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My Brethren's (Gate) Keeper? Testimony by U.S. Judges at Others' Supreme Court Confirmation Hearings: Its Implications for Judicial Independence and Judicial Ethics

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MY BRETHREN’S (GATE) KEEPER? TESTIMONY BY U.S. JUDGES AT OTHERS’ SUPREME COURT CONFIRMATION HEARINGS: Its Implications for Judicial Independence and Judicial Ethics

Mary L. Clark[†]

ABSTRACT

This article examines the merits of federal judges testifying at others’ Supreme Court confirmation hearings. Interest in this project was prompted by the testimony of seven of Samuel Alito’s then-current and former Third Circuit colleagues at his hearing to be Associate Justice.

The judges’ testimony at Justice Alito’s hearing was unprecedented in degree and kind. Because the Alito hearing testimony involved a significant expansion in number and status of judges testifying at another’s judicial confirmation hearing, this practice should be examined now before it can be repeated.

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I. INTRODUCTION

Should federal judges testify at others' Article III confirmation hearings,¹ or does such testimony (whether supporting or opposing the nominee) raise concern for the appropriate role or function for judges? More specifically, does such testimony risk undermining the independence of the judiciary by injecting judges into an executive and legislative branch function and by potentially exposing individual judges and the judiciary to undue legislative and public scrutiny? Does such testimony suggest, or actually reflect, partiality and political activity in violation of the judges' ethical obligations?

Or are we (the public, interested court observers, those involved in the three-branch system) not concerned about judges testifying at other judges' confirmation hearings because federal judges already provide evaluations, even recommendations, of Article III candidates behind-the-scenes (through informal consultations with executive and legislative branch appointment officials and confidential interviews with members of the American Bar Association's Standing Committee on the Federal Judiciary)? Is there a meaningful distinction between public testimony and private contact? If so, what is it?

Is it preferable that judicial colleagues' opinions of Article III candidates be offered publicly at Senate confirmation hearings because of the greater transparency of process that this forum appears to provide? Or is that venue's apparent transparency just that, more apparent than real? In light of

1. This article focuses on testimony by *sitting* federal judges at *others'* *Supreme Court* confirmation hearings. First, it focuses on testimony by sitting judges, *i.e.*, active judges or those on senior status who continue to hear cases.

Second, this article does not address the phenomenon of judicial nominees testifying at their own Supreme Court confirmation hearings, where federal judges nominated for elevation to the Supreme Court, or from Associate Justice to Chief Justice, have testified on their own behalf for decades. For a recent argument that judicial nominees should not testify at their own Senate confirmation hearing, see generally BENJAMIN WITTES, CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES 1 (2006). Some of the arguments made by Wittes against nominee testimony could easily be applied to nominees' colleagues' testimony, including the lack of particularities that are and can be testified to with regard to actual cases and issues likely to come before the Court for decision.

Third, the article focuses on testimony at others' Supreme Court confirmation hearings, where different processes are used for appointing non-Article III magistrate and bankruptcy judges, including primary reliance on sitting district and circuit court judges as judicial selectors. These non-Article III appointments practices have been studied at length by Judith Resnik, *see, e.g.*, Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 605–07 (2005), and I address them separately in an article on judges as judicial selectors. *See* Mary L. Clark, *Judges as Judicial Selectors: Should Currently Serving Judges Sit on Commissions to Screen and Recommend Article III Candidates Below the Supreme Court Level?* (forthcoming).

what many have termed the “theatrical” nature of judicial confirmation hearings, especially at the Supreme Court level, does judges’ participation in them risk negative effects on the public’s trust and confidence in the judiciary? Is private contact with appointments officials and ABA representatives preferable to public hearing testimony because the private contact is likely more candid because it is less staged?

Should consideration of the desirability of judges testifying turn on whether they are providing positive, negative, or neutral assessments of a judicial nominee? Do judges lend their credibility and prestige of office to judicial candidates by testifying at their hearings? How do judges testifying at others’ Article III confirmation hearings compare with judges’ roles in other judicial appointments systems, at the state, federal, national, and international levels? Ultimately, what is the optimal role, if any, for judges in the judicial appointments process?

It is with these questions in mind that I turn to the testimony by seven current and former judges of the U.S. Court of Appeals for the Third Circuit at Samuel Alito’s confirmation hearing as Associate Justice in January 2006. The Third Circuit judges’ testimony was unprecedented in both degree and kind. Though current and former federal judges have testified at others’ Supreme Court confirmation hearings off and on since 1969, only once before Justice Alito’s hearing did a judge who was then currently serving on the same court as the nominee testify (as in the Alito hearing), but that involved a single judge, who did not call for his colleague’s confirmation (as at the Alito hearing). Rather, this judge-witness explained why the nominee’s actions in a specific case did not merit the ethics charges lodged against him.² Because judges’ testimony at others’ confirmation hearings took a new turn with the Alito hearing in terms of number and status of judges and nature of testimony, the practice should be examined now before it can be repeated.³

2. See *infra* Part II.A for a discussion of Judge Harrison Winter’s testimony at Judge Clement Haynsworth’s confirmation hearing to be Associate Justice.

3. Careful consideration of the desirability of judges testifying at others’ confirmation hearings is especially important in the context of today’s Supreme Court appointments, where ten of the last eleven Supreme Court candidates served on the court of appeals at the time of nomination. See Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 974, 983–85 (2007) (citing Lee Epstein et al., *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CAL. L. REV. 903, 908–17 (2003)) (highlighting the new norm and the resulting potential for creating “undesirable incentives for decisions made with an eye to advancement”); Terri L. Peretti, *Where Have All the Politicians Gone? Recruiting for the Modern Supreme Court*, 91 JUDICATURE 112, 113–20 (2007) (discussing the findings of Epstein et al., *supra*).

Despite active debate on the merits of the Third Circuit judges' appearance at the time of Justice Alito's confirmation hearing,⁴ surprisingly little has been written about it since then.⁵ This article seeks to fill that gap. Part II begins by charting the history of judicial testimony at others'

This "new" norm of Supreme Court appointments underscores the real potential for sitting judges to continue to act as witnesses at one another's Supreme Court confirmation hearings.

The nearly exclusive reliance on the federal courts of appeal as the source of Supreme Court nominees is a departure from historic practice, where nominees had been drawn in relatively equal number from private practice, the executive branch, state courts, and the federal bench until twenty years ago. *See* DAVID M. O'BRIEN, JUDICIAL ROULETTE: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION 39 (1988); *see also* LEE EPSTEIN ET AL., *Table 4-9: Prior Judicial Experience of the Justices*, in THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS 324–32 (3d ed., CQ Press 2003); *Table 4-10: Summary of Background Characteristics of the Justices of the United States*, in THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS, *supra*.

4. *See, e.g.*, Michael C. Dorf, *Should Judges Testify at a Colleague's Senate Confirmation Hearing? The Separation-of-Powers Concern Raised by the Alito Hearings*, FINDLAW, Jan. 16, 2006, <http://writ.news.findlaw.com/dorf/20060116.html> (addressing the testimony's separation of powers implications and compliance with governing judicial conduct code).

Several news outlets commented at the time of the Alito hearing on the unusual nature of the Third Circuit judges' participation. The *New York Times* ran an editorial the day before the judges' testimony, flagging concern for the judges' injecting themselves into Supreme Court appointments politics and for the use of the prestige of judicial office to further partisan interests:

It is extraordinary for judges to thrust themselves into a controversial Supreme Court nomination in this way, a move that could reasonably be construed as a partisan gesture. The judges will be doing harm to the federal bench Their testimony's greatest value will almost certainly not stem from the facts the judges provide, but from the prestige they hold as members of the federal judiciary.

Editorial, *Fairness in the Alito Hearings*, N.Y. TIMES, Jan. 11, 2006, at A28. Noting that the judges' "planned testimony does not appear to violate judicial canons," the *Times* observed that it nonetheless "brushes up against them." *Id.* The editorial concluded, "Judge Becker and his colleagues are beginning a process of politicizing the federal judiciary that all of us will most likely come to regret." *Id.*; *see also* Bob Egelko, *Questions Raised About Having Judges Testify*, S.F. CHRON., Jan. 13, 2006, at A7; Richard Simon, *3rd Circuit Colleagues Trumpet Alito*, L.A. TIMES, Jan. 13, 2006, at A-23.

5. Two pieces published post-hearing have addressed the testimony. *See* Alan B. Morrison, *Judges and Politics: What to Do and Not to Do About Some Inevitable Problems*, 28 JUST. SYS. J. 283, 297–99 (2007); Ronald D. Rotunda, *Judicial Ethics, the Appearance of Impropriety and the Proposed New ABA Judicial Code*, 34 HOFSTRA L. REV. 1337, 1369–72 & nn.146–55 (2006).

Rotunda addressed the judges' testimony briefly, noting that the testimony had been presented and asserting that the governing conduct code "does not prohibit this testimony by fellow judges." *Id.* at 1370. I question Rotunda's conclusion in Part V of this article.

Morrison's essay addressed the judges' Alito hearing testimony at greater length than Rotunda, though it was not principally focused on this issue. *See* Morrison, *supra*; *infra* Parts IV–V for a discussion of Morrison's essay.

Supreme Court confirmation hearings. Part III introduces findings of interviews with current and former Third Circuit judges on the desirability of judges testifying at others' Supreme Court confirmation hearings. Part IV explores the judicial independence implications of this testimony, noting potential impacts on institutional comity and individual judges' behavior. Thereafter, Part V considers the testimony's permissibility under the governing judicial conduct code, noting that while some code provisions appear to authorize or even encourage it, others arguably counsel against it.

Mindful of the views articulated by many of the judges with whom I spoke that an appellate judge's immediate colleagues have something uniquely valuable to contribute to the judicial elevation process given their close work in collaborative decision making, the article considers whether there are other ways in the Supreme Court appointments process through which judges could share their knowledge of and experiences with actual or prospective candidates. Part VI explores alternative approaches to judicial participation in the judicial appointments process, drawing on comparisons with judicial roles in judicial selection systems at the state, federal, national, and international levels. The article concludes by calling for an end to public testimony by judges at others' Article III confirmation hearings because, on balance, the testimony's costs outweigh its potential benefits.

II. HISTORY OF TESTIMONY BY U.S. JUDGES AT OTHERS' SUPREME COURT CONFIRMATION HEARINGS

A. *Overview of History of Judges' Testimony at Others' Supreme Court Confirmation Hearings*

Current and former federal judges have testified at ten of the last seventeen Supreme Court confirmation hearings,⁶ though only two involved testimony by then-current colleagues, most recently, at Justice Alito's hearing and before that, at Judge Clement Haynsworth's hearing to be Associate Justice.⁷ Haynsworth's 1969 hearing marked the first time that an Article III judge testified at another's Supreme Court confirmation hearing. There, Judge Harrison Winter of the U.S. Court of Appeals for the Fourth Circuit testified about a case in which he and Chief Fourth Circuit Judge Haynsworth had participated, for which concerns had been raised regarding

6. Indeed, current and former judges have testified at nine of the last fourteen hearings.

7. See *infra* app. A for a complete listing of testimony by current and former federal judges at others' Supreme Court confirmation hearings.

Haynsworth's purchase of a stock interest in one of the parties during the pendency of the appeal. Judge Winter's testimony addressed the appellate history of the case and spoke to whether Judge Haynsworth had complied with the governing judicial conduct code.⁸

Since that time, current and/or former federal judges have testified at the Supreme Court confirmation hearings of William Rehnquist to be Associate Justice (1971) and Chief Justice (1986), Robert Bork to be Associate Justice (1987), Anthony Kennedy to be Associate Justice (1987), David Souter to be Associate Justice (1990), Clarence Thomas to be Associate Justice (1991), Ruth Bader Ginsburg to be Associate Justice (1993), John Roberts to be Chief Justice (2005), and Samuel Alito to be Associate Justice (2006).⁹

Focusing more narrowly on testimony by sitting (and not retired or former) federal judges at others' Supreme Court confirmation hearings (with which this article is specifically concerned), a complete listing of that testimony is as follows:

- Clement Haynsworth to be Associate Justice (1969) (Haynsworth was Chief Judge of the Fourth Circuit at that time):

Testimony by Judge Harrison Winter of the U.S. Court of Appeals for the Fourth Circuit.

- William Rehnquist to be Associate Justice (1971) (Rehnquist was not a judge at that time):

Testimony by Judge Walter Craig of the U.S. District Court for Arizona in support.

- Clarence Thomas to be Associate Justice (1991) (Thomas was then a D.C. Circuit judge):

Testimony by Judge Jack Tanner of the U.S. District Court for Washington in support.

- Samuel Alito to be Associate Justice (2006) (Alito was then a Third Circuit judge):

8. *Nomination of Clement F. Haynsworth, Jr., of S.C., to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary U.S. Senate, 91st Cong. 236-62 (1969)* (statement of Hon. Harrison L. Winter, 4th Cir.).

9. *See infra* app. A for details of this testimony.

Testimony by five sitting (and two former) judges of the U.S. Court of Appeals for the Third Circuit in support.

As this list reveals, two of the three pre-Alito instances of sitting judges testifying at another's Supreme Court confirmation hearing did not involve judges from the nominee's own court (Rehnquist in 1971; Thomas in 1991). As such, these judge-witnesses did not confront the prospect of continuing to serve with the nominee if the Senate rejected the nomination. Also of significance, because they did not serve on the same court as the nominee, these earlier judge-witnesses could not, and did not, testify to confidential judicial deliberations or decision making processes.

Placing judicial testimony at Supreme Court confirmation hearings in brief historic context, it was not until 1916 that the Senate hosted its first public Supreme Court confirmation hearing, for Justice Louis Brandeis. This was shortly after passage of the constitutional amendment providing for direct election of Senators, in 1913. As John Maltese notes, "Twentieth-century changes in the Senate made that body more accountable to the people and led to a more visible Supreme Court confirmation process."¹⁰ According to Maltese, "[t]hose changes made participants in the confirmation process more responsive to public opinion, but they also prompted participants to wage their own campaigns to mobilize public opinion. Aware that mass sentiment could influence the Senate vote on a Supreme Court nomination, they attempted to direct public opinion."¹¹ Supreme Court nominees did not testify at their own confirmation hearings until Harlan Fiske Stone did so in 1925,¹² and such testimony did not become a regular practice until John Marshall Harlan's hearing in 1955.¹³ Sandra Day O'Connor's hearing to be Associate Justice marked the first time a Supreme Court confirmation hearing was broadcast live, in 1981.¹⁴ Live media coverage and lengthy candidate testimony are now part of the regular fabric of Supreme Court confirmation hearings.¹⁵ The question for this article is whether testimony by the nominee's judicial colleagues should likewise become standard practice.

10. JOHN ANTHONY MALTESE, *THE SELLING OF SUPREME COURT NOMINEES* 116 (1995).

11. *Id.*; see also MICHAEL COMISKEY, *SEEKING JUSTICES: THE JUDGING OF SUPREME COURT NOMINEES* 13–14 (2004).

12. ROBERT A. KATZMANN, *COURTS AND CONGRESS* 19 (1997).

13. *Id.* at 18.

14. *Id.* at 9.

15. *Id.*

B. Third Circuit Judges' Testimony at Justice Alito's Hearing

Judge Edward Becker¹⁶ introduced the Third Circuit judges' testimony at Justice Alito's hearing by underscoring the relevance and importance of judicial colleagues' testimony:

“Sam Alito became my colleague when he joined our court in 1990. Since that time, we have sat on over a thousand cases together, and I have therefore come to know him well as a judge and as a human being. Many do not fully understand the intensity of the intellectual and personal relationship among appellate judges. We always sit together in panels of three and, in the course of deciding and writing up cases, engage in the most rigorous dialog with each other.”¹⁷

Emphasizing the intensity of the judicial colleague relationship, Judge Becker stated that he was “a good judge of the four matters that I think are the central focus of this Committee as it decides whether to consent to this nomination—Sam Alito's temperament, his integrity, his intellect and his approach to the law.”¹⁸ Judge Becker drew attention to the uniqueness of judicial colleagues' insights into one another's character gained from their participation in confidential post-argument conferences: “[T]here is an aspect of appellate judging that no one gets to see, no one but the judges themselves—how they behave in conference after oral argument, at which point the case is decided, and which I submit is the most critically important phase of the appellate judicial process.”¹⁹ Explicitly drawing on his observations of then-Judge Alito in these confidential proceedings, Judge Becker asserted, “In hundreds of conferences, I have never once heard Sam raise his voice, express anger or sarcasm, or even try to proselytize. Rather, he expresses his views in measured and tempered tones.”²⁰

16. Judge Becker was a former chief judge and then-current senior judge of the Third Circuit. See Tim Weiner, *Edward R. Becker, 73, Judge on Federal Court of Appeals, Dies*, N.Y. TIMES, May 20, 2006, available at http://www.nytimes.com/2006/05/20/us/20becker.html?_r=2&oref=slogin&oref=slogin. He died in May 2006. *Id.*

17. *Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Judiciary Comm.*, 109th Cong. 654 (2006) [hereinafter *Alito Hearing*] (statement of Judge Edward Becker).

