

The Evolution of Supreme Court Justice Confirmation Processes;  
The Façade of Apolitical Appointments

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## **Abstract**

The nomination and confirmation processes for filling vacancies on the Supreme Court of the United States are a controversial and misunderstood governmental procedure. Statistically presidents have enjoyed success when appointing members of the Court, but it is the appointment process that has been under considerable pressure despite high confirmation rates. The length of time between naming a nomination and senatorial action varies greatly depending on several significant variables that contribute to a politically polarized process. To understand the entirety of the confirmation processes, both a quantitative analysis and case study approach were taken to explain the political incentives that dictate the proceedings of Supreme Court nominations. I find that the condition of divided government, an increased ideological distance between the president and senate majority party, and the nature of a vacancy being a critical nomination all contribute to an extended confirmation process. These results are seen across decades of nominations as I took data beginning in the Post-Civil War 1866 nomination of Henry Stanbery and ended with the 2018 nomination of Justice Brett Kavanaugh. This suggests important considerations for the way in which we should analyze and view confirmation processes – not by the end result but by the complete procedure.

Keywords: polarization, divided government, ideological gap, confirmation process, hazard model, partisan behavior, critical nomination

## **Introduction: Why We Care About Justices on the Supreme Court**

When a seat becomes vacant on the Supreme Court of the United States a political process begins that involves each branch of government. The many ways to reject a nominee and a singular way to confirm a nominee sets off a course of action from the U.S. Senate and the president that either results in a filled seat or a different nomination. The importance of filling a vacant seat cannot be overstated as the Supreme Court has gained influence on legislation through important casework. Beginning with *Marbury vs. Madison* in 1803, the Supreme Court complemented the enumerated powers outlined in the U.S. Constitution with the power to assess whether or not congressional legislation or executive orders are constitutional thus creating judicial review capacities (Hartman, G., et al. 2004: xi). This decision, coupled with lifelong appointments, highlights the importance of which president fills the vacancy and with whom. Decades of policy can be influenced by any one of the nine Justices making each seat a crucial vote.

The Supreme Court plays a pivotal role in constructing national policy that affects economic, social, and political processes in American society. Landmark cases have concerned abortion, due process, executive privilege, jurisdiction, civil rights, and more. Through the cases chosen to be taken up by the Supreme Court, the ways in which American society functions and is governed can be attributed to the decisions of nine people. During a Supreme Court term 7,000-8,000 cases are filed, plenary review is given to 80 cases, and approximately 100 cases are disposed of without plenary review (U.S. Supreme Court, 2019). With Justices spending an average of two decades on the bench issuing opinions and shaping policy, the political process surrounding nominations and confirmations is heightened as each political party envisions long-lasting political influence. The interaction between U.S. Senators, the president, and public

opinion combines to highlight the importance of the composition on the Supreme Court. Given the various interactions at play, political parties, polarization, and the judicial nomination process must be evaluated as a collective unit, each aspect dependent on the others.

American politics is well known to be subjected to the whims of a rapidly diverging two-party system as differing ideologies begin to define partisan behavior. Polarization is a concept studied for both its causes and consequences. Polarization is the political phenomenon where the Republican Party has moved towards a conservative ideology on policy issues while the Democratic Party has moved towards a liberal ideology on policy issues, creating an ideological gap (Layman, Carsey, Horowitz, 2006: 84). By tracking patterns of polarization, partisan behavior can be better understood. The polarized system that occurs now is a product of decades of intensifying differences. Beginning in the 1950s and 1960s coalitions formed that promoted members to partake in party-line voting, a trend that has continued into the twenty-first century (Barber & McCarty, 2015: 19). The increased partisanship and roll-call voting created a steep increase in polarization of the House and the Senate since the 1970s (Barber & McCarty, 2015: 20). It is these highly polarized time periods that are useful for studying politically incentivized behavior, especially in regards to how all three branches interact with one another. While two branches are subject to an electorate, the judiciary branch is an extension of those who are voted into power. The executive nominates judges to fill both lower courts and the Supreme Court while the legislative branch is tasked with voting on such nominations. It is in this overlap of responsibility that the ideological rifts mentioned above become exposed as political agendas deviate.

Given the tremendous political influence of the Supreme Court, it is reasonable to expect that nominations to the Court are important political events for the parties. In this thesis I test this

expectation through analyzing the length of time of a confirmation process for various nominees with data from nominations made between the years of 1866-2018. I begin with the question of whether or not contentious nominations are a modern phenomenon due to the trend of increasing polarization in the last thirty years, or if contentiousness has always been a condition of the nomination and confirmation processes. This question leads to the purpose of this paper: answering how and why polarization matters to the process of nomination and confirmation of justices. Coupled with the data analysis of 150 years of appointment proceedings, I evaluate case studies of nominations made under periods of high polarization. The following pages explore the nomination processes for Supreme Court justices, and the ways in which they have been transformed by both the polarization between the political parties as well as contentiousness between the Senate and the President.

### **The Selection Process**

The U.S Constitution's Article II, Section 2 awards the power of nomination to the president with the advice and consent of the Senate. This creates a shared responsibility where the duty of the president is to find a suitable candidate while the duty of the Senate is to assess the suitability, resulting in either a confirmation, rejection, or no action. This process, when originally written into the U.S. Constitution, was not yet marred by the role of political parties. The attempt to fill a Supreme Court vacancy has historically been an embattled process, a trend that has not abated in contemporary times. Filling a vacancy is a unique process as it combines two branches of government to impact the third branch (Deconcini, 1992: 2). The selection process to fill a vacancy on the Supreme Court begins with evaluating the ideological preferences of the president and U.S. Senate. If there is divided government between the

executive and legislative branches, the president may want to exercise the power of appointing a justice with ideologically similar views to themselves to influence legislative action taken by Congress. However, the president must factor in the ideological preferences of the Senate in order to nominate someone who stands a chance of realistically being appointed.

The process itself is fairly straightforward with the President of the United States nominating someone for a vacancy. A vacancy can either be created through the death or retirement of a justice (Moraski & Shipan, 1999: 1070). For a chief justice vacancy, the president can either select a sitting justice to ascend and nominate a new associate justice, or nominate from outside the court (Moraski & Shipan, 1999: 1070). Typically, the President will consult Senators before nominating to ensure there would be a large population of Senators backing a nomination of a potential candidate. President communication with the majority party in the Senate is highlighted in the appointment process as the majority party leader determines Senate floor activity. Due to this structure of procedure, there is an incentive for the president to regard interests of senators from the majority party, especially if they are of the opposing party (Binder & Maltzman, 2004: 11). The nomination is then sent to the Senate Judiciary Committee where the nominee's past experience, usually previous court opinions and voting records, are examined for bias, impartiality, and competence. The nomination, once cleared of the committee, is sent to the Senate floor to be debated, confirmed, or rejected.

Though the process is straightforward, it does not typically operate with expediency and efficiency as a Senate vote can be contentious under certain conditions. For example, a Senate vote can be impacted when a nominee is less qualified, or ideologically different than the majority party within the Senate (Moraski & Shipan, 1999: 1070). With the abolition of the filibuster in 2017, the Senate now must only reach a simple majority to confirm a Justice to the

Supreme Court. Associate Justices and Chief Justices face the same nomination and confirmation processes, although they may differ in contentiousness and duration as a Chief Justiceship is held in higher regard.

## **Literature Review: Polarization & Other Influences of the Court**

The politicized nature of the confirmation processes for Supreme Court Justice can be attributed to a variety of factors. Various political mechanisms of the legislative and executive branches have been studied by scholars to evaluate their potential influence on the process. The Advice and Consent Clause is the vague, overarching mechanism that allows the Senate to influence Supreme Court nominations. Through implementation of this formal ruling clause, informal rules and traditions have been created and implemented, dictating the process itself. In conjunction with rules and traditions, the power dynamics between the legislative branch and executive branch shift whether under unified or divided government. In the 19th, 20th, and 21st centuries, high periods of polarization marked the implementation of tools by both the majority party and the minority party to accomplish either rejection or confirmation. Scholars have studied a variety of factors that make it more difficult for a president and the Senate to agree upon nominees. These factors, discussed below, have the capacity to make a nomination more, or less, combative – affecting the overall confirmation process.

### **Divided Government**

For Supreme Court nominations, different conditions under which the government operates can affect attempts by both the president and the Senate to confirm or reject a nominee.

