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The Independence of the Judiciary: A Critical Aspect of the Confirmation Process

BY RANDALL R. RADER*

On October 9, 1987, after the outcome of the vote on his nomination to be Associate Justice of the Supreme Court was no longer in doubt, Judge Robert H. Bork explicitly raised the specter of a threat to the independence of the judiciary during confirmation proceedings. In announcing his decision to seek a vote despite the certainty of an unfavorable outcome, Judge Bork stated:

The process of confirming justices for our nation’s highest court has been transformed in a way that should not and indeed must not be permitted to occur again. The tactics and techniques of national political campaigns have been unleashed on the process of confirming judges. This is not simply disturbing, it is dangerous. Federal judges are not appointed to decide cases according to the latest opinion polls. They are appointed to decide cases according to law. But when judicial nominees are assessed and treated like political candidates, the effect will be to chill the climate in which judicial deliberations take place, to erode public confidence in the impartiality of courts and to endanger the independence of the judiciary.

This assessment of the nomination process might be discounted because it was made by Judge Bork during the “heat of the battle.” To some degree, however, Judge Bork’s opinion was echoed by the reflections of Chief Justice William Rehnquist, who twice passed through the confirmation process. In a


recent address to the Bicentennial Australian Legal Convention, Chief Justice Rehnquist made the following observations:

It is not surprising that in our country both the President and some members of the Senate are interested in trying to predict how a new member of our Court will vote. The difficulty comes when the questions begin to go into great detail. Judges should not and do not behave like legislators, or like anyone else who is free to commit himself to a result for reasons apart from the merits. We need to work out something halfway between the question which elicits [a] one sentence response, and the prolonged interrogation involved in the Bork hearings.2

These commentaries raise three fundamental questions about the Senate's role in the judicial selection process. First, under what circumstances, if ever, are detailed ideological inquiries justified during the confirmation process? Second, when ideological inquiry is justified, what should be the scope of that review? Third, at what juncture do concerns about the independence of the judiciary acquire a legitimate role in the Senate's proceedings? This Article addresses these questions by reference to the history of the drafting of the Constitution and the Senate's past practice in confirmation proceedings.

Under the Constitution's judicial selection process, 145 individuals have been nominated and 113 appointed to the Supreme Court in nearly two hundred years.3 Studies of these confirmations4 have identified several functions of the advice and consent process. These functions include: (1) examination

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2 Address by Chief Justice William H. Rehnquist, Bicentennial Australian Legal Convention, 29 August 1988, at 4-5, 11, 12-13 [hereinafter Address].
4 See, e.g., H. ABRAHAM, supra note 3; L. TRIBE, supra note 3; Friedman, Tribal Myths: Ideology and the Confirmation of Supreme Court Nominations, 95 YALE L.J. 1283 (1986); Rees, Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution, 17 GA. L. REV 913 (1983); Ross, The Functions, Roles, and Duties of the Senate in the Supreme Court Appointment Process, 28 WM. & MARY L. REV 633 (1987).
of the nominee's overall physical,\(^5\) mental,\(^6\) legal,\(^7\) and ethical qualifications;\(^8\) (2) protection against favoritism or nepotism in the executive appointment power;\(^9\) (3) provision for public discourse on nominations;\(^10\) and (4) investigation of the nominee's political and judicial philosophy.\(^11\) This last function is the focus both of this Article and of the foremost current legal debate over the Constitution's appointments clause.

I. TRIGGERING SCRUTINY OF JUDICIAL PHILOSOPHY

The initial issue of debate concerning the appointment of Supreme Court justices is under what circumstances an ideolog-

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\(^5\) In many instances, the Senate has inquired into the physical fitness of nominees. Two examples are Sherman Minton, *Hearings on the Nomination of Sherman Minton to be Associate Justice of the Supreme Court of the United States Before the Senate Committee on the Judiciary, 81st Cong., 1st Sess. 2-3* (1949) (Committee inquires into past serious illness of nominee), and Justice William Hubbs Rehnquist, *Hearings on the Nomination of William H. Rehnquist to be Chief Justice of the United States, 99th Cong., 2d Sess. 299, 366-7* (1986) [hereinafter *Hearings on Justice Rehnquist*] (Committee inquires into Rehnquist's physical ability to serve as Chief Justice and discussed the use of his medical records in the hearings).

\(^6\) Questions of mental stability and health entered into the Senate's decision to reject President Washington's nomination of John Rutledge to be Chief Justice. See *infra* notes 111-14 and accompanying text.

\(^7\) The Senate invariably examines closely the professional credentials and qualifications of nominees. In at least two instances—G. Harrold Carswell, *see infra* notes 135-37 and accompanying text, and Alexander Wolcott, *see infra* note 89 and accompanying text—the Senate's perception that a nominee lacked adequate legal qualifications influenced its decision to refuse confirmation.

\(^8\) Ethical improprieties influenced the Senate's decision to reject in one case, Clement Haynsworth, *see infra* notes 138-43 and accompanying text, and influenced a nominee to withdraw from consideration before the Senate in another, Abe Fortas, *see infra* notes 144-51 and accompanying text.

\(^9\) Charges that the President had allowed personal favoritism to influence the nomination decision helped doom the confirmation chances of two nominees, Abe Fortas, *see notes* 126-32a and accompanying text; McConnell, *Haynsworth and Carswell: A New Senate Standard of Excellence*, 59 Ky. L.J. 7, 30-31 (1971); and Homer Thornberry, *see infra* note 154 and accompanying text.

\(^10\) The public hearings on the nomination of Justice Rehnquist to be Chief Justice afforded thirty-nine individuals to testify on behalf of themselves and a wide variety of organizations. Among the organizations represented in testimony were the National Organization of Women, the NAACP, the American Bar Association, the United Families Foundation, the Leadership Conference on Civil Rights, and more. *Hearings on the Nomination of Justice William Hubbs Rehnquist to be Chief Justice of the United States, 99th Cong., 2d Sess. i-v* (1986); *see also* Ross, *supra* note 4, at 677-81.

\(^11\) The most prominent example of examination of a nominee's personal political and judicial views was the proceedings on the nomination of Judge Robert H. Bork, *see infra* notes 187-205 and accompanying text.
ical inquiry is justified. On this question, two primary positions emerge from the commentaries of legal writers and Senators. The predominant viewpoint among scholars is that the Senate has been and should remain free to engage in ideological scrutiny at its will. A strong dissent to this viewpoint, however, is registered in some academic circles. This dissent argues that undue ideological scrutiny in the Senate subjects the sensitive judicial selection process and the third branch itself to unsavory and inappropriate political persuasion. Accordingly, these commentators contend that the Senate should confine its confirmation proceedings to an examination of a nominee’s professional qualifications.

A responsible compromise position, which this Article contends is supported by constitutional history and Senate precedent, was propounded by the Chairman of the Senate Judiciary Committee. The Senator noted that “under normal circumstances,” most Senators have opted “not to consider questions of judicial philosophy,” restricting their assessment of the nominee to “questions of character and of competence.” When, however, a President makes a nomination primarily on the basis of judicial philosophy in a “determined attempt to bend the Supreme Court to [the President’s] political ends,” then the Senator contended that the Senate may check the President by considering judicial philosophy in the confirmation process. This viewpoint is consistent with the Senate’s role as a check on the President’s appointment authority. This compromise position requires the Senate to assess carefully the circumstances of each appointment. Where the President has nominated a pre-eminently qualified candidate, however, senatorial suppositions

12 L. Tribe, supra note 3, at 141; Rees, supra note 4, at 923-26; Ross, supra note 4, at 634-35. Note that this determination is not necessarily a function of political allegiance. Professor Tribe has been widely heralded as a prospective judicial candidate in a Democratic administration, while Professor Rees served in the Justice Department during the Reagan Administration.

13 Freidman, supra note 4; Hatch, Save This Court From What?, 99 HAR. L. REV 1347 (1986); McConnell, supra note 9, at 13, 32-34.

14 Freidman, supra note 4; Hatch, supra note 13; McConnell, supra note 9, at 13, 32-34.


16 Id. at S10,529.

17 See infra notes 79, 84-86 and accompanying text.
about the potential motivation of "bending the Supreme Court to [the President's] ends" are strongly counterbalanced by the Chief Executive's readily apparent motivation of selecting a worthy member of the Supreme Court. Further, the history of the Constitution and prior Senate confirmation processes counsel the Senate to proceed cautiously before undertaking a detailed ideological inquiry and to restrain the scope of that process.\(^\text{18}\)

II. THE SCOPE OF SCRUTINY

The second question posed by this Article has prompted the largest degree of scholarly and senatorial commentary, namely, what is the scope of the Senate's investigatory power once it has determined to undertake some inquiry into judicial philosophy or ideology. As Chief Justice Rehnquist has accurately noted, "it is also accepted, though not so generally, that the Senate, too, may consider the nominee's judicial philosophy in the exercise of its constitutional function of advising and consenting to the nomination."\(^\text{19}\) The scope of this function, however, is far from settled.

Each legal commentator on the confirmation process and each Senator who actually exercises the advice and consent power probably has a slightly different concept of the appropriate degree of ideological inquiry. For purposes of categorization, however, these scholars and Senators again fall generally into two camps. One camp advocates the "broadest view" of the Senate's role in conducting ideological inquiries.\(^\text{20}\) For example, one senatorial expositor of unlimited ideological inquiry recommends that the Senate should weigh "the same factors the President did in making his choice," including the "candidate's philosophy."\(^\text{21}\) If a majority of the Senate differed markedly

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\(^{18}\) See infra notes 132-33 and accompanying text.

\(^{19}\) Address, supra note 2, at 3.


from a President on judicial philosophy, this viewpoint could conceivably cause an interbranch gridlock which could hold a seat on the Supreme Court vacant for a prolonged period of time.

Other scholars and Senators advocate strict limits on the Senate's desire to scrutinize judicial philosophy. Another way of stating this position is that the Senate should not inquire into judicial philosophy at all. For example, one Senator postulated that the people elected the President to "enable him to put his stamp on the Supreme Court."23 Nonetheless, with respect to determining the scope of Senate review of a nominee's ideology during confirmation proceedings, these viewpoints represent the two primary alternatives. The advocates of unlimited review contend that the Senate may consider ideology to the extent of requiring "a particular judicial philosophy in those people [it is] willing to confirm."24 The advocates of limited review contend that the Senate's "appropriate role is to look at the character, the professional qualifications, the fitness, if you will, of the nominee,"25 and little more.

These alternatives, as they are used by the Senate, can be cloaked in language that blurs the distinctions. Because both camps agree the examination of judicial philosophy has some role to play in the confirmation process, discerning the differences is often a matter of degree. As Chief Justice Rehnquist accurately described the recent confirmation process, "[t]he battle lines were drawn over whether Bork was 'in' or 'out' of the 'mainstream' of judicial thinking in the United States, with proponents and opponents coming up with their own definition of 'mainstream.'"26 Some distinctions, however, can be drawn without delving into what each camp considers to be "mainstream" or "extremist."

