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The Descent of Advice and Consent: Perspectives from a 42-Year Tour of Duty *The Honorable Orrin G. Hatch*

Abstract

During his 42-year career in the Senate, Senator Orrin Hatch (R-UT) participated in the confirmation of more than half of all Article III judges who have ever served. During this time, a lot has changed about the confirmation process. Both sides used to work together, or, at the very least, used to try to treat each other's nominees fairly. The delay tactics that have become so commonplace used to be pretty rare. The nomination of Robert Bork in 1987 brought a sea change to the confirmation process, with character assassination, shameless misrepresentations of the nominee's record, and partisan warfare. The only hope is that perhaps someone someday will take a step back and say, "Enough. Let's try to work together again." If things are going to improve, it is going to take some real effort at rebuilding trust—and perhaps a leap of faith or two.

Introduction

It's a real honor to be here at The Heritage Foundation. This is one of the most important institutions in our nation's capital—indeed, in the entire country. For decades, The Heritage Foundation has led the way in promoting policies that advance freedom, prosperity, and individual liberty. It's been a stalwart in the fight to confirm textualist, originalist judges who will interpret the law as written, not make policy. I'm particularly honored to have been invited to deliver this year's Joseph Story Distinguished Lecture. As you all know, Justice Kavanaugh delivered last year's lecture. That is a title that I will never tire of saying: Justice Kavanaugh.

As I've considered what I should speak about, I thought it would be appropriate and timely to share some thoughts about the

KEY POINTS

- The Kavanaugh confirmation represented a sort of culmination of everything the confirmation wars had been building to over the past 30 years.
- The Bork hearings gave us vilification and defamation coupled with gross distortions of the nominee's record. The Thomas hearings gave us character assassination and the politics of personal destruction. We saw elements of both of these approaches in subsequent confirmations, particularly the Alito confirmation.
- But the Kavanaugh confirmation is when everything finally came together: the outlandish misrepresentations of pretty much everything the nominee had ever said, coupled with the vilest personal attacks imaginable.
- The Kavanaugh nomination eerily parallels the experience of Justice Thomas—the last-minute revelation of a previously unreleased accusation that plays into a stereotype about the nominee that many on the Left had been pushing.

This paper, in its entirety, can be found at <http://report.heritage.org/hl1303>

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confirmation process, particularly the judicial confirmation process. Some of you may not know this, but Justice Story was actually my very first Supreme Court confirmation when I arrived in the Senate back in 1811. His confirmation hearing was quite an event. They threw everything they had at him. Really tough questions about letters of marque, post roads, piracy, and felonies committed on the high seas. The XYZ Affair, the Louisiana Purchase, Justice Story's family apothecary shop—nothing was off-limits. I even remember that Spartacus made an appearance, which was a real surprise, let me tell you. Travel between Italy and D.C. took a lot longer back then.

The Confirmation Process

In seriousness, reviewing judicial nominations is one of the Senate's most important duties, and it's been a primary focus since I took office. I'm the former Chairman and longest-serving Member of the Senate Judiciary Committee. I've seen a lot of judicial nominees in my time. In fact, I've participated in the confirmation of more than half of all Article III judges who have ever served. A lot has changed during my time in office. I wish I could say the confirmation process has improved, or at least stayed about the same, but it hasn't. It's declined—precipitously. The judicial confirmation process, simply put, is a mess. It hasn't always been this way. Both sides used to work together, or, at the very least, used to try to treat each other's nominees fairly. The delay tactics that have become so commonplace used to be pretty rare.

Here's an amazing fact—one that's almost impossible to believe given the current state of things. Before Justice Stephen Breyer was Justice Breyer, he was Judge Breyer, on the U.S. Court of Appeals for the First Circuit. He was nominated to that position by President Jimmy Carter. And he was confirmed on December 9, 1980. Think about that date for a moment: December 9, 1980. That was *after* the 1980 election, which you may recall ushered in the Reagan Revolution. Not only did Ronald Reagan defeat President Carter in the presidential race, but Republicans captured the Senate for the first time in 26 years.

