

## Political and Media Factors in the Evolution of the Media's Role in U.S. Supreme Court Nominations

RICHARD DAVIS\*

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### Abstract

The selection of U.S. Supreme Court justices has become a highly media-oriented process both in the presidential selection and Senate confirmation stages. In the former stage, the White House uses the media to signal consideration of certain nominees, while interest groups publicly pressure the president to appoint favoured candidates or threaten confirmation fights over unacceptable candidates. In the confirmation stage, the White House, and nominee supporters, battle nominee opponents through image-making strategies intended to shape media coverage of the nominee. This paper will describe and explain the role of the media in the current nomination process, briefly assess why the media's role has evolved in the past half century, and also predict how those roles would be changed under differing reform scenarios for Supreme Court nominations.

### Key words

U.S. Supreme Court; judicial selection; media

### Resumen

La selección de los magistrados de la Corte Suprema de Estados Unidos se ha convertido en un proceso muy influenciado por los medios de comunicación, tanto en la elección presidencial como en las etapas de confirmación del Senado. En la primera etapa, la Casa Blanca utiliza los medios de comunicación para señalar los candidatos que se están considerando, mientras que los grupos de interés presionan públicamente al presidente para que designe a sus candidatos de su preferencia, o amenaza con luchas ante la confirmación de candidatos no afines. En la fase de confirmación, la Casa Blanca y los partidarios del magistrado seleccionados se enfrentan a sus oponentes a través de una estrategia de creación de imagen, para determinar la cobertura mediática del candidato. Este artículo describe y explica el papel de los medios de comunicación en el proceso actual de nombramiento, evalúa brevemente por qué el papel de los medios de comunicación ha evolucionado en el último medio siglo, y también predice cómo cambiaría este

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\* Richard Davis is Director of the Office of Civic Engagement, Brigham Young University and Associate Chair and Professor of Political Science, Brigham Young University. 745 SWKT Brigham Young University Provo. Utah 84602 [Richard\\_Davis@byu.edu](mailto:Richard_Davis@byu.edu).



papel ante diferentes escenarios de reforma del proceso de nombramiento de la Corte Suprema.

**Palabras clave**

Corte Suprema de Estados Unidos; selección judicial; medios de comunicación

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## 1. Introduction

When Elena Kagan was nominated to the U.S. Supreme Court on May 10, 2010, news coverage of the nomination dominated U.S. news media. President Barack Obama's announcement of Kagan was the top story of the week on radio talk shows and the second top story on cable and network television news. Over a six week period, 237 articles about her confirmation, blog posts, and editorial pieces appeared in the *New York Times*, the *Washington Post*, and the *Los Angeles Times* combined (Holcomb 2010, Bybee 2011).

This coverage was mainly positive. According to the Center for Media and Public Affairs, Kagan's coverage was three-quarters positive across a wide array of news media, including the *New York Times*, the national television networks, and Fox News. While Democrats reacting in the news stories were uniformly positive, 40 percent of the Republicans' reaction was positive as well (The Center for Media and Public Affairs 2010).

The nomination was praised even by some likely opponents. Senator Lindsey Graham (R- SC) commented Kagan was qualified, had good character, and "understands the difference between being a judge and a politician...." Senator Richard Lugar (R - IN) called her "clearly qualified to serve on the Supreme Court." (Goldstein 2010, Stein 2010, Lorber 2010).

Nevertheless, her confirmation process took 88 days. That was considerably shorter than some recent confirmations such as Clarence Thomas (106 days) and Robert Bork (114 days). However, the length of Kagan's has become standard for non-controversial, non-eventful confirmations today. For example, Sonia Sotomayor's was 99 days while Stephen Breyer's was 82. Despite the absence of much controversy, Kagan was confirmed by a vote of 63-37 with most Republican senators voting against her. Even a largely non-controversial nomination elicits significant opposition votes in today's nomination process.

It wasn't always this way. On April 25, 1910, President William Howard Taft nominated New York Governor Charles Evans Hughes to be an associate justice of the U.S. Supreme Court. Hughes' nomination was major news of the day since Hughes was a well-known Republican politician. He was confirmed a week later, on May 2, 1910, after a five minute Senate executive (closed) session. (At that time, confirmations were conducted in closed sessions.) There was no appearance before the Senate Judiciary Committee, no debate on the Senate floor, and a unanimous confirmation, even though there were 32 Democrats in the Senate (Pusey 1951, p. 273).

What happened in that intervening century to change quick, unanimous nominations into lengthy, partisan ones? One significant change is the role of the press. The press played minor roles in most Supreme Court judicial selection processes until the 1960s. The press covered the announcement of a vacancy and a subsequent nomination, and there were news stories of the Senate vote. But rarely was there much in between, as there is today. Of course, there was not much time for the press to cover a confirmation during that period. Between 1910 and 1967, the average length of the confirmation process (the nomination by the president to the full Senate vote) was 23 days. Only two successful nominations during that period took as long as Elena Kagan's (United States Senate 2014).

Three exceptions out of 43 nominations between 1900 and 1968 prove the rule. The first was the nomination of Louis Brandeis in 1916. As a social liberal and a Jew, Brandeis was opposed by economic conservatives and anti-Semites (Karfunkel and Ryley 1978, p. 37-58). Newspapers covered the opposition to Brandeis and even split in their own editorial responses to the nomination. *The Nation*, the *New York Times*, and the *Wall Street Journal* editorialized against Brandeis as a radical. The *Boston Globe* termed him "a radical, a theorist, impractical, with strong socialistic tendencies." (Mason 1946, p. 469, Karfunkel and Ryley 1978, p. 47).

However, other media outlets supported Brandeis. The *New Republic* editorialized in Brandeis' favor. Other New York newspapers such as the *Independent* and the *New York World* also were strong Brandeis supporters (Strum 1984, p. 296-297, Abraham 1999, p. 135-137). While business groups opposed Brandeis, labor groups weighed in to support the appointment. The legal community split with many former bar association presidents opposed to Brandeis, but law professors and law students lined up in his favor (Strum 1984, p. 294-296, Maltese 1995, p. 49-51). The Senate Judiciary Committee held lengthy public hearings calling on witnesses both for and against confirmation. Interest groups were active in sending letters to the committee calling for a certain outcome from the committee and the Senate as a whole. Brandeis eventually was confirmed, but his confirmation process took 124 days (Maltese 1995).

The second was the unsuccessful nomination of Judge John J. Parker in 1930. Parker was widely recognized as an outstanding jurist, but he was unpopular with both labor and civil rights groups. An intense group lobbying effort deluged senators. Telegrams from labor groups and the NAACP urged senators to oppose the nomination. African-American newspapers editorialized against Parker. Their stance was particularly disturbing for Republicans, whose party controlled the Senate at the time. The African-American vote was a significant electoral force in several Northern states in favor of Republicans (Maltese 1995, p. 59-61). The NAACP targeted several pro-Parker Republican senators for defeat in their next elections. A prominent African-American newspaper edited by W.E.B. DuBois listed all the senators who had voted for Parker and urged readers to work for their defeat (Todd 1964, ch. 4, Goings 1990). In turn, the White House attempted to recruit a group to endorse Parker. Long known for support of civil rights, the Society of Friends (Quakers) was pressured by Hoover, also a Quaker, to blunt the NAACP's campaign. But the effort failed. Parker eventually was rejected by the Senate due to a perception of an anti-labor and anti-Negro bias (Goings 1990). Parker's nomination took six weeks, which was enough time for opponents to undermine the presumption of confirmation that was common during that time period.

The third case was President Franklin Roosevelt's appointment of Senator Hugo Black of Alabama. The *Chicago Tribune* opined that "if [Roosevelt] wanted the worst man he could find he has him." (Leuchtenberg 1995, p. 186) While the *Washington Post* charged that if Black "has ever shown himself exceptionally qualified in either the knowledge or the temperament essential for exercise of the highest judicial function, the occasion escapes recollection." (Leuchtenberg 1995, p. 187) However, press opposition made little impact on the Senate, which confirmed Black handily only five days after the president's nomination. Although, it was also the press who uncovered evidence of the extent to which Black had been associated with Ku Klux Klan a decade earlier, but only after Black had already been confirmed (Leuchtenberg 1995, p. 191-199).

These were truly exceptions for the period. The norm for the period was the absence of controversy, little or no Judiciary Committee deliberation, limited media coverage, the absence of debate, and a quick confirmation. These are traits any president or nominee could only dream about today.

By contrast, confirmation processes today are characterized by public pressure on the creation of the president's short list by various players (senators, interest groups, and the media), extensive media scrutiny of a nominee (and sometimes potential nominees), interest group media-oriented campaigns, high profile hearings, and a drawn out confirmation process that ultimately results in a divided vote. For example, each of the last four nominees (over an eight year period) received 22 or more negative votes in the Senate. Over a 70 year period from 1900 to 1970, only four nominees received that amount of opposition votes. The Supreme Court nomination process has evolved from a 20<sup>th</sup> century norm of

general approval of a nominee, a brief confirmation process, and a minimal role for external players into a lengthy, media-oriented process involving interest groups, the public, and the press.

