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# The ‘Ginsburg Rule’ Is Not an Excuse to Avoid Answering the Senate’s Questions

Washington Post, July 9, 2018.

By Lori Ringhand and Paul M. Collins Jr

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President Trump has announced his second nominee for the Supreme Court, which means it is time for a crucial reminder: The president has the power to nominate justices, but they can take their seat on the court only with the consent of the Senate. In other words, the Senate, like the president, has a constitutional role in vetting the values, reasoning and opinions of our future justices.

Today, this constitutional power is under threat. Trump’s first nominee, Neil M. Gorsuch, had little to say when he faced the Senate Judiciary Committee. In fact, [he was the least responsive nominee in decades](#), refusing to clearly answer questions about even canonical cases, such as *Brown v. Board of Education*. Despite vocal objections from the senators, it appears that [recent lower-court nominees](#) are following his lead.

At the heart of this dispute is the so-called Ginsburg Rule, a term used in confirmation hearings to argue that when answering questions from the senators, nominees must avoid offering “hints,” “forecasts” or “previews” — as Justice Ruth Bader Ginsburg put it in her confirmation hearing — into how they might rule on the bench.

But [as our work demonstrates](#), “Ginsburg Rule” is a misnomer. Ginsburg did avoid responding to some questions in her hearing, but she also, in fact, answered others substantively. Judicial nominees have done this for decades, but it’s only recently that nominees have abused this “rule” to avoid answering questions in any meaningful way.

[The Model Code of Judicial Conduct](#) prohibits judges from answering questions that could imply a bias in future cases, and nominees frequently invoke that concern when refusing to answer questions about specific issues likely to come before them during their time on the court. This is why few nominees offer opinions about currently contentious rulings such as *Roe v. Wade*.

But since just about any issue could at some point come before the Supreme Court, past nominees have declined to use that rationale to avoid answering all substantive questions about their legal positions. Doing so, as they have understood, would stymie the ability of the Senate to fulfill its constitutionally mandated role in the confirmation process.

Instead, nominees since the 1930s have balanced these competing needs by claiming a privilege to not opine on currently contested cases while freely offering their opinion about cases that used to be controversial but are no longer. Nominees are typically happy to affirm cases such as *Brown* and to reject cases such as *Korematsu v. United States*, which validated the internment of U.S. citizens and noncitizens of Japanese descent during World War II, and *Lochner v. New York*, which restricted the power of states to protect worker health and safety. More recent nominees also have affirmed the core holding of *District of Columbia v. Heller*, which held that the Second Amendment includes a personal right to possess firearms for home protection.

A nominee's willingness to accept, in public and under oath, the correctness of previously contested but no longer controversial constitutional cases and issues is critical to the success of the confirmation process. Nominees avoid offering opinions on current disputes, but their affirmation of the contemporary constitutional canon is an important way in which we as a society validate the Supreme Court's constitutional choices over time. It is a way of saying that certain issues are settled, even if people in an earlier era disagreed. In a system such as ours, which gives Supreme Court justices tremendous power, this is an essential check on how that power is exercised.

Our founders almost certainly saw this indirect control over the court as a feature and not a bug. The entire structure of the federal government is one of checks and balances. By putting the appointment of Supreme Court justices in the hands of elected officials, they ensured that the court is part of that system.

This carefully balanced process ensures that the decisions of the court don't drift too far from the constitutional commitments of the people. Almost by definition, cases with clear legal answers do not make it to the Supreme Court. Fewer than [80 cases](#) make it to the court a year, and in nearly all of them, able judges across the country have disagreed about the correct answer to the legal question presented. They also often involve some of the Constitution's most open-textured language, such as "equal protection," "freedom of speech" and "liberty."

When the justices decide these cases, they must exercise not just sharp legal reasoning but also sound legal judgment. They must take the hodgepodge of possibilities rendered by tools of constitutional interpretation and mold them into a coherent body of law consistent with our most fundamental constitutional commitments.

Until recently, nominees of both parties have understood this. They have combined their privilege to avoid some questions with the recognition that they have a corresponding duty to answer others. Senators — and the American public — should insist that this Supreme Court nominee does so as well.