The Senate is Supposed to Advise and Consent, Not Obstruct and Delay

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The Senate Is Supposed to Advise And Consent, Not Obstruct and Delay

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Over a year after President Bush nominated his first group of circuit court judges, only two have been confirmed. Most have not even received a hearing, yet the number of vacancies on the federal bench has grown to crisis proportion. Chief Justice William Rehnquist recently complained of an "alarming number of judicial vacancies," creating a real strain on the courts.¹ Even Senator Patrick Leahy, who, as Chairman of the Senate's judiciary committee is largely responsible for the current logjam, previously referred to a judicial vacancy "crisis" when the number of vacancies on the bench was about half what it is today, contending that those who delay or prevent the filling of vacancies were "derelict[ in their] duty," and delaying or preventing the administration of justice.²

More fundamentally, the judicial vacancy crisis is threatening to hamper the ability of the courts to perform their primary role as an important check on the elected branches of government, protecting individual rights against tyrannical majorities, and insuring that the legislative and executive branches do not exceed the scope of authority delegated to them by the Constitution. As James Madison noted two years before the Constitutional Convention, the "Judiciary Department merits every care" because it "maintains private Right against all the corruptions of the two other departments...."³

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

I. The Framers of the Constitution Assigned to the President the Pre-Eminent Role in Appointing Judges

The President alone has the power to nominate

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

The lengthy debates over the clause in the Constitutional Convention support this reading. According to Madison’s notes, an initial proposal on July 18, 1787, to place the appointment power in the Senate was opposed because, as Massachusetts delegate Nathaniel Ghorum noted, “even that branch [was] too numerous, and too little personally responsible, to ensure a good choice.” Ghorum suggested instead that Judges be appointed by the President with the advice and consent of the Senate, as had long been the method successfully followed in his home state. James Wilson and Governeur Morris of Pennsylvania, two of the Convention’s leading figures, agreed with Ghorum and moved that judges be appointed by the President.

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

Ghorum replied to Mason’s objection by noting that the senators were at least equally likely to “form their attachments.” Giving the power to the President would at least mean that he “will be responsible in point of character at least” for his choices, and would therefore “be careful to look through all the States for proper characters.” For him, the problem with placing the appointment power in the Senate was that “Public bodies feel no personal responsibility, and give full play to intrigue & cabal,” while if the appointment power were given to the President alone, “the Executive would certainly be more answerable for a good appointment, as the whole blame of a bad one would fall on him alone.”

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

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

The convention delegates were primarily concerned about improper influence in the appointments process, and most of the debate centered on whether assigning the appointment power to the President or to
the Senate would serve as a better check on that influence. Those who, like Madison, argued that the President should have the sole power of appointment believed that this procedure would best prevent such political bargaining. As Edmund Randolph noted, “[a]ppointments by the Legislatures have generally resulted from cabal, from personal regard, or some other consideration than a title derived from the proper qualifications.”

But those who opposed this idea, and instead wanted the Senate to have the power of appointment, did not argue that the Senate should have the power in order to control the development of case law or regulate judicial philosophy. Instead, they feared that the President would be “more susceptible to caresses & intrigues than the Senate,” as Oliver Ellsworth of Connecticut contended. In the end, the Convention agreed that the President would make the nominations, and the Senate would have a limited power to withhold confirmation as a check against political patronage or nepotism. Governor Morris put the decision succinctly: “as the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security.” As the Supreme Court subsequently recognized, “the Framers anticipated that the President would be less vulnerable to interest-group pressure and personal favoritism than would a collective body.”

No one argued that the Senate’s participation in the process should include second-guessing the judicial philosophy of the President’s nominees or attempting to mold that philosophy itself. Indeed, such a suggestion was routinely rejected as presenting a dangerous violation of the separation of powers, by allowing the Senate to control the President’s choices and, ultimately, intrude upon the judiciary.

Madison, for instance, arguing in defense of his suggested compromise—that a 2/3 vote of the Senate could disqualify a judicial nomination, but otherwise giving the President a free hand—noted that

The Executive Magistrate w’d be considered as a national officer, acting

for and equally sympathizing with every part of the U. States. If the 2d branch alone should have this power, the Judges might be appointed by a minority of the people, tho’ by a majority, of the States, which could not be justified on any principle as their proceedings were to relate to the people, rather than to the States....

In short, by assigning the sole power to nominate (and the primary power to appoint) judges to the President, the Convention specifically rejected a more expansive Senate role; such would undermine the President’s responsibility, and far from providing security against improper appointments, would actually lead to the very kind of cabal-like behavior that the Convention delegates feared.

