The Politicisation of United States Supreme Court Appointments

Introduction

Former judge Irving R. Kaufman described the qualities an individual should possess to be appointed as a justice of the Supreme Court of the United States in a 1981 New York Times opinion piece; *"the job of a judge requires a paragon of virtue, an intellectual Titan, and an administrative wizard"*.[1] Irving wrote that article in a time where a vote to approve an appointment to the Supreme Court often passed with a landslide. The same year he penned that piece, Sandra Day O'Connor, a republican appointment, was approved to join the Supreme Court by ninety-nine votes to zero.[2] The Senate that voted to appoint Justice O'Connor, who was the first woman to sit on the Supreme Court benches, as well as Ronald Reagan's first appointment of four, was split fifty-three Republicans and forty-six democrats.[3] In a modern political environment, the vote is incredibly more divisive between Republican and Democratic Senators.

This title stood out from the others for many reasons, mainly because in such a partisan and divided political landscape, it is hard not to be drawn to the politicisation of every small action undertaken by a government or administration. While the appointment of a justice to the Supreme Court is by no means an insignificant measure, rather a rarely undertaken constitutional duty, it is one that in recent years has garnered more and more attention due to its increased polarisation.

In this essay, I will analyse the politicalisation of the appointment of justices to the Supreme Court of the United States in three sections. Firstly, I will explain the principle of Judicial Independence, and describe the process of filling a vacancy on the Court. I will also examine certain notable nominations over time, before expanding on this in the next section, where I will explore historical judicial appointments, provide personal and independent political analysis of Senate confirmation results, and compare and contrast the nature of Senate Judiciary Committee hearings over the last number of decades. Finally, I will dissect proposed reforms to the Supreme Court and the appointment process for new justices, before summating.

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[1] Kaufman Irving R., "Charting a Judicial Pedigree," *New York Times*, January 24, 1981, Opinions, 23.
[2] United States Senate, *Rollcall Votes on Nominations*, 21375 No. 274 (Congressional Report, 1981).
[3] Harry F. Byrd Jr., a senator from Virginia, left the Democratic Party in 1970. He continued to caucus with the Democrats and referred to himself as an independent Democrat.

Judicial Independence and Filling a Supreme Court Vacancy

As with most legal systems worldwide, the judicial system is to be separate, impartial, and above politics. However, in the United States, the common public perception of the Supreme Court is deeply partisan in nature. This was not the intention, or even the case for many years, however. It is set out in Article III of the United States Constitution that *"The 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"*.[4]

This section lays down that the Court and its powers should be separate from both the Legislative branch (Congress - made up of the House of Representatives and the Senate), and the Executive (the President and their Vice-President and Cabinet). Justices in federal courts are protected from the indices of the other branches of government and wider public opinion under judicial independence. This allows justices to make decisions on cases and laws and not face any public, political, or personal consequences.[5] There are certain measures in place to maintain judicial independence, such as the appointment of federal judges rather than their election, life terms rather than term limits, and the inability to reduce justices salaries.[6]

To understand the problems associated with making appointments to the Supreme Court, and the reasons for its politicisation, we first must understand the current process for filling a vacancy on the bench. The process for appointing a new Supreme Court justice consists of three stages; nomination by the President, approval by the Senate, and appointment by the President. The United States Constitution outlines that the sole discretion for nominating an individual to sit on the Supreme Court lies with the President under Article II; *"[the President] shall nominate… Judges of the Supreme Court"*.[7] While this article gives absolute power to nominate to the President, it also sets out that any nominee must receive the support of at least half of the Senate to be confirmed.

