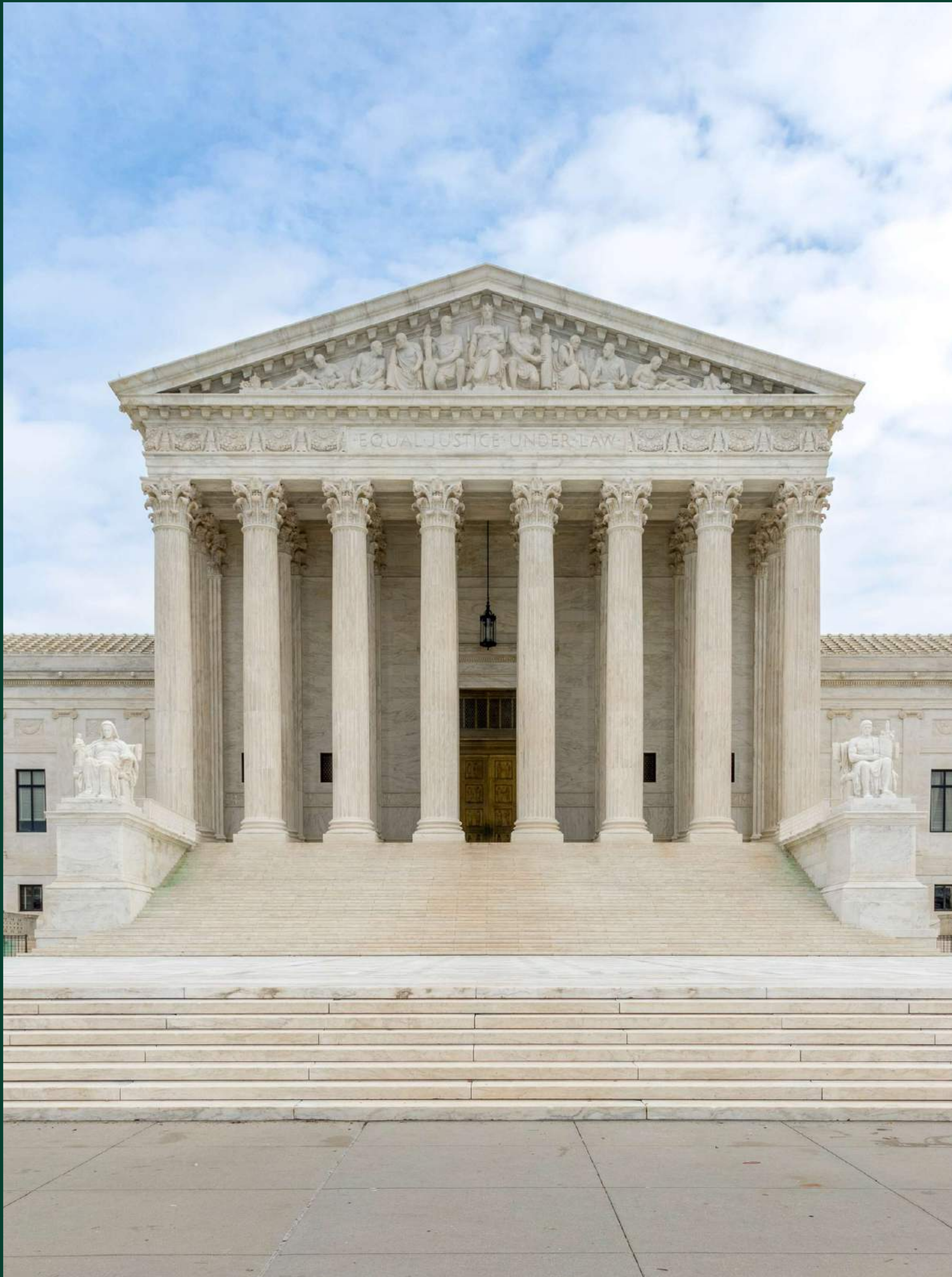


THE NEW CENTER

Policy Paper

Think Centered



The Supreme Court

DEPOLITICIZING THE JUDICIARY

The Supreme Court: Depoliticizing the Judiciary

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ABOUT THE NEW CENTER

American politics is broken, with the far left and far right making it increasingly impossible to govern. This will not change until a vibrant center emerges that can create an agenda that appeals to the vast majority of the American people. This is the mission of The New Center, which aims to establish the intellectual basis for a powerful political center in today's America.

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Executive Summary

When America's founders created the three branches of government, they intended for the judiciary to place a check on the other two branches by remaining above the fray of partisan politics. The duty of the Supreme Court, they believed, was to apply the laws passed by Congress and to resolve specific disputes. To carry out this role as intended, the court's political independence was crucial.

In Federalist 78, Alexander Hamilton wrote, "The complete independence of the courts of justice is peculiarly essential in a limited Constitution... [t]his independence of the judges is equally requisite to guard the Constitution and the rights of individuals from... dangerous innovations in the government, and serious oppressions of the minor party in the community."¹

Over 200 years later, America's judicial branch no longer operates above the political fray. In particular, the Senate nomination process for judges has become just another forum for the extreme partisan combat infecting every facet of our government. During the heated confirmation hearings for Brett Kavanaugh in 2018, Supreme Court Justice Elena Kagan voiced her concern about the future of the institution:

"The court's strength as an institution of American governance depends on people believing it has a certain kind of legitimacy—on people believing it's not simply just an extension of politics, that its decision-making has a kind of integrity to it. If people don't believe that, they have no reason to accept what the court does."²



Citizens should be able to trust the court to provide equal justice under the law no matter who sits on the bench.

