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Supreme Court Power Play: Assessing the Appropriate Role of the Senate in the Confirmation Process

Jeff Yates*  
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Abstract

The Bush Administration will likely have the opportunity to make a number of appointments to the Supreme Court; however, such nominations may lead to contentious confirmation hearings in the Senate. When such an appointment opportunity does present itself, questions are bound to arise concerning the appropriate role of the United States Senate in the confirmation of Supreme Court nominees under the "advice and consent" provisions of Article II of the United States Constitution. Disputes over the Senate's proper role and scope of inquiry seem to emerge whenever a nominee has faced the confirmation process and have been a timeworn subject of legal debate. In this Article, we assess the proposition that the Senate should have an active role in the confirmation process, which includes investigation into a nominee's ideological beliefs and constitutional philosophy. We begin by examining the background of the Constitution's "advice and consent" phraseology and consider early applications of the confirmation process by senators during the eighteenth and nineteenth centuries. We then discuss the struggle for judicial selection power between the Senate and the President and conclude by suggesting the need for an active Senate response to executive nominations.

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I. Introduction

A. The Issue

Amid rumors that at least two Supreme Court justices, Chief Justice William H. Rehnquist and Associate Justice Sandra Day O'Connor, may be retiring soon, President Bush faces the possibility of a contentious confirmation battle in trying to fill such vacancies on the Court. Indeed, with regard to potential Bush appointments to the Court, Robert Bork commented, "Both sides are set for a pitched battle, and it could be a replay of my experience." While appointing a new justice to the Supreme Court gives the President an opportunity to create a lasting political and legal legacy, such opportunities come with considerable political risks in that presidents may lose valuable political capital from a prolonged battle in the Senate over an ideologically controversial nominee.

2. Id. at 55. A Bush nominee may experience a particularly contentious confirmation process given the Court's controversial decision in Bush v. Gore, 531 U.S. 98 (2000). Professor Bruce Ackerman makes the argument that because the Court essentially decided the presidential election, and hence potentially arranged for its own succession, the Senate should refuse to confirm any Bush nominee unless and until Bush wins the 2004 election "fair and square." Ackerman, The Court Packs Itself, AM. PROSPECT, Feb. 12, 2001, at 48.
3. See Charles M. Cameron et al., Cover, & Segal, Senate Voting on Supreme Court Nominees: A Neoinstitutional Model, 84 AM. POL. SCI. REV. 525, 528 (1990) (noting that
When such an appointment opportunity does present itself, questions are bound to arise concerning the appropriate role of the United States Senate in the confirmation of Supreme Court nominees under the "advice and consent" provisions of Article II of the United States Constitution. Disputes over the Senate's proper role and scope of inquiry seem to emerge whenever a nominee has faced the confirmation process, and have been a timeworn subject of legal review. Historically, the controversy over the confirmation issue has evinced the following two major points of view: (1) that the Senate should have a circumscribed role in the confirmation process and that proper questioning of nominees should not include inquiries regarding a nominee's policy values or constitutional philosophy; and conversely, (2) that the Senate should have an active role in the confirmation process and that confirmation votes may legitimately turn on a nominee's response to questions concerning his or her policy values and constitutional philosophy.

The debate over the appropriate scope of the confirmation process yields opinions from a wide spectrum of sources. During the confirmation proceedings of Associate Justice David H. Souter, then Senate Judiciary Chairperson Joseph Biden (D-Delaware) asserted, "We have a right to know and... a duty to discover precisely what David Hackett Souter thinks on the great constitutional issues of our time." Former Chief Justice Warren Burger set forth an opposing view and questioned the propriety of asking nominees about their constitutional views, stating:

To call on a nominee for advance views as to questions that may come before the Court is really not unlike asking a potential juror how he or she

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4. See, e.g., John P. Frank, The Appointment of Supreme Court Justices: Prestige, Principles and Politics, 1941 Wis. L. Rev. 172. The selection of Supreme Court justices is a matter of pressing public concern as well. One survey, conducted months before the 2000 presidential election, indicated that a candidate's potential appointments to the Court would be either a "somewhat" or "very" important factor in 73% of respondents' voting decisions in the upcoming presidential election. See D. Acob, Courting Voters, Nat'l J., July 15, 2000, at 2329.

5. See generally Bruce Fein, A Circumscribed Senate Confirmation Role, 102 Harv. L. Rev. 672 (1989) (arguing that senatorial investigation of Supreme Court nominees should be limited to whether nominees are intellectually competent and to whether nomination was tainted by cronyism, corruption, or partisanship).

6. See generally William G. Ross, The Functions, Roles and Duties of the Senate in the Supreme Court Appointment Process, 28 Wm. & Mary L. Rev. 633 (1987) (arguing that Senate is obligated to conduct broad inquiry into suitability of Supreme Court nominees that encompasses their professional qualifications as well as their political values).

