

[Witty RPS/RBG Title]
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Part I

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 by refusing to interview him because nine months was too close to the election of the next President (Elving, 2018). This allowed the seat to remain vacant until after the next President, Donald Trump, was elected. McConnell later eliminated the filibuster which would have allowed senators to block future nominees (Elving, 2018).

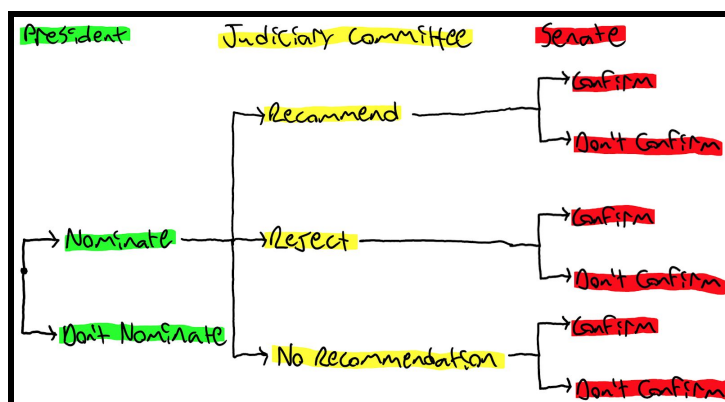
Having already nominated Justices Neil Gorsuch and Brett Kavanaugh to the Supreme Court, President Donald Trump has the opportunity to nominate a third Justice by the end of his first term (*Complete List of Donald Trump's Potential Nominees to the U.S. Supreme Court*, n.d.). Once again, within hours 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

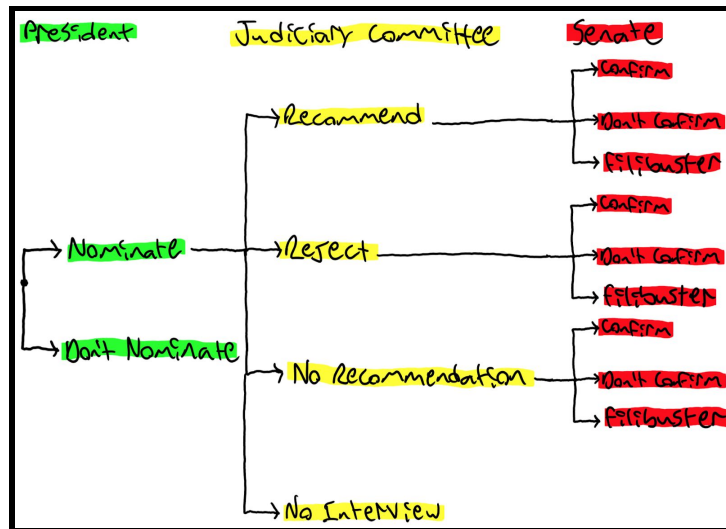
Extensive Form game representing the normal Supreme Court Nomination Process



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

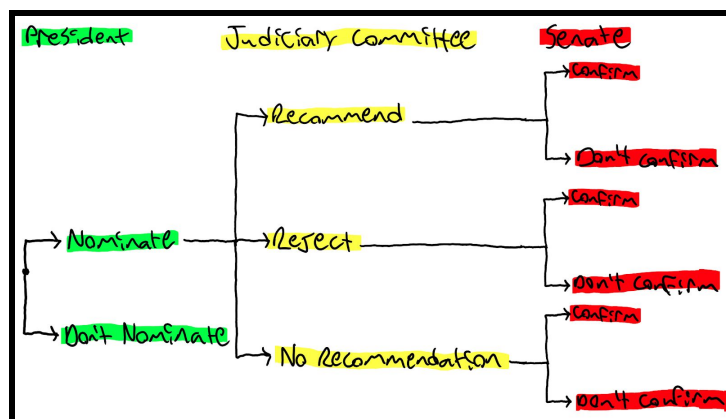
Extensive Form game representing the Supreme Court Nomination Process for Merrick Garland



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). An attempted lawsuit to force the Judiciary Committee to interview Garland was thrown out by a federal judge (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 the Republicans can force any nominee through the committee and refusing to interview the nominee is not possible for the Democrats.

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 besides flipping the majority in the committee between the Democrat and Republican parties. 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.

Author's note

Some parts of the original paper have been revised before the writing of Part II. The changes are minor and serve only to clarify the original language and any processes that may have been glossed over have some detail added.

