

## Making Judicial Nominees Answer Senate Questions

John Paul Jones

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## MAKING JUDICIAL NOMINEES ANSWER SENATE QUESTIONS

JOHN PAUL JONES\*

The Senate Judiciary Committee's televised examination of the two most recent Supreme Court nominees has frustrated the viewer wanting to know more about the nominees' constitutional jurisprudence. During their confirmation hearings, both Justice Souter and Justice Thomas fended off momentous questions like hockey goalies defending the net. Some representative shots on goal:

Senator KOHL: What was your opinion in 1973 on Roe versus Wade?

Justice (then Judge) SOUTER: Well, with respect, Senator, I'm going to have to draw the line here . . . .

Senator KENNEDY: [A]s a matter of your own individual and personal moral beliefs, do you believe that abortion is moral or immoral?

Justice SOUTER: Senator, I'm going respectfully to ask to decline to answer that question for this reason . . . . I think to answer that question and to get into a matter of personal morality of mine, when it would not affect my judgment would go far to—dispel the promise of impartiality in approaching this issue if it comes before me.

Senator HATCH: [L]et's say a woman and/or her mate uses such a birth control device and it fails. Does she still have a constitutional right to choose not to become pregnant?

Justice SOUTER: Senator, that's the point at which I will have to exercise the prerogative which you were good to speak of explicitly. I think for me to start answering that question, in effect, is for me to start discussing the concept of Roe versus Wade.

Senator LEAHY: [T]he article, as written, takes a position that

\* Professor of Law, University of Richmond School of Law. Ellen Firsching and Jeremy Sohn, University of Richmond School of Law Class of 1993, made this article possible through their acumen and diligence.

not just *Roe versus Wade* should be overturned, but that abortion, even in cases of rape and incest should be banned in every state of the union . . . . Do you agree with that?

Justice (then Judge) THOMAS: [F]or me to respond to what my views are on those particular issues . . . would really undermine my ability to be impartial in those cases.

Senator LEAHY: Well was [*Roe v. Wade*] properly decided or not?

Justice THOMAS: Senator, I think that's where I have to say what I've said before, that to comment on the holding in that case would compromise my ability to rule—.

Congress has the power to compel an answer. Title 2 U.S.C. § 192 (1988) creates the misdemeanor of "contempt of the Congress" and explicitly makes a refusal to testify or deliver papers punishable by a fine of \$1000 and a jail term of one year. As the Supreme Court said in *Watkins v. United States*:

It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees and to testify fully with respect to matters within the province of proper investigation.<sup>1</sup>

The constitutionality of such a power depends, however, on two prerequisites, one of which cannot exist in the context of a confirmation hearing.

First, because the power is not to be discovered among those expressly granted Congress in the Constitution, its existence depends upon its rational connection with an express power. Thus, as the Supreme Court declared in *Watkins*, Congress has no power to extract answers which are none of its business. In that case, the Court held that the House Committee on Un-American Activities lacked the power to expose Communist Party sympathizers purely for the sake of exposure, and that Mr. Watkins's refusal to name names was therefore privileged under the First Amendment.

<sup>1</sup> 354 U.S. 178, 187 (1957).

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“There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress,” wrote Chief Justice Warren for the Court. Congress, therefore, may not punish a private citizen like me for refusing to testify about the choices made by my wife and me with regard to bearing children or attending religious services, because Congress may not legislate—at least presently—to restrict those choices. Despite section 192, I may refuse to answer such questions when summoned to the Capitol. But, as the Supreme Court has conceded, when Congress investigates with an eye toward legislation otherwise within its purview, it may generally compel both an appearance and an answer. The power of each house to compel an appearance was confirmed in *McGrain v. Daugherty*,<sup>2</sup> when the Court reversed a district court order in habeas corpus releasing from the custody of the Sergeant-at-Arms of the Senate a reluctant banker who had ignored a committee’s subpoena.<sup>3</sup> The power of each House to compel an answer as well as an appearance was confirmed thirty years later in *Watkins*:

The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them.<sup>4</sup>

Although the issue has never reached the courts, I would be inclined to extend the notion of an implied congressional investigative power beyond situations of legislation to those of Senate confirmation. It is just as reasonable to conclude that the power to advise and consent includes the power to inform those decisions, and thus the power to compel, where necessary, both an appearance and an answer. This is more than simply reasoning to a permissible second-level implication of an express power; it also

<sup>2</sup> 273 U.S. 135 (1927).

