

Working Paper Number 21

**PUBLIC HEARINGS FOR
CONSTITUTIONAL COURT JUDGES:
AN OPEN AND TRANSPARENT MEMORANDUM TO THE JUDICIAL SERVICES COMMISSION**

by

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**The Paper was originally published by the
Centre for Applied Legal Studies as Working Paper No. 22
(June 1994)**

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"[T]he more opportunities the public have to participate in the appointment of those who will be judging the constitutionality of their laws the better. With each additional opportunity for involvement by different individuals and groups across the country, the stronger the democratic integrity of the Court will be."¹

David Beatty

INTRODUCTION

The shape, colour and substance of the judiciary has inspired significant legal and political debate over the past few years. Academic lawyers first weighed in with contributions designed to ensure that a new court appointment process realizes an accountable, representative and impartial judiciary.² Political parties then engaged the appointments

¹ David Beatty, Talking Heads and the Supremes: The Canadian Production of the Constitutional Review (1990) 269-70.

² See, eg, Hugh Corder 'The Appointment of Judges: Some Comparative Ideas' (1992) Stellenbosch LR 207; Gawie Nienaber 'United States Supreme Court Appointments: Implications for a future constitution in South Africa' (1991) 4 Consultus 19; Jeremy Gauntlett 'Appointing and Promoting Judges: Which Way Now?' (1990) 3 Consultus 23; Adrienne van Blerk, 'Judicial Appointments: Some Reflections', (1992) 55 THRHR 559.

issue last year at the Kempton Park multi-party negotiating process. One result of their engagement was creation of the institution upon which you now sit: the Judicial Services Commission ("JSC").³

The creation of the JSC was heralded by many on the grounds that it ensures broader participation and promises greater impartiality in the court appointment process than has previously been known in this country. Unfortunately, the Constitution only identifies the JSC, the President, the Cabinet and the Chief Justice as the

³ The process for the selection of the Constitutional Court is laid out in the Constitution as follows. The President of the Constitutional Court is appointed by the President to a seven-year term with the concurrence of Cabinet after taking into account the views of the Chief Justice of the Supreme Court. Constitution of the Republic of South Africa, Act 200 of 1993, Section 97(2). The remaining ten Constitutional Court judges are appointed to non-renewable terms of seven years in two groups. Section 99. Four judges are appointed by the President with the agreement of the Cabinet and the agreement of the Chief Justice from the ranks of sitting Supreme Court judges. Section 99(3). Six judges are appointed by the President with the agreement of the Cabinet from a list of ten recommended by the Judicial Service Commission. Section 99(4) & (5)(a). The recommendations are to take into account the need for "a court which is independent and competent and representative in respect of race and gender." Section 99(5)(d). If the President and Cabinet reject the choices of the Judicial Service Commission, they must give reasons for not accepting some or any of the recommendations in which case the Commission will provide a supplemented list from which the remaining appointment or appointments must be made. Section 99(5)(b) & (c).

The Judicial Services Commission itself, for purposes of appointments to the Constitutional Court, is composed of the Chief Justice, the President of the Constitutional Court, one Judge President, the Minister of Justice, two practising advocates chosen by the profession, two practising attorneys chosen by the profession, one professor of law, four Senators, and four persons (two legally qualified) chosen by the President. Section 105(1).

institutions and officials with power over Constitutional Court appointments. It does not tell us how they ought to go about making these crucial decisions. For example, should the JSC conduct open hearings for potential constitutional court judges? The interim Constitution is silent. This textual silence, however, comes as little surprise. The issue has been almost entirely ignored in the Kempton Park and academic debates over the appointments process.⁴ This memorandum is designed to help break that silence and engage the issues surrounding public nomination hearings.

Of course, we engage these issues with a definite goal in mind. We believe that the Judicial Services Commission should adopt a procedure of open public

⁴ But see Nienaber, op cit note 2, at 23-24 (to ensure public accountability a standing committee should inter alia engage in "scrupulous review" of the record created in public hearings in relation to relevant aspects of the proposed nominee's legal abilities, constitutional theories, and past writings). Recent opinion pieces have also supported the idea of open hearings. See Dennis Davis, 'No Jobs For Pals. Give Us Public Hearings,' Weekly Mail 20-26 May 1994 at 30. Etienne Mureinik, 'The Final Arbiters of Justice' Star 16 May 1994 at 10. See also Corder op cit note 2 at 227 (JSC's functions should reflect a break from the secrecy of past, but still be marked by a high degree of confidentiality).

Even abroad, the issue of introducing public procedures into the appointments process has been touched upon only lightly. See, eg, Corder at 214 (Ontario Judicial Appointments Advisory Committee conducts confidential interviews). Nonetheless, the trend revealed by studies of other Commonwealth jurisdictions such as Kenya and dissimilar countries such as Germany is towards wider participation. For Kenya, see Justice Enjoined: The State of the Judiciary in Kenya (a report of the Robert F. Kennedy Center for Human Rights) (1991) 17; for Germany, see Klaus Schlaich Das Bundes-verfassungsgericht (1992) 32.

hearings.⁵ Specifically, we argue that the JSC should make available for public comment the list, as well as the records, of potential candidates for seats on the Constitutional Court and that the JSC should hold public interviews of potential candidates.⁶

Open and public procedures will realize several significant benefit. First, they will contribute greatly to public confidence in -- and thereby help to effect the legitimacy of -- the Constitutional Court. Second, they will ensure that the most qualified and representative persons sit on the Court. Third, they will help to build a human rights culture through public exposure to and participation in constitutional debate. We shall also show how and why the arguments against open procedures fail. In short, we argue that open and public procedures will neither significantly delay the establishment of the Constitutional Court, nor, if properly conducted, undermine the quality, independence and privacy of the individuals serving on the Court.

