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Joerg W. Knipprath

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THE JUDICIAL APPOINTMENT PROCESS: AN APPEAL FOR MODERATION AND SELF-RESTRAINT

JOERG W. KNIPPRATH*

The original hearings on the nomination of Clarence Thomas brought much political posturing and theatrical grilling of the nominee. That much was expected in light of the Bork, Kennedy, and Souter hearings. As on those prior occasions, the Senators elected to define their constitutional “consent” function by probing, by turns gingerly and testily, the nominee’s political views.

As then became painfully obvious, from October 11th to the 13th the nomination hearing self-destructed. The scripted was out; the unexpected was in. Senators, staff, and media descended into a miasma of sexual allegations, hard-ball politics, betrayed confidences, and half-baked psychoanalysis. By the time the wallowing ceased, the substance of the charges had become less the issue than “the process” itself and the participants therein.

Anita Hill’s charges of sexual harassment against Clarence Thomas were a political neutron bomb. The edifice—the confirmation process—still stands. But those associated with the charges were burned. Accuser and accused, along with their senatorial champions on the Judiciary Committee, were casualties. The President, the Supreme Court, the liberal interest groups, the media, and both political parties suffered from the exposure.¹

In the end, Americans themselves stand indicted of political immaturity, hypocrisy, and prudishness, especially in the view of many who could treat the spectacle with more political dispassion. Among numerous similar quotations, the *Wall Street Journal* printed the conclusion of a *London Sunday Times* reporter who

* Professor of Law, Southwestern University School of Law; B.A. 1973, Pomona College; J.D. 1978, Stanford Law School.

¹ Michael McQueen, *Polled Voters Show Broad Agreement on Outcome of the Thomas Hearings*, WALL ST. J., Oct. 17, 1991, at A24.

stated, "America has flung itself again into one of the spasms of passionate moral debate that nations more tolerant of human frailty find so hard to understand."² When asked whether something like the Thomas hearings had ever occurred in Europe, the BBC's Washington correspondent replied, "Not since they used to bait bears in the Middle Ages."³ And finally, columnist Barbara Amiel of the *London Sunday Times* wrote, "Extreme feminism is now a state religion in America People are being disintitiled to their own sexuality This all goes fundamentally against a free society."⁴

In the wake of this distasteful spectacle, there have been many calls for reform of "the process." Only Senator Joseph Biden from the outset spoke in favor of the confirmation process, though even he appeared to do so somewhat defensively at times. This clamor for formal structural change is understandable. Yet, given the public's limited attention span in political matters, and politicians' reluctance to keep the pot boiling when their own political skins are at risk, the political momentum necessary for constitutional or other formal changes is not likely to be maintained. That is as it should be. The formal process is not the problem; the attitudes of the participants are.

This article examines three proposals that have been made to "reform" the selection of United States Supreme Court Justices. The first is to give the Senate a formal role in screening judicial nominees before nomination. This is the only one that can be said to affect directly the constitutional allocation of power between the President and the Senate. The other two proposals are to select nominees either on qualification only or to achieve an unde-

² David Brooks, *Thomas Hearings Horrify Europe*, WALL ST. J., Oct. 15, 1991, at A18.

³ *Id.*

⁴ Barbara Amiel, *Notable & Quotable*, WALL ST. J., October 14, 1991, at A12; Barbara Amiel, *Feminist Harassment*, NATIONAL REVIEW, Nov. 4, 1991, at 14, 15.

The opinions expressed by European observers were by no means the product of political conservatism. David Brooks cites editorials in British, French, and Italian publications of conservative, liberal, and, even, leftist orientation. The author of this article read a report about the Thomas hearings in the German publication *Der Spiegel*. That publication, a left-wing paradigm of "political correctness," did not report sympathetically on Clarence Thomas and the Republicans. That much was expected. But even that report questioned whether Thomas's alleged conduct against Hill amounted to disqualifying sexual harassment.

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fined ideological balance. These are discretionary political criteria, not structural constitutional commands. The article concludes that the formal process is essentially sound, and that improvement must come through political self-restraint by the participants.

