ARIZONA
LAW REVIEW

VOLUME 34 1992 NUMBER 1

Essays

EXAMINING THE JUDICIAL NOMINATION PROCESS: THE POLITICS OF ADVICE AND CONSENT

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The dramatic and startling events surrounding the nomination of Supreme Court Justice Clarence Thomas produced a widespread demand for drastic and sweeping reform of the constitutional process of Advice and Consent. Although this is an understandable response to the circumstances surrounding that nomination, demands for reform should be considered with caution.

The Thomas hearings were an unprecedented event, involving unforeseeable occurrences that necessitated ad hoc procedures. The most objectionable aspects of that particular nomination process have little chance of repeating themselves in the future.

Other aspects of that particular nomination hearing process that were considered objectionable are inherent in nomination hearings and will continue to engender contentious debate. Indeed, those aspects reflect the political nature of the process, a nature that I believe was envisioned by the Framers, a nature that is unavoidable and indeed beneficial.

Current critics of the Senate's role in the confirmation process pinpoint the 1987 Supreme Court nomination hearings of Judge Robert Bork as the

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** I would like to thank Dennis K. Burke, a Majority Counsel on the Senate Judiciary Committee, for the in depth research and thoughtful analysis he contributed to this Essay.

genesis of the problem. It is contended that the ideology of a Supreme Court nominee was first considered by the Senate at those hearings. But this view ignores the historical record of Supreme Court nominations. Although often shrouded in the guise of other criteria, the Senate throughout history has considered ideology in confirming Supreme Court nominees.

In this Essay, I will reflect upon my experiences in exercising my Advice and Consent duty under the Constitution with respect to Supreme Court nominees. In doing so, I will attempt to distinguish the objectionable aspects of recent nominations from the inherent attributes of this constitutional process. In particular, I will discuss the parameters of the Senate's Advice and Consent duty. I will then address the President's role in selecting nominees. I will discuss the hearing process and how it has developed in the last few nominations. Finally, I will examine some of the numerous suggested reforms that have evolved out of these most recent Supreme Court nominations.

SHARED POWER: THE ROLE OF THE SENATE IN THE CONFIRMATION PROCESS

With the exception of the power to declare war, I believe the Senate's responsibility to Advice and Consent to judicial nominees is the most important one granted to Congress by the Constitution.[1] It is one of the few constitutional circumstances in which two branches of the federal government interact with the opportunity to influence directly a third branch. And like so many other clauses in the Constitution, the Constitution provides no standards for Senators to apply in fulfilling this constitutional duty. However, because the Senate cannot be challenged on its interpretation, it will always be the final interpreter of the Advice and Consent Clause.

Like the Senate, no immutable standard or criterion guides the President in this decision. But, for what it is worth, the Framers contemplated a sharing of responsibility between the executive and legislative branch.[2]

The Senate's role in the confirmation process is not simply to rubber-stamp the President's selection.[3] The Senate has a constitutionally assigned power in the confirmation process. Just as the Congress does not expect the President to just rubber-stamp legislation, the President should not expect the Senate to rubber-stamp judicial nominees.

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1. The United States Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme [sic] Court, and all other Officers of the United States ...." U.S. CONST. art. II, sec. 2.

2. *See, e.g.*, Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L.J. 657 (1970); Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1204 (1988).

3. *See, e.g.*, James E. Gauch, *The Intended Role of the Senate in Supreme Court Appointments*, 56 U.CHI. L. REV. 337, 340-41 (1989):

> The Framers consciously divided the power between the Senate and the President in order to protect the interests of all states and to avoid political abuse of the appointment power.... [T]o achieve the ends the Framers desired, the Senate must play an active role in ... any factors that it deems important.

Both the President and the Senate should respect each other's role in the process. But in the same respect, they must each carry out their own constitutional responsibility. The ramifications of this decision are immense. Supreme Court justices serve lifetime tenure, making decisions that will affect generations to come. The Senate confirmation process is the only opportunity that the legislative branch and the public have to participate in this selection process.

The division of responsibility between the President and the Senate in choosing judges will always be wrapped in controversy. Throughout the history of confirmation, Presidents, not surprisingly, have attempted to define the confirmation process as one solely within their prerogative.

An illustrative example of this occurred during the unsuccessful nomination of G. Harold Carswell to the Supreme Court in 1970. Then President Richard Nixon, in the heat of the battle over Carswell, wrote to Senator William Saxbe of Ohio complaining that the Senate had failed to advise and consent to his nomination and, in doing so, had denied him the right "accorded to all previous Presidents" to place nominees of his choice on the bench.[4]

Within the Senate itself, Senators have differed in determining their role in the confirmation process. I have viewed the Advice and Consent power as a check power and not a sword. It is for this reason that I approach the process with a presumption that the President's nominee should be confirmed. In my view, affording the nominee a presumption does not lessen the level of scrutiny applied to the nominee. The Senate cannot fulfill its constitutional role by automatically consenting to the nomination. The excessive deference that is often exhibited by Senators from the President's party disregards the Senate's constitutional role in this process.

Some commentators have suggested that the Senate should limit its Advice and Consent role to determining whether the nominee is intellectually competent and possesses integrity.[5] Under this scenario, I assume the nominee merely would submit a resume and the Senators would limit our questioning to whether the nominee believed he or she was honest.

However, a nominee's qualifications on paper are not enough to confirm the individual. Furthermore, as I will discuss further in this Essay, such an approach ignores the political considerations the President has made in selecting his nominees.

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4. Letter from Richard M. Nixon to William Saxbe, April 1, 1970, *reprinted in* 116 CONG. REC. 10158 (1970).

5. *See, e.g.*, Bruce Fein, *A Circumscribed Senate Confirmation Role*, 102 HARV. L. REV. 672, 687 (1989). Fein is one of several former Reagan Administration officials who strongly supports Presidential scrutiny of a nominee's judicial philosophy, while attempting to diminish the role of the Senate. Fein once stated that

> a President who fails to scrutinize the legal philosophy of federal judicial nominees courts frustration of his own policy agenda.... It is thus imperative that President Reagan scrupulously examine the philosophies of his nominees to vindicate many of the pledges he made to the American people in 1980 and 1984.

Nadine Cohodas, *Conservatives Pressing to Reshape Judiciary*, CONGRESSIONAL Q. WEEKLY REP., 1759, 1760 (Sept. 7, 1985).

Some of my colleagues believe that the nominee must overcome a burden of proof before being confirmed. The most vocal supporter of this position is the present Chairman of the Senate Judiciary Committee, Joseph R. Biden, Jr. of Delaware. In the Committee Report on the nomination of Justice David Souter, Chairman Biden concluded his views by stating:

> In supporting the confirmation of David Hackett Souter, I am not saying that I am giving this nominee, or any other nominee, the "benefit of the doubt." Nor am I saying that a nominee need only prove himself or herself *not* to be an extremist to win this committee's approval.
>
> The burden of proof *is* on the nominee — and it is a burden that this nominee, in my view, just barely met. Any future nominee who fails to meet that burden — and again, I emphasize how close this nominee came to that line — will be vigorously opposed by me.[6]

Often a Senator's standard for evaluating a nominee will be adapted to the particular judicial nominee. Proof of this is no more evident than examining the inversely evolving approaches of two Senators who have been prominently involved in the confirmation process for some time. Consider the following quote and try to determine its source:

> I believe it is recognized by most Senators that we are not charged with the responsibility of approving a man to be an Associate Justice of the Supreme Court only if his views always coincide with our own. We are not seeking a nominee for the Supreme Court who will express the majority view of the Senate on every given issue, or on a given issue of fundamental importance. We are really interested in knowing whether the nominee has the background, experience, qualifications, temperament, and integrity to handle this most sensitive, important, and responsible job.

