**Delrahim, Makan EOP/WHO**

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| **From:** | Delrahim, Makan EOP/WHO |
| **Sent:** | Tuesday, January 31, 2017 4:46 PM |
| **To:** | Delaplane, Blake W. EOP/WHO |
| **Cc:** | Teller, Paul S. EOP/WHO; McGahn, Donald F. EOP/WHO; brett.talley@usdoj.gov |
| **Subject:** | FW: Join Conf. Call Speaker Line no later than 8:30pm Tonight |

Blake here is the call. It will be only 15 minutes and we can do this in Don's office.

You may dial in for your pre-conference 15 minutes prior to the scheduled start time of 8:30 using the Conference ID below. If you are a Presenter, please alert the Meeting/Event Specialist.

**Conference ID:** (b) (6)

Speakers, Int'l Toll: (b) (6)

**Gary A. Marx, Senior Advisor, JCN**
(b) (6)
www.judicialnetwork.com
@garymarx

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**From:** Gary Marx [mailto:Gary@madisonstrategiesllc.com]
**Sent:** Monday, January 30, 2017 6:41 PM
**To:** Gary Marx
**Subject:** Join Conf. Call: SCOTUS Nom. to be Named by Pres. Trump Tomorrow @ 8pm

Dear Friends & Allies,

As you may know, word out that the White House will be announcing the SCOTUS nominee at 8:00pm Tuesday evening. I wanted to remind you that there will be a coalitions conference call that will take place 15 minutes after the nomination announcement by the President concludes. We estimate this call to be around 8:30pm.

*Please note that this invitation is not transferable and that individuals who are not on our list will not be permitted to join by the conference call operator. Call information will be sent to you tomorrow. Stay tuned.*

Please join a conference call to discuss this nominee's biography, background, philosophy and rulings.

We will have a number of speakers present their perspectives including Leonard Leo and

Jonathan Bunch of the Federalist Society, Carrie Severino of Judicial Crisis Network and Ed Whelan of the Ethics & Public Policy Center and National Review's Bench Memos.

In addition, as previously discussed, JCN and other coalition members will be focused on putting pressure on key democratic senators who are up for re-election in 2018 in states like Montana, Missouri, Indiana, North Dakota, Ohio, Florida, Pennsylvania, Michigan, Wisconsin and West Virginia.

## Here are some basic Talking Points to use in Rapid Response:

### THE CASE FOR CONFIRMATION

President Trump kept his promise to nominate an exceptionally qualified individual who has a record of applying the Constitution as the Framers meant it to be.

This nominee is a widely respected, decent person whose record makes it clear that he will be fair to all, regardless of background or beliefs. Like Justice Scalia, he believes that judges should base their decisions on the law and the Constitution, not their own policy preferences or personal feelings.

President Trump went further than any presidential candidate in history by sharing his list of potential Supreme Court nominees with the American people. Exit polls showed that the Supreme Court was the top issue for one in five voters.

The American people have spoken, and it is now time for the Senate to give the Nominee a full and fair hearing and to confirm her so that the Court is at full capacity.

Not Responsive Records

**From:** Nathanael Bennett (b) (6)
**Date:** February 1, 2017 at 11:36:21 AM EST
**To:** (b)(6) - James Burnham Email Address
**Subject: Jay Sekulow Meeting**

James,

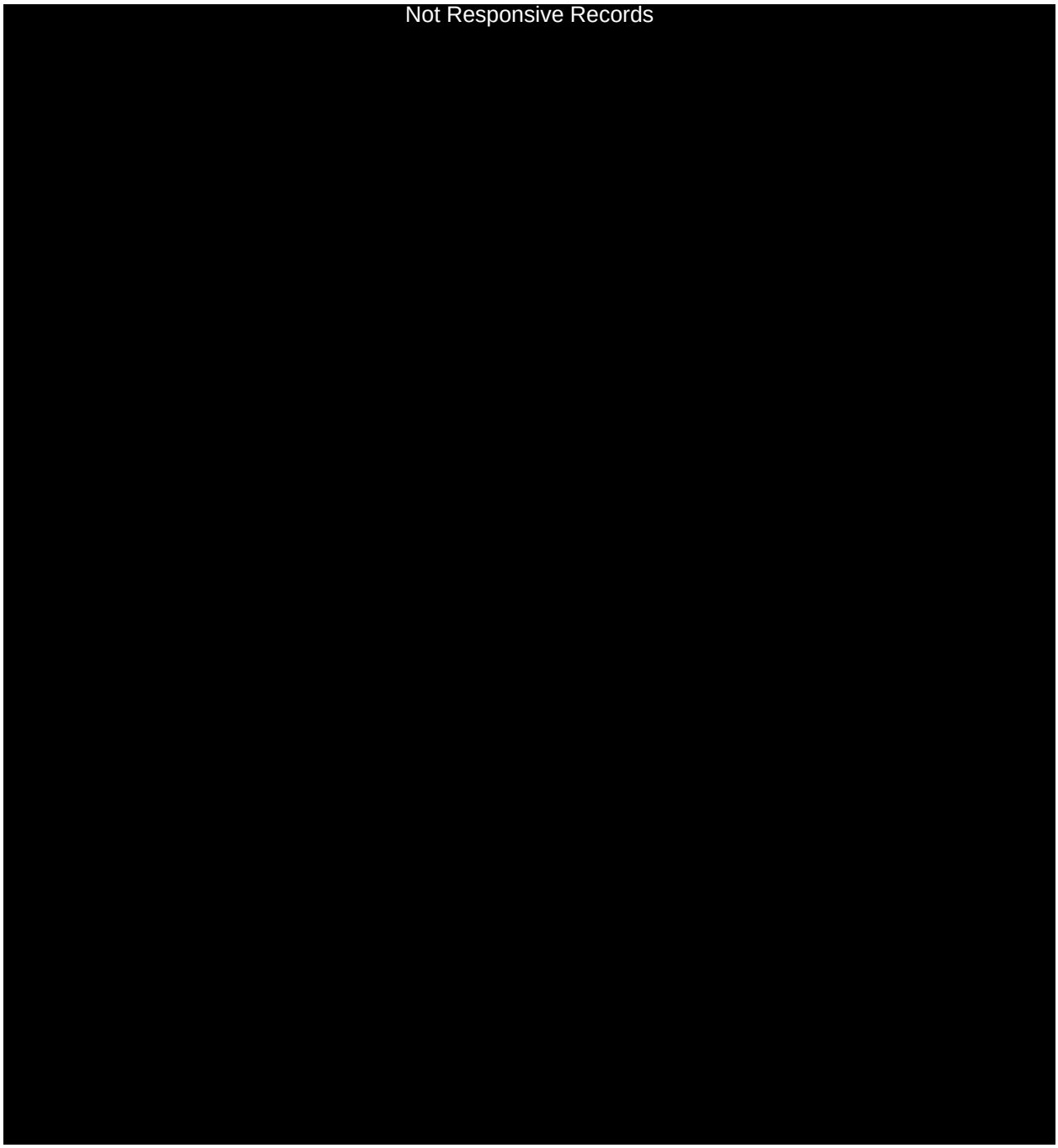
Congrats on a terrific nominee! I understand you are coordinating meetings for Judge Gorsuch. Any chance he might have just a few minutes to meet my boss, Jay Sekulow, sometime on Thursday or Friday? Jay is a regular advocate in front of the Court and has been hitting the media circuit hard in favor of the judge (Hannity, 700 Club, etc). He would love to just very briefly say hello if that is a possibility.

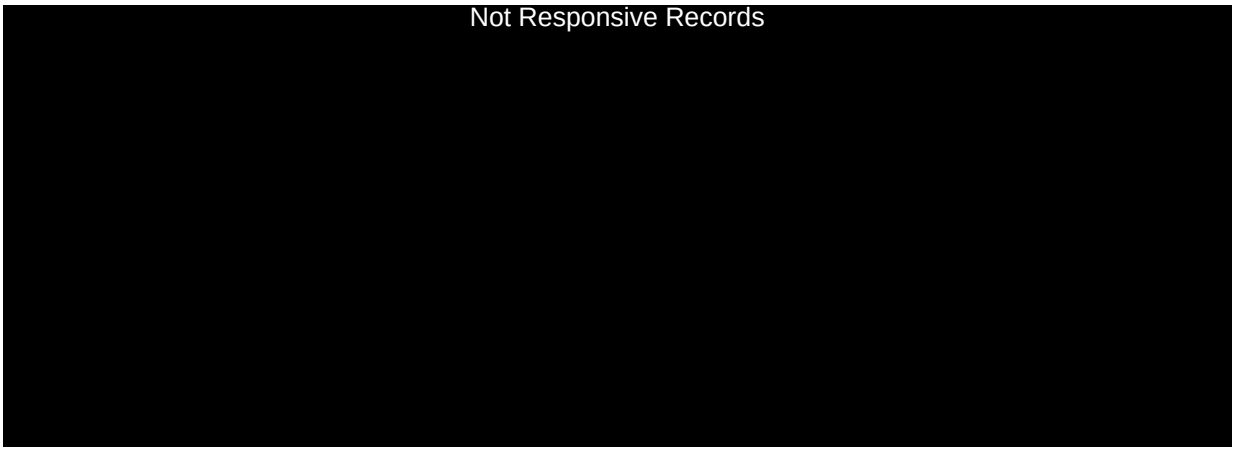
Again, congrats. Extremely strong pick.

Thann Bennett
ACLJ

**Nomination of Neil M. Gorsuch to be Associate Justice of the Supreme Court**
**Questions for the Record**
**Submitted March 24, 2017**

## QUESTIONS FROM SENATOR FEINSTEIN






27. Outside groups including Heritage Foundation and Federalist Society played an unprecedented role in the Supreme Court nomination process President Trump stated that "we're going to have great judges, conservative, all picked by the Federalist Society." (Donald Trump, Breitbart News Interview, June 13, 2016).

    In September, when your name was added to President Trump's second shortlist, he specifically thanked both the Heritage Foundation and the Federalist Society. *The Wall Street Journal* wrote an article discussing Leonard Leo's role in selecting conservative Supreme Court nominees and specifically stated that "the week after the election… Mr. Leo was summoned to Trump Tower" to discuss "winnowing" the list. (Wall Street Journal, "Trump's Supreme Court Whisperer," Feb. 3, 2017)

    **a. When did you first meet Leonard Leo?**

28. I understand you sat on a panel with Mr. Leo entitled, "The Life and Legacy of Supreme Court Justice Antonin Scalia" on September 3, 2016. Your name was put on President Trump's second short list on September 23, 2016.

    **a. Did you discuss the Supreme Court vacancy with Mr. Leo when you interacted with him on September 3 or at any time before you name was put on the list?**

    **b. Why do you think the Federalist Society and the Heritage Foundation recommended you for inclusion on Mr. Trump's list?**

29. On the first day of questioning, Senator Blumenthal asked you about officials from the Heritage Foundation who discussed the Supreme Court with you. In response to his question you said: "*To my knowledge, Senator, from the time of the election to the time of my nomination, I have not spoken to anyone that I know of from Heritage*."

    **a. Did you speak to anyone from the Heritage Foundation prior to the 2016 election about the Supreme Court? How many conversations with people from Heritage did you have? When did they take place?**

    **b. Did you speak to anyone from the Federalist Society before or after the election? If so, what topics and issues did you discuss?**

**c. Have individuals from the Federalist Society and the Heritage Foundation been involved in your preparation for this nomination hearing? If so, please detail their involvement.**

Not Responsive Records

[redacted]

**Nomination of Judge Neal. Gorsuch, of Colorado,**
**to be an Associate Justice of the United States Supreme Court**
**Questions for the Record**
**Submitted March 24, 2017**

**QUESTIONS FROM SENATOR SHELDON WHITEHOUSE**

Not Responsive Records

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5) On Question 26 of your Judiciary Committee Questionnaire, you described your experience in the selection process and listed all interviews or communications with anyone in the Executive Office of the President, the Justice Department, the President-elect transition team or the presidential campaign. Question 26 also asked you to list any interviews or communications with outside groups at the behest of the Executive Office of the President, the Justice Department, the President-elect transition team or the presidential campaign.

   a) You indicated that you communicated with Leonard Leo on December 2, 2016 and the week following January 6, 2017. Please provide more information circumstances (how those calls were arranged, who else participated) and content of your communications with Mr. Leo.

   b) Did you have any addition communication with Mr. Leo? If so, please describe the date and contents of the communication.

   c) You did not list any communication with outside groups. Is that answer still accurate? If you have communicated with outside groups, please list the names of groups, the representatives involved, the dates of the communications, and the contents of the communications.

   d) Did any outside groups assist in preparing you for your Senate Judiciary Committee hearing? If so, which groups?

Not Responsive Records

NOMINATION OF THE HONORABLE NEIL M. GORSUCH TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

(DAY 4)

Thursday, March 23, 2017

United States Senate,

Committee on the Judiciary,

Washington, D.C.

The Committee met, pursuant to notice, at 9:33 a.m., in Room SH 216, Hart Senate Office Building, Hon. Chuck Grassley, Chairman of the Committee, presiding.

Present: Senators Grassley [presiding], Hatch, Graham, Lee, Sasse, Flake, Crapo, Tillis, Kennedy, Feinstein, Leahy, Durbin, Whitehouse, Klobuchar, Franken, Coons, Blumenthal, and Hirono.

Not Responsive Records

[redacted]

Senator Whitehouse. Ms. McGhee, welcome. I appreciate that you are here and the work that Demos has done to shed some light on the problem of money in politics and the influence that it gives special interest groups. We have kind of an unusual circumstance here in that President Trump originally outsourced the creation of the list from which Judge Gorsuch was selected to a pair of well-known right-wing interest groups. And then the notification to Judge Gorsuch that he describes in his description of the selection process, the opening sentence is, "On or about December 2, 2016, I was contacted by Leonard Leo," who is the head of one of those same special interest groups.

Then it has been reported in the news that the White House outsourced the political campaign on behalf of Judge Gorsuch to those interest groups, and, indeed, we have seen reports of a $10 million political campaign to try to influence the Senate in Judge Gorsuch's favor through a front group, so we do not know who the real donors are. It is dark money that is behind that entire operation. And it

was the same front group that spent nearly an equivalent amount of money trying to disrupt the nomination of Judge Merrick Garland. And, finally, we have the Colorado reporting on Judge Gorsuch's friend and, it appears, his patron in the quest for the Tenth Circuit seat, Mr. Philip Anschutz, who is a billionaire, who is also a very big political spender. And all of that I think causes concern to some of us that although the talk may be about Olympian detachment, the actual operation of getting Judge Gorsuch before us has been special interest, dark money politics. And I would like to ask you to react to that.

Ms. McGhee. Thank you, Senator Whitehouse. I think you are right to express concern about this, the same way that the American people, including 91 percent of President Trump's own voters, have expressed concern about the role of the Supreme Court in expanding our current big-money system.

Judge Gorsuch had the opportunity over the past couple of days to distance himself from the entire problem of Citizens United, either spoken of expansively in terms of the influence of the wealthy millionaires and billionaires and special interests in our politics to even some of the more narrow concerns.

I was particularly concerned in your exchange, Senator Whitehouse, with the judge when you gave him an opportunity

to talk about something that is his predecessor, his potential predecessor's -- one of his great North Stars, which is the importance of disclosure in our campaign finance system. And instead of saying clearly that there is a public interest in knowing who is spending millions of dollars to buy influence with our politicians, he was quite evasive and, in fact, to my dismay, raised the idea that disclosure chills speech and even suggested that the $650 million in secret money from society's most powerful, which is what we have seen since Citizens United, would be on the same level as the brave civil rights leaders in the NAACP case, people who endured violence, bombings, and shootings for their political activism.

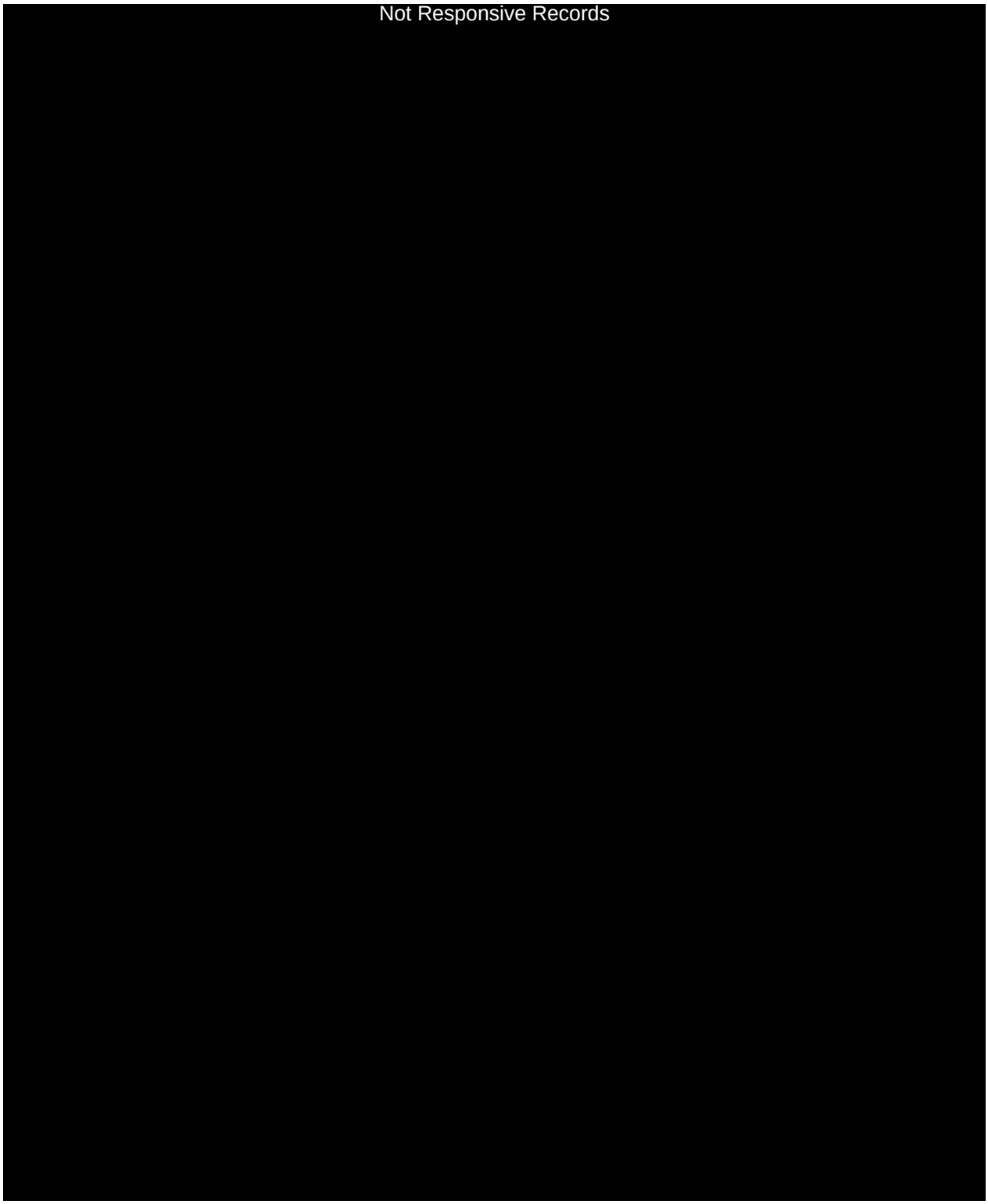
And if you do not mind, I just want to read just one sentence from what Senator Scalia said --

Senator Whitehouse. Justice Scalia.

Ms. McGhee. Sorry, Justice Scalia said in Doe v. Reed about the importance of disclosure, which gives us a sense that he might even be parting with Scalia on this important piece: "There are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed."

Senator Whitehouse. My time has expired, Chairman. Thank you very much. Thank you, Ms. McGhee.

Ms. McGhee. Thank you, Senator.



**Nomination of Neil M. Gorsuch to be Associate Justice of the Supreme Court**
**Questions for the Record**
**Submitted March 24, 2017**

## QUESTIONS FROM SENATOR FEINSTEIN

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27. Outside groups including Heritage Foundation and Federalist Society played an unprecedented role in the Supreme Court nomination process President Trump stated that "we're going to have great judges, conservative, all picked by the Federalist Society." (Donald Trump, Breitbart News Interview, June 13, 2016).

    In September, when your name was added to President Trump's second shortlist, he specifically thanked both the Heritage Foundation and the Federalist Society. *The Wall Street Journal* wrote an article discussing Leonard Leo's role in selecting conservative Supreme Court nominees and specifically stated that "the week after the election… Mr. Leo was summoned to Trump Tower" to discuss "winnowing" the list. (Wall Street Journal, "Trump's Supreme Court Whisperer," Feb. 3, 2017)

    **a. When did you first meet Leonard Leo?**

**RESPONSE**: I do not exactly recall when I first met Leonard Leo, but it was many years ago.

28. I understand you sat on a panel with Mr. Leo entitled, "The Life and Legacy of Supreme Court Justice Antonin Scalia" on September 3, 2016. Your name was put on President Trump's second short list on September 23, 2016.

    **a. Did you discuss the Supreme Court vacancy with Mr. Leo when you interacted with him on September 3 or at any time before you name was put on the list?**

**RESPONSE:** On September 3, 2016, I moderated a long scheduled panel on the legacy of Associate Justice Antonin Scalia during the Tenth Circuit Judicial Conference with Justice Elena Kagan, Professor William Kelley, and Leonard Leo. During the course of the Conference, I had conversations with Justice Kagan, Professor Kelley, and Mr. Leo about many topics, including Justice Scalia's jurisprudence and current events.

    **b. Why do you think the Federalist Society and the Heritage Foundation recommended you for inclusion on Mr. Trump's list?**

**RESPONSE:** I cannot speak for the Federalist Society or the Heritage Foundation.

29. On the first day of questioning, Senator Blumenthal asked you about officials from the Heritage Foundation who discussed the Supreme Court with you. In response to his question you said: "*To my knowledge, Senator, from the time of the election to the time of my nomination, I have not spoken to anyone that I know of from Heritage*."

