

The Weakening of the American Rule of Law as a Product of Political Polarisation in Supreme Court Selections

QUINN FARR analyses the trajectory of the increasingly polarised United States Supreme Court.

It has been the duty of Congress to confirm federal legal officials to the United States Supreme Court since the origin of the United States' institutional framework (Constitution, [2022], article II). Yet, despite longstanding precedent, political influence on judicial bodies has heightened since the start of the millennium. As partisan tensions rise in the aftermath of the January 6 insurrection in 2021, the importance of an independent judiciary—both in perception and in reality—has never been more important for American institutional legitimacy.

The ability to choose and confirm Supreme Court justices is divided between the executive and legislative branches, respectively. However, as politics becomes more polarised, the mixture of safeguarding processes has become irreconcilable. In principle, the choice of Supreme Court nominations represents the highest degree of judicial excellence and, crucially, not political pudence (American Bar Association). The other two branches of the United States government have for the past few decades shown institutional impotence. As a result, politics has diffused into the procedural safeguards, making the Supreme Court the new forum to deliberate political questions such as healthcare, abortion, immigration, and voting rights (Bobellion 2022). Proper procedure for judicial appointments and

decorous appointment hearings have noticeably degenerated. To explore the consequences of heightened politicisation of the Supreme Court, it is necessary to consider why an independent judiciary is necessary and how the deteriorated safeguards around this have destabilised democracy.

The Separation of Powers: An Apolitical Judiciary as a Necessary Feature of Democracy

As the primary guardian of the rule of law in the United States, the judiciary has the role of reviewing government decisions and legislation passed by Congress to ensure it aligns with the US Constitution. Fundamentally, it serves to mediate between other branches of government to interpret and delineate what the law is. Within US judicial philosophy, two interpretive movements dominate the liberal/conservative political divide: living constitutionalism and originalism, respectively (Solum 2019). Originalism adheres to strict textual interpretation, where legal rules are to be interpreted as originally written (Solum 2019). Interpretations not intended in the original rule cannot be extended to accommodate particular bereaved parties in a dispute (Calabresi [2022]). Rather, it is the duty of the legislature to enact further rules that correct or negate the original. This means, for example,



Illustration by Anastassia Kolchanov

that when the Supreme Court interprets protections laid out in the Constitution that did not originally include specific groups, they cannot overextend their interpretation to include those groups as society progresses. To originalists, it is up to Congress to enact a statute or constitutional amendment that extends the remit of the original protection. In contrast, living constitutionalism maintains that rules set out in the Constitution can, in effect, be modernised by judges within the contemporary context. The Constitution is considered a living document that can evolve and adapt to accommodate the modern moment (Coan 2017). For liberals who consider minority rights to be a core feature of their political platform, living constitutionalism matches societal progressivism. Conservatives, hesitant of judicial activism, seek to keep the Supreme Court insulated from modern developments, thus enjoying the limited historical approach that originalism offers (Vermeule 2020). Whilst these philosophies have political associations and preferences, it is vital that the originalist/living constitutionalist debate ultimately remains separate from political ideologies so the law produced by any political majority can be interpreted impartially.

It is therefore of the utmost importance that the judiciary remains apolitical, both in substance and appearance. When political parties begin to characterise appointments and decisions of the Supreme Court as a polarised, political process, it brings the integrity of the judiciary into the erratic political arena. Subsequently, the judiciary loses its stability as a mediator, and the electorate loses trust in its ability to make decisions fairly. Without any branch that is reliable and impartial, the foundations of democracy are destabilised.

Setting Up Politicisation: the Promise to an Electorate

Choosing a candidate for the Supreme Court is at the discretion of the President (US Constitution, art. II). While historically unproblematic, the recent

deficiencies of party politics have made it more difficult for particular agendas to make it through the legislative branch. If the President seeks to resolve issues in the court, this will be reflected in the candidates they choose. The issues at stake, however, are the primary wedge issues that make the legislative branch inefficient. Guaranteeing certain Supreme Court nominations to settle these wedge issues is a recent campaign tactic to increase voter turnout (Ax 2018). Indirectly, using Supreme Court nominations to motivate voters to turn out on partisan issues such as healthcare, abortion, immigration, and voting rights poses a direct threat to the appearance of judicial independence by failing to insulate judicial appointments from popular choice, which is a prerequisite for democratic legitimacy.

The vacancy generated by one Supreme Court Justice is filled by the appointment of another. In recent decades, ‘timing’ retirements in certain Presidential administrations has also contributed to the politicisation of the Supreme Court. This is seen, for example, with the pressuring of Justice Ruth Bader-Ginsberg to retire by former President Barack Obama. Retrospectively, Justice Ginsberg has been assigned blame for failing to retire under a Democrat President. Subsequently, individuals on the Supreme Court are losing their insulation as permanent members on the bench by being subjected to political responsibility to leave at the will of the executive (Dominus, Savage, and Charlie 2020). Coordinating with executive administrations makes retirement a book-ended process which fails to insulate the Supreme Court as an independent branch of government.

