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THE FUNCTIONS, ROLES, AND DUTIES OF THE SENATE IN THE SUPREME COURT APPOINTMENT PROCESS

WILLIAM G. ROSS*

I. INTRODUCTION

The turbulent Senate hearings and debates on the nomination of William Rehnquist to serve as Chief Justice of the United States revived a perennial controversy concerning the proper scope of the Senate's role in considering Supreme Court appointments. In contrast to its customary practice of confirming the president's nominee by an overwhelming vote, the Senate approved Rehnquist by the comparatively narrow vote of sixty-five to thirty-three, the thinnest margin any successful nominee has received since 1912.¹ The Senate's careful and prolonged consideration of the Rehnquist nomination is a reminder that the Senate is not merely a rubber stamp for the president's nomination, even though the president's choice rarely encounters serious opposition. Although no one seriously argues that the Senate's review of Supreme Court nominations should be purely perfunctory, the highly political tone of much of the opposition to Rehnquist and the Senate's exacting inquiry into Rehnquist's judicial and political philosophies raised

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1. The Senate confirmed Mahlon Pitney on March 13, 1912, by a margin of 50 to 26. N.Y. Times, Mar. 14, 1912, at 8, col. 6. Of the 39 successful Supreme Court nominees between the confirmations of Pitney and those of Rehnquist and Associate Justice Antonin Scalia in 1986, only eight received more than 10 negative votes: Charles Evans Hughes in 1930 (52-26); William Rehnquist in 1971 (68-26); Louis D. Brandeis in 1916 (47-22); Potter Stewart in 1959 (70-17); Sherman Minton in 1949 (48-16); Hugo Black in 1937 (63-16); Thurgood Marshall in 1967 (69-11); and John Marshall Harlan II in 1955 (71-11). Of the 55 nominations since 1900, the Senate has rejected only three (John J. Parker in 1930, Clement F. Haynsworth, Jr., in 1969, and G. Harrold Carswell in 1970), and only two others (Abe Fortas and Homer Thornberry in 1968) have been withdrawn. H. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 199, 13, 180, 269, 47, 290, 260 (2d ed. 1985).

questions about the factors that the Senate properly may consider in evaluating Supreme Court nominations.² Not since critics accused the Senate of playing politics in rejecting the nomination of Clement F. Haynsworth, Jr., in 1969 and G. Harrold Carswell in 1970³ has the Senate's role in the appointment process come under such widespread scrutiny.

Despite the recurring questions about the scope of the Senate's role in the confirmation process, most scholars agree that the Senate must examine the nominee's professional competence and ethical integrity and that the Senate may, and indeed, should, inquire into a nominee's judicial and political philosophy.⁴ At the same time, however, commentators generally agree that the Senate would abuse its constitutional prerogative if it rejected a nominee on grounds that were arbitrary, capricious, or blatantly political. But this consensus leaves much room for questions about the exact scope of the Senate's inquiry and the extent to which the Senate ought to defer to the president's choice.

In assessing the Senate's role in the confirmation process, the custom is to examine the factors that the Senate may consider in evaluating a nominee. A discussion of such factors would be more meaningful, however, if placed in the context of a consideration of the functions, roles, and duties of the Senate in the confirmation process. This Article analyzes the proper scope of the Senate's role to advise and consent in Supreme Court appointments by examining these functions. The Senate currently has five functions in the confirmation process: 1) to review and investigate the nominee's intellectual, professional, physical, psychological, moral, and ethical qualifications; 2) to act as a check on presidential favoritism; 3) to evaluate the political and judicial philosophies of the nominee; 4) to interview the nominee; and 5) to serve as a forum for the

2. *E.g.*, 132 CONG. REC. S 12,818 (daily ed. Sept. 18, 1986) (statements of Senators DeConcini and Hatch).

3. *E.g.*, McConnell, *Haynsworth and Carswell: A New Senate Standard of Excellence*, 59 KY. L.J. 7, 14-24 (1970).

4. *E.g.*, Black, *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L.J. 657 (1970); Rehnquist, *The Making of a Supreme Court Justice*, HARV. L. REC., Oct. 8, 1959, at 7; Lively, *The Supreme Court Appointment Process: In Search of Constitutional Roles and Responsibilities*, 59 S. CAL. L. REV. 551, 554 (1986); *see also* L. TRIBE, *GOD SAVE THIS HONORABLE COURT* (1985). *But cf.* Friedman, *Tribal Myths: Ideology and the Confirmation of Supreme Court Nominations*, 95 YALE L.J. 1283 (1986).

expression of views on the nomination by members of the bar, special interest groups, and private citizens. In order to understand these functions and duties, one must first examine the language of the Constitution and the intentions of the Framers.

II. THE CONSTITUTIONAL FOUNDATION AND EARLY HISTORY

With that combination of brevity and ambiguity that is so characteristic of the Constitution, article II, section 2 provides simply that the president shall nominate, and "by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court."⁵ The text of the Constitution clearly provides that although the power to present a candidate for the Court is vested solely in the president, the power of *appointment* is exercised concurrently with the Senate, which must review the nomination and may reject the president's choice. The Constitution says nothing about the criteria upon which the Senate may base its decision. Technically, therefore, the Senate may reject a nominee for any reason.

Examining the intent of the Framers is the first step in divining the meaning of the delphic phrase "Advice and Consent." As with so many other phrases of the Constitution, however, determining the Framers' intent proves impossible because different Framers undoubtedly harbored different intentions. The procedure for appointment of Supreme Court justices in fact represented a compromise between delegates who wanted the power of appointment to reside in the president and those who wanted to vest the power solely in the Senate. This compromise was part of a larger process whereby the Convention, fearful of creating a senatorial oligarchy, restricted the Senate's powers and concomitantly increased the powers of the president.⁶ Indeed, the Constitutional Convention came very close to granting the Senate sole power of appointment.

Early in its proceedings, on June 5, 1787, the delegates debated a proposal to vest the appointment power in both houses of Congress; the delegates, however, were unable to agree upon any

5. U.S. CONST. art. II, § 2, cl. 2.

6. 1 G. CURTIS, CONSTITUTIONAL HISTORY OF THE UNITED STATES 464-65 (1897 and photo. reprint 1974).

method of selection.⁷ James Wilson opposed the proposal, arguing that experience showed "the impropriety of such appoin[tments] by numerous bodies. Intrigue, partiality and concealment were the necessary consequences."⁸ Wilson contended that a "principal reason for unity in the Executive was that officers might be appointed by a single, responsible person."⁹ John Rutledge of South Carolina, however, was "by no means disposed to grant so great a power to any single person. The people will think we are leaning too much towards Monarchy."¹⁰ James Madison disliked permitting the Congress or any numerous body to elect judges, but likewise registered dissatisfaction with referring the appointment to the Executive.¹¹ Accordingly, "[h]e rather inclined to give it to the Senatorial branch, as numerous eno' to be confided in—as not so numerous as to be governed by the motives of the other branch; and as being sufficiently stable and independent to follow their deliberate judgments."¹² Benjamin Franklin said that he wished still "other modes to be suggested as might occur to other gentlemen; it being a point of great moment."¹³ Because opinion on this question of "great moment" was so disparate, the Convention voted nine to two to defer consideration until a time of "maturer reflection."¹⁴

The Convention next considered the issue on June 13, when it adopted a motion offered by James Madison providing for senatorial appointment of judges.¹⁵ Madison offered the motion in response to a proposal by Charles Pinckney and Roger Sherman that both houses of Congress appoint judges.¹⁶ Reiterating his earlier

7. J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, 67-69 (1976).

8. *Id.* at 67.

9. *Id.*

10. *Id.*

11. *Id.* at 68. Like Wilson, Madison warned of "the danger of intrigue and partiality" and questioned the ability of legislators to evaluate the requisite qualifications of judges. Madison also stated that "[i]t was known too that the accidental circumstances of presence and absence, of being a member or not a member, had a very undue influence on the appointment." *Id.*

12. *Id.*

13. *Id.* at 67-68. Franklin, in an "entertaining manner related a Scotch mode, in which the nomination proceeded from the Lawyers, who always selected the ablest of the profession in order to get rid of him, and share his practice among themselves." *Id.* at 68.

14. *Id.* at 68.

15. *Id.* at 113, 116.

16. *Id.* at 112-13.

arguments, Madison objected to this proposal on the ground that many congressmen would be "incompetent Judges of the requisite qualifications" of judges and that they might be partial toward persons "who had displayed a talent for business in the legislative field, who perhaps assisted ignorant members in business of their own, or of their Constituents, or used other winning means."¹⁷ Madison proposed that the Senate, as a more select and less numerous body, could evaluate judicial candidates more competently than could the House.¹⁸

The Convention did not debate the issue again for another month. In the meantime, two delegates proposed appointment by the executive. On June 15, William Paterson advocated that the executive appoint all federal judges.¹⁹ On June 18, Alexander Hamilton proposed that the executive nominate various officers, including judges, "subject to the approbation or rejection of the Senate."²⁰

The delegates debated the question again on July 18, when the Convention reconsidered the resolution to provide for appointment by the Senate.²¹ As in the original debate, the Convention was divided and failed to agree upon any new proposal. Nathaniel Gorham of Massachusetts argued that the Senate was "too numerous, and too little personally responsible, to ensure a good choice."²² Gorham contended that the executive "would certainly be more answerable for a good appointment, as the whole blame of a bad one would fall on him alone"²³ and that "[p]ublic bodies feel no personal responsibility, and give full play to intrigue [and] cabal."²⁴ He suggested that the judges be appointed by the executive,

17. *Id.*

18. *Id.* at 113. Given Madison's preference for a strong executive and his later sponsorship of a motion to vest the appointment power in the president subject to approval by two-thirds of the Senate, he may have contrived his motion on June 13 as a means of moving the Convention toward presidential participation in the appointment process. In any event, the motion eliminated the House of Representatives from the appointment process and paved the way for nomination of justices by the executive.

19. *Id.* at 120.

20. *Id.* at 138.

21. *Id.* at 314.

22. *Id.*

23. *Id.* at 316.

24. *Id.* at 315.

with the advice and consent of the Senate, as was prescribed by the Constitution of Massachusetts.²⁵ Roger Sherman, however, contended that the executive would be vulnerable to intrigue.²⁶ Likewise, Bedford insisted that the "responsibility of the Executive so much talked of was chimerical. He could not be punished for mistakes."²⁷ A motion for appointment by the executive failed by a vote of six to two, and a motion by Gorham for appointment by the executive by and with the advice of the Senate was defeated in a tie vote.²⁸ The Senate adjourned without deciding upon a proposal by Madison for appointment by the president, subject to a two-thirds vote by the Senate.²⁹

The Convention did not reconsider Madison's proposal until July 21. Once again, the debate reflected a wide disparity of opinion.³⁰ In explaining his motion, Madison stated that the president "would in general be more capable [and] likely to select fit characters than the Legislature."³¹ Madison also argued that the president, unlike the Senate, would be "acting for and equally sympathising with every part" of the nation and that senatorial appointment would "throw the appointments entirely into the hands" of the more numerous Northern states³²—a fearsome prospect for a Virginian! Charles Pinckney maintained, however, that the "Executive will possess neither the requisite knowledge of characters, nor confidence of the people for so high a trust."³³ Likewise, Oliver Ellsworth argued that the executive "will be more open to caresses [and] intrigues than the Senate."³⁴ Randolph argued, however, that intrigues were more likely to occur in the Sen-

25. *Id.* at 314.

26. *Id.* at 316.

27. *Id.*

28. *Id.* at 317.

29. *Id.* at 343-46.

30. *Id.* Similarly, Gouverneur Morris argued in support of Madison's motion that the "Executive in the necessary intercourse with every part of the U.S. required by the nature of his administration, will or may have the best possible information," while the Senate "must take the character of candidates from the flattering pictures drawn by their friends." *Id.* at 345.

31. *Id.* at 344.

32. *Id.*

33. *Id.* Elbridge Gerry likewise contended that he "could not conceive that the Executive could be as well informed of characters throughout the Union, as the Senate." *Id.* at 345.

34. *Id.*

ate.³⁵ Madison's motion, modified to require only majority approval by the Senate, was defeated in a three to six vote.³⁶ Accordingly, the June 13 resolution for appointment by the Senate was retained.

Except for a brief and inconclusive debate on August 23,³⁷ the issue lay dormant until September 4, when the Special Committee on Postponed Matters made a report providing for executive nomination of Supreme Court justices with the advice and consent of the Senate.³⁸ The proposal generated relatively little debate when considered on September 6 and 7. Morris, who had previously favored appointment by the executive, supported the plan, explaining that as "the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security."³⁹ Although Pinckney and Wilson spoke against giving the Senate any say in judicial appointments, the Convention adopted the committee's measure almost without dissent.⁴⁰

Despite the divergent opinions of the Framers respecting the Senate's role in the judicial appointment process, two conclusions emerge from the debates. First, most of the delegates envisioned an active role for the Senate because so many of the delegates who had favored appointment by the Senate alone were willing to assent to the eleventh-hour compromise. As Professor Charles Black has observed, those delegates could not have thought that the legislative part in the process had been reduced to a minimum.⁴¹ Second, the delegates desired that the president and the Senate evaluate candidates with great care, appoint only highly qualified judges, and eschew personal prejudice. This is hardly surprising. The debates do not reveal, however, whether the Senate may properly base its decision upon the political philosophy of a nominee.

35. *Id.* at 344. According to Randolph, "[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." *Id.*

36. *Id.* at 346.

37. *Id.* at 517.

38. *Id.* at 575.

39. *Id.* at 598.

40. *Id.* at 599.

