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THE OVERTLY "POLITICAL" CHARACTER OF THE ADVISE AND CONSENT FUNCTION: OFFSETTING THE PRESIDENTIAL VETO WITH SENATORIAL REJECTION

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I. CHECKS AND BALANCES, POLITICAL QUESTIONS, AND THE DEVELOPMENT OF EXTRA-JUDICIAL CONSTITUTIONAL NORMS

On paper, the constitutional process by which lawyers are transformed into Article III judges is one of the most satisfying examples of our precisely calibrated system of constitutional checks and balances at work.[1] The President nominates, the Senate consents (by a simple majority vote), and successful candidates become members of "the Least Dangerous Branch."[2] Thereafter, they hold a lifetime warrant significantly to check the freedom of action of the very President and Senators who combined to appoint them, not to mention future Presidents and future Senators.

That is not the end of the matter, however, for life tenure is not literally what the Constitution bestows on Article III judges. Instead, they hold office during "good Behaviour," but the good-

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[1] I added the first two words of this essay on the day that Clarence Thomas was confirmed to a seat on the United States Supreme Court, despondent that the Senate had not in fact performed the checking and balancing role assigned to it on paper. As may be surmised from the title of this essay, I advocate that *more* rather than less "political" content be infused into the appointment process. But the kind of principled politics I have in mind will remain an academician's paper fantasy until the electoral process yields a more principled corps of politicians, or sends it more principled messages. Never was George Bernard Shaw's epigram more apt: in a democracy, the people get exactly what they deserve.

[2] That course is explicitly spelled out only with respect to appointments to the Supreme Court. Appointments to the other Article III courts have always been made according to the same set of procedures, and—as my students have from time to time argued in bluebooks—the Constitution almost certainly so requires. Textually, this follows because lower federal court judges are "Officers of the United States" under Article II, Section 2, yet they are not "inferior Officers" merely because they sit on "inferior" courts.

ness of their behavior is subject to scrutiny via the impeachment process,[3] which in turn involves action by the House and the Senate, *without* the participation, by veto or otherwise, of the President.

It could not have been accidental—and was not—that in the appointment and then in the removal process, the Framers of the Constitution twice eschewed the "normal" procedure for getting the nation's business done.[4] Although it is hard to imagine now, a constitution might have been written that did not advert separately to these matters at all. Under such a document, both houses of Congress would together initiate formal action with respect to both the appointment and removal of judicial officers, and the President would have an opportunity to veto such action, subject to an override by a two-thirds vote in each House.[5]

Comparing the roads not taken with the practices actually written into the Constitution, we see at once that the House of Representatives has been entirely removed from the appointment process, while the President has been entirely removed from the removal process. It also appears that of the three political actors in these dramas, only the Senate plays a full leading role in all the

[3] *See* RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 193-213 (1973). The author argues, controversially, that federal judges may be removed from office (by other federal judges) for behavior that is less than "good," but not so bad as to rise to the level of an impeachable offense under Article II, Section 4. *Id. Compare* Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74, 86-89 (1970) (Supreme Court refuses to disturb order of Judicial Council assigning zero new cases to sitting district court judge).

It is well established, however, that when *Congress* removes a sitting federal judge, it may do so only via the impeachment process, and must accordingly characterize the judge's behavior as "high Crimes and Misdemeanors." This much is not controversial, because the impeachment clause of Article II nonetheless applies to Article III judges, since they must be considered to be "civil Officers of the United States." *See supra* note 2 (judges of inferior federal courts are "civil officers," but not "inferior officers").

[4] *See generally* DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION (1990). The authors have lovingly pieced together, with brilliant commentary, a detailed legislative history of the most important and controversial provisions of the Constitution. Taking Madison's daily log as their main source, they traced—often day-by-day—the proposals considered, rejected, redrafted, and reconsidered. Some of the specific proposals the 1787 Convention considered with respect to appointment of federal judges are discussed *infra*, in Part Two of this essay. The point here is simply that whatever the Framers did, they did by design.

