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978-1-107-03970-4 - Supreme Court Confirmation Hearings and Constitutional Change

Paul M. Collins and Lori A. Ringhand

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## SUPREME COURT CONFIRMATION HEARINGS AND CONSTITUTIONAL CHANGE

Before Supreme Court nominees are allowed to take their place on the high Court, they must face a moment of democratic reckoning by appearing before the Senate Judiciary Committee. Despite the potential this holds for public input into the direction of legal change, the hearings are routinely derided as nothing but empty rituals and political grandstanding. In this book, Paul M. Collins, Jr., and Lori A. Ringhand present a different view. Using both empirical data and stories culled from more than seventy years of transcripts, they demonstrate the hearings are a vibrant and democratic forum for the discussion and ratification of constitutional change. As such, they are one of the ways in which “We the People” take ownership of the Constitution by examining the core constitutional values of those permitted to interpret it on our behalf.

Paul M. Collins, Jr., is Associate Professor of Political Science at the University of North Texas. His research focuses on judicial politics, with a particular interest in the democratic nature of the courts. The recipient of numerous research awards, he has published articles in the *Journal of Empirical Legal Studies*, the *Journal of Politics*, *Law & Social Inquiry*, *Law & Society Review*, the *Notre Dame Law Review*, *Political Research Quarterly*, and other journals. Collins is also the author of *Friends of the Supreme Court: Interest Groups and Judicial Decision Making*, which received the 2009 C. Herman Pritchett Award from the Law and Courts Section of the American Political Science Association.

Lori A. Ringhand is J. Alton Hosch Professor of Law at the University of Georgia School of Law. Her research focuses on the Supreme Court confirmation process and has been published in journals such as *Constitutional Commentary*, the *American University Law Review*, the *William & Mary Bill of Rights Journal*, and the *University of Pennsylvania Journal of Constitutional Law*. Ringhand is also the recipient of the 2010 Ronald Ellington Award for Excellence in Teaching.

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For Rose and Maggie

and

In loving memory of Michael, Jillian, Makayla, and Bryce Casey

– PMC

For Mom and Dad

– LAR

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# Supreme Court Confirmation Hearings and Constitutional Change

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## Preface

The idea for this book began when Kirk Randazzo, a political scientist at the University of South Carolina, convened a workshop to bring together an interdisciplinary group of scholars interested in law and politics. It was the fall of 2009, and the country had just witnessed yet another contentious confirmation hearing. The highlight roll of this particular hearing, that of Sonia Sotomayor, featured clips about “wise Latinas” and the evils of judicial empathy. It also included the usual litany of complaints about senatorial posturing and nominee reticence, and revived the decades-old debate about the 1987 Robert Bork hearing.

As often happens at such workshops, the conversations of the day carried over into dinner, and we found ourselves huddled together at a sushi bar talking about our mutual frustration with the lack of comprehensive information about what actually happens at the confirmation hearings of Supreme Court nominees. Do Senators really just latch onto whatever is politically useful when preparing their questions for a given hearing, or do the hearings follow a more deliberative path? Have nominees actually become more reluctant to answer questions, or is that perception just a self-perpetuating post-Bork myth? Most importantly, are the hearings truly pointless exercises in political grandstanding, or is there a more positive story to be told about the role they play in our governing system?

We both believed there was, and the result is this book. The book uses empirical data, as well as historical vignettes culled from our review of hearing transcripts, to tell the story of the role the confirmation hearings play in ratifying constitutional change. In doing so, we have strived to make the book both accessible and appealing to a wide array of audiences. Political scientists are provided with an abundance of data to mull over, gathered from an original data collection effort, documenting the relationship among confirmation dialogue, public opinion, and the Court’s precedents. Legal

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scholars will value our discussions of cases and doctrines, as well as our choice to present our data within a larger normative framework, thus providing a new way of thinking about how the hearings intersect with constitutional change. Non-academics will appreciate our efforts to translate both the data and the legal doctrines into readily accessible and thought-provoking themes of self-governance and the role of courts in a constitutional system.

We also hope that all of our readers will enjoy the stories we tell in the “Sidebars” sprinkled throughout the book. These stories use scenes from more than seventy years of confirmation hearings to show the striking, moving, and occasionally even humorous side of the hearings. They complement our empirical and normative work by providing an overarching view of the hearings that is too often lost in the heat of a given confirmation fight. The hearings discussed in this book span two world wars, the growth of America as a superpower, the civil rights movement, the cracking of the glass ceiling, and the fall of the Iron Curtain. Each and every one of these changes was discussed, debated, and fought over in front of the Senate Judiciary Committee. The hearing transcripts let us explore these changes through the words of those who lived through them, and show us how senators and nominees alike struggled to be true to our deepest constitutional commitments in a rapidly transforming world.

