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# THE NEED FOR AN ESTABLISHED SENATE RULE ON ELECTION-YEAR AND LAME DUCK SESSION SUPREME COURT NOMINATIONS

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By Jacob R. Weaver\*

## Introduction

In 2016, the Republican-held Senate refused to hold a hearing on President Barack Obama's nominee, Merrick Garland, sparking outrage among the Democratic Party.<sup>1</sup> Then-Senate Majority Leader Mitch McConnell justified his party's actions based on what became known as the "McConnell Rule." This controversial rule holds that during years of presidential elections, when the president and the Senate majority are of *different* parties, the Senate is not expected to confirm the president's Supreme Court nominees; but, when the president and Senate majority are of the *same* party, vacancies may be filled.<sup>2</sup>

When the Senate applied this rule in 2020, the stakes were even higher. Revered liberal stalwart Justice Ruth Bader Ginsburg passed away only 46 days before the 2020 presidential election.<sup>3</sup> Invoking the McConnell Rule,<sup>4</sup> the Republican-held Senate moved forward with the confirmation of President Trump's nominee Amy Coney Barrett.<sup>5</sup> This contentious move again infuriated Democrats, and the

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1. Ron Elving, *What Happened with Merrick Garland in 2016 and Why It Matters Now*, NPR (June 29, 2018, 5:00 AM), <https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now>.

2. Press Release, Mitch McConnell, Republican Leader, Senate, McConnell Statement on the Passing of Justice Ruth Bader Ginsburg (Sept. 18, 2020), <https://www.mcconnell.senate.gov/public/index.cfm/pressreleases?ID=825034E2-7DDD-4559-B883-12E434F73B25>.

3. Sahil Kapur, *Ginsburg's Death Throws a Chaotic Presidential Election Year into Greater Turmoil*, NBC NEWS (Apr. 10, 2021, 11:20 PM), <https://www.nbcnews.com/politics/supreme-court/ginsburg-s-death-throws-chaotic-presidential-year-greater-turmoil-n1240510>.

4. John Fritze, et al., *McConnell Says Senate will Vote on Trump's Nominee to Fill Ruth Bader Ginsburg's Supreme Court Seat*, USA TODAY (Sept. 19, 2020), <https://www.msn.com/en-us/news/politics/mcconnell-says-senate-will-vote-on-trumps-nominee-to-fill-ruth-bader-ginsburgs-supreme-court-seat/ar-BB19bYzD?ocid=uxbndlbing>.

5. See Brian Naylor, *Amy Coney Barrett's Supreme Court Confirmation Hearing*, NATL. PUB. RADIO (Oct. 15, 2020, 8:15 AM), <https://www.npr.org/sections/live-amy-coney-barrett-supreme-court-confirmation/2020/10/12/921392600/watch-live-amy-coney-barretts-supreme-court-confirmation-hearing>.

topic of court-packing soon became a central issue for the presidential campaign.<sup>6</sup>

Now that Justice Barrett has been appointed and the presidential election has passed, it is useful to look back on the history of Supreme Court nominations during presidential election years. Such a review suggests that the so-called McConnell Rule is rooted in valid historical precedent. In fact, viewed in light of American history, even a Trump lame duck nomination and confirmation would have been valid.

This blog post argues that the Senate should distill this historical precedent into an explicit Rule of the Senate that will govern the chamber going forward. The rule should obligate the Senate to either (1) hold a vote to confirm the election-year or lame duck nominee, or (2) hold a vote to postpone action on the nomination. If a vote to postpone action on the nomination fails, the rule should then compel the Senate to hold a vote to confirm the nominee. Such a rule removes all doubt about the Senate's authority to act or refuse to act on election-year and lame duck nominees, exposes unfounded threats of retaliation by minority parties, and best conforms to the Constitution.

