

The Advice and Consent of the Congress: Toward a Supreme Court Appointment Process for Our Time

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[The President] . . . by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court¹

In the last six years, the President has nominated to the Supreme Court two judges whose confirmation hearings in the Senate have rocked the nation. In October 1987, after days of ideological warfare,² the Senate voted fifty-eight to forty-two against the confirmation of Judge Robert H. Bork³—the greatest margin of defeat ever of a candidate for the Supreme Court.⁴ In October 1991, by the narrowest margin in U.S. history, the nomination of Judge Clarence Thomas was confirmed by the Senate by a vote of fifty-two to forty-eight⁵ after days of unseemly testimony surrounding accusations that the nominee had sexually harassed Professor Anita Hill. But the controversy surrounding these nominations was broader and deeper than the ideology or character of these men, for questions concerning the role of the Senate in the Supreme Court appointment process were as hotly debated as the final vote. What should the Senate consider in determining whether a candidate is fit to be a Supreme Court Justice? What is the Senate's constitutional role of "Advice and Consent"?

Given the facial indeterminateness of the Constitutional mandate and the paucity of recorded debate surrounding its ratification, Senators have largely defined their role for themselves. From the nation's founding to the present, this self-definition has included the possibility that a nominee's ideology⁶ may

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¹ U.S. CONST. art. II, § 2, cl. 2.

² See, e.g., SENATE COMM. ON THE JUDICIARY, REPORT ON THE NOMINATION OF ROBERT H. BORK TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT, EXEC. REPORT NO. 7, 100th Cong., 1st Sess. 226 (1987) [hereinafter BORK REPORT] (noting that "politics and philosophical considerations were emphasized during the consideration of this nomination").

³ 133 CONG. REC. 29,121 (1987).

⁴ For outcomes of other nominations, see generally ELDER WITT, GUIDE TO THE SUPREME COURT 995–98 (2d ed. 1990).

⁵ 137 CONG. REC. S14,704–05 (daily ed. Oct. 15, 1991).

⁶ The term "ideology," used interchangeably with "politics" in this essay, is to be distinguished from such notions as "judicial philosophy" and the like. Acknowledging some

be properly considered grounds for rejection.⁷ Of the 143 nominations to the Supreme Court, 27 (or approximately 19%) were rejected, withdrawn or postponed.⁸ Many of these failed nominations can be explained in terms of a

conceptual overlap of these terms, the former are meant to refer to opinions about the law and public policy that are rooted in the general experience of living, see BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 14-18, 113-15 (1921) (describing how, at times, judges are called upon to make law and policy as legislators do, calling upon their life experiences), as opposed to those stemming from a specific understanding of the nature of judging. Cf. Madeline Morris, *The Grammar of Advice and Consent: Senate Confirmation of Supreme Court Nominees*, 38 *DRAKE L. REV.* 863, 874-75 (1989) (labeling the former class of terms "substantive interpretation" and the latter "theory of judging").

⁷ This is hardly to imply that ideology is always considered or considered to be decisive by Senators in casting their votes for or against a given nominee. Note, for example, that Judge Antonin Scalia was confirmed by a vote of 98-0. 132 *CONG. REC.* 23,813 (1986). And, shortly after the Bork rejection, Judge Anthony M. Kennedy was confirmed by a vote of 97-0. 134 *CONG. REC.* 483 (1988). Most recently, Judge Ruth Bader Ginsburg breezed through the Senate by a vote of 96-3. 139 *CONG. REC.* S10,163 (daily ed. Aug. 3, 1993).

Relevant to this issue, Donald R. Songer writes:

There appear to be two steps in the process of decision making used by most senators in voting on Supreme Court nominations. First, each senator must decide whether the nomination is a controversial one. If not, the senator is likely to feel compelled to vote for confirmation regardless of his personal preferences or his private view of the merits of the nomination. When a consensus exists that the nominee is not controversial, a unanimous vote for confirmation will occur in spite of the fact that some senators may privately prefer that the nominee not sit on the Court. However, a senator who concludes that a nomination is controversial may then proceed to evaluate the merits of the nomination, his own preferences, and relevant political factors before deciding whether to vote for or against confirmation.

Donald R. Songer, *The Relevance of Policy Values for the Confirmation of Supreme Court Nominees*, 13 *LAW & SOC'Y REV.* 927, 929 (1979).

It is uncontroverted that the Senate may properly inquire into the "judicial fitness" of a nominee, see, for example Morris, *supra* note 6, at 868-72, which concept may include such notions as judicial competence, ethics, and temperament. While review of a nominee's "theory of judging" may be less commonly accepted than "judicial fitness," see, for example Morris, *supra* note 6, at 874-81, it is not nearly as controversial as Senatorial forays into a nominee's ideology—the focus of this essay.

⁸ See HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* 31 (1974). The successful nominations of Sandra Day O'Connor, Antonin Scalia, Anthony M. Kennedy, David H. Souter, Clarence Thomas, and Ruth Bader Ginsburg, and the failed nomination of Robert H. Bork, update the figures

political power play on the part of the Senate.⁹ Other nominations, like that of Clarence Thomas, were successful in spite of a politically galvanized Senate.¹⁰

This practice of considering the ideologies of Supreme Court nominees is justifiable to the extent that it advances separation and balance of the powers of the three branches of American government.¹¹ Considering the broad discretion a President has in choosing a nominee, coupled with the broad power of the Supreme Court to decide to which direction the gray areas of the law will fade, a President may well precipitate a political slant to American law that extends decades beyond his or her term.¹² Senatorial consideration of the ideologies of Supreme Court nominees serves to check this potential imbalance of power.¹³ Such a broad rendering of the scope of the Senate's role finds support in the text and history of Article II, Section 2, Clause 2 of the Constitution.¹⁴

While the merits of considering a nominee's ideology have not gone unnoticed,¹⁵ the ramifications of such a political "Advice and Consent" role have not been fully articulated. If a nominee's politics are properly reviewable,

cited in this work.

⁹ Songer statistically analyzed the 14 most "controversial" nominations of this century (through 1979) and concluded that "Senate opposition to Supreme Court nominees is due primarily to a predicted dissatisfaction with the policy-relevant voting of the nominee after confirmation." Songer, *supra* note 7, at 945; accord JOSEPH P. HARRIS, *THE ADVICE AND CONSENT OF THE SENATE: A STUDY OF THE CONFIRMATION OF APPOINTMENTS BY THE UNITED STATES SENATE* 305 (1953); Thomas Halper, *Senate Rejection of Supreme Court Nominees*, 22 *DRAKE L. REV.* 102, 104 (1973); see also *infra* notes 18-64 and accompanying text.