18. *Id.* In articulating what he thought *was* the Committee's central focus in confirmation, Judge Becker might be understood as suggesting what he thought *should be* the Committee's central concern. Whether Becker's weighing in on the question of what evaluation criteria should be used presents separation of powers concerns is a question addressed in Part IV, below.

19. *Id.*

20. *Id.* at 655.

Judge Becker's testimony was followed by that of four current and two former colleagues. The four sitting judges who testified after Judge Becker included two active judges, Anthony Scirica (Chief Judge of the Third Circuit) and Maryanne Trump Barry (Third Circuit judge with whom Alito had also worked at the U.S. Attorney's Office for the District of New Jersey), and two senior judges, Ruggero Aldisert (former chief judge of the Third Circuit) and Leonard I. Garth (Third Circuit judge for whom Alito had also served as a law clerk).²¹ The two former judges who testified were Timothy K. Lewis (currently serving as a partner at Schnader Harrison Segal and Lewis in Washington, D.C.), who had served with then-Judge Alito before resigning from the Third Circuit bench, and John Gibbons (former chief judge of the Third Circuit, currently serving as a partner in the Newark, New Jersey law firm of Gibbons, Del Deo *et al.*), whose 1990 resignation from the bench created the vacancy occupied by then-Judge Alito at the time of his Supreme Court nomination.²²

The five active and senior judges who testified constituted one-quarter of Alito's then-current Third Circuit colleagues (comprising twenty active and senior judges in all). Fifteen others did not participate, raising questions as to why some judges, and not others, testified. It was with this and other questions—for the merits of this type of testimony and its potential implications for judicial independence and judicial ethics—that I sought to interview the Third Circuit judges who had testified as well as those who had not.

Themes addressed in the judges' testimony included their unique insights as judges into Alito's judicial temperament and character through years of shared work in confidential deliberations,²³ whether Alito was a "movement person" or "ideologue,"²⁴ whether he approached judicial decision making with an open mind,²⁵ whether he was respectful of his colleagues' differing views,²⁶ and whether Alito had the impartiality and integrity necessary to be a Supreme Court justice.²⁷

Following the panelists' prepared statements, Senator Specter introduced the Senate Judiciary Committee questioning of the judge-witnesses by, *inter alia*, soliciting impressions of Alito formed during the judges' confidential

21. *Id.* at 656–57, 659, 661.

22. *Id.* at 664, 667.

23. *Id.* at 657.

24. *Id.* at 655, 682.

25. *See generally id.* at 665–67.

26. *Id.* at 655.

27. *See generally id.* at 663, 668, 682.

post-argument conferences.²⁸ Then-ranking minority Committee member Senator Patrick Leahy refused to question the judge-witnesses on the ground that, if confirmed, Alito might need to recuse himself from considering decisions participated in by his testifying colleagues.²⁹ Democratic Committee members Senators Richard Durbin and Russell Feingold likewise declined to question the judge-witnesses, aligning themselves with Leahy's concerns.³⁰ Prior to the judges' testimony, Senator Durbin had asked then-Judge Alito whether the judges' testimony had been his idea, or whether he had been consulted as to its merits, and Alito had responded "no" to both inquiries.

Senator Dianne Feinstein was the only Democratic Senator to participate in the Committee questioning. Among other issues, Feinstein inquired about the judges' understandings of Alito's views of the Supreme Court's abortion jurisprudence, specifically whether Alito understood *Roe* and *Casey* to be settled law or not.³¹ The panelists declined to respond to Senator Feinstein's questioning on this matter,³² with Judge Becker

28. *Id.* at 669. For example, Specter asked, "Judge Becker, the conference is a unique opportunity, as has been explained, to really find out about what your colleagues think. [I]s it your judgment that Judge Alito would allow his personal views on a matter to influence his decisions as a Justice?" *Id.* Judge Becker responded, "I do not think—I am confident that he would not." *Id.*

Continuing to solicit impressions of Alito made in conference, Senator Specter asked Judge Barry about Alito's treatment of women's issues: "Judge Barry, you have sat with him in these private conferences, known him for a long time, back to the days when you were in . . . the U.S. Attorney's Office when he was an assistant. How would you evaluate Judge Alito on his consideration of women's issues?" *Id.* at 670. Judge Barry responded, "If I had to add anything to my initial testimony, I would have stated more about what Sam and I did together on this wonderful court and how reasonable he was and how he never indicated bias of any kind." *Id.*

29. *Id.* at 675.

30. *Id.* at 676. One day earlier, when Alito was still a witness before the Committee, Feingold had asked Alito whether he thought he might need to recuse himself, once on the Supreme Court, from reviewing cases that had been decided by his soon-to-be testifying colleagues. *Id.* at 773, 791. Alito stated that he could not respond at that time because he had not previously considered the question, but would be happy to file a response with the Committee at the hearing's conclusion, which he did. *Id.*

Alito's written response expressed concern that recusal would produce an eight-person Court, leading to the possibility of an evenly divided vote in a case. *Id.* at 791. Alito then observed: "Lack of a definitive resolution to a case when the litigants have no higher court that could resolve their cases undermines the judicial process." *Id.*; see *infra* notes 136–55 and accompanying text on the recusal question.

31. *Alito Hearing, supra* note 17, at 672–73.

32. *Id.* at 673. Senator Feinstein noted, "I asked Judge Alito, and I thought at the very least he was going to agree with Justice Roberts, and he said, well, it all depends upon what settled means. What do you make of that?" *Id.* Judge Barry stated, "I respectfully cannot characterize what Judge Alito meant by that and I would much prefer not to have to try," and Feinstein

intervening: “I think we are here as fact witnesses more than opinion witnesses, Senator Feinstein. I really would not answer that question.”³³

Senator Specter concluded the Committee questioning by underscoring the special perspective the judges brought to the confirmation hearing, again referencing their participation in confidential post-argument conferences with the nominee:

[I]t is certainly obvious that the insights which you judges have to Judge Alito’s background are unique. When you talk about what goes on in those conferences, you are the only ones who are there and you have much more insight as to the opinions he has written that you have worked with him on.³⁴

Observing that the Committee had “30 witnesses who are coming in and that has been a traditional part of the process,” Specter asserted that he knew “of no situation where witnesses have more to say which is relevant and weighty.”³⁵ Noting, “[p]erhaps weight is the best evidentiary characterization of what you have had to say,” Senator Specter asserted, “[a] lot of things can be relevant, but especially where you have the issue which has been before this Committee as to Judge Alito’s agenda or Judge Alito’s approach or Judge Alito’s personal views dominating his judicial determinations, this panel is right on the head.”³⁶

In closing the session, Senator Specter addressed the precedential value of the Third Circuit judges’ testimony: “It has been an unusual panel, but that is really not a strike against the practice. It may be a precedent for the future and it, I think, will be a good precedent.”³⁷ “[W]henever you try something new, there are differing voices,” noted Specter, “but I think it is an extraordinary contribution which this panel has made to this process.”³⁸

Ten senators who voted to confirm Justice Alito cited the Third Circuit judges’ testimony as influencing their vote.³⁹ Two senators who voted

responded, “That is fine. Anybody?” *Id.* Judge Becker intervened at this point, as quoted in the text. *Id.*

33. *Id.*

34. *Id.* at 680.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. These ten senators were Senators Susan Collins, Mike DeWine, Chuck Hagel, Orrin Hatch, Trent Lott, Lisa Murkowski, Jeff Sessions, Richard Shelby, Olympia Snowe, and John Warner. *See, e.g., Sen. Collins Announces Intent to Vote in Favor of Judge Alito*, U.S. FED. NEWS, Jan. 27, 2006, available at <http://collins.senate.gov> (search “intent to vote for judge Alito”) (reporting Senator Collins observing in announcing her vote to confirm Alito, “[p]erhaps the most compelling testimony during his confirmation hearing came from seven of Judge Alito’s colleagues on the Third Circuit Court of Appeals. These judges, holding views ranging

against Alito's confirmation cited the judges' testimony as a concerning phenomenon.⁴⁰ Whether the judges' testimony was decisive of any Senator's vote is unknown, though unlikely, given the amount of information available about Judge Alito at the time of his hearing.

III. INTERVIEW COMMENTS BY TESTIFYING AND NON-TESTIFYING CURRENT AND FORMER THIRD CIRCUIT JUDGES ON THE DESIRABILITY OF JUDICIAL TESTIMONY AT OTHERS' SUPREME COURT CONFIRMATION HEARINGS

To learn more about what judges themselves thought of the practice of judges testifying at others' judicial confirmation hearings and why some judges might testify and others not—specifically why some current and former Third Circuit judges testified at Justice Alito's hearing, while others did not—I sought to interview Justice Alito's then-current Third Circuit colleagues (those who had testified as well as those who had not), along with the two former judges who had testified.⁴¹ What follows are highlights of the judges' interview comments on how the testimony arose, the value of the testimony, the likelihood of negative testimony, and the testimony's impact, if any, on the ABA's role in evaluating judicial candidates. Their comments on the testimony's potential impacts on judicial independence and judicial ethics are set forth in Parts IV and V below, and their suggestions of alternative mechanisms for judicial involvement in the judicial appointments process are included in Part VI.

across the political spectrum, have worked closely with Judge Alito during his 15 years on the bench, and they are uniquely qualified to know how he thinks, reasons, and approaches the law. It is significant that they were unanimous in their praise of his legal skills, his integrity, his evenhandedness, and his dedication to precedent and the rule of law.”); *see also Sen. Murkowski Speaks in Support of Judge Alito High Court Nomination*, U.S. FED. NEWS, Jan. 26, 2006.

40. These were Senate Judiciary Committee member Russell Feingold and then-Senate Minority Leader Harry Reid. In explaining his vote, Reid noted that Alito was admired by his colleagues (implicitly referencing the Third Circuit judges' testimony), but that confirmation was not a “popularity contest.” Harry Reid, U.S. Senator, U.S. Senator Harry Reid's Remarks as Prepared for Delivery on the Senate Floor Before the Vote on the Nomination of Judge Samuel Alito to the U.S. Supreme Court (Jan. 31, 2006), *available at* <http://www.kuwaitifreedom.org/media/pdf/CQ%20Transcriptions%20January,%2031%202006.pdf> (Senator Reid's statement announcing Alito confirmation vote).

41. *See infra* app. B for details of interview methodology. Where most, but not all, of the judges with whom I spoke made their comments for attribution, I do not identify any of them by name so as not to reveal the identities of those who did not speak for attribution. Moreover, I refer to all of my interview subjects as “judge” so as not to identify whether a current or former judge made the particular comment and as “he” so as not to identify the judge's sex. I do note whether the judges whose comments I highlight had testified or not, where that factor may well be important in evaluating their comments.

A. How the Alito Hearing Testimony Arose

I began by asking how the panel testimony arose. What I learned was consistent with then-Senate Judiciary Committee Chair Arlen Specter's press and hearing statements concerning the testimony's origins,⁴² albeit in greater detail. My interviews revealed that Judge Becker contacted a number of current and former Third Circuit colleagues, by telephone in most instances, to ask whether they would consider testifying on then-Judge Alito's behalf. Those who agreed to testify received a formal letter of invitation from Senator Specter as Chair of the Senate Judiciary Committee. One judge's letter read:

Judge Becker has advised me of his discussions with you concerning your testifying before the Senate Judiciary Committee on the nomination of Judge Samuel Alito for the Supreme Court of the United States. The Committee and I would very much appreciate your providing that testimony because of your unique knowledge of Judge Alito's work on the Third Circuit⁴³

Not everyone who received a formal invitation to testify had spoken with Judge Becker first. Some who were not asked to testify understood that it was because they had had less experience working with then-Judge Alito than had other of their colleagues who had already agreed to testify. Others understood that they had not been asked to testify because their particular viewpoint and/or demographic status did not need further representation on the panel.

42. See, e.g., *Media Stakeout with Senator Arlen Specter (R-PA), Chairman, Senate Judiciary Committee, After the Conclusion of the Committee's Hearing for the Day on the Nomination of Judge Samuel Alito to the U.S. Supreme Court*, FED. NEWS SERVICE, Jan. 11, 2006 [hereinafter *Media Stakeout*]; see also Charles Babington, *Sitting Judges to Speak on Alito's Behalf: No Conflict of Interest in Role, Specter Asserts*, WASH. POST, Jan. 7, 2006, at A05, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/06/AR2006010601727.html>; Kathy Kiely, *For Specter, Alito Hearings Pose Internal Struggle*, USA TODAY, Dec. 14, 2005, available at http://www.usatoday.com/news/washington/2005-12-13-specter_x.htm?csp=N009.

According to Senator Specter's press interview given on the eve of the judges' testimony, Judge Becker had been working in Senator Specter's office on proposed asbestos legislation when Kathy Kiely of USA Today interviewed Specter about the upcoming Alito confirmation hearing. See Kiely, *supra*. While Kiely was present, Specter and Becker discussed whether having testimony by some of Alito's Third Circuit colleagues might be a useful addition to the hearing. *Id.* It bears mention here, as it is referenced in the press coverage, that Specter and Becker had been good friends for approximately fifty years by that time, having met as undergraduates at the University of Pennsylvania. *Id.*

43. Letter from Arlen Specter, U.S. Senator, to a judge agreeing to testify before the Senate Judiciary Committee on the nomination of Judge Samuel Alito for the U.S. Supreme Court (Dec. 20, 2005). I do not know whether other letters differ in any meaningful way from this judge's letter.

Those judges who testified said they had not coordinated their testimony in advance, *i.e.*, that the substance of the testimony was determined by each judge individually. Several noted, however, that Judge Becker had sought to compose a panel that was diverse by political party of appointing president and by ideology.

B. Value of Testimony by Judicial Colleagues at Others' Judicial Elevation Hearings

Many of the judges with whom I spoke (including those who testified and a number of those who had not) stated a strong belief that testimony by a nominee's immediate judicial colleagues was, or was among, the most valuable testimony that the Senate Judiciary Committee could hear, whether in support of or opposition to a candidate. More specifically, these judges emphasized that a nominee's colleagues were among the best, if not *the* best, witnesses on questions of the nominee's judicial demeanor, fairness, open-mindedness, collegiality, and approach to deciding cases (including whether case decisions were ideologically driven or not). Underscoring the uniqueness of appellate colleagues' insights into a nominee, resulting from years of working together in hearing cases, discussing cases at post-argument conferences, circulating draft opinions, and interacting in other court operations, many of the judges asserted that an inquisitorial body, such as the Senate Judiciary Committee, should want to hear from individuals who knew Alito as long and as well as his colleagues had, rather than from strangers who had never met him and who had reviewed a relatively small number of his opinions. As one testifying judge put it, "Why would an inquisitorial body not want this data? Why ask a stranger when you could ask those who knew him intimately? Why not go to the best source of this information? Why have only a stranger who has read six to eight opinions testify?" Another testifying judge applauded the judges' testimony as a good and healthy thing, underscoring the testimony's value and influence by noting its significance in assuring Alito's confirmation, *i.e.*, there was no question that Alito would be confirmed once the judges had testified. In light of the perceived benefits of the testimony, one judge who had testified expressed hope that testimony from a panel of the nominee's immediate judicial colleagues would become a regular part of the Supreme Court confirmation process, and many who had testified (as well as some who had not) stated a willingness to consider testifying at future confirmation hearings.

