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THE SOUND OF SILENCE

DAN ROSEN*

Except for that which President Bush assures us was not a factor in his selection, Clarence Thomas has very little in common with the man he succeeds on the Supreme Court. Thomas, a member of the party that claims to believe in streamlined government, made his name in the bureaucracy. Thurgood Marshall, a man whose party has no aversion to big government, spent most of his life fighting it.

Thomas, the insider, and Marshall, the outsider. Thomas, the Holy Cross/Yale man, and Marshall, the product of Lincoln and Howard. Thomas, the champion of the individuals rising above their circumstances, and Marshall, the NAACP leader devoted to collective action to change the circumstances.

They are the yin and yang of judicial appointments. Yet, despite their many differences, Justices Thomas and Marshall have one thing in common: their desire to reveal next to nothing on the most pressing issues in their confirmation proceedings.

It may be fashionable to think that evasion only became popular after Robert Bork provided a willing target for Democratic arrows.¹ The fact is, however, that circumnavigating the questions of would-be opponents has a long, if not venerable, history.

For Thurgood Marshall, the landmines were criminal proce-

* Professor of Law, Loyola University, New Orleans. My musing on this subject began in a seminar taught by Professors Burke Marshall and Joseph Goldstein at the Yale Law School in 1983. I have no doubt that some of what I say in this essay was first heard in that seminar, but time obscures the origin of ideas, and I cannot say with confidence which thoughts sprang up spontaneously in my head and which were filed away from the interchange among participants in that memorable course. So, instead, I acknowledge my debt and express the hope that I have presented these points in a way that reflects creditably on the seminar. My creditors also include my research assistant Raymond Landry and the Alfred J. Bonomo, Sr. Fund, which supplied funding for this project.

¹ See generally ROBERT H. BORK, *THE TEMPTING OF AMERICA* (1990). Bork did not hesitate to answer questions from the Judiciary Committee and explain his public pronouncements. His main complaint, as I understand it, is not that questions were asked but rather that they were not very good, or that they were intended to misrepresent his positions. *Id.* at 301-06.

dures, specifically *Miranda v. Arizona*² and civil rights. Like Clarence Thomas on the abortion issue, Marshall invoked the argument that the issues, in some form, might come before the Court and, thus, that his response might prejudice his opinion at that time. Judiciary Committee members unsympathetic to the nominee were no more impressed by Marshall's parry than they were with that of Thomas. The difference, however, is that it was the conservatives who argued that Marshall must answer and the liberals who tried to insulate him. Of course, the lineup was precisely the opposite in the Thomas hearings, with the President shoring up the nominee's "I know something you don't know, but I'm not gonna tell you" responses.

Thus, if we learned nothing else from the hearings into the nomination of Clarence Thomas and David Souter, it is that abstinence is invoked by any party for which it is useful and opposed by the side for which it is not. President Bush may attempt to make it into a party issue, but the fact is that Republicans as well as Democrats are primarily concerned about confirmation or blockage and will seize upon any grounds to assure their desired goal.

For example, when Thurgood Marshall was nominated to the Supreme Court the balance was tipped slightly in favor of the liberals. *Miranda* was decided by a 5-4 vote, and conservatives were concerned that the balance would worsen.³

Senator John McClellan of Arkansas attempted to expose Marshall as soft on crime, with the predicate that "the crime rate in this country has reached proportions where it endangers and jeopardizes our internal security . . . where we will have a reign of lawlessness and chaos."⁴ Marshall tried to deflect the questions by expressing his "great faith in the ability of our country to meet any emergency."⁵ McClellan expressed his dissatisfaction with Marshall's response:

² 384 U.S. 436 (1966).

³ See *id.* Marshall succeeded Justice Clark, who dissented in *Miranda* and argued for a return to the "totality of circumstances" test. *Id.* at 499, 502 (Clark, J., concurring in part, dissenting in part).

