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## The Senate Power of Advice and Consent on Judicial Appointments: An Annotated Bibliography and Research Guide

Michael J. Slinger

Lucy S. Payne

James L. Gates



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## BIBLIOGRAPHY

### The Senate Power of Advice and Consent on Judicial Appointments: An Annotated Research Bibliography

*Michael J. Slinger\**  
*Lucy Salsbury Payne\*\**  
*James Lloyd Gates, Jr.\*\*\**

*The authors present a selective bibliography which permits the reader to take a critical look at the important but sometimes uneasy relationship between the President's right to nominate federal judges and the Senate's role in providing advice and consent on those nominations.*

#### I. Conflict Over Supreme Court Nominees

The importance of the federal judiciary and particularly the United States Supreme Court cannot be underestimated in its overall effect on American life. Many factors shape the public's perception of the Supreme Court — including the media, grass roots organizations seeking to overturn rulings with which they disagree, and books detailing the workings of the Court and the lives of the Justices. The recent Presidential election calls attention once again to the importance of the chief executive's power to nominate candidates to the federal judiciary.

Recent history has shown much conflict between the Senate and the President over the way the Senate has exercised its power of advice and consent<sup>1</sup> on judicial nominees. In addition to the nomination of William

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\* Associate Director for Public Services, University of Notre Dame Law School, Kresge Law Library. B.A. University of Pittsburgh (1978), M.L.S. University of South Carolina (1979), J.D. Duquesne University (1984).

\*\* Research Specialist, University of Notre Dame Law School, Kresge Law Library. B. Mus. Andrews University (1974), M.A. Loma Linda University (1979), J.D. University of Notre Dame (1988).

\*\*\* Head of Technical Services, Boston University, Pappas Law Library. B.S. Belmont Abbey College (1979), M.A. University of Notre Dame (1981), M.L.S. Indiana University (1984).

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It is our hope that this bibliography will add to the continuing discourse on this important topic.

1 Article II of the Constitution sets out the powers of the President and the Senate regarding judicial appointments. It provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for. . . ." U.S. CONST. art. II, § 2, cl. 2.

Rehnquist<sup>2</sup> to Chief Justice and of Robert Bork<sup>3</sup> and Douglas Ginsburg<sup>4</sup> to Associate Justice, lower-court nominees Jefferson Sessions III<sup>5</sup> and Daniel Manion<sup>6</sup> received much attention. While the acrimony attached to the Bork hearings created the popular perception that the Senate broke new ground in strictly scrutinizing a candidate's background, qualifications and personal philosophy, that notion does not comport with the historical record.

Serious conflict over Supreme Court nominees first occurred in 1795, when the Senate refused to consent to the nomination of John Rutledge as Chief Justice.<sup>7</sup> Although 104 individuals have served on the High Court, twenty-eight have failed to obtain Senate confirmation.<sup>8</sup>

2 Despite Justice William Rehnquist's 14 years on the Supreme Court bench, the Senate questioned him closely on his philosophy and ethics. The Senate finally confirmed Rehnquist by a vote of 65 to 33, the greatest number of negative votes of any confirmed Justice. *Chief Justice Wins a Verdict*, U.S. NEWS & WORLD REP., Sept. 29, 1986, at 12.

3 In 1982 the Senate, without a roll call vote either in committee or on the floor and with no voiced reservations, unanimously confirmed Robert Bork for a position on the D.C. Circuit Court. 133 CONG. REC. S10,274 (daily ed. July 21, 1987) (statement of Sen. Humphrey); 133 CONG. REC. S14,770-71 (daily ed. Oct. 22, 1987) (statement of Sen. Symms). Five years later, when President Reagan nominated Judge Bork to the seat vacated by retiring Justice Lewis Powell, the Senate Judiciary Committee questioned him closely and voted not to recommend him. After full debate by the Senate, he was rejected by a vote of 58-42 on October 23, 1987. 133 CONG. REC. S15,011 (daily ed. Oct. 23, 1987).

For an analysis of the Bork hearings, see Stookey & Watson, *The Bork Hearing: Rocks and Roles*, 71 JUDICATURE 194 (1988); Totenburg, *The Confirmation Process and the Public: To Know or Not to Know*, 101 HARV. L. REV. 1213 (1988); Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202 (1988); Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164 (1988).

4 When the Senate failed to confirm Robert Bork, President Reagan nominated Judge Ginsburg of the D.C. Circuit. Nine days after his nomination, Ginsburg withdrew after the media reported possible conflicts of interest, a deceptive response on his Senate questionnaire concerning his trial experience and incidents of smoking marijuana while a Harvard professor. N.Y. Times, Nov. 8, 1987, § 1, at 1, col. 6.

5 The Senate Judiciary Committee rejected Jefferson B. Sessions III, a nominee for the United States District Court in Mobile, Alabama, because of racially insensitive statements and conduct. President Reagan then withdrew his nomination. See Effron, *Will Rejection of Sessions Be a Turning Point?* Nat'l L.J., June 16, 1986, at 45, col. 1.

6 During the summer of 1986, the competence of Daniel Manion for a seat on the Seventh Circuit Court of Appeals was called into question on the Senate floor, as well as in the editorial and opinion pages of newspapers throughout the country. The Senate inquiry focused on charges that "Manion's court submissions had misspellings and typographical errors," that he "had insufficient appellate experience," that he "was too conservative," that his "father was a founder of the John Birch Society," and that he "had been involved only in run-of-the-mill legal work." *The Judicial Selection Process*, 2 BENCHMARK 185, 185-86 (1986).

Manion won confirmation by a margin of 48 to 47; several weeks later he won a reconsideration motion by a vote of 50 to 49. *Id.* at 186.

7 Goff, *The Rejection of United States Supreme Court Appointments*, 5 AM. J. LEGAL HIST. 357, 357 (1961). Rutledge had previously served as a Supreme Court Justice but had resigned to take a position as Chief Justice of the Supreme Court of South Carolina. O'Brien, *The Nine Rejected Men*, 19 BAYLOR L. REV. 1, 3 (1967).

8 See Abraham, "A Bench Happily Filled: Some Historical Reflections on the Supreme Court Appointment Process," 66 JUDICATURE 282 (1983). He reports a total of 102 nominees were approved while 26 were rejected. Since 1983 Justice Antonin Scalia took the bench in 1986, the Senate rejected Reagan nominee Robert Bork, Reagan withdrew the name of Judge Douglas Ginsburg, and the Senate confirmed Anthony M. Kennedy, February 3, 1988, as the 104th Justice.

Several sources provide tables showing outcomes of Supreme Court nominations. See, e.g., D. O'BRIEN, JUDICIAL ROULETTE: REPORT OF TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION 67 (1988); H. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 386-91 (2d ed. 1985); Swindler, *The Politics of "Advice and Consent"*, 56 A.B.A. J. 533, 536 (1970).

While seven of those failures occurred during the twentieth century, only one rejection occurred during the seventy-four year span from 1894 until 1968.<sup>9</sup> That period lulled many Americans into believing what one commentator calls "the myth of the spineless Senate," acting to "merely rubber-stamp[] the President's nominations to the Court."<sup>10</sup>

Juxtaposed with belief in that myth has been the focus on the Reagan administration's use of the federal judiciary. Has the administration sought to implement a social agenda, as some claim,<sup>11</sup> or has it merely done what Presidents do when choosing judicial nominees, seek people whose views are similar to their own?<sup>12</sup>

From the earliest days of our Republic, American Presidents often sought to make appointments to the judiciary who appear to be sympathetic to their policies and philosophies. One of the best known examples is John Adams's "Midnight Judges," appointed to continue into Jefferson's term the federalist view on the bench.<sup>13</sup> More recently, Franklin Roosevelt sought nominees who would not resist his economic policies,<sup>14</sup> Richard Nixon sought "law and order" strict constructionists,<sup>15</sup> and Jimmy Carter used an affirmative-action approach to make the federal bench more "representative."<sup>16</sup>

9 Halper, *Senate Rejection of Supreme Court Nominees*, 22 DRAKE L. REV. 102, 102 (1972). Halper discusses the rejection of John J. Parker in 1930. He reports that, "Up to 1894, at least one nominee was turned down, not voted on, or withdrawn in virtually every decade; and, in fact, in one three year period from 1844 to 1846 five nominations were rejected." *Id.* Besides rejecting Parker, the Senate forced President Lyndon Johnson to withdraw the name of Abe Fortas for Chief Justice in 1968. When Fortas resigned as Justice in May 1969, the Senate refused to confirm President Richard Nixon's nominations of Clement Haynsworth and G. Harrold Carswell in 1970. *Id.* The Senate rejection of Bork and Reagan's withdrawal of Ginsburg round out the seven failures. This accounting does not include Homer Thornberry whose name President Johnson withdrew in 1968 when the failure of Fortas prevented Chief Justice Earl Warren from resigning and creating the necessary vacancy. *Id.* at 103.

10 L. TRIBE, *GOD SAVE THIS HONORABLE COURT* 77 (1985). Speaking of that time period, Kutner, *Advice and Dissent: Due Process of the Senate*, 23 DE PAUL L. REV. 658 (1974) states that "[t]he deplorable practice had developed whereby the Senate confirmed any Presidential appointment to the Supreme Court unless the nominee was found to be a thief or felon, or involved in a serious scandal." *Id.* at 688.

11 See, e.g., H. SCHWARTZ, *PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION* (1988); D. O'BRIEN, *supra* note 8, at 99 (1988); E. WITT, *A DIFFERENT JUSTICE* 10-11 (1986); A. STEWART, *U.S. SUPREME COURT APPOINTMENTS: 1961-1986: A BRIEF BIBLIOGRAPHY* 3 (Vance Bibliographies, Public Administration Series P2129, Mar. 1987).

