White Papers

The Nomination Process

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In ancient Rome, the Senate created the supreme law of the land, judged its own members, and appointed various judges to various levels of adjudication in the Republic. In the United States, the Senate acts as a jury only in the cases of an impeached president or ethical violations by its own members. However, it must approval all judges appointed to the federal bench, including members of the Supreme Court. Thus, nominees for the Supreme Court undergo enormous scrutiny; their lives, philosophical positions and ideological preferences come under the political microscope. In recent times, we have seen this process intensify.[1] The purpose of this chapter is to explore the nomination process and pay special attention to how it has moved from rhetorical sphere of the Senate into the public sphere. By doing this, I hope to lay a foundation for some of the chapters that follow which rely on the testimony of the various justices during their nomination hearings. This testimony is particularly important to understanding the bases of judgment that will be used by the most recent nominees to the Supreme Court. Sometimes these statements reveal which modalities the justice-to-be prefers. Sometimes these statements are abandoned once the justice is in place. In either case, they provide an interesting entry way into the justices' thinking.

Let me begin by establishing the difference between the Senate and the public spheres. In 1919 President Woodrow Wilson sent the treaty ending World War I to the Senate for approval, which required a two-thirds majority. Senator Henry Cabot Lodge, the Chair of the Foreign Relations Committee and a historian, gave a speech on the floor of the Senate comparing the treaty's League of Nations to the Holy Alliance of 1812. Lodge circulated a letter opposing the treaty unless it was amended; this "Round Robin" was signed by a sufficient number of senators to block the treaty. Wilson announced that he would travel the country to drum up support for his treaty, and particularly its League of Nations provision. In response, Republicans promptly announced that they would send a "truth squad" after Wilson, headed by the progressive Republican Senator Hiram Johnson of California. What followed demonstrated that there was a significant difference between the Senate's sphere of argumentation and the public's sphere of persuasion. Johnson, who had been ridiculed in the Senate after Lodge's display of acumen, resonated with crowds across the country using his simpler, more passionate rhetoric, while Wilson, a former college professor, was unable to adapt to the public sphere. At the end of his swing around the country, the President not only lost his treaty but suffered a stroke.

Today, due to the televising of proceedings and other mediation, the U.S. Senate is much less isolated from the public sphere than it was in 1919. Starting with the nomination of sitting Justice Abe Fortas for Chief Justice of the Supreme Court in 1968, the argumentation surrounding some nominations has broadened into the public sphere. This shift was the result of pressure from interest groups, coverage by the media, and/or at the behest of senators and the president. Since 1968, more and more nominations to the Supreme Court have entered the public sphere to the point where lower court nominations and the Senate's filibuster rule have also engaged the public sphere. After reviewing the controversial nominations between 1968 and the present, this chapter assesses their impact on argumentation in the Senate and public spheres. The chapter relies on Jurgen Habermas' theory of the public sphere in general and his theory of proceduralist law in particular.[2] He argued that "the vacant places of the economic man or welfare-client are occupied by a public of citizens who participate in political communication in order to articulate their wants and needs, to give voice to their violated interests, and, above all, to clarify and settle the contested standards and criteria."[3] Habermas attempted to construct "communicative rationality" based on agreement among the rational citizens in society performing in optimum speaking situations.[4] In such situations, argumentation becomes "a court of appeal that makes it possible to continue communicative action with other means when disagreement can no longer be headed off by everyday routines and yet is not to be settled by the direct or strategic use of force."[5] The model requires speakers who have at their disposal "basic qualifications of speech and symbolic interaction."[6] Furthermore, Habermas maintained that loyalty to the constitution must transcend cultural and ideological differences if consensus is to be achieved.[7] Thus, if argumentation in the public sphere places more value on interests other than the constitution, it can lead to fragmentation.

In his book *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Habermas extended his theory by acknowledging "offensive" social movements that "bring up issues relevant to the entire society, to define ways of approaching problems, to propose possible solutions, to supply new information, to interpret values differently, to mobilize good reasons, and criticize bad ones.[8] Often it is those outside of government or its normal channels that surface these issues. "Only through their controversial presentation in the media do such topics reach the larger public and subsequently gain a place on the 'political agenda.'"[9]

This chapter attempts to demonstrate that the Senate sphere and the public sphere meet Habermas's paradigm in different ways. The argumentation in the Senate sphere tends to focus on qualifications, constitutional interpretations, and definitions of impropriety. However, because senators play to their constituencies, they often make statements that will gain them access to the media. The more dramatic and controversial the argument, the more likely it is to be covered by the media. Public argumentation tends to focus on the nominees' gender, race, religion, political leanings, and perceived social agenda. This chapter argues that public relations consultants are much more likely to be used in cases where the public sphere is engaged; they, too, seek access to the media. While proponents of direct democracy and democratic renewal welcome such a shift, others concerned about the selection of qualified justices view the public involvement in, and media coverage of, the judicial process as troublesome.

Requiring the Advice and Consent of the Senate

Article 2, Section 2 of the United States Constitution reads: "[The President] by and with the advice and consent of the Senate, shall appoint ... judges of the Supreme Court." This section was the result of intense negotiation during the drafting of the U.S. Constitution and has remained controversial throughout U.S. history.[10] For example, in 1822 former President Thomas Jefferson called for term limits on justices because he was frustrated with how the Federalist judges had dominated the court system.[11] The Supreme Court has recognized this problem in its own decisions. For example, in *Edmunds v. U.S.* in 1997, the Court recognized that "the Framers anticipated that the President would be less vulnerable to interest-group pressure and personal favoritism than" the Senate; however, the Senate's participation "serves both to curb Executive abuses of the appointment power, and 'to promote a judicious choice of [persons] for filling the offices of the union.'"[12]

Section 2 of the Constitution does not require a super-majority in order for a justice to be approved. The U.S. Senate, however, created its own rule that prevents the closing of debate until 60 or more of its 100 member vote for cloture. Thus, a majority of less than 60 can be stifled by a minority which continues the debate, a tactic known as the "filibuster."

Today, even the nominations of judges to lower federal benches and the "filibuster" have often been thrust into the public sphere. This shift in the nomination process has broad implications for American politics. Thus, implications for public argumentation will be explored in the conclusion of this chapter since one of the goals of this study is to provide rhetorical advice to those who appear before the Supreme Court.

The Fortas Crisis

President Lyndon Baines Johnson moved Arthur Goldberg, whom John Kennedy had appointed to the Supreme Court, to the United Nations upon the death of Adlai Stevenson in the summer of 1965, and then appointed his friend Abe Fortas to the Court as an associate justice.[13]A memo prepared by the Justice Department's Nicholas Katzenbach in July of 1965 demonstrates how conscious the administration was of various factors that go into the selection process. Fortas was selected not only because he was close to Johnson, but because he was a Democrat, a Jew in the tradition of Brandeis and Frankfurter, between the ages of 50 and 60, and a judicial liberal.[14] Fortas was approved by acclamation in the Senate.[15]

On June 13, 1967 in a White House Rose Garden ceremony, Johnson took the bold step of nominating the first African-American to the Court. Thurgood Marshall had argued for Brown in the *Brown v. Board of Education* case of 1954, which resulted in a unanimous ruling ending public school segregation. The nomination led to a nasty debate in the Senate.[16] Southern senators were particularly vitriolic in their attacks. They hoped to delay Marshall's appointment, as they had when he was appointed to the Second Circuit Court of Appeals in the Kennedy Administration.[17] However, as Trevor Parry-Giles made clear, this debate rarely aroused the public.[18] The controversy was contained "in the Senate," "on the floor of the Senate," and to "floor debate" between "members of the House and Senate."[19] In the end, Marshall's nomination was approved 69 to 11, with 20 senators not voting. Marshall then began a 24 year tenure on the Court.

