

# A Brief History of Judicial Appointments from the Last 50 Years Through the Trump Administration

Donald F. McGahn II

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## Repository Citation

McGahn, Donald F. II (2019) "A Brief History of Judicial Appointments from the Last 50 Years Through the Trump Administration," *William & Mary Law Review Online*: Vol. 60 , Article 4.  
Available at: <https://scholarship.law.wm.edu/wmlronline/vol60/iss1/4>

A BRIEF HISTORY OF JUDICIAL APPOINTMENTS FROM  
THE LAST 50 YEARS THROUGH THE TRUMP  
ADMINISTRATION

DONALD F. MCGAHN II\*

LECTURE<sup>1</sup>

Thank you so much for that kind introduction. I really appreciate the opportunity to be here today. I am going to speak generally about the judicial selection process. It is an honor to be here at William & Mary. It was the first law school in the country.<sup>2</sup> I drove in this morning, walked in, and came across your large statue of John Marshall, the author of *Marbury v. Madison*.<sup>3</sup> He was the great Chief Justice, the one that all nominees tend to invoke as a role model.<sup>4</sup> There was a rumor that Justice Ginsburg met Chief Justice Marshall, but I don't think that is true. [Laughter]

I am going to talk about the confirmation process generally. There is no better place to talk about it than here. Let me begin with some numbers and statistics, before I turn to the main thrust of my talk, to give some context as to what recent Presidents have done with respect to judicial appointments. President Trump has appointed two Supreme Court Justices, Neil Gorsuch and Brett Kavanaugh.<sup>5</sup>

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\* Partner, Jones Day (Washington, D.C.). From 2017-2018, Mr. McGahn served as Counsel to the President, where he supervised the nominations of over 150 Article III judges, including the Senate's confirmation of two U.S. Supreme Court Justices.

1. EDITOR'S NOTE: This is the transcript of a lecture Mr. McGahn delivered at William & Mary Law School on November 19, 2018.

2. Symposium, *The Restyled Federal Rules of Evidence*, 53 WM. & MARY L. REV. 1435, 1437 (2012).

3. 5 U.S. (1 Cranch) 137, 153 (1803).

4. See, e.g., *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Before the S. Comm. on the Judiciary*, 109th Cong. 342 (2005) (response of John G. Roberts, Jr., to questioning by Senator Mike DeWine).

5. Press Release, The White House, President Donald J. Trump Congratulates Judge Neil M. Gorsuch on his Historic Confirmation (Apr. 7, 2017), <https://www.whitehouse.gov/>

He has nominated forty-two individuals to the Courts of Appeals, twenty-nine so far have been confirmed.<sup>6</sup> The Senate Leader, Senator Mitch McConnell has already said they will all be confirmed assuming he has the votes. So for comparison purposes, let's use forty-two as our number. As for District Court nominees, he has made over 109.<sup>7</sup> So that is over 150 judicial nominations in less than two years.

By way of comparison, President Obama appointed two Supreme Court Justices in eight years.<sup>8</sup> He appointed fifty-five judges to the Courts of Appeals and 262 to the District Courts—in eight years.<sup>9</sup> President George W. Bush also made two Supreme Court appointments, as well as sixty-three appointments to the Courts of Appeals and over 250 to the District Courts—again, in eight years.<sup>10</sup>

Let's pause there for a minute. President Trump has been in office for two years. He has nominated forty-two candidates to the Courts of Appeals. In eight years, President Obama appointed fifty-five and President Bush appointed sixty-three Court of Appeals judges. So you see the media coverage of the President's influence on the federal judiciary isn't just hype, these are real numbers that are going to have a lasting impact. President Clinton appointed two Supreme Court Justices, sixty-six Courts of Appeals judges and 305 judges to District Courts—again, in eight years.<sup>11</sup> So we see that the numbers within prior administrations within this generation are

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briefings-statements/president-donald-j-trump-congratulates-judge-neil-m-gorsuch-historic-confirmation/ [https://perma.cc/STE8-PRBD]; Donald J. Trump, President of the U.S., Remarks by President Trump at Swearing-in Ceremony of the Honorable Brett M. Kavanaugh as Associate Justice of the Supreme Court of the United States (Oct. 8, 2018) (transcript available at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-swearing-ceremony-honorable-brett-m-kavanaugh-associate-justice-supreme-court-united-states/> [https://perma.cc/9FBZ-NPB5]).

6. As of June 2019, forty-one of President Trump's nominees to the Courts of Appeals have now been confirmed. See Carrie Severino, *Judicial-Nominations Update*, NAT'L REV. (May 28, 2019, 10:47 AM), <https://www.nationalreview.com/bench-memos/judicial-nominations-update-46/> [https://perma.cc/RU8W-LRXV].

7. That number now stands at 134. See *id.*

8. See *Judgeship Appointments by President*, U.S. COURTS, <https://www.uscourts.gov/sites/default/files/apptsbypres.pdf> [https://perma.cc/UYX6-SWR5].

9. See *id.*

10. See *id.*

11. See *id.*

fairly consistent. But President Trump has almost satisfied the eight-year standard in two years.

President George H.W. Bush appointed two Supreme Court Justices and 42 judges to the Courts of Appeals in four years (as compared to the two years President Trump has nominated the same number of candidates in).<sup>12</sup> He also appointed 148 judges to the District Courts—less than President Trump will have nominated in about two-and-a-half years.<sup>13</sup> While there are still a number of vacancies without nominees to fill them, the President has preliminarily signed off on many candidates to fill these empty seats and they are currently going through the elaborate pre-nomination vetting and background check process.

President Reagan, who made judges a priority and historically people look to his administration for having “moved the needle” so to speak—appointed three Supreme Court Justices, eighty-three judges to the Courts of Appeals, and 290 judges to District Courts—in eight years.<sup>14</sup> So in eight years, Reagan had eighty-three confirmations to Trump’s forty-two nominations—in two years. President Carter made no Supreme Court appointments<sup>15</sup>—I can say it—thankfully. [Scattered applause] Thank you to the three Republicans in the audience who clapped. President Carter appointed fifty-six judges to the Court of Appeals and appointed 203 judges to the District Courts.<sup>16</sup> President Ford appointed one Supreme Court Justice, twelve judges to the Courts of Appeals and fifty-two judges to the District Courts.<sup>17</sup> President Nixon appointed four Supreme Court Justices, forty-five judges to the Courts of Appeals, and 176 judges to the District Courts.<sup>18</sup> Looking at all this, what Trump has done in two years is comparable to what Presidents of the last fifty years have done in at least four but usually eight years. So I say this not to brag about President Trump—the vacancies aren’t driven by the President—but I say this to note that the number of nominees that we’ve made recommendations to the

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12. *See id.*

13. *See id.*

14. *See id.*

15. *See id.*

16. *See id.*

17. *See id.*

18. *See id.*

President on and shepherded through the Senate in essentially eighteen months rivals what previous White Houses have done in four to eight years.

So against the background of these numbers, what do we make of the current confirmation process? Well my view is that it is in significant decline. Stephen L. Carter, a professor at Yale Law School the last I checked, wrote a book in 1995 that was aptly named *The Confirmation Mess*.<sup>19</sup> It continues to be a mess, and I think the mess has spread. It hasn't always been like this. Let's take the example of Justice Stephen Breyer. Before his appointment to the Supreme Court, he was a judge on the U.S. Court of Appeals for the First Circuit.<sup>20</sup> He was nominated on November 13, 1980 and confirmed on December 9, 1980, which for those of you who know when Presidential elections occur, will notice that his nomination and confirmation both happened *after* the 1980 presidential election where President Carter lost to Ronald Reagan.<sup>21</sup> And the vote was 80-10!<sup>22</sup> Eight Republicans voted for him for the First Circuit.<sup>23</sup> So it was not the hardline stuff you see today. Now some might chalk this up to the fact that then-Judge Breyer had been the counsel to the Senate Judiciary Committee once upon a time, when Ted Kennedy was the Chairman, so maybe that was why he was different.<sup>24</sup> But the fact remains that he received bipartisan support after an election and democracy did not end.

In addition to his appointment of Judge Breyer to the First Circuit, President Carter made four appointments to the U.S. Court of Appeals for the District of Columbia Circuit: Patricia Wald, Abner Mikva, Harry Edwards, and Ruth Bader Ginsburg.<sup>25</sup> The average

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19. STEPHEN L. CARTER, *THE CONFIRMATION MESS* (1995). Professor Carter does indeed still work at Yale Law School.

20. See NCC Staff, *Stephen Breyer's Path to the Supreme Court*, NAT'L CONST. CTR.: CONST. DAILY (Aug. 3, 2017), <https://constitutioncenter.org/blog/stephen-breyers-path-to-the-supreme-court> [https://perma.cc/6EAF-AXAT].

21. See John Copeland Nagle, *A Twentieth Amendment Parable*, 72 N.Y.U. L. REV. 470, 492-93 (1997).

22. 126 Cong. Rec. 33,013 (1980).

23. See *id.*

24. See *Stephen Gerald Breyer*, CQ PRESS: SUP. CT. COLLECTION, <http://library.cqpress.com/sc/document.php?id=bioenc-427-18975-1014168&v=06a2c351d460bd41> [https://perma.cc/48VB-YA59].

25. See *Wald, Patricia McGowan*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/wald-patricia-mcgowan> [https://perma.cc/J25V-3B2F]; *Mikva, Abner Joseph*, FED. JUD. CTR.,

timeline from their nominations to confirmations was about two to three months.<sup>26</sup> Edwards and Ginsburg were confirmed either by voice vote or unanimous consent—it is sometimes tough to tell from the record, but there was not a roll call vote.<sup>27</sup> Wald had a roll call vote, 77-21.<sup>28</sup> A majority of Republicans supported her.<sup>29</sup> Mikva was a little controversial in those days and his confirmation vote was 58-31, which was considered a tight vote in those days.<sup>30</sup> Those were the Carter appointments to the D.C. Circuit, the court some call the second most important court behind the Supreme Court.<sup>31</sup> Unless, of course you are on the First Circuit. Or the Second, or Third or Fourth, or really any other Circuit. Then the D.C. Circuit just does a bunch of government law. Most see it as a court of unique emphasis.