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

In the act of nomination, [the President’s] judgment alone would be exercised; and as it would be his sole duty to point out the man who, with the approbation of the Senate should fill an office, his responsibility would be as complete as if he were to make the final appointment. There can, in this view, be no difference between nominating and appointing. The same motives which would influence a proper discharge of his duty in one case, would
exist in the other. And as no man could be appointed but on his previous nomination, every man who might be appointed would be, in fact, his choice. 23

Note the very limited role that the Senate serves in Hamilton’s view—which, of course, echoes the views expressed at the Constitutional Convention by both those who defended and those who opposed giving the appointment power to the President. In the founders’ view, the Senate acts as a brake on the President’s ability to fill offices with his own friends and family members rather than qualified nominations, but beyond that, the element of choice—the essence of the power to fill the office—belongs to the President alone. The Senate has the power to refuse nominees, but in the Constitutional scheme it has no proper authority in picking the nominees—either through direct choice or through logrolling and deal-making.

Hamilton was not so ignorant as to deny that deal-making would be the process by which things got done in the Senate—as he writes, legislatures are very often prone to “bargain[s]” by which one party says to another, “Give us the man we wish for this office, and you shall have the one you wish for that.” 24 But this legislative propensity was, for Hamilton, a primary reason for giving the appointment power to the President instead of the Senate. Placing the nomination power in the President alone would, he argued, cut down on the degree to which political bargains in the Senate influenced the choice of candidates, because under the Constitutional scheme, all would understand that the power of appointment belonged in the President alone. That understanding, as we shall see, has been eroded in recent years.

Commenting on the prevailing understanding, Joseph Story later described the President’s power to nominate as almost absolute. “The president is to nominate,” Story noted, “and thereby has the sole power to select for office.” 25 Story believed that the danger of vesting the appointment power in the Senate was greater than the danger of giving the power to the President alone, because “if he should...surrender the public patronage into the hands of profligate men, or low adventurers, it [would] be impossible for him long to retain public favour.... At all events, he would be less likely to disregard [public disapproval] than a large body of men, who would share the responsibility and encourage each other in the division of the patronage of the government.” 26

The Framers envisioned a narrow role for the Senate in the confirmation process

Of course, there is more to the appointment power than the power to nominate, and the Senate unquestionably has a role to play in the confirmation phase of the appointment process. But the role envisioned by the framers was as a check on improper appointments by the President, one that would not undermine the President’s ultimate responsibility for the appointments he made. As James Iredell—later a Justice of the Supreme Court himself—noted during the North Carolina Ratification Convention, “[a]s to offices, the Senate has no other influence but a restraint on improper appointments.... This, in effect, is but a restriction on the President.” 27

The degree to which the founders viewed the power of appointment as being vested solely in the President can be gauged by the fact that John Adams objected even to the Senate’s limited confirmation role, contending that it “lessens the responsibility of the president.” To Adams, the President should be solely responsible for his choices, and should alone pay the price for choosing unfit nominees. Under the current system, Adams complained, “Who can censure [the President] without censuring the senate...?” 28 The appointment power is, Adams wrote, an “executive matter[,]” which should be left entirely to “the management of the executive.” 29 James Wilson echoed this view: “The person who nominates or makes appointments to offices, should be known. His own office, his own character, his own for-
tune, should be responsible. He should be alike unfettered and unsheltered by counsellors.”30

In discussing the analogous situation of executive appointments—such as ambassadors or cabinet members—James Madison asked, “Why... was the senate joined with the president in appointing to office...? I answer, merely for the sake of advising, being supposed, from their nature, better acquainted with the characters of the candidates than an individual; yet even here, the president is held to the responsibility he nominates, and with their consent appoints; no person can be forced upon him as an assistant by any other branch of government.”31

The Senate’s confirmation power therefore acts only as a relatively minor check on the President’s authority—it exists only to prevent the President from selecting a nominee who “does not possess due qualifications for office.”32 Essentially, it exists to prevent the President from being swayed by nepotism or mere political opportunism.33 Assessing a candidate’s “qualifications for office” did not give the Senate grounds for imposing an ideological litmus on the President’s nominees, at least where the questioned ideology did not prevent a judge from fulfilling his oath of office.

Idea, was not considered a proper reason for refusing confirmation, as long as it did not prevent the nominee from fulfilling the judicial oath.

In the founders’ view, then, the Senate’s power in the confirmation of judicial appointees was extremely limited. It existed solely to prevent the President from exercising his power in an improper manner. Ideology—at least ideology of the kind that is unrelated to a candidate’s ability to fulfill his oath of office—simply had no place in the Senate’s decision. As Hamilton wrote, “It will be the office of the President to nominate, and, with the advice and consent of the Senate, to appoint. There will, of course, be no exertion of choice on the part of the Senate. They may defeat one choice of the Executive, and oblige him to make another; but they cannot themselves choose—they can only ratify or reject the choice he may have made.”34 It was not that the founders believed the political views of judges were irrelevant; they were not that naive. But in their view, the President was alone responsible for his appointments, and, in turn, the ideology of those he appointed.35

