



Episode 1,740: The Post-Ginsburg Supreme Court, with Kevin Gutzman

Guest: Kevin Gutzman

WOODS: Well, I had a lot of requests for Kevin Gutzman, so who am I to tell people no? So here we are. Obviously, with the death of Ruth Bader Ginsburg, a lot of cans of worms opened up. There's the who would be the replacement? There's the when should you carry it all out? All this stuff. First of all, not that you've necessarily spent your life reading a lot of her decisions, I did read the decision – now I've actually forgotten the name of the case, but the whole "bake the cake" case, where the thing became, *Well, maybe if he had only frosted the cake* – it was just bizarre, about gay marriage and all that. I read through what every justice wrote. Everyone who wrote something, I read all of it. And I don't remember hers as being particularly distinguished or not being in line with what she believed.

In fact, maybe this is a place to start. I've seen people on social media saying the great thing about Ruth Bader Ginsburg is that in her public life, she fought for what she believed in. And I responded by saying, fighting for what you believe in is almost like the opposite of what you're supposed to do as a judge or as a Supreme Court justice. That has nothing to do with it at all. And as I said, I don't have a fetish for the framers of the Constitution, but I will say this: when they drafted that document and they talked about a judicial branch, what they had in mind was not that someday, Ruth Bader Ginsburg would get to fight for what she believed in. That was really not it. So what are your impressions of her? Because I get from people that you may not like her, but everybody respected her because she was really bright and distinguished and this and that. Well, what do you what do you make of all that?

GUTZMAN: Well, by all accounts, she was a personable woman. And obviously, she was quite intelligent. It seems that she had good relations with friends and family. And one gathers that she was dedicated to her station on the Supreme Court. So she was a collegial fellow member of the Court. On the other hand, I agree with what you just said about the supposed imperative of people who are judges and particularly federal judges to fight for what they believe in. I think that's incompatible with proper performance of the judicial role. That is, it seems to me that somebody who's got a legislative program and is a judge is in the wrong branch.

And one sees Ruth Bader Ginsburg pushing her program from the time she graduated from law school, basically, until her highly mistaken decision to stay on the Supreme Court through the Obama administration in anticipation of being replaced by the first female president. So every major move she made was intended to advance her political agenda. And as you and I have discussed numerous times before, I think that's inappropriate. That's not supposed to be what's going on.

In fact, the tendency of people from her political corner of the country to behave this way as judges is the reason why the Supreme Court appointments now are essentially the second-most important selection processes we have after the presidential one. It's far more important who becomes a Supreme Court justice than who becomes a US Senator or Secretary of State. And, of course, that's not the way the system is supposed to work. But we all know that a Supreme Court justice is one of the most important policymakers in the country. This is the way Ruth Bader Ginsburg thought of her position. So it's just a huge distortion, and again, the fact that the country is kind of roiled by the idea of selecting her successor is, in part, her own fault. It shouldn't be that way.

WOODS: Well, can you say something about — I mean, I know that in the early republic, even presidential campaigns in the very early republic were not a particularly big deal that people were consumed by and everybody had a sign in their yard and they hated each other. I was just driving through suburban Cincinnati last week, and it was unbelievable, the war of the lawn signs. There'd be a Trump, there'd be a Biden; there'd be a Trump; there'd be a Biden. There'd be a "We Love the Police," and then there'd be the Trump sign in that yard also. And it was just back and forth. There'd be "Ex-Republicans for Biden." There'd be "Former Democrats for Trump." It was everywhere. The people were consumed by it. Certainly we didn't have that. But when it came to the Supreme Court, I would think this process was almost unknown to the average person as it was happening in the early republic. I must be right about that.

GUTZMAN: Well, I of course live in Connecticut, and one does not see any Trump signs —

WOODS: [laughing] Right.

