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By Seth Rosenthal

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Many courthouse lawyers I know caught at least part of the confirmation hearings of Chief Justice John Roberts and Associate Justice Samuel Alito. For all of them, the experience produced the exact same sensation: an irresistible urge to bang their heads against the nearest wall in utter frustration over how little anyone was able to learn about the nominees' views on the law. Experienced litigators, indeed most people, know that trials and other court proceedings aren't perfect at ferreting out the truth. But at least they produce *information* – information from which judges and juries can usually render intelligent decisions. Despite their ostensible purpose, Supreme Court confirmation hearings, at least those involving "contested" nominees, haven't done so. Not since the nomination of Robert Bork, anyway.

The last term of the Supreme Court proves the point. A spate of contentious, precedent-altering decisions involving campaign finance reform, voluntary school integration, criminal procedure, abortion rights, civil rights protections and antitrust law, to name a few, show rather conclusively that the Court has begun charting a new course. Many predicted this would occur based on Chief Justice Roberts' and Justice Alito's pre-nomination records. But no one could have confidently offered any such prediction based on what little meaningful information senators obtained during the two newest justices' confirmation hearings.[1] And while the hearings of some less contentious picks have been more edifying, those of the most controversial post-Bork nominee, Justice Clarence Thomas, were by many accounts an exercise in obfuscation.[2]

Senate Judiciary Committee member Joseph Biden has referred to the hearings as a "kabuki dance," because nominees give the illusion of providing meaningful responses but in reality say little of substance.[3] At the 2007 convention of the American Constitution Society, fellow Judiciary Committee member Charles Schumer agreed, asserting that the hearings are "often meaningless … produc[ing] a lot of sound and fury, often signifying nothing."[4] Professor Ronald Dworkin similarly has observed, "[S]ince Robert Bork was rejected by the Senate in 1987, several nominees have reduced the hearings to a pointless recital of an established script."[5] Invariably for these nominees, the script has included (i) generic pledges to approach judging without an agenda, keep an open mind and respect precedent; (ii) bland recitations of the existing state of the law; and (iii) next-to-nothing about the nominees' own views, save an embrace of the must-embrace-or-else-be-defeated decisions in *Brown v. Board of Education* and *Griswold v. Connecticut* and an occasional

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* A former federal prosecutor, Seth Rosenthal is a litigation partner at Venable LLP in Washington, D.C. He served as legal director of Alliance for Justice from 2005-2006.

[1] Janet Malcolm, *The Art of Testifying,* NEW YORKER, Mar. 13, 2006.

[2] *See, e.g.,* Michael Gerhardt, *Divided Justice: A commentary on the Nomination and Confirmation of Justice Thomas*, 60 GEO. WASH. L. REV. 969 (1992) [hereinafter "Gerhardt"]; Gary J. Simson, *Thomas's Supreme Unfitness: A Letter to the Senate on Advise and Consent,* 78 CORNELL L. REV. 619 (1993) [hereinafter "Simson"]. Jane Mayer and Jill Abramson reported that Justice Thomas himself acknowledged that his hearings concealed his judicial philosophy. Jane Mayer and Jill Abramson, STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS 8, 216-20, 354 (1993).

[3] Press Release, Biden Votes No on Judge Roberts (Sept. 22, 2005) (*available at* http://biden.senate.gov/newsroom/details.cfm?id=246272&).

[4] Senator Charles Schumer, Speech at ACS National Convention (July 29, 2007) [hereinafter "Schumer ACS speech"] (*available at* http://acslaw.org/pdf/Schumer%20speech.pdf).

[5] Ronald Dworkin, *The Strange Case of Judge Alito*, NEW YORK REVIEW OF BOOKS, Feb. 23, 2006.

(somehow newsworthy) platitude like "the president is not above the law."[6] Standing alone, the hearings have revealed little about what kind of Supreme Court justices these nominees would be.

The view that the hearings rarely produce meaningful information isn't held exclusively by liberals. Conservatives who lament the Senate's rejection of Robert Bork – and who continue to seek public re-airing and vindication of the constitutional views that Judge Bork articulated – say the same thing. In the midst of the Roberts confirmation proceedings, Catholic University Professor Dennis Coyle wrote in *National Review Online*:

> Perhaps never again will the members of the Judiciary Committee be treated by a nominee as if they were worthy of a candid and informed discussion. Roberts will not repeat that "mistake [of Judge Bork]," as he will not be inclined to give Democratic attack dogs any red meat. And that is a shame, as the country will be denied an opportunity to witness a deep and thoughtful engagement on the most fundamental principles of our constitutional order. Understandable, but unfortunate.[7]

It shouldn't be this way. But how can the Senate Judiciary Committee improve the hearings? Conversely, should it even bother trying? Should reform efforts, if undertaken at all, concentrate instead on other aspects of the nomination-confirmation process?

In the past two decades, observers have advanced a number of proposals for improvement. Some suggestions have been structural: establishing a two-thirds confirmation requirement,[8] informally requiring pre-nomination consultation between the White House and the opposition party in the Senate,[9] and reducing the importance of the Supreme Court in American life by curbing its purported tendency toward "judicial supremacy."[10] Others have been narrower in scope: focusing more on the pre-nomination record and less on the hearings,[11] establishing specific confirmation criteria,[12] limiting questioning to the nominee's qualifications,[13] and dispensing altogether with testimony from the nominee.[14] The list goes on. But for a variety of reasons, discussed at length by others, most of the suggestions are unrealistic or inadvisable or both. Adoption of a two-thirds vote requirement just won't happen. Pre-nomination consultation with the Senate (an attractive idea, adopted by President Clinton) may occur, but only when the president thinks it is in his or her self-

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[6] Testimony of Samuel Alito (Jan. 10, 2006) (*available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/01/10/AR2006011000781.html) [hereinafter "Testimony of Samuel Alito"].
[7] Dennis Coyle, *Studying John Roberts*, NAT'L REV. ONLINE, Sept. 1, 2005.
[8] *See, e.g.,* Calvin R. Massey, *Getting There: A Brief History of the Politics of Supreme Court Appointments*, 19 HASTINGS CONST. L. Q. 1, 14-16 (1991).
[9] *See, e.g.,* David A. Strauss and Cass R. Sunstein, *The Senate, the Constitution and the Confirmation Process,* 101 YALE L.J. 1491 (1992) [hereinafter "Strauss and Sunstein"]; *Senate Democratic Task Force on the Confirmation Process* (U.S. Senate, Dec. 18, 1991), reprinted in 138 Cong. Rec. S 898 (daily ed. Feb. 4, 1992) [hereinafter "Task Force Report"].
[10] *See, e.g.,* John Yoo, *Choosing Justices: A Political Appointments Process and the Wages of Judicial Supremacy,* 98 MICH. L. REV. 1436 (1999); M. Edward Whelan III, *Justices on Trial: Can Senate Confirmation Ever Be Less Tortuous,* WEEKLY STANDARD, June 18, 2007.
[11] *See, e.g.,* Strauss & Sunstein, *supra* note 9; Gerhardt, *supra* note 2, at 992; David O'Brien, ed., *Judicial Roulette: Report of the Twentieth Century Fund Task Force on Judicial Selection* 11 (1988) [hereinafter "O'Brien"].
[12] William G. Ross, *The Supreme Court Appointment Process: A Search for Synthesis*, 57 ALB. L. REV. 993,1019-21 & n. 103 (1994) [hereinafter "Ross"].
[13] Michael M. Gallagher, *Disarming the Confirmation Process,* 50 CLEV. ST. L. REV. 513 (2004).
[14] O'Brien, *supra* note 11, at 10.

interest; it is unlikely ever to be mandated.[15] Specific confirmation criteria would be elusive and unworkable.[16] The Senate will not stand for examining technical qualifications alone, nor should it, since presidents invariably do not.[17] The hearings, as discussed below, are likely here to stay and will almost certainly remain a focal point of the confirmation process. And so on.