Part II

Introduction

A lot has happened since the Part I of this series was written. One republican senator voted for Amy Coney Barrett after saying they would not, Amy Coney Barrett was confirmed and sworn in to the Supreme Court, and Mitch McConnell sent the Senate on break until November 9, without voting on a Coronavirus relief bill (Kim, 2020), (Johnson, n.d.). It would be easy to say that the game is over and therefore no longer worth consideration, but, as with any human institution, especially those where the term limits are defined by one's lifespan, there will come a time where the Supreme Court has another opening and it is important to make sure that the nomination process is not tampered with again.

Breaking Down the Initial Problem and Where I Went Wrong

When originally defining the problem, I tried to stay away from singling out the Democrats or Republicans as the players in the game while instead defining the players as the separate bodies involved in the process. This mischaracterizes the problem. The game is stable when examined at a process level. The President nominates a Justice, the Judiciary Committee interviews and chooses whether or not they want to recommend the candidate to the full Senate, and then the Senate confirms or does not confirm the candidate. However, the game quickly falls apart because the President and Senators are people and some are lizard people with no respect for human beings. But I digress. When the earlier described games are broken down to the personal level and party affiliations are noted, it becomes clear that one party follows the respected norms and the other party says "fuck your feelings" and does not respect the social norms (Wilson, 2020). These social norms were never written into law because in the past, people respected them and therefore never needed to write them down.

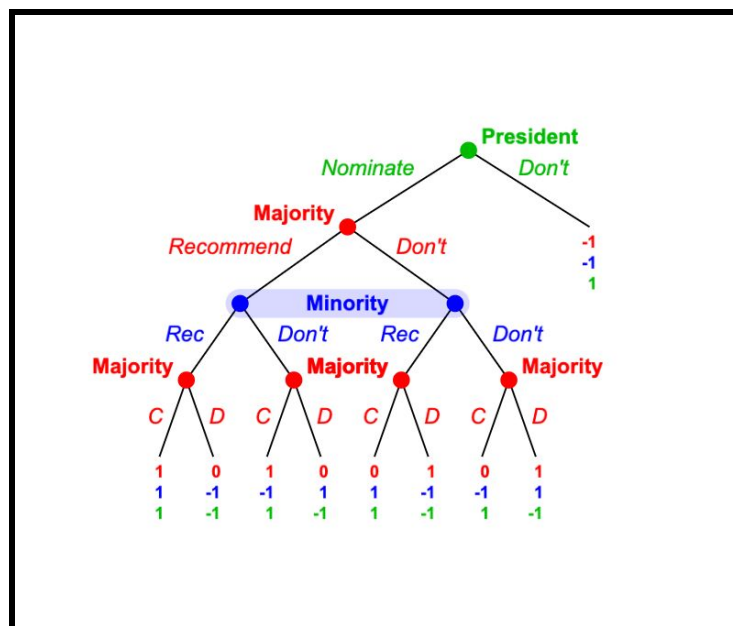
A Re-evaluation of the Game

When these norms are respected, the President nominates someone who is appropriately qualified for the position. The Judiciary Committee then interviews them and recommends or does not recommend them based on their qualifications and other parameters, and then the Senate votes to confirm them based again on their qualifications. The New York City Bar Association found her to be academically qualified to serve as a Supreme Court Justice but found her wanting on criteria which evaluated maturity, integrity and independence, temperament, and the court's role in protecting individual freedoms (*Reservations on Judge Amy Coney Barrett's Qualifications for Supreme Court*, n.d.).

When appropriate social norms are followed, the game presents as it does in [Figure 1](#). When norms are not observed. The game changes significantly and presents as the following figure.

Figure 4

Extensive form game representing a nomination process where social norms are followed when the Judiciary Committee and Senate majority parties match.



