



4-2019

Trusting the Process: Amendments to the Supreme Court Process and their Implications on the Essential Attributes of the Judiciary in Today's Political Environment

Bailey Swainston

Brigham Young University, baileyswainston@gmail.com

Follow this and additional works at: <https://scholarsarchive.byu.edu/byuplr>



Part of the [Law Commons](#)

BYU ScholarsArchive Citation

Swainston, Bailey (2019) "Trusting the Process: Amendments to the Supreme Court Process and their Implications on the Essential Attributes of the Judiciary in Today's Political Environment," *Brigham Young University Prelaw Review*: Vol. 33 , Article 10.

Available at: <https://scholarsarchive.byu.edu/byuplr/vol33/iss1/10>

This Article is brought to you for free and open access by the Journals at BYU ScholarsArchive. It has been accepted for inclusion in Brigham Young University Prelaw Review by an authorized editor of BYU ScholarsArchive. For more information, please contact scholarsarchive@byu.edu, ellen_amatangelo@byu.edu.

Trusting the Process-Amendments to the Supreme Court Process and Their Implications on the Essential Attributes of the Judiciary in Today's Political Environment

Bailey Swainston¹
baileyswainston@gmail.com

Introduction

John Tyler became the president in 1841, a mere 31 days after the death of President William Henry Harrison. Tyler was given the moniker, "His Accidency" to display the sentiments of the media and fellow politicians towards his presidency. Supreme Court vacancies arose twice during his presidency; naturally, Tyler attempted to fill those vacancies because the constitution enumerates that the President is responsible for judicial appointments. However, the Senate met President Tyler's nominations with determined resistance. Only one of the five candidates President Tyler proposed was accepted. The candidate that was chosen was a moderate democrat and therefore accepted on the basis that the democrats in senate would not oppose his nomination.² Although President Tyler's example appears anomalous, several past nominations have followed similar outside influences. Through this example and others, including President Trump's recent nomination of Brett Kavanaugh, critics have maligned the process of choosing supreme court justices.

The current Supreme Court nomination process has evolved and may continue to evolve. In recent years, the two-party system polarization has intensified to make nominations more difficult and divisive. To help combat this division, the court agreed to change the required number of passing votes for supreme court nominees from sixty to fifty-one votes. This change, otherwise known as the nuclear option, was a necessary modification to the nomination process.³

The process itself protects against the problems associated with public opinion swaying justices and is sufficient even in today's sharply polarized political environment. Although it is sufficient, to enable the two warring sides to negotiate more efficiently, the process would be effectively modified using the nuclear option and, potentially, implement term limits.

However, amending the process narrows comes down to interpretation of the constitution and its laws. The living document ideology states that the constitution should be interpreted in today's political, legal, and social environment. The originalist view states that the constitution should be considered by what the framer's intended it to mean at the time. Understanding these interpretations enables us to acknowledge why the process is so heated in the first place. Although originalist interpretations have its place in several other aspects of the Constitution, a living document view could be appealed to for the current nomination process because of the lack of clarity in the process enumerated in the constitution.

Part II of this paper will state how the politically polarized environment has been formed and

¹ Bailey Swainston is a senior in BYU Accounting program in the Marriot School of Business. He is married to Molly Swainston and they recently had their first child, Tom Swainston, on February 26, 2019. He will be attending law school after graduation. We would like to thank for the editing Krystal Bowen for her efforts and assistance.

²Josh Chafetz, *Essay: Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 Harv. L. Rev. 96, 121 (2017).

³*Id.* at 101.

how the current process protects against polarization, including the development of the nuclear option into the current process. Part III will focus on the change in the current environment and its effects on the terms of the nominees. Part IV will then discuss the two defining features of the Court against the other two branches of government: independence and interpretation of laws.