12 Political scientist Lawrence Baum states, "For the Supreme Court, policy preferences are the [P]resident's single most important consideration. No [P]resident can fail to understand the significance of the Court's decisions or the role that its members' attitudes play in shaping these decisions. Accordingly, all [P]residents have sought to put on the Court people whose views on important policy questions are similar to their own." L. BAUM, *THE SUPREME COURT* 39 (2d ed. 1985).

See also Speech by Chief Justice William Rehnquist, Bicentennial Australian Legal Convention (Aug. 29, 1988) (available from the public information officer of the United States Supreme Court).

O'Brien states that judicial selection under the Kennedy administration had shortcomings which resulted in "Kennedy nam[ing] judges who ran against his own legal-policy goals in the area of civil liberties/civil rights." D. O'BRIEN, *supra* note 8, at 52-53.

13 H. SCHWARTZ, *supra* note 11, at 55-57.

14 See Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164 (1988) (compares processes used by Reagan and F. Roosevelt).

15 D. O'BRIEN, *supra* note 8, at 20.

16 Dr. Walter Berns, resident scholar at the American Enterprise Institute, quotes President Carter, "If I didn't have to get Senate confirmation of appointees, I could tell you flatly that 12 percent of my judicial appointments would be black, 3 percent would be Spanish-speaking and 40 percent would be women and so forth." American Enterprise Institute for Public Policy Research,

The Senate too has rejected nominees on philosophical or political grounds. Ideologically based Senate resistance to nominees is nearly as old as the Republic itself. Senate rejection of George Washington's nomination of John Rutledge to be Chief Justice arose from Rutledge's earlier opposition to the Jay Treaty.<sup>17</sup> The first time Andrew Jackson nominated Roger Taney to the Supreme Court, the Senate rejected him because he had followed Jackson's orders to withdraw all government deposits from the National Bank.<sup>18</sup> Senator Robert Byrd opposed Thurgood Marshall because, as he put it, "I simply cannot bring myself to vote for an individual to be a United States Supreme Court Justice who, by his past record so clearly stamps himself as one who will be an ally to the already top-heavy, ultraliberal and activist bloc on the Court."<sup>19</sup>

The battle over Robert Bork's nomination to Associate Justice again posed the question of what are the proper criteria for questioning nominees. A majority of the Senate apparently perceived that Bork's fundamental judicial values and philosophy overshadowed his unquestioned intellectual and professional qualifications; and consequently, the Senate rejected his nomination.

## II. Differing Views of the Senate's Role

As with other constitutional phrases, "advice and consent of the Senate" has produced diversity in interpretation. Debate at the Constitutional Convention centered on who would have the appointing power. The original plan placed the power in the entire legislature.<sup>20</sup> James Madison, fearful that the members would be "too much influenced by their partialities,"<sup>21</sup> proposed that the appointment be made by the Senate, a "less numerous and more select body" that would be more "competent."<sup>22</sup> Another plan proposed that the power rest solely in the hands of the executive.<sup>23</sup> Roger Sherman, who favored the Senate plan, argued that the Senate would be composed of men "nearly equal to the Executive, and would of course have on the whole more wisdom."<sup>24</sup> He thought, "[T]hey would bring into their deliberations a more diffusive knowledge of characters. It would be less easy for candidates to intrigue with them, than with the Executive Magistrate."<sup>25</sup>

Alexander Hamilton supported the compromise proposal which eventually was adopted. He wrote in No. 76 of the *Federalist Papers* that

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*Whom Do Judges Represent?* 24 (1981) (edited transcript of an AEI forum held on June 1, 1981, moderated by John Charles Daly and with participants Griffin Bell, Walter Berns, Sheldon Goldman and Orrin G. Hatch).

On the concept of "representation" in the federal judiciary, see *infra* note 44 and accompanying text.

17 Swindler, *supra* note 8, at 535.

18 H. SCHWARTZ, *supra* note 11, at 46.

19 113 CONG. REC. 24,655 (1967).

20 J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 112 (1966).

21 *Id.*

22 *Id.* at 113.

23 *Id.* at 120.

24 *Id.* at 316.

25 *Id.*

the compromise position would not take away the advantages of having "one man of discernment . . . better fitted to analyze and estimate the peculiar qualities"<sup>26</sup> required for judicial office and at the same time would avoid the "several disadvantages which might attend the absolute power of appointment."<sup>27</sup> He argued that the method "would be an excellent check upon a spirit of favoritism in the President,"<sup>28</sup> and that "it [was] not likely that their sanction would often be refused, where there were not special and strong reasons for the refusal."<sup>29</sup>

Today the increased activity of the Senate Judiciary Committee has resurrected debate about the proper role of the Senate in judicial nominations. Some who view the Presidential role as broad and powerful favor a *pro forma* role.<sup>30</sup> In response to Senate rejection of Clement Haynsworth and lack of support for G. Harrold Carswell, President Richard Nixon complained to Senator William Saxbe, that the Senate sought to deny him "the same right of choice . . . which has been freely accorded to my predecessors of both parties."<sup>31</sup> However, history proves this view inaccurate.<sup>32</sup>

Another view acknowledges a more active role for the Senate, but defends the notion of court "packing" as part of the genius of the Constitution in balancing the three branches of government. A year and a half prior to his own hearings for confirmation as Chief Justice, William Rehnquist endorsed this position and explained that, "a President who sets out to 'pack' the Court seeks to appoint people who are sympathetic to his political or philosophical principles."<sup>33</sup> By this process the independence of the judiciary is maintained, and realignment of the courts with the rest of the nation occurs.<sup>34</sup>

In contrast, one commentator has argued that "[p]rocedurally, the stage of 'advice' has been short-circuited."<sup>35</sup> He argues that, "in deciding upon his vote at the single point now left him, every Senator ought to consider everything he would have considered if, procedurally, he were 'advising.'"<sup>36</sup> Others supporting this view further argue that:

[N]o 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

26 THE FEDERALIST No. 76, at 492 (A. Hamilton) (Modern Library ed. 1941).

27 *Id.* at 493.

28 *Id.* at 494.

29 *Id.*

30 *Supra* note 10 and accompanying text.

31 Letter from Richard M. Nixon to William Saxbe (March 31, 1970), reprinted in 116 CONG. REC. 10,158 (1970).

32 *Supra* notes 7-10 and accompanying text.

33 Rehnquist, *Presidential Appointments to the Supreme Court*, 2 CONST. COMMENTARY 319 (1985).

34 See Fein, *Is the Supreme Court the President's Sole Preserve? A Proper Check on the Supreme Court*, 71 A.B.A. J. 36, 40 (Aug. 1985).

35 Black, *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L.J. 657, 659 (1970) (emphasis in original) (footnote omitted).

36 *Id.* The *Judicial Quiz*, (Questions Sent to Nominee J. Rodriguez by Three Members), 271 HARPERS 19 (Aug. 1985), illustrates one way that Senators "consider everything."

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.<sup>37</sup>

Another frequently mentioned view of the Senate's role focuses on examination of the nominee's potential judicial merit. Professor Henry Abraham has put forth a "merit model,"<sup>38</sup> Professor Richard Friedman examines judicial temperament,<sup>39</sup> and Senator Orrin Hatch favors examining qualities of integrity, ethical sensitivity, intellect, legal experience and the nominee's "willingness and ability to uphold the Constitution."<sup>40</sup> However, such characteristics are difficult to measure and at times they have been used as a pretext for opposing ideology.<sup>41</sup>

Just as conflicting opinion exists over the proper criteria and method for Senate review of nominees, analysts differ in their evaluation of Senate rejections. In comparing the characteristics of judicial selections of the Eisenhower, Kennedy and Johnson administrations, Professor Harold Chase concluded that "administrations which are basically concerned with making appointments of high quality, will choose the same kinds of people for the same kinds of reasons whatever goals and standards they articulate and whatever procedures they employ."<sup>42</sup>

In contrast to Alexander Hamilton's view, that the Senate would be guided by merit,<sup>43</sup> consider the bluntly political statement by Carswell supporter, Senator Roman Hruska that, "Even if he were mediocre, there are a lot of mediocre judges and people and lawyers and they are entitled to a little representation."<sup>44</sup>

37 Ross, *The Functions, Roles, and Duties of the Senate in the Supreme Court Appointment Process*, 28 WM. & MARY L. REV. 633, 681 (1987). But see Powe, *The Senate and the Court: Questioning a Nominee* (Book Review), 54 TEX. L. REV. 891, 896 (1976) ("If the senators desire to know as much as the President knows about his nominee, they can probably gain that knowledge without delving into philosophical questions. Most nominees have created some sort of public record prior to their appointment.").

38 See Abraham, *supra* note 8, at 286-88.

39 See Friedman, *The Transformation in Senate Response to Supreme Court Nominations: From the Reconstruction to the Taft Administration and Beyond*, 5 CARDOZO L. REV. 1, 5 (1983).

40 See Hatch, *A Response to Sen. Biden: The Dangers of Politicizing Supreme Court Selections*, L.A. Daily J., Aug. 21, 1987, at S23.

41 See Lively, *The Supreme Court Appointment Process: In Search of Constitutional Roles and Responsibilities*, 59 S. CAL. L. REV. 551, 575-76 (1986). He uses as examples debate on Brandeis, Haynsworth, Carswell and Thurgood Marshall to illustrate ideological opposition cloaked in a purportedly policy-neutral guise. He states that when the Senate "obscures its true motives, it . . . demeans itself as well as the object of its true motive." *Id.* at 575.