### *Historical Precedent*

Presidents, including Trump, have made thirty-five nominations during election years (nominations made between January 1 and the election) or lame duck sessions (nominations made between the election and the transition between presidents).<sup>7</sup> In fact, eight presidents have made two or more nominations during such periods, including President Tyler who put forth nine nominees.<sup>8</sup>

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6. See Nicholas Fandos, *Democrats Try to Shut Down Senate, Seeking to Stain Barrett Confirmation*, N.Y. TIMES (Oct. 23, 2020), [www.nytimes.com/2020/10/23/us/politics/democrats-senate-barrett-confirmation.html](https://www.nytimes.com/2020/10/23/us/politics/democrats-senate-barrett-confirmation.html); Barbara Sprunt, *Biden Campaign Continues to Deflect on Court-Packing*, NAT'L PUB. RADIO (Oct. 11, 2020, 6:38 PM), <https://www.npr.org/2020/10/11/922806310/biden-campaign-continues-to-deflect-on-court-packing>; Dan Merica, *Joe Biden and Kamala Harris Don't Want to Talk About Changes to the Supreme Court*, CNN (Sept. 30, 2020, 1:06 PM), <https://www.cnn.com/2020/09/30/politics/joe-biden-court-packing/index.html>.

7. See *Supreme Court Nominations (1789-Present)*, U.S. SENATE (last visited Apr. 14, 2021), <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm>; see *infra* Appendix. Note that this list does not include sitting justices nominated to chief justice during presidential election years or lame duck sessions, of which there are two: William Cushing, who declined the appointment, and Abe Fortas, whose nomination was filibustered and withdrawn. *Id.*

8. Tyler nominated John Spencer twice, Reuben Walworth three times, and Edward King twice. He also nominated Samuel Nelson (the only nominee confirmed) and John Read. See *Supreme Court Nominations*, *supra* note 7; see *infra* Appendix.

But only four presidents—Washington, Jackson, Benjamin Harrison, and Wilson—secured multiple appointments.<sup>9</sup>

Of the thirty-five nominees, the Senate did not confirm sixteen, including eight of President Tyler's candidates.<sup>10</sup> Presidents John Quincy Adams, Fillmore, Buchanan, Hayes, Lyndon Johnson, and Obama also saw their picks founder in the Senate.<sup>11</sup> But not all the members of this distinguished list were rebuffed in the same way. Merrick Garland nominated by Obama, Stanley Matthews nominated by Hayes, and Jeremiah Black nominated by Buchanan are among those who saw their nominations lapse.<sup>12</sup> Additionally, multiple presidents have withdrawn their candidates, and Senate votes to postpone sank the likes of John Crittenden and Edward King.<sup>13</sup> John Spencer, Tyler's pick during the 1844 election year, has the dubious honor of being the only election-year or lame duck nominee to be rejected by a Senate vote.<sup>14</sup>

#### ELECTION-YEAR NOMINATIONS

Eleven of nineteen election-year picks have now been confirmed.<sup>15</sup> If one does not count President Washington's 1796 picks, which occurred in an era of significantly less partisanship, those nominees confirmed and those rejected are nearly even: nine to eight.<sup>16</sup>

Presidents not named Washington who had successful election-year nominations include Jefferson, Cleveland, Benjamin Harrison, Taft, Wilson, Hoover, Franklin Roosevelt, and Trump.<sup>17</sup> Before Amy Coney Barrett's confirmation, the last successful election-year nomination occurred during the 1940 campaign, when Roosevelt

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9. John Adams secured two lame duck confirmations, but there existed only one vacancy. Adams first nominee, John Jay, declined the appointment after the Senate confirmed him. *See Supreme Court Nominations, supra* note 7; *see infra* Appendix. Jay's declination allowed John Adams to nominate John Marshall, whom the Senate confirmed as chief justice on January 20, 1801.

10. *See Supreme Court Nominations, supra* note 7; *see infra* Appendix.

11. *Id.*

12. *Id.*

13. *Id.*

14. Erick Trickey, *The History of 'Stolen' Supreme Court Seats*, SMITHSONIAN MAG. (Mar. 20, 2017, updated Sept. 25, 2020), <https://www.smithsonianmag.com/history/history-stolen-supreme-court-seats-180962589/#:~:text=By%201844%2C%20when%20the%20deaths%20of%20two%20justices,the%20first%20open%20court%20seat%20in%20January%201844>.

15. *See Supreme Court Nominations, supra* note 7; *see infra* Appendix.

16. Samuel Chase, Washington's first election-year nominee, was confirmed with a voice vote. Oliver Ellsworth, Washington's second nominee, was confirmed by a vote of twenty-one to one. *See Supreme Court Nominations, supra* note 7; *see infra* Appendix.

