

Summer 2006

Choosing a Chief Justice: Presidential Prerogative or a Job for the Court?

Todd E. Pettys

Choosing a Chief Justice: Presidential Prerogative or a Job for the Court?

Todd E. Pettys*

I. INTRODUCTION

On July 19, 2005, President George W. Bush nominated Judge John Roberts, Jr., of the United States Court of Appeals for the District of Columbia Circuit, to succeed Justice Sandra Day O'Connor on the United States Supreme Court.¹ Following the death of Chief Justice William Rehnquist several weeks later,² the President announced that he had decided to nominate Roberts for the Court's top post instead.³ On September 29, 2005, after the United States Senate voted to confirm the President's choice, Roberts was sworn in as the nation's seventeenth Chief Justice.⁴ From the time the President identified Roberts as his pick for Chief Justice to the time the Senate granted its approval, citizens and scholars debated the merits of Roberts's nomination, but there was one fundamental question they never asked: Why shouldn't the Court's duly appointed nine members be permitted to decide for themselves who among them will serve as Chief Justice?

* Professor of Law and Lauridsen Family Fellow, University of Iowa College of Law.

¹ See Todd S. Purdum, *Bush Picks Nominee for Court; Cites His "Fairness and Civility,"* N.Y. TIMES, July 20, 2005, at A1.

² See Linda Greenhouse, *William H. Rehnquist, Architect of Conservative Court, Dies at 80,* N.Y. TIMES, Sept. 5, 2005, at A16.

³ See Richard W. Stevenson, *President Names Roberts as Choice for Chief Justice,* N.Y. TIMES, Sept. 6, 2005, at A1. President Bush then nominated White House counsel Harriet Miers, the President's former personal attorney, to fill Justice O'Connor's seat. See Nina J. Easton, *Bush Taps Counsel for High Court,* BOSTON GLOBE, Oct. 4, 2005, at A1. Amidst significant criticism, Miers withdrew her name three weeks later. See Michael A. Fletcher & Charles Babington, *Miers, Under Fire from Right, Withdraws as Court Nominee,* WASH. POST, Oct. 28, 2005, at A1 ("The Bush administration withdrew the Supreme Court nomination of White House Counsel Harriet Miers yesterday, bowing to intensifying attacks from right-leaning activists challenging the depth of her conservative credentials and the strength of her judicial qualifications."). President Bush then nominated Judge Samuel Alito, Jr., of the United States Court of Appeals for the Third Circuit, to replace Justice O'Connor. See Warren Vieth, *Conservatives Cheer Court Nominee,* L.A. TIMES, Nov. 1, 2005, at A1. Following a 58-42 confirmation vote in the Senate, Justice Alito was sworn in by Chief Justice Roberts. See Rick Klein, *Alito Becomes Nation's 110th Justice; Mostly Partisan Vote Sends Him to Supreme Court,* BOSTON GLOBE, Feb. 1, 2006, at A2.

⁴ See Sheryl Gay Stolberg & Elisabeth Bumiller, *Senate Confirms Roberts as 17th Chief Justice,* N.Y. TIMES, Sept. 30, 2005, at A1 ("Judge John G. Roberts Jr. became the 17th chief justice of the United States on Thursday, taking the oath of office during a brief but emotional White House ceremony just hours after the Senate . . . voted overwhelmingly to confirm him.").

Viewed solely from the perspective of tradition, the absence of debate about the selection process was hardly surprising. From the earliest days of its history, the nation has always proceeded as if it were unambiguously the duty and privilege of the President—acting with the advice and consent of the Senate—to tell the Court who will be its leader. In 1789, when the country faced the task of staffing the Supreme Court for the first time, individuals lobbying for the position of Chief Justice focused their energies squarely on President George Washington and the Senate. James Wilson sent the President a letter on April 21, 1789, for example, making his desires clear: “I commit myself to your Excellency without Reserve and inform you that my Aim rises to the important Office of Chief Justice of the United States.”⁵ Wilson’s friend, Benjamin Rush, sent a letter to John Adams the following day, urging Adams to exert his influence in the Senate on Wilson’s behalf.⁶ John Rutledge made it equally apparent to the President that he, too, coveted the job of Chief Justice.⁷ On September 24, 1789—the same day he signed the Judiciary Act of 1789 into law⁸—Washington sent the Senate his nominations, tapping John Jay for the

⁵ Letter from James Wilson to George Washington (Apr. 21, 1789), in 1 *THE DOCUMENTARY HISTORY OF THE UNITED STATES SUPREME COURT, 1789-1800*, at 612, 613 (Maeva Marcus & James R. Perry eds., 1985) [hereinafter *DOCUMENTARY HISTORY*].

⁶ See Letter from Benjamin Rush to John Adams (Apr. 22, 1789), in *DOCUMENTARY HISTORY*, *supra* note 5, at 613. Adams responded by saying that he supported John Jay for the position of Chief Justice and Wilson for the position of Associate Justice, and that “the difference is not great between the first and the other Judges.” Letter from John Adams to Benjamin Rush (May 17, 1789), in *DOCUMENTARY HISTORY*, *supra* note 5, at 619. In response, Rush reminded Adams that Wilson had been among Adams’s strongest supporters in the recent election. See Letter from Benjamin Rush to John Adams (June 4, 1789), in *DOCUMENTARY HISTORY*, *supra* note 5, at 622.

⁷ See HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS* 54 (rev. ed. 1999) (stating that the job of Chief Justice was “what Rutledge and his supporters had really craved”); ERNEST S. BATES, *THE STORY OF THE SUPREME COURT* 43 (1936) (describing Rutledge’s desire for the post). When Jay later resigned from the Court in the summer of 1795 to become New York’s governor, Rutledge unabashedly told the President, “I have no Objection to take the place which [Jay] holds” and “the Duty which I owe to my Children should impel me to accept it, if offer[e]d.” Letter from John Rutledge to George Washington (June 12, 1795), in *DOCUMENTARY HISTORY*, *supra* note 5, at 94; see also BATES, *supra*, at 63-64 (discussing Rutledge’s desire to win the President’s approval). President Washington chose Rutledge to fill the Chief Justice’s seat on a recess appointment. See ABRAHAM, *supra*, at 54 (noting the appointment); see also U.S. CONST. art. II, § 2 (granting the President the power to make recess appointments). When the Senate returned in the fall, however, it rejected the President’s selection by a vote of ten to fourteen, due to rumors about Rutledge’s mental health and Rutledge’s vociferous criticism of the treaty that John Jay had negotiated with Great Britain. See ABRAHAM, *supra*, at 54-55 (discussing the controversy surrounding Rutledge’s nomination); BATES, *supra*, at 64 (discussing Rutledge’s criticism of the treaty).

⁸ See Act of Sept. 24, 1789, 1 Stat. 73, 73 (providing, inter alia, that “the Supreme Court of the United States shall consist of a chief justice and five associate justices”) (codified as amended at 28 U.S.C. § 1 (2005)).

position of Chief Justice and five others for the remaining seats.⁹ Two days later, the Senate confirmed all of the President's selections and Jay assumed responsibility for leading the fledgling Court.¹⁰ For more than two centuries, the country has employed the same selection methodology each time the position of Chief Justice has become vacant. Sometimes the President has elected to elevate an Associate Justice (thus sending the nominee to the Senate for a second round of confirmation hearings)¹¹ and sometimes he has nominated an individual with no prior service on the Court.¹² No one has ever doubted, however, that the leader of the federal judiciary will be chosen by the President, subject to Senate approval.

The lack of controversy about the appropriate method of choosing a Chief Justice might lead one to believe that the selection process is plainly prescribed by the text of the Constitution. Yet the Constitution says nothing about how the Chief Justice is to be chosen. Indeed, as one commentator has observed, "[t]he American Constitution envelops the office of Chief Justice with silence."¹³ Article III states that "[t]he judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and

⁹ See Nomination by George Washington (Sept. 24, 1789), in DOCUMENTARY HISTORY, *supra* note 5, at 9 (nominating John Blair, William Cushing, Robert Harrison, John Rutledge, and James Wilson as Associate Justices).

¹⁰ See Notification to President of Senate Confirmation (Sept. 26, 1789), in DOCUMENTARY HISTORY, *supra* note 5, at 10.

¹¹ Three individuals have been promoted from the rank of Associate Justice to the job of Chief Justice. They are (with parenthetical references to the dates of their appointments) Edward White (1910), *see* ABRAHAM, *supra* note 7, at 128; Harlan Fiske Stone (1941), *see id.* at 176; and William H. Rehnquist (1986), *see id.* at 291-93. Although each of those individuals had been confirmed by the Senate at the time of their appointment to the position of Associate Justice, they again faced Senate confirmation at the time of their appointment to the position of Chief Justice. *See id.* at 176 (discussing the Senate's unanimous endorsement of Stone); *id.* at 292 (discussing the Senate's endorsement of Rehnquist by a vote of 65 to 33); MARIE C. KLINKHAMER, EDWARD DOUGLAS WHITE, CHIEF JUSTICE OF THE UNITED STATES 53-54 & n.194 (1943) (discussing the Senate's nearly unanimous endorsement of White).

¹² Besides John Jay, thirteen individuals from outside the Court have been appointed to the position of Chief Justice. They are (with parenthetical references to the dates of their appointments) John Rutledge (1795), *see* ABRAHAM, *supra* note 7, at 54-55 (explaining that, although Rutledge was appointed to the position of Associate Justice in 1789, he resigned that post in 1791 to become Chief Justice of the South Carolina Supreme Court); Oliver Ellsworth (1796), *see id.* at 58; John Marshall (1801), *see id.* at 61-62; Roger B. Taney (1836), *see id.* at 75-76; Salmon P. Chase (1864), *see id.* at 91-92; Morrison R. Waite (1874), *see id.* at 98-99; Melville Fuller (1888), *see id.* at 107; William Howard Taft (1921), *see id.* at 140; Charles Evans Hughes (1930), *see id.* at 150-51; Fred Moore Vinson (1946), *see id.* at 183-84; Earl Warren (1953), *see id.* at 191-94; Warren Burger (1969), *see id.* at 254-55; and John G. Roberts, Jr. (2005), *see* Purdham, *supra* note 1, at A1.

¹³ PETER G. FISH, THE OFFICE OF CHIEF JUSTICE OF THE UNITED STATES 9 (1984); *cf.* THE FEDERALIST NO. 81, at 480 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (saying nothing about the Chief Justice in the primary *Federalist Paper* on the judiciary).

establish,”¹⁴ while Article II gives the President the power to “nominate . . . Judges of the supreme Court,” subject to “the Advice and Consent of the Senate.”¹⁵ The Constitution’s lone reference to the Chief Justice appears in Article I, which states that the Senate has “the sole Power to try all Impeachments” and that “the Chief Justice shall preside” when the President is on trial.¹⁶

References to the Chief Justice’s selection are just as absent in the records of the 1787 Convention as they are in the Constitution that the delegates produced.¹⁷ Of course, the delegates did spend a substantial amount of time debating the way in which *all* federal judges would be chosen.¹⁸ Gunning Bedford, James Madison, Edmund Randolph, and Roger Sherman, for example, initially favored vesting the appointment power in the Senate;¹⁹ James Wilson argued in favor of granting the appointment power to the President, believing that a lone, politically accountable individual would make better choices;²⁰ and Madison, Nathaniel Gorham, and Gouverneur Morris eventually devised the compromise embodied in the Constitution today, under which the President appoints federal judges subject to Senate confirmation.²¹ But the historical record suggests the delegates never focused specifically on how the nation would determine which of the Supreme Court’s members would serve as the Court’s leader.

Apparently satisfied with the tradition that has emerged in the absence of an express constitutional directive, Congress has remained silent about the matter. Federal legislation does speak to other aspects of the judiciary’s leadership. Congress has declared, for example, that when the Chief Justice dies, resigns, or is otherwise unable to perform his or her

¹⁴ U.S. CONST. art. III, § 1, cl. 1.

¹⁵ *Id.* art. II, § 2, cl. 2.

¹⁶ *Id.* art. I, § 3, cl. 6.

¹⁷ The delegates did not ignore the Chief Justice entirely. *See infra* notes 66-86 and accompanying text (discussing the extrajudicial functions that some of the Framers believed the Chief Justice could usefully perform).

¹⁸ *See* Ruth Bader Ginsburg, *Confirming Supreme Court Justices: Thoughts on the Second Opinion Rendered by the Senate*, 1988 U. ILL. L. REV. 101, 103-04 (providing a concise summary of the debates).

¹⁹ *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 120, 126 (Max Farrand ed., rev. ed. 1966) (recounting the delegates’ arguments); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra*, at 43.

²⁰ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 19, at 119 (recounting Wilson’s argument).

²¹ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 19, at 41, 80-82 (recounting the delegates’ efforts to achieve a compromise).

duties, the Chief Justice's responsibilities will temporarily fall to the Associate Justice with the longest record of service on the Court.²² Using seniority and age as the primary criteria, Congress has also prescribed the manner in which the chief judge of each appellate circuit and of each federal district must be determined.²³ But Congress has said nothing about how the Chief Justice of the United States is to be chosen.

The federal government's longstanding tradition of permitting the President to pick the Chief Justice can hardly be explained by the notion that it is the only sensible way in which to proceed. Indeed, the federal practice stands in stark contrast to the array of methods that the states employ when selecting their own chief justices. Only five states grant their executive the power to appoint a chief justice subject to the approval of a legislative body.²⁴ In a strong plurality of twenty-one states, supreme courts' members decide amongst themselves which of them will serve as chief justice.²⁵ In seven states, the chief justice is elected by the citizenry.²⁶ In six states, the justice with the longest record of service is automatically deemed the chief justice.²⁷ In five states, the governor chooses the chief justice from a list of candidates provided by a judicial nominating commission,²⁸ while in one state a judicial nominating commission itself selects the chief justice.²⁹ In two states, the chief's job automatically devolves upon the justice with the shortest remaining term on the court.³⁰ In two other states, the governor appoints the chief justice

²² See 28 U.S.C. §§ 3-4 (2005).

²³ See *id.* § 45 (stating how each circuit's chief judge must be identified); *id.* § 136 (stating how the chief judge must be identified in each district that has more than one district judge).

²⁴ See CONN. GEN. STAT. § 2-40 (2000); DEL. CONST. art. IV, §§ 2-3; ME. CONST. art. V, pt. I, § 8; MASS. CONST. pt. II, ch. 2, § 1, art. IX; N.J. CONST. art. VI, § 6, ¶ 1.

²⁵ See ALASKA CONST. art. IV, § 2; ARIZ. CONST. art. VI, § 3; COLO. CONST. art. VI, § 5; FLA. CONST. art. V, § 2; GA. CONST. art. VI, § 6, ¶ 1; IDAHO CONST. art. V, § 6; ILL. CONST. art. VI, § 3; IOWA CODE § 602.4103 (1996); KY. CONST. § 110(5)(a); MICH. CONST. art. VI, § 3; MO. CONST. art. V, § 8; N.M. STAT. § 34-2-1 (1978); N.D. CENT. CODE § 27-02-01 (1991); OKLA. CONST. art. VII, § 2; S.D. CODIFIED LAWS § 16-1-2.1 (2004); TENN. CONST. art. VI, § 2; UTAH CODE ANN. § 78-2-1 (1953); VA. CODE ANN. § 17.1-300 (2006); WASH. CONST. art. IV, § 3; W. VA. CONST. art. VIII, § 2; WYO. CONST. art. V, § 4.

²⁶ See ALA. CODE § 12-2-1 (1995); ARK. CONST. amend. IX, § 1; CAL. ELEC. CODE § 13109 (West 2003); MONT. CONST. art. VII, § 8; N.C. CONST. art. IV, § 16; OHIO CONST. art. IV, § 6; TEX. CONST. art. V, § 2.

²⁷ See KAN. CONST. art. III, § 2; LA. CONST. art. V, § 6; MISS. CODE ANN. § 9-3-11 (1999); N.H. REV. STAT. ANN. § 490:1 (2005); 42 PA. CONS. STAT. ANN. § 325 (West 1998); WIS. CONST. art. VII, § 4.

²⁸ See HAW. CONST. art. VI, § 3; NEB. CONST. art. V, § 21; N.Y. CONST. art. VI, § 2; R.I. CONST. art. X, § 4; VT. CONST. ch. II, § 32.

²⁹ See IND. CONST. art. VII, § 3.

