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Advice--Consent--Senatorial Immaturity and the Judicial Selection Process

Richard D. Freer

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ADVICE? CONSENT? SENATORIAL IMMATURITY AND THE JUDICIAL SELECTION PROCESS

Richard D. Freer

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I. INTRODUCTION

Twelve years ago, the country witnessed the contentious hearings that culminated in the Senate's rejection of Judge Robert Bork's nomination to the Supreme Court. Four years later, we saw the electrifying and equally contentious hearings that culminated in the appointment of Judge Clarence Thomas to the Supreme Court. In the wake of those vitriolic episodes, we saw an outpouring of public and academic reaction — literally scores of articles¹ and dozens of books² — the

¹ See, e.g., Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164 (1988); Stephen Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185 (1988); 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 (1991); Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146 (1988); Richard D. Manoloff, *The Advice and Consent of the Congress: Toward a Supreme Court Appointment Process for Our Time*, 54 OHIO ST. L.J. 1087 (1993); 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 (1993); Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202 (1988); David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491 (1992); Symposium, *Gender, Race, and the Politics of Supreme Court Appointments: The Import of the Anita Hill/Clarence Thomas Hearings*, 65 S. CAL. L. REV. 1279 (1992).

² See, e.g., STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* (1994); JOHN ANTHONY MALTESE, *THE SELLING OF SUPREME COURT NOMINEES* (1995); JOHN MASSARO, *SUPREMELY POLITICAL: THE ROLE OF IDEOLOGY AND PRESIDENTIAL MANAGEMENT IN UNSUCCESSFUL SUPREME COURT NOMINATIONS* (1990); PATRICK B. MCGUIGAN & DAWN M. WEYRICH, *NINTH JUSTICE: THE FIGHT FOR BORK* (1990); MARK SILVERSTEIN, *JUDICIOUS CHOICES: THE NEW POLITICS OF SUPREME COURT CONFIRMATIONS* (1994); PAUL SIMON, *ADVICE AND CONSENT: CLARENCE THOMAS; ROBERT BORK AND THE INTRIGUING HISTORY OF THE SUPREME COURT'S NOMINATION BATTLES* (1992).

majority of it concluding that we had a problem, even a crisis, in the confirmation process. Indeed, the title of one book during this period referred simply to "The Confirmation Mess."³ Through the middle of the 1990s, however, with two easy appointments to the Supreme Court,⁴ the dust seemed to settle, and the sense of crisis waned.

Now, in the late 1990s, we are experiencing a second eruption of concern over the confirmation process. It focuses on the failure over the past three or four years to fill scores of vacancies on the lower federal bench. Although the public is largely unfazed by this failure, presumably because it involves lower profile courts, some academic commentators and members of the press are alarmed.⁵ They paint a bleak picture, asserting that the number of vacancies puts the federal judicial system in risk of collapse.⁶ And indeed there are some horror stories: the Ninth Circuit, particularly hard hit by vacancies, canceled oral argument in 600 cases;⁷ a few district judges are so overwhelmed by case backlog that they have not held a civil trial in over three years.⁸

There are two obvious ways to attack a case backlog problem: Congress could pare the menu of cases going to federal court or it could increase the number of federal judges. It has shown no interest in pursuing either course. As to federal jurisdiction, in fact, Congress is bent on expansion, as demonstrated by its continuing federalization of criminal law. As to personnel, Congress has not increased the number of Article III judgeships since 1990. Although the 1995 Long Range Plan of the Federal Courts concluded that we would need at least 980, and as many as 1330 federal judges by the year 2000,⁹ Congress has left the number at 826 for a

³ See CARTER, *supra* note 2.

⁴ Justice Ginsburg was appointed in 1993 and Justice Breyer in 1994. There was no serious opposition to either.

⁵ See, e.g., Michael D. Schattman, Picking Federal Judges: A Mysterious Alchemy, 96 MICH. L. REV. 1578 (1998) (reviewing SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN (1997)); Carl Tobias, Federal Judicial Selection in a Time of Divided Government, 47 EMORY L.J. 527 (1998); Viveca Novak, Empty-Bench Syndrome, Congressional Republicans Are Determined to Put Clinton's Judicial Nominees on Hold, TIME, May 26, 1997, at 37. Of course, the problem of filling judicial vacancies is not new in the late 1990s. See, e.g., Gordon Bermant et al., Judicial Vacancies: An Examination of the Problem and Possible Solutions, 14 MISS. C. L. REV. 319 (1994); IMPROVING THE PROCESS OF APPOINTING FEDERAL JUDGES: A REPORT OF THE MILLER CENTER COMMISSION ON THE SELECTION OF FEDERAL JUDGES (1996). It seems more politically charged today, with critics blaming the Senate for improperly slowing consideration of nominees.

⁶ See, e.g., Schattman, *supra* note 5, at 1581 n.6 ("hurting the selection process and crippling the courts"); Tobias, *supra* note 5, at 539-40, 550-52.

⁷ See Carl Tobias, Editorial, Don't Split the Ninth, Proposals for Improving the Largest Circuit, WASH. TIMES, Sept. 8, 1999, at A19. The Sixth Circuit canceled oral argument in about 60 cases for the same reason. Judge Shortage Clogs Up Courts, SALT LAKE TRIB., Aug. 8, 1997, at A4 [hereinafter Judge Shortage].

⁸ See, e.g., Judge Shortage Forces Delay, YORK DAILY REC., Feb. 7, 2000, at A2 ("A shortage of federal judges in Pittsburgh means litigious types may have to wait up to three years to have their days in court.").

⁹ See JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 161 (1995).

decade.¹⁰

Given Congress's intractability in these two areas, it becomes especially important that vacancies in federal judgeships be filled expeditiously. Over the past few years, however, they have not been. Indeed, over much of the past three years, more than 100 of those 826 judgeships have sat vacant.¹¹ Some of the blame undoubtedly rests, with President Clinton, who occasionally has been quite slow to nominate replacements when vacancies arise.¹² Most of the critics, however, blame the Senate for delay in considering nominations it has received. For example, in 1996, the Senate approved only seventeen nominees, and the following year only thirty-six.¹³ In his annual report in December 1997, Chief Justice Rehnquist voiced his concern and chastised both the President and the Senate for not acting quickly enough to fill vacancies.¹⁴ There was substantially more movement in 1998, with the Senate approving sixty-three nominations. Still, the federal bench remains understaffed. Indeed, as of January 1999, there were still twenty-five "judicial emergencies," which are seats vacant for more than eighteen months.¹⁵

Critics assert that the Republican Senate is delaying consideration of nominees for political reasons, in part by improperly considering the ideology of the nominees, rather than simply assessing the nominee's competence and character.¹⁶ Some Republicans plead guilty as charged; Senator Hatch argued that some of President Clinton's nominees are so activist that they require especially strict review.¹⁷ Interestingly, however, with the Bork nomination in 1987, these roles were reversed, with Democrats claiming that inquiry into ideology was acceptable, and Republicans advocating a passive Senate role. Might these two eruptions of concern over the confirmation process indicate — as some have concluded¹⁸ — that we are in the midst of a sea change in our sense of the Senate's proper role in judicial appointments?

¹⁰ See Tobias, *supra* note 5, at 527.