Notwithstanding all that, the Senate voted to confirm Judge Breyer in December 1980. And the vote wasn't even close. It was 80–10. Only six Republicans opposed Judge Breyer's confirmation. And that's not the whole of it. Judge Breyer wasn't even nominated until after the 1980 election. So he was both nominated and confirmed *after* Carter lost the election

and *after* Democrats lost the Senate. And Republicans didn't try to block him. They voted for him overwhelmingly. You would never see that today, no matter which party was in the White House.

I'm going to focus the majority of my remarks tonight on the Supreme Court. But the lower courts are important as well. And so I'm also going to talk about lower-court nominations, and in particular the D.C. Circuit, which, after the Supreme Court, has probably been the site of our most pitched confirmation battles. As we'll see, the trend lines at the Supreme Court level repeat themselves in the lower courts as well.

The Way Things Used to Be: Carter's and Reagan's Nominees

When I first joined the Senate back in 1977, the Breyer confirmation was largely par for the course. The timing was a bit unusual, but the vote count wasn't. I was sworn into office a few weeks before Jimmy Carter became President. President Carter didn't have any Supreme Court nominations during his term—thankfully. But he did have four D.C. Circuit nominations. And those nominations were Patricia Wald, Abner Mikva, Harry Edwards, and Ruth Bader Ginsburg. So we can thank Jimmy Carter for both Stephen Breyer and Ruth Bader Ginsburg. Of course, I say that in jest. They're both terrific people and highly respected jurists, even though they do rule the wrong way sometimes.

The average time between nomination and confirmation for all four of President Carter's D.C. Circuit nominees was only three months. A bit longer than Stephen Breyer had to wait, but not all that much longer in the grand scheme of things. And what about their confirmation votes? As best I can tell from my research, Judge Edwards and then-Judge Ginsburg were confirmed either by voice vote or unanimous consent. Judge Wald's confirmation vote was 77–21, with a majority of Republicans supporting her nomination. Judge Mikva had the closest vote at 58–31—still a comfortable margin.

After President Carter came President Reagan and, for a while, confirmations continued largely as before. There were some close votes here and there. But in the main, nominees were confirmed relatively quickly and with wide support. Let's start with Sandra Day O'Connor, nominated by President Reagan to the Supreme Court in 1981. Justice O'Connor received some criticism from pro-life groups when

she was nominated. But her confirmation hearings went smoothly, and she was ultimately confirmed by a vote of 99–0.

President Reagan’s next Supreme Court nomination was a “two-fer.” When Chief Justice Warren Burger announced his retirement in 1986, President Reagan decided to elevate then–Associate Justice William Rehnquist to Chief Justice and name a new Associate Justice, Antonin Scalia. Scalia was a well-known conservative who had served in both the Nixon and Ford Administrations before joining the D.C. Circuit in 1982. He had also served as the first faculty adviser for the Federalist Society’s University of Chicago chapter. He was no stealth nominee. Both sides knew what they were getting. And what was his confirmation vote? 98–0. Unanimous. Just like Justice O’Connor’s.

Justice Rehnquist’s confirmation process for Chief Justice was a bit more contentious. He had served on the Court for 15 years as an Associate Justice and had accumulated a string of dissents to liberal opinions. And so Democrats gave him a difficult time. They accused him of voter intimidation from his time in private practice back in Arizona. They dug up a restrictive covenant that he didn’t know anything about on a piece of property he owned. And they fixated on a memo he’d written for Justice Robert Jackson back when he was a law clerk for Jackson.

None of these attacks stuck, and Rehnquist was confirmed by a vote of 65–33. A closer margin than O’Connor and Scalia, to be sure, but still comfortable. He won the votes of 16 Democrats—roughly one-third of the Democratic caucus. Notably, Rehnquist’s nomination was the first time in history that opponents of a Supreme Court nomination attempted a partisan filibuster. Thirty-one Senate Democrats voted to filibuster his nomination. Not enough to block him. But a precedent was set—and the partisan terrain shifted.

