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# Evaluating the New Justices in Light of the Confirmation Ordeal

Marcia Coyle\*

As you can see, David is fascinated by the confirmation process. It's a common reaction by those of us who had to sit through two of them in four months, gavel-to-gavel. But I did take Professor Kmiec's memo to me to heart. He asked me to talk about the senators' questions and media coverage. Now, I'd really like to say that when I got that memo, I immediately came up with at least ten tremendous insights. What really came to mind was this contest that I saw on a blog right before the Roberts hearing asking for submission of the dumbest thing said or the dumbest question asked by a senator. The blog was overwhelmed by submissions, and I'm sure you want to know who at least one of the winners was. I'm going to be charitable and not reveal his identity . . . but what the heck. You've been here all afternoon, right? So I'll share it with you. It was Senator Tom Coburn of Oklahoma who said to Roberts, "I am using my observational capabilities as a physician to know that your answers have been honest and forthright, as I watched the rest of your body respond to the stress that you're under."<sup>1</sup>

OK. It's easy to poke fun, I know. But seriously, I think few of us leave the confirmation hearings feeling fully satisfied by the questions that were asked, and the senators today play predictable roles. The party of the President who nominated the Justice is there to protect and defend, and the opposite party is there to try to reveal as much information as possible.

There have been lots of books written about the shortcomings of the confirmation process, and I really would suggest that you read some of those, like Stephen Carter's *THE CONFIRMATION MESS*.<sup>2</sup> There's a brand new one out by Benjamin Wittes.<sup>3</sup> Professor Kmiec mentioned it—I think

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1. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 297 (2005) (statement of Sen. Tom Coburn).

2. STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* (1995).

3. BENJAMIN WITTES, *CONFIRMATION WARS* (2006).

it's coming out officially in December—published by Rowman & Littlefield. All great.

I'm just going to make a few quick observations about the questions. One problem is there are so many. I saw some statistic that stuck in my head about Justice Alito, what he faced: eighteen hours and seven hundred questions.<sup>4</sup> Second problem: very little follow-up on the answers that are given. An example: when Justice Roberts did say that he recognized the right to privacy,<sup>5</sup> there was no follow up to ask where he would go with that in terms of substantive due process. It was the same with Justice Alito. He was questioned about the Unitary Executive Theory,<sup>6</sup> and that's very controversial, but there was really no follow-up from Senator Kennedy after Roberts gave his response to the question, "Would that have any effect or impact on independent agencies?" So I think follow-up is a problem.

And why is that? I think that it appears there's very little coordination. They may try to coordinate, but it seems as though the senators come in, they've got their questions, they want to get through them, they have interests that they want covered, and then that's it.

I also found very interesting was what wasn't asked this time around. There were virtually no questions about sentencing, plea bargaining, very little on First Amendment speech, church/state separation, really very little on affirmative action, death penalty and *Kelo v. New London*,<sup>7</sup> which was such a hot decision by the Supreme Court on property rights. But what the questions do reflect, I think, are what the senators are most concerned about, or what they think their constituency is concerned about. We had a lot of questions about executive power this time around. They were very worried about the surveillance program, the military commissions.

At the end of the day, it's really left to the media to find a way to present the hours and hours of information gleaned in an organized and coherent way for our readers, our listeners and our viewers. I'm not a media critic and I don't want to be one. I'm not going to say, "Well, the New York

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4. See Adam Liptak, *700 Questions Show a Tilt to Right*, INT'L HERALD TRIB., Jan. 13, 2006, available at <http://www.ihrt.com/articles/2006/01/13/news/legal.php>.

5. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States*, *supra* note 1, at 146-47. Senator Specter questioned John Roberts about his position on the *Griswold* case and the fundamental right to privacy. *Id.* at 146. Roberts responded, in part:

The right to privacy is protected under the Constitution in various ways. It's protected by the Fourth Amendment, which provides that the right of people to be secure in their persons, houses, effects and papers is protected. It's protected under the First Amendment, dealing with prohibition on establishment of a religion and guarantee of free exercise, protects privacy in matters of conscience.

*Id.* Senator Specter responded, "So that the views you expressed back in 1981, raising an issue about 'amorphous' and 'so-called' would not be the views you would express today?" *Id.* at 147.

6. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 351-52 (2005) (questioning of nominee by Sen. Edward Kennedy); *id.* at 483-84 (questioning of nominee by Sen. Patrick Leahy).

7. 545 U.S. 469 (2005).

Times did this and the L.A. Times did that, and they should have done this.” I think overall today the media does an excellent job of getting all of the relevant information, and maybe the not so relevant, out to the public, and perhaps not so excellent a job of presenting it in a way that gives your audience a clear view of what the information means. And part of it is just due to the sheer amount of information.

I mentioned earlier the blog example, and I did it humorously, but I do want to tell you that, in terms of news and information, what I think was probably really defining about this confirmation process is that Roberts and Alito truly were the first Supreme Court nominees of the Internet Age. All of us in the media today are dealing with increased pressure to get information onto our websites, and even some reporters now are being asked by editors to blog off their beats. And so there’s this incredible pressure to compete with the immediacy of news.

The blogs to me were the most fascinating aspect of this whole Internet feature of the confirmation hearings. I started reading them very closely during the confirmation hearings, both political and legal blogs, and I was amazed at the amount of information they generate. And it’s not just gossip and rumor. A lot of them presented detailed background information on all of the nominees, opinions, links to cases, and reports, and some had highly placed sources.