One non-testifying judge observed that one's evaluation of the testimony's merits might come down in large part to one's views of the

confirmation process itself. If, for example, one believed that Senators have already made up their minds by the time of a nominee's hearing and are simply grand-standing for personal political gain, one would likely conclude that judges' participation in the hearing would add nothing and could convey to the public that judges are more political than they otherwise appear to be. If, however, this judge continued, one believed that senators come to the confirmation hearing with open minds about a nominee and that judicial colleagues' testimony can helpfully address senators' questions about a nominee's judicial demeanor and/or decision-making process, then one would likely conclude that there is a valuable role for judges to play in testifying. One testifying judge said on this point that the hearing process had become so partisan and defensive that, if he had something positive to contribute to it, he would.

Another non-testifying judge stated that he would be comfortable with judges testifying only if the confirmation process was itself non-partisan. In a non-partisan world, this judge observed, having judges speak to what only they can know of a nominee's judicial demeanor, ability, "even whether the nominee was thoughtful or rushed to judgment," would be invaluable. After all, this judge noted, colleagues are uniquely positioned to speak to these qualities and address the critical question of whether the nominee has the temperament to serve on the Supreme Court. In concluding our interview, this judge asked, "given how partisan the hearings currently are, should judges do this?," and responded that it is questionable, given the testimony's potential impact on public trust and confidence in the judiciary and perception of the judiciary's partiality.

Very few of the Third Circuit judges with whom I spoke were primarily critical of the practice of judges testifying at others' judicial confirmation hearings although one non-testifying judge, who was largely opposed to judges testifying, observed that the news commentary following the judges' appearance had sensitized the public and others to concern for the propriety of this type of testimony, making it unlikely that it would be repeated except in the rarest of circumstances.

C. Potential for, and Desirability of, Negative Testimony by Judicial Colleagues

Most of the judges with whom I spoke agreed that, pragmatically speaking, there would be a high bar to sitting judges testifying against the elevation of a colleague from their court because, if the nomination was

rejected, they would continue to serve together.⁴⁴ One judge who had testified, and who was supportive of judges testifying, echoed many of the judges' sentiments in saying that he would think "long and hard" before testifying against a colleague. Nevertheless, he noted that he might have an obligation to testify if he had knowledge of a nominee's wrongdoing that had not been brought to light through other means. One judge who had testified did not think that there would be a higher bar to negative testimony. This judge did not think that judicial colleagues would be inhibited by a sense that you should not say anything if you cannot say something positive. Even assuming a high (or higher) bar to negative testimony, several judges who were supportive of judges testifying stated that the disincentives to negative testimony did not undermine the value or probity of positive testimony.

One judge who had not testified and who was more ambivalent about judges testifying noted that negative information about a Supreme Court candidate would likely surface through other means—whether through testimony by other witnesses or leaks to the press—because it is likely that whatever negative information is apparent to a judicial colleague is also apparent to others outside of the judiciary. By contrast, a judge who had not testified and who was supportive of judges testifying suggested that there is a class of information known only to a nominee's immediate colleagues that might serve as the basis for negative testimony by judges. As an example, this judge observed that only immediate judicial colleagues would know whether a nominee delegated a disproportionate amount of work to his or her law clerks. Other investigatory processes would not uncover it and other witnesses would not be able to testify about it.

Asked about the possibility of "dueling" panels of judges from the same court testifying about a colleague nominated for elevation to the Supreme Court—including some panelists with positive assessments and some panelists with negative assessments—two judges who had testified responded that conflict is a good and healthy thing. One of these judges noted that it would be "fine" to have this type of conflict aired at a confirmation hearing, "just as we've seen it aired among academics." The other judge observed that appellate courts already publish majority and dissenting opinions, thereby airing differences in public without any

44. See *infra* app. A. The two instances of testimony against a judicial nominee to date involved former judges from different courts than the nominee, specifically, former Ninth Circuit Judge Shirley Hufstедler at Judge Robert Bork's hearing and former Sixth Circuit Judge Nathaniel Jones at Justice John Roberts's hearing. *Id.* Note that former Judge Jones framed his testimony as raising concerns about, rather than directly opposing, Chief Justice Roberts's confirmation. *Id.*

negative impact on the public's perception of, and respect for, the judiciary. By contrast, one judge who had testified expressed concern for the potential of dueling panels of judges testifying given the lessened public perception of dignity that might result. This judge emphasized how important maintaining the public's perception of the judiciary's dignity was for promoting respect for, and compliance with, court judgments.

D. Whether the Alito Panel Testimony Set a New Standard for Judicial Participation in Others' Supreme Court Confirmation Hearings

When asked whether the judges' panel testimony set a new benchmark for judges testifying at others' confirmation hearings, given the number of judges testifying at the Alito hearing,⁴⁵ several judges stated that this was unlikely. One judge who had testified responded that he thought it “nonsense—this idea that Alito had five sitting colleagues and two former judges, then the next guy better have nine.” After all, this judge reasoned, the nominee does not control who or how many judges testify, but, rather, the Chair of the Senate Judiciary Committee and its ranking minority member do.⁴⁶ Because it is not up to the candidate to invite witnesses, who or how many judges testify does not reflect on the merits of the candidate.

E. Potential Impact of Judges' Testimony on the ABA's Role in Evaluating Judicial Nominees

In asking about the potential impact of judicial testimony at other judges' confirmation hearings on the ABA's role in evaluating judicial nominees,⁴⁷ I heard a variety of responses. In brief, some judges observed that the judges' live testimony filled a gap in the ABA's evaluation process by

45. This point had been raised by commentator Nick Lewis in Gwen Ifill's *Washington Week* coverage of the Alito hearing testimony (Jan. 2006). Although rejected as a concern by the judges with whom I spoke, this point was echoed by Alan Morrison when he noted a concern that future nominees might cite the Alito precedent in asking colleagues to testify. Morrison, *supra* note 5, at 297–99.

46. *See id.* at 297.

47. *See infra* notes 163–67 and accompanying text for details of the ABA's judicial evaluation process. In brief, the ABA's Standing Committee on the Federal Judiciary conducts confidential interviews with many individuals familiar with the judicial nominee's professional qualifications and reputation, including dozens of sitting federal judges. *Id.* The information gathered from these interviews is synthesized and reported on an anonymous basis both orally and in writing by the ABA Standing Committee to the Senate Judiciary Committee. *See* ABA STANDING COMM. ON THE FED. JUDICIARY: WHAT IT IS AND HOW IT WORKS 3 (2007), http://www.abanet.org/scfedjud/federal_judiciary07.pdf [hereinafter ABA STANDING COMM.].

addressing questions arising during the confirmation hearing itself.⁴⁸ They also noted that the judges' live testimony delved into questions more deeply than did the ABA interviews. Other judges noted that, in concentrating on the nominee's professional qualifications and reputation, the ABA evaluation process had a different focus and objective than did the live testimony. Still, another judge, who had testified, noted that one of the advantages of live testimony was that it enabled judges to address a nominee's wrongdoing, if any, when the ABA process failed to uncover such evidence.

Recounting the judges' responses in more detail, one judge who had testified emphasized that, if it is helpful to the Senate Judiciary Committee's deliberations to have the ABA present information gleaned from its interviews with sitting judges, then it is by definition helpful for the Senate Judiciary Committee, as an inquisitorial body, to hear the judges' views directly. Underscoring that the Senate confirmation hearing is the only public element of the judicial appointments process, this judge asserted that judges' opinions of judicial candidates should not be restricted to the closed, confidential realm of the ABA evaluation process, but should be heard in the open forum of the Senate confirmation hearing so that the public can have greater knowledge of, and input into, the appointments process.

Several judges (including those who had testified and those who had not) responded to questions about the testimony's potential impact on the ABA's role by analogizing the judges' testimony to testifying at trial. One judge, in addressing the comparative merits of the live hearing testimony and confidential ABA evaluation process, stated that it is a question of whether you think presenting a report to the decision-makers is as useful as presenting live testimony. Echoing many of his colleagues in drawing on the trial metaphor, this judge, who had not testified, concluded that presenting live testimony likely has more of an impact than providing a confidential interview because live testimony resembles putting a witness on the stand and inviting cross-examination.

One judge, out of concern for preserving the ABA's role, suggested an alternative to both the judges' live testimony and the current ABA process. His proposal was for the ABA to conduct more searching interviews with a nominee's immediate judicial colleagues (if the nominee is a sitting judge) and report its findings in more detail to the Senate than this judge believes

48. These judges did not note in their interview comments that ABA Standing Committee representatives monitor a nominee's confirmation hearing as the ABA representatives await their turn to testify to determine what, if any, changes to their prepared testimony might be needed.

is currently done. When presenting their oral report to the Senate committee, this judge, who had testified, noted that the ABA representatives could seek to answer the Committee's questions about the judges' interview statements in greater detail. Acknowledging that the judges' confidential ABA interview statements would likely lose some of their immediacy in the Senate hearing's question and answer format, and that there might well be hearsay-like problems with having ABA representatives field questions from the Senators about the judges' interview statements, this judge suggested that it would nevertheless be worthwhile to explore this and other alternatives.

IV. POTENTIAL JUDICIAL INDEPENDENCE IMPACTS OF JUDGES TESTIFYING AT OTHERS' SUPREME COURT CONFIRMATION HEARINGS

One of my central concerns in undertaking this project was for potential negative impacts on judicial independence of judges testifying at others' Supreme Court confirmation hearings. Here, "judicial independence" should be understood, not as a goal unto itself, but, rather, as a set of conditions enabling judges to resist constraints on their ability to decide cases impartially.⁴⁹ Judicial independence is often conceptualized as composed of two strands—institutional and individual.⁵⁰ Institutional independence, also called "procedural," "administrative," "structural," and/or "branch" independence, connotes the judiciary's ability in the aggregate to process cases and administer justice free from undue interference by the legislative and executive branches, while individual

49. I thank Russell Wheeler of the Brookings Institution for suggesting a variation on this definition of "judicial independence" (referencing a set of policy choices and conditions enabling judges to resist potential constraints). See Stephen B. Burbank et al., *Reconsidering Judicial Independence*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 9, 10 (Stephen B. Burbank & Barry Friedman eds., 2002) (noting, "those responsible for the formal structures of government, and for the informal norms that fill up their interstices, do not seek whatever degree of independence they favor for the judiciary because they believe that judicial independence is itself normatively desirable. Rather, *judicial independence is a means to an end (or, more probably, to more than one end).*"); see also KATZMANN, *supra* note 12, at 39 (noting, "the Founders sought to create a system in which the independence of judges would be ensured. By providing for life tenure, they substantially isolated federal jurists from public pressure, giving them the freedom to make unpopular decisions.").

50. See CHARLES GARDNER GEYH, WHEN COURTS AND CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM 9 (2006) [hereinafter GEYH, WHEN COURTS AND CONGRESS COLLIDE]; see also Charles Gardner Geyh, *Customary Independence*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH, *supra* note 49, at 160, 162–63 [hereinafter Geyh, *Customary Independence*].

independence, also called “decisional” independence, refers to individual judges’ authority to decide cases free from partiality.⁵¹

Concern for the potential for judges’ confirmation hearing testimony enabling legislative interference in judicial decision-making was raised as early as Justice Rehnquist’s hearing to be Chief Justice.⁵² There, Justice Rehnquist “declined to talk about his own judicial opinions” on the grounds “that any such response would smack ‘of being called to account here before the Senate Judiciary Committee for a judicial act which I performed as a member of the Supreme Court of the United States.’”⁵³ Observing that his opinions were available, explaining his reasoning, Rehnquist asserted that “how I came to that conclusion I think is something that I think ought not to be inquired into here.”⁵⁴ Rehnquist’s concern for inappropriate Senate inquiry into judicial decision making applies with at least as much force to judges testifying about other judges’ decision making as it does to judges testifying about their own.

To be sure, judicial independence concerns do not exist in a vacuum, but, rather, operate in a dynamic relationship with those for judicial accountability. Charles Geyh and others have written of this dynamism between judicial independence and accountability and of shifting understandings of judicial independence over time. Geyh uses the term “customary independence” to connote evolving customs, conventions, or norms that create a realm of autonomy for the judiciary. As Geyh puts it, “[c]ustomary independence refers to the zone of independence that Congress respects as a matter of custom when exercising its constitutional powers over courts and judges.”⁵⁵ Michael Gerhardt has in turn observed how these evolving norms fill gaps in the “broad” constitutional framework governing judicial appointments.⁵⁶ A question for this article then is whether customs or norms of judicial independence and accountability have evolved to such an extent that testimony by sitting federal judges at others’ judicial confirmation hearings is now considered an acceptable or even

51. GEYH, *WHEN COURTS AND CONGRESS COLLIDE*, *supra* note 50, at 9.

52. KATZMANN, *supra* note 12, at 27.

53. *Id.* (quoting *Hearings on the Nomination of Justice William H. Rehnquist to Be Chief Justice of the United States Before the H. Comm. on the Judiciary*, 99th Cong. 220 (1986)).

54. *Id.*

55. Geyh, *Customary Independence*, *supra* note 50, at 160, 162.

56. MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 338 (2000) (“With respect to federal appointments, the relevant constitutional structure merely provides the broad outlines within which significant informal arrangements or norms have developed among presidents, senators, interest groups, the media, nominees, and others.”).

expected part of the Supreme Court appointment process? The answer, as I seek to demonstrate in the discussion that follows, is no.

A. The Judges' Interview Comments on Potential Judicial Independence Effects

When asked about the potential for judges testifying at others' judicial confirmation hearings to undermine judicial independence, several Third Circuit judges with whom I spoke (including those who were supportive of and those who were ambivalent about the testimony) responded that they were not terribly concerned about the testimony's potential impacts on judicial independence because a judge could ably determine what questions he or she would address in their testimony, and in response to Senate questioning, and thereby minimize any potential negative effects.

One judge, who had testified, noted that he could imagine a time when Senate questioning might be less deferential to, or respectful of, judge-witnesses than that seen at the Alito hearing. If that time were to arrive, this judge declared that it would be totally unacceptable to have "toe-to-toe" wrestling between the legislature and the judiciary over a nominee because of the damage to the public's perception of the judiciary's dignity that would likely result. If Senate questioning of judge-witnesses became less respectful, this judge would "pull the plug" on judges testifying at others' judicial confirmation hearings. Until that time, he would consider testifying again, at least in part because he thought the judges' testimony helped educate the American public about the judicial process and what qualifies someone to be a good judge.

Shifting from concern for effects on the judiciary writ large to potential impacts on individual judges' autonomy, I asked the judges about possible consequences that anticipation of testimony by one or more colleagues at a future elevation hearing might have on a judge's conduct. The judges were nearly unanimous in responding that no judge "worth his or her salt" would alter his or her judicial behavior with the prospect of a future elevation hearing in mind. When asked more specifically whether a court of appeals judge might alter his or her behavior on the bench, or with colleagues at post-argument conferences, or in positions taken in opinions (including whether to write dissenting opinions) in anticipation of testimony by colleagues at a subsequent elevation hearing, the judges again said it was unlikely. One judge who had testified responded that, even though most, if not all, active court of appeals judges hope, or think of, themselves as prospective Supreme Court candidates, it is unlikely that anyone would change his or her behavior with Supreme Court nomination in mind. After

all, observed this judge, the court of appeals is a small universe, and it is unlikely for judges to act that way. Another judge who had not testified said that the possibility of Supreme Court appointment is so remote that most court of appeals judges do not aspire to it. Therefore, the possibility of colleagues testifying at a judge's subsequent elevation hearing and its potential impact on judicial behavior is a non-issue. Yet another judge noted that judges might be tempted to modify how they framed and wrote opinions (though not the outcomes reached) with an eye to Supreme Court appointment, but that the potential for colleagues' testimony would not affect this phenomenon. Rather, this judge observed that judges known to be on the short list for Supreme Court appointment might modify how they wrote opinions with selection by appointment officials, and not colleagues' possible testimony, in mind.

