

**PRECEDENT FROM THE CONFIRMATION
HEARINGS OF RUTH BADER GINSBURG
FOR THE CONDUCT OF JUDICIAL
NOMINEES**

By

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PRECEDENT FROM THE CONFIRMATION HEARINGS OF RUTH BADER GINSBURG FOR THE CONDUCT OF JUDICIAL NOMINEES

Jay T. Jorgensen¹

Both the federal courts and the United States Senate rely extensively on precedent for the conduct of their current affairs. Whether or not a particular practice is embodied in any formal rule, both the courts and the Senate have regarded continuity of past practice as an essential part of orderly and fair government and have followed their precedents absent some compelling reason to change.

As any person who follows the news knows, the Senate has recently found itself embroiled in controversies about how senators and nominees to the federal bench should behave in posing and answering questions during the judicial confirmation process. In the hope that past practice will provide a guidepost for resolving these controversies, this paper reviews the confirmation hearings conducted on Ruth Bader Ginsburg's nomination to the Supreme Court and addresses the precedent set during those hearings for the conduct of judicial nominees. In particular, the memorandum addresses the extent to which judicial nominees may decline to answer questions posed by senators during the confirmation process, and the extent to which generalized answers are appropriate in response to both specific and general questions.

This paper sets forth some illustrative quotations in discussing the interplay between Justice Ginsburg and the members of the Senate during her confirmation. These quotations are merely examples of the conduct that they represent. Additional examples could be given for the categories discussed.

I. Senator Biden's Comments on the Conduct of Supreme Court Nominees

Senator Joseph Biden was Chairman of the Senate Judiciary Committee when Justice Ginsburg was nominated to the Supreme Court in 1993. On July 15, 1993, shortly after Justice Ginsburg's nomination became known to the Senate, Senator Biden identified the standards he expected senators and judicial nominees to follow in the confirmation process. Importantly, Senator Biden noted that the Senate's hearings, including the question-and-answer period between senators and the nominee, should not be a "dramatic spectacle" or a "trial." Senator Biden also emphasized that the nominee's appearance before the Senate should not be invested with a make-or-break importance, as the Senate's hearings are only one part of the confirmation process (particularly in instances when nominees have a long-standing public record that illustrates their qualifications and views).

In contrast to the recent idea that a nominee's appearance and answers before the Senate are an essential part of the confirmation process, Senator Biden noted that the practice of inviting Supreme Court nominees to appear before the Senate is relatively novel. Senator Biden said:

[I]t is useful to recall that testimony before the Judicial Committee

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by Supreme Court nominees is a new phenomenon.

Appearance before the committee became a standard part of the confirmation process only in the year 1955, with John Marshall Harlan. No Supreme Court nominee testified personally until 1925, when Attorney General Harlan Fisk Stone responded to allegations of prosecutorial misconduct in the investigation of a Senator.

The next five nominees did not testify at all, and it was not until 1938 that Stanley Reed appeared. The next year, Felix Frankfurter testified, but William O. Douglas waited outside the committee hearing room without ever being called in as a witness. And in 1949, Sherman Minton was called to testify at the hearing on his nomination to the Court. He refused to appear on the grounds that his record as a Senator and as appellate judge spoke for itself. He refused to come. He was called before the committee in 1949. He refused to come and he was confirmed by the Senate.²

Senator Biden's comments are important because they demonstrate that the current gladiatorial process of attacking a nominee before the television cameras is not a deeply rooted part of American history and tradition. Additionally, whatever reticence current nominees may show in participating in the Senate's hearings, that reluctance will likely not be as significant as Justice Minton's outright refusal to appear when called.

Senator Biden also commented on the extent to which Supreme Court nominees should answer questions about their potential future rulings. Senator Biden said "the public is best served by questions that initiate a dialog with the nominee, *not about how she will decide any specific case that may come before her*, but about the spirit and the method she will bring to the task of judging. There is a real difference ... between questions that focus on specific results or outcomes, the answers to which would risk compromising a nominee's independence and impartiality, and questions on judicial methods and philosophy. The former can undermine the dispassionate and unprejudiced judgment we expect the nominee to exercise as a Justice. But the latter are essential and contribute critically to our public dialog."³

Senator Biden's comments should be helpful to current senators and nominees as they reflect the considered judgment of a Democratic chairman of the Senate Judiciary Committee and explain the standards he used for conducting hearings on a Democratic nomination.