The article is very concise, however this means that it does not define any qualities, experience, or attributes required for a justice, meaning that any individual, irrespective of age, nationality, or educational background, among other characteristics can receive an appointment to the Supreme Court, provided all other conditions are met. Therefore, it is possible for an appointment to have never served as a judge before. A recent example of this was with the appointment of Justice Elena Kagan by President Barack Obama in 2010. She

[4] United States Constitution, art. 3, sec. 1.
[5] United States, Gur-Arie M, *Judicial Independence in the United States: Current Issues and Relevant Background Information*, 133-147 (Federal Judicial Center, 1999), fjc.gov/sites/default/files/2012/JudIndep.pdf.
[6] *Ibid.*
[7] United States Constitution, art. 2, sec. 2, cl. 2.

had never served as a judge but did have a distinguished academic legal career.[8] A polarising example lies with the nomination of Harriet Miers by President George W. Bush in 2005. Similarly to Justice Kagan, Miers had no experience as a judge, however she also had no significant academic legal experience either, serving only as White House counsel to President Bush. She did not impress Senators who would have to vote for her nomination - so much so that she never made it to her judiciary committee hearing, and three weeks after her announcement, she requested President Bush to allow her to withdraw her nomination.

Presidents will often appoint individuals with similar ideologies as themselves, which in turn is a contributing factor to the ever-growing politicalisation of the Court. Justice Clarence Thomas was appointed to the Court in 1991 by President George H.W. Bush, a republican, and on the Court to date, he has ruled in some of the most conservative judgements in American judicial history, such as the repeal of *Roe v Wade*,[9] and in *New York Rifle & Pistol Association. v Bruen* [2022], which expanded Second Amendments rights.

This can sometimes backfire on a President, however. Republican President Dwight D. Eisenhower nominated Earl Warren as Chief Justice of the Supreme Court in 1954 as he seemed to be a staunch conservative, mirroring the President's voice on the Court. Over the years, his judgements became more and more liberal, such as in *Brown v Board of Education* [1954], where the Court ruled that racial segregation in public schools was unconstitutional,[10] in *Engel v Vitale* [1962], where they laid down that government-directed prayer in public schools, even if voluntary and non-denominational, violated the Establishment Clause of the First Amendment,[11] and in *Miranda v Arizona* [1966], which ruled that detained criminal suspects must be informed of their rights before police questioning.[12] Chief Justice Warren voted in the majority opinion in each of these cases, leading President Eisenhower to famously describe his appointment as “the biggest damn-fool mistake I ever made”.[13]

Candidates for a position on the Supreme Court tend to undergo a public hearing by the Senate Judiciary Committee, before the committee recommends them for approval by the Senate as a whole. This hearing, which usually lasts for sixty days, is the most political-focused moment of the entire process. It is one that has become more polarising and divisive over the last number of decades. In the following section, I will explore more cases where the appointment of a justice has proved controversial or political, and I will examine

[8] United States Senate, *Rollcall Votes on Nominations*, No. 229 (Congressional Report, 2010).
[9] *Dobbs v Jackson Women's Health Organization*, 597 U.S. 215 (2022).
[10] *Brown v Board of Education of Topeka*, 347 U.S. 483 (1954).
[11] *Engel v Vitale*, 370 U.S. 421 (1962).
[12] *Miranda v Arizons*, 384 U.S. 436 (1966).
[13] Frederic D. O'Brien, "Ike's Biggest Damn-Fool Mistake," *American Heritage* 54, 4 (2003).

how this has changed over the years, from what used to be a bipartisan and uniting decisions of the United States Senate, to one that has become as alienating as any other given vote.

The History of Supreme Court Politics: Then vs Now

After briefly examining some of the minor political tactics in the actual appointment process, in this section I will focus in more depth on the history of this politicalisation, and highlight some concrete examples of instances where bipartisanship was prevalent in the selection and appointment process.

Historically, Senate votes to approve a nominee only failed if there was a concern from Senators as to that individual's conduct, history, or experience. Senators previously crossed party lines to vote for those nominated by a President of the opposing party. The following table displays all confirmation votes exceeding an eighty percent threshold where the nominating party, or the party of the sitting President, differed from the party holding the majority in the Senate since the adoption of the Third Party System in 1857.