It is through these conditions of government – divided or unified – that Supreme Court nominations can face different confirmation processes. The condition of divided government is a dominant factor in determining whether or not a nominee faces a difficult or easy confirmation (McMahon, 2007: 922). Divided government can be wielded in a manner that inhibits normal government operations – including nomination and confirmation proceedings.

In Table 1 below, the condition of divided government is scrutinized, despite the majority of nominations being made under the condition of divided government.

	<b>Divided Government</b>	<b>Unified Government</b>
<b>Number Confirmed</b>	18	103
<b>Number not Confirmed</b>	8	19
<b>Failure Rate (%)</b>	31	16

Table 1: Supreme Court Nominations by Party Control, 1789-2006 (Whittington, 2006: 412)

Using data from 1789 up until the 2006 nomination of Justice Alito, a stark contrast is illustrated between unified and divided government success and failure rates. Divided government provides for a failure rate twice as high than the failure rate for unified government (Whittington, 2006: 412). At the time when President George Bush nominated Justice Thomas, 81% of nominations had been confirmed by the Senate, but of that 19% rejection rate, 60% occurred when the president and the Senate were opposing parties (Ruckman, 1993: 794). The analysis done by previous scholars indicates that divided government provides for a contentious environment – making the process by which nominees reach the Supreme Court both complex and partisan.

## Timing of Vacancies

Another contributing factor to the contentiousness faced by nominees is the term of the president and their re-election status. The re-election status of a president can dictate political capital and bargaining power with the Senate. If a president is in their first term with a high re-election chance, the Senate may be hard pressed to refute a nominee in the first term. However, if a president is in their second term, the Senate has a greater likelihood of stalling a nomination or an outright rejection due to the outgoing president having limited political capital and bargaining power. Typically, nominations made within a threshold of the first three years of a president's term are nearly ten times more likely to be confirmed (Ruckman, 1993: 801). Second term presidents or those presidents with low re-election status then face the political condition of being a late term president or a lame duck if in an election year. Presidential strength waxes and wanes depending on the composition of the Senate but power to succeed with a nominee is also related to the term and position within a term. Depending on the sitting position of a President, appointment confirmation and failure rates vary greatly.

### Rejection Rates for President of Various Strengths

	<b>Presidents who will be re-elected</b>	<b>Presidents who will be elected only once</b>	<b>Presidents who cannot be re-elected</b>	<b>Presidents who were never elected</b>
<b>Appointments Confirmed</b>	39	35	14	4
<b>Appointments Rejected</b>	3	8	5	6
<b>Rejection Rate</b>	7.3%	18.6%	26.3%	60%

Table 2: Rejection Rates for Presidents of Various Strengths (Halper, 1972: 109)

In Table 2 above, the vulnerability of a President can dictate the likelihood of a Supreme Court nomination. The statistics highlight the contrast between favorable presidents who will most likely obtain another term versus those who will not or cannot be elected. These groups are also contrasted with President's never elected, and Vice Presidents who ascended to the role of the presidency. The incidence of rejection highlights the lack of political capital that is associated with such labels. Presidential term interacts with the condition of unified and divided government to create an intertwining obstacle experienced by nominees. Not only can composition of the Senate dictate failure rates, political capital has a determining factor on the status of a nomination.

### **Characteristics of Nominees**

Perceived quality can be extended to the personal characteristics of a nominee. A Senators' decision can be based on the ethical behavior of a judge including, but not limited to, presiding over cases with a financial interest (as seen with President Nixon's nominees in Case Study 2), racial statements, sexual harassment, or extreme partisanship (Cameron, Kastlelec, & Park, 2013: 286). Concerning public relations for both the Senate and the president, a competent nominee is easily cited for nomination and voting decisions (Halper, 1972: 104). Just as the Constitution left vague descriptions for the process in which a Supreme Court nominee reaches the bench, the qualifications of a nominee too are left vague. It is in the ambiguity provided by the Constitution of who qualifies to sit on the bench that Senators can mask their political agendas with either votes to confirm or reject on such vagueness.

Assessments of the American Bar Association (ABA) aid both presidents and senators in deciding who may meet the understood qualifications of being a Supreme Court Justice. Seeking

to eliminate a certain degree of politics in the procedure of filling vacancies, President Eisenhower sought out an independent review organization to establish the qualifications of potential judicial nominees (Little, 2001: 39). The fifteen-member committee is tasked with establishing a nominee's professional qualifications (Little, 2001: 40). Some scholars posit that in order to remove political aspirations from influencing who sits on the Court, the Senate and president should solely focus on the objective qualifications of a nominee (Epstein et. al, 2005: 1147). The implementation of an independent third party into the governmental procedure highlights the hopes to decrease partisan behavior. Despite a non-partisan group providing a review of qualifications, there is a tendency for senators to assess nominees' qualifications as an insignificant component, with the main focus being directed to predicted policy outcomes (Halper, 1972: 105). The often ignored assessments of nominees by the ABA highlights the preference of senators and presidents to place politics over true qualifications.

A characteristic of a nominee, while important, must also be evaluated against the characteristic of the vacancy. A seat that is labeled as a critical nomination is another decisive quality that impacts the contentiousness of a confirmation process. A critical nomination for the purposes of this paper is a nomination that would shift the partisan coalitions on the Court, creating new voting margins (Ruckman, 1993: 793). Using this definition of a critical nomination and contrasting that with success and failure rates of nominees, nearly half of the critical nominations to the Supreme Court have failed; however, nominations deemed non-critical succeeded at twelve times the rate (Ruckman, 1993: 793). This result highlights how the characteristic of the seat seeking to be filled can aid in determining the contentiousness, therefore determining the political behavior incentivized to actively confirm or reject nominees.

Whether or not the confirmation process is delayed or expedited can also be attributed to the ideological nature of nominees, as well as personal characteristics of nominees. Ideology of nominees is a highly important characteristic of the confirmation process, not just from the viewpoint of a president, but also from the evaluative criteria of the Senate. At the time of voting, a Senator can choose to assess the quality of a nominee based on both ideological orientation and ideological extremity (Cameron, Kastle, & Park, 2013: 286). Ideology is also important for presidents when determining who their nomination will be. Presidents seek to extend their legislative influence by naming nominees that represent their policy ideology – nominating members of their party at a rate of nearly 90% (Ruckman, 1993: 796). Partisan identification of a nominee is a shortcut to evaluate nominees for the Senate, leading to confirmations within the party at a rate of 90% and from the opposing party at a rate of 67% (Ruckman, 1993: 796).

Ideology of nominees contributes to the behavior of senators and presidents. To the extent a senator disagrees with a nomination, a stronger incentive to oppose that nominee is created. As the legislative and executive body are tied to an electorate, there is an incentive created to adhere to the wishes of that constituent body. If acting to promote the beliefs of their constituency, a senator would face difficulty to accept a nomination of a justice who is ideologically dissimilar (Friedman, 1983: 89). Increasing polarization will drive parties, presidents, and senators to focus on the ideology of nominees to accomplish political objectives. Obstructionism can then arise as polarization within the Senate and between the Senate and President leads to combativeness as each individual and party has to appear as not over-compromising to their respective electorate.

## **Ideology & Polarization**

The main focus of my thesis, polarization, is exemplified in the analysis of the cause and effect of divided ideologies when applied to Supreme Court nominations. When identifying sources that have led to increased contentiousness, the ideological distances between Senators, presidents, and presidential nominees contribute to the politicized process. Analyzing the changing trends within the Senate illustrates polarization levels being low between the late 1930s to the mid 1950s with a marked increase in the 1970s (Cameron, Kastellec, & Park, 2013: 285). The levels of polarization within the Senate have continued to rise as present positions of ideologies of the two parties mirror the ideological distances seen after the Civil War (Cameron, Kastellec, & Park, 2013: 285). The polarization seen during the Post-Civil War era and now creates incentives for politicized behavior to block the opposing party with the ultimate goal being to limit the ideological shifting of the Supreme Court.