Compare that statement with another prominent Senator's view:

> Several Senators have indicated that they do not believe it to be within the purview of authority of the membership of the U.S. Senate to question the philosophy of an appointee to the highest court in the land. I do not accept this theory as valid, particularly in view of the fact that the philosophical biases of present day members of the Supreme Court have such a bearing upon their own interpretation of the Constitution.

These divergent arguments were heard often throughout the Bork and Thomas confirmation hearings and Senate floor debate. The proper role of the Senate in confirming Supreme Court nominees was one of the primary issues debated during those hearings.

However, the aforementioned quotations are almost twenty-five years old! They were expressed during the confirmation of Justice Thurgood Marshall. The first quote was from Senator Edward Kennedy of

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6. *See* S. Exec. Rep. No. 32 , 101st Cong., 2d Sess. at 38 (1990).

Massachusetts, who argued during the Bork hearings in 1987 that Bork's philosophy would set America back 30 years.[7] The second was made by Senator Strom Thurmond of South Carolina, the ranking Republican on the Judiciary Committee, who, during Bork and Thomas nominations, argued that Senators should only consider a nominee's qualifications, temperament and integrity.[8]

Other Senators have adopted a rather unique view of the criteria that they apply in their Advice and Consent role. For example, Senator Roman Hruska, who was the lead Senate supporter for Judge G. Harold Carswell, stated, in a radio interview about Carswell, that: "Even if he were mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they, and a little chance? We can't have all Brandeises and Frankfurters and Cardozos and stuff like that there."[9]

The exact parameters of the Senate's role in filling Supreme Court vacancies and the standard it should apply in fulfilling its Advice and Consent role will always be a matter of debate. But, as I discuss in the next section, those who profess that the infusion of politics into the process is a recent phenomenon misinterpret Supreme Court confirmation history.

THE PRESIDENT AND THE SENATE: EXAMINING POLITICAL MOTIVES

With the exception of the President's announcement of a nominee, public attention to the Supreme Court nomination process centers around the Senate confirmation process. The political motives of the President in nominating an individual to the highest Court are overshadowed by the political activity that occurs after the nomination is announced by the President.

The confirmation process begins long before a nominee's name is sent to the Senate. Few people realize that the executive branch takes five times as long to perform its appointment duty than the Senate spends to confirm the nominee.[10] Unfortunately, we never witness the President's examination of the nominee's suitability and qualifications in the broad sense. The American public has no idea what political or ideological screening or questioning is conducted during the executive branch's review of a potential nominee. Because the President's evaluation is hidden from public inspection, the public's perception of the Senate's portion of the process is increased.

The Presidential selection process is often used for political gain, at times to strengthen an incumbent's chances for re-election. As many of us remember, Richard Nixon campaigned against the Warren Court and its "liberal" decisions. During the presidential campaign of 1968, Chief Justice Earl Warren had already announced plans to retire and the unsuccessful

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7. *See* 113 Cong. Rec. 24647 (Bound ed. Aug. 30, 1967) (Statement of Senator Kennedy).

8. *See* 113 Cong. Rec. 24648 (Bound ed. Aug. 30, 1967) (Statement of Senator Thurmond).

9. RICHARD HARRIS, DECISION 110 (1971).

10. *See* 138 CONG. REC. S895 (daily ed. Feb. 4, 1992) (Report of the Task Force on the Confirmation Process).

nomination of Associate Justice Abe Fortas to replace Warren was occurring in the Senate. Nixon promised that if he was elected he would appoint justices who would be in his own conservative law-and-order image. He used the term "strict constructionist" to define the judicial philosophy he expected his nominees would possess.

Nixon's victory over Hubert Humphrey in 1968 was by a small margin. Sensing a need to appeal to the south for his 1972 election, Nixon devised the "Southern Strategy." The plan was to appoint southern judges to vacancies on the Court.[11] Nixon's first two appointees were Haynsworth from South Carolina and Carswell from Florida. Although he would lose these confirmation battles, Nixon's appointment strategy contributed to his success in carrying the southern states in the 1972 election.[12]

The two most recent administrations have engaged in an excessively active judicial screening process. Ronald Reagan campaigned with an explicit promise to change the composition of the Supreme Court. Both Reagan and President Bush, but particularly Reagan, ran for President pledging to nominate so-called "conservative" justices who would interpret, not make, law.[13] Prior to Reagan, no Administration had engaged in such a blatant campaign designed to reshape the judiciary to ensure the dominance of its political agenda.[14]

For example, Reagan's was the first Administration to involve the Office of Legal Counsel in judicial nominations. His was also the first Administration to establish a systematic screening process that emphasized the judicial philosophy of potential nominees.[15] Whereas former Administrations had focused the task of judicial selection at the Justice Department, Reagan established a formal White House role. He created the President's Committee on Federal Judicial Selection, which met regularly at the White House to discuss nominees.[16]

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11. *See* JOHN P. FRANK, CLEMENT HAYNSWORTH, THE SENATE, AND THE SUPREME COURT 133 (1991).

12. *Id.* "It is impossible to evaluate precisely how much of that election victory was due ot the Supreme Court nominations and how much to other things, but certainly the Supreme Court nominations helped."

13. My good friend and colleague on the Senate Judiciary Committee, Orin G. Hatch, noted in comparing these two Presidents' approaches to judicial nominees that "Ronald Reagan knew his greatest legacy was going to be the federal courts. I think George Bush thinks the courts are important, but it [conservative dominance] is already there." *See* Joan Biskupic, *Bush's Nominees Lack Baggage That Reagan's Often Carried*, CONGRESSIONAL Q. WEEKLY REP. 8049 (Sept. 22, 1990).

14. Of course, Franklin Delano Roosevelt also blatently sought to transform the Supreme Court to further his New Deal programs. His infamous "court-packing" plan was one of the landmark events in Supreme Court history. Yet, Reagan's strategy was broader than Roosevelt in that Reagan extended his efforts to ensure that judges at *all* levels adhered to his "judicial philosophy." He effectuated this strategy through an unprecedented screening process of judicial candidates.

15. *See* WALL ST. J., Sept. 6, 1985, at 1 ("And on at least one occasion, White House officials asked associates of a potential district court nominee, a state court judge who ultimately wasn't named to the bench, about the candidate's personal views on abortion.").

16. *See* David Lauter, *A New U.S. Judiciary Looms Under Reagan*, NATIONAL L.J., May 6, 1985.

Ronald Reagan obviously wanted to use his judicial appointments to shape judicial treatment of his policies. Beyond criticizing the Warren and Burger Court decisions, he used his future appointment authority as a political tool to overturn those decisions. Interestingly, during the Bork nomination struggle, Reagan attempted to downplay his political role stressing and condemning the "politics" of those who opposed Bork.

A President is entitled to choose judges who he believes reflect a particular judicial philosophy. I do not challenge that prerogative. It is unrealistic to expect the President not to use the appointment process to promote his political objectives.[17]

However, if the President has a political agenda and nominates judges he expects will fulfill that agenda, then the Senate has a duty to determine whether the nominee will go so far as to forsake judicial independence to impose the President's political agenda through judicial fiat.[18] Like the Senate, the President should not encroach upon the independence of the judiciary.[19]

The presence of politics in the nomination process is by no means a new phenomenon. The first rejection of a Supreme Court nominee on political grounds occurred in 1795. President Washington nominated Associate Justice John Rutledge to be the Chief Justice. Rutledge was well qualified and had been an author of the first draft of the Constitution.