[5] In fact, during the 1787 Convention, the Framers tentatively adopted a regime in which federal judges would be appointed *by the Senate alone*, and that method was not replaced by the present method until near the end of the Convention. In the text, however, I am speaking of what the situation would be if *no* special provisions had been adopted.

scenes. Furthermore—and more importantly—its decision as to judicial appointments need only be voiced by a simple majority; it is only when sitting as a court of impeachment that it must marshall a two-thirds majority.[6]

Does this mean that the Senate should more openly and also less bashfully assume a genuinely "political" or "policy-oriented" role in matters of judicial appointment? More particularly, should it treat its power to confirm or veto nominations by simple majority vote as an invitation to abandon the practice of giving the President the benefit of a presumption of correctness, and instead to consider nominees on a strictly de novo basis? I believe that it should, avowedly taking as its model, the President's power to consider legislation presented to him for signature.

Like the President, the Senate should approve or veto as it sees fit, but it should then be prepared—also like the President—to defend its action in *political* terms, and to accept whatever *political* consequences ensue. To complete the analogy, the Senate should couple its decision to approve or reject judicial nominations with whatever political message it sees fit to send to either the other branches of the federal government or to the people. Furthermore, this dialogue may profitably take place not only during consideration of a particular nominee, but before and after as well.

The kind of political dialogue I am suggesting also finds an echo in presidential practice. When a President issues a series of credible threats to veto legislation (including credible predictions that the veto will be upheld), he can to a significant extent, dictate the terms of the legislative debate, gaining a significant influence over what legislation will be seriously considered, let alone passed. The Senate can and should do the same with respect to judicial nominees. Instead of complaining about the current President's abuse of the nomination process, but then timidly tiptoeing into the night, the current Senate should boldly go to the people with *its* criteria for selection, thereby warning the President not even to seriously consider "unacceptable" candidates.

[6] A two-thirds vote of the Senate is also required to ratify treaties proposed by the President. *See infra* note 17 and accompanying text (discussing hierarchy of voting majorities needed to approve or disapprove presidential action).

But, before looking more closely at the historical evidence to see if it supports such an avowedly politicized appointment process, another central feature of our constitutional scheme deserves attention, for it too points in the same direction.

Besides demonstrating the separation of powers principle at work as between the President and Congress, the judicial selection process also serves as a textbook example of a "political" question—a question that cannot be answered by a *judicial* body. This follows because the process is unmistakably "committed" by the text of the Constitution to the nonjudicial branches, and in addition the Constitution provides *no* standards by which to judge the soundness of an appointment or the reasons for a rejection.[7] Since no law or legal doctrine gives any person a right or even an expectation to be appointed or confirmed, there is no call for the courts to "say what the law is."[8] Alternatively, the courts might oust themselves from the process by *saying* what the law "is," namely that there is no law to apply.[9]

But merely because there can never be a *judicial* ruling on the fitness or appropriateness of a particular judicial nominee does

[7] The situation is thus different from that presented in Powell v. McCormack, 395 U.S. 486 (1969), where the Supreme Court avoided application of the political question doctrine by finding that the threshold issue, whether the House of Representatives could not only judge but *set* the "qualifications" of its members, required an interpretation of a clause in the Constitution, which is standard judicial fare. *Id.* at 518-49.

The *removal* of judges by Congress might present a closer case, as it might be argued that what constitutes "high Crimes and Misdemeanors" is a matter of constitutional—and therefore judicial—interpretation. This argument is tenuous, however, as the intention that the House and Senate actually *decide* impeachment matters seems unmistakable. *Cf.* Roudebush v. Hartke, 405 U.S. 15, 25-26 (1972) (Senate alone has power to finally *decide* election and recount disputes). For this reason, most commentators agree that the standard for impeachment presents a non-justiciable political question. *But see* BERGER, *supra* note 3, at 104-07 (Professor Berger argues plausibly to contrary, relying largely on *Powell v. McCormack*).

