

ADVICE AND CONSENT: A HISTORICAL ARGUMENT FOR SUBSTANTIVE SENATORIAL INVOLVEMENT IN JUDICIAL NOMINATIONS

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INTRODUCTION

The events surrounding the 2000 presidential election gave rise to political outcry and heated debate. Crisis and controversy in elections, particularly presidential elections, strike at the heart of the American political system and call into question the legitimacy of elected leaders and the political process itself. Nonetheless, controversial presidential elections are not new to American politics.¹ The question is how American politics should respond to tumultuous presidential elections. The answer, far from requiring a radical response, can be determined through an examination of the foundations of the Constitution and the history of American political practices.

During the controversial struggle over the counting of votes in the 2000 presidential election and after the subsequent recognition that George W. Bush would become the forty-third President of the United States in January of 2001, Bush's critics raised questions about the potential impropriety of his executing certain functions of the presidency.² In particular, Bush's critics pointed to Supreme Court nomi-

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1. For example, the election of 1876 was marred by a dispute over whether the Democratic candidate, Samuel Tilden, winner of the popular vote, or the Republican candidate, Rutherford B. Hayes, had actually won the electoral votes in several southern states. Tilden, of course, did not win the 1876 presidential election. For a lengthier description of the controversy, see generally PAUL LELAND HAWORTH, *THE HAYES-TILDEN DISPUTED PRESIDENTIAL ELECTION OF 1876* (1906).

2. For criticisms of Bush's legitimacy as President generally, see *Pomp and Shame*, NATION, Feb. 5, 2001, at 3; David Slive, *Opposing Bush Can Force Modera-*

nations as one of the primary powers that Bush should have little or no right to exercise in light of the fact that it was the Supreme Court who ultimately resolved the question of how votes would be counted in the critical state of Florida.³ One of the most prominent of these critics was Yale Law Professor Bruce Ackerman, who bluntly stated in an editorial in *The American Prospect*, “When sitting justices retire or die, the Senate should refuse to confirm any nominations offered up by President Bush.”⁴ In support of this approach, Ackerman cited the Senate’s refusal to confirm any of President Andrew Johnson’s nominees and its contraction of the Court during Johnson’s presidency in an effort to prevent him from changing the composition of the Court.⁵

In contrast, supporters of President Bush have asserted that his nominations are due as much deference as any other president, and that the Senate should act on them with the usual speed.⁶ Additionally, some scholars have argued that political factors should play little or no role in the judicial confirmation process, and that the process should simply focus on whether or not an individual nominee is qualified to serve.⁷

This Note will argue that there is a legitimate middle ground between Ackerman and his supporters’s⁸ position and the idea that Bush’s nominees should be due the same deference as the nominees of any other president. Both views are inconsistent with the history of how

tion, BUFFALO NEWS, Feb. 17, 2001, at C9. See also Jonathan Peterson et al., *Protests, Tight Security Line Bush Parade Route*, L.A. TIMES, Jan. 21, 2001, at A1 (chronicling demonstrations against Bush’s inauguration). For surveys of the election and post-election, see, for example, JAKE TAPPER, *DOWN AND DIRTY: THE PLOT TO STEAL THE PRESIDENCY* (2001); JEFFREY TOOBIN, *TOO CLOSE TO CALL* (2001).

3. See, e.g., Paul Begala, *What Does W Stand For?*, ESQUIRE, Apr. 2001, at 144, 168 (noting Senator Edward Kennedy’s apparent reticence to confirm Bush’s Supreme Court nominees); *Here Come the Judges*, NATION, Apr. 16, 2001, at 3 (suggesting extensive scrutiny of all of Bush’s judicial nominations); Jamin B. Raskin, *Bandits in Black Robes*, WASH. MONTHLY, Mar. 2001, at 25, 28 (arguing that “Senate must give no presumptive weight to the Bush administration’s judicial selections”).

4. Bruce Ackerman, *The Court Packs Itself*, AM. PROSPECT, Feb. 12, 2001, at 48, 48.

5. *Id.*

6. See, e.g., Byron York, *Cheney Jumps In*, NAT’L REV., Dec. 5, 2001, at <http://www.nationalreview.com/york/yorkprint120501b.html> (discussing Vice-President Cheney’s letter calling upon Senate Judiciary Committee to hold hearings and confirm more of Bush’s lower court nominees) (on file with the *New York University Journal of Legislation and Public Policy*).

7. See, e.g., Richard D. Friedman, *Tribal Myths: Ideology and the Confirmation of Supreme Court Nominations*, 95 YALE L.J. 1283 (1986) (reviewing and extensively criticizing LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY* (1985)).

8. See, e.g., *Here Come the Judges*, *supra* note 3, at 3 (stating approval of Ackerman’s suggestion that no Supreme Court Justices nominated by Bush be confirmed).

Supreme Court nominees have been scrutinized as part of the confirmation process. Part I of this Note briefly lays out the fundamental issues associated with the confirmation of Justices to the Supreme Court, including both the historical and contemporary disputes over the proper scope of legislative power in this arena. Part II examines the debates at the Constitutional Convention and the debates over ratification of the Constitution in the founding era, and concludes that the Framers intended the legislative branch to take an active role in the selection and confirmation of judicial appointments made by the executive. Part III examines the little-studied failure of George Washington's nomination of John Rutledge to serve as Chief Justice of the Supreme Court, in order to illustrate that strong legislative and political involvement in the confirmation process was a reality even in the earliest days of the American Republic. Part IV examines Rutherford B. Hayes's nomination of Stanley Matthews to serve on the Supreme Court and the Senate's rejection of the nomination as an examination of the situation arguably most parallel to the present one. Part V briefly examines Congress's reassertion of power in the judicial confirmation process since 1968, demonstrating that the current understanding is that Congress will be involved in the process. The Note concludes with a brief section suggesting that the proper role of Congress in the judicial nomination process, based on historical background and sound public policy, is a middle ground between the position of Ackerman and that of his opponents.

I

SUPREME COURT CONFIRMATION AND THE LEGISLATURE

The Constitution provides that the President shall have the power to appoint "Judges of the supreme Court" and judges of lower federal courts "by and with the Advice and Consent of the Senate."⁹ However, the exact parameters of the Senate's duty to provide advice and consent have never been clear. Some have placed high emphasis on the "advice" portion of the duty, arguing for a strong congressional role in selecting judicial and other nominees.¹⁰ Other scholars envision a far more passive role for Congress in the process.¹¹ How Con-

9. U.S. CONST. art. II, § 2.

10. See, e.g., William G. Ross, *The Supreme Court Appointment Process: A Search for a Synthesis*, 57 ALB. L. REV. 993, 999-1001 (1994); David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491 (1992).

11. See, e.g., Carl Tobias, *Rethinking Federal Judicial Selection*, 1993 BYU L. REV. 1257 (1993).

gress carries out this duty has profound implications for the role of the Legislature in two major ways. First, the Supreme Court's composition directly affects public policy in a wide range of arenas, and appointments to the Court can have far-reaching, dramatic impacts on public policy. Second, the application of the Advice and Consent Clause in the context of the Supreme Court may have profound implications on the way the Senate deals with appointments to lower courts on the federal bench and all other appointments made by the President. This is an issue perpetually before the Legislature.

A. *The Supreme Court and Public Policy*

By virtue of the established system of judicial review in America, the Supreme Court has the final word on whether any action by the state or federal government is constitutionally acceptable.¹² In recent years, the Supreme Court has revealed itself to be a closely divided body on many critical issues, including the scope of the federal government's power under the Commerce Clause,¹³ an individual's ability to sue a state for violations of law,¹⁴ the permissibility of affirmative action under the Fourteenth Amendment,¹⁵ and a woman's right to choose to terminate her pregnancy.¹⁶ These decisions, among others, have profound effects on how the Legislature functions—determining not only whether Congress can undertake particular actions (such as limiting access to abortion or establishing racial preferences in federal employment) but also the broader scope of Congress's power to enact regulatory legislation under the enumerated powers of Article I, Section 8 of the Constitution. This constant interplay between the Supreme Court and Congress determines the future of many controversial legal and social issues in the United States.

12. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (establishing system of judicial review); see also WILLIAM E. NELSON, *MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW* (2000) (discussing how *Marbury's* concept of "judicial review" has been modified by courts).

13. See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995) (5-4 decision) (ruling that federal law prohibiting guns in schools is outside Article I, Section 8 power of federal government).

14. See, e.g., *Alden v. Maine*, 527 U.S. 706 (1999) (5-4 decision) (forbidding state employee from suing his employer under federal law); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (5-4 decision) (limiting federal government's power to abrogate state sovereign immunity).

15. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (5-4 decision) (striking down federal affirmative action program for government contractors).

16. See, e.g., *Stenberg v. Carhart*, 530 U.S. 914 (2000) (5-4 decision) (overturning state of Nebraska's ban on "partial-birth" abortion procedures).

It is significant that many of these critical cases have been decided by the smallest of majorities on the Supreme Court—a five-to-four vote. In general, Chief Justice Rehnquist and Justices Scalia and Thomas are considered to be a conservative voting block, while Justices Souter, Breyer, Ginsburg, and Stevens are considered to be a relatively liberal voting block. Justices Kennedy and O'Connor—particularly Justice O'Connor—are considered the swing votes on the Court for deciding controversial issues.¹⁷ Because of this close division, it is likely that the next person appointed to the Court will have a substantial impact on the key legal and social issues facing American society today, and may even dramatically tip the balance in a new direction on some contentious questions.

While Supreme Court confirmations may not traditionally have been viewed as a legislative tool used to impact or transform public policy, the membership of the Court has always had a profound effect on the scope of congressional power, as well as on many other public policy issues. The most prominent example of this effect is the debate over the scope of the Commerce Clause during the era of the New Deal. In early cases, most notably *Schechter Poultry*,¹⁸ the Court held that regulation of certain affairs was beyond the power granted to Congress “[t]o regulate commerce . . . among the several states.”¹⁹ However, by upholding the National Labor Relations Act in *NLRB v. Jones & Laughlin Steel Corp.*,²⁰ the Court substantially expanded its view of what the Commerce Clause meant, and paved the way for the expansion of federal power seen in the years during and immediately after the New Deal. This effect becomes even more pronounced when there is a closely divided Supreme Court.

B. Supreme Court Confirmations and Other Nominations

Supreme Court vacancies are a relative rarity. Only 108 Justices have served on the Supreme Court through the 212-year history of the Court, meaning a Court vacancy occurs, on average, less than every two years.²¹ Although nominations to the Supreme Court itself are rare, other nominations covered by the Advice and Consent Clause are

17. See, e.g., Stephen L. Martino, Note, *Change on the Horizon: A Prospective Review of the Nomination and Confirmation Process of the United States Supreme Court*, 41 WASHBURN L.J. 164, 167–72 (discussing general ideological stances of current Supreme Court members).

18. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

19. U.S. CONST. art. I, § 8.

20. 301 U.S. 1 (1937).

21. See Roy M. Mersky, *The Statistics on the Supreme Court*, in 5 THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 1887,

quite common, in particular those to the lower federal bench.²² Less than a year into his term, George W. Bush had already had the opportunity to make sixty nominations to various lower federal courts.²³ The flow of nominations is constant, and the constitutional language of advice and consent applies to these judicial nominations as well.²⁴

Although a higher standard of review may apply to Supreme Court nominees by virtue of their unique ability to have the final word as to what the law of the land is, how advice and consent is carried out has a dramatic effect on how Congress does business. Congress's powers and responsibilities stretch far beyond advising and consenting to nominations.²⁵ If a searching review of every presidential nominee is required, then Congress may find itself unable to do anything other than examine nominees. This gridlock would be particularly troublesome for those committees—such as the Senate Judiciary Committee—that deal with nominees most frequently.²⁶ However, if Congress merely consents to every presidential nominee, they may find that legislation passed with a particular intent will later be interpreted in an entirely different manner.²⁷ Practically, the Legislature

1903–11 chart 1 (Leon Friedman & Fred L. Israel eds., 1997) [hereinafter *JUSTICES OF THE SUPREME COURT*].

22. The advice and consent power extends to the appointment of “ambassadors, other public ministers and consuls . . . and all other officers of the United States” as well as to “judges of the supreme court.” U.S. CONST. art. II, § 2. The history of nominations other than to the Supreme Court is beyond the scope of this Note, but is briefly surveyed in William G. Ross, *The Senate's Constitutional Role in Confirming Cabinet Nominees and Other Executive Officers*, 48 SYRACUSE L. REV. 1123, 1133–43 (1998).

23. *Senatorial Crockery*, AM. PROSPECT, NOV. 19, 2001, at 6, 6.

24. The Supreme Court has held that judges who make final decisions about the rights of parties must be subject to the protections of Article III. See sources cited *infra* note 28; see also *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 76 (1982) (overturning Bankruptcy Act of 1978 on grounds that it did not grant judges appropriate Article III protections).