¹⁰ See *infra* notes 57-59 and accompanying text.

¹¹ For a complete exposition of this argument, see *infra* notes 65-87 and accompanying text.

¹² Cf. ROBERT SCIGLIANO, *THE SUPREME COURT AND THE PRESIDENCY* 85 (1971).

¹³ See Larry W. Yackle, *Choosing Judges the Democratic Way*, 69 *B.U. L. REV.* 273, 279-80 (1989).

¹⁴ See *infra* notes 88-107 and accompanying text.

¹⁵ See, e.g., LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT* 113-21 (1985); Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 *YALE L.J.* 657, 657 (1970); Donald E. Lively, *The Supreme Court Appointment Process: In Search of Constitutional Roles and Responsibilities*, 59 *S. CAL. L. REV.* 551 (1986); Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 *HARV. L. REV.* 1202 (1988); Grover Rees III, *Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution*, 17 *GA. L. REV.* 913, 966 (1983); William G. Ross, *The Functions, Roles, and Duties of the Senate in the Supreme Court Appointment Process*, 28 *WM. & MARY L. REV.* 633 (1987); Scott R. Ryther, Note, *Advice and Consent: The Senate's Political Role in the Supreme Court Appointment Process*, 1988 *UTAH L. REV.* 411.

the *House of Representatives* ought to be involved in the confirmation process.¹⁶ Involvement by the House of Representatives would further the goal of separating and balancing the powers of the branches of government and would bring coherence to a process which, in the opinion of many, has gone awry.¹⁷

I.

The words of the Constitution¹⁸ do not explicitly define what the Senate may appropriately consider when voting upon a Supreme Court nomination. Debates in the Federal Convention of 1787 (as well as those in the state constitutional conventions thereafter) concerning the appointment of judges were scanty and focused chiefly on who would nominate (*viz.*, either the entire Congress, the Senate, or the President) and whether a confirmation body was necessary. There was little discussion of the appropriate factors to be taken into consideration during the appointment process.¹⁹

Shortly after the Federal Convention, Alexander Hamilton wrote that the Senate would generally play an accommodating role in the appointment process,²⁰ though the Senate admittedly "would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity."²¹ This view is not clearly representative of those who attended the Federal Convention, for Hamilton had favored granting the appointment power to the President alone.²² Thus, he was perhaps more inclined to diminish the role of the Senate in the appointment process to one of guarding against general incompetence and cronyism than were those founders who had argued for legislative or even shared appointment power.²³

¹⁶ For a full explication of this argument, see *infra* notes 108–24 and accompanying text.

¹⁷ See, e.g., Stephen Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185 (1988).

¹⁸ U.S. CONST. art. II, § 2, cl. 2 (quoted *supra* in text accompanying note 1).

¹⁹ See generally HARRIS, *supra* note 9, at 17–26. For a more complete discussion of the debates in the Federal Convention of 1787 and how they may yet lend support to ideological consideration of nominees, see *infra* notes 90–107 and accompanying text.

²⁰ See THE FEDERALIST Nos. 66, 76 (Alexander Hamilton).

²¹ *Id.* No. 76, at 494 (Alexander Hamilton) (Modern Library College ed., 1964).

²² See generally HARRIS, *supra* note 9, at 19.

²³ See *infra* notes 90–107 and accompanying text.

President George Washington, the first to make a Supreme Court nomination, bore witness to a certain ambiguity regarding the ambit of Senatorial review when he wrote: “[A]s the President has a right to nominate without assigning his reasons, so has the Senate a right to dissent without giving theirs.”²⁴ With little explicit guidance from the Constitution or early debates, Senators have, from the beginning, defined for themselves the proper scope of review. That a nominee’s ideology may be included within this scope was first evidenced during the Washington Administration.

In 1795, President Washington chose John Rutledge to replace Chief Justice John Jay. Though Rutledge had served the Supreme Court as Associate Justice from 1789 to 1791 before resigning to become Chief Justice of the Supreme Court of South Carolina, his nomination to be Chief Justice of the United States was nonetheless contested. Before receiving his nomination in 1795, Rutledge had spoken out against the Jay Treaty with Great Britain, which was ratified by the Senate in that same year. The Federalists, staunch supporters of the Jay Treaty, mobilized the Senate to reject the Rutledge nomination by a vote of fourteen to ten.²⁵ Thomas Jefferson wrote: “The rejection of Mr. Rutledge by the Senate is a bold thing, because they cannot pretend any objection to him but his disapprobation of the treaty. It is, of course, a declaration that they will receive none but Tories hereafter into any Department of the Government.”²⁶

There were also allegations at the time that Rutledge was becoming insane—perhaps related to the viewpoint of zealous Federalists that only a crazy person would oppose the treaty.²⁷ One commentator concludes, however, that “[b]ut for his unfortunate . . . speech [against the Jay Treaty] he would undoubtedly have been confirmed, despite the rumor as to his mental condition.”²⁸

Of all politically oriented groups, the Federalists (like Alexander Hamilton) voiced the strongest support for a strong executive and a limited role of the Senate in the appointment process during the federal and state constitutional

²⁴ 30 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745–99, at 374 (John C. Fitzpatrick ed., 1939) (quoting from Washington’s diary dated Aug. 8, 1789).

²⁵ See generally ABRAHAM, *supra* note 8, at 33; HARRIS, *supra* note 9, at 42–43; CHARLES WARREN, 1 THE SUPREME COURT IN UNITED STATES HISTORY 124–39 (1926).

²⁶ Letter from Thomas Jefferson to William B. Giles (Dec. 31, 1795), in 9 THE WRITINGS OF THOMAS JEFFERSON 318 (Albert Ellery Bergh ed., 1907).

²⁷ See HARRIS, *supra* note 9, at 43; WARREN, *supra* note 25, at 131.

²⁸ WARREN, *supra* note 25, at 139. But see John O. McGinnis, *The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 TEX. L. REV. 633, 654–55 (1993).

conventions.²⁹ Yet within a decade of the ratification of the Constitution, even those who would seemingly be most likely to disapprove of Senatorial consideration of a nominee's politics were actively opposing a nomination on such grounds.