17. *See Supreme Court Nominations, supra* note 7; *see infra* Appendix.

nominated and the Senate confirmed Frank Murphy.<sup>18</sup> Since then, just three election-year nominations have been made—one by Lyndon Johnson in 1968, one by Obama in 2016, and one by Trump in 2020.<sup>19</sup> Both Johnson’s pick and Obama’s pick failed.<sup>20</sup>

Only once has the Senate confirmed an election-year nominee of a president belonging to a different party.<sup>21</sup> This occurred during the 1888 election, when a Republican Senate confirmed Democrat President Cleveland’s nominee, Melville Fuller.<sup>22</sup> As Dan McLaughlin of the National Review noted in his analysis of Supreme Court nominees, the Court’s docket-backlog crisis likely spurred Republicans to concede the pick.<sup>23</sup> The other eight non-Washington election-year picks that saw confirmation were all nominated by a president whose party held a majority in the Senate.<sup>24</sup>

Justice Barrett was the first successful election-year nomination in eighty years.<sup>25</sup> Moreover, her confirmation came the closest ever to election day—just eight days elapsed between her confirmation on October 26, 2020 and the election on November 3, 2020.<sup>26</sup> The abolition of the filibuster for Supreme Court nominees certainly

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18. *Id.*

19. *Id.*

20. *Id.* Unique circumstances sank Johnson’s nominee, Homer Thornberry. In 1968, then-Chief Justice Earl Warren approached Johnson about the possibility of retirement. Bartee Haile, *Bartee Haile: Lyndon Johnson loses Supreme Court fight*, THE COURIER OF MONTGOMERY CNTY. (June 11, 2020, 2:53 PM), <https://www.yourconroenews.com/neighborhood/moco/opinion/article/Bartee-Haile-Lyndon-Johnson-loses-Supreme-Court-15333495.php>. Acting on this request, Johnson nominated Associate Justice Abe Fortas to chief justice, and he nominated Thornberry to fill what would have been Fortas’s vacant associate justice seat. *Id.* But, after ethical concerns were raised about Fortas, Republicans filibustered, forcing Johnson to withdraw Fortas’s nomination. *Id.* Both Warren and Fortas remained on the court, leaving no vacancy for Thornberry to fill. *Id.* Consequently, Johnson was forced to withdraw Thornberry’s nomination. *Id.*

21. Dan McLaughlin, *History Is on the Side of Republicans Filling a Supreme Court Vacancy in 2020*, NAT’L REV (Aug. 7, 2020, 2:48 PM), <https://www.nationalreview.com/2020/08/history-is-on-the-side-of-republicans-filling-a-supreme-court-vacancy-in-2020/>.

22. *Id.* The Senate confirmed Fuller as chief justice by a vote of forty-one to twenty. *See Supreme Court Nominations*, *supra* note 7; *see infra* Appendix.

23. McLaughlin, *supra* note 21.

24. *See id.*; *see infra* Appendix.

25. Robert Verbruggen, *What Mitch McConnell Actually Said in 2016*, NAT’L REV (Sept. 20, 2020, 7:05 PM), <https://www.nationalreview.com/corner/mitch-mcconnell-supreme-court-rule-what-he-said-in-2016/>.

26. Griffin Connolly, *Amy Coney Barrett: Senate Confirms Trump Supreme Court Pick Eight Days Before 2020 Election*, INDEPENDENT (Oct. 28, 2020, 4:53 PM), <https://www.independent.co.uk/news/world/americas/us-politics/amy-coney-barrett-supreme-court-us-election-2020-trump-scotus-b1353835.html>. President Benjamin Harrison’s nominee George Shiras Jr., whom the Senate confirmed 105 days before the 1892 election, formerly held the record. BARRY J. McMILLION, CONG. RSCH. SERV., IN11519, FINAL ACTION BY THE SENATE ON SUPREME COURT NOMINATIONS DURING PRESIDENTIAL ELECTION YEARS (1789-2020) 2 (2020), <https://crsreports.congress.gov/product/pdf/IN/IN11519>.