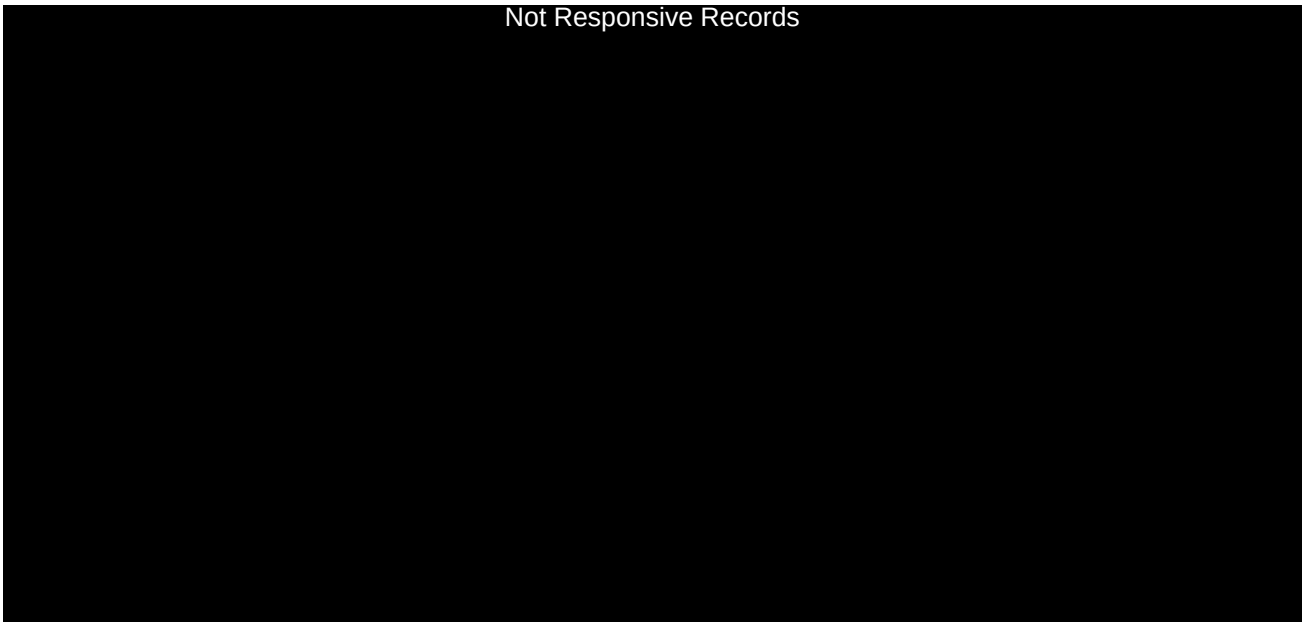
    **a. Did you speak to anyone from the Heritage Foundation prior to the 2016 election about the Supreme Court? How many conversations with people from Heritage did you have? When did they take place?**

**RESPONSE:** Prior to the 2016 election, to my knowledge, I did not have substantive conversations with someone whom I know to be employed by the Heritage Foundation about my potential nomination to the Supreme Court.

    **b. Did you speak to anyone from the Federalist Society before or after the election? If so, what topics and issues did you discuss?**

    **c. Have individuals from the Federalist Society and the Heritage Foundation been involved in your preparation for this nomination hearing? If so, please detail their involvement.**

**RESPONSE:** I have responded to many questions about my experiences in the nomination and confirmation process, both in the Senate Judiciary Committee Questionnaire and at the hearing. Various people have provided me advice, including Senators, Administration and transition personnel, former law clerks, and friends and family. Some of them are affiliated with the Federalist Society and some are affiliated with the American Constitution Society, societies that provide, among other things, valuable forums for civil discussion and debate on legal questions. As I explained at the hearing, I have made no commitments to anyone on matters that might come before me as a judge.



**Nomination of Judge Neal. Gorsuch, of Colorado,**
**to be an Associate Justice of the United States Supreme Court**
**Questions for the Record**
**Submitted March 24, 2017**

## QUESTIONS FROM SENATOR SHELDON WHITEHOUSE

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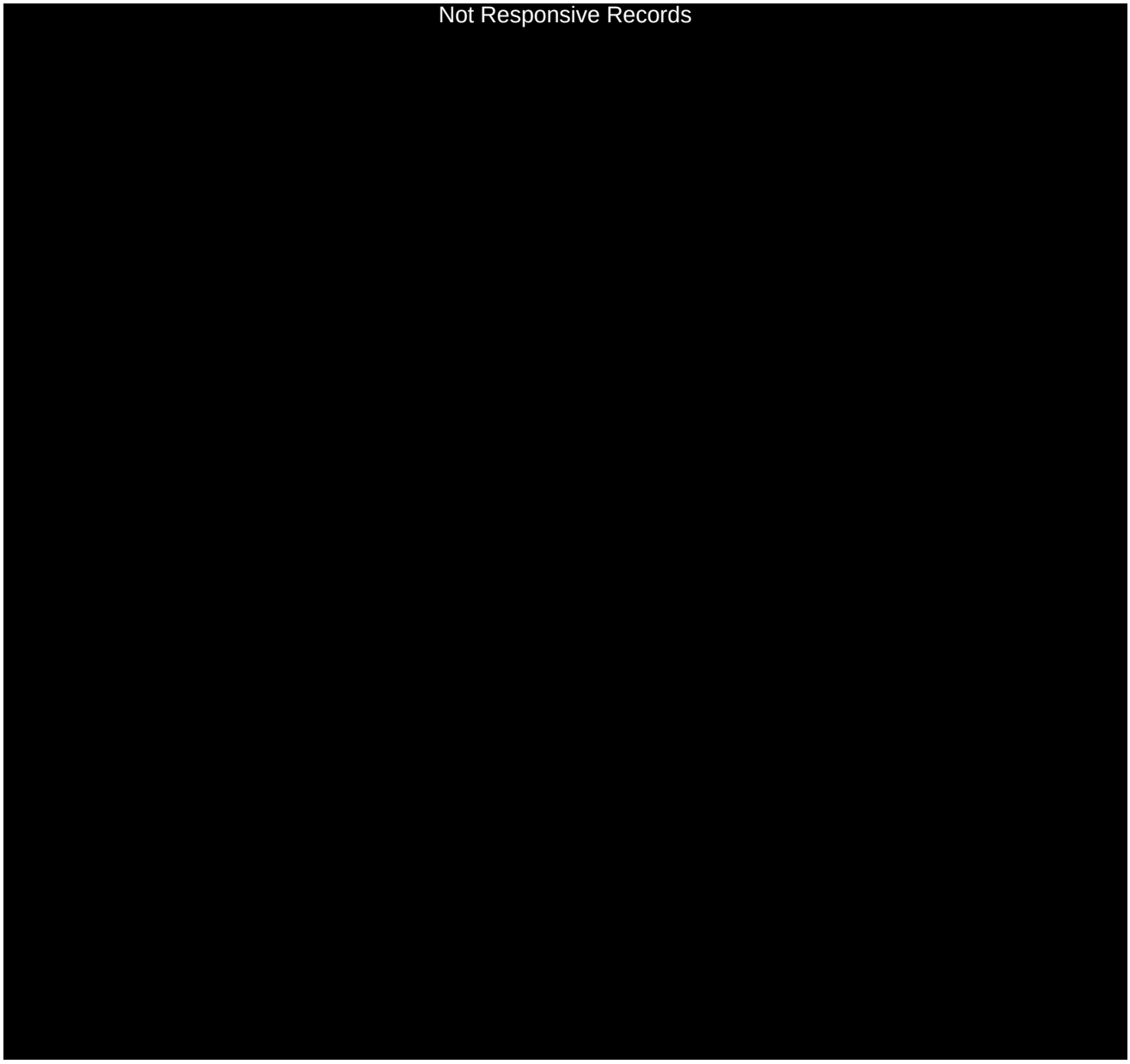


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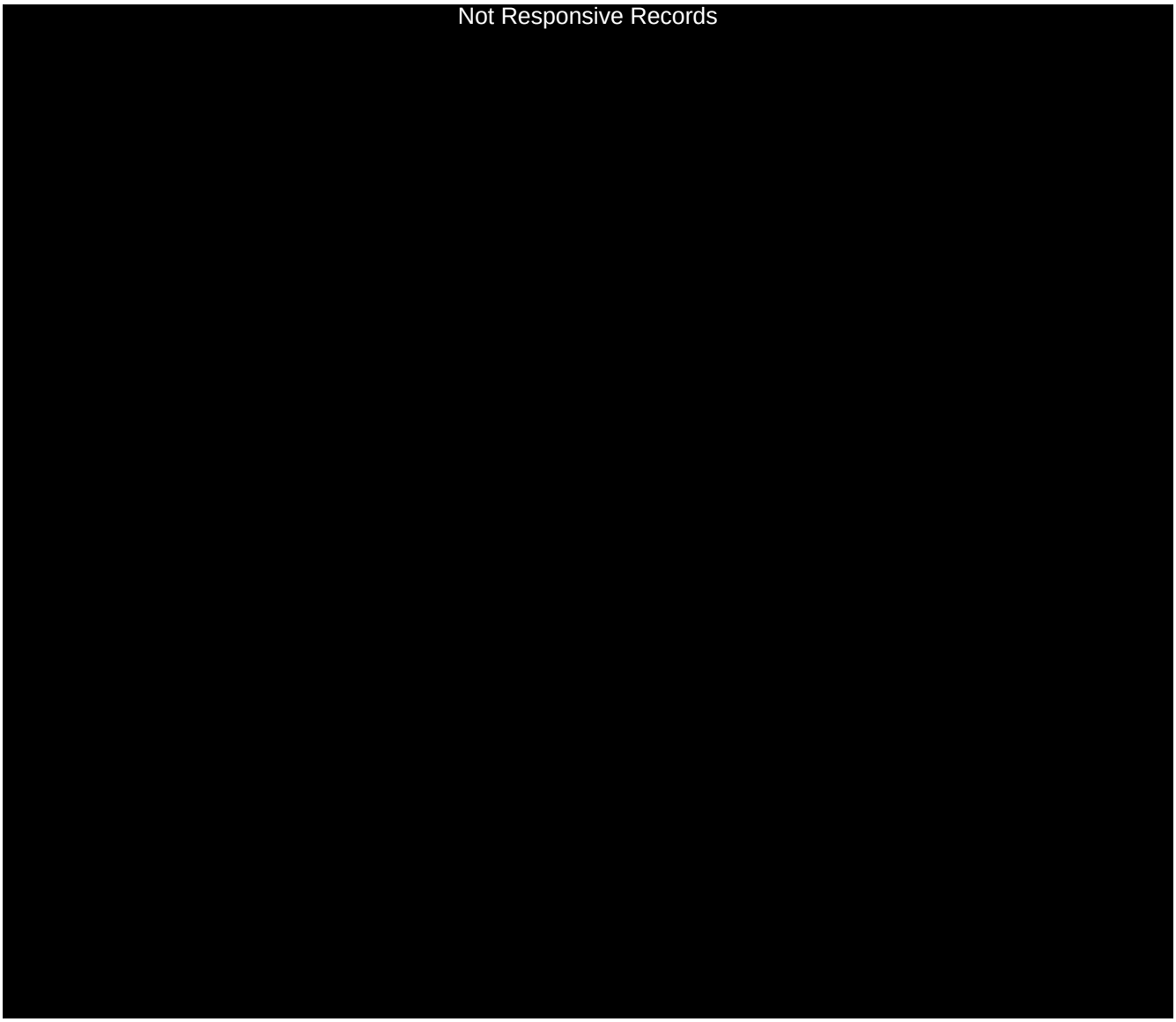

**Senator Dick Durbin**
**Written Questions for Judge Amul R. Thapar**
**May 3, 2017**

1. Judge Thapar, your name was included on the list of 21 nominees that President Trump announced he would choose from in selecting Supreme Court nominees. President Trump publicly thanked the Federalist Society and the Heritage Foundation for assembling this list.[1] He said he would only choose from that list in naming nominees for the Supreme Court.

   **a. Do you believe it was appropriate for the President to announce the involvement of the Federalist Society and the Heritage Foundation in the selection of candidates for the Supreme Court?**

   **b. Are you concerned that this creates an incentive for judges not to issue rulings that contravene the views of these two organizations, if those judges want to someday have a chance at being nominated by President Trump for a Supreme Court seat?**

   **c. Are you concerned that the announced involvement of the Federalist Society and Heritage Foundation in selecting Supreme Court candidates undermines confidence in the independence and integrity of the federal judiciary?**

Not Responsive Records

[1] In an interview with Breitbart News' Steve Bannon on June 13, 2016, President Trump said "[w]e're going to have great judges, conservative, all picked by the Federalist Society." In a press conference on January 11, 2017, he said his list of Supreme Court candidates came "highly recommended by the Federalist Society" and also thanked Heritage Foundation President Jim DeMint for being "very much involved in this group."

**Nomination of Amul Thapar to the U.S. Court of Appeals for the Sixth Circuit**
**Questions for the Record**
**Submitted May 3, 2017**

**QUESTIONS FROM SENATOR FEINSTEIN**

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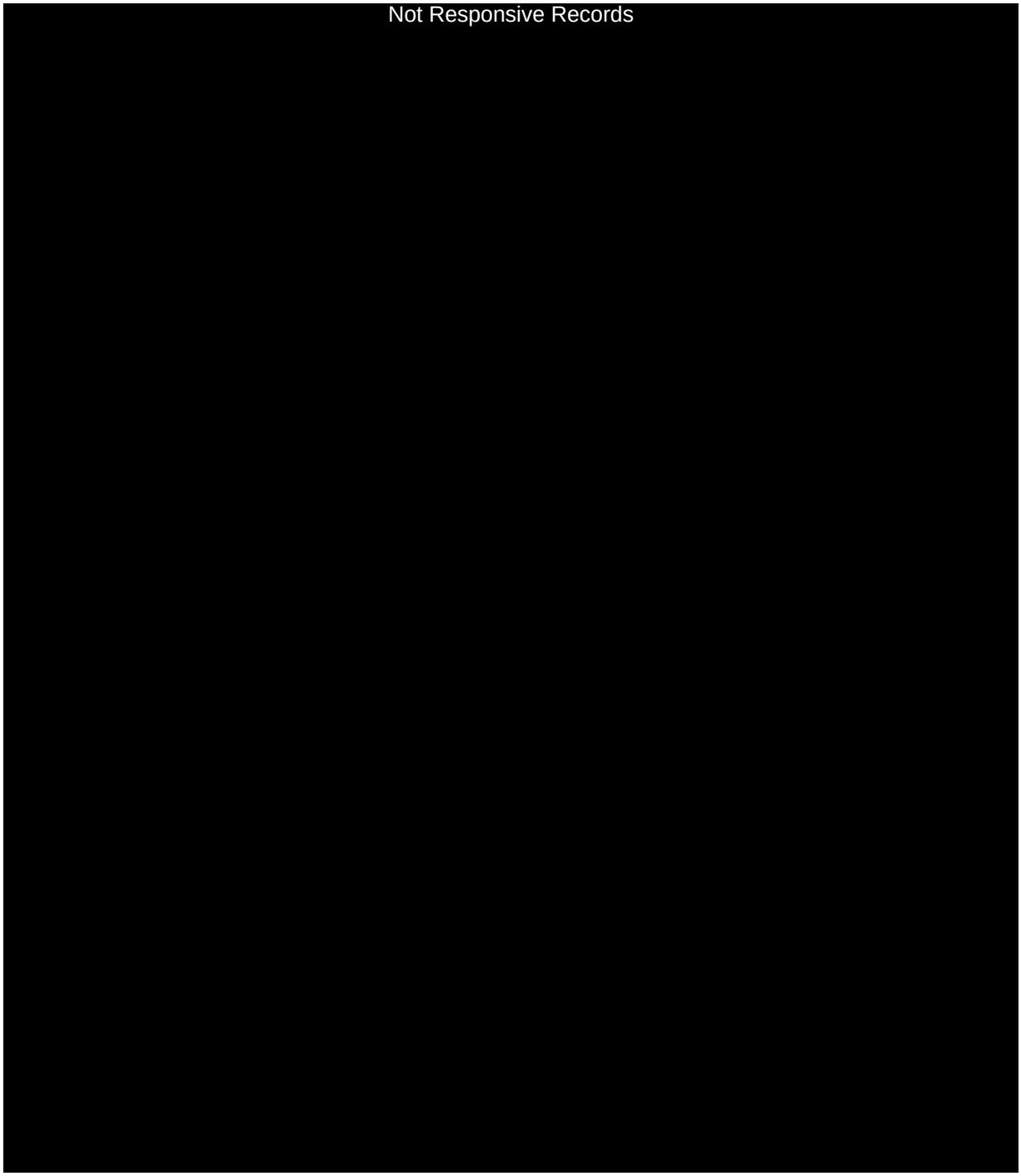

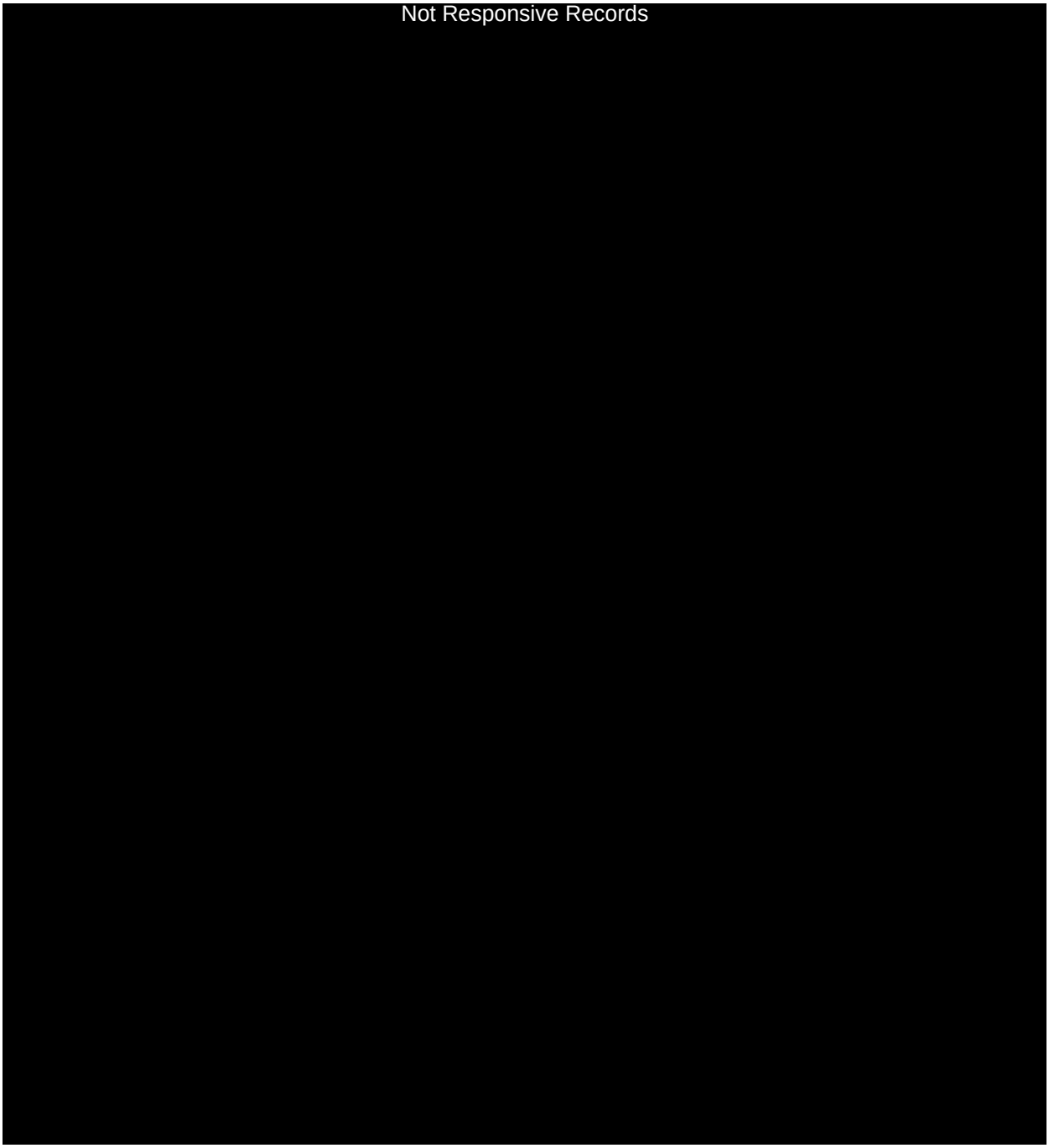


6. As a presidential candidate, President Trump made clear that conservative interest groups played a significant role in choosing who made his short list of Supreme Court nominees. In June 2016, for instance, he stated "we're going to have great judges, conservative, all picked by the Federalist Society," and in September after your name was added to the list President Trump specifically thanked both the Heritage Foundation and the Federalist Society for their work on the list.

a. **Before your name was added to the President's list of potential nominees, did you have any contact with anyone from the Heritage Foundation, including John Malcolm, or the Federalist Society, including Leonard Leo, about your possible inclusion on that list, or your potential nomination to the Supreme Court generally?**

b. **Why do you think the Federalist Society and Heritage Foundation recommended you for inclusion on then-candidate Trump's list?**

c. **From 2008 to the present, did you have any contact with anyone at the Federalist Society or the Heritage Foundation about your possible elevation to the Sixth Circuit?**

d. **On January 9, 2017, the Judicial Crisis Network announced that it planned to spend at least $10 million to confirm President-elect Trump's as-yet-unannounced Supreme Court nominee—two days after you were first contacted for an interview. This money was spent on the heels of the Judicial Crisis Network's $7 million campaign to prevent Chief Judge Garland from ever getting a confirmation hearing. Please identify all communications you have had with individuals from the Judicial Crisis Network—or any of the affiliated groups listed on their January 9 press release (https://judicialnetwork.com/judicial-crisis-network-launches-10-million-campaign-preserve-justice-scalias-legacy-support-president-elect-trump-nominee/) announcing their campaign—since February 2016. If you are aware of people who had communications with any individual from the Judicial Crisis Network regarding your nomination or potential nomination, please identify such people, the nature of the communications, and when the communications occurred.**

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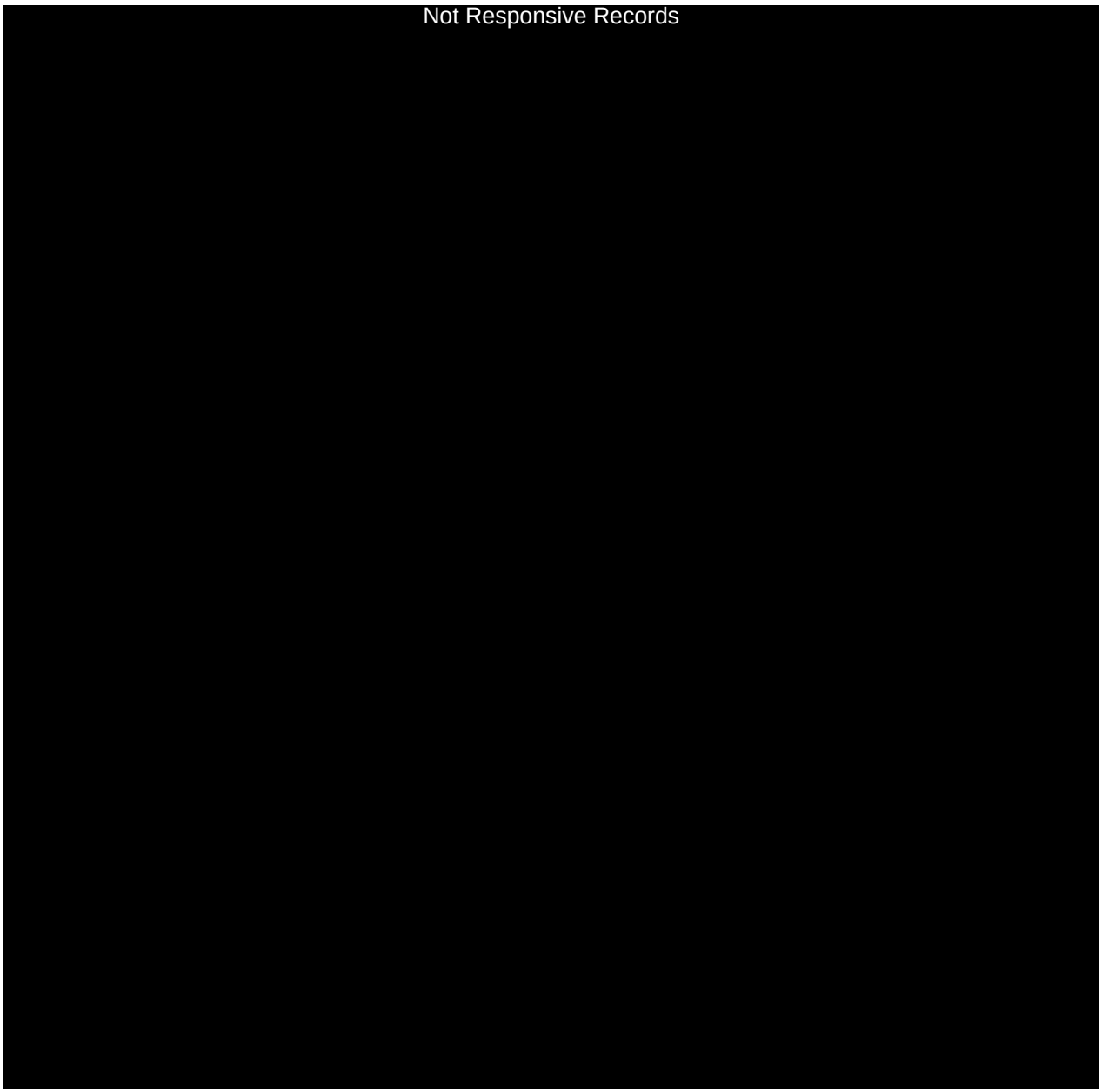


9. In a recent interview with Jeffrey Toobin, Leonard Leo, the head of the Federalist Society, said that Donald Trump told him that he wanted his Supreme Court nominee to be "somebody who was going to, quote, 'interpret the Constitution the way the Framers meant it to be.'" According to Toobin, "[t]he statement was, in effect, a call for an originalist."