25. See U.S. CONST. art. I, § 8 (enumerating various other powers and responsibilities of Congress).

26. Already, the Judiciary Committee frequently waits a long period of time to confirm nominees to lower courts. For instance, it took twenty-nine months for the Senate to confirm the nomination of Susan Oki Mollway to sit on the U.S. District Court for the District of Hawaii, and sixteen months to confirm the nomination of Sonia Sotomayor to sit on the Second Circuit. Debra Baker, *Waiting and Wondering*, A.B.A. J., Feb. 1999, at 52–53.

27. This is obviously true for judicial nominees, who have the direct power to interpret statutes and resolve controversies over their meaning. However, it is also true for members of administrative agencies to whom courts appear to be granting ever-increasing deference. See, e.g., *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984) (establishing rule that decisions made by administrative agencies that are not contrary to plain meaning of statute will be deferred to unless they are arbitrary and capricious).

must find some sort of middle ground in how it considers nominations in order for it to do business effectively.

C. *How History Matters*

What advice and consent means is a fundamental constitutional question about the balance of powers between Congress and the President. The Supreme Court has never examined, nor is it ever likely to have an opportunity to examine, what balance of power the language establishes between the President and Congress in judicial appointments.²⁸ Therefore, this is a situation where the Legislature must determine the meaning of the Constitution for itself rather than having the judicial branch dictate the appropriate interpretation.

Several scholars have recently adopted the notion that legislatures can and should interpret the Constitution on a broad basis, with some even questioning the role of the judiciary in constitutional interpretation.²⁹ Others have suggested that legislatures can interpret the Constitution on particular issues, especially in times of crisis.³⁰ If Congress is to be charged with interpreting the Constitution, it must be allowed to use the same tools that courts and scholars have used in the past in their efforts to interpret the Constitution.

History provides two powerful tools that Congress may use in interpreting the Constitution. The first of these is original intent. Supporters of the use of original intent trace the roots of their philosophy back to James Madison.³¹ Under this inquiry, the goal is to determine either the original intent of the Framers or the original understanding

28. There have been a number of cases that determine whether an official is subject to the advice and consent of Congress before they can serve. *See, e.g.*, *Edmond v. United States*, 520 U.S. 651, 656 (1997) (holding that Coast Guard criminal appeals judges not subject to advice and consent because they are “inferior officers” who may be appointed by Secretary of Transportation); *Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868, 881–82 (1991) (holding that tax court judges are subject to advice and consent because they exercise significant powers comparable to those of Article III courts); *Morrison v. Olson*, 487 U.S. 654, 696–97 (1988) (holding that independent counsels are not subject to advice and consent because authority for appointments is vested in judiciary). However, the Court has never addressed the balance of power questions inherent in the advice and consent language, and is unlikely to do so. *See generally* Lee Renzin, Note, *Advice, Consent, and Senate Inaction—Is Judicial Resolution Possible?*, 73 N.Y.U. L. REV. 1739 (1998) (arguing that judicial resolution of meaning of Advice and Consent Clause is possible, but unlikely).

29. *See, e.g.*, MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

30. *See* Neal Kumar Katyal, *Impeachment as Congressional Constitutional Interpretation*, 63 LAW & CONTEMP. PROBS. 169 (2000).

31. *See* JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 339–65 (1996) (discussing Madison’s views on originalism).

of the Constitution by its first readers.³² This sort of interpretation is claimed to have the advantage of “lead[ing] to rules that are as stable, objective, and impersonal as human beings can manage when dealing with a source which can be regarded as authoritative.”³³ Under this philosophy, the sources to be relied upon primarily are records kept at the Constitutional Convention and documents from the era of ratification.³⁴

The second historical tool that can be used to interpret the Constitution is past political practice. Past political practice can be considered relevant in two major ways. First, early political practices are considered likely to be probative of original intent.³⁵ The Supreme Court has pointed to such early practices in several cases as guidance and support for its constitutional interpretations.³⁶ Second, a pattern of prior practice may be used as guidance to determine the appropriate balance of power.³⁷ The absence of such prior practice has proven especially probative to the Supreme Court, with one case noting the “uniqueness” of a statute as part of the reason for finding it outside the power of Congress to enact.³⁸

The history of the Advice and Consent Clause, both in its framing at the Constitutional Convention and as it has been practiced for much of the life of the Constitution, strongly suggests that not only should the Senate play a vital and important role in the confirmation process of Supreme Court and other nominees, but also that the Senate can and should be “political” in how it examines nominees. This means not merely looking at qualifications and personal qualities, but also determining whether political and judicial views are appropriate

32. *Id.* at 8.

33. Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 *Nw. U. L. Rev.* 226, 258 (1988).

34. See RAKOVE, *supra* note 31, at 13–22 (discussing various sources that can be used in ascertaining original intent).

35. Thomas A. Curtis, Note, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 *COLUM. L. REV.* 1758, 1773–75 (1984).

36. See, e.g., *Marsh v. Chambers*, 463 U.S. 783, 786 (1983) (upholding opening of legislative session with prayer because: “From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom”); *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803) (arguing that early legislative practice may put constitutional question to “rest”).

37. Paul E. McGreal, *Unconstitutional Politics*, 76 *NOTRE DAME L. REV.* 519, 551 (2001).

38. *New York v. United States*, 505 U.S. 144, 177 (1992) (holding that take title provision of Low-Level Radioactive Waste Policy Amendments Act of 1985 was unconstitutional infringement on state sovereignty).

for a member of the Supreme Court. The strong (if somewhat discontinuous) historical pattern indicates that Congress should continue to engage in searching examination of nominees, especially with Supreme Court nominations.

II

THE FOUNDING

There was relatively little debate about the judicial branch during the Philadelphia Convention of 1787 and the subsequent discussions surrounding constitutional ratification in the states. Much more of the debate at the Convention and during ratification focused on issues of national supremacy and the extent of Congress's powers generally.³⁹ However, the process of appointing members of the judiciary was the subject of several days of debate at the Philadelphia Convention, and was the subject of at least some discussion during the era of ratification. The debates at the Convention reveal that the Convention's members were divided on the question of judicial selection, with some advocating a purely legislative appointment of judges and others seeking an appointment power vested solely in the Executive. The final language was a compromise between the two, seemingly allowing both branches to hold substantial power in the process. The ratification era reveals a similar division among the participants in the debate over what was appropriate and who would hold primary power over judicial appointments under the new Constitution. Despite these divisions, all seemed to agree that both the Executive and the Senate would have a substantial role in the judicial appointments process under the new Constitution.

A. *Judicial Appointments at the Constitutional Convention*

The original fifteen resolutions proposed by Edmund Randolph on May 29, 1787, commonly known as the "Virginia Plan," only briefly mentioned a judicial branch for the new national government.⁴⁰ The Virginia Plan called for the establishment of a judiciary "to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature."⁴¹ The Convention gradually worked its way through the Virginia Plan, not reaching the question of

39. For an overview of the proceedings at the Constitutional Convention, see CHRISTOPHER COLLIER & JAMES LINCOLN COLLIER, *DECISION IN PHILADELPHIA* (1986).

40. 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 21–22 (Max Farrand ed., rev'd ed. 1966) [hereinafter 1 *RECORDS*].

41. 1 *id.* at 21.

judicial appointments again until June 5, when the Convention, in the form of the Committee of the Whole, debated whether the Legislature or the Executive should have the power of judicial appointment.⁴²

The members of the Convention were clearly divided on the question of whether Congress should hold the power to appoint judges, with John Rutledge of South Carolina the first to oppose giving a unilateral power of appointment to the Executive.⁴³ Rutledge claimed that if a single person held the power to appoint judges, “[t]he people will think we are leaning too much towards Monarchy.”⁴⁴ In contrast, James Wilson, a delegate from Pennsylvania, spoke in favor of centralizing the appointment process in the Executive because of his concern that “[i]ntrigue, partiality, and concealment were the necessary consequences” of appointment by a large group such as the National Legislature.⁴⁵ James Madison and Benjamin Franklin both took a middle ground, as neither was satisfied with legislative appointment or with giving the whole power of appointments to the Executive. Franklin, at least somewhat in jest, suggested as a compromise a system from Scotland “in which the nomination proceeded from the Lawyers, who always selected the ablest of the profession in order to get rid of him, and share his practice (among themselves).”⁴⁶

Madison, on the other hand, was clearly unhappy with having the appointment power rest solely in the legislative branch, saying that legislators “were not [good] judges of the requisite qualifications” that would be required of judges on the federal bench.⁴⁷ However, Madison also substantially distrusted any powerful executive, and suggested that the appointment power could be properly divided between the Executive and the Senate, a group he viewed “as not so numerous as to be governed by the motives of the other branch;”⁴⁸ and as being

42. 1 *id.* at 119.

43. Rutledge’s opposition to pure executive appointment would prove ironic, as he was later the first Supreme Court nominee to be rejected by the Senate over the President’s continuing support. For a lengthier discussion of Rutledge’s rejection, see *infra* Part III.

44. 1 RECORDS, *supra* note 40, at 119.

45. 1 *id.*

46. 1 *id.* at 120. That Franklin’s suggestion was somewhat in jest is made clear by Madison’s description of his remarks as having been made “in a brief and entertaining manner.” 1 *id.*

47. 1 *id.*

48. In my view, there are two ways to read this language. First, “the other branch” can be taken as referring to the House of Representatives, with Madison’s argument supporting the idea that the small size of the Senate made it less vulnerable to intrigues, cabals, and other evils. A second, and in my view, more convincing, interpretation is that “the other branch” refers to the Executive. The Senate’s smaller size and more “educated” character would make it less vulnerable to demagoguery and tyranny

sufficiently stable and independent to follow their deliberate judgments.”⁴⁹ However, Madison’s motion at the end of his comments was merely to strike the words “*appointment by the Legislature. . . & and [sic] [replace it with] a blank left to be hereafter filled on maturer reflection.*”⁵⁰ Madison’s motion was seconded by James Wilson, and passed by a vote of nine to two, with Connecticut and South Carolina opposing the motion.⁵¹ The divisiveness of the issue was evident from Charles Pinckney’s subsequent statement that he would move to restore the original language providing for legislative appointment when the clause next came before the Convention for debate.⁵²

After the Convention had debated the entirety of the Virginia Plan, Randolph resubmitted an amended version of it to the Convention on June 13. Under this revised proposal, Justices of the Supreme Court were to be appointed by the Senate, while lower court judges would be appointed by the entirety of the National Legislature.⁵³ Pinckney, fulfilling the promise he had made after the first vote on the Virginia Plan’s method for judicial appointments, along with Roger Sherman, the delegate from Connecticut, moved to amend the language in a way that would return the appointment power to both houses of the National Legislature.⁵⁴ Madison then reiterated his objections to the appointment of judges by both houses of the Legislature, placing particular emphasis on the lower house’s susceptibility to improper forms of influence.⁵⁵ Apparently, Madison’s argument was convincing, for after he spoke, Pinckney and Sherman withdrew their motion calling for the House to take a role in appointments, and the Convention then approved language that provided for senatorial appointment of Justices.⁵⁶

Despite agreeing to this language in the amended Virginia Plan, William Patterson went in a different direction in introducing the New Jersey Plan on June 15, giving the power to appoint federal judges to a different branch. The New Jersey Plan resolved that “a federal Judiciary [should] be established to consist of a supreme Tribunal the Judges

in the Executive. However, either interpretation endorses a substantive role for the Senate in the decision-making process.

49. 1 RECORDS, *supra* note 40, at 120.

50. 1 *id.*

51. 1 *id.*

52. 1 *id.* at 121.

53. 1 *id.* at 230–31.

54. 1 *id.* at 232.

55. 1 *id.* at 232–233. Madison’s argument here is strongly evocative of his famous writings in *The Federalist* numbers 10 and 51, warning against the dangers of “faction.” See THE FEDERALIST NOS. 10, 51 (James Madison) (Jacob E. Cooke ed., 1961).

56. 1 RECORDS, *supra* note 40, at 233.

of which to be appointed by the Executive.”⁵⁷ After the introduction of the New Jersey Plan, the Convention began to work its way through the clauses of Patterson’s proposal, but never directly addressed its proposal for judicial appointments. The next mention of judicial appointment came in Alexander Hamilton’s speech of June 18, where he proposed the system we have today—appointment of judges by the President, subject to confirmation by the Senate.⁵⁸ Oddly, after Hamilton’s comments on the matter, it seems as though the Convention put aside the question of what branch would hold the appointment power for an entire month, not returning to it until they began to vote on specific clauses of the proposed Constitution.

The first of these votes took place on July 18.⁵⁹ The Convention unanimously passed portions of the proposed Constitution that created a national judiciary in a Supreme Court, but when the Convention reached the question of who should hold appointment power, divisions became evident.⁶⁰ The debate on the appointment power was extensive, with members of the Convention split on the question of whether one branch of the Legislature, both branches of the Legislature, the Executive, or some combination thereof should hold the appointment power.⁶¹ A motion to vest appointment power solely in the Executive failed, with six delegations opposed and only two in favor.⁶² Then, Nathaniel Gorham of Massachusetts proposed an amendment that stated judges would “be (nominated and appointed) by the Executive, by & with the advice & consent” of the Legislature of the United States.⁶³ Although this language is similar to the language that was eventually adopted by the Convention, the motion to accept it failed, as the Convention divided equally, with four delegations voting on each side of the motion to amend.⁶⁴ After some further discussion on the subject, the Convention found that it was unable to come to any agreement about how judges should be appointed, and unanimously

57. 1 *id.* at 244. Notably, under the New Jersey Plan, the executive would have consisted of multiple people, but the size was not set in Patterson’s resolution. 1 *id.*

58. 1 *id.* at 292.