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

Rutledge was a vocal opponent of the controversial Jay Treaty, negotiated by President Washington’s envoy to England—and first Chief Justice of the United States—John Jay.36 Shortly after his nomination, Rutledge delivered an emphatic and somewhat imprudent attack on the Treaty, which was supported by the Federalist majority in Congress. Rutledge’s appointment was rejected shortly thereafter on December 15, 1795, almost immediately after Congress resumed its work after a recess.37 Although the Senate’s refusal to confirm Rutledge might in part be due to questions about his mental stability,38 his opposition to the Jay Treaty undoubtedly played an important role in the vote. Thomas Jefferson complained privately that “[t]he rejection of Mr. Rutledge by the Senate is a bold thing; because they cannot pretend any objection to him but his disapprobation of the treaty. It is, of course, a declaration that they will receive none but Tories hereafter into any department of the government.”39

Jefferson’s supporters in Congress responded in kind after Jefferson was elected President. Attempting to expand Jefferson’s own control over the courts beyond what was
permitted in the normal course of filling vacancies, the Jeffersonian Republicans brought articles of impeachment against Supreme Court Justice Samuel Chase, a Federalist opponent of the administration.\textsuperscript{40} Jefferson’s supporters in Congress had been successful in impeaching New Hampshire District Judge John Pickering for bad behavior—Pickering was insane—\textsuperscript{41} but success in impeaching him emboldened members of Jefferson’s party to impeach Justice Chase, who had been appointed in 1796 by John Adams, and had attempted to enforce the notorious Sedition Act.\textsuperscript{42} Articles of impeachment against Chase were drawn up by Virginia Congressman John Randolph of Roanoke,\textsuperscript{43} who was immediately challenged on the floor of the House. “[T]he streams of justice should be preserved pure and unsullied,” said one Congressman:

The Judicial department ought to attach to itself a degree of independence. I am of opinion that this House possesses no censorial power over the Judicial department generally, or over any judge in particular. They have alone the power of impeaching them; and when a judge shall be charged with flagrant misconduct... I shall be at all times prepared to carry the provisions of the Constitution into effect, in virtue of which great transgressors are punishable for their crimes.... If the resolution pass in its present form, it appears to me that we shall thereby pass a vote of censure on this judge, which neither the Constitution nor laws authorize.\textsuperscript{44}

Popular outcry against Chase’s impeachment was swift. “The simple truth is,” one newspaper said, that “Mr. Jefferson has been determined from the first to have a judiciary, as well as a legislature, that would second the views of the executive.”\textsuperscript{45} “I am afraid,” said another Congressman, “that unless great care be taken the doctrine of judicial independence will be carried so far as to become dangerous to the liberties of the country.”\textsuperscript{46} Randolph insisted that he was not seeking impeachment for ideological reasons but based on Chase’s bad behavior. In a charge to a grand jury in a Sedition Act case in Baltimore, Chase had let fly with a political screed against the Jefferson Administration, and supporters of impeachment argued that this demonstrated Judge Chase’s own ideological bias.\textsuperscript{47} Yet few were persuaded. To the Federalists, the Chase impeachment was motivated purely by the political ideology of the Jeffersonians. As John Quincy Adams wrote in his diary, “this was a party prosecution.”\textsuperscript{48}

The Senate ultimately voted not to convict Justice Chase, and the Congress backed away from the ideological litmus test that threatened the independence of the judiciary. As one commentator has noted, “[a]t that early stage of the republic, a successful impeachment of a Supreme Court Justice innocent of criminal activity probably would have left the judicial branch of the federal government forever dependent on the legislative.”\textsuperscript{49} As a result, the use of impeachment to enforce political orthodoxy on the Supreme Court was abandoned. In 1970, when then-Congressman Gerald Ford denounced Justice William O. Douglas on the floor of the House and called for his impeachment, the suggestion was doomed from the start.\textsuperscript{50}

II. The Current State of the Confirmation Power

Why Ideology Matters to The Left

Despite the original understanding of the Senate’s limited role in the confirmation process, and despite the lessons learned from these early historical flirtations with the use of political ideology as a criterion for judicial qualification, the Senate today appears bent on using its limited confirmation power to impose ideological litmus on presidential nominees and even to force the President to nominate judges preferred by individual senators, thus arrogating to it-
self the nomination as well as the confirmation power.

The Senate's expanded use of its confirmation power should perhaps come as no surprise. As a result of the growing role of the judiciary—and of government in general—in the lives of Americans today, the Senate's part in the nomination process has become a powerful political tool, and, like all powerful political tools, it is the subject of a strenuous competition among interest groups every time the President seeks to fill a judicial vacancy. Moreover, it is a tool that poses grave dangers to our constitutional system of government. In its current manifestation, the Senate's ideological use of the confirmation power threatens the separation of powers by undermining the responsibility for appointments given to the President, by demanding of judicial nominees a commitment to a role not appropriate to the courts, and, perhaps most importantly, by threatening the independence of the judiciary.

