

## POLITICAL PULSE

**RBG RIP, the Election, and the Markets**

Monday, September 21, 2020

**Donald Luskin****A high court of 8 brings risk of deadlock in a Constitutional crisis in a litigated election.**

*Trigger warning: sorry, but we are going to have to talk about politics again. Please join us in setting personal preferences aside and using best efforts to objectively assess the outcome of the 2020 elections, and its impact on markets and the economy.*

*We mourn the passing of Joan Ruth Bader Ginsburg. Her brave and pioneering work for gender symmetry under law makes her a true champion of liberty.*

The sudden vacancy Ginsburg leaves on the Supreme Court is a momentous political event, a “September surprise” in a presidential election that we believe will have momentous consequences for markets. Our operating assumption is that Mr. Market would prefer to see the continuation of pro-growth business-friendly Trumponomics, and to a large extent is expecting that (see, among many, [“When Is Mr. Market Going to Start Worrying About President Biden?”](#) July 27, 2020).

*As of this writing early Monday morning, Mr. Market doesn’t seem pleased.*

- *That may be because markets now face a greater likelihood of a black swan event – if the vacancy left by Ginsburg goes unfilled, and then several states’ voting results in the presidential election are delayed by litigation so long that when the Electoral College deadline comes on December 14, no candidate will have the requisite 270 votes, and the election goes to the House of Representatives in January, as called for by the [12th Amendment](#). If a Supreme Court decision is required, an 8-member court could deadlock. A 9-member court did not deadlock when a 5-to-4 decision halted the Florida recounts in the 2000 “hanging chad” controversy, paving the way for the 7-to-2 [Bush v. Gore decision](#) (in which Ginsburg dissented, by the way) that averted a Constitutional crisis at the last possible moment.*
- To be sure, the post-Ginsburg Supreme Court is now composed of 5 GOP-nominated justices, and 3 Democratic-nominated, so a party-line vote would *not* deadlock. But with only 8 justices, deadlock is at least possible – and GOP-nominated Chief Justice John Roberts has more than once been a swing-vote siding with his more liberal colleagues in politically charged decisions. *Filling the Ginsburg vacancy with a third Trump-appointed justice would be a risk-reducing positive for markets – and for that matter, to be*

**Update to strategic view****US STOCKS, US**

**ELECTION MODEL:** We mourn the passing of Ruth Bader Ginsburg, a champion of liberty. The vacancy on the Supreme Court worsens the risk of destabilization that has already contributed to the present correction in equities. An 8-member court could deadlock, and fail to intervene as it did in 2000 if the presidential election is so delayed by litigation that the Electoral College cannot choose, throwing the decision to the House of Representatives under the 12th Amendment. Democrats are already making the mistake of overplaying their hands with threats. Trump’s optimal play is to pick a non-white female mainstream conservative like Florida’s Barbara Lagoa, hoping he can bait Democrats, particularly Harris, to treat her as badly as they treated Kavanaugh. Risk of GOP defections makes the timing tricky. Biden is more than ever forced to risk debating Trump but could claim infection with Covid-19 to save face while avoiding it.

[\[Strategy dashboard\]](#)

candid, a greater chance of a Trump-friendly outcome, which markets would like as well.

- To achieve these positives, the vacancy doesn't have to be filled by election day, but rather by the Electoral College deadline of December 14. Nevertheless, this justifies a certain sense of urgency at the White House to get a replacement for Ginsburg nominated and confirmed.
- While we face the possibility of confirmation bias here, we do think the markets are now focused on the black swan risk of a delayed and destabilizing election – which, if you follow it down some not-too-impossible paths could produce outcomes that would deeply unsettle the foundation of the institutions upon which the economy rests. One leads to a second term for President Donald J. Trump but with Vice President Kamala Harris; another somewhat-less-possible one President Michael Pence; or even a far-less possible (but still possible) one to President Nancy Pelosi.
- We noted, one day before the September 2 top in US equities, and the onset of a substantial correction, that with the S&P 500 equity risk premium below its post-crisis mean, “we have to start thinking there isn't much room for error in Mr. Market's expectation that Trump will win” (see [“Coming: The Chaos Election”](#) September 1, 2020). With no valuation cushion, it's not much of a stretch to think that markets are now looking at the risk of a delayed and destabilizing election as we noted that same day.
- We have been at the leading edge of evangelism in the investment community about this risk to markets, including sponsoring an oversubscribed conference call with election fraud expert John Fund (see [“Zoom meeting with election fraud expert John Fund”](#) September 3, 2020). We will be following up Friday with another conference call, this time with [controversial Constitutional scholar John Yoo](#), director of the University of California Berkeley law school's Program in Public Law and Policy and Deputy Assistant Attorney General in the Bush administration (you will receive an invitation, or you may [email Tom Demas](#) for more details).