Political considerations also factored into the nascent Senate's rejection of Alexander Wolcott in 1811. Wolcott, nominated to the Supreme Court by President James Madison, had previously served as a customs collector in Connecticut, where he enforced the Embargo and Non-Intercourse laws with vim and vigor. As was the case with Rutledge, the Federalists in the Senate strongly disapproved of Wolcott's political stance and successfully defeated the Wolcott nomination by a vote of twenty-four to nine.³⁰ There were also concerns about Wolcott's professional qualifications,³¹ though they may well have been smokescreens for political opposition.³² In sum, there is evidence that from the outset the Senate has understood it to be proper to consider the politics of Supreme Court nominees.

Many subsequent Supreme Court nominations faced opposition from Senators hostile to the politics of the nominees, as the following brief survey indicates.

President Andrew Jackson's nomination of Roger Brooke Taney in 1835 encountered fierce political opposition. As Secretary of the Treasury, Taney had fully approved of and implemented Jackson's order that all government deposits be removed from the Bank of the United States. Though the Whigs in the Senate strongly disapproved of this dismantling of the federal bank system and opposed the Taney nomination, the Senate voted to confirm by a vote of twenty-nine to fifteen in 1836.³³

President James K. Polk's 1845 nomination of George W. Woodward was opposed in part due to the phenomenon of "Senatorial courtesy,"³⁴ and in large part because of his "gross nativist American sentiments" not to be found

²⁹ See *supra* notes 20-22 and accompanying text; see also *infra* notes 90-107 and accompanying text.

³⁰ See generally ABRAHAM, *supra* note 8, at 33; HARRIS, *supra* note 9, at 50; WARREN, *supra* note 25, at 410-13; Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146, 1148 (1988).

³¹ See HARRIS, *supra* note 9, at 50.

³² WARREN, *supra* note 25, at 412. For a general discussion of the use by Senators of more commonly acceptable reasons as a cover for less commonly acceptable ones, see *infra* note 63 and accompanying text.

³³ See generally ABRAHAM, *supra* note 8, at 90-92.

³⁴ See *infra* note 62.

among the majority of Senators.³⁵ His bid was defeated by a vote of twenty-nine to twenty.³⁶

In 1916, the nomination of Louis D. Brandeis by President Woodrow Wilson sparked controversy that ran down party lines.³⁷ While the nominee's social and economic views resonated with those of Democratic and Progressive Senators, Republican Senators opposed them.³⁸ Brandeis's social and economic views were not the only factors considered by Senators. Questions concerning his character and judicial temperament were raised, but may have been facades for ideological opposition.³⁹ Ultimately, only one Democratic or Progressive Senator broke ranks with his party, and the Republicans were uniform in their opposition. Brandeis was confirmed by a vote of forty-seven to twenty-two.⁴⁰

Similarly, the nomination of Charles Evans Hughes by President Herbert C. Hoover in 1930 brought forth frank ideological opposition. Although liberal Senators contested the nomination because of the nominee's close association with big business,⁴¹ Hughes was eventually confirmed as Chief Justice by a vote of fifty-two to twenty-six.⁴²

Later that same year, the Senate rejected John J. Parker, another Hoover nominee. While the nominee was attacked on many fronts, opposition to his ideology focused on labor and race issues. He was sharply criticized by liberals as anti-union for upholding a "yellow dog contract" (*i.e.*, one which requires employees to refrain from joining any union as a condition of employment) as a Fourth Circuit judge. In addition, he was castigated for the following statement he made while running for Governor of North Carolina in 1920:

The Negro as a class does not desire to enter politics. The Republican Party of North Carolina does not desire him to do so. We recognize the fact that he has not yet reached that stage in his development when he can share the burdens and responsibilities of government. . . . The participation of the Negro in

³⁵ See generally ABRAHAM, *supra* note 8, at 33-34.

³⁶ *Id.*

³⁷ Not all ideological opposition to a nominee is associated with partisan politics. See Songer, *supra* note 7, at 946 (summarizing a part of his statistical analysis, the author concludes that "[p]artisan motives may play some part, especially in increasing support for the President's party, but it was shown that the relationship of policy views to confirmation votes was independent of party").

³⁸ See HARRIS, *supra* note 9, at 99-114; Freund, *supra* note 30, at 1151-53. See generally A.L. TODD, JUSTICE ON TRIAL: THE CASE OF LOUIS D. BRANDEIS (1964).

³⁹ See Freund, *supra* note 30, at 1151.

⁴⁰ See HARRIS, *supra* note 9, at 113; Freund, *supra* note 30, at 1152.

⁴¹ See generally ALPHEUS T. MASON, THE SUPREME COURT FROM TAFT TO WARREN 73 (1958).

⁴² See Songer, *supra* note 7, at 930.

politics is a source of evil and danger to both races and is not desired by the wise men in either race or by the Republican Party of North Carolina.⁴³

Parker was defeated by the margin of forty-one to thirty-nine.⁴⁴

The perceived liberal ideology of Abe Fortas was one factor leading to his failure to obtain the position of Chief Justice.⁴⁵ Nominated by President Lyndon B. Johnson in 1968 to replace Chief Justice Earl Warren, Fortas asked that his nomination be withdrawn after a filibuster by conservative Senators.⁴⁶

Two nominees of President Richard M. Nixon were rejected at least partially for ideological reasons.⁴⁷ Judge Clement Haynsworth, Jr., nominated in 1969, was opposed in part for being allegedly anti-union and in part for alleged conservatism on race issues.⁴⁸ While ethical improprieties were raised, scholars have suggested that these improprieties might not have been uncovered but for the diligence of "those who sought to block the nomination for political reasons."⁴⁹ His nomination was defeated by a fifty-five to forty-five vote.⁵⁰

Nominated by Nixon in 1970, G. Harold Carswell was criticized in the Senate for his record of advocating white supremacy. His qualifications were also called into question. As one scholar concludes, however, "[d]espite the many questions about Judge Carswell's abilities, his lack of intellectual distinction probably would not have been fatal if serious doubt had not also been raised about his commitment to racial justice."⁵¹ Carswell's nomination was rejected by a vote of fifty-one to forty-five.⁵²

The recent nominations of William H. Rehnquist, Robert H. Bork, and Clarence Thomas were contested at least partly for ideological reasons. In

⁴³ Rona M. Mendelsohn, *Senate Confirmation of Supreme Court Appointments: The Nomination and Rejection of John J. Parker*, 14 HOW. L.J. 105, 122 (1968) (quoting W.T. Bost, *Republicans Happy in Progress of Negroes to Democratic Party*, GREENSBORO DAILY NEWS, Apr. 19, 1920, at 1).

