COURT PACKING AS AN ANTIDOTE

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Court packing is considered the nuclear weapon that may unleash total chaos on the American constitutional system. Even in the face of a highly controversial appointment process to the U.S. Supreme Court during the 2020 presidential election season, scholars caution against the wisdom and utility of resorting to court packing. This Essay makes three bold arguments: First, a President may nominate a candidate to the Supreme Court at any time, including their last year in office; this is true both empirically and normatively. It is the Senate's responsibility to ensure the people's will is not frustrated. Second, never since the American Civil War did the Senate confirm a Supreme Court Justice in a presidential election year without bipartisan support. In fact, except for the sensational appointment of Justice Peter Daniel in 1841, all appointments to the Supreme Court in presidential election years involved either bipartisan consent or confirmation by the incoming Senate with a fresh mandate. This is true even of appointments made after a President became a lame duck or lost a re-election bid and even when the President's party controlled the Senate. Disregard of this embedded constitutional convention undermines fundamental principles of popular sovereignty. Third, the breach of this constitutional convention is not a matter for political repercussions alone. Well aware of the potential of court packing to rein in a Court, the Framers intentionally allowed its exercise in the Constitution. Further, they adopted life tenure for Justices while relying on the availability of court packing as a restraining mechanism to protect popular sovereignty. Court packing is, thus, the antidote by constitutional design to a partisan takeover of the Supreme Court during election time, as part of the inherent checks and balances of a popular sovereignty system. Senators must be

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aware that an appointment confirmed by a purely partisan vote during presidential election time legitimizes court packing as a countermeasure.

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A NOTE

This Essay was written during late September-early October 2020, after Justice Ruth Bader Ginsburg passed away and before Judge Amy Coney Barrett was confirmed as a Supreme Court Justice. It was submitted to the Senate prior to the confirmation vote by the *Cardozo Law Review* as part of a special volume dedicated to this topic. It has been publicly available since October 2020 on SSRN. I kept the original text and only made minimal linguistic updates to reflect the passage of time.

INTRODUCTION

The 2020 U.S. election season amounted to a perfect storm. It exposed a widespread deep loss of faith among the American people in

their governing institutions. No less than the integrity of the U.S. democratic system was on the line. The stakes increased even further when then President Donald Trump insisted on appointing a Justice to the Supreme Court mere days before the presidential election based on partisan votes in the Senate alone,[1] after millions of Americans had already cast their votes.[2] Yet, even in the face of this belligerent partisan behavior, scholars caution against court packing. They argue that resorting to court packing is a breach of constitutional convention in and of itself, and that democracy does not justify such quid-pro-quo behavior.[3] Michelle Obama popularized this understanding in her famous speech, "when they go low, we go high."[4] Furthermore, court packing is considered the nuclear constitutional weapon that may open the gates for an endless battle over the Supreme Court's composition. It may set a precedent for the use of abusive constitutional methods to enforce the government's will, ultimately leading to the disintegration of the American Republic.

In light of this perception, the Constitution seems to be powerless in the face of a forceful administration that does not care about constitutional conventions and upsets expectations for representatives' restraint during election time. Constitutional conventions seem to be the outer layer of protection of the inner workings of constitutional democracy. When political actors flamboyantly disregard constitutional conventions, power appears to be up for grabs.

U.S. scholars distinguish between the legal and political dimensions of the American Constitution. While the legal dimension of the Constitution is enforceable by courts, the political constitution is not. Scholars assume that constitutional conventions are the domain of

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1 Nancy Cook & Gabby Orr, *Trump Taps Barrett, Launching Brawl over Supreme Court's Future*, POLITICO (Sept. 26, 2020, 5:16 PM), https://www.politico.com/news/2020/09/26/trump-scotus-coney-barrett-easy-choice-422019 [https://perma.cc/TQ6N-SJ3R].

2 Michael McDonald, *2020 General Election Early Vote Statistics*, U.S. ELECTIONS PROJECT, https://electproject.github.io/Early-Vote-2020G/index.html [https://perma.cc/E69F-QMBE] (last updated Nov. 4, 2020, 11:48 AM).

3 *See* Joshua Braver, *Court-Packing: An American Tradition?*, B.C. L. REV. (forthcoming) (surveying the literature); Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 544–45 (2004) (discussing court packing as an unconventional weapon).

4 Michelle Obama, *Remarks by the First Lady at the Democratic National Convention*, WHITE HOUSE (July 25, 2016, 10:05 PM), https://obamawhitehouse.archives.gov/the-press-office/2016/07/25/remarks-first-lady-democratic-national-convention [https://perma.cc/MF5G-VD4Q]; Jade Scipioni, *Michelle Obama: Why Going 'High' when Faced with a Challenge Is So Important to Her*, CNBC (July 6, 2020, 12:37 PM), https://www.cnbc.com/2020/02/12/michelle-obama-on-famous-catchphrase-when-they-go-low-we-go-high.html [https://perma.cc/D25M-JQAA].

the political constitution alone.[5] Violators of conventions, therefore, would only pay a political price, if at all. This understanding relies heavily on the influence of the British constitutional system on the American tradition, and stems primarily from the work of Albert Venn Dicey, the greatest British constitutional scholar of the nineteenth century.[6] Adrian Vermeule writes, "[t]he classical approach in Commonwealth legal theory, stemming from the pre-eminent Victorian theorist Albert Venn Dicey, holds that conventions 'are not enforced or enforceable by the Courts.'"[7]

However, this Essay argues that the relationship between the political and legal constitutions is different. Theoretically and historically, constitutional conventions were always meant to be enforced, in Britain as well as in the United States. The enforcement mechanism is to deploy another political body different than the offending body. Thus, for example, if the executive breaches a constitutional norm, it is the legislature's responsibility to rectify. Ultimately, if political actors do not follow conventions, the courts are expected to enforce them. This is especially true of constitutional conventions that protect against partisan abuse of political power during election time.

Yet, the likelihood of petitioners successfully challenging the constitutionality of a U.S. Supreme Court (SCOTUS) appointment during election time is probably low. The Court will most likely treat the constitutional convention as nonjusticiable. This should not prevent, however, petitioners from approaching the Court. The Court treated congressional internal proceedings as justiciable in the past.[8] In 2020, for instance, the Court used long settled constitutional "practice" and "tradition" to interpret the scope of discretion of the Electoral College in *Chiafalo v. Washington*.[9] A similar interpretive path that grants decisive weight to constitutional conventions to guard first order democratic principles should be adopted with regard to the Senate's "advice and consent" role to SCOTUS appointments. If the Court decides to sit idle in the face of manipulation of the appointment process, it will find it

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5 *See* Neil S. Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 IND. L.J. 177, 183, 184 n.29, 187 (2018); Samuel Issacharoff & Trevor W. Morrison, *Constitution by Convention*, CALIF. L. REV. (forthcoming).

6 *See* A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 277 (8th ed. 1915).

7 Adrian Vermeule, *Conventions in Court*, 38 DUBLIN U. L.J. 283, 290 (2015) (quoting Roger E. Michener, *Foreword* to A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 15 (Liberty Fund ed. 1982)).

8 United States v. Ballin, 144 U.S. 1 (1892).

9 Chiafalo v. Washington, 140 S. Ct. 2316 (2020).

difficult to intervene when faced with court packing as a countermeasure.

Court packing is, in fact, part of the checks and balances of American democracy to counter partisan abuse of appointment power to the Supreme Court during election time. Well aware of the method of court packing, the Framers opted to allow its exercise in the Constitution. They provided life tenure to Justices because they relied on court packing as an available remedy to rein in a partisan takeover of judicial power.

A note about terminology is required. This Essay uses the term "court packing" as commonly used in popular media. Thus, court packing refers to changing the size of the Supreme Court to neutralize an illegitimate partisan takeover, in breach of constitutional conventions.[10] The Framers, however, treated illegitimate partisan takeover attempts intended to forestall or circumvent election results as court packing.[11] Under this justified understanding, enlarging the Court's size to undo such manipulation is, in fact, *de-packing* the Court.

This Essay makes three bold arguments: First, Presidents may, and do, nominate candidates to the Supreme Court at any time in their term. This is supported empirically as well as normatively. Second, never in American history since the Civil War did the Senate confirm a Supreme Court Justice in a presidential election year without bipartisan support, unless confirmed by an incoming Senate with a fresh mandate. This is true even when the President's party controlled the Senate. In fact, except for the sensational appointment of Justice Peter Daniel in 1841, the political actors conformed with this constitutional convention since the founding of the Republic. Disregard of this embedded constitutional convention frustrates primary principles of popular sovereignty. Third, the breach of this constitutional convention is not a matter for political admonition alone. The Framers were well aware of the potential for court packing to restrain a politicized Court, and intentionally crafted a Constitution that allows court packing, enabling its use as a last resort enforcement mechanism. They allowed changing the Court's size, whether by adding members or downsizing, to restore public confidence that there was no partisan illegitimate takeover of the Court. Court packing does not exploit a constitutional loophole. It does not

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10 Amber Phillips, *What Is Court Packing, and Why Are Some Democrats Seriously Considering It?*, WASH. POST (Oct. 8, 2020 12:13 AM), https://www.washingtonpost.com/politics/2020/09/22/packing-supreme-court [https://perma.cc/92R2-KR2X].

11 John Copeland Nagle, *The Lame Ducks of Marbury*, 20 CONST. COMMENT. 317, 328 (2003) ("Adams and the Federalists were accused of 'pack[ing] the judiciary.'" (alteration in original) (quoting L.G. TYLER, PARTIES AND PATRONAGE IN THE UNITED STATES 23–24 (1891)).

amount to a breach of constitutional conventions that may not be justified as a reciprocal move against a rival's behavior. Rather, to safeguard popular sovereignty, court packing, by constitutional design, is the actual antidote to a partisan Court takeover. If not for the availability of court packing, the Justices would not have enjoyed life tenure. Senators must be aware that independence of the Judiciary in the American system requires avoiding partisan takeover of judicial power during election time or the rectification of such a move by court packing.

I. APPOINTMENTS OF JUSTICES DURING PRESIDENTIAL ELECTIONS

On September 26, 2020, President Donald Trump announced Judge Amy Coney Barrett as his nominee to the U.S. Supreme Court. This decision created shock waves throughout the country. Barrett was a Conservative, intended to fill the vacant seat left by the Liberal Justice Ruth Bader Ginsburg, who passed away just a few days earlier. All knew that, should this nomination receive Senate confirmation, the U.S. Supreme Court's composition would further tilt towards the Conservative direction, giving Conservatives a decisive six-to-three majority. The public, then accustomed to five-to-four decisions on many divisive issues with a mixture of victories to both Conservatives and Liberals, anticipated a consistently Conservative Court that will remain so for generations to come in light of the young age of many of the recently appointed Justices.[12][13] The stakes were high. But, supposedly, in politics "you win some and you lose some."

12 Leah Litman & Melissa Murray, *Shifting from a 5-4 to a 6-3 Supreme Court Majority Could Be Seismic*, WASH. POST (Sept. 25, 2020, 12:13 PM), https://www.washingtonpost.com/outlook/trump-ginsburg-conservative-supreme-court-majority/2020/09/25/17920cd4-fe85-11ea-b555-4d71a9254f4b_story.html [https://perma.cc/3HAE-4HSX]. *See also* Rivka Weill, *Women's and LGBTQ Social Movements and Constitutional Change—On Geoffrey Stone's Sex and the Constitution: Sex, Religion, and Law from America's Origins to the Twenty-First Century*, JERUSALEM REV. LEGAL STUD. (forthcoming) (discussing how social movements bring about constitutional change through the courts).

13 *See* George Petras & Jim Sergent, *Can Trump Find a Justice with Supreme Longevity?*, USA TODAY (June 28, 2018, 10:16 PM), https://www.usatoday.com/story/news/2018/06/28/supreme-court-justice-ages/743053002 [https://perma.cc/BAD3-Z2MY].

A. *The SCOTUS Bipartisan Convention*

1. The Contours of the Convention

This nomination, however, was different. Appointing a Justice during a presidential election year raises serious concerns of legitimacy. Since vacancies may and did occur during presidential election years throughout American history, this Essay argues that a constitutional convention developed to guide the behavior of the political actors. To recognize the existence of a constitutional convention, three conditions should be met: (1) political actors must act consistently in a certain manner; (2) they should use rhetoric that recognizes the existence of a convention that guides their behavior; and (3) there should be a constitutional rationale that justifies this convention.[14]

This convention has been recognized and dubbed the "Thurmond Rule," after the Republican Senator Strom Thurmond who reportedly championed this position in the 1980 election year, while a ranking minority member of the Carter administration's Senate Judiciary Committee.[15] According to the Congressional Research Service (CRS), most senators define the rule "as an established practice according to which, at some point in a presidential election year, the Judiciary Committee and the Senate no longer act on judicial nominations—with exceptions sometimes made for nominees who have bipartisan support from Senate committee and party leaders."[16]

Senators attempt to stall judicial appointments to federal courts during election years citing either the Thurmond Rule explicitly or an existing tradition of slowing or even halting processing of nominations altogether. However, senators seem to rely on the convention for partisan gain in a way that casts doubt on the status of the convention. In 2008, Senator Arlen Specter aptly described, "[t]here is no Thurmond rule for Democrats when Republicans are in control and there is a Democratic President, and there is no Thurmond rule when

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14 Re: Resolution to Amend the Constitution, [1981] 1 S.C.R. 753, 888 (Can.) ("We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule?" (quoting SIR W. IVOR JENNINGS, THE LAW AND THE CONSTITUTION 136 (5th ed., 1959)).

15 DENIS STEVEN RUTKUS & KEVIN M. SCOTT, CONG. RSCH. SERV., RL34615, NOMINATION AND CONFIRMATION OF LOWER FEDERAL COURT JUDGES IN PRESIDENTIAL ELECTION YEARS 7 (2008).

16 *Id.* at 3 n.8.

the situation is reversed."[17] Robin Bradley Kar and Jason Mazzone went as far as denying the existence of the convention. They stated that an elected sitting President has always been able to appoint a Justice when a vacancy occurred before elections, even during a presidential election year. They thus harshly criticized the Senate's refusal to consider President Obama's nominee, Merrick Garland, following the sudden death of Justice Antonin Scalia in 2016.[18]

The status of the Thurmond Rule is oft disputed and the rhetoric surrounding it is strongly influenced by partisan interests, as appointments to circuit and district courts demonstrate with greater frequency. Senator Strom Thurmond was a Dixiecrat turned Republican and supported racist agendas. His motivation for insisting on the Thurmond rule in 1980 may well have been to block Jimmy Carter from appointing pro-civil rights judges.[19] Moreover, though the CRS attributes the creation of the Thurmond Rule to 1980, Thurmond had already publicly advanced it in 1968 to block the appointment of Associate Abe Fortas to Chief Justice by President Lyndon B. Johnson. Republican Senator Robert Griffin, joined by sixteen additional Republican Senators, signed a petition stating that, "I would hope and expect that [the President] would not seek to deny the people and the next President of their appropriate voice in such a crucial decision."[20] Thurmond backed this petition as well.[21]

This Essay, however, argues that close examination of congressional records reveals that the Thurmond Rule has actually been ingrained in American tradition regarding appointment of Supreme Court Justices since the founding of the Republic. According to the convention, named in this Essay the "SCOTUS Bipartisan Convention," a President must gain bipartisan support to a Supreme Court appointment during a presidential election year. Alternately, the nomination must wait to be confirmed by the incoming Senate, fresh from elections with a renewed mandate.