I. OPEN HEARINGS WILL ESTABLISH AND LATER REINFORCE THE LEGITIMACY OF THE CONSTITUTIONAL COURT

One could easily base an argument for open hearings on the

⁵ Although a detailed argument on the following point is beyond the scope of this memorandum, we believe that open, public and transparent procedures should also be adopted for the appointment process for the four Constitutional Court judges to be drawn from the Supreme Court. At the very least, the President, the Cabinet and the Chief Justice should be required to base their decisions on publicly-known criteria.

⁶ Open, public hearings are clearly within the power of the Commission to adopt. Section 105(4). For greater detail, see *infra*, "An Outline of Recommended Judicial Service Commission Procedures for Conducting Public Hearings."

language of the interim Constitution itself. Openness and transparency occupy a privileged place in the interim Constitution's list of core values.⁷ This textual commitment reflects the belief that openness and transparency are two of the most significant means of effecting an accountable and legitimate government.

Ensuring the legitimacy of the Constitutional Court ought to be one of our primary concerns.⁸ The interim

⁷ Constitutional Principle IX states: "Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government." Further textual support for openness can be found in section 35, the interpretation clause, which tells us that when

"interpreting the provisions of this Chapter [on Fundamental Rights] a court of law shall promote the values which underlie an open and democratic society based upon freedom and equality ... "

and section 33, the limitation clause, which tells us the restrictions on fundamental rights are permissible if such restrictions are

"justifiable in an open and democratic society based on freedom and equality".

⁸ Appointing a Constitutional Court made up of individuals that the citizenry does not respect would be the most efficacious way of destroying the Constitution. As De Toqueville wrote:

"[The power of judges] is enormous, but it is the power of public opinion. They are powerful as long as people respect the law; but they would be impotent against popular neglect or contempt of the law."

Alexis de Toqueville in Mayer and Lerner (eds) Democracy in America (1966) 90. See also Gary Simson 'Thomas' Supreme Unfitness: A Letter to the Senate on Advice and Consent' (1993) 78 Cornell LR 619, 627

Constitution grants the Constitutional Court enormous power in order to safeguard the operation of South Africa's new democratic constitutional order. While other branches of government share this responsibility, the Constitution makes the Constitutional Court the institution of last resort. The Court will thus have the final word on issues ranging from abortion and affirmative action to provincial powers and voting rights.⁹

What gives the members of this Court the legitimacy to make decisions that will so substantially affect the inhabitants of the nation? It clearly possesses no electoral mandate.¹⁰ Its legitimacy must, therefore, flow from some other

("Public confidence is a precious commodity for all government institutions, but especially for the Supreme Court. Unlike the President and members of Congress, the Justices can't point to their election as a source of legitimacy for their decisions. Also, lacking the enforcement mechanisms of the President and Congress, the Court is particularly dependent on public respect for its effectiveness.")

⁹ In contrast, the Appellate Division, the highest court under South Africa's previous dispensation, is specifically prohibited from exercising constitutional jurisdiction. Section 101(5).

¹⁰ The need for democratic legitimacy was, of course, a prominent feature in the debate over the appropriate institution to select judges. Indeed, numerous South African commentators argued in favour of legislative involvement in the appointments process on the ground that this involvement produces greater political legitimacy. For instance, Nienaber, *op cit* note 2; Marinus Wiechers 'Response' (1991) 4 *Consultus* 29. We believe such a stance provides support in favour of open and public hearings for the Judicial Services Commission. Both the argument in favour of the legislature confirming judicial appointments and the argument in favour of open hearings rest (albeit in part) on the same rationale: that the appointments process needs to exhibit public accountability and foster wide participation. Proponents of greater legislative involvement should therefore realize that their rationale of democratic legitimacy applies in favour of

form of public support. We suggest that such support will most naturally arise from having a selection process which enables the public both to see and to participate in the appointment of judges.

Openness and public participation is especially important given the specialized and political nature of the Constitutional Court. By specialized we mean that these eleven individuals will be entrusted with constitutional interpretation and only constitutional interpretation. Public faith and confidence in the Court will turn on the public's perception of the members' capacity to carry out this new and specialized function. By political we mean that the Constitutional Court is not only properly viewed as a political organ of state, but that constitutional adjudication requires a court to take political decisions. At this early juncture of this nation's constitutional history, it is safe to say that these judges will not be merely finding the law, they will be making it. To legitimate this law-making role, the members of the Constitutional Court should be selected in an open and participatory manner.¹¹

This argument from democratic accountability has been articulated by commentators from within and without South Africa. David Beatty has argued that

"[g]iven the need to preserve the

decreeing open hearings and of questioning the judicial nominees.

¹¹ See Carl Baar 'Comparative Perspectives on Judicial Selection Processes' Papers Prepared for the Ontario Law Reform Commission 143 at 156 (For countries with career judiciaries, where the country's highest court in constitutional matters is a specialist court, its more overtly political function explains its more politicized appointment process).

independence of the Court, [open and public hearings] are perhaps the only way in which individual justices and the Court as a whole can be held directly accountable to the people whose lives are directly affected by the rulings they made."¹²

Similarly, Stephen Carter has argued that as a branch of government, the judiciary should be responsive at some point or another to those from whom they draw their power and legitimacy, the people. He writes that

"it is in the name of We the People that the entire apparatus of the federal government purports to exercise authority. Although the most forceful defenders of judicial independence occasionally forget the fact, every federal judge is an agent of the apparatus."¹³

Indeed, the recognition of the political authority which judges actually wield prompted the Chief Justice of the

¹² Beatty op cit note 1 at 268. See, generally, Beatty op cit note 1, at 257-75. Beatty correctly notes the unavoidable discretion that judges exercise in constitutional review and that judges do more than simply apply self-executing rules to the facts of each case. He further argues that legislative involvement in the appointment process "forges a link through which those who are given authority to rule on the constitutionality of law are made accountable to those who will be governed by the decisions which result." Ibid at 261. On these grounds, Beatty calls for a greater popularization of the appointments process in Canada. [Presently, the Canadian appointments process is modelled along the lines of the secretive and executive-dominated English system.]