helped Senator McConnell expedite the confirmation process,<sup>27</sup> but conducting the process in less than a month was a feat, especially considering that the last five nominees took between sixty-six and ninety-two days from nomination to confirmation.<sup>28</sup>

#### LAME DUCK NOMINATIONS

If the Senate failed to confirm Barrett before the election, President Trump and the Republicans could have attempted to fill the seat during the lame duck session. There would have been precedent for this move, as several presidents have nominated candidates during lame duck sessions after elections they or their party lost.<sup>29</sup>

Surprisingly, the Senate has confirmed almost as many lame duck nominees as non-Washington election-year nominees. In fact, the success rate is fifty percent.<sup>30</sup> Eight of sixteen lame duck nominations have succeeded.<sup>31</sup> Federalist John Adams, who lost the 1800 presidential election, saw both John Jay and John Marshall confirmed to the court by the Federalist-held Senate, though John Jay ultimately declined the appointment.<sup>32</sup> The other lame duck presidents to boast successful lame duck nominations include Jackson, Van Buren, Tyler, Hayes, and Benjamin Harrison.<sup>33</sup> Jackson's and Hayes' party won the presidential election, whereas the Adams, Van Buren, Tyler, and Harrison lame duck confirmations came after their party lost the presidential election.<sup>34</sup>

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27. Seung Min Kim, Burgess Everett & Elana Shor, *Senate GOP Goes 'Nuclear' on Supreme Court Filibuster*, POLITICO (Apr. 6, 2017, 8:59 AM), <https://www.politico.com/story/2017/04/senate-neil-gorsuch-nuclear-option-236937>.

28. Jessica Campisi, *Here's How Long It's Taken to Confirm Past Supreme Court Justices*, CNN (Sept. 19, 2020, 8:32 PM), <https://www.cnn.com/2020/09/19/politics/supreme-court-justice-confirmations-timeline/index.html>.

29. See *Supreme Court Nominations*, *supra* note 7; see *infra* Appendix.

30. *Id.*

31. *Id.*

32. *Id.*; *Party Division*, U.S. SENATE (last visited Apr. 14, 2021), <https://www.senate.gov/history/partydiv.htm>. John Jay served as chief justice from September 24, 1789 to his resignation on June 29, 1795. Adams subsequently renominated him as chief justice on December 18, 1800. See *Supreme Court Nominations*, *supra* note 7. But, after the Senate confirmed Jay on December 19, Jay declined the appointment. *Id.* Adams then nominated Marshall to fill the vacancy. *Id.*

33. These successful nominees included William Smith, John Catron, Peter Daniel, Samuel Nelson, William Woods, and Howell Jackson. *Id.*

34. See *Presidential Elections (1789-2020)*, INFOPLEASE (last visited Apr. 14, 2021), <https://www.infoplease.com/us/government/elections/presidential-elections-1789-2020>.

Jackson's nominees filled two newly created seats on the Court. See *Supreme Court Nominations*, *supra* note 7; see *infra* Appendix.

Though most confirmations occurred when the president and the Senate were of the same political party,<sup>35</sup> two—Tyler and Hayes—occurred when the Senate and president were from different parties.<sup>36</sup> Independent President Tyler and the Whig-held Senate were in a unique position to strike a deal, as the Democrats retook both the presidency and the Senate in the 1844 election.<sup>37</sup> In Republican President Hayes' case, his party won the presidency and brought the Senate to a tie in the 1880 election, so the Democrat-held Senate conceded one of Hayes' two lame duck nominations.<sup>38</sup>

All failed nominations, except for a single instance, have one thing in common: The president's party did not control the Senate. The Jackson-leaning Senate postponed John Quincy Adams' pick, John Crittenden, allowing President Jackson to fill the vacancy.<sup>39</sup> Two of Independent President Tyler's picks were withdrawn, and one lapsed.<sup>40</sup> Whig President Fillmore also attempted two lame duck nominations after his election-year pick lapsed, but both failed in the Democrat-held Senate.<sup>41</sup> And, despite his party winning the presidency and tying the Senate, Republican President Hayes could not get his second lame duck nominee, Stanley Matthews, through the Democrat-held Senate.<sup>42</sup> The notable exception is Democrat President Buchanan's pick, Jeremiah Black, who saw his lame duck nomination expire in 1861 after the Democrat-held Senate failed to procure a motion to proceed.<sup>43</sup>

If President Trump had lost the election yet succeeded in having his pick confirmed during the lame duck period, it would be the first instance of a successful lame duck nominee since Howell Jackson in 1893.<sup>44</sup> Such a move would be even more difficult now, as the

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35. See *Party Division*, *supra* note 32; see *infra* Appendix.