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17 *Id.* at 7 (quoting 154 CONG. REC. S6897 (daily ed. July 17, 2008) (statement of Sen. Arlen Specter)).

18 Robin Bradley Kar & Jason Mazzone, *The Garland Affair: What History and the Constitution Really Say About President Obama's Powers to Appoint a Replacement for Justice Scalia*, 91 N.Y.U. L. REV. ONLINE 53 (2016).

19 Rupert Cornwell, *Strom Thurmond, Symbol of Segregation, Dies at 100*, INDEP. (June 28, 2003, 12:00 AM), https://www.independent.co.uk/news/world/americas/strom-thurmond-symbol-of-segregation-dies-at-100-110773.html [https://perma.cc/DF2P-ZA5T].

20 ILYA SHAPIRO, SUPREME DISORDER: JUDICIAL NOMINATIONS AND THE POLITICS OF AMERICA'S HIGHEST COURT 76 (2020) (alteration in original).

21 RICK PERLSTEIN, NIXONLAND: THE RISE OF A PRESIDENT AND THE FRACTURING OF AMERICA 285–88 (2008).

Two Republican Senators criticized the effort to appoint Barrett before elections. They provided rationales that align with the SCOTUS Bipartisan Convention. Senator Susan Collins, the only Republican to ultimately vote against Barrett's confirmation,[22] said:

> In order for the American people to have faith in their elected officials, we must act fairly and consistently—no matter which political party is in power. President Trump has the constitutional authority to make a nomination to fill the Supreme Court vacancy, and I would have no objection to the Senate Judiciary Committee's beginning the process of reviewing his nominee's credentials.
>
> Given the proximity of the presidential election, however, I do not believe that the Senate should vote on the nominee prior to the election. In fairness to the American people, who will either be re-electing the President or selecting a new one, the decision on a lifetime appointment to the Supreme Court should be made by the President who is elected on November 3.[23]

Similarly, Senator Lisa Murkowski has also stated that she does "not support taking up a potential Supreme Court vacancy this close to an election." However, she nonetheless recognized that President Trump had "exercised his constitutional authority [in nominating] an individual to fill the vacancy on the Supreme Court."[24] Thus, she ultimately joined her Republican peers in voting to confirm Barrett, reasoning that she now needs to "look beyond process and to vote based on a solid evaluation of [Barrett's] qualifications and fitness of judicial temperament."[25]

Appendix A provides a full examination of the forty-two presidential nominations to the Supreme Court during a presidential election year since the establishment of the Republic. I examined all instances in which either the SCOTUS nomination was in the same calendar year as the presidential election or the confirmation vote was

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22 *Roll Call Vote 116th Congress—2nd Session*, U.S. SEN., https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=116&session=2&vote=00222 [https://perma.cc/QB85-ANEH].

23 *Senator Collins' Statement on Supreme Court Vacancy*, SUSAN COLLINS: PRESS RELEASES (Sept. 19, 2020, 3:13 PM), https://www.collins.senate.gov/newsroom/senator-collins%E2%80%99-statement-supreme-court-vacancy [https://perma.cc/897M-CASV].

24 *Murkowski Comments on U.S. Supreme Court Nominee*, LISA MURKOWSKI: PRESS RELEASES (Sept. 26, 2020), https://www.murkowski.senate.gov/press/release/murkowski-comments-on-us-supreme-court-nominee [https://perma.cc/7XHN-LQAF].

25 *Murkowski Votes to Confirm Judge Amy Coney Barrett to Supreme Court*, LISA MURKOWSKI: PRESS RELEASES (Oct. 26, 2020), https://www.murkowski.senate.gov/press/release/murkowski-votes-to-confirm_judge-amy-coney-barrett-to-supreme-court [https://perma.cc/Y273-7DB5].

within twelve months prior to the President taking office. In 1933, following the ratification of the Twentieth Amendment, the President assumed office on January 20th instead of March 4th to shorten the lame-duck period.[26] This definition of presidential election years tries to be expansive while balancing between efficiency and legitimacy.

This Essay focuses specifically on presidential election years because Presidents possess the power to make the first and final moves regarding federal judicial appointments. They set the agenda and the Senate enjoys the power of response alone. This Essay finds that whenever a vacancy occurred during a presidential election year, the sitting President nominated a Supreme Court Justice, even after elections were held, and even if he lost the election. This is true regardless of the cause of the vacancy. President Trump's nomination of Barrett is therefore in line with American practice.

This is not merely an empirical finding. This Essay argues that it is a legitimate practice. There is a real need for a functioning high court at all times, and thus, the President is justified in nominating candidates to fill the void. However, the SCOTUS Bipartisan Convention suggests that the checks and balances against abuse of the nomination lies with the senators. They can do so by either garnering multi-party support or by deferring the decision to a new Senate with a fresh mandate from the people to confirm the nomination. If the President loses the election, the incoming President may decide not to reintroduce the nomination as soon as he is sworn in.

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26 U.S. CONST. amend. XX. It is also known as the "Norris Amendment," named after its initiator, Senator George W. Norris. On the legitimacy concerns leading to the adoption of the Amendment, see Jeffery A. Jenkins & Timothy P. Nokken, *Legislative Shirking in the Pre-Twentieth Amendment Era: Presidential Influence, Party Power, and Lame-Duck Sessions of Congress, 1877-1933*, 22 STUD. AM. POL. DEV. 111 (2008) (arguing that lame-duck Congresses did not abuse their legislative power in contrast to Norris's concerns).

2. Appointment Success Rate in Presidential Election Years

Table 1: Breakdown of Supreme Court Nominations since the Founding[27]

Nomination Outcome	First Three Years	Fourth Year (Late Term)	Total
Total Nominations	121 (100%)	42 (100%)	163 (100%)
Confirmed	101 (83.5%)	25 (59.5%)	126 (77.3%)
Served	97 (80.2%)	22 (52.4%)	119 (73%)
Declined	4 (3.3%)	3 (7.1%)	7 (4.3%)
No Action	4	6	10
Postponed	1	2	3
Rejected	10	2	12
Withdrawn	5	7	12
Confirmed by Voice Vote and Served	56 (46.3%)	11 (26.2%)	67 (41.1%)

As Table 1 shows, throughout American history, there have been 163 nominations to the Supreme Court, not including Barrett's nomination. As expected statistically, roughly a quarter of them (42), were presidential nominations and/or confirmations to the Supreme Court during a presidential election year, as broadly defined above. This analysis also includes nominations of a sitting Justice to be a Chief Justice.

Of these forty-two nominees, only twenty-five nominations culminated in a confirmation by the Senate, comprising a 59.5% confirmation success rate. Three of the confirmed Justices declined the

27 Based on data derived from Appendix A and Senate's website: *Supreme Court Nominations (1789–Present)*, U.S. SENATE, https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm [https://perma.cc/RC9S-2ZRB]. See "Result Key" summarizing the data.

office, yielding a 52.4% success rate in appointments.[28] Of the failed confirmation attempts, the President withdrew the nominations of seven to avoid failure; the Senate postponed discussion of two, took no action with regard to six, and flat out rejected two nominees.[29]

In contrast, of the 121 nominations in the first three years of a presidential term, 101 were confirmed with a confirmation success rate of 83.5%. Of these, only four did not take office.[30] The confirmation success rate during the first three years of a presidential term is, therefore, 40% higher than the success rate during the last year of the term. Thus, nominations to the Supreme Court in presidential election years have a much lower success rate than is typical in non-election years.[31] Historically, even within the last year of the term, there is a skew towards the first three months of the year, with fewer attempts and successes in the last eight months leading to elections, as elaborated below.[32]

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28 These include Justice William Cushing (1796), Justice John Jay (1800) and William Smith (1836). See *infra* Appendix A, Tables 1–2.

29 *See* Appendix A, Tables 2–5.

30 *Supreme Court Nominations (1789–Present)*, *supra* note 27. See "Result Key" summarizing the data. Three declined the appointment in non-presidential election years, and the Senate confirmed Edwin Stanton but he died before taking office. *See also infra* Appendix A, Tables 1–5.

31 *See also* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 190 (2002) ("Historically, Supreme Court nominees have fared poorly during the fourth year of a President's term in office.").

32 *See infra* Section I.A.4.

3. Type of Vote

Table 2: Breakdown of Late Term Nominations and/or Confirmations[33]

POTUS and Senate Relationship	Vote Information	Confirmed			Failed				
		Total	Justices Served	Justices Declined	Total	No Action	Postponed	Rejected	Withdrawn
United	Voice Vote	13	11	2	0	0	0	0	0
	Roll Call: Total	9	8	1	4	0	1	2	1
	Roll Call: Bipartisan	6	6	0	0	0	0	0	0
	Roll Call: Fresh Senate Mandate	2	1	1	0	0	0	0	0
	Roll Call: Partisan	1	1	0	0	0	0	0	0
	No Action	0	0	0	7	2	0	0	5
Divided	Voice Call	0	0	0	0	0	0	0	0
	Roll Call: Total	3	3	0	1	0	1	0	0
	Roll Call: Bipartisan	3	3	0	0	0	0	0	0
	Roll Call: Fresh Senate Mandate	0	0	0	0	0	0	0	0
	Roll Call: Partisan	0	0	0	0	0	0	0	0
	No Action	0	0	0	5	4	0	0	1
	Total Votes	25	22	3	17	6	2	2	7

Of the twenty-five confirmed nominations to the Supreme Court that succeeded during a presidential election time, thirteen appointments were confirmed by a voice vote (52%).[34] In a voice vote, the Presiding Officer of the Senate does not keep a quantitative record of how individuals voted and is satisfied with the impression that the "yea" votes outnumbered the "nay" votes. Since the opposition may impose a roll-call vote,[35] it is a safe and common practice to assume that voice votes reflect bipartisan support.[36] Sometimes, the same President had to resort to roll-call though other nominations of his garnered a voice-vote. This was true even of President Washington.[37] If the appointment is contested, then even if the opposition fails to muster

33 Data derived from Appendix A.

34 Of the thirteen confirmed by voice vote, two declined. *See infra* Appendix A, Table 1.

35 ELIZABETH RYBICKI, CONG. RSCH. SERV., RL96452, VOTING AND QUORUM PROCEDURES IN THE SENATE 5 (2020) ("Unless a roll call vote has been ordered in advance, any question is first to be put to a voice vote. The presiding officer asks those in favor to respond 'Aye,' then those opposed to respond 'No,' and then announces the result. At that time, any Senator may request either a division vote or a roll call vote."); *see also* U.S. CONST. art. I, § 6.

36 "Voice votes allow party leaders to dispose of bipartisan legislation quickly . . . ." LAUREL HARBRIDGE, IS BIPARTISANSHIP DEAD? POLICY AGREEMENT AND AGENDA-SETTING IN THE HOUSE OF REPRESENTATIVES 77 (2015).

37 *See infra* Appendix A, Tables 1 & 2.

enough support to reject an appointment, it would seek to have a roll-call to dramatize the event. It would strive to register the opposition in the public mind to extract a political price for a partisan appointment.

Until 1966, the Senate voted on Supreme Court confirmations via voice votes if no one demanded a roll-call vote. Thereafter, all confirmations to the Court required a roll-call vote.[38] Of the forty-seven roll-call votes on Supreme Court nominations since the Court's establishment in 1789 and until 1966, seventeen took place during presidential election years.[39] Statistically, presidential election years should have counted for only 25% of the roll-call votes. Yet, they comprised a strongly disproportionate 36% of the roll-call votes. Moreover, of the fourteen rejected roll-call cases during this period, six happened in presidential election years.[40] Rejection in presidential election years, thus, counts for 43% of the rejected cases through roll-call votes. This data suggests that Court appointments garnered more Senate scrutiny during presidential election years. In the first three years of a president's term, senators assumed that the President enjoys a legitimate mandate to appoint and did not scrutinize the process as heavily.

Table 3: Roll Call and Presidential Election Years

	All votes	Presidential Election Years	Percentage of Presidential Election Years in Total Data
Roll Call Votes 1789–1966	47	17	36%
Rejected Nominations through Roll Call Votes	14	6	43%

Twelve appointments were confirmed by a roll call vote. Of these, eleven were contested and another, Justice Anthony Kennedy, who was

38 BARRY J. MCMILLION, CONG. RSCH. SERV., RL33225, SUPREME COURT NOMINATIONS, 1789 TO 2018: ACTIONS BY THE SENATE, THE JUDICIARY COMMITTEE, AND THE PRESIDENT 45 (Version 31, 2020).

39 Based on my analysis of Table 1 in MCMILLION, *supra* note 38, I include in roll call votes not only confirmation and rejection but also decisions to postpone or table the nominations that have a record of the tally of the vote.

40 Based on my analysis of Table 1 in MCMILLION, *supra* note 38. I include in these "rejections" cases where the motion to vote was postponed or tabled with a tally of the vote.

confirmed during Reagan's presidency, passed unanimously with bipartisan support even though the opposition party, the Democrats, controlled the Senate. The Kennedy case had a roll call vote because starting from 1967 a new practice developed of determining Supreme Court nominations only by roll call votes.[41] Two of the contested cases involved nominees John Catron and William Smith (who declined). Both were nominated for a new seat by President Andrew Jackson on March 3, 1837, a day before the new Senate began its session.[42] Jackson, whose Vice President, Martin Van-Buren, had won the election bid in December 1836 and strengthened his party's Senate majority, had his nominees confirmed in the new Senate despite the lack of bipartisan support by relying on the fresh mandate of the incoming Senate.[43] The support rate for the other contested eight nominees—which had all relied on bipartisan support—never fell below 66% of the voting senators, and the narrowest vote margin between those in favor of confirmation and the opposition was fourteen votes, with the average falling closer to twenty-seven.[44] There is only one case in American history in which a Justice was confirmed by the Senate without bipartisan support during a presidential election year. All the others, including sensational appointments conducted after presidents lost office or retired, involved the support of at least some Senators from the opposition.[45]

The sole exception to this convention was President Martin Van Buren's confirmation of Peter Daniel as an Associate Justice in 1841. The circumstances surrounding the appointment and its aftermath were extraordinary. William Henry Harrison, hero of the War of 1812, won the 1840 presidential election while flipping both the House of Representatives and the Senate from Democratic to Whig control. On February 25, 1841, Justice Philip Barbour passed away, leaving a vacant seat a mere six days before the new Harrison administration was due to take office on March 4. Incumbent Democratic President Van Buren quickly nominated Peter Daniel on February 26 and the lame-duck

41 BARRY J. MCMILLION & DENIS STEVEN RUTKUS, CONG. RSCH. SERV., RL33225, SUPREME COURT NOMINATIONS, 1789 TO 2017: ACTIONS BY THE SENATE, THE JUDICIARY COMMITTEE, AND THE PRESIDENT 13 (Version 30, 2018).

42 *See* Appendix A, Table 2.

43 *Id*. Rule XXXI (6) currently provides that "Nominations neither confirmed nor rejected during the session at which they are made shall not be acted upon at any succeeding session without being again made to the Senate by the President."

44 Appendix A, Tables 2 & 4.

45 *Id*.

Senate confirmed the appointment on March 2.[46] The Whig Senators tried to rally in opposition to the confirmation, but, in a cunning move, the Democrats held the vote, in a decisive 22-5 vote composed of solely partisan support, with only one Whig Senator even present.[47] Had the four dissenting Democratic Senators joined the absent Whigs, they could have prevented a quorum and blocked the nomination.