Most of us know what comes next after Rehnquist and Scalia, but before getting to that, I’d like to turn back to the D.C. Circuit for a moment. It’s important not to forget about the lower courts. President Reagan nominated eight judges to the D.C. Circuit. We should all ask God’s blessing for President Trump to get that many nominations. Here’s the list: Robert Bork, Antonin Scalia, Ken Starr, Larry Silberman, Jim Buckley, Stephen Williams, Doug Ginsburg, and David Sentelle. Conservative all-stars, every one.

The majority of these D.C. Circuit nominees were confirmed in less than two months. And their

confirmation votes will surprise you. Seven of the eight had no opposition at all; in fact, the Senate took a formal roll call vote on just *two* of them. The first, Jim Buckley, was confirmed 84–11. The second, David Sentelle, was confirmed 87–0. That means that of President Reagan’s eight D.C. Circuit nominees, only one received any negative votes. Only one. Can you imagine that happening today? Never.

Let’s turn back now to the Supreme Court. As I discussed earlier, in 1986, Justice Scalia was confirmed 98–0 and Chief Justice Rehnquist was confirmed 65–33. Even Rehnquist, who had faced a fairly contentious confirmation process for the time, was confirmed by a two-to-one margin. Then came 1987. Then came Bork.

A Sea Change in the Confirmation Process: The Nominations of Robert Bork and Clarence Thomas

For those who came of age in the law—or politics—after 1987, it’s difficult to understand what a sea change Robert Bork’s confirmation process was. Character assassination, shameless misrepresentations of the nominee’s record, partisan warfare—it all seems so commonplace now. But it wasn’t always this way. Justice Scalia sailed through 98-to-nothing. *Ninety-eight to nothing.*

Go back and watch Justice Scalia’s confirmation hearings. He smoked his pipe and had pleasant conversations with Judiciary Committee members. I’m not joking. He literally smoked a pipe. It was expected at the time that Senators would treat nominees with courtesy. That they would give Presidents deference on their judicial selections. That they would ask nominees pointed questions—but wouldn’t try to destroy them.

So imagine everyone’s surprise—shock, really—when Senator Ted Kennedy (D–MA) took to the Senate floor within 45 minutes of Bork’s nomination and said the following:

Robert Bork’s America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens’ doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists could be censored at the whim of the government, and the doors of the federal courts would be shut on the fingers of millions of citizens.¹

Now, you may be thinking to yourself, that sounds like what pretty much every Democrat said about Justice Kavanaugh. Well, it was unprecedented at the time. It had been less than a year since the Senate had confirmed Justice Scalia unanimously. Even what Rehnquist went through was nothing compared to what Democrats did to Bork. They smeared him as an extremist, an activist, and a bigot. Five years earlier, he had been confirmed to the second-highest court in the land by unanimous consent. Now, he was the greatest threat to individual liberty since Attila the Hun.

Judiciary Committee Democrats prepared a 70-page report that grossly misrepresented Judge Bork's distinguished record and painted him as some sort of retrograde. Bork's video rental history was even leaked to the press in a desperate attempt to find something salacious to embarrass him with. Regrettably, Democrats succeeded in their slanderous tactics. They took one of the greatest legal minds of a generation, a former Yale Law Professor and Solicitor General of the United States, and defeated him. The final vote was 58–42 against confirmation. It was a dark day for our country.

President Reagan ultimately nominated Ninth Circuit Judge Anthony Kennedy to the seat. After a fairly smooth confirmation process, Justice Kennedy was confirmed 97–0. The next nominee to the Supreme Court was David Souter, the stealth nominee. Having been confirmed to the First Circuit only two months before President George H. W. Bush nominated him to the Supreme Court, Souter had a minimal paper trail. It was virtually impossible for opponents to misrepresent his record the way they'd distorted Judge Bork's, mainly because he didn't have one. And the stealth strategy was a success, at least vote-wise. Souter was confirmed easily by a vote of 90–9. Jurisprudentially, of course, some would say the stealth strategy was somewhat less than a success. In any event, Souter was the calm between two storms. Next came my dear friend Clarence Thomas.