¹³ 'The Confirmation Mess' (1988) 101 Harvard LR 1185, 1189-90.

United States William Rhenquist to go on record as saying that it is both appropriate and necessary that "public opinion" -- through the U.S. Senate's engagement in the confirmation process -- "has some say in who shall become judges of the Supreme Court."¹⁴

Surprisingly, opponents of open hearings often argue that such hearings will actually undermine the legitimacy of the court. By asking hard questions about a candidate's judicial philosophy or character, we allegedly undermine the public's faith in the Court as an institution which floats above the political fray. There is, however, no proof that open hearings -- especially those hearings that result in the rejection of a candidate -- undermine the reputation of and the respect accorded the Court. Indeed, the research points in the opposite direction.¹⁵ Nonetheless, as we detail below, we do believe that open hearings require clearly defined limits on questioning in order to maintain judicial independence and respect for individual privacy.

¹⁴ The Supreme Court (1987) 236.

¹⁵ See Stephen Wermiel, 'Appointment Controversies and the Supreme Court' (1990) 84 Northwestern LR 1033. Americans opposed to confirmation hearings often argue that spectacles such as the Robert Bork and Clarence Thomas hearings threaten the standing and legitimacy of the Court. However, Wermiel shows that the facts tell a different story: "[T]here is simply no statistical evidence that the confirmation battle over Bork diminished the standing of the Supreme Court. Pollsters for both the Gallup and Harris organizations have found no erosion of support." See also Walter Murphy and Joseph Tannehaus, 'Publicity, Public Opinion and the Court' (1990) 84 Northwestern LR 985, 1019("...[T]he large increments of publicity the dispute over Bork's nomination showered on the Court had no significant effect on the Court's prestige or power. We would argue that, by focusing attention on the Constitution and the importance of constitutional interpretation, the dispute performed a valuable public service").

In the end, however, the legitimacy of the courts will rest on their openness, transparency and accessibility. As Albie Sachs writes:

"Justice can neither be done nor seen to be done until the judges and the lawyers are far more representative of the community as a whole, far more sensitive in their functioning, and far more accessible to the population."¹⁶

There can few better ways for us to begin to secure that accessibility, accountability and representivity in our legal system than through the selection of Constitutional Court judges via open and public hearings.¹⁷

¹⁶ Albie Sachs, Promoting Human Rights in a New South Africa (1990) 94-95.

¹⁷ An open and careful confirmation process also provides a partial solution to the countermajoritarian difficulties created by a constitutional system in which unelected judges may overturn the decisions of elected officials. An open and public confirmation process ensures that Constitutional Court "judges will hold views not too different from those of the people's representatives." Henry Monaghan, 'The Confirmation Process: Law or Politics?' (1988) 101 Harvard LR 1202, 1203. Now this public influence on the selection process need not mean that the ultimate choices are a function of majority will. For example, the United States Senate, while "responsive to the public will, . . . also shar[es] some of the distance of the courts, [and therefore] has the ability to give voice not simply to the passions of the moment, but to the enduring and fundamental values that shape the specialness of the American people." Carter, supra note 12, at 1196. The Judicial Services Commission can play a similar mediating role. By permitting public participation, they can provide a mechanism for registering the deepest values of the people and allowing those values to play a role in determining the membership of the nation's highest value-forming body.

II. OPEN HEARINGS WILL ENSURE THAT THE MOST QUALIFIED AND REPRESENTATIVE PERSONS SIT ON THE BENCH

Beyond legitimacy, a second powerful reason supports open hearings: acquiring the necessary information to choose the most qualified and representative persons to sit on the Constitutional Court. The Constitution itself envisages a reasons-driven process of judicial selection.¹⁸ At the very

¹⁸ To dispense with openness would seriously damage the constitutionally-envisaged appointments process. This process clearly contemplates a reasoned process of dialogue between the Judicial Services Commission and the appointing authorities. The term "appointing authorities" used in s 99(5) relates to s 99(4)'s command that the President appoint these six judges in consultation with the Cabinet (that is with the concurrence of the Cabinet) and after consultation with the President of the Constitutional Court. Subsections 4 and 5 of s 99 lay out a carefully calibrated back and forth process to choose the six at-large appointments. At bottom, this process is a four-stage debate over the reasons for the recommendations.

At the first stage, s 99(5)(a) commands the appointing authorities to give due regard for the reasons for the recommendations. The necessary implication here is that the initial list of ten nominees recommended by the Judicial Services Commissions must be accompanied by reasons for those recommendations. Second, by the terms of s 99(5)(b), where the appointing authorities decide not to accept any or some of such recommendations, the JSC commission must be furnished with the reasons for such a decision. Since the appointing authorities cannot accept all the nominees that the JSC puts forward, the appointing authorities will always need to supply some reasons for their decision. Third, according to s 99(5)(c), the JSC shall submit further recommendations and reasons for those recommendations to the appointing authorities but only after having received information from the appointing authorities. The implication is that the JSC must equally give due regard for the reasons for which the appointing authorities rejected certain of the initial recommendations of the JSC. Finally, under s 99(5)(c), which refers back to s 99(5)(a), the appointing authorities again must give "due regard to [the JSC's] reasons for such recommendations."

least, JSC members must supply reasons for advancing and supporting candidates to other members of the JSC. However, while the members of the JSC have in part been chosen for their expertise in the legal field, their knowledge of the candidates will necessarily be limited.

Open hearings will undoubtedly yield more relevant information than the members of the JSC could collect and elicit on their own. Through public hearings, the legal public and the lay public can bring their knowledge and opinion to bear on the candidate's suitability for the highest court. As David Beatty points out

"open hearings and the glare of publicity can play an important role in preventing the appointment of people whose intellectual capacities, moral character, and/or understanding of the Constitution do not meet the standards which are deemed to be necessary for appointment to the Court."¹⁹

In short, open hearings are perhaps the last chance for the public to affect the decisions of the least accountable

At each of these four stages, the driving force of this process resides in the reasons for the recommendations. Without the reasons, the back and forth process is no more than the exchanging of random lists of names.

