

**THE SUPREME COURT FIGHTS ARE REALLY ABOUT THE  
SENATE**

ADAM J. WHITE

## The Supreme Court Fights are Really About the Senate

ADAM J. WHITE<sup>1</sup>

As its name suggests, President Biden’s Commission on the Supreme Court of the United States centered on debates surrounding the Supreme Court. But throughout my service on the commission, I was reminded time and again that political fights about the Court are, at a deeper level, constitutional fights about the Senate.

It is rather fitting to find myself writing about the Court, the Senate, and the Court Commission in the *Harvard Journal of Law & Public Policy*. Many years ago, as a student at Harvard Law School, I wrote a paper on the Senate and judicial nominations, which the JLPP later published.<sup>2</sup> In those years, Senate Democrats’ filibusters against President Bush’s judicial nominations spurred him to insist, “[t]he Senate has a Constitutional obligation to vote up or down on a President’s judicial nominees.”<sup>3</sup>

I liked President Bush’s judicial nominations, so I instinctively agreed with his constitutional point and set out to write a paper accordingly. But before long, my research brought me to a different conclusion: far from obligating the Senate to vote (a proposal that the constitutional convention specifically considered but rejected), the Constitution places the

---

<sup>1</sup> Former commissioner, Presidential Commission on the Supreme Court of the United States; Senior Fellow, American Enterprise Institute; Co-Executive Director, George Mason University’s C. Boyden Gray Center for the Study of the Administrative State.

<sup>2</sup> Adam J. White, *Toward the Framers’ Understanding of “Advice and Consent”: A Historical and Textual Inquiry*, 29 HARV. J.L. & PUB. POL’Y 103 (2005).

<sup>3</sup> See *id.* at 107 (quoting *Statement on Judicial Nominations*, WHITE HOUSE PRESS RELEASES AND DOCUMENTS, Dec. 23, 2004, Factiva, Doc. No. WHPR000020041226e0cn00003).

burden upon presidents to convince senators to vote for their judicial and executive nominations.<sup>4</sup> And for good reason.<sup>5</sup>

When Justice Scalia died unexpectedly in 2016, the ensuing events put this fundamental constitutional question—of the powers of the Senate and the President, and the future of the Court—front and center in our politics for nearly a year. The Senate, controlled by Republicans, did not act on President Obama’s nomination of Merrick Garland, waiting instead until President Trump’s post-election nomination of Neil Gorsuch.<sup>6</sup> And critics, in turn, accused Republicans of “stealing” a Supreme Court seat.<sup>7</sup>

The Court Commission’s report briefly recounts those events and some of the arguments.<sup>8</sup> And it also recounts another way in which the Senate’s advice and consent power is implicated by efforts to restructure the Court. The report explains how any effort to impose new term limits on Justices—for example, 18-year terms, so that a nine-Justice court would see a new vacancy every other year—would necessarily require a concomitant change to the Senate’s role in the appointment of new Justices<sup>9</sup>, so that the Senate could no longer present a serious obstacle to the President’s appointment of new Justices.<sup>10</sup>

---

<sup>4</sup> *See id.* at 141–48.

<sup>5</sup> *See* THE FEDERALIST No. 76, at 456 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (“[Senate advice and consent] would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.”).

<sup>6</sup> *See* Richard Pérez-Peña, *Hearing for Neil Gorsuch, Supreme Court Nominee, Is Set for March*, N.Y. TIMES (Feb. 16, 2017), <https://www.nytimes.com/2017/02/16/us/politics/neil-gorsuch-supreme-court-senate-hearing.html> [<https://perma.cc/PUC8-QLNR>].

<sup>7</sup> *See, e.g.*, Editorial, *The Stolen Supreme Court Seat*, N.Y. TIMES (Dec. 24, 2016), <https://www.nytimes.com/2016/12/24/opinion/sunday/the-stolen-supreme-court-seat.html> [<https://perma.cc/D68Y-4XF5>]; Jason Sattler, *Gorsuch faces supreme battle; Block him. The GOP doesn’t deserve to fill a seat it stole in the heist of the century.*, USA TODAY, Feb. 2, 2017, at 7A.

<sup>8</sup> *See* PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES, FINAL REPORT 14–15 (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf> [<https://perma.cc/ACD4-5GKJ>]; *see also id.* at 75–77 (describing arguments that the Senate’s inaction on the Garland nomination amounted to “norm violations”).

<sup>9</sup> *See id.* at 140–43.