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26 Address, supra note 2, at 5.
The unlimited review camp, for instance, feels justified in rejecting a candidate who does not share the philosophy of a majority of the Senate. The changing membership of the Senate thus sets a changeable standard of acceptable judicial philosophy for Supreme Court nominees. On the other hand, advocates of strict limits on senatorial review would apparently rule out all ideological inquiry in favor of a check on qualifications alone, thus leaving the President alone to consider judicial philosophy in candidates for the nation's highest court. To this prospect, one Senator responded that "[t]he law shouldn't be a pendulum that swings back and forth according to who is President."27

Again, a middle ground on this question suggests that the Senate exercise self-restraint according to a more objective standard when examining ideology. Past Chairman of the Judiciary Committee, Senator Thurmond, articulated this reasoned position:

Some have said that philosophy should not be considered at all in the confirmation process. I believe that a candidate's philosophy may properly be considered, but philosophy should not be the sole criteria for rejecting a nominee with one notable exception. The one exception is when a nominee clearly does not support the basic, long-standing consensus principles of our Nation. I do not believe that philosophy alone should bar a nominee from the Court unless that nominee holds a belief that is so contrary to the fundamental, long-standing principles of this country that a nominee's service would be inconsistent with the very essence of this country's shared values.28

Thus, according to this moderate restraint position, the Senate should only reject a candidate on the basis of judicial philosophy if that philosophy is contrary to "fundamental, long-standing principles."29 Senator Thurmond clarified what these principles might include:

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28 Hearings on the Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States Before the Senate Committee on the Judiciary, 100th Cong., 1st Sess. 19 [hereinafter Hearings on Bork] (statement of Sen. Thurmond).
29 Id.
[A] nominee’s position [that justifies the Senate’s rejection of
the candidate] should be unequivocal and in violation of a
basic belief. For example, freedom of speech is a fundamental,
accepted principle in this country; but exactly what constitutes
“speech” and whether or not there are limitations on any
particular activity, are issues on which reasonable people can
disagree. That discrimination based on race or national
origin is unacceptable is a basic tenet of this Nation; but there
certainly is not such agreement on the use of preferential
quotas.30

The distinction between advocates of moderate restraint and
advocates of unlimited scrutiny, however, can be drawn without
reference to the particular constitutional issues of the day. The
advocates of strict limits rule out consideration of constitutional
issues to any significant degree. The advocates of unlimited
review subscribe to a subjective standard of what constitutes an
acceptable judicial philosophy. In other words, adherents to this
latter position contend that a majority of the Senate at the time
of the nomination should determine the appropriate judicial
philosophy standard for a nominee seeking confirmation from
that body. One unlimited review advocate explains: “[the Senate
must] pass judgment on whether or not [a nominee’s] particular
philosophy is an appropriate one at this time in our history.”31
Thus, according to the unlimited review school, individual Sen-
ators are justified in voting against any candidate who does not
sufficiently share their personal judicial philosophy. If a majority
of the Senate disagrees on that basis, the nominee is rejected.

On the other hand, the advocates of moderate restraint adopt
a more objective standard. In their view, only principles of
philosophy that could reasonably be considered fundamental,
long-standing, and accepted nationwide become the subject of
ideological scrutiny. Moreover, individual Senators are not jus-
tified in voting against a nominee simply because of differences
in judicial philosophy. The question is not what individual Sen-
ators believe is an appropriate judicial philosophy, but what can
reasonably be defined as clearly beyond the pale of reasonable
intellectual debate.

30 Id. at 19-20.
31 Id. at 66 (statement of Chairman Biden).
In terms of specific issues, the differences between the unlimited review and restraint camps are differences of both subject matter and degree. The unlimited review camp would consider many more issues to be encompassed within the definition of fundamental questions, including questions decided by the Supreme Court only recently. The advocates of restraint confine the subject matter for ideological scrutiny to fewer principles, which have been conclusively established for decades. Moreover the unlimited review school would question any slight deviation from the norms, while the restraint school tolerates a wider deviance from its norms. The history of the Constitution and prior Senate confirmation proceedings commend to the Senate a course of restraint on those rare occasions when it becomes necessary to undertake an inquiry into judicial philosophy.

III. THE INDEPENDENT JUDICIARY FACTOR

With respect to the third question addressed by this Article, the principle of an independent judiciary arises as a factor in confirmations only when the Senate adjudges it necessary to undertake extensive review of a candidate's judicial views. For this reason, this factor arose recently in the context of judicial confirmation proceedings for Judge Robert Bork.

The Federalist Papers allude to the importance of a judicial selection process that is unencumbered by political considerations and respectful of the independence of the third branch. In the constitutional framework, the framers considered an independent third branch "essential" to the operation of the new Republic. In Federalist No. 78, later to serve as Chief Justice Marshall's blueprint for Marbury v. Madison, 5 U.S. 137 (1803), Alexander Hamilton stated that "[t]he Constitution] can be preserved in practice no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void." The Federalist No. 78, at 466 (A. Hamilton) (C. Rossiter ed. 1961) [hereinafter The Federalist]. The Judiciary's essential function would be to police the bounds set by the Constitution against encroachment by the political branches.

This difficult task would demand an independent, nonpolitical institution with the capacity to check the two political branches. The framers thus saw the "independence of the judges" as "an essential safeguard against the effects of occasional ill humors in the society." The Federalist No. 78, at 470. The understated "ill humors" against which the judiciary would be a "bulwark" was none other than "injury of private rights by unjust and partial laws." Id.

The framers feared the consequences of an unchecked legislature. Only judges
context of a recent confirmation, Senator Hatch of the Judiciary Committee, who has himself been repeatedly mentioned as a Supreme Court candidate, stated in more direct terms the potential implications of ideological inquiries for the independence of the judiciary:

Federal judges are not politicians and ought not be judged like politicians. When we undertake to judge a judge according to political, rather than legal criteria, we have stripped the independent of political partialities and pressures would be able to ensure that the "power of the people," as expressed in the Constitution, would remain "superior" to the will of the political branches. \textit{Id.} This basic concept—that the will of the people is most evident in the Constitution—later was the foundation of Hamilton's masterful defense of an independent judiciary in the face of anti-majoritarian charges that Article III conflicts with democratic rule.

The creation of an unprecedented nonpolitical judiciary presented a profound challenge to the framers. On the one hand, the institution had to be sufficiently sensitive to political controversy to settle constitutional disputes between the political branches and sufficiently compatible with democratic principles to satisfy the ratifying states. On the other hand, the institution had to remain sufficiently distant and distinct from the political branches to prevent pollution of the judicial function. Once again, Hamilton described the consequences of abandoning the distinctions of the independent judicial function: "liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments \textit{[T]he judiciary is in continual jeopardy of being influenced by its co-ordinate branches.} \textit{Id.} at 466.

The framers considered some interbranch conflict inevitable, and to a limited degree, desirable, to preclude any single branch from acquiring sufficient power to subjugate human rights. Thus, the judicial branch would inevitably become involved in political disputes. The only way courts could successfully arbitrate and settle those disputes would be as an independent, nonpolitical referee on the basis of legal principles in the Constitution. The danger, however, was that the judicial branch would be pressured to enter the political fray.

To enable the judicial branch to enforce the "manifest tenor of the Constitution" in essentially political disputes while retaining its unique nonpolitical independence, the framers employed some unique institutional devices. Hamilton, while discussing the distinct character of the third branch, identified the mechanisms to preserve its independence: "The manner of constituting [the judiciary] seems to embrace these several objects: First, the mode of appointing the judges. Second, the tenure by which they are to hold their places." \textit{Id.} at 464. From the very outset, the framers sensed that the manner of Supreme Court appointment and life tenure for judges were linked to the independence of the federal judiciary.

Life tenure and the diminution of salaries clauses insulate the judicial branch from any unseemly pressure from the political branches. Similarly, the Constitution's judicial selection process was designed to find individuals "who unite the requisite integrity with the requisite knowledge" in a manner that enhances the independence, integrity, and institutional individuality of the judicial branch. \textit{Id.} at 471.
judicial office of all that makes it a distinct separated power. If the general public begins to measure judges by a political yardstick, and if the judges themselves begin to base their decisions on politics, we will have lost the reasoning processes of the law which have served so well to check political fervor over the past 200 years. I would ask Americans if they would wish to have their life, liberty, and property resting on the decision of judges who are primarily worried about tomorrow's newspaper headlines or what might be said in some future nomination proceeding. This is a new threat to the independence and integrity of the Federal judiciary.

In accord with these words of warning, the history of the drafting of the Constitution and the Senate's prior confirmation proceedings suggest that when the Senate undertakes detailed review of judicial philosophy, the independence of the judiciary becomes an important factor counseling adoption of some restraint on the character of the inquiry.

IV THE CONSTITUTION'S LANGUAGE

Because the Constitution sets forth no explicit standards for advice and consent decisions, the Senate decides for itself when to undertake review of a nominee's judicial philosophy, whether to set or abide by any limitations in the review, and the point at which the independence of the judiciary counsels restraint. The Senate's decisions on these central questions will certainly influence every confirmation proceeding and in many instances may be dispositive of the outcome.

Therefore, the Senate has not only an obligation to examine the history of the drafting of the Constitution but also its own precedents. Such examination is necessary in order to set an effective standard for application of its advice and consent authority which, as far as possible in a political institution, is applied equally to candidates of different presidents and of different judicial philosophies. Nominees and presidents ought to be able to ascertain the confirmation standards to be employed from one confirmation to the next. In this context, the

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history of the Constitution and past Senate confirmation practice provide some clear guidelines.

Article II, section 2, of the Constitution states that the President "shall nominate and by and with the advice and consent of the Senate, shall appoint Judges of the Supreme Court." Although this language provides no express guidelines for employment of the Senate's advice and consent function, the debates that produced this language suggest some general prudential limits. Nonetheless, many scholars have seized on some details of the drafting of this clause, such as the lateness of the emergence of the final language, to conclude "the very reverse of the idea that the Senate is to have a confined role." A closer review of the history of this language, however, suggests that the Framers envisioned some restraints on the process.

The final language of the appointments clause was the result of relatively extensive consideration in the context of the brief Philadelphia summer that produced the Constitution. The Virginia plan—Madison's blueprint from which the Convention worked to draft the Constitution—initially proposed that "a National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature."

Relatively early in the Convention, on June 5, this clause became the subject of debate. James Wilson of Pennsylvania opened the discussion by opposing the appointment of judges by the legislature. He asserted that "experience shewed the impropriety of such appointments by numerous bodies. Intrigue, partiality, and concealment were the necessary consequences." As an alternative, Wilson suggested that "a principal reason for unity in the Executive was that officers might be appointed by a single, responsible person." In light of subsequent history, it is ironic that it was South Carolina's John Rutledge who arose

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34 U.S. Const. art. II, § 2.
35 Black, supra note 20, at 661 (Stating that because the wording was changed only at the last minute, some thought that the Legislative role was still largely intact.); Rees, supra note 4, at 937; see also Ross, supra note 4, at 68a.
36 The Records of the Federal Convention of 1787 21 (M. Farrand ed. 1911) [hereinafter Farrand].
37 1 Farrand at 119.
38 Id.
to oppose giving the appointment power "to any single person." 39 John Rutledge later became the first Supreme Court nominee ever to be rejected by the Senate. 40

Perhaps sensing a divisive friction in the air, Doctor Benjamin Franklin arose to relieve the tension with humor. He noted that two modes of appointment had been mentioned, but he "wished such other modes to be suggested." 41 Then in a "brief and entertaining manner," as described by Madison, Dr. Franklin "related a Scotch mode." 42 This consisted of the "nomination proceed[ing] from the Lawyers, who always selected the ablest of the profession in order to get rid of him, and share his practice [amongst themselves]." 43 Although clearly intended to be humorous, Franklin's wit does serve to reveal that the Convention placed a high premium on one of the functions of the advice and consent proceeding, namely assessment of qualifications. No doubt the framers sought an appointment mechanism which would produce the "ablest of the profession." 44

With laughter still ringing in the State House, Virginia's James Madison must have sensed an opportunity to achieve another of his many masterful compromises. James Madison first tried to establish his claim to the middle ground. He, like Wilson, "disliked the election of the Judges by the Legislature" and, like Rutledge, he was "not satisfied with referring the appointment to the Executive." 45 Indeed, Madison maintained, "[h]e rather inclined to give it to the Senatorial branch. He hinted this only." 46 Apparently sensing that the Convention, however, was not ready to reach any conclusion on this important issue, the crafty Virginia delegate finished his address with a motion to strike "appointment by the Legislature" from the Virginia plan which he had drafted. 47 Wilson, perhaps feeling he

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39 Id.
40 See infra notes 110-14 and accompanying text; Appendix chart.
41 1 Farrand at 120.
42 Id.
43 Id.
44 Id.
45 Id.
46 Id. The specific reference in Madison's record to the point that he had merely "hinted" at this stage of the proceedings calls to mind that Madison revised his record many decades after the actual events.
47 Id.
had prevailed, seconded the motion, which carried 9 states to 2.\textsuperscript{48} This left the mode of appointment for Supreme Court "judges" unspecified.

