ONE JUSTICE, TWO JUSTICE, RED JUSTICE, BLUE JUSTICE: DISSECTING THE ROLE OF POLITICAL IDEOLOGY IN SUPREME COURT NOMINATIONS

GREGORY DICKINSON*

This Note argues that the United States Senate's current rules to confirm a president's nominee to the Supreme Court have evolved the Supreme Court into an imperfect and ideologically divisive body. Under the simplistic process currently employed by the president and the Senate, partisan and contentious actions are taken, neglecting the apolitical purpose the Supreme Court was meant to serve. Evidence of sectarian acts and resulting consequences exists in both statistical and verbal form. President Donald Trump will likely be tasked with appointing four justices to the Supreme Court, making the present procedure to confirm the president's nominee all the more significant. This Note concisely examines the current process for a nominee to successfully earn Supreme Court confirmation and depicts the history of the Court, concentrating on the two most recent times a president was provided the chance to nominate four Supreme Court justices. This Note explains how the current Supreme Court nomination and confirmation processes have been thrust into a politically charged realm. Additionally, this Note proposes a sensible solution to minimize ideological considerations in changes to the Supreme Court and create uniformity in the Executive, Legislative, and Judicial branches as developments in fundamental law unfold.

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I. INTRODUCTION

On February 13, 2016, Supreme Court Justice Antonin Scalia passed away on a hunting trip in Western Texas,[1] thrusting into the public eye a reality that political and judicial observers have anticipated for years. The Court is approaching—rather, has arguably now reached with Justice Scalia's death—a critical juncture in its progression. On January 20, 2017, inauguration day for the forty-fifth President of the United States, there was one vacant seat[2] on the Supreme Court, and three justices over the age of seventy-eight.[3] Without any regard to the Justices' personal medical histories, it is highly likely that President Donald

1. *See, e.g.*, Jess Bravin, *Supreme Court Justice Antonin Scalia Dies at 79*, WALL ST. J. (Feb. 14, 2016, 5:14 PM), http://www.wsj.com/articles/supreme-court-justice-antonin-scalia-dead-at-79-1455404229; Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), http://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html; Susan Page & Richard Wolf, *Justice Scalia Found Dead at Texas Ranch*, USA TODAY (Feb. 13, 2016, 11:34 PM), http://www.usatoday.com/story/news/2016/02/13/justice-scalia-found-dead-texas-ranch/80347474/.

2. On March 16, 2016, President Obama nominated Merrick Garland to replace Justice Scalia.

3. Stephen Breyer, 78, Ruth Bader Ginsburg, 83, and Anthony Kennedy, 80. *See Biographies of Current Justices of the Supreme Court*, SUP. CT. U.S., http://www.supremecourt.gov/about/biographies.aspx (last visited Nov. 15, 2016).

Trump will have an opportunity that has not occurred in nearly fifty years—to appoint four justices to the Supreme Court.[4]

In the seventy years since World War II and the end of Franklin Delano Roosevelt's presidency, during which he made *eight* nominations[5] and arguably ushered in the modern era of the Supreme Court, only two presidents have filled four or more seats: Dwight Eisenhower (five) and Richard Nixon (four).[6] On both occasions, the outcome was monumental. Eisenhower's nominations ushered in the liberal era of the Warren Court,[7] forcing Nixon to specifically campaign against the Court "almost as much as his actual opponent . . . ."[8] After winning the election, Nixon then set in motion an evolution that continues to this day.

Today's Court has grown to be an incredibly political body, and the justices have similarly developed easily identifiable political ideologies. In fact, a candidate's ideology has taken center stage in the nomination process and is now the most important factor that both the president and the Senate have taken into consideration. Simultaneously, the confirmation process is taking longer and becoming more vigorous, allowing for intense public scrutiny of the nominees' beliefs on the most important issues. Yet, amazingly, at the end of the process a simple majority, just fifty-one votes, will either confirm or deny a nomination. Surely a position as important as Supreme Court Justice, one that allows for lifetime tenure and the ability to shape the fundamental laws of the United States, should require a higher threshold for approval.

This Note analyzes the Supreme Court's evolution into the ideologically divisive body that it is today, and proposes a change to the Senate's confirmation rules that would create greater parity and more moderate justices. Part II briefly recounts a history of the Court, primarily focusing on the last two times a president had the opportunity to shape it with four nominations it also briefly discusses the current procedure for a nominee to gain confirmation. Part III analyzes the probability of vacancies arising within the next four years, as well as the transformation that has occurred with regard to the deciding factors for Senate approval. Part III also discusses how the current appointment process only serves to amplify the phenomenon of political justices and its significance over the next four years. Following the analysis, Part IV proposes a solution that would diminish the prevalence of ideology in nominations and create parity between the Supreme Court and its counterpart processes for changing fundamental law.

4. Richard Nixon was the last President to fill four vacancies. *See* discussion *infra* Part II.B.2.

5. *Supreme Court Nominations, Present–1789*, U.S. SENATE [hereinafter *Supreme Court Nominations*], http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm (last visited Nov. 15, 2016) .

6. *Id.*

7. THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY 69 (2004).

8. *Id.* at 107.

II. BACKGROUND

The Supreme Court plays a vital role in American government, yet, understandably, the public often overlooks it. The justices are unelected[9] and operate behind closed doors, where cameras have not been allowed since 1946[10] and audio recordings are only made available at the end of each week.[11] In a 2012 survey, two-thirds of Americans failed to name even one of the nine justices.[12] Additionally, no justice was named by more than 20% of respondents (Chief Justice Roberts led the way with precisely 20%),[13] and Justice Breyer won the dubious award of "most anonymous," identified in only 3% of responses.[14] Finally, and admittedly unsurprising considering the preceding information, less than 1% of Americans were able to name all nine justices.[15]

This nationwide ignorance is troubling due to the significant role the Supreme Court plays within the federal government. The judiciary is one of three fundamental branches of government, and an equal counterweight in our understanding of checks and balances.[16] Sitting at the top of the judiciary, the Supreme Court's constitutional decisions are binding on the entire country and may not be overruled by any other court or branch.[17] Only a subsequent decision or a constitutional amendment can overrule these decisions, granting the Court a unique role in shaping our fundamental law.[18] Although it may remain relatively anonymous, and appears to prefer it that way,[19] the Supreme Court plays an integral role in American life.

Franklin Roosevelt's clash with the Supreme Court during the Great Depression demonstrates the interloping dynamics of the three branches of government, and also identifies the major turning point that

9. U.S. CONST. art. II, § 2 ("[The president] shall nominate . . . judges of the [S]upreme Court . . . .").

10. Federal Rule of Criminal Procedure 53 states that "(e)xcept as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom."

11. *See* Jonathon R. Bruno, *The Weakness of the Case for Cameras in the United States Supreme Court*, 48 CREIGHTON L. REV. 167, 172 (2015).

12. Steve Eder, *Most Americans Can't Name a U.S. Supreme Court Justice, Survey Says*, WALL ST. J.L. BLOG (Aug. 20, 2012, 11:56 AM), http://blogs.wsj.com/law/2012/08/20/most-americans-cant-name-a-u-s-supreme-court-justice-survey-says/ (citing a survey released by FindLaw.com, a popular legal information website owned and operated by Thomson Reuters).

13. *Id.*

14. *Id.*

15. *Id.*

16. HENRY J. ABRAHAM, THE JUDICIARY: THE SUPREME COURT IN THE GOVERNMENTAL PROCESS 1 (10th ed. 1996) ("Most Americans know less about the judicial branch of their government than they do about its other two branches, the legislative and the executive.").

17. *Id.* at 24 ("Here the Court serves as final arbiter on the construction of the Constitution and . . . it provides us with an authoritative and uniform interpretation of the law of the land.").

18. *The Court and Constitutional Interpretation*, SUP. CT. U.S., https://www.supremecourt.gov/about/constitutional.aspx (last visited Nov. 15, 2016).

19. Sam Baker, *Justice Sotomayor No Longer Backs Television Cameras in Supreme Court*, HILL (Feb. 7, 2013, 7:25 PM), http://thehill.com/homenews/news/281765-sotomayor-no-longer-backs-cameras-in-supreme-court.

initiated the Court's transformation into the political body it is today. In the mid-1930s, with the Depression in full swing, Roosevelt introduced his "New Deal"—a sweeping series of legislative acts and executive orders intended to revive the country and provide immediate economic relief.[20] Although the moves were overwhelmingly passed in Congress and generally welcomed by the public, much to Roosevelt's dismay, his policies came up for judicial review and were repeatedly struck down.[21] In fact, by 1936, the central pillars of the New Deal had been eviscerated.[22]

Rather than attempting to defend the legitimacy of his programs in the Constitution,[23] Roosevelt famously tried to "pack the court" by adding six new justices to the bench.[24] Although Roosevelt's Democratic Party had overwhelming majorities in both the Senate and the House of Representatives,[25] his court-packing proposal was met with vehement opposition.[26] It did seem to cause enough of an uproar, however, that the justices began to give in to public pressure and became more lenient in approving New Deal Legislation.[27] This conflict, and the Court's subsequent sharp transformation from a restrictive body that had for decades nullified federal legislation into one that exercised judicial restraint and deference to democratic will, came to be known as the "Switch in Time."[28]

This so-called "Switch in Time" not only emphasizes the Supreme Court's importance in the legislative process, but also is an ideal point to begin the examination of how exactly it came to be the ideological and political body that it is today. In the eighty years since Roosevelt's New Deal conflict, the Court has undergone a severe transformation with several "critical junctures." Often characterized by a single president making multiple nominations, each critical juncture significantly affected the

20. Franklin D. Roosevelt's broad plan for recovery out of the Great Depression was "christened the New Deal . . . ." Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 201 (1994); *see generally New Deal: United States History*, ENCYCLOPEDIA BRITANNICA, http://www.britannica.com/event/New-Deal (last visited Nov. 15, 2016).

21. *FDR's Losing Battle to Pack the Supreme Court*, NAT'L PUB. RADIO (Apr. 13, 2010, 12:00 PM) [hereinafter *FDR's Losing Battle*], http://www.npr.org/templates/story/story.php?storyId=125789097.

22. *Id.* ("[T]he court essentially struck down all of the central pillars of the New Deal . . . .").

23. *Id.* ("[Roosevelt] didn't see any kind of contradiction between the Constitution and the New Deal.").