The battle for Ginsburg's seat on the court is also the opportunity – for both parties – to conduct political theater at the highest level. This will reinvigorate campaigns – for both parties – that, until now, had degenerated into boring issue-free name-calling and blame-gaming. Right now, we think the advantages accrue, on net, to Trump.

- As the incumbent, Trump has an important degree of control in this new phase, through what his choice of nominee signals to voters, and how that choice shapes the feasible responses from Democrats.
- This is an example of the awesome power of presidential incumbency – and why our quantitative presidential election prediction model gives first-term incumbents a bonus 81 Electoral College votes in the calculation of their vote-margin (please see the chart on the next page and, among many, [“Video: What you're not hearing about the economy and the 2020 presidential election”](#) August 3, 2020).

---

## Contact TrendMacro

On the web at  
[trendmacro.com](http://trendmacro.com)

Follow us on Twitter at  
[twitter.com/TweetMacro](https://twitter.com/TweetMacro)

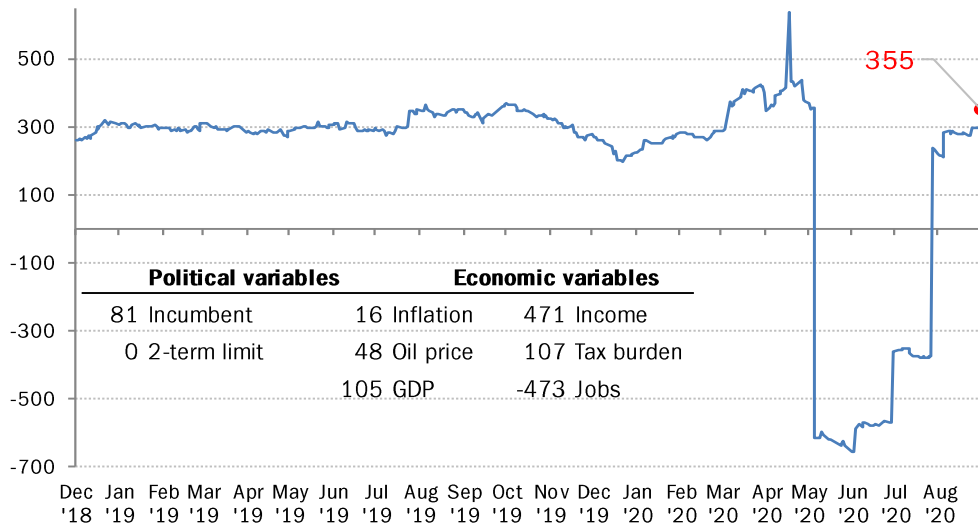
Donald Luskin  
Dallas TX  
312 273 6766  
[don@trendmacro.com](mailto:don@trendmacro.com)

Thomas Demas  
Charlotte NC  
704 552 3625  
[tdemas@trendmacro.com](mailto:tdemas@trendmacro.com)

Michael Warren  
Houston TX  
713 893 1377  
[mike@trendmacro.energy](mailto:mike@trendmacro.energy)

[\[About us\]](#)

TrendMacro 2020 presidential election prediction model:  
margin in electoral college votes for incumbent party



