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Canadian Judicial Nomination Processes and the Press: 'Interesting, in a Sleepy Sort of Way'

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Abstract

Most of the recent appointees to the Supreme Court of Canada have participated in a new Canadian judicial nomination process initiated by the current Conservative government. As originally formulated in early policy platforms, the process was intended to mimic features of US Senate judicial confirmation hearings and so would highlight the distinction (popular in US political discourse) between 'applying' and 'making' law. This led to widespread fears that any new public process would politicize judicial appointments and functions at the Supreme Court. The process turned out to be much more tepid than anticipated and so raises questions about what Canadians may have learned as a consequence of this new nomination process. This paper undertakes a qualitative analysis of reporting of four nomination processes from a select number of Canadian newspapers. The main object is to determine the degree to which readers might have been alerted to the distinction between law and politics or, put another way, between judicial activism and restraint. It turns out that this framing was not dominant in the coverage and that, instead, distinctive Canadian political preoccupations, like language politics, got channeled through this new political opportunity structure. The press, nevertheless, for the most part liked what they saw. Simply by focusing their gaze on the court and its nominees, the press reinforced the law's power and allure.

Key words

Courts; judicial nominations; hearings; media; Canada

Resumen

La mayoría de las personas nombradas recientemente a la Corte Suprema de Canadá han participado en un nuevo proceso de nombramiento judicial iniciado en Canadá por el actual gobierno conservador. Tal y como se indicó de forma temprana en plataformas políticas, el proceso estaba destinado a imitar las

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Many thanks to the workshop participants and to two anonymous referees for their comments. The paper's sub-title is taken from a Winnipeg Free Press description of Justice Marshall Rothstein's nomination hearing before a House of Commons committee in February 2006 (Oleson 2006).
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características de las audiencias de confirmación judicial del Senado de los Estados Unidos y pretendía destacar la distinción (popular en el discurso político de los Estados Unidos) entre 'aplicar' y 'hacer' la ley. Esto levantó un temor generalizado de que cualquier nuevo proceso público iba a politizar los nombramientos y las funciones judiciales de la Corte Suprema. El proceso resultó mucho más tibio de lo previsto, lo que plantea preguntas acerca de lo que los canadienses pueden haber aprendido como consecuencia de este nuevo proceso de nombramiento. Este artículo realiza un análisis cualitativo de la cobertura mediática de cuatro procesos de nombramiento de un determinado número de periódicos canadienses. El objetivo principal es determinar el grado en el que los lectores podrían haber sido alertados de la distinción entre el derecho y la política o, dicho de otro modo, entre el activismo judicial y la limitación. Resulta que esta perspectiva no fue dominante en la cobertura, y que, en cambio, consiguieron canalizar a través de esta nueva estructura de oportunidad política las preocupaciones políticas canadienses distintivas, como la política lingüística. A la mayor parte de la prensa, sin embargo, le gustó lo que vio. Simplemente centrando su mirada en la Corte y sus candidatos, la prensa reforzó el poder y atractivo del derecho.

Palabras clave

Tribunales; Cortes; nombramientos judiciales; audiencias; medios de comunicación; Canadá

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1. Introduction

Judicial appointment to high courts in Canada is formally within the jurisdiction of the Crown in Canada.[1] As a practical matter, authority is entirely centralized in the Parliamentary executive, namely, in the Prime Minister's office with assistance from his cabinet colleagues (principally, the Minister of Justice) (Hogg 2006, p. 528). Canada, after all, is the counterfactual to the 'first new nation' that is the United States (Lipset 1963). Having never rebelled,[2] Canada inherited British parliamentary institutions, refurbished so as to fit its federal form. Among those inheritances was the residue of unfettered discretion associated with the royal prerogative, which included high court appointments, that ultimately passed on to democratically elected authority in the House of Commons.

Once appointed, Canada's Constitution Act, 1867 grants to judges security of tenure ('on good behaviour') and a semblance of independence ('salaries are fixed and provided for by Parliament'). Other 'essential features' of the Supreme Court have been entrenched in the constitution since 1982, according to a recent Supreme Court ruling (Reference re Supreme Court Act 2014, paras. 91, 94). Certain qualifications, for instance, that three civilian-trained justices be appointed from the Quebec bar or promoted from the Quebec bench, have since been constitutionalized (Reference re Supreme Court Act 2014, paras. 91, 94). The method of appointment, however, remains solely within executive prerogative. The means by which short lists are created and judges chosen mostly has been a secretive process.

Calls for reform of the appointment process have been longstanding but intensified with the passage of the Charter of Rights and Freedoms in 1982. Judicial authority, now more than ever, was actively shaping the Canadian polity, hence, a closed and secretive process appeared intolerable. It was only with the election of Conservative Prime Minister Stephen Harper that a new process of judicial interviews of Supreme Court of Canada nominees before an ad hoc committee House of Commons was inaugurated. This has resulted in a batch of nomination hearings since 2006.[3] The committees have no formal constitutional authority, but the process is intended to roughly approximate Senate judicial confirmation hearings in the U.S. The innovation undoubtedly has opened up Supreme Court nominations to greater public scrutiny but also imperils, according to many in the legal community, the prestige and independence of Canada's apex court.

This paper undertakes a qualitative analysis of print journalism in selected Canadian newspapers regarding the first four nomination processes. I ask what Canadians may have learned from the press as those processes ran their course. What might readers have learned about the individual justices, the work of the Supreme Court, the Charter of Rights and Freedoms, and Canada's overall constitutional structure? I am principally interested in whether the process has become 'politicized,' as many legal commentators fear. The findings suggest that newspaper coverage predominantly had a legal frame, and therefore was mostly favourable toward the justices and the court, though little information about the court's work was elicited. In other words, the journalistic focus principally was upon

[1] See s. 96 of the 1867 Constitution.

[2] A minor rebellion in the mid-nineteenth century was easily quashed.

[3] Justice Marshall Rothstein was the first nominee to appear before the special committee in February 2006, Justices Karakatsanis and Moldaver appeared jointly in October 2011, and Justice Wagner, the most recent nominee at the time of the paper's completion, appeared before the committee in October 2012. A fifth nominee, Justice Cromwell, was appointed on 22 December 2008 while Parliament was not in session (it had been 'prorogued') despite announced plans to have him appear before a special committee. Since the paper's completion, nominee Marc Nadon appeared before a special committee in October 2013. His appointment was ruled constitutionally invalid in an unprecedented ruling by the Supreme Court of Canada in Reference re Supreme Court Act, ss. 5 and 6 [2014] SCC 21. His replacement, Justice Clément Gascon, was appointed without a hearing in June 2014.

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the individual justices, personalizing the work of the court, rather than on the court as a principal institutional player in Canadian political processes.

2. Methodology

The papers selected for the study represent a cross-country sample of tabloid (T) and broadsheet (BS) newspapers in both official languages.[4] In the French language, Le Journal de Montreal (T) and La Presse (BS) were selected for coding. In the English language, a regional selection of the Toronto-based Globe and Mail (Canada's 'national newspaper' with a business bent) (BS), the Toronto Sun (T), Winnipeg Free Press (BS), and Calgary Herald (BS) were also analyzed. The four nominations yielded up a set of 150 individual reports that either mentioned the nominee by name, or the 'Supreme Court,' in the seven days leading up to and seven days after the nomination hearing. Content analysis of news reports, signed op-eds, and editorials (printed and online) was undertaken with a view to answering a number of questions such as: how did the media portray the Supreme Court and judicial review; did they distinguish between law and politics or between judicial restraint and judicial activism; how was the appointment process itself portrayed? The overall object is to gauge the dominant frame through which the stories were told.[5] A coding sheet is attached as Appendix A.[6]

3. Legal and political frames

Lawyers and judges prefer to see a 'legal' frame predominate in journalism about the Supreme Court. Justices, after all, are not like politicians. They are constrained by the trappings associated with legal methods and legal reasoning, typically having recourse to such things as facts, text, and persuasive precedent. This is not uniformly the case, however (Frank 1963, Bellamy 2007). Such devices are not usually determinative, for instance, in vexing constitutional cases. In those circumstances, a high court's freedom of action can be as capacious as that of a legislature's (Posner 2008, p. 82). Drawing attention to the discretionary component in judicial decisionmaking – a 'politics' frame – risks attracting politicized portrayals of a partial court, its members seemingly subject to the same vicissitudes as, and no better than, ordinary politicians.