⁴ *Hearings on the Supreme Court Nomination of Thurgood Marshall, Committee on the Judiciary, United States Senate, 90th Cong., 1st Sess. 1, 4 (1967) [hereinafter Marshall Hearings].*

⁵ *Id.*

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[Y]ou are going to be in a position where, as one man, you can say what the Constitution means and make it become the law of the land. Therefore, I am concerned about your philosophy. I have made mistakes in the past, I admit, in this area, by not inquiring further and deeper. But the time has come when I can no longer be silent and not inquire into the philosophy of those who are nominated to this high position.⁶

Specifically, McClellan wanted to know Marshall's opinion on the *Miranda* case and others like it, or perhaps just expose it to provide himself with a reason for voting against the nomination. Marshall declined to answer on the grounds that such cases would surely be coming before the Court:

Senator McCLELLAN: You say you do not disagree or cannot make any comment on any decision that has been made in the past?

Judge MARSHALL: I would say that on decisions that are certain to be reexamined in the Court, it would be improper for me to comment on them in advance.

Senator McCLELLAN: I am not talking about cases pending. Here is a decision that changed the law of the land, if I have any understanding of it at all. I do not agree with it. If you do agree with it, I would like you to say so.⁷

The Chairman of the Committee, Senator James Eastland of Mississippi, tried another approach, asking Marshall to vouch for the veracity of comments he made on *Miranda* at the University of Texas Law School, reported in the school newspaper, the *Daily Texan*. Marshall, according to the paper, had said that “[c]riticism of [*Miranda*], especially by police officials, ha[s] no basis He reported he had seen no studies indicating the ruling[] ha[d] adverse effects on investigation of crime.”⁸ So, Eastland said, “you do have an opinion on the exact question Senator McClellan has been asking you.”⁹

Senator Edward Kennedy, even then a member of the Judiciary

⁶ *Id.* at 6.

⁷ *Id.* at 9.

⁸ *Id.* at 10.

⁹ *Id.*

Committee, intervened to try to rescue the nominee, but in a way that hardly comports with his approach in the Souter and Thomas hearings.

Senator KENNEDY: Actually, Mr. Solicitor General, there would have been nothing improper for you to express an opinion down in Texas Law School, because you were not nominated to the Supreme Court at that time.

Judge MARSHALL: That was the position I took.

Senator KENNEDY: So, actually, now having received the nomination, then I assume that you have a different responsibility as far as commenting on these matters.

The CHAIRMAN: No; that is not what he said. His testimony was that his opinion was filed in the brief [in *Westover v. United States*].¹⁰

Senator KENNEDY: I am just commenting on this line of questions, on any opinion that he might have had prior to the time that he received the nomination; and as that is related to this line of inquiry, I think it is of some help to have that clarified.

Judge MARSHALL: Well, the answer to Senator Kennedy is that once the President announced the nomination, I have not made any statements to anybody about anything.¹¹

Once the audience stopped laughing, Kennedy resumed:

Senator KENNEDY: But the point that I am driving at is that you have, as a nominee, a different responsibility, as I understand it, as to commenting on questions that might come up before the Court—

Judge MARSHALL: I agree with you, sir.

Senator KENNEDY: Than you would have had as the Solicitor General.

Judge MARSHALL: Senator, I think it is entirely different, because before I went on the bench in the second circuit, I doubt that there were any important opinions of the Supreme Court that I didn't comment on one way or the other. Once I became a judge of the court of appeals, I did not comment. When I became Solicitor General, on occasions, re-

¹⁰ See 384 U.S. 436, 494-97 (1966) (No. 761, *Westover*—companion case to *Miranda*).

¹¹ *Marshall Hearings*, *supra* note 4, at 11.

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stricted for the most part to law schools, I thought I had the right and the duty to explain to law school students the answers to their questions when they wanted to know what the Supreme Court meant. But I don't think it is proper, as a nominee for the Supreme Court, to express my opinion. That is my position.¹²

By 1991, however, Kennedy apparently had decided that nominees need not restrain themselves in the way that Thurgood Marshall did and that Senators were not responsible for ensuring that nominees be kept quiet. On September 11th, Clarence Thomas discussed his opinions on the First Amendment Establishment Clause, in particular the three-part test of *Lemon v. Kurtzman*,¹³ with which he said he had no disagreement. Kennedy tried to parlay that opening into an imperative for Thomas to discuss his views on abortion. Thomas, of course, declined to talk about *Roe v. Wade*¹⁴ before the Committee, on the theory that it was an issue on which he would have to rule as a Supreme Court Justice.

