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Some Thoughts on the Confirmation Process for Federal Judges

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SOME THOUGHTS ON THE CONFIRMATION PROCESS FOR FEDERAL JUDGES

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The recent history of nominations to the Supreme Court has sparked new interest in an old question: what is the proper role of the Senate in the confirmation of Article III judges? Almost everyone seems to have an opinion about this, and for better or for worse, I have not been able to resist the temptation to express a few thoughts on the subject. I should warn you that what I have to say is impressionistic. It is not based on extensive research and is certainly not polished or exhaustive. Rather, it takes the form of some random thoughts and a few more or less tentative conclusions. In short, what I am about to say is not the last word—maybe not even mine.

Because the confirmation process is rooted in the Constitution, I begin there. Article II, Section 2 provides that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint," among others, "Judges of the Supreme Court." (This same constitutionally-mandated procedure applies to all Article III judges.) Note that the Constitution places the power to nominate Article III judges exclusively in the President. The President can appoint, however, only with the advice and consent of the Senate. That is as far as the Constitution takes us. It does not in any way prescribe or delimit the manner in which the Senate is to perform its advise-and-consent role.

This brings us to the fundamental question that recent events have brought into sharp focus. Is the proper role of the Senate simply that of making sure the President's nominee meets the requirements of the office, specifically, that the nominee is a person of integrity, with the appropriate professional qualifications and the requisite degree of health and vigor and mental acuity? Or is it also permissible for the Senate to withhold its consent because it dislikes the nominee's politics, or social or economic views, or judicial philosophy? Clearly the President may, and usually does, consider at least some of those things in

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selecting the nominee. No one would seriously argue, I think, that such considerations are improper. The President is entitled to nominate persons who satisfy his vision of what a judge should be. Are those same considerations of politics and philosophy off-limits for the Senate?

I concede at the outset that this question of the range of factors that the Senate may appropriately consider has a certain naive or even scholastic quality. In performing its advise-and-consent function, the Senate is not unlike an 800-pound gorilla: who is going to tell it that it cannot do whatever it wants? On the other hand, each senator has a sworn duty to uphold the Constitution, and the Senate as a whole has an institutional duty to conduct itself in a manner consistent with the Constitution. That being so, there is reason to look into the question whether the Constitution, properly understood, makes it impermissible for the Senate to allow partisan politics to influence its consideration of judicial nominees.

We have already looked at the language of Article II, Section 2 of the Constitution. This provision represents a compromise between those delegates to the Constitutional Convention who wanted the legislature to appoint the judges and those who thought that the executive should do it. Before this compromise was reached, the convention "came very close to granting the Senate sole power of appointment."[1] Early in their proceedings, the delegates even debated a proposal to vest the appointment power in *both* houses of Congress.[2] It was Alexander Hamilton who finally proposed that the executive nominate various officers, including judges, subject, in Hamilton's words, "to the approbation or rejection of the Senate."[3] Although the convention did not immediately salute Hamilton's proposal, the compromise position that the proposal represented ultimately prevailed. The "advice and consent" language, which replaced Hamilton's formulation of "approbation or rejection," was initially suggested by Nathaniel Gorham of Massachusetts and came from the Constitution of Massachusetts.[4]

From the records of the convention, it seems reasonably clear that most of the delegates favored an active role for the Senate. After all, many of the delegates had favored appointment by the Senate alone. In addition, it seems reasonably clear that the delegates envisioned that both the President and the Senate would evaluate candidates with considerable care and that only well-qualified judges would be appointed. There appears to be no reason to believe

1. William G. Ross, *The Functions, Roles, and Duties of the Senate in the Supreme Court Appointment Process*, 28 WM. & MARY L. REV. 633, 635 (1987).
2. *Id.*
3. *Id.* at 637.
4. *Id.* at 637-38.

the Founders were looking for anything other than the ablest of the profession. What is not clear from the debates is whether the Founders thought that the Senate could properly base its decision on the political or judicial philosophy of the nominee.