At the same time, Fortas counseled Johnson on various matters behind the scenes. In 1968, a bitterly contentious election year because of the Vietnam War, Johnson had the opportunity to appoint Fortas Chief Justice when the 77 year old Earl Warren offered his resignation contingent upon being replaced by a Senate approved nominee. The nomination immediately fell into contention. Republicans were furious that Warren, the former Republican governor of California, did not wait until after the election. Believing that a Republican would win the White House, many senators claimed they would filibuster any nomination before the next president was selected. In his acceptance of the nomination in the summer of 1968, Nixon signaled that if elected, he would appoint conservative justices to the Court: "Tonight it's time for some honest talk about the problem of order in the United States.... [L]et us recognize that some of our courts in their decisions have gone too far in weakening the peace forces.[20] Hearings revealed that while Fortas had done nothing illegal, he had received $20,000 a year in consulting fees from the Wolfson Family Foundation and had accepted other gratuities. At that time, a Supreme Court justice made only $40,000 a year. The hearings also revealed Fortas' continuing advisory role to President Johnson. Senator Strom Thurman led a filibuster on October 2, 1968 that forced the withdrawal of Fortas' nomination for Chief Justice. The filibuster was also directed at Homer Thornberry, a Johnson protégé, whom he had nominated for associate justice to take the Fortas seat. The Fortas controversy spilled into the presidential campaign of 1968 when Nixon linked Fortas to liberal activists on the Supreme Court that had supported disallowing the use of tainted evidence in criminal trials.

Haynsworth and Carswell

In 1969, Richard Nixon's nomination of Warren Burger to replace Earl Warren went well, and may have lulled the President into a false sense of security, particularly when dealing with his own party. Fortas resigned his associate judgeship during Burger's confirmation process, giving Nixon another vacancy. Nixon's nominee for the open associate justice was Clement Haynsworth of South Carolina, who sat on the Fourth Circuit Court of Appeals. A Democrat, Haynsworth had supported Republican presidential candidates since 1964. While Haynsworth had been opposed by civil rights and labor groups in the past, Nixon believed Haynsworth would again prevail and win Nixon more support in the South, a region he divided with George Wallace in the election of 1968. Nixon had carried Haynsworth's state along with Tennessee, Virginia, Florida, and North Carolina but he lost the rest of the "deep South." At the behest of Kevin Phillips, a Republican strategist, and Harry Dent, the Republican State Chairman from South Carolina, Nixon sought to build a new Republican majority that would include the states of the Deep South.

On August 18, 1969, after a thorough investigation led by Attorney General John Mitchell, Nixon nominated Haynsworth, who ran into opposition almost immediately from liberal groups, who pressured the Senate. While Haynsworth's overall record indicated support for the civil rights of minorities and a flexible reading of the Constitution, in at least six decisions (three of which were overturned by the Supreme Court) he had ruled against minority rights petitions. His labor record was similar. Thus, while civil rights groups opposed Haynsworth, he did not generate enthusiasm among conservative senators who favored strict constructionists on the Supreme Court. In

reaction, the White House Congressional Liaison Office began a practice that continues to this day: the creation of ad hoc units to deal with Supreme Court nominees.

While Haynsworth said nothing to justify claims that he was a latent segregationist, he did have conflicts of interest that, in the context of the Fortas crisis, would prove fatal to the nomination.[21] Due to the death of Republican leader Everett Dirksen, Haynsworth's hearing before the Judiciary Committee was postponed until September of 1969. Thus, the opposition forces, which were led by Senator Birch Bayh (D-Indiana), had time to organize a media campaign that would take the debate into the public sphere. It became clear to Bryce Harlow, head of congressional liaison for Nixon, and Attorney General Mitchell that they needed to balance Republican defectors with southern Democratic supporters of the nomination. On October 9th, under pressure from the White House, the Judiciary Committee approved the nomination of Haynsworth by a vote of 10 to 7.

Until the committee vote, the administration kept a low profile on the nomination. Only Assistant Attorney General William Rehnquist, who was coaching Haynsworth for his hearings, spoke out in favor of the nomination[22] Rehnquist then complained to Nixon that not enough was being done by his congressional liaison staff and that Mitchell had not provided the President with a proper assessment of the nominee.[23]

Soon after the Judiciary Committee vote, the new Republican Minority Leader, Bob Griffin, told Harlow that the nomination was doomed. When Harlow recommended to Nixon that he withdraw the nomination,[24] the President demanded that a task force be put together to save it. Nixon believed defecting Republicans could be brought back into line. He told Harlow to activate southern and National Rifle Association support. Thus, Nixon rallied groups in the public sphere to counter those activated by Senator Bayh. Nixon's strategy marks a decisive shift in the politics of Supreme Court nominations.

As the battle escalated, Counselor to the President Clark Mollenhoff composed talking points in defense of Haynsworth that were sent to conservative interest groups. In a press conference in his office, Nixon claimed that Haynsworth was a victim of "character assassination," and compared this fight to the one over the nomination of Louis Brandeis, a liberal Jew who was confirmed on a 47 to 22 vote with 27 abstentions in 1916.[25] Then, in another major shift from the past, the White House, seeking a political advantage, sent the news media a defense of Haynsworth, targeting newspapers in states of swing vote senators.[26] The public was engaged. Patrick Buchanan, then the compiler of the daily news briefings for the President, and Lyn Nofziger, a press aide, were incorporated into the task force; they quickly reinforced the decision to take the fight into the public arena, a step that was offensive to Democrats and Republicans in the Senate. Harry Dent, who had moved into the Political Affairs Office, activated state Republican chairs and contributors across the country. Nixon appointees were urged to support the nomination in the media; the President was personally involved in much of this effort.[27] He instructed Herb Klein to keep pressure on the media; Klein went so far as to appear on *The Tonight Show with Johnny Carson*, one of the most popular venues in the public sphere at the time. Like other spokespersons, he pointed out that 16 former ABA presidents and the Trial Lawyers Association had endorsed Haynsworth.

Senate decorum was soon frayed. Southern Democratic senators supporting Haynsworth resented making the fight a public, partisan one. Republican senators resented the strong arm tactics of the President's staff, including telephoning wealthy Republican contributors and urging them to lobby their senators. Republican senators John Williams, Hugh Scott, William Saxbe, Charles Percy, Jack Miller, and Bob Griffin eventually voted against Haynsworth's nomination in part because of the tactics of the White House, and in part, because they had stopped the Fortas nomination on conflict of interest charges and didn't want to appear to be hypocritical. These Republican senators felt obligated to apply the same standard to Haynsworth.

Haynsworth lost despite the support of 18 Democrats because 16 Republicans voted against him. However, Nixon gained southern sympathy. His next step was to punish the defectors and to solidify southern support. He instructed H.R. Haldeman to "destroy" the disloyal senators.[28] To consolidate southern support, on January 19, 1970, Nixon nominated Judge G. Harold Carswell of the Fifth Circuit Court of Appeals in Florida. He also created the Office of Public Liaison and put Charles Colson in charge. In this way, the White House clearly signaled that it would appeal to the public sphere to support its nominee, who had the blessings of Attorney General Mitchell, Chief Justice Warren Burger, and Secretary of State William Rogers.[29] A new cycle of media wars and public engagement began with Nixon unaware of past statements by Carswell that would further engage the public arena.

The ad hoc group in charge of the Carswell nomination met each morning at eight[30] where various tasks were assigned. Clark MacGregor ran congressional relations with Bill Timmons; Dick Moore and Bill Safire ran the press operation; Colson generated public support. Again Nixon was intimately involved in the nomination campaign, using his power of patronage and presidential prestige to try to persuade senators.[31]

Carswell owned no stocks or bonds; he was financially clean. However, the opposition found a quotation from 1948 in which, when running for public office in Georgia, Carswell said, "Segregation of the races is proper and the only practical and correct way of life in our states. I have always so believed and I shall always so act."[32] Carswell immediately renounced the statement as a youthful indiscretion.