The reason that some senators are so intent on delving into the judicial philosophy of nominees is deeply connected to their view of the proper role of the judiciary in American government. Viewing the Constitution as a "living document," modern-day liberals see the Court as a place where the Constitution is stretched, shaped, cut, and rewritten in order to put in place so-called "progressive" policies that could never emerge from the legislative process. Of course, the Constitution is based on a profoundly different notion of law than is modern liberalism, and it is no wonder, therefore, that President Franklin D. Roosevelt, the godfather of the Welfare State that lies at the center of modern liberalism, found it necessary to resort to the highly questionable "Court-packing plan" of 1936 in order to enforce his "vision" of a new political order. The Constitution simply was not designed to accommodate such things as the massive redistributions of wealth that Roosevelt was proposing—in fact, it was designed precisely to prevent such things. As Rexford Tugwell, one of the principal architects of the New Deal, admitted, "To the extent that [the New Deal policies] developed, they were tortured interpretations of a document intended to prevent them." So the Constitution was essentially re-written by interpretation, culminating in the great "Switch in Time That Saved Nine," in which centuries of precedent were reversed and the Constitution stretched and torn out of shape to accommodate the New Deal programs.

Judicial ideology is therefore critically important to modern-day liberals because an honest reading of the Constitution reveals that it is incompatible with their scheme of government. Senator Charles Schumer of New York, for example, has been quite candid in acknowledging that his opposition to President Bush's judicial nominees is based on the fact that they respect and will enforce the Constitution's limitations on the power of Congress. "Elected officials," Sen. Schumer told the press on May 9, 2002, should get the benefit of the doubt with respect to policy judgments and courts should not reach out to impose their will over that of elected legislatures.... Many of us on our side of the aisle are acutely concerned with the new limits that are now developing on our power to address the problems of those who elect us to serve—these decisions affect, in a fundamental way, our ability to address major national issues like discrimination against the disabled and the aged, protecting the environment, and combating gun violence.

This is not to say that ideology should never play a role in the confirmation process. Some ideologically-based views render it impossible for a nominee who holds them to fulfill his oath of office. Consider, for instance, Judge Harry Pregerson, who, when he was nominated to the Court of Appeals for the Ninth Circuit by President Carter, was asked whether he would follow his conscience or the law, if the two came into con-
flict. "I would follow my conscience," he replied. That statement, grounded in Pregerson's own ideology, should easily have been grounds for disqualification, yet Pregerson was not only confirmed to the bench, but roundly praised for this statement, despite the fact that it threatens to undermine the very essence of constitutionalism and the rule of law.56

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

the choice for the judge who believes the death penalty to be immoral is resignation, rather than simply ignoring duly enacted constitutional laws and sabotaging death penalty cases. He has, after all, taken an oath to apply the laws and has been given no power to supplant them with rules of his own.... This dilemma, of course, need not be confronted by a proponent of the "living Constitution," who believes that it means what it ought to mean. If the death penalty is (in his view) immoral, then it is (hey, presto!) automatically unconstitutional, and he can continue to sit while nullifying a sanction that has been imposed, with no suggestion of its unconstitutionality, since the beginning of the Republic. (You can see why the "living Constitution" has such attraction for us judges.)57

Ideology understood in this light is of course relevant in selecting a judicial nominee. Broadly understood, "ideology" would encompass a nominee's honor and character, which are necessary to fulfill the oath of office. A nominee who for ideological reasons cannot "support and defend the Constitution of the United States"—say, an agent working for the Taliban—would be unfit for office because he would lack the qualifications necessary for the position. In fact, although we tend to take the concept of an oath lightly today, James Madison wrote that under the Constitution, "the concurrence of the Senate chosen by the State Legislatures, in appointing the Judges, and the oaths and official tenures of these, with the surveillance of public Opinion, [would be] relied on as guarantying their impartiality...."59 This is very different than demanding of a nominee that he toe the line of leftist jurisprudence.

Today, senators inquire into a nominee's ideology for precisely the opposite reason: to ensure that the nominee will not abide by the Constitution—to ensure that he will stretch and bend the Constitution in the directions that the senator prefers.

On top of the danger that this presents to the fair resolution of controversies in Constitutional law, it presents a great danger to another vital principle of American government: separation of powers. In Federalist 78, Alexander Hamilton declared the judiciary the "least dangerous branch" of the new federal government. "[T]he general liberty of the people can never be endangered" by the judiciary, he wrote, "so long as the judiciary remains truly distinct from both the legislature and the Executive....[L]iberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments," and "all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation."60 The enforcement of political orthodoxy on the bench is creating precisely this dependence, strengthened even more by judicial "deference" to Congressional acts that exceed the limited scope of the federal government's Constitutional powers.

