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Partisan or Precedent:

The History of Nominating Supreme Court Judges in Presidential Election Years

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I. Abstract

In both 2016 and 2020, a vacant seat opened on the Supreme Court within a year of a Presidential Election. First, in 2016, Justice Antonin Scalia passed away less than nine months before Election Day. In 2020, Justice Ruth Bader Ginsberg passed away less than two months before the election. These vacancies subsequently created political turmoil, as the sitting Presidents and Senators moved to fill the seat on the High Court before the next election.

For example, in 2016, Mitch McConnell, the Senate majority leader, quickly responded after the news broke of Justice Scalia's passing. He declared that the Senate would not be giving a vote to a Supreme Court nominee offered by President Obama. Of note, President Obama was near the end of his second term as President. However, President Obama submitted a nominee which the Senate allowed to expire. However, in 2020, Senate Majority Leader McConnell responded differently, stating that a nominee from President Trump, also near the end of his term, would receive a vote for confirmation in the Senate.

Why would McConnell respond differently only four years later? Various explanations such as partisan politics and many people cite the so-called "Thurmond Rule" as the explanation. This article seeks to explore the history of vacancies on the Supreme Court opening during Presidential election years. To accomplish this, an analysis of the nominations of Supreme Court Justices in Presidential election years, the historical precedent of the Senate passing on consideration of a Presidential nomination, and an examination of the Thurmond Rule and its origins are considered. In conclusion, each of these historical trends will be compared with the current political climate and the Senate's action or lack of action on nominations.

II. The Historical Background of Supreme Court Nominations

Many people might be surprised to learn that a law degree or previous judicial experience is not a requirement for nomination to the Supreme Court.¹ The Constitution mandates the requirement in Article III that a Justice need only “hold their Offices during good behavior.”² Furthermore, the process to become a Supreme Court Justice, as laid out in Article II Section II, states, “[the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers, and Consuls, Judges of the Supreme Court.”³ The consent of the Senate is a simple majority of votes from the chamber, i.e. 51 or more votes.⁴ While this process appears simple, judicial nominations have become increasingly partisan. While it is unclear if politics have always influenced the nomination and confirmation process for Supreme Court Justices, it is clear that politics have driven the most recent nominations to the High Court.⁵ To observe this politicization, one needs to look no further than the nominations and confirmations of 2016 and 2020; these years are specifically highlighted because each sparked great debate due to their timing during presidential election years.⁶ Each vacancy opened within months of the Presidential Election, raising the question: should the current or soon to be elected president appoint a Justice to the vacancy?

Many claim that partisan attitudes drive this debate in an attempt to capture the power that the Court holds.⁷ However, a closer examination of the history of Supreme Court nominees reveals that the choices government leaders make are either possibly partisan or purely political.

A. In Presidential Election Years

Throughout American history, there have been 164 nominations to the US Supreme Court, and of those nominations, 126 have been confirmed.⁸ Out of these 126 vacancies, 14 have opened during presidential election years.⁹ The timeline of these nominations ranges from 10 months prior to election day, to less than a month before election day.¹⁰ While this pre-election

¹ Supreme Court of the United States, Frequently Asked Questions, General Information https://www.supremecourt.gov/about/faq_general.aspx#:~:text=Do%20you%20have%20to%20be,been%20trained%20in%20the%20law. (last visited July 5, 2021).

² U.S. CONST. art. III, § 1.

³ U.S. CONST. art. II, § 2, cl. 2.

⁴ United States House of Representatives, The Legislative Process, [https://www.house.gov/the-house-explained/the-legislative-process#:~:text=If%20the%20bill%20passes%20by,of%20100\)%20passes%20the%20bill](https://www.house.gov/the-house-explained/the-legislative-process#:~:text=If%20the%20bill%20passes%20by,of%20100)%20passes%20the%20bill) (last visited July 5, 2021).

⁵ BARRY J. MCMILLION, CONG. RSCH. SERV, R44236, SUPREME COURT APPOINTMENT PROCESS: PRESIDENT’S SELECTION OF A NOMINEE (2021).

⁶ Eric Bradner, *Here's what happened when Senate Republicans refused to vote on Merrick Garland's Supreme Court nomination*, CNN (Sept. 19, 2020, 8:16 PM), <https://www.cnn.com/2020/09/18/politics/merrick-garland-senate-republicans-timeline/index.html>.

⁷ Lissandra Villa, *Here's What GOP Senators Said About the 2016 Supreme Court Vacancy-And What They're Saying Now*, TIME (Sept. 24, 2020, 4:06 PM), <https://time.com/5892574/senate-republicans-supreme-court-vote/>; See also Lisa Mascaro, *Barrett confirmed as Supreme Court justice in partisan vote*, AP NEWS (Oct. 26, 2020), <https://apnews.com/article/election-2020-donald-trump-virus-outbreak-ruth-bader-ginsburg-amy-coney-barrett-82a02a618343c98b80ca2b6bf9eafe07>.

