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Step Aside, Mr. Senator: A Request for Members of the Senate Judiciary Committee To Give Up Their Mics

PAUL E. VAGLICA *

INTRODUCTION

In 1995, a law professor at the University of Chicago Law School dubbed the Supreme Court confirmation hearings “vapid and hollow” and added that they, as implemented, “serve little educative function, except perhaps to reinforce lessons of cynicism that citizens often glean from government.”¹ Ironically, this same law professor, Elena Kagan, later endured the confirmation hearings as a nominee and currently sits as the 112th Justice of the U.S. Supreme Court.² While she may be one of the few to ever reach a seat on the High Court, she is not alone in her assessment of the Supreme Court’s lackluster confirmation process. Other legal scholars have called the process a complete mess³ and likened it to a circus⁴ or a kabuki dance.⁵

Although there are multiple aspects of the confirmation process that could use reform,⁶ this Note draws attention to one flaw of the confirmation hearings that many overlook—members of the Senate Judiciary Committee (the “Committee”) use the confirmation hearings as a forum to voice their own political beliefs instead of focusing their undivided attention on the qualifications of the nominee. Since senators do not focus entirely on the nominee, they are not thoroughly examining the nominee’s fitness for the Court. As nationally televised events, it only follows that senators use the confirmation hearings as a medium to speak to their

* J.D. Candidate, Indiana University Maurer School of Law. Thanks to Professors Charles Geyh and Luis Fuentes-Rohwer for critiquing earlier drafts of this Note and to the staff of the *Indiana Law Journal* for their remarkable editing. All errors are my own.

1. Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919, 941 (1995) (book review).

2. Edward C. Dawson, *Kagan Confirmation Contentiousness Continues Partisan Trend*, HOUS. LAW., Oct. 2010, at 41–42.

3. See STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* (1994).

4. See Terence J. Lau, *Judicial Independence: A Call for Reform*, 9 NEV. L.J. 79, 84 (2008).

5. See Richard Brust, *No More Kabuki Confirmations*, 95 A.B.A. J., Oct. 2009, at 39, 39.

6. See, e.g., JUDICIAL ROULETTE: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION 10 (1988) [hereinafter TWENTIETH CENTURY FUND TASK FORCE] (suggesting that television cameras be banned from the hearings); Stephen L. Carter, *The Confirmation Mess, Revisited*, 84 NW. U. L. REV. 962, 965 (1990) (stating that inquiry into a nominee’s ideology threatens judicial independence); Robert Post & Reva Siegel, *Questioning Justice: Law and Politics in Judicial Confirmation Hearings*, 115 YALE L.J. POCKET PART 38 (2006) (arguing that Supreme Court nominees should state how they would have voted in cases that the Court has already decided); Lori A. Ringhand, *In Defense of Ideology: A Principled Approach to the Supreme Court Confirmation Process*, 18 WM. & MARY BILL RTS. J. 131 (2009) (advocating for a confirmation process that delves into a nominee’s ideology).

constituents. One may ask why this matters or point out that one would expect this of senators;⁷ after all, senators constantly have their campaigning caps on, especially when receiving national attention. However, these responses ignore the negative effects of senators placing themselves, rather than the nominees, in the confirmation hearings' limelight. If the purpose of confirmation hearings is to determine the qualifications of a nominee and ensure that he or she is fit for the Court, then this purpose goes unfulfilled if constituents influence senators' lines of questioning. Senators consume themselves with how their constituents back home will view their questioning and fail to focus on what is at stake—the confirmation of the nation's next Supreme Court justice. If the purpose of confirmation hearings is to evaluate the nominee, then this purpose would best be served by having undivided attention focused on the nominee and his or her answers. If senators have an ulterior motive—engaging in an open dialogue with their constituents—then the confirmation process does not effectively serve its primary purpose.

Part I of this Note investigates the confirmation and appointment power that the Constitution delegates to the Senate. Part II provides a detailed history of the confirmation process and its dramatic evolution over the last century, which is crucial in order to fully comprehend today's process and its problems. Part III, after examining the media's role within the confirmation process and the publicity that the confirmation hearings attract, offers proof that senators are cognizant of their national audience and highlights specific examples of senators addressing their constituents via the confirmation hearings. Part IV concludes by setting forth three possible solutions to the overarching problem: implementing anonymous questioning of the nominees through Committee representatives; appointing experts to question the nominees in the senators' places; and replacing video recording of the hearings with audio recording.

I. THE SENATE'S ADVICE AND CONSENT POWER

Before critiquing the Senate Judiciary Committee's participation in the Supreme Court confirmation process, the Senate's role within the process must be understood. The Senate derives its power to participate in the process under Article II, Section 2 of the U.S. Constitution, which states, “[The president] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court.”⁸ This is the only sentence that directs the Senate's conduct throughout the confirmation process; there is no useful, supplemental statutory law or set of rules governing the substantive aspects of the confirmation hearings.⁹ The

7. During the drafting of this Note, Professor Geyh once commented, “Proposing that Senators stop being political is a bit like proposing that raccoons start shaving—not only is it unrealistic to expect, it runs counter to nature and history.”

8. U.S. CONST. art. II, § 2. For a detailed discussion of the history of the Appointments Clause, see Adam J. White, *Toward the Framers' Understanding of “Advice and Consent”*: A Historical and Textual Inquiry, 29 HARV. J.L. & PUB. POL'Y 103 (2005).

9. See E. Stewart Moritz, “Statistical Judo”: *The Rhetoric of Senate Inaction in the Judicial Appointment Process*, 22 J.L. & POL. 341, 352 (2006) (“The Judiciary Committee also has its own set of rules, but they are also very simple and not relevant to the important issues concerning nominations.”); see also ROBERT A. KATZMANN, COURTS AND CONGRESS 13 (1997) (arguing that the criteria for evaluating a nominee “are not carved in stone or even

lack of direction and clear guidance regarding the Senate's role in the confirmation process may be the reason senators have the opportunity to abuse the process.¹⁰

A. Original Framers' Intent of the Power

An examination of the historical records reveals that there is "little evidence indicating the exact meaning of 'advice and consent' intended by the Framers."¹¹ Rather than focusing on the necessary qualifications of justices, delegates to the Constitutional Convention were more concerned with *who* would have the power to appoint justices. During the convention, three opinions surfaced regarding the process for appointing judges: one group suggested that the national legislature possess the sole power to appoint justices,¹² a second group proposed that the president should appoint members to the High Court without any input or action from the Senate,¹³ and a final group advocated for nomination by the president with the requirement that the Senate acquiesce to the nomination.¹⁴ No group won.¹⁵

drawn in sand"); *id.* at 9 (stating that the Constitution does not state the standards for nomination and approval of Supreme Court nominees).

10. KATZMANN, *supra* note 9, at 13 ("Throughout our nation's 200-year history, the standards for confirmation have been the assertions of the Senate at the particular moment it considers a nominee.").

11. Lee Renzin, *Advice, Consent, and Senate Inaction—Is Judicial Resolution Possible?*, 73 N.Y.U. L. Rev. 1739, 1753 (1998).

12. CHARLES GARDNER GEYH, *WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM 177* (2006). This proposal, referred to as the Virginia Plan, was "resoundingly rejected" within a week. *Id.* The primary concern was that a danger of "intrigue and partiality" existed if the sole power of judicial nomination was granted to the legislature. *Id.* (quoting JAMES MADISON, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 119 (Max Farrand ed., 1911) [hereinafter RECORDS OF THE FEDERAL CONVENTION]). James Madison pointed out that legislators were not familiar with the necessary qualifications of judges and would be predisposed to appoint fellow legislators. *See id.* On June 13, 1787, James Madison proposed that only the Senate, rather than the entire legislature, have the sole power to appoint justices. *Id.* The delegates to the convention approved Madison's proposal by a vote of six to three; however, the issue was later revisited. *Id.* Madison later came to question his own proposal and realized its weaknesses. *See id.* at 177–78, 183.

13. *Id.* at 178. This proposal was known as the New Jersey Plan and never received the positive reception that the Virginia Plan had originally received. *See id.* Delegates to the convention feared that granting sole power to the president created the risk that the president would only appoint justices from his home state or that he, as an individual, would be persuaded by "caresses and intrigues" that the senate as a multi-member body would not be affected by. *Id.* (quoting 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 12, at 81). Due in large part to these concerns, the motion to grant the president sole authority to appoint justices to the Court was rejected by a vote of six to two. *Id.*

14. *Id.* at 179. Nathaniel Gorham originally introduced this proposal after noting that this system had worked seamlessly in appointing judges to the state bench in Massachusetts. *Id.* After Gorham's proposal failed with a tie vote, James Madison altered Gorham's proposal and suggested that the president should nominate a judge, and that that judge would become appointed unless two-thirds of the senate disagreed with the appointment within a certain number of days. *Id.* Delegates to the convention were not satisfied by Madison's proposal because it essentially vested all of the appointment power with the president. *See id.* Madison's amended proposal was shot down by a vote of six to three. *Id.* at 183.

15. *See id.* at 177–80.

Throughout the Constitutional Convention, delegates voted on the numerous proposals for the appointment process.¹⁶ While members of the convention originally voted six to three in favor of granting exclusive appointment power to the Senate,¹⁷ the Committee of Eleven¹⁸ subsequently amended this decision in order to resolve lingering disputes.¹⁹ The Committee of Eleven proposed the power currently found in the Constitution, and those originally in favor of granting the exclusive power to the Senate had a change of heart—the delegates unanimously approved the Committee of Eleven’s new proposal.²⁰ This final solution was thought to have created a balance: “[A]s the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security.”²¹

Regardless, the Framers did not have a clear intent in delegating power to the Senate in the confirmation process.²² Since some delegates to the convention had been willing to grant the president exclusive authority of the appointment power and some delegates were willing to grant that very same power to the Senate, “[i]t is thus reasonable to suspect that the ‘original understanding’ of the Senate’s role in rendering advice and consent would vary depending on whether the delegate one asked envisioned a process that minimized Senate interference with presidential prerogatives or one that maximized the Senate’s capacity to check presidential power.”²³ However, considering the fact that delegates to the convention had previously voted six to three to grant exclusive power to the Senate and also voted six to two in opposition of granting the exclusive power to the president, it is highly unlikely that the delegates to the convention expected the Senate to take a passive or silent role in the confirmation process.²⁴ These delegates, who subsequently voted in favor of the clause currently found in the Constitution, wanted the Senate to play a purposeful and meaningful role in the process.²⁵

B. The Senate’s Role in the Process

“Although there are some suggestions in the early history of the national government that the Senate’s role was only advisory, upon examination it is clear

16. *Id.*

17. *Id.* at 183.

18. The Committee of Eleven consisted of one delegate from each state present at the Federal Convention. MICHAEL COMISKEY, *SEEKING JUSTICES: THE JUDGING OF SUPREME COURT NOMINEES* 22 (2004).

19. *See* GEYH, *supra* note 12, at 180.

20. *Id.*

21. *Id.* (citing 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 12, at 539) (alteration in original).

22. COMISKEY, *supra* note 18, at 22; Renzin, *supra* note 11, at 1753–54.

23. GEYH, *supra* note 12, at 181.

24. *Id.* at 183; James E. Gauch, Comment, *The Intended Role of the Senate in Supreme Court Appointments*, 56 U. CHI. L. REV. 337, 354 (1989) (“A merely advisory role would be inconsistent with the compromise on the Appointment Clause reached in the last days of the convention.”).