Polarization affects incentives of the non-presidential party to be obstructionist. Due to the involvement of the Senate and the presidency at each step of the nomination process, polarization within the Senate, and the overall relationship between the Senate and President, dictates the degree of contentiousness. If parties within the Senate have different views, the party that opposes the president has strong incentives to try and derail, or at least stall, a nomination process. Historically, the party that opposes the president, no matter if they occupy the majority or minority, could offer a strong resistance effort against an unfavorable nominee. The extent to which a strong resistance can be offered is confined to the institutional structure. If the opposing party is in the minority, a contentious process can still be established given the usage of the filibuster. This rapidly underwent significant change with the nomination of Justice Neil Gorsuch. During the nomination process of Justice Gorsuch, the “nuclear option” was

imposed to rid the Supreme Court nomination process of the filibuster. Nominees previously needed a sixty vote threshold to both disable the filibuster (as cloture could be invoked) and pass the nominee. Presently a simple majority is needed, only fifty-one votes to confirm a nominee. Lacking a filibuster as a check on both the majority party and the presidency forces other internal and external factors to engage so as to ensure the minority party is not voiceless. Polarization is the underlying factor that drives the desire of the majority and minority party to forestall nominations, and eliminating a tool to do so does not lessen the degree of polarization still interwoven into the process. Obstructionism will persist with or without informal and formal methods to achieve such an end goal. This is how polarization has persisted over centuries of Supreme Court nominations. The informal and formal rules dictating procedures are manipulated from administration to administration but the politicization of the nomination process has steadfastly been a constant.

The likelihood of success for a nominee is contingent on the majority-minority party interaction within the Senate along with the choice and utilization of formal and informal tools by either party to confirm or reject. While scholars have proved divided government, timing of vacancies, characteristics of nominees and the vacancy are crucial, these aspects can all be used as a façade for rejections. The option of multiple sources to be cited for delaying a confirmation or for delivering an outright rejection allows for true politicized motives to be hidden. For instance, the first non-elected President, John Tyler, put forth five Supreme Court nominees to the Senate during the years of 1844 and 1845; however, only one was confirmed with the four nominations being rejected or not acted on, not because of qualifications (characteristics of a nominee), but because of President Tyler's political unpopularity (Deconcini, 1992: 8). This example of political behavior being attributed to flaws of nominees rather than an outright

gesture of polarization illustrates the need to understand the vastness in which polarization enables partisan behavior.

President Tyler was not the first, and not the last, president to face a Senate with underlying political aspirations for filling a vacancy. President Nixon also faced a political battle to fill a vacancy. Due to the Supreme Court being seen as a policymaking institution, there is a strong investment by the Senate to control whom can sit on the bench, or rather what ideologies sit on the bench. For this reason, rather than challenge the conservatism of President Nixon's nominations of Haynsworth and Carswell, opponents of the president and nominees questioned the ethical fitness (characteristics of nominees) to sit on the Court (Deconcini, 1992: 10). Political motives are shrouded by superficial reasoning of rejection. For Haynsworth and Carswell, accusations of ethical impropriety and allegations of incompetence, respectively, played on the quality of the nominee when the true opposition stemmed from political and ideological differences (Deconcini, 1992: 10).

Deep political polarization along party lines has led to contentious appointments. The process of confirmations is manipulated by political incentives – as seen in the eradication of institutional tools as the filibuster and in the underlying partisan behaviors. Ideological polarization in the Senate has changed the environment nominees face. Senate scrutiny has increased in accordance with the increase of Senate polarization (Bartles, 2015: 7). Polarization is thus the focus of this thesis as governmental procedures face manipulation as politically charged competition envelopes the interaction of all governmental institutions.

## Quantitative Analysis

It is easy to point to the confirmation and rejection rates as a way to understand the Supreme Court nomination and confirmation processes. This, however, would be a mistake as confirmations and rejections do not explain the full story of appointment politics. From 1789 to the present, 163 nominations have been submitted, 126 were confirmed, but only 119 served, no action was taken on 10 nominees, 3 were postponed, 12 were rejected, and 12 were withdrawn (U.S. Senate). Taken at face value, 126 confirmations out of 163 nominations appears to illustrate an efficient system. It is beyond the confirmation and rejection rates that analysis must be conducted. Since the Senate plays a large role in Supreme Court nominations either being confirmed or rejected, it is their political behavior, created by incentives, that becomes crucial to understanding the political process of filling vacancies. The factors that contribute to 73% of nominees serving on the Supreme Court are based on several contingencies including but not limited to majority-minority behavior in the Senate, use and repeal of the filibuster, precedent and traditions, and the relationship between the Senate and the President. Due to confirmation being the norm, evaluation of the process in its entirety provides for a better understanding, not just looking at the end result. For that reason, this paper analyzes the variance in the amount of time a nomination process lasts to enhance comprehension of the effect of partisan politics on a governmental institution (Shipan & Shannon, 2003: 654). Shipan and Shannon focused on polarization affecting length of time of confirmation processes from Post-Civil War to Justice Breyer and I chose to empirically extend this study, while adding specific case studies, to help understand the nuances discovered.

Shipan and Shannon interests are in the Supreme Court nomination process and how such a process could be influenced by a collection of variables (Shipan & Shannon, 2003: 654).

Shipan and Shannon examine how potential opposition between the president and the majority party in the Senate affects the confirmation process for Supreme Court Justices. They argue that certain conditions of governmental relations will create incentives within the Senate to delay confirmation. To test their argument, they collected data on 87 Supreme Court nominations since the end of the Civil War. By assessing the variance in amount of time from nomination to confirmation, Shipan and Shannon found that by increasing the ideological distance between the president and the Senate, the duration of confirmation process increases as well (Shipan & Shannon, 2003: 663). While the main finding concerned ideological variables of the president and Senate, other variables were found to create a considerable impact on length of nomination.

I elected to extend the Shipan and Shannon data to bring the analysis up to date and include the eight nominations since Justice Breyer. The aim of updating the data set is to analyze if the trends and results found by Shipan and Shannon hold up with the extension into the 21<sup>st</sup> century. Since Justice Breyer's confirmation process, there have been eight nominations since, some of which are considered highly contentious. With such varying levels of contentiousness, mapping the data trends found in Shipan and Shannon analyses from the 19<sup>th</sup> and 20<sup>th</sup> centuries onto nominations in the 21<sup>st</sup> century could prove useful. Understanding the conditions under which the confirmation process operates gives a greater understanding of the Supreme Court functionality. Such conditions create incentives for all parties involved to influence the nomination and confirmation processes. With the extended data, the additional quantitative analysis illustrates the influence the factors have in the 21<sup>st</sup> century, just as influence upon nominations was studied in the 19<sup>th</sup> and 20<sup>th</sup> centuries.

### The Additional Cases

<b>Nominee</b>	<b>Nominating President</b>	<b>Senate Majority Party</b>	<b>Length of Nomination (days)</b>	<b>Position of Vacancy</b>	<b>Final Vote</b>
John G. Roberts Jr. of Maryland	George W. Bush	Republican	39	Associate	Withdrawn
John G. Roberts Jr. of Maryland	George W. Bush	Republican	23	Chief	Confirmed (78-22)
Harriet Miers of Texas	George W. Bush	Republican	21	Associate	Withdrawn
Samuel Alito of New Jersey	George W. Bush	Republican	82	Associate	Confirmed (58-42)
Sonia Sotomayor of New York	Barack Obama	Democrat	61	Associate	Confirmed (68-31)
Elena Kagan of Massachusetts	Barack Obama	Democrat	87	Associate	Confirmed (63-37)
Merrick Garland of Maryland	Barack Obama	Republican	293	Associate	No Senate Action Taken
Neil Gorsuch of Colorado	Donald Trump	Republican	66	Associate	Confirmed (54-45)
Brett Kavanaugh of Washington, D.C.	Donald Trump	Republican	88	Associate	Confirmed (50-48)

Eight additional cases were added to the data analysis that was started with the Shipan and Shannon data. Following Justice Breyer’s confirmation process, several contentious nominees were processed under a myriad of political circumstances. There are several factors that influence a confirmation process and each of the eight cases faced unique circumstances that either brought about Senate action, did not bring about Senate action, or changed Senate

procedural rules. The focus however cannot be limited to these variables as political situations are compounded by other explanatory variables.

Chief Justice John Roberts was nominated by Republican President George W. Bush when the Senate was controlled by Republicans. Due to the condition of unified government, the President-Majority Party Median score was 0.311 while the length of nomination was thirty-nine days. Justice Roberts had experience on the Federal Appellate Court. With the combination of unified government and previous court experience, it is not unusual for the confirmation to have a short duration with a confirming vote of 78-22.

Harriet Miers was the next additional data entry and she too was nominated by President George W. Bush. The Senate took no action on this nominee as the nomination was eventually withdrawn.