This paper lists and discusses three political/media factors that have contributed to a new form of nomination, particularly in relation to the news media's role. These are changed norms on public involvement, the fragmentation and resulting tension within institutional processes, and media influence on political processes generally. Each of these forces will be discussed in turn.

When discussing these forces, particular emphasis is given to the effect of these changes on two aspects of media role in the nomination process – signaling and image-making. Signaling occurs when a player indicates to others how he or she will act in relation to others' actions. For example, a president signals when hinting about a potential nominee or a senator signals intentions to vote in favor or opposition to a nominee. An interest group also signals what it will do in response to others' actions, particularly a presidential selection or a senator's expected vote. Image-making refers to the efforts of players via the media to affect the perceptions of others regarding the nominee and the issues at stake in the nomination.

These three forces are featured because their role is under-explored by scholars. Generally, what is expected from a discussion of the evolution of the media's role in the Supreme Court nomination process is an analysis of legal-related factors. One is the Court's activist role in settling public policy issues. Related to that factor is the effect of those policies on the public. The Court's decisions regularly touch individual American's lives across a spectrum of policy from marriage relations to health care to public schools. Interest groups affected by these policy decisions attempt to shape the composition of the Court to influence policy outcomes. Still another Court-related factor is the contentiousness of recent high profile cases that indicate Court decisions may be reversed by changes in personnel. Recent cases such as *Gonzales v. Carhart*, *McCreary County v. ACLU*, and *Grutter v. Bollinger* suggest that the Court is closely divided over key issues such as abortion, establishment clause, and affirmative action and one Supreme Court nomination can alter the Court's direction (*Gonzales v. Carhart*, 2007, *McCreary County v. ACLU* 2005, *Grutter v. Bollinger* 2003).

This paper is not intended to dismiss legal factors as irrelevant. Those factors are critical in understanding how the nomination process and the media's role have developed over time. Rather, the purpose is to examine factors beyond the "usual suspects" in explaining the evolution of the nomination process and the media's role in that process.

Nor is there an argument here that these factors discussed below are exclusive among political and media factors in shaping nomination processes. One, for example, that is not discussed is the role of interest groups. The salience of group influence in the process has been one political factor accorded significant scholarly treatment.<sup>1</sup> However, these three forces have been under-discussed by scholars in conjunction with the evolution of the process. The intent of this paper is to bring them forward for greater discussion as possible influences on the change that has occurred in judicial selection, and the media's role in that selection, during the past century.

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<sup>1</sup> See, for example Caldeira (1989), Segal *et al.* (1992), Maltese (1995), Caldeira and Wright (1998), and Caldeira *et al.* (2000). There also is a significant literature on the role of interest groups in judicial selection for federal district and appellate judges. See Flemming *et al.* (1998), Scherer (2005), Scherer *et al.* (2008).

## 2. Contributing factors to press role

### 2.1. Changed norms of the role of public opinion

Rhetoric about the importance of public involvement in governmental decision-making long has characterized American political discourse. But the practice of incorporating public opinion into policy-making evolved in the 20<sup>th</sup> century, particularly in response to two inter-related developments. One is the expansion of the public's role in the selection of public officials. The second is the movement towards greater transparency of government.

#### 2.1.1. Expansion of the public's role in the selection of public officials

In 1789, George Washington became president upon the votes of 69 electors who had no accountability to the public. Indeed, no public vote even occurred. In 2012, Barack Obama received 332 electoral votes, but those votes were tied to popular vote totals in every state. Those totaled over 62 million votes.

The process of selecting political leaders has devolved from elites to masses over the course of American history, but particularly during the 20<sup>th</sup> century. Democratization has been facilitated and legitimated by the perception that citizens are increasingly capable of determining their own representatives. That perception has been aided by changes in levels of educational attainment, particularly during the 20<sup>th</sup> century. In 1910, the high school graduation rate was nine percent; by 1940 it was 51 percent and by 2008, 75 percent (Goldin 1998, National Center for Education Statistics 2014). While only four percent of college-age Americans attended college in 1910, two-thirds did so by 2006 (Veysey 1970, p. 2, Davis and Bauman 2008).

Higher education levels contributed to a sense of a better informed public capable of participating in public affairs. Since education provides more familiarity with political processes and institutions and stimulates interest in current events, it is positively associated with political knowledge. It also promotes higher levels of political efficacy; i.e. better educated people feel more capable of making a difference in government (Delli Carpini and Keeter 1996, Owen *et al.* 2011).

Higher educational attainment levels were accompanied by increased acceptance of public role in decision-making. This movement in the early 20<sup>th</sup> century sparked interest in the power of public opinion. Walter Lippman's classic *Public Opinion* indicated widespread interest in this new phenomenon of the public's role (Lippmann 1922). At the same time, the practice of public relations emerged as a means for communicating with citizens to inform them about public policy and assist them in fulfilling their civic duties. The premise of public relations is that such communication is essential, i.e. public opinion matters in governance. It assumes the importance of the recipient – the public – and the necessity of the communication act in order to engage the public in the process of governance.

Simultaneous with public opinion acquiring a new importance in governance, scientific public opinion polling emerged as a means to gauge public opinion. Polling was problematic in the early part of the 20<sup>th</sup> century. The most cited example of polling failure is the *Literary Digest* survey of Americans that predicted Kansas Governor Alf Landon would defeat President Franklin Roosevelt in a landslide (Squire 1988). The Gallup Poll, Roper, and other polling firms emerged by the late 1930s as organizations using reliable techniques to describe public opinion. As a result, public opinion surveys increasingly gained a place as valid gauges of public opinion.<sup>2</sup>

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<sup>2</sup> For a discussion of the history of survey research in the United States, see Converse (2009). For a discussion of the early use of polls by political actors, see Fried and Harris (2010).

The outcome not only was better measurement of public opinion, but a higher value placed on public opinion itself, particularly as a factor in policymaking, due to the ready availability of portrayals of public opinion. The public's opinions on policies and personnel appointments mattered because they could be measured and presented for policymaker consumption. Moreover, the broad dissemination of such poll numbers placed policymakers in the position of having to account for their policy decisions vis-à-vis public opinion.

Simultaneously, the 20<sup>th</sup> century was characterized by an expansion in the franchise to previously excluded demographic groups, including women (19<sup>th</sup> amendment), the poor (24<sup>th</sup> amendment, D.C. residents for presidential elections (23<sup>rd</sup> amendment) and 18-20 year olds (26<sup>th</sup> amendment). The franchise also expanded statutorily through the Indian Citizenship Act of 1924 that opened the door for voting rights to Native Americans, as well as the Voting Rights Act of 1965. The direct product of this expansion was increased candidate interest in groups of Americans who now held voting power. For example, at the turn of the 20<sup>th</sup> century, African Americans played an insignificant role in electoral politics at the national or statewide level due to voting restrictions, but by the end of the century African-Americans were a major voting bloc in Southern states, particularly within the Democratic Party.

Another democratic change was the institution of the direct primary at the beginning of the 20<sup>th</sup> century. Candidates for public office not only faced the general election, but also the primary electorate. The double election process forced candidates to campaign longer and more diligently in public. Presidential candidates, and therefore presidents, were affected by the direct primary beginning with the 1970s mass adoption of the primary as a tool for national nominating convention delegate selection. This change placed presidential candidates in greater proximity to the rank and file membership of the party. The most active elements of the party were most influential due to their greater presence in party primaries and caucuses.

Still another change, and perhaps even more relevant, was the direct election of U.S. Senators that resulted from the passage of the 17th amendment in 1913. Previously, the electors for the U.S. Senate were state legislators, who did not necessarily respond to public sentiment. That two-step process of influence – citizen to legislator to senator - was a barrier to public pressure on senators. Without that barrier, senators were more directly connected to the voters. This change did not occur immediately (Daynes 1971). Since voters now directly controlled senators' re-election chances, public sentiment became a more salient factor in senatorial decision-making. Six year terms still offered more distance than existed for House members, but senators at least became more responsive to the general public as election time approached. The result has been the creation of a body that has become closer to constituencies and therefore more responsive to public opinion. In an age of permanent campaigns, senators go home more often, receive more mail, and campaign longer for re-election than they did in the past.

#### 2.1.2. Governing in public

Related to growing democratization of the selection process has been a similarly expanding public expectation of transparency in governmental action. Compared with just half a century ago, far more of what occurs in American national government today is deemed potentially open to public scrutiny. Voters expect to be included in the transmission of information among political players.

This applies to the electoral process where voters expect to know much more about candidates for office, especially the presidency, than they did in the past. With the required submission of financial records, the voluntary release of other tax documents, and the press scrutiny of personal activities, voters become privy to a great deal of information about a candidate's personal life. Candidates feel



obligated to expose themselves to public view in order to pass the litmus test of character.

Not only is individual information considered germane to the public interest, but the public policy process generally is subject to greater public scrutiny. Open sessions – at the national, state, or local level - are standard in governance. Congress opened its consideration of personnel appointments in 1929 rather than make decisions in closed sessions (Harris 1968, p. 253-255). With C-SPAN and cable news networks, more and more of the policy making process in Congress is available for public view. Granted, most of the legislative process remains obscure to Americans and even to other elites because it hardly fits news values.<sup>3</sup> But the choice of not disseminating information regarding Congressional action is the news media's rather than government's.

