Rejecting the Confirmation Process: Modern Standards for Investigating Nominees to the Supreme Court

NATHAN A. WILLIAMS*

ABSTRACT

Elimination of the filibuster for nominations to the Supreme Court by Senate Majority Leader Mitch McConnell in 2017 upended the procedural calculus used by modern Presidents. No longer did endogenous rules encourage the selection of a nominee capable of attracting broad support in the upper house as long as the president's party controlled the majority in the Senate at the same time. In mid-2018, this led to the nomination of Brett Kavanaugh, the first appointment following the rule change, whose breadth of experience in public life threatened discovery of unexplored vulnerabilities for Committee investigators. Ultimately, his nomination forced the most expansive investigation of any nominee to the Supreme Court in history. His background file exceeded one million pages of documents detailing his tenure in roles across the executive and judicial branches. Yet his confirmation almost met defeat from an allegation undisclosed to investigators until the eleventh hour.

In reality, Brett Kavanaugh's nomination presented unique challenges to the Judiciary Committee from the outset. Not only did his nomination attract early opposition from senators in the minority—in part because his confirmation meant shifting the ideological direction of the Supreme Court—but the Committee had never before conducted a background investigation comparable in scope. Both because of the depth required to review Kavanaugh's voluminous record and in spite of it, events that unfolded throughout the Judiciary Committee's consideration of his nomination underscored the importance of process in equal measure as it exposed the need to standardize it. In short, the modern procedural landscape in the Senate requires reforming the processes for considering nominations to the Nation's highest Court to protect the integrity of the federal judiciary.

TABLE OF CONTENTS

---

* J.D., Georgetown University Law Center, 2020; M.Sc., London School of Economics & Political Science, 2017; B.A., University of Georgia, 2016. I thank Professor Richard Leon for his guidance in choosing this Note topic.

INTRODUCTION

As the saying goes in Washington, the battle is already lost once debate is focused on "process." In the United States Senate Judiciary Committee where nominations to the Supreme Court are often won or lost, however, process assumes outsized importance. In mid-2018, the nomination of Judge Brett Kavanaugh exposed weaknesses in the Committee's playbook for considering judicial nominees with political associations and deep backgrounds in public service. The confirmation fight that followed upended norms previously anchoring congressional investigations and damaged public confidence in the independent judiciary.

James Madison argued that separation of powers provides "to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."[1] Much to the chagrin of the Founders and the modern public, however, judicial confirmation battles in the Senate Judiciary Committee are now akin to watered-down political trials. Senators serve as either prosecutors or defense attorneys—their roles dictated by partisan affiliation with or against the nominating president—and the nominee, as a defendant, charged with committing an unsavory act or holding a belief seemingly unbearable to the public conscience. Making matters worse, the competing goals of "acquittal" or "conviction" depend on the other side's failure to make a convincing case.

The confirmation process for nominees to the Supreme Court has become a dreaded spectacle, in part because the Legislature, the most democratically accountable branch, has abdicated its constitutional role of debating and deciding policy. The modern Congress—paralyzed by internal warfare—no longer does much of the work assigned to it by the Constitution. As a result, the nation's

1. THE FEDERALIST NO. 51 (James Madison).

courts often substitute their judgment in a gap filling role. And just as actors in the political branches assume power by running successful campaigns, so too must any successful judicial nominee before the Judiciary Committee, especially one seeking lifetime tenure on the Supreme Court. Senator Ben Sasse of Nebraska made a similar observation during Justice Kavanaugh's confirmation hearing:

> For the past century, more legislative authority has been delegated to the Executive Branch every year. Both parties do it. The legislature is weak, and most people here in Congress want their jobs more than they want to do legislative work. So they punt most of the work to the next branch. The consequence of this transfer of power is that people yearn for a place where politics can actually be done. When we don't do a lot of big political debating here in Congress, we transfer it to the Supreme Court. And that's why the court is increasingly a substitute political battleground.[2]

This sort of transference invites an inordinate level of scrutiny into the personal and professional lives of Supreme Court nominees. It also forces the judiciary into the partisan arena—where it does not belong—despite its design as the branch of federal government most insulated from the public pulse.[3]

The confirmation experience of Justice Kavanaugh underscored the importance of process as much as it exposed the need for process standardization. In a formalist sense, a balanced separation of powers requires that the Judiciary Committee reevaluate how it considers Supreme Court nominations in order to prevent the continued transfer of policymaking expectations to the courts. This reevaluation would be a necessary first step by the Committee towards restoring the public's confidence in an independent judiciary.

In this Note, Part I explains why the nomination of Justice Kavanaugh defied conventional thought and why modern presidents may select nominees with deep backgrounds in public life, despite the mercurial nature of judicial confirmations in the modern Senate. Without discussing the qualifications of Kavanaugh as a nominee or issuing judgment on the sexual misconduct allegations raised against him, Parts II through V identify shortcomings in the Judiciary Committee's background review process, as well as flaws in modern practices during confirmation hearings. This Note also proposes reforms that could insulate the nation's future Justices from political commoditization and protect the Supreme Court's legitimacy. In other words, debating about "process," at least as it relates to the consideration of Supreme Court nominations, could be a winner after all.

---

2. Ilya Shapiro, *Crisis at the Supreme Court*, CATO INST. (Sept. 23, 2019), https://www.cato.org/publications/ commentary/crisis-supreme-court [https://perma.cc/X94T-ZZJE].

3. *See* THE FEDERALIST NO. 78 (Alexander Hamilton); *see also* THE FEDERALIST NO. 51 (James Madison).

I. UNDERSTANDING THE PARTISAN BACKDROP

President Donald Trump nominated Judge Brett Kavanaugh of the U.S. Court of Appeals for the District of Columbia to the Supreme Court after Justice Anthony Kennedy announced his retirement in the summer of 2018.[4] Although a conservative in most senses, scholars and legal observers often described Justice Kennedy as the Court's ideological median based on his willingness to side with the four liberal justices on cases involving individual rights.[5] Replacing the Justice at the ideological center meant altering the Court's ideological balance. Even though Republicans held a narrow majority in the Senate, the heightened stakes promised a grueling confirmation no matter the nominee.

Partisan battles over the judiciary's composition are not new phenomena in the United States, but history provides little shelter to justify the modern escalation of trench warfare. Aside from the defeat of Judge Robert Bork's nomination in the second Reagan administration, only an episode shortly after the election of President George W. Bush in 2000 indicated that judicial nominations would routinely become causes célèbres. Shortly before Senate Democrats gained a brief mid-session majority, then-Minority Leader Tom Daschle of South Dakota instructed his caucus to withhold support for any Bush judicial nominee as means of leveraging a more robust role in the "advice" portion of the nominating process.[6] The Republican President nonetheless sent eleven nominations to the Senate, including the nomination of Miguel Estrada to U.S. Court of Appeals for the District of Columbia.[7] Predictably, Democrats stalled on the "consent" front, but they ultimately lost their majority and with it the ability to defeat a nomination in the Judiciary Committee in the subsequent midterm election.[8] Powerless against nominees labeled as too "ideological," Senate Democrats then began successfully filibustering appeals court nominees like Estrada for the first time in history.[9]

Decades later, the Senate's treatment of judicial nominations only has deteriorated. At the time of Justice Kavanaugh's nomination the Supreme Court, scholar Benjamin Wittes noted that the country had:

> [N]ever before in our history faced a reality in which our normative expectation was that the opposition party would oppose the average Supreme Court

4. Shapiro, *supra* note 2.

5. *See, e.g.*, Katie Reilly, *How Anthony Kennedy's Swing Vote Made Him 'the Decider'*, TIME (June 27, 2018), https://time.com/5323863/justice-anthony-kennedy-retirement-time-cover/ [https://perma.cc/UFM2-A9HM] (noting that former U.S. Solicitor General Theodore B. Olson said that "[s]o crucial is his vote that lawyers regularly pitch their arguments in close cases overtly to Justice Kennedy.").

