

# Strategic Communication Pattern Analysis: The McConnell Rule, the Weaponization of Supreme Court Nominations, and Preparing the Environment for a 2020 Campaign Surprise

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## Background

In 2016, a little over an hour after the news was reported that Associate Justice Scalia had died in his sleep while on vacation, Senator Mitch McConnell, the Senate Majority Leader, announced that it did not matter who President Obama nominated as Justice Scalia's replacement, that person would not get a hearing, let alone an up or down vote.<sup>2</sup> Rather, the American people deserved to weigh in on whether the next Supreme Court justice was selected by a Democratic successor to President Obama or by a Republican one. Senator McConnell justified this by referring to something he called the Biden Rule. According to McConnell the Biden Rule was a Senate rule/tradition that no Supreme Court nominations were taken up for advice and consent by the Senate during a presidential election year. There was only one problem: there is no Biden Rule. What McConnell was referring to was a hypothetical scenario provided by Vice President Biden during a floor speech in the Senate when he was both a senator and the chair of the Senate Judiciary Committee. Biden's remarks were in response to both the contentious nomination of Associate Justice Clarence Thomas and several other contentious nominations that preceded it, as well as a call for collaboration between the President and the Senate on any potential future nominees to ratchet down the tension around Supreme Court nominations.<sup>3</sup> Nevertheless, because Senator McConnell, as the Majority Leader, controls the Senate's calendar and micromanages his caucus and his committee chairs, President Obama's eventual nominee - Judge Merrick Garland - never so much as got a meeting with Republican senators, let alone a hearing before the Senate Judiciary Committee, a committee vote, or an up or down vote on the floor of the Senate.

Senator McConnell's brazen strategy to break the Senate's rules and traditions served him well. It helped bring the Republicans back into the majority in the 2014 midterms, prevented President Obama from filling an open Supreme Court vacancy two years later, and, as a result, gave birth to a new Senate rule: the McConnell Rule. The McConnell Rule states that the Senate does not take up Supreme Court nominations during a presidential election year because the American electorate should have a say in the vote, regardless of the fact that the sitting President was elected to serve a four year term, not a three year one. As the contentious confirmation process for now Associate Justice Brett Kavanaugh was working its way to completion, Senator McConnell clarified the McConnell Rule. Instead of being a blanket rule that prohibits the Senate from taking a Supreme Court nomination into consideration during an election year, the McConnell Rule now states that this only applies when the party in opposition to the President controls the Senate during a

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<sup>2</sup> Burgess Everett and Glenn Thrush, "McConnell Throws Down the Gauntlet: No Scalia Replacement Under Obama", *Politico*, 13 February 2016, <https://www.politico.com/story/2016/02/mitch-mcconnell-antonin-scalia-supreme-court-nomination-219248>.

<sup>3</sup> Julie Hirschfield Davis, "Joe Biden Argued for Delaying Supreme Court Picks in 1992", *The New York Times*, 22 February 2016, <https://www.nytimes.com/2016/02/23/us/politics/joe-biden-argued-for-delaying-supreme-court-picks-in-1992.html>.

presidential election year, as was the case during the final year of the Obama administration<sup>4</sup> As is the case with almost every Senate rule, tradition, and norm that Senator McConnell references, the McConnell Rule is completely situational and subject to change whenever Senator McConnell feels the need to do so. To quote the fictional Captain Barbosa from *Pirates of the Caribbean*, the rules that McConnell references are “more like guidelines than actual rules”.

## **The Weaponization of Supreme Court Nominations and the Preparation of the Electoral Environment for a 2020 Campaign Surprise**

As a follow up to successfully shepherding the Kavanaugh nomination through the Senate, Senator McConnell appeared on all of the following Sunday’s morning news shows. All of these appearances, including his contentious one with John Dickerson during his appearance on CBS’s Face the Nation, featured Senator McConnell expounding on his newly revised rules pertaining to Supreme Court nominations during a presidential election year.<sup>5</sup> These appearances demonstrate a new strategic communication pattern for Senator McConnell regarding this issue. Specifically, it appears that he has begun the next stage of his strategy to remake the judiciary.