There is, however, a modest suggestion that holds out genuine promise for at least modest improvement, and it comes back to those frustrated courthouse lawyers mentioned above: let them lead the questioning, with senators doing follow-up. This idea, or at least an iteration of it (e.g., bring in outside constitutional experts), has been floated before, but either dismissed or treated cursorily. As unilluminating as the Roberts and Alito hearings proved to be, and with the current lull in Supreme Court nominations, we should stop to consider it anew.

Tapping experienced litigators to lead the questioning of Supreme Court nominees has several significant advantages. First, by virtue of their training, their experience and the time they will spend in preparation, courtroom advocates will be more adept at examining nominees. Improved questioning will either produce better information about a nominee's views or, by more fully exposing the nominee's unwillingness to divulge such information, show the Senate and the public that they are not getting what they deserve most from the hearings. Second, unlike a number of the proposals that have been advanced, turning the questioning over to outside experts should be politically tenable. Congress has done it before – with success – in other contexts. And despite what critics of outside counsel questioning might say, the Judiciary Committee can easily design the process so that senators continue to enjoy the platform they seek to air their views and dialogue publicly with nominees. Third, allowing experienced litigators to do the questioning may have the salutary effect of improving the level of bipartisan cooperation and reducing the level of rancor that often accompanies modern day nominations. This is, of course, highly speculative, but it is hard to imagine the situation growing more contentious than it is now.

I. The Senate Has an Independent, Substantive Role to Play

The proposal to delegate questioning responsibility to outside counsel is premised on two assumptions. The first is that the Senate has a meaningful role to play in the confirmation process. As others have explained at length, the Framers intended the Senate to play an independent role,[18] academics agree that the Senate should play an independent role,[19] and senators historically have insisted on playing an independent role, refusing to confirm one in five high court nominees. Historian Robert Caro has written: "[T]he nation's Founders depended on the Senate's members to stand up to a popular and powerful President. In the case of judicial appointments, the Founders specifically mandated the Senate to play an active role, providing both advice and consent to the President. That shared authority was basic to the balance of powers among the branches."[20] Similarly, Senator Orrin Hatch has said: "I am not saying that the Senate can or should use its advise and consent power to block all judicial appointees whose political views we do not agree

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[15] *See, e.g.,* John Maltese, THE SELLING OF SUPREME COURT NOMINEES 15-56 (1998); Michael Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process,* 21 HARV. J. L. & PUB. POL'Y 467 (1998)
[16] O'Brien, *supra* note 11, at 79-80.
[17] *See, e.g.,* Schumer ACS speech, *supra* note 4.
[18] *See, e.g.,* Strauss & Sunstein, *supra* note 9, at 1494-1502; Matthew D. Marcotte, *Advice and Consent: A Historical Argument for Substantive Senatorial Involvement in Judicial Nominations*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 519, 559-60 (2001-02).
[19] *See, e.g.,* Ross, *supra* note 12, at 2 & n.10.
[20] Letter from Robert Caro to Senators Trent Lott and Christopher Dodd (June 3, 2003).

with. … But conducting a fair confirmation process most assuredly does not mean granting the president carte blanche in filling the federal judiciary."[21] And 20 years ago Professors Philip Kurland (a conservative) and Laurence Tribe (a liberal) jointly asserted:

> The Constitution entrusts the power to appoint the member of the third branch of the National Government not to the executive branch nor to the legislature, but to *both* political branches together: the President nominates, but the Senate must confirm. Providing "advice and consent" on judicial nominations, therefore, is no more senatorial courtesy but a constitutional duty of fundamental importance to the maintenance of our tripartite system of government. … The Senate is surely not required to defer to the appointment of men and women whose most salient qualification is their location in a particular partisan line-up or their devotion to a particular cluster of political or philosophical views…[The Nation] has a right to insist that the Senate, whatever the practice of the past decade or two, recall the Framers' vision of its solemn duty to provide advice and consent, rather than perfunctory obeisance, to the will of the President.[22]

The second assumption is that it is appropriate for the Senate to consider and for nominees to disclose their legal views or "judicial philosophy." According to University of Chicago Professor Cass Sunstein, "[A] bipartisan consensus has emerged on the relevance of 'ideology,' so much so that no Senator, and no outside observer, has seriously questioned that it does not matter."[23] In fact, one would be hard-pressed to find a senator, Democrat or Republican, who at one time or another hasn't expressed hearty agreement about the propriety of considering a nominee's legal views. Judges have, too. The late Chief Justice William Rehnquist, for instance, asserted in 1987 that an inquiry into "judicial philosophy … has always seemed … entirely consistent with our Constitution and serves as a way of reconciling judicial independence with majority rule."[24]

The reason for such agreement is clear: it is the nominee's jurisprudential beliefs, more than anything else, that will affect our rights and make its mark on American life. If an independent, unaccountable government actor is going to wield such authority legitimately in a democratic society like ours, the public and its elected representatives have a basic right to know how and what he or she thinks. "Why should the public be asked to accept a pig in a poke? … [I]t hardly seems right that a nominee should be permitted to give an answer that is a fancy version of 'trust me,'" National Public Radio legal affairs correspondent Nina Totenberg once wrote.[25] This is particularly true insofar as presidents invariably pick their nominees based on the belief that the nominees share their preferred vision of the law. If the Senate were to fail to consider a nominee's legal views in the face of this reality, it would effectively abdicate its independent advise-and-consent role. As Professor Charles Black maintained:

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[21] Orrin Hatch, Speech to Federalist Society's 10th Anniversary Lawyers' Convention (Nov. 15, 1996).
[22] Letter to the Senate Judiciary Committee (June 1, 1986).
[23] Testimony before Senate Judiciary Committee's Subcommittee on Administrative Oversight and the Courts (June 26, 2001).
[24] William H. Rehnquist, Remarks of the Chief Justice, Columbia University School of Law, New York (Nov. 19, 1987) (*cited in* Ruth Bader Ginsburg, *Confirming Supreme Court Justices: Thoughts on the Second Opinion Rendered by the Senate*, 1988 U. ILL. L. REV. 101, 111-12 (1988)). His statement echoed what he had written as a young lawyer: "The Senate should restore its practice of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him." William H. Rehnquist, *The Making of a Supreme Court Justice,* Harvard Law Record, Oct. 8, 1959, at 7, 10.
[25] Nina Totenberg, *The Confirmation Process and the Public: The Right to Know or Not to Know*, 101 HARV. L. REV. 1213 , 1218 (1988) [hereinafter "Totenberg"].

> "[A nominee's] policy orientations are material – and … can no longer be regarded as immaterial by anybody who wants to be taken seriously, and are certainly not regarded as immaterial by the President – it is just as important that the Senate think them not harmful as that the President thinks them not harmful. … The Constitution certainly permits, if it does not compel, the taking of a second opinion on this crucial question, from a body just as responsible to the electorate, and just as close to the electorate, as is the President. Is it not wisdom to take that second opinion in all fullness of scope?"[26]

This is not to say, of course, that nominees ought to divulge how they would rule in particular cases. Despite persistent efforts by some to suggest that this is what advocates of openness are demanding, it isn't. What they are demanding is insight into a nominee's views on established legal principles.[27]

II. Because the Hearings Aren't Likely to be Abolished, They Should Be Improved

The proposal outlined here operates on the assumption that it is worthwhile to seek to improve confirmation hearings. But is it? Some suggest not. After the hearings on Justice Thomas' nomination, David Strauss, Cass Sunstein and others advocated diminishing the role of the hearings and emphasizing the nominee's pre-nomination record. Some have gone further. In the wake of the Bork hearings, a task force of legal luminaries assembled by the Twentieth Century Fund recommended not only that the Senate base its confirmation decisions on a nominee's written record and the testimony of experts, but that nominees not be required to testify at all.[28] In a fit of exasperation during the Alito hearings, Senator Biden made the same suggestion: "The system's kind of broken. Nominees now, Democrat and Republican nominees, come before the United States Congress and resolve not to let the people know what they think about the important issues. Just go to the Senate floor and debate the nominee's statements, instead of this game."[29] Former *Washington Post* editorial page writer Benjamin Wittes recently suggested that, if the Senate won't eliminate the hearings, presidents should simply refuse to send nominees to Capitol Hill to testify.[30]