The media have a critical role to play in determining whether legalist concerns get actualized or assuaged. According to Spill and Oxley, 'public perceptions' of the US Supreme Court and its justices are 'based largely upon the media's portrayal' (Spill and Oxley 2004, p. 108). The high regard in which the US Supreme Court is held usually is attributed to media coverage in which there is 'little or no discussion of the underlying rationale' for the Court's decisions (Baird and Gangl 2006, p. 598). The operative assumption likely guiding public opinion is that decisions are

[4] Papers were selected with reference to large readership numbers within their city of origin (or nationwide numbers in the case of the Globe and Mail) and also for their representativeness across regions, official language, and diversity of ownership. The newspapers were selected immediately after Justice Marshall Rothstein's hearing in February 2006. The Winnipeg Free Press was included on the assumption that, because Rothstein was a Winnipeg-based judge, the local press would be more interested in a local candidate. This assumption turned out not to be entirely correct: the Winnipeg Free Press accounted for about 15 per cent of the total coverage we found during the Rothstein process, equivalent to the number of stories in the Calgary Herald and La Presse but well below the number in the Globe and Mail (35 per cent).

[5] By framing, I am referring to the way in which media select, organize, and make sense of the world (Gamson and Stuart 1992, Reese 2001). The dominant frame refers to the main messages readers take away after reading a news story. The assumption is that media have the power and authority to structure the way citizens think about issues of public concern (Hall 1982, p. 64).

[6] The methodology draws heavily on that deployed in Sauvageau *et al*. (2006). The coding sheet used here, for instance, is an abridged and adapted version of that used in the 2006 study. Coding instructions also are similar to those used there (Sauvageau *et al*. 2006, p. 240). Three law students were hired to collect and code stories (see coding sheet in Appendix A). In the case of disagreement between the three coders (typically disagreement turned on questions regarding 'tone'), the author resolved the coding dispute.

premised upon legal methods – those associated with precedent, principle, and reasons – and not upon politics – associated with bargaining and compromise (Baird and Gangl 2006, p. 599-600). If the press are central in the determination of whether the framing of news accounts will emphasize either a 'legal' or a 'political' lens, the stakes are rather large.

Baird and Gangl's controlled study of court reporting vignettes reinforce the predominant 'myth of legality' that helps to sustain the Court's legitimacy (Baird and Gangl 2006, p. 606). Spill and Oxley's study of newspaper and television news coverage during the 1998 term reveals that a political frame was dominant in television news broadcasts, with an emphasis on winners and losers, characteristic of sporting events (a standard journalistic convention) (Greenhouse 1996, p. 1551), while newspaper reporting was more nuanced, providing information about the 'political nature of the decision' and 'the role that attitudes and ideology play in the final outcome' (Spill and Oxley 2004, p. 29).[7] Reporting of such fine details, they hypothesize, 'clearly undermines faith' in the non-political nature of courts and judicial decisionmaking (Spill and Oxley 2004, p. 29). A study of newspaper and television reporting of Supreme Court of Canada decisionmaking revealed no such difference – newspapers, though providing greater information, were no less likely to emphasize a conflict or battle frame associated with politics (Sauvageau *et al*. 2006). The Canadian study confirmed findings in the U.S. that reporting of high court decisionmaking, particularly on television (Jones 2003, p. 654-655), often is uninformative and uninformed, though more in-depth reporting can be anticipated where high court cases have local salience (Hoekstra 2000, Haider-Markel *et al*. 2006).[8]

The judicial nomination process reveals a similar set of dynamics occurring outside the confines of the courtroom. This renders the process unstable, from a legal point of view. Beyond the control of judicial institutions and press information officers that help to shape positive images of the Court and its justices (Davis 1994, p. 53, Sauvageau *et al*. 2006, p. 202-203), appointment processes are vulnerable to the trappings of a political campaign (Davis 2005, p. 9). The political frame, one surmises, will therefore play an even more predominant role. Gibson and Caldeira's study of the Alito nomination suggests that even controversial nominations, though susceptible to being captured by political processes, are capable of keeping some distance from politics. This is because of a reservoir of 'institutional loyalty', sometimes called 'diffuse support' (Easton 1965, p. 273), that can be drawn upon whenever attention gets focused on the Court, as it did during the Alito confirmation hearings (Gibson and Caldeira 2009, p. 39-40). So long as nominees are able to reinforce these preexisting conceptions, that judges are not like politicians, 'opponents will find it difficult to substitute an alternative frame centered on ideology and partisanship' (Gibson and Caldeira 2009, p. 66, 95). The upshot of the contested Alito nomination battle was that the more 'people paid attention to the confirmation battle, the more supportive they were of the Court' (Gibson and Caldeira 2009, p. 113). Farnsworth and Lichter's study of selected nomination battles on television and in the New York Times yields similar findings (Farnsworth and Lichter 2006). Assessments of judicial nominees, they find, are unusually positive when compared to news coverage of politicians – coverage of nominees is far more positive than coverage of senators asking the questions, for instance – and this is so even in the case of nominees who attract an unusual amount of negative coverage (i.e. Clarence Thomas) (Farnsworth and Lichter 2006). Bogoch and Holzman-Gazit's study of nomination coverage in two leading Israeli newspapers also found that, for the most part, reports tended to focus on

[7] On the constraints of television news reporting of the U.S. Supreme Court proceedings, see Slotnick and Siegel (2001, p. c.3). On print reporting, see Greenhouse (1996) and Newland (1964).

[8] Standards of reporting do not usually rise to those of former New York Times reporter Linda Greenhouse. New online media, however, are generating new opportunities to rise above the prevailing norm (Goss 2003).

legal/professional qualifications. It was only in 2008, when the mechanics of the nomination process attracted quite a lot of political heat, that a political frame became predominant (Bogoch and Holzman-Gazit 2014, p. 630).

4. The appointment process

Granting exclusive authority of appointment to the governing party risks rendering Canada's highest court a sinecure for political patronage (Angus 1966). Prior studies have confirmed that there has historically been a close connection between appointment and affiliation with the political party in power (Russell and Ziegel 1991, Friedland 1995, p. 236). This is not to say that high court decisionmaking in Canada is highly politicized. Despite efforts by scholarly critics (Bakan 1997; Morton and Knopff 2000) and complaints about left-wing bias issuing out of conservative political movements, decision making by the Supreme Court of Canada generally is portrayed as non-partisan and of a high quality (Cotler 2008, p. 131-132).[9] This is how apex courts around the world, increasingly an audience for Canadian justices, also appear to view the court's record (L'Heureux-Dubé 2004; Liptak 2008).

Modest innovation, outside of Supreme Court appointments, was introduced with the adoption of judicial screening committees with the power to rate nominees (Ziegel 2012, p. 5). The most recent evidence suggests that this has resulted in appointments with fewer political connections and incremental improvements in the quality of judges appointed (Hausegger *et al*. 2010, p. 651). There are otherwise few constraints on the appointing authority. By statute, nominees to the Supreme Court must have served on a lower court or must have had a minimum 10 years of legal practice. Three civilian-trained judges from Quebec are guaranteed seats on the nine-person court.[10] There are further regional divisions that constrain Supreme Court appointments (by convention, two justices must be from Western Canada, three from Ontario, and one from Atlantic Canada). Ethnicity and gender also have become considerations in more recent appointments to the Court. It will still be the case, however, that the executive enjoys unfettered discretion in appointments to the Supreme Court (Ziegel 2012, p. 5). It was a significant development, then, when the Prime Minister introduced a public interview process for nominees to the Supreme Court of Canada

5. The reform project

In 2004, the House of Commons Standing Committee on Justice and Human Rights issued their report entitled 'Improving the Supreme Court of Canada Appointments Process' (Canada 2004). The committee found that the process 'by which Justices are appointed to the Court is largely unknown and lacks credibility in the eyes of many' (Canada 2004, p. 1). A majority of the committee recommended that the Minister of Justice appear in public in order to explain the process of filling vacancies and to speak to the qualifications of the next nominee (Canada 2004, p. 5). Justice Minister Irwin Cotler subsequently appeared before the House of Commons Standing Committee on Justice for two hours in order to speak to the credentials of the next two nominees, Justices Rosalie Abella and Louise Charron (Cotler 2008). Though wholly novel, it seemed inadequate to many.[11] Indeed, in their 2004 dissenting report, Conservative Party members of the Standing Committee on Justice had called for Parliamentary ratification of Supreme Court nominees (Canada 2004, p. 16).