The drama did not end with the problematic appointment. Having just assumed control of the White House and the Senate following the 1840 elections, the Whigs faced the sudden death of President Harrison, a month after he took office. Vice President John Tyler, a former Democrat, succeeded Harrison and quickly alienated both the Democrats and the Whigs. He vetoed Whig bills, feuded with the Whig Senator Henry Clay and his supporters, and eventually found himself kicked out by his own party, effectively functioning as a political independent.[48] Under these circumstances, not only was he unable to extract a price for Van Buren's midnight illegitimate Supreme Court appointment, but Tyler struggled to confirm any appointments of his own. During the 1844 presidential election year, two Justices died, and Tyler attempted nine times to replace them by a roster of repeating nominees.[49] He ultimately succeeded to appoint only one Justice, the Democrat Samuel Nelson, after seven failed attempts.[50] This occurred after Senator Clay lost to the Democratic James Polk in the 1844 elections, and Whigs realized they would not be able to fill the vacancies left by Tyler with their preferred candidates.[51] Thus, Nelson was confirmed by a voice vote, with minimal Whig opposition.[52] By then, Tyler understood that he would need bipartisan support to fill his additional vacancy as well and turned to John Read, a Democrat who had supporters in the Whig camp. By this point, however, the Senate adjourned session and did not act on the nomination.[53]

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46 Earl M. Maltz, *Biography is Destiny: The Case of Justice Peter V. Daniel*, 72 BROOK. L. REV. 199, 202–03 (2006).

47 *See infra* Appendix A, Table 2; MCMILLION & RUTKUS, *supra* note 41; *see also* HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II 84–85 (5th ed., 2008)

48 Michael J. Gerhardt & Michael Ashley Stein, *The Politics of Early Justice: Federal Judicial Selection, 1789–1861*, 100 IOWA L. REV. 551, 587 (2015); Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146, 1148–49 (1988).

49 One of the Justices died in mid-December 1843 on the eve of the presidential election year.

50 *See infra* Appendix A, Tables 1-3.

51 ABRAHAM, *supra* note 47, at 70.

52 *See infra* Appendix A, Table 1.

53 *See generally* ABRAHAM, *supra* note 47, at 70, 78–86.

4. Timing of Confirmation Within the Presidential Election Year

There was never a case in U.S. history of a successful appointment to the U.S. Supreme Court made during a presidential election year, and before election, without bipartisan support. This is true, even though most appointments to the U.S. Supreme Court during presidential election years and before election involved a united government situation. The majority party never imposed its will on the minority in a way that undermined the legitimacy of American democracy. Thus, even in united governments, successful appointments were made as much by roll-call votes as voice-votes during the presidential election year.[54] The only unilateral partisan appointment ever made to the Court involved Peter Daniel and occurred after election by a lame-duck President.

Moreover, there are only three cases in American history of nominations made after March of a presidential election year and confirmed before election. Two of these appointments involved unanimous support and the third garnered more support from the minority than the majority party in the Senate. In 1892, Republican President Benjamin Harrison waited six months after the death of Justice Joseph Bradley to nominate and appoint George Shiras, Jr. to the Court by a voice vote in a Republican-controlled Senate. He later lost re-election and the Senate flipped to the Democrats.[55] In 1916, President Woodrow Wilson was able to nominate and appoint John Clarke to the Court by voice vote in July. Wilson later won re-election.[56]

The third case involved President Grover Cleveland, a Democrat, who faced a Republican-controlled Senate and nominated Melville Fuller for the Chief Justice position. The appointment received more support from the Democrats than the Republicans. Fuller was nominated in April and confirmed in July based on 67% support with 80% of the Senators voting. More than half of the Republicans either supported or did not vote to enable this confirmation. President Cleveland later lost the election.[57]

There is also no case in American history except for the Garland affair, in which the Senate did not vote on a nominee to the Supreme Court, if the nomination was made until the end of March of a

54 *See infra* Appendix B, Table 1.

55 *See infra* Appendix A, Tables 1 & 4. Harrison was able to make another appointment as a lame-duck President with a lame-duck Senate by voice-vote because his nominee, Justice Howell Jackson, enjoyed the Democrats' support. *Id.* Appendix A, Table 1.

56 *Id.*

57 *Id.* at Table 4.

presidential election year.[58] This is true in cases of both united and divided control of the presidency and the Senate. Furthermore, all the nominees that did not get a vote, except Garland, were nominated later than June 14th of an election year. In fact, of the eleven nominations made in U.S. history after March of a presidential election year and before elections, most did not garner a vote (63.6%).[59] Whether the government is united or divided, after March of an election year the Senate votes only on nominations that garner broad bipartisan consent.

Table 4: Time of Nomination in Presidential Election Years and Results[60]

	Nomination Until End of March	Nomination After March & Senate's Action Before Election	Nomination After Election & Confirmation w/ Bipartisan Support	Nomination After Election with Confirmation by the New Senate
Voice Vote in United Government (13 cases) 31%	5, confirmed	2, confirmed in July	6, confirmed (despite flip in control in 4 cases)	
Roll Call in United Government (13 cases) 31%	5, confirmed 2, rejected/tabled (Tyler)	1 in June, postponed (Tyler)	1, partisan appointment (Peter Daniel) (only case in American history) 1, rejected (secession crisis starts) 1, confirmed after it is known that elections returned the same party to power (Stone)	2, confirmed by new Senate (Andrew Jackson)
United Government, Nomination Does Not Get		4, nomination after 6/15	1, no vote (expected flip	

58 *See infra* Appendix B. "Vote" includes all cases where there is a tally of senators' positions.

59 *Id*. at Table 10.

60 Data is derived from Appendix A.

a Vote (7 cases) 16.5%		(Tyler); no vote 2, nomination after June (LBJ); no vote	in control) (Tyler)	
Roll Call in Divided Government (4 cases) 9.5%	1, confirmed unanimously (Justice Kennedy)	1, nominated in April and confirmed (minority party in Senate supports more than the majority) (CJ Fuller)	1, confirmed 1, rejected in a bipartisan vote	
Divided Government, Nomination Does Not Get a Vote (5 cases) 12%	1 (Garland; no other precedent in American history)	1, nominated in August (President Fillmore); no vote	3, no vote	
42 cases	14	11	17 6, failed 8, bipartisan consent 1, partisan consent 2, confirmed by new Senate	
Confirmation Success Rate 25/42, 59.5%	11/14 cases 78.57%	3/11 cases 27.27%	11/17 cases 64.7%	

Some scholars distinguish between the Senate's behavior before the Civil War and after it, or between nineteenth-century Senate and the twentieth-century Senate.[61] While the numbers differ, the pattern holds true: with the exception of Justice Daniel, no late term appointment was confirmed without bipartisan support or the consent of a fresh Senate. Furthermore, eliminating President Tyler's eight failed nominations, which skew the numbers, does not change the pattern. If anything, it bolsters the claim for the need for bipartisan legitimacy.

61 *See* Keith E. Whittington, *Presidents, Senates, and Failed Supreme Court Nominations*, 2006 SUP. CT. REV. 401.

5. The Filibuster Myth

Scholars might wonder whether there is a SCOTUS Bipartisan Convention, or whether this phenomenon results from the filibuster mechanism alone, which traditionally allowed for unrestricted debate.[62] But such an assertion is not supported historically. Until 1949, no cloture procedure that could end debate and force a vote on the merits was available to appointments. Potentially, any Senator could have filibustered the process to obstruct an appointment.[63] Yet, it seems that no one utilized the filibuster against Supreme Court nominees during this period.[64] This also explains why there was no rush to adopt a cloture rule to override filibusters of appointments while the need for a cloture rule for legislation manifested as early as 1917.[65] Before the adoption of the cloture rule, the time period necessary to decide on a nominee to the U.S. Supreme Court in a presidential election year was 2.5 times longer than in the other three years, as shown below in Table 5.

Table 5: Length of Confirmation Process Before 1949[66]

	# Nominees	Average # Days from Date Received in Senate to Final Action by Senate or President
First Three Years	85	11
Presidential Election Years	34	26

62 SARAH A. BINDER & STEVEN S. SMITH, POLITICS OR PRINCIPLE?: FILIBUSTERING IN THE UNITED STATES SENATE 1–29 (1997).

63 MCMILLION, *supra* note 38, at 10 n.39.

64 John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL'Y 181, 188 (2003); Gerald N. Magliocca, *Reforming the Filibuster*, 105 NW. U. L. REV. 303, 308–09 (2011).

65 The cloture rule is codified in STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, R. XXII(2), at 15–16 (2013). Typically, cloture allows the Senate to close debate and reach a decision on the merits when a super-majority of senators support such a move. *See* RICHARD S. BETH, ELIZABETH RYBICKI, & MICHAEL GREENE, CONG. RSCH. SERV., RL32878, CLOTURE ATTEMPTS ON NOMINATIONS: DATA AND HISTORICAL DEVELOPMENT THROUGH NOVEMBER 20, 2013, at 4 (2018) (writing that the Senate adopted cloture in 1917 for legislation).

66 Table 5 does not include cases where "no action" occurred. This Table is based on my analysis of info derived from Table 1 of MCMILLION, *supra* note 38. Edward Bradford appears in Appendix A as a "No Action" case. He was tabled within 10 days with no recorded vote according to McMillion. *Id.*

After 1949, overcoming a filibuster of Supreme Court appointments initially required the support of two-thirds of the senators (until 1975), and then of 60% (until 2017).[67] Under these new rules, only Justice Kennedy was appointed in a presidential election year, and he was confirmed unanimously.[68] Thus, the introduction of cloture does not explain the fact that no Supreme Court appointment in a presidential election year garnered less than 66% support in roll-call votes throughout American history. Rather, the SCOTUS Bipartisan Convention accounts for it.

This convention was born already in the early years of the Republic as a lesson from the traumatic first transfer of power from Federalists to Anti-Federalists in 1800. Jefferson at all times condemned partisan judicial appointments that frustrate election results as unjust, "indecent," "unkind," and non-democratic.[69] President Adams's infamous last minute, midnight judicial appointments, were the subject of the *Marbury vs. Madison*[70] decision. Chief Justice William H. Rehnquist described the decision as "the most famous case ever decided by the United States Supreme Court."[71] Forever, in the collective memory, the growth of judicial power is linked to constraining abuse of political power during election time to manipulate control of the judiciary.

When the cloture rule was redefined to include Supreme Court appointments, the length of the appointment process grew, as shown in Table 6 below.[72] Paradoxically, as long as *any* senator could block the appointment, no filibuster was utilized, since all parties understood that such behavior would lead the chamber to a deadlock. Once a super-

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67 BETH ET AL., *supra* note 65, at 6. In 2017, the Senate reinterpreted its rules "to allow cloture to be invoked on Supreme Court nominations by a simple majority of Senators voting (a quorum being present)." MCMILIION, *supra* note 38, at 12.

68 *See infra* Appendix A, Table 4.

69 Nagle, *supra* note 11, at 317, 327, 329.

70 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

71 WILLIAM H. REHNQUIST, THE SUPREME COURT 35 (Vintage Books 2002).

72 Geoffrey Stone also treats differently the era beginning in 1955. He provides a different explanation: "It was not until 1955 that the Senate established the current practice of inviting nominees to testify as a matter of course." Geoffrey R. Stone, *Understanding Supreme Court Confirmations*, 2010 SUP. CT. REV. 381, 427. The CRS does not attribute the longer process to cloture but to other changes in the confirmation process occurring from the start of the twentieth century, including public hearings for Justices. The Senate Judiciary Committee also allows for at least four weeks prior to the public hearings to study and review the background of nominees. MCMILLION, *supra* note 38, at 6–8, 14. But it is difficult to ignore the spike in the length of the process after 1949.

majority requirement was set, the filibuster became a real threat.[73] Thus, while scholars typically treat the cloture rule as facilitating the appointments process,[74] it in fact became more difficult to appoint under it. Under the new system, as shown in Table 6, the confirmation process lasted fifty-seven instead of eleven days on average in the first three years of a presidency, and eighty-eight instead of twenty-six days in presidential election years. The Senate still dedicated more energy to scrutinizing appointments in presidential election years. Under the cloture system, the confirmation process took 54% more time in presidential election years in comparison to the other three years of the term.

Table 6: Length of Confirmation Process After 1949[75]

	# Nominees	Average # Days from Date Received in Senate to Final Action by Senate or President
First Three Years	32	57
Presidential Election Years	3	88

In the election year of 1968, senators first used a filibuster against a Supreme Court appointment, successfully blocking Associate Justice Abe Fortas's confirmation as Chief Justice.[76] Some of the Republican senators legitimized their opposition to Fortas's nomination by citing the election year.[77] The Thurmond Rule was articulated during this time, but, as this Essay argues, the roots of it are in the Founding, with

73 *Cf.* BINDER & SMITH, *supra* note 62, at 5 (noting that during the nineteenth century there was no serious abuse of the filibuster and suggesting that the explosion in its utilization in the twentieth century is due to more polarization, publicity of Senate's activity, and other political factors).

74 BINDER & SMITH, *supra* note 62, at 8–9.

75 Table 6 does not include cases where "no action" occurred. This Table is based on my analysis of info derived from Table 1 of McMillion, *supra* note 38.

76 Carl Tobias, *Confirming Supreme Court Justices in a Presidential Election Year*, 94 WASH. U. L. REV. 1089, 1096 (2017); Whittington, *supra* note 61, at 412 n.34; Stone, *supra* note 72, at 460.

77 Donald G. Tannenbaum, *Explaining Controversial Nominations: The Fortas Case Revisited*, 17 PRESIDENTIAL STUD. Q. 573, 575 (1987).

regard to SCOTUS appointments. It should be noted that Fortas's appointment as Chief Justice faced bipartisan opposition.[78]

The SCOTUS Bipartisan Convention was so ingrained that in fact not only did some members of the minority party support the appointment, but also some members of the President's party opposed it. Members of the President's party felt free to either oppose the nomination or not vote, thus strengthening the opposition.[79] The confirmation process was not treated as a battle for a partisan takeover of the Court, where party members were required to act with discipline, close ranks and prove their loyalty.[80] Rather, bipartisanship was the norm if a nomination were to pass in a presidential election year. While the filibuster is typically treated as a mechanism to enable the minority to be heard,[81] the SCOTUS Bipartisan Convention was intended to protect the expected incoming majority's ability to enjoy a smooth, peaceful transfer of power.[82]

B. *Rationales for the SCOTUS Bipartisan Convention*

The rationale behind the SCOTUS Bipartisan Convention is two-fold. First, the convention is intended to enable the people to have input on the appointment of the Justices. Presidential candidates treat the power to appoint Supreme Court Justices as a central electioneering item and discuss their vision of the Court during campaigns.[83] Many

78 *See infra* Appendix A, Table 3 and accompanying notes.

79 *See infra* Appendix A. The appointment of Peter Daniel is the exception.

80 *Cf.* Kevin J. McMahon, *Presidents, Political Regimes, and Contentious Supreme Court Nominations: A Historical Institutional Model*, 32 LAW & SOC. INQUIRY 919 (2007) (arguing that not only divided government but divided party of the President may explain failed nominations). While McMahon treats opposition within the President's party as a weakness, I treat it as manifesting the SCOTUS Bipartisan Convention.