Let's compare this to President Trump's first D.C. Circuit nominee, Greg Katsas. The timing was comparable. He was nominated September 7, 2017, and finally confirmed on November 28, 2017, about three months later.<sup>32</sup> That isn't much to complain about, but with a Republican-controlled Senate and a Republican President,

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<https://www.fjc.gov/history/judges/mikva-abner-joseph> [<https://perma.cc/5S47-XDKF>]; *Edwards, Harry Thomas*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/edwards-harry-thomas> [<https://perma.cc/TY97-S39S>]; *Ginsburg, Ruth Bader*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/ginsburg-ruth-bader> [<https://perma.cc/7U55-DEV4>].

26. See Orrin G. Hatch, *The Descent of Advice and Consent: Perspectives from a 42-Year Tour of Duty 2* (Oct. 24, 2018), in HERITAGE FOUND. (Jan. 25, 2019), <https://www.heritage.org/sites/default/files/2019-01/HL1303.pdf> [<https://perma.cc/3RKQ-D2ZW>].

27. See 126 Cong. Rec. 3211 (1980) (Judge Edwards); 126 Cong. Rec. 15,239 (1980) (then-Judge Ginsburg).

28. 125 Cong. Rec. 20,324 (1979). Judge Wald's nomination was opposed by some conservative groups, who saw her as "anti-family." See Patricia M. Wald, *Reflections on Judging: At Home and Abroad*, 7 U. PA. J. CONST. L. 219, 224 (2004).

29. See 125 Cong. Rec. 20,324 (1979).

30. 125 Cong. Rec. 26,048-49 (1979); see R. Bruce Dold, *Dissenting Opinion*, U. CHI. MAG. (Aug. 1996), <http://magazine.uchicago.edu/9608/9608Mikva3.html> [<https://perma.cc/K9PP-MC5K>] (asserting that Judge Mikva's "nomination touched off a brawl with ... the NRA").

31. See, e.g., The Editorial Board, *The Homogenous Federal Bench*, N.Y. TIMES: OPINION (Feb. 6, 2014), <https://www.nytimes.com/2014/02/07/opinion/the-homogeneous-federal-bench.html> [<https://perma.cc/QGF3-DLZ7>]; see also John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375, 389 (2006) (describing the D.C. Circuit as a court of "unique character," with "special responsibility").

32. *Katsas, Gregory George*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/katsas-gregory-george> [<https://perma.cc/3X38-J9E3>]; see also Kevin Freking, *Senate Gives Trump Another Victory on Judges*, AP (Nov. 28, 2017), <https://apnews.com/53a02a2693e54bf5accd27a3cf3f9e23> [<https://perma.cc/2A62-7N2E>].

one would expect things to move quickly. But the total vote here is interesting.

His Judiciary Committee vote went on party lines, 11-9.<sup>33</sup> The cloture vote was 52-48—cloture is a motion a Senator makes to end debate, otherwise the Senate can continue to debate, and debate, and debate ... The way to end that is to move for cloture, and that has to pass by a majority.<sup>34</sup> In Katsas's case, that passed 52-48.<sup>35</sup> And the final vote was 50-48.<sup>36</sup> So a D.C. Circuit judge was confirmed with only 50 votes. Compare that to what seems to be ancient history with voice votes and unanimous consents, particularly with respect to Ruth Bader Ginsburg. Maybe Katsas was an outlier? Maybe he wasn't qualified? Maybe he was not everyone's cup of tea? Could be—he went to Princeton.<sup>37</sup> He went to Harvard Law School and was an executive editor of the *Harvard Law Review*.<sup>38</sup> He clerked on the U.S. Supreme Court.<sup>39</sup> He had two Circuit Court clerkships prior to that.<sup>40</sup> He argued over seventy-five appeals in every one of the Courts of Appeals.<sup>41</sup> Or maybe it is just how D.C. Circuit judges go nowadays? Maybe something has changed since Jimmy Carter? It is one thing to talk about Stephen Breyer and the First Circuit, but maybe the D.C. Circuit is special, so people pay special attention? Is this a new trend? Let's look at the history.

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33. See *Results of Executive Business Meeting, November 9, 2017 Before the S. Comm. on the Judiciary* (The Senate Judiciary Committee Held an Executive Business Meeting to Consider Pending Nominations on November 9, 2017); see also Charlie Savage, *Trump Is Rapidly Reshaping the Judiciary. Here's How.*, N.Y. TIMES (Nov. 11, 2017), <https://www.nytimes.com/2017/11/11/us/politics/trump-judiciary-appeals-courts-conservatives.html> [<https://perma.cc/TQY8-X8C5>].

34. Debbie Lord, *What Is Cloture and Why Will Mitch McConnell Call For It?*, DAYTON DAILY NEWS (Oct. 3, 2018), <https://www.daytondailynews.com/news/national/what-cloture-and-why-will-mitch-mcconnell-call-for/g1g17ho38XCkqiDHE9xkTK/> [<https://perma.cc/8Z9K-WHPP>].

35. *Roll Call Vote 115th Congress—1st Session*, U.S. SENATE, [https://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=115&session=1&vote=00282](https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=115&session=1&vote=00282) [<https://perma.cc/3FBG-2XJQ>].

36. Freking, *supra* note 32.

37. *Gregory G. Katsas*, U.S. CT. APPEALS D.C. CIR., <https://www.cadc.uscourts.gov/internet/home.nsf/content/VL+-+Judges+-+GGK> [<https://perma.cc/9346-HCFW>].

38. *Id.*

39. Judge Katsas clerked for Justice Thomas. *Id.*

40. *Id.*

41. *Id.*

Let's look at the time after President Carter, and look at President Reagan. Reagan appointed eight judges to the U.S. Court of Appeals for the D.C. Circuit: Bork, Scalia, Starr, Silberman, Buckley, Williams, Douglas Ginsburg, and Sentelle.<sup>42</sup> Now, if you are a Federalist Society type, these are the Hall of Fame busts that one would put in one's house if you were doing shrines to conservative jurists. They are seen as the who's who, each and every one of them are considered to be legacy picks of President Reagan. With respect to timing, the longest of these confirmations took about four months from the date of nomination, whereas half were less than two months.<sup>43</sup> The votes—this is interesting—six of the eight were confirmed either by voice vote or unanimous consent, meaning no roll call vote.<sup>44</sup> Instead, it stands for the unanimous advice and consent grant by the Senate. Judge Buckley and Judge Sentelle had roll call votes, but they weren't really close: Sentelle was 84-11, and Buckley was 87-0.<sup>45</sup> Here you had nominees that, at least looking back, are considered conservative stalwarts—pioneers—Hall of Fame members—and they were going through without much in the way of opposition.

What else happened in the 1980s? Lots—a number of Supreme Court nominations for starters.<sup>46</sup> In 1981, Justice Sandra Day O'Connor was appointed.<sup>47</sup> When she was first announced, there was a little bit of controversy. Various pro-life groups thought she may be pro-choice, and *Roe v. Wade* was brandished about.<sup>48</sup> So she had some attacks, not from the left but from the right. But

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42. 128 Cong. Rec. 1005 (1982) (Judge Bork); 128 Cong. Rec. 19,639 (1982) (then-Judge Scalia); 129 Cong. Rec. 24,833 (1983) (Judge Starr); 131 Cong. Rec. 29,169 (1985) (Judge Silberman); 131 Cong. Rec. 36,837 (1985) (Judge Buckley); 132 Cong. Rec. 13,746 (1986) (Judge Williams); 132 Cong. Rec. 29,514 (1986) (Judge Ginsburg); 133 Cong. Rec. 23,549 (1987) (Judge Sentelle).

43. See Hatch, *supra* note 26, at 3.

44. See 128 Cong. Rec. 1005 (1982) (Judge Bork); 128 Cong. Rec. 19,639 (1982) (then-Judge Scalia); 129 Cong. Rec. 24,833 (1983) (Judge Starr); 131 Cong. Rec. 29,169 (1985) (Judge Silberman); 132 Cong. Rec. 13,746 (1986) (Judge Williams); 132 Cong. Rec. 29,514 (1986) (Judge Ginsburg).

45. 133 Cong. Rec. 23,549 (1987) (Judge Sentelle); 131 Cong. Rec. 36,837 (1985) (Judge Buckley).

46. See *supra* notes 12-14 and accompanying text.

47. O'Connor, Sandra Day, FED. JUD. CTR., <https://www.fjc.gov/history/judges/oconnor-sandra-day>, [https://perma.cc/G9QJ-7N8K].

48. See Hatch, *supra* note 26, at 2-3.



otherwise, it went smoothly, and she was confirmed 99-0.<sup>49</sup> She was the first woman appointed to the Supreme Court, which may have made her less controversial, but she was still confirmed 99-0. Sixteen Democrats said very nice things about then-Judge O'Connor during the debate.

Moving forward, a vacancy occurred due to the retirement of Chief Justice Burger, and President Reagan—instead of going with someone new, sought to elevate Associate Justice William Rehnquist to be the chief justice—which in turn would create a vacancy for Rehnquist's seat.<sup>50</sup> Reagan nominated D.C. Circuit Judge Nino Scalia—certainly one who was not a late bloomer when it came to his views.<sup>51</sup> Rehnquist proved to be somewhat contentious, and some Democrats attempted to filibuster him (unsuccessfully).<sup>52</sup> Scalia, on the other hand, did not face much in the way of questioning, and openly smoked a pipe in the hearing room.<sup>53</sup> Rehnquist took the brunt of it. Rehnquist was confirmed 65-33 while Scalia was confirmed 98-0.<sup>54</sup> Now if you read the newspapers today, how could you imagine someone like Scalia being confirmed 98-0? Rehnquist's controversy was understandable to a certain extent—he had already been on the Court for some time, and so he had a number of opinions. Senators can't resist the urge to ask about them—it is their one chance. Rehnquist had some other things pop up, including a memo that was written when he was clerking for Justice Jackson concerning *Brown v. Board of Education* that suggested that *Plessy v. Ferguson* may have been correctly decided.<sup>55</sup> Questions were raised—was this a discussion draft, who wrote it, and the like.<sup>56</sup> Rehnquist was also an election law lawyer—just saying—it

49. 127 Cong. Rec. 21,375 (1981).