⁸ The Supreme Court Historical Society, Timeline of the Justices, https://supremecourthistory.org/?page_id=650 (last visited July 5, 2021).

⁹ BARRY J. MCMILLION, CONG. RSCH. SERV, IN11514, SUPREME COURT VACANCIES THAT OCCURRED DURING PRESIDENTIAL ELECTION YEARS (1789-2020) (2020).

¹⁰ *Id.*

vacancy has repeatedly occurred, there is not a constitutionally required protocol for a Supreme Court Justice's nomination prior to a presidential election. As there are no specific provisions for such an event, it can be assumed that the founders either did not anticipate such a vacancy occurring; or that such a vacancy would not cause political turmoil. Nevertheless, a pattern has emerged among the nominations presidents make during election years.

The first vacancy in a presidential election year occurred in 1804 when Supreme Court Associate Justice Alfred Moore resigned from the court.¹¹ This presented first-term President Thomas Jefferson with a supreme court vacancy 281 days before the election. President Jefferson promptly filled the position, on March 22, 1804, within two months of Moore's resignation.¹² The Democratic-Republican-majority-Senate confirmed President Jefferson's nominee, William Johnson, in just two days.¹³ This was the first example of the same party that controlled the White House and the Senate confirming a Supreme Court Justice in a presidential election year.

While this confirmation timeline did not immediately become precedent, later vacancies would help it to emerge as a pattern. The next three vacancies that occurred in presidential election years were when the same political party did not control the Senate and the White House.¹⁴ In 1828, Supreme Court Justice Robert Trimble passed away, after serving for two years on the Court, on August 25, 1828, 67 days before the election.¹⁵ The President, John Quincy Adams, who was running for reelection at the time, nominated John J. Crittenden. Crittenden's nomination was rejected by the Senate.¹⁶ Eventually, President Adams lost his reelection bid and Justice Trimble's spot was filled by President Adams's successor, President Andrew Jackson.¹⁷

Next, in 1844, Supreme Court Justice Henry Baldwin died 194 days before election day.¹⁸ President Tyler, who was expelled from the Whig party in 1841, assumed the presidency after he was elected as vice president and the death of William Henry Harrison.¹⁹ Sometimes called "the president without a party,"²⁰ President Tyler did not have support from either side of the aisle, which led to the rejection of Edward King's nomination twice.²¹ The Senate originally tabled the nomination of King, leading President Tyler to nominate King a second time.²² Once again, the Senate tabled King's nomination, resulting in President Tyler withdrawing the nomination.²³

¹¹ Supreme Court of the United States, Justices 1789 to Present, https://www.supremecourt.gov/about/members_text.aspx (last visited July 5, 2021).

¹² McMillion, *supra* note 9, at 4.

¹³ *See supra* note 8.

¹⁴ *See* McMillion, *supra* note 9, at 4.

¹⁵ *See supra* note 8.

¹⁶ United States Senate, Supreme Court Nominations (1789-Present), <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm> (last visited July 5th, 2021).

¹⁷ *Id.*

¹⁸ McMillion, *supra* note 9, at 4.

¹⁹ The White House, John Tyler, <https://www.whitehouse.gov/about-the-white-house/presidents/john-tyler/> (last visited July 5th, 2021).

²⁰ CHRISTOPHER J. LEAHY, *PRESIDENT WITHOUT A PARTY: THE LIFE OF JOHN TYLER* (2020).

²¹ *See supra* note 16, (discussing King's nomination process).

²² John S Goff, *The Rejection of United States Supreme Court Appointments*, 5, *THE AM. J. OF LEGAL HISTORY*, 357, (1961).

²³ *Id.*

The third vacancy occurred in 1852, with 100 days until election day when Supreme Court Justice John McKinley died on July 19, 1852. The vacancy resulted in President Millard Filmore, a member of the Whig Party, having 3 months to fill the spot.²⁴ However, the Democratic party controlled a majority in the Senate and tabled President Filmore's nomination of Edward A. Bradford,²⁵ allowing for President Filmore's successor, President Franklin Pierce, to fill the vacancy.²⁶

This pattern of failed nominations demonstrates the power that the Senate has exercised when confirming Supreme Court nominees to vacancies on the Court. Following this time period, only one Supreme Court nomination occurred during a Presidential Election year that was filled when the President and Senate were of opposing parties.²⁷ This circumstance arose in 1888, Supreme Court Justice Morrison R. Waite died within seven months of election day, leaving President Grover Cleveland, a Democrat, to fill the spot.²⁸ At that time, the Republican Party only possessed a slim majority of two seats, which allowed for the confirmation of President Cleveland's nominee, Melville Weston Fuller.²⁹ Fuller eventually became Chief Justice of the Supreme Court and went on to serve on the Court for over twenty years.³⁰ This break from the historical trend of exclusive same party confirmations in election years has been the only confirmation under a divided government.³¹ This pattern of nominations, some believe, eventually evolved into the Thurmond Rule, which was used to justify Mitch McConnell's decisions in 2016 and 2020.