81 BINDER & SMITH, *supra* note 62, at 3.

82 Research suggests that filibusters have an edge and become more effective towards the end of a legislative session either because the opposition becomes more motivated to block items on the legislative agenda, or because the filibuster becomes more potent as time dwindles. *See, e.g.*, BINDER & SMITH, *supra* note 62, at 6; Magliocca, *supra* note 64, at 310 n.28 and accompanying text. In this sense the filibuster may have a different dress near election times. Instead of enabling the minority to provide input on legislative items, near elections it enables the people to weigh in on the issues. The SCOTUS Bipartisan Convention goes even beyond that. It affects nominations to the Supreme Court throughout the entire presidential election year, rather than just near elections.

83 SEGAL & SPAETH, *supra* note 31, at 181. *See also* GEOFFREY R. STONE, SEX AND THE CONSTITUTION: SEX, RELIGION, AND LAW FROM AMERICA'S ORIGINS TO THE TWENTY-FIRST CENTURY (2017) (describing similar trends).

historians believe that appointing Justices to the Court is among the most important decisions a President can make.[84] During election time, presidents suffer from a democratic deficit as it is not guaranteed that they or their party's designated successor will win the election. Presidents must reflect the will of the people in proposing nominees and should not be able to frustrate election results through such appointments.[85] Even the Senate during an election period does not muster the public confidence to act in a partisan way and make irreversible, hotly-contested decisions with long-term effects.[86] One should bear in mind that, on the eve of Barrett's confirmation vote, millions of Americans had already cast their votes in the 2020 election cycle, though these votes had not been counted yet. This democratic rationale has never been more relevant with the Supreme Court deciding issues of life and death, abortion, gay rights, gun-control, healthcare, border control, and gerrymandering.

Second, the Convention is intended to counter the agency problem, under which elected representatives as agents of the people might abuse their power and promote their self-interest rather than the public good. While this danger is part of the nature of representative governments, election times substantially bolster the risks of this danger materializing.[87] Presidents in particular face the greatest temptation to engage in risky behavior to tilt election results or at least make executive, and even judicial, appointments that will promote their agenda even after they leave office. On the eve of Barrett's confirmation, the data suggested that this fear was very much grounded.[88] President Trump did not leave room for speculation whether this rationale applies. He repeatedly refused to commit to a peaceful transition of power. He had questioned the validity of the 2020 election's results in advance, thereby laying the groundwork for disputing their results, and

84 SEGAL & SPAETH, *supra* note 31, at 179.

85 *See* Rivka Weill, *Constitutional Transitions: The Role of Lame Ducks and Caretakers*, 2011 UTAH L. REV. 1087 (discussing the democratic deficit and agency problem of lame-duck presidents and caretaker governments); *see also* Nancy Amoury Combs, *Carter, Reagan, and Khomeini: Presidential Transitions and International Law*, 52 HASTINGS L.J. 303 (2001); Nina A. Mendelson, *Quick Off the Mark? In Favor of Empowering the President-Elect*, 103 NW. U. L. REV. COLLOQUY 464 (2009); Jack M. Beermann & William P. Marshall, *The Constitutional Law of Presidential Transitions*, 84 N.C. L. REV. 1253 (2006); Jack M. Beermann, *Presidential Power in Transitions*, 83 B.U. L. REV. 947 (2003).

86 *See* sources cited *supra* note 85 (discussing the constitutional challenges of lame-duck legislatures); Rivka Weill, *Resurrecting Legislation*, 14 INT'L J. CONST. L. 518 (2016) (dealing with the democratic deficit of legislatures in times of election and transition).

87 *See* Weill, *supra* note 85.

88 *See* sources cited *supra* note 85.

anticipated that the Supreme Court would need to determine the United States's next President. President Trump explicitly stated, "I think having a 4-4 situation [in the Supreme Court] is not a good situation . . . . I think it should be 8-nothing or 9-nothing. But just in case it would be more political than it should be, I think it's very important to have a ninth judge."[89] Needless to say, the lack of willingness to commit to accepting election results runs against American democratic traditions. Democracy requires the peaceful transition of power.

While the Thurmond Rule discusses judicial appointments in general, this Essay argues that the Rule applies at least with regards to judicial appointments to the Supreme Court. The Supreme Court is the final arbiter on the law of the land and its decisions bind lower courts. It enjoys the power of stare decisis as part of the common law tradition.[90] Though some Americans may deny this fact or challenge its acceptability, the Supreme Court not only interprets but also makes law. But, unlike members of the Executive and Legislative branches, Supreme Court Justices enjoy a life tenure during "good Behaviour" and their appointment is irreversible unless impeached by a supermajority of senators.[91] Supreme Court appointments, therefore, present Presidents with greater incentives to act coercively and in a partisan fashion with elections underway. Partisan appointments to the Court during election time frustrate the *very* nature of representative government. Democracy requires that the people have an input directly or indirectly on policy and on the institutions governing their country.[92]

Worse yet, in March 2016, the Republicans refused to allow debate on President Barack Obama's nominee, Merrick Garland, on the Senate floor. Prominent Republican senators like Majority Leader Mitch McConnell have stated that "[t]he American people should have a voice in the selection of their next Supreme Court Justice. Therefore, this vacancy should not be filled until we have a new president."[93] Senator

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89 Kathryn Watson, *Trump Predicts Supreme Court Needs a Ninth Justice to Decide November Election*, CBS NEWS (Sept. 23, 2020, 5:26 PM), https://www.cbsnews.com/news/trump-predicts-supreme-court-needs-a-ninth-justice-to-decide-november-election [https://perma.cc/9DGX-7GCE].

90 *See* Rivka Weill, *Constitutional Statutes or Overriding the Court—On Bruce Ackerman's* We the People: The Civil Rights Revolution, 13 JERUSALEM REV. LEGAL STUD. 1 (2016) (on the influence of stare decisis on American revolutionary tradition).

91 U.S. CONST. art. III, § 1; U.S. CONST. art. I, § 3, cl. 6–7.

92 *See* HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 232–34 (1967).

93 Richard Hall, *Here's What Senate Republicans Said When Obama Tried to Confirm a Supreme Court Judge in an Election Year*, INDEP. (Sept. 19, 2020, 3:15 AM)

Lindsey Graham, then chairman of the Senate Judiciary Committee, even invited the public to "use my words against me," should a Republican president be elected in 2016 and face a vacancy in the last year of his first term.[94] While the Republicans treated March of a presidential election year as too late in the Garland case, they promoted Barrett's appointment less than a month before the election. No other March-of-election-year nomination was doomed to the "No Action" archive of history. All five other "No Action" nominations took place within five months of the election, or even after the election. It is definitely against constitutional convention to allow one political party, but deny the other, the power to appoint, or at the very least debate an appointment, during election time. In this sense, the Republicans "stole" a judicial appointment from the Democrats.

Moreover, despite Republican control of the Senate, it is not a foregone conclusion that the Senate would have rejected Garland's appointment had it received a floor vote. Senators may act and vote differently on preliminary procedural issues—such as whether to hold a confirmation vote, or whether to postpone a nomination—than they do on the substantive vote of the confirmation.[95]

One may argue that the two scenarios are different. In 2016, two different political parties controlled the presidency and the Senate. Realistically, President Obama would not have been able to appoint Merrick Garland, even if the Republican-controlled Senate held confirmation hearings. In 2020, the Republicans controlled both the presidency and the Senate and had the majority to confirm Barrett. This is a claim not just of political power to force the appointment but also of legitimacy. Political control of both institutions supposedly testifies to greater support from the public. Keith Whittington's study may lend support for such a proposition.[96] He found that no President appointed

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https://www.independent.co.uk/news/world/americas/us-politics/obama-mcconnell-ruth-bader-ginsburg-scalia-supreme-court-b491539.html [https://perma.cc/KYM8-BALX] (quoting Senator Mitch McConnell's official statement from February 13, 2016, the day of Scalia's passing).

94 *Id.* (quoting Senator Lindsey Graham's statement from March 10, 2016).

95 Senator Lisa Murkowski, for example, voted against holding the confirmation vote on Justice Barrett near elections, yet committed to support the nomination on the merits. Emma Newburger, *Lisa Murkowski Says She Will Vote to Confirm Amy Coney Barrett to Supreme Court*, CNBC (Oct. 24, 2020, 4:42 PM), https://www.cnbc.com/2020/10/24/lisa-murkowski-says-she-will-vote-to-confirm-amy-coney-barrett-to-supreme-court.html [https://perma.cc/JJT7-MCP6].

96 Whittington, *supra* note 61.

a Justice during presidential election years when the Senate was in control of the other party.[97]

The focus of Whittington's study was explaining failed confirmations to the Supreme Court. He found that it is impossible to appoint a Justice during presidential election years if the Senate and the presidency are controlled by different political parties.[98] However, he did not examine the composition of the political support for the appointments in the Senate. He also defined the election period narrowly to include only six months before elections and until a new President assumes office.[99]

The findings of this Essay are different. Presidents have succeeded in appointing Justices in presidential election years—defined to include all nominations made within the entire calendar year of presidential election and all appointments made within twelve months prior to the President assuming office—even when the opposition controlled the Senate.[100] Moreover, even when the same political party controlled both the presidency and the Senate, confirmations still required bipartisan consent. This makes sense not only in light of the looming presidential elections but also because the public may have already expressed dissatisfaction with the current administration by overturning the control of either or both houses of Congress to the other party in midterm elections. This has in fact happened under the Trump administration, when the House of Representatives flipped to Democratic control in the 2018 midterm elections.[101]

The SCOTUS Bipartisan Convention prohibits appointments to the Supreme Court during presidential election years, unless achieved by bipartisan consent. Thus, it is in fact more legitimate, and even more constitutional, to appoint a Justice in election time if the presidency and the Senate are held by different political parties. This guarantees that no appointment is made without bipartisan consent. Research suggests that great Justices are appointed not by great Presidents but by Presidents in need of bipartisan support, including appointments

97 *Id.* at 421.

98 *Id.*; *see also id.* at 437–38.

99 *Id.* at 415 n.40.

100 *See* Appendix A, Table 4 (noting the cases of Justice William Woods (1880), Chief Justice Melville Fuller, and Justice Anthony Kennedy).

101 *Mid-Term Elections: Democrats Win House in Setback for Trump*, BBC NEWS (Nov. 7, 2018), https://www.bbc.com/news/world-us-canada-46120373 [https://perma.cc/EF97-FB85].

during presidential election times.[102] The need to garner bipartisan support affects the type of nominees chosen by the President.

Barrett's confirmation before the 2020 election date based on Republican control of the Senate alone, was thus a severe breach of the SCOTUS Bipartisan constitutional convention. Never has a confirmation garnered less than a margin of fourteen votes when occurring so close before an election date.[103] Except for the infamous case of Peter Daniel, which took place before the Civil War, never was a Justice appointed by an outgoing Senate without bipartisan support in a presidential election year.[104]

II. COURT PACKING AS CONSTITUTIONAL REMEDY

Liberal circles are discussing court packing in earnest as a possible response to Republicans' breach of constitutional conventions. When asked during the presidential and vice-presidential debates, the Democratic Presidential candidate, Joe Biden, and his running mate, Kamala Harris, refrained from ruling out court packing as a possible response to the appointment of Barrett to SCOTUS before the election.[105] Yet, many scholars argue that court packing is illegitimate and ill advised. It will diminish the independent status of the Supreme Court and subject it to political will.[106] It might lead to endless wars between the rival political parties and cycles of retaliation.[107] Imagine a more polarized American society than the present in which the Court loses its legitimacy to serve as the arbiter of constitutional disputes.[108]

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102 *See* John Massaro, *"Lame-Duck" Presidents, Great Justices?*, 8 PRESIDENTIAL STUD. Q. 296 (1978).

103 *See supra* Section I.A.3, and *infra* Appendix A.

104 *See supra* Section I.A.3, and *infra* Appendix A.

105 *Harris Dodges Pence on Packing Supreme Court*, N.Y. TIMES (Oct. 7, 2020), https://www.nytimes.com/video/us/elections/100000007383977/pence-harris-supreme-court.html [https://perma.cc/ZQJ7-QZ9B].

106 Thomas Jipping & GianCarlo Canparo, *Why Court Packing Would be Devastating to Our Republic*, HERITAGE FOUND. (Oct. 5, 2020), https://www.heritage.org/courts/commentary/why-court-packing-would-be-devastating-our-republic [https://perma.cc/64UX-ABUV]; John Yoo & Robert Delahunty, *The Foolish Court-Packing Craze*, NAT'L REV. (July 19, 2018, 6:30 AM), https://www.nationalreview.com/2018/07/court-packing-ideas-threaten-judicial-independence [https://perma.cc/8265-GVFV]; Bruce Ledewitz, *A Call for America's Law Professors to Oppose Court-Packing*, 2019 PEPP. L. REV. 1.

107 *See supra* Introduction.

108 *See generally* NOLAN MCCARTY, KEITH T. POOLE, & HOWARD ROSENTHAL, POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES (2d ed. 2016); Daryl J. Levinson &

Court packing could even backfire against the political party advancing it, as arguably happened to President Franklin Delano Roosevelt (FDR) in the 1930s.[109] Scholars from around the world further warn that, by pursuing court packing, the Democrats will set a bad precedent internationally.[110] It will legitimize the actions of authoritarian leaders, who use court packing to repress opposition forces and destroy democracy while justifying it in the name of popular sovereignty. This dynamic is at play in countries such as Poland, Hungary, and Turkey.[111]

A. *FDR's Court Packing Plan*

The public associates court packing with FDR's threat to pack the Court in 1937 to overcome its resistance to New Deal legislation.[112] FDR won repeated presidential elections and translated the results to a broad public mandate for reform. After a second landslide victory in the November 1936 election with the support of 60.8% of the popular vote, FDR proposed on February 5, 1937, to pack the Supreme Court.[113] He treated the "Old-Court" veto as democratically illegitimate and justified court-packing in the name of popular sovereignty: "It is the American people themselves who are in the driver's seat. It is the American people themselves who want the furrow plowed. It is the American people

Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2332 (2006). *See also* Rivka Weill, *Election Integrity: The Constitutionality of Transitioning to Electronic Voting in Comparative Terms*, *in* DIGITAL DEMOCRACY IN A GLOBALIZED WORLD 142 (Corien Prins, Colette Cuijpers, Peter L. Lindseth, & Mônica Rosina eds., 2017) (on the effects of polarization on electronic voting).

109 *See infra* Section II.A.

110 That the U.S. looms as a comparable example in discussions on court-packing in authoritarian regimes, see, e.g., David Kosar & Katarina Sipulova, *How to Fight Court-Packing?*, 6 CONST. STUD. 133 (2020); STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2018); Richard J. Sweeney, *Constitutional Conflicts in the European Union: Court Packing in Poland Versus the United States*, 18 ECON. & BUS. REV. 3 (2018).

111 WOJCIECH SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN (2019); LEVITSKY & ZIBLATT, *supra* note 110.

112 Ian Millhiser, *Let's Think About Court-Packing*, DEMOCRACY J. (2019) https://democracyjournal.org/magazine/51/lets-think-about-court-packing-2 [https://perma.cc/6Y5H-HUF4]; Astead W. Herndon & Maggie Astor, *Ruth Bader Ginsburg's Death Revives Talk of Court Packing*, N.Y. TIMES (Oct. 22, 2020), https://www.nytimes.com/2020/09/19/us/politics/what-is-court-packing.html [https://perma.cc/83RL-5R8G].

