

The Limited Nature of the Senate's Advice and Consent Role

Dr. John C. Eastman *

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* Professor of Law, Chapman University School of Law, and Director, The Claremont Institute Center for Constitutional Jurisprudence. Ph.D., Claremont Graduate School, 1993; J.D., University of Chicago, 1995. Dr. Eastman formerly served as a law clerk to the Honorable Clarence Thomas, Associate Justice, Supreme Court of the United States, and to the Honorable J. Michael Luttig, United States Court of Appeals for the Fourth Circuit. This testimony is based on an article published in *NeXus: A Journal of Opinion*, with special acknowledgement to then-3L Chapman law student Timothy Sandefur, my co-author in that effort, and 2L Chapman law student Luma Beran-Simms, who also provided tremendous research assistance. To the extent necessary, the materials are reprinted here with permission.

Oral Statement of Dr. John C. Eastman

Before

The House Judiciary Subcommittee on the Constitution

Oversight Hearing on "A Judiciary Diminished is Justice Denied: The Constitution, the Senate, and the Vacancy Crisis in the Federal Judiciary."

Thursday, October 10, at 9:00 a.m.
Rayburn House Office Building,
Room 2237

Thank you, Chairman Chabot, for inviting me to participate in this hearing this morning. I first want to acknowledge what an extraordinary hearing this is, a subcommittee of the House of Representatives inquiring into a matter that is textually committed by the Constitution to the other body, the Senate of the United States. Of course, the House of Representatives does have an important role in the overall appointments process. It can propose legislation to confer the power of appointment for lower court judges in the President alone under Article II of the Constitution.¹ Moreover, the judicial seats that have been vacant for this entire session of Congress have been not only authorized, but mandated by law.² Yet that law is clearly not being followed. It is as if Senator Leahy thinks he has been vested with the line item veto power and has

¹ See U.S. CONST. art. II, § 2, cl. 2.

² See 28 U.S.C. §§ 44, 133 (1994 & Supp. 2002) (specifying that President "shall appoint" 179 circuit court judges and 651 district court judges) (emphasis added).

used his own red pen to single-handedly strike out fifteen percent of the Federal appellate court bench.³

This hearing, however, is about much more than the vacancy created by the Senate's inaction. The unprecedented assertion of power by the Senate is threatening two of the most core principles of our constitutional system of government. First, it is intruding upon the President's power to nominate judges, in violation of the separation of powers. Second, it is threatening the independence of the judiciary and, as a result, the very rule of law itself.

Now, my fellow panelist Ralph Neas is going to tell you that the Senate is just being diligent in its advice and consent role,⁴ but quite frankly, his view of that role is fundamentally mistaken. He claims in his prepared testimony that the Senate has a co-equal role in nominating judges.⁵ That claim is inconsistent with the Constitution's text and the history of the advice and consent power.

As I describe in greater detail in my prepared testimony, the Framers of the Constitution assigned to the President the sole power to nominate and the primary power in appointing judges.⁶ They did this because they wanted the accountability that came with placing the appointment power in a single individual.⁷ They specifically refused to give the power of appointment to the Senate because they knew the tendency of public bodies to feel no personal responsibility and to give full play to intrigue and cabal.⁸

Now, as with every aspect of the separation of powers, there are, of course, checks on that Presidential power: The requirement of advice and consent is given to the Senate for principal officers and is a default for inferior officers.⁹ But when we view this mere check in the Senate as

³ See *A Diminished Judiciary: Causes and Effects of the Sustained High Vacancy Rates in the Federal Courts*, 107th Cong. (2002) (statement of Todd F. Gaziano, noting that as of October 10, 2002, 15.1% of circuit court judgeships were vacant), available at <http://www.house.gov/judiciary/gaziano101002.htm> (last visited Jan. 12 2003).

⁴ See *Written Testimony of Ralph G. Neas*, 107th Cong. (2002) (statement of Ralph G. Neas, President, People for the American Way), available at <http://www.house.gov/judiciary/neas101002.htm> (last visited Dec. 4, 2002).

⁵ *Id.*

⁶ The appointment power of Art. II, § 2 is divided into two clauses — the power to nominate and the power to appoint. The former is committed exclusively to the President; the latter is also committed to the President, but with the advice and consent of the Senate.

⁷ See *infra* notes 21-34 and accompanying text.

⁸ See *infra* note 25 and accompanying text.

⁹ U.S. CONST. art. II, § 2 (“[The President] . . . 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, . . . but

a co-equal share in the power of appointment itself, as Mr. Neas does,¹⁰ we grant to the Senate a power that the Constitution does not confer, opening the door to the very threat of cabal and partisanship that the Founders feared. What is worse, the ideological litmus test some Senators would impose with their new-found power is one that would turn a blind eye to the limits on power that the Constitution itself imposes on those very same Senators.¹¹

This threat to an independent judiciary and its ability to check a Congress bent on exercising power that is not authorized by the Constitution is every bit as great as the threat raised by the court-packing scheme advanced by President Roosevelt in the 1930s,¹² and every bit as dangerous to the very idea of limited constitutional government.

So what can this committee do? As I alluded to at the beginning, it can consider legislation that would give sole appointment power to the President alone whenever the Senate has failed to act within a reasonable time in confirming or rejecting his nominees.¹³ That would ensure that the Senate's check on Presidential power does not itself become a blank

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 Departments").

¹⁰ Statement of Ralph G. Neas, *supra* note 4.

¹¹ See, e.g., *Hearing Before the Senate Comm. On the Judiciary Subcomm. on Administrative Oversight and the Courts on Should Ideology Matter?: Judicial Nominations 2001*, 107th Cong. (2001) (statement by Charles E. Schumer), reprinted in *Senate Committee Hearings on the Judicial Nomination Process*, 50 *DRAKE L. REV.* 429, 435 (2002).

¹² See, e.g., *SENATE COMM. ON THE JUDICIARY, REORGANIZATION OF THE FEDERAL JUDICIARY*, S. REP. NO. 75-711, at 1, 13, 23 (1937) (describing President Roosevelt's court-packing plan as "vicious precedent which must necessarily undermine our system" of independent judiciary and "which should be so emphatically rejected that its parallel will never again be presented to free representatives of free people of America").

¹³ Less than three weeks after the hearing at which this testimony was presented, President Bush himself proposed that the Senate Judiciary Committee hold hearings on judicial nominees within 90 days, with a vote by the full Senate not later than 180 days after the President sends a nomination to the Senate. See Press Release, President George W. Bush, Remarks on Judicial Confirmations (Oct. 30, 2002), available at <http://www.whitehouse.gov/news/releases/2002/10/20021030-6.html> (last visited Jan 12, 2003); see also John C. Eastman, *Confirmation Logjam*, *WALL ST. J.*, Oct. 17, 2002, at A18 (proposing six-month timetable). Whether Circuit Court Judges are constitutionally "inferior officers" whose appointment can be vested in the President alone is, of course, an open question. In *Edmond v. United States*, the Supreme Court held that judges on the Court of Appeals for the Armed Forces were "inferior officers" for purposes of the appointments clause for two reasons. First, they were somewhat under the supervision of the Judge Advocate General. Second, their decisions were subject to reversal by a higher court. Although the former ground is not apt with respect to Article III circuit judges, the latter clearly is, and the treatment of circuit judges as "inferior" officers comports with the language of Article III, which denominates all courts below the Supreme Court as "inferior" courts. *Edmond v. United States*, 520 U.S. 651, 664-65 (1997).

check.

I thank this committee for the opportunity to help shed some light on this serious problem, and I hope that your hearing today will demonstrate to the country how critical is the constitutional crisis that has been perpetrated by the Senate's abject refusal to perform its advice and consent role for a significant number of the President's nominees to the Circuit Courts of Appeals.

Thank you, Mr. Chairman.

[A slightly modified version of Dr. Eastman's prepared testimony follows.]

**Prepared Testimony of Dr. John C.
Eastman**

Before

**The House Judiciary Subcommittee on
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**Oversight Hearing on "A Judiciary
Diminished is Justice Denied: The
Constitution, the Senate, and the
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**Thursday, October 10, at 9:00 a.m.
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Good morning, Chairman Chabot and other members of the House Judiciary Subcommittee on the Constitution. I am delighted to be here this morning to offer some historical and constitutional perspective on the current stalemate in the Senate Judiciary Committee over confirmations of circuit court judges, its impact on the federal judiciary and, perhaps more importantly, its threat to the separation of powers.

As of yesterday,¹⁴ seventeen months have passed since President Bush nominated his first group of 11 circuit court judges; only three have been confirmed.¹⁵ Several have not even received a hearing, yet the number of

¹⁴ That is, October 9, 2002.