Nominee	President	In favour (%)	Against (%)	Dems. in Senate	Reps. in Senate
W. B. Woods (1880)[14]	Hayes	82.98	17.02	42	31
J. Harlan II (1955)[15]	Eisenhower	86.59	13.42	49	47
P. Stewart (1959)[16]	Eisenhower	80.46	19.54	64	34
W. Burger *(CJ)* (1969)[17]	Nixon	95.10	3.90	57	43
H. Blackmun (1970)[18]	Nixon	100.00	–	57	43
L.F. Powell Jr. (1971)[19]	Nixon	98.89	1.11	54	44
J.P. Stevens (1975)[20]	Ford	100.00	–	56	42
A. Kennedy (1988)[21]	Regan	100.00	–	55	45
D. Souter (1990)[22]	G. H.W. Bush	90.91	9.09	55	45

[14] United States Senate, *Rollcall Votes on Nominations*, No. 422 (Congressional Report, 1880).
[15] United States Senate, *Rollcall Votes on Nominations*, No. 19 (Congressional Report, 1955).
[16] United States Senate, *Rollcall Votes on Nominations*, No. 58 (Congressional Report, 1959).
[17] United States Senate, *Rollcall Votes on Nominations*, No. 27 (Congressional Report, 1969).
[18] United States Senate, *Rollcall Votes on Nominations*, No. 377 (Congressional Report, 1970).
[19] United States Senate, *Rollcall Votes on Nominations*, No. 408 (Congressional Report, 1971).
[20] United States Senate, *Rollcall Votes on Nominations*, No. 603 (Congressional Report, 1975).
[21] United States Senate, *Rollcall Votes on Nominations*, No. 436 (Congressional Report, 1988).
[22] United States Senate, *Rollcall Votes on Nominations*, No. 259 (Congressional Report, 1990).

It should be noted that every case where these circumstances were met involved a Democratic-majority Senate confirming a Republican Presidents nomination. This leads us to believe that Democrats have historically demonstrated a greater willingness to prioritise judicial competence and bipartisanship over strict party loyalty during Supreme Court confirmations. Overall, this data proves that in the past, there have been many instances of Senators on both sides of the aisle crossing party boundaries and voting to approve a nominee. If one were to examine the data further, they would see a similar trend when a Supreme Court nominee hails from the same party in the White House and Senate concurrently. Here, I have only examined cases where the President's party and the Senate majority party have been different, but there have been dozens of appointments since 1857 where a voice vote was called - leading us to believe that votes to approve have been so skewed to the affirmative that a roll call was not required.

Recently, rather than examining a nominee's experience, judicial history, or scandals that may have arisen throughout their career, Senate Judiciary Committee hearings have now turned into political interviews, where Senators choose to probe nominees on their ideological leanings, opinions on certain social issues, and their loyalty to the current administration. The newest justice to the bench, Ketanji Brown Jackson (appointed by President Biden in 2022) was quizzed about her views on reading 'anti-racist' books to children.[23] Trump's first appointment, Justice Neil Gorsuch had to answer on his ruling should he have been asked to vote on *Roe v Wade*.[24] Justice Samule Alito, nominated by George Bush in 2009 was quizzed on his opinion on the right to die.

These hearings have also uncovered hidden secrets about candidates which result in a large media storm and outcry from the public. For example, Donald Trump's second nominee of three, Brett Kavanaugh, was accused after the announcement of his candidacy by three seperate women of sexual assault.[25] This received huge media attention around the time of the confirmation hearing, which were met with disruptive protests.[26] Similarly, after President George H. W. Bush nominated Clarence Thomas to the bench in 1991, a sexual assault

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[23] Larson. S, "Ted Cruz criticized Ibram X. Kendi's 'Antiracist Baby.' He may have just propelled the book to the top of the bestseller list.," *Boston Globe,* March 26, 2022, https://www.bostonglobe.com/2022/03/26/nation/ted-cruz-criticized-ibram-x-kendis-antiracist-baby-he-may-have-just-propelled-book-top-bestseller-list/.