Reducing Apolitical Protection: the Removing of Confirmation Safeguards to Avoid Consensus

In the process of becoming a Justice, candidates selected by the President for the Supreme Court are confirmed and scrutinised by the Legislative branch, particularly the Senate Judiciary Committee. Before

a vote is held in the Senate, the Senate Judiciary Committee publicly interrogates candidates on their background, past associations, and legal commentary in televised hearings (Supreme Court Appointment Process 2021). Effectively, the hearings serve as a final opportunity for politicians to comment on complex legal and policy issues before the Supreme Court and to make particular efforts to delegitimise candidates chosen from the opposite party. In tandem with heightened political tensions, the public nature of these hearings has made the judicial confirmation process a forum for politicising the Supreme Court. Typically, Supreme Court candidates are not meant to comment on policy, so this public hearing presents a tricky situation for candidates. The nominating party's partisan associations can place the burden on the candidate to prove their impartiality. Furthermore, the nominating party often 'hard-ball' and 'soft-ball' Supreme Court candidates by the party that nominated them. In the questioning during the confirmation of Justice Amy Coney Barrett, Senator John Kennedy (R-LA) opened his remarks by rephrasing Senator Kamala Harris' (D-CA) (the current Vice President) questions into a series of rapid-fire confirmatory questions: 'Judge, let's try to answer some of Senator Harris' accusations: are you a racist...you're sure? ... Are you against clean air, bright water? ... Do you support science?' (Kennedy 2020). Redirecting legitimate concerns over Barrett's judicial record by the (then-minority) Democrats as easily dismissible straw man arguments made it easier to gain conservative support while losing liberal trust in Barrett's answers. This manoeuvre deployed by the majority party makes it difficult for candidates to be properly scrutinised.

The problematic nature of partisan scrutiny has been compounded over recent decades by reforms to judicial appointment procedure. After a candidate has been scrutinised by the Committee, the nomination is confirmed by a vote in the Senate (Supreme Court Appointment Process 2021). This process has not always been polarised, as plenty of Supreme Court candidates have been confirmed as Justices with

large Senate majorities. For example, as recently as 2010, Justice Elena Kagan was confirmed to the bench with a 63-37 majority in the Senate (Supreme Court Appointment Process 2021). The precedent of Senate consensus originates from a procedural threshold of 60 votes with the additional threat of a filibuster; judicial nominations in previous political eras needed bipartisan legitimacy to be confirmed (Flegenheimer 2017). The heightened polarisation in the Senate in recent decades, however, has weakened the need for any consensus, as political parties have amended the rules to judicial appointment. In a November 2017 vote, the 60-vote threshold and judicial filibuster were removed so that the executive's choices for all federal judicial appointments could be pushed through without consensus (Flegenheimer 2017). This proved devastating for Senate Democrats (who were the minority party); it was not foreseeable to either party at the time that, during the Trump administration, three Supreme Court seats would become available for nomination, which could be pushed through the Senate by a simple 51-vote majority. The legitimacy of these nominations was questioned publicly: Justice Neil Gorsuch's seat (confirmed in 2017) was originally supposed to go to Merrick Garland, Brett Kavanaugh had a nebulous FBI probe into sexual assault allegations, and Amy Coney Barrett was confirmed merely weeks from a federal presidential election (Kar, Bradley, and Mazzone 2016; Kelly 2021; Fandos 2020). Due to the amendments to the rules, however, nominations can be pushed through with simple majorities and little scrutiny. As a product, the legitimacy of confirming Supreme Court justices has become increasingly politically aligned, making long-term independence unsustainable.

Aftermath

In the epilogue of heightened political tensions and lower confirmatory standards, the legitimacy of new Supreme Court officials is jeopardised for both conservatives and liberals. It is plausible,

however, that with periods of adjustment, political controversy over Justices will subside (Little 2020). Nonetheless, it is apparent that the lowering of safeguards correspondingly sent the substantive product that Justices produce, landmark decisions on constitutional rights and government powers, in a downward spiral. Lower standards, by nature, are producing judicial officials who in their qualifications are markedly political yet are admitted to the Bench as a political manoeuvre (Talbot 2022).

The procedural protections have not yet improved; in fact, there is extensive public discourse over the continuing reformulation of appointment procedures so more legal officials under political administrations can be pushed through. As the incoming justice Judge Ketanji Brown Jackson is being confirmed this spring,¹ it is notable, especially to liberals, that her admission to the court will not impact the conservative 6-3 majority. Subsequently, there are questions about expanding membership on the Court and placing term limits (Kapur 2021). These efforts may appear to be in good faith, but in reality, they reflect the shifting standards that are following the appointments of the most important judicial officials in the country.

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¹Associate Justice Ketanji Brown Jackson was successfully confirmed to the US Supreme Court between writing and publication of this issue.

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