¹¹ See Tobias, *supra* note 5, at 527-28.

¹² See Tobias, *supra* note 5, at 541 ("The failure to appoint additional judges during the last year partially resulted from delay in submitting nominees.").

¹³ All of these confirmations were at the district court level only.

¹⁴ See William H. Rehnquist, *The 1997 Year-End Report of the Federal Judiciary, THIRD BRANCH*, Jan. 1998, at 3.

¹⁵ *Vacancies in the Federal Judiciary*, (last modified July 1, 2000) <<http://www.uscourts.gov/vacancies/01.html>>.

¹⁶ See, e.g., Schattman, *supra* note 5, at 1581.

¹⁷ See *Judge Shortage*, *supra* note 7, at A4 (quoting Senator Hatch: "Frankly the record of activism demonstrated by so many of the Clinton judges and nominees calls for more vigilance in reviewing these nominees.").

¹⁸ See, e.g., SILVERSTEIN, *supra* note 2, at 4-6.

II. THE APPOINTMENTS CLAUSE AND THE ORTHODOX VIEW OF THE SENATE'S ROLE

Appointment of federal officers, including federal judges, is governed by the Appointments Clause of the Constitution.¹⁹ That clause prescribes three steps, of which the first and third are entirely in the President's hands. First, the President nominates the judge, and, third, he appoints the judge through the ministerial act of signing the commission. But the President only gets to appoint if he can get past the second step — the advice and consent of the Senate.²⁰ The clause is purely procedural — it is silent on the factors to be considered by the President in nominating and by the Senate in giving advice and consent.²¹

In giving content to the clause, it is important to remember that federal judges enjoy enormous job security. They never face an election; their pay cannot be reduced; they serve for life.²² These extraordinary protections insulate federal judges from politics, from the popular will. The job security is designed to give them the backbone to act in a counter-majoritarian way when necessary.

While federal judges are politically insulated, those selecting them are not. In theory, the involvement of the President and the Senate might provide a majoritarian check on the judiciary's often counter-majoritarian function.²³ So it would not be surprising to see the President and Senate consider a variety of political issues in considering judicial appointments. For example, we could expect a President to nominate judges who share his philosophy on judicial activism or restraint or who support his policy preferences. As we will discuss below, Presidents have not hesitated to consider such factors in making nominations.

Oddly, however, the "orthodox view" of the Senate's role is passive. It holds that the Senate *must confirm* a nominee unless there is a problem with her character or qualifications. Inquiry into the nominee's judicial philosophy or ideology is off-limits. This deferential role — what one observer properly calls a "su-

¹⁹ U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States . . .").

²⁰ Of course, the President really wants the Senate's consent, not its advice. The Appointments Clause provides no vehicle for the Senate to give its advice to the President except through the ex post action of refusing its consent. At some points in our history, the Senate has actually approached the President, telling him whom to nominate. A majority of the Senate told President Grant that they would accept no one for a Supreme Court vacancy other than Edwin Stanton. See HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 127 (3d ed. 1992). The Chairman of the Senate Judiciary Committee strongly advised President Hoover to nominate a liberal to replace Holmes. See ABRAHAM, *supra*, at 204.

²¹ See generally JOSEPH P. HARRIS, THE ADVICE AND CONSENT OF THE SENATE: A STUDY OF THE CONFIRMATION OF APPOINTMENTS BY THE UNITED STATES SENATE 17-26 (1953); Manoloff, *supra* note 1, at 1090 ("There was little discussion [among the Founders] of the appropriate factors to be taken into consideration during the appointment process." (footnote omitted)).

²² U.S. CONST. art III, § 1.

²³ See Manoloff, *supra* note 1, at 1102 (Appointments Clause product of compromise); Carter, *supra* note 1, at 1193 ("Beginning constitutional law students are taught that the Supreme Court serves as a counter-majoritarian brake").

pinely deferential" role²⁴ — has not always been the norm; it is essentially a twentieth century phenomenon. In our nation's history, the Senate has rejected twelve nominations to the Supreme Court. In addition, it has thwarted (usually by postponing consideration) fourteen other Supreme Court nominations. Thus, the Senate has stopped twenty-six formal nominations. Interestingly, twenty of those came before 1896. In the past 103 years, in contrast, the Senate has rejected only four Supreme Court nominations and thwarted two by other means.²⁵

But the orthodox view seems to be waning in the last third of this century.²⁶ As noted, the Senate has rejected or otherwise thwarted only six Supreme Court nominations since 1896. Of those, however, five have come since 1968.²⁷ Indeed, even successful nominations have been increasingly contentious: of the past fifteen nominations to the Supreme Court, the Senate has rejected three; and seven confirmations over that span have generated at least twenty-five negative votes in the Senate.²⁸ In part, the recent relative strife is explained by the contemporary penchant for divided government. From 1896 until 1969, only two Presidents — Truman and Eisenhower — faced a Senate in opposition hands. Since then, however, every President except Carter — Nixon, Ford, Reagan, Bush, and Clinton — has faced opposition Senates for at least part of his tenure.²⁹ But is there something more than divided government at play here? Is the Senate's perception of its role changing? Some observers have suggested that the Bork hearings signaled such a change. Before addressing that possibility, however, we assess the President's ability to consider political factors in nominating judges.

III. THE PRESIDENT'S ABILITY TO CONSIDER IDEOLOGY IN MAKING A JUDICIAL NOMINATION

In practice, the president is free to consider any factors — including overtly political factors — in making a judicial nomination. There is a long history, for example, of nominating party loyalists. George Washington and John Adams

²⁴ Jeffrey K. Tulis, *Constitutional Abdication: The Senate, the President, and Appointments to the Supreme Court*, 47 CASE W. RES. L. REV. 1331, 1332 (1997).

²⁵ This century, the Senate has rejected John J. Parker, Clement F. Haynsworth, Jr., G. Harrold Carswell, and Robert Bork. It has thwarted the elevation of Abe Fortas to Chief Justice and the appointment of Homer Thornberry to replace Fortas as Associate Justice. I do not include the aborted effort to appoint Douglas Ginsburg, because President Reagan never formally nominated him. Although Reagan introduced Judge Ginsburg as the nominee to follow the rejection of Judge Bork, the ensuing furor over Ginsburg's having smoked marijuana with students while on the Harvard faculty caused Reagan to nominate Anthony Kennedy instead.

²⁶ See Tulis, *supra* note 24, at 1333 ("There can be no doubt that there has been a resurgence of conflict between the President and Congress after a long period of cooperation.").

²⁷ President Hoover's 1930 nomination of Chief Judge John J. Parker of the Fourth Circuit was the only Supreme Court nomination rejected by the Senate between 1896 and 1969.

²⁸ See SILVERSTEIN, *supra* note 2, at 4.