However, the continued vitality of the *Lemon* test was coming before the Court early in the upcoming term as well. Quoting from the Justice Department's brief in *Weisman v. Lee*,¹⁵ Kennedy pointed out that "[t]he case offers the Court the opportunity to replace the *Lemon* test with the more general principle implicit in the traditions relied upon in *Marsh [v. Chambers]*¹⁶ and explicit in the history of the establishment clause."¹⁷ Kennedy continued:

So if you're confirmed as justice, you'll be sitting on that case this fall as a member of the Court.¹⁸ Yet, you did not hesitate yesterday and today to tell us that you have no personal disagreement with the *Lemon* test now being used by the Su-

¹² *Id.*

¹³ 403 U.S. 602, 612-13 (1971).

¹⁴ 410 U.S. 113 (1973).

¹⁵ 908 F.2d 1090, 1090 (1st Cir. 1990), *cert. granted*, 111 S. Ct. 1305 (1991).

¹⁶ 463 U.S. 783, 786-92 (1983).

¹⁷ *Hearings on the Supreme Court Nomination of Clarence Thomas, Committee on the Judiciary, United States Senate*, 102d Cong., 1st Sess. (1991) [hereinafter *Thomas Hearings*] (available in LEXIS, Legis library, Fednew file). The issue in the case was the extent to which non-denominational prayers might be allowed at events such as graduation ceremonies of public schools. See *Weisman*, 908 F.2d at 1090.

¹⁸ In fact, arguments were heard on November 6th, shortly after Justice Thomas took his seat on the Court.

preme Court. My question is, do you have any personal disagreement with the test used by the Supreme Court in the *Roe v. Wade* to decide the cases on abortion? That test requires the state to have a compelling state interest if it is to justify an infringement on a woman's right to choose an abortion.¹⁹

Thomas responded that he had no quarrel with the use of the strict scrutiny "compelling interest" test in privacy cases involving fundamental rights, but he declined to say whether abortion was such a right. "I think that that is important for me to do," Thomas said, "in order to not compromise my impartiality."²⁰

Senator Kennedy was not the only member of the Committee to change his mind on the appropriate scope of questioning. In the Marshall hearings in 1964, conservative Senator Strom Thurmond wanted to question the nominee about the limits of the Equal Protection Clause in barring discrimination:

Judge MARSHALL: Well, Senator, I would respectfully request that I not be asked to comment on broad general principles of law apparently or allegedly decided by the Supreme Court period.

Senator THURMOND: Well, probably you would not like for me to propound any questions to you, but as an appointee by the President, I think as a Senator who has to advise and consent, I have a responsibility to do this.

Judge MARSHALL: I appreciate that, Senator, and I respectfully request that you appreciate my position of not prejudging lawsuits before I am sent them.²¹

Yet, in the Thomas, Souter, and Bork hearings, Senator Thurmond helped insulate the Republican nominees from pressing Democratic questions. In fact, Senator Thurmond twice tried to shut Robert Bork up. While Senator Kennedy was questioning Bork on the constitutionality of the special prosecutor statute, Thurmond interjected, "That is a question that may come before the Supreme Court, and I would caution the witness to be careful

¹⁹ *Thomas Hearings*, *supra* note 17.

²⁰ *Id.*

²¹ *Marshall Hearings*, *supra* note 4, at 166.

