

When to Step Down: Justice Ruth Bader Ginsburg and the Supreme Court

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Abstract: Justice Ruth Bader Ginsburg has been a pioneering woman lawyer, legal scholar, and judge for over five decades. In 2013 Ginsburg celebrated two important milestones—20 years serving on the Supreme Court, and her eightieth birthday—and faced an important decision: Should she retire from the bench? This was a question not only of personal preference, but also of politics. The federal court system purports itself to be apolitical, but its decisions have far-reaching political implications and it is staffed by human beings, none of whom are without bias. As a liberal justice, would it be better for the court, and for Ginsburg’s legacy, to retire under democratic President Barack Obama, or to continue to serve for as long as possible regardless of who would appoint her successor? Ginsburg’s decision was weighed down by her position as the second ever female Supreme Court justice, and the possibility that her successor might not be another woman. She also had to contend with societal norms that expected women to forbear any personal ego and to bow to the majority opinion that would see her retire.

Should Justice Ginsburg Retire?

It was March 15, 2013, Supreme Court Justice Ruth Bader Ginsburg’s eightieth birthday. President Barack Obama had just begun his second term and the newly elected 113th United States Congress was split, with Democrats in control of the Senate and Republicans in the majority in the House of Representatives. Ginsburg had spent almost 20 years on the Supreme Court and had been getting questions about when she was going to retire since she became eligible a decade earlier (Gresko 2018). She was not even close to the longest-serving justice—William O. Douglas sat on the Court for 36 years—but she was one of the oldest; only ten justices over the age of 80 have served on the Court.

Ginsburg had not professed an interest in retiring any time soon, but the question still swirled. Shortly before her birthday Ginsburg told an audience “I will stay in this job as long as I can do it full steam” (Patel and Parlapiano 2018, 1). When that answer failed to satisfy her listeners Ginsburg referenced Justice Louis Brandeis, the oldest Jewish justice, who retired at age 82, or her former colleague Justice John Paul Stevens, who retired in 2010 at the age of 90 (Gresko 2018). Ginsburg’s age was not the only reason people questioned her retirement; her health was also a worry. Ginsburg had battled cancer twice and lost her husband in 2010, but she maintained that her mind was functioning perfectly, and her health was excellent (Patel and Parlapiano 2018, 1).

The timing of Ginsburg’s retirement was no mere idle speculation but rather a question of vital political importance. As one of nine justices on the Supreme Court, Ginsburg, and her future successor, wield enormous power over the United States legal system. Ginsburg was one of the

most reliably liberal justices, and Democrats wanted her to retire soon, preferably before the midterms when the Republican party would have a chance to retake the Senate and force the appointment of a less liberal judge. Democrats also urged Ginsburg to retire quickly because “presidential Supreme Court nominations tend to be more successful if the vacancy comes in the first two years of the president’s term” when the president has a strong popular mandate and has not spent all of his political capital (Schultz 2005, 448). Nominations are also more likely to succeed when the president’s party has the majority in the Senate. Should Ginsburg delay even longer and a Republican be elected president, she would either have to wait four or eight years for another Democratic president or retire under the aegis of a Republican president and see her seat be taken by a more conservative justice. The Supreme Court professes to be apolitical, but the justices are not immune to party politics and many take the political affiliation of the president who would appoint their successor into account (Schultz 2005).

If Ginsburg truly believed in the impartial and apolitical nature of the court, then she had no reason to step down. However, if she was willing to acknowledge party bias, then Ginsburg was caught between retiring in order to allow another liberal justice to be chosen or remaining on the bench. If she did not retire she could remain in the position to which she had been appointed for as long as she was physically and mentally able to do so and continue her work shaping the Court and American law. She must also consider whether she was the most qualified person for the job, given her advanced age and heightened risk of mental decline (Gresko 2018).

Justice Ginsburg’s Career

Justice Ginsburg was appointed to the Supreme Court in 1993 when she was nominated by President Bill Clinton and confirmed by a Senate vote of 96-3. She already had impressive achievements through her pioneering career in the fight for gender equality in the legal system. Ginsburg graduated from Cornell University in 1954 with an undergraduate degree in government and Columbia Law School in 1959, where she was one of only nine women in her class. After clerking for a federal judge, Ginsburg became the second woman professor at Rutgers University, where she taught from 1963 to 1972 (Jost 2006). Ginsburg became the first woman to hold a tenured position at Columbia Law School, where she specialized in civil procedure and taught Women’s Rights: Sex Discrimination and the Law, the first class on gendered legal studies at the university (Franke 2013). While in New York City she helped to found and served as the director of the American Civil Liberty Union’s Women’s Rights Project, where she “conceived and directed the legal strategy that moved the Supreme Court in a series of cases to rule that laws treating men and women differently because of sex are subject to heightened constitutional scrutiny” (Jost 2006, 214). Ginsburg was also active in campaigning for the Equal Rights Amendment, which ultimately failed to pass. In 1980, Ginsburg was appointed by President Jimmy Carter to the Washington D.C. Circuit Court of Appeals, where she served for 13 years.

