NATIONAL REVIEW

What's Gone Wrong with the Supreme Court — and How to Fix It

Robert Verbruggen

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Coney Barrett seems headed for confirmation to the Supreme Court, and I'm very much among those celebrating. But everyone across the political spectrum knows that something has gone deeply wrong with this process. For decades now the Senate has been rejecting well-qualified judicial nominees, from Robert Bork to Merrick Garland, for ideological reasons. "Court-packing" is even in the headlines again, however unlikely it remains.

Cato Institute legal scholar Ilya Shapiro has thus picked a fortuitous time to release his new book, *Supreme Disorder*. It provides the full history of Supreme Court confirmations and evaluates proposals for reform. Court-watchers owe it to themselves to give it a read.

Under the Constitution, the president nominates Supreme Court justices, but the Senate must "consent" to them. Presidents and senators are politicians, so politics has played a role in the process from the beginning.

Shapiro acknowledges as much, noting "the judicial battles of Adams and 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." Early presidents also sought to balance the Court geographically and reward their cronies with appointments. Later on, Teddy Roosevelt and William Howard Taft sought to divine potential justices' "real" politics, looking for progressive and conservative jurists respectively regardless of their party.

And if the Senate doesn't like a nominee, that nominee has usually failed. "Historically," Shapiro notes, "the Senate has confirmed fewer than 60 percent of Supreme Court nominees under divided government, as compared to just under 90 percent when the president's party controlled the Senate."

At this point it's important to note that for most of our history, the battles over the Court were inside-baseball affairs, not the public spectacles that confirmation battles have become in the past few decades. It wasn't until the 1916 nomination of Louis Brandeis that the Senate even held public hearings on a nominee — and "Brandeis himself was not called to testify," because "that was seen as unseemly." FDR nominee Felix Frankfurter was the first nominee to take unrestricted questions in an open hearing, in 1938; this wouldn't become standard until the 1950s. The FDR years also, of course, saw the president fight the Court's invalidation of his

economic initiatives, with the threat of court-packing and the much-debated "switch in time" in which the justices became a bit meeker.

It wasn't until later in the 20th century that the Court took up its most aggressive, controversial judicial activism, the parties polarized ideologically, television brought confirmation hearings directly to the public, and the Senate started killing nominations purely on ideological grounds. This is the part of Supreme Court history seared into the brains of modern Court-watchers. Shapiro notes that "five of the closest eight confirmation margins have come in the last thirty years."

A Democratic Senate voted down Robert Bork in 1987. A Democratic Senate *minority* squelched the appeals-court nomination of Miguel Estrada in 2002 through a filibuster. The "Gang of 14" deal of the mid 2000s saved the filibuster, but in 2013, Democrats killed it for lower-court nominees. Republicans refused even to vote on Merrick Garland in 2016, and under Trump they killed the filibuster for the Supreme Court too, installing both Neil Gorsuch and Brett Kavanaugh over more than 40 "no" votes apiece. Barrett appears headed for a similarly narrow confirmation.

If you want a detailed history of how these fights have played out over the republic's history, *Supreme Disorder* is your book, replete with fascinating little historical tidbits doled out at regular intervals.

For example: Supreme Court justices in the past had often been politicians themselves, which feels odd today. Salmon P. Chase had run for president twice before Lincoln appointed him, and he later sought the presidential nominations of both parties *from the bench*. Reagan appointee Sandra Day O'Connor had been the majority leader of the Arizona Senate before becoming a judge. Some justices never even attended law school, the most recent being FDR appointee James Byrnes (also a senator). It was long common for justices to personally advise presidents, too. And Lindsey Graham, who's been mocked a lot this year, has a remarkable track record of voting for Democrats' nominees even after the process became polarized: He was the only Judiciary Committee Republican to vote for Sonia Sotomayor and Elena Kagan. To me this makes it more believable that his recent flip-flop on election-year confirmations is a genuine change of attitude following the assault on Brett Kavanaugh, and not merely the product of political convenience.