6. ILYA SHAPIRO, SUPREME DISORDER, JUDICIAL NOMINATIONS AND THE POLITICS OF AMERICA'S HIGHEST COURT 190 (2020).

7. *Id.*

8. *Id.*

9. *Id.* at 190–92 (indicating that Senate Democrats viewed Miguel Estrada as an eventual nominee to the Supreme Court so they defeated his nomination, in part, to prevent President George W. Bush from appointing the first Hispanic Justice).

> appointment of a nominee whose formal qualifications were not seriously in question—and block that nominee if humanly possible. We have never before faced a situation in which our working assumption was that Democrats would oppose all Republican nominees and that Republicans would oppose all Democratic nominees and that we would thus create partisan camps on every appellate court in the country.[10]

Distant are the days when objectively qualified nominees to the Supreme Court were confirmed with broad bipartisan support. Despite the slow erosion of Senate norms, President Trump nominated Justice Kavanaugh to the Supreme Court, defying convention since successful nominees are often, ironically, those with limited experience in government.[11] With narrower public backgrounds providing less material available for review by the Judiciary Committee, Presidents now often choose individuals with towering intellects but with limited public records —many of whom are appellate judges already approved by the Senate to serve on the federal bench.

Instead, President Trump selected a nominee with a massive public record from his time in the Justice Department, as staff secretary in the White House, and in the Office of Legal Counsel under President George W. Bush.[12] Additionally, Kavanaugh had spent more than a decade on the District of Columbia Circuit Court authoring hundreds of pages in legal opinions on controversial topics such as the scope of executive power, domestic surveillance, healthcare, and abortion rights. This made his background file the largest of any Supreme Court nominee in history.[13] And even more worrisome was his unpromising record of support in the Senate after winning confirmation to the nation's premier lower appellate court by a relatively thin margin of 57-36, following recommendation from the Judiciary Committee on a party-line vote.[14]

The selection of Justice Kavanaugh is owed, at least in part, to the procedural landscape of the Senate. At the time of his nomination to succeed Justice Kennedy in 2018, Senate rules allowed the upper chamber to advance Supreme

---

10. Benjamin Wittes, *The Confirmation Wars Are Over*, THE ATLANTIC (Aug. 14, 2018), https://www.theatlantic.com/ ideas/archive/2018/08/the-polarization-contagion/567422/ [https://perma.cc/MHF4-AEKX]; *see also* Keith E. Whittington, *Partisanship, Norms, and Federal Judicial Appointments*, 16 GEO. J.L. & PUB. POL'Y 521, 530 (2018) ("Forced to go on record in a roll call, conservative senators feel obliged to vote against a liberal nominee, and liberal senators feel equally obliged to vote against a conservative nominee. It was not long ago that such votes only needed to be cast in the case of the occasional *controversial* nominee.").

11. *See generally* SUSAN LOW BLOCH ET AL., INSIDE THE SUPREME COURT: THE INSTITUTION AND ITS PROCEDURES 142 (2d ed. 2008).

12. Matthew Nussbaum, *Brett Kavanaugh: Who is He? Bio, Facts, Background, and Political Views*, POLITICO (July 9, 2018), https://www.politico.com/story/2018/07/09/brett-kavanaugh-who-is-he-bio-facts-background-and-political-views-703346 [https://perma.cc/3T8L-MU4T].

13. See Erin Kelly, *Senate Digs Through Record 1 Million Pages of Documents on Supreme Court Nominee Brett Kavanaugh*, USA TODAY (Jul. 31, 2018), https://www.usatoday.com/story/news/politics/2018/07/31/senate-digs-through-record-1-million-pages-documents-kavanaugh/864516002/ [https://perma.cc/K84ZVZW2].

14. Pete Williams & Adam Edelman, *Trump Taps Federal Appeals Court Judge Brett Kavanaugh for Supreme Court*, NBC NEWS (July 9, 2018), https://www.nbcnews.com/politics/supreme-court/trump-taps-federal-appeals-court-judge-brett-kavanaugh-supreme-court-n889921 [https://perma.cc/UHE3-AD9F].

Court nominations by a simple majority.[15] Changes to Rule XXII, the rule controlling filibustering, first began in 2013 when then-Majority Leader Harry Reid, a Democrat from Nevada, invoked the "nuclear option" that lowered the cloture threshold for lower court nominations to a simple majority.[16] This allowed President Barack Obama to fill judicial vacancies with fewer votes required for confirmation.[17] Such an unusual mid-session rule change drew immediate rebuke, with Republican Senator Chuck Grassley of Iowa presciently warning that "there is one thing which will always be true . . . [m]ajorities are fickle. Majorities are fleeting. Here today, gone tomorrow."[18] A few short years later, with Republicans in control of the Senate and unable to advance the nomination of Neil Gorsuch to replace the late-Justice Antonin Scalia in early 2017, then-Majority Leader Mitch McConnell returned the favor by lowering the threshold required to advance Supreme Court nominations, too.[19] This meant that any judicial nomination needed only fifty-one supporting votes, or fifty if the Vice President filled a tie breaking role, to secure lifetime appointment on the federal bench.[20]

No longer did the Senate's rules encourage the nomination of a jurist to the high court capable of attracting bipartisan support, or even unified support from senators in the President's party. In fact, the elimination of the filibuster for Supreme Court nominees meant that the President could nominate someone with a deeper, more voluminous public record and perhaps, even political bonafides.[21] This likely held weight with the President's legal counsel, Don McGahn, who advised the President to select Kavanaugh, a reliable conservative whose record signaled antagonism toward the expansive administrative state.[22] However, the White House failed to account for the limitations of the Senate Judiciary Committee's traditional review process, especially with a nominee unlike any other before him.

---

15. Shapiro, *supra* note 2.

16. Burgess Everett & Seung Min Kim, *Senate Goes for 'Nuclear Option'*, POLITICO (Nov. 21, 2013), https://www.politico.com/story/2013/11/harry-reid-nuclear-option-100199 [https://perma.cc/C7LU-T2NV].

17. *See generally* VALERIE HEITSHUSEN & RICHARD S. BETH, CONG. RESEARCH SERV., RL30360, FILIBUSTERS AND CLOTURE IN THE SENATE (2017), https://www.senate.gov/CRSpubs/3d51be23-64f8-448e-aa14-10ef0f94b77e.pdf [https://perma.cc/U62N-ZHXA].

