

THE CONFIRMATION MESS, REVISITED

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I. ASKING THE QUESTIONS

For an institution that sits atop what is supposed to be the least dangerous branch of the federal government,¹ the Supreme Court of the United States excites a remarkable degree of cautious and envious affection. We love it, we hate it, we cherish it, we fear it—but, most importantly, when one of its members steps aside and leaves a vacancy, we all feel as though we own it. It is *our* Court, and, in the rhetoric of the moment of nomination and confirmation, it ought to articulate *our* values. Choosing a new Justice nowadays is a bit like hiring a new servant—one wants to see prior experience, excellent references, a judicious temperament, and an instinct for knowing the master's will.

Martin Shapiro's paper reflects an uneasiness about, perhaps even a resistance to, this vision of the Court as servant of the public will.² Servants have to do what they're told. From the courts we expect something more—most of the time, anyway. According to Shapiro, while most presidential nominations to the Supreme Court are successfully cast in the "independent judiciary" mode, which evidently limits the Senate to screening out the scoundrels, the knaves, and the truly incompetent, some nominations fall into the "political mode," when the nominee stirs sufficient controversy that senators realize that there are points to be scored through strong public positions on confirmation. As a good political scientist, Shapiro strives for objectivity as he speculates on the reasons that nominations fall into one mode or another. Despite Shapiro's efforts at dispassionate observation, however, one senses from his discussion of the political mode and the independent judiciary mode of reviewing nominations a definite preference for the second.

I don't blame him. The political mode treats the Supreme Court as a servant. For all that late-twentieth century constitutional law may be built, as Shapiro suggests, on the political program of the liberal democratic rights industry,³ two centuries of constitutional survival are built

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¹ See A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 1 (1962) ("The least dangerous branch of the American government is the most extraordinarily powerful court of law the world has ever known.")

² See Shapiro, *Interest Groups and Supreme Court Appointments*, 84 *Nw. U.L. Rev.* 935 (1990).

³ *Id.*

on a different and firmer footing: the proposition that the judicial branch stands above the partisan fray. If the Supreme Court turns out to be independent, nothing is threatened by a political program, but if it turns out instead to be a tool of partisan politics, what is at risk is our constitutional self-image, the constitutional *mythos* that pretends that our system of government still resembles the one that the founders chose.⁴

The independent judiciary model, in short, is not politically attractive because it spares incumbents tough potentially costly choices. It is attractive because it squares so well with the American vision of the people we are. No wonder, then, that so many critics of the Bork confirmation proceedings argue, in effect, that the independent judiciary model is the only one in which we ought to indulge.⁵ No wonder that the supporters of every nomination claim, in perfect but unself-conscious sincerity, that it is they who are the guardians of judicial integrity, and their opponents who are involved in narrow-minded partisan squabbling. And no wonder that those on the other side make the same argument—albeit with a minor transposition of adjectives.

Very likely the truth lies somewhere in between. Strive though we might, few of us are able to make a complete separation between our views about good public policies and our views about constitutional meaning.⁶ It would be foolish to expect that many of us would have an easier time separating our views about good public policies from our views about the qualifications of prospective judges in general, and potential Supreme Court Justices in particular. We know in the way that we know our left hand from our right, that the judicial branch is supposed to be independent of political control, and we can sense, although it is difficult to say just why, that independence is threatened when the President and members of the Senate make their decisions on the basis of predictions about the way they believe a nominee is likely to vote.

But we also have enormous affection for our favorite precedents, even if they represent constitutional analysis at its worst, and considerable passion about those decisions we like least, no matter how powerful the legal arguments available to support them. Somewhere along the line we get confused, and think that our two instincts are really one. We get the idea that protecting our favorite precedents is the same as protecting judicial independence. Or we convince ourselves that overturning the

⁴ It is always risky for a writer to slip too easily into “we”—especially because the writer almost always means “my friends and I.” But I am using “we” in a self-conscious effort to identify myself within the broad sweep of the American *mythos* that reaches beyond the academy. Cf. Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 399 n.1 (1985). If I am wrong, it is not because I am unconsciously projecting my friends as “we,” since my friends would be astonished to learn that they reason this way.

⁵ See, e.g., Fein, *A Circumscribed Senate Confirmation Role*, 102 HARV. L. REV. 672 (1989).