Next, the opposition added the label of "mediocre" to Carswell's list of sins, which was confirmed when Senator Roman Hruska (R-Nebraska) foolishly claimed that the mediocre had a right to be represented on the Court. The nomination was defeated 51 to 45 on April 8, 1970. Nixon wrote in his memoirs, "I was determined that [the opposition] would at least pay a political price for it in the South.[33] Nixon claimed in a press conference that Carswell was defeated because he came from the South. Nixon then nominated moderate Republican Harry A. Blackmun of Minnesota, who was unanimously confirmed by the Senate on May 12, 1970, and later disappointed conservatives by supporting the majority decision in *Roe v. Wade*. In the fall of 1970, Nixon entered into the ensuing congressional election campaign armed with a wedge issue: crime, the reduction of which he connected to strict constructionist judges. He also campaigned across the South seeking converts to the Republican Party.

It is important to note that while the Haynsworth and Carswell nominations had been thrust into the public arena, neither man was criticized for his ideology or his methods of constitutional interpretation. While Nixon tried to put a political face on the attacks, they consisted of either the appearance of impropriety or racism. As we shall see, the

notion of ideological assessment for the public debate did not emerge until the 1980s.

Nixon's Later Appointments

In September of 1971, Justices Hugo Black and John Harlan resigned. Black, formerly of Alabama, became a civil liberties advocate and a textualist, who believed in a close reading of the language of the Constitution alone as a basis for making decisions. Harlan was one of the most conservative judges on the Court, who had regularly opposed the Warren agenda. Thus, Nixon would have the opportunity of a life time; he could now appoint a third and fourth justice to the Court, remaking it in his image.

His first choice was attorney Lewis Powell of Virginia who was easily confirmed; the process was contained between the Senate and the White House. His second choice was William Rehnquist, who proved to be more controversial. Rehnquist had written a memo in 1952, when he was clerking for Justice Jackson, which defended the "separate but equal" decision in *Plessy v. Ferguson*. Under questioning Rehnquist claimed he had written the memo at the behest of Jackson to present one side of the issue for a debate among Jackson's staff. Other witnesses disputed Rehnquist's version of the context of his memo. However, the charges against Rehnquist failed to ignite public controversy and he was confirmed 68 to 26. Nonetheless, the public battles over Haynsworth and Carswell would haunt the selection process in the future.[34]

The Nomination of Robert Bork

President Reagan was successful in getting his nominees appointed to the federal courts because he had a Senate majority when he came into office and remained popular with the public until publicity surrounding the Iran-Contra affair damaged his reputation late in his second term. Official records show that he appointed about 50 federal judges a year during his two terms leaving an indelible mark on the judiciary.[35] One reason for this success was the fact that the Justice Department was given more authority in the Office of Legal Policy with regard to the selection of nominees. The Office was ideologically driven by presidential counselor, and eventual Attorney General, Edwin Meese III, who, as we have seen, was a firm believer in the precept of original intent.[36]

Before Meese came to full power, however, the Justice Department reported to William French Smith, who believed it was time a woman was appointed to the Court. The selection of Sandra Day O'Connor proved felicitous. She was easily approved even though her ABA rating was only "qualified." When it came to selecting Supreme Court justices under Meese's direction, the going was more difficult. As we saw in the previous chapter, Meese had taken his notion of "original intent" public and in the process engaged members of the liberal wing of the Supreme Court to debate him.

This rare public exchange educated the news media, but did not engage the public. However, it was a prelude to the battle that would follow over Meese's recommendations to the President regarding appointments to the federal bench. Meese put Charles J. Cooper in charge of the Office of Legal Counsel and consulted with William Bradford Reynolds of the Justice Department when appointments became available. Reynolds had been in the Justice Department in the Nixon administration where he worked closely with Solicitor General Robert Bork. Reynolds had led the fight to roll back affirmative action programs[37]Denied a promotion by the Senate, Reynolds continued to pursue his own course. For example, he intervened in four employment discrimination cases seeking to alter consent decrees that required racial or gender quotas. In 1985, he suggested what the ideal Supreme Court justice would look like. This internal memo decried judicial activism and endorsed federalism, meaning state's rights. The memo called for "commitment to strict principles of 'nondiscrimination,'" and an end to affirmative action and racial prejudice.[38]

In 1986, when Chief Justice Burger retired to coordinate the celebration of the bicentennial of the Constitution, Reagan announced that he would nominate Rehnquist for Chief Justice and Antonin Scalia from the D.C. Circuit Court of Appeals to take Rehnquist's associate seat. Scalia was not well known, nor well published. His affable and humorous testimony before the Judiciary Committee carried the day. He won appointment unanimously on the same day that Rehnquist was moved up to Chief Justice by a divided Senate. Scalia was a textualist, who some suspected would be in favor of reversing *Roe v. Wade*, a move that would also be favored by an originalist like Rehnquist. Thus, when Reagan nominated Robert Bork on July 1, 1987 to replace the retiring Powell, a wave of lobbying overwhelmed the Capitol. As Acting Attorney General, Bork had fired Watergate prosecutor Archibald Cox when no one else would do it. As a Yale professor, he had defended strict construction and close reading of the Constitution, and attacked judicial activism. As a member of the D.C. Circuit Court of Appeals, he had put his philosophy into his rulings. The ABA divided on the Bork nomination, with the majority declaring him "well qualified," and the minority claiming he was "not qualified." In contrast, in the cases of Rehnquist and Scalia, the "well qualified" designation had been unanimous. The ABA majority report claimed that Bork's rulings had been "balanced" and "fair."[39] Bork's essays and books, however, revealed that he did not believe the Constitution should be interpreted liberally. He drew the most attention for his 1963 article in *New Republic* and his lectures that were published in the *Indiana Law Journal*. In the former, he implied that the 1964 Civil Rights Act violated the rights of white owners; in the latter, he made clear that only explicit language in the Constitution gives Congress power to act. Furthermore, he often ignored legislative intent to give legislation a literal reading, which worked against the interpretations put in place by the Warren Court in general, and *Roe v. Wade* in particular.

Since Bork was not tainted by any financial or other kinds of scandals, he would have to be attacked on ideological grounds if his nomination was to be stopped[40]There were many reasons to believe that the Bork nomination would be contained in the Senate's sphere. The Democrats had regained control of the Senate. In the wake of the Iran-Contra scandal, Howard Baker, a moderate, had become Reagan's Chief of Staff. With Reagan's popularity slipping, Baker decided that Reagan should stay in the background during this nomination process.[41] However, Baker was not the only person who had Reagan's ear nor were the Democrats eager to keep the fight in the Senate.

President Reagan included Bork's nomination as the third item in a speech to the nation in August. Reagan was responding to the fact that Democratic Senators Edward Kennedy and Joseph Biden had gone public on the nomination[42] In an appearance on *Face the Nation*, Biden, the Chair of the Judiciary Committee, had warned that if the president nominated someone like Bork, the Senate would resist because Bork had an unacceptable "predisposition" on all major issues.[43] The day after the nomination on the floor of the Senate, Kennedy played to the media by proclaiming that "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, school children could not be taught about evolution."[44] A week later, Biden claimed that the public needed to become much more active in this struggle because the administration was moving the Supreme Court back in time to the age of strict constructionism and conservative judicial activism. Kennedy and Biden made clear that an ideological litmus test would be applied to Bork, as opposed to a financial, criminal, or competency based test, and that these issues would be taken public. This combination of argumentative moves by the opposition was unique in the annals of the appointment process.