24. *Id.*; *see also* William G. Ross, *When did the "Switch in Time" Actually Occur?: Re-Discovering the Supreme Court's "Forgotten" Decisions of 1936–1937*, 37 ARIZ. ST. L.J. 1153, 1154 (2005) ("Roosevelt's proposal to pack the Supreme Court with six additional Justices.").

25. Ross, *supra* note 24, at 1160 ("[Democrats] emerged from the election with a majority of 333 to 102 in the House of Representatives and 75 to 21 in the Senate.").

26. *FDR's Losing Battle to Pack the Supreme Court*, *supra* note 21.

27. Ross, *supra* note 24, at 1168.

28. *Id.* at 1153–54 ("The Supreme Court's validation of major federal and state regulatory legislation in a series of landmark decisions between March 29 and May 24, 1937 contrasted sharply with its nullification of major regulatory legislation between January 1935 and June 1936, and signaled the end of a decades-long era during which the court had used restrictive theories of due process, equal protection, the commerce clause, and the federal taxing power to invalidate state and federal economic legislation.").

following generation. Today, the Supreme Court faces another critical juncture of sorts, and the important decisions of the coming years cannot be understated. President Trump will likely have the opportunity to fill up to four vacancies, which has added significance considering the Court has evolved to be as ideologically defined as ever before.

A. The Formation of the Supreme Court

It is wise to begin by briefly explaining the history that surrounds the formation of the Supreme Court, as the Constitution is curiously silent when it comes to the Judiciary. In fact, the Constitution fails to specify the exact powers of the Supreme Court, and does not establish any specific organization of the judicial branch.[29] Instead, it simply declares, "[t]he judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."[30] It further explains that all federal judges will hold their positions for life, or at least "during good behavior," and subsequently discusses their compensation.[31] Beyond those few words, the Constitution does not elaborate.

It was an act of Congress, the Judiciary Act of 1789, which initially set forth the basic organization for the judiciary.[32] Likewise, as the Constitution says nothing specific about the composition of the Supreme Court, that too is left to the legislature.[33] In contrast to the familiar number of nine justices we have today, over the years "the membership of the high bench has varied from six (the number at the time of its creation) to five, to seven, to nine, then to ten, then seven again, and finally to the present membership of nine. . . ."[34] Each change to the Court's composition occurred by and upon the authority of Congress.[35]

Finally, there is little guidance as to how exactly justices should be nominated.[36] The Constitution simply declares that the President "shall nominate . . . by and with the Advice and Consent of the Senate . . . Judges of the [S]upreme Court . . . ."[37] There appears to have been little discussion among the original drafters themselves regarding what this particular provision meant.[38] According to a leading work on the appointment process, the "exact meaning of the words *nominate* and *consent* . . . was not discussed in the brief debate which took place on the

29. U.S. CONST. art. III.
30. *Id.* art III, § 1.
31. *Id.*
32. BERNARD SCHWARTZ, A BASIC HISTORY OF THE U.S. SUPREME COURT 11 (1968).
33. *Id.*
34. *Id.*
35. *History of the Federal Judiciary*, FED. JUD. CTR., http://www.fjc.gov/history/home.nsf/page/courts_supreme_leg.html (last visited Nov. 15, 2016).
36. U.S. CONST. art. II, § 2.
37. *Id.*
38. Glenn Harlan Reynolds, *Taking Advice Seriously: An Immodest Proposal for Reforming the Confirmation Process*, 65 S. CAL. L. REV. 1577, 1578–79 (1992).

provision in the closing days of the Convention."[39] In early practice, since specified as such in its rules, the Senate only provided its advice and consent to a nomination after a confirmation vote,[40] where a simple majority is sufficient for passage.

The exact meaning of the words "advice" and "consent" is the topic of significant academic debate,[41] but the aim of this Note is not to weigh in on that question. It is sufficient simply to understand that most of the rules and procedures for the Supreme Court, from its official functions to its technical composition, are decided by Congress, and not only may be, but often have been, changed.[42] Franklin Roosevelt was aware of this fact when he proposed his court-packing plan, and although he was ultimately unsuccessful, Roosevelt's proposal appears to be the last time a procedural change to the Supreme Court was suggested by a major politician. In the nearly century that has passed, however, the Court has undergone a major substantive transformation, beginning in the 1950s with Dwight Eisenhower's creation of the Warren Court.[43]

B. The Modernization of the Supreme Court

The character of the Supreme Court is undoubtedly different today than it has ever been before, as it has increasingly become a political body with identifiable ideologies. In order to gain a full understanding of how this evolution occurred, it is helpful to examine the critical points in the Court's history.[44] Two obvious turning points occurred the last two times a single president made four nominations. In the 1950s, President Eisenhower actually made five Supreme Court nominations, ushering in one of the Court's most liberal eras under the direction of Chief Justice Earl Warren. Then, as a direct result of the Warren Court's liberal decisions,[45] Nixon, the last president to make four nominations, created a conservative majority,[46] and the Supreme Court has held a conservative tilt ever since.

39. *Id.* (quoting JOSEPH PRATT HARRIS, THE ADVICE AND CONSENT OF THE SENATE 33 (1968)).

40. Matthew C. Stephenson, *Can the President Appoint Principal Executive Officers Without a Senate Confirmation Vote?*, 122 YALE L.J. 940, 955 (2013) ("[T]he Senate itself, pursuant to its constitutional power under Article I, Section 5 to establish its own rules of procedure, has specified that it gives its advice and consent to a nomination only after a formal confirmation vote.").

41. *See, e.g.*, Reynolds, *supra* note 38; Karl A. Schweitzer, *Litigating the Appointments Clause: The Most Effective Solution for Senate Obstruction of the Judicial Confirmation Process*, 12 U. PA. J. CONST. L. 909 (2010); Stephenson, *supra* note 40.

42. *See* discussion *supra* Part II.A.

43. *See* discussion *infra* Part II.

44. *See* KECK, *supra* note 7, at 107.

45. *Id.* at 108.

46. *See* discussion *infra* Part II.B.2.

1. Eisenhower and the Warren Court

Dwight Eisenhower entered office in 1953 as a highly decorated military General and ardent Republican.[47] It was the beginning of the Cold War, and he had campaigned on a platform opposed to anti-communism, Korea, and federal spending.[48] Eisenhower served two terms as president, and over the course of eight years he made five successful nominations to the Supreme Court.[49] The first, and arguably most important nomination, took place during Eisenhower's first year in office after the sudden death of then-Chief Justice Fred Vinson in September 1953.

a. The Nominees

To fill the role of Chief Justice, Eisenhower nominated Earl Warren,[50] then-governor of California, who would go on to chair the Supreme Court for the next sixteen years.[51] The following year, in 1954, another justice, Robert Jackson, passed away, allowing Eisenhower to make a second appointment— Justice John Marshall Harlan.[52] Eisenhower made two simultaneous nominations in 1957, William Brennan, Jr. and Charles Whittaker, both of whom were confirmed on the same day.[53] He made his final selection in 1959 with the nomination of Potter Stewart.[54]

Eisenhower's five selections to the Supreme Court undoubtedly shaped it for the next two decades, composing the heart of the Warren Court era. Interestingly, however, due to traditional differences in how justices were selected, it was not necessarily his intention to create the liberal machine that he did. He once famously declared that the "two biggest mistakes of his presidency were appointing Earl Warren and William Brennan, the leading forces behind the aggressively liberal court of the 1960s."[55] It is a popular myth, however, that Eisenhower's regret was because the justices surprised him—that they "flipped" once they were appointed and did not behave as expected.[56] To the contrary, the justices perspectives should have been, and likely were, easily predicted. The issue was that Eisenhower simply had not put much weight on their ideologies when he nominated them.

47. *Dwight D. Eisenhower*, ENCYCLOPEDIA BRITANNICA, http://www.britannica.com/biography/Dwight-D-Eisenhower (last visited Nov. 15, 2016).
48. *Id.*
49. *Supreme Court Nominations Present–1789*, *supra* note 5.
50. *Id.*
51. *Earl Warren*, ENCYCLOPEDIA BRITANNICA, http://www.britannica.com/biography/Earl-Warren (last visited Sept. 22, 2016).
52. *Supreme Court Nominations Present–1789*, *supra* note 5.
53. *Id.*
54. *Id.*
55. Ed Lazarus, *Four Enduring Myths About Supreme Court Nominees*, TIME (May 26, 2009), http://content.time.com/time/specials/packages/article/0,28804,1900851_1900850_1900845,00.html.
56. *Id.*

It is actually a relatively recent phenomenon that the Supreme Court is so definitively divided among ideological party lines. During Eisenhower's presidency, nominations were made in ways that would be unheard of today and would likely raise the ire of the public. Earl Warren and William Brennan provide two perfect examples. Eisenhower nominated Warren as part of a political deal,[57] in part for backing Eisenhower and providing the support of the powerful California delegation, but also simply to prevent Warren himself from challenging Eisenhower for the presidency.[58] Perhaps exhibiting even less interest in political ideologies, Eisenhower selected William Brennan for purely geographic reasons.[59] Maintaining equal demographics on the Court was a significant concern at the time, so Brennan was selected simply to fill the quota of "Northeastern Catholic."[60] Thus, while Eisenhower was certainly disappointed in his nominations, and perhaps regretted them, it would be imprudent to suggest that the outcomes were entirely unexpected.[61]

When it comes to analyzing the Warren Court and its impact, there is significant scholarly debate as to its true legacy.[62] Much of the debate centers around what exactly the time frame should be.[63] The most general consideration is that the era should include the entirety of Warren's tenure as Chief Justice—from 1953 until 1969.[64] During that time, however, there were seventeen different justices, which some scholars believe makes it too broad to be singularly defined.[65] Some argue the true Warren Court did not begin until the 1960s,[66] but this would problematically leave out the monumental *Brown v. Board of Education* decision.[67] It is not necessary for this Note to enter into the debate, but for the purpose of understanding the Court's transformation it will provide a brief overview of Warren's entire tenure.

b. The Impact

Recognizing the historic significance of the decision, Chief Justice Warren himself authored the opinion of *Brown v. Board of Education*.[68]

57. Peter D. Ehrenhaft, *What Would Warren Say Now – Can* Brown *and* Baker *be Reconciled?*, 2 WAKE FOREST J.L. & POL'Y 321, 326–27 (2012) (citing G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 9, 11 (1982)).

58. *Id.* at 327.