[9] Characterization of the Canadian court as a counter-majoritarian institution simply has not taken hold (Sauvageau *et al*. 2006, p. 24-26).

[10] According to statute and, according to the Supreme Court, mandated by the constitution. See Supreme Court Act Reference (2014, paras. 91, 94).

[11] The initial process is described as a 'sham' in a Globe and Mail editorial. This was published in advance of the Wagner hearing (Globe and Mail 2012b).

The origins of the Conservative Party position are traceable back to its political antecedents in the Reform Party of Canada (1987-2000). This was a populist western-based political movement for which Stephen Harper was Chief Policy Officer and the principal architect of the party's 'Blue Books' (the Party's rolling 'Statement of Principles and Policies' on which it ran election campaigns). The Reform Party framed the Supreme Court's work principally in political, not legal, terms. The dominant narrative was that Parliament had abdicated its responsibilities in favour of an unaccountable liberal-minded Court operating under the undue influence of so-called 'special' interest groups. In its 1990 Blue Book, the Party declared that it supports 'a more stringent and more public ratification procedure for Supreme Court Justices in light of the powers our legislators are handing to the courts' (Reform Party of Canada 1991, p. 7). The Reform Party proposed that a newly reformed senate – the 'Triple E-Senate,' namely, a senate that was elected, effective, and equal – have carriage of the ratification process (Seidle 1991, p. 108).[12] The proposed edifice was clearly modelled upon U.S. constitutional text and practice.

The Conservative Party (the product of a marriage between two warring conservative forces, the Reform/Alliance Party and Progressive Conservative Party of Canada), has been less vocal about this but equally insistent about adopting a confirmation process. In their May 2004 dissenting report, the Conservative Party committee members declared that 'Parliament and the legislatures are no longer the only bodies involved in legal policy making, if they ever were' and insisted upon Parliamentary ratification of Supreme Court nominees (Canada 2004, p. 16). In its 2005 inaugural policy conference, the Conservative Party adopted this resolution: 'A Conservative Government will ensure that nominees to the Supreme Court of Canada will be ratified by a free vote in Parliament, after receiving the approval of the Justice Committee of the House of Commons.'[13] Though neither of these events has occurred – there have been no free votes and nominees have appeared before House of Commons special committees convened for that purpose – there is little evidence that Prime Minister Harper's thinking has evolved much in this regard.

Once in power, the Harper Government (when in minority and, as at present, majority government) embraced the process of public interviews before an ad hoc committee of the House of Commons (20 Feb. 2006). In announcing the new process that would be adopted for Justice Rothstein's nomination, the first nomination to kick start the process, Prime Minister Harper reaffirmed his preference for judges who were 'prepared to apply the law rather than make it' and who would avoid being 'inventive' in their rulings.[14] This will be familiar to many as the simplistic yet familiar framing of the judicial function popular among social conservatives. It aims to distinguish between the course of judicial activism – that of politics – and that of judicial restraint – which looks more like law. It is naïve because it assumes that assumes 'application' does not require 'inventiveness.'[15]

6. Resistance to reform

Renovation has been resisted, in large part, because of fears that politics would pollute not only judicial appointments to, but decisionmaking by, the Supreme Court. The Canadian Bar Association (the national body representing lawyers across Canada) expressed strong opposition to any form of Parliamentary review of

[12] According to the Draft Constitutional Amendment prepared by legal experts and ratified by the Party in May 1988.

[13] Conservative Party of Canada Policy Declaration (19 March 2005) at 5 <http://www.conservative.ca/media/20050319-POLICY%20DECLARATION.pdf>

[14] See Gordon (2006).

[15] Jerome Frank likens the view that judges have no power to 'change existing law or make new law' as the 'direct outgrowth of a subjective need for believing in a stable, unalterable legal world – in effect, a child's world' (Frank 1963, p. 38).

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candidates in its 2004 submission to the House of Commons Standing Committee on Justice:

Candidates should not be subjected to a congressional type process of public examination and review. This would politicize the appointment process and detract from the principle of the independence of the judiciary (CBA 2004, p. 1).

Retired Supreme Court of Canada Justice Claire L'Heureux-Dubé testified to similar effect, stating that her 'real worry [is] that there will be [a] process putting a candidate right in front of the public with the media in attendance, not looking for the best qualities generally, but looking for the failures, the little things' (L'Heureux-Dubé 2004).

United States Senate confirmation hearings represent, for many, the anti-model. These have been described as hearings that 'leave blood on the floor' (Carter 1994, p. 95), a 'battleground where groups wage holy war and the tactics reflect a take no-prisoners approach to combat' (Davis 2005, p. 6). So dysfunctional are Senate confirmation hearings, the argument goes, that they deter judges from allowing their names to go forward. Admittedly, the messiness associated with the Robert Bork and Clarence Thomas confirmation hearings are atypical. Instead, confirmation hearings have evolved principally into an occasion for Senators to lecture at length on constitutional matters in nationwide gavel-to-gavel coverage. At the same time, nominees are reluctant to reveal anything about their ideological proclivities (Stone 2010, p. 435). Indeed, there has been a discernible 'downward trend in nominee candor' though 'not as dramatic' a decline as some assume (Farganis 2011, p. 554). Little but platitude is offered to seal the confirmation deal. There is evidence, nevertheless, that confirmation hearings prove somewhat helpful in eliciting 'varying testimony and useful insights into nominees' interpretive views' (Comiskey 2008, p. 356) and that the hearings 'involve concrete discussion of judicial decisions' of mostly recent vintage (Batta *et al*. 2012, p. 8). Questions are asked and answered about past judicial decisions without, at the same time, violating judicial norms about proffering opinions before cases are heard (Batta *et al*. 2012, p. 15).[16] So important is past Supreme Court precedent to the confirmation process that Collins and Ringhand maintain that hearings 'function as a formal mechanism through which the Court's [prior] constitutional choices are ratified as part of our constitutional consensus'— the hearings generate 'common understandings' about past precedent (Collins and Ringhand 2013, p. 3, 8). Newspaper coverage of Supreme Court judicial appointments, however, exaggerates the degree to which divisive issues, such as abortion, dominate the hearings as well as the Court's own docket (Evans and Pearson-Merkowitz 2012, p. 1051).

Given the politically charged environment that is a U.S. Senate confirmation hearing, there were fears that the public judicial interview process in Canada would backfire. There was a further suspicion that, as the reform was initiated by Stephen Harper, this precisely was the intended outcome – to forever politicize the Supreme Court appointment process so that it looked more like the one in the U.S.

7. The hearings

Before turning to an analysis of the print reporting, I should foreground the discussion with a little more detail about the hearings. A short list of six candidates (selected from a much longer list prepared by the Minister of Justice) was recommended to the Prime Minister by an all-party committee of five members, with the Conservative party having a majority of three votes (Ziegel 2012, p. 12). The ruling party, in other words, has not given up control over the process (Makin

[16] Not only is past precedent discussed but, since 1986, every Supreme Court nominee (but for Clarence Thomas) was asked at least 10 questions about the nominees' prior decisions (Williams and Baum 2006, p. 76).

2011b). For each nomination (or in the case of the joint nomination in 2011), a special House of Commons committee was convened with representatives from political parties represented in the House of Commons, but dominated by the ruling Conservative Party. It is curious that the Prime Minister did not turn the matter over to the House of Commons Standing Committee on Justice and Human Rights, the committee with presumably a better feel for the dossier. Members of these ad hoc committees did not, however, lack in expertise – a number of committee members had participated in the process by which a short list of candidates was proffered. With the ruling party in control, and committee members of all parties having something of a stake in endorsing the candidate, little drama was to be expected.

