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CONFIRMATION BIAS

PATRICK BARRY*

ABSTRACT

Supreme Court confirmation hearings are vapid. Supreme Court confirmation hearings are pointless. Supreme Court confirmation hearings are harmful to a citizenry already cynical about government. Sentiments like these have been around for decades and are bound to resurface each time a new nomination is made. This essay, however, takes a different view. It argues that Supreme Court confirmation hearings are a valuable form of cultural expression, one that provides a unique record of, as the theater critic Martin Esslin might say, a nation thinking about itself in public.

The theatre is a place where a nation thinks in public in front of itself.
—Martin Esslin¹

The Supreme Court confirmation process—once a largely behind-the-scenes affair—has lately moved front-and-center onto the public stage.
—Laurence H. Tribe²

INTRODUCTION

That Supreme Court confirmation hearings are televised unsettles some legal commentators. Constitutional law scholar Geoffrey Stone, for example, worries that publicly performed hearings encourage grandstanding; knowing their constituents will be watching, senators unhelpfully repeat questions they think the nominee will try to evade—the goal being to make the nominee look bad and themselves look good.³ Stone even suggests the country might be

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1. MARTIN ESSLIN, *AN ANATOMY OF DRAMA* 101 (1977).

2. Laurence H. Tribe, *Foreword* to PAUL SIMON, *ADVICE AND CONSENT: CLARENCE THOMAS, ROBERT BORK AND THE INTRIGUING HISTORY OF THE SUPREME COURT'S NOMINATION BATTLES* 13 (1992).

3. Geoffrey R. Stone, *Understanding Supreme Court Confirmations*, 2010 S. CT. REV. 381, 439 (2011) (“Because Supreme Court confirmations now attract enormous media

better off doing away with the hearings completely. “We did not even have hearings until 1955,” he notes. “They are not indispensable.”⁴

Benjamin Wittes of the Brookings Institute agrees. In *Confirmation Wars: Preserving Independent Courts in Angry Times*, Wittes argues that Supreme Court confirmation hearings “almost inevitably prove an embarrassing spectacle that yields minimal information.”⁵ And although doing away with them would “by no means eliminate nasty nomination fights,” it would, in Wittes’s view, “let a good deal of air out of the balloon—eliminating that one extended, nationally televised moment at which senators publicly name the price of their votes.”⁶ For this reason, Wittes proposes the Senate limit the confirmation hearings to a vote based on the nominee’s record and the testimony of others.⁷ The nominee’s presence is unnecessary.

This kind of proposal goes too far according to Christopher Eisgruber, the author of *The Next Justice: Repairing the Supreme Court Appointments Process*. “It is hard to believe,” he suggests, “that Americans today would be satisfied with a process in which Supreme Court nominees were confirmed or rejected without first being questioned about their views.”⁸ Yet Eisgruber nevertheless agrees with Wittes’s core point: the hearings “have degenerated into embarrassing spectacles.”⁹ And so does Justice Elena Kagan, or at least she did in 1995 when, still a law professor, she wrote that confirmation hearings have become a “vapid and hollow charade” that “serve little educative function, except perhaps to reinforce lessons of cynicism that citizens often glean from government.”¹⁰

My own view is at once less pessimistic and more pedagogical. This essay argues that Supreme Court confirmation hearings are a valuable form of cultural activity, one that should be taught and studied as plays are often

attention, they increasingly afford senators ‘an attractive opportunity’ to perform for their constituents. The result is that nominees now repeatedly confront the same ‘tough’ questions from a succession of senators, and unresponsive answers therefore must be repeated over and over again.”)

4. *Id.* at 465.

5. BENJAMIN WITTES, *CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES* 13 (2009).

6. *Id.* at 13.

7. *Id.* at 123–124.

8. CHRISTOPHER L. EISGRUBER, *THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS* 164–65 (2007).

9. *Id.* at 164.

10. Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919, 941 (1995) (reviewing STEPHEN L. CARTER, *THE CONFIRMATION MESS* (1994)).

taught and studied: as a record of, to return to Martin Esslin's phrase from the epigraph, "a nation thinking about itself in public."¹¹

I. DIALOGUES THAT DIVIDE COMMUNITIES

The specialness of this record comes from its form. Unlike a statute, judicial opinion, or anything written, a confirmation hearing is a series of ordered exchanges performed by real people in real time in front of an audience. Each Senator wears the costume of formal business attire. Each is also positioned behind a dais and arranged purposefully in relation to both one another and the nominee. Lights beam down. Spectators look on. The whole thing is quite deliberately "staged."

The language of a confirmation hearing is therefore not merely verbal. It is also visual, spatial, and architectural—which means it is, at its core, the language of theater: multi-voiced, multi-dimensional, and particularly well-suited to expressing deep cultural conflicts.

A. THEATER

What makes the language of theater a good forum for conflict is that it emerges from dialogue and disagreement, from the opposition of different ways of speaking and being. Ancient Greeks called this opposition *agon*. Perhaps its most salient example comes from Sophocles's *Antigone*.¹² Determined to bury her slain brother despite a royal edict, the title character clashes with King Creon, who is equally determined to see his edict enforced. Common interpretations of this clash frame it as a battle between:

- (1) the individual (Antigone) and the state (King Creon); and
- (2) divine law (Antigone) and human law (King Creon).

A more nuanced interpretation pairs Antigone and King Creon together and identifies the real clash as one between the self-righteousness and inflexibility they share and the more humane openness to context and compromise exhibited by their respective confidantes, Ismene and Haemon.¹³

But more important than how these interpretations differ is what these interpretations share: the sense that *Antigone*, as a play, creates a space where

11. ESSLIN, *supra* note 1, at 101.

12. SOPHOCLES, *ANTIGONE* (Paul Moliken & Elizabeth Osborne, eds., J.E. Thomas trans., Prestwick House Inc. 2005).

13. See JAMES BOYD WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF LAW* 115 (1985).

oppositions can be aired and explored, where competing voices can be put in conversation with each other, where people with different viewpoints stemming from different sensibilities and different backgrounds can be made to interact. These kind of interactions are the essence of theater. *King Lear* works as a play because Cordelia does not respond to her father the way her sisters do.¹⁴ *The Crucible* works as a play because not everyone believes Abigail Williams, nor agrees what to do with her.¹⁵ A *Tartuffe* full of Tartuffes would be unbearable.¹⁶

Much of the value of these plays—as well as the theater more generally—derives from how the conflicts they crystallize give us a sense of the culture that produced them. We can learn something from *Antigone* about the fault lines in fifth century Athens between private and public duty. We can learn something from *King Lear* about the fault lines in Elizabethan England created by the transfer of power. And we can learn something from both *The Crucible* and from *Tartuffe* about how two different communities—America during the rise of Joseph McCarthy and France during the reign of Louis XIV—coped with similar struggles: the threat of obsession and hypocrisy.

Theater grants us special access to the experiences of people trying to work through the struggles and inconsistencies of a cultural moment. It helpfully, and rather artfully, documents the dialogues that divide communities.

B. CONFIRMATION HEARINGS

Supreme Court confirmation hearings do something similar. To watch Robert Bork's 1987 confirmation hearing—where senators from one side of the aisle criticized Bork as racist and retrograde, while senators from the opposite side championed him as a principled protector of individual rights—was to get special access to the tensions circulating during the “Reagan Revolution,” as well as to the scars left by Watergate. Indeed, many of the most heated exchanges during Bork's hearing centered around Bork's role in the firing of Special Prosecutor Archibald Cox on October 20, 1973, the evening that came to be known as the “Saturday Night Massacre.”¹⁷

Similarly, to watch Clarence Thomas's 1991 confirmation hearing as

14. WILLIAM SHAKESPEARE, *KING LEAR* (1606).

15. ARTHUR MILLER, *THE CRUCIBLE* (1953).

16. MOLIÈRE, *TARTUFFE* (1664).

17. *Nomination of Robert H. Bork to be an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 100th Cong. 194–96* (1991).

senators from both sides of the aisle appeared at once captivated and confused by the testimony of Anita Hill was to get special access to a country learning to talk to itself about sexual harassment, and also learning that the dynamics of race become even more complicated when combined with the dynamics of gender.¹⁸