But restoring this trust requires structural changes to diminish the incentives for Congressional Democrats and Republicans to declare war with one another each time a Supreme Court vacancy occurs. The New Center believes two ideas in particular could make a difference:

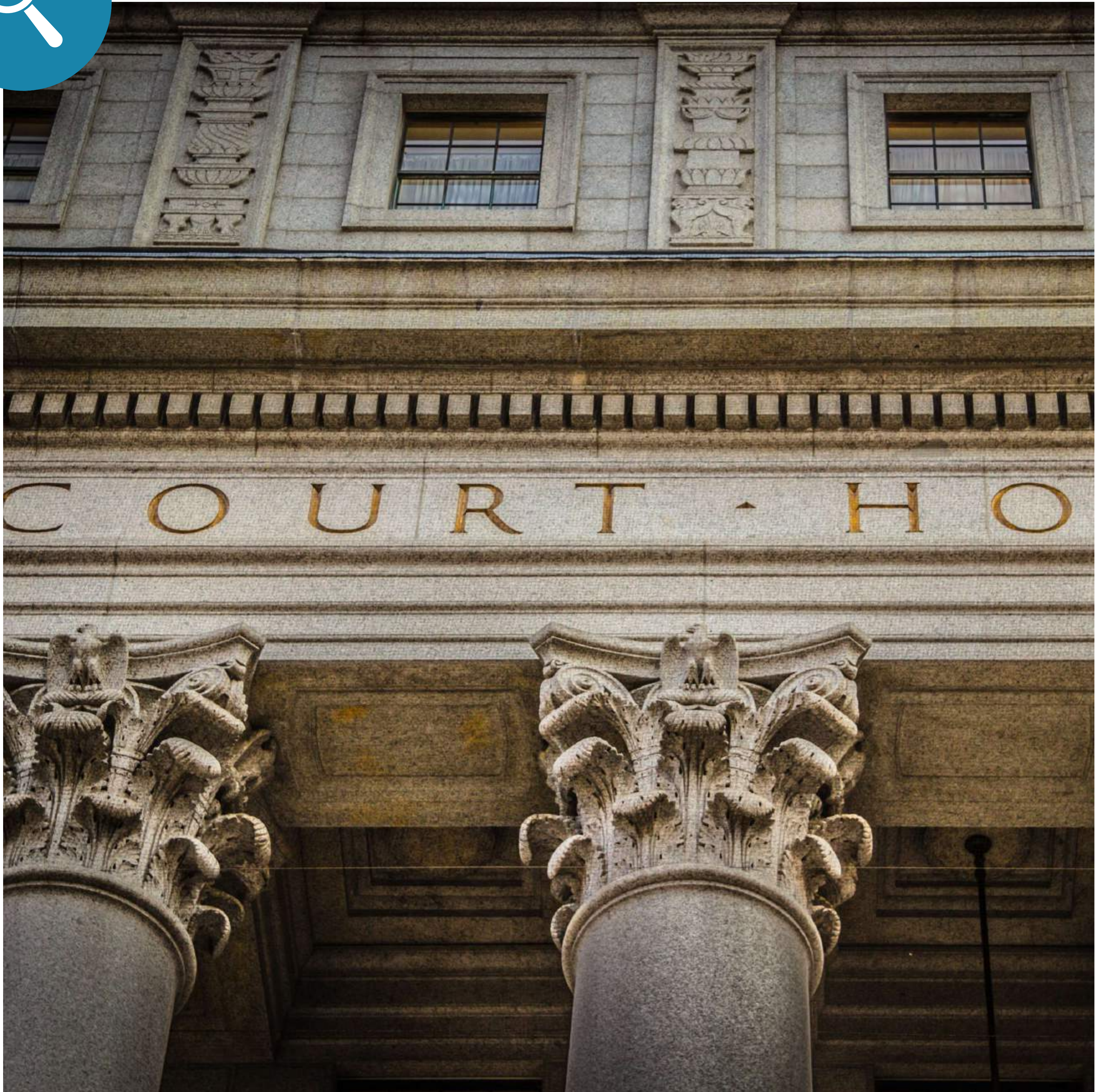


Lowering the stakes of each Supreme Court nomination by limiting justices to 18-year terms



Encouraging the nomination of more moderate judges by raising the cloture threshold to 60 votes when one party controls both the Senate and the presidency





The Problem

Polarization Infects the Judicial Branch

Polarization is on the rise, as evidenced by who the president chooses to serve on the Court, how the confirmation process works, and how the judges rule once they are on the Court.



The Presidential Appointment

Today, more than ever, presidents choose especially ideological nominees. Donald Trump's two nominees (Brett Kavanaugh and Neil Gorsuch) are some of the most conservative on the court and the two current justices appointed by Barack Obama (Sonia Sotomayor and Elena Kagan) are some of the most liberal. Measures of ideology are based on data from the Supreme Court Database—a widely cited archive of data related to each Supreme Court justice and each case decided by the Court from 1791 to present. Scores are calculated by analyzing the perceptions of each nominee in newspaper editorials related to each justice's nomination.⁵ Rather than promising to select the most qualified and objective judges, presidential candidates openly vow to appoint justices who will advance ideological policy agendas:

"The justices that I'm going to appoint will be pro-life. They will have a conservative bent. They will be protecting the Second Amendment."⁶

Donald Trump in the final debate with Hillary Clinton, October 2016

"I will never...nominate any justice to the Supreme Court unless that justice is 100 percent clear he or she will defend Roe v. Wade."⁷

Democratic presidential candidate Bernie Sanders during the first Democratic debate of the 2020 cycle, June 2019

Today, it is easier than ever for a president to choose a qualified nominee who will match his or her ideology. Outside groups on both sides of the political spectrum are tasked with screening potential nominees for ideological purity and producing a “shortlist” from which a president may choose.