I. Background

The founding fathers were vague in outlining the nomination process to the highest court in the land. While earning a seat in Congress or winning a presidential race are clearly defined, becoming a Supreme Court Justice is not. Although some evolutions in the nomination process were simple, these changes set important precedent that has influenced several nominations since their inceptions. The founding fathers did not enumerate these changes in the constitution.⁴

For example, Justice Felix Frankfurter began the tradition of appearing before the Senate Judiciary Committee in order to protect his Jewish faith and character from persecution.⁵ Personal appearance before the senate judiciary committee played a starring role in the nomination of justices Clarence Thomas and Brett Kavanaugh. The interview of Justice Sandra Day O'Connor established the precedent that television and radio would be allowed during the Senate Judiciary Committee for the country to witness the process.⁶

Both the vague outline and progression of Supreme Court nominations now play more important roles than in the past. Each of the two main Congressional parties have taken turns as the minority and majority parties. The current Congressional routine for the two parties is simple: the minority party attempts to prevent the majority party's candidate from attaining the nomination.⁷ These filibustering tactics made it difficult for the President to pass any nominees displayed to the senate.

Filibustering was present during the Obama administration. Democrats, the party in majority of the Senate, decided to advocate for the "nuclear option" or lowering the threshold to 51 votes. Democrat Senator Harry Reid, the Senate Majority Leader, postured filibuster tactics must be eliminated to break "the logjam" to pass a nomination.⁸ Senator Reid amended the process to allow for a simple majority to pass a candidate through the process. The Senate changed the process and the senate turned red; the Republicans were in power to pass their nominees at 51 votes and subsequently passed Gorsuch and Kavanaugh at the new, lower threshold.⁹

Both parties have attempted to delay nominations to allow their parties more time to counteract votes. President Obama attempted to fill a supreme court vacancy with Merrick Garland and was resisted by the majority Republican party in the Senate. The Senate Majority Leader Mitch

⁴Constitution: Article 2 section 2
U.S. Const. art. II, § 2.

⁵ Ronald D. Rotunda, *Symposium: Separation of Powers: The Confirmation Process for Supreme Court Justices in the Modern Era*, 37 Emory L.J. 559, 560 (1988).

⁶ *Id.* at 559.

⁷Chafetz, *supra* note 2, at 110.

⁸Jeremy W. Peters, *Democrats Plan Challenge to G.O.P.'s Filibuster Use*, N.Y. Times (Jul. 8, 2013), <https://www.nytimes.com/2013/07/09/us/politics/democrats-plan-challenge-to-gops-filibuster-use.html>

⁹Chafetz, *supra* note 2, at 109.

McConnell proposed that the American people should have a voice concerning the new justice.¹⁰ According to McConnell, people would demonstrate their intentions for the Supreme Court seat in the upcoming elections.

Historically, administrative and political expertise in obstructing the process has enabled both parties to delay, facilitating additional time to gain power. Once the 2016 elections ended and President Trump nominated his judges, the process was continued. Although the media displayed the idea of delayed nomination as novel, examples of delay tactics to prevent nominee confirmation was used in President Tyler's administration.¹¹ Political leaders prioritize certain ideologies because they believe deeply in them and will fight for them regardless of opposing parties. These differing beliefs encourage each party to fight vigorously for their coveted principles. For example, Brett Kavanaugh's recent nomination to the court ignited a fire under the Democrats to protect the precedent set by *Roe v. Wade* permitting abortion. Allegations also came to light concerning Kavanaugh's past that sparked a debate concerning due process and corroboration. The ordeal left a fractured relationship between Democrats and Republicans.¹²

Another difficulty complicating the process is the inability to predict the leaning of a specific justice. A prevalent example comes in Ronald Reagan's presidency. In what was predicted to be a conservative tide rushing through the supreme court, Reagan chose three justices, two of which, O'Connor and Kennedy, made decisions that conservatives consistently disapproved of.¹³ A more distant, peculiar example comes with Hugo Black. Franklin Delano Roosevelt nominated Black, who, only ten years earlier, was a member of the Klu Klux Klan. Despite the media outcry over the possible racism and segregation that would permeate court decisions, Black was nominated by the Senate and proceeded to fight for desegregation and protect free speech.¹⁴

The instruction of the Founding Father's in the Constitution concerning the Supreme Court nomination process is not extensive. Politicians have capitalized on this vagueness. American history shows how they amended the process several times, even if it was sometimes cosmetic. The changes in the process have made it more efficient, even more controversial changes like the nuclear option.