The truncated timing between announcement and appointment also contributed to defusing the process. The first nomination of Marshall Rothstein lasted just under one week, with an announcement on Thursday (23 February 2006), a full-day hearing the following Monday (27 February) and appointment the next Wednesday (1 March). The joint nomination of two justices, Andromache Karakatsnais and Michael Moldaver, was even more abridged with an announcement on Monday (17 October 2011), an afternoon hearing two days later (19 October) and appointment two days after that. Richard Wagner's nomination followed a similar pattern with a Tuesday announcement (2 October 2012), a Thursday afternoon hearing (4 October), and appointment the very next day (5 October). The condensed timing between nomination, hearing, and appointment ensured that committee members would have little time to prepare for their encounters with nominees. Nor would it provide any opportunity for individuals or interest groups to provide meaningful feedback, if they were so inclined. Though it is unlikely that, with a more drawn out process, organized opposition to the nominees would have been mobilized (outside of the established party system in the House of Commons, that is), the stunted process ensured that 'external forces' (Davis 2005, p. 27) could not possibly have had time to percolate. So disillusioned was the press by the time of the Wagner nomination, the Globe and Mail editorialized that, if the Prime Minister believed that the nomination process needed fixing, he 'should believe in the process he created and give it time to work' (Globe and Mail 2012b).

Another factor that significantly dampened the proceedings were anxieties associated with 'demeaning the dignity' or 'embarrassing' the nominees. Anxious about this possibility, one committee member (NDP Member of Parliament and lawyer Joe Comartin) even threatened to boycott the proceedings (Tibbetts 2006). So as to assuage these concerns and to help guide committee members, Peter Hogg (Professor Emeritus of constitutional law at Osgoode Hall Law School and one of Canada's leading authorities on the constitution) was retained to guide the ad hoc House of Commons Committee on questioning appropriate to ask of judicial nominees at the first three hearings. Though committee members were not obliged to follow any particular protocol, they pretty much respected the spirit of Professor Hogg's guidelines. This was, he declared in his opening statement at the Rothstein hearing, a historic opportunity to prove the critics of the interview process wrong: 'This Committee has the opportunity to demonstrate that the Canadian virtues of civility and moderation can make an open and public process work' (Hogg 2006, p. 537). Hogg advised the committee members about the norms of judicial propriety: nominees could not forecast opinions about future or controversial cases. Though committee members were 'free to ask any questions at all' (Canada 2011, p. 1550) they should focus on whether the candidate had the 'right stuff' to be a Supreme Court judge: 'Does he have the professional and personal qualities that will enable him to serve with distinction as a judge on our highest court?' (Hogg 2006 p. 538). Hogg added, in the 2011 joint hearings, that committee members should expect answers to 'general questions on how the nominees reach decisions—they are both experienced judges, of course—how they interact with colleagues, their professional

lives and work, and any other matters that in your view bear on their ability to be a wise member of our highest court' (Canada 2011, p. 1550).

The result was a rather unilluminating process, drawing ridicule from some of the press corps who described the Rothstein hearing, under questioning by his 'political fan club,' as 'a coronation' (Martin 2006) and a 'love-in' (Samyn 2006). Press grumbling carried over into the joint Moldaver/Karakatsanis hearings, which were described as too rushed, overly 'genteel' (Winnipeg Free Press 2011) and 'akin to a meet and greet' (Makin 2011b). They elicited little about the judges' 'perspectives on law, except in the most general way,' observed a Globe and Mail editorial (Globe and Mail 2011b). In the case of Justice Wagner, he suffered polite but superficial questioning. One of the only questions that dug deep into his 'judicial philosophy' – a question concerning the limits of constitutional growth associated with the Canada's 'living tree' doctrine (a.k.a. the 'living constitution') – was easily deflected by the nominee. Answering that question, he opined, could disqualify him from sitting in some future case. The 'Hogg effect' successfully framed the hearings in terms favourable to the justices and so neutralized attempts at portraying the nominees as anything other than qualified legalists. This resulted in a serious dropping off in media interest between the first nomination hearing (Justice Rothstein's) and the fourth (Justice Wagner's) six years later.[17]

8. Law versus politics

All of which suggests that a legal frame prevailed in the reporting. Even the very basic distinction – between law and politics or between judicial activism and restraint – was not dominant in the coverage of the four appointments. It simply was not a preoccupation for the journalists. In this regard, it can be said that the narrative originating out of the Reform Party policy shop did not get widely taken up.[18] It was a preoccupation, it turns out, for the nominees themselves. Each of the Justices made the point, either in their formal comments to, or in response to questions from, the committee and dutifully picked up by the press, that judicial reasoning was unlike political bargaining. Responding to the special Committee in the French language, Justice Karakatsanis declared that: «Le pouvoir judiciaire, c'est un pouvoir d'appliquer et d'examiner les lois avec les dispositions de la Charte et la jurisprudence. Ce n'est pas de créer les lois» (de Grandpré 2011b).[19] According to one account, '[b]oth Karikatsanis and Moldaver indicated they were well aware that their job involves applying the law, whereas Parliament's role is to create law – no doubt scoring points with Conservatives who have long complained about an overly activist judiciary' (Cohen 2011). A more recent nomination elicited the following observation from nominee Wagner during his short two hour meeting: 'The courts apply the law and maybe for some people the application of the law is the creation of the law – I don't think it is' (Murphy 2012).[20] It turns out that Canadian judges are as pragmatic as their American counterparts.

9. A political process?

This is not to say that the coverage was empty of politics. First, much of the coverage centered on the process and so took on a political hue: the make-up of

[17] Rothstein coverage attracted three times (3x) the coverage as compared to each of the three subsequent nominees. Note also that coverage of the Rothstein and the Karakatsanis/Moldaver joint hearings was televised live on cable news. By the time of Wagner's appointment the live hearing could only be followed over the internet on CPAC (the Canadian Parliamentary Affairs Channel, the Canadian analogue to C-Span).

[18] If the distinction likely was to arise, it would be in editorials and op-eds penned, for instance, by law professors insisting that law is not like politics (i.e. Sossin 2011).

[19] 'The judicial power, it is a power of applying and examining the laws with the provisions of the Charter and the jurisprudence. It is not the creation of law' (my translation).

[20] One journalist observed that 'Judge Wagner also asserted that judges need to remember their place in a democracy: '"The creation of law is for you, Members of Parliament to do," he said. "It is not up to judges"' (Cheadle 2012; also Makin 2012a).

the advisory committee, the discretion available to the Prime Minister, and perceived splits within the federal political parties, were all the subject of reporting and commentary. This is unsurprising: the process, after all, is led by elected politicians while journalists, who ordinarily cover the political beat, mostly were the ones filing the stories. This was prevalent during the Rothstein hearings[21] and particularly pronounced during the 2011 joint hearings. The significant decline in coverage since the Rothstein hearings suggests that even journalists ordinarily covering the political beat found the politics of judicial nominations rather dull.[22]

The fact that the coverage attracted so little political heat largely may be due to the approach adopted by the Prime Minister. A reader of the English-language coverage would have been left with the impression that Prime Minister Harper should be credited with having taken a nonpartisan approach to the appointment process. This is how a Globe and Mail editorial put it: 'Claims of some critics that [Harper] would try to hijack the court for some narrow ideological purpose have proven abysmally wrong' (Globe and Mail 2011b, see also Sossin 2011) – an observation the editorial board repeated during the following year's nomination process of Wagner (Globe and Mail 2012a). Criticism of the tepid line of questioning permitted by the Committee members occasionally is bemoaned. But the nomination process is described mostly in positive terms. The Prime Minister emerges unscathed, if not smelling like roses. This is despite the impression readers also would have had that Justice Karakatsanis was appointed, in part, because of her close connection to the late Finance Minister Jim Flaherty, having previously served as Flaherty's deputy when he was Ontario Attorney General (Blatchford 2011a, Makin 2011a).