18. 159 CONG. REC. S8420 (daily ed. Nov. 21, 2013) (statement of Sen. Grassley).

19. Matt Flegenheimer, *President Trump Says 'Go Nuclear' as Democrats Gird for Gorsuch Fight*, N.Y. TIMES (Feb. 1, 2017), https://www.nytimes.com/2017/02/01/us/politics/neil-gorsuch-supreme-court-trump.html [https://perma.cc/8VPM-9EVK]; Josh Chafetz, *Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96 (2017) ("[President Trump] publicly urged Senate Republicans to "*go nuclear*" if Democrats filibustered. Democrats did indeed filibuster, and Republicans . . . took the opportunity to lower the cloture threshold for Supreme Court nominees to a bare majority, completing the move that Democrats had begun in 2013.") (emphasis added).

20. Whittington, *supra* note 5, at 532. ("The recent rule changes have allowed the Senate majority to work around obstructionist minorities, but party polarization will mean that few judicial nominees will be satisfactory to a Senate controlled by the opposition party.").

21. Shapiro, s*upra* note 2.

22. *See* RUTH MARCUS, SUPREME AMBITION: BRETT KAVANAUGH AND THE CONSERVATIVE TAKEOVER 78 (2019); CARL HULSE, CONFIRMATION BIAS: INSIDE WASHINGTON'S WAR OVER THE SUPREME COURT, FROM SCALIA'S DEATH TO JUSTICE KAVANAUGH 220 (2019).

II. FRAMING THE BACKGROUND INVESTIGATION: THE REVIEW PERIOD

The Judiciary Committee starts its formal investigation of a Supreme Court nominee soon after the President announces their nomination. Committee staff begin by reviewing any background material revealing the nominee's character and competence, such as information about his or her formative years, professional history, and personal life. Modern pre-hearing investigations span anywhere from seven to seventy days, reflecting the Senate's broad discretion over the process and its strategic willingness to devote resources to certain nominations and not others.[23]

An arbitrary process, one determined ad hoc for each nominee, invites excessive grandstanding at the expense of institutional legitimacy and, in certain instances, the nominee's reputation. History provides forceful examples. Bombshell allegations against Clarence Thomas in 1991, like Brett Kavanaugh in 2018, reached staff on the Committee shortly before scheduled votes.[24] Investigators had completed their review of documents provided by the nominee and the Federal Bureau of Investigation, and senators had already heard testimony from relevant witnesses on the nominee's professional and moral character. The belated arrival of each allegation threatened the credibility of the Committee's earlier investigation and brought disorder to the confirmation process.

Given the susceptibility of the process to political abuse, the Judiciary Committee should formalize a temporal framework through which staff requests, gathers, and reviews background material on any Supreme Court nominee.[25] Establishing a standardized review period for use in future confirmations would help the Judiciary Committee avoid surprise allegations and potentially endless rounds of reopened investigations. It should be designed to accommodate a thorough review of nominees with voluminous public records, as well as delays from outside agencies or organizations in providing relevant documents. This period could run sixty-days from the time that the nomination becomes official, although any reasonable amount of time is preferable to a timetable freely determined by the majority party.[26] Importantly, the proposed rule could provide a mechanism

---

23. BARRY MCMILLION, CONG. RESEARCH SERV., R44236, SUPREME COURT APPOINTMENT PROCESS: CONSIDERATION BY THE SENATE JUDICIARY COMMITTEE 12 (2018) (comparing the amount of time between the nomination announcement and the date of the first public hearing for Supreme Court nominees since 1975).

24. *Id.*

25. *See* John C. Danforth, *How to Fix the Confirmation Mess*, TIME (Nov. 11, 2018), https://time.com/ 5451509/how-to-fix-supreme-court-confirmation/ [https://perma.cc/SV3M-43UC].

26. MCMILLION, *supra* note 23 (showing that sixty-days is greater, but not much higher, than the average period between date of nomination and the conclusion of the background investigation for Supreme Court confirmations since 1975). Others, including President George W. Bush in October 2002, have proposed that the Judiciary Committee commit to holding a hearing on judicial nominations within ninety-days of receiving them from the White House. *See* Press Release, President George W. Bush, Remarks by the President on Judicial Confirmations (Oct. 30, 2002), https://georgewbush-whitehouse.archives.gov/news/releases/2002/10/20021030-6.html [https://perma.cc/67ER-XAJ6].

to shorten or lengthen the background review period, should circumstances so demand.

In addition, the rule should set a cutoff date after which the committee may no longer hold public hearings on any matter related to the nomination. This change will minimize the risk that harmful information is released outside of established information-gathering forums. Federal agencies, of course, would retain freedom to open investigations at the Committee's request, but the Committee itself should only consider relevant information during a set period to provide each nominee with a political form of due process.

III. STANDARDIZING DOCUMENT REVIEW

Documents created by nominees while working in the legislative, executive, or judicial branch can reveal intellectual acuity, ethical probity, and their legal philosophy. Although nominees may create thousands of documents during their service in government, some are not relevant in evaluating the nominee's judgment. Entire classes of documents may extend beyond the Committee's capacity and scope depending on the nature of the particular role held by the nominee.

Committee investigators understand that every document reviewed as part of a Supreme Court nominee's public record exposes the nominee to political vulnerability. As such, Democrats believed that the only way to defeat Justice Kavanaugh's nomination was to find "something in all that paper—if only it could be dislodged."[27] The resulting disagreement between the majority's document request and the minority's demands over which documents to review stymied the confirmation process. Yet again, Justice Kavanaugh's confirmation process demonstrates the need for a standardized procedure—one accepted over time by Republican and Democratic majorities—for reviewing the public records of nominees to the high court.

A. The Document Disagreement

Early in Justice Kavanaugh's confirmation process, both parties agreed that documents he authored would be helpful in evaluating his judgment and should therefore be reviewed.[28] This included even his notes and emails from his tenure in the Department of Justice and the White House, minus those withheld for justifiable reasons.

Disagreement between the majority and minority staff erupted over whether to review documents in Kavanaugh's file from his time as staff secretary for President George W. Bush.[29] Republicans argued those files revealed little about his personal views because other administration officials authored the vast

27. Marcus, *supra* note 22, at 181.

28. *Id*. at 183–84.