GUTZMAN: And it's not that there's no Trump support; it's that one fears what would be done to one's property if Trump signs appeared on it. So I don't see any Trump bumper stickers. I still see Obama and Bernie Sanders and the occasional earlier bumper sticker, always in support of Democratic candidates, of course, because the party that chooses love is going to ruin your vehicle if you —

WOODS: [laughing] I know.

GUTZMAN: So that's New England's 2020. Yes, well, in the early republic, becoming a Supreme Court justice could be seen as a kind of honor, but it was not anything like the significant marker in one's career that it is today. So, for example, when John Marshall was appointed Chief Justice in the waning days of the John Adams administration, Marshall had been one of the people who were relaying, on behalf of President Adams, President Adams' desire to appoint those people to the Supreme Court and to this position of Chief Justice. And they turned him down. And so Marshall tells us that, well, after the third or fourth such rejection of an offer, Adams said to Marshall: well, I guess I must point you. Marshall didn't even answer. He says, "I bowed and backed out of the room," right, so this was just not something that people were dying to do.

In fact, John Jay, famously the first Chief Justice, who of course had been a prominent Revolutionary and important ratifier of the Constitution in New York, when he when he was Chief Justice, since there was so little business for him to do, he eventually accepted president Washington's appointment of him to go to Britain, in a time when traveling cross the ocean took seven weeks by ship — he went to Britain and negotiated what came to be known

as the Jay Treaty. He was gone for months and months. And then by the time he came back, he learned that – he had actually not known this was going to happen – he learned that his friends had had him elected Governor of New York. So he wrote to the President and said he was resigning as Chief Justice because he was going to be governor of New York now. This, again, is not what one would expect to happen today. There were numerous people in the early republic who didn't even want to be on the Supreme Court.

Jay, actually, one duty of early Supreme Court justices was to do what was called riding circuit. There were no intermediate-level appellate court judges in those days, although there were intermediate-level appellate courts. The personnel on the appellate courts were the local trial court judges and the circuit justice, so Jay kept a diary of traveling around his circuit, which included Connecticut. [laughing] And he describes getting to a little Connecticut town. There's one instance where he got to a little Connecticut town late at night. He asked someone for directions to an inn. The guy pointed him down the road and gave him directions. When he got to the house, he knocked on the door, it was late, and the fellow came out with a candle and led him up a stairway on the outside of the building. They went in, and Jay noticed that the bed that he was being rented already had three strangers in it. So Jay was one of four men sleeping in his bed. Well, he ended up with lice and bedbugs and all kinds of problems. And this just was not a sexy position to be in, in other words. It was actually really kind of onerous.

So after the first group, Washington, when he made his first appointments to the cabinet and to the courts and so on, basically everybody who was anybody in American politics was willing to take one of the spots the general was offering. But after that, the quality of people who were on the Supreme Court just went downhill. You didn't have anybody like John Jay or Oliver Ellsworth or any of those people after a few years. And why was that? Well, because the work wasn't that important. There wasn't actually that much of it to do. It wasn't that important. And again, riding circuit was just a terrible duty, which justices continued to have to perform all the way to the end of the 19th century.

WOODS: All right, then, let me bring this up, I brought up this in an episode a couple days ago. I saw footage on Twitter of people rioting in New York over her death. And I mean, I don't know how to respond to this, except I just said – maybe you even saw this tweet – what a strange principle to riot over, that we want the major decisions in this country to be made by a five-to-four majority of lawyers. We absolutely do not want local self-government. We do not want a voice in any of this. A five-to-four majority of lawyers should be making the major decisions in this country, and I'm going to riot on that principle. Because that –

GUTZMAN: It's not just a committee of lawyers. It's a secret committee of politically connected lawyers, all of whom went to one or the other of two law schools, which are both located in New England. You could not have a smaller group of people being selected from among to make the most important social decisions and a lot of the most important political decisions in the country. I think in the abstract there's no way to justify this system.