<sup>3</sup> *Id.* at 175, 182.

<sup>4</sup> 354 U.S. at 187.

sounds in the judicial obligation to interpret the Necessary and Proper Clause so as to prevent those words of the Framers from becoming superfluous. Chief Justice Marshall first used this reasoning to confirm the existence of Congress' power to charter a national bank in *McCulloch v. Maryland*,<sup>5</sup> and Justice Johnson soon reapplied it to confirm Congress' power to punish as contempt the attempted bribery of its members in *Anderson v. Dunn*.<sup>6</sup>

But, unlike the powers to charter a bank or corrupt a legislator, congressional power to compel an appearance or an answer ought to be held to exist only where *necessary* rather than when merely *convenient* because, as Marshall noted in *McCulloch*, the second prerequisite of a congressional power is that it not violate a constitutional prohibition. Coercing answers calls into question both the First Amendment, which expressly prohibits Congress from making laws which interfere with a person's right to free speech, and the Fifth Amendment, which guarantees a person the right to remain silent rather than to incriminate herself.

I'll dispose of the Fifth Amendment guarantee as easily as the Congress and the courts have in this context by simply calling attention to the federal use immunity statute, 18 U.S.C. § 6002 (1988), which empowers a member of Congress presiding at a committee hearing to issue an order compelling testimony. According to the statute, testimony delivered under such compulsion cannot later be used in a criminal prosecution of the person compelled to answer. The Supreme Court has accepted this quid pro quo as satisfying constitutional concerns embodied in the Fifth Amendment,<sup>7</sup> and the impact of section 6002 on prosecutions in the wake of the Iran-Contra affair is notorious.<sup>8</sup> As these causes celebres have illustrated, the Fifth Amendment does not directly prohibit congressional compulsion to testify, but merely acts as a bar on subsequent prosecution stemming from such testimony. So, when investigating in the course of legislating, Congress can compel an answer by threatening punishment for contemptuous si-

<sup>5</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>6</sup> 19 U.S. (6 Wheat.) 204 (1821).

<sup>7</sup> See *United States v. Kastigar*, 406 U.S. 441 (1972).

<sup>8</sup> See *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991); *United States v. North*, 910 F.2d 843, *modified*, 920 F.2d 940 (D.C. Cir. 1990).

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lence whenever Congress at the same time offers immunity from prosecution. In a confirmation hearing, the character of the nominee ordinarily ought to make self-incrimination an unlikely issue, and the Fifth Amendment may now be put aside.

The First Amendment remains a barrier to compelled testimony; presumably a barrier no more absolute than the putative barriers imposed by other explicit constitutional guarantees, or by the guarantee of freedom of speech in other contexts. It is far too late to quibble over whether freedom of speech includes a right to silence. But free speech, like other individual guarantees, is not absolute. The government may infringe the protected freedom when it can adequately justify the infringement and thus satisfy a reviewing court's strict scrutiny: the government must show that its objective is compelling and that its means are absolutely necessary, that is, without adequate substitute. When Congress investigates to legislate, its apologists should, in most cases find it easy to later persuade a court that Congress' purpose was and is compelling. Congress also should be able to persuade a court that, at least sometimes, there is no other access to information it regards as essential. The Court's opinion in *Watkins* certainly suggests as much. Prosecution for refusing to answer, therefore, should be constitutional when it occurs in the course of some, if not all, congressional hearings with respect to existing, pending, or even contemplated legislation.