25. Gauch, *supra* note 24, at 354–55.

that the Framers intended the Senate's check to involve a vigorous review of judicial nominees."²⁶ The Framers expected the Senate to use great discretion in consenting to nominees, and they expected both political and economic interests to be intertwined with the confirmation process.²⁷ After all, both interests weighed heavily in the Framers' debate over who should receive the appointment power in the first place—the Framers “did not trust future generations to behave in a more high-minded way than they themselves did.”²⁸ The Framers spent extensive time contemplating whom to authorize with the appointment power because it was an issue that was important to them; they wanted to ensure that whatever process they finally settled on would result in the appropriate people being appointed to the federal bench.²⁹ Based on this history, the Senate should subject each nominee to the highest level of scrutiny in determining whether that nominee should be appointed to the High Court.³⁰ As Senator Patrick Leahy once stated, “If the Senate fails to take its advice and consent role seriously . . . it abdicates its duty to guarantee . . . the rights of our citizens.”³¹

According to Professor William G. Ross, the Senate has five functions within the confirmation process: 1) to review and investigate the qualifications of the nominee, including the nominee's intellectual, professional, physical, psychological, moral, and ethical qualifications; 2) to serve as a check on presidential favoritism; 3) to evaluate both the political and judicial philosophies of the nominee; 4) to interview the nominee; and 5) to serve as an open forum for the expression of views on the nomination by members of the bar, special interest groups, and private citizens.³² The focus of this Note assesses the Senate's performance of the fourth function. Ross also states that nominees attend their confirmation hearings for three primary reasons. First, a nominee's testimony helps senators evaluate a nominee's political, social, and judicial views.³³ Second, the hearings provide a nominee with the opportunity to respond to any questions or allegations concerning his character, judicial record, or philosophy.³⁴ Third, the appearance of the nominee at his own confirmation hearings facilitates a dialogue between senators and the nominee.³⁵

These purposes of the confirmation hearings make it clear that senators should intensely and aggressively question a nominee for the sake of evaluating the nominee's fitness for the Court.³⁶ “Not even the most renowned, respected, or

26. *Id.* at 353.

27. COMISKEY, *supra* note 18, at 22–23.

28. *Id.* at 23.

29. *See* GEYH, *supra* note 12, at 178–83.

30. *Id.* at 183 (arguing that the Founders “wanted an appointments process that would produce judges selected on the basis of their ‘intrinsic merit’ . . . rather than their political connections, family ties, or personal friendships”).

31. S. EXEC. REP. NO. 102-15, at 98–99 (1991).

32. William G. Ross, *The Functions, Roles, and Duties of the Senate in the Supreme Court Appointment Process*, 28 WM. & MARY L. REV. 633, 634–35 (1987).

33. *Id.* at 669.

34. *Id.*

35. *Id.*

36. *See* Dennis DeConcini, *Examining the Judicial Nomination Process: The Politics of*

experienced nominee should be presumed fit for the nation's highest bench and be permitted to escape the scrutiny that interrogation by the Committee affords."³⁷ Senators have an important obligation to the American people to ensure that the Court's next appointee is qualified and capable of serving as a life-tenured justice on the country's most important bench.³⁸ Senators should take this duty seriously and focus their undivided attention on the issue at stake. To put it differently, senators should press nominees and not allow their constituents to influence their performance within a confirmation hearing.

At a very simple level, confirmation hearings currently proceed as follows: members of the Senate Judiciary Committee individually question the nominee, hear testimony from various interest groups, and provide either a positive or negative recommendation of the nominee to the Senate.³⁹ The Committee's recommendation carries great weight within the Senate—"[n]o nominee to the Supreme Court has been confirmed after receiving a negative recommendation from the committee."⁴⁰ The nominee needs a simple majority to reach confirmation as the next justice of the Supreme Court.⁴¹

The Senate's role within the confirmation process is one without boundaries or restrictions. The Constitution does not state which qualifications members of the Senate Judiciary Committee should look for in future justices or what specific purpose the public confirmation hearings should fulfill.⁴² However, one thing will soon be clear: members of the Senate Judiciary Committee take advantage of the opportunities confirmation hearings provide by addressing their constituents, which takes away from the energy they can direct towards the nominee.⁴³

II. EVOLUTION TO PRESENT-DAY CONFIRMATION HEARINGS

Though the Supreme Court confirmation hearings have followed the same format in recent years, the modern-day process is somewhat new. In fact, the Senate conducted the confirmation process much differently just six decades ago.⁴⁴ Besides the obvious increase in media attention and publicity that the hearings have received since 1981,⁴⁵ the fundamentals of the process have also drastically changed. A thorough understanding of this historical transformation helps explain the new opportunities available to senators during present-day confirmation hearings.

Advice and Consent, 34 ARIZ. L. REV. 1, 2 (1992).

37. William G. Ross, *The Supreme Court Appointment Process: A Search for a Synthesis*, 57 ALB. L. REV. 993, 1005 (1994).

38. See DeConcini, *supra* note 36, at 2–3.

39. See THOMAS G. WALKER & LEE EPSTEIN, *THE SUPREME COURT OF THE UNITED STATES: AN INTRODUCTION* 44–46 (1993).

40. *Id.* at 46 ("The only justice to be confirmed with less than a positive recommendation was Clarence Thomas, over whom the committee was divided 7–7.").

41. Hon. John Cornyn, *Standards for the Supreme Court*, 39 U. RICH. L. REV. 971, 975 (2005).

42. See *supra* note 9.

43. See *infra* Part III.C.

44. See *infra* Part II.D.

45. See *infra* Part III.A.

A. First Public Hearing & First Appearance by a Nominee

Supreme Court nominees have not always received the immense attention that they now receive.⁴⁶ Not only were hearings held in private, but the Senate Judiciary Committee did not require (and usually did not even request) nominees to testify.⁴⁷ Needless to say, this process did not provide members of the Senate Judiciary Committee an opportunity to reveal their own beliefs regarding hot-button issues or send signals to their constituents.

Originally, not all nominees passed along to the Senate warranted a hearing; confirmation hearings only took place if the Senate Judiciary Committee believed the president made a controversial nomination.⁴⁸ The Senate typically approved or rejected nominees—though most commonly approved⁴⁹—by a simple yes or no vote without a hearing.⁵⁰ Though rare, when the Committee held a hearing, they did so behind closed doors unless two-thirds of the Senate voted to make the hearing public.⁵¹ This trend continued until 1929, when the Senate chose to make confirmation hearings open to the public unless a majority of the Senate voted to keep them private.⁵² Perhaps more surprisingly, nominees did not appear at their own confirmation hearings to testify before or answer questions from senators.⁵³ “[E]ven though everybody wanted to know how potential Justices might vote [on future cases before the Court], to ask was considered unseemly.”⁵⁴ Two nominees, however, served as exceptions to these otherwise simple confirmation rules: Louis Brandeis in 1916 and Harlan Fisk Stone in 1925.

In 1916, the nomination of Louis Brandeis shook the confirmation process as the country had previously known it because the Committee held, for the first time, a public hearing to discuss Brandeis’s nomination. Brandeis was the first Jewish man nominated to the Court, and many questioned whether he could overcome his “handicap of being a Jew.”⁵⁵ Brandeis faced strong opposition.⁵⁶ Former

46. WALKER & EPSTEIN, *supra* note 39, at 44 (“Today we take these hearings for granted. We expect to see excerpts of the hearings on the television news and read press accounts of how the nominee performed. It should be kept in mind, however, that public hearings are a relatively modern phenomenon.”).

47. *See id.* (pointing out that, as late as 1949, it was not the norm for nominees to appear before the Committee).

48. GEORGE WATSON & JOHN A. STOOKEY, *SHAPING AMERICA: THE POLITICS OF SUPREME COURT APPOINTMENTS* 142 (1995).

49. *See* LEE EPSTEIN, JEFFREY A. SEGAL, HAROLD J. SPAETH & THOMAS G. WALKER, *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS* 379–88 tbl.4-15 (4th ed. 2007). Prior to 1929, the Senate had confirmed eighty-one of the presidents’ Supreme Court nominees, while only rejecting seven. *Id.*

50. *All Things Considered: A History of Supreme Court Confirmation Hearings* (Nat’l Pub. Radio broadcast July 12, 2009) (Guy Raz, host; interview with Professor Lucas Powe).

51. Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146, 1157 (1988).

52. COMISKEY, *supra* note 18, at 13–14.

53. CARTER, *supra* note 3, at 65–66.

54. *Id.* at 65.

55. THOMAS KARFUNKEL & THOMAS W. RYLEY, *THE JEWISH SEAT: ANTI-SEMITISM AND THE APPOINTMENT OF JEWS TO THE SUPREME COURT* 44 (1978).

Republican President William Taft famously called Brandeis a “muckraker,” an “emotional socialist,” and “unfit for the post.”⁵⁷ Opponents of Brandeis did not hide their feelings, and multiple rumors surfaced that cast Brandeis in a negative light.⁵⁸ Despite President Woodrow Wilson’s public statement endorsing Brandeis as “eminently qualified” to sit on the Supreme Court,⁵⁹ the Senate Judiciary Committee, for the first time in the Committee’s history, held an open, public hearing to discuss the nomination.⁶⁰ Brandeis did not appear at his confirmation hearings and avoided questions by the Senate Judiciary Committee.⁶¹ Eventually, Brandeis passed the Senate vote by a convincing forty-seven to twenty-two margin on June 1, 1916.⁶²

Nine years later, in 1925, Harlan Fiske Stone was the first Supreme Court nominee to appear at his confirmation hearing.⁶³ Some senators considered Stone a controversial nominee because he, while serving as attorney general, refused to dismiss a criminal prosecution against Montana Senator Burton K. Wheeler.⁶⁴ To address the concerns of the Committee, Stone volunteered to appear at his own hearing.⁶⁵ As a bright legal mind, Stone answered the Committee’s questions with great skill, and he eventually passed confirmation with an easy seventy-one to six vote.⁶⁶

An examination of the original confirmation hearings process (or lack thereof) and a look at the events surrounding the confirmations of Louis Brandeis and Harlan Fiske Stone reveal that Americans have not always put senators under a public microscope as they question and decide whether to confirm a nominee to the High Court. Simply put, members of the Senate Judiciary Committee have not always had an audience and, thus, have not always faced the temptation to use the confirmation process for their own personal gain.⁶⁷ Unfortunately, as the process evolved, so too did the opportunity for senators to treat this important process as a

56. GEYH, *supra* note 12, at 199.

57. KARFUNKEL & RYLEY, *supra* note 55, at 48–49 (“[Taft] wanted the seat himself, and if he could not have it, at least he wanted someone whom he regarded as ‘appropriate,’ for he was more than aware of the role that a conservative Court would play in checking the flood of progressive legislation.”).

58. *See id.* at 53–54 (stating that opponents of Brandeis accused him of deserting a client, conspiring with one of the heirs to the Warren estate to defraud the other inheritors, and settling a breach of promise suit against the president but charging a seat on the Court as his fee).

59. KARFUNKEL & RYLEY, *supra* note 55, at 56.

60. *A History of Supreme Court Confirmation Hearings*, *supra* note 50.

61. *Id.*

62. *See* KARFUNKEL & RYLEY, *supra* note 55, at 57–58.

63. *See* DENIS STEVEN RUTKUS & MAUREEN BEARDEN, CONG. RESEARCH SERV., RL33225, SUPREME COURT NOMINATIONS, 1789–2006: ACTIONS BY THE SENATE, THE JUDICIARY COMMITTEE, AND THE PRESIDENT 7 (2006), *available at* <http://www.fas.org/sgp/crs/misc/RL33225.pdf>.

64. WATSON & STOOKEY, *supra* note 48, at 144.

65. WALKER & EPSTEIN, *supra* note 39, at 44.

66. CARTER, *supra* note 3, at 66.

67. *See* GEYH, *supra* note 12, at 187 (“Until 1929, the Senate deliberated the fate of judicial nominations in executive session and published records of little more than the final vote taken.”).

public forum to express their own political beliefs and, consequently, take the focus away from the nominees.⁶⁸

B. Mandatory Hearings and Invitations to Testify

After the unordinary confirmation hearings of Brandeis and Stone, the confirmation process reverted to its previous state⁶⁹—hearings were optional, and the nominees were not expected to appear if the Senate Judiciary Committee decided to hold hearings.⁷⁰ The two most controversial hearings of the next stage of the confirmation evolution were those of Hugo Black and Felix Frankfurter. Both confirmations tweaked the confirmation process and continued the movement towards the confirmation hearings as they currently stand.