The Federalist Society, established in 1982 as a forum for conservative and libertarian law students disillusioned by the liberal teachings of their top-ranked law schools, is now a Washington powerhouse with a monopoly on Republican judicial appointments.⁸ Donald Trump outsourced the selection of his two Supreme Court nominees, Neil Gorsuch and Brett Kavanaugh, to the Federalist Society—something he promised to do in an interview before his election: “We’re going to have great judges, conservative, all picked by Federalist Society.”⁹

Having seen the success of The Federalist Society’s approach, the liberal Alliance for Justice recently announced an analogous initiative called “Building the Bench,” which will provide the next Democratic president with a shortlist of future Supreme Court nominees.¹⁰



PUBLIC OPINION

81% OF AMERICAN VOTERS

believe the confirmation process for Supreme Court justices is “too political.”³

Quinnipiac University, May 2019

62% OF AMERICANS

view the Supreme Court favorably, but the difference between Republicans (75% favorable) and Democrats (49% favorable) is the largest it has been in the past 20 years.⁴

Pew Research Center, August 2019

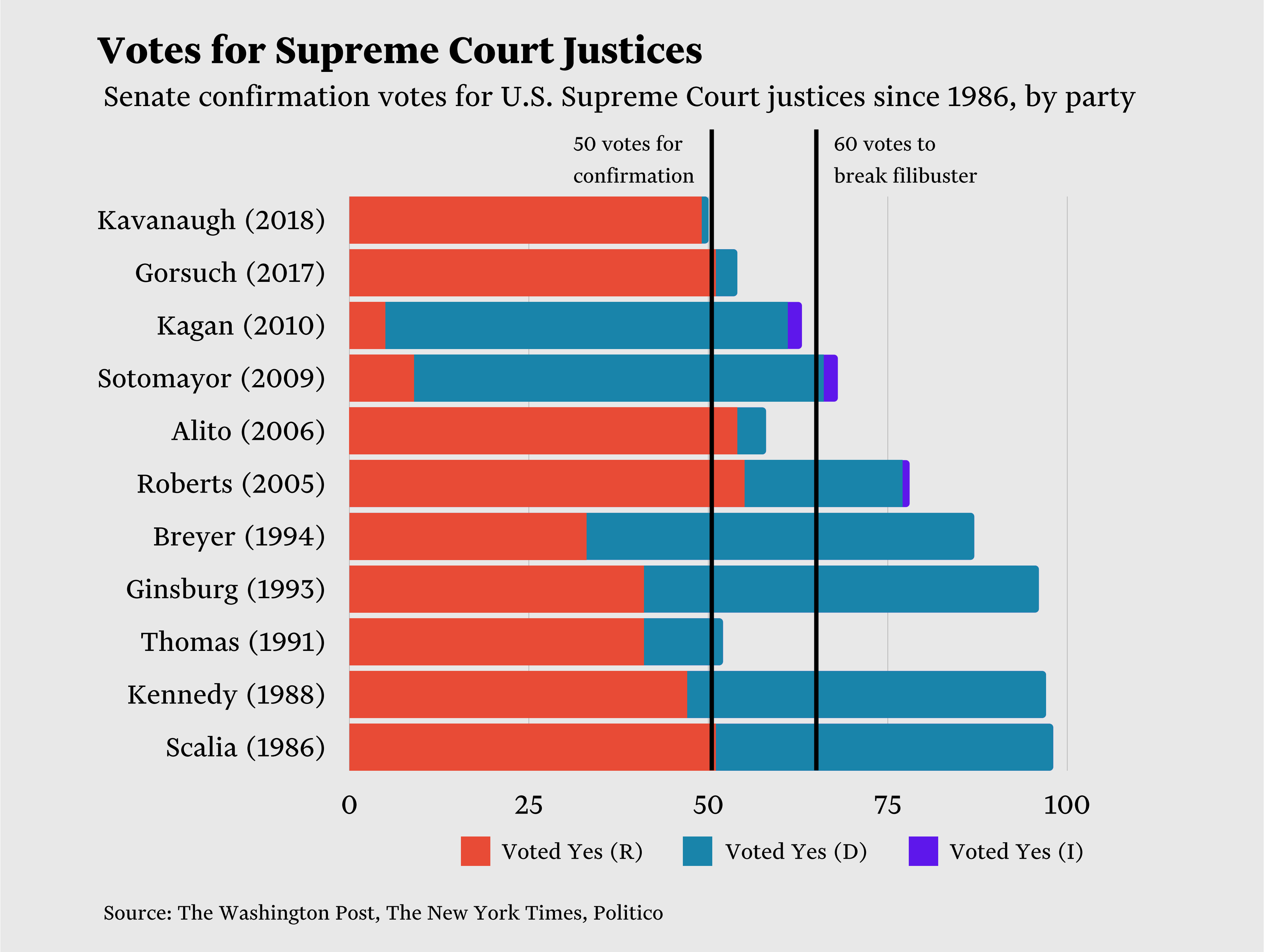


The Senate Confirmation

The Founders granted the Senate the power of “advice and consent” to place a final check on presidential appointments. They intended for senators to evaluate each nominee based on qualifications and judicial temperament.¹¹ In Federalist 76, Alexander Hamilton described the “advice and consent” role of the Senate as “an excellent check upon a spirit of favoritism in the President... [it] would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.”¹²

In the past, the Senate generally respected the president’s discretion in selecting nominees, and a failed confirmation was typically due to flagrant issues related to a nominee’s fitness for the role. In 1986, the reliably conservative Antonin Scalia was unanimously confirmed in a vote of 98-0, and in 1993, the reliably liberal Ruth Bader Ginsburg was confirmed by a 96-3 vote.¹³

Unanimous and near-unanimous confirmation votes like those are relics of the past. The most recent confirmation votes for Neil Gorsuch (54-45) and Brett Kavanaugh (50-48) were among the most contentious in Supreme Court history.