The potential for immediate and broad exposure of scandals now exists. Formerly anonymous agencies, events, and people can suddenly become highly newsworthy. The story of the machinations of a little-known Marine colonel named Oliver North in the Iran-contra affair is the classic example of a process not only going public, but quickly triggering saturation coverage in the press. Public scandals such as the House banking abuses, Iran-contra, and the Clinton impeachment process thrust administration officials, members of Congress, or others into the public eye.

Increased public interest in national politics, which characterized the last half of the 20<sup>th</sup> century fed media status and led to greater investment in newsgathering and surveillance. The search for more and more news was the unintended byproduct of the addition of cable news networks and the competition with the three major networks for news programming. By the 1980s, news became profitable and cable news networks, particularly CNN, gained status as news sources. The big break for CNN was the Persian Gulf War in early 1991. Fox News experienced a similar boost in the Iraqi War.

The 1990s and 2000s brought financial difficulties and cutbacks in traditional news organization budgets. However the late 1990s and early 2000s produced a series of news stories maintaining public interest. The Monica Lewinsky scandal, the Clinton impeachment, the contested election of 2000, September 11, 2001, wars in Afghanistan and Iraq all contributed to public attention to national politics. Through the 1980s, 1990s, and 2000s, instead of shrinking news options, news proliferated with the addition of CNN, the Fox News Channel and MSNBC.

The rise in news also increased the public nature of standard government events. Television coverage of Congress became a staple of C-SPAN and a regular feature in millions of homes with cable. The floor proceedings of the House and Senate received priority in the daily schedule of C-SPAN's two networks. Moreover, routine Congressional committee proceedings earned a level of national attention unknown prior to the 1980s.<sup>4</sup> C-SPAN had found its niche by the late 1980s among the politically attentive. By 1988, an estimated 20 million Americans watched C-SPAN monthly (C-SPAN 1989).

Committee action also became more frequently shown on national television. By 1987, Congressional committees were routinely aired on C-SPAN, and Fox, MSNBC, and CNN occasionally offered live coverage during major news stories, such as the Iran-contra hearings, the Senate Whitewater Committee, and the impeachment of the president during the 1980s and 1990s.

This development of extensive broadcasting of committee hearings was relatively recent. Before the 1970s, committee hearings were only rarely televised, due to individual committees' restrictions on their access. One of the best known exceptions was the Army-McCarthy hearings in 1954, which were televised live on

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<sup>3</sup> For a discussion of press coverage of the policy-making process, see Davis (1996, p. 297-309).

<sup>4</sup> For a narrative on television in the House of Representatives, see Garay (1984).

ABC and the now defunct Dumont Network. But rule reforms of the early 1970s opening hearings to broadcast coverage, and the increasing comfort with television on the part of the members, facilitated television accessibility to committee hearings and deliberations. Rarely did broadcast news organizations choose to cover them, but the opportunity was there to do so.

Some senators saw television coverage of committee hearings as an opportunity to gain public notice in order to further their agenda. Senator George Mitchell (D – ME) attracted national attention through his role in the Iran-contra hearings in 1987 and soon was elected Senate Majority Leader. Senator Al D’Amato (R – NY) similarly sought to enhance his public image through his chairmanship of the Senate Whitewater Committee in the 1990s.

By 1987, the networks faced the dilemma of deciding which of the many available committee hearings to cover. Committees competed with each other, particularly in inviting high-profile witnesses to testify in order to gain media attention. One committee that gained attention was the Senate Judiciary Committee. With its jurisdiction over issues such as abortion, gun control, death penalty, by the mid-1980s Judiciary had become one of the more widely publicized committees (Hess 1986, p. 31-35).

### 2.1.3. Effects on media role in Supreme Court nominations

Each of these forces eventually affected the Supreme Court nomination process and the media’s role. First, as the norms about public opinion generally changed, the role of the public in the Supreme Court nomination process changed as well. The public became entitled to participate in the determination of whether an individual could serve on the U.S. Supreme Court, just as the public played an enlarged role in who became president or a U.S. senator. What logically followed was the premise that the public ought to be given the knowledge to make a decision about a nominee. For example, a Fox News/Opinion Dynamics poll asked whether the public “has the right to know about the private life of anyone nominated to the Supreme Court.” Sixty-one percent of respondents answered affirmatively.<sup>5</sup>

Over the 20<sup>th</sup> century, the public’s role in the Supreme Court nomination process evolved from a sporadic and limited role to a permanent and significant one shaping the behavior of other players such as the president, senators, interest groups, and the media. While early 20<sup>th</sup> century politicians primarily could make decisions about Supreme Court nominees without appealing to public opinion, their late 20<sup>th</sup> century and early 21<sup>st</sup> century successors had no such freedom.

Interestingly, in 1910, the expectation of public role in the process had not changed considerably from how the Framers had conceived it. Presidents nominated, and senators confirmed, typically without much regard for the public’s will. This included both the process of selection and confirmation as well as the specific nominee. For one thing, the rapidity of the confirmation process, and, often as well, the presidential selection process, precluded public involvement. Presidents often acted immediately in selecting a nominee and Senate confirmation took place within days, and sometimes hours, of receiving a nomination from the president. In the Hughes and Black cases referred to above, the speed of each process made organized opposition by the public, media, and groups impossible (Ross 1990).

Indeed, elite opinion could be dismissive of public involvement as inappropriate anyway. When his nominee, Judge John J. Parker, was defeated by the Senate, President Herbert Hoover blamed “vigorous nation-wide propaganda from different groups among our citizens...” who have “carried the question of confirmation into the field of political issues rather than personal fitness...” Hoover concluded that “public opinion as a whole cannot function in this manner.” (Maltese 1995, p. 68-69).

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<sup>5</sup> Fox News/Opinion Dynamics Poll, May 18-19, 2010 (PollingReport.com 2014).

Hoover's views seem antiquated today. The public's views of the suitability of a nominee are assumed to be important because they are regularly collected, analyzed, and reported. For example, the number of public opinion polls on Supreme Court nominees conducted by Gallup alone jumped from one in the period 1940 to 1968 to 18 on the four nominees between 2005 and 2010.

Moreover, it is assumed that not only should the public have a role in determining a nominee, but the nominee plays a representative role vis-à-vis the public. In other words, he or she holds opinions that reflect the views of the public. An NBC/Wall Street Journal poll during the Sotomayor confirmation process asked respondents the extent of confidence they had that "if she is confirmed by the Senate to sit on the Supreme Court, Sonia Sotomayor will reflect your views about most issues."<sup>6</sup>

The public's role goes beyond expressing an opinion about whether or not a justice should be confirmed. Pollsters also ask about whether the nominee is too liberal or too conservative, whether he or she is mainstream or extreme, and whether the selection was a good pick by the president. They also ask about the process – factors the president should consider in choosing a nominee, the issues that should be relevant in senators' decisions, and whether the nominee has been treated fairly by the press. All of these questions operate on the assumption that the public's view matters.

Public opinion polls are not just taken; they also are reported by the news media to indicate to policymakers how the public feels. The public's support, or lack thereof, of confirmation has been noted in nomination-related news coverage. Typically, lack of majority support has been a sign of nominee weakness. For example, a major element in the Miers nomination was her lack of support by the public. Before she withdrew, the Gallup Poll reported 42 percent wanted her confirmed, while Rasmussen Reports reported even less support – only 30 percent favoring confirmation (Gallup 2014, Rasmussen Reports 2005). Similarly, during Elena Kagan's nomination, it was noted that she was the first Supreme Court nominee confirmed with less than majority support from the public (Saad 2010).

This attention to public opinion has occurred despite the fact that the public possesses little information to judge the qualifications of a Supreme Court justice. Polls in 1993 and 1994 found that three-fifths of Americans admitted they didn't know anything about Ruth Bader Ginsburg or Stephen Breyer's ideology and half said they didn't even know who Ginsburg was. From 40-60 percent of Americans say they follow Supreme Court nominations today at least somewhat closely, but many confess they lack much information to make judgments about Supreme Court nominees.<sup>7</sup> One-third of Americans said they had not heard of Supreme Court nominee John Roberts two months after he had been nominated and, four years later, thirty-six percent of Americans said they either had never heard of Sonia Sotomayor or had no opinion about her (Davis 2005, p. 122-123).<sup>8</sup> This lack of political knowledge is not limited to Supreme Court nominees. It also includes other public officials as well as public issues. Nor has education seemed to have changed that situation. According to the Pew Research Center, political knowledge has declined in some ways since mass use of Internet information (Pew Research Center for the People & the Press 2007).

In order to educate citizens on Supreme Court nominees they are unfamiliar with, some polling organizations now go further. They provide more information on a nominee and then poll respondents on that additional information. For example, a CNN poll asked respondents whether they were more or less likely to support Elena Kagan knowing that she had never served as a judge, had worked with President

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<sup>6</sup> NBC News/Wall Street Journal Poll, June 12-15, 2009 (PollingReport.com 2014).

<sup>7</sup> Gallup Survey, July 10-12, 2009; and CBS News Poll, July 9-12, 2010.

<sup>8</sup> Gallup survey, September 8-11, 2009; and Gallup July 10-12, 2009.