7. At about the same time, a newspaper public opinion poll of 1,000 registered voters found that 75% of them felt that it was appropriate for the Senate to seek Souter's views on controversial issues. See Tony Mauro & Mimi Hall, Souter Pressed to Make Views Clear, USA Today, Sept. 12, 1990, at A3, col. 4.
Commentators note that both liberals and conservatives alike support the ideological inquiry of nominees by the Senate when they dislike the nominee. Similarly, both liberals and conservatives deem ideological inquiry inappropriate when the nominee has been to their liking. Such capricious assessments of the Senate’s proper role are quite possibly inescapable given the fact that the executive office and at least a substantial portion of the Senate likely always will be controlled by ideologically discordant parties. Commentators, perhaps concerned over previous contentious confirmation proceedings, have offered suggestions for revising the process of selecting Supreme Court justices. Such suggestions range from proposals to institute formal reforms in the way the confirmation process is conducted to keeping the process as it is, but fundamentally rethinking the way we assess candidates for our highest court.

B. Defining the Senate’s Role

The confirmation process has been implemented in this country for over two hundred years. Thus, it is somewhat ironic that a dispositive role for the Senate has not yet been defined. Inherent in the assessment of the Senate’s...

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10. Id.


12. See generally STEPHEN L. CARTER, *THE CONFIRMATION MESS* 68-84, 159, 183-86, 203-06 (1994) (discussing various approaches to analyzing nominees). Carter argues that to avoid “blood on the floor” and to ultimately improve the confirmation process and its results we should: (1) not dwell on how a nominee might vote if confirmed; (2) not focus so much on the importance of the Court (and hence the importance of nominees’ ideologies), but instead focus such political efforts toward the popularly elected branches of government; (3) be more forgiving of nominees’ past improprieties; and (4) not presume that nominees are necessarily qualified for the position. But see Gary J. Simson, *Review Essay: Mired in the Confirmation Mess,* 143 U. PA. L. REV. 1035, 1036-46 (1995) (arguing that Carter’s suggestions that focus undue attention on reducing “blood on the floor” would not actually have effect of reducing consternation with which he is concerned, and ignore potential threat of presidential domination of judicial selection process).
role is the issue of whether Senate inquiry into a nominee's political and constitutional philosophy is within the proper scope of confirmation investigation. If it is determined that the Senate should have an active role, then it seems reasonable that a nominee's political and constitutional views constitute a proper line of inquiry. Although few would argue that it is appropriate for a nominee to comment on pending cases, there is ostensibly no reason why nominees should not discuss cases that are already decided or their general political views. One scholar notes that the premise that such discussions will inhibit or bias nominees' ability to decide future cases fairly is no more sound than the proposition that sitting justices who write precedent-setting opinions should recuse themselves from voting on similar cases in the future.

In this Article, we assess the proposition that the Senate should have an active role in the confirmation process, which includes investigation into a nominee's ideological beliefs and constitutional philosophy. Section II examines the background of the Constitution's "advice and consent" phraseology and considers early applications of the confirmation process by senators during the eighteenth and nineteenth centuries. Section III discusses the struggle for appointment power between the Senate and the President and suggests the need for an active Senate response to executive nominations.

II. The Constitutional History of "Advice and Consent"

A. Debate of the Framers

Article II, section 2 of the United States Constitution dictates that "[t]he President . . . shall nominate, and by and with the Advice and Consent of the Senate shall appoint . . . Judges of the Supreme Court . . . ." Thus, although the Constitution grants the President alone the power to nominate a candidate for the Court, the appointment power is subject to the Senate's review and possible rejection. In determining the proper role of the Senate under the "advice and consent" phraseology, an examination of the aim and intent of the Constitutional Framers in creating the passage is necessary.

13. See Charles L. Black Jr., A Note on Senatorial Consideration of Supreme Court Nominees, 79 YALE L.J. 657, 659 (1970) (asserting that consideration of all relevant factors is inherent in giving sound advice); see also Paul A. Freund, Appointment of Justices: Some Historical Perspectives, 101 HARV. L. REV. 1146 (1988) (stating that issues of Senate's role and proper scope of questioning are intertwined).
15. Id.
17. Ross, supra note 6, at 635. Ross adds, "The Constitution says nothing about the criteria upon which the Senate may base its decision. Technically, therefore, the Senate may reject a nominee for any reason." Id.
18. Id. But cf: Freund, supra note 13, at 1147 ("To be really helpful the record would
The Constitutional Convention of 1787 saw a variety of proposals regarding the selection of Supreme Court Justices and debate over the proposals suffered numerous postponements before the attainment of a decisive vote. On June 1, 1787, the Framers reached a decision that the President should have the power, independent of the legislature, to appoint all officers not otherwise provided for in the Constitution. This broad grant of appointment power to the President by the Framers was surprising considering the fact that none of the several states' constitutions gave the governor independent appointment power. This provision, granting appointment power solely to the President, was amended on June 13, when James Madison offered a motion, subsequently adopted, that judges be appointed solely by the Senate.

