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SUPREME COURT APPOINTMENTS AFTER THE THOMAS NOMINATION: REFORMING THE CONFIRMATION PROCESS

The Judicial Appointments Clause of Article II of the Federal Constitution establishes that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . . Judges of the supreme Court . . . ."\(^1\) This language has been variously interpreted over time.\(^2\) Champions of a strong ex-

\(^1\) U.S. Const. art. II, § 2, cl. 2. This clause provides in its entirety:

He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of the department.

\(^{Id.}\)

Article II, commonly referred to as the "executive article," establishes that the "executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1, cl. 1. It may follow that since the mechanism for nominating and appointing Supreme Court Justices appears in this article, the Framers intended for the President to be preeminent in the area. However, it is not uncommon for constitutional powers granted by one article to bear on the functioning of a branch of government otherwise provided for in another article. See, e.g., U.S. Const. art. I, § 7, cl. 2 (Presentation Clause); U.S. Const. art. II, § 1, cl. 3 (congressional determination of time for choosing presidential electors); U.S. Const. art III, § 2, cl. 2 (congressional limitations on Supreme Court appellate jurisdiction). See generally Arthur T. Prescott, The Drafting of the Federal Constitution 543-653 (1968) (powers of federal executive).

For background information on the drafting of this clause and its adoption, see The Federalist Nos. 76-77 (Alexander Hamilton); James Harris, The Advice and Consent of the Senate 19-25 (1953); James Madison, Debates in the Federal Convention of 1787 277, 300, 303 (Guillard Hunt & James Scott eds., 1920); Prescott, supra at 453-65.

For a discussion of the operation of the three branches of government under the separation-of-powers doctrine, see The Federalist Nos. 47-51 (Alexander Hamilton); Prescott, supra, at 543-653.

ective believe that the Clause grants the President a prerogative

319, 319-30 (1985) (Chief Justice of Supreme Court) (discusses presidential tendency to appoint Court jurists "sympathetic to his political or philosophical principles"); Paul Simon, The Senate's Role in Judicial Appointments, 70 JUDICATURE 55, 55-60 (1986) (Democratic member of Judiciary Committee) (argues that Senate should play active role in confirmation process); Arlen Specter, Concluding Address: On the Confirmation of a Supreme Court Justice, 84 NW. U. L. REV. 1037, 1037-38 (1990) (Republican member of Judiciary Committee) (Article II sets forth the role of the President); see also Joseph R. Biden, Advice and Consent: The Right and Duty of the Senate to Protect the Integrity of the Supreme Court, L.A. DAILY J., Aug. 21, 1987, at 3 (Chairman of Senate Judiciary Committee) (arguing that Senate has right and duty to protect integrity of Supreme Court); Joseph R. Biden, Selecting a Judiciary to Protect the Constitution, NAT'L L. J., Apr. 27, 1987, at S4 (arguing that role of Senate is to select a judiciary which will protect Constitution); Joseph R. Biden, Choosing Judges, NAT'L L. J., March 24, 1986, at 13 (debate over independence of federal judiciary); Orrin G. Hatch, A Response to Senator Biden: The Dangers of Politicizing Supreme Court Selections, L.A. DAILY J., Aug. 21, 1987, at 13 (Republican member of Senate Judiciary Committee) (arguing dangers of politicizing Supreme Court).

In addition, there are probably as many interpretations of the Appointments Clause as there are observers of the confirmation process. See, e.g., DAVID O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 343-58 (2d ed. 1980) (discussing impact of extragovernmental constitutional interpretations on Court); LEONARD D. WHITE, THE FEDERALISTS 82-87 (1948) (recognizing that Senate's power to veto nominations dates back to John Adams administration); Bruce A. Ackerman, Transformative Appointments, 101 HARV. L. REV. 1164, 1164 (1988) (reviewing Senate's changing role in confirmation process from "rubber-stamp" to formidable obstacle in light of failed Bork nomination); Vik D. Amar, The Senate and the Constitution, 97 YALE L. J. 1111, 1118-19 (1988) (senatorial consent should "not be read out of the Constitution"); Stephen Carter, The Confirmation Mess, 101 HARV. L. REV. 1185, 1190 (1988) (President's nomination and Senate's consent, although ideally distinct from politics, are virtually inseparable); Erwin Chemerinsky, Evaluating Judicial Candidates, 61 S. CAL. L. REV. 1985, 1988-89 (1988) (Senate should not consider Justices based upon their political views, for such inquiry threatens their judicial independence); Bruce Fein, A Circumscribed Senate Confirmation Role, 102 HARV. L. REV. 672, 672 (1989) [hereinafter Confirmation Role] (noting Framers' intent that Senate serve as check on favoritism by President); Robert A. Friedlander, Judicial Selection and the Constitution: What Did the Framers Originally Intend?, 8 ST. LOUIS U. PUBLIC L. REV. 1, 11 (1989) (there is no definite answer as to Framers' intent, thus debate continues); James E. Gauch, The Intended Role of the Senate in Supreme Court Appointments, 56 U. CHI. L. REV. 337, 341 (1989) (Constitution's Appointments Clause grants Senate authority to reject nominees); Henry P. Monaghan, The Confirmation Process: Law or Politics, 101 HARV. L. REV. 1202, 1204 (1988) (President selects according to his political views and seeks Senate's consent, not its advice); William G. Ross, The Functions, Roles, and Duties of the Senate in the Supreme Court Appointment Process, 28 WM. & MARY L. REV. 633, 633-82 (1987) (reviewing history of Senate's role in confirmation process); Ronald D. Rotunda, The Confirmation Process for Supreme Court Justices in the Modern Era, 37 EMORY L. J. 559, 563 (1988) (argument against considering political views is unpredictability of Justices once on Court); Nina Totenberg, The Confirmation Process and the Public: To Know or Not to Know, 101 HARV. L. REV. 1213, 1227 (1988) ("The Senate should pay careful attention to the opinions of the people, without compromising the independence of its decision or converting the advice and consent function into a majoritarian electoral process."); Scott R. Ryther, Note, Advice and Consent: The Senate's Political Role in the Supreme Court Appointment Process, 1988 UTAH L. REV. 411, 414 (1988) (Advice and Consent Clause allows Senate to consider only qualifications, not ideology of candidate in his or her confirmation); Bruce A. Fein, A Proper Check on the Supreme Court, A.B.A. J., Aug., 1985, at 36 [hereinafter Check on Supreme Court] (arguing Senate has signifi-
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in the appointment of Supreme Court Justices and that the Sen-
cant role as check on Supreme Court's interpretation of Constitution); Herman Schwartz, The Senate Can Play Too, A.B.A. J., Aug. 1985, at 36 (arguing Senate has important constitutional role in confirmation process); Laurence Tribe, Only the Senate Can Protect the Constitution, L.A. DAILY J., Oct. 7, 1985, at 4 (arguing Senate in unique position to protect Constitution through advice and consent function).

The President operates under Article II in various ways, including actively seeking the input of Senators, including those within the President's own party as well as members of the opposition. See, e.g., ABRAHAM, supra, at 201-03 (Cardozo nomination); Ira H. Carmen, The President, Politics, and the Power of Appointment: Hoover's Nomination of Mr. Justice Cardozo, 55 VA. L. REV. 616, 616 (1969) (same); Kennedy Hearings Indicate Easy Confirmation, CONG. Q. Wkly. Rep., Dec. 19, 1987, at 3129 (Kennedy nomination). One of the best known examples of this is the Cardozo nomination: Republican president Herbert Hoover, under pressure to nominate New York's liberal Chief Judge Benjamin N. Cardozo to fill the seat of the recently retired Justice Oliver Wendell Holmes, called in for advice the powerful Chairman of the Senate Foreign Relations Committee and fellow Republican, William E. Borah. ABRAHAM, supra, at 202. After discussing the vacancy in general terms, President Hoover thrust into Borah's hands a list prepared by Hoover of possible nominees; Cardozo's name appeared at the bottom of the list. Id. "Your list is all right," Senator Borah told the President, "but you handed it to me upside down." Id. at 203; see also ROBERT SHOGAN, A QUESTION OF JUDGMENT: THE FORTAS CASE AND THE STRUGGLE FOR THE SUPREME COURT 150-52 (1972) (President Lyndon Johnson sought advice of Senator from opposing party, Republican Leader Everett Dirksen of Illinois); Stidham et al., Patterns of Presidential Influence on the Federal District Courts: An Analysis of the Appointment Process, 14 PRESIDENTIAL STUDIES Q. 548, 548-60 (1984) (discussing presidential appointments of lower federal court judges).

