Disorder in the Court

Review of Ilya Shapiro's "Supreme Disorder: Judicial Nominations and the Politics of America's Highest Court"

Michael M. Rosen

October 4, 2020

"The necessity of their concurrence," Alexander Hamilton wrote in Federalist #76, discussing the Senate's "advice and consent" to the president's appointment power, "would have a powerful, though, in general, a silent operation" and "would be an efficacious source of stability in the administration."

How times have changed.

While Hamilton may have correctly predicted the course and manner of confirmation during the republic's first two centuries, the current controversy over replacing the late Justice Ruth Bader Ginsburg with Judge Amy Coney Barrett weeks before a presidential election belies the notion that the Senate's consideration of judicial appointments has been either a silent operation or a source of stability.

To this conundrum, the Cato Institute's Ilya Shapiro turns in his new book *Supreme Disorder*, a fluid, assured history of Supreme Court nomination battles. Shapiro explores how we arrived in our current predicament, which features deep, seemingly intractable polarization between the two parties and the three branches of government, laying ultimate blame at the feet of the federal government, which "is simply making too many decisions at a national level for such a large, diverse, and pluralistic country."

From the very beginning of the republic, presidents have encountered senatorial roadblocks during the judicial nomination process. The very first rejected high court nominee, John Rutledge, was appointed by the very first president. But Rutledge failed to command the support of George Washington's own party. John Adams also struggled to secure the appointment of Chief Justice John Marshall, who would become one of the nation's greatest jurists.

A few decades later, Andrew Jackson triggered resistance from the bench and the Senate when he sought through his judicial appointments to impose a populist slant on the Court. So did John Tyler, who "refused to work with senators to find compromise picks." The confirmation records of other 19th-century presidents were more mixed, as they, along with Roosevelt and Taft in the early 1900s, achieved success in direct proportion to their collegiality with their counterparts in the Senate.

One of the first truly controversial confirmation fights arrived in 1916, when Woodrow Wilson's nomination of Louis Brandeis lasted nearly four months, featured the first-ever public hearing on

the nominee's qualifications, and ended with a party-line vote in favor of the first Jewish justice, a staunch progressive. John J. Parker, President Hoover's 1930 nominee, became the first appointee in four decades, and for another four decades hence, to lose his confirmation battle.

A far more significant judicial drama unfolded in 1937, when Franklin Roosevelt, frustrated at the Court's repeated constitutional-grounds rejections of New Deal legislation, sought to raise the number of justices to 15. The measure spurred national controversy, as FDR issued a rousing call to "save the Constitution from the Court, and the Court from itself."

Yet the famous "switch-in-time-that-saved-nine" took place a few months later, when two of the more conservative justices sided with the Roosevelt administration and when another justice announced his retirement, thereby affording FDR his first vacancy after more than four years in office. While the court-packing plan never took effect, its mere threat effected significant change, awarding Roosevelt the judicial majority he needed to uphold the New Deal's provisions (but costing his party dozens of congressional seats in the 1938 midterms).

The next major bump emerged in 1968, when a lame-duck Lyndon Johnson sought to elevate Justice Abe Fortas to the center seat during a presidential election year. While ideology and petty politics influenced the debate, an undisclosed (although legal) honorarium ultimately scotched Fortas's nomination, which stalled unceremoniously in a filibuster. Notably, Senator Strom Thurmond tried unsuccessfully to block the nomination outright because it took place too close to the election.

And while the 1987 nomination of Robert Bork represented a significant escalation of congressional hostility to the appointment power, Shapiro observes that the battle over Justice William Rehnquist's confirmation and elevation to the chief's seat prefigured it. Opposition from the likes of Senator Edward Kennedy resembled Democratic resistance to Bork in substance and in style. Rehnquist came within a dozen or fewer votes of a filibuster during both of his nominations, and fully a third of the Senate ultimately voted against his elevation to the bench.

When Bork's controversial appointment arrived, a newly-Democratic Senate handily rejected it by a 58–42 margin, easily the largest ever, after the nominee refused to back down during the hearings from his unapologetically originalist philosophy. Bork's experience, Shapiro reasons, "unfortunately produced a chilling effect on ambitious would-be judges and their academic writings or public pronouncements, especially when testifying before the Senate." The intensity and narrowness of the arch-conservative Clarence Thomas's subsequent confirmation likely reflects his replacement of the arch-liberal Thurgood Marshall and the ideological change it augured.