¹⁵ Between the time of the hearing at which this testimony was presented and the present publication of that testimony, Republicans regained control of the Senate as a result of the mid-term elections held November 5, 2002. *See, e.g.,* Jim VandeHei & Jonathan Weisman, *Republicans Poised to Enact Agenda*, WASHINGTON POST, Nov. 7, 2002, at A1.

vacancies on the federal bench has grown to crisis proportions. Chief Justice William Rehnquist recently complained of an “alarming number of judicial vacancies,” creating a real strain on the courts.¹⁶ Even Senator Patrick Leahy, who, as Chairman of the Senate’s judiciary committee is largely responsible for the current logjam, previously referred to a judicial vacancy “crisis” when the number of vacancies on the bench was about half what it is today. In 1997, he contended that those who delay or prevent the filling of vacancies were “derelict [in their] duty” and delaying or preventing the administration of justice.¹⁷

More fundamentally, a large number of judicial vacancies threatens to hamper the ability of the courts to perform their primary role as an important check on the elected branches of government, protecting individual rights against tyrannical majorities, and insuring that the

Following the election, the Senate Judiciary Committee reported out several additional nominees, who were promptly confirmed by the full Senate. *See, e.g.,* Edward Walsh, *Two More Senate Victories for Bush*, WASHINGTON POST, Nov. 20, 2002, at A5; U.S. Department of Justice, Office of Legal Policy, *Confirmed Nominees During the 107th Congress*, available at <http://www.usdoj.gov/olp/confirmed107.htm>. Smoother sailing is therefore expected for President Bush’s nominees, at least in the short term, but the concerns raised in this article about the abuse of the advice and consent process remain valid, for at least two reasons. First, one of the Circuit Judges recently confirmed by the Senate — Dennis Shedd — was confirmed with enough opposition votes to signal that the Democrats had the solidarity to sustain a filibuster, should they so choose. Walsh, *supra* note 15. Second, both parties have been accused of improper obstruction in recent years. *See, e.g.,* Carl Tobias, *Federal Judicial Selection in the Fourth Circuit*, 80 N.C. L. REV. 2001, 2006-07 (2002). A strong case can be made that the recent obstructionist tactics began when the Democrat-controlled Senate blocked a number of nominations made by President George H. W. Bush. DENIS STEVEN RUTKUS, CONGRESSIONAL RESEARCH SERVICE, PRESIDENT BUSH’S JUDICIAL NOMINATIONS DURING THE 101ST AND 102D CONGRESSES 9-18 (1993) (listing Bush I Circuit Court nominees who were not confirmed). Furthermore, most (though perhaps not all) of the delays imposed by Republicans on Clinton nominees during the 1990s were quid pro quos for the Bush I nominees blocked by Senate Democrats. *See, e.g.,* Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 HARV. J.L. & PUB. POL’Y 467, 516 (1998) (describing Senator Charles Grassley’s hold on Merrick Garland in response to Democrat blocking of John Roberts to D.C. Circuit Court of Appeals). However, there is every reason to expect that the obstructionist tactics will only grow worse with each succeeding period of divided government. It is better, therefore, to address the problem now, when neither party will know whether it will be on the giving or receiving end of the next round of obstructionism, for it is only when the calculations of base partisan advantage are hidden behind a “veil of ignorance” that remedies can truly be addressed on their merits. *Cf.* JOHN RAWLS, *A THEORY OF JUSTICE* 136-38 (1971).

¹⁶ William H. Rehnquist, *2001 Year-End Report on The Federal Judiciary*, available at <http://www.supremecourtus.gov/publicinfo/year-end/2001year-endreport.html> (last visited Oct. 25, 2002).

¹⁷ Press Release, Reaction of Sen. Patrick Leahy, D-Vt., Ranking Member, Senate Judiciary Committee, to Chief Justice Rehnquist’s Year-End Report on the Federal Judiciary (Dec. 31, 1997), available at <http://leahy.senate.gov/press/199801/980101.html> (last visited Oct. 25, 2002). *See also* 143 CONG. REC. S6492 (1997) (statement of Sen. Leahy).

legislative and executive branches do not exceed the scope of authority delegated to them by the Constitution. As James Madison noted two years before the Constitutional Convention, the “Judiciary Department merits every care” because it “maintains private Right against all the corruptions of the two other departments. . . .”¹⁸

Of course, Senator Leahy and his Democratic colleagues in the Senate claim that they are simply fulfilling their own constitutional obligation to give “advice and consent” to the President in the nomination process. Moreover, they claim that their inaction is meant to insure that those nominees who are “hostile” to their view of what the law ought to be are not confirmed to lifelong seats on the bench. The resulting standoff reveals important differences of opinion over the role of the Senate in the appointment process. But that disagreement in turn masks a profound division over the proper role of government in general, and even the very notion of the rule of law. As is often the case, it is well to begin with a review of the founders’ understanding of the process in assessing this disagreement.

I. THE FRAMERS OF THE CONSTITUTION ASSIGNED TO THE PRESIDENT THE PRE-EMINENT ROLE IN APPOINTING JUDGES

A. *The President Alone Has the Power to Nominate*

Article II of the Constitution provides that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint. . . Judges of the Supreme Court [and such inferior courts as the Congress may from time to time ordain and establish].”¹⁹ As the text of the provision makes explicitly clear, the power to choose nominees — to “nominate” — is vested solely in the President.²⁰ The President also has the primary role to “appoint,” albeit with the advice and consent of the Senate. The text of the clause itself thus demonstrates that the role envisioned for the Senate was a much more limited one than is currently claimed.

The lengthy debates over the clause in the Constitutional Convention support this reading. According to Madison’s notes, an initial proposal

¹⁸ Letter from James Madison to Caleb Wallace (Aug. 23, 1785), in JAMES MADISON: WRITINGS 39, 42 (Jack N. Rakove ed., 1999).

¹⁹ U.S. CONST. art. II, § 2, cl. 2; art. III § 1.

²⁰ See also *Weiss v. United States*, 510 U.S. 163, 185 n.1 (1994) (Souter, J., concurring) (“[T]he President was. . . rightly given the sole power to nominate.”).

on July 18, 1787, to place the appointment power in the Senate was opposed because, as Massachusetts delegate Nathaniel Ghorum noted, "even that branch [was] too numerous, and too little personally responsible, to ensure a good choice." Ghorum suggested instead that Judges be appointed by the President with the advice and consent of the Senate, as had long been the method successfully followed in his home state. James Wilson and Gouverneur Morris of Pennsylvania, two of the Convention's leading figures, agreed with Ghorum and moved that judges be appointed by the President.²¹

In contrast, Luther Martin of Maryland and Roger Sherman of Connecticut argued in favor of the initial proposal, contending that the Senate should have the appointment power because, "[b]eing taken from all the States it [would] be best informed of the characters and most capable of making a fit choice."²² And Virginia's George Mason argued that the President should not have the power to appoint judges because (among other reasons) the President "would insensibly form local & personal attachments . . . that would deprive equal merit elsewhere, of an equal chance of promotion."²³

Ghorum replied to Mason's objection by noting that the Senators were at least equally likely to "form their attachments."²⁴ Giving the power to the President would at least mean that he "will be responsible in point of character at least" for his choices, and would therefore "be careful to look through all the States for proper characters." For Ghorum, the problem with placing the appointment power in the Senate was that "Public bodies feel no personal responsibility, and give full play to intrigue and cabal,"²⁵ while if the appointment power were given to the President alone, "the Executive would certainly be more answerable for

²¹ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 41 (Max Farrand ed., 1911).

²² *Id.*

²³ *Id.* at 42. Mason's objections were actually more complicated. He argued that the President should not appoint judges because the judges might try impeachments of the President. This problem was later avoided by having the Senate try impeachments with the Chief Justice of the Supreme Court merely presiding. See U.S. CONST. art. I, § 3, cl. 6. Gouverneur Morris, in replying to Mason, argued that impeachments should not be "tried before the Judges." 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 21, at 42. Mason also worried that "the seat of Govt. must be in some state," and the President would form personal attachments to people in that state, which might exclude citizens of other states from the federal bench — an understandable objection from an anti-federalist like Mason. *Id.* This problem was at least partly obviated by placing the capital in a federal district which would not be subject to the jurisdiction of any state. See U.S. CONST. art. I, § 8, cl. 17.

²⁴ 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 21, at 42.

²⁵ *Id.*

a good appointment, as the whole blame of a bad one would fall on him alone."²⁶

Seeking a compromise, James Madison suggested that the power of appointment be given to the President with the Senate able to veto that choice by a 2/3 vote.²⁷ Another compromise was suggested by Edmund Randolph, who "thought the advantage of personal responsibility might be gained in the Senate by requiring the respective votes of the members to be entered on the Journal."²⁸ These compromises were defeated, however, and the vote on Ghorum's motion — that the President nominate and with the advice and consent of the Senate, should appoint — resulted in a 4-4 tie.²⁹ The discussion was then postponed.

When the debate over the appointment power was renewed on July 21, the delegates repeated their previous arguments. One side argued that the President should be solely responsible for the appointments because he would be less likely to be swayed by "partisanship" — what Madison's generation called "faction"³⁰ — than the Senate. The other side opposed vesting the appointment power in the President for a similar reason: he would not know as many qualified candidates as the Senate would, and might still be swayed by personal considerations or nepotism.

The convention delegates were primarily concerned about improper influence in the appointment process, and most of the debate centered on whether assigning the appointment power to the President or to the

²⁶ *Id.* at 43.

²⁷ *Id.* at 42.

²⁸ *Id.* at 43.

²⁹ *Id.* at 44. The Convention voted by state. *Id.* at 8. Georgia abstained from this vote, and Rhode Island never sent a delegate. *Id.* at 44. Other states' delegates were sometimes absent for various reasons. For instance, although the Convention had been underway for more than a month, New Hampshire's delegates had still not arrived. *Id.* In addition, this debate came during one of the lowest points of the Convention, when the differences between the delegates were at their most severe. Two of New York's delegates, Robert Yates and John Lansing, left the Convention on July 10, opposed to all its proceedings. New York's third delegate, Alexander Hamilton, had left ten days earlier. See CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA* 115 (1966). The day Lansing and Yates left the Convention, Washington wrote to Hamilton that he "almost despaired" of the Convention's success. *Id.* at 140. Hamilton returned to the Convention in September and was New York's only signer. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 21, at 664; Lisa Marie DeCarolis, *From Revolution to Reconstruction*, at <http://odur.let.rug.nl/~usa/B/hamilton/hamil16.htm> (last visited Dec. 8, 2002). Thus, the vote on July 18 was Massachusetts, Pennsylvania, Maryland, and Virginia in favor of Ghorum's motion, and Connecticut, Delaware, North Carolina, and South Carolina against. 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 21, at 44.