In 1937, the confirmation of Hugo Black triggered the rule that the Senate must hold a hearing to discuss a president's nomination.⁷¹ Prior to his nomination, Black represented Alabama in the United States Senate.⁷² The Chairman of the Senate Judiciary Committee, Henry Ashurst, thought a referral of the nomination to the Committee was unnecessary;⁷³ however, the Committee denied his motion to bypass the Committee's approval.⁷⁴ The Senate Judiciary Committee never held a confirmation hearing to discuss Black's qualifications,⁷⁵ but it was this lack of a hearing that revealed the necessity to hold one in subsequent nominations. After the Committee received the nomination, Ashurst forced the nomination through the Committee without ever holding a hearing.⁷⁶

Unfortunately, the importance of holding a hearing did not surface until after both the Committee and the full Senate confirmed Justice Black. Shortly after confirmation, news reports surfaced that Black had previously and continued to maintain ties with the Ku Klux Klan.⁷⁷ These allegations against Black took a backseat after Black proved himself as a strong justice and contributor on the

68. *See infra* Part III.C.

69. DENIS STEVEN RUTKUS, CONG. RESEARCH SERV., 7-5700, SUPREME COURT APPOINTMENT PROCESS: ROLES OF THE PRESIDENT, JUDICIARY COMMITTEE, AND SENATE 20 (2010) (“Neither the Brandeis nor the Stone hearings . . . served as binding precedents. Public confirmation hearings for Supreme Court nominations did not become a regular practice of the Judiciary Committee until the late 1930s.”).

70. *Id.*

71. WATSON & STOOKEY, *supra* note 48, at 142.

72. *Id.*

73. *See* HOWARD BALL, HUGO L. BLACK: COLD STEEL WARRIOR 94 (1996) (“Ashurst asked for immediate confirmation, consistent with the practice of senatorial courtesy.”).

74. WATSON & STOOKEY, *supra* note 48, at 142.

75. DENIS STEVEN RUTKUS, CONG. RESEARCH SERV., RL31989, SUPREME COURT APPOINTMENT PROCESS: ROLES OF THE PRESIDENT, JUDICIARY COMMITTEE, AND SENATE 20 (2010). It had been tradition for senators to be confirmed to judicial office without any debate. BALL, *supra* note 73, at 94.

76. WATSON & STOOKEY, *supra* note 48, at 142.

77. *Id.* While Black regretted joining the Ku Klux Klan, he once stated, “I would have joined any group if it helped get me votes.” BALL, *supra* note 73, at 16, 50 (emphasis omitted) (quoting ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 100 (1994)).

bench.⁷⁸ Specifically, in *Chambers v. Florida*,⁷⁹ Justice Black's decision to rule for an African American criminal defendant eased concerns that he was a bigot.⁸⁰ Regardless, the regret of not fully exploring these allegations prior to Black's confirmation resulted in the Senate's adoption of a rule mandating that the Senate Judiciary Committee hold a hearing to discuss all nominations.⁸¹

Though hearings were now mandatory after Black's confirmation, the Senate Judiciary Committee still did not require the nominee to appear and testify;⁸² however, in 1939, Felix Frankfurter defended himself at his own confirmation hearing.⁸³ Like Brandeis and Stone, senators viewed Frankfurter as a dangerous candidate.⁸⁴ Frankfurter cofounded the American Civil Liberties Union and also came forward and advocated for a new trial for Ferdinando Nicola Sacco and Bartolomeo Vanzetti after they received the death penalty for murder.⁸⁵ Additionally, Frankfurter was Jewish and many senators found it unsettling to have two sitting Jewish justices on the Supreme Court.⁸⁶ As a result, the Committee held hearings to discuss Frankfurter's confirmation.⁸⁷ Instead of attending the confirmation hearings, Frankfurter continued to teach at Harvard, while Dean Acheson attended on his behalf.⁸⁸

Though much of the disapproval surrounding Frankfurter derived from absurd accusations,⁸⁹ one senator on the Committee vehemently opposed Frankfurter's confirmation.⁹⁰ Senator Pat McCarran possessed a "deep hatred of leftists, liberals, Easterners, intellectuals, and Harvard faculty members. Frankfurter qualified on all counts by his definition."⁹¹ Noticing this potential roadblock in Frankfurter's confirmation, President Franklin D. Roosevelt's press secretary requested that Frankfurter attend the hearings and speak with Senator McCarran.⁹² Frankfurter obliged, and he "put on the greatest lecture of his career."⁹³ The audience gave

78. WATSON & STOOKEY, *supra* note 48, at 142–43.

79. 309 U.S. 227 (1940).

80. BALL, *supra* note 73, at 104–05.

81. *See* RUTKUS, *supra* note 75, at 20 (stating that the Senate held a confirmation hearing for every nominee beginning with Stanley F. Reed in 1938, except for two senators nominated to the Court in the 1940s and two nominees who had their nominations withdrawn in 2005).

82. KATZMANN, *supra* note 9, at 20 (stating that the Senate Judiciary Committee began the practice—if not yet tradition—of questioning nominees in 1939).

83. WALKER & EPSTEIN, *supra* note 39, at 44.

84. KARFUNKEL & RYLEY, *supra* note 55, at 89.

85. *Id.*

86. *Id.* at 94.

87. *Id.*

88. *Id.*

89. *Id.* at 95 (“[T]here was Charles Carraway, a carpenter by trade, who said that if Frankfurter was confirmed it would encourage aliens to come to the United States on the expectation that they would get good jobs.”).

90. *Id.*

91. *Id.* at 96.

92. *Id.*

93. *Id.* (noting that Frankfurter responded to one of Senator McCarran's comments by stating, “Senator, . . . you have never taken an oath to support the government of the United

Frankfurter a two-minute ovation for his presentation to the Committee, and Frankfurter passed both the Committee and the full Senate unanimously.⁹⁴

The nominations and subsequent confirmations of Hugo Black and Felix Frankfurter transformed the confirmation process. Though more changes would take place in the coming decades, these two nominations established two principles: 1) the Senate Judiciary Committee must hold hearings for each nominee and 2) nominees should appear at their confirmation hearings.⁹⁵ These two principles are now fundamental to the confirmation process, and their implementation led to the issues inherent in today's confirmation hearings.

C. Refusing to Testify

The confirmation process of Sherman Minton in 1949 reveals that the Senate Judiciary Committee did not yet view a nominee's testimony as a crucial step in the confirmation process. The Senate Judiciary Committee allowed Sherman Minton to refuse to testify at his confirmation hearing.⁹⁶ Minton had made comments publicly, stating that some form of check upon the Supreme Court should exist, which resulted in some senators' desire to question Minton.⁹⁷ After receiving an invitation to appear before the Senate Judiciary Committee, Minton refused, stating that "personal participation by [a] nominee in the committee proceedings relating to his nomination presents a serious question of propriety."⁹⁸ Minton believed his record as both a U.S. senator and judge for the United States Court of Appeals for the Seventh Circuit revealed all the Committee needed to know about his qualifications.⁹⁹

The fact that Sherman Minton refused to appear at his own hearings and, perhaps more shockingly, that the Senate Judiciary Committee allowed him to refuse to appear is difficult to believe considering the current structure of confirmation hearings. If a nominee in today's confirmation world refused to testify in front of the Senate Judiciary Committee, the Senate probably would not approve that nominee for appointment to the Court.¹⁰⁰

States with less reservation than have I, nor do I believe that you are more attached to the principles and policies of Americanism than I am." (internal quotation marks omitted).

94. *Id.* at 96–97.

95. However, it was still not custom for every nominee to testify at his hearing. See KATZMANN, *supra* note 9, at 21 ("After the Harlan confirmation hearing [in 1955], the Senate Judiciary [Committee] would call every nominee to testify.").

96. 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*, 62 TUL. L. REV. 109, 118 (1987).

97. *Id.* ("Although Minton made the speech as an ardent New Deal Senator in June 1936, his remarks still concerned a number of Senators.").

98. *Id.*

99. *Id.* at 118–19 (stating that Minton claimed he "had left politics behind when he became a judge").

100. See RUTKUS, *supra* note 69, at 21 ("Whereas, historically, nominees were routinely uninvolved in the appointment process, they have now become active participants. Indeed, at hearings, a nominee's demeanor, responsiveness and knowledge of the law may be crucial in influencing the committee members' and other Senators' votes on confirmation.").

D. Post-Brown and Mandatory Testimony

John Marshall Harlan's nomination in 1955 established the routine of mandating nominees to appear and testify before the Senate Judiciary Committee.¹⁰¹ Angry over the recent Supreme Court's decision in *Brown v. Board of Education*¹⁰² and realizing, perhaps for the first time, the immense power the Supreme Court possessed, southern senators on the Senate Judiciary Committee demanded that Harlan explain his specific views on (de)segregation.¹⁰³ Liberals on the Committee worried that such an imposition threatened judicial independence.¹⁰⁴ However, Harlan eventually agreed to appear in front of the Senate Judiciary Committee.¹⁰⁵

The confirmation of Justice Harlan created a new tradition. Harlan's confirmation hearing laid the foundation for the present-day interrogations that occur at confirmation hearings. According to Professor Stephen Carter, for more than the next decade, "every nominee appeared and every nominee was grilled about the segregation decisions. As the era of the Warren Court continued, the questioning broadened, and potential Justices found themselves asked about their views on everything from communism to defendants' rights to prayer in the public schools."¹⁰⁶ Since Harlan's public confirmation hearing in 1955, every nominee has testified in front of the Senate Judiciary Committee.¹⁰⁷ Looking back, Harlan's hearing set the stage for what became the contemporary process.¹⁰⁸ Though changes continued to occur, this 1955 confirmation process cemented the procedural aspects of the Senate's power under Article II, Section 2.¹⁰⁹

Though it is easy to assume that the confirmation hearings of Robert Bork and Clarence Thomas most impacted the modern concept of confirmation hearings,¹¹⁰ the impact of this 1955 confirmation process cannot be ignored. This confirmation hearing forced senators to realize the importance of the confirmation process and its importance in assessing a nominee's judicial philosophy and overall temperament. Senators, as a result of not wanting to confirm a justice without learning of his personal views regarding segregation, utilized the questioning phase as a way to receive answers to the questions they needed to know.¹¹¹ This is a crucial distinction from recent confirmation hearings. In 1955, senators questioned the nominee to assess his credentials and fitness for the Court. It was about the nominee, and only about the nominee. As part of this Note's argument, it is

101. CARTER, *supra* note 3, at 66; KATZMANN, *supra* note 9, at 18.

102. 347 U.S. 483 (1954).

103. CARTER, *supra* note 3, at 66.

104. *Id.*

105. *Id.*

106. *Id.* at 67.

107. ROSS, *supra* note 96, at 119 ("Testimony by nominees has become an integral part of the confirmation process.").

108. RUTKUS, *supra* note 69, at 21 ("[H]earings in 1955 on the Supreme Court nomination of John M. Harlan marked the beginning of a practice, continuing to the present, of each Court nominee testifying before the Judiciary Committee.").

109. KATZMANN, *supra* note 9, at 21-22.

110. *See infra* Part II.E.

111. CARTER, *supra* note 3, at 66.

imperative to recognize that the 1955 hearing fulfilled the intended purpose of the confirmation hearings—to evaluate a nominee’s ability to serve on the High Court, absent any ulterior motive. As will be made clear in Part IV, throughout the next fifty-five years senators have sacrificed this original purpose by using the confirmation hearings in another fashion that helps accomplish their own personal agenda.¹¹²

E. Getting “Borked”¹¹³ and Thomas’s Spectacle

Though the confirmation hearings in 1955 set the structure, two additional confirmation hearings helped revolutionize the process. The confirmation hearings of Robert Bork in 1987 and Clarence Thomas in 1991 accomplished something that previous hearings failed to do—they made the confirmation process interesting.¹¹⁴ Since Sandra Day O’Connor’s confirmation hearing in 1981, all confirmation hearings have been televised.¹¹⁵ The addition of television cameras, coupled with the drama of the Bork and Thomas hearings, contributes to the issue highlighted by this Note.¹¹⁶

In 1987, President Ronald Reagan nominated Robert Bork to the Court, which resulted in public outcry.¹¹⁷ Many considered Bork too extreme to occupy the seat previously held by Justice Lewis Powell, especially due to Justice Powell’s status as a consistent swing vote.¹¹⁸ In particular, Senator Ted Kennedy of Massachusetts declared:

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 would be censored at the whim of government, and the doors of the

112. *See infra* Part IV.