⁶ Of course, it is possible to carry this clear and cautionary insight to unnecessary extremes. Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981).

decisions we detest is equivalent to preserving the integrity of constitutional government. Having convinced ourselves, we thrash about for ways to convince the President—or, failing that, the Senate. And the best way of organizing our anxieties, as Shapiro, a political scientist, knows, is by supporting groups capable of taking collective action—the interest groups that he describes.

In general, I suspect that Shapiro is right to suggest that interest groups wield comparatively little influence in the confirmation process. They do not carry many votes, and most do not have much money to contribute. They probably do more to provide ammunition for positions that senators are inclined to take anyway rather than they do to shape the positions themselves. The Bork battle is a case in point. It seems unlikely that many senators voted against the nomination because four members of the American Bar Association's Standing Committee on Federal Judiciary found the nominee "not qualified" to be a Justice⁷—just as it is unlikely that many of G. Harrold Carswell's supporters took their positions because the Standing Committee voted unanimously that he was qualified.⁸ In each case, however, senators found it politically useful to be able to say that they were in effect only doing what the ABA told them they ought to.

The interest groups that lobby for and against various nominations almost certainly care about the make-up of the Court more passionately than do most members of the Senate.⁹ As a general proposition, the interest groups view every nomination in Shapiro's political mode, because they view the results the Court reaches as its most significant aspect.¹⁰ They prefer a model of the Court as guardian of the rights they happen to value most—the Court as servant. They therefore believe that the Senate should base its judgment on a prediction about how a nominee is likely to vote.

⁷ See SENATE COMM. ON THE JUDICIARY, REPORT ON THE NOMINATION OF ROBERT BORK TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT, 100th Cong., 1st Sess. 3-6 (1987) [hereinafter BORK COMMITTEE REPORT].

⁸ NOMINATION OF GEORGE HARROLD CARSWELL, REPORT OF THE SENATE COMMITTEE ON THE JUDICIARY, 91st Cong., 2d Sess. 2 (1970). The Carswell nomination was defeated by a vote of 51-45. See 116 CONG. REC. 10,769 (1970).

⁹ There are exceptions. For example, the members of the Senate probably care more than most interest groups do about the "congressional standing" doctrine—perceived opposition to which was one fact that counted against Bork. See BORK COMMITTEE REPORT, *supra* note 7, at 62-64.

¹⁰ I would like to except the ABA Standing Committee from this generalization, but I am not sure what else to make of the justification offered by the four members who held Bork "not qualified." They questioned his "compassion, open-mindedness, his sensitivity to the rights of women and minority persons or groups and comparatively extreme views respecting constitutional principles or their application, particularly within the ambit of the Fourteenth Amendment." BORK COMMITTEE REPORT, *supra* note 7, at 5-6. It is hard to support confirmation of a potential Justice who is hard-hearted, closed-minded, and insensitive to the rights of women and members of minority groups, but it is also hard to imagine that this description is much more than a code for "is likely to reach results that I do not like."

Let me make my own position clear. I am firmly on record as believing, and I continue to believe, that when senators ask questions intended to elicit information that will permit them to predict the votes that a nominee will cast if confirmed, they are engaging in an activity that represents a profound threat to judicial independence.¹¹ Approving nominees who will vote the "right way" means enshrining the politically expedient judgments of a given era as fundamental constitutional law. That cannot be what life tenure was designed to achieve, and if it is, then life tenure is a despotic horror that we ought to sweep away.¹²

That said, I hasten to add that I only believe that asking the questions is constitutionally improper. I do not consider the questions unconstitutional. On the contrary, if one conceives unconstitutionality as a prediction of what a court is likely to do in fact (a conception that presumably would have appealed to Holmes), then I am quite clear that questions intended to make prediction easier are *not* unconstitutional. I would not want the courts involved at all. I am quite confident that the senators are entitled under the Constitution to cast votes for or against a nominee on any basis they choose—be it judicial philosophy, political party, race, religion, or color of hair—and that no court ought to give relief in a suit claiming wrongful denial of confirmation. If there is ever a place for the political question doctrine—and I believe that we need one, desperately¹³—it is here, on the issue of the grounds on which a member of the Senate casts a vote against confirmation.

Casting votes on any grounds they please, including disagreement with judicial philosophy or prediction of particular votes, is, I emphasize, what I believe the Constitution *permits* the senators to do. That is not the same as saying that I think exercising this particular prerogative is a good idea. Actually, I think that making a decision on the basis of a predicted vote is contrary to the spirit of separation of powers in general, and of an independent judiciary in particular.