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of what he says on that point.”²² Only moments later he interjected again: “I want to say again that there is a case pending that may be before the Supreme Court. Again, I would caution the witness on this point.”²³

The Chairman of the Committee, Senator Joseph Biden, responded, “Judge, let me make clear, you are the one to make the judgment as to whether or not it is something that may in any way compromise you.”²⁴ Bork replied, “I will say, then, something that does not compromise me. I have written what I have written. It is a long opinion, and it is all laid out.”²⁵

At the opening of the Souter hearings, Thurmond said, “Direct questioning about sensitive issues that may come before the Court could impinge on the concept of an impartial, independent judiciary.”²⁶ When Souter, then a judge of the court of appeals, refused to talk about abortion, Thurmond elicited comments from several witnesses supporting the nominee’s position, in one case asking, “In fact, wouldn’t he have violated the rule of ethics if he had answered such questions?”²⁷ Senator Alan Simpson made the same point, citing the Code of Judicial Conduct: “A judge should abstain from public comment about a pending or impending procedure in any court.”²⁸

The rule, however, does not end there. A subsequent sentence provides that “[t]his subsection does not prohibit judges from making public statements in the course of their official duties.”²⁹

²² *Hearings on the Supreme Court Nomination of Robert Bork, Committee on the Judiciary, United States Senate, 100th Cong., 1st Sess. pt. 1, 340 (1987) [hereinafter Bork Hearings].*

²³ *Id.* at 343.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Hearings on the Supreme Court Nomination of David H. Souter, Committee on the Judiciary, United States Senate, 101st Cong., 2d Sess. 14 (1990) [hereinafter Souter Hearings].*

²⁷ *Id.* at 771.

²⁸ *Id.* at 26 (quoting ABA CODE OF JUDICIAL CONDUCT, Canon 3(A)(6) (1972)).

²⁹ *Id.* Abe Fortas, when nominated to become Chief Justice, steadfastly refused to answer questions about opinions of the Supreme Court, on the theory that separation of powers insulated him from any such requirement and, indeed, prevented him from cooperating. Why that is so was never made clear, for Justice Fortas simply stated that it was not only his right but also his duty to refrain from discussing any opinions of the Court, whether or not he participated in them. *Hearings on Nomination of Abe Fortas to be Chief Justice of the United States, Committee on the Judiciary, United States Senate, 90th Cong., 2d Sess. pt. 1, 214-15 (1968).* See generally Note, *Must a Supreme Court Justice Refuse to Answer Senators’ Questions?*, 78 YALE L.J. 696, 698 (1969) (discussing Fortas’s failure to respond to Sena-

There could hardly be a duty more official than that of testifying before the Senate with regard to a subsequent nomination to the Supreme Court. Moreover, the elastic definition of "impending" has been stretched so far, so long, that its tensile strength is all but gone. Not every issue that could conceivably come before the Court is impending. And, in any event, discussing the issues of law that happen to be embedded in cases is not the same thing as discussing the cases themselves. One can talk about abortion without commenting on the merits of any particular statute of the "wannabe" states, each of which aspires to provide the fodder for the overruling of *Roe*.

In the final analysis, however, if a judge believes he is barred from testifying due to his position, he can hardly blame the Senate for refusing to confirm him. The Senate, after all, has a duty too, a duty that is mandated by the Constitution.

Fortunately, Clarence Thomas did not and future nominees will not face that dilemma, as the revised Code of Judicial Conduct limits only those public comments "that might reasonably be expected to affect [a case's] outcome or impair its fairness"³⁰ This relief, of course, will not prevent them, Republican and Democratic nominees alike, from invoking this incantation to avoid disclosure; they are "not demonstrating . . . impartiality but defending . . . prospects for confirmation behind a stone wall of silence."³¹

To his credit, Robert Bork did not attempt to conceal himself behind such a wall. He neither refrained from answering questions about his current thinking nor attempted to create an artificial distinction between what he had said before and after being

tors' questions, refusing to "be an instrument by which the separation of powers specified in our Constitution is called into question That is the mandate of our Constitution" (quoting *Fortas Hearings, supra*, pt. 1 at 214-15) (statement of Justice Fortas). The Senate, of course, could have just as readily refused to confirm him for not providing enough information to allow it to exercise its constitutional duty. The right to remain silent, even if it exists, does not impose a correlative duty on the Senate to promote the one who asserts it.