³⁰ See NEV. CONST. art. VI, § 3; OR. CONST. art. VII, § 5 (original).

without any formal participation by the legislature.³¹ In one state, the chief justice is chosen by the general assembly.³²

In this Article, I argue that the United States Supreme Court's nine members should be permitted to decide for themselves who among them will serve as Chief Justice. I do not challenge the Constitution's procedure for filling vacancies on the Court; when a sitting Justice dies or retires, the President should appoint an individual to fill the empty seat, subject to Senate confirmation. But once the President and the Senate have staffed the Court with a full complement of Justices, I contend that those Justices should be allowed to choose their own leader.

In Part II, I attempt to discern the original rationale for the country's longstanding tradition of permitting the President to specify which of the Court's members will serve as Chief Justice. I argue that the early Americans were likely heavily influenced by the practice prevailing in Great Britain throughout the eighteenth century, under which the Crown selected the individuals who would fill the kingdom's top judicial posts and then regularly relied upon those individuals for advice and other assistance. At the 1787 Convention in Philadelphia, the delegates discussed a range of ways in which the Chief Justice might serve the President in extrajudicial capacities. Although the Framers ultimately decided not to formally assign such duties to the Chief Justice, many assumed the Chief Justice would hold a place within the President's circle of close aids and advisers. Indeed, President George Washington consulted Chief Justice John Jay on numerous occasions during the early years of his administration and assigned the Chief Justice a variety of administrative and diplomatic tasks in service to the Executive Branch. With such arrangements in mind, the nation's first generation of leaders simply assumed, without debate, that the President would choose the individual who not only would serve as the leader of the federal judiciary, but also would serve the President in important ways. I contend that when the practice of employing the Chief Justice as an aid and adviser to the

³¹ See MD. CONST. art. IV, § 14; MINN. CONST. art. VI, §§ 7-8. In Minnesota, supreme court justices are elected by the citizenry, but the governor possesses the sole appointment power when a vacancy occurs on the court. After an appointed justice has served on the court for at least one year, he or she must stand for a general election. For more than a century, no sitting supreme court justice has ever been defeated in an election. By tradition, justices retire before their elected term expires, thereby giving the governor the opportunity to fill the created vacancy and confer the benefits of incumbency upon the person of his or her choice. See American Judicature Society, *Judicial Selection in the States*, <http://www.ajs.org/js/MN.htm> (last visited October 1, 2006).

³² See S.C. CODE ANN. § 14-3-10 (1976).

Executive Branch quickly faded away, the tacit rationale for permitting the President to choose the Chief Justice disappeared as well.

In Part III, I argue that, when coupled with the Constitution's rules regarding impeachments, presidential selection of the Chief Justice creates unnecessary conflicts of interest. The Constitution states that, when the President has been impeached by the House of Representatives and is on trial in the Senate, "the Chief Justice shall preside."³³ The Framers assigned the Chief Justice that task because they wanted to avoid the conflicts of interest that would arise if the Senate's usual presiding officer—the Vice President—were allowed to preside over a trial that, depending on the verdict, could confer upon him or her the powers and privileges of the presidency. Conflicts of interest also arise, however, when the President is permitted to select the individual who will serve as Chief Justice. If President Richard Nixon had not resigned, for example, the presiding officer at his impeachment trial would have been Chief Justice Warren Burger—a man whom President Nixon himself had chosen to be the Chief Justice and who worked very hard, both before and after his appointment, to earn and retain the White House's approval. If President George W. Bush were impeached, the presiding officer at the President's trial would be Chief Justice John Roberts, whom President Bush himself appointed to the Court's center chair. Just as Anglo-American law has long recognized that no one should be permitted to be a judge in his or her own case, neither should the President be allowed to hand-pick the individual charged with presiding over his or her impeachment trial. The conflicts of interest posed by the present allocation of responsibilities would be significantly reduced if the Court were permitted to decide for itself which of its members will serve as the Court's leader.

In Part IV, I argue that, although the existing method of choosing a Chief Justice does not violate the constitutional doctrine of separation of powers, there are at least three ways in which that methodology represents an undesirable configuration of the Judicial Branch's relationship with its two counterparts. First, once it has determined that a Chief Justice nominee is intellectually and morally worthy of a seat on the nation's highest court, the Senate has historically contributed very little to the effort to determine whether the nominee also possesses the administrative skills and political savvy necessary to excel in the position of Chief Justice.

³³ U.S. CONST. art. I, § 3, cl. 6; *see also id.* § 2, cl. 5 (granting the House of Representatives the "sole Power of Impeachment").

Second, when asked to determine whether an Associate Justice should be elevated to the position of Chief Justice, the Senate finds it all too tempting to use the occasion as an opportunity to reward or punish the Justice for his or her prior actions as a member of the Court. I argue that this kind of mid-career assessment of an Associate Justice's performance is in tension with the objectives underlying federal judges' constitutional guarantees of life tenure and undiminished salaries. Third, the Court's members are in a better position than the President and the Senate to identify an individual who has the skills, personality traits, and intra-Court relationships necessary to serve effectively as the Justices' leader.

II. THE ANACHRONISTIC RATIONALE FOR PRESIDENTIAL SELECTION OF THE CHIEF JUSTICE

Consider the following scenario: The Chief Justice has died, the nation has turned—as it always has turned—to the President to nominate a successor, and the President has decided that he wishes to elevate Associate Justice Smith to the Court's top post. What is the rationale for relying so heavily upon the President's wishes? In her time on the Court, Justice Smith might or might not have earned the confidence and respect of her fellow Justices. Why shouldn't their assessment be dispositive? Similarly, if Justice Smith is to become Chief Justice, what is the rationale for requiring her to go before the Senate for a new round of confirmation hearings? She has already been nominated for Court membership once before, she has already testified before the Senate Judiciary Committee, and the Senate has already voted to grant her a seat on the Court. Since her vote as Chief Justice will have no more weight than her vote as an Associate Justice,³⁴ why is an added measure of political scrutiny warranted? If she becomes the Court's leader, Justice Smith will preside over the Justices' conferences and will assign the Court's opinion-writing

³⁴ See JOHN P. FRANK, MARBLE PALACE: THE SUPREME COURT IN AMERICAN LIFE 70 (2d prtg. 1972) ("The Chief Justice of the United States is not the number-one man among a group of subordinates. . . . He casts only one vote, and that vote carries no more authority, no more weight, than that of the most junior Justice . . ."); *id.* at 71 ("The great and yet intangible difference between the Chief and his Associates is the prestige that, rightly or wrongly, tradition attaches to the Chief Justiceship."); Theodore W. Ruger, *The Judicial Appointment Power of the Chief Justice*, 7 U. PA. J. CONST. L. 341, 349 (2004) (stating that the Chief Justice does not have an added measure of influence in determining how cases are decided).

responsibilities in each case in which she finds herself in the majority,³⁵ yet those hardly seem like duties necessitating presidential selection and a second round of confirmation proceedings.³⁶ Of course, as Chief Justice she also will be statutorily assigned a variety of administrative responsibilities.³⁷ But if her confirmation hearings even remotely resemble those held for Chief Justice John Roberts and his predecessors, the Senators will pay very little attention to Justice Smith's administrative skills and vision, and will focus instead on her views about the law—matters about which she was thoroughly questioned prior to first taking her seat on the Court.

In 1789, President Washington nominated John Jay to serve as the Supreme Court's first Chief Justice and the Senate rapidly granted its approval.³⁸ At that time, such a selection process arguably made good sense. Following the British model, with which they were so familiar, many early Americans—including President Washington—believed that one of the Chief Justice's important functions would be to provide advice and other services to the Executive Branch. Just as the President was to nominate those senior executive officials whose assistance would be vital to the success of the President's administration,³⁹ it seemed appropriate to

³⁵ See FRANK, *supra* note 34, at 76 ("The most important duty of the Chief Justice in relation to his Associates is his assignment of the writing of opinions."); *id.* at 77 ("[T]he Chief, if he is on the majority side in a given case, designates or assigns the Justice who is to write the opinion . . .").

³⁶ See *infra* notes 212-13 and accompanying text (noting Chief Justice Rehnquist's views regarding the limited importance of those powers). But cf. Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 291-92 (2005) ("Empirical work suggests that the initial opinion assignee often ends up writing the opinion for the Court and that most members of the majority coalition join without requesting any changes, making the initial assignment incredibly important as to the direction the law will take."). Professor Friedman apparently assumes that, although a Justice might choose to join an opinion written by a colleague without requesting any changes, he or she would characterize the law differently (or send the law in a different "direction") if he or she had been assigned responsibility for writing the opinion.

³⁷ See *infra* notes 116-29 and accompanying text (discussing the Chief Justice's administrative duties).

³⁸ See *supra* notes 9-10 and accompanying text (discussing Washington's nomination of Jay).

³⁹ See U.S. CONST. art. II, § 2, cl. 2 (stating that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, . . . and all other Officers of the United States, whose Appointments are not herein otherwise provided for," but permitting Congress to vest the appointment of "inferior" officers "in the President alone, in the Courts of Law, or in the Heads of Departments"). Although they did not extensively debate the matter, the Framers provided two reasons for requiring Senate confirmation of non-inferior executive officers. First, the Framers believed the Senate would often have better knowledge of a nominee's character. See, e.g., Statement of James Madison in House of Representatives (May 19, 1789), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 19, at 356, 357. Second, many feared the President would see himself as a monarch, fill the federal government with appointees who were loyal to him, and then refuse to surrender his post once his term expired. The Framers believed Senate confirmation

allow the President to nominate the individual who would serve the Executive Branch in important ways as Chief Justice. Although Chief Justice Jay did frequently assist President Washington at the outset, that arrangement lasted only a few years. Today, although the Chief Justice carries a number of extrajudicial responsibilities, those responsibilities are not of the sort that warrants presidential nomination and Senate confirmation. In short, the existing method of choosing a Chief Justice is a relic of a political arrangement that became outmoded many generations ago.

A. *Extrajudicial Activity in Eighteenth-Century Great Britain*

Throughout the eighteenth century, the British Crown frequently consulted with its judges regarding political and legal issues confronting the kingdom.⁴⁰ Because all judges ultimately traced their authority to the Crown,⁴¹ the King found it only natural to turn to the judiciary for assistance whenever he thought it useful. To be sure, there were times when the King's use of his judges was controversial. As Stewart Jay has explained, the King on many occasions "employed the law as an instrument for accomplishing royal goals by restraining the people, rather than accept law as a limit on governance," and so "[a]sking for advice from judges often appeared to be a thinly disguised means of legitimizing the King's plans."⁴² After several judges expressed their growing discomfort with the practice, the King stopped asking the courts for written advisory opinions in the mid 1700s.⁴³ But the King (as well as the government's other top leaders) continued to consult informally with the highest-ranking

would make such an event less likely. See Luther Martin, *Genuine Information* (Nov. 29, 1787), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 19, at 172, 218 (presenting this argument to the Maryland legislature); Letter from Pierce Butler to Weedon Butler (May 5, 1788), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 19, at 301, 302 (stating that requiring Senate confirmation of the President's top appointees is one feature that distinguishes the President from the British Crown).

⁴⁰ See STEWART JAY, *MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES* 12-19 (1997) (describing the extrajudicial activity prevailing in Great Britain throughout the eighteenth century).

⁴¹ See 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 257, 260 (Univ. of Chicago Press 1979) (1765) (stating that "all jurisdictions of courts are either mediately or immediately derived from the crown" and that "judges are the mirror by which the king's image is reflected").

⁴² JAY, *supra* note 40, at 14. By granting many British judges life tenure, however, the Settlement Act of 1701 provided the judiciary with a measure of insulation from the charge that they were merely the King's tools. See J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 167-68 (4th ed. 2002) (discussing the Settlement Act of 1701).

⁴³ See JAY, *supra* note 40, at 20-21 (describing the British judiciary's reluctant handling of a request for an advisory opinion in 1760).

members of the British judiciary on a wide array of legal and political matters.

In the late 1700s, when the Americans were framing and ratifying their new Constitution, the British judiciary was dominated by two powerful figures: Lord Chancellor Edward Thurlow and Lord Mansfield, the Chief Justice of King's Bench. Both men not only served as Great Britain's most prominent jurists, but they also were believed to be among King George III's closest advisers.

By the eighteenth century, the Lord Chancellor had become "the most respected and influential judge in the kingdom."⁴⁴ The Lord Chancellor originally rose to prominence by virtue of the fact that he was both the keeper of the Great Seal of England (by which the Crown authenticated writs and other important documents)⁴⁵ and "the royal officer who reviewed petitions to the monarch, the ultimate fount of justice."⁴⁶ By the time the American colonists demanded their freedom, the Lord Chancellor had gained tremendous power. Serving at the pleasure of the Crown,⁴⁷ he

⁴⁴ DIANE WOODHOUSE, *THE OFFICE OF LORD CHANCELLOR* 5 (2001) (internal quotation omitted); see also FREDERICK PAYLER, *LAW COURTS, LAWYERS AND LITIGANTS* 17 (1980) (stating that the Lord Chancellor is "the highest public officer in the land, supreme head of the judiciary, maker of Judges, [and] holder of vast legal patronage"). Henry Abraham concisely captures the Lord Chancellor's importance and power today:

The Lord Chancellor . . . is the politically designated head of the judicial hierarchy of the United Kingdom. In addition, he advises on all appointments to judicial office from the rank of Justice of the Peace to the higher officers of the English judiciary As Speaker of the House of Lords, the Lord Chancellor presides from the Woolsack (a bright red padded bench, its name signifying how important wool was to the British economy in earlier centuries); he is a member of the Cabinet, and, as head of the judiciary, he combines in his person the threefold function of executive, legislator, and jurist—a complete refutation of the principle of separation of powers so dear to Montesquieu.

HENRY J. ABRAHAM, *THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND, AND FRANCE* 32 (7th ed. 1998).

⁴⁵ See BAKER, *supra* note 42, at 99; see also 1 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 396 (7th ed. 1956) ("It is in fact the Chancellor's position as Keeper of the Great Seal which puts him at the head of the English legal system, and makes him the legal centre of the constitution.").

⁴⁶ W.R. CORNISH & C. DE N. CLARK, *LAW AND SOCIETY IN ENGLAND, 1750-1950*, at 26 (1989).

⁴⁷ Although the Prime Minister played a very important role in selecting the Lord Chancellor, it was ultimately up to the King to decide whether a person held that vital post. See 12 HOLDSWORTH, *supra* note 45, at 319 ("When the ministry of [First Lord of the Treasury (today known as "Prime Minister") Lord Frederick] North fell, [Lord Chancellor Edward] Thurlow retained his office as Chancellor—the King refused to have any other Chancellor."); *id.* at 320 ("In 1792 [Lord Chancellor Thurlow] opposed [First Lord of the Treasury William] Pitt's bill for the establishment of a sinking fund, with the result that Pitt told the King that he must choose between him and Thurlow. Somewhat to Thurlow's astonishment, the King chose Pitt and dismissed him.").

presided over the House of Lords (and because that body served important appellate functions, the Lord Chancellor was seen “as the judicial equal or superior of the Chief Justices”);⁴⁸ he was either directly or indirectly responsible for appointing the great majority of Britain’s judges;⁴⁹ and he frequently acted “as domestic as well as constitutional adviser to the king when difficulties arose.”⁵⁰

Edward Thurlow served as Lord Chancellor from 1778 to 1792.⁵¹ Nicknamed “Tiger,” Thurlow was “scowling, arrogant, sardonic, and hard-drinking,” and was “held in terrified awe” in the House of Lords.⁵² Either because of or despite Thurlow’s “individuality, his overbearing manner, and his impartial disregard for the common conventions of politeness,” King George III regarded Thurlow as a man “of integrity and deep wisdom.”⁵³ The King frequently sought Thurlow’s advice.⁵⁴ Indeed, throughout the latter half of the eighteenth century, the King often relied upon his Lord Chancellors “as advisers, informants on proceedings in Cabinet, go-betweens in the formation of governments, and, where possible, as Trojan horses in administrations of which he disapproved.”⁵⁵

As Chief Justice of King’s Bench,⁵⁶ Lord Mansfield enjoyed a position of prominence in Great Britain’s judicial hierarchy that was second only to Thurlow’s. Lord Mansfield held his powerful post for thirty-two years, from 1756 to 1788.⁵⁷ He had been an influential member of the House of Commons and had served briefly as Attorney General (a position that, by tradition, often led to the chief justiceship of King’s Bench).⁵⁸ He was a member of the Cabinet from 1757 to 1765⁵⁹ and was Chancellor of the

⁴⁸ WOODHOUSE, *supra* note 44, at 5.

