



Written by [Steve Byas](#) on February 23, 2016

## Biden: Don't Choose Supreme Court Justice in an Election Year

Joe Biden weighed in on the issue of whether the Senate should even take up a presidential nomination of a Supreme Court Justice during an election year.

The president should “not name a nominee until after the November election is completed,” Biden said. But if he did name a nominee before that, then “the Senate Judiciary Committee should seriously consider not scheduling confirmation hearings on the nomination until after the political campaign season is over.”



Biden explained his reasoning: “Senate consideration of a nominee under these circumstances is not fair to the president, to the nominee, or to the Senate itself. Where the nation should be treated to a consideration of constitutional philosophy, all it will get in such circumstances is partisan bickering and political posturing from both parties and from both ends of Pennsylvania Avenue.”

Certainly, were Vice President Joe Biden to make such remarks today, the comments would be in line with what the Republican leadership in the Senate is promising — no vote on any nominee the president sent up to the Senate. But, Biden’s comments were made in 1992, in an effort to block any judicial nomination that then-President George H.W. Bush put forward.

Confronted with his late June 1992 comments, Biden tried to backtrack earlier this week, arguing that what he said in 1992 was somehow different. Biden protested that, in ‘92, he was just discussing a “hypothetical vacancy.”

“In the same statement critics are pointing to today, I urged the Senate and White House to work together to overcome partisan differences to ensure the Court functions as the Founding Fathers intended.”

Biden’s present position is that the situation, now that he is vice president, and the president is a Democrat like himself, is considerably different. “To leave the seat vacant at this critical moment in American history is a little bit like saying, ‘God forbid something happen to the president and the vice president, we’re not going to fill the presidency for a year and a half.’”

Of course, should something “happen” to the president and the vice president at the same time, federal law provides an immediate replacement already — the speaker of the House becomes president. But no such automatic replacement is provided for in the Constitution for federal judgeships. The Constitution is quite clear on how one ascends to the Supreme Court: The president nominates an individual, with the advice and the consent of the Senate.

But Biden certainly gets confused at times. He once famously said that when the stock market crashed in 1929, President Franklin Roosevelt “went on television” and gave the people hope. Of course, there are so many things wrong with that statement, it is hard to know where to start. First of all, no



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president went on TV in 1929 to talk about the stock market crash — certainly not Roosevelt, who did not take the oath of office until 1933.

Senator Charles Grassley (R-S.D.), the Judiciary Committee chairman, praised Biden's 1992 comments from the floor of the Senate. Grassley even proposed the adoption of what he derisively termed "Biden Rules." According to the Biden Rules, as adopted by Senator Grassley, there ought to be no presidential Supreme Court nominations in an election year, and if there is such a nomination, the Senate should "seriously consider" skipping hearings on the nominee.

Talking points were already being heard from both Democrats and Republicans within hours of the sudden death of long-time Supreme Court Justice Antonin Scalia. Scalia was widely regarded as in a close contest with fellow Associate Justice Clarence Thomas for the title of most conservative judge on the High Court. But Scalia was without a doubt the most articulate spokesman for the position of interpreting the Constitution as the framers and the ratifying conventions intended it to be interpreted. His opinions, both in the majority and in dissent, were carefully studied by legal scholars around the country, and he is considered one of the most significant justices in American history.

His replacement with a judge in the mold as those already selected for the bench by President Barack Obama — progressives Elena Kagan and Sonia Sotomayor — would tilt the Court to the left for perhaps a generation. Thus, the intensity of the battle over his replacement.

Many Democrats have expressed great concern over leaving a slot vacant on the Supreme Court and creating the likelihood of 4-4 decisions. But, Biden and his fellow Democrats should not have to worry about that, at least not according to the 1992 Biden.

"The cost of such a result — the need to reargue three or four cases that will divide the justices four to four — are quite minor compared to the cost that a nominee, the president, the Senate, and the nation would have to pay for what would assuredly be a bitter fight," Biden explained in 1992.

In 1992, Biden believed it was better to put off the nomination and confirmation process until after the election. "It would be our pragmatic conclusion that once the political season is under way, and it is, action on a Supreme Court nomination must be put off until after the election campaign is over."

Surely everyone would now agree that the "political season is under way."

President Obama's spokesman, Josh Earnest, struggled to explain away Obama's own actions and comments on the issue of judicial nominations of just a few years ago, when Obama was in the Senate. Specifically, Earnest tried to tell the press why Senator Obama's attempted filibuster of Associate Justice Samuel Alito should not justify Republican opposition to an Obama pick now.

Alito was eventually confirmed, 58-42, in January 2006, but had to overcome a filibuster that included several Democrat senators. Along with Obama, the Alito nomination was filibustered by Harry Reid, Chuck Schumer, Joe Biden, John Kerry, and Hillary Clinton.

But, Earnest told the press, "I would draw an important distinction here. There is a difference between the president's symbolic vote against President Bush's Supreme Court nominee and Republican's reflexive opposition to the idea of President Obama even nominating anybody to the Supreme Court."

Earnest also told the press that Obama regrets his filibuster against Alito. Besides, Obama told reporters at the ASEAN summit that his opposition was unsuccessful, and Alito is "on the bench right now." This would be like John Hinckley arguing that, while he did try to kill President Reagan, he failed, so what's the big deal?



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“No party is solely responsible for the way that this process has become so politicized in recent years,” Earnest said. Actually, to the disgust of the Republican base, Republican senators have usually offered little fight against Democrat nominees in recent years. On the other hand, in addition to the filibuster effort of Obama and others against Alito, the Democrat opposition to Judge Robert Bork, a Reagan nomination, was so fierce that Bork’s name actually became a verb — to “bork” meant to sink a nomination with all sorts of accusations and innuendo.

A similar effort was made to sink the nomination of Judge Clarence Thomas in 1991. Thomas was thoroughly disgusted at the viciousness of the attacks made against him. “When I stood next to the president in Kennebunkport, being nominated to the Supreme Court of the United States,” Thomas told the Senate Judiciary Committee, “that was a high honor. But as I sit here, before you, 103 days later, that honor has been crushed. From the very beginning charges were leveled against me from the shadows — charges of drug abuse, anti-Semitism, wife-beating, drug use by family members, that I was a quota appointment, confirmation conversion and much, much more.”

Thomas told the committee about reporters sneaking into his garage “to examine books I read,” and reporters “looking for dirt.”

Another justification for Republican refusal to even consider an Obama nomination would be an effort for the Senate to assert the important constitutional principle of separation of powers — haughtily dismissed by this president with his snarky remarks such as, “I’ve got a pen and a phone,” alluding to his intention to get his way by executive orders.

This is an opportunity for the Republican-majority Senate to take a stand. As of now, Senate Majority Leader Mitch McConnell has publicly pledged that the Senate will not even take up an Obama nominee this year. Despite such bold statements, conservatives are nervous that Republican senators will buckle, as they have so often over the past seven years.

*Photo: AP Images*

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