²⁹ And Carter, of course, did not get to nominate a Supreme Court justice, although he appointed many lower court judges.

packed the first Supreme Court with tried and true Federalists.³⁰ President Eisenhower nominated Earl Warren as Chief Justice in part to reward Warren's assistance in securing the 1952 Republican presidential nomination. President Carter's overt efforts to appoint minorities and women certainly strengthened relations with those traditional constituencies of the Democratic party.³¹

Although some have been more activist than others, no one doubts that the Chief Executive may assess a nominee's ideology and the possibility of shaping the direction of the federal bench. For example, before nominating Oliver Wendell Holmes, Theodore Roosevelt wrote to Henry Cabot Lodge: "I should like to know that Judge Holmes was in entire sympathy with our views — that is, yours and mine — before I would feel justified in appointing him."³² Indeed, we have become accustomed to regarding the makeup of the federal judiciary and its role in American life as issues in presidential elections, at least since Richard Nixon ran in 1968 in part on a platform of appointing "strict constructionists" to the federal bench.

The all-time champions of the ideological appointment were Franklin Roosevelt and Ronald Reagan.³³ Although coming from different ends of the political spectrum, and engaged personally to different degrees, they used the same playbook. Each made the composition of the federal courts a campaign issue, criticized specific holdings and vowed to undo them, and used the "myth of rediscovery" — an appeal to the good old days when judges interpreted the Constitution rather than making it up.³⁴ In addition, each understood the importance of lower court ap-

³⁰ In a letter to George Washington, concerning a potential Supreme Court nomination, John Adams said. "If ability is desired, take Rutledge; if politics, take Jay." Evidently, Washington desired politics; he nominated Jay.

³¹ See Ely, *supra* note 1, at 843 n.20 (noting that presidential concern with nominee's position on particular issues "[i]n significant degree . . . began with former President Carter, who did a fairly good job of stacking the lower federal courts with liberals"); Donald W. Fyr, *Judicial Selection: New Players, Same Game*, 38 EMORY L.J. 771, 775 (1989) (reviewing HERMAN SCHWARTZ, *PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION* (1988)) (Carter ideological appointments).

³² 2 SELECTIONS FROM THE CORRESPONDENCE OF THEODORE ROOSEVELT AND HENRY CABOT LODGE, 1884-1918, at 517-19 (Henry Cabot Lodge & Charles F. Redmond eds., 1971). Of course, a judge screened for ideology is not a robot. After a Holmes opinion displeased Roosevelt, the President reportedly exclaimed, "I could carve out of a banana a judge with more backbone than that." W. HARBAUGH, *POWER AND RESPONSIBILITY: THE LIFE AND TIMES OF THEODORE ROOSEVELT* 161 (1961), quoted in Richard D. Friedman, *Tribal Myths: Ideology and the Confirmation of Supreme Court Nominations*, 95 YALE L.J. 1283, 1298 (1986).

³³ See Ely, *supra* note 1, at 843 n.24 ("[T]o find a precedent for Reagan's [ideological] approach (unless it's Carter) one has to go back to Franklin Roosevelt, who was quite single-minded about appointing men who could be counted on to side with the New Deal on issues of federal power."); Manoloff, *supra* note 1, at 1098 ("[FDR] provided perhaps the most blatant example of a President seeking to create a Court that would mirror his own political concerns."). As the quote from Professor Ely notes, Carter's appointments were largely ideological, a fact perhaps hidden behind the facade of "blue ribbon" screening panels and overlooked because Carter did not appoint a Supreme Court justice. An interesting aside is that Carter's "blue ribbon" panels managed to find two of the seven federal judges in American history to be removed by impeachment.

³⁴ See Ackerman, *supra* note 1, at 1166 ("Call it the myth of rediscovery: a new wave of presidential appointments repudiates the Court's immediate past by appealing to the 'intent of the Framers' of more distant times, and then reinterprets this intent in ways that give the President's party new authority to enact its

pointments. After FDR's effort to pack the Supreme Court failed, he packed the lower courts with New Dealers. Similarly, Reagan's influence on federal bench is attributable more to his lower court, rather than Supreme Court, appointments.

Interestingly, FDR and Reagan also appointed a notable number of academics to the federal bench. Perhaps this fact is mere coincidence, but it might be that these Presidents concluded that professors would bring to the bench an ideological dependability that a pragmatic, real-world lawyer would not. After all, professors come from a profession that puts a premium on consistency, and they rarely need to compromise.³⁵ In contrast, successful practicing lawyers and legislators must be adept at the art of compromise. Reagan appointed several noted conservative academics to courts of appeals, including Robert Bork, Antonin Scalia, Richard Posner, Frank Easterbrook, John Noonan, and Douglas Ginsburg. Such judges could not only render important service at that level, but a lucky few might use the experience to get ready for ascension to the Supreme Court. Indeed, appellate judges, because they have a paper track record of opinions, might bring similar dependability to the Supreme Court.³⁶

With this in mind, a look at the present composition of the Supreme Court is fascinating. Each of the last eight appointees to the Supreme Court — covering 24 years and appointments by four presidents — came from the ranks of appellate judges.³⁷ And three of those eight (Scalia, Breyer, and Ginsburg) had been law professors before becoming appellate judges. Moreover, two failed nominations during this period (Bork and Douglas Ginsburg) were of professors who had been appointed to the appellate bench. Again, perhaps these facts are merely coincidental, but it might be that the types of persons chosen at the Supreme Court level over the past generation share a background that fosters ideological consistency and, perhaps in the President's mind, reliability.

Certainly, one is struck by the types of persons *not* on the Supreme Court anymore. There are no former senators, such as Hugo Black or Sherman Minton. There are no major national political figures, such as Earl Warren. And there are no giants from the practicing bar, such as Lewis Powell, John Marshall Harlan, and Abe Fortas. No one, in short, whose job description includes the need to compromise.³⁸

The main point is simple — presidents are free to consider whatever fac-

program.”).

³⁵ One visit to a faculty meeting at any law school will provide evidence for this latter point.

³⁶ See Ely, *supra* note 1, at 869-70 (“History strongly supports what common sense would have suggested, that persons who have already served as judges make vastly more predictable justices.” (footnote omitted)).

³⁷ These are Justices Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer. All but O'Connor had been federal appellate judges, and thus had been through a Senate confirmation process before.

³⁸ Professor Ely notes that in earlier days, “thanks in part to the then prevailing ‘myth’ that judges are not just another set of politicians, the tendency was to appoint ‘first-rate lawyers,’ the ‘lions of the bar,’ without much attention to how exactly they were likely to vote on particular issues.” Ely, *supra* note 1, at 843 (footnotes omitted).

tors they like — including overtly political factors — in making a nomination, and some have had no qualms about nominating in a desire to shape the ideological direction of the federal bench.

IV. THE ORTHODOX VIEW AND THE SENATE'S CHARADE

Although the president has great leeway in making his nomination, the Senate, as noted above, has limited its role under the orthodox view. It may reject a nomination under this approach only if the nominee is unqualified professionally or as a matter of character. There are at least two reasons for concluding that the orthodox view is not just wrong, but wrongheaded.