9.1. Language

Not all appointments went as smoothly as the Prime Minister's Office would have hoped. Justice Moldaver's nomination was mired in controversy from the start due to his inability to speak Canada's other official language. Though this was far less of a concern to the English-language press, where Justice Moldaver was looked upon more favorably, it was decidedly an issue in the French-language press. This was because Justice Moldaver lacked any French-language skills and this deficiency proved embarrassing for the candidate. It also proved embarrassing for the NDP representative on the House of Commons Committee (Joe Comartin) who complained about the candidate's unilingualism yet sat on the advisory committee that approved the short list of candidates. Moldaver's unilingualism played out in both the Journal de Monteal and in the much larger coverage generated by La Presse – 'Un Candidat Juge Unilingue Anglophone' announced a La Presse headline (de Grandpré 2011a).[23] Because it was the second such appointment of a unilingual justice since 2006 – Justice Rothstein also could not speak French, had undertaken to become fluent on the job, and failed to do so – it compounded the impression that this was part of a larger federal trend.[24] Moldaver's unilingualism was mentioned in every single news article and editorial item published in La Presse during this appointment process.[25] It was mentioned far less frequently in the English-language press. Indeed, the English language press was discernibly more positive about Moldaver than the French language coverage.[26] This focus on

[21] The Globe and Mail's Kirk Makin, who covered the Supreme Court beat during the entire period under study, is not found in our database of Rothstein stories in 2006.
[22] Supra note 16.
[23] 'A Unilingual Anglophone Candidate for Judge' (my translation).
[24] The Conservatives earlier had opposed legislation mandating bilingual Supreme Court justices (Bill C-232 passed in the minority House of Commons but stalled in the Senate), had appointed a unilingual Auditor General, and earlier a unilingual Rothstein.
[25] 6 articles in total appeared in La Presse.
[26] Sixty three per cent (12 of 19) of the English language stories on Moldaver had a positive tone, as compared to 22 per cent (2 of 9) of the French language coverage. Moreover, the French language coverage was as likely to be negative as it was positive or neutral in tone. No other nominee attracted as much negative press overall.

language also dominated coverage during the Rothstein nomination. Both Le Journal de Montreal (Soumis 2006) and La Presse (Boisvert 2006) were preoccupied with the nominee's ignorance of both the French language and the civil law. After acknowledging this deficiency, however, Yves Boisvert (2006) and Nathaélle Morissette (2006) in La Presse, admitted that Rothstein would make an excellent addition to the Court.

Politics entered into reporting of the nomination process, therefore, but not as predicted – in ways that did some damage to the credibility of New Democrats (who appeared to flip-flop on the Moldaver appointment) and, potentially, to the reputation of the Supreme Court of Canada as a bilingual institution. This should be unsurprising. If one views Canada's nomination process as offering up a new 'political opportunity structure' to intervene in national political discourse (Tilly and Tarrow 2007, p. 49), it is predictable that distinctive Canadian political preoccupations, like language, will get channeled through it. Once having begun down this path, politicization of the appointment process, one might say, is unavoidable. The question remains what other issues will get channeled in future nomination processes.

9.2. Gender

The politics of gender were an obvious candidate in this regard. The nomination of Justice Richard Wagner provided just such an occasion. Justice Wagner's rapid rise through the ranks of the judiciary was noted, as were the Conservative Party political connections of his father (Claude Wagner) who was a leadership candidate for the federal party in 1976 [27] – but these were mostly non-issues. What was an issue was that Wagner was replacing Justice Marie Deschamps, and so there was some expectation that the Prime Minister would appoint another woman to the seat (to maintain a near parity of four female justices). That this did not occur emerged as a major sub-theme in the reporting. [28] Many articles profiling Wagner made some mention of gender, even those in populist tabloids such as the Toronto Sun and Journal de Montreal. The Sun concluded one of its two reports with a quote from feminist tax law Professor Kathleen Lahey. Conveying profound disappointment, Lahey claimed that Wagner's appointment 'reduces the diversity and equity reflected in the Court, and sends the message that the wisdom and expertise of woman lawyers and judges is still not valued equally with that of men in 21st century Canada' (Kirkup 2012). This is reproduced in the French language in a Journal de Montreal report published on the same day (Agence QMI 2012, also Marin 2012). The first few paragraphs of the only Winnipeg Free Press story on the Wagner nomination, entitled 'Harper Selects Richard Wagner for Supreme Court, Urged to Pick Woman Next Time') quoted at length from New Democrat MP Francoise Boivin (opposition justice critic) who emphasized the importance of maintaining gender parity on the court – it was as important as guaranteeing three seats on the court for Quebec, she insisted (Blanchfield 2012). Boivin nevertheless was satisfied with the Wagner appointment given the strength of his personality and expertise in the civil law (Agence QMI 2012). Besides, there would be an upcoming opportunity to appoint more women from Quebec with more pending retirements (Cheadle 2012, Marin 2012). There was no noticeable difference in English and French language coverage on the issue of gender dynamics on the court. La Presse notably devoted a whole story to the issue, observing that the politics of gender 'unleashed less passion' than the issue of bilingualism (Marin 2012). Overall, however, the question of gender was treated as minor and remediable. It remains a live issue as two seats from Quebec become vacant.

[27] Claude Wagner also served in the Quebec Liberal Party cabinet of Jean Lesage in the 1960s (Cohen 2012).

[28] Of the 25 stories concerning the Wagner nomination, 28 per cent had 'gender' as either the main (4) or secondary (3) topic of the story. No other nominations coded gender as a main or a secondary topic.

10. A personalized process?

The overwhelming message readers would have received is that the nominees inhabited the ideals of judicial propriety – they had, in Peter Hogg's words, 'the right stuff.' Justice Moldaver is described in laudatory terms as a 'judge with moxy' (Marshall 2011), of enhancing the criminal law expertise on the Court (Globe and Mail 2011a), and as having a 'fine nose for even the faintest odour of B.S.' (Blatchford 2011b). Sporadic mention is made of Justice Moldaver's complaint about criminal trial lawyers 'trivializing' the Charter by excessively invoking the Charter rights of the criminal accused, but this is looked upon as a plus, at least among columnists like Yves Boisvert (2011) and Christie Blatchford (2011b).

Justice Karakatsanis seemingly was of less interest to the media horde. With a shorter judicial tenure on the Ontario Court of Appeal (eighteen months, eight years as a trial judge), she is touted for bringing more diversity to the Court. There are reported grumblings issuing out of the Toronto legal community about having overlooked other more qualified candidates on the Ontario Court of Appeal. Nonetheless, she is reported to have just the right judicial temperament.

From Calgary to Montreal, Justice Wagner was touted as an outstanding candidate. Quoting faithfully from the Prime Minster's press conference, Wagner was described as an 'exceptional candidate who possesses the aptitude and qualifications to serve Canadians well' (Agence QMI 2012). The tone of the reporting is overwhelmingly positive, one could say glowing, and any concerns about Conservative party ties or gender composition on the court are dismissed as unimportant or an issue for another day (Cohen 2012).[29]

Given the absence of a salient political frame with which to report on the prospective nominees (outside of Justice Moldaver's unilingualism), the press chose to focus on personality and personal biography. As Bogoch and Holzman-Gazit find in their study of Israeli high court appointments, there was a great deal of 'media personalization,' with a heightened focus on individual candidates rather than on the Court as an institution (Rahat and Sheafer 2007, p. 67, Bogoch and Holzman-Gazit 2014, p. 636). In contrast to their findings, however, elements of 'media privatization' also were present, with a focus on 'personal characteristics and personal life of individual candidates' (Rahat and Sheafer 2007, p. 68). The hearings were replete with references to the candidates' backgrounds, often coming from humble origins, and their ability to rise to the top.[30] A life steeped in learning, delivered with a tinge of humour (Ziegel 2006, p. 549), helped frame the dominant message that these all were outstanding and well-qualified candidates. This is best captured by a Toronto Sun headline regarding Justice Rothstein's nomination: 'He's Human – Who Knew?' (Weston 2006).

With a focus fixed firmly on the personal, readers would have learned little about decision making under the Charter of Rights and Freedoms, structures of analysis, or the role the judiciary in Canada's constitutional system.[31] There was hardly any discussion, for instance, of Supreme Court cases already decided, old or new.[32] During the Wagner hearing, there was mention made of judicial independence (the nominee is described as a 'fervent advocate' [Murphy 2012]), though this is left largely unexplained. It is hard to maintain, then, that an 'important educational function' was served by the nomination hearings (Ziegel 2006, p. 555; Dodek

[29] There was not one story coded as having a negative tone toward the nominee Wagner. A high proportion of the stories (72 percent) positively portrayed the nominee. For Justice Rothstein, who was also positively portrayed, the percentage is 47 per cent.

[30] See their biographical treatments in the Toronto Star, where Moldaver is described as a 'nice jewish boy' (Allen 2011) and Karakatsanis is described as rising up from working class roots (Tyler 2011).

[31] Writing about the Rothstein hearings, and this could be said about all four nominees, 'there was a remarkable failure to push Justice Rothstein to say anything about how judges go about interpreting the broad, open-ended rules' of the Charter (Plaxton 2008, p. 99).