At this early juncture, the Convention had determined not to vest appointment in the legislature. Madison's reasons against legislative appointment were apparently persuasive: "Mr. Madison disliked the election of the Judges by the Legislature or any numerous body. Besides, the danger of intrigue and partiality, many of the members [of the legislature] were not judges of the requisite qualifications. The Legislative talents which were very different from those of a Judge, commonly recommended men to the favor of Legislative Assemblies."\textsuperscript{49}

Madison pointedly noted the distinction between lawmaking and judging: "[l]egislative talents [are] very different from those of a Judge."\textsuperscript{50} This was an explicit reference in the record of the Convention to the distinction between judges and political officers. Madison and Wilson, at least, seemed resolved that the selection of the nonpolitical officers of the judicial branch should not fall prey to the intrigues and partialities of the political process. Moreover, Madison clearly informed the Convention that the means of selecting judges could affect the institutional character of the third branch. Madison was destined to struggle for some time to find the best institutional means to select judges possessing legal, rather than lawmaking, qualifications. In any event, it is hard to escape the conclusion that Madison wished to divorce the politics of lawmaking from the process of selecting legal officials.

In any event, on the seventh day of debate in 1787, June 5, the Convention had already delineated the parameters of the appointments issue. Due to fears of partisan intrigue and legislative predispositions to favor lawmaking over legal skills, the delegates decided that judges would not be selected by the legislature as a whole. On the other hand, the delegates also were not prepared to entrust so important a function to a single chief executive. The Convention would consider many other formu-
lations before arriving in July at the formulation that ultimately prevailed.

With no process for appointment specified, Delegates Pinckney and Sherman were free to attempt a restoration of the appointment-by-the-legislature concept on June 13. Madison objected:

[the legislature would be an] incompetent judge] of the requisite qualifications, too much influenced by partialities. The candidate who displayed a talent for business in the legislative field or used other winning means, would without any of the essential qualifications for an expositor of the law prevail over a competitor possessed of every necessary accomplishment.

Once again, Madison emphasized at length the distinction between the branches as his reason for opposing appointment by Congress. As an alternative to the Pinckney-Sherman plan, Madison suggested that the Senate be given the appointment power. Perhaps trusting that the Senate would not be subject to political whims, the delegates accepted Madison's suggestion on June 13 without a recorded vote.

The issue was far from decided at that point. On June 15, Delegate William Patterson of New Jersey put forth a new blueprint for the Constitution in an effort to secure more advantages for the smaller states. The New Jersey plan suggested that judges should be appointed solely by the Executive. Apparently the smaller states feared that in a Senate and House where representation was based on population, their opportunity to influence the judicial selection process would be best protected by the Chief Executive. On June 18, Alexander Hamilton delivered a lengthy address on the need for a strong executive in which he advocated that key officers, including judges, should be appointed by the Executive "subject to the approbation or rejection of the Senate," Thus, although the Convention had

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51 Id. at 232.
52 Id. at 232-33.
53 Id.
54 Id. pt. 233.
55 Id. at 244.
56 Id. at 292.
tentatively given the Senate appointment authority, executive appointment continued to win support from some states and delegates. Alexander Hamilton was apparently the first delegate to suggest vesting the appointment power in the Executive with the Senate serving a checking function.

When the question arose before the delegates again on July 18, Massachusetts' Delegate Gorham opined that the Senate was "too numerous, and too little personally responsible, to ensure a good choice." Perhaps encouraged by Hamilton's earlier recommendation, he proposed instead appointment by the Executive with the advice and consent of the Senate as was specified in the Constitution of Massachusetts.

The debate at that juncture became very involved. James Wilson preferred that the Executive make appointments without Senate participation, but would accept Gorham's formulation. Delegates Martin, Bedford, and Sherman preferred that the Senate make appointments without Executive branch participation. Maryland's Martin contended that the Senate "being taken from all the States would be best informed of characters and most capable of making a fit choice." Gorham responded sharply that if Senators cannot "get the man of the particular State to which they may respectively belong, they will be indifferent to the rest." Moreover, he feared "in intrigue and cabal" in senatorial appointment.

Delegates Mason and Morris interrupted to discuss the impropriety of judges presiding over the impeachment of the Executive who appointed them. James Madison, ever the conciliator, made another suggestion: "Judges might be appointed by the Executives with the concurrence of one-third at least of the Senate." On this occasion, however, Madison's suggestion was passed over without direct comment. Delegate Sherman instead

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57 2 Farrand at 41.
58 Id.
59 Id.
60 Id.
61 Id. at 41.
62 Id. at 42.
63 Id.
64 Id.
responded to Gorham, charging that the executive would also be vulnerable to intrigue.65

Although Delegate Gorham’s views were destined to prevail, they suffered a temporary setback on this particular day. Nonetheless, because his views eventually prevailed, they deserve special attention. Delegate Gorham’s response to the argument that the Senate would be exposed to more qualified candidates was that “the Executive will be careful to look through all the States for proper characters. Rhode Island is a full illustration of the insensibility to character produced by a participation of numbers, in dishonorable measures, and of the length to which a public body may carry wickedness and cabal.”66

After this rather lengthy debate by 1787 Convention standards, two votes were taken. Wilson’s motion to have the President alone make appointments failed, two states to six.67 Gorham’s motion for Executive nomination with Senatorial advice and consent—the system in Massachusetts—failed on a tie vote, four to four.68 A consensus was beginning to form around a compromise that would address Gorham’s apprehensions about the potential difficulties of a Senatorial appointment system.

Madison followed the tie vote on the Gorham motion with another motion for an advice and consent plan permitting the Senate to override the President’s nomination by a two-thirds vote.69 The Convention decided unanimously to postpone the issue.70 This last action was an indication that the Convention had turned the corner. Delegate Gorham had achieved only a tie vote, but he had won the day. The influential Madison was now in his camp and the Convention had agreed to revisit the issue. It was only a matter of time.

A brief discussion occurred again on August 23, when Delegate Morris—earlier an opponent of Executive appointment—argued against Senate appointment of judges, which was still in the language of the draft document.71 This was another sign that

65 Id. at 43.
66 Id. at 42.
67 Id. at 44 (there was one abstention).
68 Id. (there was one abstention).
69 Id.
70 Id.
71 Id. at 389.
the tide had shifted. The next consequential event occurred on September 4 when the issue was assigned to the Special Committee on Postponed Matters, or the Committee of Eleven as it was called in both the Official Journal and Madison's notes. The September 4th report of that Committee contained the current language of the Constitution.72

In the context of another debate, the delegates made their views known on this new language. The Convention was discussing whether the Senate should be empowered to choose a President in the event of a deadlocked Electoral College. Commenting on the Electoral College provision, Delegate Wilson expressed his concern that the plan would "throw a dangerous power into the hands of the Senate."73 He was specific about the consequences of the Senate's new power:

They will have in fact, the appointment of the President, and through his dependence on them, the virtual appointment to offices; among others the offices of the Judiciary Department; In allowing [the Senate] thus to make the Executive and Judiciary appointments, the Legislative, Executive & Judiciary powers are all blended in one branch of the Government.74

Delegate Wilson continued to harbor concerns about Senatorial participation in the judicial selection. Indeed later, when the judicial appointment clause was debated, he restated his views and opined that "[r]esponsibility is in a manner destroyed by such an agency of the Senate."75 Delegate Pinckney also echoed his views.76

Delegate Morris, whose change in views had been publicly articulated only a few days earlier, spoke in favor of the new language: "the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security."77 After this brief debate, the committee language was accepted unanimously.78

72 Id. at 498.
73 Id. at 522.
74 Id. at 522, 523.
75 Id. at 539.
76 Id.
77 Id.
78 Id.
Some commentators, focusing perhaps too much on this last action, have characterized the appointments clause as an "eleventh hour compromise." To the contrary, the Convention voted twice on a similar plan on July 18. The first vote was a tie. The second was a unanimous vote to postpone an advice and consent formulation. Moreover, intervening events, like the speeches of Patterson, Hamilton, and Morris, indicated a shift in favor of the Gorham formulation which had earlier achieved a tie. The clearest indication that this matter was settled by the Convention well before the report of the Committee of Eleven is that the Committee’s recommendation was embraced without dissent.

In conclusion, it appears that the arguments of Madison and Gorham prevailed. They had apprehensions about committing the appointment power into the hands of a numerous body. Madison stressed the inadequacy of legislators as assessors of legal, rather than lawmaking, skills. Madison and Gorham both expressed apprehensions about the danger of political intrigue and partiality in the nomination of nonpolitical officers. Perhaps most important was their emphasis on finding a system that would adequately screen judicial candidates for the "requisite qualifications." Accordingly, the Gorham-Madison compromise vested the nomination power solely in the President. At the same time, delegates like Morris were attracted to the new formulation because it provided a Senatorial checking power as "security" against any intrigues in the Executive nomination process.

In the wake of the debates, the ratification process provided further commentary on the meaning of the appointments clause and the practical workings the Framers expected under the new Constitution. Alexander Hamilton defended the interaction between the branches incorporated into the judicial selection process:

But [the President’s] nomination may be overruled: this it certainly may, yet it can only be to make place for another nomination by himself [the Executive]. [T]he Senate could not be tempted by the preference they might feel to another to reject the one proposed; because they could not assure

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79 Biden, supra note 20; Ross, supra note 4, at 639.
themselves that the person they might wish would be brought forward by a nomination.\textsuperscript{80}

Hamilton explained further that the Senate would be reluctant to negate a Presidential nomination because "their dissent might cast a kind of stigma upon the individual rejected."\textsuperscript{81} Accordingly, he opined that the Senate would generally confirm nominations unless there were "special and strong reasons for the refusal."\textsuperscript{82}

Perhaps in response to critics of the Constitution who feared that the President would have too much power and the Senate's role would be superfluous, Hamilton responded:

To what purpose then require the co-operation of the Senate?
It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.\textsuperscript{83}

Thus, Hamilton, who had initiated the idea of giving both political branches a role in the appointment function, embraced a very narrow scope for the advice and consent power. The Senate, when prompted by "special and strong" evidence, would act to prevent nepotism, crass regional favoritism, or other distortions of the nomination process likely to produce "unfit characters."\textsuperscript{84}

Thus, the history of the Constitutional Convention offers guidance to the Senate on the three questions posed by confirmation proceedings. With regard to the first question, under what circumstances should the Senate delve into judicial ideology, this history contemplates that the Senate must serve an appropriate checking function. The 1787 and ratification debates focused primarily on creation of a system that would identify the "ablest of the profession." Accordingly, the historical record would encourage the Senate to place a particular emphasis on

\textsuperscript{80} \textit{The Federalist} No. 76, at 457 (A. Hamilton).

\textsuperscript{81} \textit{Id.}

\textsuperscript{82} \textit{Id.}

\textsuperscript{83} \textit{Id.}

\textsuperscript{84} \textit{Id.}
assessment of the entire array of qualifications necessary for the challenges of court decisionmaking. In this context, Madison's repeated statements about selecting judges with judicial and legal skills, as opposed to legislative and policy making skills, acquire particular significance. As a normal rule, therefore, this history suggests that the Senate should concentrate on qualifications.