⁴⁹ See BAKER, *supra* note 42, at 99, 169; NICHOLAS UNDERHILL, *THE LORD CHANCELLOR* 142 (1978).

⁵⁰ UNDERHILL, *supra* note 49, at 158.

⁵¹ See *id.* at 152.

⁵² *Id.* at 153.

⁵³ *Id.*

⁵⁴ *Id.* at 157.

⁵⁵ *Id.*; see also WOODHOUSE, *supra* note 44, at 5 (stating that, in the eighteenth century, the Lord Chancellor was frequently regarded as the King’s informant).

⁵⁶ Founded in the thirteenth century, King’s Bench initially traveled with the King, then took a permanent home in Westminster Hall in the early fourteenth century. See BAKER, *supra* note 42, at 39. From its inception, the court’s responsibilities were important. Its job “was to correct all crimes and misdemeanors that amounted to a breach of the peace, the king being then plaintiff, . . . and to take cognizance of everything not parceled out to other courts. It also had superintendence of the other courts by way of appeal” A.T. CARTER, *A HISTORY OF ENGLISH LEGAL INSTITUTIONS* 85 (1910).

⁵⁷ See JAY, *supra* note 40, at 36.

⁵⁸ See EDMUND HEWARD, *LORD MANSFIELD* 40-42 (1979).

⁵⁹ See C.H.S. FIFOOT, *LORD MANSFIELD* 40 (1936).

Exchequer in 1757,⁶⁰ periods during which he also held his position as Chief Justice. In Mansfield's early years on the court, the Duke of Newcastle—the government's principal leader in the late 1750s—frequently solicited his professional advice.⁶¹ Throughout his career, Mansfield was also widely believed to be one of King George III's most influential behind-the-scenes advisers.⁶² In public, Mansfield certainly was among the Crown's most outspoken supporters. As one historian has observed, "Mansfield offered vital support for the ministry's policies at various points, most notably during the critical period of the American Revolution, from which he emerged as an unrelenting hardliner in favor of coercion."⁶³

In eighteenth-century Great Britain, where the kingdom's highest-ranking judges were routinely called upon to provide advice to the King and to government leaders, it made sense for the Crown to play a decisive role in identifying the individuals who would fill those important leadership posts. Whether a comparable arrangement would make sense for choosing a Chief Justice in late eighteenth-century America would depend on the uses to which the Chief Justice was put.

B. The Early American Conception of the Chief Justice as Aid and Adviser to the President

Although those attending the 1787 Convention did not discuss how the Chief Justice would be chosen,⁶⁴ they did envision a variety of ways in which the Chief Justice could play vital, non-judicial functions in service to the Executive Branch. The delegates ultimately chose not to formally assign the Chief Justice any such duties, but the fact that such possibilities were seriously contemplated reveals that many of America's early leaders believed the Chief Justice could serve the nation in ways extending far

⁶⁰ See HEWARD, *supra* note 58, at 77.

⁶¹ See *id.* at 78 ("After [Lord Mansfield] became Chief Justice, Newcastle continued to lean on him for advice and he was constantly sending packets to [Mansfield] to read and comment on. The subjects of the packets were many and varied.").

⁶² See *id.* at 75 (stating that Mansfield's opponents often charged that "he was a secret adviser of the King and a power behind the throne"); see also Robert J. Pushaw, Jr., *Why the Supreme Court Never Gets Any "Dear John" Letters: Advisory Opinions in Historical Perspective*, 87 GEO. L.J. 473, 476 (1998) (stating that, because of Mansfield's unpopularity in many quarters, it made sense for the Crown to distance itself from him in the public eye, while continuing to rely on him for advice behind closed doors). Heward states that the historical record actually contains very little evidence of correspondence between Mansfield and George III. See HEWARD, *supra* note 58, at 89.

⁶³ JAY, *supra* note 40, at 38; see also *id.* at 71 (stating that Mansfield was widely reviled in America for his support of George III's treatment of the American colonies).

⁶⁴ See *supra* notes 17-21 and accompanying text (noting the delegates' failure to debate the issue).

beyond the courtroom. Indeed, President Washington proceeded as if he were entitled to employ the Chief Justice in some of the very same kinds of extrajudicial capacities that marked King George III's use of Britain's top judicial officials.⁶⁵

1. The Options Contemplated at the Convention

At the Convention's outset, Edmund Randolph presented the "Virginia Plan" for a new Constitution.⁶⁶ Among other things, that plan called for the creation of a Council of Revision. Randolph proposed

that the Executive and a convenient number of the National Judiciary . . . compose a council of revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final; and that the dissent of the said Council shall amount to a rejection, unless the Act of the National Legislature be again passed, or that of a particular Legislature be again negatived by [a not-yet-determined number] of the members of each branch.⁶⁷

The Council's proponents believed that the President, acting alone, would be too weak to resist the overly ambitious tendencies of a popular Congress, but that Congress's strength would be counterbalanced if the President and the judiciary joined forces when reviewing Congress's actions.⁶⁸ James Madison and Gouverneur Morris, two of the plan's staunchest advocates, pointed to the British model as support, noting that judges in Great Britain were routinely consulted during the law-making process.⁶⁹ Although the proposal had the endorsement of such Convention luminaries as Madison, Morris, Oliver Ellsworth, and James Wilson, it was

⁶⁵ See *infra* notes 87-101 and accompanying text (discussing President Washington's frequent reliance on the advice and services of Chief Justice Jay).

⁶⁶ See DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 29 (1990) (describing the opening day of the Convention).

⁶⁷ See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 19, at 21.

⁶⁸ See JAY, *supra* note 40, at 66-67 (discussing the rationale for proposing the Council of Revision).

⁶⁹ See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 19, at 75-76 (recounting Morris's argument); *id.* at 77 (recounting Madison's argument).

defeated by a vote of the delegates on four separate occasions.⁷⁰ Various attacks were lodged against the proposal. Elbridge Gerry, for example, complained that the proposal would “mak[e] Statesmen of the Judges”;⁷¹ Luther Martin argued that judges would lose “the confidence of the people” if they were asked to play decisive roles in shaping legislation;⁷² and Nathaniel Ghorum contended that judges who sat on the Council of Revision would find it difficult to be evenhanded when litigants later challenged legislation that the judges previously had either endorsed or found unobjectionable.⁷³

With the support of Charles Pinckney, Gouverneur Morris then proposed an alternative arrangement, under which a Council of State would advise the President from time to time on matters of legal and political concern.⁷⁴ The Council’s members would include the President, several cabinet officials, and the Chief Justice, with the Chief Justice presiding when the President was unable to attend the Council’s meetings.⁷⁵ The proposal likened the Chief Justice to Britain’s Lord Chancellor: it conceived of the judiciary’s top official as a politically savvy leader who could offer valuable advice to the Executive.⁷⁶ As a member of the Council, the Chief Justice would be required to “recommend such alterations of, and additions to, the Laws of the United States as may in his opinion be necessary to the due administration of Justice, and such as may promote useful learning and inculcate sound morality throughout the Union.”⁷⁷ Moreover, the President would be permitted to seek the Council’s views on any issue he or she deemed appropriate and to demand the written advice of the Council’s individual members.⁷⁸

Morris’s proposal was referred to the Committee of Detail on August 20, 1787.⁷⁹ Two days later, the committee returned to the Convention calling instead for the creation of a Privy Council on which the Chief Justice would serve:

⁷⁰ See JAY, *supra* note 40, at 67.

⁷¹ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 19, at 75.

⁷² *Id.* at 76-77.

⁷³ See *id.* at 79.

⁷⁴ See JAY, *supra* note 40, at 71-72 (describing the proposed Council of State).

⁷⁵ See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 19, at 335-36 (describing the Council’s membership).

⁷⁶ See FISH, *supra* note 13, at 13-14 (comparing the Chief Justice to the Lord Chancellor).

⁷⁷ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 19, at 335.

⁷⁸ See *id.* at 336-37 (describing the Council’s functions).

⁷⁹ See *id.* at 342-44 (reporting the referral to the committee).

The President of the United States shall have a Privy Council which shall consist of the President of the Senate, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, and the principal Officer in the respective departments of foreign affairs, domestic affairs, War, Marine, and Finance . . . whose duty it shall be to advise him in matters respecting the execution of his Office, which he shall think proper to lay before them⁸⁰

The proposal to create a Privy Council was then forwarded to the Committee of Eleven,⁸¹ which in turn came back to the Convention with the language that appears in Article II of the Constitution today: “The President . . . may require the Opinion, in writing, of the principal Officer in each of the Executive Departments, upon any Subject relating to the Duties of their respective Offices”⁸² Morris, who served on the Committee of Eleven, explained that he and his colleagues had decided not to create a Council of State or a Privy Council because they feared the President would abuse those advisory bodies: they feared the President would prevail upon his or her designated advisers to endorse unwise or unpopular policies and then cite their support as a defense when those policies were attacked,⁸³ much as King George III had sometimes been perceived to secure judicial endorsements merely to legitimize his plans for the kingdom.⁸⁴

Although many conceived of the Chief Justice as a person who could provide the President with valuable counsel, therefore, the delegates opted in the end not to assign any duties to the Chief Justice beyond the tasks of serving on the Supreme Court and presiding over the trials of impeached presidents.⁸⁵ The delegates’ reluctance to assign executive functions to the

⁸⁰ *Id.* at 367.

⁸¹ *See id.* at 481 (reporting the decision to send unresolved matters to a committee consisting of one representative from each state).

⁸² U.S. CONST. art. II, § 2; *see* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 19, at 542-43 (reporting the Convention’s approval of the cited language).

⁸³ *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 19, at 542 (recounting Morris’s explanation).

⁸⁴ *See supra* notes 42-43 and accompanying text (noting this criticism of the King).

⁸⁵ *See* U.S. CONST. art. I, § 3, cl. 6 (requiring the Chief Justice to preside when the President has been impeached and is on trial in the Senate); *id.* art. III, § 1 (establishing “one supreme Court”); *see*

Chief Justice in the text of the Constitution, however, did not preclude the President from behaving as if the Chief Justice were available to provide a wide range of services to the Executive Branch. Indeed, as Russell Wheeler observed, “[t]he Jay Court faced a President and Congress anxious to adopt a basic assumption of the English constitution, the assumption that judges were obligated to serve the nation extrajudicially in various ex officio capacities in which their judicial skills would be of use.”⁸⁶

2. *President Washington’s Extrajudicial Reliance upon Chief Justice Jay*

From his first days in office, President Washington regularly called upon Chief Justice Jay to provide advice in numerous areas having little or nothing to do with the day-to-day work of the Supreme Court.⁸⁷ When the President contemplated a tour of the New England states in the late fall of 1789, for example, he asked Jay whether he thought the trip was politically wise.⁸⁸ That same fall, the President consulted with Jay about the handling of United States interests in Morocco⁸⁹ and about the wisdom of sending an envoy to Great Britain to discuss diplomatic and trade issues.⁹⁰ In the spring of 1790, the President solicited Jay’s views regarding limits that the Constitution might place on the Senate’s ability to interfere with the President’s foreign policy.⁹¹ In June 1790, the President obtained the Chief Justice’s advice concerning a pardon petition that the President had received from a man sentenced to death for killing a fellow sailor.⁹² In

also infra notes 135-67 and accompanying text (discussing the Chief Justice’s duty to preside over presidential impeachment trials).

⁸⁶ Russell Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 SUP. CT. REV. 123, 123-24; *see also id.* at 126 (stating that, at the time of this country’s founding, “there was very little fear of extrajudicial activity, and such activity was common both in England and the American colonies”).

⁸⁷ *See JAY*, *supra* note 40, at 73-74 (stating that although President Washington knew the delegates had decided not to create a Privy Council, he “evidently thought that the chief executive possessed inherent authority to create such a council”).

⁸⁸ *See* Editors’ Note, in 4 THE PAPERS OF GEORGE WASHINGTON 163 (Presidential Series) (W.W. Abbot & Dorothy Twohig eds., 1993) (recounting the exchange). Jay advised him that the trip was a good idea, but noted that states in the South would likely demand comparable attention. *See id.*

⁸⁹ *See* Letter from George Washington to John Jay (Dec. 1, 1789), in 4 THE PAPERS OF GEORGE WASHINGTON, *supra* note 88, at 353 (requesting advice).

⁹⁰ *See* Editors’ Note, in 4 THE PAPERS OF GEORGE WASHINGTON, *supra* note 88, at 181 (recounting the exchange).

⁹¹ *See* Editors’ Note, in 5 THE PAPERS OF GEORGE WASHINGTON, *supra* note 88, at 345 (recounting the exchange).

⁹² *See id.* at 481 (recounting the exchange); *see also* Letter from Thomas Bird to George Washington (June 5, 1790), in *id.* at 478-79 (requesting a presidential pardon).

March 1791, the President again sought Jay's advice regarding the propriety of a pardon, this time in a forgery case.⁹³ In the summer of 1790, the President asked Jay whether he believed British military personnel should be permitted to march across United States territory in order to reach Spanish troops.⁹⁴ On several occasions, the President asked the Chief Justice to share his thoughts regarding remarks the President should include in his speeches to Congress.⁹⁵ When he made his second such request on September 4, 1791, the President emphasized that he wanted Jay's advice not merely about judicial matters, but about "all other topics which have, or may occur to you as fit subjects for general, or private communications."⁹⁶

President Washington's extrajudicial use of Chief Justice Jay was not limited to requests for advice. In the early 1790s, Jay served with the Vice President and several others on the Sinking Fund Commission, charged with reducing the nation's debt from the Revolutionary War.⁹⁷ In 1792, the Chief Justice and several high-ranking executive officials were put in charge of inspecting coins produced by the United States Mint.⁹⁸ Most significantly of all, President Washington sent the Chief Justice overseas in the spring of 1794 to negotiate a cessation of the United States' growing hostilities with Great Britain⁹⁹—a vitally important diplomatic mission that kept Jay out of the country for a year, at the end of which he decided to resign from the Court and accept the governorship of New York.¹⁰⁰

The President thus saw the Chief Justice not merely as the individual who would preside over the Supreme Court, but also as a politically gifted

⁹³ See Letter from John Jay to George Washington (Mar. 11, 1791), in 7 THE PAPERS OF GEORGE WASHINGTON, *supra* note 88, at 543 (providing the requested advice).

⁹⁴ See Letter from John Jay to George Washington (Aug. 28, 1790), in 6 THE PAPERS OF GEORGE WASHINGTON, *supra* note 88, at 353-56 (responding to the President's inquiry).

⁹⁵ See, e.g., Letter from George Washington to John Jay (Nov. 19, 1790), in 6 THE PAPERS OF GEORGE WASHINGTON, *supra* note 88, at 665 (requesting advice); Letter from George Washington to John Jay (Sept. 4, 1791), in 8 THE PAPERS OF GEORGE WASHINGTON, *supra* note 88, at 486 (same).

⁹⁶ Letter from George Washington to John Jay (Sept. 4, 1791), in 8 THE PAPERS OF GEORGE WASHINGTON, *supra* note 88, at 487; see also Letter from John Jay to George Washington (Sept. 23, 1791), in 9 THE PAPERS OF GEORGE WASHINGTON, *supra* note 88, at 1-3 (providing the requested advice).

⁹⁷ See Wheeler, *supra* note 86, at 140-43 (describing Jay's work on the Commission).

⁹⁸ See *id.* at 140 (explaining the need for such inspections).

⁹⁹ For a good discussion of the issues that were dividing the United States and Great Britain, see STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM: THE EARLY REPUBLIC, 1788-1800*, at 375-95 (1993); see also *id.* at 406-13 (describing Jay's negotiation of the treaty); *id.* at 417-36 (describing the treaty's mixed reception in the United States).

¹⁰⁰ See Maeva Marcus, *Federal Judicial Selection: The First Decade*, 39 U. RICH. L. REV. 797, 803 (2005) (describing Jay's decision to leave the Court).

leader who could be trusted to provide advice and other services to the Administration. As one historian concludes, Washington “assumed that it was proper for him to include the Chief Justice as one of his advisers” and “understood that the Chief Justice in his official capacity was to work with the executive officers.”¹⁰¹ Just as it made sense for the British Crown to select those judges on whom it would rely for advice and other assistance, it seemed intuitive to the early Americans that the President should be permitted to identify the individual who not only would lead the Court, but would serve as one of the President’s most trusted associates as well.