Obama on legal issues, and had barred military recruiters from campus because of the "don't ask, don't tell" policy.<sup>9</sup>

Regardless of information levels, by the end of the 20<sup>th</sup> century, senators attended to public opinion. The potential linkage led scholars to examine whether the public's views about Supreme Court nominees mattered to senators.<sup>10</sup> Frankovic and Gelb concluded that the Senate vote confirming Clarence Thomas in 1991 came after senators who were confused about whether Thomas or Anita Hill was telling the truth decided to "validate their position by recourse to the public's judgment" through opinion polls that supported Thomas' confirmation (Frankovic and Gelb 1992). The connection with public opinion transcends the Thomas nomination. Cameron *et al.* found that senators' voting patterns are connected to ideology, which, they suggest, is a reflection of concerns about constituent opinions. John Maltese contended that since the 1980s, elite players in the process "pay much more attention to the mobilization of public opinion than participants ever did in the nineteenth century." (Maltese 1995, p. 86, Cameron *et al.* 1990) Jonathan P. Kastellec *et al.* found a correlation between public support for a nominee as registered by public opinion polling and the vote of a U.S. senator from that state. The effect of public opinion was particularly strong for opposition party senators (Kastellec *et al.* 2010).

It is debatable whether the public opinion consequences for a senator are high. Most Americans likely do not punish their senators for voting against constituents' views on Supreme Court nominees. There may be exceptions. In 1992, Senator Alan Dixon (D-IL) was defeated in a re-nomination bid by Carol Mosely Braun, who campaigned on Dixon's vote for Thomas' confirmation.

However, the Thomas nomination is the exception proving the rule. For example, the Senate vote on the Thomas confirmation in 1991 was well publicized in the news media, but over 40 percent of Americans could not say how their senator voted or guessed inaccurately. And news coverage of the Thomas nomination was unusual regarding Supreme Court confirmation votes. Public knowledge of the nomination process in the case was highly unusual and the role of a Supreme Court nomination in priming for voters' election-related decision-making likely was unusual as well. Where voters know about a senator's vote, that vote could become a factor in vote choice (Wolpert and Gimpel 1997, Hutchings 2003, chapter 3).

However, public knowledge of their senator's vote is far lower in the vast majority of nominations. Senators may perceive voters will respond negatively, but it is difficult to imagine voters will do so if they lack such information. Nevertheless, the perception of public awareness and the potential of discontent over a senator's vote appear to influence senators.

Another factor, the expansion of the franchise, has meant a new appreciation for the perspectives on Supreme Court nominees held by previously disenfranchised groups, particularly African-Americans (Overby 1992). For example, African-Americans opposed the Robert Bork nomination in 1987, but favored Clarence Thomas' confirmation in 1991. Southern Democratic senators took notice. For example, Senator Howell Heflin of Alabama, a conservative Democrat, was lobbied by prominent representatives of Alabama's African-American community who argued that Bork's confirmation would "set black people and the whole state back." Heflin eventually voted against confirmation (Noble 1987).

The gradually deepening connection between elected officials and their party bases has resulted in both presidents and senators becoming sensitive to the views of the public in conducting their decision making processes about nominees. This is

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<sup>9</sup> CNN/Opinion Research Corporation Poll, May 21-23, 2010 (PollingReport.com 2014).

<sup>10</sup> See Caldeira (1989), which spawned a literature on the role of public opinion in the Supreme Court nomination process, such as Caldeira and Wright (1998), Johnson and Roberts (2004) and Gibson and Caldeira (2009).

particularly true of an activist partisan electorate affecting the nomination and re-nomination of presidents and senators. The party's activist base today is more inclined to demand partisan-based Supreme Court nominations where nominees conform to the ideological mainstream of the party. This likely has affected presidential selection of a nominee by compelling presidents to satisfy their respective party bases to a greater extent than was necessary in the past. As a result, it may not be coincidental that the incidence of presidents choosing Supreme Court nominees outside their own parties or not clearly identified with the party's ideological emphases is declining. Of the nominees in the past 50 years, only one has been of the opposite political party from the president. In the previous 50 years, there were four such nominees, including one for chief justice. In two cases during that earlier period, presidents appointed opposition party nominees during their re-election campaigns, and without intra-party opposition.<sup>11</sup>

Senate Judiciary Committee hearings also reflect these changed norms concerning the public. First, their very existence is an indication of change. While hearings were sporadic prior to the 1950s, they have become staples of the process today. In accordance with expectations of transparency, no Supreme Court judicial nominee today would consider not appearing before the committee. Their non-appearance would not be tolerated. Nominees are expected to spend several days testifying through rounds of senator's questions.

The expectation of greater transparency in the judicial selection process has not been limited to the confirmation process. The presidential selection process also has become much more open today than in the past. One reason is the time taken to make a selection. This is done to assure that a nominee's potential problems are vetted before going public with the nomination. But time also is taken to gauge external support. Rapid nominations can lead to trouble today as slighted interest groups, even among likely supporters of the nominee, take revenge during the confirmation process. For example, George H.W. Bush nominated Clarence Thomas three days after Thurgood Marshall's retirement announcement. Thomas was barely confirmed by the Senate after a prolonged hearing process revolving around sexual harassment charges that had not been vetted previously. Bush had acted quickly the prior year when he nominated Judge David Souter, again only three days after receiving Justice William Brennan's retirement letter. Although Souter was confirmed, conservatives initially criticized Bush for not vetting him with them first. Later, they criticized Bush when Souter failed to provide a solid conservative vote on the Court (Toobin 2007, p. 20-21).

One difference in transparency in the presidential selection stage is the occasional use of public interviews. Presidential style still ranges from no public interviews to highly public sessions with prospective candidates for nomination. Ronald Reagan adopted the former approach with Sandra Day O'Connor, who was quietly interviewed at the White House without press fanfare (Burks 1981). Similarly, in 1970, Richard Nixon met with potential nominee Harry Blackmun without any mention to the press (Dean 2001, p. 23).

Bill Clinton took the opposite route – public interviews accompanied by extensive press coverage. In 1993, Clinton conducted highly publicized interviews that were well-publicized by the press. Stephen Breyer was touted as the front-runner by some administration officials and his interview with the president was scheduled as he was recouping in a hospital bed, suggesting a great sense of urgency. The public nature of the process, coupled with Breyer eventually not being selected that year, led to a less publicized interview with Ruth Bader Ginsburg.

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<sup>11</sup> Richard Nixon, a Republican, nominated Lewis Powell, a Democrat, in 1971. During the previous period, those nominated included William Brennan (Eisenhower, 1956), Harold Burton (Truman, 1945), Harlan Stone (Roosevelt, 1941), and Benjamin Cardozo (Hoover, 1932).

President Obama pursued a low-profile interview process, which included leaks of names of possible nominees and of interviews after the fact. Similarly, President George W. Bush interviewed candidates privately. For example, Bush gave no advance notice of his interview of White House Counsel Harriet Miers.

The public interview process is still not the norm. But its usage at times is a reflection of growing expectation by the press and the public of greater openness. Such openness aids the president, particularly when the process is elongated. It demonstrates that the president is making progress on selection and satisfies and channels the press' interest in the process. However, it also restricts the president in the sense of being bound by a publicly-released short list or, if ultimately abandoning the short list, appearing indecisive or secretive.

Even without a formal publicized interview process, the presidential selection process is undertaken publicly. Reporters expect the White House to release a short list of potential nominees. News is regularly leaked from the White House about who the president is seriously considering at any given time. Moreover, prominent potential candidates who do not wish to be considered for a vacancy release public, rather than just private, withdrawals, rather than waiting to see if they are appointed. Senator George Mitchell did so in 1994, as did Governor Mario Cuomo in 1993. Not only is it the names of nominees that go public, but also those of the administration officials and others involved with the process.

Evolving attitudes about the public's role affected the judicial selection process last because it is the most indirect of leader selection processes in American national politics. The public's own involvement may have been more tentative than in other processes due to the Supreme Court's traditional aloofness from the public and its image as a legal institution. However, the changes in how presidents and senators used public opinion and how the media, interest groups, and the public perceived public role eventually were applied to judicial selection. But, at least by the Bork nomination in 1987, change had occurred, as indicated by a statement from Senator Patrick Leahy (D-VT) that the members of the U.S. Senate "took time to hear from the people, the people... who elected the [one hundred] Members of the senate who count on us to do our duty under the Constitution." (Quoted in Ross 1990).

The changes in the nature of the process have been stimulated by media coverage and have created a more enhanced role for media. As the role of the public has increased, the role of the logical forum for communicating with the public – the press – has been elevated as well. Those players who seek to affect public opinion know that the most effective tool for doing so is the press. Moreover, what better medium for transmitting the public's views to policymakers? News organizations have covered the polls taken by news organizations, and even commissioned polls themselves.

The democratization of the selection process has enhanced media role by giving news organizations a pivotal place in public selection processes. This is not only true for president and members of Congress, but also Supreme Court justices. Justices still are selected by others and not the public, but the democratization of other processes has resulted in more democratic elements of the judicial selection process as well, particularly accountability to public opinion and the consequent use of the media to shape that opinion.