42 Chase, *The Johnson Administration — Judicial Appointments 1963-1966*, 52 MINN. L. REV. 965, 999 (1968).

43 THE FEDERALIST No. 66, at 433 (A. Hamilton) (Modern Library ed. 1941).

44 N.Y. Times, Mar. 17, 1979, at 21, col. 1.

Originally the concept of "representation" grew out of the Justices' circuit riding duties. However, that practice ceased in 1891. In addition, the seventeenth amendment, passed in 1913, made Senators more directly responsible to the electorate. With those changes, emphasis on geographic representation declined. However, to a certain extent regional seats were replaced by a "Jewish," "Catholic," and presumably, a "Black" and "Women's" seat. See E. Witt, *supra* note 11, at 20. See also Halper, *Supreme Court Appointments: Criteria and Consequences*, 21 N.Y.L. FORUM 563, 571-82 (discussing factors such as a justice's political and religious affiliations, as well as ethnic background and social position). See generally T. RILEY, THE JEWISH SEAT (1978).

Some commentators have reasoned that "the quality of an appointment has little bearing upon the outcome of a confirmation fight,"<sup>45</sup> and that while "it is regrettable that petty and political considerations caused most rejections, things did turn out tolerably well. . . . [I]t is fairly certain that Marshall, Story, and Miller . . . would have been excluded from the Court but for the rejections of first choices by the President."<sup>46</sup>

### III. Issues

The multiplicity of views on everything from selection criteria to eventual result raises a number of issues. Perhaps the most fundamental concerns the delicate balance of three coequal branches of government. Whether one sees the role of judicial review as deference to the elected branches or as protection of individual rights colors one's view of the confirmation process. To the extent that one's political outlook focuses on the majoritarian aspects of our democracy, one might take the position that the choice of the President, as "the one official who is elected by the entire nation,"<sup>47</sup> should be given deference. However, others argue, since the judiciary is to be an independent branch, the advice of the Senate, "whose members are responsible to regional constituents,"<sup>48</sup> provides a check on the power of the executive branch while allowing public opinion some effect. These interrelated issues of balance, independence and accountability undergird the contrast between the closer Senate scrutiny of judicial nominees and the relatively quick acquiescence to executive appointments.<sup>49</sup>

But what of the greater intensity used in questioning a Supreme Court nominee who perhaps earlier was easily confirmed to a seat on a District or Appeals Court? While greater subsequent scrutiny has been justified by the practice of senatorial courtesy<sup>50</sup> at the lower level, it does

45 Goff, *supra* note 7, at 368.

46 O'Brien, *supra* note 7, at 18-19.

47 Rehnquist, *supra* note 33, at 320.

48 *Id.* See also, Lively, *supra* note 41, at 574 (The Senate represents a cross section of the electorate whereas the President might not even represent a majority of voters.).

49 See J. HARRIS, *THE ADVICE AND CONSENT OF THE SENATE* 258-59 (1953):

A different kind of review is conducted by the Senate for nominations in each of [the major types of federal offices]. Its customs, traditions, and practices in confirming nominations to the Cabinet are quite different from those it follows in passing on nominations to the courts or of postmasters. Nominations of judges and independent regulatory commissioners are scrutinized frequently with unusual care and are often contested, whereas nominations of officers of the armed forces and postmasters are usually routinely approved en bloc without individual consideration.

See also Kutner, *supra* note 10 (The Senate's role in appointment process is a continuum, with strongest scrutiny in judicial appointees and lessening through members of independent agencies, to foreign envoys, and finally to cabinet and other executive officers.).

50 The tradition of "senatorial courtesy" arose in part as a means of involving the Senate in advising the President prior to certain appointments. Harold Chase defines senatorial courtesy in this way: "Senators will give serious consideration to and will be favorably disposed to support an individual senator of the President's party who opposes a nominee to an office in his state." H. CHASE, *FEDERAL JUDGE'S: THE APPOINTMENT PROCESS* 68 (1970). A home state Senator's influence over a district court nominee is stronger than in the case of an appeals court nominee. *Id.* at 43. In Supreme Court nominations it still plays a role, albeit a limited one. See, e.g., Abraham and Goldberg, *A Note on the Appointment of Justices of the Supreme Court of the United States*, 46 A.B.A. J. 147, 221 (1960) (attributing to senatorial courtesy the rejections of Hornblower and Peckham); Swindler, *supra* note 8, at 541 (describing the role of "collegial courtesy" in President Cleveland's nominating



not explain why the independence of the judiciary is better served by senatorial courtesy in the first place.<sup>51</sup>

A recent task force on the selection of the federal judiciary determined that "[c]ertain qualities . . . are essential for all federal judges, but because different skills are required at different levels of the judiciary, different considerations ought to come into play in the selection and confirmation of federal judges at each level."<sup>52</sup> The task force also observed that in contrast to its view that the Supreme Court nomination process receives too much attention, the main problem with the process for the lower courts is that those nominees usually receive nothing more than a rubber stamp.<sup>53</sup>

In addition to the potential effect on judicial independence which the appointment process plays, there is the underlying irony that Congress has the technical power to control the number of Justices on the Court and to adjust the Court's jurisdiction.<sup>54</sup> Thus stricter scrutiny by the Senate in the appointment process may obviate the need to exercise its more drastic powers to effect balance on the Supreme Court.

The questioning of the nominee raises other issues, perhaps chief among them, what potential damage is done to the Court as an institution if the Senate, when aggressively questioning the nominee, is in reality merely fighting another battle in a war with an opposition President.<sup>55</sup> Furthermore, questioning the nominee without regard to his/her ethical responsibilities as a sitting judge, or without concern for issues which are likely to appear before the Court, poses another threat to the independence of the judiciary.<sup>56</sup>

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strategy subsequent to two sequential rejections); Cole, *Mr. Justice Black and 'Senatorial Courtesy'*, 31 AM. POL. SCI. REV. 1113, 1113-15 (1937) (discussing the level of inquiry when a nominee to the Supreme Court is drawn from the sitting membership of the Senate); and Powe, *supra* note 37, at 892 (discussing a Senator's effort to limit certain types of questions as involving senatorial courtesy).

51 Another justification for a stricter standard of scrutiny for U.S. Supreme Court nominees is the position that the highest court in the land should require the highest level of examination. For example, Republican Senator Steven Symms of Idaho, a supporter of Judge Bork's nomination conceded, "I understand there may be a higher level of scrutiny required for nominees to the Supreme Court." 133 CONG. REC. S14,767 (daily ed. Oct. 22, 1987).

52 D. O'BRIEN, *supra* note 8, at 5.

53 *Id.* at 7-10.

54 Lawlor, *Court Packing Revisited: A Proposal for Rationalizing the Timing of Appointments to the Supreme Court*, 134 U. PA. L. REV. 967, 975 (1986), posits that "the Roosevelt incident [attempt at court-packing] has bestowed a legacy of distrust on any proposal to interfere with the appointment process." *Id.* at 975.

55 See Abraham and Goldberg, *supra* note 50, at 221 (listing J. Q. Adams, Tyler, Fillmore, Buchanan and A. Johnson as Presidents whose nominees were rejected due to Senate opposition to the President). More recently, opposition to the Fortas nomination to Chief Justice surfaced in part due to the view of some Republicans that since President Johnson had already refused to seek another term and with the nomination occurring only months before the election, the Senate should oppose "any such appointment." See Thorpe, *The Appearance of Supreme Court Nominees Before the Senate Judiciary Committee*, 18 J. PUB. L. 371, 388 (1969). See also Stookey and Watson, *supra* note 3, regarding opposition to President Reagan manifested in the Bork hearings.

56 When sitting Justice Abe Fortas appeared before the Committee for confirmation as Chief Justice, Senator Albert Gore, Sr. cautioned with respect to the issues of separation of powers and judicial independence that: "[W]e are aware . . . that there are severe limitations on the kind of questioning that a legislative committee may . . . submit to a sitting Justice . . . and that he himself may answer." *Hearings on the Nomination of Abe Fortas to be Chief Justice of the United States and the Nomination of Homer Thornberry of Texas to be an Associate Justice of the Supreme Court of the United States Before the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess., at 100-01 (1968), quoted in Thorpe, *supra* note 55,

#### IV. Conclusion

History teaches us that because of the constitutional interplay between the Senate and President, it may disappoint those who travel a career path in anticipation of a Court appointment to realize that the success of nominees is often as much related to the political astuteness of the President's advisors as to the nominees themselves.<sup>57</sup> A nomination cannot be viewed in isolation, but rather as only one part of a continuing relationship. A President already in trouble with Congress will have less success.<sup>58</sup> The number of years left in an administration at the time the appointment occurs affects the outcome, especially where a "lame duck" is involved.<sup>59</sup>

Not only does the political party controlling the Senate play a crucial role, but the individuals on the Senate Judiciary Committee carry signifi-

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at 390. Professor Powe takes the view that with regard to a nominee's legal philosophy, Senators can "probably gain that knowledge without delving into philosophical questions. Most nominees have created some sort of public record." Powe, *supra* note 37, at 896.

However, this poses the problem which surfaced in the Bork hearings. "[Bork] has suggested previously that his academic writings provided only limited insights into his views because some of his writings represent only tentative thoughts and speculations and others include views he no longer holds. Phillips, *A Study of Robert Bork*, 19 ARIZ. ST. L.J. 467, 469 (1987) (footnotes omitted). For a comprehensive treatment of the questioning process, see Rees, *Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution*, 17 GA. L. REV. 913 (1983) and Ross, *The Questioning of Supreme Court Nominees At Senate Confirmation Hearings: Proposals for Accommodating the Needs of the Senate and Ameliorating the Fears of the Nominees*, 62 TUL. L. REV. 109 (1987).