59. Lazarus, *supra* note 55.

60. *Id.*

61. *Id.*

62. James A. Thomson, *Capturing the Future: Earl Warren and Supreme Court History*, 32 TULSA L.J. 843, 843–44 (1997) (reviewing THE WARREN COURT: A RETROSPECTIVE (Bernard Schwartz ed., 1996)).

63. *Id.* at 849.

64. *Id.* at 849–50.

65. *Id.* at 851.

66. *Id.* at 849–50.

67. *Brown v. Board of Education* was handed down just two months after Earl Warren took office. 347 U.S. 483 (1954).

68. *Id.*

It was a unanimous decision, which was Warren's primary goal—he actually delayed the vote until a consensus was reached.[69] He even went so far as to lobby Justice Jackson while Jackson was in the hospital to dissuade him from his planned dissent.[70] *Brown* emphatically declared that the "separate but equal doctrine" set forth in *Plessy v. Ferguson*[71] had no place in the field of public education. The ruling was an enormous victory that led to the downfall of the entire separate-but-equal doctrine, and served as a precursor to the Civil Rights victories of the 1960s.[72] Warren's extreme efforts in deciding *Brown* became hallmarks in his work as Chief Justice, all as he put it, "for the sake of the Court's legitimacy."[73]

Today, the Warren Court is known for its liberal majority that expanded civil rights, civil liberties, and judicial power. During the late 1950s and early 1960s, the Court handed down many well-known civil-rights decisions. Most, such as *Bolling v. Sharpe* and *Lucy v. Adams*, advanced upon the ideas set forth in *Brown* and struck down policies of segregation.[74] *Bolling* extended *Brown* to the District of Colombia, while *Lucy* made sure it extended to public universities.[75] Another influential civil-rights decision, *Loving v. Virginia*, held that laws prohibiting interracial marriages were unconstitutional.[76]

Perhaps even more than its civil-rights victories, the Warren Court is remembered for being tough on police tactics and expanding the rights of the accused. *Mapp v. Ohio*, which applied the exclusionary rule to state courts,[77] and *Miranda v. Arizona*, which addressed the admissibility of criminal defendants' prior testimonies,[78] are frequently cited and remain topics of great debate.

The 1960s were a rather tumultuous time period in American history, granting the presidential election of 1968 special importance. Martin Luther King, Jr. was assassinated[79] in April of that year, and Robert Kennedy, a leading candidate for the Democratic Party, was assassinated in June.[80] Violent crime appeared to be on the rise, and many attributed the spike to the liberalism of the Warren Court governing police tactics.[81] It was in that era that Richard Nixon campaigned for, and won, the pres-

69. A.E. Dick Howard, *The Changing Face of the Supreme Court*, 101 VA. L. REV. 231, 257 (2015).
70. *Id.*
71. 163 U.S. 537, 550–51 (1896).
72. *Brown*, 347 U.S. at 494–95.
73. Howard, *supra* note 69.
74. 347 U.S. 497, 500 (1954); 350 U.S. 1, 2 (1955).
75. *Bolling*, 347 U.S. 497; *Lucy*, 350 U.S. 1.
76. 388 U.S. 1, 12 (1967).
77. 367 U.S. 643 (1961).
78. 384 U.S. 436 (1966).
79. KECK, *supra* note 7, at 107.
80. *Id.*
81. *Id.* at 108 (citing Nixon's 1968 campaign paper "blaming both the Warren Court and the Johnson administration for the nations dramatic increase in violent crime").

idency, becoming the last president to fill four Supreme Court vacancies.[82]

2. *Nixon and the Burger Court*

By the time Richard Nixon campaigned for president in 1968, the Court had spent the past decade making increasingly liberal decisions.[83] During his campaign, Nixon was forced to specifically address how he would formulate the Supreme Court.[84] It was a rather appropriate talking point, as Nixon would eventually fill four vacancies in less than six years as president.[85] With the assassination of Robert Kennedy, Nixon became the favored candidate,[86] and he ended up running "against the liberal Warren Court almost as much as his actual opponent . . . ."[87]

When he realized Nixon would be president, Chief Justice Warren immediately announced his retirement in an attempt to allow the lame duck President Lyndon Johnson to replace him.[88] Nixon immediately called for the next president to be allowed to make the decision, and Johnson was unable to nominate a replacement before his term ended.[89] Even President Johnson's attempt simply to elevate Abe Fortas from Associate Justice to Chief Justice was blocked by the Senate, and the vacancy was indeed left to Nixon.[90]

a. The Nominees

Just as Eisenhower's first appointment became Chief Justice, so too did Nixon's first nominee, Warren Burger.[91] Unfortunately, Burger, a distinguished academic and conservative, proved not to have the leadership qualities that made Warren so successful.[92] Nixon went on to make five more nominations, but, in the first Senate rejections since 1930,[93] only three were confirmed: Harry Blackmun, Lewis Powell, Jr., and William Rehnquist.[94] To Nixon's dismay, he was unable to fully stem the Court's liberal decisions.[95]

82. *Supreme Court Nominations Present–1789, supra* note 5.
83. *See* discussion *supra* Part II.B.1.a.
84. Brad Snyder, *How the Conservatives Canonized* Brown v. Board of Education, 52 RUTGERS L. REV. 383, 419 (2000).
85. *Supreme Court Nominations Present–1789*, *supra* note 5.
86. KECK, *supra* note 7, at 107.
87. *Id.* at 4.
88. *Id.* at 107.
89. *Id.*
90. *Id.* at 108 ("The rights revolution had made the Court an attractive political target, and it would be Nixon, not LBJ, who would name Warren's successor.").
91. *Supreme Court Nominations Present–1789*, *supra* note 5.
92. Howard, *supra* note 69, at 258.
93. KECK, *supra* note 7, at 107 ("[T]he Warren Court's opponents quickly mobilized to block Fortas's confirmation, even though the Senate had succeeded in doing so only once before in the twentieth century."); *Supreme Court Nominations Present–1789*, *supra* note 5.
94. *Supreme Court Nominations*, *supra* note 5.
95. Howard, *supra* note 69, at 299.

After his election in 1968, Nixon "tried to shape the Court by appointing strict-constructionist judges."[96] His nomination of Warren Burger went smoothly, but he faced staunch resistance to his next two nominations, federal appellate judges Clement Haynsworth and Harrold Carswell. Both were opposed, leading Nixon to suggest there was a prejudice against the South.[97] Eventually, Justice Blackmun was nominated and unanimously confirmed.[98] The final two Nixon nominations, Powell and Rehnquist, both faced opposition in the Senate but were eventually confirmed.[99]

b. The Impact

The real legacy of Nixon's nominations to the Supreme Court was in their partisanship, as the Supreme Court was long thought to be above partisan politics.[100] Ideology was a consideration, but often nominations were made "based on legal ability, to cater to religious or ethnic groups, to repay political favors or to reward friends."[101] Even when ideology was the primary consideration, presidents sometimes "bet wrong."[102] Beginning with Nixon, and in direct response to the Warren Court, ideology became *the* deciding factor.

With his appointment of William Rehnquist, it is clear that ideology was Nixon's number one concern.[103] Nixon often spoke of a desire to appoint "strict constructionists"[104] who could "be expected to give a strict interpretation of the Constitution, and protect the interests of the average law-abiding American."[105] He insisted that they would "shift[] the balance away from protection of the criminal to the protection of law-abiding citizens."[106] In fact, according to an internal memo circulated just before he was to make a nomination, Nixon generally did not support criminal defendants nor civil-rights plaintiffs[107]—the two primary benefactors of the Warren Court.[108] The perfect nominee, someone Nixon

96. *Richard M. Nixon and the Supreme Court*, PRESIDENTIAL TIMELINE [hereinafter *Richard M. Nixon*], http://www.presidentialtimeline.org/#/exhibit/37/02 (last visited Nov. 15, 2016).

97. *Id.*

98. *Supreme Court Nominations Present–1789*, *supra* note 5.

99. *Id.*

100. Adam Liptak, *The Polarized Court*, N.Y. TIMES (May 10, 2014), http://www.nytimes.com/2014/05/11/upshot/the-polarized-court.html?_r=0.

101. *Id.*

102. *Id.*

103. Lee Epstein et al., *The Increasing Importance of Ideology in the Nomination and Confirmation of Supreme Court Justices*, 56 DRAKE L. REV. 609, 611 (2008).

104. KECK, *supra* note 7, at 108.

105. *Id.* at 114.

106. *Id.*

107. Lee Epstein et al., *supra* note 103, at 611. (according to an internal memo, "[a] judge who is a 'strict constitutionalist' in constitutional matters will generally not be favorably inclined toward claims of either criminal defendants or civil rights plaintiffs . . .").

108. *Id.*

could rely on to adhere to his vision of a "strict constructionist," turned out to be the author of the memo, none other than William Rehnquist.[109]

Unfortunately for Nixon, although he was groundbreaking in his focus on the political ideologies of his nominees, he too was unable to shape the court perfectly. The Supreme Court was far more conservative under Chief Justice Burger than it had been under Earl Warren, but it did not completely reverse the liberal movement. Nixon faced significant opposition from the Court towards the end of his own presidency, perhaps best highlighted by the infamous *Roe v. Wade* decision.[110] Although he had campaigned against abortion in his 1972 reelection bid,[111] the next year, the Supreme Court held in *Roe* that a woman's right to an abortion was to be protected.[112] Adding salt to the wound, Nixon's own appointee, Justice Harry Blackmun, penned the opinion.[113]

President Nixon's own tenure in the oval office ended abruptly,[114] yet he still had time to make four nominations to the Supreme Court[115] and undoubtedly shaped it for the next generation. The Burger Court is not as well known or as radically influential as the Warren Court, but it is of equal importance when examining critical junctures in the Court's history. It was the turning point that marked the Supreme Court's pivot toward an ideological body, and it marks a transition into the modern nomination process. Historically, the focus in nominations had been on satisfying geographic diversity or providing political favors. Today, the focus is on the justice's ideologies more than anything else.[116]

3. Recent History and Increased Partisanship

Recent years have seen an incredible transformation of the Supreme Court into one that is divided along party lines. Continuing the ideological trend Nixon began, "Reagan and his legal advisers carried this effort even further, systematically vetting judicial candidates on a series of ideological grounds."[117] Today, ideological polarization of the current Supreme Court justices is well-documented. Of the eight justices,[118] four are considered conservative: Thomas, Roberts, Alito, and Kennedy;[119] and four are considered liberal: Kagan, Sotomayor, Ginsburg, and

109. *Id.* at 612.
110. 410 U.S. 113 (1973).
111. *Richard M. Nixon and the Supreme Court*, *supra* note 96.
112. *Roe*, 410 U.S. 113.
113. *Id.*
114. President Nixon resigned amid the Watergate Scandal on August 9, 1973. *See* Todd E. Pettys, *Choosing a Chief Justice: Presidential Prerogative or a Job for the Court?*, 22 J.L. & POL. 231, 261 (2006) (citing MICHAEL A. GENOVESE, THE NIXON PRESIDENCY 220 (1990)).
115. *Supreme Court Nominations Present–1789*, *supra* note 5.
116. *See* discussion *infra* Part III.
117. KECK, *supra* note 7, at 157.
118. Unfortunately, Justice Scalia passed away on February 13, 2016. Liptak, *supra* note 1.
119. Conservative Justice Antonin Scalia previously held the seat that is currently vacant. Michael D. Shear, *Supreme Court Vacancy Has Left and Right Ready to Pounce*, N.Y. TIMES (Feb. 17, 2016), http://www.nytimes.com/2016/02/18/us/politics/antonin-scalia-supreme-court-nomination.html.