50. See Eleanor Clift, *Burger to Retire; Rehnquist Nominated for Chief Justice: Appeals Judge Antonin Scalia Also Selected*, L.A. TIMES (June 18, 1986), <https://www.latimes.com/archives/la-xpm-1986-06-18-mn-11055-story.html> [<https://perma.cc/PW2L-GYXE>].

51. See *id.*

52. See Geoffrey R. Stone, *Understanding Supreme Court Confirmations*, 2010 SUP. CT. REV. 381, 461.

53. See *Scalia Pipe Smoking*, C-SPAN (Aug. 5, 1986), <https://www.c-span.org/video/?c4662345/scalia-pipe-smoking> [<https://perma.cc/5MP8-E4GD>].

54. 132 Cong. Rec. 23,803 (1986) (Chief Justice Rehnquist); *id.* at 23,813 (Justice Scalia).

55. See Adam Liptak, *The Memo That Rehnquist Wrote and Had to Disown*, N.Y. TIMES (Sept. 11, 2015), <https://www.nytimes.com/2005/09/11/weekinreview/the-memo-that-rehnquist-wrote-and-had-to-disown.html>. [<https://perma.cc/JE5K-JZXR>].

56. See Brad Snyder, *How the Conservatives Canonized Brown v. Board of Education*, 52

worked out for him. But when you do elections, someone wins and someone loses, and the people who lose usually say the person who won wasn't on the up and up. It happens to the best of us. He made it to the Supreme Court, 65-33, which is still two thirds of the Senate and a pretty healthy margin.

Next, Associate Justice Lewis Powell's retirement created a vacancy, and President Reagan nominated Judge Robert Bork.<sup>57</sup> Now, 1987 is a long time ago for some in this room, but it isn't that long for others. By a show of hands, other than professors, who here was alive in 1987? Very few, making this ancient history to you. Some of the recent confirmation antics may seem normal, but in 1987 this was a new program. I was a college student and we had just gotten a VHS recorder—this was a thing you would attach to the TV that used cassette tapes, you could record and play it back, fascinating at the time, in the Smithsonian now. My father recorded it, I watched it and a lot of people watched it. When Bork was nominated, Senator Ted Kennedy went to the Senate floor and gave what has been called the “Robert Bork's America” speech.<sup>58</sup> This was a new move, where he claimed that if Bork were on the Court, we'd have back alley abortions, blacks would sit at segregated lunch counters, teachers couldn't teach evolution and the government would censor artists and the like.<sup>59</sup> It was quite the barn burner. This sort of thing is common today, the caricaturing of nominees, but now it is almost a helpful thing because it has become so commonplace that people tune it out. But back then, it was not the sort of thing the happened every day. In fact, the White House was so ill-prepared, they did not respond for weeks.<sup>60</sup> This is in stark contrast to how modern confirmations are run—today, they are run like campaigns, with messaging and the like. Keep in mind that

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RUTGERS L. REV. 383, 440-46 (2000).

57. Reagan Library, *President Reagan's Remarks on Nomination of Robert Bork to the U.S. Supreme Court*, YOUTUBE (July 1, 1987), <https://www.youtube.com/watch?v=u6QKdiSIW0c> [<https://perma.cc/SL8R-SRBS>].

58. *Robert Bork's America*, C-SPAN (July 1, 1987), <https://www.c-span.org/video/?45973-1/robert-borks-america> [<https://perma.cc/S2LP-3243>].

59. *See id.*

60. *See* Betsy Hart, *How 'Robert Bork's America' Gave Us Justice Kennedy's America*, DAILY SIGNAL (July 2, 2015), <https://www.dailysignal.com/2015/07/02/how-robert-borks-america-gave-us-justice-kennedys-america/> [<https://perma.cc/A4W7-F8VB>]; Michael M. Gallagher, *Disarming the Confirmation Process*, 50 CLEV. ST. L. REV. 513, 524-26 (2003).

Bork had been confirmed to the D.C. Circuit five years earlier by unanimous consent.<sup>61</sup> He was a sitting judge and had been a professor at Yale Law School and the Solicitor General of the United States.<sup>62</sup> Yes, he fired the special prosecutor per Nixon's direction, and his detractors raised that, but he had already been on the D.C. Circuit for several years at the time he was nominated.<sup>63</sup> He was voted out of committee—sort of—and then he had a floor vote before the full Senate. He did not withdraw and went down 42-58.<sup>64</sup> He eventually resigned his seat on the D.C. Circuit and was replaced by someone named Clarence Thomas.<sup>65</sup> Keep that name in mind—it will matter later in the lecture.

During President George H.W. Bush's term, Associate Justice William Brennan retired due to health reasons and his seat became vacant.<sup>66</sup> Probably in reaction to what happened with Bork, President Bush picked Judge David Souter of the U.S. Court of Appeals for the First Circuit who—at the time and since—has been characterized as “a stealth nominee.”<sup>67</sup> The Bush people were very happy that he had little to no so-called paper trail. He was 51 years old, and was appointed to the First Circuit just two months prior.<sup>68</sup> He was confirmed relatively easily, 90-9, but even then, the nine had some interesting statements.<sup>69</sup> I ran into this while doing some

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61. See *supra* notes 43-45 and accompanying text.

62. *Bork, Robert Heron*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/bork-robert-heron> [<https://perma.cc/WH85-6RHE>].

63. See Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit*, WASH. POST (Oct. 21, 1973), <https://www.washingtonpost.com/wp-srv/national/longterm/water-gate/articles/102173-2.htm> [<https://perma.cc/33VN-B5XH>].

64. See Stone, *supra* note 52, at 397.

65. See Gallagher, *supra* note 60, at 525; *Thomas, Clarence*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/thomas-clarence> [<https://perma.cc/VFE3-VK6V>].

66. *Liberal Justice Brennan, 84, Retires from Supreme Court: Resignation: President Bush Will Get Chance to Make His First High Court Appointment. A Dramatic Shift in Liberal-Conservative Balance is Bound to Occur*, L.A. TIMES (July 22, 1990), <https://www.latimes.com/archives/la-xpm-1990-07-22-mn-666-story.html> [<https://perma.cc/8YFA-7ADS>].

67. See, e.g., Linda P. Campbell, *Souter Keeps His Counsel on Abortion*, CHI. TRIB. (Sept. 14, 1990), <https://www.chicagotribune.com/news/ct-xpm-1990-09-14-9003170181-story.html> [<https://perma.cc/F5B8-NSF8>]; see also Stone, *supra* note 52, at 438-39.

68. See 136 Cong. Rec. 8705 (1990); *Souter, David Hackett*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/souter-david-hackett> [<https://perma.cc/S4DH-8F9W>]. Then-Judge Souter was confirmed to the First Circuit by unanimous consent. 136 Cong. Rec. 8705 (1990).

69. 136 Cong. Rec. 26,996-97 (1990).

research on a recent Supreme Court nomination, where Senate Democrats said he would reverse *Roe*. It was really amazing the sorts of things they were accusing him of. Joe Biden, for example, said “this nomination was a very, very, hard case, women’s groups are opposed.”<sup>70</sup> Senators Kennedy, Cranston, Kerry, Lautenberg, and a few others all had very punchy press releases about why the sky is falling because of David Souter. In hindsight, it is actually the conservatives who see Souter as a liberal judge, and he did none of these things.

This brings us to Associate Justice Thurgood Marshall’s seat. After Justice Marshall retired, President George H.W. Bush nominated Clarence Thomas, who had been on the D.C. Circuit for about a year.<sup>71</sup> He ran the EEOC and had worked at another agency.<sup>72</sup> He had been confirmed three times—the third being the D.C. Circuit judgeship.<sup>73</sup> This probably predates everyone here as well, but for me, I was a first year law student at the time, so my coming of age in the law occurred watching this unfold. There are essentially two hearings for Thomas. He was two days away from a final vote on the Senate floor when the media broke the story—and I am being kind here, as there were quite a few articles and scholarship on this being leaked, but I am not really here to get into all of it. It became known that a former employee of his, Anita Hill, was accusing him of some improper behavior. It is worth looking it up on YouTube and watching the hearings—it is a different scene than what you saw recently for a few different reasons.<sup>74</sup> If you look at how the hearing room is set up, both Bork and Thomas sat at a table, and the committee sat a similar table of the same height, no farther from me to you, on the same level.<sup>75</sup> Now the Senate has built an altar to itself, with the nominee on the ground and the

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70. Richard L. Berke, *Senate Confirms Souter, 90 to 9, As Supreme Court’s 105th Justice*, N.Y. TIMES (Oct. 3, 1990), <https://www.nytimes.com/1990/10/03/us/senate-confirms-souter-90-to-9-as-supreme-court-s-105th-justice.html> [https://perma.cc/3HR4-XFPS].

71. *See Thomas, Clarence*, *supra* note 65.

72. *Current Members*, SUP. CT. U.S., <https://www.supremecourt.gov/about/biographies.aspx> [https://perma.cc/W77V-W9ME].

73. *See id.*

74. *See, e.g., Senators Question Clarence Thomas*, C-SPAN (Oct. 11, 1991), <https://www.c-span.org/video/?21974-2/senators-question-clarence-thomas> [https://perma.cc/CAG5-GM82].