[8] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). Furthermore, no one would have standing to ask for a ruling on such a question, and any opinion would accordingly be advisory. These are two more reasons why the entire appointment and confirmation process is nonjusticiable. It is again arguable that the *removal* of a sitting federal judge might be different, for in that case it might be argued that the loss of salary alone would be enough to confer standing and concreteness, and that there *is* a legal standard to apply. *See supra* note 7.

[9] Compare modern administrative law cases such as Heckler v. Chaney, 470 U.S. 821, 826-27 (1985), and Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410-14 (1971) (discussing extent to which matters may be "committed to agency discretion by law," and thus gain immunity from judicial review because there is "no law to apply").

not mean that no constitutional standard is in play. Commentators as diverse as Edwin Meese, Charles Warren and Sandford Levinson,[10] to say nothing of Thomas Jefferson, Andrew Jackson, Abraham Lincoln, Franklin Roosevelt, Richard Nixon, and Daniel Patrick Moynihan, have pointed out that in the absence of a court pronouncement in a "case or controversy" *to which they are parties*, political actors—including ordinary citizens—have both a right and a duty to take the Constitution seriously as a guide for action and to make their *own* judgments about what it means.[11] By extension, it should be clear that in areas where litigated results cannot exist, constitutional principles can *only* be developed through out-of-court tradition and practice.

In the next section of this essay, I try to demonstrate that the Framers of our Constitution would not have been surprised to see the development *in the Senate* of a "common law" of judicial qualifications; indeed, they probably intended it. In the third section, I reflect on how such norms might have been put to use in a political yet principled way in connection with the nomination of Clarence Thomas.

II. The Judicial Nomination Process and the Intent of the Framers

Ordinarily, even a casual reference to "the intent of the Framers" should be accompanied by long footnotes rehearsing the ferocious duels those words evoke. Even casual references are ordinarily hedged about with caveats concerning the role of changed circumstance, the appropriate level of generality and abstraction, how one determines what a corporate body of outspoken and

[10] *See generally* Sandford Levinson, *Perspective on the Authoritativeness of Supreme Court Decision: Could Meese be Right this Time?*, 61 Tul. L. Rev. 1071 (1987). The symposium, of which this article is a part, concerns the extent to which Supreme Court pronouncements are "binding" on citizens generally. The centerpiece of the symposium is a speech given by former Attorney General Edwin Meese.

[11] Two different approaches to extra-judicial constitutional interpretation were evident when the city councils of Minneapolis and Indianapolis passed similar ordinances equating the display of certain sexually explicit material with acts of discrimination against women. The mayor of Minneapolis vetoed the law on the ground that it violated the First Amendment; the mayor of Indianapolis expressed some doubts about the constitutionality of the law, but withheld his veto on the ground that only the courts should make such a determination.

quarrelsome people really meant, what individuals should be counted as constituents of that corporate body, and so on.

For purposes of this essay, however, I have quietly put those questions to one side, and have temporarily buried another set of related—but even more fractious—issues: the extent to which either the Constitution or the Framers' broad or narrow understanding of it is "binding" on Americans now living. That requires revisiting (and then temporarily reburying) all of the problems noted above, and negotiating the difficulty that all of the Framers and ratifiers were not only male, white and propertied, but are now all long since deceased to boot.[12]

Fortunately, a third and most difficult set of issues is not even germane to the problem at hand, and can even more readily be ignored. Most questions about original intent and the "bindingness" of constitutional text are, at bottom, questions about who will do the interpreting, by what authority, and according to what methodology. Whenever the answer is that unelected *judges* will interpret the text or the intent of the Framers regarding that text, and that these interpretations will then bind the rest of us, the counter-majoritarian difficulty looms large. But when we are dealing with constitutional norms to be developed *outside* of formal litigation, that problem not only disappears, but causes the constitution-building instincts of the other branches of the federal government to thrive.

Our tradition of constitutionalism rightly requires even political actors to trace the lineage of their ideas back to the founding generation. Our political system will not advance (and will eventually punish) those who stray too far from accepted constitutional bounds for too long.[13] It is not the Constitution itself which is

[12] *See, e.g.,* Larry Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation be Justified?*, 73 CAL. L. REV. 1482, 1498 n.44 (1985) (asserting that when eligibility and participation rates are taken into account, only 2.5% of population then living in thirteen colonies actually voted in favor of Constitution).