Ironically, Rutledge was rejected for views he held that would have had little relevance to the position as Chief Justice. But two weeks after he was nominated, he made the mistake of criticizing the Jay Treaty entered into between the United States and England in 1795. Proponents of the treaty within Rutledge's party joined with the opposition party to defeat Rutledge's elevation by a vote of ten to fourteen.[20] In a strategy that would continue to

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17. During the nomination hearings for Justice Thomas, Chairman Biden, in response to testimony from the Dean of the Yale Law School, Guido Calebrasi, stated, "I doubt whether there is a single American out there who believes that President Bush said, 'By the way, just go find me a nominee who has an open mind, just find me a nominee who has integrity, just find me a nominee who is schooled in the law; I ask no more.' John Sunnunu [Bush's Chief of Staff at the time] would have apoplexy if that were the call."

18. *See* Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1204 (1988):

> Nothing in the language of the appointments clause, in its origin, or in the actual history of the appointments process supports a constitutionally based presidential 'right' to mold an independent branch of government for a period extending long beyond his electoral mandage. Rather ... all the relevant historical and textual sources support the Senate's power when and if it sees fit to assert its vision of the public good against that of the President.

19. Since the Bork nomination, the executive branch has attempted to control a nominee's performance before the Judiciary Committee. After months of coaching the nominee, White House advisors sit behind the nominee during the hearing. I have no objection to the White House aiding a nominee in preparing for his testimony before the Committee. However, such coaching creates the perception that the judicial nominee serves the executive branch rather than a separate branch of government. Nominees receive enough "assistance" from Senators from the President's party to make interference from the White House unnecessary. By their coaching, White House handlers, who use an approach appropriate for a political campaign, can discourage the nominee from being candid in answering legitimate questions. At times, this was evident during the Thomas hearings.

20. Rutledge's defeat, so early in the history of the Constitution, casts doubt upon the theory that the Framers intended for the Senate's role in Advice and Consent to be narrow.

be exercised throughout confirmation history, Rutledge's initial opponents attempted to conceal their true political motives behind a pretext — they circulated rumors that Rutledge was mentally incompetent.[21]

Other Presidents during the nineteenth century encountered difficulty in gaining confirmation that would be hard to fathom today. The first non-elected President, John Tyler, forwarded five Supreme Court nominees to the Senate between 1844 and 1845. Only one was confirmed to sit on the Court. Four others were rejected or not acted on, not because they were not qualified, but because of the Tyler's political unpopularity.[22]

To prevent President Andrew Johnson from appointing his Attorney General, Henry Stanberry, the Radical Republican Congress passed legislation reducing the number of justices from ten to seven as vacancies occurred. Thus, the seat that Stanberry had been nominated to fill was abolished.[23]

Democratic President Grover Cleveland twice attempted to appoint New Yorkers to the Supreme Court. Both times he was stopped by a powerful Democratic Senator from New York, David B. Hill.[24] Cleveland and Hill differed on patronage matters and Hill, through the use of "senatorial courtesy,"[25] both times was able to stop Cleveland's nominees.[26] Cleveland finally was successful in naming to the seat the Senate Majority Leader to the seat, Senator Edward Douglass White of Louisiana.

Fewer rejections of Supreme Court nominees have occurred in this century, but certainly not because the process has become less political. Robert Bork was the sixth nominee rejected by the Senate since 1930. In that year, President Herbert Hoover appointed Robert Parker, a North Carolina judge, who was bitterly opposed by the NAACP and by labor unions such as the American Federation of Labor. These special interest groups were instrumental in defeating Parker by engaging in a well-orchestrated campaign against his nomination.[27]

In an effort to provide his own defense, Parker requested permission to testify before the Senate Judiciary Committee but was denied the opportunity. He was defeated thirty-nine to forty-one by the full Senate. After his defeat, Parker returned to the court of appeals where he issued several decisions supported by civil rights groups. Ironically, the man subsequently confirmed

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21. 1 CHARLES WARREN, THE SUPREME COURT IN THE UNITED STATES HISTORY 134-35 (rev. ed. 1935).

22. *See* Paul Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146, 1148-49 (1988).

23. *See* CONGRESSIONAL QUARTERLY'S GUIDE TO THE U.S. SUPREME COURT 657 (1979).

24. Freund, *supra* note 22, at 1151.

25. Senatorial courtesy is the unwritten practice by which a Senator in the President's party provides his or her views on a candidate or proposes a candidate for positions within his or her respective circuit or state. Traditionally, without this endorsement, the President will withdraw the candidate or the Senate will reject the nomination.

26. The Senate rejected William B. Hornblower by a vote of 24-30 on January 15, 1894 and rejected Wheeler H. Peckham by a vote of 32-41 on February 16, 1894.

27. *See* W. BURRIS, DUTY AND THE LAW: JUDGE JOHN J. PARKER AND THE CONSTITUTION 73-83 (1987).

for that seat, Owen J. Roberts, often voted in a manner contrary to the interests of the groups opposing Parker.[28]

The unsuccessful attempt to elevate Justice Abe Fortas to be Chief Justice in 1968 provides further proof that ideological inquiry of a judicial nominee by the Senate did not start with Robert Bork. Fortas was an old friend of President Lyndon Johnson and had been on the Court since 1965. Republicans, who were in the minority in the Senate, strongly opposed Fortas. The 1968 presidential election loomed on the horizon and the election of a Republican President was a distinct possibility. On the same day that Fortas was nominated to fill Chief Justice Warren's seat, nineteen Republican Senators issued a statement stating that it was their "strongly held view" that the next Chief Justice should be selected by the newly elected President.[29] The Senators vowed to vote against confirming any Supreme Court nominees of the incumbent President, "with absolutely no reflection on any individuals involved."[30]

Following that opening volley, the Fortas nomination process became extremely contentious. Fortas was a convenient target for the anti-Warren Court sentiment harbored by many conservative southern Senators. During the hearing some Senators shouted at Fortas demanding that he answer questions about Warren Court decisions, some of which were decided before Fortas joined the Court.

Eventually, Fortas was accused of judicial impropriety for informally advising President Johnson on various policy matters while he was a sitting justice. He was also attacked for accepting large lecture fees during 1968. Opponents of Fortas filibustered his nomination and Johnson was forced to withdraw his name when a motion to invoke closure on his nomination vote failed by a fourteen-vote margin.[31]

The effort to fill Fortas' seat proved to be a long and arduous process. On August 14, 1969, Clement F. Haynsworth, who was Chief Judge of the Fourth Circuit Court of Appeals, was nominated by Richard Nixon to fill Fortas' seat on the Court. Much like the Bork hearings, the Haynsworth nomination was accompanied by lobbying tactics on both sides. While the Nixon Administration was actively involved in a complex public relations campaign to "sell" the nominee, opponents mobilized interest groups in oppo-

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28. *See* Freund, *supra* note 22 at 1154-55 ("In one of the ironies of history, Judge Parker later showed himself to be more supportive of New Deal measures than was Justice Roberts.").

29. Marjorie Hunter, *19 In the Senate Study Filibuster*, N.Y. TIMES, June 27, 1968, at 30, col. 1.

30. *Id.*

31. Any Senator who opposes legislation or a nomination may delay or prevent a vote by extending debate on the matter through lengthy speeches. This tactic is referred to as "filibustering." In the United States Senate, such obstructive debate may be ended if 16 Senators sign a motion to end the debate followed by three-fifths of the Senators "duly chosen and sworn" voting in favor of that motion. When the motion is carried, further debate is limited to 30 hours. This motion procedure is called "invoking cloture."

sition.[32] The Haynsworth nomination also provided an opportunity for Fortas' supporters to even the score with Fortas's opponents.