    **a. Have any White House officials, anyone affiliated with the Federalist Society, or anyone affiliated with the Heritage Foundation ever asked you whether you are an originalist, subscribe to an originalist theory of constitutional interpretation, or believe that the Constitution's terms should be read**

**consistent with the original intent of the Framers or with its original public meaning?**

**b. With respect to constitutional interpretation, do you believe judges should employ an originalist method of reading the Constitution?**

**c. How do you decide when an originalist reading of the Constitution should be controlling?**

**d.** In *Obergefell v. Hodges*, the Supreme Court upheld a constitutional right to same-sex marriage. **How do you understand an originalist reading of the Constitution to support this right?**

**e.** In *Loving v. Virginia* (1967), the Supreme Court upheld a constitutional right to marry persons of a different race. **How do you understand an originalist reading of the Constitution to support this right?**

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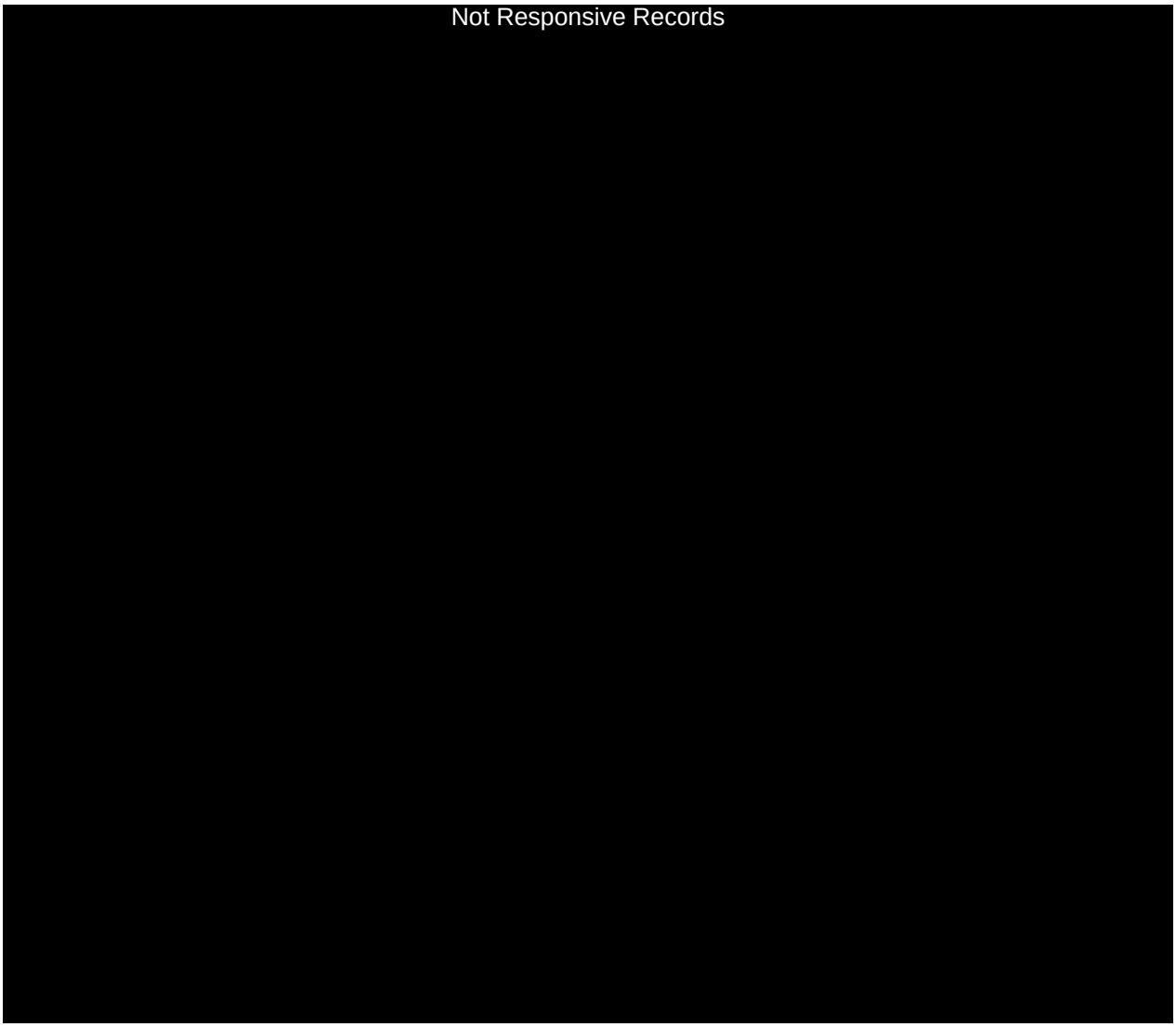

**Nomination of Amul Thapar to the U.S. Court of Appeals for the Sixth Circuit**
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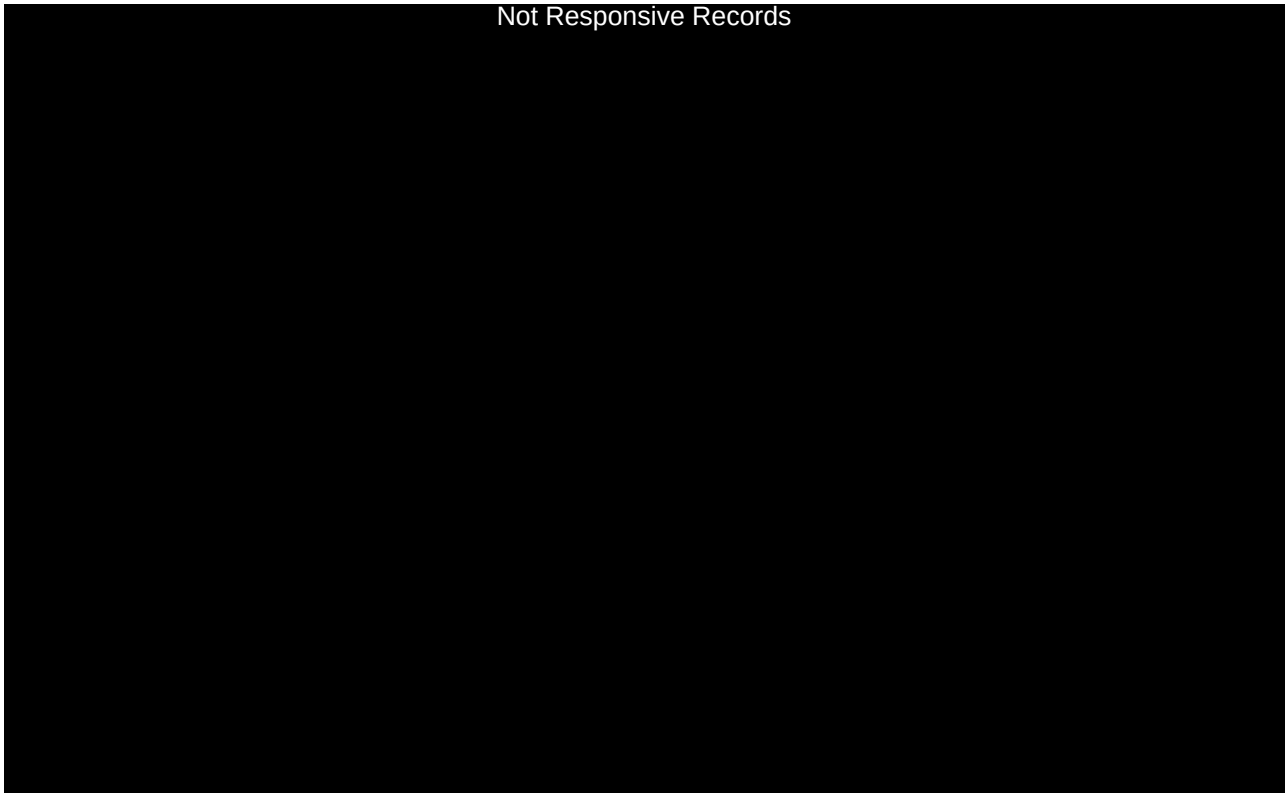


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**a. Before your name was added to the President's list of potential nominees, did you have any contact with anyone from the Heritage Foundation, including John Malcolm, or the Federalist Society, including Leonard Leo, about your possible inclusion on that list, or your potential nomination to the Supreme Court generally?**

**Response:** No.

**b. Why do you think the Federalist Society and Heritage Foundation recommended you for inclusion on then-candidate Trump's list?**

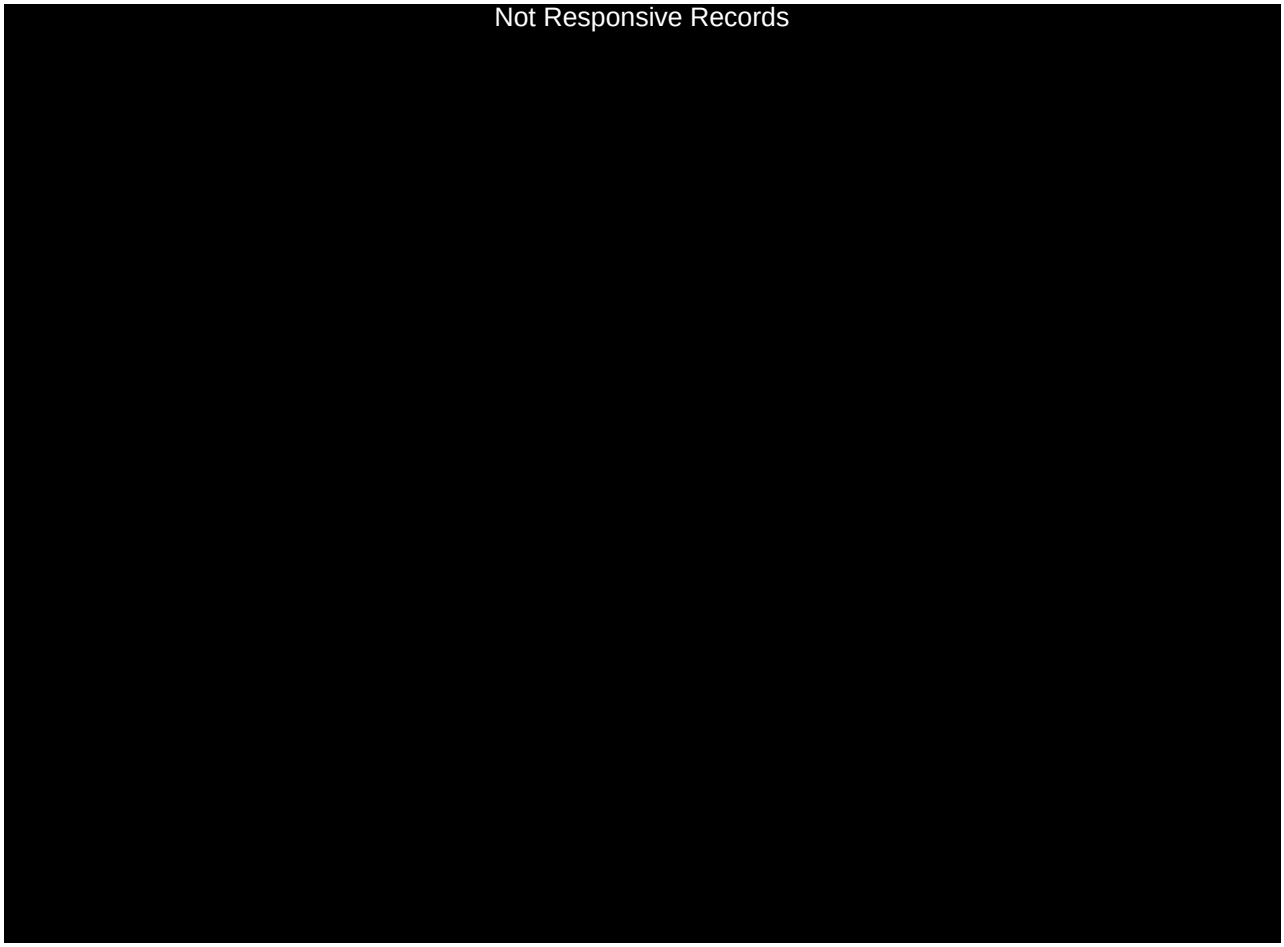
**Response:** I do not know, and I am unable to speak to their thought processes.

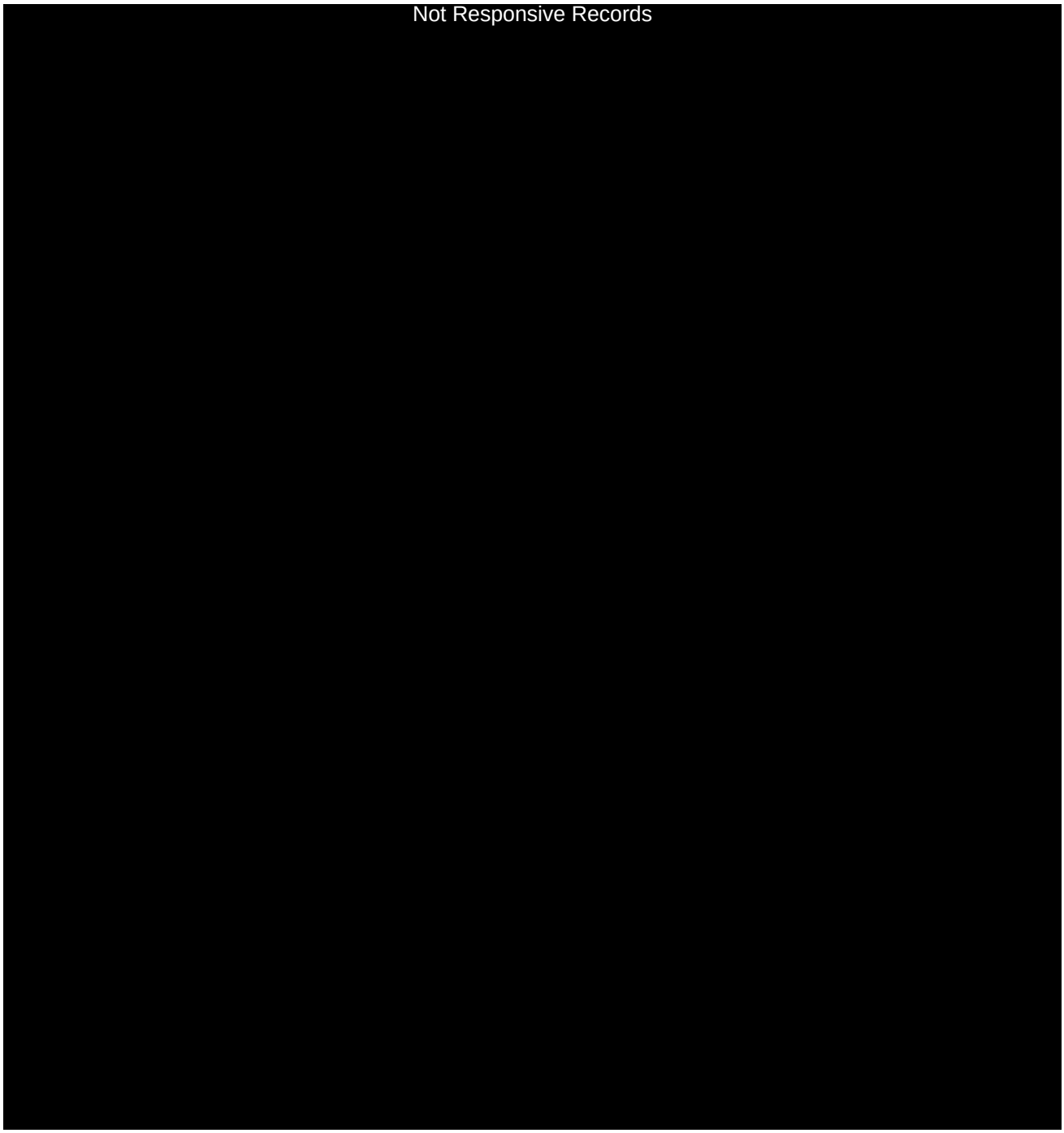
**c. From 2008 to the present, did you have any contact with anyone at the Federalist Society or the Heritage Foundation about your possible elevation to the Sixth Circuit?**

**Response:** No.

**d. On January 9, 2017, the Judicial Crisis Network announced that it planned to spend at least $10 million to confirm President-elect Trump's as-yet-unannounced Supreme Court nominee—two days after you were first contacted for an interview. This money was spent on the heels of the Judicial Crisis Network's $7 million campaign to prevent Chief Judge Garland from ever getting a confirmation hearing. Please identify all communications you have had with individuals from the Judicial Crisis Network—or any of the affiliated groups listed on their January 9 press release (https://judicialnetwork.com/judicial-crisis-network-launches-10-million-campaign-preserve-justice-scalias-legacy-support-president-elect-trump-nominee/) announcing their campaign—since February 2016. If you are aware of people who had communications with any individual from the Judicial Crisis Network regarding your nomination or potential nomination, please identify such people, the nature of the communications, and when the communications occurred.**

**Response:** I have not communicated with any individual from the Judicial Crisis Network or from any of the other groups listed in the Network's January 9 press release. I am not aware of anyone having communicated on my behalf with the Network or any of the listed groups.



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   **a. Have any White House officials, anyone affiliated with the Federalist Society,**

**or anyone affiliated with the Heritage Foundation ever asked you whether you are an originalist, subscribe to an originalist theory of constitutional interpretation, or believe that the Constitution's terms should be read consistent with the original intent of the Framers or with its original public meaning?**

**Response:** I do not recall any such question.

**b. With respect to constitutional interpretation, do you believe judges should employ an originalist method of reading the Constitution?**

**Response:** I would follow the precedent of the Supreme Court and Sixth Circuit regarding the methods to be employed when interpreting the Constitution. That precedent suggests that a court should consult original sources when interpreting the language of at least some constitutional provisions. For example, in cases involving the Seventh Amendment, the Supreme Court has explained that courts must (1) compare the nature of the claim to "18th-century actions brought in the courts of England prior to the merger of the courts of law and equity," and (2) evaluate the remedy that the Plaintiff seeks to "determine whether it is legal or equitable in nature." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989). Where precedent calls for the use of other sources, I would use those other sources.

**c. How do you decide when an originalist reading of the Constitution should be controlling?**

**Response:** I will look to the precedent of the Supreme Court and Sixth Circuit to determine when an originalist reading of the Constitution should control.