## *2.2. Fragmentation and tension within institutional processes*

The fundamental difference between the American political system and most parliamentary systems regarding the diffusion of power is well known. Constitutional provisions created separation of powers, thus fragmenting power in American government. However, that diffusion became even more pronounced in the 20<sup>th</sup> century. Such changes have affected the Supreme Court nomination

process and created conditions for enhanced media salience in that process. Primarily, fragmentation has meant the absence of clear institutional leadership that would be echoed by the media. Instead, there is greater open division among elites that creates a vacuum of leadership that allows the news media to emphasize conflict. The presence of debate and conflict within the system affects press coverage as journalists “index” elite debate and then reflect it (Bennett 1990).

However, there is also a benefit to the press of such fragmentation. Media imperatives are served by fragmentation that provides an array of voices, and sources, as well as a competing universe of political agendas pleading for the media’s attention. Not only can the news media pick and choose among these diverse voices, a practice that places them in an enviable gatekeeping position, but they also can do so based on their own norms. Hence, news media gain a privileged position in political debates, which also spills over into the Supreme Court nomination process.

### 2.2.1. Divided government

A major component of that institutional fragmentation is the reality of divided government.<sup>12</sup> During most of the 20<sup>th</sup> century, divided government – one party controlling the White House while the other holds a majority in either the House or the Senate – was uncommon. However, during the past half century, divided government in American politics has become more the routine than the exception. What the French call “cohabitation” - opposition parties sharing responsibility for government - has become a regular feature of American national politics.

Divided government in the last half century has provided an opportunity for sustained, meaningful opposition to the president. Between 1910 and 1952, only 10 percent of elections resulted in divided party control between the White House and the Senate. However, between 1952 and 2012, one-half of presidential and mid-term elections have resulted in divided party control. With the exception of Jimmy Carter, since 1969 every president since Richard Nixon has faced opposition party control of the Senate during at least some of his term. The result has been a default position that the president not only must maintain his own party support, but also win over some of the opposition party to enact his agenda.

### 2.2.2. The rise in partisanship

During the mid-20<sup>th</sup> century, divided government did not necessarily hamper the president’s ability to pass legislation because of the intra-party divisions experienced by both Republicans and Democrats. The two major parties were “big tent” parties including factions affected more by region than ideology, such as Southern Democrats and northeast Republicans. Both groups represented a different brand of their respective political parties, which drew them closer to the other party’s positions. That meant a Republican president like Richard Nixon could receive policy support from a large number of conservative Southern Democrats and Democrat Bill Clinton could acquire the votes of some moderate northeast Republicans.

But, Congress changed during the last part of the 20<sup>th</sup> century. Partisanship in the institution increased (Sinclair 2006). Congressional parties became more uniform and, as a result, intra-party divisions have decreased. Constituent bases for the two parties means the electoral connection weakens intra-party divisions and increases ideological homogeneity (Jacobson 2003). Party unity scores have risen dramatically in the last 30 years (Congressional Quarterly 2013). In the 112<sup>th</sup> Congress, the most conservative Senate Democrat was more liberal than the most liberal Senate Republican. That meant there was no ideological overlap between the two parties (Matthews 2012). Poole and Rosenthal conclude that the polarization of Congress is at its highest levels since 1900 (Poole and Rosenthal 2007).

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<sup>12</sup> For discussions of the phenomenon, see Cox and Kernell (1991), Fiorina (1996), and Mayhew (2005).

As a result, party control of the Congress affects a president's ability to pass initiatives. In a period of opposition control, presidents have fewer opportunities to peel off outliers in the opposition party. That impinges on the ability to forge electoral coalitions – either for simple majorities or at least claims of bipartisanship in governance.

However, increased partisanship levels have impacted presidential success in Congress even when the opposition party is in the minority. The number of majority senators typically must exceed 59 to invoke cloture and increase the chances of presidential success. Such a majority has been rare in the past 30 years; Democrats achieved it only once, for less than a year in 2009-2010, and Republicans did not reach that number at all.

### 2.2.3. Congressional resurgence vis-à-vis the Presidency

Coupled with divided government is the resurgence of Congress as check on presidential power. In the mid-1880s, Woodrow Wilson, then a graduate student at Johns Hopkins University wrote a dissertation, later published as a book titled *Congressional Government* (Wilson 1965). Wilson's thesis was that U.S. government power rested in Congress, not the presidency. Policy leadership was the purview of the legislative body and the presidency was a decidedly secondary branch to the dominant legislature.

But by the turn of the 20<sup>th</sup> century, Wilson reversed himself. He wrote another book, titled *Constitutional Government in the United States*, arguing that power had shifted to the presidency (Wilson 1908). Wilson himself later became president and sought to expand president powers further.

Nor was he alone in doing so. Early 20<sup>th</sup> century presidents such as William McKinley and Theodore Roosevelt created a modern presidency of expanded presidential leadership and powers (Gould 2009). Some intervening presidents disputed that approach. For example, William Howard Taft argued that the president "can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied within such express grant as proper and necessary to its exercise." (Taft 1967, p. 139-140). However, by the 1930s, President Franklin D. Roosevelt had institutionalized the modern approach to the presidency by expanding presidential power and the heightening expectations of policy leadership. Lyndon Johnson used expanded presidential power to pass Great Society legislation and pursue the Vietnam War largely on his own. Richard Nixon continued Johnson's expansion, particularly by unilaterally impounding Congressionally-appropriated funds.

By the beginning of the Nixon administration, however, the willingness of Congress to defer to the president was fraying. The Vietnam War and the Watergate scandal tarnished the credibility of the presidency and led to Congressional action to restore Congressional prerogative. Congress passed two major actions to restore its role. The Budget and Impoundment Act increased Congressional power over the budget-making process, while the War Powers Act limited presidential war making power. Congress also took the unusual action of initiating impeachment proceedings against a sitting president, only the second time such an action had occurred in U.S. history. (The first time had been during the era of Congressional power Wilson wrote about).

The midterm election of 1994 was another example of Congressional resurgence when Republicans gained control of both houses of Congress for the first time in forty years during the Clinton administration. The 104<sup>th</sup> Congress briefly acquired a policy initiative role almost always held by the president. Although the president later re-surfaced as a legislative leader, the second impeachment of a president in the nation's history again demonstrated Congress' willingness to act aggressively vis-à-vis a sitting president.



The struggle between Congress and the president has continued with President George W. Bush's unitary executive approach, President Obama's use of executive orders, and Congress' attempts to block presidential recess appointments and ignore the president's agenda, particularly during periods of divided government. The continuation of the conflict indicated an aggressive Congressional stance vis-à-vis the president that is exacerbated by divided government. Congressional investigations are much more common in periods of divided control where opposition party committee chairs hold subpoena power than in periods of single party control.<sup>13</sup>

#### 2.2.4. Effects on media role in Supreme Court nominations

Institutional processes of making policy have been affected by divided government and an increased partisanship in that divided government, as well as a resurgence of institutional tension between Congress and the president. The tension produced by this resurgence has spilled over into the judicial selection process. Whereas senators previously during the 20<sup>th</sup> century usually accepted deference to the president's appointment power over the judicial branch in the past, the post-Vietnam/Watergate atmosphere of Congressional role saw a different approach. The Senate slowed down the process of judicial selection – both for the Supreme Court and appellate positions. Senators also used ideology as a factor in vote decisions rather than relying primarily on merit.<sup>14</sup>

In divided government, each senator plays an individual role in nominations. The tension is high for each senator since the vote is recorded and constituents and groups can determine how the senator voted. Moreover, interest groups may use the vote as a gauge of whether future electoral and policy support will be forthcoming. The importance of individual senators is indicated by the process of courtesy calls. Now nominees are expected to make courtesy calls on all senators who wish to talk to them, whether or not the senator sits on the Judiciary Committee. These are partly media-oriented sessions since, before or after the session, the senator will pose with the nominee for the benefit of the press.

One effect of institutional tension is the ability of competing players to shape the public discourse on the nominee. Divided government, i.e. when the opposition party controls the Senate, means likely critics of the appointment are in a position to shape the agendas of confirmation processes. (In a period of high party unity, even a party without control of the Senate, may well block a nominee or, before that, indicate to a president to withdraw a nomination before it is subject to likely defeat.) Today, since media generally follow power in Congress, opposing voices can be more effectively heard during the hearing process, debate, and final votes. With power, opposition party leaders and committee chairs who are in a position to stop a nomination gain more publicity because of their power over a president's nominee.

The opposition and the press form a symbiotic relationship. Journalists turn to the opposition to meet news values of conflict. Without that conflict in the story, it is more difficult to justify coverage of the nomination process. Opposition party senators, supplying that conflict, utilize the press to shape press coverage.

Media imperatives are satisfied by a process embroiled in conflict, thus heightening the interest of the press in the story. Partisanship not only makes a Supreme Court nomination a more contentious process, but also a more partisan one. This all fits neatly into the conflict narrative of the media and increases media interest in the judicial selection process. It defines the conflict in easily understandable partisan and ideological terms. News organizations describe judicial nominees as conservative or liberal today, depending on which president appoints them. For

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<sup>13</sup> See Parker and Dull (2009). For another view, see Mayhew (2005).