Rather than openly challenge Haynsworth's conservatism, Haynsworth's opponents questioned his ethical fitness to sit on the Court. Criticism arose regarding possible conflicts of interest involving the business interests he maintained while on the court of appeals. Senators were deluged with anti-Haynsworth mail.[33] Although the Judiciary Committee approved Haynsworth by a vote of ten to seven, the full Senate rejected him by a forty-five to fifty-five vote.

Nixon next nominated G. Harold Carswell, a judge on the Fifth Circuit Court of Appeals, for Fortas' seat. Carswell quickly drew opposition and widespread disapproval because of his alleged racial bias and his questionable competence. The apparatus of opposition to Haynsworth was in place to use against Carswell. In the wake of Haynsworth's defeat, Carswell should have garnered support from those who, in an effort to restore stability to the process, would not vote against two consecutive nominees. However, Carswell proved to be his own worst enemy.[34] He was defeated forty-five to fifty-one.[35]

A wide-ranging litany of accusations were utilized to defeat both Haynsworth and Carswell. The allegations ranged from ethical impropriety to incompetence. In reality, the opposition to these two nominees stemmed from political and ideological differences.

The Carswell and Haynsworth nominations illustrate the fact the "politicization" of the Supreme Court confirmation process did not originate during the nomination of Robert Bork. What distinguishes the Bork confirmation battle is that, for the first time, political motives were not veiled behind personal accusations. During his hearings, Robert Bork's competence or ethics were not in question. Rather, it was his particular approach to interpreting the Constitution that paved the path to his rejection.

THE ROLE OF COMMITTEE HEARINGS IN THE PROCESS

Many recent hearings, but particularly the Bork and Thomas hearings, have produced considerable public criticism of the nomination hearing process. At times, commentators implore us to return to the days when nominees did not appear before the Committee. Senate nomination hearings do not have a long history. However, I believe their importance has increased with the expanding policy-making role the Court has assumed over the years.

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32. *See* John Anthony Maltese, *The Selling of Clement Haynsworth: Politics and the Confirmation of Supreme Court Justices*, 72 JUDICATURE 338, 340-42 (1989).

33. JOHN EHRLICHMAN, WITNESS TO POWER 120 (1982).

34. *See* FRANK, *supra* note 11, at 100-26.

35. This vacancy was finally filled by the appointment of Justice Harry Blackmun, who was a judge on the Eighth Circuit Court of Appeals. Blackmun was unanimously approved by the Judiciary Committee and the Senate confirmed him on May 12, 1970. During the nomination hearings for Justice Souter, I stated to some of his opponents that they could not expect anyone better (from their point of view) from President Bush. They cited the Blackmun nomination as precedent that it was worth opposing a nominee with the hope that his or her replacement would be more responsive to their interests.

With only a few exceptions, until 1929, nominations were considered in closed executive sessions by the Senate. The first judicial nominee appeared before the Senate Judiciary Committee in 1925.[36] But it was not until 1955 that an appearance of a Supreme Court nominee before the Committee began to become common practice.

In 1949, Sherman Minton refused to appear before the Committee. Ironically, Minton was a former Senator from Indiana who had long record of supporting a check on the Court's authority by the legislative branch.[37] Since Minton's refusal, with the exception of Earl Warren, all Supreme Court nominees have agreed to appeared before the Committee.

As a Judiciary Committee member, long before the hearings even commence, I begin an extensive analysis of the Supreme Court nominee. The Judiciary Committee staff comprehensively researches the nominee's qualifications, experience and background. The FBI conducts a background investigation of the nominee. The American Bar Association also provides an evaluation of the nominee, a practice which has been the subject of criticism since the Bork nomination.[38]

Part of the pre-hearing process entails a "courtesy call" by the nominee to members of the Committee and, in the case of Judge Thomas, to other Senators as well. I view this custom as an important opportunity to meet the nominee and begin to familiarize myself with the person. The courtesy call also benefits the nominee in that it provides him or her with insight into the concerns of each Committee member. Often I will use this office visit to discuss with the nominee some of the questions I will pose to the nominee at the hearing.

In the cases of Justices O'Connor and Rehnquist, the courtesy call had little significance because I was a longtime friend of each of those Justices. We all came from the practice of law in Arizona and I had been exposed to their legal and ethical backgrounds.[39] However, in the case of nominees such as Bork and Thomas, their courtesy calls were the first opportunity I had to meet these individuals and talk to them one-on-one.

The two most recent nominees to the Supreme Court had the advantage of having a very close friend in the Senate. In Justice Souter's case, it was Senator Warren Rudman, a Republican from New Hampshire. For Justice Thomas, his Senate guardian was Senator John C. Danforth, a Republican from Missouri. Earlier in his professional career, Justice Thomas

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36. The first Supreme Court nominee to appear before the Committee was Harlan Fisk Stone. Stone's nomination raised some controversy because Senator Burton K. Wheeler of Montana opposed Stone's prosecution, while Attorney General, of a client of Wheeler's.

37. *See* James A. Thorpe, *The Appearance of Supreme Court Nominees Before the Senate Judiciary Committee*, 18 J. PUB. L. 371, 378-79 (1969).

38. *See* Joan Biskupic, *ABA's Role Under Scrutiny*, 47 CONGRESSIONAL QUARTERLY WEEKLY REPORT, 896 (April 22, 1989).

39. Justice Rehnquist had practiced law in Arizona for 15 years before leaving to become a U.S. Assistant Attorney General in the Office of Legal Counsel in the Department of Justice during the Nixon Administration. Justice O'Connor had practiced law in Arizona for six years, was an Arizona State Senator for six years, became the first woman Majority Leader in the country, served five years as a judge on the Superior Court of Arizona and two years as a judge on the Arizona Court of Appeals.

had served on Danforth's Senate staff and the two had maintained a close friendship over the years.[40]

The senatorial friendships that these two nominees possessed proved to be assets to each. Both Senators assumed the duty of escorting the respective nominees to offices of each member of the Committee and introducing them. They each served as the chief lobbyist for the nominees and were able to monitor the progress of the nominees from within the Senate. Most important, they could personally attest to the integrity of the nominee. In the case of Senator Danforth, this would proved to be of great importance in Justice Thomas' confirmation battle.

As helpful as the courtesy visit and the pre-hearing preparation can be, I develop my best judgment of the nominee during the Committee hearings. My true understanding of how important the hearing process is to my deliberation came about when the process failed.

The nomination of Judge Antonin Scalia had been somewhat overshadowed by the controversy over the nomination of Justice William Rehnquist to be Chief Justice.[41] I was very disappointed in both Scalia and Rehnquist for their protectiveness and reticence in answering questions of myself and my colleagues during their confirmation hearings.[42]

I understand the need to avoid issues that will be directly before the Court, but it is very difficult for the Committee and the Senate to fulfill their responsibilities Senators are unable to question nominees about their judicial philosophies and views on constitutional interpretation. It is apparent to me that those nominees were advised by the Administration to be evasive and passive in response to questions from committee members.[43]

After the Rehnquist and Scalia hearings, Senator Specter and I discussed proposing a Committee resolution addressing the refusal of judicial nominees to answer questions. But before long, Justice Powell announced his retirement from the Court and President Reagan nominated Judge Bork to replace him, placing us in the midst of the process, once again.

GROWING CONTROVERSY: THE BORK AND THOMAS NOMINATIONS

With the exception of Justice Clarence Thomas' hearings, no recent confirmation hearings have been as controversial as that of Judge Robert

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40. In fact, Danforth originally hired Thomas out of Yale Law School to work for him in the Missouri Attorney General's Office. Coincidently, Souter had worked for Rudman when Rudman was Attorney General of New Hampshire.