The President often preempts senatorial influence by making a "surprise" nomination. President Bush seems especially adept at this; several selections have taken the Senate, as well as the media, by surprise. See R.W. Apple, Jr., Bush's Enigmatic Choice for the High Court, N.Y. TIMES, July 29, 1990, § 4 (Week in Review), at 1 (Souter "unknown to the nation when Mr. Bush chose him . . . ."); R.W. Apple, Jr., Bush's Move: Caution Wins, N.Y. TIMES, July 24, 1990, at A1 (nomination of Souter unexpected); Linda Greenhouse, A Wild-Card Nominee, N.Y. TIMES, July 2, 1991, at A1 (same); Linda Greenhouse, Opponents Find Judge Souter Is a Hard Choice to Oppose, N.Y. TIMES, Sept. 16, 1990, § 4 (Week in Review), at 4 (same); Robin Toner, Symbolic Justice, N.Y. TIMES, July 7, 1991, § 4 (Week in Review), at 1 (same); Kenneth Walsh & Ted Gest, Scouting Thomas, U.S. NEWS & WORLD REPORT, July 15, 1991, at 22-26 (same). The President may achieve the same goal by appealing directly to the American people. President Reagan often used this tactic; he was not necessarily, however, always successful. See ROBERT BORK. THE TEMPTING OF AMERICA 315 (1990) (Reagan subject to Senate's close scrutiny for second half of his term, unlike first half); Sheldon Goldman, Reagan's Judicial Legacy, 72 JUDICATURE 318, 318-30 (1989) (detailing judicial appointments of President Reagan); see also John A. Maltese, The Selling of Clement Haynsworth: Politics and the Confirmation of Supreme Court Justices, 72 JUDICATURE 338, 339-340 (1989) (Bork nomination defeated despite President's efforts).

In the past, the Senate has often acted as a virtual rubber-stamp of the President's nominee. See Lloyd N. Cutler, The Limits of Advice and Consent, 84 NW. U. L. REV. 876, 876-77 (1990) (Senate cannot make consent conditional on Justice's future voting in particular way); R.W. Apple, Jr., Senate's Carte Blanche vs. Souter's Blank Slate, N.Y. TIMES, Aug. 6, 1990, at A18 ("Early in the century, Supreme Court Justices were confirmed as a matter of course"). At other times it has exerted a powerful, often decisive influence over the process. See BORK, supra, at 271-321; Robert Nagel, Advice, Consent, and Influence, 84 NW. U.L. REV 858, 868-69 (1990) (public interest influences Senate but is limited).

Special-interest groups exert their considerable influence on the process primarily
ate's role should be confined to ratifying the President's selections, verifying only that a nominee is at least minimally qualified to sit on the Supreme Court. Those who advocate giving greater power to Congress feel that the Clause provides for the Senate's role in the confirmation process to be at least equal to that of the President's and that the Senate's advice and consent function requires individual senators to scrutinize a nominee based on criteria similar to that used by the President at the selection stage.

through the Senate. See generally Bork, supra, at 337-43; Michael Pertschuk & Wendy Schaetzle, The People Rising: The Campaign Against the Bork Nomination 127-45 (1989) (detailing influence of special interests in Bork nomination); Martin Shapiro, Interest Groups and Supreme Court Appointments, 84 NW. U. L. Rev. 900, 935, 946 (1990) (interest groups might wield some influence over voters of few Senators); Robert Suro, Court Nominee at Focus as N.A.A.C.P. Meets in Houston, N.Y. Times, July 8, 1991, at A9 (civil rights group debates whether to support Thomas nomination); Neil A. Lewis, Souter’s Views Trouble Groups Opposed to Bork, N.Y. Times, Sept. 7, 1990, at A14 (illustrating interest group participation in defeating Supreme Court nominees). Such groups also influence the White House during the selection stage of the process and mainly through the President's advisors. See Ted Gest & Lauraine Miller, Edith Jones: A Texas Hard-Liner Might Be Next in Line for the Supreme Court, U.S. News & World Report, Jan. 7, 1991, at 72 (White House Chief of Staff John Sununu assured conservatives that Edith Jones was next on President's list after Justice Souter); Robin Toner, Two Sides Prepare for Hard Battle on Court Nominee, N.Y. Times, July 22, 1990, at A1 (White House consulting with activists on Souter nomination).

Finally, the American people are increasingly interested in the role of the judiciary. See Bork, supra, at 3-4; see also William G. Ross, Participation by the Public in the Federal Judicial Selection Process, 43 VAND. L. REV. 1, 2 (1990) (several factors have resulted in increased public interest, including A.B.A. ideological rankings of judicial candidates); Totenberg, supra, at 1227, 1227-29 ("[t]he public has a role to play in choosing who will serve on the nation's highest court"). The American people exert their influence over the confirmation process primarily through special-interest groups. See Pertschuk & Schaetzle, supra, at 1-3. But the public also acts by holding Senators as well as the President accountable at the polls. See Richard Berke, Women Accusing Democrats of Betrayal, N.Y. Times, Oct. 17, 1991, at A1 (Thomas nomination); Stephen Holmes, South’s Senators Expect to Survive Vote on Judge, N.Y. Times, Oct. 20, 1990, at A22 (political pundits predict no adverse effect at polls for southern senators); Phone Calls Swamp Senate Switchboard Before Vote on Confirmation of Thomas, UPI, Oct. 16, 1991, available in WESTLAW, New Search file (Thomas nomination).

3 See The Sixth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, 122 F.R.D. 281, 302 (1989) ("the Senate's role in advice is one that should be whether the person is qualified or not"); Senate Confirmation Role, supra note 2, at 672-73 (Senate’s role to ascertain qualifications of nominee); Friedlander, supra note 2 and accompanying text (same); Michael J. Slinger et al., The Senate Power of Advice and Consent on Judicial Appointments: An Annotated Research Bibliography, 64 Notre Dame L. REV. 106, 113-14 (1989) (Senate to inspect and keep stabilized excesses of President); Larry W. Yackle, Choosing Judges the Democratic Way, 69 B.U.L. REV. 273, 275 (1989) (Senate’s role is limited to President’s political judgment); Hatch, supra note 2, at 13 and accompanying text (debating Senate’s role).

4 See Gauch, supra note 2, at 341 and accompanying text (analyzing interplay between President and Senate with regard to judicial appointments); Biden, Advice and Consent: The
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Article II does not define "advice and consent," nor is there any case law interpreting the Appointments Clause. Consequently, those who participate in the confirmation process ("process participants") differ as to the meaning and scope of "advice and consent" and the Appointments Clause. Perhaps the most

Right and Duty of the Senate to Protect the Integrity of the Supreme Court, supra note 2, at 3 and accompanying text (examining Senate's role in judiciary nominations); Biden, Selecting a Judiciary to Protect the Constitution, supra note 2, at 4 and accompanying text (same); Biden, Choosing Judges, supra note 2, at 13 (same); Schwartz, supra note 2, at 36 and accompanying text (Senate's involvement in confirmation proceedings is critical); Simon, supra note 2, at 55-60 and accompanying text (same); Tribe, supra note 2, at 4 and accompanying text (same).

See supra note 1 and accompanying text (discussing Advice and Consent Clause of Article II).

Nightline: Town Meeting: A Process Run Amok — Can It Be Fixed? (ABC television broadcast, Oct. 16, 1991) [hereinafter Nightline: Town Meeting] (comments by Senator Arlen Specter on Thomas proceedings) (any case brought under Appointments Clause would almost certainly be ruled by Supreme Court "political question" and thus nonjusticiable); see, e.g., Coleman v. Miller, 307 U.S. 433, 450 (1939) (question of reasonable time for pendency of constitutional amendment before states nonjusticiable claim). The Court held that "[i]n determining whether a question falls within [the political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." Id. at 454-55; see also Goldwater v. Carter, 444 U.S. 996, 998 (1979) (foreign relations); Gilligan v. Morgan, 413 U.S. 1, 1 (1973) (training of national guard); O'Brien v. Brown, 409 U.S. 1, 8 (1972) (seating of delegates at national political convention). See generally Symposium, 17 UCLA L. Rev. 1, 1 (1969) (discussing limits of political question doctrine).

As a result of this, it would appear that the actors in the confirmation process—the President and senators, as well as members of special-interest groups and the public generally—have no common framework to guide them through the process. Indeed, the confirmation of particular Justices is often described as a "fight" or a "battle," or similar terms. See ABRAHAM, supra note 2, at 47-48 (discussing struggle of Black's nomination due to his involvement in Ku Klux Klan); BORK, supra note 2, at 271-349 (Bork noting that his nomination was "one battleground in a long running war"); DAVID BURNER, HERBERT HOOVER 234-36 (1978) (Hughes and Parker nominations); O'BRIEN, supra note 2, at 70-76 (Black nomination); SHOCAN, supra note 2, at 150-52 (Fortas nomination to Chief Justice); Jeffrey Levine, Will Thomas Nomination Fight Damage the Court?, L. A. TIMES, Oct. 20., 1991, at M1 (noting "political fight" over Thomas nominations will not cause long term damage); Toner, supra note 2, at A1 (analyzing Souter nomination and describing Bork's failed nomination as "bitter battle"). This lack of agreement among process participants is a fundamental cause of the contentious nominations that spot American judicial history. Through 1991, twenty-eight of the 144 presidential nominations for the Supreme Court have failed to obtain senate confirmation (this does not include Douglas Ginsburg, whose name was publicly announced in 1987 by the White House but withdrawn without ever being formally submitted for consideration by the Senate). Of these twenty-eight, eight have been withdrawn by the President, another eight postponed and twelve rejected outright. The ratio of failed nominations in the nineteenth-century works out to one in three; in the twentieth-century the ratio is closer to one in thirteen. The following table chronicles all failed nominations:

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controversial issue presently dividing process participants concerns the proper role of a nominee’s judicial philosophy in the nomination and confirmation functions of the President and the Senate, respectively. Ideological differences over the role of judicial philosophy were central to the Senate’s rejection of Judge Robert Bork in 1987. In that instance, the judicial philosophy of the nominee was the critical issue affecting the confirmation pro-

