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A PROPOSAL TO REFORM THE PROCESS FOR CONFIRMING JUSTICES OF THE UNITED STATES SUPREME COURT

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The Supreme Court's role as the arbiter between the other branches of government and, as well, between the government and the people is crucial to the distribution and balance of power in our government. The founders of this government were vitally concerned about concentration of power, and sought to avoid abuses stemming from concentration by dividing the basic attributes of sovereignty among three co-equal branches of government, two of which would be elected and one of which would be staffed by agreement of the other two.[1] As co-equal branches, the two elected, "representative" branches of the executive and the legislative would have their own political constituencies.

The Supreme Court would serve as the referee of constitutionalism and statutory construction, checking either of the political branches (or both) when their activities exceeded the prescribed sphere of their delegated powers under the Constitution. If the Supreme Court misunderstood the intent of the legislature in its interpretation of statutes, the statutes could be amended to overrule the Court's misunderstandings. If the Supreme Court misunderstood the contemporary understanding of the people in construing the Constitution, the people could amend that document to reflect their current, broadly based understanding. In either role, however, it would be important that the Supreme Court be respected as independent, fair-minded, and judicious.

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[1] This is a slight over-simplification. Originally members of the Senate were selected by state legislators, themselves popularly elected, and of course only the Senate gets to vote on nominees for the Supreme Court. The President is elected by "electors" themselves popularly elected, under a system which, in some of its permutations, could result in the election of a President whose electors had won only a minority of the national popular vote. Over two hundred years of our history, however, what has resulted is a popularly elected Congress and a President who almost always has won in the popular vote nationwide.

Under this system, it seems to this observer that the Supreme Court should be made up of distinguished and experienced lawyers who are widely recognized for their intellectual acuity, ethical probity, and at least collectively, for their representativeness of the diversity of American political views. Each candidate for the Court should be actively scrutinized for intellectual and ethical qualifications, and each candidacy should be evaluated politically in light of the existing balance of the Court to assure that an appropriate variety of views is represented on the bench. Because the Supreme Court is the co-equal third branch of the federal government, neither of the other branches is solely or primarily responsible for determining the ideological make-up of the Court. These principles are the starting point for a proposal to change significantly the current procedures by which the Senate evaluates those whom the President has nominated for the Court.

The Constitution provides that the President shall nominate Justices of the Court with the advice and consent of the Senate. The Constitution says nothing about the factors the President and the Senate are to consider in deciding whom to place on the Court. The requirement of "advice and consent" was conceived by persons who expected that the Senate would be a relatively small, collegial body with whose members the President could frequently confer on matters of foreign policy and appointments to the judicial and executive branches of the government. The Framers also might have unconsciously assumed that the President and the members of the Senate would be of like mind on most matters, since they would commonly emerge from the ranks of propertied white men who were the political actors of America at that time. The one hundred member Senate of today, popularly elected from across a vast continent and frequently controlled by members of the opposite party from the executive branch, is an unlikely participant in a collegial conversation with the President about whom to appoint to the Court. Thus, the "advice" function is largely informal and vestigial, and the "consent" function looms large. The appropriate role of the Senate in the "consent" function, especially when the Senate is controlled by the opposing party, becomes the central focus of any discussion about how the selection and confirmation of Justices should be accomplished

under existing constitutional provisions.

By requiring the agreement of the President and the Senate on the appointment of Justices, and by giving Justices lifetime appointments, the Framers evidently hoped to create a judicial body that would be broadly representative of political views and broadly acceptable to the polity over time. The particular political balance of the executive and legislative branches at a given moment in history could achieve only partial representation on the Court, because only a few openings would occur during any particular four-year administration. The requirement for agreement between branches would produce a consensus choice if both branches, operating according to the theory of checks and balances, assert their respective interests to achieve appointments of Justices whose conceptions of the judicial role are satisfactory to both the appointer and the ratifiers. In light of this structure for Supreme Court as well as lower court appointments, it is clear that the Senate owes no special deference to the President, but rather is entitled to subject judicial appointments to the same sort of ideological tests that the President may establish for his or her selections. There is nothing inherent in the structure of the appointment process that privileges one branch (i.e., the executive) but not the other (i.e., the legislative) to take into account the political views of potential members of the federal judiciary, and through most of our history the Senate has felt free to reject presidential nominees on ideological grounds.