³⁰ See THE FEDERALIST NOS. 10, 51 (James Madison).

Senate would serve as a better check on that influence. Those who, like Madison, argued that the President should have the sole power of appointment believed that this procedure would best prevent the political bargaining that would inevitably result from giving the power to a legislative body. As Edmund Randolph noted, “[a]ppointments by the Legislatures have generally resulted from cabal, from personal regard, or some other consideration than a title derived from the proper qualifications.”³¹ But those who opposed assigning the appointment power to the President, and instead wanted the Senate to have the power of appointment, did *not* argue that the Senate should have the power in order to control the development of case law or regulate judicial philosophy. Instead, they feared that the President would be “more susceptible to caresses and intrigues than the Senate,” as Oliver Ellsworth of Connecticut contended.³²

In the end, the Convention agreed that the President would make the nominations, and the Senate would have a limited power to withhold confirmation as a check against the President making appointments based on political patronage or nepotism. Governor Morris put the decision succinctly: “as the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security.”³³ As the Supreme Court subsequently recognized, “the Framers anticipated that the President would be less vulnerable to interest-group pressure and personal favoritism than would a collective body.”³⁴ No one argued that the Senate’s participation in the process should include second guessing the judicial philosophy of the President’s nominees or attempting to mold that philosophy itself. Indeed, such a suggestion was rejected as presenting a dangerous violation of the separation of powers, by allowing the Senate to control the President’s choices and, ultimately, intrude upon the judiciary itself. Madison, for instance, arguing in defense of his suggested compromise — that a 2/3 vote of the Senate could disqualify a judicial nomination, but otherwise giving the President a free hand — noted that:

The Executive Magistrate wd be considered as a national officer, acting for and equally sympathizing with every part of the U. States. If the 2d. branch alone should have this power, the Judges might be appointed by a minority of the people, tho’ by a majority, of the

³¹ 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 21, at 81.

³² *Id.*

³³ *Id.* at 539.

³⁴ *Edmond v. United States*, 520 U.S. 651, 659 (1997).

States, which could not be justified on any principle as their proceedings were to relate to the people, rather than to the States. . . .³⁵

Furthermore, as noted above, Ghorum thought giving too great a role to the Senate would result in “intrigue and cabal.”³⁶ In short, by assigning the sole power to nominate (and the primary power to appoint) judges to the President, the Convention specifically rejected a more expansive Senate role. The delegates believed that providing the Senate with such a role would undermine the President’s responsibility and, far from providing security against improper appointments, would actually lead to the very kind of cabal-like behavior that the Convention delegates feared.

This understanding of the appointment power was reaffirmed during the ratification debates. In *Federalist* 76, for example, Alexander Hamilton explained at length that “one man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices, than a body of men of equal or perhaps even of superior discernment.”³⁷ Noting that a President would “have fewer personal attachments to gratify, than a body of men who may each be supposed to have an equal number,”³⁸ — or as we would say today, that the President will be swayed by fewer political pressure groups than the Senate — Hamilton concluded:

In the act of nomination, [the President’s] judgment alone would be exercised; and as it would be his sole duty to point out the man who, with the approbation of the Senate should fill an office, his responsibility would be as complete as if he were to make the final appointment. There can, in this view, be no difference between nominating and appointing. The same motives which would influence a proper discharge of his duty in one case, would exist in the other. And as no man could be appointed but on his previous nomination, every man who might be appointed would be, in fact, his choice.³⁹

Note the very limited role that the Senate serves in Hamilton’s view — which, of course, echoes the views expressed at the Constitutional

³⁵ 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 21, at 81.

³⁶ See *supra* text accompanying note 25.

³⁷ THE FEDERALIST NO. 76, at 481 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

³⁸ *Id.*

³⁹ *Id.* at 482.

Convention by both those who defended and those who opposed giving the appointment power to the President. In the founders' view, the Senate acts as a check on the President's ability to fill offices with his own friends and family members rather than qualified nominees. Beyond that, the element of choice — the essence of the power to fill the office — belongs to the President alone. The Senate has the power to refuse nominees, but in the Constitutional scheme it has no proper authority in *picking* the nominees — either through direct choice or through logrolling and deal-making.

Hamilton was not so ignorant as to deny that deal-making would be the process by which things got done in the Senate. Legislatures, he noted, are very often prone to "bargain[s]" by which one party says to another, "'Give us the man we wish for this office, and you shall have the one you wish for that.'"⁴⁰ But this legislative propensity was, for Hamilton, a primary reason for giving the appointment power to the President instead of the Senate. Placing the nomination power in the President alone would, he argued, cut down on the degree to which political bargains in the Senate influenced the choice of candidates because, under the Constitutional scheme, all would understand that the power of appointment belonged to the President alone.

Commenting on the prevailing understanding, Joseph Story later described the President's power to nominate as almost absolute. "The president is to nominate," Story noted, "and thereby has *the sole power* to select for office."⁴¹ Story believed that the danger of vesting the appointment power in the Senate was greater than the danger of giving the power to the President alone, because

if he should . . . surrender the public patronage into the hands of profligate men, or low adventurers, it [would] be impossible for him long to retain public favour At all events, he would be less likely to disregard [public disapprobation], than a large body of men, who would share the responsibility, and encourage each other in the division of the patronage of the government.⁴²

⁴⁰ *Id.*

⁴¹ JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1525 (1833) (emphasis added).

⁴² *Id.* § 1523, at 375-76.

B. *The Framers Envisioned a Narrow Role for the Senate in the Confirmation Process*

Of course, there is more to the appointment power than the power to nominate, and the Senate unquestionably has a role to play in the *confirmation* phase of the appointment process. But the role envisioned by the framers was as a check on improper appointments by the President, one that would not undermine the President's ultimate responsibility for the appointments he made. As James Iredell, later a Justice of the Supreme Court, noted during the North Carolina Ratification Convention: "[a]s to offices, the Senate has no other influence but a restraint on improper appointments This, in effect, is but a restriction on the President."⁴³

The degree to which the founders viewed the power of appointment as being vested solely in the President can be gauged by the fact that John Adams objected even to the Senate's limited confirmation role, contending that it "lessens the responsibility of the president."⁴⁴ To Adams, the President should be *solely* responsible for his choices, and should alone pay the price for choosing unfit nominees. Under the current system, Adams complained, "Who can censure [the President] without censuring the senate. . . ?"⁴⁵ The appointment power is, Adams wrote, an "executive matter[]," which should be left entirely to "the management of the executive."⁴⁶ James Wilson echoed this view: "The

⁴³ James Iredell, Debate in the North Carolina Ratifying Convention (July 28, 1788), reprinted in 4 THE FOUNDERS' CONSTITUTION 102 (Philip B. Kurland & Ralph Lerner eds., 1987).

⁴⁴ See *infra* note 45.

⁴⁵ Letter from John Adams to Roger Sherman (circa July 20, 1789), reprinted in 4 THE FOUNDERS' CONSTITUTION, *supra* note 43, at 107. John Adams was a lifelong champion of judicial independence. See JOHN ADAMS, *The Independence of The Judiciary: A Controversy Between William Brattle And John Adams* (1773), reprinted in 2 THE WORKS OF JOHN ADAMS 511 (Easton Press, 1992). He was the author of the Massachusetts state constitution, which Ghorum cited as his precedent for giving the President the power to appoint, and the Senate to advise and consent on, judicial nominees. See DAVID MCCOLLOUGH, JOHN ADAMS 220-22 (2001) ("it was the establishment of an independent judiciary, with judges of the Supreme Court appointed, not elected . . . that Adams made one of his greatest contributions not only to Massachusetts, but to the country, as time would tell"); 1 PAGE SMITH, JOHN ADAMS 440 (1962) ("even with minor changes and deletions and one major change in the article dealing with religious freedom, the constitution [of Massachusetts] was Adams' handiwork").

⁴⁶ Letter from John Adams to Roger Sherman (circa July 20, 1789), reprinted in 4 THE FOUNDERS' CONSTITUTION, *supra* note 43, at 107. See also James Madison, Speech in Congress on the Removal Power (June 16, 1789), in JAMES MADISON: WRITINGS, *supra* note 18, at 453, 456 ("if any power whatsoever is in its nature executive it is the power of appointing, overseeing, and controlling those who execute the laws").

person who nominates or makes appointments to offices, should be known. His own office, his own character, his own fortune should be responsible. He should be alike unfettered and unsheltered by counselors."⁴⁷

In discussing the analogous situation of executive appointments — such as ambassadors or cabinet members — James Madison asked,

Why . . . was the senate joined with the president in appointing to office . . . ? I answer, merely for the sake of advising, being supposed, from their nature, better acquainted with the characters of the candidates than an individual; yet even here the president is held to the responsibility he nominates, and with their consent appoints; no person can be forced upon him as an assistant by any other branch of government."⁴⁸

The Senate's confirmation power therefore acts as a relatively minor check on the President's authority. It exists only to prevent the President from selecting a nominee who "does not possess due qualifications for office."⁴⁹ Essentially, the Senate's confirmation power exists to prevent the President from being swayed by nepotism or mere political opportunism.⁵⁰ Assessing a candidate's "qualifications for office" did not give the Senate grounds for imposing an ideological litmus on the President's nominees, at least where the questioned ideology did not prevent a judge from fulfilling his oath of office.

⁴⁷ James Wilson, *Lectures on Law* (1791), reprinted in 4 THE FOUNDERS' CONSTITUTION, *supra* note 43, at 110; see also John Stevens Jr., *Americanus* (Jan. 21, 1788), reprinted in 2 DEBATE ON THE CONSTITUTION 58, 59-60 (Bernard Bailyn ed., 1993) ("Instead of controlling the President still farther with regard to appointments, I am for leaving the appointment of all the principal officers under the Federal Government *solely* to the President. . .").

