

[Witty RPS/RBG Title]  
Gus Lipkin  
Florida Polytechnic University

## Introduction

In elementary school, we are all taught that three branches of the federal government have checks and balances so that one branch never gains too much power. For almost 250 years, this system has functioned reasonably well with some minor power struggles and disagreements here and there, but no branch has managed to battle the other two and definitively come out on top. Even with the passing of Supreme Court Justice Ruth Bader Ginsburg, the Supreme Court will hold the same amount of power that it did before her passing. The issue right now is not that one branch has more power than another, but that the same people are in power in both the Executive and Legislative branches and stand a lot to gain by installing a new justice with whom they share a common lack of values and integrity. By applying game theory to the Supreme Court nomination process, we can learn where the system is failing and explore possible ways to improve it.

## Background

Since the Circuit Judges Act of 1869, the United States Supreme Court has held space for one Chief Justice and eight Associate Justices (*Circuit Judges Act*, n.d.). When a vacancy in the Supreme Court opens, either by the death of a justice or their retirement, the President nominates a candidate who then goes before the Senate Judiciary Committee (Nguyen, 2015). If the committee approves of the nomination, they send their recommendation to the full Senate where the Senate then debates and ultimately decides the nomination with the Vice President stepping in as a tiebreaker (Nguyen, 2015). In order to properly understand the situation that Ruth Bader Ginsburg's passing creates, we must first understand the last time a Supreme Court Justice passed before retiring.

In February of 2016, just nine months before the presidential election in November and almost a full year before President Barack Obama's successor would take power, Justice Antonin Scalia passed away (Elving, 2018). Within hours of Justice Scalia's passing, Senate Majority Leader Mitch McConnell announced that the Republican senate would block the nomination of Merrick Garland because nine months was too close to the election of the next President (Elving, 2018). McConnell then removed one of the last tools available to Senators that would allow them to block a nomination vote by speaking until the vote could no longer be held, known as a filibuster (Elving, 2018). This allowed the seat to remain vacant until after the next President, Donald Trump, was elected.

Having already nominated Justices Neil Gorsuch and Brett Kavanaugh to the Supreme Court, President Donald Trump has the opportunity to nominate a third

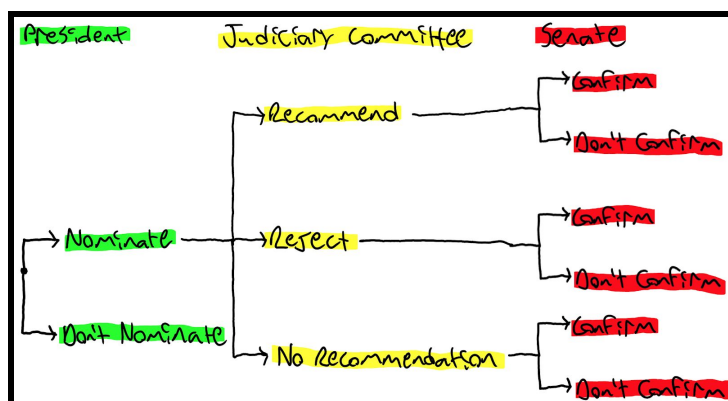
Justice by the end of his first term (*Complete List of Donald Trump's Potential Nominees to the U.S. Supreme Court*, n.d.). Once again, within hours of a Supreme Court Justice's passing, Senate Majority Leader Mitch McConnell made an announcement on the nomination of a new Justice: "President Trump's nominee will receive a vote on the floor of the United States Senate" (Cochrane, 2020) & (Gambino, 2020)). This is an extreme reversal of his announcement in 2016 that because it is an election year, the President should not be able to nominate anyone to the Supreme Court (Elving, 2018).

### Description of the Games

Ideally, the nomination of a new Supreme Court Justice could be represented by the following extensive form game:

**Figure 1**

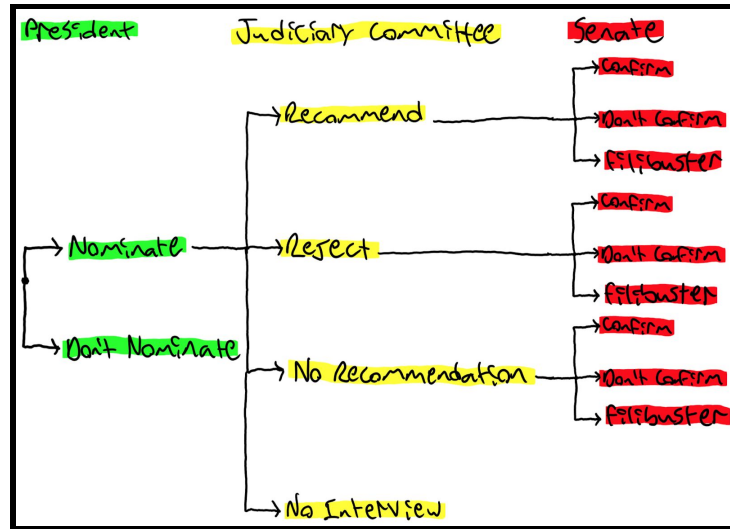
*Extensive Form game representing the normal Supreme Court Nomination Process*