[13] In the Spring of 1989 I gave a talk in Beijing, comparing the Chinese and American legal systems. The main comparative point I made was that while the Chinese Constitution provides for a tripartite division of labor between the three branches of government, there is no "separation of powers" in the American sense, because the Chinese courts are not genuinely independent, and do not perform a "checking" function.

A perceptive student challenged the notion that *American* judges are genuinely independent by asking: "What is to prevent the U.S. Congress from simply removing any federal

binding on our generation, but rather our continuously refreshed commitment to each other to treat it as binding and to ostracize those who mock it, even as we continuously duel with each other about what its "accepted" meaning actually is.

In the arena of judicial appointments, the constitutional *is* the political. What kind of politics, then, did those "long-headed statesmen"[14] of the 1780's have in mind, and how should today's President and Senators play the game they designed?

When the Convention opened in May of 1787, it had before it the fifteen "Randolph Resolutions," written by James Madison and the other Virginia delegates while they awaited the arrival of their counterparts from the other states.[15] This working paper proposed that both the executive *and* the judiciary be chosen by the legislature, that a veto over legislation be shared by the executive and the judiciary in a Council of Revision, and that impeachments be tried in court.

On June 19, the Convention decisively rejected the competing New Jersey Plan, but the dynamic of the debate led to important modifications of Randolph's proposal. By the end of the day, the most current working draft provided for the selection of the President by both houses of Congress, selection of federal judges by the *Senate* alone, presidential veto with a two-thirds vote override in both Houses, and impeachments still to be tried in the courts. This configuration of basic provisions was still intact on July 29, when the Convention amended the Randolph Plan for the last time, and turned much of the remaining work over to the Committees of Detail and Style.

The delegates debated the matter of judicial appointments both before and after July 29, and considered a variety of alternative proposals, including veto or confirmation of such appointments by various factions of various political bodies. At every turn, how-

judge who makes a 'wrong' decision?" My response was the point of this text: "Nothing is to prevent that, except 200 years of political tradition. It is virtually impossible that enough people willing to flout generally accepted [non-judicial] constitutional norms could be elected to Congress at the same time."

[14] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593 (1952) (Frankfurter, J., concurring).

[15] *See* FARBER & SHERRY, *supra* note 4 (source for all discussion in this essay about 1787 Convention).

ever, they alluded to the interrelatedness of this relatively noncontroversial issue with several other matters of significant controversy, especially the matter of how the President himself was to be selected and removed, and what kind of veto he would exercise over legislation.[16] At every turn, they recognized that each plan to check one political power with another was rife with the possibility of abuse and conflict of interest, and might call for further calculation of the balance of power.

Consider the following paraphrased sampling of the Convention debates, spread over almost three months, and with emphasis added:

> WILSON of Pennsylvania: Judicial appointments should not be made by numerous bodies—there would be too much "intrigue, partiality and concealment."
>
> RUTLEDGE of South Carolina: To grant so great a power to one person would be to make him a king.
>
> MADISON of Virginia: Legislators are not "judges of the requisite qualifications," and are subject to being lobbied, yet letting the President alone appoint has drawbacks. Appointment by the Senate alone is a good compromise, because that will be a small, stable and independent body.
>
> GORHAM of Massachusetts: Even the Senate has insufficient personal responsibility; perhaps the Massachusetts system is better, which is appointment by the executive, with advice and consent by the Senate.
>
> MARTIN of Maryland: The Senate, taken from all the States, is better situated to decide.
>
> SHERMAN of Connecticut: There ought to be geographical representation on the national courts, which also argues for appointment by the Senate.