B. Institutional Independence Concerns

Testimony by sitting judges at others' Article III confirmation hearings presents concerns for the judiciary's institutional independence as well as for inter-branch comity and separation of powers more generally. When judges testify about the merits of other judicial candidates, senators, both individually and collectively, are placed in an awkward position in terms of how best to evaluate the judges' testimony.⁵⁷ Should or could senators press the judge-witnesses for verification, or elaboration, of the matters testified to, as they would with other witnesses? Or would doing so trample on judicial confidentiality? Should or could senators reject or discount the judges' testimony as insufficiently probative of the nominee's fitness for office in recognition of the incentives for positive testimony (noted in Part III, above), or would that undermine institutional comity?⁵⁸

57. See Tony Mauro, *Judges Turn Witnesses for Alito: Unusual Endorsement Sparks Worries About Politicization of Bench, Possible Recusals*, LEGAL TIMES, Jan. 16, 2006, available at <http://www.law.com/jsp/dc/PubArticleDC.jsp?id=900005444882>.

58. In addressing the judges' Alito hearing testimony in an essay on judges and politics, Alan Morrison raised similar questions in depicting Senators' responses to a hypothetical judge testifying at a colleague's elevation hearing. See Morrison, *supra* note 5, at 297–98. Morrison wrote:

After hearing favorable testimony, none of which is likely to be very specific, a senator would ask a question such as, "Judge, can you give us an example of a case that illustrates the proposition that the nominee is open-minded and changes his views when presented with strong contrary arguments?"

Id. Morrison noted, "[t]he judge surely would, and should, refuse to supply such specifics, if there are any, because to do so would violate the sanctity of the judges' conference." *Id.* at 298. Morrison continued: "If such a scenario took place in a courtroom, with an ordinary witness, the witness could not refuse to answer, or if he did, his prior testimony would be stricken," and

Beyond the awkwardness that such testimony presents for Senators, testimony by judges at others' Article III confirmation hearings has the potential to present separation of powers problems by involving individual judges and the judiciary in assisting Senators and the Senate in evaluating judicial candidates.⁵⁹ Problems may arise if the judge-witnesses comment on individual case decisions or types of decisions by a candidate and thereby assist the Senate in evaluating the candidate's decision-making process, where it is the Senate's, and not the judiciary's, responsibility to evaluate the nominee's qualifications for office. Judicial testimony may also jeopardize the separation of powers by involving judges in weighing in on inherently political questions of how best to evaluate judicial nominees, e.g., what criteria to apply, including whether a nominee's ideology should be considered.⁶⁰ These are questions committed to the executive and legislative branches.⁶¹ Moreover, judicial testimony at others' confirmation hearings runs the risk of exposing to Senate (and public) scrutiny what should properly be confidential judicial branch operations. Many of these concerns would become even more pressing if Senate questioning of judge-witnesses became more challenging and less respectful than that seen to date.

Of course, judges already interact with Congress, including through the presentation of testimony,⁶² and separation of powers principles do not dictate that the branches cannot interact. Indeed, the governing code of

asked, "[w]hat would happen in the Senate? Would the committee, and the remaining senators who were not on the committee, be instructed to disregard the testimony of the judges, or would the judges be compelled to violate their rules of confidentiality?" *Id.* "Either way," Morrison concluded, "the situation would be quite awkward, with the need for information to test the statements made in support of the nominee on one side and the need to guard the confidentiality of communications between judges regarding their cases on the other." *Id.*

59. See Mauro, *supra* note 57, at 13.

60. Dorf, *supra* note 4.

61. See, e.g., *id.* This formulation of the issue begs the question whether judges inappropriately weigh in on political questions if invited to do so by a Senate committee, as in the Alito hearing. See *Alito Hearing*, *supra* note 17, at 654–81. In other words, has any branch trampled on any other branch's domain under these circumstances? The judges were invited, and they welcomed the invitation. Thus, it could be argued that the invitation to testify, and the resulting testimony, reflect cooperation, not interference.

62. See Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1172 n.20 (1996) (citing Maeva Marcus & Emily Field Van Tassel, *Judges and Legislators in the New Federal System, 1789–1800*, in JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 31, 36–42 (Robert A. Katzmann ed., 1988) (discussing interaction between judges, Congress, and the president in the 1790s)); Harvey Rishikof & Barbara A. Perry, "Separateness but Interdependence, Autonomy but Reciprocity": A First Look at Federal Judges' Appearances Before Legislative Committees, 46 MERCER L. REV. 667, 671, 679–80 (1995) (compiling and classifying congressional testimony by sitting judges).

conduct authorizes judicial testimony about matters of judicial expertise, including judicial administration,⁶³ and court-Congress interactions have been encouraged by judges, legislators, and academic commentators as a healthy and productive enterprise, leading to greater mutual understanding and improved efficacy of each branch.⁶⁴ Thus, the question is not whether there will, or should, be court-Congress interaction, but, rather, as Geyh and Katzmann and others frame it, what parameters should govern such interactions.⁶⁵

Aside from the confirmation hearing testimony noted in Part II and Appendix A, judges' congressional testimony to date has focused on the judiciary's budget, number of judgeships and their allocation, revisions to civil and criminal procedural rules, and enactment of, or amendments to, substantive law. While all of these matters of judicial testimony can be contentious, they are different in kind from judges weighing in on the merits of individual judicial appointments. As Terri Peretti and others have observed, the judicial appointment process is overtly political, and indeed, overtly partisan:

Although some may find it abhorrent, the process by which federal judges, especially Supreme Court justices, are recruited and selected is highly political. Judges are not recruited and chosen through a civil service system emphasizing merit, as in some European legal systems, but through a political process controlled by politicians and emphasizing partisanship and ideology.⁶⁶

Because the judicial appointment process is inherently political (with executive and legislative powers intentionally at play)⁶⁷ and overtly partisan, and because the Constitution specifically reserves the judicial appointment power to the executive and legislative branches,⁶⁸ it is especially concerning from an institutional well-being and inter-branch

63. See discussion *infra* Part V.

64. See generally KATZMANN, *supra* note 12 (proposing, as appropriate, greater interaction between courts and Congress, for example, judicial notification to Congress of statutory errors or omissions).

65. Geyh, *supra* note 62, at 1239 (Geyh cautions that "the problem for the future is not that judges will fail to communicate with Congress. The problem is that they may communicate too much or in such a way as to appear self-interested to a Congress and public predisposed to second-guess the motives of government officials in the aftermath of Watergate . . ."); see generally KATZMANN, *supra* note 12.

66. TERRI J. PERETTI, IN DEFENSE OF A POLITICAL COURT 85 (1999).

67. See U.S. CONST. art. II, § 2, cl. 2. (stating that the President shall appoint judges with advice and consent of Senate); see also WITTES, *supra* note 1, at 130 (observing that "the Framers of the Constitution designed a system that involved the two political branches of government").

68. See, e.g., Jackson, *supra* note 3, at 974.

comity perspective that sitting judges are injected, and/or are injecting themselves, into the heat of the confirmation process. While the judicial conduct code authorizes judges to “participate in the process of judicial selection by . . . responding to official inquiries concerning a person being considered for a judgeship,”⁶⁹ judicial testimony at others’ Article III confirmation hearings goes beyond merely responding to inquiries when it takes positions in favor of or against nominees. Judges should not pass judgment on judicial nominees because this is a function reserved for the executive and legislative branches. Rather, judges should desist from testifying to safeguard the well-being of the courts and the three-branch system.

C. Individual Independence Concerns

In addition to the testimony’s implications for institutional independence and inter-branch comity lie possible threats to individual judges’ autonomy. Here, the principal concern is for the extent to which individual judicial behavior may be adversely affected by a judge’s awareness that his or her current (and former) judicial colleagues may volunteer, or be called on, to testify if the judge is nominated for elevation to a higher court. Will the job performance or manner of judges contemplating elevation be affected by a desire to gain colleagues’ favorable reviews, or avoid colleagues’ criticism (whether consciously or not)? Does an apparent need for circumspection already exist for those aspiring to higher judgeships, irrespective of the potential for public testimony by fellow judges, where judges already talk with executive and legislative branch officials and ABA representatives about the merits of individual nominees?⁷⁰ Put more directly, are judges with aspirations for higher office, and/or those known to be on the short list for the Supreme Court, already aware of the need to be circumspect around their colleagues out of concern that things they say or do may be divulged privately, such that the possibility of, indeed, the perceived need for, public testimony by judicial colleagues does nothing to alter this reality? Does the public nature of confirmation hearing testimony render it sufficiently different in kind that it has a more powerful, and more damaging, effect on individual judicial autonomy? This is a question for further empirical research. Among the questions framed by the potential impact of public testimony on individual judicial behavior are: for the prevalence of judicial

69. CODE OF CONDUCT FOR U.S. JUDGES Canon 2B cmt. (Proposed Revised Code Feb. 29, 2008); *see infra* Part V.B.

70. *See* discussion *infra* Part VI.

ambition,⁷¹ for the degree to which judges are affected by awareness of fellow judges' opinions of them,⁷² and for the importance of the forum in which colleagues' opinions might be expressed, whether public or private.

What we do know is that where a judge's confirmation hearing constitutes the point in time when he or she is most vulnerable to Senate scrutiny and least independent,⁷³ testimony by other judges implicates the judiciary, both individually and collectively, in a lessened observation of judicial autonomy, with individual as well as institutional ramifications.

V. THE TESTIMONY'S PERMISSIBILITY UNDER THE GOVERNING JUDICIAL CONDUCT CODE

Concern for the conduct code permissibility of judges' testimony at others' judicial confirmation hearings had been raised by Senate committee members as early as Rehnquist's confirmation hearing to be Associate Justice. At that time, Senator Birch Bayh flagged concern for the ethical propriety of the Senate Judiciary Committee's seeking Judge Craig's opinion of Rehnquist: "[T]his morning I had said to my staff I would really like to talk to Walter Craig, but I didn't think it was ethical for me to approach him because he now sits as a distinguished member of the Federal

71. See LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* 57 (1997); see also LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* 81 (2006). Baum has considered this question of judicial ambition and its impact on judicial decision-making at some length. See *id.* Noting, "[t]he federal courts provide a good setting in which to consider ambition for judicial promotions," Baum writes, "[p]resumably, the great majority of judges would happily accept a promotion: 'Every magistrate judge is a district judge in waiting; every district judge is a circuit judge in waiting; every circuit judge is an associate justice in waiting.'" *Id.* (citations omitted). According to Baum, "one federal judge said about those who want promotions: 'they know their votes are being watched, their decisions are being analyzed.' Thus ambitious judges [in the federal system] have reason to think about the relationship between their choices in cases and their prospects for promotions." *Id.* (citation omitted). Of course, this might be all the more true if judges anticipate colleagues testifying about them at subsequent confirmation hearings.

72. This second question has been insufficiently studied to date, though a burgeoning literature on intra-panel decision making and factors that affect appellate judicial outcomes is developing. See, e.g., VIRGINIA A. HETTINGER ET AL., *JUDGING ON A COLLEGIAL COURT: INFLUENCES ON FEDERAL APPELLATE DECISION MAKING* (Greg Ivers & Kevin T. McGuire eds., 2006).

73. According to Geyh, Congress has "experimented with a variety of means to control court decision making, eventually jettisoning them as antithetical to judicial independence." GEYH, *WHEN COURTS AND CONGRESS COLLIDE*, *supra* note 50, at 11. Geyh observes, "the appointments process—which had always been highly politicized and comparatively unrestrained—emerged as the one remaining viable mechanism that would allow Congress to influence judicial decision making." *Id.* Thus, judicial appointments became "the battlefield of choice for [congressional] control of the courts." *Id.*

judiciary in Arizona.”⁷⁴ Several senators likewise raised concern for the ethical propriety of sitting judges testifying in support of judicial nominees at Judge Bork’s 1987 hearing to be Associate Justice.⁷⁵

As for whether the Code of Conduct for U.S. Judges⁷⁶ permits judges’ testimony at others’ judicial confirmation hearings, the answer is far from clear. While some Code provisions appear to allow, if not encourage, this testimony, others arguably counsel against it.⁷⁷ What is clear is that the

74. See generally *Nominations of William H. Rehnquist and Lewis F. Powell, Jr.: Hearing Before the S. Comm. on the Judiciary*, 92d Cong. 180 (1971).

75. During former Chief Justice Warren Burger’s testimony in support of Bork’s confirmation, Senator Dennis DeConcini solicited Burger’s thoughts on the ethics of judges addressing the merits of individual judicial appointments, asking, “[d]o you feel that it is proper for a judge to make public statements or if not, is there a proper way for them to express their views?” *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 2108 (1987). When Burger replied that each judge must decide for him or herself, DeConcini asked whether there were any guidelines or standards governing judges’ testimony about other judicial nominees. *Id.* Without referencing relevant judicial conduct codes, Burger replied, “I think it is up to each judge, Senator.” *Id.*

Senator Hubert Humphrey also questioned Burger on the ethics of judges testifying at others’ judicial confirmation hearings, observing, “I find it remarkable that a retired Chief Justice would even involve himself in such a controversy. I do not know if there is precedent for that, but it is certainly a remarkable thing.” *Id.* at 2114. Burger interjected, “I do not feel as though I am involved in a controversy, Senator, if I may interrupt you. I feel I am simply expressing views as a citizen. Now if that draws me into a controversy, so be it.” *Id.*

76. The Code of Conduct for U.S. Judges was adopted in 1973 by the Judicial Conference of the United States, the federal judiciary’s standards and policy-setting body. See 69 F.R.D. 273 (1973). The Judicial Conference proposed a revised code on February 29, 2008, for which the comment period has closed. Though the newly revised code has not been finally adopted, I cite to its revised language and numbering in this Part.

The Code of Conduct is considered “the law with respect to the ethical obligations of federal judges,” *United States v. Microsoft Corp.*, 253 F.3d 34, 113 (D.C. Cir. 2001), and governs all Article III judges below the Supreme Court level. See generally JAMES ALFINI ET AL., *JUDICIAL CONDUCT AND ETHICS* (4th ed. 2007). Compliance with the judicial conduct code is evaluated according to a reasonable person standard and consistent with applicable federal law. *Id.* The official Commentary to Canon 1 instructs, “[t]he Canons are rules of reason. They should be applied consistent with constitutional requirements, statutes, other court rules, and decisional law, and in the context of all relevant circumstances.” *CODE OF CONDUCT FOR U.S. JUDGES Canon 1 cmt.* (Proposed Revised Code Feb. 29, 2008); see generally Leslie W. Abramson, *Canon 2 of the Code of Judicial Conduct*, 79 MARQ. L. REV. 949, 953–57 (1996).

77. See, e.g., KATZMANN, *supra* note 12, at 87 (observing that “[a]ny review of [the Conduct Code’s] provisions . . . highlights its limited utility in the context of judicial-legislative relations”). Katzmann continued:

They [the conduct code provisions] do not expressly deal with judicial interaction with Congress, with the full range of circumstances in which judges and legislators interact, directly and indirectly. The canons do not consider how such variables as substance and form, conjoining in a multiplicity of ways, affect the propriety of communication.

Id. at 89.

Code applies only to sitting judges, including active and senior judges, and not to those who have resigned from the bench. Thus, the Code analysis set forth in Parts B and C below applies to some but not all of the judges who have testified at others' Supreme Court confirmation hearings to date.⁷⁸

A. The Judges' Interview Comments on the Testimony's Permissibility Under the Governing Conduct Code

In speaking with the judges about the permissibility of judges' confirmation hearing testimony, I was interested, first, in verifying Senator Specter's statement to the press at the time of the Alito hearing that Judge Becker and his colleagues had consulted, prior to agreeing to appear before the Committee, on the conduct code permissibility of judges testifying at others' confirmation hearings.⁷⁹ The interviews made clear that Judge Becker had engaged in an ethics consultation before the panel testimony was presented and had been assured that the testimony was permissible under the governing code.⁸⁰

78. The conduct code does not apply to any of the former judges who have testified at others' judicial confirmation hearings, including former Judges Gibbons and Lewis at Justice Alito's hearing. CODE OF CONDUCT FOR U.S. JUDGES cmt. Compliance with the Code of Conduct (Proposed Revised Code Feb. 29, 2008).

79. *Media Stakeout*, *supra* note 42, at 2 (reporting that, when asked whether there was "ever any question as to whether [the Third Circuit judges'] testimony met their canon of ethics?," Specter responded, "[n]o, I don't think so Judge Becker first thought about testifying as character witnesses in criminal trials, and analogized it. And even there they can testify if they're -- so long as they're not volunteers, if they're subpoenaed. So -- and then, when there was research further -- and these judges are very careful people and they know their canons, and I know that they went into it in meticulous, scrupulous detail to make a determination as to the propriety of what they're doing.").