⁴⁸ James Madison, Speech in Congress on the Removal Power (May 19, 1789), reprinted in JAMES MADISON: WRITINGS, *supra* note 18, at 434, 436.

⁴⁹ STORY, *supra* note 41, § 1525, at 377.

⁵⁰ It might seem ironic, then, that President John Adams nominated Bushrod Washington, the nephew of his predecessor, George Washington, to the Supreme Court in 1798. But Justice Washington was easily confirmed and served a long and successful term on the Supreme Court. David A. Faber, *Justice Bushrod Washington and the Age of Discovery in American Law*, 102 W. VA. L. REV. 735, 735, 751 (2000). His most famous opinion, *Corfield v. Coryell*, was an important early case interpreting the Privileges and Immunities Clause in Article IV. *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823); see also *Saenz v. Roe*, 526 U.S. 489, 524-25 (1999) (Thomas, J., dissenting); *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 281 n.10 (1985).

C. *Ideology Was Not Considered a Proper Reason for Refusing Confirmation, as Long as It Did Not Prevent the Nominee From Fulfilling the Judicial Oath*

In the founders' view, then, the Senate's power in the confirmation of judicial appointees was extremely limited. It existed primarily, if not solely, to prevent the President from exercising his power in an improper manner. Ideology — at least ideology of the kind that is unrelated to a candidate's ability to fulfill his oath of office — simply had no place in the Senate's decision. As Hamilton wrote:

It will be the office of the President to *nominate*, and, with the advice and consent of the Senate, to *appoint*. There will, of course, be no exertion of *choice* on the part of the Senate. They may defeat one choice of the Executive, and oblige him to make another; but they cannot themselves *choose* — they can only ratify or reject the choice of the president.⁵¹

It was not that the founders believed the political views of judges were irrelevant; they were not that naïve. But in their view, the President was alone responsible for his appointments, and, in turn, the ideology of those he appointed.⁵²

There is, of course, an early case that suggests the Senate believed that it was appropriate to reject nominees because of their political ideology. In 1795, John Rutledge of South Carolina, former delegate to the Constitutional Convention, was nominated by President Washington to be Chief Justice of the United States. Although Rutledge took his seat and presided over two cases, he was never confirmed.

Rutledge was a vocal opponent of the controversial Jay Treaty, negotiated by President Washington's envoy to England — and first Chief Justice of the United States — John Jay.⁵³ Shortly after his nomination, Rutledge delivered an emphatic and somewhat imprudent

⁵¹ THE FEDERALIST NO. 66, at 434 (Benjamin Fletcher Wright ed., 1961).

⁵² This is not to say that the founding generation did not use the confirmation power as a political tool. It and subsequent generations have done so very frequently. See Jeffrey K. Tulis, *The Appointment Power: Constitutional Abdication: The Senate, The President, and Appointments to the Supreme Court*, 47 CASE W. RES. L. REV. 1331 (1997). But in these confirmation battles, the Senate more often used its power to block nominees in opposition to the President's policies, not in order to enforce a particular vision of the Constitution. In the original understanding, judicial *philosophy* was a matter for the President's consideration. In those unusual cases in which the Senate *did* attempt to enforce an orthodoxy on the Court, the Senate was subjected to severe criticism.

⁵³ For more on the Jay Treaty, see THOMAS A. BAILEY, *A DIPLOMATIC HISTORY OF THE AMERICAN PEOPLE* 75-82 (7th ed. 1964); JAMES MACGREGOR BURNS, *THE VINEYARD OF LIBERTY* 103-04 (Alfred A. Knopf ed., 1982).

attack on the Treaty, which was supported by the Federalist majority in Congress. Rutledge's appointment was rejected shortly thereafter on December 15, 1795, almost immediately after Congress resumed its work after a recess.⁵⁴ Although the Senate's refusal to confirm Rutledge might in part be due to questions about his mental stability,⁵⁵ his opposition to the Jay Treaty undoubtedly played an important role in the vote. Thomas Jefferson complained privately that "[t]he rejection of Mr. Rutledge by the Senate is a bold thing; because they cannot pretend any objection to him but his disapprobation of the treaty. It is, of course, a declaration that they will receive none but Tories hereafter into any department of the government."⁵⁶

Jefferson's supporters in Congress responded in kind after Jefferson was elected President. Attempting to expand Jefferson's own control over the courts beyond what was permitted in the normal course of filling vacancies, the Jeffersonian Republicans brought articles of impeachment against Supreme Court Justice Samuel Chase, a Federalist opponent of the administration.⁵⁷ Jefferson's supporters in Congress had

⁵⁴ Washington's nomination of Rutledge was delivered to the Senate on December 10, 1795. See S. EXEC. J. at 194 (Dec. 10, 1795), available at [http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field\(DOCID+@lit\(ej001285\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(ej001285))). The nomination was delayed and finally rejected on December 15. See *id.* at 195-96 (Dec. 15, 1795), available at [http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field\(DOCID+@lit\(ej001289\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(ej001289))). No official record exists of floor debates on the nomination.

⁵⁵ See David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995, 999 (2000) (noting that some contemporary observers claimed that "after the death of his Wife, his mind was frequently so much deranged, as to be in a great measure deprived of his senses"). As Garrow notes, "Professor Haw concludes that the nomination 'was defeated primarily for political reasons,' but even in the weeks immediately preceding the Senate's vote, Chief Justice Rutledge's mental health appears to have taken a very decided turn for the worse. In November, while riding circuit in North Carolina, Rutledge became seriously ill, and his illness exacerbated his depression to such an extent that on his way home to Charleston Rutledge apparently tried 'to drown himself at Camden' but without success." *Id.* at 1000; see also Letter from James Madison to Thomas Jefferson (Feb. 7, 1796), in 2 THE REPUBLIC OF LETTERS 917, 919 (James Morton Smith ed., 1995) ("There is some reason to think that Jno. Rutledge is not right in his mind."). But see Matthew D. Marcotte, Note, *Advice and Consent: A Historical Argument for Substantive Senatorial Involvement in Judicial Nominations*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 519, 538 (2001/2002) (arguing that allegations of Rutledge's insanity were tool in partisan campaign against Rutledge).

⁵⁶ Letter from Thomas Jefferson to William Branch Giles (Dec. 31, 1795), in 9 WRITINGS OF THOMAS JEFFERSON 318 (A. Bergh ed., 1907).

⁵⁷ David Mayer argues that Jefferson "gave only lukewarm support" to the attempt to impeach Chase. DAVID MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON* 273-74 (1994). Dumas Malone shares this view. DUMAS MALONE, *JEFFERSON THE PRESIDENT: FIRST TERM, 1801-1805*, at 468 (1970). For an interesting evaluation of the impeachment power as a mechanism for redressing the problem of faction, see Jonathan Turley, *Senate*

been successful in impeaching New Hampshire District Judge John Pickering for bad behavior — Pickering was insane⁵⁸ — but success in impeaching him emboldened members of Jefferson's party to impeach Justice Chase, who had been appointed in 1796 by John Adams, and who had attempted to enforce the notorious Sedition Act.⁵⁹ Articles of impeachment against Chase were drawn up by Virginia Congressman John Randolph of Roanoke,⁶⁰ who was immediately challenged on the floor of the House. "[T]he streams of justice should be preserved pure and unsullied," said one Congressman:

The Judicial department ought to attach to itself a degree of independence. I am of opinion that this House possesses no censorial power over the Judicial department generally, or over any judge in particular. They have alone the power of impeaching them; and when a judge shall be charged with flagrant misconduct . . . I shall be at all times prepared to carry the provisions of the Constitution into effect, in virtue of which great transgressors are punishable for their crimes If the resolution pass in its present form, it appears to me that we shall thereby pass a vote of censure on this judge, which neither the Constitution nor laws authorize.⁶¹

Popular outcry against Chase's impeachment was swift. "The simple truth is," one newspaper said, that "Mr. Jefferson has been determined from the first to have a judiciary, as well as a legislature, that would second the views of the executive."⁶² "I am afraid," said another Congressman, "that unless great care be taken the doctrine of judicial independence will be carried so far as to become dangerous to the liberties of the country."⁶³ Randolph insisted that he was seeking impeachment based on Chase's behavior, not for any ideological reasons. In a charge to a grand jury in a Sedition Act case in Baltimore, Chase had let fly with a political screed against the Jefferson Administration, and

Trials And Factional Disputes: Impeachment As A Madisonian Device, 49 DUKE L.J. 1 (1999).

⁵⁸ President Jefferson referred the question of Judge Pickering's impeachment to the Congress on February 4, 1803. See 12 ANNALS OF CONG. 460 (1803). The House reported articles of impeachment to the Senate on March 2. *Id.* at 642. The Senate took up the impeachment proceedings on October 26. 13 ANNALS OF CONG. 315 (1803). The actual trial began January 4, 1804. *Id.* at 317.

⁵⁹ Act of July 14, 1798, ch. 74, 1 Stat. 596 (1798).

⁶⁰ Randolph was a cousin of Jefferson, but while he started out as a leading member of Jefferson's party, he ended up being Jefferson's chief antagonist in the House. See ALF J. MAPP, JR., THOMAS JEFFERSON: PASSIONATE PILGRIM 41-42 (1991).

⁶¹ 13 ANNALS OF CONG. 807 (1804) (statement of Mr. Elliott).

⁶² MALONE, *supra* note 57, at 469 (quoting *New York Evening Post*, Jan. 20, 1804).