From Routine Votes to Divisive Battles

In the past, a highly qualified Supreme Court nominee nominated by a president of one party was likely to receive “yes” votes even from senators of the other party. Ideology was only a strong predictor of a senator’s vote when a nominee was thought to be less than perfectly qualified.¹⁵

Over the past few decades, though, the norms surrounding Supreme Court nominations have changed. Instead of collaborative processes intended to provide final checks on nominees’ qualifications, today’s Supreme Court vacancies inevitably lead to politically charged confirmation hearing battles. Votes to confirm or deny a nominee split predictably along party lines. Both Republicans and Democrats have shown blatant hypocrisy during these processes, using certain tactics to advance their agendas while in power and later denouncing the other side for doing the same. A few recent examples illustrate this pattern:

The Merrick Garland Nomination

President Barack Obama nominated Merrick Garland, the Chief Judge of the DC Circuit Court of Appeals, to succeed the conservative Antonin Scalia in 2016. Garland was highly qualified; he was the first Supreme Court nominee since Ruth Bader Ginsburg (and Scalia) to receive a perfect qualifications score from the Supreme Court Database.¹⁶ Unlike Ginsburg and Scalia, Garland did not receive strong support from both parties; in fact, the Republican-controlled Senate refused to even consider his nomination for a vote.



Hoping it would allow for an opportunity to fill Scalia's seat with a conservative justice instead, Senate Majority Leader Mitch McConnell argued that, because President Obama was in the last year of his term, the next president should have the opportunity to select a new judge.¹⁷ Three years later, with a Republican president in power, McConnell fielded a question about what would happen if a Supreme Court vacancy were to open up in the final year of the presidential term. In a perfect display of hypocrisy, he replied, "Oh, we'd fill it."¹⁸

The Neil Gorsuch Confirmation

Merrick Garland's nomination expired at the end of the 114th Congress due to the Senate's unprecedented refusal to consider his nomination.

Just weeks later, Donald Trump nominated Neil Gorsuch, a solidly conservative federal judge. Senate Democrats believed that, in allowing Garland's nomination to expire, Republicans had stolen the vacant seat that should have rightfully belonged to Garland.¹⁹ Senate Republicans used McConnell's argument to justify their blockade of a justice who would have shifted the Court further to the left than they would have liked.

Bitter confirmation hearings ensued, and Senate Democrats decided to filibuster the nomination. In response, Republicans invoked the "nuclear option," which changed Senate rules to require just a simple majority to invoke cloture, the procedure that ends a filibuster and forces a final vote.²⁰ The final vote for the highly qualified Gorsuch split almost exactly along party lines, with all Republicans voting in favor of confirmation and all but three Democrats voting against.²¹



Each time the pendulum of power swings from one side to the other, the new majority party can justify using the same type of hardball tactics they faced in the previous cycle. This normalized pattern of partisan retaliation delegitimizes the Senate's status as "the greatest deliberative body in the world" and sends us further down the dangerous path of polarization.

The "Nuclear Option"

Both Democrats and Republicans are guilty of opportunism and hypocrisy when it comes to Congressional rulemaking. Each party has changed the rules to grant the Senate more power while in the majority and opposed such rule changes while in the minority. A prime example of this as it relates to federal court confirmations is known as invoking the "nuclear option." This procedure involves reducing the cloture threshold from a supermajority (60 votes) to a simple majority (51 votes), and each party has used it at their convenience to confirm presidential appointments they favor.²²

- **2013:** Then-Senate Majority Leader Harry Reid, a Democrat from Nevada, invoked the nuclear option for federal judicial nominees with the exception of Supreme Court nominees to facilitate the confirmation of three of President Obama's nominees to the U.S. Court of Appeals for the D.C. Circuit. He and other Senate Democrats rationalized the move, arguing that Republican objections to the nominees were purely partisan rather than substantive.²³ Republicans called the tactic a "power grab," and then-Senate Minority Leader Mitch McConnell (R-KY) issued Democrats a warning: "You'll regret this, and you may regret it a lot sooner than you think."²⁴
- **2017:** When Senate Republicans allowed Barack Obama's nomination of Merrick Garland to expire and Donald Trump nominated Neil Gorsuch to fill Antonin Scalia's seat, Senate Democrats sought to get even and prevent Gorsuch's confirmation with a filibuster. Without the 60 votes necessary to end debate, Majority Leader Mitch McConnell acted on the warning he made in 2013. He changed the rules and triggered the nuclear option for Supreme Court nominees, citing former Majority Leader Reid's 2013 action as precedent.²⁵

Judicial Voting Behavior

Until the 1940s, at least 80% of Supreme Court decisions in most years were unanimous, and 5-4 splits rarely crept over 5%. Since 2000, only 36% of decisions were unanimous while 19% were 5-4.²⁶

While they are on the decline, unanimous decisions are still the most likely Supreme Court results. Some point to this as evidence that the Supreme Court is truly absent of partisan bias.²⁷ However, this argument neglects an important nuance. Some Supreme Court cases involve issues that tap into ideological values while many others do not. First Amendment and criminal procedure cases, for example, involve balancing the values of liberty and law enforcement. There are clearly defined conservative and liberal opinions associated with these issue areas.