Justice Alito was the final nomination of President George W. Bush and experienced similar conditions as Justice Roberts. The Presidential and Majority party median score was 0.311 and the nomination was made under unified control. Justice Alito also served on the Federal Appellate Court. Justice Alito's length of nomination was nearly double that of Justice Roberts, despite having similar conditions, indicating other factors at play. Justice Alito was eventually confirmed 58-42 after cloture was invoked with a vote of 72-25.

Justice Sotomayor was the first nomination of Democratic President Obama in 2009 and was made when the Senate was controlled by the Democratic Party. The President-Majority Party Median score was -0.0375 showing alignment of ideological position under unified government. Justice Sotomayor served on both the Federal Appellate Court and Federal District Court indicating experience. This experience and unified control may account for the decline in

length of nomination compared to Justice Alito's nomination length of 82 days compared to Justice Sotomayor's duration of 61 days. Justice Sotomayor was confirmed with a vote of 68-31.

Justice Kagan was the next nomination of President Obama in 2010. The nomination was made with the same Presidential-Senate Majority Median score as well as unified government. Justice Kagan is considered an outlier as she never had experience on either the State Court, Federal Appellate Court, or Federal District Court. Despite this difference, Justice Kagan was confirmed with a vote of 63-37 following a nomination length of 87 days, a significant duration difference than Justice Sotomayor but only a 5-day difference than Justice Alito.

Merrick Garland was the last nomination of President Obama in 2016, notable due to a nomination occurring in a presidential election year. This nomination was complicated further due to conditions of divided control as the Senate shifted to Republican control. The Presidential-Majority Party Median score ideological divided increased to -0.8065, illustrating presidential and senatorial contentiousness. The Senate never took action as the length of nomination of 293 days ended with the congressional session. Due to the powers invested in the Senate Majority Leader, the flow of business on the senate floor can be controlled and manipulated to create specific outcomes (Gerhardt & Painter, 2017: 271). This outcome, in the instance of Justice Garland, was Senate inaction, a tool used by Republican Senate Majority Leader Senator McConnell to combat then Democratic President Obama's nomination. This nomination also came at the end of President Obama's second term, indicating that the variable of late term appointments can decrease likelihood of Senatorial action.

Justice Gorsuch was the first nomination of Republican President Trump in 2017, filling the vacancy of Justice Scalia, the vacancy President Obama's nomination of Merrick Garland attempted to fill. At the time of Justice Gorsuch's nomination, Republicans controlled both the

presidency and Senate and this significantly decreased the length of nomination to 66 days. Justice Gorsuch had previous experience on the Federal Appellate Court. Republican Senate Majority Leader Senator McConnell elected to impose the “nuclear option” changing the vote requirement for cloture and confirmation. Cloture was invoked with a vote of 55-45, the nomination was later confirmed 54-45. This rule change can be attributed to the decreased length in duration when compared to other nominations made under unified government such as Justice Sotomayor and Justice Alito.

Justice Kavanaugh was the second nomination of President Trump in 2018, and the second nominee to be confirmed under the new Senate rules of simple majority. Despite the similar conditions of Justice Gorsuch such as unified government, the length of nomination lasted 88 days. Justice Kavanaugh had experience as a Federal Appellate Court judge, indicating experience, but was investigated by the Senate Judiciary Committee for sexual assault allegations. Cloture was invoked with Senate Republicans to limit debate and force a final vote which later confirmed Justice Kavanaugh 50-48.

**The Hazard Model**

Nominations	Confirmed	Confirmed and Served	No Action	Postponed	Rejected	Withdrawn
163	126	119	10	3	12	12

U.S. Senate Supreme Court Nominations 1789-Present (U.S. Senate, 2019)

In order to evaluate Shipan and Shannon’s analysis of variable influence on nominations, as well as my argument about polarization’s influence, the focus of the investigation rests on the length of time from nomination to confirmation. Since the rate of confirmations is so high (73% for confirmed and served), contentiousness in regards to Supreme Court nominations must be

analyzed in terms of length of a nomination. Duration of a nomination is an indication of political contentiousness within the three branches of government, and certain variables increase and decrease this rate.

Shipan and Shannon (2003) sought to assess the success of presidential nominations to the Supreme Court using duration of the entire process in conjunction with differing variables. The historical trend indicates that confirmations are the likelihood and rejections are the exception to the norm as 119 nominations have been confirmed and 12 nominations have been rejected (U.S. Senate). Shipan and Shannon used a spatial model of presidential nominations in order to create a hazard model to illustrate the effect of multiple variables on the manipulation of the confirmation process (Shipan & Shannon, 2003: 654). A Proportional Hazard Model is useful to analyze those Supreme Court nominations that either received a lengthy duration from nomination to either rejection, confirmation, or withdrawal. The aim of the hazard model analysis is to understand the length of time to an event; therefore, the probability of an event occurring given that it hasn't occurred already. In the case of Supreme Court nominations, the length of time to an event is the duration from the presidential action of nomination to Senatorial action. Since the majority of all nominations succeed and are confirmed, the analysis cannot meaningfully track confirmation but instead the focus is on the amount of time it takes to get there.

The hazard rate model was selected to assess the potential effect a variable could exert on the time until Senatorial action occurs. The interest for Shipan and Shannon was if certain factors increase the longevity of a confirmation process. I take interest in the overarching theme of polarization impacting confirmation and how certain factors contribute to increasing the contentiousness of filling a vacant Supreme Court seat. The hazard model produces coefficients

that show whether or not an independent variable increases or decreases the hazard rate (Shipan & Shannon, 2003: 662). With the Cox Regression Model a positive coefficient illustrates that the particular variable increases the hazard rate, which increases the duration rate. An increase in the hazard rate means a decrease in the expected length of time; with a positive coefficient, a quicker confirmation, or rejection, is the result. The same is true for negative coefficients – a decrease in the hazard rate means an increased in the expected length of time for Senate action. For example, in Table 1 when evaluating the variable of current senator, the coefficient is positive meaning if a nominee is a current senator, the length of time until Senatorial action decreases.

### **Variables Included in the Data Set**

#### *Divided Control*

Divided Control between the presidential party and the majority party in the U.S. Senate was one of the covariates assessed for increasing the duration of the confirmation process. The variable was coded at 1 when the parties differed, and was coded 0 when the presidential party and the Senate majority party were shared. Divided control has proved to be a significant variable as it creates a combative atmosphere surrounding the interactions of presidents and the Senate. For instance, divided control can be utilized as a formal tool as the majority party controls action on the Senate floor. This power was utilized in 2016 when Republican Senate Majority Leader McConnell completed the longest delay of a Supreme Court nomination when Democratic President Obama nominated Justice Garland (Gerhardt & Painter, 2017: 263). Divided government suggests that the ideal nominee for the president and the ideal nominee for the majority party differs. This tension between negotiating ideal points contributes to the contentiousness of the confirmation process.

### *President-Majority Party Distance*

It is this contentiousness that leads to the next variable, the difference in presidential ideals and the median position of the majority party. In order to find the median majority party position relation to presidential position, DW-NOMINATE scores were used for all 87 cases of the Shipan and Shannon data from 2003. This data point comes from the idea that ideologically distant relations between the president and the majority party in the U.S. Senate lead to elongated confirmation processes. This variable examines the ideologically partisan patterns that emerge through presidential and senatorial interaction, especially when the Court lies between the two ideological points of those two actors.

### *Current Senator and Previous Senator*

Senatorial action cannot be limited to examining partisan efforts produced by either the majority party, minority party, or the president. Additional variables contribute to the length of a confirmation process as the Senate chooses to assess a variety of factors despite Senator Cook's claim that the Senatorial judgment process of a nominee should be made exclusively on the grounds of qualifications (McConnell, 1970: 15). An example of an external factor other than divided control or ideological positions is the previous or current experience of a nominee in the U.S. Senate. A nomination is expected to have a streamlined version of a confirmation process if they were a previous Senator or current Senator as their ideology and behavior are already known to the Senate (Shipan & Shannon, 2003: 661). Current and Previous Senators were coded as 1 and those nominees who had no Senate experience were coded as 0.

### *Age*

Another personal characteristic of the nominee that can dictate duration of confirmation process is the actual age of a nominee. Considering appointments to the Supreme Court are

lifetime appointments, as well as considering that incentives in the political environment have shifted to treat Supreme Court vacancies as political spoils, a nominee with a younger age would indicate a longer tenure, leading to higher scrutiny (Gerhardt & Painter, 2017: 274). As shown in the Shipan and Shannon data analysis, when the variable of age increased, the duration of the confirmation processes decreased, highlighting an inverse relation (Shipan & Shannon, 2003: 661).