41. Black, *supra* note 4, at 661. Black concluded that "[t]he . . . process, to me, suggests the very reverse of the idea that the Senate is to have a confined role." *Id.*

Similarly, the debates on the Constitution in the state conventions do not illuminate the intentions of either the Framers or those who voted on ratification.⁴² Even the few recorded comments on the appointment power offer little information; some persons expressed fear that the appointment power would give the president an undue power over the Senate while others argued that it would have the opposite tendency.⁴³ To Hamilton, this division of opinion was "a strong proof that neither suggestion is true."⁴⁴

Hamilton's discussion of the appointment power in numbers sixty-six, seventy-six, and seventy-seven of *The Federalist* offers the most thorough contemporary interpretation of the advice and consent clause. Hamilton's discourse ultimately adds little to what the debates themselves reveal about the Framers' intentions, however. Like the debates, Hamilton's essays express a concern that the Senate should help ensure that the president select meritorious justices rather than personal favorites. According to Hamilton, requiring the Senate's concurrence "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."⁴⁵

Hamilton suggested, however, that the Senate's function would be limited to checking cronyism.⁴⁶ Indeed, Hamilton argued that the real power of appointment would reside in the president. He stated 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."⁴⁷

42. J. HARRIS, *THE ADVICE AND CONSENT OF THE SENATE* 25 (1953). See generally, S. BOYD, *THE POLITICS OF OPPOSITION, ANTIFEDERALISTS AND THE ACCEPTANCE OF THE CONSTITUTION* (1979).

43. J. HARRIS, *supra* note 42, at 25; *THE FEDERALIST* No. 77, at 497 (A. Hamilton) (Modern Library ed. 1937).

44. *Id.*

45. *THE FEDERALIST* No. 76, at 494 (A. Hamilton) (Modern Library ed. 1937). Hamilton contended that the president "would be both ashamed and afraid to bring forward . . . candidates who had no other merit than that of coming from the same State to which he particularly belonged, or of being in some way or other personally allied to him, or of possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure." *Id.* at 495.

46. *Id.* at 494.

47. *Id.* at 492.

He contended that a "single well directed man . . . cannot be distracted and warped by that diversity of views, feelings and interests, which frequently distract and warp the resolutions of a collective body."⁴⁸ Moreover, each of Hamilton's three relevant essays emphasizes that the Senate would exercise a high level of deference toward the president's appointment. In number sixty-six, for example, Hamilton explained that the Senate would not reject the president's candidate merely because senators preferred someone else because they could not be certain "that the subsequent nomination would fall upon their own favorite, or upon any person in their estimation more meritorious than the one rejected."⁴⁹ Hamilton therefore contended that the Senate's "sanction would [not] often be refused, where there were not special and strong reasons for the refusal."⁵⁰

Hamilton's essays are illuminating, but they do not necessarily represent the mainstream of thought at either the Constitutional Convention or the ratification conventions, in as much as Hamilton was a particularly ardent advocate of a potent executive. Moreover, none of his essays were concerned exclusively with the appointment of Supreme Court justices; they also dealt with presidential appointments of diplomats. Certainly, the appointment of a justice warrants much more intensive senatorial scrutiny than does the appointment of "Ambassadors, other public Ministers and Consuls."⁵¹ On the other hand, the fact that Hamilton was bold enough to emphasize the power of the executive in essays written to help with the adoption of the Constitution in New York, an anti-federal

48. *Id.*

49. THE FEDERALIST No. 66, at 433 (A. Hamilton) (Modern Library ed. 1937). Similarly, Hamilton wrote in No. 76 that "[t]he Senate could not be tempted by the preference they might feel to another to reject the one 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." THE FEDERALIST No. 76, *supra* note 45, at 494. Hamilton emphasized that the rejection of one presidential choice would only make room for another presidential choice and that "[t]he person ultimately appointed must be the object of his preference, though perhaps not in the first degree." *Id.*

50. *Id.* With perhaps less prescience, John Adams predicted in 1787 that "[f]action and distraction are the sure and certain consequences of giving to a senate a vote on the distribution of offices." J. HARRIS, *supra* note 42, at 29.

51. U.S. CONST. art. II, § 2, cl. 2.

state, suggests Antifederalists were not strongly opposed to giving broad deference to the president's choice.⁵²

An examination of the role of the Senate during the first years following the Constitution's ratification reveals the distance between Hamilton's theory and the intentions of other Framers. The early Senate was anything but the restrained and deferential body that Hamilton had envisioned. From the start, it exercised a high degree of independence and influence in the appointment process. Only three months into its first term, the Senate established the precedent of "senatorial courtesy" by rejecting a highly qualified nominee for a naval position in Savannah because the two senators from Georgia preferred a different candidate.⁵³ Fully acquiescent to the new protocol, President Washington sent a message to the Senate stating that he was sure that the Senate had sufficient reasons for the rejection; he added drily, however, that he could not discern those reasons. He asked only that the Senate spare him further embarrassment by making its preference known in advance of future appointments.⁵⁴ At about this same time Washington wrote, "[A]s the President has a right to nominate without assigning his reasons, so has the Senate a right to dissent without giving theirs."⁵⁵

Six years later, the Senate asserted itself dramatically when it rejected Washington's nomination of John Rutledge by a vote of fourteen to ten. Although Rutledge's foes spread the rumor that Rutledge was insane, opposition focused on Rutledge's vehement rejection of the Jay Treaty.⁵⁶ The Senate's rejection of Rutledge

52. This argument is particularly convincing if one agrees with Professor Crosskey's theory that the Federalist Papers minimized federal power because the essays were addressed to an Antifederalist audience in New York. 1 W. CROSSKEY, *POLITICS AND THE CONSTITUTION* 8-11 (1953). Some validity may be recognized in Professor Crosskey's theory even if one does not accept Crosskey's general derogation of the Federalist Papers as a means of constitutional interpretation. Crosskey's theory may be overstated, however, since it appears that the Federalist Papers "enjoyed at least some circulation and esteem outside New York during the course of their serial publication." Brown, Book Review, 67 HARV. L. REV. 1439, 1445 (1954).

53. J. HARRIS, *supra* note 42, at 40.

54. *Id.* at 41.

55. *Id.* at 39.

56. See, e.g., J. GOEBEL, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 748 (1971) (Volume I of the Oliver Wendell Holmes Devise); H. ABRAHAM, *supra* note 1, at 33; 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES*

for partisan reasons, unrelated to his fitness to serve on the Court, is revealing of the Framers' intentions because several of the senators who voted against Rutledge had been delegates to the Philadelphia Convention. Washington, who had presided over the Convention, does not appear to have regarded the Senate's action as unconstitutional; and, significantly, the principal opposition to Rutledge came from Federalists,⁵⁷ who favored a strong presidency.

On several other occasions during the nineteenth century, the Senate reviewed appointments to the Court with a free-wheeling partisanship that probably would evoke strong criticism today. In 1811, for example, the Senate rejected Alexander Wolcott by a vote of nine to twenty-four, partly because of doubts about his professional qualifications but principally because he had vigorously opposed enforcement of the Embargo and Non-intercourse Acts when he was a customs official.⁵⁸ In 1870, the Senate refused to confirm Ebenezer Hoar because of his refusal to support partisan judicial appointments, his advocacy of civil service reform, and his opposition to Andrew Johnson's impeachment.⁵⁹ Similarly, in 1894, the Senate rejected two of President Cleveland's nominees, William B. Hornblower and Wheeler H. Peckham, because Cleveland had refused to nominate persons suggested by New York's powerful Senator David B. Hill.⁶⁰ Although the Senate rejected or failed to confirm several other nominees for political reasons, most of those nominees had been proposed by lame duck or unelected presidents.⁶¹ The actual extent of the Senate's rejection of nominees

HISTORY 134-35 (rev. ed. 1935). The effect of the rumors concerning Rutledge's mental stability should not be completely discounted, however, because Rutledge had already displayed bizarre behavior in his highly intemperate attacks on the Jay Treaty; later he became demonstrably insane. See, e.g., L. PFEFFER, *THIS HONORABLE COURT* 56-58 (1965).

57. H. ABRAHAM, *supra* note 1, at 33; 1 C. WARREN, *supra* note 56, at 135-36.

58. H. ABRAHAM, *supra* note 1, at 33; 1 C. WARREN, *supra* note 56, at 410-13.

59. H. ABRAHAM, *supra* note 1, at 34.

60. *Id.* at 18; Pierce, *A Vacancy on the Supreme Court: The Politics of Judicial Appointment 1893-94*, 39 TENN. L. REV. 555, 565-612 (1972).

61. For example, in February 1829 the Senate indefinitely postponed action on John Crittenden, who was nominated by John Quincy Adams after his defeat for reelection. During the final year of the tenure of John Tyler, the first unelected president, the Senate rejected one nominee, John C. Spencer, forced the withdrawal of the nominations of two more, Reuben H. Walworth and Edward King, and took no action on a fourth, John M. Read. In 1853, the Senate formally voted to postpone consideration of George E. Badger, and informally

during the nineteenth century, therefore, is not so great as the numbers suggest. Nevertheless, politics clearly played a part in the confirmation process. In addition, many of the nominees actually confirmed did encounter politically-inspired opposition.⁶² An examination of the text of the Constitution, the intentions of the Framers, and the early history of the confirmation process therefore provide support for vesting a high level of discretion in the Senate.

III. REVIEW OF QUALIFICATIONS

Throughout its history, the Senate has remained true to the intention of the Framers that the Senate's principal roles would be to ensure the appointment of competent persons and to check any presidential favoritism. Because service as a justice requires a high level of intellect, the Senate first considers a nominee's professional qualifications.⁶³ Presidents rarely have nominated persons

postponed indefinitely its consideration of William C. Micou, nominees of the unelected Fillmore, less than one month before Fillmore's term expired. During the previous year, the Senate had failed to take any action on Fillmore's nomination of Edward A. Bradford shortly before a presidential election in which Fillmore was not a candidate. In 1860, it rejected Jeremiah S. Black, whom the lame duck Buchanan had appointed. In 1866, the Senate failed to take any action on Andrew Johnson's nomination of Henry Stanbery. From the Senate's rejection of Rutledge in 1795 to its rejection of Parker in 1930, there were 94 nominations, but only 73 were made by presidents who were neither lame ducks nor were serving out the terms of the predecessors. Of these 73 nominations, the Senate rejected or forced the withdrawal of only 8. In addition to Wolcott, Hoar, Hornblower, and Peckham, those nominees were: Roger B. Taney (action postponed on first nomination in 1835); George Woodward (rejected in 1846); and George H. Williams and Caleb Cushing (nominations withdrawn in 1874). See A. BLAUSTEIN & R. MERSKY, *THE FIRST ONE HUNDRED JUSTICES* 122-23 (1978); L. TRIBE, *supra* note 4, at 142-48.

62. See generally H. ABRAHAM, *supra* note 1, at 64-144.

63. As Professors Kurland and Tribe have observed:

[t]he men and women of the federal bench must possess open minds that are capable of grasping sophisticated legal analysis, and that can grapple intelligently with fundamental constitutional issues. To federal judges is given the task of policing the boundaries between state and federal government, of giving principled articulation to the content of basic human rights protected by the Constitution, of enforcing the myriad and complex federal statutes and regulations, and of overseeing complicated commercial and criminal litigation. Senators therefore have a duty, both to the Constitution and to the nation's citizens, businesses and public and private institutions, to ensure that the President's nominees have the experience, the talent, the intellectual acumen, and the fairness of mind to perform their functions and, particularly in the case of appellate judges, to contribute lucidly to a body of legal precedents that

whose intellectual or judicial reputations made them obvious choices for a seat on the Supreme Court. Holmes, Taft, Cardozo, and Frankfurter are among the few exceptions. Likewise, presidents often have passed over brilliant candidates such as Learned Hand⁶⁴ or Paul Freund.⁶⁵ Nevertheless, the nominees during this century almost always have had outstanding legal qualifications.⁶⁶ Consequently, the Senate's review of professional qualifications usually has been perfunctory. Although senators occasionally have expressed concern about a candidate's lack of prior judicial experience,⁶⁷ the Senate is tolerant of that deficiency because so many distinguished justices had no previous judicial experience.⁶⁸

Although the public and the legal profession have grumbled about the lack of distinction of such nominees as Hugo Black and Tom Clark, the only recent nominee to encounter serious objec-

enlighten and guide trial courts, litigants, and those who must try to anticipate what courts will do.

Letter from Philip Kurland and Laurence Tribe to Senate Judiciary Committee (June 1, 1986).

64. See, e.g., G. WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* 262-63 (1976).

65. This may be partly attributable to the rarity of unanimity about who really is an "obvious" choice for a seat on the Court.

66. A substantial share of justices have started their careers with elite education. For example, five of the present nine justices, Brennan, Blackmun, Powell, Rehnquist, and Scalia, have degrees from Harvard; two, Rehnquist and O'Connor, have two degrees from Stanford; one, White, is a Yale Law School graduate; and Stevens has degrees from Chicago and Northwestern. After the completion of their schooling, most justices have gone on to occupy particularly notable positions in the legal community. For example, Brennan was a New Jersey Supreme Court justice; Marshall, Blackmun, Stevens, and Scalia were judges of the United States Court of Appeals; Scalia also taught at several prestigious law schools; Rehnquist served as a deputy United States Attorney General; and Powell had been president of the American Bar Association.

67. E.g., *Hearings Before the Senate Comm. on the Judiciary on Nomination of Arthur J. Goldberg, of Illinois, to be Assoc. Justice of the Supreme Court of the United States*, 87th Cong., 2d Sess. 11-12 (1962) [hereinafter *Hearings on Goldberg*]. In reply to Senator Hruska's question about his lack of judicial experience, Goldberg stated that he had a "well-rounded legal experience" and that such luminaries of the Court as John Marshall, Felix Frankfurter, and Charles Evans Hughes had no prior judicial experience. *Id.* During the hearings on John Marshall Harlan, Senator Richard Russell said that while he was "very loath to oppose any nominations submitted to this body by the Chief Executive," he would oppose the nomination of John Marshall Harlan, who had served as a judge for only a few months, because there were so many able sitting judges. 101 CONG. REC. 3035 (1955).

