

MONITOR

DEMOCRACY LAW AND POLITICAL PARTIES

The American Supreme Court in Crisis?

Interview Concerning the Judicial Crisis in the United States

Prof. Russell A. Miller, Washington & Lee University School of Law

Professor Miller, we're concerned about things on the other side of the Atlantic. What's the state of the rule of law in the United States, which is one of the oldest democracies in the world?

Miller: Many Americans have deep and growing concerns about the health, function, and integrity of our judicial system. In the last years these concerns have focused especially on the Supreme Court: the highest and most visible court in the country, the only court established by the constitution, and the court providing the definitive interpretation of the constitution and federal statutes. In fact, some Americans now believe that the Supreme Court is in a moment of grave crisis.

Judges provide an important control function, they are the backbone, for the rule of law. As a measure of the health of the rule of law in a society it is often helpful to assess the public's trust in its courts. How much do Americans trust the Supreme Court?

Miller: Recent polling confirms the general erosion of Americans' confidence in the Supreme Court. In 2022 40% of Americans said they approve of the job the Supreme Court is doing, while 58% disapprove of the Court. The 40% approval score ties the lowest standing ever (from 2021). More troubling, the 58% disapproval is the highest ever expression of disapproval.

Worry about the Court's standing has become so intense that President Biden convened a special Commission to investigate the idea of reforming the Supreme Court. The Commission was supposed to provide a nonpartisan analysis of the principal arguments for and against Supreme Court reform. The Commission issued its Final Report in December 2021, concluding that "the nation has been engaged for some time in an intense and ongoing debate about the Court's composition, the direction of its jurisprudence, and whether one political party or the other has breached norms that guide the process of confirming new Justices." Still, the Commission did not reach consensus on the reform or remedies that might address the problem.

Above all, it seems that intense political debates are triggered by the nomination of new justices to the Supreme Court. Unlike the justices at the German Federal Constitutional Court, whose tenure ends after 12 years or at age 68, justices at the Supreme Court enjoy life-long tenure. What has been the impact of recent Supreme Court nominations?

Miller: The current crisis is rooted in the messy and brutally-contested process used to appoint justices to the Supreme Court. It is well-known that the nine justices on the Supreme Court are nominated by the president and must be confirmed by the Senate in order to take-up their role, in which they can serve for life. Throughout most of American history, the 165 presidential nominees to the Supreme Court have been considered and confirmed without much excitement. But, since the late-1980s, the Senate's Supreme Court confirmation hearings have become intense political affairs that are broadcast on live television. The first such episode came in 1987. The Democratic majority in the Senate rejected President Reagan's nomination of Judge Robert Bork. Many Republicans viewed this as an excessively ideological maneuver that undermined the president's constitutional entitlement to shape the judiciary.

More recently – and perhaps more directly responsible for contemporary alarm about the Court – there have been two highly problematic appointments. In 2016, almost a year before the end of President Obama's second term, the outspoken conservative justice Antonin Scalia died unexpectedly. President Obama nominated Judge Merrick Garland, but the Republican controlled Senate used legislative procedures to block consideration of Garland's appointment for nearly seven months in order to push it past the 2016 presidential election. After winning the presidency in 2016, Donald Trump nominated conservative Judge Neal Gorsuch to fill the still-empty seat. This led progressive commentators and scholars to accuse the Republicans of "stealing a seat" on the Court.

In 2018, Justice Kennedy stepped-down from the Court. He had been appointed by a Republican President and he clearly wanted to ensure that a Republican would have the opportunity to name his replacement. President Trump nominated the conservative Judge Brett Kavanaugh to fill Justice Kennedy's seat. This was significant, because Justice Kennedy had emerged in the last generation as a moderate voice on the Court and he often provided a decisive swing-vote for the majority in cases with conservative as well as progressive policy outcomes. Now the Court's ideological balance shifted decisively towards the right. More problematic was the fact that during his senate confirmation hearing, Democrats cast doubt on Kavanaugh's fitness based on late-emerging accusations of sexual misconduct from his teenage years. The nation watched as Professor Christine Blasey-Ford testified that Kavanaugh, using physical

force, had sexually groped her at a high school party in the summer of 1982. Kavanaugh responded to the accusation at the hearing with a mix of calm denial, indignity, and nearly hysterical outrage. Still, he was confirmed to the Court with a 50-48 vote.