De-emphasizing or even abolishing the hearings sounds good in theory. It would permit senators to focus, as they should, on the nominee's existing record, which is far more likely to be an accurate barometer of future performance. But some nominees do not possess extensive records. More significantly, at least as a practical matter, we have now come to the point where dispensing

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[26] Charles L. Black, *A Note on Senatorial Consideration of Supreme Court Nominations*, 79 YALE L.J. 657, 660 (1970).
[27] Yale Professors Robert Post and Reva Siegel contend that the best way to flesh out a nominee's views is to have the nominee offer candid opinions on previously decided cases. Robert Post and Reva Siegel, *Questioning Justice: Law and Politics in Judicial Confirmation Hearings*, YALE L.J. (THE POCKET PART) (Jan. 2006) (*available at* http://yalelawjournal.org/2006/01/post_and_siegel.html). Senator John Cornyn, one of the fiercest proponents of President Bush's judicial nominees, agrees: "It's completely inappropriate to ask nominees to make promises to politicians about how they're going to vote should a case come before them. … [But] I think it's an appropriate question to ask what their views are on cases that have been decided and judicial opinions that have been written." Interview of Sen. John Cornyn, *This Week*, ABC, July 3, 2005. *See also* Vikram Amar, *It's the Specifics, Stupid*, Aug. 4, 2005, http://writ.corporate.findlaw.com/amar/20050804.html; Walter Dellinger, *Fair Questions for Roberts*, WASH. POST, July 27, 2005.
[28] *See, e.g.,* O'Brien, *supra* note 11, at 10; Simson, *supra* note 2, at 653-56.
[29] *Biden Suggests Supreme Court Confirmation Hearings No Longer Useful*, ASSOCIATED PRESS, Jan. 12, 2006.
[30] Benjamin Wittes, CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES (2006).

with the hearings seems unrealistic. Feeding off of each other, the Senate and the media have invested too much stock in the hearings to let them go.

The Bork confirmation process is probably what triggered the Senate and the media's mutual fixation on the hearings. Judge Bork's nomination was an open question before his hearings, but the hearings sealed his fate. By most accounts, Judge Bork did himself in with his own testimony, which observers found to be unconvincing both because his vision of the law was not one that a majority of senators embraced and because his effort to qualify or distance himself from prior controversial statements rang hollow. The fallout from the Bork experience is the expectation that the hearings make all the difference, at least for non-consensus nominations, even if that's not really the case.[31] All of the interested players – senators, the White House and interest groups on both sides – have made the hearings the focal point of the confirmation process, either hoping for or guarding against a repeat of the Bork outcome. The media have only magnified the focus.

Senators routinely say that what happens at the hearings will prove determinative for them. The result is that they imbue the hearings with more importance in the eyes of the media and the public than the nominees' often extensive pre-hearing records. The media then reinforce the message. And they have powerful incentives to do so. What transpires on camera today is far more newsworthy, particularly for television and radio, than what appears in some ten year-old opinion. It is, after all, "news;" it is happening now. Moreover, it is much easier for the media, especially television, to convey matters that are, as Ohio State Professor Lawrence Baum observes,[32] far less relevant than a nominee's past work – e.g., congeniality, comportment and platitudinous sound-bites. Also, by virtue of their format, the hearings carry with them the potential for political drama that those dusty old law books simply don't possess. Think of the hearings of the past 15 years or so. What the memory immediately brings forward, even for many astute observers, are Justice Alito's wife leaving the hearing room in tears, Justice Thomas' complaining of a "high tech lynching," and Chief Justice Roberts' analogy between judges and umpires – nothing concrete about those justices' legal views, but certainly some memorable, made-for-TV moments.

Even elite segments of the print media, such as *The Wall Street Journal, Los Angeles Times, Washington Post* and *New York Times*, contribute to this trend. Many have done a commendable job of exploring the pre-hearing records of the past few Supreme Court nominees. But like television and most other print media, these sources are also interested, quite naturally, in the politics surrounding a nomination and a nominee's prospects for confirmation. This focus leads them to place undue emphasis on the hearings and often to treat the hearings as the determinative, make-or-break point of a nomination.

With the press focused on the hearings, senators – particularly Judiciary Committee senators – become even more focused on them. Ordinary committee hearings do not receive anywhere near the exposure that Supreme Court confirmation hearings do. Senators understandably want to capitalize on this opportunity, particularly since they are being confronted with the awesome responsibility of voting on a potential Supreme Court justice. Senators have political incentives to retain the current focus on the hearings and no real countervailing incentives.

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[31] "The big thing that the Bork confirmation experience changed was not the rancor in the process, but the role of the hearings as national theater." Cliff Sloan, *The Snooze Hearings*, SLATE, July 22, 2005, *available at* http://www.slate.com/id/2123131/entry/2123296/; O'Brien, *supra* note 11, at 103.

[32] Lawrence Baum, *What Will Hearings Tell About Alito? Little,* NEWSDAY, Jan. 8, 2006. *See also, What's the Alternative?: A Roundtable on the Confirmation Process*, 78 A.B.A. J. 41 (Jan. 1992).

The upshot is that it is highly unlikely that the Senate can ever put the genie back in the bottle. The hearings are here to stay. The Senate, therefore, should make the most of them. It should ensure to the greatest extent possible that the hearings do what they were intended to do: meaningfully educate us and our elected representatives about individuals who stand to enjoy a lifetime of unaccountability in one of the most influential positions in government. As Nina Totenberg said: "The public deserves to find out … about the men and women who, if confirmed, will be the final arbiters of the rules by which the country is governed."[33] The proposal described below is designed to provide such deserved enlightenment.

III. Let Litigators Lead

Several observers of the confirmation process have raised the idea of turning over the questioning at hearings to people other than senators. Some reject it.[34] Some believe it's worthwhile.[35] I offer here a detailed explanation of what a revamped process, led by outside counsel, would look like and why it would improve the quality of the hearings.

A. The Proposal and its Precedents

A litigator-led process would work as follows. The majority and minority parties in the Senate Judiciary Committee would each collectively select its own lawyer to take charge of the investigation and conduct the questioning. Each lawyer would be given the authority to hire a small team to help her. Each lawyer, or each small team, would be given sufficient time to conduct a meaningful, thorough inquiry at the hearing – perhaps eight hours each, divided into alternating two-hour increments (so that neither side could dominate the proceedings for too long). Each Committee member would then be permitted to ask follow-up questions, subject to time limits, with outside counsel retaining the authority to conduct additional, though strictly limited, follow-up. As is the case now, each Committee member could make an opening statement prior to any questioning and closing remarks prior to the Committee vote, in addition to statements on the Senate floor.

There is ample precedent for conducting high-profile hearings in this fashion. Over the past 30 years, Congress has tasked outside counsel with leading the investigations into and conducting questioning at hearings on the following matters, among others: Watergate; the Iran-Contra scandal; the Keating Five scandal; and Whitewater. Outside counsel were given investigative and interrogatory responsibilities for reasons equally applicable to Supreme Court nominations: the time they have to absorb the subject matter and prepare meticulously, and the experience they bring in delivering effective, probing questions.

