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Legal Scholarship Spotlight: The Evolution of Supreme Court Confirmation Hearings

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Legal scholarship highlight: The evolution of Supreme Court confirmation hearings

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The Senate Judiciary Committee hearings on Supreme Court nominations have become an important and highly visible part of the confirmation process. We have become accustomed to watching the senators and nominees participate in an exchange of ideas about the role of the Court and the Constitution in American life. Over the years, these exchanges – done under oath and in full public view – have become an important forum for democratic engagement with constitutional decision-making.

This type of engagement is essential to our system of self-government. Relatively few constitutional provisions are self-defining: text, precedent, and tradition often fail to generate single determinative answers to complex constitutional questions. In such cases, Supreme Court Justices necessarily make hard choices about constitutional meaning. Public engagement with the confirmation process is an important way in which our system ensures that those choices do not stray too far from the constitutional understandings of the American people.

The Supreme Court confirmation process has not always played this role. In a recent article in *Law & Social Inquiry* and our book, *Supreme Court Confirmation Hearings and Constitutional Change*, we document how its status as a forum for democratic engagement grew slowly, over the course of many decades. The Senate Judiciary Committee was established as a standing committee in 1816, and the Senate did not begin automatically referring Supreme Court nominations to the Committee until 1868. The first confirmation hearings for a nominee occurred in 1873. Those hearings, unlike the ones we are accustomed to today, were closed to the public and limited to the specific question of whether the nominee at issue – George Williams – had misappropriated governmental funds (apparently he had: his nomination was subsequently withdrawn). But it was the first important step in the democratization of the confirmation process.

The Committee's next step was more significant. In January 1916, President Woodrow Wilson nominated Louis Brandeis to sit on the high Court. Brandeis was a controversial nominee. He was a zealous advocate for labor and equalitarian causes – the press called him "The People's Lawyer." He also was an architect, through what would come to be called the Brandeis Brief, of a mode of constitutional argument that drew judicial attention to the social facts underlying abstract legal arguments. Brandeis was opposed by a host of well-heeled interests, including much of the organized bar and former President William Howard Taft.

The confirmation process took more than four months. Transcripts of the hearings fill three volumes of *The Supreme Court of the United States: Hearings and Reports on Successful and Unsuccessful Nominations of Supreme Court Justices by the Senate Judiciary Committee, 1916-1975* compilation. As expected, the hearings were vitriolic. Brandeis's progressive constitutional vision was debated in full public view, with testimony taken from dozens of witnesses. The American people heard the arguments for and against the nomination, and their representatives responded. The Judiciary Committee reported out the nomination on a vote of ten to eight, and the full Senate confirmed Brandeis by a vote of forty-seven to twenty-two.

Open hearings continued in fits and starts for the next two decades. Then, in 1939, President Franklin Delano Roosevelt nominated Felix Frankfurter to fill the seat vacated by the death of Justice Benjamin Cardozo. Roosevelt, like Wilson, knew his nomination would be controversial. Anti-Semitism and anti-immigrant sentiment were both running rampant in pre-war America, and Frankfurter was a Jewish immigrant who came to America, unable to speak English, when he was twelve years old. Frankfurter also was a founding member of the American Civil Liberties Union and an avid supporter of Roosevelt's New Deal agenda. While his legal capacities were not questioned, opponents contested his commitment to what they saw as important constitutional norms.

Confronted with this opposition, Frankfurter would become the first Supreme Court nominee to take unrestricted questions, under oath, in a fully public hearing. He did so on the advice of the Roosevelt administration, to answer the charges of disloyalty being made against him in the hearing room. But the Senate Judiciary Committee had its own reasons for opening up the hearing process. Two years earlier the Senate had confirmed one of its own members, Hugo Black, without holding public hearings. When Black was shortly thereafter revealed to have acquired and apparently never surrendered a life-time membership in the Ku Klux Klan, the public was outraged at the secretive process the Senate had used when considering the nomination. There were accusations that the Senate had rushed through the appointment in order to cover up the affiliation. The journalist who broke the story won

a Pulitzer Prize, and Black was forced to give a radio address dealing with the issue before he took his seat.

In the wake of this debacle, the American Bar Association passed a resolution petitioning the Senate to commit to holding public hearings on future judicial nominations. When Frankfurter was nominated two years later, the Senate complied. Public hearings were immediately scheduled, and Committee members opened their hearing comments by extolling the importance of citizen engagement with the confirmation process.

An empowered and expanding American electorate also was generating more direct pressure for an opening up of the process. Direct election of senators, the enfranchisement of women, and the emergent civil rights movement all contributed to the need to create a process that was more publically accessible and accountable. By 1955, the transformation of the process was complete: open hearings and nominee testimony were fully embraced as an essential part of the confirmation process. Every nominee since that date, excepting only those who were withdrawn by the president, has received a hearing.

As we explain in our article and book, the content of the hearings has changed over the years as well as the process. Despite appearances to the contrary, the hearings have become more substantive. Nominees today are asked relatively fewer questions about their own personal histories and more about their positions on the important constitutional issues of the day. So instead of talking about Byron "Whizzer" White's prowess on the football field, today's nominees are asked about their preferred methods of constitutional interpretation, their commitment to precedent, and their view of the judicial role in a system of democratic government. In answering these more substantive questions, nominees today also are at least as forthcoming as were their predecessors: two independent studies have found no notable decrease in nominee candor over time.

Not surprisingly, the topics discussed at the hearings also shift in response to contemporary events. Frankfurter's hearing in 1939 focused on communism, internationalism, and free speech. After *Brown v. Board of Education*, the focus shifted to concerns about racial segregation, voting rights, and affirmative action. The 1970s and 80s ushered in conversations about gender discrimination and reproductive rights, while today's hearings give voice to concerns about marriage equality, federal power, and gun rights.

While many nominees avoid taking specific stands on the most controversial of these issues, the senators' questions nonetheless elicit genuine and important constitutional commentary from the nominees. One of the most significant things that happens at the hearings is that the nominees and senators engage in a colloquy about which constitutional decisions are – and are not – settled law. This has been manifested most recently in confirmation hearings discourse about "super precedents" – cases the nominee is asked to commit to as correctly decided. Thus, while nominees tend to avoid making specific commitments on hotly contested cases such as *Roe v. Wade*, they routinely accept, in public and under oath, the constitutional correctness of previously controversial cases such as *Griswold v. Connecticut* and *Brown v. Board of Education*. This affirmation of prior decisions, when it occurs over time and across multiple confirmations, provides a type of democratic validity to the Court's constitutional choices, ensuring that they continue to reflect our core constitutional commitments.

Seen in this light, it is clear that the confirmation hearing process has evolved over time into a unique and important format for democratic engagement with constitutional decision-making. This evolution has not been the result of a single event, but has been driven by the ongoing need of senators to legitimate their actions in this area to an increasingly engaged and diverse electorate. This process of institutional evolution and change is typical of complex organizations, and we expect it will continue as the president, Senate and the Court work through the ongoing challenge of mapping our centuries old Constitution onto the needs and expectations of today's Americans.

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