

What Is the Future for Supreme Court Nominee Hearings?

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The contentious confirmation hearings for Supreme Court nominee Ketanji Brown Jackson from March 21–24, 2022, renewed calls from some Court watchers to eliminate what they regard as an increasingly politicized spectacle that does not serve the Court or the American public well. In this Court Report, court expert Kenneth Jost explores some Supreme Court nomination hearings, some much more contentious than others.

As President Joe Biden's nominee to succeed the retiring justice Stephen G. Breyer, Jackson presented qualifications and credentials that matched or exceeded qualifications of many if not most of the nominees over the previous three decades. An honors graduate of Harvard College and Harvard Law School, Jackson's resume also included eight years as a federal court judge and service as a federal public defender and as vice chairman of the U.S. Sentencing Commission.

Despite those qualifications, Republican senators grilled Jackson relentlessly over her three days at the witness table on such issues as race, child pornography, abortion, and transgender rights, that resonated with the Republicans' political base but that shed little light on Jackson's judicial philosophy or her likely stance on such issues if confirmed.

The evident partisanship in the hearing approached the level of political heat seen in confirmation hearings dating from Robert Bork's rejected nomination in 1987 and the party-line confirmations for President Trump's three nominees in 2017, 2018, and 2020.

With Jackson widely expected to win confirmation, Republican senators pressed hard to look for vulnerabilities in her record that could give GOP senators grounds to vote against her confirmation and that could create political risks for Democratic senators in voting for her.

The reviews of the Republican tactics were generally critical. As one example, Andrew McCarthy, a political conservative and former federal prosecutor, called the Republicans' critique of Jackson's below-guideline sentences in child pornography possession cases "meritless to the point of demagoguery." A leading sentencing policy expert, Ohio State University law professor Douglas Berman, countered the GOP critique by calling Jackson's sentencing decisions "quite mainstream," in line with those imposed by federal judges in other cases.

With the hearings over, two influential Court-watching columnists weighed in with recommendations to eliminate the practice of summoning Supreme Court nominees to testify in person before a Senate committee hearing. The calls came from The Los Angeles Times's David Lauter and The Washington Post's Charles Lane, both of whom had worked the Supreme Court beat for several years before their current roles as columnists.

In Lauter's [column](#), published on March 25 under the headline, "Supreme Court nomination hearings-long awful-have gotten worse," Lauter opined that with few exceptions, the modern-day hearings have been "stultifying or repulsive." Lauter also argued that the recent history, beginning with Louis Brandeis's confirmation in 1916, has been "mostly ugly."

Surveying the nominations since the 1980s, Lauter correctly observed that "partisan nominations, once a rarity, have become the norm." He noted that President Clinton's two nominees, Ruth Bader Ginsburg and Stephen Breyer, are the only recent nominees to win confirmation with lopsided bipartisan Senate votes: 96-3 for Ginsburg in 1993, and 87-9 for Breyer in 1994.

The lineup at Jackson's hearing matched Lauter's description of the partisan pattern seen in public opinion polls since the 1980s. "Voters from the president's party now reflexively support his nominees, while those from the other party oppose them," Lauter wrote. He noted that Jackson's supporters point to her relatively high approval rating in polls of 58 percent along with relatively high opposition of 30 percent.

Lane's [column](#), published on March 30 under the headline "The verdict on KBJ's nomination hearings: never again," blasted Republicans for "tendentious attacks" on Jackson that "produced more political grandstanding than new and useful information." Lane concluded by posing this question: "How many more hearings, for how many more would-be justices, will the Senate hold before admitting that they're worse than useless?"

Lane submitted his own answer to the question: "The Senate should abolish live testimony from Supreme Court nominees," he wrote, "in favor of alternatives that further its constitutional function of advice and consent, but have less potential for demeaning, cringeworthy political theater."

Jackson's prospects for confirmation seemed assured after March 31 when one Republican senator, Maine's Susan Collins, said that she would vote for her confirmation. Her support was followed by Alaska's Lisa Murkowski and Utah's Mitt Romney on April 4. Meanwhile, other Republicans, including Kentucky's Mitch McConnell and South Carolina's Lindsey Graham, one of those who questioned Jackson sharply during the Judiciary Committee hearings, vowed to oppose her confirmation.

Early History of Nominations

The recent history of Supreme Court nominations is in sharp contrast to the perfunctory procedures the Senate followed in considering Supreme Court nominations through the nineteenth century and until the early twentieth century. Formal hearings on Supreme Court nominees, with the nominee testifying and responding to senators' questions in person, date back only as far as Louis Brandeis's nomination and eventual confirmation in 1916.

President Woodrow Wilson's nomination of Brandeis, a vigorous advocate for workers' rights, touched off widespread opposition from major newspapers and from leading figures in the legal establishment. The opposition was tinged with anti-Semitism to Brandeis's possible ascension to the Court as the first-ever Jewish justice.

The opposition prompted the Senate to schedule the first-ever committee hearing for a Supreme Court nominee. The politically contentious hearing went on for four months, as Brandeis sought to defend his views and dispute the critics' depiction of him as a radical. The Senate eventually confirmed Brandeis by a 47-22 vote on June 1, 1916; he went on to serve on the Court until he retired on February 13, 1939.