113 Archibald M. Crossley, *Straw Polls in 1936*, 1 PUBLIC OPINION Q. 24 (1937); Michael Comiskey, *Can a President Pack—or Draft—the Supreme Court? FDR and the Court in the Great Depression and World War II*, 57 ALB. L. REV. 1043, 1046 (1994).

themselves who expect the third horse [the Court] to pull in unison with the other two [Congress and the President]."[114]

The prevalent narrative suggests that in response to the threat to pack the Court, the Court "switched in time" and accepted the constitutionality of the New Deal legislation.[115] This judicial legitimation of the constitutionality of expansive government intervention in economic life amounts to "the constitutional revolution of 1937."[116] The Court's retreat obviated the need for FDR to act on his threat and pack the Court in the name of enforcing the people's will. Others contended that the Court switched its position regardless of, and even before, FDR's threat.[117] Despite FDR's claim that he intended to enforce the people's will, his plan was not popular. A congressional majority, including some members of his Democratic party, opposed FDR's court packing plan.[118] In the midterm elections of 1938, the Democratic Party seemed to pay a price for FDR's insistence to pack the Court, losing "71 House seats, 6 Senate seats, and 12 governorships."[119] FDR's plan thus seems to be an unworthy exercise of statesmanship.

Moreover, the Judiciary Committee discussing FDR's court packing plan in 1937 rejected the proposal with harsh, unequivocal criticism as a serious violation of constitutional conventions.[120] It treated previous historical cases of court packing as justified on administrative grounds with the admission of new states to the

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114 Franklin D. Roosevelt, U.S. President, Fireside Chat 9: On "Court-Packing" (Mar. 9, 1937).

115 WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 160–62 (1995); *see also* Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69 (2010) (showing that Justice Owen Roberts shifted abruptly to the left in the 1936 term).

116 BRUCE ACKERMAN, WE THE PEOPLE, VOLUME 2: TRANSFORMATIONS 279–382 (1998); Barry Cushman, *Inside the "Constitutional Revolution" of 1937*, 2016 SUP. CT. REV. 367; Rivka Weill, *Secession and the Prevalence of Both Militant Democracy and Eternity Clauses Worldwide*, 40 CARDOZO L. REV. 905 (2018) (arguing that the political actors will resort to an evolutionary or revolutionary constitutional narrative depending on strategic considerations).

117 *See, e.g.*, Comiskey, *supra* note 113, at 1047.

118 Cushman, *supra* note 116, at 382–88.

119 Rick Pildes, *How FDR's Court-Packing Plan Set Progressive Policies Back by 25 Years*, BALKINIZATION (Apr. 1, 2019), https://balkin.blogspot.com/2019/04/how-fdrs-court-packing-plan-set.html [https://perma.cc/7HM9-STQA]; *see also* Julian E. Zelizer, Opinion, *Packing the Supreme Court Is a Terrible Idea*, N.Y. TIMES (Oct. 15, 2018), https://www.nytimes.com/2018/10/15/opinion/supreme-court-packing-democrats-.html [https://perma.cc/M36A-49GZ] ("Democrats paid a political cost for decades after F.D.R. tried it in the 1930s. They probably would again.").

120 S. COMM. ON THE JUDICIARY, ADVERSE REPORT OF THE COMMITTEE ON THE JUDICIARY ON A BILL TO REORGANIZE THE JUDICIAL BRANCH OF THE GOVERNMENT, S. REP. NO. 75-711, at 45–46 (1937) [hereinafter SENATE REPORT].

Union.[121] It claimed that even when, under extraordinary circumstances, presidents tried to manipulate the Court's size to affect its ideology, it had never been done to direct a particular judicial decision.[122] The Committee's Report asserted:

> It is a proposal without precedent . . . . It would subjugate the courts to the will of Congress and the President and thereby destroy the independence of the judiciary, the only certain shield of individual rights. . . . It stands now before the country, acknowledged by its proponents as a plan to force judicial interpretation of the Constitution, a proposal that violates every sacred tradition of American democracy. . . . It is a measure which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America.[123]

This criticism marred court packing in American politics. It became an illegitimate, outcast political maneuver. The Senate Judiciary Committee not only ruled out court packing as inappropriate in America but felt the heavy weight of avoiding setting a dangerous precedent for the world at large. In the Committee's words, "[i]t is immeasurably more important, immeasurably more sacred to the people of America, indeed, to the people of all the world than the immediate adoption of any legislation however beneficial."[124]

B. *The Antecedents in the British Model*

However, FDR did not invent the idea of court packing. He relied on the British threats to pack the House of Lords (Lords) in the beginning of the twentieth century, which convinced the Lords to give up their veto power. On November 13, 1935, Roosevelt discussed with Secretary Harold Ickes the analogy between the crisis with the Supreme Court that they confronted and the crisis with the House of Lords that the British Liberal Government confronted in 1909–1911.[125] At a cabinet meeting on December 27, 1935, FDR referred yet again to the British experience. Ickes recalled:

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121 *Id.* at 23–24.

122 *Id.* at 23–26.

123 *Id.* at 45–46.

124 *Id.* at 17. *But see* ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS (1941) (Jackson assisted FDR in his court-packing plans as Assistant Attorney General before his appointment to the Court).

125 HAROLD L. ICKES, *Diary Entry (Nov. 13, 1935)*, *in* THE SECRET DIARY OF HAROLD L. ICKES: THE FIRST THOUSAND DAYS 1933–1936, at 468 (1953).

> The President had a good deal to say about what the Supreme Court is likely to do on New Deal legislation. As once before in talking with me, he went back to the period when Gladstone was Prime Minister of Great Britain and succeeded in passing the Irish Home Rule Bill through the House of Commons on two or three occasions, only to have it vetoed by the House of Lords. Later, when Lloyd George's social security act was similarly blocked, Lloyd George went to the King, who was in favor of the bill, and he asked Lloyd George whether he wanted him to create three hundred new peers. Lloyd George said that he did not but that he was going to pass through Commons a bill providing that in the future any bill vetoed by the House of Lords should, notwithstanding that, become the law of Great Britain if passed again by the Commons. He told the King that when that bill was ready to go to the Lords he would like the King to send word that if it didn't pass, he would create three hundred new Lords. This the King did, with the result that the bill was accepted by the House of Lords.[126]

In analogizing the U.S. Supreme Court and the British House of Lords, FDR sought leverage mechanisms to overcome the veto power of the Supreme Court as a non-elected branch whose members enjoy a life tenure. He could not rely on a fully analogous precedent as the U.S. Supreme Court is exceptional worldwide in providing life tenure for Justices who exercise judicial review over primary legislation as the highest tribunal in the land.[127] However, the Founding Fathers' adoption of life tenure for Justices was inspired by the British Act of Settlement of 1701.[128] This Act provided for judicial independence to the superior courts from royal intervention. Judges would be protected during "good behavior," subject only to impeachment by parliament.[129] The same language is echoed in Article III of the U.S. Constitution: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . . ."[130] The Founding Fathers even listed royal intervention in judicial independence as one of the

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126 *Id.* at 494–95.

127 Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 819–21 (2006); *see also* Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579 (2005) (discussing various ways to mitigate judicial life-tenured effects on democratic governance).

128 Raoul Berger, *Impeachment of Judges and "Good Behavior" Tenure*, 79 YALE L.J. 1475, 1478 (1970) (suggesting that it is common to attribute "good behavior" tenure to the Act of Settlement but that the British roots are even earlier).

129 James E. Pfander, *Removing Federal Judges*, 74 U. CHI. L. REV. 1227, 1235–36 (2007).

130 U.S. CONST. art. III, § 1.

grievances against King George III justifying secession.[131] The Declaration of Independence thus states: "He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."[132] Thus, the bitter experience with British executive encroachment on judicial independence led the Framers to adopt life tenures for Justices in the Constitution. This way, Justices would be guaranteed status and salary and be free to determine cases objectively, immune to external influences.

The linkage between the British and American judicial models does not conclude with life tenure for the Justices. In fact, the British House of Lords was the forerunner to the U.S. Supreme Court.[133] The House of Lords fulfilled a dual function in British history: It was an upper legislative body like the American Senate. But, in addition, the House of Lords and eventually a sub-part of it, the Law Lords, served as the highest court of Britain like the Supreme Court.[134] The Lords' legislative veto on constitutional matters resembled judicial review power in the U.S. Both were intended to guarantee that no constitutional change would pass without popular consent. Dicey described this function of the Lord's veto:

> The legislative authority of the House of Lords meant, and was up to 1911 understood to mean, that the House had the power, and was under the obligation to reject any Bill of first rate importance which the House reasonably and *bona fide* believed to be opposed to the permanent will of the country. . . . [N]o one till 1910 and 1911 seriously disputed the doctrine that the House of Lords in modern times had the right to demand an appeal to the people whenever on any great subject of legislation the will of the electorate was uncertain or unknown.[135]

The House of Lords exercised judicial review in its capacity as a legislature rather than as a court, to prevent assertions that what the

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131 SENATE REPORT, *supra* note 120, at 18; *see also* Weill, *supra* note 116 (discussing popular sovereignty as composed of people plus territory).

132 THE DECLARATION OF INDEPENDENCE (U.S. 1776).

133 George Jarvis Thompson, *The Development of the Anglo-American Judicial System*, 17 CORNELL L.Q. 9 (1931).

134 *See* ROBERT STEVENS, LAW AND POLITICS: THE HOUSE OF LORDS AS A JUDICIAL BODY, 1800–1976 (1978); *see also* Rivka Weill, *Evolution vs. Revolution: Dueling Models of Dualism*, 54 AM. J. COMPAR. L. 429 (2006) (discussing how constitutional transformations may occur in evolutionary ways and drawing comparisons between the British and American constitutional models).

135 A.V. Dicey, *The Parliament Act, 1911, and the Destruction of All Constitutional Safeguards*, *in* RIGHTS OF CITIZENSHIP: A SURVEY OF SAFEGUARDS FOR THE PEOPLE 81, 85–86 (1912).

Lords allowed on one hand as a legislature, they later undid as a Court.[136]

The Framers of the Constitution debated at great length whether the judiciary should also serve as a Council of Revision and veto laws as part of the legislative function, like the House of Lords.[137] They rejected this idea on separation of powers grounds. They did not want to grant the judges a "double negative" over laws, through a legislative veto in addition to judicial review.[138] They further held that judges should not be biased in their judicial function because of their previous legislative involvement in them.[139] The Framers explicitly discussed the similarities between the Lords' legislative veto function and judicial review. They understood why the Lords exercised their judicial review function as a legislature rather than as a Court.

Thus, FDR's reliance on British experience in search of ways to deal with the Court had legal, historical support. In 1911, the Lords lost their non-democratic absolute veto over bills because they usurped constitutional conventions, by vetoing Lloyd George's budget bill of 1909 and forcing the British nation to endure early elections.[140] They disregarded the British convention that the House of Commons, as the only elected branch, is supreme in fiscal matters.[141] Liberal Prime Minister (PM) Herbert Asquith attacked the House of Lords' action as "the most arrogant usurpation" of the House of Commons' powers in two centuries.[142] He viewed it as "a breach of the Constitution" that would bring about a constitutional revolution.[143] Therefore, in 1911 the Lords faced the "Masada" dilemma: figuratively, commit suicide or die

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136 *See* Weill, *supra* note 134, at 471.

137 James T. Barry III, *The Council of Revision and the Limits of Judicial Power*, 56 U. CHI. L. REV. 235, 239, 243 (1989).

138 *Id*. at 255 (quoting Luther Martin).

139 *Id*. at 256.

140 The Parliament Act 1911 eliminated the Lords' absolute veto power. Instead, the Lords were left with only suspensory veto power over regular legislation, and no veto power over money bills. *See* ROYAL COMMISSION ON THE REFORM OF THE HOUSE OF LORDS, A HOUSE FOR THE FUTURE, CM. 4534, ¶ 4.3 (2000).

141 *See* Rivka Weill, *From Earl Grey to Boris Johnson: Brexit and the Anglo-American Constitutional Model* (Aug. 21, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3483682 [https://perma.cc/BM7M-MDUS]. For an updated draft: Rivka Weill, *Constitutionalism Reborn: Popular Sovereignty and Constitutional Conventions in the US and UK*, COLUMBIA J. TRANS. L. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3830074.

142 NEAL BLEWETT, THE PEERS, THE PARTIES AND THE PEOPLE: THE GENERAL ELECTIONS OF 1910, at 101 (1972) (quoting HC Deb (2 Dec. 1909) (13) cols. 546–58)).

143 *Id.*

at enemy's hands.[144] The Lords could either allow the Parliament Act of 1911 to pass and lose their absolute veto power, or be packed with new peers that will enact such a measure anyway. PM Asquith and his Chancellor of Exchequer Lloyd George's move was highly effective. The Lords yielded and chose to vote in support of losing their veto rather than be packed with new peers.[145] Thus, the threat of packing the Lords assisted the British to enforce constitutional conventions that protected the nexus between a mandate for political action and elections.

This Essay argues that the British constitutional design is to counter life tenure and veto power with court packing, if needed to protect popular sovereignty. While scholars typically cite Dicey for the proposition that constitutional conventions are not legally enforceable,[146] they misunderstand the workings of the British system. Dicey explicitly acknowledged that court packing, or the threat thereof, is justified to guarantee the prevalence of popular sovereignty against a partisan takeover of non-elected veto power. In the third part of his *Introduction to the Study of the Law of the Constitution*, Dicey dealt with constitutional conventions, and in particular how the Crown and Lords should exercise their discretionary powers; *i.e.*, their prerogatives and privileges respectively. His answer upheld the people's sovereignty:

> The same thing holds good of the understanding, or habit, in accordance with which the House of Lords are expected in every serious political controversy to give way at some point or other to the will of the House of Commons as expressing the deliberate resolve of the nation, or of that further custom which, though of comparatively recent growth, forms an essential article of modern constitutional ethics, by which, in case the Peers should finally refuse to acquiesce in the decision of the Lower House, the Crown is expected to nullify the resistance of the Lords by the creation of new Peerages. How, it may be said, is the "point" to be fixed at which, in case of a conflict between the two Houses, the Lords must give way, or the Crown ought to use its prerogative in the creation of new Peers? The question is worth raising, because the answer throws great light upon the nature and aim of the articles which make up our conventional code. This reply is, that the point at which the Lords must yield or the Crown intervene is properly determined by anything which conclusively shows that the House of Commons represents on the matter in dispute the deliberate decision of the

144 *See* Rivka Weill, *We the British People*, 2004 PUB. L. 380, 402; *see also* JODI MAGNESS, MASADA: FROM JEWISH REVOLT TO MODERN MYTH (2019) (on the Masada dilemma).

145 Weill, *supra* note 144 (describing the British popular sovereignty model in the nineteenth century).

146 *See supra* Introduction.

> nation. The truth of this reply will hardly be questioned, but to admit that the deliberate decision of the electorate is decisive, is in fact to concede that the understandings as to the action of the House of Lords and of the Crown are, what we have found them to be, rules meant to ensure the ultimate supremacy of the true political sovereign, or, in other words, of the electoral body.[147]

The famous British political analyst Walter Bagehot similarly acknowledged, "[j]ust as the knowledge that his men *can* strike makes a master yield in order that they may not strike, so the knowledge that their House could be swamped at the will of the king—at the will of the people—made the Lords yield to the people."[148] The British model thus identified the House of Lords first, and ultimately institutional packing, as the enforcers of constitutional conventions. The British constitutional convention required the Lords to identify when the Lower House enjoys popular consent for constitutional reform that requires the removal of the Lords' veto.[149] This convention was not left to the whims of the Lords. Rather, the King, at the Prime Minister's request, had to intervene through threats of—or actual—court packing, if the Lords did not abide by the convention.[150] The British understood that no democracy may exist if it is left to the caprice of unrestrained unilateral partisan political power.