In the Iran-Contra matter, to take one example, the House and the Senate agreed to conduct the investigation jointly. Each party designated a lead counsel. Arthur Liman, a former prosecutor and well-known firm litigator, represented the Senate Democrats, while John Nields, also a former prosecutor and firm litigator, represented the House Democrats. Republicans tapped George Van Cleve. For their part, Liman, Nields and their deputies worked together to map out and execute an investigation strategy, which involved sifting through millions of documents and interviewing or

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[33] Totenberg, *supra* note 25, at 1229. *See also* Maltese, *supra* note 15, at 148; Ross, *supra* note 12, at 1005.
[34] *See, e.g.,* Ross, *supra* note 12, at 1010-13; Task Force Report, *supra* note 9, at S896.
[35] *See, e.g.,* Simson, *supra* note 2, at 656-67; Strauss and Sunstein, *supra* note 9, at 1519; Joseph L. Nellis, *An Imperfect Proceeding,* NAT'L L. J., Oct. 28, 1991.

deposing hundreds of people. At the hearings, which spanned weeks, Liman and Nields divided questioning responsibilities. Van Cleve and his deputy, Richard Leon (now a federal judge), conducted all of the questioning for Republican members. The 11 senators and 15 representatives on the panel observed the questioning of Liman, Nields, Van Cleve and Leon, but did not ask questions of the witnesses themselves until the lawyers were largely done.[36] Liman, Nields, Van Cleve and Leon ultimately asked a substantial percentage of the questions. For instance, based on the hearing transcript, questioning by Liman, Nields and Van Cleve accounted for roughly 65% of the questioning of arguably the main witness, Oliver North.

The idea that senators would allow outside counsel to question Supreme Court nominees appears to run headlong into the notion that senators prize the public exposure that the hearings provide them. But Congress' experiences with Watergate, Iran-Contra and other investigative hearings suggest that members of Congress are willing to cede effective control of highly-publicized proceedings to outside counsel, so long as they retain some authority to ask questions and make statements themselves. To be sure, unlike these other hearings, Supreme Court confirmation hearings are focused on discovering what individuals believe, not what individuals have done. But the larger objective – asking probing questions, getting illuminating answers – is the same. There is no persuasive argument that the process should not be the same as well.

Like the process utilized to investigate Iran-Contra, Watergate and other matters, the process proposed here has the great benefit of allowing senators, as those answerable to the electorate, to retain control of the investigation and hearing, including the subject matter they want covered, while turning execution over to those with the necessary time and expertise. As Arthur Liman said just before the Iran-Contra hearings began, "With senators, they have to make the decisions, and I have to do everything the way they think will be most effective in helping them make those decisions."[37] By the same token, there was little doubt that Liman and his colleagues drove the investigation, advised members of Congress which direction to take based on what they learned, and "carr[ied] much of the interrogation, whoever the witness, whatever the subject, throughout the spring and summer."[38]

The proposed process has other practical advantages. By giving senators ample time to voice their opinions and question nominees, it preserves the opportunity for public exposure that senators might seek. Answering certain critics of counsel-led questioning,[39] the proposed process also continues to provide senators a chance to engage in public, face-to-face dialogue with their putative counterparts in another branch of government. Having the right both to ask follow-up questions and deliver opening comments in the nominees' presence, senators would still be able to inform nominees whether, how and why the courts, in their eyes, are behaving properly or improperly.

B. The Advantages of Litigator-Led Inquiry

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[36] In fact, as originally planned, "the panels hope[d] to minimize the problem [of overly extensive questioning] by having Liman and Nields lead the questioning with two senators and two representatives acting as 'designated hitters' on interrogating specific witnesses." Robert Doherty & Dana Walker, *Senate, House Panels Combine Forces in Rare Iran Arms Probe*, UNITED PRESS INT'L, Mar. 22, 1987.

[37] David E. Rosenbaum, *Washington Talk: Iran Arms Hearing; Preview of the Soon-to-be-Famous Lawyers for Congress*, N.Y. TIMES, Apr. 29, 1987.

[38] *Id.*

[39] Ross, *supra* note 12, at 1012.

Delegating the lead role in examining Supreme Court nominees to experienced courtroom advocates should facilitate the goal of obtaining better information for at least three reasons.

1. Preparation

Senators invariably have a number of different matters competing for their time and attention. As important as Supreme Court nominations are, senators simply do not have the luxury of focusing on them to the exclusion of all else. Judiciary Committee senators rely heavily on their staffs to research nominee records, identify issues of importance and prepare pertinent questions. Senators then take the prepared questions and recite them at the hearings, occasionally offering modest, but rarely thorough, follow-up. The lack of effective follow-up is largely the result of insufficient preparation. For understandable reasons, most senators rarely take the time needed to know the nitty-gritty details about each subject that concerns them so that they may deliver sophisticated lines of questioning based on those details. And it is impractical for staff to prepare such sophisticated lines of questioning because those are useful only for examiners extremely well-versed in the subject matter. As litigators know, successful examinations almost never follow a verbatim "script" laid out in advance, especially one not crafted by the examiner.

With nothing to focus on besides the hearing, experienced litigators brought in as outside counsel would expend the time necessary to prepare themselves to conduct thorough questioning at the hearings. This is, after all, what they do in their professional lives. Whether preparing for a trial, an evidentiary hearing, a key deposition or, for prosecutors, the grand jury appearance of an important witness, they know how to do what senators have been trying to do for years in Supreme Court confirmation hearings. That is, they know how to explore subjects about which they want or need to find out; expose and nail down facts they know based on evidence they already have; and depending both on their objective and what occurs during questioning, bolster or create doubt about a witness's candor. Pursuing such inquiries successfully at a court proceeding as involved as a Supreme Court confirmation hearing takes a lot of preparation time, sometimes weeks. It requires integrating often voluminous documents, witness statements and physical evidence into discrete lines of questioning aimed at achieving particular goals. With a Supreme Court nominee like Justice Alito, who had been a judge for 15 years and had previously served as a political appointee, the task would be quite formidable. It would involve:

- Pouring over hundreds of written opinions from a lengthy judicial record, thousands of pages of documents from years in government service, and a handful of significant, non-judicial public statements, oral and written.
- Choosing for questioning no more than a few of the many subjects the nominee has addressed, and learning or refreshing one's self on the law in the areas chosen for questioning.
- Preparing lines of questioning that integrate the nominee's record and the law, aiming to explore what the record might suggest but doesn't make clear and/or to nail down what the record already reflects.
- Choosing for additional questioning no more than a couple of legal subjects that the nominee has never publicly addressed – or even hinted at – but senators want to know about, and learning or refreshing one's self on the law on those subjects.
- Preparing lines of questioning aimed at discovering the nominee's views on those subjects.

Unlike senators, who outsource most, if not all, of these tasks, outside counsel would perform all of these tasks themselves. In their own practice, they are accustomed to doing so. Accordingly, the person doing the questioning at the hearing would be far more familiar with the subject matter of the questioning, ready to call it up from memory at a moment's notice. The process would be far more hands-on. The result would be more incisive questioning up front, and better follow up. Personally spending the long hours needed to sift through critical parts of the record, become intimately familiar with the relevant law and prepare possible lines of questioning is a tried-and-true recipe for more informed, and consequently more informative, witness examination.

As the old saying goes, the three keys to success in litigation are preparation, preparation and preparation. Skills and experience are important. But nothing counts as much as knowing everything there is to know and being ready to use it cogently when needed. The same is undoubtedly true for conducting questioning at Congressional hearings. Senators are not out of their depth when it comes to asking questions that shed light on the complex work of the Supreme Court. But because of competing demands on their time, there are others better suited to the task.