68. For example, Justices Brandeis and Frankfurter, and Chief Justice Warren had no prior experience. A. BLAUSTEIN & R. MERSKY, *supra* note 61, at 37, 69; see also McKay, *Selection of United States Supreme Court Justices*, 9 KAN. L. REV. 109, 124-25 (1960).

tions to his professional fitness was G. Harrold Carswell in 1970.⁶⁹ Although Carswell had served for a dozen years as a federal district judge and had been elevated to the court of appeals the year before his nomination to the Supreme Court, his qualifications to serve on the nation's highest bench were widely disputed. One prominent witness at the Senate hearings derided Carswell as a "dull graduate of the third best law school in the State of Georgia."⁷⁰ Others questioned his intellectual ability because he had written no scholarly articles, his district court opinions were poorly written and rarely cited by other judges, and he lacked special expertise in any area of the law.⁷¹ Studies revealing that his district court decisions had been reversed more than twice as often as those of the average federal district judge raised more telling and perhaps fairer doubts concerning Judge Carswell's competence.⁷² Judge Carswell's detractors were neither placated nor amused by Senator Hruska's celebrated suggestion that mediocre people, too, deserve representation on the Court.⁷³

Despite the many questions about Judge Carswell's abilities, his lack of intellectual distinction probably would not have been fatal if serious doubt had not also been raised about his commitment to racial justice. Although many persons forgave him when he apolo-

69. Prior to Carswell, the last nominee whose appointment appears to have been thwarted by concerns over his professional abilities was George H. Williams in 1874. H. ABRAHAM, *supra* note 1, at 38, 121 (1974 ed.).

70. *Hearings Before the Senate Comm. on the Judiciary on Nomination of George Harrold Carswell, of Florida, to be Assoc. Justice of the Supreme Court of the United States*, 91st Cong., 2d Sess. 218 (1970) [hereinafter *Hearings on Carswell*] (testimony of Stephen I. Schlossberg, Gen. Counsel, Int'l Union, United Auto. Workers).

71. See, e.g., *id.* at 134-36 (testimony of Prof. William Van Alstyne); see also McConnell, *supra* note 3, at 23.

72. McConnell, *supra* note 3, at 23. As McConnell points out, Judge Carswell's record of reversal revealed a chronic inability to follow the law as articulated by higher authority. That Carswell's judicial record was used against him is ironic because lengthy judicial experience ought to have been an asset. Professors Grossman and Wasby observe that "all three nominees rejected in this century were lower court judges, a factor tending to indicate the vulnerability which such service may bring and which could perhaps inhibit the President's selection of one whose judicial record is at least partly known." Grossman & Wasby, *The Senate and Supreme Court Nominations: Some Reflections*, 1972 DUKE L.J. 557, 568.

73. Senator Hruska told a radio interviewer that "[e]ven if he were mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they, and a little chance? We can't have all Brandeises and Cardozos and stuff like that there." R. HARRIS, DECISION 110 (1971).

gized for a speech in which he had advocated white supremacy twenty years earlier, his subsequent record suggests that time did not significantly temper his views on race. His allegedly tepid decisions on desegregation and his involvement in the transfer of a golf course to private ownership in order to avoid racial integration provoked stern rebukes from many senators and Judiciary Committee witnesses.⁷⁴ Judge Carswell's generally conservative politics cost him support,⁷⁵ as did resentment over President Nixon's heavy-handed criticism of the confirmation proceedings.⁷⁶ In short, Judge Carswell's deficiencies as a lawyer and a judge caused only part of the Senate's misgivings; the effect of those deficiencies upon his ultimate defeat by a forty-five to fifty-one vote is impossible to isolate.⁷⁷ The narrow margin of defeat makes such a calculation especially difficult.

The Senate's deliberations on Carswell demonstrate that the Senate will accord a high level of deference to the president's choice, even when the nominee possesses mediocre professional qualifications.⁷⁸ Deference to the president's choice inheres in the

74. *Hearings on Carswell*, *supra* note 70, at 11-13, 35-37, 49.

75. *See, e.g., id.* at 85-101 (testimony of Betty Friedan, President of the National Organization for Women), 267-78 (testimony of Clarence Mitchell, Legislative Chairman, Leadership Conference on Civil Rights).

76. Grossman & Wasby, *supra* note 72, at 558 n.4.

77. The widespread hostility generated by the Carswell appointment probably caused the Senate to be more exacting. For example, the committee cited Carswell's failure to publish any legal articles as a deficiency; yet relatively few Supreme Court nominees have been distinguished authors. Harry Blackmun published only three articles over the course of twenty years, and none of those articles appears to have been particularly notable. Similarly, John Paul Stevens published only a few articles, and Sandra Day O'Connor authored only one law review article. *See Hearings Before the Senate Comm. on the Judiciary on Nomination of Harry Blackmun, of Minnesota, to be Assoc. Justice of the Supreme Court of the United States*, 91st Cong., 2d Sess. 8 (1970) [hereinafter *Hearings on Blackmun*]; *Hearings Before the Senate Comm. on the Judiciary on Nomination of John Paul Stevens, of Illinois, to be an Assoc. Justice of the Supreme Court of the United States*, 94th Cong., 1st Sess. 19 (1975) [hereinafter *Hearings on Stevens*]; *Hearings Before the Senate Comm. on the Judiciary on Nomination of Sandra Day O'Connor, of Arizona, to be an Assoc. Justice of the Supreme Court of the United States*, 97th Cong., 1st Sess. 5, 172 (1981) [hereinafter *Hearings on O'Connor*].

78. The Senate's tolerance for undistinguished nominees may be attributed in part to the difficulty of predicting performance on the bench. Little in the background of Hugo Black, for example, suggested that he would grow to become one of the Court's most brilliant jurists. Likewise, Tom Clark's record on the bench turned out to be better than his detractors had predicted. Conversely, Charles Evans Whittaker found that the Court's work taxed him

president's power to nominate. As Hamilton observed in *The Federalist*, the Senate "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."⁷⁹ Still, as the rejection of Carswell suggests, a president must be wary of nominating someone whose professional credentials are slender. Indeed, on at least a few occasions, adverse reaction to the qualifications of potential nominees may have prevented their nomination.⁸⁰

In addition to reviewing the professional fitness of nominees, the Senate occasionally has reviewed a nominee's physical fitness. Presidents generally nominate persons whose health is robust because they hope that their nominees will have long tenures. Health therefore is not usually an issue and has never been a serious issue. On at least three occasions since World War II, however, it has figured briefly in confirmation hearings. In 1949, members of the Judiciary Committee discussed the health of Sherman Minton, who had suffered a serious illness several years earlier. The senators satisfied themselves that he had recovered sufficiently and that his general health was sound.⁸¹ The Senate Judiciary Committee questioned John Paul Stevens about his health at his confirmation hearings in 1975 because he had undergone a cardiac operation one year earlier. Stevens discussed his operation in detail and presented letters from four physicians who attested to his good health.⁸² William Rehnquist's hospitalization for problems related to a back condition were a minor issue at his confirmation hearings in 1986.⁸³

almost beyond endurance, although no one questioned his professional qualifications when he was nominated.

79. THE FEDERALIST No. 66, *supra* note 49, at 433.

80. In 1971, for example, the American Bar Association's lack of enthusiasm for California State Court of Appeals Judge Mildred Lillie and Arkansas municipal bond attorney Herschel Friday may have prevented Nixon from nominating either of those persons to the Court. *E.g.*, H. ABRAHAM, *supra* note 1, at 29.

81. *Hearings Before the Senate Comm. on the Judiciary on Nomination of Sherman Minton, of Indiana, to be Assoc. Justice of the Supreme Court of the United States*, 81st Cong., 1st Sess. 2-3 (1949) [hereinafter *Hearings on Minton*].

82. *Hearings on Stevens*, *supra* note 77, at 8-12.

83. *Hearings Before the Senate Comm. on the Judiciary on Nomination of William Rehnquist to be Chief Justice of the United States*, 99th Cong., 2d Sess. 299, 366-67 (1986) [hereinafter *Hearings on Rehnquist*].

Like physical fitness, psychological fitness as such has never been a major issue in confirmation proceedings. Occasionally, however, the Senate has considered the psychological health of a nominee under the rubric of "judicial temperament." The question of judicial temperament often has been a smoke screen for other objections to a nominee's candidacy. The hand-wringing in 1916 over Louis Brandeis's alleged lack of judicial temperament, for example, appears to have been a rationalization for opposition to his social activism and ideology.⁸⁴ Similarly, discussion of G. Harrold Carswell's judicial temperament was part of larger misgivings regarding his racial attitudes. Several former civil rights workers from the North who had appeared before Judge Carswell during the summer of 1964 testified that he was belligerent toward them, that he connived with local officials to deprive them of their rights, and that his rudeness toward blacks in his courtroom contrasted with his courteous treatment of local whites.⁸⁵ Judicial temperament also arose briefly during the deliberations on Thurgood Marshall, when Marshall's opponents suggested that Marshall willfully had distorted the history of the fourteenth amendment in preparing the plaintiff's case in *Brown v. Board of Education*.⁸⁶ Marshall's remarks were explained to the Judiciary Committee's satisfaction.⁸⁷ Here again, concern over judicial temperament may have

84. See *Hearings Before the Senate Comm. on the Judiciary on Nomination of Louis D. Brandeis to be Assoc. Justice of the Supreme Court of the United States*, 64th Cong., 1st Sess. (1916); A. MASON, *BRANDEIS—A FREE MAN'S LIFE* 465-510 (1940). The attacks on Brandeis also contained "a leavening of anti-Semitism." A. BICKEL & B. SCHMIDT, *HISTORY OF THE SUPREME COURT: THE JUDICIARY AND RESPONSIBLE GOVERNMENT 1910-1921*, at 367 (Volume IX of the Oliver Wendell Holmes Devise).

85. *Hearings on Carswell*, *supra* note 70, at 149-95. The specific testimony of these witnesses was not rebutted, although a district court clerk defended Carswell's demeanor toward civil rights workers. *Id.* at 197.

86. 347 U.S. 483 (1954).

87. In a paper presented to an historical association, history Professor Alfred H. Kelly of Wayne State University stated that in preparing the argument in *Brown*, Marshall had been "emphasizing facts, bearing down on facts, sliding off facts." Kelly used this remark to contrast the subjective use of facts by lawyers with the objective use of facts by historians. In his testimony before a subcommittee of the Senate Committee on the Judiciary, Kelly stated that he did not intend to suggest that Marshall actually had distorted facts. *Hearings Before the Senate Subcomm. on the Judiciary on Nomination of Thurgood Marshall, of New York, to be United States Circuit Judge for the Second Circuit*, 87th Cong., 2d Sess. 181-82 (1962). This issue surfaced again when Marshall was nominated to the Supreme Court. *Hearings Before the Senate Comm. on the Judiciary on Nomination of Thurgood*

masked deeper problems, especially objections to Marshall's political liberalism.

Senators have a duty to the nominee, the president, the Court, and the public to be honest about their objections to a nominee; senators should not use the issue of judicial temperament as a pretext for opposing a nominee on political grounds. This is not to say, however, that senators should not evaluate a nominee's judicial temperament. As Professor Tribe has observed, "[p]erhaps the most important qualification for being a Supreme Court Justice is the possession of an open mind."⁸⁸ No one could gainsay that a sense of justice and fairness is an indispensable attribute for any person who sits on the nation's highest judicial tribunal.

The Senate must also evaluate the moral and ethical fitness of nominees to the Court. Beginning with the unsuccessful nomination of John J. Parker in 1930, the question of morality most often has centered on the candidate's racial attitudes. In addition to its role in the Parker nomination,⁸⁹ racial sensitivity was an issue in the nominations of Carswell,⁹⁰ Haynsworth,⁹¹ and Powell⁹² and on both Rehnquist⁹³ nominations. It was also a factor in the defeat of Carswell.⁹⁴ The issue of ethics sometimes has concerned personal finances or conflicts of interest, as in the nominations of Haynsworth, Fortas, Blackmun, Powell, and Stevens. Harlan and Stevens also were accused of improper conduct in connection with public investigations.⁹⁵

Marshall, of New York, to be an Assoc. Justice of the Supreme Court of the United States, 90th Cong., 1st Sess. 182-85 (1967) [hereinafter *Hearings on Marshall*].

88. L. TRIBE, *supra* note 4, at 103.

89. Mendelsohn, *Senate Confirmation of Supreme Court Appointments: The Nomination and Rejection of John J. Parker*, 14 How. L.J. 105, 121-23 (1968).

90. *Hearings on Carswell*, *supra* note 70, *passim*.

91. *Hearings Before the Senate Comm. on the Judiciary on Nomination of Clement F. Haynsworth, of South Carolina, to be Assoc. Justice of the Supreme Court of the United States*, 91st Cong., 1st Sess. *passim* (1969) [hereinafter *Hearings on Haynsworth*].

92. *Hearings Before the Senate Comm. on the Judiciary on Nomination of William H. Rehnquist, of Arizona, and Lewis F. Powell, Jr., of Virginia, to be Assoc. Justices of the Supreme Court of the United States*, 92d Cong., 1st Sess. *passim* (1971) [hereinafter *Hearings on Rehnquist and Powell*].

93. *Hearings on Rehnquist*, *supra* note 83, *passim*; *Hearings on Rehnquist and Powell*, *supra* note 92, *passim*.

94. *Hearings on Carswell*, *supra* note 70, *passim*.