Ginsburg argued six cases before the Supreme Court, winning five of them, and submitted amicus curiae¹ briefs in 15 other cases; Ginsburg is one of only two current sitting justices to have argued before the Court. Her first case regarding women’s rights was *Reed v. Reed* (1971), in which she wrote the plaintiff’s brief. In this case the Court ruled against the Idaho Probate Code that stated that “males must be preferred to females” in choosing estate administrators, a decision that marked “the first time in American history that the Supreme Court found a gender-based

¹ Amicus curiae (lit. ‘friend of the court’) briefs are legal briefs submitted by third parties who are not directly subject to the ruling in question but have a vested interest in its outcome. Amicus curiae briefs are often submitted by advocacy groups such as the American Civil Liberties Union or the Electronic Frontier Foundation that are concerned with the broader legal or public policy ramifications of a ruling (Shultz 2005).

classification unconstitutional” (Schultz 2005, 183). The first case that Ginsburg argued before the Supreme Court was *Frontiero v. Richardson* (1973), in which the Court ruled that the military could not grant different spousal benefits to married male and female military personnel (Schultz 2005). Ginsburg has jokingly referred to herself as a champion of men’s rights because of her strategy of “finding cases in which gender stereotyping hurt men as well as women to show ‘the disadvantage to men of being pigeonholed’” (Jost 2006, 214). This strategy is evident in *Kahn v. Shevin* (1974) in which Ginsburg successfully argued before the Supreme Court that a male widower should be entitled to the same property tax exemptions as a female widow (Schultz 2005).

While her political opinions and constitutional interpretations are quite liberal, Ginsburg has a fairly conservative view of jurisprudence and the role of the courts. She advocates for incrementalism, judicial restraint, and collegiality. Incrementalism is the belief that the law evolves slowly over time and that judges should respect precedent and only create incremental changes in the legal code. Related to this is her support for the principle of judicial restraint, “the belief that the law should be interpreted as narrowly as possible by the courts and that broad policy changes should come from elected legislatures” (Schultz 2005, 183). Ginsburg is well known for embracing collegiality on a personal level: she was a close personal friend of fellow Justice Antonin Scalia, a hardline conservative who was often on the opposite side of a ruling from Ginsburg. On a professional level, Ginsburg also favors collegiality, “arguing that appellate judges should exercise discretion and write dissents as sparingly as possible in order to increase the legitimacy of the courts” (Schultz 2005, 183). However, her belief in collegiality has not prevented Ginsburg from writing blistering dissents when she disagreed with the majority ruling.

The Supreme Court of the United States

The Supreme Court of the United States is the highest court in the country and therefore has authority only under certain specific circumstances. The Court has primary jurisdiction “in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party” (US Const. art III. sec II). It is also the highest appellate court, wherein a litigant may appeal to the Supreme Court to review a decision made by a lower court after the case has worked its way up through subsequent levels of the appellate court system. Every case that Ginsburg and the Supreme Court have ruled on had already been tried in several lower courts and in some instances each court had interpreted the law differently. Only the most controversial or legally tangled cases make it all the way to the Supreme Court. Arguably the most significant responsibility of the Supreme Court is the right of judicial review, “the most important source of judicial power in the United States” (Schultz 2005, 239). In *Marbury v. Madison* (1803) Chief Justice John Roberts explained the concept of judicial review, stating, “it is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each” (*Marbury vs Madison* 1803, 138). This decision established the right of judicial review and made the Supreme Court the final arbiter of the constitutionality of all laws and policies in the United States.

The Apolitical Court

The authors of the Constitution viewed lifetime appointments to the Supreme Court as necessary to ensure the independence of the Court. In the *Federalist Paper* No. 78 Alexander Hamilton argues that the general liberty of the citizenry will be protected by the courts “so long as the judiciary remains truly distinct from both the legislature and the Executive” (Hamilton 1789,

1). In order to maintain the separation of powers and protect judges from the whims of the executive, judges must have guaranteed lifetime appointments. They also have guaranteed salaries to protect them from Congress and the power of the purse. Requiring both Congress and the president to approve of judicial nominees prevents either branch from having too much power over the judiciary (Hamilton 1789). Free from the pressures of reelection, a Supreme Court justice is supposed to be completely separate from politics:

Someone who is probing, objective, dispassionate, open-minded, conscientious, and fair. For such a justice, each case is absolutely unique and should be decided on its own merits, with careful reference to the facts of the case, the state of the law, the relevant judicial precedents, and the text of the Constitution. The justice's personal values or policy preferences should not influence how the justice votes (Barnum 1993, 229).

