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What Two Legal Scholars Learned From Studying 70 Years of Supreme Court Confirmation Hearings

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THE CONVERSATION

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Elena Kagan takes the hot seat for what she called a “vapid and hollow charade” in 2010.
REUTERS/Jason Reed

Joe Biden called them a “kabuki dance.” Elena Kagan called them a “vapid and hollow charade.”

So Supreme Court confirmation hearings are worthless, right?

Wrong.

Our research moves beyond the conventional wisdom espoused by Biden, Kagan and others, and presents a strong case for an alternative view of the hearings. Examining every

statement made at confirmation hearings from 1939 to 2010, we conclude the hearings are important to the health of American democracy. Based on this, we'd like to see partisan politics pushed aside and Judge Merrick Garland to get a hearing.

The current debate

Within hours after the death of Justice Antonin Scalia, Senate Majority Leader Mitch McConnell made clear his intention to preemptively block President Obama's then-unnamed nominee. Republicans on the Senate Judiciary Committee soon followed suit, indicating that the president's nominee would not even get a confirmation hearing.

Their logic is simple. They believe that it is important for the American people to have a voice in the selection of the next Supreme Court justice. And, according to them, the best way to hear this voice is through the 2016 presidential election. Their behavior is also motivated by a broader desire to block the president's attempt to move the court in the liberal direction. Though Garland is perceived as being politically moderate, his confirmation would alter the ideological balance of the Supreme Court since he is ideologically to the left of Scalia.

Democrats argue that the American people have already spoken. Their voice was expressed in 2012 by electing President Obama to a second term.

Despite the rancor, there is common ground here. Members of both political parties believe that "We the People" deserve a say in the selection of the next justice. Where the parties disagree is when that voice should be heard.

Here's a fresh idea: the voice of the American people can be heard through confirmation hearings themselves. History shows that senators taking part in hearings have spoken for the American people for decades.

Why confirmation hearings matter

In our book, *Supreme Court Confirmation Hearings and Constitutional Change,* we show that the traditional story about confirmation hearings is wrongheaded. Investigating more than 70 years of hearing transcripts related to 32 nominees, we realized four important truths about the confirmation process.

Nominees are forthcoming. Perhaps the most common myth is that nominees say nothing of value, dodging the senators' questions. There is little evidence to support this claim. We find that nominees are outright evasive less than five percent of the time. When they do refuse to answer senators' questions, those questions tend to reflect controversial issues in which the the American public has deeply divided opinions, such as abortion rights. Most of the time, nominees are quite forthcoming, providing substantive answers to the senators' questions. In recent years, this means taking firm positions on topics ranging from racial discrimination to the right to keep and bear arms.

Senators are good surrogates. The transcripts show senators do a good job reflecting the will of the American people in the questions they ask. For example, when women's rights became an important political issue in the 1970s, senators began to grill nominees on their positions on this topic.

This included requiring that nominees like Anthony Kennedy, David Souter and Clarence Thomas take a firm position on the unacceptability of gender-based discrimination.

U.S. Supreme Court Justice Clarence Thomas. REUTERS/Mannie Garcia

Views of the Constitution. We show that senators from both parties have a shared understanding about what the Constitution means at a given moment in time, and that this understanding comes from the American people. Some hearings, like those held on the Bork nomination in 1987, starkly reveal that a new constitutional consensus has arisen. Among other issues, this hearing demonstrated that senators from both political parties expected nominees to affirm a constitutional right to privacy, agree that the First Amendment protects nonpolitical speech like artistic expression, hold allegations of gender discrimination to heightened scrutiny and endorse the wisdom of key precedents involving voting rights and racial discrimination. When Bork refused to agree to this consensus, he was rejected. More commonly, the hearings make incremental but steady progress toward determining just what our core constitutional commitments are.

Significantly, this constitutional understanding changes from generation to generation, reflecting the will of the modern American public. Nominees must adhere to the core, shared, constitutional understandings of their era if they expect to be confirmed.

Consider Brown v. Board of Education, decided in 1954. The contemporary tradition of holding confirmation hearings in which nominees take unrestricted questions from members of the Senate Judiciary Committee began only a year later. The core of Brown – that racial discrimination in the public sector is unconstitutional – was deeply controversial when the case was decided. In fact, it wasn't until the 1980s that Americans demanded acceptance of Brown as a condition of serving on our highest court. This was first shown at William Rehnquist's chief justice hearing in 1986, during which senators from both parties repeatedly required Rehnquist to endorse Brown. By that time, the huge majority of the American public – Democrat and Republican – agreed that disadvantaging people because of the color of their skin was constitutionally unacceptable.

A more recent example involves the Second Amendment. In 2008, more than 70 percent of Americans believed in an individual right to own a firearm. Prior to this date, discussion of the Second Amendment at the confirmation hearings was virtually absent. Yet, when Sonia Sotomayor appeared before the Judiciary Committee a year later, more than 10 percent of her hearing involved her opinions on the Second Amendment. Senators from both parties questioned her closely about the Court's then-recent decision in District of Columbia v. Heller, asking whether she agreed with the majority of Americans on gun rights. She affirmed that she did, and she currently sits on the Supreme Court.

Our findings reveal these larger truths, plus one more.

We show that confirmation hearings give the American people – all of us – a much-needed opportunity to talk about our Constitution and hear whether potential Supreme Court justices agree with our core beliefs about what it stands for. If the nominees turn out to hold views outside of our shared understanding, they should not be confirmed. If we deem their constitutional views acceptable, however, they deserve serious consideration for the high court.

In our system, the confirmation hearings are the place where constitutionalism meets democratic self-government. That is why it is in the best interest of American democracy to hear what Judge Garland has to say.