DAILY NEWS

Just accept it: The Supreme Court has always been political

Ilya Shapiro

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In the wake of President Trump's nomination of Amy Coney Barrett to the Supreme Court, pundits of all ideological stripes lament that the fight over the seat vacated by Ruth Bader Ginsburg is too political, that if only our leaders were statesmen, we'd go back to a halcyon age of norm-respecting good feelings.

Yet politics has always been part of the process. From the beginning of the republic, presidents have picked justices for reasons that include balancing regional interests, supporting policy priorities and providing representation to key constituencies.

Whether looking to candidates' partisan labels or "real" politics, they've tried to find people in line with their own political thinking, and that of their party and supporters. Even in the earliest days, it was rare for someone to be on the Supreme Court short list of presidents from different parties.

Look at the judicial battles of John Adams and Thomas Jefferson, with the Midnight Judges Act — the original court-packing — as well as Jefferson's failed attempts to appoint justices to counter the great Federalist John Marshall (whom Adams had appointed in the lame-duck session after losing his bid for reelection).

In the years that followed, when U.S. politics was defined by rivalries *within* the Democratic-Republican Party and its successors, ambitious lawyers knew that their careers depended on navigating the intra-party split. There has never been a golden age when "merit" as an objective measure of brainpower and legal acumen was the sole consideration.

When nominees have gotten to the Senate, they've faced another gauntlet, particularly when the president's party didn't have a majority. Historically, the Senate has confirmed fewer than 60% of Supreme Court nominees under divided government, as compared to just under 90% when the president's party controlled the Senate. Timing matters too: Over 80% of nominees in the first three years of a presidential term have been confirmed, but barely more than half in the fourth (election) year. The difference there is again political: 17 of 19 pre-election nominees to vacancies arising during that election year have been confirmed under united government, versus just one of 10 when power was split.

Nearly half the presidents have had at least one unsuccessful nomination, starting with George Washington and running all the way through George W. Bush and Barack Obama. James Madison had a nominee rejected, while John Quincy Adams had one "postponed indefinitely." Andrew Jackson was able to appoint Roger Taney only after a change in Senate composition, while poor John Tyler, a political orphan after the Whigs kicked him out of their party, had only one successful nomination in nine attempts.

Most 19th-century presidents had trouble filling seats before a run from 1894 until 1968 where only one nominee was rejected, John Parker under Herbert Hoover in 1930. Since Lyndon Johnson, all presidents who have gotten more than one nomination had one fail, except George H.W. Bush and Bill Clinton.

In all, of 163 nominations formally sent to the Senate, only 126 were confirmed, which represents a success rate of 77%. Of those 126, one died before taking office and seven declined to serve, the last one in 1882 — an occurrence unlikely ever to happen again. Of the rest, 12 were rejected, 12 were withdrawn, 10 expired without the Senate's taking any action (most recently Merrick Garland), and six were postponed or tabled. In other words, for various reasons, fewer than three-quarters of high court nominees have ended up serving.

Based on relative rates of successful nominations, the argument could be made that the nomination and confirmation process was more political during the nation's first century than since. Both the presidency and the court were relatively weak then and the process was more of an insider's game. As the judiciary took on a greater role, nominations attracted more public attention, and also more transparency. Interest groups began to matter — unions and the NAACP contributed to Parker's 1930 rejection — as public relations became just as important as Senate relations. Politics came back into the process, but in a different way. The battle became one over ideology and public perception rather than satisfying intra-party or regional factions.

More recently, we've seen divergent theories of constitutional interpretation map onto partisan preferences at a time when the parties are more ideologically sorted than any time since at least the Civil War and the Supreme Court is more powerful than it's ever been. So of course the battles over these precious judicial seats will be fraught.

It's too bad, but voters are the ultimate judges, as it were, of the kinds of people they want to see in black robes and the kinds of judicial philosophies they want to empower.

Shapiro is director of the Robert A. Levy Center for Constitutional Studies at the Cato Institute and author of the new book "Supreme Disorder: Judicial Nominations and the Politics of Americas Highest Court," from which this essay is adapted.