Part II.

A. Partisan Polarization

A chasm exists between the two popular political ideologies in the United States: conservatism and liberalism. The chasm seems to grow wider from day to day with migration from moderate ideologies to more pronounced beliefs. Most contemporaries lament the division between the

¹⁰*Id.*

¹¹*Id.* at 121.

¹²John Verhovek, *In Midterm Elections, Parties Seize on Kavanaugh Fight*, ABC News (Oct. 9, 2018), <https://abcnews.go.com/beta-story-container/Politics/democrats-republicans-capitalize-post-kavanaugh-midterm-landscape/story?id=58361855>

¹³Benjamin Pomerance, *Article: Justices Denied: The Peculiar History of Rejected United States Supreme Court Nominees*, 80 Alb. L. Rev. 627, 729 (2016 / 2017).

¹⁴ Rotunda, *supra* note 5, at 563.

two sides because of difficulties the growing divide creates in resolving important social, political, and economical decisions.¹⁵

Opponents to the current process state that the court cannot withstand the political polarization permeating the court. The political polarization supposedly creates a gridlock that disallows any progress.¹⁶

However, the courts have avoided this ideological partisanship for almost all of the nation's history. On only two occasions of important decisions before 2010 had the court been divided into two camps on a specific case with republican appointed justices on one side and democratic appointed justices on the other.¹⁷

Today's court is more ideologically polarized than in previous years. Part of this polarization is due to the fact that since law school these lawyers and politicians have been trained and have maintained certain beliefs. In recent years, politicians have become more entrenched in their respective ideologies as have the elite class of the nation.

Judges and justices come from this elite class. Most of the current justices on the supreme court came from higher socioeconomic classes, with the exception of Clarence Thomas. These candidates were raised with their strong beliefs leading them to their respective success. For a judge to be a moderate in this political climate, he or she would likely restrict their upward mobility in the Judicial system.

At the same time, more polarizing judges struggle to get votes that in the past they would have normally received. You would be hard pressed to find a democrat to vote for Scalia in today's climate, or a republican to vote for Ginsburg. However, when they were nominated, Scalia and Ginsburg both received over 95 votes in the Senate.¹⁸

To say the flaws in the current nomination process is an effect of the polarization is false. On the contrary, the process helps prevent against polarization in the court. The founding fathers designed the process to be full of hindrances just like every part of the federal government enumerated in the constitution.

The checks and balances inherent in the nomination process prevent extremist or unqualified nominees to acquire a judicial seat. If the president were to choose someone controversial, he or she would have difficulty surviving a vote in the Senate. A great example in recent memory comes from the nomination of Robert Bork. Because he was an extreme, outspoken conservative, Bork was denied a Supreme Court seat by the Senate. After his failed nomination, Reagan chose one of the most moderate judges in recent history: Anthony Kennedy. If the president were to choose someone unqualified or extreme, the Senate would also deny the nomination.¹⁹

To pass the Senate nomination process, a supreme court candidate must demonstrate not only

¹⁵Neal Devins & Lawrence Baum, *Article: Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 Sup. Ct. Rev. 301, 302 (2016).

¹⁶*Id.* at 304.

¹⁷*Id.* at 315.

¹⁸*Id.* at 330.

