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Judicial Nominations Have Always Been Political | Opinion

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As we approach yet another razor-thin Supreme Court confirmation, it's clear that the judiciary is now under the same toxic cloud that has enveloped all of the nation's public discourse. Although the Court is still respected more than most institutions, it's increasingly viewed through a political lens.

To a certain extent, the politicization of judicial appointments has tracked political divisions nationally—and confirmation controversies are hardly unprecedented over the long sweep of American history. But the *reasons* for those controversies have shifted in the last few decades. While inter- and intra-party politics have always played a role, couching opposition in terms of judicial philosophy is a relatively new phenomenon.

For most of the republic's history, judicial controversies tended to revolve around either the president's relationship with the Senate or deviations from shared understandings of the factors that go into nominations for particular seats—especially geography and patronage. That dynamic is markedly different from the ideological considerations we see now. Today's fights transcend any particular nominee or even president, growing and filtering into the lower courts. And ideological litmus tests cause more of a problem than geographic, patronage, religious, merit and other factors because there's no longer widespread agreement that a president gets to have his choice as long he meets those more neutral criteria. With the two major parties adopting incompatible judicial philosophies, it's impossible for a president to find an "uncontroversial" nominee.

The conservative legal movement, meanwhile, has learned its lesson from previous judicial disappointments; "no more Souters" means a nominee has to have a proven record of commitment to originalism and textualism, not simply center-right views and affiliations. Once you consider someone who doesn't have a long judicial record, or at least academic writings to the same originalist-textualist effect, it opens the door to the sort of presidential discretion that has led to misfires in the past.

The entire reason Donald Trump released a judicial shortlist in 2016 was to convince Republicans, as well as cultural conservatives who may otherwise have stayed home or voted Democrat, that he could be trusted. The current emphasis on judicial philosophy may well be an updated version of the "real politics" approach favored by presidents in the early 1900s—the innovation of Theodore Roosevelt and William Howard Taft of trying to find (or avoid)

progressive Republicans or conservative Democrats—applied to modern intellectual commitments. But the problem is that there aren't too many progressive originalists or conservative living-constitutionalists, at least not in any way where the ideological appellation doesn't override the philosophical one. Even Merrick Garland, who's about as much of a moderate as President Obama could find, didn't budge the Republican Senate.

The inflection point for our legal culture, as for our social and political culture, was 1968, which ended a 70-year near-perfect run of confirmations. Until then, most justices were confirmed by voice vote, without the Senate having to take a roll call. Since then, there hasn't been a single voice vote, not even for the five justices confirmed unanimously or the four whose "no" votes were in the single digits. And five of the eight closest confirmation margins—soon to be six of nine—have come in the last 30 years. Not surprisingly, the increased opposition and scrutiny has accompanied an increase in the time it takes to confirm a justice; six of the eight longest confirmations have come since 1986. Every confirmation since the mid-1970s except Sandra Day O'Connor and Ruth Bader Ginsburg—and now Amy Coney Barrett, wholly due to the pre-election timing—has taken more than two months.

There are many factors going into the contentiousness of the last half-century: the Warren Court's activism and then *Roe v. Wade*, spawning a conservative reaction; the growth of presidential power to the point where the Senate felt the need to reassert itself; the culture of scandal since Watergate; a desire for transparency when technology allows not just a 24-hour media cycle but a constant delivery of information and opinion; and, fundamentally, more divided government. As the Senate has grown less deferential, and presidential picks have become more ideological, seeking to empower a certain kind of jurisprudence rather than merely appointing a good party man, the clashes have grown.

And as these philosophical battle lines have emerged, so have the widespread media campaigns orchestrated by supporters and opponents of any given nominee. There's a straight line from the national TV ads against Robert Bork to the tens of millions of dollars spent supporting and opposing Brett Kavanaugh, including sophisticated targeting of digital media to voters in states whose senators are the deciding votes. "It's a war," Leonard Leo, a Trump adviser on judicial nominations who now chairs the public affairs firm CRC Advisors, explained to me, "and you have to have troops, tanks, air and ground support."

To put a finer point on it, all but one failed nomination since Justice Abe Fortas's stalled elevation in 1968 have come when the opposition party controlled the Senate. The one exception is Harriet Miers in 2005, who withdrew because she was the first nominee since Harrold Carswell in 1969 to be seen as not up to the task. The last nominee rejected by a Senate run by the same party as the president was John Parker in 1930, by two votes. For that matter, this turbulent modern period has seen few outright rejections—Nixon's two in 1967-70 and Bork in 1987 are the only ones, in 52 years—with pre-nomination vetting and Senate consultation obviating most problematic picks.

At the same time, the inability to object to qualifications has led to manufactured outrage and scandal-mongering. This was more evident before considerations of judicial philosophy became

standard practice, when Bork was an outlier. "Many people sneer at the notion of litmus tests for purposes of judicial selection or confirmation—even as they unknowingly conduct such tests themselves," Harvard law professor Randall Kennedy wrote nearly 20 years ago. The real problem, as he saw it, was that not being able to openly discuss ideology led to a search for scandal. "A transparent process in which ideological objections to judicial candidates are candidly voiced," he concluded, "is a much-needed antidote to the murky 'politics of personal destruction.'" Sounding the same refrain was one Chuck Schumer, now the Democrats' Senate leader: "The taboo [on invoking ideology] has led senators who oppose a nominee for ideological reasons to justify their opposition by finding non-ideological factors, like small financial improprieties from long ago. This 'gotcha' politics has warped the confirmation process and harmed the Senate's reputation."

Well, that taboo no longer exists—which is a good, honest thing, because vetting a nominee's judicial philosophy is important—and yet we still got the Kavanaugh hearings. And, as we just saw with the Barrett hearings, the Bork playbook of depicting a nominee as out to steal people's hard-fought rights and benefits is still very much in use. The Democrats may not have attacked ACB personally as they did when she was nominated to the Seventh Circuit three years ago, realizing that the anti-Catholic "dogma" attack backfired, but they still caricatured her record and made emotional appeals about smiling kids who would die if she were to join the Supreme Court.

Senatorial brinksmanship is symptomatic of a larger problem that began long before Kavanaugh, Garland or even Bork: the courts' self-corruption, aiding and abetting the expansion of federal power, and then the shifting of that power away from the people's representatives and toward administrative agencies. The judiciary thus affects public policy more than it did before.

As the courts play more of a role in the political process, of course confirmation fights are going to be more fraught with partisan considerations. It's a new phenomenon for our parties to be so ideologically distinct, and thus for judges nominated by presidents from different parties to have markedly different constitutional visions. That doesn't mean a Justice Barrett will be any less legitimate than any of her colleagues, but it should make us want the federal government to be making fewer decisions in this large, diverse, pluralistic country.

Let Texas be Texas and California be California. That's the only way we'll defuse tensions in Washington, whether in the halls of Congress or in the highest court in the land.

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