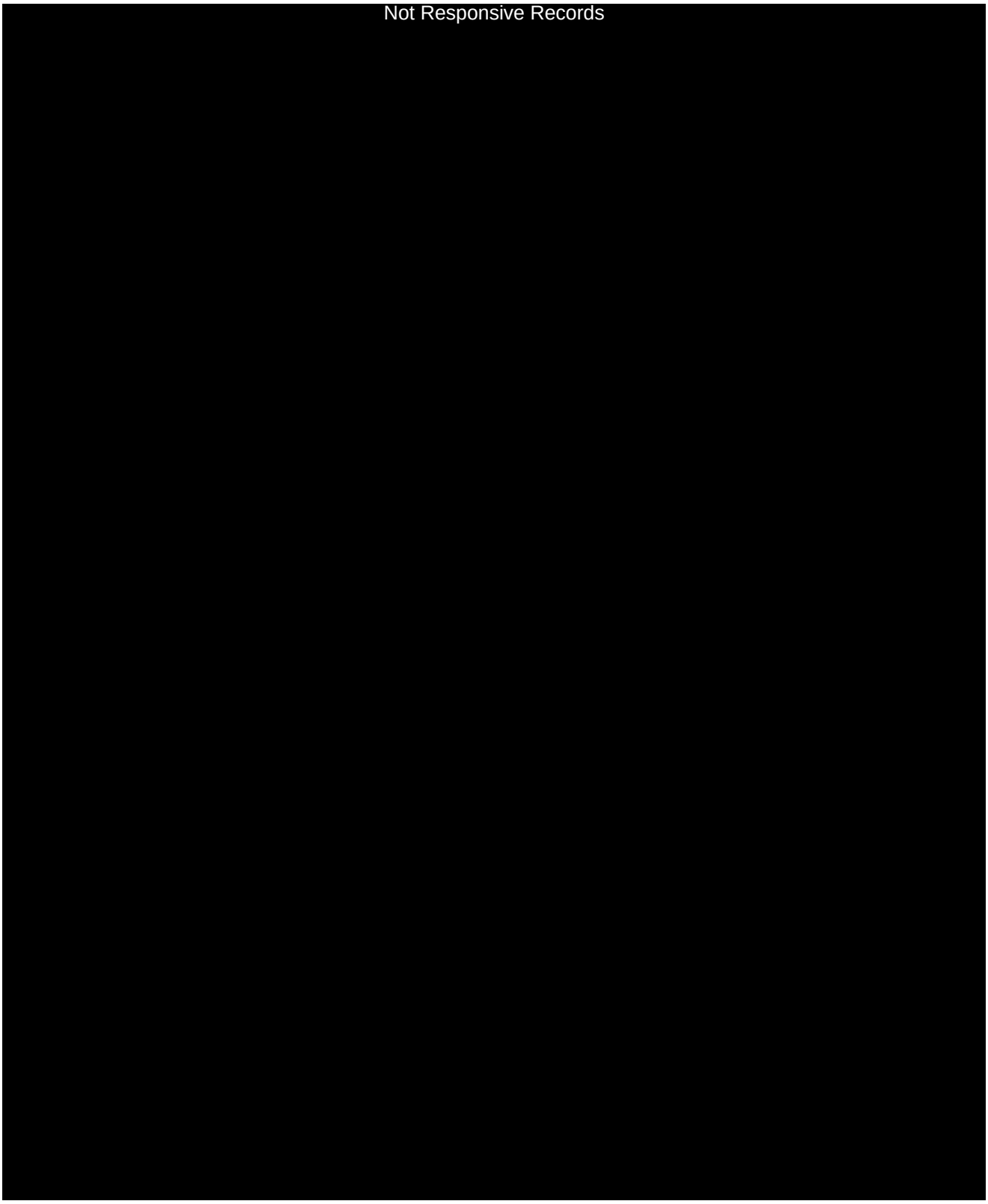
**d.** In *Obergefell v. Hodges*, the Supreme Court upheld a constitutional right to same-sex marriage. **How do you understand an originalist reading of the Constitution to support this right?**

**Response:** In *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Supreme Court held that the Due Process and Equal Protection Clauses of the Fourteenth Amendment protect the right of same-sex couples to marry on the same terms and conditions as opposite-sex couples. I have not had occasion to consider what role, if any, originalism played in the Court's analysis. *Obergefell* is a binding precedent of the Supreme Court, and I will follow it faithfully as a district judge and, if confirmed, as a circuit judge.

**e.** In *Loving v. Virginia* (1967), the Supreme Court upheld a constitutional right to marry persons of a different race. **How do you understand an originalist reading of the Constitution to support this right?**

**Response:** In *Loving v. Virginia*, 388 U.S. 1 (1967), the Supreme Court held "[t]here can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." *Id.* at 12. I have not had occasion to consider what role, if any, originalism played in the Court's analysis. *Loving* is a binding precedent of the Supreme Court, and I will follow it faithfully as a district judge and, if

confirmed, as a circuit judge.



**Senator Dick Durbin**
**Written Questions for Judge Amul R. Thapar**
**May 3, 2017**

1. Judge Thapar, your name was included on the list of 21 nominees that President Trump announced he would choose from in selecting Supreme Court nominees. President Trump publicly thanked the Federalist Society and the Heritage Foundation for assembling this list.[1] He said he would only choose from that list in naming nominees for the Supreme Court.

   **a. Do you believe it was appropriate for the President to announce the involvement of the Federalist Society and the Heritage Foundation in the selection of candidates for the Supreme Court?**

**Response:** This is a political question about which ethically I cannot opine. *See* Canon 5 of the Code of Conduct for United States Judges.

   **b. Are you concerned that this creates an incentive for judges not to issue rulings that contravene the views of these two organizations, if those judges want to someday have a chance at being nominated by President Trump for a Supreme Court seat?**

**Response:** As judges, it is our job to apply the law faithfully, without regard to political interests or pressures. Indeed, our lifetime tenure protects us from any such pressures. Moreover, under Canon 3(A)(1) of the Code of Conduct for United States Judges, judges "should be faithful to, and maintain professional competence in, the law and should not be swayed by partisan interests, public clamor, or fear of criticism."

   **c. Are you concerned that the announced involvement of the Federalist Society and Heritage Foundation in selecting Supreme Court candidates undermines confidence in the independence and integrity of the federal judiciary?**

**Response:** Please see the response to Question 1(b) and the response to Question 6 from Senator Leahy.

Not Responsive Records

[redacted]

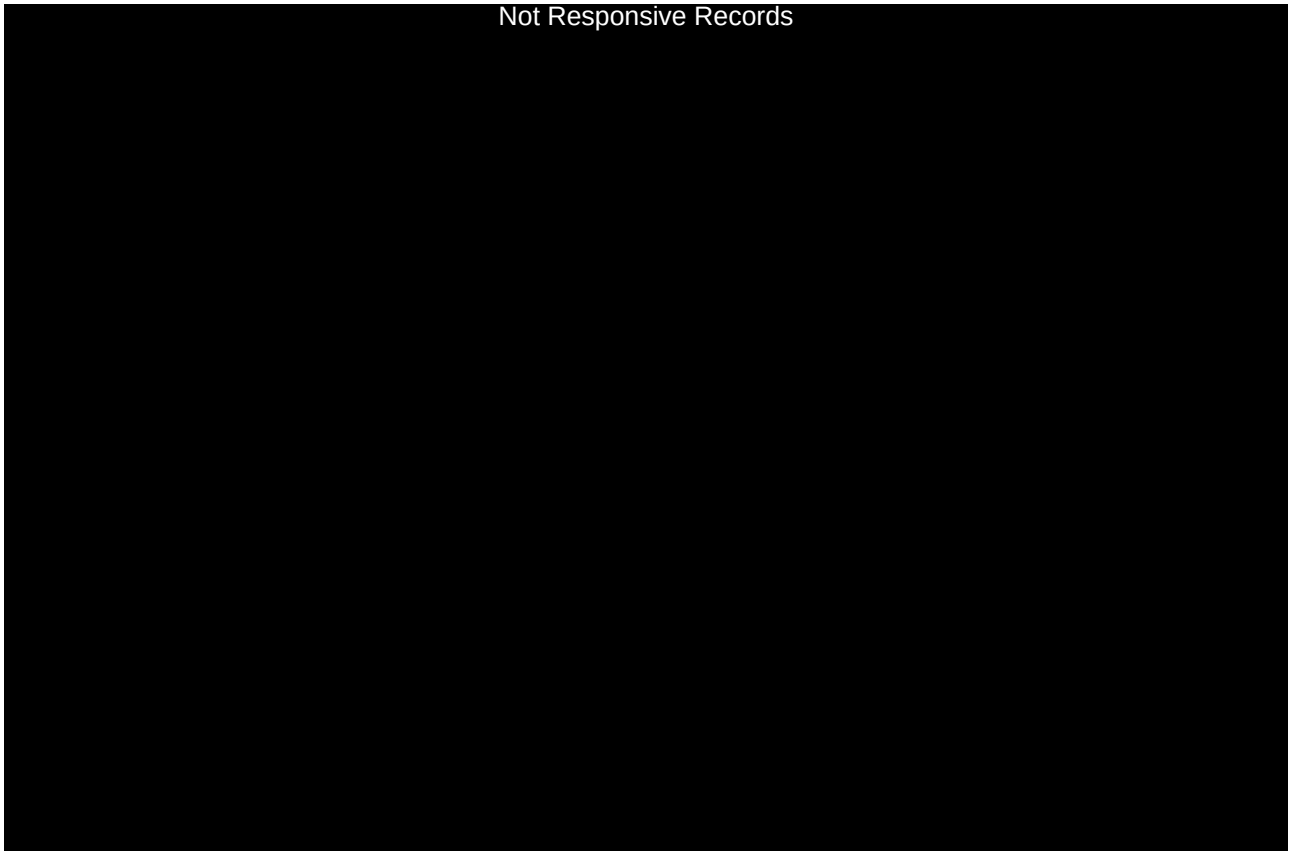
[1] In an interview with Breitbart News' Steve Bannon on June 13, 2016, President Trump said "[w]e're going to have great judges, conservative, all picked by the Federalist Society." In a press conference on January 11, 2017, he said his list of Supreme Court candidates came "highly recommended by the Federalist Society" and also thanked Heritage Foundation President Jim DeMint for being "very much involved in this group."

**Senator Dick Durbin**
**Written Questions for Gregory Katsas**
**October 24, 2017**

For questions with subparts, please answer each subpart separately.

**Questions for Gregory Katsas**

Not Responsive Records




11.

a. You say in your questionnaire that you have been a member of the Federalist Society since 1989. **Are you aware that President Trump publicly thanked the Federalist Society for helping compile his Supreme Court shortlist?** For example, in an interview with Breitbart News' Steve Bannon on June 13, 2016, Trump said "[w]e're going to have great judges, conservative, all picked by the Federalist Society." In a press conference on January 11, 2017, he said his list of Supreme Court candidates came "highly recommended by the Federalist Society."

I am generally aware that the President has made comments to that effect.

b. **Prior to your nomination, did you ever discuss the possibility of a judicial nomination with Federalist Society Executive Vice President Leonard Leo or any other Federalist Society board members or staff? If so, please discuss the dates and contents of such discussions.**

I had no discussions with Leonard Leo or any other Federalist Society personnel about the possibility of my judicial nomination before July 12, 2017, when the Counsel to the President informed me that the President intended to nominate me to the D.C. Circuit subject to my clearing the necessary background checks and vetting procedures. Shortly after July 12, I conveyed this news to Mr. Leo, and he congratulated me.

c. **Please list each year that you attended the Federalist Society's annual conference and describe any other engagement you've had with the Federalist Society.**

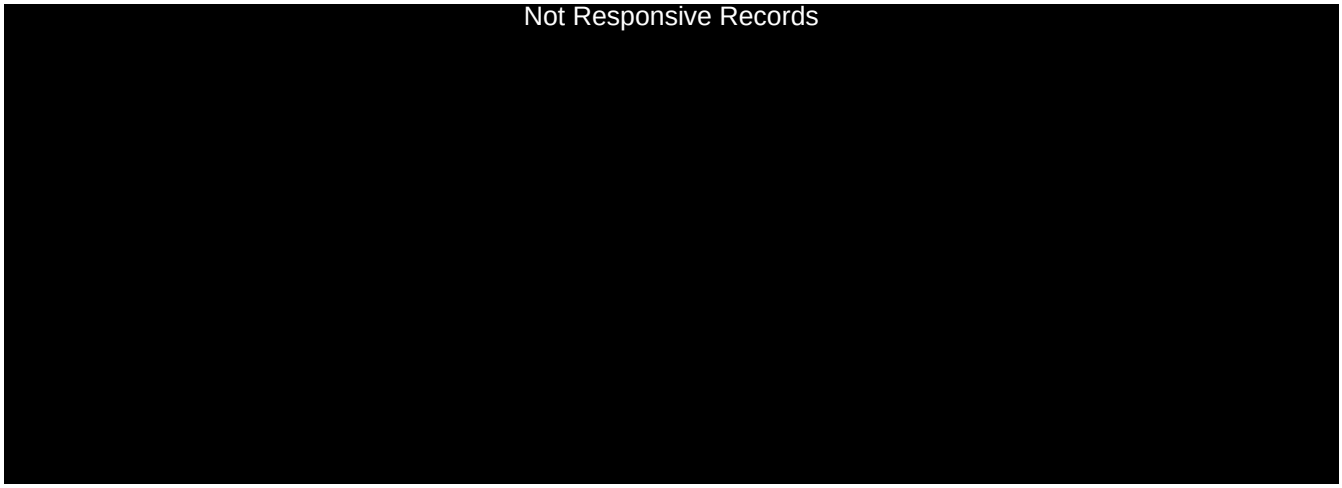
Since 1992, I have attended the Federalist Society's annual conference to the extent permitted by my work schedule. In most years, I have been able to attend at least small portions of the conference. Rarely have I been able to attend the entire conference. I do not have calendar records regarding the extent of my attendance in individual years. My participation in speeches, debates, and panels sponsored by the Federalist Society is set forth in my answer to Question 12(d) of the Senate Judiciary Questionnaire.

Not Responsive Records

**Nomination of David Stras to the U.S. Court of Appeals**
**for the Eighth Circuit**
**Questions for the Record**
**December 6, 2017**

**QUESTIONS FROM SENATOR FEINSTEIN**

Not Responsive Records




10. Senator Franken asked you several questions about your selection process. He asked you "Have you ever discussed the possibility that President Trump would nominate you to the Supreme Court with the Heritage Foundation or the Federalist Society? Have you discussed that possibility with Leonard Leo?" And you responded, "I don't believe so, no. Again, I've had informal conversations, but I never discussed that with Leonard Leo, and I don't recall discussing that with anyone from Heritage or the Federalist Society."

**a. What do you mean by "informal conversations"?**

**RESPONSE**: By informal conversations, I mean that, although I do not recall any specific conversations with the leadership of the Federalist Society, I cannot rule out the possibility that I may have discussed being on President Trump's list of potential Supreme Court nominees with one or more of the members of the Federalist Society in casual conversation.

**b. Please specify what "informal conversations" you have had regarding—to quote Senator Franken's question—"the possibility that President Trump would nominate you to the Supreme Court." With whom did you have these "informal conversations"?**

**RESPONSE**: Please see my response to Question 10a.

11. Senator Franken also asked you "[H]ave you at any time said to anyone that you have been told that you will be the first chosen for the Supreme Court if you become the circuit court judge, a federal circuit court judge on the Eighth Circuit?" You responded, "I have not. I have not had anyone discuss that with me, and I have made promises to no one on how I would rule. So, I've had no discussions of that kind, even as an Eighth Circuit judge."

**a. You said "I have not had anyone discuss that with me." Just to be clear: have <u>you yourself</u> ever raised the prospect, with anyone, that you believe you will be appointed to the next Supreme Court vacancy?**

**RESPONSE:** Not to my recollection.

**b. Specifically, have you ever discussed, with Leonard Leo—or anyone else at the Federalist Society or the Heritage Foundation—the prospect of serving on the U.S.**

**Supreme Court, or your expectation or understanding that you would be appointed to the next Supreme Court vacancy? Have you ever told anyone you have had such discussions?**

**RESPONSE**: Please see my response to Question 10a.

**c. You stated that you "have made promises to no one on how I would rule." That was not Senator Franken's question, but it does imply you have had conversations. Please explain conversations you have had about possible elevation to the Supreme Court – who they were with, what was discussed, and when they occurred.**

**RESPONSE**: Please see my response to Question 10a.

Not Responsive Records

13. President Trump specifically thanked the Federalist Society and the Heritage Foundation for putting together his Supreme Court shortlist.

**a. Were you ever contacted by anyone from the Federalist Society or the Heritage Foundation about a potential Supreme Court nomination or about your nomination to the Fifth Circuit? If so, when and by whom?**

**RESPONSE**: Please see my response to Question 10a.

**Why do you think the Federalist Society and Heritage Foundation selected your name to appear on President Trump's list?**

**RESPONSE:** I do not know why I was selected to be on the list of possible Supreme Court nominees released by President Trump during the campaign.

Not Responsive Records

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April 5, 2017

The Honorable Mitch McConnell
Majority Leader
United States Senate
317 Russell Senate Office Building
Washington, DC 20510

The Honorable Charles E. Schumer
Minority Leader
United States Senate
322 Hart Senate Office Building
Washington, DC 20510

**Re: Confirmation of Judge Neil Gorsuch to the United States Supreme Court**

Dear Leader McConnell and Leader Schumer:

As members and friends of the Republican National Lawyers Association (RNLA), we urge you to promptly confirm Judge Neil Gorsuch as the next Associate Justice of the United States Supreme Court.

There are few jurists as qualified to hold such a solemn constitutional role in the American legal system, and even fewer with the wisdom and breadth of experience of Judge Gorsuch. As a graduate of Harvard Law who holds a Doctor of Legal Philosophy from Oxford, clerked for two Supreme Court justices, spent years in private practice, served in the U.S. Department of Justice, and has served ten years on the U.S. Court of Appeals for the Tenth Circuit, Judge Gorsuch clearly possesses the legal credentials necessary for the role.

Through his career on the bench, Judge Gorsuch has proven that he is committed to the rule of law and protecting the rights of all Americans. He has sought to interpret the Constitution and the law impartially. His clear but erudite legal writing and dedication to carefully studying the law and facts of each case before him demonstrate discipline and a depth of character that ensure that he will uphold core American judicial principles on the Supreme Court.

As you know, Judge Gorsuch was confirmed unanimously via voice vote when he was nominated to serve on the Tenth Circuit in 2006. Judge Gorsuch received such strong, bipartisan support because his record demonstrated that he was a thoughtful, hard-working, and intelligent lawyer, and he has only increased in those qualities as a judge.

Thank you in advance for your thorough and expeditious consideration of Judge Gorsuch. His sterling legal and academic credentials make him an excellent choice to be the next Associate Justice to sit on the United States Supreme Court. We encourage the Senate to provide President Trump with its advice and consent and promptly confirm Judge Gorsuch.

Sincerely,

The Undersigned RNLA Leaders, Members, and Friends*

*All persons have signed in their personal, and not their official or professional, capacities.

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August 20, 2018

The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Grassley:

I share the concerns expressed by Ranking Member Feinstein and my Committee colleagues, Senators Leahy and Durbin, about the unprecedented lack of transparency regarding Brett Kavanaugh's extensive record as we prepare for his confirmation hearing a mere two weeks from now. Even the limited set of documents that has been produced for our review by Judge Kavanaugh's former deputy has been marked by him as "committee confidential." To my knowledge, there has never been a committee action to designate these documents as "committee confidential," nor has there been a committee action to make public a subset of them, as you have done unilaterally.

By allowing these documents to be marked "committee confidential," you have placed them is a state of procedural limbo: available for review by Committee members and staff but presumably unavailable for public review or to be used during Judge Kavanaugh's hearing. I take little comfort in the assurance you gave to Ranking Member Feinstein on August 16 that you "will work with [her] to make sure Committee confidential records are available," because you qualified that assurance by noting the various layers of review by the National Archives, the Bush Presidential Library, and the White House that must occur before documents are made available to the public. The National Archives has already said its review will take until the end of October. This cramped timeline is of the Majority's own making, and forecloses the ability of Committee members to fully exercise their constitutional responsibility to provide advice and consent on this nomination.

In light of this predicament, I write today to request you take all steps at your disposal as Chairman to make publicly available all documents in Judge Kavanaugh's files related to his decades-long association with Leonard Leo and/or the Federalist Society. It has been widely reported that President Trump outsourced the selection of his Supreme Court nominees to unaccountable private individuals and organizations. That process has been driven by the Federalist Society and its Executive Vice President, Leonard Leo. In a 2016 interview, then-candidate Donald Trump stated: "We're going to have great judges, conservative, all picked by the Federalist Society."[1] In early 2016, then-candidate Trump released a list of eleven potential

[1] Kate Harloe, *How Donald Trump Is Remaking the Federal Courts in His Own Image*, MOTHER JONES, Nov. 9, 2017, https://www.motherjones.com/politics/2017/11/how-donald-trump-is-remaking-the-federal-courts-in-his-own-image/.

Supreme Court nominees, culled with the help of Mr. Leo and the Federalist Society.[2] He released another list of 21 judges in September 2016, and then a list of 25 judges in November 2017 when he was President.

Despite his prominent position on the District of Columbia Circuit Court of Appeals and deep ties to the Federalist Society, Judge Kavanaugh appeared only on the third list. Indeed, according to his Judiciary Committee questionnaire, Judge Kavanaugh has been a member of the Federalist Society since 1988 and has spoken at Federalist Society events over 50 times. This suggests some circumstance changed over the past year to trigger Judge Kavanaugh's inclusion and ultimate selection by the President.

During that period, the Federalist Society played an integral role in the selection of judicial nominees, and Mr. Leo appears to be playing as significant a role as anyone in that process. As he did for the nomination of Justice Gorsuch, Mr. Leo is currently on leave from the Federalist Society to assist the White House with Judge Kavanaugh's nomination.[3] On July 30, Mr. Leo warned ultra-rich donors to the Koch political network that the "left is far more engaged" on this nomination,[4] creating the impression that he is actively soliciting political donations to support Judge Kavanaugh's nomination. History has shown us that these political efforts will take place in the shadows behind the cloak of anonymity from 501(c)(4) organizations and shell corporations.

Mr. Leo's role in this process is of particular interest given reporting about his financial ties to the Trump administration. Mr. Leo serves as the attorney for the BH Group LLC and as president of the BH Fund. The BH Group donated $1 million to President Trump's inaugural committee.[5] The Federalist Society also received a $750,000 payment from the Wellspring Committee, a secretive political nonprofit which provided a nearly $24 million donation to the right-wing Judicial Crisis Network.[6] This web of secret donations and disguised relationships, with Mr. Leo at its center, casts a troubling shadow over the entire selection process.

Even with the slow production of documents from the limited universe you requested, I am already aware of a substantial number of Kavanaugh documents referencing or related to Mr. Leo, evidencing his longstanding relationship with Mr. Kavanaugh, and demonstrating Mr. Leo's direct influence over Republican judicial appointments dating back to at least the Bush administration. Americans should understand how and why – and on whose behalf – a person is selected to fill a life-tenured seat on our nation's highest court. Our Committee has but one

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[2] Joel Achenbach, *How Trump and two lawyers narrowed the field for his Supreme Court choice*, The WASHINGTON POST, July 8, 2018, https://www.washingtonpost.com/politics/how-trump-narrowed-the-field-for-his-supreme-court-pick/2018/07/08/b9d3b16a-808c-11e8-b660-4d0f9f0351f1_story.html?utm_term=.b699fdd432d6.