3. *The Rapid Decline of the Chief Justice’s Service to the President*

The Chief Justice’s practice of routinely providing extrajudicial assistance to the President did not last long. Three factors played particularly important roles in its decline. First, and most practically, communication between the President and the Chief Justice became more difficult once the nation’s capital moved from New York to Philadelphia in 1790 and once the Chief Justice began spending long periods away from home riding circuit.¹⁰² With President Washington and Chief Justice Jay in the same city for only short periods of time each year, it was difficult for the President to consult the Chief Justice as frequently as he might have liked.¹⁰³

Second, and more importantly, Chief Justice Jay concluded in 1793 that he and his colleagues on the bench should restrict the President’s ability to ask the Justices for advice. On July 18, 1793, Secretary of State Thomas Jefferson sent the Court a letter, asking whether it would be willing to answer a series of legal questions concerning America’s relations with the warring nations of France and Great Britain.¹⁰⁴ Jefferson explained that the questions were extremely important, but arose “under circumstances which

¹⁰¹ Wheeler, *supra* note 86, at 145-46.

¹⁰² See JAY, *supra* note 40, at 98 (noting the communication difficulties).

¹⁰³ Stewart Jay explains:

The twice-yearly Supreme Court sessions in Philadelphia afforded some opportunity to confer directly with members of the administration, but the sessions in these early years lasted only a few days or weeks. It almost goes without saying that communications were such that Jay and the other members of the Court could not have been involved in the policy discussions that took place in cabinet meetings.

Id. at 98-99.

¹⁰⁴ See Letter from Thomas Jefferson to the Supreme Court (July 18, 1793), in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 486-87 (Henry P. Johnston ed., 1970).

do not give a cognizance of them to the tribunals of the country.”¹⁰⁵ Chief Justice Jay replied two days later, emphasizing the Justices’ eagerness “to promote the welfare of our country in every way that may consist with our official duties,” but saying that he wanted to wait until all of the Justices had had an opportunity to consult with one another before responding.¹⁰⁶

The Court sent the President a letter on August 8, 1793, reporting that it would not provide the advice that the President had requested. Citing principles of separation of powers that are now eminently familiar to us today, the Court reminded the President that the delegates attending the 1787 Convention had limited his pool of formal advisers to members of the Executive Branch and had not given him a Council of State or a Privy Council:

We have considered the previous question stated in a letter written by your direction to us by the Secretary of State on the 18th of last month, [regarding] the lines of separation drawn by the Constitution between the three departments of the government. These being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been *purposely* as well as expressly united to the *executive* departments.¹⁰⁷

President Washington and Secretary of State Jefferson were surely surprised by the Court’s response. Relying on Great Britain’s longstanding practice of seeking judges’ advice in comparable circumstances, the

¹⁰⁵ *Id.* For an iteration of the questions that the Washington Administration hoped to ask, see Draft of Questions to Be Submitted to Justices of the Supreme Court (July 18, 1793), in 15 THE PAPERS OF ALEXANDER HAMILTON 110-16 (Harold C. Syrett & Jacob E. Cooke eds., 1969).

¹⁰⁶ Letter from Supreme Court to George Washington (July 20, 1793), in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, *supra* note 104, at 487-88.

¹⁰⁷ Letter from Supreme Court to George Washington (Aug. 8, 1793), in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, *supra* note 104, at 488-89; *see also* U.S. CONST. art. II, § 2 (authorizing the President to demand written advice from the heads of executive departments); *supra* notes 74-84 and accompanying text (discussing the 1787 delegates’ rejection of proposals to create a Council of State or a Privy Council). For a discussion of the events surrounding the 1793 exchange, *see* Wheeler, *supra* note 86, at 148-58.

Administration had gone so far as to “announce[] to the foreign countries involved that the consultation would occur.”¹⁰⁸ The Court’s letter put the President on notice, however, that his professional relationship with the Chief Justice “needed to be restricted rather than expanded” and that the President’s “view of the Chief Justice as a semiofficial executive adviser would have to be abandoned.”¹⁰⁹ The Court’s refusal to answer the Administration’s questions is cited today as authority for the proposition that federal judges cannot issue advisory opinions, but can only adjudicate disputes that constitute “cases” or “controversies” within the meaning of Article III.¹¹⁰

The third factor contributing to the shift in the Chief Justice’s role was John Marshall’s success in building a nonpartisan and independent Court during politically tumultuous times. Before becoming the nation’s fourth Chief Justice in 1801, Marshall had been deeply immersed in the nation’s political life. As a faithful member of the Federalist party, he served with a delegation sent by President John Adams to negotiate with the French in 1797,¹¹¹ he was elected to the United States House of Representatives in 1799,¹¹² and he was named President Adams’s Secretary of State in 1800.¹¹³ Only weeks after Marshall took his seat on the Court, however, Thomas Jefferson assumed the presidency on behalf of the Democratic-Republican party and Marshall suddenly found himself deeply at odds with the Executive Branch.¹¹⁴ The circumstances hardly lent themselves to an intimate advisory relationship between the President and the Chief Justice. That turn of events, coupled with Chief Justice Marshall’s thirty-four-year tenure on the Court through multiple presidencies, solidified the Chief Justice’s independence from the Executive. Peter Fish explains:

¹⁰⁸ JAY, *supra* note 40, at 149.

¹⁰⁹ Wheeler, *supra* note 86, at 150, 154.

¹¹⁰ See, e.g., ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 54-55 (2d ed. 2002) (citing the 1793 correspondence as the formative expression of the rule against advisory opinions); RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 78-81 (5th ed. 2003) (same).

¹¹¹ See ELKINS & MCKITRICK, *supra* note 99, at 570 (discussing Marshall’s diplomatic mission to France).

¹¹² See THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789-1995, at 63 (Clare Cushman ed., 2d ed. 1995) (recounting Marshall’s election to the House).

¹¹³ See *id.* (noting Marshall’s appointment to the position of Secretary of State).

¹¹⁴ See ABRAHAM, *supra* note 7, at 61 (stating that Marshall and Jefferson “detested each other profoundly”); William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 3-4 (describing this tumultuous period).

[I]t was Chief Justice John Marshall—whose politically astute jurisprudence proved instrumental in elevating the High Court’s legitimacy as an independent institution of government—who effectively blocked development of his office in the Lord Chancellorship pattern. . . . Whereas the [Lord Chancellor’s] tenure depended on party strength in Parliament, Marshall’s persisted notwithstanding party turnover in the White House and Congress. The great Chief Justice remained in the Court’s center chair during the presidencies of Adams, Jefferson, Madison, Monroe, John Q. Adams, and Jackson and during the congressional dominance of the fading Federalists, Jefferson’s Democratic-Republicans, John Quincy Adams’s Administration party, and the Jacksonian Democrats.¹¹⁵

Today, the Chief Justice does not serve as one of the President’s leading advisers, nor does the Chief Justice routinely perform executive functions at the President’s request. The Chief Justice does carry a number of other, statutorily assigned extrajudicial responsibilities. Among other things, the Chief Justice serves as a regent for the Smithsonian Institution¹¹⁶ and as a trustee for both the National Gallery of Art¹¹⁷ and the Joseph H. Hirshhorn Museum and Sculpture Garden;¹¹⁸ serves as chairman of the board for the Federal Judicial Center;¹¹⁹ presides over the Judicial Conference of the United States;¹²⁰ appoints the director of the Administrative Office of the United States Courts,¹²¹ three members of the Federal Judicial Center

¹¹⁵ FISH, *supra* note 13, at 14–15.

¹¹⁶ See 20 U.S.C. § 42 (2000).

¹¹⁷ See *id.* § 72(a).

¹¹⁸ See *id.* § 76cc(a).

¹¹⁹ See 28 U.S.C. § 621(a) (2000); see also *id.* § 620(a) (stating that the Center’s purpose is “to further the development and adoption of improved judicial administration in the courts of the United States”); Daniel J. Meador, *The Federal Judiciary and Its Future Administration*, 65 VA. L. REV. 1031, 1033 (1979) (“The Federal Judicial Center, created by Congress in 1967, undertakes research related to the federal courts and conducts educational programs for federal court personnel.”).

¹²⁰ See 28 U.S.C. § 331 (2000); see also *id.* (describing the Conference’s functions); Meador, *supra* note 119, at 1032 (“The Judicial Conference of the United States is the primary administrative and internal policymaking authority of the federal judiciary.”).

¹²¹ See 28 U.S.C. § 601 (2000); see also Meador, *supra* note 119, at 1033 (“The Administrative Office of the United States Courts, created by Congress in 1939, serves as the statistics gatherer, housekeeper, and budget coordinator for the judicial system.”).

Foundation,¹²² two members of the Citizens' Commission on Public Service and Compensation,¹²³ and one member of the National Historical Publications and Records Commission;¹²⁴ assigns judges to a variety of tribunals;¹²⁵ certifies that federal judges who have taken senior status are entitled to receive salaries for judicial work they have performed;¹²⁶ appoints the individual charged with publishing the Court's decisions;¹²⁷ supervises the purchase of law books for the Library of Congress;¹²⁸ and reviews the regulations prescribed by the Marshal of the Supreme Court for the protection and maintenance of the Supreme Court building.¹²⁹ It has been a very long time, however, since the Executive Branch has routinely consulted with the Chief Justice about legal and political issues facing the country or has routinely assigned the Chief Justice executive tasks.¹³⁰

¹²² See 28 U.S.C. § 629(b) (2000); see also *id.* § 629(a) (stating that the Foundation's purpose is "to accept and receive gifts of real and personal property and services made for the purpose of aiding or facilitating the work of the Federal Judicial Center").

¹²³ See 2 U.S.C. § 352 (2000).

¹²⁴ See 44 U.S.C. § 2501(a)(1)(E) (2000).

¹²⁵ See 8 U.S.C. § 1532(a) (2000) (instructing the Chief Justice to designate five district court judges to constitute a court charged with reviewing requests by the Attorney General to expel aliens who are suspected of being terrorists); 28 U.S.C. § 291(a) (2000) (authorizing the Chief Justice to appoint a circuit judge to sit temporarily in another circuit); *id.* § 292(d) (authorizing the Chief Justice to appoint a district judge to sit temporarily in another circuit or another district); *id.* § 294(a) (authorizing the Chief Justice to assign a retired Supreme Court Justice "to perform such judicial duties in any circuit, including those of a circuit justice, as he is willing to undertake"); 50 U.S.C. § 1803(a) (2006) (instructing the Chief Justice to "designate eleven district court judges from seven of the United States judicial circuits . . . who shall constitute a court which shall have jurisdiction to hear applications for and grant orders approving electronic surveillance anywhere within the United States"); *id.* § 1803(b) (instructing the Chief Justice to "designate three judges, one of whom shall be publicly designated as the presiding judge, from the United States district courts or courts of appeals who together shall comprise a court of review which shall have jurisdiction to review the denial of any application made under this chapter"); see also Ruger, *supra* note 34, at 372-84 (raising questions about the propriety of allowing the Chief Justice to designate judges for particular tribunals).

¹²⁶ See 28 U.S.C. § 371(e)(1) (2000).

¹²⁷ See *id.* § 673(a).

¹²⁸ See 2 U.S.C. § 135 (2000).

¹²⁹ See 40 U.S.C. § 6102 (Supp. II 2002).

¹³⁰ Cf. Donald E. Lively, *The Supreme Court Appointment Process: In Search of Constitutional Roles and Responsibilities*, 59 S. CAL. L. REV. 551, 563 (1986) ("Judges do not serve the president but are supposed to be independent of and provide a check upon the executive."). The circumstances in which the President has publicly called upon the Chief Justice for assistance in the modern era have been rare and extraordinary. See, e.g., Jonathan Simon, *Parrhesiastic Accountability: Investigatory Commissions and Executive Power in an Age of Terror*, 114 YALE L.J. 1419, 1440-43 (2005) (discussing the work of the commission chaired by Chief Justice Earl Warren and appointed by President Lyndon B. Johnson to investigate the assassination of President John F. Kennedy).

Indeed, although there have been friendships between Justices and White House officials in the modern era,¹³¹ even those social relationships have become increasingly controversial. In 1968, for example, when President Lyndon B. Johnson nominated his good friend Justice Abe Fortas to succeed Chief Justice Earl Warren, Justice Fortas faced criticism from those who believed that his long-standing friendship with President Johnson would render him unfit to decide cases involving the presidency.¹³² More recently, there was extended public debate about whether Justice Antonin Scalia should have recused himself from a case involving the Vice President of the United States, after it was learned that Justice Scalia and Vice President Dick Cheney had gone duck hunting together.¹³³ Today's culture is certainly not one in which the Justices are encouraged to maintain close, consultative relationships with those in the White House.

Although the original method of choosing a Chief Justice has persisted through the generations, that method's tacit rationale became anachronistic long ago. The Chief Justice today simply does not serve the Executive Branch in the kinds of ways that warrant permitting the President to decide, with the advice and consent of the Senate, which of the Court's members will fill that position. That fact alone provides good reason to ask whether the existing selection process should be changed.

¹³¹ See *Cheney v. United States District Court*, 541 U.S. 913, 916-17 (2005) (mem. of Scalia, J.) (citing examples of friendships between Justices and White House officials).

¹³² See *Nomination of Abe Fortas: Hearings Before the S. Comm. On the Judiciary*, 90th Cong. 103-04 (1968) (testimony of Justice Fortas) (insisting, in response to Senators' questions, that during his time on the Court, he had never "initiated any suggestions or any proposal to the President" and that the President had "never, directly or indirectly, approximately or remotely, talked to me about anything before the Court or that might come before the Court"); see also Nina Totenberg, *The Confirmation Process and the Public: To Know or Not to Know*, 101 HARV. L. REV. 1213, 1216 (1988) (stating that Justice Fortas's critics "discerned that Fortas had remained close to the President in a political sense long after he had been named to the Court and was supposed to be an independent voice ruling on issues that were often of direct concern to the President"). For a further discussion of Justice Fortas's failed bid for the Chief Justiceship, see *infra* notes 235-38 and accompanying text.

¹³³ See, e.g., E.J. Dionne, Jr., *Why Scalia Should Duck Out*, WASH. POST, Mar. 23, 2004, at A19 (criticizing Justice Scalia for refusing to recuse himself); Michael Janofsky, *Scalia Refusing to Take Himself Off Cheney Case*, N.Y. TIMES, Mar. 19, 2004, at A1 (reporting that Justice Scalia had refused to recuse himself); Stuart Taylor, Jr., *Scalia: Is Justice (Duck) Blind?*, NEWSWEEK, Mar. 29, 2004, at 8 (reporting that Congress might consider legislation requiring that a Justice's refusal to recuse himself or herself be subject to review by others); Jonathan Turley, *The High Court's Enfant Terrible*, CHI. TRIB., Apr. 16, 2004, at C27 ("While Scalia may have been correct in not recusing himself, he showed a colossal lack of judgment in going on vacation with Cheney before the argument in the case."). For Justice Scalia's explanation of his refusal to recuse himself, see *Cheney*, 541 U.S. at 913-29.

III. PRESIDENTIAL IMPEACHMENTS AND CONFLICTS OF INTEREST

In its lone reference to the office of Chief Justice, the Constitution states that, when the President has been impeached by the House of Representatives and is on trial in the Senate, “the Chief Justice shall preside.”¹³⁴ That provision was added in the closing days of the 1787 Convention in an effort to avoid the conflicts of interest that would arise if the Vice President—who ordinarily serves as the Senate’s presiding officer—were permitted to preside over a trial that could deliver him or her the powers of the presidency. When coupled with the tradition of allowing the President to select the individual who will serve as Chief Justice, however, the Framers’ decision to substitute the Chief Justice for the Vice President raises the specter of equally troubling conflicts of interest. Those conflicts would be significantly reduced if the Court were permitted to decide for itself which of its nine members will be the Court’s leader.

A. The Chief Justice’s Duty to Preside over Presidential Impeachment Trials

At the 1787 Convention in Philadelphia, the delegates slowly built the framework for impeachment proceedings. Giving the House of Representatives the sole power to impeach executive officials proved to be fairly uncontroversial.¹³⁵ The delegates found it far more difficult to decide who would conduct impeachment trials. On June 13, 1787, the Convention tentatively approved a proposal to give the “national Judiciary” jurisdiction over “cases which respect . . . impeachments of any national officers.”¹³⁶ Two months later, the Committee of Detail suggested that the power to conduct impeachment trials be more narrowly conferred solely upon the Supreme Court.¹³⁷ Gouverneur Morris objected to that plan, however, arguing that it would be “improper” for the Chief Justice

¹³⁴ U.S. CONST. art. I, § 3, cl. 6.