*State Court Experience, Federal District Court Experience, Federal Appellate Court Experience*

The confirmation process can be influenced when the Senate assesses qualifications and experience, such as serving in the State Court, Federal District Court, or Federal Appellate Court. If Senator Cook's philosophy of evaluating nominees purely on qualifications was upheld, we would expect to see that experience in a court would highly correlate to Senate action being taken. Different levels of court experience were coded as 1 while inexperience in a court was coded as 0. As indicated in the first 87 cases included in the Shipan and Shannon analysis, likelihood of Senate action increased between 90%-132% when evaluated on the variable of court experience (Shipan & Shannon, 2003: 665). Previous court experiences illustrate, in a similar manner of previous Senatorial experience, that if ideology of nominee is well known, duration of confirmation processes are lessened.

*Chief Justice*

Confirmation processes differ depending on the nature of the vacancy available on the court – namely if the position to be filled is one of a Chief Justiceship. Considering the power differential between associate justices and chief justices, a nomination to fill a chief justice vacancy can be expected to increase in duration. The Chief Justice variable was coded as 1 for chief justice nominations and associate justice positions were coded as 0.

### *Critical Nomination & Critical Nomination with Divided Control*

A critical nomination is coded as 1 if the partisan balance of the court shifts with a seat being filled leading to a new partisan split, or a partisan deadlock is created, or if a replacement for a vacancy is a member of the opposing party (Shipan & Shannon, 2003: 661). A critical nomination factor adds complexity to the partisan battle between the president and Senate majority should a critical nomination fall under divided control. The minority party also can create an elongated version of the confirmation process even under unified control if a nominee is deemed critical. Critical nominations would then be expected to become even more contentious when supplemented with the condition of divided control, another independent variable assessed.

### *Time Remaining in Session*

This external variable refers to the point in time of the congressional session that the nomination of a president is given to the Senate. There may be a procedural difference in how nominees are treated depending on if the nomination is made near the end of session or earlier in the session. This variable is categorized as the number of days from the date of nomination to the last day of that congressional session (Shipan & Shannon, 2003: 662).

### *Unelected & Last Year*

Presidential characteristics, besides ideology, can affect a nominee's confirmation process experience. A president who was not been elected faces a different version of confirmation battles than an elected president. For this reason, the variable Unelected is coded as 1 for a president who succeeds to the position rather than is elected to the position. The position of a president in her term also effects confirmation processes and senatorial relations as

incentives shift for a president who may either be finishing up a second term or first term. The variable Last Year is coded as 1 to represent the last year of a president's term.

## **Results**

The Shipan and Shannon data set began with data following the end of the Civil War with nominee Henry Stanbery in 1866 and ended with Justice Breyer's nomination by President Clinton in 1994. The primary finding of the data analysis indicated that the length of the confirmation process increased when the ideological distance increased between the president and the majority party in the U.S. Senate (Shipan & Shannon, 2003: 654). Although length and ideology were the two primary variables studied, data analysis resulted in a positive relationship between duration of confirmation processes and when a nominee was coded as critical, or as a chief justice; however, duration decreased with other variables such as a current or previous senator being nominated and prior state or federal court experience (Shipan & Shannon, 2003: 665). To create an expanded model, data on the additional eight nomination cases was gathered in the same method of Shipan & Shannon's original data collection. Duration of a nomination is defined as the number of days from the date of the president's official nomination until the date of action taken by the Senate (Shipan & Shannon, 2003: 656).

In Columns 1 and 2 of Table 3 the data upholds Shipan & Shannon's theoretical hypothesis that the variables Divided Control and President-Majority Party Distance expend significant influence on a duration of a nomination. Divided Control in the updated data set shows that there is an extension of time in the confirmation process as the coefficient is significant with the expected sign. Divided Control has actually increased in impact from the

2003 Shipan and Shannon analysis as the coefficient has increased from -0.56 to -0.625 illustrating a continued influence of Divided Control. In column 2 of Table 3, when President-Majority Party Distance increases, the length of the confirmation increases in duration highlighting the influence of ideological segmentation. Similar to the change in Divided Control, the President-Majority Party Distance also increased with the addition of the more modern eight nominations as the coefficient increased from -0.81 to -1.032, with significance. The President-Majority Party Distance also emphasizes how ideologically divergent actors, the president and the Senate, create an environment that incentivizes senators to increasingly delay confirmation votes (Cho, Todd, Vanberg, 2018: 11).

As highlighted in the description of variables section above, duration of the confirmation process cannot solely be attributed to only two variables. Other identified variables also prove to have significant influence on the duration of the confirmation process, and each variable contributes to the updated analysis. Many of the covariates influence duration in an expected manner. As presidents seek to meet the understood legal and juridical qualifications demanded of a nominee, prior experience as a legislator, state court judge, or federal district court judge lead to a decreased confirmation process length. Position of the vacancy attempting to be filled also determines the length of the confirmation process as a Chief Justice vacancy leads to a longer confirmation process than an Associate Judge vacancy. Senate and Presidential characteristics also impact duration as a nomination made near the end of a congressional session has a decreased duration.

**Table 3: Cox Regression of Duration of Supreme Court Confirmations, 1866-2018**

<b>Variable</b>	<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>
<i>Regime Proxies</i>				
Divided Control	-0.625* (-2.80)	-	-0.558* (-2.22)	-
President-Majority Party Distance	-	-1.032* (-2.73)	-	-0.910* (-2.09)
<i>Nominee Characteristics</i>				
Age	-	-	0.0105 (0.58)	0.0114 (0.63)
Current Senator	-	-	2.672* (5.84)	2.672* (5.86)
Previous Senator	-	-	-0.038 (-0.08)	-0.0121 (-0.02)
State Court Experience	-	-	0.638* (2.24)	0.632* (2.24)
Federal District Court Experience	-	-	0.690 (1.61)	0.685 (1.61)
Federal Appellate Court Experience	-	-	-0.264 (-1.06)	-0.264 (-1.07)
<i>Name of Position</i>				
Chief Justice	-	-	-0.483 (-1.15)	-0.485 (-1.14)
Critical Nomination	-	-	-1.308* (-2.02)	-1.296* (-2.02)
Critical Nomination X Divided Control	-	-	1.088 (1.25)	1.096 (1.28)
<i>Senate and Presidential Characteristics</i>				
Time Remaining in Session	-	-	-0.00149 (-1.31)	-0.00151 (-1.32)
Last Year of Presidential Term	-	-	-0.506 (-0.99)	-0.473 (-0.92)
Unelected President	-	-	0.707 (1.56)	0.701 (1.56)
Log Likelihood	-319.08	-318.84	-300.94	-300.93
X <sup>2</sup>	7.85*	7.48*	87.06*	86.85*
N	95	95	95	95

The *t* statistics in parentheses; <sup>+</sup> p < 0.10, \* p < 0.05

**Table 4: Magnitude of Significant Covariate Effects on the Duration of Confirmation**

Variable	Change in X (from, to)	HAZARD RATE CHANGE	
		Based on Column 3 of Table 3	Based on column 4 of Table 3
<b>Divided Control</b>	(unified, divided)	-42.7%	-
<b>President-Majority Party Distance</b>	(0, 1.07)	-	-59.8%
<b>Current Senator</b>	(0, 1)	1447%	1447%
<b>State Court Experience</b>	(0, 1)	89.4%	88.1%
<b>Critical Nomination</b>	(0, 1)	-73%	-72.6%

Using the data collected from the primary theoretical variables, those found statistically significant in Columns 3 and 4 of Table 3, substantive effect is calculated creating Table 4. In Table 4, a nominee's hazard rate decreases by 42.7% when the control of the Senate and the presidency differs on a partisan basis. Additionally, along partisan lines, when the president was ideologically distant from the median majority party member, the hazard rate fell by 59.8%. As mentioned above, qualification level of a nominee is a significant variable as a nominee currently serving in the Senate at the time of a nomination has a hazard rate increase of 1,447% a significant reduction in confirmation processes. Table 4 also shows how the hazard rate decreases for critical nominations, slowing the process, just as state court experience increases the hazard rate, streamlining the confirmation process for those nominees with state court experience.

