



Partisan Reaction to Loss of Ginsburg Shows How Much Else Has Been Lost

Ron Elving

September 22, 2020

Rarely in American history has the death of anyone other than a sitting president unleashed so much political anxiety as the passing of U.S. Justice Ruth Bader Ginsburg.

With all the grief her death caused for millions — and all the respectful tributes that poured in, even from adversaries — fundraising appeals were popping up on Twitter the same night keyed to the politics of her replacement.

Sen. Joni Ernst, R-Iowa, sent condolences on Twitter, but 10 minutes later her reelection campaign messaged this: "The next Supreme Court justice will be decided by Dems if we lose the White House and the Senate. Help hold the line."

Similar social media appeals appeared from other Republican incumbents on the ballot in November, as more than a few Democrats also began rallying their troops and donors to defend Ginsburg's seat and legacy.

The chance to provoke an anxious and often angry electorate for campaign cash has often proved stronger than something that once mattered a great deal to the American experiment — a sense of our democracy as a shared responsibility.

In his first inaugural address, with the nation on the verge of civil war, Abraham Lincoln reiterated the founding hope of American unity:

"We must not be enemies. Though passion may have strained, it must not break our bonds of affection. The mystic chords of memory ... will yet swell the chorus of the Union, when again touched, as surely they will be, by the better angels of our nature."

Those angels were not much in evidence over the weekend.

Instead, there were raucous chants of "fill that seat" at President Trump's rallies. And Democrats were filled with outrage because Republicans could not wait until after the impending national election. This had been Ginsburg's own "most fervent wish," as dictated to her granddaughter Clara Spera. Asked about this, Trump said "it came out of the wind" and might have been made up by one of his Democratic opponents.

In response, Senate Minority Leader Chuck Schumer, D-N.Y., said "nothing is off the table." Some other Democrats talked of impeachment, or interrupting negotiations to keep the government funded past the Sept. 30 end of the fiscal year.

House Speaker Nancy Pelosi, D-Calif., said she would not favor a government shutdown in retaliation but also warned: "We have arrows in our quiver I am not about to discuss right now."

Minority lament

Democrats are especially frustrated because they have watched helplessly over the past three years while Trump and Senate Majority Leader Mitch McConnell, R-Ky., filled hundreds of judgeships at the district and appellate level. Many of these had been held open by McConnell and Senate Republicans who blocked the appointments of President Barack Obama in his second term.

Democrats have limited options for retaliation at the moment. But if Trump and McConnell force another Supreme Court confirmation now, support will grow for blowback in the future.

One scenario could see Democrats, if they recapture the Senate majority, end the historic filibuster rule that now requires 60 votes to pass most legislation. Bills could then pass by simple majority, as they do in the House. That might allow a Democratic Congress and White House to do many things, such as undoing the Republican advantage on the Supreme Court by increasing the number of justices.

Democratic presidential nominee Joe Biden said in 2019 he did not support expanding the Supreme Court. Ginsburg herself had told NPR "nine seems to be a good number; it's been that way for a long time." The Constitution does not set a number of justices; Congress can, as it did in 1869 when it set the current number of nine.

Ginsburg thought the idea of expanding the court, or "court-packing," was a bad idea when Franklin D. Roosevelt proposed it — unsuccessfully — in 1937.

But FDR's plan failed in large part because he pressed for *six* new judges. Some Democratic leaders in Congress at the time were willing to add two, but the votes were not there for the wholesale transformation the president wanted.

And whatever sentiments may have been in the recent past, much has changed in this year of pandemic, recession and civil unrest.

New depths for partisan rancor

There is no question that Ginsburg's death is another potential turning point in a political season already fraught with deeply divisive issues and circumstances.

Given the closely divided votes of the high court, and Ginsburg's role as anchor for the liberal minority, it was inevitable that her death would deepen existing divides. But the immediacy and intensity of the fireworks that followed cast a harsh light on the current landscape.

The general discourse in this presidential cycle — both from Trump and the Democrats who oppose him — had already plumbed new depths of partisan rancor.

As a long-term and worsening trend, this portends grave challenges to our democracy in the days to come. While the rancor did not begin with Ginsburg's death — or even with the Trump presidency — having these events coincide has deepened the shadows on the road ahead.

This is not just about what happens on Election Day in November, nor in the subsequent weeks when the outcome may well be contested. This is about an even greater sea change in the conduct of our national life, the loss of the value we once placed on finding common ground through political moderation. We are losing our sense of forbearance, restraint and negotiated compromise — values that have arguably been key to our national success since the earliest days of the republic.

The immediate battle

Most immediate and obvious is the high court battle at hand.

Trump says he will name a successor to Ginsburg at once and push for confirmation in the Senate before the election on Nov. 3. In recent years, the average time it has taken the Senate to process a new Supreme Court nominee through vetting, committee hearings, committee votes and floor debate has been about 10 weeks.

The election is just six weeks away.

Nonetheless, McConnell immediately said the Senate would follow the dictates of the president. And most Senate Republicans just as promptly signaled their readiness to fall in line behind their leader, who had already announced on the night Ginsburg died that his troops would back immediate confirmation of the president's nominee — a person who had yet to be named.

Much of the debate since that moment has centered on McConnell's apparent reversal on the question of election-year nominations. So let us review the relevant history.

In February 2016, when Obama had almost a year left on his term in office, McConnell said the Senate would not consider anyone named to a high court vacancy by the president. "The American people should have a say in filling this seat," McConnell said.