⁶³ 13 ANNALS OF CONG. 808-09 (1804).

supporters of impeachment argued that this demonstrated Judge Chase's own ideological bias.⁶⁴ Yet few were persuaded. To the Federalists, the Chase impeachment was motivated purely by the political ideology of the Jeffersonians. As John Quincy Adams wrote in his diary, "this was a party prosecution."⁶⁵

The Senate ultimately voted *not* to convict Justice Chase, and Congress backed away from the ideological litmus test that threatened the independence of the judiciary. As one commentator has noted, "[a]t that early stage of the republic, a successful impeachment of a Supreme Court Justice innocent of criminal activity probably would have left the judicial branch of the federal government forever dependent on the legislative."⁶⁶ As a result, the use of impeachment to enforce political orthodoxy on the Supreme Court was abandoned. In 1970, when then-Congressman Gerald Ford denounced Justice William O. Douglas on the floor of the House and called for his impeachment, the suggestion was doomed from the start.⁶⁷

⁶⁴ MAYER, *supra* note 57, at 268, discusses Jefferson's view of the proper role of ideology in the judiciary — a view too complex to address fully here. In brief, "Jefferson's constitutional theory . . . relied upon the independence of the judiciary as a guardian of individual rights against executive and legislative tyranny; [so] his quarrel with the judiciary was that under the control of the Federalists, it failed to fulfill this vital function and had become the destroyer rather than the protector of the Constitution and citizens' liberties." *Id.* at 268. As I argue *infra*, section II, today's attempt by Senate liberals to delve into the ideology of judicial nominees gets this Constitutional theory backwards: their quarrel with the judiciary is precisely that it threatens to place roadblocks in the way of the left's attempt to increase government control over citizens' lives. Where Jefferson believed the judiciary should not be independent "of the will of the people," modern liberals want the judiciary dependent on the will of *political interest groups*. Witness the liberal reaction to the recall of California Chief Justice Rose Bird — an expression of "the will of the people" that the left denounced as a corruption of the rule of law by thoughtless mob rule. See generally Erwin Chemerinsky, *Evaluating Judicial Candidates*, 61 S. CAL. L. REV. 1985 (1988). Witness also the notion of a "living Constitution," by which unelected judges exercise the power to nullify duly enacted laws based on their own unaccountable consciences rather than any specific constitutional prohibition.

⁶⁵ THE DIARY OF JOHN QUINCY ADAMS 1794-1845, at 35 (Allan Nevins ed., 1928). Adams, of course, would become much more familiar with such "party prosecutions" late in his career, when the House of Representatives attempted to expel him for his outspoken opposition to slavery. See WILLIAM LEE MILLER, ARGUING ABOUT SLAVERY 429-44 (1996).

⁶⁶ MAPP, *supra* note 60, at 89.

⁶⁷ See generally BOB WOODWARD & SCOTT ARMSTRONG, THE BROTHERS 75-79 (1979).

II. THE CURRENT STATE OF THE CONFIRMATION POWER

A. *Why Ideology Matters to the Left*

Despite the original understanding of the Senate's limited role in the confirmation process, and despite the lessons learned from these early historical flirtations with the use of political ideology as a criteria for judicial confirmation, the Senate today appears bent on using its limited confirmation power to impose ideological litmus tests on presidential nominees. In this way, the Senate seems to be arrogating to itself the nomination as well as the confirmation power.

The Senate's expanded use of its confirmation power should perhaps come as no surprise. As a result of the growing role of the judiciary, the Senate's part in the nomination process has become a powerful political tool. And, like any powerful political tool, it is the subject of a strenuous competition among interest groups every time the President seeks to fill a judicial vacancy. Nevertheless, it is a tool that poses grave dangers to our constitutional system of government. In its current manifestation, the Senate's ideological use of the confirmation power threatens the separation of powers in three ways. First, it undermines the responsibility for appointments given to the President. Second, it demands of judicial nominees a commitment to a role not appropriate to the courts. Third, and, perhaps most importantly, the Senate's ideological use of the confirmation power threatens the separation of powers by threatening the independence of the judiciary itself.

The reason that some Senators are so intent on delving into the judicial philosophy of nominees is deeply connected to their view of the proper role of the judiciary in American government. Viewing the Constitution as a "living document," modern-day liberals see the Court as a place where the Constitution is stretched, shaped, cut, and rewritten in order to put in place so-called "progressive" policies that could never emerge from the legislative process. Of course, the Constitution is based on a profoundly different notion of law than is modern liberalism. It is no wonder, therefore, that President Franklin D. Roosevelt, the godfather of the Welfare State that lies at the center of modern liberalism, found it necessary to resort to the highly questionable Court-Packing Plan of 1936 in order to uphold his vision of a new political order.⁶⁸ The Constitution simply was not designed to accommodate such things as the massive

⁶⁸ See, e.g., William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347.

redistributions of wealth or bureaucratic restrictions on individual liberty that Roosevelt was proposing. On the contrary, the Constitution was designed precisely to prevent such things.⁶⁹ As Rexford Tugwell, one of the principal architects of the New Deal, admitted, "To the extent that these [New Deal policies] developed, they were tortured interpretations of a document . . . intended to prevent them."⁷⁰ So the Constitution was essentially re-written by interpretation, culminating in the great "Switch in Time That Saved Nine," in which a century and a half of precedent was reversed and the Constitution stretched and torn out of shape to accommodate the New Deal programs.⁷¹

Judicial ideology is, therefore, critically important to modern-day liberals because any honest reading of the Constitution reveals that it is incompatible with their scheme of government. Senator Schumer, for example, has been quite candid in acknowledging that his opposition to President Bush's judicial nominees is based on the fact that they respect and will enforce the Constitution's limitations on the power of Congress. "Elected officials," Senator Schumer told the press on May 9, 2002,

should get the benefit of the doubt with respect to policy judgments and courts should not reach out to impose their will over that of elected legislatures Many of us on our side of the aisle are acutely concerned with the new limits that are now developing on our power to address the problems of those who elect us to serve — these decisions affect, in a fundamental way, our ability to address major national issues like discrimination against the disabled and the aged, protecting the environment, and combating gun violence.⁷²

⁶⁹ See CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 324 (1935) ("The Constitution was essentially an economic document based upon the concept that the fundamental private rights of property are anterior to government and morally beyond the reach of popular majorities.").

⁷⁰ See Roger Pilon, *The Purpose and Limits of Government* 31 (Cato Institute 1999) (quoting Rexford G. Tugwell), available at <http://www.cato.org/pubs/catosletters/cl-13.pdf>.

⁷¹ See also *United States v. Carolene Products*, 304 U.S. 144, 152 (1938); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30-31 (1937); *West Coast Hotel v. Parrish*, 300 U.S. 379, 398 (1937). See generally HADLEY ARKES, *THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS* (1994); THOMAS FLEMING, *THE NEW DEALER'S WAR: FRANKLIN D. ROOSEVELT AND THE WAR WITHIN WORLD WAR II* 59-62 (2001); BERNARD SEIGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (1980); Timothy Sandefur, *The Common Law Right to Earn A Living*, 75 *INDEPENDENT REVIEW* 51 (Summer 2001).

⁷² Press Release, Senator Charles E. Schumer, Clinton Judicial Nominees to Set the Record Straight at Court's Subcomm. Hearing on "Ghosts of Nomination Past" (May 9, 2002), available at http://schumer.senate.gov/SchumerWebsite/pressroom/press_releases/PR00978.html (last visited Jan. 13, 2003).

This is not to say that ideology should never play a role in the confirmation process. Some ideologically-based views render it impossible for a nominee who holds them to fulfill his oath of office. Consider, for instance, Judge Harry Pregerson, who, when nominated to the Court of Appeals for the Ninth Circuit by President Carter, was asked whether he would follow his conscience or the law, if the two came into conflict. "I would follow my conscience," he replied.⁷³ That statement, grounded in Pregerson's own ideology, should easily have been grounds for disqualification. Yet Pregerson was not only confirmed to the bench, but roundly praised for this statement, despite the fact that it embodied a belief that threatens to undermine the very essence of constitutionalism and the rule of law.⁷⁴

Contrast this with Justice Antonin Scalia, who in a recent speech said that he was glad the Pope had not declared the Catholic Church's opposition to the death penalty a matter of infallible Church doctrine. Justice Scalia explained that had the Pope done so, Justice Scalia would, as a practicing and committed Catholic, feel compelled to resign, unable to abide by his oath to enforce the law. In his view,

the choice for the judge who believes the death penalty to be immoral is resignation, rather than simply ignoring duly enacted constitutional laws and sabotaging death penalty cases. He has, after all, taken an oath to apply the laws and has been given no power to supplant them with rules of his own This dilemma, of course, need not be confronted by a proponent of the "living Constitution," who believes that it means what it ought to mean. If the death penalty is (in his view) immoral, then it is (hey, presto!) automatically unconstitutional, and he can continue to sit while nullifying a sanction that has been imposed, with no suggestion of its unconstitutionality, since the beginning of the Republic. (You can see why the "living Constitution" has such attraction for us judges.)⁷⁵

⁷³ John Johnson, *Judge Harry Pregerson Choosing Between Law and His Conscience*, LOS ANGELES TIMES, May 3, 1992, at B5.

⁷⁴ In 1992, Judge Pregerson ordered a stay to the execution of the serial killer Robert Alton Harris, the *fourth* such stay that was issued on the night of Harris' scheduled execution. The result was an unprecedented decision from the Supreme Court of the United States, ordering that "no further stays of Robert Alton Harris' execution shall be entered by the federal courts except upon order of this Court." *Vasquez v. Harris*, 503 U.S. 1000 (1992); see also Charles Fried, *Impudence*, 1992 SUP. CT. REV. 155, 188-92.

⁷⁵ Antonin Scalia, *God's Justice and Ours*, FIRST THINGS, May 1, 2002, at 17.