59. 2 RECORDS, *supra* note 40, at 37.

60. 2 *id.*

61. Nathaniel Gorham was the leader of the forces seeking a prominent role for the executive, but many of the prominent members of the Convention, including Roger Sherman, Luther Marin, George Mason, Governour Morris, Edmund Randolph, and James Madison, expressed their views about the appointment of judges. The debates on the clauses are fully recounted in 2 *id.* at 41–44.

62. 2 *id.* at 37.

63. 2 *id.* at 44.

64. 2 *id.* at 38.

agreed to postpone further consideration of the appointment process for judges.⁶⁵

The Convention returned to its consideration of the appointment power three days later on July 21, when the Convention reconsidered James Madison's proposal that the Executive would hold the right of appointment of judges "unless [his appointments were] disagreed to by 2/3 of the 2d. branch of the Legislature."⁶⁶ Madison said that his motion was offered because "it secured the responsibility of the Executive who would in general be more capable & likely to select fit characters than the Legislature."⁶⁷ However, Madison remained concerned about vesting a great deal of power in the Executive as an individual, and kept the Senate involved in the appointment process "that in case of any flagrant partiality or error, in the nomination, it might be fairly presumed that 2/3 of the 2d. branch would join in putting a negative on it."⁶⁸

Lengthy debate followed, revealing the continued division of the Convention on this issue, and several proposals were made for different means of appointing judges.⁶⁹ Yet again, the Convention rejected changing the method of appointment, this time by a margin of three votes in favor of Madison's motion and six votes opposed, and again gave its endorsement to appointment by the Senate, with six states favoring appointment by the Senate alone.⁷⁰ The final language referred to the Convention's Committee of Detail was "That a national Judiciary be established to consist of one Supreme Tribunal—the Judges of which shall be appointed by the second Branch of the national Legislature."⁷¹ The continuing presence of language giving the sole appointment power to the Senate, especially in conjunction with the often noisy opposition when motions were made to strip the Senate of that power, indicates that many Framers saw strong senatorial involvement in the judicial appointment and confirmation process as essential to the establishment of a proper form of government.

The Committee of Detail continued to revise the Constitution's language but made no substantive changes to the draft Constitution.

65. 2 *id.*

66. 2 *id.* at 80.

67. 2 *id.*

68. 2 *id.*

69. Among the proposals made was appointment by the Senate with approval or veto by the President and a return to Gorham's earlier proposal, which closely mirrored the advice and consent language adopted in the Constitution. The debates are described in full in 2 *id.* at 80–83.

70. 2 *id.* at 83.

71. 2 *id.* at 132.

Generally, the Committee of Detail's minor changes strengthened the power of the Senate with respect to appointments even more than the original draft language, with the Committee of Detail's new draft providing explicitly that "The Senate of the United States shall have power . . . to appoint . . . Judges of the supreme Court."⁷² On August 23, this section was considered by the Convention, which returned to its prior debate about which branch should hold the power of judicial appointment. Governour Morris and James Wilson again expressed their concerns about senatorial appointment of Justices, and the Convention again postponed consideration of the appointment power, after Edmond Randolph observed that "almost every Speaker had made objections to the clause as it stood."⁷³

Because of the clear division in the Convention about the appointment process, resolution of the issue was referred to a special committee, chaired by David Brearley from New Jersey. The committee substantially changed the clauses dealing with appointment power, creating new language that provided: "The President . . . shall nominate and by and with the advice and consent of the Senate shall appoint . . . Judges of the Supreme Court."⁷⁴ Interestingly, despite all the prior debate on this subject, this new recommendation was adopted unanimously, with extremely minimal debate.⁷⁵ The language adopted in this recommendation was again adopted by the Convention when the members signed the Constitution on September 17, 1787.⁷⁶

The final language of the Constitution represents a compromise—one that permitted a great deal of discretion on the part of the Executive in making the selection of judges and other officers while still allowing the Senate to maintain a substantial role in the selection and confirmation process. The Executive would have the power to appoint, allowing for many of the advantages of a unitary system of appointments, but the Senate would be there to check the Executive's actions through its advice and consent function. This system envisions both branches playing a critical role in the process of nominating and confirming judicial appointments, rather than one branch or the other having sole power.

72. 2 *id.* at 183.

73. 2 *id.* at 393.

74. 2 *id.* at 498.

75. 2 *id.* at 539.

76. 2 *id.* at 659–67.

B. *The Ratification Debates on Judicial Nominations*

For the most part, nominations to the judiciary provoked very little discussion during the debates over whether the new Constitution should be ratified by the states. However, there was some discussion of the issue by members of the Convention in private correspondence and in more public forums such as *The Federalist*. These writings indicate that there was a diversity of opinion on the subject of how the process of judicial selection would function, with every writer having his own views on exactly what advice and consent would mean.

The Federalist, in particular, seems to have argued for a relatively small role for the Senate in the judicial selection process. In fact, Hamilton adopts this view directly when he states that “in the business of appointments the Executive will be the principal agent.”⁷⁷ However, Hamilton envisions at least some role for the Senate in the judicial appointment process when he says that “it could hardly happen that the majority of the senate would feel any other complacency towards the object of an appointment, than such, as the appearances of merit, might inspire, and the proofs of the want of it, destroy.”⁷⁸ Hamilton’s writings suggest a role for the Senate that was limited to examining the qualifications of nominees. Others, even Hamilton’s fellow *Federalist* authors, were less clear about their position on the subject.

James Madison implied his approval of an active role for the Senate when he argued in *The Federalist* that the Constitution’s method of appointments was designed to strike a balance between giving the Executive absolute power and involving the Legislature at the early stages of the appointment process.⁷⁹ In addition to Madison, several other important figures at the Constitutional Convention expressed deep concern during the ratification period about unchecked Executive power over appointments. Edmund Randolph, a delegate to the Convention from Virginia, stated in a letter to the Virginia House of Delegates that the President’s involvement in judicial nominations was one of the reasons that he refused to sign the Constitution.⁸⁰ Like Randolph, Luther Martin had refused to sign the Constitution, and he expressed the concern that without substantial involvement by the Senate

77. THE FEDERALIST NO. 65, at 439 (Alexander Hamilton) (Jacob Cooke ed., 1961).

78. THE FEDERALIST NO. 66, at 449–50 (Alexander Hamilton) (Jacob Cooke ed., 1961).

79. THE FEDERALIST NO. 38, at 245 (James Madison) (Jacob Cooke ed., 1961).

80. Letter from Edmund Randolph, to the Speaker of the Virginia House of Delegates (Oct. 10, 1787), reprinted in 3 RECORDS, *supra* note 40, at 123, 127.

in the appointment process, the President could have “an army of civil officers as well as Military.”⁸¹

While Randolph and Martin were not signatories of the Constitution, their views show that some present at the Convention felt that the Senate would have to play an important role in the appointment process in order to provide an essential check against executive power. Other persons involved in the ratification debates also expressed their concern about executive appointment of judges and other officers. In a speech before the Maryland House of Delegates, James McHenry made clear his desire for senatorial involvement, saying that the President’s power of appointment “is check’d by the Consent of the Senate to the appointment of Officers.”⁸² McHenry’s desire for a check on executive power reveals that he saw the Constitution’s text as providing for the Senate to take a relatively active role in judicial appointment proceedings in order to prevent appointed officials from becoming mere pawns of the Executive.

Although those who supported the adoption of the Constitution at least briefly discussed their views about the appropriateness of the constitutional scheme for judicial appointments, very little was said about the appointment power in the major writings of Anti-Federalist figures, who opposed the adoption of the Constitution. In the only major piece of Anti-Federalist writing that dealt explicitly with the appointment power, the author claimed that the Constitution would create a system in which the Senate “will not in practice be found to be a body to advise, but to order and dictate in fact.”⁸³ While the concern expressed by this Anti-Federalist does not necessarily indicate the meaning of the Constitution’s appointment clause, it does reflect that at least some people held the view that the Senate would continue to take an extremely active role in the appointment of judges and other officers under the Constitution.

While there is evidence that some of the Framers and others involved in the ratification of the Constitution disapproved of strong senatorial involvement in the nomination and confirmation process, the weight of evidence indicates that the original understanding of the Constitution was that there would be an active senatorial role in the

81. Luther Martin, Address Before the Maryland House of Representatives (Nov. 29, 1787), reprinted in 3 RECORDS, *supra* note 40, at 151, 158.

82. James McHenry, Address Before the Maryland House of Delegates (Nov. 29, 1787), reprinted in 3 RECORDS, *supra* note 40, at 144, 150.

83. Richard Henry Lee, *An Antifederalist View of the Appointing Power Under the Constitution*, reprinted in THE ANTIFEDERALIST PAPERS 216, 218 (Morton Borden ed., 1965).

confirmation process. At the Convention, the Framers crafted the language dealing with judicial appointments as a compromise between those who wanted the Senate to have sole power of appointment, and those who wanted the entirety of the appointment power to be vested in the executive branch. It seems clear that this compromise left room for substantial involvement in the process by both the executive and the legislative branches. While the evidence from the ratification period is much more ambiguous on the question of which branch would hold more power, there is still substantial indication that the Senate was to play a major role. Events after the ratification of the Constitution indicate that this has continued to be the prevailing understanding of the Constitution throughout American history.

III

JOHN RUTLEDGE: POLITICAL REJECTION IN THE EARLY REPUBLIC

Shortly after taking office, George Washington had the opportunity to shape the Supreme Court in a way that no President has since, with the opportunity to appoint every member of the Court at once.⁸⁴ All six of Washington's initial nominees were swiftly confirmed by the Senate, as were his next three nominations for Associate Justices.⁸⁵ However, in 1795, when Washington sought to appoint John Rutledge to replace John Jay as Chief Justice, one of the most contentious political battles of the early Republic erupted.⁸⁶

Given Rutledge's qualifications and his extensive experience in public service, it is rather surprising that politics became involved in the struggle over his confirmation. Prior to independence, Rutledge served with distinction in South Carolina's representative assembly, and was elected to and served in the Continental Congress of 1774 and on many of its committees.⁸⁷ Between 1775 and 1782, Rutledge continued his political career in South Carolina, first as a member of the

84. JOHN ANTHONY MALTESE, *THE SELLING OF SUPREME COURT NOMINEES* 23 (1995).

85. *Id.* at 25–26.

86. *Id.* at 26.

87. Rutledge's political life is discussed at great length in HENRY FLANDERS, *THE LIVES AND TIMES OF THE CHIEF JUSTICES OF THE SUPREME COURT OF THE UNITED STATES* 452–521 (1858). Flanders's account is undeniably biased, non-academic, and poorly sourced, but it is the most complete biography of Rutledge available and was officially sanctioned by Congress at the time of its publication. The only other biographies of Rutledge extant are RICHARD BARRY, *MR. RUTLEDGE OF SOUTH CAROLINA* (1942), which is highly unreliable and makes such outlandish claims as Rutledge's alleged authorship of the entire Constitution, and, more recently, JAMES HAW, *JOHN AND EDWARD RUTLEDGE OF SOUTH CAROLINA* (1997), which focuses quite heavily on

colonial assembly, and, from 1776 to 1782, as the Chief Executive of the state.⁸⁸ Although Rutledge could no longer serve as governor after 1782 due to South Carolina's term limitations, he returned to representing South Carolina in the Continental Congress, where he demonstrated "[h]is sagacity, his knowledge of men, his sensibility to justice, his lofty spirit, his invincible courage, [and] his penetrating judgment" prior to his retirement from Congress in June of 1783.⁸⁹ In March of 1784, the South Carolina legislature appointed Rutledge to be Chief Judge of the newly created South Carolina Court of Chancery.⁹⁰ In 1787, Rutledge served as one of four delegates from South Carolina to the Philadelphia Convention, and while he did object to portions of the Constitution, he signed it and recommended it for ratification.⁹¹

After the Convention, Rutledge served on the South Carolina convention that ratified the Constitution.⁹² In the first presidential election, Rutledge even received all seven of South Carolina's "second" electoral votes for President.⁹³ Immediately after the passage of the Judiciary Act of 1789, Rutledge was named an Associate Justice of the Supreme Court, but served only until 1791, when he resigned to accept the position of Senior Judge of the Court of Common Pleas and Sessions of South Carolina.⁹⁴ Rutledge served on the South Carolina court until July 29, 1795, when he agreed to accept Washington's nomination to return to the Supreme Court as Chief Justice after Jay's resignation.⁹⁵

Rutledge's service to the State of South Carolina in the 1770s and 1780s and on John's relationship with his brother, Edward.

