

Safeguarding the Rule of Law

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The Senate hearings to consider Judge Brett Kavanaugh's nomination to the U.S. Supreme Court will likely be among the most partisan this country has seen.

In recent years, the process to both nominate and confirm candidates to the court has become polarizing to the point of dysfunctionality. This year the stakes are as high as they've ever been — the possibility of locking in a five-person conservative majority for years to come.

To understand how polarized things have become, consider that ideological opposites Antonin Scalia and Ruth Bader Ginsburg were confirmed unanimously or near-unanimously by the Senate — in 1986 (98-0) and 1993 (96-3), respectively. By contrast, last year Senate Republicans invoked the "nuclear option," lowering the threshold for ending debate on a nomination to the court from 60 to 51 votes to avert Democrats' expected filibuster of Neil Gorsuch's appointment.

That's not to say the court has been unexposed to political forces before. In past periods of crisis, such as FDR's effort to enlarge the court and pack it with additional justices who would uphold the constitutionality of his New Deal programs, SCOTUS has certainly felt the pressures of its sister branches holding the powers of sword and purse.

However, we now live in an environment where it is apparently acceptable for the Senate simply to refuse to consider a president's nominee, or for a simple majority of 51 senators, representing significantly less than half the population of the United States, to approve a nominee who could remain in one of the most powerful offices in the land for 40 years or more, with virtually no accountability.

There is real danger to the rule of law in normalizing the form of bloody-knuckle partisanship that has taken hold of the appointments process in the United States. It risks profoundly diminishing the court both in its stature and its unique, vital role in our governing system as a source of independence, impartiality and, when possible, consensus. Over time that could undermine the court's role as guardian of the rule of law in this country in at least three ways.

First, making the appointment process a political litmus test for court nominees detracts from the court's constitutional function as an independent branch of government that was designed by our constitutional framers to place an important check on majoritarian forces to which the other branches of government are subject. In its place, it risks debasing the court by making it increasingly an extension of the political branches rather than a check on them.

Second, encouraging more partisan decision-making by the court disserves the wider interests of democracy and the rule of law, which require the building of consensus and finding common ground within a pluralistic society on the most contentious matters

of civic life. Justice Anthony Kennedy, whose retirement gave rise to the current vacancy, exemplified the tradition of consensus-building which earned him a reputation as a "centrist" member of the court.

Third, the increased politicization of the selection process risks adversely affecting the court's decision-making process. If this disturbing dynamic lessens the perceived need to build consensus among the "liberal" and "conservative" wings of the court, we may see more 5-4 decisions and starker majority and dissenting opinions. We may also see full reversals of a court's partisan tilt, to the detriment of legal certainty, a cornerstone of the rule of law.

The process needn't be like this. Globally, there is a clear trend toward reforms that aim to make judicial appointment processes less political and more focused on the professional attributes required to be a judge. More than 60 percent of countries worldwide appoint judges selected by independent commissions through a competitive application process open to all qualified candidates.

In fact, a large majority of countries that share the U.S. heritage of English common law have switched over to this model, including more than 80 percent of Commonwealth member states. The U.K. did so in 2005, partly to guard against both real and perceived risks of partisan politics influencing the judiciary. The methods by which such independent appointments commissions select judges are now the subject of international guidelines such as the Cape Town Principles of 2016, which draw on experiences from the U.K. and other Commonwealth jurisdictions that pioneered the use of commissions, including Canada and South Africa.

Hyper-partisan approaches to filling seats on the U.S. Supreme Court distorts the court's role in our governing system and diminishes it in the eyes of the public. Rather than nominate candidates on the basis of fidelity to a list of ideological prerequisites, or seek to extract promises on how a candidate would decide future cases, representatives of both parties, in the Executive and Legislative Branches of government, would better serve the country by focusing on whether the nominee has the professional and personal qualities to judge independently in accordance with the Constitution and the rule of law.

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