These events underscore the high-stakes, the hostility, and the intense partisanship that now regularly cloud the appointment of a new justice to the Supreme Court. It is thought that the process promotes partisan and ideological appointments and then, in its crude and invasive character, galvanizes those positions. It is made worse by the weighty political significance of each appointment and by the media attention that accompanies the process.

With respect to the Democrat's outrage over Justice Gorsuch's appointment, which they portray as a "stolen seat" on the Court, it is important to note that Senate Republicans and President Trump certainly breached old norms and traditions that would have ensured that President Obama would have named Justice Scalia's successor. As dangerous as the erosion of such norms is, it is nevertheless the case that there is nothing formally illegitimate about Justice Gorsuch's appointment. He is a constitutionally legitimate and legally confirmed member of the Court. I can't escape the problematic parallels between these exaggerated and not-fully-accurate claims of a "stolen" Supreme Court and President Trump's invented and destructive claims that the 2020 presidential election was "stolen."

Let me make a final comment on this issue. It is important to note that both political parties have contributed to the politicization of the Court and the partisanship that now grips the nomination process. As I noted, it was the Democrats who voted-down President Reagan's nomination of Judge Bork. And it was the Democrats who first employed the "nuclear option" by disposing of the Senate rule calling for a 60 vote super-majority for the confirmation of lower federal court judges. The Republicans followed that gambit by blowing up the super-majority rule for Supreme Court confirmations. If the Court is irredeemably broken, then both parties have dirty hands.

But aren't the justices independent? Even if they feel themselves aligned with a political party, that shouldn't influence their decisions.

Miller: Those who claim that the Court has fallen into a legitimacy crisis argue that, due to the recent conservative nominations, the Court is afflicted by partisanship and that it has begun issuing crudely ideological judgements. There's no disputing the fact that the current Court is pursuing a new, conservative constitutional agenda. Maybe the most prominent evidence of this is the Court's controversial and intensely contested decision last summer to overturn the fifty-year-old precedent (*Roe v. Wade*) that found a right to an abortion in the constitution. This narrow 5-4 decision was the product of a decades-long partisan, political, and legal campaign to end abortion in America. The Court's clear conservative turn has been confirmed by its decision in June 2023 to overturn affirmative action. That policy permitted the state to use race as a factor in decision-making in order to pursue compelling policy aims such as remedying past discrimination or to promote diversity of viewpoints in education. To advance this new conservative constitutional paradigm the Court's conservative majority has overturned precedent ten times in five years. That's an intense pace of constitutional change. Significantly, the Court's activism has come to be viewed as a partisan-political effort rather than as the consequence of a phase of new jurisprudential reflection.

As I noted earlier, respect for the Court as a general matter is at an all-time low. But more nuanced polling reveals the deepening sense that the Court is acting in a partisan manner. By overwhelming margins, it is Democrats who are losing trust in the Court.

Furthermore, there are concerns about partiality and impropriety at the Court. News reports suggest that several of the justices have received extravagant gifts (especially in the form of vacations and travel) that have not been – or that have not been properly – reported. Some of the justices maintain sizeable investment portfolios that might be affected by the Court's decisions. Finally, there are allegations that the justices' wives and husbands may be cashing-in on the justices' prominence and power to enrich themselves or that they may be deeply involved in political affairs in Washington in a way that casts a partisan shadow on the work of the justices. For example, Chief Justice Roberts' wife made more than \$10 million in the last years as a recruiter for legal professionals. And Justice Thomas' wife is a very prominent Republican lobbyist and political strategist with close ties to the Trump camp.