29. Jessica Gretsko, Senators Spar on Access to Kavanaugh's Staff Secretary Work, ASSOCIATED PRESS (July 27, 2018), https://apnews.com/article/4e272e40fe914e19a1d67212bae99056 [https://perma.cc/RTH9-DH5N].

majority of documents ultimately forwarded by him to the President.[30] Chairman Grassley, for example, described the staff secretary role as the "inbox and outbox of the Oval Office," where Kavanaugh processed "memos and policy papers" drafted by officials in other White House offices instead of "provid[ing] his own substantive work product."[31]

Based on Bush administration policies at the time, those documents likely discussed issues related to abortion, same-sex marriage, and interrogation practices used during the War on Terror.[32] Acknowledging the risk of disclosing highly sensitive information, especially related to national security, Chairman Grassley argued in a fiery speech on the Senate floor:

> The Senate should focus its efforts on reviewing [Judge Kavanaugh's] tens of thousands of pages of judicial opinions and other legal writings. Not only would a broad review of Staff Secretary documents be a waste of time but also a waste of taxpayer dollars. Moreover, Staff Secretary documents contain some of the most sensitive information and advice that went directly to President Bush from a range of policy advisors.[33]

The disagreement defined the background investigation as negotiations between majority and minority staff floundered. Democrats, on the other hand, claimed on the Senate floor and in the press that White House staff secretaries "aren't traffic cops," viewing the position instead as "integrally involved in the decision-making process for an extraordinarily wide range of policy issues, since virtually everything comes to them before it goes to the president."[34] The minority party wanted to review Kavanaugh's "complete record in the White House," or in simpler terms, they wanted "everything."[35] The resulting debate over where to draw the line left Committee staff in a constant state of warfare—and, at times, left their bosses uncertain how to proceed since the Committee had never before reviewed the background of a Supreme Court nominee with such broad experience in public life.

B. The Papers Chased

The Judiciary Committee submitted its official document request necessary for a thorough review of Kavanaugh's background on July 24 after meeting with White House Legal Counsel Don McGahn.[36] Investigators in the majority

30. *Id*.
31. *Id*.
32. Gresko, *supra* note 29.
33. 164 CONG. REC. S5229 (daily ed. July 24, 2018) (statement of Sen. Grassley).
34. John Podesta & Todd Stern, *Staff Secretaries Aren't Traffic Cops. Stop Treating Kavanaugh Like He Was One*, WASH. POST (July 30, 2018), https://www.washingtonpost.com/opinions/republicans-are-obstructing-a-fair-vetting-of-brett-kavanaugh/2018/07/30/9d823d00-9410-11e8-80e1-00e80e1fdf43_story.html [https://perma.cc/X8D5-JX9B].
35. Gresko, *supra* note 29.
36. Marcus, *supra* note 22, at 184.

compared the request to the civil discovery process, importing the duty to disclose all relevant emails and electronic communications to the Senate unless disclosure implicated some protectable interest or privilege. As a result, the Committee's official request did not include any material from Kavanaugh's time as White House staff secretary, and therefore did not include the name of any senator in the minority.[37]

As Committee staff concluded debate over the scope of documents it wished to review, Chairman Grassley set a timeline with the goal of advancing Kavanaugh's nomination in early fall.[38] That allowed a floor vote in time for Kavanaugh to participate in oral arguments during the Supreme Court's October Term, assuming acquittal in the Committee's political "trial" and confirmation on the floor. This gave staff nearly six weeks to comb through documents obtained from the National Archives and Records Association (NARA), including those released by former President George W. Bush, as well as any document already in the public domain, such as judicial opinions and academic writings.

The documents received by the Committee, marked according to their level of importance, arrived in waves throughout August and early September after release from NARA.[39] Approximately thirty-eight percent of the 458,000 pages released by President George W. Bush received a "committee-confidential" classification, which reflected sensitive conversations between Kavanaugh and other presidential advisors.[40] As a result, Chairman Grassley generally opted against public release of documents with this classification. However, majority staff created "work stations" for all senators to access the documents at any point during the review period.[41] In partnership with NARA, staff also provided "search terms" for senators to use in reviewing the documents.[42] Another 102,000 pages were blocked using George W. Bush's "constitutional privilege," which withheld documents involving Kavanaugh's discussion of judicial nominations, executive orders, and advice that he solicited to the president.[43]

In the end, committee staff reviewed more than one million pages of background materials—the largest file of any Supreme Court nominee in history—using time, relevance, and privilege as filters.[44] The Committee examined

37. *Id*. at 184.

38. Eliza Collins, *Judiciary Chair Chuck Grassley: Kavanaugh Could Be Confirmed to Supreme Court by October 1*, USA TODAY (Aug. 1, 2018), https://www.usatoday.com/story/news/politics/2018/08/01/chuck-grassley-brett-kavanaugh-supreme-court/878675002/ [https://perma.cc/ZZ9N-4LET].

39. Marcus, *supra* note 22, at 185, 197.

40. *Id*. at 185.

41. *Id*. at 203.

42. This let senators filter through documents with ease, allowing them to locate any page containing a specified term.

43. Marcus, *supra* note 22, at 186.

44. *See* Erin Kelly, *Senate Digs Through Record 1 Million Pages of Documents on Supreme Court Nominee Brett Kavanaugh*, USA TODAY (Jul. 31, 2018), https://www.usatoday.com/story/news/politics/2018/07/31/senate-digs-through-record-1-million-pages-documents-kavanaugh/864516002/ [https://perma.cc/K84Z-VZW2].

documents spanning from Justice Kavanaugh's time in the Office of Independent Counsel during the Whitewater Investigation to his tenure in the Office of Legal Counsel during the Bush administration. He had also authored more than three-hundred judicial opinions during twelve years on the U.S. Court of Appeals for the District of Columbia, filing concurrences or dissenting opinions more frequently than any other colleague.[45] The Committee reviewed those as well, along with a staggering 1,287 written questions, mostly from Senate Democrats, that the nominee answered after his hearings.[46]

The "trial-like" nature of modern Supreme Court confirmations made predictable each side's measure of success when it came to the review of documents in Kavanaugh's file. Republicans touted the breadth of the investigation, with Senator Grassley referring to it as "the most expansive and transparent confirmation process in history" because senators requested "more pages of executive branch documents than . . . for any Supreme Court nominee."[47] Democratic senators, on the other hand, claimed that the Committee had incomplete access to Kavanaugh's public records and, therefore, could not make an informed judgement on his nomination.[48] Each side, of course, characterized their assessment in political terms. The amount of documents reviewed in Kavanaugh's file exceeded the combined total of his predecessors, as Republican senators emphasized, but still excluded a portion from his White House tenure.

Senate Democrats faced an impending sense of defeat from the start of the public hearings. The disclosed documents revealed Kavanaugh's professional reflections, opinions on the law, and even "a glimpse of [his] personality" with unprecedented depth, but none contained a smoking gun to disqualify his nomination.[49] Lacking agency to subpoena documents through the compelled process, Democratic senators let tensions boil over from the review period into the public hearings.[50] First, then-Senator Kamala Harris of California interrupted Chairman Grassley's opening statements, citing her party's opposition to the restricted

45. Marcus, *supra* note 22, at 159.

46. Paulina Dedaj, *Brett Kavanaugh Responds to 1,287 Written Questions from Senators, Nearly All From Dems*, FOX NEWS (Sept. 13, 2018), https://www.foxnews.com/politics/brett-kavanaugh-responds-to-1287-written-questions-from-senators-nearly-all-from-dems [https://perma.cc/5QG7-5QDD].