Ideology understood in this light is, of course, relevant in selecting a judicial nominee. Broadly understood, such "ideology" would encompass a nominee's honor and character, which are necessary to fulfill the oath of office.⁷⁶ A nominee who for ideological reasons cannot "support and defend the Constitution of the United States" would be unfit for office because he would lack the *qualifications* necessary for the position. In fact, although we tend to take the concept of an oath lightly today, James Madison wrote that under the Constitution, "*the concurrence of the Senate* chosen by the State Legislatures, in appointing the Judges, *and the oaths* and official tenures of these, with the surveillance of public Opinion, [would be] relied on as *guarantying their impartiality . . .*"⁷⁷ This is very different than demanding that a nominee toe the line of leftist jurisprudence.

Today, Senators inquire into a nominee's ideology for precisely the opposite reason: to ensure that the nominee will *not* abide by the Constitution or his oath to support it.⁷⁸ In addition to the danger that this presents to the fair resolution of controversies in constitutional law, it presents a great danger to another vital principle of American government: separation of powers. In *Federalist* 78, Alexander Hamilton described the judiciary as the "least dangerous branch" of the new federal government:

[T]he general liberty of the people can never be endangered [by the judiciary] . . . so long as the judiciary remains truly distinct from both the legislature and the Executive [L]iberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments . . . [A]ll the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent

⁷⁶ The oath of office is prescribed in U.S. CONST. art. VI, § 1, cl. 3.

⁷⁷ Letter from James Madison to Thomas Jefferson (June 27, 1823), in JAMES MADISON: WRITINGS, *supra* note 18, at 798, 801 (emphasis added).

⁷⁸ The most strident criticism leveled against Fifth Circuit nominee Priscilla Owen, for example, was based on the fact that as a Texas Supreme Court Justice, she had *not* voted to invalidate a Texas law requiring parental notification (with the requisite judicial bypass mechanism) before a minor girl could receive an abortion even though the Texas law was in full conformity with prevailing Supreme Court precedent. See, e.g., Alliance for Justice, *Texas Supreme Court Justice Priscilla Owen, Nominee to the U.S. Court of Appeals for the Fifth Circuit* 16-19 (October 2002), available at http://www.allianceforjustice.org/judicial/research_publications/research_documents/owen_full_report.pdf (last visited Dec. 9, 2002); *Judicial Nominations*, 107th Cong. (2002) (statement of Sen. Orin Hatch), available at http://judiciary.senate.gov/member_statement.cfm?id=322&wit_id=51 (last visited Dec. 9, 2002).

separation.⁷⁹

The enforcement of political orthodoxy on the bench is creating precisely this dependence, strengthened by demands for judicial “deference” to Congressional acts that exceed the limited scope of the federal government’s Constitutional powers.

“The complete independence of the courts of justice is peculiarly essential in a limited Constitution,” wrote Hamilton. The courts alone could “declare all acts contrary to the manifest tenor of the Constitution void.”⁸⁰ But the current attempt to block judges who believe in limited government is not motivated by a desire to maintain inviolate the “exceptions to the legislative authority.”⁸¹ It is motivated by a desire to ensure that the judiciary will interpret the Constitution in a way most suited to *extend* that legislative authority as far as possible.

In other words, the current attempt to use the Senate’s confirmation power to regulate the ideology of judges is part of an overall trend which is turning the *judiciary* into a second *legislative* branch. The fundamental differences between the legislative and the judicial branch is that in the former, parties lobby, contend, vote, and decide on procedures that may infringe on the private rights of individuals. The courts are supposed to act as a “countermajoritarian” mechanism to ensure that the legislature does not engage in “the invasion of private rights . . . from acts in which the Government is the mere instrument of the major number of the constituents.”⁸² The very existence of an independent judiciary is premised on the fact that the majority is not always right, and that a body independent of the legislative majority is necessary to secure individual rights.⁸³ Allowing the Senate — elected by the majority — too great a hand in regulating the federal bench risks eroding the judiciary’s power to provide this most crucial check against the possibility of majority tyranny.

⁷⁹ THE FEDERALIST NO. 78, at 491 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in JAMES MADISON: WRITINGS, *supra* note 18, at 418, 421.

⁸³ See, e.g., James Wilson, Debate in Pennsylvania Ratifying Convention (Dec. 4, 1787), reprinted in 4 THE FOUNDERS’ CONSTITUTION, *supra* note 43, at 139.

B. The Dangerous Tactics of Today's Judicial Confirmation Process

One of the most disturbing manifestations of the new process is the growing tendency of the Senate to *refuse even to hold hearings* for nominees. This practice suggests not that the nominees are too far outside the ideological mainstream to be confirmed, but rather that the Senators fear to vote down the nominees on ideological grounds, precisely because they are *not* outside the ideological mainstream.⁸⁴

Even those who argue that the Senate should take a large role in molding the judiciary must acknowledge that blocking nominations by refusing to hold hearings is an inappropriate tactic. The Senate has the power to advise and consent to a President's nominees. The refusal to hold hearings at all is not advice or consent; it is political blackmail which perpetuates the critical number of vacancies on the federal bench. In fact, as one author has noted, senatorial inaction is contrary to a resolution passed by the very first Senate in 1789. "When nominations shall be made in writing by the President of the United States to the Senate, a future day shall be assigned, unless the Senate unanimously direct otherwise, for taking them into consideration . . . and the Senators shall signify their assent or dissent by answering, *viva voce*, ay or no."⁸⁵

Moreover, the current strategy of delay that appears to be the mainstay of the present Senate Judiciary Committee threatens to intrude upon the Executive's powers, in violation of core separation of powers principles. Improper attempts to impose ideological litmus tests by voting down the President's nominees could be countered by re-nomination of like-minded individuals, but the outright refusal to hold hearings, or to refer nominees to the floor of the Senate for a vote, deprives the President of even this remedial power. Such a tactic eventually forces the President to accede to demands to nominate individuals more to the liking of individual Senators. The delay tactics

⁸⁴ For example, Professor Michael McConnell, one of the leading constitutional law scholars in the country, did not receive a hearing until September 18, 2002, more than 16 months after his nomination and despite the fact that he had received a unanimous "well qualified" rating from the American Bar Association. Even then, the Senate Judiciary Committee refused to vote on the nomination until after the November 2002 election. When the nomination was finally permitted a vote on the Senate floor, Professor McConnell was confirmed by unanimous consent. U.S. SENATE COMM. ON THE JUDICIARY, CONFIRMED NOMINEES, available at http://judiciary.senate.gov/nominations_appeals.cfm (last visited Dec. 9, 2002); American Bar Ass'n, *Ratings of Article III Judicial Nominees, 107th Congress*, available at <http://www.abanet.org/scfedjud/ratings.pdf> (last visited Dec. 9, 2002).

⁸⁵ See Lee Renzin, Note, *Advice, Consent, and Senate Inaction: Is Judicial Resolution Possible?* 73 N.Y.U. L. REV. 1739, 1755 (1999) (quoting 1 Exec. J. 19).

appear designed, then, to transfer the nomination power from the President to the Senate, a result that the founders greatly feared.⁸⁶

It is important to note an interesting claim made by some Senate Democrats in defense of their refusal to hold hearings on President Bush's nominees. Senator Leahy, for example, has argued that they have actually confirmed quite a lot of judges, and that Republicans are simply lying when they complain about the slow pace of Senator Leahy's Judiciary Committee.⁸⁷ But, in fact, most of the judges that have been confirmed are *district* court judges, a very important component of the judicial system, to be sure, but not the final word on the law, the way circuit judges are in many cases. Of the eleven circuit court nominations President Bush made on May 9, 2001, only six had received hearings by October 9, 2002 — seventeen months after the nominations were made. Two of these, Judges Barrington Parker, Jr. and Roger Gregory, were confirmed relatively quickly⁸⁸ because they were *Clinton* nominees, whom President Bush re-nominated in an apparent show of bipartisanship.⁸⁹ The others, Judge Charles Pickering, Justice Priscilla

⁸⁶ The arrogation of the nomination power to individual Senators is also evident in new structures that have been devised for the selection of district court judges. Patterned after the commissions established by Gerald Parsky in California with the enthusiastic support of Senators Feinstein and Boxer, these "vetting" commissions essentially have veto power over candidates submitted for the President's consideration. Because the committees are structured so that block voting by the Feinstein and Boxer appointees can prevent any candidate's name from being forwarded to the White House, the commissions amount to much more than "advice" to the President. They represent a transfer of the nomination power itself to individual Senators who are not even members of the President's own political party. Reportedly, the appointees of Senators Feinstein and Boxer have used this newfound power to question candidates about their religious views, in violation of the Constitution's ban on religious tests, and about their positions on cases likely to come before the candidate as judge, in violation of the Canons of Judicial Ethics. See generally John Fund, *Boxer Rebellion*, OPINION JOURNAL FROM THE WALL ST. J. (June 5, 2002), available at <http://www.opinionjournal.com/diary/?id=110001801> (last visited Dec. 9, 2002).

⁸⁷ See *Judicial Nominations*, 107th Cong. (2002) (statement of Sen. Patrick Leahy, Member, Senate Comm. on the Judiciary), available at http://judiciary.senate.gov/member_statement.cfm?id=268&wit_id=50 (last visited Jan. 13, 2003).

⁸⁸ Judge Parker was nominated on May 9, 2001 and confirmed on October 11, 2001. David G. Savage, *Bush's Judicial Nominees Go 28 for 80 in The Senate*, LOS ANGELES TIMES, Dec. 31, 2001, at A12. Judge Gregory was nominated on May 9, 2001 and confirmed on July 20, 2001. Jonathan Ringel, *Senate Confirms Three Bush Judicial Nominees*, THE LEGAL INTELLIGENCER, July 24, 2001, at 4.