WOODS: Yeah, I don't see there is either. I don't know. So all right. I don't want to speculate too much on who might be chosen, given that the selection could be kind of soon and then this gets out of date, but on the other hand, it's probably a pretty short list. So before we get into that, I guess, even briefly, why don't we hit on the subject that's apparently driving some controversy: whether Trump should be advancing a nominee in the first place, or whether we ought to wait until after the election? There have been accusations of hypocrisy toward Mitch

McConnell and others. Mitch McConnell's argument I believe at the time when Merrick Garland's name was out there was that if the Senate and the White House are occupied by different parties, then we should wait for the election and kind of get a sense of where everybody is, and that's not the case today. What's your take on all this?

GUTZMAN: Well, when they were enunciating these principles at the time toward the end of the Obama administration, I thought this could be uncomfortable for them later. It seems to me that the constitutional provision that the Senate will provide its advice and consent after the President has nominated somebody to be on the Supreme Court gave them cover for just saying we're not going to do it. They didn't have to have an abstract principle. They could have just said we know the President Obama doesn't share our constitutional principles. We believe we're all sworn to uphold our constitutional principles, and so we're going to wait and see what the next president would do. I think that would have been a perfectly good thing for them to say. In fact, I may have mentioned this idea on your show before.

So now here they are, some of them apparently said things that are inconsistent with what they're doing. Surprise. But I think, given that it's the Democrats and solely the Democrats who have made federal courts this important in the policymaking process going back to the 1930s, the Democrats have no grounds for complaining that the Republicans are treating it as an important element of the policymaking process. And so they're going to exercise the authority they have to ensure that President Trump's nominee receives a careful hearing and certainly a vote. I mean, what else is the Senate supposed to do? Just say we're not ever going to vote on a nomination? So I think, as far as I'm concerned, the Republicans have done the right thing, both in regard to the Garland nomination and so far in regard to this pending nomination.

WOODS: I was seeing somewhere on Twitter – again, I'm sorry. It's the second time I've mentioned Twitter. I assure you, I have other sources of information. It just so happens that somebody was saying – it might have been Glenn Greenwald. I can't remember, but it was somebody saying that the one area where Trump has a clear advantage is on the economy, that people give him actually pretty good marks on the economy and where he does pretty well as compared to Biden. But instead of really hammering home on the economy, according to this line of reasoning, he's been falling back on other things that haven't really budged his poll numbers and don't do as well for him, like rioting and law and order – even though you would think people would be against rioting and that that would be a winning issue. And they're saying not so much. And then also on this Supreme Court thing, they're saying that 50% of Americans say we should wait; only 37% say we should go ahead, so this is not a winner for him, either. Do you have any feel for the politics of this, whether this is a winner or loser?

GUTZMAN: Well, there are two questions. One is: what does the general public think about this? The other one is: what do people who might vote on this basis think? And in general, past polling on that latter question has shown that more Republicans are apt to vote on that basis. And besides that, we know that last time around, people who voted on that basis overwhelmingly voted for Trump. So I think, as far as the general public is concerned, most people can't even name a Supreme Court justice. But on the other hand, as far as dedicated Republicans are concerned, it's likely that they'll be able to even kind of generally describe the difference between the Republican Party's stated constitutional principles and that of the Democrats'. I don't think then that really he's got an option but to go ahead with this.

WOODS: And then the question becomes – by the way, I can't help mentioning this. You know the *Babylon Bee*, of course. They just seem to get better and better all the time. One of my old high school friends who follows me on Facebook and has kind of figured out more or less where I stand on things and how I look at the world sent me a piece by them, this headline: "Fisher Price Releases My First Peaceful Protest Playset with House You Can Actually Burn Down." [laughing] I just love it. That's just beautiful. You don't even have to read the article. The headline is beautiful.

All right, but so let's say a little something, because I hear two names, and they're both women. And one of them is this Amy Barrett. And I don't know, do you want to comment on the possibility – I mean, obviously, Trump could pick somebody out of left field, I suppose, but do you want to say something about the likely nominees?