II. Justice Ginsburg's Responses to Senators' Questions

In answering questions before the Judiciary Committee, Justice Ginsburg added her own twist to Senator Biden's standard for nominees. While Senator Biden had said that a nominee should decline to answer questions about how she would decide a specific case, which suggests that only prospective cases are off-limits, Justice Ginsburg declined to answer questions

² CR S8771.

³ *Id.* (emphasis added).

about her views on both prospective and many historical Supreme Court cases. She also declined to answer questions (or gave non-responsive answers to questions) involving a number of controversial issues, hypothetical facts, or areas in which she is not an expert.

In the give-and-take of the hearing, Justice Ginsburg was not always consistent in the standards she applied in deciding whether to answer a question. For example, sometimes she answered questions on a controversial issue currently before the federal courts (such as the validity of *Roe* and its reasoning), and other times she would decline to answer a question specifically because the issue involved a controversial issue currently before the federal courts. However, with that caveat in mind Justice Ginsburg's standards for answering the senators' questions can be summarized as follows:

A. Questions must address specific real-world facts and specific issues, rather than hypotheticals or broad questions of policy or belief

Justice Ginsburg emphasized that judges decide cases based upon real-world facts and that appellate judges are presented with a developed factual record in each case. Justice Ginsburg cited this as a reason to decline to answer questions that were either completely hypothetical or that were vague in their factual underpinnings. For example:

Senator Metzenbaum. My question to you is: How would you view an antitrust case where the facts indicated that there had been anti-competitive conduct but the defendant attempted to justify it based on an economic theory such as business efficiency?

Judge Ginsburg . I am not going to be any more satisfying to you, I am afraid, than I was to Senator Specter. I can answer antitrust questions as they emerge in a case. I said to you yesterday that I think the only case where I addressed an antitrust question fully on the merits was in the Detroit newspaper case where I think I faithfully--or at least I attempted to faithfully interpret the Newspaper Preservation Act and what Congress meant in allowing that exemption from the antitrust laws.

Senator Metzenbaum. Indeed you did.

Judge Ginsburg . Antitrust, I will confess, is not my strong suit. I have had, as you pointed out, some half a dozen--not many more--cases on this court. I think I understand the consumer protector, the entrepreneur, individual decisionmaking, protective trust of those laws, but I can't give you an answer to your abstract question any more than I could--I can't be any more satisfying on the question you are asking me than I was to Senator Specter on the question that he was asking.

If you talk about my particular case--and it was a dissent. There was a division in the court on how to interpret that statute. I think I tried to indicate what my approach--I think that case indicates what

my approach is in attempting to determine what Congress meant. But I can't, other than saying I understand----

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Senator Leahy. Does that mean that the Free Exercise Clause and the Establishment Clause are equal, or is one subordinate to the other?

Judge Ginsburg. I prefer not to address a question like that; again, to talk in grand terms about principles that have to be applied in concrete cases. I like to reason from the specific case and not----

Senator Leahy. Let me ask you this: In your view of the Supreme Court today--or do you have a view whether the Supreme Court has put one in a subordinate position to the other?

Judge Ginsburg . The two clauses are on the same line in the Constitution. I don't see that it is a question of subordinating one to the other. They both have to be given effect. They are both----

Senator Leahy. But there are instances where both cannot be upheld.

Judge Ginsburg . Senator, I would prefer to await a particular case and----

Senator Leahy. I understand. Just trying, Judge. Just trying.

* * * * *

Senator Thurmond. ... [B]ased upon your understanding of the U.S. Constitution, do communities, cities, counties and States have sufficient flexibility to experiment with and provide for diverse educational environments aided by public funding and geared to the particular needs of individual students of their particular area of jurisdiction?

Judge Ginsburg. Senator Thurmond, that is the kind of question that a judge cannot answer at-large. The judge will consider a specific program in a specific school situation, together with the legal arguments for or against that program, but it cannot be answered in the abstract. As you well know, judges work from the particular case, not from the general proposition.