The Framers' next debate on the issue did not occur until a month had passed. However, during the interim, two proposals were made regarding the appointment power. William Patterson presented the New Jersey Plan, which provided for appointment by the executive, who was to be elected by the legislature. Alexander Hamilton's plan suggested that the executive should have the power of appointment subject to the approbation or rejection of the Senate. Hamilton's suggestion constituted the first time that a method of appointment similar to the one finally adopted was proposed during the Convention. When the debates recommenced on July 18, opinions were again divided and the Convention failed to agree on any of the new proposals.

Roger Sherman advocated appointment by the Senate, contending:

It would be composed of men nearly equal to the Executive, and would of course have on the whole more wisdom. They would bring into their...
deliberations a more diffusive knowledge of characters. It would be less easy for a candidate to intrigue with them, than with the Executive Magistrate.\textsuperscript{28}

Nathaniel Gorham took a different view, arguing:

\begin{quote}
[T]he Executive will be responsible, in point of character at least, for a judicious and faithful discharge of his trust, he will be careful to look through all the States for proper characters. The Senators will be as likely to form their attachments at the seat of government where they reside, as the Executive. . . . Public bodies feel no personal responsibility, and give full play to intrigue and cabal.\textsuperscript{29}
\end{quote}

Ironically, a compromise plan proposed by Gorham, which closely paralleled the final plan, was defeated by a 4-4 vote.\textsuperscript{30}

Further debates on July 21 and August 23 proved to be inconclusive and the issue was not reconsidered until September 4, when the Special Committee on Postponed Matters made a report providing for executive nomination of Supreme Court Justices with the advice and consent of the Senate.\textsuperscript{31} Debate on the Committee's proposal took place on September 6 and 7 and although Charles Pinkney and James Wilson voiced opposition to the Committee's proposal on the grounds that it gave the Senate too much power, the proposal was agreed to \textit{nem. con.} by the Framers.\textsuperscript{32} Supporting the Committee's plan was Gouverneur Morris, who had previously advocated appointment by the executive.\textsuperscript{33} Morris asserted, "[A]s the President was to nominate, there would be responsibility; and as the Senate was to concur, there would be security."\textsuperscript{34}

In examining the Convention's record, it becomes ostensible that the Constitutional Framers, who had for months retained a proposal granting the Senate sole appointment power, had not intended to eviscerate the Senate's vital role in the selection process. Professor Charles Black reaches a similar interpretation, asserting:

\begin{quote}
This last vote must have meant that those who wanted appointment by the Senate alone -- and in some cases by the whole Congress -- were satisfied that a compromise had been reached, and did not think the legislative part in the process had been reduced to a minimum. The whole process, to me,
\end{quote}

\begin{thebibliography}{9}
\bibitem{28} MADISON, \textit{supra} note 19, at 375.
\bibitem{29} Id. at 374-75.
\bibitem{30} Id. at 377.
\bibitem{31} Ross, \textit{supra} note 6, at 639.
\bibitem{32} MADISON, \textit{supra} note 19, at 680-81.
\bibitem{33} HARRIS, \textit{supra} note 20, at 24.
\bibitem{34} MADISON, \textit{supra} note 19, at 681.
\end{thebibliography}
suggests the very reverse of the idea that the Senate is to have a confined role.\textsuperscript{35}

Black further argues that the Framers contemplated the Senate’s active questioning of a nominee’s policy values.\textsuperscript{36}

\textbf{B. Early Applications of "Advice and Consent" by the Senate}

The proposition that the Senate may actively investigate a nominee’s ideological values and vote against a nominee for political reasons is supported by the Senate’s application of the "advice and consent" phraseology during the eighteenth and nineteenth centuries. During the years 1787 through 1900, the Senate refused to confirm twenty-two Supreme Court nominees,\textsuperscript{37} often for political reasons.\textsuperscript{38} As detailed below, the Senate’s early practices evince a historical tradition of the Senate as an active and political participant in the confirmation process.

This role of the Senate as an active and politically driven participant in assessing nominees traces back to the Washington administration.\textsuperscript{39} The Senate’s first significant assertion of its constitutional power to reject executive nominees came not in the form of a judge, but as a candidate for a naval post.\textsuperscript{40} The Senate rejected Washington’s nominee for a Savannah naval post as a means of "senatorial courtesy" to the two senators from Georgia, who had a candidate of their own.\textsuperscript{41} Although this was not a Supreme Court nomination, the Senate’s action in this instance was significant because it established from the beginning that the Senate could reject a presidential nominee without regard to his qualifications.\textsuperscript{42} The second significant Senate rejection occurred in 1795 when the Senate rejected Washington’s nominee for Chief Justice, Associate Justice John Rutledge.\textsuperscript{43} Although it has been suggested that Rut-

\textsuperscript{35} Black, supra note 13, at 661.