88. Rutledge's service in South Carolina's government is detailed in FLANDERS, *supra* note 87, at 522–89. During the Revolutionary War, Rutledge dealt with a number of military situations, and was at least partially responsible for plans made for the defense of Charleston. Rutledge's military activities while governor are discussed in HAW, *supra* note 87, at 111–37.

89. FLANDERS, *supra* note 87, at 598. Flanders also enumerates Rutledge's involvement in debates of the Continental Congress and notes praises lavished on him by various parties. *Id.* at 590–92.

90. *Id.* at 601.

91. *Id.* at 602–12 (detailing Rutledge's involvement in debates); *see also supra* text accompanying note 43 (discussing Rutledge's views on judicial selection).

92. *Id.* at 617–18.

93. In effect, these electoral votes were for Rutledge as Vice President, as every South Carolina elector first cast an electoral ballot for George Washington. *Id.* at 620–21. Until the adoption of the Twelfth Amendment, electoral votes were not cast separately for President and Vice President. U.S. CONST. amend. XII.

94. FLANDERS, *supra* note 87, at 621–22. Rutledge's choice to accept the Senior Judge position on a state court over the position of Associate Justice on the Supreme Court seems surprising from a contemporary perspective, but the choice is entirely consistent with the sentiments he expressed at the Constitutional Convention that state courts should continue to be the primary guarantors of rights. *Id.* at 607.

95. HAW, *supra* note 87, at 245–50.

Given these extensive qualifications, it is at least superficially surprising that Washington's nomination of Rutledge failed. However, Rutledge's qualifications became irrelevant when he sharply criticized the terms of the much-debated Jay Treaty. The Jay Treaty was intended to serve as the final settlement of the Revolutionary War, restoring a normal relationship between Great Britain and the United States.⁹⁶ Due to fears over the controversy that the text of the treaty would create, the text of the treaty was kept out of public view until after the Senate had (by the bare two-thirds majority required by the Constitution) ratified all but one of its articles.⁹⁷

The text of the treaty reached Charleston on July 12 and provoked an angry response from much of the population of South Carolina, including assaults on those who supported ratification of the treaty and other violent actions directed toward those involved with the treaty.⁹⁸ Four days later, in response to the outcry over the treaty, a public meeting was called for the purpose of formulating the state's response to the ratification of the Jay Treaty.⁹⁹ At that meeting, Rutledge "deliver[ed] one of the most momentous speeches of his life," a speech that would later play a major factor in his rejection as Chief Justice.¹⁰⁰

Rutledge's speech was fiery in its opposition to the Jay Treaty, and, according to one commentator, it lasted at least an hour.¹⁰¹ While no transcript of the speech is available, various newspapers and letter writers reported on it. The Boston *Independent Chronicle* claimed Rutledge's speech stated "that he had rather the President should die than sign that puerile instrument—and that he preferred war to an adoption of it."¹⁰² Rutledge also apparently took exception to the treaty's use of the word "will" rather than "shall" in certain areas, saying that the use of the word "will" implied that compliance with the treaty by the British was a favor rather than a duty.¹⁰³ A letter written by a person in attendance at Rutledge's speech indicated that he even went so far as to claim that Jay had been bribed by "Brit-

96. For a lengthier discussion of the Jay Treaty's provisions, see *id.*

97. *Id.* at 247.

98. *Id.*

99. *Id.* at 248.

100. *Id.*

101. Leon Friedman, *John Rutledge*, in 1 JUSTICES OF THE SUPREME COURT, *supra* note 21, at 23, 35.

102. INDEP. CHRON. (Boston), Aug. 13, 1795, *reprinted in* 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 780 (Maeva Marcus & James Perry eds., 1985) [hereinafter DOCUMENTARY HISTORY].

103. Friedman, *supra* note 101, at 35.

ish gold” because the terms of the treaty were so favorable to the British.¹⁰⁴ Finally, Rutledge’s speech sharply criticized the Jay Treaty as being overly favorable to Britain at the expense of France. This criticism angered many of the High Federalists of the era, who strongly supported the Jay Treaty as a way of ensuring peaceful relations between the United States and Great Britain rather than a closer relationship with revolutionary France.¹⁰⁵

Almost immediately after the speech, Rutledge began his journey to Philadelphia, where he would begin to serve as Chief Justice.¹⁰⁶ As he had been appointed during a recess of the Senate, Rutledge could serve on the Court for some time in the absence of Senate confirmation.¹⁰⁷ However, his fiery speech ignited a great deal of concern among supporters of the Jay Treaty about whether Rutledge remained fit to serve as Chief Justice. Upon hearing of Rutledge’s nomination and his statements about the Jay Treaty, Oliver Wolcott, Jr. asked Alexander Hamilton in a letter, “[H]ow near ruin & disgrace has the Country been?”¹⁰⁸ Wolcott and Timothy Pickering even expressed concerns that Rutledge’s speech reflected that he had become insane.¹⁰⁹ These accusations of insanity continued in private letters for some time until they were made public.¹¹⁰

The first record of a public allegation that Rutledge was insane came on August 17, 1795, when a supporter of the Jay Treaty alleged that Rutledge’s speech against the Treaty proved that he had lost his mind.¹¹¹ These allegations became stronger, with those who sup-

104. HAW, *supra* note 87, at 249 (citing Letter from William Read, to J. Read (July 21, 1795)).

105. The lengthiest discussion of Rutledge’s speech can be found in FLANDERS, *supra* note 87, at 633–37. Unfortunately, Flanders’s account of the speech is poorly sourced and not particularly contemporary, so it is difficult to assess its accuracy. For a discussion of Federalist support of the Jay Treaty, see generally JERALD A. COMBS, *THE JAY TREATY: POLITICAL BATTLEGROUND OF THE FOUNDING FATHERS* (1970).

106. MALTESE, *supra* note 84, at 29.

107. See U.S. CONST. art. II, § 2, cl. 3 (“The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”).

108. Letter from Oliver Wolcott, Jr., to Alexander Hamilton (July 28, 1795), *reprinted in* 1 DOCUMENTARY HISTORY, *supra* note 102, at 772.

109. See Letter from Edmund Randolph, to George Washington (July 29, 1795), *reprinted in* 1 DOCUMENTARY HISTORY, *supra* note 102, at 773 (“The conduct of the intended Chief Justice is so extraordinary, that Mr. Wolcott and Col. Pickering conceive it to be a proof of the imputation of insanity.”).

110. See, e.g., Letter from William Bradford, Jr., to Alexander Hamilton (Aug. 4, 1795), *reprinted in* 1 DOCUMENTARY HISTORY, *supra* note 102, at 775 (discussing Rutledge’s alleged insanity).

111. INDEP. CHRON. (Boston), Aug. 17, 1795, *reprinted in* 1 DOCUMENTARY HISTORY, *supra* note 102, at 783.

ported the Treaty calling those who were opposed to it, including Rutledge, “Jacobins,” and suggesting that opponents of the Treaty were possessed by the Devil.¹¹² Perhaps the most prominent political writer of the time, Alexander Hamilton, joined those saying that Rutledge was mad, claiming that Rutledge was in a “delirium of rage” when he delivered his remarks in opposition to the Jay Treaty, and that he was unfit to serve on the Supreme Court as a result of those remarks.¹¹³

The allegations of madness were not the only ones levied against Rutledge in an effort to prevent him from being confirmed. Others attacked Rutledge’s character, pointing to allegations that he owed substantial debts that he had never repaid.¹¹⁴ Whether Rutledge was insane at the time is impossible to determine, and the only evidence cited by most contemporary accounts in support of this claim was the intensity of his speech against the Jay Treaty.¹¹⁵ It seems that these allegations of insanity and bad character served merely as a pretext for disagreement with Rutledge’s strongly expressed political views.

In addition to the allegations of insanity and bad character, some explicitly cited political grounds for their opposition to Rutledge’s nomination. For instance, Christopher Gore felt that Rutledge’s confirmation would prevent the enforcement of the Jay Treaty by the Supreme Court, and he opposed confirmation on those grounds.¹¹⁶ In a letter to President Washington, Timothy Pickering demanded that Washington revoke Rutledge’s commission to service on the Supreme

112. See *The Lamentation*, INDEP. CHRON. (Boston), Sept. 3, 1795, reprinted in 1 DOCUMENTARY HISTORY, *supra* note 102, at 794–95 (reporting on allegations made by supporters of Jay Treaty against opponents). The term “Jacobin” was a term for some of the more radical elements of the French Revolution.

113. Camillus (Alexander Hamilton), *The Defence No. V*, ARGUS (New York), Aug. 5, 1795, reprinted in 1 DOCUMENTARY HISTORY, *supra* note 102, at 776.

114. See, e.g., AURORA (Philadelphia), Oct. 20, 1795, reprinted in 1 DOCUMENTARY HISTORY, *supra* note 102, at 804. Whether the allegations of debt were true or not remains uncertain. *Id.* at 805 n.2 (discussing allegations’ truthfulness).

115. Scholars and contemporaries remain divided on the question of Rutledge’s insanity. Flanders accepted the allegations unquestioningly, and Barry emphatically denied them. FLANDERS, *supra* note 87, at 631; BARRY, *supra* note 87, at 358. It is uncontested however, that after his rejection, Rutledge sank into a substantial depression and likely attempted suicide. The most scholarly interpretation comes from Haw, who points to how carefully arranged the alleged suicide attempt was, concluding that, “Rutledge’s attempt to take his life was the deliberate act of a despondent man who believed he had nothing to live for.” HAW, *supra* note 87, at 258. It is notable that the suicide attempt took place only after Rutledge heard of his rejection rather than before, making his action seem to be less one of insanity and more one of dependency.

116. See Letter from Christopher Gore, to Rufus King (Aug. 14, 1795), reprinted in 1 DOCUMENTARY HISTORY, *supra* note 102, at 781.

Court solely because of “his recent conduct relative to the treaty.”¹¹⁷ Oliver Wolcott, Sr. made clear that his opposition to Rutledge was based on Rutledge’s statements about the Jay Treaty when he wrote to his son: “I think that it would have been disgraceful to America that after what [Rutledge] had done, he should be confirmed in his Office.”¹¹⁸ These statements reveal that political grounds played at least some role in formulating opposition to Rutledge’s confirmation.

In spite of calls for Rutledge’s rejection, President Washington formally submitted Rutledge’s nomination to the Senate on December 10, 1795, and there is no evidence of Washington asking Rutledge to withdraw his name.¹¹⁹ In fact, Rutledge and Washington dined together while Rutledge was in Philadelphia serving as Chief Justice during the recess period, although Washington’s reasons for doing so are unclear.¹²⁰ Some asserted that despite this conduct, Washington secretly wished that the Senate would defeat Rutledge’s nomination. For instance, Pierce Butler concluded that Washington “‘was not pleased with the speech [Rutledge] made in Charleston and possibly would not feel hurt at his rejection.’”¹²¹ In spite of the claim that Washington would not have objected to Rutledge’s rejection, there is no record of any public or private statement from Washington expressing his views on Rutledge’s confirmation proceedings. Washington’s lack of involvement likely reveals that he viewed the Senate as having a substantial and wholly independent role to play in the appointment process. Otherwise, he would have taken steps to ensure that Rutledge was either confirmed or rejected by the Senate, rather than simply standing aside during the contentious confirmation process.

Rutledge also drew public support from a number of people, many citing his opposition to the Jay Treaty as an excellent reason why he should be confirmed. The *Independent Chronicle* of Boston ridiculed one critic of the “illustrious” Rutledge who had cited Rutledge’s “patriotic oration” against the Jay Treaty as proof of Rutledge’s insanity.¹²² In addition, Thomas Shippen supported Rutledge based on his hope that Rutledge’s appointment would “be able to stem

117. Letter from Timothy Pickering, to George Washington (July 31, 1795), reprinted in 1 DOCUMENTARY HISTORY, *supra* note 102, at 774.

118. Letter from Oliver Wolcott, Sr., to Oliver Wolcott, Jr. (Jan. 11, 1796), reprinted in 1 DOCUMENTARY HISTORY, *supra* note 102, at 830.

