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The rot at the core of the Senate turns Supreme Court confirmation hearings into gratuitous distractions—or frequently, worse.

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Supreme Court nominee Ketanji Brown Jackson testifies during her Senate Judiciary Committee confirmation hearing on Capitol Hill in Washington, March 22, 2022.

No jurist should have to face an inquisition from the thuggish wing of the Senate. The microaggressions that Judge Ketanji Brown Jackson endured in her confirmation hearing made it clear that the only thing that the Senate Judiciary coven of Sens. Ted Cruz, Josh Hawley, and Marsha Blackburn wanted was to goad Jackson into some sound-bite-able, nomination-dooming missteps, ready for their campaign commercials and social media.

What the coven didn't anticipate was being schooled in a master class in judicial temperament: Republican senators conceded as much as they jostled to get to the head of the line to explain why they would not confirm Jackson.

The hearing, as Russ Feingold, the former Wisconsin Democratic senator now heading the American Constitution Society, noted, "was a coordinated attempt to humiliate her in order to set up a soft-on-crime argument for the fall election that really has no place in a United States Supreme Court nomination hearing." Alaska Republican Lisa Murkowski said in a statement that her yes vote on Jackson "rests on my rejection of the corrosive politicization of the review process for Supreme Court nominees, which, on both sides of the aisle, is growing worse and more detached from reality by the year."

Politics cannot be eliminated from a process designed and executed by politicians. But the Senate needs to move, admittedly something it doesn't do well or often, to reform its Supreme Court confirmation hearings rules and procedures to assure that nominees and the public do not suffer through days of middle school detention–level behavior and nonsensical questions. Seventy-two percent of Americans surveyed in a Quinnipiac University national poll believe that Supreme Court nomination hearings have become too political, while another 52 percent disapprove of the way the Senate Republicans have handled these particular hearings.

Using the Senate and Judiciary rules processes, hearings could be revamped to eliminate distracting antics. Feingold, who served on the Judiciary Committee hearings for Chief Justice John Roberts, and Associate Justices Samuel Alito, Elena Kagan, and Sonia Sotomayor, suggests

that since the Senate Judiciary Committee has its own unique rules, those mechanisms could be strengthened to match Senate floor Rule 19 regarding decorum, which empowers the chair to "gavel down" anyone who uses "dilatory tactics or inappropriate techniques," says Feingold, adding that Rule 19 has been "sometimes enforced" and "abused" by members. Even more specific rules could be instituted to require that certain kinds of settings, like confirmation hearings, require certain kinds of decorum.

Televised hearings for Supreme Court nominees have generated controversy since they were first instituted for Sandra Day O'Connor's confirmation. Although ending live television coverage and substituting recordings (as some lower federal courts do) or live audio-only sessions might curb exhibitionism, it would likely be a political nonstarter for senators.

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But exhibitionism has debased the legal value of the hearings. Senators insist on riffing on questions that have already been asked and answered or avoided by nominees or, worse, ask questions on issues that have no bearing on matters that have come before the Court, such as critical race theory, the detour taken by Cruz. "I can see the adoption of … language to keep to topics and discussion that are relevant to the nominee and what [position] they're being appointed for," says Feingold. "The kind of thing that Cruz was doing could have been ruled out of order *potentially*; I think you could do it, there just are no rules."

As to the nominees, they usually want to avoid being pinned down to specific positions. Kagan, prior to her ascension to the high court, wrote in a 1995 *University of Chicago Law Review* article, "Confirmation Messes, Old and New," that Justices Anthony Kennedy, David Souter, Clarence Thomas, Ruth Bader Ginsburg, and Stephen Breyer gave vague answers to certain questions. (At her own 2010 confirmation hearings, she did the same.) Kagan wrote: "When the Senate ceases to engage nominees in meaningful discussion of legal issues, the confirmation process takes on an air of vacuity and farce, and the Senate becomes incapable of either properly evaluating nominees or appropriately educating the public. Whatever imperfections may have attended the Bork hearings pale in comparison with these recent failures."

One way to diminish the raw politics of the process could be to have a senator's chief counsel, rather than the senator, ask the questions. But the senators, most of whom are lawyers, and some even onetime Supreme Court law clerks (like Utah Republican Mike Lee, who acquitted himself respectfully in the Jackson hearing) would be unlikely to cede questions to staff members. Questions about issues a judge has worked on, such as sentencing in child pornography cases or representation of a certain client in Guantanamo are certainly permissible, says Feingold. "What is not legitimate is constantly probing the witness, pretending that you are going to let that person respond and cutting them off before they can make a response." That shouldn't deter senators from seeking to draw out evasive nominees. Senators could say, "'You really should answer this,'" says Feingold, "because what the coaches tell them on both sides is answer nothing."

For her part, Judge Jackson delivered a twist on the judicial philosophy query that senators like to press nominees on, deftly pivoting to describing instead her "judicial methodology." "That's frankly, a better way of thinking, potentially even for so-called originalist judges," says Gabe Roth, executive director of Fix the Court, a nonpartisan Supreme Court/federal judiciary reform advocacy group. "You had a judge saying, 'This is what I do when I go to a case; these [are the] methods of interpretation I use; this is the history and the texts and the statute and the constitutional language. And these are all the things that come to bear when a case reaches my desk.'"

Some legal advocates would like to see a nominee's on-the-record written answers that they provide to senators before public hearings also made public before the hearings, rather than after, as is currently the case. "You will see how the judge thought about responding to various questions that were posed in a nonadversarial position," says Rakim Brooks, president of Alliance for Justice, a progressive court reform advocacy group. That way, "we would all know in advance if there was a duck and dodge in a particular question, but we'd also know they're on record not answering."

Hearings on Supreme Court nominees should also be required by law to take place within a set time window. That would prevent both the tactics used by then–Majority Leader Mitch McConnell to thwart President Obama's right to install Antonin Scalia's successor, as well as those used by President Trump to rush through Amy Coney Barrett's confirmation.

Brooks notes that the intensity of these hearings, crammed into several days with marathon rounds of interrogation, suggests that they often are going to end up in "a hysterical place because a senator gets 30 minutes of questioning. The nominee is exhausted. The chair doesn't want to take a break because we're in such a rush to get the person confirmed."

He recommends that the Senate "regularize what the process is going to be, with everybody just agreeing in advance that [for example] it's going to be two weeks."

Ilya Shapiro, vice president of the libertarian Cato Institute, takes a more radical view of how to deal with the spectacle of Senate hearings. In testimony before the 2021 Presidential Commission on the Supreme Court of the United States, he proposed scrapping confirmation hearings across the board, since so much information about nominees and their records is available online. Alternatively, he argued, they could be held in a closed session, as the intelligence committees' hearings are, "which are more effective."

In the hyper-partisan Senate, even a groundswell of condemnation such as that which has followed the spectacle of Republican behavior at the Jackson hearings doesn't mean change is gonna come. Nonetheless, there's a growing belief across the political spectrum that the confirmation hearings have become little more than a test of the nominee's endurance and personal composure.

There are ways to vet nominees for the Supreme Court that don't descend into verbal hazings by members of one party. Indeed, such hazing-free hearings were once more the norm than the

exception. Surviving a confirmation hearing with one’s dignity intact should not be a prerequisite for public service.