GUTZMAN: I can't say that I know enough about her jurisprudence to give an educated evaluation of it. People have asked me that for months, and my response is, well, if she were appointed, I would familiarize myself with her record. But at this point, there's kind of an infinite number of people who could be selected, and then if I had studied Amy Coney Barrett's record, I would be familiar with one Seventh Circuit judge's work.

WOODS: It's not a good use of your time. No, understandable, understandable. But all right, we've had two appointments to the court under Trump, Kavanaugh and Gorsuch. Have you formed an opinion about what their tenure has been like?

GUTZMAN: Well, in general, I think they've been satisfactory as far as what people who supported Trump hoped for from them. Their work has been unpredictable, in a sense, but that's what you'd expect of thinking people. I think both of them, though, tend to rely on the kind of – In case listeners aren't familiar with this, the main thing one hopes to see on this side of the political divide that is on the intentionalist reading of the Constitution side of the argument, if there is an argument, is that federal judges are actually trying to identify what a particular provision is supposed to mean. What was it intended to mean? And one might think, well, that seems kind of arbitrary assignment. Why is that more important than, say, what a better policy outcome would be? And the answer is related to republican legitimacy. If we have elections and we have a legislative process, and then the judges are free to ignore the legislative process and the elections, then what kind of government is it? It's just an aristocracy of accidentally appointed Harvard and Yale Law School graduates meeting in secret and deciding what they think would be a good idea, which is not the way it's supposed to work.

So I do think that both Gorsuch and Kavanaugh have demonstrated, to my satisfaction at this point, that they're taking the intentionalist tack. Now, whether I thought that I agreed with both of them in every instance, well, of course not. But it's certainly preferable to having two more Ginsburgs, which is what Hillary Clinton would have been looking for. By the way, I've always suspected that Hillary Clinton chose Ginsburg back during the Clinton administration. So I think that's what we could have looked forward to, in case Hillary Clinton had been president.

WOODS: What kinds of issues could come before the court in the ensuing years that could account for the contentiousness of all this? It can't just be abortion, because you would think that, other than the hysterics out there who just are beyond reason, I think reasonable people understand by now how Republican appointees work, that most of them are not going to vote

to overturn *Roe v. Wade*. They've pretty much signaled that fairly clearly, so that I don't think *Roe v. Wade* is going to be overturned. It doesn't matter. So what other kinds of cases do you think are we talking about that make people – or is it that they think that a right-wing court will repeal some of the things they like? What do you think's behind this?

GUTZMAN: Well, consider the question we were talking about a minute ago, the bake the cake issue. Or consider the fact that in my state, Connecticut, there are a couple of biological males who hold over a dozen girls' state track records. That's the kind of issue that's going to come before the court again, and I think somebody like Ginsburg would have taken a predictable approach to that kind of a question. So we're still beset on an ongoing basis with these cultural matters. And really, just the seismic shift in our culture in my lifetime has been a product of Ginsburg and a handful of other people working through the courts to make these changes. They weren't approved by society. So there was never a time when society decided, okay, we want young biological males to be able to win all the girls' track championships. It's just kind of come to us through the courts, through the litigation process.

And there are numerous other areas like that that are still more or less open questions. The left has been accustomed to getting its way in the court system ever since the New Deal. And we really have a situation now in which if there were a six-to-three majority of self-described constitutional originalists on the court, that we could see a significant change back from that, at least from the procedural change that we've seen, where the system is now dominated largely by court decisions to one in which what the people vote for matters, what the electorate expresses its desire to have matters.

WOODS: Yeah, but see, this is where I have trouble understanding where the left is coming from. I can understand 40, 50 years ago, even 30 years ago, they feel like, all right, there are certain things we want for society that we know are good and right and just and moral. But unfortunately, we live in a country with a lot of backward rubes who are not going to understand this and they're never going to vote for it, so the only prayer we have of getting it is through the courts. But today we have a very different America. You have an America that leans very heavily left even culturally. There are a lot of soccer moms who are perfectly okay with the social changes you're talking about. So why do they still feel like they need to ram it through via the courts? Now they have the votes.