First, it seems quite clear that the Founders' envisioned a bold role for the Senate.³⁹ In the Constitutional Convention, Alexander Hamilton championed the Federalist proposal that the President should have sole power to appoint.⁴⁰ The proposal got nowhere, which is not surprising, given the general wariness of centralized power and the fact that no state had employed a similar provision under the Articles of Confederation. The proposal considered longest was that the national legislature *alone* would choose the national judiciary.⁴¹ A major issue was whether the House or the Senate, or both, should be involved. Several suggested that the Senate was more stable, politically independent, and contemplative — more removed from the rough and tumble of politics — than the House.⁴² Thus the Convention adopted a proposal by James Madison that the Senate have sole power to appoint the judiciary.⁴³

Nathaniel Gorham proposed an amendment, based upon the provision for selection of judges in his native Massachusetts. The amendment was basically what became the Appointments Clause, calling for nomination and appointment by the President with the advice and consent of the Senate.⁴⁴ The proposal was then defeated, and James Madison followed it with a proposal that the President appoint

³⁹ Detailed discussion of the history of the debate over the Appointments Clause is beyond our scope, and has been handled well by many. *See, e.g.*, HARRIS, *supra* note 21, at 17-35; Manoloff, *supra* note 1, at 1102 ("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."); McGinnis, *supra* note 1; Tulis, *supra* note 24, at 1341 (historical review of Convention "unquestionably endorses a strong Senatorial role").

⁴⁰ *See* HARRIS, *supra* note 21, at 19.

⁴¹ *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 119 (Max Farrand ed., 1966) (providing that the federal judiciary "be chosen by the National Legislature") [hereinafter 1 RECORDS OF THE CONVENTION].

⁴² *See, e.g.*, JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 67-68 (1976) (fearing "intrigue, partiality and concealment" in nominations by large groups but characterizing the Senate as "not so numerous as to be governed by the motives of the other branch").

⁴³ *See* 1 RECORDS OF THE CONVENTION, *supra* note 41, at 233.

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

judges unless *two-thirds* of the Senate rejected the nomination.⁴⁵ Oliver Ellsworth and others criticized this suggestion for putting *too much power* in the hands of the President.⁴⁶ The supermajority requirement would make it impossible for the Senate to be a meaningful check against presidential intrigue. The proposal was defeated, as was one that changed the required Senate vote to one-half. Somewhat curiously, the final provision allowing the President to nominate and, with the advice and consent of the Senate, to appoint, was adopted with little further discussion.⁴⁷

Of course, the Senate is not as powerful as the President under the Appointments Clause, for the simple reason that it does not have the power to nominate. Its role is reactive, in the nature of a veto.⁴⁸ Also, as a practical matter, because the Senate is large and diffuse, it is difficult to motivate a majority of the Senate to vote against a nomination. Still, nothing suggests that the Senate is not to look at the same variety of factors as the president. George Washington recognized this fact in the earliest days of the nation, saying: “[A]s the President has a right to nominate without assigning his reasons, so has the Senate a right to dissent without giving theirs.”⁴⁹

It is worth emphasizing why the Founders involved the Senate, and not the House, in the confirmation process. The Senate is more removed from direct political pressure than the House, the members of which stand for election every two years.⁵⁰ It was designed to permit dispassionate, discursive, meditative decision making. In Stephen Carter’s terms: “The Senate is more capable than the House of reflective and deliberative consideration of the issues confronting the legislative branch. The House . . . might be considered the heart of the democracy. The Senate, then, must surely be the soul.”⁵¹ The high confidence and respect the Founders had for the Senate — a reverence, really — seems misplaced when we look at the political hijinx and game-playing that characterize the Senate’s use of its advice and consent responsibility.

Beyond the Founders’ apparent intentions in involving the deliberative senior chamber, an active Senate role is suggested by a common sense notion of checks and balances. Here, the Senate is playing a role in selecting the personnel

⁴⁵ See 2 RECORDS OF THE CONVENTION, *supra* note 44, at 80.

⁴⁶ See MADISON, *supra* note 42, at 345.

⁴⁷ See Manoloff, *supra* note 1, at 1103-04.

⁴⁸ See Michael J. Gerhardt, Toward a Comprehensive Understanding of the Federal Appointments Process, 21 HARV. J.L. & PUB. POL’Y 467, 475 (1998) (“[Founders] expected that the divergent interests of senators and the largely defensive posture to which the Appointments Clause consigned the Senate would hinder its ability to dictate that the president appoint a particular individual to a certain post.”).

⁴⁹ 30 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745-99, at 374 (John C. Fitzpatrick ed., 1939), *quoted in* Manoloff, *supra* note 1, at 1091.

⁵⁰ Such insulation from the popular will was greater originally, when members of the Senate were elected by state legislatures. Not until ratification of the 17th Amendment in 1913 were senators elected by direct vote. U.S. CONST. amend. XVII.

⁵¹ Carter, *supra* note 1, at 1196 (footnote omitted).

for an independent branch of government, one that routinely resolves disputes between the executive and the legislature.⁵² Moreover, the federal judges will be in office long after the President and his administration have left Washington. If the President is free to consider political factors in nominations, but the Senate cannot consider the same factors, then the President has plenary power to mold the third branch — the power to nominate becomes the power to appoint. If the job is simply to check on character and qualifications of the nominee, a ministerial functionary would suffice; there would be no need to involve the august Senate. So history and a traditional understanding of checks and balances indicate that the founders did not intend *carte blanche* for the President in selecting federal judges.

But the orthodox view gives the President exactly such power. This fact not only puts excessive power in the executive's hands, but leads to a rather extraordinary charade, in which senators in fact concerned about the direction of the federal bench or about the judicial philosophy of a particular nominee must cloak their concern as relating to qualifications or character. An example was the 1916 nomination of Louis Brandeis to the Supreme Court. Although many senators were concerned about Brandeis's views and what he might do on the bench, the Senate was reluctant to inject judicial philosophy into the debate. Rather than engage in open and contemplative discussion of Brandeis's views and his possible impact on the Court, the Senate gave the country a prolonged and obfuscating debate along character lines.⁵³

Perhaps the best example of the twisting of the "character" label to defeat a nomination came in 1969, with the rejection of Clement Haynsworth for a seat on the Supreme Court.⁵⁴ The Haynsworth debacle was part of an extraordinary flurry of activity started in 1968 when Earl Warren announced he would retire in time to let President Johnson appoint the new Chief Justice. Johnson nominated Abe Fortas, who was a sitting Associate Justice. Republicans wanted to filibuster because they felt they would win the White House in November.⁵⁵ They (joined by some southern Democrats, notably Sam Ervin) raised some character issues about Fortas,

⁵² See Strauss & Sunstein, *supra* note 1, at 61 ("often the Court must mediate conflicts between the President and the Congress; one party to a conflict should not have the dominant role in choosing the mediator."). Executive branch appointees, in contrast, work at the pleasure of the President; at least part of their job description is to implement administration policies. If senatorial deference were ever proper, it would seem to be with regard to these, and not judicial, nominations.

⁵³ Freund, *supra* note 1, at 1151-53.

⁵⁴ I look at the Haynsworth case in some detail for three reasons. First, it may be part of a shift away from the orthodox view. Second, because Judge Haynsworth was Chief Judge of the Fourth Circuit, of which West Virginia is a part, I thought the story might be of especial interest here. And third, I had the honor of clerking for Judge Haynsworth. I did so in 1979-80, 10 years after the Senate had rejected his nomination, and, as it turns out, 10 years before his death.

