

**Testimony of Jeffrey J. Peck**  
**Before**  
**The Presidential Commission on the Supreme Court of the United States**  
**July 20, 2021**

Chairs Bauer and Rodriguez and distinguished Members of the Presidential Commission on the Supreme Court of the United States –

My name is Jeffrey Peck. I am testifying today in my individual capacity. The views expressed here are entirely my own.<sup>1</sup>

Between 1987 and 1992, I had the privilege of serving as Special Counsel, General Counsel and then Staff Director of the Senate Judiciary Committee, under the chairmanship of now President, and then Senator, Joseph R. Biden, Jr. I staffed the Committee’s consideration of the nominations to the Supreme Court of Robert Bork, Anthony Kennedy, David Souter and Clarence Thomas. My service in the Senate, and particularly with these nominations, remains one of the true highlights of my professional career.

For that reason, I am immensely grateful for the opportunity to appear before you today to discuss processes of the United States Senate and the Senate Judiciary Committee as they relate to the nomination and confirmation of Supreme Court Justices through the Senate’s exercise of its advice and consent obligations under Article II, Section 2, of the Constitution.

President Biden’s Executive Order directs the Commission to produce a report addressing, in part:

“An account of the contemporary commentary and debate about the role and operation of the Supreme Court in our constitutional system and *about the functioning of the constitutional process by which the President nominates and, by and with the advice and consent of the Senate, appoints Justices to the Supreme Court;*...”<sup>2</sup>

To that end, I identified and interviewed a bipartisan group of more than two dozen current and former Senate Judiciary Committee staff, Senate Leadership staff and former Senators to explore their views about the Senate’s role in the advice and consent process regarding nominees to the Supreme Court of the United States (“SCOTUS”).

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<sup>1</sup> I am grateful to Jordyn Ramsey for her assistance with this project. Abundant thanks to all the interviewees who graciously offered their time and candid insights. Without their willingness to speak, this project would not have been possible. I learned much from them during our discussions. The Senate has a long history of dedicated, committed and thoughtful staff members on both sides of the aisle, and those whom I interviewed thoroughly exemplify this tradition. It is an honor to have served with many of them. I also appreciate the outstanding comments from those who reviewed prior drafts.

For inquiries, I can be reached at [jpeck@jjpstrategies.com](mailto:jpeck@jjpstrategies.com).

<sup>2</sup> <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/04/09/executive-order-on-the-establishment-of-the-presidential-commission-on-the-supreme-court-of-the-united-states/> (emphasis added).

Reflecting my work, this testimony is divided into 10 sections:

- I. Introduction
- II. Summary of Recommendations
- III. Research Approach and Methodology
- IV. An Historical Framework for Considering Nominations During Periods of Divided Government
- V. Key Inflection Points Since 1900
- VI. Senate Judiciary Committee Time Frames for Considering Supreme Court Nominations
- VII. The Proper Scope of Questioning of Supreme Court Nominees
- VIII. Improving the Investigative FBI Process for SCOTUS Nominations
- IX. Addressing Third Party Witnesses
- X. The Senate’s Voting Rules on Supreme Court Nominations

## **I. INTRODUCTION**

The Commission’s mission and underlying work are not easy. Politics are now largely tribal in nature. For many, allegiance to one’s “team” overrides all policy considerations. Both sides no longer play by the same rules. Norms, customs and historical precedents have been jettisoned or selectively enforced, starting well before 2017 but certainly accelerating since that time.

Unfortunately, but not surprisingly, the same extreme partisanship and adherence to “alternative” realities that characterize our body politic generally have also infected the SCOTUS nomination and confirmation processes. We are now at a point where these combative processes hardly differ from the divides associated with such legislative issues as immigration, gun control, voting rights and even a Commission to investigate the January 6<sup>th</sup> insurrection, to name just a few. Indeed, just as Congress seems on many days to be incapable of resolving these tough public policy issues, particularly in periods of divided government, so, too, may future Supreme Court nominations remain hopelessly deadlocked when the Senate majority and the President are of different parties.<sup>3</sup>

To many Republican interviewees, the Supreme Court bears considerable responsibility for these developments. They argue that the Court’s improper and unwarranted intrusion into many hot button social and political issues that ought to be the province of the legislature has led to increased politicization of the process by which Justices ascend to their seats. They also point to hearings on the nominations of Robert Bork, Clarence Thomas and Brett Kavanaugh as evidence that Democrats are to blame for the deeply troubled current state of affairs.

Democrats’ perspective differs. They argue that SCOTUS nominations have become appealing campaign issues to rally the Republican “base,” and point to the Federalist Society as a “wholly owned GOP subsidiary” whose mission is to identify and, in effect, select, members of the Court. They dismiss Republican claims that Senate Democrats must shoulder the blame for the downward spiral of the

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<sup>3</sup> The increased combativeness of Supreme Court nominations has been well-documented. See, e.g., Ruth Marcus, **Supreme Ambition: Brett Kavanaugh and the Conservative Takeover** (Simon & Schuster 2019); Mollie Hemingway & Carrie Severino, **Justice on Trial: The Kavanaugh Confirmation and Future of the Supreme Court** (Regnery 2020). See also <https://www.sentinelandenterprise.com/2018/09/24/george-f-will-the-degradation-of-the-supreme-court-confirmation-process/>

nomination and confirmation processes for their orchestrated rejection of President Reagan's 1987 nomination of Robert Bork to the Court by noting that Bork was defeated by a bipartisan majority.

Emotions run hot. Finger-pointing is mutual and commonplace. Basic facts are disputed.

The politics surrounding SCOTUS nominations were not, however, always this bad.

In calendar years, it was not too long ago – 1994, in fact – when Stephen Breyer was confirmed, 87-9. When Ruth Bader Ginsburg was confirmed, 96-3, in 1993. When David Souter was confirmed, 90-9, in 1990. When Anthony Kennedy was confirmed, 97-0, in 1988. When Antonin Scalia was confirmed, 98-0, in 1986. And when Sandra Day O'Connor was confirmed, 99-0, in 1981. Strong bipartisan majorities often prevailed.

In political years, these consensus confirmations reflect a bygone era akin to the locomotive, the Model T and wired telephones. Will any nominee to the highest court in the land ever get 90 votes again? Doubtful, since at present there are likely to be at least 25 negative votes before hearings begin, regardless of which party controls the White House and the Senate; indeed, there may be that many automatic negative votes before a nomination is even announced!

That said, it is appropriate to ask – should we care if a nominee gets 90 votes? As one interviewee commented, with the increase in tribalism and the end of the filibuster, “there is no award for 90 votes. This is now simply a pass-fail test.”

We should care. We should care that “the distinction between judges and elected politicians is becoming blurred.”<sup>4</sup> So, too, should we care that high-profile cases before the highest court in the land are increasingly seen as a game between two predictable teams, each of whom occupies a separate locker room. We should care that nominees to the Supreme Court are seen as blunt political instruments intended to advance one party's political agenda, as opposed to neutral arbiters of the Constitution and the nation's laws.

This report addresses President Biden's directive to examine the “*functioning of the constitutional process by which the President nominates and, by and with the advice and consent of the Senate, appoints Justices to the Supreme Court...*” Through my inquiry, I have sought to put forth recommendations leading to affirmative answers to these two questions:

- 1. Will the Senate ever again process a Supreme Court nominee by a President of the opposite party, whether a vacancy arises in an election year or in any year of the opposing president's term?**
- 2. Will a Supreme Court nominee ever receive a super-majority of Senate votes reflecting a consensus of support from both parties?**

These, of course, are not the only two relevant questions. But if we can improve the multiple processes embedded in their exposition, we will advance, in the words of President Biden, the “functioning of the constitutional process” of advice and consent.

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<sup>4</sup> Annenberg Public Policy Center, “Most Americans Trust the Supreme Court, But Think it is ‘Too Mixed Up in Politics,’” October 16, 2019, at 1. <https://www.annenbergpublicpolicycenter.org/most-americans-trust-the-supreme-court-but-think-it-is-too-mixed-up-in-politics/>

## II. SUMMARY OF RECOMMENDATIONS

The interviews conducted yielded a number of consensus recommendations, while also illustrating some areas of disagreement. Recommendations herein also reflect my own extensive, direct experience on four Supreme Court nominations, as well as my subsequent work on SCOTUS nominations and observations of the process for 30+ years. In sum, the recommendations set forth below reflect a combination of interviewee recommendations, my experience, historical precedents and review of a range of analyses and commentaries.

The Senate Rules of Procedure<sup>5</sup> and the rules adopted by the Senate Judiciary Committee<sup>6</sup> provide a general operational framework. For all of us who have worked there, these Rules are only the beginning, not the end. Norms, comity, mutual toleration and mutual forbearance<sup>7</sup> are what really guide the Senate as an institution. For that reason, I begin with a general reluctance to propose more formality and rigidity in the belief that “the Senate can work it out.”

In my judgment, however, the Senate is in institutional crisis. Norms are broken with regularity. Mutual tolerance and mutual forbearance are too often the exception, not the imperatives they once were. A substantial majority of interviewees made these very points about the Senate generally and, with even greater passion and certainty, about the processes associated with SCOTUS nominations and confirmations.

Indeed, with one group of Senators largely shut out of consultation with the President, denied any real decision-making role on process and left with platitudes and slogans when questioning nominees, incentives have increased to exploit other avenues that could derail a nomination. This by no means suggests the Senate should ignore serious allegations of a personal or financial nature. Investigating such matters are part and parcel of fulfilling the Senate’s “advise and consent” responsibilities, and they must be pursued vigorously and responsibly. But we should not be surprised by increasing reliance on procedural “tricks,” excessive media and third-party engagement and senatorial sensationalism when input at valuable points in the process and answers on substance are subject to wholesale denial. This all contributes even further to the untoward mentality of “winning is everything” and “the ends justify the means.”

In light of the institutional breakdown, creating some flexible but essential rules coupled with instituting core norms would lead us to a process fitting of what the Framers had in mind when they created three separate branches of American government, inextricably linked by affording an Article I branch, the United States Senate, with the responsibility to render “advice and consent” on nominations by the Article II branch, the president, to the Article III branch, the Supreme Court.

My recommendations standardize certain Senate and Judiciary Committee processes while maintaining sufficient flexibility for exigent circumstances. Standardization with a modicum of elasticity will, in my judgment, cover most, if not all, circumstances.

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<sup>5</sup> <https://www.rules.senate.gov/rules-of-the-senate>

<sup>6</sup> <https://www.judiciary.senate.gov/about/rules>

<sup>7</sup> See Steven Levitsky and Daniel Ziblatt, **How Democracies Die** (Crown 2018), for an outstanding discussion of the essential political norms of mutual toleration and mutual forbearance.

The objective of these recommendations is to reduce the level of partisanship and tribalism associated with Senate processes on Supreme Court nominations by introducing greater regularity and predictability. The processes for each nomination should no longer be left to the personal predilections and political preferences of the Senate majority and Judiciary Committee chair as they see fit at any particular moment in time. Whether even to consider a nomination and the time frames associated with those that are taken up should no longer be entirely discretionary and, therefore, subject to abuse and misuse.

There is no denying that, as some interviewees pointedly noted, “rules are made to be broken.” There is also no denying that the record, particularly in recent years in the Senate, bears this out. All the more reason, in my view, to institute new rules. Breaking norms carries little cost, nor does the public know of, or care about, their occurrence. Rules carry much more clarity and, importantly, accountability. When they are broken, the identity of the offending party is clear, and the public will know an important line has been crossed.

With this backdrop, I offer the following recommendations to the Commission.<sup>8</sup>

1. **Time Frames:** By Standing Rule of the Senate or Rule of Procedure of the Senate Judiciary Committee, the following time frames and procedures should be adopted and implemented:
  - a) Hearings shall commence no sooner than 30 days and no later than 50 days after the Senate receives the nomination. If the nomination is made during a Senate recess that is longer than three days, the minimum and maximum periods shall be extended by the length of the recess.
  - b) The nominee’s complete written record shall be delivered to the Committee no later than 10 days before hearings begin. Delays in the production of materials shall extend the minimum and maximum periods by the length of the delay, thereby penalizing the nominating Administration for dragging its feet. The White House Counsel shall certify when production of materials has been completed.
  - c) The Committee shall vote on the nomination no sooner than 10 days and no later than 21 days after hearings conclude. The “official” conclusion of the hearings shall be determined by the Chair and Ranking Member; any “gaming” of the hearings for the sole purpose of extending the time frames should be avoided. The current ability of one Senator to “hold over” a nomination shall be eliminated.
  - d) The Committee shall be required to report the nomination to the floor in all circumstances – even with a negative recommendation or without recommendation. The Constitution places the advice and consent obligation on the Senate, not a committee of the Senate. The Judiciary Committee processes the nomination by holding hearings, preparing a report and reporting the nomination to the Senate. It should not determine the fate of the nominee.

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<sup>8</sup> Each potential reform area is discussed later in detail, and organized and presented in three sections: Relevant Historical Background and Context; Results of Research; and Policy Recommendations. The relevant historical background sections are not intended to be exhaustive.

- e) The full Senate shall begin consideration of the nomination no sooner than 10 days and no later than 21 days after the Committee formally files its report on the nomination. The Senate can delay consideration only by unanimous consent.
  - f) The time frames in this new Rule could be shortened or lengthened “for cause” by joint agreement of the Judiciary Committee’s Chair and Ranking Member. “Cause” includes, but is not limited to, a voluminous record of the nominee due to extensive writings, speeches or opinions, the need for investigation of new matters and/or if additional relevant materials are uncovered.
  - g) These timeframes shall apply under all circumstances, including nominations in a presidential election year up to August 1 of that year, as explained below.
  - h) These new Rules could be altered only by unanimous consent of the Senate in order to eliminate the ability of the majority party to jettison the new policies for political expediency by simple majority vote.
  - i) These new Rules are needed now and, ideally, should be adopted and implemented immediately. Unfortunately, there is little or no chance of that occurring. Accordingly, the new Rules proposed here shall not take effect until after the next presidential election and not until the swearing in of the new Congress in January 2025. Postponing the effective date of new rules should reduce the partisanship over their deliberation and increase the likelihood of adoption because neither party would know who the rules theoretically help, and who they theoretically hurt, by the time they go into effect.
2. **Scope of Questioning:** While it is not feasible to establish a Senate or Committee Rule defining the allowable scope of questioning, the appropriate norm for questioning SCOTUS nominees – a “standard of responsiveness” – should be “philosophical particularity,” as opposed to “pinpoint specificity seeking pledges or commitments” or the “extreme reluctance” taken by more recent nominees. Procedurally, no Member of the Committee, including the Chair or Ranking Member, should be allowed to instruct a nominee not to answer a question. A Member or Members may dislike the questions posed by a colleague, but it is up to the nominee to decide whether to answer.
- a) To make an informed decision and fulfill their constitutional obligation and duty to exercise “advice and consent” on judicial nominations, Senators must understand the nominee’s judicial philosophy and views on core constitutional principles.
  - b) The so-called “Ginsburg Rule” cited by recent nominees is neither a rule nor an appropriate tactic to utilize to deflect substantively appropriate questions. Indeed, then Judge Ginsburg did not always follow it during her hearings.
  - c) When presidents campaign on promises regarding the justices they will appoint to the Supreme Court, criticizing past rulings and individual Justices – as they increasingly do – the Senate can hardly sit idly by during the hearings and not probe the judicial philosophy of nominees selected to fulfill those promises and answer those critiques. Indeed, the imperative to question nominees on judicial philosophy is even greater under such circumstances.

3. **The Role of the FBI.** Processes pertaining to the FBI's investigation of SCOTUS nominees should be further clarified and memorialized in a Memorandum of Understanding that updates and replaces the 2009 MOU executed by President Obama's White House Counsel and the then Senate Judiciary Committee Chair and Ranking Member. This MOU should be adopted at the beginning of a new Congress so that it is done outside the context of any particular nomination, and should:
  - a) Underscore and memorialize the independence of the FBI, stating specifically that the FBI's client is the American people. It is important to make clear, formally, that when the FBI conducts its investigations neither the White House Counsel nor the Senate Judiciary Committee majority or minority are the clients.
  - b) Create communication protocols governing the FBI's dialogue with the White House and the Chair/Ranking Member of the Judiciary Committee so that each of those three parties receives information simultaneously when the FBI has determined that a matter warrants investigation. It is necessary to take steps ensuring neither receives preferential treatment over the other.
  - c) Spell out the parameters of the FBI's role in conducting the background investigation before the hearings begin and any subsequent investigations that arise once the hearings have started. Specifically, and working with FBI leadership, the MOU should require a more fulsome investigative process at the outset so matters that have historically come to light later in the process are more likely to be uncovered on the front end.
  - d) Set an expected time frame for the delivery of the FBI report for the original investigation and any subsequent investigations, with room for potential adjustments depending on the precise nature of allegations that arise.
  
4. **Third Party Witnesses:** Qualitative or quantitative limits on the live testimony of third-party witnesses should not be established by rule.
  - a) The Supreme Court plays a vital role in our nation and third-party witnesses should have the opportunity not only to submit written statements for the record but also testify in person.
  - b) A norm should be established whereby the majority of outside witnesses should provide well-informed assessments of the record of the nominee.
  - c) The Chair and Ranking Member should utilize their joint discretion, as they do in all hearings, to manage the number of witnesses.
  - d) The American Bar Association should no longer play the dominant role it has in reviewing nominees. The Committee should place equal weight on multiple bar associations without affording a lead role to any single one.
  
