RETHINKING SUPREME COURT CONFIRMATION POLITICS: A CASE FOR TERM LIMITS

By

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Abstract

The Supreme Court confirmation process is an essential aspect of ensuring the democratic accountability of the Court. Given that the Supreme Court is an undeniably important institution with far-reaching influence, the process and senators responsible for confirming justices should be chiefly focused on ensuring that the Court is comprised of the most supremely qualified individuals. While politics have naturally always been intertwined in the confirmation process, the current polarization in the Senate has significantly elevated the heated political debate over confirmations to an unprecedented level. As a result of the contentiousness and politicization of the process, the confirmation process has shifted the focus away from objective qualifications and toward politics, ideology, and partisanship. Today, bipartisan confirmation votes have virtually disappeared and one can predict with a high degree of certainty exactly how senators will vote based on the nominating president's party. The polarization of the Senate has resulted in a confirmation process that feels too consequential, thus calling for reform that lowers the temperature. This thesis, through a review of historical and current data, as well as a wide range of literature, will identify term limits for Supreme Court justices as the optimal option to reform this broken process.

Introduction

The Supreme Court confirmation process is arguably the most significant check that the Senate has on the Supreme Court. The role of the Senate in confirmations, when exercised effectively, can be seen as a mechanism for accountability in the democratic process. With the Supreme Court being the highest court in the land, the process of confirming a nominee should be conducted with the utmost seriousness and thoughtfulness in order to ensure that justices will be qualified and capable of fulfilling the duties of this consequential position. Given the striking polarization that exists in the Senate today, the confirmation process has come to appear to be a political charade, more focused on ideology and shifting the composition of the Court than about confirming the most qualified candidates. Although the confirmation process has always been inextricably linked to politics, the confirmations of the 21st century show the political elements to be taking precedence. This is cause for concern because the intention behind the process is to probe nominees in an effort to ensure that those confirmed to such an impactful position are supremely qualified, especially given the expanded role that Supreme Court justices have today. In order to identify a solution that would allow this process to meet the ideals, it is necessary to fully investigate the past and present of the process and isolate the pertinent issues. While the process has never been perfect, the present consequences of the politicization in the Senate can no longer be overlooked. In analyzing the seven most recent confirmation processes, it becomes abundantly clear that new problems have arisen that warrant prompt reform. The confirmation process is greatly important and has significant, long-lasting implications, as justices hold their positions "during good Behaviour," giving them life tenure.[1] Therefore, making the process as

[1] U.S. Const. art. III § 1.

effective as possible should be of paramount importance to upholding the democratic ideals of the Court and the country.

A thorough review of how the confirmation process has historically operated points to the creation of term limits for Supreme Court justices as an optimal choice for reforming the process. Instituting term limits will have the effect of addressing the issues associated with life tenure, chiefly the impact that life tenure has on the consequentiality of the confirmation process, while maintaining the values, integrity, and independence of the Court as an institution. The creation of a system of staggered, eighteen-year terms for justices through an amendment to Article III's grant of life tenure will create a structure that stands up strongly to criticisms of term limits proposals. While an amendment is a significant change to make, such measures are necessary to combat the pervasive polarization that currently characterizes the Senate confirmation process.

The Confirmation Process: 1789-2022

The process of appointing one to the Supreme Court is plainly laid out in the Article II, Section 2, Clause 2 of the Constitution, a clause known as the "Appointments Clause." The Appointments Clause stipulates that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint … Judges of the supreme Court."[2] While this clearly delineates the role of the President in terms of nominations, there is little elaboration on the intended meaning of "advice and consent." There are a number of differing interpretations of the framers' intent, consequently leading to different views on what the process or Senate role is meant to look like.[3] One notable school of thought holds that this process was only intended to be a minor check on presidential power, holding that the role of the Senate is only to prevent the

[2] U.S. Const. art. II, § 2.
[3] Lee Epstein and Jeffrey A. Segal, *Advice and Consent: The Politics of Judicial Appointments.* (New York: Oxford University Press, 2005), 18-19.

confirmation of nominees who are clearly unfit.[4] On the other hand, others suggest that "advice and consent" is intended to give the Senate significant responsibility in the process; from this perspective, it is argued that the Senate is required, by the Constitution, to exercise responsibility in the confirmation process actively and must, if necessary, not confirm a president's nominee.[5] The plain language of the Constitution also raises debate over what should be considered in Supreme Court appointments, as the language itself provides little guidance on if or how ideology and politics ought to be considered. This has allowed substantial room, throughout time, for varying interpretations of what it means to be qualified. Regardless of one's perspective on what "advice and consent" truly means, it remains clear that both the President and the Senate play important roles in this process. Both Presidents and Senators bring their own goals and ideologies to the table, often resulting in a vested interest in moving the Court in their preferred direction when possible. Intention of the framers aside, history has shown the Senate to have a critical role in the process of getting nominees on the Court.

The History of the Confirmation Process

The basic structure of the Supreme Court confirmation process as set by the Constitution has remained in place, though many changes surrounding it have occurred throughout time. While the President nominates someone and the Senate votes on whether to confirm or not, the process that we see today differs in important ways from 1798. The changing role of the Senate Committee on the Judiciary and the introduction of confirmation hearings are clear examples of shifts that have substantially altered the process, making it what it is today. The Judiciary Committee, an original standing committee created in 1816, initially played a role very similar to the other committees and was not as active in the confirmation process as it is now; only in 1868

[4] Ibid, 19.
[5] Ibid, 19.

did the Senate start automatically referring Supreme Court nominees to the Judicial Committee.[6] This shift aided the development of a clearer role for the Judicial Committee in the confirmation process. Further, confirmation hearings in which Supreme Court nominees themselves testified were nonexistent until 1925, and they only became routine starting in 1950. Prior to this, there were a few circumstances in which confirmation hearings were held, but the nominee did not testify, they were held behind closed doors, they were only held for controversial nominees, and the scope of the hearing was very limited.[7] Since 1950, the Judiciary Committee has requested for nominees to appear in front of the committee and nearly all nominees have voluntarily done so.[8] While there is no single, stated reason as to why this occurred, some have argued that as the Supreme Court became a more prominent force in political debate, Senators felt the need to investigate nominees more thoroughly, which was made more possible by the introduction of nominee testimony.[9] Within this shift is the shift toward requiring hearings to be open. This change followed the controversial confirmation of Justice Hugo Black in 1937; Black was known to be affiliated with the Ku Klux Klan and his speedy confirmation without open hearings sparked public outrage.[10] As a result, the public became intolerant of the idea of behind closed doors hearings and the Senate agreed to consistently hold open hearings beginning with Felix Frankfurter in 1939. The implementation of both hearings in which nominees testify and the requirement that they be made public have had numerous important implications on the confirmation process. By having the nominee testify, senators are able to gather information from the source themself about how they will be as a Supreme Court justice; doing this publicly

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[6] Paul M. Collins Jr. and Lori A. Ringhand, "The Institutionalization of Supreme Court Confirmation Hearings," *Law & Social Inquiry* 41, no. 1 (2016): 129, https://heinonline.org/HOL/P?h=hein.journals/aulr60&i=54.
[7] Ibid, 130.
[8] Epstein and Segal, *Advice and Consent*, 88.
[9] Collins and Ringhand, "The Institutionalization," 132.
[10] Ibid, 131.

makes this information widely available and introduces the public to the nominees, and potentially future justices, that their Senate representatives are voting on.

These are arguably changes that are positive. The implementation of hearings, specifically ones in which nominees testifies, allows for more interaction with the nominee before voting, provides an opportunity for nominees to discuss their experiences and opinions, and they serve as a vehicle for a more thorough look into nominees that should inform voting decisions. Further, making hearings public allows for the American people to see the democratic process play out and holds Judiciary Committee members accountable for probing nominees on issues that are of national importance. Additionally, it gives people insight into who will be sitting on the highest court in the country and making decisions that can have widespread impact. While the implementation of these hearings is positive, it also introduced new issues, and the question remains if senators are effectively using this opportunity. While being made public has had positive consequences for senator behavior, there is a negative side of them being made public, as well. In being aware that the public will see these hearings, senators are also aware that these hearings can be a platform for them and issues they wish to take a position on. During the hearings, committee members are able to use their time to take positions; not only are they able to publicly take a position on a nominee, they can also use their question time to highlight issues they personally care about a lot.[11] This can be done inadvertently in trying to understand the nominee and the justice they will be, but it is not to be overlooked that it is a forum for senators to show the public, and specifically their constituents, what they care about. Ideally, the time available in a confirmation hearing should be devoted to examining the nominee and focusing on the possibility that they will become a Supreme Court justice. The idea that questioning would be

[11] Ibid, 133-34.

self-interested on the part of senators directly conflicts with this. There are examples of position taking that exist from the start of public confirmation hearings until today, some of which are very explicit. For example, in 2010, during the confirmation hearings for Justice Elena Kagan, Senator Leahy of Vermont stated the following as a lead up to a question about the Second Amendment: "Two years ago, in *District of Columbia v. Heller*, the Supreme Court held the Second Amend guarantees to Americans the individual right to keep and bear arms. I am a gun owner, as are many people in Vermont, and I agreed with the *Heller* decision."[12] While he ultimately asked a fair question in regard to Kagan's view on the constitutional meaning of the Second Amendment, his introduction is a clear example of position taking. Having identified the benefits that can come from a nominee's testimony in a confirmation hearing, it is an ineffective use of time for senators to explicate their personal positions. Given the evidence that the public pays notable attention to confirmation hearings, alongside the growth of media and media coverage, it seems incredibly likely that senators are aware of the ways they can present themselves and issues well; a 2014 study notes that, since Justice O'Connor's hearing in 1981, the availability to listen or view hearings has increased significantly and it is safe to estimate that tens of millions of people in the US have heard or seen parts of the confirmation hearings.[13] Confirmation hearings have had an increasingly large audience, creating an opportunity that senators appear to have taken advantage of. It is important to note, however, that this is the result of a myriad of factors, not just senators alone; the growing prevalence of interest groups, the expansion of media capabilities, the vast increase in news media platforms, and the increase in ways to interact with public opinion have all played a part in confirmation hearings becoming a

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[12] Senate Committee on the Judiciary, *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing before the U.S. Senate Committee on the Judiciary,* 111th Cong., 2nd sess., 2010, 65. https://www.govinfo.gov/content/pkg/CHRG-111shrg67622/pdf/CHRG-111shrg67622.pdf.

[13] Dion Farganis and Justin Wedeking, *Supreme Court Confirmation Hearings in the U.S. Senate: Reconsidering the Charade* (Ann Arbor: The University of Michigan Press, 2014), 18.

larger platform, as well.[14] Though it is unlikely that a senator would come forth and say they used their time to let the American people know what issues matter most to them, the idea that this may be a primary motivation for certain senators during the hearing is concerning. While these changes to the process have brought about changes that can be of concern, they do not present a complete picture of why the confirmation process looks the way it does today.