⁸⁹ See Press Release, President George W. Bush, Remarks by the President During Federal Judicial Appointee Announcement (May 9, 2001), available at <http://www.whitehouse.gov/news/releases/2001/05/20010509-3.html> (last visited Dec. 9, 2002); see also Amy Goldstein & Helen Dewar, *11 Judicial Nominees Names; Bush Urges Senate to Rise Above Partisan Bitterness*, WASHINGTON POST, May 10, 2001, at A2 (quoting

Owen, Professor Michael McConnell, and former deputy Solicitor General Miguel Estrada, waited over a year for their hearings, and then were given hearings only after far-left interest groups thought they had dug up enough dirt to scuttle the nominations.⁹⁰ The Senate Judiciary Committee refused, by straight party-line vote, to report Judge Pickering and Justice Owen out of committee. It appears that the Committee is poised to do the same with Michael McConnell and Miguel Estrada, both of whom have received unanimous well-qualified ratings from the American Bar Association.⁹¹ The remaining five have not even received a hearing, 519 days as of the date of this hearing and counting since their nominations were first announced.⁹²

Even assuming that the refusal to confirm President Bush's nominees is an exercise of legitimate congressional power to protect the country from unqualified judges, one cannot justify the *refusal to hold hearings* or have confirmation votes by the full Senate. If the President's nominees are so dangerous, the Senate should hold the hearings and vote them down. The fact, however, is that these nominees are, in general, of impeccable character, many with outstanding legal minds and all of whom have received "well-qualified" or "qualified" ratings from the

then Senate Minority Leader Thomas Daschle as "pleased that the White House [had] chosen to work with [Democrats] on the first group of nominations" and Judiciary Committee ranking Democrat Patrick Leahy as "encouraged" by President's choices).

⁹⁰ See, e.g., Alliance for Justice, *About Judicial Selection Project*, available at <http://www.allianceforjustice.org/judicial/about/index.html> (last visited Dec. 9, 2002); People for the American Way, *The Dissents of Priscilla Owen: A Judicial Nominee Who Would Make the Law, Not Interpret It*, available at <http://www.pfaw.org/pfaw/general/default.aspx?oid=1323> (last visited Dec. 9, 2002); Statement of Senator Orin Hatch, *supra* note 78 (describing "organized and untruthful opposition" to Justice Priscilla Owen" from usual leftist, Washington special interest groups").

⁹¹ American Bar Ass'n, *Ratings of Article III Judicial Nominees*, *supra* note 84. As previously noted, Michael McConnell was reported out of committee on a voice vote and unanimously confirmed by the Senate following the November 5, 2002 election at which Republicans regained a majority in the Senate. CONFIRMED NOMINEES, *supra* note 84. Miguel Estrada has not yet received a vote in the Judiciary Committee. U.S. SENATE COMM. ON THE JUDICIARY, PENDING NOMINEES, available at http://judiciary.senate.gov/nominations_appeals.cfm (last visited Dec. 9, 2002).

⁹² John Roberts, one of the leading Supreme Court practitioners of the day, was nominated to the D.C. Circuit for the second time, and his nomination by the elder Bush was stalled until it died with the expiration of the Congressional session following President Bush's defeat to Bill Clinton in 1992. Terrence Boyle was nominated to the Fourth Circuit for the second time and his nomination by the elder Bush was also stalled until it died after the 1992 election. Dennis Shedd was nominated to the Fourth Circuit and subsequently confirmed after the November 2002 election. Deborah Cook and Jeffrey Sutton were both nominated to the Sixth Circuit. See PENDING NOMINEES, *supra* note 91.

American Bar Association.⁹³ Senator Leahy refuses to hold hearings precisely because, if he did so, it would become clear that there are no legitimate objections to the President's nominees and that, in fact, the nominees enjoy majority support in the Senate, including support by some Democrats. The delays are meant as a starvation campaign — or, worse, to bide time for radical interest groups to discover (or invent) grounds for objecting to the nominees.⁹⁴

This tactic, too, has been previously addressed by the Senate. After Andrew Jackson defeated John Quincy Adams for President in 1828, Adams had several months as a lame duck President in which to nominate Judges to the federal bench. Because the President no longer had the confidence of the people, several Senators wanted to postpone consideration of John J. Crittendon, whom President Adams had nominated as an Associate Justice of the Supreme Court. Although the Senate ultimately rejected the Crittendon nomination, the arguments made against the delay were profoundly important and ultimately carried the day throughout most of this nation's history. Senator Holmes argued, for example, that while the Senate had a right to deliberate and evaluate the character and qualifications of a candidate in performing its advice and consent role, it had "no constitutional power to resist its execution." Delays beyond what were necessary to deliberate about the nominee's qualifications were, he asserted, "an *abuse* of a discretion" given by the Constitution.⁹⁵ Senator Johnson echoed the sentiment, stating that "the duty of the Senate is confined to an inquiry into the character and qualifications of the person, and to a decisive action upon the nomination, in a reasonable time."⁹⁶ Johnson made the following dire prediction: "The moment you depart from the constitution, and begin an attack upon the other departments of the Government, you commence a conflict of authority where there is no arbiter, which will end in perpetual collision, or in the destruction of the Government."⁹⁷ That, and a similar prediction by Senator Chambers — "Once let discretion be adopted as the rule of conduct for those in power, and no man can prescribe limits to the mischief which must ensue"⁹⁸ — should give us all pause at the actions, or rather inaction, currently being

⁹³ American Bar Ass'n, *Ratings of Article III Judicial Nominees*, *supra* note 84.

⁹⁴ See, e.g., Statement of Senator Orin Hatch, *supra* note 78 (describing false accusations against Justice Priscilla Owen).

⁹⁵ 5 REG. DEB. 86, 88 (1829).

⁹⁶ *Id.* at 92.

⁹⁷ *Id.*

⁹⁸ *Id.* at 86.

undertaken in the Senate.

Another dangerous change that has occurred in the confirmation process involves an expansion of the so-called "blue slip" policy — the practice whereby home state Senators are essentially given a veto power of the President's nominees to positions in that state.⁹⁹ Although the policy has always been constitutionally suspect,¹⁰⁰ as historically exercised, it at least had some grounding in the original purpose that underlay the advice and consent clause. Home state Senators were extended this courtesy because it was assumed that they would have first-hand knowledge of nominees from their home state. Such insider knowledge would allow them to more adequately judge nominees' character and fitness for office — just the kind of role envisioned by the framers of the clause.¹⁰¹ More importantly, the blue slip practice, again as historically exercised, had natural limits protecting against its abuse. A Senator who used the blue slip too often could easily find that the President simply nominated a judge from another state in the circuit.¹⁰²

⁹⁹ See Brannon P. Denning, *The "Blue Slip": Enforcing The Norms of the Judicial Confirmation Process*, 10 WM. & MARY BILL RTS. J. 75, 96 (2001).

¹⁰⁰ See *id.* at 88. The advice and consent power is given to the Senate as a body, not to individual Senators. U.S. CONST. art. II, § 2. The *procedural* power to make its own rules would not seem sufficient to support a transfer of this *substantive* power to individual Senators or committees, at least not where confirmation by the full Senate seems assured. According to its defenders, on the other hand, the blue slip procedure enforces the Constitutional scheme of advice and consent by serving as a "formal sanction for violation of the Senate norm of the courtesy from *presidents*, who are expected to seek advice from Senators prior to making judicial appointments." Denning, *supra* note 99, at 97. But the President is *not* expected to seek advice from *individual Senators*, or at least not from the two Senators from a nominee's home state, whose views will be based primarily on the nominee's party loyalty and the Senator's political ambitions. See *id.* at 88-90. The Constitution expects the President to seek advice from the *Senate*. *Id.* at 89-90. In fact, as the convention history of the Advice and Consent Clause shows, the founders would have preferred a system which required the President to seek the advice from Senators of states *other* than the nominee's home state because they would be less likely to be influenced by that nominee's home-grown political connections. See, e.g., 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 21, at 42 (statement of Ghorum). In any case, the Constitution does not confer the confirmation power on the home-state Senators; it vests it in the Senate, and only to prevent unqualified or politically driven nominations. See Denning, *supra* note 99, at 89-90.

¹⁰¹ See *supra* note 22 and accompanying text.

¹⁰² North Carolina Senator Jesse Helms' blue-slip hold on President Clinton's nominees from North Carolina to the Fourth Circuit arguably resulted in the appointment of Judges from Maryland, West Virginia, and Virginia for the "North Carolina" seat. See Alliance for Justice, *Active Judges Report*, available at http://www.allianceforjustice.org/judicial/judicial_selection_resources/selection_database/activeJudges.asp#4 (last visited Jan. 14, 2003); see also 28 U.S.C. § 44(c) (1994 & Supp. 2002) (specifying that there shall be "at least one circuit judge in regular active service appointed from the residents of each state in that circuit").

Neither the original purpose nor the inherent limit is found in the current, expanded blue slip policy. Now, Senators essentially have a veto power over any nominee from the *entire circuit* in which their state is located.¹⁰³ This power belies any claim to special knowledge of the nominee's character derived from home-state familiarity, and removes the check on the policy's potential for abuse. Not surprisingly, without the check that was built into the original policy, the blue slip has become a much more favored tool for advancing a Senator's own views, further undermining the President's constitutional role in appointments.