<sup>14</sup> See Cameron *et al.* (1990), Epstein *et al.* (2006).

example, Elena Kagan was described as “having a liberal bent” and the word “liberal” was used in reference to her nearly as much on CNN as on Fox News (Hochberg 2010).

Another element is the attention to the Senate Judiciary Committee. During most of the 20<sup>th</sup> century, Congressional committees became the loci of power over legislation as well as confirmation processes (Deering and Smith 1997). The Senate Judiciary Committee acquired greater power to shape the process and its outcome by first insisting on a role and then enhancing that role through hearings. That responsibility has been entrenched in the public’s mind through live television coverage of the committee’s questioning of the nominee. Again, the news value of conflict has amplified press interest in what this Congressional committee does, even though press coverage of committees generally is uncommon.

In both chambers, power has tilted somewhat back to central party figures in recent years, thus reducing the power of committees. However, the Senate Judiciary Committee still performs an independent function on nominees. This could be due to the extensive press coverage of the committee’s hearing process that heightens the value of each committee member’s role on the committee and in the nomination process.

The committee’s role is not limited to the hearings. It also is instrumental in querying nominees through its lengthy questionnaire requesting information on past speeches, associations, activities, statements, etc. All of this communicates the seriousness with which the Senate undertakes its “advise and consent” role through the committee.

The resurgence of Congress has affected Supreme Court nomination processes as the Senate has sought to take its time in carrying out its deliberative responsibilities and to do so in its own inimical way. The Senate’s reluctance to act expeditiously has applied whether the Senate is in the hands of the president’s party or the opposition party. President George W. Bush sought to expedite the Senate’s consideration of Judge Alito, but was rebuffed by the Republican chair of the Judiciary Committee who countered that “We have to do it right, and we’re not necessarily going to do it fast.” (Specter 2005).

Time, and what fills it, also enhances news media role because it offers the opportunity for more news coverage. Longer confirmation processes increase the number of events that become news pegs for journalists over that time period. These range from release of the results of FBI background checks and the nominee’s answers to the questionnaire to committee hearings and deliberations. There also is the full Senate’s debate and final vote. Time also provides more opportunity for the news media to engage in editorializing about the nominee, producing public opinion polls measuring public sentiment, reporting interest group reactions, and engaging in independent investigations of the nominee’s background. Time also allows interest groups to produce their own pseudo-news events such as the release of reports, press conferences, testimony before the Judiciary Committee, etc.

A longer confirmation process fits news values and expands the media’s role in affecting how the process unfolds. The media do so independently, but also do so through the efforts of other players seeking to use that time to move public opinion. Obviously, a rapid process does not allow time for the public to be engaged through media coverage. The longer process opens the opportunity for the battle to be engaged over how the nominee is portrayed through various events, and the news media become the primary battlefield.

### *2.3. Media influence on political processes*

Over the past twenty years, the rise of Internet-based media has changed the way American politics is conducted. Web sites, email, blogs, twitter, Facebook, and the

invention of mobile access to data has altered the habits of Americans and, consequently, the communication strategies and tactics of elected officials, candidates, groups, and other elite players. However, media developments shaping the Supreme Court nomination process reach beyond the past twenty years. They stretch across nearly a century of media changes that have impacted not only politics generally, but also the judicial selection specifically.

The media's capability to serve as a linking mechanism between government and citizens has expanded with the explosion of media forums for the dissemination of news and information. The consequence has been emphasis on image in governance that has reshaped how public officials make decisions and relate to the public. Each of these developments has shaped political processes, including the Supreme Court nomination process.

### 2.3.1. Media capabilities

In 1910, the dominant medium for the transmission of mediated news and information was the same format that had been common one hundred years earlier – the print newspaper. Although soft news and opinion magazines such as *McClures* and *The Century* were beginning to impact politics at the time, the daily newspaper was the main source of news. Technology had enhanced the speed of printing and the size of a press run, but it not created new media formats.

However, throughout the 20<sup>th</sup> century, new technological formats would be introduced that dramatically altered the way Americans received news. They extended from radio to television to the Internet. And within each of these media forums, there was a range of media programs from talk radio to television news and talk programs to blogs, Facebook, YouTube, Twitter, etc. The average citizen had the potential to receive news from a variety of sources – print media, broadcast media, and Internet-based media such as blogs and social media – and not just newspapers.

Moreover, news media organizations over the 20<sup>th</sup> century became media conglomerates organizationally and financially capable of covering news rapidly in various parts of the world. Radio and television stations held monopolies on a limited number of frequencies and, buoyed by the creation of networks, offered large amounts of entertainment and information programming. Communication technology such as the telephone, the portable computer, broadcast satellites, and the Internet aided newsgathering and established media organizations as rapid conveyors of breaking news and information. Policymakers received the latest news from CNN and not official channels.

News organizations have faced financial challenges as advertising revenue has plummeted in the last decade. As a result, reporting staffs have been cut, news bureaus pared back, and coverage has shrunk through traditional mechanisms such as on the ground journalists. News media organizations are seeking to adapt to the new financial environment, particularly by partnering with new media companies and incorporating social media components into their traditional news presentation. Current trends suggest the future may be different, but the 20<sup>th</sup> century saw an expansion of media organizational power that still influences American politics.

However, it is not just the availability of media and its news surveillance ability that has changed the media's role. It is the public's use of that media. Television, with its visual capability and its immediacy, acquired a central role for the average news consumer in information delivery by the early 1960s. That dominance is still true today, although not for young people. Young people turn to the Internet for news (Roper Organization 1979, Pew Research Center for the People & The Press 2011, Pew Research Center Journalism Project 2012). The Internet, with its capability to disseminate vast amounts of information increasingly has become a valued source of news from both traditional news outlets as well as new ones. By 2012, 39 percent of Americans were reporting they got their news "yesterday" from online

news sources, compared with 24 percent who did so in 2004 (Sasseen *et al.* 2013a).

These developments have placed the news media in a more powerful position as an information source for the average citizen than was true a century ago. Even the rise of political blogs has not decreased reliance on traditional media.<sup>15</sup> Rather, it has supplemented, adding more sources for news and information. Thirty one percent of Americans with mobile devices say they now spend more time reading or watching news and 43 percent relate that using their mobile device is adding to the news they consume. Perhaps most encouraging for media role, 49 percent of those with less than a college education say their mobile device is increasing their news consumption (Sasseen *et al.* 2013b).

The dominance of traditional media is still present – both offline and online. While television use still outpaces the Internet as the main source for news, traditional media also enjoy a significant presence in online news delivery. According to Nielsen, half of the most visited news sites online are owned by traditional news organizations such as CNN, the *New York Times*, and *USA Today* (Nielsen 2012).

### 2.3.2. Governance as symbolic image

“Politics is for most of us a passing parade of abstract symbols.” (Edelman 1985, p. 5). Murray Edelman described the way ordinary citizens interpret the spectacle of politics they encounter in their daily lives. That spectacle has little to do with actual administration, but is critical for the outcome of major decisions that involve the public’s approval.

Symbolic image in governance is hardly new. Clothes, buildings, traditions, and processes have been designed to convey certain images. Ceremonies of inauguration and investiture of power have characterized American politics, although to a more limited degree than European systems. These images convey messages of transfer of power, order, and authority. They are referential in the sense that they stand for something else – a principle in the minds of citizens. But they also can convey emotion.

But symbolic governance has moved beyond ceremonies, particularly with media role as a linking mechanism. The last century has been characterized by visual media – photographs and video clips – rather than just print, which magnifies the importance of image. Media are particularly adept at focusing on appearances rather than policy or process substance. Images fit news values of human interest and a short-hand form of communication.

For example, the communication of the State of the Union message by the president was conducted through written report for the first 125 years. However, since Woodrow Wilson, presidents have personally visited Capitol Hill to make a speech. Those speeches first were broadcast live on radio and then on television. They were moved from daytime to prime time to increase the audience size. Leaks about the content of the speech appeared prior to the speech to heighten attention. Then members of Congress began to use the speech to make their own symbolic points. Supporters became props for the public in indicating public approval. Opponents sat stony-faced to symbolize public opposition. And even vocal criticism of the president from the floor erupted. All of this around a speech that is constitutionally unnecessary and was not employed until the 20<sup>th</sup> century.<sup>16</sup> The substance of the speech can be lost in the emphasis on the surroundings, the delivery, and the reaction.

The State of the Union speech is only one example of a media-oriented event laced with symbolism of presidential, Congressional, and public symbolism. Specific

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<sup>15</sup> For a discussion of the use of political blogs, see Karpf (2012), Perlmutter (2008), Davis (2009), and Kerbel (2009).

<sup>16</sup> For a discussion of the history of the State of the Union speech, see Hoffman and Howard (2006).

examples include George W. Bush standing atop the rubble of the World Trade Center and promising retribution, Barack Obama hugging victims of Hurricane Sandy, and Bill Clinton holding a town meeting and answering questions from average citizens. These events convey images of determination, compassion, and accessibility. The rise of pseudo-events designed explicitly for media – from news conferences to rallies to photo-opportunities – indicates how political players have adapted to the role of the media to further particular political agendas through imagery. Such symbolic messages cannot be conveyed without media.