By the same token, the Senate is expected to perform a critical checking function. It is therefore consistent with this history for the Senate to perceive that a President has evinced a particular "favoritism" in selecting a candidate of a peculiar judicial philosophy and for that perception to trigger an inquiry into judicial views. Thus, the compromise position on when an ideological inquiry might be warranted finds considerable support in the debates accompanying the language of article II.

With regard to the scope of an inquiry into judicial philosophy, the eighteenth century debates evince general apprehensions about undue partisanship and political intrigue in the appointment process. In this vein, the debates counsel the Senate to deemphasize political factors in the confirmation process. To the extent that the Senate has been or would be influenced to reject a nominee solely to punish or warn the nominating president or solely to guarantee that a particular state or region was represented on the Court, for instance, the debates would counsel against such a course. Moreover, the emphasis on qualifications found in the debates counsel some self-restraint in the scope of Senate inquiries into judicial philosophy.

In sum, the language of the appointments clause clearly distinguishes between the roles of the President, as nominator, and the Senate, as advisor and consenter. The debates that created the clause indicate that the Framers committed the nomination power to the President with the Senate serving a sensitive checking function. The authors of the Constitution anticipated that the Senate would provide a "security" check on any predisposition of the President to nominate unfit judges. At the same time, the debates rejected any role for political and partisan intrigue in the nomination process. In particular, the debates indicate the Framers' awareness that a flawed judicial selection.

\[81\] See supra notes 15-16 and accompanying text.
process could adversely affect the independence of the single nonpolitical branch. Accordingly, the history of the appointments clause counsels the Senate to take great care in establishing the scope and subject matter of confirmation inquiries.

V THE SENATE PRECEDENTS

Because the Senate itself will ultimately determine the standard of review to be applied in confirmation inquiries, the history of past confirmations provides some rules of practice for the Senate. Several studies have substantiated the existence of various factors contributing to the twenty-eight rejections in the history of Supreme Court nominees.66 Most legal commentators, however, have interpreted these precedents as an indication that the Senate has had "no doubt that inquiry into a candidate's substantive views was a proper and even essential part of the confirmation process."67

A closer review of past Supreme Court confirmations reveal, to the contrary, that probing inquiries into a candidate's views were relatively infrequent. Moreover, where an examination of a candidate's "substantive views" occurred, the inquiry was generally unrelated to judicial philosophy. Instead, the inquiry usually focused on another nonjudicial political issue of the day in which the candidate had become embroiled. The type of "substantive views" examined in past confirmation proceedings lends very little support to the notion that the Senate has traditionally attempted to ascertain how a candidate's judicial philosophy might affect Supreme Court directions. In sum, the Senate precedents for intense scrutiny of how a candidate might influence Supreme Court jurisprudence are few in number and recent in origin.

Of the twenty-eight rejected nominees, most were rejected due to geographic favoritism, animosity toward the appointing

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66 H. ABRAHAM, supra note 3; L. TRIBE, supra note 3; C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1923) [hereinafter WARREN]; Biden, supra note 20, at S10,524-26; 133 CONG. REC. S10,878-85 (daily ed. July 30, 1987) (statement of Sen. Hatch); Ross, supra note 4.

67 L. TRIBE, supra note 3, at 80; Black, supra note 20; Rees, supra note 4; see Ross, supra note 4.
The rejected confirmations often featured, but were not dominated by, questions about a candidate's substantive views. As a general rule, the substantive views examined, however, had little or nothing to do with the policies of the Supreme Court. The record indicates that the Senate as a collective body has, as a rule, exercised restraint in weighing a candidate's judicial views as determinants of the suitability of a nominee.

VI. 1795-1893

A brief examination of the twenty-one rejections in the Constitution's first century does not provide extensive evidence of a Senate practice of giving the nominee's judicial philosophy a role in the confirmation process. Blatant political considerations—such as the strength of the President's party in the Senate, the President's lame duck status, and regional preferences in the Senate—were far more influential than judicial philosophy in the rejections of this era. At the outset, however, these twenty-one rejections must be balanced by the recognition that during this era sixty-seven justices were confirmed without undue political or ideological pressures.

In analyzing the rejections of this era, some evident patterns emerge. Several rejections occurred in this century because the nominee lacked the qualifications for the office. For instance, President James Madison's second nomination suffered for lack of qualifications. In the words of Professor Lawrence Tribe, "Alexander Wolcott, a Connecticut boss of the Democratic Republican party, was the first nominee to be rejected primarily because he was not up to snuff." Another was George Williams, President Grant's Attorney General, who was attacked by both the bar and the press as sadly mediocre. Stung by the criticism, the nominee asked the President to withdraw his name.

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88 See infra notes 89-215 and accompanying text.
89 L. Tribe, supra note 3, at 81; see also H. Abraham, supra note 3, at 41 (Abraham also notes opposition because of Wolcott's vigorous enforcement of the embargo and nonintercourse acts.).
90 H. Abraham, supra note 3, at 46.
91 Id.
Eleven of the twenty-one rejections during this era were victims of overt partisan politics associated with the timing of Supreme Court vacancies and presidential elections. Thus, the Senate rejected these nominations to preserve the chance that a President of the same political party as the majority of the Senate would be elected and able to fill the vacant seat. The rejected nominees' primary flaw was simply the party affiliation of the nominating President.92

In February of 1829, for instance, John Crittenden's nomination was "postponed" on a partisan vote. President Andrew Jackson had already been elected to replace President John Quincy Adams.93 The Senate's vote foiled President Adams' last-minute attempt to fill the seat and preserved the vacancy for President Andrew Jackson's appointment.94 President John Tyler, the first unelected President, had five nominations defeated "chiefly because of the mistaken expectation of the Clay Whigs that their revered leader would defeat James K. Polk in the Presidential election of 1844."95 The three rejections suffered by President Fillmore were prompted by similar partisan stratagem near the end of the President's tenure.96 In a familiar pattern, lame duck President James Buchanan's 1860 nomination of Jeremiah Black failed by a single vote because only one month remained in Buchanan's term and the Senate wished to preserve the vacancy for newly-elected President Abraham Lincoln.97

The high-water mark of this hostility toward a President came in 1866 when the Congress eliminated the vacant seat on the Supreme Court rather than allow President Andrew Johnson

92 See id. at 39-40.
93 id.
94 Id. at 40.
95 Id. at 40 (Spencer was defeated 21-26; action was postponed on Reuben Walworth and John Read; Edward King was twice nominated and both times the Senate took no action.).
96 Id. at 40. In 1852, the Senate voted to postpone consideration of George E. Badger's nomination, even though he was then a Whig Senator from North Carolina, and informally postponed William Micou's nomination in the last month of Fillmore tenure. During the previous year, Fillmore's nomination of Edward Bradford expired on the eve of a presidential election in which Fillmore was not a candidate. Again, these defeats were engineered "to preserve court vacancies for incoming Democratic President Franklin Pierce."
97 Id.
to nominate his Attorney General, Henry Stanbery. Thus, eleven of the twenty-one rejections in our first century had little, if anything, to do with the ideology of the nominee. Rather, these were partisan attempts to thwart a lame duck or unelected president.

This form of political infighting often blighted confirmations in the Supreme Court's early history. One commentator noted that "[t]he whole period of the Senate's rejection of Rutledge in 1795 to its rejection of Parker in 1930, there were 94 nominations, but only 73 were made by Presidents who were neither lame ducks nor were serving out the terms of their predecessors. Of these 73 nominations, the Senate rejected or forced the withdrawal of only 8." On the other hand, the majority of the twenty-one nominations made by politically weak presidents were rejected.

A third category independent of judicial philosophy may be characterized as another way of assessing the political strength of the president. In these rejections, a strong Senator was able to invoke senatorial courtesy to defeat a nominee. Henry Abraham notes that this "appears to have been the sole factor in Grover Cleveland's unsuccessful nominations of William B. Hornblower (1893) and Wheeler H. Peckham (1894)."

In 1894, New York's powerful Democratic Senator David B. Hill felt that President Cleveland should nominate another New Yorker to replace Justice Samuel Blatchford. Accordingly, Senator Hill invoked senatorial courtesy and convinced his colleagues to narrowly defeat Hornblower, by a margin of 24-30, and Peckham, by a margin of 32-41. President Cleveland, however, outfoxed Senator Hill in the long run by nominating Democratic Majority Leader Edward White of Louisiana to fill the vacancy. On that nomination, the forces of senatorial courtesy reversed gears and the President's nomination prevailed.

Similarly, Reuben Walworth, one of Tyler's nominees whose fate was described above, was defeated primarily due to Sena-

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98 Id. at 40-41.
99 Ross, supra note 4, at 644 n.61.
101 Id. at 27-28.
102 Id.
The Whigs, "thinking they had victory in their grasp," postponed the Walworth nomination on a narrow 20-27 vote. Finally, President James Polk’s nomination of Pennsylvanian George Woodward ran afoul of Pennsylvania Senator Simon Cameron, who invoked senatorial courtesy against one of his own constituents. Woodward’s nomination failed on a 20-29 vote.

This narrows the list of twenty-one rejections down to five. The rejected candidate’s substantive views played a larger role in these cases. In no case, however, were the views in question related directly to judicial philosophy. The earliest of these was John Rutledge who was opposed by his fellow Federalists in the Senate because he had ardently opposed one of their favorite projects—the Treaty achieved by Chief Justice John Jay in 1794. The Jay Treaty was a heated public issue in 1795 when President Washington appointed Rutledge to succeed Jay who was retiring to become Governor of New York. Rutledge’s credentials seemed unassailable: delegate to the 1787 Convention, former Governor of South Carolina, and former Associate Justice of the Supreme Court.

Nonetheless, the Jay Treaty dominated political affairs of this period. Many American merchants, particularly in the South, were disappointed by a treaty that permitted the defeated British to recover pre-war debts, but denied reimbursement for American property carried off during the conflict. Prior to his nomination, South Carolina’s John Rutledge had joined the chorus of Southern opponents. This ired the Federalists, who dominated the Senate. After his nomination, Rutledge took his seat on a recess appointment and began to serve as Chief Justice. Meanwhile, the Northern Federalist newspapers began to denounce him vigorously.

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103 Id.
104 Id. at 105-06.
105 Id. at 41-42.
106 Id.
107 Id. at 65.
108 1 Warren, supra note 86, at 129.
109 Id. at 133.
110 Id. at 129-31.
At the same time, another serious allegation arose against Rutledge. As early as August 4, 1795, Attorney General Bradford had written to Alexander Hamilton suggesting that Rutledge was displaying signs of derangement and had attempted suicide.\(^{111}\) Alexander Hamilton, in turn, wrote to Senator Rufus King of New York suggesting "if the charges [of derangement] are true," that he would advise a vote against the nomination.\(^{112}\) As these charges became notorious, the press began to attack Rutledge's behavior, accusing him of failure to pay debts among other improprieties.\(^{113}\) Perhaps out of deference to the former Justice and venerable delegate to the 1787 Convention, the Senate debate on the nomination concentrated on the treaty issue. Charles Warren opines that "the excited political situation" spelled defeat for Rutledge "irrespective of [his] mental condition."\(^{114}\) The Senate's fitness concerns, however, proved well founded as Rutledge's mental condition deteriorated markedly during the time prior to his death five years later.

In this case, an unacceptable judicial philosophy was not the flaw which cost Rutledge the Chief Justiceship. Rutledge was an avowed Federalist. He had signed the Constitution, worked for its ratification, and ultimately was confirmed as one of President Washington's charter members of the Supreme Court. His judicial philosophy was well-known and undoubtedly shared by the predominantly Federalist Senate. Rutledge's faults in the eyes of the Senate related to his views on an issue entirely unrelated to judicial decisionmaking. His views on the treaty issue were scrutinized not because they were likely to affect his performance on the Supreme Court, but because they offended the Senate and rendered him unfit for any confirmable position. The vortex of the concern over Rutledge was his indiscreet statements and behavior on past political issues, not a concern over how he might decide cases as a Supreme Court justice. Accordingly, the Rutledge nomination should not be cited for the proposition that the Senate has in the past engaged in judicial philosophy inquiries.