95. *Hearings Before the Senate Comm. on the Judiciary on Nomination of John Marshall Harlan, of New York, to be Assoc. Justice of the Supreme Court of the United States*,

Because only men and women of the highest integrity should sit on the Supreme Court, the Senate should probe deeply into any charge that impugns the ethical or moral fitness of a nominee. Opposition based upon a nominee's philosophy, however, often masquerades as concern about a nominee's ethics. Commentators have suggested, for example, that Blackmun's decision to participate in cases involving corporations in which he owned stock raised ethical questions at least as serious as those raised concerning similar conduct by Haynsworth.⁹⁶ The Senate confirmed Blackmun by a vote of eighty-eight to zero, and rejected Haynsworth ostensibly because of his ethical insensitivity. The real reasons for Haynsworth's defeat, however, may be traced to senatorial hostility toward Nixon and concerns over Haynsworth's judicial conservatism.⁹⁷ Similarly, opposition to Rehnquist in 1971 and 1986 may have been inspired more by his conservatism than by charges that he intimidated black voters or engaged in other unscrupulous conduct.⁹⁸

A corollary of the Senate's duty to review the professional fitness of nominees is its duty to investigate charges that cast doubt on such fitness. Since the earliest days of the Republic, Congress has asserted a power to investigate matters of public concern.⁹⁹ The Senate therefore may employ its investigatory power when it provides advice and consent on Supreme Court nominations. Although the administration customarily investigates a nominee in order to avoid embarrassment, the administration's own investigations sometimes have proved deficient.¹⁰⁰ This may be attributable in part to the administration's reluctance to dig too deeply into the

84th Cong., 1st Sess. 4-41 (1955); *Hearings on Stevens*, *supra* note 77, at 60-62. In both cases, the accusations were based solely on the testimony of a single individual, and the committee quickly concluded that the nominees had committed no impropriety.

96. McConnell, *supra* note 3, at 26.

97. Grossman & Wasby, *supra* note 72, at 570-71; Lively, *supra* note 4, at 575 n.143.

98. As Senator DeConcini stated during the debates on Rehnquist in 1986, "Let us not kid ourselves. This is not an issue about a restriction in a deed or about supposedly challenging voters. This is an issue of whether or not a very conservative sitting Justice should be moved to the position of Chief Justice." 132 CONG. REC. S 12,818 (daily ed. Sept. 18, 1986).

99. B. SCHWARTZ, *FROM CONFEDERATION TO NATION: THE AMERICAN CONSTITUTION, 1835-1877*, at 69-71 (1973).

100. See, e.g., Grossman & Wasby, *supra* note 72, at 579, 587; Lively, *supra* note 4, at 577.

past of a candidate that it finds attractive, but another reason is that a prospective justice is not subjected to full scrutiny by the press and by the public. Until a nomination is announced, the press and the public have often provided information on a nominee's background that the administration has not ferreted out. Many of the most important revelations concerning Haynsworth and Carswell, for example, came from members of the public and the press.¹⁰¹ The Senate therefore has resources to aid its investigation that the administration lacks.¹⁰²

Review of ethical qualifications has led to several of the Senate's most detailed investigations of nominees. For example, in investigating charges that Haynsworth had participated improperly in cases involving corporations in which he owned stock, the Senate interviewed an expert on judicial ethics, Haynsworth's stockbroker, one of Haynsworth's fellow judges from the Fourth Circuit, and Haynsworth himself.¹⁰³ The Judiciary Committee also interviewed the chairman of the Standing Committee on the Federal Judiciary of the American Bar Association, which in turn had interviewed Haynsworth's judicial colleagues, a cross section of district judges and lawyers in the Fourth Circuit, and Haynsworth himself.¹⁰⁴ While investigating Blackmun, the committee reviewed opinion letters from the deputy attorney general, the American Bar Association, and a judge from the Eighth Circuit.¹⁰⁵ The committee's probe into charges that Rehnquist had intimidated black voters concentrated heavily on affidavits and testimony by avowed eye

101. For example, the revelations about Carswell's 1948 speech and the transfer of the golf course originated with an enterprising reporter for a Jacksonville radio station. R. HARRIS, *supra* note 73, at 26-27; *See also* 210 THE NATION 450 (1970).

102. Although presidents often make public the names of persons who are under consideration, the full glare of public scrutiny usually does not come to bear until one person is nominated officially.

103. *Hearings on Haynsworth*, *supra* note 91, at 236, 363, 270 (testimony of Randolph Phillips, Chairman, Comm. for a Fair, Honest, and Impartial Judiciary).

104. *Id.* at 137.

105. *Hearings on Blackmun*, *supra* note 77, at 18, 26, 30 (testimony of Hon. Harrison L. Winter, Judge of the United States Court of Appeals for the Fourth Circuit).

witnesses.¹⁰⁶ The Judiciary Committee also has relied on FBI investigations of nominees.¹⁰⁷

IV. PREVENTION OF FAVORITISM

The second duty of the Senate which the Framers specifically identified, the duty to safeguard against presidential favoritism, is related closely to the Senate's duty to ensure the nominee's professional fitness. During the constitutional debates, the Framers warned against the appointment of presidential favorites because they feared that such favorites would be unqualified. Not surprisingly, therefore, the Senate seldom has demonstrated any aversion to presidential favorites *per se*, provided that they have been reasonably well qualified.

Three types of favoritism must be distinguished: personal favoritism, political favoritism, and demographic favoritism. Personal favoritism occurs when a president nominates a personal friend or close associate. Political favoritism involves the appointment of someone who has provided important services to the president, his program, or party. Such an appointment is a reward for past fidelity and sometimes is made in the expectation that the nominee would favor the president's programs while on the Court. Demographic favoritism arises when the president appoints a member of a particular geographic, religious, or ethnic group from which he seeks support, or which he wishes to have represented on the Court.

The nomination of presidential friends, although not a routine practice, has been far from uncommon. These nominations rarely have raised senatorial eyebrows because most nominees have been exceptionally well qualified. For example, the nomination of David

106. *Hearings on Rehnquist*, *supra* note 83, at 101-06; *Hearings on Rehnquist and Powell*, *supra* note 92, at 320, 290, 293; see N.Y. Times, Nov. 24, 1971, at 31, col. 2.

107. *E.g.*, *Hearings on Stevens*, *supra* note 77, at 8. Because investigations are so important, the Senate should make certain that it does not rush confirmation proceedings. See L. TRIBE, *supra* note 4, at 136. The 99th Congress adopted a timetable designed to ensure that there will be adequate opportunity for a thorough investigation even of seemingly routine nominations, and it provided extra time for those meriting special attention. Mathias, *Advice & Consent: The Role of the United States Senate in the Judicial Selection Process*, 54 U. CHI. L. REV. 200, 206 (1986). As former Senator Mathias has observed, "[u]nlike legislation, action on a judicial nomination processed in haste cannot be revisited and refined at leisure." *Id.*

Davis, Lincoln's friend, executor, and 1860 presidential campaign manager, encountered no significant opposition because Davis was well qualified.¹⁰⁸ Similarly, Kennedy's selections of Bryon White, an old Navy buddy, and Arthur Goldberg, a personal and political adviser, inspired no significant concern about favoritism because both White and Goldberg possessed outstanding professional credentials.¹⁰⁹ The brilliant background of Abe Fortas likewise blunted charges of favoritism when Johnson named him to the Court in 1965, even though senators questioned Fortas in detail about his close ties with the president.¹¹⁰

But when a nominee's credentials are not particularly distinguished, personal favoritism becomes an issue. The Senate opposed all four of Truman's nominees on charges of "cronyism" because none of them were known as bright legal talents.¹¹¹ Similarly, many senators expressed misgivings over Johnson's nomination of his old Texas friend, Homer Thornberry, whose record in Congress and on the federal bench was less outstanding than was his personal devotion to the president.¹¹²

In addition to concerns about professional fitness, a second objection to the nomination of presidential friends is that the friend will consult the president on matters that come before the Court or allow the president to influence his vote. Most commentators agree, for example, that Justice Vinson violated the doctrine of separation of powers when he advised President Truman in 1952 that the Court would rule in the administration's favor if the president seized the nation's steel mills.¹¹³ It may be more than coinci-

108. H. ABRAHAM, *supra* note 1, at 118-19. For a full discussion of the circumstances surrounding Davis's appointment, see C. SWISHER, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD 1836-64*, at 817-29 (1974) (Volume V of the Oliver Wendell Holmes Devise).

109. *Id.* at 274-77.

110. *Hearings Before the Senate Comm. on the Judiciary on Nomination of Abe Fortas, of Tennessee, to be an Assoc. Justice of the Supreme Court of the United States*, 89th Cong., 1st Sess. 41-50 (1965) [hereinafter *Hearings on Fortas*]. Considerable criticism of Fortas's close ties to Johnson occurred during the floor debate on the nomination. See 111 CONG. REC. 18827-28, 20054-55, 20068-69, 20072-73 (1965).

111. See H. ABRAHAM, *supra* note 1, at 238.

112. *Id.* at 286.

113. See R. DONOVAN, *TUMULTUOUS YEARS: THE PRESIDENCY OF HARRY TRUMAN 1949-1953*, at 386 (1982).

dence that the three justices who upheld Truman's position in the Steel Seizure Case were all Truman appointees.¹¹⁴

Johnson's attempt to elevate Fortas to the position of Chief Justice in 1968 ignited a firestorm of criticism because Fortas was reported to have been in almost daily contact with Johnson during his three years on the Court.¹¹⁵ Fortas said at his original confirmation hearings in 1965 that his relationship with Johnson had been "exaggerated out of all connections with reality."¹¹⁶ Once on the Court, however, Fortas helped Johnson with such important projects as the drafting of his 1966 State of the Union message and his address to the nation during the Detroit riots in July 1967. Indeed, Fortas reportedly acted as one of Johnson's closest advisers on a wide range of foreign and domestic matters. Fortas's categorical denial that he ever discussed Court business with Johnson¹¹⁷ did little to quell criticism. Senator Griffin declared that "the doctrine of separation of powers is the most fundamental concept embodied in our Constitution and . . . its preservation is crucial to the survival of free government," and concluded that "those who assume positions of high responsibility in any of the three branches of our Government have no license to ignore this fundamental principle which is at the core of our system."¹¹⁸

The Senate rightly was concerned about Justice Fortas's intimate association with President Johnson. The relationship easily could have influenced Fortas's decisions, especially on matters concerning the administration. Although Fortas could have recused himself in matters on which he had advised the president, Senator Griffin accurately pointed out that such recusal unfairly would de-

114. M. MARCUS, *TRUMAN AND THE STEEL SEIZURE CASE* 188-91, 197 (1977).

115. *Hearings Before the Senate Comm. on the Judiciary on Nomination of Abe Fortas, of Tennessee, to be Chief Justice of the United States and Nomination of Homer Thornberry, of Texas, to be Assoc. Justice of the Supreme Court of the United States*, 90th Cong., 2d Sess. 48 (1968) [hereinafter *Hearings on Fortas and Thornberry*]. In his defense, Fortas insisted that he "very seldom" advised Johnson on any matters. *Id.* at 104.

116. *Hearings on Fortas*, *supra* note 110, at 50 (testimony of Abe Fortas).

117. *Hearings on Fortas and Thornberry*, *supra* note 115, at 104. Fortas said that since he became a justice, Johnson "never, directly or indirectly, approximately or remotely, talked to me about anything before the Court or that might come before the Court. I want to make that absolutely clear." *Id.* Again, Fortas stated that "I have never, never been asked by the President. Nor have I expressed by [sic] views on any pending or decided case—never, senator, never." *Id.* at 183.

118. *Id.* at 47.

prive the nation of the services of one of only nine justices.¹¹⁹ More significantly, the doctrine of separation of powers clearly precludes close contact between the White House and the Marble Palace. As Professor Black pointed out in his essay on the Senate's role in the confirmation process, the "judges are *not* the President's people They are to be independent of him as they are of the Senate, neither more nor less."¹²⁰

The Senate's pronounced disgust over the favoritism inherent in the Fortas and Thornberry nominations may have discouraged cronyism. Although both Presidents Nixon and Reagan have made no secret that political considerations weighed heavily in their selections, no nominee since 1968 has been close to the president personally. The history of the Convention and the dangers of cronyism demonstrate that the Senate should scrutinize very carefully any presidential friend who is nominated to the Supreme Court.¹²¹

The second species of favoritism, political favoritism, also has become rare in recent years. Except for William Rehnquist in 1971, no nominee to the Court since Arthur Goldberg in 1962 has been a member of the administration. The objections to nominations as a reward for past services or in expectation of support from the Court resemble the objections to personal favoritism. Just as the Supreme Court should not be a retirement home for party war-horses, the president should not appoint justices who will promote the party line from the High Court bench. Although the life tenure of justices affords them a measure of independence, residual fealty to the administration, as with three of Truman's four appointees in

119. *Id.* at 50. Because Johnson already had announced that he would not be a candidate for reelection, however, the dangers posed by the Johnson-Fortas relationship would not have affected Fortas's service as Chief Justice adversely for any substantial period of time. In any event, Fortas's nomination was defeated more because of conservative opposition to his decisions and Republican hopes of an electoral victory in November than because of concern over Fortas's ties to Johnson. See, e.g., D. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 91-92 (1985).

120. Black, *supra* note 4, at 660.

121. As Senator Robert Griffin stated at the Fortas hearings in 1968, "The argument has been advanced that if a 'crony'—nominated because he is a crony—is 'qualified', he should be approved. I reject such a view because it demeans the Senate and the Supreme Court." Griffin later suggested that the Senate should confirm a confidant only if it was satisfied that he was one of the "best qualified" for appointment to the Supreme Court. *Hearings on Fortas and Thornberry*, *supra* note 115, at 47, 50.

the Steel Seizure Case, compromises the doctrine of separation of powers.