1. William Paterson 1793  Washington withdrawn
2. John Rutledge 1795  Washington rejected (10-14)
3. Alexander Wolcott 1811  Madison rejected (9-24)
4. John Crittenden 1828  J.Q. Adams postponed
5. Roger B. Taney 1835  Jackson postponed
6. John Spencer 1844  Tyler rejected (21-26)
7. R. Walworth 1844  Tyler withdrawn
8. Edward King 1844  Tyler withdrawn
9. Edward King 1844  Tyler withdrawn
10. John Read 1845  Tyler withdrawn
11. G. Woodward 1846  Polk rejected (20-29)
12. Edward Bradford 1852  Fillmore postponed
13. George Badger 1853  Fillmore postponed
14. William Micou 1853  Fillmore postponed
15. Jeremiah Black 1861  Buchanan rejected (25-26)
16. Henry Stanbery 1866  A. Johnson postponed
17. Ebenezer Hoar 1870  Grant rejected (24-33)
18. George Williams 1874  Grant withdrawn
19. Caleb Cushing 1874  Grant withdrawn
20. Stanley Matteys 1881  Hayes postponed
21. W.B. Hornblower 1894  Cleveland rejected (24-30)
22. Wheeler H. Peckham 1894  Cleveland rejected (32-41)
23. John J. Parker 1930  Hoover rejected (39-41)
24. Abe Fortas 1968  L. Johnson withdrawn
25. Homer Thornberry 1968  L. Johnson withdrawn
27. G. H. Carswell 1970  Nixon rejected (45-51)

HAROLD W. STANLEY & RICHARD G. NIEMI, VITAL STATISTICS ON AMERICAN POLITICS 269 (1990); see also ABRAHAM, supra note 2, at 39 (as of 1985, Senate had refused 27 of the 139 nominees for Supreme Court).

7 See BORK, supra note 2, at 345-49 (discussing role of judicial philosophy in confirmation process); O'BRIEN, supra note 2, at 70-72 (same); David J. Danelski, Ideology as a Ground for the Rejection of the Bork Nomination, 84 NW. U.L. REV. 900, 900 (1990) (supporting view that ideology is legitimate ground for rejecting nominee); Terry Eastland, Ultra-Wrong about the Ultra-Right, 87 MICH. L. REV. 1450, 1450-51 (May 1989) (criticizing judicial selections based on conservative ideology of nominee); Joseph L. Rauh, An Unabashed Liberal Looks at a Half-Century of the Supreme Court, 69 N.C.L. REV. 213, 214-19 (1990) (reviewing influence of ideology on nominees since Roosevelt era); George F. Will, How It Came to This, WASH. POST, Oct. 10, 1991, at A23 (arguing Bork nomination fight led to increased emphasis on ideology in process).
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cess, and more explicitly so than ever before. Furthermore, events surrounding the recent confirmation of Associate Justice Clarence Thomas have convinced many observers that the judicial confirmation process is in need of reform.

Part One of this Note will trace the history of the confirmation process from its origins in the Constitution to the present era. Part Two will contrast the "traditional approach," which considers only the nominee's legal and personal qualifications, with the "ideological approach" to the confirmation process. Part Three will explore the need for reform, offering three proposals for limiting the influence of a nominee's judicial ideology on the process. The authors will suggest that the influence of ideology on the confirmation process may be significantly limited by reducing the overall length of the process, giving the Senate a greater role in the selection stage of the process, and curtailing the role of special-interest groups and the public through the use of closed hearings.

I. HISTORICAL OVERVIEW

A. Constitutional Origins

At the Constitutional Convention of 1787, the Framers debated three plans for the appointment of judges to the proposed national judiciary. The first, offered by James Wilson and Gouverneur Morris, provided simply that "judges be appointed by the executive," and thus rejected any senatorial role. Nathaniel Gorham, who enthusiastically endorsed the plan, stated the rationale for an executive monopoly on judicial appointments in terms of national versus parochial motivations:

See Bork, supra note 2, at 281-93; Pertschuk & Schaetz, supra note 2, at 127-45 (ideology central motivating factor of opponents of Bork nomination); Daniel Bryden, How to Select a Supreme Court Justice: The Case of Robert Bork, 57 THE AM. SCHOLAR 201, 201 (1988) (arguing use of ideology in Bork nomination appropriate).

See infra notes 61-75 and accompanying text (discussing need for reform).

MADISON, supra note 1, at 56-58, 97, 274-77, 300-03; Prescott, supra note 1, at 453-65. See generally Harris, supra note 1, at 19-25 (reporting on Constitutional Convention); Ross, supra note 2, at 633-45 (detailing motivating factors influencing delegates to Constitutional Convention).

MADISON, supra note 1, at 274-77; Prescott, supra note 1, at 453-55.
As the 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. [S]enators[,] [i]f they cannot get the man of the particular state to which they may respectively belong, [] will be indifferent to the rest. 

Gorham flatly rejected appointment by the Senate, arguing that "[p]ublic bodies feel no personal responsibility, and give full play to intrigue and cabal." The second plan, sponsored by Roger Sherman and supported by Edmund Randolph, vested the power of appointment completely in the Senate, which "would be composed of men nearly equal to the executive, and would of course have on the whole more wisdom." Randolph suggested that the lack of senatorial accountability alluded to in Gorham's plan might be avoided by requiring senators' votes to be "entered on the journal." Both Sherman and Randolph believed that the Senate "would bring into their deliberations a more diffusive knowledge of characters" than would the President, and would be less susceptible to "intrigue."

The third plan, an attempt by Gorham to compromise with Sherman and the proponents of the second plan, suggested that "judges be nominated and appointed by the executive, by and with the advice and consent of the second branch." However, Gorham also suggested that a time limit be set for Senate consideration of the President's nominee. After the Convention dead-

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12 Madison, supra note 1, at 275; Prescott, supra note 1, at 454.
13 Madison, supra note 1, at 276; Prescott, supra note 1, at 455. Gorham cited the Rhode Island legislature, which was, most delegates agreed, dangerously democratic. Richard A. Bernstein, Are We to Be a Nation?: The Making of the Constitution 91-92 (1987). This plan was also favored by Alexander Hamilton, who viewed an independent power of appointment as a necessary ingredient of an effective executive. Id.
14 Madison, supra note 1, at 97, 274-77, 303; Prescott, supra note 1, at 455.
15 Madison, supra note 1, at 276; Prescott, supra note 1, at 455.
16 See Madison, supra note 1, at 276; Prescott, supra note 1, at 455.
17 See Madison, supra note 1, at 276; Prescott, supra note 1, at 455. This plan was ardently supported by John Rutledge, who otherwise feared the "monarchical" tendencies inherent in a strong executive vested with an independent power of appointment. Madison, supra note 1, at 276.
18 See Madison, supra note 1, at 277; Prescott, supra note 1, at 456. "This mode [of appointing judges] had been ratified by the experience of a hundred and forty years in
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locked over Gorham's motion,19 James Madison proposed that "judges should be nominated by the executive, and such nomination should become an appointment if not disagreed to within [a set number of days—to be determined at some later point in the Convention] by two-thirds of the second branch."20

As the debate on the question of judicial appointments drew to a close, the time limitation as well as the requirement of an extraordinary majority in the Senate were removed from consideration; the remainder of Madison's language was accepted by the delegates and ultimately became the Appointments Clause.21

B. Development of the Process

Alexander Hamilton wrote in 1788 that "the judiciary, from the nature of its functions will always be the least dangerous [branch of government] to the political rights of the Constitution because it will be least in a capacity to annoy or injure them."22

The Supreme Court's independence would, Hamilton argued, insulate it from the political considerations common to the elected

Massachusetts," Gorham declared. Id. "If the appointment should be left to either branch of the legislature, it will be a mere piece of jobbing." Id.

This plan had several proponents, and actually took several forms before compromise language was formulated, which language would ultimately become the Appointments Clause of Article II. See Madison, supra note 1, at 277, 300-03; Prescott, supra note 1, at 455-69.

19 See Madison, supra note 1, at 277. In the Convention transcript, the vote read: "Massachusetts, Pennsylvania, Maryland, Virginia, aye — 4; Connecticut, Delaware, North Carolina, South Carolina, no — 4; Georgia, absent." Id.

20 See Madison, supra note 1, at 277; Prescott, supra note 1, at 456. Earlier, Madison had suggested that "judges might be appointed by the executive, with the concurrence of one-third at least of the second branch," and had stated at that time that such shared power "would unite the advantage of responsibility in the executive, with the security afforded in the second branch against any incautious or corrupt nomination by the executive." See Madison, supra note 1, at 276; Prescott, supra note 1 at 455.

