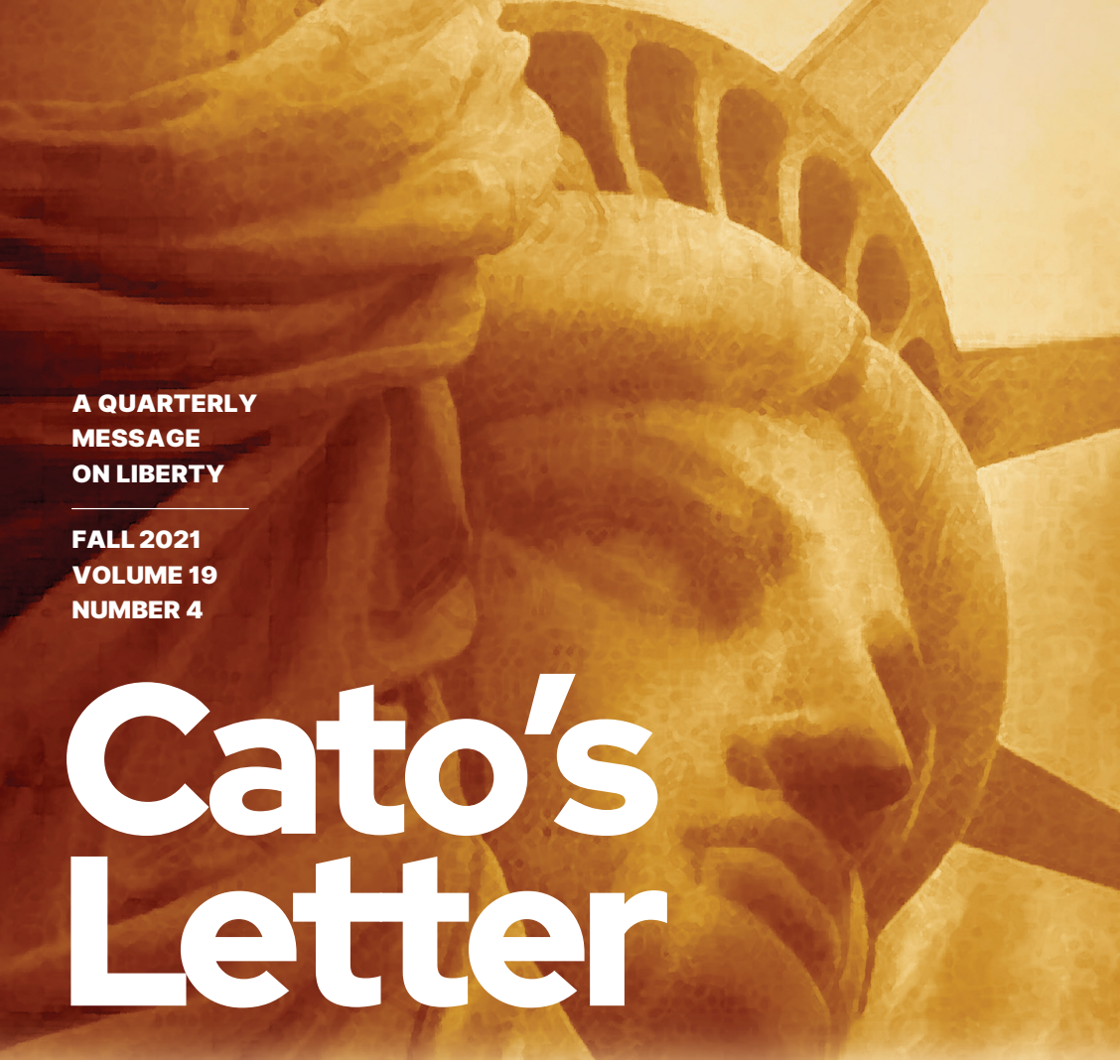

A QUARTERLY MESSAGE ON LIBERTY

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# Cato's Letter

## Are Supreme Court Confirmation Hearings Worth It?

**ILYA SHAPIRO**

The last few years have shown that the Supreme Court is now covered by the same toxic cloud that has enveloped all of the nation's public discourse. Although the court is still respected more than most institutions, it's increasingly viewed through a political lens. What most concerns people is how judicial politics affects the court's "legitimacy," so what lessons can we draw from the history of confirmation battles that can improve public confidence going forward?