In contrast, cases related to judicial power and economic activity are less ideologically charged. Instead, they are likely to present esoteric legal questions and require justices to use their extensive legal knowledge, rather than ideological leanings, to determine the answers.²⁸

A breakdown of the justices' voting patterns by individual issue area provides more meaningful insight.

Using case data from the 2018 Supreme Court database, a regression analysis shows that cases involving criminal procedure, due process, and the First Amendment—all politically charged issue areas—were significantly more likely than others to produce divided votes. Conversely, cases involving interstate relations, judicial power, economic activity, or attorneys were significantly more likely than other types of cases to result in unanimous votes.²⁹

These findings support the idea that Supreme Court justices value consensus until an ideological question is at stake.

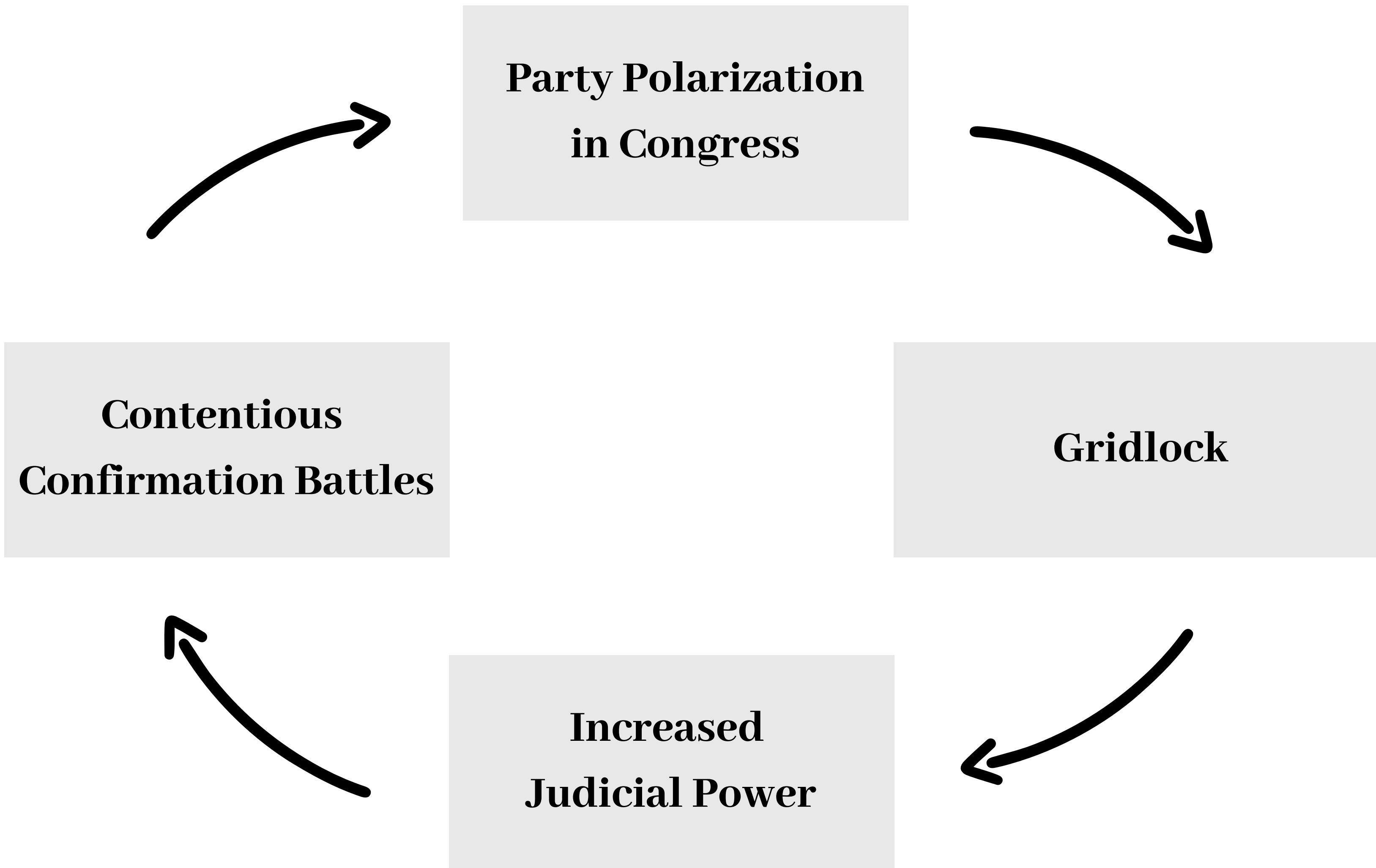


Root Causes

Congressional gridlock has prevented the legislative branch from making progress on difficult issues, so the Supreme Court has had to bear the burden of answering politically polarizing questions.³⁰ During the 2018 confirmation hearings for Brett Kavanaugh, Republican Senator Ben Sasse of Nebraska articulated his beliefs about the politicization of the Supreme Court:

“The people yearn for a place where politics can actually be done. And when we [Congress] don’t do a lot of big, actual political debating here, we transfer it to the Supreme Court. And that’s why the Supreme Court is increasingly a substitute political battleground in America... it’s something that our founders wouldn’t be able to make any sense of.”³¹

The judiciary is stuck in a feedback loop. As polarization in Congress increases, it becomes more difficult for legislators to pass laws. Congressional gridlock gives the judiciary more power to effectively create and interpret laws. Disproportionate judicial power raises the stakes for judicial appointments, which makes for more contentious, party-line confirmation votes. Divisiveness among Senators during confirmation votes feeds back into overall party polarization.