\textsuperscript{36} Black, supra note 13, at 660-63. Black bases his contention that the Framers contemplated investigation of nominees' ideological values on the Constitutional Convention record, Hamilton’s writings in \textit{The Federalist No. 76} at 494-95 (Mod. Libr. 1937), and early applications of the confirmation role by the Senate. Id.


\textsuperscript{39} Id. at 563-64. Lively notes that the early Senate’s most prominent leaders, including Senators Clay, Calhoun, and Webster, vigorously opposed the appointment of nominees whose substantive views they regarded as unsound. Id. at 564.

\textsuperscript{40} Harris, supra note 20, at 40.

\textsuperscript{41} Id.

\textsuperscript{42} Id. at 41.

\textsuperscript{43} Henry J. Abraham, Justices and Presidents 65 (1974).
Rutledge was prejudiced by rumors of mental instability, his rejection was most likely due to his opposition of the Jay Treaty. Thomas Jefferson commented, "The rejection of Mr. Rutledge by the Senate is a bold thing, because they cannot pretend any objection to him but his disapprobation of the treaty." The rejection of Rutledge's nomination for Chief Justice is significant in revealing the Framers' intentions because: (1) several of the senators who voted against Rutledge had been delegates at the Constitutional Convention; and (2) the principal opposition to Rutledge came from the Federalists, who had favored a strong executive power.

As Senate rejections of executive nominees during the Washington administration laid the foundation for the Senate's role as an active and political assessor of nominees, Senate rejections based on political grounds during the nineteenth century fortified this traditional role for the Senate. Early in the nineteenth century, the Senate rejected President Madison's Supreme Court nominee, Alexander Wolcott, even though Madison's party controlled the Senate. Scholars attribute the rejection of Wolcott to his strict (and controversial) enforcement, as United States Attorney, of the highly unpopular Embargo and Intercourse Acts. President Tyler experienced similar politically based opposition from the Senate in 1843 when he unsuccessfully nominated John C. Spencer, a former Secretary of the Treasury from New York. Unfortunately for Spencer, he had run afoul of the New York Whigs and the charismatic Henry Clay, who clearly dominated the party against the politically weak President.

Toward the latter part of the nineteenth century, the Senate continued to refuse to confirm executive nominees on political grounds. In 1870, the Senate rejected President Grant's nominee, Ebenezer Hoar, for political reasons, most notably his opposition to Andrew Johnson's impeachment. In a similar manner, the Senate confounded President Cleveland in 1894 by refusing to confirm executive nominees on political grounds. As Senate rejections of executive nominees during the Washington administration laid the foundation for the Senate's role as an active and political assessor of nominees, Senate rejections based on political grounds during the nineteenth century fortified this traditional role for the Senate. As Senate rejections of executive nominees during the Washington administration laid the foundation for the Senate's role as an active and political assessor of nominees, Senate rejections based on political grounds during the nineteenth century fortified this traditional role for the Senate. As Senate rejections of executive nominees during the Washington administration laid the foundation for the Senate's role as an active and political assessor of nominees, Senate rejections based on political grounds during the nineteenth century fortified this traditional role for the Senate.
rejecting two of his nominees for the Supreme Court, William Hornblower and Wheeler Peckham. Cleveland had aroused the Senate's ire by refusing to nominate persons suggested by New York's powerful Senator, David Hill.

In sum, seventeen of the twenty-one Supreme Court nominees rejected by the Senate during the nineteenth century were rejected for political or ideological reasons. Hence, a thorough examination of the creation of the "advice and consent" phraseology and its early implementation by the Senate provides little support for the position taken by some commentators, that an active and political senatorial role has no historical foundation.

III. The Struggle for Selection Power

A. The President and Senate as Judicial Selectors

As the preceding historical account of the confirmation process tends to suggest, a very political struggle for judicial selection power exists between the executive office and the Senate. At the heart of this struggle for power is the issue of whether the Senate may engage in the same substantive ideological screening process that even those advocating a constrained role for the Senate admit that presidents undertake. As a judicial selector, the President has the capacity and political incentive to influence significantly Supreme Court policy through nominations. In the absence of an active Senate response and ideological inquiry, presidential nominations based on a candidate's political ideology quickly become rubber stamp appointments, and thus the President can mold the Court in his own image with no meaningful democratic check. The American constitutional system is based upon a separation of powers principle that presupposes that no single branch of the government is to dominate pervasively. This basic principle is endangered, however, if the

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53. Ross, supra note 6, at 643.
56. For instance, during the confirmation hearings of Supreme Court nominee Robert Bork, Senator Orrin Hatch (R-Utah) vehemently argued that senatorial ideological investigations and inquiries of Supreme Court nominees were without historical foundation. See Myers, supra note 37, at 4.
57. See Richard D. Friedman, The Transformation in Senate Response to Supreme Court Nominations: From Reconstruction to the Taft Administration and Beyond, 5 CARDOZO L. REV. 1, 87 (1983) (considering argument that Senate must consider ideology while evaluating nominees because President does so while selecting them); Fein, supra note 5, at 684 (discussing appropriate senatorial response to "constitutionally transformative" nominees).
58. Lively, supra note 38, at 563.
President endeavors to shape the ideological composition of the judiciary and the Senate merely defers to the President's judgment.59