<sup>10</sup> *See id.*

The fact that term limits would almost necessarily require a reduction in the Senate’s role is the main reason why I changed my mind on term limits, as I explained at the end of the Commission’s work in my concurring statement.<sup>11</sup> More broadly, my time on the Commission helped me to better understand that current political fights over the Court are, at their heart, arguments about the role of the Senate and the Presidency in our constitutional republic.

There seems to be a strongly held view, among Court-focused activists and perhaps much of the politically aware public, that Supreme Court appointments are simply a perk of the presidency. We see it when partisan activists demand that Supreme Court justices retire simply to open a new seat for the current president.<sup>12</sup> We saw this in the debates surrounding the 2016 vacancy, animated by the presumption that it is unfair for the Senate not to fill a vacant Supreme Court seat.<sup>13</sup> We also see it in the debates about Supreme Court term limits, when advocates for term limits argue that a regular schedule of vacancies and appointments is necessary to eliminate “the variation in the number of each President’s opportunities to nominate a Justice[;]” their premise is that it is inherently unfair for one President to appoint more Justices per four-year term than others.<sup>14</sup> As the Court Commission’s report recounted, “proponents of term limits do not seek partisan balance” on the Court, but “if a party wins the White House more often, its Presidents should have the opportunity to nominate more Justices,” and “parties that lose

---

<sup>11</sup> Adam White, *Separate Statement of Commissioner Adam White* (Dec. 15, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/White-Statement.pdf> [<https://perma.cc/9AEF-9RL2>].

<sup>12</sup> Cf. Robert Barnes, *Activists, academics step up pressure on Justice Breyer to retire*, WASH. POST (June 16, 2021), [https://www.washingtonpost.com/politics/courts\\_law/breyer-retirement-pressure-biden-mcconnell/2021/06/16/498b2df2-ceb8-11eb-8cd2-4e95230cfac2\\_story.html](https://www.washingtonpost.com/politics/courts_law/breyer-retirement-pressure-biden-mcconnell/2021/06/16/498b2df2-ceb8-11eb-8cd2-4e95230cfac2_story.html) [<https://perma.cc/A3C5-AJZK>]; Fatma Khaled, *Justice Stephen Breyer, 83, Responds to Liberal Activists Pressing for His Retirement*, NEWSWEEK (Sep. 19, 2021), <https://www.newsweek.com/justice-stephen-breyer-83-responds-liberal-activists-pressing-his-retirement-1630594> [<https://perma.cc/DWP6-8VDC>].

<sup>13</sup> Cf. Editorial, *supra* note 7; Sattler, *supra* note 7.

<sup>14</sup> See PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES, *supra* note 8, at 114–15.

[presidential] elections” should not “have outsized impact on who sits on the Court and on its general direction.”<sup>15</sup>

We are well accustomed to warnings about the overgrowth of presidential power. We are all too familiar with the dangers of Presidents overstepping their constitutional bounds, encroaching upon the other branches. We also know that too often Congress gives power away to the executive branch, in ways that advance Congress’s modern political incentives yet undermine the constitutional order. And we see this all in both domestic and foreign affairs.<sup>16</sup>

The new Court-packing or term-limit arguments present the same dangers. Criticism of the Senate’s inaction on the Garland nomination; proposals to reduce the Senate’s confirmation power in order to facilitate term limits; and the presumption that fairness requires Supreme Court vacancies to be mapped on to presidential political calendars all treat the Supreme Court as little more than the echo of presidential elections. It treats presidential elections as the only elections that genuinely matter.

Today our major constitutional crisis is not a domineering Congress, but a desiccated one. We cannot afford for Congress to cede still more power to the presidency; rather, we need Congress to reassert its proper constitutional roles. And especially so for the Senate, the part of Congress that was created to be less impassioned, more statesmanlike.<sup>17</sup> For the sake of our constitutional system, we need to resist this latest instinct toward the imperial presidency and learn once again to respect the Senate’s crucial role in the appointments process.

---

<sup>15</sup> *Id.* at 115.

<sup>16</sup> *See, e.g.,* Neomi Rao, *Why Congress Matters: The Collective Congress in the Structural Constitution*, 70 FLA. L. REV. 1 (2018); JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* ix (1993) (“[T]he legislative surrender was a self-interested one: Accountability is pretty frightening stuff.”).

<sup>17</sup> *See* Adam J. White, *The Senate’s Trial*, NAT’L REV. (Dec. 19, 2019), <https://www.nationalreview.com/2019/12/the-senates-trial> [<https://perma.cc/7EAH-E82Q>].