41. Justice Rehnquist was nominated by the President Reagan to replace Warren Burger as Chief Justice on June 20, 1986. Scalia was nominated to fill Rehnquist's seat on June 24, 1986.

42. For an example of the uncooperative responses that Scalia gave to my questions, see Nina Totenberg, *The Confirmation Process and the Public: To Know Or Not To Know*, 101 HARV. L. REV. 1213, 1219 (1988).

43. Although I was satisfied with the extent of Justice Thomas' responses, it was clear that he, too, was coached to respond with evasive answers. Many Senators, who had decided to vote against Thomas prior to learning of Professor Hill's allegations, had based their decisions on Thomas' evasiveness and lack of candor.

Bork. Bork's strident views insured that his confirmation hearings would elevate emotion and rhetoric on both sides. From the day his nomination was announced by President Reagan, Bork's ardent opponents began their campaign against his confirmation.

When I met with Judge Bork prior to his confirmation hearings, I told him of my strong interest in hearing his views on the Constitution. I informed him of my dissatisfaction with the responses given to the Committee the year before by Justice Scalia and that if he took the same approach I would be hard-pressed to support his confirmation.

Bork assured me that he believed that the Committee had every right to learn of his views on constitutional and other legal issues. He told me that, without committing himself to positions on issues that might come before the Court, he would endeavor to inform the Committee of his views. I respect Judge Bork for the responsible way that he went about informing the Committee of what it needed to know before voting upon his confirmation.

I entered the Bork hearings with some uncertainties about the nominee. Nonetheless, I presumed that I would vote to confirm him. The decision on whether to vote to confirm Judge Bork proved to be one of the toughest I have faced in my fifteen years in the Senate. I heard from thousands of people on both sides of the issue from Arizona and throughout the country. What struck me the most about these people was their sincere belief that their position was best for the country.

Those who urged me to support Judge Bork's nomination were convinced that his judicial philosophy would lead America into a new era of morality, prosperity, and reduced crime. Those who urged me to oppose Judge Bork's nomination were equally convinced that his judicial philosophy would lead America backwards into an era of discrimination, economic monopolies, and governmental intrusion.

Why did this single nomination arouse such whirlwinds of passion and rhetoric? Judge Bork was different from Justice Sandra Day O'Connor, Chief Justice William Rehnquist, and Justice Antonin Scalia. He had spent his career as a legal scholar criticizing in the harshest terms the Court and its decisions. He had used inflammatory terms to criticize the decisions that most people in this country credit with giving some measure of equality and respect to all of us.

In my judgment, no other potential Supreme Court nominee in history has been as strident in his criticism of the way the Constitution has been used to protect individual liberties. That was the difference between the previous Reagan nominees and Judge Bork. Judge Bork was chosen by President Reagan because of his career and what he had come to symbolize. I finally reached the conclusion that he should be defeated for the same reason.[44]

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44. Justice Bork's political conservativism did not bother me. I do not believe it is my responsibility to base my decision on a judicial nominee's political views. I have, in the past, voted for both conservative and liberal judicial nominees. Among these were conservative judges such as Chief Justice William Rehnquist, leading "Right-to-Life" scholar Judge John Noonan and Judge Alex Kozinski of the Ninth Circuit, and Judges Frank Easterbrook and Richard Posner of the Seventh Circuit. I have also voted for liberal appointees of President

After the Bork hearings, the Senate was hoping that Reagan would not challenge the message of the Bork defeat. Reagan, however, wanted a battle and nominated Douglas Ginsburg, claiming that he was similar in judicial philosophy to Bork.

As would also prove to be the case with the Thomas nomination, the Ginsburg case demonstrated the imperfections of the executive branch's capacity to investigate and evaluate nominees prior to appointment. Furthermore, when he was nominated to the Court of Appeals for the District of Columbia Circuit, Ginsburg underwent little, if any, scrutiny. He had been confirmed within fifteen days of his nomination.

Although Ginsburg's nomination was never formally received by the Senate, the confirmation process had been set in motion. He had gone through the FBI background investigation and had already begun making rounds meeting with Judiciary Committee members.

When I met with him, I thought he was an intelligent and articulate conservative. At the time I expected that he would have little problem being confirmed. But I think his mistake was miscalculating the overwhelmingly intense scrutiny that a nominee to the Supreme Court undergoes.

Ginsburg, who ultimately requested President Reagan to withdraw his name, suffered diminishing support from even his staunchest supporters when it was reported that he used and might have sold marijuana as a law professor. Ginsburg's biggest problem was that he was nominated by a conservative and supported by conservatives. The allegations against him were considered unforgivable by his most ardent supporters. Without that support his chance of convincing others to vote for him was nearly impossible.

The process of selection of an individual to fill the seat of retiring Justice Lewis Powell had been divisive and bitter. The nomination of Judge Bork divided the Judiciary Committee, as well as the Senate and the nation as a whole. While I had been critical of President Reagan earlier in this process, by appointing Justice Anthony M. Kennedy, Reagan had at least attempted to resolve the controversy that emanated from the Bork and Ginsburg nominations.

Unlike Reagan, Bush did not attempt to challenge the Senate with a controversial nominee. Many believe that, in direct contrast to Bork, Justice Souter was nominated because he lacked a public record.[45] Before President Bush announced the nomination of Judge Souter, this individual was virtually unknown outside the confines of New Hampshire. In fact, Souter had been confirmed just five months earlier to be a judge on the Court of Appeals for the First Circuit.

Because Souter's background did not engender as many controversial areas to examine, the issue of abortion became more pronounced in this nomination. Unfortunately, the harsh reality is that politics of abortion now dominate the process of filling vacancies on the Supreme Court. I have supported

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Carter, such as Judge Patricia Wald of the D.C. Circuit Court of Appeals, and I forwarded the names of Judges William C. Canby and Mary Schroeder of the Ninth Circuit to President Carter.

45. Justice Thomas would later prove wrong many critics who speculated that, after Bork, individuals with controversial written backgrounds would no longer be nominated.

the pro-life movement since I came to the Senate. However, I have never made my decision to vote for or against a nominee because of one issue. To do so, demeans the process and the position.

To his benefit, Justice Souter was extremely forthcoming in his answers to the Committee members' questions. Souter quickly dispelled the notion flourishing after the Bork battle that a nominee could not fully disclose his or her judicial philosophy and still be confirmed.

With Souter replacing Brennan, the Court's last true liberal was Thurgood Marshall. When Justice Marshall announced his retirement on June 27, 1991, speculation ran rather high that Judge Clarence Thomas of the District of Columbia Circuit Court of Appeals would be nominated to replace Marshall. Thomas had just been confirmed to that court of appeals the previous year and it appeared that the Bush Administration was grooming him for the Supreme Court.[46]

No one can doubt that Justice Thomas was a controversial nominee. Thomas would have more votes cast against him than any other confirmed nominee to the United States Supreme Court. In announcing the nomination, Bush asserted that Thomas was the most qualified candidate for the job. This disingenuous comment made little political sense and it set the tone for the debate on this nominee.

Voting upon a nominee to the Supreme Court entails a difficult decision of conscience. For this particular nomination, I must candidly admit, I struggled in making my decision.

Prior to his nomination hearings, I read extensively from Justice Thomas' writings, speeches and judicial decisions. I reviewed his record at the Equal Employment Opportunity Commission (EEOC) and at the Department of Education. I read analyses of his record prepared by opponents and proponents. I talked to my constituents in Arizona.