While a President could choose not to nominate a Justice, the game only ends until the next President chooses to nominate a Justice. Once a President does nominate, the game does not end until the Senate either confirms or denies the nominee. However, if the Senate is unwilling to cooperate with the President or believes that the President should not be allowed to make that nomination, they are able to change the way the game is played and add more moves that they can make. The changed game gives the Judiciary Committee and the Senate a new move each. The former can choose to ignore the nomination and to not interview any nominees that the President puts forth while the latter can choose not to vote on the nominee regardless of the recommendation put forth by the Judiciary Committee.

**Figure 2**

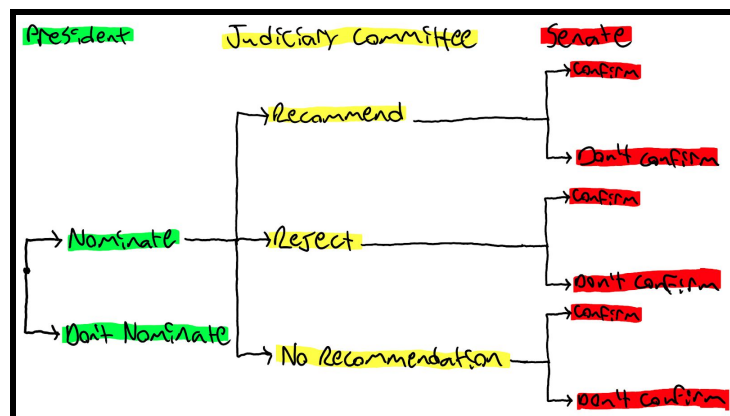
*Extensive Form game representing the Supreme Court Nomination Process for Merrick Garland*



In the game representing the nomination of Merrick Garland in 2016, the Republican controlled Judiciary Committee gave themselves a new move. By refusing to interview a nominee, they could effectively end the game. In reality, the game then returns to the President until they nominate someone new that the Judiciary Committee will interview or until a new President is sworn in and nominates someone new that the committee will approve of (Elving, 2018). Had Merrick Garland been interviewed by the Judiciary Committee, the Senate Republicans could have then filibustered as a way to block a vote because the Senate Democrats did not have enough members to force a vote (Elving, 2018).

**Figure 3**

*Extensive Form game representing the current Supreme Court nomination process*



While filibuster is still an option in the current Supreme Court nomination process, it has effectively been eliminated by changing the cloture rules, the rules that allow the senate to vote to end a debate, so that only a simple majority of fifty-one votes is needed (Smith, 2017). Because the Republicans control fifty-three of the 100

total Senate seats, they have the simple majority that they need to end any Democratic attempt at filibuster (Snell, 2018). Of the fifty-three Republican Senators, eleven are on the Judiciary Committee which has twenty-one total seats (*Members*, n.d.). This means that they can force any nominee through the committee and refusing to interview the nominee is no longer an option.

The current Supreme Court nomination process is relatively fair in a well-balanced government. However, because Senate Republicans have put their loyalty to the President over their loyalty to what few values they may have, the game is no longer balanced. No matter who the President nominates, the Judiciary Committee will interview them because the Democrats do not have the majority they need to refuse to interview them. Then, regardless of the recommendation the committee makes, the nominee goes before the full senate to either be confirmed or not confirmed. A filibuster from the Democrats is no longer an option because the Republicans only need fifty-one votes to end debate and control fifty-three seats and only two Republican Senators have said they would not vote for the nominee (Molly Reynolds, 2020). This leaves exactly the number of votes needed to confirm the new Justice (Smith, 2017). Nevertheless, Democrats press on and are trying to find ways to stall the Senate so that they cannot vote on the nominee (Molly Reynolds, 2020). One such tactic would be for the House to impeach Attorney General Bill Barr or President Trump because impeachment proceedings take precedent in the Senate (Molly Reynolds, 2020). But this is unlikely to work because impeachments require fifty-one votes as well, which the Republicans have ((Snell, 2018 & Molly Reynolds, 2020)).

### **How to Balance the Game**

Regardless of whether or not the Republicans or Democrats control the Presidency, Senate, and House, this is an unfair game and must be balanced for democracy to continue to function. This is extremely difficult. Do you change the game in its current form or create a new game? If you create a new game, how do you ensure it does not become imbalanced like the current one? Who is chosen to design the game? In my opinion, the ideal solution would be to put the confirmation vote in the hands of the people but this still leaves the position vulnerable to poor decisions by voters.