75. *See, e.g., id.*

Senate up above.<sup>76</sup> Spartacus is over there.<sup>77</sup> [Gesturing] Assuming he's still there, unless he is Departacus and he already left. I am from New Jersey, so I can say that. I know him quite well and think the world of him, other than the fact that I went to Notre Dame and he went to Stanford, and when Notre Dame were the defending national champions, they lost to Stanford at Notre Dame stadium.<sup>78</sup> The one game Cory Booker had where he played out of his mind was against Notre Dame.<sup>79</sup> He caught more balls—he had the game of his life.<sup>80</sup> So I have that little issue with Cory.

So there were two hearings, and ultimately Thomas was confirmed 52-48.<sup>81</sup> Now what is significant about that was that he had received a voice vote to be confirmed to the D.C. Circuit a year before.<sup>82</sup> So a year before, he was fine, and no one mentioned

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76. The practice of Senators questioning Supreme Court nominees from a raised dais began in earnest when the Judiciary Committee, under the leadership of then-Senator Joe Biden, questioned nominee Ruth Bader Ginsburg. *See, e.g., Confirmation Hearing on the Nomination of Ruth Bader Ginsburg to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 103d Cong. 1 (1993). Since Justice Ginsburg's hearings, the Judiciary Committee has made a habit of questioning nominees in Room 216 of the Hart Senate Office Building, which features a raised dais for the Senators, with nominees and witnesses seated at tables at the ground level. *See, e.g., Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 1 (2006). For photographs of the setup of Room 216, see Andrea Swalec, *Behind the Scenes of Where James Comey Will Testify Thursday*, NBC WASH. (June 6, 2017), <https://www.nbcwashington.com/news/local/Behind-the-Scenes-at-the-Hart--426850031.html> [<https://perma.cc/T3GZ-5KUJ>]. Justice Thomas's confirmation hearings, in contrast, took place in the Kennedy Caucus Room in the Russell Senate Office Building, in which Senators and nominees alike sit at tables at ground level. *Confirmation Hearing on the Nomination of Clarence Thomas to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 102d Cong. 1 (1991). For a photograph of the setup of the Kennedy Caucus Room, see *Kennedy Caucus Room*, U.S. SENATE, [https://www.senate.gov/reference/common/image/Caucus\\_room.htm](https://www.senate.gov/reference/common/image/Caucus_room.htm) [<https://perma.cc/75QM-PU58>].

77. Senator Cory Booker described leaking files related to then-nominee Brett Kavanaugh as his "I am Spartacus moment." *See* Tim Marcin, *Senator Cory Booker Says He's Having 'I am Spartacus' Moment at Kavanaugh Hearing*, NEWSWEEK (Sept. 6, 2018, 12:30 PM), <https://www.newsweek.com/cory-booker-i-am-spartacus-moment-kavanaugh-hearing-claims-watch-1109658> [<https://perma.cc/24T4-J6YZ>].

78. *See* Jonathan Tamari, *The Long Game*, INQUIRER (Apr. 18, 2018), [http://media.philly.com/storage/special\\_projects/cory-booker-stanford-football-highlights-video-2020-presidential-election-new-jersey.html](http://media.philly.com/storage/special_projects/cory-booker-stanford-football-highlights-video-2020-presidential-election-new-jersey.html) [<https://perma.cc/7FD7-S7QA>].

79. *See id.*

80. *See id.*

81. 137 Cong. Rec. 26,354 (1991).

82. *See* 136 Cong. Rec. 3503 (1990).

anything about any sort of problem. He had been confirmed three times before, and he secured a number of Democrat votes. One difference between now and then was a number of Democrats came out with public support for him before the final floor vote.<sup>83</sup> So then when the allegations broke, they had to figure out how to politically back track. Back then, this was considered the new low, and it was horrible and it could not possibly get any worse.

Then Bill Clinton was elected. Two Supreme Court vacancies occurred, and we know that Justices Breyer and Ginsburg were appointed.<sup>84</sup> There were plenty of ways to attack both if one wanted to make a lot of noise. Breyer is a brilliant man, a brilliant jurist, one of the foremost experts in administrative law in the country at the time, and was counsel to the Senate Judiciary Committee, and perceived as Ted Kennedy's guy.<sup>85</sup> So one could probably make hay over that. Certainly not fair to him, as he is his own man, but one could have attacked by proxy everything Ted Kennedy was for and attached it to Breyer. But what we saw, was when Clinton called the ranking member, Senator Hatch, for pre-nomination advice, Hatch actually claims he suggested to Clinton Breyer and Ginsburg for the first vacancy, thinking those were the two most qualified candidates of the sort that Clinton would want.<sup>86</sup> Certainly, not the choice Hatch would make on his own but he thought it was in the best interest of the Senate to do this like grown-ups and give the President real advice.<sup>87</sup> Breyer was confirmed 87-9.<sup>88</sup> Ginsburg 96-3.<sup>89</sup> Overwhelming bipartisan support, and both overwhelming qualified by any measure. But from my political vantage point, certainly to the left of me. And presumably the Senate Republicans at the time. That did not hold back the nominations or result in party line votes. Seems like the Senate, particularly, the Senate Republicans, took a step back at that point, and maybe got things back to a little more normal.

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83. *Cf.* Hatch, *supra* note 26, at 4.

84. *See Ginsburg, Ruth Bader, supra* note 25; *supra* note 20 and accompanying text.

85. *See* Hatch, *supra* note 26, at 4.

86. *See id.* at 4-5.

87. *Id.*

88. 140 Cong. Rec. 18,704 (1994).

89. 139 Cong. Rec. 18,414 (1993).

Let's look at President Clinton's picks for the U.S. Court of Appeals for the D.C. Circuit, you'll see a similar trend there. He had three: Judith Rogers, David Tatel, and Merrick Garland.<sup>90</sup> Keep that last name in mind. The first two went through on a voice vote.<sup>91</sup> Not particularly controversial, but certainly not my cup of tea. If the Republican Senators got to pick, they would not have been the judges that they picked, but they nonetheless let the confirmations go through. Garland was unique, for reasons that had nothing to do with him. Every so often there is a spat over whether the D.C. Circuit needs all the seats Congress has allotted that court. The caseload there is taxing in that it is very detailed with a lot of regulatory challenges, but compared to other circuits, the case load is noticeably lower. So every so often there is a debate over whether or not the court needs so many seats.<sup>92</sup> For those of you who are law students, you need all those seats, since it means more clerkships, and even if you don't clerk at the D.C. Circuit, it frees up clerkships elsewhere. So Garland had to wait for 18 months while the Senate sorted this out, but that debate came and went, he was confirmed 76-23.<sup>93</sup> The controversy was not about him; it was the process.

Fast-forward to President George W. Bush. I'll suggest that this is where things really seemed to really change, but I'll let you draw the conclusion for yourself. His first nominee to the U.S. Court of Appeals for the D.C. Circuit was John G. Roberts, Jr., who is now the Chief Justice.<sup>94</sup> That took two years.<sup>95</sup> The timing really became elongated, Bush made his nominations, and then Senator Jeffords of Vermont switched parties, causing the Senate to go from a Republican majority to Democrat majority—that caused a little dust

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90. See *Rogers, Judith Ann Wilson*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/rogers-judith-ann-wilson> [<https://perma.cc/KXC2-HABE>]; *Tatel, David S.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/tatel-david-s> [<https://perma.cc/DRK3-M9NY>]; *Garland, Merrick B.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/garland-merrick-b> [<https://perma.cc/9X92-AE2Y>].

91. 140 Cong. Rec. 4554 (1994) (Judge Rogers); 140 Cong. Rec. 28,360 (1994) (Judge Tatel).

92. See Hatch, *supra* note 26, at 5.

93. 143 Cong. Rec. 4252 (1997).

94. See *Roberts, John Glover, Jr.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/roberts-john-glover-jr> [<https://perma.cc/KFU3-LJUS>].

95. See 147 Cong. Rec. S4773 (daily ed. May 9, 2001) (initial nomination); 149 Cong. Rec. S5929 (daily ed. May 8, 2003) (confirmation).

up.<sup>96</sup> After two years, he was confirmed by voice vote.<sup>97</sup> Thomas B. Griffith's confirmation took 13 months.<sup>98</sup> He was confirmed 73-24.<sup>99</sup> He is a little more moderate than some Republican appointees on the D.C. Circuit, but is still a conservative. Janice Rogers Brown's confirmation took nearly two years and she was confirmed 56-43.<sup>100</sup> She is a fascinating person. If you want to study a judge and a career, she is someone to take a hard look at. She grew up with nothing, and ended up being the counsel to the Governor of California, then an appellate judge in California, then a state Supreme Court Justice in California, prior to her appointment to the D.C. Circuit.<sup>101</sup> Finally, there is Brett Kavanaugh, another name to keep in mind. His confirmation took 2 years and 10 months.<sup>102</sup> He was filibustered a number of times.<sup>103</sup> He was finally confirmed 57-36, with four Democrats voting for him.<sup>104</sup> You see how the votes have gotten tighter. In my view, this is a significant change from what happened only a few years prior. I haven't mentioned Miguel Estrada. He was nominated, but withdrew after seven filibusters and two years and four months of waiting.<sup>105</sup> Liberals were terrified of him. The perception was that Estrada could be the first Hispanic Supreme Court Justice someday, so they really went to the mat on him.

We had not really seen filibusters of judges before this century. Justice Thomas, for example, was not filibustered. He was

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96. See Christopher Graff, *An Inside Look at a Party Switch that Changed History*, L.A. TIMES (June 24, 2001), <https://www.latimes.com/archives/la-xpm-2001-jun-24-mn-14081-story.html> [https://perma.cc/G9PZ-N36R].

97. See 149 Cong. Rec. S5929 (daily ed. May 8, 2003).

98. See 150 Cong. Rec. S5168 (daily ed. May 10, 2004) (initial nomination); 151 Cong. Rec. S6438 (daily ed. June 14, 2005) (confirmation).

99. 151 Cong. Rec. S6438 (daily ed. June 14, 2005).

100. 151 Cong. Rec. S6218 (daily ed. June 8, 2005).