5. **Senate Consideration and Vote on Confirmation:** If we had the good fortune to write on a blank slate, Senate Rules should require 60 votes to confirm a Supreme Court Justice in order to force, at least in most circumstances, a bipartisan consensus not only on the back end, for the final vote, but also on the front end, by necessitating more consultation by the president with the minority party leadership in the Senate. But the slate is not blank; far from it. It is inconceivable that Democrats will restore a 60-vote margin for SCOTUS nominees after a Republican president

and Republican Senate confirmed one-third of the Justices sitting today by majority vote. Bipartisan consensus on this issue is simply not attainable. Accordingly, I recommend:

- a) The Senate should retain the current simple majority requirement for confirming Supreme Court nominees.
- b) The Senate should add a new Rule explicitly requiring that all nominees receive a Senate Judiciary Committee hearing, a Committee vote and an up-or-down vote on the merits in the Senate. No nominee should be refused consideration unless the nomination has been withdrawn.
- c) The Senate should consider all nominations in a presidential election year except for those made after August 1. Nominations before August 1 are likely to be completed prior to Election Day in an balanced and orderly manner. Given the time frames proposed for new Rules guiding the Judiciary Committee's consideration, nominations after August 1 are not likely to be considered thoroughly and fairly before the American people select the next president. Key steps by the Administration and the Senate – including document production, requests for more investigative work by the FBI, number of third-party witnesses and the like – are more likely to be colored by politics and game-playing when taking place within 90 days of a presidential election. Fairness and responsible decision-making will ensue when presidential politics is not the main driver.
- d) Using August 1 as a cut-off date in a presidential election year also takes into account the early voting – either by mail or in-person – that many states now allow. There are few more consequential decisions made in in our nation than placing one of nine Justices with life tenure on the Supreme Court. Doing so while tens of millions of Americans are voicing their preference about the next president is anti-democratic.
- e) Despite the August 1 cut-off date, any Senator who believes nominations made before that date in a presidential election year are still too close to Election Day can vote against the nomination solely for that reason.
- f) While not likely feasible to implement by Senate rule, the two parties should share an understanding that nominations made by a lame duck president after his or her defeat on Election Day will not be considered.

### III. RESEARCH APPROACH AND METHODOLOGY

#### A. Selection of Interviewees

During the past few months, I conducted 25 interviews<sup>9</sup> -- 13 Republicans and 12 Democrats, thereby ensuring that both sides of the political spectrum were fairly represented.<sup>10</sup> All respondents served in the Senate as Senators or senior staff, typically as committee chief counsels, staff directors, senior

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<sup>9</sup> I am not presenting my findings as empirical research or necessarily consistent with scientifically accepted statistical methodology. The goal was to solicit opinions through a standardized set of questions, with answers informed by personal experience, which, in all cases, was extensive.

<sup>10</sup> Since my views as a Democrat are also included in this report, the total number of interviewees was, in effect, equally split.



nomination counsels or senior leadership staff. Time constraints and respondent availability limited the overall number.

## B. Nomination Experience of the Interviewees

My objective was to speak with individuals spanning as broad a range of nominations as possible to secure bipartisan perspectives from multiple political eras. Accordingly, the responses discussed herein cover 17 nominations between Sandra Day O'Connor (1981) and Amy Coney Barrett (2020) as follows:<sup>11</sup>

**TABLE 1**  
**NUMBER OF INTERVIEWEES PER NOMINATION**

<b>Nomination</b>	<b>Number of Interviewees</b>
Barrett	3
Kavanaugh	4
Gorsuch	5
Garland	4
Kagan	11
Sotomayor	10
Alito	12
Roberts	12
Breyer	9
Ginsburg	8
Thomas	8
Souter	8
Kennedy	9
Bork	9
Rehnquist (for Chief Justice)	6
Scalia	6
O'Connor	5

## C. Topics Covered

The interview guide used in my questioning can be found at Appendix 1. As detailed therein, I covered eight areas with all interviewees.

1. Biographical Information
2. General Observations
3. The Senate's Advice Function
4. Role of the Senate Judiciary Committee
5. Scope of Questioning
6. The FBI Report
7. Third Party Witnesses
8. The Senate's Consent Function: Filibuster, Margins and Presidential Election Year Nominations

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<sup>11</sup> As the list makes clear, numerous interviewees worked on multiple nominations.

## D. Interview Methodology

For all interviews:

- Each was conducted either by phone or video conference.
- Each lasted approximately 45-60 minutes.
- All names and responses have been anonymized as a condition of participation.
- No interviews were taped or recorded.
- Considering the Commission’s responsibilities set forth in President Biden’s Executive Order, interviews focused on the roles and responsibilities of the Senate; I am not reporting on any comments on pending structural proposals regarding the Court.

## IV. A HISTORICAL FRAMEWORK FOR CONSIDERING NOMINATIONS DURING PERIODS OF DIVIDED GOVERNMENT

### A. General Background and Data on SCOTUS Nominations

The Constitution grants the President “the Power, by and with the Advice and Consent of the Senate, to...appoint...Judges of the Supreme Court.”<sup>12</sup> This plain text “assign[s] two distinct roles to the Senate – an advisory role before the nomination has occurred and a reviewing function after the fact.”<sup>13</sup>

Overwhelming evidence supports the view that the Senate’s role is not merely to rubber stamp the president’s nominees.<sup>14</sup> Indeed, during most of the Constitutional Convention, “the Framers agreed that the Senate alone or the legislature as a whole would appoint the judges.”<sup>15</sup> Only at the end of the debate on this subject did the Framers include the nominating power of the President.<sup>16</sup>

The first nomination to the Supreme Court was made in 1789. Since that time:

- The Senate has confirmed 127 out of 164 nominees.
- Of the 37 unsuccessful nominations, the Senate rejected 11 by roll call votes.
- Of these 37, six were later renominated and confirmed.
- Most of the rest were either withdrawn by the President or postponed, tabled or otherwise never voted on by the Senate.<sup>17</sup>

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<sup>12</sup> **U.S. CONST.** Article II, Section 2.

<sup>13</sup> David A. Strauss and Cass R. Sunstein, “The Senate, the Constitution, and the Confirmation Process,” 101 Yale L.J. 1491, 1495.

<sup>14</sup> Strauss and Sunstein, at 1495-1501.

<sup>15</sup> Strauss and Sunstein at 1496.

<sup>16</sup> Strauss and Sunstein at 1497-98. See also William G. Ross, “The Functions, Roles, and Duties of the Senate in the Supreme Court Appointment Process,” 28 Wm. & Mary L. Rev. 633, 635-40 (1987).

<sup>17</sup> Congressional Research Service, **Supreme Court Nominations, 1789 to 2020: Actions by the Senate, the Judiciary Committee, and the Present**, Updated February 23, 2021, at 1.  
<https://crsreports.congress.gov/product/pdf/RL/RL33225>

Other excellent sources include Henry Abraham, **Justices, Presidents, and Senators. A History of U.S. Supreme Court Appointments from Washington to Bush II** (5<sup>th</sup> ed. 2007); Laurence Tribe, **God Save This Honorable Court**, (1985); Donald Lively, “The Supreme Court Appointment Process: In Search of Constitutional Roles and

For all Supreme Court nominations since 1900, Table 2<sup>18</sup> at the end of my testimony provides key data points that inform much of the research presented herein, including:

1. The nominating President
2. The nominee
3. The Justice to be replaced
4. Party control of the Senate, and by what margin
5. Date of the nomination
6. Dates of the hearings
7. Date of the vote by the Senate Judiciary Committee
8. Date of Senate floor action
9. Final Senate result

### **B. The Senate's Consideration of Nominees During Periods of Divided Government**

Throughout our history, the Senate has confirmed Supreme Court nominees appointed by presidents of the other party. Indeed, one needs only to go back to the period between the presidencies of Richard Nixon and George H.W. Bush for prime examples of such bipartisan cooperation. In the 24-year period between 1968 and 1992, Republican presidents made 14 consecutive appointments<sup>19</sup>:

1. Burger
2. Haynsworth
3. Carswell
4. Blackmun
5. Powell
6. Rehnquist (to Associate Justice)
7. Stevens
8. O'Connor
9. Rehnquist (to Chief Justice)<sup>20</sup>
10. Scalia
11. Bork
12. Kennedy
13. Souter
14. Thomas

Democrats controlled the Senate in 11 of these cases. ***In 8 of those 11, the Democratically controlled Senate confirmed the Republican president's nominees.*** Three were defeated (Haynsworth, Carswell

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Responsibilities, 59 S. Cal. L. Rev, 551 (1986); Paul M. Collins Jr., and Lori A Ringhand, **Supreme Court Confirmation Hearings and Constitutional Change** (Cambridge University Press 2013).

<sup>18</sup> The Congressional Research Service has done exceptional work in compiling and analyzing data on Supreme Court nominations. Table 2 draws upon multiple CRS reports as well as independent research I conducted on such items as Senate control and margin.

<sup>19</sup> While Jimmy Carter was president during this period, he never had the opportunity to nominate a Justice to the Supreme Court.

<sup>20</sup> I have counted William Rehnquist twice given the significance of elevating an individual from Associate Justice to Chief Justice.

and Bork). ***Notably, all – even the three defeated nominees – were not subject to a filibuster; rather, the full Senate took an up-or-down vote on the merits in each instance.***

## V. KEY INFLECTION POINTS SINCE 1900

Each Supreme Court nomination poses different challenges and issues:

- Who is the president and of which political party is he or she a member?
- Did the president select the nominee largely for political reasons – e.g., to fulfill a campaign promise to specific ideologically-aligned groups, reward an ally or enhance his or her prospects for re-election?
- Did the president consult with Members of the Senate in a meaningful way prior to submitting the nomination?
- Which party controls the Senate, and by what margin?
- Is the nominee likely to alter the ideological make-up of the Court and, more specifically, is he or she going to be the “swing vote” in a narrowly divide Court?

Simply put, the circumstances surrounding, on the one hand, a president sending a nominee to the Senate controlled by his or her same party by a margin of 59-41 and a Judiciary Committee controlled 12-7, differ immeasurably from the circumstances surrounding, on the other hand, a president and Senate of different parties and the narrowest of Senate and Judiciary Committee margins.

Against this background, there are 10 key inflection points, in my judgment, since 1900:<sup>21</sup>

### 1. The Frankfurter and Harlan Nominations

While a handful of nominees before him had testified in front of the Senate Judiciary Committee, Felix Frankfurter, in 1939, was the first SCOTUS nominee to take unrestricted questions in an open hearing. Likewise, in 1955, John Marshall Harlan started the practice of SCOTUS nominees regularly appearing before the Judiciary Committee. These appearances mark the true beginning of the hearings we see today.

### 2. The Carswell and Haynsworth Nominations

In 1969 and 1970, Clement Haynsworth and G. Harrold Carswell, respectively, were the first two nominees in modern history to suffer defeats by majority vote in the Senate. Issues arose over their record on civil rights, among other matters, and, in Carswell’s case, his level of competence.<sup>22</sup> While other nominations had been withdrawn, they were the first two to fall in recent history by a final vote in the Senate. To be clear, neither nominee was filibustered; rather, each was defeated by an up-and-down vote.

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<sup>21</sup> I do not profess to hold a monopoly on the identification of these key inflection points. Others will no doubt point to other events that are noteworthy and disagree with ones I have identified.

<sup>22</sup> Responding to claims about Carswell’s “mediocrity,” Nebraska Senator Roman Hruska famously said: “Even if he were mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren’t they, and a little chance? We can’t have all Brandeises, Frankfurters and Cardozos.” “The Supreme Court: A Seat for Mediocrity?” **Time**, March 30, 1970.

### 3. The Bork Nomination

Republican and Democrat interviewees alike – every single one – identified the 1987 nomination of Robert Bork as a key inflection point in modern SCOTUS history. Certainly, the number of books, articles and other commentary on the nomination attest to the truth of this view. Notably, widespread gavel-to-gavel cable coverage of SCOTUS nomination hearings began with the Bork nomination.<sup>23</sup>

Of course, Democrats and Republicans hold entirely different views as to **why** the Bork nomination was so important. One could devote yet another lengthy book to reviewing these differences, but for purposes of my testimony today, suffice it to say the following:

- Democrats laud the Bork nomination because for them, the Senate truly exercised its advice and consent responsibilities by fully exploring Bork’s lengthy scholarly and judicial record through detailed questions about his judicial philosophy and by demonstrating to the American people, through hearings that held great civic education value, that the nominee’s views were substantially out of the mainstream. They assert that the bipartisan 58-42 vote to defeat the nomination – on the merits, not by filibuster – also showed a well-functioning Senate with both parties working together. The Bork hearings, for Democrats, marked a positive turning point for the Senate because then Chairman Biden created a solid foundation for asking SCOTUS nominees questions about judicial philosophy and ideology, reversing the presumption of some against such questioning.<sup>24</sup>
- Republicans harshly criticize the Senate’s consideration of the Bork nomination. As described by them, it marked a significant negative turning point in the history of SCOTUS nominations because Democrats demagogued Judge Bork and his record, utterly politicized and degraded the process and unfairly forced the nominee to sit for days of questioning.<sup>25</sup> They argue that the Bork nomination triggered the downward spiral that has led to the breakdowns we witness today, and point still to this day to the use of “Borked” to describe mistreatment of a nominee. It is the fault of Democrats, in their view, that interest groups for the first time waded into SCOTUS nominations with the full arsenal of lobbying, grass roots organization and media buys, creating a never-before-seen level of intensity that has led to the destructive patterns marking today’s nomination fights.

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<sup>23</sup> Televised coverage began with the O’Connor hearings in 1981, when C-SPAN aired the proceedings. Public television went gavel-to-gavel with the Rehnquist hearings in 1986.

<sup>24</sup> For a comprehensive account of the Bork nomination, see Mark Gitenstein, **Matters of Principle, An Insider’s Account of America’s Rejection of Robert Bork’s Nomination to the Supreme Court** (Simon & Schuster 1992).

<sup>25</sup> At least one Republican interview rejected the notion that politicization began with the Bork hearings, noting that Southern Senators certainly “hazed” Thurgood Marshall and thereby politicized those hearings. The record of the Marshall hearings supports this. See **Hearings before the Senate Comm. on the Judiciary on the Nomination of Thurgood Marshall to be Assoc. Justice of the Supreme Court of the United States**, 90<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1967). Along these same lines, conservative Senators questioned Potter Stewart in 1959 about principles of judicial restraint and stare decisis, demanding to know “whether Stewart regarded himself as a ‘creative judge,’ whether he believed that the Constitution had the same meaning as it had in 1787, and whether he would honor the doctrine of stare decisis.” Ross, at 661 (citing **Hearings Before the Senate Comm. on the Judiciary on the Nomination of Potter Stewart to be Assoc. Justice of the Supreme Court of the United States**, 86<sup>th</sup> Cong., 1<sup>st</sup> Sess. 16, 20, 26 (1959)).

Certain historical events are marked by disagreements among the parties that will last for time immemorial. The Bork nomination undoubtedly is one such event. I would only note the following:

- While there certainly were some early demagogic comments about Judge Bork, the clear majority of the analysis by Democrats was substantive and focused on his lengthy record.<sup>26</sup>
- Bork testified for 32 hours. He was free to speak as much or as little as he wanted. He elected to speak freely and comprehensively. Indeed, a strong argument can be made that needed to do so, given, among other things, his voluminous criticism of landmark Supreme Court decisions.<sup>27</sup>
- Every single witness the Reagan White House requested was allowed to testify, while the Democratic majority turned away many witnesses who wanted to speak against him. In fact, more witnesses testified for his confirmation than against it.<sup>28</sup>
- The Bork nomination did launch an interest group tsunami – on the left and the right – that has often degraded the process and demonized nominees in unseemly, inappropriate ways.

While parties vehemently disagree about the reasons, there is little doubt the Bork nomination was a key inflection point in SCOTUS nomination history.

#### 4. The Thomas Nomination

After the Bork nomination, both Anthony Kennedy (nominated by President Reagan) and David Souter (nominated by President George H.W. Bush) testified at considerable length about their judicial philosophies. The Bork nomination was not an exception with respect to detailed scope of questioning; rather, the level of questioning continued with subsequent nominees.<sup>29</sup>

Importantly, it also continued with the hearings on President Bush's second nomination, that of Clarence Thomas. This continuing pattern of questioning about judicial philosophy is lost in the historical recounting of Thomas' nomination because of the controversy surrounding the second round of hearings, which focused on Professor Anita Hill's allegations against the nominee. That second round became "must see" TV for a nationwide audience, going so far as a *Saturday Night Live* sketch on Columbus Day weekend. As one interviewee rightly pointed out, the second round of hearings made it seem like the first round on the substantive views of the nominee never occurred.

In this regard, then, the Thomas nomination represented the first time in the modern television age when personal allegations about the nominee dominated the Senate Judiciary Committee and full

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<sup>26</sup> See, e.g., Christopher H. Schroeder and Jeffrey Peck, "Response Prepared to the White House Analysis of Judge Bork's Record," reprinted in 9 *Cardozo Law Review* 219-296 (1987).

<sup>27</sup> As Collins and Ringhand note, "...Bork failed to garner Senate confirmation not because he answered too many questions, but because he gave the wrong answers." Collins and Ringhand, **Supreme Court Confirmation Hearings and Constitutional Change**, at 12.

<sup>28</sup> **Hearings Before the Senate Comm. on the Judiciary on the Nomination of Robert Bork to be Assoc. Justice of the Supreme Court of the United States**, 100<sup>th</sup> Cong. First Session (1987).  
[https://archive.org/details/bork\\_transcripts](https://archive.org/details/bork_transcripts)

<sup>29</sup> See Carolyn Shapiro, "Putting Supreme Court Confirmations in Context," **SCOTUS BLOG**, August 18, 2018., where Shapiro notes: "...[T]he hearings held during the late 1980s and 1990s were remarkably substantive. This is not to say that nominees during those years made commitments about how they would rule on contested legal issues. But they did discuss their judicial philosophies, their past writings and their beliefs about the role of judges."  
<https://www.scotusblog.com/2018/08/putting-supreme-court-confirmation-hearings-in-context/>; See also Collins and Ringhand, at 12-13.

Senate's consideration, with the nominee's judicial philosophy largely lost in the brightness of the klieg lights and media scrutiny.

#### 5. The Ginsburg Nomination

Why is the Ginsburg nomination an inflection point, one might ask, when the Senate confirmed her by the overwhelming vote of 96-3? The reason – subsequent reliance by nominees on the so-called “Ginsburg Rule.”

Discussed in depth in Section VII on scope of questioning, then Judge Ginsburg testified in response to questioning from Senator William Cohen that she would offer “no hints, no forecasts, no previews” when confronted with questions about certain of her views.<sup>30</sup> Ginsburg's comment has been cited repeatedly – mostly by Republican Senators and nominees of Republican presidents but not only by them – as the core defense against answering questions of substance. It has become the proverbial Heisman “stiff arm”<sup>31</sup> utilized by nominees to defend against would be Senate Judiciary Committee tacklers seeking answers to questions about judicial philosophy and ideology.

The “Ginsburg Rule” is important, therefore, because it has been used to shut down questions – and, more importantly, answers – that had become a core staple of the Bork, Kennedy, Souter and Thomas hearings. It is also important, as discussed later, because no other than then Judge Ginsburg often ignored the “Rule.”