The implementation of public confirmation hearings has clearly had positive and negative consequences. The question remains, are they, or have they ever been, effective? Arguably, Supreme Court confirmation hearings have not reached their potential effectiveness, thus often being considered more as a formality than a crucial factor in voting decisions. Firstly, most senators admit to committing themselves on how to vote prior to the hearings even starting.[15] If senators already know how they will vote before the nominee even gives their opening speech, it raises the question of what the utility of holding hearings even is and supports the notion that they are not being used effectively. Further, while the number of comments made during hearings have increased over time, the substance of those questions varies significantly. Specifically, when a senator in the same party as the president is questioning a nominee, there is a tendency to ask meaningless questions that serve to help a nominee look good; on the other hand, senators in the opposing party tend to focus their questions in ways that indicate their non-support.[16] There is significant preparation that goes into these hearings, as senators often walk in with long lists of questions to squeeze into their allotted time, many of them drafted by staffers or proposed by interest groups.[17] As a result, questions are asked of nominees with little time for follow-up, whether it be a result of the senator not having follow up questions because it is not an issue they

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[14] Richard Davis, *Electing Justice: Fixing the Supreme Court Nomination Process* (New York: Oxford University Press, 2005), 24-30.
[15] Ibid, 161.
[16] Ibid, 163-64.
[17] Ibid.

themselves care about or if it is due to time constraints. There is a lack of evidence that suggests the confirmation process has ever fully met its potential, but there are certainly a number of factors that suggest that the process, where it stands today, is clearly not operating effectively.

Beyond changes in the confirmation process itself, there have been changes in the Senate on a more general basis that have impacted the process in notable ways. While confirmation politics have always been associated with partisanship, a dominant theme of the 21st century has been party polarization. Many scholars have argued that much of this shift toward polarization has its foundations in the mid-1980s on the heels of congressional reform.[18] At this time, Congress made changes to its "formal structure and processes, informal norms and practices, and internal distribution of power."[19] The impact of these alterations can be seen in the changes in Senate procedures starting in the mid-1980s, including but not limited to a sizable increase in both filibusters and cloture votes throughout all Senate proceedings.[20] In light of current polarization, some view the modern Senate as notably more obstructionist than it had been in the past, potentially as a result of the procedural changes that occurred in the 1980s[21]; it can be argued that the view of increased obstruction refers back to the use of Senate rules, like the filibuster, to block or delay Senatorial action. However, it is important to note that 2013 and, subsequently, 2017 brought more changes to Senate procedure in terms of action on Supreme Court nominees. In 2013, the Senate, which was Democrat-controlled at the time, invoked the nuclear option, which reduced the number of senators needed to invoke cloture for federal court

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[18] James B. Cottrill and Terri J. Peretti, "The Partisan Dynamics of Supreme Court Confirmation Voting," *Justice System Journal* 34, no.1 (2013): 18, https://doi.org/10.1080/0098261X.2013.10768027.
[19] Paul J. Quirk, "Evaluating Congressional Reform: Deregulation Revisited," *Journal of Policy Analysis and Management* 10, no. 3 (1991): 407, https://doi.org/10.2307/3325323.
[20] Cottrill and Peretti, "The Partisan Dynamics," 18.
[21] Keith E. Whittington, "Presidents, Senates, and Failed Supreme Court Nominations," *The Supreme Court Review* 2006, no.1 (2006): 427, https://www.jstor.org/stable/10.1086/655178.

nominees, aside from Supreme Court nominations.[22] In 2017, Majority Leader Mitch McConnell extended the nuclear option to include Supreme Court nominations in order to clear a path for confirming Justice Neil Gorsuch. Today, a supermajority is no longer required to invoke cloture on debate of Supreme Court nominees. Therefore, while the Senate is not able to filibuster Supreme Court nominees, for now, the overall obstructionist nature of today's Senate still suggests a highly contentious environment. Further, the simple majority requirement for Supreme Court nominees adds to the concern over gaining Senate control, as having at least 51 senators from a given party enables that party to do a lot when it comes to the Court.

Another important change in the composition of the Senate that impacts the confirmation process is the ongoing disappearance of moderate senators. With the Senate becoming increasingly polarized, a natural consequence has been the gradual disappearance of senators who fall in the middle. In the 91st Senate, from 1969-1971, 41 percent of senators were moderates, with strong conservatives and liberals only accounting for 22 percent. [23] In stark contrast, the 111th Senate, from 2009-2011, only eight percent of senators were moderates and 45 percent were strong conservatives and liberals. The disappearance of senators in the middle has increased the difficulty of achieving bipartisan cooperation, whether it be in passing a piece of legislation or confirming a Supreme Court nominee. In arguing that the increased polarization of the Senate has had negative consequences for the thoughtfulness of the confirmation process, it is important to understand that it is not only changes in individual senator's behavior; the disappearance of legislators in the middle make party distinctions more clear cut and more explicit party alignment, leading to more pressure to vote in a way that matches your

[22] Gregory J. Wawro and Eric Schickler, "Reid's Rules: Filibusters, the Nuclear Option, and Path Dependence in the US Senate," *Legislative Studies Quarterly* 43, no. 4 (2018): 619, https://doi.org/10.1111/lsq.12207.
[23] Alan I. Abramowitz, "U.S. Senate Elections in a Polarized Era," in *The U.S. Senate: From Deliberation to Dysfunction*, ed. Burdett Loomis (Washington DC: CQ Press, 2011): 27.

co-partisans. With fewer moderate senators, there are fewer potential votes to be added from the other side to the expected party line vote.

To further assess the effectiveness of the Supreme Court confirmation process, it is crucial to identify what it really means to be qualified to serve on the Supreme Court. To argue that a process is not focusing chiefly on qualifications, it is necessary to first define what it means to be qualified for the Supreme Court. The word qualifications is vague and can have a vast array of meanings for different people. For some, being qualified refers to having received an impressive legal education, while for others it means having served as a judge for a certain amount of time. Undoubtedly, the conception of what makes a nominee qualified has changed over time. Something that is highly relevant in the conversation about qualifications is the American Bar Association (ABA) and its Standing Committee on the Federal Judiciary's evaluations of Supreme Court nominees. Since 1956, ABA's Standing Committee has been evaluating the professional qualifications of nominees through what they deem as an extensive process and providing a rating of "Well Qualified," "Qualified," or "Not Qualified."[24] According to the ABA, their evaluation involves a review of "each nominee's integrity, professional competence, and judicial temperament."[25] Further, the ABA commits to excluding the consideration of ideology, political affiliation, or philosophy in their review of a nominee. Because of the purported objectivity of these evaluations, many are inclined to view them as a gold standard.[26]

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[24] American Bar Association, *Standing Committee on the Federal Judiciary: What It Is and How It Works*, September 21, 2020: 6, https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/backgrounder-9-21-2020.pdf.

[25] "Supreme Court Evaluation Process," American Bar Association, accessed March 1, 2022, https://www.americanbar.org/groups/committees/federal_judiciary/ratings/supreme-court-evaluation-process/.

[26] Epstein and Segal, *Advice and Consent*, 71.

While the ABA ratings can provide meaningful insight into a nominee through attempting to get a full picture of them as a professional and as a legal scholar, it is also necessary to acknowledge that the ABA has often been criticized with allegations that they have become increasingly political. A commonly noted example of where partisan politics may have interfered with an evaluation is the case of Judge Robert Bork's nomination to the Supreme Court. Prior to this nomination, Judge Bork had been previously evaluated by the ABA for when nominated to the D.C. Circuit Court and had received a unanimous rating of "Well Qualified"; however, five years later, when being evaluated as a nominee for the Supreme Court, the ABA evaluation produced significantly different results as numerous members rated Bork as "Not Qualified".[27] This situation points to partisan interests being involved, as many have extrapolated this to mean signal that the ABA wanted to try to stop the confirmation of a conservative nominee. Since then, numerous people have accused the Standing Committee of being left-leaning, from senators to judicial nominees themselves. Though the ABA refutes these claims, any potential biases in these evaluations is troubling. Another issue that has been raised involves the criteria the ABA uses for evaluation. Specifically, speculation has risen about what is meant by temperament, as it appears to essentially refer to personality.[28] According to the ABA, the following are characteristics included in their evaluation of a nominee's temperament: "compassion, decisiveness, open-mindedness, courtesy, patience, freedom from bias, and commitment to equal justice under the law."[29] Unlike more objective evaluations, such as years of experience or level of education, characteristics like patience and compassion can be framed

[27] Grant H. Frazier and John N. Thorpe, "A Case for Circumscribed Judicial Evaluation in the Supreme Court Confirmation Process," *Georgetown Journal of Legal Ethics* 33, no. 2 (2020): 258, https://link.gale.com/apps/doc/A625156130/AONE?u=uarizona_main&sid=bookmark-AONE&xid=50954e2d.
[28] Philip Chen and Amanda Bryan, "The Legal Double Standard: Gender, Personality Information, and the Evaluation of Supreme Court Nominees," *Justice System Journal* 42, no. 3-4 (2021), 328, https://doi.org/10.1080/0098261X.2021.1967231.
[29] American Bar Association, "Standing Committee," 3.

in highly subjective ways.[30] All of this points to the ABA ratings of nominees as being more subjective than some may want to believe them to be; while there are objective aspects, such as a review of experience or analyses of published opinions, considering these ratings to be a gold standard, highly influential factor in deciding how to vote overlooks the potential bias that may exist for any given nominee.

This brings up a concerning aspect of the approach to deciding whether to confirm a nominee. Qualifications absolutely need to remain at the forefront, but the ABA rating of qualifications is not the objectivity that is needed more than ever in the current era of intense polarization. Given how polarized the Senate is, distrust of the ABA ratings as biased renders them somewhat irrelevant; if the rating is only accepted as accurate by the party that aligns with the nominee, there is essentially no point, as those already in support of the nominee may be the only ones to even acknowledge the rating. If used effectively, confirmation hearings and a thorough preparation process on the part of senators should theoretically be enough to draw conclusions on a nominee's integrity, professional competence, and judicial temperament. While the ABA research may speed up this process by having Standing Committee members conduct the research and interviews, rather than senators, the burden should still be on the senators to develop an understanding of the nominee's qualifications for themselves. These qualifications should not surround personality in a biased way and should instead focus on their legal and ethical backgrounds. As Professor Douglas W. Kmiec said to the Senate in 2002, "the proper Senate inquiry of a judicial candidate is demeanor, integrity, legal competence, and fidelity to the rule of law."[31] An organization's arguably subjective evaluation of a nominee's compassion need

[30] Chen and Bryan, "The Legal Double Standard," 328.
[31] Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, *The Judicial Nomination and Confirmation Process,* 107th Cong., 1st sess., 2001, 191, (Statement of Douglas Kmiec). https://www.govinfo.gov/content/pkg/CHRG-107shrg79825/html/CHRG-107shrg79825.htm.

not have a place in deciding whether or not to confirm a nominee; rather, senators ought to use the confirmation hearings and the resources at their disposal to determine if a nominee meets these objective criteria that are specifically relevant to an individual's potential to be a quality justice. At present, politics appear to be coming before qualifications, thus there needs to be a change in the confirmation process that more strongly encourages senators to use their time and resources to come to their own, ideally less political conclusions about the nominee. Unless an outside organization can put forth fully objective ratings, whether it be the ABA or another group, these ratings of qualifications should not be accepted alone as a stamp of approval.