[24] Liptak. A, "Gorsuch Says He'd Rule Against Trump if Law Required It," *New York Times,* March 21, 2017, www.nytimes.com/2017/03/21/us/politics/supreme-court-justice-confirmation-neil-gorsuch.html.

[25] Britzky. H, "How we got here: The Kavanaugh timeline," *Axios,* October 2, 2018, www.axios.com/2018/10/02/brett-kavanaugh-timeline-allegations-vote.

[26] Stableford. D, "Kavanaugh hearing starts with a bang as protesters, Dems interrupt opening statements," *Yahoo! News*, September 4, 2018, https://shorturl.at/qu07a.

allegation came out against him from Anita Hill. Again, the public outcry loudened, however the vote to appoint Thomas passed, albeit by a razor-thin margin of fifty-two votes to forty-eight.[27]

Some further and blatantly obvious evidence that the Supreme Court is more politicised than ever before is with the recent approval of nominations since 2015 where the President has been of a different affiliation to the Senate majority party. Merrick Garland was nominated by President Obama to fill the seat vacated by the sudden death of Justice Antonin Scalia in February 2016.[28] Then-Senate Majority Leader, Mitch McConnell (a Republican), blocked the nomination hearing citing that it was too close to an election;

> *"The next justice could fundamentally alter the direction of the Supreme Court…The next President may nominate someone very different. Either way, our view is this: Give the people a voice in the filling of this vacancy."*[29]

In comparison to this, upon the death of Justice Ruth Bader Ginsburg in September 2020, President Trump rushed to nominate and appoint now-Justice Amy Coney Barrett, in direct opposition of the views that Republicans adopted in 2016.[30] For comparison, there were two hundred and thirty seven days from the announcement of Merrick Garland's nomination by President Obama to the 2016 General Election, yet there was only thirty-eight between when President Trump announced Amy Coney Barret's candidacy and the 2020 General Election. This clearly illustrates the political nature of the decision to appoint a justice to the Supreme Court. Interestingly, Justice Coney Barrett has been the only judge in history to not have received a vote from the minority party in a Senate confirmation ballot.

The examples I have listed are only the tip of the iceberg when it comes to the politicalisation of appointing justices to the Supreme Court. This politicisation did not used to be as prevalent as it is now, but it has taken a sharp increase over the last number of decades.

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[27] "Clarence Thomas: A Silent Justice Speaks Out," *ABC News*, September 28, 2007,https://abcnews.go.com/TheLaw/story?id=3665221&page=1.

[28] D. Shear. M, "Obama Chooses Merrick Garland for Supreme Court," *New York Times,* March 16, 2016, www.nytimes.com/2016/03/17/us/politics/obama-supreme-court-nominee.html?_r=0.

[29] Senator Mitch McConnell. "McConnell On Supreme Court Nomination." Speech at United States Senate. 16 March 2016.

[30] Kendall. B, "Justice Ginsburg's Death Creates Prospect of Bitter Nomination Fight," *The Wall Street Journal,* September 19, 2020, wsj.com/politics/policy/justice-ginsburgs-death-creates-prospect-of-bitter-nomination-fight-11600476584.

Reforming the Court

As discussed, there are many issues with the independence of the Supreme Court. Throughout the years, there have been numerous attempts and academic recommendations to reform the Supreme Court, but it has largely remained the same for hundreds of years. I will now explore some reforms proposed by academics and politicians and examine their application, and any positives and negatives associated with each measure.