B. Nominees cannot be expected to give detailed, expert answers to questions involving every legal subject, as no person is an expert in everything

As the foregoing quotes illustrate, Justice Ginsburg also asked for (and got) leniency in answering questions involving areas in which she is not an expert. Justice Ginsburg told Senator Metzenbaum that she had limited experience in the antitrust area, and suggested that she therefore could not discuss all aspects of antitrust law. Justice Ginsburg's exchange with Senator Feinstein on the Second Amendment is another example:

Senator Feinstein. Thank you, Mr. Chairman.

Just to try to pursue that a little bit further, Judge Ginsburg, could you talk at all about the methodology you might apply, what factors you might look at in discussing Second Amendment cases should Congress, say, pass a ban on assault weapons?

Judge Ginsburg. I wish I could, Senator, but all I can tell you is that this is an amendment that has not been looked at by the Supreme Court since 1939. And apart from the specific context, I really can't expound on it. It is an area in which my court has had no business, and one I had no acquaintance as a law teacher. So I really feel that I am not equipped beyond what I already told you, that it isn't an incorporated amendment. The Supreme Court has not dealt with it since 1939, and I would proceed with the care that I give to any serious constitutional question.

While admitting inexperience in specific areas of the law could undermine a nominee (since nominees are judged in part on their legal knowledge), Justice Ginsburg's hearings demonstrate that the Senate recognizes a particular nominee will not have expertise in all areas of the law.

C. Nominees (particularly sitting judges) can decline to answer by citing their experience in deciding cases based on the legal research and argument set forth in briefs, rather than answering general, non-case-specific questions

This point is related both to Justice Ginsburg's refusal to answer broad, non-fact-specific questions and her willingness to concede that she is not an expert on all legal subjects. Justice Ginsburg declined to answer some questions because the question did not provide the full legal briefing and argument that judges ordinarily receive and use as a basis for their decisions in the cases that come before them.

Senator Grassley. Well, there wouldn't be any question about separation of powers protecting Members of Congress from applicability of criminal laws against this. What principal distinction can there be made of having employment laws or civil rights laws applied to Congress?

Judge Ginsburg. I think if you ask the counsel to the Senate, who argued very effectively in a number of Speech or Debate Clause cases before us, for a brief on that subject, that office would be best qualified to address it.

Senator Grassley. Well, I believe before long you will be addressing it sometime. Obviously that would keep you from responding to specific question, but---

Judge Ginsburg . If and when, I would have the benefit of the wonderful brief, I hope; the briefs on both sides. But that is the difficulty that I confront in this milieu. I am so accustomed--and as a judge, it is the only way I can operate, on a full record, with briefs, and not making general statements apart from a concrete case for which I am fully prepared with the arguments that parties make on both sides.

D. Nominees can refuse to answer questions relating to specific cases or controversies likely to come before them as Justices of the Supreme Court

As Senator Biden's remarks suggested, Justice Ginsburg repeatedly declined to answer questions involving specific cases or issues likely to be addressed by the Supreme Court.

Senator Thurmond. One vocal critic of this decision said that the Supreme Court has now created an entirely new constitutional right for white people. Judge Ginsburg , do you believe this to be an accurate assessment of the Shaw decision? And if confirmed, how will you approach challenges to reapportionment plans under the Equal Protection Clause?

Judge Ginsburg . Senator Thurmond, the Shaw case to which you referred was returned to a lower court. The chance that it will return again to a higher court is hardly remote. It is hardly remote for that very case. It is almost certain for other cases like it. These are very taxing questions. I think that the Supreme Court has redistricting cases already on its docket for next year, so this is the very kind of question that would be injudicious for me to address.

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Senator Thurmond. What are your views on the constitutionality of some form of voucher system, so that working and middle-class parents can receive more choice in selecting the best education available for their children?

Judge Ginsburg. Senator Thurmond, aid to schools is a question that comes up again and again before the Supreme Court. This is the very kind of question that I ruled out.

Senator Thurmond. Would you prefer not to answer?

Judge Ginsburg. Yes.