Confirmation of a Supreme Court Justice is a constitutional function of the Senate under Article II, Section 2 of the Constitution. It is the constitutional counterweight to the President's authority to nominate. It has been argued that the Senate's function is actually two-fold. The first step is to advise, and a later, independent step is to consent. However, both literally and practically, pre-nomination advice is not part of the Senate's constitutional role. The exact text of Article II, Section 2 is: "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court" Literally, the advice function refers to a process of appointment *after* the nomination.

Historical evidence bears out this distinction. In various Federalist Papers, Alexander Hamilton explained the purpose of separating the nomination and appointment/confirmation processes:

It will be the office of the President to "nominate," and with the advice and consent of the Senate, to "appoint." There will, of course, be no exertion of "choice" on the part of the Senate. They may defeat one choice of the Executive, and oblige him to make another; but they cannot themselves "choose"—they can only ratify or reject the choice he may have made.⁵

Hamilton also pointed out the danger that comes from giving the Senate a role in the nomination, as compared to the confirmation, process. An individual, such as the President, is far less likely to engage in horse-trading—"Give us the man we wish for this office, and you shall have the one you wish for that"—than an assembly.⁶

The Convention Debates record similar concerns. For example, under the Virginia Plan, judges were to be appointed by the na-

⁵ THE FEDERALIST NO. 66, at 405 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁶ *Id.* at 456.

tional legislature.⁷ This was a common method of selection under early state law. But that aspect of the Virginia Plan was soon attacked in the national convention. James Wilson, for one, argued "Experience showed the impropriety of such appointments by numerous bodies. Intrigue, partiality, and concealment were the necessary consequences. A principal reason for unity in the Executive was that officers might be appointed by a single, responsible person."⁸ The approach favored by Wilson was incorporated into the New Jersey Plan by William Paterson.⁹ Others, including James Madison, argued for appointment by the Senate.¹⁰ The matter went back and forth but by June 18, 1787, the final plan took shape and was presented by Alexander Hamilton. That plan provided for the *nomination* of, among others, judges by the President ("Governour"). The Senate was to have "the power of approving or rejecting" those nominees.¹¹ Hamilton's plan reflected the evolving consensus of the Convention that the Senate was to have a reactive function only. That consensus crystallized in the report of the Committee of Eleven on September 3, 1787,¹² and the debate of September 7, 1787, after which the modern language was approved by unanimous vote.¹³

The concern about the corruptive effect of an affirmative Senate role in the nomination process is also reflected in the debate over "senatorial courtesy." In its purest form, senatorial courtesy allows a Senator of the President's party to block nominations to federal judgeships within the Senator's state. This led, for a time, to the practice of having Senators, in effect, control nominations to the lower federal bench within their states as long as the Senators were of the President's party. President Hoover wrote:

⁷ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 21 (Max Farrand ed., 1937) [hereinafter FEDERAL CONVENTION] (citing J. Madison).

⁸ *Id.* at 119 (citing J. Madison).

⁹ *Id.* at 244 (citing J. Madison).

¹⁰ *Id.* at 120 (citing J. Madison) & 128 (citing R. King). Madison's proposal was adopted in the report of the Committee of the Whole on Edmund Randolph's proposition (the "Virginia Plan"). *Id.* at 236 (citing J. Madison).

¹¹ *Id.* at 292 (citing J. Madison). It should be noted that Hamilton proposed to let the President have the sole power to appoint the heads of the departments of Finance, War, and Foreign Affairs.

¹² FEDERAL CONVENTION, *supra* note 7, at 495 (citing J. Madison).

¹³ *Id.* at 539 (citing J. Madison).