\(^{111}\) Id. at 137.
\(^{112}\) Id. at 136.
\(^{113}\) Id. at 137.
\(^{114}\) Id.
Next came Roger B. Taney, who was opposed largely because of President Andrew Jackson's anti-bank policies that Treasury Secretary Taney carried out. In his opposition to the National Bank, President Jackson had ordered Taney's predecessor as Treasury Secretary, Louis McLane, to withdraw all the Government's deposits from the bank. McLane refused, but Taney complied, thus simultaneously winning the admiration of the President and the contempt of the Whigs in the Senate.\textsuperscript{115}

In 1835, President Jackson sent Taney's nomination to the Senate for the position of Associate Justice.\textsuperscript{116} The Senate "postponed" the Taney nomination on its last day in session and simultaneously passed a bill to eliminate the seat on the Court. The court-depacking bill failed in the House, and John Marshall passed away in the interim.\textsuperscript{117}

Thus, President Jackson nominated Taney on December 28 to be Chief Justice.\textsuperscript{118} This prompted heated confrontations in the Senate. Whig Senator Henry Clay led the opposition. In the words of one Senator, "[t]here was hardly an opprobrious epithet which, as he told me himself, afterwards, Clay failed to use against the nomination."\textsuperscript{119} The Whig press editorialized against the nomination exclaiming that "[t]he pure ermine of the Supreme Court is sullied by the appointment of that political hack, Roger B. Taney."\textsuperscript{120} Nonetheless, Taney won confirmation by the margin of 29-15. Ironically, Henry Clay later rued the folly of his opposition when he told the Chief Justice years later, "I am satisfied now that no man in the United States could have been selected more abundantly able to wear the ermine which Chief Justice Marshall honored."\textsuperscript{121} This is an indication that Senators are scarcely better than presidents at predicting how

\textsuperscript{115} H.C. HOCKETT, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES, 1826-1876, 86 (1939).
\textsuperscript{116} 2 WARREN, supra note 86, at 260-63.
\textsuperscript{117} Id. at 275-79.
\textsuperscript{118} Id.
\textsuperscript{119} Id. at 289 (quoting from speech of Sen. Revardy Johnson before the United States Senate, March 31, 1864, CONG. GLOBE, 38th Cong., 1st Sess., p. 1363).
\textsuperscript{120} Id. at 290.
\textsuperscript{121} C. SWISHER, ROGER B. TANEY 450 (1935) (quoting from a speech of Revardy Johnson before the United States Senate, March 31, 1864, CONG. GLOBE, 38th Cong., 1st Sess., p. 1363).
past political performance will translate into judicial performance.

Like Rutledge, Taney faced opposition not on the basis of how he might decide future cases but on the basis of how he had conducted himself during current political controversies. The Whigs resented Taney's receipt of a reward for opposing their policies. Their effort was focused far less on his judicial philosophy and any "damage" he might cause as a Supreme Court Justice, than on an effort to punish him for supporting policies unpopular in the Whig Senate. Accordingly, this example offers little comfort to the modern apologists for in depth examination of judicial philosophy. Rather, the Taney confirmation counsels against politicizing the confirmation process.

In 1869, President Grant nominated his "emminently qualified and popular" Attorney General, Ebenezer Hoar. The main issue against Hoar was his "consistent refusal to back Senatorial nominations for judgeships [and] by his publicly uncompromising insistence on 'nonpolitical' appointments." With a Senate accustomed to the corrupt patronage of the Reconstruction era, this was not a popular position. In addition, Hoar had angered some Republican Senators by opposing the impeachment of Andrew Johnson. Once again, Ebenezer Hoar was rejected in 1870 as a result of his role in a contemporaneous political confrontation, not as a result of his judicial philosophy and the likelihood that he would hue to a particular line in deciding cases.

The fatal blow to his candidacy, however, may well have turned on geographical considerations. Regional considerations were politically important when the Justices also "rode the circuits." Hoar, from Massachusetts, was appointed to a seat assigned to a Southern circuit. The final vote was 24-34 against Hoar. Professor Friedman points out that Hoar lost several votes on the impeachment issue, but that the absence of votes from Southern Republicans (who voted against him 13-3) cost him the

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122 H. ABRAHAM, supra note 3, at 42.
123 Id. at 34.
124 Id.
125 Id.
The geographical question apparently supplied the margin of defeat.

Grant's nomination of Caleb Cushing was defeated on the basis of a unique mix of ethical and political considerations. Cushing's judicial philosophy was undoubtedly satisfactory to the post-war Republican Senate. In fact, he had helped draft the Fourteenth Amendment to the Constitution, the Republican party's crowning achievement of that era. During the war, however, Cushing allegedly objected to patriotic music and hoisted a rebel flag on one of his ships. These allegations would not have been fatal if a letter he had written to newly-elected Confederate President Jefferson Davis had not come forth. This letter asked Davis to arrange a meeting with one of Cushing's former law clerks. In the post-war patriotic hysteria, Cushing could not overcome allegations of disloyalty. This rejection, again, was not primarily motivated by apprehensions over Cushing's judicial philosophy. Entanglement in the burning political question of the day, however, apparently made his nomination a symbolic test vote on matters wholly unrelated to judicial philosophy.

Stanley Matthews was nominated by President Hayes, an avowed one-term President, in 1881. Matthews was controversial because, as an attorney and Senator from Ohio, he had opposed a popular anti-railroad bill sponsored by the Chairman of the Senate Judiciary Committee. In apparent retribution, the Judiciary Committee failed to act on the nomination prior to expiration of Hayes' term. President Garfield immediately renominated Matthews. He was approved by the Senate on this second try and served for seven years on the Court.

In any event, of the last five rejections, two were only temporarily delayed in their confirmations as Justices, and the cause of the other three was unrelated to the candidates' judicial ideology. In each of those rejections, punishment for past political indiscretions was more evident than apprehension over a prospective judicial record. The Senators were casting votes de-

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126 Friedeman, supra note 4, at 34.
127 Id. at 24-25.
128 H. Abraham, supra note 3, at 135-36.
129 Id.
130 Id.
manded by the symbolic role played by the nominee in political affairs. The historical record is rather convincing evidence of a Senate disposed to accept the guidelines of the 1787 Convention and remain within a restrained concept of the advice and consent function.

These rejections contain a caution of the dangers of politicizing the appointment process. As this brief survey discloses, the decade of the Reconstruction featured the most prominent cases of political domination of the confirmation process. This era featured other threats as well to the Court’s independence. During that period, political checks on the Court were not merely branded but actually employed. The number of seats on the Court was reduced to prevent appointments. Nominations were considered political patronage or were allocated according to geography. During the same time that selection of justices was just another political question, the Court was occasionally treated as just another political entity. Congress even stripped the Supreme Court of jurisdiction to hear a case on which it had already heard oral arguments.131 The Court concomitantly lost status as an independent institution with a nonpolitical constitutional mission distinct from the policy-making and administrative branches. While Congress is not likely to engage in such excesses again, this record is indicative of the blurring of functions that can occur when the branches deal confrontationally with each other.

In any event, the era of 1795-1893 produces no support for the notion that the Senate has traditionally engaged in scrutiny of judicial philosophy. When the Senate did, on a few occasions, consider a nominee’s substantive views, those considerations did not pertain to judicial philosophy.

VII. 1893-1988

Since 1893, only seven nominations have failed to win confirmation.132 In other words, in nearly a century, fifty-four nomi-
Institutions have won confirmation without a central focus on scrutiny of judicial philosophy. In fact, thirty-seven of those confirmations came by a unanimous vote. Another thirteen won confirmation with fewer than twenty-five dissenting votes. Of the remaining four confirmations, the high-water mark of opposition was thirty-three votes against Chief Justice Rehnquist in 1986. For more than a century, the Senate has not, as a rule, employed policy preferences as the determinative test for Supreme Court nominees.

This confirmation record is significant in another sense as well. During this period of nearly a century, the Senate confirmed fifty-four justices from Presidents with widely divergent political and judicial ideologies. During much of this period, the majority of the Senate and the President owed their allegiance to different political parties. Nonetheless, partisanship and ideological differences did not alter the normal rule of avoiding undue scrutiny of judicial philosophy.

Setting aside for a moment the Bork confirmation, an examination of the other six rejected nominees over this period suggests that questions of ethics or qualifications were generally the determinative factors in the confirmation decision. Judicial philosophy began to play a role in some rejections, although it was generally not determinative.

The most recent unsuccessful nominee was Judge Douglas Ginsburg of the Court of Appeals for the District of Columbia. Although some early press accounts had branded Judge Ginsburg a "Borklet" in an attempt to load his candidacy with some of the ideological baggage fatal to Judge Bork's aspirations, Judge Ginsburg withdrew himself from consideration in the face of allegations about his use of marijuana many years before the nomination. The other issue which had arisen prior to the charges of marijuana use concerned Judge Ginsburg's failure to recuse himself while serving in the Department of Justice from making some decisions which affected companies in which he had a

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193 Two Cleveland nominees, one McKinley nominee, three Theodore Roosevelt nominees, six Taft nominees, three Wilson nominees, four Harding nominees, one Coolidge nominee, three Hoover nominees, nine Franklin Roosevelt nominees, four Truman nominees, five Eisenhower nominees, two Kennedy nominees, two Johnson nominees, four Nixon nominees, one Ford nominee, and four Reagan nominees.
minor and peripheral stock interest. At a time when the nation's war on illicit narcotics was continually a front-page political issue, the short-lived Ginsburg nomination was doomed by questions of ethics, not judicial philosophy.

Judge G. Harrold Carswell, a Nixon nominee, was rejected primarily due to his mediocre legal qualifications. Even his primary Senate advocate, Senator Hruska of Nebraska, conceded that "[e]ven if he is mediocre there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation." This faint praise damned the nominee far more than any considerations of judicial philosophy. Senator Ernest Hollings of South Carolina, for instance, noted that Carswell "was not qualified to carry Judge Haynsworth's law books." The Dean of Yale Law School, Louis H. Pollack, testified that Carswell "presents more slender credentials" than any other Supreme Court nominee in a century. Ultimately twenty-two law school deans opposed Carswell's nomination, which failed on a 45-51 vote on April 8, 1970. Thirteen Senators from President Nixon's party voted against the nomination. This rejection was far more a result of weak qualifications than an incompatibility with the Senate's policy preferences in judicial matters.

The other rejected Nixon nominee was Judge Clement F Haynsworth, Jr. Judge Haynsworth demonstrated during the confirmation hearings a "patent insensitivity to some financial and conflict-of-interest improprieties." Judge Haynsworth purchased 1,000 shares of Brunswick Corporation stock in 1967 after he had voted in favor of the Corporation in a case but before the decision was announced. When questioned about the apparent impropriety, the Judge stated that he "simply did not recall the pending decision" when making the stock pur-

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134 H. Abraham, supra note 3, at 46 ("[A]ll fair-minded observers now agree on [his] lack of qualifications.").
135 Id. at 16; L. Tribe, supra note 3, at 82.
137 R. Harris, Decision (1971).
138 H. Abraham, supra note 3, at 15.
139 Senate Hearings on the Nomination of Clement Haynsworth, Jr. to be Associate Justice of the Supreme Court of the United States, 91st Cong., 1st Sess. 11-12 (1969).
Another ethical issue arose when Judge Haynsworth was accused of casting a deciding judicial vote in favor of a company that did business with a firm in which the Judge held a one-seventh interest.141 As one commentator noted, "how could the Senate confirm Haynsworth when it had played such an admirable activist-moralist role in causing Fortas's resignation?"142 A combination of bad timing in the wake of the Fortas confirmation and ethical improprieties, far more than the existent differences with the Senate on judicial ideology, provided the "margin of defeat."143 The nomination of Judge Haynsworth failed on a 45-55 vote on November 21, 1969.

