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The Top Five Supreme Court Nomination Myths

If you think the court hasn't always been a political place, you're wrong.

By Paul M. Collins Jr. and Lori A. Ringhand

Every time a seat opens up on the Supreme Court, our elected officials express their dismay at the political games being played by the other side. Even if the circumstances surrounding Merrick Garland's nomination to the high court are different this time around, the basic dynamic remains the same. Orrin Hatch, for example, will complain about how the Supreme Court is being treated like a "**political football**," while Harry Reid expresses outrage at Senate Republican threats to turn Garland into a piñata.* United States senators **argue on the Senate floor about who did what to whom first**, while those **wanting to stay above the fray** call on everyone to please just play nice. The script flips with the Senate majority, but our elected officials never fail to be shocked—**shocked!**—that the confirmation process is being politicized (by somebody else).

It is *just possible* that some of this outrage is feigned. But lying just beneath the surface indignation is an assumption that back in some bygone era we had a pristine confirmation process unpolluted by politics. Even as the battle to fill the current Supreme Court vacancy shapes up to be one of the oddest of recent times—many Republicans in the Senate are refusing to meet with Garland, and Sen. Majority Leader Mitch McConnell is promising there will be no hearings, much less a vote—we still can't afford to indulge this rosy view of the past. Politics and partisanship have always played a part in the confirmation process; they are baked into the constitutional cake. So rather than yearning for a time that never was, we need to start thinking about how to make the best of the process we actually have. (Spoiler alert: **just hold hearings!**)

Nope. From its start, the court has always been involved in the most pressing public issues of the day. In fact, in the early 1800s, Chief Justice John Marshall's Supreme Court was far from shy about issuing broad and controversial decisions about key questions facing the nation. That included expanding the reach of federal power in cases such as **McCulloch v. Maryland**, **Martin v. Hunter's Lessee**, and **Gibbons v. Ogden**. These cases seem rather quaint when we read them today—after all, they involve spat about ferryboats and royal land grants—but they were at the center of bitter political disputes. Since then, of course, the court also has dealt with questions

of continental expansion, Native American rights, slavery, nullification, the gold standard, segregation, desegregation, **the whole Lochner thing**, and, of course, *Bush v. Gore*. As Alexis de Tocqueville said, in America, political issues become legal issues.

Myth two: OK, but even if the court has been involved in hotly contested issues, presidents didn't choose justices on the basis of those things.

Again, nope. The United States has a long tradition of presidents using the Supreme Court to push their political allies onto the bench. Presidents George Washington and John Adams filled the bench entirely with their fellow Federalists. When the Democratic-Republicans swept the election of 1800, Adams—then a true **lame-duck president**—nominated John Marshall to the high court, and the lame-duck Senate happily confirmed him. President Jefferson promptly returned the favor, packing the court with his partisans whenever possible. In fact, Jefferson kept working to flip the court even after he left office. “The death of [Justice William] Cushing,” he wrote in 1810, was “opportune, as it gives an opening for at length getting a republican majority on the bench.”*

Other times it's the opposition to the nominee that is overtly partisan, such as when the nomination of Louis Brandeis—nicknamed in the press as “The People's Lawyer” —was treated by railroad and business interests as a constitutional apocalypse. The favor was returned in short order, when four other progressive-era nominees were all vigorously opposed by labor on the grounds that they were too sympathetic to exactly those same interests. And don't even get us started on **Franklin Delano Roosevelt's plans for the court**.

Myth three: The Senate used to defer to the president's choice.

Tell that to George Washington, whose 1795 nomination of John Rutledge to Chief Justice was defeated in the Senate by a vote of 10 to 14. Or to President John Tyler, who had all six of his Supreme Court nominations rejected by the Senate in the 1840s. (Don't feel too badly for Tyler—**he kind of deserved it**.)

On average, about 20 percent of nominees fail to win Senate confirmation. According to ***The Supreme Court Compendium***, this is a higher rejection rate than that of any other federal office. But the rejection rate has gone down, not up in recent years: In the 19th century, the rejection rate was closer to 1 in 3.

Myth four: But, wait—I remember Robert Bork. That was nasty, and proves the Democrats really did start it!

Sure, having your last name turned into a verb that essentially means to be systematically vilified is a pretty big indication of partisan intensity. What everyone

forgets is that President Ronald Reagan really swung for the fences in 1987 when he named then-Judge Robert Bork to the court. And he missed.

If confirmed, Bork would have filled the seat of swing Justice Lewis Powell and dramatically changed the direction of the court. What Reagan misjudged was how ready the rest of America was to make that change. The Bork confirmation process revealed that while anti-Warren Court rhetoric was still popular at the end of the Reagan era, the political center had grown rather fond of some of the court's "activist" decisions. So when Bork continued at his hearings to question landmark cases providing greater constitutional protection to women, non-political speech, and basic privacy rights, the center rebelled. Bork was voted down (after extensive hearings, we might add) by a bi-partisan vote of 42-58. Anthony Kennedy, with his feet planted much more firmly in the constitutional center, easily won confirmation a year later by a unanimous vote.

Myth five: Well, at least nominees used to answer questions at the hearings. Now they all follow the "Ginsburg rule" and refuse to say anything.

Listen, we understand that Justice Ginsburg seems to many to have **near-superhero powers**, but unless she was advising Supreme Court nominees from her cradle, she shouldn't be held responsible for a practice that started almost 80 years ago. Supreme Court nominees have always answered some questions and avoided others. But two **large, empirical** studies have both shown that the nominee responsiveness rate has not changed much over time, including after the Bork hearings.

So, it's pretty simple. A Supreme Court confirmation process that calls for a nomination by the president (an elected official) and requires consent from the Senate (also composed of elected officials) is going to be a political process. It always has been, and always will be.

But just because politics is going to inevitably play a role in a Supreme Court confirmation doesn't mean we shouldn't care what role it plays, and a confirmation process without confirmation hearings is **the worst kind of politics**.

Read more on Obama's nomination of Merrick Garland to the Supreme Court.

****Correction, March 24, 2016: This article originally misidentified Sen. Harry Reid as Henry. (Return.) It also misstated the date of Thomas Jefferson's quote about Judge William Cushing as having been written in 1804. It was written in 1810. (Return.)***

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