47. Erin Kelly, *Can Senate Confirm Kavanaugh Before November Election? Review Will Last Through October*, USA TODAY (Aug. 3, 2018), https://www.usatoday.com/story/news/politics/2018/08/02/brett-kavanaugh-document-review-go-through-october-nationalarchives/891220002/ [https://perma.cc/Z4M2-CNYH].

48. *Id*. Despite these claims, many Democratic senators on the Judiciary Committee announced their opposition to Justice Kavanaugh's nomination before his hearings began. *See* Marcus, *supra* note 22, at 186 (noting that "Democrats who had already announced their opposition to Kavanaugh weren't involved in a good-faith search for information to guide their decision-making.").

49. Marcus, *supra* note 22, *Id*. at 141.

50. MICHAEL L. KOEMPEL, CONG. RESEARCH SERV., R44247, A SURVEY OF HOUSE AND SENATE COMMITTEE RULES ON SUBPOENAS 14 (2018) (showing that the chairman and ranking member must authorize any subpoena compelling access to any document, or class of documents, believed to shed light into the nominee's background on the Senate Judiciary Committee. This meant Senate Democrats alone could not subpoena documents that the majority did not request for review.).

access of Kavanaugh's public records, as well as insufficient time for minority staff to review the final round of documents released from NARA.[51] Senator Cory Booker of New Jersey later violated the Senate rule prohibiting disclosure of "committee-confidential" documents—despite the threat of expulsion from the upper-chamber—by reading emails aloud during the confirmation hearing.[52] The lack of a cross-party standard agreed upon by majority and minority staff for requesting a nominee's public records disrupted the confirmation process—and risked the nation's confidence in the integrity of the background investigation.

C. The "Political" Standard

The Judiciary Committee should reevaluate the objectives it seeks to accomplish when reviewing any future nominee's records, particularly when that nominee served in the executive branch. As a general matter, the Committee requests documents to glean insight into the nominee's professional acuity, legal philosophy, and sense of ethical boundaries. Obtaining documents that provide senators with this information is possible under a compartmentalized standard that respects the confidential nature of executive branch communications without foreclosing the usefulness of documents the nominee produced in the executive branch altogether. In other words, investigators could perform their duties by requesting only documents from a nominee's tenure in purely political or policy-related positions within the executive department, as opposed to positions, for example, where the nominee served as a legal advocate for the President or the United States government.

For too long, the Committee has accommodated politicization of attorney advocacy on behalf of a client—both public and private—despite understanding that arguments made in the course of client advocacy neither reveals a nominee's legal philosophy nor reflects worthiness of judicial appointment. Instead, the most identifiable risk is chilling zealous representation on behalf of private clients or, in the case of federal prosecutors, the United States government. If executive branch attorneys with judicial ambitions expect their mental impressions or communications to be subject to public review, for example, human nature may favor prudently tailoring representation with that end in mind rather than using more clever methods to serve the client's best interests.

This "political standard" is supported, at least in part, by historic precedent. When President Barack Obama nominated Elena Kagan to the Supreme Court in 2010, Senator Patrick Leahy of Vermont, then-chairman of the Judiciary

---

51. Although NARA released documents totaling more than 42,000 pages the night before the public hearings began, most pages were copies of legislative text that had been forwarded to Brett Kavanaugh in email attachments from colleagues in the White House. Few, if any, were useful in evaluating the nominee's professional background.

52. Unbeknownst to the senators who intended to violate Senate Rule XXIX by publicly disclosing the content of documents marked "committee-confidential," Chairman Grassley earlier in the day had "lifted the confidentiality restrictions . . . meaning that [they were] not actually in ethical jeopardy." Marcus *supra* note 22, at 211.

Committee, with Senator Orrin Hatch of Utah, the ranking member, "set up guidelines and worked together to determine which of her documents would be withheld" and which would be disclosed.[53] Committee investigators then received the executive branch documents she authored as a policy advisor in the Clinton administration when they considered her nomination to the Supreme Court, but non-public documents produced during her tenure as the United States Solicitor General, the nation's chief legal advocate before the Supreme Court, were not requested.[54] And when the Committee investigated the tenure of John Roberts in the same office during his confirmation process to serve as Chief Justice, a similar standard applied.[55]

Despite the lack of a clear, uniform standard for requesting documents relating to experience in the executive branch, any precedent that existed went ignored with the Kavanaugh experience. No such cooperation materialized between the majority and minority, and the Committee proceeded on strictly partisan terms when it requested documents to review from government and outside agencies. Given the state of political disunion, senators and their staff will likely chart yet another course when the Committee next considers a Supreme Court nominee with a comparable depth of public experience, a spectacle avoided after the death of Justice Ruth Bader Ginsburg when President Trump nominated legal scholar Amy Coney Barrett, unless the process is standardized.

To prevent constant rule changes that serve political interests above all others, the Committee could adopt this standard through an official rule and require bipartisan support to amend it. Under a codified version of the "political standard," the Committee could request documents related to a nominee's service in the executive branch if they held a substantive policy-based position. Importantly, even with such a rule, the Committee would retain the power to subpoena documents that fall outside this standard. Using the Kavanaugh experience as a guide, it is clear that a durable framework is preferable to conduct a thorough review of the documents that reveal characteristics helpful in performing the advice and consent function without fearing sequestration of certain background materials.

IV. REFORMING THE CLOSED-DOOR SESSION

No greater procedural misfire occurred during the Committee's handling of the Kavanaugh nomination than in the "closed-door" session. In the aftermath of the public hearings for Justice Clarence Thomas that focused on allegations of sexual harassment, then-Judiciary Committee Chairman Joe Biden of Delaware introduced the closed-door session for all subsequent Supreme Court nominees.[56] The

53. Norm Omstein, *The Senate Shreds its Norms*, THE ATLANTIC (Sept. 7, 2018), https://www.theatlantic.com/ideas/archive/2018/09/senate-kavanaugh/569596/ [https://perma.cc/24HD-5EEN].

54. Marcus, *supra* note 22, at 203.

55. *Id*.

56. *See* 138 CONG. REC. S8853 (daily ed. June 25, 1992) (statement of Sen. Biden).

Committee adopted the procedural change as a logical outgrowth from an existing Senate rule, which provided that a committee may vote to close hearings for a variety of reasons, including when an issue "will tend to charge an individual with crime or misconduct, or disgrace or injure the professional standing of an individual, or otherwise expose an individual to public contempt or obloquy, or will represent a clearly unwarranted invasion of the privacy of an individual."[57] By design, the nominee sits only with members of the Committee and a handful of staffers with high-level clearances, allowing candid discussion of any major issues or embarrassing allegations in private.[58]

The most serious allegation against Kavanaugh did not make the agenda during his closed-door session, however, exposing shortcomings in its design.[59] Committee members convened for the session late at night on the third day of the public hearings, following thirteen hours of televised testimony.[60] Senator Chuck Grassley, then the committee's 84-year-old chairman, emerged from his office to lead the confidential meeting.[61] But Senator Dianne Feinstein of California, the Committee's ranking member, failed to attend at all.[62] The meeting likely focused instead on personal financial matters disclosed by Kavanaugh in response to the committee's standard questionnaire, information customarily redacted from the version released to the public.