On the related issue of questioning of sitting Justices, see also Note, *Recess Appointments to the Supreme Court—Constitutional But Unwise?*, 10 STAN. L. REV. 124 (1957).

<sup>57</sup> Political scientists Stookey and Watson have developed a "situation/nominee controversy model" from which outcomes of the Supreme Court nomination process may be predicted. They state: "[A]mong those situational variables of importance are Presidential power and popularity; partisan and ideological distribution in the Senate; [and] the President's party and ideology." Watson and Stookey, *Supreme Court Confirmation Hearings: A View from the Senate*, 71 JUDICATURE 186, 189 (1988). In an article which applies their model to the Bork hearings, they state, "Whether the nominee's sex, ethnicity, religion or ideology are potentially controversial matters depends in part on the political atmosphere of the times." Stookey and Watson, *supra* note 3, at 195. See also Grossman and Wasby, *The Senate and Supreme Court Nominations: Some Reflections*, 1972 DUKE L.J. 557, 577-82 (discussing Presidential strategy in the confirmation process).

<sup>58</sup> Stookey and Watson, *supra* note 3, at 195 (citing, among other things, Reagan's prestige and credibility drops due to the Iran-Contra hearings and other political setbacks).

<sup>59</sup> See Halper, *supra* note 9. Speaking of a President's last year in office, he states: "[N]ot only are the rewards and punishments at his command at their lowest point, but also the desire of his senatorial opponents to have his successor make appointments is at its zenith . . . . Eight out of fifteen lame duck nominations have been rejected, a rejection rate of 53.3[%]." *Id.* at 109. See also Palmer, *Senate Confirmation of Appointments to the U.S. Supreme Court*, 41 REV. SOC. ECON. 152 (1983). In analyzing the relationship between the probability of confirmation and the number of years remaining in the President's term, Palmer concludes that:

A President whose party controls 60 percent of the Senate and who has three years left in his term has about a 90 percent chance of having his nominee confirmed. But a President whose party controls 40 percent of the Senate and who has one year left in his term has about a 52 percent chance.

*Id.* at 160.

cant weight.<sup>60</sup> Strong public reaction to recent Court decisions may also play a part in enhancing senatorial scrutiny of nominees.<sup>61</sup>

The public's perception of the Court, the President and the nominee, and the role of the press in creating those perceptions, cannot be underestimated. In addition, greater participation by special interest segments of the public in the Senate hearings raises questions about the influence of money and political lobbies.<sup>62</sup> This is not to say that the nominee plays an insignificant part. As the quick confirmation of Justice Kennedy demonstrates, opposition still requires distrust of a nominee's ideology or character.

The purpose of this selected bibliography is to gather books and articles which discuss the many sides of this multidimensional question of the Senate's power to offer "advice and consent" on the President's judicial appointments. The material annotated in our bibliography provides a historical survey, analysis of reasons for rejections, statistics for predicting success and especially commentary on the role the Senate should play. It covers materials published from 1980 onward.<sup>63</sup> In addition to law review articles and statistical studies from political science journals, it includes articles from legal newspapers, chosen because the author is a direct participant in the selection process. Among the authors are Chief Justice William Rehnquist, Joseph Biden, Chairman of the Senate Judiciary Committee, and Laurence Tribe, Constitutional Law Scholar and frequent witness before the Senate Judiciary Committee.

60 Powerful Senators from both sides of the aisle have exerted influence through their questioning. For example, Senator Thurmond asked argumentative questions of Abe Fortas (*see* Ross, *supra* note 56, at 148), and "[i]n the Marshall hearings, Thurmond took the nominee through questions of legal technicalities and historical occurrences that proved difficult to answer in an effort to embarrass the nominee." Watson and Stookey, *supra* note 57, at 192. More recently Senators Biden, with questions concerning the right to privacy, and Kennedy, concerning discrimination, have taken an active role. This highlights, once again, the political nature of the process. These highly visible Senators each belonged to the appointing President's opposition party.

According to O'Brien, "The approach of the chairman of the Judiciary Committee toward judicial nominees determines, to a large extent, whether the Senate exercises its check on the President's choices for the federal bench." D. O'BRIEN, *supra* note 8, at 72.

61 Halper, *supra* note 9, at 112, states that "[t]he rejection rate during periods of unpopular Courts is 38.1 [percent], nearly triple the 13.5 [percent] rate prevailing at other times." However, he goes on to qualify this as not occurring frequently enough to be considered a singular cause of nominee rejection, but predictive when coupled with Presidential unpopularity.

62 Special interest groups spent over \$3 million on the Bork hearings and orchestrated a flood of letters to Senators. People for the American Way spent \$2 million on a media campaign, and the National Conservative Political Action Committee committed over \$1 million in an effort to get Bork approved by the Senate. D. O'BRIEN, *supra* note 8, at 101.

The ABA has assisted in selecting federal judges since 1946. S. WASBY, *THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM* 80 (2d ed. 1984). Recently two citizen groups from opposite viewpoints joined together to compel the ABA standing committee to comply with the Federal Advisory Committee Act. That would require them to open their hearings to the public. In *Washington Legal Found. v. Dept. of Justice*, 691 F. Supp. 483 (D.D.C. 1988), *prob. juris. noted sub nom.* Public Citizen v. Dep't of Justice, 57 U.S.L.W. 3394 (U.S. Dec. 5, 1988) (No. 88-429), Judge Joyce Hens Green held that the committee fits the Act's definition of an advisory committee, but that the Act is unconstitutional as applied to the committee. The case has gone on direct appeal to the United States Supreme Court. No. 88-494 (September 22, 1988).

63 Included also is an annotation, entry 3, concerning a bibliographic monograph published by the American Judicature Society, *LITERATURE ON JUDICIAL SELECTION*, by Nancy Chinn and Larry Berkson. Published in 1980, the work has a broad scope and includes materials on state and foreign nations' judicial selection processes. Under the heading, "Role of Senate," for example, it includes 13 entries on federal judicial selection, none of which is repeated in our bibliography.

## MONOGRAPHS

1. Abraham, Henry J. *Justices and Presidents: A Political History of Appointments to the Supreme Court*. 2d ed. New York: Oxford University Press, 430 pp. (1985).

Among its other qualities this book contains a wealth of statistical information on Supreme Court appointments and rejections. For example, the author points out that in the nineteenth century, the average was one nominee rejected for every three nominees appointed. Detailed information is provided regarding each nominee's prior judicial experience, occupation at time of appointment, home state, religion and political affiliation. The author also cites reasons for successful appointments and provides an evaluation of each Justice's subsequent performance on the bench.

2. Berkson, Larry C. and Susan B. Carbon. *The United States Circuit Judge Nominating Commission: Its Members, Procedures and Candidates*. Chicago: American Judicature Society, 260 pp. (1980).

This book details a study of the United States Circuit Judge Nominating Commission, a body created by President Jimmy Carter to facilitate selection of federal judges according to their professional merit and potential for quality service, and to increase placement of women and minorities. Each of the ten chapters is well documented. The first of the eleven appendices includes thirty-two recommendations based upon this study to improve the U.S. Circuit Judge Nominating Commission. Chapter two describes the history of circuit judge selection including a section on the role of the Senate. This work also reports the results of numerous interviews. Among the twenty-five tables and two lists, the tables, "Criteria Which Panelists Consider 'Decisive' or 'Of Major Importance'" and "Single Disqualifying Characteristics", are telling.

3. Chinn, Nancy and Larry Berkson, *Literature on Judicial Selection*. Chicago: American Judicature Society, 108 pp. (1980).

Published as part of the American Judicature Society's continuing effort to improve the quality of judicial performance and to insure that the most capable attorneys are appointed to the bench, this annotated bibliography includes literature published between 1913 and 1980. It includes sections on state judicial selection and judicial selection in foreign nations as well as a section on federal judicial selection. The federal section is broken into the following categories: appointment-overviews; role of the Senate; role of bar associations; the Department of Justice examination of lower court appointments; and an examination of United States Supreme Court nominations.

4. *The Judges War: The Senate, Legal Culture, Political Ideology and Judicial Confirmation*. Patrick B. McGuigan and Jeffrey P. O'Connell, eds., Washington: The Institute for Government and Politics of the Free Congress Research and Education Foundation, 307 pp. (1987).

Published by a tax-exempt research organization, this book is a part of the foundation's Judicial Reform Project. That project, centering on the proper role of the judiciary in a democratic society, has resulted in several books and conferences.

*The Judges War* is an examination of the controversy surrounding President Reagan's judicial nominees. Grappling with the substance of the liberal criticisms of the Reagan judiciary, the book places such controversial topics as Supreme Court "balance," the Senate's role, and the role of the judiciary in government, in an historical and cultural context. Written from a politically conservative viewpoint, the book contains thirteen chapters by ten contributors. In addition to chapters which defend Reagan appointments and their records, chapters include an historical survey of Supreme Court appointments, discussions of President Carter's methodology in appointments, the role of the ABA in the selection process, and the supposed bias of legal academia.

5. McFeeley, Neil D. *Appointment of Judges: The Johnson Presidency*. Austin, Texas: University of Texas Press, 199 pp. (1987).

Although this work focuses primarily on appointees by the Johnson administration, it contains a chapter on the historical development of the judicial appointment process. The author discusses the management process or "subpresidency" on which a President must rely in selecting judicial candidates.

