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The Ginsburg Rule

EXECUTIVE SUMMARY

- Article II of the United States Constitution provides "[t]he President … shall nominate, and by and with the Advice and Consent of the Senate, shall appoint … Judges of the [S]upreme Court." U.S. Const. art. II, §2.
- As with many questions involving the federal courts, the Constitution itself is rather sparse regarding Supreme Court nominations. Section II of Article II leaves open important questions about the qualifications of prospective nominees, the standards for evaluating them, and the confirmation process itself.
- From the mid-twentieth century on, a series of norms regarding Supreme Court nominations and confirmations have developed. The President appoints a nominee usually after an intense vetting process; the Senate Judiciary Committee holds a hearing at which the nominee testifies; and the nominee is referred to the full Senate.
- Given the high-profile issues that the Supreme Court weighs in on nowadays, confirmation hearings for nominees are now followed by a great many Americans.
- Article III of the Constitution vests in the Supreme Court the power to decide cases and controversies. In so doing, the Court interprets the Constitution and the laws passed by Congress. Unlike the common law courts of yore, it is given no mandate to "make" law.
- Canon 5 of the Model Judicial Code preserves judicial impartiality by preventing a judicial nominee from commenting on cases or issues that might come before them.
- Then-Judge Ginsburg invoked this rule at her confirmation hearing more than 30 times and refused to answer questions on issues as wide-ranging as church and state, antitrust, and abortion.
- Every nominee to follow has invoked the "Ginsburg Rule" and refrained from answering questions that implicate matters and issues that might come before the Supreme Court.

MORE INFORMATION

History of Supreme Court Nominations

The United States Constitution provides "[t]he President … shall nominate, and by and with the Advice and Consent of the Senate, shall appoint … Judges of the [S]upreme Court." U.S. Const. art. II, §2. The Constitution itself is rather sparse regarding Supreme Court nominations and thus a common practice has evolved and changed over time.

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Our first President, George Washington, was in the unusual position of nominating all of the then-six Supreme Court Justices at once. In a process very different from today, the Senate confirmed all six of the President's nominees by voice vote just two days later. It appears that President Washington did not consult with the nominees, and one of them, Robert Harrison of Maryland, declined his confirmed seat.

By and large, the confirmation process for Supreme Court Justices continued to be relatively uncontroversial up through the early 1800s. When a vacancy arose, Presidents usually selected a nominee quickly, sent their names to the Senate (often without consulting the nominee), and the Senate confirmed most nominees by a voice vote within days.

The intense political rivalries and sectionalism surrounding the Civil War led to close scrutiny of many Supreme Court nominees. But interestingly, the confirmation process still looked remarkably like the process from the Washington era. There were no hearings held and little, if any, direct contact between the Senate and the nominees.

From the late 1890s through the mid-twentieth century, the Senate confirmed nearly every Supreme Court nominee, regardless of the party in the White House. Indeed, between 1895 and 1968, the Senate rejected only one nominee. During this period of relative domestic tranquility, a series of norms regarding the confirmation process began to develop. In 1916, when President Woodrow Wilson appointed Louis Brandeis, the Senate held hearings for the first time. The Senate took testimony from individuals supportive of his nomination, but not from the nominee himself. In 1925, nominee Harlan Fiske Stone became the first person to testify personally at a hearing, speaking in order to dispel corruption allegations. During this time period, nominees continued to sail through the process, and the Senate continued to formalize the process.

From this history, the modern process has emerged. The President makes a nomination, usually previewed by a long vetting process by the administration. The Senate Judiciary Committee sends the nominee a long written form. The 68-page form returned by Judge Gorsuch, for example, is comprehensive. Question 11(c), for example, requests a list of all conferences, symposia, panels, and continuing legal education events that the judge has attended (not spoken at) in the last twelve years or so. The questionnaire also requests all materials published during the Judge's lengthy career, along with four copies of each article.

The Judiciary Committee then performs an independent investigation of the nominee and schedules a hearing. The hearings typically last three to four days. They include opening statements by the Senators, questioning by Judiciary Committee members, and panels of individuals who support and who oppose the nomination.

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To be confirmed, a nominee must garner a majority of the Senate. This would typically be 51 votes, though the Vice President would tip the balance in the case of a 50-50 split. Current Senate rules, however, permit opposing senators to filibuster to defeat a Supreme Court nominee. In the case of a filibuster, supportive Senators need 60 votes to end debate and force a vote.