21 See Madison, supra note 1, at 303, 551; Prescott, supra note 1, at 465. In the Convention transcript, the vote read: "Connecticut, Delaware, Maryland, North Carolina, South Carolina, Georgia, aye — 6; Massachusetts, Pennsylvania, Virginia, no — 3." Madison, supra note 1, at 303. On the day the plan passed, George Mason suggested that "[n]otwithstanding the form of the proposition by which the appointment seemed to be divided between the Executive and the Senate, the appointment [is] substantially vested in the former alone. The false complaisance which usually prevails in such cases will prevent disagreement to the first nominations." Id. Moreover, Mason considered "appointment by the Executive as a dangerous prerogative. It might even give him an influence over the Judiciary department itself." Id.

branches of government. However, from the beginning of our history under the Constitution, the Supreme Court has been both a source of political and social change and subject to political influence from the other two branches. For example, during the administrations of the nation's first two Presidents, political considerations were central to the confirmation process. Moreover,

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23 Id. at 465-72.
25 See BORK, supra note 2, at 129-52; O'BRIEN, supra note 2, at 62-134.
26 See ABRAHAM, supra note 2, at 71-79 (George Washington populated judiciary with loyal Federalists whose nationalist outlook mirrored his own); WHITE, supra note 2, at 257-63 (same). Senate Federalists, who were from the time of the first Congress through the 1790's in the majority, generally approved of Washington's appointments. See JOHN F. BIBBY, POLITICS, PARTIES, AND ELECTIONS IN AMERICA 21-24 (1987). Actually, there were no political parties identified as such during much of Washington's presidency. Id. at 21-22. Instead, factions emerged out of the policy disagreements between cabinet-officers Alexander Hamilton and Thomas Jefferson, which factions ultimately became in the mid-1790's the nation's first two political parties; the Federalist Party was formed at that time in response to the better-organized Democrat-Republicans of Thomas Jefferson. Id. at 23. Nonetheless, the Senate was controlled by men with federalist, or nationalist, views during the first six congresses, ending in 1800. Id. at 23; see also ABRAHAM, supra note 2, at 71. "It is said that only God can change the Court . . . But George Washington, who was, so to speak, present at Creation, nominated thirteen Justices in an era when the Court only had six members." GEORGE F. WILL, THE NEW SEASON 155 (1988). Twelve of Washington's appointees were confirmed and one was rejected (Rutledge). See supra note 6 (detailing in chart failed Supreme Court nominations). One of the twelve confirmed had been withdrawn and resubmitted (Paterson); two refused to serve after confirmation (Robert Harrison and William Cushing, the latter as Chief Justice). Id. And John Adams' "midnight appointments, an attempt to maintain Federalist control of the federal judiciary in the wake of the "Revolution of 1800," were confirmed expeditiously. See WILLIAM B. LOCKHART ET AL., THE AMERICAN CONSTITUTION 1, 1 (6th ed. 1986); see also O'BRIEN, supra note 2, at 76. In what now seems an incredible exception to the Senate's otherwise ready acceptance of Adams's judicial nominees, many Federalist senators resisted the nomination in 1801 of John Marshall as Chief Justice of the Supreme Court. ABRAHAM, supra note 2, at 82. Any plan to scuttle the nomination went unpursued, however, probably because the Federalists feared that the incoming Thomas Jefferson Administration would have the opportunity to name the Court's Chief Justice if Adams could not. Id. The Senate's rejection of Washington's nomination in 1795 of John Rutledge as Chief Justice because of Rutledge's opposition a year earlier to the Federalist-sponsored Jay Treaty is therefore unusual for the 1790's in that it was a rejection, but proves the rule that political considerations were central to the confirmation process from the earliest days of the Republic. Id. at 72-73. Rutledge had been an Associate Justice from 1789-1791, stepping down to assume South Carolina's Chief Justiceship. When he was nominated to the United States Supreme Court in 1795, President Washington sent him to the bench by recess appointment; Rutledge presided over the August, 1795 term before being rejected by the Senate. Id. at 79-83. Among the fifteen recess appointments made in Supreme Court history, Rutledge's was the
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throughout the nineteenth century, seven nominees to the Supreme Court were rejected by the Senate, political considerations being at the root of every rejection. During the twentieth

only one not ultimately confirmed. Id. at 73. And none of Adams' Supreme Court appointments were rejected by the Federalist Senate. Id.

27 See supra note 6 (listing failed Supreme Court nominations).

28 See ABRAHAM, supra note 2, at 41, 88. In 1811, Alexander Wolcott, who was nominated by James Madison, was rejected primarily because of his opposition to the Embargo and Non-intercourse Acts when he was a customs officer and because of other partisan positions taken in and out of office. Id. Wolcott was rejected by a margin of 9 to 24. Id. While the U.S. Collector of Customs in Connecticut, Wolcott had enthusiastically enforced the Embargo and Non-intercourse Acts, protectionist measures aimed at British goods and anathema to Federalist Senators. Id. at 41. For some background on the Embargo Acts, see KELLY ET AL., supra note 24, at 150-53. In 1844, John Tyler's nomination of John Spencer was defeated due to the opposition of Henry Clay and Clay's followers. ABRAHAM, supra note 2, at 105. In addition to the Spencer rejection (21 to 26), three of President Tyler's nominee's were withdrawn and one was postponed for a total of five failed nominations, more than any other President in the history of the Supreme Court. See supra note 6 (listing rejected Supreme Court nominees). Tyler's split with the Henry Clay faction within his own Whig party prevented him from successfully nominating more than one Justice to the Court: in 1845, the Senate confirmed Samuel Nelson, a Democrat. ABRAHAM, supra note 2, at 105-06. In 1846, the Senate rejected George Woodward in a partisan rebuke of the James Polk Administration. Id. at 108. Senate Whigs were solidly against Democratic President Polk's nominee, but six Democrats also joined in rejecting him 20 to 29. Id. In 1861, after the election of Abraham Lincoln but prior to Lincoln's inauguration as President, Senate Republicans blocked James Buchanan's lame-duck nomination of Jeremiah Black; Lincoln got to fill the seat. Id. at 114-15. Several factors precipitated Black's rejection: Senator Stephen A. Douglas, bitter after his loss to Lincoln in the 1860 presidential election, was opposed to the nominee; many southern senators who were predisposed to vote to confirm Black had recently left the Senate in the wake of the secession crisis; and Republicans in the Senate were content to wait and have the vacancy filled by their incoming President. Id. at 114. Nonetheless, it was a close vote: 25 to 26. Id. at 115. Lincoln appointed Union loyalist and abolitionist Noah H. Swaine, who was confirmed 38 to 1. Id. at 116-17. In 1871, the Senate turned away Ulysses S. Grant nominee Ebenezer Hoar, based more than anything on Hoar's opposition three years earlier to Andrew Johnson's impeachment. Id. at 124, 126-27. Although Hoar was well qualified, he was a Republican who often disagreed with many in the Senate rank and file; he opposed Republican party patronage, angering party regulars, and, as indicated, opposed the impeachment of Andrew Johnson. Id. The Senate rejected Hoar 24 to 33. Id. at 126. In 1894, two of Democrat Grover Cleveland's nominees, William B. Hornblower and Wheeler H. Peckham, were defeated by Senate Democrats, due to inter-party squabbling over patronage issues. Id. at 142-43. Both nominations were doomed due to the practice of "senatorial courtesy." Id. at 143. According to this tradition, which began in the 1840's, the Senate would reject a nominee if that nominee was opposed by senators from the president's party who also were from the nominee's state. O'BRIEN, supra note 2, at 69. Both Hornblower and Peckham were from New York and were vociferously opposed by the powerful New York Democrat David B. Hill, the latter whose Democratic machine in New York was part of the anti-Cleveland wing of the Democratic party; they were rejected 24 to 30 and 32 to 41, respectively. Id. ABRAHAM, at 142-43. Following Peckham's rejection, however, President Cleveland nominated another New Yorker, who this time met with Senator Hill's approval: Rufus W. Peckham, Wheeler's brother. Id. at 142-43. Rufus Peckham had not been part of the New York patronage fights and thus was confirmed without the invocation "senatorial
century, nomination rejections have been fewer, but the level of partisanship has continued to increase as did the impact of politics on the confirmation process.

II. Advice and Consent

The Senate, because of its advice and consent function, is cen-
courtesy," going on to serve fourteen years on the Supreme Court. *Id.* Justice Peckham, a staunch defender of laissez-faire capitalism, is perhaps best remembered for his opinion in *Lochner v. New York*, the landmark substantive due process case in which, according to the dissenting Oliver Wendell Holmes, Peckham interpreted the Fourteenth Amendment to "enact Mr. Herbert Spencer's Social Static's." *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

29 See *supra* note 6 (listing rejected Supreme Court nominees).

30 See *Bork, supra* note 2, at 346-47. From 1894 to 1930, twenty nominees were confirmed by the Senate, with no rejections. *Stanley & Niemi, supra* note 6, at 273-74. But in 1930, Herbert Hoover's nomination of John J. Parker was brought down by a coalition of labor groups, the N.A.A.C.P., and southern Democrats in the Senate, the last who, notwithstanding the N.A.A.C.P.'s opposition, thought Parker too liberal in the area of race. See *Abraham, supra* note 2, at 42-43, 200; *Burner, supra* note 6, at 235-36. The American Federation of Labor's (A.F.L.) opposition to Parker was based primarily on a decision he had handed down while a judge on the Fourth Circuit Court of Appeals, affirming a lower-court ruling upholding so-called "yellow dog labor contracts." *Abraham, supra* note 2, at 42; *Burner, supra* note 6. at 235. Parker was bound in deciding the case by Supreme Court precedent. *Id.* However, the A.F.L. discounted the precedent, as have some observers. See, e.g., *Burner, supra* note 6, at 235 ("[t]he President . . . overlooked or disregarded [Parker's] decision [upholding the] injunction enforcing a yellow-dog labor contract requiring a written promise not to strike"). Likewise, the N.A.A.C.P. found objectionable a remark made by Parker while he was campaigning in 1920 for Governor of North Carolina: "The Participation of the Negro in Politics is a source of evil and danger to both races and is not desired by the wise men in either race or by the Republican Party of North Carolina." *Abraham, supra* note 2, at 43. Interestingly, however, after his rejection, Judge Parker, still on the Fourth Circuit, handed down several pro-desegregation decisions. See, e.g., *Rice v. Elmore*, 165 F. 2d 387, 387 (4th Cir. 1947) (removing barriers to blacks in voting in primary elections), *cert denied*, 333 U.S. 875 (1948).