Source: BLS, BEA, Bloomberg, TrendMacro calculations

- Until Trump’s choice is known, *the first response for Democrats is to advance a fairness argument about the impropriety of Trump’s making a nomination in an election year.* Never mind that Democrats ([including Joseph R. Biden](#)) insisted Barack Obama could do the same thing with his 2016 nomination of Merrick Garland. [Ginsburg herself said](#) publicly in 2016 she wanted to see Garland confirmed, even if it had to be in the Senate’s lame-duck session – a very different stance than that reflected in [her dying wish](#) this year “that I will not be replaced until a new president is installed.”
- If it even matters, there is plenty of precedent. 27 out of the 162 [nominations in American history](#) were made during an election year, and almost 60% of them were confirmed – with the confirm-or-not decision being, in every case, a matter of whether the president’s party controlled the Senate. *It has never happened once that a seat was left vacant in an election year when the President and the Senate majority were the same party.*
- *We think the Democrats are already making a very bad mistake by moving beyond fairness arguments into what amount to threats.*
- Senate Minority Leader Chuck Schumer [told his Senate colleagues Saturday](#):

*"Let me be clear: If Leader McConnell and Senate Republicans move forward with this, then nothing is off the table for next year. Nothing is off the table."*

- What might he mean? [A tweet Sunday morning](#) by Democrat surrogate Vox’s Matt Yglesias probably about captures it:

*“— End the filibuster  
— Adopt DC/PR statehood*

- *Ban partisan gerrymandering*
- *Create a 17-justice court with 17-year term limits*
- *Expand lower courts on pace with population growth*

- [Biden uttered his own version](#) of a threat. He urged Republicans Sunday, “Don’t go there... Cool the flames that have been engulfing our country.” It’s not the only way to read those words, but one obvious way – which the Trump campaign will encourage – is that if the GOP does go there, there will be more flames.
- *This is our subjective view, to be sure, but we don’t think potential Trump voters like to be threatened simply because the President and Senate of the United States carry out their Constitutional prerogatives like every other one in American history – any more than they like to be called “deplorables” by Hillary Clinton or racists by Kamala Harris* (see [“On Harris for Veep”](#) August 11, 2020 and [“On the Dems’ Virtual Convention”](#) August 21, 2020).
- *Such threats drive turn-out among Trump voters who might not have otherwise bothered, and can flip some undecided voters who don’t like Trump’s bullying personality, but like the Democrats’ bullying even less. We think this fatal error by Democrats lost the presidency for Clinton in 2016, and caused the Republicans to pick up two Senate seats in the 2018 mid-terms in the aftermath the Democrats’ character assassination of Supreme Court nominee Brett Kavanaugh* (see [“On the Mid-Term Elections”](#) November 7, 2018).
- Indeed, we think Trump’s choice of nominee will be driven by the Kavanaugh experience. Kavanaugh was, like Trump’s first nominee Neil Gorsuch, a seemingly uncontroversial, highly qualified mainstream conservative jurist. The intense controversy around him arose not from his judicial outlook but from allegations of past sexual misconduct, which were made by Democrats on the Senate Judiciary Committee with undue ferocity in relation to provable facts. *Trump’s play here is to select a similarly uncontroversial nominee, and hope that Democrats overplay their hand again.*
- We can see that emerging already in [Trump’s statement yesterday](#) that he would likely select a woman as nominee – avoiding the controversy of replacing feminist icon Ginsburg with a man. A non-white woman would be even better – building on the Republican National Convention’s rebranding of the GOP as a big tent that welcomes up-and-comers of any gender or race.
- From [the list of 46 potential nominees](#) that Trump has published, 12 are women and 9 are non-white. The only one on the list who is both female and non-white is [Barbara Lagoa](#), Circuit Judge of the US Court of Appeals for the Eleventh Circuit, and the first Hispanic woman to be appointed as a Justice on the Supreme Court of Florida. She has the especially salient credential of having defended *pro bono* Cuban immigrant 6-year old Elian Gonzales in 2000, against deportation efforts by the Clinton administration.
- What could be better? A non-white woman who supports Hispanic immigrants and comes from a must-win swing state? [Reports have emerged](#) that Trump is strongly considering her.