Moreover, justices who have close political associations with the president might follow the party line because they hope to attain that one political office which outranks a Supreme Court justiceship. Chief Justice Chase, for example, harbored presidential ambitions,¹²² and Charles Evans Hughes resigned from the Court in 1916 to accept the Republican nomination for president. Justice William O. Douglas was touted in 1944 as a running mate for Franklin Roosevelt, who announced shortly before the Democratic convention that he would be pleased to run with either Truman or Douglas.¹²³ In 1948, Douglas was Truman's first choice as a running mate, but Douglas declined the offer of a place on what seemed to be a doomed ticket.¹²⁴ Uninhibited about tapping the Court for political talent, Truman promised to support Chief Justice Vinson for the Democratic nomination in 1952.¹²⁵ Earl Warren, who had sought the Republican presidential nomination in 1948 and 1952, prior to his appointment to the Court in 1953, was mentioned widely in late 1955 and early 1956 as a likely successor to the ailing Eisenhower.¹²⁶

Although the evidence does not suggest that political ambitions influenced the judicial performance of these men, the danger remains that a politically well-connected justice may leave the Court to seek public office. For example, James Byrnes, a Democratic stalwart whose appointment to the Court was a consolation prize for his failure to receive the Democratic vice-presidential nomination in 1940, left the Court after barely one year to become a

122. *E.g.*, B. SCHWARTZ, *supra* note 99, at 225.

123. *E.g.*, B. COCHRAN, *HARRY TRUMAN AND THE CRISIS PRESIDENCY 15-17* (1973); W. DOUGLAS, *THE COURT YEARS 1939-75*, at 283 (1980). Douglas admitted in his memoirs that "[a]n FDR 'draft' would have been difficult to resist. I am glad I never had to face up to it in 1944." *Id.* at 283-84.

124. *See* J. FRANK, *MARBLE PALACE: THE SUPREME COURT IN AMERICAN LIFE* 275 (1958); J. SIMON, *INDEPENDENT JOURNEY, THE LIFE OF WILLIAM O. DOUGLAS* 257-75 (1980).

125. A. HAMBY, *BEYOND THE NEW DEAL: HARRY S. TRUMAN AND AMERICAN LIBERALISM* 481-82 (1973). Vinson seriously deliberated a campaign for the presidency, but eventually declined Truman's support because of failing health. *Id.*

126. J. POLLACK, *EARL WARREN: THE JUDGE WHO CHANGED AMERICA* 183 (1979). Eisenhower's physical recovery and his resolution to seek a second term ended all speculation about a Warren candidacy in 1956. *Id.*

Roosevelt adviser.¹²⁷ Similarly, Arthur Goldberg's close connection to Democratic Party politics led him to yield to President Johnson's intense pressure to leave the Court to become Ambassador to the United Nations.¹²⁸ Such short tenures are undesirable. Most justices need a few years to adjust to their jobs, and continuity of membership gives the Court's decisions predictability and coherence. Accordingly, the Senate should scrutinize specially a nominee whose political background suggests that he or she will not serve a long tenure on the Court.¹²⁹

Despite the dangers of political favoritism, the Senate has shown a high tolerance for nominations that repay political debts. For example, all of Franklin Roosevelt's nominees, with the exception of Wiley Rutledge, had provided key support for New Deal legislation or policies. Although some foes of the New Deal complained that Roosevelt's appointments were too political, few accused him of favoritism because most of his nominees enjoyed outstanding professional reputations. Moreover, the Senate displayed similar deference to Truman's nominees, all of whom had done yeoman's work for the Democratic Party, even though none of them had distinguished credentials.

Similarly, the Senate often has countenanced demographic favoritism. Since the earliest days of the Republic, when Washington made a special point of naming one justice for each region of the country,¹³⁰ the Senate generally has seen no harm in allowing the president to consider geography, or even religion or race, as a factor in selecting a nominee, provided that the nominee is otherwise qualified. In 1956, for example, President Eisenhower was widely praised for appointing a Roman Catholic, William Brennan, at a time when the Court had no Roman Catholic members.¹³¹ More recently, as the nation's geographic and religious divisions have grown less pronounced, presidents and the Senate have paid less

127. H. ABRAHAM, *supra* note 1, at 14-16.

128. *Id.* at 259-62.

129. John P. Frank has observed that "[t]he Constitution was intended to free the Justices to satisfy just one ambition, the ambition to do a good judicial job. As Chief Justice Waite said in 1876, 'certainly no man should have the place who is willing to exchange it for another.'" J. FRANK, *supra* note 124, at 279.

130. *Id.* at 71.

131. *Id.* at 245.

attention to the geographic and religious balance of the Court. Presidents Nixon, Ford, and Reagan, for example, did not restore the Court's so-called "Jewish seat," which has remained vacant since Fortas's resignation in 1969. Geographic balance has become so unimportant that Nixon appointed two justices from Minnesota and Reagan did not hesitate to name a second Arizonan.¹³² Concern for geographical and religious balance has given way to a concern for racial and sexual balance. Just as Johnson acknowledged that race was a primary consideration in his appointment of Marshall in 1967,¹³³ so Reagan's appointment of O'Connor in 1981 fulfilled his campaign promise to appoint a woman.¹³⁴

V. EVALUATION OF PHILOSOPHY

Although the Framers did not discuss the issue, consideration of a nominee's social, political, judicial, and economic views has become an integral part of the appointment process. The Senate's review of a nominee's personal views sometimes may shock the public, embarrass senators, and offend some scholars; nevertheless, the Senate has a duty as well as a right to inquire about such views. At several hearings on nominees in recent years, the Judiciary Committee properly has been reminded of Oliver Wendell Holmes's remark that the beliefs of judges are "the secret root from which the law draws all the juice of life."¹³⁵ Because the Court's justices "[a]re not abstract and impersonal oracles, but are men whose views are necessarily, though by no conscious intent, affected by inheritance, education and environment and by the impact of history past and present,"¹³⁶ the Senate would abdicate its

132. Between 1981, when Sandra Day O'Connor of Arizona became a justice, and 1986, when Warren Burger of Minnesota resigned as Chief Justice, four of the Court's nine members were from Arizona and Minnesota. The combined population of these states is only about three percent of the total population of the nation.

133. See, e.g., *Hearings on O'Connor*, *supra* note 77, at 5.

134. N.Y. Times, July 8, 1981, at A1, col. 6, A12, col. 2.

135. *Hearings on Rehnquist and Powell*, *supra* note 92, at 444 (testimony of Prof. Gary Orfield);

136. *Hearings on Haynsworth*, *supra* note 91, at 562 (testimony of Charles Warren). As Felix Frankfurter observed, many words and phrases in the Constitution are so undefined that they "leave the individual Justice free, if indeed they do not actually compel him, to fill in the vacuum with his own controlling notions of economic, social and industrial facts with reference to which they are invoked." F. FRANKFURTER, *The Red Terror of Judicial Reform*,

constitutionally ordained role as an essential partner in the appointment process if it failed to review the political and judicial philosophies of nominees. As Professor Black observes, the proposition that the Senate should not consider a nominee's political views "amounts to an assertion that the authority that must 'advise and consent' to a nomination ought not to be guided by considerations which are hugely important in the making of the nomination."¹³⁷ Even though senators can never accurately predict how a nominee's ideology might change after he or she has donned judicial robes, pre-appointment predictions are not entirely lacking in prescience. The Senate would be remiss if it did not even attempt to consider how a nominee's ideology might affect his or her performance on the Court.¹³⁸ As Professor Lively points out, "The argument that policy-oriented debate concerning a Supreme Court nominee demeans the candidate and the Court . . . ignores a well-established constitutional principle favoring precisely such a focus. It reflects a misplaced notion that somehow selection of judges is supposed to be above politics."¹³⁹

The history of confirmation proceedings demonstrates that the Senate has been concerned about the political views of nominees. In a few instances, senators have admitted rather frankly that political considerations influenced their vote. In 1930, for example, a number of liberal senators opposed Charles Evans Hughes because of his close association with big business.¹⁴⁰ Later that year, opponents of Judge Parker cited his decisions ruling against labor unions.¹⁴¹ So far as possible, however, the Senate has tried to mask its partisan interests with appeals to fundamental values. Thus, opponents of Hughes contended that he elevated property rights

in FELIX FRANKFURTER ON THE SUPREME COURT, *EXTRAJUDICIAL ESSAYS ON THE COURT AND THE CONSTITUTION* 163 (P. Kurland ed. 1970).

137. Black, *supra* note 4, at 658; see also *Hearings on Rehnquist and Powell, supra* note 92, at 303 where Joseph L. Rauh, Jr., stated that "if the President is making his decisions on an ideological bent, the Senate . . . has a right to do likewise."

138. *But cf.* Friedman, *supra* note 4, at 1291-1320.

139. Lively, *supra* note 4, at 575.

140. A. MASON, *THE SUPREME COURT FROM TAFT TO WARREN* 73 (1958).

141. Mendelsohn, *supra* note 89; *Hearings Before the Senate Comm. on the Judiciary on Nomination of John J. Parker to be Assoc. Justice of the Supreme Court of the United States*, 71st Cong., 2d Sess., *passim* (1930).

over human rights.¹⁴² In opposing Parker in 1930, Senator George Norris stated that "[w]hen we are passing on a judge, therefore, we not only ought to know whether he is a good lawyer, not only whether he is honest . . . but we ought to know how he approaches the great questions of human liberty."¹⁴³ In 1955, a number of senators opposed Harlan because they contended that he would jeopardize national sovereignty by elevating international treaties over the Constitution.¹⁴⁴

The nomination of Potter Stewart in 1958 marked the beginning of an era in which conservative senators made adherence to the principles of judicial restraint and stare decisis the litmus test for nominees. Embittered by the Court's desegregation decisions and a recent line of holdings in national security cases, conservative southern senators demanded to know whether Stewart regarded himself as a "creative judge," whether he believed that the Constitution had the same meaning as it had in 1787, and whether he would honor the doctrine of stare decisis.¹⁴⁵ During the 1960s, southern conservatives subjected several other nominees, most notably Marshall and Fortas, to similar questions as the Supreme Court continued to shatter precedents in such areas as race relations, criminal procedure, and legislative apportionment. After the election of Nixon in 1968, however, the liberals in the Senate more than any other group queried nominees about their views on fundamental issues. Whereas the conservatives regarded judicial restraint as the sine qua non for confirmation, the liberals believed that commitment to certain civil liberties was crucial. During the hearings on Rehnquist in 1971, for example, Senator Birch Bayh declared that the most important quality for the Senate to con-

142. W. SWINDLER, *COURT AND CONSTITUTION IN THE TWENTIETH CENTURY: THE OLD LEGALITY 1889-1932*, at 298 (1969).

143. 72 CONG. REC. 8192 (1930). Norris contended that "we ought to know that every one who ascends to that holy bench should have in his heart and in his mind the intention of looking after the liberties of his fellow citizens." *Id.* See also R. LOWITT, *GEORGE W. NORRIS: THE PERSISTENCE OF A PROGRESSIVE 1913-1933*, at 438-39 (1971).

144. *E.g.*, 101 CONG. REC. 3015-19 (1955) (statement of Sen. James Eastland); *id.* at 3029 (statement of Sen. William E. Jenner); *id.* at 3035-36 (statement of Sen. Olin D. Johnston).

145. *Hearings Before the Senate Comm. on the Judiciary on Nomination of Potter Stewart to be Assoc. Justice of the Supreme Court of the United States*, 86th Cong., 1st Sess. 16, 20, 26 (1959) [hereinafter *Hearings on Stewart*].

sider was "a demonstrated commitment to fundamental human rights."¹⁴⁶ Bayh explained that

[t]he great struggle of our time has been to secure equal justice under law for all citizens. It goes without saying that demonstrated insensitivity to the problems of inequality and discrimination should disqualify a candidate for the Court. No person should be put on the Court whose views are inconsistent with securing equal rights and equal opportunity for all regardless of race, religion, creed, national origin or sex. And equally important are the fundamental liberties of the Bill of Rights. Thus, a nominee should also have a record which shows that he is committed to preserving those basic individual freedoms.¹⁴⁷

During a number of hearings and debates over the past fifteen years, liberals have expressed the view that the Senate should not confirm a nominee whose views would be "harmful" to the country.¹⁴⁸ These senators generally have defined "harm" as opposition to their own understanding of human equality and their interpretation of the Bill of Rights. This test of "harmfulness" stems from a 1970 article by Professor Black, who wrote in the wake of the Haynsworth and Carswell nominations that a senator should vote against a nominee "if he firmly believes on reasonable grounds, that a nominee's views on the large issues of the day will make it harmful to the country to sit and vote on the Court."¹⁴⁹ Professor Black concluded that a senator has no duty "to vote for a man whose views on great questions the Senator believes to make him dangerous as a judge."¹⁵⁰ More recently, and in a similar vein, Professors Tribe and Kurland wrote that the Senate has an

obligation to assure itself that a nominee's substantive views of law are within the broad bounds of acceptability in American

146. 117 CONG. REC. 44741 (1971).

147. *Id.*

148. For example, Senator John Tunney stated at the Rehnquist hearings in 1971 that where the President deems it appropriate to change entirely the character of the Supreme Court, changing it to his own image, the Senate has the right to reject the nominee on the grounds that his views on the large issues of the day will make it harmful to the country were he to sit and vote on the Court.

Hearings on Rehnquist and Powell, supra note 92, at 75.