I have used the term "constitutional impropriety" to capture the idea that there are things that courts should not (or mistakenly do not) forbid, even though they are contrary to the spirit of the Constitution, and even contrary to its structure.¹⁴ Under this model, a Senate decision to reject a nominee because, for example, she was a black woman would be constitutionally improper. But it would not be unconstitutional. Similarly, a Senate decision to approve a nominee because she promised to

¹¹ See Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185 (1988).

¹² Chief Justice Rehnquist is among those who have proposed that Justices serve for nonrenewable fixed terms.

¹³ For my views on the importance of the political question doctrine, see Carter, *From Sick Chicken to Synar: The Evolution and Subsequent De-Evolution of the Separation of Powers*, 1987 B.Y.U. L. REV. 719, 800-08.

¹⁴ See Carter, *Constitutional Improprieties: Mistretta, Morrison, and Administrative Government*, 57 U. CHI. L. REV. (forthcoming 1990).

uphold a controversial bit of legislation would be constitutionally improper, but it would not be unconstitutional.

In fact, even though a nominee can and should decline to express a view on pending cases, it is certainly constitutionally permissible (although still, I believe, improper) for a senator to refuse to vote to confirm on the basis of that very refusal to speak. For example, Senator McClellan, who as a member of the Senate Judiciary Committee voted against the confirmation of Thurgood Marshall as an Associate Justice (McClellan did not vote on the Senate floor), was one of several senators who hoped to obtain the nominee's commitment to overturn *Miranda v. Arizona*,¹⁵ the decision requiring police officers to inform suspects of their rights before beginning any custodial interrogation. Marshall, as Solicitor General, had argued for the result that the senators now favored, but at his confirmation hearings he refused to say whether he would, if the case arose again, vote in accordance with his brief. The following colloquy ensued:

SENATOR McCLELLAN. . . . Do you subscribe to the philosophy expressed in the majority of the *Miranda* opinion . . . ?

JUDGE MARSHALL. I would say again, I respectfully state to you, Senator, that this is certainly a case that is on its way to the Supreme Court right now.

SENATOR McCLELLAN. But it is already ruled on. This is the ruling of the Court.

JUDGE MARSHALL. But there are other cases. The *Miranda* case is not the end. The case itself says in three or four places in the opinion that they do not know what Congress intends to do, they do not know —

SENATOR McCLELLAN. I am not talking about legislation. I am asking you now about the Constitution. Do you think that the Constitution requires that evidence be excluded?

JUDGE MARSHALL. I cannot comment on what is coming up to the Court.

SENATOR McCLELLAN. But this has already been there.

JUDGE MARSHALL. But there are hundreds of other ones on the way that are variations on this.

SENATOR McCLELLAN. Of course there are, but this is specific and has been done.

JUDGE MARSHALL. Well, Senator, I respectfully say that it would be improper for me to tell you and the committee or anybody else how I intend to vote.

SENATOR McCLELLAN. It is not improper, may I say, for me to weigh your reluctance to answer.

JUDGE MARSHALL. It certainly is not.

¹⁵ 384 U.S. 436 (1966).

SENATOR McCLELLAN. Very well.

JUDGE MARSHALL. It certainly is not. You have a perfect right to try to find out —

SENATOR McCLELLAN. I will try to pursue one or two further questions. Do you subscribe to the philosophy that the fifth amendment right to assistance of counsel requires that counsel be present before police can interrogate the accused?

JUDGE MARSHALL. That is part of the *Miranda* rule.

SENATOR McCLELLAN. Yes.

JUDGE MARSHALL. And, as I say, I can't comment, because it is coming back up.

SENATOR McCLELLAN. I have to wonder, from your refusal to answer, if you mean the negative.

JUDGE MARSHALL. Well, that is up to you, sir. But I have never been dishonest in my life.

SENATOR McCLELLAN. I did not say that. But you lead me to wonder why I cannot get the answer.¹⁶

Marshall's position, of course, was quite simple. It would be wrong, he insisted, to make the promises that McClellan and others demanded. By refusing to make the promises, he in effect denied the senators the information that they needed in order to predict his votes. And whether McClellan and others chose to penalize him for it or not, Marshall was right to remain silent.