C. *The Founding Fathers' Endorsement of Court Packing*

When opting to adopt life tenure for federal judges inspired by the Lords' unique status, the Framers were fully aware of court packing's use as an antidote against breach of conventions in defense of popular sovereignty. In 1712, facing Whig opposition in the House of Lords, Queen Anne created twelve new peers to enable the parliamentary ratification of the Peace of Utrecht treaties, which ended the War of the Spanish Succession.[151] The treaties led to Britain's emergence as Europe's foremost commercial powerhouse and expanded the United Kingdom's North American territories well into modern Canada. While

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147 DICEY, *supra* note 6, at 286–87 (footnote omitted).

148 WALTER BAGEHOT, THE ENGLISH CONSTITUTION 129 (London, Chapman and Hall 1867).

149 Dicey acknowledged this dynamic. *See* DICEY, *supra* note 147and accompanying text.

150 In fact, both the Great Reform Act 1832 that began the expansion of the franchise in Britain and the Parliament Act 1911 that redefined the legislative powers of the Lords passed only after the King threatened the Lords with creation of peers. Weill, *supra* note 134, at 453.

151 Clyve Jones, *Lord Oxford's Jury: The Political and Social Context of the Creation of the Twelve Peers, 1711–12*, 24 PARLIAMENTARY HIST. 9, 9 (2005).

the War of Spanish Succession waged in Europe, the American colonists fought their own joint front with the British and some Native American tribes against the French and Spanish, in what became known as Queen Anne's War (the second of the French and Indian Wars). Following the war, the Americans found their borders expanded by the Treaty of Utrecht, in which the French ceded several North American territories to the British.[152] The Americans were thus well aware of the treaties' existence and of the methods Queen Anne employed to ratify them.

In fact, in 1776, the Founding Fathers leaned heavily on the Treaty of Utrecht when drafting the Model Commercial Treaty, to serve as the platform the young Republic would use to pursue international relations with European nations. Congress drafted the Model Treaty during the same months as the Declaration of Independence and Articles of Confederation. Daniel Hulsebosch writes:

> The committee that drafted the Model Treaty collected compilations of European treaties. Although the conscientious John Adams did most of the drafting, Benjamin Franklin obtained the best single source: the Anglo-French Treaty of Utrecht of 1713. The Anglo-French Treaty of Utrecht was the leading example of liberal treaties designed to promote European peace by fostering relatively unfettered trade in peace and war.[153]

The Treaty of Utrecht lingered in the American mind after the Model Treaty was completed. The Founding Fathers also referred to it, in 1773, during their negotiations with Britain to end the American Revolutionary War.

Furthermore, the Founding Fathers were not just aware of the creation-of-peers method in its historical context, but even brought it up while crafting the Constitution. They explicitly rejected the idea that the President will enjoy royal prerogative powers such as creation of peers:

> Imperial dignity, and hereditary succession—constituting an independent branch of the Legislature—the creation of Peers and distribution of titles and dignities— . . . all these prerogatives, besides a great many more, which it is unnecessary to detail here,

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152 THE TREATIES OF THE WAR OF THE SPANISH SUCCESSION: AN HISTORICAL AND CRITICAL DICTIONARY 75–78 (Linda Frey & Marsha Frey eds., 1995).

153 Daniel J. Hulsebosch, *The Revolutionary Portfolio: Constitution-Making and the Wider World in the American Revolution*, 47 SUFFOLK U. L. REV. 759, 797 (2014).

> (none of all which are vested in the President) put together, form an accumulation of power of immense magnitude . . . .[154]

And even as these debates took place, the creation of peers remained topical in the global scheme. In fact, while the Founding Fathers fixated on the drafting and ratification of the U.S. Constitution in 1787, King George III, whose rule they rejected in the Declaration of Independence, was busy with the creation of new peers in Britain to promote political agendas.[155]

The Founding Fathers deliberately opted to allow court packing in the constitutional document. The wording of Article III of the Constitution thus states, "[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."[156] While the Founding Fathers had learned from their experience with the British monarchy not to grant the Executive permission to pack the Court, they explicitly granted Congress the authority to determine the Court's size. Hence, the Judiciary Act of 1789 was needed to determine the original number of Justices. The Founding Fathers entrusted Congress with both packing the Court and removing Justices through impeachment. This aligned with ideas discussed, but rejected, in Britain at the time of placing the prerogative to create peers under parliamentary control.[157] Indeed, over the course of American history the Court's size had not just been manipulated multiple times but actually expanded from six members as dictated by the Judiciary Act of 1789 to the nine members it has today.[158]

The Founding Fathers were not only familiar with the methods of manipulating the Court by controlling its size, they even engaged in court packing themselves. FDR relied on this American history in making his threat to pack the Court. He stated:

> Is it a dangerous precedent for the Congress to change the number of the Justices? The Congress has always had, and will have, that power. The number of justices has been changed several times

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154 Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. 1269, 1355 (2020) (quoting Americanus, *II*, VA. INDEP. CHRON., Dec. 19, 1787, *reprinted in* 8 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 89, 288–89 (John P. Kaminski, Gaspare J. Saladino, & Richard Leffler eds., 1988)).

155 *See generally* William C. Lowe, *George III, Peerage Creations and Politics, 1760–1784*, 35 HIST. J. 587 (1992).

156 U.S. CONST. art. III, § 1.

157 *See* Lowe, *supra* note 155.

158 SENATE REPORT, *supra* note 120, at 23–26 (documenting changes in the Court's size and arguing that it was never done to influence the content of judicial decisions).

> before, in the Administration of John Adams and Thomas Jefferson—both signers of the Declaration of Independence—Andrew Jackson, Abraham Lincoln and Ulysses S. Grant.[159]

When facing the first constitutional transition of power from Federalist to Anti-Federalist, the lame-duck President Adams decided to eliminate a vacant seat and downsize the Court to influence its ideology. Adams resorted to court packing through the Judiciary Act of 1801, fully aware of the availability of this constitutional weapon.[160] President Jefferson responded by restoring the Supreme Court's original size and eliminating the new circuit court seats that Adams had arranged.[161] The lame-duck President Adams also appointed the Secretary of State, John Marshall, to be Chief Justice, but that appointment was well received broadly, was passed by a voice vote and was not contested.[162] The two methods—lame-duck appointments and manipulation of the Court's size—went in tandem. The Framers understood that they belonged to the same toolkit. This would become the subject of the landmark *Marbury v. Madison* decision in which the Court needed to rule on the constitutionality of midnight judicial appointments and the Judiciary Act of 1789.[163]

When the British transferred judicial power from the Lords to the U.K. Supreme Court in 2009, the U.K. Supreme Court inherited the Lords' role of enforcing constitutional conventions.[164] In 2019, British citizen Gina Miller challenged the constitutionality of Parliament's prorogation on the eve of Brexit and won. The U.K. Supreme Court declared the prorogation invalid, thus frustrating Prime Minister Boris Johnson's intention to break constitutional convention by preventing Parliament from deliberating on, and potentially blocking, Brexit.[165]

CONCLUSION

Constitutional conventions against partisan appointments to the highest judicial court during election time are prevalent in comparative

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159 Roosevelt, *supra* note 114.

160 *See* Nagle, *supra* note 11.

161 SENATE REPORT, *supra* note 120, at 23; *see also* William S. Carpenter, *Repeal of the Judiciary Act of 1801*, 9 AM. POL. SCI. REV. 519 (1915).

162 Nagle, *supra* note 11, at 324 ("The Senate unanimously confirmed Marshall on January 27, with the Republicans supporting Marshall enthusiastically.").

163 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

164 Constitutional Reform Act (2005), c.4, §§ 23, 40 (UK).

165 R (Miller) v. The Prime Minister [2019] UKSC 41, [61], [70].

law and are, at times, judicially enforced.[166] The United States cannot afford to ignore its constitutional convention against such partisan appointments in light of the life tenure of Justices. While in other countries, court packing was conducted in breach of constitutional conventions, in the United States, court packing is intended to counter such partisan takeover of the Court. This is especially so because "[t]he American system of life tenure for Supreme Court Justices has been rejected by all other major democratic nations in setting up their highest constitutional courts."[167]

Senators must be aware that confirming a Justice's nomination during presidential election times requires either bipartisan consent or the consent of the incoming Senate. Appointing a Justice to the Supreme Court during presidential election time without bipartisan support is a severe breach of American constitutional conventions. They should realize that moving forward with an appointment on partisan lines during such times will legitimize court packing in return. It is incumbent on any would-be-Justice during such times to condition her acceptance on achieving bipartisan consent to her appointment. Senators of either party should publicly commit to not support a partisan appointment to the Court during elections. A partisan appointment should be challenged in the Court for breach of constitutional conventions. Ultimately, if all other enforcement mechanisms fail, court packing is the antidote by design under the American constitutional model.

POSTSCRIPT

The Senate's confirmation of Justice Barrett's nomination to the U.S. Supreme Court based on partisan support alone, when presidential elections were underway, severely compromised the Court's integrity. It constituted an unprecedented breach of the SCOTUS Bipartisan Convention, which is designed to protect the democratic transfer of power following elections. In April 2021, President Biden appointed a Committee to examine reform of the Supreme Court. This Essay provides the theoretical, principled justification for court-packing in the US. As it is not intended to undo a particular judicial agenda, it does not threaten the Court's independence. It thus differs sharply from

166 *See* Rivka Weill, *Judicial Review of Constitutional Transitions: War and Peace and Other Sundry Matters*, 45 VAND. J. TRANSNAT'L L. 1381 (2012) (discussing how caretaker conventions are legally enforced in Israel).

167 Calabresi & Lindgren, *supra* note 127, at 819.

FDR's plan and motive, which drew serious criticism. Since it is intended to neutralize a partisan takeover of the Court in breach of the SCOTUS Bipartisan Convention, its principled justification should avoid endless tinkering with the Court's size for partisan ends.

APPENDIX A[i]

1. United Government & Voice Vote for Confirmation to Supreme Court in Presidential Election Years

	Election Date	President	Nominee	Senate Breakdown	# Congress	Near Elections	Lameduck Status
1	1796 Nov 4–Dec 7	George Washington (Fed)	William Cushing (for CJ)[ii] – Declined (John Jay retired)	Federalist: 21 Dem-Rep: 11	4	9 months b/f election Nom: 1/26 Con:1/27	Did not run for re-election
2			Samuel Chase (Blair retired)	Federalist: 21 Dem-Rep: 11		10 months b/f election Nom: 1/26 Con: 1/27	
3	1800 Oct 31–Dec 3	John Adams (Fed)	John Jay (for CJ)-Declined[iii] (Oliver Ellsworth retired)	Federalist: 22 Dem-Rep: 10	6	2 weeks after election Nom: 12/18 Con: 12/19	POTUS lost election; Senate flipped
4			John Marshall (For CJ)[iv] (Oliver Ellsworth retired)			2 months after election Nom: 1/20/1801 Con: 1/27/1801	POTUS lost election; Senate flipped
5	1804 Nov 2–Dec 5	Thomas Jefferson (Rep)	William Johnson (Alfred Moore retired)	Rep: 25 Fed: 9	8	7 months b/f election Nom: 3/22 Con: 3/24	Jefferson later got re-elected by a landslide
6	1844 Nov 1–Dec 4	John Tyler[v] (Whig)	Samuel Nelson[vi] (Thompson died, 12/18/1843)	Whigs: 29 Dem: 23	28	2 months after election Nom: 2/4/1845 Con: 2/14/1845	Judicial Nominee, Dem
7	1864 Nov 8	Abraham Lincoln (Rep)	Salmon Chase (Roger Taney died, 10/12/186)	Rep: 33 Dem: 10 Other: 5 Unconditional Unionist: 1 Unionists: 4	38	1 month after election Nom: 12/6/1864 Con: 12/6/1864	POTUS won landslide re-election; Senate did not flip; Civil War period Lincoln waited with nominee

							until after election Judicial Nominee, Rep
8	1872 Nov 5	Ulysses Grant (Rep)	Ward Hunt (Samuel Nelson retired)	Rep: 56 Dem: 17 Liberal Rep: 1	42	1 Month after election Nom: 12/3/1872 Con: 12/11/1872	Won re-election by landslide
9	1892 Nov 8	Benjamin Harrison (Rep)	George Jr. Shiras (Joseph Bradley died, 1/22/1892)	Rep: 47 Dem: 39 Populist: 2	52	4 months b/f election Nom: 7/19/1892 Con: 7/26/1892	
10			Howell Jackson (Lucius Lamar died, 1/23/1893)			3 months after election Nom: 2/2/1893 Con: 2/18/1893	Lost elections, Senate flipped to Dem Judicial Nominee, Dem
11	1916 Nov 7	Woodrow Wilson (Dem)	John Clarke (Charles Hughes retired)	Dem: 56 Rep: 40	64	4 months b/f election Nom: 7/14/1916 Con: 7/24/1916	POTUS later won reelection
12	1932 Nov 8	Herbert Hoover (Rep)	Benjamin Cardozo (Oliver Wendell Holmes retired)	Rep: 48 Dem: 47 Other: 1	72	10 months b/f election Nom: 2/15/1932 Con: 2/24/1932	POTUS later lost to FDR by a landslide; Senate flipped Judicial Nominee, Dem Tied Congress
13	1940 Nov 5	FDR (Dem)	Frank Murphy (Pierce Butler died, 11/16/1939)	Dem: 69 Rep: 23 Other: 2 Ind: 1	76	10 months b/f election Nom: 1/4/1940 Con: 1/16/1940	FDR later won by a landslide WWII