80. I do not know whether Judge Becker sought an official advisory opinion on the propriety of the testimony from the Judicial Conference Committee on Codes of Conduct. The Judicial Conference began issuing advisory opinions on questions of judicial ethics in 1970. *See* Andrew Lievens & Avern Cohn, *The Federal Judiciary and the ABA Model Code: The Parting of the Ways*, 28 JUST. SYS. J. 271, 276 (2007). Its Committee on Codes of Conduct continues to do so in response to anonymous queries by sitting judges seeking guidance on the permissibility of particular conduct by judges and/or judicial personnel. Some, but not all, of the Committee's advisory opinions are publicly available "on issues frequently raised or issues of broad application." *See* U.S. Courts: The Federal Judiciary, Published Advisory Opinions, <http://www.uscourts.gov/guide/advisoryopinions.htm> (last visited Jan. 5, 2009). The Committee can also respond to ethics questions informally, without published opinions.

The Committee's published advisory opinions are an important resource for understanding the judicial conduct code, though they are not binding on courts. *See, e.g.*, *Draper v. Reynolds*, 369 F.3d 1270, 1280 (11th Cir. 2004) ("This Court is not bound by the opinions of the Committee on Judicial Codes of Conduct. In the past, however, courts have considered those opinions to some extent.").

When asked more broadly whether testimony by judges at others' judicial confirmation hearings (whether positive, negative, or both) is permissible under the governing conduct code, one judge who had not testified responded that the Code instructs judges to testify on matters of judicial administration and that nothing is more critical to judicial administration than the confirmation of judges. In light of this provision, this judge concluded that judges should be able to testify at one another's confirmation hearings in conformity with the Code. Another judge who had testified stated that it was not "even a close question as to whether a judge can testify regarding judicial nominees because the ABA has asked him every year since he was appointed" about judicial candidates. This judge also stated that the judges' testimony was not character testimony, and that the prohibition on voluntary character testimony applied only in the trial context.⁸¹

Striking more of a cautionary note, one judge who had testified observed that the testimony might have approached the line on the Code's prohibition on judges' involvement in political activity when the judges addressed Alito's viewpoints on certain issues and expressed opinions more generally on whether a candidate's ideology should be taken into account by the Senate.⁸²

On the specific question of whether Alito, once confirmed to the Supreme Court, might need to recuse himself from considering cases participated in by his testifying and/or non-testifying colleagues, several of the judges (testifiers as well as non-testifiers) declared the issue "bunk" and "ridiculous." One judge, who had not testified and who largely opposed judges testifying at others' hearings, stated that Senator Leahy's articulated concern for Alito's recusal need was not the real problem with the testimony. Rather, the real problem, for this judge, was the overtly political nature of the judges' panel.

No advisory opinion on the permissibility of this type of testimony has been published on the Judicial Conference's website, *see* U.S. Courts: The Federal Judiciary, Published Advisory Opinions, <http://www.uscourts.gov/guide/advisoryopinions.htm> (last visited Jan. 5, 2009), but not all of the Committee's advisory opinions are made public.

81. *See infra* Part V.C for a detailed discussion.

82. *See Dorf, supra* note 4 (noting that Dorf labeled the latter issue an explicitly political one).

B. Conduct Code Provisions Arguably Authorizing or Encouraging Judges' Testimony at Others' Article III Confirmation Hearings

Turning specifically to the terms of the relevant conduct code provisions, Canon 4's authorization of judges' legislative and executive branch activity, including testimony, on matters of judicial expertise, including judicial administration, provides the strongest argument in support of judges testifying at others' judicial confirmation hearings and was cited by Senator Specter, Senator Cornyn, and Judge Becker at Alito's confirmation hearing as so doing.⁸³ Specifically, Canon 4(A)(2) provides,

A judge may appear at a public hearing before, or otherwise consult with, an executive or legislative body or official: (a) on matters concerning the law, the legal system, or the administration of justice; (b) to the extent that it would generally be perceived that a judge's judicial experience provides special expertise in the area⁸⁴

Canon 4's official Commentary sheds light on the considerations animating this provision when it observes that a judge, as a "person specially learned in the law . . . is in a unique position to contribute to the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice."⁸⁵ To the extent time allows and impartiality is not compromised, "the judge is encouraged to [contribute to the law], either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law."⁸⁶

Though Canon 4(A)(2)'s reference to judges speaking at public hearings on matters of judicial expertise has come to be understood largely in terms of testimony on matters of judicial resources, including budget and number of judgeships, and on matters of civil and criminal procedure and even of substantive law,⁸⁷ it is certainly arguable that Canon 4(A)(2) extends to testimony regarding judicial nominees. Providing guidance on Canon 4's authorization to testify is the Judicial Conference Codes of Conduct Committee's Advisory Opinion No. 50 ("Opinion 50"). Entitled, "A

83. *Alito Hearing*, *supra* note 17, at 678–80.

84. CODE OF CONDUCT FOR U.S. JUDGES Canon 4(A)(2) (Proposed Revised Code Feb. 29, 2008).

85. *Id.*

86. *Id.*

87. *See, e.g.*, Rishikof & Perry, *supra* note 62, at 683 (inventorying these appearances). As Perry and Rishikof document, federal judges have testified regularly before Congress on matters of judicial budget, allocation of judgeships, amendment of procedural rules, and merits of proposed legislation. *Id.* at 680–82.

Judge's Appearance Before a Legislative or Executive Body or Official,"⁸⁸ Opinion 50 notes, "[t]he Committee is of the view that under Canon 4 it is clear that a judge properly may appear before a legislative or executive body or official, at a public hearing or in private consultation, with respect to matters concerning the *administration* of justice."⁸⁹ The opinion lists matters subject to Canon 4 testimony as those "relating to court personnel, budget, equipment, housing, and procedures," and notes, "[t]hese are all vital for the judiciary's housekeeping functions and for the smooth operation of the dispensation of justice generally."⁹⁰ The opinion continues: "This much is clear."⁹¹ Whether the opinion provides support for judges testifying at others' judicial confirmation hearings is not so clear. More specifically, whether the reference to testimony on court personnel encompasses testimony on the merits of judicial nominees is uncertain, where the reference has been understood to date as relating to the need for, and optimal allocation of, judgeships and not the particularities of individual appointments.

Opinion 50 articulates two conditions that must be satisfied before a judge can appear before a legislative or executive body. These are: "when (1) the hearing is public and (2) the subject matter reasonably may be considered to merit the attention and comment of a judge as a judge, and not merely as an individual."⁹² Given the judges' testimony's compliance with condition (1), the question under Opinion 50 is whether the merits of a proposed Supreme Court appointment may reasonably be understood as calling for "the attention and comment of a judge as a judge, and not merely as an individual,"⁹³ in satisfaction of condition (2).

At the same time, the Committee's Advisory Opinion No. 93 ("Opinion 93") cautions against judicial involvement in activity that uses the law to promote social, political, or civic objectives.⁹⁴ Observing that "[n]ot every activity that involves the law or the legal system is considered a Canon 4 activity," Opinion 93 clarifies:

88. A Judge's Appearance Before a Legislative or Executive Body or Official, Comm. on Codes of Conduct, Advisory Op. 50 (adopted Aug. 15, 1977; revised Jan. 16, 1998), *available at* <http://www.uscourts.gov/guide/vol2/50.html>.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. Extrajudicial Activities Under Canons 4 and 5, Comm. on Codes of Conduct, Advisory Op. 93 (adopted Apr. 25, 1997; revised Oct. 27, 1998), *available at* <http://www.uscourts.gov/guide/vol2/93.html> [hereinafter Extrajudicial Activities Op.].

[T]o qualify as a Canon 4 activity, the activity must be directed toward the objective of improving the law, *qua* law, or improving the legal system or administration of justice, and not merely utilizing the law or the legal system as a means to achieve an underlying social, political, or civic objective.⁹⁵

Taking Opinions 50 and 93 together, the question under condition (2) of Opinion 50 becomes whether a judge's testimony on the merits of a particular Supreme Court candidate is testimony by a judge *qua* judge (and not *qua* individual) on the law *qua* law (and not *qua* politics). Echoing this formulation, Opinion 93 notes that judicial testimony on matters of law, the legal system, and the administration of justice have traditionally been understood narrowly, with two dominant formulations: "[f]irst, we have described the phrase 'improve the law' as 'being limited to the kinds of matters a judge, by virtue of [the judge's] judicial experience, is uniquely qualified to address.'"⁹⁶ Second, after ensuring that the testimony is provided in the judge's capacity as a judge and not as an individual, "we look to see if the beneficiary of the activity is the law or legal system itself."⁹⁷

Applying the first formulation to the Third Circuit judges' Alito hearing testimony, Judge Becker and his colleagues specifically framed their testimony as judges, indeed as the nominee's immediate judicial colleagues, in establishing their basis of expertise on then-Judge Alito's fitness for higher office. Reasonable minds may differ, however, on whether judges' testimony in this context is on the law *qua* law or *qua* politics. There are certainly ways in which testimony about the merits of a judicial nominee is testimony about the law, e.g., about the nominee's understanding of the role of law and courts in regulating human relations. But, there are also ways in which testimony on the merits of a judicial nominee is testimony about law *qua* politics. Insofar as the testimony relates to the interaction between law and public policy or is predictive of likely impacts on public policy outcomes of a particular appointment, it may be understood as relating to politics.

Applying the second formulation, it is arguable whether the "beneficiary" of testimony on the merits of a particular nominee is the law or legal system itself.⁹⁸ Opinion 93's examples of appropriate Canon 4

95. *Id.*

96. *Id.*

97. *Id.*

98. JEFFREY M. SHAMAN, ET AL., JUDICIAL CONDUCT AND ETHICS 293 (LexisNexis Matthew Bender Publishing 2007) (1990). Jeffrey Shaman helps shed light on the purpose behind the ABA's then-parallel Canon 4 authorization of judicial testimony on matters of

activity are markedly different in kind from judges testifying at others' judicial confirmation hearings. They include participation in "an educational videotape to improve the quality of court reporters," participation in "a not-for-profit organization to promote the concept of the resolution of disputes through arbitration," participation in "an organization that researches and provides information on the juvenile justice system," and so on.⁹⁹ Under this formulation of the Canon 4 test, it is unclear whether judges testifying at others' judicial confirmation hearings complies with the Code.

Lastly with regard to Code provisions arguably supporting presentation of this type of testimony, Canon 2(B)'s official Commentary specifically allows judges to "respond[] to official inquiries concerning a person being considered for a judgeship" despite its prohibition on use of prestige of judicial office to further the judge's or others' private interests.¹⁰⁰ The question becomes whether responding to official inquiries "concerning a person being considered for a judgeship" includes testifying at another's judicial confirmation hearing?

In a related fashion, Advisory Opinion No. 59 ("Opinion 59"), subtitled "Propriety of a Judge Giving Evaluation of Judicial Candidate to Screening or Appointing Authority," notes that Canon 2(B) bars a judge from initiating advocacy on behalf of a friend or acquaintance for judicial appointment,¹⁰¹ but that, following from the 2(B) Commentary, "there would be no impropriety in a judge's answering a proper inquiry from an appointing officer with respect to the judge's knowledge concerning the character and fitness of a candidate for appointment to any public office, including that of judge."¹⁰² Opinion 59 cautions against "pleading for a candidate of the judge's choosing in opposition to others under consideration" and states that a "judge should not lend his or her name to any publicity campaign for any candidate."¹⁰³ While judges who testify at

judicial expertise, noting, "[t]he exception for bodies concerned with improvement of the law is necessary in order to allow jurists, who, after all, possess the most experience in administering the judicial system, to participate in state and national efforts aimed at upgrading the system of justice." *Id.*

99. Extrajudicial Activities Op., *supra* note 94.

100. CODE OF CONDUCT FOR U.S. JUDGES Canon 2 cmt. Canon 2(B) (Proposed Revised Code Feb. 29, 2008).

101. Propriety of a Judge Giving Evaluation of Judicial Candidate to Screening or Appointing Authority, Comm. on Codes of Conduct, Advisory Op. 59 (adopted April 16, 1979; revised July 10, 1998), *available at* <http://www.uscourts.gov/guide/vol2/59.html>.

102. *Id.* Similarly, Advisory Opinion No. 59 notes that judges may "respond affirmatively to requests from or on behalf of the appointing authorities to evaluate candidates insofar as the judge's knowledge of the candidates permits." *Id.*

103. *Id.*

another's judicial confirmation hearing do not plead the individual nominee's candidacy in opposition to other candidates, their testimony is reasonably understood as lending their names, positions, and reputations to support (or oppose, as relevant) a particular candidate, as actually happened at Justice Alito's and others' hearings. Additionally, because Supreme Court confirmation hearings are broadcast live and covered widely in the media, it is readily anticipatable that judges' testimony would generate public attention, even if not self-consciously framed as a publicity campaign.

C. Conduct Code Provisions Arguably Counseling Against Judges' Testimony at Others' Article III Confirmation Hearings

Canon 1 of the Code of Conduct for U.S. Judges,¹⁰⁴ exhorting judges to uphold the independence and integrity of the judiciary, and its official Commentary¹⁰⁵ make clear the Code's grounding in concern for preserving judicial independence and safeguarding the public's trust and confidence in the courts. Testimony by judges at others' judicial confirmation hearings risks exposing the judiciary to pressures from other entities involved in the appointments process, thereby raising concern for the perceived and actual integrity of the judiciary. Judicial testimony also creates at least the appearance of judges attempting to influence the confirmation process by using the prestige of judicial office.

Canon 2 exhorts judges, *inter alia*, to safeguard the actuality and appearance of propriety.¹⁰⁶ The Canon's official Commentary helps shed light on this directive by underscoring, as in Canon 1, the importance of

104. CODE OF CONDUCT FOR U.S. JUDGES Canon 1 (Proposed Revised Code Feb. 29, 2008) (providing, “[a]n independent and honorable judiciary is indispensable to justice in our society. A judge should . . . personally observe those [high] standards [of conduct], so that the integrity and independence of the judiciary may be preserved.”).

105. *Id.* Canon 1 cmt. (observing “[d]eference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. . . . Although judges should be independent, they should comply with the law, as well as the provisions of this Code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.”).

106. *Id.* Canon 2. Canon 2 instructs:

(A) A judge should . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. (B) . . . A judge should not lend the prestige of the judicial office to advance the private interests of the judge or others A judge should not testify voluntarily as a character witness.

Id.

“[p]ublic confidence in the judiciary.”¹⁰⁷ The Commentary also makes clear that “judge[s] must expect to be the subject of constant public scrutiny.”¹⁰⁸ As a result, “judge[s] must . . . accept restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.”¹⁰⁹

Canon 2’s next exhortation to judges, to safeguard the actuality and appearance of impartiality,¹¹⁰ arguably applies with even greater force than concern for propriety, where impartiality is central to the public’s expectations for its judges.¹¹¹ Judges testifying in favor of or against judicial colleagues arguably engage in actual partial behavior and certainly risk the appearance of judicial partiality, *i.e.*, that judges favor (or disfavor in the case of opposing testimony) particular individuals and even particular policy outcomes associated with those individuals.

Next, in understanding how Canon 2(B)’s prohibition on use of prestige of judicial office to further another’s private interests applies to the question of judges testifying at others’ judicial confirmation hearings, it is important to consider whether judicial testimony under these circumstances promotes a nominee’s private interests (e.g., in career advancement or prestige of position), or whether such testimony should instead be understood as relating to matters of overriding public, and not private, interest concerned with law interpretation and the judicial process. The answer may well be that judicial testimony under such circumstances involves both. A recent example of seemingly improper, although not ultimately censured, use of the prestige of judicial office to advance the private interests of another involved Texas Supreme Court Justice Nathan Hecht’s provision of more than 120 press interviews in support of Harriet Miers’ failed Supreme Court nomination.¹¹² The Texas Commission on Judicial Conduct recommended Hecht’s censure for violating Texas’ Code of Judicial Conduct Canon 2(B), paralleling the U.S. judicial conduct code in prohibiting the use of “the prestige of judicial office to advance the private interests of the judge or

107. *See generally supra* note 106; CODE OF CONDUCT FOR U.S. JUDGES Canon 2 cmt. Canon 2(A) (Proposed Revised Code Feb. 29, 2008).