149. Black, *supra* note 4, at 657.

150. *Id.* at 659.

life and not on its lunatic fringes—whether left or right. The Republic may demand—and its senators ought therefore to ensure—that its life-tenured judiciary does not disdain the Bill of Rights or the Fourteenth Amendment's command for equal protection of the laws and due process.¹⁵¹

Although the formulations of Professors Black, Tribe, and Kurland represent a useful and reasoned effort to define a constitutionally appropriate means of accommodating political reality in evaluating a nominee's philosophy, their test, as applied in a cruder form by senators, suffers from certain limitations. The word "harmful" and phrases such as "broad bounds of acceptability" and "lunatic fringe" are inherently ambiguous. An intellectually honest senator might well believe that a nominee whose philosophical bent differed from his or her own would be harmful to the country; yet few senators would—or should—oppose a nominee merely because the nominee occupies a place on the political spectrum a bit to the left or right of his or her own. In this sense, the word "harmful" provides too broad a basis for opposing a nominee. Professors Black, Tribe, and Kurland have properly disavowed such a broad interpretation.¹⁵² If, however, the word refers to views which might subvert the republican foundations of the nation, then the definition is too narrow. No president ever has nominated a candidate harmful in that sense, nor is one likely to appoint such a candidate. Because even unsuccessful nominees always have won substantial numbers of votes in the Senate¹⁵³ as well as significant support from federal judges, the bar, and the public,¹⁵⁴ no nominee

151. Kurland & Tribe, *supra* note 63, at 3. For a more complete discussion of Professor Tribe's views on the role of ideology in the Senate's confirmation of Supreme Court nominees, see L. TRIBE, *supra* note 4, at 93-124.

152. Black, *supra* note 4, at 658; Kurland & Tribe, *supra* note 63.

153. The Senate defeated Carswell's nomination, for example, by a vote of 45 to 51, Haynsworth's by a vote of 45 to 55, and Parker's by a vote of 39 to 41. The votes also often were narrow on unsuccessful nominees during the nineteenth century. In 1894 the Senate rejected Peckham by 32 to 41 and Hornblower by 24 to 30. The Senate defeated the nomination of Hoar in 1870 by a vote of 24 to 33, and rejected Black in 1860 by a vote of 25 to 26. See H. ABRAHAM, *supra* note 1, *passim*.

154. See, e.g., *Hearings on Haynsworth*, *supra* note 91.

ever has held views that fell outside the "broad bounds of acceptability."¹⁵⁵

Moreover, a test based upon "broad bounds of acceptability" or "harmfulness" may suggest to senators that they may measure a nominee's ideology by a roughly objective standard. In reality, however, the existence of any consensus about what is a "reasonable" ideology is problematical.¹⁵⁶ Moreover, the illusion of such a consensus may encourage a senator to delude him or herself into believing that his or her vote on a nominee is based upon transcendent values when in fact it represents a subjective political decision.

A senator may properly base his or her vote upon subjective political choices, however, if that decision is based upon a broad view of the nominee's record and ideas and a broad vision of the Constitution, rather than upon narrowly partisan or evanescent issues.¹⁵⁷ Accordingly, Senator Bayh's insistence upon fidelity to a broadly libertarian interpretation of the Bill of Rights and the fourteenth amendment would provide a sound test for any senator who favored such an interpretation. Likewise, a more conservative senator who favored a less expansive interpretation of the Bill of Rights and the fourteenth amendment could properly oppose a nominee whose views were broadly more libertarian.

155. Professor Friedman has observed that there have been few, if any, nominees whose views were so abhorrent that they were beyond the realm of rational political discourse in the nation. Friedman, *supra* note 4, at 1284, 1319.

156. *But cf.* L. TRIBE, *supra* note 4, at 96.

157. Because justices usually serve a lengthy tenure and rule on a wide array of issues, there is agreement that a senator should not base his or her vote on a nominee's position on one issue. As Professor Stephen Gillers told the Senate Committee on the Judiciary at the O'Connor hearings:

People sit on the Court for 10, 20, some in excess of 30 years. A nominee who is pressed with regard to an issue that may be emerging today, may be sitting on the Court long, long after that issue is forgotten. It . . . is shortsighted in the extreme to emphasize a particular current issue over a nominee's character, history, intellect, judgment

Hearings on O'Connor, *supra* note 77, at 388-89. Or, as Senator Kennedy stated, "It is . . . offensive to suggest that a potential Justice . . . must pass the litmus test of any single-issue interest group." Likewise, Professor Tribe has aptly argued that "if the President insists—unwisely and improperly—on nominating only those who express a politically approved view of a single issue, such as the 'right to life' or school prayer, or only those who are found acceptable by a specific political or moral constituency, then each Senator has a special duty not to confirm." L. TRIBE, *supra* note 4, at 98.

In applying this standard, it is important to emphasize again that the senator must recognize that his or her criteria are subjective. The dissenting members of the Judiciary Committee seemed to recognize this in their report opposing the nomination of Rehnquist in 1971. They stated:

Under any theory of the Senate's task, our role inescapably includes weighing the nominee's attitude toward the fundamental values of our constitutional system: limits on government power, individual liberty, human equality. A man takes what he is, and believes, to the bench. Ultimately, it may be less important to debate the meaning of judicial philosophy than simply to acknowledge the inherent strand of discretion in judicial decision—especially Constitutional interpretation. The best intentions of restraint cannot erase the elements of value and judgment involved when the Court applies the majestic generalities of the Fourteenth Amendment¹⁵⁸

A refusal by the Senate to admit frankly that policy considerations influence its attitude toward the nominee creates a charade in which the Senate's focus on issues such as personal integrity and judicial temperament conceals concern over the nominee's political views. For example, the conservative senators who interrogated such nominees as Stewart, Fortas, and Marshall about their views on judicial restraint were less concerned with fidelity to precedent than they were fearful that the nominees would construe the Constitution to promote liberal positions on issues such as criminal procedure and civil rights.¹⁵⁹ Similarly, much of the concern expressed over the competence and temperament of Carswell and the integrity of Haynsworth and Rehnquist masked objections to their ideology.¹⁶⁰ Such hypocrisy impugns the reputation of the nominee and demeans the integrity of the Senate.¹⁶¹ As Professor Lively has observed:

158. 117 CONG. REC. 44,766 (1971).

159. At his confirmation hearings in 1968, Fortas reminded Senator Sam Ervin that Ervin himself had voted to overturn a recent precedent when Ervin served on the North Carolina Supreme Court and that Ervin had written in that decision that "the doctrine of stare decisis will not be applied . . . to preserve and perpetuate error and grievous wrongs." *Hearings on Fortas and Thornberry*, *supra* note 115, at 110 (statement of Abe Fortas).

160. See *supra* notes 90-98 and accompanying text.

161. As McConnell concludes:

Whenever the Senate . . . obscures its true motives, it is a proper subject of criticism for fostering a process that demeans itself as well as the object of its true motive. Denigration is better avoided, the public better served, and constitutional mandates better fulfilled not by abandoning robust political debate, but by embracing it candidly.¹⁶²

VI. QUESTIONING OF THE NOMINEE

As part of the Senate's probe into the fitness of a nominee and its evaluation of a nominee's political views, the Judiciary Committee solicits the testimony of the nominee. The Senate's interrogation of nominees is a relatively new function of the Senate's confirmation process. No nominee testified before the Senate until 1925, when Harlan Fiske Stone appeared before the Judiciary Committee in order to defend his investigation as Attorney General into the conduct of Senator Burton Wheeler.¹⁶³ Although Stone's appearance before the Judiciary Committee was a "complete success,"¹⁶⁴ his testimony did not establish a custom, and three decades passed before testimony by a nominee became an established practice. The testimony of the few nominees appearing before the Judiciary Committee between 1925 and the 1950s was limited to questions about the nominee's past actions.¹⁶⁵ The committee did not question nominees about judicial philosophy or their opinions on legal issues. One nominee, Sherman Minton, declined an invitation to appear;¹⁶⁶ and Felix Frankfurter agreed to testify only about his past actions, explaining that

A pattern emerges running from Rutledge and Taney through Brandeis and Parker up to and including Haynsworth and Carswell in which the Senate has employed deception to achieve its partisan goals. The deception has been to ostensibly object to a nominee's fitness while in fact the opposition is born of political expedience.

McConnell, *supra* note 3, at 13.

162. Lively, *supra* note 4, at 575.

163. A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 188-97 (1956).

164. *Id.* at 197.

165. See generally Thorpe, *The Appearance of Supreme Court Nominees Before the Senate Judiciary Committee*, 18 J. PUB. L. 371 (1969) (discussing the questioning of Supreme Court nominees from 1925 to 1969).

166. Minton explained in a letter to the committee that "personal participation by the nominee in the committee proceedings relating to his nomination presents a serious question of propriety, particularly when I might be required to express my views on highly controversial and litigious issues affecting the Court." 95 CONG. REC. 13,803 (1949).

[m]y attitude and outlook on relevant matters have been fully expressed over a period of years and are easily accessible. I should think it not only in bad taste but inconsistent with the duties of the office for which I have been nominated for me to attempt to supplant my past record by personal declarations.¹⁶⁷

Starting with Harlan in 1955, however, every nominee has testified before the committee and most have been questioned about their judicial philosophy and at least some current legal issues. Indeed, the Senate's questioning of nominees has evolved into an integral part of the confirmation process. The scope of such testimony, however, has varied widely from nominee to nominee. In many instances, it has been either perfunctory or concentrated on narrow issues that reflect immediate political concerns. The clear tendency, however, has been toward increasingly comprehensive questions. In 1955, for example, the Judiciary Committee asked Harlan primarily about his views on national sovereignty, a subject brought to the fore by a temporary recrudescence of isolationism. The 1957 hearings on Brennan also were narrowly focused. Brennan was perhaps the last target of the sharp tongue of Senator Joseph McCarthy,¹⁶⁸ who interrogated Brennan about speeches in which Brennan had condemned the excessive zeal of investigations such as those conducted by McCarthy.¹⁶⁹ Perhaps embarrassed by McCarthy's hectoring of Brennan, other senators had few questions for the nominee. Even southern conservatives limited themselves to a few questions about constitutional interpretation as it related to the Court's recent rulings on desegregation.

Southern conservatives made up for lost time two years later, however, when they examined Stewart in detail about his theories on constitutional interpretation and his opinions on desegregation. Later that year, however, the committee spent much less time questioning Charles Whittaker, whose conservative judicial record

167. *Hearings Before the Senate Comm. on the Judiciary on the Nomination of Felix Frankfurter to be Assoc. Justice of the Supreme Court of the United States*, 76th Cong., 1st Sess. 108 (1939) [hereinafter *Hearings on Frankfurter*].

168. McCarthy died three months after the hearings.

169. *Hearings Before the Senate Comm. on the Judiciary on the Nomination of William Joseph Brennan, Jr., of New Jersey, to be Assoc. Justice of the Supreme Court of the United States*, 85th Cong., 1st Sess. 5-28 (1957) [hereinafter *Hearings on Brennan*].

apparently appeased southern conservatives.¹⁷⁰ Similarly, in 1962 the committee spent little time questioning Byron White, who testified that "I think it is clear under the Constitution that legislative power is not vested in the Supreme Court."¹⁷¹ The committee devoted more attention to Goldberg because his record of liberal activism worried some senators.¹⁷² During the Marshall hearings in 1967 and the Fortas and Thornberry hearings in 1968, however, senators questioned the nominees intensively about a wide range of issues, especially desegregation, criminal procedure, and reapportionment.¹⁷³ These were the first hearings to cover so broad a gamut of public issues. When Warren E. Burger appeared to testify in 1969, however, the committee again confined itself to only a few questions.¹⁷⁴

Although the Senate interrogated the next several nominees—Haynsworth, Carswell and Blackmun—more extensively, the questions primarily addressed the nominees' ethical and moral fitness rather than public issues.¹⁷⁵ The committee questioned Rehnquist, Powell, and Stevens more broadly. The queries to Stevens, for instance, concerned the issues of capital punishment, wiretap-

170. *Hearings Before the Senate Comm. on the Judiciary on the Nomination of Charles Evans Whittaker to be Assoc. Justice of the Supreme Court of the United States*, 86th Cong., 1st Sess. (1959). The brevity of the Senate's questioning of Whittaker led William Rehnquist to complain that the committee had

succeeded in adducing only the following facts: (a) proceeds from skunk trapping in rural Kansas assisted him in obtaining his early education; (b) he was both fair and able in his decisions as a judge of the lower federal courts; (c) he was the first Missourian ever appointed to the Supreme Court; (d) since he had been born in Kansas but now resided in Missouri, his nomination honored two states.

Rehnquist, *supra* note 4, at 7-8.

171. *Hearing Before the Senate Comm. on the Judiciary on Nomination of Byron R. White, of Colorado, to be Assoc. Justice of the Supreme Court of the United States*, 87th Cong., 2d Sess. 23 (1962) [hereinafter *Hearings on White*].

172. *Hearings on Goldberg*, *supra* note 67, at 7-14, 43-44, 56, 63-65.

173. *Hearings on Fortas and Thornberry*, *supra* note 115, *passim*; *Hearings on Marshall*, *supra* note 87, *passim*.

174. *Hearing Before the Senate Comm. on the Judiciary on Nomination of Warren E. Burger, of Virginia, to be Chief Justice of the United States*, 91st Cong., 1st Sess. (1969) [hereinafter *Hearings on Burger*].

175. See *Hearings on Blackmun*, *supra* note 77, *passim*; *Hearings on Carswell*, *supra* note 70, *passim*.

ping, prior restraints on the news media, gender discrimination, the exclusionary rule, and the Court's jurisdiction.¹⁷⁶

The committee's most comprehensive examination occurred in 1981, when it solicited the views of Sandra Day O'Connor on more than fifty different issues. In addition to asking questions on such familiar topics as the exclusionary rule, capital punishment, school prayer, and constitutional interpretation,¹⁷⁷ the Senate also raised several issues rarely, if ever, discussed at nomination hearings. The committee asked about venue rules, diversity jurisdiction, judicial salaries, rehabilitation of juvenile offenders, judicial training programs, life tenure for Supreme Court justices, court delays, the constitutional implications of administrative regulations, the creation of specialty courts, and Supreme Court press conferences.¹⁷⁸ Committee members also questioned her about such social and political issues as the right to keep and bear arms, cruel and unusual punishment, homosexuality, and notification to parents regarding distribution of contraceptives to their children.¹⁷⁹ The questioning of Rehnquist in 1986 was narrow by comparison, but the committee again raised a broad range of issues. Scalia was also questioned about a fairly broad range of issues, including abortion, the *Miranda* rule, and affirmative action.¹⁸⁰

The personal appearances of nominees serve three functions. The most obvious is to help senators evaluate nominees' social, political, and judicial views in order to make a reasoned decision on confirmation. A second, related function is to provide nominees with an opportunity to respond to any charges impugning their character, competence, or any other aspect of their record. A third purpose is to facilitate an exchange of ideas between the senators and the nominees.