The book is also valuable as a detailed case history of how one President conducted the process of judicial selection and nomination. Included is an appendix listing characteristics such as religion, age and political affiliation for all of Johnson's judicial appointees.

6. Neff, Alan. *The United States District Judge Nominating Commissions: Their Members, Procedures and Candidates*. Chicago: American Judicature Society, 203 pp. (1981).

Volume two of a study of federal judicial selection during the Carter administration, this book on selection of district court judges is a companion to entry 2 in this bibliography, which covers in detail selection of circuit judges. This book combines historical, legal and survey research to provide background to the selection of district court judges. Special emphasis is given to the Carter years. The author uses thirty-nine tables and includes twelve appendices to illustrate his findings.

7. O'Brien, David M. *Judicial Roulette: Report of Twentieth Century Fund Task Force on Judicial Selection*. New York: Priority Press Publications, 145 pp. (1988).

Sponsored by the Twentieth Century Fund, a research foundation with the avowed purpose of analyzing economic, political and social issues, this publication consists of a background paper and report of a task force which studied the process of nominating federal judges. Chaired by former New York Governor Hugh Carey and featuring distinguished Americans such as Walter Berns, Joseph Califano, Lloyd Cutler and Philip Kurland, among others, the task force had as its designated reporter, David O'Brien, Associate Professor in government at the University of Virginia, and author of a number of books, including *Storm Center: The Supreme Court in American Politics*.

The report offers a comprehensive analysis of the many factors involved in federal judicial selection and confirmation. Among its recommendations, the task force suggests that Supreme Court nominees are subject to too much scrutiny, but that lower court nominees do not receive enough. Furthermore, they recommend that all Senators use a bipartisan nominating commission to find potential candidates, and that a subcommittee hold hearings in the locale where the nominee would sit.

An extended background paper written by Mr. O'Brien analyzes historical considerations and political realities. The epilogue focuses on the Bork nomination.

8. Schwartz, Herman. *Packing the Courts: The Conservative Campaign to Rewrite the Constitution*. New York: Charles Scribner's Sons, 242 pp. (1988).

The author focuses on what he believes is a campaign by political conservatives to effect social policy in the United States by the appointment of conservative judges to the federal bench. He details how this purported conservative court packing plan developed, paying particular attention to Reagan nominees Manion, Rehnquist, Scalia, Bork, Ginsburg and Kennedy. He devotes an entire chapter to federal judicial selection from 1793-1980, in which he states that the Senate's insistence on an active role in advising and consenting on judicial appointments goes back to the earliest days of the Republic. In addition, in the first of two appendices he explains what he believes to be the conservative agenda concerning civil rights, antitrust and economic regulation and criminal procedure.

9. *The Supreme Court of the United States: Hearings and Reports on Successful and Unsuccessful Nominations of Supreme Court Justices by the Senate Judiciary Committee, 1916-1983*. R. Mersky and J. Jacobstein, comps., Buffalo: Hein 11 Vols. in 14 books (1977 and 1983 Supp.).

The compilers, law librarians/professors at two major law schools, present documentation on nominations to the Supreme Court. Included are roll call votes, testimony from hearings and material

from the Congressional Record. The compilers indicate that for each nominee varying amounts of material exist. Some reasons for these omissions include: some nominees have not appeared before the Judiciary Committee, but were instead considered in executive sessions for which no records were produced; all hearings and reports have not been published; and due to its confidential nature, some material was not made available to the compilers.

The first public hearings on a nomination to the Supreme Court were the Louis P. Brandeis hearings held in 1916. Those hearings generated material for the first three volumes. Volumes 4 through 8 include a chronological treatment of other successful nominees. Successive volumes include the hearings and reports of unsuccessful nominees since 1925, including complete volumes on Haynsworth and Carswell.

In 1977 the set went into its second printing, and a supplement to the first printing became available. In 1983 a supplement covering Justice O'Connor was published. Supplements on Justices Rehnquist, Scalia, Kennedy and unsuccessful nominees Bork and Ginsburg are in progress.

10. Tribe, Laurence H. *God Save This Honorable Court: How The Choice of Supreme Court Justices Shapes Our History*. New York: Random House, 171 pp. (1985); New American Library, 202 pp. (1986).

Written by one of America's leading Constitutional scholars, this treatise attempts to debunk several alleged myths surrounding procedures for nominating and approving new Justices. Professor Tribe states that the process of placing new Justices on the Court is far "too important a task to be left to any President; unless the Senate, acting as a continuing body accountable to the nation as a whole, plays an active and thoughtful part." An historical review of the process and the resultant effect on Court decisions is offered as evidence of his position.

#### ARTICLES

11. Abraham, Henry. "A Bench Happily Filled: Some Historical Reflections on the Supreme Court Appointment Process," 66 *Judicature* 282-95 (1983).

Professor of Government and Foreign Affairs at the University of Virginia, and author of the book, *Justices and Presidents: A Political History of Appointments to the Supreme Court* (See Abraham, *supra* entry 1), the author adapted this article from a lecture presented to the Supreme Court Historical Society in 1982. He uses statistics both to demonstrate why some nominations were successful and to show seven compelling reasons why twenty-three percent of United States Supreme Court nominees have been rejected. He states that the delegates to the Constitutional Convention focused on appointment method but not criteria, since the nominees' merit for the

post was assumed. He offers a six part "merit model" which he believes is historically sound.

12. Ackerman, Bruce W. "Transformative Appointments," 101 *Harvard Law Review* 1164-84 (1988).

Professor Ackerman's piece is one of five articles published in this issue of the *Harvard Law Review* under the overall heading "Essays on the Supreme Court Appointment Process." See also entries 16, 18, 33 and 55.

This article proceeds from the assumption that the nomination of Robert Bork was meant to be a "transformative appointment," i.e., one that is designed to transform the constitutional jurisprudence of the Court into decisions favored by the appointing President.

The author states that Judge Bork possessed outstanding qualifications for membership on the court. Ironically, however, he attributes Bork's failure to gain confirmation largely to the fact that his excellent record enabled his opposition to build a strong case against him, particularly, in light of the fact that Bork was believed by his opponents to have the vision and legal ability to succeed in transforming the constitutional jurisprudence of the Court. As such, he was thought to be both dangerous and attackable.

The author compares what he believes is President Reagan's transformative plan with that of President Franklin Roosevelt's, which he suggests was a transformative plan that worked. He calls the Bork rejection a tragedy, but necessary if the Senate and the country decide that President Reagan should not have the means to transform constitutional jurisprudence as President Roosevelt did.

The author also argues that supposed Presidential election mandates do not in themselves grant a popular mandate to transform constitutional law. Rather, he believes that election victories must be coupled with factors such as significant future gains in congressional elections, transformation of statutory law and political education of the American people to support the changes. His conclusion is that while Roosevelt succeeded in establishing these factors, Reagan did not.

13. Biden, Joseph R., Jr. "Advice and Consent: The Right and Duty of the Senate to Protect the Integrity of the Supreme Court," 100 *Los Angeles Daily Journal* S3, col. 1 (August 21, 1987).

This article consists of remarks taken from the Chairman of the Senate Judiciary Committee's address to the Senate on July 23, 1987, three weeks after President Reagan nominated Judge Robert Bork to be an Associate Justice of the Supreme Court. He argues that the framers intended the Senate to take the broadest view of its role in the appointment of judges; that the Senate historically has done so; that it has considered the political, legal and constitutional views of nominees; that it has previously rejected professionally qualified nominees; and in certain cases, the Senate has performed



a constitutional function in blocking a President's effort to "remake the Supreme Court in his own image."

14. Biden, Joseph R., Jr. "Choosing Judges," 8 *National Law Journal* 13 (March 24, 1986).

This article, by the then ranking minority member of the U.S. Senate Judiciary Committee, is based on his speech at the Georgetown University Law Center. A brief essay, this piece opposes Attorney General Edwin Meese's model of constitutional interpretation. The Senator asserts that the "Constitution requires a President to select nominees to the judiciary from the mainstream of American jurisprudence," and that the Senate's role is to "check and balance the excesses of Presidents." He looks at three questions which the Senate has traditionally asked:

Does the nominee have the intellectual capacity, competence and temperament to be a Supreme Court Justice?

Is the nominee of good moral character and free of conflicts of interest?

Will the nominee faithfully uphold the Constitution of the United States?

15. Biden, Joseph R., Jr. "Selecting a Judiciary to Protect the Constitution," 9 *National Law Journal* S4, col. 1 (April 27, 1987).

This article appears in a special supplement entitled, "Framing the Constitution Then and Now." The author opines that the Senate's role in advising and consenting to Presidential nominations remains one of its most important functions because we ask so much of our federal judges. He further states that "ideology never becomes an issue unless a President chooses to make an issue of it."

16. Carter, Stephen. "The Confirmation Mess," 101 *Harvard Law Review* 1185-1201 (1988).

Professor Carter believes that the Senate in exercising its power of advice and consent over judicial appointments should not focus on either a limited exercise in checking paper credentials to insure that nominees possess a relatively finite list of paper credentials or engage in inquiring into the nominees "so called" judicial philosophy to keep from the Court those with extreme constitutional visions. He bases this position on the theory that traditional paper credentials, in themselves, bear little relation to the work of a judge, and that the concept of judicial philosophy is very difficult for most Americans to understand and therefore deteriorates to predictions of hypothetical case results.

The author also argues that the use of the term "philosophy" in contemporary political rhetoric means "rights we like" and want to see implemented or protected. This is in conflict with the idea that interpretation of constitutional issues should be done dispassionately, without political motivations or merely to support the popular causes or positions of the moment.