Some might argue that the JSC should devote what time is available to this constitutional conversation, rather than engaging in public hearings. However, the very conception of the process as a reasoned one strengthens the argument that the JSC should elicit as much information about the prospective appointees as possible (and public hearings are, perhaps, the most valuable mechanism for eliciting such information).

¹⁹ Beatty op cit note 1 at 268.

branch: the judiciary.²⁰

Furthermore, without public hearings, the press is unable to play the kind of watchdog role it plays with respect to the other branches of government. Press investigations will be absolutely crucial to the vetting of Constitutional Court candidates for two different, although related, reasons. First, unlike the JSC itself, the press is likely to possess the resources and energy necessary to uncover important information about candidates.²¹ Second, as the comparative experience suggests, official examination of candidates tends to be rather superficial.²² Thus, while only relevant information need be brought to the attention of the committee and the public, it stands to reason that such information is more likely to come from civil society and the media than from government investigators. Public hearings, therefore, make it far more likely that the process will yield appropriate selections.

²⁰ See Nina Totenberg 'The Confirmation Process and the Public: To Know or Not to Know' (1988) 101 Harvard LR 1213.

²¹ Over the past twenty years in the United States, the press has revealed information which led to challenges to nominees who had advocated and advanced segregation, accepted payment from relatives of parties who were before the Court, systematically challenged minority voter qualifications, smoked marijuana while holding an academic post or engaged in behaviour best described as sexual harassment.

²² Totenberg op cit note 19 at 1214 ("Many of the investigations and hearings conducted by the Judiciary Committee have been shockingly thin").

III. OPEN HEARINGS WILL HELP TO BUILD A HUMAN RIGHTS CULTURE IN SOUTH AFRICA

Finally, we believe that open hearings can be an important form of country-wide constitutional education. As we move from an authoritarian regime which operated entirely without respect for the rule of law, equality, individual rights or the most basic notions of political accountability, to an open constitutional democratic order committed to these principles, the public must learn all it can about the document which ensures the new order and the institution created to safeguard it. One important role of public hearings can be to educate the public to the positions the Court and its members are likely to take on constitutional issues and what such positions mean for the country.²³ The hearings provide the space for the public to raise its hand and ask questions. This opportunity that an open and transparent process for choosing Constitutional Court judges presents for building a human rights culture should not be squandered. Open judicial selection hearings can help a constitutional culture take root in South African soil.

Moreover, and very significantly, the educational process is not simply top down. A human rights culture also needs to be established amongst the soon-to-be judges of the Constitutional Court. By asking questions of the candidates, the public and its representatives can also educate our judges as to the direction which the Court ought

²³ Murphy and Tannehaus op cit note 14 at 1005 ("In the long run we return to education. . . [T]he Court may shape the values that guide future generations").

to take.²⁴ That is, open hearings provide the public with an opportunity "to articulate a vision of the Constitution's future, and to scrutinize potential Justices in that vision's light."²⁵ Thus, while not quite a plebiscite, "[p]ublic hearings can be a vehicle through which individuals and groups can deliver their own review of the Court's performance whenever a vacancy arises."²⁶ On the other hand, without open hearings, the public learns little or nothing of the Court and its processes, and the politicians and judges learn nothing about the needs of the people they serve.²⁷

²⁴ Almost 400 organizations in the United States regularly take positions on Supreme Court nominees. This large number of participating organizations demonstrates that the public wants to be and can be integrated into the selection-making process. Gregory Caldeira, Commentary on Senate Confirmation of Supreme Court Justices: The Roles of Organized and Unorganized Interests (1988-89) 77 Kentucky LR 531.

²⁵ Lawrence Tribe God Save This Honourable Court, (1985) 131. See also Robert Nagel 'Advice, Consent and Influence' 84 Northwestern LR (1990) 858: "By exposing legal thinking to broader political values and forms of discourse, the Bork hearings provided a useful testing ground. While not a plebiscite or anything close to one, the tone and content of the hearing sent important messages about the acceptability of decisional outcomes and justificatory norms to the executive branch, to sitting judges and to would-be judges. This sort of influence depends not on selection but on communication."

²⁶ Beatty op cit note 1 at 268.

²⁷ See Judith Lichtman 'Public Interest Groups and the Bork Nomination' (1990) 84 Northwestern LR 978. During the Bork nomination, the interplay between media, interest groups and politicians elicited a significant amount of information about how the public felt about a variety of constitutional issues. The result was that the Senate was put on notice that Bork's positions were ideologically untenable in the 1980s -- though they may have been tenable in the 1950s -- and that his confirmation would

IV. HOW AND WHY THE ARGUMENTS AGAINST OPEN HEARINGS FAIL

The concerns about open hearings are understandable. However, as we shall see, the arguments from transparency, openness, accessibility, legitimacy, and accuracy remain far more compelling.

A. Why the Argument from Urgency Fails

The first counterargument is peculiar to mid-1994 South Africa: the argument from urgency. Because our constitutional arrangements depend so heavily on the Constitutional Court, there are appeals for its immediate composition and for dispensing with the requirements of public hearings and questioning of the candidates. This demand is allegedly reinforced by the backlog of cases already awaiting review that only the Constitutional Court can provide.²⁸

To give in to these calls for haste would be a waste and a mistake. First, where the selection process demands urgency, the interim Constitution has catered for that demand. For example, the Constitution makes special

likely damage the Court. See also Totenberg *op cit* note 19 at 1227 ("For years the confirmation process has been treated as if public knowledge were somehow dangerous. But we depend on knowledge to run a democracy. Over and over again in our history . . . we have learned the dangers of secret government. Government by deliberate ignorance is only marginally better").

²⁸ "[T]he new dispensation hinges specifically on the establishment of the Constitutional Court." 'A Political Vacuum in the First 100 Days' Weekly Mail May 6 to 12 1994 at 11.

provision for exempting the appointment of the first President of the Constitutional Court from a nomination-selection process.²⁹ It has not made such provisions here. By not exempting the selection of the judges to be appointed by both the JSC and the President, the Constitution implies, if not demands, that greater care should be taken.

