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End confirmation hearings for Supreme Court nominees

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As the battle over another Supreme Court nomination rages, reform proposals abound: term limits, changing the size of the court to make each seat less important, periodically rotating in circuit judges rather than having permanent justices. Setting aside Supreme Court structure, what about the confirmation process itself? Should we have rules for how many days after a nomination there must be a hearing and then a vote?

Maybe we should consider restoring the filibuster for nominees — although Neil Gorsuch was the first and only Supreme Court nominee subject to partisan filibuster. (Justice Abe Fortas lacked even a majority of announced support for his elevation to chief justice in 1968, while Justices Clarence Thomas and Samuel Alito were confirmed with fewer than 60 votes.) Of course, if we had the political unity for these kinds of changes, we wouldn't have the toxic atmosphere we're in, so it's a chicken-and-egg problem.

Earlier this year, at a Princeton conference on the politics of judicial nominations, Henry Saad, a former Michigan court of appeals judge whose nomination to the Sixth Circuit was filibustered under George W. Bush, proposed a number of process reforms. Saad would make it a violation of judicial ethics for nominees to give their opinions about a case, while making hearings untelevised, with questions submitted in writing, restricted to professional qualifications, and asked by the chief counsel for each party's judiciary committee members.

Some congressional committees allow this in other contexts, and while it didn't seem to work very well for Republicans in the supplemental hearing on Brett Kavanaugh's nomination, that was largely a function of the five-minute increments the counsel questioning was forced into. Any personal information or ethical concerns could then be handled in the confidential session that the Senate Judiciary Committee already has to discuss the required FBI background check and other sensitive matters.

These sorts of post-nomination proposals are healthy, because they target the spectacle that confirmations have become, with senators either not equipped to handle the required lines of questioning or grandstanding to produce a gotcha moment, or at least B-roll for campaign videos. "It's like testifying in a restaurant," quips former White House counsel Don McGahn, with photographers clicking away in front and protesters haranguing in the back. And it's not like we learn anything about nominees, who are now coached to avoid saying anything newsworthy.

The Senate didn't even hold public hearings on Supreme Court nominations until 1916, a tumultuous year that witnessed the first Jewish nominee (Louis Brandeis), and then the resignation of a justice to run against a sitting president. It wouldn't be until 1938 that a nominee testified at his own hearing. In 1962, the part of Byron White's hearing where the

nominee himself testified lasted less than 15 minutes and consisted of questions about his storied football career. It was a different time.

I've come to the conclusion that we should get rid of hearings altogether, that they've served their purpose for a century but now inflict greater cost on the Court, Senate, and rule of law than any informational or educational benefit gained. Given the voluminous and instantly searchable records nominees have these days — going back to collegiate writings and other digitized archives — is there any need to subject them, and the country, to a public inquisition?

At the very least, the Senate could hold nomination hearings entirely in closed session.

Any such change won't come in time for the consideration of Amy Coney Barrett, of course, but to turn down the heat on future nominations, we need to think outside the box.

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