Breyer.[120] Between 2001 and 2013, 70% of five-four divided decisions were based upon the ideological split of the court.[121] Justice Kennedy is widely and appropriately considered the most important vote. He has sided with the majority in five-four decisions a remarkable 80% of the time.[122]

Although the Supreme Court may be reasonably defined along party lines, it does not lock in every decision. Rather, they are simply predictable. For example, in *National Federation of Independent Business v. Sebelius*, it was Chief Justice Roberts, not Kennedy, who stunned the political world by siding with the liberals in upholding President Obama's healthcare legacy.[123] Unfortunately such surprises are few and far between, and among the issues that the Court has recently divided along ideological lines are "abortion, affirmative action, campaign finance, and the treatment of enemy combatants."[124]

Ideological divides of the Supreme Court are not new, as each Court going back over a century is often defined as either liberal or conservative. For the first time, though, the ideological divide lines up perfectly with the president who made the nominations.[125] A Democratic president nominated every liberal justice currently on the court,[126] just as a Republican president nominated every conservative justice.[127] President Reagan nominated Antonin Scalia and Anthony Kennedy,[128] President George H.W. Bush nominated Clarence Thomas,[129] and President George W. Bush nominated John Roberts and Samuel Alito.[130] Conversely, President Clinton nominated Stephen Breyer and Ruth Bader Ginsburg,[131] while President Obama nominated Elena Kagan and Sonia Sotomayor.[132]

The importance of such a phenomenon cannot be understated. With potentially four seats to be filled by President Trump, not only is it an incredibly rare opportunity, but it is one that for the first time, is almost entirely predictable. Since Donald Trump, a Republican, won the election, it is almost guaranteed that he will nominate conservative justices to fill the vacancies.

120. Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 243 (2013).
121. *Id.*
122. *Id.*
123. 132 S. Ct. 2566, 2609 (2012).
124. Hasen, *supra* note 120, at 242.
125. *Id.* at 243.
126. *Supreme Court Nominations Present–1789, supra* note 5.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* President Obama made one more nomination during his tenure—Merrick Garland.

C. The Appointment Process

Although the process for becoming a justice on the Supreme Court is often filled with drama and theatrics, the literal procedure is remarkably straightforward. The president nominates a candidate, the Senate holds committee hearings to vet the candidate, and finally the entire Senate debates and votes.[133] Additionally, this process has arisen more out of practice than any literal set of constitutional rules.

Article III of the United States Constitution creates the Supreme Court, details its powers, and sets forth certain judicial procedures.[134] What Article III fails to mention is any specific procedure detailing how one becomes a justice of the Supreme Court.[135] It is Article II, which creates and explains the powers of the Executive,[136] that contains the only statement regarding nomination of Supreme Court justices.[137] It states that the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court . . . ."[138] Thus begging the question: what exactly does "Advice and Consent of the Senate" consist of?

Without further constitutional guidance, the Senate created its own rules for confirmation. Senate Rule XXXI explains that when a president makes a nomination to the Senate, it is referred to the "appropriate committee."[139] For Supreme Court nominations, that means the Judiciary Committee.[140] The final question on all nominations, according to Rule XXXI "shall be 'Will the Senate advise and consent to th[e] nomination?'"[141] Fifty-one votes answers the question affirmatively.[142]

Before the Judiciary Committee takes action on a nomination, however, there is also an informal requirement that the nominee's home state Senators approve of the nominee.[143] This primary confirmation by the home state is called "blue slipping."[144] It has been opined that the blue-slip process covered the advice portion of "advice and consent," while

133. Charles W. "Rocky" Rhodes, *Navigating the Path of the Supreme Appointment*, 38 FLA. ST. U. L. REV. 537, 568–69 (2011).

134. U.S. CONST. art. III.

135. *Id.*

136. *Id.* art. II.

137. *Id.* art. II, §2.

138. *Id.*

139. S. COMM. ON RULES & ADMINISTRATION, STANDING RULES OF THE SENATE, Rule XXXI [hereinafter Rule XXXI], https://www.gpo.gov/fdsys/pkg/CDOC-113sdoc18/pdf/CDOC-113sdoc18.pdf# (last visited Nov. 15, 2016).

140. Rhodes, *supra* note 133, at 568 ("Once the President nominates a candidate, the Senate Judiciary Committee begins reviewing the nominee's background, qualifications, prior judicial opinions, and other writings.").

141. Rule XXXI, *supra* note 139.

142. *Id.*

143. Schweitzer, *supra* note 41, at 913.

144. *Id.* at n.25 ("The term 'blue slip' refers to the process in which the SJC chair sends a blue slip of paper to the home state senator of the nominee, who must return the slip for the nominee to get a hearing.").

the committee and Senate votes provided the consent.[145] Today this requirement appears to be nothing more than a formality, however, further muddying the waters around "Advice and Consent."

To recap once more, in order to become a justice on the Supreme Court of the United States, one must first be nominated by the president, and then confirmed by the United States Senate.[146] Since the Constitutional guidelines are scarce, the Senate has created its own rules governing confirmation,[147] which take form similar to any other act of the Senate, beginning in committee and requiring just a simple majority for passage.[148]

Supreme Court justices and all federal judges are appointed for life, or until they voluntarily step down.[149] Thus, there is virtually no way of predicting exactly when a seat will become vacant. Justice James F. Byrnes served just over a year on the Court before leaving the bench for a position as head of the Office of Economic Stabilization.[150] Justice William O. Douglas, on the other hand, served for over thirty-six years,[151] only to be replaced by Justice John Paul Stevens who himself then served for over thirty-four years.[152]

The unpredictability of a justice's tenure is arguably part of what holds the system in check. It is difficult to predict exactly how an individual will act once he receives such job security. But when a president has the opportunity to make multiple nominations, as many as nine in one instance,[153] he gains more influence on the process. One justice cannot control the decisions of the Court, but multiple justices can have a much greater influence upon the Court's overall identity. The president does not need every single justice to be perfectly predictable at all times. Rather, he just needs to have a general sense of how each will decide.

III. ANALYSIS

We are in the midst of perhaps one of the most significant turning points in American political history, and most Americans may not even notice as it passes us by. President Donald Trump is likely to fill four va-

145. *Id.* at 913.

146. *See* discussion, *supra* Part II.C.

147. Rule XXXI, *supra* note 139.

148. Schweitzer, *supra* note 41, at 916 ("On one hand, the Advice and Consent Clause does not require any specific action by the Senate regarding a nominee, and it does not specify whether or not a majority or supermajority is required to 'consent' for confirmation."). Thus, the Senate has determined a simple majority is sufficient.

149. U.S. CONST. art III, § 1.

150. *Byrnes, James Francis, (1882–1972)*, BIOGRAPHICAL DIRECTORY U.S. CONGRESS, http://bioguide.congress.gov/scripts/biodisplay.pl?index=B001215 (last visited Sept. 22, 2016).

151. *Members of the Supreme Court*, SUP. CT. U.S., http://www.supremecourt.gov/about/members_text.aspx (last visited Nov. 15, 2016).

152. *Id.*

153. Franklin D. Roosevelt made nine successful nominations to the Supreme Court during his presidency. *See, e.g.*, *Supreme Court Nominations Present–1789*, *supra* note 5.

cancies[154] on the Supreme Court for the first time in almost fifty years, and in those fifty years the Court has undergone a significant evolution. The confirmation process has taken on an entirely new form,[155] and the selection process has become much more of a politically charged event. Today, most questions focus on a nominee's ideologies instead of his or her respective qualifications.[156]

In light of the political ramifications and the partisan politics at play in the Senate, Median Voter Theorem suggests that a president is best served by nominating a candidate that is strongly to one side of the political spectrum.[157] For this reason, the ideologies of nominees have become highly predictable. Furthermore, the Constitutional system for determining Supreme Court justices, in place for over two centuries, enforces this unusual conundrum.[158] At this point in time, it should be recognized that the potential impact is enormous.

A. Predicting Vacancies

It is, of course, entirely unpredictable exactly when a vacancy will occur on the Supreme Court. As previously mentioned, the difference between the shortest tenured justice and the longest is an astonishing thirty-five years.[159] Additionally, George Washington, who needed to create the first Supreme Court, made a record ten nominations, President Franklin Roosevelt made eight nominations,[160] yet several other presidents, most recently Jimmy Carter, never had the opportunity to make a single appointment.[161]

There are two factors that allow us to make reasonable predictions about when vacancies will arise—age of retirement and length of service. It should be noted that while one seat is currently vacant,[162] none of the justices, as far as I am aware, have publicly expressed their intentions to retire any time soon.[163] It is not unreasonable for us to speculate, howev-

154. David M. Herszenhorn, *Senate Republicans Stand by Refusal to Consider Any Supreme Court Nominee*, N.Y. TIMES (Mar. 10, 2016), http://www.nytimes.com/2016/03/11/us/politics/senate-judiciary-committee-supreme-court-nominee.html.

155. *See* Rhodes, *supra* note 133, at 548–70.

156. *See id.* at 568.

157. *See* discussion *infra* Part III.C.2.

158. *See* discussion *infra* Part III.B.

159. *See* discussion *supra* Part II.C.

160. Roosevelt also elevated Justice Harlan Stone from Associate Justice to Chief Justice, and his final nomination replaced a justice that Roosevelt himself had nominated to the court previously. *See Supreme Court Nominations Present–1789*, *supra* note 5.