¹⁹Rotunda, *supra* note 5, at 565.

strong ethical decisions and superb legal knowledge, but also neutral non-incendiary answers to hot-button issues. Although most senators are deeply entrenched to the right or left, the most important senate votes belong to the senators in the middle. This does give opportunities for judicial nominees to lie to receive votes but doing so is useless in today's increasingly transparent society with both social and other medias. Senators can also see thousands of documents about a nominee's decisions in courts before they reach the court. For a nominee to reach the Senate floor, he or she must be on their best behavior.²⁰

B. The Nuclear Option

The nuclear option developed the nomination process to balance the polarized environment. For a nominee to gain approval from the senate, he or she must receive at least 60 votes. Nominees have struggled to receive votes in the past, but opposition escalated with senate democrats opposing several of President Bush's nominees to lower courts.²¹

A couple years later, Senator majority leader Harry Reid enacted the nuclear option. Instead of the normal 60 votes that left open the possibility of a filibuster, the nuclear option made it possible for a nominee to begin their judgeship with only 51 votes.²²

The nuclear option balances the polarized environment. Years of filibuster made it difficult for any judge that was not moderate to gain the support. The nuclear option allowed more qualified judges to gain the necessary support. With less moderate judges, the nuclear option made the transition the court smoother.

Neil Gorsuch was nominated to the court at the beginning of the Trump presidency with only 55 votes. Kavanaugh was then nominated to the court and received the bare minimum 51 votes after a sexual abuse claim. Neither judge would have been accepted to the court without the nuclear option, and it would have been difficult for any nominee after to be placed on the court.²³

Part III.

A. Term Limits

One reason that the competitiveness between parties concerning Supreme Court nominees is that the tenure of the justices is longer than ever before. The constitution enumerates that the justices would serve "during good behaviour".²⁴ The statement is interpreted to mean that justices would serve for life or until retirement, pursuant with British custom in the 17th century spurred by the Glorious revolution.²⁵ In their native land, the founding fathers knew that serving for life was

²⁰Pomerance, *supra* note 13, at 633.

²¹Chafetz, *supra* note 2, at 98.

²²Jeremy W. Peters, *Democrats Plan Challenge to G.O.P.'s Filibuster Use*, N.Y. Times (Jul. 8, 2013), <https://www.nytimes.com/2013/07/09/us/politics/democrats-plan-challenge-to-gops-filibuster-use.html>

²³Chafetz, *supra* note 2, at 109.

²⁴Constitution: Article 2 section 2

U.S. Const. art. II, § 2.

²⁵Steven G. Calebresi & James Lindgren, *Article: Term Limits For the Supreme Court: Life Tenure Reconsidered*, 29 Harv. J. L. & Pub. Pol'y 769, 777 (2009).

essential to independence because sovereigns previously decided the judge's tenure impairing the judge's independence.²⁶

Naturally, people live longer due to advances in medicine. Of the nine post-1975 retirees from the Supreme Court, the average tenure for those retirees was 26.1 years. In contrast, the average tenure leading up to 1975 in the United States was 14.9 years.²⁷ The longer tenure causes the court's vacancies to arrive infrequently, and both parties jump on the opportunity to gain a valuable edge in court.

If they can postpone the vacancy until their president comes into office, each party will do whatever it takes to get their justice in the court. After all, an ideological and political ally that serves in the Supreme Court for more than 30 years can be more valuable than all their party's senators.²⁸

The quick solution to extended tenures is to create term limits. The average tenure itself is not enough of a catalyst to lower term limits, but the fact that it causes vacancies to arise less frequently. He or she would retire and consequently vacancies would arise more frequently. If a term limit were implemented, the justices would not have to decide when to retire. This would all but guarantee that a vacancy would arise every 2 years.

More frequent vacancies would ease the tension between the two parties. The vacancies would allow the court to stay younger and continue with more innovative ideas. Additionally, older justices are not taxed physically beyond their limits to stay in the court. Ruth Bader Ginsburg has dealt with several health difficulties, which have impaired her ability to serve in the court and psychologically held herself captive to serve until she cannot breathe.²⁹

Opponents to term limits cite Alexander Hamilton's rationale when he established the idea in the Constitution, arguing for "the permanent tenure of judicial offices... since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty".³⁰ Hamilton's point was sound at the time and in direct opposition to the current practice of the world.

