

# The Delray Democrat

## SCOTUS 2020: Another Stolen Seat?<sup>1</sup>

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Within minutes of the announcement that Justice Ruth Bader Ginsburg had died, Donald Trump and Mitch McConnell quickly and callously announced they would try to seat her successor on the Court even though there were less than 50 days before the election. Putting aside the utter lack of class or compassion for a grieving family, judicial colleagues, and the millions of Americans who had such great respect and admiration for Ginsburg and her incredible career, Trump and McConnell salivated over the chance to appoint a third Justice, knowing there was a strong chance Trump would lose the upcoming election.

McConnell stole an appointment from President Obama in 2016 by arguing the American people should decide who gets to make an appointment so close (9 months) to the Presidential Election. Well, here we are on the very eve of the election, yet McConnell brazenly declared his intent to ram a nominee through before November 3. Ignoring the hypocrisy and outright dishonesty of McConnell's actions, there really is not sufficient time for a bona fide vetting and confirmation process. As critically important as is the appointment of a Supreme Court Justice, it is not the only pressing business of the Senate right now, not to mention that one third of the Senate is in the final stretch of their reelection campaigns.

Appointment shenanigans are nothing new and have occurred throughout our history. The current cycle of abject weaponization of the judiciary and politicizing the nomination process began in the post-Watergate era. Although President Gerald Ford was a mere caretaker of the White House after Nixon was forced to resign, Democrats did not prevent Ford, a Republican, from making an appointment (Justice John Paul Stevens, who also happens to be the last veteran appointed to the Court). However, Republicans, who later took over the Senate during President Carter's term, blocked Carter from filling a vacancy. Although there was plenty of time to work the process, Republicans believed Carter was vulnerable and that a Republican would win in 1980 so they left the vacancy open. Thus began the current cycle of impropriety and politicization.

President Reagan made 3 appointments. Sandra Day O'Connor was a well-qualified nominee and easily confirmed. It was not until after Justice Scalia took the bench did Democrats come to understand the new era of partisan political and policy-based nominations. When Reagan nominated Robert Bork, his third nomination, Democrats conducted hearings, exposed concerns about Bork, and defeated the nomination. The result was Justice Anthony Kennedy, appointed by Reagan, not a seat left unfilled until after the 1988 Election. Bork's defeat was nothing new. The Senate has failed to confirm plenty of other nominees. Reagan added 3 Justices to the Court.

President George H.W. Bush appointed the successors to two titans of the Supreme Court, William Brennan and Thurgood Marshall. David Souter's nomination to succeed Justice Brennan proceeded without difficulty, but Clarence Thomas's confirmation was filled with controversy,

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Thomas was ultimately confirmed, despite the concerns over some unprofessional conduct. because he was deemed qualified and it was felt the President should receive some deference in his nomination. Democrats did not block the Republican President's nominee. During the final year of Bush's term, then Senate Judiciary Chair Joe Biden expressed hesitation about undergoing a confirmation process in a President's final term, as Bush seemed poised to nominate a third Justice (on the heels of Reagan's 3 and Ford's 1). There was no rule against doing so and Biden's point was actually directed at Bush previously foregoing the normal process of coordinating a nomination with the Judiciary Committee prior to announcing it. In any event, Bush was not prevented from making a nomination.

President Bill Clinton nominated Justice Ruth Bader Ginsburg and once she was confirmed she was at the time the only Democrat-appointed Justice on the Court. Clinton later nominated Justice Stephen Breyer. Neither confirmation process had any notable excitement. The Supreme Court was 7 to 2 Republican appointees when George W. Bush (43) took office. Bush added Justice Samuel Alito, among the Court's more extremist Justices, and Chief Justice John Roberts, who continues to strive to steer the Court as an institutionalist committed to legacy, precedent, and consensus.

President Barack Obama successfully nominated Justices Sotomayor and Kagan; neither could fairly be labeled as extremist. Upon the sudden passing of Justice Antonin Scalia, just under a year before the 2016 Election, Obama nominated Judge Merrick Garland, a highly respected, non-partisan pick, who would easily have been confirmed in any normal process. However, McConnell, as Republicans also did to Carter, stated that under no circumstances would he allow Garland to even have a hearing. Most Republican Senators would not even have an office call with him.

McConnell said there was not enough time (9 months) and that the American people should decide who appoints the next justice by the result of the 2016 Election. The problem is that there are many issues upon which individuals vote, not just the Supreme Court, and the results of any election are not a clear indication of who the people want to appoint the next justice. It is clear McConnell's only intent was to effectively steal an appointment from Obama. That was the second appointment stolen from Democrats in the modern era and the current attempt to replace Ginsburg would be the third stolen appointment, if successful.

President Trump nominated Neil Gorsuch for that vacancy. Despite some extreme views and legitimate concerns about Gorsuch, McConnell changed the rules to require only a simple majority of 51 Senators to confirm Supreme Court nominees and Democrats had little ability to prevent Gorsuch's confirmation. Many people will remember the drama surrounding Trump's second nomination, Brett Kavanaugh, who despite his qualifications was accused of sexual assault and other impropriety. Republicans, using the new simple majority rule, ensured there was not a proper vetting of the allegations and forced Kavanaugh through on a razor thin vote.

With Joe Biden having a comfortable lead in the race for the White House but Democrats in the Senate minority and lacking the votes to stop McConnell, Republicans are stealing a second Supreme Court appointment for Trump. Assuming Joe Biden wins the 2020 Election, a strong possibility, this should be his vacancy to fill.

Is this what has become of the Supreme Court, the once venerated institution of government looked upon to ultimately protect our democracy? Can McConnell and Senate Republicans really circumvent the vetting and confirmation process to force through Trump's pending nomination in

record time with under 50 days until the election? If 9 months was not enough time for Obama to fill a vacancy, then there is not even an argument that we now have enough time. Republicans are so desperate to exercise power that they would steal appointments. Based on his first two appointments, it is safe to assume Trump will appoint another conservative with extreme views and tendencies. The Supreme Court would be poised to ignore precedent and increase a wave of activist political decisions by the Court and even the Chief Justice will not be able to control it.

At least 4 Republican Senators must demonstrate the courage and integrity to stand with Democrats in support of democracy to wait until after the inauguration to conduct the nomination process. Alaska's Senator Murkowski has apparently stepped forward. Several Republican Senators are in extremely tough election battles. If they accept the likelihood of defeat, will they do the right thing now and leave office with integrity or will they support the Trump treachery because it doesn't matter to them anymore? If they believe they can still win, do they appeal to Trump's extremist base and support the nominee or do they appeal to the independent and even Democratic voters they need to push them over the top to win? This entire matter is further evidence of who Trump and McConnell are and why neither is fit to serve in office. The American people must demand better and make their voices heard on November 3.

And now we have something very close to the truth from the Senate Republican leaders. This really has nothing to do with policy, rules, procedures, or the voice of the American people. This is 100% about power. When Republicans control the White House and the Senate, even with a looming election, even with the real likelihood they will lose control of both, they will jam through any nominee up until the very last day. Plain and simple. The Constitution does not prohibit this and the founders left it to those elected to serve to establish the rules and procedures by which they operate. These founders, resting in eternity, are no doubt disgusted by what their venerable institutions of democracy and government have become.