Advocates of a constrained senatorial confirmation role make the argument that an active inquiry into a nominee's substantive views by the Senate threatens to compromise the judiciary's independence and to politicize the appointment process.60 However, it is evident that the federal judicial selection process is already politicized because of the executive office's use of ideological screening processes in selecting nominees.61 When the President is guided by political and ideological considerations in selecting nominees, it seems logical for the authority obligated to render advice and consent to review those same considerations.62 Furthermore, the argument that policy-oriented debate during confirmation demeans the judiciary ignores a well-established constitutional principle favoring precisely such a focus.63 The integrity of the confirmation process is truly demeaned not when the Senate focuses upon a nominee's ideological views, but when it does so and pretends that it has not.64 This rather uncomfortable selection process, whereby senators actually vote on nominees based on political concerns while espousing politically neutral reasons, has been labeled by one commentator as "the mask of nonpartisanship."65

Another argument advanced in favor of a constrained Senate role is the proposition that executive nominations based on a candidate's ideological

59. Id. Former Senator Simon (D-Illinois) argued, "In contrast to the President's nominations to positions within his own executive branch, appointments to the judiciary are to a branch of government that is supposed to be independent of the President and for a duration exceeding his own term of office. For the President to control such appointments unilaterally would be inappropriate, especially in a political system where checks and balances are so important." See Paul Simon, The Senate's Role in Judicial Appointments, 70 JUDICATURE 55 (1986).
60. See, e.g., Fein, supra note 5, at 687 (arguing that senatorial inquires into nominees' constitutional philosophies threatens to turn confirmation process into battlefield and negatively affects quality of judiciary).
61. See MALTESE, supra note 11, at 120-28 (examining role of ideology through history of nomination process); see also R. Brownstein, Reagan's List of Potential High Court Justices, 49 NAT'L J. 2339 (1984) (discussing Reagan-era search for potential nominees that emphasized conservative credentials).
62. Lively, supra note 38, at 557.
63. Id. at 574-75. Lively maintains that First Amendment constitutional guarantees depend upon uninhibited public debate, adding, "That central constitutional principle effectively is subverted to the extent that one branch of government is exempted from the checks and balances of evaluation and discourse by another branch." Id.
64. Id. See also generally Donald R. Songer, The Relevance of Policy Values for the Confirmation of Supreme Court Nominees, 13 LAW & SOC'Y REV. 927 (1979) (using empirical analysis to support argument that although senators espouse policy neutral reasons in opposing nominees, ideological and partisan dissatisfaction are real motives).
views are innocuous because the President is unable to predict a Justice's long-term voting trends. This premise, however, is not supported by history or by empirical studies on the policy impact of presidents' Court nominations and belittles the intrusion on the Senate's constitutional role. Lively concurs on this point, asserting:

The argument that policy oriented inquiry is unlikely to enable the Senate meaningfully to assess long-term predictability also is unpersuasive. A president's agenda for instance may be relatively short term. Immediate goals, such as Franklin Roosevelt's objective to fashion a Court sympathetic to New Deal legislation, may be at least as significant as quality of service over the long run. . . . The suggestion that policy-oriented Senate review is unnecessary because performance is unpredictable . . . is misplaced and perhaps fosters a false sense of security. The unpredictability premise invites not only deferential review, but also effective displacement of the Senate's constitutional function and unprecedented enhancement of executive power and influence.

Support for this position can be found in the success of the Nixon/Reagan appointments in building a "law and order" Court. When presidents have attempted to influence the Court through nominations, their aims usually have been achieved to a significant degree. Thus, executive screening processes yield sophisticated performance predictions that threaten the neutrality of the judiciary. It is only through open debate and a system of checks and balances between the executive and the Senate in implementing their concurrent selection responsibilities that judicial independence can be maintained.

66. See Friedman, supra note 9, at 1291. Friedman states, "No matter how important a Justice's substantive views may be, ideological consideration at the time of his nomination is futile to the extent that it is impossible to predict what those views will be over the course of his career on the Court." Id.; see also B. Goldwater, Political Philosophy and Supreme Court Justices, 58 A.B.A. J. 135 (1972) (arguing that, because predicting how Justice will vote once on Court is difficult, presidents' nominations should be confirmed unless nominee is unqualified or has conflict of interest).

67. Frank, supra note 4, at 488.

68. See, e.g., Stephanie A. Lindquist et al., The Impact of Presidential Appointments to the U.S. Supreme Court: Cohesive and Divisive Voting Within Presidential Blocs, 53 Pol. Res. Q. 795 (2000) (assessing President's ability to impact Supreme Court policymaking via appointment of justices).

