



Judiciary

Has the judicial nomination process become more politicised than ever?

What's the story?

In October and November 2017, the American Bar Association (ABA) attracted considerable media attention when it rated four of President Trump's federal judicial nominees as 'not qualified' – the first time the ABA has given this rating since 2006. For a number of reasons, one of the four nominees, Brett Talley, has since been withdrawn by the White House. However, controversially, another 'not qualified' nominee, Leonard Grasz, has since been confirmed by the Senate, in what proved to be a predictably partisan vote. Democratic critics argue that, by disregarding the impartial advice of the ABA, Senate Republicans are failing in their duty to scrutinise nominees carefully, to ensure that they are suitably qualified. However, Republicans dispute this, and argue that the ABA is not as impartial as it appears.

What role does the ABA have in the nomination process?

The American Bar Association is a voluntary association that represents American lawyers. It has been involved in the federal judicial nomination process since 1953, when it began to rate nominees as 'well qualified', 'qualified' or 'not qualified'. Today, the ABA scrutinises all federal judicial nominees with a 15-member committee of lawyers, representing each judicial circuit in the US. Candidates are assessed on three main qualifications: integrity, professional competence and judicial temperament. Nominees are considered 'not qualified' if they fail to meet the committee's standards in any of these three areas. The rating is based on interviews with the nominee, and other lawyers who have worked with them, and a detailed look at their past writings. It is rare for federal judicial nominees to be rated as 'not qualified'.

Why was Brett Talley's nomination withdrawn?

Talley's nomination was controversial because, while he graduated from Harvard Law School in 2007, he has only been a practicing lawyer for three years, and has never tried a case in court. He was unanimously rated 'not qualified' by the ABA, likely due to his lack of experience, but possibly also due to his prolific partisan blogging. One widely circulated example was a 2013 blog written shortly after the 2013 mass shooting at Sandy Hook Elementary School, in which he pledged his support for the NRA "financially, politically, and intellectually." Despite this, Talley told the Senate Judiciary Committee that he would not recuse himself from cases involving the NRA. Also noted were numerous tweets strongly criticising Hillary Clinton. The Senate Judiciary Committee approved Talley in a party line vote on 9th November. However, it was later revealed that Talley had failed to inform the Senate that his wife is the Chief of Staff for White House Counsel Donald McGahn, who is currently overseeing the nomination process. This prompted criticism from Congress, and Talley's nomination was later withdrawn.

Why was Leonard Grasz rated 'not qualified'?

The head of the ABA Standing Committee that scrutinised Grasz's nomination said that, in interviews, a number of lawyers raised concerns over his ability to preside over cases without bias. The ABA said that Grasz acknowledged that "he spends about 50% of his professional time lobbying and 50% of his time in litigation". Grasz has served on the board of the Nebraska Family Alliance, a conservative, pro-life group that advocates for a traditional conception of family and marriage. He was also once the Assistant Secretary for Nebraskans for the Death Penalty, which seeks to overturn the state ban on capital punishment. The ABA questioned whether Grasz "would be able to detach himself from his deeply-held social agenda and political loyalty to be able to judge objectively, with compassion and without bias."

Debate! Are Republicans right to be sceptical of the ABA? Is it possible for the ABA to impartially assess a nominee's "integrity, professional competence and judicial temperament"? Look at the table on the final page, how do the ratings of Trump's judicial nominees compare to other recent presidents'?



How does this fit into your exams?

Judiciary – Are judges simply politicians in robes?

The controversy over President Trump's judicial nominations is interesting when considering the extent to which the judiciary, particularly the judicial nomination process, has become politicised. Since 1953, when the ABA was first asked by President Eisenhower to advise on the suitability of judicial nominees, the ABA has claimed to play a vital, non-partisan role in the appointment process. While the two parties may be naturally tempted to focus on whether nominees are suitably liberal or conservative, the ABA has always claimed to stick to the question of whether candidates are suitably qualified. Historically, presidents of both parties have asked the ABA to rate judges before they have even announced them as nominees, so that those deemed 'not qualified' can be quietly reconsidered. President Obama decided against proceeding with a number of nominations, after they were criticised by the ABA behind closed doors. However, like President George W. Bush, Trump has not consulted the ABA before announcing his nominees. Critics have argued that, by disregarding the ABA's warnings, Republicans have made it clear that they are more concerned with filling federal courts with judges of a particular political ideology and legal philosophy, than with ensuring that the individuals being appointed for life are really the most qualified candidates. Critics argue that Republicans have essentially outsourced nominations to the Federalist Society, a network of conservative lawyers, judges and academics that has co-operated closely with the Trump administration to propose suitably conservative judges.

Republicans have strongly dismissed the notion that they have done anything wrong. Firstly, they argue that the ABA is not as impartial as it claims to be. Senator Jeff Flake argued, "The ABA's long history of political liberal activism makes it very hard to see how their process isn't biased". Conservative media outlets have argued that the lead investigator on the ABA committee that rated Grasz 'not qualified' is a liberal law professor, while another investigator, who was asked to give a second opinion on the rating, is a liberal lawyer, with a history of donating to Democratic candidates and left-wing causes.

Furthermore, the fact that there is no longer bi-partisan agreement that the ABA is even *capable* of impartially assessing nominees only further reinforces the impression that this *is* a political process.

Congress – How well does Congress perform its scrutiny function?

The withdrawal of Talley's nomination, following revelations over his comments online and his failure to disclose vital information to the Senate, also raises questions over how well Congress is performing its scrutiny function. President Obama had three appeals court judges approved in his first year. However, in December, the chairman of the Senate Judiciary Committee, Chuck Grassley, said he was proud to say that 12 new appeals court judges had been approved – a record for a president's first year. Critics argue that the speed at which the Senate has moved has come at the cost of weakened scrutiny.

Republicans point to Talley's withdrawal as evidence that the Senate is unwilling to approve unqualified candidates, but critics counter that his nomination was withdrawn only after the media unearthed issues that the Judiciary Committee had missed when it approved him in a party line vote.

Democrats argue that cases such as this show exactly why the confirmation process should slow down. They have criticised Grassley for scheduling brief hearings for multiple nominees at a time, giving members of the Senate Judiciary Committee only minutes to question individuals who are on the verge of being given lifetime appointments. In December, a video of Republican Senator John Kennedy using his limited time to quickly ask basic legal questions to nominee Matthew Spencer Petersen, which he was unable to answer, soon went viral after it was tweeted by a Democratic Senator. The video led to the nominee being withdrawn, but Democrats have questioned whether more nominees would have struggled had Senators been given more time. As the Republicans control the Senate there is little that Democrats can do beyond tweeting. In 2013, Senate Democrats took the 'nuclear option' of banning filibusters for all judicial nominees, with the exception of the Supreme Court, after a record number of Obama's nominees were blocked by filibusters. As a result, even without a supermajority in the Senate, there is little that can slow the Republicans down.