The coalition against Parker was helped by progressive Republicans in the Senate, who opposed Hoover and Hoover's conservative policies, and the nomination was rejected 39 to 41. *Abraham, supra* note 2, at 42. Over the next thirty-eight years, the longest continuous period without nomination rejection, the Senate confirmed the appointments of twenty-five Justices to the Supreme Court. *Stanley & Niemi, supra* note 6, at 274-75. During this period without a rejection, the personnel of the Court was completely turned over nearly three times. *Id.*

Then, two successive nominations by Richard Nixon, that of Clement Haynsworth in 1969 and G. Harrold Carswell in 1970, were rejected by the Senate. See *supra* note 6 (detailing in chart failed Court nominations). Each rejection came in the wake of opposition by labor and civil-rights groups and was occasioned by rancorous Senate debate. *Abraham, supra* note 2, at 15-19. Although the process continued to be affected by political influences, seventeen years passed before a Supreme Court nominee was rejected by the Senate. See *supra* note 6 (listing rejected Supreme Court nominees).
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...tral to the confirmation process and to any proposed reforms.\textsuperscript{31} Traditionally, the Senate asks three questions in effectuating its responsibilities under the Appointments Clause: whether the President's nominee possesses the intellectual capacity, competence, and temperament to sit on the Supreme Court; whether the nominee is of sound moral character and unburdened by conflicts of interest; and whether the nominee will faithfully uphold the Constitution of the United States.\textsuperscript{32} Thus, under the traditional approach a senator votes to confirm or reject a Supreme Court nominee based solely on the nominee's qualifications and moral character.\textsuperscript{33}

In contrast, some process participants and observers argue that

\textsuperscript{31} \textsc{The Federalist} No. 76, at 457 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

\textsuperscript{32} To what purpose then require the co-operation of the Senate? I answer, that the necessity of their concurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. In addition to this, it would be an efficacious source of stability in the administration.

\textsuperscript{33} \textit{Id.; see also} Nagel, supra note 2, at 858 ("Although some politicians and a few academics continue to articulate doubts and reservations about energetic, substantive senate review of judicial nominees, we seem as a matter of both theory and practice to be drifting toward a norm of active senate participation."); Stanley Feingold, \textit{Sure It's Politics; When Wasn't It?}, 13 Nat'l L. J. 17, Sept. 2, 1991 (espousing important and active Senate role in confirmation process).

Many senators nonetheless see the Senate's role in the confirmation process as a limited one. See Richard Friedman, \textit{The Transformation in Senate Response to Supreme Court Nominations: From Reconstruction to the Taft Administration and Beyond}, 5 Cardozo L. Rev. 1, 83 (1983) [hereinafter Transformation] (senators have usually given unequivocal "deference to the president's choice"); Joel B. Grossman & Stephen Wasby, \textit{Haynsworth and Parker: History Does Live Again}, 23 S.C.L Rev. 345, 346 ("The confirmation role of the Senate is limited to reviewing the fitness of the nominee."); Orrin Hatch, \textit{Save the Court from What?}, 99 Harv. L. Rev. 1347, 1347 (1986) (book review by Republican member of Judiciary Committee).

\textsuperscript{32} \textit{See} Biden, \textit{Choosing Judges}, supra note 2, at 13; \textit{see also} Hatch, supra note 2, at 23 (citing nominee's "willingness and ability to uphold the Constitution" along with nominee's integrity, competence, and legal experience as proper evaluative criteria).

\textsuperscript{33} \textit{See Confirmation Role}, supra note 2, at 672-73 ("The Senate, simply stated, is ill-suited intellectually, morally, and politically to pass on anything more substantive than a nominee's professional fitness for the office of Supreme Court Justice."); \textit{see also} David Caplan, \textit{Judge Souter's Beliefs Should Stay His Own}, Nat'l L. J., Sept. 10, 1990, at 12 ("Prudence would indicate a return to the approach to the judicial confirmation process in which the only questions that should be considered are the candidate's competence and moral character"); George F. Will, \textit{The Democrat's Glass Chin}, Newsweek, July 20, 1987, at 66 ("With judicial nominees, the proper senate role is to address threshold questions about moral character, legal skills and judicial temperament").

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the traditional approach is too restrictive and that the Senate should also consider the nominee's judicial philosophy.\textsuperscript{34} When the Senate considers judicial philosophy, it seeks to determine whether the views which the nominee holds will have an adverse impact on the nation when transposed into judicial decisions.\textsuperscript{35} Some suggest that while it is appropriate for the President to consider judicial philosophy in selecting a nominee, the Senate should not do so.\textsuperscript{36} They argue that the President—due to his unique role in the selection stage of the confirmation process—is obligated to consider the nominee's judicial philosophy when making an appointment to the Supreme Court.\textsuperscript{37} The President's election

\textsuperscript{34} See Charles Black, \textit{A Note on Senatorial Considerations of Supreme Court Nominations}, 79 \textit{Yale L. J.} 657, 663-64 (1970) ("In a world that knows a man's social philosophy shapes his judicial behavior, that philosophy is a factor in his fitness.").

\textsuperscript{35} Id. at 657.

\textsuperscript{36} See Carter, supra note 2, at 1199 (cautioning senators that they are not fit to judge nominee's judicial philosophy, Carter states that appropriate Supreme Court Justice is one who makes "moral choices" through "deep and sustained reflection"); see also Confirmation Role, supra note 2, at 672 (Senate's role should be limited); Richard Friedman, \textit{Tribal Myths: Ideology and the Confirmation of Supreme Court Nominations}, 95 \textit{Yale L. J.} 1283, 1302 [hereinafter \textit{Tribal Myths}] ("We do not need ideological review of Supreme Court nominations by the Senate as a backstop to prevent the Court from veering off in a dangerous direction.") But see Laurence Tribe, \textit{God Save This Honorable Court: How the Choice of Supreme Court Justices Shapes Our History} 95 (1988) (most important factor when considering whether Supreme Court nominee should be confirmed is ideology of nominee). Tribe contends that the Senate should apply a two part test: the nominee must believe in an "American vision . . . of a just society" and the nominee must show that he will not change the "overall balance" of the court. Id.; accord Black, supra note 34, at 663-64 ("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 satisfactory basis in itself for a negative vote"). Similarly, William G. Ross contends that:

No reasonable aspect of a nominee's record should be beyond the scope of the Senate's inquiry; and the inquiry is not completed without testimony from interested members of the bar, persons having special knowledge about the nominee, members of the general public, and the nominee him or herself. A senator should not hesitate to oppose the nomination of any person whose intellectual, professional, physical, or ethical qualifications are deficient, whose relations with the president might limit his or her independence, or whose fundamental judicial or political values significantly differ from those of the Senator.

Ross, supra note 2, at 681.

\textsuperscript{37} See Stephen Carter, supra note 2, at 1202 ("For the president the confirmation process is entirely political in the ordinary sense of the term. He has selected an appointee satisfactory to him—a judgment that may include the nominee's philosophy."); see also Check on Supreme Court, supra note 2, at 36 ("Such philosophical "packing" of the Supreme Court would reflect a proper operation of constitutional checks and balances."); Transformation, supra note 31, at 20 ("It is probably beneficial that the President pay at least some attention to ideology, for this offers some assurance that the nominee will not be totally
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must, for practical public policy reasons, be considered an endorsement of the policies on which he ran. For the President to appoint a nominee whose philosophy is different from his own would be to ignore that endorsement and the public's expectations when voting in the presidential election. Voters are cognizant that the President is responsible for appointing Supreme Court Justices and weigh this consideration when they vote. The Supreme Court is often an important issue in presidential elections. By nominating jurists whose judicial philosophy concurs with his own, the President is complying with the public's preference for those views as evidenced by their presidential vote.

In contrast, individual senators have only a state-wide constituency. There are no implied endorsements by the entire nation of a particular senator's judicial views when the senator is elected. It is therefore inappropriate for the Senate to use judicial philosophy as a factor in its determination of the nominee's eligibility. In addition, some have argued that considerations by the Senate have in the past led to, and will continue to lead to, the appointment of mediocre and under-qualified Supreme Court Justices.

... it would be unnatural for most presidents to put ideology totally out of mind.

See Confirmation Role, supra note 2, at 675 ("Presidential candidates ... frequently pledge to appoint judges of a particular philosophy if elected.").

See Robert J. Wise, Senator Should Not 'Insult' American Voter, Nat'l L.J., April 21, 1986, at 16 ("The Senator should not insult the American voters by implying that we did not know for whom we were voting or which political philosophy would be reflected in judicial appointments.").

See Confirmation Role, supra note 2, at 675 ("Judicial appointments were major campaign issues as early as 1936. They continued to be such in 1980 and 1984. Voters understood that President Franklin Roosevelt's nominees would be New Deal [supporters] and that President Ronald Reagan's would generally embrace judicial restraint.").