The Confirmation Process Today

To understand why this issue is pressing today, it is essential to look at confirmation data and patterns, particularly from the past seven confirmations, as it reveals evidence of voting being primarily influenced by factors other than qualifications. Based on the prior review, it is clear that the process has never been perfect, but the rate it is currently going at suggests intervention is needed in order to have this process meet ideals. Despite the fact that politics have always played some role in the confirmation process, the history and trends of nominations signal that the degree of politicization regarding Supreme Court nominees has changed over time and specifically become more polarized. Prior to the 1980s, research shows that, while ideological concerns were relevant, partisanship itself did not play as systematic of a role in voting on nominees as it does today.[32] Of the nominees that have been voted on in the 21st century, none have had more than 80% yea votes.[33] The last four confirmation votes are clear examples of near party-line votes; all four nominees were confirmed with three or fewer votes

[32] Farganis and Wedeking, *Reconsidering the Charade,* 7.
[33] Leeann Bass, Charles M. Cameron, and Jonathan P. Kastellec, "The Politics of Accountability in Supreme Court Nominations: Voter Recall and Assessment of Senator Votes on Nominees" (working paper, Princeton University, 2020), 3, http://dx.doi.org/10.2139/ssrn.3770323.

from the opposing party, and the three confirmed nominees that preceded were all confirmed with fewer than ten. In fact, since Chief Justice John Roberts confirmation in 2005, the maximum votes a confirmed nominee received from the opposing party is nine.[34] A look back even as recent as thirty years ago shows a starkly different reality. While the votes for nominees like Justice Clarence Thomas in 1991 show numbers that appear to resemble the party-line votes we see today, there are many instances throughout time in which a number of Senators crossed partisan lines and voted to confirm a nominee from the other party. For example, just in the past 32 years, Justice Ruth Bader Ginsburg, a President Clinton nominee, was confirmed in 1993 with the support of 41 Republicans.[35] Similarly, Justice David Souter, a President H.W. Bush nominee, was confirmed three years prior with the support of 46 Democrats.[36] In clear contrast, in 2020, Justice Amy Coney Barrett, President Trump's third and final nomination to the Supreme Court, was the first justice confirmed with no support from the opposing party since 1869.[37] Thus, these patterns reveal that, while politics may have always played a role in confirmation voting, recent years reflect an undeniable shift toward party affiliation being a primary factor in a senator's voting decisions. With these partisan patterns in consideration, it becomes apparent that nominee qualifications are certainly not playing the most significant role in how senators vote.

Helpful research has looked at nomination and confirmation voting in the context of the current polarized era. One notable analysis used an estimation of opinion for the nomination of

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[34] Senate, *Roll Call Vote,* 109th Cong., 1st sess., 2005, https://www.senate.gov/legislative/LIS/roll_call_votes/vote1091/vote_109_1_00245.htm.
[35] Senate, *Roll Call Vote*, 103rd Cong., 1st sess., 1993, https://www.senate.gov/legislative/LIS/roll_call_votes/vote1031/vote_103_1_00232.htm.
[36] Senate, *Roll Call Vote*, 101st Cong., 2nd sess., 1990, https://www.senate.gov/legislative/LIS/roll_call_votes/vote1012/vote_101_2_00259.htm.
[37] Sarah Binder, "Barrett is the first Supreme Court Justice confirmed without opposition support since 1869," *The Washington Post*, October 27, 2020, https://www.washingtonpost.com/politics/2020/10/27/barrett-is-first-supreme-court-justice-confirmed-without-opposition-support-since-least-1900/.

Justice William Rehnquist's through that of Justice Sonia Sotomayor and found that senators tend to weigh their copartisans' opinions more heavily than both their own median constituency or the median constituent of their party.[38] They further cited that their findings showed that senators will do what their fellow partisans want 87% of the time when it comes to Supreme Court confirmations; additionally, when the nomination is made by a president from their own party, senators vote to confirm nominees 80% of the time, further emphasizing the importance of copartisan opinion.[39] This research solidifies the concept that partisan opinion is extremely important in confirmations, even relative to factors like a senator's own ideology. The research also finds that this trend does not only apply to copartisans within the Senate; they suggest that partisan groupings, in general, can result in polarized voting behavior.[40] This suggests a responsiveness to not only copartisan senators, but also to broader copartisans, whether it be constituents or party figures. The results imply that copartisan opinion receives disproportionate attention in comparison to other factors. These assertions are also extended to highlight the importance of Senate control as it pertains to Supreme Court nominations. In this era of polarization, Senate control can be a constraint on the process; if the opposition party has Senate control, the president is likely constrained in terms of who can be nominated with a chance of confirmation. As a result, there is also pressure on senators in the same party as the president to get nominees confirmed, especially if they have control of the Senate, for the obvious reasons of impacting Supreme Court ideological composition. The interplay between Senate control and who a president nominates produces complicated results, with a president and their copartisan

[38] Jonathan P. Kastellec et al., "Polarizing the Electoral Connection: Partisan Representation in Supreme Court Confirmation Politics," *The Journal of Politics* 77, no. 3 (2015): 800, 787-804. http://dx.doi.org/10.1086/681261.
[39] Ibid, 788.
[40] Ibid, 800.

senators wanting their nominee confirmed before the composition of the Senate changes, as it can every two years.

Another factor at play today that results from the ideological distance at play in the polarized Senate is tolerance for ideologically remote nominees. While some research asserts that nominees in recent years have consistently become more ideologically remote than past nominees, other research has introduced the idea that what is occurring is actually a decrease in tolerance for ideologically remote nominees.[41] While there are instances of notably extreme nominees in recent years, for example Justice Thomas as a notably conservative nominee or Justice Sotomayor as notably liberal, the ideological trends of nominees over time do not reveal consistent increases in extremism in either direction. This supports the notion that what has instead significantly changed is senators' responses to nominees who are ideologically distant from themselves. One study found that the tolerance for ideologically distant nominees has seen a clear decrease in regard to both moderately and highly qualified nominees. Prior to Robert Bork's nomination, the study points out, a yea vote for highly qualified nominees had an ideological cut-off point of 1.02; this allows for much more distance between a nominee and a senator than the post-Bork cut-off point of 0.37 for highly qualified candidates.[42] Given that there have not been consistent increases in nominee extremism, these changes appear to be at least partially explained by the ideology of senators. It is believed that, on the Judiciary Committee, at least, the two political parties began their sharp divergence in the 1970s and the distance has continued to grow.[43] Both Democrats and Conservatives in the Senate as a whole have consistently moved further to the left and right, respectively, in the past forty years; as a result,

[41] Lee Epstein et al., "The Changing Dynamics of Senate Voting on Supreme Court Nominees," *The Journal of Politics* 68, no. 2 (2006): 303, https://doi.org/10.1111/j.1468-2508.2006.00407.x.
[42] Ibid, 303.
[43] Farganis and Wedeking, *Reconsidering the Charade,* 23.

conservative Democrats and liberal Republicans have effectively disappeared, and moderate senators have become increasingly rare.[44] Today, even the most conservative Democrats still ideologically fall to the left of the most liberal Republicans, resulting in a very clear ideological divide. A natural consequence, therefore, is that any nominee is likely to be significantly ideologically distant from senators of the opposite party.[45] If senators themselves are becoming increasingly distant from one another, as well as from presidents of the opposite party, a logical result would be that nominees would be more distant from senators of the opposite party. This ties in clearly to senators' decreasing tolerance for ideologically remote nominees; because senators today are more ideologically remote themselves, nominees from an opposite party administration will naturally be more distant from those senators, and the heated polarization makes senators far less willing to vote for a nominee that is so distant from them and their copartisans.

During confirmation hearings today, senators ask more questions of the nominees. While this appears to point to increased participation in the process, which is theoretically positive, the content of this time spent talking presents a slightly different picture. As earlier noted, position taking has historically been a part of the content of senators' questioning time, and this certainly remains relevant today. Similarly, so-called "softball" questions are relevant during a senator's questioning time; "softball" questions are questions that are considered attempts to extend the opportunity for a nominee to "rehabilitate" themselves.[46] These questions are essentially responses to the questions of other senators and are commonly employed by senators who clearly support the nominee. Research also reveals that senators from the opposite party are more likely

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[44] Abramowitz, "U.S. Senate Elections," 33.
[45] Charles M. Cameron, Jonathan P. Kastellec, and Jee-Wang Park, "Voting for Justices: Change and Continuity in Confirmation Voting 1937-2010," *The Journal of Politics* 75, no. 2 (2013): 286, https://www.journals.uchicago.edu/action/showCitFormats?doi=10.1017%2FS0022381613000017.
[46] Farganis and Wedeking, *Reconsidering the Charade,* 76.

to ask hostile questions, which are intended to demand a response.[47] It appears that hostility in questioning has significantly risen and has characterized recent confirmation hearings. For example, during the confirmation hearings for Justice Barrett, Senator Feinstein of California continually pressed Justice Barrett on her stance on *Roe v. Wade*, to which Barrett repeatedly said she could not answer the question being asked; the degree of hostility increased, as Feinstein continued to ask and Justice Barrett continued to give a non-answer, ultimately ending with Feinstein expressing that it was "distressing not to get a good answer."[48] Similar situations occurred during Judge Ketanji Brown Jackson's recent testimony, during which multiple Republican senators pressed Judge Jackson for answers in a hostile manner and overtly dismissed her answers as not good enough. Along similar lines is the concern about how questioning today differs in regard to a nominee's race or gender. Studies have shown that female nominees are subject to notably more rigorous questioning in terms of judicial philosophy than their male counterparts.[49] The research has viewed this difference as a persisting trend to question female nominee's competence, despite female nominees becoming more common than ever. Similar concerns regarding discriminatory differences exist for minority nominees as well. Research shows that minority nominees receive far more questions about criminal justice than white nominees.[50] Given that this process is intended to allow senators to make informed decisions about who should serve on the highest court in the land, the fact that demographic

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[47] Jessica A. Schoenherr, Elizabeth A. Lane, and Miles T. Armaly, "The Purpose of Senatorial Grandstanding during Supreme Court Confirmation Hearings," *Journal of Law and Courts* 8, no.2 (2020): 342, https://doi.org/10.1086/709913.

[48] Lisa Mascaro, Mark Sherman, and Laurie Kellman, "Barrett bats away tough Democratic confirmation probing," *Associated Press*, October 13, 2020, https://apnews.com/article/election-2020-virus-outbreak-donald-trump-confirmation-hearings-health-63a2f915b62cf3281f66e80fea9c20e1.

[49] Christina L. Boyd, Paul M. Collins Jr., and Lori A. Ringhand, "The Role of Nominee Gender and Race at U.S. Supreme Court Confirmation Hearings," *Law & Society Review* 52, no. 4 (2018): 890, https://doi.org/10.1111/lasr.12362.