⁴⁴ See generally ABRAHAM, *supra* note 8, at 34-35; Freund, *supra* note 30, at 1154-55; Lively, *supra* note 15, at 567-72.

⁴⁵ See generally ABRAHAM, *supra* note 8, at 265-66; see also *infra* notes 60-63 and accompanying text.

⁴⁶ See ABRAHAM, *supra* note 8, at 266.

⁴⁷ See A. Mitchell McConnell, Jr., *Haynsworth and Carswell: A New Senate Standard of Excellence*, 59 KY. L.J. 7, 20-24 (1970); Ross, *supra* note 15, at 645-48.

⁴⁸ See generally Joel B. Grossman & Stephen L. Wasby, *The Senate and Supreme Court Nominations: Some Reflections*, 1972 DUKE L.J. 557, 570.

⁴⁹ *Id.* at 577.

⁵⁰ See McConnell, *supra* note 47, at 20.

⁵¹ Ross, *supra* note 15, at 89.

⁵² See Songer, *supra* note 7, at 930.

1986, Rehnquist was nominated to be elevated to Chief Justice. Voicing the opposition of liberal Senators to Rehnquist's conservative ideology, Democratic Senator Dennis DeConcini bluntly maintained, "Let us not kid ourselves. This is not an issue about a restriction in a deed or about supposedly challenging voters. This is an issue of whether or not a very conservative sitting Justice should be moved to the position of Chief Justice."⁵³ By a vote of sixty-five to thirty-three, the nomination was approved.⁵⁴

Judge Robert H. Bork was nominated to be an Associate Justice of the Supreme Court by President Ronald W. Reagan in 1987. This nomination produced perhaps the stormiest confirmation debate to that time, much of which had an ideological bent. Senator Edward Kennedy summed up the liberal opposition to the nominee in frank terms:

No one disputes the President's right to try to force [a] tilt on the Supreme Court—and no one should dispute the right of the Senate to try to stop him. That's what advice and consent means in the Constitution. . . . [W]hat is sauce for the goose is sauce for the gander. President Reagan obviously took Judge Bork's ideology into account in making the nomination, and the Senate has every right to take it into account in acting on the nomination.⁵⁵

Bork was defeated by a wide margin, fifty-eight to forty-two.⁵⁶

Judge Clarence Thomas was nominated by President George H.W. Bush in 1991. While initial political skirmishes were fought on the sidelines, accusations of sexual harassment against the nominee turned the nomination into the most controversial one in American history. The confirmation hearings and debates became the battlegrounds of an outright political war. On his way toward casting his vote against the nominee, the Democratic Majority Leader, Senator George Mitchell, suggested that Thomas's ideology as it related to abortion was to be given serious consideration:

In 1980, the Republican National Convention adopted a platform which called for the appointment of judges committed to the pro-life position on abortion.

Since 1980, in honoring that commitment, Presidents Reagan and Bush

⁵³ 132 CONG. REC. 23,788 (1986) (statement of Sen. DeConcini).

⁵⁴ See WITT, *supra* note 4, at 998.

⁵⁵ 133 CONG. REC. 28,695 (1987) (statement of Sen. Kennedy). This sentiment was echoed on the other side of the Capitol by Representative Major Owens of New York, who stated that "since Bork's ideology and philosophy is the reason for his being nominated to the high Court, it must also be the reason to turn down his nomination." 139 CONG. REC. 23,916 (1987) (statement of Rep. Owens).

⁵⁶ 133 CONG. REC. 29,121 (1987).

have established as a litmus test for a potential nominee to the Supreme Court that person's position on abortion.

The President opposes a woman's right of choice. In order to have any hope of being nominated to the Supreme Court, so must any potential nominee.

The President selects nominees because of the views, not despite them. That is his privilege. . . .

By the same token, the Senate is not required to rubber stamp a nomination simply because it has been made by a President.

It is illogical and untenable to suggest that the President has the right to select someone because of that person's views and then to say the Senate has no right to reject that person *because of those very same views*.⁵⁷

Senator Kennedy crisply stated: "[I]t is clear that Judge Thomas was nominated precisely to advance the agenda of the right wing. I oppose any effort by this administration to pack the Supreme Court" ⁵⁸ Thomas was confirmed by a vote of only fifty-two to forty-eight.⁵⁹

At times, Senators have directed their political attacks toward a *President* of the rival political party. For example, when the liberal Fortas was nominated to be Chief Justice in June 1968, nineteen Republican Senators signed the following statement:

It is the strongly held view of the undersigned that the next Chief Justice of the United States, and any nominees for the vacancies of the Supreme Court should be selected by the newly elected President of the United States, after the people have expressed themselves in November's elections.

We will, therefore, because of the above principle, and with absolutely no reflection on any individuals involved, vote against confirming any Supreme Court nominations of the incumbent President.⁶⁰

As noted above, the political opposition to Johnson's nominee succeeded.⁶¹ Whether directed toward the nominee, the President,⁶² or both, it is clear that

⁵⁷ 137 CONG. REC. S14,703 (daily ed. Oct. 15, 1991) (statement of Sen. Mitchell) (emphasis added).

⁵⁸ 137 CONG. REC. S14,641 (daily ed. Oct. 15, 1991) (statement of Sen. Kennedy).

⁵⁹ 137 CONG. REC. S14,704-05 (daily ed. Oct. 15, 1991).

⁶⁰ 137 CONG. REC. S14,702 (daily ed. Oct. 15, 1991) (statement of Sen. Mitchell) (quoting the 1968 decree).

⁶¹ See *supra* note 46 and accompanying text.

⁶² At times, Senate opposition to a President's nominee may not stem from ideological factors *per se*. For example, the phenomenon of "senatorial courtesy" factored heavily into the rejections of several nineteenth century candidates. Both William B. Hornblower and

ideological factors have been considered in the Senate's review of Supreme Court candidates.

Often, consideration of a nominee's ideology is not overt. Ideological reasons for rejecting a nominee may be masked by stated reasons that are more "objective" in nature and thus more commonly acceptable.⁶³

Senators may disapprove of considering a Supreme Court nominee's ideology. Many if not most have voiced such disapproval.⁶⁴ The fact remains, however, that Senators throughout this nation's history have deemed ideological factors relevant in deciding the fate of a candidate's nomination. Thus, there appears to be a tension in the historical record, even to this day, between theory and praxis. The tension may be resolved by a closer examination of the theory.