By the time Bork's nomination became official, a coalition of civil libertarian groups had coalesced to fight him. The coalition was led by Ralph Neas of the Leadership Conference on Civil Rights[45] and included Kate Michelman of the National Abortion Rights Action League, Estelle Rogers of the Federation of Women Lawyers, and many more. Michelman's press release claimed, "We're going to wage an all-out frontal assault like you've never seen before on this nomination."[46] Her rhetoric invited a conservative response. Columnist George Will, for example, launched an attack on Senator Biden "because groups were jerking his leash."[47] When Biden continued to assure civil rights groups that he would oppose the Bork nomination even the *Washington Post* faulted him: "While claiming that Judge Bork will have a full and fair hearing, Sen. Joseph Biden this week pledged to civil rights groups that he will lead the opposition to the confirmation. As the Queen of Hearts said to Alice, 'sentence first—verdict afterwards.'"[48]

To begin what ended up being 12 days of hearings, former President Ford, Republican Senators Dole and Danforth, and Congressman Hamilton Fish introduced Bork to the Senate Committee, while his family sat behind him. In his opening statement as a member of the committee, Republican Senator Alan Simpson anticipated the "high drama" of the process.[49] However, in his opening statement Bork sought to avoid controversy by dodging some issues: "I cannot, of course, commit myself as to how I might vote on any particular case and I know you would not wish me to do that."[50]Bork gave testimony or answered questions on five of the 12 days of the hearing; he retracted several of his previous statements, rationalized others, and gave rather boring discourses on case law. Biden pointed out that Bork's scholarship indicated that he would overturn *Griswold v. Connecticut*, a 1965 ruling striking down a state's prohibition on the use of contraceptives,[51] *Skinner v. Oklahoma*, a 1942 ruling that stopped involuntary sterilization of criminals, *Shelly v. Kraemer*, a 1948 ruling forbidding state courts from enforcing racially restrictive covenants, and the cases on one-person, one-vote. Bork responded that his opinions of 1971 were not his opinions in 1987. When Democratic Senator Patrick Leahy asked Bork just how far he had moved from his 1971 article, Bork's answer seemed disingenuous: "About to where the Supreme Court currently is."[52] Under further questioning from Leahy, Bork reversed his previous opposition to *Brandenburg v. Ohio*, a 1969 ruling protecting speech that did not pose "a true threat."

Humorlessly, he engaged Republican Senator Arlen Specter in a long philosophical debate on the Constitution. He claimed to have changed his mind about *Hess v. Indiana*, another free speech case. He said that he would not overturn *Roe v. Wade*, and that commercial and broadcast speech probably deserved more First Amendment protection that he had previously thought. However, Bork was dismissive of the Ninth Amendment, which reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Moderate Republican Senators were angered by his attitude on this point[53] They also felt uneasy with the number of times Bork had claimed to have changed his mind on landmark cases. They suspected what Senator Leahy would claim was a "confirmation conversion."[54]

In the hearing room and behind the scenes, administration operatives provided conservative Republican senators with material to refute the attacks of the Democrats and to help Bork re-establish his credibility. Nonetheless, Bork often failed to take advantage of soft ball questions from his supporters. Bork left Senator Orin Hatch stranded on the issue of literacy tests.[55] When Senator Gordon Humphrey encouraged Bork to comment on rulings related to crime, he dodged the question with a jaw dropping response, "I'm not an expert on criminal law."[56]

Witnesses on both sides came before the committee; many of these drew national media attention. Congresswoman Barbara Jordan and Atlanta's Mayor Andrew Young attacked Bork's opposition to such "one-man-one" vote decisions. Judge Shirley Hufstedler and constitutional expert Philip Kurland claimed Bork would undercut un-enumerated rights. Chief Justice Berger defended Bork's interpretation of the Ninth Amendment, though with some hesitation. Cabinet Member Carla Hills from the Ford Administration and Griffin Bell, Carter's Attorney General, were more helpful to Bork. Nonetheless the committee voted five to nine against the nomination. No single nomination had ever taken up so much time; even Clarence Thomas' two sets of hearings would not last as long. Bork's wife, Mary Ellen, met with Republican senators the day after the committee vote to complain about how her husband had been treated. At a meeting with White House Communications Director Tommy Griscom, Bork demanded that President Reagan give a speech to the nation backing a full Senate vote on the nomination. Griscom denied the request.[57] Three weeks later after a meeting with Reagan, Bork walked to the White House press room and challenged the Senate to hold a vote on his nomination. He claimed that his record has been distorted and he wanted the full Senate on record.

At the same time, the White House gained an advantage when press reports of plagiarism eliminated Senator Biden from the on-going Democratic presidential nomination process. President Reagan went on the offensive; eventually, he would make more than 30 public statements in support of Bork—some on national television to the viewing public.[58]This was another major turning point in the nomination process because from that moment on, presidents would make public statements supporting their nominees, a practice that was quite rare prior to Reagan.[59]

Courting the public, Bork continued to engage the press to his advantage. Tom Korologos, a Washington lobbyist with influence in Republican circles, arranged interviews and coached his client on tough questions.[60] The White House Office of Communications set up fifteen radio interviews a week to support Bork.[61]In the South many radio stations played Jesse Jackson's condemnation of Bork.[62] Griscom coordinated the newspaper opinion page efforts of administration officials resulting in at least 20 being published. The conservative Washington Legal Foundation, founded as a counter-weight to the liberal ABA, rallied support as did Secretary of Education William Bennett.

Expanding the public arena, the women's movement mobilized its largest letter writing and phone call campaign ever. Members led a "Media Task Force" dedicated to stopping the nomination. For the first time, advertisements against a Supreme Court nominee appeared on television; one was narrated by the actor Gregory Peck and paid for by television

producer Norman Lear's People for the American Way. Peck stated, "Robert Bork could have the last word on your rights as citizens, but the Senate has the last word on him. Please urge your senators to vote against the Bork nomination, because if Bork wins a seat on the Supreme Court, it will be for life—his life and yours.[63] Ralph Nader's Public Citizen Litigation Group released a detailed study of Bork's 56 most controversial rulings, ignoring over 400 others that were uncontroversial and generally had unanimous support from Bork's colleagues on the bench. The White House counted almost 300 special interest groups that opposed Bork. These groups were successful in getting the news media to turn negative on Bork's nomination in the crucial July 1st to October 9th period.[64] For example, the *Washington Post* and the *New York Times* editorialized against Bork's nomination.[65]

The public and media pressure forced the full Senate to take up the nomination. After three days of dramatic debate, six moderate Republicans voted against Bork.[66] The nomination was defeated 58 to 42 on October 23rd, 1987. The White House public relations machine and congressional liaison office could not overcome Bork's rhetorical inadequacies, change of positions on important cases, record on political issues, and the major media opinion leaders turning against him.

Bork's nomination marked a major sea change in the confirmation process. As Yalof has written, "Robert Bork's ill-fated Supreme Court bid in 1987 fundamentally changed the nature of public discourse that would surround all future Supreme Court appointments. By their persistent attacks on Bork's academic writing, Democratic senators established a precedent for challenging future nominees on strictly ideological grounds.[67] And one might add, by doing so in the public arena.

Matters went from bad to worse for the administration when Reagan nominated Douglas Ginsburg, who then confessed to smoking marijuana with his law students at Harvard. His nomination was withdrawn on November 11th, 1987. Reagan then turned to Anthony Kennedy, who was approved unanimously after a non-controversial hearing.

The Thomas Nomination

If anyone believed that Bork's adventure in the public sphere was a fluke, they were disabused of the notion when Clarence Thomas, an African-American, was nominated to the Supreme Court by President George H. W. Bush. There would be significant differences between the two events. Aside from the fact that Thomas was approved, Thomas's backers used narrative to great effect, and Thomas himself broke through media screeners to appeal to the public directly, something Bork failed to do.

To replace Thurgood Marshall, President George H. W. Bush nominated Thomas on July 1st, 1991. Born in the segregated South, and raised in Pin Point, Georgia, Thomas was a product of poverty, Catholic boarding schools, and hard work. He eventually entered and left two seminaries, as a result of being the victim of racism. After graduating from Holy Cross College with honors, Thomas attended Yale Law School. From there he went to work for moderate Republican Senator John Danforth of Missouri and changed his voter registration to Republican.