Professor Carter offers as an alternative an investigation by the Senate designed to obtain a sense of the nominee as a whole person which would include an examination of his or her legal arguments and entire moral universe. He posits that the nominee should be a person for whom moral choices occasion deep and sustained reflection and whose personal moral choices seem generally sound.

17. Fein, Bruce. "Is the Supreme Court the President's Sole Preserve? A Proper Check on the Supreme Court," 71 *American Bar Association Journal* 36-40 (August 1985).

This article, targeted at ABA members, presents a side by side debate on the roles of the President and the Senate in the process of judicial selection. In this part of the debate, a former general counsel of the FCC during the Reagan administration argues that "the Constitution and history give the President the right to appoint justices who adhere to his view of the role of the judiciary." He reasons that such a method implements "the constitutional plan for rectifying judicial error and holding the judiciary partially answerable to contemporary political forces."

In a side by side response, a constitutional law professor argues for an active role for the Senate. (See Schwartz, *infra* entry 46).

18. Freund, Paul A. "Appointment of Justices: Some Historical Perspectives," 101 *Harvard Law Review* 1146-63 (1988).

In this article, the author examines the historical record concerning Supreme Court nominations to demonstrate that there have been numerous rejections, withdrawals and other confirmation battles motivated by purely political reasons and because of the social and economic views of the nominee.

Professor Freund states that although the qualifications and character of the nominee remain of paramount importance, there has been a shift in the twentieth century from the importance of sectional and party affiliations to an examination of the nominee's social and judicial philosophy. Coupling this development with the shift from secret Senate hearings and debates to an intensive public inquiry of a nominee's fitness, Freund suggests that there is a thin line between appropriate and inappropriate questioning and behavior. To address this concern, he suggests that committee rules be adopted to provide guidelines for both nominees and Senators.

Finally, the author cautions that since prior practice and happenstance have given us some of our best Justices, we must be concerned that the search for the ideal process might create more harm than good.

19. Friedlander, Robert A. "Judicial Selection and the Constitution: What Did the Framers Originally Intend?" 8 *Saint Louis University Public Law Review* 1-11 (1989).

In a Supreme Court symposium, the author, Minority Special Counsel for the Committee on Foreign Relations of the U.S. Senate and Former Counsel to the Subcommittee on the Constitution of the Senate Committee on the Judiciary, takes a historical approach to ask whether the nomination of a Supreme Court Justice is a political matter. He discusses the debates about the judiciary at the Constitutional Convention and qualifies Hamilton's writings in *The Federalist* due to his absence from much of the Convention and the fact that Essays Nos. 78-83 were not originally published with the other essays. He then traces the early history of Supreme Court appointments to conclude that within a generation of the Convention, the judiciary became a political branch despite the framers' intention to the contrary. He finds that this resulting friction among the governmental powers is both the strength and weakness of our system of government.

20. Friedman, Richard D. "The Transformation in Senate Response to Supreme Court Nominations: From the Reconstruction to the Taft Administration and Beyond," 5 *Cardozo Law Review* 1-95 (1983).

This substantial article focuses on the period between Reconstruction and the administration of William Howard Taft in an attempt to identify "underlying changes that explain the diminished frequency of rejection of Supreme Court nominees." The article is heavily documented with over 500 footnotes, most of them textual. The author offers perceptions of the Court as a vehicle for tracing the perceived shift of the court as a sectional mirror to a national body. The article discusses judicial temperament as a criterion for evaluation, and also distinguishes the role of the Senate from that of the President in the nominating process.

21. Friedman, Richard D. "Tribal Myths: Ideology and the Confirmation of Supreme Court Nominations" (Book Review), 95 *Yale Law Journal* 1283-1320 (1986).

Written by a professor at the Benjamin Cardozo School of Law, this review essay seeks to refute a concept presented by Laurence Tribe in *God Save This Honorable Court: How the Choice of Supreme Court Justices Shapes Our History* (See Tribe, *supra* entry 10). The author argues that Tribe misuses history and fails to recognize the double-edged sword of seeking to balance ideology on the Court. He concludes by offering an alternative test: "[A Senator] should satisfy himself that the nominee does not hold views that the Senator regards as so repugnant that he perceives harm merely in giving the nominee the opportunity to air them from the platform of the Supreme Court."

22. Ginsburg, Ruth Bader. "Confirming Supreme Court Justices: Thoughts on the Second Opinion Rendered by the Senate," 1988 *University of Illinois Law Review* 101-17.

Originally presented as the first 1987-88 lecture of the David C. Baum Memorial Lectures on Civil Liberties and Civil Rights at the University of Illinois College of Law on January 27, 1988, the article's author is a Circuit Judge on the United States Court of Appeals for the District of Columbia Circuit, appointed in 1980 by President Carter. Judge Ginsburg asks whether the Senate should ask questions about cases still moving through the courts or about a judicial nominee's political or ideological philosophy. In answering those questions she discusses the framers' understanding of the appointment process, provides a historical survey of how that has evolved over the last two hundred years, and makes some observations based on her previous discussions coupled with a look at the Bork nomination. She suggests that the misinformation generated in the special interest media campaigns may be made more tolerable "if the President seeks more 'advice' from the Senate prior to a nomination." She concludes that the debate on the Senate's role will continue into the next century.

23. Hatch, Orrin G. "A Response to Sen. Biden: The Dangers of Politicizing Supreme Court Selections," 100 *Los Angeles Daily Journal* S13, col. 1 (August 21, 1987).

This article consists of remarks made in response to an address to the Senate by Joseph Biden, the Chairman of the Senate Judiciary Committee. It argues that the language and history of the Constitution, together with Senate precedents, lead to the conclusion that the Senate's function is to check nominees for qualities of morality, integrity, ethical sensitivity, intellect, legal experience and the nominee's "willingness and ability to uphold the Constitution and laws of the United States." The Senator contends that politicizing the Supreme Court selection process, as he suggests was the case with the Bork nomination, poses serious risks to the judicial branch.

24. "Judicial Quiz" (Questions Sent to Nominee J. Rodriguez by Three Members), 271, *Harpers* 19 (August 1985).

This short article is a copy of a letter from three conservative members of the Senate Judiciary Committee—Senators Denton, East and Hatch—to Joseph Rodriguez, a nominee for a federal judgeship. It includes a selection of ideologically centered questions to which the Senators sought answers. The questions illustrate the Senate's renewed interest in its "advice and consent" role, not simply by liberal senators with respect to conservative nominees, but by conservative senators as well.

25. "The Judicial Selection Process," 2 *Benchmark* 185 (1986).

This brief article appears under the pseudonym Suetonius, as part of the regular feature "Judiciary Committee Report" in this con-

servative publication of the Center for Judicial Studies. It focuses on the difficulties faced by Daniel Manion, and relying on that examination makes two predictions: Senator Joseph Biden, through his services as Chairman of the Senate Judiciary Committee, had diminished his chances of appearing on the Democratic national ticket in 1988; and the Democrats, in their zeal to block Manion, were perceived as the inevitable losers who attempted to politicize the judicial process for their own political ends. The author suggests this tact would smooth the way for future conservative nominations. This point seems to have been debunked by the unsuccessful Bork-Ginsburg nominations.

26. Kaufman, Irving R. "Keeping Politics Out of the Court," *New York Times Magazine*, 72, 74, 79, 83, 84, 86 and 87 (December 9, 1984).

Judge on the United States Court of Appeals for the Second Circuit and formerly chief judge of that body, the author cites dangers that could arise if the public were to perceive the judiciary as a "powerful, politicized third branch of government." Published soon after Reagan's Presidential landslide victory of 1984, the article discusses criteria a President should use in selecting a Supreme Court nominee. Laurence Tribe credits this article as one which prompted him to write his book on judicial selection, *God Save This Honorable Court*. (See Tribe, *supra* entry 10). The *ABA Journal* featured this article as "Must Reading" in its March 1985 issue.

27. Kurland, Philip and Laurence Tribe. "The Burden of Advice and Consent: Review of Federal Judicial Nominees Demands Great Care" (Letter to Senate Judiciary Committee, June 1, 1986), 99 *Los Angeles Daily Journal* 4, col. 3 (June 13, 1986).

Two constitutional law professors delivered a joint statement to the Senate Judiciary Committee just after Justice Powell retired. In it they point to the constitutional duty of the Senate to do more than provide "senatorial courtesy," relying on the debate at the 1787 Constitutional Convention on whether to place the appointment power in the Senate alone. Focusing on the difficulty in utilizing the impeachment and conviction process, they emphasize the necessity of pre-appointment scrutiny of nominees.

28. Lawlor, John. "Court Packing Revisited: A Proposal for Rationalizing the Timing of Appointments to the Supreme Court," 134 *University of Pennsylvania Law Review* 967-1000 (1986).

This comment attempts to place court packing in a more sympathetic light. The author examines prior attempts to change the frequency with which Justices are appointed and notes that the Court's longstanding tradition of a nine-member court does not preclude change. He argues that the current method of formulating the Court weakens its independence, legitimacy and competence. He offers alternatives and applies his proposal to past points

in the Court's history to prove its merit. In addition, he discusses the Recess Appointments Clause.

29. Lee, Rex E. "Only the President May Rightfully Consider a Justice's Ideology," 99 *Los Angeles Daily Journal* 4, col. 3 (August 11, 1986).

In this short piece Mr. Lee, who was Solicitor General of the United States from 1981 to 1985, argues that since the Constitution expressly placed appointment power in the hands of the President, the President has the power to choose nominees based on whatever criteria, including ideology, he or she wishes. Mr. Lee then states the Senate may not decide which candidate is preferable but may instead only pass on the qualifications of the nominee. However, Mr. Lee posits that the Senate would have the power to refuse to confirm a nominee for philosophical reasons in extreme cases, if the nominee's ideology was "outside the wide range of reasonable constitutional views." Mr. Lee concludes that the extreme case exception does not apply to the nominations of William Rehnquist or Antonin Scalia.