In the Federalist Papers, written to gain support for the ratification of the Constitution, Hamilton argued that the real power of appointment would reside in the President, and that the Senate's role would be limited to preventing the appointment of "unfit characters."[5] In each of his relevant essays, he emphasizes that the Senate would give a high level of deference to the President's nominee. As he put it in Federalist No. 76, the Senate's consent "would [not] often be refused, where there were not special and strong reasons for the refusal."[6]

Unfortunately for Hamilton, a page of history is worth volumes of prophecy. After the Constitution's ratification, the Senate quickly asserted itself (and demolished Hamilton's notion that the President's nominations would get great deference) by rejecting President Washington's nomination of John Rutledge to the Supreme Court by a vote of fourteen to ten. Although Rutledge's foes had spread a rumor that he was insane, the focus of the opposition was Rutledge's strong hostility to the Jay Treaty.[7] Thus, it can be said that Rutledge was defeated for political reasons, unrelated to any question of his fitness to serve on the Court. This is revealing of the framers' intentions. Several of the senators who voted against Rutledge had been delegates to the constitutional convention,[8] as had Rutledge himself.[9] Washington, who had presided at the convention, never attacked the Senate's action as unconstitutional,[10] nor, as far as is known, did Rutledge.

Later, at various times throughout the nineteenth century, the Senate rejected Supreme Court nominees for partisan reasons. For example, two of President Cleveland's nominees met defeat because Cleveland refused to nominate persons who had been suggested by a powerful senator from New York.[11] Politics clearly played a part in the Senate's rejection of several candidates, and many of the nominees who won confirmation encountered politically-inspired opposition.[12]

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5. THE FEDERALIST No. 76, at 457 (Alexander Hamilton) (Arlington House ed.).
6. *Id.*
7. Ross, *supra* note 1, at 642.
8. *Id.* at 642-43.
9. Rutledge signed the Constitution as a delegate from South Carolina.
10. Ross, *supra* note 1, at 643.
11. *Id.* at 643.
12. *See generally id.* at 643-44.

In our own century, the President's Supreme Court nominations have, with a few notable exceptions, fared rather well. Of the approximately sixty nominations since 1900, the Senate has rejected only four, and most of the others were confirmed by overwhelming majorities. (The four rejected nominees were Judge John J. Parker in 1930, Judge Clement Haynsworth in 1969, Judge G. Harrold Carswell in 1970, and Judge Robert Bork in 1987.) Judge Carswell was voted down largely because he was perceived (fairly or not) as not being up to the task, although partisan political reasons may have influenced the outcome. I think it accurately can be said, however, that Parker, Haynsworth, and Bork, able judges all, went down to defeat because of politics, not because of any doubt about their qualifications. Similarly, three post-1900 Supreme Court nominations have been withdrawn (Justice Abe Fortas and Judge Homer Thornberry in 1968 and Judge Douglas Ginsberg in 1987). Justice Fortas and Judge Thornberry encountered partisan political opposition, and Justice Fortas, who was nominated for the office of Chief Justice of the United States, was attacked as having committed a breach of judicial ethics by accepting a substantial amount of money from an outside source while serving as a member of the Court. Judge Ginsberg was subjected to intense political pressure and withdrew from consideration after it was reported that he had smoked marijuana while serving as a member of the faculty of the Harvard Law School.

The purpose of this hasty historical survey is to make the point that from the earliest times until the present, the Senate, although usually deferential to the President's judicial nominees, has occasionally, indeed with some frequency, fought and defeated nominations based on partisan political grounds. When I look at this long history, together with the text of the Constitution and the intention of the framers, I am unable to conclude that the Senate is constitutionally barred from rejecting a nominee for political or philosophical reasons. The President has the power to nominate, but in the end he must nominate someone acceptable to a majority of the Senate.