II. GETTING THE ANSWERS

The battle over the Bork nomination carried echoes of this theme, as skeptics on the Judiciary Committee grew increasingly frustrated at their inability to get the nominee to recant those views that they did not like. Nor is this the only aspect of the Bork battle that mirrored the controversy over Thurgood Marshall's nomination almost exactly twenty years earlier. Marshall, like Bork, came to his hearing with a magnificent resume: successful litigator (twenty-nine victories in thirty-four Supreme Court arguments), judge on the Court of Appeals for the Second Circuit (in those days unquestionably the nation's second most important court), and Solicitor General of the United States. At that time of his nomination, Marshall was already one of the great figures of twentieth-century American law. His hearings should have been a bit like a coronation. Instead, there was an air of *lese majeste* about the thing, as senators nit-picked through his record. Indeed, the many astonishing and depressing parallels between the Marshall battle and the Bork battle suggest the

¹⁶ *Nomination of Thurgood Marshall to be Associate Justice of the Supreme Court of the United States: Hearings Before the Sen. Comm. on the Judiciary, 90th Cong., 1st Sess. 12-13 (1967) [hereinafter *Marshall Hearings*].*

need to modify at least one part of Shapiro's thesis: perhaps the study of nominations in the political mode should not be limited to the defeats.

The parallels between Marshall and Bork begin with the way that the two nominations were characterized. Opponents of Bork said that he was a narrow ideologue rather than a principled conservative. Change "conservative" to "liberal" and the same proposition can be found in criticism of Marshall. Marshall's nomination was opposed, like Bork's, because it would upset the rough left-right balance on the Court. Critics of Bork complained that the moderate swing vote of Lewis Powell would be replaced by the vote of a right-wing ideologue. Critics of Marshall complained that the moderate swing vote of Tom Clark would be replaced by the vote of a left-wing ideologue.¹⁷

Like Bork's critics, who focused much on the "swing-vote" argument on *Roe v. Wade*,¹⁸ Marshall's critics had a particular case in mind when they spoke of the Court's alignment. They worried that Marshall might have turned around the 5-4 vote in *Walker v. City of Birmingham*,¹⁹ the case that held that court orders cannot be challenged by disobedience and, more important for the political moment, sustained the contempt citation and jail sentence of Martin Luther King, Jr., for parading in Birmingham without a permit and in defiance of an injunction. Had Marshall been on the Court when *Walker* was decided, so the worried opponents insisted, Dr. King might have gotten away with his defiance.²⁰

And there was much more. Marshall's critics, like Bork's, took him to task for blaspheming any number of icons—only they were icons that faced to the right rather than to the left. Bork was attacked for his disrespect of Supreme Court precedent, and, sometimes, for disrespecting constitutional theories—for example, the theory that the ninth amendment provides judicially enforceable rights—that the Supreme Court has never embraced.²¹ Marshall was criticized for urging the Supreme Court to overturn venerable precedents and for disrespecting other constitutional theories—for example, the view that the fourteenth amendment permits separate-but-equal segregation—that the Supreme Court had re-

¹⁷ See, e.g., *Mr. Marshall's Nomination*, Wash. Evening Star, June 15, 1987 (editorial), reprinted in 13 CONG. REC. 16,138 (1967); see also Kilpatrick, *Marshall's Appointment Upsets Court Balance*, Wash. Evening Star, June 18, 1967, reprinted in *Marshall Hearings*, supra note 16, at 45; White, *Marshall to the Court—Can Moderation Survive?*, Wash. Post, June 19, 1967, reprinted in *Marshall Hearings*, supra note 16, at 48.

¹⁸ 410 U.S. 113 (1973).

¹⁹ 388 U.S. 307 (1967).

²⁰ See, e.g., *Dr. King's Conviction*, Wash. Evening Star, June 14, 1967 (editorial), reprinted in 113 CONG. REC. 16,057 (1967); Kilpatrick, *Marshall's Appointment Upsets Court Balance*, supra note 17. See also 113 CONG. REC. 24,643 (1967) (remarks of Senator Eastland).