36. McLaughlin, *supra* note 21.

37. See *id.*; *Party Division*, *supra* note 32.

38. See *Presidential Elections*, *supra* note 34; *Party Division*, *supra* note 32. Republicans and Democrats each held thirty-seven seats. *Id.* William Mahone, a Readjuster, and David Davis, an independent, held the other two seats. *Id.*; *The Great Senate Deadlock of 1881*, U.S. SENATE (last visited Jan. 13, 2021), [https://www.senate.gov/artandhistory/history/common/briefing/Senate\\_Deadlock\\_1881.htm#:~:text=It%20is%20difficult%20to%20discuss,seven%20Democrats%2C%20and%20two%20independents.](https://www.senate.gov/artandhistory/history/common/briefing/Senate_Deadlock_1881.htm#:~:text=It%20is%20difficult%20to%20discuss,seven%20Democrats%2C%20and%20two%20independents.)

39. See *Supreme Court Nominations*, *supra* note 7; *Party Division*, *supra* note 32; see *infra* Appendix.

40. See *Supreme Court Nominations*, *supra* note 7; see *infra* Appendix.

41. *Id.*

42. See *Supreme Court Nominations*, *supra* note 7; *Composition of Congress, by Political Party, 1855-2017*, INFOPLEASE (last visited Sept. 15, 2020), <https://www.infoplease.com/us/government/legislative-branch/composition-of-congress-by-political-party-1855-2017>; see *infra* Appendix. President Garfield subsequently renominated Matthews, who was confirmed by a vote of twenty-four to twenty-three on May 12, 1881. See *Supreme Court Nominations*, *supra* note 7.

43. See *Supreme Court Nominations*, *supra* note 7; *Composition of Congress*, *supra* note 42; see *infra* Appendix.

44. See *Supreme Court Nominations*, *supra* note 7; see *infra* Appendix.

Twentieth Amendment shortened the lame duck session.<sup>45</sup> Because the Republicans lost the Senate, the confirmation would have had to occur before January 3, 2021 or, if Republicans had kept the Senate, before President Biden's inauguration on January 20, 2021.<sup>46</sup>

### Reform

While the forgoing precedent may justify Mitch McConnell and the Republican's controversial actions both in 2016 and 2020, the Senate should craft a Senate rule that explicitly endorses this historical precedent with a slight variation. Namely, for all election-year and lame duck nominations, the Senate *must* (1) hold a vote to confirm the nominee, or (2) hold a vote to postpone action on the nomination until after the election or the president-elect takes office. Should a vote to postpone fail, the proposed rule would obligate the Senate to hold a vote to confirm the nominee before the election or the inauguration.

Article I, section five, clause two of the Constitution, which allows each house to "determine the Rules of its Proceedings," authorizes the passage of the proposed rule.<sup>47</sup> And the Senate would pass the proposal pursuant to Senate Rule XXII, section 2, which requires an affirmative vote by two-thirds of the senators in order to close debate on "a measure or motion to amend the Senate rules," thus giving the proposal an air of bipartisan support.<sup>48</sup>

The proposed rule would state as follows:

When a vacancy on the Supreme Court occurs during a presidential election year and the president nominates a candidate to fill the vacant seat:

1. The Senate shall, in accordance with other rules of this chamber:
  - a. Hold a vote to confirm the nominee; or,

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45. Edward J. Larson & Jeff Shesol, *Common Interpretation: The Twentieth Amendment*, NAT'L CONST. CTR. (last visited Mar. 19, 2021), <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xx/interps/153>.

46. U.S. CONST. AMEND. XX, § 1; The Associated Press, *Democrats Take US Senate Majority with Ossoff Win in Georgia, Seizing Control of Congress to Pursue Biden Agenda*, ABC NEWS (Jan. 6, 2021, 4:20 PM), [abcnews.go.com/Politics/wireStory/democrats-s-senate-majority-ossoff-win-georgia-seizing-75093724](https://abcnews.go.com/Politics/wireStory/democrats-s-senate-majority-ossoff-win-georgia-seizing-75093724).