⁵⁵ After Johnson proposed to elevate Justice Fortas, 19 Republican senators issued a statement that "any nominees for the vacancies of the Supreme Court should be selected by the newly elected President" and thus that they would "vote against confirming any Supreme Court nominations of the incumbent President." 137 CONG. REC. S14,702 (daily ed. Oct. 15, 1991) (statement of Sen. Mitchell) (quoting the 1968 decree), quoted in Manoloff, *supra* note 1, at 1096.

although there was not much more than some questionable judgment in financial matters. Interestingly and somewhat atypically,⁵⁶ though, the Senate also addressed judicial philosophy, especially on the narrow issue of pornography, complaining about some of Fortas's liberal opinions.⁵⁷ The press coverage led to public concern, which contributed to further delay. Finally, certain that he could not get the nomination through before the election, Johnson withdrew it. The treatment of Fortas was reminiscent of many of the nineteenth century rejections, in which a strong Senate simply beat up a lame duck President, in this case one devastated politically by Vietnam. The Senate's acts had little to do with the nominee, and everything to do with hardball politics.

Nixon won the election and nominated Warren Burger, who was confirmed easily as Chief Justice. Fortas, of course, remained on the Supreme Court as an Associate Justice. In 1969, the press started breaking stories about Fortas's relationship with his former client Louis Wolfson, who had been convicted for various financial misdeeds. Wolfson alleged that Fortas had promised to use his influence to have the charges dismissed and that he had practiced law for Wolfson while on the bench. The Nixon Justice Department pursued the issue with considerable vigor. Finally, under threat of indictment and in the wake of public pressure, Fortas resigned from the Supreme Court.⁵⁸

Democrats, predictably and understandably, were furious, and directed their anger at Nixon. It was clear that any Nixon nominee would be attacked. That nominee was Clement Haynsworth. There was no question that he was qualified. He had amassed an impressive record on the Fourth Circuit. There was some talk that he was anti-labor and insensitive on civil rights, but neither assertion went very far. Opponents needed some basis for opposition under the orthodox view, and went to work in an unprecedented way. Some senators pooled their staffs along with 40 full-time labor union lobbyists to comb the Judge's record for dirt. They came up with a series of "character issues," which, they alleged, showed ethical insensitivity.

Complete discussion of the charges is beyond our scope, but I focus on one which seemed to trouble many senators. Months after oral argument and the tentative decision in a case involving the Brunswick Corporation, but before circulation of the opinion by the judge assigned to write it, Judge Haynsworth bought a small number of shares of Brunswick stock. Later, when the opinion was circulated, the Judge remembered the purchase and asked his colleagues whether he should recuse. They said no, since the opinion was unanimous and the Judge's recusal would do nothing but waste resources. Moreover, the law of that time actually *required* Haynsworth to stay on the case, since judges had a "duty to sit" when their interest

⁵⁶ As with Fortas, the Senate occasionally discussed judicial ideology openly, at least as to particular issues, in rejecting the nomination of Judge John J. Parker to the Supreme Court in 1930. See Manoloff, *supra* note 1, at 1093-94.

⁵⁷ See ABRAHAM, *supra* note 20, at 290-91 (ideological considerations in Fortas nomination to Chief Justiceship).

⁵⁸ For an excellent discussion of the events leading up to Fortas's resignation, see JOHN P. FRANK, CLEMENT HAYNSWORTH, THE SENATE, AND THE SUPREME COURT 4-16 (1991).

in a litigant was *de minimis*.⁵⁹ In other words, as John Frank, the leading authority on recusal (and author of the present statute) concluded, Haynsworth's holdings were legally irrelevant. There was no ethical violation.

Despite these facts, the press worked into a frenzy on this point, as it had with Fortas. As John Hart Ely and John Frank concluded in separate treatments of the Haynsworth nomination, the Senate never really rejected Clement Haynsworth. Instead, it created a caricature of the Judge — one insensitive to ethical issues — and rejected the caricature.⁶⁰

To make the charade all the clearer,⁶¹ this seat ultimately went to Harry Blackmun. Curiously, Blackmun had done exactly as Haynsworth — purchased stock in a litigant before the opinion was circulated. Indeed, he had done it four times! More curiously, the Senate never mentioned it during the Blackmun hearings. John Frank summarized aptly:

The Blackmun confirmation made the Haynsworth pretense transparent. If one starts from the wholly fallacious premise that Haynsworth was either unethical or insensitive, then Blackmun not merely duplicated but multiplied the Haynsworth sins. The truth, of course, is that neither of them . . . did anything wrong under the law as it [then] stood.⁶²

Nixon fought back by nominating G. Harrold Carswell, a federal appellate judge noted largely for a high reversal rate when he had sat on the district bench; he was, in the words of *Time*, “more reversed than revered.”⁶³ Although Carswell was not well qualified, and had made racist statements in his early political career, he appeared headed for confirmation. The Senate had had its bloodletting, had sent its message to Nixon, and was now ready to staff the Supreme Court. But ultimately the weakness of Carswell's record became palpable, and he remains one of few

⁵⁹ The law today would require a judge in Haynsworth's position to recuse, since any holding in a litigant is proscribed. 28 U.S.C. § 455(b)(4). The present statute grew out of the Haynsworth experience and may be one salutary event in an otherwise unhappy episode.

⁶⁰ See FRANK, *supra* note 58, at 51-61; Ely, *supra* note 1, at 874-75 n.136; See also Richard Freer, The Two Clement Haynsworths and the Politics of the Confirmations Process, 2 J. SO. LEG. HIST. 324, 327-30 (1994). As an aside on this point, Judge Haynsworth's wife related that during the hearings, the Judge came home one day with a copy of the Washington Post. Pointing to it, he said, “You know, Miss Dorothy, the more I read about this fellow Haynsworth, the more I'm convinced that he simply will not do.”

⁶¹ Another example of the lack of substance to the ethical charges involved a 1963 anonymous telephone tip to a labor union that the Judge had taken a bribe in a case involving the union. Although the investigation by Simon Sobeloff, then-Chief Judge of the Fourth Circuit, had exonerated the Judge, Haynsworth insisted that the matter be turned over to the Attorney General. After his investigation, Robert Kennedy found nothing to the allegation of bribery and issued a report exonerating the Judge and expressing “my complete confidence in Judge Haynsworth.” Finally, the union withdrew the charge, with its lawyer admitting that, after investigation, it was baseless. Despite this, the Senate hearings on the Haynsworth nomination in 1969 managed to spend 128 pages of testimony on the issue.

⁶² FRANK *supra* note 58, at 135; See also FRANK *supra* note 58, at 120 (“Haynsworth's conduct, treated as fatal by the committee, was magnified several times over by Blackmun and was not regarded as consequential in his case.”).

⁶³ *Once More, With Feeling*, TIME, Feb. 2, 1970, at 8.

Supreme Court nominees rejected on perception of low ability.⁶⁴ The seat then went to Blackmun.

The Fortas-Haynsworth-Carswell-Blackmun episode was not just an example of the Senate's using "character" as a screen for ideological assessment of a nominee. It was window dressing for a shot across the presidential bow, the kinds that characterized so many Senate rejections in the nineteenth century. Unlike most of the rejections in the nineteenth century, however, the Senate in 1969 did not admit what it was up to. Instead, it hid behind its unjustified assault on the reputation of a good judge (and a good man) to reject clement Haynsworth.⁶⁵ To this point, the Senate had showed only sporadic interest in assessing ideology or the philosophical direction of the federal bench. But things were different in 1987.