Wheeler H. Peckham, two New Yorkers nominated by President Grover Cleveland to replace New Yorker Samuel Blatchford in 1893 and 1894, respectively, were rejected principally because the President had ignored the alternative suggestions of the highly influential Senator David B. Hill from New York. Reuben H. Walworth, nominated by President Tyler in 1844, and George W. Woodward, nominated by President Polk in 1845, may have also suffered the slings and arrows of Senatorial discourtesy en route to the rejection of their nominations. *See generally* ABRAHAM, *supra* note 8, at 18.

⁶³ *See generally* Lively, *supra* note 15, at 575 (arguing that the appointment process "truly is demeaned not when the Senate focuses upon values and ideology, but when it does so and pretends that it has not"); McConnell, *supra* note 47, at 13 ("A pattern emerges running from Rutledge and Taney through Brandeis and Parker up to and including Haynsworth and Carswell in which the Senate has employed deception to achieve its partisan goals. The deception has been to ostensibly object to a nominee's fitness while in fact the opposition is born of political expedience."); Ross, *supra* note 15, at 649-51 (noting that concerns about "ethical fitness" and "judicial temperament" are often smokescreens for ideologically based grounds for opposition).

For specific instances of Senators masking real objections to a nominee, see, for example WARREN, *supra* note 25, at 412 (commenting that attacks upon the morals and abilities of Wolcott were "in fact due to Wolcott's vigorous enforcement of the Embargo and Non-Intercourse laws"); Freund, *supra* note 30, at 1151 (maintaining that in the case of Brandeis "[t]he opposition couched its attack in terms of questionable character and lack of judicial temperament, and occasionally anti-Semitism became overt, but essentially the campaign against the nominee rested on the repugnance of his social and economic views"); Grossman & Wasby, *supra* note 48, at 354 (arguing that voiced ethics objections to Haynsworth masked ideologically based objections); Lively, *supra* note 15, at 575, 577 (suggesting that opposition to Haynsworth on ethical grounds was a facade for "ideological or political considerations").

⁶⁴ *See, e.g.*, BORK REPORT, *supra* note 2, at 226 (stating that though ideology was considered during the confirmation hearings, it should not be considered when it comes time to vote); *see also* 133 CONG. REC. 28,677 (1987) (statement of Sen. Hatch).

II.

The practice of senatorial review of a Supreme Court nominee's ideology is constitutionally appropriate inasmuch as it serves to maintain the separation and balance of power among the three branches of American government. Because and insofar as ideology may affect the outcome of judicial decisions, a President's political agenda may be advanced well in excess of his or her tenure by appointing an ideological soul mate to the nation's highest bench. Active probing of a nominee's ideology on the part of the Senate serves to check this potentially destabilizing eventuality.

The Constitution does not limit the ideological range of persons a President may nominate to the Supreme Court. Presidents from George Washington to George H.W. Bush seemed to have sought nominees with ideologies similar to their own on key issues of the day. President Washington generally insisted on nominating men with strong Federalist leanings,⁶⁵ as did President John Adams, who nominated John Marshall as Chief Justice.⁶⁶ President Ulysses S. Grant, a vigorous proponent of paper currency, was able to appoint two Justices who tipped the balance of the Supreme Court from its prior ruling that Congress could not issue paper money to a ruling upholding the Legal Tender Act as a proper exercise of war powers.⁶⁷ Both President Benjamin Harrison and President Grover Cleveland appointed individuals who were likely to uphold the interests of big business in the name of economic liberty.⁶⁸ President William Howard Taft is also believed to have screened potential nominees with regard to their conformance to his strongly held views on economic liberty; in fact, one of Taft's appointees, Justice Willis Van Devanter, provided a critical vote in striking down President Franklin D. Roosevelt's New Deal legislation—twenty-five years after his appointment.⁶⁹ President Roosevelt himself, with his threatened Court-packing scheme, provided perhaps the most blatant example of a President seeking to create a Court that would mirror his own political concerns.

More recently, the Reagan Administration reportedly engaged in intense

⁶⁵ See ABRAHAM, *supra* note 8, at 64–71 (noting that Washington's 10 Federalist appointees rendered "[p]ractically no anti-Federalist decisions [or] what could be called an anti-Federalist dissenting opinion").

⁶⁶ See *id.* at 72 (commenting that Adams's three appointees—Bushrod Washington, Alfred Moore, and John Marshall—were all established Federalists).

⁶⁷ See LEO PFEFFER, *THIS HONORABLE COURT* 182–85 (1965).

⁶⁸ See Lively, *supra* note 15, at 558.

⁶⁹ See HERBERT JACOB, *LAW, POLITICS AND THE FEDERAL COURTS* 72–87 (1967); MASON, *supra* note 41, at 67.

screening of candidates to ensure a choice of nominees who would promote and safeguard the Administration's ideological goals.⁷⁰ In the words of judicial appointments expert Sheldon Goldman, "I think there has been more consistent ideological screening under Reagan than any Administration since Roosevelt. . . . Certainly, it is not a rational use of the appointment process to select people who are going to sabotage their agenda."⁷¹ Among ideological issues, abortion certainly ranked high. The 1980 and 1984 Republican platforms called on the President to appoint "judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life"—the latter requirement commonly understood to be opposition to abortion.⁷²

Once appointed, the politics of a sitting Justice may creep into and influence his or her opinion even when faced with an application of clearly defined law to a set of facts.⁷³ Justices who approach cases as "objectively" as possible are not immune to more "subjective" impulses. Consider the reflections of Benjamin Cardozo:

There has been a certain lack of candor in much of the discussion . . . or rather perhaps in the refusal to discuss it, as if judges must lose respect and confidence by the reminder that they are subject to human limitations. I do not doubt the grandeur of the conception which lifts them into the realm of pure reason, above and beyond the sweep of perturbing and deflecting forces. None the less, if there is anything of reality in my analysis of the judicial process,

⁷⁰ Lively, *supra* note 15, at 561 & n.54.

⁷¹ Ronald Brownstein, *With or Without Supreme Court Changes, Reagan Will Reshape the Federal Bench*, 49 NAT'L J. 2338, 2340 (1984).