Second, we question the reality of the urgency. Under the interim Constitution, the Constitutional Court has little original jurisdiction.³⁰ For the most part, the Constitutional Court will have appellate jurisdiction to look at cases after the provincial and local divisions of the Supreme Court have already heard and decided a matter. Thus, there should be few litigants who are denied their initial day in court by the temporary absence of the Constitutional Court. All that is delayed is an appeal, not a claim. Again, it is not denied but merely postponed. Indeed, many applicants are already having their constitutional claims heard in the Supreme Court. While this

²⁹ Section 99(6). The first President of the Constitutional Court is, in part, exempted because he must sit on the Judicial Services Commission. Section 105(1)(b). However, even this exception buttresses the case for greater care and consultation with regard to the selection process adopted by the JSC. The special provision exempting the President of the Constitutional Court from the selection process only applies to the first President of the Constitutional Court. (The first President is also charged, in consultation with the Chief Justice, with the urgent task of promulgating rules regarding access to the Constitutional Court. Section 100.)

³⁰ The Constitutional Court has exclusive jurisdiction over disputes of constitutionality in the Parliament, over the constitutionality of Acts of Parliament, over certain classes of disputes between organs of state, the determination of its own jurisdiction, and certain matters relating to the adoption of the new constitution by Constitutional Assembly. Section 98, 101, and Chapter 5.

percolation of cases up through the lower courts can be further expedited³¹, the primarily appellate nature of the Constitutional Court's jurisdiction allows the JSC time to conduct the proper process when determining the Court's membership.

B. Why the Argument that Publicity Will Prevent the Best Candidates from Coming Forward Fails

A second counterargument accepts the desirability of open hearings in principle but states that the effect of such hearings will be to drive away the best candidates because the best judges will refuse to participate in open hearings.³² We believe this concern to be overstated for several reasons. First, this fear, while arguably valid at the lower court levels, is countered at the Constitutional Court level by other considerations. It is difficult to conceive of a first-flight judge or legal academic refusing a chance to sit on the nation's top court simply because she is reluctant to answer a few tough questions. Second, the comparative experience shows that this claim has no empirical support. Open hearings elsewhere do not deter good candidates.³³ Third, we have to ask whether the kind of candidate that would be deterred by answering questions in public is the kind of candidate that ought to sit on a Constitutional Court.

³¹ One suggestion is to allow provincial and local divisions of the Supreme Court the power to review national laws passed before 27 April 1994.

³² See, eg, Stephen Carter 'The Confirmation Mess, Revisited' (1990) 84 Northwestern LR 962.

³³ See Beatty op cit note 1, at 269.

That is, as long as the questions asked appropriately respect judicial independence and individual privacy (as we propose below), we need to ask whether candidates who would not be willing to answer such limited questions about constitutional and social philosophy are the individuals that we want to sit on a Constitutional Court textually committed to securing an open and democratic society.

V. OPEN HEARINGS REQUIRE CLEARLY DEFINED LIMITS ON QUESTIONING

We recognize that critics of open hearings have reason to fear an entirely unfettered enquiry. Indeed, while we strongly support open hearings, we propose that such hearings have clearly defined limits on questioning.³⁴ Without clearly defined limits, questioning may impinge either upon independence of the judiciary or upon the

³⁴ A related point, but one beyond the scope of this paper, is that of selection criteria. In particular, the Commission and the appointing authorities will need to give content to the interim Constitution's command to select a Constitutional Court that is representative in respect of race and gender. Section 99(5)(d). Under section 99(5)(a), the appointing authorities are enjoined to have "due regard to [the JSC's] reasons for [its] recommendations" which, naturally, will take account of section 99(5)(d)'s injunction to constitute a court representative in respect of race and gender.

There is no express command that the President take these factors into account in selecting persons from the ranks of sitting judges or in choosing the President of the Constitutional Court, but such a duty would seem to be clearly implied. The need to constitute a court representative in respect of race and gender cannot be satisfied solely in relation to the choices of the JSC but must impinge on the entire composition of the Constitutional court. In considering the question of representation, the Commission should adopt an expansive interpretation of these requirements. See, generally, Madame Justice Bertha Wilson 'Will Women Judges Really Make a Difference?' (1990) 28 Osgoode Hall LJ 507 (women judges may succeed in infusing the law with an understanding of what it means to be fully human).

privacy of the individual. Furthermore, an enquiry without limits may well increase the danger of good candidates refusing to put themselves forward. We believe that clearly defined limits on questioning will safeguard these ends and ensure that the best candidates come forward. By examining the kind of information necessary to the selection process and the types of questions appropriate to gather that information, this section defines those limits.

A. The Kinds of Information Necessary for the Selection Process

The first kind of information we might wish to elicit from a candidate would probably concern her constitutional or judicial philosophy.³⁵ This information is crucial to the judicial selection process because it is apt to suggest how a candidate will interpret the interim Constitution itself. At this early juncture of South Africa's constitutional history, the constitutional text is obviously open to a multiplicity of interpretations. None have been closed off by a judgment of the Court. However, there are clearly some interpretations which could be deemed unacceptable and we

³⁵ We assume here that these questions will be asked of each nominee individually. But the answers must be considered not only individually but also in the context of the rest of the makeup of the Court. Thus it will be proper for the Judicial Services Commission to take into account the likely or established judicial philosophies of the four sitting judges to be appointed to the Constitutional Court in assessing the suitability of the judicial philosophies of the six members to be appointed through the JSC process. See Tribe, *op cit* note 24 at 106-124. For a South African example of this point, see Submissions to the Selection Panel Regarding Criteria and Guidelines to be Followed in the Appointment of Members to the New SABC Board submitted by the Campaign for Independent Broadcasting, para. 13.

need to be in a position to determine whether a candidate endorses those interpretations.