However, his argument rested on two assumptions that have since been proven wrong. The first being that the judiciary "is beyond comparison the weakest of the three departments of power".³¹ The judiciary has steadily increased in its power beyond any measure of what Hamilton could have considered.³²

The second assumption was that the judges would be older and their tenures shorter, which was

²⁶*Id.*

²⁷*Id.* at 775.

²⁸*Id.* at 882.

²⁹Matthew Baker, *BAKER: Why Justice Ginsburg's health demonstrates the need for term limits*, Cavalier Daily: University of Virginia (Jan. 14, 2019), <http://www.cavalierdaily.com/article/2019/01/baker-why-justice-ginsburgs-health-demonstrates-the-need-for-term-limits>

³⁰THE FEDERALIST NO. 78 (Alexander Hamilton).

³¹*Id.*

³²Calebresi, *supra* note 25, at 822.

the case of his era. The justices nominated are younger and younger than they have ever been, which leads to longer tenures. Additionally, these judges may be insulated to greatly from the pulse of contemporary law and its interpretations.³³

For effective term limits, justices must have proper retirement benefits or another path available in the lower courts for employment.³⁴ The nuisances of independence would restrict some conduct from retired nominees, but proper rules and procedures would protect independence.

Part IV.

A. Supreme Court Independence

The Supreme Court is a unique branch of the government compared to the legislative and executive branches for two reasons. First, the court is independent from public opinion. Second, the court has the ultimate say to interpret laws. The nuclear option, term limits, or any other amendment to the process must be able to keep these vital qualities intact: the Supreme Court's independence and its ability to interpret every law, regardless of outside influence.

The first essential quality is independence from public opinion. The Supreme Court determines what the laws, statutes, precedents, and the constitution states on any matter. Therefore, it should be as independent as possible from public opinion because justices must make decisions on principles and precedents, not popularity. If Supreme Court justices worried about the next election, independence and impartiality would be damaged as the justices would attempt to mollify the wrath of majority opinion, and follow a practice labeled "majoritarianism".³⁵ Another reason continued independence is important is to prevent the lower courts from operating unfettered. Since these judges are elected, they are affected by implicit bias.³⁶

This makes the current system exceptionally effective in keeping judiciaries outside of public influence. Although the public has an indirect hand in choosing the candidates by voting for presidential and legislative nominees, they cannot directly determine who the next Justice will be. The justices must demonstrate themselves through effective judicial service and proper philosophy that they are fit to serve in the Supreme Court. They typically also serve for years in other capacities including the state, district, or appellate courts. They must have been involved in the judicial branch before their ascent to the highest court in the land. Next, they must be chosen by the executive branch to be nominated to the court. Finally, they must be voted in by the legislative branch. All three branches work in harmony with checks and balances arrive to prevent any candidate unjustly receiving a nomination.

The Supreme court justices may make decisions that seem unpopular, but their decisions will be construed by the media to be positive or negative. Justices must ignore what the public believes in their decisions and instead focus on moderating the operation of law in the country. They must ensure that even the smallest minorities can receive proper treatment under the law.³⁷

³³*Id.* at 823.

³⁴*Id.* at 773.

³⁵Steven P. Croley, *Article: The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. Chi. L. Rev. 689, 694 (1995).

³⁶*Id.* at 727.

³⁷*Id.*

To institute the nuclear option would most likely boost independence, because the nominee would have to cater to less voices in the Senate. Changes, like the nuclear option, can be effective because of their boost to impartiality.