See Check on Supreme Court, supra note 2, at 36-38 ("Such philosophical 'packing' of the Supreme Court would reflect a proper operation of constitutional checks and balances."); see also Rehnquist, supra note 2, at 319 (president may "pack" Court with justices who share his political beliefs). But see Alexander Bickel, The Least Dangerous Branch, 16-23 (1962) (Senate can get better indication of who public wants nominated to Supreme Court).

Both Presidents Reagan and Bush, for example, made it clear during their respective campaigns that if elected they would nominate conservative jurists to the federal bench. Check on Supreme Court, supra note 2, at 36-38.

See Confirmation Role, supra note 2, at 675 ("Senators represent only parochial viewpoints and speak only for statewide constituencies."); see also Choosing Judges, supra note 2, at 213 (President entitled to reflect in nominations his view of national interest).

Check on Supreme Court, supra note 2, at 36-38.
tices. For example, after the Senate's rejection of Robert Bork in 1987 on the basis of his adherence to the judicial philosophy of original intent, President Reagan, and later President Bush, sought to avoid political battles with the Senate by nominating jurists whose judicial and legal written record was minimal. The absence of a "paper trail" allowed the last three appointees to the Supreme Court to avoid the high level of scrutiny in their confirmation hearings which was present in the Bork nomination. Although probably sharing Bork's conservative views, Justices Anthony Kennedy, David Souter, and Clarence Thomas, each having less experience than Bork when nominated, were nevertheless confirmed to the Supreme Court. The fact that they

"See Richard Friedman, Balance Favoring Restraint, 9 Cardozo L. Rev. 15, 17 (1987) ("Active ideological review is bound to encourage the appointment of the bland and mediocre, of those whose views have not been clearly articulated or are unlikely to anger any substantial portion of the population.").

"See Danelski, supra note 7, at 900.

Opponents of Robert Bork's nomination did not question his personal integrity or his professional qualifications for the Supreme Court. Rather, they objected to his constitutional views and for that reason sought to prevent his confirmation. Their premise was that ideology is a permissible ground for rejecting a Supreme Court nominee.

Id. Bork was rejected on October 23, 1987 by a vote of 58 to 42, the largest vote ever rejecting a Supreme Court nominee. Id.

"See Walter V. Robinson, Thomas Winning Through Evasion; Elusive Nominee Skirts Opposition, Boston Globe, Sept. 15, 1991 (Nat'l/Foreign), at 1. "After Robert H. Bork flung the gauntlet of his conservative views at the committee's feet in 1987, and was defeated for doing so, the Reagan and Bush White Houses have opted for more faceless nominees, culminating in last year's choice of David Souter." Id.; see also Feingold, supra note 31, at 52 (Bork, after defeat stated, "A President who wants to avoid a battle like mine, and most Presidents would prefer to, is likely to nominate men and women who have not written much, and certainly nothing that could be regarded as controversial by left-leaning senators and groups."); Bobette Riner, Is She Too Hot for the Court?, Nat'L L. J., July 15, 1991, at 1 (reluctance of President Bush to nominate highly qualified Judge Edith Jones is illustrative of state of confirmation process after Bork). Although qualified, Jones has left an "unmistakable" paper trail reflecting a clearly conservative judicial philosophy. Id.

"See Carter, supra note 2, at 1187 (discussing "paper trail" issue).

"See Confirmation Role, supra note 2, at 685. The Senate scrutinized, and ultimately rejected Bork because he would have been the deciding vote "on politically contentious cases on abortion, civil rights, free speech, antitrust, separation of powers, and congressional standing in a manner adverse to the desires of a Senate majority." Id.

"See John Hart Ely, Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different From Legislatures, 77 Va. L. Rev. 833, 833 (1991) (little indication [pre- or post-appointment] that Kennedy is philosophically different from Bork.); see also Stephen Kurkjian, Reagan-Appointed Justices and the Future of the Court, Boston Globe, June 30, 1988 (National/Foreign), at 12 ("Although he has heard arguments on only 50 cases, Kennedy 'has proven to be a decidedly conservative appointment so far' ").
were nominated and confirmed is an indication that the process operates under ideological constraints and that those constraints ultimately force the President to nominate less qualified judges to the Supreme Court.

Additionally, the Senate's rejection of a Supreme Court nominee on philosophical grounds does not end the process of filling a Supreme Court vacancy. Although some senators and scholars argue that rejections based on philosophy prevent "extremists" from being appointed to the Court, since the Senate cannot compel the President to appoint someone with judicial views antithetical to his own, the President will very likely nominate someone with views similar to those of the rejected nominee.

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50 See Ely, supra note 49, at 893. "The notion was thus to transpose the existence of a 'paper trail' from an evidentiary liability, a repository of possible prior inconsistent statements, to a prerequisite to asking any questions at all about live legal issues." Id. For example, because Souter had not written many articles, there was little material, particularly on specific issues, about which the members of the Committee could ask him questions.

51 See Nagel, supra note 2, at 878 (if "extremists" were barred from sitting on Supreme Court "we would lose the justices who formulate broader and more creative statements than the particular case requires—statements that project twenty years ahead and affect the course of future cases. We want the kind of variety and stimuli that different justices can provoke in one another."). Justices labeled extremists when nominated, such as Justices Black, Douglas, and Brandeis, were later praised by many for their novel approaches to constitutional adjudication. It is pointed out that, for example, "Justice Black's views on the first amendment were extremist and . . . those views have offered a major contribution to constitutional debate." Friedman, supra note 36, at 17 (importance of "extremists"). In contrast, it seems doubtful that Justices without any strong, or at least enunciated convictions, such as Justices Kennedy, Souter, and Thomas, will be responsible for such novel approaches or major contributions.

52 See Friedman, Transformation, supra note 31, at 1 ("If the Senate rejects a nominee on ideological grounds, the choice still belongs to the president, who may insist on nominating a justice to his liking ideologically."); see also Al Kamen, Nomination to Test Senate Role in Shaping of Supreme Court; Democratic Senators Taking More Aggressive Stance This Year, WASHINGTON POST, July 1, 1987, at 9 ("If the Senate were to reject a nominee solely on ideological grounds, it would be straying far beyond its constitutional prerogative. The president has the power . . . to place his nominees on the Court unless they are intellectually or morally unqualified."); Monaghan, supra note 2, at 1210 ("The hard fact is that the President's vision of what is proper judicial philosophy ultimately will prevail, as Judge Kennedy's confirmation demonstrates.").

53 See Tribal Myths, supra note 36, at 60 ("The same President will ordinarily make the replacement nomination, and so usually the second choice will share at least the general outlook of the rejected candidate."); see also THE FEDERALIST, supra note 31, at 457. Hamilton stated:

But his nomination may be overruled: this it certainly may, yet it can only be to make place for another nomination by himself. The person ultimately appointed must be the object of his preference, though perhaps not in the first degree. It is also not very probable that his nomination would often be overruled. The Senate could not be tempted by the preference they might feel to another to reject the one
Finally, it is submitted that senatorial consideration of judicial philosophy is futile. Often a nominee's philosophy will change once he is confirmed and seated on the Supreme Court. And as a Justice, the nominee will not necessarily render decisions based on a predetermined set of views. Many factors may affect a judge's decisions, and this is certainly true of members of the Supreme Court. A colleague's suggestion or line of thinking, a particular set of facts, a compelling oral argument, or a change in his own judicial philosophy are all factors that may contribute to a Justice's vote in a particular case. A President can never be certain how a particular nominee will vote once on the Court. In fact, often the Senate confirms a nominee whose votes on the Court consistently surprise and disappoint the nominating President. Due to this difficulty in determining how a Justice is likely to vote, the Senate's application of a philosophical test is almost certainly futile.

proposed; because they could not assure themselves that the person they might wish would be brought forward by a second or by any subsequent nomination. They could not even be certain that a future nomination would present a candidate in any degree more acceptable to them; and as their dissent might cast a kind of stigma upon the individual rejected and might have the appearance of a reflection upon the judgment of the chief magistrate, it is not likely that their sanction would often be refused, where there were not special and strong reasons for the refusal.

Id.

54 See Confirmation Role, supra note 2, at 682 ("Although a justice may reflect majority views on the prevailing issues of the day when appointed, he may become countermajoritarian as issues change."); see also Tribal Myths, supra note 36, at 90 (Justices will often change their philosophical approach once on Court).

55 See Henry J. Abraham, "A Bench Happily Filled": Some Historical Reflections on the Supreme Court Appointment Process, 66 JUDICATURE 282, 287 (1983) ("You shoot an arrow into the far-distant future ... when you appoint a justice, and not the man himself can tell you what he will think about some of the problems he will face.").

56 See Tribal Myths, supra note 36, at 91-92 (lists factors which may change Justice's philosophy).

57 See Confirmation Role, supra note 2, at 682 n.68 (President Nixon was often disappointed by Justice Blackmun's vote on the Supreme Court); see also Ely, supra note 49, at 840 ("Subsequent developments have moved Justice Blackmun significantly to the left.").

58 See Confirmation Role, supra note 2, at 682 ("Nominees also occasionally vote in ways unanticipated by and contrary to the wishes of the appointing president and confirming senate."); see also Tribal Myths, supra note 36, at 90 ("One survey estimates that one justice in four has turned out to be quite different from what his appointer wanted.").