Thomas's early life provided a potent narrative that President Bush and his advisors used to influence the nomination process by taking the story to the public.[68] In fact, soon after the announcement of the nomination, Bush touted Thomas' accomplishments in a series of venues. On July 8th, 1991, Bush claimed that Thomas offered a "stirring testament to what people can do."[69] On August 6th, the President said he was "deeply moved" by Thomas' life story.[70] The President continued his unprecedented, pre-hearings campaign of persuasion in mid-August by claiming that "his personal story cannot help but move people."[71] The same strategy was used in a teleconference with the National Governors Association on August 18th, in a speech to the National Association of Towns and Townships and a speech to the nation, both on September 6th, and at a fund-raising dinner in Philadelphia on September 12th, 1991. No president prior to Bush had made so many statements in support of a nominee before his or her hearings than Bush did for Thomas. Using the Justice Department's strategy, Bush clearly sought to replace questions about ideology with the narrative of Thomas's life, which was much more accessible to the public than theoretical considerations. The press was quick to take up the same theme.[72] Thus, even before Anita Hill's charges of sexual harassment, Thomas was in the public eye. The charges would serve to widen the public forum. However, the initial round of hearings came first.

In 1981 and 1982, Thomas served as Assistant Secretary for Civil Rights in the Department of Education. Subsequently, President Reagan chose Thomas to head the Equal Employment Opportunity Commission (EEOC), which supported most affirmative action programs. While the Civil Rights Commission was critical of the Reagan administration in many areas, it singled Thomas out for praise. In fact, Thomas' EEOC was critical of the Reagan Justice Department, deciding not to file amicus briefs opposing it only after major pressure from the White House. In 1983 the EEOC resolved over seventy-four thousand complaints, compared with less than fifty-eight thousand in 1980 under Carter. Only after 1984 did Thomas openly begin to question the hiring regulations of the EEOC in particular, and the use of quotas for reparation or past abuses in general.[73]

Thomas's 16 months of non-controversial service on the D.C. Circuit Court of Appeals, his conversion on the issue of affirmative action, and his support of natural rights made him attractive to the Bush administration, particularly to White House Counsel C. Boyden Gray, who helped usher the nominee through the process. The media generally reported favorably on Thomas; however, a red flag went up when the ABA gave Thomas only a "qualified" designation, the same designation applied to O'Connor and Carswell.

During his first set of hearings, Thomas refused to speculate on how he might vote on various cases. His opening statement read, "A judge must not bring to his job, to the court, the baggage of preconceived notions, of ideology, and certainly not an agenda.[74] While his performance was not brilliant, Thomas dodged enough questions to pass muster. For example, when confronted with inconsistencies in his record, Thomas explained that it was one thing to be part of an administration and quite another to be a judge, the same rationale later used by John Roberts when nominated for Chief Justice in 2005. Thomas asked the members of the Judiciary Committee to assess him in his role as a member of the D.C. Circuit Court of Appeals. He also relied on the narrative of his upbringing to defuse criticism.[75]

Thomas was followed by three days of testimony from various witnesses opposed or favoring his nomination. Some

revealed that, unlike what he said in his statement, Thomas had indicated his displeasure with the *Roe v. Wade* decision. On September 27th, the Committee voted seven to seven on the nomination. President Bush immediately urged the public to contact their senators to support Thomas's nomination.[76] Bush also brought the Christian Coalition and the NRA on board. In response, the board of the NAACP voted against the nomination 49-1 and the National Bar Association and the National Council of Black Lawyers, both African-American groups, opposed the nomination. The battle was escalating.

Just as the Senate was about to vote on Thomas, National Public Radio broke a story: Anita Hill, an African-American former employee of Thomas at the Department of Education and a professor of law at the University of Oklahoma, claimed in testimony to the FBI that he had sexually harassed her. Due to a staff error, committee chair Biden had failed to provide the information to the other committee members.

A second round of hearings began on October 11th, 1991 in which Thomas angrily denied the charges. Then Hill repeated her reluctant FBI testimony about intimate sexual innuendos.[77] That evening, Thomas's testimony in reply drew huge television ratings.[78] An electric moment came when viewers saw Thomas accuse the panel of conducting a "high-tech lynching of an uppity black man."[79] Thomas's indignation and passionate delivery stood in marked contrast to his previous testimony. ABC's *Nightline* ran three programs on the hearings; ABC, NBC, and CBS provided live coverage of the second hearing.

Over the next 48 hours, Hill returned and new witnesses were called on the specific charge of sexual harassment. Republican senators accused Hill of lying, or of being part of a conspiracy to stop the nomination[80] Thomas returned one more time to protest how he was being treated and refused to withdraw his name.[81] Throughout the two sets of hearings over eleven days, the committee heard from 50 different interest groups, most of which opposed the nomination. After more media coverage and debate in the Senate, Thomas was confirmed on a vote of 52 to 48, the closest confirmation vote in the twentieth century. Thomas's nomination battle was won not only because of the rhetorical strategies of President Bush and his Justice Department, but also because of Thomas's own ability to manipulate the media at a live, very public hearing.[82]

Since Thomas' explosion, most Supreme Court nominations have been rather peaceful in part because the nominees were not extremists, and they proved facile at dodging tough questions. Ninety-six senators approved of Clinton's nomination of Ruth Bader Ginsburg; only three voted against. Eighty-seven senators approved his nomination of Stephen Breyer; only nine voted against. After Thomas, presidents seem to have learned that low key nominations are better than high profile ones. Presidential staffs are leery about what potential nominees have written and said. They are cautious about financial dealings, past indiscretions, and publications.[83] The result is safe nominations such as that of John Roberts, whom President George W. Bush endorsed in a public speech. The news media quickly noted that Roberts and his wife were Catholics, and that she was a leader in the anti-abortion movement. Conservative interest groups, such as Operation Rescue endorsed Roberts; liberal groups, such the National Organization of Women (NOW), labeled Roberts an extremist. Despite being opposed by Senate minority leader Reid, Roberts was endorsed by the ranking Democrat on the Judiciary Committee, Senator Patrick Leahy, which assured that the nomination would be approved. After the unsuccessful nomination of Harriett Miers, the President's lawyer, he quickly nominated Samuel A. Alito for the opening and publicly supported him with a call for an up or down vote on the nomination.[84]Senators contained the nomination within their sphere by invoking cloture on a vote of 75 to 22 and then confirming the nomination mainly along partisan lines.[85]

President Obama's nomination of Sonia Sotomayor followed the same pattern as did that of Elena Kagan.

Conclusions

In his theory, Habermas promoted a public sphere of universal assent induced by practical, rational argument. He provided a standard against which we can measure the argumentation in the public and Senate spheres; but he did not provide a theory that specifically explains what happens when the nomination process enters the public sphere. That must be left to inductive studies like the one completed in this chapter. It shows that engaging the public sphere can lead to a media circus, but it can also mean that the public has more access to information about the nominees, thereby empowering them to make better arguments in terms of Habermas' paradigm. From presidential news conferences to appearances on the *Tonight Show*, mediation of the nomination process opens it to the public. When the public sphere is engaged, there are many more venues available for the debaters involved in the controversy. Furthermore, initial attacks on the nominee by one side, whether ideological or political, engender responses by the other side that escalate the debate and often attract the attention of the public. These heated exchanges are carried on the national news and opinion programs to the public, who become further involved in the battle. However, as anyone who has been a guest on so-called interview programs can tell you, interviewers seek drama through polarization. They pit guests against one another in a way that is deleterious to the argumentative process.

Such an arena is in stark contrast to what happened after the Thomas hearings and confirmation. The Senate sphere became more closed. The Senate Judiciary Committee conducted questioning on private matters in closed executive session, locking the public out of the Ruth Bader Ginsburg and Stephen Breyer hearings. Surprisingly, prior to his theory of procedural law, Habermas' work might be read to support the Senate's approach. He questioned the value of debate that is mediated: "The public sphere in the world of letters was replaced by the pseudo-public or sham-private world of culture consumption.... The world fashioned by the mass media is a public sphere in appearance only."[86]The public sphere has been so invaded by the public media that sensible debate is marginalized and instead of becoming involved and empowered, the public has become passive consumers to whom special interests pander. Thus, senators are not actually engaging in public sphere debate; they are entering the mediated sphere of publicity to advance their position and gain support in future elections.

The shift to ideological concerns with Bork and sexual matters with Thomas created a tendency to move nomination debates into the public sphere if they are at all controversial. The result is a longer nomination process. Unless nominees, their backers, and their attackers understand how decisions are made in the public sphere, they are likely to fail to achieve their goals, particularly if they are naive about how the public arena operates.