[3] Staff Bio of Leonard Leo, The Federalist Society, https://fedsoc.org/staff/leonard-leo.

[4] James Hohmann (@jameshohmann), Twitter (July 30, 2018, 11:04am), https://twitter.com/jameshohmann/status/1023992654713872384.

[5] Andrew Perez, *Revealed: Mystery $1M inaugural donation linked to Trump judicial adviser*, FAST COMPANY, May 15, 2018, https://www.fastcompany.com/40572666/revealed-mystery-1m-inaugural-donation-linked-to-trump-judicial-adviser.

[6] Robert Maguire, *$1 million mystery gift to Trump inauguration traced to conservative legal activists*, OpenSecrets.org, May 14, 2018, https://www.opensecrets.org/news/2018/05/mystery-gift-to-trump-inauguration-from-conservative-activists/.

opportunity to ascertain these facts. I urge you to commit to making available all documents related to Mr. Leo, perhaps the most integral private individual in the selection Judge Kavanaugh, before September 4.

Sincerely,

Sheldon Whitehouse
United States Senator

cc: The Honorable Dianne Feinstein

Not Responsive Records

**From:** Davis, Mike (Judiciary-Rep)
**Sent:** Friday, August 31, 2018 12:53 PM
**To:** Judiciary Nominations Republican (b) (6)
**Subject:** FW: Support Letter from American Center for Law and Justice

FYI, the ACLJ submitted 105,000 signatures in support of BK.

Thank you,
Mike Davis

Mike Davis, Chief Counsel for Nominations
United States Senate Committee on the Judiciary
Senator Chuck Grassley (R-IA), Chairman
224 Dirksen Senate Office Building
Washington, DC 20510
202-224(b) (6)direct)
(b) (6) (cell)
202-224-9102 (fax)
(b) (6)

**From:** Camacho, Dario (Judiciary-Rep)
**Sent:** Friday, August 31, 2018 12:48 PM
**To:** Davis, Mike (Judiciary-Rep) (b) (6)
**Cc:** Kenny, Steve (Judiciary-Rep (b) (6) ; Foy, Taylor (Judiciary-Rep)
(b) (6) Hartmann, George (Judiciary-Rep) (b) (6)
(b) (6)
**Subject:** Support Letter from American Center for Law and Justice

Dario Camacho
Law Clerk
Charles E. Grassley
Chairman
Senate Committee on the Judiciary

ACLJ
American Center
for Law & Justice

August 31, 2018

The Honorable Chuck Grassley
Chairman
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building, Washington, D.C. 20150

The Honorable Dianne Feinstein
Ranking Member
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building, Washington, D.C. 20150

*Re: Nomination of Brett Kavanaugh to the United States Supreme Court*

Dear Chairman Grassley and Ranking Member Feinstein:

By way of introduction, the American Center for Law & Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties as secured by law. ACLJ attorneys have argued before the Supreme Court of the United States and other federal and state courts in a number of significant cases involving the freedoms of speech and religion. The ACLJ and its international affiliates are committed to defending human rights and religious liberty around the world.

We write today for the purpose of sharing our petition to confirm Judge Brett Kavanaugh to serve as an Associate Justice of the Supreme Court of the United States. This petition has been circulated among our members and has been signed by more than 105,000 people. We believe that Judge Kavanaugh is supremely qualified by every standard to serve on our nation's highest court.

We are confident the testimony you will hear next week will further affirm the conclusion that he is highly capable to serve on the Supreme Court. We look forward to following the confirmation proceedings and appreciate your careful consideration.

Sincerely,

Jordan Sekulow
Executive Director

*201 Maryland Avenue, N.E.*
*Washington, DC 20002*
*202-546-8890*


# Supreme Court Appointment Process: Consideration by the Senate Judiciary Committee

**Barry J. McMillion**
Analyst in American National Government

August 14, 2018

**Congressional Research Service**
7-5700
www.crs.gov
R44236

**CRS REPORT**
Prepared for Members and
Committees of Congress

# Summary

The appointment of a Supreme Court Justice is an event of major significance in American politics. Each appointment is of consequence because of the enormous judicial power the Supreme Court exercises as the highest appellate court in the federal judiciary. To receive appointment to the Court, a candidate must first be nominated by the President and then confirmed by the Senate. Although not mentioned in the Constitution, an important role is played midway in the process (after the President selects, but before the Senate considers) by the Senate Judiciary Committee. Specifically, the Judiciary Committee, rather than the Senate as a whole, assumes the principal responsibility for investigating the background and qualifications of each Supreme Court nominee, and typically the committee conducts a close, intensive investigation of each nominee.

Since the late 1960s, the Judiciary Committee's consideration of a Supreme Court nominee almost always has consisted of three distinct stages—(1) a pre-hearing investigative stage, followed by (2) public hearings, and concluding with (3) a committee decision on what recommendation to make to the full Senate.

During the pre-hearing investigative stage, the nominee responds to a detailed Judiciary Committee questionnaire, providing biographical, professional, and financial disclosure information to the committee. In addition to the committee's own investigation of the nominee, the FBI also investigates the nominee and provides the committee with confidential reports related to its investigation. During this time, the American Bar Association also evaluates the professional qualifications of the nominee, rating the nominee as "well qualified," "qualified," or "not qualified." Additionally, prior to hearings starting, the nominee pays courtesy calls on individual Senators in their offices, including Senators who do not serve on the Judiciary Committee.

Once the Judiciary Committee completes its investigation of the nominee, he or she testifies in hearings before the committee. On average, for Supreme Court nominees who have received hearings from 1975 to the present, the nominee's first hearing occurred 40 days after his or her nomination was formally submitted to the Senate by the President.

Questioning of a nominee by Senators has involved, as a matter of course, the nominee's legal qualifications, biographical background, and any earlier actions as public figures. Other questions have focused on social and political issues, the Constitution, particular court rulings, current constitutional controversies, and judicial philosophy. For the most recent nominees to the Court, hearings have lasted for four or five days (although the Senate may decide to hold more hearings if a nomination is perceived as controversial—as was the case with Robert Bork's nomination in 1987, who had 11 days of hearings).

Usually within a week upon completion of the hearings, the Judiciary Committee meets in open session to determine what recommendation to "report" to the full Senate. The committee's usual practice has been to report even those Supreme Court nominations opposed by a committee majority, allowing the full Senate to make the final decision on whether the nomination should be approved. Consequently, the committee may report the nomination favorably, report it unfavorably, or report it without making any recommendation at all. Of the 15 most recent Supreme Court nominations reported by the Judiciary Committee, 13 were reported favorably, 1 was reported unfavorably, and 1 was reported without recommendation.

Additional CRS reports provide information and analysis related to other stages of the confirmation process for nominations to the Supreme Court. For a report related to the selection of a nominee by the President, see CRS Report R44235, *Supreme Court Appointment Process:*

*President's Selection of a Nominee*, by Barry J. McMillion. For a report related to Senate floor debate and consideration of nominations, see CRS Report R44234, *Supreme Court Appointment Process: Senate Debate and Confirmation Vote*, by Barry J. McMillion.

This report will be updated as action proceeds on the July 10, 2018, nomination of Judge Brett Kavanaugh to fill the vacancy created by the retirement of Justice Anthony Kennedy. As of this writing, committee hearings are scheduled to begin on Judge Kavanaugh's nomination on September 4, 2018.

# Contents



## Figures



## Contacts

# Background

While the U.S. Constitution assigns explicit roles in the Supreme Court appointment process only to the President and the Senate,[1] the Senate Judiciary Committee, throughout much of the nation's history, has also played an important, intermediary role.[2] From 1816, when the Judiciary Committee was created, until 1868, more than two-thirds of nominations to the Supreme Court were referred to the committee, in each case by motion. In 1868, the Senate determined, as a general rule, that all nominations should automatically be referred to appropriate standing committees.[3] Since then, all but seven Supreme Court nominations, with the most recent being in 1941, have been referred to the Judiciary Committee.[4]

Since the late 1960s, the Judiciary Committee's consideration of a Supreme Court nominee almost always has consisted of three distinct stages—(1) a pre-hearing investigative stage, followed by (2) public hearings, and concluding with (3) a committee decision on what recommendation to make to the full Senate.

# Pre-Hearing Stage

## Committee Questionnaire

Upon the President's announcement of a nominee, the Judiciary Committee typically initiates an intensive investigation into the nominee's background. One primary source of information is a committee questionnaire to which the nominee responds in writing.[5] The questionnaire asks the nominee for detailed biographical and financial disclosure information,[6] with responses to some

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[1] Article II, Section 2, clause 2, in pertinent part, provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... Judges of the supreme Court."

[2] This scope of this report involves the consideration of a Supreme Court nomination by the Senate Judiciary Committee. For a report providing information and analysis related to the selection of a nominee for the Court by the President, see CRS Report R44235, *Supreme Court Appointment Process: President's Selection of a Nominee*, by Barry J. McMillion. For a report providing information and analysis related to floor action on nominations, see CRS Report R44234, *Supreme Court Appointment Process: Senate Debate and Confirmation Vote*, by Barry J. McMillion.

[3] U.S. Congress, Senate, *History of the Committee on the Judiciary, United States Senate, 1816 1981*, S. Doc. 97 18, 97th Cong., 1st sess. (Washington: GPO, 1982), p. iv.; also, U.S. Congress, Senate, *History of the Committee on Rules and Administration United States Senate,* prepared by Floyd M. Riddick, Parliamentarian Emeritus of the Senate, S. Doc. 96 27, 96th Cong., 1st sess. (Washington: GPO, 1980). Riddick provided, on pp. 21 28, the full text of the general revision of the Senate rules, adopted in 1868, including, on p. 26, the following rule: "When nominations shall be made by the President of the United States to the Senate, they shall, unless otherwise ordered by the Senate, be referred to appropriate committees.... "

[4] The seven nominations not referred to the Judiciary Committee were Edwin M. Stanton in 1869 (former Secretary of War at time of nomination); Edward D. White in 1894 (sitting Senator); Joseph M. McKenna in 1897 (Attorney General, former U.S. Representative); Edward D. White again, in 1910, nominated to be Chief Justice; William Howard Taft in 1921 (former President); George Sutherland in 1922 (former Senator); and James F. Byrnes in 1941 (sitting Senator).

[5] As of this writing, the committee treats the questionnaire's biographical and financial disclosure sections as public information. The committee, however, treats as confidential (and not available to the news media or the public) the nominee's responses to more sensitive questions, such as whether he or she ever had been under investigation for possible violation of a civil or criminal statute.

[6] For example, the Judiciary Committee's questionnaire for Supreme Court nominee Sonia Sotomayor asked, among other things, for

> a complete employment record;
> a list of all organizations in which the nominee had been a member;

questions requiring the retrieval, listing, and summarizing of voluminous information about the nominee's past experiences or activities.[7] The questionnaire also asks the nominee about the selection process that he or she experienced prior to being nominated by a President, including the circumstances which led to the nominee's nomination and any interviews with administration officials and others that he or she had prior to being selected.[8] Because of the labor-intensive nature of the task, an Administration typically will aid the nominee in preparing and transmitting the questionnaire to the Judiciary Committee.

A chief purpose of the questionnaire is to provide members of the Judiciary Committee and their staffs with detailed pre-hearing information about the nominee.[9] After delivery of the completed questionnaire to the committee, however, some Members may formally request in writing that the nominee provide additional information to clarify or expand on what he or she has already submitted. The nominee may then provide the committee with written responses to specific questions from the Senators, which in turn are made available as supplements to the questionnaire to all committee members prior to the start of the nominee's confirmation hearings.[10]

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a list and copies of all her published writings and public statements;
any judicial offices held and, if ever a judge, "the 10 most significant cases over which you presided,"
citations for all opinions she had written, and citations to all cases in which she had been a panel member but did not write an opinion;
a list of any cases in which a litigant or party had requested that she recuse herself as a judge due to an asserted conflict of interest, along with the reason for recusing or declining to recuse;
identification of any position held or role played in a political campaign;
a description of the 10 "most significant litigated matters which you personally handled, whether or not you were the attorney of record";
teaching experience, including titles of courses and subject matter of courses taught;
the sources, amounts and dates of all anticipated deferred income and future benefits;
the sources and amounts of all income received during the calendar year preceding nomination and for the current calendar year;
"potential conflicts of interest when you first assume the position to which you have been nominated"; and
a description of instances and amount of time devoted in the past "to serving the disadvantaged."

See, concerning the Sotomayor nomination, "Committee Questionnaire and Related Materials" link on the Senate Judiciary Committee's website, at http://www.judiciary.senate.gov/nominations/supreme court/sotomayor#Questionnaire.

[7] In 2009, for example, in response to the Judiciary Committee's questionnaire concerning her Supreme Court nomination, appellate judge Sonia Sotomayor accounted for almost 200 speeches she had delivered from the early 1990s to May 2009 and more than 140 conferences and events she had attended during her years as a federal judge. Following the initial submission of her questionnaire, Judge Sotomayor provided the committee more than 200 items of questionnaire supplement materials (including news articles, letters, memoranda, reports, videos, meeting minutes, seminar and speech transcripts, and case citations.) Ibid.

[8] For example, Judge Neil Gorsuch indicated in his questionnaire that he was initially contacted in early December of 2016 by Leonard Leo, a lawyer, executive vice president of the Federalist Society, and a member of the President elect's transition team. Following this initial communication with Mr. Leo, and prior to his interview with President elect Donald Trump on January 14, 2017, Judge Gorsuch had interviews with Donald McGahn (a member of the President elect's transition team and now current White House Counsel and Assistant to the President), Vice President elect Michael Pence, Steve Bannon (former Senior Advisor to the President), Mark Paoletta (former chief counsel and assistant to Vice President Pence), and Reince Priebus (former Chief of Staff to the President). Judge Gorsuch also indicated that during the selection process he had a conversation with Makan Delrahim (former Deputy Counsel to the President).

[9] Judge Neil Gorsuch, the most recent nominee to have hearings, submitted a completed 68 page public questionnaire on February 11, 2017 (10 days after his nomination was submitted to the Senate on February 1, 2017). Judge Gorsuch's questionnaire is available at https://www.judiciary.senate.gov/nominations/supreme/pn55 115.

[10] For example, prior to the start, on July 13, 2009, of confirmation hearings on the Supreme Court nomination of Sonia

## Committee Background Investigation

The Judiciary Committee's confidential background investigation of a Supreme Court nominee closely reviews, among other things, the nominee's past professional activities. In this review, committee members and staff examine the mission of entities that employed or otherwise retained the services of the nominee and the nature and quality of the work product of the nominee while in that service. To this end, the committee might seek and attain access to the nominee's confidential written work product or to other documents that the past employer might consider of an internal nature and ordinarily not suitable for public release.[11]

If the nominee's background includes prior service in the federal executive branch, the Judiciary Committee as a whole, or some of its members, can be expected to seek access to records of the nominee's written work product from that service. Sometimes, however, a President might resist such requests, citing the need to protect the confidentiality of advice provided, or decisions made, by the nominee while having served within an Administration—and typically invoking an "executive privilege" or attorney-client privilege to support his refusal to make such information available to the Judiciary Committee.[12] In such an event, committee members or their staff might then devote a significant amount of time, prior to confirmation hearings, to identifying and justifying disclosure of specific kinds of documents that would aid the committee in making a more informed evaluation of the nominee—as well as to examining whatever documents are eventually released. In some cases, the committee may be in a position to exert leverage over an Administration, particularly when a majority of the committee's members are insistent that at least some executive branch documents be released before the committee will act on the nomination. This, a CRS report notes, was the case in 1986, when the Judiciary Committee prepared to consider the nomination of William H. Rehnquist to be Chief Justice.

> During the confirmation proceeding for the elevation of Justice Rehnquist to be Chief Justice, the Judiciary Committee sought documents that he had authored on controversial subjects when he headed DOJ's Office of Legal Counsel. President Reagan asserted executive privilege, claiming the need to protect the candor and confidentiality of the legal advice submitted to Presidents and their assistants. But with opponents of Rehnquist [in

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Sotomayor, the nominee's completed questionnaire to the Judiciary Committee was supplemented by at least 10 letters to the nominee from members of the committee or from the nominee responding to the Senators' letters. See, concerning the Sotomayor nomination, "Letters to and from Members of the Committee" link on the Judiciary Committee's website, at http://judiciary.senate.gov/nominations/SupremeCourt/upload/Sotomayor MemberLetters.pdf.

[11] In such a context, some members of the Judiciary Committee, prior to confirmation hearings for Supreme Court nominee Sonia Sotomayor in 2009, sought for the committee internal documents of the Puerto Rican Legal Defense and Education Fund (PRLDEF). Prior to becoming a federal judge, Judge Sotomayor, at various points during the period 1980 1992, had worked for PRLDEF, including as a board member. Soon after being nominated to the Court, Judge Sotomayor provided the Judiciary Committee with documents that she had contributed to or helped write as a board member. Subsequently, however, some Judiciary Committee members requested more information, from the fund itself, about cases it had handled and policy positions it took while Sonia Sotomayor was working on its behalf, and ultimately the fund provided some of these requested materials to the Judiciary Committee. See Tom LoBianco, "Nominee Advised Critics of Bork; Legal Funding Tied to Sotomayor," *The Washington Times*, July 2, 2009, p. A8; also, "Papers Irrelevant, White House Says," *The Washington Times*, July 3, 2009, p. A2.

[12] When President George W. Bush was asked at a news conference whether he would release to the Judiciary Committee some or all of Supreme Court nominee Harriet E. Miers's legal work as White House counsel, he replied, "I just can't tell you how important it is for us to guard executive privilege in order for there to be crisp decision making in the White House." Richard W. Stevenson, "President, Citing Executive Privilege, Indicates He'll Reject Requests for Counsel's Documents," *The New York Times,* October 5, 2005, at http://www.nexis.com. For the views, against the backdrop of the Miers nomination, of a range of legal scholars on the extent to which a President may properly invoke executive privilege to deny the Senate the work product of a White House counsel nominated to the Supreme Court, see Marcia Coyle, "Battle Looming over Privilege," *The National Law Journal*, vol. 28, October 10, 2005, pp. 1, 21.

> the Judiciary Committee] gearing up to issue a subpoena, the nomination of not only Rehnquist but that of Antonin Scalia to be an Associate Justice, whose nominations were to be voted on in tandem, were in jeopardy. President Reagan agreed to allow the Committee access to a smaller number of documents, and Rehnquist and Scalia were ultimately confirmed.[13]

In addition to the committee's own investigation of the nominee, confidential FBI reports on the nominee are another important information source. These are available only to committee members and a small number of designated staff under strict security procedures designed to prevent unauthorized disclosure.

## Courtesy Calls

During the pre-hearing stage, the nominee, in accordance with long-standing tradition, visits Capitol Hill to pay "courtesy calls" on individual Senators in their offices. For Senators not on the Judiciary Committee, that may be the only opportunity to converse in person with the nominee before voting on his or her confirmation to the Court. Senators may use these meetings to gain firsthand impressions of the nominee and to discuss with the nominee issues that are important to them in the context of the nomination.[14]

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[13] CRS Report RL32935, *Congressional Oversight of Judges and Justices*, by Elizabeth B. Bazan (available to congressional clients upon request). The report, under the heading "Judicial Nominations," provides a more detailed narrative of the 1986 conflict between the Judiciary Committee and the Reagan Administration over the Rehnquist documents provided in Louis Fisher, *The Politics of Executive Privilege* (Durham, NC: Carolina Academic Press, 2004), pp. 76 77.

Comparable requests from the Judiciary Committee produced mixed results in the case of President George W. Bush's Supreme Court nominees John G. Roberts Jr., Harriet E. Miers, and Samuel A. Alito Jr., whose backgrounds all included service in either the Department of Justice, the White House, or both. The Bush Administration allowed the release of some documents from each of the three nominees' executive branch service, but refused the release of other documents. See, for example: David G. Savage and Henry Weinstein, "Files from Roberts' Reagan Years Are Released," *Los Angeles Times,* August 16, 2005, p. 12; William Branigin, "Bush Will Not Release All Miers Documents," *The Washington Post*, October 24, 2005, at http://www.washingtonpost.com; and Susan Milligan, "Top Democrats Question Alito's Credibility," *Boston Globe*, December 2, 2005, at http://www.nexis.com.

[14] In the weeks prior to the start of his confirmation hearings, Neil Gorsuch reportedly met individually with more than 70 Senators. Seung Min Kim, "How Gorsuch Is Preparing for Senate Showdown," *Politico*, March 14, 2017, available at https://www.politico.com/story/2017/03/gorsuch supreme court hearings confirmation 236044.

Several weeks before the start of confirmation hearings on her nomination, Elena Kagan had reportedly made courtesy calls to "more than 50" Senate offices. Sheryl Gay Stolberg, "A Knock Down, Drag Out Yawn," *The New York Times*, June 3, 2010, p. 19.

President Obama's first Supreme Court nominee, Sonia Sotomayor, reportedly made courtesy calls to 89 Senators prior to the start of her confirmation hearings on July 13, 2009. Mark Sherman, "Sotomayor Arrives, Supreme Court Hearing Under Way," Associated Press Financial Wire, July 13, 2009, at http://www.nexis.com.

The nominee immediately prior to Sotomayor, Samuel A. Alito Jr., was reported to have met privately with more than 80 Senators between his nomination on November 10, 2005, and his confirmation on January 24, 2006. Jesse J. Holland (Associated Press), "Senate Moves Toward Alito's Confirmation," *Las Vegas Sun,* January 25, 2006, at http://www.lasvegassun.com.

Of the two Supreme Court nominees who immediately preceded Alito, John G. Roberts Jr. and Harriet E. Miers, one paid numerous courtesy calls to Senate offices, while the other made fewer. "By the time Justice Roberts took the oath before the Senate Judiciary Committee, he had met with more than half of the 100 members of the Senate." By contrast, a week prior to the withdrawal of her nomination, Miers was reported to have met "with only about 25 senators," reportedly because the meetings that had been held "had been fraught with misunderstandings and disagreements, giving ammunition to detractors.... " Charles Hurt, "Miers to End Her Meetings with Senators; Supreme Court Nominee Will Cram for Hearings," *The Washington Times*, October 21, 2005, p. A1.