The nature of news media – such as an emphasis of visualization, simplistic explanations of complexity, and personalization - lends itself to conveying symbolic messages. Not surprisingly, the governance image becomes the object of attention, not only by the press but also by other actors affected by press agendas. The result is governance through symbolic image.

### 2.3.3. Effects on media role in Supreme Court nominations

The confirmation of Clarence Thomas was the ideal news story with its combination of recurring news interests - sexual scandal, race, and ideological conflict - and the clash of competing interest groups signaling to the press the issues involved in the process. Due to media imperatives of reporting news, after the announcement of Anita Hill's charges, the Thomas nomination garnered saturation coverage. According to an NBC News executive vice president, the networks latched onto the Thomas story because of its combination of recurring news interests - sex, race, and politics. "Very rarely had we seen anything like this where all of these issues converged in one place at one time." (Broadcasting 1991).

The Thomas nomination example is extreme. Other confirmations - before and since - have lacked such drama. But this case does suggest the importance of image in the determination to cover Supreme Court nomination processes. Thomas and Hill were symbolic of certain political aspects current in U.S. politics at the time. Supreme Court nominations have become an element of current stories and symbolic of larger struggles occurring within American politics. For example, the appointment of Sandra Day O'Connor occurred at a time of intense public debate over the legal status of women as evidenced by extant gender discrimination cases and the debate over ratification of the Equal Rights Amendment. Similarly, Sonia Sotomayor was nominated when immigration reform dominated news headlines.

The Thomas case also suggests the media's capability to devote resources to a Supreme Court nomination and the public's interest when that investment is made. Unlike other confirmations, the Thomas hearings dominated news coverage over several days and that coverage acquired a high level of public interest. Players in the nomination process are aware of this potential. Indeed, since some level of attention is a given, the question is how that attention will be allocated. Who will receive it? How will it be used to further agendas.

The Senate Judiciary Committee hearings are the focal point of the confirmation process; indeed, the most significant public event of the entire process. The committee members, the White House, and the nominee know that the several days of nominee testimony is equivalent to a presidential candidate debate in the ability to create drama for media audiences.

The ceremony fits news values as a confrontational setting. The nominee sits at a witness table facing the curved bench behind which committee members sit. But behind the nominee can be found the nominee's White House handlers, representatives from various interest groups waiting to testify or merely interested in noting the nominee's views on positions of interest to them, and, of course, the members of the press taking notes and preparing the news copy that other players, including the public, will read or hear that evening or the next morning.

Senators and witnesses, including the nominee, are well aware that television networks are broadcasting live. CSPAN airs the hearings live, while CNN, MSNBC, and Fox often do the same. The major broadcast networks will carry clips of the hearings on the first day as well as on subsequent days, if major news occurs. Any out-of-place word or phrase will be on the Internet within minutes, repeated in that night's broadcast news, and on the front pages of print newspaper editions the next day.

Senators, the nominee, groups, and even the president, indirectly, are on stage during the several-day event. Senators know they can make news with the questions they ask, the tone they take, and the answers they may elicit from the nominee. Senators' questions are scrutinized by reporters, while groups are watching to determine how the groups' concerns are represented in questions.

Given the unblinking, and often unforgiving, nature of the television image, today the visual presence of the nominee matters. For example, with his scraggly gray/black beard, Robert Bork appeared as an out-of-touch intellectual smirking at the senators and seemingly bored with the proceedings. Elena Kagan, on the other hand, appeared intelligent but also perky, personable, and funny. The camera presence symbolizes the candidate's qualifications through image. For example, Clarence Thomas seemed to exhibit the right amount of calm and outrage to undermine Anita Hill's charges among the majority of Americans who believed he should still be confirmed. Since Bork, nominees are coached on substance, but also on style of presentation. "Murder boards" emphasize not just the right answers to legal questions, but the right way to say them.

Another feature of the hearings affected by the media's coverage is the role of other witnesses, particularly those opposing the nominee. Typically, a lengthy list of groups seeks to participate as witnesses, but that list of witnesses has grown as television coverage has increased. In January 2006, 31 witnesses testified before the committee regarding the nomination of Judge Samuel Alito. By contrast, twenty one witnesses testified in the hearings on William Rehnquist's nomination in 1971 (United States. Congress. Senate. Committee on the Judiciary 1971, 2006). In the 1940s through most of the 1960s, the average number of groups involved in a confirmation process was two (Cameron 2013). Moreover, the number of groups testifying against the nominee lowers the likelihood of a positive confirmation vote (Segal *et al.* 1992). That may well be related to the extent of media coverage of opposing witnesses, since such coverage fits news values of conflict.

Still another change is the role of the nominee questionnaire administered and issued by the Senate Judiciary Committee. In addition to personal financial information and background facts, the questionnaire requests a copy of every speech the nominee has given, every position held with various organizations, and the policy statements of those organizations with whom the nominee has affiliated. When the results are distributed to the press, the nominee's responses initiate news stories about financial net worth, membership in social clubs, and other potentially newsworthy information.

The release of the questionnaire is a newsworthy moment that elicits press attention, particularly if there is some previous speech or group membership that would spark controversy. The questionnaire can be fodder for senator's questions at committee hearings, thus provoking another round of publicity as reporters get another news peg of a senator posing a question. For example, in 1993, Senator Hatch used Ruth Bader Ginsburg's answer to a questionnaire query about the race and gender of her employees to note that she had never hired an African-American as a clerk (United States. Congress. Senate. Committee on the Judiciary 1993, p. 131-132). That prompted a spate of news stories about Ginsburg's commitment to minority advancement.

The media's capability also affects how reporters approach reporting on a Supreme Court nominee. Journalists are more likely today than in the past to conduct investigations of a nominee. These are aided by opposition groups willing to utilize the press to influence public opinion. This press scrutiny can be a significant factor in the outcome of a nomination. In 1993, the *Washington Times* covered Bruce Babbitt in a series of investigative stories linking him with Las Vegas gambling debts (Seper 1993a, 1993b, Seper and Bedard 1993). The administration denied that the stories affected Clinton's decision making (Clinton 1993). Yet, Babbitt was passed over by Clinton, twice. Another case was the nomination of Judge Douglas Ginsburg by President Ronald Reagan six years earlier. Ginsburg seemed the ideal Republican president choice – a young, conservative judge who also had been a former Harvard Law professor. However, press reports of Ginsburg smoking marijuana while on the law faculty led to Ginsburg's quick withdrawal (Broder 1987).

The plethora of media outlets means Supreme Court nominations are not just covered by the newspapers, as was true 100 years ago. Today's story is available to a varied and fragmented audience paying attention to print, broadcast, and/or Internet. These include traditional elite media sources such as the *New York Times*, the *Wall Street Journal*, or the *Washington Post*, but also traditional media's forays into the world of new media such as the *Law Blog of the Wall Street Journal*. Then, there are other non-traditional media blogs such as *SCOTUSblog*, and *The BLT: The Blog of the Legal Times*. On Twitter, Supreme Court news can be read by following feeds provided by reporters such as Adam Liptak (New York Times), David Savage (Los Angeles Times), or Joan Biskupic (Reuters).

Political players seeking to influence the public's perception of the nomination process are aware of the public's reliance on news media— on this story as well as many others – is an opening for influencing that perception. The need for players to influence the nomination process – both the White House and interest groups – leads them to the press as a means to impact still another player – the public. For political players seeking to influence the public's perception of a Supreme Court nominee, the media are a prime outlet.

### 3. Signaling and image-making

Signaling has been an internal process in the nomination process for a long time, perhaps since the beginning of federal judicial selection. Senators have privately communicated to the White House the names of nominees who would win confirmation easily or result in a tough confirmation battle. Interest groups with close ties to an administration have vetted nominees privately.

That internal communication among elites still occurs today through private one on one or small group conversations. For example, interest groups will be given lists of potential nominees by a White House official with the expectation that the group will signal who is and is not acceptable. Senators privately signal their intentions through the nominee's courtesy visits.

However, with the involvement of the public, signaling no longer is simply an elite process. The public's involvement means signaling is conducted publicly as well, which means the press is critical as the medium for communicating such signals. The press plays this role because it already serves as a communication mechanism among players. Its role in this process is an extension of that reality. Indeed, it is the most efficient way to signal the general public.

Signaling occurs throughout the confirmation process, and even before a nomination occurs. Sometimes signaling takes place even before a vacancy. Presidential candidates signal how they will approach judicial nominations. For example, while a candidate in 1988, George H.W. Bush promised that he would appoint judges who would not be part of a "liberal majority." (Rosenbaum 1988).

During the presidential selection stage, presidents signal who they might choose and senators and groups signal who they may or may not support. It continues through the confirmation stage as other players signal their intentions. This can occur through thinly-veiled press statements, questions to the nominee and other witnesses in hearings, and actions such as group public relations campaigns and mobilization of activists or the absence of such efforts.

In the case of institutional fragmentation, signaling becomes more complicated. In divided government situations, the signals the opposition gives to the public determine the nature of the selection and confirmation stages. This is particularly true when opposition leaders signal their intention to acquiesce to or fight against a nominee. An example was Senator Harry Reid's comment when Harriet Miers was nominated by President George W. Bush in 2005. Reid said the Court "would benefit from the addition of a justice who has real experience as a practicing lawyer." (NBC News 2005). Through the absence of a negative reaction, Reid was signaling public satisfaction with the nominee.