161. Andrew Johnson, Zachary Taylor, and William Henry Harrison all failed to make a single nomination; however, none served a full term in office. Ten more presidents only made one nomination. *See, e.g.*, *Supreme Court Nominations*, *supra* note 5.

162. Justice Scalia's.

163. A news article from January 2016 speculated about several of the justices and remarked upon recent statements they had made about retirement. Rebecca Shabad, *How Could the Next President Reshape the Supreme Court?*, CBS NEWS (Jan. 5, 2016), http://www.cbsnews.com/news/the-next-president-could-reshape-the-supreme-court/ (Justice Breyer for instance was quoted as saying "I guess at some point I will retire. You want to know when. I don't know. I will figure it out at some point.

er, as the three oldest and longest tenured justices are approaching all time records for the Court.[164]

1. Based on Age of Retirement

In January 2017, when the next president takes office, Justices Breyer, Ginsburg, and Kennedy will each be over the age of seventy-eight.[165] Justice Breyer will be seventy-eight,[166] Justice Kennedy will be eighty,[167] and Justice Ginsburg will be eighty-three.[168] Without regard to any of the justices' past medical issues, history suggests it is entirely possible, even likely, that all three seats will become vacant within the next presidential term. If President Donald Trump wins two terms in office, it would become almost certain that he or she would fill four vacancies, if not more. It would lead to several statistical anomalies for Justices Breyer, Ginsburg, and Kennedy to serve beyond the next two terms—becoming exponentially more anomalous if all three reached the milestones together.

A 2006 study[169] found that in the period between 1971 and 2006, the average age that justices left office was at an all time high.[170] Justices that retired during that time period did so at an average age of seventy-eight.[171] That mark represented an eleven-year increase over the previous period (1941–1970),[172] and a more than six-year increase over the previous record of seventy-two years old.[173] At the beginning of President Trump's term, all three justices will have already surpassed the greatest average age of retirement in that study.[174] Even considering that this study only indicates the average age at which justices retire rather than their peak ages, it is enlightening. It is unreasonable to expect all three to surpass this number by four to eight years.

2. Based on Length of Service to the Court

In addition to examining the average age of retirement for Supreme Court justices, the average length of service of the justices indicates that the vacancies are imminent. There is significant scholarly debate as to

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How do I know? Normally it is a personal decision . . . and I will make it personally at some point . . .").

164. *See* discussion *infra* Part III.A.3.

165. *Biographies of Current Justices of the Supreme Court*, *supra* note 3.

166. *Id.*

167. *Id.*

168. *Id.*

169. Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769 (2006).

170. *Id.* at 782.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

how one can best measure trends in Supreme Court justices' tenures,[175] but no matter how the data is analyzed, the result points toward the fast-approaching retirements of Breyer, Ginsburg, and Kennedy.

The Supreme Court's own website states that the average length of service for a justice is sixteen years.[176] It does not provide any information on how the number was obtained, but they likely added up each justices' length of service and took the average without regard to time period or reason for leaving office. Legal scholars Steven G. Calabresi and James Lindgren[177] chose to break up their research by thirty-year periods,[178] and their data declares that between 1971 and 2006 the average length of service was about twenty-six years, up from just over twelve years between 1940 and 1971.[179]

In direct response to Calabresi and Lindgren's research,[180] however, David R. Stras and Ryan W. Scott analyzed the data using alternative methods and found that the data paints a different picture depending on the time period points of view.[181] Stras and Scott examined the data by decade (as opposed to thirty-year periods) and by groups of five justices.[182] Their findings display a different picture, though, a similar message. They found that by decade, the average length of service is increasing but at a slower pace than Calabresi and Lindgren proposed.[183] Additionally, when examined in groups of five, the data seems to be rather periodic, with only a slight upward trend.[184]

The disagreement among the various researchers appears to be over the historical significance of the data rather than mistakes within data itself.[185] The data obviously changes depending on how it is framed, but it is absolutely sufficient to show that whatever the average age is that justices retire, Justices Breyer, Ginsburg, and Kennedy are fast approaching it. With respect to the variances when examining averages, either at age of retirement or length of service, it is perhaps most enlightening simply

175. *See, e.g.*, Calabresi & Lindgren, *supra* note 169; David R. Stras & Ryan W. Scott, *An Empirical Analysis of Life Tenure: A Response to Professors Calabresi & Lindgren*, 30 HARV. J.L. & PUB. POL'Y 791, 795–96 (2007).

176. *Frequently Asked Questions—Justices*, SUP. CT. U.S., http://www.supremecourt.gov/faq_justices.aspx#faqjustice4 (last visited, Nov. 15, 2016).

177. Steven G. Calabresi is the George C. Dix Professor of Law at Northwestern University. Calabresi & Lindgren, *supra* note 169. James Lindgren is the Benjamin Mazur Research Professor at Northwestern University. *Id.*

178. *Id.* at 782.

179. *Id.* at 853.

180. Stras & Scott, *supra* note 175, at 793.

181. *Id.* at 795–96.

182. *Id.*

183. *Id.*

184. *Id.*

185. The debate appears to be about how Calabresi and Lindgren interpreted the data. "Before responding to the revised version of Calabresi and Lindgren's article, we should clearly identify the point of disagreement. Calabresi and Lindgren's empirical claim about life tenure has two features. First, they contend that changes in the actual operation of life tenure since 1970 have been *'dramatic.'* Second, they argue that the changes are historically *'unprecedented.'* Both aspects of their claim deserve fuller explanation." *Id.* (emphasis added).

to examine the justices' ages and, thus, truly appreciate the extremes that they are approaching.

3. Based on All-time Records

In addition to the purely statistical analysis of lengths of service and average age of retirement, it would lead to numerous historic records for the three justices if they served completely throughout the next two presidential terms. For example, the oldest age that a justice has continued to serve was Oliver Wendell Holmes, Jr.,[186] who was ninety-years old when he retired.[187] If Ruth Bader Ginsburg holds her seat through the next two terms, she would tie that mark.[188] Similarly, if Anthony Kennedy is still a Supreme Court Justice in 2025, he will be the longest tenured justice in Supreme Court history.[189]

With one vacancy already on the Court, no matter how one examines the data, it is clear that it faces a turning point. It is exceedingly likely that President Donald Trump will make four appointments to the Supreme Court, as it would take some amazing feats of longevity for the three justices to prove otherwise. With the way the confirmation process has evolved and now exists, that is a frightening prospect. The Supreme Court has become more ideological than ever before, and the current appointment process entrenches that fact. The amount of influence President Trump will have over the entire Judiciary is astonishing.

B. Evolution of the Confirmation Process

A historical overview of Supreme Court nominations and confirmations shows that while political ideology was obviously never ignored, it was never the major deciding factor it has become today.[190] There are still many factors presidents and senators consider when they make appointment decisions, and what is considered *most* important has varied throughout this nation's history. Research shows that today, however, political ideology is undoubtedly the primary factor presidents take into consideration when making their nominations.[191]

Political and legal researchers have compared the ideologies of presidents and the justices they nominated[192] and reached two conclusions. The first conclusion is, unsurprisingly, that presidents tend to choose individuals who share their ideologies.[193] The research also

186. *Frequently Asked Questions—Justices*, *supra* note 176.
187. *Id.*
188. *Biographies of Current Justices of the Supreme Court*, *supra* note 3.
189. In January 2025, Anthony Kennedy will have been a Supreme Court Justice for nearly thirty-seven years, beyond the record thirty-six-year tenure of William O. Douglas. *See id*; *Frequently Asked Questions—Justices*, *supra* note 176.
190. Lee Epstein et al., *supra* note 103, at 620.
191. *Id.*
192. *Id.* at 619.
193. *Id.* at 620.

showed, however, that the association between the two has strengthened over time,[194] which tends to indicate that political ideology has grown to become a larger factor in the decision-making process than ever before.

1. Changing Factors Considered

At our nation's inception, the primary concern of presidents such as Washington, Adams, and Jefferson appears to have been geography.[195] In fact, "[o]f George Washington's first six appointments, two hailed from the East, two from the Mid-Atlantic, and two from the South. This was no coincidence."[196] George Washington's government was extremely concerned with unity, as up until that time, and in fact for long afterwards, the states saw themselves as entirely separate sovereignties. The idea of giving up powers to a central, federal government was still a nascent concept, and thus political decisions tended to take into account the geography of the politicians themselves.[197] Just as Washington's self-imposed two-term limit set an unwritten (at the time) precedent for his successors, so too did his geographically concerned Supreme Court.[198] For well over a century, "President after President adhered to the norm of geographic diversity that Washington had established."[199]

At the beginning of the twentieth century, electoral considerations seem to have become the most predominant factor.[200] In this era, nominations were meant to empower either the president or his party in a certain way.[201] Eisenhower's nomination of William J. Brennan, for example, a Catholic and a Democrat, was largely driven because he thought it would improve his chances at reelection.[202] Similarly, William Howard Taft attempted to appeal to voters in New Jersey with his appointments.[203] Other factors that at times have been predominant include rewarding party loyalty and even religion.[204] Political ideology has certainly always been a consideration—John Adams famously tried packing the Court with Federalist judges, after all[205]—however, it simply was not the primary concern that it is today.

194. *Id.*
195. *Id.* at 612–13.
196. *Id.* (footnotes omitted).
197. *Id.* at 613 ("In the appointments to the great offices of the government, my aim has been to combine geographical situation, and sometimes other considerations.") (quoting William J. Daniels, *The Geographic Factor in Appointments to the United States Supreme Court: 1789–1976*, 31 W. POL. Q. 226, 227 (1978) (quoting 11 THE WRITINGS OF GEORGE WASHINGTON 78 (Jared Sparks ed., 1855))).
198. *Id.* at 613–14.
199. *Id.*
200. *Id.* at 614.
201. *Id.*
202. *Id.* at 615.
203. *Id.* at 614.
204. *Id.* at 615.
205. *Id.* at 613.