108. CODE OF CONDUCT FOR U.S. JUDGES Canon 2 cmt. Canon 2(A) (Proposed Revised Code Feb. 29, 2008).

109. *Id.*

110. *See id.* Canon 2 cmt. Canon 2(A), Canon 2.

111. *See, e.g.*, DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 153 (Cambridge University Press 2007) (observing that “[t]he job of the judge is to render an impartial decision. Impartiality is the key. It explains the privileged position of judges as expositors of the law.”).

112. *See In re Hecht*, 213 S.W.3d 547, 554–55 (Tex. Spec. Ct. Rev. 2006).

others”¹¹³ The Texas Supreme Court vacated Justice Hecht’s censure on the ground that Texas’ Canon 2(B) was too vague to serve as the basis for judicial discipline.¹¹⁴ As a result, there was no final determination on whether Justice Hecht’s conduct used the prestige of judicial office to advance a principally *private* or *public* interest, if any.¹¹⁵

In addition to its exhortations to propriety and impartiality, and its prohibition on use of prestige of judicial office to further others’ private interests, Canon 2(B) prohibits judges from voluntarily testifying as character witnesses.¹¹⁶ Whether the Third Circuit judges testified voluntarily at Justice Alito’s hearing in contravention of Canon 2’s prohibition is a complex question.¹¹⁷ As a matter of official record, the Third Circuit judges testified in response to formal invitations to do so from the then-Chair of the Senate Judiciary Committee.¹¹⁸ However, all who testify before the Senate Judiciary Committee receive such letters, and so the letters may not be decisive of the question of actual voluntariness. Nevertheless, it is clear that those Third Circuit judges who testified conditioned their willingness to testify on receipt of formal invitations from the Committee, and Senator Specter emphasized this point in introducing the panelists at the hearing.¹¹⁹

On this question of voluntariness, the official Commentary to Canon 2(B) instructs judges to discourage being called to testify as character witnesses.¹²⁰ There is no evidence of such an effort here. To the contrary,

113. *Id.* at 553; TEX. CODE OF JUD. CONDUCT Canon 2(B) (2007), available at <http://www.courts.state.tx.us/Judethics/canons.asp#Canon2>.

114. *In re Hecht*, 213 S.W.3d at 575–76.

115. A potentially important factor in the Canon 2 analysis, relating to both its exhortation to impartiality and prohibition on use of prestige of judicial office to further the judge’s or others’ private interests, is the Supreme Court’s ruling in *Republican Party of Minnesota v. White*. 536 U.S. 765, 795–96 (2002) (Kennedy, J., concurring) (recognizing broad First Amendment rights for judges in the context of judicial election campaigns). In *White*, the Supreme Court framed the question for decision as “[w]hether the First Amendment permits the Minnesota Supreme Court to prohibit candidates for judicial election in that State from announcing their views on disputed legal and political issues,” and held that Minnesota’s “no announce” rule violated the First Amendment as a prior restraint on speech. *Id.* at 768, 788. Given the Court’s opinion in *White*, a prohibition on judges testifying at others’ Senate confirmation hearings may well be struck down absent a finding that the prohibition is narrowly tailored to serve a compelling governmental interest.

116. TEX. CODE OF JUD. CONDUCT Canon 2(B) (2007), available at <http://www.courts.state.tx.us/Judethics/canons.asp#Canon2>.

117. According to Rotunda, this prohibition on voluntary character testimony was not relevant to the judges’ Alito hearing testimony because the provision has not been applied outside of the criminal trial context. See Rotunda, *supra* note 5, at 1370 n.148.

118. See *Alito Hearing*, *supra* note 17, at 653.

119. *Id.*

120. CODE OF CONDUCT FOR U.S. JUDGES Canon 2 cmt. Canon 2(B) (Proposed Revised Code Feb. 29, 2008) (providing that “[e]xcept in unusual circumstances where the demands of

we know that Judge Becker played a central role in organizing the panel testimony.¹²¹

Turning to the question of whether the judges provided character or fact testimony at the Alito hearing, where the prohibition is on voluntary character testimony, the answer is that they provided both. The judges' testimony included many statements about Alito's temperament, integrity, and humility that contained both factual and character elements.¹²² Other statements were simply factual in nature, as when the judges observed that Alito had never raised his voice in post-argument conferences and that Alito had refused to have a reception held in honor of his tenth anniversary on the bench.¹²³ Still other statements constituted clear character, or opinion, testimony as when Judge Becker asserted that Alito was not a "movement person" and was not an "ideologue."¹²⁴

In determining whether the judges' testimony was primarily factual or character in nature, it might be useful to consider what relevant facts a judge might address at another judge's elevation hearing. In *Courts and Congress*, Katzmann suggests that there might be a role for a chief district judge to provide his or her views when formally solicited by a congressional committee about whether a district judge nominated for elevation to the court of appeals was up-to-date with his or her docket.¹²⁵ Substituting "circuit" for "district" in Katzmann's hypothetical, none of the current or former Third Circuit judges who testified at the Alito hearing and who had served as chief judges while Alito was on the bench (Judges Scirica, Becker, and Aldisert) addressed in their Senate testimony whether Alito had been up-to-date with assigned opinions and other case dispositions.¹²⁶ Moreover, there is no need for judicial colleagues to testify to this type of factual information because the Administrative Office of the U.S. Courts ("AO") maintains official data on case dispositions.¹²⁷ Rather than call a chief judge to provide his or her understanding of an elevation candidate's

justice require, a judge should discourage a party from requiring the judge to testify as a character witness"). The ABA's annotated guide to its then-parallel model judicial conduct code noted one of the motivations for the prohibition on voluntary character testimony as being a call from judges for protection from such requests. *See, e.g.,* E. WAYNE THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 49 (1973).

121. *See Alito Hearing, supra* note 17, at 653.

122. *Id.* at 654–56 (Third Circuit Judge Becker describing Alito's judicial temperament, integrity, intellect, and approach to law).

123. *Id.* at 654–55.

124. *Id.* at 655.

125. KATZMANN, *supra* note 12, at 95–96.

126. *See Alito Hearing, supra* note 17, at 654–61.

127. *See* Admin. Office of the U.S. Courts, <http://www.uscourts.gov/ao/services.htm> (last visited Nov. 2, 2008).

case management record, the Senate Judiciary Committee could instead examine AO data. Indeed, submission of a set of AO data for the period of a nominee's judicial service could become standard practice for Senate consideration of sitting judges nominated for elevation, obviating any need for judges to testify about these types of factual matters at others' confirmation hearings.¹²⁸

A last consideration on this question of judges volunteering character testimony concerns the Judicial Conference Committee on Codes of Conduct's Advisory Opinion No. 9, which provides that, if judges present character testimony, then the number of judges testifying should be limited.¹²⁹ Insofar as the Alito hearing testimony represented an unprecedented expansion in the number of judges testifying, the panel appeared to have tried to demonstrate strength in numbers in support of Alito's confirmation, rather than limiting their presence.

With final regard to conduct code provisions arguably counseling against testimony by judges at others' confirmation hearings, Canon 7 instructs judges to refrain from political activity, providing, *inter alia*, "[a] judge should not . . . publicly endorse or oppose a candidate for public office" and "[a] judge should not engage in any other political activity."¹³⁰ Canon 5 contains an important caveat for purposes of this article: that its prohibition on judicial involvement in political activity "should not prevent a judge from engaging in the activities described in Canon 4,"¹³¹ which authorizes

128. Returning to the fact versus character question, Katzmann distinguished the situation of a chief district judge called upon by a congressional committee or Senator to evaluate a sitting district court judge nominated for elevation from a non-chief judge called upon to provide his or her views on "the fitness of a particular judicial nominee" (analogous to the testimony at the Alito hearing). See KATZMANN, *supra* note 12, at 95. Here, Katzmann observed, "the situation is different in that a chief judge would have relevant views about such factual, objective matters as to whether the prospective nominee disposes of his or her cases in a timely manner." *Id.* at 96. Katzmann distinguished the chief district court judge situation yet further by hypothesizing a "circumstance . . . in which a sitting judge initiates contact with a senator or congressional committee to offer views about a prospective candidate." *Id.* There, Katzmann observed, "the considerations arguing against such input are magnified, particularly the risk that the judge will be perceived as attempting to influence the legislature." *Id.* Katzmann cautioned, "The possibility of legislative backlash underscores the danger of such a step. Prudence would suggest that if a judge is to provide views about a nominee, then it should be done, if at all, at the request of legislators." *Id.*

129. Judge Testifying as a Character Witness, Comm. on Codes of Conduct, Advisory Op. 9 (adopted Jan. 21, 1970; revised Jan. 16, 1998), available at <http://www.uscourts.gov/guide/vol2/09.html> (observing, "to the extent that the trial court has discretion to limit character evidence generally the trial judge should consider limiting the number of judges appearing in such a role").

130. CODE OF CONDUCT FOR U.S. JUDGES Canon 7(A) (Proposed Revised Code Feb. 29, 2008).

131. *Id.* Canon 5(C).

judges to testify before legislative and executive branch bodies on matters of judicial expertise, including judicial administration.¹³²

Because Supreme Court confirmation hearings are highly politicized, testimony by judges at these hearings risks injecting the judges into political activity and casting the judiciary in an overtly political role. This in turn risks undermining public trust and confidence in the courts and respect for the independence, integrity, and impartiality of the judicial process.¹³³

D. Conclusions as to the Testimony's Permissibility Under the Judicial Conduct Code

As the preceding discussion demonstrates, the Code of Conduct for U.S. Judges does not directly address the permissibility of sitting judges testifying at others' judicial confirmation hearings. While Canon 4's authorization of judicial testimony on matters of judicial expertise and Canon 2(B)'s Commentary's authorization of judges' responses to official inquiries concerning individual judicial candidates arguably support such testimony, consideration of the larger principles animating the judicial conduct code—impartiality,¹³⁴ independence, and non-involvement in political activity—appear to counsel against it.

E. Must Judicial Elevation Candidates, Such as Alito, Recuse Themselves, if Confirmed, from Reviewing Cases Participated in by Their Testifying and/or Non-testifying Colleagues?

A Supreme Court candidate's need to recuse him or herself from considering cases in which his or her testifying (and/or non-testifying) colleagues participated below is not *the*, or even *a*, central question in evaluating the wisdom and propriety of judges testifying at others' judicial

132. *Id.* Canon 5(B).

133. As Morrison observed in his essay on judges and politics:

[I]t is hard to imagine a more political activity than the confirmation of a Supreme Court justice. There is no pretense that competence, integrity, and judicial temperament are all that matter, nor is there any doubt that presidents do take political considerations into account and that the Senate does also. This fact alone should be enough to preclude federal judges from testifying at confirmation hearings

Morrison, *supra* note 5, at 297.

134. W. Bradley Wendel, Abstract, *Jurisprudence and Judicial Ethics* (Cornell Legal Studies Research Paper No. 08-009, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1024316 (observing that “[t]he fundamental value in judicial ethics is impartiality”).

confirmation hearings. Indeed, it is a bit of a red herring, given the more pressing questions for judicial independence and judicial ethics effects raised by the testimony. Nevertheless, the question of recusal need is addressed briefly here because it was raised by Senators, academics, and other commentators at the time of the Alito hearing.¹³⁵ More specific questions include whether recusal is triggered only by testimony offered in favor of confirmation? Against confirmation?¹³⁶ Only by the case participation of testifying judges? Non-testifying judges?

As it happened, Justice Alito recused himself from considering what appears to be all Third Circuit cases coming before the Supreme Court for review (at both the petition for certiorari and merits stages) for more than one year following his confirmation to the Court, though he did not state his reason(s) for recusal.¹³⁷ It may well be that Justice Alito recused himself from consideration of his former court's matters as a result of the Third Circuit's practice of circulating and pre-filing all published opinions to all active judges for review.¹³⁸ Because every active Third Circuit judge

135. See *Alito Hearing*, *supra* note 17, at 644–52; see also FED. JUDICIAL CTR., RECUSAL: ANALYSIS OF CASE LAW UNDER 28 U.S.C. §§ 455 & 144, at 1 (2002), [http://www.fjc.gov/public/pdf.nsf/lookup/Recusal.pdf/\\$file/Recusal.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Recusal.pdf/$file/Recusal.pdf). For excellent treatments of judicial recusal standards, see generally Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531 (2005) and Arthur D. Hellman, *The Regulation of Judicial Ethics in the Federal System: A Peek Behind Closed Doors*, 69 U. PITT. L. REV. 189 (2007).

136. Chief Justice Rehnquist recused himself for several years from considering cases involving James Brosnahan of Morrison & Foerster, who had testified against Rehnquist at his elevation hearing. See Mauro, *supra* note 57, at 13.

137. I found 162 instances in which Justice Alito had taken “no part in the consideration or decision” of a case from the Third Circuit, including petitions for certiorari, petitions for rehearing from denial of certiorari, and decisions on the merits (LEXIS search last performed on Mar. 7, 2008). The Third Circuit cases from which Justice Alito has recused himself in the Supreme Court included some in which he had served on the appellate panel, such as *Beard v. Banks*, in which then-Judge Alito had authored a dissent. 548 U.S. 521, 524 (2006). Most of the Third Circuit cases from which Justice Alito recused himself did not involve his participation at the appellate level. See, e.g., *Wadley v. United States*, 127 S. Ct. 1894 (2007) (denying petition for certiorari with respect to unpublished opinion authored by Judge Smith and joined by Judges Barry and Rodriguez).

While some of the Third Circuit cases from which Justice Alito has recused himself involved one or more of his testifying colleagues, see, e.g., *id.* (considering unpublished opinion authored by Judge Smith and joined by Judges Barry and Rodriguez), the majority of the Third Circuit cases from which Justice Alito has recused himself did not involve his testifying colleagues. See, e.g., *Vazquez v. Ragonese*, 127 S. Ct. 1213 (2007) (denying petition for certiorari with respect to unpublished opinion by Judge Rendell and joined by Judges Fisher and Van Antwerpen).

138. See 3D CIR. INTERNAL OPERATING P. § 5.5.4 (2002), available at <http://www.ca3.uscourts.gov/Rules/IOP-Final.pdf>.

reviews every published opinion pre-filing,¹³⁹ every active judge may be considered to have participated in the decision. That then would serve as a basis for recusal, as detailed in the discussion below.¹⁴⁰

The two most recently confirmed justices prior to Alito, Chief Justice Roberts and Justice Breyer, had also recused themselves from consideration of cases, at both the certiorari and merits stages, arising from their former courts of appeals (the District of Columbia and First circuits, respectively).¹⁴¹ This is so even though none of their colleagues had testified at their confirmation hearings.¹⁴² What is not known is whether their recusals were prompted by parallel opinion-circulation practices in their circuits, or whether their recusals suggest a Supreme Court custom, though not rule, against involvement in a case that was on one's lower court's docket while serving as a lower court judge.

Looking to the federal law governing judicial recusal,¹⁴³ a judge's need to recuse him or herself from consideration of a case arises either from (a) concern for the appearance or actuality of partiality,¹⁴⁴ or from (b) specific grounds including personal knowledge of the facts of a case, or familial or financial involvement in the case.¹⁴⁵ More specifically, 28 U.S.C. § 455(a) provides that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."¹⁴⁶ Section 455 was amended years ago to substitute an objective test for the previously subjective test, where the question for decision now is whether a judge's participation would be apparently improper because apparently partial.¹⁴⁷ A

139. *See id.*

140. I found a number of instances in which Chief Justice Roberts had taken "no part in the consideration or decision" of a case from the D.C. Circuit, including decisions on petitions for certiorari, on petitions for rehearing from denial of certiorari, and on the merits (LEXIS search last performed on Mar. 7, 2008). Looking to the last Justice confirmed before Chief Justice Roberts, Justice Breyer recused himself from consideration of First Circuit cases at both the certiorari and merits stages. *See, e.g., United States ex rel. LeBlanc v. Raytheon Co.*, 516 U.S. 1140 (1996).

141. *See, e.g., id.* (Breyer recusing himself from ruling on petition of certiorari from First Circuit).

142. *See infra* app. A.

143. 28 U.S.C. § 455 (2001). Section 455 applies to Supreme Court Justices and lower court judges. *Id.* § 455(a). *See generally* Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1887–90 (1988) (discussing interpretation and application of judicial recusal standards).