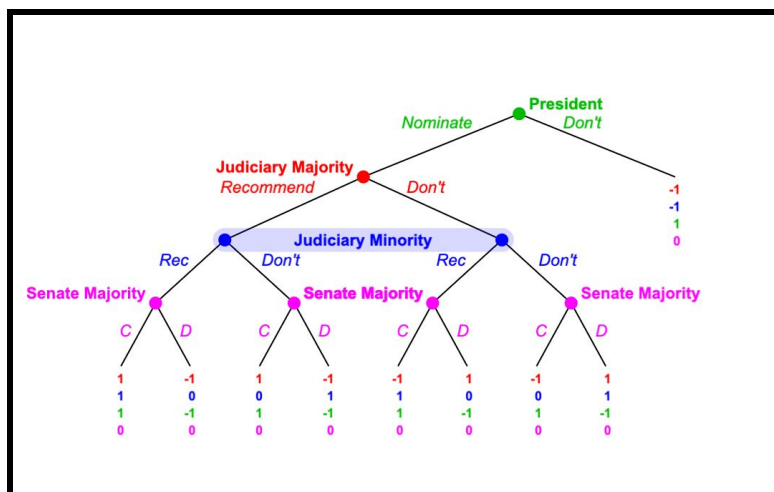
The second and third levels represent the Judiciary Committee. C and D on the fourth level represent the Senate's ability to Confirm or Deny a nomination.

Six assumptions were made in designing this game to ensure that proper social norms are properly demonstrated. First, everyone wants to nominate a new justice with the possible exception of the President. The possibility of the President not nominating a new Justice is extremely low. Second, the majority party is the same between the Judiciary Committee and full Senate. Third, payoffs for the general public are aligned

with those of their party. Fourth, if the majority party is in disagreement at any point in the process, their payoff is zero regardless of whether or not the Justice is confirmed. Fifth, while the minority party in the Judiciary Committee ultimately does not have any effect on the progress of the game assuming Senators vote on party lines at that stage, individual Senators in the majority for the full Senate may take into account those minority opinions and ultimately decide to cross the aisle and vote against their party's candidate. Sixth, if the Judiciary Committee majority and full Senate majority parties do not match, the game in [Figure 5](#) is used instead. Finally, one acknowledgement must be made. Payoff values are not as cut and dry as they are laid out to be. In [Figure 4](#) and [Figure 5](#), the payoffs correspond to a general level of satisfaction for that party.

Figure 5

Extensive form game representing a nomination process where social norms are followed when the Judiciary Committee and Senate majority parties do not match.



The pink player has been added to make it easier to differentiate between parties. The blue and pink players are from the same party and share blue's payoffs. The payoffs listed for pink are irrelevant and are only there because the program forces them to be there.

Because only fifty-one votes are needed to confirm a Supreme Court Justice, the difference between a confirmation and no confirmation vote is just one Senator whereas if a super majority were required, sixty votes are needed to confirm (Molly Reynolds, 2020). In 2017, current Republican Senate Majority Leader Mitch McConnell initiated a change to Senate rules that allows Supreme Court Justices to be nominated with fifty-one votes after previously condemning a similar change in 2013 (Caldera, 2020). Unless any one party truly has super majority representation in the Senate, it is unlikely that a candidate will be confirmed without Senators deviating from party lines. Clearly the game cannot be balanced by shifting power around the Senate as

whichever party has majority power will be able to dictate the law of the land. Thus, the game must be changed in another way.

Let us, for a brief moment, return to [Figure 4](#). While it is generally improper to simply add payoff values together, it is the easiest way to compare players' satisfaction with the outcome of any game following that form. The President has a total value of one because all outcomes when they nominate a candidate sum to zero, and they also have the option of not nominating a candidate. This is highly unlikely to happen, but if it did, the President would have a positive payoff because they are getting the result they wanted. The majority sums to a total of three while the minority sums to zero. Realistically, these numbers will be different due to the President choosing candidates that are more likely to be confirmed and playing out their own game of the median voter theorem. Payoffs change dramatically in [Figure 5](#). The President still keeps their payoff of one which is unlikely to change no matter how much the game is changed. This time, however, because the Judiciary Committee and Senate majorities are not in agreement, the Judiciary Committee majority payoff changes to negative one and the minority, which is also the Senate majority, has a payoff total of three. This is not ideal. Ideally, no one party would have an advantage over the other. The only player with an advantage should be the President who can choose not to nominate a Justice at all. The only way to equalize the game is to spread the payoffs out between more players and aim for a zero sum game.