Whether this is actually possible in practice is a matter of much debate. Justices may not be beholden to Congress or the president for their jobs, but they are still citizens with the right to vote and hold political opinions, opinions that may influence how they interpret the Constitution and the law.

The Process and Politics of Confirmation

The selection of Supreme Court judges is provided for in the US Constitution, which states the president "shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court..." (US Const. art. II sec. II). These vague guidelines have led to the creation of a process for the confirmation of Supreme Court justices that relies on institutional norms and traditions. The president nominates a candidate, usually drawn from a shortlist created by his advisors and members of the Justice Department, and the candidate is then sent to the Senate for approval. The practice of senatorial courtesy has "given a quasi-veto power to senators of the president's party from the state for which an appointment is made" (Baum 1981, 42). If the home state senator does not return a blue-slip stating approval for the nominee, then the other senators will not approve the nomination. The Senate Judiciary Committee holds hearings to question the candidate and then issues a positive, negative, or neutral report on the eligibility of the nominee to the broader Senate. In recent years, Senate hearings have become more contentious, as nominees deflect "questions about their personal values and their future voting behavior" (Barnum 1993, 233). The candidate needs a simple majority to be confirmed, although a filibuster is possible, in which case 60 senators would need to approve a cloture vote in order for the nomination to continue and the candidate to be confirmed.

Unsurprisingly, the confirmation of Supreme Court justices is an extremely political process that involves lobbying from various interest groups. A Supreme Court justice serves, on average, 17 years on the Court and "a vacancy on the Supreme Court occurs every twenty-two months. At that rate, it takes over sixteen years, or four presidential terms, to replace all nine members of the Court" (Barnum 1993, 243). With such high stakes, those party to the nomination attempt to discover how a potential justice will vote on certain key issues. In almost 90% of cases the president nominates someone from his own party, presumably in the hope that the justice will vote in accordance with the president's wishes (Barnum 1993, 227). Roughly 20% of nominations have failed, either through the candidate's withdrawal or a lack of timely votes in the Senate (Barnum 1993, 224). Some of these failures are undoubtedly apolitical: the senators find the

candidate unqualified or the nominee withdraws his name when the investigations dig up something unsavory or potentially embarrassing. Other nominations, such as that of Robert Bork², are intensely partisan and contentious, involving media campaigns and lobbying from special interest groups (Totenberg 2012, 1).

Resignation, Retirement, and Death of Justices

Unlike the president and members of Congress, Supreme Court justices do not have a term limit, nor do they have a mandatory retirement age. As a result, many justices spend decades on the court and do not retire until their seventies, eighties, or even nineties. Article III of the Constitution states “the judges, both of the supreme and inferior courts, shall hold their offices during good behavior” (US Const. art. III sec. I). The definition of good behavior is not adequately explained. The Constitution allows for the impeachment of federal judges but does not lay out a mechanism to force judges to retire should they become too senile or elderly to carry out their duties. Instead, Congress has relied upon retirement benefits to incentivize judges to leave the court (Ward 2003).

The rate of retirement of Supreme Court justices has varied over time in accordance with retirement policies imposed by Congress. The first decade of the Court had the highest retirement rate, because justices were required to participate in riding the circuit court. Circuit court riding was a practice in which judges travelled around to adjudicate cases at lower district courts, a physically taxing exercise given the advanced age of the justices and the poor quality of transportation available prior to the turn of the 19th century. When circuit riding became optional the number of justices to die in office increased dramatically, from 29% to 83%, as the physical hardships were no longer a factor in causing judges to resign their positions (Ward 2003, 17). In 1869 the first retirement provision was implemented, allowing judges to retire at age 70 with at least ten years of service as a federal judge and to receive a full pension; prior to this, judges resigned, not retired, and received no benefits. Between 1869 and 1954 roughly half of all justices resigned or retired. In 1955, a new retirement provision was implemented that allowed all federal judges to retire at 70 with ten years of service or at 65 with 15 years of service and to retain their full salary. Due to this provision, between 1955 and 2004 not a single Supreme Court justice died while in office (Ward 2003). These provisions, while effective in encouraging turnover, have sidestepped the larger constitutional issue of term limits and mandatory retirement ages for federal judges.

The shift from dying in office to retirement has politicized the Court. Justices are now more likely to consider the party in power when deciding when to step down in order to maximize the chances that their successor will share their ideological views. In recent years “partisan and strategic concerns, involving the timing and choice of a successor, played an increasingly larger role in the decision-making process” (Ward 2003, 11). Some checks on the partisan timing of judges’ retirements still exist. Failing health can force judges to retire, as was the case with John Marshall Harlan, who died of spinal cancer three months after retiring. Judges also avoid retiring during election years and the rule of eight prevents justices from retiring when there is already another vacancy on the court, in order to keep enough judges to form a quorum and hear cases (Ward 2003).