For example, a candidate might defend the proposition that a constitutional amendment that makes explicit provision for the right to terminate a pregnancy until the third month would not be a valid part of the Constitution. By refusing to recognize the constitutionally recognized right of the people and their representatives to amend the highest law of the land, such a candidate renders herself unfit to support and defend the Constitution.³⁶

A candidate might advance the hypothesis that under this Constitution, land from which people were removed after 1913 could not be expropriated by the state from its current owners without the payment of full market value to the owner as compensation. The textual support for this position is slight. The text points instead toward a polycentric analysis of the land problem which considers market value as only one of a number of factors and therefore does not so clearly privilege the current land owner's claim.³⁷ We might, therefore, want to explore

³⁶ See section 62. Similarly, a candidate might argue that the interim Constitution allows the provinces to enact legislation that will allow them to secede from the nation. Not even the most ardent proponents of federalism are likely to offer this interpretation of the text. Since the most generous reading of the text cannot support such an analysis, such a candidate clearly should not be selected for the Constitutional Court.

³⁷ In pertinent part, s 28(3) provides: "[E]xpropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of the compensation, the use to which the

why the candidate holds this position. If she says that this Constitution is committed to freedom and property above all else, we might ask her about the Constitution's clear commitment to democracy, equality, reconstruction and reconciliation. If she says that such values are subordinate to freedom and property -- despite textual evidence to the contrary -- then we may wish to ask ourselves whether this person should be sitting on South Africa's highest court.

The second kind of information we might wish to elicit from a candidate would concern her social or moral philosophy. As we have already noted, our Constitution tells us that the new South Africa will be an open and democratic society based upon freedom and equality. The public would want to know if the social or moral philosophy of the candidate accords with such a vision.³⁸ As Charles Black notes, "in a world that knows a man's social philosophy shapes his judicial behaviour, that philosophy is a factor in

property is being put, the history of its acquisition, its market value; the value of investments in it by those affected and the interests of those affected."

³⁸ See Judith Resnik, *Changing Criteria for Judging Judges* (1990) 84 Northwestern LR 889, 893 ("For me, the lessons of the last two decades -- of Watergate, the Iran Contra dispute, and the Supreme Court -- are that individuals matter a great deal. The constraints one might have thought existed by virtue of legal documents such as the Constitution and statutes and by virtue of institutional arrangements do not seem, in fact, always to constrain. At bottom, it is the people that count enormously. Hence the pressure to look hard and the emotional involvement in who will be our spokespersons and our judges").

his fitness."³⁹ Thus, if a candidate tells us that he belongs to a racially restricted club and sees nothing wrong with such membership or has said that the people may vote every five years, but are not and should not be capable of more significant forms of participation, we might call into question his ability to give appropriate and adequate meaning to the Constitution. Indeed, if the candidate's philosophy is one which a JSC member believes will hurt the Court, the Constitution and the country, then she is obliged to oppose recommending the candidate.

Of course, we need to be careful about reductive arguments about constitutional theory and personal outlooks. It does not follow from our argument that a candidate's social philosophy and judicial philosophy should be seen as coterminous and that decisions on the candidate's merit should be made exclusively on that basis. As Martin Redish notes,

³⁹ Charles Black, A Note on Senatorial Consideration of Supreme Court Nominees, (1970) 79 Yale LJ 657, 663-64. See also Carter op cit note 12 at 1198-9:

"The rhetoric of judging insists that judges should put aside their personal beliefs when called upon to decide what the law requires. In constitutional adjudication especially, however, no matter how much judges strive to interpret without regard to their background morality, they cannot hope for a complete separation of judgment from judge. In this sense, constitutional interpretation is like interpretation of any other text. The words of the Constitution do not, by themselves, determine very much, and all who must strive to interpret and apply the text, no matter how great their intellectual force or legal sophistication, must at some point make leaps of faith not wholly explicable by reference to standard tools for interpretation."

"that a judge does not find a particular legislative act violative of the Constitution does not necessarily mean that she is in political agreement with the law."⁴⁰

B. The Kinds of Questions Appropriate for the Selection Process

If these are the two lines of inquiry we wish to pursue, then we next must decide what kinds of questions are appropriate to the task. We believe that good reasons exist to impose two general limits on questioning. The first limit recognizes that a candidate should not be required to give a firm commitment as to how she will decide a specific constitutional case. The second limit recognizes that in order to maintain the dignity of the process and the Court, a candidate should not be asked questions that trench on her individual privacy.

1. Justifiable Limits on Constitutional Questions

Some commentators argue that we can ask for firm commitments on particular constitutional issues and that the refusal by a candidate to answer questions on her position may be used against her.⁴¹ They take this strong line because they generally believe that when courts render decisions they are simply making public policy. If we are

⁴⁰ See Martin Redish 'Legal Realism and the Confirmation Process: A Comment on Professor Nagel's Thesis' (1990) 84 Northwestern LR 886.

⁴¹ See Robert Nagel 'Advice, Consent and Influence' (1990) 84 Northwestern LR 858.

appointing someone to a policy-making position, they argue, it is fair to ask what position they are going to take. This strong position appears to be buttressed here by the fact that we are at the very beginning of the constitution-interpreting process here, and it is quite obviously the case that the Constitutional Court will be making new law and thus making public policy.

The interim Constitution, however, does not support such a strong line of questioning. One of the foundational tenets of the new legal order is that judges must be impartial. As s 96(2) of the Constitution states:

"The judiciary shall be independent, impartial and subject only to this Constitution and the law."

However, if a judge is not in a position to actually hear both sides of an argument, if she has lost her openness "to persuasion and factual nuance," her capacity to weigh fairly the scales of justice must, quite naturally, be called into question.⁴² Yet by asking the judge about how she would come down in a particular case -- and making our decisions about her fitness accordingly -- we would be demanding effectively that she "reach a predetermined outcome, irrespective of the arguments of the parties or the discrete facts of the presented case."⁴³ In so doing, we undermine

⁴² Steven Lubet 'Advice and Consent: Questions and Answers' (1990) 84 Northwestern LR 879, 882.