¹³⁵ See *id.* § 2, cl. 5 (“The House of Representatives . . . shall have the sole Power of Impeachment.”); see also 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 19, at 231 (reporting that the delegates unanimously approved this provision without debate on August 9).

¹³⁶ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 19, at 223-24; *cf. id.* at 244 (reporting the provision in William Paterson’s proposed “New Jersey” plan to create “a supreme Tribunal” with the power “to hear & determine in the first instance on all impeachments of federal officers”).

¹³⁷ See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 19, at 186 (“The jurisdiction of the Supreme Court shall extend to . . . the trial of impeachments of Officers of the United States . . .”).

both to sit on the tribunal charged with trying an impeached President and to serve as a member of the President's Privy Council,¹³⁸ the advisory body that the Committee of Detail had proposed five days earlier.¹³⁹ Apparently persuaded by this and related concerns,¹⁴⁰ the Committee of Eleven suggested on September 4 that the "Senate [be given the] power to try all impeachments."¹⁴¹ Roger Sherman spoke in favor of that arrangement, arguing that the Supreme Court would be an inappropriate forum for trying the President "because the Judges would be appointed by him."¹⁴² By a vote of nine to two, the Convention endorsed the Committee of Eleven's proposal.¹⁴³ The Committee on Style, charged with putting the Constitution into final form, then suggested that the Chief Justice "preside" in lieu of the Vice President when the Senate is "sit[ting] to try the impeachment of the President."¹⁴⁴ In the Convention's final days, the delegates approved that proposal without debate.¹⁴⁵ The Senate's and the Chief Justice's respective duties are now described in Article I: "The Senate shall have the sole Power to try all Impeachments. . . . When the President of the United States is tried, the Chief Justice shall preside"¹⁴⁶

Although the Committee on Style did not explain its rationale for requiring the Chief Justice to preside over presidential impeachment trials, scholars generally agree that the delegates' primary objective was to minimize conflicts of interest. Ordinarily, the Vice President acts as the

¹³⁸ See *id.* at 427 (reporting Morris's argument).

¹³⁹ See *supra* notes 80-84 and accompanying text (discussing the proposed Privy Council).

¹⁴⁰ See, e.g., THE FEDERALIST NO. 65, at 394 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (arguing that an impeached individual might face subsequent criminal or civil liability, and that the Court's prior involvement in the impeachment proceedings might render it unfit to adjudicate that liability).

¹⁴¹ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 19, at 497.

¹⁴² *Id.* at 551; *cf. id.* (reporting Gouverneur Morris's argument that, because its members were fewer in number than the Senate's, the Court would be too easily "warped or corrupted"); MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS (2d ed. 2000) ("The [Committee of Eleven] agreed to designate the Senate as the body to conduct *all* impeachment trials after concluding that the president would not be selected by the Senate but rather by a college of electors . . .").

¹⁴³ See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 19, at 552-53 (reporting the Convention's vote).

¹⁴⁴ *Id.* at 574.

¹⁴⁵ See Michael F. Williams, *Rehnquist's Renunciation? The Chief Justice's Constitutional Duty to "Preside" Over Impeachment Trials*, 104 W. VA. L. REV. 457, 468 (2002) (stating that the committee's proposal "was not the subject of debate at the Convention, and the directive appeared in the wake of the more significant decision to strip the judiciary of all authority to conduct impeachment trials").

¹⁴⁶ U.S. CONST. art. I, § 3, cl. 6; see also *id.* § 2, cl. 5 ("The House of Representatives . . . shall have the sole Power of Impeachment.").

Senate's presiding officer.¹⁴⁷ He or she also, of course, is the individual who assumes the President's duties if the President dies, resigns, or is otherwise unable to fulfill his or her responsibilities.¹⁴⁸ Akhil Reed Amar, Michael Gerhardt, and Richard Posner are among those who have concluded that the Framers hoped to avoid the conflicts of interest that would arise from placing the Vice President in charge of a proceeding that could give him or her the powers and privileges of the presidency.¹⁴⁹ Amar concisely captures the point: "[T]he Vice President should play no part in a trial that could put him in the Oval Office."¹⁵⁰

If the presiding officer's powers were negligible, there would have been little reason for the Framers to worry about allowing the Vice President to fill that role.¹⁵¹ After all, the conflicts of interest that concerned the delegates in 1787 can arise only if the presiding officer is in a position to exert at least some measure of influence over the trial's ultimate outcome. Under the rules prescribed by the Senate for impeachment proceedings, it is clear that, although the Senate can overrule the presiding officer's decisions by a majority vote, the presiding officer is indeed central to the conduct of the trial:

The Presiding Officer shall have power to make and issue . . . all orders, mandates, writs, and precepts

¹⁴⁷ See *id.* § 3, cl. 4 ("The Vice President of the United States shall be President of the Senate . . .").

¹⁴⁸ See *id.* art. II, § 1, cl. 6 ("In Case of the Removal of the President from Office, or of his Death, Resignation or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President . . ."); *id.* amend. XXV, § 1 ("In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.").

¹⁴⁹ See RICHARD A. POSNER, *AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON* 130 (1999) ("The Constitution assigns the Chief Justice to preside over trials of Presidents not because he's a judge but because the Vice-President . . . would have a conflict of interest in presiding over the trial of the President."); Akhil Reed Amar, *On Impeaching Presidents*, 28 *HOFSTRA L. REV.* 291, 312 (1999) (stating that the Framers' purpose was "to avoid the obvious conflict of interest that would exist if the Senate's regular presiding officer—the Vice President—sat in the chair"); Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 *TEX. L. REV.* 1, 88 (1989) ("[I]n the special case of presidential removal, the Chief Justice must preside so that the Vice President, who normally presides, is spared from presiding over the removal trial of the one person who stands between him and the presidency.").

¹⁵⁰ Amar, *supra* note 149, at 312.

¹⁵¹ Scholars disagree about the precise extent of the presiding officer's powers. See, e.g., POSNER, *supra* note 149, at 128-30 (noting his disagreement with Bruce Ackerman's assertion before the House Judiciary Committee that Chief Justice Rehnquist could rule on whether the lame-duck House of Representatives possessed the power to impeach President Clinton); Williams, *supra* note 145, at 459 (arguing that, contrary to some scholars' belief, "the Chief Justice's role [in an impeachment trial] is one with independent, constitutional import").

authorized by these rules or by the Senate, and to make and enforce such other regulations and orders in the premises as the Senate may authorize or provide.¹⁵²

[T]he Presiding Officer . . . may rule on all questions of evidence including, but not limited to, questions of relevancy, materiality, and redundancy of evidence and incidental questions, which ruling shall stand as the judgment of the Senate, unless some Member of the Senate shall ask that a formal vote be taken thereon, in which case it shall be submitted to the Senate for decision without debate; or he may at his option, in the first instance, submit any such question to a vote of the Members of the Senate.¹⁵³

All motions, objections, requests, or applications whether relating to the procedure of the Senate or relating immediately to the trial . . . made by the parties or their counsel shall be addressed to the Presiding Officer only¹⁵⁴

If a Senator wishes a question to be put to a witness, or to a manager [from the House of Representatives], or to counsel of the person impeached, or to offer a motion or order . . . it shall be reduced to writing, and put by the Presiding Officer.¹⁵⁵

Thus far, two of the nation's seventeen Chief Justices have been called upon to preside in the Senate, and they have exercised their powers with different degrees of vigor. In the impeachment trial of President Andrew Johnson in 1868,¹⁵⁶ Chief Justice Salmon Chase gave the role of presiding

¹⁵² S. DOC. NO. 106-2, at 4 (1999) (RULES OF PROCEDURE AND PRACTICE IN THE SENATE WHEN SITTING ON IMPEACHMENT TRIALS, hereinafter SENATE IMPEACHMENT RULES).

¹⁵³ *Id.* at 5.

¹⁵⁴ *Id.* at 8.

¹⁵⁵ *Id.*

¹⁵⁶ See generally NOEL B. GERSON, THE TRIAL OF ANDREW JOHNSON 71-94 (1977) (recounting the events giving rise to President Johnson's impeachment); U.S. CONG., THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES *passim* (Dover Publications 1974) (1868) (reproducing Congress's contemporaneous account of the trial's daily proceedings).

officer a “strong imprint.”¹⁵⁷ When President Johnson appeared at a reception hosted by the Chief Justice the same evening that the House of Representatives approved the articles of impeachment, the President’s opponents became convinced “that the officer to preside at the trial was an enemy to their scheme.”¹⁵⁸ If Chief Justice Chase was troubled by the accusation of bias, he certainly did not show it by diminishing his role in the ensuing trial. When the Senators divided evenly on procedural matters, for example, the Chief Justice insisted that he had the right to cast the tie-breaking vote.¹⁵⁹ On several occasions, Chief Justice Chase’s rulings proved sufficiently controversial to be overruled by the Senate.¹⁶⁰ He sometimes posed his own questions to witnesses.¹⁶¹ By forcefully making his presence felt throughout the proceedings, the Chief Justice “established an assertive role for the holder of that office in such trials, and likely saved President Johnson from the fate sought for him by Radical Republicans.”¹⁶²

When presiding over the 1999 trial of President William Jefferson Clinton, Chief Justice William Rehnquist took a far more passive approach,¹⁶³ thereby drawing praise from some quarters¹⁶⁴ and criticism

¹⁵⁷ Committee on Federal Legislation, Association of the Bar of the City of New York, *The Role of Congress and the Courts*, in *PRESIDENTIAL IMPEACHMENT: A DOCUMENTARY OVERVIEW* 80 (M.B. Schnapper ed., 1974).

¹⁵⁸ DAVID M. DEWITT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON* 389 (1903).

¹⁵⁹ See Committee on Federal Legislation, *supra* note 157, at 80 (nothing that when the Senate vote on his procedural rulings was a tie, the Chief Justice asserted the right to cast the tie-breaking vote in his favor).

¹⁶⁰ The Senate overruled the Chief Justice several times. See, e.g., DEWITT, *supra* note 158, at 419 (noting the Senate’s vote to admit a written account of a speech the President had made); *id.* at 440-41 (noting the Senate’s vote to exclude an individual’s account of a conversation that the individual had with the President); *id.* at 442 (same); *id.* at 445 (noting the Senate’s vote to exclude testimony concerning conversations between the President and his Cabinet officials).

¹⁶¹ See S. DOC. NO. 93-102, at 33 (1974) (PROCEDURE AND GUIDELINES FOR IMPEACHMENT TRIALS IN THE UNITED STATES SENATE) (“On two occasions while the Senate was sitting for the impeachment trial of Andrew Johnson, the Chief Justice . . . examined witnesses on his own.”).

¹⁶² FISH, *supra* note 13, at 20.

¹⁶³ See generally *THE IMPEACHMENT AND TRIAL OF PRESIDENT CLINTON passim* (Merrill McLoughlin ed., 1999) (reproducing an abridged copy of the Senate transcripts). Seven years before he was called upon to preside over President Clinton’s trial, Chief Justice Rehnquist published a book on the impeachments of Justice Samuel Chase and President Andrew Johnson. See WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* (1992). In his chapter on President Johnson’s trial, Chief Justice Rehnquist gives no indication that Chief Justice Salmon Chase powerfully asserted himself at President Johnson’s trial. See *id.* at 217-35. Chief Justice Rehnquist may have wished to avoid assessing his predecessor’s performance.

¹⁶⁴ See, e.g., Susan Low Bloch, *A Report Card on the Impeachment: Judging the Institutions that Judged President Clinton*, 63 *LAW & CONTEMP. PROBS.* 143, 159 (2000) (“Basically, his role was that of traffic cop, but he performed it well and with humor”); Michael J. Gerhardt, *The Perils of Presidential Impeachment*, 67 *U. CHI. L. REV.* 293, 298-99 (2000) (arguing that Chief Justice

from others.¹⁶⁵ As Judge Posner observed, the Chief Justice “made few rulings, none either substantive or remotely likely to affect the outcome.”¹⁶⁶ In Judge Posner’s mind, the most striking thing about Chief Justice Rehnquist’s presence was the fact that he wore a robe bearing four yellow stripes on each sleeve, a design that was “inspired by the costume worn by the Lord Chancellor in a production that Rehnquist had seen of Gilbert and Sullivan’s operetta *Ionanthe*.”¹⁶⁷

B. The Specter of Conflicts of Interest

Although Chief Justices Chase and Rehnquist approached the role of presiding officer differently, the position is clearly one of great potential significance—of sufficiently great significance to warrant barring the Vice President from holding it when the President is on trial.¹⁶⁸ Therein lies the problem with allowing the President to decide which member of the Court will serve as Chief Justice: the stronger the link between the President and the Chief Justice, the greater the threat that the Chief Justice will be saddled with actual or perceived conflicts of interest if the President is impeached and the Chief Justice is called upon to preside over his or her trial.

Consider, for example, the comparable concerns that arose after the House of Representatives voted to impeach President Clinton. Pursuant to the statutory arrangement then in effect,¹⁶⁹ Independent Counsel Kenneth

Rehnquist commanded a great deal of respect during the trial and that “[a] dramatic example of this respect was that no senator ever challenged nor did the Senate overturn a single ruling made by Chief Justice Rehnquist during the trial”).

¹⁶⁵ See, e.g., Williams, *supra* note 145, at 483-84 (arguing that Chief Justice Rehnquist was far too deferential to the Senate Parliamentarian during President Clinton’s trial).

¹⁶⁶ POSNER, *supra* note 149, at 130.

¹⁶⁷ *Id.* at 168; see also *id.* (arguing that, given its “comic-opera origins,” the robe brought a lack of dignity to the proceedings).

¹⁶⁸ Alexander Hamilton implicitly acknowledged the importance of the Chief Justice’s role when he argued that, although there might have been advantages to giving the Supreme Court jurisdiction to hear impeachment trials, those advantages were sufficiently secured by requiring that the Chief Justice preside when it is the President who has been impeached. See THE FEDERALIST NO. 65, *supra* note 140, at 395-96.

¹⁶⁹ See 28 U.S.C. § 49 (2000) (requiring the Chief Justice to appoint three circuit judges or justices to serve on “a division of the United States Court of Appeals for the District of Columbia to be the division of the court for the purpose of appointing independent counsels”); *id.* §§ 591-92 (stating the conditions under which the Attorney General was required to apply to the three-judge panel for the appointment of an independent counsel); *id.* § 593 (describing the three-judge panel’s duty to appoint an independent counsel and to define his or her jurisdiction); *id.* § 594 (describing the independent counsel’s powers and duties). Pursuant to a sunset provision, the independent counsel statutes expired on June 30, 1999. See *id.* § 599. See generally Morrison v. Olson, 487 U.S. 654, 660-65 (1988) (providing a concise description of how the independent counsel statutes worked).

Starr, who led the investigation that culminated in President Clinton's impeachment, was appointed by three federal judges; those judges, in turn, were chosen for the task by Chief Justice Rehnquist.¹⁷⁰ In Akhil Reed Amar's eyes, the Chief Justice's selection of the panel that appointed Starr created a conflict of interest when the Chief Justice later presided over the President's trial in the Senate: "If Starr [was] not quite the chief's man, he [was] the man picked by the chief's men," and thus the Chief Justice could reasonably "be seen [as] linked to one side."¹⁷¹ Amar concluded that this was "uncomfortably close to the kind of appearance of impropriety that the Framers meant to avoid when they displaced the Vice President from the chair."¹⁷²

If such concerns can arise when the Chief Justice is loosely tied to the prosecution, then surely they can arise when the Chief Justice is loosely tied to the defense. Suppose, for example, that President Richard Nixon had not resigned in 1974, just days before the House Judiciary Committee was scheduled to decide whether to recommend impeachment.¹⁷³ The man who would have presided over the President's Senate trial was Chief Justice Warren Burger, whom President Nixon had appointed five years earlier.¹⁷⁴ Burger had lobbied tirelessly for the position of Chief Justice.¹⁷⁵ He had given President Nixon copies of one of his own speeches, for example, and had sent the President's staff "little notes from time to time signed 'W.E.B.' about the Supreme Court, law enforcement and the President's policies."¹⁷⁶ In an effort to appear helpful, he sent the President

¹⁷⁰ See Amar, *supra* note 149, at 297-98 (noting Chief Justice Rehnquist's selection of the three-judge panel).

¹⁷¹ *Id.* at 298.