Term limits could be a dangerous amendment. The key to ensuring that term limits would not harm independence would be to make sure that justices would not have to worry about a separate career after ending their term on the court. If a justice were to end their career and seek another it would possibly affect their decisions as a justice; bribes for post-retirement employment would be a dangerous implication with early retirement.³⁸

B. Court Precedence

The second unique quality of the Supreme Court rests on its ability to set precedent and decide cases that will affect the entire legal system. The Supreme Court has the final, resolute voice on any legislature, regardless of what the legislature intended by such legislation.

Because of this essential duty of the court, two basic, conflicting interpretations of the laws exist: the originalist interpretation and the living document interpretation. The originalist interpretation states that the document itself should be interpreted to mean what the author at the time meant or what it was intended for the audience.³⁹ The living document view or “the living tree”⁴⁰ states the constitution was made to be interpreted differently as the nation grew politically, socially, and technologically. The court has rarely united around either of these interpretations.

Originalism is the philosophy that judges should not interpret laws based upon their own ideas, beliefs, principles, etc.⁴¹ In light of the Supreme Court’s basic duty to interpret the laws, originalism says that the framers have the final say. Whatever the law they enacted says, is what goes.

The originalist view would object to term limits as being outside the meaning of the authors. The reasoning behind the originalist view is that interpreting the constitution one way or the other, is difficult because of the lack of consensus in opinion. Interpretation would be under the whims of whomever sits in the position to interpret laws.

The living document interpretation would see term limits as a plausible amendment. They would cite the changing health provisions that enable justices to serve later in life. The founding fathers did not have this constraint during their lifetime, but they would have approved different interpretation with changing landscapes. To living document champions, term limits are obvious compared to other debates with interpretations like those around the Second Amendment.

Although originalists have sound reasoning for maintaining a never-relenting originalism perspective, implementing term limits is an interesting exception. The reason rests on the fact that little is enumerated in the Constitution concerning the appointment of Supreme Court Justices. We know from history and the framer’s intent concerning the idea of “Good Behavior”, but we do not have it written down in the Constitution. Therefore, an amendment would not go

³⁸Calebresi, *supra* note 25, at 773.

³⁹Jamal Greene, *Article: On the Origins of Originalism*, 88 Tex. L. Rev. 1, 8(2009).

⁴⁰*Id.* at 5.

⁴¹*Id.* at 3.

beyond original intent.

If there was consensus in a vote to create an amendment for term limits, the three branches should allow the term limits to be instituted for Supreme Court justices. Term limits would not need to be instituted for lower courts, but instead only for the highest court in the land.

V. Conclusion

Changes in the Supreme Court nomination have been developing over the life of our nation. The political and ideological polarization has seemed to hamper the Supreme Court nomination process. More than ever, justices appear to vote along party lines of the president that appointed them. To combat this development, the nuclear option was instituted to make the process run more smoothly.

To make the process more efficient, term limits could be instituted to ensure that the process is less contested. With more frequent vacancies in the court, both sides of the senate will act less anxiously because of the greater perceived opportunities. Instituting term limits would be difficult because of what the Constitution enumerates, but the change would be effective as long as it is regulated.

The most important fact of the current process is that the justices are more independent and freer from conflicts of interest than other solutions like a public vote for justices. The Supreme Court in the current process has buffers in place to keep the Justices from the influence of public interest. Because of this important conditional fact, the current process should not be changed too significantly from what it is: a convergence of the three basic branches of government.

Term limits are the tip of the iceberg when it comes to the debate on changing the nomination process. Other views will continue to voice their dissent with the process as it has been developed. Whether the changes are cosmetic, like televised personal appearances, or more substantive like term limits, changes will continue to be made in the process. Whatever the change or the idea, a process should be implemented to ensure that changes are made within the scope of due process.

Above all else, the Judiciary should hold those two principles of independence and ultimate interpretation as the guidelines. Any amendments that infringe on those principles should be rejected. The court must be impartial to avoid regimes oppressing the minority. And the court must be able to have the final say of interpretation, to prevent confusion.