If voters were presented with a shortlist of candidates from the President and the current first past the post system was used, there would be no mechanism to vote against someone. If the President were to release a list of too many nominees, the Associate Justice position could be won with a very small portion of the vote such as

when Jake Auchincloss won House seat MA-4 with only 22.41% of the vote (Newsroom, 2020).

Because the Judiciary Committee does not hold true power in the game besides refusing to interview the nominee, there is no substantial change that could be made at this point in the game. This leaves the Senate as a whole as the next step at which changes could be made, but there are issues that arise similar to those if the general population were to vote. So long as the President is the only one able to nominate candidates, the senate can only vote against the nominees and never put forward a candidate themselves. Even so, this leaves the nominee vulnerable to a blanket no vote from the opposing party so long as that party has fifty-one or more members.

It appears that without changing its entire structure, there is little room to balance the nomination process. As the hit movie *War Games* taught, sometimes the only way to win is to not play. While we have to nominate Supreme Court Justices, maybe we can play a different game that will allow us to influence the nomination process. By first instituting eighteen year term limits for Supreme Court Justices, each President would be able to appoint a Justice in the first and third year of each four year term (Newsroom, 2020). This creates a gap if there is a vacancy on the bench. To fill the gap, any retired Supreme Court Justice could be brought back in the order of retirement until it is time to appoint a new Justice (Newsroom, 2020). While these changes do not guarantee a certain quality of Justice appointed to the Supreme Court, it does provide a mechanism for Justices who become unpopular to have a set retirement date.

## **Conclusion**

By studying the current and past nomination processes as games using game theory, we come to understand where the system is failing. We understand that something must change, but creating a new system by which a Supreme Court Justice is nominated is a daunting task. It must maintain the balance of power in the federal government and must be appealing to people of all political ideologies. Unfortunately, while there are people in power who have abandoned their duty to the people and have no moral compass, they will always seek to better themselves before the people and that means confirming Justices that are not qualified and unable to separate church and state.

## Bibliography

- Circuit Judges Act*. (n.d.). Retrieved September 24, 2020, from <https://www.fjc.gov/history/timeline/circuit-judges-act>
- Cochrane, E. (2020, September 19). How Mitch McConnell Can Quickly Push Through Trump's Supreme Court Nominee. *The New York Times*.  
<https://www.nytimes.com/2020/09/19/us/politics/mitch-mcconnell-trump-supreme-court.html>
- Complete list of Donald Trump's potential nominees to the U.S. Supreme Court*. (n.d.). Retrieved September 24, 2020, from [https://ballotpedia.org/Complete\\_list\\_of\\_Donald\\_Trump%27s\\_potential\\_nominees\\_to\\_the\\_U.S.\\_Supreme\\_Court](https://ballotpedia.org/Complete_list_of_Donald_Trump%27s_potential_nominees_to_the_U.S._Supreme_Court)
- Elving, R. (2018, June 29). *What Happened With Merrick Garland In 2016 And Why It Matters Now*. NPR.  
<https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now>
- Gambino, L. (2020, September 19). *Mitch McConnell vows US Senate will push on with Trump's pick to replace Ginsburg*.  
<http://www.theguardian.com/us-news/2020/sep/19/mitch-mcconnell-vows-us-senate-will-push-on-with-trumps-pick-to-replace-ginsburg>
- Members*. (n.d.). Retrieved September 24, 2020, from <https://www.judiciary.senate.gov/about/members>
- Molly Reynolds, B. W. (2020, September 22). *Can Democrats Stop the Nomination?*  
<https://www.theatlantic.com/ideas/archive/2020/09/questions-watch-senate/616428/>
- Newsroom, W. (2020, September 1). *Live Election Results: 2020 Mass. Senate, Contested Congressional District Primaries*. WBUR.  
<https://www.wbur.org/news/2020/09/01/massachusetts-senate-congress-primary-race-results>
- Nguyen, T. (2015). *Guides: Supreme Court Nominations Research Guide: Nomination & Confirmation Process*. <https://guides.ll.georgetown.edu/c.php?g=365722&p=2471070>
- Smith, A. (2017, April 6). *SENATE GOES NUCLEAR: McConnell kills the filibuster for Supreme Court nominees to get Trump's court pick over the top*. Business Insider.  
<https://www.businessinsider.com/nuclear-option-gorsuch-filibuster-senate-2017-4>
- Snell, K. (2018, November 6). *Election Results Give Split Decision: Democrats Win House & GOP Keeps Senate Majority*. NPR.  
<https://www.npr.org/2018/11/06/664506915/republicans-keep-senate-majority-as-democrats-make-gains-in-the-house>