[50] Lori A. Ringhand and Paul M. Collins Jr., "May it Please the Senate: An Empirical Analysis of the Senate Judiciary Committee Hearings of Supreme Court Nominees, 1939-2009," *American University Law Review* 60, no. 3 (2011): 597, https://heinonline.org/HOL/P?h=hein.journals/aulr60&i=54.

differences play a role in the content discussed could be a source of concern for any potential objectivity, as it appears to reveal a bias that still exists despite the diversification of the Court over time. Another issue with the content of questions is the number of seemingly irrelevant comments. Not only are senators asking more controversial questions than ever, despite knowing that they will likely not elicit a response, they are also asking questions that are not relevant to judging a nominee's qualifications to serve on the Supreme Court.[51] This has led to the misled perception that nominees are answering less questions than they used to; the level of candor of nominees has actually remained high, as most answer between 60 and 70 percent of questions in a very forthcoming way.[52] However, questions of a highly controversial or forecasting manner sometimes warrant a nominee declining to answer or utilizing the "Ginsburg Rule," which refers to a nominee's right to refuse to answer questions that would forecast how they may respond to unsettled legal questions.[53] Recent years have shown a number of questions being asked that pertain to a nominee's personal views, despite the fact that personal views are expected to be put aside when dealing with constitutional matters as a justice and should seemingly be outside the purview of the Judiciary Committee's investigatory role. Considering that the Supreme Court is not part of a political branch, questions of personal ideology may be seen as a waste of limited time. An example of this comes from Justice Kavanaugh's confirmation hearing, during which he was asked what his position was regarding a woman's right to choose.[54] While questions regarding *Roe v. Wade* in terms of precedent and settled law are common and more acceptable, a nominee's personal opinion on various issues like abortion should not be considered relevant or

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[51] Dion Farganis and Justin Wedeking, "'No Hints, No Forecasts, No Previews': An Empirical Analysis of Supreme Court Nominee Candor from Harlan to Kagan," *Law & Society Review* 45, no.3 (2011): 554, https://doi.org/10.1111/j.1540-5893.2011.00443.x.
[52] Ibid, 554.
[53] Ibid, 526.
[54] Senate Committee on the Judiciary, *Confirmation Hearing on the Nomination of Hon. Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States*, 115th Cong., 2nd sess., 2018, 128, https://www.govinfo.gov/content/pkg/CHRG-115shrg32765/pdf/CHRG-115shrg32765.pdf.

necessary to ask. Just last month, Senator Ted Cruz dedicated a significant portion of his allotted time to question Judge Jackson about critical race theory, even bringing out children's books; he made references to the curriculum at the school her children attended and asked her if she thought critical race theory was a correct way to view society, despite her repeated insistence that critical race theory had and would never factor into her judicial decisions.[55] Examples like this get at the heart of how the confirmation process has not only been being used ineffectively, but also points to the blatant politicization of the entire process, all the way from a nominee's swearing in to roll call voting.

The polarization of the Senate and politics in general has largely contributed to the process appearing more consequential than ever. Supreme Court confirmations have always been, and should remain, consequential to some degree; however, the ideological distance and subsequent contentiousness between senators and the political parties today has led to the entirety of the confirmation process failing to center around qualifications. To fully understand the problem and seek a complete solution, it is still important to acknowledge that other factors have heightened the perceived consequences of these decisions, specifically in terms of average tenure, as it has notably risen in recent decades. In the past 40 years, the average time spent in office by a Supreme Court has increased from 16 years to over 25.[56] Crowe and Karpowitz looked at age and tenure trends of justices, seeking an answer as to why justices today are electing to serve longer than before[57]; their conclusions present a few plausible reasons for the increase in average tenure. Firstly, they propose that institutional changes to the Court have impacted decisions on how long to remain on the Court. Not only has the Court seen changes in

[55] Alexander Bolton, "Cruz presses Jackson on critical race theory in tense questioning," *The Hill*, March 22, 2022, https://thehill.com/homenews/senate/599275-cruz-presses-jackson-on-critical-race-theory-in-tense-questioning/.
[56] Justin Crowe and Christopher F. Karpowitz, "Where Have You Gone, Sherman Minton? The Decline of the Short-Term Supreme Court Justice," *Perspectives on Politics* 5, no.3 (2007): 425, https://doi.org/10.1017/S1537592707071472.
[57] Ibid, 433.

its structure, including improved working conditions and an increase in support infrastructure, the role of justices in US politics has shifted according to institutional changes.[58] Though once more passive, the Supreme Court has expanded its political influence in modern times. For one thing, certiorari jurisdiction has expanded over time, affording justices the ability to control their caseload more.[59] The issues taken up by the Court are more controversial than before and often involve nationally relevant issues of constitutionality; as a result, justices are involved in controversial decisions that have broad social and legal impact, which arguably leads to a desire to remain on the Court for longer. While institutional changes are assumed by Crowe and Karpowtiz to be the clearest potential reason for justices serving longer, they also introduce the idea that personal and demographic factors are worthy of consideration, as well[60]. They suggest that the increasing reliance on federal judges for Supreme Court nominees may help explain the increase in average tenure; pulling from federal appellate judges, they assert, increases the likelihood that a nominee values appointment to the Supreme Court as the ultimate sign of a successful judicial career.[61] As for demographic changes, it is noted that there has been a dramatic increase in lifespan since the construction of the Constitution. As a result, justices are likely to live longer which implies the possibility that they can, and might very well choose, to serve longer. Justices no longer have to circuit ride, they exert important political and social influence, and they are more likely to live to 100 than ever before; consequently, it appears judicious to anticipate that the justices being confirmed in the modern era will serve for a long time. This plays a crucial role in understanding the confirmation process today; considering the decreasing tolerance for ideologically distant nominees, there appears to be extreme weight

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[58] Ibid.
[59] Ibid.
[60] Ibid, 434.
[61] Ibid.

associated with these decisions, as senators are displaying clear disinterest in putting nominees from the opposing party on the Court for an upwards of 25 years. Not only do senators appear to not want to confirm nominees from the opposite party in general, it seems plausible that an increased reluctance comes from knowing how long a nominee can serve on and impact the composition of the Court.

All of this being considered, it is unsurprising that confirmation votes today can be predicted with almost perfect accuracy. Despite the ideal of a thoughtful, non-partisan process, the past seven confirmation hearings reveal a highly calculated, highly predictable nature, as bipartisan confirmation votes fade to a thing of the past. Party affiliation now appears to be enough to know what roll call votes will look like, with the occasional exception of a couple of senators, which is a clear cause for concern. Further, senators have become candid about this fact, not denying the primary importance of party and partisan ideology. For example, Senator Lindsey Graham, the former Chairman of the Judiciary Committee, was quoted saying the following leading up to Justice Barrett's confirmation hearing: "This is probably not about persuading each other unless something really dramatic happens. All Republicans will vote yes and all Democrats will vote no."[62] Senator Graham was almost exactly right, as all Democrats voted no and all Republicans, with the exception of Senator Susan Collins, voted yes; the confirmation hearings appeared to be nothing more than a formality, as it went exactly along the party lines people anticipated. It is also important to note that this vote is certainly not an isolated incident; the 5 confirmation votes prior all had less than 10 yea votes from the opposite party. Extended further, the last time a nominee received any significant bipartisan support was 17

[62] Deirdre Walsh, "Takeaways From Amy Coney Barrett's Judiciary Confirmation Hearings," *NPR*, October 15, 2020, https://www.npr.org/2020/10/15/923637375/takeaways-from-amy-coney-barretts-judiciary-confirmation-hearings.

years ago, when Chief Justice Roberts was confirmed with the support of 22 of 44 Democrats.[63] Given these patterns and trends, there was little room for speculation on what would happen with Biden's first nominee, Judge Jackson upon her nomination in early 2022. Based on the six nominations prior, it was reasonable to expect the vote to be nearly party-line, and it was; Judge Jackson received 53 yea votes that included all Senate Democrats and Independents, as well as three Republicans. While the Biden administration and Senate Democrats viewed the support of three Republicans to be a big win, there was not significant concern about whether she would be confirmed because the Senate is narrowly controlled by Democrats. Therefore, despite senators from either side of the aisle opinion on her, it was clear that the hearings, which were arguably a formality, would end with the confirmation of Judge Jackson, and they did. If confirmation hearings are used effectively as actual decision makers, roll call votes should not be this predictable. The ability to estimate with near certainty what the votes on a nominee will look like based on the president that nominated them clearly reveals how partisan affiliation and ideology take precedence over qualifications.

What Needs To Be Done?

This is all of notable importance because of the nature of nominating someone to the Supreme Court. The impact of the Supreme Court is undeniable, thus making a nomination and eventual confirmation extremely consequential. It can be argued that today's confirmation processes have been incredibly calculated, as opposed to the thoughtful, intentional process that they would ideally be. The clear pattern of partisan voting cannot be ignored and reveals that a primary motive of senators, as proxies of the president and their party, is ensuring that the ideological direction of the Court either shifts or remains in alignment with their position. Given that the confirmation process is effectively the only check on the Supreme Court and serves as a

[63] Senate, *Roll Call Vote* (109th Cong.).

primary vehicle for accountability in the democratic process, these significant problems should not continue to be overlooked. Ideally, the confirmation process should be exclusively focused on ensuring that only the best, most objectively qualified candidates are confirmed, regardless of their personal views; considering that the Court is intended to be independent and isolated from politics, it is incompatible that those who are appointed are done so through a highly politicized process that gives weight to the personal opinions that justices swear under oath to keep separate from their judicial duties. It is in everyone's best interest, including sitting justices, nominees, senators, presidents, and the American public, to find a way to meet the ideals of the confirmation process; if the goal is to have the most qualified candidates serving on the Court, changes need to be made to bring qualifications to the forefront of senators' evaluations and eventual voting decisions, encouraging thoughtfulness, objectivity, and, in the case of supremely qualified nominees, bipartisanship.

With the current polarization that increases in the Senate, it appears that the best way to meet these objectives is to lower the stakes. Because of the role of the Supreme Court, especially given its expanded role that we see today, the confirmation of justices will always be consequential to a degree. However, it is necessary to lower the stakes, as the weight that accompanies such stark polarization and the fear of shifting the ideological composition of the Court for decades is a clear barrier to focusing primarily on qualifications and the potential for bipartisan support. Theoretically, if a nominee is supremely qualified, they should be receiving broad support across the Senate, but this is clearly not the case today. The means to achieve this end requires a significant lowering of the temperature, paving a path for senators to decide how to vote irrespective of their party and chiefly responsive to an evaluation of qualifications. All of

this being considered, the introduction of term limits for Supreme Court justices is arguably the best way to work toward the ideal confirmation process.

A Case for Term Limits

In today's context, life tenure for Supreme Court justices is flawed. Instituting term limits for Supreme Court justices would be the optimal way to reform the confirmation process and enable it to work more effectively and objectively. Most of the current flaws in the confirmation process relate back to the idea of consequentiality; confirming a Supreme Court justice is incredibly consequential to begin with, heightened by the length of time justices spend on the Court on average today. With the current polarization in the Senate, the two sides rarely agree on anything. The possibility of confirming a justice from the opposite party to serve an upwards of 25 years feels very serious to senators, as these justices will likely impact the ideological balance of the Court long after many of these senators are even serving. As a result, factors other than qualifications are becoming chief reasons for how senators vote, a problem that requires addressing. Term limits would effectively lower the stakes, encouraging more objectivity and less partisanship in voting, ultimately enabling the confirmation process to meet ideals.

In evaluating life tenure, it is firstly important to understand the reasoning for granting Supreme Court justices life tenure in the first place. Alexander Hamilton, a passionate and important influence on the decision to grant justices life tenure, advocated for life tenure as a mechanism to ensure the Court's complete independence from being influenced by the political branches[64]. In his view, "nothing can contribute so much to its firmness and independence as permanency in office," thus making life tenure crucial to a justice's constitutionally-defined

[64] James E. DiTullio and John B. Schochet, "Saving This Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms," *Virginia Law Review* 90, no.4 (2004): 1099, https://doi.org/10.2307/3202417.

role.[65] The decision for life tenure is underscored by the understandable concern for the Court to remain free from political influence, rendering opinions solely based on the interpretation of the Constitution; this is a sentiment that has remained unchanged and unquestioned since the ratification of the Constitution. What can be questioned, however, is whether or not life tenure is an essential mechanism for maintaining an independent judiciary. Despite being included in the Constitution, criticisms of life tenure have been made since before the Constitution was even ratified. From the time of its proposal, Anti-Federalists criticized the idea and argued that they were creating a judiciary that was too independent.[66] This criticism did not stop with ratification, as several proposals for term limits have appeared in Congress since the early 19th century. Criticisms regarding life tenure and whether it is a necessary means to this mutually agreed upon end have also changed over time in response to contextual changes; changes to life expectancy, average tenure, and frequency of vacancies all contribute to a 21st century approach to whether life tenure is necessary for justices. Therefore, while Hamilton's sentiment has remained relevant and should stay central to the role of the Supreme Court, flaws in the tenet of life tenure have been revealed over time and require consideration given the state of the confirmation process today.