119. See MALTESE, *supra* note 84, at 30.

120. HAW, *supra* note 87, at 252.

121. Letter from Pierce Butler, to A. Burke (Oct. 10, 1795), quoted in HAW, *supra* note 87, at 252.

122. See INDEP. CHRON. (Boston), Aug. 17, 1795, reprinted in 1 DOCUMENTARY HISTORY, *supra* note 102, at 783.

the Torrent of the N. York faction which has for so many years brought mischief & corruption into our Councils.”¹²³

Even before the Senate voted on confirmation, many speculated that the Senate would reject Rutledge’s nomination. Henry Lee made this clear when he wrote in a letter three months before the vote that, “I think Mr. Rutledge’s late appointment will probably be dissented to on the part of the Senate.”¹²⁴ Rutledge’s supporters shared this fear. In one newspaper a supporter wrote: “I fear a cabal is forming to reject the appointment in Senate.”¹²⁵ These predictions came true when, on December 15, 1795, the Senate voted fourteen to ten to reject Rutledge’s nomination.¹²⁶

That Rutledge’s rejection was based on politics and ideology rather than his lack of qualifications or his personal behavior became clearer after the vote. After the rejection, Thomas Jefferson stated that he believed political grounds were the primary motivation for the Senate’s action, writing that “the rejection of mr [sic] Rutledge by the Senate is a bold thing, *because they cannot pretend any objection to him but his disapprobation of the treaty.*”¹²⁷ One newspaper called the rejection of Rutledge “an unparalleled [sic] instance of party spirit.”¹²⁸ Several letters written at the time indicate that Rutledge’s opposition to the Jay Treaty played at least some factor in the Senate’s choice to reject his nomination.¹²⁹

The rejection of Rutledge’s nomination provides a critical first step in understanding what advice and consent means for several reasons. First and foremost, a Senate that was made up largely of men involved in the creation of the Constitution acted upon Rutledge’s

123. Diary Entry of Thomas Shippen (Aug. 9, 1795), in 1 DOCUMENTARY HISTORY, *supra* note 102, at 778–79. Shippen’s reference to the “New York Faction” was apparently to Jay and Alexander Hamilton, both New Yorkers, who were among the firmest supporters of the Jay Treaty.

124. Letter from Henry Lee, to Patrick Henry (Sept. 30, 1795), *reprinted in* 1 DOCUMENTARY HISTORY, *supra* note 102, at 801–02.

125. *Letter from an Anonymous Correspondent*, GAZETTE OF THE U.S. (Philadelphia), Oct. 10, 1795, *reprinted in* 1 DOCUMENTARY HISTORY, *supra* note 102, at 803.

126. SENATE EXECUTIVE J., Dec. 10, 1795, *reprinted in* 1 DOCUMENTARY HISTORY, *supra* note 102, at 98–99. Six Senators were not present for the vote. Of those, four would have likely voted in opposition to confirmation. *Id.* at 99 n.2.

127. Letter from Thomas Jefferson, to William B. Giles (Dec. 31, 1795), *reprinted in* 1 DOCUMENTARY HISTORY, *supra* note 102, at 821 (emphasis added).

128. INDEP. CHRON. (Boston), Dec. 31, 1795, *reprinted in* 1 DOCUMENTARY HISTORY, *supra* note 102, at 822.

129. *See, e.g.*, Letter from Henry Tazewell, to John Ambler (Jan. 24, 1796), *reprinted in* 1 DOCUMENTARY HISTORY, *supra* note 102, at 831–32; Letter from Henry Tazewell, to Richard Cocke (Jan. 30, 1796), *reprinted in* 1 DOCUMENTARY HISTORY, *supra* note 102, at 833.

nomination. Their action in refusing to confirm Rutledge indicates that they viewed the words advice and consent in the Constitution as requiring something more than acquiescence to presidential power. Second, this Senate sanctioned political involvement in the process of confirmation. With only one exception, whether a Senator supported or opposed Rutledge's confirmation was determined by the Senator's position on the Jay Treaty.¹³⁰ This close tie between an external political issue and voting on a nomination reveals at least a tacit sanctioning of ideological voting, which has also been present in the voting on judicial nominations in recent years.¹³¹

Finally, Rutledge's story demonstrates that the process is designed to involve more than just the nominee's academic ability to serve on the Court. No one seems to have doubted that Rutledge was qualified to serve on the Supreme Court from a purely legal standpoint, especially due to his experience as an Associate Justice. Those who opposed Rutledge, a group that included many Framers, attacked him on grounds other than his qualifications and were successful in their attempt to deny his confirmation. In addition, Rutledge's story reflects political activity and involvement not merely by those who opposed confirmation, but by those who supported it as well. Even in the early Republic, the propriety of Supreme Court nominations were the subject of violent public debate.

IV

STANLEY MATTHEWS: POLITICAL REJECTION IN THE AGE OF HAYES

The Senate continued to take an active role in the judicial confirmation process after its rejection of Rutledge. Seventeen nominations to the Supreme Court failed between 1810 and 1875.¹³² Then, in

130. HAW, *supra* note 87, at 256. Although political parties were not firmly established at this time, the controversy over the Jay Treaty sowed the seeds for the creation of political parties—those who supported the Jay Treaty would form the roots of the Federalist Party and those who opposed it would form the roots of the Democratic Republican Party.

131. The final vote on the nomination of Clarence Thomas to serve as Associate Justice is illustrative. Forty-six of the forty-eight votes against Thomas's confirmation came from Democrats, and only eleven Democrats supported the nomination. David Rogers & Jackie Calmes, *Thomas Is Confirmed by Senate, 52 to 48*, WALL ST. J., Oct. 16, 1991, at A18.

132. "Failed" nominations include not only those directly rejected by the Senate, but those nominations that were postponed, those on which Congress refused to take action, or those withdrawn by either the President or the nominee. The count includes Roger B. Taney, whose nomination as an Associate Justice was postponed, but who was later renominated and confirmed as Chief Justice. Edward King, who was nomi-

1877, Congress was faced with an extraordinary situation. In the 1876 presidential election, the Democratic candidate, Samuel Tilden, had clearly won the popular vote, but the returns in three states—Florida, Louisiana, and South Carolina—were uncertain.¹³³ If the Republican candidate, Rutherford B. Hayes, received the electoral votes of those states, he would have a one-vote majority in the electoral college.¹³⁴ If Hayes lost even one of these states to Tilden, Tilden would win.¹³⁵ In the end, a commission made up of members of the House, Senate, and Supreme Court voted eight to seven along party lines to certify Hayes as the winner in all three states, and Hayes assumed the presidency in 1877.¹³⁶ The ascension of Hayes to the Presidency has a number of obvious parallels to the 2000 election and the manner in which George W. Bush became President. Therefore, President Hayes's nominations to the Supreme Court are particularly worthy of examination in considering how the Senate should respond to President Bush's judicial nominations.

Given the unusual circumstances of the 1876 election, it is relatively unsurprising that Hayes decided not to run in the 1880 election. Yet, in the final days of the Hayes Presidency, Justice Noah H. Swayne resigned from the Supreme Court and Hayes nominated his old friend Stanley Matthews, who was then serving as a Senator from Ohio, to fill the vacancy.¹³⁷ The nomination provoked a whirlwind of controversy for a wide variety of reasons—among them, his involvement in winning the election for Hayes, his close friendship with Hayes, his support of the coinage of silver, and his close ties to railroad interests.¹³⁸

The greatest surprise from an examination of documents about the Matthews nomination is what was not mentioned. The Matthews nomination was rarely criticized on the grounds that “lame duck” presidents should not be entitled to great deference in the making of appointments, and even more rarely was it mentioned that Matthews

nated twice to the Court by President Tyler (failing both times), is counted only once. MALTESE, *supra* note 84, at 3 tbl.1.

133. ARI HOOGENBOOM, *THE PRESIDENCY OF RUTHERFORD B. HAYES* 25–27 (1988).

134. *Id.* at 27.

135. *Id.*

136. *See id.* at 40–50 (discussing proceedings of Electoral Commission).

137. MALTESE, *supra* note 84, at 38. Matthews served as counsel for Hayes in the arguments before the special Electoral Commission, and thus played a prominent role in Hayes's election. *Id.* The equivalent would be for George W. Bush to appoint James Baker or another person prominent in the Florida controversy to the Supreme Court.

138. Louis Filler, *Stanley Matthews*, in 2 *JUSTICES OF THE SUPREME COURT*, *supra* note 21, at 1351, 1356.

and Hayes had close personal ties.¹³⁹ Instead, the opposition appears to have been almost purely political—based on concerns about the judicial philosophy Matthews was likely to invoke were he to be confirmed to the Supreme Court. During this era, the Senate was a closed body, and very few (if any) records of their discussions about the Matthews nomination exist. The nomination was never brought to the floor—discussed only in committees and informally amongst the Senators.¹⁴⁰

The only available sources of information regarding the basis of opposition to the Matthews nomination are newspapers from the era. Although newspapers of this era were no longer the partisan organs of the early Republic, they remained a reflection of political sentiment among the people and, frequently, their elected representatives as well.¹⁴¹ The *New York Times*, which opposed the Matthews confirmation, tacitly acknowledged that its grounds for opposition was political when it noted that Matthews had “abilities as high at least as the average of those now employed on the Supreme bench.”¹⁴² Nonetheless, the *Times* still demanded that Matthews’s “judicial character” be questioned and took a stand against his confirmation.¹⁴³

Later editorials further indicate that politics, rather than qualifications, were the reasons for opposition to Matthews’s confirmation. Editorials published in *The Sun*, a New York newspaper, repeatedly criticized Matthews’s nomination by asserting that it was an attempt by Hayes to provide railroad magnate Jay Gould with greater influence over the government and that it would damage the protection of rights by the Court.¹⁴⁴ In fact, *The Sun*, in a later editorial, went so far as to say that Matthews’s nomination represented “an outrage on public decency” because of his political views.¹⁴⁵

At first, it appeared that Matthews would be confirmed.¹⁴⁶ At the time, there was “no question among Senators as to the personal fitness

139. See MALTESE, *supra* note 84, at 38–41 (discussing focus by newspapers on Matthews’s political views).

140. Allegedly, a “deal” was made with incoming President James Garfield, whereby Garfield agreed to renominate Matthews to the Supreme Court. Garfield did so, and the nomination was confirmed. See *infra* text accompanying note 154.

141. See MALTESE, *supra* note 84, at 29 (describing early Republic’s press as “rabbidly partisan”).

142. *Stanley Matthews as a Judge*, N.Y. TIMES, Jan. 27, 1881, at 4.

143. *Id.* The editorial goes on to argue that Matthews was unqualified to serve, which seems to contradict the earlier tone and remarks in the article.

144. See *The Little Bird was Right*, SUN (New York), Jan. 27, 1881, at 2.

145. *Another Corporation Judge*, SUN (New York), Feb. 1, 1881, at 2.

146. *Last Weeks of Congress*, N.Y. TIMES, Feb. 1, 1881, at 1 (“It is generally thought that Mr. Matthews will be confirmed . . .”).

or professional capacity of Mr. Matthews.”¹⁴⁷ However, the Senators began to examine Matthews’s view that the power of Congress to regulate railroads was extremely limited.¹⁴⁸ According to press coverage, because of Matthews’s views on railroad regulation it was “generally believed that the nomination [would] be . . . either rejected by the Senate or suffered to lapse by expiration.”¹⁴⁹ An editorial in the *New York Times* stated that the nomination was supported by Democrats because “the views which Mr. Matthews holds on important constitutional questions are such as to be altogether pleasing to them.”¹⁵⁰ When arguing for careful scrutiny of the Matthews nomination, a piece in the *New York Times* made clear that the editors of the paper understood the Senate’s duty of advice and consent as something “which should not be disposed of as a matter of courtesy or of personal favor.”¹⁵¹ This statement makes clear that there were at least some members of the press and public who saw the Senate’s responsibility as expansive rather than merely a perfunctory exercise.

Matthews’s nomination continued to come under fire as the weeks passed, with another editorial in the *New York Times* claiming that “[e]very effort to discover reasons for his appointment only results in disclosing stronger reasons for the rejection of his name.”¹⁵² As a result, the Senate predictably declined to act on the nomination in the waning days of the Hayes administration. On March 2, only two days before the end of Hayes’s term, the Judiciary Committee met and declined to take action on the Matthews nomination.¹⁵³ By the time Hayes left office, neither the Judiciary Committee nor the entire Senate had acted upon the Matthews nomination.

Hayes’s nomination of Matthews and the Senate’s refusal to take action on it often go unnoticed by scholars because Matthews was re-nominated to the Supreme Court by President Garfield and the nomination was subsequently confirmed (by one vote) in a vote equally divided between the two major political parties of the time.¹⁵⁴ However, it is clear that the Matthews controversy was rooted in a dispute over his political and judicial philosophies rather than his qualifications. No one seemed to contest that Matthews was qualified to sit on the Supreme Court from an intellectual or moral standpoint. In fact,

147. *The Supreme Court Vacancy*, N.Y. TIMES, Feb. 2, 1881, at 1.

148. *See id.*

149. *Id.*

150. *Mr. Matthews’s Nomination*, N.Y. TIMES, Feb. 10, 1881, at 4.

151. *Id.*

152. Editorial, N.Y. TIMES, Feb. 14, 1881, at 4.

153. *Notes from Washington*, N.Y. TIMES, Mar. 3, 1881, at 1.