113. According to the Oxford English Dictionary, the verb “Bork” has the following definition: “To defame or vilify (a person) systematically, esp. in the mass media, usually with the aim of preventing his or her appointment to public office; to obstruct or thwart (a person) in this way.” *Bork Definition*, OXFORD ENGLISH DICTIONARY ONLINE, <http://www.oed.com/view/Entry/251270?redirectedFrom=Bork#eid>.

114. *See* RICHARD DAVIS, JUSTICES AND JOURNALISTS: THE U.S. SUPREME COURT AND THE MEDIA 21 (2011) (“The high drama of the confirmation hearings attracted television cameras and tables filled with reporters from various news organizations taking notes on the proceedings.”); Walter Goodman, *Next Act in Drama Fails to Disappoint*, N.Y. TIMES, Oct. 14, 1991, at A17.

115. RUTKUS, *supra* note 69, at 21 (“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.”).

116. *See* Michael Comiskey, *Not Guilty: The News Media in the Supreme Court Confirmation Process*, 15 J.L. & POL. 1, 29 (1999).

117. Michael M. Gallagher, *Disarming the Confirmation Process*, 50 CLEV. ST. L. REV. 513, 524 (2003).

118. *Id.* at 524–25; KATZMANN, *supra* note 9, at 28 (“The fact that Justice Powell, whose vacancy Bork would fill, was viewed as a centrist swing vote, only raised the stakes.”).

Federal courts would be shut on the fingers of millions of citizens for whom the judiciary is often the only protector of the individual rights that are the heart of our democracy.¹¹⁹

Needless to say, the confirmation of Bork erupted into an ideological battle over Bork's alleged originalist views that many senators considered "outside the mainstream" of legal thought.¹²⁰ Opponents of Bork echoed the same concerns of Senator Kennedy, and one senator went so far as to say that Bork's judicial philosophy mirrored the *Dred Scott* decision.¹²¹ The astounding number of public, controversial statements concerning Bork resulted in heightened public interest.¹²² Nina Totenberg points out that Bork's confirmation hearings reveal a perfect example of public participation in the confirmation process.¹²³

Similarly, the confirmation process of Clarence Thomas in 1991 also resulted in widespread public attention after Anita Hill alleged sexual harassment against Thomas.¹²⁴ The public became so invested in the scandalous nature of the confirmation that a *New York Times* article boasted, "The Public Broadcasting Service will have gavel-to-gavel coverage [of the confirmation hearings] with no commercial interruptions."¹²⁵ Though the amount of attention in Thomas's confirmation may resemble that received by Bork, Thomas's attention derived from issues that developed in his personal life.¹²⁶ The issue of sexual harassment became

119. 133 CONG. REC. 18519 (1987) (statement of Sen. Edward Kennedy), *quoted in* ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 268 (1990).

120. Richard Lacayo, David Beckwith & Anne Constable, *The Battle Begins: Bork's Nomination Is Likely To Stir a Fiercely Political Senate Fight*, *TIME*, July 13, 1987, at 10 ("All at once the political passions of three decades seemed to converge on a single empty chair: the Supreme Court seat vacated by Lewis Powell . . .").

121. Gallagher, *supra* note 117, at 524 (Senator Paul Simon made these remarks). For more on the problems associated with the Court's *Dred Scott* decision, see Robert A. Burt, *What Was Wrong with Dred Scott, What's Right About Brown*, 42 *WASH. & LEE L. REV.* 1 (1985).

122. In 1971, Bork published "[o]ne of the most intelligently provocative law journal articles of its time." ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* 74 (1989). The article may be found at Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1 (1971).

123. KATZMANN, *supra* note 9, at 18 (stating that Bork's confirmation hearing lasted twelve days and included eighty-seven hours of testimony from 112 witnesses, eighty-six of whom represented interest groups); Gallagher, *supra* note 117, at 526 ("Considering the many distortions, omissions, and inaccuracies of Judge Bork's record made by his critics, this conclusion is somewhat strange.").

124. *See, e.g., Against Clarence Thomas: Even 'Don't Know' Calls for a 'No' Vote*, *N.Y. TIMES*, Oct. 15, 1991, at A24; Neil A. Lewis, *Law Professor Accuses Thomas of Sexual Harassment in 1980's*, *N.Y. TIMES*, Oct. 7, 1991, at A1; Michael Wines, *Compelling Evidence on Both Sides, but Only One Can Be Telling Truth*, *N.Y. TIMES*, Oct. 15, 1991, at A20.

125. *The Hearings on Television*, *N.Y. TIMES*, Oct. 10, 1991, at B14.

126. *See generally* TIMOTHY M. PHELPS & HELEN WINTERNITZ, *CAPITOL GAMES: THE INSIDE STORY OF CLARENCE THOMAS, ANITA HILL, AND A SUPREME COURT NOMINATION* (1993).

paramount—those who believed Hill’s testimony opposed Thomas’s confirmation, while those who believed Thomas’s testimony supported his confirmation.¹²⁷

Both of these hearings further transformed the confirmation process because they made the confirmation of Supreme Court justices appealing to the American people. In addition, specific attributes of these confirmation processes continued for future nominees’ confirmation processes—“a lengthy process stretching over months rather than weeks or days, elongated televised confirmation hearings, lobbying by various interest groups, and frequent public opinion polls measuring the public’s views of the nominee.”¹²⁸ Of course, one may hope that all Americans would show interest in an appointment to the High Court; however, the media circus that surrounded Bork’s and Thomas’s confirmation hearings drew in audiences that had not previously existed.¹²⁹

III. CONSEQUENCES OF THE EVOLUTION

The transformation of the confirmation process since 1955 has altered the way senators conduct themselves throughout the process. As Professor Stephen Carter pointed out, “The presence of television cameras probably makes everyone behave worse.”¹³⁰ The members of the Senate Judiciary Committee have realized that the confirmation hearings provide them with an opportunity of which they can take advantage—a chance to address the entire country, specifically their home state constituents, on national television.¹³¹ The nominees are no longer the only people in the room with something on the line, with something to lose. As wise politicians, senators exploit the confirmation process and utilize the momentous occasion as a time to procure more votes. Unfortunately, the confirmation hearings serve as a campaign platform for senators, and the emphasis of the confirmation hearings no longer rests entirely on the nominee.

One may dispute this Note’s thesis and argue that senators do, in fact, participate in the confirmation hearings to examine the qualifications of the next candidate to the nation’s High Court. Undoubtedly, this is the case; this Note does not imply that senators disregard the severity and high stakes of the confirmation itself and attempt to use the hearings solely as a time to campaign. But assessing a nominee’s qualifications and self-promoting one’s political beliefs are not mutually exclusive. Both purposes are served (and appear to do so unnoticed) simultaneously.

A. Media’s Role and the Publicity of Hearings

Since Justice Sandra Day O’Connor’s confirmation hearing in 1981, every Supreme Court confirmation hearing has been nationally televised.¹³² The media’s role in the confirmation process has impacted the way in which hearings’

127. See CARTER, *supra* note 3, at 18.

128. DAVIS, *supra* note 114, at 22–23.

129. *Id.* at 21–22.

130. CARTER, *supra* note 3, at 194.

131. See *infra* Part III.B–C.

132. See *supra* note 115 and accompanying text.

participants conduct themselves.¹³³ Knowing that they have a national audience, senators now have the incentive to act in a manner that benefits themselves rather than staying true to the important issues.¹³⁴

Professor Stephen Carter has argued that the televised hearings have overpoliticized and degraded the confirmation process.¹³⁵ While Carter acknowledges that Bork's confirmation hearings would have occurred regardless of whether or not cameras were present in the room, he argues that television "gave us the Bork hearings" and "transformed an inside-the-Beltway ritual into a full-blown national extravaganza."¹³⁶ Similarly, Carter asserts that the media's involvement deflects attention from more important issues.¹³⁷ During Thomas's confirmation hearings, the sexual harassment allegations made by Anita Hill consumed Americans so much that they forgot that there were more substantial issues to address.¹³⁸ The examples of Bork's and Thomas's confirmation hearings reveal that the confirmation hearings received national spotlight and taught senators that they had a national audience during confirmation hearings.

In addition, the media's new role in the confirmation process has influenced whether senators vote to approve or reject a Supreme Court nominee. Professors George Watson and John Stookey argue that televised hearings make the public more attuned to issues regarding nominees.¹³⁹ As a result, this increased media coverage "effectively introduce[s] constituency opinion into a senator's decision-making calculus."¹⁴⁰

Though there may be disadvantages to the publicity surrounding the confirmation hearings, some public participation in the confirmation process is important,¹⁴¹ and confirmation hearings are likely to continue to receive national attention.¹⁴² Instead of arguing that the confirmation hearings should take place behind closed doors, this Note advocates for reform that will strip senators of the opportunity to exploit the confirmation hearings as their own personal playgrounds.

133. TWENTIETH CENTURY FUND TASK FORCE, *supra* note 6, at 9 ("The White House, the Department of Justice, senators, witnesses, and even nominees now seem tempted to use televised hearings as a forum for other purposes, ranging from self-promotion to mobilizing special interest groups in order to influence public opinion.").

134. *See id.*

135. Comiskey, *supra* note 116, at 5.

136. CARTER, *supra* note 3, at 17.

137. *Id.*

138. *Id.* at 18 ("[T]he spectacle was so riveting that most Americans apparently forgot that there were other issues about the nomination to be debated. Instead, those who believed Thomas's testimony seemed to think he should be confirmed and those who believed Hill's seemed to think he should not.").

139. WATSON & STOOKEY, *supra* note 48, at 21.

140. *Id.*

141. COMISKEY, *supra* note 18, at 75.

142. CARTER, *supra* note 3, at 194-95.

B. Senators' Cognizance of American Audience

It would be naïve to argue that senators are not aware of their national audiences during confirmation hearings or that senators do not give any credence to the fact that they have a national audience. Senators acknowledge their live audience repeatedly throughout the confirmation hearings.¹⁴³ In fact, at Justice Kagan's hearing, Senate Judiciary Committee Chairperson, Senator Leahy, said, "I urge the nominee to engage with this Committee and through these proceedings with the American people."¹⁴⁴ Similarly, most senators acknowledge during their opening remarks that Americans view the confirmation hearings to learn about the nominees.¹⁴⁵ By making such comments, senators emphasize that their role in the hearings is to act on behalf of the American people,¹⁴⁶ which explains why senators choose to verbalize their own political beliefs throughout the hearings.

Aside from political theory or ideology, one physical aspect of the confirmation hearings makes it difficult to argue that senators are not cognizant of the public nature of the hearings: the excessive number of cameras in the room.¹⁴⁷ When a picturesque moment takes place, such as the nominee entering the hearing room or taking the oath prior to testifying, dozens of cameras flash. Throughout the hearing, photographers fill the area of the room between the senators and the nominee, requiring all communication between the senators and nominee to essentially go through the media.¹⁴⁸ The press does not go unnoticed by the senators. Senator Cardin joked during Justice Kagan's hearing, "[W]e did not have quite as much media attention at [the hearing to confirm Kagan as Solicitor General]."¹⁴⁹

After highlighting the senators' cognizance of their national audiences during Supreme Court confirmation hearings, this Note examines how senators turn the nominee's spotlight into their own in an effort to procure more votes from their constituents and to voice their own political beliefs for personal gain.

143. In his opening remarks to Justice Kagan, Senator Franken stated, "Before I joined the U.S. Senate, I watched every televised confirmation hearing . . ." *The Nomination of Elena Kagan To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 48 (2010) [hereinafter *Confirmation Hearing of Justice Kagan*] (statement of Hon. Al Franken, U.S. Senator from Minnesota).

144. *Id.* at 3 (opening statement of Hon. Patrick J. Leahy, U.S. Senator from Vermont).