He did that within two hours of learning that another icon of Supreme Court jurisprudence, Antonin Scalia, an archconservative jurist — and yet close personal friend to Ginsburg — had died. At that time, as in the current situation, McConnell declared his intentions well before he knew who the replacement might be.

In other words, the actual identity of the nominee was of no importance to McConnell's response in either case. The identity of the nominating president was all that mattered.

At the time, McConnell said it was good and proper that the Senate ignore the appointee of a president in his last year, even with 10 months to go before the election. He then referred to what he called "the Biden rule," which he said meant the Senate majority did not have to consider nominees in an election year if they came from a president *of the other party*.

When asked where this "rule" came from, he referred to a speech Biden had given a quarter of a century earlier, in June 1992, when Biden was chairman of the Senate Judiciary Committee. At that time, Biden questioned whether his committee should process a nomination if one were to be made by President George H.W. Bush with his reelection a few months away.

At the time, there was no vacancy on the court, and the discussion was hypothetical. No vacancy occurred then, or in any presidential election year thereafter until Scalia's death in 2016. The Senate has never established a rule or any other formal precedent or commitment regarding election-year nominations.

As for the constitutional directive, Article II simply says the president will nominate and the Senate will confirm. It could not have said anything about majority party control, one way or the other, for the simple reason that the Constitution never mentioned parties at all. The framers feared "factions" and hoped to keep them from forming.

But McConnell used Biden's speech as cover 24 years later, when Scalia died suddenly and unexpectedly. Fast-forward to this past weekend, when McConnell was informed that Ginsburg's death had created a vacancy 46 days before the election, and the Republican leader saw things very differently. Now, he said, with the Senate and White House both in Republican hands, there would be no problem with proceeding — and accelerating the process.

As for letting the American people "have a say," McConnell said the American people already had their say in the last round of presidential and senatorial elections won by his party.

What is at stake

What fewer seem to appreciate is the degree to which all this reveals how traditional values of moderation, forbearance and restraint have receded in the current Congress — and indeed in the civil discourse of the nation as a whole.

In fairness to what has been called "the world's greatest deliberative body," and not always in irony, the Senate of our day reflects broader changes in the American body politic. If Congress has been gridlocked by partisanship, it is responding largely to the choices of those citizens who actually vote. And the actual voters have been tending away from the center for years.

"Huge gaps based on partisanship pose dangers for democracy because they breed extremism and intolerance and make it difficult to have civil dialogue," says Darrell M. West, director of governance studies at the Brookings Institution, in a May 2019 publication of the libertarian Cato Institute.

"We need to revive moderation as a central element in American politics. It is a way to strengthen our democracy, rebuild our societal glue and promote meaningful substantive debate over major issues."

West notes that a generation or two ago, "more than half of the members of the U.S. Congress were moderate in their voting records ... routinely supported legislation from the other party and were willing to negotiate."

That share of Congress has now dwindled to less than 5%, according to West. The unifying force of shared experience that held things together in World War II and the Cold War years has aged and weakened. And the trend continues with the nominees for this year's congressional elections, incumbents and challengers alike.

Yet the tradition of moderation — of accommodating other viewpoints and searching for common ground — is deeply embedded in our national DNA. Alexis de Tocqueville, the Frenchman whose *Democracy in America* is still studied and quoted nearly two centuries after his first visit in 1831, marveled at how he perceived the ways in which Americans had resolved questions of church and state.

Coming from France at a time of great division between religious groups and secularists, Tocqueville was greatly impressed with the American "point of departure" from such conflicts, which had soaked much of Europe in blood for centuries.

The spirit that impressed him has endured, on most issues, through wars and crises and vast changes in the population. Paul Carrese, a political scientist at the Air Force Academy, notes in a 2015 book called *Democracy in Moderation* that the balancing of religious faith with liberty and tolerance has been an invaluable legacy: "There is more public prominence for religion in America than in any other liberal democracy, and there also is more religious liberty than in states with deep religious cultures."

A means to unity

But it was not just a way of accommodating differences of religion. It was a means for creating a new political life for a new nation.

Carrese also pointed out that Tocqueville was a disciple of the 18th century French jurist and philosopher Montesquieu, whose *The Spirit of Laws* and ideas about balancing power among separate parts of a government had inspired some of America's Founding Fathers.

That is why Montesquieu's philosophy was evident in the creation of certain "checks and balances" in the American system. Carrese argues that these structural relationships helped "to develop harmonies among seemingly opposing views, whether of religion, politics, institutions, or culture."

The American idea, then, was not just a tolerance of religious diversity — including secularism — but a degree of tolerance that generalized to other differences as well.

Flawed and incomplete as our inclusiveness has been, it has remained central to the American ideal. The idea of accepting one's "fellow Americans" has been enforced on military recruits, college students and members of Congress.

Or so it was with Congress before the deliberate rejection of bipartisan endeavors came into vogue in the mid-1990s. Since then, the demands of fundraising, the divergence of information sources and the miasma of social media have served to separate parties, factions and individuals on Capitol Hill as elsewhere in our society.

Writing five years ago in *The American Interest*, Carrese worried about these trends "because this Montesquieuan tradition of political and philosophical balance cannot run on autopilot."

"It is an equipoise," Carrese wrote, "full of tension and difficulties, requiring intellectual and political effort."

But in our time, the greater intellectual and political effort seems to be expended in driving division, whether to win a primary within one party or to "whip up the base" to win a general election when many or most who are eligible to vote do not do so.

A Supreme Court nomination is not an election. But it is a measure of those who come to office by winning elections, and it reveals the values that inform their election campaigns. Even in the grip of this pandemic, it is the health of our democracy that should concern us most.