V. THE BORK EPISODE AND AFTERMATH

When President Reagan nominated Judge Robert Bork to the Supreme Court in 1987, a confluence of factors guaranteed both that confirmation would be problematic and that ideology would be on the table for discussion. For one thing, frankly, opponents had no colorable character or qualification issue.⁶⁶ For another, Reagan had made clear his desire to transform the Supreme Court.⁶⁷ Moreover, Bork had written widely, and was seen as a pugnacious conservative. Republican presidents (Nixon, Ford, and Reagan) had appointed seven justices in a row (six still sitting at the time).⁶⁸ The preceding year, Reagan had scored two significant appointments victories by elevating William Rehnquist to the Chief Justiceship (vacated by Burger) and by appointing Antonin Scalia to the position vacated by Rehnquist. And perhaps most importantly, the Democrats had seized control of the Senate for the first time in six years.

These factors meant that Bork could not be seen as "just another Justice." Clearly, not all vacancies are created equal, and Bork might well have been seen as

⁶⁴ Even Carswell's friends did not help matters. Senator Roman Hruska of Nebraska defended Carswell as providing representation on the bench for all the mediocre people in the country. After all, "we can't have all Brandeises and Frankfurters and Cardozos and stuff like that there." FRANK *supra* note 58, at 112. John Frank is not alone in concluding that Carswell was "an incompetent." See FRANK *supra* note 58, at 148, n.32. Amazingly, the Senate rejection of Carswell's nomination (51-48) was closer than that of Haynsworth's nomination (55-45).

⁶⁵ Justice Lewis Powell said that Haynsworth was "as fine a human being as I have ever known." Lewis F. Powell, Jr., Foreward to FRANK, *supra* note 58, at x.

⁶⁶ Professor Ackerman has referred to Bork's "superqualification" for the job. Ackerman, *supra* note 1, at 1165. See also Carter, *supra* note 1, at 1185 ("Robert Bork was, on paper, perhaps the best qualified candidate in many decades to be nominated to serve on the Supreme Court." (footnote omitted)).

⁶⁷ Senator Kennedy said "[n]o 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." 133 CONG. REC. 28,695 (1987) (statement of Sen. Kennedy), quoted in Manoloff, *supra* note 1, at 1095.

⁶⁸ President Nixon appointed Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist. President Ford appointed Justice Stevens. President Reagan had already appointed Justices O'Connor and Scalia. Of these, all but Burger were still serving (Rehnquist had been elevated to Chief Justice in 1986).

what one commentator calls a “transformative appointment,”⁶⁹ one that would enable the President to redefine the direction of Supreme Court. FDR did exactly that when he replaced the Taft Court in the 1930s and 1940s. It may be, as some conclude, that Reagan failed to convince the nation that he had earned the right to do what FDR had done.⁷⁰ Although some might debate the conclusion, debate on such terms would be appropriate. Certainly, Bork’s ideology and his potential impact on the Court were issues to be discussed.

Many observers feel that the Bork hearings established the Senate’s right to address the nominee’s ideology unabashedly. In fact, they did, but they didn’t, because the Senate did something very strange. From the outset, Senate leaders said they could reject the nomination only if Bork’s views were “out of the mainstream” of American legal thought.⁷¹ In other words, instead of simply disagreeing with Bork’s views or expressing concern with how he might tip the Court, opponents had to prove — *or appear to prove* — that Bork was out of touch.

From that point, it should have been clear that the Senate had no interest in (if capacity for) mature deliberation of ideology. Assessing whether a nominee is “out of the mainstream” is just another way of charging him with a character flaw. A mature and deliberative Senate, one with a true sense of its proper role, could discuss and contemplate Bork’s views and his possible impact on the Court and give an honest assessment of the appropriateness of his appointment. But the version of the Senate we have set up an absurd standard that could be met only by distortion, by yet another charade.

For at least two reasons, it should have been impossible to show that Bork was out of the mainstream of American legal thought. First, the Senate had confirmed Bork easily to the District of Columbia Circuit just six years earlier. Although such a vote does not create an estoppel, it makes you wonder: if Bork were really that out of touch, if he intended to trample the Constitution, you would think that at least one member of the Senate would have seen it in 1981 — especially since the judgment was based upon extant writings from Bork’s academic life. Second, just the preceding year, the Senate confirmed Antonin Scalia for the Supreme Court by a vote of 98 to zero. Scalia had served with Bork on the District of Columbia Circuit for five years. Over that period, reviews of opinions of that court showed Scalia consistently the more “conservative” of the two jurists. I don’t like surveys of this sort. I don’t think judges “vote,” and tabulations of decisions seem silly to me. Nonetheless, such surveys confirmed what any observer already knew — that Bork and Scalia are at least ideological fellow travelers. Thus it is difficult to reconcile the conclusion that Bork is out of the mainstream while Scalia was confirmed unanimously.

Difficult to reconcile, that is, if we are discussing judicial ideology. But

⁶⁹ See Ackerman, *supra* note 1, at 1165.

⁷⁰ See Ackerman, *supra* note 1, at 1173-77.

⁷¹ See Strauss & Sunstein, *supra* note 1, at 1491 (opponents “expend enormous energy not in disinterested inquiry but in trying to ‘catch’ the nominee: to find some statement in her record that reveals a belief so extreme as to be ‘out of the mainstream.’”).

quite easy to reconcile if we are discussing the coin of the senatorial realm — political expediency. Scalia was the first Italian-American nominated to the Supreme Court. Within hours of the announcement, Senator Dennis DiConcini — who opposed elevating William Rehnquist to Chief Justice and who would oppose Bork — announced his support for Scalia. As one political insider explained, with his “political power in the Italian-American community[,] [w]ith his Catholicism and his many children, [Scalia] was untouchable.”⁷² Of course, in a true discussion of the ideological direction of the federal bench, these facts would be irrelevant.

The plain fact is that Bork was not out of the mainstream.⁷³ He was painted as such in an effective campaign of distortion.⁷⁴ Bork was also a victim of bad presidential timing. He would be on the Supreme Court today had he been nominated instead of Justice O'Connor in 1981 or Justice Scalia in 1986.⁷⁵ At both times, the Republicans held the Senate. Moreover, O'Connor, as the first woman, and Scalia, as the first Italian-American, were guaranteed confirmation no matter who held the Senate. Because Reagan waited with Bork, his most overtly ideological nominee had to face a Senate in the opposition's hands. By that time, Reagan was a lame duck weakened by the Iran-Contra scandal. In contrast, FDR never had to deal with a Senate in the hands of his opposition. He and Truman appointed thirteen Justices in a row. The Democrats held the Senate during the entire period.

What does a President do when the Senate rejects his top candidate for the Supreme Court? If the rejection were based on an honest, forthright assessment of ideology, if the Senate had said to the country, “this man is too inflexible, or too conservative, or likely to be too influential on this Court, so send us someone more moderate or less influential,” the President might be moved to moderate his views in filling the vacancy. But when the Senate plays games — inventing character flaws that are not there (and harming a good reputation in the process) or (with the aid of the press) painting a leading academic figure as daft (again harming a good reputation in the process) — what should the President do? History tells him to stick to his guns. The Senate almost never musters the gumption to reject two nominees in a row. Unless he nominates a Carswell, the President will win in the second round.⁷⁶ It is difficult to motivate the majority of a large group to do some-

⁷² Leonard Garment, *The War Against Robert H. Bork*, 85 COMMENTARY, Jan. 1988, at 17, 18 (1988).