The repeated pattern of McConnell’s remarks over the past week to ten days indicates that he is preparing the environment for how he will handle another vacancy on the Supreme Court during the next presidential election year. If the Republicans maintain control over the Senate after the 2018 mid-terms, then he will push through whomever Trump nominates. This is why he needed to clarify what the McConnell Rule is: that a Supreme Court nomination is only taken up during an election year if the serving President’s party controls the Senate. He is also preparing the environment in case the Republicans do not hold the chamber as a result of the 2018 mid-term elections (according to polling the Democrats have an approximately 20 to 25% chance of retaking the Senate in 2018). By revising the McConnell Rule, the rules he created for handling Supreme Court nominations during presidential elections, McConnell is trying to box in the Democrats who would have a slim majority. He is doing this by making statements that the Democrats would have done what he did to President Obama and Judge Garland if they had been in the majority at the time and the president was a Republican. While it is impossible to disprove this counterfactual, there is enough observational evidence based on how he ran the Senate as Majority Leader that Harry Reid would not do something like that. Regardless, Senator McConnell is basically challenging the Democrats to either give the truth to the lie that is the McConnell Rule or cave and confirm whomever the President would nominate to the Supreme Court during the 2020 election should a vacancy occur.

Based on the totality of his public remarks regarding Supreme Court nominations in general, the Kavanaugh nomination, and the McConnell Rule - on the Senate floor, in press conferences, and on the Sunday morning news shows - Senator McConnell’s communication is hinting at his strategy for 2020. McConnell’s remarks about the Kavanaugh nomination and how he thinks both parties in the Senate would handle a Supreme Court vacancy in the final year of a presidency were all made within the context that all of the opposition to Kavanaugh, both the protests and survivors of sexual assault and rape coming forward as part of the protests, actually helped him because it angered his base, mobilized them for action, and allowed him to keep his caucus together to vote for

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<sup>4</sup> Linda Qui, “McConnell’s Position Has Shifted on Handling Supreme Court Nominees in Election Years”, *The New York Times*, 8 October 2018, <https://www.nytimes.com/2018/10/08/us/politics/fact-check-mcconnell-supreme-court-nominations-.html>.

<sup>5</sup> Emma Hinchliffe, “Mitch McConnell Defends Blocking Merrick Garland”, *Fortune*, 7 October 2018, <http://fortune.com/2018/10/07/mitch-mcconnell-defends-blocking-merrick-garland/>.

Kavanaugh's nomination.<sup>6</sup> Senator McConnell's commentary regarding the Kavanaugh nomination is in line with how he, as well as other Republican officials, understands the electoral operating environment during the 2016 election. Specifically that the Republican base and Republican leaning independents are far easier to mobilize and turn out to vote if the issue of control of the Supreme Court can be placed on the ballot within the context of a Presidential election.<sup>7</sup> This is, of course, what the strategists around the President think, as well as what the President has stated was one of the reasons he was elected. Which is why the President was advised to campaign on the fact that he had a list of potential Supreme Court nominees produced by The Federalist Society and laundered through the Heritage Foundation that he would choose his nominee from if he was elected.<sup>8</sup> And that the nominee he would choose would vote to overturn *Roe V. Wade* and outlaw abortion.

The reporting has clearly indicated that Justice Kennedy was convinced during the 2017-2018 Supreme Court term to retire at the end of that term specifically so that the President could choose his replacement and have him confirmed while the Senate was still under Republican control.<sup>9</sup> The pattern that I am seeing in McConnell's strategic communication over the past week to ten days is that McConnell is preparing the environment to have a Supreme Court nomination fight during the 2020 presidential election as he believes it will once again mobilize the Republican base and Republican leaning voters and serve as a primary driver for them turning out to vote for a second Trump presidential term and to either maintain or return the Senate to Republican control in 2021 in order to seat whomever President Trump would nominate. What is unclear is whether talks similar to those with Justice Kennedy have begun with Associate Justice Thomas, who is the oldest of the five conservative/Republican appointed justices, regarding his potential retirement, with an announcement coming sometime during the summer or fall of 2019 or if this is just contingency planning in case either Associate Justices Ginsburg or Breyer, who are both in their 80s, either have to retire or die before the next election.