I had thought, perhaps naively, that the Bork nomination was as bad as it could get. Senate Democrats had taken a universally admired and respected jurist and managed to paint him as a threat to freedom and prosperity. They had twisted his record—and his words—until they were completely unrecognizable. But it turns out that grossly misrepresenting a nominee's record is only part of the playbook. There's also character assassination.

Justice Thomas is a dear friend of mine. I'd like to make just a few points about his confirmation experience. Not many people remember this, but there were actually two sets of hearings on Justice Thomas's nomination. The first was the standard set of hearings on his record and qualifications—the sort of hearings all Supreme Court nominees go through. The second set was the hearings with Professor Anita Hill. By the time Hill came forward with her allegation of sexual harassment, Justice Thomas's nomination had already been voted out of committee. Indeed, she went public only *two days* before Justice Thomas's nomination was scheduled for a final floor vote. And so the Senate delayed the vote to hear from Professor Hill. You may notice some parallels here to recent events.

The hearings were ugly, but I believe they vindicated Justice Thomas. And the American people agreed. Opinion polls taken shortly after the hearings showed that the public believed Justice Thomas's account overwhelmingly. And at the end of the day, Justice Thomas was confirmed, as he should have been. One of the proudest moments of my life was defending Justice Thomas from the scurrilous, unfounded attacks on his character. Justice Thomas is a blessing to this country, and I thank God every day that he is on the Supreme Court.

A Brief Respite in the Confirmation Wars: Clinton's Nominees

At the time of Justice Thomas's confirmation, I had been in the Senate for 14 years. We had gone from a unanimous confirmation process for Justice O'Connor to a more contentious process for Chief Justice Rehnquist to the all-out warfare of the Bork and Thomas nominations. The attacks had become increasingly heated, increasingly personal. By all appearances, we were on the road to the abyss. Then something interesting happened. We took a step back.

Consider the next two Supreme Court nominations: Ruth Bader Ginsburg and Stephen Breyer, our friends from the Carter days. Both were well-known liberals. Before joining the bench, Ginsburg had been the general counsel for the American Civil Liberties Union. Breyer had been Ted Kennedy's chief counsel. But they were both well respected and had solid reputations on the court of appeals.

When President Bill Clinton called me in 1993 to ask my views on whom he should nominate to the Supreme Court, I suggested Ginsburg and Breyer. They were certainly not the nominees I would have

chosen had I been President. But as the Ranking Member on the Senate Judiciary Committee at the time, I thought it was important to try to work with the White House to dial back the rancor that had been escalating for so long. And to his credit, President Clinton nominated Justices Ginsburg and Breyer to vacancies that occurred in 1993 and 1994. Both had smooth confirmation processes and were confirmed overwhelmingly. Justice Ginsburg's confirmation vote was 96–3. Justice Breyer's was 87–9.

And so, after the all-out partisan attacks on Bork and Thomas, Republicans took a step back from the brink. I have been criticized by some for my role in suggesting Justices Ginsburg and Breyer to President Clinton, but I believe it was the right thing to do. Republicans were in the minority at the time. We could not block President Clinton's nominees. But we could work with the other side to stop the slide into the abyss. And that's what we did. The confirmation was hit a pause. Things were relatively calm at the lower-court level as well through much of Clinton's presidency. There was some sniping at the fact that nominations were taking longer to process, a practice the Democrats had begun under George H. W. Bush. But confirmation votes were generally bipartisan—if there even was a roll call vote rather than a voice vote or unanimous consent agreement.

Let's take a quick look at the D.C. Circuit. President Clinton appointed three judges to the D.C. Circuit: Judith Rogers, David Tatel, and Merrick Garland. He also nominated Elena Kagan and Allen Snyder during the latter part of his second term, but the Senate did not act on their nominations, following the practice Senate Democrats set under George H. W. Bush.² Judges Rogers and Tatel were both confirmed by voice vote within four months of nomination.