Trouble ensued during George W. Bush's presidency, when Senate Democrats engaged in a sustained campaign to filibuster his judicial nominees, an unprecedented escalation in response to Republicans' slow-walking many of Bill Clinton's appointments. In turn, after the GOP filibustered some 80 of Barack Obama's selections, Senate Majority Leader Harry Reid detonated the "nuclear option," requiring thenceforward only a simple majority to confirm all but Supreme Court nominees.

The Republicans returned fire in 2016 by outright refusing to consider Obama's nomination of Merrick Garland, partly by invoking a 1992 speech by then-Senate Judiciary Committee Chairman Joe Biden to the effect that Senate consideration of a Supreme Court nominee during

an election year "is not fair to the president, to the nominee, or to the Senate itself." (Reid made similar comments.) While unprecedented, the Garland blockade and the bitter campaign fight it engendered contributed significantly to President Trump's surprise victory. Once in office, Trump selected Neil Gorsuch, and the Senate GOP overcame a Democratic filibuster by removing it altogether, thereby completing Reid's work.

Another challenge arose with the subsequent nomination of Brett Kavanaugh to replace swing Justice Anthony Kennedy, provoking another vicious fight. Kavanaugh narrowly staved off both credible and frivolous allegations of sexual assault with fiery and emotional testimony, in which he averred that "this confirmation process has become a national disgrace. You have replaced 'advice and consent' with 'search and destroy.'"

What can we learn from this spiraling deterioration of comity between the parties and branches regarding Supreme Court nominations? Shapiro draws a few overarching conclusions. First, politics and ideology increasingly determine outcomes. Overall, the Senate has confirmed 126 out of 163 Supreme Court nominees, but lately, a stark judicial philosophy divide has tracked partisan ideological sorting. While senators for centuries generally believed the president was entitled to name judges of his choosing without regard to ideology, mere credentials no longer suffice.

Moreover, the same technological trends of instant gratification and social-media feedback loops that have plagued our political culture generally have also buffeted the judicial wars. "The battle to confirm Brett Kavanaugh," Shapiro posits, "showed that the Supreme Court is now part of the same toxic cloud that envelops all of the nation's public discourse." Similarly, Senate hearings, as with legislative matters, have become "kabuki theater," in Shapiro's telling. Then, too, the small size of the Supreme Court invests each seat with outsize importance, thereby intensifying nomination battles that presage an ideological shift.

In addition, more laws mean more fights: "the ever-expanding size and scope of the federal government has increased the number and complexity of issues brought under Washington's control," Shapiro reckons, "while the collection of those new federal powers into the administrative state has transferred ultimate decision-making authority to the courts."

So what can we do to resolve or at least temper the crisis? Some scholars have suggested term limits for Supreme Court justices, thus allowing each president to make the same number of judicial appointments per term. This proposal, however, would require a constitutional amendment and could impair judicial independence. Furthermore, transitioning from the current life tenure system would present difficulties, even though it attracts tremendous popular support.

More recently, in the wake of the Barrett nomination, liberal activists and scholars have proposed adding justices, an idea that hasn't seriously arisen since FDR's court-packing scheme. But, it can be achieved fairly easily by statute. Expanding the Court, however, would do little to tamp down partisan fervor and instead is more likely to exacerbate it, as future GOP administrations would simply add yet more justices to those installed by their Democratic predecessors.

Shapiro surveys other experimental ideas — including a lottery to draw Supreme Court justices from the appellate courts, the selection of "neutral" justices by the existing ones, stripping the Court of certain jurisdictional powers, or anonymously-published opinions — but finds them, too, wanting.

Instead, he argues, the only way out "is for the Supreme Court to restore our constitutional order by returning improperly amassed federal power to the states; securing all of our rights, enumerated and unenumerated alike; and forcing Congress to legislate on the remaining truly national issues rather than delegating that legislative power to executive-branch agencies." This, of course, is hard and relatively unpopular work. But, perhaps counterintuitively, the Court can command respect and ensure its legitimacy only by *ignoring* public approval and shrugging off popular outrage alike, focusing instead on its unique charge: to interpret the law faithfully.

But however compelling this case may be, those who are not originalists are unlikely to accept it. Which means, *pace* Hamilton, we'll be stuck for some time in the crossfire between the presidency, the Court, and the loud and unstable influence of the Senate.