Thus, it is important that the Senate, in exercising its confirmation role, be able to form a clear and accurate impression of the character and views of those whom the President has nominated for the Court. Confirmation hearings on recent appointees vividly demonstrate that such a clear and accurate impression cannot reliably be formed by questioning the nominee about his or her substantive views on issues likely to come before the Court, especially when opposite parties control the presidency and the Senate. While it might appear to serve some purpose for members of the Senate Judiciary Committee to seek "pledges" from nominees on particular controversial issues, such as the "right of privacy," actually little purpose is served because Justices, once appointed, are not politically accountable to anybody and, furthermore, nomi-

nees to the Court are unlikely to agree in advance to any but the most general statements of constitutional theory. The best way to reform the confirmation process so that the Senate can properly play the role of a co-equal branch in staffing the Supreme Court would be for the Senate to *cease* questioning nominees about their substantive views, but at the same time to insist on the right to evaluate nominees for the federal judiciary with regard to those views.

How is the Senate to form an opinion without questioning? By thoroughly reviewing the public record to determine the views of candidates, and by rejecting any candidate whose record is so meager that no reliable opinion can be formed as to his or her views on those issues which the Senators deem crucial. Under such a system, only those nominees who are truly qualified by virtue of experience will be considered for appointment to the Court, because inexperienced nominees are unlikely to have compiled an adequate public record from which their views can be ascertained with fair reliability.

Under the approach the Senate has been following in the past few nominations, the way is wide open for a "stealth candidate" to win confirmation, as several have since the Senate's rejection of Judge Robert Bork in 1987. With the possible exception of Clarence Thomas, Judge Bork was probably the last nominee to the Court who had compiled a significant enough record of public service and participation in legal debate for the Senate adequately to form conclusions about his views on a wide range of constitutional and statutory issues, without having to rely upon statements he might make during a confirmation hearing.

The phenomenon of the "confirmation conversion" is best observed when a candidate brings such a past to the confirmation hearings. It is clear that it was Judge Bork's real convictions, as revealed by a record of more than twenty years of legal publications and service in both the executive and judicial branches, rather than answers he gave at the confirmation hearings, that sealed his fate as a candidate. The past record was judged by the Senate, and more importantly by the American people, as the more reliable indicator of how he would approach his duties as a Supreme Court Justice.

By comparison, those nominated since the Bork summer of 1987 had less extensive and informative records, generating a perceived need for detailed substantive questioning in confirmation hearings. Such a need should have immediately signaled the unsuitability of these nominees. For one thing, the utility of public interrogation is slight, especially if Senators are willing to credit such assertions as Judge Thomas's statement that he had not expressed his personal view about *Roe v. Wade*[2] to anyone. Great attention was focused on the responses by Anthony Kennedy, David Souter, and Clarence Thomas, which consisted either of recantations of bits and pieces of the modest records these men had compiled that might be offensive to particular Senators whose votes were needed for confirmation, or statements of support for generalized concepts like "privacy" or "judicial restraint."

While it is too early to evaluate either Justice Souter or Justice Thomas on the Court, Justice Kennedy's ideological position as revealed by his performance over several years is one that would have been unacceptable to the Senate that rejected Judge Bork. If the entire focus of the confirmation hearings had been on Kennedy's published decisions as a judge of the Ninth Circuit Court of Appeals and writings, if any, as a law faculty member, rather than on his testimony before the Judiciary Committee, the Senate would have had a much clearer basis upon which to judge the nominee. Kennedy's testimony served largely to obfuscate and minimize that record.