Such stuff comprises the appeal of *Supreme Disorder* to history buffs. But what about those wondering where the Court goes from here? For them, Shapiro discusses the pros and cons of various reform proposals — and mostly comes away unimpressed.

On term limits, for instance, he suspects a constitutional amendment would be needed — not just legislation such as the bill recently put forth in the House — and he's skeptical that we could manage the transition between the current justices and the new ones. More out-there proposals, such as having the Supreme Court become a constantly rotating panel of randomly selected lower-court judges, suffer from even deeper problems. Ultimately, Shapiro concludes,

The only way judicial confirmations will be detoxified, and the only way we reverse the trend whereby people increasingly see judges as "Trump judges" and "Obama judges," 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.

I agree with parts of Shapiro's analysis — but I think a constitutional amendment is a lot more likely than a Supreme Court that aggressively pares back the federal government and becomes a *less* salient political issue as a result. As things stand, I suspect we're not too far from seeing a Senate refuse to confirm nominees from the opposing party, period, whether it's an election year or not. We've got to be able to amend the Constitution once we reach *some* level of dysfunction, right?

I also think the right mix of rules could reduce the stakes of each nomination somewhat and stop the Senate from turning the process into a massively important circus. For whatever it's worth, here's how I'd draw up the amendment:

- The Court has nine seats going forward, and this number cannot be changed with legislation.
- Ultimately, the judges will serve 18-year terms, with each president picking two in each presidential term, during non-election (i.e., odd) years.
- The transition to the new system will absolutely not involve a period with the Court having more than nine judges, as the House bill proposes. We conservatives lived under left-wing judicial activism for half a century; now that we finally have our majority, we're not watering it down. The new 18-year judges will come online as the old life-tenured ones leave. The entire Right should see this as nonnegotiable, and the Left can't seriously think it gets to pretend that a right to abortion is written into the Constitution for 50 years (to take just one pertinent example) and then change the rules when justices who know better gain a foothold.
- When possible, the transitional judges should serve fewer than 18 years rather than more, to avoid having judges "limited" to as much as 35 years. One way to do this would be to establish a "2021 seat," a "2023 seat," and so on, and have presidents fill the seats, starting with the earliest, as current judges retire. Only when retirements outpaced new seats could any new judge serve longer than the allotted time. For example, if the first vacancy didn't occur until 2022, the nominee would take the 2021 seat and serve the remaining 17 years. But if another vacancy then occurred the same year, that justice would have to be given the 2023 seat and serve 19 years. If a seat remained empty through its entire first term because not enough life-tenured justices retired — if, say, 2055 came before the 2037 seat had been filled, which could happen if Barrett served into her 80s — the ultimate nominee would just serve whatever's left of the seat's *second* 18-year term instead.
- As Shapiro writes, the two parties have adopted "essentially incompatible judicial philosophies," and these "ideological litmus tests cause more of a problem than the

> geographic, patronage, religious, and other past criteria because there's no longer widespread acceptance that a president gets to have his choice as long he meets those other, more neutral criteria." *Any* nominee, no matter how qualified, can expect "no" votes from about half the Senate now, and substantial opposition no longer signals anything troubling about the nominee. It won't work to give each president two nominations per term if a Senate of the opposing party can then hold the seats open as long as it likes, and even an 18-year justice will be worth voting down if possible. Therefore, we need what I'll call a "reverse filibuster" system: Nominees should be presumed confirmed after, say, 90 days, and the Senate should need a supermajority, say three-fifths or even two-thirds, to kill a nomination in that time frame. (In the pre-Gorsuch system, you needed 60 votes to *confirm* the nominee if the minority chose to filibuster.) Finally, the simple-majority "advice and consent" rule should still apply during the transition period, to discourage life-tenured judges from trying to retire strategically; and also when an 18-year judge retires or dies early and a president gets an extra nomination (albeit only for the remainder of that 18-year term).

None of this seems all that likely today, I realize. But hey, a guy can dream.