Judge Garland's confirmation process was a bit different. There was a dispute at the time over whether there was a need for another judge on the D.C. Circuit. Compared to other courts of appeals, the D.C. Circuit had a smaller caseload per judge. After an extended back and forth, the Senate voted to confirm Judge Garland 18 months after he was nominated. The vote was 76–23, with a majority of Republicans supporting his nomination.

A New Front in the Confirmation Wars: Filibustering Bush's Nominees

After President Clinton came President George W. Bush. President Bush appointed four judges to the D.C.

Circuit: John Roberts, Janice Rogers Brown, Tom Griffith, and Brett Kavanaugh. Their confirmation experiences were, shall we say, rather different from President Clinton's nominees. Recall how long President Clinton's nominees had to wait between nomination and confirmation. Judge Rogers waited four months. Judge Tatel also waited four months. Judge Garland had a lengthier 18-month wait while the argument over the D.C. Circuit's caseload played out.

Here's how long George W. Bush's D.C. Circuit nominees had to wait between nomination and confirmation. Judge Roberts: two years. Judge Brown: nearly two years. Judge Griffith: a comparatively breakneck 13 months. And the winner of the Democrat obstruction crown? Judge Kavanaugh: two years, 10 months. Judge Kavanaugh waited longer between nomination and confirmation than all 12 Carter and Reagan D.C. Circuit nominees *combined*.

This recitation of President Bush's D.C. Circuit nominees leaves out an important name: Miguel Estrada. That's because Estrada was never confirmed. He withdrew his nomination after two years and four months in limbo after Senate Democrats filibustered his nomination *seven times*. You'll notice I just used the F-word: filibuster. When we talk about the extraordinary delays that arose during the George W. Bush years, the root cause was Senate Democrats' unprecedented use of the filibuster. This was a new front in the confirmation wars. It may sound strange to say today, but until the early 2000s, judicial filibusters simply didn't happen, at least not for lower-court nominees. Prior to the George W. Bush Administration, there had never been a successful filibuster of a lower-court nominee. And there had never been a successful filibuster of any judicial nominee who had clear majority support.

That changed during the Bush years, and it really precipitated the decline of the judicial confirmation process. All of the work my Republican colleagues and I had done during the Clinton Administration to restore a semblance of bipartisanship was blown up in an instant. It became all-out warfare once again. No good deed goes unpunished. Just look at the confirmation votes on President Bush's D.C. Circuit nominees. John Roberts had a voice vote. Janice Rogers Brown: 56–43. Only one Democrat in support. Tom Griffith: 73–24. The Democrats split roughly even. Brett Kavanaugh: 57–36. Only four Democrats in support. For the first time in history, we had near-party-line votes for the D.C. Circuit. Contrast that with the

eight Reagan appointees, all but one of whom were confirmed without recorded opposition. The confirmation wars were back in full swing.

Let's turn back now to the Supreme Court. President Bush appointed two Justices to the Court. The first was John Roberts. His confirmation had fewer fireworks than some previous nominations. Because he was replacing Chief Justice Rehnquist, he was not expected to change the ideological balance of the court. Moreover, Democrats knew there was another nomination coming that would change the balance of the Court. At the time Chief Justice Roberts had his confirmation hearing, there were actually two Supreme Court openings—Rehnquist's and Justice O'Connor's.³ Rehnquist's opening would be filled first, O'Connor's second. Replacing Rehnquist with another conservative would not alter the Court's ideological makeup. But replacing O'Connor with a more conservative Justice would.

I believe that Democrats held their fire on Roberts because they knew a second, more consequential nomination was coming. They wanted to be able to say, look, we voted for Roberts. We're not partisan. Roberts was reasonable. But this new nominee, he or she is different. He or she is unacceptable. And so Roberts was confirmed relatively easily, by a vote of 78–22. I would note, however, that his confirmation vote did represent a decline from Justice Ginsburg's 96–3 vote and Justice Breyer's 87–9 vote.