The most important point is that politics has always been part of the process of selecting judicial nominees and even more part of the process of confirming them.

**ILYA SHAPIRO** is a vice president of the Cato Institute and director of the Robert A. Levy Center for Constitutional Studies. In July, he testified before the Presidential Commission on the Supreme Court.

CATO INSTITUTE

From the beginning of the republic, presidents have picked justices for reasons that include balancing regional interests, supporting policy priorities, and providing representation to key constituencies. There's never been a golden age when "merit" as an objective measure of legal acumen was the sole consideration for judicial selection. Nearly half the presidents had at least one unsuccessful nomination.

As we've seen over the long sweep of American history, confirmation controversies are hardly unprecedented. To a certain extent, the politicization of Supreme Court appointments has tracked political divisions nationally. But the *reasons* for such controversies in the past few decades are largely unprecedented. While inter- and intra-party politics have always played a role, couching opposition in terms of judicial philosophy is a relatively new phenomenon.

> "Until 1968, most justices were confirmed by voice vote, without having to take a roll call."

Historical controversies before the 1960s tended to revolve around either the president's relationship with the Senate or deviations from shared understandings of the factors that go into nominations for particular seats, especially geography and patronage. That dynamic is markedly different from the ideological considerations we see now. With the two major parties adopting essentially incompatible judicial philosophies, it's impossible for a president to find an "uncontroversial" nominee.

The inflection point for our legal culture, as for our social and political culture, was 1968, which ended a 70-year near-perfect run of successful nominations. Until that point, most justices were confirmed by voice vote, without having to take a roll call. Since then, there hasn't been a single voice vote, not even for the five justices confirmed unanimously or the four whose "no" votes were in the single digits.

There are many factors going into the contentiousness of the last half-century: the Warren court's activism and then *Roe v. Wade*, spawning a conservative reaction; the growth of presidential power to the point where the Senate felt the need to reassert itself; the culture of scandal since Watergate;

a desire for transparency when technology allows not just a 24-hour media cycle but a constant *and instant* delivery of information and opinion; and, fundamentally, a more divided government. As the Senate has grown less deferential and as presidential picks have become more ideological, seeking to achieve a certain legal agenda or empower a certain kind of jurisprudence rather than merely appointing a good party man, the clashes have grown.

As these philosophical battle lines have hardened, so have the media campaigns orchestrated by supporters and opponents of any given nominee. There's a straight line connecting the national TV ads against Robert Bork to the tens of millions of dollars spent on the fight over Brett Kavanaugh,

> "Public confirmation hearings have only been around for a century."

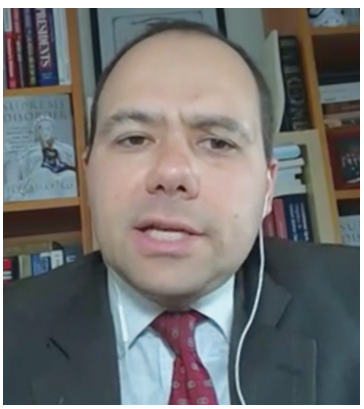
including sophisticated targeting of digital media to voters in states whose senators are the deciding votes. "It's a war," explained Leonard Leo, the longtime Federalist Society officer who now chairs the public affairs firm CRC Advisors, "and you have to have troops, tanks, air, and ground support."