² Robert Bork was an appeals court judge who espoused political conservatism. When President Reagan nominated him for the Supreme Court in 1987, civil rights activists launched a campaign to defeat his candidacy on the basis of his opposition to abortion and desegregation. His supporters decried these tactics as character assassination, but his confirmation was ultimately defeated by a large margin (Totenberg 2012, 1).

The Stakes for RBG

On the Supreme Court docket in 2013 were cases relating to affirmative action (*Fisher v. University of Texas at Austin*), the Foreign Intelligence Surveillance Act (*Clapper v. Amnesty International USA*), gay marriage in the form of the Defense of Marriage Act and California's Prop 8 (*Windsor v. US* and *Hollingsworth v. Perry*), the Voting Rights Act of 1965 (*Shelby County v. Holder*), voter identification laws (*Arizona v. ITCA*), the provision of birth control through the Affordable Care Act (*Burwell v. Hobby Lobby*), warrantless cell phone searches (*Riley v. California*), campaign financing (*McCutcheon v. Federal Election Commission*), and clean air (*Utility Air Regulation Group v. EPA*). In addition to the immediate effects of these rulings, the decisions of the justices have long-term consequences. Prospective litigants pay attention to what cases the Supreme Court decides to hear and tailors cases to fit those interests; in this way "the process that determines the flow of cases onto the Supreme Court's agenda follows a spiral upward, led by signals of the priorities of the Supreme Court justices and the reactions to those signals by policy entrepreneurs who litigate" (Baird 2007, 38). Were Ginsburg to leave the Court, she would lose all influence over what cases the Court hears and would cede her vote to a new justice with opinions different than her own.

In 2013, Ginsburg could choose to continue to serve the Court, lending her political expertise and liberal views, or she could step down to make way for a younger justice. A new justice nominated by President Obama would almost certainly be a liberal, but he or she may not share all of Ginsburg's opinions or vote the way Ginsburg would. To stay on would allow her to solidify her legacy on the court; on the other hand, to retire would create room for a new voice and ensure a liberal successor who could serve for decades to come.

Epilogue

Ruth Bader Ginsburg did not retire in 2013 and continues to serve on the Supreme Court today. In June of 2018, she announced that she plans to spend "at least another five years" on the Court (Gresko 2018). In 2016, Ginsburg's close friend Justice Scalia died in office, leaving a vacancy on the Supreme Court that remained unfilled for 14 months. The Republicans, now in control of the Senate, refused to hold hearings for President Obama's nominee Merrick Garland. Only hours after Scalia's death was publicized, Senate Majority Leader Mitch McConnell (R-Kentucky), announced that his party would refuse to confirm any nominees until after the next presidential election because "the American people should have a say in the court's direction" and in McConnell's view Obama had lost the popular mandate with the midterms (Elving 2018). The 11 Republican members of the Senate Judiciary Committee "signed a letter saying that they had no intention of consenting to any nominee from Obama" (Elving 2018, 2). During the year in which the Supreme Court had only eight justices, five cases resulted in a 4-4 split. In a split decision the lower court ruling is upheld but a legal precedent is not created, which leaves the constitutionality of the law in question uncertain.

After Donald Trump won the 2016 election in a surprise upset, he swiftly nominated Judge Neil Gorsuch of the Tenth Circuit Court of Appeals to fill Scalia's seat. Gorsuch was confirmed on April 10, 2017 and 18 months later a second conservative justice, Judge Brett Kavanaugh of the Court of Appeals of the District of Columbia Circuit, was confirmed to replace the retiring justice Anthony Kennedy. Gorsuch appears to be slightly more moderate than his predecessor, but Kavanaugh is far more conservative than the moderate swing-vote Kennedy. This appointment will shift the median justice to the right from Kennedy to John Roberts and create a solid conservative bloc, leaving Ginsburg and the liberals in the minority (Patel and Parlapiano 2018).

As of early 2019, Ginsburg has to wait a minimum of two years should she desire to retire under a Democratic president.

Ginsburg's dilemma reflects the difficulties of navigating between personal and public benefit and of standing up to doubters. On a personal level, Ginsburg wanted to continue to serve, but on the other hand it might benefit society more for her to retire. Her status as a woman in a position of power, especially an elderly woman, exposed her decisions to extreme scrutiny. Public opinion could interpret her refusal to retire as an unfeminine manifestation of ego and censure her for it. Ultimately Ginsburg stuck true to her principles: her trust in the impartiality of the Supreme Court, and her belief in her own abilities.

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