Remodeling the Game

As the United States has aged, its governmental structure has always been labelled a democracy where the people are able to elect their representatives in local, state, and federal government. In a piece for The Washington Post, columnist Paul Waldman points out that Amy Coney Barrett was confirmed by a Republican majority in the Senate which represents fewer voters than the Democrat minority and that President Trump himself was elected in a similar manner, but with the Electoral College taking the role of the Senate (Waldman, 2020). Waldman goes on to touch on the social norms mentioned before and says that Democrats will not take any actions that will cause Republicans to "raise a stink" in case the Republicans deem those actions inappropriate. Be that as it may, no matter how appropriately the Democrats conduct themselves, the Republicans will always "say that everything they do, no matter how by-the-book it might be, is an egregious violation of propriety and good conduct." He then provides a unique insight into the size of the court. Since the Circuit Judges Act of 1869, the Supreme Court has held nine Justices (*Circuit Judges Act*, n.d.). However, when a Justice retires or dies the court decreases in size until a new Justice is

confirmed (*What Happens When a Supreme Court Justice Dies?* - FindLaw, n.d.). In 2016, the Senate majority Republicans left the Supreme Court with eight seats after refusing to begin the process to confirm Merrick Garland after the death of Justice Antonin Scalia (Elving, 2018). Waldman concludes that the best way to balance the court is to expand it. Unfortunately, adding Justices does not balance the game, but it does correct the existing Supreme Court's direction and brings the majority views back into the center.

If adding more Justices to the bench does not balance the game, how can it be balanced? One of the purposes of appointing Federal judges for life is so that they are outside the influence of current politics and can focus solely on the cases presented to them (Berman, 2020). Another famous political structure that appoints for life or until retirement is that of the Roman Catholic Church (Rayman, 2015). The Pope is chosen from among a group of 120 Cardinals called the Cardinal Electors which make up the College of Cardinals, who, according to church law, must be under the age of eighty (*How Is a New Pope Chosen?*, n.d.). The Cardinals and Cardinal Electors are themselves chosen by the Pope (Reese & Religion News Service, 2020). Interestingly, if a Cardinal under the age of eighty is appointed, they also automatically become a Cardinal Elector, even if that means that there would be more than 120 Cardinals in the College (Reese & Religion News Service, 2020). How would the Supreme Court Justice appointment process game change if it was modelled after the appointment of a new Pope?

On 28 November 2020, thirteen new Cardinals will be appointed with nine of them being eligible Electors, thereby bringing the total number of Electors to 129 (Francis, 2020). Unlike the Cardinal Electors, there appears to be no limit on how many Cardinals there are because they are appointed for life and the Pope must aim to maintain 120 Cardinal Electors. As life expectancies have increased so has the number of Cardinals and the breakdown of their ages into groups has become more varied. Of the 218 appointed Cardinals at the time of this writing, 120 are under the age of eighty and make up 55.5% of all Cardinals. If the new Supreme Court Justice was chosen from the next highest court, that would mean they are chosen from the Court of Appeals (*Court Role and Structure*, n.d.). As of 1 June 2017, there were 160 active U.S. Circuit Court Judges (McMillion, 2017). The Congressional Research Service report that has the age bracket breakdown for all Federal Judges groups all ages seventy and above together so a direct comparison is not able to be made with the Cardinal Electors (McMillion, 2017). However, if the age bracket percentages are added to get as close as possible to the 55.5% of the Cardinal Electors, we find that seventy-nine Circuit Court Judges are under the age of sixty-five, representing just under fifty

percent of all Circuit Court Judges (McMillion, 2017). Performing a direct comparison is not ideal because there is no cap on the total number of Cardinals and while the number of Circuit Court Judges can change, it is much less volatile.

Authors note for the following paragraph: Please forgive a lack of sources. There are very few that are easy to find and most are in Latin. Recognizing that Wikipedia cites their sources, I am choosing to use Wikipedia instead because it is in English and I will not have to cite many different sources for one sentence each. (Contributors to Wikimedia projects, 2004)

I much prefer round numbers, so let us say that the ideal number of Circuit Court Judge Electors is eighty, exactly half of the total number of Circuit Court Judges, and that they must be under the age of sixty-five to be an Elector. Without going too far into detail, when a new Pope needs to be chosen, the Cardinal Electors all meet all day, every day, and vote up to four times a day, until a Cardinal has received two-thirds of the vote. If a Pope is not chosen after two or three days, up to a full day's break is taken to pray and an address by the Senior Cardinal Deacon. If, after nine days of voting, a new Pope has not been elected, the two people with the most votes in any of the previous elections are eligible for a runoff election. The two people in the running are not allowed to vote and one must still receive two-thirds of the vote to become the Pope.