This chapter analyzed the impact on public persuasion when the debate over court nominees is taken into the public

sphere. First, arguments in the public sphere do not provide the kind of rational completeness Habermas sought when he called for public reflection on the implication of court decisions.[87] These arguments tend to focus on social issues, the rules of the game, and the gender, the race or religion of the nominee, which is in contrast to the focus on constitutional interpretation, qualifications, ethics, and alleged wrong doing of the nominee in the Senate sphere. While the public is not engaged by explanations of the incorporation doctrine, or the precept of original intent, they are much more passionate about abortion, drug use, sexual misconduct and racism. Thus, argumentation shifts from qualifications and constitutional theory in the Senate sphere to social and political issues in the public sphere. As such, it is less likely to be "civil" in the sense that Habermas used the word for his rational democracy.[88]

Second, if nominations are delayed, opponents of the nominee have a much better chance of gathering evidence and arguments in opposition that they can use to generate public debate on the nominee. Fortas and Bork were disadvantaged by delays that occurred in their nomination process allowing public opposition to coalesce. However, because their nominations had a full debate in the public and Senate spheres, it is fair to assume that Habermas would have endorsed such delays to allow enough time in the nomination process for public argument.

Third, once the public sphere is engaged, it can be used for political advantage in a way that the Senate sphere cannot. President Johnson claimed that Fortas had been rejected on political grounds, which excited loyal Democrats; Nixon claimed that Fortas would be soft on criminals, which excited loyal Republicans. In Haynsworth's case, Nixon injected the nomination into the congressional campaign, using Johnson's strategy when he claimed that Haynsworth was rejected for political, regional, and ideological grounds. President Nixon lost his nominations of Carswell and Haynsworth but succeeded in advancing his political agenda and winning over Southern voters. Thus, Johnson and Nixon shifted the nomination process to the public sphere by including it in campaigns that focused on different issues than those that engaged the Senate. If these campaign arguments were disingenuous—and they certainly appear to be—then they violated Habermas' standards.

As a corollary, the public relations operation in the White House has expanded greatly in terms of its size and involvement in federal court nominations. There is a new emphasis on checking scholarly writing of nominees, as well as legal opinions; that move has provided a different kind of evidence for the arguments that are developed. Some writings, as in the case of Bork, may be used to argue that the nominee is out of touch, ideologically unacceptable, or theoretically flawed. Under Nixon, the public relations divisions began to do polling when a nomination got in trouble. As we have learned, interest groups now do polling to determine the best way to attack or defend a nominee. Thus, public sphere argumentation has become poll driven.

Fourth, engaging the public sphere has promoted a tit-for-tat mentality that smacks of political revenge instead of civil debate.[89] Republicans had to sacrifice Haynsworth because of what they had done to Fortas; Thomas was nominated in response to what happened to Bork. The Democrats filibustered George W. Bush's federal nominees because Republicans had filibustered Clinton nominees. Such an atmosphere does not contribute to a refined, rational, and well argued nomination process recommended by Habermas's consensual model.[90] He was particularly concerned about the disregard for integrity in civic debate, a characteristic quite common when nomination enters the public sphere in America.

Fifth, engaging the public sphere has led to an escalation in presidential involvement in the public debate over nominees. Presidents have become advocates of their nominees to an extent unheard of before the Bork nomination. They present their nominees to the public and then endorse their nominees in public speeches. They regularly engaged the media and interest groups to rally support for their candidates.

Sixth, Thomas's nomination indicates that when the public sphere is engaged, argumentation can change in at least two ways other than those mentioned above. First, narratives seem to capture the attention of the media and move the public. Second, a nominee can break through media screens by making an effective, and usually passionate, rhetorical appeal. Neither of these tactics is likely to move members of the Senate sphere. And these tactics appear to be outside the realm of what Habermas recognized as the normative sphere of rational argumentation.

Seventh, the argumentative roles that senators play during the hearings often define how or why they engage the public. Watson and Stookey identified at least four roles that senators perform: evaluator, validator, partisan, and advocate.[91] Senators will shift roles and even combine them depending on partisan and ideological variables. An Orrin Hatch will try to validate the nomination of a Robert Bork, while at times playing his advocate. However, that same senator might become an evaluator of a Ruth Bader Ginsburg. The senator's adopted role shapes the argumentation the senator uses in public forums. Senator Arlen Specter's prosecutorial role in his questioning of Anita Hill on live television nearly resulted in his defeat at the polls because Pennsylvania viewers were incensed at the aggressive nature of his questions.[92]

As Ronald Reagan once opined, the selection of nominees to the Supreme Court has become a partisan, and often ideological, struggle.[93] The president has at his disposal several loci of argumentation to win the day. These include the White House Congressional Liaison Office and Communication Center, the Justice Department (particularly the Office of Legal Counsel), interest groups, and the party's national political committees. All of these can act in concert through various ad hoc groups to pressure the Senate to confirm a nominee. They also clash with opposing interest groups and the opposing party's apparatus.

Because the number of players has grown and because the media focuses on it, the nomination process has become increasingly public. Thus, when a nominee is chosen, the screening process is crucial not only because it can generate evidence and arguments in favor of the nominee but also because it can discover an Achilles' heel. If the results of the screening are favorable, the White House liaison office then must decide how to use the arguments in favor of the nominee. At first, such arguments are directed at members of the Senate Judiciary Committee, and then to the whole Senate. However, should the nomination run into trouble, the appeals may be expanded beyond normative Senate argumentation and to the public sphere. The liaison office may also expand the involvement of the administration to the Justice Department and the political wing of the White House.

The same pattern with some modification is true of the opposition. Initially, those groups opposing the nomination, usually special interest groups, focus their attention and testimony on the senators on the Judiciary Committee. If

these groups are successful, they need not expand the scope of the controversy. However, should they fail, they then expand the scope first to the Senate at large and then to the public having nowhere else to turn.

The role the U.S. Supreme Court played in the selection of the president in 2000 increased the stakes in the nomination process because those who sit on the Court were seen by many to have chosen the president. For that reason, nomination to the Supreme Court will continue to engage the attention and scrutiny of the media and the public.[94]Unless nominees are carefully screened, they are likely to face intensive media campaigns for and against them in a mediated public sphere.

Endnotes

[1]. See Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, "Ideological Drift Among Supreme Court Justices: Who, When, and How Important?" *Northwestern University Law Review*, 101 (2007): 1483-1497.

[2]. See Jürgen Habermas, "Paradigms of Law," in *Habermas on Law and Democracy: Critical Exchanges*, eds. Michel Rosenfeld and Andrew Arato (Berkeley: University of California Press, 1998). Habermas writes, "an economic society institutionalized in the form of private law (above all through property rights and contractual freedom) was separated from the sphere of the common good and the state," 14.

[3]. Habermas, "Paradigms of Law," 18.

[4]. Habermas has admitted that this model of the "public sphere" in his early work tended to exclude minorities and other marginalized groups. See his "Further Reflections on the Public Sphere," in *Habermas and the Public Sphere*, Craig Calhoun, ed. (Cambridge, MA: MIT Press, 1992), p. 466–68

[5]. Jürgen Habermas, *The Theory of Communicative Action*, vol. 1, trans. T. McCarthy (Boston: Beacon Press, 1984), pp. 17–18.

[6]. Jürgen Habermas, "Toward a Theory of Communicative Competence," *Inquiry*, 13 (1970): 367

[7]. Jürgen Habermas, "Citizenship and National Identity: Some Reflections on the Future of Europe," *Praxis International* 12 (1992): 7.

[8]. Trans, William Regh (Cambridge, MA: MIT Press, 1996) 370.

[9]. *Between Facts and Norms*, 381.