Ironically, senatorial inaction toward judicial nominations came under increasing fire during the Clinton Administration, when Democrats complained that the Republican-controlled Senate was refusing to confirm President Clinton's nominees.¹⁰⁴ Now that the tables have turned, however, Democrats are defending their inaction not only as a political game of turnabout-is-fair-play,¹⁰⁵ but as a solemn duty to defend the constitutional structure, as they see it.¹⁰⁶ Of course, the turn-about, tit-for-tat argument depends entirely on the starting point. One need only query John Roberts and Terrence Boyle, both nominated originally in the first Bush administration, to rebut any claim that the "inaction" that has been attributed to the Republicans during the second term of the Clinton administration was the first shot in this confirmation war.¹⁰⁷ In any event, one of the three main examples of Republican "inaction,"

¹⁰³ Michigan Senators Carl Levin and Deborah Stabenow, for example, have reportedly blocked two Ohio nominees to the U.S. Court of Appeals for the Sixth Circuit, Jeff Sutton and Deborah Cook, both of whom have the support of their home-state Senators. Jonathan Groner, *A Major Shift in the Battle for the Bench*, LEGAL TIMES, Nov. 11, 2002, at 8.

¹⁰⁴ See, e.g., Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 233 (1997) (proposing lawsuit to force Senate to hold hearings on nominees); Renzin, *supra* note 64, at 1748 (arguing that blue slip procedure and Senatorial inaction are unconstitutional). Of course, in reality, the Congress did not refuse to confirm President Clinton's judicial nominees — it confirmed 377, almost as many as the 382 confirmed during the Reagan Administration, despite the fact that for six of his eight years in office, President Clinton was faced with a Senate majority of the opposite political party, while President Reagan had a Senate majority of his own party for six of his eight years in office. See *Hearing Before the Senate Comm. on the Judiciary Subcomm. on Administrative Oversight and the Courts on Should Ideology Matter?: Judicial Nominations 2001*, 107th Cong. (2001) (statement by C. Boyden Gray), reprinted in *Senate Committee Hearings on the Judicial Nomination Process*, 50 DRAKE L. REV. 429, 435 (2002).

¹⁰⁵ See, e.g., Statement of Senator Patrick Leahy, *supra* note 87 (complaining about Republican inaction on President Clinton's judicial nominations).

¹⁰⁶ See generally Thomas G. West, *The Constitutionalism of the Founders Versus Modern Liberalism*, 6 NEXUS J. OP. 75 (2001) (describing how modern liberalism's view of constitution is contrary to that of founders).

¹⁰⁷ See RUTKUS, *supra* note 15 (listing Bush I Circuit Court nominees who were not confirmed).

Roger Gregory, was re-nominated to the Fourth Circuit by President Bush, promptly confirmed, and is now sitting on the bench. Confirmation of another Clinton nominee, Merrick Garland, was delayed for a year by Senator Charles Grassley in response to the Democrat's 1992 blockage of John Roberts,¹⁰⁸ but he was ultimately confirmed and now sits on the D.C. Circuit. The final frequently-cited example, Helene White of Michigan, who languished for several years, was the sister-in-law of Senator Carl Levin. The blue-slip opposition by Michigan's other Senator to the blatant display of nepotism was precisely the kind of check on the appointment power envisioned by the framers. The blue slip opposition hardly serves as precedent for the broad-based delay and opposition to the highly qualified nominees currently before the Senate.

But inaction and the blue slip process are not the only tactics being employed against President Bush's nominees. Recently, Judge D. Brooks Smith received a remarkable letter from Senator Charles Schumer of New York, asking Smith

to imagine it is 1965 and you are a Supreme Court justice. The *Griswold* opinion¹⁰⁹ has not yet been written. Chief Justice Warren turns to you in conference and asks you for your opinion on whether there is a right to privacy in the Constitution and why. He further asks you to articulate how that right, if it exists, should be applied in *Griswold*. Please provide your answers to those inquiries.

Schumer was, in his own words, "interested in how you personally read and interpret the Constitution."¹¹⁰

Senator Schumer's questions quite obviously have nothing to do with preventing nepotism, or the appointment of incompetent political cronies by the President. Instead, Senator Schumer's questions serve merely to test Judge Smith's commitment to the standard of "evolving constitutionalism" advocated by Schumer and some of his colleagues. Senator Schumer's question is designed precisely to elicit the nominee's political ideology in an attempt to enforce political orthodoxy on the bench. Yet Schumer is not "responsible" for the nomination in the sense that the founders envisioned. Citizens throughout most of the country who might be appalled by Senator Schumer's questions cannot vote the

¹⁰⁸ See Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 HARV. J. L. & PUB. POL'Y 467, 516 (1998).

¹⁰⁹ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹¹⁰ Byron York, *Schumer's Attack*, NAT'L REV. ONLINE (May 14, 2002), at <http://www.nationalreview.com/york/york051402.asp> (last visited Jan. 14, 2002).

Senator from New York out of office. While President Bush, in nominating Judge Brooks, must be, in Madison's words, "considered as a national officer, acting for and equally sympathizing with every part of the U[nited] States," Senator Schumer is only required to serve his liberal constituency in New York. That constituency includes groups such as the National Organization for Women, which targeted Judge Smith's nomination, claiming that he is "unfit" to be a Circuit Judge because he did not resign fast enough from a men's hunting club, and because, in its words, he has "ultraconservative buddies."¹¹¹

A similar dynamic was at play in the Senate Judiciary Committee's rejection of Texas Supreme Court Justice Priscilla Owen to a seat on the U.S. Court of Appeals for the Fifth Circuit. The main source of opposition to Justice Owen was her vote to uphold a Texas statute requiring that minor girls notify their parents before obtaining an abortion. The Texas statute contained a judicial bypass mechanism, as required by existing Supreme Court precedent. In fact, there was little doubt that the statute was constitutional under prevailing precedent. The opposition to Justice Owen, then, was based on her refusal to ignore existing, binding Supreme Court precedent in favor of the expanded, unfettered right to abortion being propounded by the litigants in the case. What the opponents of Justice Owen wanted instead, apparently, was a judge who would ignore the law and existing Supreme Court precedent to advance her particular causes from the bench.¹¹²

In short, the opposition to Justice Owen, like Senator Schumer's opposition to Judge Smith, was ultimately grounded in the fear that they would honor their oaths and uphold the law rather than bend the law to their own will (or, more precisely, to the will of those who would vote to confirm them). That such is an abuse of the advice and consent process should be obvious, as should the intrusion upon both other branches of government — the President's power to nominate and the very independence of the judiciary in upholding the rule of law.

¹¹¹ Press Release, National Organization of Women, NOW Activists Protest Nomination of D. Brooks Smith Outside Federal Court Building (May 20, 2002), at <http://www.now.org/press/05-02/05-20.html>.

¹¹² Compare the recent attempt by the Ninth Circuit to strike down a Montana statute that, in full accord with prevailing Supreme Court precedent, required abortions to be performed by a physician. The effort was met with a rare, summary reversal by the Supreme Court without oral argument. *Mazurek v. Armstrong*, 520 U.S. 968, 974 (1997) ("The Court of Appeals' decision is also contradicted by our repeated statements in past cases — none of which was so much as cited by the Court of Appeals, despite the District Court's discussion of two of them — that the performance of abortions may be restricted to physicians.").

Of course, Congress has one constitutional power that would enable it to advance causes not currently authorized by the Constitution: It can propose constitutional amendments that would authorize such action. For example, it could propose to repeal the constitutional protections for property rights found in the Fifth Amendment and elsewhere, by writing an amendment and submitting it to the states for ratification. But it is unlikely that such an amendment would ever succeed, so some members of Congress instead pursue a new, extra-constitutional method of constitutional change, relying on the courts to push their agenda from the bench.

This is essentially the difference between raw, abusive power and constitutional norms. Having failed to accomplish their policy goals in the constitutional fashion, some members of the Senate are attempting to accomplish them by submitting judicial nominees to a vetting by radical interest groups that will decide whether the nominees can be relied upon to decide the "right" way on the cases that come before them. The irony is the Constitution already requires judges to decide the "right way" — that is, it requires judges to abide by an oath to "support and defend the Constitution."¹¹³ But it also requires Senators to do the same thing.¹¹⁴ Some Senators have arguably abandoned that duty by supporting and defending a governmental scheme totally alien to that contemplated by the framers. Now those Senators are seeking to block the confirmation of any judge who might force them to abide by the constitutional limits on their power.

CONCLUSION

In June of 2001, President Clinton's White House Counsel, Lloyd Cutler, told the Senate Judiciary Committee that

it would be a tragic development if ideology became an increasingly important consideration in the future. To make ideology an issue in the confirmation process is to suggest that the legal process is and should be a political one. That is not only wrong as a matter of political science; it also serves to weaken public confidence in the courts.¹¹⁵

¹¹³ U.S. CONST. art. VI, cl. 3.

¹¹⁴ *Id.*

¹¹⁵ *Testimony of Lloyd N. Cutler Before the Administrative Oversight and the Courts Subcomm., Senate Judiciary Comm., 107th Cong. (2001) (statement of Lloyd N. Cutler), 2001 WL 21756493.*

Today the Senate is doing precisely what one delegate to the North Carolina ratification convention warned against: it is taking over the nomination power which the Constitution vested in the President alone. "[T]he President may nominate, but they have a negative upon his nomination, till he has exhausted the number of those he wishes to be appointed: He will be obliged finally to acquiesce in the appointment of those which the Senate shall nominate, or else no appointment will take place."¹¹⁶ The dangers posed by such a system are as real today as they were to the founding generation. It is time to rid ourselves of all ideological litmus tests save one: "Mr. or Ms. Nominee, are you prepared to honor your oath to support the Constitution as written and not as you would like it to be, if we confirm you to this important office?" Any nominee who answers that question in the negative deserves to be rejected. Unfortunately, the Senate is today refusing a hearing or denying a vote to several nominees precisely because the current leadership knows that those nominees would honestly answer that question in the affirmative.

¹¹⁶ Samuel Spencer, Speech at the North Carolina Ratification Convention (July 28, 1788), reprinted in 2 DEBATE ON THE CONSTITUTION, *supra* note 47, at 879.