Senator Feinstein's absence meant that she failed to disclose to other Committee members a letter detailing an allegation of sexual misconduct against Kavanaugh, even though she had received it months before the start of public hearings on his nomination.[63] In late July, Dr. Christine Blasey Ford met with Representative Anna Eshoo, a California congresswoman, to detail the alleged encounter in 1982. The congresswoman then wrote to Senator Feinstein on July 30, emphasizing that Dr. Ford wished to remain confidential.[64] But for six weeks, neither Senator Feinstein nor her committee staff officially investigated the claim.[65] Only when Representative Eshoo contacted Senator Harris after the public hearings ended in early September did fellow senators

57. *See generally* S. COMM. ON RULES & ADMIN., 101ST CONG., SENATE MANUAL CONTAINING STANDING RULES, ORDERS, LAWS, AND RESOLUTIONS AFFECTING THE BUSINESS OF THE UNITED STATES SENATE, Rule XXVI(5)(B) (1989).

58. MCMILLION, *supra* note 23.

59. *Cf.* Joe Perticone, *Dianne Feinstein Says She Sent Secret Letter about Brett Kavanaugh to FBI*, BUS. INSIDER (Sept. 13, 2018), https://www.businessinsider.com/dianne-feinstein-brett-kavanaugh-letter-fbi-2018-9 [https://perma.cc/B3JU-R5MA]. Senator Feinstein claims she kept the letter confidential to honor Dr. Ford's request to remain confidential.

60. *Brett Kavanaugh Hearings Day 3: Booker's 'Spartacus Moment'; Same-Sex Marriage Questions*, CBS NEWS (Sept. 7, 2018), https://www.cbsnews.com/live-news/brett-kavanaugh-confirmation-hearing-day-3-questioning-2018-09-06-live-updates/ [https://perma.cc/DZR8-6VEY].

61. *See generally* Press Release, Senator Chuck Grassley, Judiciary Committee Continues Effort to Accomodate Testimony from Dr. Ford Next Week (Sept. 21, 2018), https://www.judiciary.senate.gov/press/rep/releases/judiciary-committee-continues-effort-to-accommodate-testimony-from-dr-ford-next-week [https://perma.cc/QHU9-N3BE].

62. *Id.*

63. Marcus, *supra* note 22, at 229.

64. *Id.* at 270.

65. *Id.* at 230; *see* Grassley, *supra* note 61.

learn that the letter existed.[66] In fact, Chairman Grassley, whose reputation of protecting whistle-blowers is well established, only learned about the allegation from Senator Feinstein on September 13, shortly before it went public—and almost one week after the hearings had concluded.[67]

Despite undergoing six "Full Field Single Scope" background investigations by the Federal Bureau of Investigation throughout his career, the allegations against Kavanaugh only surfaced with Dr. Ford's letter.[68] In theory, the closed-door session provided the Ranking Member an opportunity to discuss the claim with fellow senators, or even question the nominee, as well as determine subsequent investigative steps without publicly identifying the accuser. Senator Feinstein knew about the allegation when the session occurred yet chose not to participate. To the committee's detriment, she ignored her duty to report the allegation in the controlled setting, which ultimately led to a second round of public hearings.

These sobering events demonstrate a need for reform. As a starting point, Committee members must attend the closed-door sessions. Attendance at these meetings, like other hearings, is encouraged but not required under Senate rules.[69] Given the scope and seriousness of the session, however, mandatory attendance is necessary for the session to function as intended. To account for unforeseen circumstances, absences should only be excused for serious reasons, and those absences should be noted in public record. Forthrightness holds equal importance. Therefore, disclosure of any information known about a nominee's background should be required in this confidential setting. When fulfilling their advice and consent role, senators owe a duty not only to the Committee but to the country when presented with sensitive information that impacts their ability to satisfy constitutional responsibilities, especially one involving appointment for lifetime tenure.

In addition, the "closed-door" session could benefit from the help of outside investigators when senators are presented with credible information undisclosed by the nominee or undetected by the FBI's "Full Field Single Scope" background query. When charges are made against a nominee's character, in particular, a confidential forum is necessary to conduct an investigation without political interference. The Committee could convene a panel of three retired jurists to investigate an allegation, reach conclusions, and forward any findings in a confidential manner to members of the Committee.[70] The panel would operate much like a federal

66. *Id*. at 284.

67. *Id*. at 292–93.

68. Press Release, Senator Chuck Grassley, Grassley Statement at Continuation of the Hearing to Consider Judge Brett M. Kavanaugh (Sept. 27, 2018), https://www.grassley.senate.gov/news/news-releases/grassley-statement-continuation-hearing-consider-judge-brett-m-kavanaugh [https://perma.cc/7WJH-4L6R].

69. RULES OF PROCEDURE OF THE SENATE COMMITTEE ON THE JUDICIARY, R. P. 8(2), https://www.judiciary.senate.gov/about/rules [https://perma.cc/Q3G5-65AP].

70. Danforth, *supra* note 25.

grand jury. The Judiciary Committee, at that point, "would retain sole power to accept or reject the panel's finding," including the decision of whether to publicize the allegation.[71] As former Senator John Danforth of Missouri noted in his proposal, "[t]his approach would better protect the privacy and reputations of accusers, the reputations of nominees and public confidence in the Senate itself."[72]

The Kavanaugh experience, set against the backdrop of the "Me Too" movement exposing and combatting sexual violence, teaches an important lesson about institutional legitimacy.[73] On one hand, the way government protects and provides resources to victims of sexual violence—including the use of confidential reporting forums—is critical for respecting individual privacy, especially in an advanced society with intolerance for this kind of abuse. At the same time, providing future nominees with safeguards against unsubstantiated allegations is important, too. This is especially imperative for those nominated to the Supreme Court because the nation's judiciary draws its legitimacy from public confidence in the notion of impartial justice where no one is above the law.[74] In this sense, the closed-door session—when used as intended—is a useful mechanism to achieve these goals for victims and nominees alike. Reforming it is vital to protect future nominees and potential accusers from undue embarrassment, harassment, and hardship.

V. REFORMING THE PUBLIC HEARINGS

Criticisms over Supreme Court confirmation hearings have intensified in recent decades. During the George W. Bush administration, in particular, public hearings began straying from their intended purpose of providing "a colloquy capable of adequately informing a senatorial vote on whether to invest a nominee with the independent authority to interpret the Constitution."[75] Senators, especially those antagonistic to the nominating President, now use hearings to define nominees as political actors, often by entangling them in ideological hypotheticals about controversial topics.[76] The purpose of the hearings is no longer to gather details undisclosed by the nominee or to inquire about information uncovered by Committee staff during the background investigation. The goal is simple: force the nominee into the binary conundrum of either vowing to rule a certain way or avoiding the hypothetical altogether, appearing

71. *Id.*

72. *Id.*

73. Leigh Ann Caldwell, *Kavanaugh's Confirmation Fight Has Nearly Broken the Senate. Can it Recover?* NBC NEWS (Oct. 7, 2018), https://www.nbcnews.com/politics/congress/kavanaugh-s-confirmation-fight-has-nearly-broken-senate-can-it-n917411 [https://perma.cc/HWM6-TEJ2].