"The complete independence of the courts of justice is peculiarly essential in a limited Constitution," wrote Hamilton. The courts alone could "declare all acts contrary to the manifest tenor of the Constitution
The dangerous techniques of today’s judicial confirmation process

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

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

It is very important to note an interesting claim made by Senate Democrats in defense of their refusal to hold hearings on President Bush’s nominees. Many of them—for instance, Sen. Leahy—argue that they have actually confirmed quite a lot of judges, and that Republicans are simply lying when they complain about the slow pace of Sen. Leahy’s Judiciary Committee. But in fact, most of the judges that have been confirmed are district court judges, a very important component of the judicial system, to be sure, but not the final word on the law, the way Circuit Judges are in the vast majority of cases. Of the eleven circuit court nominees President Bush made on May 9, 2001—more than a full year ago—only four have received hearings. Two of these, Judges Barrington Parker Jr. and Roger Gregory, were confirmed almost immediately because they were Clinton nominees, whom President Bush re-nominated in a show of bipartisan-ship. The others, Judges Charles Pickering and Judge D. Brooks Smith, waited over a year for their hearings, and then were given hearings only after far-left interest groups thought they had dug up enough dirt to scuttle the nominations.

Even taking Democrats at their word that their refusal to confirm President Bush’s nominees is an exercise of legitimate Congressional power to protect us from dia-
bolical judges, one cannot justify the refusal to hold hearings. If these judges are so dangerous, Congress should hold the hearings and vote them down. But the fact is that these judges are in general unobjectionable characters and outstanding legal minds. Democrats refuse to hold hearings precisely because, if they did so, it would become clear that the Democrats have no legitimate objections to them. The delays are meant as a starvation campaign—or, worse, to bide time for liberal interest groups to discover (or invent) grounds for objecting to the nominees.

Another dangerous change that has occurred in the confirmation procedures involves the so-called “blue slip” policy—the practice whereby home state senators are essentially given a veto power of the President’s nominees to positions in that state. Although the policy has always been constitutionally suspect—the advice and consent power is given to the Senate as a body, not to individual senators—it at least had natural limits as it has been exercised historically. A senator who went to the blue slip well too often could easily find that the President simply nominated a judge from another State in the Circuit. Not so with the current, expedited blue slip policy. Now, senators essentially have a veto power over any nominee from the entire circuit in which their states are located. Not surprisingly, without the check that was built in to the original policy, the blue slip has become a much more favored tool for advancing a senator’s own views, further undermining the President’s constitutional role in appointments.

Ironically, Senatorial inaction toward judicial nominations came under increasing fire during the Clinton Administration, when Democrats complained that the Republican-controlled Senate was refusing to confirm President Clinton’s nominees. Now that the tables have turned, however, Democrats are defending their inaction not only as a political game of tournabout-is-fair-play, but as a solemn duty to defend the Constitutional structure—the same structure, of course, that they have been vigorously undermining for at least seventy years.

But inaction and the blue slip process are not the only tactics being indulged toward President Bush’s nominees. Recently, Judge D. Brooks Smith received a remarkable letter from Sen. Schumer, asking Smith to imagine it is 1965 and you are a Supreme Court justice. The Griswold opinion has not yet been written. Chief Justice Warren turns to you in conference and asks you for your opinion on whether there is a right to privacy in the Constitution and why. He further asks you to articulate how that right, if it exists, should be applied in Griswold. Please provide your answers to those inquiries.

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

Sen. Schumer’s questions quite obviously have nothing to do with preventing nepotism, or the appointment of incompetent political cronies, by the President. Nor could it. Judge Smith has served on the District Court of Pennsylvania for the Western District since 1988, when he was appointed by President Ronald Reagan. Before that, he was a state judge, and before that a district attorney for seven years. Judge Brooks is unquestionably competent, and not related to President Bush. Nor is he a political crony.

Instead, Sen. Schumer’s questions serve merely to test Judge Smith’s commitment to the standard of “evolving constitutionalism” advocated by Schumer and his colleagues. Sen. Schumer’s question is designed precisely to elicit the nominee’s political ideology in an attempt to enforce political orthodoxy on the bench. Yet Schumer is not “responsible” for the nomination in the sense that the founders envisioned. Citizens throughout most of the country who might be appalled by Sen. Schumer’s questions...
cannot vote him out of office. While President Bush, in nominating Judge Brooks, must be, in Madison's words, "considered as a national officer, acting for and equally sympathising with every part of the U. States," Sen. Schumer is only required to serve his liberal constituency in New York, comprised of groups such as the National Organization for Women, which has targeted Judge Smith's nomination, claiming that he is "unfit" to be a Circuit Judge because he did not resign fast enough from a men's hunting club, and because, in its words, he has "ultraconservative buddies." 12

Of course, Congress has the Constitutional power to create schemes for the redistribution of wealth or other interferences with individual rights—that is to say, it can propose Constitutional amendments that would authorize such action. It could propose to repeal the Constitutional protections for property rights found in the Fifth Amendment and elsewhere, by writing an amendment and submitting it to the states. But Congress knows that such an amendment would never succeed, so instead some members of Congress pursue this new method of enforcing their liberal orthodoxy from the bench.