⁴³ Ibid.

her impartiality.⁴⁴ Furthermore, by forcing the judge to promise to reach a certain conclusion in a particular case -- we would be ostensibly also making a fitness judgment based upon her answer -- we undermine her independence. Such a result must be avoided at all costs.

The threat to judicial independence posed by too strong a line of enquiry does not mean we must refrain from asking hypothetical questions which draw out a candidate's constitutional philosophy. As long as the members of the JSC limit themselves to questions which simply shed substantial light on the candidate's general approach to the subject matter, the candidate does not undermine her impartiality and the Commission receives the information it needs to make an informed decision. That is, the candidate can be asked about her approach to constitutional adjudication without being asked to make "absolute promises" or firm commitments. For example, a candidate might be asked how she would deploy the Constitution's protection of freedom of expression when interpreting the common law of defamation. Her answer to this particular

⁴⁴ See Carter op cit note 32 at 965. Carter likewise argues that judicial impartiality is threatened when nominees are asked to state how they would vote in a given case. He illustrates the dangers by rehearsing a colloquy between former United States Supreme Court Justice Thurgood Marshall and Senator McClellan during Marshall's confirmation hearing. During the hearing, Marshall was continually asked questions about how he would decide Miranda v Arizona -- the case in which police officers were directed to inform an accused of his rights before beginning any custodial interrogation. Marshall refused to answer these questions. "It would be wrong, [Marshall] insisted, to make the promises that McClellan and others demanded. By refusing to make promises, he in effect denied the senators the information that they needed in order to predict his votes. And whether McClellan and the others chose to penalize him or not, Marshall was right to remain silent." Ibid at 967.

question will enable us to explore the subtlety of her constitutional reasoning process. We want a careful answer which reflects her capacity to undertake constitutional adjudication. We are not interested in the substance of her response, which we recognize may change over time, with the facts or with the development of a corpus of constitutional decisions. Lawrence Tribe makes this point forcefully when he writes that

"[r]egardless of where a nominee stands on an issue, a candidate for our highest court owes us an explanation of why".⁴⁵

Stated in other words, public hearings must be primarily about looking for open, critical, intelligent and inquiring judges.

2. Justifiable Limits on Personal Enquiries

In order to maintain the dignity of the process, the Court and the lives of the individual judges, we believe that members of the JSC should refrain from asking questions which touch directly on a candidate's private life. While there may be no hard and fast line between the public and the private, questions about a candidate's marriage or children operate at too great a distance from the concerns of the Commission and, ultimately the Court. They should, therefore, not be asked. If we turn the hearings into a showcase of issues irrelevant to the constitutional business of the Court through such questioning, we risk undermining the very legitimacy we hope to have built through the hearings themselves.

⁴⁵ Tribe op cit note 24 at 98.

Furthermore, we believe that questions which relate only indirectly to a candidate's private life ought to be *prima facie* unacceptable as well. Such potentially invasive questions should only be permitted if the member of the Commission can show that such questions are relevant to the candidate's fitness to be on the Constitutional Court. We suggest that only those questions bearing upon a candidate's ability, temperament, impartiality, and moral character are relevant. The Commission may wish to supplement this minimal list of criteria. In any case, by rigorously maintaining such limits on questioning, and through firm chairing, open hearings will both bring out only the information necessary to choose good Constitutional Court judges and elicit all such information.

C. How and Why Open Hearings with Limited Spheres of Questioning Succeed in Real Life

The preeminent example of a jurisdiction where open hearings are held and the nominee is questioned about her judicial and social philosophy is the United States. At the federal level, a Supreme Court justice is nominated by the President and confirmed by the Senate.⁴⁶ The confirmation process includes a thorough, open and public examination by a committee of the Senate.⁴⁷ Members of the public are

⁴⁶ See David Strauss and Cass Sunstein 'The Senate, The Constitution, and the Confirmation Process' (1992) 101 Yale LJ 1491.

⁴⁷ That the American legislature is involved only in the confirmation process rather than in the initial defining the pool of candidates and screening out of the candidates does not argue against at least a portion of the proceedings of the Judicial Services Commission being open and public. Clearly, there would be a greater premium placed upon confidentiality at the

entitled to submit materials to the committee and to examine much (but not all) of the information available to the committee.⁴⁸ Furthermore, the committee engages in direct questioning of the nominee and of other witnesses. This public process developed over time in response to calls for wider public participation in the process of judging a nominee's qualifications to be a Supreme Court justice.⁴⁹

initial stages of the process. This paper argues for open hearings not in the initial defining the pool of candidates, nor at the stage of excluding candidates from the pool, but only at a final stage where evaluation and selection of a limited number of candidates needs to be made. See *infra*, "An Outline of Recommended Procedures for Conducting Public Hearings." See also Carl Baar 'Comparative Perspectives on Judicial Selection Processes' (a paper prepared for the Ontario Law Reform Commission) 158-161.

⁴⁸ See William Ross 'Participation by the Public in the Federal Judicial Selection Process' (1990) 43 Vanderbilt LR 1.

⁴⁹ Paul Freund 'Appointment of Justices: Some Historical Perspectives' (1988) Harvard LR 1146. Along with the progression towards wider participation went a progression towards a broader conception of a nominee's essential qualifications.

The call has been heeded at the American state level as well. Where direct election of judges is not provided for (an option not argued for in South Africa), similarly open and public procedures for appointing judges are also in place on a state level. For instance, in Alaska, state judges are nominated by a state commission and then appointed by the elected chief executive of the state. After applications have been received, a survey of members of the bar is taken and the overall results released to the public. A public hearing is held on the selection in the community where the judge will sit. The applicant is then interviewed by the commission (either in executive session or in public). At this interview, the applicant has a chance to respond to or explain any material gathered in the course of the commission's evaluation process.