59 See Tribal Myths, supra note 36, at 90. Chief Justice Earl Warren often disappointed President Eisenhower with his vote; Stevens' decisions were often at odds with the views of Gerald Ford. Id.

60 See Tribal Myths, supra note 36, at 90. For example, Justice Thomas' views on the issue of civil rights may change during his tenure on the court; his views on this subject have
III. Reforming the Process

A. The Need for Reform

A great debate has ensued in the wake of the Clarence Thomas confirmation hearings over reforming the confirmation process. Views on this topic are as varied as the many existent political, ideological, and social perspectives. President Bush, for example, was harshly critical of the way the Senate Judiciary Committee handled the Thomas hearings. On at least one occasion, he linked the hearings—particularly the leaking of the Anita Hill-F.B.I. reports—to other scandals recently plaguing Congress. Republican member of the Judiciary Committee, Alan Simpson of Wyoming—Senate Minority Whip and a staunch supporter of Clarence Thomas throughout the hearings (and of the Bush Administration generally)—recommended closed sessions for all Supreme Court confirmation hearings. Senator Paul Simon of Illinois, Democratic member of the Judiciary Committee, agreed that the Thomas hearings should have been conducted in closed session, but would limit such sessions to hearings involving sexual harassment and other sensitive issues. Simon also suggested that the advice and consent role of the Senate be enhanced by the President consulting with senators during the selection stage of
the process." No Republican senator has suggested that such a "short-list" approach be utilized by the White House; certainly the President would resist anything approaching a senatorial "veto" of the list as an intrusion of his authority under the separation of powers doctrine.

In addition to institutional and partisan factors, ideological differences divide those offering reforms of the confirmation process. Liberals, for instance, argue that Presidents Reagan and Bush have tried to "pack" the Court with conservative jurists. They cite as the prime example of this the nomination of Robert Bork. Conservatives, on the other hand, are just as vehement that Liberals, who they say have controlled the Supreme Court for the last half-century, are trying desperately to maintain that control against a tide of change in the country that does not favor Liberals or their policies.

Finally, perhaps the most important development in recent years in the debate over how to reform the confirmation process has been the increase in influence generated by the American people and the social issues that they care about. From civil rights to abortion, Americans view the Supreme Court as a policy-making body that affects their lives at least as much as the political branches of government. This view has led to an increased awareness by the public of the confirmation process. Hearings

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66 Id.
68 See Feingold, supra note 31 (discussing impact of politics on confirmation process).
69 See, e.g., Christopher H. Schroeder, Executive Extremism, N.Y. TIMES, Oct. 23, 1991, at A23 (Op-Ed page) (Presidents Reagan and Bush have attempted to "pack" Supreme Court with conservative justices.)
70 See Pertschuck & Schaettzel, supra note 2, at 7 (liberals cite Bork nomination as example of President Reagan's attempt to "pack" Court with conservatives).
72 See Bork, supra note 2, at 3-5 (American people view Court as political institution); Ely, supra note 49, at 833 ("Modern constitutional scholarship is generally characterized by a desire to take up the question ... what politics should judges pursue, and on the basis of what conception of the good should they act?"); Ross, supra note 2, at 1 (level of participation by public in confirmation process has increased over time).
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that were once out of the public eye, if held at all, are now full-blown media events. The American people exercise control over the process directly, first by pressuring elected officials preemptively, through letter-writing and other campaigns, and second by acting retributively at the ballot box.

It is submitted that given the current political, ideological, and social factors impeding the functioning of the confirmation process, at least three changes in the process are required.

1. Reducing the Length of the Confirmation Process

The Robert Bork nomination illustrates perhaps the most pervasive problem resulting from the absence of time limitations on the confirmation process: the opportunity of special-interest groups to mount a campaign against a nominee to whom they are opposed. Bork’s qualifications to sit on the Court were unimpeachable: Professor of Law at Yale (fifteen years); Solicitor General of the United States (four years); court of appeals judge (five years and then currently). Indeed, Bork had been confirmed by

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73 See ABRAHAM, supra note 2, at 194. Not until 1925 did a nominee even appear before the Senate Judiciary Committee during the confirmation process; in that year, Harlan Fiske Stone was made to appear before the Committee. Id.

74 See PERTSCHUK & SCHAETZEL, supra note 2, at 146-76. The authors state:

In the campaign to defeat Robert Bork, the coalition [opposed to the nomination] sought access for its spokespeople and its message to the news, or “free media.” [...] It dedicated as many resources and as much intensity of effort to media strategy and implementation as to lobbying, research, and grassroots activism.

Id.

75 See generally PERTSCHUK & SCHAETZEL, supra note 2, at 74-92 (discussing electorate influence on senators).

76 Stephen Griffin, Politics and the Supreme Court: The Case of the Bork Nomination, 5 J. OF L. & Pol. 551, 557 (1991). In announcing the nomination, President Reagan stated in part: Judge Bork is recognized as a premier constitutional authority. His outstanding intellect and unrivalled scholarly credentials are reflected in his thoughtful examination of the broad, fundamental legal issues of our times. When confirmed by the Senate as an appellate judge in 1982, the American Bar Association gave him his highest rating: “exceptionally well qualified.” On the bench, he has been well prepared, evenhanded, and openminded.

In taking this action today, I’m mindful of the importance of this nomination. The Supreme Court of the United States is the custodian of our Constitution. Justices of the Supreme Court must not only be jurists of the highest competence; they must be attentive to the specific rights guaranteed in our Constitution and proper role of the courts in our democratic system.

Judge Bork, widely regarded as the most prominent and intellectually powerful advocate of judicial restraint, shares my view that judges’ personal preferences and
the Senate for the latter two positions, and in each instance unani-
mously.\(^7\) However, Senators Biden and Kennedy delayed the
Bork hearings in order to give special-interest groups an opportu-
nity.\(^8\) With enough time to successfully do so, a media campaign
values should not be part of their constitutional interpretations. The guiding princi-
ple of judicial restraint recognizes that under the Constitution it is the exclusive
province of the legislatures to enact laws and the role of the courts to interpret
them.

\(^7\) See Slinger et al., supra note 3, at 106. Bork's jurisprudence, clearly established by
1982, nevertheless did not become an issue for the Senate until Bork's 1987 nomination to
the Supreme Court. See Danelski, supra note 7, at 900 ("Opponents of Robert H. Bork's
nomination did not question [the nominee's] professional qualifications for the Supreme
Court. Rather, they objected to his constitutional views and for that reason sought to pre-
vent his confirmation.").

\(^8\) See Bork, supra note 2, at 268 (Kennedy delivered vitriolic speech denouncing the
nomination). "Robert Bork's America," cried Senator Kennedy in a sound-bite played re-
peatedly on that evening's news programs, "is a land in which women would be forced into
back-alley abortions, blacks would sit at segregated lunch counters, rogue police could
break down citizens' doors in midnight raids," and so on. Id. Senator Kennedy stated:

Robert Bork's America is a land in which women would be forced into back-alley
abortions, blacks would sit at segregated lunch counters, rogue police could break
down citizens' doors in midnight raids, schoolchildren could not be taught about
evolution, writers and artists would be censored at the whim of government, and the
doors of the Federal courts would be shut on the fingers of millions of citizens for
whom the judiciary is often the only protector of the individual rights that are the
heart of our democracy.

\(^{11}\) See Griffin, supra note 76, at 559.
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was mounted by such groups against the Bork nomination. Bork was portrayed as opposed to civil rights, the rights of women, and many provisions of the Bill of Rights itself. The American people responded to the media campaign, pressuring senators, many of whom in turn voted against Bork. The national interest of confirming the most qualified and competent Justice to the Supreme Court was compromised in order to satisfy the parochial interests of individual senators.

The Clarence Thomas nomination illustrates two other problems resulting from the absence of time constraints. The first is best summed up by the paradox: the more time you have, the more time you need. Since the nature of the confirmation process is that of a continuing investigation, information damaging to the nominee will continually surface, extending the process as each new revelation, however minor or unsubstantiated, is investigated and disposed of. Senator Howell Heflin, Democrat of Alabama, for instance, perplexed by some of Thomas' answers during the hearings, asked at one point: "Can you please give us an idea of what the real Clarence Thomas is like today?" While Heflin and others searched for the real Clarence Thomas, part of an F.B.I. report containing a claim by Oklahoma Law Professor Anita Hill that Thomas had sexually harassed her when she was Thomas's personal assistant at the Equal Employment Opportunity Commission, was leaked to the press. Professor Hill confirmed the contents of the report, and the Judiciary Committee was pressured to extend the hearings to investigate the charge, which it did, by six days. During the extended hearings, both Thomas' and Hill's personal lives were scrutinized as millions of Americans watched

79 Griffin, supra note 76, at 559.
80 See generally PERTSCHUCK and SCHAEZEL, supra note 2, at 127-45 (interest groups strongly influenced public during Bork confirmation process).
81 See supra notes 12-13. Gorham warned against just such a result when arguing at the Convention in favor of the plan giving the president exclusive power over appointments.
82 See supra notes 12-13.
84 See Richard Berke, Vote on Thomas is Put Off As Senate Backing Erodes over Harassment Charges, N.Y. TIMES, Oct. 9, 1991, at A1. Since the "date-certain" for the vote by the Senate on the Thomas nomination had been set by unanimous vote, a second such unanimous vote was required, under the rules of the Senate, to extend the hearings; the Senate so voted on October 8. Id.
The second problem is that issues properly raised at the hearings will be discussed to an extent disproportionate to their true importance to the nomination.