The New York Times was one of several major newspapers that opposed his confirmation in 1916. By the time of his retirement, the Times reversed its view in an editorial that called Brandeis "one of the great judges of our time."

Fourteen years after Brandeis's confirmation, a Senate Judiciary subcommittee convened a hearing on April 5, 1930, on President Herbert Hoover's nomination of federal judge John J. Parker to a vacancy on the Supreme Court. Parker himself was not called to testify, but two major interest groups—the American Federation of Labor (AFL) and the National Association for the Advancement of Colored People (NAACP)—testified in opposition to the nomination based on Parker's anti-labor record as a judge and his expressed opposition to voting by Negroes while a candidate for governor in his home state of North Carolina. The opposition resulted in the Senate's 41-39 vote to reject Parker's nomination.

Hoover responded by appointing a relatively moderate candidate, Owen Roberts, for the unfilled vacancy. Roberts, a law professor and former Justice Department attorney, won unanimous confirmation on May 20, 1930. For a second vacancy, Hoover turned two years later to the well-respected New York judge, Benjamin Cardozo.

A half century later, the Senate's rejection of the archconservative Robert Bork in 1986 also led a Republican president, Ronald Reagan, to turn to a less ideological nominee: Anthony M. Kennedy, who won unanimous confirmation from the Senate in January 1988. Kennedy went on to serve for almost thirty years until he retired in January 2018.

Democratic senators seized on Bork's refusal to acknowledge a constitutional right to privacy in opposing his nomination on the Senate floor. Six Republican senators joined with fifty-two Democrats to block his appointment by a vote of 58-42. The lesson that subsequent Republican nominees took from the Bork episode was to be more circumspect in answering challenging questions from Democratic senators.

The Post-Bork Era

Beginning with David Souter in 1990 and Clarence Thomas in 1991, GOP nominees studiously avoided direct answers to Democrats' efforts to learn their views on the landmark abortion rights decision, *Roe v. Wade*. Under persistent questioning, Thomas repeatedly said that he had never "debated" the question. A decade later, President George W. Bush's nominees, John Roberts and Samuel Alito, also skirted the issue; President Trump's three nominees, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett, also avoided direct answers even after Trump had promised to appoint justices who would vote to overrule *Roe v. Wade*.

Summarizing the Senate's recent procedures, a [report](#) by the Congressional Research Services describes hearings as covering the nominee's personal background as well as pending social and political issues. "Questioning of a nominee by Senators has involved, as a matter of course, the nominee's legal qualifications, biographical background, and any earlier actions as public figures," according to the report's author, Barry J. McMillion. "Other questions have focused on social and political issues, the Constitution, particular court rulings, current constitutional controversies, and judicial philosophy."

Thomas won confirmation by a 52-48 vote, with eleven Democrats providing the votes he needed to reach the Supreme Court. The Judiciary Committee hearing ended with an explosive accusation of sexual harassment from a former Thomas aide, law professor Anita Hill. Thomas vigorously denied the late-arising accusation and largely neutralized the issue by calling the accusation "a high-tech lynching."

In his testimony, John Roberts signaled an aversion to overruling prior decisions by saying that reversing a precedent amounted to "a jolt to the system." With his gold-plated resume, Roberts dazzled the senators with his encyclopedic knowledge of Supreme Court jurisprudence and went on to win confirmation on September 29, 2005, by a 78-22 vote, with nearly half of the Democratic caucus voting against him.

The Republican nominees' reticence about abortion rights was in contrast to the forthright answers from Clinton's two nominees, Ginsburg and Breyer, in general support of women's rights. President Obama's two subsequent nominees, Sonia Sotomayor and Elena Kagan, also appeared to confirm support for *Roe v. Wade* in their answers. They both went on to win confirmation by substantial margins despite opposition from most Republican senators: Sotomayor was confirmed in 2009 by a 68-31 vote with eight Republicans voting in favor; Kagan was confirmed in 2010 by a 63-37 with five Republicans voting in favor.

Trump's three nominees all won confirmation with fewer than sixty votes, after the Senate GOP leader McConnell engineered a change in Senate rules to bring nominations to a vote with fewer than sixty votes. Gorsuch was confirmed in 2017 by a 54-45 vote, with three Democrats voting in favor; Kavanaugh was confirmed on October 6, 2018, by a 50-48 vote with one Democratic senator voting in favor, after he indignantly denied a late-arising accusation that he had attempted to rape a teenaged student while he was in high school.

Barrett was confirmed two years later on a party-line vote of 52-48; she became the first justice in more than a century to be confirmed without a single vote from senators of the opposing party.

Lauter and Lane are among the many Court watchers who complain that Supreme Court nomination hearings produce little by way of useful information and also put nominees in the untenable position of prejudging the positions they will take on the Court if confirmed. But the calls to dispense with testimony from nominees collide with political reality: senators seem unlikely to give up the spotlight and the public is quite likely to object to losing the opportunity to learn about a nominee's qualifications and judicial philosophy.

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