²¹ See BORK COMMITTEE REPORT, supra note 7, at 11-13, 33.

cently rejected.²²

Both candidates, moreover, were accused of lacking judicial temperament, of being too much the advocate, and of being too committed to their particular models of justice to engage in the dispassion (that word again) that their opponents suggested was the proper approach to the judicial process. Bork, it was said, was too much the abstract philosopher, ungenerous toward individuals, and ever the pleader for such special interests as free enterprise. Marshall, according to the critics, was disqualified because his lifetime of struggling for racial justice had warped his vision, as evidenced, for example, by the many speeches he had given strongly espousing his civil rights ideals.²³ Bork had given addresses questioning whether the due process clause protected unenumerated fundamental rights.²⁴ Marshall had given briefings questioning the constitutional authority of law enforcement officials to plant listening devices without court orders.²⁵ Bork was attacked for denying that the Constitution is a living document. Marshall was attacked for endorsing the same proposition.²⁶ On and on similar questions went, the painstaking dissection of every public comment by the nominee, the cross-examination about every nuance, all in the purported service of enabling the Senate to discover the nominee's judicial philosophy—that is, all in the service of helping the senators figure out which way the nominee, if confirmed, would vote.

After that, the arguments got truly weird. One of the sillier arguments made against Bork, for example, was that while serving as a judge on the District of Columbia Circuit, he changed the rationale of a draft opinion without consulting his colleagues on the panel.²⁷ An equally absurd argument against Marshall asserted that in preparing the briefs for

²² See, e.g., 113 CONG. REC. 24,590 (1967) (remarks of Senator Ervin).

Judge Marshall argued some of these [civil rights] cases with singular success before the Supreme Court, which repudiated or ignored the history of the 14th and 15th amendments, overruled or misconstrued or ignored form decisions interpreting the amendments in accord with the purpose of those who framed and ratified them, and attributed to the amendments new meanings implementing the notions of its members.

Id.

²³ See, e.g., 113 CONG. REC. 24,589 (1967) (remarks of Senator Ervin) (“if [Marshall] is elevated to the Supreme Court, he will join other activist Justices in rendering decisions which will substantially impair, if not destroy, the right[s] of Americans for years to come”); 113 CONG. REC. 24,635 (1967) (remarks of Senator Holland) (similar). Marshall's lifelong civil rights activism moved one senator to ask Marshall during the hearings whether he was “prejudiced against white people in the South” and whether, if confirmed, Marshall would give white Southerners “fair and square treatment.” *Marshall Hearings*, *supra* note 16, at 161 (Senator Eastland); see also 113 CONG. REC. 15,968 (1967) (remarks of Senator Rarick) (accusing Marshall of “contempt, open ridicule, and hatred of white southerners”).

²⁴ BORK COMMITTEE REPORT, *supra* note 7, at 8-21.

²⁵ See 113 CONG. REC. 24,640-42 (1967) (remarks of Senator Eastland).

²⁶ See 113 CONG. REC. 24,648 (1967) (remarks of Senator Thurmond).

²⁷ BORK COMMITTEE REPORT, *supra* note 7, at 78-81.

Brown v. Board of Education,²⁸ he slanted the facts and the law to conform to the result that he supported.²⁹

Bork's opponents made much of the identities and arguments of the interest groups that opposed him, giving prominent mention in the Committee Report to the objections of forty percent of full-time faculty members of accredited law schools and a variety of bar groups.³⁰ Marshall's opponents gave similar prominence to a report of nearly three-quarters of the chief justices of the state supreme courts, charging that the Warren Court's work (which Marshall was expected to carry on) generally disregarded principles of federalism and the rights of states.³¹

Of course, Marshall was subjected to other lines of questioning, some of them far more offensive than what Bork had to face. But the difference, unfortunately, was largely one of degree rather than of kind, for the theories propounded to support the questions asked of Bork cannot rule out of bounds most of the questions asked of Marshall. For example, Marshall's opponents, as Bork's would later, tried to show that the nominee was outside of the mainstream—although, to be sure, the mainstream was defined in different ways in the two cases. Senator Eastland, who chaired the Judiciary Committee, observed that one of Marshall's opinions had cited in support of a particular historical proposition a book by Herbert Aptheker, and wanted to know whether Marshall had known at the time that Aptheker "had been for many years an avowed Communist and was the leading Communist theoretician in the United States."³² Senator Thurmond demanded that Marshall call immediately to mind such minutiae as the views of Senator Bingham on whether the Congress could enforce the privileges and immunities clause of article IV,³³ and the names of the members of the congressional committee that reported out the fourteenth amendment.³⁴

The questions from the senators were the polite versions of what the right-wing group Liberty Lobby, a major opponent of Marshall's confirmation, was doing. Eastland's question about Aptheker matched nicely the efforts of Liberty Lobby to call into question Marshall's loyalty to the United States.³⁵ Thurmond's long line of questions about the minutiae of the history of the Civil War amendments dovetailed perfectly with the

²⁸ 347 U.S. 483 (1954).

