

Memorandum

From: The Smith-Free Group
Date: September 21, 2020
RE: The Big Casino – SCOTUS 2020

Following the sudden and sad news about the death of Justice Ginsburg, we have some initial thoughts about the impact her death will have in the coming days on policy and politics.

What Comes Next

The president has indicated he will announce a nomination this week, and Senator McConnell has stated publicly the nominee will receive a vote in the Senate. For all of the posturing and claims by both sides about judicial nominations, the fact remains that in the last 80 years only one Justice (Kennedy, 1988) has been confirmed to a seat on the Court in a presidential election year. To underscore the obvious, the coming days will be momentous and historic. Following all of the vitriol and bile of the Kavanaugh confirmation just two years ago, we should be prepared for almost anything.

Several weeks ago the president released an updated list of candidates from which he would choose a nominee and there is every reason to believe he will follow this practice as he did in nominating both Justices Kavanaugh and Gorsuch. On average it has taken 70 days from announcement to confirmation for Supreme Court nominees, although Justice Ginsburg herself was confirmed in 43 days. Even if paperwork (FBI background check, financial disclosure, etc.) and hearings are expedited, it is very difficult to see how a roll call vote on the Senate floor could be taken between now and November 3rd – possible but the process would have to work precisely and that is difficult to orchestrate in the U.S. Senate. The next reliable indicators will come after Republicans meet at their weekly lunch on Tuesday.

How Does the Death of Justice Ginsburg Affected the 2020 Elections

THAT is the THE question, at least in the short term. We are initially skeptical her passing changes the fundamentals of the contest. Consider that on January 1 the fivethrityeight.com survey of polls had the president's job approval rating at 42%. At the end of last week it stood at 43.5%. In the intervening 8+ months, we have lived through impeachment, Covid-19, an economic downturn and then resurgence, racial equality/anti-police protests and violence in a number of American cities (Seattle, Portland, Kenosha, etc.) If that confluence of events did not alter the president's standing with the public, it seems unlikely that Ginsburg's death will do so.

A step down, four Republican senators who sit on the Judiciary Committee are currently in spirited races – Graham, Cornyn, Tillis and Ernst. The focus on them and their opponents will only increase, even more so than other Senate elections. And even though House Members obviously do not play a role in the nomination process, the effects of the coming debate will affect these races, too.

What About the Next Few Weeks on Capitol Hill

Because Supreme Court nomination fights have become the ultimate shirts-versus-skirts argument in American politics, we have to assume the argument will spill over into other congressional work for the next several weeks. This will only make things more difficult on the Hill, and make it even harder for House Democrats to meet their goal of passing a stopgap spending bill by the end of this week. In the end, we do expect a relatively lean CR, likely running to December 11th, to pass in the next nine days and for it to include only the most high-profile riders (e.g. surface transportation reauthorization) as well as the most pressing anomalies. Talks on Covid-19 relief legislation had been on life support and now will certainly be delayed until the lame duck session. Watch to see the tenor of debate on the House floor this week; there are 57 measures scheduled to be considered under suspension, and although most are non-controversial the super-charged atmosphere could lead some to fall by the wayside. Over in the Senate, work will continue on executive branch and district court confirmations: we expect eventually the House-passed CR to come to the floor quickly and to be adopted after perhaps a few symbolic, and failed, amendment votes. The only real question will be what if, any changes, Senate Republicans make to the target adjournment date of October 9.

Composition of the Lame Duck Senate

The current 53-47 margin might change to 52-48 during the lame duck if Mark Kelly defeats Sen. McSally in Arizona. Under Arizona election law, a final canvass of balloting is to be completed by November 30. While legal challenges could forestall the potential seating of Kelly, Senate leadership and the White House will possibly need to plan for a larger Democratic minority.

A Few Things We Know About the Coming Nomination Debate

While there is much we do not know yet about what will occur after the elections, we do know a few things. First, if Sen. McConnell believes he has 50 votes for confirmation, he will move as swiftly as possible to schedule a final vote. Both sides see Court nominations as paramount; everything else will be secondary. Second, Senate Democrats can hinder the process and slow the work in the Senate to a crawl. But, in the end, if there are 50 Republican votes for confirmation then Democrats cannot stop it. In that instance, it will only be a matter of how hard and how long to fight before taking the final vote. That political end game would provide a fitting end for the tumultuous politics of 2020.

Attention and Enthusiasm

In the first four hours after the announcement of Ginsburg's death, ActBlue raised \$20 million, at times averaging \$100,000 per minute. Perhaps no issue currently animates both Republican and Democratic bases as much as a Supreme Court confirmation. Candidates of both parties are likely to have as much money as they can spend in the waning days of the cycle. In fact, some candidates – win or lose – might have significant leftover funds. This was the case for Sen. Heitkamp who after losing in 2018 still had close to \$8 million in her campaign coffers, largely a result of donations from anti-Kavanaugh forces, and money she was not able to spend in the waning days of her campaign.