III. The Thurmond Rule

Based on the historical trend of Supreme Court nominations in presidential election years a "rule" emerged that has had various names based on the time period in which it has been invoked. While this rule is an unwritten tradition and is technically not binding for the United States Senate, the rule follows a line of tradition and precedent that holds as much power as a written word. This rule provides a cut-off date for judicial nominees by the President in election years, though the actual timing of the date is ambiguous.³²

The first application of the rule occurred in 1968, when Senator Strom Thurmond, a Republican from South Carolina, filibustered the nomination of Associate Justice Abe Fortas for the position of Chief Justice by President Lyndon B. Johnson.³³ The filibuster of Justice Fortas'

²⁴McMillion, *supra* note 9, at 4.

²⁵ See *supra* note 8.

²⁶ See *supra* note 8.

²⁷McMillion, *supra* note 9, at 4.

²⁸ See *supra* note 11.

²⁹The Supreme Court Historical Society, Melville Weston Fuller, 1888-1910, <https://supremecourthistory.org/history-of-the-court-timeline-of-the-justices-melville-weston-fuller-1888-1910/> (last visited July 5, 2021).

³⁰ See *supra* note 11.

³¹McMillion, *supra* note 9, at 4.

³² Senator Strom Thurmond, Statement by Senator Strom Thurmond at the Leader's Lecture Series, (transcript available at U.S. Senate Leader's Lecture).

³³ Daniel Victor, *What Is the 'Thurmond Rule'?*, N.Y. TIMES, (Feb. 13, 2016), <https://www.nytimes.com/live/supreme-court-justice-antonin-scalia-dies-at-79/what-is-the-thurmond-rule/>.

nomination sparked significant debate for the reasons behind the filibuster. The filibuster has been attributed to unfavorable information that surfaced about Justice Fortas in the confirmation process.³⁴ Conversely, others have argued that this blockage of the nomination was meant to operate as a cut off for presidential Supreme Court nominations.³⁵ Thomas Jipping, the deputy director of the Heritage Foundation Center for Legal and Judicial Studies writes, “The Congressional Research Service describes the Thurmond Rule as a “past Senate practice” or an “informal Senate understanding” that confirmation of lower court nominees drops off and ends ‘earlier in presidential election years than in other years.’ Beyond that very general description, it is hard to get a handle on just when this practice/understanding begins and what it actually is.”³⁶ In recent days, however, this “rule” is used mostly to reason about the proper process for Supreme Court nominees in presidential election years based on their vacancy time.³⁷

While it is unclear when this nomination cut-off date is to be observed, another part of the “rule” can be drawn from this blocked nomination. The majority in the Senate at this time was Republican, while the White House was controlled by President Lyndon B. Johnson, a Democrat.³⁸ This follows the earlier pattern of the Senate not confirming a Supreme Court nominee in a presidential election year if the executive and legislative branches are controlled by different political parties.

However, this may not have been Thurmond’s intent in filibustering Justice Fortas’ nomination. As Senator Thurmond stated at a Leader’s Lecture Series, “I have always believed that it is the responsibility of the Senate to approve, whenever possible, the nominations of a President, regardless of which party controls the White House. If the President thinks that a particular individual is best suited to serve in his administration and is the best person to serve the people, then that is the man or the woman who the Senate should confirm, and rapidly so.”³⁹ However, Thurmond went on to explain how partisanship has crept its way into the confirmation process for judicial nominees. “As I stated earlier, there was a time in my Senate career when candidates to be federal judges were individuals who were only concerned with interpreting the law, not making it, but since the 1960s that is no longer the case. In order to protect against judicial activism, as well as to guard the authority of the legislative branch, judicial nominees must now be carefully vetted.”⁴⁰ Thurmond’s statement about the changing role of the judicial branch indicates why Thurmond may have felt so strongly about the confirmation process in a presidential year. Thurmond’s application of this unwritten and technically nonbinding rule displays the incredible power that precedent plays in the United States government. Even though this is one of the first versions of the “rule,” it certainly is not the last.

A. The Biden interpretation of the Thurmond Rule

³⁴ Harsh Voruganti, *Private: Decoding the Thurmond Rule*: AM. CONST. SOC’Y (July 19, 2016), <https://www.acslaw.org/expertforum/decoding-the-thurmond-rule/>.

³⁵ *Id.*

³⁶ Thomas Jipping, *The “Thurmond Rule”: A Phony Excuse to Play Judicial Politics*, THE HERITAGE FOUND. (May 15, 2019), <https://www.heritage.org/courts/commentary/the-thurmond-rule-phony-excuse-play-judicial-politics>

³⁷ Carl Tobias, *Transforming the “Thurmond Rule” in 2016*, 66 EMORY L. J. ONLINE 2001, (2016).

³⁸ The White House, Richard M. Nixon: The 37th President of the United States, <https://www.whitehouse.gov/about-the-white-house/presidents/richard-m-nixon/> (last visited July 5, 2021).