This is essentially the difference between raw power and right. Having failed to accomplish their legal goals in the Constitutional fashion, the Senate is accomplishing them through techniques whereby judges are vetted by liberal interest groups to ensure that they will decide the "right" way on the cases that come before them. There is an interesting irony to this, however: in a sense, the Constitution already requires judges to decide the "right way"—that is, it requires judges to abide by an oath to "support and defend the Constitution." But it also requires senators to do the same thing. Some senators have abandoned that duty by supporting and defending a governmental scheme totally alien to that contemplated by the framers. Now those senators are seeking to weed out any judges who might force them to abide by that duty.

Conclusion

In June of 2001, President Clinton's White House Counsel, Lloyd Cutler, told the Senate Judiciary Committee that "it would be a tragic development if ideology became an increasingly important consideration in the future. To make ideology an issue in the confirmation process is to suggest that the legal process is and should be a political one. That is not only wrong as a matter of political science; it also serves to weaken public confidence in the courts." 73

Today the Senate is doing precisely what one delegate to the North Carolina ratification convention warned against: it is taking over the nomination power which the Constitution vested in the President alone. "[T]he President may nominate, but they have a negative upon his nomination, till he has exhausted the number of those he wishes to be appointed: He will be obliged finally to acquiesce in the appointment of those which the Senate shall nominate, or else no appointment will take place." 74 The dangers posed by such a system are as real today as they were to the founding generation. It is time to rid ourselves of all ideological litmus tests save one: "Mr. Nominee, are you prepared to honor your oath to support the Constitution as written and not as you would like it to be, if we confirm you to this important office?" 75 Any nominee who answers that question in the negative deserves to be rejected. Unfortunately, the Senate is today refusing a hearing to several nominees precisely because the current leadership knows that those nominees would honestly answer that question in the affirmative.