145. *See, e.g., id.* at 9–10 (statement of Hon. Orrin G. Hatch, U.S. Senator from Utah); *id.* at 17 (statement of Hon. Russell D. Feingold, U.S. Senator from Wisconsin).

146. *See, e.g., id.* at 36 (statement of Hon. Ben Cardin, U.S. Senator from Maryland) ("I also will do all I can to ensure that the American people, whether you are watching the hearing at home, at work or at school, gain a better understanding of how the Supreme Court . . . really does affect your lives."); *id.* at 48 (statement of Hon. Al Franken, U.S. Senator from Minnesota).

147. Just one photo from Justice Kagan's confirmation hearing reveals that twenty-two cameramen were seated between the members of the Senate Judiciary Committee and Justice Kagan during her testimony. This photo accompanies Hans von Spakovsky, *The End of the Beginning of the Kagan Hearing*, *FOUNDRY* (June 28, 2010, 9:40 PM), <http://blog.heritage.org/2010/06/28/the-end-of-the-beginning-of-the-kagan-hearing/>.

148. *See supra* note 83.

149. *Confirmation Hearing of Justice Kagan, supra* note 143, at 35 (statement of Hon. Ben Cardin, U.S. Senator from Maryland).

C. Senators in the Spotlight: Examples from Recent Hearings

Few things have more of an impact on the American people than the confirmation of a new justice to the United States Supreme Court. After all, almost every decision the Court renders directly affects the rights, privileges, and opportunities of Americans.¹⁵⁰ For this reason, one would expect high stakes during confirmation hearings and an intense atmosphere surrounding the proceedings. Unfortunately, senators jeopardize the importance and purpose of these hearings when they attempt to use the hearings as a public forum to relay their own political beliefs to their constituents. It is difficult and inefficient to discuss how senators send political signals to their constituents in the abstract. As a result, this Note focuses on four examples from the most recent confirmation hearings of Justice Sonia Sotomayor and Justice Elena Kagan. These examples¹⁵¹ highlight the different ways in which senators use the confirmation hearings as an opportunity to speak to their constituents, rather than as an opportunity to solely question the integrity and judicial philosophy of a Supreme Court nominee.

Example 1. Senator Coburn: I've never walked away from my conservative positions. I don't apologize for my social conservatism or my fiscal conservatism. . . . [Solicitor General Kagan], you have a very different belief system than most of the people who come from where I come from. . . . You're very pro-Choice. . . . You believe in gender-mixed marriages, or gay marriage. . . . [Y]ou're different than me and you're different than many of the people that I represent. . . . I'm a proud conservative. . . . I'll debate anybody about what I believe and why I believe it¹⁵²

Example 1 provides the ideal (or un-ideal, if you agree with the thesis of this Note) example of a Senate Judiciary Committee member using the Supreme Court confirmation hearing as a personal forum to enforce his own political ideology to his constituents viewing the hearings. Senator Coburn's remarks do not concern the

150. See generally DeConcini, *supra* note 36, at 3 (Senator DeConcini states, in noting that the ramifications of the decision to confirm or reject a nominee are immense, "Supreme Court justices serve lifetime tenure, making decisions that will affect generations to come."). Consider the following cases, which had significant and broad-based implications for the American people: *McDonald v. Chicago*, 130 S. Ct. 3020 (2010) (holding that the Second Amendment is incorporated to the states via the Due Process Clause of the Fourteenth Amendment); *Lawrence v. Texas*, 539 U.S. 558 (2003) (overturning bans on consensual sex between adults of the same gender); *Bush v. Gore*, 531 U.S. 98 (2000) (declaring that George W. Bush had won the 2000 presidential election); *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing that a woman's decision to have an abortion is protected by the Fourteenth Amendment).

151. These illustrative examples were selected solely because they further the thesis of this Note; no consideration was given to the actual views expressed within the examples nor the political affiliation of the senators that delivered the remarks. It should be noted that the formatting of these examples has been altered in such a way that an ellipsis may denote an entirely deleted paragraph.

152. *Confirmation Hearing of Justice Kagan*, *supra* note 143, at 174–75.

qualifications, judicial philosophy, or integrity of Justice Kagan. Rather, Senator Coburn voices his pride in his strong conservative beliefs. After all, Senator Coburn has a reputation as a tough Republican in the U.S. Senate.¹⁵³ This example epitomizes the dangerous point that confirmation hearings have reached.

Senator Coburn's comments to Justice Kagan read much like his own personal website, which advertises his stance on the controversial issues affecting Oklahoma voters. According to his webpage, his "priorities" in the Senate include "protecting the sanctity of all human life—including the unborn—and representing traditional, Oklahoma values."¹⁵⁴ Senator Coburn prides himself on his opposition to abortion and same-sex marriage. Specifically, Senator Coburn informs his constituents via his personal webpage that he "oppose[s] abortion in all cases, with the lone and rare exception of when the life of the mother is endangered."¹⁵⁵ After the Supreme Court held the Partial Birth Abortion Act to be constitutional, Senator Coburn released the following statement: "I hope this ruling will challenge all Americans to consider that children deserve legal protection long before they reach the birth canal."¹⁵⁶ As for the issue of same-sex marriage, Senator Coburn cosponsored the Defense of Marriage Act¹⁵⁷ and has supported a federal constitutional amendment to define marriage as a union between a man and a woman.¹⁵⁸ After voting in favor of a federal constitutional amendment to ban same-sex marriage, Senator Coburn called the institution of marriage "the cornerstone of civilization."¹⁵⁹

Senator Coburn's views on these controversial issues are not discussed for any reason other than to reveal that his comments to Justice Kagan are identical to those discussed in his *personal* press releases and posted on his *personal* website. Like

153. Senator Coburn had become known as "Dr. No" due to his opposition to government spending. In an interview with Senator Coburn, Fox News Sunday anchor Chris Wallace asked, "[H]ow tough are you . . . ?" *Sen. Coburn Talks Debt and Taxes*, FOXNEWS.COM (Dec. 26, 2010), <http://www.foxnews.com/on-air/fox-news-sunday/transcript/sen-coburn-talks-debt-and-taxes-cardinal-donald-wuerl-religion-and-politics>.

154. *About Senator Coburn*, TOM COBURN, M.D.: UNITED STATES SENATOR FROM OKLAHOMA, <http://www.coburn.senate.gov/public/index.cfm/aboutsenatorcoburn?p=Biography>.

155. *Legislation & Issues: Sanctity of Life*, TOM COBURN, M.D.: UNITED STATES SENATOR FROM OKLAHOMA, <http://www.coburn.senate.gov/public/index.cfm/?p=SanctityOfLife>.

156. Press Release, Tom Coburn, M.D., U.S. Sen. from Okla., Dr. Coburn Commends Supreme Court's Abortion Ruling (Apr. 18, 2007), *available at* http://www.coburn.senate.gov/public/index.cfm/pressreleases?ContentRecord_id=05ad4187-802a-23ad-4d88-358e21ac2b18&ContentType_id=d741b7a7-7863-4223-9904-8cb9378aa03a&Group_id=ead5fc45-fbc3-406d-a51d-8b2af15cf314.

157. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 and 28 U.S.C. § 1738C).

158. Marriage Protection Amendment, H.R.J. Res. 89, 110th Cong. (2008).

159. Press Release, Tom Coburn, M.D., U.S. Sen. from Okla., Dr. Coburn Votes to Protect Sanctity of Marriage (June 7, 2006), *available at* http://www.coburn.senate.gov/public/index.cfm/pressreleases?ContentRecord_id=af661931-802a-23ad-4e5f-65f78539da89&ContentType_id=d741b7a7-7863-4223-9904-8cb9378aa03a&Group_id=d034d7ac-4245-468d-bdb7-9097f5d5598e.

his personal webpage or statements made through his own press secretary, Senator Coburn used the confirmation hearings as an opportunity to make public statements advancing his own personal agenda and ideology. However, unlike his personal website or personal comments made through his press secretary, the confirmation hearings of Supreme Court justices should not be used to relay his views on controversial issues to his constituents in Oklahoma. There are numerous other forums (press conferences, debates, public speaking opportunities, etc.) available to senators that provide them with the opportunity to preach their personal belief systems in hopes of procuring more votes. The confirmation hearings of Supreme Court justices are simply not one of these forums.

Though Senator Coburn may have appreciated the confirmation hearings as a time to evaluate Justice Kagan's credentials on behalf of his constituents, there is no denying that the confirmation hearing provided Senator Coburn with a fifteen-second opportunity to emphasize his right-wing loyalty. And, of course, Senator Coburn took advantage of this opportunity. His remarks were not necessary in order for him to adequately question Justice Kagan. They were nothing shy of superfluous, and one can reasonably view Senator Coburn's remarks as a way to remind his constituents of his loyalty to the Republican Party and the fact that he shares most of his constituents' beliefs (pro-life, anti-gay marriage, etc.).¹⁶⁰ If nothing else, Senator Coburn's comments reveal that the current confirmation process's structure provides an ample opportunity for senators to stand on their soapboxes and actively speak their political beliefs to attract more voters in their home states. Tolerating such remarks may lead the confirmation process down a dangerous path that will continue to take the spotlight off of the nominee's qualifications and put it on senators' own political ideology, thus making the confirmation hearings moot as far as they relate to determining the legitimacy of a nominee.

Critics of this Note may question whether Senator Coburn's comments truly abuse the confirmation hearings. As previously discussed,¹⁶¹ the questioning of Supreme Court nominees serves specific purposes. Specifically, senators question the nominee for the purpose of assessing a nominee's fitness for the Court.¹⁶² When senators turn the confirmation hearings into their personal lectures, they sacrifice fulfilling their obligation of thoroughly evaluating a nominee's qualifications. Put simply, Senator Coburn, in the example above, wasted some of his limited time to speak to his constituents rather than solely challenge Justice Kagan on relevant issues concerning her confirmation. If somebody besides a senator had questioned Justice Kagan, less time would have been spent serving senators' personal motives and more time would have been allotted to challenging any controversial remarks from Justice Kagan's past, her record as Solicitor

160. In 2004, 76% of Oklahoma voters supported Question 711, a referendum to approve an amendment that would prohibit the state from recognizing same-sex marriages or civil unions. *Election Results*, CNN.COM, <http://www.cnn.com/ELECTION/2004/pages/results/ballot.measures/>; see also Wesley Burt, *Abortion Remains a Polarizing Issue in Oklahoma*, SOONER POLL.COM (July 16, 2010), <http://soonerpoll.com/abortion-remains-a-polarizing-issue-in-oklahoma112/>.

161. See *supra* Part I.B.

162. See *supra* Part I.B.

General, and her mysterious judicial philosophy considering that she had no judicial experience at the time of her nomination.¹⁶³ If the Senate Judiciary Committee's goal is to investigate a nominee's social, political, and judicial views,¹⁶⁴ then the Committee fails to reach that goal when senators turn the confirmation hearings into their own personally motivated spectacles.

Example 2. Chairman Leahy: I have owned firearms since my early teen years. I suspect a large number of Vermonters do. I enjoy target shooting on a very regular basis at our home in Vermont, so I watched [the] decision [in *District of Columbia v. Heller*¹⁶⁵] rather carefully and found it interesting.

Is it safe to say that you accept the Supreme Court's decision as establishing that the Second Amendment right is an individual right? Is that correct?¹⁶⁶

In addition to voicing his own personal views, as in Example 1, Senator Leahy also used the confirmation hearings as an opportunity to reach common ground with his constituents by ensuring them he shares their ideals. More specifically, Senator Leahy relates to his constituents in Vermont who possess firearms for recreational use. Vermont is notorious for its loose gun control laws. In fact, the state does not require gun owners to acquire permits or register their firearms, and the only people who may not own a gun are children under the age of sixteen who do not have parental consent.¹⁶⁷ Senator Leahy reveals his support of interpreting and applying the Second Amendment in a way that allows citizens to individually possess firearms. After the Supreme Court's holding in *Heller*,¹⁶⁸ Senator Leahy wants to ensure that the next justice to the Supreme Court respects the holding as one that grants individuals the right to possess firearms. Before the Supreme Court decided *Heller*, there was probably concern from Vermont gun owners that the Court's holding could infringe upon their right to possess firearms.¹⁶⁹ Senator

163. See TWENTIETH CENTURY FUND TASK FORCE, *supra* note 6, at 9 (pointing out that senators are "tempted to use televised hearings as a forum for other purposes, ranging from self-promotion to mobilizing special interest groups in order to influence public opinion").