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At the time I began my term as President, the Senators were practically choosing the Federal Judges. Since they controlled confirmation of the President's appointment, the practice had grown up for the President to accept their nominees unless there was substantial opposition. The Senators, by control of appointments of Judges, were able to secure from them appointments to judicial staffs and to influence such jobs as receiverships to their own law firms or their friends. The result was the standards needed for Judges were far below the level which the then Attorney General and I could wish.¹⁴

Hoover might have been exaggerating the effect of senatorial courtesy. Moreover, the interest of individual Senators in Supreme Court appointments is likely to be far less parochial than in lower court appointments. After all, senatorial courtesy is not a factor in Supreme Court appointments. Still, the Hoover letter corroborates the dangers perceived by the Framers of the Constitution in giving the Senate anything other than a formal negative role.

In any event, Presidents long ago abandoned any formal senatorial pre-screening of Supreme Court nominees—if such a process was ever tried. Even with a nominee to a lower federal court, the President today only consults informally with the Senators from the forum state who are of the President's party. Current calls by some Democrats to have the President formally submit a list of Supreme Court nominees to the Senate for pre-screening go against long-standing practice and appear to violate the Constitution's separation of the nominating and confirming processes. Of course, President Bush is free constitutionally to undertake informal consultation with various Senators, but he is unlikely to agree to a formal surrender of his Article II prerogatives.

A second "reform," related to the first, is to "depoliticize" the selection process. This could be simply a call to pick the "best and the brightest" for Supreme Court service. As should be obvious, the Court, as an institution, has never been a meritocracy. The judicial house is haunted by the ghosts of many Supreme Court Justices of whom it might be said that they satisfied Senator Ro-

¹⁴ HAROLD W. CHASE, *FEDERAL JUDGES* 12 (1972).

man Hruska's (R-Neb.) wistful observation in 1970 that mediocre people also deserve representation on the Supreme Court.¹⁵ As long as politicians nominate and confirm Justices to a Court that has sometimes seemed to revel in its increasingly political activism over the last forty years, merit and qualification will continue to play a supporting, not starring, role. Just ask Robert Bork. If a nominee has a powerful legal mind, that is a welcome, but nonessential characteristic. Of course, the process might be changed along the lines suggested by Benjamin Franklin during the constitutional debates in 1787:

[Franklin] then in a brief and entertaining manner related a Scotch mode, in which the nomination proceeded from the Lawyers, who always selected the ablest of the profession in order to get rid of him, and share his practice (among themselves).¹⁶

No one has yet proposed changing the Constitution to require nominating the high scorer on a legal competency exam. Not the least reason for that reluctance would be the chimerical task of developing a satisfactory exam. Even in California, where nominees are named by the governor subject to approval by the Commission on Judicial Appointments,¹⁷ the emphasis in a nomination is on politics, not legal knowledge. That is not to say that most, or even any, Supreme Court nominees have been stupid or ignorant of the law. It is only to doubt that legal or judicial craftsmanship, as contrasted with minimal competency, is what drives the process.

That may be just as well. A bench of nine Platos, or Joseph Storys, or even Robert Borks or Gerald Gunthers might be more than the Court or the country could tolerate. One can only shudder at the opinions such a bench might produce—each opinion

¹⁵ JOHN MASSAR, *SUPREME POLITICAL* 110 (1990). The exact quotation is: "There are a lot of mediocre judges and people and lawyers, and they are entitled to a little representation, aren't they? We can't have all Brandeises, Frankfurters, and Cardozos." *Id.* (citing *N.Y. TIMES*, Mar. 17, 1970, at A21).

¹⁶ FEDERAL CONVENTION, *supra* note 7, at 120 (citing J. Madison).

¹⁷ CAL. CONST. art. VI, § 16(d) (1981). The Commission on Judicial Appointments consists of the chief justice of the California Supreme Court, the state attorney general, and—in a Supreme Court nomination—the longest-serving presiding justice of any district of the state courts of appeal.

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seriatim and exquisite in a different teaching of high theory, but incomprehensible as a useful guide to legislators, lawyers, and laymen. Still, one or two intellectual giants give the Court a sense of direction. Nominations of such caliber are so rarely made that it is a loss to the Court and the country when one is rejected by the Senate on political grounds, as happened with Robert Bork.