2. Questioning Quality

During Supreme Court confirmation hearings, many senators spend more time talking than eliciting testimony from the individual they have convened to hear from. Justice Alito's hearings showed that this holds true not only for senators who do whatever they can to bolster a nominee's confirmation prospects (including ensuring that the nominee says very little), but also for senators who strive to raise concerns about the nominee's record. Even where senators engage in *bona fide* questioning, however, what occurs is often wooden. There is little give-and-take, little real dialogue, none of the stuff that's ordinarily conducive to obtaining meaningful information. Certain senators, to be sure, have courtroom experience, and they sometimes use it effectively. But that is the exception, not the rule. The typical inquiry goes something like this: (i) the senator gives a lengthy, scripted, prefatory explanation of the question he or she is about to ask, making no secret of the desired answer; (ii) the senator asks the question, which, given the lead-in, often sounds rhetorical; (iii) the nominee gives a response that matches the question in length, usually digressing into non-responsive explanations about the state of the law rather than divulging his own views; (iv) the senator's follow-up is either weak or non-existent, both because the senator may not be sufficiently prepared to do incisive follow up (staff did most of the preparatory work) and because the senator is not, by training and experience, accustomed to doing it; (v) the senator moves on to the next scripted question, and the process is repeated.

Questioning by experienced litigators would not proceed like this. While the Senate Judiciary Committee may never operate under rules like those governing in-court witness examination – rules *designed* to ferret out reliable evidence efficiently – experienced litigators are habitually accustomed to working within such rules and to making such rules work for them. Evidentiary restrictions forbid them from delivering minutes-long prefatory explanations and, ideally, prevent them from asking sloppy, confusing, compound and argumentative questions. What's required is sharp, simple questioning – questioning that takes complex subjects and breaks them down so that they may be more easily understood. To an experienced litigator, it is second nature to use brief, open questions to explore virgin territory or begin a discussion ("Tell us about your approach to interpreting the Constitution"); tight, closed questions to propel the discussion forward and get more focused answers ("Do you agree that when the text of a constitutional provision isn't clear, courts ought to consider the provision's animating purpose in interpreting it?"); and direct, leading questions to explain complex subjects through the witness and to bring a

point home after an adequate foundation has been laid ("You've explained that you believe in interpreting Constitutional text according to what those living at the time of its ratification understood it to mean? You would agree that's what people who call themselves originalists generally believe? So you would call yourself an originalist?").

In other words, litigators are practiced in the art of engaging witnesses in *conversations* – fluid give-and-take, with illuminating follow-up, that is essential to getting at the truth. Where the conversation falters, litigators know how to bear down on a witness, both gently and firmly, to get answers to their questions. If a witness remains unwilling to give answers, they know how to use questions to show that the witness is holding back or being evasive. And the good ones know how to do all of this without being unfairly argumentative, disrespectful, long-winded or confusing.

This is not to say that litigators would or should always adhere strictly to courtroom norms when examining nominees. The leeway they would enjoy under Senate rules might help them make a point more quickly than they could in court. For instance, they would be able lay certain foundations themselves, without having to go through the trouble of laying them through the witness. Such expediencies might prove necessary to prevent nominees from "running out the clock" to forestall more probing questions – something the nominees' handlers at the Justice Department and White House Counsel's Office undoubtedly encourage them to do.

Courtroom advocates also routinely incorporate documentary evidence into their examinations. There is a good reason for this: evidence people can see and/or read has an impact, clarifying and strongly reinforcing the information they receive aurally. With the wealth of material that a typical nominee produces prior to nomination, documentary evidence – say, video projections of brief, absorbable snippets of a nominee's own writings – might be used to some effect. During the Bork hearings, Senator Edward Kennedy played a tape recording of Judge Bork saying that constitutional precedents are not "all that important." Because Judge Bork's contradictory testimony about that key topic reflected what some key senators, like Howell Heflin, regarded as an artificial "confirmation conversion," it packed a punch. But the use of such evidence during confirmation hearings is exceedingly rare, perhaps because easy-to-use audio/video recordings usually don't exist and, for those without practice, seamlessly employing documentary material during questioning is far more cumbersome. Litigators, however, would see no difficulty using documents in a Senate hearing room. Recognizing just how effective the judicious use of documents can be, they employ documents as part of their routine courtroom practice.

Some might find unappealing the prospect of experienced examiners bringing their skills to bear on a Supreme Court nominee. Chief Justice Roberts, for instance, has bristled at the notion of confirmation hearings as "Perry Mason" moments. But allowing skilled practitioners to conduct questioning is not intended to be, and should not be, a Perry Mason-like game of "gotcha." Its purpose is simply to produce better information and, therefore, to give senators and the public a more comprehensive picture of someone who might well become one of the most powerful figures in the country. If, consistent with their purpose, the hearings are to serve an expository function, the idea of using expert examiners should not be cynically viewed as an underhanded means of degrading nominees to the High Court.

3. Coordination and Depth of Questioning

In recent hearings, each senator has been given 30 minutes during the opening round of questioning, 20 minutes during a second round, and if authorized by the Chair, a short additional

time to finish up. This framework suffers from several shortcomings. First, although it might well be possible to cover one topic thoroughly within the time allotted for each round of questioning, there is simply no way a questioner can meaningfully explore three or more subjects within those time limits. Yet because of their legitimately profound interest in the myriad issues that the judiciary confronts, this is what senators try to do. The often complex nature of the subject matter makes their task even more difficult. So does the tendency of nominees to respond to questions with discursive, indirect and exceedingly long answers.

Moreover, under this framework, senators often wind up duplicating each other's efforts. Although there is sometimes loose coordination among the staffs of senators for each party regarding the topics that each senator will cover, senators invariably cover the topics that are important to them. That often leads different senators to address the same topics. Occasionally, such duplication produces more information. More often, it produces mere repetition.

If the majority and minority on the Judiciary Committee each selected one lawyer, accompanied by a small team, to conduct the investigation and examination of a Supreme Court nominee, these problems would either be mitigated or extinguished. There would be no need to coordinate among offices because the lawyers would already be working together, in two separate teams. While conducting its investigation, each team could consult with all of the senators/staffs from the party that selected it to find out which topics of inquiry each senator would like to cover, and the team could proceed accordingly to craft lines of questioning that address its bosses' various concerns. Duplication would be eliminated.

More importantly, with a number of hours (I suggest eight) to conduct questioning, the lawyers selected to do the job would not operate under the same time constraints that senators currently do. They could pursue a line of questioning without worrying excessively about having to cut it short to get to the next subject. To cover all of the material they would want and need to cover, they would not be able to tarry too long on any one issue. But unlike senators, they would not try to address five different subjects in approximately an hour divided up into 30-, 20- and 10-minute increments. Rather, they could pursue one topic, continuously, until they fully exhaust it, much as they would during a court proceeding. To be sure, they would still have to pick and choose among the bounty of important issues the Supreme Court addresses. But with more time to cover each issue without interruption, the depth and breadth of the Senate's inquiry would improve.

C. The Proposal Applied

So what would the examination of Supreme Court nominees by professional litigators look like? I envision three basic types of questioning: exploratory, expository and hortatory. Senators, of course, already use such questioning to varying degrees, but courthouse lawyers would bring rigor and discipline to the process.

Exploratory questioning would entail largely open-ended inquiries aimed at obtaining new insight into a nominee's judicial outlook. It would mirror questioning during a discovery deposition in civil litigation or questioning of certain kinds of witnesses by prosecutors during a criminal grand jury probe. The object is to discover new information. With most nominees, and on most subjects, exploratory questioning should make up the bulk of the inquiry. That would certainly be the case for a nominee without an extensive public record. It would also probably be the case for someone with an extensive record. Even for nominees who have been lower court judges for a long time, there are a number of important issues that they likely will not have addressed directly; and with

most of the issues they have addressed, they will not have expressed their own, original thoughts because they will have been tightly constrained by Supreme Court precedent.

Expository questioning would entail confirming, or "exposing," what nominees are already known to believe. It would resemble questioning during a trial, or "lock-in" questioning during a deposition or grand jury appearance, where the object is not to discover new information but to verify what is already known. Expository questioning would be used to show the rest of the Senate, as well as the public, that a nominee already has expressed certain views, continues to hold them, and is likely to adhere to them on the Court if confirmed. Depending on the objective, senators might want their designated attorneys to use expository questioning either to shine a light on a nominee's views or, more pointedly, to support or weaken the case for confirmation.