144. 28 U.S.C. § 455(a).

145. *Id.* § 455(b).

146. *Id.* § 455(a).

147. *See, e.g.,* Monroe H. Freedman, *The Threat to Judicial Independence by Criticism of Judges—A Proposed Solution to the Real Problem*, 25 HOFSTRA L. REV. 729, 740–41 (1997).

Supreme Court Justice's need to recuse is left for decision to the individual Justice and is not reviewed by his or her colleagues.¹⁴⁸

Justice Alito's decision to recuse himself from considering all Third Circuit matters coming before the Court was not unreasonable, where his impartiality "might reasonably be questioned"¹⁴⁹ with regard to published decisions he had reviewed pre-filing as a result of the Third Circuit's opinion-circulation practice, or with regard to cases in which his lower court colleagues had participated, whether testifiers or non-testifiers. On this latter point, Steven Lubet incorrectly distinguished at the time of the Alito hearing between "[a] justice's anger at someone who testifies against him" and "a judge's gratitude toward someone who testifies for him,"¹⁵⁰ where either circumstance could give rise to reasonable questions of partiality.

I conclude then where I began: that recusal is not the main issue, nor even one of the more important issues, arising when federal judges testify at others' judicial confirmation hearings. I turn instead to recommendations for the future. Specifically, are there other more desirable mechanisms for judges to share with appointing officials their impressions of colleagues who are candidates for elevation?

148. See Hellman, *supra* note 135, at 203 n.87 (quoting Justice Rehnquist in *Hanrahan v. Hampton*, 446 U.S. 1301 (1980), noting, "generally the Court as an institution leaves [disqualification] motions, even though they be addressed to it, to the decision of the individual Justices to whom they refer").

A particular concern with recusal at the Supreme Court level, highlighted by Justice Alito's written response to Senator Feingold's recusal inquiry at the hearing, is that it results in an eight-person court, with the possibility of a four-four tie, leading to affirmance of the lower court judgment. *Alito Hearing*, *supra* note 17, at 791. Alito's written response observed, *inter alia*:

Supreme Court Justices have less latitude to err on the side of recusal, because recusal can lead to decisions that are evenly divided or that involve less than an absolute majority of the Court. Lack of a definitive resolution to a case when the litigants have no higher court that could resolve their cases undermines the judicial process.

Id. Justice Alito concluded by noting:

Based on what I know at this time, I do not think that the testimony of the court of appeals judges should require me to recuse myself in cases on which they sat, but if confirmed, I would undertake a thorough review of the past practices of Justices in any analogous situations, and if a recusal motion is filed in a case on which one or more of the testifying judges sat, I would carefully consider the arguments presented.

Id.

149. 28 U.S.C. § 455(a).

150. Mauro, *supra* note 57, at 13 (quoting Lubet as observing that "[a] justice's anger at someone who testifies against him is more palpable than a judge's gratitude toward someone who testifies for him. They are not symmetrical.").

VI. ARE THERE OTHER MORE DESIRABLE MECHANISMS FOR JUDGES TO PARTICIPATE IN THE ARTICLE III APPOINTMENTS PROCESS?

I return to one of the central findings of my interviews—that most of the judges with whom I spoke thought judges could provide appointment officials with unique insights into judicial colleagues' temperaments and character.¹⁵¹ With this in mind, I wanted to explore whether there are other ways besides live testimony for judges to share their impressions of, and experiences with, judicial colleagues who are being considered for elevation, and to reflect on whether these other mechanisms avoid the judicial independence and ethics concerns presented by live testimony. I look first to the two current (and historic) mechanisms of judicial involvement noted in the Introduction—behind-the-scenes consultations with Senators and participation in confidential ABA interviews.¹⁵² I then turn to other suggested mechanisms of judicial involvement¹⁵³ and to comparative perspectives on judges' roles in judicial appointments processes for state, federal, national, and international courts.¹⁵⁴

A. *Judges' Historic Involvement in Article III Appointments Processes Through Means Other than Presenting Live Testimony*

Henry Abraham and other scholars have documented the active role played by some judges, including Supreme Court Justices, in suggesting names of prospective judicial candidates to appointment officials, including the President, and lobbying for particular candidates since at least the early part of the twentieth century.¹⁵⁵ Chief Justice Warren Burger, for example, was notoriously active in lobbying the President and other appointing officials for Supreme Court and circuit court candidates, as were Chief Justice William Howard Taft and Justice Abe Fortas.¹⁵⁶

151. *See infra* app. B.

152. *See supra* Part I; *infra* Part VI.A.

153. *See infra* Part VI.B.

154. *See infra* Part VI.C.

155. HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II 25 (Rowman & Littlefield Publishers, 5th ed. 2008) (1974).

156. HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS 21–22 (Rowman & Littlefield Publishers, 4th ed. 1999) (1974); *see* DAVID J. DANIELSKI, A SUPREME COURT JUSTICE IS APPOINTED 54–55 (Random House 1964) (1963) (recounting Justice Taft's lobbying for Justice Pierce Butler's appointment); GERHARDT, *supra* note 56, at 194–95 (highlighting Justice Frankfurter's lobbying of President Roosevelt for Judge Learned Hand's Supreme Court appointment); DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 87–88 (W. W. Norton & Company 2005) (1986); *see also* DAVID A. YALOF, PURSUIT

This behind-the-scenes consultation between judges and executive and legislative branch appointments officials continues into the present, initiated in some instances by judges and in others by other branch officials.¹⁵⁷ These consultations raise many of the same concerns as live testimony for judicial independence effects (both institutional and individual), integrity, impartiality, use of prestige of judicial office to promote others' private interests, and judicial involvement in political activity. Beyond that, behind-the-scenes consultations lack transparency and are "virtually impossible to monitor and control."¹⁵⁸ As Gerhardt has observed, "informal consultation could represent the opposite of the democratization of the process by reflecting the degree to which decision makers are captive to or consult only with a relatively small elite."¹⁵⁹ Gerhardt goes so far as to consider whether there should be a law prohibiting legislative or executive branch consultation by judges on judicial appointments, but concludes that such a law "would be difficult to enforce," noting "[f]ederal judges might find ways around it by sending signals by indirect, difficult-to-detect means."¹⁶⁰

As for the second means of ongoing judicial involvement in the judicial appointments process—participation in confidential interviews with ABA representatives investigating judicial candidates, the ABA has spoken with judges (as well as lawyers, litigants, and others) about the merits of actual and prospective judicial nominees since 1956.¹⁶¹ Established early in the Eisenhower administration, the ABA Standing Committee on the Federal Judiciary played a central role in the investigation and evaluation of federal judicial candidates through the end of the Clinton presidency.¹⁶² President George W. Bush ended the practice of forwarding names of prospective nominees to the ABA Standing Committee pre-nomination soon after he entered office,¹⁶³ and the ABA currently initiates its investigation after public announcement of a nomination. Relevant information gleaned from the ABA's confidential interviews is reported to the Senate on an anonymous basis.¹⁶⁴ The confidentiality and anonymity of the ABA

OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES 11–12, 123, 138 (1999).

157. ABRAHAM, *supra* note 155, at 18–19.

158. GERHARDT, *supra* note 56, at 231–32.

159. *Id.* at 232.

160. *Id.* at 233.

161. *See* O'BRIEN, *supra* note 3, at 84–85.

162. *See id.* at 85; GERHARDT, *supra* note 56, at 141.

163. LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 74 (2005).

164. ABA STANDING COMM., *supra* note 47, at 3.

investigatory process is thought to encourage judges and others to be more candid in their assessments of nominees.¹⁶⁵

In the case of Alito's nomination to be Associate Justice,

the Standing Committee . . . interviewed more than 300 people from all Federal circuits who knew, had worked with, or had substantial knowledge of the nominee. Of that number over 130 were Federal judges, including all members of the Supreme Court of the United States [and] members of the United States Courts of Appeals"¹⁶⁶

As this example makes clear, ABA interviews with judges constitute a significant form of judicial involvement in the Article III appointments process.

The ABA's evaluation process has not been without its critics. Concerns have been raised, for example, for the potential for bias and/or mistaken understandings affecting confidential interview statements. Because interview comments are reported anonymously, if at all, candidates and appointment officials are handicapped in their ability to respond to negative comments. As a result, the ABA interviews also raise transparency concerns. It was with these concerns in mind that Michael Dorf questioned, "[i]f that information can enter the process indirectly, what's wrong with airing it directly?"¹⁶⁷ In other words, "What's the big deal with the live testimony?"

Indeed, judges' live confirmation hearing testimonies contain at least two elements that offer the promise of greater transparency of judicial input and protection against unchecked communication of bias and/or misinformation than do either of the longstanding mechanisms of judicial involvement. First, the open format of the live testimony appears to provide some measure of accountability for judge-witnesses' statements. A conundrum arises, however, in that the very public nature of the sitting judges' testimony is a significant part of what is most concerning about the testimony from a judicial independence and ethics perspective. The testimony's very openness raises concerns for negative impacts on public trust and confidence in the impartiality and integrity of the courts. The public nature of the testimony likewise raises concerns for the use of

165. *Id.* The ABA then rates each nominee as "well qualified," "qualified," or "not qualified" in a report submitted both orally and in writing to the Senate Judiciary Committee. *Id.* at 8–9.

166. Letter from Stephen L. Tober, Chair, ABA Standing Comm. on Fed. Judiciary, to the Honorable Arlen Specter, Chair, S. Comm. on the Judiciary 3 (Jan. 9, 2006), *available at* <http://www.abanet.org/scfedjud/SCpage/Alito-letter.pdf>.

167. Dorf, *supra* note 4.

prestige of judicial office to promote others' private interests and for judges' involvement in overt political activity. The answer to this conundrum should not, of course, be to hide this type of judicial influence, but, rather, to engage in an open examination of its desirability.

Second, live questioning of judge-witnesses by Senate committee members offers at least the promise of direct follow-up, whether the testimony is negative or positive in nature. That said, I question whether the judges' hearing testimony offers a truly meaningful opportunity for follow-up. Despite the judges' emphasis on live Senate questioning as one of the testimony's central benefits akin to cross-examination at trial, a number of those with whom I spoke made clear that as soon as Senate questioning becomes probing, judge-witnesses would, and likely should, resist answering on the grounds of confidentiality of the judicial process or from concern for other judicial independence harms. Thus, if a Committee member were to question a judge-witness about something that transpired at a post-argument conference, or having to do with the substance of a judge's vote on a particular case, or on how two or more judges came to agree on a particular passage or holding in an opinion, the judge-witness would, and likely should, invoke confidentiality and/or respect for institutional comity and refuse to answer. This dynamic already exists with respect to nominees' testimony, and it is this "prevarication" and "non-responsiveness" that have prompted Benjamin Wittes, and others, to call for an end to nominee testimony.¹⁶⁸ The same dynamic exists for confirmation hearing testimony by a nominee's judicial colleague.

Given concerns for the lack of transparency of the two historic means of judicial involvement in judicial appointments and for the various concerns raised by judges' live testimony, I turn to suggestions of other possible means of participation by judges in Article III appointments.

B. Other Means of Involvement by Judges in Judicial Appointments?

Are there other mechanisms for involving judges in Article III appointments that avoid the concerns identified with existing processes? One judge with whom I spoke proposed several ways of trying to preserve some of the value of live testimony while avoiding some of the testimony's potential impacts on judicial independence and judicial ethics. First, he suggested having the nominee's colleagues testify in the Senate confirmation hearing's closed session, instituted after Clarence Thomas' confirmation hearing as a forum for airing sensitive matters related to ethics

168. WITTES, *supra* note 1, at 118–28.

and personal finances.¹⁶⁹ Alternatively, he proposed taking oral testimony from the nominee's immediate judicial colleagues and reporting it to the Senate Judiciary Committee without attribution, noting that this might better preserve the dignity of the judiciary by avoiding the appearance of partiality and/or political involvement potentially at stake in the Alito hearing. This judge acknowledged that such an approach would sacrifice the live testimony's directness of exchange between judge-witnesses and Senate committee members, thought by many of the judges with whom I spoke to be one of the principal benefits of the judges' testimony. Third, he suggested having the ABA Standing Committee representatives field questions from the Senate Judiciary Committee on the substance of their interviews with the nominee's judicial colleagues when they present their report to the Committee in open session. None of these proposals works, however, where the third raises hearsay-like concerns and may well impact the candor with which the ABA interviews are conducted, while the first and second fail to address concerns for the transparency of the testimony.

Another alternative suggested to me was to establish a standing body of judges within the federal judiciary to conduct investigations of other judges nominated for elevation, with findings reported to judicial appointments officials in the executive and legislative branches. This proposal is akin to, though different from, the operation of judicial appointments commissions in other systems and presents many of the same judicial independence and ethics concerns raised by the live testimony, including potential for partiality and political involvement by judges.¹⁷⁰ Yet another alternative suggested to me was to allow only former federal judges to testify at judicial elevation hearings. While this proposal avoids judicial conduct code concerns insofar as the Code does not apply to former judges, testimony by former judges still has the potential to shape public perceptions of judges' partiality, political involvement, and use of judicial office to benefit others. Moreover, as with testimony by sitting judges, former judges' testimony risks rendering unduly vulnerable to Senate and public scrutiny the necessarily confidential realm of judicial decision making.

In rejecting various alternative proposals for judicial involvement in Article III appointments, I am mindful that judges are actively involved in the selection of judges in other judicial systems, at the state, federal, national, and international levels. What follows are highlights of judges'

169. The idea for a closed door session at judicial confirmation hearings was originally published by Lloyd N. Cutler in *Why Not Executive Sessions?*, WASH. POST, Oct. 17, 1991, at A23. A closed session is presently held for all Supreme Court nominees.

170. *See infra* Part VI.D.

roles in a sampling of other appointments systems, developed more fully in a separate article.¹⁷¹

C. Comparative Perspectives on Judges' Roles in Other Judicial Appointments Systems

Participation in and/or leadership by judges is a common element of judicial appointments systems at the state, national, and international levels, and is likewise relied on for non-Article III federal appointment of magistrate and bankruptcy judges. Looking first to state court systems within the United States, approximately twenty, or two-fifths, of the states include judges on judicial nominating commissions, with more than half of these states naming the chief justice of their supreme court as chair or member of the state's nominating commission.¹⁷² In most of these states, the nominating commissions forward names of three to five prospective judicial candidates to the governor for appointment.¹⁷³

Turning to non-Article III federal judicial appointments, Congress has provided for district court judges to appoint U.S. magistrate judges¹⁷⁴ and circuit judges to select U.S. bankruptcy judges.¹⁷⁵ Per statutory provision, district courts are to use merit selection panels in vetting candidates for magistrate judgeships, with final appointment decisions resting with the district judges in each district.¹⁷⁶ Bankruptcy judges are selected by the circuit judges of the regional courts of appeal, and there is no statutory requirement of use of merit selection panels to identify qualified candidates.¹⁷⁷ Magistrate and bankruptcy judges serve for fixed, renewable terms (of eight and fourteen years, respectively) and are reviewed by district

171. Clark, *supra* note 1.

172. LARRY C. BERKSON & RACHEL CAUFIELD, JUDICIAL SELECTION IN THE UNITED STATES: A SPECIAL REPORT FOR THE AMERICAN JUDICATURE SOCIETY 2–3 (2004), available at <http://www.ajs.org/selection/docs/Berkson.pdf>.

173. *Id.* Judges appointed through this system typically serve for an initial two-year term before facing a public retention election.

174. Resnik, *supra* note 1, at 605–06 (noting that “through enactments in 1968 and in 1984, Congress created these new categories of what I term statutory judges and stipulated their method of selection and their terms of office. Article III judges at the trial level, district by district, appoint magistrate judges who serve for eight-year renewable terms. The number of magistrate slots is decided by the Judicial Conference of the United States . . . as long as it can allocate funds to pay for their judgeships.”)

175. *Id.* at 606 (observing that “[t]he twelve appellate courts that govern geographically-delineated circuits have the power to appoint bankruptcy judges, who serve for fourteen-year renewable terms. Congress has retained its power to decide directly the number of such judgeships . . .”).

176. *Id.* at 607.