After this preparation, I was left with a number of concerns about Justice Thomas. I knew these concerns could only be resolved through the hearings. After five days of testimony by Justice Thomas and hearing from over ninety witnesses, I came to the conclusion that I could support this nominee.[47]

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46. Consider the prescience of the following quote from an article written a few months prior to Marshall's retirement announcement:

> If Justice Thurgood Marshall decides to retire from the Court, the Administration will surely replace him with an African-American (to do otherwise would suggest that there is no African-American in the entire United States qualified to sit on the Supreme Court, a position that at the least would be awkward to take for a President running for reelection). Clarence Thomas, although only 42 years old, has been mentioned by Court watchers as a possibility; but it is uncertain how controversial his nomination would be (much would likely depend upon his record on the D.C. Circuit).

Sheldon Goldman, *The Bush Imprint on the Judiciary: Carrying on a Tradition*, 74 JUDICATURE 294, 306 (1991).

47. Justice Thomas would not have been my choice to fill the vacancy of Justice Marshall. Thomas' positions on natural law and his prior comments on the right to privacy, as well as his praise of the views of Thomas Sowell, raised serious concerns in my mind. I was also concerned with Thomas' controversial tenure at EEOC.

The Senate and the American public have a right to know a nominee's judicial philosophy. And quite frankly, many of my concerns regarding Thomas were only alleviated through his hearing testimony and his answers to our questions.

Undoubtedly, we have had nominees who have made a more concerted effort to convey their judicial philosophy to the Committee and in turn to the American public. Nonetheless, I believed that Judge Thomas' testimony before the Committee was revealing of his judicial philosophy and addressed several of my prior concerns of him. Furthermore, I believe that the Committee has made considerable advances over prior nomination hearings when nominees refused to respond to legitimate inquiries.

The Committee vote to confirm Thomas was scheduled for September 26, 1991. I had already announced my public support for Thomas. The afternoon before the Committee vote, I received a call from Chairman Biden. He informed me that the Committee had been contacted by someone who alleged that Thomas had sexually harassed her. He stated that the complainant wanted to remain anonymous. He also noted that Thomas had been informed of the allegation and denied it.

After learning of the charge, I was shocked and distressed. I requested an opportunity to review the FBI report detailing the allegations. I also spoke with the Committee investigator.

In the short time before the vote, I consulted a number of women regarding the pattern of facts alleged and I asked their opinions. Each one viewed the allegations with skepticism. After reviewing the allegations, I felt comfortable proceeding with the Committee vote.

The Judiciary Committee maintains a long-existing tradition that permits any Committee member, for any reason, to request that a vote on a nominee be delayed for one week from its scheduled date. No member chose to invoke that right before the Committee vote, not even Thomas' most adamant opponents.

In retrospect, my colleagues and I should have requested closed hearings to question the complainant and Thomas. Nonetheless, I am not sure that closed hearings at that time would have prevented the firestorm that erupted after the leak. Had we concluded after closed hearings that Thomas should be confirmed, there was a good chance that the proceedings would be leaked and the Committee would have still been accused of a cover-up.

As a result of the allegation of Professor Anita Hill, the Senate postponed its vote on the Thomas nomination and directed the Judiciary Committee to investigate and conduct hearings on the allegation. The

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In contrast to Judge Bork, however, Thomas assured the Committee that he did reccognize an unenumerated right to privacy in the Constitution. More so than even Justice Souter, Thomas supported heightened scrutiny review for gender discrimination cases. Some of my colleagues would have liked to have heard a more direct application of this right, but I had no objection to where Thomas chose to draw a line of propriety in answering questions.

Thomas and I had our differences regarding EEOC's treatment of the claims of Hispanics and the elderly during his tenure. I made this clear to him at both the court of appeals and Supreme Court hearings. I was not happy with the results at EEOC during his tenure, but I do believe Thomas acted within his official capacity and was earnest in his efforts.

Committee was confronted with a monumental task: to conduct a number of investigative interviews of witnesses; to sift through countless reports, letters and allegations that attested to and challenged each party's veracity, character and motivation; to confront dueling affidavits. Following this preparation, three days of nationally televised marathon hearings were conducted to investigate the allegations of Professor Hill against Thomas.

Congressional hearings are intended to focus on legislation and broad issues of policy. They are not structured and thus poorly suited for determining specific questions of fact, or truth, or falsehood or dealing with matters of such sensitivity. Thus, in the case of the hearings to investigate the allegations of Professor Hill, the Senate Judiciary Committee was involved in an unexpected activity that it was ill-suited to perform.

The Thomas-Hill public hearings resulted in a serious disservice to Thomas, Hill, the Senate and the public. Thomas was damaged because, as always, the accusations are played on page one and the resolution of the charges is commonly situated on the back page. In this instance, it was even worse. Judge Thomas was subject to allegations of which he could not affirmatively prove to be untruthful. Even if his innocence could be clearly demonstrated, it seemed impossible for Thomas to clear his name.

Hill was also damaged. Like Thomas, she could not prove the truth of her statements. And like Thomas, she was left to swing in the shifting winds of public opinion. Furthermore, it is quite clear to me that Hill could foresee such difficulty if her charges were revealed and quite sensibly had adamantly resisted such disclosure.

The Senate, particularly, the members of the Senate Judiciary Committee were damaged, because we were forced, by the media "hype" and public accusations of a cover-up, to hold open and public hearings as the only means of protecting the integrity of the Committee and the Senate itself.

While most seemed to recognize that a public hearing was terribly damaging to all participants, at the same time it was the only viable alternative to prove that the Senate was not "hiding a smoking gun." As I have noted, even the seven Senators on the Committee, whose opposition to Thomas could be potentially buttressed by such hearings, initially declined to delay the vote and call for public hearings.

The public was not well served because the resulting drama polarized the country along subjective lines. The facts of the Thomas case became secondary to a genuine and appropriate national concern about the long-avoided problem of sexual harassment in the workplace.

If you supported Thomas, you were accused of being blind to the existence of sexual harassment as a serious problem. If you opposed Clarence Thomas, you were accused of partisan politics and character assassination.

After reviewing the available evidence, I feared the results would be inconclusive, as they turned out to be in the final analysis. I feared there was no way to prove or disprove these accusations.

It is important that we have a process available to us so that in the future we can explore such issues in private to determine whether they deserve further exploration. Openness in public policy is considered a virtue

by most. It is, however, critical to remember that in the nomination process there are myriads of scurrilous, unfounded and frequently anonymous accusations that are presented to a Committee handling a nomination.

REFORMING THE PROCESS: HOW AND WHY?

In the wake of the controversial nomination hearings of Justice Thomas, the cries for reform cut across the political spectrum. President Bush, several Senators and many commentators urged changes in the judicial nomination process.

I agree that changes to the process should be considered and possibly adopted. But fundamental reform of the system should not be a guise for an attack on the Senate's constitutional duty. Those who want to turn back the clock to the time when nominees were confirmed with no public scrutiny or investigation, I believe, are merely frustrated with their inability to achieve their own agenda. The Court is too important and powerful an institution to permit so slight an inquiry as to its members. Nonetheless, reform may be in order. There have been no shortage of ideas on exactly what type of reform should be instituted. Below, I discuss some suggested reforms.