## Evaluation by the American Bar Association

Also during the pre-hearing stage, the nominee is evaluated by the American Bar Association's Standing Committee on the Federal Judiciary,[15] which is publicly committed to providing the Senate Judiciary Committee with an impartial evaluation of the qualifications of each Supreme Court nominee. A publication of the ABA committee stresses that each evaluation focuses strictly on the candidate's "professional qualifications: integrity, professional competence and judicial temperament" and does "not take into account [his or her] philosophy, political affiliation or ideology."[16] Performance of this evaluation role, the committee states, is intended to help "ensure that the most qualified persons serve on the federal judiciary."[17] At the culmination of its evaluation, the ABA committee votes on whether to rate a nominee "well qualified," "qualified," or "not qualified."[18]

The rating of the ABA committee is then reported to each member of the Senate Judiciary Committee, as well as to the White House, the Department of Justice, and the nominee.[19] Invariably, a nominee's ABA rating receives prominent news coverage when it is sent to the Senate Judiciary Committee. In the past, a unanimously positive rating by the ABA committee has almost always presaged a favorable report by the Judiciary Committee on the nominee as well. Conversely, a divided vote, or less than the highest rating, by the ABA committee usually served to flag issues about the nominee for the Senate Judiciary Committee to examine at its confirmation hearings, and these issues in turn have sometimes been cited by Senators on the Judiciary Committee who voted against reporting a nomination favorably to the Senate floor.

For the most part, from its inception in the late 1940s, and continuing through the next three decades, the ABA committee evaluated Supreme Court nominees, as well as nominees to lower court judgeships, with bipartisan support in the Senate. In the 1980s and 1990s, however, the committee came under criticism from some Senators who questioned its impartiality and the usefulness of its evaluations to the Judiciary Committee.[20] Notwithstanding those criticisms, and

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[15] Traditionally, this evaluation role has been performed at the official invitation of the chair of the Senate Judiciary Committee. In 1947, the ABA committee was first invited by the committee's chair, Sen. Alexander Wiley (R WI), to testify or file a recommendation on each judicial nomination receiving a hearing. Grossman, Joel B. *Lawyers and Judges: The ABA and the Politics of Judicial Selection* (New York: John Wiley and Sons Inc., 1966), p. 64. A central purpose of the Judiciary Committee, when it first invited the ABA committee to evaluate judicial nominees, was to "help insure that only the highest caliber [of] men and women ascended to the bench…. " Statement of Sen. Joseph R. Biden Jr., chair of the Senate Judiciary Committee, in U.S. Congress, Senate Committee on the Judiciary, *The ABA Role in the Judicial Nomination Process*, hearing,101st Cong., 1st sess., June 2, 1989 (Washington: GPO, 1991), p. 2.

[16] American Bar Association, *The ABA Standing Committee on the Federal Judiciary: What It Is and How It Works*, p. 1, at http://www.abanet.org/scfedjud/federal judiciary09.pdf.

[17] Ibid. All 15 members of the ABA committee take part in its evaluation of a Supreme Court nominee. Committee members conduct confidential interviews nationwide with practicing lawyers, judges, law professors, and others "who are in a position to evaluate the prospective nominee's integrity, professional competence and judicial temperament." Meanwhile, teams of law school professors, as well as a separate team of practicing lawyers, examine the legal writing of a nominee. The nominee as well is interviewed, specifically by the committee member or members from the judicial circuit where the nominee has practiced or served as a judge; the chair of the committee also may participate in the interview, if he or she so chooses. The results of all of these inquiries are forwarded to the full ABA committee.

[18] Since the inception of the ABA committee's evaluating role, most, but not all, Supreme Court nominees have received the highest ABA rating of "well qualified," while no nominees have been rated by a committee majority to be "not qualified."

[19] The rating is also posted for the public record on the ABA committee's website at http://www.americanbar.org/groups/committees/federal judiciary/ratings.html.

[20] The ABA committee has, in the past, been accused by some Senators, as well as by some conservative groups, of holding a liberal ideological bias. The committee's ratings of judicial nominees Robert H. Bork in 1987 and Clarence

variations in the recognition afforded it by chairs of the Judiciary Committee,[21] the ABA committee has continued, in recent Congresses, to appear on a regular basis before the Judiciary Committee under both Republican and Democratic chairs. In keeping with long-standing practice, the ABA committee chair was the first public witness to testify at Supreme Court confirmation hearings in 2005, 2006, and 2009—to explain the ABA committee's rating of nominees John G. Roberts Jr., Samuel A. Alito Jr., and Sonia Sotomayor, respectively.[22] At the Alito hearings, the then-chair of the Judiciary Committee, Senator Arlen Specter (R-PA), observed that, in receiving the testimony of outside witnesses at Supreme Court confirmation hearings, "our tradition is to hear first from the American Bar Association and their evaluation of the judicial nominee."[23] Most recently, in 2010, in a minor break from this tradition, the ABA committee chair was not the first public witness to testify at the confirmation hearings for Supreme Court nominee Elena Kagan, but testified in a third panel of public witnesses (testifying first among those panelists).[24]

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Thomas in 1991 in particular were cited as demonstrating prejudice against nominees with conservative judicial philosophies. The ABA rating of Bork was unusual in that none of the committee's 15 members voted for the intermediate "qualified" rating instead, 10 members rated Bork as "well qualified," 4 members rated him "not qualified," and 1 member voted "not opposed." For the Thomas nomination, 12 of the committee's 15 members found the nominee "qualified," 2 found him "unqualified," and 1 abstained. None rated him "well qualified." The mid level rating of "qualified" of the Thomas nomination by the 12 member majority was in contrast to the "well qualified" ratings that the ABA panel had unanimously given the two previous Supreme Court nominees, David H. Souter and Anthony M. Kennedy. More recently, during the G.W. Bush presidency, the ABA committee unanimously rated John G. Roberts Jr. as "well qualified," as well as Samuel A. Alito Jr. (with one recusal).

[21] In 1997, Senator Orrin G. Hatch (R UT), as chair of the Judiciary Committee, announced that, during his chairmanship, the ABA committee would no longer be accorded an "officially sanctioned role" in the judicial confirmation process. "One cannot assume," Chairman Hatch wrote, "that a group as politically active as the ABA can at the same time remain altogether neutral, impartial and apolitical when it comes to evaluating judicial qualifications." Sen. Orrin G. Hatch, Letter to Colleagues on the Senate Judiciary Committee, February 24, 1997; also, Associated Press, "Hatch Hits ABA's Screening Role, *The Washington Post,* February 19, 1997, p. A4. However, in 2001, the Judiciary Committee's next chair, Senator Patrick J. Leahy (D VT), restored to the ABA committee a quasi official evaluating role, stating that the Judiciary Committee's Democratic members would oppose votes on any of President George W. Bush's judicial nominees who were not first reviewed by the ABA committee. Audrey Hudson, "Democrats Want ABA to Vet Judges," *The Washington Times*, March 28, 2001, p. A4; "Democrats Say ABA's Vetting of Nominees Still Counts," *The Washington Post*, March 28, 2001, p. A5. See also, for discussion of the ABA committee's role in evaluating judicial candidates, Sen. Patrick J. Leahy, "Nomination of Morrison C. England, Jr. To Be United States District Judge for the Eastern District of California," *Congressional Record*, daily edition, vol. 148, August 1, 2002, p. S7814.

[22] U.S. Congress, Senate Committee on the Judiciary, *Confirmation Hearing on the Nomination of John G. Roberts Jr. To Be Chief Justice of the United States,* 109th Cong., 1st sess., September 12 15, 2005 (Washington: GPO, 2005), pp. 451 455; U.S. Congress, Senate Committee on the Judiciary, *Confirmation Hearing on the Nomination of Samuel A. Alito Jr. To Be an Associate Justice of the Supreme Court of the United States,* 109th Cong., 2nd sess., January 9 13, 2006 (Washington: GPO, 2006), pp. 641 654; (Hereinafter cited as Senate Judiciary Committee, *Confirmation Hearing on John G. Roberts*, and Senate Judiciary Committee, *Confirmation Hearing on Samuel A. Alito.*); "Senate Judiciary Committee Holds Hearing on the Nomination of Judge Sonia Sotomayor to be an Associate Justice of the U.S. Supreme Court," *CQ Congressional Transcripts*, July 16, 2009, at http://www.CQ.com.

The ABA committee unanimously, in each instance, gave Roberts, Alito, Sotomayor, and Kagan its "well qualified" rating.

[23] Senate Judiciary Committee, *Confirmation Hearing on Samuel A. Alito*, p. 640.

[24] See "Continuation of the Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States Official Hearing Notice/Witness List," Senate Judiciary Committee, July 1, 2010, at http://judiciary.senate.gov/hearings/hearing.cfm?id=4679.

## Public Debate

Meanwhile, it is common, well before the start of confirmation hearings, for public debate to begin on a nominee's qualifications and on the meaning of the nomination for the future of the Court. Much of this debate is waged by commentators in the news media and increasingly, in recent years, on Internet sites and by advocacy groups that actively support or oppose a nominee.[25] Senators, too, sometimes contribute to this debate in Senate floor statements or other public remarks.[26] Moreover, if a nominee is not quickly selected, groups who see their interests to be at stake by a new Court appointment can be expected to begin mobilizing members, or seeking to affect public or Senate opinion, before the President even selects a nominee. Their purpose in doing so might be to influence the President's choice or to galvanize the groups' members and political allies in anticipation of whomever the President ultimately chooses to nominate.[27]

If the President's choice of a nominee proves to be divisive, the pre-hearing phase will be of strategic concern to both those groups which support the nominee's nomination, as well as to those groups which oppose it. During this phase, a political analyst has noted, "both sides will move quickly to try to define the nominee."[28] The analysis, published in July 2005, only days after Justice Sandra Day O'Connor announced her intention to retire, considered what might happen if President George W. Bush's choice to succeed Justice O'Connor immediately polarized the Senate along party lines. In that event, it predicted the following scenario prior to the nominee's confirmation hearings:

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[25] For an account of interest group support of, or opposition to, recent Supreme Court nominations during the pre hearing stage, see "Interest Groups React," *The National Law Journal*, vol. 31, June 1, 2009, p. 23 (reporting, less than a week after the selection of Sonia Sotomayor as a Supreme Court nominee, that her nomination "drew fervent praise and equally impassioned criticism"); David D. Kirkpatrick, "For Conservative Christians, Game Plan on the Nominee," *The New York Times,* August 12, 2005, p. 15; Jo Becker, "Television Ad War on Alito Begins; Liberals Try to Paint Court Pick as Tool of the Right Wing," *The Washington Post*, November 18, 2005, p. A3. For overviews of the role that interest groups played during an entire appointment process (from the point of Justice Sandra Day O'Connor's retirement announcement until the point that her successor, Samuel A. Alito Jr., was confirmed), see Lois Romano and Julie Eilperin, "Republicans Were Masters in the Race to Paint Alito; Democrats' Portrayal Failed to Sway the Public," *The Washington Post*, February 2, 2006, p. A1; David D. Kirkpatrick, "Paving the Way for Alito Began in Reagan Era," *The New York Times*, January 30, 2006, pp. A1, A18.

[26] Several Senators, for example, spoke favorably of Elena Kagan's nomination prior to hearings being held on her nomination. See floor remarks by Sens. Amy Klobuchar, Debbie Stabenow, and Jeanne Shaheen in "Nomination of Elena Kagan," Remarks in the Senate, *Congressional Record*, daily edition, June 16, 2010, p. S4956. Other Senators expressed concern with the nomination prior to Ms. Kagan's hearings. See, for example, floor remarks by Sen. Jon Kyl in "Nomination of Elena Kagan," Remarks in the Senate, *Congressional Record*, daily edition, May 17, 2010, p. S3796. Most recently, prior to committee hearings being scheduled for Brett Kavanaugh, several Senators have spoken favorably of the Kavanaugh nomination. See, for example, floor remarks by Sen. John Thune, "Executive Session," Remarks in the Senate, *Congressional Record*, daily edition, July 31, 2018, p. S5467; and remarks by Sen. Shelley Moore Capito, "Executive Session," Remarks in the Senate, *Congressional Record*, daily edition, July 11, 2018, p. S4891 S4892. Other Senators have expressed concern with the Kavanaugh nomination. See, for example, floor remarks by Sen. Elizabeth Warren, "Nomination of Brett Kavanaugh," Remarks in the Senate, *Congressional Record*, August 1, 2018, p. S5555; and remarks by Sen. Richard Blumenthal, "Executive Calendar," Remarks in the Senate, *Congressional Record*, July 11, 2018, p. S4897 S4898.

[27] A news account reported that *before* George W. Bush's announcement, on July 19, 2005, of his selection of John G. Roberts Jr. to succeed Associate Justice Sandra Day O'Connor, the "prospect of filling the first Supreme Court vacancy in 11 years" had "already mobilized political forces on both sides to raise vast financial resources in preparation for a struggle akin to a presidential campaign. From the moment O'Connor announced her retirement July 1, interest groups have been airing television and Internet advertising, blitzing supporters with email, and pressuring elected officials to stand strong." Peter Baker and Jim VandeHei, "Bush Chooses Roberts for Court," *The Washington Post*, July 20, 2005, p. A1. (Hereinafter cited as Baker, "Bush Chooses Roberts".)

[28] Kirk Victor, "The Senate Showdown," *National Journal*, vol. 37, July 9, 2005, p. 2185.

> First impressions are lasting impressions. If Republicans can create a positive image of a Bush Supreme Court nominee in the public's mind right out of the gate, that could help the nominee withstand later efforts by critics to portray him or her as an extremist. Conversely, if Democrats can quickly paint the president's choice as ideologically driven and far out of the mainstream, that could be a deathblow.[29]

However, even if a nominee is not a "consensus" choice attracting immediate support across the political spectrum, the pre-hearing stage will not necessarily be marked by sharp polarization in the Senate (or by the immediate emergence of Senate opposition). Such partisan division, for instance, was absent when President G.W. Bush, on July 19, 2005, announced his selection of U.S. appellate court judge John G. Roberts Jr. to succeed Justice O'Connor. While "[l]iberal advocacy groups immediately assailed Roberts for his positions on abortion and other issues," and "Republican senators quickly rallied behind Roberts," Senate Democrats withheld immediate criticism of the nominee—reportedly out of concern about falling into what the Senate Democratic leader, according to aides, "considered a Republican trap of condemning a nominee before hearings."[30]

Similarly, after President Obama selected Sonia Sotomayor, Republican Senators spoke "in cautious but measured tones about Sotomayor's qualifications and fitness for the court while Democrats" joined "the White House in singing her praises."[31] Another news account noted that "Senate Republicans responded with restraint to the announcement [of Sotomayor's nomination], and their largely muted statements stood in sharp contrast to the fractious partisanship that has defined court battles in recent decades."[32]

## Preparation for Hearings

As confirmation hearings approach, Judiciary Committee members and staff closely study the public record and investigative information compiled on the nominee,[33] and with the benefit of such research, they prepare questions to pose at the hearings. Sometimes committee members indicate in advance, either publicly or by communicating directly with the nominee, the kind of questions they intend to ask at the hearings.[34]

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[29] Ibid., p. 2186.

[30] Baker, "Bush Chooses Roberts," p. A1.

[31] Associated Press, "Interest groups engaged in Sotomayor battle," May 28, 2009.

[32] Shailagh Murray and Michael D. Shear, "Obama Names Sotomayor to Supreme Court," *The Washington Post*, May 27, 2009, available at http://www.washingtonpost.com/wp dyn/content/article/2009/05/26/AR2009052601313.html.

[33] See, for example, "Hanna Rosin," "They're Fishing on the Hill, but It's No Vacation," *The Washington Post*, August 4, 2005, p. C1 (describing the work of the "Noms Unit," a "special unit of the 50 member Democratic staff of the Senate Judiciary Committee, which in early August 2005 was tasked with investigating the background and past writings or statements of Supreme Court nominee John G. Roberts prior to Roberts's confirmation hearings scheduled to begin early the next month); see also Sheryl Gay Stolberg, "Out of Practice, Senate Crams for Battle over Court Nominee," *The New York Times*, July 8, 2005, pp. A1, A20 (describing the investigative and research roles of Republican staff on the Senate Judiciary Committee in early July 2005, as it prepared for President George W. Bush to select a nominee to succeed retiring Associate Justice Sandra Day O'Connor).

[34] See, for example, Seth Stern, "Leahy Says He Will Ask Roberts About So Called Torture Memo," *CQ Today*, August 29, 2005, at http://www.cq.com; Gary Delsohn, "Feinstein to Seek Roberts' Abortion Views"), *Sacramento Bee*, August 25, 2005, p. A1, at http://www.nexis.com; Sen. Arlen Specter, Letter to Hon. John G. Roberts Jr., August 23, 2005. In his August 23, 2005, letter, Sen. Specter, then chair of the Judiciary Committee, began by stating, "Supplementing my letter on the Commerce Clause, this letter deals with Supreme Court decisions on the Americans with Disabilities Act (ADA), which I intend to ask you about at your confirmation hearing."

For his or her part, the nominee also intensively prepares for the hearings, focusing particularly on questions of law and policy likely to be raised by committee members. The Administration assists the nominee in this effort by providing legal background materials and by conducting mock hearing practice sessions for the nominee. At these sessions—also called "murder boards," because of "their grueling demands on a judicial nominee"[35]—the nominee is questioned on the full range of legal and constitutional issues that Senators on the Judiciary Committee can be expected to raise at the nominee's confirmation hearings.[36]

# Hearings

Supreme Court nominations since 1949 have routinely received public confirmation hearings before either the Senate Judiciary Committee or a Judiciary subcommittee.[37] In 1955, hearings on the Supreme Court nomination of John M. Harlan marked the beginning of a practice, continuing

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[35] Elisabeth Bumiller, "Lengthy Practices Prepare Court Nominee for his Senate Hearings," *The New York Times*, September 1, 2005, p. A11.

[36] In preparation for the hearings on his nomination to the Court in March 2017, Neil Gorsuch went "through his own voluminous record of legal opinions" and underwent "'murder boards' to practice answering pointed questions from 20 probing senators. Some of his former law clerks [were] enlisted for hearing prep.... Those aiding Gorsuch's prep have reviewed confirmation hearings from past Supreme Court nominees to determine what kinds of questions arise during the high profile, televised grilling sessions." Seung Min Kim, "How Gorsuch Is Preparing for his Senate Showdown," *Politico*, March 14, 2017, available at https://www.politico.com/story/2017/03/gorsuch supreme court hearings confirmation 236044.

Prior to the start of her confirmation hearings in July 2009, Supreme Court nominee Sonia Sotomayor reportedly "endured weeks of insults, obnoxious questions and unwelcome drilling into her work as a judge and a lawyer and it was all on purpose, essentially a dress rehearsal for her confirmation hearings." Jesse J. Holland (The Associated Press), "Mock Exercises Prepare Sotomayor for Hearings," *The Washington Post*, July 10, 2009, at http://www.washingtonpost.com. A day before the start of the confirmation hearings, another story reported, quoting an Administration official, that Judge Sotomayor "and her helpers have been 'going over questions she would expect to be asked,' based on her record and what she has discussed in visits with senators over the last few weeks." Neil A. Lewis, "Nominee Wraps Up Rehearsals" *The New York Times*, July 12, 2009, p. 16.

In preparation for his confirmation hearings in September 2005, Associate Justice nominee John G. Roberts Jr. reportedly "participated in some 10 mock hearings of two to three hours each at the Justice Department, where administration lawyers and a revolving cast of Judge Roberts's colleagues and friends baited him with queries, including those they anticipated from the three Democratic senators who are widely expected to be toughest on the nominee.... " Ibid. After Judge Roberts's hearings were postponed (following the withdrawal of his Associate Justice nomination and then his re nomination, this time to be Chief Justice), he apparently participated in even more mock hearings, for it was later reported that he "underwent at least a dozen murder boards in preparing for his hearings." Marcia Coyle, "Alito's 'Murder Board' a Mix of the Legal Elite," *The National Law Journal*, vol. 28, January 30, 2006, p. 7. Coyle, in the same article, reported that subsequently the next Supreme Court nominee, Samuel A. Alito Jr., also participated in a rigorous series of mock hearing sessions, in preparation for his confirmation hearings before the Senate Judiciary Committee in early January 2006. Alito, she noted, "was shepherded through all of the murder boards by a team that included Steve Schmidt, special advisor to the president in charge of the White House confirmation team, and Harriet Miers, counsel to the president." Coyle observed that the "well handled U.S. Supreme Court nominee is now a fixture in the political process, and much of the credit goes to those so called murder boards, or preparation sessions for the Senate confirmation hearings."

[37] Prior to 1916, the Judiciary Committee considered Supreme Court nominations behind closed doors. In 1916, for the first time, the committee held open confirmation hearings on a Supreme Court nomination that of Louis D. Brandeis to be an Associate Justice at which outside witnesses (but not the nominee) testified. The Brandeis hearings, however, did not set immediately into place a new policy of open confirmation hearings for Supreme Court nominations, since each of the next six nominations (from 1916 to 1923) was either considered directly by the Senate, without referral to the Judiciary Committee, or was acted on by the committee without the holding of confirmation hearings. From 1925 to 1946, public confirmation hearings for Supreme Court nominations became the more common practice of the Judiciary Committee during this period 11 Court nominations received public confirmation hearings (while 5, prior to Senate approval, did not receive such hearings).

to the present, of Court nominees testifying in-person before the Senate Judiciary Committee.[38] Additionally, in 1981, Supreme Court confirmation hearings were opened to gavel-to-gavel television coverage for the first time when the committee instituted the practice at the confirmation hearings for nominee Sandra Day O'Connor.

A confirmation hearing typically begins with a statement by the chair of the Judiciary Committee welcoming the nominee and outlining how the hearing will proceed.[39] Other members of the committee follow with opening statements, and a panel of "presenters" introduces the nominee to the committee.[40] It is then the nominee's turn to make an opening statement, after which begins the principal business of the hearing—the questioning of the nominee by Senators serving on the Judiciary Committee. Typically, the chair begins the questioning, followed by the ranking minority Member and then the rest of the committee in descending order of seniority, alternating between majority and minority members, with a uniform time limit for each Senator during each round.[41] When the first round of questioning has been completed, the committee begins a second round, which may be followed by more rounds, at the discretion of the committee chair.[42]

## Nominations That Did Not Receive a Committee Hearing

Overall, from the nomination of Tom Clark in 1949 through the nomination of Neil Gorsuch in 2017, 34 of 38 Supreme Court nominations (89%) received hearings. Four nominations did not receive hearings—the nomination of John Harlan in 1954 (renominated and confirmed in 1955);

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[38] But note that, in 1925, Harlan F. Stone became the first Supreme Court nominee to appear in person and testify at his confirmation hearings. Notwithstanding Stone's appearance at his hearings in 1925, the Judiciary Committee, over the next 30 years, usually declined to invite Supreme Court nominees to testify if a confirmation hearing were held; as recently as 1954, for example, Earl Warren did not appear at his confirmation hearings to be Chief Justice.