My recommendation for reform is quite simple. The Judiciary Committee should resolve in the future to evaluate nominees solely upon the basis of their public record, as it reflects on their intellectual acuity, ethical probity, and political acceptability. Anything a nominee says in testimony to the Committee is by its very nature likely to be self-serving and tainted by heavy coaching from White House "handlers." Thus, the Committee should dispense with most questioning along these lines. Indeed, for all of our history prior to the confirmation hearings on Justice Felix Frankfurter in January 1939, nominees did not even testify before the Judiciary Committee, and at that contentious hearing Justice

[2] 410 U.S. 113 (1973).

Frankfurter did not testify as to his views on any legal issues that might come before the Court.[3] Despite this lack of live testimony, Senators were able to engage in extended debate about the qualifications of both successful (Brandeis) and unsuccessful (Parker) nominees based on their well-established public records.

How should the Judiciary Committee compile this public record? In an age of computer information retrieval, it is quite simple. The day President Bush announced his nomination of Judge Thomas, it was possible for subscribers to Westlaw or LEXIS to obtain a complete set of all the published decisions of the District of Columbia Circuit Court of Appeals in which Thomas cast a vote. Computerized databases of leading law reviews and public affairs journals made it possible to quickly assemble the texts of relevant speeches, interviews and articles. The leading daily newspapers and weekly newsmagazines can also be researched through computer databases. As a highly visible executive branch administrator at the head of two major civil rights agencies for a decade, Thomas had been the subject of significant media attention.

It would be a relatively easy task for a few talented researchers from the Congressional Research Service at the Library of Congress to assemble a voluminous record on any candidate with significant experience in government or the judiciary of the sort relevant to appointment to the Supreme Court. The main task of the Judiciary Committee would be to evaluate the results of such research, and to listen to the testimony of those who oppose or support the nominee based on his or her public record. No need to worry about "confirmation conversions," disavowals of past performance, or "pledges" to support particular popular doctrines. The candidate's actual record can speak for itself.

If the Judiciary Committee and the entire Senate were to commit themselves to this procedure, the range of available nominees who could expect to receive serious consideration by the Senate would narrow to those whose participation in public life and legal debate has been extensive enough to generate a satisfactorily full record. Such a process, if faithfully followed by the Senate, would virtually end the problem of the "stealth candidate," for a candi-

[3] JAMES F. SIMON, THE ANTAGONISTS 13-16 (1989).

date without a significant record could not be properly evaluated or confirmed. There would still remain significant room for debate about how much weight the Senate should give to particular past pronouncements, or whether particular issues should serve as a "litmus test," but those questions would have to be decided by each Senator on an individual basis in determining how to vote on the nominee.

Anthony Kennedy would not have been nominated under such a system, although Justice Kennedy did vote on hundreds of cases and wrote scores of opinions on the Ninth Circuit from which the Judiciary Committee might be able to form a relatively well-informed opinion about his judicial philosophy and likely approach to problems of current and future concern. For example, in *American Federation of State, County and Municipal Employees v. Washington*,[4] then Judge Kennedy held for the Ninth Circuit that the "comparable worth" theory of job compensation was not embodied in Title VII of the Civil Rights Act of 1964.[5] Justice Kennedy's opinion exhibited an approach to the issue of disparate impact discrimination under Title VII that would accurately predict his subsequent vote in *Wards Cove Packing Co. v. Atonio*,[6] and in fact, Kennedy approvingly cited the Ninth Circuit's opinion in *Wards Cove* in his *AFSCME v. Washington* opinion. A Senate overwhelmingly concerned about a nominee's views on the disparate impact issue might have refused to confirm Kennedy due to his *AFSCME* opinion. There would be no need to question him about his approach to disparate impact, as his published opinion would be a more reliable indicator of his actual views than anything he might say at a confirmation hearing prompted by White House "handlers."