* * * * *

Senator Brown. I wanted to cover one last area, and it may be an area you would prefer not to explore. If you do, I would certainly understand.

I believe earlier on Senator Cohen and others had brought up a question with regard to homosexual rights. I would not expect you to rule on something or advise on something that may well involve a case. But there is a question I thought you might clear up for us that I think has some relevance here.

The Equal Protection Clause, as we have explored it this afternoon, deals, in effect, requiring sex-blind standards with regard to Government action or legislation, or may well deal in that area. That relates to classes of people; in this case, males and females. Obviously there are other classes.

In the event we are dealing with forms of behavior--and I appreciate that is not a foregone conclusion with regard to homosexuals. That is open to debate whether or not it is a class of people or forms of behavior. But in the event we are dealing with forms of behavior, would they come under the provisions of the Equal Protection Clause?

Judge Ginsburg. Senator Brown, I am so glad you prefaced this by saying you would understand if I resisted a response, because this is an area where I sense that anything I say could be taken as a hint or a forecast on how I would treat a classification that is going to be in question before a court, and ultimately the Supreme Court. So I think it is best that I not do anything that could be seen, be used as a prediction of how I might vote with regard to that classification.

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Senator Cohen. What about sexual orientation?

Judge Ginsburg. Senator, you know that that is a burning question that at this very moment is going to be before the Court based on an action that has been taken. I cannot say one word on that subject that would not violate what I said had to be my rule about no hints, no forecasts, no previews.

E. Nominees can give generalized answers to questions that involve judicial management or that address issues impacting the entire judiciary

The senators asked Justice Ginsburg at least two questions that involved issues of judicial tenure and courtroom management, rather than judicial decision-making. These questions addressed whether the federal courts should allow cameras in the courtroom and whether the judiciary should have an internal mechanism for disciplining judges who engage in serious wrongdoing. Justice Ginsburg gave very general answers to both of these questions because they did not address matters in which she could effectively act on her own. All federal judges have a voice in these issues of judicial management, which must be decided in consultation with other judges (at a minimum in consensus with the other Supreme Court justices, if not in consensus with the entire U.S. Judicial Conference). Justice Ginsburg deferred in large part to this need for judicial consultation and consensus.

Senator DeConcini. Let me put it this way, Judge: Do you think there is any merit to a process within the judicial branch of government, which would permit the removal of a judge?

In other words, what if a constitutional amendment set up or gave authority to the judicial branch to set up procedures where complaints could be heard? A judge would have an opportunity to respond and to have a hearing and to appeal the hearing, and what have you, and that the Supreme Court or somebody within the judicial branch could, in fact, dismiss the judge. Have you given that any thought?

Judge Ginsburg. I understand that the Kastenmeier Commission that has been looking into the discipline and tenure of judges, has come out with a preliminary draft of its report that takes a careful-- that commission has been operating for some time and it is supposed to have a very broad charter to take a careful look at all these areas.

I will read the final report when it comes out with great interest, but I don't feel equipped to address that subject.

Senator DeConcini. Let me ask you this: Is it offensive to you, if the judiciary had authority to discipline judges and that discipline could also include dismissal?

Judge Ginsburg . We already have an in-house complaint procedure, as you know.

Senator Deconcini. Yes, I do.

Judge Ginsburg . And I think that has worked rather well. It has never come to the point in all my 13 years there has been an instance calling for removal.

Senator DeConcini. My problem, Judge, is what do you do with a convicted judge? Wouldn't it be appropriate for the judiciary to have a process that they could expel that judge? I mean I am giving you the worst of all examples. I am not talking about the litigant who is unsatisfied, doesn't like the ruling of the judge and, thereby, files a complaint as to moral turpitude of the judge, and then you have a hearing on that. I am talking about something that is so dramatic as a felony conviction of a judge.

Judge Ginsburg . Senator, I appreciate the concern that you are bringing up, and it isn't hypothetical, because there are judges who are in that situation. They are rare, one or two in close to a thousand.

Senator DeConcini. I think there are two.

Judge Ginsburg . So I appreciate the problem. When I was asked before about cameras in the court room, I was careful to qualify my own view, saying I would, of course, give great deference to the views of my colleagues on this subject, and there is an experiment going on now in the Federal courts on that subject.