³⁹ Senator Thurmond, *supra* note 32 at ¶ 9.

⁴⁰ *Id.*

On June 25, 1992, then-Senator Joseph Biden spoke for an hour and a half on the Senate floor about how the Senate should proceed with confirmations in a Presidential election year.⁴¹ Though there were no vacancies on the Court at this time, Senator Biden felt compelled to address what the Senate ought to do, should a Justice resign or pass away in the summer before a presidential election.⁴² This aligns fairly well with the Thurmond Rule since many believe the cut-off date for nominations to be in the summer, likely after the July recess.⁴³ In this speech, Senator Biden stated, “It is my view, that if a Supreme Court Justice resigns tomorrow or within the next several weeks, or resigns at the end of the summer, President Bush should consider following the practice of a majority of his predecessors and not... name a nominee until after the November election is completed.”⁴⁴ When Senator Biden gave this speech in 1992, the Senate was controlled by a Democratic majority while the White House was held by Republican George H.W. Bush.⁴⁵ This serves yet another instance of a divided Senate and President resulting in a pause in the nomination and confirmation process of judicial appointments in a presidential election year.

Biden states that his motivation for delaying a nomination in this time would be to prevent the “throes of an election year”⁴⁶ from affecting the nomination process. The Thurmond Rule evolved to a new form in Senator Biden’s speech as the purpose of the rule was further fleshed out. Not only would this rule be based on timing, as Biden references, saying “a few Justices have been confirmed in the summer or fall of a Presidential election season, such confirmations are rare,”⁴⁷ but it also relates to the politics of the confirmation process that Senator Thurmond alluded to in his speech concerning the transformation of the court. Biden too frequently recognizes that the court has now been made into a political organization and Presidents appoint based on party in modern times, which he believes is sometimes not in the best interest of the country. Biden takes Thurmond’s Rule a step farther by expanding the purpose of the rule to include shielding the Supreme Court from atrocious politics.

Biden argued that though many divided governments had filled vacancies on the court before, this current government, due to the timing of the “bitterest, dirtiest, Presidential campaigns”⁴⁸ the Senate should refrain since the politics would surely poison the nomination process. Biden’s speech set a precedent much like the Thurmond Rule of the Senate refusing to consider a nomination in a Presidential election year.

B. The McConnell Application of the Thurmond Rule

⁴¹President Biden: No Senate Hearings For SCOTUS Vacancy In Election Year, C-SPAN (1992) <https://www.c-span.org/video/?c4581754/user-clip-biden-senate-hearings-scotus-vacancy-election-year>.

⁴² *Id.*

⁴³ Amber Phillips, *Why Joe Biden's 1992 Supreme Court comments aren't a silver bullet for Republicans*, WASH. POST (Feb. 3, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/02/23/why-joe-bidens-1992-supreme-court-comments-arent-a-silver-bullet-for-republicans/>.

⁴⁴ See President Biden *supra*, note 42.

⁴⁵ The White House, George H. W. Bush, <https://www.whitehouse.gov/about-the-white-house/presidents/george-h-w-bush/> (last visited July 5, 2021).

⁴⁶ See President Biden *supra*, note 42.

⁴⁷ *Id.*

⁴⁸ *Id.*

The most recent interpretation of the Thurmond Rule took place in 2016. Though the Senate Majority leader is not a Constitutionally prescribed position, the member who holds this position has arguably the most power in the Senate. Republican Senator Mitch McConnell wielded this power in 2016 when Justice Antonin Scalia passed away, leaving a vacancy on the Supreme Court in February 2016, seven months before the presidential election.⁴⁹ Within a week of Justice Scalia's death, Senator McConnell made a statement saying, "I believe the overwhelming view of the Republican Conference in the Senate is that this nomination should not be filled, this vacancy should not be filled by this lame-duck president."⁵⁰ McConnell's response brought backlash from President Barack Obama who accused Senator McConnell of playing politics.⁵¹ The President went ahead and nominated Merrick Garland, the Chief Judge of the U.S. Court of Appeals for the D.C. Circuit, for the seat on the Supreme Court on March 16, 2016.⁵² In his statement on the nomination for Judge Garland, President Obama said a supreme court nomination should be, "above politics, it has to be, and should stay that way."⁵³ Senator McConnell asserted that while it is the President's duty to nominate a Justice for the Supreme Court, it is only the duty of the Senate to give advice and consent if they deem the nominee the best person to assume the bench. In this case, McConnell declined to consider Judge Garland's nomination.⁵⁴

Justifying his reasoning, Senator McConnell stated a lesser-known version of the Thurmond rule. He did not argue for his decision based on timing, but instead, he called for the new president to make the appointment because of the division of the Senate and the White House.⁵⁵ In 2016, the White House was under the control of then President Barack Obama, a Democrat, and the Senate was held by a four seat Republican majority, making it unlikely for the Democratic Senate minority to overrule the Republicans without right-wing defectors.⁵⁶ McConnell stated when referring to the precedent of not filling a Supreme Court spot during an election year with different parties controlling the Senate and White House, "You did have to go back to 1888, when Grover Cleveland was president, to find the last time a vacancy created in a presidentially elected year was approved by a Senate of a different party."⁵⁷ This position holds that as the American people have put a Republican Senate into power, they have implicitly said

⁴⁹ Press Release, Sup. Ct. of the U.S., Statement by Chief Justice John Roberts, Jr., https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_02-13-16.