I don’t consider them established news media, but I do consider them, I think, in the future, to play a very significant role, perhaps akin to what television did to the confirmation hearings.

People look at confirmation hearings and they think, “Oh, they’ve become a mess in the modern age,” but if you read some of the books that have been written, you’ll see the confirmation hearings have been a mess a long time, perhaps going back all the way to Justice Brandeis.<sup>8</sup> And one book found three factors contributing to the way they are now and why they seem so political, so disorganized.<sup>9</sup> One reason is that political parties, for a long time—until the ‘60s—were mainly grass root parties, but beginning in the ‘60s, we had the rise of national political parties that were policy driven.

Another factor was the role of the Supreme Court itself. It started deciding individual rights cases that were very controversial; so this may

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8. See JOHN ANTHONY MALTESE, *THE SELLING OF SUPREME COURT NOMINEES* 10-11 (Michael Nelson ed., 1995) (explaining that politics has played a role in the selection and confirmation of Supreme Court Justices since the Republic’s first days); RICHARD DAVIS, *ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATION PROCESS* 4, 15 (2005) (describing the nomination process as “public pitched battles involving partisans, ideological groups, single-issue groups, and the press”).

9. See DAVIS, *supra* note 8, at 77-81.

have made the Court of more interest to the public. And finally, television. Putting cameras in the confirmation hearings and even on the Senate floor changed the nature of it. The Senators are playing a lot to their constituencies.

Now, I support television in those hearings and in the Court, but what I'm saying is that I think blogs, podcasts—all of this is also going to have a major role down the road in how nominees present themselves, and how Senators question them. I know in one blog site—and this is not uncommon—that people would post opinions maybe five, six, ten times a day, and those postings would attract anywhere from two hundred to five hundred public comments. Special interest groups all had their own blogs. They had podcasts during the confirmation hearings. This is all part of trying to convey a message to the public, and also trying to influence the media.

I know that White House officials talk to bloggers in order to get their message out about the nominees, and so I think what we saw with the Roberts and Alito confirmations is only the very beginning of what will be quite fascinating down the road as we head more and more into the Internet Age. And I'm not sure what the ultimate impact is going to be. There are those who have written books who suggested that we eliminate confirmation hearings and go back to private meetings.<sup>10</sup> There are those who suggest that perhaps the Senate Judiciary Committee ought to have designated hitters, you know, one from one party, one from the other, and just have legal counsel doing the questioning in order to make it more manageable.<sup>11</sup> But I don't think we're going to be able to retreat from this very, very public aspect of confirmation hearings today. I think the public wants to see these nominees, and I think, because of the immediacy of the Internet, they are going to want to know as much information as they can, or answers to the questions they have, as soon as possible. So it will be very interesting to see how it plays out.

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10. See GEORGE WATSON & JOHN A. STOOKEY, *SHAPING AMERICA: THE POLITICS OF SUPREME COURT APPOINTMENTS* 216 (1995) (discussing the reform proposal, advocated in the wake of the Thomas nomination hearings, to replace committee questioning with selected questioners, or use a special counsel to examine Supreme Court nominees); Donald J. Devine, Reform the Judicial Nomination Process Now: Five Proposals for a Return to Senatorial Comity, Address at The Heritage Foundation (Nov. 12, 1991), [http://www.heritage.org/Research/LegalIssues/upload/92198\\_1.pdf](http://www.heritage.org/Research/LegalIssues/upload/92198_1.pdf) (proposing a confirmation process without hearings).

11. See WATSON & STOOKEY, *supra* note 10, at 216; MICHAEL COMISKEY, *SEEKING JUSTICE: THE JUDGING OF SUPREME COURT NOMINEES* 187-89 (2004) (remarking on the suggestion by some that senators use expert special counsel to probe nominees); DAVIS, *supra* note 8, at 165-66 (suggesting that the committee appoint designated questioners to lead the questioning, or allow questioning to be conducted by majority and minority counsel); SENATOR PAUL SIMON, *ADVICE & CONSENT: CLARENCE THOMAS, ROBERT BORK AND THE INTRIGUING HISTORY OF THE SUPREME COURT'S NOMINATION BATTLES* 306-07 (1992) (recommending the Senate utilize professional counsel on each side to do the majority of the questioning).

PROFESSOR KMIEC: Marcia has been writing for a good many years for the National Law Journal, and her commentary there is excellent, but you can also see in her comments why The News Hour has made her the regular Supreme Court commentator. She deals with cases and legal issues with intelligence and with conciseness, so we thank you for that.

It is interesting that her prediction that the nominees will not soon be excluded from the process is directly opposite from the 1988 report of the Twentieth Century Fund, which wrote up a report following the Bork episode, in which they made the following four recommendations: Limit the number of participants in confirmation hearings, prevent nominees from testifying, prevent senators from asking nominees questions about how they would deal with specific issues, and base confirmation decisions solely upon a nominee's written records and testimony from legal experts.<sup>12</sup>

There is an old folk song by the late Steve Goodman called "The Twentieth Century Is Almost Over."<sup>13</sup> I think it's over.

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12. DAVID M. O'BRIEN, JUDICIAL ROULETTE: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION 8-11 (1998); COMISKEY, *supra* note 11, at 54.

13. STEVE GOODMAN, *The Twentieth Century is Almost Over*, on SAY IT IN PRIVATE (Red Pajamas Records/Oh Boy Records 1977).