While the nomination of Justice Fortas to the position of Chief Justice eventually was favorably reported to the full Senate by the Judiciary Committee, a purported ethical breach led to the report's withdrawal and ultimately to Fortas's resignation.

³⁰ ABA CODE OF JUDICIAL CONDUCT, Canon 3(B)(9) (1990).

³¹ *Thomas Hearings, supra* note 17 (statement of Senator Kennedy).

nominated. Under questioning on what factors he would consider in an abortion case, he said, “[i]f you want to hear me on that, I will tell you exactly what I would consider.”³² He then went on to describe his belief that *Roe* “comes out of no legitimate constitutional materials, which are primarily text, history and constitutional structure.”³³

Despite its manipulation by members of both parties, the abstention approach to Supreme Court confirmation proceedings now seems to be the accepted norm. Its provenance, however, is suspect. As recently as 1969, a notewriter in the *Yale Law Journal* referred to it as a “new doctrine.” However, it was his opinion that the practice of not commenting on potential future cases was actually a liberalization, the “old doctrine” holding that “any personal appearance was improper.”³⁴ Nevertheless, the writer concluded that even the new doctrine was overbroad. Additionally, Chief Justice Rehnquist once opined that “until the Senate restores its practice of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him, it will have a hard time convincing doubters that it could make effective use of any additional part in the selection process.”³⁵ Of course, Rehnquist was writing at a time when conservatives were fuming at the emerging Warren Court and trying to find a way to break the chain of “progressive” appointments. His article, in fact, was held up by the editors of the *Harvard Law Record* in genteel deference to the then-pending nomination of Potter Stewart.

At his own nomination hearings, Rehnquist was true to his word; he declined to predict how he would rule in any particular case but freely discussed his past writings and his present state of thinking. Once on the Court, Rehnquist acted in accordance with his belief that an expression of opinion, earlier in life, does not disqualify a Justice from ruling fairly on a case. Everyone has opinions, he stated, ruling in a case in which litigants moved to

³² *Bork Hearings*, *supra* note 22, pt. 1 at 185.

³³ *Id.* at 186.

³⁴ Note, *supra* note 29, at 707.

³⁵ William H. Rehnquist, *The Making of a Supreme Court Justice*, *HARVARD LAW RECORD*, Oct. 8, 1959, at 7.

disqualify him because of speeches he made on the general subject of the litigation while in the Justice Department. "Yet," Rehnquist wrote in denying the motion, "whether these opinions have become at all widely known may depend entirely on happenstance."³⁶

"It would be not merely unusual, but extraordinary, if [nominees] had not at least given opinions as to constitutional issues in their previous careers," Rehnquist wrote.³⁷ "Proof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias."³⁸

The appearance of this kind of voidness, however, seems to have become the desideratum in recent Supreme Court appointments:

Senator LEAHY: So I would assume that it would be safe to assume that, when [Roe v. Wade] . . . came down you're in law school where recent case laws are discussed, the Roe versus Wade would have been discussed in the law school while you were there.

Judge THOMAS: [W]e may have touched on Roe v. Wade at some point and debated that, but let me add one point to that, because I was a married student and I worked, I did not spend a lot of time around the law school doing what the other students enjoyed so much, and that's debating all the current cases and all of the slip opinions. My schedule was such that I went to classes and generally went to work and went home.

Senator LEAHY: Well, Judge Thomas, I was a married law student who also worked, but I also found that at least between classes we did discuss some of the law, and I'm sure you're not suggesting that there wasn't any discussion at any time of Roe versus Wade?

Judge THOMAS: I cannot remember personally engaging in

³⁶ Laird v. Tatum, 409 U.S. 824, 835 (1972) (Rehnquist, J., mem.) (denial of motion to recuse). As an example, Rehnquist noted that nominees who themselves have served as lower court judges already have committed themselves on a wide variety of issues. *Id.* If such expressions by themselves were fatal, then Supreme Court Justices would have to be selected from outside the most logical pool of candidates. *Id.*

³⁷ *Id.*

³⁸ *Id.*

those discussions. . . .