A. Consultation

One suggested reform to limited the acrimony that spews from a divided government is for the President to meet with the leadership of the Senate before nominating someone to the Supreme Court. It is an approach that has been used in the past. Indeed, during the first few Administrations, the Senate leadership consulted with the President on various executive branch nominees and, at times, established advisory councils to the President.[48]

On the day the Senate voted on Clarence Thomas's nomination to the Supreme Court, Senator Paul Simon, a Democrat from Illinois and a member of the Senate Judiciary Committee, introduced a Resolution[49] in the Senate. If adopted, the Resolution would express the "Sense of the Senate" that the President "should keep philosophical balance in mind" in choosing future Supreme Court nominees so that "the law is not like a pendulum, swinging back and forth depending upon the philosophy of the President."[50]

The Resolution also states that before a President submits a name to the Senate, "there should be informal, bipartisan consultation with some members of the Senate on who is to be named to the Supreme Court."[51]

Not long after Justice Thomas was sworn in at the Court, President Bush held a news conference announcing his suggested reforms for the nomination process in general. In an indirect reference to Simon's resolution and

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48. *See* G. CALVIN MACKENZIE, THE POLITICS OF PRESIDENTIAL APPOINTMENTS 93-94 (1981). *See also* J.P. HARRIS, THE ADVICE AND CONSENT OF THE SENATE 39, 42, 45-46, 49-50 (1968).

49. S. Res. 194, 101st Cong., 2d Sess. (1991), *reprinted in* 137 CONG. REC. 14707 (1991).

50. 137 CONG. REC. S14640 (daily ed. Oct. 15, 1991) (statement of Senator Simon).

51. *Id.*

its supporters, Bush noted that he had "heard complaints that the White House does not consult sufficiently with Congress in matters of these nominations."[52]

But Bush disagreed with Simon's solution of prior consultation with the Senate. Bush asserted that he would "not give a group of senators veto power over a nominee before the Senate has conducted hearings and held a confirmation vote."[53]

In October 1991, the Majority Leader of the Senate, George Mitchell of Maine, appointed a task force of Senate Committee Chairmen to determine what improvements could be made in the nomination and confirmation process in general.[54] On February 4, 1992, the Task Force presented its report to Mitchell.[55] Among the Task Force's recommendations were immediate consultations between the President and Senate leaders on future Supreme Court nominations.

In remarks made in the House of Representatives after the Thomas-Hill hearings, Representative Lee H. Hamilton of Indiana suggested that to encourage agreement between the President and the Senate, the Senate should pass a resolution "setting forth the professional and philosophical criteria it will use in deciding whether to confirm a future high court nominee."[56] Hamilton contends that this would put the President on notice as to what the Senate would accept. Thus, if the President's nominee failed to meet the Senate criteria, the President could expect a confirmation battle.

The proposal that the Senate should play a greater "advice" role in conjunction with its "consent" role is a reform which I believe is worthy of serious consideration. As long as the Senate is not controlled by the same party as the President, the confirmation process will be controversial. During times of divided government, which appears to be the norm, it is not unreasonable to strive for consensus nominees.

Consultation with the Senate prior to the President's choosing a nominee will not lead to candidates whose only qualification is a lack of controversy. One of the greatest American judges, Benjamin Cardozo, was nominated by President Herbert Hoover only after Senate leaders chose him from a list that Hoover forwarded to them.

B. The Hearing — Questioning of Supreme Court Nominees

In the wake of the Bork hearings, a non-governmental task force composed of lawyers proposed that Supreme Court nominees no longer be

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52. *Remarks to Representatives of Public Administration Groups on Public Service*, 27 WEEKLY COMP. PRES. DOC. 1497 (Oct. 24, 1991) (on file with the Arizona Law Review).

53. *Id.*

54. The Task Force was headed by Senator Wendell H. Ford, Chairman of the Committee on Rules and Administration. The other members were: Senator Joseph R. Biden, Jr., Chairman of the Committee on the Judiciary; Senator David L. Boren, Chairman of the Select Committee on Armed Services; and Senator Claiborne Pell, Chairman of the Committee on Foreign Relations. These Chairmen represent the Senate Committees that handle the majority of Presidential nominations.

55. *See* 138 CONG. REC. S895 (daily ed. Feb. 4, 1992) (Report of the Task Force on the Confirmation Process).

56. 137 CONG. REC. S3942 (daily ed. November 21, 1991) (statement of Rep. Hamilton).

required to testify before the Senate Judiciary Committee.[57] The task force contended that the confirmation process had "become very much a national referendum on the appointment, with media campaigns, polling techniques, and political rhetoric that distract attention from, and sometimes completely distort, the legal qualifications of the nominee."[58]

In a reflection of how far the confirmation process had come from the days of Judge Parker, the task force's proposal received no support from even Committee members who strongly supported Bork and who were highly critical of the nature of the proceedings. In responding to the report, Senator Thurmond stated, "If the Senate is responsible for confirming Supreme Court nominees we ought to have a right to cross-examine individuals. Otherwise, how would you get difficult questions answered?"[59]

Some Court commentators who support the hearing process, nonetheless believe that it has come to play too prominent a role in the process.[60] They argue that nominees are now judged by their television performance rather than their judicial qualities.

I believe the American public has a right to view the Supreme Court nomination process. Nominees should be required to be subject to more than a resume review. It is essential to determine how a nominee views the Constitution. Through questioning, my colleagues and I have been able to uncover useful insights into a nominee's understanding of various important constitutional issues. The nominee need not be controversial to engage in a wide-ranging dialogue. In 1981, Justice Sandra Day O'Connor was questioned on more than fifty different issues ranging from school prayer to capital punishment.[61]

I do not believe that questioning should be used as an opportunity to punish the nominee or to attempt to cause the nominee to contradict a prior statement or opinion. Certainly, a nominee has constitutional obligations that prevents him or her from answering particular questions. However, no clear line exists between improper and proper questions. The Committee has a duty to elicit information about a nominee so that the Senate may make and informed decision. The nominee has an obligation to consider his or her judi-

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57. The 10-member Task Force had been established by the Twentieth Century Fund and was headed by the former Governor of New York, Hugh Carey. *See* David M. O'BRIEN, JUDICIAL ROULETTE: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION (1988).

58. *Id.*

59. *See Should Court Nominees Be Left Off Hook?*, ROLL CALL, May 8, 1988, at 15.

60. Stephanie B. Goldberg, *"What's the Alternative?" A Roundtable on the Confirmation Process*, 78 A.B.A. J. 41 (1992) (comments of Professors Michael W. McConnell and Walter Dellinger).

61. The nomination of Sandra Day O'Connor fulfilled a campaign pledge by President Reagan that he would nominate a woman to the Court. O'Connor's nomination received great bipartisan support from the beginning. Unexpectedly, some of her toughest questioning came from conservative Committee members, who were concerned about her position on abortion, rather than liberals. This reversal in roles led one of the great members of the House and my good friend, Morris K. Udall, to comment that his "Democratic friends ought to be grateful [about the nomination of Sandra Day O'Connor].... It's almost inconceivable to me that they could do any better. Ronald Reagan isn't going to appoint liberal Democrats." Morris K. Udall, *A Master Stroke*, WASH. POST, July 13, 1981, at A13, col. 2.

cial independence in responding to questions. Accordingly, a nominee should not invoke judicial independence as a sheild to answering relevant questions because of their political controversy. My questioning has always been structured to elicit responses that will provide myself, my colleagues and the American public with a better understanding of the nominee.

The nominee also benefits from an appearance before the Committee as the nominee is provided with the opportunity to clarify his or her record or views. Many Court historians believe that if Judge Parker had been given an opportunity to appear before the Committee in 1930, as he had requested, he would have dispelled many of the accusations made against him by his opponents. Justice Souter was an unknown entity out of New Hampshire, who insured overwhelming Senate support through his brilliant performance before the Committee in 1990.

The hearing process also provides a forum for members of the public to express their views regarding the nominee. For example, although their role has been the subject of recent criticism, the American Bar Association customarily testifies before the Committee, presenting their rating of the nominee after an extensive examination.

But the use of the hearing as a public forum has lead to another recent criticism of the process — the increasing activity of interest groups in the judicial nomination process. I cannot deny that the techniques of grass roots lobbying have become more sophisticated and effective over the years. Unfortunately, special interest groups usually evaluate a nominee upon the basis of a single issue. I believe this distorts the process. The choice of a Supreme Court Justice should not be a referendum on the hottest issue of the day.