Inherent to why life tenure is flawed today is the average life expectancy, tenure, and frequency of vacancies. At the time that the Constitution was ratified, the average person had a life expectancy of around 35.[67] As of 2020, average life expectancy is 77.8 years.[68] Given that the

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[65] Alexander Hamilton, "Federalist No. 78," in *The Federalist Papers*, ed. Michael A. Genovese (New York: Palgrave Macmillian, 2009), 236.
[66] Adam Chilton et al., "Designing Supreme Court Term Limits," (working paper, Southern California Law Review, Washington University in St. Louis Legal Studies Research Paper, HKS Working Paper, U of Chicago, Public Law Working Paper no. 763, 2021), http://dx.doi.org/10.2139/ssrn.3788497.
[67] "Population Explosion Among Older Americans," Info Please, last modified February 11, 2017, https://www.infoplease.com/us/population/population-explosion-among-older-americans.
[68] Elizabeth Arias, Betzaida Tejada-Vera, Farida Ahmand, "Provisional Life Expectancy Estimates for January through June, 2020," *Vital Statistics Rapid Release*, no. 010 (2021): 1, https://www.cdc.gov/nchs/data/vsrr/VSRR10-508.pdf.

average life expectancy today is more than double that of the time life tenure was signed into law, the framers of the Constitution could have never anticipated Supreme Court justices consistently serving for 25 or more years. Naturally there are some outliers, but from 1789 to 1970, the average tenure of Supreme Court justices was 14.9 years; today's average of 26.1 years provides a starkly different picture.[69] As a result of the increased average life expectancy and the resulting increase in tenure, vacancies on the Court occur significantly less frequently. From 1789 through 1970, vacancies occurred, on average, every 1.9 years, but today they occur closer to every 3.1 to 3.4 years.[70] The opportunity to confirm Supreme Court nominees and fill vacancies is an important check that the Senate has on the Court, and with notably less frequent vacancies, this check decreases in efficacy. Further, the decrease in frequency of vacancies intensifies the already heated confirmation process; the importance of the Supreme Court already makes the process intense, the addition of infrequency of opportunity to exercise that role makes it even more consequential. The nature of tenure, factoring in health, personal choices regarding retirement, and potential political pressure, leads these vacancies to not only occur infrequently, but they also occur inconsistently. For example, no vacancies arose between 1994 and 2005, resulting in no appointments being made after President Bill Clinton's first term until President George W. Bush's second term[71]; this also means that the 104th through the 108th Congress did not confirm any justices. Essentially, the Supreme Court went unchecked by the Senate for eleven years, which is concerning for the democratic process. Combining the average tenure, which could theoretically continue to increase, with the infrequency and inconsistency of

[69] Steven G. Calabresi and James Lindgren, "Term Limits for the Supreme Court: Life Tenure Reconsidered," *Harvard Journal of Law and Public Policy* 29, no.3 (2006): 775, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=701121.
[70] Ibid, 786.
[71] Ibid.

vacancies, it is clear that the confirmation process has become increasingly consequential and an arguably less effective check on the Supreme Court.

The efficacy of the confirmation process as a check on the Court is dependent on vacancies occurring. As earlier discussed, a result of justices serving longer is a decrease in frequency of vacancies. This poses several problems. The intensification that occurs as a result of the decreased frequency adds to the already contentious Senate environment that exists in today's polarized era when justices serve such long terms. It is only every so often that the Senate has the opportunity to confirm a nominee, leading senators to want to influence the Court when they can. Knowing that it could be years before another vacancy occurs, senators appear to be acutely aware of the influence that they have on the ideological composition of the Court during any given nomination. Beyond senators' personal awareness, there is also immense political pressure that accompanies these infrequent vacancies.[72] Beyond infrequency, vacancies can also be random or unexpected. A number of factors play into why a justice retires, whether it be health concerns, one's view on retirement, or even pressure to retire based on who is president or who controls the Senate. As a result, there could be zero nominees during a presidential term, as was the case with President Jimmy Carter, or, like during President Donald Trump's single-term, there could be three. The opportunity to nominate a justice is rare and important for presidents who do not have other mechanisms to affect the Court, and they are known to exploit vacancies for political and ideological reasons.[73] In turn, this puts pressure on senators in the president's party to confirm nominees, as the opportunity may not arise again during that presidency. The result can be deference to the president by confirming a nominee based on party affiliation and ideology, allowing the investigation into qualifications to fall to the side. It is this behavior that

[72] Ibid, 811.
[73] Epstein and Segal, *Advice and Consent*, 3.

breeds such intense partisanship in the confirmation process. While viewing the process as rare may contribute to a positive evaluation of it as being very important, it also leads to increased contentiousness and partisanship, as each party wishes they either had the nomination or the ability to block it. If vacancies were less rare, the political pressure would be lowered, contentiousness could decrease, and qualifications could move to the forefront of evaluations of nominees.

Another factor that contributes to the problem of life tenure is strategic retirements. Given that it is very clear that the direction a Supreme Court appointment will go depends on the political party of the president and the majority of the Senate, it is unsurprising that justices may retire strategically based on who would be nominated to fill their seat, whether it be based on their own personal concerns about the Court or as a result of pressure from political actors. While justices are expected to be apolitical in their judicial decision-making, their interest in policy or ideology of the Court does not fully disappear and may still influence their decision to retire.[74] This is not a new concern, as there have been questions about why certain justices chose to retire when they did for decades. For example, it is commonly believed that Chief Justice Earl Warren attempted to retire at a time that would allow Democratic President Johnson to appoint his successor, as he felt confident that the winner of the upcoming 1968 election was going to be Republican President Nixon.[75] A more recent example is Justice Ginsburg, who, on her deathbed, wished that she would not be replaced until the next president was sworn in; many believe this, and other comments she made in the years prior, signaled that she was strategically planning on

[74] Michael A. Bailey and Albert Yoon, "'While there's a breath in my body': The systematic effects of politically motivated retirement from the Supreme Court," *Journal of Theoretical Politics* 23, no.3 (2011): 294-95, https://doi.org/10.1177/0951629811411751.
[75] Calabresi and Lindgren, "Term Limits," 802.

retiring when, and only when, President Trump was out of office.[76] It is also highly possible that the idea of strategically retiring has led to the trend of justices serving longer and retiring at notably older ages, adding to the practical consequences of life tenure.[77] While there are extensive arguments on both sides of the debate over whether strategic requirements themselves are an issue, they undeniably create an issue for the confirmation process. Senators have already shown themselves to be strategic and the strategic retirement of justices only furthers senators' abilities to put politics at the forefront of their decision-making process when it comes to Supreme Court confirmations. While life tenure arguably encourages justices to strategically consider when they wish to retire, term limits would remove that opportunity, which would be beneficial for the efficacy of the confirmation process.

The optimal way to create term limits for justices is through a constitutional amendment. A constitutional amendment creating term limits would be a thoughtful approach that leaves little room for possible manipulation by future Congresses, making it the ideal option.[78] In accordance with Article V of the Constitution, a constitutional amendment imposing term limits would amend the Article III grant of life tenure, as prescribed in the Good Behavior Clause. The amendment would first have to be voted on by Congress and then sent to be ratified by the states. The amendment would create specific limits for justices and establish them to function on a staggering basis.

Legal professors Calabresi and Lindgren have outlined in great detail an ideal model of term limits via a constitutional amendment for Supreme Court justices[79]. Their proposal

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[76] Jessica Levinson, "Ruth Bader Ginsburg's dying wish highlights Trump's Supreme Court Hypocrisy," *NBC News,* September 19, 2020, https://www.nbcnews.com/think/opinion/ruth-bader-ginsburg-s-dying-wish-reveals-trump-s-supreme-ncna1240542.
[77] Calabresi and Lindgren, "Term Limits," 802.
[78] Ibid, 868.
[79] Ibid, 824-31.

recommends eighteen-year term limits that would be staggered, which they believe would move the average tenure closer toward 14.9 years, the average tenure that prevailed from 1789 through 1970. This proposal would ensure that a vacancy on the Court would occur every two years, structured specifically to create vacancies during the first and third years of a four-year presidential term, requiring vacancies be filled in odd years; the intention behind structuring vacancies to occur in the first and third years is to lower the possibility of the Senate holding up confirmations in attempt to block a president from appointing someone to the Supreme Court. They further stipulate that tenure will be nonrenewable, meaning that no justice could be reappointed for another term after completing their eighteen years on the Court. This proposal encourages that the amendment only apply prospectively, going into effect upon the election of a new president; in practice, this means that proposed system would not apply to sitting justices nor the current president, and would only begin when the current president leaves office, whether it be after one or two terms. With term limits being prospectively applied, the individual nominated to fill the first vacancy once a new president is in office will be subject to an eighteen-year term and sworn in on an odd year, as will every appointee that follows. Once the amendment is in effect, if a sitting Associate Justice were to be elevated to being Chief Justice, they would still be limited to their eighteen-year slot, serving only the remainder of the eighteen-year term they have left at that time. The proposal also takes into account the possibility of early retirement or death of a justice; they propose that if a justice were to die or resign before their term is over, an interim justice would fill their seat for the remainder of the term after being subjected to the typical confirmation process. This method of handling early retirements or deaths is ideal because the interim justice would have an even more limited term than typically-appointed justices, therefore it would not inadvertently make strategic early retirements

appealing. Further, interim justices would be subject to the same stipulation that terms are not renewable; if an interim justice were to be confirmed to complete the five years left of a full term, they can only serve those five years on the Court with no exceptions or avenues to be appointed for a second term. This system also follows logically as it resembles how the US handles the occasional unfinished terms of Presidents, Vice-Presidents, senators, and representatives.

The constitutionality of this proposal is clear. The amendment would be subject to the constitutionally-defined ratification process, therefore subject to the scrutiny of both chambers of Congress and the states. Because the Constitution only outlines life tenure, an amendment that imposes term limits would be sufficient enough to change the rules, rendering an amendment abolishing life tenure unnecessary; while constitutionally permissible, an amendment abolishing life tenure and replacing it with term limits would also be unfair to the sitting justices and the presidents that appointed them, as they were appointed with the expectation that they would have life tenure. This proposal would apply only to Supreme Court justices, as the situation regarding the confirmation process for the Supreme Court has unique issues when compared to the confirmation processes for lower court judges. Further, there are far more individuals who are federal judges than Supreme Court justices at any given time, meaning that changes to terms that would result in quicker, more consistent turnover would likely cause problematic procedural and administrative issues.

A key reason why term limits would address the problems of today's confirmation processes is because it would lower the consequences of any given nomination. At present, a vacancy could theoretically only happen every five years and then nominees, if confirmed, could sit on the bench for 25 years. If a vacancy was ensured every two years and term length was

uniformly set and understood, the feelings of consequentiality would be significantly decreased. Consequentiality is a primary reason for why senators do not vote to confirm a nominee from the other party; the idea of a liberal or conservative justice being on the Court for an upwards of 25 years feels far too risky to Republican and Democrat senators, respectively. As earlier discussed, the idea of consequentiality has increased alongside increases in the polarization of the Senate. Considering that there is no reason to believe that Senate polarization will suddenly decrease soon, term limits would be a highly effective way of lowering the degree of consequentiality, therefore encouraging senators to cross partisan lines on confirmation when nominees are consistently of high quality. Ideally, the confirmation process should be an opportunity to investigate nominees and make a decision on whether to confirm based on their qualifications, not their ideology or partisan affiliations. An essential step to achieving this ideal would be lowering the temperature; term limits, as a guarantee of consistent vacancies and predetermined term length, would accomplish this and take the Senate one step closer to the ideal, effective confirmation process that they have the potential to have.