#### 6. Escalating Fights Over Circuit Court Nominations

One cannot look at the current breakdown over SCOTUS nominations without understanding the dramatically escalating battles over circuit court nominations since the early 2000s. These battles contributed heavily to the problems we face today.

Nominated in 2001 and ultimately withdrawing in 2003, Miguel Estrada, President George W. Bush's nominee for the D.C. Circuit, became the first circuit court nominee to be filibustered.<sup>32</sup> Early in the Bush Administration, Democrats controlled the Senate and could stymie nominations in the Judiciary Committee. Once the Republicans took control after the 2002 mid-term elections, Senate Democrats resorted to filibustering the Estrada nomination.<sup>33</sup> Additional appellate nominees were also filibustered by Senate Democrats.<sup>34</sup>

As frustration mounted within the Bush White House and Senate Republicans, Senate Majority Leader Bill Frist threatened to invoke the “nuclear option,” eliminating the filibuster for judicial nominations. This path became even more appealing after the 2004 election, when Republicans gained three seats to hold a 55-45 majority in the 109<sup>th</sup> Congress.

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<sup>30</sup> **Hearings before the Senate Comm. on the Judiciary on the Nomination of Ruth Bader Ginsburg to be Assoc. Justice of the Supreme Court, 103<sup>rd</sup> Cong., First Session (1993)** at 323; see also at 52, 55, 222 and 290.

<sup>31</sup> <http://www.grapplearts.com/wp-content/uploads/2008/05/heisman-trophy.jpg>

<sup>32</sup> The first of seven cloture votes took place on March 6, 2003. All seven motions to invoke cloture failed after receiving only 55 of the 60 votes necessary to shut off debate.

<sup>33</sup> Democrats argued that Estrada lacked judicial experience and objected to certain refusals by the Bush Administration to provide documents. Republicans argued he was more than qualified, noting his experience in the Solicitor General's office.

<sup>34</sup> Texas Supreme Court Justice Priscilla Owens (nominated for the 5<sup>th</sup> Circuit) and Alabama Attorney General Bill Pryor (nominated for the 11<sup>th</sup> Circuit) were also filibustered at this time.

By May 2005, it appeared that Senate Republicans were indeed on the path to “go nuclear.” At that time, however, the so-called “Gang of 14” emerged, comprised of seven Senators from each party.<sup>35</sup> Together, they could block changing Senate rules to eliminate the filibuster. In the end, the “Gang” reached agreement whereby the seven Democrats agreed to vote for cloture for some of the then-filibustered nominees and for any future filibustered nominees except in “extraordinary circumstances” as defined by each individual Senator, and the Republicans agreed that they would not vote to implement the “nuclear option.”<sup>36</sup>

#### 7. The Democrats’ Decision to go “Nuclear” on All But Supreme Court Nominations

Fast forward to 2013, when Senate Republicans, now in the minority, filibustered President Obama’s three nominees to the D.C. Circuit (Patricia Millett, Nina Pillard and Robert Wilkins), arguing, among other things, that the D.C. Circuit had too many judges.<sup>37</sup> In addition, the GOP was also filibustering several Obama nominees to Executive Branch positions.

As a result, led by Majority Leader Harry Reid, Senate Democrats voted 52-48 to invoke the “nuclear option” in November 2013 with respect to executive branch, district court and appellate nominations.<sup>38</sup> Decrying the move, Senate Republicans, led by Minority Leader Mitch McConnell, warned: “You’ll regret this, and you might regret it even sooner than you might think.”<sup>39</sup>

Republican interviewees repeatedly identified this action by Senate Democrats as an important inflection point in the breakdown over nominations, arguing that it clearly set the precedent for the Senate GOP’s later decision to extend the “nuclear option” to SCOTUS nominees.<sup>40</sup>

#### 8. The Garland and Barrett Nominations

While each of these nominations is significant, they are a key inflection point when considered together.

In March 2016, President Obama nominated Merrick Garland to fill the seat vacated as a result of Antonin Scalia’s death. Majority Leader McConnell made it clear he considered the nomination to be null and void, stating publicly that because it was occurring in a presidential election year, Scalia’s replacement should be chosen by the next president after the voters had spoken.

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<sup>35</sup> Senators Robert Byrd, Lincoln Chafee, Susan Collins, Mike DeWine, Lindsey Graham, Daniel Inouye, Mary Landrieu, Joseph Lieberman, John McCain, Ben Nelson, Mark Pryor, Ken Salazar, Olympia Snowe and John Warner comprised the “Gang of 14.”

<sup>36</sup> It is worth noting that the “Gang of 14” became active again in July 2005 in conjunction with President Bush’s decision on who to choose to replace Justice O’Connor when she retired. The group met to discuss the Alito nomination but came to no conclusions. Bush selected Alito, and each of the Democrats in the “Gang” supported invoking cloture on Alito’s nomination – more than enough votes to prevent the filibuster.

<sup>37</sup> Democrats argued this claim was a smokescreen for the real agenda, namely, for the GOP to limit the number of additional “progressive” judges that could be nominated by President Obama for the influential D.C. Circuit.

<sup>38</sup> Senators Carl Levin, Joe Manchin and Mark Pryor voted against invoking the nuclear option.

<sup>39</sup> Burgess Everett, “Senate Goes for ‘Nuclear Option,’” **Politico**, November 22, 2013.

<https://www.politico.com/story/2013/11/harry-reid-nuclear-option-100199>

<sup>40</sup> Democrats defend the move by saying, in part, that the Republicans would have done away with the filibuster on judges, including SCOTUS nominees, even if Reid had not led the effort to do on executive branch and lower court nominations in 2013. Like the Bork nomination, this will be topic of disagreement for time immemorial.



During my interviews, I expected Democrat respondents to cite Senator McConnell's decision on Garland as a key inflection point in SCOTUS nomination history. And, to a person, they did.

What surprised me is the number of Republican respondents who critiqued it as well, citing it as another key inflection point in the downward "death spiral" of the confirmation process. As one GOP respondent put it, there has been a "degradation of the process from Garland to Barrett," with this same person acknowledging that the failure to consider the Garland nomination "delegitimized the process" and another describing it as "fundamentally dishonest." Another GOP interviewee noted that not considering the Garland nomination "definitely made things worse." Another said that the GOP's action on Garland "limited the field [for confirmations] to three years," noting there is no reason a Democratic Senate would move a Republican nominee in an election year. This same interviewee described the blocking of Garland as "not necessarily a plus" and an exercise of "raw power."<sup>41</sup>

While Senate Republicans refused to consider a Democrat President's nomination *eight months* before a presidential election, they moved expeditiously to consider a Republican President's nomination *six weeks* before a presidential election. The Senate received President Trump's nomination of Amy Coney Barrett on September 29, 2020. Her hearings started 13 days after receipt of her nomination – the shortest period in 45 years. She was confirmed on October 26, 27 days after nomination, a week before the 2020 presidential election and while early voting was already taking place. Indeed, by the date of her confirmation, more than 58 million Americans had voted.<sup>42</sup>

Senator McConnell has sought to justify the difference between refusing to consider the Garland nomination in March of an election year while speedily processing the Barrett nomination in October of an election year by arguing that Barack Obama was finishing a second term and, therefore, could not be re-elected, whereas Donald Trump was only completing his first term and, therefore, had a chance of re-election.

This is a distinction without a difference. The American people were speaking on Election Day 2016 and on Election Day 2020. The presidency was at stake on both days. A president was going to be sworn in on January 20<sup>th</sup>, 2017, and January 20<sup>th</sup>, 2021. Certain inconsistencies are simply irreconcilable and, therefore, bereft of principle. Trying to distinguish between the type of incumbent president is surely one.

Taken together, these nominations became a tipping point for Democrats, which, among other things, vastly accelerated calls for structural and other reforms to the Supreme Court. Some consider them to be "break glass" moments in Senate history, with tribalism further embedded in our political foundation.

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<sup>41</sup> This interviewee noted that while an "exercise of raw power," Senator McConnell was clearly within his rights to do so, adding that other branches also engage in similar "exercises of raw power," citing President Obama's executive actions with respect to Dreamers. There is no doubt that nothing in the Constitution, the law or the rules of the Senate prohibited McConnell from taking the action he did. And McConnell has told Hugh Hewitt that his action on Garland represents "the single most consequential thing I've done in my time as majority leader in the Senate." Tweet by Manu Raju, June 14, 2021. To my mind, the question is less about whether Senator McConnell had the power and more about whether holding it necessarily means one should always exercise it, considering the likely consequences.

<sup>42</sup> <https://www.theweek.in/wire-updates/international/2020/10/26/fgn17-us-election-ld-report.html>

## 9. The Gorsuch Nomination and Invocation of the “Nuclear Option”

After his Inauguration, Donald Trump wasted little time in selecting Neil Gorsuch for the Scalia seat, acting on January 31, 2017. In a change from past practice and in response to the GOP’s refusal to consider the Garland nomination, Democrats filibustered the Gorsuch nomination once it was reported to the floor. After the motion to invoke cloture failed, Majority Leader McConnell invoked the “nuclear option” and, with the support of his GOP colleagues, ended the filibuster for Supreme Court nominations.

Any discussion of the Democrats’ decision to use the filibuster to attempt to stop the Gorsuch nomination, and McConnell’s decision to kill the filibuster for SCOTUS nomination, must take note of two important historical facts.

- In 1987, the Senate Judiciary Committee voted 9-5 in favor of a negative recommendation on the Bork nomination. The Committee Chair, then Senator Biden, working with Senate Democratic Leadership, could have elected to kill the Bork nomination right there in Committee. Instead, because they believed that Supreme Court nominees were entitled to an up-or-down vote, Bork’s nomination was reported to the full Senate. That gave Senate Democrats a second bite at the procedural apple, given the opportunity to filibuster the Bork nomination, killing it without making Senators take a stand on the merits. Again, however, believing that SCOTUS nominees deserve an up-or-down vote, Senate Democrats chose to make the vote on Bork a vote on the merits of the nomination.
- Similarly, in 1991, the Judiciary Committee tied 7-7 on a vote to report the nomination of Clarence Thomas without recommendation. Without a favorable recommendation, Senate Democrats again could have killed the nomination in Committee. Again, they elected not to do so. Nor did they choose to filibuster the nomination, which would have clearly succeeded since Thomas was ultimately confirmed by a narrow 52-48 vote on the merits.

Republicans blame Harry Reid for the end of the filibuster on SCOTUS nominations, claiming his action on lower court nominations inevitably led to this result. Democrats claim Republicans abuse the rules when it suits their political purposes. Whether one, both or neither are correct, the filibuster is now gone for the foreseeable future when it comes to nominations to the Supreme Court.

## 10. The Kavanaugh Nomination

Just as the Garland and Barrett nominations constitute a collective tipping point for Democrats, the Kavanaugh nomination is a fundamental line of demarcation for Republicans. Many decry what they consider to be the untoward and unprecedented lengths to which Democrats, progressive interest groups and the media went to try to defeat Kavanaugh. They argue Senate Democrats sought to place unacceptable pressure on the FBI to “dig up dirt” and that Democrats’ questioning of the nominee was dehumanizing to him and degrading to the process. Republicans further ascribe a “winning is everything” mentality to Democrats, asserting that historical norms about deferring to a president’s

selection of SCOTUS nominees were destroyed as a result. To one top Republican Senator, the hearings represented “the most unethical sham” he had ever seen in politics.<sup>43</sup>

There is little doubt that the Kavanaugh hearings left Senate Republicans feeling that “all bets are now off.” What that means for future nominations is not yet clear, but the signs are ominous.

## **VI. SENATE JUDICIARY COMMITTEE TIME FRAMES FOR CONSIDERING SUPREME COURT NOMINATIONS**

### **A. Relevant Historical Background**

Ninety-four of the past 100 Supreme Court nominations have been referred to the Senate Judiciary Committee. The six not referred to the Committee were a former President, a sitting or former House member, a former Senator, a former Attorney General and House Member, a former Secretary of War or a sitting Associate Justice.<sup>44</sup>

#### **1. Nominee Testimony at Hearings**

Before 1916, the Judiciary Committee considered nominations in closed hearings, with Members discussing and voting on nominees in executive session. It did not take testimony from outside witnesses.<sup>45</sup>

The Committee held its first public confirmation hearings on Louis Brandeis in 1916. Lest one believe that long hearings are only a recent development, Brandeis’ lasted 19 days, although he never appeared. After Brandeis, the Senate acted on the next six nominations (1916 to 1923) with neither referral to the Judiciary Committee nor public hearings.<sup>46</sup>

The next public hearing was on Harlan Fiske Stone’s nomination in 1925. Stone became the first SCOTUS nominee to appear in person and testify, largely out of a need to rebut claims of prosecutorial misconduct by the Justice Department when Stone was Attorney General in the investigation of Senator Burton Wheeler. During the next 20 years, a total of 11 nominees took part in public hearings, while five did not.<sup>47</sup> Importantly, Felix Frankfurter in 1939 became the first SCOTUS nominee to take unrestricted questions in an open hearing.<sup>48</sup>

It was not until John Harlan’s appearance in 1955 – three decades after Stone’s in person testimony before the Judiciary Committee – that the practice of regular testimony began in earnest.<sup>49</sup> This

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<sup>43</sup> <https://www.cbsnews.com/news/lindsey-graham-brett-kavanaugh-hearing-unloads-on-democrats-over-supreme-court-nomination-process/>. See also Letter from Senator Graham to Judiciary Committee Democrats, <https://www.judiciary.senate.gov/imo/media/doc/Hearing%20Letter%20Response%2009.21.2020.pdf>

<sup>44</sup> CRS, **Supreme Court Nominations, 1789 to 2020**, at 5.

<sup>45</sup> CRS, **Supreme Court Nominations, 1789 to 2020**, at 6.

<sup>46</sup> CRS, **Supreme Court Nominations, 1789 to 2020**, at 6.

<sup>47</sup> CRS, **Supreme Court Nominations, 1789 to 2020**, at 6.

<sup>48</sup> That same year, William Douglas waited outside the hearing room while his hearings were conducted. As remarkable as this seems in the age of 24-7 cable TV, Twitter and Instagram stories, outside the hearing room is where he stayed; the Judiciary Committee never called him as a witness.

<sup>49</sup> In 1949, Sherman Minton refused to appear before the Judiciary Committee, foreshadowing the rationale used by more recent nominees in declining to answer questions about judicial philosophy. Minton wrote that “personal participation by the nominee in the committee proceedings relating to his nomination presents a serious question

represented the first time inquiry was made into a nominee's views on substantive legal issues. Opposition to Harlan's nomination by isolationists led to questions concerning his views on national sovereignty and separation of powers.<sup>50</sup>

There have been 40 Supreme Court nominations since 1949 – from Sherman Minton to Amy Coney Barrett.<sup>51</sup> Of those:

- Public hearings in the Senate Judiciary Committee or Subcommittee were held on 36.
- 4 did not receive public hearings:
  - John M. Harlan II did not receive a hearing less than a month before Congress' final adjournment for the year, but he was renominated, and hearings were held, at the beginning of the next Congress.
  - Harrier Miers' nomination was withdrawn in 2005 before any hearings would have taken place.
  - The original nomination of John Roberts to be Associate Justice was withdrawn only so he could be renominated as Chief Justice, a position for which hearings were held.
  - No hearings were held on the Garland nomination, since the GOP-controlled Senate refused to take any action.

***Since 1949, therefore, outside of the Miers withdrawal, only Merrick Garland did not receive a hearing.***

## 2. Hearing Length

The length of hearings has varied considerably. But for the Brandeis hearings, the Judiciary Committee typically devoted one or two days to hearings from the 1920s to the mid-1960s. From 1967 to the present:

- 20 of the 26 Supreme Court nominations hearings lasted four or more days.
- Four of those 20 lasted 11 or more days (Homer Thornberry, Abe Fortas, Robert Bork and Clarence Thomas).
- Only three lasted two or fewer days (Warren Burger to be Chief Justice, Harry Blackmun and Antonin Scalia).<sup>52</sup>

## 3. Reporting of Nominations

In 1870, the Senate Judiciary Committee started reporting Supreme Court nominations with a favorable recommendation whenever a majority of the Members supported the nominee.<sup>53</sup> Since that time, the

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of propriety, particularly where I might be required to express by views on the highly controversial and litigious issues affecting the Court." 95 Cong. Rec. 13803 (1949).

<sup>50</sup> It is probably not a coincidence that the precedent set in the Harlan nomination for nominees to testify regularly came in the aftermath of **Brown v. Board of Education**, 347 U.S. 483 (1954). See also Shapiro, SCOTUS Blog, at 3. <https://www.scotusblog.com/2018/08/putting-supreme-court-confirmation-hearings-in-context/>

<sup>51</sup> CRS, **Supreme Court Nominations, 1789 to 2020**, at 7.

<sup>52</sup> CRS, **Supreme Court Nominations, 1789 to 2020**, at 8.

<sup>53</sup> CRS, **Supreme Court Nominations, 1789 to 2020**, at 9. From 1828, when the Committee first began to consider nominations, until 1863, the Committee simply reported them to the full Senate without any official indication of the views of the Members. CRS, **Supreme Court Nominations, 1789 to 2020**, at 9

Committee has favorably reported 77 SCOTUS nominations, with the Senate confirming 71. The six favorably reported but not confirmed included, in more recent memory, Abe Fortas for Chief Justice (nomination withdrawn) and both Clement Haynsworth and Harrold Carswell, whose nominations were voted down.<sup>54</sup>

In four instances, the Committee has reported a nomination without recommendation, with only one – the nomination of Clarence Thomas – in the last 127 years.<sup>55</sup>

There have been seven occasions when the Judiciary Committee reported a nomination with an unfavorable, or negative, recommendation. Only two of those occurred in the 20<sup>th</sup> Century – John Parker in 1930 and Robert Bork in 1987.<sup>56</sup>

Out of the 120 Supreme Court nominations referred to the Judiciary Committee since it was established, nine were not reported to the full Senate, although three were renominated and then confirmed.<sup>57</sup>

## **B. Historical Record on Time Frames for Senate Judiciary Committee and Senate Floor Action**

Based on CRS data and my own independent research, Table 3 below shows the elapsed time for four different key periods of consideration by the Senate Judiciary Committee and the full Senate. Included is important data on the party controlling the Senate control and by what margin, two factors that certainly affect timing.<sup>58</sup> The four periods shown are:

1. The Senate’s formal receipt of a nomination to the first day of hearings.
2. The first day of hearings to the Committee’s vote.
3. The day of the Committee report to the Senate vote.
4. The total number of days between the Senate’s formal receipt of the nomination and final action by the Senate or president.