2. United Government & Roll Call Vote to Supreme Court

	Election Year	President	Nominee	Senate Breakdown	# Cong	Near Elections	Lameduck	Outcome of vote	Margin of vote
1	1796 Nov 4– Dec 7	George Washington (Fed)	Oliver Ellsworth (for CJ) [vii] (John Jay retired)	Federalist: 21 Dem-Rep: 11	4	10 months b/f election Nom: 3/3 Con: 3/4	Did not run for re-election	Confirmed, 21 : 1	20 95.5% in favor 65.6% of senators voted
2	1836 Nov 3– Dec 7	Andrew Jackson (Jacksonian/ Dem)	Roger Taney (for CJ) [viii] (John Marshall died, 7/6/1835)	At the beginning of session: Jacksonian: 21 Anti-Jacksonians: 24 Nullifiers: 2 Vacant: 1[ix] During the confirmation vote: Jackson seemed to have gained a majority control of Senate b/c some senators crossed the aisle	24 (b/f admitting 2 new states mid-session in 1836)	Confirmed 8 months before elections Nom: 12/28/1835 Con: 3/15/1836	His Vice-President Won Election	Confirmed, 29 : 15 yea-sayers: D-17, W-2, J-8, A-1, A-1 nay: D-1, W-7, J-1, A-4, none-1, N-1	Margin: 14 66% in favor 92% of senators voted multi-factional, within Jackson's side plus at least 3 Anti-Jacksonian
3			Philip[x] Barbour (Gabriel Duvall retired)	At the beginning of session: Jacksonian: 21 Anti-Jacksonians: 24 Nullifiers: 2 Vacant: 1[xi] During the confirmation vote: Jackson seemed to have gained a majority control of Senate b/c some senators crossed the aisle	24 (b/f admitting 2 new states mid-session in 1836)	Confirmed 8 months before Election Nom: 12/28/1835 Con: 3/15/1836		Confirmed — 30 : 11	Margin: 19 73% in favor 87% of senators voted
4	1836 Nov 3– Dec 7	Andrew Jackson	William Smith (new seat after 2 states are admitted to	After expansion of Senate: Democrat: 35 Whig: 17	24/25	3 months after elections Nom: 3/3/1837 Con: 3/8/1837	His Vice-President Won Election	Confirmed, 23 : 18	Nominated post elections while 24th in session

			the Union), declined						Confirmed by incoming Senate with FRESH MANDATE
5			John Carton (new seat after 2 states are admitted to the Union)	Democrat: 35 Whig: 17	24/25	3 months after elections Nom: 3/3/1837 Con: 3/8/1837		Confirmed, 28: 15	Nominated post elections while 24th in session Confirmed by incoming Senate with FRESH MANDATE
6	1840 Oct 30–Dec 2	Martin Van Buren (Dem)	Peter Daniel (Philip Barbour died, 2/25/1841) [xii]	Dem: 30 Whig 22	26	3 months after elections Nom: 2/26/1841 Con: 3/2/1841	POTUS lost re-election; Senate flipped	Confirmed, 22: 5 yea-sayers: D-22 nay: D-4, W-1	Only Candidate confirmed by partisan vote in outgoing Senate
7	1844 Nov 1–Dec 4	John Tyler[xiii] (Whig)	John Spencer (Smith Thompson died, 12/18/1843)	Whigs: 29 Dem: 23	28	10 months b/f elections Nom: 1/8/1844 Vote: 31/1/1844	Became president upon Harrison's death	Rejected, 1 : 26 yea: W-5, D-16 Nay: W-21, D-5 abstain: W-1, D-2	Bipartisan rejection
8			Reuben Walworth (Smith Thompson died)			5 months b/f elections: Nom: 3/13/1844 Vote to table it/ignore it: 6/17/1844		Withdrawn after losing, 27 : 20 vote to table the nomination yea: W-25, D-1, L-1 nay: W-1, D-19, L-0 not voting: W-2, D-3, L-0	Couldn't muster support within his own party
9			Edward King (Henry Baldwin died, 4/21/1844)			4 months b/f elections: nom: 6/5/1844 vote to postpone: 6/15/1844		Postponed, 29 : 18 yea: W-26, D-2, L-1 nay: W-0, D-18, L-0 abstain: W-2, D-3	Couldn't muster support within his own party; Did not run for re-election; Senate flipped
10	1860 Nov 6	James Buchanan (Dem)	Jeremiah Black[xiv] (Peter Daniel died, 5/31/1860)	Dem: 38 Rep: 26 Other: 2	36	3 months after elections Nom: 2/5/1861 Vote: 2/21/1861	Nominat-ed post elections. POTUS and Senate flipped	Rejected, 25 : 26	Rejected by lame duck Senate after secession started

11	1912 Nov 5	William Taft (Rep)	Mahlon Pitney[xv] (John Harlan died, 10/14/1911)	Rep: 52 Dem: 44	62	9 months before elections Nom: 2/19 Con: 3/13	Later lost re-election; Senate flipped	Confirmed, 50 : 26	Margin 24, support rate 66%, 79% of Senators voted; bipartisan support. Though breakdown not recorded, at least 4 Republicans voted against, so at least 2 Dems voted in favor
12	1916 Nov 7	Woodrow Wilson	Louis Brandeis (Joseph Lamar died, 1/2/1916)[xvi]	Dem: 56 Rep: 40	64	Nom 9 months b/f elections Nom: 1/28 Con: 6/1	Won re-election, WWI	Confirmed, 47 : 22 yea: Dem-44, Rep-3 nay: Rep-21, Dem-1 no vote: Rep-16, Dem-11	Margin: 25 68% in favor, 72% of senators voted
13	1924 Nov 4	Calvin Coolidge[xvii]	Harlan Stone (Joseph McKenna retired, 1/5/1925)	Rep: 53 Dem: 42 Others: 1 Farmer	68	2 Months after elections Nom: 1/5/1925 Con: 2/6/1925	Won elections, party maintains control of the Senate, gains 1 seat	Confirmed, 71 : 6 No vote: 19 Republicans only had 53 Senators, so they must have had the support of at least 18 members of the minority party.	margin: 65 92% supported, 74% of senators voted

3. United Government-Supreme Court Nominations that failed to get a vote

	Election Date	President	Nominee	Senate Breakdown	# Congress	Near Elections	Lameduck Status
1	1844 Nov 1– Dec 4	John Tyler[xviii] (Whig)	John Spencer (Thompson died) Nominee Whig	Whigs: 29 Dem: 23	28	5 months b/f elections Nom: 6/17/1844, withdrawn same day	
2			Reuben Walworth (Thompson died) Nominee Democrat			5 months b/f elections Nom: 6/17/1844 No action same day	
3			Edward King (Henry Baldwin died) Nominee Democrat			On Election Day Nom: 12/4/1844 Withdrawn: 2/7/1845	YES
4			Reuben Walworth (Thompson died) Nominee Democrat			On Election Day Nom: 12/4/1844 Withdrawn: 2/4/1845	YES
5			John Read Nominee Democrat			After elections: Nom: 2/7/1845 No Action	YES
6	1968 Nov 5	Lyndon B. Johnson (Dem)	Abe Fortas[xix] (for CJ) (Earl Warren retired)	Dem: 64 Rep: 36	90	4 months b/f elections Nom: 6/26/1968 Withdrawn: 10/4/1968	NO Nominated sitting Justice for Chief; filibustered by Strom Thurmond
7			Homer Thornberry[xx] (Abe Fortas sit did not become available)			4 months b/f elections Nom: 6/26/1968 Withdrawn: 10/4/1968	LBJ didn't seek re-election (Vietnam War); Nixon won (Rep); Senate didn't flip

4. Divided Government & Roll Call Vote on Confirmations to Supreme Court

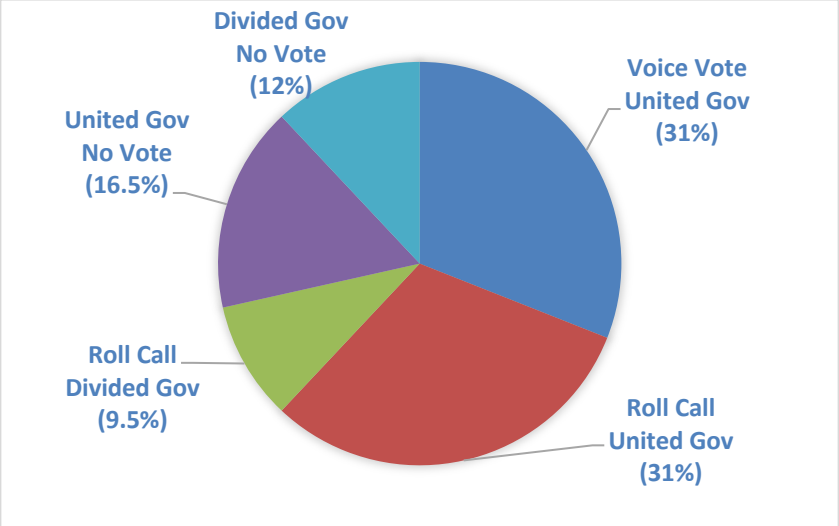
	Election Year	President	Nominee	Senate Breakdown	# Congress	Near Elections	Lameduck	Outcome of vote	Margin of vote
1	1828 Oct 31-Dec 2	John Quincy Adams	John Crittenden[xxi] (Robert Trimble died, 8/25/1828)	Jacksonian: 27 Adams: 21	20	After elections Nom: 12/17/1828 Con: 2/12/1829	YES Lost elections	Postponed, 23 : 17 Yea: J-20, A-2, U-1 Nay: J-0, A-17, U-0	
2	1880 Nov 2	Rutherford Hayes (Rep)	William Woods[xxii] (William Strong retired) Nominee Republican	Dem: 42 Rep: 33 Ind: 1	46	After election Nom: 12/15/1880 Con: 12/21/1880	Per his campaign promise, did not seek re-election. Republicans won presidency but not Senate	Confirmed, 39 : 8 Yea: Dem-14, Rep-24 Nay: Dem-8 no vote: Dem-21, Rep-9	Post election. Margin 31, 83% of voters in favor, 62% of Senators voted
3	1888 Nov 6	Grover Cleveland (Dem)	Melville Fuller (for Chief Justice)[xxiii] (Morrison Waite died) Nominee Democrat	Rep: 39 Dem: 37	50	6 months b/f election Nom: 4/30/1888 Con: 7/20/1888	He later lost election; Senate did not flip	Confirmed, 41 : 20 Yea: Dem-31, Rep-10 Nay: Rep-20, Dem-0 no vote: Rep-9, Dem-6	Margin: 21, 67% in favor, 80% of senators voted
4	1988 Nov 8	Ronald Reagan (Rep)	Anthony M. Kennedy[xxiv] (Lewis Powell retired) Nominee Republican	Dem: 55 Rep: 45	100	Confirmation ended 10 months b/f election Nom: 11/30/1987 Con: 2/3/1988	Bush later won; Senate did not flip	Confirmed, 97 : 0 Yea: Dem-51, Rep-46 no vote: Dem-3	Bipartisan, unanimous

5. Divided Government-Supreme Court Nominations that Failed to Get a Vote

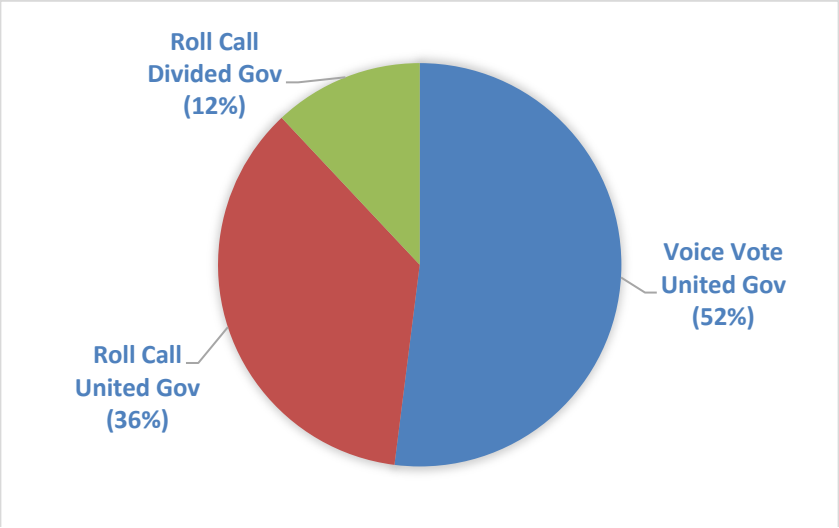
	Election Date		President	Nominee	Senate Breakdown	# Congress	Near Elections	Lameduck Status
1	1852 Nov 2		Millard Fillmore (Whig)	Edward Bradford (John Mckinley died, 7/19/1852) Nominee was a Whig and McKinley was a Democrat	Dem: 36 Whig: 23 Other: 3 Free Soilers	32	3 months b/f election Nom: 8/16/1852 NO Action	Unelected president; his party did not endorse him for re-election
2				George Badger (John Mckinley died)			After election: Nom: 1/3/1853 Withdrawn: 2/14/1853	
3				William Micou (John Mckinley died)			After election Nom: 2/14/1853 No Action	
4	1880 Nov 2		Rutherford Hayes (Rep)	Stanley Matthews[xxv] (Noah Swayne retired)	Dem: 42 Rep: 33 Ind: 1	46	After election Nom: 1/26/1881 NO action	Per his campaign promise, did not seek election. Republicans won presidency and Senate
5	2016: Nov 8		Barack Obama (Dem)	Merrick B. Garland[xxvi] (Antonin Scalia died, 2/13/2016)	Rep: 54 Dem: 44 Other: 2 (caucused w/ Dem)	114	7 months b/f election Nom: 3/16/2016 No Action	Majority Leader McConnell blocked nomination citing waning mandate in an election year despite 7+ months remaining till the election

APPENDIX B

1. Breakdown of Type of Votes to Supreme Court Nominees During Presidential Election Year



2. Breakdown of type of Votes to Successful Supreme Court Appointments During Presidential Election Year



3. Breakdown of all Successful Confirmations to the Supreme Court During Presidential Election Years (25 cases)

Nomination Until End of March	Nomination After March and Before Election	Nomination After Election
11 cases	3 cases	11 cases
44%	12%	44%

4. Breakdown of Successful Confirmations, When Nominations were Made Until the end of March of Presidential Election Years

Voice Vote in United Government (Unanimity)	5 cases	45.5%
Roll Call in United Government (Bipartisan Support)	5 cases	45.5%
Roll Call in Divided Government (Bipartisan Support)	1 case	9%

5. Breakdown of Successful Confirmations, When Nominations were Made After March of a Presidential Election Year and Before Elections

Voice Vote in United Government (Unanimity)	2 cases	66.7%
Roll Call in Divided Government, Minority Party in Senate Supports More than the Majority Party (Nomination in April)	1 case	33.3%

6. Breakdown of Successful Confirmations, When Nominations were Made After Presidential Elections

Bipartisan Support	8 cases	72.7%
Confirmation by Incoming Senate	2 cases	18.2%
Partisan Midnight Appointment (Peter Daniel)	1 case	9%

7. Breakdown of Failed Appointments, When Nominations were Made Until the end of March of a Presidential Election Year

Roll Call in United Government	2 cases (Tyler)	66.7%
Garland Case in Divided Government	1 case unprecedented	33.3%

8. Breakdown of Failed Appointments, When Nominations were Made After the end of March of a Presidential Election Year and Before Elections

Roll Call in United Government, Postponed	1 case (Tyler)	12.5%
United Government, No Vote	6 cases (of these, 4 involve Tyler)	75%
Divided Government, August Nominee, No Vote	1 case	12.5%

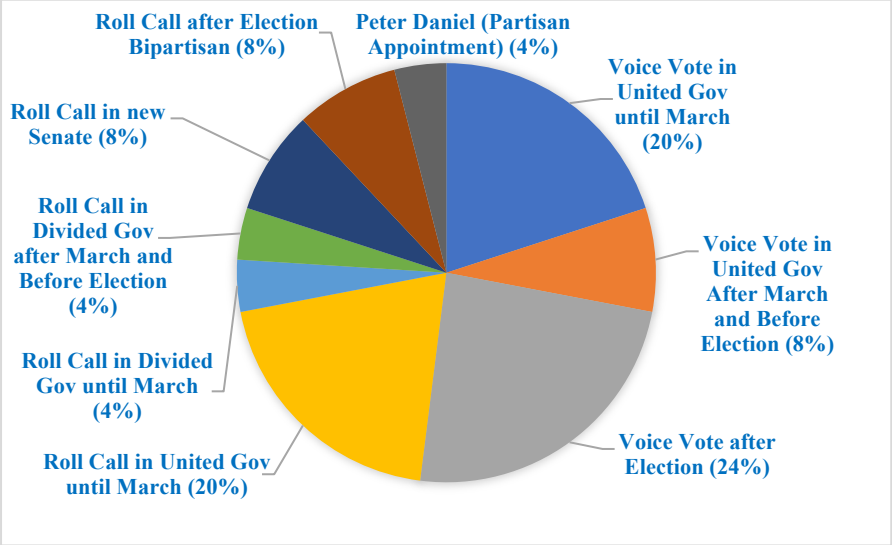
9. Breakdown of Failed Appointments, When Nominations were Made After Presidential Elections