¹⁷² *Id.* at 312. The appearance of those conflicts of interest might help to explain why Chief Justice Rehnquist chose to take such a passive approach in his role as presiding officer. See *supra* notes 163-67 (describing Chief Justice Rehnquist's performance).

¹⁷³ His presidency collapsing under the weight of the Watergate scandal, President Nixon resigned on August 9, 1974. Days later, the House Judiciary Committee voted unanimously to recommend impeachment. See MICHAEL A. GENOVESE, *THE NIXON PRESIDENCY* 220 (1990) (discussing President Nixon's resignation).

¹⁷⁴ See *THE SUPREME COURT JUSTICES*, *supra* note 112, at 483 (noting that President Nixon nominated Chief Justice Burger on May 21, 1969, and that the Senate confirmed the nomination on June 9, 1969).

¹⁷⁵ See JOHN W. DEAN, *THE REHNQUIST CHOICE* 12 (2001) ("Warren Burger . . . was energetically seeking the job [of Chief Justice]. He was an able politician who realized that his judicial philosophy was exactly what Richard Nixon sought."); *id.* at 14 (quoting Attorney General John Mitchell as saying, "Burger's the first guy to run for the job of Chief Justice—and get it"); see also JOHN EHRLICHMAN, *WITNESS TO POWER: THE NIXON YEARS* 113-18 (1982) (describing President Nixon's decision to nominate Chief Justice Burger).

¹⁷⁶ EHRLICHMAN, *supra* note 175, at 114.

names of individuals he thought should be considered for other judicial appointments.¹⁷⁷ Burger reportedly even went so far as to promise President Nixon that he would resign prior to the end of the President's tenure in office, "so that Nixon could then appoint another, younger Chief Justice to carry the Nixon mandate far beyond the Burger and Nixon years."¹⁷⁸ Once in office, the Chief Justice continued to send the President "a steady stream of notes and letters," some of them voicing strong support for the President's policies in Vietnam.¹⁷⁹ On several occasions, he asked the White House (unsuccessfully) for the use of the Executive Branch's jets and helicopters.¹⁸⁰ When another vacancy opened on the Court and the President contemplated a woman to fill it, the Chief Justice "hinted that a woman on the Court was unacceptable to him, and Nixon backed away."¹⁸¹ In light of Chief Justice Burger's persistent efforts to establish and maintain good relations with the White House, would he really have found himself able to approach the President's trial in the Senate with the necessary measure of impartiality?¹⁸² Would he have enjoyed the confidence of the American public?

Similarly, if President George W. Bush were impeached,¹⁸³ the presiding officer at his trial in the Senate would be Chief Justice John Roberts, whom President Bush appointed to the Court's top post in

¹⁷⁷ *Id.* at 125; *see also* DEAN, *supra* note 175, at 13 (stating that Nixon asked for Burger's suggestions and "Burger was flattered, and pleased to assist").

¹⁷⁸ EHRLICHMAN, *supra* note 175, at 114-15.

¹⁷⁹ *Id.* at 132.

¹⁸⁰ *Id.* at 131-32.

¹⁸¹ GENOVESE, *supra* note 173, at 43; *see also* DEAN, *supra* note 175, at 137-38, 179-84 (stating, in stronger terms, that Burger was firmly opposed to placing a woman on the Court and had threatened to resign if Nixon nominated Mildred Lillie).

¹⁸² I do not mean to say that Chief Justice Burger undoubtedly would have handled the assignment irresponsibly. After all, approximately two weeks before President Nixon resigned, the Chief Justice delivered the opinion of a unanimous Court requiring the President to surrender tape recordings of his Oval Office conversations with advisers. *See United States v. Nixon*, 418 U.S. 683 (1974). It does seem fair to ask, however, how Chief Justice Burger would have conducted himself once he was separated from the company of his eight colleagues and placed at the head of the Senate in the trial of the man whose favor he had so diligently courted.

¹⁸³ Speculation concerning President Bush's impeachment occasionally preceded the fall 2006 elections. *See, e.g.,* David D. Kirkpatrick, *Call for Censure Is Rallying Cry to Bush's Base*, N.Y. TIMES, Mar. 16, 2006, at A1 ("Republicans, worried that their conservative base lacks motivation to turn out for the fall elections, have found a new rallying cry in the dreams of liberals about censuring or impeaching President Bush."); Morton Kondracke, *Democrats Better Be Careful Shooting Off I-Word*, CHICAGO SUN-TIMES, Nov. 23, 2005, at 51 ("The 2006 election is shaping up to be a bitterly fought referendum on President Bush—to the point where, if Democrats win, they just might impeach him."); Stephanie Mansfield, *Vermont Towns Call for Bush's Impeachment*, WASH. TIMES, Mar. 14, 2006, at A6 (reporting that four Vermont towns passed resolutions calling for President Bush's impeachment).

2005.¹⁸⁴ That arrangement undoubtedly would strike many observers as problematic. Just as fundamental principles of justice dictate that a person cannot serve as the judge in his or her own case,¹⁸⁵ neither does it seem that the President should be permitted to select the individual who would preside over his or her trial—to give the President that power only invites critics to accuse the Chief Justice of partiality. After all, if critics charged Chief Justice Chase with bias because President Johnson appeared at one of the Chief Justice’s social events,¹⁸⁶ then critics certainly could charge Chief Justice Roberts with bias because President Bush had personally chosen him for the nation’s most prestigious judicial office.¹⁸⁷ The Chief Justice himself would likely be uncomfortable presiding over the trial of the person who had given him such a tremendous honor. These concerns are akin to those that inspired Gouverneur Morris and Roger Sherman to argue in 1787 that the Senate, rather than the Supreme Court, should be given jurisdiction over impeachment trials: it would be improper to entrust an impeached President to the care of Justices whom he appointed.¹⁸⁸

When one contemplates the spectacle of Chief Justice Burger presiding over President Nixon’s impeachment trial or of Chief Justice Roberts presiding over the impeachment trial of President Bush, one can see that the delegates to the 1787 Convention did not fully address the concerns Morris and Sherman raised. The delegates themselves should have spotted the problem, particularly in light of their expectation that the Chief Justice would serve as one of the President’s closest advisers.¹⁸⁹ Such an advisory relationship would surely give rise to conflicts of interest when the Chief Justice was called upon to preside over the President’s trial. At the time, however, the delegates likely concluded that any plausible candidate for

¹⁸⁴ See *supra* notes 1–4 and accompanying text (discussing Chief Justice Roberts’s appointment).

¹⁸⁵ See *In re Murchison*, 349 U.S. 133, 136 (1955) (“[N]o man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.”); *Calder v. Bull*, 3 U.S. 386, 388 (1798) (stating that “a law that makes a man a Judge in his own cause” would be “against all reason and justice”); THE FEDERALIST NO. 10, at 74 (James Madison) (Clinton Rossiter ed., 1999) (“No man is allowed to be a judge in his own cause . . .”). The maxim traces its roots to Lord Coke in the early seventeenth century. See *Dr. Bonham’s Case*, 77 Eng. Rep. 646, 652 (C.P. 1610) (“No man shall be a judge in his own cause.”).

¹⁸⁶ See *supra* note 158 and accompanying text (noting this criticism of Chief Justice Chase).

¹⁸⁷ Cf. MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1) (2004) (“A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned . . .”). To hold the position of Chief Justice is unquestionably a great honor. See FRANK, *supra* note 34, at 71 (“Popular mythology makes the Chief Justiceship much of what it is, in part because there have been some very great Chief Justices whose personal glory has rubbed off on the office . . .”).

¹⁸⁸ See *supra* notes 138, 142 and accompanying text (noting Morris’s and Sherman’s arguments).

¹⁸⁹ See *supra* notes 64–101 and accompanying text (discussing this expectation).

the position of presiding officer would present some measure of conflict and that the Chief Justice was no worse than the alternatives: each member of Congress could be identified as either a political ally or a political opponent of the President; the Vice President would inherit the powers of the presidency if the Senate voted to convict; and any member of the federal judiciary would trace his or her appointment to the Executive Branch.¹⁹⁰ The delegates were likely also influenced by their familiarity with Great Britain's House of Lords. Because the House of Lords had long served important judicial functions and the Lord Chancellor (the kingdom's highest judicial official) was its presiding officer, the delegates probably found it fairly easy to envision America's highest judicial official presiding over the Senate when that body was acting in an important judicial capacity.¹⁹¹ (In that respect, Chief Justice Rehnquist's decision to preside over President Clinton's impeachment trial in a robe modeled after one worn in a dramatic depiction of the Lord Chancellor seems oddly fitting.¹⁹²)

Although the Framers tried to ameliorate the conflicts of interest they perceived, there is no reason to believe that the system they devised is immune to improvement. Indeed, in the closing passage of one of his *Federalist Papers* on the subject of impeachment, Alexander Hamilton conceded that the Framers' plans for impeachment trials might be imperfect, and he implicitly encouraged subsequent generations to explore possible refinements. But he urged his readers not to reject the entire Constitution merely because one set of provisions was susceptible to criticism:

But though one or the other of the substitutes which have been examined [regarding impeachment trials], or some other that might be devised, should be thought preferable to the plan, in this respect, reported by the Convention, it

¹⁹⁰ Although the power to try impeachments could have been conferred upon individuals entirely distinct from those staffing the federal government's three branches, Alexander Hamilton argued that such arrangements would have added unwarranted complexity and expense to the plan. See THE FEDERALIST NO. 65, *supra* note 140, at 395-96 (considering and rejecting alternatives, such as giving the power to try impeachments to officials drawn from state governments).

¹⁹¹ See *supra* notes 44-55 and accompanying text (describing the Lord Chancellor's status within the House of Lords and within Great Britain's judicial hierarchy); cf. THE FEDERALIST NO. 65, *supra* note 140, at 394 (stating that the Constitution assigns the Senate a "judicial character as a court for the trial of impeachments").

¹⁹² See *supra* note 167 and accompanying text (describing the origins of Chief Justice Rehnquist's yellow-striped robe).

will not follow, that the Constitution ought for this reason to be rejected. If mankind were to resolve to agree in no institution of government, until every part of it had been adjusted to the most exact standard of perfection, society would soon become a general scene of anarchy, and the world a desert. . . . [T]he adversaries of the Constitution . . . ought to prove, not merely that particular provisions in it are not the best, which might have been imagined; but that the plan upon the whole is bad and pernicious.¹⁹³

Today, we can see that there is indeed a way in which the nation could further minimize the conflicts of interest raised when the President is impeached. By stripping the Executive Branch of its traditionally recognized power to tell the Court who its top official will be, and by instead letting the Court's members designate their own leader, we would loosen the connections between the President and the judicial officer charged with presiding over the President's impeachment trial. It is possible, of course, that the Chief Justice selected by his or her colleagues would be an individual who was appointed by the currently sitting President, just as it is possible that the Chief Justice and the President would be members of the same political party. Even under those scenarios, however, the conflicts of interest would be significantly mitigated if the gratitude the Chief Justice felt for being honored with the Court's top position were owed to the Chief Justice's eight colleagues on the bench, rather than to the President on trial in the Senate.

The problem, in short, lies not with the method prescribed by the Constitution for conducting impeachment trials, but rather with a practice that emerged in the vacuum of constitutional silence—namely, permitting the President to decide (with the advice and consent of the Senate) who will be the Chief Justice. In light of the fact that the Constitution's sole reference to the Chief Justice appears in a provision placing him or her in a position of vital neutrality with respect to the President, it is remarkable that the nation has allowed the existing selection methodology to persist

¹⁹³ THE FEDERALIST NO. 65, *supra* note 140, at 399. Indeed, if the delegates had believed the Constitution was infallible, there would have been little need for them to define the circumstances in which it could be amended. *See generally* U.S. CONST. art. V (describing the methods by which the Constitution may be amended).

for so long. When the President is impeached, the nation would be better served if the Chief Justice had been selected by the Court itself.

IV. RETHINKING THE JUDICIARY'S INTERBRANCH RELATIONSHIPS

The judiciary is the only branch of the federal government whose leader has traditionally been selected by the other two branches: the President is elected by the Electoral College,¹⁹⁴ the House of Representatives elects its own Speaker,¹⁹⁵ the Vice President serves as the Senate's president,¹⁹⁶ and the Senate elects its own president pro tempore to preside in the Vice President's absence.¹⁹⁷ Although highly unique within the federal government, one cannot say that the existing method of selecting a Chief Justice violates the constitutional doctrine of separation of powers. When faced with allegations that one branch has intruded too far into the domain of another, courts place great weight on whether the practice at issue has deep roots in the nation's history¹⁹⁸—and the federal government has followed the same method of choosing chief justices for more than two centuries.¹⁹⁹ Moreover, the Supreme Court has emphasized that the separation-of-powers doctrine does not require the three branches to remain totally distinct from one another.²⁰⁰ Rather, it demands that each

¹⁹⁴ See U.S. CONST. amend. XII (specifying the election procedure).

¹⁹⁵ See *id.* art. I, § 2, cl. 5 ("The House of Representatives shall chuse their Speaker and other Officers . . .").

¹⁹⁶ See *id.* § 3, cl. 4 ("The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.").

¹⁹⁷ See *id.* § 3, cl. 5 ("The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President . . .").

¹⁹⁸ See, e.g., *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 230 (1995) ("Apart from the statute we review today, we know of no instance in which Congress has attempted to set aside the final judgment of an Article III court by retroactive legislation. That prolonged reticence would be amazing if such interference were not understood to be constitutionally proscribed."); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992) ("[T]he Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts."); Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 724 (1995) (stating that, "in light of the long and established history of congressional involvement in the rulemaking process," the doctrine of separation of powers likely does not bar Congress from prescribing rules of procedure for the courts to follow).

¹⁹⁹ See *supra* notes 5-12 and accompanying text (discussing the selection method's origins).

²⁰⁰ See, e.g., *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (stating that the three branches need not "be entirely separate and distinct"); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977) (stating that the Court has "squarely rejected the argument that the Constitution contemplates a complete division of authority between the three branches"); accord THE FEDERALIST NO. 47, at 297-98 (James Madison) (Clinton Rossiter ed., 1999) (arguing that the Constitution does not bar one branch of the federal government from having some measure of control or influence over the other two branches, so long as no branch possesses "the whole power" of another).

branch refrain from interfering with the “constitutionally assigned functions” of its counterparts.²⁰¹ History has demonstrated that allowing the President—acting with the advice and consent of the Senate—to choose the individual who will serve as Chief Justice does not hinder the Court’s ability to perform its core, adjudicatory functions.

Although the separation-of-powers doctrine does not forbid the existing method of selecting a Chief Justice, that methodology does raise important questions about whether the Court’s relationships with the President and the Senate are structured in an optimal fashion. I have already identified two reasons why the selection of a Chief Justice should be left to the Court itself: the existing selection process is based upon the anachronistic belief that the Chief Justice routinely serves the President in important ways²⁰² and it fosters troubling conflicts of interest when the Chief Justice is called upon to preside over the President’s impeachment trial in the Senate.²⁰³ There are at least three additional ways in which permitting the Court to choose its own leader would represent a better allocation of responsibilities among the federal government’s three branches. First, once it has determined that a Chief Justice nominee is worthy of a seat on the Supreme Court, the Senate has historically contributed very little to the effort to determine whether the nominee possesses that special blend of administrative ability and political savvy necessary to excel in the position of Chief Justice. Second, when the nominee for the position of Chief Justice is already a member of the Court, there is a risk that the Senate will behave in ways that conflict with the objectives underlying federal judges’ constitutional guarantees of life tenure and undiminished salaries. Third, the Court’s members are in a better position than the President and the Senate to identify an individual with the skills, personality traits, and intra-Court relationships necessary to serve effectively as the Justices’ leader.

²⁰¹ *Nixon*, 433 U.S. at 443 (stating that when determining whether a statute unconstitutionally encroaches upon the President’s domain, “the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions”); *see also* *Miller v. French*, 530 U.S. 327, 341 (2000) (“While the boundaries between the three branches are not hermetically sealed, the Constitution prohibits one branch from encroaching on the central prerogatives of another.”) (internal citations omitted); *id.* at 350 (holding that the challenged statute did not violate the separation-of-powers doctrine because it did “not deprive courts of their adjudicatory role”); *Mistretta*, 488 U.S. at 382 (stating that a concern about “encroachment and aggrandizement . . . has animated our separation-of-powers jurisprudence”); *accord* THE FEDERALIST NO. 48, at 305 (James Madison) (Clinton Rossiter ed., 1999) (“It is . . . evident that none of [the three branches] ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers.”).