Paradoxically, calls to “depoliticize” the selection of Supreme Court Justices are often combined with demands that the President select nominees with an eye toward ideological balance on the Court. Such demands actually place special emphasis on the political ideology of the nominee. “Ideological balance” is usually described in political, not judicial terms. The goal is to get the President to nominate individuals who will vote for a political result desired by the political “out” group. An example is the campaign of liberal interest groups after the resignations of Lewis Powell, William Brennan, and Thurgood Marshall to obtain the nomination of someone who would support a constitutional right of unrestricted abortion. There is rarely an intellectually honest call for a particular *judicial* philosophy, such as “strict construction,” “majoritarianism” or “natural rights.”

Indeed, the Thomas hearings once again showed the hypocrisy behind demands for “balance” on the Court. Robert Bork had been pilloried for not finding a general right of privacy in the Constitution. Because of his *judicial* philosophy, Bork was seen as *politically* opposed to unrestricted abortion. He was also castigated for refusing to allow natural rights generalities to intrude into the resolution of specific constitutional issues. One of his chief tormentors was Professor Laurence Tribe.¹⁸

Yet, when Clarence Thomas was nominated, the same anti-Bork activists decried Thomas’s appeal for natural rights to supply content to constitutional provisions. The concern was that Thomas might use natural rights to find a general right to life in the Constitution. He, too, was seen as politically opposed to unrestricted abortion. One of his leading critics was Professor Laurence Tribe.¹⁹ The issue in Bork’s case, as well as Thomas’, was not pos-

¹⁸ Jacob Weisberg, *Laurence Tribe, Supreme Courtier*, L.A. DAILY J., Oct. 24, 1991, at 6.

¹⁹ *Id.* (citing Laurence Tribe, *Clarence Thomas and “Natural Law”*, N.Y. TIMES, July 15,

itivism versus natural rights, but abortion versus no-abortion. Ann Lewis, 1988 campaign director for Jesse Jackson and feminist Democratic Party activist, freely admitted this in the early hours of October 11, 1991 on CNN's *Crossfire* program. In the course of debate on the upcoming hearing into Anita Hill's claims, Ms. Lewis reminded her opponents that the key issue regarding Clarence Thomas was abortion, not sexual harassment.²⁰

"Ideological balance" is not merely a cover for political correctness on the bench. It is historically unprecedented as a strategy of presidential nominations. One can concede that both the President and the Senate have the authority to consider a nominee's political views. If that is the case, one would expect the President to nominate individuals sympathetic to his political ideology. It is as ludicrous to expect George Bush to nominate Abner Mikva or Patricia Wald as it would be to expect a President Michael Dukakis to have nominated Alex Kozinski or Richard Posner.

Historically, ideological balance on the Court has not been the result of a conscious strategy by Presidents. On the contrary, when it has occurred, it has done so *despite* the appointment strategy of individual Presidents. A new Supreme Court Justice is appointed on average about every two years. Thus, each presidential term should produce two appointments. It would require control of the White House by the same party for three straight terms for there to be a reasonable chance of changing the ideological tilt of the Court. It would require an even longer period of time to cement that change. Presumably, such long-term continuous occupancy of the White House by the same political party reflects a general acceptance by the public of that party's position on most of the controversial issues of the day.

Presidential politics during this century have been characterized by alternating periods of dominance by one party or the other. With the exception of 1932 to 1952, however, that dominance has not led to the exclusion of the "out" party from the White House for such long periods as to eliminate the opposing ideology from

1991 (Op. Ed.), at A15).

²⁰ Personal observation by the author of the CNN program *Crossfire*, shown between midnight and 12:30 A.M. on cable channel 19, in an exchange among co-host Patrick Buchanan, Ms. Lewis, and guest Brent Bozell.

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the Court. The virtual exclusion of conservatives from the Court in the 1960's and the similarly endangered status of liberals now are partly the result of bad timing. Not every President has had a chance to appoint a proportionately equal number of Justices. William Taft, in his single term, appointed five Justices. Herbert Hoover appointed three. President Jimmy Carter, on the other hand, became the only elected President to serve four years without an appointment to the Supreme Court. It is safe to say that the current ideological complexion of the Court would look rather different had Jimmy Carter appointed two Justices.