## Case Studies

The key variables of divided control, ideological distance between the president and the median member of the Senate majority, and previous court experience appear to have the most impact on the duration of confirmation processes. By understanding the quantitative analysis behind the contentiousness of Supreme Court nominations, such analysis can be applied to case studies. Case studies provide for a real-world application of statistically significant findings, as is the case with data collected on the nomination process for the Supreme Court. The purpose of this section is to apply the significant findings of the quantitative analysis to the actual implementation of the variables studied for their effect.

Polarization matters in the discussion about the nomination procedure as filling a vacancy on the Supreme Court has become a severely partisan process. There are questions to be answered in this process as some nominations draw higher degrees of conflict than others. What is triggering contentious nominations shifts along time frames, along congresses, and along presidents. Under the two party system, a portion of the Senate will always be antagonistic towards the President's political agenda; however, confirmations are still made under both unified and divided government. As seen in the quantitative analysis above, a variety of factors contribute to the duration of a nomination. When a nomination is made, political returns are expected by the president that would outweigh the costs of nominating and confirming a particular individual (Cameron, Kestellec, Mattioli, 2018: 2). The president must balance knowing the incentivized Senate behavior given certain conditions and finding a candidate that is consider politically reliable along ideological lines.

Given that the court matters politically, it is expected that parties would be concerned over the political consequences of appointments. In times of polarization, when parties are highly

divided, this will mean a contentious process. Polarization is evident in the Supreme Court nominations processes as ideologically differing senators work within their parties, and against the other party, to either confirm, delay, or reject a nominee. Polarization has increased party divisions as each of the two parties retreat to an ideological homogeneous model. By tracking patterns of polarization, the early 2000s to the present mirror the high rate of polarization not seen since the end of the Civil War in the late 1800s (Hare & Poole, 2014: 411). This high rate of polarization in American politics lead to incentives on either side of the political spectrum to utilize whichever tools are available to them to implement any semblance of power, regardless of being in the majority or minority. It is these incentives, brought on by polarization, that lead to the changing behaviors of governmental procedures - including the Supreme Court nomination processes.

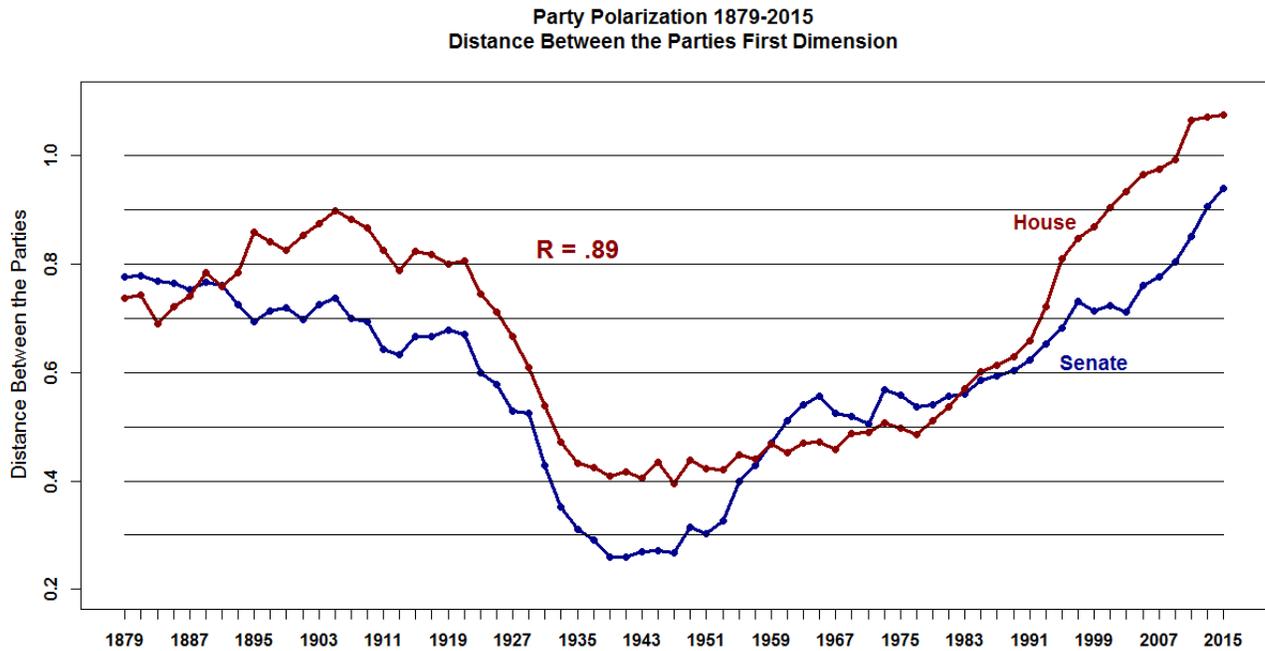


Figure 1: Party Polarization Between the Years 1879-2015 (Barber & McCarty, 2015: 20)

As polarization is a focal point of this thesis, three case studies will be examined when the distance between the two political parties within the United States Senate reaches a value greater than 0.5, as seen in Figure 1. The time periods selected are 1) President Cleveland’s 1893-1894 nominations of William Hornblower, Wheeler Peckham, and Edward White; 2) President Nixon’s 1969-1970 nominations of Clement Haynsworth, George Carswell, and Harry Blackmun; 3) President Obama’s 2016 nomination of Merrick Garland and President Trump’s 2017 nomination of Neil Gorsuch. The case studies outline how polarization has come to matter in the way Supreme Court nomination processes are completed.

**Case Study 1: President Cleveland 1893-1894**

<b>Nominee</b>	<b>Divided Government</b>	<b>Current or Previous Senator</b>	<b>Length of Nomination</b>	<b>Court Experience</b>	<b>Critical Nomination</b>
William Hornblower of New York	No	No	118	State	Yes
Wheeler Peckham of New York	No	No	25	State	Yes
Edward White of Louisiana	No	Yes	0	State	Yes

According to the Party Polarization Graph (Figure 1) that tracked polarization from 1879-2015, the distance between the parties reached a value of nearly 0.70 for the years 1893-1894. Despite the high levels of polarization between the parties, President Cleveland had a potential saving grace as he made his appointments under unified government, with a Democratic majority in the Senate of 44 members to 40 Republican members. Although his nominations occurred under unified government, President Cleveland still made three attempts at filling one seat,

eventually finding success with Edward White. The question that arises is what caused such difficulties for a second term president nominating under conditions of unified government.

In his first presidential term, President Grover Cleveland completed two successful nominations as Lucius Lamar and Melville Fuller were both confirmed 32-28 and 41-20, respectively. The Senate majority at this time was held by Republicans, meaning President Cleveland was successful under divided government conditions. This success in the first term is a troubling juxtaposition to the failure of his first two nominations when then Senate majority was Democratic. President Cleveland had a clear criterion for a nominee that was well known to both Republicans and Democrats that included a) a Democrat in good standing, b) someone who Cleveland knew personally, c) economically conservative leanings, and d) a non-Populist from a particular geographic area (Abraham, 2008). These stipulations worked for two nominees, but President Cleveland's success record diminished in his second term.

When President Cleveland had the chance to fill a vacancy for the third time, he was met head on with the implementation of an informal rule – senatorial courtesy. Senatorial courtesy is a pro-Senate bias which influences behaviors in two methods: 1) Senators are more likely to confirm fellow senators and 2) the Senate may be less likely to confirm a nominee opposed by a Senator from the same state as the nominee (Segal, 1987: 1004). Senatorial courtesy is an example of the guiding rules that arise out of the vague text of the Advice and Consent Clause that are followed in regard to Supreme Court nominations, as well as lower court nominations. Under his criterion, President Cleveland sought to replace Justice Samuel Blatchford of New York with another New Yorker. However, this plan was negated by New York Democratic Senator David B. Hill who was a member of an anti-Cleveland faction in New York's Democratic Party (Abraham, 2008). This internal party discord created incentive for Senator Hill

to invoke senatorial courtesy – drawing enough support from colleagues that William Hornblower was rejected 24-30 following a fourth month long nomination. Senatorial courtesy in the instance of President Cleveland’s nominations, increased contentiousness, not on the basis of ideological differences between parties, but rather within a singular party. The polarization was not between ideologies of Republican members or Democratic members but occurred in the diverging beliefs of the Democratic party.