⁷² *See id.*; *see also* 137 CONG. REC. S14,703 (daily ed. Oct. 15, 1991) (statement of Sen. Mitchell) (accusing President Bush of the same type of ideological screening *see supra* text accompanying note 57); John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures*, 77 VA. L. REV. 833, 844 (1991). One rendering of this screening process was given by Yale Law School students in a humorous skit performed in May 1992, which contained the words (fictitiously attributed to President Bush and sung to the tune of Michael Jackson's "Black or White"):

Had a chance to fill Thurgood's seat,
My chance to finalize the liberal's defeat,
And I thought about equality—
Did not make this decision by sight;
Said as long as you oppose abortion
It don't matter if you're black or white.

⁷³ It should be emphasized that this is not a normative but a descriptive statement.

they do not stand aloof on these chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do. The great tides and currents which engulf the rest of man, do not turn aside in their course, and pass the judges by.⁷⁴

Undoubtedly, the "sweep of perturbing and deflecting forces" is felt to an even greater degree when a Justice is faced with a situation in which the state of the law is unclear, or involves a balancing test.⁷⁵ The balancing tests fashioned by the Court to resolve multifarious controversies cannot be employed mechanically. Subjective opinions derived from a Justice's "whole outlook on life"⁷⁶ affect the tilt of the balance.⁷⁷ At times, the factors in the balance may be objective, so that only the weighting *process* is subjective. At other times, however, the *factors themselves* are open to differing views among reasonable persons. In short, when deciding issues of this type, "five Justices of the Supreme Court are molders of policy, rather than impersonal vehicles of revealed truth."⁷⁸ Because a Supreme Court Justice sits "during good Behaviour,"⁷⁹ she or he may tint the ideological color of the law well in excess of the term of the appointing President.

Given the long-reaching effects of a Supreme Court appointment, the Senate ought to consider the ideology of a Supreme Court nominee in order to maintain the separation and balance of powers among the branches of government. The framers of the Constitution took great pains to provide a system of checks and balances among the three branches of government—legislative, executive, and judicial. This "basic concept"⁸⁰ of American government, "admitted on all hands to be essential to the preservation of

⁷⁴ CARDOZO, *supra* note 6, at 167–68.

⁷⁵ *Cf. id.* at 14–18 (maintaining that when there are no objective factors to be relied upon, the law which is the resulting product is not found, but made).

⁷⁶ FELIX FRANKFURTER, *The Supreme Court and the Public*, in FELIX FRANKFURTER ON THE SUPREME COURT 218 (Philip Kurland ed., 1970).

⁷⁷ *See* CARDOZO, *supra* note 6, at 113, 115 ("If you ask how [the judge] is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself. . . . The process, being legislative, demands the legislator's wisdom.").

⁷⁸ Felix Frankfurter, *The Supreme Court and the Public*, 83 FORUM 329, 334 (1930); *see also* Ryther, *supra* note 15, at 425–26 (arguing that both legal realists and legal positivists must agree that judges are in the business of legislation at least some of the time). *See generally* MARTIN SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT: NEW APPROACHES TO POLITICAL JURISPRUDENCE* (1964).

⁷⁹ U.S. CONST. art. III, § 1.

⁸⁰ *United States v. Nixon*, 418 U.S. 683, 704 (1974).

liberty,”⁸¹ provides that, *inter alia*: the President may veto legislation;⁸² Congress may override such a veto;⁸³ and the Supreme Court may strike down legislation considered unconstitutional.⁸⁴ If a President is able to appoint a Supreme Court Justice whose ideology is similar to his or her own, without ideology-related Senate scrutiny, the delicate balance of these powers may be upset. On matters ranging from the constitutionality of legislation to the authorization of power in the gray areas between the Chief Executive and the Legislature,⁸⁵ the Supreme Court may tip the balance in the President’s direction. A straightforward review of the ideology of a Supreme Court nominee is thus an essential component of the Senate’s advice and consent role. In the words of James Madison, “power is of an encroaching nature, and ought to be effectually restrained from passing the limits assigned to it.”⁸⁶

The text of the Appointments Clause as well as a close examination of its origin support a coequal role of the Senate in appointing Supreme Court Justices. The plain meaning of the phrase chosen to describe the Senate’s role, “by and with the Advice and Consent . . .,”⁸⁷ seems to connote active participation by the Senate. The Senate is to *give advice*⁸⁸ and is not constrained with regard to the scope of that advice. A liberal Senate would be likely to advise against a President appointing a person with a conservative

⁸¹ THE FEDERALIST No. 51, at 336 (Alexander Hamilton or James Madison) (Modern Library College ed., 1964); *see also id.* Nos. 47–48 (James Madison), No. 49 (Alexander Hamilton or James Madison) (detailing the roots of this concept in Montesquieu and discussing how the Constitution ensures that each branch is sufficiently disconnected from the others as to be separate from them, but sufficiently connected to them to be checked by them).

⁸² U.S. CONST. art. I, § 7.

⁸³ *Id.*

⁸⁴ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁸⁵ *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

⁸⁶ THE FEDERALIST No. 48, at 321 (James Madison) (Modern Library College ed., 1964).

⁸⁷ U.S. CONST. art. II, § 2, cl. 2.

⁸⁸ On a few occasions, the President did indeed receive advice about whom to nominate. For example, Edwin Stanton was nominated by President Ulysses S. Grant in response to a petition that was signed by a majority of the House and Senate. Grant heeded the advice in an effort to obtain Senate support for the pending nomination of Ebenezer R. Hoar. *See ABRAHAM, supra* note 8, at 118.

President Herbert C. Hoover was advised by the Chairman of the Senate Judiciary Committee, Senator George W. Norris, to nominate a judicial liberal to replace the retiring Justice Oliver Wendell Holmes, Jr. Benjamin N. Cardozo was nominated and approved without discussion or roll call in the Senate. *See id.* at 191.

See also supra note 62.

ideology to the Supreme Court. By subjecting a nominee to ideological scrutiny after the nomination is made, the Senate gives, perhaps belatedly but no less effectively, its advice.⁸⁹

A review of the debates surrounding the appointment of judges at the Federal Convention of 1787 also supports the view of an active Senatorial role in the Supreme Court appointment process. The Appointments Clause is best viewed as a compromise between those who favored independent executive power to appoint and those who favored independent legislative power to appoint. Such a compromise has implications regarding the scope of Senatorial review.