⁷³ As Professor Carter concludes, “unless the mainstream is defined very narrowly, this charge [of Bork's being outside the mainstream] is surely incorrect as a factual matter.” Carter, *supra* note 1, at 1191.

⁷⁴ Professor Ely concluded that “many of the tactics employed against Bork were disgusting.” Ely, *supra* note 1, at 845 n.29. As Ely recounted, charges that Bork had approved of mandatory sterilization, favored “separate but equal” facilities for different races, favored a right to life statute, that he was agnostic, and had never functioned as a lawyer in the public interest were all contrary to the facts. Ely, *supra* note 1, at 845 n.29.

⁷⁵ A Bork nomination in 1981 might have been problematic only because he had no judicial experience at that point. Still, in view of the 1980 Reagan landslide, the Republican takeover of the Senate, and the historical deference to a president's first nomination, coupled with Bork's experience as Solicitor General, confirmation seemed likely.

⁷⁶ The Haynsworth and Carswell nominations are the only sequential rejections in this century.

thing unpleasant twice in a row.⁷⁷ This is especially so when the first rejection had less to do with ideology than thwarting a President. Moreover, with a second rejection, the Senate is taking a political risk, since the President can blame it for a prolonged vacancy on the Supreme Court, which is something the public will notice.⁷⁸

Thus, with a second nomination, the interests of all the players start to converge: everyone wants the seat filled. For the Senate, this means that it must make the new nominee *appear to be different* from the one they rejected. In 1988, this job was easy because Bork had been portrayed as something just short of a madman. When up against one labeled as outside the mainstream of American legal thought, almost anyone — even a *bona fide* conservative — should pass muster. And Anthony Kennedy was given every opportunity to qualify, basically by saying that he had not yet formed an overarching theory of constitutional interpretation and thus could be flexible. As Professor Monaghan concluded, “[t]he senators made every effort to see [Kennedy] as different from Judge Bork, regardless of whether he actually was.”⁷⁹ For some senators, then, voting against Bork became a no-lose political proposition. It made points with the interest groups opposed to the nomination, but ultimately (because the Senate would not defeat a second nomination) let the President get something close to what he wanted anyway.⁸⁰ Justice Kennedy was the first of five post-Bork appointments.⁸¹ The only difficult one of this lot was Thomas, and the difficulty with his nomination had nothing to do with ideology. It was character — had he committed sexual harassment? To the extent ideology has come up in the post-Bork nominations, we have had a series of highly stylized hearings, in which the senators ask a litany of narrow, rifle-shot questions. In response, the nominee politely refuses to answer questions that might come before the Court,⁸² and (wisely) refuses to fall into the trap of making campaign promises. The process is not edifying. From Kennedy through Breyer, each was skillful at avoiding detailed explication of overarching principles. As Dean Ely put it, the nominee’s ability to refuse to answer tough questions “provides a final con-

⁷⁷ See Monaghan, *supra* note 1, at 1209 (“The institutionally important point is that it takes enormous energy for senators to unite in order to resist the President.”(footnote omitted)). See also Ely, *supra* note 1, at 874-75 (“[T]he President can be pretty sure that he will ultimately be able to appoint someone whose predicted performance is not importantly different from that of his first choice. The Senate, and anti-administration interest groups, are unlikely to have the energy to gear up for many concerted oppositions in a row” (footnotes omitted)).

⁷⁸ Cf. Gerhardt, *supra* note 48, at 482 (“[Appointments Clause’s] allocation of authority puts pressure on the president and the Senate to reach accord on how to fill most federal offices and thereby ensure the continued functioning of the national government.”).

⁷⁹ Monaghan, *supra* note 1, at 1209.

⁸⁰ Of course, if the second nominee really is ideologically more moderate than the first, we might say the system works -- the Senate sent a message and the president moderated his position. And maybe that is what happened by substituting Kennedy for Bork. On the other hand, it is not clear that the Senate would have the fortitude to put up an ideological fight if the second nominee had been a Bork clone.

⁸¹ The others are Justices Souter, Thomas, Ginsburg, and Breyer.

⁸² Indeed, Scalia refused to opine on *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

firmation of the nominee's mastery of the situation."⁸³

These nominees learned that not having (or at least not expounding) an overarching theory of jurisprudence is a way to show that they are not Bork.⁸⁴ Oddly, then, it seems that a job requirement of being one of the ultimate arbiters of the meaning of the Constitution is that one have no theory for undertaking such interpretation. Several senators whined about the lack of meaningful answers. Senator Specter even suggested that the Senate some day is "going to have to get up on its hind legs" and reject a nominee for refusing to answer its hypotheticals.⁸⁵ But I doubt that anyone is holding his breath for such a display of backbone. The fact is we only get "stealth nominees" because the Senate lets them get away with it.

Some may suggest that the Senate accedes to stealth because it is not convinced that it should be discussing ideology. This may be true, but I think something else is at play: Senators accede because the answers they would get are not important. What matters is the fact that they are asking questions and delivering little lectures about the appropriate answers. Why? One possibility is that the process is didactic — the Senate is trying to influence constitutional interpretation by teaching the nominee about it. But, ultimately, I cannot imagine, however, that someone of the intellectual and academic caliber of Stephen Breyer considers himself enlightened by hearing some politician's theory of the Constitution.

So why, then, would Senators ask questions and not insist on answers? Because ideology is on the table, all right, *but not the nominee's ideology* — it's the Senator's. For over 200 years the Senate has shown no interest in shaping the ideological direction of the courts. But it is always interested in getting reelected.⁸⁶ Judicial confirmation hearings, at least at the Supreme Court level, are the ideal vehicle. They provide free television time in a serious setting. The Senator gets to lecture the nominee (who invariably has more distinguished academic credentials)⁸⁷ on issues of perceived constitutional import. The fact that the nominee does not answer is actually *wonderful* — it means the Senator can vote to confirm, saying the nominee obviously got the message being imparted by the senator.

Of course, for this to work, the senator has to be preaching on an issue of

⁸³ Ely, *supra* note 1, at 874 n.133.

⁸⁴ See Ely, *supra* note 1, at 850 (post-Bork nominees heed "advisors' admonitions not to come across as 'another Bork'").

⁸⁵ *Senate Committee Unanimously Endorses Ginsburg -- Confirmation by Full Chamber Likely Next Week*, ARIZ. REPUBLIC, July 30, 1993, at A2.

⁸⁶ See Ely, *supra* note 1, at 877 (describing Senate as "a body whose members' principal priorities seem to be keeping (a) out of the line of fire, and (b) their jobs").