⁵⁰ Amita Kelly, *McConnell: Blocking Supreme Court Nomination 'About A Principle, Not A Person'*, NPR (March 16, 2016, 12:31 PM), <https://www.npr.org/2016/03/16/470664561/mcconnell-blocking-supreme-court-nomination-about-a-principle-not-a-person>.

⁵¹ President Barack Obama, Remarks by the President Announcing Judge Merrick Garland as his Nominee to the Supreme Court, (Mar. 16, 2016, 11:04 AM).

⁵² *Id.*

⁵³ *Id.* at ¶ 28.

⁵⁴ Kelly, *supra* note 51, at ¶ 1.

⁵⁵ *Id.* at ¶ 7.

⁵⁶ See The White House, Barack Obama: The 44th President of the United States, <https://www.whitehouse.gov/about-the-white-house/presidents/barack-obama/> (last visited July 5, 2021); see also United States Senate: Party Division, <https://www.senate.gov/history/partydiv.htm> (last visited July 5, 2021).

⁵⁷ Senator Mitch McConnell, Remarks on the Senate Floor Regarding Supreme Court Vacancy (Sept. 21, 2020), (transcript available at <https://www.republicanleader.senate.gov/newsroom/remarks/mcconnell-president-trumps-nominee-for-this-vacancy-will-receive-a-vote-on-the-floor-of-the-senate>).

that they would agree with the advice and consent of the Republican Senate. Thus, the American people have chosen a divided government. By postponing the nomination and confirmation process, the Thurmond rule transfers more power to the voters to show who they would like to fill the vacancy on the High Court.

IV. Recent Application of the Thurmond Rule

This section will take a closer look at the applications of the Thurmond, Biden, and McConnell rules to the vacancies created in 2016 and 2020. While each of these so-called rules hold different purposes based on the circumstances under which they were proposed, each rule had a huge impact on the makeup of the Supreme Court. These rules have guided two of the most controversial Supreme Court nomination processes in the 21st century and they no doubt will continue to do so.

A. 2016 Application

When Justice Antonin Scalia passed away in 2016, it was the first time a Supreme Court vacancy had occurred during a presidential election year in almost 30 years.⁵⁸ Justice Antonin Scalia was the longest serving member of the Court before he passed away. He was a towering Conservative jurist who could be characterized as a strict originalist by any source.⁵⁹ This event stirred much controversy as to what the proper response should be since this was a presidential election year. Senator McConnell immediately stepped up to take charge of the situation. He declared that because of the impending election, the Senate would not hear a nomination from President Obama.⁶⁰ Many other Senators supported McConnell's decision, including all 11 Republican members of the Judiciary Committee.⁶¹ Only two Senators voiced skepticism, but this dissent was inconsequential since the majority of Republicans stood with Senate Majority Leader McConnell.⁶² While Senator McConnell was accused of playing politics, he said, "the decision the Senate made weeks ago remains about a principle, not a person."⁶³ McConnell responded to these accusations and did not hesitate to assert, "We know what would happen if the shoe was on the other foot...A nominee of a Republican president would not be confirmed by a Democratic Senate when the vacancy was created in a presidential election year. That's a fact."⁶⁴ Many Democrats predicted that Senator McConnell would soon back down, but

⁵⁸McMillion, *supra* note 9, at 4.

⁵⁹ Elizabeth Slattery, *The Legacy of Justice Antonin Scalia: Remembering a Conservative Legal Titan's Impact on the Law*, THE HERITAGE FOUND. (Aug. 30, 2016), <https://www.heritage.org/courts/report/the-legacy-justice-antonin-scalia-remembering-conservative-legal-titans-impact-the>; see also The Supreme Court Historical Society, Antonin Scalia 1986 – 2016, <https://supremecourthistory.org/history-of-the-court/timeline-of-the-justices-justice-antonin-scalia-1986-2016/> (last visited July 5, 2021).

⁶⁰ See Kelly, *supra*, note 51 at ¶ 1.

⁶¹ Susan Davis, *Senate Republicans Agree To Block Obama's Supreme Court Nominee*, NPR (Feb. 23, 2016, 6:28 PM), <https://www.npr.org/2016/02/23/467860960/senate-republicans-agree-to-block-obamas-supreme-court-nominee>.

⁶² *Id.* at ¶ 5 and ¶ 6.

⁶³ See Kelly, *supra* note 51, at ¶ 5.

⁶⁴ *Id.* at ¶ 12.