176. *Hearings on Stevens*, *supra* note 77, at 27, 46, 31, 56-57, 77, 45.

177. *Hearings on O'Connor*, *supra* note 77, at 79, 128, 132-33, 82-86.

178. *Id.* at 153-54, 92-93, 212-13, 130, 97, 136-37, 210-11, 155-56, 203-04, 112.

179. *Id.* at 134-35, 161, 247, 246-47.

180. *Hearings on Rehnquist*, *supra* note 83, 132-373; *Hearings Before the Senate Comm. on the Judiciary on Nomination of Antonin Scalia to be Assoc. Justice of the Supreme Court of the United States*, 99th Cong., 2d Sess. 37, 34, 45 (1986) [hereinafter *Hearings on Scalia*]. The Senate's query of Scalia, however, was less detailed than its questioning of O'Connor in 1981. The reason may be that the Senate expended so much time and energy on the interrogation and investigation of Rehnquist.

Although the first function is the most obvious and is frequently cited as a reason for a nominee's testimony, it is probably the least important. As Professor Powe has observed, "Senate questioning has proved astonishingly ineffective in eliciting the desired information."¹⁸¹ The questioning presents a conflict between the Senate's right to elicit a nominee's views, and the nominee's duty to refuse to make any statement that would prejudice his or her service on the Court.¹⁸² Although senators often have pressed nominees for specific views, nominees just as often have refused to answer, contending that to answer would compromise the Court's integrity. The result of this conflict is an impasse which has frustrated senators and exasperated nominees. In 1967, southern senators tried for two days to extract comments from Thurgood Marshall regarding the fifth amendment's prohibition of compelled self-incrimination in the wake of the Court's controversial decision in *Miranda v. Arizona*.¹⁸³ Marshall refused to answer, although he was willing to state generally that he opposed involuntary confessions and that he did not believe *Miranda* had contributed to an increase in crime. The following exchange illustrates the stalemate characterizing the Senate's attempts to elicit the opinions of nominees on controversial public issues:

Senator ERVIN. [I]f you are not going to answer a question about anything which might possibly come before the Supreme Court some time in the future, I cannot ask you a single question about anything that is relevant to this inquiry.

Judge MARSHALL. All I am trying to say, Senator, is I do not think you want me to be in the position of giving you a statement on the fifth amendment, and then, if I am confirmed and sit on the Court, when a fifth amendment case comes up, I will have to disqualify myself.

Senator ERVIN. If you have no opinions on what the Constitution means at this time, you ought not to be confirmed. Anybody that has been at the bar as long as you have, and has as

181. Powe, *The Senate and the Court: Questioning a Nominee*, 54 TEX. L. REV. 891, 893 (1976).

182. See Rees, Memorandum on the Proper Scope of Questioning of Supreme Court Nominees at Senate Advice and Consent Hearings, in *Hearings on O'Connor*, *supra* note 77, at 174.

183. 384 U.S. 436 (1966).

distinguished a legal career as you have, certainly ought to have some very firm opinions about the meaning of the Constitution. Judge MARSHALL. But as to particular language of a particular section that I know is going to come before the Court, I do have an opinion as of this time. But I think it would be wrong for me to give that opinion at this time. When the case comes before the Court, that will be the time.¹⁸⁴

Similarly, Rehnquist explained in 1971 that he could not answer a question on searches and seizures because "there are several cases pending up there now and I would anticipate that there would be a number in the future."¹⁸⁵ Senator Tunney remarked in frustration to Rehnquist that "[i]f it is impossible to probe your thinking because you feel that . . . the issue might come before the Supreme Court at some time, there is no way that we can go after the process of thinking that you engage in."¹⁸⁶

The committee's questioning of nominees, however, need not necessarily result in a stalemate if the senators are willing to phrase their questions in general terms and if the nominees are willing to provide general answers.¹⁸⁷ Sandra Day O'Connor, for example, shared her thoughts on a wide variety of issues, even while she avoided specific comments that would have prejudiced her participation on the Court. O'Connor limited herself to explaining the importance of the issues about which she was questioned, reciting in general terms the relevant state of the law.¹⁸⁸ Although O'Connor's testimony may have provided little basis for the committee's evaluation, she at least demonstrated that she was concerned, thoughtful, and informed about major problems facing American society.

Despite their frequent refusals to answer certain questions, no nominee since Minton has challenged the Senate's right to ask

184. *Hearings on Marshall*, *supra* note 87, at 53.

185. *Hearings on Rehnquist and Powell*, *supra* note 92, at 157.

186. *Id.* at 75.

187. Whether a nominee *should* provide more specific answers to certain types of questions is a different issue which is beyond the scope of this Article. For a discussion of this issue, see Ross, *The Questioning of Supreme Court Nominees at Senate Confirmation Hearings: Proposals for Accommodating the Needs of the Senate and Assuaging the Fears of the Nominees*, 62 TUL. L. REV. ____ (1987) (forthcoming).

188. *E.g.*, *Hearings on O'Connor*, *supra* note 77, at 163.

such questions. William Rehnquist told the committee in 1971 that he could "fully sense the problem you have, and surely you can sense the problem that the nominee has, too." Rehnquist explained that "I do not blame you for feeling you want something more specific than just a . . . pious declaration, and yet I find that when one tries to elaborate specific they tend to be things no one would disagree with or else we get into an area where the matter is likely to come before the court in some form."¹⁸⁹ The only ruling by the committee that specifically addresses the dilemma reiterated that the Senate may ask any question and the nominee may refuse to answer any question.¹⁹⁰

Nominees have felt freer to discuss their judicial philosophies than to discuss their views on particular issues. Nevertheless, such testimony has generated little beyond what Rehnquist called "pious declarations." Every nominee since Stewart has abjured judicial activism when asked about how flexibly the Court should interpret the Constitution.¹⁹¹ The answers are so perfunctory that they reveal nothing about a nominee's performance on the Court. When the committee asked Fortas, a highly political man and an activist judge, to describe the circumstances under which the Court should attempt to bring about social and economic change, he replied, "Zero, absolutely zero."¹⁹² Fortas pointed out, however, that the words of the Constitution are not "simple and clear and unmis-takable in their meaning."¹⁹³ This truism has been expounded by strict constructionists and broad constructionists alike.

189. *Hearings on Rehnquist and Powell*, *supra* note 92, at 41. Similarly, Fortas stated at his hearings in 1968 that "I believe that this is an area in which there is truly a constitutional dilemma. I believe that it is a dilemma for the committee as well as for the nominee". *Hearings on Fortas and Thornberry*, *supra* note 115, at 122.

190. *Hearings on Stewart*, *supra* note 145, at 41-60. In response to a point of order that Senator Hennings raised suggesting that questions about state court decisions were improper, Senator Eastland ruled that senators could ask any questions they liked, but that the nominee was free to decline to answer any questions he or she thought improper. Senator Hennings withdrew his point of order after several senators expressed support for Eastland's ruling. *Id.*

191. See, e.g., *Hearings on Blackmun*, *supra* note 77, at 33, 35; *Hearings on Fortas and Thornberry*, *supra* note 115, at 105-06, *Hearings on Goldberg*, *supra* note 67, at 8, *Hearings on Burger*, *supra* note 174, at 6.

192. *Hearings on Fortas and Thornberry*, *supra* note 115, at 105-06.

193. *Id.* at 105.

Not only does testimony by the nominees reveal little about their views on public issues or judicial philosophy, but in most instances such testimony is superfluous because the nominee's views already are well known. If the nominee is an appellate judge, his or her record speaks more authoritatively than the words he or she might speak at a hearing. Additionally, like Frankfurter, most nominees who are not judges have records on public issues "that have been fully expressed over a number of years and are accessible."¹⁹⁴

Notwithstanding its many shortcomings, testimony by nominees serves important purposes. Even if a nominee's views generally are well known, testimony can help to clarify particular aspects of the nominee's public record. Indeed, a nominee's writings and speeches may raise more questions about his or her philosophy than they answer. William Rehnquist's reputation for conservatism prompted many questions at his confirmation hearings in 1971, yet many of his answers ameliorated concern that he was an extremist. Rehnquist explained, for example, that he supported Phoenix's Public Accommodations Act, which he had opposed publicly prior to its enactment in 1964.¹⁹⁵ Rehnquist explained that the ordinance had "really worked very well in Phoenix" and that "I have come to realize . . . more than I did at the time, the strong concern that minorities have for the recognition of these rights. I would not feel the same way today about it as I did then."¹⁹⁶ Rehnquist's answers to other questions also demonstrated that his philosophy was tempered by a respect for fundamental rights. Rehnquist's statement that "any sort of electronic surveillance that would interfere with the lawyer-client relationship of a defendant after he has been charged would be very disturbing" pleased his questioner, Senator Fong, who was "glad to hear that view."¹⁹⁷ Similarly, Senator Tunney was "very happy" to hear Rehnquist explain that he "heartily" favored increased availability of legal services for the poor.¹⁹⁸ Although Tunney still voted against him, Rehnquist's opportunity to present himself as a humane and reasonable conservative may have

194. *Hearings on Frankfurter*, *supra* note 167.

195. *Hearings on Rehnquist and Powell*, *supra* note 92, at 69-70, 155-56.

196. *Id.* at 70.

197. *Id.* at 143.

198. *Id.* at 189.

changed votes. At the very least, the testimony helped clarify Rehnquist's general philosophy.

Just as Rehnquist's testimony tempered his conservative reputation, so liberals sometimes have expressed support for certain conservative principles. In 1968, for example, Fortas pointed out that he had dissented in *Avery v. Midland County*,¹⁹⁹ the case in which the Supreme Court applied the one-man, one-vote principle to units of local government.²⁰⁰

In addition to providing an opportunity to learn more about a nominee's politics and philosophy, the hearings also allow the Senate to inquire about specific incidents or charges that emerge in the confirmation process. For example, the Judiciary Committee questioned both Haynsworth and Blackmun about their decisions to participate as judges in cases involving corporations in which they owned stock.²⁰¹ Blackmun also was questioned about possible conflicts of interest arising out of his service as executor of three estates²⁰² and director of a corporation.²⁰³

The third purpose of a nominee's personal appearance before the Judiciary Committee is to provide an opportunity for a direct exchange of ideas between senators and nominees. No other occasion permits face-to-face dialogue between the legislative branch and executive nominees for the judicial branch of government. The nominee's appearance thus enables committee members to give the nominee their views on a justice's proper constitutional role and to share their opinions on constitutional law. In this sense, the Senate "advises" the nominee him or herself as well as the president.²⁰⁴

199. 390 U.S. 474, 495 (1968) (Fortas, J., dissenting).

200. *Id.* at 476; see *Hearings on Fortas and Thornberry*, *supra* note 115, at 111.

201. *Hearings on Haynsworth*, *supra* note 91, at 39-54; *Hearings on Blackmun*, *supra* note 77, at 45-56.

202. *Hearings on Blackmun*, *supra* note 77, at 50-51.

203. *Id.* at 31-32. Similarly, the committee asked Goldberg about possible conflicts of interest created by his position as counsel to the Steelworkers Union. *Hearings on Goldberg*, *supra* note 67, at 12-14. Goldberg explained that he terminated his relationship with the Union when he became Secretary of Labor in 1961 and that he even renounced his rights to "a very substantial pension." *Id.* at 13. He also averred that he would not resume his ties to the union if he returned to private practice. *Id.* at 13-14.

204. This use of the word "advice" differs from the original meaning of the term in article II of the Constitution. U.S. CONST. art. II, § 2, cl. 2. Over the past 30 years, however, "advice" arguably has embraced this interpretation in addition to its original meaning.

As with every other aspect of the confirmation process, the interview may be abused by unscrupulous senators. In the words of one observer, these dialogues "have tended on occasion to degenerate into exercises in political flapdoodle that detract from the dignity of both the Senate and the nominee."²⁰⁵ Joseph McCarthy ranted at Brennan, and during the late 1950s and 1960s southern senators often hectorred nominees about their liberal views and sternly lectured them about the constitutional role of the Court. When Fortas appeared before the committee in 1968, for example, Senator Ervin delivered a lengthy philippic concerning the Court's decisions on criminal procedure and civil rights. In his monologue covering thirty-seven pages, Ervin expounded on judicial restraint and critiqued various decisions in which Fortas had joined.²⁰⁶ When Ervin finished, Senator Thurmond badgered Fortas in an exchange that consumed another sixty-seven pages in the committee's report.²⁰⁷

Despite such excesses, senators should impart their views to nominees—even if those views are imparted with passion—because the Senate is no passive observer of the Court's work. During the Warren Court years, for example, many senators, along with large numbers of congressmen, state legislators, judges and private citizens, vehemently objected to the Court's decisions on a broad spectrum of issues. In 1958, the Senate and House Judiciary Commit-

205. Graham, *Marshall on the Stand*, N.Y. Times, July 30, 1967, at E10, col. 1.

206. At one point, Ervin declaimed that the Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), "illustrates an overweening . . . solicitude for the welfare of those accused of crime, and it overlooks a very significant truth, that society and the victims of crime are just as much entitled to justice as the accused." *Hearings on Fortas and Thornberry*, *supra* note 115, at 134-35.