²⁹ *Marshall Hearings*, *supra* note 16.

³⁰ BORK COMMITTEE REPORT, *supra* note 7, at 6-7.

³¹ See *Marshall Hearings*, *supra* note 16, at 27-44.

³² *Id.* at 176. Later, in the Senate debate, Eastland strongly implied that he did not believe Marshall's denial of any knowledge of Aptheker's Communist ties, adding a challenge to veracity to the slur on Marshall's loyalty. See 13 CONG. REC. 24,642-43 (1967) (remarks of Senator Eastland).

³³ *Marshall Hearings*, *supra* note 16, at 163.

³⁴ *Id.* at 164.

³⁵ See *id.* at 183-84 (testimony of Michael Jaffe). Liberty Lobby also called Marshall's "a record of duplicity and arrogance unparalleled by that of any nominee to high judicial office in recent times." *Id.* at 181.

Liberty Lobby's effort to convince the panel that Marshall was not up to the job intellectually—a slur that Marshall, as the first black nominee, must surely have expected.³⁶

But the fact that the attacks on Marshall were worse does not mean that the attacks on Bork were justified or fair. Perhaps the efforts of the Bork opponents to paint themselves as the true guardians of the *mythos* are evidence in support of Shapiro's thesis. No group wants to call itself partisan—politics is that nasty stuff that the other side does. Yet, even if considered politics as usual, the vicious attacks on the integrity, fairness, and ability of Thurgood Marshall deserved to be condemned, and the liberal establishment rushed to condemn them.³⁷ For the condemnation to be principled in liberal terms, of course, it had to attack the process, not the substance, and the process was disgusting.³⁸ Sadly, if the Bork mess has made one thing clear, it is that the outrage about inappropriate tactics turns out to be a matter of whose ox is being gored.³⁹

III. INTEREST GROUPS AND JUDICIAL INTEGRITY

It would be a fascinating exercise to calculate the number of trees that have been mashed to pulp to produce enough paper to carry all the assurances that predicting nominees' votes on future issues is so hard that there's hardly reason to try—or reason to fear when others try.⁴⁰

³⁶ *Id.* (testimony of Michael Jaffe). On the floor of the Senate, Thurmond repeatedly implied that Marshall was simply not smart enough to serve as a Justice. See, e.g., 113 CONG. REC. 24,649 (1967) (remarks of Senator Thurmond) (“I felt certain he would know . . .”; “The nominee displayed a total lack of knowledge of . . .”; “this candid acknowledgement of the complete lack of understanding of the most basic and elemental portions of the [thirteenth] amendment is astounding”); *id.* at 24,650 (Judge Marshall had no knowledge of the significance of . . .); “Judge Marshall showed little or no familiarity with . . .”; “It was surprising to find that the nominee did not know . . .”).

³⁷ See, e.g., *Good Man for Supreme Court*, Cleveland Plain Dealer (editorial), reprinted in 113 CONG. REC. 17,507 (1967).

³⁸ During the Senate's debate on the Marshall nomination, Senator Javits attacked the process in terms that might almost be called prescient: “the opposition, Mr. President, is not on the basis of fitness, but on the basis of disagreement with the kind of decisions which the opponents believe Judge Marshall will make.” And he concluded: “Supreme Court cases should be reargued here.” 113 CONG. REC. 24,639-40 (1967) (remarks of Senator Javits).

At least one member of the Senate stated that he would vote in favor of Marshall on the question of qualifications alone, notwithstanding his strong disagreement with Marshall's views on a variety of issues. See 113 CONG. REC. 24,646 (1967) (remarks of Senator Tower).

³⁹ To see just how inconsistent outrage can be, from left and right alike, it is useful to compare the remarks of the only two members of the 1967 Judiciary Committee that considered Marshall who also served on the 1987 Judiciary Committee that considered Bork. Compare 113 CONG. REC. 24,647 (1967) (remarks of Senator Kennedy) (“[W]e are not charged with the responsibilities of approving a man to be Associate Justice of the Supreme Court only if his views always coincide with our own”) with 113 CONG. REC. 24,648 (1967) (remarks of Senator Thurmond) (“Several Senators have indicated that they do not believe it to be within the purview of . . . the U.S. Senate to question the philosophy of an appointee to the highest court in the land. I do not accept this theory as valid . . .”).