30. Lively, Donald. "The Supreme Court Appointment Process: In Search of Constitutional Roles and Responsibilities," 59 *Southern California Law Review* 551-79 (1986).

The author examines the interplay and importance of both the President and the Senate in the judicial selection process. He illustrates his theory of the need for assertive Senate inquiry focusing upon ideology and policy values by examining the Senate rejection of John J. Parker. He asserts that it demeans the process when the Senate focuses on values and ideology, while pretending not to do so.

31. Mathias, Charles, Jr. "Advice and Consent: The Role of the United States Senate in the Judicial Selection Process," 54 *University of Chicago Law Review* 200-07 (1987).

Retired from the Senate after 26 years in Congress, the author served 18 of those years as a member of the Senate Judiciary Committee. Written in essay form, the article investigates the constitutional foundation of the duty to "advise and consent" and looks at the practical and political mechanism based on that foundation. He analyzes the role of "advising" separately from that of "consenting" relying heavily on the Federalist Papers. He suggests that the Senate allocate more resources to consideration of a nomination; that the full Senate have a complete record, i.e., a written committee report, including minority views from which to consider the nomination; and that the Senate should inquire into how the nominee came to be chosen in the first place. He concludes that "[o]nly with vigorous review can the Senate carry out" its function of advice and consent.

32. Mikva, Abner, J. "Judge Picking," 10 *District Lawyer* 36-40 (September-October 1985).

The author, a Circuit Judge on the U.S. Court of Appeals, D.C. Circuit, delivered this speech at the D.C. Bar Annual Meeting on June 13, 1985. He asserts that the President may select nominees who share his world view, but that the President may not use the appointment process to amend the Constitution or to recast important constitutional precedents. Further, he contends that the Senate should avoid asking prospective judges their views on an issue likely to arise in the future, since that gives the appearance of creating judicial I.O.U.'s. He concludes that a nominee's choice as to which questions are proper for response is the "best litmus test" because it "tells us that this nominee possesses the independence and courage we ought to want in our judges." Ironically, he illustrates that premise by referring to comments made by then Circuit Judge Robert Bork.

33. Monaghan, Henry P. "The Confirmation Process: Law or Politics?" 101 *Harvard Law Review* 1202-12 (1988).

This article written by the Harlan Fiske Stone Professor of Constitutional Law at Columbia University is quite noteworthy because the author testified before the Senate Judiciary Committee in support of Judge Bork and the idea that the Senate had a constitutional duty to approve his nomination. However, he reveals in this article that much to his surprise, subsequent historical research convinced him that not only is there no affirmative constitutional compulsion for the Senate to confirm any qualified candidate, but rather the Senate has the duty to reject any nominee whose appointment will not advance the public good as the Senate understands that good to be. Most significant to this premise is the author's contention that the Senate should use its power to reject nominees for the public good when a President, through his judicial nominations, is seeking to extend long beyond his term of election an ideology with which the Senate does not agree.

34. Note. "Advice and Consent: The Senate's Political Role in the Supreme Court Appointment Process," 1988 *Utah Law Review* 411 (authored by Scott R. Ryther).

This note discusses the proper role of ideology in the examination of Supreme Court Justices. It examines the convention debate from which the "advice and consent" power emerged, the historical development of advice and consent, and it argues that the Senate is more representative of the electorate and, due to the separation of powers, better able to maintain independence of the judiciary. The note concludes with a three part framework by which each Senator may consider ideology:

1. Whether the nominee's views come within certain broad grounds.

2. Whether the nominee's ideology is such that it interferes with a willingness to reexamine his/her biases.
3. Whether the nominee's ideology will add diversity to the court.

35. Note. "All the President's Men? A Study of Ronald Reagan's Appointments to the U.S. Court of Appeals," 87 *Columbia Law Review* 766-93 (1987) (authored by Timothy B. Tomasi & Jeff A. Velona).

This well-documented note tests quantitatively the hypothesis that Reagan appointees are the most conservative jurists on the U.S. Court of Appeals. Thoughtfully written, it first explains the basis for the popular conception that Reagan has appointed ideological extremists. The article also reports the results of studies of judicial voting behavior. This study compares the votes of Reagan judicial appointees with those judges appointed by other G.O.P. Presidents. They also evaluate Reagan appointees' disagreement rate in contrast with judges appointed by Democrats. Next, they study whether Reagan appointees take a conservative position more often than other Republican appointed judges. Finally, they examine positions on specific issues to determine whether Reagan appointees tend to vote more conservatively. The authors carefully explain their methodology and results. They conclude that Reagan judges are not significantly more conservative than their Republican colleagues.

36. Palmer, Jan. "Senate Confirmation of Appointments to the United States Supreme Court," 11 *Review of Social Economy* 152-62 (1983).

This paper takes a statistical approach to examine the Senate's role in the selection of Supreme Court Justices. The author hypothesizes that the probability of confirmation depends on two factors attributable to the President and three attributable to the nominee. He illustrates his findings from this empirical study using tables and a list of references rather than footnotes. Working from an economic or interest group theory, he discusses each of the variables and predicts the probabilities of confirmation based on these selected characteristics.

37. Peck, Robert S. "Can Presidents Pack the Courts? The Answer is Yes, No, and Maybe," 8 *Update on Law-Related Education* 12-15 (Spring 1984).

The author, Staff Director of the ABA Committee on Public Understanding of the Law, states that in studying the Court "the lessons of history prove that with the turnover of justices there is often substantial change in philosophy." However, he provides an interesting argument that this change can neither be predicted nor controlled.



38. Powe, L.A., Jr. "The Senate and the Court: Questioning a Nominee" (Book Review), 4 *Texas Law Review* 891-901 (1976).

Professor Powe's article is listed as a review of the Mersky & Jacobstein compilation entitled *The Supreme Court of the United States Nominations 1916-72* (see Hearings, *supra* entry 9); however, it is more accurately a brief essay on the Senate's questioning of Supreme Court nominees. Professor Powe takes the position that asking a nominee questions of a philosophical nature is relatively useless. He suggests the more proper and effective method of discovering a nominee's philosophy is by analyzing his or her public record (writings, judicial opinions, etc.).

39. Rees, Grover III. "Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution," 17 *Georgia Law Review* 913-67 (1983).

This article includes ideas presented in a memorandum to the Subcommittee on Separation of Powers of the United States Senate Judiciary Committee at the time of the nomination of Justice O'Connor. The author argues against the practice of nominees refusing to answer constitutional questions. He believes that the risks of viewing those discussions as binding on the issues or as commitments for votes is outweighed by the Senate's need for highly relevant information concerning the candidates' voting philosophies.

40. Rehnquist, William H. "Presidential Appointments to the Supreme Court," 2 *Constitutional Commentary* 319-30 (1985).

Then Associate Justice Rehnquist delivered this address at the University of Minnesota as a "Jurist in Residence." He discusses Presidents' historical propensities to "pack" the Court with people "who are sympathetic to his political or philosophical principles." He cites examples involving Jefferson, Lincoln, and Roosevelt and comments on the unpredictability of their choices. He concludes that while the Court is independent of the legislative and executive branches, it is subject to infusions of popular will through the President's appointment power. However, he assures the reader that institutional pressures on the Court cause justices to act independently.

The material in this article has been integrated into Rehnquist's book, *The Supreme Court: How It Was, How It Is* (New York: Morrow, 1987).

41. Robinson, John H. "Envisioning the New Court" (Book Review), 48 *The Review of Politics* 463-67 (1986).

In reviewing Professor Tribe's *God Save This Honorable Court: How the Choice of Supreme Court Justices Shapes Our History* (See Tribe, *supra* entry 10), Professor Robinson finds Tribe's book overly simplistic and "counterproductive to Tribe's own cause." Robinson discusses the interplay of the Constitutional text regarding both judicial appointment and judicial independence, the debates of the Constitu-

tional Convention and some historical examples of Presidents whose nominees the Senate rejected. He compares the views of Tribe with those of Senator Joseph Biden. He concludes that despite the "corrosive separation of vision from reason in Tribe's presentation," the book may influence Senate response to Supreme Court nominations, and that Tribe's "rigid dichotomy between a passive populace and a super-political judiciary" leads one to question how the people can once again take hold of their own political lives.

42. Ross, William G. "The Functions, Roles, and Duties of the Senate in the Supreme Court Appointment Process," 28 *William & Mary Law Review* 633-82 (1987).

Spurred by the Senate's inquiry into Chief Justice Rehnquist's judicial and political philosophies, the author, an attorney and teacher of Supreme Court history, analyzes the proper scope of the Senate's role by examining three areas: review and investigation of the nominee's intellectual, professional, physical, psychological, moral and ethical qualifications; check on Presidential favoritism; and evaluation of the nominee's political and judicial philosophies by interviewing the nominee and serving as a forum for the expression of views of the bar, special interest groups and private citizens. From an examination of the language of the Constitution and the intentions of the framers, the author concludes that the framers envisioned an active Senate role.

43. Ross, William G. "The Questioning of Supreme Court Nominees at Senate Confirmation Hearings: Proposals for Accommodating the Needs of the Senate and Ameliorating the Fears of the Nominees," 62 *Tulane Law Review* 109-74 (1987).