[32] This was not coded but determined by watching hearings online and by reading the collected news reports.

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2014). In their collective swooning over the candidates, the press corps effectively elided the high court's judicial functions.

11. Conclusion: a big love-in?

It turns out that readers of the nomination coverage would not have learned much about the work of the Supreme Court of Canada, the Charter of Rights and Freedoms, or Canada's constitutional structure. Nor would they have learned very much about the distinction between law and politics. They would have, instead, learned much about the individual justices, their personal biographies, and their suitability for high judicial office. Overall coverage might best be described as a big 'love-in' (Samyn 2006). One can surmise that the journalists liked what they saw because the justices did not exhibit the sort of behavior one typically finds in Parliament Hill. This is in accord with what we found in our 2008 study of media reporting of the Supreme Court of Canada (Sauvageau *et al*. 2006) and also with the empirical work undertaken in the U.S. which shows that the more people get to know about the U.S. Supreme Court, via the Senate judicial confirmation process for instance, the more that they like it (Gibson and Caldeira 2009). The more the press frames the U.S. Supreme Court's work in political terms, by contrast, the less the public likes it (Baird and Gangl 2006). The more legalistic the frame, however, looking less like bargaining associated with political processes, the more that folks hold the Court in high esteem. Gibson and Caldeira confirm the hypothesis that 'anything that causes people to pay attention to courts,' even controversial confirmation processes, 'winds up reinforcing institutional legitimacy through exposure to the legitimizing symbols associated with law and courts' (Gibson and Caldeira 2009, p. 3). This is a consequence of the 'positivity bias,' the reservoir of institutional goodwill associated with the Court that gets woken up whenever attention gets focused on the Court. '[T]o know Courts is to love them, or at least respect them,' they conclude (Gibson and Caldeira 2009, p. 122).

So tepid and apolitical were these processes that Justice Wagner recommended that their scope be enlarged to include every appeal court justice nominated to provincial courts of appeal (Makin 2012a).[33] 'It might surprise you,' he declared to the Globe and Mail's Kirk Makin, 'but I liked the process' (Makin 2012a). This vote of confidence would have come as a surprise to many court watchers who were concerned about politicization of the appointment process. It should not have been surprising. Wagner was praised for his intelligence and humanity. Even the unilingual Justice Moldaver was lauded in the francophone press for being a fine judge. We can similarly conclude that the more the Canadian press corps get to know justices on the Supreme Court, the more that they like them. They are not like politicians, after all. They are interesting, even if in a sleepy sort of way.

References

Agence QMI, 2012. Harper recommande un juge québécois. *Le Journal de Montréal* [online], 2 October. Available from: http://www.journaldemontreal.com/2012/10/02/harper-recommande-un-quebecois-pour-devenir-juge [Accessed 17 October 2014].

Allen, K., 2011. "Nice Jewish Boy" Had Blue Collar Beginnings. *Toronto Star*, 15 November, p. A6.

Angus, W.H., 1966. Judicial Selection in Canada – The Historical Perspective. *Canadian Legal Studies*, 3, 220-251.

Baird, V.A. and Gangl, A., 2006. Shattering the Myth of Legality: The Impact of the Media's Framing of Supreme Court Procedures on Perceptions of Fairness. *Political Psychology* [online], 27 (4), 597-614. Available from:

[33] This also is a matter that is within federal competence under s. 96 of the Constitution Act, 1867.

http://sobek.colorado.edu/~bairdv/Baird_Gangl.pdf [Accessed 18 October 2014].

Bakan, J., 1997. *Just Words: Constitutional Rights and Social Wrongs*. University of Toronto Press.

Batta, A., *et al*., 2012. Let's Talk: Judicial Decisions at Supreme Court Confirmation Hearings. *Judicature* [online], 96 (1), 7-15. Available from: http://www.psci.unt.edu/~pmcollins/Batta%20et%20al.%202012.PDF [Accessed 18 October 2014].

Bellamy, R., 2007. *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy*. Cambridge University Press.

Blanchfield, K., 2012. Harper Selects Richard Wagner for Supreme Court, Urged to Pick Woman Next Time. *Winnipeg Free Press*, 2 October.

Blatchford, C., 2011a. New Top Court Judge Known for Plain Talk. *Calgary Herald* [online], 18 October, p. A6. Available from: http://www2.canada.com/calgaryherald/news/story.html?id=3f90c0e4-f6a9-40e2-bb7b-31cc7268e2f2 [Accessed 18 October 2014].

Blatchford, C., 2011b. Holy smokes! A Supreme Who's a Star. *The Winnipeg Free Press* [online], 19 October, p. A11. Available from: http://www.winnipegfreepress.com/opinion/analysis/holy-smokes-a-supreme-whos-a-star-132123123.html [Accessed 18 October 2014].

Bogoch, B. and Holzman-Gazit, Y., 2014. Promoting Justices: Media Coverage and Judicial Nominations in Israel. *Oñati Socio-legal Series* [online], 4 (4), 621-641. Available from: http://ssrn.com/abstract=2478756.

Boisvert, Y., 2006. Un Processus Utile et Sans Danger. *La Presse*, 28 February, p. A8.

Boisvert, Y., 2011. Deux nouveaux juges à la Cour suprême. *La Presse* [online], 17 October. Available from: http://blogues.lapresse.ca/boisvert/2011/10/17/deux-nouveaux-juges-a-la-cour-supreme/ [Accessed 18 October 2014].

Canada, House of Commons, 2004. *Improving the Supreme Court of Canada Appointments Process. Report of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness. Chair: Derek Lee, M.P. May* [online]. Ottawa: Parliament of Canada. Available from: http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1350880&Language=E&Mode=1&Parl=37&Ses=3 [Accessed 18 October 2014].

Canada, House of Commons, 2011. *Supreme Court of Canada Nominees Appear Before Ad Hoc Committee of Parliamentarians: Ad Hoc Committee on the Appointment of Supreme Court of Canada Justices (19 October)* [online]. Available from: http://canada.justice.gc.ca/eng/news-nouv/ja-nj/2011/doc_32665.html [Accessed 18 October 2014].

Canadian Bar Association [CBA], 2004. *Supreme Court of Canada Appointment Process. March* [online]. Available from: http://www.cba.org/cba/submissions/pdf/04-10-03-eng.pdf [Accessed 18 October 2014].

Carter, S.L., 1994. *The Confirmation Mess: Cleaning Up the Federal Appointments Process*. New York: Basic Books.

Cheadle, B., 2012. MPs Get to Know Richard Wagner, Canada's Newest Supreme Court Nominee. *Calgary Herald*, 4 October.

Cohen, T., 2011. Top Court Nominee Comes Under Fire for Lack of French. *Calgary Herald* [online], 19 October. Available from:

http://www.calgaryherald.com/news/court+nominee+comes+under+fire+lack+French/5574508/story.html [Accessed 18 October 2014].

Cohen, T., 2012. Despite Conservative Ties, Richard Wagner Seen as Good Choice for Supreme Court. *Calgary Herald*, 2 October.

Collins, P.M. and Ringhand, L.A., 2013. *Supreme Court Hearings and Constitutional Change*. Cambridge University Press.

Comiskey, M., 2008. The Supreme Court Appointment Process: Lessons From Filling the Rehnquist and O'Connor Vacancies. *PS: Political Science & Politics* [online], 41 (2), 355-58.

Cook, T.E., 2005. *Governing With the News: The News Media as Political Institution*, 2nd ed. Chicago University Press.

Cotler, I., 2008. The Supreme Court Appointment Process: Chronology, Context and Reform. *University of New Brunswick Law Journal*, 58, 131-146.

Davis, R., 1994. *Decisions and Images: The Supreme Court and the Press*. Englewood Cliffs, NJ: Prentice Hall.

Davis, R., 2005. *Electing Justice: Fixing the Supreme Court Nomination Process.* Oxford University Press.

de Grandpré, H., 2011a. Un Candidat Juge Unilingue Anglophone. *La Presse* [online], 17 October. Available from: http://www.lapresse.ca/actualites/politique/politique-canadienne/201110/17/01-4457915-cour-supreme-un-candidat-juge-unilingue-anglophone.php [Accessed 18 October 2014].

de Grandpré, H., 2011b. Un Candidat à la Cour Suprême S'excuse de ne pas Parler Français. *La Presse* [online], 19 October. Available from: http://www.lapresse.ca/actualites/politique/politique-canadienne/201110/19/01-4458945-un-candidat-a-la-cour-supreme-sexcuse-de-ne-pas-parler-francais.php [Accessed 18 October 2014].