That, however, is not the end of the story. Like any other power, the Senate's power over the confirmation process is subject to abuse. A nominee may be attacked not only in a political way, but also in a false way, by innuendo, unsupported allegations, deliberate misrepresentations, and the like, and the attack may even be aided and abetted by well-financed media campaigns. Such practices are the sort of thing that gives politics a bad name, and they have no rightful place in the confirmation process. Political considerations may be legitimate, but the rule ought to be one of honest opinions expressed honestly, openly, and fairly, without distortion or misrepresentation of the nominee's record or views.

Moreover, I believe that, as a prudential matter, the Senate should use its

power sparingly. What is fair game for one party is fair game for the other, and the threat of reprisals is obvious. Even more important, I do not think we really want politicized judges of either the right or the left. We want judges who will decide cases on the facts and the law, not on the basis of how their decisions will play to the Senate Judiciary Committee if they are nominated for higher office. Although we want our judges to approach their cases with open and inquiring minds, we certainly do not want them to be blank slates who have reached mid-life or beyond without having formed any principled views about anything of importance, or without ever having taken a position on a controversial issue. It is, I believe, for reasons of this kind that the Senate generally, though not always, has refrained from applying a political litmus test to judicial nominees. Nothing less than the integrity of the federal judiciary is at stake, and all participants in the confirmation process must keep that in mind.

We have recently experienced, in the case of Justice Thomas, a particularly nasty and demeaning confirmation hearing. Where do we go from here? One still unresolved question, it seems to me, is that of how far the Senate decently can go in probing into the nominee's mind. How specific is it proper for the questions to be about cases past, present, and future? About the nominee's philosophy and views on constitutional issues and other matters? Should this depend on how much the nominee has written? If so, does that place the bold and innovative legal scholar at a disadvantage? Does it discourage honest scholarly criticism of popular or "politically correct" judicial decisions? To what extent does the nominee have a duty to answer fully?

In pondering these matters, we need to remember that the practice of having nominees appear before the Judiciary Committee is a fairly recent development. The first nominee to appear before the committee was Harlan Fiske Stone in 1925.[13] After that, it was another thirty years before it became customary to have the nominee appear before the committee and submit to questioning.[14] Thus, many of the great justices of the past never faced the committee. Would a Holmes or a Brandeis have been defeated if subjected to the kind of scrutiny that recent nominees have undergone? We shall never know the answer, but the question nevertheless is an intriguing one.

And so, how far should the Judiciary Committee go? Should the Senate probe until it gets a commitment on a hot issue or a trendy doctrine? Should we allow the nominee to avoid questions by employing the "my lips are sealed" tactic, or did Judge Bork's full and straightforward answers set for all time a different precedent? Should stale and unprovable charges of improper conduct

13. *Id.* at 666.
14. *Id.*

be brought forward and paraded at the hearing, producing bizarre spectacles of the sort we witnessed during Justice Thomas's hearing? The whole question concerning the character and thrust of the hearing is one that requires a great deal of constructive thought, and even some soul-searching, by the Senate. Certainly, we ought to be capable of handling the process better. The public interest would be served by a meaningful, dignified, substantive hearing, which is not exactly what we have been getting recently.

It is unrealistic to expect that persons nominated to serve as justices of the Supreme Court will not be subjected to intense public scrutiny. The stakes are high. Moreover, for various reasons that are beyond the scope of this paper, there is much more general awareness now than in earlier times of the importance of appointments to the Court. Each nomination, therefore, will continue to attract much attention from the media and the public, with all the possibilities for both true enlightenment and serious mischief that this entails. Whether the confirmation process will work in a way that makes us proud and increases public confidence in the Court does not depend upon constitutional limits on the advise-and-consent role of the Senate, for there are no such limits. What matters, instead, is the character, integrity, fairness, and good judgment of the Senate as it discharges its constitutional duty to assess the qualifications of the President's nominees.