When the Senate conducts hearings related to confirmation and proposes prosecution for contempt by silence, the purpose is prima facie compelling, but the means are patently not necessary. The national interest in properly staffing those federal offices which constitutionally require Senate action is just as important as objectives pursued by ordinary exercises of legislative power. But ravishing the right to silence is not the only way to ensure that only the best and the brightest are confirmed. The alternative always exists of simply denying a tight-lipped nominee the Senate's consent. Withholding government employment seems less onerous than a year in the slammer, so prosecution for contempt of the Congress ought to be unconstitutional when the accused is a nominee stubbornly refusing to answer.

Two more issues arise when the Senate investigates in the

course of confirming judges. The first was raised by both Justices Souter and Thomas in their hearings when they refused to answer Senate questions about constitutional doctrines on the grounds that answering would jeopardize their apparent impartiality in future cases. An appeal to judicial impartiality shouldn't justify a nominee's resistance to the Senate's power to inquire. A nominee for the bench who declines to answer questions about his interpretation of particular laws or cases is mistaken in justifying that refusal by resort to notions of judicial impartiality or the appearance of prejudgment. In fact, as cases like *Federal Trade Commission v. Cement Institute*,<sup>9</sup> and statutes like 28 U.S.C. § 455 (1988) (not to mention the practice of indiscreet jurists in every level of federal court) make clear, existing bias and prejudgment rules dictating recusal or reversal are very narrow. They simply don't justify the reluctance exhibited by nominees Souter and Thomas to answer questions about *Roe v. Wade*<sup>10</sup> and reproductive rights.

In any case, a solution for the bench nominee is to only cross such a bridge when he comes to it—by considering recusal later, rather than refusal now. This alternative seems more appropriate in light of the Senate's constitutionally legitimized interest. After all, the case or controversy limitation on judicial review practically ensures that controversial issues come to a court encumbered by facts and procedures which make predictions of a judge's ruling unreliable when they are based only on a judge's expressed personal view on a single public issue, no matter how controversial. Certainly Justice Powell's dedication to the principle of stare decisis in *City of Akron v. Akron Center for Reproductive Health, Inc.*,<sup>11</sup> and *Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft*,<sup>12</sup> confounded those prophets who had considered only his expressed views regarding abortion. A nominee hides behind a flimsy and transparent screen when he declines to answer so as to protect his future appearance of judicial impartiality. On this basis, there is no conflict with the general duty to answer described in *Watkins*.

<sup>9</sup> 333 U.S. 683 (1948).

<sup>10</sup> 410 U.S. 113 (1973).

<sup>11</sup> 462 U.S. 416 (1983).

<sup>12</sup> 462 U.S. 476 (1983).

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The second issue arising when the Senate investigates in the course of confirming judges arises not from the future office at stake but from the office held presently by the nominee. When a person, who is already an Article III judge, is nominated for another post or a promotion, the separation of powers is called into question. The constitutional doctrine surely protects Article III judges as much from a congressional subpoena as it would from a conscription notice. Congress cannot compel any judge to appear (except to answer a charge of impeachment), and prosecuting a judge nominee for contempt when she fails to appear before, or answer, the Senate would therefore be unconstitutional. Unlike the President, a judge has no duty to report to Congress. The President must, according to Article II, Section 3, "give Congress information of the State of the Union." No corresponding duty appears in Article III. Whether impeachment of an officer of either coordinate branch would lie for failure to appear before, or answer, the Congress is another matter, for the nature and scope of impeachable offenses is so far largely undefined.

All this leads to a simple conclusion: if the Senate chafes at the refusal of a nominee to answer, its only remedy is to withhold its confirmation. For those in the Senate who believe, on the other hand, that the confirmation power is not intended for political manipulation, the only principled act when a nominee declines to answer a politically charged question is to vote for confirmation and live with the nominee's intransigence.