2. Statistical Examination

In their article, *The Increasing Importance of Ideology in the Nomination and Confirmation of Supreme Court Justices*, Lee Epstein, Jeffrey A. Segal, and Chad Westerland attempted to statistically analyze political ideology's effect on a Supreme Court appointee's nomination.[206] In order to examine this relationship, they needed to look at "reliable and valid" measures of the political ideologies of both the president and nominees prior to their nomination.[207]

For the Supreme Court nominees, the researchers utilized a method that was developed by Segal and Albert D. Cover,[208] which "relies on newspaper editorials written about the candidate between the time of his or her nomination to the Supreme Court and the Senate's vote."[209] The researchers examined editorials paragraph by paragraph, assigning scores based upon whether the paragraph suggested moderate, conservative, or liberal views.[210] These scores are known as "Segal-Cover" scores[211] and have been updated so that there is data on every nominee "from Hugo L. Black through Samuel Alito."[212] For examining the presidents' ideologies, the researchers used a system developed by Keith Poole, based off of the presidents' positions on bills before Congress.[213]

What the data shows is that when we compare a nominee's Segal-Cover score to the presidents' ideologies, we find that the two are closely associated.[214] Of course, this is to be expected. What is most illuminating, however, is the fact that since Eisenhower's nominations (the first president for which the scores are available), the relationship between the president and nominee's ideology is strengthening.[215] Eisenhower's nominations are again a perfect indicator of the evolution that has occurred. Justice Whittaker's ideology is closely aligned with Eisenhower's, but Justices Harlan, Brennan, Warren, and Stewart's are not.[216] President George W. Bush's two nominees, on the other hand, are "an extremely close fit."[217]

This research put together by Epstein, Segal, and Westerland is absolutely essential to illuminate the growing relationship between a president and his nominee's ideologies, but it must be noted that, unfortunately, the data is far from definitive. While it certainly identifies trends,

206. *Id.* at 609.
207. *Id.* at 616.
208. *Id.*
209. *Id.*
210. *Id.* (citing Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 559 (1989)).
211. *Id.* at 617.
212. *Id.*
213. *Id.*
214. *Id.* at 620.
215. *Id.*
216. *Id.*
217. *Id.*

it is susceptible to a small-sample-size bias, as the data is only available for nine presidents and twenty-eight nominations.[218] The authors also examined the impact of political ideology on senators' votes for confirmation in order to determine whether it plays a significant role in whether they will vote "yay" or "nay."[219] For this question, there was much more data available to examine—"3,809 votes cast by Senators, covering forty-one candidates for the Supreme Court (from Black to Alito)."[220]

Once again the results were enlightening, though unsurprising. When it comes to the senators' votes, additional considerations must be taken into account, since senators have no say in who is nominated, just in whether they are confirmed.[221] The authors chose to focus on the qualifications of the candidate, the ideological distance between the nominee and senator, whether the president was considered "strong," and whether the president and senator were from the same party.[222]

Much of the data was again predictable. Senators were found to be less likely to vote "yay" for a moderately qualified candidate when the two are at ideological extremes, whereas they were exceedingly more likely to vote "yay" when their ideologies were most similar.[223] Similar to the relationship found in presidents and their nominees, the researchers also found that ideology is playing an increasingly important role in senators' decisions.[224] According to the authors, "[t]he results could not be more telling. To [them], it is simply impossible to look at [the data] and ignore the increasing importance of ideology over time."[225]

Thanks to this extensive research, it is clear that political ideology is not only a major factor in Supreme Court nominations, but it is also more important than ever before. There is much speculation as to what is causing this recent phenomenon,[226] with some blaming the increasing political nature of the Court[227] among other ideas. What is clear, though, is that the confirmation process encourages such results.

C. How the Senate's Procedure Creates Ideological Justices

The process by which Supreme Court Justices are appointed is rather straightforward, though deceptively so. As discussed previously, the

218. *Id.*
219. *See generally id.* at 627.
220. *Id.* at 622.
221. *Id.*
222. *Id.*
223. *Id.* at 628–29 ("[T]he predicted probability of a Senator voting for a moderately qualified candidate is a highly unlikely 0.06 when the candidate and Senator are ideological extremes; that figure increases to 0.91 when they are at the closest levels.") (footnotes omitted).
224. *Id.* at 629.
225. *Id.* at 631.
226. *Id.* (footnote omitted).
227. *Id.* ("Robert Bork himself lays the blame—or credit, depending on one's perspective—on the Court and, in particular, its 'increasingly political nature . . . , which reached its zenith with the Warren Court . . . .'").

president nominates a candidate, and the United States Senate subsequently votes to confirm or deny.[228] The way the process actually occurs, though, is extremely contentious and partisan, and this is becoming truer and truer with each passing appointment. Simple evidence of this is the fact that the length of time from a candidate's nomination to his or her confirmation is increasing,[229] and so is the amount of time each candidate spends answering questions before the Judiciary Committee.[230] This process for determining membership on a supposedly "apolitical" body[231] only serves to intensify the growing political ideologies of the Court.

1. Simple-majority Rules and Filibusters

According to Senate Rule XXXI, it takes just a simple majority, fifty-one votes, for the Senate to confirm the president's nominee to the Supreme Court.[232] Before the Senate in its entirety can vote on a candidate, however, that candidate must appear before the Senate Judiciary Committee, usually "six to nine weeks after the nomination."[233] "After the hearing, the Judiciary Committee reconvenes and reports the nomination with either a *favorable*, *unfavorable*, or *no recommendation* to the entire Senate."[234] After this recommendation, the Senate will schedule a time to debate the candidate on the Senate floor and then vote in a recorded roll-call vote to confirm the nomination.[235]

In addition to Rule XXXI's simple majority requirement, senators may also filibuster potential nominees by endlessly debating so that no vote may be held. In 2013, Democrats, at the time in control of the Senate, initiated a so-called "nuclear option" for the confirmation of federal judges.[236] Republicans had been using filibusters to block many of Presi-

228. *See* discussion *supra* Part II.C.

229. *See* BARRY J. MCMILLION, CONG. RES. SERV., R44234, SUPREME COURT APPOINTMENT PROCESS: SENATE DEBATE AND CONFIRMATION VOTE 12, 12–13 (2015), https://www.fas.org/sgp/crs/misc/R44234.pdf.

230. *See COURT IN TRANSITION: Republicans Speak of Respect of Roberts' Peers, and Democrats Issue Warnings*, N.Y. TIMES (Sept. 16, 2005), http://query.nytimes.com/gst/fullpage.html?res=9C02E5D91E31F935A2575AC0A9639C8B63&sec=&spon=&pagewanted=1.

231. Jack Wade Nowlin, *The Constitutional Illegitimacy of Expansive Judicial Power: A Populist Structural Interpretive Analysis*, 89 KY. L.J. 387, 433 (2001) ("The Supreme Court was understood to be an institution largely *apolitical* in its determination of constitutional meaning, decidedly limited and deferential in its application of that meaning to other institutions of government, and politically vulnerable as measured against Congress or the President.") (emphasis added).

232. Rule XXXI, *supra* note 139.

233. Rhodes, *supra* note 133, at 568 ("Once the President nominates a candidate, the Senate Judiciary Committee begins reviewing the nominee's background, qualifications, prior judicial opinions, and other writings. The nominee is also expected to complete a detailed Committee questionnaire, which includes questions on the nominee's professional history, financial affairs, jurisprudential views, and any potential legal or ethical breaches.").

234. *Id.* at 569 (emphasis added).

235. *Id.*

236. Paul Kane, *Reid, Democrats Trigger 'Nuclear' Option; Eliminate Most Filibusters on Nominees*, WASH. POST (Nov. 21, 2013), https://www.washingtonpost.com/politics/senate-poised-to-limit-

dent Obama's judicial nominees, so the Democrats simply changed the rules.[237] They removed the filibuster option permanently so that a simple majority would definitively be all that is necessary for confirmation.[238] Democrats left the filibuster in place for Supreme Court nominations, however, with an eye to the future when they might not hold the majority.[239] Now that Republicans control the Senate and many potential vacancies are on the horizon, there has been renewed discussion of expanding the nuclear option to include Supreme Court nominees.[240]

The entire process, from the day a nomination is made until the Senate votes, takes several weeks[241] and "provides ample opportunity for scrutinizing the nominee's record . . . ."[242] "The glare from this extended public spotlight has influenced all the institutional actors involved in judicial appointments, including the media, special interest groups, senators, the president, and nominees."[243] Throughout the early history of the Court and into the mid-twentieth century, the process was much simpler and performed in private.[244] Before 1925, no justice had ever appeared in a hearing before the Senate,[245] and it took another thirty years for it to become the standard practice.[246]

It was during the 1950s that the Judiciary Committee began the practice of interviewing all nominees, which we still observe today.[247] At the hearings, senators attempt to ascertain a nominee's approaches to—and views on—legal issues through pointed Committee examination.[248] Almost simultaneously with the increase we have observed regarding justices' political ideologies,[249] the duration and specificity of Committee members' questions has also intensified.[250] Additionally, the involvement of special-interest groups at the hearings has increased dramatically. Between 1930 and 1968, twenty-eight representatives of interest groups tes-

filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html.

237. *Id.*

238. *Id.*

239. *Id.*

240. Kristina Peterson, *Republicans Weigh Expanding 'Nuclear Option' for Supreme Court Nominees*, WALL ST. J.: WASH. WIRE (Jan. 24, 2015, 1:22 PM), http://blogs.wsj.com/washwire/2015/01/24/republicans-weigh-expanding-nuclear-option-for-supreme-court-nominees/.

241. Rhodes, *supra* note 133, at 569.

242. *Id.*

243. *Id.*

244. *Id.* at 554.

245. *Id.* at 561.

246. *Id.*

247. It is no coincidence this change occurred shortly after the *Brown v. Board of Education* decision. *Id.* at 561–62.

248. *Id.* at 562 ("In years since, all Supreme Court nominees have appeared before the Committee to answer questions related to their judicial philosophy, the role of precedent, and even their opinions regarding specific cases.").

249. *See* discussion *supra* Part III.B.2.

250. Rhodes, *supra* note 133, at 562; *see also* MCMILLION, *supra* note 229.

tified at hearings.[251] In the time since 1968, special-interest groups have been involved in all but one hearing, "usually with several—and in some instances dozens—of organizations testifying through representatives."[252]

This increased interest in the confirmation process, from senators and special-interest groups alike, has created a politically charged spectacle that would be unheard of to the founding fathers. It has continually increased in grandeur over the last seventy years, not coincidentally concurrent with the Court's history. It is not unreasonable to trace this phenomenon's causes back to the Warren Court's liberalism, Nixon's resultant campaign against the Court, and its conservative tilt.[253] In addition to the spectacle that is confirmation hearings, political voter theories also help explain why the candidates that successfully pass this gauntlet tend to be firmly ideological.