Many confirmation hearings, of course, pass without much fanfare or feuding. Justice Neil Gorsuch's hearing was like that, as were the hearings of several of the current justices. Justice Kennedy, Justice Breyer, Justice Alito, Justice Kagan—none of them faced fierce opposition. Nor did any of their statements before or during their hearings trigger a national conversation the way, for instance, the phrase “Wise Latina” did during Justice Sonia Sotomayor's hearing.¹⁹

Yet given the stakes, the stage, and the often hostile tug-of-war between those who desire a Supreme Court full of multiple backgrounds and perspectives and those who think backgrounds and perspectives have no business affecting the outcome of a case,²⁰ these hearings seem built for the special access described above.

II. DYNAMIC DISAGREEMENT

This is not to say that the special access Supreme Court confirmation hearings provide to the dialogues that divide communities is the only way to access dialogues that divide communities. Newspaper editorials document these dialogues, as do law review articles, novels, short stories, and poems. Yet none of these forms present us with actual people who speak, move and

18. See, e.g., *Nomination of Judge Clarence Thomas to be an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 102d Cong. 196–203 (1991).

19. See *Nomination of Hon. Sonia Sotomayor to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 66 (2009) (statement of Hon. Sonia Sotomayor, J. of the Second Circuit) (“I was trying to inspire [young women and Latino lawyers] to believe that their life experiences would enrich the legal system, because different life experiences and backgrounds always do”); Charlie Savage, *A Judge's View of Judging is on the Record*, N.Y. TIMES (May 14, 2009), <https://perma.cc/2MMD-WDB9>; Frank James, *Sotomayor's 'Wise Latina' Line Maybe Not So Wise*, NPR (May 27, 2009), <https://perma.cc/D7SX-2E3H>.

20. *Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 15 (2006) (“Supreme Court nominees should know, without any doubt, that their job is not to impose their own personal opinions of what is right and wrong, but to say what the law is, rather than what they personally think the law ought to be.”) (statement of Sen. Charles E. Grassley).

react.

It is one thing to read about the battles over “originalism” in a law review article.²¹ But it is another to see these battles unfold on stage, as they did during Bork’s confirmation hearing. To see these battles unfold on stage—to see “originalism” in a very real sense embodied in someone like Bork—is to see how originalism responds when confronted with other ways of thinking, speaking and being. How well does originalism stand up under the hostile questioning of Senator Ted Kennedy of Massachusetts, who suggested, even before the hearings began, that Bork and his originalism would create:

[An] America . . . in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens’ doors in midnight raids, schoolchildren could not be taught about evolution . . . and the doors of the Federal courts would be shut on the fingers of millions of citizens for whom the judiciary is often the only protector of the individual rights that are the heart of our democracy.²²

Alternatively, how much is originalism revived by the support of Senator Orrin Hatch of Utah? Consider Senator Hatch’s claims that critics like Kennedy are unprincipled and in fact “understand that much of the law they prefer is judge-made and is susceptible to change by other judges. Their protestations only underscore that the doctrines they like are not found in the Constitution.”²³

In a law review article, such differing perspectives would be expressed by a single voice—the written equivalent of a lecture. But in a confirmation

21. See, e.g., Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207, 1207–08 (“Judges and scholars such as William Rehnquist, Robert Bork, and Raoul Berger have argued that the principle of majority rule is sacrificed if judicial decisions are based upon values that are not stated or implied in the Constitution. They claim that democracy requires unelected judges to defer to the decisions of popularly elected officials unless there is a clear violation of rights protected by the Framers of the Constitution.”); Robert W. Bennet, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445, 449 (1984) (“For Bork, originalism supplies a legitimating vision of constitutional authoritativeness; by reference to originalism, and originalism alone, Bork’s ideal arbiter can identify correct and incorrect constitutional decisions.”).

22. 133 Cong. Rec. S9188 (daily ed. July 1, 1987) (statement of Sen. Edward M. Kennedy).

23. 133 Cong. Rec. S10539 (daily ed. July 23, 1987) (statement of Sen. Orrin G. Hatch).

hearing, as in a play, these differing perspectives are expressed by multiple voices. The effect for the audience is less like hearing a lecture and more like dropping in on a seminar. There is dialogue. There is diversity, both in the views on display and in the appearance of those who offer them. There is dynamic disagreement.