164. See *supra* Part I.B.

165. 554 U.S. 570 (2008).

166. *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 67* (2009) [hereinafter *Confirmation Hearing of Justice Sotomayor*]. Two professors recently used this same excerpt to illustrate that public opinion influences senators' lines of questioning during Supreme Court confirmation hearings. See Paul M. Collins, Jr. & Lori A. Ringhand, *Public Opinion, Precedents, and Supreme Court Confirmation Hearings*, Paper Prepared for Delivery at the 82nd Annual Meeting of the Southern Political Science Association 3–4 (Jan. 6–8, 2011), available at <http://www.psci.unt.edu/~pmcollins/Collins%20Ringhand%20SPSA%202011.pdf>.

167. VT. STAT. ANN. tit. 13, §§ 4001–4016 (West 2010 & Supp. 2011).

168. 554 U.S. 570 (2008) (holding that the Second Amendment protects the rights of individuals to possess firearms for private use within federal enclaves).

169. See generally Brief for American Civil Rights Union as Amicus Curiae Supporting Respondents, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290) (discussing

Leahy uses the confirmation hearing as an opportunity to address his constituents by stating that he supports an interpretation of the Second Amendment that guarantees an individual the right to bear arms without federal interference. He also takes the opportunity to convey to his constituents the importance of upholding the *Heller* decision.

On his campaign website, Senator Leahy claims to have “praised the Supreme Court’s decision in *District of Columbia v. Heller*.”¹⁷⁰ Obviously, the purpose of campaign websites is to allow senators a forum to state their stances on important issues in hopes of appealing to the voters. For that reason, Senator Leahy found it important to praise the Court’s decision in *Heller*.¹⁷¹ For the same reasons, Senator Leahy found it self-fulfilling to reiterate his support of the *Heller* decision during the confirmation hearing of Justice Sotomayor. Like Senator Coburn in Example 1, Senator Leahy utilized the confirmation hearings as a means to relay the same information to his constituents that he relayed via his own *personal* mediums. However, his mindset during the confirmation hearings of using the hearings as a forum to communicate directly to his constituents detracts from the essence of the confirmation hearings and prevents the accomplishment of their intended purpose.

While opponents of this Note’s theory may argue that Senator Leahy merely provided a backdrop to his questioning, the question would have been just as effective had Senator Leahy refrained from declaring his personal affection for gun rights. Should Senator Leahy expect his pre-question commentary to influence the response Justice Sotomayor would deliver?¹⁷² Overall, Senator Leahy’s comments add nothing of substance to the confirmation hearing and do not trigger a special reaction from Justice Sotomayor; they are merely a way for Senator Leahy to connect with his constituents and remind them that he has the same position as them when it comes to gun control laws. This example from Senator Leahy further reveals that constituents influence senators’ approaches to the confirmation hearings, and for this reason, the confirmation hearing becomes tampered with when the party responsible for challenging and evaluating a nominee does not have complete liberty to do so. The outside pressure from constituents restricts the way senators behave because senators may feel obligated to reach common ground with constituents and may avoid more important issues concerning the nominee.

Example 3. Senator Whitehouse: I was talking with some friends in Providence when I was home about your nomination, and I said, “It actually gives me goose bumps to think about the path that has brought you here today and, more importantly, to think about”—because it is not about you—more important to think what that means about America, that path. And they said, “No, no. You can’t say ‘goose

the importance of recognizing an individual’s right to possess firearms).

170. *Working for the Rights of Every American*, LEAHY FOR VERMONT, <http://leahyforvermont.com/issues/?id=0003>.

171. Senator Leahy also commended the Court for its decision in *McDonald*. Press Release, Patrick Leahy: U.S. Sen. for Vt., On the Supreme Court’s Decision in *McDonald v. City of Chicago* (June 28, 2010), available at http://leahy.senate.gov/press/press_releases/release/?id=76A95A7C-C542-4824-AC9A-5E0013DC92A2.

172. This is a question completely distinct from the purpose of this Note though it may be worthy of discussion at a later point.

bumps.’ You have to say ‘piel de gachina.’” And so I promised them that I would, so I am keeping that promise right now.¹⁷³

As opposed to reinforcing political stances as in the first two examples, senators may also use their time to make personal shout-outs to their constituents back home. Such a tactic makes the senator appear charismatic on national television, and it also shows that the senator listens to his constituents and acts on behalf of his constituents. In the example above, Senator Whitehouse of Rhode Island makes comments directly to his constituents before he even begins the questioning phase. Not only does this emphasize the fact that Senator Whitehouse listens to his constituents, but it also sets a backdrop to the remainder of his questioning by outlining that he plans to approach his round of questioning on behalf of his constituents.

As Rhode Island voters view the confirmation hearing, they should take comfort in the fact that Senator Whitehouse regularly speaks on behalf of his constituents, and perhaps more importantly, it reveals to his constituents that Senator Whitehouse takes time out of his busy schedule to discuss matters such as the confirmation process with Rhode Island natives. Again, such a tactic interferes with the confirmation hearings’ original purpose of evaluating the nominee.¹⁷⁴ If senators focus on appealing to their constituents or sending personal shout outs, then it is clear that their entire focus is not on the nominee. With the severity of the situation and the major impact that confirming a Supreme Court justice has on the American people, senators should place their undivided attention on the nominees rather than worry about behaving in a manner that attracts potential votes. For this reason, the purpose of the confirmation hearings would best be served if nominees were questioned by parties that did not have anything to gain. Senators have their minds elsewhere as they try to appeal to their constituents, and perhaps more important issues slip through the confirmation cracks.

Example 4. Senator Grassley: I believe that I’m going to ask you something that you’ve never been asked before during this hearing, I hope. I’d like to be original on something.

[Explains Supreme Court holding in *Baker v. Nelson*.¹⁷⁵]

[D]o you agree that marriage is a question for the States to decide based on *Baker v. Nelson*?¹⁷⁶

On April 3, 2009, the Iowa Supreme Court held that denying marriage licenses to same-sex couples violated the equal protection clause of the state constitution.¹⁷⁷

173. *Confirmation Hearing of Justice Sotomayor*, *supra* note 166, at 350.

174. *See supra* Part I.B.

175. 409 U.S. 810, 810 (1972) (mem.) (dismissing, “for want of a substantial federal question,” an appeal from the Minnesota Supreme Court, which held that state law limiting marriage to different-sex couples did not violate the United States Constitution). For the facts and procedural history of *Baker v. Nelson*, see Lynn D. Wardle & Lincoln C. Oliphant, *In Praise of Loving: Reflections on the “Loving Analogy” for Same-Sex Marriage*, 51 *How. L.J.* 117, 137–40 (2007).

176. *Confirmation Hearing of Justice Sotomayor*, *supra* note 166, at 404.

177. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

The decision in *Varnum v. Brien* outraged many Iowans, so much so that three of the Iowa Supreme Court's justices were not retained after the 2010 election.¹⁷⁸ Needless to say, the state was divided on this issue and a large portion of the Iowa population disagreed with the court's holding.¹⁷⁹

Just three months later, Senator Chuck Grassley of Iowa began his questioning of Justice Sotomayor with the above remarks. Senator Grassley is a proud Republican senator and opposes same-sex marriage.¹⁸⁰ This example reveals how senators tailor their questions in a manner that sends subtle signals to their constituents. By framing his leading question in the affirmative, Senator Grassley reveals that he believes that marriage is a question for the states to decide—a point he aims to emphasize to his Iowa voters. The example conveys that senators may allow their constituents to influence their lines of questioning and essentially strips senators of the ability to question nominees as U.S. senators entrusted with the advice and consent power. Instead, senators question nominees as their constituents' puppets, and this may result in important issues going unaddressed throughout a nominee's confirmation hearings.

As a controversial topic at the forefront of his voters' minds, Senator Grassley puts this issue as his primary concern in the confirmation hearing. It is an issue that concerns his constituents,¹⁸¹ and Senator Grassley wants Justice Sotomayor to state that it is up to each individual state to determine to whom marriage licenses should be granted (or denied). Since *Varnum*, members of the Iowa state legislature have proposed legislation that would essentially overturn the court's holding.¹⁸² Senator

178. O. Kay Henderson, *Three Justices Voted Off Iowa Supreme Court*, RADIO IOWA, (Nov. 3, 2010), <http://www.radioiowa.com/2010/11/03/three-justices-voted-off-iowa-supreme-court/>.

179. In 2010, Iowa was the only state that allowed same-sex marriage and had less than 50% public approval for the practice. See Andrew Gelman, Jeffrey Lax & Justin Phillips, *Over Time, a Gay Marriage Groundswell*, N.Y. TIMES, Aug. 22, 2010, at WK3; see also A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES, Nov. 4, 2010, at A1.

180. Senator Grassley issued the following statement after the *Varnum* holding:

I also voted twice in 2006, in the Judiciary Committee and on the Senate floor, for a joint resolution that would have amended the federal Constitution to define marriage as between one man and one woman. Now, to change what's happened with the Iowa Supreme Court decision, the state legislature would have to take action.

Press Release, Sen. Chuck Grassley, *Iowa Supreme Court Decision on Gay Marriage* (Apr. 3, 2009), available at http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=20093.

181. Senator Grassley's opposition to same-sex marriage has not changed since Justice Sotomayor's confirmation hearing. On July 20, 2011, Senator Grassley commented, "Marriage is an institution that serves the same public purpose all over the world: to foster unions that can result in procreation. It creates incentives for husbands and wives to support each other and their children." S. 598, *The Respect for Marriage Act: Assessing the Impact of DOMA on American Families: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 10 (2011) (statement of Hon. Chuck Grassley, U.S. Senator from Iowa).

182. See Kathleen Gilbert, *Iowa Marriage Defenders Push for Marriage Amendment, Decry Foul Play in Activist Same-Sex "Marriage,"* LIFESITENEWS.COM (Apr. 6, 2009),

Grassley makes his remarks to remind his constituents that the Iowa legislature possesses the power to overturn the *Varnum* holding through legislation, and that he hopes the legislature will eventually do so. Essentially, Senator Grassley wants Iowans to realize that he still opposes same-sex marriages,¹⁸³ and he wants to reinforce his belief that the court's holding in *Varnum* will not be good law for much longer and that same-sex marriages will soon be banned again in Iowa.¹⁸⁴ Such a message would resonate well with his voters back home and reaffirms that Senator Grassley shares their beliefs.¹⁸⁵

This type of questioning is an abuse of the confirmation hearings because Senator Grassley uses the confirmation hearings as an opportunity to relay to his constituents his stance on same-sex marriage. If the nominee should be the focus of the confirmation hearings, then the ability for senators to instead speak to their constituents disturbs this purpose. Senators attempt to use the confirmation hearings to advance their own personal agenda, and this motive undoubtedly interferes with senators' ability to intensively question a nominee without bias or outside influence.

D. Specter Treated Bork and Thomas Differently Due to Reelection

In addition to the sound bites throughout a confirmation hearing, an analysis of a senator's total behavior towards one nominee compared to a previous nominee supports the argument that senators use the Supreme Court confirmation process as their own personal campaign playgrounds. After all, if senators know they have a national audience, it would not shock the conscience to find that a senator would cross-examine or treat a nominee differently knowing that his senate seat is up for reelection soon.¹⁸⁶ The hearing serves as the perfect (in the eyes of the senators) time to prove party loyalties, address a controversial issue in their home states, or simply appear charismatic in hopes of securing more votes. Perhaps the best example of a senator altering his approach to the confirmation hearings close to a looming election is that of Arlen Specter. The Senator Specter that showed up to Robert Bork's hearing in 1989 is almost unrecognizable from the Senator Specter that appeared at Clarence Thomas's hearing just two years later in 1991.¹⁸⁷

With experience as a county prosecutor under his belt, Specter's cross-examination of Robert Bork helped lead to the nominee's defeat.¹⁸⁸ Though a

<http://www.lifesitenews.com/news/archive/ldn/2009/apr/09040607> (Family Research Council President challenged, "We hope the legislature will heed the powerful swell of statewide support for an amendment and reclaim from the High Court its rightful place as the state's policy making body.").