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<sup>54</sup> CRS, **Supreme Court Nominations, 1789 to 2020**, at 9.

<sup>55</sup> CRS, **Supreme Court Nominations, 1789 to 2020**, at 9.

<sup>56</sup> CRS, **Supreme Court Nominations, 1789 to 2020**, at 9.

<sup>57</sup> CRS, **Supreme Court Nominations, 1789 to 2020**, at 10.

<sup>58</sup> Table 3 does not include the elapsed time between the end of the hearings and the Committee vote because Senate Judiciary Committee rules already specify that a nominee can be “held over” only once from one executive business meeting to the next, where a vote must occur. In other words, this period has been relatively standardized.

**TABLE 3****Full Senate and Senate Judiciary Committee Processes Since 1960**<sup>59</sup>

President	Nominee	Senate Control <sup>60</sup>	Date Received to 1 <sup>st</sup> Day of Hearings	1st Day of Hearings to Comm. Vote	Comm. Report to Final Vote	Date Received to Final Vote
<b>Donald Trump</b>	Barrett	GOP 53-47	13	10	4	27
	Kavanaugh	GOP 51-49	56	24	8	88
	Gorsuch	GOP 51-49	47	14	4	65
<b>Barack Obama</b>	Garland	GOP 54-46	NEVER CONSIDERED	N/A	N/A	N/A
	Kagan	DEM 59-41	49	22	16	87
	Sotomayor	DEM 59-41	42	15	9	66
<b>George W. Bush</b>	Alito	GOP 55-45	60	15	7	82
	Miers	GOP 55-45	Withdrawn	N/A	N/A	N/A
	Roberts (for C.J.)	GOP 55-45	6 from renomination as C.J. 39 from nomination as Ass. J.	10	7	62
<b>Bill Clinton</b>	Breyer	DEM 57-43	56	7	10	73
	Ginsburg	DEM 56-44	28	9	5	42
<b>George H.W. Bush</b>	Thomas	DEM 55-45	64	17	18	99 (2 sets of hearings)
	Souter	DEM 55-45	50	14	5	69

<sup>59</sup> Congressional Research Service, **Supreme Court Appointment Process: Senate Debate and Confirmation Vote**, updated February 22, 2021, at 14, 16; CRS, **Supreme Court Nominations, 1789 to 2020, 21-46**; Judiciary Committee Report on Recent Votes on Supreme Court Nominees, <https://www.judiciary.senate.gov/nominations/supreme-court/committee-votes>

<sup>60</sup> For purposes of this table, Independents are counted as Democrats because they caucus with them. Table 2 lists third parties specifically for each Senate margin.

President	Nominee	Senate Control	Date Received to 1 <sup>st</sup> Day of Hearings	1st Day of Hearings to Comm. Vote	Comm. Report to Final Vote	Date Received to Final Vote
<b>Ronald Reagan</b>	Kennedy	DEM 55-45	14	44	7	65
	Bork	DEM 55-45	70	21	17	108
	Rehnquist (for C.J.)	GOP 53-47	39	16	34	89
	Scalia	GOP 53-47	42	9	34	85
	O'Connor	GOP 53-47	21	6	6	33
<b>Gerald Ford</b>	Stevens	DEM 62-38	7	3	9	19
<b>Richard Nixon</b>	Rehnquist (for Ass. J)	DEM 54-44	12	20	27	49
	Powell	DEM 54-44	12	20	13	45
	Blackmun	DEM 57-43	14	7	6	27
	Carswell	DEM 57-43	8	20	51	79
	Haynsworth	DEM 57-43	26	23	43	92
	Burger (for C.J.)	DEM 57-43	11	0	6	17
<b>Lyndon Johnson</b>	Thornberry	DEM 64-36	15	No hearing	No Comm. Report	100 Withdrawn
	Fortas (for C.J.)	DEM 64-36	15	68	17	100
	Marshall	DEM 64-36	30	21	27	78
	Fortas (for Ass. J.)	DEM 68-32	8	5	0	14
<b>John F. Kennedy</b>	Goldberg	DEM 64-36	11	14	0	25
	White	DEM 64-36	8	0	0	8

Table 2 highlights several key data points:

1. The Senate's Formal Receipt of the Nomination to the First Day of Hearings

The Judiciary Committee has held public hearings for 48 Supreme Court nominations, starting, as previously noted, with Brandeis in 1916.

- The shortest time between the Senate's receipt of the nomination and the start of hearings was four days (Cardozo and Douglas).
- The second shortest time was five days (Reed and Frankfurter).
- The longest time was 82 days (Stewart), while the second longest time was 70 days (Bork).<sup>61</sup>

The median time between receipt of the nomination and the start of hearings has also lengthened:

- Prior to 1967, the median time was 10 days.
- Between 1967 and 2020, the median time was 27 days.<sup>62</sup>

Since 1960, the median time overall between the Senate's receipt of the nomination and the start of hearings is 26 days.

The average time since 1960 has been 29.897 days.

Notable differences occurred in two cases:

- 45 days elapsed between John Roberts' nomination for Chief Justice (his first nomination to be Associate Justice was withdrawn) and the start of hearings.
- Amy Coney Barrett's hearings started 13 days after receipt of her nomination – the shortest period in 45 years.

2. The First Day of Hearings to the Committee Vote:

The time frame from the first day of hearings to the vote by the Senate Judiciary Committee has also varied:

- Since the beginning of the 20<sup>th</sup> Century, the longest elapsed time, 105 days, was for the Brandeis' nomination, with the second longest, 68 days, occurring on Fortas' nomination to be Chief Justice.
- More recently, the longest elapsed time has been 44 days in the case of Anthony Kennedy. This reflected the timing quirks for consideration of the Kennedy nomination, which only began after Bork's defeat and President Reagan's decision to nominate Kennedy in his place. As a result, the hearings did not occur until December, which were then followed by the December-January congressional recess, before his committee vote in January.
- Examples of rapid action are Breyer (seven days), Ginsburg (nine days), Scalia (nine days) and O'Connor (six days).

The median time from the first day of hearings to the Committee vote since 1960 has been 14.5 days.

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<sup>61</sup> CRS Report, **Supreme Court Nominations, 1789 to 2020**, at 14.

<sup>62</sup> CRS Report, **Supreme Court Nominations, 1789 to 2020**, at 14.



The average time from first day of hearings to the Committee vote since 1960 is just 16.214 days.

3. The Committee Report to Final Action

The time frame from the filing of the Judiciary Committee’s report to final action on SCOTUS nominations has generally been shorter than the two previously discussed time frames.

The median time from committee report to final Senate or presidential action is 8.5 days, while the average is 13.928 days.

4. Receipt of Nomination to Final Senate or Presidential Action

Not surprisingly, the length of time between the Senate’s receipt of the nomination to final action has increased over time. Between 1789 and 1960, the median time was only seven days. Between 1960 and 2020, the median time has been 65.5 days while the average time has been 58.143 days.

5. Summary of Median and Average times

Table 4 summarizes the median and average times for these four key time periods.

**TABLE 4**

	<b>Date Received to 1<sup>st</sup> Day of Hearings</b>	<b>1st Day of Hearings to Comm. Vote</b>	<b>Comm. Report to Final Vote</b>	<b>Date Received to Final Vote</b>
Median	26	14.5	8.5	65.5
Average	29.896	16.214	13.928	58.143

**C. Research Findings**

All interviewees were asked their views on the Senate promulgating a new Standing Rule or, alternatively, the Senate Judiciary Committee promulgating a new Rule of Procedure, which would create time parameters for each stage of consideration of Supreme Court nominees once the president officially submits the nomination.

A substantial majority of interviewees – more than 70% -- support the adoption of time frames by rule, if the parameters set a range of time for each stage of the process as opposed to a single deadline for each stage.

Most of these interviewees did not opine on the number of days for each range, while urging longer parameters than shorter ones to err on the side of giving Senators more time to evaluate nominees’ records. Some suggested using past precedents as a guide.

A minority of interviewees oppose the adoption of time frames by rule, with most arguing each nomination is so different that any type of “one size fits all” approach will not be feasible in at least some instances.

A considerable majority of interviewees, including many who support the adoption of time frames, were highly skeptical about the ability to reach bipartisan agreement on a new Senate Standing Rule or

Judiciary Committee Rule of Procedure given today's fierce partisanship and deep rancor over Supreme Court nominations. In short, they believe it is difficult but not impossible. For this reason, one interviewee suggested postponing the effective date, with many interviewees supporting such an approach.

#### **D. Recommendations**

Based on my interviews with respondents and historical data, I recommend a new Standing Rule of the Senate or new Rule(s) of Procedure of the Senate Judiciary Committee applicable to Supreme Court nominations.

The new Rule or Rules would impose these time frames:

- Hearings shall commence no sooner than 30 days and no later than 50 days after the Senate receives the nomination. If the nomination is made during a Senate recess that is longer than three days, the minimum and maximum periods shall be extended by the length of the recess.
- The nominee's complete written record shall be delivered to the Committee no later than 10 days before hearings begin.<sup>63</sup> The Administration shall certify that the record is complete. Delays in the production of materials shall extend the minimum and maximum, thereby penalizing the nominating Administration for any such delays.
- The Committee shall vote on the nomination no sooner than 10 days and no later than 21 days after hearings conclude. The "official" conclusion of the hearings shall be determined by the Chair and Ranking Member; any "gaming" of the hearings for the sole purpose of extending the time frames should be avoided. The current ability of one Senator to "hold over" a nomination shall be eliminated.
- The Committee shall be required to report the nomination to the floor in all circumstances – including with a negative recommendation or without recommendation. The Constitution places the advice and consent obligation on the Senate, not a committee of the Senate. The Judiciary Committee processes the nomination by holding hearings, preparing a report and reporting the nomination to the Senate. It should not determine the fate of the nominee.
- The full Senate shall begin consideration of the nomination no sooner than 10 days and no later than 21 days after the committee formally files its report on the nomination. The Senate can delay consideration only by unanimous consent.
- As noted in Section X, the Senate should be required to take an up-or-down vote on the nomination.
- The time frames herein could be shortened or lengthened "for cause" by joint agreement of the Judiciary Committee's Chair and Ranking Member. "Cause" includes, but is not limited to, the

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<sup>63</sup> Once a nomination is announced, the Judiciary Committee initiates the process of collecting information about the nominee through a detailed questionnaire that seeks biographical, financial and employment information, as well as the nominee's writings, speeches and the like. Senators will sometimes ask additional questions, and the nominee may supplement his or her questionnaire with answers to such questions. Historically, fights between the Committee and the Administration will erupt over materials (memos, emails and the like) on which the nominee worked while in the Executive Branch, as questions regarding the application and scope of executive privilege are often raised. See generally, Congressional Research Service, **Supreme Court Appointment Process: Consideration by the Senate Judiciary Committee, Updated February 22, 2021**, at 1-3.

nominee’s lengthy record of extensive writings, speeches and/or opinions, the need to investigate new matters and/or the discovery of additional relevant materials.<sup>64</sup>

- These timeframes shall apply under all circumstances, including nominations prior to August 1 of a presidential election year.<sup>65</sup>
- These new procedures could be altered only by unanimous consent of the Senate in order to eliminate the ability of the majority party to jettison the new policies for political expediency by simple majority vote.<sup>66</sup>
- The new Rule proposed here shall not take effect until after the next presidential election and not until the swearing in of the new Congress in January 2025. Postponing the effective date of new rules should reduce the partisanship over their deliberation and increase the likelihood of adoption because neither party would know who the rules theoretically help, and who they theoretically hurt, by the time they go into effect.

In sum, this means that a SCOTUS nomination could be considered in as short as a 50-day period but no longer than a 92-day period, subject to timely and complete document production and joint agreement by the Chair and Ranking Member to modify one or more elements.

In arriving at the time frames proposed, I used historical medians and averages as guideposts, as a number of interviewees suggested, while also taking into account the voluminous records that some nominees possess and the fact that the Senate moves more slowly than in years past. Furthermore, problems are more likely to arise from considering a SCOTUS nomination too quickly rather than too slowly; a complete record poses fewer risks than an incomplete one.

Time frames are, in the words of one supportive interviewee, “intellectually consistent” and should “remove much of the political fighting over timing.” More specifically:

- By allowing some flexibility in each period but eliminating total discretion, standardization would mitigate the previous partisan fights over timing and require both parties – regardless of who is in the majority and who is in the minority – to adhere to the same time frames under all circumstances.
- A time frame for commencing the hearings would ensure that hearings are not rushed to meet any artificial deadlines while at the same time are not inordinately delayed.
- These timeframes would ensure that all SCOTUS nominations are reported to the full Senate, whether with a favorable recommendation, a negative recommendation or without recommendation. This is consistent with the Constitution’s requirement that the Senate – not the Judiciary Committee, but the *full* Senate – render not only its advice but also its consent.
- Time frames would also mitigate and shorten the negotiations over each element of the process that often consume considerable Member and staff time.

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<sup>64</sup> I considered a Rule allowing the Chairman only to alter the time frames while also requiring a written statement of the reasons for doing so. In the end, a Chairman-only Rule would likely increase partisanship even more. Furthermore, it is more consistent with the historic operations of Senate committees to require the consent of both the Chair and Ranking Member.

<sup>65</sup> The rationale for the August 1 cut-off date in presidential election years is discussed in full in Section X.

<sup>66</sup> This would prevent the majority party voting acting unilaterally to eliminate rules previously adopted on a bipartisan basis.

Precedents exist supporting time frames.

For example, Presidents George W. Bush and Barack Obama offered limited approaches:

- In 2002, with respect to lower court nominations, President Bush proposed that nominees receive (1) a hearing before the Senate Judiciary Committee within 90 days of nomination and (2) an up or down vote with 180 days of nomination.<sup>67</sup>
- President Obama called for an up-or-down vote by the full Senate with 90 days of nomination, while not proposing any deadline for a hearing.<sup>68</sup>

Furthermore, in 2004, Senator Arlen Specter introduced a resolution creating a three-pronged timetable for Senate action on judicial nominations:

- Hearings within 30 days of the Senate’s receipt of a nomination.
- A Committee vote within 30 days of the hearing.
- A full Senate vote within 30 days after the Committee reported out the nomination.<sup>69</sup>

In addition, the Specter resolution authorized the Committee Chair – with notice to, but not agreement by, the Ranking Member – to extend Committee action by 30 days “for cause,” such “as the need for investigation or additional hearings.” The same authorization was given to the Majority Leader.<sup>70</sup>

Finally, a Miller Center Commission, which included such bipartisan members as former Attorney General Nicholas Katzenbach, former Senator Majority Leader Howard Baker, former Senator Birch Bayh and former White House Counsels Lloyd Cutler and Fred Fielding, proposed a 60-day time frame from Senate receipt of the nomination to final Senate action.<sup>71</sup>

Time frames for Supreme Court nominations are not without risks. Arguments against and responses thereto include:

- Argument: All nominations are different; no one size fits all.
- Rebuttal:
  - Flexible time parameters, as opposed to fixed dates, will cover most situations, and exigent circumstances can be managed by the Chair and Ranking Member.
  - The time frames proposed are not pulled out of thin air; rather they are consistent with historical precedent and practice, as well as the realities of the Senate today.
- Argument: We already have “soft” time frames based on Committee precedent and it is better to use precedents than attempt to create new rules.
- Rebuttal:
  - The time frames proposed reflect the “soft” time frames used in the past.

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<sup>67</sup> <https://georgewbush-whitehouse.archives.gov/news/releases/2002/10/20021030-6.html>

<sup>68</sup> <https://obamawhitehouse.archives.gov/state-of-the-union-2012>

<sup>69</sup> <https://www.govtrack.us/congress/bills/108/sres327/text>

<sup>70</sup> <https://www.govtrack.us/congress/bills/108/sres327/text>

<sup>71</sup> <https://millercenter.org/issues-policy/us-domestic-policy/the-national-commission-on-the-selection-of-federal-judges>

- Given the consensus view that the current process is largely, if not entirely, broken, reliance on precedent no longer works the way it once did – formalized rules are needed.
- Argument: Rules are only as good as the ability to enforce them. Given today’s excessive partisanship, they will not be enforced because the majority party can always vote to override them at any time. This would have occurred even had the rules proposed here been in place when President Obama nominated Merrick Garland, the argument goes, and would apply as well to Democrats had they done, or would do, the same if positions were reversed.
- Rebuttal:
  - Rules do require mutual respect and comity for their application and enforcement.
  - But it is one thing to alter past practice or a norm; it is another to vote to change an *existing* rule. Doing the latter bespeaks of obvious political maneuvering and manipulation, which should impose some political cost to the flouting party and thereby create some measure of incentive not to resort to such flagrant abuse of the process.
  - That said, since recent history shows that political costs are not high, the better practice, as recommended here, is to require unanimous consent to change the new Rules proposed.
- Argument: Requiring a committee vote removes the flexibility needed on some occasions to let a nomination “wither and die on the vine” at the end of a Congress or end of a congressional session so as to avoid the embarrassment of requiring a nominee formally to withdraw.
- Rebuttal:
  - This is true for district and circuit court nominations, which are large in number and rarely, if ever, draw the attention of a Supreme Court nomination, where withdrawal will always attract enormous public attention.
  - This is a reason to apply the proposed time frames only to Supreme Court nominations.

## VII. THE PROPER SCOPE OF QUESTIONING OF SUPREME COURT NOMINEES

### A. Relevant Historical Background

Extensive written commentary exists about the proper scope of questioning of judicial nominees as well as the applicable codes of judicial conduct.<sup>72</sup> While ethical rules “purport to *constrain* what a federal judicial nominee may permissibly say during the confirmation process[,] none of the ethical rules...affirmatively *obligate* nominees to respond to particular questions.”<sup>73</sup> This is a grey area that leaves wide latitude and discretion with the nominee.

Three models of questioning have emerged during the past 65+ years.

#### 1. Pinpoint Specificity Seeking Pledges and Commitments

<sup>72</sup> See, e.g., **Congressional Research Service, Questioning Judicial Nominees: Legal Limitations and Practice**, August 30, 2018. <https://crsreports.congress.gov/product/pdf/R/R45300>; see also Congressional Research Service, **Supreme Court Appointment Process, Practice of the Senate Judiciary Committee, Updated February 2021**, <https://crsreports.congress.gov/product/pdf/R/R44236>

<sup>73</sup> CRS Report, **Questioning Judicial Nominees**, at 4 (emphasis in original).