It is submitted that a time limit of six weeks should be imposed on the process by agreement between the President and the Senate. While such a limit would cut in half the current average length of the period from nomination to confirmation (or rejection), implementation of the change is feasible, particularly as part of an overall reform package that includes at least the second of our recommendations. The advantage of limiting the length of the confirmation process is that such a change would decrease the opportunity for special interest groups to bring a case against the nominee. In both the Bork and Thomas nominations, coalitions of various groups were able to generate opposition to a Supreme Court nomination among substantial portions of the public. It is suggested that six weeks is an adequate period for the Senate to consider the nominee's qualifications and that opposition to the nominee generated after that time is superfluous to the Senate's deliberations and contrary to the effective discharge of its advice and consent function.

2. Giving the Senate a Greater Role in the Selection Stage

Both the Bork and Thomas nominations illustrate the potential advantage of seeking the advice of the Senate during the selection stage of the confirmation process. In the case of Judge Bork, Pres-

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85 See David Rosenbaum, Selection Process for Court Under Attack from All Sides, N.Y. TIMES, Oct. 17, 1991, at A22 ("Last weekend's drama exposed intimate details of the private lives of Judge Thomas and his chief-accuser, Professor Hill, portrayed many senators as hatchet men or patsies but not as statesmen, and that caused countless Americans to feel uneasy as the spectacle unfolded on their television sets.").

86 See Rosenbaum, supra note 85, at A22. Charges that Clarence Thomas had ties to lobbyists for the South African government, had supported statements made by others espousing "fetal rights," and had made speeches in favor of natural rights were all made during the course of the nomination and discussed before and during the hearings, ad nauseum. And the most damaging charge of all, that made by Anita Hill, actually led to special extended hearings being held. Id. In addition, during the hearings the issues of affirmative action, abortion, and the proper role of natural rights in constitutional adjudication were raised over and over again, well after it was reasonable to expect the nominee to shed any new light on the subject. Id.
ident Reagan was advised by the Democratic leadership in the Senate that if he nominated the controversial jurist, strong opposition would follow.\textsuperscript{87} Reagan ignored the admonition and the nomination ultimately failed.\textsuperscript{88} Later, Reagan heeded the advice of the Senate, however, nominating Anthony Kennedy, who was confirmed 97 to 0.\textsuperscript{89} In the case of Thomas, President Bush announced the nomination without significant input from the Senate in the selection stage, or any indication of how the nominee would fare in the hearings.\textsuperscript{90} As a result, the nominee faced a contentious fight, the Judiciary Committee sent his name to the floor without any recommendation,\textsuperscript{91} and the Senate barely confirmed him by a vote of 52 to 48.\textsuperscript{92}

It is submitted that the President must be willing to confer, or to have his top advisers confer with the Chairman and Ranking Member of the Senate Judiciary Committee before nominating someone to the Supreme Court. The mechanism for implementing this reform could be quite simple: the President’s Attorney General or Chief of Staff would present to the Judiciary Committee for its consideration the President’s “short-list” of possible nominees. At present, although this is routinely done,\textsuperscript{93} the President is under no obligation to heed the advice of the Senators who consider the list.\textsuperscript{94} It is suggested that the President should, in good faith, consider the advice of the Senators and base his nomination at least in part on that advice. The short-list benefits

\textsuperscript{87} See supra notes 76-81 and accompanying text (discussing Bork nomination).
\textsuperscript{88} See supra notes 76-81.
\textsuperscript{89} See supra notes 76-81.
\textsuperscript{90} See David Gergen, How to Improve the Process, U.S. NEWS & WORLD REPORT, Oct. 28, 1991, at 39 (“Ronald Reagan found late in his presidency, in selecting Anthony Kennedy, that he could achieve a much smoother confirmation—and also put someone of his philosophy on the Court—if he called in key Senators in advance to discuss a list of prospective nominees and then gave some weight to their views.”).
\textsuperscript{91} See Maureen Dowd, Conservative Black Judge, Clarence Thomas, Is Named to Marshall’s Court Seat, N.Y. TIMES, June 1, 1991, at A15 (reporting on President Bush’s selection of Thomas without senatorial input).
\textsuperscript{92} See Dan J. DeBenedictis, Confirmation Conversion, A.B.A. J., November, 1991, at 18 (Hatch complained during hearings concerning plethora of questions relating to Thomas’ view on abortion).
\textsuperscript{94} See supra note 89 and accompanying text (discussing Kennedy nomination).
\textsuperscript{95} See supra note 67 and accompanying text (discussing independence of President in selection stage of process under separation-of-powers).
the President in two related ways. First, if a time limit is placed on
the process, Senators will be under less pressure to reject a nomi-
ee who would otherwise be vulnerable to attack by special inter-
est groups, and thus under less pressure to reject qualified persons
on the short-list. Second, the President gets a shortened confirma-
tion process, which will yield him greater flexibility in filling a Su-
preme Court vacancy. In addition, this reform has three benefits
for the confirmation process generally. First, advice from the Sen-
ate arguably will produce better candidates; certainly the Framers
intended this to be the result of cooperation between these two
branches of government.9

Second, it will avoid confirmation "fights," since good faith on both sides will ensure that only those
with a reasonable chance of confirmation will be nominated. Fi-
nally, a potential nominee who is "rejected" by Senators at the
short-list stage may survive to be nominated another day, when
the nominee will gain more experience,98 or the views or the per-
sonnel of the Senate change, or in some other way the reasons for
the initial rejection disappear. Once a nominee goes through the
confirmation process and is rejected, it becomes very difficult, if
not impossible, for a president to renominate that person again in
the future. Robert Bork, for instance, certainly will never again be
ominated to sit on the Supreme Court. However, if his name had
never been formally submitted, his nomination could have taken
place at some future date, without the stigma of the prior repudia-
tion. It is suggested that a greater role for the Senate at the selec-
tion stage of the confirmation process, particularly together with a
time limit on the process, should be acceptable to both the Presi-
dent and the Senate, as each has something to gain by the
reforms.

3. Holding Hearings in Closed Session

Finally, both the Bork and Thomas nominations demonstrate
the danger of holding confirmation hearings in open session

9 See supra notes 10-21 and accompanying text (discussing constitutional origins of con-
firmation process).
98 Marcia Coyle & Fred Strasser, Judge Thomas Takes His Case to the Senate, NAT'L L. J.,
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where there is coverage by the omnipresent media readily accessible to the public. In the case of Judge Bork, the American public watching the hearings on television perceived the nominee in a negative light, often as arrogant or worse, making it relatively easy for special-interest groups to portray him as someone outside of the American mainstream. In the case of Justice Thomas, the hearings, particularly those to investigate Anita Hill's charges of sexual harassment, became a forum for partisan posturing by individual senators.

It is submitted that Supreme Court confirmation hearings should be conducted in closed session; they should take place beyond the glare of the media and insulated from the direct influence of the American people. Such a reform will have the effect of reducing the influence on the confirmation process of special-interest groups and the public generally. It is suggested that there is nothing in the Constitution or in our history that requires that the hearings be open—the Constitution vests the advice and consent function in the Senate, not in the American people. It is further suggested that, as with the other two recommendations, closed hearings would substantially reduce the level of politicization that has over the years crept into the process.

97 See Bork, supra note 2, at 309 ("So enormous were the negative advertising and the bias in the major media organs that to this day I am astounded that so many Americans saw through them and understood that I was not the ogre painted.").

98 See supra notes 82-86 and accompanying text (discussing Thomas nomination).

99 But see Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 563-64 (1980) (press and public have a right to access to criminal trials). However, in Richmond, the Court held that an "overriding consideration" (such as the defendant's or complaining witness's right to privacy, might overcome the right of public access to trials. Id. at 564. Also, the Court based its decision on the fact that trials historically have been, and were at the time of the adoption of the First Amendment, "presumptively open." Id. at 556. If the rule in Richmond is applied by analogy to Senate hearings, it is suggested that first, hearings such as those in the Thomas nomination to investigate the Anita Hill charges would clearly be subject to the "overriding consideration" exception; and second, congressional hearings have never been "presumptively open" (indeed, the Convention of 1787 was most definitely closed).

In any event, such an issue would almost certainly be deemed by the Court to be nonjusticiable under the political question doctrine. See Nightline: Town Meeting, supra note 6 (Senator Arlen Specter argues Senate hearings on judicial appointments nonjusticiable political question).
CONCLUSION

The confirmation process for Supreme Court Justices has been the subject of political influence since almost the beginning of our history under the Constitution. The level of politicization, however, has increased over time: political, ideological, and social factors have interfered with the proper functioning of the President and the Senate in their respective roles pursuant to the Appointments Clause. The Framers originally intended a confirmation process whereby the two political branches of government would share responsibility in filling vacancies in an independent judiciary. Today, ideological considerations have turned the deliberative mechanism envisioned by the Framers into the kind of political free-for-all the Appointments Clause was drafted to avoid. The confirmation process is too politicized, too long, and too public. To remedy these problems, the President and the Senate should cooperate in the selection stage of the process, the length of the confirmation stage should be substantially reduced, and the Senate confirmation hearings should be held in closed session.

Joseph Faria & David Markey