177. *Id.*

and appellate court judges for purposes of reappointment. In light of these selection and reappointment processes, and given district and circuit court judges' power to review judgments of magistrate and bankruptcy judges, respectively, commentators have raised concern for the meaningful decisional independence of magistrate and bankruptcy judges.¹⁷⁸

As for other countries' judicial appointments processes, a not insignificant number rely exclusively or in large part on judges to select other judges.¹⁷⁹ Great Britain, for example, recently revised its high court appointment process to locate authority to recommend justices for its new Supreme Court in a five-person commission chaired by the President of the Supreme Court (its chief justice).¹⁸⁰ Other members of the commission include the Deputy President of the Supreme Court (its most senior associate justice) and one member each from the Judicial Appointments Commission for England and Wales, the Judicial Appointments Board for Scotland, and the Northern Ireland Judicial Appointments Commission.¹⁸¹ Lower court judges in England and Wales are recommended by a different judicial appointments commission, which includes judges as well as lawyers and laypersons.¹⁸²

178. *See id.* at 607–10.

179. For an excellent recent source on other countries' judicial appointment systems, see ALAN PATERSON ET AL., *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD* (Kate Maleson and Peter Russell eds., 2006). For other outstanding sources, see generally CARLO GUARNIERI & PATRIZIA PEDERZOLI, *THE POWER OF JUDGES: A COMPARATIVE STUDY OF COURTS AND DEMOCRACY* (C.A. Thomas ed., 2002) and John Bell, *Judicial Appointments: Some European Experiences* (Oct. 4, 2003) (unpublished paper from the Conference on "Judicial Reform: Function, Appointment and Structure" held by the Centre for Public Law, University of Cambridge), available at <http://www.law.cam.ac.uk/docs/view.php?doc=865>.

180. CONSTITUTIONAL REFORM ACT, 2005, app. 1, pt. 3, § 21 (Eng.), at 10, available at <http://www.parliament.the-stationery-office.com/pa/ld200506/ldselect/ldconst/83/83.pdf> [hereinafter CRA]. Pursuant to the CRA, the final appellate review authority exercised by the Appellate Committee of the Law Lords of the House of Lords is to be transferred to a newly established Supreme Court for the United Kingdom, to be composed of the former Law Lords, known as "Justices." *Id.* app. 1, pt. 3, § 20, at 9–10. The Supreme Court will begin operating in October 2009. *Id.* app. 1, Commencement, at 7.

181. *Id.* app. 1, pt. 3, § 21, at 10. Note that the last three listed individuals on the Supreme Court appointments commission (from the new regional judicial appointments commissions) may or may not be judges. *Id.* The CRA and related consultation papers specify that the Commission must consult with judges familiar with the selectee's work as a lower court judge and that when the Lord Chancellor receives the commission's report, he must consult with all judges consulted by the commission itself along with other senior judges of the British courts and other officials of Wales, Scotland, and Northern Ireland.

182. *See id.* app. 1, pt. 4, § 31, at 12; see also Kate Maleson, *The New Judicial Appointments Commission in England and Wales: New Wine in New Bottles?*, in *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER*, *supra* note 179, at 48–49.

In Israel, a nine-member judicial selection committee composed of professional and political representatives names judges to the general courts, peace courts, and Supreme Court.¹⁸³ The five professional members of the commission include three Supreme Court justices and two members of the bar.¹⁸⁴

In strictly civil law systems,¹⁸⁵ judges play an even more central role in judicial selection. In France, for example, judicial candidates are recruited directly out of the National Judges College.¹⁸⁶ The Supreme Judicial Council (Conseil Supérieur de la Magistrature, “CSM”), composed of judges, prosecutors, and laypersons, proposes candidates for the “ordinary judiciary,” including the Supreme Court of Appeals (Cour de Cassation) and the principal trial and appellate courts.¹⁸⁷ The President of the Republic formally appoints candidates recommended by the CSM.¹⁸⁸ The CSM must also give periodic “advice,” or evaluations, of lower court judges.¹⁸⁹

A survey of selection methods for international court judges reveals a wide variety of approaches used,¹⁹⁰ including some reliance on judges to propose judicial candidates. The ICJ, for example, recommends that member states confer with their high court justices, among other officials, in nominating candidates for election by participating states.¹⁹¹ Most international courts are silent on how states-members should nominate judicial candidates. In response to concern for lack of guidance on judicial nomination procedures, a report on the judicial appointments process for the

183. Judges Law, 5713–1953, LSI 124 (Isr.).

184. Eli M. Salzberger, *Judicial Appointments and Promotions in Israel: Constitution, Law, and Politics*, in APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER, *supra* note 179, at 248–49.

185. Reference to “strictly” civil law systems is intended to distinguish the Israeli legal system from the civil law systems in Europe, Latin America, and elsewhere, where Israeli law reflects a hybrid of common law and civil law traditions. The latter is seen most prominently in Israel’s codification of contract and tort law.

186. See Bell, *supra* note 179, at 7–8; see also Ecole Nationale de la Magistrature, *Recrutement sur concours* (2007), available at <http://www.enm.justice.fr//devenir-magistrat/recrutement-concours.php>.

187. See Bell, *supra* note 179, at 7–8; see also Ecole Nationale de la Magistrature, *Recrutement hors concours*, available at <http://www.enm.justice.fr//devenir-magistrat/sans-concours.php>.

188. See Bell, *supra* note 179, at 7–8; see also Ecole Nationale de la Magistrature, *Devenir Magistrat* (2007), available at <http://www.enm.justice.fr//devenir-magistrat/accueil.php>.

189. See Bell, *supra* note 179, at 7–8.

190. The discussion here includes, but is not limited to, the International Court of Justice (ICJ), the European Court of Human Rights (ECHR), the International Criminal Court (ICC), the Inter-American Commission on Human Rights (IACHR), and the International Criminal Tribunal for the former Yugoslavia (ICTY).

191. Ruth MacKenzie & Phillippe Sands, *Judicial Selection for International Courts: Towards Common Principles and Practices*, in APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER, *supra* note 179, at 220.

ECHR recommended, *inter alia*, “the establishment of independent bodies at the national level to nominate candidates”¹⁹² The ECHR also recently amended its rules to provide for a longer non-renewable term of judicial service to minimize incentives for judges to decide cases so as to promote their re-election prospects.¹⁹³

Lastly, of particular relevance to this article’s focus on judges’ testimony at other judicial candidates’ confirmation hearings, none of the systems highlighted here involve legislative branch confirmation hearings. As a result, the particular concerns involved in judges testifying at others’ hearings are not presented.

D. Some Reflections on Merits of Judges’ Roles in Other Judicial Appointment Systems

Reflecting on the comparative merits of sitting judges’ roles in other judicial appointments systems and focusing specifically on the relatively common practice of judges serving on, even chairing, judicial nominating commissions, some of the advantages of that practice include: judges know what the “job” of judging entails and can effectively evaluate judicial candidates from that vantage point; judges on the commission may have first-person experience of the nominee’s judicial temperament, character, and work ethic from working together in practice and/or on the bench; participation by judges gives the judiciary greater control over its own “staffing;” and successful judges can “reproduce” themselves by recruiting similarly skilled colleagues for the bench. There are also some compelling disadvantages, including: judicial involvement in judicial selection is less democratic, or democracy-reinforcing, than participation by members of the public and publicly accountable elected officials; judges can dominate the opinions and/or votes of non-judges on judicial nominating commissions, thereby undermining the diversity of views expressed, considered one of the central benefits of the nominating commission model; judges do not necessarily know what is most desirable in a judicial candidate because the public, and not fellow judges, are the consumers of judges’ work and have valuable ideas about what makes a good judge; lower court judges could be motivated to curry favor for promotion with judges known or anticipated to be on the judicial nominating commission, with potential effects on judicial reasoning and outcomes; judges picking other judges presents the potential for “stacking the deck” ideologically; potential for public perception of the

192. *Id.* at 229.

193. *See id.* at 223.

partiality and/or political involvement by judges; and actual potential for judges' injection into partisan politics.

VII. CONCLUSIONS AND RECOMMENDATIONS

Mindful of other approaches to the question of judicial participation in other judicial appointments systems and of their comparative advantages and disadvantages, this article nevertheless concludes that federal judges should not testify at others' Article III confirmation hearings. The U.S. Constitution reserves the power to nominate and confirm judges to the executive and legislative branches. No official role or power is granted to the judiciary regarding judicial appointments, and none shall be assumed. Judges threaten judicial independence and judicial ethics principles when they exercise power in the Article III appointments realm. It is not so much a question of judges usurping the Senate's domain when they testify, especially where the Senate has invited their testimony, but, rather, a question of judges inappropriately assisting the Senate in its constitutional advise and consent function. Concern for inappropriate judicial role, along with concern for actual and perceived partiality, overt political involvement, and use of prestige of office by judges to benefit others, counsel against judges testifying at others' judicial confirmation hearings, where, on balance, the testimony presents more concerns than benefits for the well-being of individual judges, the judiciary, and the three branch system.

Greater thought should instead be given to whether members of the bar, other professional colleagues, members of civic organizations, and other non-judges can present useful testimony on the nominee's judicial temperament and qualifications for office and thereby avoid the judicial independence and judicial ethics concerns associated with judges' participation in the Article III appointments process.¹⁹⁴ The Senate could learn much, for example, about a nominee's possession of the attributes Abraham argues Supreme Court justices should hold, including "demonstrated judicial temperament" and "professional expertise and competence," by hearing from lawyers and litigants who have appeared before the nominee, as well as bar association representatives, other civic leaders, and legal academics familiar with the nominee.¹⁹⁵ With so many

194. Here, I echo KATZMANN, *supra* note 12, at 95–96.

195. ABRAHAM, *supra* note 155, at 2. These attributes are: "One, demonstrated judicial temperament. Two, professional expertise and competence. Three, absolute personal as well as professional integrity. Four, an able, agile, lucid mind. Five, appropriate professional educational background or training. Six, the ability to communicate clearly, both orally and in writing, especially the latter." *Id.* (citation omitted).

non-judges available to testify, and with their testimony avoiding concerns for judicial independence and judicial ethics effects, the Senate should desist from calling sitting judges to testify at others' Article III confirmation hearings, and judges should resist any such calls.

APPENDIX A

*History of Federal Judges' Testimony at Others' Supreme Court
Confirmation Hearings[√]*

A complete listing of testimony by current and former federal judges at others' Supreme Court confirmation hearings is as follows:

Clement Haynsworth to be Associate Justice (1969)

Testimony by:

Judge Harrison Winter of the U.S. Court of Appeals for the Fourth Circuit;

and Former Judge Lawrence Walsh of the U.S. District Court for the Southern District of New York, and then-current Chair, ABA Standing Committee on the Federal Judiciary.[‡]

William Rehnquist to be Associate Justice (1971)

Testimony by Judge Walter Craig of the U.S. District Court for Arizona in support.

William Rehnquist to be Chief Justice (1986)

Testimony by former Judge Griffin Bell of the U.S. Court of Appeals for the Fifth Circuit, and former Attorney General, in support.*

[√] In addition to presenting live testimony, current and former judges have also submitted letters and written statements to the Senate Judiciary Committee in support of individual Supreme Court nominees. *See, e.g.*, Letter from the Hon. Tom Clark, former U.S. Supreme Court Justice, to the Senate Judiciary Committee (Apr. 20, 1970); *Nomination of Harry A. Blackmun of Minn. to be Associate Justice of the Supreme Court of the United States: Hearing Before the H. Comm. on the Judiciary*, 91st Cong. 28 (Apr. 29, 1970) (supporting the confirmation of Judge Harry Blackmun to be Associate Justice).

* As the above list reveals, Griffin Bell has testified in support of the nominee at four Supreme Court confirmation hearings. Bell's status as a former Attorney General who oversaw judicial appointments in the Carter administration (along with the White House Counsel) was of greater relevance to his appearance at these hearings than his status as a former federal judge.

Robert Bork to be Associate Justice (1987)

Testimony by:

Retired Chief Justice Warren Burger of the U.S. Supreme Court in support;

Former Judge Griffin Bell of the U.S. Court of Appeals for the Fifth Circuit, and former Attorney General, in support;

Former Judge Shirley M. Hufstedler of the U.S. Court of Appeals for the Ninth Circuit, and former Secretary of Education, in opposition;

and former Judge Harold Tyler of the U.S. District Court for the Southern District of New York, and then-current Chair, ABA Standing Committee on the Federal Judiciary.[‡]

Anthony Kennedy to be Associate Justice (1987)

Former Judge Harold Tyler of the U.S. District Court for the Southern District of New York, and then-current Chair, ABA Standing Committee on the Federal Judiciary.[‡]

David Souter to be Associate Justice (1990)

Testimony by former Judge Griffin Bell of the U.S. Court of Appeals for the Fifth Circuit, and former Attorney General, in support.

Clarence Thomas to be Associate Justice (1991)

Testimony by:

Former Judge Griffin Bell of the U.S. Court of Appeals for the Fifth Circuit, and former Attorney General, in support;

Former Judge John Gibbons of the U.S. Court of Appeals for the Third Circuit in support; and

[‡] Note that former Judge Lawrence Walsh and former Judge Harold Tyler each testified specifically as the then-current Chair of the ABA Standing Committee on the Federal Judiciary, and not in their capacities as former federal judges.

Judge Jack Tanner of the U.S. District Court for Washington in support.

Ruth Bader Ginsburg to be Associate Justice (1993)

Former Judge Shirley M. Hufstedler of the U.S. Court of Appeals for the Ninth Circuit, and former Secretary of Education, in support.

John Roberts to be Chief Justice (2005)

Testimony by former Judge Nathaniel Jones of the U.S. Court of Appeals for the Sixth Circuit, raising concerns about the nominee's civil rights record.⁺

Samuel Alito to be Associate Justice (2006)

Testimony by seven current and former judges of the U.S. Court of Appeals for the Third Circuit in support.

⁺ Judge Jones's testimony is identified here as "raising concerns about" Roberts's candidacy, rather than "opposing" it because nowhere in Judge Jones's testimony did he directly state his opposition to Roberts's confirmation. *Senate Judiciary Committee Hearing on Nomination of John Roberts to be Chief Justice*, S. Hrg. 109-158, at 466-67 (2005). Judge Jones introduced his testimony by stating that he was speaking on behalf of a number of civil rights "greats" to raise concerns about Roberts's civil rights record. *Id.*

APPENDIX B

Interview Methodology

I mailed three rounds of letters to active and senior Third Circuit judges serving at the time of the Alito hearing, asking the judges to contact me if they were interested in speaking about the question of judges testifying at others' confirmation hearings. I contacted nineteen judges in total. Judge Becker died in May 2006 as I began work on this project, and so I did not have an opportunity to speak with him about the testimony.

The first round of letters was sent to all judges on July 5, 2006. The second round of letters was sent to those I had not yet heard from on August 15, 2006. The third, and final, round of letters was sent to those I still had not heard from as of September 25, 2006. I also wrote to the two former judges who had testified at Justice Alito's hearing with the same request noted above.

I received responses from fourteen judges. Ten granted interviews, on which I took contemporaneous notes from which I draw their interview comments here. The judges with whom I spoke have reviewed this article in draft form to confirm the accuracy of the interview comments attributed to them. These judges included slightly more non-testifying than testifying judges and more judges who supported the practice than were critical of it. The four who declined to be interviewed did not state a reason for their declining and included both those who had testified and those who had not.

I interviewed eight of the judges by telephone and two in person. All of the interviews were conducted between July and October, 2006. The interviews were relatively brief, typically running 25 to 35 minutes, with the two in-person interviews lasting longer than that.

As noted earlier, where most, but not all, of the judges with whom I spoke made their comments for attribution, I do not identify any of them by name so as not to reveal the identities of those who did not speak for attribution. Moreover, I refer to all of my interview subjects as "judge" so as not to identify whether a current or former judge made the particular comment and as "he" so as not to identify the judge's sex. I do note whether the judges whose comments I highlight had testified or not, where that factor may well be important in evaluating their comments.

At the same time that I contacted the judges, I also mailed letters seeking interviews to Senators Arlen Specter and Patrick Leahy as then-Chair and ranking minority member of the Senate Judiciary Committee. I received

several responses from Senator Specter's office indicating interest in an interview, though one did not ultimately result. I did not receive a response from Senator Leahy's office.