2. Applying Median Voter Theorem

Given that Senate confirmations come down to the votes of just one hundred senators,[254] it is fairly susceptible to political theories that are less applicable in the real world. The Median Voter Theorem ("MVT"), though contested in terms of real-world applicability,[255] is surprisingly relevant to examining Senate votes for Supreme Court nominees, as many of the pitfalls of the theory are overcome when it comes to examining a single body.

MVT makes two key assumptions: "(1) [i]ssues are defined along a single dimensional vector x, and (2) [e]ach voter's preferences are single-peaked in that one dimension."[256] In layman's terms, what these assumptions attempt to show is first, that voters can place their preferences along a one-dimensional line, and second, that voters will make the decision that most similarly comports with their preference. Essentially, voter decisions can be graphed.

These two assumptions are rarely satisfied in the real world for various reasons. Low voter turnout, primary elections, and twenty-four-hour news cycles all make it impossible for candidates to merely appeal to the literal median. Although candidates usually try to appeal to the median voter within their own party, there are so many separate factors at play that it is overly simplistic to examine most elections this way.

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251. Rhodes, *supra* note 133, at 563 ("[A]ppearing in a mere nine out of twenty-five nominations considered by the Senate.").

252. *Id.*

253. *Id.* at 563–64.

254. Usually. Sometimes Senators choose to abstain from confirmation votes. *See, e.g.*, *Confirmation of Nomination of Thurgood Marshall, the First Negro Appointed to the Supreme Court*, GOVTRACK, https://www.govtrack.us/congress/votes/90-1967/s176 (last visited Nov. 15, 2016) (recording that twenty Senators abstained from voting).

255. Paul H. Edelman & Jim Chen, *"Duel" Diligence: Second Thoughts About the Supremes as the Sultans of Swing*, 70 S. CAL. L. REV. 219, 230 (1996) ("Far from being a foregone conclusion, the median voter theorem is hotly contested among positive political theorists.").

256. *Id.* at 231.

This theory is strengthened, however, with regards to the Supreme Court. "Within the context of unified government and absent scandal, Supreme Court nominees with solid credentials and judicial philosophies that place them within the mainstream *of their own* political parties . . . should be expected to succeed."[257] Essentially, the best strategy to get the necessary majority, just fifty-one votes, is to find a nominee that fits squarely within one's own party. "Getting to fifty-plus-one in the Senate means securing the base."[258]

This makes logical sense as well. A nominee who falls in the center of the political spectrum will make both party's cautious and will receive no easy votes. On the other hand, a firmly conservative or liberal nominee will almost certainly gain his or her own party's votes, thus gaining confirmation either if their party has a majority, or they just win over a small portion of the opposition. President Bush's failed nomination of Harriet Miers in 2005 provides illuminating evidence of this phenomenon.

Miers was admittedly a strange choice for the position for many reasons,[259] but what frustrated senators most was that they could not pin down her political identity.[260] "Her positions could not be firmly [understood] on abortion and gay rights . . . . [s]he favored affirmative action for minorities and women. She named 'Warren' as one of two justices who she held in the highest regard [and s]he donated to Al Gore's presidential campaign in 1988."[261] On the other hand, Miers did have significant experience that would seem to qualify her for the position. She was a successful lawyer and leader in a large Texas law firm when relatively few women were,[262] she served in local and state government, and she had prior experience in the executive branch.[263] Unfortunately, she was too unpredictable in her political views and too much of a centrist to gain traction in the Senate. Miers' political opponents came from both sides of the aisle,[264] so she withdrew her nomination.[265]

President Bush's replacement nomination, Samuel Alito, Jr., comported exactly with what we expect a successful nominee to look like. "[T]he Bush administration moved to secure its political base by naming

257. Keith E. Whittington, *Presidents, Senates, and Failed Supreme Court Nominations*, 2006 SUP. CT. REV. 401, 403 (2006).

258. *Id.*

259. Harriet Miers lacked any judicial experience:she was George Bush's white house counsel and before that his private attorney. She did not seem to fit the bill of a typical Supreme Court nominee. Tuan Samahon, *The Judicial Vesting Option: Opting Out of Nomination and Advice and Consent*, 67 OHIO ST. L.J. 783, 792 (2006).

260. *Id.* at 794.

261. *Id.* at 794–95.

262. *Id.* at 792.

263. *Id.* at 792–93 (Miers "served as Assistant to the President and Staff Secretary, Deputy Chief of Staff for Policy, and eventually White House Counsel.").

264. *Id.* at 796.

265. *Id.*

a new nominee around whom its conservative base would rally."[266] The nomination of Alito was exactly what Median Voter Theorem predicted. He gained all the votes necessary from a strong Republican backing.

Due to the growing importance of political ideology in presidential nominations, the expanded confirmation process that allows for heightened scrutiny of the candidates, and voter theories,[267] what we are left with is an unfortunately predictable system.

3. Logical Predictability

Perhaps obvious, the greatest indicator of a successful confirmation is simply whether the president is from the same party that controls the Senate.[268] Presidents have only made thirty-three nominations when the opposition party controlled the Senate, but of those only eighteen succeeded, for a success rate of just 54.5%.[269] Alternatively, presidents have a 90% success rate when their own party has a majority in the Senate.[270] They have succeeded on 102 of 114 such nominations.[271]

This data is enlightening for two reasons. First, a logical inference to draw from it is that political ideology is a major factor in the determination. If the parties involved were unconcerned with political ideology, the difference in the two success rates would not be so stark. The correlation may still exist and is not a definitive indicator, but it is certainly significant. Second, it must be noted that the data is admittedly sparse. There have only been a total of 147 nominations in the history of the United States.[272] Of those, only 22.4% were made while the opposition party controlled Congress.[273]

This fact alone, though, is useful for the analysis. Presidents clearly prefer to make nominations when their own party controls the Senate. This will have an impact on when presidents make their nominations—sometimes waiting to outlast an election cycle. It also has an impact on justices' decisions to retire. Justices may retire early if they want the current president to replace their seat, as Earl Warren did, or they may try to wait and outlast a presidential term.[274]

The success and failure of a presidential nomination to the Supreme Court largely depends upon which parties control the Senate and the White House. This effect plays into both the president and the justices'

266. *Id.*
267. *See* discussion *supra* Part III.
268. John Anthony Maltese, *Confirmation Gridlock: The Federal Judicial Appointments Process Under Bill Clinton and George W. Bush*, 5 J. APP. PRAC. & PROCESS 1, 4 (2003).
269. *Id.* at 5.
270. *Id.*
271. *Id.*
272. Depending on how it is calculated. As many as seven more nominations have been made, but they were all withdrawn for various reasons. *Id.* at 5 n.18.
273. *Id.* at 5.
274. KECK, *supra* note 7, at 107.

decision-making, and it also increases the possibility that a nominee will be judged by his or her political ideology as opposed to other factors.

D. The Significance of the System: Potential Outcomes

The previous discussion, detailing the growing trend toward ideological justices and the system that is percolating it, is an important phenomenon to address in its own right; however, it deserves special attention because the Court is nearing a critical turning point. Donald Trump will likely have the opportunity to fill four vacancies on the Supreme Court, something that has not happened in nearly fifty years. Coupled with the fact that the Court has increasingly become an ideological branch, there is potential for President Trump to have an unprecedented impact on our government that lasts an entire generation. Equally important is the fact that the nominations will be entirely predictable: as a Republican president, Donald Trump can be expected to only nominate conservative justices.

1. Potential Formulations of the Court

Including Justice Scalia's vacant seat, the four potential vacancies are evenly split among liberal and conservative justices,[275] which actually opens the door to the most possibilities. The Court has been acting with a five-four conservative majority for the past few years, yet still only manages to vote conservative approximately 70% of the time.[276] But Donald Trump could create a seven to two conservative majority, creating an ideological tilt that is much heavier and harder to overcome than ever before.

Even if President Trump makes fewer than four nominations, the effect could still be important. Justice Scalia was long one of the most conservative voices of the Court.[277] Given the growing length of Supreme Court justices' terms in office,[278] even simply having the opportunity to reinforce the current status quo would be a success in and of itself itself for conservatives.

2. Recently Proposed Changes

In response to the concerns surrounding aging and ideological justices, certain changes have been proposed. For example, there has been

275. Hannah Fairfield & Adam Liptak, *A More Nuanced Breakdown of the Supreme Court*, N.Y. TIMES (June 26, 2014), http://www.nytimes.com/2014/06/27/upshot/a-more-nuanced-breakdown-of-the-supreme-court.html.

276. Hasen, *supra* note 120, at 243.

277. Richard G. Wilkins et al., *Supreme Court Voting Behavior 2004 Term*, 32 HASTINGS CONST. L.Q. 909 (2005).

278. *See* discussion *supra* Part III.A.

some debate regarding term limits.[279] Proponents of term limits point to the troubles that come with aging justices, including health issues that effect their performance, as burdens of lifetime tenure. Additionally, term limits would rapidly increase the turnover of the bench, allowing the justices to remain in touch with modern philosophies more easily.

The greatest counter to term limits is the fact that it would rid the Court of the many benefits to job security. Alexander Hamilton "argued that 'permanency in office' would help ensure the judiciary's 'firmness and independence.'"[280] Lifetime tenure allows the justices to have confidence in their decisions and not have to worry about the ramifications of their judgments. Additionally, lifetime appointment is a constitutional mandate.[281] It would take an amendment to the Constitution to make such a drastic change.[282]

The move to impose term limits would also be ineffective at solving the issues that arise with an ideological Supreme Court. It is meant mostly as a response to justices who serve for decades at a time and the problems they face in their longevity.[283] Term limits could conceivably increase the rate of turnover on the Court, but it would do nothing to change the impact that the political ideologies of the justices currently have as long as the confirmation process remains the same.

Another potential change to the Court that has been discussed is a proposal to create a merit-based nomination process.[284] A merit-based system would ideally look only to a candidate's past behavior in determining whether to confirm or deny. While it is certainly a noble idea, it is unlikely for many reasons. It would seemingly give preference to candidates with judicial experience,[285] and although admittedly most nominees are members of the judicial branch already, that is not always true and by no means required.

These proposed changes are insufficient and fail to address the growing problems that arise out of an ideological Supreme Court. The Court was intended to remain, at least mostly, politically neutral. Unfortunately, the trend has begun to focus on the justices' ideologies, and the confirmation process is strengthening that phenomenon. The simplest and most effective solution is one that can be undertaken by the Senate

279. *See* Calabresi & Lindgren, *supra* note 169; Joshua C. Teitelbaum, *Age and Tenure of the Justices and Productivity of the U.S. Supreme Court: Are Term Limits Necessary?*, 34 FLA. ST. U. L. REV. 161 (2006); Michael J. Mazza, *A New Look at an Old Debate: Life Tenure and the Article III Judge*, 39 GONZ. L. REV. 131, 136 (2003–2004).