69. Lively, supra note 38, at 558-59.

70. Id. at 555.

71. See id. at 578 (arguing that to extent that nomination process yields functional equivalent of nominees making commitment to President to rule certain way, nomination process endangers separation of powers).

72. Concerning the magnitude of the appointment responsibility and the need for an active senatorial review of nominees, Black argues the following:
B. Senatorial Standards for Rejection of Supreme Court Nominees

Much of the debate on the appointment-confirmation controversy has concerned the standards for Supreme Court nominee fitness that are to be applied by the Senate in deciding whether to reject or to confirm a presidential nominee. As noted previously, Article II of the U.S. Constitution promulgates no criteria restricting the reasons for which a Supreme Court nominee can be rejected. Therefore, a senator may legally reject a candidate for any reason that he or she chooses, including politically based objections. However, such a wide-open standard has received little academic support, despite historical precedent of rejections due to partisan politics. The remainder of this subsection will examine some of the various standards for Senate rejection that have been promulgated and suggests that the senatorial standard for rejection should be wide-open to include rejections based upon partisan politics and ideological opposition.

Commentators and confirmation participants have had a field day proposing various standards for evaluating Supreme Court nominees that they believe the Senate should confine itself to or at least be guided by. During the confirmation hearings of Robert Bork, Senator Mitch McConnell (R-Kentucky) set forth what he contended were the appropriate criteria for assessing Supreme Court nominees. They included: (1) judicial competence, (2) sufficient level of achievement or distinction, (3) judicial temperament, (4) no violation of existing standards of ethical conduct, and (5) a clean record in the judge’s life off the bench. Former Senate Judiciary Committee Chairperson

The Supreme Court is a body of great power. Once on the Court, a Justice wields that power without democratic check. This is as it should be. But is it not wise, before that power is put into his hands for life, that a nominee be screened by the democracy in the fullest manner possible, rather than in the narrowest manner possible, under the Constitution? ... The Constitution certainly permits, if it does not compel, the taking of a second opinion on this crucial question, from a body just as responsible to the electorate, and just as close to the electorate, as is the President.

Black, supra note 13, at 660.


74. See, e.g., Myers, supra note 37, at 16-18 (discussing criteria proposed by commentators).

75. See Freund, supra note 13, at 1157 (noting role of politics in unsuccessful nominations).

76. See, e.g., Myers, supra note 37, at 16-18.

77. Id. at 16. For a more detailed explanation of McConnell’s standards, see A. Mitchell McConnell, Jr., Haynsworth and Carswell: A New Senate Standard of Excellence, 59 KY. L.J. 7, 33-34 (1970). A standard similar to McConnell’s was introduced during the Bork hearings by the American Bar Association. The ABA based its evaluation of the nominee upon his
Joseph Biden (D-Delaware) called for a different standard, under which a senator would consider the following: (1) does the nominee have the intellectual capacity, competence, and judicial temperament required for a Supreme Court Justice; (2) is the nominee of good moral character and free of conflicts of interest; and (3) would the nominee faithfully uphold the Constitution?78

The primary distinction between McConnell's and Biden's standards is that Biden would include a nominee's constitutional philosophy as a basis of rejection. The conflict of standards between McConnell and Biden is representative of the primary dispute between those who either do or do not believe that a nominee's substantive views are a proper basis for senatorial rejection. Even those who agree that a nominee's substantive views may be properly considered do not agree as to what extent.

One of the major theories regarding the bounds of ideological rejection dictates that a nominee may be rejected on ideological grounds only if it is shown that the nominee's substantive views would be harmful to the best interests of the nation.79 Although this standard provides a broad basis for rejection, including ideological opposition, Professor Ross has explained that this standard would not include rejections based on political pique or narrow substantive issues.80

A similar standard for nominee rejection is the "mainstream jurist" theory, whose advocates include Robert Bork.81 This standard basically requires that the nominee have ideological support in his substantive views and not be a "lone wolf" interpretationist.82 It is somewhat ironic that Bork would espouse this standard because the mainstream jurist theory was at least one of the

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78. Myers, supra note 37, at 16-17.
79. See Ross, supra note 6, at 663-64; see also Black, supra note 13, at 663-64 (arguing that senators must take all factors into consideration when reviewing nominees). Black states the following:

In a world that knows that a man's social philosophy shapes his judicial behavior, that philosophy is a factor in his fitness. If it is a philosophy the Senator thinks will make a judge whose service on the Bench will hurt the country, then the Senator can do right only by treating this judgment of his, unencumbered by deference to the President's, as a satisfactory basis in itself for a negative vote.