Moreover, even a strategy for ideological balance (or dominance) can be upset by "mistakes" in appointment. There have been a number of instances where the President's expectations about a nominee's ideology have not been satisfied. William Johnson, despite his reputation as the first "great dissenter," was never sufficiently Republican on the Court to suit Thomas Jefferson. When Holmes, shortly after his appointment to the Court, wrote the dissent to the government's 5-4 victory in the *Northern Securities*²¹ antitrust case in 1904, a disappointed Theodore Roosevelt is supposed to have remarked that "a banana has more backbone than Oliver Wendell Holmes."

Better known is Eisenhower's evaluation of his appointment of Earl Warren as the "worst mistake" he made. It has been said that Ike made that remark about William Brennan. Maybe he said it about both. As least, he must have thought it. Had those two appointees been political conservatives, there might have resulted a modicum of ideological balance on the 1960's Court.

If ideological balance has been the product of chance, not design, other types of balance more clearly have been the result of presidential strategy. Geographic interests have long been important, though they are less so today than in the 19th century. It has been rumored that the presence of too many New Yorkers on the Court kept Learned Hand out of the running for a seat. The presence on the Court today of Rehnquist, O'Connor and Kennedy makes it difficult for another resident of the Ninth Circuit to be appointed.

²¹ *Northern Securities Co. v. United States*, 193 U.S. 197 (1904).

Interest group politics create a "balance" of sorts. Politically visible pressure groups, particularly if they are components of the President's electoral coalition, may be rewarded by having "one of their own" appointed. Labor unions, Catholics, Jews, racial or ethnic groups, women, and even immigrants have had their "seats." After a while, these groups may lose those seats, but people who happen to share their characteristics may still be appointed. Today, a Catholic or a Jew would likely be appointed for reasons other than conscious regard of his or her religion.

It also must be pointed out that, essentially, a strategy for general ideological balance (or dominance) on the Court is quixotic. At best, a President can be reasonably certain that a nominee will agree with the President's political outlook on one or two public issues. Given that a Supreme Court Justice serves an average of twenty years, there is no way for the President to ensure that a nominee will vote the President's way on unforeseen future matters of controversy. In that vein, the Franklin D. Roosevelt appointees, as expected, upheld New Deal legislation and radically altered the Court's course in economic and social regulation. However, that coalition showed fractures in separation of powers, equal protection, criminal procedure, speech, and religion cases. Richard Nixon's "bloc" was no more solid. Though they could be expected to be "tough on crime," at least until Harry Blackmun began to change in the mid-to-late 1970's, the four "Nixon Justices" (Burger, Blackmun, Powell, Rehnquist) often differed on equal protection, substantive due process, speech, and religion.

Even now, speculation has begun that the new "conservative bloc" will split over the religion clauses and over the protection of economic property rights. In the latter context, much is being made of the difference between "traditional judicial-restraint conservatives," such as William Rehnquist and Byron White, and "judicial libertarian" conservatives, such as Antonin Scalia.

Various other proposals have been made to tinker with the process. For example, President Bush has proposed to limit access to confidential FBI reports and to have the Senate Judiciary Committee conduct hearings into incendiary and difficult-to-prove charges in executive session. Indeed, originally the FBI reports were not shared with the Senate because of the injustice that might be done

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to innocent people if the reports were leaked. Probably very few people believe, however, that such changes will have any effect. The information, whether in FBI reports or otherwise, will still be leaked, as long as there is a market for it. The President's proposals treat the symptom, not the cause.

Perhaps nothing can be done in a formal sense. But there are some changes that might produce more rational debate during judicial selection. These proposals are undoubtedly idealistic because they require a self-imposed moderation and restraint totally at odds with the fundamental character of politicians seeking votes; staff minions seeking "insider status" through the press; media ferrets seeking exposure and ratings; interest groups seeking contributions from supporters; and the public seeking Oprah-Phil-Geraldo titillation. Still, seeing so starkly how legislation is made may have shocked enough viewers that, for at least a brief moment, reason and sanity have a chance to establish themselves.