[16] The question of whether the President should have *any* veto over legislation or indeed should have an *absolute* veto, became enmeshed with whether the Congress would have a role in his selection, and whether he would be limited to a single term (since those would affect whether he would need to curry favor with Congress by rarely exercising the veto). There were also persistent proposals that he *share* a veto with the judges in a Council of Revision, which obviously had an enormous impact on whether he would be given the leading oar—or any oar—in the appointment of judges. At the same time, the locus of power to *remove* the President was moved from the courts to the legislature, but that merely served to reopen all of the difficulties noted above, since the delegates were acutely aware of the potential that political tiffs could escalate into retaliatory impeachments to compensate for abusive vetoes.

GORHAM of Massachusetts: The Senators will not be better informed than the President, since they too must rely on local people for recommendations, and local people will tout local candidates. Presidential appointment will appropriately focus the political consequences for bad appointments, and therefore, will make for more thoughtful appointments.

MADISON of Virginia: Perhaps a further compromise is possible: appointment by the President with the concurrence of only *one third* of the Senators.

ELLSWORTH of Connecticut: Madison's plan puts too much power in the hands of the President, *because at least one third of the Senate can always be relied upon to consent.* The President will be more subject than the Senate to "caresses and intrigues," but if he is to be given a role, Madison's compromise should be reversed: appointment should initially be made by the Senate, subject to presidential veto (with a two thirds override in the Senate alone).

MADISON of Virginia: My proposal that two thirds of the Senate be required to *reject* a presidential nomination was merely to provide an alternative to Gorham's proposal for a simple majority [which had itself been rejected]. Perhaps we should return to that proposal.

MASON of Virginia: No matter what mathematical formula is used, presidential participation will *always* amount to presidential control, because of the "false complaisance which usually prevails in such cases."

It is noteworthy that after all of the above comments were made, the Convention *rejected* all compromise proposals, and continued to lodge the appointment power in the Senate alone; indeed, that was still the situation in the Committee of Detail draft, which was presented on August 6th. This draft also provided for election of the President by the Congress (to a single seven-year term), today's veto and two-thirds override provision, and impeachment by the House and trial *in the Supreme Court.*

It was only after the passage of another month, after the September 4th invention of the electoral college finally broke the impasse on presidential selection, that the Convention was able, with relative dispatch, to resolve a series of issues that had been settled only tentatively in the Randolph Resolutions and the Committee on Detail draft. In particular, it was not until September 7th, *only*

ten days before the end of the Convention, that the delegates *for the first time* transferred initial responsibility for the appointment of federal judges from the Senate to the President. This action was taken unanimously and without significant debate; essentially contemporaneously, the power to try impeachments was transferred from the Supreme Court to the Senate.

Space does not permit further consideration of the debates over selection of the executive and his term of office, the extent of his veto power, and the ability of Congress to respond with impeachment proceedings. There is no doubt, however, that the delegates clearly saw the interrelationship of these issues, and recognized the possibility that any power granted could be abused, and thus required a corresponding power to check it. Given the pervasiveness of this concern throughout the Convention, it is plausible to ascribe significance not only to the role of checks and balances in general, but to the specific stopping places chosen by the delegates.

Where the delegates elected not to check a power, or where they checked it only weakly, it is plausible to treat their action as a deliberate statement that the power in question is insufficiently worrisome to require more. Where the check provided is a specific voting majority, the Constitution must be understood to have remanded the issue in question to whatever political maneuvers are needed to obtain the requisite majority. However, that political calculus must in turn be understood to encompass the negative political and electoral consequences of relying on "unacceptable"—and therefore "unconstitutional"—methods and arguments. Of course, what is or is not within bounds will be determined by political actors—including the voters at the next election—not Article III judges.

Focusing on the votes needed to *disapprove* the President's position in various situations, this hierarchy appears: only one-third of the Senate is needed to check the President with respect to treaties, only one-half with respect to appointments, but half of the House and two-thirds of the Senate are required to impeach and convict a President, while two-thirds of *both* houses are needed to

override a veto.[17] I urge pairing presidential veto of legislation with senatorial rejection of presidential nominees precisely because both are near the respective ends of the spectrum.