154. MALTESE, *supra* note 84, at 41–44.

there was not even the construction of a pretext, such as Rutledge's insanity, for the attacks on Matthews's views. Rather, the debate over Matthews focused on how he would decide particular cases that were likely to come before the Supreme Court in the near future. The Senate's refusal to take action on the initial nomination, as well as its division in the second vote, reflects the perceived legitimacy of using judicial philosophy as grounds for rejection of a nomination to the Supreme Court. Specifically, the Senate's refusal to act on Hayes's nomination of Matthews reflects how the nation understood the nomination and confirmation process to operate under a President elected with a minority of the popular vote after disputes over electoral vote counting—the same situation that America faces today.¹⁵⁵

V

POLITICAL INVOLVEMENT IN THE MODERN ERA

After Matthews's nomination, the Senate took a relatively inactive role in the confirmation process for the first time in American history. The Senate declined to confirm only three nominations to the Supreme Court between 1881 and 1968.¹⁵⁶ Since 1968, the Senate has revived its active role in the confirmation process, with five nominations failing and only twelve passing muster.¹⁵⁷ This reassertion of

155. Although Hayes's "legitimacy" does not seem to have been explicitly invoked by those who opposed Matthews's confirmation, it remained an undercurrent in much of the discussion. The *Sun*, in particular, was strongly anti-Hayes, in large part because of the circumstances surrounding the 1876 election. While never openly stated, the notion that Hayes was owed less deference because of how he was elected is implicit in many of the statements against Matthews.

156. MALTESE, *supra* note 84, at 3 tbl.1. This marks a definite reduction in congressional rejection of Supreme Court nominees. Between 1789 and Matthews's confirmation, nineteen nominations to the Supreme Court failed. *See id.* During this same era, forty-seven Justices served on the Court. *See* Mersky, *supra* note 21, at 1904–07 chart 1. Between 1881 and 1968, only three nominations were rejected, but fifty-three Justices were confirmed. *See id.* at 1906–11 chart 1; MALTESE, *supra* note 84, at 3 tbl.1. This lull in senatorial involvement is likely tied to the general expansion of presidential power in the 1881–1968 era, especially under Theodore and Franklin Roosevelt. The general expansion of presidential power in this era has been discussed by a number of scholars. *See, e.g.,* ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973). However, Maltese discusses at some length the political process involved in the rejection of Herbert Hoover's nomination of John J. Parker to the Supreme Court in 1930, which indicates that the Senate did not entirely discard the idea that it should closely scrutinize nominees, at least in some circumstances. *See* MALTESE, *supra* note 84, at 56–69.

157. *See* MALTESE, *supra* note 84, at 3 tbl.1; Mersky, *supra* note 21, at 1910–11 chart 1. William Rehnquist's initial nomination to the Court and his subsequent elevation to Chief Justice are counted only once in reaching the number of twelve nominations. In addition, nominees that were confirmed by Congress were often subjected to intense scrutiny, in particular Clarence Thomas. *See* discussion *infra* Part V.C.

senatorial power reflects both a return to the historical roots of the confirmation process and the changes that modern society has forced upon the confirmation process due to increased media involvement and greater transparency in the American political and legal systems.¹⁵⁸

A. *Haynsworth and Carswell: Political Rejection in the Nixon Years*

The modern era for Supreme Court confirmations began when Richard Nixon became President in 1969.¹⁵⁹ While Nixon's first nomination to the Court—Warren Burger as Chief Justice—passed with ease, his subsequent appointments met with far more difficulty.¹⁶⁰ When Justice Fortas resigned from the Court under the specter of potential financial misdeeds and conflicts of interest, Nixon nominated Clement Haynsworth, a judge on the Fourth Circuit, to fill the vacancy as an Associate Justice.¹⁶¹ Haynsworth's nomination quickly provoked opposition from a number of groups, including civil rights groups, who portrayed him as a segregationist, and labor unions, who noted that Haynsworth had been reversed by the Supreme Court seven times on labor issues.¹⁶² However, political grounds alone did not lead to Haynsworth's defeat. It was subsequently discovered that Haynsworth owned stock in several companies that were parties to cases in his court and had refused to recuse himself.¹⁶³ These allegations of conflicts of interest served as a jumping-off point for later, more explicitly political, grounds for rejection.

The general understanding of advice and consent can be inferred from the manner in which political groups lobbied for and against the

158. For commentary on the news media's involvement in the Supreme Court confirmation process, see, for example, Michael Comiskey, *Not Guilty: The News Media in the Supreme Court Confirmation Process*, 15 J.L. & POL. 1 (1999) (concluding that media impact on confirmation process is less dramatic than it appears); Richard Davis, *Supreme Court Nominations and the News Media*, 57 ALB. L. REV. 1061 (1994) (surveying media involvement in confirmation process).

159. Congress filibustered against Lyndon Johnson's nomination of Abe Fortas for Chief Justice in 1968, but that rejection had more to do with a number of external factors, including Johnson's lame-duck status and a scandal surrounding Fortas's financial affairs, than it did with purely political motives. MALTESE, *supra* note 84, at 71–72.

160. PAUL SIMON, *ADVICE AND CONSENT* 290–94 (1992). While not a scholar in the traditional sense, Simon brings a unique perspective to his subject, as he served for a number of years on the Senate Judiciary Committee and was involved in many of the hearings discussed below.

161. MALTESE, *supra* note 84, 70–72.

162. *Id.* at 72.

163. *Id.* at 73.

Haynsworth nomination. Groups opposed to Haynsworth lobbied the Senate directly in an effort to have the nomination rejected.¹⁶⁴ Labor and civil rights organizations used political techniques like letter writing and telegram campaigns in an effort to make their opposition to Haynsworth known.¹⁶⁵ This focus on the Senate indicates that these groups recognized a strong and independent role for the Senate in the confirmation process, as they otherwise would have lobbied the President to withdraw the nomination. This notion of a strong senatorial role was even accepted by supporters of Haynsworth, who involved themselves in grassroots politicking in support of the nomination.¹⁶⁶ While this consensus supporting a strong senatorial role in the nominations process is not determinative of the Constitution's meaning, it indicates that there was little dispute over the meaning of advice and consent at the time.

That Haynsworth's nomination sparked a political controversy is relatively unexceptional. To begin with, the nomination was an essentially political act. Nixon sought to appoint a southerner to the Court in an effort to thank the South for its support of him in the 1968 election, and he sought a "law and order" conservative who he felt could curb the abuses he perceived as having occurred during the years of the Warren Court.¹⁶⁷ Nixon's attempts to mobilize public support for Haynsworth through a media campaign made it clear that even he viewed public support for a Supreme Court nominee to be essential.¹⁶⁸

The Nixon administration used other traditional political tools to garner support for Haynsworth, including recruiting traditional party leaders in the House and Senate to "encourage" members to support the nomination, having state parties and officials pressure members of the Senate who were undecided, and even attempting to use campaign contributions.¹⁶⁹ However, these efforts were clearly not successful, as Haynsworth's nomination failed by a forty-five to fifty-five vote on November 21, 1969.¹⁷⁰ The Haynsworth nomination is notable not only because it marked the resurgence of the Senate as a major player in the confirmation process but also because it marked a general

164. *See id.* at 72–74 (discussing general interest group opposition to Haynsworth nomination).

165. *Id.* at 73.

166. *See id.* at 74–82 (discussing White House's response to opposition to Haynsworth nomination).

167. *Id.* at 72.

168. *See id.* at 76.

169. *Id.* at 77–79.

170. *Id.* at 73.

agreement among the political branches that the politics of the Senate had a substantial role to play in the judicial nomination process.

Much of the political firestorm surrounding the Haynsworth nomination carried over to Nixon's subsequent nomination of Harold Carswell of Florida to serve on the Court.¹⁷¹ In fact, the White House lobbying team became stronger and more entrenched during the Carswell battle than it had been in the battle over Haynsworth.¹⁷² Carswell was perhaps even more conservative than Haynsworth, and there were allegations that he was a racist.¹⁷³ Despite the allegations, the American Bar Association's (ABA) Committee on the Federal Judiciary unanimously endorsed Carswell's confirmation.¹⁷⁴ Given this endorsement by the ABA, it is difficult to believe claims such as those made by Senator Birch Bayh that "[t]he President has confronted the Senate with a nominee who is incredibly undistinguished as an attorney and as a jurist."¹⁷⁵ However, despite this claim, opposition to the Carswell nomination only truly began to rise after his opposition to desegregation became public.¹⁷⁶

With the ABA's endorsement and the realization that the revelation of Carswell's political views was what marked the expansion of opposition to his nomination, it seems likely that "qualification" served as little more than a veil for political attacks, as it did during the Rutledge confirmation.¹⁷⁷ Carswell's nomination represents further legitimization of the involvement of politics in the modern confirmation process, with both sides of the confirmation process using increasingly sophisticated tools to influence public opinion and congressional action on the subject. Despite the claims that his nomination was rejected because of a lack of qualifications, it seems that the Senate reasserted its long-established (but recently neglected) power to make a searching inquiry into the politics of judicial nominees.

B. Ginsburg and Bork: Political Rejection in the Reagan Years

Congress confirmed five of the next six nominees to the Supreme Court with almost no opposition.¹⁷⁸ Richard Nixon's nomination of

171. *Id.* at 12–13.

172. The organizing tactics used by the Nixon White House in the Carswell battle are discussed further in *id.* at 132–34.

173. For more on these allegations, see SIMON, *supra* note 160, at 292.

174. *Id.*

175. *Id.* at 293.

176. *Id.* at 291–92.

177. *See supra* Part III.

178. Harry Blackmun was confirmed ninety-four votes to zero; Lewis Powell was confirmed eighty-nine to one; John Paul Stevens was confirmed ninety-eight to zero;

William Rehnquist to be an Associate Justice provoked mild controversy. The American Civil Liberties Union and the Leadership Conference on Civil Rights both opposed his confirmation despite his excellent qualifications, and “the Senate debate centered on his philosophy rather than his ability.”¹⁷⁹ After extensive debate, the Senate approved the nomination by a vote of sixty-eight to twenty-six.¹⁸⁰ Although the Senate did not reject any nominees during this time, the historical record reflects that they continued to be intimately involved in the nomination and confirmation process with the White House often going to great lengths to assuage senatorial concerns before the choice was announced.¹⁸¹ In 1988, the Senate would again assert its advice and consent powers in the form of rejecting nominees when President Ronald Reagan nominated Robert Bork and Douglas Ginsburg to the Court.

Bork had perhaps the strongest credentials of any nominee to the Supreme Court in some time. A graduate of the University of Chicago Law School, Bork worked at several law firms before joining the faculty at Yale Law School. He also had experience in the government, having served as Nixon’s Solicitor General between 1972 and 1977 before moving to the District of Columbia Circuit beginning in 1980.¹⁸² In addition, Bork had an extensive “paper trail,” having written several books and articles on a variety of legal subjects, and having delivered numerous speeches and addresses throughout the

Sandra Day O’Connor was confirmed ninety-nine to zero; and Antonin Scalia was confirmed ninety-eight to zero. SIMON, *supra* note 160, at 294–98; Thomas L. Jipping, *From Least Dangerous Branch to Most Profound Legacy: The High Stakes in Judicial Selection*, 4 TEX. REV. L. & POL. 365, 450 n.543. The politics surrounding these nominations are discussed in SIMON, *supra* note 160, at 294–98. The lopsided votes do not necessarily indicate that politics were not involved in the confirmation process. A successful confirmation may indicate an effective choice and political work by the White House in support of the nominee. *See generally* MALTESE, *supra* note 84, at 128–40.

179. SIMON, *supra* note 160, at 295. For a lengthy first-person discussion of the politics surrounding Rehnquist’s selection and confirmation, see JOHN W. DEAN, *THE REHNQUIST CHOICE* (2001).

180. SIMON, *supra* note 160, at 295. Rehnquist’s subsequent confirmation as Chief Justice in 1986 was also contentious, passing by a vote of sixty-five to thirty-three. *Id.* at 49.

181. *See* sources cited *supra* note 178.

182. Bork’s impressive biography is presented in greater length in NORMAN VIEIRA & LEONARD GROSS, *SUPREME COURT APPOINTMENTS: JUDGE BORK AND THE POLITICIZATION OF SENATE CONFIRMATIONS* 12–21 (1998).

country on legal issues.¹⁸³ It would be this paper trail that would prove to be his undoing before the Senate.¹⁸⁴

Because of Bork's well-documented record, he was unable to plausibly deny that he had formed views on a number of issues that Senators sought to question him.¹⁸⁵ In particular, Bork's writings criticizing the right to privacy recognized by the Supreme Court in *Griswold v. Connecticut*,¹⁸⁶ and its subsequent expansion to abortion rights in *Roe v. Wade*,¹⁸⁷ led to harsh questions from many members of the Judiciary Committee.¹⁸⁸ In the hearings, Bork was also questioned at great length on his positions on civil rights, church-state issues, and free speech, among other areas of the law.¹⁸⁹

The hearings were comprehensive, and, in the end, the Judiciary Committee voted nine to five to refer the nomination to the floor of the Senate with a recommendation that Bork not be confirmed.¹⁹⁰ In its report, the majority of the Judiciary Committee was frank in spending less of its time on Bork's qualifications to serve as a Justice and far more time on Bork's political and legal views. The majority report begins with a lengthy section entitled: "Judge Bork's view of the Constitution disregards this country's tradition of human dignity, liberty and unenumerated rights."¹⁹¹ The report then moves forward, explaining that their grounds for recommending rejection included disa-

183. Bork's publications prior to his nomination include ROBERT H. BORK, CONSTITUTIONALITY OF THE PRESIDENT'S BUSING PROPOSALS (1972); ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978); ROBERT H. BORK, TRADITION AND MORALITY IN CONSTITUTIONAL LAW (1984); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

184. See VIEIRA & GROSS, *supra* note 182, at 146 ("Bork's writings . . . had seriously damaged [his chances for confirmation].").