Senator LEAHY: Have you ever had discussion of Roe versus Wade other than in this room? (Laughter) In the 17 or 18 years it's been there?

Judge THOMAS: Only, I guess, Senator, in the fact that, in the most general sense, that other individuals express concerns one way or the other and you listen and you try to be thoughtful. If you're asking me whether or not I've ever debated the contents of it, the answer to that is no, Senator.³⁹

Structurally and literally, the Constitution gives little support to the proposition that nominees should be seen but not heard. It is true that the Senate's role to advise and consent follows the President's power to appoint and is contained in Article II, which confers the executive power, but history shows that the Framers thought of the power to name judges as primarily senatorial. The Committee of Detail in the Constitutional Convention, for example, included among its resolutions, "[t]hat a national Judiciary be established to consist of one Supreme Tribunal—the Judges of which shall be appointed by the second Branch of the national Legislature"⁴⁰

Even under the compromise by which the power is shared with the President, it is hard to imagine why the Senate would be included in the process at all if it were not supposed to investigate fully the suitability of a nominee. In our system of checks and balances, no one is dead weight. No one suggests that the Senate rubberstamp a President's treaty recommendations, another area in which the Senate has advise and consent power, even though it touches and concerns the strong implied authority of the President over foreign affairs. Why should the Senate's role in this Article II arrangement be any different from its authority in the judicial nomination process?

To be sure, Presidents and the Senate must allow one another some latitude, lest no one nominee ever be found acceptable. The responsibility, however, is mutual. The President is obliged to accommodate the Senate just as much as the Senate must take into

³⁹ *Thomas Hearings*, *supra* note 17.

⁴⁰ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 132 (M. Farrand ed., 1911) (July 23, 1787 resolutions).

account the President's desires. Presidential rhetoric portrays the Senate as standing in the way of the President's prerogative. The fact of the matter is that nomination and confirmation is a dance; either the President or the Senate can lead, but only where the other agrees to follow.

We are told with a straight face that recent Presidents have not inquired of nominees about their position on abortion or other pressing matters of the day. If that is so, it is surely only because their point of view has already been clearly expressed. I, for one, find no valor in such abstention. I would hope a President would not nominate a person to the highest court in the country without inquiring of his or her thoughts on the most important legal issues to be faced. For the same reason, I would expect the Senate to do an equally complete job of ferreting out the nominee's viewpoints.

In all of the discussion in this area no one has said anything about securing a commitment to vote in a particular way on a case that will actually come before the Justice. Like a contract that is against public policy, such an agreement would surely be void and, in any event, practically unenforceable. A President or the Senate would no more admit to having made such a deal than a hired bankrobber would publicly complain that his employer failed to give him his promised share of the stolen loot.

Although we want judges with open minds, we do not desire nominees with empty ones. Is there anyone who believes that Supreme Court nominees have not formed opinions over the years? We know they have. We simply trust them to test those opinions against the particular facts of a case or controversy. The public utterance of the nominee's opinions, whatever they may be, in no way compromises the fairness of the hearing. In fact, one might say the opposite.

If litigants knew what a Justice's thoughts had been at the time of nomination they could directly address those concerns. Under the current system, however, litigants do not learn of most nominees' opinions because the Senate does not insist upon their being revealed. As a result, the parties and their lawyers must guess at what predilections are hidden from public view in the minds of the Justices. This is more fair?

More than twenty years ago, Professor Charles Black went on a

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scavenger hunt through the Constitution looking for any evidence holding that the Senate should defer to a President's choice for the Supreme Court.⁴¹ He came up empty-handed. That being so, it certainly follows that nothing in the Constitution prevents the Senate from obtaining the most relevant information in determining whether the nominee is qualified.

"I have as yet seen nothing textual, nothing structural, nothing prudential, nothing historical, that tells against this view," Black wrote. "Will someone please enlighten me?"⁴²

Silence.

⁴¹ See Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 *YALE L.J.* 657, 658-62 (1970).

⁴² *Id.* at 664.