⁸⁷ On a personal level, it must be rewarding for senators to try to flex intellectual muscles in front of their captive academic superiors. To some observers, the image of Joseph Biden, whose meager academic accomplishments and misrepresentation thereof came to light in 1987, lecturing the former Yale Law School professor Robert Bork about the Constitution was quite bizarre. So too on matters of character. It is unthinkable that someone who had been suspended from college for having someone take a Spanish test in his stead would be nominated for the Supreme Court. Such a failure of character does not disqualify anyone from serving in the Senate, however, and judging whether a judicial nominee has the right stuff.

popular moment. The American people will not flock to the television to see a senator grill a nominee on supplemental jurisdiction or ERISA. So senators ask only about those narrow, hot-button issues important to their primary constituencies — interest groups. We are not getting judicial philosophy. We are not getting contemplative reflection. We are not getting what Stephen Carter calls a view of the nominee's "entire moral universe."⁸⁸ We are getting sound bites to appease interest groups. And in an era of instant communication ubiquitous overnight polls, this is our version of the "soul" of our democracy.

What about the more recent impasse? There is no question the Republicans are playing hardball. The question is whether it is hardball based upon a meaningful discussion of ideology and the direction of the federal courts. In some instances, it actually seems to be. We hear a good bit of discussion about the impact of a nominee on a court, particularly on the Ninth Circuit. Senator Hatch finally voted for Professor William Fletcher of Boalt Hall, in part because he felt Fletcher could help "rein in" the "runaway" Ninth Circuit.⁸⁹ Because this flap concerns the lower courts and is thus out of the public view, perhaps the Senate is not merely grandstanding. Maybe it is truly assessing ideology in the sort of contemplative way the Founders might have hoped.

But we should think long and hard before concluding that the Senate is acting maturely. First, if this were serious ideological assessment, the Senate would be *rejecting* various candidates. Instead, they just bottle them up. Second, the impasse seems at least in part to be a payback to the Democrats for their treatment of Bork and Thomas. Indeed, former Senator Alan Simpson has said as much,⁹⁰ and one cannot help but notice how much some Republicans enjoy quoting Democrats from the Bork era about the propriety of looking into a nominee's ideology. Third, precisely because this flap is out of the public eye, it is an easy way for the Republicans to beat up on a President besieged by scandal. So far, efforts to make the vacancies an issue of public concern have not borne fruit, so it seems a fairly cost-free way to nettle the President. And, anyway, there is some reason to believe that the game may be ending. The Senate did push through an impressive number of appointments at the end of the year. I predict this year will go smoothly this year, so the Republicans can avoid any risk that the issue might be used against them in the year 2000 presidential campaign. This most recent "confirmation crisis," like the earlier one, is really just more politics as usual.

Still, the days of the Senate's being a compliant rubber stamp are ending. This is so not because of the institution's desire for mature deliberation but because contemporary political factors make it possible for senators to make some political hay from being obstreperous. First, as noted before, the country seems to enjoy

⁸⁸ Carter, *supra* note 1, at 1198.

⁸⁹ Remarks of Senator Hatch, Dec. 21, 1998.

⁹⁰ *Conservative Revolt – Movement Divided Over Taking on Activist Judges*, BELOIT DAILY NEWS, Mar. 5, 1997, at A3 (quoting Senator Simpson as saying that Bork was "one hell of a lawyer, one hell of a teacher and one hell of a judge Before our eyes they turned him into a gargoyle. [Current Senate action] is payback time.").

divided government, which opens the chance for political hardball. Second, just as the orthodox view reflected the ascendancy of the presidency, so a more prickly Senate will reflect a weaker executive in the post-Watergate, post-Clinton world. Third, although the emphasis has varied from President to President, we have seen some very overt ideological appointments in the latter third of this century. If a President is going to shop for ideology in a nominee to an important policy-making body, a Senate in the opposition party's hands may at least register dissent.

Fourth, one cannot help but notice that we have not had a former senator in the White House in over a generation. Since Nixon, our presidents have consisted of three governors (Reagan, Carter and Clinton); one career congressman (Ford), and one career public servant (Bush). Of the five presidents before Ford, four had served in the Senate (Nixon, Johnson, Kennedy and Truman). We might expect the Senate to be more deferential to one of its former colleagues than to an outsider.

Finally, and no doubt most importantly, the federal courts matter as major shapers of national policy.⁹¹ Senatorial deference did not matter much when, as Professor Ely says, judges were not just another set of politicians.⁹² For good or ill, federal judges — once a somewhat mysterious group above the political fray and out of the public's view — now decide policy issues that used to go to representative bodies.⁹³ It is not surprising, then, that their selection comes to be treated as an election. One of the unprecedented things about the Bork hearings was the frenzy of mass-media advertizing by opponents, invoking the views of such constitutional scholars as Gregory Peck. The entire affair came to have the bite and glitz of an electoral campaign.⁹⁴ Because the selection of federal judges is important to influential interest groups, senators must appear appropriately sensitive to the issue by expressing concern, looking worried, delivering lectures to nominee, grilling the nominee (but requiring no answers) and, if their moistened, extended finger so dictates (based upon polling data), voting against confirmation.

VI. CONCLUSION

Some say that the Bork hearings ushered in a new freedom for the Senate to address judicial ideology in exercising the advice and consent power. Some see

⁹¹ Professor Carter is surely correct when he concludes that the Senate's discussion is not so much about "philosophy" as "rights we like." Carter, *supra* note 1, at 1192.

⁹² Ely, *supra* note 1, at 843.

⁹³ Indeed, Professor Ely notes "the unspoken premise that the very body in which Biden and Kennedy sit, the United States Congress, cannot be counted on to deliver the desired outcomes. (That's what makes it necessary for them to insist on justices who will do so whatever the inclination of the elected branches.)" Ely, *supra* note 1, at 848 n.33. See also Oona A. Hathaway, Book Note, *The Politics of the Confirmation Process*, 106 *YALE L.J.* 235, 239 (1996) (reviewing JOHN ANTHONY MALTESE, *THE SELLING OF THE SUPREME COURT NOMINEES* (1995)) ("[T]he Supreme Court was thrust into the center of national political debate during the 1930s, when it struck down central elements of [the] New Deal. With rulings ranging from civil rights to marital privacy to criminal law, the Court again entered the center of national political debate in the 1950s." (footnotes omitted)).

⁹⁴ "[T]he Bork confirmation battle took on the aspect of an election contest in which one party accused the other of seeking to undermine the nation's traditional values." Carter, *supra* note 1, at 1192.

this as a bad thing, since it has injected a significant contentiousness into the hearings. Some even long for the good old days of supine deference.⁹⁵ But the problem is not contentiousness. Disagreement is good. Debate is good. It is healthy. The crisis — and it's too longstanding to call it that — is that the Senate has never engaged in meaningful, healthy debate over judicial nominations. It has never been a mature deliberative body, addressing the role of federal courts in American society and the ideology of their personnel. It has not realized its potential for shaping the judiciary, informing the process, and providing a meaningful check on the President. Instead of being the contemplative “soul” of our democracy, the Senate has for two centuries used the advice and consent power to flex its political muscle to tweak weakened presidents and to preen in an effort to realize goal number one: reelection. Events of the past dozen years merely show that body's ability to use new technology and buzzwords to serve that timeless end.

It's not a crisis. It's a pity.

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See, e.g., SILVERSTEIN, *supra* note 2; Tulis, *supra* note 24, at 1333 (reviewing Silverstein's position that a “golden age” has passed).