47. U.S. CONST. Art. I, § 5, cl. 2.

48. *Rules of the Senate*, U.S. SENATE (last visited Sept. 15, 2020), <https://www.rules.senate.gov/rules-of-the-senate>.



- b. Hold a vote to postpone action on the nomination until the election concludes.
2. Should a vote to postpone action on the nomination fail, the Senate shall hold a vote to confirm the nominee before the election.<sup>49</sup>

When a vacancy on the Supreme Court occurs during a presidential election year and the Senate voted to postpone action on the nomination until after the election or when a vacancy on the Supreme Court occurs during a lame duck session and the president nominates a candidate to fill the vacant seat:

1. The Senate shall, in accordance with other rules of this chamber:
  - a. Hold a vote to confirm the nominee; or,
  - b. Hold a vote to postpone action on the nomination until after the president-elect takes office.
2. Should a vote to postpone action on the nomination fail, the Senate shall hold a vote to confirm the nominee before the president-elect takes office.<sup>50</sup>

This proposal differs from the historical precedent in that it forces the Senate to take action in recognition of the president's nomination: it cannot simply table the nominee indefinitely. But which of the two options the Senate takes remains within the Senate's discretion, maintaining the historical presumption that the Senate will vote to confirm the nominee when the president is of the same party as the Senate majority, and that the Senate will refuse to consider the nomination if the president is of a different party than the Senate Majority.

This rule has several salutary characteristics. First, the rule removes all doubt about the Senate's authority to act or refuse to act on an election-year or lame duck nominee. While only one election-year Supreme Court vacancy occurred between 1940 and 2012, two

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49. The Senate would also want to consider establishing time parameters on this rule, providing the Senate with discretion to take *no action* when a president nominates a candidate within a certain number of days before an election. Such discretion is necessary to prevent an unreasonable application of the rule. For instance, it would be unreasonable to force the Senate to follow these procedures if the president nominated a candidate the day before an election, but the Senate should still be allowed to act in such a case. As historical precedent indicates, an aligned president and Senate can quickly confirm a nominee: The Senate confirmed the average election-year nominee in 24.6 days and the average lame duck nominee in 6.9 days. *See Supreme Court Nominations, supra* note 7.

50. For reasons addressed in *supra* note 49, the Senate would want to consider time parameters on this rule as well, providing the Senate with discretion to take *no action* when a president nominates a candidate within a certain number of days before the inauguration.

have occurred within the last two presidential election years.<sup>51</sup> Instead of rehashing the historical, legal, and policy debate each time such a vacancy occurs, the proposed rule will settle the debate, preventing cries of “constitutional crisis” and lowering the strain on American democracy.<sup>52</sup>

Second, the rule exposes unjustified retaliatory threats by minority parties. As noted, multiple presidents have nominated and Senates have confirmed nominees during election years and lame duck sessions, including lame duck sessions where the majority party lost the presidency, the Senate, or both.<sup>53</sup> When such nominations occur, minority parties often rattle their sabers. For instance, Democrat President Van Buren’s pick, Peter Daniel, whom the Democrat-held Senate confirmed just days before Whig President-Elect Harrison took office, faced intense Whig opposition.<sup>54</sup> There is, however, no historical precedent for major retaliation by minority parties once they have reclaimed the presidency and a Senate majority.

The distillation of historical precedent into a rule will result in an objective standard by which the American public can judge majority actions, regardless of whether Republicans or Democrats invoke the rule. Either the Senate majority followed the rule, or it did not. Thus, only in the case where a majority forsakes the rule can a minority legitimately claim a grievance and in good conscience threaten retaliation.

Finally, the rule conforms to the Constitution. Article II, section two, states that the president “*shall* nominate, and by and with the *Advice and Consent* of the Senate, shall appoint . . . Judges of the Supreme Court.”<sup>55</sup> While this language implies that the president has a constitutional duty to nominate, it does not imply that the Senate has a constitutional duty to consent to the president’s nominee. The language and structure suggest, however, that the Senate must recognize the nomination and take *some* action on the nominee, i.e., provide advice or consent.