Another way in which term limits will benefit the efficacy of the confirmation process is in regard to the benefits associated with vacancy frequency. Considering the random manner in which vacancies presently open, it feels highly consequential to confirm a given president's nominee, especially from the perspective of senators in the other party. There appears to be a perception of risk associated with confirming a nominee, fueled by a concern that any given president may have too many or too few nominees to the Court. Through the institution of term limits for Supreme Court justices, this concern will essentially disappear. Senators will know exactly how many nominees a president will have per term, removing the concern that one president can have three nominees, while another could have zero. Further, this will give senators

less to worry about in terms of ideological balance of the Court. The fear that confirming a justice of a certain ideology in terms of the impact they may have on the Court will lessen if there is certainty that all presidents, regardless of political party, will ultimately have the same number of nominations per term. This will leave concerns of politics to presidential elections, as that will be the determining factor of the ideological balance of the Court, rather than bringing nominee ideology into confirmation hearings that are meant to be about judicial qualifications.

Term limits will also address the issue of strategic retirements. Regardless of whether one views strategic retirements as highly problematic or not, they are, at times, undeniably political in nature. Term limits will set clear end dates for tenure on the Court, meaning that justices do not have the same opportunity or pressure to retire at a specific, strategic time. Further, as mentioned above, the parameters of this term limits proposal do not make early retirements appealing, as an interim justice would only sit on the Court for the remainder of the term of justice who they are replacing; there is little political incentive to retire early if the replacement will only serve the years left in the term and cannot be reappointed for any additional amount of time. Additionally, the move away from strategic retirements has similar benefits that accompany vacancy consistency. Strategic retirements result in unpredictability and compound the already-existing inconsistency in vacancies that accompanies the Supreme Court appointment process as it stands today. The Senate and the Court will both benefit from increased consistency and clear predictability regarding when vacancies will occur. By not having room for strategic retirements, one less opportunity for attaching politics to the Supreme Court will exist, as justices will not be making politically motivated decisions about retirement and outside political actors will not be incentivized to put pressure on sitting justices regarding their retirement for political gain.

Importantly, this proposal for Supreme Court term limits will not threaten the ideals Hamilton used to promote the adoption of life tenure. Hamilton's motivation in advocating for the adoption of life tenure was to ensure that the Supreme Court would be insulated from political influences from the other branches, keeping the judiciary fully independent.[80] While this sentiment still continues to be of the utmost importance, a review of how the Supreme Court has functioned reveals that life tenure is not a necessary means to that end. Professor Henry Monaghan, on the subject of maintaining an independent judiciary, stated that, "what relieves judges of the incentive to please is not the prospect of indefinite service, but the awareness that their continuation in office does not depend on securing the continuing approval of political branches."[81] Judicial independence is maintained through ensuring that decisions made on the Court cannot be utilized by political branches to threaten one's standing on the Court; thus, the Court's independence from politics comes from the appointment process that stipulates removal can only occur through the clearly defined impeachment process, not from the assurance that justices can serve for however long they want. This leads to the conclusion that the maintenance of an independent judiciary is reliant on the guarantee that justices' tenure cannot be interfered with on the basis of politics, rather than a guarantee of indefinite service. Further, it can be argued that the institution of term limits for justices will allow the Court to be even more insulated from politics, as term limits will make the process of confirming justices less politically contentious. Confirming justices based on ideology and partisan affiliation allows politics to slightly permeate the boundary of an apolitical judiciary, so refocusing confirmation hearings to be about qualifications will remove that factor. Similarly, strategic retirements, whether by personal choice or outside pressure, are political in nature and suggest that the Court may not be

[80] Hamilton, "Federalist No. 78," 236-38.
[81] Henry Paul Monaghan, "The Confirmation Process: Law or Politics?," *Harvard Law Review* 101, no.6 (1988): 1211, https://www.jstor.org/stable/1341492.

as independent as we may desire; term limits would disincentivize these types of political actions. Therefore, while Hamilton's notion of independence remains undeniably valid, fixed, nonrenewable term limits would not undermine that, as they will uphold the guarantee of freedom from political branches.

It is important to acknowledge that several other proposals have been made to address these problems. There are proposals with the same goal of creating term limits but propose different methods, while others seek to address the same concerns without creating term limits at all. As for the proposals that advocate for different methods to instituting term limits, some have taken issue with term limits being accomplished through a constitutional amendment, with arguments ranging from that an amendment would be too difficult to accomplish to that an amendment is not necessary. Of these proposals, the most prevalent suggestions are instituting term limits through statute and creating them informally. On the other end of the spectrum, of the proposals that advocate for reform without using term limits, the most notable of these are creating mandatory retirement ages and utilizing Senate-based reforms. An analysis of all of these proposals reveals why creating term limits through a constitutional amendment is the best course of action to address the pervasive problems that currently exist in the confirmation process.

In terms of statutory recommendations, most proponents take the stance that the avenue of creating term limits through statutory means warrants serious consideration because the Constitution is very difficult to amend.[82] Because these proponents believe that an amendment is highly unlikely to happen, they hold that creating term limits through statute is the more desirable option. Arguably, the most notable statutory proposal is the Supreme Court Renewal

[82] Roger C. Cramton, "Reforming the Supreme Court," *California Law Review* 95 (2007): 1324, https://www.jstor.org/stable/20439154.

Act, drafted by Paul Carrington and Roger Cramton in 2005. Carrington and Cramton agree that life tenure has created significant political problems that warrant correction, but also hold that a Congressionally-enacted statute creating eighteen-year terms on the Supreme Court is sufficient, more likely to pass, and constitutionally permissible. The Supreme Court Renewal Act proposes that a new justice be appointed every two-year session of Congress and that the Court would consist of the nine most junior justices, with senior justices stepping in during instances of recusal or vacancies.[83] The Act suggests that justices will retain lifelong judicial power, but will only participate on the Supreme Court for an eighteen-year period of time; after that, justices would be able sit on inferior courts, a feature Carrington and Cramton argue keeps their proposal in line with the interpretation that the Good Behavior Clause simply requires a judicial position for life, not necessarily a position as a justice.

While the intent behind this proposal, and other statutory proposals, seems to be in line with proposals for a constitutional amendment, there are several issues with the proposal that contribute to the conclusion that a constitutional amendment is the optimal method. Firstly, the constitutionality of The Supreme Court Renewal Act has been called into question, which would likely interfere with it being passed. Many have raised issues with their interpretation of the Appointments Clause, specifically as it pertains to the distinction between the Supreme Court and lower federal courts. Opponents of the proposal have noted that the granting of life tenure to the judicial branch, rather than just to one entity within, is an improper interpretation of the Appointments Clause because it goes against the Constitution's stipulation that the Supreme Court is to be a distinct office.[84] Further, there are concerns that Congress does not have the right

[83] Paul D. Carrington and Roger C. Cramton, "The Supreme Court Renewal Act: A Return to Basic Principles," in *Reforming the Court: Term Limits for Supreme Court Justices* (Durham: Carolina Academic Press, 2005), 471.
[84] Calabresi and Lindgren, "Term Limits," 860.

to add these duties, including sitting on lower courts or filling in on the Court after their tenure, to the already-existing role of a Supreme Court justice; arguments have been made, based on prior cases, that these roles are not relevant to the position of Supreme Court justice and the creation of them, therefore, are not within Congress's purview. Lastly, a highly concerning aspect of both The Supreme Court Renewal Act and the creation of term limits through statute in general is the potential for future manipulation. Unlike an amendment, a statute is more susceptible to manipulation, whether by Congress, the President, or even interest groups.[85] A statute creating term limits could possibly be steered in a different direction in the future, manipulating its provisions to meet political goals. If that occurred, it could also become an accepted new precedent, resulting in the consistent reinterpretation of its intent, which is highly problematic because it will not attack the consequences we currently see from Senate polarization. If the meaning of the statute can be repeatedly manipulated, the negative impacts of a highly polarized Senate on the confirmation process will continue to be a pervasive problem. This is a clear problem that would not exist if term limits were to be created via a constitutional amendment, as amendments are not at risk for manipulation in that way. Therefore, while a statute may seemingly be sufficient and more feasible than an amendment, the serious constitutional questions regarding a term limits statutory proposal counteracts the notion that they are feasible and, if even passed, they will not address the true issues at hand due to the susceptibility to future manipulation.

Other proposals have suggested the implementation of term limits through informal means. Of these, one that stands out is the proposal that the Senate can informally impose term limits through pledges. This proposal suggests that, during the confirmation process, the Senate should insist that nominees agree to term limits, at the risk of not being confirmed if they

[85] Ibid, 868.

refuse.[86] Proponents of this approach argue that pledging to agree to term limits would result in justices feeling bound to abide by that commitment. While this may be appealing due to its simplicity and the fact that it does not require any substantial constitutional or statutory changes, this proposal is simply not sufficient. Firstly, a pledge is not enforceable; while one can hope that a justice would not agree to something that they do not plan to abide by, it is naive to overlook the fact that this recommendation is legally unenforceable and it is incredibly possible that justices may choose to not fulfill the promise. While there is enough theoretical basis to oppose this proposal, the argument against it can be bolstered by looking at the efficacy of self-imposed term limits for people in other offices. There are clear examples of members of Congress pledging to self-impose term limits and continuing to run for office beyond what they had promised; if this has occurred for people in other branches, it is ignorant to assume that all justices would automatically and reliably behave any differently. The bigger problem lies under the possibility of justices breaking these pledges. If these promises are not kept, which is very feasible, the problem that it seeks to address is left completely unsolved. Given the seriousness of the present issues with the confirmation process, adopting a proposal that has a high likelihood of being unsuccessful at solving the problems would appear to be an insincere, and certainly insufficient, approach to this much-needed reform.

A proposal that has sought to address issues with life tenure without the implementation of term limits is the suggestion of creating a mandatory retirement age. This suggestion is not new, as it has been brought up several times throughout history. 36 states presently have mandatory retirement ages for their judges, many of which have received approval in terms of constitutionality from the Supreme Court.[87] A prominent supporter of creating a mandatory

[86] Ibid, 871.
[87] DiTullio and Schochet, "Saving This Honorable Court," 1133.

retirement age for justices, Professor Artemus Ward, said that, "a mandatory retirement age would largely insulate the justices from accusations that either they are too old to keep up with the workload, or that they are hanging on to their seats for partisan reasons."[88] Many of the proposals regarding mandatory retirement ages put forward the idea of doing so via a constitutional amendment. Like proposals advocating for term limits, this has received criticism on the basis of how difficult it is to amend the Constitution. Not only would it be difficult to pass, but it would also not truly solve the problem. This proposal is cemented more around the idea about justices staying on the Court for too long; while research may reveal that there are specific problems associated with justices staying for too long, this solution is too focused on age. A mandatory retirement age would not solve the issue of strategic retirements, nor would it help with vacancy inconsistencies. Further, creating a mandatory retirement age could have negative, unintended consequences. For example, if presidents know that justices will have to retire by a certain age, they will be incentivized to nominate younger people, allowing them to subvert the intentions of this proposal and nominate some as young as forty who could end up serving for well over thirty years. Considering how consequential confirming a nominee already feels, adopting a proposal that could potentially make it even more controversial would be counterproductive.