NOTES

4 U.S. CONST. art. II § 2 cl. 2; art. III § 1.
5 See also Weis v. United States, 510 U.S. 163, 185 n. 1 (1994) (Souter, J., concurring) ("the President was...rightly given the sole power to nominate").
6 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION 41 (1911).
7 Id.
8 Id. at 42. Mason's objections were actually more complicated. He argued that the President should not appoint judges because the judges might try impeachments of the President. This problem was later avoided by having the Senate try impeachments with the Chief Justice of the Supreme Court merely presiding. See U.S. CONST. art. I § 3 cl. 6. Gouverneur Morris, in replying to Mason, argued that impeachments should not be "tried before the Judges." FARRAND, supra note 6 at 41-42. Mason also worried that "the Seat of Govt must be in some state," and the President would form personal attachments to people in that state, which might exclude citizens of other states from the federal bench—an understandable objection from an antifederalist like Mason. This problem was at least partly obviated by placing the capital in a federal district which would not be subject to the jurisdiction of any state. See U.S. CONST. art. I § 8 cl. 17.
9 FARRAND, supra note 6 at 42.
10 Id.
11 Id. at 43.
12 Id. at 42.
13 Id. at 43.
14 The Convention voted by state. Georgia abstained from this vote, and Rhode Island never sent a delegate. Other states' delegates were sometimes absent for various reasons—for instance, although the Convention had been under way for more than a month, New Hampshire's delegates had still not arrived. In addition, this debate came during one of the lowest points of the Convention, when the differences between the delegates was at its severest. New York delegates, Robert Yates and John Lansing, had left the Convention on July 10, opposed to all its proceedings. New York's third delegate, Alexander Hamilton, had left ten days earlier. See CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA 140 (Book of the Month Club, 1966) (1966). The day Lansing and Yates left the Convention, Washington wrote to Hamilton that he "almost despaired" of the Convention's success. id. at 185-186. (Hamilton returned to the Convention in September and was New York's only signer). Thus the vote on July 18 was Massachusetts, Pennsylvania, Maryland and Virginia in favor of Gchorum's motion, and Connecticut, Delaware, North Carolina and South Carolina against.
16 FARRAND, supra note 6 at 81.
17 Id.
18 Id. at 539.
20 FARRAND, supra note 6 at 81.
21 The Federalist No. 76 at 455 (C. Rossiter, ed. 1961).
22 Id. at 456 (emphasis in original).
23 Id. at 456-457.
24 Id. at 456.
26 Id. §1529 at 353.
28 Letter to Roger Sherman (July 20, 1789) in id. at 106-107. John Adams was a lifelong champion of judicial independence. See John Adams, The Independence of The Judiciary: A Controversy between William Brattle And John Adams (1773) reprinted in 2 THE WORKS OF JOHN ADAMS 511 (Easton Press, 1992). He was the author of the Massachusetts state constitution, which Gchorum cited as his precedent for giving the President the power to appoint, and the Senate to advise and consent on, judicial nominees. See 1 PAGE SMITH, JOHN ADAMS 440 (1962) ("even with minor changes and deletions and one major change in the article dealing with religious freedom, the constitution [of Massachusetts] was Adams' handiwork"); DAVID McCOLLOUGH, JOHN ADAMS 220-222 ("it was the establishment of an independent judiciary, with judges of the Supreme Court appointed, not elected...that Adams made one of his greatest contributions not only to Massachusetts, but to the country, as time would tell." Id. at 222).
29 Letter to Roger Sherman, supra note 28 at 107. See also James Madison, Speech in Congress on the Removal Power, June 16, 1789, reprinted in RAKOVE, supra note 3 at 453, 456 ("if any power whatsoever is in its nature executive it is the power of appointing, overseeing, and controlling those who execute the laws.")
30 James Wilson, Lectures on Law (1791), 4 KURLAND & LERNER, supra note 27 at 110. See also Americanus (John Stevens Jr.), No. VII (Jan. 21, 1788) reprinted in 2 DEBATE ON THE CONSTITUTION 58, 59 (B. Bailyn ed. 1993) ("Instead of controlling the President still farther with regard to appointments, I am for leaving the appointment of all the principal officers under the Federal Government solely to the President....").
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32 STORY, supra note 25 §1531 at 354.
33 It might seem ironic, then, that President Washington nominated his nephew, Bushrod Washington, to the Supreme Court in 1798. But Justice Washington was easily confirmed and served a long and successful term on the Supreme Court. His most famous opinion, Coral v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823), was an important early case interpreting the Privileges and Immunities Clause in Article V.
35 This is not to say that the founding generation did not use the confirmation power as a political tool. It and subsequent generations have done so very frequently. See Jeffrey K. Tulis, The Appointment Power: Constitutional Abdication: The Senate, The President, and Appointments to the Supreme Court, 47 CASE W. RES. 1331 (Summer 1997). But in those confirmation battles, the Senate more often used its power to block nominees in opposition to the President’s policies, not in order to enforce a particular vision of the Constitution. In the original understanding, judicial philosophy was a matter for the President’s consideration. In those unusual cases in which the Senate did attempt to enforce an orthodoxy on the Court, the Senate was subjected to severe criticism.
37 Washington’s nomination was made December 10, 1795. See SENATE EXECUTIVE J. at 194 (Dec. 10, 1795). The nomination was delayed and finally rejected on December 15. See id. at 195-196. No official record exists of floor debates on the nomination.
38 See David J. Garrow, Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment, 67 U. CHI. L. REV. 995, 998 (Fall, 2000) (noting that some contemporary observers claimed that “after the death of his Wife, his mind was frequently so much deranged, as to be in a great measure deprived of his senses”). As Garrow notes, “Professor Haw concludes that the nomination ‘was defeated primarily for political reasons,’ but even in the weeks immediately preceding the Senate’s vote, Chief Justice Rutledge’s mental health appears to have taken a very decided turn for the worse. In November, while riding circuit in North Carolina, Rutledge became seriously ill, and his illness exacerbated his depression to such an extent that on his way home to Charleston Rutledge apparently tried ‘to drown himself at Camden’ but without success” Id. at 1000. See also Letter of James Madison to Thomas Jefferson, (Feb. 7, 1796) in 2 THE REPUBLIC OF LETTERS 917, 919 (J. Smith ed. 1995) (“There is some reason to think that Jno. Rutledge is not in his mind”). But see Matthew D. Marcom, NOTE: Advice and Consent: A Historical Argument for Substantive Senatorial Involvement in Judicial Nominations, 5 N.Y.U. J. LEGIS. & PUB. POL’Y 519, 538-539 (2001/2002) (arguing that allegations of Rutledge’s insanity were a tool in the partisan campaign against Rutledge).
41 President Jefferson referred the question of Judge Pickering’s impeachment to the Congress on February 4, 1803. See 13 ANNALS OF CONG. 460 (1803). The House reported articles of impeachment to the Senate on March 2. Id. at 642. The Senate took up the impeachment proceedings on October 26. 13 ANNALS OF CONG. 315. The actual trial began January 4, 1804. Id. at 317.
42 Act of July 14, 1798, 1 Stat. 596 (1798).
43 Randolph was a cousin of Jefferson’s, but while he started out as a leading member of Jefferson’s party, he ended up being Jefferson’s chief antagonist in the House. See ALF MAPP, THOMAS JEFFERSON: PASSIONATE PILGRIM 41-42 (1991).
44 13 ANNALS OF CONGRESS 807 (1804) (statement of Mr. Elliott).
45 MALONE, supra note 40 at 469 (quoting New York Evening Post, Jan. 20, 1804).
46 13 ANNALS OF CONGRESS 808-809 (1804).
47 MAYER, supra note 40 at 268-276, discusses Jefferson’s view of the proper role of ideology in the judiciary—a view too complex to address fully here. In brief, “Jefferson’s constitutional theory…relied upon the independence of the judiciary as a guardian of individual rights against executive and legislative tyranny; [so] his quarrel with the judiciary was that under the control of the Federalists, it failed to fulfill this vital function and had become the destroyer rather than the protector of the Constitution and citizens’ liberties.” Id. at 268. As I argue infra, section II, today’s attempt by Senate liberals to delve into the ideology of judicial nominees gets
this Constitutional theory backwards: their quarrel with the judiciary is precisely that it threatens to place roadblocks in the way of the left’s attempt to increase government control over citizens’ lives. Where Jefferson believed the judiciary should not be independent “of the will of the people,” modern liberals want the judiciary dependent on the will of political interest groups. Witness the liberal reaction to the recall of California Chief Justice Rose Bird—an expression of “the will of the people” which the left denounced as a corruption of the rule of law by thoughtless mob rule. See Erwin Chemerinsky, Evaluating Judicial Candidates, 61 S. Cal. L. Rev. 1985 (Sept. 1988). Witness also the notion of a “living Constitution,” by which unelected judges exercise the power to nullify duly enacted laws based on their own unaccountable consciences.