74. TOM CLARK, THE LIMITS OF JUDICIAL INDEPENDENCE: POLITICAL ECONOMY OF INSTITUTIONS AND DECISIONS 17–18 (2010).

75. DION FARGANIS & JUSTIN WEDEKING, SUPREME COURT CONFIRMATIONS IN THE U.S. SENATE: RECONSIDERING THE CHARADE 128 (2014).

76. Shapiro, *supra* note 2.

evasive before the watchful public eye. As a result, hearings no longer focus on probing the nominee's temperament or worthiness of lifetime appointment to the nation's highest judicial office.[77]

Although restoring public hearings to a less adversarial affair requires overcoming political inertia, a proper balance in the constitutional separation of powers necessitates it. First, the advice and consent function exists as a check on the presidential appointment power, although not without limitation. The public understands that the President they elect will fill vacancies not only on the Supreme Court but throughout the judiciary and the executive department. Even without the use of a litmus test in the selection process, it is safe to assume that the President will choose judicial nominees with comparable views on the law. Second, asking specific questions about a Supreme Court nominee's own ideology in a public hearing exceeds the proper scope of the Committee's investigatory role. Such specificity serves only to politicize the nominee and, by extension, the nation's judiciary. Instead, senators should standardize use of the "Ginsburg Rule," named after former Justice Ruth Bader Ginsburg, which discourages any question designed to forecast the nominee's treatment of a particular legal issue that may come before the Court.[78]

A. Ideology Belongs in the Political Branches

The Constitution vests the Senate with the advice and consent function, commonly interpreted as a restraint on the President's power to nominate Supreme Court justices.[79] The exercise of these powers at times leads to institutional tension, especially when government is divided. Despite such constitutional confrontations,

> [B]y requiring the agreement of the President and the Senate on the appointment of Justices, and by giving Justices lifetime appointments, the Framers evidently hoped to create a judicial body that would be broadly representative of political views and broadly acceptable to the polity over time. The particular political balance of the executive and legislative branches at a given moment in history could achieve only partial representation on the Court, because only a few openings would occur during any particular four-year administration. The requirement for agreement between branches would produce a consensus choice if both branches, operating according to the theory of checks and balances, assert their respective interests to achieve appointments of Justices whose conceptions of the judicial role are satisfactory to both the appointer and the ratifiers.[80]

---

77. *See* BENJAMIN WITTES, CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES 13 (2006) ("[T]he hearings—because of irreconcilable conflict between their ever increasing ambition to explore a nominee's soul and appropriate reticence of nominees for a judicial role to bare their souls—almost inevitably prove an embarrassing spectacle that yields minimal information.").

78. *Id*. at 93; *see also* MODEL CODE OF JUD. CONDUCT Canon 5 (AM. BAR ASS'N 2020).

79. U.S. CONST. art. II, § 2, cl. 2.

80. Arthur S. Leonard, *A Proposal to Reform the Process for Confirming Justices of the United States Supreme Court*, 7 ST. JOHN'S J. LEGAL COMMENT. 193, 195 (1991).

In this sense, the Senate owes deference to the President's selection, at least under a strict textualist interpretation of the Appointments Clause, in combination with democratic theory. After winning a national election, the President is entitled to fill judicial vacancies based on constitutional powers. The electorate understands this process and supports a candidate at the ballot box with knowledge that he or she will select judicial nominees with similar values. In the words of a young lawyer from Kentucky, reflecting on the Senate's rejection of Judge Clement Haysworth to the high Court, "[t]he President is presumably elected by the people to carry out a program and altering the ideological directions of the Supreme Court would seem to be a perfectly legitimate part of a Presidential platform."[81] Of course, the Senate is equally empowered to reject any President's nominee, but nothing entitles senators to batter a nominee over their philosophy the way the process now allows, especially since the Constitution vests both the appointment power and the restraint on it in Article II.

Although history provides examples of failed nominees for purely political reasons, the overwhelming majority of nominees have been given ideological deference by the Senate. This means the Senate typically confirms nominees whose views are considered mainstream—a practice that should continue to preserve the federal judiciary's integrity. In 1795, for example, the Senate voted down John Rutledge, who had become Chief Justice of the Supreme Court by recess appointment, over a political disagreement.[82] Rutledge had "outspokenly and vehemently opposed the Jay Treaty with Britain, and even though Washington nominated him knowing this, the Federalist press strongly opposed him, and Federalist senators followed suit."[83] Nearly a century later in 1881, President Rutherford B. Hayes unsuccessfully nominated Stanley Matthews to the Supreme Court.[84] Based on "heavy opposition from populist and agrarian groups who believed he was too close to corporate interests," Matthews only became a justice years later when President Andrew Garfield renominated him after Democratic senators "simply ran out the clock" on his original nomination under Hayes.[85] Only Merrick Garland in 2016 never even received a hearing purely because of a political standoff between President Barack Obama and Senate Republicans.[86] The Senate has confirmed the majority of Supreme Court nominations otherwise.

As a general matter, senators should reserve deeply probing ideological questions for nominees that seek appointment in the political department rather than the judiciary—especially if the nominee's ideological or judicial philosophy is observably mainstream. The advice and consent process, in most instances, vests judges with lifetime tenure as impartial arbiters of the law. Insulation from

81. *See* A. Mitchell McConnell Jr., *Haynsworth and Carswell: A New Senate Standard of Excellence*, 59 KY. L.J. 7, 32 (1970).
82. Chafetz, *supra* note 19, at 119.
83. *Id*.
84. *Id*. at 124.
85. *Id*.
86. *Id*. at 107–08.

political forces during their confirmation process and throughout their service on the federal bench, therefore, is necessary to protect their appearance of impartiality. To heed the warning of political scientist Donald Songer, "[g]ood judges are expected to make decisions according to a fixed body of legal rules and the inexorable commands of logic. They are the spokesmen for the law. Politics should, therefore, not be allowed to influence their selection, or we would cease to have a government of laws and not of men."[87] Unless a nominee's views are observably extreme, the Senate's proper role in Supreme Court nominations is to probe them only on a visceral level. Senators instead should direct their primary focus to the nominee's temperament, ethical history, and professional qualifications, relying primarily on his or her past statements and writings in order to evaluate fitness to serve.

B. Restoring the Limited Purpose of Public Hearings

Modern congressional investigators understand that fact-finding is often minimal and beside the point in public hearings. However, limited questioning of a nominee's judicial philosophy remains important for senators on the Judiciary Committee. These hearings are typically the only times in which the nominee may publicly defend his or her qualifications as well. But public hearings now occupy the nation's political consciousness for nearly a week through live stream. Similar to prosecutorial cross-examiners, senators build or undercut the nominee's ideological character by asking specific questions about contentious bodies of law. The scope of questions asked often exceeds the committee's role in the 'advice and consent' process as a result.