Hortatory questioning would entail prodding, or "exhorting," nominees to begin providing meaningful answers by demonstrating that they have been illegitimately refusing to provide them. Ideally, such questioning would be used sparingly, if at all – a last resort to be employed when neither exploratory nor expository questioning is producing real answers. The immediate objective is to show that nominees are not providing information that they ought to provide if the hearings are to serve their educational purpose. The long-term objective is to encourage nominees to become more forthcoming in responding to future areas of inquiry. If a nominee repeatedly proves unresponsive, however, the long-term objective is to strengthen the Senate's resolve to refuse to give its consent to the nomination. Nominees are, of course, ethically bound to say nothing about how they would rule in particular cases. But they are under no obligation to demur when asked about their views regarding settled legal principles.[40] Senators can complain, and have complained, about how certain nominees have not been sufficiently forthcoming about their views. But complaining about it and actually showing it are very different things. As litigators know, juries – and people – do not like to be told what to believe; they like to be shown the facts so that they can draw conclusions for themselves. As much as some senators have protested nominees' lack of candor, their protests would prove substantially more persuasive, to their colleagues and to the public, if they had effective, demonstrative lines of hortatory questioning to back them up.

What follows are abbreviated examples of lines of exploratory, expository and hortatory questioning that might have been pursued at the Judiciary Committee's most recent Supreme Court confirmation hearing. These examples are not meant to suggest what was, in fact, most important. Each simply draws on one area that one or more senators saw fit to address. Keep in mind that questioning would never proceed verbatim according to the "scripts" below. Again, the idea is to engage the nominee in a natural give-and-take, which requires active listening and follow-up – something that could never take place if the examiner were to rigidly follow a script.

1. Exploratory Questioning

At the time of his nomination, Justice Alito had been on the Third Circuit for 15 years. But because his position as a lower court judge obligated him to follow Supreme Court precedent, he never had much of a chance to show whether he subscribed to a particular method of interpreting

[40] According to Northwestern University Law School Professor Steven Lubet, there is, for instance, nothing ethically impermissible about opinion testimony regarding decided cases: "[N]ominees may find it tactically advantageous to duck tough questions about endangered precedent, but they cannot find refuge in the Code of Judicial Conduct." Steven Lubet, *Questioning Ethics*, YALE L.J. (THE POCKET PART) (Jan. 2006) (*available at* http://yalelawjournal.org/2006/01/lubet.html). *See also* Ronald Dworkin, *Judge Roberts on Trial*, N.Y. REVIEW OF BOOKS, Sept. 21, 2005.

the Constitution. Nor had he publicly embraced a particular interpretive theory in any other forum. Nevertheless, he had dropped a few hints along the way – hints that provided an opening for some real fact-finding at his hearing. Justice Alito widened the opening himself when, consistent with these hints, he answered a broad question on constitutional interpretation from Senator Charles Grassley as follows:

> [I]f it is a question of absolutely first impression – and there aren't that many constitutional issues that arise at this point in our history that are completely issues of first impression – you would look to the text of the Constitution and you would look to anything that sheds light on the way in which the provision would have been understood by the people reading it at the time. [If it were not a matter of first impression, you also] certainly would look to precedent …"[41]

He answered another open-ended inquiry from Senator Sam Brownback with similar testimony: "I think we should look to the text of the Constitution, and we should look to the meaning that someone would have taken from the text of the Constitution at the time of its adoption."[42] But then the exploration ended. There was no follow-up from Senators Grassley or Brownback, and no follow-up from Democratic senators who otherwise indicated they wanted to know whether Justice Alito was like Justice Thomas or Justice Scalia, whose brands of originalism sound a lot like what Justice Alito was describing.

A meaningful conversation on the subject might have gone like this:

What things do you take into account when interpreting a provision of the Constitution?

When you say you'd "look to the meaning that someone would have taken from the text of the Constitution at the time of its adoption," what do you mean – how they expected a provision to be applied at that particular time in history; how they anticipated it might be applied to future developments they couldn't foresee; what? Give an example. What would you look at to determine this original understanding? What would you do if there were differing, even opposing, original understandings?

Do you take into account the purpose the Framers had in drafting a constitutional provision? Why/why not?

Do you take into account the consequences of a particular interpretation, and whether those consequences are consistent with the provision's overriding purpose? Why/why not?

Do you take into account how a provision has been understood throughout history, and not just when it was ratified? Why/why not?

Apart from the plain words of the text and the way those words were understood at the time of ratification, do you take anything else into account? Anything else besides precedent? If a precedent relies on something more than text and original understanding, is it entitled to less consideration than a precedent that relies only on text and original understanding?

[41] Testimony of Samuel Alito (Jan. 10, 2006).
[42] Testimony of Samuel Alito (Jan. 11, 2006).

Let's try to make this discussion a little more concrete. Let's take a few of the Constitution's vaguer clauses and explore what you've just told us. Let's start with the Due Process Clause of the Fourteenth Amendment. It's true that the Court has interpreted to protect the right to control many of our most important, private decisions free from government interference? Decisions like whom to marry? And whether to have and how to raise children?

In your view, does the text of the Due Process Clause support a right of privacy? Does the original understanding? If so, how? If neither the text nor the history of the Due Process Clause supports a right of privacy, what, if anything, does? Do you agree with Justice Harlan's dissent in *Poe v. Ullman* regarding the right of privacy? Why/why not? In your view, is that dissent rooted in either the text or the original understanding of the Due Process Clause? Justice Harlan himself suggested it was also rooted in the purpose of the Clause and the traditions that have evolved from it: "Each new claim to Constitutional protection must be considered against a background of Constitutional *purposes,* as they have been rationally perceived and historically developed." [***display on screen***] Do you agree with that? How is reliance on only text and original understanding consistent with it?

The Supreme Court's decision in *Loving v. Virginia* said in part that due process prohibits the states from forbidding someone to marry a person of another race. In your view, does the text of the Due Process Clause support *Loving*? The original understanding? If so, how? If neither the text nor the original understanding supports the due process portion of *Loving*, does the Due Process Clause, in your view, support *Loving* in any way? How? [*Use the same series of questions to probe the nominee's views about Skinner v. Oklahoma, Pierce v. Society of Sisters, Meyer v. Nebraska, Griswold v. Connecticut, Moore v. City of East Cleveland, Lawrence v. Texas, Roe v. Wade*]

Have you written opinions that shed light on your view of how the Due Process Clause should be interpreted? Which ones? What about *Alexander v. Whitman*, a case where the Third Circuit held that the Due Process Clause does not authorize recovery for fetuses killed prior to delivery? In a brief concurrence you wrote, "I think our substantive due process must be informed by history. It is therefore significant that at the time of the adoption of the Fourteenth Amendment and for many years thereafter, the right to recover for injury to a stillborn child was not recognized."[43] [***display relevant language on screen***] Does that reflect what you've described as your position on interpreting the Constitution? Explain. [*Ask similar questions regarding (i) a memo he prepared at the Justice Department in 1984, in which he wrote that shooting a fleeing felon, no matter how minor the threat the felon posed, could never violate the due process clause because the law historically authorized such conduct*;[44] *and (ii) his solitary – but, with the help of a visiting judge, ultimately successful – effort to overturn a line of Third Circuit precedents that provided due process protection against impurely-motivated government actions*.[45]]

[43] Alexander v. Whitman, 114 F.3d 1392, 1409 (3d Cir. 1997) (Alito, J., concurring).
[44] Memorandum from Samuel Alito to the Solicitor General re: Memphis Police Dept. v. Garner (May 18, 1984).
[45] *See* Homar v. Gilbert, 89 F.3d 1009, 1026 (3d Cir. 1995) (Alito, J., dissenting), *rev'd on other grounds*, Gilbert v. Homar, 520 U.S. 924 (1997); Phillips v. Borough of Keyport, 107 F.3d 164, 183 (3d Cir. 1997) (*en banc*) (Alito, J., concurring in part and dissenting in part) (12-1 decision, with Judge Alito as the lone dissenter); United Artists Theatres, Inc. v. Twp. Of Warrington, 316 F.3d 392 (3d Cir. 2003).