Some changes would need to be made to bring the process in line with what is expected of the government of the United States. First and foremost, the secret balloting would need to be replaced by public ballots. These need not be public to the Judge Electors at the time of voting, but it is important to make sure that they are published. In the 2007 movie *Pirates of the Caribbean: At World's End*, the pirate lords are tasked with electing a pirate king from among themselves. Each pirate lord votes for themselves and no king is crowned until Captain Jack Sparrow chooses to vote for Captain Elizabeth Swann instead. Even though they have devoted their life to their country, one should expect no better from the Judge Electors and thus must be barred from voting for themselves as the next Supreme Court Justice. By barring any Judge Electors over the age of sixty-five, the United States can be reassured that they will choose a Justice that they themselves would accept rulings from whereas if the Electors were very old and about to die, they may elect someone who would not be a good fit, simply because it would not affect them.

The Papal System: A Brief Description of the New Game

The President nominates and the Senate confirms new Federal judges when one dies, retires, or is promoted to the Supreme Court. When a Supreme Court Justice dies or retires, a meeting of the Judge Electors, members of the Circuit Court, meet and vote four times a day until a new Supreme Court Justice has been elected by two thirds of the vote. The newly accepted Justice must then accept the position.

Similarities Between the Two Systems in the News

At first glance the two systems do not have much in common besides that the Pope and Supreme Court Justices are appointed for life. However, in doing research for this paper, I have discovered further similarities. In 2001, then Pope John Paul II created forty-four new Cardinals which raised the number of Cardinal Electors to 135 (Cantwell, 2001). This caused a mild disturbance as it was perceived that the Pope wanted more influence in choosing his successor (Cantwell, 2001). In 2018, the National Catholic Reporter wrote how nearly half of the Cardinal Electors at the time had been appointed by Pope Francis (Reese & Religion News Service, 2018). The Reporter also drew attention to Pope Francis' unorthodox appointments and the changing demographics of the College of Cardinals (Reese & Religion News Service, 2018). This is incredibly similar to how President Donald Trump has appointed a third of the Supreme Court and critics draw attention to his nominees, in particular the sexual misconduct allegations against Justice Brett Kavanaugh and the cult to which Justice Amy Coney Barrett belongs (Cranley & Mark, 2018; Graham & LaFraniere, 2020; Trump, n.d.).

The Wikipedia article on the Papal Conclave makes an uncited claim that because the College of Cardinals is a small body, there have been proposals to expand the electorate. Similarly, as I have argued in [Part II](#) of this paper, the number of people who have a say in the choosing of the next Supreme Court Justice must be expanded.

Flaws in the Plan

Oddly enough, my proposal does not acknowledge the fact that the Senate has 100 members while in my proposal, there are only eighty Judge Electors. This decreases the number of people involved in choosing the next Supreme Court Justice. However, a super-majority of eighty votes is fifty-three and a third, rounded up to fifty four, which is three more than the current majority needed of fifty-one votes in the Senate.

As the National Catholic Reporter pointed out, it is possible that the President could install Circuit Court Judges that would choose a Justice that is preferred by the President, but there is no guarantee that there would be a Supreme Court opening

before those judges became too old to vote. This is also combated by the fact that unlike the College of Cardinals, there is a fixed number of Circuit Court Judges that cannot be exceeded.

Currently, there is no requirement that a Supreme Court Justice be a Judge before they are appointed. By forcing Judge Electors to choose, it is much more likely that they would choose a new Justice from themselves or from another Federal court rather than someone who may be uniquely qualified but has never been a Judge such as Justice Elena Kagan (*Elena Kagan*, 2015).

Conclusion

In [Part I](#) it was demonstrated that when Senators are not held accountable to the rules or social norms, the majority party has an obscene amount of power in choosing the next Supreme Court Justice. In [re-evaluating the game in Part II](#), it was shown that this still holds true, even when all rules and social norms are followed, albeit to a lesser extent. By noting the similarities between the term limits for the Pope and Supreme Court Justices and Cardinals and Federal Judges, a new Supreme Court Justice appointment system was created in the image of the Papal Conclave. This decreases the ability of any one party to influence the highest court. Ultimately, the goal is to have the new supreme Court Justice be as representative of the people as possible without giving undue priority to any one party's politics.

Author's Note II

[Part II](#) has considerably less actual game theory than I was hoping for but at the level to which I needed to abstract, there was no other way. If I had gone into a deep dive I would have created ridiculous games that would be more fitting for a thesis of some kind. In order to save my sanity, I decided to keep it simple. In addition, I strayed from the goal because I found writing about the abstract concepts cathartic while writing about game theory increases my stress levels.

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