GUTZMAN: Well, of course, the public campaign against President Trump nominating someone and against the Senate confirming whomever he might select has focused on some of the outcomes, some of the judicial outcomes that Democratic constituencies like. So in other words, the bottom line is there is a very large portion of the population that would be perfectly happy to live in a dictatorship if the dictator gave it the policies it wants. That's what it comes down to. And there's a fear that not only if the ship turns away from the pole star of always having left-wing legislative results come from courts, if people were thrown back on getting to vote on these questions, that we'd move away from the situation we are now back toward a more traditional one. I think that's what's likely to happen over time, and so it makes sense that people on the left are unhappy with the prospect.

You think of the people who've made this situation, who've contributed to it coming to be. I still think that the guiding light is Woodrow Wilson. You know, we should have an educated elite who make decisions. We could put a lot of them in administrative agencies and just let them be policymakers behind the scenes. We could have federal judges deciding what essentially are legislative disputes. And over time, this would move us in a direction that's

more or less unlike traditional American society, more or less unlike traditional American values, more or less unlike America. And that's where we are, where it's not coming to perfect fruition, but this is what's at stake.

So even if 99% of the people who are out protesting have no idea of what I just said, they have an inkling of disliking what are apt to be the results of replacing Justice Ginsburg, who's the most important feminist litigator in American history, and took that same program of the Supreme Court to somebody like Kavanaugh, one of those, only a female one this time. So sure, it'll be interesting to see what kind of propaganda campaign they come up with. Is Amy Coney Barrett going to be accused of running teenage rape gangs? I wonder how that'll work. But there'll be something like that, surely.

WOODS: Yeah. I know, the Woodrow Wilson thing and the Progressive Era, "we'll have the educated elite more or less run things," today we have an extremely stupid elite. They think they're educated because they have pieces of paper, but my gosh, we must be governed by the dumbest bunch of dolts in the history of the world. I mean, if I were to bring one of them on here to talk to you, they wouldn't have anything to say. There would be nothing of value to say whatsoever, other than some platitudes. But now the left is going to come back with some kind of court packing scheme, they say. What do you think the prospects of that are?

GUTZMAN: I think that's good. In fact, I've long argued that I don't have a problem with that. If we're going to have it be the case that every time party control of the more republican branches of the federal government changes, we have court packing, this will make perfectly clear to people that what's going on in the courts is political. So I think that would spur resistance to this tendency that I have been I guess implicitly decrying up to this point in our conversation. I don't like the politicization of the court system. I don't like the courts making legislative choices. I've been moved from not caring about most of these issues to finding the outcomes offensive in the 30 years that I've been thinking about these things.

When I started thinking about these general political philosophy matters we've been discussing, I didn't really care about the policy questions that were being decided by judges. I just cared that they were being decided by judges. And over time, the rank dishonesty has made me decide I generally don't like the outcomes. I think if you strip the outcomes of the process that has produced them, I would probably move back to not really caring about the questions. But I find it so offensive that Ruth Bader Ginsburg gets to decide these questions just because she's a Supreme Court justice, that I've come to dislike the policy outcomes. That's what it's done for me.

But anyway, so if we had court packing tradition, if we went from 9 Supreme Court justices to 11 when the Democrats take over the next time, and then 13 when the Republicans do, fine with me, because people would come to think there's something illegitimate about having the Supreme Court decide important questions. They should really just be back to deciding what federal statutes mean. That would be fine with me. Or what a treaty means and how it applies to a state law. That'd be fine with me. I'd like that. Anything to demystify the Supreme Court, I am for.

WOODS: Wow, that is an interesting take. That's an interesting take. I did an episode — I'll link to it on the show notes page. I did an episode of court packing and US history and the Constitution and all that.