Public confirmation hearings have only been around for a century, starting with Louis Brandeis's nomination in 1916. But Brandeis didn't testify at his own hearing; the first open hearing where the nominee took unrestricted questions was that of Felix Frankfurter in 1938. It simply wasn't regular practice until the 1950s. At that point, the hearings became a chance for Southern Democrats to rail against *Brown v. Board of Education*. Few senators other than the segregationists even asked the nominees questions. Otherwise, hearings became perfunctory discussions of personal biography, as with Charles Whittaker in 1957 or the man who succeeded him in 1962, Byron White. John Paul Stevens, the first nominee after *Roe*, wasn't even asked about that case.

Things changed in the 1980s, not coincidentally when the hearings began to be televised. Now all senators ask questions, especially about key controversies and fundamental issues, but nominees largely refuse to answer, creating what Elena Kagan 25 years ago called a "vapid and hollow charade." But even with this conventional narrative, there has been a subtle shift: from Bork in 1987 through Stephen Breyer in 1994, nominees went into some

detail about doctrine. Clarence Thomas discussed natural law and the role that the Declaration of Independence plays in constitutional interpretation. Ruth Bader Ginsburg talked about gender equality and the relationship between liberty and privacy.

Beginning with John Roberts in 2005, however, the nominees still covered the holdings of cases and what lawyers call "black letter law"—what you need to know to get a good grade in law school—but there's been little revelation of personal opinions. The nominees speak in platitudes: Roberts and his judicial umpire; Sonia Sotomayor saying that fidelity to the law was her only guidepost; and Kagan accepting that "we're all originalists now." President Trump's nominees, starting with Neil Gorsuch and filtering down to lower court nominees, have even been hesitant to take a view on whether iconic cases like *Brown* were correctly decided, lest their inability to similarly approve of another long-standing precedent (notably *Roe*) cast doubt on its validity.



Another reason why filling each vacancy is such a big deal is that justices now serve longer. Since 1972, only 1 of 16 justices (Ginsburg) was over 55 years old at confirmation. To put it another way, before 1970, the average tenure of a Supreme Court justice was less than 15 years. Since then, it's been more than 25. The life expectancy of justices once confirmed has grown from about 8 years at the beginning of the republic to 25–30 years today. Justices appointed at or before age 50, including Roberts, Kagan, Gorsuch, and Barrett, are likely to serve 35 years—or about nine presidential terms—projecting the legal-policy impact of presidents Bush, Obama, and Trump, respectively, as far into the future as Scalia and Kennedy did for President Reagan. Justice Thomas, who was 43 when he joined the court and has already served nearly 30 years, could serve another decade!

Setting aside potential changes to Supreme Court structure, such as term limits or changing the size of the court, what about reforming the confirmation process? Henry Saad, a former Michigan Court of Appeals judge whose nomination to the Sixth Circuit was filibustered under George W. Bush, has proposed a number of reforms. He would make it a violation of judicial ethics for nominees to give their opinions about a case, and he would make hearings untelevised, with questions submitted in writing, restricted to professional

qualifications, and asked by the chief counsel for each party's judiciary committee members. Any personal information or ethical concerns could be handled in the confidential session that the judiciary committee already has to discuss the FBI background investigation and other sensitive matters.

I've come to the conclusion that we should get rid of hearings altogether, that they've served their purpose for a century but now inflict greater cost on the court, Senate, and rule of law than any informational or educational benefit

> "I've come to the conclusion that we should get rid of hearings altogether."

gained. Given the voluminous and instantly searchable records nominees have these days—going back to collegiate writings and other digitized archives—is there any need to subject them, and the country, to a public inquisition? At the very least, the Senate could hold nomination hearings entirely in closed session.

But in the end, all this reform discussion boils down to rearranging the deck chairs on the *Titanic*. And this *Titanic* is not the appointment process but the ship of state. The fundamental problem we face, and that the Supreme Court faces, is the politicization not of the *process* but of the *product*. The only way judicial confirmations will be detoxified, and the only way we can reverse the trend whereby people increasingly see judges as "Trump judges" and "Obama judges," is for the Supreme Court to restore our constitutional order by returning improperly amassed federal power to the states while forcing Congress to legislate on the remaining truly national issues rather than letting bureaucratic rules govern us.