You would agree that those who choose to interpret the Constitution solely according to its text and original understanding – as you've said you do – are called "originalists"? You would agree that Justices Scalia and Thomas call themselves originalists? That Robert Bork calls himself an originalist? Given that you, like they, believe that judges should only look to text and original understanding (and precedent) when interpreting the Constitution, do you consider yourself an originalist? If not, what distinguishes your method of constitutional interpretation from theirs?

2. Expository Questioning

One aspect of Justice Alito's pre-nomination record that prompted intense scrutiny was his apparently stringent view of the Constitution's limitations on Congress' powers. During the hearings, Justice Alito provided still more material for a meaningful exposition of that view when he maintained that he had taken "really a very modest position" in his dissent in *United States v. Rybar*.[46] In *Rybar,* Justice Alito broke from other circuits and voted to strike down the federal law banning machine gun possession, saying it exceeded Congress' Commerce Clause authority in view of the Supreme Court's decision in *United States v. Lopez.*[47] If it was the Democrats' intent to expose Justice Alito's federalist leanings (as appeared to be the case), or even just to understand them better, that statement provided a clear opening. But no senator picked up on it. Nor did other questioning do much to illuminate Justice Alito's views about federal vs. state authority.

An experienced litigator might have done more to spotlight Justice Alito's beliefs:

Would you agree that, ever since the New Deal era, the interstate Commerce Clause has been a vital source of Congress' law-making authority? That Congress enacted much of the most significant legislation of the 20th century based on its Commerce Clause authority? Environmental laws like the Clean Air and Clean Water Acts? Food and drug safety laws? Civil rights laws like the landmark Civil Rights Act of 1964 and the Fair Housing Act? Labor laws – laws providing for a minimum wage, overtime pay and workplace safety? Just to name a few? And without the Commerce Clause as a source of Congressional power, some – perhaps none – of these laws would have been permitted to be enacted?

The Commerce Clause has also provided the constitutional basis for federal laws designed to protect public safety, true? In *United States v. Rybar*, you had occasion to rule on whether Congress had acted within its Commerce Clause powers when it banned the possession of machine guns? You wrote a dissent that would have struck down the machine gun ban? On the grounds that Congress did not have the authority, under the Commerce Clause, to do what it did? (To be clear, this was not a case under the Second Amendment, which some believe – and others don't – guarantees an individual right to bear arms?)

Why did you rule the way you did in *Rybar*? So your position is that *Lopez* compelled what you wrote? At the time you wrote your opinion, other courts had also ruled on the constitutionality of the machine gun ban in the wake of *Lopez*? How many? None of them agreed with you? All of them agreed with your colleagues in the majority?[48] Other courts

[46] 103 F.3d 273 (3d Cir. 1996).
[47] Testimony of Samuel Alito (Jan. 10, 2006).
[48] United States v. Beuckelaere, 91 F.3d 781 (6th Cir. 1996); United States v. Kenney, 91 F.3d 884 (7th Cir. 1996); United States v. Rambo, 74 F.3d 948 (9th Cir. 1995); United States v. Wilks, 58 F.3d 1518 (10th Cir. 1995).

also ruled on the constitutionality of the machine gun ban after *Rybar* came down? How many? How many courts agreed with you? All except one?[49] As to the one that did agree with you, the Supreme Court vacated that decision after its ruling in 2005 in *Gonzales v. Raich*?[50] What did *Raich* hold? Would you agree with legal commentators who have said that *Raich* is at odds with the position you staked out in *Rybar*? Why/why not?

You characterize your opinion in *Rybar* as "really very modest"? Yet you wanted to strike down a federal statute? You would agree that some people loudly accuse judges of "judicial activism" when they vote to invalidate legislation? Whether it should be called "activism" or not, how is invalidating an act of Congress – one of the gravest things a federal judge can do – "really very modest"?

As you know, many do not believe you were correctly applying *Lopez*, or acting very "modestly" in *Rybar*. Your colleagues in the majority didn't – they said your opinion "runs counter to the deference the judiciary owes to its two coordinate branches of government" and requires Congress to "play Show and Tell with the federal courts."[51] [***display on screen***]. In hindsight, do you think that assessment is right or wrong? The appeals courts that came both before and after you also didn't think your position was compelled by *Lopez*. In hindsight, do you agree with those assessments? The Supreme Court, in *Raich*, also suggests that your position wasn't compelled by *Lopez*. Do you agree with that assessment? Do you agree with the *Raich* majority or do you agree with the dissent in *Raich*? [*If consistent with the senators' wishes, insert questions using visual displays quoting others who found the Rybar dissent to be immodest, including supporters of Chief Justice Roberts' nomination – e.g., Jeffrey Rosen*[52]*, The Washington Post*[53] *and Senator Tom Coburn.*[54]]

Is it fair to say that your position in *Rybar* reflects your core beliefs about how the Constitution allocates power between Congress and the states? And places limits on Congress' power?

When you submitted an application for a political appointment as Deputy Assistant Attorney General in the Reagan Administration, you wrote, "I believe very strongly in … federalism."[55] [***display on screen***] You would agree that the result you advocated in *Rybar* is consistent with that?

When you worked in the Justice Department, you recommended that President Reagan veto a bill aimed at regulating what was then the rampant practice of odometer tampering? Just about everyone, including the used car industry, was in favor the law – in favor of national,

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[49] United States v. Franklyn*,* 157 F.3d 90 (2d Cir. 1998); United States v. Knutson*,* 113 F.3d 27 (5th Cir. 1997); United States v. Wright, 117 F.3d 1265 (11th Cir. 1997), *reh'g en banc granted in part and opinion vacated in part on other grounds,* 133 F.3d 1412.

[50] United States v. Stewart, 348 F.3d 1132 (9th Cir. 2003), *vacated* 545 U.S. 1112 (2005).

[51] *Id.* at 282.

[52] Jeffrey Rosen, *How to Judge*, NEW REPUBLIC, Nov. 29, 2004, at 18 (characterizing Justice Alito as "a conservative activist who [is] determined to use the courts to strike at the heart of the regulatory state … [and whose] lack of deference to Congress is unsettling.").

[53] Editorial, *Judge Alito on the States,* WASH. POST, Nov. 21, 2005.

[54] Transcript of *Today Show*, Oct. 31, 2005 (""Those aren't decisions judges should be making. Those are decisions legislatures should be making.").

[55] Memorandum from Mark Sullivan to Mark Levin re: Samuel A. Alito, Jr., Deputy Assistant Attorney General, SES I (Dec. 12, 1985) [hereinafter "Application"].

rather than patchwork, regulation? Yet you recommended that the president veto the law because it "violates the principles of federalism supported by this administration. … After all, it is the states, and not the federal government, that are charged with protecting the health, safety and welfare of their citizens."[56] [***display on screen***] You would agree that the result you advocated in *Rybar* is also consistent with the views you expressed there? Did President Reagan accept your advice? That prompted the *Washington Times* to report, "Judge Alito apparently believed in the ideals of federalism even more strongly than Mr. Reagan."[57] [***display on screen***] Do you agree?

You have a well-earned reputation for using modest, measured prose in your opinions, even when you disagree with your colleagues. Is that something you strive for? Yet these were the very first words in your *Rybar* dissent: "Was *United States v. Lopez* a constitutional freak?" [***display on screen***] In hindsight, you would agree that this is not what most would consider to be modest, measured language? And it's perhaps uncharacteristically strident for you? So a reasonable observer might conclude that you felt pretty passionately about the views you expressed in your *Rybar* opinion?