In some instances, Judiciary Committee Members have not hesitated to ask pointed questions that seek, or certainly appear to seek, pledges or commitments that would apply to future cases. This has been the case with both parties.

Such attempts run afoul of principles of judicial independence and, politically, fall more into the “gotcha” category than a true attempt to gauge judicial philosophy and approach. Furthermore, such questions focus purely on outcomes and results, not on legal reasoning, interpretation and methodology. Whether in the presidential selection process or the Judiciary Committee hearings, these sorts of questions are typically nothing more than improper attempts to impose litmus tests.

## 2. Extreme Reluctance

At the other end of the spectrum, some nominees entertain literally no questions about judicial philosophy.<sup>74</sup> During his hearing, for example, Antonin Scalia deflected nearly all questions into the “I can’t answer category,” arguing that they seek “predictions as to how I will vote in the future.”<sup>75</sup> Scalia went so far as to assert that “I do not think I should answer questions regarding any Supreme Court opinion, even one as fundamental as Marbury v. Madison.”<sup>76</sup>

More recent nominees have justified their extreme reluctance to answer questions by professing to follow the previously discussed “Ginsburg Rule,” citing her hearing statement that she would offer “no hints, no forecasts, [and] no previews” of how she might rule on questions that could come before the Court.<sup>77</sup> While the so-called “Ginsburg Rule” is now framed in absolute terms – along the lines of “she never answered any specific questions so neither will I” – nominee Ginsburg did not always follow her own rule. She declined to offer information about some matters but proffered more extensive views on others, particularly those issues about which she had previously written.<sup>78</sup>

As former Duke Law School Professor Christopher Schroeder has outlined,<sup>79</sup> recent nominees now use a “handy toolkit” to implement their studied and practiced reluctance to answer questions. This kit has four well-used tools:

- The so-called “Ginsburg Rule,” updated by Justice Kavanaugh during his hearings as “nominee precedent” in refusing to answer substantive questions, because multiple nominees since Ginsburg have, in fact, repeatedly cited her alleged “Rule.”
- A follow-on refusal to answer any hypothetical questions, no matter how general.
- A near religious-like promise to “follow the Constitution.”

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<sup>74</sup> Using empirical analysis, Collins and Ringhand argue that “nominee candor has not declined over time.”

**Supreme Court Confirmation Hearings and Constitutional Change**, at 265. With deep respect for their work, I would note that in the additional hearings since the publication of their book, nominees’ reluctance to engage in substantive conversations regarding judicial philosophy has, in fact, increased, with trend lines suggesting a continuation of this pattern if the status quo remains.

<sup>75</sup> **Hearings Before the Senate Comm. on the Judiciary on the Nomination of Antonin Scalia to be an Associate Justice of the Supreme Court of the United States**, 99<sup>th</sup> Congress, 2<sup>nd</sup> Sess., 99th Congress (1986) 87.

<sup>76</sup> **Scalia Hearings**, at 33.

<sup>77</sup> **Ginsburg Hearings** at 323.

<sup>78</sup> Indeed, nominee Ginsburg testified about her judicial philosophy in such areas as the right to privacy; unenumerated rights; stare decisis; race and gender discrimination, affirmative action and civil rights; reproductive rights; First Amendment, including freedom of speech and the religion clauses; and separation of powers.

<sup>79</sup> Speech at the Mauer School of Law at Indiana University, <https://www.youtube.com/watch?v=YConsa8Bgkw>

- A reverential respect for “Supreme Court precedent.”<sup>80</sup>

Taken to its logical extreme, this toolkit means that no nominee will answer any question bordering on judicial philosophy or reasoning – since any statement on any legal issue could conceivably affect some case that could be presented. We end up in the situation we witness today, where nominees do not say anything about their current views on any legal issues, posed in however general terms they may be, and they do not say anything about their views on any past cases.<sup>81</sup> As one astute commentator has put, this has become the nominee’s “Fifth Amendment.”<sup>82</sup>

### 3. Philosophical Particularity

Hearings on the Bork, Kennedy, Souter and Thomas nominations exemplify the kind of dialogue for which the Judiciary Committee and nominee should strive. Much of the questioning probed these nominees’ reasoning (particularly, Bork’s case, with respect to the many cases he had harshly criticized), the sources they would consult in resolving constitutional questions and their understanding of the meaning of specific amendments to the Constitution. Such questions probe the manner, the means and the methods by which the nominee will decide cases without seeking specific pledges or commitments.

Of course, many on the right side of the political spectrum have argued for 30+ years that Robert Bork was defeated precisely because he engaged in this constitutional discourse and dialogue with Members of the Senate Judiciary Committee. The questioning, this argument goes, was highly inappropriate – the questions should not have been asked in the first instance and, if Senators insisted on taking this wrongful tack, Judge Bork would have been fully within his rights to refuse to answer them.

This argument has it exactly wrong. First, given Judge Bork’s extensive and, by any reasonable measure, highly controversial, record, he likely would have been defeated by an even greater margin had he adopted the “extreme reluctance” approach. Second, nominees after Bork prove conclusively that one can offer answers with philosophical particularity and still get confirmed – even when the Senate majority and the president are of different parties. Both Anthony Kennedy – nominated by Reagan and confirmed by a vote of 97-0 when Democrats controlled the Senate 55-45 – and David Souter – nominated by George H.W. Bush and confirmed by a vote of 90-9 when Democrats also controlled the Senate 55-45 – demonstrate that philosophical specificity does not guarantee Senate rejection. Indeed, it helps secure a bipartisan vote in support.

### 4. Summary

In the end, when it comes to the proper scope of questioning of judicial nominees, two clear observations can be made:

- The only consensus is that there is no consensus.
- Any Senator can ask any question he or she decides to pose, and any nominee can refuse to answer any question with which he or she is uncomfortable.

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<sup>80</sup> Schroeder Speech, minutes 14-20.

<sup>81</sup> Schroeder Speech.

<sup>82</sup> Jeff Blattner, “The Nominees’ Fifth Amendment,” October 10, 2020. <https://medium.com/@JeffBlattner/the-nominees-fifth-amendment-3aa1f55b4550>

## B. Research Findings

Most interviewees believe that the value of SCOTUS nomination hearings has increasingly diminished over time. Common descriptions included “kabuki theater,” “farce,” “charade,” “circus,” “a model of escape and evasion” and “insufferable.” Anyone who has watched recent hearings would be hard pressed to disagree. Given the extreme reluctance of nominees, questioning by Senators has become tedious and uninformative. One interviewee noted that Senate questioning has become “air cover for some to justify a negative vote they have already decided to make.”

There was consensus among all interviewees that it is not feasible to develop hard-and-fast formal rules regarding the questioning of SCOTUS nominees. Among other problems, such rules would turn the Judiciary Committee chair into a faux judge obligated to decide on the relevance, materiality and scope of his or her colleagues’ questions – inevitably a “lose-lose” proposition for the Chair, as one interviewee put it. It would also, as another interviewee noted, invade the “holy province of senatorial desire” to ask any questions he or she wants to pose.

A small number of Democrat interviewees and one Republican interviewee supported the view that nominees should answer questions about how they would have ruled in specific past Supreme Court decisions. These interviewees dismissed the notion that outside groups would use these answers to politicize the process even further, noting that the groups already assume that nominees embrace particular views and act on those assumptions accordingly. The Republican interviewee in this group supported this level of specificity based on his view that future cases involved different facts and thereby do not compromise a nominee’s judicial independence. Moreover, this interviewee believes that the public is entitled to know a nominee’s views and that Senators, with such information, can then vote based on the totality of the nominee’s record.

Two Democrat interviewees and one Republican interviewee support specific questioning but stop short of asking about how a nominee would have voted in past cases. The Republican interviewee noted the appropriateness of asking a nominee, “Had you been on the Court in 1973 and had the Roe factual record before you, how would you have approached the case,” distinguishing that question from a precise question about how the nominee would have voted.

Approximately 15 interviewees – both Democrats and Republicans – support questions about the “general philosophy of judging.” They believe it is appropriate to ask questions about what nominees have written but oppose questions regarding how nominees would have ruled in specific past cases decided by the Court. For nominees who are or have previously been judges, these interviewees also support asking them about their reasoning in cases they have decided.

Several Republican interviewees referred approvingly to the so-called “Ginsburg Rule,” noting that should be the model for all future nominees.

One issue that arose during my research was whether to allow each Member of the Judiciary Committee to submit a defined number of written questions to the nominee before the hearings commence, with answers due before the nominee appears in person. The argument in favor of such an approach is that the nominee’s testimony would then follow an enhanced record. The problem with such an approach is that if history is any guide, the answers are likely to be written by White House Counsel lawyers, Department of Justice lawyers, outside lawyers (such as former law clerks) supporting the nominee or



some combination thereof. While rules could require the nominee to attest to the accuracy of the answers and the fact that they reflect the nominee's actual views, it would be difficult, if not impossible, to police their actual preparation.

One GOP interviewee proposed limiting the questioning of nominees in open session to one round, no longer than 30 minutes, with the remainder of the questioning occurred in closed session to "produce less grandstanding."

### C. Recommendations

What is the proper scope of questioning of Supreme Court nominees? The answer, to my mind, is philosophical particularity.

As I have previously written,<sup>83</sup> to make an informed decision and fulfill their constitutional obligation and duty to exercise "advice and consent" on judicial nominations, Senators must understand the nominee's judicial philosophy and views on core constitutional principles. Otherwise, they would merely be rubber stamps. Bromides, maxims and slogans do nothing but leave Senators – and the public – in the dark.

This does not mean every question about judicial philosophy is appropriate. Senators should not ask nominees to comment on the merits of a pending case or soon-to-be-filed case. Nor should they ask nominees to comment on specific hypothetical fact patterns. Nominees should resist making explicit promises, pledges or commitments about how they may rule on particular issues.

I do believe it is appropriate to ask about the Court's past decisions. Such questions should not be simple yes-or-no formulations that focus on the results only; in my view, those are unseemly outcome-based inquiries. Rather, questions about past decisions should focus on the method of reasoning (whether majority opinions, dissents or concurrences), the judicial philosophy applied, the impact of stare decisis, the level of adherence to originalism, the context of the case in the history of the Court's jurisprudence in the particular areas of the law covered and the like. These inquiries go to the heart of judicial philosophy, constitutional analysis, reasoning and methodology. They do not imperil a nominee's impartiality in future cases.

By way of example, philosophically specific appropriate questions might include:

1. What is your understanding of stare decisis and what are the factors you think should be considered in determining whether a prior Court decision is "settled law?"
2. Do you believe the Constitution recognizes a right to privacy under the due process clause of the 14<sup>th</sup> Amendment?
3. Is Griswold v. Connecticut, in which the Court embraced this right, settled law?
4. Do you agree with Justice Powell who wrote in Moore v. East Cleveland: "Freedom of personal choice in matters of marriage and family life is one of the liberties protected by the 14<sup>th</sup> Amendment?" Do you consider it a "fundamental liberty" such that the government may interfere only for extraordinary reasons?

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<sup>83</sup> Jeffrey Peck, "No More Softball, Senate. Ask Trump's Supreme Court Pick These Questions," **The Washington Post**, July 6, 2018; Jeffrey Peck, "Do's and Don'ts for Questioning Nominees to the Supreme Court," **Roll Call**, July 15, 2005; Jeffrey Peck, "How to Get to the Core," **Legal Times**, July 12, 1993.

5. What is your understanding of “one person, one vote?”
6. What reasoning would you have applied if you were on the Court when it considered Brown v. Board of Education?
7. How does the War Powers Act fit into your understanding of separation of powers?
8. Describe how the Constitution supports your understanding of political speech?
9. What is your understanding of the Second Amendment and what do you think the Framers intended in its adoption?
10. What is your view on the scope of Congress’ power under the Commerce Clause?
11. What is the appropriate scope of state sovereign immunity and the 11<sup>th</sup> Amendment of the Constitution?
12. Please explain how you see the various tiers of review used by the Supreme Court in its interpretation of the Equal Protection Clause.
13. What is your understanding of the appointment powers of the President, particularly with respect to recess appointments and appointments to independent agencies?
14. Are you an originalist? Or do you think the meaning of the Constitution evolves over time?
15. Name three Justices who you believed engaged in “judicial activism” and explain why.

Considerable support for this recommended approach exists from both sides of the aisle:

- In 1959, after serving as a Supreme Court clerk, William Rehnquist wrote, in connection with Charles Whittaker’s nomination:
 

“Given the state of things in March 1957 [three years after the decision in Brown v. Board of Education], what could have been more important to the Senate than...Whittaker’s views on equal protection and due process?...The only way for the Senate to learn of these [views] is to inquire of men on their way to the Supreme Court something of their views on these questions.”<sup>84</sup>
- In 1970, noted scholar Charles Black wrote that “a judge’s judicial work is...influenced and formed by his whole life view, by his economic and political comprehensions, and by his sense, sharp or vague, of where justice lies in respect of the great questions of his time.”<sup>85</sup> Black further noted that just like a president considers a nominee’s views when deciding on whether to put their name forward, so, too, ought the Senate consider those views.

The argument that the Senate should not consider a nominee’s views “amounts to an assertion that the authority that must ‘advise and consent’ to a nomination ought not to be guided by considerations which are hugely important in the making of the nomination.”<sup>86</sup>

“The Supreme Court is a body of great power. Once on the Court, a Justice wields that power without democratic check. This is as it should be. But is it not wise, before that power is put in his hands for life, that a nominee be screened by the democracy in the fullest manner possible, rather than in the narrowest manner possible, under the Constitution? He is appointed by the

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<sup>84</sup> William Rehnquist, “The Making of a Supreme Court Justice,” **Harvard Law Record**, October 8, 1959, at 7, 8.

<sup>85</sup> Charles Black, “A Note on Senatorial Consideration of Supreme Court Nominees,” 79 *Yale L.J.* 657, 657-58 (1970). <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=6015&context=yjl>

<sup>86</sup> Black, at 658.

President (when the President is acting at his best) because the President believes his worldview will be good for the country, as reflected in his judicial performance. The Constitution certainly permits, if it does not compel, the taking of a second opinion on this crucial question, from a body just as responsible to the electorate, and just as close to the electorate, as is the President. Is it not wisdom to take that second opinion in all fullness of scope?"<sup>87</sup>

- In 1972, in the case of Laird v. Tatum,<sup>88</sup> respondents sought Justice Rehnquist's disqualification on the ground that prior to his nomination, he had commented publicly on the constitutional issues raised in the case. Rehnquist rejected the request, noting in part:

"Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions which would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers. Proof that a Justice's mind at the time he joined the Court was complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias."<sup>89</sup>

- In 1981, conservative professor Grover Rees III, then counsel to the Senate Judiciary Committee's Subcommittee on Separation of Powers chaired by conservative Senator John East, wrote a memorandum on the proper scope of questioning of Supreme Court nominees.<sup>90</sup> Rees made several key points:

"...a Senator may have a duty to base his vote at least partly on the nominee's views – then the Senator ought to have some way of ascertaining what those views are."<sup>91</sup>

"A nominee's discussion of questions of constitutional law at confirmation hearings, outside the context of specific pending cases, is not a proper basis for his disqualification from cases involving those questions that come before the Court after his confirmation."<sup>92</sup>

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<sup>87</sup> Black, at 660.

<sup>88</sup> 409 U.S. 824 (1972).

<sup>89</sup> Laird, at 835 (emphasis added).

<sup>90</sup> Grover Rees III, Memorandum on the Proper Scope of Questioning of Supreme Court Nominees at Senate Advice and Consent Hearings, Submitted to the Subcommittee on Separation of Powers, September 1, 1981. The Rees memo was sent to O'Connor by none other than John Roberts. <https://www.archives.gov/files/news/john-roberts/accession-60-88-0498/026-oconnor-misc/folder026.pdf>

See also Grover Rees, III, "Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution," 17 Ga. Law Rev. 913, 962, 967 ("The risk of the *appearance* of impropriety, however, must be balanced against the near certainty that a rule against discussing constitutional questions deprives the Senate of information that is vital to an intelligent performance of its advice and consent function." (emphasis in original)); ("Since the responsibility of Senators to choose good Supreme Court Justices is just as great as that of the President, and since nominees' opinions on constitutional questions are relevant to their qualification, the practice of nominees refusing to answer such questions should be changed....Only by abolishing the exclusionary rule can nominees provide any assistance to the Senate in fulfilling the purpose of the advice and consent function.")

[https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/geolr17&id=923&men\\_tab=srchresult](https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/geolr17&id=923&men_tab=srchresult)

<sup>91</sup> Rees Memorandum at 8 (emphasis in original).

“The tension between the Senators’ and the nominee’s respective duties can be resolved, first, by a good faith effort to understand each other’s problems. Such understanding would entail a mutual recognition that a candid discussion of a question of constitutional law at a confirmation hearing is not a promise to vote a certain way.”<sup>93</sup>

“The balance must be struck in such a way as to leave the nominee free to discuss leading Supreme Court cases such as Brown and Roe, without which an intelligent discussion of the fundamental problems of constitutional law is impossible; in such a way as to leave Senators with something more than resume and slogans as a basis for their decision.”<sup>94</sup>

The Supreme Court’s 2002 decision in Republican Party of Minnesota v. White<sup>95</sup> is also instructive. There, the Minnesota Supreme Court had adopted a canon of judicial conduct that prohibited a “candidate for a judicial office” from “announc[ing] his or her views on disputed legal or political issues” (the so-called “announce clause”). While running for associate justice of that court, the petitioner and others filed suit seeking a declaration that the “announce clause” violated the First Amendment and an injunction against its enforcement. The District Court granted respondent officials summary judgment, and the Eighth Circuit affirmed.