101. See *Brown, Janice Rogers*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/brown-janice-rogers> [https://perma.cc/3HSK-R57Z].

102. See 149 Cong. Rec. S9992 (daily ed. July 25, 2003) (initial nomination); 152 Cong. Rec. S5311 (daily ed. May 26, 2006) (confirmation).

103. See Hatch, *supra* note 26, at 5.

104. See 152 Cong. Rec. S5311 (daily ed. May 26, 2006).

105. See 147 Cong. Rec. S4773 (daily ed. May 9, 2001) (initial nomination); 149 Cong. Rec. S10,203 (daily ed. July 30, 2003) (rejecting, for the seventh time, a motion to invoke cloture on Mr. Estrada's nomination); see also Jesse J. Holland, *Estrada Withdraws His Judicial Nomination*, AP NEWS (Sept. 4, 2003) <https://www.apnews.com/ef4da3e7054f4d60245c3aedc713c544> [https://perma.cc/BRE5-6K3M].



confirmed with fifty-two votes.<sup>106</sup> So we are clear, a filibuster is when you keep debate going, and going, and going ... To overcome the filibuster, the Senate has varied the required number of votes between a two-thirds vote and sixty votes—but regardless, you need a super majority to move a nomination forward to a confirmation vote.<sup>107</sup> Yet even then, Democrats did not vote against Thomas on this predicate procedural step. They only voted against him on final passage—meaning on the merits. This is also something that has changed radically this century.

President Bush had a Supreme Court vacancy to fill, and he nominated Judge John Roberts to replace Chief Justice Rehnquist.<sup>108</sup> The perception was that Roberts would be similar to Rehnquist and wouldn't change the "balance of the Court"—whatever that means—and Roberts was confirmed 78-22.<sup>109</sup> Roberts was very good in his hearings—he did not disclose a whole lot and was very crisp. Still, compare his vote to Ginsburg (96-3), and Breyer (87-9)—Roberts 78-22.<sup>110</sup> Not much difference, other than which party the President who made the nominations was affiliated with. All three nominees were eminently qualified and all were seen as brilliant sitting judges. The Roberts nomination got a little squirrely because there was a second vacancy, and the President nominated Harriet Miers.<sup>111</sup> Conservatives balked—Miers was not the best choice—and she eventually withdrew.<sup>112</sup> The President then nominated Judge Samuel Alito, who was a judge on the Third Circuit.<sup>113</sup> Keep in mind, this was to replace Justice O'Connor, who many

106. See Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 215 n.187 (1997).

107. See *id.* at 182, 198.

108. 151 Cong. Rec. S9692 (daily ed. Sept. 6, 2005).

109. See 151 Cong. Rec. S10,649-50 (daily ed. Sept. 29, 2005); see also *id.* S10,642 (statement of Sen. Kohl) (discussing Chief Justice Roberts's anticipated impact on "the balance of the Court").

110. Compare 139 Cong. Rec. 18,414 (1993) (Justice Ginsburg), and 140 Cong. Rec. 18,704 (1994) (Justice Breyer), with 151 Cong. Rec. S10,649-50 (daily ed. Sept. 29, 2005) (Chief Justice Roberts).

111. George W. Bush, President, U.S., Harriet Miers Nomination (Oct. 3, 2005), <https://www.c-span.org/video/?c4682772/harriet-miers-nomination> [<https://perma.cc/JC8C-MPK8>].

112. Letter from Harriet Ellan Miers, White House Counsel, to George W. Bush, President, U.S. (Oct. 27, 2005), [http://www.nbcnews.com/id/9837716/ns/us\\_news-the\\_changing\\_court/t/harriet-miers-withdrawal-letter/#.XQPC99NKhmA](http://www.nbcnews.com/id/9837716/ns/us_news-the_changing_court/t/harriet-miers-withdrawal-letter/#.XQPC99NKhmA) [<https://perma.cc/QSG9-YKVG>].

113. 151 Cong. Rec. S12,059 (daily ed. Oct. 31, 2005) (statement of Sen. McConnell).

perceived to be the swing vote on certain social issues.<sup>114</sup> My read is that because Roberts was replacing Rehnquist, that wasn't seen as that much of a trade, but replacing O'Connor—the knives would be out—and they were. The Alito hearings were quite contentious, but he did well. He is not the most dynamic guy, but that helped him. He has a great poker face. They dug up a supposed membership in something called “The Concerned Alumni of Princeton.”<sup>115</sup> People in that group allegedly had some outrageous positions.<sup>116</sup> Alito was unaware of all that.<sup>117</sup> It got so bad, his wife Martha-Ann got up and left the hearing crying.<sup>118</sup> A filibuster was attempted.<sup>119</sup>

There was a filibuster attempted on Alito. One had been attempted with Rehnquist, but it wasn't a real serious effort.<sup>120</sup> The effort to block Alito was much more serious. As a side note, one of the architects of the potential filibuster was a Senator named Russ Feingold, the sponsor of McCain-Feingold.<sup>121</sup> There were a number of TV ads run in his home state of Wisconsin urging him not to filibuster Alito.<sup>122</sup> One of the ads was sponsored by a group called Wisconsin Right to Life.<sup>123</sup> The Federal Election Commission, before I was there, determined that under McCain-Feingold the ad was banned, since it was run within a certain number of days of an election.<sup>124</sup> This ended up going to the Supreme Court—the case of *Wisconsin Right to Life, Inc. v. FEC* was actually about an ad urging Feingold not to filibuster Alito.<sup>125</sup> I say this for no real reason other

114. See, e.g., 151 Cong. Rec. S10,642 (daily ed. Sept. 29, 2005) (statement of Sen. Kohl).

115. See *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 333-34 (2006) (statements of Sen. Leahy and then-Judge Alito).

116. See *id.* at 334 (statement of Sen. Leahy).

117. *Id.* at 333-34 (statement of then-Judge Alito).

118. *Emotions Run High in Alito Hearing's 3rd Day*, NBC NEWS (Jan. 11, 2006, 9:45 PM), [http://www.nbcnews.com/id/10802815/ns/us\\_news-the\\_changing\\_court/t/emotions-run-high-alito-hearings-rd-day/#.XK5ZdhNKhmA](http://www.nbcnews.com/id/10802815/ns/us_news-the_changing_court/t/emotions-run-high-alito-hearings-rd-day/#.XK5ZdhNKhmA) [<https://perma.cc/V683-RVSM>].

119. Hatch, *supra* note 26, at 6.

120. See Fisk & Chemerinsky, *supra* note 106, at 194 n.67 (“Senators disputed whether liberals were filibustering the [Rehnquist] nomination.”).

121. *Anti-Alito Filibuster Soundly Defeated*, CNN (Jan. 31, 2006, 8:56 PM), <http://edition.cnn.com/2006/POLITICS/01/30/alito/index.html> [<https://perma.cc/6FAH-DL3D>].

122. See *Wis. Right to Life, Inc. v. FEC*, No. 04-1260, 2004 WL 3622736, at \*1 (D.D.C. Aug. 17, 2004).

123. See *id.*

124. See *id.*

125. See 546 U.S. 410 (2006) (per curiam).

than to note that all things eventually overlap and run into each other. This filibuster is in stark contrast to what the Republicans did regarding Ginsburg and Breyer. They did not try to filibuster, though they certainly could have tried—they could have made a lot of noise to try to slow it down, but they didn't. And as we can all guess, since he is on the Supreme Court, Alito was confirmed 58-42, and received four Democratic votes.<sup>126</sup> Clarence Thomas, by contrast, received eleven Democratic votes.<sup>127</sup>

Now we move forward to President Obama, and getting closer to the modern age. Most of you were alive at this point. As we know, he nominated—Sonia Sotomayor and Elena Kagan.<sup>128</sup> Sotomayor was slightly controversial due to a speech she had given where she made a comment that a “wise Latino woman” would reach a better result than a white man.<sup>129</sup> Some found that to be a little out of bounds. Elena Kagan had an issue over the banning of military recruiters while she was the Dean at Harvard, but really no one could criticize her abilities as a legal mind.<sup>130</sup> She was impeccably qualified. The point here is you didn't see the personal assaults here that we have seen in other confirmations. There were certainly opportunities to throw partisan shots, but you didn't see that. The votes were tighter—Sotomayor was confirmed 68-31, with nine Republican votes.<sup>131</sup> Kagan was 63-37 with five Republican votes.<sup>132</sup> So, you see the trend of tighter votes continuing.

Meanwhile, Senate Republicans were not moving Obama's nominees to the D.C. Circuit—presumably still smarting from how the Democrats had handled President Bush's nominees.<sup>133</sup> President Obama did not do well in the D.C. Circuit for the first five to six years of his Presidency.<sup>134</sup> His Administration essentially lost

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126. See 152 Cong. Rec. S348 (daily ed. Jan. 31, 2006).

127. See 137 Cong. Rec. 26,354 (1991).

128. 155 Cong. Rec. S5909 (daily ed. June 1, 2009) (Justice Sotomayor); 156 Cong. Rec. S3486 (daily ed. May 10, 2010) (Justice Kagan).

129. See 155 Cong. Rec. S8919 (daily ed. Aug. 6, 2009) (statement of Sen. Voinovich).

130. See 156 Cong. Rec. S6758 (daily ed. Aug. 5, 2010) (statement of Sen. Roberts).

131. See 155 Cong. Rec. S8945 (daily ed. Aug. 6, 2009).

132. See 156 Cong. Rec. S6830 (daily ed. Aug. 5, 2010).

133. See Hatch, *supra* note 26, at 6-7.

134. See David B. Rivkin, Jr. & Andrew M. Grossman, *Is Obama Trying to Pack the DC Appeals Court?*, HILL (Nov. 1, 2013, 8:00 AM), <https://thehill.com/blogs/congress-blog/judicial/188872-is-obama-trying-to-pack-the-dc-appeals-court> [<https://perma.cc/4YAR-8ZKW>].

virtually every administrative case for regulatory overreach.<sup>135</sup> One way to fix that—other than changing your policies—was to load up the D.C. Circuit with judges more favorable to your position. The so-called nuclear option was deployed by Senate Democrats—meaning they would eliminate the filibuster for circuit nominees, allowing Obama’s D.C. Circuit nominees to go through on party line votes.<sup>136</sup> So, what we are seeing is this ratcheting up each time, getting more and more contentious, and it exploded here.