As you'll recall, President Bush made two nominations to fill Justice O'Connor's seat. The first was White House Counsel Harriet Miers, who withdrew following opposition from conservative groups. The second was Third Circuit Judge Samuel Alito, who was confirmed. Alito's confirmation experience was different from Roberts'. Because Alito would be replacing Justice O'Connor, the Court's longtime "swing vote," Democrats were much more pointed in their attacks. In particular, they dug up a 25-year-old job application in which Alito had listed membership in a group called Concerned Alumni of Princeton. Even when it became clear that Alito knew nothing of the group's more controversial positions, Democrats kept up the attack. The criticisms of Justice Alito were so personal and so intense that his wife briefly left the confirmation hearing in tears.

Democrats' efforts ultimately failed, however, and Justice Alito was confirmed. But not before Democrats tried to filibuster his nomination. Note that no Republicans had tried to filibuster Justices Ginsburg

or Breyer. Even those who opposed their nominations didn't try to prevent an up-or-down vote. But as we've already seen with the D.C. Circuit, Republican efforts during the Clinton years to dial back the partisan warfare were met with the back of the hand once a Republican was back in the White House. The filibuster failed and Alito was confirmed 58–42. Only four Democrats supported his confirmation, the lowest number of opposing party votes for a Supreme Court nomination in all my years in the Senate up to that point. Even Justice Thomas received 11 Democratic votes for confirmation—and that was after the most contentious confirmation process in American history.

Changing the Rules of the Game: Obama's Nominees

President Bush was followed in office by President Barack Obama. Given the deterioration of the confirmation process during Bush's time, one might have expected Republicans to give President Obama's Supreme Court nominees a nasty reception. But that didn't happen.

Republicans found much to object to in Sonia Sotomayor and Elena Kagan's records, including Sotomayor's suggestion in numerous speeches that a "wise Latina woman" would more often than not make better judicial decisions than a white male. Republicans also expressed deep concerns about Kagan's decision as Dean of Harvard Law School to ban military recruiters from campus.

But they didn't launch the withering personal assaults that Democrats had leveled against previous Republican nominees. They didn't try to filibuster their nominations. Republicans asked Sotomayor and Kagan pointed questions, to be sure, but they didn't try to destroy them. The confirmation votes were 68–31 for Sotomayor, with nine Republicans in support, and 63–37 for Kagan, with five Republicans in support. Sotomayor and Kagan both received more votes from Republicans than Alito received from Democrats: Keep that in mind next time Democrats try to pin the blame for the confirmation wars on the GOP.

I'll say just a few words about President Obama's D.C. Circuit nominees. President Obama appointed four judges to the D.C. Circuit: Sri Srinivasan, Patricia Millett, Cornelia Pillard, and Robert Wilkins. A fifth nominee, Caitlin Halligan, withdrew her nomination. Compared to the way Senate Democrats

treated President Bush's D.C. Circuit nominees, the confirmation process for President Obama's first nominee, Judge Srinivasan, was a walk in the park. He was confirmed 11 months after nomination by a vote of 97–0. Not a single Republican opposed his nomination. Compare that to the votes on President Bush's D.C. Circuit nominees: Forty-three “no” votes for Judge Brown. Twenty-four “no” votes for Judge Griffith. Thirty-six “no” votes for Judge Kavanaugh. You'd have thought it was the 1990s again.

President Obama's other D.C. Circuit nominees were confirmed only after Senate Democrats changed the rules to eliminate the filibuster for lower-court nominees. The hubris of this move was quite something. It was Democrats, recall, who first deployed the judicial filibuster 10 years earlier to block President Bush's nominees. Now that the shoe was on the other foot and a Democrat was in the White House, Senate Democrats had no compunction about changing the rules to suit their needs.