The Supreme Court reversed. In a majority opinion written by Justice Scalia and joined by Chief Justice Rehnquist and Justices O’Connor, Kennedy and Thomas, the Court held that the First Amendment barred the Minnesota Supreme Court from prohibiting candidates for judicial election from announcing their views on disputed legal or political issues:

“We do not agree with [dissenting Justice] Stevens’ broad assertion that to the extent that [statements on legal issues] seek to enhance the popularity of the candidate by indicating how he would rule in specific cases if elected, they evidence a lack of fitness for office. Of course, all statements on real-world legal issues indicate how the speaker would rule in specific cases. And if making such statements (of honestly held views) with the hope of enhancing one’s chances with the electorate displayed a lack of fitness for office, so would similarly motivated statements of judicial candidates made with the hope of enhancing their chances of confirmation by the Senate, or indeed of appointment by the President. Since such statements are made, we think, in every confirmation hearing, Justice Stevens must contemplate a federal bench filled with the unfit.”<sup>96</sup>

The case for philosophical specificity is strongest when presidents select nominees precisely because of their judicial philosophy – such as President Reagan’s selection of Robert Bork, President George H.W. Bush’s selection of Clarence Thomas and President Trump’s selection of Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett. Compare these instances to President Eisenhower’s selections of Potter Stewart, a moderate, and Earl Warren and William Brennan, both liberals. Nor should we forget that while Richard Nixon selected conservatives Warren Burger and William Rehnquist, he also nominated moderate Republican Harry Blackmun and conservative Democrat Lewis Powell. A president who uses a

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<sup>92</sup> Rees Memorandum at 10 (emphasis in original).

<sup>93</sup> Rees Memorandum at 16 (emphasis in original).

<sup>94</sup> Rees Memorandum at 17.

<sup>95</sup> 536 U.S. 765 (2002).

<sup>96</sup> White, 536 U.S. at 781,

vacancy to select a nominee to suit his or her political purposes must be met by a Senate that carefully evaluates the judicial philosophy of that nominee with the specificity of questioning that affords insights into their views on a full range of constitutional issues.

When presidents campaign on promises regarding the justices they will appoint to the Supreme Court<sup>97</sup>, criticisms of past rulings and even of individual Justices – as they increasingly do – the Senate can hardly sit idly by during the hearings and not probe the judicial philosophy of nominees selected to fulfill those promises and answer those critiques. The Senate has a clear obligation under the Constitution to assess that philosophy in the exercise of its advice and consent function.

In sum, as the late Senator and Judiciary Committee Chair Sam Ervin once stated, if the Senate “ought not to be permitted to find out what [the nominee’s] attitude is toward the Constitution or what [the nominee’s] philosophy is,” then “I don’t see why the Constitution was so foolish to suggest that the nominee for the Supreme Court ought to be confirmed by the Senate.”<sup>98</sup>

## **VIII. IMPROVING THE FBI INVESTIGATIVE PROCESS FOR SUPREME COURT NOMINATIONS**

Two background investigations are generally conducted on Supreme Court nominees. First, the Judiciary Committee conducts its own review, focused mainly on the nominee’s substantive record, publicly available documents and the like. A significant part of the Committee’s review is reflected in the detailed questionnaire sent to nominees. Nominations counsel, limited in number, also investigate certain matters. Second, the FBI conducts a background investigation that includes confidential interviews with a range of different people.

In some cases – Clarence Thomas and Brett Kavanaugh – a third investigation takes place, with the FBI, together with or separate from Judiciary Committee counsel, initiating a supplemental investigation of allegations that arise after the first two investigations have been completed.

### **A. Relevant Historical Background**

The primary investigation conducted by the FBI is relatively pro forma. It is not, as some might assume, the kind of full-blown, detailed investigation that would occur in the context of a criminal investigation, for example. Cleared Judiciary Committee staff can review the FBI’s report. On some occasions, follow-up questions are sent to the FBI, to which they will then respond.

After the second round of hearings at which Clarence Thomas and Anita Hill, as well as other witnesses, testified, and the conclusion of the process, Chairman Biden led the Judiciary Committee to adopt new procedures whereby for every nominee, the Committee would sit in closed session to hear any allegations of a personal nature.<sup>99</sup> In many cases, because there are no such allegations, the sessions are largely pro forma. Yet they ensure a non-public forum in each case if such matters do arise.

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<sup>97</sup> As just one of many examples, President Trump pledged throughout his campaign to nominate someone “in the mold of Justice Scalia.” He kept that promise by nominating Neil Gorsuch.

<sup>98</sup> **Stewart Hearings**, at 33-34.

<sup>99</sup> Closed sessions are allowed under Senate Rule XXVI(5)(b). A description of the genesis of and practices associated with these new closed sessions can be found at **Ginsburg Hearings**, at 115-117.

<https://www.govinfo.gov/content/pkg/GPO-CHRG-GINSBURG/pdf/GPO-CHRG-GINSBURG.pdf>

In September 2009, White House counsel Gregory Craig, Judiciary Committee Chair Patrick Leahy and Ranking Member Jeff Sessions executed a Memorandum of Understanding regarding FBI background investigation reports on nominees.<sup>100</sup> This MOU addresses such areas as who has access to FBI reports, including Senators and certain “designated staff;” oral briefings by designated staff; delivery of the reports; physical custody of the reports; use of the reports; and their return after final action.

While this MOU only binds the White House and the Committee Chair and Ranking Member who were signatories, it has been used in subsequent hearings, such as those on the Kavanaugh nomination.<sup>101</sup>

## **B. Research Findings**

The process of using the FBI to conduct background investigations has worked reasonably well in most instances. One GOP interviewee commended past Democratic Committee Chairs for their discretion and for ensuring that no leaks occurred, as did some Democratic interviewees about Republican chairs.

At the same time, there have been notable exceptions (e.g., the Thomas and Kavanaugh nominations) where the process has been substandard. It is unhealthy and unhelpful when allegations warranting investigation reach third-party interest groups – whether on the left or right – before the White House or the Judiciary Committee are apprised of them. Nominations are pending before the Judiciary Committee – it is the Committee that should drive the process.

Several interviewees believe that the FBI process was degraded on the Kavanaugh nomination, noting that the FBI was caught between the competing pressures of a White House seeking to forestall further investigation and rush to a conclusion and Democratic Senators wanting considerably more thoroughness and time.

A substantial majority of interviewees support the continued use of the FBI in conducting background investigations for SCOTUS nominees. The consensus view is that the FBI lends credibility to the process as an independent investigate entity with a long history of work in this area.

A small but vocal minority of interviewees suggested the Senate should increase the Judiciary Committee’s resources in order to hire a more fulsome full-time investigative staff. A deeper investigative unit, they argue, would more likely uncover matters worthy of further investigation sooner than the current staffing allows. They also note that a better-resourced Committee investigative unit would lessen reliance on the FBI, particularly when contentious allegations of a personal nature arise.

In the end, a clear majority of interviewees believe that further clarification of the FBI’s role is warranted. Many support updating and re-executing a Memorandum of Understanding between the White House and the Judiciary Committee Chair and Ranking Member.

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<sup>100</sup><https://www.judiciary.senate.gov/imo/media/doc/BI%20MOU.PDF#:~:text=This%20memorandum%20of%20understanding%20between%20the%20U.S.%20Senate,Senate%20for%20confirmation%20and%20referred%20to%20the%20Conunittee>

<sup>101</sup> Considerable disputes arose among the Committee Members regarding the interpretation of the MOU in connection with the FBI’s work on Dr. Christine Blasey Ford’s allegations.

### C. Recommendations

The FBI has played, and continues to play, an important role in conducting background investigations of SCOTUS nominees. They are the most independent group that can conduct such reviews and, in most cases, have been lauded for their work.

Adding full-time investigators to the Judiciary Committee staff has some appeal but, in the end, I do not believe it would materially advance the process. As some interviewees pointed out, adding more investigators would inevitably lead to more matters to investigate, whether fully meritorious or not. As the saying goes, more investigators leads to more investigations. Furthermore, in practical terms, adding five or even 10 full-time staff investigators would not provide the resources sufficient to investigate allegations that might require nationwide interviews of multiple individuals in relatively short time frames. Finally, more staff investigators might well increase partisanship, with each party accusing the other's investigators of injecting personal and political preferences into what ought to be neutral investigations.

The status quo, however, can be improved. The role of the FBI should be further clarified and memorialized in an updated Memorandum of Understanding. Such an MOU should be adopted at the beginning of a new Congress so that it is done outside the context of any particular nomination. A new MOU should:

- Underscore and memorialize the independence of the FBI, stating specifically that the FBI's client is the American people. It is important to make clear, formally, that when the FBI conducts its investigations, neither the White House Counsel nor the Senate Judiciary Committee majority or minority are the client.<sup>102</sup>
- Create communication protocols that govern the FBI's dialogue with the White House and the Chair/Ranking Member of the Judiciary Committee so that each entity receives information simultaneously when the FBI determines that a matter warrants investigation. Neither entity should receive preferential treatment over the other.
- Spell out the parameters of the FBI's role in conducting the background investigation before the hearings begin and any subsequent investigations that arise once the hearings have started. Specifically, and working with FBI leadership, the MOU should require a more fulsome investigative process at the outset so matters that have historically come to light later in the process are more likely to be uncovered on the front end.<sup>103</sup>

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<sup>102</sup> While one interviewee suggested codifying by statute the relationship between the Senate and the FBI for purposes of Supreme Court nominations – namely, that the Chair and Ranking Member of the Senate Judiciary Committee are the client – such an approach would seem to run afoul of separation of powers principles since the FBI is, in fact, part of the Department of Justice and, therefore, the Executive Branch.

<sup>103</sup> Some will claim that a deeper level of investigation will only breed politically motivated allegations. This black-and-white view misses the point. There will always be a risk of politically motivated allegations. But that does not mean every allegation is politically motivated. The Senate, the nominee and the public at large will all benefit the earlier matters requiring further investigation are identified. They are more likely to be investigated quietly, before third party groups take them to the media, with all Members of the Committee able to sit in closed session to assess their propriety and, if necessary, with the nominee able to confront the claims outside the crucible of nationally televised hearings at the 11<sup>th</sup> hour. An improved process is one where allegations of wrongdoing can be pursued while also protecting the nominee from meritless claims.

- Set an expected time frame for the delivery of the FBI report on the original investigation and any subsequent investigations, with room for potential adjustments depending on the precise nature of allegations that arise.

An MOU agreed to by one Senate and one Administration is not binding on future Senates and future Administrations. But a new MOU would create a solid precedent and impose some political cost on the party who fails to follow it.

## **IX. ADDRESSING THIRD PARTY WITNESSES**

### **A. Relevant Historical Background**

Third party witnesses have testified on and off since the Brandeis hearings in 1916. The range of witnesses has been broad, including home state Senators; federal, state and local public officials; the American Bar Association; academics and scholars who have studied the nominee’s substantive writings and work; in cases of sitting judges, former losing litigants in cases decided by the nominee; interest groups; single-issue organizations; professional colleagues; and Supreme Court experts.

### **B. Research Findings**

No single dominant view emerged during the interview process about whether to impose any quantitative or qualitative limits on third party witnesses. Positions receiving some support included the following:

- A plurality of interviewees opposes placing any limits on third party witnesses.
- A handful of interviewees would impose a time cap by limiting the number of third-party witnesses to no more than two days of hearings.
- Some interviewees would eliminate live testimony entirely and require written submissions for the record.
- A handful would not allow live testimony from any witness paid to appear (including interest groups).
- A couple of interviewees specifically argued against allowing any witness who was a litigant in a case heard by a nominee.
- The American Bar Association was criticized by Democrats and Republicans alike for partisanship, unreliable assessments and excessive application of personal, as opposed to substantive, views.
- No interviewee would limit the number of written statements for the record.

### **C. Recommendations**

Third party witnesses can clearly serve a useful function. They help fill out the background, qualifications and substantive analysis of the nominee. They assist with the public education and civic value that many hearings have provided. They can also provide a forum for airing different perspectives for the Senate’s consideration.

Eliminating all live testimony by third party witnesses seems arbitrary and excessive. While it is true that anything a third-party witness says in an open hearing can be produced in a written submission, there is



value in evaluating a witness’s credibility while they appear – something that is not possible through a statement for the record.

In my view, qualitative or quantitative limits on the live testimony of third-party witnesses should not be established by rule. The Supreme Court plays a vital role in our nation and third-party witnesses should have the opportunity not only to submit written statements for the record but also testify in person. A norm should be established whereby the majority of outside witnesses should be those with well-informed assessments of the substantive record of the nominee. The Chair and Ranking Member should utilize their joint discretion, as they do in all hearings, to manage the overall number of witnesses.

The American Bar Association should not play the dominant role it has in in the past in reviewing nominees. The Committee should place equal weight on multiple bar associations without affording a lead role to any single one.

## **X. THE SENATE’S VOTING RULES ON SUPREME COURT NOMINATIONS**

In exploring the Senate’s role on SCOTUS nominations, four inter-related questions are important:

1. Should confirming SCOTUS nominees require a simple majority or super-majority vote?
2. Should the Senate restore the filibuster for SCOTUS nominations?
3. Should Senate Rules require the Senate to take an up-or-down on every SCOTUS nominee, except those withdrawn?
4. Should the Senate process SCOTUS nominations in a presidential election year?

### **A. Relevant Historical Background**

The Framers had every opportunity to require, through the plain text of the Constitution, the confirmation of judges – whether for the Supreme Court only or for all Article III judges – by a super-majority. After all, they imposed such requirements for Senate conviction after House impeachment;<sup>104</sup> expulsion of a Member;<sup>105</sup> overriding a presidential veto;<sup>106</sup> ratifying a treaty;<sup>107</sup> passing a constitutional amendment;<sup>108</sup> calling for a constitutional convention by two-thirds of the state legislatures;<sup>109</sup> and ratifying a constitutional amendment adopted by the states.<sup>110</sup> The Framers chose not to extend that requirement to the confirmation of Supreme Court Justices.<sup>111</sup>

Particularly considering the debate in contemporary politics over the filibuster, it is worth noting the Senate’s historical application of this powerful procedural tool to nominations:

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<sup>104</sup> Article I, Section 3.

<sup>105</sup> Article I, Section 5.

<sup>106</sup> Article I, Section 7.

<sup>107</sup> Article II, Section 2.

<sup>108</sup> Article V.

<sup>109</sup> Article V.

<sup>110</sup> Article V.

<sup>111</sup> Or to legislation, for that matter.

- Prior to 1949, the filibuster (and accompanying cloture motions) could be used *for legislation only*.<sup>112</sup>
- Between 1949 and 1975, the super-majority required by Senate Rule was two-thirds of Senators present and voting.<sup>113</sup>
- Between 1975 and early 2017, invoking cloture on Supreme Court nominations required a vote of three-fifths of Senators duly chose and sworn (60 unless there were vacancies).<sup>114</sup>
- In April 2017, the Senate abolished the filibuster for Supreme Court nominations.<sup>115</sup>

There have been seven filibusters of Supreme Court nominations:

- Johnson’s nomination of Abe Fortas to be Chief Justice in 1968, with cloture not invoked by a 45-43 vote. The nomination was withdrawn.
- Nixon’s nomination of William Rehnquist to be Associate Justice in 1971, with cloture not invoked by a 52-42 vote. Rehnquist was confirmed.
- Reagan’s nomination of Rehnquist to be Chief Justice in 1986, with cloture invoked by a vote of 68-31. Rehnquist was confirmed as Chief Justice.
- George W. Bush’s nomination of Samuel Alito in 2006, with cloture invoked by a vote of 72-25. Alito was confirmed. Notably, a number of Democrats who voted against the nomination voted for cloture in the belief that all Supreme Court nominees deserve an up-or-down vote.
- Trump’s nomination of Neil Gorsuch in 2017, with cloture not invoked by a vote of 55-45. As previously discussed, Gorsuch was confirmed nevertheless because the GOP Senate majority eliminated the filibuster for SCOTUS nominations immediately after the failed cloture vote.
- Trump’s nomination of Brett Kavanaugh in 2018, with cloture not invoked by a vote of 51-49. Kavanaugh was confirmed because only a simple majority was necessary as a result of the rule change following the Gorsuch confirmation.
- Trump’s nomination of Amy Coney Barrett in 2020, with cloture not invoked by a vote of 51-48. Like Kavanaugh, she was confirmed because she received a simple majority of votes.<sup>116</sup>

## B. [Research Findings](#)

Of the various topics covered during my interviews, the questions of whether to require the Senate to fully process SCOTUS nominations, whether to allow a filibuster or require a vote on the merits and by what margin nominees ought to be confirmed evoked the strongest opinions. Interviewees also felt

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<sup>112</sup> Congressional Research Service, **Cloture Attempts on Nominations: Data and Historical Development Through November 20, 2013**, 5-8.

<sup>113</sup> CRS Report, **Cloture Attempts on Nominations**, 5-8.

<sup>114</sup> CRS Report, **Cloture Attempts on Nominations**, 5-8. As previously noted, then Majority Leader Harry Reid reduced the threshold to a simple majority in 2013 with respect to Executive Branch, district court and appellate nominations. That action was taken after Republicans used the filibuster against several of President Obama’s picks for the D.C. Circuit as well as his choices for the Department of Defense, National Labor Relations Board and Consumer Financial Protection Bureau.

<sup>115</sup> CRS Report, **Cloture Attempts on Nominations**, at 11.

<sup>116</sup> CRS Report, **Cloture Attempts on Nominations**, at 11-12.

most passionately on these issues about what could be implemented practically as opposed to what the rules should be in theory.<sup>117</sup>

### 1. The Required Margin for Confirmation

*In theory*, most interviewees said, Senate Rules should require a super-majority vote – 60 for most respondents – for SCOTUS nominees to secure confirmation. One interviewee captured the sentiments of many by observing that if it takes a super-majority (two-thirds) for *amending* the Constitution, it ought to take some level of super-majority votes to confirm Justices who will be afforded the ability, in effect, to have an analogously-broad impact on the nation by *interpreting* the Constitution.

That said, a substantial majority of these same interviewees were strongly of the opinion that in light of the change initiated in 2017 by Majority Leader McConnell to abolish the filibuster for SCOTUS nominations,<sup>118</sup> the current rule requiring confirmation by a simple majority ought to be maintained. It makes no political or practical sense, they argue, for either party, particularly the Democrats, to restore a super-majority for the next round of Justices when President Trump was able to see his three nominees confirmed by a simple majority. “Unilateral disarmament,” as one respondent put it, is a losing strategy for both nuclear weapons and politics.

A vocal bipartisan minority of interviewees emphatically reject both the move to a simple majority and acceptance of what they consider to be the current horrendous state of affairs brought on by the leadership decisions of both Harry Reid and Mitch McConnell. In their view, returning to a super-majority requirement on SCOTUS nominations would lead to more consensus nominees because except in cases where one party controls the Senate by an overwhelming margin, confirmation would require the assent of Senators from both parties. The ability of Senators to filibuster, in their view, creates leverage with the president in terms of his or her selection process. One interviewee proposed using a super-majority of 55 as a middle ground.<sup>119</sup>

### 2. An Up-or-Down Vote

Here there are two related, but different, issues.