183. *See supra* note 181.

184. Same-sex marriage continues to be legal in Iowa. *See Gelman et al., supra* note 179.

185. *See id.* (pointing out that only 44% of Iowa voters support same-sex marriage).

186. Collins & Ringhand, *supra* note 166, at 9 ("Senators, highly aware of the importance of reelection . . . must stay in tune with their constituents' desires in order to secure reelection." (citation omitted)).

187. Gallagher, *supra* note 117, at 559.

188. Gary J. Simson, *Thomas's Supreme Unfitness—A Letter to the Senate on Advise and Consent*, 78 CORNELL L. REV. 619, 646–47 (1993) (stating that Senator Specter's questioning "helped trigger Bork's defeat").

Republican, Senator Specter appeared determined not to allow conservative Bork to reach a seat on the Supreme Court.¹⁸⁹ Specter spent the entire summer prior to the confirmation hearings reading Bork's articles and speeches, so that he was the most knowledgeable about Bork's beliefs and most prepared for what turned out to be an interrogation.¹⁹⁰ "It was his questioning, more than anyone else's, that lent the hearings the feel of high-minded constitutional debate."¹⁹¹ Senator Specter grilled Bork on Bork's views of privacy rights, equal protection, and original intent.¹⁹² Specter questioned Bork in such detail that when the Committee decided Specter would have to finish his questioning the following day, Specter informed Committee Chairman Joe Biden that he would need another hour and a half to finish.¹⁹³

Throughout his questioning, Specter repeatedly returned to Bork's belief in looking to the original intent of the Framers in interpreting the Constitution.¹⁹⁴ After all, it was this aspect of Bork's convoluted judicial philosophy that was most troublesome to senators.¹⁹⁵ Specter exploited this point on national television. Specter highlighted that many issues arise that could not have been within the purview of the original Framers. For example, Specter brought up electronic listening devices, and Bork conceded that judges would have to extend search and seizure protection to account for such devices.¹⁹⁶ Specter then wondered why that right could be expanded but not privacy rights, referencing Bork's stance on the lack of constitutional protection rights in privacy.¹⁹⁷ Specifically, Specter pointed out contraceptives and that the original Framers could not have imagined this advancement in medicine.¹⁹⁸ Bork acknowledged the argument, and for the first time, admitted that one of his opponents had a valid point.¹⁹⁹ Specter concluded his questioning by stating that "[t]he hearings present a real opportunity for the Senators to tell you what is on our minds, and to tell you what is on the minds of our constituents."²⁰⁰ Bork's nomination was defeated by the Senate and in no small part due to Specter's questioning.²⁰¹

Fast forward just two years to the confirmation hearings of Clarence Thomas. As Gary J. Simson puts it, "it was difficult to believe that the Specter of the Bork hearings and the one now before us [in the Thomas hearings] were one and the

189. *Id.*

190. BRONNER, *supra* note 122, at 265.

191. *Id.*

192. *Nomination of Robert H. Bork To Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 100th Cong. 429-38 (1987)* [hereinafter *Confirmation Hearing of Robert Bork*].

193. BRONNER, *supra* note 122, at 265.

194. *Id.* at 265-70.

195. *See id.*

196. *Confirmation Hearing of Robert Bork, supra* note 192, at 820.

197. *Id.* at 819-20; *see* BRONNER, *supra* note 122, at 273 ("Why, Specter wanted to know, was the doctrine of original intent sacrosanct regarding the specificity of privacy, but not so for other areas?").

198. *Confirmation Hearing of Robert Bork, supra* note 192, at 820.

199. *Id.* at 820; BRONNER, *supra* note 122, at 273.

200. *Confirmation Hearing of Robert Bork, supra* note 192, at 840.

201. *See supra* note 118 and accompanying text.

same.”²⁰² Senator Specter, sometimes attacked for being too liberal,²⁰³ revealed his strong Republican loyalties during the Thomas hearings.²⁰⁴ Though nothing too extreme sticks out from Thomas’s original hearing, the same cannot be said for the second wave of hearings regarding the sexual harassment allegations of Anita Hill. Senator Specter received the duty of cross-examining Anita Hill,²⁰⁵ and prior to the questioning phase, he explicitly stated that his “duties run to the people of Pennsylvania who have elected [him].”²⁰⁶

After intensely questioning Anita Hill about her allegedly incomplete statements to the FBI,²⁰⁷ her definition of sexual harassment,²⁰⁸ and her alleged sexual interest in Clarence Thomas,²⁰⁹ it was clear to all watching that Specter was putting his prosecutorial skills to good use.²¹⁰ His primary motivation for destroying Anita Hill’s credibility appeared to be to help get Thomas confirmed, so that he could then rely on Republican Party loyalties to win reelection.²¹¹ In fact, prior to entering the hearing room that morning, Specter promised one news reporter a “flat-out demolition of [Hill’s] credibility,”²¹² and upon completion of his questioning, he told a reporter that he was confident “her credibility has been demolished.”²¹³

While there may have been other reasons to vote against Bork and in favor of Thomas,²¹⁴ the election facing Specter shortly after Thomas’s hearing should receive considerable weight when trying to figure out why he treated each nominee

202. Simson, *supra* note 188, at 646.

203. Senator Specter left the Republican Party and joined the Democratic Party in April 2009. Carl Hulse & Adam Nagourney, *Specter Switches Parties; More Heft for Democrats*, N.Y. TIMES, Apr. 29, 2009, at A1.

204. Simson, *supra* note 188, at 647.

205. *Nomination of Judge Clarence Thomas To Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, Pt. 4*, 102d Cong. 3 (1991) [hereinafter *Confirmation Hearing of Justice Thomas*] (Senator Hatch was also chosen to question Anita Hill on behalf of the Republicans).

206. *Id.* at 58.

207. *See id.* at 60–62.

208. *See id.* at 108–11.

209. *See id.* at 81.

210. Kim A. Taylor, *Invisible Woman: Reflections on the Clarence Thomas Confirmation Hearing*, 45 STAN. L. REV. 443, 446 (1993) (“Senator Specter’s background as a prosecutor enabled him to slide into and out of the roles of prosecutor and judge whenever doing so served his purpose. For example, Senator Specter posed a series of questions that he believed demonstrated that Professor Hill had perjured herself.”).

211. *See* Simson, *supra* note 188, at 647.

212. Dan Hirschhorn, *Reinventing Arlen: One Year After He Fled the GOP, Pa.’s Senior Senator Is Scratching and Clawing To Do What He Does Best: Survive*, PHILA. CITY PAPER, Mar. 9, 2010, available at <http://archives.citypaper.net/articles/2010/03/11/reinventing-arlen>.

213. Michael Rubinkam & Laurie Kellman, *Voters Turn Away from Party Switcher Specter*, ASSOCIATED PRESS, May 19, 2010, available at <http://abclocal.go.com/wpvi/story?section=news/politics&id=7449435>.

214. For a short list of reasons that senators may have voted against Bork and later voted to confirm Justice Thomas, see Michael J. Gerhardt, *Divided Justice: A Commentary on the Nomination and Confirmation of Justice Thomas*, 60 GEO. WASH. L. REV. 969, 976–78 (1992).

so differently. Specter won the 1992 election after capturing only 49.1% of the votes and narrowly defeating Lynn Yeakel, who carried 46.3% of the votes.²¹⁵ This close election reveals that one slip up on national television during the live hearings and subsequent replays by news stations could have cost Specter the election. As a politician, it would be hard to argue that Specter did not think about the upcoming election and his constituents viewing the hearing while he cross-examined Hill. Something changed in Specter between Bork's and Thomas's hearings, and it is reasonable to conclude that Specter's cognizance of his audience during the Thomas hearing led him to emphasize his party loyalties from his Committee-built soapbox.

E. Kennedy Supported Scalia to Maintain Italian-American Voters

As noted above, Senator Ted Kennedy of Massachusetts took a lead role in ensuring that the Senate rejected Robert Bork's nomination.²¹⁶ However, just a year before attacking Bork, Kennedy questioned right-wing Judge Antonin Scalia softly.²¹⁷ Michael M. Gallagher explains Kennedy's different treatment of the two nominees by pointing out that "Senator Kennedy chose not to attack a nominee of Italian descent, considering that Italian-Americans are an influential constituency in Massachusetts."²¹⁸

Gallagher's observation and analysis reveals that reform is necessary to uphold the integrity of the Supreme Court confirmation process. Ideally, senators would feel that they have the liberty to ask whatever questions they feel necessary in order to acquire the information needed to accurately assess a nominee's fitness for the Court. The bottom line is that if senators do not feel like they possess such liberty, they should not be tasked with the responsibility of assessing who is fit for our nation's highest court. In this example, Kennedy could have strengthened the confirmation process had he challenged Scalia as he did Bork, requiring that Scalia answer difficult legal questions regarding his judicial philosophy and his interpretation of controversial constitutional questions. Supreme Court seats should not be handed out to whichever nominee happens to have support because senators are too cautious (or too scared) to challenge the nominee. In such a system, unqualified candidates (or at least candidates that deserve more scrutiny) can reach the Supreme Court without *earning* the support of the Senate, which has the constitutional duty to advise and consent to the nominees. Senators fail to carry out their obligation if they refrain from challenging a nominee due to the potential repercussions from their constituents.

215. David Leip, *1992 Senatorial General Election Results—Pennsylvania*, ATLAS U.S. PRESIDENTIAL ELECTIONS, <http://www.uselectionatlas.org/RESULTS/state.php?fips=42&year=1992&f=0&off=3&elect=0&class=3>.

216. *See supra* Part II.E.

217. Gallagher, *supra* note 117, at 560.

218. *Id.*

IV. REMEDYING THE PROBLEM

In order to strip senators of the opportunity to send political signals to their constituents during Supreme Court confirmation hearings, this Note offers three possible solutions that the Senate Judiciary Committee could implement. These proposed solutions would allow for the confirmation hearings to serve their intended purpose of allowing senators to acquire the information they need from the nominee in order to cast an informed vote. In addition, these proposals would eliminate senators' opportunity to abuse the confirmation process and would shift the spotlight back onto (and ensure that it remains on) the nominees.

A. Appoint Two Representatives of the Committee to Question Nominees

The Senate Judiciary Committee should appoint two members of the Committee (one Republican and one Democrat) to thoroughly question Supreme Court nominees on all issues requested by fellow Committee members. Physically removing the microphones from members of the Committee is the most direct solution to the problem of senators utilizing the confirmation hearings as a time to emphasize their own political beliefs. There is no need for all members of the Committee to question the nominee individually, especially considering that many senators touch upon the same legal issues and ask similar questions.²¹⁹ Of course, senators will resist any suggestion that they give up their right to question the nominee individually on national television;²²⁰ however, the senators must make such a sacrifice to ensure the fulfillment of their constitutional obligation and to guarantee that the confirmation process effectively serves its purpose.

In practice, this proposed solution would require Committee members to assign questioning powers to one Republican and one Democrat. Presumably, this power would be granted to the most senior members of the Committee, but Committee members may instead grant the power to a senator that possesses the skill set necessary to effectively question or cross-examine a nominee, such as a senator with experience as a prosecutor or one with a vast knowledge of constitutional law. These two representatives would each be given adequate time to touch upon all of the issues concerning their colleagues. The remainder of the Committee should still attend the hearing because, after all, it should be the answers to the questions that the Committee members need in order to make an informed vote in favor or against confirmation. Allowing senators to remain in the room for the hearing will also remind the American public that they are represented in the process and that their elected officials will eventually make a decision with regards to whether the nominee is fit to sit on the Court. The proposed change would simply make the questions anonymous in the sense that television viewers will not know which senators wanted which issues addressed, and thus this proposed change would prevent senators from sending political signals and will force them to focus solely

219. See KATZMANN, *supra* note 9, at 42 (“[S]ome senators . . . have criticized repetitive questions posed by the collective Judiciary Committee.”).