The reason we have these heated court battles is that the federal government is simply making too many decisions at a national level for such a large, diverse, pluralistic country. There's no more reason that there needs to be a one-size-fits-all health care system, for example, than that zoning laws must be uniform in every city. Let federal legislators make the hard calls about truly national issues like defense or (actually) interstate (actual) commerce, but let states and localities make most of the decisions that affect our daily lives. Let Texas be Texas and California be California. That's the only way we're going to defuse tensions in Washington, DC, whether in the halls of Congress or in the marble palace of the highest court in the land. ■

CATO PROFILE

# Julian Sanchez

Julian Sanchez is a senior fellow at the Cato Institute and studies issues at the busy intersection of technology, privacy, and civil liberties, with a particular focus on national security and intelligence surveillance.

**What first attracted you to libertarian ideas, and how did you come to work at Cato?**

I think I was probably an instinctive libertarian by temperament from a very young age. My father had fled Franco's Spain before coming to the United States, so growing up with stories about that authoritarian regime may have had an influence. Libertarian philosophy was something I first encountered as a teenager, reading a lot of the classical liberals and later Robert Nozick's and David Boaz's books. I ended up taking economist Mario Rizzo's seminar on classical liberalism at New York University and via him ended up working part time for the wonderful Andrea Rich at Laissez Faire Books. After college, I came to Washington, DC, and worked as a Cato staff writer for a year. I then ended up spending the better part of a decade in journalism, developing an obsessive interest in surveillance law and policy, which Cato asked me to come back and write about as a scholar.

**Your work focuses on technology, privacy, and civil liberties. Has public understanding of these issues improved as some of the technologies you write about become ubiquitous?**

The wider public is certainly aware to a much greater extent of tech policy issues that were once the exclusive province of geeks and wonks. Unfortunately, this often means people are approaching those issues with misconceptions that can be quite difficult to dislodge. The prizewinner on this front is undoubtedly Section 230, the statutory provision that says, in essence, social media platforms and their users aren't legally liable for what other people say on those platforms, even if they curate or exercise editorial discretion over some of that content. A staggering number of people—including in some cases writers for reputable news outlets—have gotten the impression that the law says the exact opposite of what it actually says. Inevitably, some people don't like the content policies that platforms adopt, so they've either convinced themselves or decided to convince others that the law says what they wish it said.

**How do you think we should balance the beneficial uses of new technology against the potential new threats to freedom they can pose?**

The critical first step is to insist on much greater transparency about novel technologies deployed by law enforcement and intelligence agencies. We see a pattern recur where they discover the potential of some new tech—cellphone tracking or drones or facial recognition—and do their best to keep it secret under the rationale of protecting sources and methods. Which means there are no ground rules or external accountability. Then when the public belatedly takes notice and asks for some rules, they object that this is disrupting a standard practice they've become reliant on. We need to reverse that pattern and establish a presumption that when law enforcement wants to deploy new technologies, the rules and safeguards are developed first—not grudgingly accepted once they can't keep it secret anymore. ■

# A Life of Liberty

"If liberty is to be, it is up to me!" So went Dick Rowland's social change philosophy. In 2001, Dick's devotion to the power of the individual led him to create the Grassroot Institute of Hawaii to educate isle residents about individual liberty, free markets, and limited and accountable government.

Originally from Texas, Dick served for 25 years as a colonel for the U.S. Army. After moving to Hawaii in 1971 and retiring as a colonel four years later, Dick worked for Northwestern Mutual for 26 years. At 71 years old in 2001, Dick founded the Grassroot Institute to embark on a crusade for liberty. He earned himself the reputation of a "happy warrior" for the way he strongly but kindly—and with a sense of humor—defended libertarian ideals and the free market. In keeping with his devotion to the Founding Fathers' ideas, he always carried his pocket copy of the Constitution and Declaration of Independence.