A final prominent proposal that does not involve term limits focuses on Senate-based reform. Some have suggested that changes to Senate rules could help move the Senate away from such contentious confirmation processes. Reintroducing the filibuster for Supreme Court nominees is a common proposal; proponents of this idea believe that it would motivate bipartisan consensus. It has also been suggested that, by restoring the filibuster, presidents would have to

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[88] Artemus Ward, *Deciding to Leave: The Politics of Retirement from the United States Supreme Court* (Albany: State University of New York Press, 2003), 247.

move toward nominating candidates who would be more broadly accepted. While this proposal is appealing, especially in terms of how changes to Senate rules are easier to accomplish than passing an amendment or statute, it also has several flaws. A key problem with this proposal is that it is difficult to make such changes permanent.[89] Given that changes to Senate rules can be accomplished through a simple handshake agreement, Senators could agree to change the rules in this way, and, just as easily, they could change them back again, just as they did with getting rid of the filibuster on Supreme Court nominees before. Further arguments against this proposal have highlighted that, even if presidents are forced to nominate more moderate candidates, nominating moderate candidates will not necessarily ensure a less contentious process, let alone an automatic confirmation. A clear example of this would be the nomination of Judge Merrick Garland, a nominee who many would regard as being a clear example of a moderate candidate who could overcome a filibuster.[90] What actually occurred when Judge Garland was nominated was completely the opposite, as Republican Senators refused to even hold a hearing on his nomination. Therefore, changing Senate rules to reintroduce the filibuster does not inherently entail a less contentious process, even if presidents nominate more moderate candidates. Lastly, simply restoring the filibuster does not address the deeper issues facing the Senate in regard to confirmation processes; the removal of the filibuster was a direct result of the intense polarization in the Senate. Merely changing the Senate rules for Supreme Court confirmations, whether it reinstates the filibuster or makes a different procedural change, fails to address the problems that led to the broken process that we see today, which is exactly what one would hope to avoid in a proposal intended to address it.

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[89] Daniel Epps and Ganesh Sitaraman, "How to Save the Supreme Court," *The Yale Law Journal* 129, no.1 (2019): 179, https://www.yalelawjournal.org/feature/how-to-save-the-supreme-court.
[90] Ibid, 180.

In Response to Critiques of Term Limits

While the proposal of Supreme Court term limits has received support, there have unsurprisingly been various criticisms as well. Opponents to term limits have focused on several different factors. Of the critiques made, the most common ones regard the consequences of term limits on judicial independence, doctrinal stability, judicial experience, and attracting and retaining qualified candidates.

Judicial independence is something that is universally regarded as important when it comes to the Supreme Court. Critics of term limits have made arguments that creating term limits will undermine judicial independence, claiming that life tenure is the best way to keep the Court insulated.[91] These critics often cite Hamilton, highlighting his assertion that life tenure ensures justices' freedom from the political branches as it guarantees safety from potential political ramifications for opinions that may be viewed by some as unfavorable. The critics also argue that the decision to grant justices life tenure is clear and intentional; Professor Martin Redish, a prominent professor of law and public policy, stated that, "Article III's provision of life tenure is quite obviously intended to insulate federal judges from undue external political pressures on their decision-making."[92] They have extended these concerns to include the risk that term limits will lead justices to consider future career prospects when making decisions, while the prospect of indefinite service ensures that justices need not think about that. From this perspective, the choice to grant life tenure was highly purposeful and the move to term limits would undermine that.

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[91] Kevin M. Lewis, "Proposals to Modify Supreme Court Justices' Tenure: Legal Considerations," *Congressional Research Service*, no. R46731 (2021): 4, https://crsreports.congress.gov/product/pdf/R/R46731.
[92] Martin H. Redish, "Judicial discipline, judicial independence, and the Constitution: A textual and structural analysis," *Southern California Law Review* 72, no. 2-3 (1999): 685, https://heinonline.org/HOL/LandingPage?handle=hein.journals/scal72&div=29&id=&page=.

While it can be agreed upon that maintaining judicial independence is of supreme importance, the assumption that life tenure is the only way to maintain it, implying term limits will undermine it, is misguided. Firstly, the proposal of eighteen-year terms will not undermine judicial independence because it will bring tenure back to the average length of time that justices served between 1789-1970.[93] Presumably critics would agree that judicial independence was maintained during this period where the average tenure was closer to eighteen years and the proposal's suggested term length is not out of the historical norm. Further, the proposal for term limits has specific parameters to ensure that judicial independence will not be compromised. While tenure will be fixed, justices with term limits will still be safe from their position being threatened for political reasons; term limits are solely focused on limiting the time served on the Court and does not alter anything related to removal. As referenced earlier, Professor Monaghan highlighted that judicial independence is dependent on the Court being free from influence of political branches.[94] Term limits will still uphold the Court's freedom from requiring approval from any of the political branches, therefore safeguarding judicial independence. The term limits proposal is also clear in that it will continue the practice of guaranteeing that justices have salaries for life. This goes directly against critic's claim that term limits will lead justices to make judicial decisions with the concern of future employment in mind; the promise of lifelong salary will remain intact, therefore term limits will not incentivize justices to worry about how their work on the Court will impact their future in terms of career. Finally, the proposal will promote judicial independence because it is very clear that no justice may be reappointed. Were reappointment possible, it is understandable that concerns may arise about whether justices are acting in a way that puts them in a favorable position to be reappointed to the Court after their

[93] Calabresi and Lindgren, "Term Limits," 775.
[94] Monaghan, "The Confirmation Process," 1211.

terms ends. However, there is clear consensus that, to promote judicial independence under term limits proposals, justices unquestionably must be limited to one term with no potential for reappointment. This is a key way in which term limits will ensure the continuation of judicial independence because it further secures the Court freedom from political influence when it comes to justices' position; under this proposal, there is no circumstance in which the political branches will be making decisions about a justices' position based on their decision-making on the Court, as they cannot be reappointed and no new mechanisms to remove a justice will be created. Therefore, the proposition of fixed, eighteen-year, nonrenewable term limits will not threaten the judicial independence of the Supreme Court.

Other critics of term limits have put forth the argument that it may pose a threat to doctrinal stability. Proponents of this concern hold that life tenure promotes doctrinal and precedential stability because it slows down turnover on the Court.[95] These critics cite concerns that a single election, meaning two new justices nominated, could take a case from being a clear winner to a clear loser.[96] Critics express concern that they feel that term limits are "very likely to have negative consequences for stability."[97] Thus, their concerns appear to surround predictability of Supreme Court decisions, emphasizing that a quicker turnaround of justices will lead to instability because changes in position can occur too quickly.

While term limits will create more frequent vacancies, this does not necessarily mean that such notable changes will occur. Firstly, as with the response to concerns over judicial independence, this proposal will ensure that justices do not have to worry about future employment concerns or being removed from their position; as a result, justices with term limits

[95] Lewis, "Proposals to Modify," 4.
[96] Christopher Sundby and Suzanna Sherry, "Term Limits and Turmoil: *Roe v. Wade's* Whiplash," *Texas Law Review* 98, no.1 (2019): 157, https://heinonline.org/HOL/LandingPage?handle=hein.journals/tlr98&div=7&id=&page=.
[97] Ibid, 123.

will not be incentivized to make decisions in regard to how it will be politically or publicly received. Thus, individual justices are not necessarily more likely to want to reinterpret precedents because they are subject to term limits. Secondly, quicker turnover on the Court does not inherently mean that new justices will want to make doctrinal changes. Whether a justice's term is limited or not should not automatically lead to the perception that any particular justice will be seeking changes, as one would hope that justices will abide by their oath to keep personal opinions separate from their official duties. Despite the differing views of justices or the Senators that vote on their nomination, one area that is typically a common ground for all is the importance of judicial precedent.[98] It is a dangerous assumption to believe that creating term limits will make future justices less understanding or respectful of the value of precedent. There are also some flaws in the argument that term limits themselves will lead to changes in an unprecedented way. This argument is flawed because it assumes that this is a phenomenon that we have not already seen; while their argument rests on the notion that their concerns come from that turnover will be quicker, under life tenure we already see instances in which the confirmation of a new justice changes the trajectory of a case. Sundby and Sherry, in their article outlining their opposition to term limits, focus on how the outcome of *Roe v. Wade* could have been completely different with different justices[99]; while this is likely an accurate assessment, the idea that the trajectory of decisions depends on who hears it stands true whether there are term limits or not. Therefore, this conclusion appears to be hasty. Another flaw with this critique is that it neglects to consider that eighteen-year term limits are designed to move average tenure and average time between vacancies closer to the average that it was from 1789-1970.[100] When

[98] Randy J. Kozel, "Stare Decisis as Authority and Aspiration," *Notre Dame Law Review* 96, no. 5 (2021): 1972, https://link.gale.com/apps/doc/A666682357/AONE?u=uarizona_main&sid=bookmark-AONE&xid=afbc6152.
[99] Sundby and Sherry, "Term Limits," 1972.
[100] Calabresi and Lindgren, "Term Limits," 775.

the average tenure was 14.9 years and the average time between vacancies on the Court was 1.9 years, as it was for much of history, it does not seem that there was widespread concern over doctrinal stability. If the time on the Court and time between vacancies align closely with what they were for much of history, it seems to be a stretch to assume that the fact that those numbers would be set by an amendment would threaten doctrinal stability in such a way. Further, concerns over the stability of Supreme Court doctrine and precedent should be addressed at the individual level during the confirmation process. In addressing a nominee's qualifications, which should theoretically become of greater importance under this term limits proposal, Senators should actively seek to understand the nominee's approach to doctrine and precedent in their prior work; for example, a review of prior decisions, assuming the nominee was a judge in some other capacity, should reveal that nominee's approach to precedent and how to apply it. If a nominee has a track record of ignoring precedent, interpreting issues in a way that greatly differs from the norm, Senators should take that into consideration when deciding how to vote, which would likely, and probably for valid reasons, lead to non-confirmation. Within critiques on term limits in terms of doctrinal instability, critics have subtly conceded that the degree of change is dependent on a justices level of independence from partisan politics and ideological conformity.[101] Firstly, the acknowledgement of this suggests that critics are assuming that the creation of term limits will automatically result in nominees that would be less independent from politics, which is a perfunctory assumption. And, once again, these are concerns that exist with or without term limits and should be parsed during the confirmation process. In reviewing prior decisions and analyzing a nominee's qualifications for this highly consequential position that requires judicial independence, Senators should be able to identify nominees that will clearly

[101] Sundby and Sherry, "Term Limits," 123.

deviate from the norm and seek doctrinal changes; this recommendation holds regardless of whether there are term limits in place or not, but will be more likely to occur if the confirmation process is reformed in the way it should be with the adoption of this proposal.

Other critics have focused on concerns that term limits will have negative consequences for the judicial experience of justices. Those who hold this perspective argue that life tenure allows justices time to refine their judicial skills, which, in their opinion, has benefits for decision making.[102] This critique is focused on how limiting tenure will theoretically limit the time the justices have to develop and become expert interpreters. In the opinion of the critics, this may ultimately result in a Court that is less skilled when it comes to making decisions.