3. Hortatory Questioning

At his hearing, Justice Alito almost always resorted to explaining legal principles and precedents without revealing his own views, even if he had expressed such views before. Faced with that situation, many senators repeatedly failed to ask the most obvious, *exploratory*, follow up question: "I understand that's the law. Do you agree with it? Is that *your* view?" But even on the limited number of occasions when such follow-up was pursued, Justice Alito demurred, either continuing to avoid a direct answer or asserting that providing one would improperly compromise the appearance of impartiality on matters that might come before him. At the same time, Justice Alito *did* offer his views on certain matters, such as the propriety of looking to foreign law in constitutional adjudication, even though such matters continue to be debated on the Court. Senators did not expose that inconsistency effectively and did not persuasively show that, when faced with a follow-up question on his own views, Justice Alito refused to provide meaningful information.

[*This line of inquiry would have to be preceded by an educational line of crisp, easily comprehensible questions about Morrison v. Olson, the unitary executive theory and the fact that, if adopted, the theory would abolish the independent status of many agencies (e.g., the SEC, FCC, FEC, FTC, NLRB, OSHA, CPSC).*] In a speech you gave in 2001, you embraced the theory of the unitary executive, true? You said "I thought [when working at DOJ], and I still think, that this theory best captures the meaning of the Constitution's text and structure." [***display on screen***] In the same speech, you also criticized the decision in *Morrison*? As you had done in an earlier speech, in 1999? In the 1999 speech, you also applauded Justice Scalia's lone dissent in *Morrison* – the dissent that, in your view, applied the unitary executive theory? You called the dissent "brilliant"? Do you still hold these same views today? *Morrison* was wrong? Justice Scalia was right? The theory of the unitary executive best captures the meaning of the Constitution? You cannot tell us?

[*Perhaps ask similar series of questions regarding his reluctance to discuss (i) his view of whether the Constitution protects a right to abortion (he said it didn't in a 1985 job*

[56] Memorandum from Samuel A. Alito, Jr. to Peter J. Walliston re: Enrolled Bill S. 475 (Oct. 27, 1986).
[57] Charles Hurt, *Alito Papers Evince a Conservative*, WASH. TIMES, Nov. 15, 2005.

application for a political appointment at the Justice Department)[58]*; and (ii) his view of whether presidential signing statement should help shape the meaning of legislation (he said they should in a memo he wrote as a Justice Department official)*[59]]

You say you won't give your views on these subjects because you believe they might come before you if you're confirmed? That it might compromise the appearance of impartiality if you told us what you think? But you've already expressed your views on the subjects we just talked about? How would giving your views now compromise your impartiality any more than what you said before? When you gave those speeches on *Morrison* and the unitary executive in 1999 and 2001, you were a sitting appeals court judge? The issues could have come before you then? But you went ahead and gave the speeches? So why can't you tell us what you think now?

You've also given us your views on other matters that might come before you? You've testified that foreign law should have no bearing on the interpretation of the U.S. Constitution? Isn't that something that might come before you? Isn't it also something that, unlike *Morrison*, you had not publicly expressed an opinion about before now? And isn't it true that whether the Court should consider foreign law remains an unsettled issue? A subject of intense controversy, in fact? In the case of *Roper v. Simmons*, which outlawed the death penalty for juveniles? In the case of *Atkins v. Virginia*, which outlawed the death penalty for those with mental retardation? And as a result of those decisions, in academia? In politics? And in the court of public opinion? How exactly are you choosing which matters, still before the Court, you will discuss and which you won't?

IV. Toward a Less Rancorous Future?

While a number of observers have pointed out quite forcefully that Supreme Court nominations have been a political football throughout American history,[60] critics of the modern day process still complain that things are just too heated. So what might lower the temperature?

In the wake of the Thomas confirmation hearings, David Strauss and Cass Sunstein advocated one solution. They said that if senators flexed their muscles more by rejecting candidates whose convictions they vehemently disagreed with, the president might be compelled to consult with the Senate prior to nomination and to select someone whose views reflected those of the Senate at large. By the same token, if the Senate were allowed to provide genuine "advice" to the president before a nomination, senators would be less inclined to be oppositional – or to go searching for some disqualifier unrelated to the nominee's views – afterward. Strauss and Sunstein stressed that their conclusions were speculative, but they maintained that the process could scarcely get any less political than it already was, given that then-recent presidents had made such a concerted effort to choose justices with hard-line conservative orientations.[61]

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[58] Application, *supra* note 55.

[59] Memorandum from Samuel A. Alito, Jr., to The Litigation Strategy Working Group, re: Using Presidential Signing Statement to Make Fuller Use of the President's Constitutionally Assigned Role in the Process of Enacting Law (Feb. 5, 1986).

[60] *See, e.g.,* Jeffrey Rosen, *Supreme Court Confirmations are as Messy as They Should Be*, CHRON. OF HIGHER EDUC., Nov. 11, 2005; David Greenberg, *The Judge Wars: Borking Didn't Start with Bork*, SLATE, July 6, 2005, *available at* http://www.slate.com/id/2122081/.

[61] Strauss & Sunstein, *supra* note 9, at 1514-16.

There is much to commend Strauss and Sunstein's suggestion, however speculative their conclusion. But it begs the question of what, exactly, will give senators the *political will* to exercise their constitutional prerogative not to consent to a nomination if circumstances warrant it. Is it enough that a nominee holds disagreeable views, or refuses to divulge his or her views during the hearing? It may well be that some senators will never be convinced to vote against a nomination based on a nominee's unwillingness to share his or her views, or to vote no because they find such views unacceptable. But if anything will give senators such resolve, it is *demonstrating* to their constituents that a no vote is warranted. Recent history has shown that senators cannot rely merely on their own characterizations of either a nominee's record or a nominee's lack of testimonial candor to persuade their on-the-fence colleagues to side with them. They might stand a better chance of succeeding, however, if they were able to point to dynamic proof of a nominee's views or a nominee's obfuscation – i.e., proof from the nominee's hearing testimony. As noted above, it was precisely such forceful "proof" that led wavering senators to vote against Judge Bork and that, as a result, decided the outcome of his nomination.

Senators have tried repeatedly to elicit the same kind of evidence from contested, post-Bork selections. But with nominees cognizant of and coached to avoid Judge Bork's pitfalls, they have not succeeded in obtaining it. Litigators might not fare any better. By virtue of their expertise, however, they might. If they were able to elicit the kind of testimony senators appear to believe is needed to reject a nominee who either hides or holds unacceptable views, then Strauss and Sunstein's already speculative chain of events might unfold: the Senate's wavering members might develop the political fortitude to exercise their constitutional prerogatives more forcefully; the president might respond by genuinely seeking the Senate's advice prior to nomination; the Senate might respond by giving the president's selections the benefit of the doubt; and the confirmation process might become less contentious. But without first ensuring that the Senate obtains tangible evidence of what a nominee either believes or refuses to divulge, there will be nothing to set this process in motion. For all the reasons discussed above, litigators would be well-suited to provide the impetus.

V. Conclusion

For nearly two decades, senators, academics, journalists and countless others have complained that Supreme Court confirmation hearings have become meaningless, formulaic rituals. At the same time, however, the hearings remain a focal point of the confirmation process and the Senate has given no indication that it is going to eliminate them or diminish their importance. What's left to do but try to improve them? The most practical and politically feasible way to do so is to allow litigators to take the lead in examining nominees. Because of their preparation habits and examination skills, litigators are better equipped to ensure that the hearings serve their intended purpose of educating the Senate and the public about how and what a nominee thinks. To be sure, even under questioning from an experienced courtroom advocate, a nominee may still refuse to divulge anything of substance. And even if an experienced courtroom advocate can more effectively demonstrate that a nominee is stonewalling, senators may still refuse to insist on their institutional prerogatives, particularly if the Senate majority and the president are of the same party. But in light of the current, unhappy state of affairs, the Senate Judiciary Committee ought to do *something* to shake things up. Tapping seasoned litigators to lead the way is worth a try.