[10]. See Michael J. Gerhardt, *The Federal Appointments Process: A Constitutional and Historical Analysis* (2000). Theodore Y. Blumoff, "Separation of Powers and the Origins of the Appointments Clause," *Syracuse Law Review*, 37 (1987): 1037; James E. Gauch, "The Intended Role of the Senate in Supreme Court Appointments," *University of Chicago Law Review*, 56 (1989): 337; Matthew D. Marcotte, "Advice and Consent: A Historical Argument for Substantive Senatorial Involvement in Judicial Nominations," *New York University Journal of Legislation and Public Policy*, 5 (2001-2002): 519-562.

[11]. Letter from Thomas Jefferson to William T. Berry (July 2, 1822) in *The Writing of Thomas Jefferson*, Vol. 7 (H.A. Washington edition, 1859), 256.

[12]. *Edmunds v. U.S.* 520 U.S. 651, 659-60 (1997).

[13]. Some have argued that Goldberg transferred because his decisions were badly written and poorly reasoned. See L. Marvin Overby, Beth M. Henschen, Julie Strauss, and Michael H. Walsh, "African-American Constituents and Supreme Court Nominees: An Examination of the Senate Confirmation of Thurgood Marshall," *Political Research Quarterly* 47 (1994): 839-41.

[14]. David Alistair Yalof, *Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees* (Chicago: U. of Chicago Press, 1999), 83.

[15]. It is important to note that Dwight Eisenhower's nominees were approved easily and seemed bi-partisan. They included Earl Warren, John Harlan, William Brennan, and Potter Stewart. Eisenhower is said to have later regretted the appointment of Warren, the former conservative Republican governor of California, who became a liberal activist on the Court. Harlan remained true to his strict constructionist roots by opposing Warren's agenda. Brennan supported it fully, and Stewart was ambiguous about it.

[16]. For a full account see, Linda S. Greene, "The Confirmation of Thurgood Marshall to the Supreme Court," *The Harvard Blackletter Journal* 6 (1989): 27-50.

[17]. Strom Thurmond led the filibuster that delayed the appointment for a year.

[18]. Trevor Parry-Giles, "Character, the Constitution, and the Ideological Embodiment of 'Civil Rights' in the 1967 Nomination of Thurgood Marshall to the Supreme Court," *Quarterly Journal of Speech*, 82 (1996): 364-82.

[19]. Parry-Giles, "Character, the Constitution ... ," 371-374. See also Stephen L. Carter, *The Confirmation Mess: Cleaning up the Federal Appointments Process* (New York: Basic Books, 1994), 6-12.

[20]. Richard M. Nixon, "Acceptance of the Republican Nomination," *Vital Speeches of the Day*, XXXIV (1968): 674-78.

[21]. The conflict of interest was very small. Though Haynsworth had resigned as a director of Vend-A-Matic, he voted in a case for a company that held 3% of Vend-A-Matic's stock.

[22]. John Anthony Maltese, *The Selling of Supreme Court Nominees* (Baltimore: John Hopkins U. Press, 1995), 74.

[23]. Yalof, *Pursuit of Justice*, 108.

[24]. Maltese, *The Selling*, p. 75.

[25]. *Public Papers of the Presidents of the U.S.: Richard Nixon*, (Washington, D.C., 1969) 815, 818; Richard Nixon, *The Memoirs of Richard Nixon* (New York: Grosset & Dunlap, 1978) 420-21. It is interesting to note that there were few hearings concerning Supreme Court nominations before the controversy surrounding Brandeis. But it was the 1937 nomination of Hugo Black that led to the institution of regular hearings.

[26]. Maltese, *The Selling*, 75.

[27]. Maltese, *The Selling*, 79.

[28]. H. R. Haldeman, *The Haldeman Diaries: Inside the Nixon White House* (New York: Putnam's, 1994), 95.

[29]. Yalof, *Pursuit of Justice*, 109.

[30]. Maltese, *The Selling*, 132. The group drafted Senators Dole and Baker, and included Charles Colson, Herb Klein, Jeb Magruder, Bryce Harlow, William Rehnquist and John Dean.

[31]. Maltese, *The Selling*, 134.

[32]. Nixon, *The Memoirs*, 422.

[33]. Nixon, *The Memoirs*, 422.

[34]. For example, in reaction to the way southern nominees had been treated, President Jimmy Carter created the Circuit Court Nominating Commission by executive order. He encouraged the states to follow suit, which about half did. The Commission would pre-screen nominees before they came to the U.S. Senate for approval. President Ronald Reagan abolished the Commission and substituted his own President's Committee on Federal Judicial Selection, which was retained by Bush, but abolished by Clinton, who turned the authority over to Office of Policy Development in the Justice Department.

[35]. David G. Savage, "Vacancy Rate on Federal Bench is at a 13-Year Low," *Los Angeles Times* (November 6, 2003): A14.

[36]. Ethan Bronner, *Battle for Justice: How the Bork Nomination Shook America* (New York: W.W. Norton, 1989), 42.

[37]. When William Bradford Reynolds was nominated for Associate Attorney General, he was savaged by civil rights leaders. Benjamin Hooks, Executive Director of the NAACP, claimed Reynolds was trying to turn back two decades of progress on civil rights. Bronner, *Battle for Justice*, 48. Reynolds' condemnation of busing and racial quotas led to the defeat of the nomination. It also foreshadowed Bork's troubles because the same moderate Republican senators who made the difference with Reynolds would make the difference in the case of Bork.

[38]. As printed in Yalof, *Pursuit of Justice*, 143.

[39]. Harold Tyler to Senator Joseph Biden, September 21, 1987 in U.S. Senate, Committee on the Judiciary, *The Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States*, 100the Congress, 1st Session, (Washington, Government Printing Office, October, 1987), 1232.

[40]. See Mary Katherine Boyte, "The Supreme Court Confirmation Process in Crisis: Is the System Defective, or Merely the Participants," *Whittier Law Review* 14 (1993): 517-47; Frank Guliuzza III, Daniel J. Reagan, and David M. Barrett, "Character, Competency, and Constitutionalism: Did the Bork Nomination Represent a Fundamental Shift in Confirmation Criteria?" *Marquette Law Review* 75 (1992): 409-37; Mark Silverstein, *Judicious Choices: The New Politics of Supreme Court Confirmations* (New York: Norton, 1994).

[41]. Mark Gitenstein, *Matters of Principle: An Insiders Account of America's Rejection of Robert Bork's Nomination to the Supreme Court* (New York: Simon & Schuster, 1992),11. Gitenstein was the chief counsel for the Democrat controlled Senate Judiciary Committee.

[42]. Bronner (50) claims there were 180 groups in the coalition opposed Bork.

[43]. Gitenstein, *Matters of Principle*, 30.

[44]. Bronner, *Battle for Justice*, 98.

[45]. In 2004, Neas became the head of Norman Lear's People for the American Way, which also fought the Bork the nomination. As we shall see, Neas was among the first in 2005 to oppose President Bush's re-nomination of candidates to the federal bench who had been stopped earlier by Democratic filibusters in the Senate.

[46]. Gitenstein, *Matters of Principle*, p. 57.

[47]. Gitenstein, *Matters of Principle*, p. 58.

[48]. Gitenstein, *Matters of Principle*, p. 64.

[49]. Gitenstein, *Matters of Principle*, p. 222.

[50]. *Nomination of Judge Robert H. Bork*, 105.

[51]. Bork had been critical of Justice William O. Douglas' use of "penumbras" of the Constitution in which the right to privacy "emanated."

[52]. Gitenstein, *Matters of Principle*, 232.

[53]. The present author served as the Director of Senate Services for the Republican Conference of the U.S. Senate from 1979 to 1980, and was a consultant to several Republican senators and Vice President Bush during the Bork nomination. He witnessed the frustration of Republican senators with the Bork nomination.

[54]. There is strong evidence that they were right, especially when, in 1990, Bork claimed that the "only" legitimate way to read the Constitution was in the context of its original meaning. See Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (1990) 143.

[55]. Bronner, *Battle for Justice*, 234.

[56]. Bronner, *Battle for Justice*, 234.

[57]. Gitenstein, *Matters of Principle*, 12.