Then came February 13, 2016. Justice Scalia passes.<sup>137</sup> And we enter a new phase. President Obama took his time on who he was going to nominate.<sup>138</sup> Some Presidents rush out with a name, but he took his time. He is a thoughtful guy in that respect. He eventually nominated Merrick Garland.<sup>139</sup> Garland was and still is a D.C. Circuit judge, who by all accounts is a very, very smart guy, was an excellent lawyer in practice, and is generally seen as a lawyer’s lawyer.<sup>140</sup> You aren’t going to find too many people to say a bad word about Merrick Garland. My own view is that when it comes to administrative law, the government seems to always win before him and he has tended to be deferential to administrative agencies. He was nominated in March 2016.<sup>141</sup> The Presidential primaries were well under way. The Republican view was that it had been over a hundred years since a Supreme Court Justice was confirmed in an election year, which is a fact.<sup>142</sup> But there is precedent from the end of President George H.W. Bush’s term in office, where Joe Biden, as Chairman of the Senate Judiciary Committee, stopped processing nominees due to the upcoming presidential election.<sup>143</sup> That was something that came back home to roost, and was cited by Senate

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135. *See id.*

136. *See Hatch, supra* note 26, at 7.

137. Press Release, John G. Roberts, Jr., Chief Justice, Supreme Court of the U.S., Justice Scalia (Feb. 13, 2016), [https://www.supremecourt.gov/publicinfo/press/pressreleases/pr\\_02-13-16](https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_02-13-16) [<https://perma.cc/X4KJ-2H3W>].

138. *See Julie Hirschfeld Davis, Joe Biden Argued for Delaying Supreme Court Picks in 1992*, N.Y. TIMES (Feb. 22, 2016), <https://www.nytimes.com/2016/02/23/us/politics/joe-biden-argued-for-delaying-supreme-court-picks-in-1992.html> [<https://perma.cc/RMQ5-9BU6>].

139. *See Garland, Merrick B., supra* note 90.

140. *See Merrick B. Garland*, U.S. CT. APP. D.C. CIRCUIT, <https://www.cadc.uscourts.gov/internet/home.nsf/content/v1+-+judges+-+mbg> [<https://perma.cc/FY4B-WED6>].

141. *Garland, Merrick B., supra* note 90.

142. *See Hatch, supra* note 26, at 7.

143. *See id.*; *see also Davis, supra* note 138.

Republicans as a reason not to process Garland.<sup>144</sup> What is particularly interesting about the Garland nomination was that you didn't hear any personal attacks on Garland. The Republicans didn't dress it up as something about him personally, or try and dig up something in his past, or say that in third grade he was late for gym class or anything of the sort. They just said they were not going to move him, it's an election year. You have to give them credit—even if you are one who doesn't like the Senate Republicans—for the honesty, and that they didn't concoct some pretextual reason, but instead cited the “Biden Rules.”<sup>145</sup>

Which brings us to the 2016 election, where President Trump—much to the surprise of virtually everyone except for a handful of us—won, and inherited a Supreme Court vacancy. Once Trump won, the political assumption, as I saw it, was that having a Republican President replace Scalia is going to be essentially the same, meaning the so-called balance of the Court would not be altered. Ultimately the President nominated Neil Gorsuch, who had been on the Tenth Circuit.<sup>146</sup> When he went through for the Tenth Circuit, guess what his vote total was? You guessed it, a voice vote. At his hearing, almost no one showed up. Lindsey Graham was there, and asked a few questions.<sup>147</sup> It was not uncommon for Senators not to come to Circuit Court hearings. They were not “made for C-SPAN 3” events, like what you see now. It is a very discreet audience for C-SPAN 3. Not every home gets it. So, when you are on C-SPAN 3, it's a very select and sophisticated audience.

Democrats talked a little about a filibuster for Gorsuch's Supreme Court nomination.<sup>148</sup> The Republicans counter-measured, and said they would do what Harry Reid did regarding the D.C. Circuit at the tail end of the Obama presidency, the so-called nuclear option.<sup>149</sup> I throw out for discussion amongst yourselves whether that was a smart tactical move by the Democrats. Gorsuch was eminently

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144. See, e.g., 162 Cong. Rec. S1022 (daily ed. Feb. 25, 2016) (statement of Sen. Grassley).

145. See Davis, *supra* note 138; see also, e.g., 162 Cong. Rec. S1022 (daily ed. Feb. 25, 2016) (statement of Sen. Grassley).

146. See *Current Members*, *supra* note 72.

147. See generally *Confirmation Hearings on Federal Appointments: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 1-52 (2006).

148. See 163 Cong. Rec. S1945 (daily ed. Mar. 23, 2017) (statement of Sen. Schumer).

149. See *id.*

qualified—Harvard, Columbia, Oxford, Kellogg Huber in private practice, worked at DOJ, Tenth Circuit judge<sup>150</sup>—a very, very smart guy by any measure, and looks and talks like a judge, certainly the sort of person that one could see on the Supreme Court. If I were the Democrats, I would not have brought the filibuster issue to a head, but instead just move a vote on the merits, and save that fight for the next time. But for whatever reason, the Democrats decided to make a big deal over the filibuster. So, the ability to filibuster a Supreme Court nominee was done away with, and harmonized with what had already happened with Circuit Court nominations.<sup>151</sup> He was confirmed 54-45, with three Democrats voting for him.<sup>152</sup> This was amazing. When you look at his resume, it is impeccable. Other than the trucker case,<sup>153</sup> which you may remember, his record was thorough for all the world to see; no one could challenge him on qualifications or dig up personal skeletons. But yet is was still a very tight vote.

Which then brings us to the most recent spectacle, which I am not going to say much about. Other than to say all this history came home to roost. It was one-part Bork, one-part Thomas, and one part I don't know what. The buzz among some on the right in D.C. was this was the “Bork seat”—it is true this was the seat that Bork had been nominated for. The same basic move that was used against Clarence Thomas was deployed against Kavanaugh. He was moving forward on the path to confirmation, and then allegations leaked out that resulted in a second set of hearings.<sup>154</sup> What is different here is the fact that Democrats knew about this allegation for some time, but sat on it.<sup>155</sup> And there are all sorts of rumors buzzing around D.C. about which Democrats knew what and when they knew it. But regardless, it got out via the newspapers, but he was ultimately confirmed 50-48, with one Democrat supporting.<sup>156</sup>

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150. See *Current Members*, *supra* note 72.

151. See 163 Cong. Rec. S2389-90 (daily ed. Apr. 6, 2017); 163 Cong. Rec. S2179-80 (daily ed. Apr. 4, 2017) (statement of Sen. McConnell).

152. See 163 Cong. Rec. S2442-43 (daily ed. Apr. 7, 2017).

153. See *generally* *TransAm Trucking, Inc. v. Admin. Review Bd.*, U.S. Dep't of Labor, 833 F.3d 1206, 1215-17 (10th Cir. 2016) (Gorsuch, J., dissenting).

154. See 164 Cong. Rec. S6596 (daily ed. Oct. 5, 2018) (statement of Sen. Cruz); Hatch, *supra* note 26, at 8.

155. See 164 Cong. Rec. S6596 (daily ed. Oct. 5, 2018) (statement of Sen. Cruz).

156. See *id.* at S6697 (vote confirming Justice Kavanaugh to the Supreme Court).

So, let's review. Sandra Day O'Connor was unanimous. William Rehnquist got two thirds of the Senate. Kavanaugh got 50 votes. Greg Katsas, D.C. Circuit judge, 50 votes, 50-48. So other than the votes, what else is different? I say that assuming that you see how things have changed in obvious ways, how the votes have gotten tighter and tighter, and how it has become more partisan and more public. There are now roll call votes on virtually every nominee, which is not how it had been done in the past. The Senate Minority Leader is insisting on votes for everyone, even the district judges. There have been a few package deals when some district judges have gone through in groups, which used to be the norm. But those days seem to be over. District judges are getting full hearings with full questioning before the full committee, and they are using every procedural minute to slow down the judicial nominees, which is unprecedented. And it's not just the Supreme Court or the circuit courts—it is now virtually every judge. This is not how is used to be.

Maybe one could say this is because the Trump nominees are flunkies? Maybe there is a reason why, maybe they aren't qualified, maybe they are patronage picks, or maybe there is a reason why this all needs to be slowed down. Of President Trump's forty-two Circuit Court nominees to date, sixteen of them clerked at the Supreme Court. This is a very tough job to get, and is only offered to a select few. Seven of them clerked for Thomas (Eid, Katsas, Ho, Stras, Miller, Rushing, and Rao).<sup>157</sup> Three clerked for Justice Scalia

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157. Mike Scarcella & Nate Robson, *Neomi Rao's DC Circuit Nomination Clears Senate Panel*, NAT'L L.J. (Feb. 28, 2019, 11:01 AM), <https://www.law.com/nationallawjournal/2019/02/28/neomi-raos-d-c-circuit-nomination-clears-senate-panel/> [<https://perma.cc/6NBE-F2XY>]; *Judge Allison H. Eid*, U.S. CT. APP. TENTH CIR., <https://www.ca10.uscourts.gov/judges/judge-allison-h.-eid> [<https://perma.cc/7CQH-FLPQ>]; *Gregory G. Katsas*, *supra* note 37; *Ho, James C.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/ho-james-c> [<https://perma.cc/3FN5-G3X6>]; Mark Sherman, *22 Former Justice Thomas Clerks Have Jobs Thanks to Trump*, AP NEWS (Aug. 4, 2018), <https://www.apnews.com/ebda07542740484c86ea192caaf357a9> [<https://perma.cc/H23C-HCEJ>] (Judge Stras); Patrick L. Gregory, *Trump Ninth Circuit Nominee Eric Miller Advances in Senate (2)*, BLOOMBERG L. (Feb. 25, 2019, 7:13 PM), [https://www.bloomberg.com/document/XI9Q5F8000000?bna\\_news\\_filter=us-law-week&jcsearch=BNA%252000000169164fd566a5edd6cf871e0000#jcite](https://www.bloomberg.com/document/XI9Q5F8000000?bna_news_filter=us-law-week&jcsearch=BNA%252000000169164fd566a5edd6cf871e0000#jcite) [<https://perma.cc/X5RL-YVZ3>] (Judge Miller); Mike Scarcella & Nate Robson, *Williams & Connolly's Allison Rushing Is Confirmed to 4th Circuit Seat*, NAT'L L.J. (Mar. 5, 2019, 4:36 PM), <https://www.law.com/nationallawjournal/2019/03/05/william-connollys-allison-rushing-is-confirmed-to-4th-circuit-seat/> [<https://perma.cc/YD5Z-7698>].

