

A Nomination and an Election in the Balance

A civilized discussion of abortion would be a preferable backdrop to the election than the Democrats' continued desperate effort to maintain public hysteria over the coronavirus.

by Conrad Black



It is already a cliché to say that the death of Supreme Court Justice Ruth Bader Ginsburg further complicates what is already a tumultuous election campaign. All the arguments for and against the propriety of nominating and attempting to confirm a replacement on the high court bench in the midst of an election campaign are self-serving casuistry by both parties to give the sanctuary of legal tradition to the opportunistic positions that they will take.

According to the Republicans, they have a right and duty to fill such vacancies as soon as possible. And according to the Democrats, any such initiative must await the results of the election for the president and the Senate.

As in most political arguments, unless something seriously illegal is being considered, the real question is what is politically *possible*. It will be extremely difficult, though perhaps not technically impossible, to have a new nominee confirmed prior to the election on November 3.

Controversies over judicial appointments have gone on throughout the life of the Republic. The person generally regarded as the greatest jurist in American history and the longest-serving chief justice of the United States, John Marshall, was appointed to the office which he held for 34 years by President John Adams in 1801—more than two months after Adams had been defeated by Thomas Jefferson and Aaron Burr in the presidential election. Even so Marshall continued to serve concurrently as secretary of state until a month after his elevation as chief justice, when Jefferson was inaugurated and James Madison replaced Marshall at the State Department.

Although a number of America's most exalted historic figures were involved in those contentious times, the violence of the charges hurled between the camps of Alexander Hamilton, Jefferson, Burr, and Adams were not markedly less incendiary than the current ambience of American national politics. The example of Marshall may perhaps be taken as an encouraging precedent to demonstrate that comparative normalcy and civility return eventually to American public life.

Since the president has the undoubted *right* to fill this vacancy, there is no reason why he does not do so, as he said over the weekend was his intention. Despite the self-assurance of many commentators who have filled the airwaves since the announcement of Justice Ginsburg's death on Friday evening, it

is impossible to predict with confidence where the political advantage might lie if the president sends the Senate the name of a nominee in the next week.

The disgraceful harassment of Brett Kavanaugh two years ago will not be followed exactly, as the president has promised that his choice will be a woman, and the great rap on Kavanaugh was that more than 30 years before, in high school, he allegedly pounced on a girl, now a somewhat eccentric academic living in California. Kavanaugh's accuser was allegedly able to escape when a friend jumped on them both, sending them tumbling. But all of the witnesses named denied any recollection of such an incident, and the whole story was pretty fuzzy and in any case irrelevant. The judge vehemently denied that the incident had ever occurred and he was confirmed.

If the president decides to go forward with this now, other issues as explosive as sexual assault are awaiting detonation.

The two leading candidates appear to be circuit court appellate judges Amy Coney Barrett of Indiana and Barbara Lagoa of Florida. Both have been recently confirmed by the Senate to their present positions and both unquestionably are highly qualified and competent judges. It is indicative of the antlike progress of atheism through official America and of the imperishable durability of sectarian bigotry, that Barrett's status as a practicing Roman Catholic creates a hair-trigger on the abortion issue.

Barrett handled this question skillfully at her previous confirmation hearing in saying that judges interpret the law, they do not make it. As long as the *Roe v. Wade* decision of 1973, which legitimizes abortion as within a woman's right to determine in privacy what goes on within her own body, is the law, she would observe the law. Under rather obnoxious questions from Senator Dianne Feinstein (D-Calif.), who had

the effrontery to submit her to something of a religious examination, Barrett said that neither her religious nor any other convictions would influence her interpretation and application of the law.

Since the U.S. Supreme Court can strike down or rewrite laws, Barrett would, if nominated and confirmed to the high court, be entering a more dangerous world. The problem of the pro-abortionists is that *Roe v. Wade* decision was a correct decision for faulty reasons. Abortions occur and they must be sanitary and un-stigmatizing, and the state does not have and should not seek to have the right to force childbirth on a woman who does not wish to have a child.

It is a matter of great moral significance, however, and the real issue is when the unborn attain the rights of human beings. Here there is room for a full range of intelligent arguments from conception to birth at full term. (The desire of some zealots, such as the unrigorous Democratic governor of Virginia Ralph Northam, to extend the permissible to outright infanticide of delivered babies, is fundamentally unacceptable.)

What ultimately is going to have to happen is some form of compromise in which abortions are uncontroversially available for up to approximately five months and thereafter, for an abortion to be performed, the circumstances will have to be considered according to criteria to be determined. This is a compromise that will not satisfy large numbers of sincere champions at the far ends of the issue. But it is what other civilized countries have done and democracy usually implies some degree of compromise.

If Barrett were nominated, it is possible that the president could moderate somewhat the predictable hysteria of the pro-choice movement, (i. e. pro-abortion), by repeating his view that the abortion rules should be left to the states to establish. This would assure a reasonable variety of abortion

regimes to serve the whole country and might somewhat placate all but the most militant.

Since Barrett unquestionably is qualified and is not on a pro-life crusade, if the White House handles her nomination carefully and the Democrats are as frenzied in their antagonism as they were to Justice Kavanaugh, Democrats could alienate the entire Roman Catholic community of the United States, about a quarter of the population, and many others of other faiths.

Lagoa's religious views are less well known. As a Floridian fugitive with her family from Castro's Cuba, her nomination could be politically timely.

There is no reason for the president to make the tentative gesture of an interim appointment, but he could make it clear that if his nominee is not confirmed by election day, the results of the election would be taken into careful consideration before attempting to confirm the nominee. That might not allay many suspicions but it might not arouse as much hostility as expressing determination to confirm whatever the election result. It is very hard to manage these controversies but it might be possible to dampen the extremes.

A civilized discussion of abortion would be a preferable backdrop to the election than the Democrats' continued desperate effort to maintain public hysteria over the coronavirus, while arguing for renewed economic shutdowns to embarrass the president, no matter how much damage would be inflicted onto millions of other people.

I am generally skeptical about chaotic election scenarios, but the election conceivably could go to the Supreme Court and end in a 4-4 tie, creating a severe crisis. Chief Justice John Roberts would probably vote with the other Republican appointees, but avoiding such a scenario would furnish the

president an argument for swift confirmation of his nominee.

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