The proposed rule permits a president to fulfill his or her constitutional duty to nominate a Supreme Court candidate, and it balances the constitutional requirement of senatorial action with the discretion the Constitution entrusts to the Senate. Specifically,

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51. See *Supreme Court Nominations*, *supra* note 7.

52. See Rebecca Shabad, *Biden: GOP’s Opposition to Merrick Garland Could Lead to “Constitutional Crisis”*, CBS NEWS (Mar. 24, 2016), <https://www.cbsnews.com/news/vice-president-joe-biden-gop-opposition-to-merrick-garland-could-lead-to-constitutional-crisis/>.

53. See *Supreme Court Nominations*, *supra* note 7; see *infra* Appendix.

54. Earl M. Maltz, *Biography Is Destiny: The Case of Justice Peter V. Daniel*, 72 BROOK. L. REV. 199, 202–03 (2006).

55. U.S. CONST. Art. II, § 2 (emphasis added).

requiring a vote to postpone as opposed to indefinitely tabling a nominee forces each senator to take an explicit stance on the nomination—in other words, provide advice. It does not, however, require senators to provide consent. The rule also effectively ends the debate about the constitutional legitimacy of allowing “the people” to have a say in the nomination through the upcoming election. Simply put, the only “say” in the nomination and confirmation of Supreme Court justices that the Constitution grants the people—no matter when a vacancy occurs—is through their currently elected representatives.<sup>56</sup>

#### CONCLUSION

It is time to bury the controversy over election-year and lame duck session Supreme Court nominations and confirmations. History is clear: Presidents who can rally their respective parties for one last vote on a Supreme Court nominee may do so, even near an election or during a lame duck session; and those presidents who send an election-year or lame duck nominee to a Senate held by the opposing party are at the mercy of that Senate. An explicit rule that clearly states that the Senate has the power to either confirm or postpone an election-year or lame duck Supreme Court nominee removes all doubt about the Senate’s authority, exposes unfounded threats of retaliation by minority parties, and best conforms to the Constitution.

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56. See Andrew C. McCarthy, *On Supreme Court Nominations, All That Counts is the Constitution*, NEWSWEEK (Sept. 22, 2020, 7:00 AM), <https://www.newsweek.com/supreme-court-nominations-all-that-counts-constitution-opinion-1533325>.

**APPENDIX: ELECTION YEAR AND LAME DUCK SUPREME COURT NOMINATION INFORMATION**

1. FAILED LAME DUCK NOMINEES

<b>Nomination Date</b>	<b>Nominee<sup>1</sup></b>	<b>President<sup>2</sup></b>	<b>Outgoing President's Party<sup>3</sup></b>	<b>Senate Majority<sup>4</sup></b>	<b>Incoming President's Party<sup>5</sup></b>	<b>Result<sup>6</sup></b>	<b>Additional Information<sup>7</sup></b>
Jan. 26, 1881	Stanley Matthews	Hayes	Republican	Democratic	Republican	No Action	Renominated by Garfield & confirmed by a vote of 24 to 23
Feb. 5, 1861	Jeremiah Black	Buchanan	Democrat	Democratic	Republican	Failed Motion to Proceed	
Feb. 14, 1853	William Micou	Fillmore	Whig	Democratic	Democratic	No Action	
Jan. 3, 1853	George Badger	Fillmore	Whig	Democratic	Democratic	Withdrawn	
Feb. 7, 1845	John Read	Tyler	Independent	Whig	Democratic	No Action	
Dec. 4, 1844	Reuben Walworth	Tyler	Independent	Whig	Democratic	Withdrawn	Nominated three times by Tyler
Dec. 4, 1844	Edward King	Tyler	Independent	Whig	Democratic	Withdrawn	Nominated twice by Tyler
Dec. 17, 1828	John Crittenden	J.Q. Adams	Adams-Clay	Jackson	Jackson	Postponed	

