The Supreme Court Confirmation Process in Historical Perspective

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Thank you, Mr. Chairman and Senators, for the opportunity to speak with you today. I have studied the confirmation of Supreme Court justices for more than ten years, and it is truly a delight to be here with you today to discuss this work.

Few things are as important to the Senate's oversight of the structure and operation of the Federal Courts as its role in the confirmation of Supreme Court justices. As you know first-hand, Article II Section 2 of the U.S. Constitution provides that, although the President nominates Supreme Court justices, they take their seats only with the advice and consent of the Senate.

Throughout our history, both Presidents and Senators have taken their respective responsibilities in that process seriously. Presidents and Senators have always known that who sits on the high court matters, and have conducted themselves accordingly. Since they have not always agreed about these important choices, however, confirmation controversies have existed throughout our history. Our very first president, George Washington, had a Chief Justice nominee rejected. Presidents Madison, Tyler, Polk, Buchanan, Grant, Cleveland, Hoover, Nixon and Reagan likewise each had nominees rejected by vote of the U.S. Senate, while many more nominees were denied seats through Senate inaction. In fact, disputes between the President and Congress have become slightly less, not more, common over time. Almost 20 percent of the first 142 Supreme Court nominees named by Presidents were not confirmed by the Senate, but in the nineteenth century, that rejection rate was even higher, at about one-third.

Clearly, the Senate has always been an engaged participant in this process. The way the Senate exercises its oversight, however, has changed over time, along with changes in the wider society. Prior to the establishment of the Senate Judiciary Committee, the Senate as a whole considered nominations in private, without the benefit of public input or prior committee review. Committee review was established in 1816, when this committee was established. Meaningful public input began in 1939, when Felix Frankfurter became the first nominee to appear before the Committee to take unrestricted questions, in public and under oath, thereby ushering in the process with which we are now familiar.

The advent of public nominee testimony was not surprising. American democracy in the 1900s became more robust, through the passage of the Seventeenth and Nineteenth Amendments and the emergent civil rights movement. The Senate correspondingly sought to legitimate its work to a broader and more engaged constituency. There also was a more particular explanation for the Frankfurter testimony. A few years before the Frankfurter nomination, the Senate had encountered trouble when it rushed through the confirmation of Hugo Black without publically disclosing that he had accepted and allegedly never relinquished a lifetime membership in the Ku Klux Klan. This news was explosive when it became public, and the Senate Judiciary Committee responded by promising a more transparent process in the future. By 1955, less than 20 years after Justice Frankfurter's hearing, the Committee had kept that promise, and public nominee testimony had become customary.

Given the role that the Supreme Court plays in our system of governance, this robust Senatorial oversight is not surprising. By constitutional design, the Court does not sit outside of our system of checks and balances, but rather, through the confirmation process, is embedded within it. The confirmation hearings, from the very start, have enabled this oversight by

providing a forum in which Senators engage nominees on substantive issues of constitutional importance. Today this discourse takes place mainly in the language of prior cases and precedents, while in the early hearings, constitutional issues were discussed in more directly policy-based language. But throughout the history of the hearings, discussions of substantive issues of constitutional law have been an important part of the process.

My co-author Paul Collins and I have been able to quantify this, through an original dataset that codes every question asked and very answer given at every public confirmation hearing since Frankfurter's. Our work confirms the substantive nature of the process. Since the inception of the hearings, the most common issue of discussion, constituting almost 30 percent of all hearing dialogue, has been civil rights. Dialogue involving judicial philosophy has been second, constituting 12 percent of hearing discourse, while issues of criminal justice constitute an additional 8.6 percent (the remainder of the substantive dialogue is scattered over numerous topics, none of which constitute more than 4 percent of the commentary). The precise issues discussed have changed over time, but have consistently echoed those important to the public at the time of the hearing. So, over the past 80 years, hearing topics have addressed issues such as communism, war, America's place in the world, federalism, racial and gender equality, religious freedom, gun rights, and executive power. The key point is that confirmation process has always provided a forum to help illuminate how our Constitution connects to the deepest concerns of a given era.

Importantly, nominees have facilitated this by being willing to answer questions. Contrary to the inaptly named "Ginsburg Rule," Supreme Court nominees (including Justice Ginsburg) typically have been willing to answer questions about some constitutional issues while avoiding discussion of others. Nominees since Frankfurter have struck this balance in large part

by willingly providing opinions on settled areas of constitutional law, while being more reluctant to offer opinions on currently contested issues.

So, for example, although nominees at times have been reluctant to opine on cases they consider controversial, for at least thirty years they have readily affirmed the correctness of *Brown v. Board of Education*, rejected *Lochner v. New York*, and *Plessy v. Ferguson*, agreed that the Constitution includes a basic right to privacy, agreed that gender discrimination is subject to heightened review and that free speech protections extend beyond political speech, and – more recently – affirmed the core holding of *District of Columbia v. Heller* that the Second Amendment embodies an individual right to bear arms for personal protection in one's home. What issues are and are not controversial – and therefore which issues the nominees are willing to provide firm opinions on – has changed over time. But what has stayed constant is that nominees have recognized that they must balance their desire to avoid answering questions with the Senate's need for sufficient information to enable it to exercise its own constitutional duty responsibly.

That is why I believe the confirmation process, and your role in it, is so important. Supreme Court confirmation hearings are one of the ways in which we weave the Court's resolution of previously contested cases into our shared constitutional understanding. When nominees, in public and under oath, affirm those shared understandings, they signal that they are within the mainstream of today's constitutional thought, and that they understand and are satisfied with the resolution of the conflicts of earlier eras. Nominees also provide critical information when they refuse to do this, by signaling which cases and issues they believe may be ripe for reconsideration. Understanding what a nominee believes is on and off the "constitutional table" in this way is helpful information for Senators attempting to take seriously their

constitutionally mandated responsibility to decide whether, or not, to consent to Supreme Court nominations.

The goal of my work for the past decade has been to shed empirical light on this key value of the confirmation process, and to stress that – contrary perhaps to its reputation – the confirmation process does in fact add great value to our system of constitutional self-governance. I applaud each of you for the tremendously challenging work you do during these proceedings, and the diligence with which you and your predecessors have undertaken that work.

Thank you so much for your time.

**The opinions expressed herein are my own. Institutional affiliation provided for identification purposes only.*