The much-discussed "nuclear option" is a parliamentary procedure that allows a simple majority, rather than a super-majority, to change a rule. By employing this option, 50 senators would be able to change the filibuster rules, and thus end debate with a majority. Indeed, during the Obama Administration, Democratic Senators invoked the nuclear option (by "redefining" the term 3/5ths to mean a simple majority) and eliminated the filibuster for executive branch appointments and all judicial appointments except for the Supreme Court.

Despite the hot-button political issues routinely decided by today's Supreme Court, the last four nominees to the Court all have been confirmed by comfortable margins. Chief Justice Roberts was confirmed 78-22; Justice Alito was confirmed 58-42; Justice Kagan was confirmed 68-31; and Justice Sotomayor was confirmed 63-37.

Cliff Notes to Supreme Court Nomination Hearings

Judge Neil Gorsuch of the Tenth Circuit will have an opportunity to introduce himself to the Judiciary Committee and the watching nation when hearings commence on March 20, 2017. Each Senator on the Committee will have an opportunity to offer an opening statement, followed by the nominee's own opening statement.

Each of the twenty Senators on the judiciary committee will have the opportunity to question the nominee twice, typically for 30 minutes each time. This grueling exercise often reveals a nominee's legal acumen, intelligence, sense of humor, and perseverance.

It also reveals the inherent tension in Supreme Court hearings. Since judicial nominees are confirmed for life, the hearings are a public and transparent opportunity for Senators to assess the nominee. But candidates for judicial office are not legislators who make policy promises to their constituents. The reason that judges have life-time tenure is precisely to ensure their independence. Thus, Canon 5 of the Model Code of Judicial Conduct prevents judicial candidates from commenting on potential cases, controversies, or issues likely to come before the court.

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As Justice Sandra Day O'Connor explained at her hearings:

> There is . . . a limitation on my responses which I am compelled to recognize. I do not believe that as a nominee I can tell you how I might vote on a particular issue which may come before the Court, or endorse or criticize specific Supreme Court decisions presenting issues which may well come before the Court again. To do so would mean that I have prejudged the matter or have morally committed myself to a certain position. Such a statement by me as to how I might resolve a particular issue or what I might do in a future Court action might make it necessary for me to disqualify myself on the matter.

Since 1993, the nominees have by and large adhered to what has become known as the "Ginsburg Rule." As then-Senate Judiciary Chairmen Joe Biden put it as he opened the hearings for Justice Ginsburg, a nominee must not comment about "any specific case that may come before her." Justice Ginsburg then clearly indicated that she would not comment on potential matters in her introductory statement:

> Judges in our system are bound to decide concrete cases, not abstract issues. Each case comes to court based on particular facts and its decision should turn on those facts and the governing law, stated and explained in light of the

> particular arguments the parties of their representatives present. A judge sworn to decide impartially can offer no forecast, 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.

Justice Ginsburg made good on that promise. Despite pressure from Senators on both sides of the aisle, she repeatedly declined to address questions involving matters that could potentially come before the Court. Time and again, she reminded the Senators that asking for a signal on a potential case "is something you must never ask a judge to do." In response to a question regarding sexual orientation classification, for example, she stated that she could not answer the question without "violating what [she] had said to be [her] rule about no hints, no forecasts, no previews." With respect to school vouchers, Justice Ginsburg refrained from answering on the grounds that "aid to schools is a question that comes up again and again to the Supreme Court." Because there was "much debate about" the meaning of the Second Amendment, she refused to comment on the issue. Indeed, Justice Ginsburg refused to address approximately 30 questions, involving everything from the tension between the Establishment and Free Exercise Clauses, to the Speech and Debate Clause, to the death penalty, to antitrust law.

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The Senators were surprisingly compliant. After then-Judge Ginsburg declined to answer a series of questions regarding equal protection, Senator Strom Thurmond asked her about a balanced budget amendment. Justice Ginsburg replied that she could not comment because the Senator was "describing a future controversy that may very well come before the Court." Senator Thurmond, replied, "Well, you don't have to answer it, then, if you feel that you shouldn't." He then followed up with a question about limiting adoption to heterosexual couples. Noting a current controversy in the morning newspaper, Justice Ginsburg again declined to comment because "the questions that you have outlined certainly could come up." Senator Thurmond was accommodating: "I will not press you to answer any that you feel are inappropriate."