²⁰² *See supra* notes 40-133 and accompanying text.

²⁰³ *See supra* notes 134-93 and accompanying text.

A. The Questionable Contributions of the Senate

Earlier, after posing a hypothetical scenario in which the President has decided that he wishes to elevate Associate Justice Smith to the position of Chief Justice, I asked what purpose would be served by requiring Justice Smith to go before the Senate for a second round of confirmation proceedings.²⁰⁴ One might expect the answer to be obvious: the Senate should be afforded an opportunity to determine whether Justice Smith possesses the abilities necessary not “merely” to be an Associate Justice, but to be the leader of the Supreme Court. One might imagine, in other words, that the Senate would want to examine Justice Smith’s qualifications in those areas that distinguish the position of Chief Justice from the position she already holds. In actuality, however, the Senate has demonstrated little interest in that task.

As those who watched John Roberts’s confirmation hearings in September 2005 know, the Senate Judiciary Committee spent very little time trying to determine whether Roberts possessed the administrative skills and vision appropriate for the office of Chief Justice. The Senators were far more interested in asking questions aimed at exploring Roberts’s legal philosophy, the opinions he wrote as a member of the United States Court of Appeals for the District of Columbia Circuit, and the impact he likely would have as one of the nine individuals ultimately responsible for interpreting federal law.²⁰⁵ With very few exceptions, in other words, the Senators’ questions were identical to those one would have expected to hear if Roberts had been nominated for the position of Associate Justice.

The Senate’s lack of concern about administrative matters in Roberts’s case was not unique. Consider the cases of the three individuals who preceded Roberts in the Court’s center chair: Earl Warren, Warren Burger, and William Rehnquist. When President Eisenhower nominated Earl Warren in September 1953, it was not yet the custom to ask judicial nominees to testify before the Senate Judiciary Committee.²⁰⁶ The committee did hear testimony from other individuals, but those witnesses’ remarks focused entirely on Warren’s general fitness to hold a seat on the

²⁰⁴ See *supra* notes 34–37 and accompanying text.

²⁰⁵ See *Confirmation Hearing on the Nomination of John G. Roberts, Jr., to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 141–449 (2005).

²⁰⁶ See CHRISTINE L. COMPSTON, *EARL WARREN: JUSTICE FOR ALL* 67 (2002) (stating that, at the time of Chief Justice Warren’s nomination, “a judicial nominee was not expected to testify before the Senate Judiciary Committee”).

Supreme Court.²⁰⁷ When President Nixon nominated Warren Burger in May 1969, Burger appeared briefly before the Senate Judiciary Committee, but the transcript of his testimony fills a mere twenty pages, only a few of which touch upon administrative responsibilities unique to the position of Chief Justice.²⁰⁸

When President Ronald Reagan nominated William Rehnquist for the position of Chief Justice in 1986, the nominee had already served on the Court as an Associate Justice for fifteen years. Prior to joining the Court in 1971, he had spent two days appearing before the Senate Judiciary Committee, giving testimony that fills more than two hundred pages of the transcript.²⁰⁹ In 1986, he again spent two days testifying before the Senate Judiciary Committee.²¹⁰ Reading the transcript of the 1986 hearings, one is struck by the Senate's lack of clarity about what, precisely, its task was. Because Rehnquist had been deemed worthy of a seat on the Court fifteen years earlier, many of the questions that Senators usually would ask—regarding judicial philosophy and the like—seemed unnecessary. After all, Rehnquist had participated in hundreds of Supreme Court decisions by that time, and so a great deal was already known about his views on judicial methodology and constitutional issues. Moreover, Rehnquist refused to answer specific questions about those decisions, arguing that fielding such questions “would be a form of being called to account here before the Senate Judiciary Committee for a judicial act which I performed as a member of the Supreme Court of the United States.”²¹¹ The scope of Senators' questions was limited still further by the committee's apparent

²⁰⁷ See *Hearings Before the S. Comm. on the Judiciary*, 83rd Cong. 1-104 (1954), as reprinted in 5 THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916-1986 (1989) [hereinafter HEARINGS AND REPORTS].

²⁰⁸ See *Nomination of Warren E. Burger: Hearing Before the S. Comm. on the Judiciary*, 91st Cong. 4-23 (1969), as reprinted in 7 HEARINGS AND REPORTS, *supra* note 207.

²⁰⁹ See *Nomination of William H. Rehnquist and Lewis F. Powell, Jr.: Hearings Before the S. Comm. on the Judiciary*, 92nd Cong. 16-86, 137-76, 184-97 (1971), as reprinted in 8 HEARINGS AND REPORTS, *supra* note 207. His testimony over those two days covered a broad spectrum of issues, ranging from his approach to constitutional interpretation, *see, e.g., id.* at 18-26, 81-82; to his “judicial philosophy,” *see, e.g., id.* at 26-29, 75-78, 156-60; to actions he took with respect to wiretapping while serving as Assistant Attorney General for the Office of Legal Counsel, *see, e.g., id.* at 48-52, 138-43, 192-94; to his assessment of the Warren Court, *see, e.g., id.* at 55-56, 159-62, 167-68; to allegations that he harassed and intimidated minority voters while working for the Republican Party in Phoenix in 1968, *see, e.g., id.* at 71-72.

²¹⁰ See *Nomination of Justice William Hubbs Rehnquist: Hearings Before the S. Comm. on the Judiciary*, 99th Cong. 129-212, 219-34, 262-81, 286-90, 295-323, 338-77 (1986), as reprinted in 12 HEARINGS AND REPORTS, *supra* note 207.

²¹¹ *Id.* at 220.

acceptance of a statement that Rehnquist made at the beginning of his testimony. Senator Strom Thurmond, the committee's chairman, asked Rehnquist the first question: "To what extent [do] you believe that a Chief Justice can influence, if at all, the philosophical direction of the Court?"²¹² Rehnquist replied:

[T]he Chief Justice does have . . . the authority to lead the conference discussion and the authority to assign cases. And I think both of these, properly exercised, can lead to a smoothly functioning Court. But the idea that the power to lead the conference discussion . . . means that the Chief Justice can pull the wool over other people's eyes by his discussion and make them think that green is blue, my 15 years on the Court convinces me that is not the case.

The same with the assignment power. The Chief Justice, by properly exercising the assignment power, can pick out the strengths and weaknesses of his colleagues, play on the strengths, avoid the weaknesses, and again, work toward a smoothly functioning Court. But if the Chief Justice assigns the case to someone who feels very much the way he does about it, but not like the majority of the Court feels about it, the person to whom the case is assigned is not going to be able to get a Court opinion. So I think the Chief Justice does have a leadership role, . . . but I do not think it has much to do with the philosophical direction of the Court.²¹³

Did the Senators thus focus their attention on those administrative aspects of the job that would be new to Rehnquist? No. His 1986 testimony fills more than one hundred and sixty transcript pages. Only a small number of those pages contain testimony focused on administrative matters of particular concern to the office of Chief Justice.²¹⁴ Instead, as

²¹² *Id.* at 129.

²¹³ *Id.* at 130

²¹⁴ See *id.* at 140-41 (discussing Rehnquist's administrative priorities); 172-75 (discussing the Supreme Court's workload and the means by which federal judges could be disciplined); *id.* at 176-78 (discussing Rehnquist's administrative priorities and the Supreme Court's workload); *id.* at 194-98

its final report to the full Senate makes clear, the committee focused its energies on other matters. The first four pages of the committee's final report contained general information about Rehnquist's background, information regarding the American Bar Association's endorsement of the nomination, and quotations from witnesses who testified in Rehnquist's favor.²¹⁵ The next eight pages discussed allegations that, in 1968, Rehnquist harassed and intimidated minority voters at polling places in Phoenix, Arizona (a matter that the Senate had briefly explored in 1971).²¹⁶ The following twelve pages addressed allegations that, in light of work he performed while serving as Assistant Attorney General, Rehnquist should have recused himself from the Court's decision in *Laird v. Tatum*²¹⁷ and should have been more candid regarding his knowledge of the facts in that case when testifying before the committee in 1971.²¹⁸ The committee then spent about three pages discussing a memorandum that Rehnquist wrote regarding *Brown v. Board of Education*²¹⁹ while serving as a clerk for Justice Robert Jackson.²²⁰ Two pages of the report discussed Rehnquist's handling of a family trust.²²¹ Finally, one page each was devoted to allegations that Rehnquist's dissenting opinions suggested he was "out of the mainstream,"²²² and to the fact that discriminatory restrictive covenants were attached to properties Rehnquist purchased in Arizona and Vermont.²²³ The committee did not devote a single paragraph to its assessment of Rehnquist's suitability for the tasks that are uniquely those of the Chief Justice.

What, then, did the Senators understand their task to be? The committee's final reports suggests the committee believed its job was primarily to reconfirm that Rehnquist possessed the character traits necessary to hold a seat on the Supreme Court. Those members of the committee who opposed Rehnquist's elevation made that belief clear, and

(same); *id.* at 201-02 (discussing the federal judiciary's workload); *id.* at 368-69 (discussing administrative matters).

²¹⁵ See S. EXEC. REP. NO. 99-18, at 1-4 (1986), as reprinted in 12A HEARINGS AND REPORTS, *supra* note 207, at 1481-84. The report noted that, "according to the ABA, Justice Rehnquist enjoys the respect and esteem of his colleagues on the Court." *Id.* at 3.

²¹⁶ See *id.* at 4-12.

²¹⁷ 408 U.S. 1 (1972).

²¹⁸ See S. EXEC. REP. NO. 99-18, *supra* note 215, at 13-25.

²¹⁹ 347 U.S. 483 (1954).

²²⁰ See S. EXEC. REP. NO. 99-18, *supra* note 215, at 25-28.

²²¹ See *id.* at 28-29.

²²² See *id.* at 29-30.

²²³ See *id.* at 30-31.

tried to attach particular significance to the fact that Rehnquist would hold the Court's highest post. Senator Joseph Biden stated, for example, that "[m]ore than any other individual, the Chief [Justice] symbolizes the guarantee of 'Equal Justice Under Law' for all Americans."²²⁴ Senator Edward Kennedy stated that the Chief Justice "is the highest symbol of America's commitment to the Constitution and the Bill of Rights," that he "is the ultimate protector of our freedoms and our system of equal justice under law," and that "the highest scrutiny should be reserved for the person nominated to be Chief Justice of the United States."²²⁵ Senator Patrick Leahy stated that the Chief Justice "is the person who, perhaps more than any other, embodies our principles of justice."²²⁶ Senator Paul Simon stated that the Chief Justice must be "the symbol of justice for all of our people."²²⁷

When offered as the primary rationale for Rehnquist's second round of confirmation hearings, those declarations are dissatisfyingly hollow. The Supreme Court is a powerful and prestigious institution. Each of its nine members holds a position of unparalleled importance and influence in the American judicial system. The notion that the Senate should be more forgiving of misconduct and character flaws when a person is nominated for the position of Associate Justice than when he or she is nominated for the position of Chief Justice is unacceptable on its face. If the Supreme Court is to retain the respect of the American people, all nine Justices should be held to the same exacting standard. *All* appointees to the Court should be screened to see whether they are fit to serve as a symbol and embodiment of America's commitment to justice, so that once a person takes a seat on the Court it is of little concern to the public whether the person holds the title of Associate Justice or Chief Justice. If the nation cannot locate nine individuals worthy of the highest measure of the people's trust, then it is in sorry shape indeed.²²⁸ If, on the other hand, the Senate deems a nominee worthy of a seat on the Court and information later surfaces raising questions about the propriety of the person's conduct, then Congress should determine whether impeachment proceedings are

²²⁴ *Id.* at 67.

²²⁵ *Id.* at 69.

²²⁶ S. EXEC. REP. NO. 99-18, *supra* note 215, at 108.

²²⁷ *Id.* at 114.

²²⁸ One is amusingly reminded of the biblical story in which Abraham negotiates with God about the number of righteous individuals that must be found in Sodom and Gomorrah in order for God to spare that city from destruction. *See Genesis* 18:20-33.

appropriate.²²⁹ But once the Senate has concluded that an individual is intellectually and morally fit to sit on the nation's highest court, and no new information has suggested that the individual should be stripped of that exalted status through impeachment, an added measure of Senate scrutiny should not be necessary to determine whether the individual possesses the traits necessary to serve as the Court's leader.

Moreover, to the extent that the Chief Justice does carry an added responsibility both to symbolize and to protect core principles of justice, there is no reason to be sure that the President and the Senate are better able than the members of the Court to identify a Justice who is up to the task. Indeed, the Court has strong incentives to select a Chief Justice who will maintain, or even enhance, the Court's credibility in the eyes of the public. To select a partisan ideologue or a person whose character has been widely called into question would only invite politicians and their constituents to explore ways of reducing the Court's power and influence. There is no reason to think that the Justices are less likely than the President and the Senate to select a figurehead who will represent the federal judiciary effectively.

B. The Tension with Justices' Constitutional Guarantees

Not only should the Senate hold each nominee to the same demanding standard of fitness for a seat on the Court—thereby making it unnecessary for the Senate to conduct a further assessment of a sitting Justice's character when he or she is elevated to the rank of Chief Justice—but there is a significant risk that, when asked to determine whether an Associate Justice should be elevated, the Senate will behave in ways that are in tension with the objectives underlying the nominee's constitutional guarantees of political protection. Article III states that “[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour,” and that their salaries “shall not be diminished during their Continuance in Office.”²³⁰ Although the guarantee of life tenure is increasingly controversial,²³¹ the nation does not appear poised to change

²²⁹ See U.S. CONST. art. II, § 4 (stating that “all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors”).

²³⁰ U.S. CONST. art. III, § 1.

²³¹ See, e.g., Ward Farnsworth, *The Regulation of Turnover on the Supreme Court*, 2005 U. ILL. L. REV. 407, 407-08 (stating the author's intent to defend life tenure against its many recent attacks); Philip D. Oliver, *Systematic Justice: A Proposed Constitutional Amendment to Establish Fixed, Staggered Terms for Members of the United States Supreme Court*, 47 OHIO ST. L.J. 799, 800 (1986).

it. Instead, Americans have continued to be persuaded by the argument Alexander Hamilton made in *Federalist No. 78*: “The standard of good behavior for the continuance in office of the judicial magistracy . . . is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws.”²³² Continuing the theme in *Federalist No. 79*, Hamilton declared that “[n]ext to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support.”²³³ The clear objective of both constitutional guarantees is to ensure that federal judges are free to interpret and apply the law to the best of their abilities, without fear of political retribution when their rulings make powerful politicians or citizens unhappy.

That objective is threatened when the Senate is asked to determine whether an Associate Justice should be elevated to the Court’s leadership post. The Senate may find it irresistibly tempting to use the occasion as an opportunity to reward or punish the Justice for his or her prior rulings on the Court. When an individual who has served on one of the nation’s lower tribunals is nominated for a seat on the Court, it is surely appropriate for the Senate to examine the nominee’s judicial record in order to determine his or her fitness for the nation’s highest judicial body. Indeed, the Constitution expressly requires the Senate to provide its advice and consent on the President’s Supreme Court nominees;²³⁴ it would be perverse for the Senate to close its eyes to one of the best sources of information about the kind of Supreme Court Justice that a particular nominee might be. But once the Senate has determined that an individual

(proposing that Supreme Court Justices be limited to eighteen-year terms); Saikrishna B. Prakash, *America’s Aristocracy*, 109 YALE L.J. 541, 568-84 (1999) (reviewing MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999)) (arguing that federal judges should be stripped of life tenure); Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 640-41 (2005) (suggesting that Article III might not bar Congress from establishing a fixed retirement age for federal judges).

²³² THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1999); *see also id.* at 438-39 (“That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission.”); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59 (1982) (stating that the purpose of life tenure is “to ensure the independence of the Judiciary from the control of the Executive and Legislative Branches of government”); *United States v. Will*, 449 U.S. 200, 217-18 (1980) (“A Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government.”).

²³³ THE FEDERALIST NO. 79, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

²³⁴ *See* U.S. CONST. art. II, § 2, cl. 2 (stating that the President, “by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court”).

is fit for Supreme Court membership and the individual has taken his or her seat on the Court, the Senate should be exceedingly reluctant, absent a constitutional necessity, to take actions that could reasonably be construed as rewarding or punishing the Justice for the votes he or she has cast while on the Court.