Here I don't even feel comfortable in expressing my own view, without the view of the U.S. Judicial Conference on this subject. I know that the judges are going to study the Kastenmeier report, and they are going to react to it. I can just say that I appreciate it is a very grave problem.

F. Nominees can decline to answer questions (or give general answers) in areas of the law that are evolving or otherwise in flux

Justice Ginsburg also declined to give specific answers to questions involving areas of the law that she believed to be evolving or otherwise in flux. Presumably the rationale for this refusal is that the ongoing uncertainty in the area prevents (or at least hampers) detailed discussion of the issues.

Senator Moseley-Braun. So I have two questions. The first is, in a situation like this, if the property owners challenge the government action as a taking of their property, what principles should the Supreme Court look to in evaluating that claim?

Judge Ginsburg . Senator, the question has some kinship to the one that Senator Pressler raised about the wetlands. It is just evolving. There is a clear recognition that at some point a regulation does become a taking. When that point is reached is something to be settled for the future.

We do know that, as I said in the Lucas case, when the value of that property is totally destroyed as a result of the regulation, that is indeed a taking and there must be compensation for it. Reliance is certainly one of the factors that goes into the picture.

As I say, this is just a developing area and it is still evolving and I can't say any more about it than is reflected in the most recent precedents in the Nolan case and in the recent Lucas case of the Court. But there certainly is sensitivity to the concerns. One, the regulations for the benefit of the community, which you mentioned, and the other is the expectation, the reliance of the private person, and those two will have to be balanced in the future cases coming up. But this is an area that is very much evolving now, and I can't say anything more than I have said about it so far.

G. Nominees can decline to discuss their personal feelings or reactions to issues or decisions

On several occasions Justice Ginsburg declined to answer questions about her personal feelings or emotional reactions to issues or particular judicial decisions. Presumably this refusal is justified by the idea that a federal judge is supposed to apply the law to the facts irrespective of her personal feelings or views.

Senator Pressler. Are you uncomfortable that the Constitution's Bill of Rights does not extend to Native Americans?

Judge Ginsburg. I can't express my personal view on that subject. I know that there are many people who care deeply about the concept of tribal sovereignty. I am not a member of one of those communities and, as a judge, I will do my best to apply faithfully and fairly the policy that Congress sets with respect to tribal governance.

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Senator Simon. If I could get you to be a little more specific here, if I can ask, not in commenting on the substance of the Alvarez case--incidentally, he was tried in the United States and not found guilty--but were you at all startled, when you heard about the results of the Alvarez case?

Judge Ginsburg . If I may, Senator, I would not like to comment on my personal reactions to that case. I think I told you what my view is on how U.S. officials should behave, and I would like to leave it at that. This was a decision of the United States Supreme Court that you have cited, and I have religiously tried to refrain from commenting on a number of Court decisions that have been raised in these last couple of days.

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Senator Specter. Let me ask you a question articulated the way we ask jurors, whether you have any conscientious scruple against the imposition of the death penalty?

Judge Ginsburg. My own view on the death penalty I think is not relevant to any question I would be asked to decide as a judge. I will be scrupulous in applying the law on the basis of the Constitution, legislation, and precedent. As I said in my opening remarks, my own views and what I would do if I were sitting in the legislature are not relevant to the job for which you are considering me, which is the job of a judge. So I would not like to answer that question, and more that I would like to answer the question of what choice I would make for myself, what reproductive choice I would make for myself. It is not relevant to what I would decide as a judge.

III. Conclusion

Justice Ginsburg's hearings demonstrate that there are many valid reasons why a judicial nominee may decline to answer the questions posed by individual senators. Justice Ginsburg declined to answer, or gave only generalized answers, to a vast number of the questions she was asked during her confirmation hearings. Despite this, Justice Ginsburg was confirmed by a vote of 96-3, which suggests that the Senate recognized her reasons for caution as valid and appropriate. In light of this precedent, the Senate and current judicial nominees should carefully apply those same reasons for caution (discussed above) to establish a common understanding of the rules for a confirmation hearing. This understanding will help in avoiding much of the delay and conflict that has become part of the confirmation process.



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