[39] The chair's opening statement might also express views on the nomination and confirmation process or on the nominee. For example, then Judiciary Chairman Senator Patrick Leahy stated, in his opening remarks during Supreme Court nominee Elena Kagan's confirmation hearing, that "Elena Kagan earned her place at the top of the legal profession. Her legal qualifications are unassailable.... I welcome questions to Solicitor General Kagan about judicial independence, but let us be fair. Let us listen to her answers. There is no basis to question her integrity and no one should presume that this intelligent woman, who has excelled during every part of her varied and distinguished career, lacks independence." National Public Radio, "Transcript: Leahy's Statement on Kagan Hearing," June 28, 2010, available at http://www.npr.org/templates/story/story.php?storyId=128168185.

[40] The presenters often will include the Senators and, less frequently, Representatives from the state in which the nominee is a resident or the state in which the nominee was born or has resided for much of his or her life. Other presenters at recent Supreme Court confirmation hearings have included a former President (Gerald R. Ford, at the 1987 hearings for Robert H. Bork); the Attorney General (William French Smith, at the 1981 hearings for Sandra Day O'Connor, and Edward Levi, at the 1975 hearings for John Paul Stevens); a former Attorney General (Griffin B. Bell, at the 1986 hearings for William H. Rehnquist); and a former governor (Christine Todd Whitman, at the 2006 hearings for Samuel A. Alito Jr.). The tradition of home state Senators presenting a nominee to the Judiciary Committee does not obligate a home state Senator to support (or imply that he or she will support) the nominee's nomination at the time of the confirmation vote on the floor. Recent instances of a home state Senator voting against the confirmation of a nominee whom they introduced to the committee include Sens. Michael Bennet of Colorado (Gorsuch nomination), Scott Brown of Massachusetts (Kagan nomination), and Frank Lautenberg of New Jersey (Alito nomination).

[41] For example, for the three most recent nominations to the Court to receive hearings (Kagan, Sotomayor, and Alito), each Senator was allotted 30 minutes to question the nominee.

[42] Almost invariably, the questioning is conducted exclusively by members of the committee. However, on at least two occasions in the 20th century, a Senator who was not a committee member was allowed to join in the questioning of the nominee. This first instance, in 1941, involved Sen. Millard E. Tydings (D MD) at the confirmation hearings for nominee Robert H. Jackson; the second instance, in 1957, involved Sen. Joseph R. McCarthy (R WI) at the confirmation hearings for nominee William J. Brennan Jr. See James A. Thorpe, "The Appearance of Supreme Court Nominees Before the Senate Judiciary Committee," *Journal of Public Law*, vol. 18, 1969, p. 378 (Jackson hearings) and p. 385 (Brennan hearings).

John Roberts, Jr. in 2005 (renominated to be Chief Justice and confirmed in 2005); Harriet Miers in 2005; and Merrick Garland in 2016.

The most recent nomination not to receive a hearing, the nomination of Merrick Garland by President Obama, is the second nomination to the Court since 1949 for which no hearings were scheduled (hearings had been scheduled for the Roberts and Miers nominations prior to both nominations being withdrawn by the President).

The Garland nomination is, however, distinct from the nomination of Mr. Harlan in 1954 in that Mr. Harlan's nomination was resubmitted in 1955, hearings were held on that nomination, and Mr. Harlan was subsequently confirmed by the Senate.[43]

## Number of Days from Nomination to First Committee Hearing

For nominees since 1975 who have received hearings, **Figure 1** shows the number of days that elapsed from the date on which the nomination was formally submitted to the Senate to the date on which the nominee had his or her first hearing before the Judiciary Committee.[44]

Of the 14 nominees listed in the figure, Robert Bork waited the greatest number of days (70) from nomination to his first committee hearing, while John G. Roberts Jr. waited the fewest number of days (6)—followed closely by John Paul Stevens (7).[45] The Bork nomination, controversial at the time, was ultimately rejected by the Senate, while the Roberts nomination to be Chief Justice was to fill an immediate vacancy on the Court after Chief Justice Rehnquist's death in 2005.

Note that Judge Roberts was initially nominated to fill the vacancy that would be created by the retirement of Justice Sandra Day O'Connor.[46] While his nomination was pending for that anticipated vacancy, Chief Justice Rehnquist died on September 3, 2005. Following Chief Justice Rehnquist's death, Judge Roberts's nomination for the anticipated O'Connor vacancy was withdrawn and he was instead nominated to fill the immediate vacancy created by Chief Justice Rehnquist's death.

At the time he was nominated for the Chief Justice position, Judge Roberts's nomination to replace Justice O'Connor had been pending for 39 days. Judge Roberts's nomination to the Chief Justice position only delayed his already-scheduled confirmation hearings to replace Justice O'Connor by several days.[47] Altogether, considering both of his nominations, Judge Roberts waited a total of 45 days from the initial nomination to replace Justice O'Connor to the first

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[43] See CRS Insight IN10476, *Senate Judiciary Committee Hearings for Supreme Court Nominations: Historical Overview and Data*, by Barry J. McMillion (available to congressional clients upon request).

[44] It is not uncommon for a President to announce his choice for a vacancy prior to formally submitting the nomination to the Senate but typically, at least for nominees since the mid 1970s, the nomination has been formally submitted to the Senate within approximately one week of the President's announcement. There are, however, exceptions. For example, 43 days elapsed between President Reagan's announcement that he was going to nominate Sandra Day O'Connor to the Court and when the President actually submitted her nomination to the Senate. For the purposes of **Figure 1**, the date on which the nomination is formally submitted (not the date on which the President announces who he intends to nominate) is used in the calculation. Using the date the nomination is submitted provides a better measure of how long a nominee waits for hearings to begin once his or her nomination is formally submitted to the Senate.

[45] Of nominees confirmed by the Senate, Clarence Thomas waited the longest from nomination to first committee hearing (64 days).

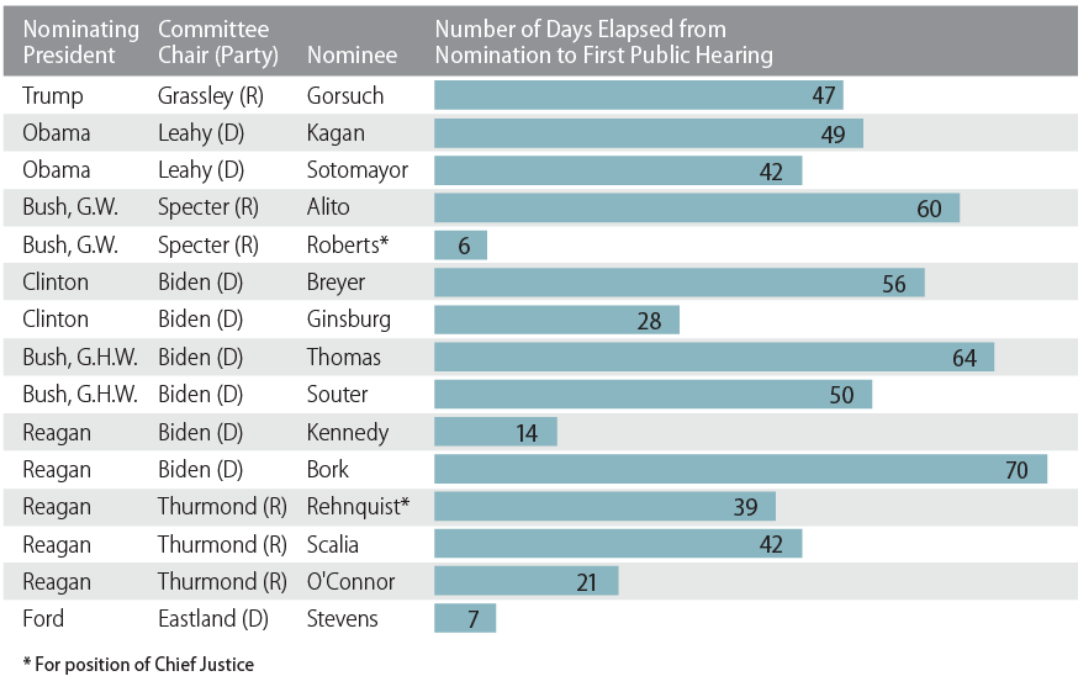
[46] Justice O'Connor's retirement announcement indicated that she would retire "upon the nomination and confirmation of my successor." The letter announcing her retirement is available online at https://www.supremecourt.gov/publicinfo/press/oconnor070105.pdf.

[47] See James Kuhnhenn, "Senate Expands Focus of Questions for Roberts as Chief Justice," McClatchy, Knight Ridder Newspapers, September 6, 2005, available at https://www.mcclatchydc.com/latest news/article24449263.html.

committee hearing date to replace Chief Justice Rehnquist. As shown by **Figure 1**, this 45-day interval is similar to the wait time experienced by other recent nominees.

**Figure 1. Number of Days from Nomination to First Committee Hearing**

(Nominees Receiving Hearing from 1975 to 2017)




**Source:** Congressional Research Service

**Notes:** This figure shows, for nominees to the Supreme Court who received a hearing before the Senate Judiciary Committee from 1975 through 2017, the number of days that elapsed from the date a nomination was submitted to the Senate to the date of the nominee's first committee hearing.

* John G. Roberts Jr. was initially nominated to the judgeship vacated by Justice Sandra Day O'Connor. Following the death of Chief Justice William Rehnquist, the Roberts nomination was withdrawn by President Bush and Mr. Roberts was subsequently renominated by President Bush to serve on the Court as Chief Justice. Mr. Roberts had his first committee hearing, as a nominee to replace Chief Justice Rehnquist, **45 days** after he was initially nominated to fill the O'Connor vacancy.

** William Rehnquist, who was already serving on the Court as an Associate Justice, was nominated by President Reagan to serve as the new Chief Justice once Chief Justice Burger stepped down from the Court. Justice Rehnquist's elevation to the Chief Justice position would itself create a vacancy for an Associate Justice, to which Mr. Scalia was nominated.

For the 15 nominees listed in **Figure 1**, the average number of days from nomination to first committee hearing is approximately 40 days, while the median is 42 days.[48] If 45 days (rather than 6 days) is used as the time interval that Mr. Roberts waited from nomination to his first

[48] The mean is equivalent to the arithmetic average. The mean or average is calculated by adding a group of numbers and then dividing that value by how many numbers there are, while the median is the middle value for a particular set of numbers (i.e., half of the numbers are above the median and half of the numbers are below it). Although the average or mean is a more commonly used measure, the median is less affected by outliers or extreme cases (e.g., nominees for whom the time from nomination to first committee hearing was relatively much shorter or longer than it was for other nominees). Consequently, the median might be a better measure of central tendency.

committee hearing, the average number of days from nomination to first committee hearing is 42 days, while the median is 45 days.

For the eight Justices who, as of August 1, 2018, are serving on the Court, the average number of days from nomination to first committee hearing is 44 days, while the median is 48 days. If 45 days (rather than 6 days) is used as the time interval that Judge Roberts waited from nomination to his first committee hearing, the average number of days from nomination to first committee hearing is approximately 49 days, while the median is 48 days.

### The Kavanaugh Nomination

Confirmation hearings for the current nominee to the Court, Judge Brett Kavanaugh, are scheduled to begin on September 4, 2018. If hearings begin on this date, 56 days will have elapsed from Judge Kavanaugh's nomination to first committee hearing.

## Purposes of Questioning the Nominee

For members of the Judiciary Committee, questioning of the nominee may serve various purposes. As already noted, for Senators who are undecided about the nominee the hearings may shed light on the nominee's fitness, and hence on how they should vote. Other Senators, as the hearings begin, may already be "reasonably certain about voting to confirm the nominee," yet "also remain reasonably open to counter-evidence," and thus use the hearings "to pursue a line of questioning designed to probe the validity of this initial favorable predisposition."[49] Still others, however, may come to the hearings "having already decided how they will vote on the nomination" and, accordingly, use their questioning of the nominee to try "to secure or defeat the nomination."[50]

A Senator may even be initially undecided about whether he or she supports a nominee of a President belonging to the same party as the Senator. One reason for this is that a Senator might question whether a nominee is sufficiently committed to a particular judicial philosophy or ideological perspective—and, consequently, might view the committee hearings as important in determining whether a nominee might be supportive of the Senator's preferred judicial philosophy or ideological disposition.[51]

For some Senators, the hearings may be a vehicle through which to impress certain values or concerns upon a nominee in the hope of influencing how he or she might approach issues later as a Justice.[52] The hearings, to some Senators, also may represent an opportunity to draw the

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[49] George L. Watson and John A. Stookey, *Shaping America: The Politics of Supreme Court Appointments* (New York, HarperCollins College Publishers, 1995), p. 150. (Hereinafter cited as Watson and Stookey, *Shaping America*.).

[50] Ibid., p. 152.

[51] For example, following President G.W. Bush's nomination of Harriet Miers, Senator John Thune (R SD) stated that "conservatives see this (nomination) as having enormous stakes, that's why there's a lot of anxiety and uncertainty as to where she's really going to come down," and that in her committee hearings "she's going to have to give a very good insight into her judicial philosophy, whether she's an originalist, whether she's exercise judicial restraint. Those hearings are going to be enormously important." Tom Curry, "Sen. Brownback is key to nominee Miers' fate," *NBC News*, October 6, 2005, at http://www.nbcnews.com/id/9604860/ns/us news the changing court/t/sen brownback key nominee miers fate/#.VeimfvnjB M. Senator Sam Brownback (R KS), a member of the Judiciary Committee at the time of the Miers nomination, stated, "there's precious little to go on and a deep concern that this would be a Souter type candidate." Scott Benjamin, "Conservatives Divided On Miers, *CBS News*, October 5, 2005, available at http://www.cbsnews.com/news/conservatives divided on miers. Ultimately, Ms. Miers asked President G.W. Bush to withdraw her nomination prior to her first committee hearing.

[52] See Stephen J. Wermiel, "Confirming the Constitution: The Role of the Senate Judiciary Committee," *Law and*

public's attention to certain issues, to advocate their policy preferences, or to associate themselves with concern about certain problems. Senators, it has also been noted, "may play multiple roles in any given hearing."[53]

## Types of Questions Posed to Nominee

In recent decades, most nominees have undergone rigorous questioning in varying subject areas. They have been queried, as a matter of course, about their legal qualifications, private backgrounds, and earlier actions as public figures. Other questions have focused on social and political issues, the Constitution, particular Court rulings, current constitutional controversies, constitutional values, judicial philosophy, and the analytical approach a nominee might use in deciding issues and cases.[54]

Still other questions may concern past public statements made by the nominee, or (if the nominee has prior judicial experience) particular rulings handed down by the nominee.[55] To many Senators, eliciting testimony from the nominee may be seen as an important way to gain insight into his or her professional qualifications, temperament, and character. Some Senators, as well,

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*Contemporary Problems*, vol. 56, Autumn 1993, p. 141, in which the author maintained that, since the 1987 hearings on Supreme Court nominee Robert H. Bork, a purpose of Senators on the Judiciary Committee has been "to identify points of constitutional concern and pursue those concerns with nominees, with the hope that, once confirmed, the new Justices will remember the importance of the core values urged on them by the senators or at least feel bound by the assurance they gave during their hearings."

[53] Watson and Stookey, *Shaping America*, p. 155.

[54] For example, some of the issues addressed by questions posed to Neil Gorsuch, the most recent nominee to the Court to have hearings, included his views, generally, on legal precedent; his former role and views as a Justice Department official on issues related to torture, the habeas corpus rights of Guantanamo detainees, warrantless surveillance, and the scope of the President's power as commander in chief to ignore statutes; and his views on how to apply new technologies to constitutional principles. See Matt Flegenheimer, Adam Liptak, Carl Hulse, and Charlie Savage, "Seven Highlights From the Gorsuch Confirmation Hearings," *New York Times*, March 21, 2017, available at https://www.nytimes.com/2017/03/21/us/politics/neil gorsuch confirmation hearings.html. For additional information related to the types of questions posed to Supreme Court nominees, see CRS Report R41300, *Questioning Supreme Court Nominees About Their Views on Legal or Constitutional Issues: A Recurring Issue*, by Denis Steven Rutkus. Available to congressional clients upon request to the author.

[55] For instance, at her confirmation hearings in July 2009, Supreme Court nominee Sonia Sotomayor was asked questions about public statements she had made prior to her nomination (and which opponents of her nomination had criticized) of appellate judges making policy and of the experiences of a "wise Latina woman" versus those of a white male judge. Senators on the Judiciary Committee also asked her about her participation in a controversial three judge appellate panel ruling in a case involving reverse discrimination allegations by a group of white firefighters against city officials in New Haven, Connecticut (a ruling reversed by the Supreme Court in June 2009, after Judge Sotomayor's nomination to the Court but prior to the start of her confirmation hearings). See Tony Mauro, "During Senate Questioning, Sotomayor Explains Controversial Statements, Defends Rulings," *The National Law Journal,* July 15, 2009, at http://www.law.com;, Peter Baker and Neil A. Lewis, "Republicans Press Judge About Bias and Activism," *The New York Times*, July 15, 2009, pp. A1, A15; and Tom LoBianco, "Nominee Hit with Hot Button Issues; Sotomayor Explains 'Wise Latina' Again," *The Washington Times*, July 16, 2009, p. A9. During another recent confirmation hearing, Supreme Court nominee Neil Gorsuch "distanced himself" from previous statements he made criticizing liberals for preferring litigation to the political process. Specifically, in a 2005 essay he characterized liberals who sought certain policy changes as being "addicted to the courtroom." During his testimony before the Judiciary Committee he indicated he had been wrong to single out liberals and that "the problem lies on both sides of the aisle." See Matt Flegenheimer, Adam Liptak, Carl Hulse, and Charlie Savage, "Seven Highlights From the Gorsuch Confirmation Hearings," *New York Times*, March 21, 2017, available at https://www.nytimes.com/2017/03/21/us/politics/neil gorsuch confirmation hearings.html.

may hope to glean from the nominee's responses signs of how the nominee, if confirmed to the Court, might be expected to rule on issues of particular concern to the Senators.[56]

For his or her part, however, a nominee might sometimes be reluctant to answer certain questions that are posed at confirmation hearings.[57] A nominee might decline to answer for fear of appearing to make commitments on issues that later could come before the Court.[58] A nominee also might be concerned that the substance of candid responses to certain questions could displease some Senators and thus put the nominee's chances for confirmation in jeopardy.[59]

For their part, committee members may differ in their assessments of a nominee's stated reasons for refusing to answer certain questions.[60] Some may be sympathetic and consider a nominee's refusal to discuss certain matters of no relevance to his or her fitness for appointment, or as illustrative of a commendable inclination not to be "pinned down" on current legal controversies.

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[56] See, for example, Charles Babington, "On Question of Nominee Questions, No Clear Answer," *The Washington Post*, July 28, 2005, p. A6, which examined the issue facing Senators on the Judiciary Committee, prior to confirmation hearings for Supreme Court nominee John G. Roberts Jr, "of what should be asked and answered or not answered in confirmation hearings later this summer."

[57] Most recently, for example, Neil Gorsuch declined to answer questions related to his personal views on various rulings by the Supreme Court. According to one account, Mr. Gorsuch had "rewritten the playbook for Supreme Court nominees by refusing to share his personal views on even the most widely accepted landmark cases during his Senate confirmation hearing. His strict adherence to a game plan of dodging questions on his personal views or legal philosophy on even the most accepted rulings that desegregated schools and established the right to contraception allowed him to sidestep a variety of political landmines that could have given" Senators a reason to oppose his nomination to the Court. Alexander Bolton and Lydia Wheeler, "Gorsuch Rewrites Playbook for Confirmation Hearings," *The Hill*, March 22, 2017, at http://thehill.com/homenews/news/325343 gorsuch rewrites playbook for confirmation hearings. See, also, William G. Ross, "The Questioning of Supreme Court Nominees at Senate Confirmation Hearings: Proposals For Accommodating the Needs of the Senate and Ameliorating the Fears of the Nominees," *Tulane Law Review*, vol. 62, November 1987, pp. 109 174.

[58] Illustrative of such a concern was the following statement by nominee David H. Souter, at a September 14, 1990, hearing, explaining his refusal to answer a question concerning the issue of a woman's right, under the Constitution, to have an abortion: "Anything which substantially could inhibit the court's capacity to listen truly and to listen with as open a mind as it is humanly possible to have should be off limits to a judge. Why this kind of discussion would take me down a road which I think it would be unethical for me to follow is something that perhaps I can suggest, and I will close with this question.

"Is there anyone who has not, at some point, made up his mind on some subject and then later found reason to change or modify it? No one has failed to have that experience. ... With that in mind can you imagine the pressure that would be on a judge who had stated an opinion, or seemed to have given a commitment in these circumstances to the Senate of the United States, and for all practical purposes, to the American people?" U.S. Congress, Senate Committee on the Judiciary, *Nomination of David Souter To Be Associate Justice of the Supreme Court of the United* States, hearings, 101st Cong., 2nd sess., September 13, 14, 17, 18 and 19, 1990 (Washington: GPO, 1991), p. 194.

[59] In one account, one journalist has written, the perspective of Supreme Court nominee John G. Roberts Jr., as he prepared for his 2005 confirmation hearings, was that he "knew he could afford no mistakes. He worried that one answer, one ten second response to one question over the course of fifteen hours of questioning, could doom his chances." Jan Crawford Greenburg, *Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court* (New York: Penguin Press, 2007), p. 234.

[60] As early as 1959, at the confirmation hearings for Supreme Court nominee Potter Stewart, there is a record of Judiciary Committee members differing among themselves as to appropriateness of certain areas of questioning for the nominee. During the hearings, Sen. Thomas C. Hennings Jr. (D MO) raised a point of order about interrogating a nominee on his "opinion as to any of the questions or the reasoning upon decisions which have heretofore ... [been] handed down" by the Supreme Court. The point of order, however, was overruled by the committee's chair, Sen. James O. Eastland (D MS), who stated the rule he would follow: "[I]f the nominee thinks that the question is improper, that he can decline to answer. And that when he declines, his position will be respected." L.A. Powe Jr., "The Senate and the Court: Questioning a Nominee," *Texas Law Review*, vol. 54, May 1976, p. 892, citing an unpublished transcript of the April 9 and 14, 1959, hearings of the Senate Judiciary Committee on the Supreme Court nomination of Potter Stewart, pp. 43 44.