McConnell held his ground, citing both the speech by then-Senator Biden and the historical precedent.⁶⁵

As discussed, in 1992, the Chairman of the Judiciary Committee in the Senate, Joe Biden, gave a speech advocating that should a vacancy be created on the Supreme Court in “throes of election season,” then the President should not make an attempt to fill the spot.⁶⁶ Biden, at that time, not only strongly discouraged this choice but also implied that if President Bush did nominate someone, then Biden would encourage his fellow senators to ignore the nomination.⁶⁷ Senator McConnell referred to this speech in 2016 when speaking to CNN stating, “Joe Biden said in 1992, a presidential election year, had a vacancy existed, [the Democrats] would not have filled it.”⁶⁸

Though Vice President Biden attempted to deny that this was what he meant in his speech,⁶⁹ other senators bolstered McConnell’s choice by speaking out in support. Senator John Cornyn, from Texas, a member of the Judiciary committee voiced his support for McConnell’s choice by saying, “At this critical juncture in our nation’s history, Texans and the American people deserve to have a say in the selection of the next lifetime appointment to the Supreme Court. The only way to empower the American people and ensure they have a voice is for the next President to make the nomination to fill this vacancy.”⁷⁰ Another ally of McConnell’s choice was Senator James Inhofe of Oklahoma, who said, “Sens. Barack Obama, Joe Biden, Hillary Clinton, Chuck Schumer, and Harry Reid have all made statements that the Senate does not have to confirm presidential nominations in an election year. I will oppose this nomination as I firmly believe we must let the people decide the Supreme Court’s future.”⁷¹

Senator McConnell further argued that the historical precedent of a vacancy occurring in the late months of a president’s term has not resulted in a confirmation from a divided legislature and executive branch since President Grover Cleveland was in office.⁷² This precedent is set in order, Senator McConnell and others argue, to allow the American people to have a say in the “ideological makeup of the Court.”⁷³ McConnell’s statements indicated that should the voters elect a Democrat or Republican as president in the upcoming election, then the Senate would go forward with that President’s nomination. Democracy is built on the idea that the people make decisions for the good of the nation, which is why these Senators took the position of delaying the nomination until after the upcoming election. They believed that in order to allow the American people to decide the ideological makeup of the Court, they must wait until after the Presidential election has been decided.

⁶⁵ See Senator McConnell, *supra* note 58, at ¶ 9.

⁶⁶ President Biden, *supra*, note 42.

⁶⁷ *Id.*

⁶⁸ See Senator McConnell, *supra* note 58, at ¶ 9.

⁶⁹ President Joseph Biden, Campaign Speech on SCOTUS Nominations (Sept. 20, 2020), (transcript available at <https://www.rev.com/blog/transcripts/joe-biden-philadelphia-speech-transcript-sept-20-accuses-trump-republicans-of-abuse-of-power-over-scotus>).

⁷⁰ Senator John Cornyn, *Cornyn Statement on Nomination of Judge Merrick Garland to the Supreme Court United States*, (Mar. 16, 2016), <https://www.cornyn.senate.gov/content/cornyn-statement-nomination-judge-merrick-garland-supreme-court>.

⁷¹ Senator James Inhofe, *Inhofe Statement on SCOTUS Nomination* (Mar. 16, 2016), <https://www.inhofe.senate.gov/newsroom/press-releases/inhofe-statement-on-scotus-nomination>.

⁷² See Senator McConnell, *supra* note 58, at ¶ 2.

⁷³ Senator Cornyn, *supra* note 71, at ¶ 3.

Several other Republicans spoke out in support of Senator McConnell's decision such as Speaker of the House, Paul Ryan, and Judiciary Committee Chair, Senator Chuck Grassley.⁷⁴ Speaker Ryan stated, "This has never been about who the nominee is. It is about a basic principle. Under our Constitution, the president has every right to make this nomination, and the Senate has every right not to confirm a nominee."⁷⁵ The Speaker used his statement to push back on the accusation of partisanship in the confirmation process, arguing that the Constitution does not require that the Senate confirm the President's nominee, nor does it demand a hearing or meeting. Instead, the Speaker contended that the Constitution only dictates that the Senate must give its advice and consent. Adding to this position, Senator Grassley said, "Today the President has exercised his constitutional authority. A majority of the Senate has decided to fulfill its constitutional role of advice and consent by withholding support for the nomination during a presidential election year, with millions of votes having been cast in highly charged contests. As Vice President Biden previously said, it's a political cauldron to avoid."⁷⁶ Grassley also referred to the 1992 speech by then-Vice President Joe Biden to cast doubt on the Democrats' arguments of Republican hypocrisy. Senator Grassley went on to state, "A lifetime appointment that could dramatically impact individual freedoms and change the direction of the court for at least a generation is too important to get bogged down in politics. The American people shouldn't be denied a voice."⁷⁷ These statements indicate that Senator Grassley is acutely aware of the power that a seat on the Supreme Court holds and his reason behind his choice to defend Senator McConnell's decision since Senator Grassley understood how it could shape the future of the nation.