As a result, landmark Supreme Court decisions, rather than congressional legislation, guide federal policy for some of the most polarizing issues we face. A few examples include:

- **Same-sex marriage:** The Defense of Marriage Act (DOMA) was a 1996 law that defined marriage as a “legal union between one man and one woman as husband and wife.” It allowed states to refuse to recognize the legal, same-sex marriages granted in other states.³² Two Supreme Court cases in 2013 and 2015 declared DOMA unconstitutional, and today, same-sex couples in all states can legally marry and receive the same rights as opposite-sex couples.³³
- **Campaign finance:** The Bipartisan Campaign Reform Act of 2002 (BCRA) prohibited corporations and unions from making political expenditures or funding political advertisements within a certain number of days before a primary or general election.³⁴ The 2010 Supreme Court case *Citizens United v. FEC* overturned these provisions of BCRA. Today, independent campaign expenditures and ad funding by corporations and unions are protected forms of free speech.³⁵

Several metrics reveal just how unproductive Congress has been in recent years and foreshadow the judiciary taking on an increasingly prominent policymaking role. A 2018 study by The Washington Post and ProPublica found that the 2008 election of Barack Obama coupled with the rise of the Tea Party movement catalyzed a new era of legislative dysfunction. One of the most striking examples is the increasing amount of time and attention Congress devotes to confirming judicial and executive branch nominees—at the expense of legislating to affect policy change.



During the 110th Congress (2007-2008), only 6% of Senate roll call votes involved appointment confirmations. In the years since, this percentage skyrocketed to 55% during the 115th Congress (2017-2018).³⁶

Yet another example of congressional dysfunction is the way leadership completely excludes rank and file members—particularly those from the minority party—from participation in the legislative process. When a bill comes to the floor of the House of Representatives, the amendment process has historically allowed members not involved in the drafting of the bill to voice their concerns and make changes based on the priorities of their constituents. However, the only time members of the minority party are guaranteed the opportunity to offer amendments is when the bill in question comes to the floor under an “open rule.” Since the end of the 114th Congress in January 2017, not a single bill has come to the floor under open rule.³⁷



Court Packing: Still a Bad Idea

In response to a Supreme Court that has become increasingly conservative over the past few years, several Democratic presidential candidates have expressed their openness to increasing the number of justices on the bench. Presidential candidate and senator Elizabeth Warren (D-MA) has tried to frame the proposal as an institutional reform rather than a political one, arguing, “It’s not just about expansion, it’s about depoliticizing the Supreme Court.”³⁸

In 1937, President Franklin D. Roosevelt, frustrated that the Supreme Court was striking down many of his New Deal reforms, tried to expand the size of the court. Although it was a blatant power grab, FDR tried to sell it as a noble, non-partisan proposal. He presented it as a way to increase efficiency and clear backlogged dockets.³⁹ Roosevelt introduced a plan that would allow him to add a new justice for each existing justice over the age of 70 (there were six) and effectively offset their unfavorable votes.⁴⁰



Members of both parties in Congress vehemently opposed his proposal. According to Marian C. McKenna, author of “Franklin Roosevelt and the Great Constitutional War: The Court-Packing Crisis of 1937,” Roosevelt’s own Vice President stood in the back of the chamber during the reading of the bill, “holding his nose with one hand and vigorously shaking his thumb down with the other.”⁴¹

According to historian Michael Parrish, the court packing scheme “blunted the momentum for additional reforms, divided the New Deal coalition, squandered the political advantage Roosevelt had gained in the 1936 elections, and gave fresh ammunition to those who accused him of dictatorship, tyranny, and fascism.”⁴²

There is no reason to believe an attempt to pack the court would fare any better today than it did in the past.

Especially in today’s political climate, the move would be seen as a blatant power grab. And, like the use of the “nuclear option,” it would reinforce the new norm of payback whenever the balance of power changes. At least one prominent Democrat, Senator and former presidential candidate Cory Booker, recognizes the danger of court packing: “I’m open to these kind of conversations, but I really caution people about doing things that become a tit for tat throughout history.”⁴³



The Solutions

There is no single rule reform or legislation that can depoliticize the Supreme Court. However, two changes could help restore some of the Supreme Court's objectivity and legitimacy by lowering the stakes for each nomination and forcing bipartisanship back into the process.

1.

Impose 18-Year Term Limits for Supreme Court Justices

Supreme Court judges serve lifelong terms because the Founders wanted to insulate them from the pressures of day-to-day politics. They did not want them to be influenced by any political pressure to get reelected or please constituents:

“[Life tenure] is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws... [the judiciary] is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches,” and “nothing can contribute so much to its firmness and independence as permanency in office.”

— Alexander Hamilton,
Federalist No. 78⁴⁵



This made sense at a time when life expectancy and average tenure on the Court were much shorter. For all of the Supreme Court justices who had retired by 1970, the average tenure was about 15 years. Since then, the average tenure has jumped to about 26 years.⁴⁶ The U.S. is the only major democracy in which judges on the highest court serve lifelong terms, and the stakes of judiciary appointments have never been higher.⁴⁷

The opportunity to appoint a Supreme Court justice, if it arises, gives a president the power to shape policy for decades after he or she leaves office. This trend incentivizes modern presidents to choose younger, more ideological judges than they did in the past, leading to the bitter confirmation battles and predictable, party-line votes we have come to know as the norm.