Id.; see also Lively, supra note 38, at 573 (asserting that senators who believe that nominee's substantive views are dangerous deserve their constituents by failing to reject that nominee).
80. See Ross, supra note 6, at 664. Ross explains, "A senator may properly base his or her vote upon subjective political choices, however, if that decision is based upon a broad view of the nominee's record and ideas and a broad vision of the Constitution, rather than upon narrowly partisan or evanescent issues." Id.
81. See, e.g., Myers, supra note 37, at 18.
82. Id.
grounds upon which his rejection was based. During his confirmation hear-
ings, supporters of Bork presented evidence to show, statistically, that Bork was "in the mainstream" while sitting on the D.C. Circuit Court of Appeals. Opponents of Bork's nomination presented letters and testimony from almost forty percent of all law professors in the United States, who opposed Bork as a nominee. Thus, it is evident that confirmation participants will take great measures to prove that a nominee is or is not a mainstream jurist.

The standards noted above are only a few of the many that have been advanced by commentators and confirmation participants. Professor Tribe has put forth his own unique standard which requires: (1) that the nominee adhere to the American vision of a just society; and (2) that the nominee not upset the overall balance of the Court's ideology. Professor Friedman generally opposes ideologically based rejections, but allows for an exception where a nominee's views are so repugnant that merely allowing him to voice them as a Supreme Court Justice would be dangerous. On the other end of the spectrum is Professor Rees, who thinks that single issue rejections are appropriate under some circumstances. All of these standards call for a limit to the bounds of senatorial rejection and none would allow for rejection of a nominee for purely partisan political reasons. These theories ostensibly assume that standards for rejection of nominees can be enforced effectively. Below, we suggest that these proposed standards offer no realistically effective strategy for implementing the Senate's "advice and consent" role and that a wide-open rejection standard is the most plausible solution to the appointment-confirmation dilemma.

C. Enforceability of Standards

The various criteria standards that have been promoted by commentators seek to provide for the Senate a uniform set of rules by which it could constrain itself to appropriately based rejections. Inherent in implementing a set

84. See Myers, supra note 37, at 19. Senator Strom Thurmond urged that Bork had written over 100 majority opinions and had joined the majority in almost 300 other cases while on the D.C. Circuit bench. Id.
85. Griffin, supra note 83, at 562.
86. See Laurence H. Tribe, God Save This Honorable Court 96 (1985).
87. Friedman, supra note 57, at 93-94.
88. Rees, supra note 55, at 947. Rees maintains, "If a Senator believes that a certain constitutional question has a right answer and a wrong answer and that a nominee's wrong answer could be explained only as evidence of the nominee's tendency to 'make law,' then the Senator would be justified in voting against the nominee." Id.
of rules regulating rejections is the supposition that a set of rules could be enforced effectively. At present, there are no constitutional or statutory restrictions on senators' rejection motives. Assuming that a set of criteria for restrictions could be agreed upon and successfully enacted, they nonetheless would be impracticable to enforce. The premise that rejection restrictions would be unenforceable is supported by empirical studies of senatorial rejections that indicate that Senate opposition to a nominee is often due primarily to ideological or political influences, despite alleged policy-neutral justifications given by senators. Thus, although a senator actually opposes a nominee on partisan or policy grounds, he may easily fool onlookers, and perhaps even himself, by articulating policy neutral opposition. One commentator has analyzed this dilemma in the following manner:

[A] test based upon "broad bounds of acceptability" or "harmfulness" may suggest to senators that they may measure a nominee's ideology by a roughly objective standard. In reality, however, the existence of any consensus about what is a "reasonable" ideology is problematical. Moreover, the illusion of such a consensus may encourage a senator to delude him or herself into believing that his or her vote on a nominee is based upon transcendent values when in fact it represents a subjective political decision.

In short, a set of rules that cannot be effectively enforced serves no realistic purpose.

As noted above, senators are not under any legal duty to offer justifications for their rejection of a nominee. This is as it should be. A senator may very well not be able to offer any articulable reason for rejecting a nominee,

89. See Songer, supra note 64, at 927. Songer notes, "Even if partisan and ideological dissatisfaction are the real motives for opposition to Supreme Court nominees, the reasons publicly given for the opposition are likely to deal with alleged defects in qualifications of the nominee such as ethical impropriety or lack of legal ability." Id. Subsequent research on the confirmation process indicates that a number of politically based factors influence senators' confirmation voting decisions, including senators' ideological preferences, constituency preferences, interest group mobilization, and presidents' political strength, among other factors. See generally Gregory A. Caldeira & John R. Wright, Lobbying for Justice: Organized Interests, Supreme Court Nominations, and the United States Senate, 42 AM. J. POL. SCI. 499 (1998) (arguing that interest groups play crucial role in forming senatorial opinion about Supreme Court nominees); Cameron et al., supra note 3 (assessing impact of ideology, political environment, and presidential power on Senate confirmation votes); L. Marvin Overby et al., Courting Constituents? An Analysis of the Senate Confirmation Vote on Justice Clarence Thomas, 86 AM. POL. SCI. REV. 997 (1992) (examining role of constituency preferences in Clarence Thomas nomination debate); Jeffrey A. Segal et al., A Spatial Model of Roll Call Voting: Senators, Constituents, Presidents, and Interest Groups in Supreme Court Confirmations, 36 AM. J. POL. SCI. 96 (1992) (arguing that ideology, interest group action, and presidential strength significantly affect confirmation voting).