Dick's vision for improving American public policy was founded on the independent application of his principles. "Forget the left and forget the right, those are meaningless terms," he said. "What we need to look at is whether we're going toward individual liberty or whether we're going down toward statism," Dick continued. "Somebody has to watch these people that are running the government, and the Declaration said, 'We the People' have that responsibility, authority, and obligation."

Recently, the Cato Institute's Project on Jones Act Reform has worked with the Grassroot Institute to raise public awareness and lay the groundwork for repeal or reform of this 101-year-old failed protectionist law, which effectively bans foreign ships—or even simply *foreign-built* ships—from domestic maritime trade in the United States. Justified on national security grounds, the law was meant to ensure a strong maritime sector to bolster U.S. capabilities in times of war or national emergency. These envisioned benefits, however, have proved illusory while the Jones Act has

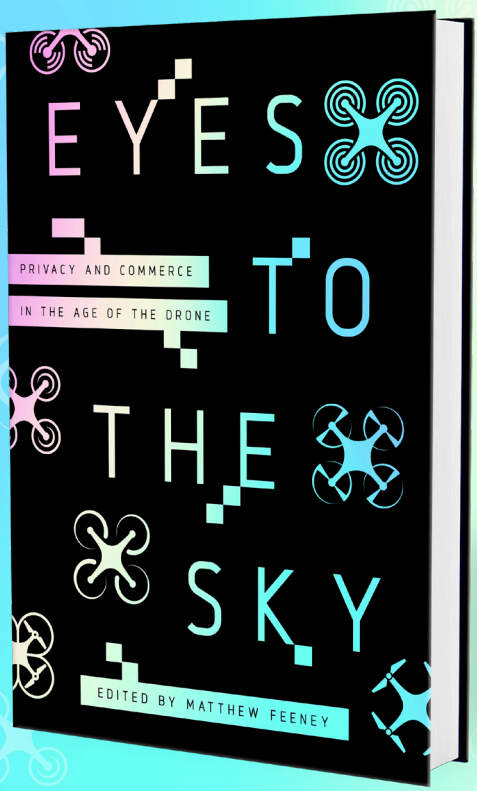
imposed a very real and ongoing economic burden. Thanks in large part to our efforts, the Jones Act has garnered interest in Congress, with several legislative remedies—ranging from a total repeal bill to various reforms—introduced this year.

In November 2020, Dick Rowland passed away at age 90. His colleagues and friends at the Grassroot Institute fondly remember his influence. "We've lost one of the bravest and most courageous fighters for liberty," says chairman Robin Stueber. "Dick Rowland was an inspiring leader whose life advanced the cause of liberty in Hawaii and across the world," says president and CEO Keli'i Akina.

At the Cato Institute we were recently honored to receive a contribution from the legacy fund created by Dick Rowland to continue advancing liberty in his memory. It is energizing that Dick's personal legacy for liberty continues to live through our work for our shared values. ■

**IF YOU WOULD LIKE TO DISCUSS CATO'S LEGACY SOCIETY OR CREATING A PLANNED GIFT FOR THE INSTITUTE, PLEASE CONTACT BRIAN MULLIS AT BMULLIS@CATO.ORG OR 202-789-5362.**

# New from the Cato Institute




Drones are among the most exciting and promising new technologies to emerge in the last few decades. Yet drones pose unique regulatory and privacy issues. Is there a way to ensure that entrepreneurs and hobbyists can safely use drones while also protecting us from intrusive aerial surveillance?

In *Eyes to the Sky*, experts from legal, regulatory, policy, and civil liberty communities tackle these pressing problems, highlighting not only what we can learn from the history of drone regulation but also proposing policies that will allow for an innovative and dynamic drone sector while protecting our privacy.

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