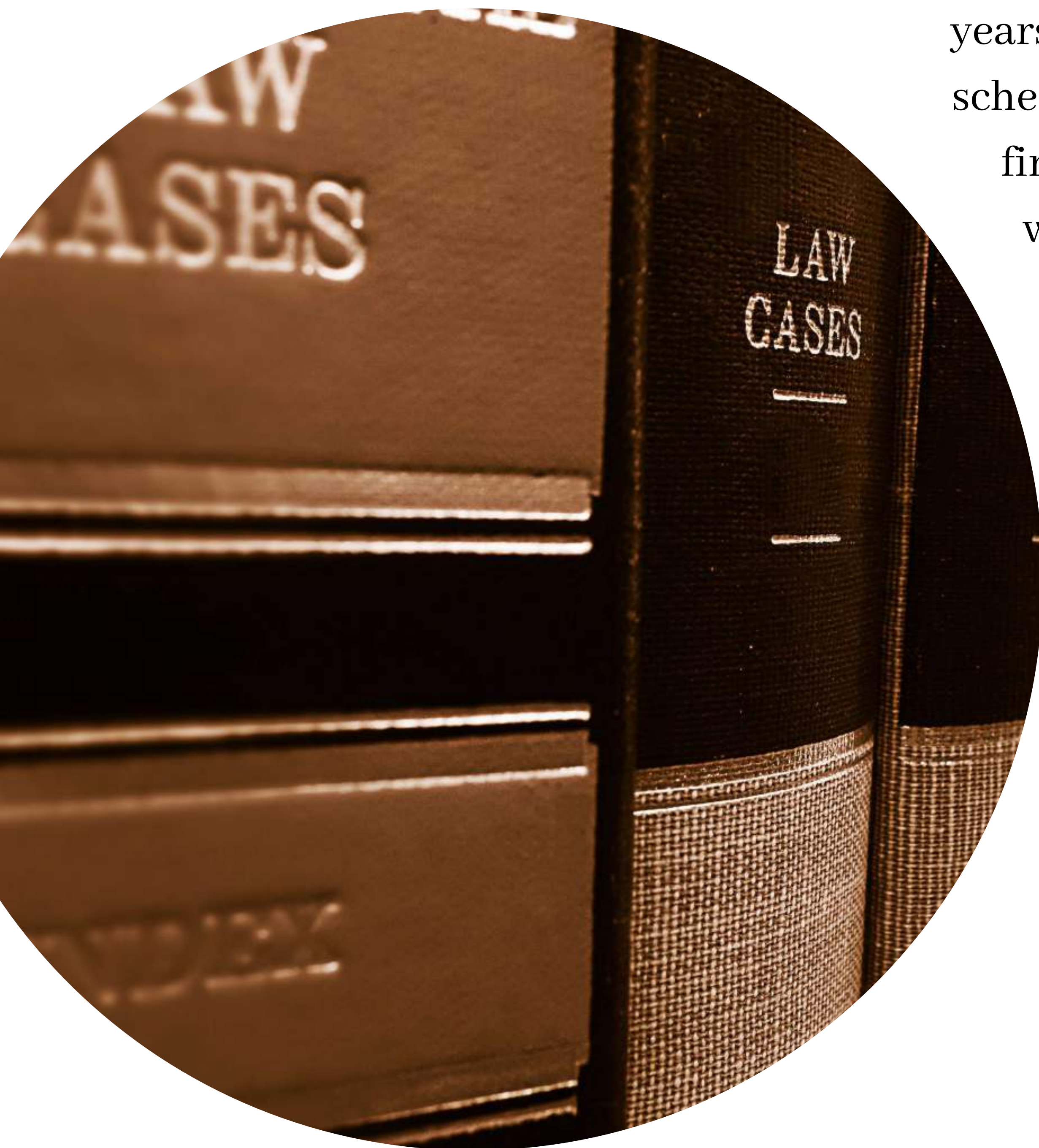


PUBLIC OPINION

70% OF AMERICANS

**believe Supreme Court Justices
should have term limits.⁴⁴**

IPSOS/UVA Center for Politics, July 2018



To remain consistent with the intentions of the Founders and grant judges some autonomy from the other two branches of government and public opinion, they should be allowed a generous, but not lifelong, tenure of 18 years. This would allow for a predictable appointment schedule: a president would appoint one justice in the first year and one in the third year of a term. Judges would not feel pressure to delay retirement until a politically opportune moment arises.

Three current Supreme Court justices—Kagan, Breyer, and Roberts—have all voiced their support for limited, but sufficiently long, tenures.⁴⁸ According to UC Irvine law professor Erwin Chemerinsky,

“Eighteen years is long enough to allow a justice to master the job, but not so long as to risk creating a court that reflects political choices from decades earlier.”⁴⁹

Legislation would have to specify how we would make a smooth transition from our current system of life tenure to a system involving term limits. The transition from the current system could at first involve more than nine justices on the bench at a time, but eventually there would be a consistent, nine-justice Court with a new justice replacing the longest tenured judge every other year.