185. See *id.* at 71-105 (discussing Bork's views on controversial issues that were challenged by Judiciary Committee).

186. 381 U.S. 479 (1965).

187. 410 U.S. 113 (1973).

188. For a lengthier discussion of Bork's writings on the right to privacy and the criticisms invoked by Senators who opposed his confirmation, see VIEIRA & GROSS, *supra* note 182, at 71-79.

189. Due to space constraints, this Note will not discuss in detail the various details brought up at the Bork hearings relating to Bork's political views. For a good survey of Bork's confirmation hearings, see generally *id.* In addition, the entire Bork hearings and the subsequent committee reports on his nomination have been collected in 14-14F THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE 1916-1987 (Roy M. Mersky & J. Myron Jacobstein eds., 1990).

190. SENATE COMM. ON THE JUDICIARY, NOMINATION OF ROBERT H. BORK TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT, S. EXEC. REP. NO. 100-7, at 2-3 (1987).

191. *Id.* at 8.

greement with Bork on many issues of legal doctrine, including the existence of a right to privacy, his understanding of civil rights for minorities and women, his understanding of the First Amendment, his expansive understanding of executive power, and his views on anti-trust enforcement.¹⁹²

Senator Patrick Leahy, in a separate statement joining the majority report, stated even more explicitly that his grounds for opposing confirmation had nothing to do with Bork's qualifications, extensively praising Bork as an academic and a thinker, but making clear that "[t]he central issue [of this confirmation] is [Bork's] judicial philosophy."¹⁹³ Arlen Specter, one of the few Republicans to oppose the Bork nomination, also stated that his vote was "not a matter of questioning [Bork's] credibility or integrity . . . but [was] rather [based on] the doubts [that] persist as to his judicial disposition in applying principles of law which he has so long decried."¹⁹⁴ Although the committee report did criticize Bork for some of his personal conduct, such as his role in discharging Archibald Cox during the Watergate scandal,¹⁹⁵ the lion's share of the committee report is spent enumerating reasons for rejecting Bork's nomination that are purely political in nature.

The rejection of Bork on account of his political ideology did not go unchallenged. The minority report attacked the majority for the political considerations brought to bear on Bork's nomination, claiming that "[t]he historical evidence reflects the Framers' expectations that the President would exercise great discretion in choosing nominees, while limiting the Senate's role to rejecting nonmeritorious candidates."¹⁹⁶ However, this substantially misreads not only the Framers' intent in creating the shared power of appointment, but the historical record of Senate involvement in the confirmation process as well.¹⁹⁷ The minority's report, rather than invoking the Senators' agreement with Bork's judicial philosophy as grounds for confirmation, focused its argument on two main points. First, the minority report spent numerous pages attempting to argue that the majority report mischaracterized Bork's testimony before the committee and that Bork's viewpoints on most issues were relatively moderate.¹⁹⁸ Second, the minority continuously attacked the majority's view that polit-

192. See generally *id.*

193. *Id.* at 193.

194. *Id.* at 214.

195. *Id.* at 65-71. For other examples of incidences criticized by the committee, see *id.* at 78-92.

196. *Id.* at 226-27.

197. See *supra* Parts II-IV.

198. S. EXEC. REP. NO. 100-7, at 237-310.

ics should play a role in the confirmation process, saying that political involvement “will also see the judiciary have its independence threatened by activist special interest groups.”¹⁹⁹

From a historical perspective, arguing that a nominee’s views are actually within the mainstream is not unprecedented. This argument was used by the White House during the confirmation proceedings of John J. Parker in an attempt to explain his prior decisions on racial segregation and labor interests.²⁰⁰ However, the second idea is hardly supported by the historical record, as the record indicates that political factors played a role in the Supreme Court nomination and confirmation process for many years with little or no harm to the process. Perhaps the minority would have been more successful had they attempted to argue that Bork’s views were correct interpretations of the Constitution, even if they did not square with precedent.

Despite the bitter minority report, Bork’s nomination was rejected, with fifty-eight Senators voting against his confirmation and only forty-two supporting it.²⁰¹ In the aftermath of Bork’s rejection, several people expressed their discontent with the method in which the Senate carried out the confirmation process. In fact, William Safire even turned Bork’s name into a verb: “bork: [to] attack viciously a candidate or appointee, especially by misrepresentation in the media.”²⁰² Bork himself wrote a book angrily condemning political involvement in the confirmation process, and specifically condemning his confirmation process as improper.²⁰³ After Bork’s defeat by the Senate, Reagan nominated Douglas Ginsburg to the Court in 1987.²⁰⁴ Like Bork, Ginsburg had an extensive background in governmental service and academia, having taught at Harvard Law School and having served in several capacities in the Reagan Department of Justice prior to his appointment to the District of Columbia Circuit.²⁰⁵

Almost as soon as he was nominated, Ginsburg began to draw many of the same political complaints that had plagued the Bork nomination. Dan Rather, on the CBS Evening News, referred to Ginsburg as “Bork’s ideological soul mate,” and CBS correspondent Bill Plante

199. *Id.* at 310.

200. MALTESE, *supra* note 84, at 63–67.

201. Linda Greenhouse, *Bork’s Nomination Is Rejected*, 58–42; *Reagan ‘Saddened’*, N.Y. TIMES, Oct. 24, 1987, at A1.

202. WILLIAM SAFIRE, SAFIRE’S NEW POLITICAL DICTIONARY 76 (1993).

203. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990).

204. MALTESE, *supra* note 84, at 135.

205. ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA 330 (1989).

described him as “arch-conservative.”²⁰⁶ Ginsburg withdrew his name from nomination only nine days after his nomination was submitted to the Senate amidst allegations (which Ginsburg admitted were true) that he had used marijuana while a professor at Harvard in the 1970s.²⁰⁷ While the marijuana revelations provided an excellent pretext for Ginsburg’s withdrawal of his name from consideration, by that time it had already become clear that many Democratic Senators would oppose him on the same grounds they had opposed Bork.²⁰⁸ This clear political opposition, which included Senators from both parties, indicates the continuing powerful force of the Senate in the appointment and confirmation process.²⁰⁹

The Senate’s rejection of Robert Bork and Douglas Ginsburg’s withdrawal of his nomination reflect further evidence of the involvement of politics in the confirmation process. In the wake of the Bork rejection, many books and articles were written critiquing or supporting the allegedly new phenomenon of political involvement in the confirmation process.²¹⁰ However, as already demonstrated in this Note, this involvement was far from a novel phenomenon by the time of Bork’s nomination, although his rejection was admittedly unusual in that the sole reason given for it appears to have been his ideology. When the historical record is examined more closely, it is clear that ideological reasons played a role in many of the earlier rejections. The reasons given, such as insanity (Rutledge), conflict of interest (Matthews and Haynsworth), and lack of qualification (Carswell), were essentially pretexts for rejection on ideological grounds. The use of pretexts for rejection appeared again when the Senate considered Ginsburg’s nomination, with the allegations of marijuana use serving as a pretense for Senators who wished to vote against the nomination because of disagreement with his political beliefs. Bork and Ginsburg’s rejections do represent something of a change because the media and other members of Congress were able to pierce the pretexts for the rejections, but by no means was the political involvement in their confirmation processes unprecedented.

206. *CBS Evening News* (CBS television broadcast, Oct. 29, 1988), available at <http://www.ratherbiased.com/judicial.htm> (on file with the *New York University Journal of Legislation and Public Policy*).

207. VIEIRA & GROSS, *supra* note 182, at 185.

208. *See id.* at 183 (discussing organization of political groups in opposition to Ginsburg nomination).

209. *See id.* at 184–85 (recounting opposition of several Senators to Ginsburg nomination).

210. *See, e.g.,* VIEIRA & GROSS, *supra* note 182 (commenting at length on various aspects of Bork confirmation process); MALTESE, *supra* note 84 (asserting that politics has always played role in Supreme Court confirmation process).

C. *Clarence Thomas: Political Near-Rejection Under Bush*

George H. W. Bush had the opportunity to make two nominations to the Supreme Court during his four years in office.²¹¹ The first of his nominations, David Souter to replace William Brennan as Associate Justice, caused little difficulty in the Senate. Souter was confirmed by a substantial margin.²¹² When Thurgood Marshall resigned from the Court the following year, Bush nominated Clarence Thomas to fill the vacancy.²¹³ Thomas had been an active political figure in the Reagan and Bush administrations, serving as Assistant Secretary for Civil Rights in the Education Department from 1981 until 1982, and then serving as Chairman of the Equal Employment Opportunity Commission until 1990, when he was elevated to the District of Columbia Circuit by President Bush.²¹⁴ Bush nominated Thomas to the Supreme Court after Thomas had spent little more than a year on the District of Columbia Circuit.²¹⁵

Considering Thomas's relatively limited career as a jurist (and almost nonexistent career prior to that as a professor or active member of the bar), it is somewhat surprising that Thomas's qualifications were not the primary issue in his confirmation hearings.²¹⁶ Instead, Thomas's confirmation hearings revolved around allegations that he sexually harassed Anita Hill, a former employee.²¹⁷ However, the *Congressional Record* of the debates on the Thomas nomination reveals that political grounds played an extremely important role among those who opposed the nomination.

211. See generally VIEIRA & GROSS, *supra* note 182, at 193–224 (discussing confirmations of David Souter and Clarence Thomas).

212. Susan Thomas, *Clarence Thomas*, in 5 JUSTICES OF THE SUPREME COURT, *supra* note 21, at 1829, 1833. By nominating Souter, Bush intended to replace Brennan, a long-term leader of the liberal forces on the Court, with a relatively conservative mind. VIEIRA & GROSS, *supra* note 182, at 193–94 (discussing selection process for Justice Souter). Ironically, Souter has since become one of the most reliable members of the Court's "liberal" block, writing much-studied dissents in many of the Court's most contentious cases. See, e.g., *Bush v. Gore*, 531 U.S. 98, 129 (2000) (Souter, J., dissenting); *Alden v. Maine*, 527 U.S. 706, 760 (1999) (Souter, J., dissenting); *Seminole Tribe v. Florida*, 517 U.S. 44, 100 (1996) (Souter, J., dissenting).

213. MALTESE, *supra* note 84, at 7.

214. Thomas, *supra* note 212, at 1831–32.

215. *Id.* at 1832–33.

216. *Id.* at 1831.

217. Due to space constraints, this Note does not detail the allegations against Thomas. For further discussion of the issue, see DAVID BROCK, *THE REAL ANITA HILL* (1993) (taking position that allegations against Thomas were largely unsubstantiated); JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* (1994) (taking position that allegations against Thomas were well-founded).

Several of the Senators who opposed the Thomas nomination asserted political grounds for their opposition. Herbert Kohl of Wisconsin criticized him for lacking a “comprehensive judicial philosophy,” and for Thomas’s unwillingness to express any views about the *Roe v. Wade* decision.²¹⁸ Senator Claiborne Pell invoked political grounds for his opposition, stating that part of his reason for opposing the nomination was that Thomas had an “extremely conservative philosophy already well represented in the Court.”²¹⁹ Senator Riegle took an even stronger stance, claiming that since Thomas had “a record of a decade of bizarre and questionable legal theories and policy positions,” he was unfit to serve on the Court.²²⁰ Several other Senators expressed similar concerns about Thomas’s philosophy and intellectual ability in political terms.²²¹

A few of Justice Thomas’s supporters also asserted political grounds for their support of his nomination. Senator Burns asserted that Thomas should be confirmed because “he understands the truest meaning of rights.”²²² While this does not signify direct support for Thomas’s conservative philosophy, this statement does at least imply support for Thomas’s philosophical point of view. Senator Connie Mack from Florida also implicitly invoked agreement with the nominee’s judicial philosophy as reason for support when he stated that Thomas understood the “principles of self-reliance and personal freedom which must be at the core of the Supreme Court’s reasoning.”²²³

The Senate confirmed Thomas by the extremely narrow margin of fifty-two votes in favor of confirmation to forty-eight votes opposed.²²⁴ Even though Thomas’s nomination, unlike those of Carswell, Haynsworth, and Bork, was successful, the protracted struggle over his confirmation reveals that politics was as important as, if not more important than, the allegations of sexual misconduct. Yet again, both sides of a bitterly contested confirmation proceeding invoked political grounds in support of their stances on the confirmation. The battle over Thomas’s confirmation shows that politics have come into

218. 102 CONG. REC. 14,669 (1991) (statement of Sen. Kohl).

219. *Id.* at 14,671 (statement of Sen. Pell).

220. *Id.* at 14,673 (statement of Sen. Riegle).

221. Among those who spoke on these issues were Senator Paul Wellstone, *id.* at 14,682, Senator Brock Adams, *id.* at 14,688, Senator John Glenn, *id.* at 14,691, Senator Tom Daschle, *id.* at 14,694, Senator Richard Pryor, *id.* at 14,695–96, and Senator Frank Lautenberg, *id.* at 14,698.