Dodek, A., 2014. Reforming the Supreme Court Appointment Process, 2004-2014: A Ten Year Democratic Audit. *Supreme Court Law Review* (2nd Ser.) 67, 111 (forthcoming). Available from: http://ssrn.com/abstract=2439336 [Accessed 20 October 2014].

Easton, D., 1965. *A Systems Analysis of Political Life*. New York: John Wiley and Sons.

Evans, M. and Pearson-Merkowitz, S., 2012. Perpetuating the Myth of the Culture War Court? Issue Attention in Newspaper Coverage of U.S. Supreme Court Nominations. *American Politics Research,* 40 (6), 1026-1066.

Farganis, D., 2011. "No Hints, No Forecasts, No Previews": An Empirical Analysis of Supreme Court Nominee Candor from Harlan to Kagan. *Law & Society Review* [online], 45 (3), 525-559. Available from: http://www.uky.edu/~jpwede2/lawsocietycandor.pdf [Accessed 18 October 2014].

Farnsworth, S.J. and Lichter, S.R., 2006. The Mediated Supreme Court Nomination Process: News Coverage of Confirmed and Non-Confirmed Nominees. *Paper Presented to the Annual Meeting of the American Political Science Association, Philadelphia* [online]. Available from: http://citation.allacademic.com/meta/p_mla_apa_research_citation/1/5/1/9/8/pages151987/p151987-6.php [Accessed 17 October 2014].

Frank, J., 1963. *Law and Modern Mind*. Garden City, New York: Anchor Books.

Friedland, M., 1995. *A Place Apart: Judicial Independence and Accountability in Canada*. Ottawa: Canadian Judicial Council.

Gamson, W.A. and Stuart, D., 1992. Media Discourse as a Symbolic Contest: The Bomb in Political Cartoons. *Sociological Forum*, 7 (1), 55-86.

Gibson, J.L. and Caldeira, G.A., 2009. *Citizens, Courts, and Confirmations: Positivity Theory and the Judgments of the American People*. Princeton University Press.

Globe and Mail, 2011a. Even Good Judges Need Public Scrutiny. *The Globe and Mail*, 18 October, p. A14.

Globe and Mail, 2011b. Probing Progress. *The Globe and Mail*, 21 October, p. A14.

Globe and Mail, 2012a. A Role Player, While Balance Waits. *The Globe and Mail*, 3 October, p. A16.

Globe and Mail, 2012b. Harper v. Harper. *The Globe and Mail*, 4 October, p. A14.

Gordon, S., 2006. MPs to vet selection of judge to top court; Harper's choice to be named Thursday; Critics fear drift to "political judiciary". *Toronto Star,* 21 February, p. A1.

Goss, B.M., 2003. The 2000 US Presidential Election in *Salon*.com and the *Washington Post. Journalism Studies,* 4 (2), 163-182.

Greenhouse, L., 1996. Telling the Court's Story: Justice and Journalism at the Supreme Court. *Yale Law Journal,* 105 (6), 1537-1561.

Hall, S., 1982. The Rediscovery of Ideology: The Return of the Repressed in Media Studies. *In*: M. Gurevitch *et al*., eds. *Culture, Society and the Media*. London: Routledge, pp. 56-90.

Hall, S. *et al*., 1978. *Policing the Crisis: Mugging, the State, and Law and Order*. Houndmills: Macmillan Press.

Hausegger, L. *et al*., 2010. Exploring the Links Between Party and Appointment: Canadian Federal Judicial Appointments from 1989-2003. *Canadian Journal of Political Science,* 43 (3), 633-659.

Hoekstra, V., 2000. The Supreme Court and Local Public Opinion. *American Political Science Review,* 94 (1), 178-189.

Hogg, P.W., 2006. Appointment of Justice Marshall Rothstein to the Supreme Court of Canada. *Osgoode Hall Law Journal* [online], 44 (3), 527-538. Available from: http://digitalcommons.osgoode.yorku.ca/ohlj/vol44/iss3/4/ [Accessed 22 October 2014].

Haider-Markel, D.P., Allen, M.D. and Johansen, M., 2006. Understanding Variations in Media Coverage of U.S. Supreme Court Decisions: Comparing Media Outlets in their Coverage of *Lawrence* v. *Texas. Press/Politics,* 11 (2), 64-85.

Jones, C.A., 2003. Voting From the Bench: Media Analysis of Legal Issues in the 2000 Postelection Campaign. *American Behavioral Scientist,* 46 (5), 642-657.

Kirkup, K., 2012. Prime Minister Nominates Judge Richard Wagner as New Supreme Court Justice. *Toronto Sun*, 2 October. Available from: http://www.torontosun.com/2012/10/02/prime-minister-nominates-judge-richard-wagner-as-new-supreme-court-justice [Accessed 18 October 2014].

L'Heureux-Dubé, J.C., 2004. *Evidence (Number 8) Before the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, 30 March* [online]. Available from: http://www.law-lib.utoronto.ca/conferences/judiciary/background.htm [Accessed 18 October 2014].

Lipset, S.M., 1963. *The First New Nation: The United States in Historical and Comparative Perspective*. New York: Basic Books.

Liptak, A., 2008. U.S. Court Is Now Guiding Fewer Nations. *The New York Times* [online], 17 September, p. A1. Available from: http://www.nytimes.com/2008/09/18/us/18legal.html?pagewanted=all&_r=0 [Accessed 18 October 2014].

Makin, K., 2011a. Harper's Picks Highlight New Direction. *The Globe and Mail*, 18 October, p. A4.

Makin, K., 2011b. Grilling of Top Court Nominees Akin to a "Meet-and-Greet," Experts Say. *The Globe and Mail* [online], 19 October. Available from: http://www.theglobeandmail.com/news/politics/grilling-of-top-court-nominees-akin-to-a-meet-and-greet-experts-say/article4182517/ [Accessed 18 October 2014].

Makin, K., 2012a. Supreme Court Judge Warns of "Dangerous" Flaws in the System. *The Globe and Mail* [online], 13 December, p. A1, A8. Available from: http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/supreme-court-judge-warns-of-dangerous-flaws-in-the-system/article6290483/ [Accessed 19 October 2014].

Makin, K., 2012b. Lack of Publicity and Scrutiny Renew Calls for Overhaul of Appointment Process. *The Globe and Mail* [online], 26 December, p. A4. Available from: http://www.theglobeandmail.com/news/national/lack-of-publicity-and-scrutiny-when-appointing-judges-renews-calls-for-overhaul-of-process/article6710398/ [Accessed 20 October 2014].

Makin, K., 2012c. New Judge Pitches His Street Smarts. *The Globe and Mail,* 5 October, p. A4.

Marin, S., 2012. Stephen Harper soumet la candidature de Richard Wagner à la Cour suprême. *La Presse* [online], 2 October. Available from: http://www.lexpress.to/pressecanadienne/20311396/ [Accessed 20 October 2014].

Marshall, R., 2011. A Judge With Moxy. *Winnipeg Free Press* [online], 22 October, p. J6. Available from: http://www.winnipegfreepress.com/opinion/analysis/a-judge-with-moxy-132369893.html [Accessed 20 October 2014].

Martin, D., 2006. Supreme Gathering Resembled Coronation. *Calgary Herald*, 28 February, p. A3.

Morissette, N., 2006. Harper Choisit Marshall Rothstein. *La Presse*, 24 February, p. A7.

Morton, F.L. and Knopff, R., 2000. *The Charter Revolution and the Court Party*. Peterborough: Broadview Press.

Murphy, J., 2012. MPs Grill Top Court Nominee Richard Wagner. *Toronto Sun* [online], 4 October. Available from: http://www.torontosun.com/2012/10/04/mps-grill-top-court-nominee-richard-wagner [Accessed 20 October 2014].

Newland, C.A., 1964. Press Coverage of the United States Supreme Court. *The Western Political Quarterly,* 17 (1), 15-36.

Nicholls, G., 2012. Harper and the Charter: Setting the Record Straight. *The Hill Times,* 23 April, p. 10.