Firstly, there are certain measures that are currently in place to maintain judicial independence, as mentioned in the first section. For example, justices are appointed for life to attempt to ensure political independence. The belief is that a justice would not be threatened with their position if they made a decision that was contrary to the belief of another branch of the government. Additionally, the simple action that justices are appointed rather than elected is meant to ensure their independence, however, as has been discussed, we can clearly tell that justices are a political appointment, so this almost has no function other than transparency and ensuring (for the most part) that experienced officials are placed on the court and not just any citizen with an interest in constitutional law. Finally, there is also the inability to reduce the salary of a justice, another protection that prohibits them from facing huge scrutiny for any decision that they make on the bench.[31]

The most recent attempt at reform of the court came under Biden's presidency. In April 2021, he ordered a commission to produce a report to examine the reform and further expansion of the court.[32] The intention of the report was never to make any formal recommendations, and this proved to be true as there was no such direction on topics like term limit or expansion of the court. Aside from this, there have been numerous academic papers and researches published that make suggestions as to measures that could be implemented to ensure fairness and the de-politicalisation of the Court. The first broad recommendation is the introduction of term limits for justices. In an 2021 article in the Southern California Law Review, Adam Chilton et al. discuss how the implementation of fixed, non-renewable term limits would reduce the randomness and strategic timing of retirements, as well as ensure that the electorate and politicians know in advance of an election what justices will be forced to retire during a certain term.[33] A disadvantage of this, often argued by conservatives, is that this may require a constitutional amendment, and

[31] *Ibid*, 5.
[32] Gambino. L, “Biden orders commission to study supreme court expansion and reform,” *The Guardian*, April 9, 2021, theguardian.com/us-news/2021/apr/09/joe-biden-supreme-court-expansion-commission-reform.
[33] Chilton. A, et al. "Designing Supreme Court Term Limits," *Southern California Law Review* 95, 1 (2021): 16.

therefore require bipartisan support to pass, returning to the problem that we are trying to solve. Additionally, this violates the previously discussed principles of judicial independence, and could lead to post-term career prospects.

Another suggestion, which mirrors that of Ireland's recently-adopted selection and appointment process for judges to the Supreme Court (introduced with the Judicial Appointments Commission Act 2023) is the establishment of an independent judicial appointments commission.[34] This commission would take applications from prospective judges, complete vetting and interviews, and make formal recommendations to the Government, who can then either accept or reject these recommendations for appointment by the President, however, the government would no longer be able to choose from outside these recommendations by the commission. This would reduce partisan influence in the nomination process, and have an independent focus on qualifications and relevant experience ober political ideology or cronyism. On the contrary, the effectiveness would depend on the genuine impartiality of members of the commission, although it can be argued that impartial members could be mitigated by an equivalent of Ireland's Public Appointments Service.

To tackle bipartisanship in Senate confirmation hearings, the threshold for verification could be increased from a simple majority to a super majority of sixty or two-thirds of Senators. This solution was explored in *Advice and Consent: The Politics of Judicial Appointments*, a 2009 text. An advantage is that confirmations would now require cross-party support, as the days of supermajority Senates are far behind us. This promotes bipartisanship, however does pose its own problem in a split Senate, such as fifty-two to forty-eight, possibly leading to a political gridlock on nearly all appointments. Furthermore, this would incentivise a President to make recess appointments and bypass Senate rules.[35]

Overall, there have been many attempts and suggestions surrounding the reform of the Supreme Court, which often fall on deaf ears. The only true way to end the politicisation of Supreme Court appointments is to introduce a non-partisan, independent, and unbiased appointment system, which still gives complete authority to the President, however it would rid the system of any personal-favour appointments, or ones lacking the experience or qualities necessary to sit as a judge on the Supreme Court of the United States.

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[34] Judicial Appointments Commission Act 2023.

[35] Epstein. L, A Segal. J, *Advice and Consent: The Politics of Judicial Appointments*, 1st ed. (Oxford University Press, 2005).

Conclusion

To summate, the process for appointing justices to the United States Supreme Court has increased in its political nature since the end of the 20th century. The increased politicisation of the appointment process undermines the legal principle of judicial independence, which until recently has governed the partial and non-partisan process for hundreds of years. As of recently, both the executive and legislative branches of government have become over involved in the appointment process, breaching the core principle of separation of powers. Controversial appointments such as Brett Kavanaugh and Amy Coney Barrett have led to public uproar on the both the experience and qualities required to become a justice and the political timing of certain appointments. Many reforms have been suggested but often fall on deaf ears from the President or ruling White House party.

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