222. *Id.* at 14,673 (statement of Sen. Burns).

223. *Id.* at 14,700 (statement of Sen. Mack).

224. Rogers & Calmes, *supra* note 131.

play in the most recent nominations, even as the game has evolved with the advent of media involvement.²²⁵

VI

MOVING FORWARD: ADVICE AND CONSENT FOR PRESIDENT GEORGE W. BUSH

During the Clinton years, the Senate confirmed both nominees to the Supreme Court with little struggle.²²⁶ However, both of Clinton's nominations to the Court took place while there was a clear Democratic majority in the Senate, and they were the product of careful political maneuvering on the part of the White House, which aimed to ensure quick confirmations for his nominees.²²⁷ Clinton's attempts to nominate judges became more problematic in 1994, when Republicans gained control of the Senate. His struggles to get district and circuit court judges confirmed by the Senate, especially in the later years of his Presidency, are well known.²²⁸ There is no question that politics continued to play a role in the judicial confirmation process, even under Clinton.

The Presidency of George W. Bush poses a number of unique questions about the degree to which politics should continue to be involved in the judicial confirmation process. The unusual circumstances under which Bush became President have led a number of scholars to examine the issue of how the Senate should respond to his nominees to the Supreme Court.²²⁹ Not only did Bush fail to win a plurality of the popular vote in the 2000 election, but the electoral votes in the state of Florida were disputed at great length, and in the end the dispute was settled by a decision of a closely divided Supreme Court.²³⁰ In addition, Bush may well have the opportunity to make an

225. For a discussion of how the media has altered the Supreme Court confirmation process, see generally MALTESE, *supra* note 84.

226. *Id.* at 151.

227. *See id.* at 150–57.

228. *See, e.g.*, Kelly Wallace, *Clinton Calls on Congress to Act on Judicial Nominations*, CNN.COM, Jan. 4, 2001, at <http://www.cnn.com/2001/ALLPOLITICS/stories/01/04/clinton.judges/index.html> (on file with the *New York University Journal of Legislation and Public Policy*).

229. *See, e.g.*, Michael J. Gerhardt, *Norm Theory and the Future of the Federal Appointments Process*, 50 DUKE L.J. 1687 (2001); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001); Ackerman, *supra* note 4.

230. *See* sources cited *supra* note 2.

unusually high number of nominations to the Supreme Court because several of the Justices are nearing retirement age.²³¹

Many critics have demanded that Bush's nominees be treated with extreme scrutiny in the hopes of avoiding the confirmation of another "stealth candidate" like Justices Anthony Kennedy and Clarence Thomas.²³² Those who expressed concern about the potential for Bush's nominees to hide their ideologies from the public became even more anxious when Bush announced that he would end the American Bar Association's role in the confirmation process.²³³ This announcement, coupled with the existing concerns about a conservative tilt on the Supreme Court, led many to assert that no nominees to the Supreme Court should be confirmed during the Bush presidency.²³⁴

This argument fundamentally misunderstands the meaning of advice and consent in several respects. First, it misunderstands history. Bruce Ackerman uses Congress's reaction to the prospect of Andrew Johnson nominating Justices to the Supreme Court in support of his position that the Senate should refuse to confirm Bush's nominees.²³⁵ While Andrew Johnson, like Bush, was not elected to the Presidency by a majority of the popular vote, the ticket of Lincoln as President and Johnson as Vice-President had received a clear majority of both popular and electoral votes cast in the 1864 election.²³⁶ Further, the distinctive and unusual political and social situation of the time, caused by the Civil War and its immediate aftermath, makes the Senate's refusal to consider Johnson's nominees considerably more understandable than a refusal to consider Bush's nominees. Finally, and

231. Justice John Paul Stevens is eighty-two; Chief Justice Rehnquist is seventy-eight; Justice Sandra Day O'Connor is seventy-two; and Justice Ruth Bader Ginsburg is seventy-two (and recently suffered from colon cancer). See Mersky, *supra* note 21, at 1954–55 chart 2. Any or all of these Justices might choose to leave the court in the next four years.

232. It should be noted that "stealth candidates" often turn out quite differently than might be expected. In recent years, the most prominent example is Justice David Souter, who has turned out to be far more liberal than any other Justice appointed by Presidents Reagan or Bush. See *supra* note 212.

233. See, e.g., Neil A. Lewis, *White House Ends Bar Association's Role in Screening Federal Judges*, N.Y. TIMES, Mar. 23, 2001, at A13. Controversy about the ABA's role in the confirmation process began when four members of the ABA's fifteen member Committee on the Judiciary publicly announced that they felt Robert Bork was not qualified to serve on the Supreme Court. Neil A. Lewis & David Johnston, *Bush Would Sever Law Group's Role in Screening Judges*, N.Y. TIMES, Mar. 17, 2001, at A1.

234. See Ackerman, *supra* note 4, at 48; *Here Come the Judges*, *supra* note 3, at 3.

235. Ackerman, *supra* note 4, at 48. When Andrew Johnson threatened to nominate conservative Justices to the Supreme Court, Congress responded by passing a statute that prohibited retiring Justices from being replaced. *Id.*

236. HANS L. TREFOUSSE, ANDREW JOHNSON: A BIOGRAPHY 184 (1989).

most persuasively, the House of Representatives impeached Johnson, who came within one vote of conviction in his trial by the Senate, reflecting an unprecedented level of animosity between the President and Congress.²³⁷ This high degree of animosity does not exist in this case, and while Democrats currently control the Senate, their control is only by a slim margin.²³⁸ The situation Bush faces is dramatically different from that faced by Johnson.

Although the analogy to the presidency of Andrew Johnson is ultimately flawed, there is a persuasive analogy to be made to a prior presidency. Like George W. Bush, Rutherford B. Hayes became President only after a protracted post-election struggle over vote counting in Florida (as well as, in Hayes's case, several other southern states) that was resolved only by action of the Supreme Court.²³⁹ During his term, Hayes made three nominations to the Supreme Court, and only one of those nominations, Stanley Matthews, was rejected.²⁴⁰ That in the most direct historical parallel to Bush's presidency the Senate did not reject all Supreme Court nominees out of hand, but rather carefully scrutinized all nominees, indicates that out-of-hand rejection is not the appropriate remedy should President Bush have the opportunity to make a nomination to the Supreme Court. Rather, the Senate should follow the Matthews example and carefully examine both the qualifications and political views of Bush's nominees.

At the Constitutional Convention, the Framers clearly created a shared power structure for appointments as a way to ensure that both the legislative and executive branches had a substantial voice in the process of appointing judges and other important federal officials.²⁴¹ This power-sharing structure has been in practice throughout American history. As early as 1791, the Senate went far beyond merely questioning qualifications of nominees to questioning their political

237. For a complete discussion of the political, social, and legal aspects of Jackson's impeachment, see WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* 143–274 (1992).

238. Matt Bai, *The Steel Behind the Smile*, *NEWSWEEK*, June 4, 2001, at 28.

239. See HOOGENBOOM, *supra* note 133, at 25–50. Unlike Bush's situation, the Hayes vote-counting issue was not resolved by a specific decision of the Supreme Court. However, the special panel that resolved the vote-counting dispute in favor of Hayes contained five members of the House, five members of the Senate, and five members of the Supreme Court, with the Justices provided the deciding votes. *Id.* at 38–41.

240. See MALTESE, *supra* note 84, at 3 tbl.1. Hayes's other two nominees were John Marshall Harlan and William B. Woods. Woods served for only six years, but Harlan became one of America's most important jurists during his thirty-four years on the Supreme Court. Mersky, *supra* note 21, at 1906 chart 1.

241. See *supra* Part II.

views when it rejected John Rutledge on those grounds.²⁴² The Senate has continued to act in such a manner, with Stanley Matthews and many recent confirmation hearings serving as prominent examples. Although this phenomenon has attracted more notice in recent years, it is by no means a new one.

The bases of the strong senatorial role in the nomination and confirmation process are only strengthened by three circumstances particular to the Bush administration. First, the Supreme Court is closely divided on several contentious issues at this time, with many opinions decided by five to four votes.²⁴³ The fact that laws relating to such a wide range of issues could easily be changed by only one appointment to the Supreme Court makes any appointment, regardless of who is President, worthy of careful scrutiny.

Second, it is likely that over the next few years, the Supreme Court and other federal courts will be dealing with new legislation passed in the wake of the events of September 11, 2001, that may arguably intrude on civil liberties. Congress recently passed an anti-terrorism bill, quickly signed into effect by President Bush, that dramatically expands wiretapping authority, increases penalties for aiding terrorists, and lengthens the statute of limitations for prosecuting terrorist offenses.²⁴⁴ It is all but certain that these new governmental powers will be challenged in the federal courts, and constitutional issues are likely to reach the Supreme Court.

A similar series of events occurred in the wake of the 1995 bombing of the Murrah Federal Building in Oklahoma City, which led to the passage of the Anti-Terrorism and Effective Death Penalty Act (AEDPA).²⁴⁵ Several cases relating to the scope of AEDPA have been litigated in the federal courts, including the Supreme Court, which has been forced to confront serious issues relating to the writ of *habeas corpus* and due process in death penalty cases in particular.²⁴⁶ These cases have had a dramatic effect on the practice of criminal law in America, and a similar impact can be expected from the legislation that is the result of the tragedy of September 11, 2001.

242. See *supra* Part III.

243. See sources cited *supra* notes 13–16 and accompanying text.

244. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

245. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 28 U.S.C.).

246. See, e.g., *Tyler v. Cain*, 533 U.S. 656 (2001) (holding that prisoner was not entitled to file successive *habeas* petitions under AEDPA).

Finally, greater scrutiny of Bush's nominees is justified because of the manner in which he assumed the presidency. Historically, those who have ascended to the Presidency as a result of a controversial election or after the death or resignation of a President have faced a considerably more difficult road in achieving confirmation of their Supreme Court nominees. Nine prior Presidents (including Hayes) have had the opportunity to make nominations to the Supreme Court without having been duly elected to the Presidency.²⁴⁷ Of their twenty-three nominations, ten (approximately forty-three percent) were not successfully confirmed.²⁴⁸ In contrast, duly elected Presidents have made 116 nominations to the Court, and only seventeen (or approximately fourteen percent) of their nominations have been rejected.²⁴⁹ This dramatically higher rejection rate for unelected Presidents reflects a clear historical trend—Presidents who were not duly elected are entitled to significantly less respect when making Supreme Court nominations than those who were. Given that Bush did not win a plurality of the popular vote in the 2000 election, the historical pattern of careful scrutiny should continue.

These factors all indicate that Bush's nominees are worthy of special scrutiny, although no more so than those of other Presidents not duly elected. Recall that even Hayes was able to achieve confirmation of the majority of his nominees to the Supreme Court, despite the highly unusual circumstances under which he came to office.²⁵⁰ President George W. Bush is entitled to the same deference as any other President who takes office under controversial circumstances. This means that his nominees to the Supreme Court should neither be rejected out of hand, nor confirmed without careful examination of their philosophies and qualifications to serve on the Supreme Court.

247. These nine Presidents were John Tyler, Millard Fillmore, Andrew Johnson, Rutherford B. Hayes, Chester Arthur, Theodore Roosevelt, Calvin Coolidge, Harry Truman, and Gerald Ford. MALTESE, *supra* note 84, at 4 tbl.2; Mersky, *supra* note 21, at 1906 chart 1. All but Hayes assumed the presidency after the death or resignation of their predecessor. Hayes is not considered "duly" elected because of the dispute over the 1876 election.

248. MALTESE, *supra* note 84, at 4 tbl.2; Mersky, *supra* note 21, at 1906 chart 1. For purposes of these statistics, Edward King (nominated twice by Tyler and rejected twice by Senate) is counted only once.

249. See MALTESE, *supra* note 84, at 3 tbl.1, 4 tbl.2; Mersky, *supra* note 21, at 1903–11 chart 1.

250. In addition to Matthews, Hayes nominated John Harlan and William B. Woods to serve on the Court, both of whom were confirmed. See Mersky, *supra* note 21, at 1906 chart 1.

CONCLUSION

Understanding the Advice and Consent Clause requires a close look at its origins and its historical uses. The origins of the Clause indicate a division between those who wanted the appointment power to rest solely in the Executive and those who wanted the power to rest solely in the Legislature, with the final language proving to be a compromise designed to mollify both parties. Additionally, despite claims to the contrary, Congress has frequently used its advice and consent function to play an active role in the confirmation process. As early as the presidency of George Washington, Congress's disapproval of judicial nominations was based on both concerns with qualifications and on the nominee's political views.

This heritage continued to thrive throughout the eighteenth century, leading to the rejection of many nominations, including Rutherford B. Hayes's nomination of Stanley Matthews. After the Hayes presidency, the Senate's role in the confirmation process may have been less prominent, but the Senate has reasserted its power in recent years. These struggles have once again led to some nominations being rejected by the Senate. This history provides a useful guide for those making decisions about what advice and consent should mean. The Senate owes the Constitution and America advice on whether particular nominations are proper and has a responsibility to consent only when the nominees are acceptable.