However, when opposing party leaders intend to use their positions to oppose a nominee and block confirmation, early signaling is crucial, as is the media's role in that signaling process. Clearly, the White House desires the signal to be communicated that confirmation is inevitable. If such messages dominate media coverage of the initial announcement, then opponents may be less willing to invest precious political capital. Also, potential opponents only weakly disposed one way or the other may be inclined to declare early support in order to be on the right side early on. That is why opposition signals must be sent before such views on the part of the public, groups, editors and reporters, and senators harden.

The classic example of this tactic was Senator Edward Kennedy (D-MA), who, within hours of the announcement of Judge Robert's Bork's nomination, delivered a speech on the Senate floor lambasting Bork. Had Democrats not controlled the Senate, Kennedy's speech likely would not have had much effect on the Senate majority. The object of Kennedy's efforts was the group of fellow Democratic senators who would have been inclined to offer quick, positive assessments of the nominee in line with the inevitability factor current for presidential nominees.

Signaling via the press by the opposition can occur even before a presidential announcement. Such signaling warns the administration concerning certain nominees before a decision is made. It also prepares other players – senators and groups – that opposition is pending. For example, in 1993, while President Bill Clinton was considering nominating Interior Secretary Bruce Babbitt, Senator Orrin Hatch (R-UT) signaled through appearances on the talk show circuit that he would oppose Babbitt, if nominated (Davis 2005, p. 117).

Clearly, such signaling matters more when the senator plays a crucial role in the confirmation process. Hatch was the ranking member of the Senate Judiciary Committee. His cues to fellow Republicans were important signals of the acceptability of support or opposition to fellow senators. Similarly, Reid's signal when Miers was announced was an important cue to fellow Democrats that the majority leader would not head an opposition effort.

Interest groups engage in signaling through the press as well, which has been exacerbated by the tension between the Congress and the president and, to an even greater extent, by divided government. Groups can take signs from senators about whether an opposition effort will be worthwhile. But they also can interact with senators to spur them to act independently rather than accept the administration's image of inevitability. In divided government or even when the majority party lacks a filibuster-proof majority, the views of opposition groups can be important in White House and Senate reaction. For example, Nan Aron, director of the liberal legal group, Alliance for Justice, routinely promises to oppose Republican nominees the group dislikes. Her signals can be dismissed when a



Republican president commands a Senate majority, but Democratic control makes her signals important. Even when Republicans control, but lack a filibuster-proof majority, her signals carry weight with a potentially emboldened Democratic minority.

Since the public's view of the process is not based on first-hand experience, but rather images, players must attend to the question of what type of images exist in the minds of citizens about the process and particularly the nominee. Image-making becomes an important determinant in the success of a Supreme Court nomination and factors into the fundamental decision of who the president chooses and how senators vote.

Judicial selection has become a public process prone to the same emphases as other public selection processes such as elections and executive branch appointments - i.e. image-making to shape mass perceptions. As presidential campaigns seek to shape the voters' images of a candidate, so Supreme Court nominations have become an attempt by the White House and other players to secure certain perceptions of the nominee in the minds of the public.

Contrasting images of a nominee, and the implications of the nominee's role on the bench, compete with each other in both the presidential selection and Senate confirmation stages. Image-making is more intense in the confirmation stage because the process can be centered on a single individual rather than a group of prospective nominees. However, even during that stage, the White House, senators, and interest groups, as well as the press, will speculate about potential nominees and attempt to shape public images of those prospective nominees.

For example, President Clinton shaped an image of a nominee with a "big heart" who understood the political process (Davis 2005, p. 138). The description matched three of his potential nominees in 1993 and 1994 – Senate Majority Leader George Mitchell, New York Governor Mario Cuomo, and Interior Secretary Bruce Babbitt. Clinton wanted to shape the image of his likely nominee even before a selection announcement.

But others also seek to set public images, particularly by re-casting the White House's image. These include various groups, the press, and opposition senators. Those images are intended to blunt the White House's image with another, less desirable image. Again, Kennedy's effort was to describe an America with Robert Bork on the U.S. Supreme Court as an undesirable one, thus creating an image of looming disaster with a Bork confirmation.

Again, the news media are critical to any image-making process. For example, the White House rarely misses the opportunity to engage in a live nationally televised ceremony attending the announcement of a nominee. President Nixon even held one such announcement during primetime television to achieve the largest possible television audience.

The backdrop for such announcements reinforces the image of presidential power and, in the White House view, increases the inevitability of confirmation and elevation to the highest court. The president is physically present, surrounded by a crowd of supporters. The trappings of the White House are employed, such as the Rose Garden, Oval Office, or the East Room.

The president's rhetoric on such occasions seeks to set the tone of the confirmation process. For example, President Bill Clinton described Judge Ruth Bader Ginsburg as the Thurgood Marshall of the women's movement, establishing the image of a women's rights advocate. He also sought to portray her as confirmable because she was a centrist who would build a consensus among the justices (Cannon 1993). Similarly, the Obama White House described Judge Sonia Sotomayor's background as "an American Story" because Sotomayor had "lived the American dream" of

going from a public housing project in the South Bronx to Princeton (The White House Office of the Press Secretary 2009).

The news media's role is to convey that rhetoric, along with the visual images, to the public. The bank of television cameras and gaggle of journalists is stationed in the rear to assure that the proceedings reach the public, who have become part of the evaluation process of a nominee. That ceremony is particularly important because it provides the public's first glimpse of the new nominee.

Image-making through the press continues through the confirmation stage as interest groups issue reports regarding nominees, senators release information about the nominee and then spin that information, and the White House continues to make statements regarding the nominee. The press becomes the vehicle for all of these efforts.

In an era of institutional friction, the role of image-making is more critical since a president cannot guarantee confirmation and the opponents have the potential of scuttling the nomination. The public becomes the tipping point in deciding this issue between the two competing forces. The images in the public's mind are shaped by news media coverage. This is particularly true for constituents in the states of key swing senators who ultimately will provide the votes for confirmation or defeat.

One example of White House image making via the press in a divided government setting was the nomination of Clarence Thomas by President George H.W. Bush in 1991. The White House instituted a PinPoint strategy that emphasized Thomas' embodiment of the American dream. Thomas was an African-American who had emerged from a working class background exacerbated by racial discrimination to graduate from Yale and become a federal judge. The PinPoint strategy, named after the small town where Thomas was raised, centered on directing reporters to Thomas' past in Georgia – his poverty-stricken community, his grandfather's influence, and Thomas' own desire to break out of that environment and succeed. In conjunction with the White House's efforts, a conservative group ran an ad in the *Washington Post* promoting Thomas and featuring a photograph of poor, black children (Watson and Stookey 1997, p. 117).

Similarly, the news media's capabilities make it the prime tool for image-making by players in the nomination process. And the media's own emphasis on symbol transforms image-making into a battle over symbols. For example, was Clarence Thomas a symbol of the American dream – an African-American who overcomes the effects of racial discrimination to become successful? Or was he a symbol of sexual harassment that represses women in the workplace? Was Sonia Sotomayor another example of American success through hard knocks? Or was she the symbol of racial arrogance with her "wise Latina" remark?

Various players – the White House, senators, and groups – use the media events of the process to create their own images of the nominee to fit particular political agendas. They conform to current topical discussions of the time in order to shape images of nominees. They also use public expectations about Supreme Court nominees, particularly a more recent perception that justices should be close to rather than distant from the people.

The Supreme Court nomination process is a battle over images created by supporters and opponents to define a nominee, as well as those issues the nominee stands for. Those images are established in the public's mind through media messages. No other institution is as well suited as a forum for that battle than the news media, particularly when the news media stand ready to serve in that capacity.

#### 4. Conclusion

The media's role has been shaped by changed norms about how the public should be involved in governance issues, fragmentation and tension within the political process, and the media's own capabilities and imperatives that shape political coverage. These forces have expanded the media's role by involving the public to a greater extent in political selection processes and valuing public opinion about those particular processes, thus providing the need for a venue for including the public. In addition, transparency accentuates the media's role as a watchdog in government.

Also, elite conflict caused by institutional tension has fit neatly into the media's definitions of news. Divided government, increased partisanship, and tension between Congress and the president may lead to increased political gridlock, but it is fodder for media involvement in politics. The Supreme Court nomination process is another opportunity for elite conflict to be played out in public, thus inviting media coverage.

Finally, the media's own role in political processes generally has spilled over into a role in judicial selection. The media possess the capability and willingness to devote resources to covering confirmation struggles, particularly those fitting news values. And they are willing to cast those struggles in symbolic terms. These forces have had particular effect on two behaviors during nomination processes – signaling and image-making.

What does this mean for future research of the Supreme Court confirmation process and the media? It means scholars should look more broadly at the factors that affect nominations, both historically and currently, as well as the media's role in that nomination process. That role was not common in the 20<sup>th</sup> century. Yet, it is now. The difference is not wholly attributable to the Court's own docket or the behavior of the justices. Other forces in American politics and the media have contributed to the changed media role in the nomination process as well. What those forces and what impact they have should interest legal and communication scholars, as well as political scientist in the years to come.

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