The Democratic Response

Were this a normal year in a normal political season, Judge Gorsuch would sail through the confirmation hearings. He has sterling credentials, an unimpeachable character, and an impressive record as a Tenth Circuit Judge—a position to which he was confirmed unanimously. Even Senate Minority Leader Charles Schumer has described him as "clearly very smart, articulate and polite, with superb judicial demeanor."

The unquestionably qualified Gorsuch is also replacing Justice Scalia—someone decidedly on the right side of the political equation. For this reason, too, Judge Gorsuch's nomination should be uncontroversial. The balance of the Court will not change with his succession.

Nevertheless, the stinging loss of the Presidency and the failure of Judge Garland's nomination to the Supreme Court, may lead Senate Democrats actively to oppose Judge Gorsuch's nomination. Indeed, in a particularly troubling Op-Ed, Senate Minority Leader Charles Schumer attacked Judge Gorsuch for refusing to answer a number of his questions during the customary meeting between Senators and the nominee. According to Senator Schumer, Judge Gorsuch "refused to answer even the most rudimentary questions."

Although Senator Schumer paid lip-service to the Ginsburg Rule, saying "a judicial nominee should not prejudge how he or she would rule in a specific case to come before the court," he clearly misunderstands it. Included among those "rudimentary" questions, were ones about the constitutionality of a Muslim ban, issues of executive overreach, voter fraud, and the Supreme Court's relatively recent and decidedly controversial decisions in *Citizens United* and *Bush v. Gore*. The Senator insisted that nominees should answer specific questions about how he or she would have decided past cases and comment on fraught political issues with obvious legal dimension. Make no mistake. This is *not* the Ginsburg Rule.

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Indeed, the Senator is asserting as fact a proposed *change* to the Ginsburg Rule first advocated by two Yale law professors. In their 2006 article, Questioning Justice, the professors argue for a new norm that nominees can be questioned about past cases. But as Justice Ginsburg's testimony makes clear, past cases, especially controversial ones, may well come before the Court again. Indeed, when questioned about *Roe v. Wade*, Justice Ginsburg deflected the question because the

permissibility of state regulation of abortion "is certainly a matter likely to be before the Court." As her answer makes clear, just because a case has been decided doesn't mean that issue is completely resolved—follow-on cases often proliferate—and the Supreme Court sometimes reverses course. The most prominent example being *Brown v. Board of Education* a decision that reversed *Plessy v. Ferguson* and held that separate schools are not in fact equal.

Based on these standards, Senator Schumer's questions are clearly out of bounds. Issues related to the *Citizens United* case, for example, are winding their way through numerous lower federal courts. Further, questions regarding a Muslim ban or executive overreach clearly implicate pending legal issues. As Justice Ginsburg put it, one only has to look at the morning paper to conclude that certain issues might come before the Supreme Court.

> "The way a judge thinks about judging matters."

What Should the American Public Hope to Hear?

The Ginsburg rule does not make the nomination hearings pointless. The American people should be interested in the way a nominee views judging. Is he or she someone who feels constrained by the text of a statute? The Constitution? Is he or she a believer in original meaning or someone who believes that the Constitution changes with the passage of time?

These questions are particularly poignant today because Judge Gorsuch has been nominated to fill Justice Antonin Scalia's seat. Justice Scalia firmly believed that the Founders gave Congress, and not federal judges, the power to "make law." He repeatedly expressed concern about a Supreme Court that went beyond text and original meaning. The practice of constitutional revision by nine unelected lawyers, he wrote in one of his last opinions, "robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves." The way a judge thinks about judging matters.

CONCLUSION

In just a week, the high drama of a Supreme Court nomination will unfold before the public's eyes. Judge Neil Gorsuch will have an opportunity to introduce himself to the watching nation and the senators will have an opportunity to question him. Given all the high theatre, it is important to remember the position to which Judge Gorsuch has been nominated—that of a Supreme Court Justice. Rules of judicial impartiality demand that he refrain from commenting on cases and issues that might come before the Supreme Court. That's been the rule for thirty-some years.

Nevertheless, given the current tone of public debate, it is unlikely that the democratic senators will defer to the Ginsburg Rule. It's highly doubtful, for example, that a democratic senator will say, "I will not press you to answer any [questions] that you feel are inappropriate." Undoubtedly, Judge Gorsuch can hold his own—as Senator Schumer appears to concede in his op-ed—but the American public should be aware that it is the senators and not Judge Gorsuch, who are playing beyond the rules if they demand specific answers to issues that might come before the Supreme Court.