Although it no longer has the power formally to initiate appointments to the federal courts, as it did in all working drafts of the Constitution up to the final one, the Senate has complete power to veto presidential nominations. The question then becomes how this power will be exercised—will it be allowed to atrophy into a farcical rubber stamp (as George Mason predicted it would), or will it be put to such aggressive and overt political use that it will actually influence the President's choice of nominee (as I claim it should)?

III. Putting Politics in Command

In the wake of the heavily politicized Bork and Thomas nomination battles, many commentators have urged a greater emphasis on the Senate's role in "advising" the President, suggesting that if discussions are held in advance and in private, a "kinder and gentler" confirmation process will unfold once the name of the nominee is made public. I have no constitutional quarrel with such proposals, but I am somewhat dubious about their practical value. If relations among the political actors are sufficiently harmonious to countenance such discussions, then nominees who commend themselves to the President will likely face no more than moderately tough sledding in the Senate. But if relations are so strained that a nominee—whom the President is virtually bound to proclaim as "uniquely qualified"—faces a serious prospect of being found not qualified at all by the Senate, then it seems unlikely that the President would be in a mood to invite senatorial "interlopers" onto his turf.

What I propose goes much farther. I propose that if the Senate

[17] At first glance, it is stunning to note that it is more difficult to override a President's veto of a single bill than it is to remove him from office. This seeming anomaly is almost certainly attributable to the Framers' assumption that both the House and Senate would have the discipline to develop a limited definition of the "high Crimes and Misdemeanors" needed to impeach and convict. Professor Raoul Berger has argued convincingly that ordinary criminal conduct was not necessary for removal from office, but that only a narrowly defined species of misconduct, having to do with abuse of the public trust, would be sufficient. *See* Berger, *supra* note 3, at 193.

is unable to find a sympathetic ear in the White House at the "advice" stage, that it seize the initiative and use its considerable political resources (including access to the media) to state forcefully and in advance which or what kinds of nominees it will and will not veto. Then, of course, it must have both the discipline and the courage to stick to its program.[18] This seemingly radical invasion of the President's domain only seems radical if one first concedes that the domain indeed belongs to the President. But that is the very point at issue, and the historical evidence suggests the contrary: that the President was only given *any* role in judicial appointments in a last-minute adjustment of the constitutional calculus, while the Senate's role was made reactive, *but unchecked*.[19]

As noted at the outset, the course I propose for the Senate is actually not different from that pursued by many strong Presidents: to describe in advance the kinds of bills that will be vetoed, thus ensuring that few such bills are enacted. Although political opponents of a President commonly condemn this practice as the substitution of rule by a one-third minority (in either house) for rule by the majority, and thus a perversion of the legislative process, it is consistent with the severely "checked" legislative process

[18] The greatest difficulty faced by the Senate in carrying out such a political program is precisely that it can only take action as a series of individuals. This permits the President to exert political pressure, one Senator at a time, including indirect pressure exerted through appeals to the Senator's constituency. Since the *only* weapon the President has against a series of Senate rejections is political pressure, it is perhaps appropriate that his weapon is sharpened in this fashion. Still, it is significant that the President has been given *less* of a weapon here than in connection with ordinary legislation. There, he can still exert political pressure on a series of individuals, but he needs only to garner the votes of one-third of either house.

[19] It is therefore odd that even with respect to politically charged judicial nominations, such as those involving Abe Fortas, Clement Haynsworth, Harold Carswell, Robert Bork, Daniel Manion (of the Seventh Circuit), and Clarence Thomas, both republican and democratic Senators seem to assume that once the President has made the initial proposal, the burden of persuasion lies with those who oppose it. Few, if any, Senators have publicly admitted to having doubts about why such a deferential standard should be in play in the case of a life appointment to the federal bench, when a President's proposal with respect to, say, a temporary appropriation item would *not* be treated with such deference. It is also odd that most Senators, of whatever political persuasion, seem to assume that the *standard* of proof required for rejection is high—a major "smoking gun" is required, or a series of serious flaws—such serious flaws not to consist of serious disagreements about the content of constitutional law.

prescribed in the Constitution.[20] But by the same token, a judicial nomination process dominated by the Senate is wholly consistent with the balance of forces actually set out in the Constitution, and was certainly one of the possibilities envisioned by the founding generation.