Each of these voices also comes with a face, and words are spoken with a combination of tone, accent, and gesture, and so become part of a larger physical and verbal ethos, a fact apparently not lost on Anita Hill. She insisted on being able to deliver her allegations against Clarence Thomas in person rather than having those allegations read into the confirmation hearing record by someone else.²⁴ Nor was it lost on many who tuned into the Sotomayor hearings and heard, for the first time in American history, the sound of a Hispanic accent coming out of the mouth of a Supreme Court nominee.

These kind of moments illustrate the surprising economy of Supreme Court confirmation hearings, their ability to use a bundle of sights and sounds to communicate meaning in a way that a written transcript cannot: the sights and sounds of Clarence Thomas telling an all-white panel of senators that he has been the victim of a “high-tech lynching” aimed at “uppity-blacks,”²⁵ as his very fair-skinned white wife, Virginia, sits behind him in support; the sights and sounds of Sandra Day O’Connor, dressed in a purple suit and a pink blouse, answering questions on her way to becoming the first woman to sit on a court²⁶ that once held, in *Bradwell v. Illinois*, that women could be prohibited from even becoming lawyers.²⁷ And, more recently, the sights and sounds of now Chief Justice John Roberts introducing himself to the country with perhaps the most quoted line in Supreme Court confirmation history and one that continues to drive the questions of senators and the answers of

24. ANITA HILL, SPEAKING TRUTH TO POWER 6–7 (1997) (“I am no longer content to leave the assessment to others, for they cannot know what I experienced—what I felt, saw, heard, and thought. Whatever others may say, I must address these questions for myself. . . . [I]t is as important today as it was in 1991 that I feel free to speak. . . . More than anything else, the Hill-Thomas hearing of October 1991 was about finding our voices and breaking the silence forever.”).

25. *Nomination of Judge Clarence Thomas to be an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 102d Cong. 157 (1991) (statement of Hon. Clarence Thomas, Judge, D.C. Circuit).

26. *Nomination of Sandra Day O’Connor to be an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 97th Cong. 57 (1981) (“As the first woman to be nominated as a Supreme Court Justice, I am particularly honored, and I happily share the honor with millions of American women of yesterday and of today whose abilities and whose conduct have given me this opportunity for service.”).

27. 83 U.S. 130 (1873).

nominees: “Judges are like umpires. Umpires don’t make the rules, they apply them.”²⁸

I say this economy is “surprising” because most Supreme Court confirmation hearings are long and boring. The Bork hearing lasted five days and ended up creating thousands of documents few people have the time or inclination to read. During Sotomayor’s hearing, her own nephews fell asleep. They were sitting in the front row alongside Sotomayor’s other family members and friends, but even the prospect of appearing on national television could not keep them interested.

Yet it is helpful to remember that most theater is also long and boring. As the famed London theater critic Kenneth Tynan acknowledged in the preface to *The Sound of Two Hands Clapping*, a lifetime collection of his reviews, “The fact, as any critic will confirm, is that most theatrical productions, like most books and most television shows, are extremely dreary.”²⁹ Said differently, even Shakespeare is not always Shakespeare. *Hamlet* rewards extended attention. *Titus Andronicus* does not.

Which is why when Shakespeare is taught, and when theater in general is taught, not every play is chosen nor every scene discussed. Instead, teachers approach these topics selectively—the idea being that more can be learned by focusing on a few particularly rich examples than can be learned by attending to every available example. Perhaps this is how we should approach Supreme Court confirmation hearings as well. We should be selective. We should ignore the duds and instead focus on the hearings in the past that say something especially useful or new about their particular cultural moment, and be open to the possibility that hearings in the future will do the same.

A blanket ban on the hearings, or even just on televising them, seems unlikely. A consolation is that we can try to enjoy the show, or at least learn from it.

28. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on Judiciary*, 109th Cong. 55 (2005).

29. KENNETH TYNAN, *THE SOUND OF TWO HANDS CLAPPING* 1 (1976).