As you can imagine, Senate Republicans were furious. The result was near-party-line votes on President Obama's other D.C. Circuit appointees. I mentioned that one of President Obama's D.C. Circuit nominees, Caitlin Halligan, withdrew her nomination. She did so after a wait of two years and six months and following two failed cloture votes (before Senate Democrats eliminated the filibuster). If you wanted, I suppose you could criticize Republicans for holding up her nomination for such a lengthy period of time. But it wasn't anything different from what Senate Democrats did to John Roberts, Miguel Estrada, Janice Rogers Brown, or Brett Kavanaugh. And I haven't even mentioned Peter Keisler, whom President Bush nominated to the D.C. Circuit in 2006 but who never received a floor vote.

President Obama had one other judicial nominee who bears mention: Merrick Garland. Garland's name has become a rallying cry for our friends on the Left. President Obama nominated Garland to the Supreme Court in March 2016, eight months before the 2016 presidential election and one month after the primaries had already begun. It had been 100 years since a Supreme Court nominee had been confirmed in a presidential election year after voting in the election had started. So Republicans made the entirely justifiable decision not to process Garland's nomination, following a policy Joe Biden himself had laid out 25 years earlier when he chaired the Senate Judiciary Committee. In so doing, they didn't seek to destroy

or tear down Judge Garland. They didn't attack his character or try to sully his good name. They simply didn't process his nomination. Compare that to what Democrats did to Alito, Thomas, Bork, and Rehnquist.

The Culmination of 30 Years of Confirmation Wars: Trump's Nominees

As we all know, Donald Trump won the 2016 election and nominated Neil Gorsuch. Gorsuch's hearings followed a path similar to the hearings for Chief Justice Roberts.

Gorsuch, a conservative, had been nominated to fill the seat of Justice Scalia, also a conservative, meaning his nomination was unlikely to change the balance of the Court. Democrats made some efforts to distort Gorsuch's record. We heard endlessly about a frozen trucker, for example. But we didn't see the sort of personal attacks we saw with Alito and Thomas.

We did, however, see a filibuster. Now that the shoe was back on the other foot, Democrats were more than happy to use the filibuster to try to block a Republican nominee. And so, following the precedent set by Democrats during the Obama years, Republicans lowered the threshold for cloture to prevent the minority party from blocking a nominee with clear majority support. Gorsuch was confirmed 54–45, with only three Democratic votes. The number of Democrats willing to support a Republican Supreme Court nominee continued to fall.

That brings us to Brett Kavanaugh. The less said about recent events, the better. But I'd like to highlight two points about the Kavanaugh confirmation. First, it represented a sort of culmination of everything the confirmation wars had been building to over the past 30 years. The Bork hearings gave us vilification and defamation coupled with gross distortions of the nominee's record. The Thomas hearings gave us character assassination and the politics of personal destruction. We saw elements of both of these approaches in subsequent confirmations, particularly the Alito confirmation.

But the Kavanaugh confirmation is when everything finally came together: the outlandish misrepresentations of pretty much everything the nominee had ever said, coupled with the vilest personal attacks imaginable. It's no coincidence, I believe, that this confluence of events occurred during the battle to replace Justice Kennedy, the man who for many years had held the key to critically important 5–4 decisions. When the stakes are high, the wolves come out.

The second point to highlight about the Kavanaugh confirmation is how eerily it parallels the experience of Justice Thomas. The nominee endures a tough hearing but comes through mostly unscathed. He appears on the path to confirmation. He has been nominated to replace a Justice well to his left, sending the other side into apoplexy. Then, on the eve of a crucial vote, allegations are leaked to the press. And not just any allegations, but salacious allegations that just so happen to play into stereotypes about the nominee that many on the left have been pushing.

It turns out also that Democrats have known about these allegations for some time—but did not raise them in the earlier hearing or in private conversations with the nominee. They also failed to disclose the allegations to Republicans for a period of several weeks. And then, at a late hour, when confirmation appears assured, the allegations are leaked to the press, throwing the nomination into doubt and dragging the nominee and his family through the mud. Call it the Democratic playbook. It's dishonest. It's malicious. And it's enormously damaging to the country. It's also something that Republicans have never done to a Democratic Supreme Court nominee, at least not during my time in office.