In the recent case of Clarence Thomas, the democratically controlled Senate plainly had the raw political power to veto the nomination, but it failed to do so. Was its failure a failure of political nerve and constitutional duty, or would a rejection, on avowedly political grounds, have been *dehors* accepted constitutional norms—norms developed without the benefit of judicial review? Furthermore, since heavy majorities of the electorate—especially the black, southern electorate—apparently favored confirmation at the end, did politics play its assigned role after all, giving the people what they wanted?

What follows is a partisan account of the political dialogue that actually took place, and a suggestion about how that dialogue could have been improved.

President George Bush told two political lies in connection with the Thomas nomination. The first lie—that race was not a factor in the selection process, and that Clarence Thomas was simply the most qualified person available at the time[21]—was nasty in its implications, but politically harmless. The lie was nasty because Judge Thomas was plainly not the most qualified lawyer available, or the most qualified *black* lawyer, or even the most qualified black *conservative* lawyer. Thus, while pretending not even to be engaged in a mild form of affirmative action, President Bush slyly promoted his general claim that affirmative action leads to mediocrity, and casts doubt upon the qualifications of all minorities,

[20] Such complaints are often lodged against President George Bush, in part because he so delights in "keeping score" in the manner of a sports columnist. But he is by no means "Veto Hall of Fame" material, to continue the sports analogy. President Grover Cleveland had only 2 of his 414 vetoes overridden in his first term, and President Theodore Roosevelt was rebuffed only once in 82 tries. President Dwight Eisenhower went 186 for 188, while Lyndon Johnson's final "stats" were similar to George Bush's current record: 29 vetoes, no overrides.

[21] To believe that, one would have to believe that if Justice Marshall had retired before Justice Brennan, David Souter, and not Clarence Thomas, would have replaced him! Clarence Thomas, who was, after all, President Bush's *second* choice, would then have been available to replace Justice Brennan, with race playing no part.

whether they have personally benefitted from such programs or not. The lie was harmless, however, because it was believed by no-one, and was, in any event, unnecessary.

The lie was unnecessary because despite the bitter and long-standing controversy in this country over quotas, reverse discrimination, and affirmative action, there was, ironically, a rather broad consensus in the country that a black Justice to replace Thurgood Marshall was at least appropriate and probably imperative. That is to say that according to "accepted" constitutional norms assumed throughout this essay to exist "out-of-court," it would have been "constitutional" to make race a controlling factor, and it might even have been "unconstitutional" *not* to do so! Certainly, this consensus reached well into the political mainstream of black and white voters, and probably included most elected officials, even including most *republican* Senators.

George Bush's second political lie, told largely for the benefit of the black electorate, was that if Clarence Thomas was not confirmed, the President would not nominate another black. This destructive lie is what ultimately won the day, and the President was both astute and cynical enough to tell it largely through surrogates—including muddle-headed black leaders and weak-kneed democratic Senators. The point of the lie was to convince black voters to pressure their representatives into choosing the lesser of two evils: accept this deeply flawed and undistinguished black nominee, rather than accept no black nominee at all. The cynical and intended result of the lie, of course, was that the same President who denied (in his first lie) that race was a factor, was able to paint opponents of Clarence Thomas as people standing in the way of a *black* replacement for Thurgood Marshall, while positioning himself as a *champion* of a racially balanced court!