First, the President and the Senate should consider the nominee's *judicial* philosophy, not his or her views on particular political issues. It is true that the constitutional prerogatives of the President and the Senate in the confirmation process allow them to consider any factors they wish. Still, authority pressed to its fullest is not usually a sign of wisdom and never a sign of moderation. In that vein, the President and the Senate should focus on the nominee's views on the role of the judiciary in a democratic republic; his or her conception of popular sovereignty; his or her understanding of the role of judicial review and the limits of the judicial power; his or her view of the limits of the law to coerce individuals; and, most of all, his or her recognition that the Constitution is different from constitutional law and that it is the *written* Constitution that, according to *Marbury v. Madison*,²² gives the courts competency to act in constitutional matters. A leopard does not change its spots, goes the saying, and the judge whose record establishes a respect for the supremacy of the written Constitution over the courts is not likely to turn into a judicial activist who reads his or her values into the Constitution.

Second, the reporters should report and the analysts should de-

²² 5 U.S. (1 Cranch) 137 (1803).

bate thoroughly the *judicial* philosophy of the nominee. They should refrain from reporting anything else, unless it involves an indictable offense (including consideration of the time elapsed since the alleged offense) or some *ongoing* behavior that would affect the nominee's physical, mental, or ethical fitness to serve. A *continuing* drug addiction or treatment for psychological ailments should be reported, but a nominee's sexual practices with consenting adults, marital discords with former spouses, or marijuana use fifteen years earlier should not.

Catherine MacKinnon and other feminists were virtual fixtures on television, where every fact was forced into the feminist Procrustean bed.²³ CNN's Mary Tillotson never let the facts or public opinion polls get in the way of her ideology while she was "reporting."²⁴ The general problems of sexual harassment, male-female relations, and sexism everywhere became the topics of the hour. That is hardly astonishing, as a thorough analysis of judicial philosophy requires more intellectual raw material and neutral engagement than does the pop-psychology of feminist paranoia.

Third, except as they contribute to exploring the aforementioned concerns, interest groups should be excluded from the process. In any event, they must be made to step forward and subject themselves to the same scrutiny as they wish upon their victims. Lying in wait, making false accusations, leaking distortions and derogatory innuendos, and otherwise making judgments from the protective darkness of anonymity contributes nothing to rational debate. Such interest groups include not only the Alliance for Justice and People for the American Way, but also the increasingly politicized and politically correct American Bar Association. Perhaps the time has come to eliminate the role of the ABA's Standing Committee on the federal judiciary in the appointment of judges. That role might be placed in the hands of a more impartial legal body than an unelected elitist trade group.

²³ Christina Sommers, *Hard-Line Feminists Guilty of Ms-Representation*, WALL ST. J., Nov. 7, 1991, at A14.

²⁴ Personal observation of the author during the hearings on Anita Hill's charges. For a similar impression and a comment on the liberal bias of (particularly female) reporters as compared to the views of the public at large, see S. Robert Lichter, *Hill vs. Thomas: Why the Media Just Didn't Get It*, WALL ST. J., Nov. 13, 1991, at A16.

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Fourth, the public should immediately boycott any of the above who violate the rules. If a Senator subverts the appearance of dignity necessary for legal and governmental legitimacy by pursuing irrelevant, salacious, and harmful accusations against a nominee, that Senator should be defeated, recalled, or publicly censured. If reporters engage in such conduct, the public should refuse to buy their newspapers.

Again, one is probably tilting at windmills in hoping for such a regime so utterly dependent on moderation and self-restraint. But *if* such an ethic of respect, tolerance, and civility were to take root, the process of selecting a Justice or other aspirant to an office of high honor would become a time for pride in our institutions and joy for the nominee. And, as is often the case, a change produced by informal cultural processes is likely to be more lasting and effective than a change mandated simply by formal constitutional command. The only likely alternative, particularly when different parties control the presidency and the Senate, is more of the same.