207. *Hearings on Fortas and Thornberry*, *supra* note 115, at 218-19. Thurmond asked Fortas the following questions about the Court's decision in *Mallory v. United States*, 354 U.S. 449 (1957):

Does not that decision, Mallory—I want that word to ring in your ears—Mallory—the man happened to be from my State, incidentally—shackle law enforcement? Mallory, a man who raped a woman, admitted his guilt, and the Supreme Court let him loose on a technicality . . . Is not that type of decision calculated to bring the courts and the law and the administration of justice in [sic] disrepute? Is not that type of decision calculated to encourage more people to commit rapes and serious crimes? Can you as a Justice of the Supreme Court condone such a decision as that?

Hearings on Fortas and Thornberry, *supra* note 115, at 191. Fortas replied that answering the question would be improper. *Id.* at 191-92.

tees favorably reported bills to curtail the Court's jurisdiction which received a majority of votes in the House and a substantial number of votes in the Senate.²⁰⁸ So intense was opposition to the Court's reapportionment decisions that in 1966 a substantial majority of senators twice voted for a proposed constitutional amendment to overrule those decisions.²⁰⁹ Senators who oppose the Court's direction are remiss if they do not inform prospective justices of their views and warn them of possible Senate responses to unpopular decisions.

The hearings sometimes have provided the nominees with an opportunity to defend the Court. During his testimony in 1968, for example, Fortas attempted to demonstrate that the Court was not really "soft on crime." He pointed out, for example, that the Court either affirmed or allowed to stand most of the criminal convictions presented to it during the 1967-68 term²¹⁰ and that the Court recently had overruled²¹¹ a 1921 decision²¹² holding that police who made an unauthorized search could not seize evidence.²¹³

Direct exchanges between senators and nominees also serve a useful purpose when the hearings are not confrontational. Once again, the O'Connor hearings serve as a model. They provided a forum for intelligent discourse, concerning a wide range of issues, in which O'Connor frequently drew upon her experience as a trial judge. In discussing the balance between the need for a free press and the need for a fair trial, for example, O'Connor stated that she never had needed to "close the doors to my courtroom to the media."²¹⁴ O'Connor pointed out that "[t]here are other things that a court can do to protect a defendant's right in a given situation,

208. *E.g.*, P. MURPHY, *THE CONSTITUTION IN CRISIS TIMES 1918-1969*, at 332-33 (1972); R. STEAMER, *THE SUPREME COURT IN CRISIS: A HISTORY OF CONFLICT* 253-57 (1971); W. SWINDLER, *COURT AND CONSTITUTION IN THE TWENTIETH CENTURY: THE NEW LEGALITY 1932-1968*, at 249-57 (1970).

209. R. CORTNER, *THE REAPPORTIONMENT CASES* 236-40, 243-46 (1970). The proposed amendment failed to receive the requisite two-thirds majority by only a few votes. *Id.* at 246. For a full discussion of the apportionment amendment campaign, see R. DIXON, *DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS* 385-435 (1968).

210. *Hearings on Fortas and Thornberry*, *supra* note 115, at 171. Fortas, of course, was in a unique position to defend the Court since he was already a member of it.

211. *Warden v. Hayden*, 387 U.S. 294 (1967).

212. *Gouled v. United States*, 255 U.S. 298 (1921).

213. *Hearings on Fortas and Thornberry*, *supra* note 115, at 170.

214. *Hearings on O'Connor*, *supra* note 77, at 143.

such as sequestering the jury if that is necessary. It is also possible to change the venue of the trial.”²¹⁵ In discussing the *Miranda* rule, O'Connor remarked:

My experience on a trial court is that the application of *Miranda* has not resulted in an inability of the police to still be reasonably successful in their efforts to gain information and obtain statements. It has, no doubt, precluded some but on a broad, general basis I cannot say that I think the police have been unable to cope with it.²¹⁶

O'Connor expressed some reservations, however, about the exclusionary rule, which she said had affected the outcome of a number of cases over which she had presided.²¹⁷ During other hearings, the committee similarly has invited nominees to offer their comments on issues that concerned the nominee. Stevens, for example, advocated increasing judicial salaries and the number of judges.²¹⁸ Warren Burger, foreshadowing one of the principal interests of his tenure, spoke about the importance of the chief justice's duties as administrator of the federal court system.²¹⁹

VII. THE SENATE AS PUBLIC FORUM

The final function of the Senate in the appointment process is to provide a forum in which members of the public can express their views concerning a nominee. Although the Framers did not foresee this function, the growth of popular participation in the processes of government and the pervasive impact that the Court's decisions have on everyday American life make it desirable that private citizens have a voice in the appointment process. Scholars generally have overlooked this aspect of the Senate's role in the appointment process; yet input from the public has been an important aspect of every Judiciary Committee hearing since the nomination of Bran-

215. *Id.*

216. *Id.* at 146.

217. *Id.* at 146-47.

218. *Hearings on Stevens, supra* note 77, at 47.

219. *Hearings on Burger, supra* note 174, at 5. Burger explained that the chief justice “has a very large responsibility to try to see that the judicial system functions more efficiently. He should certainly be alert to trying to find these improvements.” *Id.*

deis in 1916. The Senate provides a forum for three distinct groups: the bar, special interest groups, and private citizens.

Representatives of bar associations, law professors, and prominent attorneys customarily testify before the committee or write letters which are introduced into the record. In 1975, for instance, the American Bar Association endorsed Stevens on the basis of its analysis of his 215 opinions on the court of appeals and interviews with every Seventh Circuit judge, the chief judges of the districts within the Seventh Circuit, law school deans, more than fifty lawyers in the Seventh Circuit, and Stevens himself.²²⁰ Although bar leaders usually provide ringing endorsements of the nominee,²²¹ severe criticism from prominent members of the legal profession crippled the nominations of Haynsworth and Carswell.²²² Although presidents sometimes solicit the opinions of the bar prior to making a nomination, the Senate's hearings provide a fuller and more public exposition of the bar's opinions and invite comment from a wider range of the bar. Members of the House of Representatives also often testify at Senate Judiciary Committee hearings.²²³

In recent years, various special interest and lobbying groups have sent representatives to testify before the committee. The National Organization for Women has been prominent at several recent hearings. NOW opposed Stevens and Carswell and Rehnquist in 1986, but endorsed O'Connor.²²⁴ In both 1971 and 1986, the NAACP opposed Rehnquist.²²⁵ Labor unions took a leading part in

220. *Hearings on Stevens*, *supra* note 77, at 18-21. See also *Hearings on White*, *supra* note 171, at 17; *Hearings on Minton*, *supra* note 81, at 18.

221. In 1986, for example, the American Bar Association gave their highest recommendations to Rehnquist and Scalia. See *Hearings on Rehnquist*, *supra* note 83; *Hearings on Scalia*, *supra* note 180.

222. Grossman & Wasby, *supra* note 72, at 585.

223. E.g., *Hearings on Rehnquist and Powell*, *supra* note 92, at 379-86 (testimony of Rep. Conyers); *Hearings on Haynsworth*, *supra* note 91, at 314-16 (testimony of Rep. Ryan); *Hearings on Rehnquist and Powell*, *supra* note 92, at 441-42 (testimony of Rep. McCloskey).

224. *Hearings on Stevens*, *supra* note 77, at 83; *Hearings on Carswell*, *supra* note 70, at 88; *Hearings on O'Connor*, *supra* note 77, at 398; *Hearings on Rehnquist*, *supra* note 83, at 787, 817.

225. *Hearings on Rehnquist and Powell*, *supra* note 92, at 289-349 (testimony of Clarence Mitchell, Director, Washington Bureau, NAACP, and Legislative Chairman, Leadership Conference on Civil Rights; Accompanied by Joseph L. Rauh, Jr., Counsel); *Hearings on Rehnquist*, *supra* note 83, at 817-55 (testimony of Althea T.L. Simmons, Director, Washington Bureau, NAACP).

the opposition to Haynsworth and Carswell.²²⁶ The testimony of special interest groups is vulnerable to criticism because they often evaluate a nominee on the basis of a single issue. For this reason, representatives of special interest groups frequently take pains to emphasize that their endorsement of or opposition to a nominee is not based solely or even primarily upon the issues of principal concern to their group.²²⁷ Even when it concerns a parochial issue, however, special interest group testimony is appropriate because it provides the Senate with additional information concerning the views of the public. The testimony of any one single group should not itself persuade a senator to vote for or against a nominee, but the cumulative effect of special interests might properly influence a senator's vote.

Finally, the Senate provides a forum for the opinions of individual citizens. A host of obscure persons, including a liberal share of cranks and oddballs, have passed through the committee's chambers to testify against nominees. On several occasions, in fact, public comment has provided the principal focus of the hearing. At the hearings on Frankfurter in 1939, for example, the committee heard testimony from a succession of witnesses, including right-wing activists, a carpenter, a housewife, and an American Indian representative, questioning Frankfurter's commitment to the fundamental ideals of American democracy. Frankfurter's foreign birth, his defense of Sacco and Vanzetti, and his membership on the American Civil Liberties Union's national committee made him suspect in the eyes of many witnesses.²²⁸

Just as testimony by right-wing members of the public dominated the Frankfurter hearings, so liberal and left-wing activists held center stage at the hearings on Tom Clark in 1949. Various witnesses denounced Clark for his alleged hostility toward blacks,

226. *Hearings on Haynsworth*, *supra* note 91, at 162, 391; *Hearings on Carswell*, *supra* note 70, at 233. Major unions had not opposed a nominee since Parker in 1930. *Hearings on Haynsworth*, *supra* note 91, at 173.

227. At the Haynsworth and Carswell hearings, for example, representatives of labor unions stated that their opposition to the nominee was based more upon the nominee's records on race than upon their records with regard to organized labor. *Hearings on Haynsworth*, *supra* note 91, at 162-73; *Hearings on Carswell*, *supra* note 70, at 212-21, 233-37.

228. *Hearings on Frankfurter*, *supra* note 167, at 8, 29, 65, 74-75, 95, 96.

organized labor, and aliens.²²⁹ Witnesses also castigated Clark for having compiled three blacklists of 150 leftist organizations in his capacity as attorney general.²³⁰ A member of the board of directors of a black-listed cooperative bookstore accused Clark of making a "Roman carnival of the Constitution,"²³¹ and a representative of the National Council of the Arts, Sciences, and Professions proclaimed Clark's nomination "tragic."²³² Clark was a lightning rod for criticism because he had served as attorney general, a position of high public visibility prior to his nomination. Likewise, the official acts of Attorney General Robert Jackson and Secretary of Labor Arthur Goldberg inspired adverse testimony by private citizens.²³³

The committee also introduces into its record letters from members of the public. The record on Clark's nomination, for example, contains more than 500 letters opposing Clark's nomination and approximately 250 letters in support. The committee often accords importance to letters from the public. During the Stevens hearings, a number of prisoners who had been tried before Stevens wrote to the Judiciary Committee in support of his nomination; and Senator Kennedy concluded that this spoke well of Stevens's fairness.²³⁴

In addition to receiving testimony and letters from interested members of the public, the committee members have sometimes asked nominees questions submitted by the public. During the hearings on Goldberg, for example, Senator Alexander Wiley asked Goldberg about certain letters Wiley had received intimating that Goldberg was a Communist. Wiley later explained that he himself did not have any question about whether Goldberg was a Communist, but that he thought that Goldberg should answer the question because a number of constituents had asked it.²³⁵ Similarly, one

229. *Hearings Before the Senate Comm. on the Judiciary on Nomination of Tom C. Clark to be Assoc. Justice of the Supreme Court of the United States*, 81st Cong., 1st Sess. 32, 85, 92, 100, 163 (1949).

230. *Id.* at 39, 143.

231. *Id.* at 129.

232. *Id.* at 100.

233. *Hearings Before the Senate Comm. on the Judiciary on Nomination of Robert Jackson to be Assoc. Justice of the Supreme Court of the United States*, 77th Cong., 1st Sess. 1-10 (1941); *Hearings on Goldberg*, *supra* note 67, at 83.

234. *Hearings on Stevens*, *supra* note 77, at 15.

235. *Hearings on Goldberg*, *supra* note 67, at 43.

senator asked Brennan a question submitted by a right-wing organization about whether Brennan's Roman Catholicism would interfere with his duty to uphold the Constitution. Several senators agreed that the committee should not ask Brennan questions about his religion, but they felt that asking the question was appropriate because it reflected a matter of concern to some members of the public.²³⁶ Although participation by the general public sometimes may distract the attention of the Judiciary Committee members, waste time, or raise improper issues, ordinary citizens need to have a voice in a process that has such a significant impact on their lives.

VIII. CONCLUSION

The Senate's role in the Supreme Court appointment process is multifaceted, broad, and vital. A vigorous exercise of its duties is essential to ensure that only capable, healthy, and honest persons serve on the nation's highest tribunal. Accordingly, no reasonable aspect of a nominee's record should be beyond the scope of the Senate's inquiry; and this inquiry is not complete 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. Although the Senate may not substitute its own nominee for that of the president, no danger exists that an exacting inquiry by the Senate will lead to such substitution. One hundred senators could never agree on a single candidate. Initial deference to the president's choice is therefore a practical necessity as well as a constitutional command.

Senator Edward Brooke perhaps expressed the Senate's duty most succinctly and eloquently during the final debate on the Carswell nomination in 1970. Brooke said:

236. *Hearings on Brennan*, *supra* note 169, at 32-34.

[W]e are not supposed to make a decision based upon whether one is a liberal or a moderate or a conservative, a Republican or a Democrat, but based upon our individual responsibility as U.S. Senators. Each of us, in his own mind and conscience and heart, must ask[: Is] this a man to sit on the Supreme Court? There is nothing else.²³⁷

237. 116 CONG. REC. 10,160 (1970).