Turning to the issue that has become central to the last several confirmation procedures, Justice Kennedy might not have been confirmed because of *lack of information* about his views regarding whether unenumerated rights under the Fourteenth Amendment pose any restriction on governmental regulation of abortion, had

[4] 770 F.2d 1401 (9th Cir. 1985).
[5] *Id.* at 1408.
[6] 109 S. Ct. 2115 (1989).

he not testified that he recognized a constitutional "right of privacy." This testimony satisfied those on the Judiciary Committee who felt pressure from their constituents to base their vote on this issue.

It is likely that a conscientious review of his record on the Ninth Circuit would have led any Senator who was really serious about this issue to conclude that Justice Kennedy was likely to side with Chief Justice Rehnquist rather than Justice Blackmun on the issue of abortion, based on his approach to other issues that came before the Ninth Circuit, including the *AFSCME* decision. By contrast, Justice Antonin Scalia, who compiled a significant record as a legal academic, Justice Department attorney, and appellate judge prior to his appointment to the Court, might be evaluated on that record as someone of strong conservative views but with a strong libertarian streak, making him harder to categorize on many issues, less doctrinaire, more unpredictable, and thus perhaps more acceptable to a broader range of Senators than the more rigidly doctrinaire Justice Kennedy.

How would this approach to confirmation by the Senate affect the selection of Justices for the Court when the executive branch and the Senate are controlled by opposing political parties? It would require both bodies to compromise on their ideal choices. A President would be unable to select a well-known nominee whose publicly established views were wholly antithetical to those of a majority of the Senate, and—because it may only vote on nominees appointed by the President—the Senate would be unable to insist on a nominee whose publicly established views were wholly antithetical to those of the President. That is, in times of political division between the White House and the Senate, appointees would have to come from the middle range of American political and legal views, thus assuring that neither of the political branches would be able to "capture" the Court completely. Even when the White House and the Senate were led by the same party, as happened from 1981 through 1987, the President's choices would have to be tempered to assure that the members of his party assented to the choice. Since neither of the major parties is monolithic with respect to the most significant issues of constitutional theory and statutory interpretation, the Senate's insistence

on its co-equal role even when the White House is controlled by a member of the same party would require the President to moderate his views sufficiently to summon a majority. While we have surely gotten beyond the myth that the federal judiciary is not, in some significant sense, a "political branch" of the government, it is essential to continued belief in our democratic-republican form of government that the federal appellate courts, and particularly the Supreme Court, not be seen as the ideological captive of any one party, even when that party has sustained domination of the executive branch for a significant period of time. This is particularly so when there is significant support for the opposition party in the legislative branch and the popular vote in presidential elections shows that a significant minority, sometimes more than forty percent even when the President wins by an electoral landslide, favor the opposition candidate. The American people are not themselves politically monolithic and should be able to rely on a "balanced" judiciary to mediate between the government branches as well as between the government and the people.

If the same political party should attain a significant majority in the Senate as well as control of the executive branch for several years, as the Republicans did for six years during the past decade, it would be entirely appropriate for openings on the Court during that period to be filled by persons whose public records on significant issues were acceptable to those political forces, although, again, the lack of a monolithic view in either party would probably lead the President—especially if his senatorial majority is slim—to avoid appointing an extreme candidate under a system where the past record would be the primary basis for evaluation of the nominee.

A confirmation system that would force a politically divided government to place centrists on its highest court would ideally reflect the politically divided mood of the country by guarding against a skewing of the tri-partite system. It would also more faithfully reflect the division of powers between the branches envisioned by the Framers of the Constitution. It would strengthen the Supreme Court's role as a referee between the political branches and avoid the kind of one-sided revisionism that led to the spate of misinterpretations of the Civil Rights Act of 1964

which precipitated the recent passage of the 1991 Civil Rights Act. The decisions leading up to that enactment signified a Supreme Court that, at least on the issue of interpreting civil rights law, was no longer an impartial mediator but rather an ally of one branch of government against the other. Such a situation should be avoided if we want to strive toward a government that is truly representative of the broad diversity of the American populace, rather than the raw power tool of whichever faction happens to have attained control of the executive branch this time around.