President Cleveland’s second attempt to fill the same vacancy, his fourth nomination, was yet another New Yorker, William Peckham. This nomination was met with the same internal combativeness and senatorial courtesy again was invoked by New York Senator Hill, killing the nomination with a vote of 32-41 following a month long nomination. Senatorial courtesy, when wielded by members of the Senate, seems in practice to award a degree of nominating power to the Senate, a responsibility entrusted to the President in Article II, Section 2. Despite conditions of unified government, previous court experience, and a well-known selection criterion of the president, Cleveland still faced back to back rejections. This rejection rate of 50% highlights the interaction of political behaviors within parties may misalign, creating political environments that may be more hostile than divided government would offer.

President Cleveland’s third attempt to fill the still open vacancy, his fifth nomination, was a successful nomination with confirmation of popular Democratic majority leader Senator Edward D. White. White was unanimously confirmed on February 19, 1894, the same day of the nomination (Abraham, 2008). This nomination illustrates how one norm, senatorial courtesy, can take power from the president as senators can influence a nomination to a high degree, but also that the president can take back some power by using the same mechanism. In the Hazard Model Table 2, the magnitude of different covariates on the duration of a nomination is assessed. It is

evident given the case study of President Cleveland’s nominations in 1893-1894 that the variable “Current Senator” statistically decreases the duration of a nomination period as well as in practice decreases the duration of a nomination period.

Nominations are affected by a variety of things – as illustrated by the findings of scholars above and the analysis of President Cleveland’s nominations – but the focus of this thesis is the political opposition and tensions between presidents and non-presidential party. Uniquely, President Cleveland’s difficulties with nominations came not from divided government as trends of polarization would predict, but rather intraparty splits. The important takeaway from this case study is that it does not align with my theories of divided government and polarization. Antagonism from the opposing party isn’t the only thing a president faces as opposition from inside the party derails nominations as well. As long as there is a perceived reason to oppose a president, the Senate confirmation process can be disrupted.

**Case Study 2: President Nixon 1969-1971**

<b>Nominee</b>	<b>Divided Government</b>	<b>Current or Previous Senator</b>	<b>Length of Nomination (days)</b>	<b>Court Experience</b>	<b>Critical Nomination</b>
Clement Haynsworth of South Carolina	Yes	No	95	Federal Appellate	Yes
Harold Carswell of Florida	Yes	No	79	Federal Appellate, Federal District	Yes
Harry Blackmun of Minnesota	Yes	No	28	Federal Appellate	Yes

Unlike President Cleveland, President Nixon faced divided government conditions in his efforts to fill a vacancy on the Supreme Court. President Nixon had previously been successful when Justice Warren Burger was confirmed nearly unanimously 74-3 in a Democratically

Majority Senate. When Justice Fortas resigned, it took President Nixon three attempts to fill a seat, despite having previous success in a divided Senate setting. Similar to President Cleveland, certain conditions turned previous success into a hard fought political battle to fill a vacancy. President Nixon also had explicitly defined his criterion for selecting a candidate which included being a strict constructionist, lengthy experience as an appeals judge or a judge of the lower courts, and a guardian of the Constitution (Abraham, 2008).

Compounded with the condition of divided government, President Nixon also faced the circumstances of filling a vacancy that was deemed critical. As described earlier in the variable section, a nomination is considered critical when filling the seat would lead to a new partisan split, or a partisan deadlock is created, or if a replacement for a vacancy is a member of the opposing party. When Justice Fortas, nominated by Democratic President Johnson, decided to step down, the opportunity arose to both replace Fortas with a member of the opposing party; also, a new partisan split would be created as with a President Nixon nominee would swing the Court in Republican favor. According to the Hazard Model data analysis, a critical nomination characteristic of a nomination increases the duration of a confirmation, evident with the long length of nomination faced by Haynsworth and Carswell. Faced with divided government and attempting to fill a critical vacancy, President Nixon faced a contentious Senate – so contentious that not since President Cleveland has a President experienced two successive rejections for a single vacancy (Grossman & Wasby, 1972: 557).

No vacancy existed until Justice Fortas was pushed out of the Court by the Senate due to a declining reputation and questionable judgment, despite breaking no law. The cloud of suspicion was enough to tarnish the standing of the Court, making the pressure to retire even greater. With Justice Fortas' resignation, President Nixon was rewarded with a second

nomination. President Nixon, using the same criterion used to select Justice Burger, nominated Judge Clement Haynsworth of the U.S. Court of Appeals for the Fourth Circuit. Judge Haynsworth fit the qualifications deemed important by both President Nixon and the Senate as he was considered intellectually qualified with a strong courtship merit. Despite the Senate being disposed to confirm Judge Haynsworth, the Senate Judiciary Committee found financial and moralist reasons to hesitate, although nothing illegal had occurred (Abraham, 2008). This situation mirrored Justice Fortas whom the Senate had pushed out of the Court for problematic behavior, implying to invasive behavior the Senate began to take in matters of the Court composition. Haynsworth faced liberal backlash from the Senate over prior judicial voting history that indicated Haynsworth as an opponent of organized labor and the civil rights movement (Kalk, 1998: 267). With a Democratically controlled Senate, divided government extended the duration of the nomination process to nearly three months which ultimately culminated in a rejection of 55-45. This rejection was the first in nearly 40 years.

This rejection marked a change in the Senate behavior towards nominations during a divided government political environment. Not since 1930 had a Supreme Court nominee been rejected marking a decline in Senate compliance with nominees that had been observed from 1894 (Halper, 1972: 102). The rejection was also a moderate surprise as the Haynsworth nomination was early in Nixon's term when it would be expected the President would enjoy a "halo" effect coming off of an election victory (Grossman & Wasby, 1972: 580). A shift in behavior is evident. This new Senate behavior was the beginning of an era where Supreme Court nominations now could be judged and decided based on ideological reasons as party opposition of the jurisprudential goals of the president was no longer veiled (Whittington, 2006: 435). This openly hostile behavior faced by President Nixon coincided with the steep rise in polarization as

there was a dramatic increase in political polarization beginning in the 1970s (Hare & Poole, 2014: 412). Divided government began to have a costlier effect on the confirmation processes as parties in Congress diverged further on the ideological scale.

Following his first rejection, President Nixon offered up a nomination with similar characteristics – Judge Harrold Carswell – a southern strict constructionist with previous judicial experience on the U.S. District Court and the U.S. Court of Appeals for the Fifth Circuit. Although the Democratic majority of the Senate had just displayed the power of divided government against an unwanted nominee, the Senate was in a conciliatory mood, wanting to confirm and fill the vacancy (Kalk, 1998: 267). There were, however, severe objections to President Nixon’s attempt to fill the seat with Judge Carswell, a further right southern constructionist than Haynsworth. Following the Senate intervening in Justice Fortas’ tenure on the Court, as well as the Senate Judiciary Committee’s high investigation into the Haynsworth nomination, it is clear that the Senate will offer more scrutiny for Supreme Court nominations than tradition has seen (Grossman & Wasby, 1972: 558). Carswell met the qualifications aspect which should have lead to a shorter confirmation process, however ideology again played an important part in the failed attempt to nominate. As the left-leaning Senate examined the judicial voting record of Judge Carswell there were findings that cast doubt on his objectivity of racial matters (Abraham, 2008). As the number of dubious Senators increased, President Nixon’s “Southern Strategy” failed, as the nomination of Carswell failed by a vote of 51-45.

This back-to-back rejection was a rarity for presidential and senatorial interaction; however, these rejections highlight a notable trend. A nominee’s hazard rate decreases by 42.7% when divided government is a condition of the nomination process. In data collected from post-Civil War to the present, divided government is an effective tool for delaying a nomination.

Shown by President Nixon’s nominations, those nominees made by a president of the opposite political party of the Senate, but especially those nominees made by a president who is antagonistic to a Senate, continuously fare worse (Freidman, 1983: 2). Realizing there was no chance on implementing a southern strategy when the opposing party held the Senate, President Nixon nominated Judge Blackmun of Minnesota. Blackmun had previous court experience on the U.S. Court of Appeals for the Eighth Circuit, was found to have a clean repute by the Senate (despite having questionable financial and morality judgment calls similar to Haynsworth), and was confirmed unanimously 94-0 following a month confirmation process. The saga of the three nominations for one seat features the evolution of Senate evaluation criterion that progressed to a character assessment as well as an ideological assessment for a nominee (Freer, 1999: 507).