President Lyndon Johnson's nominee, Justice Abe Fortas, to succeed Chief Justice Earl Warren was questioned scrupulously for ethical improprieties, specifically, cronyism due to his close relationship with the President, judicial impropriety due to extrajudicial service as a close counsellor to the President during his tenure on the Supreme Court, and acceptance of exorbitant lecture fees.144 Justice Fortas testified that he had assisted the President in planning Vietnam war strategies and responses to urban riots.145 Further, he was accused of attempts to get federal government jobs for his friends.146

A blatant political factor also influenced the outcome of the Fortas nomination. President Johnson had already announced that he would not seek his party's nomination to serve another term as President.147 With the Vietnam War raging and civil unrest prevalent in many urban centers, President Johnson's political strength was ebbing. Consequently, the President's weakness magnified the ethical questions about Fortas' nomination.148

140 Id. at 11.
141 Id. at 6-8.
142 H. Abraham, supra note 3, at 5.
143 Id. at 43.
144 Hearings on the Nomination of Justice Abe Fortas to be Chief Justice of the United States Before the Senate Committee on the Judiciary, 89th Cong., 1st Sess. 41-50 (1965).
145 Id.
146 Id.
147 H. Abraham, supra note 3, at 41.
148 Id.
At the same time, Fortas was under attack as a symbol of the progressive jurisprudence of the Warren Court era.\textsuperscript{149} In particular, Senator Thurmond of South Carolina attacked Justice Fortas quite openly for his views on several important Supreme Court decisions.\textsuperscript{150} The Senator questioned Fortas’ posture on criminal justice questions.\textsuperscript{151} On October 2, 1968, the President withdrew Justice Fortas’ nomination.\textsuperscript{152}

Shortly thereafter, revelations of inappropriate paid legal association with a convicted stock manipulator, Louis Wolfson, led to Justice Fortas’ resignation from the bench.\textsuperscript{153} Although a vocal minority of the Senate scrutinized Fortas’ judicial ideology closely, ethical and political questions plagued his candidacy as well. In the waning days of the Johnson Administration, these various factors conspired to cause Fortas’ withdrawal.

Judge Homer Thornberry lost his chance for a Supreme Court seat when the Fortas nomination failed, leaving no vacancy for him to fill. One commentator has described Judge Thornberry as a friend of President Johnson from Texas, “whose record in Congress and on the federal bench was less outstanding than was his personal devotion to the President.”\textsuperscript{154}

In addition to the Bork nomination, judicial philosophy of the nominee was undoubtedly the central cause of rejection in one other confirmation proceeding of this era. In 1930, President Herbert Hoover nominated Judge John J Parker to replace Justice Sanford who had died.\textsuperscript{155} In a time of heated concern over labor issues, Judge Parker was accused of insensitivity to labor because he affirmed a lower court opinion upholding yellow-dog contracts.\textsuperscript{156} In April 1927, Judge Parker followed a 1917 Supreme Court precedent by upholding a district court injunction against interference in mine operations by the United Mine Workers Union. According to Henry Abraham, Judge Parker’s questioned opinion indicated “neither approval or dis-

\textsuperscript{149} \textit{Id.} at 43-45.
\textsuperscript{150} \textit{Id.}
\textsuperscript{151} \textit{Id.}
\textsuperscript{152} \textit{Id.}
\textsuperscript{153} \textit{Id.}
\textsuperscript{154} \textit{Ross, supra} note 4, at 654.
\textsuperscript{155} \textit{H. Abraham, supra} note 3, at 42-43.
\textsuperscript{156} \textit{Id.} at 42.
approval of yellow-dog contracts."\textsuperscript{157} In fact, Judge Parker had only upheld Supreme Court precedent, as he was bound to do as a lower court judge.\textsuperscript{158} Nonetheless, the President of the American Federation of Labor testified against Judge Parker's nomination because "[c]onfirmation will mean another 'injunction' judge will be a member of the Supreme Court."\textsuperscript{159}

The other issue against Judge Parker was a racist statement made as a gubernatorial candidate ten years prior to his nomination.\textsuperscript{160} On this subject, the Secretary of the National Association for the Advancement of Colored People, Walter White, testified against Judge Parker.\textsuperscript{161} In the face of this opposition, Judge Parker was defeated 39-41 on May 7, 1930. Henry Abraham described Judge Parker's continued service on the Fourth Circuit in these terms:

Ironically it would be Judge Parker who would write some of the earliest and most significant pro-black opinions on desegregation. Among them were \textit{Rice v Elmore} in 1947, in which he sustained U.S. District Court Judge J.W. Warns outlawing of South Carolina's machinations to bar blacks from primary elections, and his 1955 remand opinion in \textit{Briggs v Elliott}, in which he rejected "massive resistance."\textsuperscript{162}

In the judgment of Henry Abraham, the ideological inquiry that took place failed to accurately discern or predict the nominee's subsequent judicial performance on the Fourth Circuit.\textsuperscript{163}

In any event, the record of Senate confirmations from 1893-1988 is not replete with ideological inquisitions. Once again, the general rule was to avoid questions about the nominee's judicial

\textsuperscript{157} \textit{Id.} at 42-43.
\textsuperscript{158} \textit{Id.}
\textsuperscript{159} \textit{Hearings Before the Subcommittee of the Committee of the Judiciary, United States Senate, on the Confirmation of John J. Parker, 71st Cong., 2d Sess. 27 (1930)} (testimony of William Green, President, American Federation of Labor).
\textsuperscript{160} \textit{Id.} at 10 (When a candidate for governor of North Carolina in 1920, Parker was quoted as saying that "[w]e recognize that [the black] has not yet reached the stage in his development when he can share the burden and responsibilities of government.").
\textsuperscript{161} \textit{Id.} at 74-79.
\textsuperscript{163} \textit{Id.}
ideology While investigations of judicial philosophy played a role in a few confirmation proceedings, most notably the Fortas and Parker hearings, the Senate as a body exercised restraint in nearly all confirmation inquiries.

VIII. THE BORK NOMINATION AND THE MODERN ERA

As illustrated in this brief study of rejected nominees, a candidate's substantive views on any topic only infrequently emerged as a factor in unsuccessful nominations. Moreover, where substantive views were examined, the inquiry was most often confined to retrospective investigations of a candidate's involvement in major public political issues or activities. Specific examination of judicial philosophy with a prospective apprehension about a candidate's likely Supreme Court voting record was very rarely a feature of these rejections. The examination of judicial philosophy has a much shorter history Nonetheless, the emergence of this factor, which became explicit in the Bork proceedings, traces its roots to some earlier confirmations.

The first intimations of a change in the historical pattern of confirmation proceedings came with the confirmation of Justice Louis D. Brandeis in 1916. Shortly after President Wilson announced the nomination, protests were heard from sixty-one prominent citizens—many of them leading lawyers in Boston—maintaining that the nominee lacked the confidence of the bar and was not fit for the position.164 Six former presidents of the American Bar Association also informed the Senate Judiciary Committee that, in their opinion, Brandeis was "not a fit person to be a member of the Supreme Court of the United States."165

This stir was not caused by Brandeis' legal qualifications. Harvard's Roscoe Pound prophetically testified that "so far as sheer legal ability is concerned, [Brandeis] will rank with the best who have sat upon the bench of the Supreme Court."166 The real underlying issue was a deep-seated prospective appre-

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164 Hearings on the Nomination of Louis D. Brandeis to be Associate Justice of the Supreme Court Before the Senate Committee on the Judiciary, 64th Cong., 1st Sess. 319 (1916).
165 Id. at 1226.
166 Id. at vol. 2, p. 251.
hension about Brandeis' judicial methodology and philosophy. Still, this apprehension was cloaked not in terms of dissatisfaction with judicial ideology, but in terms of vague questions about judicial temperament and professional ethics.

The Senate apparently perceived the inadequacy and stealth of the case against Brandeis. On June 1, 1916, he was confirmed on a 47-22 vote. The Senate declined to extend its inquiry to examine apprehensions about how Brandeis might decide cases as a Justice.

Although apprehensions about judicial philosophy occasionally surfaced again after the Brandeis nomination, they played no significant role again until the Parker nomination. As discussed, this exception to the historical rule of Senate restraint was an instance where the Senate rejected a nominee because it disagreed with the substantive results it expected Judge Parker to render if confirmed.

The next instance of philosophical scrutiny was the second Fortas nomination in 1968. As mentioned earlier, Justice Fortas' candidacy for Chief Justice was marred by charges of overstepping the bounds of the judicial office and ethical insensitivity. When Justice Fortas appeared before the Senate Judiciary Committee for questioning, he was viewed by some Senators as a "symbol of the pent-up frustrations against the Warren Court—but against the Court as a unit rather than against the individuals." Several Senators questioned Fortas at length on his judicial philosophy. Still the Senate did not expand its standard for ideological inquiries to include the likely outcome of future rulings by Fortas. The questions about this aspect of Fortas' record, however, contributed to the controversy associated with his nomination and delayed the proceedings until the ethical charges began to poison the prospects for confirmation.

Similarly, Haynsworth's nomination was burdened by senatorial concerns about his judicial philosophy. Although this nomination also failed on ethical grounds, the delays and controversy

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167 Id.
168 Id.
169 See supra notes 157-62 and accompanying text.
170 See supra notes 144-50 and accompanying text.
171 H. Abraham, supra note 3, at 44.
associated with the Judge’s judicial philosophy provided the time and environment which made the ethical charges fatal. President Nixon’s other nominees—in particular William Rehnquist—encountered some friction due to questions of judicial philosophy, but still the Senate would not venture to abandon its historical tradition of respecting the independent judicial function by refusing to demand that a candidate toe to any particular ideological orthodoxy.

Another step toward a wholesale dive into the depth of philosophy inquiries occurred in the nomination of Sandra Day O’Connor. President Reagan had recently swept into office on the Republican platform which promised selection of judges respectful of unborn human life. This was an explicit reference to the Supreme Court’s Roe v. Wade decision which had become controversial in many political sectors. When Arizona state Judge O’Connor was nominated, reports immediately surfaced about her votes as an Arizona legislator in favor of some abortion policies. Some Republican Senators, emboldened by acquiring majority status in the Senate, determined to inquire about Judge O’Connor’s judicial philosophy relative to doctrines associated with Roe. Memoranda circulated among Republican Senators and staff arguing for aggressive questioning on this aspect of judicial philosophy.

When Judge O’Connor appeared before the Senate Judiciary Committee, her questioners were very restrained and respectful. For the most part, however, Judge O’Connor declined to divulge her own particular judicial philosophy preferring instead to respond to questions by stating the current status of the law. When pressed on her personal judicial ideology, she maintained

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172 Id. at 43.
173 Id. at 22.
174 The 1980 Republican platform plank stated: “We will work for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life.” N.Y. Times, July 13, 1980, at 14, col. 2.
175 410 U.S. 113 (1973).
176 Hearings on the Nomination of Sandra Day O’Connor to be Associate Justice of the Supreme Court Before the Senate Committee on the Judiciary, 97th Cong., 1st Sess. (1981) [hereinafter Hearings on O’Connor].
177 This memorandum was revised and printed in Georgia Law Review in 1983, Rees, supra note 4.
178 Hearings on O’Connor, supra note 176, at 69-70, 85, 130-31.
that the judicial office requires her to avoid prejudging any
issue. A few Republican Senators expressed frustration at their
inability to get a clear picture of Judge O'Connor's philosophy
A counsel on the staff of the Senate Judiciary Committee during
the hearings, who was desirous of more penetrating questions,
commented that: "Justice O'Connor apparently made no dis-
tinction between prejudging a case and forming an abstract
opinion on an issue before it has presented itself in a case." Justice O'Connor was unanimously approved. The Senate once
again rejected invitations by a minority of Senators to expand
the limits of inquiries into judicial philosophy.