The first proposal to be considered at the Convention, put forward on June 5, 1787, called for "the national Judiciary [to] be chosen by the National Legislature."⁹⁰ Those opposing this proposal either sought to vest the executive with independent appointment power in order to avoid the "[i]ntrigue, partiality and concealment" claimed to be inherent in nominations by numerous bodies,⁹¹ or would have given the appointment power to the Senate, for it was "not so numerous as to be governed by the motives of the other branch,"⁹² and Senators were "sufficiently stable and independent to follow their deliberate judgments."⁹³ No agreement was reached on this matter at the Convention at that time.⁹⁴

On June 13, the Convention adopted a proposal by James Madison to give independent appointment power to the Senate.⁹⁵ Madison reiterated his opposition to involvement by the House of Representatives as he felt they were "incompetent Judges of the requisite qualifications" of judges and would be

⁸⁹ See Black, *supra* note 15, at 658–59; see also TRIBE, *supra* note 15, at 9.

⁹⁰ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 119 (Max Farrand ed., 1966) [hereinafter 1 RECORDS]. This may be seen as a logical extension of Article IX of the Articles of Confederation, which stated that the "united states in congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more states concerning boundary, jurisdiction or any other cause whatever. . . ." ARTS. OF CONFED. OF 1781, reprinted in DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 31 (Charles C. Tansill ed., 1927). The legislature was authorized to choose judges to hear such matters if the parties could not agree upon judges themselves. *Id.* at 31–32.

⁹¹ JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 67 (1976). Another delegate, James Wilson of Pennsylvania, propounded such a view. See generally HARRIS, *supra* note 9, at 18.

⁹² MADISON, *supra* note 91, at 68 (noting that Madison advanced this argument).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ 1 RECORDS, *supra* note 90, at 233.

partial toward those “who had displayed a talent for business in the legislative field, who perhaps assisted ignorant members in business of their own, or of their Constituents, or used other winning means.”⁹⁶

The issue was next debated on July 18. Nathaniel Gorham of Massachusetts proposed that “the Judges be nominated and appointed by the Executive, by [and] with the advice [and] consent of the [Senate],”⁹⁷ as was the procedure according to the Constitution of Massachusetts. This proposal was opposed on one side by delegates who favored independent executive power, and on the other by those, like Roger Sherman, who favored independent Senate appointment because it was “composed of men nearly equal to the Executive, and would of course have on the whole more wisdom. They would bring to their deliberations a more diffusive knowledge of characters.”⁹⁸ Similar to the concerns voiced by James Wilson apropos the *legislature*,⁹⁹ Roger Sherman expressed concern that the *executive* would be too vulnerable to intrigue.¹⁰⁰ A motion to amend the June 13 proposal was defeated.¹⁰¹

On July 21, the Convention debated a second proposal put forward by James Madison that “the Executive [should nominate, and] such nominations become appointments unless disagreed to by [two-thirds] of the [Senate].”¹⁰² According to Madison, the President would better take the concerns of the country into account, while the Senate would consider chiefly state interests.¹⁰³ During this session of the debates, Oliver Ellsworth of Connecticut argued that this proposal would give too much power to the *executive*, which would “be more open to caresses [and] intrigues than the Senate.”¹⁰⁴ Edmund Randolph disagreed, believing more intrigue to lie with the *Senate*.¹⁰⁵ Madison’s second proposal was defeated, even after the two-thirds provision was changed to one-half.

The matter was finally resolved with the report of the Special Committee on Postponed Matters on September 4. The relevant provision of the report read: “[The President] shall nominate and by and with the advice and consent

⁹⁶ MADISON, *supra* note 91, at 112–13.

⁹⁷ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 44 (Max Farrand ed., 1966) [hereinafter 2 RECORDS].

⁹⁸ MADISON, *supra* note 91, at 316.

⁹⁹ See *supra* note 91 and accompanying text.

¹⁰⁰ *Id.*

¹⁰¹ 2 RECORDS, *supra* note 97, at 43.

¹⁰² *Id.* at 80.

¹⁰³ MADISON, *supra* note 91, at 344. The majority of Senators at the time came from Northern states; Madison was from Virginia.

¹⁰⁴ *Id.* at 345.

¹⁰⁵ *Id.* at 344.

of the Senate shall appoint . . . Judges of the supreme Court.”¹⁰⁶ After little further substantive debate, this final proposal was adopted on September 7.

From these debates, it is clear that a compromise was reached between those who favored appointment solely by the Executive and those who would have placed this power completely within the realm of the legislative branch. Opinions differed sharply as to which entity would be more susceptible to “intrigue” and the like. It is difficult to assert that the Senate should serve as a mere “rubber stamp” to the nominations of the President from this record. Instead, an active, coequal role of the Senate may be implied from the type of compromise reached.¹⁰⁷

III.

Senate confirmation votes have turned on the ideologies of Supreme Court nominees. Arguing that this past practice is properly within the scope of the Senate’s advice and consent role, some commentators have called for more consistent and open consideration of a nominee’s ideology.¹⁰⁸ One scholar, for example, arguing for increased consideration of ideological factors and lamenting Senatorial acquiescence in the President’s choices of nominees, writes:

Lost in the course of deferential review is the opportunity for input on a momentous decision from a maximum number of sources. Presumably, the more voices heard and the more concerns heeded, the wiser the ultimate decision will be. . . . [U]nlike the president, the Senate better reflects the diversity of the populace and thus of the interests affected by an appointment.¹⁰⁹

¹⁰⁶ *Id.* at 575.

¹⁰⁷ See PFEFFER, *supra* note 67, at 22; Black, *supra* note 15, at 661.

¹⁰⁸ See *supra* note 15. *But see, e.g.*, 133 CONG. REC. 28,677 (1987) (statement of Sen. Hatch) (“Federal judges are not politicians and ought not to be judged like politicians. The great danger I see in the impending ideological inquisition is injury to the independence and integrity of the Federal judiciary. When we undertake to judge a judge according to political, rather than legal criteria, we have stripped the judicial office of all that makes it a distinct separated power.”); Letter from Richard M. Nixon to William Saxbe (Mar. 31, 1970), *reprinted in* 116 CONG. REC. 10,158 (1970) (maintaining that because the President has the “power of appointment,” the Senate should not substitute its “subjective judgment” for that of the President, and commenting that his immediate predecessors were “freely accorded” this “right of choice”).

¹⁰⁹ Lively, *supra* note 15, at 576.