Others, however, may consider a nominee's views on certain subjects as important to assessing the nominee's fitness and hence regard unresponsiveness to questions on these subjects as sufficient reason to vote against confirmation.[61] Protracted questioning, occurring over several days of hearings, is likely if a nominee is relatively controversial or is perceived by committee members to be evasive or insincere in responding to certain questions, or if Senators perceive certain issues to merit extended discussion.[62]

## Public Witnesses

After questioning of the nominee has been completed, the committee, in subsequent days of hearings, also hears testimony from public witnesses. As stated earlier, among the first to testify in recent decades has been the chair of the ABA's Standing Committee on the Federal Judiciary, who explains the committee's rating of a nominee. Other witnesses ordinarily include professional colleagues of a nominee[63] or representatives of advocacy groups which support or oppose a nominee.[64]

## Closed-Door Committee Session

In a practice instituted in 1992, the Judiciary Committee also conducts a closed-door session with each Court nominee. This session is held to address any questions about the nominee's background that confidential investigations might have brought to the committee's attention. In announcing this procedure in 1992, the then-chair of the committee, Senator Joseph R. Biden Jr. (D-DE), explained that such a hearing would be conducted "in all cases, even when there are no major investigative issues to be resolved so that the holding of such a hearing cannot be taken to demonstrate that the committee has received adverse confidential information about the nomination."[65]

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[61] That noncommittal replies by a Supreme Court nominee may be regarded differently by Senators on the Judiciary Committee appeared to be borne out at the confirmation hearings in September 2005 for Chief Justice nominee John G. Roberts Jr. In his first day of testimony, Roberts "was Delphic," according to one news analysis, "and his supporters and critics each ended the day saying his performance had hardened their enthusiasm or their doubts." Todd S. Purdum, "With His Goal Clear, the Nominee Provides a Profile in Caution During Questioning," *The New York Times,* September 14, 2005, p. 25.

[62] For example, Judge Robert H. Bork, a controversial nominee of President Reagan's to be an Associate Justice, had 11 days of hearings during the period from September 15, 1987 to September 30, 1987. The Bork nomination was later rejected by a 42 58 vote on the Senate floor. In contrast, Judge Anthony M. Kennedy, nominated to the same vacancy for which Bork was rejected, had 3 days of hearings and was later confirmed by a unanimous vote of 97 0. More recently, Elena Kagan had four days of hearings, Sonia Sotomayor had four days, Samuel Alito Jr. had five days, and John Roberts Jr. had four days.

[63] If a nominee, for instance, is a sitting U.S. circuit court judge, one or more of the nominee's colleagues on the bench might testify on his or her behalf during the hearings. For example, at the time of his nomination, Samuel Alito served as a judge on the Third Circuit Court of Appeals (comprised of Delaware, New Jersey, and Pennsylvania). Two of Judge Alito's colleagues serving as active judges on the Third Circuit, Maryanne Trump Barry and Anthony J. Scirica, testified as witnesses on his behalf.

[64] Advocacy or interest groups, for example, with representatives testifying at recent Supreme Court hearings include the National Federation of Independent Business (supporting Neil Gorsuch's nomination), the Sierra Club (opposing Gorsuch), the National Association of Women Judges (supporting Elena Kagan's nomination), Family Research Council (opposing Kagan), National Fraternal Order of Police (supporting Sonia Sotomayor's nomination), Americans United for Life (opposing Sotomayor), and the National Abortion and Reproductive Rights Action League Pro Choice America (opposing Samuel Alito's nomination).

[65] Sen. Joseph R. Biden Jr., "Reform of the Confirmation Process," remarks in the Senate, *Congressional Record*, vol. 138, June 25, 1992, p. 16320.

The first such closed-door session was held for Supreme Court nominee Ruth Bader Ginsburg in 1993. Most recently, such sessions were held in 2005, 2006, 2009, 2010, and 2017 for nominees John G. Roberts Jr., Samuel A. Alito Jr., Sonia Sotomayor, Elena Kagan, and Neil Gorsuch, respectively. At the Roberts, Alito, and Kagan confirmation hearings, a brief executive session was held after the Judiciary Committee had concluded all of its rounds of questions for the nominees but before it received outside witness testimony.[66] At the Sotomayor confirmation hearings, an executive session was held between the Judiciary Committee's first and second rounds of questions for the nominee.[67]

# Reporting the Nomination

## Reporting Favorably, Negatively, or Without Recommendation

Usually within a week of the end of hearings, the Judiciary Committee meets in open session to determine what recommendation to report to the full Senate. The committee may (1) report the nomination favorably, (2) report it negatively, or (3) make no recommendation at all on the nomination. A report with a negative recommendation or no recommendation permits a nomination to go forward, while alerting the Senate that a substantial number of committee members have reservations about the nomination.

**Figure 2** shows, for the 15 nominations reported by the Judiciary Committee since 1971, whether the nomination was reported favorably (identified in columns with blue dots) or other than favorably (identified in column with orange dots).[68]

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[66] On February 15, 2005 (following a morning of public testimony by nominee John G. Roberts Jr.), the chair of the Judiciary Committee, Sen. Arlen Specter (R PA), announced that the committee would immediately be going into executive session, "to ask the nominee on the record under oath about all investigative charges against the person if there were any." Such hearings, Chairman Specter said, "are routinely conducted for every Supreme Court nominee, even where there are no investigative issues to be resolved. In so doing, those outside the Committee cannot infer that the committee has received adverse confidential information about a nominee." Thirty one minutes after proceeding to closed session, the committee reconvened in open session. Chairman Specter noted that the committee had reviewed "the background investigations on Judge Roberts, which were routine," and that he and the committee's ranking Member, Sen. Patrick J. Leahy (D VT), had been "delegated to report that there are no disqualifying factors." (The committee then proceeded to hear outside witnesses in open session.) Senate Judiciary Committee, *Confirmation Hearing on John G. Roberts*, p. 450. See also Senate Judiciary Committee, *Confirmation Hearing on Samuel A. Alito,* p. 640, where, after a brief executive session, Chairman Specter, in public session, announced that the committee had "reviewed confidential data on the background of Judge Alito, and it was all found to be in order." Shortly before the conclusion of the Judiciary Committee's questioning of Court nominee Elena Kagan on June 30, 2010, the chair of the committee, Senator Patrick J. Leahy (D VT), informed committee members, "We'll finish the questions … and then … we will … go to the traditional closed session. And the press won't be able to be there." [66] "Senate Judiciary Committee Holds Hearing on the Nomination of Solicitor General Elena Kagan to the U.S. Supreme Court, Day 3," *CQ Congressional Transcripts*, June 30, 2010, at http://www.CQ.com (no page numbering supplied).

[67] On July 15, 2009, after all the Judiciary Committee's members had participated in a first round of questions for Judge Sotomayor, the chair of the committee, Senator Leahy requested, without objection, "for the committee now proceeding to a closed session, which is a routine practice we've followed for every [Supreme Court] nominee since back when Senator Biden was chairman of the committee." Upon conclusion of the brief closed door session, the committee resumed public hearings that afternoon, starting with its second round of questions for Judge Sotomayor. "Senate Judiciary Committee Holds Hearing on the Nomination of Judge Sonia Sotomayor to be an Associate Justice of the U.S. Supreme Court," *CQ Congressional Transcripts*, July 15, 2009, at http://www.CQ.com.

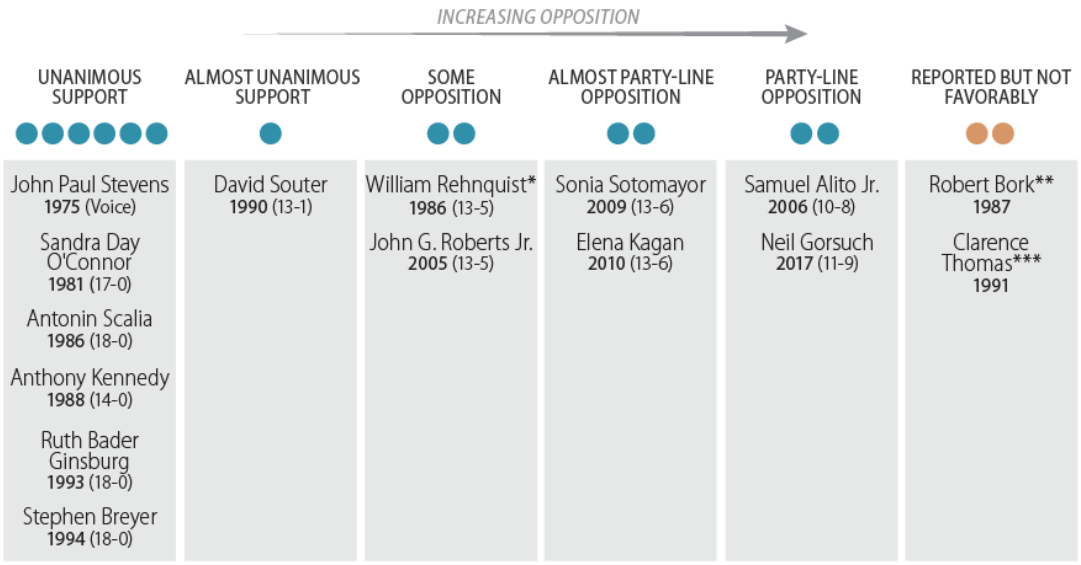
[68] The nomination of William Rehnquist to be Chief Justice is not included in **Figure 2** (as he was already serving as an Associate Justice on the Court at the time of his nomination). His nomination to be Chief Justice was reported favorably by the Committee with a 13 5 vote.

For nominations reported favorably, the level of support among committee members is indicated as follows: (1) unanimous support (i.e., no opposition by committee members); (2) almost unanimous support (opposition by one committee member); (3) some opposition (opposition by two or more committee members, but with the nomination also receiving the support of at least two members not belonging to the President's party); (4) almost party-line opposition (opposition by all but one committee member not belonging to the President's party); and (5) party-line opposition (opposition by all committee members not belonging to the President's party). The number of colored circles at the top of each column indicates the number of nominees in each particular category.

Of the 13 nominations reported favorably, 6 were reported with unanimous support (while another 1 was reported with nearly unanimous support). The most recent nomination to be reported with unanimous support by the committee was that of Stephen Breyer in 1994.

None of the five most recent nominations to the Court were reported unanimously or almost unanimously. The Roberts nomination was reported with some opposition (three committee members not belonging to the President's party supported the nomination),[69] while the Sotomayor and Kagan nominations were reported with almost party-line opposition (one committee member not belonging to the President's party supported the nominations).[70] The nominations of Samuel Alito and Neil Gorsuch were reported with complete party-line opposition (only committee members belonging to the President's party voted to report the nomination favorably).

**Figure 2. U.S. Supreme Court Nominees Reported by Senate Judiciary Committee**
(1975 to 2017)




* For position of Chief Justice
** Nomination reported by the committee unfavorably
*** Nomination reported by the committee without recommendation

**Source:** Congressional Research Service.

[69] Senators Patrick Leahy (D VT), Herb Kohl (D WI), and Russ Feingold (D WI) voted to report the Roberts nomination favorably to the full Senate.

[70] Senator Lindsay Graham (R SC) voted to report the Sotomayor and Kagan nominations favorably to the full Senate.

**Notes:** This figure shows, for nominees whose nominations were reported by the Senate Judiciary Committee since 1971, whether the nomination was reported favorably (columns with blue circles) or other than favorably (column with orange circles). For nominations reported favorably, the level of committee support is indicated (e.g., whether the nomination received unanimous support or was opposed on a party line vote).

* William Rehnquist, who was already serving on the Court as an Associate Justice, was nominated by President Reagan to serve as the new Chief Justice once Chief Justice Burger stepped down from the Court. Previously, Mr. Rehnquist (nominated by President Nixon) had been reported favorably out of committee by a vote of 12 4 on November 23, 1971, to be Associate Justice on the Court.

** Prior to the Judiciary Committee voting 9 5 to send the Bork nomination to the Floor with an unfavorable recommendation, the Committee voted 5 9 on a motion to report the nomination favorably (motion failed).

*** Prior to the Judiciary Committee voting 13 1 to send the Thomas nomination to the Floor without recommendation, the Committee voted 7 7 on a motion to report the nomination favorably (motion failed).

Two nominations included in **Figure 2** were not reported favorably, those of Robert Bork (reported unfavorably after the committee defeated a motion, 5-9, to report the nomination favorably)[71] and Clarence Thomas (reported without recommendation after the committee defeated a motion, 7-7, to report the nomination favorably).[72]

If a majority of its members oppose confirmation, the committee technically may decide not to report a nomination, which would prevent the full Senate from considering it. However, since its creation in 1816, the Judiciary Committee's typical practice has been to report even those Supreme Court nominations that were opposed by a committee majority,[73] thus allowing the full Senate to make the final decision on whether the nominee should be confirmed.[74]

This committee tradition was reaffirmed in June 2001 by the committee's then-chair, Senator Patrick J. Leahy (D-VT), and its then-ranking Member, Senator Orrin G. Hatch (R-UT), in a June 29, 2001, letter to Senate colleagues. The committee's "traditional practice," their letter stated,

> has been to report Supreme Court nominees to the Senate once the Committee has completed its considerations. This has been true even in cases where Supreme Court nominees were opposed by a majority of the Judiciary Committee.
>
> We both recognize and have every intention of following the practices and precedents of the committee and the Senate when considering Supreme Court nominees.[75]

During the 20th century, the Senate usually, but not always, agreed with Judiciary Committee recommendations that a Supreme Court nominee be confirmed. In other words, a favorable

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[71] The vote to report the Bork nomination favorably was almost a party line vote. Senator Specter (R PA) was the sole Republican on the committee to join with all of the committee's Democrats to oppose reporting the nomination favorably.

[72] The vote to report the Thomas nomination favorably was almost a party line vote. Senator Dennis DeConcini (D AZ) was the sole Democrat on the committee to join with all of the committee's Republicans to vote in support of reporting the nomination favorably.

[73] According to CRS data, since its creation in 1816, the Judiciary Committee has reported 107 Supreme Court nominations to the full Senate (while not reporting 8 nominations). Of the 107, seven were reported unfavorably (indicating substantial committee opposition) those of John Crittenden (1829), Ebenezer R. Hoard (1869), Stanley Matthews (1881), Lucius Q.C. Lamar (1888), William B. Hornblower (1894), John J. Parker (1930), and Robert H. Bork (1987). Two nominations were reported without recommendation those of Wheeler H. Peckham (1894) and Clarence Thomas (1991).

[74] Of the seven nominations reported unfavorably, two were approved by the Senate (Stanley Matthews and Lucius Q.C. Lamar). Of the two nominations reported without recommendation, one was approved by the Senate (Clarence Thomas).

[75] Sen. Patrick J. Leahy and Sen. Orrin G. Hatch, "Dear Colleague" Letter, June 29, 2001, *Congressional Record*, daily edition, vol. 147, June 29, 2001, p. S7282.

recommendation by the committee has, in a few instances (each occurring during the period 1968 to 1970), not been followed by Senate confirmation of the nomination.[76]

Historically, unfavorable committee reports, or reports without recommendation, have been precursors to nominations encountering substantial opposition in the full Senate, although a few of these nominations have eventually been confirmed by narrow margins.[77]

## Printed Committee Reports

In recent decades, reporting to the Senate frequently has included a printed committee report, although the five most recently reported Supreme Court nominations were done so without printed reports.[78] Prepared behind closed doors, after the committee has voted on the nominee, the printed report presents in a single volume the views of committee members supporting a nominee's confirmation as well as "all supplemental, minority, or additional views ... submitted by the time of the filing of the report.... "[79] No Senate committee, however, is obliged to transmit a printed report to the Senate. Instead, the chair of the Judiciary Committee may file a one-page document reporting a nomination to the Senate and recommending whether the nomination should be confirmed.

A printed report may be valuable in providing for Senators not on the Judiciary Committee a review of all of the reasons that the committee's members cite for voting in favor or against a nominee.[80] A written report, however, might not always be considered a necessary reference for

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[76] The Senate disagreed with the Judiciary Committee's favorable assessment of a Supreme Court nominee three times in the 20th century, declining to confirm Supreme Court nominees Abe Fortas (to be Chief Justice) in 1968, Clement F. Haynsworth Jr. (as an Associate Justice) in 1969, and G. Harrold Carswell (as an Associate Justice) in 1970, even though their confirmations had been recommended by the committee. Abe Fortas was already serving on the Court as an Associate Justice when he was nominated by President Lyndon Johnson to be Chief Justice.

At least once in the 19th century, the Senate, in 1873, questioned a favorable committee report on a nominee to the Court, recommitting the nomination of George H. Williams to be Chief Justice; the nomination later was withdrawn by the President, without having been reported out a second time by the committee. A year later, in 1874, the nomination of Caleb Cushing to be Chief Justice failed to receive Senate confirmation after being reported favorably by the Judiciary Committee. Soon after the committee's action and in the face of growing Senate opposition, the nomination was withdrawn by President Ulysses S. Grant without, however, having received formal Senate consideration. See Jacobstein and Mersky, *The Rejected*, pp. 82 87 (Williams), pp. 87 89 (Cushing), pp. 125 137 (Fortas), pp. 141 147 (Haynsworth), and pp. 147 155 (Carswell).

[77] As discussed previously, the following three Supreme Court nominations, though reported out of committee without a favorable recommendation, nonetheless were confirmed by the Senate: Stanley Matthews (1881), by a 24 23 vote; Lucius Q.C. Lamar (1888), by a 32 28 vote; and Clarence Thomas (1991), by a 52 48 vote. The remaining six nominations were rejected by the full Senate.

[78] From the 1960s through 2010, the Judiciary Committee reported 25 Supreme Court nominations to the Senate, 16 of which included transmittals of printed reports. During this time span, the nine Supreme Court nominations reported to the Senate without printed report were those of Byron W. White and Arthur J. Goldberg in 1962, Abe Fortas in 1965, Warren E. Burger in 1969, John Paul Stevens in 1975, John G. Roberts Jr. (for Chief Justice) in 2005, Samuel A. Alito Jr. in 2006, Sonia Sotomayor in 2009, and Elena Kagan in 2010.

[79] Rule 26, paragraph 10(c), *Standing Rules of the Senate.*

[80] This argument, for instance, was raised in 1969, after the nomination of Warren E. Burger to be Chief Justice was reported by the Judiciary Committee to the Senate floor without a printed report. During floor consideration of the nomination, three Senators expressed concern about the absence of a printed committee report. The Senators maintained that it was important for the Senate, when considering an appointment of this magnitude, to be able to consult a printed report from the Judiciary Committee that provided a breakdown of any recorded votes by the committee and an explanation of the committee's recommendation regarding the nominee. "The Supreme Court of the United States," debate in the Senate, *Congressional Record*, vol. 115, June 9, 1969, pp. 15174 15175 and 15192 15194. Shortly after this discussion, however, the Senate concluded debate on the Burger nomination and voted to

the Senate as a whole. For instance, in some cases, Senators not on the Judiciary Committee might believe they have received adequate information about a nominee from other sources, such as from news media reports or gavel-to-gavel video coverage of the nominee's confirmation hearings.[81] Further, preparation of a written report would likely mean additional days for a nomination to stay with the committee before it can be reported to the Senate.[82] In some situations, this might be viewed as creating unnecessary delay in the confirmation process, particularly if there is a desire to fill a Court vacancy as quickly as possible.[83]

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confirm the nominee, 74 3.

[81] In one instance, involving the Supreme Court nomination of Ruth Bader Ginsburg in 1993, the Senate received the Judiciary Committee's printed report on the nomination on August 5, two days after voting to confirm the nominee. In that instance, it might be argued, the greater value of the committee's report, in being transmitted after the Senate's confirmation vote, was not as an advisory resource for the Senate but as an official record for posterity that reviewed the nature of the committee's investigation of the nominee and the reasons for committee members unanimously favoring the nominee's confirmation.

[82] A written report ordinarily is produced within a week of the committee vote. On infrequent occasions, however, the report may entail weeks of preparation if the nomination is controversial or if the report is regarded as possibly crucial in influencing how the full Senate will vote on the nomination. In 1970, for instance, the committee submitted its written report on nominee Clement F. Haynsworth Jr. more than a month after voting 10 7 to recommend that Judge Haynsworth be confirmed. (Subsequently the full Senate rejected the Haynsworth nomination by a 55 45 vote.)

[83] Concern that vacancies on the Court be filled as expeditiously as possible appeared to figure in the decisions to report two recent Supreme Court nominees, John G. Roberts Jr. and Samuel A. Alito Jr., to the Senate without printed report. Dispensing with a written report for Roberts was briefly discussed on the Senate floor on July 29, 2005, the day his first nomination (for Associate Justice) was received by the Senate. (This nomination would later, on September 6, 2005, be withdrawn, with Roberts that same day re nominated to be Chief Justice.) In a floor statement, the chair of the Judiciary Committee, Sen. Arlen Specter (R PA), described a joint agreement that he and the committee's ranking Member, Sen. Patrick J. Leahy (D VT), had reached with the Senate's party leaders concerning the scheduling procedures for the confirmation hearings on the Roberts nomination. The particulars of the agreement, Senator Specter said, were shaped by what he said was the Senate's "duty to have the nominee in place" on the Court by the start of its next term on October 3, 2005. In the list of particulars agreed to (including the start of hearings by a set date and the waiving by members of the Judiciary Committee of their right under committee rules to hold over the nomination for one week when first placed on the committee's executive agenda), Judiciary Committee members from both parties, Senator Specter said, "would waive their right to submit dissenting or additional or minority views to the committee report." "Hearings on Supreme Court Nominee John Roberts," *Congressional Record*, daily edition, vol. 151, July 29, 2005, p. S9420. Senator Leahy as well, in a floor statement immediately after Senator Specter, indicated that the joint agreement allowed for dispensing with a written committee report on the Roberts nomination: "And we recognize," Senator Leahy stated, "that nothing in the Senate or Judiciary Committee rules precludes the Senate from considering the nomination on the floor without a committee report." Ibid.

The scheduling of a Judiciary Committee vote on the Alito nomination, without a printed report by the committee to follow, also appeared to be grounded on concerns of acting as quickly on the nomination as possible. In Chairman Specter's initial announcement, on November 3, 2005, of a schedule for the Judiciary Committee and Senate floor action on the Alito nomination, he specified that floor action was to begin the day after the committee's vote (hence not allowing time for preparation of a printed report). Senator Specter observed that the Court was then in the midst of its October 2005 term, with the possibility of various cases already heard by the Court having to be reargued, if the departure of outgoing Justice Sandra Day O'Connor during the term were to result in 4 4 decisions. Thus, Senator Specter said, it was important to the Court for the Senate to act on the Alito nomination "as promptly as possible." "Senator Specter and Leahy Hold News Conference on Hearings for Supreme Court Justice Nominee Alito," CQ.Com Newsmaker Transcripts, November 3, 2005, at http://www.cq.com.

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