During its 1968 hearings for Justice Abe Fortas's bid to become Chief Justice, the Senate Judiciary Committee questioned Justice Fortas extensively about votes he had cast while a member of the Court. Senator Sam Ervin, for example, filled nearly forty pages of the transcript with descriptions of controversial Supreme Court rulings in which Justice Fortas had participated.²³⁵ Senator Strom Thurmond filled nearly forty additional pages in the same manner.²³⁶ Justice Fortas refused to answer those questions, stating that the separation-of-powers doctrine prevented him from fielding the Senate's questions about his actions as a member of the Court.²³⁷ When Justice Fortas's nomination later encountered a filibuster on the Senate floor, President Johnson withdrew it.²³⁸

During then-Justice Rehnquist's 1986 testimony before the Senate Judiciary Committee, the Senators appeared to accept the nominee's declaration that he would not discuss the opinions he had written while on the Court because answering Senators' questions about those rulings "would be a form of being called to account here before the Senate Judiciary Committee."²³⁹ Nevertheless, Rehnquist's votes in particular cases clearly played a role in shaping Senators' assessment of his suitability for the position of Chief Justice. In its report to the full Senate, for example, the Senate Judiciary Committee asserted that Rehnquist was

²³⁵ See *Nomination of Abe Fortas: Hearings Before the S. Comm. on the Judiciary*, 90th Cong. 126-64 (1968) (providing a transcript of Senator Ervin's questions).

²³⁶ See *id.* at 180-223.

²³⁷ See, e.g., *id.* at 214-15 (making this argument on one of many such occasions).

²³⁸ See THE SUPREME COURT JUSTICES, *supra* note 112, at 475 (noting President Johnson's decision to withdraw the nomination). Justice Fortas's bid to become Chief Justice failed for numerous reasons:

[C]ronyism, the timing of the nomination [just weeks before a presidential election], the political climate, accumulated hostility to the Warren Court, Fortas's posture on some of the more controversial issues in which he participated (and some in which he did not), charges of judicial impropriety by his continuing extrajudicial active counseling of the president, and the revelation that he had accepted a then-huge lecture fee (\$15,000) to conduct a series of university seminars . . . at American University during the summer of 1968 combined ultimately to doom the proposed Fortas promotion . . .

ABRAHAM, *supra* note 7, at 219. Amidst allegations of financial impropriety in yet another matter, Associate Justice Fortas resigned from the Court the following year. See THE SUPREME COURT JUSTICES, *supra* note 112, at 475.

²³⁹ See *supra* note 211 and accompanying text.

“very much in the mainstream of the current Court” and had shown himself to be “one who believes in equal justice for all.”²⁴⁰ Those who opposed Rehnquist’s elevation saw Rehnquist’s record differently. Senator Joseph Biden stated, for example, that he was troubled by Rehnquist’s “actions as a member of the Court over the past 15 years, especially whether he has an open mind with regard to the application of the fourteenth amendment in race and gender discrimination cases.”²⁴¹ Senator Edward Kennedy stated that “[i]n his 15 years on the Supreme Court, Justice Rehnquist has compiled a record of consistent opposition to individual rights in all areas—minority rights, women’s rights, religious liberty, rights of the poor, rights of aliens, and rights of children.”²⁴² Senator Howard Metzenbaum stated that he believed Rehnquist’s record “shows he recognizes an extremely narrow role for the Constitution in protecting individual liberties against the invasive hand of big Government.”²⁴³

In 2005, when it became clear that Chief Justice Rehnquist’s health would prevent him from serving on the Court much longer, speculation arose that President Bush might nominate Justice Antonin Scalia to replace Chief Justice Rehnquist in the Court’s center chair.²⁴⁴ Many predicted, however, that Justice Scalia’s controversial voting record would provoke a bruising confirmation battle in the Senate.²⁴⁵ In the end, the President nominated an individual who presented fewer political risks.²⁴⁶

The office of Chief Justice should not be offered as a reward for those members of the Court whose rulings the Senate finds favorable; neither should the office be withheld from those members of the Court whose

²⁴⁰ S. EXEC. REP. NO. 99-18, *supra* note 215, at 30.

²⁴¹ *Id.* at 68.

²⁴² *Id.* at 75.

²⁴³ *Id.* at 100.

²⁴⁴ See, e.g., Warren Richey, *One Scenario: Chief Justice Scalia?*, CHRISTIAN SCI. MONITOR, May 13, 2005, at 1 (“Justice Scalia, who has served on the high court since 1986, is frequently mentioned as a potential nominee for the top post should Chief Justice William Rehnquist announce his retirement.”).

²⁴⁵ See, e.g., John M. Broder, *Have a Seat, Your Honor (Presidents Wish It Were that Easy)*, N.Y. TIMES, July 10, 2005, at 4:3 (stating that nominating Justice Scalia for the position of Chief Justice “would require an additional confirmation vote and perhaps drive the Judiciary Committee and the interest groups batty”); Peter S. Canellos & Susan Milligan, *From Troubled Present, a Chance to Shape Future: Bush’s Problems May Limit Strategy He Takes with Court*, BOSTON GLOBE, Sept. 5, 2005, at A9 (stating that “confirmation hearings for Scalia would likely raise politically uncomfortable issues for the administration”).

²⁴⁶ See Lorraine Woellert, *Why Not Scalia? The Pugnacious Darling of the Right Was Sidelined by the Political Calculus*, BUSINESS WEEK, Sept. 19, 2005, at 56 (stating that, by nominating John Roberts to succeed William Rehnquist, the President “avoid[ed] what would have been a nasty political fight over Scalia’s nomination” at a time when the President was already facing numerous political difficulties).

rulings the Senate finds objectionable. Such behavior by the Senate does not violate the Justices' constitutional guarantees of life tenure and undiminished salaries, but it certainly is in tension with the objectives that underlie those constitutional assurances. If a Justice's rulings demonstrate that he or she is no longer willing to abide by his or her oath to uphold the Constitution, then the proper remedy is not to deny him or her a promotion to a position with more significant administrative responsibilities, but rather to remove him or her from the bench through impeachment.²⁴⁷ But if a Justice's rulings are based upon good-faith interpretations of the law, and if the nation believes that our legal system functions best when federal judges are free to interpret and apply the law without worrying about their rulings' political popularity, then we should be loathe to permit the kind of mid-career assessments that are demanded by the current method of elevating an Associate Justice to the position of Chief Justice.

C. The Justices' Informational Advantages

Court observers take great pleasure in speculating about the nature of Justices' relationships with one another. For example, when rumors were circulating in the spring of 2005 that Chief Justice Rehnquist would soon retire and that President Bush might nominate Justice Scalia to succeed him, some argued that Justice Scalia would be a poor choice because he had a "prickly relationship" with Justice O'Connor²⁴⁸ and had alienated many of his colleagues with his "short temper and biting pen."²⁴⁹ Those assessments might very well have been accurate. But no one knows the truth regarding such matters better than the members of the Court. Rather than ask the President and the Senate to speculate about the ways in which the Justices' personalities mesh or conflict with one another and about the skills and personality traits that would enable a person to lead that group of individuals effectively, it would make far more sense to allow the Justices to make that determination for themselves.

Our system of divided government is based, in part, on the conviction that each branch possesses its own unique institutional competencies.²⁵⁰

²⁴⁷ Cf. Laurence H. Tribe, *Defining "High Crimes and Misdemeanors": Basic Principles*, 67 GEO. WASH. L. REV. 712, 717 (1999) ("A President who completely neglects his duties . . . would be guilty of no crime but would certainly have committed an impeachable offense.").

²⁴⁸ Richey, *supra* note 244, at 1.

²⁴⁹ Woellert, *supra* note 246, at 56.

²⁵⁰ See Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1504 (1984) ("Separation-of-power principles are closely related to the concept of the limited institutional

When asked to resolve a dispute about the Constitution's allocation of power among the three branches, federal courts often attempt to discern which branch is best positioned to carry out the task at issue. The political-question doctrine, for example, serves to ensure that the courts refrain from deciding issues that the political branches are better equipped to resolve.²⁵¹ An assessment of institutional competency is similarly appropriate when creating the nation's methodology for choosing a Chief Justice. The power to determine which of the nine Justices will serve as the Court's leader should rest in the hands of those who are best able to evaluate each candidate's ability to provide the leadership that the Court needs in order to carry out its core, adjudicatory functions effectively.

Such considerations weigh heavily in favor of giving the Court itself the power to choose a Chief Justice. Due to a mixture of prudence and necessity, most of the Justices' interactions with one another remain shielded from public view. The Justices' law clerks gain a certain measure of exposure to the Justices' conversations with one another about the cases that come before them, but even they do not enjoy access to all of those discussions.²⁵² Moreover, there is a powerful and rarely breached understanding among those who work at the Court that the discussions that occur within the Justices' chambers should remain hidden behind a veil of secrecy.²⁵³ Not surprisingly, therefore, no one other than the Justices themselves knows exactly what the personal dynamics are between them.

competence of each branch of the federal government.”); Robert A. Destro, *Federalism, Human Rights, and the Realpolitik of Footnote Four*, 12 WIDENER L.J. 373, 383 (2003) (“Sovereign immunity, federalism, and separation of powers are structural issues derived from a far more fundamental issue: institutional competence.”); M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 624-25 (2001) (noting that separation-of-powers analysis can be based on judgments about each branch's institutional competency).

²⁵¹ See *Baker v. Carr*, 369 U.S. 186, 217 (1982) (stating that a case might present a nonjusticiable political question if, among other things, there is “a lack of judicially discoverable and manageable standards for resolving it” or if it cannot be adjudicated “without an initial policy determination of a kind clearly for nonjudicial discretion”); see also Barbara E. Armacost, *Affirmative Duties, Systemic Harms, and the Due Process Clause*, 94 MICH. L. REV. 982, 1039 (1996) (“Th[e] notion that certain kinds of decisions should be left to the political branches rather than the courts . . . is grounded in the separation of powers and includes the familiar idea that the various branches have different areas of institutional competence.”).

²⁵² See Alex Kozinski, *Conduct Unbecoming*, 108 YALE L.J. 835, 877 (1999) (“Though [the Justices' clerks] work within the Court, they gain little reliable information as to what goes on inside other Justices' chambers.”).

²⁵³ The most well-known breach of this understanding is Edward Lazarus's book about the year Lazarus clerked for Justice Harry Blackmun. See EDWARD LAZARUS, *CLOSED CHAMBERS: THE RISE, FALL, AND FUTURE OF THE MODERN SUPREME COURT* (1999). Lazarus was sharply criticized for what many regarded as an inexcusable breach of confidentiality. See, e.g., Kozinski, *supra* note 252, at 837 (stating that former “clerks may have spoken anonymously [to reporters] on occasion, but the

The Court's nine Justices are thus in a superior position to determine who among them is best equipped to serve as the Court's leader. Admittedly, Congress has assigned the Chief Justice a number of extrajudicial statutory responsibilities,²⁵⁴ and the Court's members may not be any better positioned than the President and the Senate to identify an individual capable of carrying out those administrative tasks. But administrative ability of the sort required by the Chief Justice's statutory duties has never been the President's and the Senate's focus when evaluating an individual's suitability for the Court's top post.²⁵⁵ When filling a vacancy in the office of Chief Justice, it is far more important to determine whether a candidate is capable of helping the Court's members carry out the adjudicatory functions that the Constitution requires them to perform. No one is in a better position than the Justices to make that determination.

V. CONCLUSION

When an individual joins an organization and, after a period of observation, approaches his or her colleagues with ideas about how their operations might be improved, there are few things he or she finds more dissatisfying to hear than the comment, "Well, that's just the way we've always done things around here." Sometimes, of course, an entity's traditions can usefully reflect many generations' best judgment about how certain tasks should be performed. On other occasions, however, an unexamined adherence to tradition can prevent an organization's members from recognizing ways in which their behaviors are less than optimal.

Legal institutions are certainly not exempt from the possibility that tradition, while bringing stability and wisdom to some dimensions of their activities, will mask undesirable risks and inefficiencies in others. That possibility is particularly great when the tradition emerged without debate and has been allowed to persist without ever being questioned. One will

overwhelming majority do not because they consider it ethically improper"); *id.* at 875-77 (recounting some of the sharp criticism Lazarus received and stating the author's overarching thesis that such criticism was well deserved).

²⁵⁴ See *supra* notes 116-29 and accompanying text (describing some of the Chief Justice's statutory duties).

²⁵⁵ See *supra* notes 204-29 and accompanying text (describing the Senate's negligible interest in evaluating Chief Justice nominees' administrative talents).

find no better example of that phenomenon than the federal government's method of choosing a Chief Justice.

When President Washington sent the Senate his nominations for the Supreme Court's first slate of Justices in the fall of 1789, he did not give the Senators an undifferentiated list of names. Instead, he stated that he wanted his friend John Jay to fill the position of Chief Justice.²⁵⁶ Although the matter was not debated at the 1787 Convention in Philadelphia and the Constitution itself did not speak to the issue,²⁵⁷ President Washington and his contemporaries simply assumed that the President—acting with the advice and consent of the Senate—would have the power to decide which of the Justices would serve as the Supreme Court's leader. That arrangement undoubtedly seemed appropriate at the time. Many believed that the Chief Justice would be an important member of the President's team of advisers, and so, just as it made sense for the President to be able to select his or her own Cabinet officials, it seemed sensible for the President to choose the individual who would fill the office of Chief Justice.²⁵⁸ The wisdom of that selection methodology likely appeared confirmed when the President proceeded to ask Chief Justice Jay for advice and assistance, ranging from advising the President how he should respond to pardon petitions, to helping the President prepare his speeches to Congress, to finding ways to reduce the fledgling nation's war debt, to traveling overseas to negotiate a treaty with Great Britain.²⁵⁹

Although the cooperative working relationship between the President and the Chief Justice was soon severed,²⁶⁰ the Executive Branch has continued to claim that one of its prerogatives—so long as it can secure the Senate's agreement—is to tell the Supreme Court who its leader will be. It certainly is not a prerogative that one would expect the Executive Branch to surrender of its own accord. Nor would one expect the Senate suddenly to announce that it was volunteering to give up its role in the selection

²⁵⁶ See *supra* notes 8-10 and accompanying text (discussing President Washington's first slate of nominees).

²⁵⁷ See *supra* notes 13-21 and accompanying text (noting the Convention's and the Constitution's silence on the question of how the Chief Justice should be chosen).

²⁵⁸ See *supra* notes 66-86 and accompanying text (discussing the expectation that the Chief Justice would serve the President in numerous ways).

²⁵⁹ See *supra* notes 87-101 and accompanying text (discussing some of the ways in which President Washington relied upon Chief Justice Jay for advice and assistance).

²⁶⁰ See *supra* notes 102-15 and accompanying text (discussing some of the reasons why the advisory relationship was severed).

process. Nevertheless, the federal government's method of choosing a Chief Justice should be changed.

The President and the Senate should continue to fill vacancies on the Supreme Court in the manner prescribed by the Constitution. But once all nine of the Court's seats have been filled, the Court's members should be allowed to decide which of them will serve as Chief Justice. The rationale for permitting the President to choose the Court's leader became anachronistic many generations ago;²⁶¹ the nation should never be subjected to the spectacle of a Chief Justice presiding over the impeachment trial of the very President who appointed him or her to the Court's center chair;²⁶² the Senate has shown little interest in determining whether a Chief Justice nominee is well equipped to carry out those administrative duties that distinguish the job of Chief Justice from that of Associate Justice;²⁶³ when asked to determine whether an Associate Justice should be elevated to the office of Chief Justice, the Senate has found it difficult to resist the temptation to evaluate the Associate Justice's record in ways that conflict with the objectives underlying federal judges' constitutional guarantees of life tenure and undiminished salaries;²⁶⁴ and the Justices are better informed than the President and the Senate about the personal dynamics between the Justices and about the kinds of skills and traits necessary to lead those particular individuals effectively.²⁶⁵ A significant majority of the states already bar their governments' political branches from playing any formal role in deciding who among their highest courts' members will serve as chief justice.²⁶⁶ It is time for the federal government to follow suit.

²⁶¹ See *supra* notes 34-133 and accompanying text (making this argument).

²⁶² See *supra* notes 134-93 and accompanying text (making this argument).

²⁶³ See *supra* notes 204-29 and accompanying text (making this argument).

²⁶⁴ See *supra* notes 230-47 and accompanying text (making this argument).

²⁶⁵ See *supra* notes 248-55 and accompanying text (making this argument).

²⁶⁶ See *supra* notes 24-32 and accompanying text (discussing the states' varying methods of selecting chief justices).