(Barrett, Larsen, and Collins).<sup>158</sup> Three clerked for Kennedy (Bibas, Scudder, and Murphy).<sup>159</sup> One clerked for Rehnquist (Richardson).<sup>160</sup> Of the forty-two, thirty-five clerked on a circuit court. A few did not clerk at all, but they were sitting district judges who were elevated to the circuit court (Quattlebaum, St. Eve).<sup>161</sup> So, if you look at the resumes and qualifications of the forty-two, you cannot possibly say that they all required excruciating Senate consideration as to whether they were qualified. The only reasonable conclusion one can draw is that it was done to slow things down.

So where do we go from here? Well, I think it is only getting worse. First, there has been a lot of talk about something called the blue slip—so named because it is literally on blue paper. Over the years, it has varied as to what the significance of the blue slip is or is not.<sup>162</sup> A few Chairmen took the position that it was an absolute veto of a nominee, meaning if a home state senator did not return a blue slip for a nominee from his or her state, the nomination would not proceed.<sup>163</sup> When Democrat Pat Leahy was Chairman in the mid-2000s, he viewed it as an absolute veto.<sup>164</sup> The Constitution

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158. *Barrett, Amy Coney*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/barrett-amy-coney> [<https://perma.cc/A75G-GUAB>]; Joan L. Larsen, *What I Learned From Justice Scalia*, N.Y. TIMES (Feb. 16, 2016), <https://www.nytimes.com/2016/02/16/opinion/what-i-learned-from-justice-scalia.html> [<https://perma.cc/MH4Z-K26N>]; Carrie Severino, *Who Is Dan Collins*, NAT'L REV. (Oct. 10, 2018, 11:15 PM), <https://www.nationalreview.com/bench-memos/who-is-dan-collins/> [<https://perma.cc/QU8M-K9YG>].

159. *Bibas, Stephanos*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/bibas-stephanos> [<https://perma.cc/TK9C-THAJ>]; Sabrina Eaton, *Senate Confirms Ohio's Eric Murphy as a Federal Judge over Objections from Democrats*, CLEVELAND.COM (Mar. 7, 2019), <https://www.cleveland.com/open/2019/03/senate-confirms-ohios-eric-murphy-as-a-federal-judge-over-objections-from-democrats.html> [<https://perma.cc/57QT-SL78>]; *Scudder, Michael Yale, Jr.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/scudder-michael-yale-jr> [<https://perma.cc/D8S7-Y5L2>].

160. *Judge Julius N. Richardson*, U.S. CT. APP. FOURTH CIR., <http://www.ca4.uscourts.gov/judges/judges-of-the-court/judge-julius-n-richardson> [<https://perma.cc/J3TV-K8KE>].

161. *Judge A. Marvin Quattlebaum, Jr.*, U.S. CT. APP. FOURTH CIR., <https://www.ca4.uscourts.gov/judges/judges-of-the-court/judge-a-marvin-quattlebaum-jr> [<https://perma.cc/X2J4-RMDH>]; *St. Eve, Amy Joan*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/st-eve-amy-joan> [<https://perma.cc/KTF3-PJKN>].

162. See generally Brannon P. Denning, *The "Blue Slip": Enforcing the Norms of the Judicial Confirmation Process*, 10 WM. & MARY BILL RTS. J. 75, 76-83 (2001).

163. See E. Stewart Moritz, "Statistical Judo": *The Rhetoric of Senate Inaction in the Judicial Appointment Process*, 22 J.L. & POL. 341, 355, 380 (2006).

164. See *id.* at 380.



itself talks about the advice and consent of the Senate.<sup>165</sup> It doesn't talk about the advice of a home-state Senator. One could see a home state Senator having a bone to pick about district judges within their state, which goes back at least 100 years. In one of the lectures that President, Chief Justice, and all-around good guy William Howard Taft gave between being President and the Chief Justice, he talked at length about having to talk to home state Senators about judges.<sup>166</sup> So that is nothing new. But what is new is the President no longer has to rely nearly as heavily on home state Senators to figure out who the good lawyers are in their states. Today, we now have telephones, the internet, various bar associations and lawyers groups; thus making it much easier for the White House to figure out who is who in the various states, and making it less necessary for the home state Senators to be the filter that they were 100 years ago when there was no way of really knowing who was who but for the Senators.

But for Circuit Court judges, this was something that was in a way news to me when I became White House Counsel—even though a circuit judge sits for many states, certain seats are perceived as being tied to certain states. The statute requires that each state have a member on the circuit in which it is located, and as to where they sit is silent.<sup>167</sup> But the Senate established this tradition that virtually all the seats are tied to different states, which means you have to get those home state senators involved in the selection of circuit judges.<sup>168</sup> Chairman Grassley took the more traditional view of the blue slip, where it provides a way for a Senator to be heard

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165. U.S. CONST. art. II, § 2 (“The President ... by and with the advice and consent of the Senate, shall appoint ... judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law.”).

166. See WILLIAM HOWARD TAFT, *OUR CHIEF MAGISTRATE AND HIS POWERS* 63-64 (1916); see also Rayman L. Solomon, *The Politics of Appointments and the Federal Courts' Role in Regulating America: U.S. Courts of Appeals Judgeships from T.R. to F.D.R.*, 1984 AM. B. FOUND. RES. J. 328-29 (“Taft attempted to limit the role of senators to one of making recommendations, thus denying them the prerogative of actually appointing. He stated after leaving the White House that ‘nothing had distressed him ... more than those “heartbreaking experiences ... in which mediocre or unfit judicial appointments were compelled by the exigencies of politics, or by the requirements of senatorial courtesy.”’ (quoting ALPHEUS THOMAS MASON, *WILLIAM HOWARD TAFT: CHIEF JUSTICE* 178 (1965))).

167. 28 U.S.C. § 44(e) (2012).

168. See Moritz, *supra* note 163, at 349-50.

regarding a nominee, but it not an absolute veto.<sup>169</sup> He has demanded, however, a tremendous amount of what we call pre-nomination consultation. I had to talk to the Senators before the nomination. If they had recommendations, those folks were interviewed, they were worked up (meaning a detailed review of their record was undertaken), and we also asked the Senators to take a look at our suggestions. Sometimes we traded lists of potential nominees. Sometimes this process works. For example, there was a package deal that went through concerning Illinois circuit judges.<sup>170</sup> Mike Scudder and Amy St. Eve were a part of that, and they went through the Senate virtually unanimously, 90-0, and a number of district judges were also nominated with their support as a part of that deal.<sup>171</sup> In other states, things devolve into party line votes or we otherwise never seem to get there.

Justice Kavanaugh suggested a fix for the process years ago. He suggested putting in a time limit on the Senate of 120 days per nominee, where they have to fish or cut bait within 120 days of the nomination, precluding them from dragging it out or not acting on nominees, but instead would have to have a vote, and under Senate rules would have to stand and be counted.<sup>172</sup> Senate rules tend to be designed to avoid requiring Senators to vote on things. Much of their business is done via unanimous consent. This was an idea to try and force the Senate to act.

Maybe the answer is more pre-nomination consultation? Maybe that would have made Kavanaugh easier, maybe he was a surprise? Hardly. The President met with a number of Senators from both parties personally in the Oval Office before the nomination. Those meetings were very helpful—they were heard, some had suggestions, some had names, some had more of a general concept of the

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169. See Kevin Freking, *Grassley Panel Helps Seat Appeals Judge Amid Dispute over Senate Practices*, DES MOINES REG. (May 10, 2018, 4:56 PM), <https://www.desmoinesregister.com/story/news/politics/2018/05/10/blue-slips-senate-judiciary-committee-chuck-grassley-federal-judge-confirmed/600240002/> [<https://perma.cc/6Q89-VH4J>].

170. See Tim Ryan, *Senate Unanimously Confirms Two for the Seventh Circuit*, COURTHOUSE NEWS SERV. (May 14, 2018), <https://www.courthousenews.com/senate-unanimously-confirms-two-for-the-seventh-circuit/> [<https://perma.cc/F3HS-MVBQ>].

171. See *id.*

172. The 120 day time limit is discussed in, for example, Michael J. Gerhardt & Richard W. Painter, *Majority Rule and the Future of Judicial Selection*, 2017 WIS. L. REV. 263, 279, though Justice Kavanaugh is not credited with the idea.

sort of person they were looking for. I personally spoke to every member of the Senate Judiciary committee on both sides of the aisle to the extent they were willing to talk to me. Some of the Democrats did not return the call or otherwise engage. Which also was unprecedented. Ordinarily, they would at least have a conversation—but now it is to the point where they don't even want to have a conversation before nomination. It was odd, as I had talked to many of them about their home state judges and had good relationships with virtually all the members, but then when the Supreme Court vacancy arose, they apparently lost my phone number. They all—that is, of the ones I talked with—said they would meet with the nominee after the nomination. And they all said certainly. But then none of them met with Kavanaugh for at least a month. So you can't say that it was due to the White House not doing pre-nomination consultation. This White House did plenty.