In light of this dramatic depiction of the state of affairs, what's next? In your opinion, how can the Court be reinforced? How can it reclaim the confidence it has lost from the public?

Miller: There are various reform proposals, including: calls for more robust ethical oversight; calls for changing the appointments process in order to add more justices to the Court; and calls to impose term limits on the justices' tenure at the Court. I am skeptical of some of the calls for reform of the Supreme Court. Too often, they seem to be partisan medicine as a cure for alleged partisanship at the Court. After all, the critics of the Court are largely Democrats who, first and foremost, are disillusioned with the policy losses they are suffering at the Court. That outrage, however, overlooks some fundamental long-term truths about the Court.

First, the Court functions fairly well, delivering a significant majority of its decisions with consensus (9-0) or near consensus (8-1 or 7-2) judgements. Second, the Court has always been a political (if not overtly partisan) institution, sometimes mired in muddy maneuvers to manipulate its decisions. Out of respect for an essential but fragile institution, I think it is important to emphasize that the current state of things is neither altogether dysfunctional nor new. It's possible that the current conduct and character of the Court is not even worse than some past periods in America's history.

Progressives should be reminded that they are only now seeing the tide at the Court shift after generations of jurisprudence that more-or-less favored their positions on constitutional law and policy. At least in part, alarm about a crisis at the Court and calls for reform must be seen in this light: having lost on the playing field, many Democrats would now like to change the rules even at the risk of harming the Court itself.

My skepticism about the reform agenda are rooted in concern for the enduring well-being of the institution and are informed by observing the fragility of judiciary in places like Hungary, Poland, and now Israel. Built up over nearly a quarter of a millennium, the Supreme Court is generally a well-functioning institution that most of the time operates with an admirable degree of agreement and jurisprudential sophistication. Even if I disagree with the results of many of its recent decisions, I hesitate to agree that we should respond by casually sacrificing the Court to partisan political interests of the day.

Still, to be clear, I strongly agree that there is an urgent need for action on the ethical problems now plaguing the Court. The Court should act quickly to subject itself to the Code of Conduct for Federal Judges or adopt a special Code of Conduct for its own purposes. If the Court doesn't act on its own, then Congress should adopt legislation imposing more rigorous ethical constraints on the Court. This should involve clarifying and tightening reporting obligations and a more strictly applied rule for recusal in cases that risk an appearance of impropriety or partiality.

It is the other, structural calls for reform that I find problematic.

The departure from the life-tenure the justices currently enjoy is probably a legal impossibility. It would likely require an amendment of Article III, Section 1 of the Constitution, which provides that "the Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour." The U.S. Constitution is notoriously difficult to amend. This reform proposal has no prospects for success. Plans to add more justices to the Court (known as court-packing) in order to achieve a partisan balance aren't more hopeful, even if they might be legally viable. It's true that Congress can freely set the number of justices serving on the Court. But adding more Democratic-appointed justices only concedes the partisan-political character of the Court and abandons any hope that it might function as a judicial organ. A scheme that adds more judges also puts the stability and predictability of the Court's precedent at risk. A steady rotation of new justices onto the Court will likely encourage nearly constant reconsideration of past decisions and rules. Finally, this proposal seems like an invitation to every Congressional majority to reshape the Court so that it aligns with the political posture of the day. Some members of the Biden Commission worried that, by adding new justices today, a future Congress might do the same. A slippery slope of these maneuvers could lead to a Court with 30 or 40 or even more justices.

Maybe it isn't surprising that a prominent and immensely impactful institution like the Supreme Court has also fallen victim to the problems plaguing American politics: intense polarization, devalued democratic norms, and all-or-nothing policy positions. If the Court is now suffering from a legitimacy crisis, it might be enough to simply attribute that to contagion from the broader political pathology. In that sense, the most important thing that could be done to heal the Court would be to try to cure American politics more broadly.

Professor Miller, warm thanks for this conversation! The questions were posed by Dr. Franziska Rinke, Policy Advisor for Rule of Law and International Law at the Konrad-Adenauer-Stiftung.

Imprint

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