Thankfully, Justice Kavanaugh made it through the ordeal and was confirmed by a vote of 50–48. Only one Democrat supported his confirmation, the lowest number for a Republican Supreme Court nominee yet. We're very nearly to the point of party-line Supreme Court confirmations. From the unanimous vote for Justice O'Connor to the two-thirds vote for Chief Justice Rehnquist to the near-party-line vote for Justice Kavanaugh. If you want to talk about the decline of the judicial confirmation process, that's it in a nutshell.

And lest we forget about the lower courts, the decline is proceeding there as well. President Trump's one D.C. Circuit nominee so far, Greg Katsas, was confirmed by a vote of 51–49. Again, nearly party line. We're seeing roll call votes on every single court of appeals nominee. Cloture votes on nearly every court of appeals nominee. Roll call and cloture votes on nearly every district-court nominee as well. We've gone from the world of no recorded opposition for seven of President Reagan's eight D.C. Circuit nominees to straight partisan warfare up and down the entire federal judiciary. It's all scorched earth all the time. And it's terrible.

Conclusion

I hope you've found tonight's history lesson interesting. My goal has been to share with you my perspective on how the judicial confirmation process has changed for the worse during my time in the Senate. There's blame on both sides, I admit, though I think a fair assessment of the facts shows that the vast majority of the blame lays with one side in particular.

I worry that those entering politics today—and my many Senate colleagues who haven't had the long tenure I have—think that it's always been this way, that it's always been a pitched battle over every nomination. That it's been nuclear war forever. But it hasn't. It really hasn't. Not until 30 years ago did the partisan fires engulf the Supreme Court confirmation process. And with the lower courts, it's an even more recent inferno. I remember the days before the fire. The days of unanimous confirmation votes. The days of voice votes and unanimous consent even for D.C. Circuit nominees. I wish we could get back to those days.

Things are just so nasty right now. And unfortunately, I don't see a way out of it, not as long as both sides are engaged in all-out warfare. The only hope I have is that perhaps someone someday will take a step back and say, "Enough. Let's hit a pause. Let's try to work together again." That's what I did with President Clinton, and I think it helped. Did I vote for some nominees I wouldn't have chosen if I'd been President? Yes. But I did it under the expectation that when the shoe was back on the other foot, the other side would reciprocate.

Regrettably, that didn't happen. We went from the détente of the Clinton years straight into the partisan warfare of the Bush years. There's not much trust left on either side. Certainly there's very little trust on the Republican side. Not after the complete, almost mindless obstruction we've seen from Senate Democrats these last two years.

If things are going to improve, it's going to take some real effort at rebuilding trust, and perhaps a leap of faith or two. The last time we saw this was when the Senate minority decided to work with the White House to give the President's Supreme Court nominees a fair shake. I led that effort. I think it was good for the country. I'm hopeful something like that can happen again. I can't say I'm optimistic that it will, but things can change. As our good friend Harvey Dent likes to say, the night is darkest just before the dawn.

Thank you again for the honor of being here tonight.

—The Honorable Orrin G. Hatch served as a U.S. Senator for Utah for 42 years. He was a member of the Senate Judiciary Committee for many years, participating in the confirmation of every current member of the Supreme Court. These remarks were delivered on October 24, 2018, as part of the Joseph Story Distinguished Lecture series hosted by The Heritage Foundation in Washington, DC.

Endnotes

1. Congressional Record, July 1, 1987, p. S18518.
2. The Democrat-controlled Senate had held up President George H. W. Bush's nomination of John Roberts to the D.C. Circuit in 1992, denying him a hearing or a vote for 11 months.
3. Justice O'Connor announced her intention to retire on July 1, 2005, and John Roberts was nominated to succeed her. Then Chief Justice Rehnquist died on September 5, 2005, and Roberts was, instead, nominated to be the next Chief Justice.