- *The best thing that could happen for Trump is for Judiciary Committee member Kamala Harris to take time off the campaign trail to grill this woman of color as harshly and as haughtily as she grilled Kavanaugh.*
- Another name often heard as a possibility is [Amy Coney Barrett](#), Circuit Judge of the US Court of Appeals for the Seventh Circuit. She has been a member of [a religious organization](#) that has been characterized, probably unfairly, [as a cult](#). Trump may see such a weakness as a strength, because it is sure to draw rancorous criticism from Democrats against this mother of seven, including one with special needs and two adoptees from Haiti – especially since Barrett’s seemingly intense Catholicism portrays her as a staunch opponent of abortion, a classic GOP get-out-the-vote issue. Our intuition is that she is too hot to handle. She was on Trump’s original pre-election list, and has been the whisper-nominee before, she has been passed over twice.
- *It remains to be seen whether Republican senators will welcome this political theater.* Two Republicans, [Susan Collins](#) (R-ME) and [Lisa Murkowski](#) (R-AK), have both said they would not vote to confirm a replacement so close to the election. Of the two, only Collins is up for re-election, and it will be a struggle in purple Maine, especially after her defense of Kavanaugh in 2016. Neither of them is on the [Senate Judiciary Committee](#) that would have to pass on a nominee before the full Senate could vote. But with a 53 to 47 majority, the GOP can’t take much more defection.
- As of this writing, we haven’t heard of any more defections, but incumbents in difficult races in purple states – Cory Gardner (R-CO, for example – are going to have to think this through very carefully. A repeat of the Kavanaugh experience just two years ago should embolden any Republican – but on the other hand we suppose it can be difficult to stand up to a Twitter-driven Democratic media-storm, too.
- Senate Majority Mitch McConnell is [encouraging his caucus](#) to “be cautious and keep your powder dry until we return to Washington.” He has said “President Trump’s nominee will receive a vote on the floor of the United States Senate,” [but he carefully did not say when](#). He has many timing possibilities, including holding Committee hearings before the election, but a vote after the election. [One timing element he must consider](#) is that incumbent Martha McSally (R-AZ) is running in a special election, and if she loses, the Democratic winner could be seated as a voting Senator as soon as November 30.
- Remember, even if there are enough defections to moot a pre-election vote on a nominee, post-election dynamics could change that. Litigation or allegations of cheating could cause defectors to change their tune, especially if they are directly affected.
- Even if such conversions don’t take place, while it would be a positive for markets to have a 9-justice court going into the post-election environment, perhaps there is a silver lining even if defections cause Ginsburg’s seat to remain empty. Each defection is a political optimization by each Senator – and if enough Republican Senators facing re-election choose correctly, perhaps

that would be enough at the margin to allow the GOP to keep the Senate. That would be a very market-friendly backstop in the event of an otherwise market-unfriendly Biden win.

As a final note, it strikes us subjectively that the emergence of the Ginsburg vacancy as a campaign issue makes it all the more necessary for Biden to dare to debate Trump – considering that there is a here-and-now matter of substance to talk about.

- *At this point, we see only one way that Biden could avoid the risk of a “Dukakis moment”* (see [“On Trump’s Executive Action Stimulus”](#) August 9, 2020) in which – how can we put this without giving offense? – he might not appear to be sufficiently quick on his feet (again, see [“Coming: The Chaos Election”](#)).
- Two days before the first debate, [scheduled for September 29](#), Biden will announce he has tested positive for Covid-19. Shortly after the date of the last of three debates, October 22, he will announce that he is completely recovered – demonstrating how physically robust he is, even at his age. Consider that a prediction.

---

### **Bottom line**

We mourn the passing of Ruth Bader Ginsburg, a champion of liberty. The vacancy on the Supreme Court worsens the risk of destabilization that has already contributed to the present correction in equities. An 8-member court could deadlock, and fail to intervene as it did in 2000 if the presidential election is so delayed by litigation that the Electoral College cannot choose, throwing the decision to the House of Representatives under the 12th Amendment. Democrats are already making the mistake of overplaying their hands with threats. Trump’s optimal play is to pick a non-white female mainstream conservative like Florida’s Barbara Lagoa, hoping he can bait Democrats, particularly Harris, to treat her as badly as they treated Kavanaugh. Risk of GOP defections makes the timing tricky. Biden is more than ever forced to risk debating Trump but could claim infection with Covid-19 to save face while avoiding it. ▶