48 The Diary of John Quincy Adams 1794-1845 at 35 (Allan Nevis ed., 1928). Adams, of course, would become much more familiar with such “parody prosecutions” late in his career, when the House of Representatives attempted to expel him for his outspoken opposition to slavery. See William Lee Miller, Arguing About Slavery (1996).

49 Mapp, supra note 43 at 89.


51 See Charles A. Beard, An Economic Interpretation of the Constitution of the United States 324 (1913) (“The Constitution was essentially an economic document based upon the concept that the fundamental private rights of property are anterior to government and morally beyond the reach of popular majorities”).

52 Quoted in Roger Pilon, The Purpose And Limits of Government 31 (Cato Institute 1999).


56 In 1992, Judge Pregerson ordered a stay to the execution of the serial killer Robert Alton Harris, the fourth such stay that was issued on the night of Harris’ scheduled execution. The result was an unprecedented decision from the Supreme Court of the United States, ordering that “no further stays of Robert Alton Harris’ execution shall be entered by the federal courts except upon order of this Court.” Vasquez v. Harris, 503 U.S. 1000 (1992). See further Charles Fried, Impudence, 1992 Sup. Ct. Rev. 155, 188-92.

57 Antonin Scalia, God’s Justice And Ours, First Things, May 1, 2002 at 17.

58 The oath of office is prescribed in U.S. CONST. art. VI § 3.

59 Letter to Thomas Jefferson (June 27, 1798), in Rakove, supra note 3 at 801 (emphasis added).

60 The Federalist No.78 at 466 (C. Rossiter ed. 1961).

61 Id.

62 Letter from James Madison to Thomas Jefferson (Oct. 17, 1798) in Rakove, supra note 3 at 418, 421.


67 According to its defenders, the blue slip procedure enforces the Constitutional scheme of advice and consent by serving as a “formal sanction for violation of the Senate norm of the courtesy from presidents, who are expected to seek advice from Senators prior to making judicial appointments.” Id. at 97. But the President is not expected to seek advice from individual Senators, or at least not from the two Senators from a nominee’s home state, whose views will be based primarily on the nominee’s party loyalty and the Senator’s political ambitions. The Constitution expects the President to seek advice from the Senate. In fact, as the history of the Advice and Consent Clause shows, the founders would have preferred a system which required the President to seek the advice from Senators of states other than the nominee’s home state, because they would be less likely to be influenced by that nominee’s home-grown political connections. In any case, the Constitution does not confer the confirmation power on
the home-state Senators; it vests it in the Senate, and only to prevent unqualified or politically driven nominations.

68 See, e.g., Catherine Fisk & Erwin Chemerinsky, The Filibuster, 49 Stan. L. Rev. 181, 233 (Jan. 1997) (proposing a lawsuit to force the Senate to hold hearings on nominees); Renzin, supra note 63 (arguing that blue slip procedure and Senatorial inaction are unconstitutional). Of course, in reality, the Congress did not refuse to confirm President Clinton’s judicial nominees—it confirmed 377, almost as many as were confirmed during the Reagan Administration (382).


73 Statement to Administrative Oversight And The Courts Subcommittee (June 26, 2001) 2001 WL 21756493.

74 Samuel Spencer, Speech at the North Carolina Ratification Convention, July 28, 1788, reprinted in 2 BAILYN, supra note 30 at 879.

75 In this view, the qualifications of judges are similar to the qualifications of jurors as explained in Wainwright v. Witt, 469 U.S. 412 (1985). There the Court held that “the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment. That standard is whether the juror’s views would ‘prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.’” Id. at 424 (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)).