The most notable change is the marked increase in the number of questions senators ask about civil rights and liberties in the wake of *Roe v. Wade*. In the words of Dion Farganis and Justin Wedeking, "it [eventually] became increasingly important for senators to satisfy their constituents by probing nominees for their views on hot-button issues such as abortion rights, capital punishment, affirmative action, school prayer, and same-sex marriage."[88] In response, Elena Kagan, a former academic appointed to the Supreme Court in 2010, argued that:

> The Bork hearings [in the late 1980s] presented to the public a serious discussion of the meaning of the Constitution, the role of the Court, and the views of the nominee; that discussion at once educated the public and allowed it to determine whether the nominee would move the Court in the proper direction. Subsequent hearings have presented to the public a *vapid and hollow charade*, in which repetition of platitudes has replaced discussion of viewpoints and personal anecdotes have supplanted legal analysis.[89]

87. *See generally* Donald R. Songer, *The Relevance of Policy Values for the Confirmation of Supreme Court Nominees*, 13 L. & SOC'Y REV. 927–28 (1979) (internal quotations omitted).

88. FARGANIS & WEDEKING, *supra* note 75, at 132.

89. *Id*. at 131.

Nominees, like Kagan herself years later, now evasively answer questions comparably to the elected politicians who ask them. This is, in part, because many of the questions asked of Supreme Court nominees are designed to make political points unrelated to assessing a judge's qualifications. Modern nominees routinely avoid providing direct answers, despite attempts to predict how they will rule on specific issues, and senators learn very little, if anything, during modern public hearings. In other words, nominees believe "it is better to be silent and thought a fool" than take the bait.[90] Therein lies the defect.

The improper scope of questioning for judicial nominees hit a highwater mark during the Kavanaugh confirmation. Rather than focusing on his public record, including the judicial opinions he authored, senators asked whether he supported a "woman's right to choose" and if he would commit to upholding *Roe v. Wade* as settled precedent.[91] They also probed whether he agreed with the Court's reasoning in *National Federation of Independent Business v. Sebelius*, the case which upheld key provisions of the Affordable Care Act, and whether he would vote to uphold the act's coverage of individuals with pre-existing conditions in a subsequent case.[92] Then, in the context of Special Counsel Robert Mueller's investigation of Russian interference in the presidential election of 2016, senators asked whether the law required the President to comply with a subpoena or if the President had the authority to fire the special counsel.[93] With little to disqualify Kavanaugh discovered during the background investigation, the minority's purpose became clearer with each subsequent questioner: compel him to appear overtly partisan or tie his loyalty to the politically volatile President who nominated him, if not both at once.

The late-Justice Ruth Bader Ginsburg is famous for her quote made as the Judiciary Committee considered her nomination to the Supreme Court in 1993, in which she reasoned that "[a] judge sworn to decide impartially can offer no forecasts, no hints, for that would show not only disregard for the specifics of the particular case—it would display disdain for the entire judicial process."[94] Returning to the "Ginsburg Standard" is preferable because it separates judicial nominees from the unsettling partisanship that defines modern discourse by reserving debate on controversial issues for those in the political branches. This preserves

90. Geoffrey R. Stone, *Understanding Supreme Court Confirmations*, 2010 SUP. CT. REV. 318, 434 (2011).

91. Sabrina Siddiqui, *Brett Kavanaugh Sidesteps Senate Questions on* Roe v. Wade, THE GUARDIAN (Sept. 5, 2018), https://www.theguardian.com/us-news/2018/sep/05/brett-kavanaugh-senate-abortion-supreme-court-roe-v-wade [https://perma.cc/NNR7-UBQE].

92. 567 U.S. 519 (2012); James Hohmann, *12 Questions Brett Kavanaugh Would Not Answer During His Confirmation Hearing*, WASH. POST (Sept. 6, 2018), https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2018/09/06/daily-202-12-questions-brett-kavanaugh-would-not-answer-during-his-confirmation-hearing/5b9084da1b326b32de918ad6/ [https://perma.cc/47TV-QYWV].

93. Siddiqui, *supra* note 91.

94. David B. Rivkin Jr. & Andrew M. Grossman, *Kavanaugh and the Ginsburg Standard*, WALL ST. J. (Sept. 3, 2018), https://www.wsj.com/articles/kavanaugh-and-the-ginsburg-standard-1536010512 [https://perma.cc/86SK-44ME].

the notion of impartial justice given the possibility that interested parties may one day petition the Supreme Court for relief on a related controversy.[95] Even more, restoring the proper scope of questioning would provide "senators [with] enough information to make an informed decision on the nominee without simultaneously asking the nominee to violate any perceived norms regarding prejudice or bias concerning possible future cases."[96] To alter the dynamic that discourages providing thorough answers that help senators evaluate their qualifications, senators should not expect nominees to address specific legal or political issues. Otherwise, the public confirmation hearings lack usefulness and the integrity of the judiciary as a truly independent branch in our tripartite scheme is but a figment of constitutional imagination.

Restoring the purpose of public hearings is part of a larger rebalancing of institutional powers too, which requires redirecting partisan ire toward the political branches rather than the judiciary. If the Supreme Court "is supposed to be the 'brake' in our political system—then it is crucial for the justices not to always be part of [the] majority. And if the Senate only approves justices with whose [particular] views they agree, then, by definition, those justices are unlikely to be part of a countermajoritarian force."[97] Therefore, questioning during the public hearings should be limited to probing a nominee's character, his or her preferred methods of interpreting the Constitution, and content authored in academic and government writings. In essence, the Judiciary Committee should resolve to evaluate past experiences and qualifications with particular emphasis, as they best reflect the nominee's "intellectual acuity, ethical probity, and political acceptability" in determining fitness for lifetime appointment on the Supreme Court.[98]

CONCLUSION

Debate over the processes used to consider Supreme Court nominations is a worthy endeavor, especially given the procedural terrain in the modern Senate. As the confirmation experience of Brett Kavanaugh revealed, methods used in the Judiciary Committee can be reformed to improve the quality, accuracy, and timeliness of information senators receive and review in considering a nominee's worthiness of a lifetime appointment, particularly for those with deep records of government service.

---

95. *Compare* David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1493–94 (1992) (noting that senators should vote on the basis of agreement or disagreement with a nominee's legal views), *with* John McGinnis, *The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 TEX. L. REV. 633, 636 (1993) (arguing that senators should not vote on an ideological basis). *See also* Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1205 (1988).

96. FARGANIS & WEDEKING, *supra* note 75, at 128.

97. *Id*. at 127.

98. Leonard, *supra* note 80, at 197.

The reforms proposed in this Note could provide institutional benefits to the Judiciary Committee and the nation's judiciary alike as well. Repairing the relationship between majority and minority members, in part by eliminating the discretion to abuse or weaponize critical steps in the confirmation process, is an important step. Even more, improving the judicial confirmation process is indispensable for preserving public confidence in the Supreme Court's ability to administer equal justice, regardless of circumstances in the political branches. A more standardized process could help excise the septic level of politicization beleaguering the branch that rejects it in design, restoring symmetry to our tripartite system of government that deliberately seeks to separate those whose role is to "say what the law is" from those who write it. Until then, nominees to the Supreme Court should expect to experience trial by fury in the Senate.