**Case Study 3: President Obama and President Trump 2016-2017**

<b>Nominee</b>	<b>Divided Government</b>	<b>Current or Previous Senator</b>	<b>Length of Nomination</b>	<b>Court Experience</b>	<b>Critical Nomination</b>
Merrick Garland of Maryland	Yes	No	293	Federal Appellate	Yes
Neil Gorsuch of Colorado	No	No	66	Federal Appellate	No

The unexpected death of conservative Justice Scalia created a vacancy during February of 2016, notable for being an election year. President Obama sought to fill the vacancy while he remained in office with the nomination of Judge Merrick Garland of the U.S. Court of Appeals for the District of Columbia. This was not achieved as Senate Majority Leader Mitch McConnell (R-KY) announced he would not consider a nomination by the president, even before President Obama announced his nominee (Everett & Thrush, 2016). After announcing the obstruction technique, the technique was implemented and President Obama’s nomination of Judge Garland

ultimately failed as the nomination faced the longest delay of a Supreme Court nomination in history with 293 days. Senator McConnell cited the election year as cause to delay. President Obama was denied filling a vacancy as well as making a critical nomination as Garland's confirmation would have flipped the Court partisan composition to a majority of Democratically appointed justices, a composition not seen since the late 1960s (Gerdhardt & Painter, 2017: 264).

Judge Garland's nomination process was different than the prior case studies as no one questioned his intellectual capabilities, judicial qualifications, or general personal character. In a manner similar to President Cleveland, Judge Garland was blocked by a segment of the Senate that was hostile to the president's political agenda. Judge Garland's exaggerated delayed confirmation process cannot be labeled anything other than politically motivated. As the majority party openly and outwardly chose obstruction, this partisan behavior has the potential to create more contentious nominations in the future as the majority party, regardless of who holds it, can stall a Supreme Court selection process long enough until a party aligned president comes into office (Gerdhardt & Painter, 2017: 268).

As a result of obstruction techniques from the Senate majority party, the vacancy of Justice Scalia was left to newly elected President Trump to fill. President Trump nominated Judge Neil Gorsuch from the Tenth Circuit. In response to the obstruction of Senator McConnell, the Democratic minority party implemented the filibuster in attempts of leveling the playing field and righting the political wrongs they felt were done by the Senate majority. A filibuster blocks a floor vote on the nomination unless cloture is invoked with a vote of 60 Senators. Considering as how the composition of the Senate was 52 Republicans to 46 Democrats, 60 votes was not foreseen as being a possibility. This condition set into motion the "nuclear option" where those 52 Republicans voted to change the Senate rules to prohibit filibustering of Supreme Court

nominees thus reducing a confirming vote to a simple majority (Gerdhardt & Painter, 2017: 264). With the rule change, Judge Gorsuch was confirmed 54-45.

The nomination process of Justice Gorsuch is a fine juxtaposition to that of Judge Garland's nomination as they compare and contrast the influence of majority and minority party obstruction techniques. The eradication of judicial filibusters creates several new trends. The first notable trend is that the power dynamics between the majority and minority parties shifts as the inability to use a filibuster strengthens the majoritarian control over the judiciary confirmation processes (Gerdhardt & Painter, 2017: 266). The Democratic party opened the opportunity to remove the filibuster for Supreme Court nominations when Democratic Senate Majority Leader Harry Reid removed the 60 vote threshold to get nominees to the Senate floor for lower courts in 2013 (Everett & Kim, 2013). The precedent set in 2013 was utilized as a rationale for the actions of Senator Reid in the cases of Supreme Court nominees. These two radical rule changes in conjunction with one another exemplify how precedent influences rule changes and how partisan behavior can be cited to recreate further partisan behavior. With one party citing the other for behavior, this creates a scenario where retribution and retaliation will become the new face of politics.

With the abolition of the filibuster, another distribution of power changed further as the power dynamic between the president and the Senate changed. Since the implementation of the nuclear option reducing the number of senators required to confirm a nominee to a simple majority, the president's control of the composition of the court is extended as there now exists easier access to a success (Gerdhardt & Painter, 2017: 265). This redistribution of power could potentially lead to nominees who would normally not be confirmed for qualification, experience, or character reasons to surpass the voting threshold with a smaller support faction. This could

redefine the composition of the court as more radical nominees could be confirmed thus recreating a new political leaning, or a new political center, for the Court's ideology. This change in ideology could impact national legislation and governmental procedures for decades due to the lifelong term appointments.

## **Conclusions**

In my thesis I sought to prove that nominations to the Supreme Court have always been contentious, influenced by levels of high periods of polarization. The politically fraught process that ensued with the 1987 nomination of Robert Bork is the example people point to about how polarization and politics influence what should be an independent judiciary; however, politicized processes concerning the Supreme Court is not a modern trend. Appointment politics are left vulnerable once a seat becomes vacant, and appointment politics do not subside through the entire appointment process. As polarization increases in influence over political processes in the present, historical parallels can be drawn during such periods of polarization that mirror today's high levels.

I do not believe in the critics who point to the Supreme Court nomination hearings of Judge Robert Bork as the origin of contentious nomination processes (DeConcini, 1992:1). I also disagree with the evaluation that the Supreme Court hearings for Justice Thomas were an unprecedented event involving unforeseeable occurrences (DeConcini, 1992:1). The occurrences in modern Supreme Court nomination and confirmation processes can be found to have origin in the ever-changing process itself, spanning decades. Contentious nominees are not a new concept. Illustrated in the case studies and quantitative analysis, presidents have continuously run into complications when pitting a nominee against the implementation of the Senate's advice and

consent. The conditions under which a nomination is made dictate the experiences of the president, Senate, and nominee.

The presence of politics in the nomination and confirmation processes cannot be limited to the assessment of being a modern phenomenon. The Supreme Court confirmation processes began as a political process as the first rejection of a nominee in 1795 can be linked to political motivations. President Washington's failed nomination of Associate Justice Rutledge can be attributed to mismatched political agendas as Rutledge had been critical of the Jay Treaty, a quality that could not be overlooked by the Senate (Deconcini, 1992: 7). The trend of politicized behavior has not abated since the beginning of the U.S. government in the 18<sup>th</sup> century. Polarization of parties has only contributed to the contentious Supreme Court confirmation processes, a political process that intertwines all three branches.

With how the Constitution sets up the filling of seats on the Supreme Court, contention was interwoven into the language of Article II, Section 2. The co-responsibility of two independent institutions – the president and the Senate – created a process that would be subjected to ever-changing behavior as the process evolved to fit the political environment of the time. Historically it is evident that the two-stage appointment process has created deadlock as the president, majority party of the Senate, and minority party of the Senate can all come into conflict with one another (Whittington, 2006). Controversy, partisan battles, and the evolution of the nomination process is an illustration about how the Supreme Court has an elaborate role in the political system (Grossman & Wasby, 1972: 557). With the impact of polarization, adversarial politics in regards to the confirmation process in the Senate is to be expected creating a non-independent judiciary. Those persons appointed, confirmed, or rejected to sit on the Supreme Court are manifestations of political agendas being wielded by opposing parties.

As polarization overlays the Supreme Court nomination procedure, the process has increased in length and decreased in expediency. Duration is a marker of the contentiousness of a nomination as it highlights the combative actions taken by the president, majority party, and minority party. Wielded correctly, delaying tactics can be utilized to delay Senatorial action until more votes could be obtained to either confirm or reject (Grossman & Wasby, 1972: 588). An obstruction ridden confirmation process can only damage the integrity of both the lower courts and the Supreme Court. Obstruction by either party creates a politicized system where vacancies are political spoils – hostages and collateral damage in the combative nature of partisan warfare (Gerdhardt & Painter, 2017: 273). Polarization has been a political phenomenon since the inception of government. When overlaid with institutional procedures, polarization can be an instigator to create severely partisan behavior, incentivized by both political rewards and political failures of the opposing party.

In regards to institutional procedural norms, precedent and tradition are often cited when the Constitution offers vague rules and regulations. This remains true for the filling of Supreme Court vacancies. The procedure itself, however, has adapted to fit the political climate and it is through the malleable nature of the confirmation process that the evolution of Supreme Court nominations has been molded. Several variables can be attributed to the success and failure of a nominee, but each variable is acting under the condition of polarization. As each political party seeks power and influence, these variables are manipulated and implemented to best establish political dominance for decades.

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