[58]. By comparison, Reagan only made 2 public statements for Sandra Day O'Connor, five for Scalia, four for Rehnquist, three for Douglas Ginsburg, and none for Kennedy. Maltese, *The Selling*, 88, 114-15.

[59]. Maltese, *The Selling*, 114. Certainly, Franklin Roosevelt had challenged the Supreme Court in 1937, when he tried to add members to it. But that fight was about the direction of the Court, not a single nominee. Roosevelt fought for his nominees behind the scenes. Andrew Jackson was more public about his desire to place Roger Taney on the Court, especially after his first nomination was blocked by the Whigs.

[60]. Korologos had been close to Senator Howard Baker and had worked in the Nixon and Ford White Houses as a congressional liaison officer.

[61]. Maltese, *The Selling*, 130.

[62]. Bronner, *Battle for Justice*, 146.

[63]. Bronner, *Battle for Justice*, 155.

[64]. Bronner, *Battle for Justice*, 151.

[65]. Ironically, the *Post* admitted that Bork had suffered a "lynching" by special interest groups. (Bronner, 312). One can only speculate as to whether this language inspired Clarence Thomas complaint of suffering a "high tech lynching" during his hearings. (See below).

[66]. Each of the six was heavily lobbied by women's groups and each had received campaign contributions from them. However, some had also received contributions from the NRA.

[67]. Yalof, *Pursuit of Justice*, 189. See also, Norman Vieira and Leonard E. Gross, "The Appointments Clause: Judge Bork and the Role of Ideology in Judicial Confirmations," *Journal of Legal History* 11 (1990): 311-52; Albert P. Melone, "The Senate's Confirmation Role in Supreme Court Nominations and the Politics of Ideology Versus Impartiality," *Judicature* 75 (1991): 68-79. The point here is not that previous justices had been subjected to ideological scrutiny. Certainly presidents from Adams and Jefferson regularly populated the court with justices who reflected their own ideology. The point is that an attack on the ideology of the candidate had not been used in the public sphere in any significant way before Bork.

[68]. Jane Mayer and Jill Abramson point out that the Justice Department sought to "bury ideology and sell biography" using the "Pin Point story." *Strange Justice: The Selling of Clarence Thomas* (Boston: Houghton Mifflin, 1994), 30.

[69]. "Remarks Announcing the New American Schools Development Corporation Board, July 8, 1991," *Public Papers of the Presidents of the United States: George Bush, 1991*, Book II (Washington: Government Printing Office, 1992): 830.

[70]. "Remarks at the Annual Convention of the National Fraternal Order of Police in Pittsburgh, Pennsylvania, August 14, 1991," *Public Papers of the Presidents of the United States: George Bush, 1991*, Book II (Washington: Government Printing Office, 1992): 1041.

[71]. "Remarks at a Kickoff Ceremony for the Eighth Annual National Night Out Against Crime in Arlington, Virginia, August 6, 1991," *Public Papers of the Presidents of the United States: George Bush, 1991*, Book II (Washington: Government Printing Office, 1992): 1119.

[72]. Trevor Parry-Giles, "Celebritized Justice, Civil Rights, and the Clarence Thomas Nomination," in *The White House and Civil Rights Policy*, ed. James Aune (College Station, TX: Texas A&M University Press, 2004.)

[73]. Trevor Parry-Giles, "Celebritized Justice..."

[74]. *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the Committee on the Judiciary, United States Senate*, 102nd Congress, 1st Session, pt. 1 October 10-15,(Washington, D.C., Government Printing Office, October, 1991), 110.

[75]. See Nancy Fraser, "Sex, Lies and the Public Sphere: Some Reflections on the Confirmation of Clarence Thomas," *Critical Inquiry* 18 (1992): 595-612.

[76]. Presidential remarks, Kickoff Ceremony for the Eighth Annual National Night Out Against Crime, August 6, 1991, in *Weekly Compilation of Presidential Documents* (1991): 1119.

[77]. Her argument was that references to pornographic videos, pubic hair and the like were tantamount to sexual harassment.

[78]. Maltese, *The Selling*, 93.

[79]. *Nomination of Judge Clarence Thomas*, 157-8. Like Hugo Black's radio address of 1937 when he was in trouble for his past association with the KKK, Thomas' outburst broke through the mediating screen of news

reporters and commentators. Earlier, Thomas had previewed this strategy when he said, "I have been able ... to defy poverty, avoid prison, overcome segregation, bigotry, racism, and obtain one of the finest educations available in this country. But I have not been able to overcome this process.... I will not provide the rope for my own lynching..." *Nomination of Judge Clarence Thomas*, 8-10.

[80]. Vanessa Bowles Beasley, "The Logic of Power in the Hill-Thomas Hearings: A Rhetorical Analysis," *Political Communication* 11 (1994): 287-97.

[81]. For a full analysis see, "William L. Benoit and Dawn M. Nill, "A Critical Analysis of Judge Clarence Thomas' Statement Before the Senate Judiciary Committee," *Communication Studies* 49 (1998): 179-95; Michael J. Gerhardt, "Divided Justice: A Commentary on the Nomination and Confirmation of Justice Thomas," *George Washington Law Review*, 60 (1992): 969-96.

[82]. See Joseph Faria and David Markey, "Supreme Court Appointments After the Thomas Nomination: Reforming the Confirmation Process," *Journal of Legal Commentary* 7 (1991): 389-416; John Massaro, "President Bush's Management of the Thomas Nomination," *Presidential Studies Quarterly* 26 (1996): 816-27.

[83]. See Susan Low Bloch and Thomas G. Krattenmaker, *Supreme Court Politics: The Institution and Its Procedures* (Minneapolis: West Law, 1994); Henry J. Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court*, 4th ed., (New York: Oxford U. Press, 1999).

[84]. See, for example, the president's national Saturday radio address of January 28, 2006.

[85]. Alito most controversial decision came in *Planned Parenthood v. Casey* (1991) in which Alito voted to uphold a section of a Pennsylvania law requiring that the father of the fetus be notified about the intention to have it aborted. He voted with the majority in all other cases in which they voted to strike down provisions of the law. In a 5-4 ruling in 1992, with O'Conner in the majority, the Supreme Court overturned the entire law including the provision that Alito had supported. This decision was a major re-affirmation of *Roe v. Wade*. In his first ruling on the Court, Alito broke with the most conservative justices, Rehnquist, Thomas, and Scalia, and supported a stay of execution in a Florida case.

[86]. Jürgen Habermas, *The Structural Transformation of the Public Sphere* (Cambridge, MA: MIT Press, 1999),160, 171.

[87]. See Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, 440-41. In this section, Habermas calls for public hearings to monitor administrative decisions.

[88]. Habermas, *Between Facts and Norms*, 370ff.

[89]. Brent Wible, argues that "filibustering judicial nominees has proven a problematic, polarizing tactic that entrenches partisanship in the appointment process." "Filibuster vs. Supermajority Rule: From Polarization to a Consensus—And Moderation—Forcing Mechanism for Judicial Confirmations," *William and Mary Bill of Rights Journal* 13 (2005): 937.

[90]. Jürgen Habermas, "Struggles for Recognition in Constitutional States," *European Journal of Philosophy* 1 (1993): 128.

[91]. George L. Watson and John A. Stookey, *Shaping America: The Politics of Supreme Court Appointments* (New York: Harper Collins, 1995), 149-155.

[92]. S. Ashley Armstrong, "Arlen Specter and the Construction of Adversarial Discourse: Selective Representation in the Clarence Thomas-Anita Hill Hearings," *Argumentation & Advocacy*, 32 (1995): 75-89; Donald Grier Stephenson, Jr., *Campaigns & the Court: The U.S. Supreme Court in Presidential Elections* (New York: Columbia U. Press, 1999), 214-17.

[93]. PBS, *MacNeil/Lehrer NewsHour*, October 1, 1987.

[94]. Theodore Prosise and Craig R. Smith, "The Supreme Court's Ruling in Bush v. Gore: A Rhetoric of Inconsistency," *Rhetoric and Public Affairs*, 4 (2001): 605-632.

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