B. 2020 Application

The passing of Justice Ruth Bader Ginsberg was shocking to the nation. Justice Ginsberg was a "trailblazer,"⁷⁸ as people describe her, fighting for the rights of many Americans that are considered marginalized or minorities. Her influence on the country's judicial system is certainly "indelible."⁷⁹ While she was advanced in years and battling cancer, she had been reported to have "positive results" with chemotherapy two months before her death.⁸⁰ On a Friday evening in September, less than two months before the Presidential election, the "notorious RBG" passed away.⁸¹ At Justice Ginsburg's passing, Senator McConnell still served as Majority Leader in the

⁷⁴ See Kelly, *supra*, note 51, at ¶ 10, ¶ 11, ¶ 12.

⁷⁵ @SpeakerRyan, TWITTER (Mar 16, 2016 11:43 AM), <https://twitter.com/SpeakerRyan/status/710129379498725376>.

⁷⁶ Senator Chuck Grassley, *Grassley Statement on the President's Nomination of Merrick Garland to the U.S. Supreme Court* (Mar. 16, 2016), <https://www.grassley.senate.gov/news/news-releases/grassley-statement-presidents-nomination-merrick-garland-us-supreme-court>.

⁷⁷ *Id.* at 30.

⁷⁸ Caroline Hendrix, Opinion, *RBG: An American Trailblazer*, THE BUCKNELLIAN, Sept. 23, 2020, <https://bucknellian.net/100773/uncategorized/rbg-an-american-trailblazer/>.

⁷⁹ *Id.* at ¶ 1.

⁸⁰ Adam Liptak, Denise Grady & Carl Hulse, *Ginsburg Says Her Cancer Has Returned, but She's 'Fully Able' to Remain on Court*, N.Y. TIMES (July 18, 2020), <https://www.nytimes.com/2020/07/17/us/justice-ruth-bader-ginsburg-cancer.html>.

⁸¹ Press Release, Sup. Ct. of the U.S., (Sept. 18, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_09-18-20.

Senate, this time with an even broader majority than in 2016 when Justice Scalia passed.⁸² He released a statement, explaining that the Republican Majority would uphold the duty given to them by the American people and the Constitution: “President Trump’s nominee for this vacancy will receive a vote on the floor of the Senate.”⁸³ While many were shocked by this choice based on McConnell’s previous passionate campaign in 2016 to ignore President Barack Obama’s nomination, Senator McConnell explained that his decision was made not based on the time left until the election, as it was several months longer in 2016 than in 2020, but instead it was due to the same party controlling the White House and the Senate.⁸⁴ Senator McConnell strengthened his argument by stating how the minority party was reaping what they have sown by citing the abolishment of the filibuster for district and circuit court judges in 2013 and the subsequent removal of the filibuster for Supreme Court nominees which could have allowed President Trump’s nominee to be blocked from consideration.⁸⁵

Many argued that Senator McConnell was abusing his power to support partisan interests by allowing President Trump’s nominee to receive a hearing when he denied this to President Obama’s nominee.⁸⁶ However, when the Majority Leader took the Senate Floor, he argued that the Senate had more than sufficient time to complete the hearing and confirmation process, citing previous confirmations, including the late Justice Ruth Bader Ginsberg’s confirmation process that took only 42 days.⁸⁷ At this time there were 43 days till election day, indicating that there would be sufficient time.⁸⁸ Also, McConnell argued that this nomination was not the same as the 2016 vacancy. Senator McConnell stated:

Others want to claim this situation is exactly analogous to Justice Scalia’s passing in 2016, and so we should not proceed until January. This is also completely false... Only six prior times in American history had a Supreme Court vacancy arisen in a presidential election year, and the President sent a nomination that year to a Senate of the opposite party. The majority of those times, the outcome was exactly what happened in 2016: No confirmation... Voters had explicitly elected our majority to check and balance the end of his presidency. So we stuck with the historical norm. And by the way, in so doing, our majority did precisely what Democrats had indicated they would do themselves.⁸⁹

⁸² United States Senate, Majority and Minority Leaders, https://www.senate.gov/artandhistory/history/common/briefing/Majority_Minority_Leaders.htm#3 (last visited July 5, 2021).

⁸³ Senator Mitch McConnell, Remarks on the Senate Floor Regarding Supreme Court Vacancy (Sept. 21, 2020), (transcript available at <https://www.republicanleader.senate.gov/newsroom/remarks/mcconnell-president-trumps-nominee-for-this-vacancy-will-receive-a-vote-on-the-floor-of-the-senate>).

⁸⁴ United States Senate: Party Division, <https://www.senate.gov/history/partydiv.htm> (last visited July 5, 2021).

⁸⁵ Thomas Jipping, *5 Years After Going Nuclear, Democrats Have Reaped What They Sowed*, THE HERITAGE FOUND. (Nov. 26, 2018), <https://www.heritage.org/political-process/commentary/5-years-after-going-nuclear-democrats-have-reaped-what-they-sowed>.