280. Mazza, *supra* note 279, at 136.

281. U.S. CONST. art. III.

282. Calabresi & Lindgren, *supra* note 169, at 824.

283. Teitelbaum, *supra* note 279, at 163.

284. Stephen Choi & Mitu Gulati, *A Tournament of Judges?* 92 CAL. L. REV. 299, 321 (2004); Ryan J. Owens et al., *Ideology, Qualifications, and Covert Senate Obstruction of Federal Court Nominations*, 2014 U. ILL. L. REV. 347 (dealing primarily with the heated nomination process of lower federal court justices, but also discussing how the system would potentially impact the Supreme Court).

285. Choi & Gulati, *supra* note 284, at 316.

themselves, although would most likely require some form of significant outside pressure.

IV. RECOMMENDATION

It is clear that the Supreme Court is more political today than ever before, with justices' ideologies well-known and accepted, and their decisions frighteningly predictable. The best way to deal with this problem is open to debate, and many solutions have been proposed. The simplest changes are often the most successful, however, and this Note proposes a simple change to the confirmation process that would have a tremendous impact—changing the required amount of votes in the Senate from a simple majority, fifty-one, to a supermajority, sixty-seven.

This proposal makes sense for several reasons. Primarily, it would comport better with our common understanding of the Supreme Court's unique role, shaping fundamental law, and put the selection process on similar terms as other methods of changing fundamental law. Further, this change would not create a significant barrier to confirmation, as most nominees surpass this threshold already. Finally, it could be done simply with just a change to the Senate's self-imposed rules, although for a more definitive resolution, a constitutional amendment would be preferable.

A. The Supreme Court and Fundamental Law

The Constitution is the basis for all laws of the United States, often appropriately dubbed, "fundamental law." It gives power to the federal government and preserves the rights of all people. Meanwhile, for the justices of the Supreme Court, "at the base of [their] jurisprudence, facilitating if not driving decisions, lies [their] conviction that they and they alone are responsible for the Constitution."[286] Similarly, it has been postulated that

> if the Constitution did establish a fundamental law which was to be interpreted and enforced as all law is interpreted and enforced, and if the separation of powers under the Constitution was a reality, then the Supreme Court of the United States was the only court having final jurisdiction to interpret the fundamental law . . . .[287]

It takes a two-thirds vote in both the Senate and the House of Representatives to adopt a proposed amendment, and then three quarters of all states must ratify the amendment for it to become part of the constitution—to become part of our fundamental law.[288] As the Supreme Court is

286. Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4, 158 (2001).

287. Herbert Pope, *The Fundamental Law and the Power of the Courts*, 27 HARV. L. REV. 45, 55 (1913).

288. U.S. CONST. art. V.

tasked as the final decision-maker on all interpretations of the Constitution, they alone ultimately determine the effect of each amendment. Thus, the justices shape fundamental law in a way that no other branch of government does.

In several situations, our government accepts that a simple majority of votes is a sufficient threshold. Senators, congressmen, and the president are all elected by simple majority rule,[289] and it takes just 51% of votes in Congress to pass a bill.[290] Yet, none of those elections have even close to the same effect on fundamental law as the Supreme Court does, and we even hold Congress to a higher standard if they attempt to change it by its only means available. It does not make sense to allow Supreme Court justices to gain lifetime appointment and have such an influential effect on fundamental law with just a simple fifty-one percent majority consensus.

It seems most logical to hold the Supreme Court to a higher standard than their Congressional and Executive counterparts due to its unique role in American government. For support, we need look no further than to the founding fathers themselves. In determining the procedure of amending the Constitution, the founding fathers appeared to recognize that certain fundamental decisions should be held to a higher standard and have the support of a greater majority. The same rationale applies to Supreme Court Justices, given their substantial role in interpreting the Constitution and shaping fundamental law. Certain decisions must be made with less deference to political ideologies.

Raising the necessary vote for a justice to gain confirmation from simple majority to super majority would remove some of the influence of political parties and ideology from the nomination. It would no longer be enough for a president to simply satisfy one party and nominate a candidate with a firmly entrenched ideology, thereby alienating the opposition. If candidates were required to satisfy a significant portion of both parties they would necessarily align closer to the center of the political spectrum.

B. Procedure for Change

The current rule in the Senate, that a simple-majority is enough to "advise and consent" to the nomination, is self-imposed.[291] The Constitution is silent on the issue, so there are many ways that the proposed change could be adopted. Additionally, the impact, though great on the type of candidates that would gain nomination, would not be substantial

289. *Id.* art. I; *id.* art. II, § 1; *id.* amend. XII.
290. *Id.* art. I.
291. *See* Rule XXXI, *supra* note 139.

enough to flip the entire process on its head. Most Supreme Court justices receive far more than the fifty-one votes necessary already.[292]

One solution is for the Senate to change the rule imposed on them by themselves. Changing the Senate rules requires just a simple majority of senators with no other houses or branches involved in the decision.[293] Unfortunately, it is hard to imagine a scenario where a majority party would voluntarily make it more difficult to confirm favorable candidates, especially considering there is no way to guarantee that the rule would remain in effect, since the Senate could merely change it back if they so choose.[294]

A more definitive and lasting solution would be a Constitutional amendment that clarifies and entrenches the Supreme Court nomination process. As discussed above, it would still most likely require action on the part of the Senate,[295] but it would make the decision much more institutional by involving a vast majority of the public. Public support and pressure would make it much more likely to pass, and it would not be completely without precedent. The change could take form similar to the Seventeenth Amendment.

Before the early 1900s, there was no direct election of senators.[296] It was proposed as an amendment as early as 1826, but did not gain momentum until the 1890s.[297] At that time, the House of Representatives passed several resolutions proposing an amendment requiring direct election of senators, yet each time the Senate refused to even vote on it.[298] Finally, with massive pressure from both the House of Representatives and the public, the Senate narrowly agreed.[299] The Seventeenth Amendment was officially ratified on April 8, 1913,[300] despite its seemingly detrimental effect on the senators that ratified it.

A Constitutional amendment is an extreme measure which would require massive support from all branches of government, state legislatures, and the general public. It would be admittedly difficult, though not entirely inconceivable, and would in fact be the most definitive and lasting solution. The Supreme Court has an impact on fundamental law that

292. Richard D. Manoloff, *The Advice and Consent of the Congress: Toward a Supreme Court Appointment Process for Our Time*, 54 OHIO ST. L.J. 1087, 1087 (1993) ("In October 1991, by the narrowest margin in U.S. history, the nomination of Judge Clarence Thomas was confirmed by the Senate by a vote of fifty-two to forty-eight.").

293. *See* S. Comm. on Rules & Admin., STANDING RULES OF THE SENATE, Rule V, https://www.gpo.gov/fdsys/pkg/CDOC-113sdoc18/pdf/CDOC-113sdoc18.pdf# (last visited Nov. 15, 2016).

294. *Id.*

295. Amendments may also be proposed by state convention, but has never successfully been done. *See* U.S. CONST. art. V.

296. *17th Amendment to the U.S. Constitution: Direct Election of U.S. Senators*, NAT'L ARCHIVES, https://www.archives.gov/legislative/features/17th-amendment/ (last visited Nov. 15, 2016).

297. *Id.*

298. *Id.*

299. States began applying for constitutional conventions, thereby putting pressure on the Senators to act. *Id.*

300. *Id.*

is greater than any other unit of government and should be held to a commensurate standard. Raising the number of votes that is required for confirmation by the Senate would elevate the nomination process to a similar level of consensus that is required for constitutional amendment, which has the most similar effect on fundamental law.

V. CONCLUSION

The Supreme Court undoubtedly plays an integral role in American politics, shaping our understanding of fundamental law with every decision. Franklin Roosevelt's social policies nearly did not survive his battle with the Court during the Great Depression,[301] and the foundation for the liberalism of the 1960s was laid the previous decade when Dwight Eisenhower nominated Chief Justice Earl Warren and Justice William Brennan, Jr.[302] Nixon campaigned on a platform that emphasized restoring judicial conservatism,[303] at times running against the Warren Court as much as his opponent,[304] and his focus on the nominees' ideology has been a lasting tradition ever since.[305]

With one vacancy already, and three more reasonably expected to follow, President Donald Trump will most likely have the incredibly unique opportunity to nominate four justices to the Supreme Court.[306] Such an opportunity should be paid special attention in light of the Court's recent development. Not only has it been nearly fifty years since a president filled four seats, but in that time the Supreme Court has also undergone a drastic transformation from a non-partisan body to one that is deeply defined by political ideologies.

Due to the confirmation process, there is every reason to believe that the impending nominees' ideologies will be equally decisive and transparent. The focus on a candidate's ideology has become increasingly important, and the fact that a mere fifty-one votes are needed causes voter theories to suggest that it is a rational strategy to nominate ideologically entrenched candidates. Additionally, the confirmation process, at times lasting two to three months,[307] puts the nominee's political opinions on center stage, exposing them to intense scrutiny and clarifying their stance on the most important issues.[308] Not only has the Supreme Court become frighteningly political over the last century, but its justices' ideologies have also become amazingly transparent.

The Supreme Court plays such a unique and important role in shaping fundamental law that a departure from political neutrality should not

301. *See* discussion *supra* Part II.
302. *Id.*
303. *Id.*
304. Rhodes, *supra* note 133, at 563.
305. *Id.*
306. *See* discussion *supra* Part III.
307. Rhodes, *supra* note 133, at 569.
308. *Id.*

be a welcome shift. There have been several discussions over the years regarding potential changes to the Court, but none are sufficient to solve the problems that arise out of ideological justices. Altering the voting rules in the Senate to require a super majority in favor of confirmation would elevate the process to the same level of legitimacy as our other methods for changing fundamental law and would encourage more moderate nominations.

It is a shame that the general public remains rather unaware of the Supreme Court and its justices, though Justice Scalia's recent passing may change that for at least the near future. Following the election, with potentially four seats up for grabs, the Supreme Court appears to be at a critical turning point. This is an ideal time for the spotlight to shine, as the decisions that are made in the coming years will undoubtedly shape American life for generations to come.