Presupposing the Supreme Court appointment process properly to have a political aspect in order to preserve separation and balance of powers, it is indeed appropriate to argue for maximum representation of the populace in the process. To the extent that ideology affects the outcomes of constitutional conundrums affecting the People, that ideology should reflect that of the People. When it does not, the institution of judicial review exists in tension with ongoing representative democratic government.¹¹⁰ This tension is, at times, appropriate to counter codified waves of public opinion that stray from the Constitution.¹¹¹ When ideology influences outcome, however, the judiciary is not a check upon, but a substitution for, the judgment of the People. The overriding constitutional principle of a nation of the People, by the People, for the People is thereby undermined. Increasing the political aspect of advice and consent in the appointment process to better reflect the diverse views of the citizenry would serve to minimize this “countermajoritarian difficulty.”¹¹²

If the Senate’s consideration and appraisal of a Supreme Court nominee’s ideology is appropriate to resolve the countermajoritarian difficulty, the *House of Representatives* ought to be involved in the appointment process as well. The House “better reflects the diversity of the populace and thus of the interests affected by an appointment”¹¹³ than the Senate alone. If the Senate should be called upon to preserve the balance of powers among the branches of government, the House, a key component of that balance, should be asked to aid in the cause. Without House involvement, the legislative branch of government responds disproportionately to the interests of smaller *states*, when the interests of *all citizens* are at stake.

Expanding the advice and consent role to include the House also comports with the changing view of the Senate in American government. Initially, Senators were not chosen by the People, but by state legislatures,¹¹⁴ and they were to serve as an aristocratic check upon a populist House of Representatives.¹¹⁵ This image of the Senate as privy counsel to the President

¹¹⁰ *Id.* at 566; *cf.* DUMAS MALONE, *JEFFERSON AND HIS TIME: THE SAGE OF MONTICELLO* 349 (1981) (noting that Jefferson understood “judicial independence from popular control” as incongruous with democracy; Jefferson would have preferred direct election of judges).

¹¹¹ *See generally* THE FEDERALIST No. 78 (Alexander Hamilton).

¹¹² *See* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16–23 (1962); Monaghan, *supra* note 15, at 1203.

¹¹³ *See supra* text accompanying note 109.

¹¹⁴ U.S. CONST. art. I, § 3.

¹¹⁵ *See generally* JAMES L. SUNDQUIST, *CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT* 22–23 (1986); *see also* THE FEDERALIST No. 62 (Alexander Hamilton or James Madison); Vik D. Amar, Note, *The Senate and the Constitution*, 97 *YALE L.J.* 1111,

in matters such as appointments may at one time have been consistent with the general view of the Senate in the governmental structure.¹¹⁶ As a privy counsel, removed from the ebbs and flows of public opinion, it would be better able to aid in the selection of objective decisionmakers who, it was thought—or hoped—stood aloof on the chill and distant heights of pure reason. But the notion of the Senate as privy counsel to aid in the selection of such an aloof judiciary has faded with time. Given the direct election of Senators,¹¹⁷ and the rise of legal realism, it seems high time to reevaluate the special status of the Senate in Supreme Court appointments.

On a related note, the Senate's special status with regard to treaties, found in the same section of the Constitution as the Appointments Clause,¹¹⁸ has diminished somewhat since the nation's founding, with a concomitant rise in the importance of the House. For the first several decades it was well understood that all treaties made by the President and approved by the Senate would, in self-executing fashion, become the law of the land.¹¹⁹ In the 1829 case of *Foster v. Neilson*,¹²⁰ Chief Justice Marshall first suggested that some treaties are not self-executing but require the input of the House to become domestically enforceable.¹²¹ Since then, the view that "certain treaties are inherently non-self-executing because legislative power exists, for example, to regulate commerce, to define and punish crimes, and to appropriate money,"¹²² has risen in importance.¹²³ Thus, in many treaty matters affecting the interests of American citizens, the House is viewed as having an increased role.¹²⁴

The House may become involved in the advice and consent process with or without a constitutional amendment. The Senate might merely expand the scope of advice and consent to involve House input. This might be accomplished by the Senate establishing a Joint Judiciary Committee to handle hearings, and by

1114, 1118 (1988).

¹¹⁶ See generally SUNDQUIST, *supra* note 115, at 52–56.

¹¹⁷ See U.S. CONST. amend. XVII (1913).

¹¹⁸ U.S. CONST. art. 2, § 2.

¹¹⁹ See generally Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760 (1988).

¹²⁰ 27 U.S. (2 Pet.) 253 (1829), *overruled on other grounds by* United States v. Percheman, 32 U.S. 51 (1833).

¹²¹ See Paust, *supra* note 119, at 766–67.

¹²² *Id.* at 775.

¹²³ For cases and commentary, see *id.* at 775 n.99.

¹²⁴ See also Kenneth C. Randall, *Foreign Affairs in the Next Century*, 91 COLUM. L. REV. 2097, 2109 (1991) (reviewing LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY AND FOREIGN AFFAIRS* (1990)).

taking a House floor vote into account before casting its own.

Alternatively, an amendment need only add the words “and the House of Representatives” to the appropriate clause of Article II, Section 2 of the Constitution. The amendment might be procedurally implemented as described above, with the key difference being that the House floor vote would not be merely advisory, but could constitutionally quash a nomination.

The most ambitious approach would combine a constitutionally legitimized advice and consent role of the House with a new understanding of the *advice* aspect of the role generally. Such a new understanding might involve active participation by a Joint Judiciary Committee in the screening of candidates. Though ambitious, this proposal would best implement the goals propounded in this Essay.

IV.

The appointment process has been much maligned recently, in no small part due to confusion over what factors may appropriately be considered by the Senate. Senators feel constrained by custom to avoid overt consideration of a nominee’s ideology, while simultaneously feeling the need to resist attempts by Presidents to cast their ideological imprints upon the law of the land far in excess of their terms. The resulting tension is often released by creating shams to cover what is truly being considered. The result is a sham, and is rightly maligned.

It is also a shame, because it need not be so. The constraints of custom may be loosened by a broader view of the history of Supreme Court nominations. We value precedent, and there is ample precedent for active consideration of a nominee’s ideology. The felt need to resist political power plays on the part of the President may be acted upon openly and often when the need is properly viewed to rest upon a constitutional imperative regarding the basic structure of American government.

Once this tension is thus resolved, however, a new one arises. If the appointment process is openly political, should we not observe the same rites we observe with regard to other political acts—namely, review by both the President and Congress as a whole? Presupposing that Supreme Court Justices must often step down from chill and distant heights, ought not the House, too, be privy to decisions affecting the direction of American law? Once it is clear what we are doing during the appointment process, and why what we are doing is appropriate, House involvement is clearly warranted to bring further coherence to the process.