The next nomination to stir concerns in terms of judicial
philosophy was President Reagan's elevation of Associate Justice
Rehnquist to Chief Justice in the wake of Warren Burger's
retirement. Justice Rehnquist encountered a firestorm of oppo-
sition. The Senate Judiciary Committee engaged in an exhaustive
study of the allegations against Justice Rehnquist, including
allegations that his judicial philosophy was "out of the main-
stream." The scope of the Senate's inquiry was unfettered. As
an indication of the Justice's judicial philosophy, memoranda
that Justice Rehnquist had written thirty years earlier as a law
clerk to Justice Robert Jackson were dissected in exhaustive
questioning. In addition, some witnesses charged Rehnquist
with unethical behavior in refusing to recuse himself from the
decision of a case with which he had some peripheral dealings
as an Assistant Attorney General. The Committee devoted an
entire day to investigating charges that Rehnquist had intimi-
dated voters at an Arizona precinct during an election dispute
years before. Finally, even the Justice's health was scruti-
nized. Despite the vitriol evinced by the campaign against the
nomination—which prompted one Senator to note that Rehn-
quist's opponents had conducted a "Rehnquisition" which left

179 Id. at 68, 120-21, 132-35.
180 See id. at 922 n.37.
181 See id. at 951 (emphasis in original).
182 Hearings on Justice Rehnquist, supra note 5, at 15, 17.
183 Id. at 136-38, 161-62, 223, 300-01.
184 Id. at 182-85, 231-32, 265.
185 Id. at 984-1135.
186 See supra note 5.
"no stone unthrown"—the Senate confirmed the nomination. The Senate as a whole was not persuaded to evaluate the nomination on the basis of the nominee’s likely influence on directions of Supreme Court policy.

The Rehnquist hearing set the stage for the nomination of Judge Bork. The intensity of the ideological inquisition of Judge Bork was unprecedented. While many prior confirmation proceedings had included an element of inquiry into substantive views, the Bork nomination ventured into unchartered territory with respect to such investigations. The unprecedented aspects of the scrutiny of Judge Bork’s judicial philosophy include: first, the abandonment of most self-imposed restraints on the nature and purpose of the inquiries; second, the expansion in terms of length and repetitiveness of the inquiry process; and third, an element out of the control of the Senate but influenced by the nature of the Senate proceedings, the use of direct political grass-roots campaigning and mass media advertising to shape public opinion on the nomination and affect the outcome.

Although former proceedings had examined a candidate’s substantive views, and occasionally even a candidate’s substantive judicial views, the Bork proceeding, for the first time, assumed characteristics of an express effort to affect the outcomes of Supreme Court decisions by rejecting an individual with judicial views different from the majority of the Senate. Former ideological inquiries had traditionally focused retrospectively on a past records to ascertain if a nominee possessed the judgment or temperament for the significant responsibilities of Justice. The Fortas proceeding had contained overtones of apprehension about the Justice’s continued influence on the directions of Court policy. Because Fortas was already an Associate Justice, however, these overtones did not ripen into stated reservations about his future voting patterns. Instead, Fortas was attacked by some Senate conservatives as a symbol for “pent-up frustrations against the Warren Court.” More importantly, the Senate as a body did not engage in the questioning of Fortas with an eye to influencing Supreme Court decisions via the

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188 H. Abraham, supra note 3, at 44.
confirmation process. The inquiry was conducted by a distinct minority of the Senate.

In the Bork proceeding, however, the Senate assumed the role of considering prospectively the influence that the nominee, if confirmed, might have on the substance of Supreme Court judicial policy. On the day that the nomination was announced, the influential Senator Kennedy addressed the Senate to express his apprehensions that "Robert Bork's America" would feature resegregation, retrenchment of women's rights, reductions in free speech, and so forth through a lengthy catalogue of current social issues which the candidate would presumably affect if confirmed.\(^{189}\) The Senate Judiciary Committee Chairman couched the notion of considering the influence of the nomination on Supreme Court judicial directions in more careful terms. He stated that the Senate has a duty to consider judicial ideology aggressively when "the balance of the Court itself is at stake."\(^{190}\)

The notion of preserving a perceived balance on the Court was immediately attacked by other Senators: "If past Presidents had striven to preserve the Court's ideological balance, the vile separate but equal doctrine of \textit{Plessy v Ferguson} would still be the law of the land."\(^{191}\) Another Senator reported finding no Senate precedent surrounding the confirmation of Supreme Court candidates that "requires or even suggests anything about balance between liberals and conservatives when a new nominee is presented."\(^{192}\) The findings of this Senator are supported by a review of prior confirmations.\(^{193}\) Still another Senator noted that the Senate had declined to consider "balance" as recently as 1967 when President Johnson made his second nomination, even though "[i]t was immediately clear to every one on both sides of the aisle that Mr. Marshall would decidedly, decisively, and extraordinarily shift the Court's philosophical balance toward a more liberal position."\(^{194}\)


\(^{190}\) Biden, \textit{supra} note 15, at S10,528.


\(^{193}\) \textit{See infra} at 27-28.

\(^{194}\) Humphrey, \textit{supra} note 23, at S10,275.
Ultimately, the Senate elected as a body to consider directly what effect the Bork nomination might have on Supreme Court directions. The record of the proceedings on the floor is replete with apprehensions of what Judge Bork might do as Justice Bork.\textsuperscript{195} While impossible to judge precisely why individual Senators cast their vote for or against the nominee, it is possible to conclude that the examination of Judge Bork's ideology for its potential prospective impact on Supreme Court jurisprudence pushed back the frontiers of ideological inquiry.

In terms of the quality and quantity of the inquiry, the Bork proceedings also pushed back the former limits. As a procedural matter, the Senate had not previously engaged in what Chief Justice Rehnquist called a "prolonged interrogation"\textsuperscript{196} to the lengths featured in the Bork confirmation. Judge Bork himself testified before the Senate Judiciary Committee for five days with several sessions stretching late into the evening.\textsuperscript{197}

The extent and character of the inquiry into Judge Bork's judicial philosophy was more searching than in any past nomination. Chief Justice Rehnquist describes some of the difficulties for the nominee:

[N]ot all members of the committee are present during any particular phase of the questioning and therefore it is quite possible for a nominee to have been subjected to extensive questioning on a rather detailed point by one Senator, to be followed shortly afterwards by virtually identical questioning by another Senator. If the nominee were a witness in a judicial proceeding, his attorney could protect him, at least in our country, by objecting to the second line of questions. But alas, the nominee has no attorney. [O]ne of my advisers cautioned me to bear in mind that the Constitution ended at the hearing room door.\textsuperscript{198}

Judge Bork experienced precisely the difficulty described by the Chief Justice. For example, on one issue—his judicial views


\textsuperscript{196} Address, supra note 2, at 7.

\textsuperscript{197} Hearings on Bork, supra note 28.

\textsuperscript{198} Address, supra note 2, at 7.
on the standards for implementing the equal protection clause of the Fourteenth Amendment—Judge Bork was questioned in detail at least eighteen separate times.\(^\text{199}\) Indeed, every member of the Committee, save one—thirteen in all—delved into the same issue.\(^\text{200}\) Moreover, the inquiry covered an amazing array of issues, including the right to privacy,\(^\text{201}\) judicial restraint,\(^\text{202}\) voting rights,\(^\text{203}\) wiretapping,\(^\text{204}\) due process,\(^\text{205}\) the Ninth Amendment,\(^\text{206}\) women’s rights,\(^\text{207}\) and far more.

While the repetitiveness of the process does not in itself suggest improprieties, the character of the questions and the type of answers demanded by some questions can pose a threat to principles of judicial independence. As the Chief Justice again describes:

The difficulty comes when, because of dissatisfaction with a putative judge’s answer, or because of questions about the frankness of the answer, the questions begin to go into great detail. If judges were computers, all primed to spew out answers when the proper button was pushed, this would be a permissible form of interrogation. But judges are not computers judges should not and do not behave like legislators, or like anyone else who is free to commit himself to a result for reasons apart from the merits. Judges are called judges because they ‘judge’ and to ‘judge’ is an infinitive which connotes certain procedural prerequisites Obviously [the judging] process is something which cannot possibly be duplicated in a committee hearing room, and since it cannot be duplicated no nominee who is both prudent and honest can


\(^{200}\) *Id.*

\(^{201}\) *Id.* at 87.

\(^{202}\) *Id.* at 101.

\(^{203}\) *Id.* at 130.

\(^{204}\) *Id.* at 217

\(^{205}\) *Id.* at 291.

\(^{206}\) *Id.* at 301.

\(^{207}\) *Id.* at 324.
give categorical answers to detailed questions of constitutional law in the Senate confirmation hearings in our country. 208

As intimated by the Chief Justice, the form and duration of the scrutiny process can have an effect on questions related to the judicial role. One Senator made specific reference to this possibility:

I am very troubled that the questioning of the nominee was too specific and too detailed. In effect, committee members were extracting campaign promises from the nominee who gave them under oath. In doing this the Senate is seeking to control the result of Supreme Court deliberations. In my opinion, this compromises the independence of the judiciary and infringes on the separation of powers.

We have no business trying to get a nominee to decide cases our way. As a corollary, we must not deny confirmation because a nominee would decide this case or that case contrary to our preferences. It is not the proper role of the Senate to dictate how specific cases must be decided as a condition of confirmation. Never before has the Senate done so—until now. 209

Judge Bork, unlike Justice O'Connor who had declined to answer some questions on the grounds that she should avoid prejudging future cases, responded in detail to questions about his judicial philosophy. 210 This triggered some heated exchanges between the Senators and prompted one Senator to comment on the difficulty of assessing the merits of a judicial candidate on the basis of "thirty second bites" relative to complex issues. 211

At length, Judge Bork's nomination was defeated on a Senate vote of 42 to 58. 212 The Senate, for the first time, had elected to abandon most restraints when undertaking an inquiry into judicial philosophy. Instead the Senate adopted an unlimited approach to philosophical inquiry.

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208 Address, supra note 2, at 10-11.
210 Hearings on Bork, supra note 28, at 153.
211 Id. (statement of Sen. Hatch) ("these major issues are not easily explained in 30-second bites that we people in Congress are used to popping off about").
212 Id. at 170.
While the Bork nomination took the ideological scrutiny function a step further (both in terms of purpose and process of the scrutiny) than any prior Senate confirmation proceeding, the aspect of the hearings that established an entirely unprecedented practice was the use of grass-roots political election tactics to influence the outcome of the Senate vote. Most prior nominations had taken place within the chambers of the Senate without extensive public participation. This closed atmosphere had enabled past Senators to defeat nominations on the basis of senatorial courtesy.