Oleson, T., 2006. He's Got Right Stuff. *Winnipeg Free Press,* 28 February, p. A13.

Plaxton, M., 2008. The Neutrality Thesis and the Rothstein Hearing. *University of New Brunswick Law Journal* [online], 58, 92-104. Available from: http://ssrn.com/abstract=2383963 [Accessed 20 October 2014].

Posner, R.A., 2008. *How Judges Think.* Cambridge: Harvard University Press.

Rahat, G. and Sheafer, T., 2007. The Personalization(s) of Politics: Israel, 1949-2003. *Political Communication*, 24 (1), 65-80.

Reference re Supreme Court Act, ss. 5 and 6. 2014. SCC 21 (SCC).

Reform Party of Canada, 1991. *Building New Canada: Reform Party of Canada Principles and Policies 1991*. Calgary: Reform Party of Canada.

Reese, S.D., 2001. Prologue – Framing Public Life: A Bridging Model for Media Research. *In*: S.D. Reese, O.H. Gandy and A.E. Grant, eds. *Framing Public Life: Perspectives On Media And Our Understanding Of The Social World.* Mahwah, N.J.: Lawrence Erlbaum Associates, 7-20.

Russell, P.H. and Ziegel, J., 1991. Federal Judicial Appointments: An Appraisal of the First Mulroney Government's Appointments and the New Judicial Advisory Committees. *University of Toronto Law Journal,* 41 (1), 4-37.

Samyn, P., 2006. It was Like a Love-in. *Winnipeg Free Press*, 28 February, p. A3.

Sauvageau, F., Schneiderman, D. and Taras, D., 2006. *The Last Word: Media Coverage of the Supreme Court of Canada.* Vancouver: UBC Press.

Seidle, L.F., 1991. Senate Reform and the Constitutional Agenda: Conundrum or Solution?. *In*: J. Ajzenstat, ed. *Canadian Constitutionalism, 1791-1991*. Ottawa: Canadian Study of Parliament Group, 90-122.

Sossin, L., 2011. Picking Judges Injudiciously. *The Globe and Mail* [online], 18 October, p. A15. Available from: http://www.theglobeandmail.com/globe-debate/picking-canadas-judges-injudiciously/article557731/ [Accessed 19 October 2014].

Spill, R.L. and Oxley, Z.M., 2004. Philosopher Kings or Political Actors: How the Media Portray the Supreme Court. *Judicature,* 87 (1), 23-29.

Slotnick, E.E. and Segal, J.A., 1998. *Television News and the Supreme Court*. Cambridge University Press.

Soumis, L., 2006. Le Juge Rothstein Passe le test. *Le Journal de Montréal,* 28 February, p. 22.

Stone, G.R., 2010. Understanding Supreme Court Confirmations. *The Supreme Court Review*, 381-467.

Tibbetts, J., 2006. Critics Seek to Cancel Judge's TV Appearance. *Winnipeg Free Press*, 25 February, p. A11.

Tilly, C. and Tarrow, S., 2007. *Contentious Politics*. Boulder: Paradigm Publishers.

Tyler, T., 2011. From Prohibition Lane to Highest Court in the Land. *Toronto Star,* 15 November, p. A6.

Weston, G., 2006. He's Human – Who Knew?. *Toronto Sun*, 28 February, p. 18.

Williams, M. and Baum, L., 2006. Supreme Court Nominees Before the Senate Judiciary Committee. *Judicature* [online], 90 (2), 73-80. Available from: http://faculty.goucher.edu/mawil002/williams_902.pdf [Accessed 19 October 2014].

Winnipeg Free Press, 2011. Genteel Grill. *Winnipeg Free Press* [online], 19 October, p. A10. Available from:

www.winnipegfreepress.com/opinion/editorials/genteel-grill-132123288.html [Accessed 19 October 2014].

Ziegel, J., 2006. A New Era in the Selection of Supreme Court Judges?. *Osgoode Hall Law Journal* [online], 44 (3), 547-555. Available from: http://digitalcommons.osgoode.yorku.ca/ohlj/vol44/iss3/6/ [Accessed 19 October 2014].

Ziegel, J., 2012. Judicial Appointments in Canada: The Unfinished Agenda. University of Toronto Faculty of Law, Faculty Workshop (19 March) [unpublished]

Appendix A

Coding Sheet for Judges

1	coder	NAME OF CODER
2	caseid	CASE ID _____
3	medium	MEDIUM
	1	Television
	2	Newspaper
4	tvid	IF TV, WHICH NETWORK
	1	CTV
	2	CBC
	3	TVA
	4	Radio Canada
	99	NA
5	npid	IF NEWSPAPER, WHICH ONE
	1	Calgary Herald
	2	Winnipeg Free Press
	3	Globe and Mail
	4	Toronto Sun
	5	La Presse
	6	Le Journal de Montreal
	99	NA
6	datsto	DATE OF STORY
		dd.mm.yy
7	judgenom	NAME OF JUDGE NOMINATED
	1	Rothstein
	2	Karakatsanis
	3	Moldaver
	4	Wagner
	5	Nadon
8	apptsta	APPOINTMENT STATUS AT TIME OF ARTICLE
	1	Pre-Hearing
	2	Hearing
	3	Post-Hearing
9	locanp	LOCATION OF PRINT ARTICLE IN PAPER
	1	Front page (with or without inside turn)
	2	Politics Section
	3	Other
	99	NA

HEADLINES

10	mfoh	MAIN FOCUS OF PRINCIPAL HEADLINE
	1	Judge
	2	Supreme Court
	3	Process
	4	Other
11	faih	FIRST ACTOR IN PRINCIPAL HEADLINE
	1	Judge
	2	Supreme Court
	3	Stephen Harper
	4	Special Committee
	5	Opposition
	99	Other
12	judgetone	IF JUDGE IS MAIN FOCUS OF PRINCIPLE HEADLINE, WHAT IS TONE?
	1	Positive
	2	Negative
	3	Neutral/Mixed
	99	NA
13	courttone	IF COURT IS MAIN FOCUS OF PRINCIPLE HEADLINE, WHAT IS TONE?
	4	Positive
	5	Negative
	6	Neutral/Mixed
	99	NA
14	commtone	IF HOUSE OF COMMONS COMMITTEE IS MAIN FOCUS OF PRINCIPLE HEADLINE, WHAT IS TONE?
	1	Positive
	2	Negative
	3	Neutral/Mixed
	99	NA
15	maintopi	MAIN TOPIC OF STORY (SELECT ONE)
	1	Individual Judge
	2	Supreme Court
	3	Appointment Process
	4	House of Commons Committee
	5	Language
	6	Gender
	7	Ethnicity
	8	Judicial Activism
	9	Judicial Restraint
	10	Judicial Independence
	11	Separation of Powers
	12	U.S. Senate Confirmation Process
	13	Other
16	secontopi	SECONDARY TOPIC OF STORY (SELECT ONE)
	1	Individual Judge
	2	Supreme Court
	3	Appointment Process
	4	House of Commons Committee

	5	Language
	6	Gender
	7	Ethnicity
	8	Judicial Activism
	9	Judicial Restraint
	10	Judicial Independence
	11	Separation of Powers
	12	U.S. Senate Confirmation Process
	13	Other

TONE

17	tonescc	TONE OF REFERENCES TO SUPREME COURT
	1	Positive
	2	Negative
	3	Neutral/mixed
	99	NA
18	tonejud	TONE OF REFERENCES TO JUDGE
	1	Positive
	2	Negative
	3	Neutral/mixed
	99	NA
19	tonecom	TONE OF REFERENCES TO HOUSE OF COMMONS COMMITTEE
	1	Positive
	2	Negative
	3	Neutral/mixed
	99	NA
20	tonepm	TONE OF REFERENCES TO GOVERNMENT OR PRIME MINISTER
	1	Positive
	2	Negative
	3	Neutral/mixed
	99	NA
21	genre	GENRE
	1	Hard news
	2	Editorials
	3	News analysis
	4	Columns, opinion pieces, commentary
	5	Direct excerpts
	6	In brief
	7	Feature
	8	Personality profile
	9	Other (cite)
22	lawpol	FRAME: LAW VERSUS POLITICS DISTINCTION
	1	Judges Apply Law
	2	Judges Make Law
	3	Judges Are Like Politicians
	4	Judges Are not Like Politicians
	5	Other
	99	NA

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