panel of nine judges if **legal questions related to the election come before the high court**. That argument, however, ignores the fact that the Court was also missing a justice when the 2016 election took place.

In the end, the explanation for the GOP's turnaround on the Supreme Court vacancy is the most straightforward one: They've long been eager to add another Republican nominee to the Court, and there's not much standing in their way.