Following the controversy surrounding the Robert Bork and Clarence Thomas nominations, this procedure has come in for some criticism. However, the commitment to open and public hearings remains unchallenged. What questions arise concern the issues with which we have just dealt: namely, the role and the nature of questioning.

For example, as we have already noted, the confirmation battle over Bork did not diminish the standing of the Supreme Court.⁵⁰ On the contrary, political scientists tend to agree that "by focusing attention on the Constitution and the importance of constitutional interpretation, the dispute actually reinforced the legitimacy and the importance of the Court".⁵¹

The Bork hearing is also widely understood to reflect the efficacy of asking a nominee questions about his constitutional philosophy. In his answers to general questions about his approach to constitutional adjudication, Bork cast grave doubts in the minds of his enquirers and the public about his willingness to uphold broadly, if not universally, accepted Supreme Court decisions which recognized African-American equality and women's reproductive rights. Indeed, as Judith Lichtman notes, the public response to Bork's answers put the Senate on notice that Bork's constitutional philosophy did not accord with that of the majority of concerned Americans and that his confirmation would be wildly unpopular.⁵²

⁵⁰ See *Wermiel* op cit note 14.

⁵¹ See, eg, *Murphy and Tannehaus* op cit note 14 at 1019.

⁵² *Lichtman* op cit note 26.

Greater disquiet about the nomination process may have been felt during and after the Clarence Thomas confirmation hearings. Most of that discomfort was caused by the rather unusual hearing within a hearing⁵³ -- Anita Hill's testimony that Clarence Thomas had sexually harassed her when she worked for him at the Equal Employment Opportunity Commission ("EEOC").⁵⁴ However, even here, in the most delicate of areas, most commentators believe that the enquiries into this matter were appropriate.⁵⁵ No questions were asked about Thomas' marriage to a white woman or their decision not to have children. Rather the questions asked by Senate Judiciary committee members about Hill's allegations helped to shed light on Thomas' stewardship of a government agency supposedly committed to redress of societal discrimination. In fact, the allegations added support to the far less controversial proposition that as Chairman of EEOC Thomas intentionally allowed the limitations period on age discrimination claims to run and actively undermined gender-based suits. As Gary Simson notes

"... Hill's allegations, together with the doubt cast on [Thomas's integrity] by his controversial record at the EEOC, his self-

⁵³ It is worth noting that it is precisely because we wish to avoid the discomfort and distraction caused by such sensationalist personalizing of the issues, that we propose that the JSC take only written public comment. See, *infra* "An Outline of Recommended Procedures for Conducting Public Hearings."

⁵⁴ The EEOC is charged with the responsibility, among other responsibilities, of safeguarding employees from sexual harassment.

⁵⁵ See, eg, Simson, *op cit* note 7 at 627-37.

serving exception for race-based preferences, his many disingenuous statements [about his writings], his endorsement of opportunism in the first set of hearings and his shameless and inflammatory appeal to [anti-racist] emotion in the second hearings. . . [placed] Thomas's integrity . . . in such overwhelming doubt by the end of all the hearings that [the Senate] should have been prepared to reject him on that basis alone."⁵⁶

Perhaps the most compelling case for such contentious open hearings rests on the public's sentimental and constitutional education during the Thomas hearings. Most Americans followed the proceedings closely and argued vociferously about the merits of allowing such a nominee to rise to the highest court in the land. At the time of the vote, the public shared the Senate's ambivalence, and favoured by a bare majority, Thomas's confirmation. A year down the line, and much rational discourse later, some two-thirds of Americans believed Anita Hill and deemed Thomas unfit to serve on the Court. Though this conversion may have come too late to block Thomas's confirmation, the public's more fully formed and articulated beliefs about sexual harassment have served clear notice to the President, the Congress and the Court about the acceptable range for a Supreme Court nominee's behaviour in that oldest of

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Ibid at 636.

constitutional democracies.⁵⁷

CONCLUSION

Openness. Responsiveness. Transparency. Accountability. Participation. The clarion calls of a new age, a new politics, a new government, a new South Africa. By holding public hearings, the Judicial Services Commission can demonstrate the death of the old ways -- of secrecy, of paternalism, of exclusivity. By holding public hearings, the Judicial Services Commission has the power to establish a precedent that could well be its greatest legacy: that this government is open to and encourages the participation of all its people. It is an historic opportunity that should not be missed.

⁵⁷ For support for this proposition see, generally, the essays found in Toni Morrison (ed) Race-ing Justice, En-gendering Power: Essays on Anita Hill, Clarence Thomas and the Construction of Social Reality (1992).

**AN OUTLINE OF RECOMMENDED PROCEDURES
FOR CONDUCTING PUBLIC HEARINGS
FOR POTENTIAL CONSTITUTIONAL COURT JUDGES**

The Judicial Services Commission has the discretion to determine the exact procedures it will follow. In line with our arguments from openness, transparency, participation and education, we would suggest the following process as a departure point for discussion:

1. The Commission publishes for written public comment by a specified date a set of criteria by which candidates may be evaluated.
2. The Commission accepts nominations of potential candidates from the public until a specified date. Members of the Commission also generate nominations. Thus, nominations can come from both internal and external sources.
3. In closed session, the Commission evaluates its proposed criteria in light of the comments received and publishes a final set of criteria.
4. The Commission publishes a short list of the candidates it intends to interview. It invites written public comments on that short list in terms of the criteria to be submitted to the Commission by a specified date. No oral representations by members of the public are allowed. [The Commission, thereby, avoids personalizing issues that should remain matters for principled discourse.]

5. After evaluating the written public comments, the Commission advises the candidates of the issues likely to be raised in the interviews.
6. In public hearings, the Commission interviews the short list of candidates. Only members of the Commission will be allowed to put questions to the short list of candidates. [We would urge the Commission to allow full media access including television and radio].
7. In closed session, the Commission decides upon its recommendations to the President and formulates the reasons for its recommendations. The Commission forwards its recommendations to the President.
8. The Commission makes public both the recommendations and the reasons for its recommendations to the President.

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