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Should We Reform the Supreme Court?

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On Tuesday, I testified before the Presidential Commission on the Supreme Court, the body appointed in April to analyze the nascent public debate over whether and how the high court should be reformed. Although sometimes referred to as the "court-packing commission"—President Joe Biden created it in part to kick the can down the road on progressives' call for adding justices—it's both more and less than that.

Indeed, between this latest hearing and one held last month, the Commission convened 10 panels of legal scholars, practitioners and activists on issues ranging from perceptions of the Court's legitimacy to its role in our constitutional system to term limits to docket management. All of this activity stems from the idea that there's a problem that needs to be addressed, of course—which lawyers would call "assuming facts not in the evidence," given that public confidence in the Court is actually higher than it's been in a long time.

Nonetheless, I was asked to give my perspective on the process by which jurists ascend to the bench, as well as the Senate's role in the judicial food fight. I came up with seven lessons from our long history of confirmation battles.

First, politics has always been part of the process. From the early republic, presidents have sought people in line with their own political thinking. There's never been a golden age in which "merit" as an objective measure of legal acumen was the sole consideration. And control of the Senate is most of the ballgame. Historically, fewer than 60 percent of nominees have been confirmed under divided government, while about 90 percent have been confirmed under united government. The disparity is even more stark in presidential election years (20 percent versus 90 percent); so the 2016 blockade of Merrick Garland was certainly hardball politics—just like the 12 other Court nominees who were tabled, "postponed indefinitely" or not acted upon—but was by no means unprecedented.

Second, confirmation fights are now driven by judicial philosophy. That's a relatively new phenomenon, because fights transcend any particular nominee. Earlier 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. With the culmination of several trends whereby divergent interpretive theories map onto partisan preferences at a time when the parties are both ideologically sorted and polarized, it's impossible for a president to find an "uncontroversial" nominee.

Third, modern confirmations are different because the legal culture is different. The inflection point here—as for our social and political culture—was 1968, which ended a 70-year near-perfect run of nominations. Until that point, most justices were confirmed by voice vote. Since then, there hasn't been a single voice vote. And the inability to object to qualifications—Harriet Miers was an exception, with members of her own party prevailing on President George W. Bush to withdraw her nomination—leads to manufactured outrage and scandal-mongering.

Fourth, hearings have become kabuki theater. Public hearings have been around for only about a century, and it was originally seen as unseemly for the nominee himself to testify. They weren't regular practice until the 1950s, when Dixiecrats used them to rail against *Brown v. Board of Education*. These days, senators try to get nominees to admit that controversial cases are "settled law"—whether *Roe v. Wade* from a Democrat or *District of Columbia v. Heller* from a Republican. And that's before we get to "gotcha" questions or last-minute accusations of sexual impropriety.

Fifth, every nomination can have a big impact. The confirmation process has little to do with being a judge. As former White House Counsel Don McGahn once told me, "it's a Hollywood audition to join a monastery." Regardless, as the late Justice Byron White was fond of saying, every justice creates a new Court. Not all big cases would've turned out differently if one justice were replaced, but some would've—and not simply by changing the party of the president making the appointment. Moreover, vacancies have become more important in the last half-century because justices now serve longer.

Sixth, the hardest confirmations come when there's a potential for a big shift. Think of it this way: Regardless of which party controlled the Senate, would there have been as big a political firestorm last fall if President Trump were replacing Justice Clarence Thomas rather than Justice Ruth Bader Ginsburg? Will the fight to replace Justice Stephen Breyer be fiercer under President Biden or a Republican president?

Seventh, the Court rules on so many controversies that political battles are unavoidable. Under the Framers' Constitution, the Court hardly ever had to block a federal law. But as the Court let the government grow, so has its own power to police the programs that its own jurisprudence enabled. In that light, modern confirmation battles are a logical response to political incentives, to which senators are merely responding.

The ever-expanding size and scope of the federal government has increased the number and complexity of issues under Washington's control, while the collection of those new federal powers into the administrative state has transferred ultimate decision-making authority to the courts. The imbalance between the executive branch and Congress has made the Supreme Court the decider both of controversial social issues and complex policy disputes.

But will any reforms to the confirmation process change the toxic dynamic people complain about? I've come to the conclusion that we should get rid of confirmation hearings altogether: They once served a purpose, but they now inflict a greater cost than any informational benefit. Nominees have voluminous and instantly searchable records, so is there any need to subject them, and the country, to a public inquisition? Or maybe senators could hold hearings in closed session, like they already do for nominees' sensitive background checks.

In the end, all "reform" talk boils down to rearranging the deck chairs on the Titanic. And this Titanic is not the appointment process, but the ship of state. The fundamental problem is the politicization not of the *process* but of the *product*. The intense judicial debates we've seen over the last few decades were never really about the nominees themselves. They're about the Court's direction. Formalistic changes won't do anything because it's not a breakdown in the rules that caused the poisonous atmosphere surrounding nominations. It's the other way around. Senators have—correctly—come to see judges as just as important as legislation, so they apply the same bare-knuckle political plays to them.

In the end, the only measure of the Court's "legitimacy" that matters is the extent to which it gets the law right and applies the law correctly. The reason for our judicial wars isn't that the Court is partisan or that the confirmation process is broken, but that the federal government—and thus the Supreme Court—is making too many decisions for such a large, diverse and pluralistic country. And that problem is far beyond anything a blue-ribbon presidential commission can fix.

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