Roll Call in United Government	1 case	16.67%
United Government and No Vote	1 case (Tyler)	16.67%
Roll Call in Divided Government, Bipartisan Vote	1 case	16.67%
Divided Government and No vote	3 cases	50%

10. Senate's Treatment of Nominations Made After the end of March in a Presidential Election Year and Before Elections (11 cases)

Voice Vote in United Government (Unanimity)	2 cases confirmed	18%
Roll Call in Divided Government, Opposition Supports More than President's Party, Nomination in April	1 case confirmed	9%
Roll Call in United Government, Postponed	1 case (Tyler)	9%
United Government, No Vote	6 cases (of these 4 involve Tyler)	55%
Divided Government, August Nominee, No Vote	1 case	9%

11. Breakdown of Successful Appointments to the Court



[i] General Sources of Appendix A: For Presidents and nominees: *Supreme Court Nominations (1789–Present)*, *supra* note 27. For Senate's composition: *Party Division*, U.S. SENATE, https://www.senate.gov/history/partydiv.htm [https://perma.cc/5AF4-TTA6]. For vote tally: *Supreme Court Nominations (1789–Present)*, *supra* note 27. For vote breakdown: *Voting Records*, GOVTRACK, https://www.govtrack.us/congress/votes [https://perma.cc/96RU-MN8N]. The Senate's composition sometimes changed over the course of a session. In relevant cases, this change is acknowledged in the Appendix. Note: William Paterson is not included in the statistics even though President Washington nominated him on February 27, 1793 following the 1792 elections and before the new Senate came into office. Washington withdrew the nomination the following day after realizing it was unconstitutional for him to nominate Paterson while he was still a senator due to the Incompatibility Clause. U.S. CONST. art. I, § 6, cl. 2. Washington informed the Senate that "his nomination of William Patterson to serve as an Associate Justice of the Supreme Court was 'null by the Constitution.'" Matthew Madden, *Anticipated Judicial Vacancies and the Power to Nominate*, 93 VA. L. REV. 1135, 1145 n.35 (2007) (quoting THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 90 (Maeva Marcus & James R. Perry eds., 1985)). He renominated Patterson once the old Senate's term expired.

[ii] Cushing was confirmed by a voice vote but declined the appointment, citing his advanced age and imperfect health. He was also not enthusiastic about handling a Chief Justice's duties. He may have arguably served one day as Chief Justice. ABRAHAM, *supra* note 47, at 57, 60.

[iii] When Ellsworth retired, citing health reasons, lame-duck John Adams raced to find a Chief Justice to replace him before Jefferson assumed the presidency. John Jay, the first Chief Justice who initially retired to become Governor of New York, was Adams's first choice. The Senate confirmed him, presumably by voice vote since no record of vote-results exists, but Justice John Jay declined, stating that the Court lacked "energy, weight and dignity." Sandra F. VanBurkleo, *Jay, John*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES (Kermit L. Hall, James W. Ely, Jr., & Joel B. Grossman eds., 2d ed. 2005).

[iv] President John Adams drew a lot of criticism regarding his last-minute lame-duck nominations under the Judiciary Act 1801 and for attempting to reduce the Court's size from six to five seats to deprive Jefferson of a nomination. Marshall was hardly Adams's ideal choice. However, because of the ticking clock, Adams couldn't afford reaching out to his preferred choices after John Jay declined the appointment, because they lived too far away for 18th century communication methods. Marshall was the best choice strategically not just because of his compatibility but also because he was Adams's Secretary of State at the time, so he was both easily accessible and trusted by Adams. Braver, *supra* note 3. The Federalists opposed the nomination at first but preferred Marshall over the alternatives they suspected Adams would suggest, and over any Jefferson pick, should they leave the vacancy open. They ended up voting unanimously in favor of Marshall's confirmation while facing virtually no opposition. ABRAHAM, *supra* note 47, at 66.

[v] Tyler ran as Harrison's VP on the Whig ticket. After Harrison died a month after taking his office, Tyler assumed the office. Formerly a Democrat, he switched alliances. Though he ran under Harrison's Whig ticket, he alienated both sides of the aisle. ABRAHAM, *supra* note 47, at 85.

[vi] Nelson was Tyler's only successful nominee. After the Whigs realized their candidate, Senator Henry Clay, had lost the 1844 elections and would not be able to fill the Supreme Court vacancies with more "ideal" candidates, they lost some of the motivation to stall Tyler's nominees. In Nelson's case, Tyler decided to appeal to the opposition by nominating a Democrat. The gambit worked well and the nomination passed with mostly bipartisan support, and only scattered Whig opposition. ABRAHAM, *supra* note 47, at 85–86.

[vii] Voting records show that twenty-one senators supported Ellsworth and that there were exactly twenty-one Federalist senators in the Senate. No breakdown of the roll-call vote is available, raising the theoretical possibility that Ellsworth was confirmed by a purely partisan vote. However, this Essay follows the Congressional Research Service's (CRS) interpretation which considers such minor opposition as *insignificant* and places it within the same category as appointments which received voice votes and unanimous consent. In fact, this Essay takes a stricter view than the CRS, which might have even considered Peter Daniel as unopposed by relative terms. CONG. RSCH. SERV., RL33247, SUPREME COURT NOMINATIONS: SENATE FLOOR PROCEDURE AND PRACTICE, 1789–2011, at 33 (2011).

[viii] Taney garnered such opposition that he was the first Cabinet-level nominee to fail to be confirmed by the Senate. *First Cabinet Rejection*, U.S. SENATE, https://www.senate.gov/about/powers-procedures/nominations/first-cabinet-rejection.htm [https://perma.cc/5XPW-87PB]. Jackson then tried appointing him to the Supreme Court as an Associate Justice, but his opponents stalled until the end of the congressional session. On March 3, 1835, the Senate voted 24 to 21 to postpone action. MCMILLION, *supra* note 38, at 24. After strengthening his Senate's majority in the midterm elections and following John Marshall's death, Jackson nominated Taney again, this time for Chief Justice position. He faced powerful, bipartisan resistance from prominent politicians like Henry Clay and Daniel Webster (Whigs) as well as John C. Calhoun (Democrat). ABRAHAM, *supra* note 47, at 82. The vote's breakdown is unavailable. However, given that Taney faced strong opposition within Jackson's party yet won more support than Jackson's majority, he must have garnered bipartisan support.

[ix] The votes on the confirmation of Taney and Barbour were held before Congress added four new seats to the Senate as the result of admission of two new states. Post expansion, the breakdown of the Senate was: Jacksonian: 31, Anti-Jacksonians: 19, Other: 2 Nullifiers.

[x] Barbour's nomination faced strong opposition from anti-Jacksonians/Republicans/Whigs, but ultimately passed with a narrow majority. Gerard W. Gawalt, *Barbour, Philip Pendleton*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES (Kermit L. Hall, James W. Ely, Jr., & Joel B. Grossman eds., 2d ed. 2005). Like Taney's appointment, Barbour was confirmed shortly before the Senate expanded, and, with it, the Democratic majority increased. However, Barbour's confirmation must have passed with bipartisan support, since those voting in favor of his confirmation numbered 30, putting them above the 24 Jacksonians present in the Senate at the time.

[xi] The vote on the confirmation of Taney and Barbour was held before Congress added four new seats to the Senate as the result of admission of two new states. Post expansion, the breakdown of the Senate was: Jacksonian: 31, Anti-Jacksonians: 19, Other: 2 Nullifiers.

[xii] Peter Daniel's confirmation process is the sole exception to the SCOTUS Bipartisan Convention. For the special circumstances surrounding the nomination, see *supra* Part I.

[xiii] Tyler assumed office after war hero Harrison died within a month of assuming office. Tyler set a precedent by assuming the office of the President, rather than holding a temporary *fill-in* position. Though he ran under Harrison's Whig ticket, he alienated both sides of the aisle and consequently repeatedly failed to garner support for his candidates, some of whom he nominated up to three times. Some were rejected, some postponed and thus withdrawn, and others simply ignored until withdrawn. *See generally* CONG. RSCH. SERV., RL31171, SUPREME COURT NOMINATIONS NOT CONFIRMED, 1789 TO THE PRESENT 4 (2010).

[xiv] Jeremiah Black's nomination came after Lincoln won the election. President Buchanan picked Black—a northern, pro-Union Democrat who opposed the abolition of slavery—to appeal to both Democrats and Republicans. Less than a month before Lincoln was to take office, Republican Senators wanted Lincoln to fill the vacancy, and several Democrats already resigned to join the secessionist movement. Thus, the confirmation was defeated in a narrow vote. ABRAHAM, *supra* note 47, at 92.

[xv] Even President Taft had hesitations about Mahlon Pitney, whose nomination was opposed even by some progressive Republicans due to his stance on labor issues. The Senate delayed the confirmation but ultimately confirmed Pitney with some support from the Democratic opposition. While I could not find the vote's breakdown, Michal Belknap states that "[t]he division was basically along partisan lines, although four Insurgent Republicans did join twenty-two Democrats in voting 'no.'" Michal R. Belknap, *Mr. Justice Pitney and Progressivism*,16 SETON HALL L. REV. 381, 405 (1986). If four Republicans defected out of a fifty-two Republican majority, then at least two Democrats must have supported the confirmation.

[xvi] Brandeis's confirmation battle was one of the nastiest in American history. Opposition against him rose on grounds of his progressive socio-economic position and was also influenced by anti-Semitic sentiments. Brandeis was ultimately confirmed after months of delays and the first—and longest—string of public hearings on a Supreme Court candidate in history, with bipartisan support of 44 Democrats and 3 Republicans. Of those abstaining, 10 Democrats and 2 additional Republicans were officially paired in favor of his confirmation. *See generally* ABRAHAM, *supra* note 47, at 140–47; MCMILLION & RUTKUS, *supra* note 41, at 7.

[xvii] Coolidge ran as Warren Harding's VP in the previous election cycle, and became un-elected POTUS after Harding died in office. The 1924 elections were technically his first presidential electoral victory, but they began his second term. Stone's nomination was resubjected to the Judiciary Committee's consideration before receiving a final floor vote because of his involvement with an investigation of a Senator as Attorney General. Both times, he was unanimously reported favorably. MCMILLION, *supra* note 38, at 22.

[xviii] See *supra* endnote xiii for the unique circumstances of the Tyler's Presidency.

[xix] Johnson had been supposedly promised the support of key Republican Senator Dirksen and was hoping for a bipartisan confirmation. However, Republicans, who did not support Fortas's liberal views and anticipated Richard Nixon's victory in the 1968 elections, were not eager to help. ABRAHAM, *supra* note 47, at 227–28. Worse still, confirmation hearings revealed that "[a]s a sitting justice, he [Fortas] regularly attended White House staff meetings; he briefed the president on secret Court deliberations; and, on behalf of the president, he pressured senators who opposed the war in Vietnam." *Filibuster Derails Supreme Court Appointment*, U.S. SENATE, https://www.senate.gov/artandhistory/history/minute/Filibuster_Derails_Supreme_Court_Appointment.htm?ftag=MSF0951a18 [https://perma.cc/KY7R-B9JE]. Furthermore, Fortas also received $15,000 (~$140,000 dollars in current value) to lecture multiple times in a summer course at American University. This sum was equal to 40% of his Supreme Court salary and was privately

funded. *Id*. These problematic revelations led to bipartisan opposition to his nomination and a Republican filibuster. After an attempt to stop the filibuster by invoking a cloture motion failed to muster the requisite supermajority, Fortas requested that LBJ withdraw his nomination for the Chief Justice position. He continued to serve on the Court as an Associate Justice for a short time afterwards, until the discovery of another potential financial scandal led him to resign. *See generally* MCMILLION & RUTKUS, *supra* note 41. LBJ believed that if not for the presidential election year, Fortas' appointment would have turned out differently. *Filibuster Derails Supreme Court Appointment*, *supra*.

[xx] Thornberry was intended to take Fortas's seat as Associate Justice. When LBJ withdrew Fortas's nomination as Chief Justice per his request, he withdrew Thornberry's nomination as well. ABRAHAM, *supra* note 47, at 223.

[xxi] Justice Trimble passed away in August. In December, John Quincy Adams, who had already lost his re-election bid to Andrew Jackson nominated John Crittenden. Jackson's supporters, who already held the Senate's majority, prevented the confirmation. Interestingly, the Judiciary Committee first reported the case to the Senate with recommendation not to act, but then, rather than withholding action or voting on his confirmation they ended up voting on a resolution to postpone debate of the matter pending other matters related to circuit courts reorganization. This effectively delayed the vote on Crittenden's nomination until Jackson assumed the office and tried filling the vacancy with his own candidates. (It might be possible to speculate that Adams did not propose a candidate in August or September hoping to win the elections and avoid appointments in an election year. He moved with the nomination only once he realized he would not be re-elected). CONG. RSCH. SERV., RL33247, *supra* endnote vii, at 4–5, 18, 28.

[xxii] Woods was a Unionist Southern Republican, the first Southerner to be confirmed not only since the Civil War but since 1853. He had strong ties to the North, but was professionally committed to the South. By picking him, President Hayes hoped to garner bipartisan, bi-regional support and help mend the regional tensions between the North and the South. ABRAHAM, *supra* note 47, at 108.

[xxiii] Interestingly, Fuller did not consider becoming the Chief Justice and actually recommended a mutual friend (John Scholfield) for the position. When Scholfield refused, Cleveland turned to Fuller himself, hoping Fuller's business connections would make him acceptable to the Republican opposition, which controlled the Senate. Fuller was confirmed with bipartisan support, despite facing personally motivated opposition from the Republican head of the Judiciary Committee. ABRAHAM, *supra* note 47, at 113–14.

[xxiv] Reagan nominated Kennedy in the year preceding the election, but his confirmation took place early in the election year. Democrats, who had flipped the Senate following the 1986 midterm elections, cooperated with Reagan. They strongly preferred Kennedy over Reagan's earlier nominee, Robert Bork. Senator Joe Biden, the then Chairman of the Senate's Judiciary Committee, characterized Kennedy as an "open-minded" judge. The vote was unanimous. ABRAHAM, *supra* note 47, at 284–85.

[xxv] Like with his other picks, President Hayes nominated Matthews because he hoped that Matthews would be acceptable to both parties. Matthews's record included support for the Southerner, Democrat President James Polk, as well as support for President Lincoln's Northerner, Republican Supreme Court Chief Justice Salmon Chase. Matthews was an abolitionist but respected the law enough to enforce the Fugitive Slave Act as the U.S. attorney for the state of Ohio. However, Hayes did not predict that Matthews's nomination would be vehemently opposed for his affiliation with railroad interest groups, which actively pushed for his nomination. The Judiciary Committee blocked the nomination from ever receiving floor action. ABRAHAM, *supra* note 47, at 108–09.

[xxvi] Garland was President Obama's nominee. He was chosen in hopes of securing Republican consent to his confirmation. Republicans, led by Speaker Mitch McConnell, however, blocked his nomination from ever receiving a floor vote. *See generally* Kar & Mazzone, *supra* note 18.