Several legal scholars and organizations have proposed suggestions for how to implement a system of term limits. Even Steven Calabresi, chairman of The Federalist Society, has suggested the possibility of passing a constitutional amendment to remove the language that grants judges life tenure.⁵⁰ The organization Fix the Court has proposed a reform that would circumvent the constitutional amendment process. They suggest ordinary legislation, as opposed to a constitutional amendment, that would allow judges to retain their life tenure on a federal appeals court after they finish their 18-year terms on the Supreme Court.⁵¹



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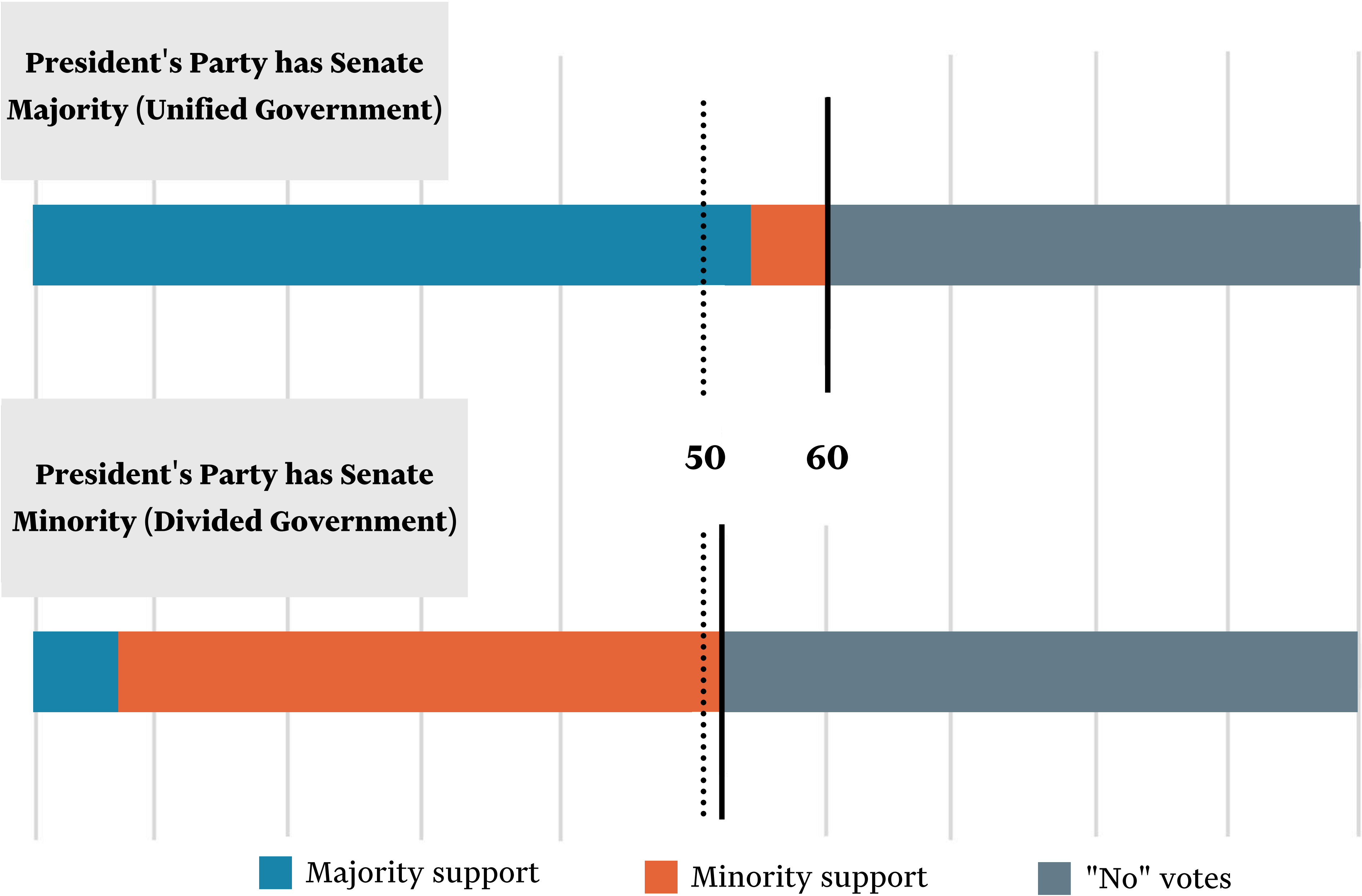
Implement a Cloture Threshold That Alternates with the Balance of Power

When one party controls both the White House and the Senate, a president can be relatively confident that the Senate will vote to end debate and move to a vote (i.e. cloture) on a politically contentious Supreme Court nominee, even if all members of the minority party vote “no.”

Ever since Mitch McConnell changed Senate rules and triggered the “nuclear option” to ensure the confirmation of Neil Gorsuch in 2017, ending debate on a nominee and moving forward to a final vote has only required a simple majority (51 votes).

Between the previous rule (60 votes to confirm) and today's rule (51 votes to confirm), there is a middle ground that would require at least some bipartisan support for any confirmation. Here is how it would work.

If the same party controls the White House and the Senate, 60 votes would be required to invoke cloture and proceed to a vote on a nominee.



Note: Solid Line indicates the cloture threshold, Dotted Line indicates 50% of the Senate

During a period of divided government, however, a 60-vote cloture requirement would allow a filibuster to effectively derail any presidential nomination for the Supreme Court, regardless of the quality of the nominee. So, if the Senate is controlled by one party and the president is a member of the other, the cloture threshold should remain 51 votes. This would give the minority party a realistic chance to end debate and move on to a final vote if the nominee appeals to a handful of senators in the opposing party as well.

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