⁴⁰ See, e.g., J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 50-51

It's true that there are spectacular examples of presidential disappointment—Roosevelt with Frankfurter and Eisenhower with Brennan are the most prominently mentioned twentieth century examples—and it is also true that no one can guess everything that is likely to come up in the future. But none of this matters to Presidents and senators, who nevertheless try to enshrine their political programs as law through the appointment process. And still less does it matter to the interest groups who lobby for and against the nominations, especially the single-issue groups, who, by definition, care only about a small and concrete set of cases.

The single-issue group is in a unique situation, although it may be that Shapiro in his article credits such groups with too much power. One cannot say to a pro-choice or to a pro-life group, "Oh well, who knows what issues will come before the Court in the future," because if there is one thing that the members of each group know for sure, it is that the abortion issue comes before the Court regularly. Groups that care only about a single issue will tend to elevate that issue above the *mythos* that values judicial independence and integrity. What matters is the bottom line; as a consequence, the groups work to discover what the bottom line is for the nominee.

Shapiro posits that interest groups cannot seriously be said to be capable of defeating nominations,⁴¹ and my instincts say that he is right. Why, then, do they act as they do? One answer, of course, is that they are advertising—that through their activism they hope to build up membership and name recognition, and to garner contributions. Another is that they serve an information-gathering function. The information they gather is not information about voter preferences—information that, if available, might well influence incumbents—but rather information about the nominee. Interest groups function like research assistants, putting together extensive analyses of the nominee's background, writing, speeches, interviews, whatever. They are an efficient solution to the problem of combing multitudinous records of many different courts for just that one key snippet, that single morsel that might prove to be crucial.

For example, the ABA Standing Committee, while not needed, I think, for its well-known "resume review" function,⁴² possesses sources of information about practitioners and judges that other researchers are unlikely to recover. The organized bar often operates like a huge rumor mill, in the best sense of the term. Lawyers might share with other law-

(1980); Fein, *supra* note 5. Laurence Tribe refers to the claim that the votes of justices are difficult to predict as "the myth of the surprised president." See L. TRIBE, *GOD SAVE THIS HONORABLE COURT* 50-76 (1985).

⁴¹ Shapiro, *supra* note 2, at 935.

⁴² For an explanation of why I am skeptical of the resume-review model of the confirmation process, see Carter, *The Confirmation Mess*, *supra* note 11, at 1185-88.

yers confidences that they would share with no one else, and as the confidences make the rounds, nuggets of information regarding judicial temperament, for example, might well come to the attention of the Standing Committee.

In the model that I propose, when a nomination degenerates into the political mode, the senators, as Shapiro suggests, take their positions on the basis of investing in incumbency advantage. But because they cannot be seen to be partisan, they must present their opposition or support as though the nomination is being considered in the judicial independence mode. The information generated by the interest groups helps them do that, because any nominee's background, if searched with adequate enthusiasm, is likely to turn up something that can be used against her.⁴³

This model is not inconsistent with the plain fact that the views of some interest groups carry more weight than the views of others. The point is not that some interest groups make more convincing arguments than others, although some undoubtedly do, and I will not rule out the possibility that some senators will be convinced by good arguments even in the absence of any apparent incumbency advantage to be gained. Even within the political mode, however, interest groups that are capable of presenting *themselves* as impartial, as guardians of judicial integrity, will likely be more successful at finding their views listened to and their information used.

Once again, the venerable, if fallible, ABA Standing Committee provides a case in point. In the Senate Judiciary Committee's report on the Bork nomination, the very first thing the reader is told about the report of the Standing Committee is not, as one might expect, that the Standing Committee voted overwhelmingly that Judge Bork was "well qualified" to serve as a Justice. Rather, the first thing the reader is told is this: "For the first time since the [Standing Committee] began evaluating Supreme Court nominees, a substantial minority of the Standing Committee found a Supreme Court nominee to be 'not qualified' to serve on the nation's highest court."⁴⁴

The information content of that statement is that the Standing Committee was divided. Because of the ABA's success in portraying the Standing Committee as an impartial servant of the independent judiciary (a portrayal I do not challenge), that fact alone—without regard to rationale or evidence—is of value to senators who are predisposed to oppose the nomination.