First, should Senate Rules allow the minority party to filibuster SCOTUS nominations? Interviewees who support a simple majority vote margin reject, by definition, the use of the filibuster. Among interviewees who support a 60-vote margin, some believe in restoring the filibuster while others would make the 60-vote margin an up-or-down vote on the merits.

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<sup>117</sup> One interviewee astutely observed how the politics of votes on nominations have turned 180 degrees. He noted that since a negative vote used to impose the highest political cost, a positive vote was the natural inclination of most Senators. Today, however, the formulation is reversed: a positive vote tends to cost Senators politically, meaning for many, their natural instinct is to vote no.

<sup>118</sup> Again, to be fair, Republican interviewees believe that Senator McConnell’s action was merely the logical response to the 2013 decision by Harry Reid and Senate Democrats to do away with the filibuster for all nominations but those for the Supreme Court.

<sup>119</sup> I cannot help but note the recommendation of one interviewee if term limits for Justices were adopted: tie the term to the number of votes received so that 67 or more votes would lead to an 18-year term; 60-66 votes would lead to a 14-year term; and 51-59 votes would lead to a 10-year term. While offered mostly in jest, it is hard not to see some merit to this approach given the current state of American politics.

Second – and, in my judgment, more importantly – should the Senate process every Supreme Court nominee from beginning to end? A number of interviewees – Democrat and Republican – answer this question affirmatively. For them, full-blown Senate consideration, concluding with a vote on the merits, is a foregone conclusion given the importance of the Supreme Court and the role Justices play in democracy and in maintaining the rule of law. Except for a lame duck president’s nomination, these respondents believe that a Senate majority should not hold the option, as was with the Merrick Garland, to ignore the nomination and do nothing.

As one GOP interviewee put, requiring hearings, a committee vote and final Senate vote on the merits would serve as a “pressure release valve” by forcing a greater focus on the substance on the nomination as opposed to the procedural tools available to stall or kill the nomination. Another GOP interviewee argued that SCOTUS nominations are at least, if not more, important than votes on reconciliation bills and the spending and tax reform measures embedded within them. If the latter are subject to simple majority vote requirements, the interviewee noted, nominations to the Supreme Court should receive the same treatment.

### C. Recommendations

If we were starting afresh, Senate Rules should require, in my view, a 60-vote margin to confirm a nominee to the Supreme Court:

- A 60-vote threshold would force some level of bipartisanship except when the Senate is dominated by one party, which seems unlikely for the foreseeable future.
- This bipartisan consensus would exist not only on the back end, for the final vote, but also on the front end, likely necessitating consultation by the president with the minority party leadership in the Senate. The more consultation there is, the more likely the nominee is ultimately confirmed. As one interviewee put it, “if a Senator is there for the takeoff, he or she is more likely to be there for the landing.”
- Finally, if bipartisan support is necessary, a nominee is more likely to answer questions on judicial philosophy and ideology rather deflect such questions secure in the knowledge that votes from the minority are not needed for confirmation.

Were a 60-vote threshold restored, I would apply it as an up-or-down vote on the nominee’s merits, thereby forbidding any filibuster. Some might argue this is a distinction without a difference: 60 votes are 60 votes, since voting against the nominee on the merits and voting to filibuster the nomination produce the same result.

My view differs. Some Senators hide behind the filibuster’s procedural invisibility cloak<sup>120</sup> to preserve their ability to tell voters they never took a substantive position on the merits. The filibuster serves as an insurance policy to protect Senators from political downsides that might arise from a negative vote on the merits. When it comes to deciding who sits on the Supreme Court of the United States, no Senator should be allowed to take the coward’s way out. All members of the Senate should be required to vote on the merits and defend the substantive position they take.

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<sup>120</sup> [https://harrypotter.fandom.com/wiki/Invisibility\\_cloak](https://harrypotter.fandom.com/wiki/Invisibility_cloak)

All this said, we are not writing on a blank slate. Quite to the contrary, in fact. The road is littered with political potholes that are, at present, unfillable. We are not living in wistful days gone by when bipartisanship flourished – when we regularly witnessed substantial crossover by conservative Democrats and liberal Republicans and when Supreme Court nominees received overwhelmingly bipartisan support. Commentators and observers will debate for decades whether Democrats or Republicans are more to blame for the tribalism that infects politics today, and whether Harry Reid or Mitch McConnell is more responsible for the current simple majority requirement for SCOTUS nominations. That debate will yield far more blame and finger-pointing than a productive course forward.

We are where we are. More than any other area covered in my research, we cannot on this issue turn back the hands of time to another political era. It is simply inconceivable that Democrats will restore a 60-vote requirement for SCOTUS nominations after a Republican president and Republican Senate were able to confirm one-third of the Justices with a simple majority. This would constitute unilateral disarmament in the extreme. Even if Democrats did the inconceivable – and, again, they will not – nothing will keep Republicans from changing the margin back to 51 if it suits their purposes in the future. And to be clear, Democrats would likely do the same thing if the proverbial shoe were on the other political foot.

A recommendation wholly divorced from reality is a pipedream, not a measurable contribution. Accordingly, I recommend that the Senate retain the current simple majority requirement for confirming Supreme Court nominees.

As noted by some interviewees, a simple majority requirement increases the risk of partisan nominees because support by the minority party is more likely to be unnecessary. There is no doubt that a super-majority *should* increase the level of pre-nomination consultation and post-nomination consensus. But the difference between *should* and *would* is fundamental. Even with pre-nomination consultation between the president and the minority party in the Senate, there is no guarantee that the latter would not simply resort to a filibuster to block the president's nominee. To the contrary, under the current state of affairs, the ability to filibuster a nominee is highly likely to produce partisan gridlock, not the bipartisan consensus many of us prefer. And it is not too much of a stretch of the imagination to see multiple consecutive nominations filibustered, with the number of sitting Justices dropping to a dangerously low number.

Maintaining a simple majority margin is necessary but not sufficient. A simple majority vote requirement – or a super-majority requirement, for that matter – does not necessarily require consideration of the nomination by the Senate Judiciary Committee and the full Senate. That is, ***a rule on the vote margin, whatever it is, focuses on the end of the process; it does not guarantee that the process start in the first instance and proceed to conclusion.***

In my view, therefore, the Senate should add a Rule explicitly requiring Judiciary Committee hearings, a Committee vote and an up-or-down vote on the merits. The Senate Democratic majority adhered to this good government practice, even without a rule, in connection with several nominations by Republican presidents, perhaps most notably in connection with the Thomas nomination, which could have been defeated by a filibuster. It is time to require both parties to do so.

The final questions regarding Senate action relate to the appropriate policy governing SCOTUS nominations in a presidential election year. Should the Senate process every nomination made in the year leading up to a presidential election, regardless of the timing? Should the Senate take no action on any nomination in the final year of a president's term? Is there a sensible cut-off date?

The "McConnell Rule" – no nomination will be considered in a presidential election year when made by a president of the opposite party – is indefensible. Nowhere in the Constitution is there an exception to advice and consent for the full year or longer before a presidential election. Nor does the Constitution grant a Senate Majority Leader the power to decide, for the nation as a whole, the date before which the "will of the American people" as expressed in the prior presidential election becomes null and void. Indeed, for those professing support for originalism and judicial interpretation that relies on the plain text of the Constitution, creating such an exception is particularly unprincipled. An abuse of power, it undermines the Framers' guiding principle of checks and balances.

Confirming a new Supreme Court Justice on the eve of a presidential election is also reckless and wrongheaded, particularly as more and more states adopt early voting.<sup>121</sup> In many states, the American people begin expressing their will about who should be the next president – either the incumbent, the challenger or one of two individuals vying to replace a retiring president or one who has finished her or her two terms – well before the first Tuesday in November. While a Court with eight Justices is not ideal, postponing the confirmation process for a period of a few months so that the voters can speak will not permanently undermine or interfere with the Court's decision-making.

If good public policy supports a pre-presidential election moratorium, the next issue is to identify the date in a presidential year after which the confirmation process should be postponed. In my judgment, August 1 of a presidential election year is a logical and supportable cut-off date:

- The outside time frame in my proposed new Rules applicable to the various elements of the Senate Judiciary Committee process is approximately 92 days; that period could be extended should the Chair and Ranking Member determine more time is warranted due to exigent circumstances or delays in the production of relevant materials. If the cut-off date is August 1, we can reasonably expect nominations made before that date to conclude before Election Day.
- Actions by the Administration and the Senate – including document production, requests for more investigative work by the FBI, number of third-party witnesses and the like – are more likely to be colored by politics and game-playing when taking place within 90 days of a presidential election. Presidential politics should not driving decision-making.
- The Senate typically recesses for the month of August, which would also extend the proposed time frames and push consideration of any SCOTUS nomination even closer to Election Day and quite possibly into a lame duck period.
- Consideration of a SCOTUS nomination in a presidential election year should take into account the early voting – either by mail or in-person – that many states now allow. As previously noted, more than 58 million Americans had cast their ballot – *representing more than one-third of all those who ultimately voted* – by the time Justice Barrett was confirmed. There are few more consequential decisions made in in our nation than placing one of nine Justices with life tenure

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<sup>121</sup> <https://www.vote.org/early-voting-calendar/>

on the Supreme Court. Doing so while tens of millions of Americans are voicing their preference about the next president is simply anti-democratic.

- A cloud will hang over the Court tenure of any nominee whom approximately half the country believe was jammed through a rushed process for purely political reasons. There will always be nominees who some people support while others oppose because of the judicial philosophy they bring to the Court or the identity of the president who selected them. That is the nature of our democratic process and consistent with the history of SCOTUS nominations for more than 200 years. Substantive disagreements are one thing. Doubts about the underlying legitimacy of one of the Court's members are entirely different because they undermine public trust and confidence in the Court and its decisions.

Had these rules been in place in 2016, Merrick Garland would have received a hearing, a committee vote and a vote by the Senate.<sup>122</sup> Perhaps Attorney General Garland would now be Justice Garland, since a requisite number of Republicans had expressed support for Judge Garland in the past. Perhaps his nomination to the Supreme Court would have gone down to defeat because a majority of Republicans decided it was too close to the presidential election or because they objected to his judicial philosophy.

Regardless of the outcome of the Garland nomination, my proposals would have ensured the Senate take action one way or the other. A decision to reject a Supreme Court nomination by voting no is a proper exercise of advice and consent. It is materially and fundamentally different – and better – than a decision to take no action at all, which is an abdication of the duty to render to advice and consent.

Amy Coney Barrett's nomination would not have been considered under my proposals, given President Trump's late September 2020 nomination. The nation would have avoided the rancorous debate over whether it should be considered in the first place on the eve of a presidential election. Hearings on the nomination for the seat vacated by Justice Ginsburg's death would have been subject to a more deliberate, thoughtful and balanced review. Questions of legitimacy would not cloud the seat now held by Justice Barrett.<sup>123</sup>

While not feasible to implement by rule, the two parties should share an understanding that a lame duck president should not be allowed to fill a vacancy after his or her defeat on Election Day. In that case, it is literally true that the American people have spoken. A lifetime appointment to the Supreme Court should not be made by a defeated president and if a defeated president attempts such an extreme power grab, the Senate should reject it.

These recommended rules would remove considerable partisanship from the process. No longer could a Majority Leader put his finger in the political wind, unilaterally rejecting a sitting president's rightful exercise of power under the Constitution and the Senate's clear obligations under the advice and consent clause. No longer could the Leader manipulate the composition of the Supreme Court to suit his

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<sup>122</sup> Because I am also recommending that a new Rule require every nominee to receive an up-or-down vote, the Garland nomination would not have been subject to a filibuster.

<sup>123</sup> My Republican colleagues will no doubt point to the "convenient" results my proposals would have produced for Democrats. I believe good public policy – and plain common sense – undergird my proposed Rules. Let the chips fall as they may. There may well be a day when these proposals come back around to forestall Democrats' objectives.

or her parochial political objectives and counter-majoritarian impulses. Today's steady march toward using the Supreme Court as a political weapon to block legislation supported by clear majorities of the population would, at least, be slowed.

To have any chance of passage, the rules proposed here, as elsewhere, would not take effect until 2025 so that neither party would know now who, if anyone, would be advantaged or disadvantaged.

At the same time, it is clear that action here is needed before 2025. According to Senator McConnell, if the GOP retakes control of the Senate after the midterm elections in 2022, he will not only once again shatter the norm broken in 2016 with the Garland nomination but may also extend it further to block any Biden nominee to the Supreme Court in 2023. In a mid-June interview, he said it is "highly unlikely" he would process a Biden Supreme Court nominee in 2024, nor would he even commit to moving a nominee in 2023.<sup>124</sup>

These statements underscore the fear noted at the outset of my testimony, namely, that a Senate controlled by one party may never consider the nominee of the other party, whether in a presidential election year or earlier. This would violate the Constitution's advice and consent mandate to the Senate, ignore more than two centuries of historical practice, violate fundamentally important norms of behavior and quite possibly become the final tipping point to wholesale minority rule. As a nation, we cannot allow this to happen.

## **XI. CONCLUSION**

Thank you for the opportunity undertake this project, prepare a report and testify. I look forward to answering the Commission's questions.

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<sup>124</sup> <https://www.c-span.org/video/?c4966837/senator-mcconnell-block-biden-supreme-court-pick-2023-republicans-win-back-senate>; <https://www.nytimes.com/2021/06/14/us/politics/mcconnell-biden-supreme-court.html>



## Appendix 1

### INTERVIEWEE QUESTION GUIDE

#### **Biographical Information**

1. During what period of time did you work in the Senate?
2. What was your position?
3. On which SCOTUS nominations did you work and, with respect to each, for whom did you work?
4. In each case, were in the majority or the minority?

#### **General Observations**

5. Tell me about your experience on those nominations? If you worked on more than one nomination, in what ways did the experiences differ? In what ways were they the same?
6. Do you believe the confirmation process has been politicized? If so, in what ways? What are the causes?
7. Would you identify some key inflection points in the history of Supreme Court nominations?

#### **Senate's Advice Function**

8. Given that the Constitution's specifies a role of "advise and consent" for the Senate, do you believe the Senate should have any role in the nomination process on the front end?

#### **Role of the Senate Judiciary Committee**

9. Should the manner in which the Senate Judiciary Committee conducts hearings be changed? If yes, how so? If not, why not?
10. Should Senate or Senate Judiciary Committee rules set out a specific timetable or time parameters for each step of the confirmation process, so that all nominations are generally treated the with the same timeframe?
11. If you support time frames by rule, why?
12. If you oppose time frames by rule, why?
13. If you support time frames, should there be a defined date or a range of dates?
14. Do you have any specific time frames you would recommend?
15. Should the Chair and Ranking Member be allowed to change the time frames? Would you require a joint agreement among them, or would you allow the Chair to do so unilaterally?

#### **Scope of Questioning of Supreme Court Nominees**

16. What are your general views about scope of questioning and the ways in which nominees' answers have evolved?
17. Have things gotten better or worse?
18. What are appropriate areas of committee questioning?
19. What are inappropriate areas?
20. Do you think the Senate Judiciary Committee should inquire about a nominee's judicial philosophy?
21. If yes, why?
22. If yes, to what extent?

23. If no, why not?
24. What about questions that are tied to specific SCOTUS decisions – appropriate or not?
25. Is it appropriate to ask a nominee whether they consider a SCOTUS precedent or precedents “settled law?”
26. Is it appropriate for a Senator to vote against a nominee because he/she refuses to answer questions – lack of specificity -- about his/her judicial philosophy?

### **FBI Report**

27. What is your impression of the FBI’s work in conducting background investigations?
28. What about subsequent investigations should as in the case of the Thomas and Kavanaugh nominations?
29. Should FBI processes be clarified?
30. If so, how so? If not, why not?
31. Do you think a new Memorandum of Understanding would be beneficial?
32. If so, what should it cover?
33. Should the Judiciary Committee hire more investigative staff? What are the pros and cons of doing so?

### **Third Party Witnesses**

34. Should the Committee impose any qualitative or quantitative limits on third-party witnesses during SCOTUS nomination hearings?
35. If so, limit by number or subject matter?
36. If not, why not?
37. Should this be governed by rule or discretion of the Chair and Ranking Member?
38. What do you think of the role of the American Bar Association?

### **The Senate’s Role, the Filibuster, Margins and Nominations During a Presidential Election Year**

39. Should the filibuster be restored for SCOTUS nominations, or should confirmation be subject to a simple majority vote? Why?
40. Is any change feasible in this area?
41. Should the Senate require an up-or-down vote on the merits for every SCOTUS nomination?
42. If so, why?
43. If not, why?
44. Should every SCOTUS nominee be afforded the entire process? In other words, should every nominee get a Senate vote unless the nomination is withdrawn?
45. If so, why?
46. If not, why?
47. How should the Senate handle SCOTUS nominations in a presidential election year?
48. Should there be any cut-off date after which the Senate should not act?
49. What should happen during a lame duck presidency?

### **Miscellaneous**

50. Are there any questions I should have asked that I did not?

**Table 2**

**Supreme Court Nominations Since 1900<sup>125</sup>**

Nominee	To Replace	Senate	Date of Nom.	Hearings	Committee Vote	Floor Vote	Result
<b>Donald Trump</b>							
Amy Coney Barrett	Ruth Ginsburg	GOP 53-47 <sup>126</sup>	9.29.20	10.12.20 - 10.15.20	10.22.20  12 – 0 (10 Senate Democrats boycotted the vote so no nay votes were recorded)	10.26.20	52-48  Cloture invoked 51-48
Brett Kavanaugh	Anthony Kennedy	GOP 51-49 <sup>127</sup>	7.10.18	9.4.18 – 9.7.18  9.27.18	11-9  11 GOP – 9 Dem	10.6.18	50-48  Cloture invoked 51-49
Neil Gorsuch	Antonin Scalia	GOP 51-49 <sup>128</sup>	2.1.17	3.20.17 – 3.23.17	4.3.17  11 GOP – 9 Dem	4.7.17	54-45  Cloture invoked 55-45.
<b>Barack Obama</b>							
Merrick Garland	Antonin Scalia	GOP 54-46 <sup>129</sup>	3.16.16	No hearing held	Referred to SJC on 3.18.16. No action taken	Blocked	N/A

<sup>125</sup> <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm>;

CRS Report, **Supreme Court Nominations, 1789 to 2020.**

<sup>126</sup> Two independents caucused with Democrats.

<sup>127</sup> Two independents caucused with Democrats.

<sup>128</sup> Two independents caucused with Democrats.

