



Can We Depoliticize the Supreme Court? An Interview with Ilya Shapiro

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The fights over the most recent Supreme Court nominees have been some of the most politically virulent in our nation's history. In his new book, *Supreme Disorder: Judicial Nominations and the Politics of America's Highest Court*, Ilya Shapiro, director of the Robert A. Levy Center for Constitutional Studies at the Cato Institute, discusses how the nomination process became so politicized, and what we might be able to do about it. Ilya joined AFF to discuss some of the key issues surrounding the court, as well as some of the highlights from the history of SCOTUS nominations. (*Note: Responses have been edited for length and clarity*)

AFF: The Kavanaugh nomination split the country apart. Why has the nomination process become so brutal? Has it always been this way?

Ilya Shapiro: I started thinking about this book in the wake of the Kavanaugh process. Clearly, the same toxic cloud that had enveloped the rest of our public discourse now covers the Supreme Court, so I wanted to find out: When did this start? What can we learn? How do we fix it? Should we do anything? One thing I found is that politics has always been a part of the nomination and confirmation process. It shouldn't be surprising; the president is a politician, senators are politicians, and they all face all sorts of political incentives. What's different now isn't that politics is a factor, it's that, first of all, the federal government has grown and power has centralized within Washington within the federal government, skewed toward the administrative branch, which can only be sued rather than voted out of office, and so the Supreme Court is deciding very important issues every year. And then you have divergent interpretive theories mapping onto partisan preferences at a time when the parties themselves are more ideologically sorted and polarized than they've been since at least the Civil War, so of course whenever you have an opening in one of these precious powerful seats, you're going to have this fraught political battle.

AFF: Amy Coney Barrett's confirmation has seemed relatively tame, compared to Kavanaugh's. How does what we've seen so far fit with the overall trends you've observed?

IS: It sort of became more about process arguments and whether the Republicans should have pushed through this confirmation so close to an election. She personally was charming and disarming, and sure, she faced attacks about the Obamacare case that's coming up at the Supreme Court and her views on abortion (which of course every nominee faces), but it seems like those attacks really didn't work well, and there was nothing else to glom on to, so the opposition (the Democrats) ended up making purely political arguments aimed at the electorate for the election – which of course is coming up just a week after she got confirmed. But if she

had been put up two years ago when Kavanaugh was nominated, it's quite likely that it wouldn't have been such a pure party line vote

***AFF:* Have there been any positive developments you've noticed in the nomination process, or has it all been for the worse?**

IS: It depends on how you define those terms. The judges themselves who have been confirmed under this administration, especially the circuit judges, have been very solid in terms of their qualifications, their intellect, their track record, and in terms of being movement originalists and textualists, not just loyal Republicans or people that check certain political boxes without having as much scholarly rigor behind them.

In the overall process, we see an evermore ratcheting up of tensions. Of course, now we move into the debate of, if Joe Biden wins and the Democrats take over the Senate, will they pack the court, expand the number of seats, or make other structural changes? That will only further heighten tensions, so no, I don't see any kind of breaking in the fever over this issue, even as the judges that have joined the federal ranks, I see them as better than under any other president in the modern age.

***AFF:* Are there any solutions currently being proposed to depoliticize the nomination process?**

IS: Of the various things that have been proposed — and I focus on this in the third part of my book — term limits are probably the ones I'm most amenable to. They're probably the least political as well. What term limits would do is, if you have an 18 year term — so a vacancy every two years with the nine justices — each presidential term will get two and exactly two appointments. If there's a death or an early retirement, then whoever you appointed would only serve out the remainder of that term. At least this would eliminate morbid death watches of octogenarian justices or politically timed retirements, and it would regularize the process. We have to be clear that what it wouldn't do is ideologically rebalance the court or diminish its power. These seats would still be very powerful, but at least we'd have people only serving 18 years instead of 30 or more.