The rest of the Judiciary Committee's report contains a number of explicit references to interest group positions—once again, consider the

⁴³ Among prominent conservatives who might at any time be nominated for positions of importance, think, for example, of the way that David Stockman's antiwar activism during his college years or Thomas Sowell's youthful flirtation with Marxism could be twisted and abused by a committee determined to treat them as Marshall and Bork were treated.

⁴⁴ BORK COMMITTEE REPORT, *supra* note 7, at 3-4.

forty percent of law school teachers—and is replete with arguments against confirmation that are themselves the fruits of the searches conducted by the interest groups. For senators seeking partisan advantage without the risks of acting partisan, the interest groups (all of which, when on your side, serve the *public* interest—only the other side's groups serve *special* interests) are the finest researchers one could desire.⁴⁵ Their members are smart, sincere, and hard working. They come up with plausible arguments about tiny fragments and big pictures. And you don't have to pay them.

IV. INTEREST GROUPS AND JUDICIAL MEDIOCRITY

Even a would-be Justice whose nomination has successfully been cast in the political mode can be confirmed. But sometimes the confirmation will be rocky. Eleven senators voted against the nomination of Thurgood Marshall. The Marshall confirmation battle came in the late middle age of the civil rights movement, after Selma and Birmingham and the Audobon Ballroom but before Memphis, and the heat of the matter is evidenced by the fact that some twenty senators considered it the better part of valor not to show up to vote.⁴⁶

It would not be accurate, I think, to say that the interest groups were responsible for the votes against Marshall, any more than they deserve the credit or, if one prefers, the blame for the defeat of Bork. What the interest groups can do, and perhaps will do for the foreseeable future, is raise the costs to future nominees by spreading on the public record arguments and allegations and conclusions that will make the nominees seem to be among the least savory of characters. Perhaps in the long run, interest group activity of this kind (combined with the ridiculous salaries, which any number of forces in the society are conspiring to keep depressed) will simply make highly qualified individuals shun judicial service. After all, who will want to go through (and put families through) what it too often takes to become a judge—to say nothing of a Justice?

Well, one might respond, there is always somebody. And that's true. Perhaps Ralph Nader is right, and the benches will be filled with the advocates for the oppressed (*i.e.*, the members of the legal staffs of the interest groups), to whom salaries that judges earn might be quite attractive. Many of these people would, of course, be outstanding candidates

⁴⁵ I have already discussed the line of questions that Senator Thurmond asked of Thurgood Marshall in an apparent effort to demonstrate the nominee's lack of intellectual capacity. It bears noting that those questions were evidently the fruit of interest group research—they were provided not by the Senator or his staff, but by an outside party interested in defeating the nomination. See Tushnet, *Principles, Politics, and Constitutional Law*, 88 MICH. L. REV. 49, 49-50 (1989).

⁴⁶ To be fair, several of those recorded as not voting were "paired"—that is, the votes that they would have cast were announced on the Senate floor and canceled votes of others who agreed not to vote in deference to their absence. See 113 CONG. REC. 24,656 (1967) (remarks of Senators Mansfield and Byrd).

for judicial office.⁴⁷ What Nader overlooks—and what I fear the interest groups that line up in opposition to various nominees often overlook as well—is that none of this will screen out the truly ambitious, who might be beyond shame, or might simply learn from Bork's experience and try to be more cautious about expressing their views much earlier in their careers.

What a judiciary we will have then! Ignoring Plato's advice, we will ultimately fill the federal bench with those who want most to be there rather than those perhaps we most need. No doubt there are any number of earnest, hard working, morally reflective lawyers of good will and good nature who would be very fine judges, but who will look the whole thing over and say, "No thanks." And if we treat them as Marshall and Bork were treated, and underpay them into the bargain, we will have few arguments available to overcome their understandable reluctance.

How sad to discourage public service at a time when a growing ethic of selfishness makes it hard enough to convince so many of our best that the Government (capital G) is anything other than a burden on well-educated and well-paid Baby Boomers, or, at best, a supplier of resume points. In the long run, driving away people we ought to be drawing in can only lead us to a judicial branch full of mediocrities—a prospect likely to please virtually no one.

⁴⁷ The senators who complained of Marshall and Bork that they were too much pleaders for particular interests would presumably disagree.