<sup>129</sup> Two independents caucused with Democrats.

Nominee	To Replace	Senate	Date of Nom.	Hearings	Committee Vote	Floor Vote	Result
Elena Kagan	John Paul Stevens	DEM 59-41 <sup>130</sup>	5.10.10	6.28.10 – 7.1.19	7.20.10 13 (Dem + Graham) – 6 GOP	8.5.10	63-37
Sonia Sotomayor	David Souter	DEM 59-41 <sup>131</sup>	6.1.09	7.13.09 – 7.16.09	7.28.09 13 (Dem + Graham) – 6 GOP	8.6.09	68-31
<b>George W. Bush</b>							
Samuel Alito	Sandra Day O'Connor	GOP 55-45 <sup>132</sup>	11.10.05	1.9.06 – 1.13.06	1.24.06 10 GOP – 8 Dem	1.31.06	58-42 Cloture invoked 72-25
Harriet Miers	Sandra Day O'Connor	GOP 55-45 <sup>133</sup>	10.7.05	10.7.05 – referred to SJC	10.28.05 -- withdrawn	N/A	N/A
John Roberts (nominated to CJ)	William Rehnquist	GOP 55-45 <sup>134</sup>	9.6.05	9.12.05 – 9.15.05	9.25.05 13 (GOP + Leahy, Kohl, Feingold) – 5 Dem	9.29.05	78-22
John Roberts <sup>135</sup>	Sandra Day O'Connor	GOP 55-45 <sup>136</sup>	7.29.05	7.29.05 – referred to SJC	9.6.05 -- withdrawn	N/A	N/A

<sup>130</sup> One Independent and one Independent Democrat, both of whom caucused with Democrats.

<sup>131</sup> One Independent and one Independent Democrat, both of whom caucused with Democrats.

<sup>132</sup> One Independent caucused with Democrats.

<sup>133</sup> One Independent caucused with Democrats.

<sup>134</sup> One Independent caucused with Democrats.

<sup>135</sup> John Roberts, Jr. was initially nominated on July 29, 2005, for the seat vacated by Justice O'Connor's retirement. President Bush withdrew the nomination following Chief Justice Rehnquist's death, and then renominated Roberts to serve as Chief Justice. Thereafter, Bush nominated Samuel Alito to fill the O'Connor vacancy.

<sup>136</sup> One Independent caucused with Democrats.

Nominee	To Replace	Senate	Date of Nom.	Hearings	Committee Vote	Floor Vote	Result
<b>Bill Clinton</b>							
Stephen Breyer	Harry Blackmun	DEM 57-43	5.17.94	7.12.94 – 7.15.94	7.19.94 18 (all Dem + all GOP) -- 0	7.29.94	87-9
Ruth Bader Ginsburg	Byron White	DEM 56-44	6.22.93	7.20.93 – 7.23.93	7.29.93 18 (all Dem + all GOP) -- 0	8.3.93	96-3
<b>George H.W. Bush</b>							
Clarence Thomas	Thurgood Marshall	DEM 55-45	7.8.91	9.10.91 – 9.20.91 10.11.91 - 10.13.91	9.27.91 7 Dem – 7 (all GOP + DeConcini) to send nom to floor with favorable rec); motion failed 13 (12/13Dem and all GOP) – 1 Dem (Simon) to send nom to floor without rec)	10.15.91	UC agreement reached 10.8.91 to reschedule vote from 10.8.91 to 10.15.91 to allow for additional hearings. 52-48
David Souter	William Brennan	DEM 55-45	7.25.90	9.13.90 – 9.19.90	9.27.90 13 (7/8 Dems + all GOP) – 1 (Kennedy)	10.2.90	90-9

Nominee	To Replace	Senate	Date of Nom.	Hearings	Committee Vote	Floor Vote	Result
<b>Ronald Reagan</b>							
Anthony Kennedy	Lewis Powell	DEM 55-45	11.30.87	12.14.87 – 12.16.87	1.27.88 14 – 0	2.3.88	97-0
Robert Bork	Lewis Powell	DEM 55-45	7.7.87	9.15.87 – 9.30.87	10.6.87  5 (5/6 GOP) – 9 (all Dem + Specter) To send to floor with favorable rec; motion failed  9 (all Dem + Specter) – 5 To send to floor with negative rec	10.23.87	42-58
Antonin Scalia	William Rehnquist	GOP 53-47	6.24.86	8.5.86 – 8.6.86	8.14.86  18-0	9.17.86	98-0
William Rehnquist (sitting Justice elevated to Chief) <sup>137</sup>	Warren Burger	GOP 53-47	6.20.86	7.29.86 – 8.1.86	8.14.86  13 (all GOP + Byrd, DeConcini, Heflin) – 5	9.17.86	65-33  Cloture invoked 68-31
Sandra Day O'Connor	Potter Stewart	GOP 53-47 <sup>138</sup>	8.19.81	9.9.81 – 9.11.81	9.15.81  17-0	9.21.81	99-0
<b>Gerald Ford</b>							
John Paul Stevens	William Douglas	DEM 62-38 <sup>139</sup>	11.28.75	12.11.75	12.11.75  Unanimous by Voice	12.17.75	98-0

<sup>137</sup> When President Reagan nominated William Rehnquist to replace Warren Burger as Chief Justice, he was already serving as an Associate Justice. The elevation of Rehnquist, in turn, created a vacancy for an Associate Justice, for which Antonin Scalia was nominated.

<sup>138</sup> One Independent caucused with Democrats.

<sup>139</sup> One Conservative caucused with Republicans; one Independent caucused with Democrats.

Nominee	To Replace	Senate	Date of Nom.	Hearings	Committee Vote	Floor Vote	Result
<b>Richard Nixon</b>							
William Rehnquist	John Harlan	DEM 54-44 <sup>140</sup>	10.22.71	11.03.71 – 11.04.71  11.08.71 – 11.10.71	11.23.71  12 (all GOP + Eastland, McClellan, Ervin, Burdick, Byrd) – 4 (Hart, Kennedy, Bayh, Tunney)	12.10.71	68-26  Cloture motion rejected 52-42, 12.19.71  Motion to postpone until 1.18.72 rejected
Lewis Powell Jr.	Hugo Black	DEM 54-44 <sup>141</sup>	10.22.71	11.03.71 – 11.04.71  11.8.71 – 11.10/71	11.23.71  16 – 0	12.6.71	89-1
Harry Blackmun	Abe Fortas	DEM 57-43	4.15.70	4.29.70	5.6.70  17 – 0	5.12.70	94-0
G. Harrold Carswell	Abe Fortas	DEM 57-43	1.19.70	1.27.70 – 1.29.70  2.2.70 – 2.3.70	2.16.70  13 – 4	4.8.70	45-51
Clement Haynsworth	Abe Fortas	DEM 57-43	8.21.69	9.16.69 – 9.19.69  9.23.69 – 9.26.6	10 – 7	11.12.69	45-55
Warren Burger (nominated to CJ)	Earl Warren	DEM 57-43	5.23.69	6.3.69	6.3.69  Voice vote	6.9.69	74-3

<sup>140</sup> One Conservative caucused with Republicans; one Independent caucused with Democrats.

<sup>141</sup> One Conservative caucused with Republicans; one Independent caucused with Democrats.

Nominee	To Replace	Senate	Date of Nom.	Hearings	Committee Vote	Floor Vote	Result
<b>Lyndon Johnson</b>							
Homer Thornberry	Abe Fortas	DEM 64-36	6.28.68	7.11.68 – 7.12.68 7.16.68 – 7.23.68 9.13.68 9.16.68	No committee vote taken	10.4.68	Withdrawn
Abe Fortas (sitting Justice nominated to CJ)	Earl Warren	DEM 64-36	6.26.68	7.11.68 – 7.12.68 7.16.68 – 7.23.68 9.13.68 9.16.68	9.17.68 11-6	10.4.68	Cloture motion rejected 45-43  Filibustered and Withdrawn
Thurgood Marshall	Tom Clark	DEM 64-36	6.13.67	7.13.67 – 7.14.67 7.18.67 – 7.19.67 7.24.67	8.3.67 11 – 5	8.30.67	69-11
Abe Fortas	Arthur Goldberg	DEM 68-32	7.28.65	8.5.65	Reported favorably voice vote	8.11.65	Voice
<b>John F. Kennedy</b>							
Arthur Goldberg	Felix Frankfurter	DEM 64-36	8.31.62	9.11.62 9.13.62	9.25.62 Reported favorably by voice vote	9.25.62	Voice
Byron White	Charles Whittaker	DEM 64-36	4.3.62	4.11.62	4.11.62 Reported favorably by voice vote	4.11.62	Voice



Nominee	To Replace	Senate	Date of Nom.	Hearings	Committee Vote	Floor Vote	Result
<b>Dwight Eisenhower</b>							
Potter Stewart <sup>142</sup>	Harold Burton	DEM 65-35	1.17.59	4.9.59 4.14.59	4.20.59 12 – 3	5.5.59	70-17
Charles Whittaker	Stanley Reed	DEM 49-47	3.2.57	3.18.57	3.19.57 Reported favorably by voice vote	3.19.57	Voice
William Brennan <sup>143</sup>	Sherman Minton	DEM 49-47	1.14.57	2.26.57 – 2.27.57	3.4.57 Reported favorably by voice vote	3.19.57	Voice
John M. Harlan II	Robert Jackson	GOP 48- 47 <sup>144</sup>	1.10.55	2.25.55 <sup>145</sup>	3.10.55 10 – 4	3.16.55	71-11
John M. Harlan II	Robert Jackson	GOP 48- 47 <sup>146</sup>	11.9.54	No hearing held	No committee vote		No Action
Earl Warren <sup>147</sup> (nominated to CJ)	Frederick Vinson	GOP 48- 47 <sup>148</sup>	1.11.54	2.2.54 2.19.54	2.24.54 12 – 3	3.1.54	Voice
<b>Harry Truman</b>							
Sherman Minton	Wiley Rutledge	DEM 54-42	9.15.49	9.27.49	10.3.49 9 – 2	10.4.49	Motion to recommit rejected 21 – 45  48-16

<sup>142</sup> Recess appointment on 10.14.58.

<sup>143</sup> Recess appointment on 10.15.56.

<sup>144</sup> In 1955, Strom Thurmond was an Independent Democrat.

<sup>145</sup> The Judiciary Committee held two days of hearings on the Harlan nomination, on February 24-25, 1955. The 2.24.55 session was a closed session. The second day began in closed session and then opened to hear testimony from the nominee.

<sup>146</sup> One Independent.

<sup>147</sup> Recess appointment on 10.2.93.

<sup>148</sup> One Independent.

Nominee	To Replace	Senate	Date of Nom.	Hearings	Committee Vote	Floor Vote	Result
Tom Clark	Frank Murphy	DEM 54-42	8.2.49	8.9.49 – 8.11.49	8.12.49  9 – 2	8.18.49	73-8
Fred Vinson (nominated to CJ)	Harlan Stone	DEM 57- 38 <sup>149</sup>	6.6.46	6.14.46	6.19.46  Reported favorably by voice vote	6.20.46	Voice
Harold Burton	Owen Roberts	DEM 57- 38 <sup>150</sup>	9.18.45	No hearing held	9.19.45  Reported favorably by voice vote	9.19.45	Voice
<b>Franklin Roosevelt</b>							
Wiley Rutledge	James Byrnes	DEM 57- 38 <sup>151</sup>	1.11.43	1.22.43	2.1.43  Reported favorably by voice vote	2.8.43	Voice
Robert Jackson	Harlan Stone	DEM 66- 28 <sup>152</sup>	6.12.41	6.12.41  6.23.41  6.27.41  6.30.41	6.30.41  Reported favorably by voice vote	7.7.41	Voice
James Byrnes	James McReynolds	DEM 69- 23 <sup>153</sup>	6.12.41	Not referred to SJC		6.12.41	Voice
Harlon F. Stone (sitting Justice elevated to CJ)	Charles Hughes	DEM 69- 23 <sup>154</sup>	6.12.41	6.21.41	6.23.41  Reported favorably by voice vote	6.27.41	Voice

<sup>149</sup> One Progressive.

<sup>150</sup> One Progressive.

<sup>151</sup> One Progressive.

<sup>152</sup> One Independent and one Progressive.

<sup>153</sup> One Independent and one Progressive.

<sup>154</sup> One Independent and one Progressive.

Nominee	To Replace	Senate	Date of Nom.	Hearings	Committee Vote	Floor Vote	Result
Frank Murphy	Pierce Butler	DEM 69-23 <sup>155</sup>	1.4.40	1.11.40	1.15.40  Reported favorably by voice vote	1.16.40	Voice
William Douglas	Louis Brandeis	DEM 76-16 <sup>156</sup>	3.20.39	3.24.39	3.27.39  Reported favorably by voice vote	4.4.39	62-4
Felix Frankfurter	Benjamin Cardozo	DEM 76-16 <sup>157</sup>	1.5.39	1.10.39 – 1.12.39	1.16.39  Reported favorably by voice vote	1.17.39	Voice
Stanley Reed	George Sutherland	DEM 76-16 <sup>158</sup>	1.15.38	1.20.38	1.24.38  Reported favorably by voice vote	1.25.38	Motion to recommit rejected  Voice
Hugo Black	Willis Van Devanter	DEM 69-25 <sup>159</sup>	8.12.37	No hearing held	8.16.37  13-4	8.17.37	63-16
<b>Herbert Hoover</b>							
Benjamin Cardozo	Holmes	GOP 48-47 <sup>160</sup>	2.15.32	2.19.32	2.23.32  Reported favorably by voice vote	2.24.32	Voice
Owen Roberts	Edward Sanford	GOP 56-39 <sup>161</sup>	5.9.30	No hearing held	5.19.30  Reported favorably by voice vote	5.20.30	Voice

<sup>155</sup> Two Farmer-Labors; one Progressive; one Independent.

<sup>156</sup> Two Farmer-Labors; one Progressive; one Independent.

<sup>157</sup> Two Farmer-Labors; one Progressive; one Independent.

<sup>158</sup> Two Farmer-Labors; one Progressive; one Independent.

<sup>159</sup> One Farmer-Labor; one Progressive.

<sup>160</sup> One Farmer-Labor.

<sup>161</sup> One Farmer-Labor.

Nominee	To Replace	Senate	Date of Nom.	Hearings	Committee Vote	Floor Vote	Result
John Parker	Edward Sanford	GOP 56-39 <sup>162</sup>	3.21.30	4.5.30	4.21.30  6 – 10 reported negatively	5.7.30	39-41
Charles Evans Hughes (nominated to CJ)	William Taft	GOP 56-39 <sup>163</sup>	2.3.30	No hearing held	2.19.30 10 – 2	2.13.30	Motion to recommit rejected 31 -- 49  52-26
<b>Calvin Coolidge</b>							
Harlan F. Stone	Joseph McKenna	GOP 53-42 <sup>164</sup>	1.05.25	Closed hearing First hearing at which the nominee appeared.	1.21.25  Reported favorably by voice vote	1.26.25 – Recommended  2.5.25	71-6
<b>Warren Harding</b>						1.29.93	
Edward Sanford	Mahlon Pitney	GOP 59-37	1.24.23	No record of hearing	1.29.23  Reported favorably by voice vote	1.29.23	Voice
Pierce Butler	William Day	GOP 59-37	12.5.22	Closed hearings 12.9.22 12.13.22	12.18.22  Reported favorably by voice vote	12.21.22	61-8
Pierce Butler	William Day	GOP 59-37	11.21.22	No record of hearing	11.28.22  Reported favorably by voice vote	Placed on calendar 1.28.22	No Action
George Sutherland	John Clarke	GOP 59-37	9.5.22	Not referred to SJC	No vote taken	9.5.22	Voice

<sup>162</sup> One Farmer-Labor.

<sup>163</sup> One Farmer-Labor.

<sup>164</sup> One Farmer-Labor.

Nominee	To Replace	Senate	Date of Nom.	Hearings	Committee Vote	Floor Vote	Result
William Taft (nominated to CJ)	Edward White	GOP 49-47	6.30.21	Not referred to SJC	No vote taken	6.30.21	60-4
<b>Woodrow Wilson</b>							
John Clarke	Charles Hughes	DEM 56-40	7.14.16	No record of hearing		7.24.16	Voice
Louis Brandeis	Joseph Lamar	DEM 56-40	1.28.16	2.9.16 – 2.10.16 2.15.16 – 2.18.16 2.24.16 – 2.26.16 2.29.16 3.1.16 – 3.4.16 3.6.16 – 3.8.16 3.14.16 – 3.15.16	5.24.16  10-8	6.1.16	47-22
James McReynolds	Horace Lurton	DEM 51-44	8.19.14	No record of hearing	8.24.14  Reported favorably by voice vote	8.29.14	44-6
<b>William Taft</b>							
Mahlon Pitney	John Harlan	GOP 52-44	2.19.12	No record of hearing	3.4.12  Reported favorably by voice vote	3.13.12	50-26
Joseph Lamar	William Moody	GOP 60-32	12.12.10	No record of hearing	12.15.10  Reported favorably by voice vote	12.15.10	Voice

Nominee	To Replace	Senate	Date of Nom.	Hearings	Committee Vote	Floor Vote	Result
Willis Van Devanter	Edward White	GOP 60-32	12.12.10	No record of hearing	12.15.10 Reported favorably by voice vote	12.15.10	Voice
Edward White (sitting Justice elevated to CJ)	Melville Fuller	GOP 60-32	12.12.10	Not referred to SJC	No vote taken	12.12.10	Voice
Charles Evans Hughes	David Brewer	GOP 60-32	4.25.10	No record of hearing	5.2.10 Reported favorably by voice vote	5.2.10	Voice
Horace Lurton	Wheeler Peckham	GOP 61-31	12.13.09	No record of hearing	12.16.09 Reported favorably by voice vote	12.20.09	Voice
<b>Theodore Roosevelt</b>							
William Moody	Henry Brown	GOP 58-32	12.3.06	No record of hearing	12.10.06 Reported favorably by voice vote	12.12.06	Voice
William Day	George Chiras	GOP 56-32 <sup>165</sup>	12.19.03	No record of hearing	2.23.03 Reported favorably by voice vote	12.23.03	Voice
Oliver Wendell Holmes	Horace Gray	GOP 56-32 <sup>166</sup>	12.2.02	No record of hearing	12.4.02 Reported favorably by voice vote	12.4.02	Voice

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<sup>165</sup> Two Populists.

<sup>166</sup> Two Populists.