90. Ross, supra note 6, at 633.
especially if the senator's opposition stems from an intuitive reaction disfavoring a nominee. For example, during the Bork confirmation hearings, several senators appeared to be concerned that Bork was not being forthright with the Senate about his jurisprudential views.\textsuperscript{91} Of particular concern were Bork's claims that he had great regard for, and would follow, legal precedent.\textsuperscript{92} Concerns over Bork's sincerity regarding precedent escalated when Senator Edward Kennedy introduced tape recordings of Bork's lectures, in which Bork stated, "I don't think that in the field of constitutional law precedent is all that important.... I think the importance is what the Framers were driving at, and go back to that."\textsuperscript{93} A senator's apprehension about the insincerity of a nominee's testimony would be hard to categorize as one of the criteria promulgated by the various commentators. However, such anxieties over a nominee's true constitutional philosophy constitute a valid, yet perhaps inarticulable, basis for rejection.

Finally, any worries over a senator rejecting a nominee for truly repugnant reasons such as racial or gender based discrimination are abated by the political realities involved with opposition. If a senator articulates such irrational grounds for rejection, he will arouse public scorn and suffer political ruin. If he keeps his reasons to himself, then there is no way to prove that his grounds were unreasonable anyway. Given the above considerations, we suggest the use of a wide-open standard for confirmation voting over any criterion based set of rules.

\textbf{IV. Conclusion}

As detailed above, the history of the Framers' debates on the "advice and consent" provisions of the Constitution indicate that the Framers envisioned an active Senate role in the judicial selection process. Further, early applications of this provision provide a strong historical basis and precedent for politically motivated voting on Supreme Court nominees. Although constraints on the bounds of Senate inquiry of nominees are feasible, constraints on senators' true and undisclosed grounds for rejection would essentially be unenforceable. Therefore, a likely result of such constraints on Senate inquiry of nominees would be to promote voting based on hunches and uninformed guesses as to a nominee's constitutional philosophy and policy views. Such an undercutting of the Senate's role might also lead to manufactured personal or professional attacks on nominees in a search to find non-


\textsuperscript{92} Nina Totenberg, The Confirmation Process and the Public: To Know or Not to Know, 101 HARV. L. REV. 1213, 1223 (1988).

\textsuperscript{93} \textit{Id.} (quoting Judge Bork).
political grounds for rejection, thus creating more "blood on the floor" during the confirmation process.\footnote{See Simson, supra note 12, at 1051-52 (arguing that senators opposing Judge Bork's nomination had to portray him in less than fair light to block nomination).}

At present, we are faced with the curious situation in which the President's nomination process remains, to a large degree, shrouded and unquestioned. At the same time, commentators and confirmation participants have called for constraints on the Senate's role as an active judicial selection participant and on its scope of inquiry. But what would be the likely consequence of the Senate becoming a politically active participant in the confirmation process? Given the dominance of divided government in recent decades, the Senate's willingness to engage in heightened scrutiny of (and opposition to) presidents' ideologically extreme nominees may actually have the effect of reducing the impact of ideology in the process.\footnote{See Simon, supra note 59, at 58 (arguing that President may appoint less ideological candidates when faced with active Senate scrutiny).}

Certainly, this appears to be the case with regard to President Clinton's appointments to the Court: Ruth Bader Ginsburg and Stephen R. Breyer. Clinton's appointments seem to fit the mold of political science studies which indicate that, holding other factors constant, highly qualified and ideologically moderate nominees have a significantly easier time gaining confirmation than do less qualified ideologically extreme candidates.\footnote{See MALTESE, supra note 11, at 150-56 (discussing Ginsburg and Breyer appointments).} However, the selection of these "confirmable" nominees may have come at the cost of Clinton's original preference to appoint Justices who may have had a bigger impact on the policymaking of the Court.\footnote{Id. Maltese notes that neither Ginsburg nor Breyer was Clinton's first choice for appointment to the Court. Id. at 151. Clinton's original preference was to appoint a politician who might have possessed the leadership skills needed to forge a moderate majority on the Court. Id. Potential candidates who were ultimately not nominated included New York Governor Mario Cuomo and Senator George Mitchell (D-Maine). Id.}

Hence, while the confirmation proceedings of Ginsburg and Breyer may have been somewhat tame, this may be a function of the President anticipating a politically costly confirmation battle and, consequently, making less ideologically driven nomination decisions. If a vigorous institutional role for the Senate in the confirmation process yields such restraint on the part of the President, then this situation should be welcomed. Ultimately, it should have the effect of improving the quality of the judiciary, increasing the legitimacy of the Court, and keeping the law from swinging too far in either ideological direction.\footnote{Simon, supra note 59, at 58. Simon adds, "A president will be thwarted only when he holds significantly more extreme views than the Senate, and seeks to use judicial appointments to impose those views."}
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