An interesting part of this is the questions that the Senators ask. There is a tradition in the modern era where the nominee goes around and meets with the individual Senators—you generally start with the Majority Leader, then the Minority Leader, then Chairman of the Judiciary Committee and the Ranking Member, then the members of the Committee and so on. For this most recent nomination, it did not go that way. This time, the meetings with the Republicans were done before the Democrats finally agreed to meet, which was unprecedented.

Very few questions are posed about a nominee's qualifications. Instead, the questions tend to be variants of asking how the judge would rule in a certain case. Sometimes, ones that are pending. Sometimes even before that judge. Under the judicial canons, judges can't answer these sorts of questions,<sup>173</sup> nor should they. Judicial independence requires that a judge decide a case on the merits, not promising to a Senator how they would vote.

In addition to this, there is the Senate questionnaire that nominees must complete. It is voluminous, it asks many questions, requires the nominee to list every speech, article, and the like.<sup>174</sup> It

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173. See, e.g., CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 2 (JUDICIAL CONFERENCE 2019) (“A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities.”).

174. See, e.g., *Questionnaire for Nominee to the Supreme Court*, U.S. SENATE COMMITTEE

takes a tremendous amount of time and it bogs things down. But I suppose this helps someone somewhere evaluate the nominee. The questionnaire feels particularly onerous where the matter has been worked out with the home state Senators, yet there is a mountain of paperwork the Senate still requires. This is in addition to going through an FBI background check, which is shared with the Senate. So not only do they get the confidential background investigation report, the Senate piles on top with its own questions—some of which are propounded by individual Senators who have no intention of voting for the nominee regardless of the answer provided.

The hearings themselves have turned into something that I don't think anyone intended, but here we are now. Perhaps when one turns on TV cameras things change. Often times, some Senators give speeches and punctuate the end with a question mark. A theme tends to be how the nominee would rule in a certain case, dressed up in lofty rhetoric. They rarely ask questions about qualifications of the nominee. Questions tend not to probe whether someone would be a good decision maker, whether one has the temperament to be judge or the like. Instead, some questions seem designed to look good on TV. With all due respect to the Senators, it has become a TV show at this point. It isn't a substantive process—the substance tends to occur in the individual meetings with Senators, not in the hearing itself.

It hasn't always been this way. For a good part of our history, nominees did not appear before the Committee—there wasn't even a Judiciary Committee until 1816, and it wasn't until 1868 that nominees were automatically referred to the Committee for consideration.<sup>175</sup> And even then, that was occasionally bypassed depending on the nominee. In fact, the hearings in 1868 were closed to the public.<sup>176</sup> A fellow named George Williams—he never made it—was accused of misusing public funds.<sup>177</sup> His nomination to serve

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ON JUDICIARY, [https://www.judiciary.senate.gov/imo/media/doc/Brett%20M.%20Kavanaugh%20SJC%20\(PUBLIC\).pdf](https://www.judiciary.senate.gov/imo/media/doc/Brett%20M.%20Kavanaugh%20SJC%20(PUBLIC).pdf) [<https://perma.cc/AY9D-MRTJ>].

175. BARRY J. McMILLION, CONG. RESEARCH SERV., R44236, SUPREME COURT APPOINTMENT PROCESS: CONSIDERATION BY THE SENATE JUDICIARY COMMITTEE 1 (2018).

176. *See id.* at 1, 9 n.37; Stone, *supra* note 52, at 426.

177. Sidney Teiser, *Life of George H. Williams: Almost Chief-Justice*, 47 OR. HIST. Q. 417, 425-26 (1946).

as Chief Justice was withdrawn.<sup>178</sup> That was a closed session.<sup>179</sup> There are still closed sessions today. There is a session with the members of the Committee with the nominee, Senators only, along with the Counsel to the President, where the Senators ask about things in the confidential background material, where they sit not much farther apart than from where you are sitting. It is still a formal setting, but a much more candid setting without the bright lights. To me, it is much more conducive to getting to the heart of the matter. The first time a nominee had to appear was in 1916.<sup>180</sup> Woodrow Wilson had nominated Louis Brandeis, and that was a four-month long barn-burner.<sup>181</sup> The Committee voted him out 10-8, and the Senate confirmed him 47-22.<sup>182</sup> If you read the history, there are undertones of anti-Semitism, where he was brought in to be more of a spectacle.<sup>183</sup> That was the first spectacle—but certainly long before television. The Brandeis process is its own case study.

In 1939, President Roosevelt nominated Frankfurter.<sup>184</sup> He had a tough hearing. To put that in context, since people like to cite Frankfurter as another example of an over the top hearing.<sup>185</sup> Hugo Black had gone through right before Frankfurter, and as a member of the Senate, he basically got waved through.<sup>186</sup> After he was confirmed, it was alleged that he was a member of the KKK in his youth.<sup>187</sup> There was a big public outcry, and this is when the Senate said we need to do more of a background check.<sup>188</sup> This illustrates that there is almost always a reason why things are in place—some-

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178. *Id.* at 428-29.

179. *See id.* at 427.

180. Charles W. “Rocky” Rhodes, *Navigating the Path of the Supreme Court Appointment*, 38 FLA. ST. U. L. REV. 537, 557-58 (2011); *see also* McMILLION, *supra* note 175, at 9 n.37.

181. *See* David G. Dalin, *The Appointment of Louis D. Brandeis, First Jewish Justice on the Supreme Court*, BRANDEIS U., <https://bir.brandeis.edu/bitstream/handle/10192/31435/LDB100Dalini.pdf?sequence=1&isAllowed=y> [<https://perma.cc/V5F9-5VA4>].

182. *See id.*

183. *See* Stone, *supra* note 52, at 426.

184. *See* Meredith Hindley, *Supremely Contentious: The Transformation of “Advice and Consent,”* HUMANITIES (2009), <https://www.neh.gov/humanities/2009/septemberoctober/feature/supremely-contentious> [<https://perma.cc/Z7J6-BZMH>].

185. *See id.*

186. William E. Leuchtenburg, *A Klansman Joins the Court*, 41 U. CHI. L. REV. 1, 10-11 (1973).

187. *See generally id.*

188. *See id.* at 20-23.

thing happens, and then the solution tends to spiral away from the original reason. So when one complains about background checks, one can thank Hugo Black for that.

Maybe one way to streamline the process is to limit the time for questions. The way things currently work is that each Senator gets to ask questions, and they go back and forth between parties, resulting in a very disjointed approach. And in defense of Senators who are trying to ask real questions, it is tough because they have time limits. As someone who has sat through two nominations, on behalf of the nominee I can say I love the time limits. But if I were a Senate staffer, I would hate the time limits. You saw the time playing out in an odd way when the Senate Republicans brought in an outside counsel to ask questions, and every five minutes, time was up. *Saturday Night Live* really nailed it on that one.<sup>189</sup> She starts a question and then “time!” It was really jarring and doesn’t seem to be the best way to get to the heart of the matter. The TV hearings and what they have become tend not to shed any light on the nominee. It is different during the meetings the nominee has with individual Senators. They can be quite substantive and candid. And some Senators ask questions that get to the heart of the matter. Some don’t. That’s their prerogative. Senator Susan Collins knew Kavanaugh’s record almost as well as I did—it was amazing to watch her in action.

Aside from the Supreme Court, what about the circuit nominees? They are dragging out too, with the questionnaires, hearings, and more questions.<sup>190</sup> The time it takes for a circuit judge is expanding and is more intrusive and more cumbersome than what Supreme Court nominees went through twenty to twenty-five years ago (setting aside Bork). But if you look back, the circuit nominations,

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189. See generally *Saturday Night Live, Kavanaugh Hearing Cold Open—SNL*, YOUTUBE (Sept. 29, 2018), <https://www.youtube.com/watch?v=VRJecfRxbr8> [<https://perma.cc/F2TE-YLMT>].

190. Frustrated by these delays, and subsequent to this lecture, the Senate changed its rules to shorten debate over lower-level presidential nominees, including nominees for district court judgeships, from thirty hours to two hours. See *Senate Confirms Trump High Court Short-Lister For Judgeship*, LAW360 (Apr. 9, 2019, 9:17 PM), <https://www.law360.com/articles/1148004/senate-confirms-trump-high-court-short-lister-for-judgeship> [<https://perma.cc/X5TK-M45P>].

and even some of the district court nominees, are getting more scrutiny than Supreme Court nominees.

So where do we go from here? I am certainly not a Senator, so I have no idea. But to me, I think the Senate needs to take a hard look at its rules, take a look at the timing of nominations, and try and to refocus its efforts on trying to get the attention back on the merits of the nominee. Senator Lindsey Graham has always taken this view—that if a nominee is qualified, even if one does not agree with that nominee’s judicial philosophy or how they read the law, he or she should still vote for the nominee. If you don’t think the nominee is qualified, then ask questions about the nominee’s qualifications. Graham has talked the talk and walked the walk on this, having led the charge much to the chagrin of some Republicans. But regardless of what one thinks about it, he certainly sets a good example for others who view it much more situational and overtly partisan. One can certainly step back and note that if the Court did not get into social issues so often, the confirmations would not be so hot, but then that begs another question that is an entirely different lecture. But we are on a collision course where judges are being confirmed with the slimmest of margins. It results in judges being cast into partisan roles, and confirmations becoming quasi-judicial elections. It is not the sort of thing that is good. I think Presidents needs to confer with the Senate, and the Senate certainly has to do its due diligence. But I hope the Senate can perhaps take a step back from the brink, and not repeat what we have seen over the past several years and decades. What you saw recently is part of a much longer continuum, and this was the culmination of it. With that, I appreciate your time and attention. Again, thank you for the invitation to be here. I very much enjoyed my time here, and have a Happy Thanksgiving. Thank you. [Applause]