2. SUCCESSFUL LAME DUCK NOMINEES

<b>Nomination Date</b>	<b>Nominee</b>	<b>President</b>	<b>Outgoing President's Party</b>	<b>Senate Majority</b>	<b>Incoming President's Party</b>	<b>Additional Information</b>
Feb. 2, 1893	Howell Jackson	B. Harrison	Republican	Republican	Democratic	
Dec. 15, 1880	William Woods	Hayes	Republican	Democratic	Republican	
Feb. 4, 1845	Samuel Nelson	Tyler	Independent	Whig	Democratic	
Feb. 26, 1841	Peter Daniel	Van Buren	Democratic	Democratic	Whig	
Mar. 3, 1837	John Catron	Jackson	Democratic	Democratic	Jackson	Filled new seat
Mar. 3, 1837	William Smith	Jackson	Democratic	Democratic	Jackson	Filled new seat
Jan. 20, 1801	John Marshall	Adams	Federalist	Federalist	Democratic-Republican	Nominated to chief justice
Dec. 18, 1800	John Jay	Adams	Federalist	Federalist	Democratic-Republican	Nominated to chief justice but declined appointment

1. See *Supreme Court Nominations (1789-Present)*, U.S. SENATE (last visited Apr. 14, 2021), <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm>.  
2. See *Presidential Elections (1789-2020)*, INFOPLEASE (last visited Apr. 14, 2021), <https://www.infoplease.com/us/government/elections/presidential-elections-1789-2020>.  
3. See *Id.*  
4. See *Party Division*, U.S. SENATE (last visited Apr. 14, 2021), <https://www.senate.gov/history/partydiv.htm>.  
5. See *supra* Appendix note 2.  
6. See *supra* Appendix note 1.  
7. See *Id.*

### 3. FAILED ELECTION YEAR NOMINEES

Nomination Date	Nominee	President	Outgoing President's Party	Senate Majority	Presidential Election Results	Result	Additional Information
Mar. 16, 2016	Merrick Garland	Obama	Democratic	Republican	Republican	No Action	
Jun. 26, 1968	Homer Thornberry	L. Johnson	Democratic	Democratic	Republican	Withdrawn	
Aug. 16, 1852	Edward Bradford	Fillmore	Whig	Democratic	Democratic	No Action	
Jun. 17, 1844	John Spencer (II)	Tyler	Independent	Whig	Democratic	Withdrawn	Nominated twice by Tyler
Jun. 17, 1844	Reuben Walworth (II)	Tyler	Independent	Whig	Democratic	No Action	Nominated three times by Tyler
Jun. 5, 1844	Edward King	Tyler	Independent	Whig	Democratic	Postponed	Nominated twice by Tyler
Mar. 13, 1844	Reuben Walworth (I)	Tyler	Independent	Whig	Democratic	Withdrawn	Nominated three times by Tyler
Jan. 8, 1844	John Spencer (I)	Tyler	Independent	Whig	Democratic	Rejected	Nominated twice by Tyler

### 4. SUCCESSFUL ELECTION YEAR NOMINEES

Nomination Date	Nominee	President	Outgoing President's Party	Senate Majority	Presidential Election Results	Additional Information
Oct. 26, 2020	Amy Coney Barrett	Trump	Republican	Republican	Democratic	
Jan. 4, 1940	Frank Murphy	F.D. Roosevelt	Democratic	Democratic	Democratic (Re-elected)	
Feb. 15, 1932	Benjamin Cardozo	Hoover	Republican	Republican	Democratic	
Jul. 14, 1916	John Clarke	Wilson	Democratic	Democratic	Democratic (Re-elected)	
Jan. 28, 1916	Louis Brandeis	Wilson	Democratic	Democratic	Democratic (Re-elected)	
Feb. 19, 1912	Mahlon Pitney	Taft	Republican	Republican	Democratic	
Jul. 19, 1892	George Shiras Jr.	B. Harrison	Republican	Republican	Democratic	
Apr. 30, 1888	Melville Fuller	Cleveland	Democratic	Republican	Republican	Nominated to chief justice
Mar. 22, 1804	William Johnson	Jefferson	Democratic-Republican	Democratic-Republican	Democratic-Republican (Re-elected)	
Mar. 3, 1796	Oliver Ellsworth	Washington	None	None	Federalist	Nominated to chief justice
Jan. 26, 1796	Samuel Chase	Washington	None	None	Federalist	

5. TOTALS

	Successful	Failed	Total
Lame Duck	8	8	16
Election	11	8	19
Total	19	16	35