There are several reasons as to why this critique is not sufficient enough to oppose the implementation of term limits. Firstly, it is important to note that, throughout history, many justices who have been regarded as having highly developed judicial skill and expertise have served for around eighteen years or even less. For example, Chief Justice Earl Warren, an individual who is widely regarded as having been a model justice, only served for just under sixteen years.[103] Chief Justice Warren is just one of numerous highly skilled justices who served around that length. While there are also many skilled justices who served much longer than eighteen years, their expertise need not automatically be attributed to the amount of time they spent on the Court. This concern is also less relevant today, especially given the recent trend to nominate individuals who already have significant judicial experience by the time they are sworn in; of the nine current justices, eight served as Circuit Judges for US Courts of Appeals, and the only who did not, Justice Kagan, clerked for both a Circuit Judge and a Supreme Court justice.[104]

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[102] Lewis, "Proposals to Modify," 4.
[103] "Justices 1789 to Present," About the Court, Supreme Court of the United States, last modified October 27, 2020, https://www.supremecourt.gov/about/members_text.aspx.
[104] "Current Members," About the Court, Supreme Court of the United States, accessed April 1, 2022, https://www.supremecourt.gov/about/biographies.aspx.

Therefore, there is good reason to believe that those who are confirmed to serve on the Court are highly likely to already have some degree of judicial experience and, in most current cases, that experience is very significant. Another reason why term limits will not necessarily result in less experienced justices is because of the positive consequences that this term limits proposal may have on who gets appointed. In terms of judicial experience, term limits will have the positive effect of disincentivizing appointing younger justices with less experience; unlike with the promise of life tenure, the implementation of term limits will not motivate presidents to select younger, less experienced individuals, as they will only be able to serve eighteen years, regardless of their age at confirmation.[105] Further, with term limits, there is no reason for Senators to confirm any younger, less experienced nominees with the hope that they will have essentially unlimited time to refine their skills, therefore requiring Senators to pay closer attention to the skills that nominees already possess at the time of nomination. Therefore, while there are already flaws in the concern regarding term limits and judicial experience, the positive impacts that term limits will have on the consideration of qualifications and experience during the confirmation process solidifies that term limits are not bound to have this negative effect.

A final common critique of Supreme Court term limits is that term limits will interfere with attracting qualified individuals and encouraging those qualified individuals to remain on the Court.[106] This stance advocates for life tenure on the premise that the promise of indefinite service is what attracts qualified jurists to want to serve on the Court and also encourages them to remain in their position. These critics emphasize the importance of the position of justice remaining a highly aspirational role. From this perspective, the potential to serve for as long as

[105] Lewis, "Proposals to Modify," 5.
[106] Ibid, 4.

one wants is a key factor that contributes to the attraction and retention of the most qualified individuals.

The primary issue with this critique is that it makes a weighty assumption about the motivations of candidates for the Supreme Court. Like Hamilton, who made the argument that limited tenure would discourage qualified individuals from leaving their current positions to assume a position on the Court, these critics are responding to the proposition of term limits according to an unsupported assumption. While many justices, past and present, may have happened to particularly enjoy the promise of life tenure, it is extreme to assume that that is the primary reason why they wanted to be on the Court or why they stayed for the length of time that they did. While some justices have expressed a desire to remain on the Court as long as they can, such as Justice Ginsburg saying she will stay for as long as she can do the job well, others have even expressed support for the proposition of term limits.[107] For example, when asked about term limits for federal judges, Chief Justice Roberts expressed support for the creation of term limits, citing that life tenure was created at a time where people simply did not live as long; he elaborated that he thinks that term limits would be beneficial for keeping jurists in touch with reality and allowing for more regular turnover on among judges.[108] Chief Justice Roberts is certainly not the only justice to signal approval of term limits, Justice Breyer even said that term limits would have made his life a lot easier, suggesting that the assumption that life tenure is what makes individuals want to serve may be misguided.[109] On the critique's notion of ensuring

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[107] Pete Williams, "Supreme Court Justice Ruth Bader Ginsberg: I'm Staying Put," *NBC News*, September 23, 2014, https://www.nbcnews.com/politics/first-read/supreme-court-justice-ruth-bader-ginsberg-im-staying-put-n210371.
[108] John M. Broder and Carolyn Marshall, "White House Memos Offer Opinions on Supreme Court," *The New York Times*, July 30, 2005, https://www.nytimes.com/2005/07/30/politics/politicsspecial1/white-house-memos-offer-opinions-on-supreme-court.html.
[109] Stephen Breyer, "2016 AALS Annual Meeting - A Conversation with the Honorable Stephen Breyer, U.S. Supreme Court," interview by Alan B. Morrison, *Association of American Law Schools*, YouTube, March 28, 2016, video, 51:23, https://www.youtube.com/watch?v=SjqKy8WOkP0.

that the role of justice remains aspirational, it is important to note that eighteen year terms are still long. Eighteen years is still a significant amount of time to serve as a justice, therefore allowing justices to still make important contributions. If the term length being proposed was significantly shorter than the length that was average for much of history, this argument may have more weight, however this is not the case. The role of Supreme Court justice is aspirational because of how important the Court is as an institution and the opportunity the position provides to make significant contributions. This proposal will not threaten the prestige of the Court as an institution and those confirmed will have plenty of time to make contributions to the country and the justice system. If anything, the positive effects that term limits will have on the confirmation process will result in the Supreme Court continuing to be viewed by the public as a legitimate, prestigious institution. Therefore, it seems unsupported to assume that, without life tenure, qualified candidates will not be attracted to serve or stay on the Court.

While several criticisms of term limits have been made, this proposal stands up well to all of them. Although term limits will be a substantial change, they will not threaten the values, quality, or prestige of the Court, while also creating substantial room for improving the process of confirming justices. There are notable reasons and sufficient evidence to combat these criticisms and support the creation of term limits; justices under term limits will be no less independent, skilled, or qualified as a result of having limited tenure and the process of confirming justices will be far more effective, creating potential for the Court to become even better.

Conclusion

At present, the Supreme Court confirmation process is not meeting its ideals. While the confirmation process has always been political, the situation today is in dire need of

reform. The confirmation process is a very significant part of the Senate's role, especially because it is the primary check that the legislative branch has on the Supreme Court. The process has never been perfect, but there have been improvements over time. The creation of the Senate Committee on the Judiciary, the implementation of hearings, and the use of nominee testimony have all been changes that have moved the process in the right direction, but it is still not being used to its fullest potential.

In today's era of polarization, the partisan voting that we have seen in the past seven nominations suggests that the confirmation process is just a formality. There is so much that can be gained during the confirmation process that can help confirm only the most qualified candidates, but it is not being used in that way because most senators already know how they are going to vote before the nominee is even sworn in for testimony. All recent confirmation votes have been near party lines, signaling that partisan affiliation and ideology are taking precedence over qualifications when senators are assessing a nominee's candidacy. This was not always the case, as there are numerous instances throughout history where confirmation votes were very bipartisan. But today, this has become a highly unlikely situation. Senators have come to value the opinion of their fellow partisans disproportionately to other factors, including even their own personal ideology.

Much of this behavior appears to be the result of a confirmation process that feels incredibly consequential. Part of the reason for this increase in consequentiality today relates to average tenure, which jumped from an average of 16 years to now over 25 only in the past 40 years. There are several reasons for the increase in tenure, but it is primarily concerning in terms of its impact on the confirmation process; in an already dramatically divided Senate, confirming a justice nominated by the opposing party to serve for an upwards of three decades is a highly

consequential decision. This has led to senators focusing particularly on ideology instead of qualifications, as they are chiefly concerned with the ideological composition of the Court rather than filling it with the most qualified individuals. This is a significant problem because, regardless of one's interpretation of what is meant by advice and consent, the confirmation of justices should be about appointing the most qualified jurists to serve on the highest court in the land.

The clearest way to address this problem is by lowering the temperature on Supreme Court confirmations, encouraging senators to see beyond ideology and partisanship and approach confirmation hearings primarily focused on the qualifications of the nominee. To achieve this, the ideal option is to create term limits for Supreme Court justices. A constitutional amendment that creates staggered, eighteen-year term limits for justices will combat this current problematic approach to the confirmation process that is guided by consequentiality and politics. This proposal, which will allow each president to nominate two justices per term, will effectively lower the stakes of the process enough to motivate an apolitical, bipartisan approach, while also maintaining the integrity, prestige, and values of the Court as an institution. Term limits are the optimal choice because they address several problems associated with life tenure that interfere with the efficacy of the confirmation process. Term limits will bring average tenure closer to what was once the enduring average, it will address the issues that accompany long stretches of time between inconsistent vacancies, and will disincentivize strategic retirements. This will serve to decrease the temperature of confirmations, while adding needed consistency and preserving the political insulation of the Court.

Several other proposals have been made to address these same concerns, none of which appear to be as effective as a term limit amendment would be. While an amendment may be

difficult to pass, statutes are too easily manipulated and informal pledges do not bind nominees to abide by term limits. Further, a mandatory retirement age will create new problems of nominating younger, less experienced nominees. It has been suggested that confirmation processes can be adequately reformed through the reintroduction of the filibuster on nominees, but this does not address the root problem and can be removed again as quickly as it is reintroduced. An amendment will be the surest way to ensure that term limits successfully last without future manipulation or reinterpretation.

Term limit proposals have grown in popularity, but there are still several common critiques. Firstly, many note concerns about how they will impact judicial independence, which overlooks that term limits will not change anything about the removal process; therefore, having a limited tenure will not threaten judicial independence as the Court will remain independent from the political branches. Others have concerns about the future of doctrinal stability under term limits. This concern fails to see that more regular turnover does not inherently mean that justices will seek doctrinal changes, as they will be equally insulated from politics as life tenured justices are. A third common critique is that life tenure allows for justices to gain valuable judicial experience that helps improve decision making, arguing that term limits will interfere with that. However, it is increasingly common that nominees are confirmed having already gained a wealth of judicial experience and concerns regarding judicial skill and expertise should be addressed during the confirmation process. Finally, some have addressed concerns about attracting and retaining qualified candidates without the promise of life tenure. However, this position makes a hasty conclusion that life tenure is what makes the position of justice aspirational and overlooks that there are several other key reasons as to why jurists want to be nominated to and continue to serve on the Court. While these critiques all raise interesting

questions, it is clear that this particular proposal for term limits is not the threat that critics perceive it to be. Under staggered, eighteen-year terms, justices will continue to be independent and judicially skilled, qualified individuals will still aspire to serve on the Court, and doctrine will not be under attack as a result of more regular turnover on the Court.

Given these factors and the fact that the current political divide in the Senate does not appear to be disappearing anytime soon, it is essential to rethink Supreme Court confirmation politics. Term limits are the optimal solution to lower the consequentiality of the confirmation process in a way that will encourage senators to actually utilize the opportunity provided by confirmation hearings to thoroughly examine a nominee, focusing on the potential justice they may be based on their qualifications. Term limits will help move the process away from partisan politics, at which time the process will be able to meet its democratic ideals. Theoretically, everyone should want to most qualified candidates to serve on the Court, regardless of their personal ideology that they swear under oath to separate from their official duties; if qualifications can move to the forefront of senators' evaluations of nominees, the confirmation process will become characterized by thoughtfulness, objectivity, and, if a nominee is supremely qualified, bipartisanship, as well, rather than the hostile political charade it appears to presently be. The ideal way to accomplish this is through the implementation of term limits, a decision that will have positive consequences for the confirmation process, the Senate as a whole, the Supreme Court as a respected institution, and, arguably, our gravely divided country that is in need of bipartisan cooperation where it will truly count.

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