Based on the pattern of his strategic communication regarding how he believes Supreme Court nominations should be handled, it appears that Senator McConnell is preparing the environment to leverage a Supreme Court vacancy going into 2020 to bolster Republican electoral chances. And that he is doing so to increase the chances of the President being reelected and the GOP doing better than would be expected in an otherwise non-GOP favorable Senate reelection cycle.

Given that the President, Senator McConnell, other Republican elected and appointed officials, and the President's advisors believe that leveraging a Supreme Court vacancy aided the President's election, as well as the Republicans maintaining control of the Senate in 2016, it is necessary to begin to plan for the contingency that the Republicans will try this strategy again in the 2020

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<sup>6</sup> Avi Seik, "McConnell Says GOP Was 'Literally Under Assault' - By People Protesting an Alleged Sexual Assault", *The Washington Post*, 8 October 2018, [https://www.washingtonpost.com/politics/2018/10/08/mcconnell-says-gop-was-literally-under-assault-by-people-protesting-an-alleged-sex-assault/?noredirect=on&utm\\_term=.f19a088a42ae](https://www.washingtonpost.com/politics/2018/10/08/mcconnell-says-gop-was-literally-under-assault-by-people-protesting-an-alleged-sex-assault/?noredirect=on&utm_term=.f19a088a42ae).

<sup>7</sup> Russell Berman, "Why the Supreme Court Matters More to Republicans than Trump", *The Atlantic*, 14 October 2016, <https://www.theatlantic.com/politics/archive/2016/10/why-the-supreme-court-matters-more-to-republicans-than-trump/504038/>.

<sup>8</sup> Alan Rappeport and Charlie Savage, "Donald Trump Releases List of Possible Supreme Court Picks", *The New York Times*, 18 May 2016, <https://www.nytimes.com/2016/05/19/us/politics/donald-trump-supreme-court-nominees.html>.

<sup>9</sup> Adam Liptak and Maggie Haberman, "Inside the White House's Quiet Campaign to Create a Supreme Court Opening", *The New York Times*, 28 July 2018, <https://www.nytimes.com/2018/06/28/us/politics/trump-anthony-kennedy-retirement.html>.

presidential election. Bill Shine, the recently appointed Deputy White House Chief of Staff and Director of Communications, learned strategic communication from Roger Ailes during his long tenure as Ailes right hand man. Specifically he learned how to use communication to mobilize popular support for Ailes objectives through Fox News programming. From the perspective of Senator McConnell and the President running for reelection in 2020, being able to hammer a Supreme Court vacancy on the campaign trail is a winning strategy for voter mobilization and turnout. Even more so, given the herrenvolk makeover of the Republican Party and movement conservative base, with the President's constant focus on white, (evangelical) Christian victimization and grievance, a campaign that once again focuses on the need to prevent a Supreme Court justice being selected by anyone who is not a Republican and who has not been vetted by The Federalist Society, is a winning strategic communication, voter mobilization, and voter turnout strategy. Moreover, such a strategy will also lock in the support of the various white supremacists, anti-Semites, neo-NAZIs, neo-fascists, and Putinphiliacs that comprise the alt-right supporters of the President who they refer to as their God Emperor.<sup>10</sup>

As a result, it is imperative that a strategy be developed to navigate this potential electoral/political obstacle in the 2020 presidential election cycle as soon as possible. Moreover, this strategy will need to be regularly updated to account for what appear to be early indications that Democrats, Democratic leaning independents, as well as former Republicans angry with the President and the congressional Republican majorities who might be willing to vote for the Democratic nominee in 2020 are also now beginning to view the Supreme Court in general and Supreme Court nominations in specific as highly important to their electoral choices. The strategy will need to include both the ways and means to neutralizing the Supreme Court as an electoral benefit for the President and Republicans, as well as a strategic communication component that reassures Independents, whether they lean Democratic or are newly disaffected Republicans, that a Democratic president would be a proper steward of the Nation's interests in his or her nominations to the Supreme Court and all other Federal Courts.

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<sup>10</sup> Andrew Marantz, "The Alt-Right Hails Its Victorious God-Emperor", *The New Yorker*, 12 November 2016, <https://www.newyorker.com/news/news-desk/the-alt-right-hails-its-victorious-god-emperor>.