220. See SETH ROSENTHAL, *TIRED OF KABUKI? TIME TO TANGO: THE CASE FOR LITIGATOR-LED QUESTIONING OF SUPREME COURT NOMINEES* 5–6 (2007).

on the qualifications of the nominee. The Committee used a similar format during the second part of Justice Thomas's hearings—only representatives received the duty of questioning Anita Hill and Clarence Thomas.²²¹

Opponents of this proposal may argue that this change would make confirmation hearings dry and boring; however, maybe confirmation hearings should lack entertainment value.²²² Certainly each hearing does not need to play out like a dramatic daytime soap opera. The stakes are too high.²²³ Maybe the confirmation hearings should be a dense intellectual debate that would not attract the attention of Americans simply looking to see senators and nominees in an “intellectual feast.”²²⁴ Maybe these hearings should be reserved for C-SPAN and not network television. For this reason, it is acceptable to sacrifice the showy nature of the current hearings for a system that would allow senators to receive the answers they need to important questions without them polluting the hearings' effectiveness.

Other opponents may argue that this proposed solution only partially remedies the central issue because the selected representatives would still have the opportunity to abuse the confirmation hearings in such a way that allows them to speak to their constituents. However, senators are less likely to send political signals to their constituents back home if they are chosen to speak on behalf of the other senators on the Committee. They will have less personal choice in which topics they address and how to frame their questions, eliminating the opportunity to insert their own personal beliefs. There will be a level of accountability, an aspect that the current process lacks entirely. Rather than lecturing freely, their fellow senators will define the role granted to them.

Overall, this may be the easiest option to alter the confirmation hearings so that the emphasis of the hearings shifts back onto the nominees. Senators will not have the opportunity to question the nominees individually; however, their primary issues will still be addressed via the questioning power of their chosen representative. And most importantly, senators will receive the benefit of hearing the nominee's responses so that they can assess the credibility and legitimacy of the nominee prior to casting a vote for or against confirmation.

B. Designating Questioning Power to Experts

Another possible solution to correct the wrong of senators using the confirmation hearings for personal gain is to force each senator to appoint an “expert” to question the nominee in his place. Some scholars have already suggested that law professors or lawyers question nominees rather than senators.²²⁵

221. See *supra* note 205 and accompanying text.

222. Donald J. Devine, Reform the Judicial Nomination Process Now: Five Proposals for a Return to Senatorial Comity, Address at The Heritage Foundation 4 (Nov. 12, 1991), <http://www.policyarchive.org/handle/10207/bitstreams/12724.pdf> (“Committee hearings are (or should be) technical proceedings.”).

223. See *supra* note 150 and accompanying text.

224. See BRONNER, *supra* note 122, at 261.

225. See ROSENTHAL, *supra* note 220; Stephen Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185, 1195 (1988); Simson, *supra* note 188, at 656–58; David A. Strauss &

Most of these scholars advocate for such a change because senators are ill equipped to cross-examine and challenge Supreme Court nominees.²²⁶ Many senators, these scholars argue, do not have experience as practicing attorneys and lack the skills necessary to truly drill the nominees and receive substantive testimony from the nominees.²²⁷ In addition, many senators on the Senate Judiciary Committee do not have law degrees,²²⁸ which may render them incapable of effectively challenging a nominee on Supreme Court precedent, the role of the federal courts, or doctrinal issues relating to constitutional law.²²⁹ Many questions asked by senators reveal a lack of understanding of how the federal courts work, which renders the questioning phase inefficient at times.²³⁰ Also, the nominee is arguably the brightest legal mind present in the room during the hearings;²³¹ as a result, the questioning phase is sometimes an uneven debate.²³² After all, “[t]he Senate is designed to be a deliberative body, but not necessarily a deeply intellectual one.”²³³ As one scholar points out, the problem is not always that senators attend the hearings without good questions drafted, but rather that senators “often fail to ask follow-up questions that do a good job of probing a response’s ambiguities and implications.”²³⁴

For these reasons, the confirmation hearings would be more effective in determining a nominee’s fitness (or unfitness) for the Court if experts in constitutional law, federal jurisdiction, or judicial philosophy challenged the nominees in place of the senators. As the process currently stands, the senators are tasked with questioning one of the sharpest legal minds in the country and a

Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1519 (1992). For a brief counterargument that senators should not be replaced with law professors or lawyers, see Gallagher, *supra* note 117, at 591.

226. See, e.g., Bruce Fein, *A Circumscribed Senate Confirmation Role*, 102 HARV. L. REV. 672, 673 (1989) (“The Senate, simply stated, is ill-suited intellectually, morally, and politically to pass on anything more substantive than a nominee’s professional fitness for the office of Supreme Court Justice. Because senators tend to be intellectually shallow and result-oriented, their ostensible inquiries into ‘judicial philosophy’ will almost invariably degenerate into partisan posturing.”); see also KATZMANN, *supra* note 9, at 42; Carter, *supra* note 225, at 1195 (“Senators and their staff members will not have read deeply or broadly in the literature on judicial philosophy or adjudication or interpretation; even if they have, they will be unlikely to have the scholarly turn of mind vital to making sense of it all.”).

227. See Fein, *supra* note 226, at 673; Simson, *supra* note 188, at 657.

228. During Justice Sotomayor’s confirmation hearing, there were nineteen members on the Senate Judiciary Committee, but only thirteen of these Committee members possessed law degrees. Natasha Metzler, *The Confirmation Hearing by the Numbers*, YAHOO! NEWS (July 11, 2009), http://old.news.yahoo.com/s/ynews/20090711/ts_ynews/ynews_ts434.

229. See Carter, *supra* note 225, at 1195; Simson, *supra* note 188, at 657.

230. During Justice Kagan’s hearing, Senator Cornyn admitted that Kagan had “talked about some legal history that [he’s] vaguely familiar with.” *Confirmation Hearing of Justice Kagan*, *supra* note 143, at 161.

231. During Justice Kagan’s confirmation hearing, Professor Ronald Sullivan testified that Kagan is an “outstanding legal scholar” with a “first-class mind,” and that “[h]er academic record is unassailable.” *Confirmation Hearing of Justice Kagan*, *supra* note 143, at 355.

232. Carter, *supra* note 225, at 1195.

233. *Id.*

234. Simson, *supra* note 188, at 657.

nominee who was extensively prepped by White House staff members.²³⁵ “[A]s long as the Senators are the ones who will be asking the questions, the hearings are not going to be as informative as [we] need them to be.”²³⁶ To say that senators cannot succeed in questioning a nominee is not the purpose of this Note; however, it provides additional support for reforming the process in this regard.

Allowing experts, rather than senators, to question Supreme Court nominees would strip senators of the opportunity to use the confirmation hearings as a campaign forum. Since senators may not be the most qualified to challenge nominees, law professors, seasoned attorneys, and federal agency officials can stand in the shoes of the senators to guarantee that the nominees are challenged and less likely to curtail serious questions during the confirmation hearings. In addition, it is not an uncommon practice to have litigators handle high-profile congressional hearings. Over the last thirty years, Congress has called on outside counsel to conduct the following investigations: Watergate, the Iran-Contra scandal, the Keating Five scandal, and Whitewater.²³⁷ “Outside counsel were given investigative and interrogatory responsibilities for reasons equally applicable to Supreme Court nominations: the time they have to absorb the subject matter and prepare meticulously, and the experience they bring in delivering effective, probing questions.”²³⁸

Since there are some benefits to giving senators an opportunity to discuss issues important within their home states, this Note recommends that each senator of the Senate Judiciary Committee appoint an expert to question the nominee in his place. This alteration would allow for a senator to select an expert who has similar ideology to him, and it would also allow for senators to meet with the expert in advance in order to inform the expert what issues are most important to the senator. This does not entirely strip the Senate of its advice and consent power—the senator would still pick representatives to question the nominees, meet with the representatives to provide a general path of questioning, and, most importantly, vote on whether or not to confirm a nominee.

Because senators’ staffs are more likely to do the background research on nominees and draft possible questions than senators, the proposed change is not taking as much from senators as may be seen at first glance.²³⁹ This proposed change would simply eliminate the senators’ opportunity to treat the confirmation hearings as a time to drag out their political soapboxes and guarantee that nominees receive strict questioning. It is in everybody’s best interest for the nominee to face a challenge, so it is hard to argue that having experts conduct the questioning phase would taint the confirmation process in any way—senators and the American people would receive relevant testimony from the nominee and the nominee would be subjected to intense scrutiny prior to appointment.

235. RUTKUS, *supra* note 69, at 28 (noting that the president’s administration assists the nominee by providing legal background materials and by conducting mock hearing practice sessions).

236. Simson, *supra* note 188, at 657.

237. ROSENTHAL, *supra* note 220, at 7.

238. *Id.*

239. *See* Carter, *supra* note 225, at 1195.

C. Replace Cameras with Speakers

One last possibility for reform is replacing the video recording of the current process solely with audio recording. Since senators treat the confirmation hearings as their own public forums, this problem will be alleviated (if not eliminated) by banning the existence of cameras from the room entirely. As discussed above, there is an overwhelming number of cameras present in the hearing room.²⁴⁰ There are certainly benefits to having cameras present during the hearings—notably educating the public and capturing the historic moments for future archival purposes²⁴¹—however, the large number of cameras in the room makes it impossible for senators to forget the public nature of the hearings. As a senator questions a nominee, there are dozens of cameras staring him in the face.

Instead of the current system, the confirmation hearings should only be audio recorded—a system analogous to the approach employed by the Court in the recording of oral arguments. Eliminating cameras at confirmation hearings would allow for a more relaxed atmosphere in which senators may be more likely to focus on their conversations with the nominee, rather than constantly focusing on how their constituents are interpreting and critiquing their interactions with the nominee.²⁴² This approach also preserves the right of the public to become familiar with a Supreme Court nominee. Although Americans may be less likely to listen to an audio recording (after all, it is unlikely that anybody besides practicing attorneys and law students listen to oral arguments), the proposed reform still provides the American people with the *opportunity* to do so in order for them to familiarize themselves with the concerns of senators and the nominee’s testimony. If the primary goal is to deliver the most effective and promising confirmation process, then sacrificing video footage of the hearings while allowing for audio recording would help attain the goal. It is more likely that senators will be more focused on the task at hand (specifically, questioning the qualifications of a nominee) if there are not cameras present in the room during the questioning stages of the hearings.

CONCLUSION

After analyzing the Senate’s undefined role in the Supreme Court confirmation process, the evolution of the confirmation hearings, and the increase in media attention surrounding the Supreme Court, it is not surprising that the current confirmation process provides an ample opportunity for senators to speak to their constituents via national television. Members of the Senate Judiciary Committee have taken full advantage of the opportunity. Throughout confirmation hearings, senators make multiple statements that they hope will resonate with their constituents at the expense of scrutinizing Supreme Court nominees to the highest

240. *See supra* Part III.B.

241. *See Confirmation Hearing of Justice Kagan, supra* note 143, at 48 (statement of Hon. Al Franken, U.S. Senator from Minnesota).

242. TWENTIETH CENTURY FUND TASK FORCE, *supra* note 6, at 10 (One task force member suggested further “that television cameras be banned from the hearings. This would go some way toward getting the senators to attend to the business at hand instead of striking poses to please their favorite constituents.”).

degree. These statements may reveal the senator's position on a controversial issue, emphasize how loyal the senator is to his political party, or acknowledge his audience in his home state and the fact that his presence during the hearing is to serve his constituents, which provides comfort to Americans watching on television. Regardless of the approach, the primary purpose of the confirmation hearings should be to determine the qualifications of a Supreme Court nominee, and for this reason, reform is necessary. Without reform, confirmation hearings of Supreme Court justices will continue to be "vapid and hollow" and "reinforce cynicism that citizens often glean from the government."²⁴³

243. *See supra* text accompanying note 1.