⁸⁶ Carl Hulse, *The Shifting Standards of Mitch McConnell*, N.Y. TIMES (May 29, 2019), <https://www.nytimes.com/2019/05/29/us/politics/mitch-mcconnell-supreme-court-trump.htm>.

⁸⁷ PN422 - Ruth Bader Ginsburg - Supreme Court of the United States, <https://www.congress.gov/nomination/103rd-congress/422?pageSort=asc> (last visited July 5, 2021).

⁸⁸ McMillion, *supra* note 9, at 4.

⁸⁹ Senator McConnell, *supra* note 84 at ¶ 18.

The Senator from Kentucky went on to argue that in both 1992, during then-Senator Biden's "unprompted" floor speech, and in 2007, when Senator Schumer said that only under "extraordinary circumstance" would the Majority Democrat Senate confirm a Supreme Court Nominee from Republican President, the precedent of not confirming a Court Nominee under a divided government was strengthened.⁹⁰ Once again, Senator McConnell argued that if the situation was reversed, Democrats would do exactly as he had done in 2016 and would do what he was doing now. Senator McConnell even said, "So in 2016, Senate Republicans did not only maintain the historical norm. We also ran the Biden-Schumer playbook."⁹¹

Furthering his position, Senator McConnell also argued that Democrats had put themselves in this position through the actions of former Senate Majority Leader and then-Senate Minority Leader Harry Reid and Judiciary Committee Member Chuck Schumer in 2013.⁹² After years of a Republican-held Senate blocking judicial nominations through filibusters, Democrats employed what was known as the "nuclear" option.⁹³ This option altered the process to achieve cloture and decreased the number of votes to end debate from a supermajority to a simple majority.⁹⁴ As Senator Orrin Hatch put it, "52 senators made 60 equal 51," referring to the number of votes it took to change the debate rules.⁹⁵ Hatch would go on to explain in an article for the Stanford Law Review, "On November 21, 2013, Senate Majority Leader Harry Reid declared that "unbelievable, unprecedented obstruction" by Republican filibusters had made the confirmation process "completely unworkable."⁹⁶ As a result, he said, "Democrats were forced to eliminate virtually all nomination filibusters."⁹⁷ This change in the rules meant that Senators could no longer filibuster judicial nominations, which would have allowed for Democrats to potentially block the confirmation of President Trump's nominee. Senator Lindsay Graham tweeted, "Harry Reid & Chuck Schumer changed Senate rules to try and stack the courts for Obama. Now it's coming back to haunt them as I predicted."⁹⁸ President Trump even retweeted this to emphasize the effects of the "nuclear" option.

While McConnell's actions were controversial and will likely continue to be debated over the next years, his choice to delay and go-forward with the confirmation processes in 2016 and 2020 respectively subscribe to the historical precedent set by the Thurmond Rule. As the parties were divided late in a presidential election year, just like they were when then-Senator Biden made his floor speech in 1992, McConnell followed suit with his predecessors to put off the nomination and confirmation process of Justice Scalia's successor. However, in 2020, the Senate and White House were unified and therefore, McConnell's decision to proceed was justified based on the Thurmond Rule.

⁹⁰ *Id.* ¶ 26.

⁹¹ *Id.* ¶ 27.

⁹² Senator McConnell, *supra* note 84.

⁹³ Jipping, *supra*, note 86 at ¶ 1.

⁹⁴ *Id.* at ¶ 9.

⁹⁵ Orrin G. Hatch, *How 52 Senators made 60=51*, 25 STAN. L. & POL'Y REV. ONLINE 9, (2014).

⁹⁶ *Id.* at 12.

⁹⁷ *Id.* at 9.

⁹⁸ @LindsayGrahamSC, TWITTER (Sept. 19, 2020, 6:26 PM), <https://twitter.com/LindsayGrahamSC/status/1307446037922148353>.

V. Conclusion

The history of Supreme Court nominations during a Presidential election year support both decisions made by Senator McConnell in 2016 and 2020. These choices were derived partly from the various interpretations of the so-called rule named after Senator Strom Thurmond. The Thurmond rule respects the power of the people and the rights entitled to the voters to shape those who serve in the Senate and White House and by proxy, the people who sit on the Supreme Court. When looking at how to proceed in a controversial situation, a public servant ought to consider not what is in the best interest of their party or themselves, but instead the Constitution's guidelines. A true public servant will look for the best way to uphold the power of the Constitution and therefore the power of democracy. Senator Mitch McConnell championed the power of the people by allowing them to decide in 2016 the direction of the Court and by respecting their decision in 2020 of unified party control in the Senate and White House. Going forward, vacancies on the Supreme Court in presidential election years, should follow the Thurmond rule by adhering to the standard of respecting the parties put in power by the people and by overcoming the cries of partisan hypocrisy in order to uphold the precedent set for public servants as it is the best for the citizens and democracy.