The story told by the changing faces of the nominees who have come before the Committee over the years is equally inspiring. As time passes, more and more of us become *present* on these pages. The New England aristocracy of Oliver Wendell Holmes shifts and makes room for Felix Frankfurter, a Jewish immigrant who came to this country at age twelve unable to speak English. Thurgood Marshall, the great civil rights lawyer, takes his seat after dismantling, step by painful step, the legalized apartheid system that tarnished our nation for so long. Sandra Day O'Connor sets aside her doubts and answers her President's call to become the first woman to sit on the Court. Antonin Scalia, Clarence Thomas, Ruth Bader Ginsburg, Sonya Sotomayor – more and more, these transcripts ring with the varied voices of America herself. We consider ourselves lucky to have spent the past few years immersed in this rich history, and we hope the Sidebars will give our readers a taste of the story these transcripts tell.

None of this would have been possible, however, without a great deal of help. Special thanks are due to Kirk, the University of South Carolina, and the National Science Foundation, who hosted and supported the conference that led to this book. Funding was also provided by the Dirksen Congressional Center and the Southern Political Science Association (through its recognition of a portion of this work as the recipient of the Neal Tate Award). Our own

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institutions, the University of North Texas and the University of Georgia School of Law, have given us their unwavering support, as have our colleagues at those institutions. An early article based on some of the data used in this book appeared as “May It Please the Senate: An Empirical Analysis of the Senate Judiciary Committee Hearings of Supreme Court Nominees, 1939–2009” in the *American University Law Review* (Volume 60, pp. 589–641). We also are indebted to a host of graduate and law students who have provided able research assistance, including Anna Batta, Bryan Calvin, and Tom Miles, as well as Patrick Baldwin, Douglas Gladden, Nathan Goodrich, Nick Jones, Alexander King, Jonathan Milby, Kristin Rigdon, and Alex Sklut.

Numerous friends and colleagues provided valuable feedback at different stages of the project, including Henry Abraham, Sara Benesh, Ryan Black, Bethany Blackstone, Eileen Braman, Jonathan Cardi, Pam Corley, Jolly Emery, Matt Eshbaugh-Soha, David Fontana, Barry Friedman, Amanda Frost, Ben Gross, Paul Heald, Lisa Holmes, Stefanie Lindquist, Wendy Martinek, Joe Miller, Chris Nemacheck, Elizabeth Oldmixon, Ryan Owens, Rich Pacelle, Eve Ringsmuth, Neil Siegel, Amy Steigerwalt, Geoffrey Stone, Christian Turner, Rich Vining, Art Ward, Justin Wedeking, Elizabeth Weeks-Leonard, Sonja West, and Margie Williams. Special thanks are also owed to Frank Baumgartner and Bryan Jones for making their Policy Agendas Project data publicly available, and to Stacy Harvey, who played an essential role in keeping us organized and on track. We are additionally grateful for the comments we received on earlier versions of this work presented at the meetings of the Midwest Political Science Association, Southeastern Association of Law Schools, and Southern Political Science Association, as well as the American University Washington College of Law.

We also wish to extend our deepest thanks to John Berger, Rishi Gupta, and the team at Cambridge University Press, and to the anonymous reviewers whose insightful comments significantly improved the quality of this book.

Paul M. Collins, Jr., expresses his sincere gratitude to his family and friends for their continuing encouragement, good humor, and inspiration. He is especially indebted to his wife, Lisa, whose love, patience, and kindness make life a pleasure to live. Paul dedicates this book to his amazing daughters, Rose and Maggie, and to the loving memory of Michael, Jillian, Makayla, and Bryce Casey, who were with us for far too short a time.

Lori A. Ringhand thanks her family and friends for their ongoing support. She is especially grateful to her husband, Dan Lorentz, and her parents, to whom she dedicates this book. Without their love and support, this work would not have been possible.

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Finally, as this book was going to print we learned of the death of Senator Arlen Specter. Senator Specter served on the Senate Judiciary Committee for decades, and always fought to protect the role of the Senate in the confirmation process. For this he deserves our gratitude and thanks.