I would not support, however, a curtailment of the access special interest groups have to the Committee. These groups often have large constituencies, representing proponents and opponents. They have a right to voice their opinions on a decision that will have a tremendous impact on their lives.

One possible reform to the current hearing process is to allow the nominee to respond to groups who testify after his or her initial testimony. Under the current format, the nominee appears for committee questioning, follwed by individuals and representatives of groups testifying in support for or opposition to the nominee. This format permits the nominee's opponents to scrutinize the nominee's testimony for inconsistencies, contradictions or other faults. The nominee should, at a minimum, be offered the opportunity to respond to opposition testimony.

C. Allegations of Misconduct

Allegations of misconduct create a distinct problem in the confirmation process as demonstrated by the Thomas-Hill hearings. The most commonly heard criticism emanating from those hearings was that the Committee should have conducted closed executive hearings on these personal accusations. In the abstract, I completely agree. But the reality of the matter is that once the public became aware of the allegation, the Senate risked the accusation of a cover-up if subsequent investigative hearings were held in closed meetings.

To avoid the reoccurrence of a problem, the Senate must resolve how to treat a serious allegation of misconduct which appears credible but comes from a complainant requesting confidentialiy. No sane individual will offer himself or herself for public service in the future if we can not assure with greater certainty that such accusations can be screened behind closed doors. Whether an individual in a highly charged atmosphere that is receiving public attention will unilaterally request a closed hearing is doubtful.

At the outset of the Thomas-Hill hearings, Chairman Biden invited any witness to request a private session. During those three marathon days of hearings, not one witness accepted that invitation. Every one of them preferred to have their stories heard in public. Under the circumstances, I did not question their judgment.

However, I do not believe that the interests of the confirmation process or the parties involved were served by public hearings. The highly sensitive and inflammatory nature of these allegations supported the need for such hearings to be held in private. Thus, I believe the current Senate rule on executive hearings should be re-examined.

The Majority Leader's Task Force concluded that a Committee should consider a closed session when a nominee so requests.[62] Unfortunately, the Task Force only recommends what can already occur under current Senate rules. The standing Rules of the Senate provide that Committee hearings are to be open to the public, except that a hearing may be closed "on a motion made and seconded to go into closed session to discuss" whether certain enumerated provisions of the rule require a closed meeting.[63]

Under the existing Senate Rule, the Senate has identified six sensitive matters that are appropriate for discussion in closed session, including an allegation of misconduct.[64] However, the presumption in this Senate rule requires these sensitive matters to be aired in public unless a majority of the Committee or subcommittee members determine that a closed session is preferable.[65]

For that reason, I recently proposed a Senate Resolution that would amend the Rules of the Senate regarding closed sessions.[66] The resolution would require that certain sensitive matters that are the subject of Committee and subcommittee matters be held in closed session in the absence of a vote by a majority of the members to conduct the hearings in the public.

I agree with the metaphor that sunshine is the best disinfectant. But the highly charged nature of Supreme Court nomination procedures creates too much opportunity for scandalous accusations to taint a nominee before his or her defense can be presented.

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62. *See* 138 CONG. REC. S895 (daily ed. Feb. 4, 1992) (Report of the Task Force on the Confirmation Process).
63. S. Doc. No. 125, 101st Cong., 2nd Sess. at 36 (1990).
64. *Id.*
65. *Id.*
66. S. Res 206, 101st Cong., 2d Sess. (1991), *reprinted in* 137 CONG. REC. S15202-03 (daily ed. 1991).

D. Confidentiality

Sadly, leaks have become a way of life both in Congress and the executive branch. And as long as someone can achieve political gain with little repercussion, leaks will continue to occur. What is in the best interest of the Nation has been subsumed by what is in the best interest of a good story. Leaks and counterleaks from all political persuasions from both sides of the aisle and from all stripes of interest seems to compete on a daily basis. The media reports less news than it reports rumor, gossip, innuendo, and leaks.

In light of the Professor Hill leak, I introduced a resolution amending the Senate rules regarding the leaking of classified Committee material.[67] My resolution will not end leaks in the Senate, but it will clarify the rules with respect to the treatment of documents and information of a classified, confidential or sensitive nature.[68]

In announcing his confirmation reform proposals, Bush also announced a new White House policy limiting access to FBI background investigations on judicial nominees. Under the new rule, Senate Judiciary Committee members were permitted to only read a summary prepared by the White House. Such a summary could be inaccurate or misleading. Prior to this Bush rule, all Senators on the Judiciary Committee could read the actual FBI reports on a nominee as could a limited number of Committee staffers with security clearances.

The new Bush rule is cumbersome and ill-conceived. In my fifteen years in the Senate, the Judiciary Committee has handled thousands of nominations of judges, U.S. marshals and U.S. attorneys. Leaking of FBI information has never been a problem. FBI reports can, at times, contain scandalous accusations with no corroboration, making their confidentiality essential. Yet, Bush has provided no evidence of a recurring problem of Senate leaks of FBI reports. Indeed, the leak of the Anita Hill allegation of sexual harassment against Clarence Thomas was most likely taken from a sworn statement that she submitted directly to the Judiciary Committee and not Thomas' FBI report.

In response to Bush's new rule on FBI reports, at an Executive Committee meeting on November 21, 1991, the Senate Judiciary Committee unanimously adopted a bipartisan resolution that called for renewed access to the FBI background reports on judicial nominees.[69] The reality is that without staff access to the FBI reports, the process will be delayed even further. Realizing the burden he was placing upon the Committee, Bush rescinded his

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67. S. Res 205, 101st Cong., 2d Sess. (1991), *reprinted in* 137 CONG. REC. S15202 (daily ed. 1991). My resolution would clarify the status of classified Committee documents in the Senate.

68. The Mitchell Task Force recommended that each Senate Committee adopt a rule on improper disclosure of confidential information.

69. UNITED STATES SENATE JUDICIARY COMMITTEE, RESOLUTION ON FBI REPORTS (Nov. 21, 1991).

position on February 7, 1991 and reinstituted the FBI report policy with some modifications.[70]

Clearly, no shortage of suggestions exists on how to reform the nomination process. But as exemplified by the ephemeral existence of Bush's rule on FBI reports, confirmation reform should result from thoughtful review, not a reactionary decision. As I have argued, it has been far from clear exactly what role the executive branch and the Congress are to play in this process. Over our history, the relationship has ranged from working in unison, to working in nothing short of an adversarial fashion. Therein lies the problem — establishing a consistent and acceptable balance between the White House and the Congress. Until such time as such balance is struck, I submit that the process will continue to be controversial.

CONCLUSION

In bestowing the authority to fill Supreme Court vacancies on the political branches, the Constitution foresaw the political friction that has been a part of this process since the beginning. The political element of this process can be distasteful at times as can the politics of any other policy issue. Corrections to the process are needed but true reform will not be achieved by ignoring the fundamental nature of this process. Furthermore, in considering reforms of the process it would be prudent to heed the sage advice of my former colleague, Senator Mathias, Jr., who noted that "it would be folly to claim that procedural reforms can relieve senators of the burden of a tough decision on a controversial nomination."[71]

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70. *See* SENATE JUDICIARY COMMITTEE AND WHITE HOUSE COUNSEL, MEMORANDUM OF UNDERSTANDING (Feb. 7, 1992).

71. Charles M. Mathias, Jr., *Advice and Consent: The Role of the United States Senate in the Judicial Selection Process*, 54 U. CHI. L. REV. 200, 207 (1987).