History has already recorded how the democratic Senate responded: petrified that an anti-Thomas vote would be interpreted and then punished at the polls as anti-black, it cravenly accepted the false terms of the debate as dictated by Mr. Bush. Its ability to engage in *principled* representation of the people atrophied by years of addiction to overnight polls and empty soundbites, it made no attempt whatsoever to engage in dialogue with the people, to lead, or to teach. Thus, even those Senators who were will-

ing to risk voting against the nominee were not willing to lead a national debate over the obvious third possibility that President Bush had by innuendo banished from the conversation—that some *other* black lawyer would take Justice Marshall's place on the Supreme Court.[22]

But according to the paradigm examined in this essay, the Senate can—if it so desires—take control of the judicial appointment process.[23] All that was required in the Clarence Thomas case was to move immediately to uncouple the specific nominee from his race. Rather than agonizing over how politically incorrect it would look to challenge a black nominee—thus imposing upon themselves an *enhanced* burden of persuasion where no burden should have been imposed at all[24]—Senators should have assured nervous black voters, right from the outset, that although this black nominee might well be defeated, *the next nominee would also be black.*

How could the Senate give such assurances, when only the President can nominate? By stating publicly that in this specific situation it regarded race as so important that it would veto any nonblack candidate, without more. If the statement was both clear and credible—meaning that a majority of the Senate could be relied upon to exercise such a veto—then the President would understand the message as well, and would not seriously consider nonblack candidates.

IV. Final Thoughts

To argue in 1992 in favor of adding more politics—especially racial politics—to the judicial selection process takes some nerve. But I take comfort from the following four considerations.

First, the greater the political and electoral accountability of

[22] Of course, the people were not blameless either. A fully engaged electorate could have insisted that this third possibility be pursued, rather than instructing its representatives to choose one of the two choices presented by President Bush.

[23] It is concededly difficult for a group of persons to act and speak as one, especially in politically charged situations. *See supra* note 18. I am here assuming a principled and *disciplined* group of political leaders who will gradually gain courage as they support each other and achieve some initial success.

[24] *See supra* note 19 (most Senators incorrectly assume that burden of persuasion lies with those opposing any presidential nominee).

those who actively participate in the selection process, the less we need worry that unaccountable judges will stray far out of step with public sentiment for long periods of time. This is not to suggest that Article III judges should read more polls; rather, the point is that officials who have risen in a democratic system which does not often reward extremism are unlikely to elevate lawyers who swim far outside the mainstream to the federal bench.

Second, the selection process has already been politicized by Presidents who *rightly* claim to bring something of a mandate into office to appoint a certain kind of judge. Rediscovering a more active role for the Senate merely restores the kind of political balance the Framers originally intended. After all, one-third of the Senate was elected on the same day as the President, and the rest of the Senate was elected at two different points in time, providing two more snapshots of the mood of the people. During their campaigns for office, Senators should more openly seek a mandate to approve or veto judges of a certain stripe.

Third, neither of the first two points suggests that crude populism should inform either the President or the Senators in making judicial selections.[25] Madisonian democracy assumes that "enlightened statesmen" will act as a "medium," reflecting but also *refining* the public will. Both Presidents and Senators have a civic duty, therefore, to look beyond immediate results, and to guard jealously the integrity of the federal courts. That Presidents and Senators have rarely lived up to the Madisonian ideal is not a reason to give up the attempt; it is instead a reason to do better the next time a vacancy occurs on any federal court.

Fourth, the kind of overt constitutional politics I would have preferred in the Clarence Thomas case can only be played out where an "accepted" and *principled* nonjudicial constitutional norm genuinely exists. It is therefore a self-limiting concept, and should not degenerate into mere partisan or interest group squabbling. For example, although I believe that a legitimate consensus existed specifically for the appointment of a black Justice to the

[25] If we wanted direct popular input into the content of constitutional law, after all, we could long since have amended Article III to permit judges to stand for election to the federal bench, in which case the First Amendment would probably require that they be permitted to campaign on the basis of promised doctrinal developments.

Supreme Court in 1991, I would fiercely oppose any generalized notion that any racial or other group is "entitled" to more or less "representation" on any federal court,[26] and I would expect any such proposal to make no headway at either end of Pennsylvania Avenue, now or any time soon.

[26] In the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973-1973bb-1 (1988)), Congress appears to have adopted just such a notion with respect to *elected* members of the *state* judiciary. *See, e.g.*, Chisolm v. Roemer, 111 S. Ct. 2354, 2363 (1991). This is no doubt constitutional, but a desperate mistake nonetheless, as it will inevitably lead to unprincipled racial campaigns for judicial office.