GUTZMAN: People don't realize that the size of the Supreme Court has changed.

WOODS: Yes.

GUTZMAN: Initially, it was six justices. It was up to 10. Now it's been 9 for a long time, relative to the age of our republic. But it's not set in stone, and the Constitution doesn't say 9. It can be whatever number you wanted it to be. So, fine.

WOODS: Right.

GUTZMAN: Make it all political. Bring it out into the open. Tell people we're actually arguing about political questions. And then the implication is, well, that means it should be decided in Congress, not by administrative – not by Strzok and Page. I don't want them making decisions, and I don't want Lois Lerner making important policy decisions, and I don't want Ruth Bader Ginsburg making important policy decisions.

WOODS: Well, I agree, so now we just have to wait and see what happens. And yet the thing is, one other phenomenon that is worth commenting on is that you don't generally get somebody like a Ruth Bader Ginsburg who then is appointed, and then as time goes on, she becomes more of an originalist in the Scalia mold.

GUTZMAN: She's not going to become less impressed with her own relative wisdom over time. That's right.

WOODS: Yeah. Right, exactly. Whereas it doesn't seem to work the other way. We like to think or we're taught to think of Supreme Court justices as being completely above politics. They're contemplating the eternal forms on some Platonic mountaintop somewhere, and they're unperturbed by all these other things. But boy, they seem to be very suggestible when they're surrounded by a hostile media and culture to suddenly seeing the light on a lot of things. So there's always that problem, too, that we have to reckon with.

GUTZMAN: Right, and well, it's very unusual to have somebody like Scalia, with whose judicial performance, as we've discussed before, I didn't always agree, but to have somebody like that who's willing to say, *Well, yes, I disagree with the literati on these issues, and I'm willing to be their whipping boy, because I take kind of pleasure in being the one they target with their criticism.* That is very unusual.

More usual is to be like Harry Blackmun or Anthony Kennedy, and through the course of a long career on the Supreme Court, increasingly decide I'm going to vote for the outcomes that the *New York Times* will laud me for, right? Or actually, there's a law professor at Harvard Law School who's made a point of bringing Anthony Kennedy every year to address one of his constitutional law classes at Harvard and allow the Harvard students to praise him for his votes on abortion and gay marriage and so on. And when Kennedy retired, this law professor at Harvard went public with *this is what I did, and this was the reason I was doing it.* And he said, And I think that hearing from the law students affected Kennedy's performance.

So you have very weak lowercase-R republicans on the Supreme Court. They're mostly people who just want to be praised, not that that's that unusual, but it takes a stiff spine for somebody to say, *Well, I know what would get me accolades, but that's not the way a*

republic is supposed to work. I'm just a judge. I'm not supposed to be making these decisions. So I understand the phenomenon that people on the Supreme Court tend to become more progressive over time. That's where all the psychic rewards come from, I guess, except for satisfying oneself that: I've been a good republican. I kept my oath.

WOODS: Yeah, I know. So much for that. All right, what's your next project so we can conclude on that and people can know what Kevin Gutzman is up to?

GUTZMAN: Ah, well, at the moment, I have stacks of things I'm doing, but the main thing is I'm working on a book on the three Jeffersonian republican presidencies at the beginning of the 19th century. So sometime soonish, I'm going to be finished with this manuscript about the Jefferson, Madison, and Monroe administrations, which starts with Jefferson's first inaugural where he lays out the program, and then for six terms, during all of which time their party controlled the Congress as well, we have these guys trying to implement their program. And they basically did. Most of it was highly beneficial, but some of it was an absolute debacle. And that's what my story is.

WOODS: Well, we will look forward to that very much. I can't wait to talk about that. But probably there'll be enough insanity in the world between now and then that I'll have you on to cover that as well. So thanks a lot, Kevin. We appreciate it.

GUTZMAN: You're welcome.