The author examines the principle of recusal, and gives a brief history of questioning nominees at Senate hearing. He also analyzes seven categories of questions commonly put to nominees. He concludes that despite its insufficiencies, testimony of Supreme Court nominees provides insights into the thinking of future justices. He separates questions into those which a nominee should not be obliged to answer and those that require full responses if the Senate is to discharge its constitutional duty to advise and consent. In the former category, he places questions concerning the merits of actual pending cases; questions which elicit comments from a judge on his/her own judicial decisions; argumentative or highly speculative questions; and those for which the nominee feels he lacks sufficient knowledge to answer.

44. Rotunda, Ronald D. "The Confirmation Process for Supreme Court Justices in the Modern Era," 37 *Emory Law Journal* 559-86 (1988).

Appearing in a symposium on "Separation of Powers" this article by a well-known constitutional law scholar traces the origins of

nominee appearances before the Senate Judiciary Committee and of a nominee's courtesy calls to certain senators, and asks what legacy the Bork nomination may have left us, particularly with respect to media coverage. In doing so, the author first presents a thoughtful look at the seemingly inconsistent attacks upon Bork during his hearings. He then examines the "publicity campaign and paid advertisements[.]" many of which he finds misstated Bork's positions. Of public opinion polls taken, he discusses charges that the language used in the questioning promoted bias rather than polling opinion. He concludes that future nominees will probably "neither invite nor engage in any discussion of judicial philosophy[.]" and he also suggests that the possibility of "a media blitz of innuendo and false statement" initiated from either side at a future confirmation exists, but that it will make us all losers.

45. Schauer, Frederick. "Judging in a Corner of the Law," 61 *Southern California Law Review* 1717-33 (1988).

This essay appears in the "USC Symposium on Judicial Election, Selection, and Accountability." The author, a professor of Constitutional Law and Jurisprudence at the University of Michigan School of Law, discusses legal theory and Priest and Klein's selection hypothesis that posits that appellate judging comprises only a small part of the law. He suggests that perhaps some appellate judges "need not be lawyers, or need not be experienced or good lawyers in a technical, traditional, and positivist sense of what a 'good' lawyer is." He concludes that before meaningful discussions about selection and retention can occur, a determination of what appellate judges do and what they ought to do must take place.

46. Schwartz, Herman. "Is the Supreme Court the President's Sole Preserve? The Senate Can Play Too," 71 *American Bar Association Journal* 36-40 (August 1985).

This article, targeted at ABA members, presents a debate on the roles of the President and the Senate in the process of judicial selection. In this side by side article (*See* Fein, *supra* entry 17), the author, a constitutional law professor, responds to the assertion that a President may try to pack the Supreme Court. He takes the position that anything other than court packing would be unnatural. He further posits that "[i]t is equally right for the [nominee's judicial] philosophy to be crucial to a senator's vote." He concludes that during much of the twentieth century the Senate neglected its constitutional duty to exercise its independent judgment.

47. Segal, Jeffrey. "Senate Confirmation of Supreme Court Justices: Partisan and Institutional Politics," 49 *The Journal of Politics* 998-1015 (1988).

The author proceeds from the idea that confirmation or rejection of a Supreme Court nominee is based primarily on political considerations. To prove his hypothesis, he builds what he calls a "political

model" of Senate confirmation, which includes the goals of U.S. Senators in confirmation votes together with significant nonpolitical variables, such as the century of the nomination and the experience of the nominee. This model is then applied as a test on all confirmation decisions through 1981.

48. Segal, Jeffrey and Harold Spaeth. "If a Supreme Court Vacancy Occurs, Will the Senate Confirm a Reagan Nominee?" 69 *Judicature* 186-90 (1986).

This article, by two professors of political science, presents a statistical analysis of the Senate's voting record on the approval or rejection of Supreme Court nominees. They conclude that a nominee's chance of rejection increases in direct relation to the length of time the nominating President has been in office. Accordingly, President Reagan's early nominees have had a good Senate approval rate. However, chances of rejection increase as his tenure draws to a close.

49. Simon, Paul. "The Senate's Role in Judicial Appointments," 70 *Judicature* 55-60 (1986).

Senator Simon, writing as a member of the Judiciary Committee, suggests how the Senate should go about fulfilling its responsibility. He starts with the general view that the Senate should play an active role in the appointment of federal judges and that no automatic presumption of approval should exist. His basic premise is derived from the Hamiltonian description of the Senate's role as being the "efficacious source of stability" and that an active Senate may ultimately reduce the role of ideology in this process.

50. Solfridge, Wayne. "Ideology as a Factor in Senate Consideration of Supreme Court Nominations," 42 *Journal of Politics* 560-67 (1980).

The author notes that Presidents often view appointments of cabinet officers as Presidential prerogatives, but he suggests that such a presumption with respect to the appointment of Supreme Court Justices would be constitutionally suspect. He contrasts the 18th and 19th centuries, when approximately one Supreme Court nominee in four was rejected, with the 20th century in which prior to 1968, only one nominee was rejected. Two tables are included; one provides vote tallies for Supreme Court nominees from 1968-1975. The other table gives the Americans for Constitutional Action ideological ratings of senators for the same time period. The author concludes that for opposition to be successful, emotional issues which excite the public must be present and those issues must relate to the nominee in a direct rather than general way.

51. Solum, Lawrence B. "The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection," 61 *Southern California Law Review* 1735-56 (1988).

The author, a professor at Loyola Law School, Los Angeles, comments in the "USC Symposium on Judicial Election, Selection, and Accountability," on Professor Schauer's "Judging in a Corner of the Law," *see* Schauer, *supra* entry 45. He counters with the argument that appellate judging requires the virtues of character and mind as derived from Aristotelian theory. He expands on three of four aspects of judicial virtue: judicial intelligence, judicial integrity and judicial wisdom, and he posits that these virtues are developed through training in the law, experience in practice and in developing the habit of respect and concern for the law. He concludes that selection of lawyers over lay people and of excellent lawyers over mediocre ones does more to ensure these judicial virtues.

52. Songer, Donald R. "The Policy Consequences of Senate Involvement in the Selection of Judges in the United States Courts of Appeals," 35 *Western Political Quarterly* 107-19 (1982).

Using a statistical approach, this study reports the findings of an investigation to see whether a consonance of policy positions exists between appeals court judges and home state senators of the President's party. The author measured the strength of association between policy positions on economics and civil liberties. He concludes that those who are dissatisfied with the decisions of their circuit court need to secure election of both a President and senators who share their policy outlook.

53. Stidham, Ronald, Robert A. Carp and C.K. Rowland. "Patterns of Presidential Influence on the Federal District Courts: An Analysis of the Appointment Process," 14 *Presidential Studies Quarterly* 548-60 (1984).

Written by three academicians in the area of government and political science, this article analyzes the President's capacity to influence the character of the district courts. After a review of the literature, the authors, focusing on Presidents Wilson through Ford, pinpoint several factors which determine a President's capacity to influence the political character of the federal trial courts. They present evidence which suggests that the voting patterns of the district judges reflect the political values of the President who appointed them.

54. Stookey, John and George Watson. "The Bork Hearing: Rocks and Roles," 71 *Judicature* 194-96 (1988).

A companion to "Supreme Court Confirmation Hearings: A View from the Senate," this article applies the theories expressed in the former (*See* Watson & Stookey, *infra* entry 57). The authors find three recent political developments are especially significant: Democratic opposition no longer constituted a minority in the Senate;

due to political and policy setbacks, President Reagan's power had waned; and the ideological balance of the court seemed at stake. The authors use a table, three figures and footnotes to explain their analysis. They conclude that had the Bork nomination preceded that of Scalia both would likely have gained seats on the court.

55. Totenberg, Nina. "The Confirmation Process and the Public: To Know or Not to Know," 101 *Harvard Law Review* 1213-29 (1988).

The author is the Legal Affairs Correspondent for National Public Radio and is perhaps best known for breaking the story concerning the use of marijuana by Supreme Court nominee Douglas Ginsburg. In this article Ms. Totenberg argues that the judicial confirmation process is the last and probably only chance for the public to affect the least accountable branch of government, and therefore the Senate has the responsibility to get the facts regarding the nominee out to the public. The author is critical of the Senate Judiciary Committee because she believes they have often neglected their duty to investigate and question nominees aggressively in favor of political expediency. She states that the Committee's approach to the Bork hearings was the first time it did its job properly. This article is also notable for the detail included concerning the questioning of Supreme Court nominees Bork, Rehnquist, Scalia and Kennedy.

56. Tribe, Laurence. "Only the Senate can Protect the Constitution" (reprinted from the *New York Times*), 98 *Los Angeles Daily Journal* 4, col. 3 (October 7, 1985).

The author suggests that the "power of appointment" can exceed the "power of amendment" because while there are "no single-issue justices," there are "single-issue amendments." He further states that since the Senate represents both parties, many philosophies, many ancestries, and both genders, and because of its staggered terms and biennial elections, it more accurately reflects the electorate than the President.

57. Watson, George and John Stookey. "Supreme Court Confirmation Hearings: A View from the Senate," 71 *Judicature* 186-93 (1988).

The authors, associate professors of political science, use the O'Connor, Scalia and Rehnquist hearings to examine the role of the hearings in the confirmation process. They focus on senators' legislative roles rather than on how controversial the hearings are or on what outcome the hearings produce. They hypothesize that because of the amount of pre-hearing information available and their own political and personal situation, most senators have made up their minds prior to the hearings. Consequently, they found that the role of validator, position advertiser, or educator replaced the role of evaluator. They use tables to illustrate each senator's political ideology and pre-hearing commitment to a nominee. They

conclude that an important senatorial goal is to influence the next nomination even before it is made.