Other proposals are variations of restructuring the court or court packing. For example, you'd have 15 justices, one third nominated by Republicans, one third by Democrats, and one third so-called neutrals who have to be approved unanimously by the others. This rebalances the court, certainly, but it doesn't depoliticize it. In fact, in that scenario, two thirds of the justices would have explicit partisan labels attached. There's another idea of rotating lower court judges through the Supreme Court for short periods rather than having permanent justices. That doesn't really depoliticize the court, it just makes the battles over the lower court judges that much more heated.

One of the things I actually conclude in my book is that we should eliminate public hearings. They draw the nominee and the court into the partisan political muck, and we don't really learn anything about the nominee. It might humanize the person — that seems to have happened with Justice Barrett. The American people, as they've seen her, she's gained positive ratings, although we don't necessarily need or want justices to run on popular support anyway.

At the end of the day, all the various proposals that we've seen that might come out of Joe Biden's judicial reform commission, if he's elected and forms that as he's proposed, are nibbling around the edges. They're rearranging deck chairs on the Titanic, because the problem is not with the process but with the product. The only way we're going to turn down the heat is by rebalancing our constitutional order, pushing power back down to the states and localities and the people, and rebalancing separation of powers so that Congress is making controversial policy decisions rather than punting everything to the executive branch. That's obviously not an easy solution, it's not an overnight solution, but we didn't get to where we are overnight either. So only by putting in those kinds of reforms which the court itself is responsible for, by changing the jurisprudence, will we, in the long-term, bring down the heat on these judicial battles

***AFF:* You not only go into the history of the nomination process, but also into the personal lives of the people involved. What were some of the most surprising things you learned**

IS: There are a lot of kind of funny or weird or eccentric nuggets about people in the early years of the court when nominees would decline their nominations. The communications being what they were, they sometimes wouldn't learn for days that they had not only been nominated in the same day, but have been confirmed by the Senate. They would think, "why would I leave my prosperous legal practice in Boston or seat on the Pennsylvania Supreme Court to go to this backwater swamp in Washington and be in the basement of the Senate and not be appreciated?" It wasn't considered a prestigious job.

One thing that's interesting is that — and this also goes to Woodrow Wilson, one of my least favorite presidents — one other legacy of his is that, in addition to Louis Brandeis — one of the more Progressive members of the court — he nominated James Clark McReynolds, who is one of the more retrograde members of the court and probably had little in common with Wilson other than, well, bigotry and racism, but also a commitment to antitrust. Among other things, McReynolds became one of what became known as the Four Horsemen who thwarted the progressive agenda when it came to the Supreme Court eventually, deep into the New Deal under Franklin Delano Roosevelt. Not only that, he was such a cantankerous, obnoxious personality that, not only would he not appear in the same picture as the progressive Jew Brandeis, but he offended his colleagues so much that a couple of them resigned from the Chevy Chase Country Club so as not to spend any more time with him or cross paths than they needed.

Wilson appointed one other person John Hessin Clarke, who was kind of a cipher, who did not leave a lasting imprint on the court. So there you have Woodrow Wilson, one of the most knowledgeable presidents about the law, about jurisprudence, with a definite vision for what he wanted on the court, nominating three very different people and kind of foreshadowing the misfires of modern Republican presidents.

***AFF:* What was the most interesting discovery you made while researching the history of the SCOTUS nomination process?**

IS: People ask me what the most contentious nomination we've had is, expecting me to choose between Robert Bork, Clarence Thomas, Brett Kavanaugh, maybe even this one for Barrett. But I would say actually it was the 1916 nomination of Louis Brandeis. He was the first Jewish nominee and, even more controversially, was a big crusading progressive who had controversial

legal policy ideas supporting the Woodrow Wilson administration. His confirmation process lasted over four months — the longest of anyone — and caused the Senate for the very first time to have hearings for the nomination. It was seen as unseemly for the nominee himself to testify, so it was other witnesses providing the pros and cons. Ultimately, Brandeis was confirmed by a slightly wider margin than Barrett or Kavanaugh or Thomas, but he was hugely controversial. And after he was confirmed, one of his new colleagues, Charles Evans Hughes, resigned to run against Woodrow Wilson in that fall's presidential election. So if you think that 2020 and 2016 are big in terms of the weaving together of presidential politics and the Supreme Court, I'll see those years and raise you 1916.