Unlike past nomination proceedings, the Bork proceedings quickly became a national political contest, complete with grass-roots lobbying, full-page newspaper advertisements, fund-raising appeals, thirty-second radio and television appeals, and letter-writing campaigns. As the combatants strove to make their point, their media appeals contained the kind of distortions common in modern political contests. A Senate proponent of Judge Bork's nomination exploited these distortions by identifying "67 falsehoods" in one full-page advertisement against Judge Bork, 84 in another and 99 in still another. To this, the
successful opponents of Judge Bork identified flaws in the advertising in favor of Judge Bork and appropriately disclaimed responsibility for the mass media errors of special interest groups.214

A significant portion of the Senate floor debate on the Bork nomination featured charges against outside advertising, polling, and fund-raising.215 As mentioned earlier, however, the Bork debate spread beyond the bounds of the Senate to a degree unrivaled in any prior confirmation proceeding. Whereas Rutledge, Cushing, Taney, and a few others suffered rejection when they became ensnared in political affairs raging in the general forum of public affairs, Judge Bork himself became the central focus of political affairs. Moreover, Judge Bork's views, correctly and incorrectly portrayed, were the subject of political gamesmanship. The fervent political issue of the day was whether Judge Bork should be allowed to reshape the positions of the Supreme Court with his proposed one-ninth influence.216

At this juncture, Judge Bork issued his appeal about effects on the independence of the judiciary. With some time for reflection, most objective viewers can endorse Chief Justice Rehnquist's assessment:

President Reagan is regarded as a philosophical conservative, and Judge Bork was a distinguished federal judge rightly regarded as having a conservative judicial philosophy. All of the liberal elements in the United States mobilized to defeat his confirmation.

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I think I speak for a great number of my fellow citizens of the United States when I say that there is a general feeling of dissatisfaction with the process attending Judge Bork's nomination, a feeling which is shared by many of those who were happy to see him denied confirmation.217

In sum, if nominations were to be decided on the basis of what the public can be made to believe about a nominee's judicial philosophy, the notion of a federal judiciary detached from influences of public opinion and political pressure may be affected.

After Judge Bork was rejected by the Senate and Judge Ginsburg fell victim to questions of ethics, President Reagan nominated Ninth Circuit Judge Anthony Kennedy. After a process which featured once again detailed and repetitive questions about judicial philosophy within lengthy Judiciary Committee hearings, Judge Kennedy was unanimously confirmed.

IX. WHEN TO SCRUTINIZE: CHECKING THE PRESIDENT'S FAVORITISM

The Senate has a need to derive, to the extent possible within a changeable political body, some uniform understandings and policies for the conduct of confirmation proceedings. Relying upon the Constitution's history and the record of past confirmations, the Senate would be well served to adhere to a general rule of avoiding scrutiny of a nominee's judicial philosophy. As articulated by Chairman Biden, however, the framers clearly intended that the Senate would act as a check on excesses within the nominating function. It follows therefore that the Senate should serve as a check on the President's use of ideological factors in the nomination process. This particular checking function is easily implemented where the President nominates solely on the basis of political or ideological preferences. In such a situation, the Senate generally can identify a lack of qualifications or a lapse in ethical propriety or some other fatal deficiency in the candidate. Carswell may well have fit into this category. Some opponents of Judge Bork suggested that he fit ...
into this category because President Reagan was attempting to "remake the Supreme Court in his own image."\textsuperscript{218}

When, however, the President has not nominated solely on the basis of judicial philosophy, the Senate must again weigh carefully the consequences of exercising its checking function. If the Senate persists in demanding satisfaction of its own ideological preferences, the inevitable interbranch confrontation could precipitate a constitutional crisis.

Harvard Law Professor Lawrence Tribe acknowledges this threat in these terms: "In Supreme Court appointments, the Constitution allows only the President his 'druthers.' Allowing each Senator to confirm solely from the Senator's own 'short list' would prescribe paralysis in the Supreme Court appointment process."\textsuperscript{219} Thus, the basic distinction between the President's and the Senate's prerogatives requires the Senate "only to react, not to create."\textsuperscript{220} Accordingly, the Senate, in reacting, has the primary responsibility to avoid compromising the appointive power. If the Senate insists on confirming only justices likely to vote in accordance with a majority of the Senate on judicial issues, it would deny the President his constitutional prerogatives and virtually assert a power to select nominees that the Senate was not intended to possess. Accordingly, the Senate must elect to exercise its check only in those rare instances in history where the President has clearly overstepped the bounds of appropriate discretion in the appointment process.

X. SCOPE OF SCRUTINY: THREATS TO AN INDEPENDENT JUDICIARY

When setting a standard for those few instances when scrutiny of judicial philosophy may be warranted, the Senate should consider the merits of some self-restraint. At the outset of the Republic, the framers understood that the process for selecting judges would contribute to and perpetuate the unique character of the nonpolitical branch. Yet, if the Senate, during repeated confirmation processes, treats the Supreme Court as a political

\textsuperscript{218} 133 CONG. REC. S10,523.

\textsuperscript{219} L. TRIBE, \textit{supra} note 3.

\textsuperscript{220} \textit{Id.} at 131.
institution that it expects to hue to a particular ideological orthodoxy, then the unique independent character of the Court could be tarnished.

Professor Richard Freedman discusses this threat in these terms:

Rarely is public attention focused on the Court as intensely as during a confirmation struggle. Extended debates, both within the Senate and beyond, concerning recent decisions and the political philosophy of a nominee cannot help but diminish the Court's reputation as an independent institution and impress upon the public—and indeed upon the Court itself—a political perception of its role. A Justice who reaches the Court only in the face of doubts concerning his ideological acceptability may bear scars that will affect his judicial behavior. Perhaps more clearly and more importantly, if unpopular Supreme Court decisions tend to lead to nasty confirmation controversies that put the Court in an unfavorable light, then it is natural to expect that the Court will be less willing to render such decisions.221

Another danger inherent in excessive scrutiny of judicial philosophy is the risk of political reprisals. If blocking a nomination on grounds of judicial philosophy is fair game for one President or party, it is fair game for the other as well. This could degenerate very quickly into an endless cycle of revenge and retribution which can only damage the institutional standing of both the Senate and the Court. At the conclusion of the Bork debate, one conservative Senator noted that he had consistently supported qualified judicial candidates with a "liberal" judicial philosophy. He asserted that he would no longer follow the rule which gives a presumption to the merits of a President's nomination. He vowed to reject nominees on the basis of political preference. This is the kind of talk, which, if put into action, can only spell danger for the impartiality of the judicial selection process.

XI. OVERT POLITICS

Observers of the Senate confirmation process in the past have noted that "the Senate has at various times made purely

221 Freedman, supra note 4, at 1317
political decisions in its consideration of Supreme Court nominees.'\textsuperscript{222} One of the institutional strengths of the Senate is its political character. In addition to ensuring responsiveness to the electorate, the Senate's political character makes it sensitive to, and able to check, political excesses in the House and in the Executive. In dealing with the nonpolitical affairs of the judicial branch, however, the Senate must also be sensitive to the potential long-range effects of overly politicized confirmation proceedings.

In the Reconstruction Era, politics ruled the confirmation process and the Supreme Court was subject to crass political patronage.\textsuperscript{223} While that era is not likely to return, it illustrates the dangers of excessive partisanship in Supreme Court selection decisions.

Another commentator has observed that "political involvement in the selection of justices is a two-edged sword whose backswing has the potential to injure the prestige and independence of the Court as much as or more than its thrusts have the chance to reshape jurisprudential directions."\textsuperscript{224} Recognizing this precise danger, the Senate refused to employ political litmus tests while confirming fifty-four justices over the past century.

**Conclusion**

During confirmation proceedings, as at no other time, the Senate interfaces with the third branch. When determining the propriety and scope of ideological inquiries during confirmation proceedings, the Senate's advice and consent processes would be more consistent and less intrusive if undertaken pursuant to some established guidelines. The history of the Constitution and prior Senate practice, with few exceptions, provide those standards.

In the first place, the Senate should undertake scrutiny of a nominee's judicial philosophy only rarely and reluctantly. The norm should be to refrain from delving into a candidate's views

\textsuperscript{222} McConnell, supra note 9, at 13.

\textsuperscript{223} See Friedman, The Transformation in Senate Response to Supreme Court Nominations: From Reconstruction to the Taft Administration and Beyond, 5 Cardozo L. Rev. 1, 26-30 (1983).

\textsuperscript{224} Hatch, supra note 13, at 1352.
in a manner that might be perceived as an attempt to influence Supreme Court jurisprudence by denying otherwise worthy nominees a seat on the bench. On rare occasions, however, the Senate may consciously determine that a President has overstepped the bounds of propriety in seeking to remold the constituency of the Court. Then the Senate's role as a check of presidential "favoritism" may justify a restrained scrutiny of a nominee's judicial views.

With regard to the scope of an ideological inquiry on these occasions when warranted as a check, an unlimited review could entail gridlock or diminution of the independent role of the judiciary. Accordingly, a more restrained standard of inquiry into judicial philosophy would both permit the Senate to perform its constitutional role and protect the institutional integrity, independence, and individuality of the judicial branch.
## APPENDIX

### SUPREME COURT NOMINEES NOT CONFIRMED BY THE SENATE*

<table>
<thead>
<tr>
<th>Nominee</th>
<th>President</th>
<th>Senate Action</th>
<th>Rationale</th>
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<tbody>
<tr>
<td>1. William Paterson</td>
<td>Washington</td>
<td>Withdrawn</td>
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<tr>
<td>2. John Rutledge</td>
<td>Washington</td>
<td>Rejected (10/14)</td>
<td>P1</td>
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<td>3. Alexander Wolcott</td>
<td>Madison</td>
<td>Rejected (9/24)</td>
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<td>4. John Crittenden</td>
<td>J.Q. Adams</td>
<td>Postponed</td>
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<tr>
<td>5. Roger Taney</td>
<td>Jackson</td>
<td>Postponed (24/21)</td>
<td>P2</td>
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<tr>
<td>6. John Spencer</td>
<td>Tyler</td>
<td>Rejected (21/26)</td>
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<tr>
<td>7. Reuben Walworth</td>
<td>Tyler</td>
<td>Withdrawn</td>
<td>A</td>
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<tr>
<td>8. Edward King</td>
<td>Tyler</td>
<td>Postponed</td>
<td>A</td>
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<tr>
<td>9. Edward King</td>
<td>Tyler</td>
<td>Withdrawn</td>
<td>A</td>
</tr>
<tr>
<td>10. John Read</td>
<td>Tyler</td>
<td>Not Acted Upon</td>
<td>L</td>
</tr>
<tr>
<td>11. George Woodward</td>
<td>Polk</td>
<td>Rejected (20/29)</td>
<td>L</td>
</tr>
<tr>
<td>12. Edward Bradford</td>
<td>Fillmore</td>
<td>Not Acted Upon</td>
<td>A</td>
</tr>
<tr>
<td>13. George Badger</td>
<td>Fillmore</td>
<td>Postponed</td>
<td>L</td>
</tr>
<tr>
<td>14. William Micou</td>
<td>Fillmore</td>
<td>Not Acted Upon</td>
<td>L</td>
</tr>
<tr>
<td>15. Jeremiah Black</td>
<td>Buchanan</td>
<td>Rejected (25/26)</td>
<td>L</td>
</tr>
<tr>
<td>16. Henry Stanberry</td>
<td>Johnson</td>
<td>Not Acted Upon</td>
<td>L</td>
</tr>
<tr>
<td>17. Ebnezer Hoar</td>
<td>Grant</td>
<td>Rejected (24/23)</td>
<td>P3</td>
</tr>
<tr>
<td>18. George Williams</td>
<td>Grant</td>
<td>Withdrawn</td>
<td>Q</td>
</tr>
<tr>
<td>19. Caleb Cushing</td>
<td>Grant</td>
<td>Withdrawn</td>
<td>P4</td>
</tr>
<tr>
<td>20. Stanley Matthews</td>
<td>Hayes</td>
<td>Not Acted Upon</td>
<td>P5</td>
</tr>
<tr>
<td>21. William Hornblower</td>
<td>Cleveland</td>
<td>Rejected (24/30)</td>
<td>S</td>
</tr>
<tr>
<td>22. Wheeler Peckham</td>
<td>Cleveland</td>
<td>Rejected (32/41)</td>
<td>S</td>
</tr>
<tr>
<td>23. John J. Parker</td>
<td>Hoover</td>
<td>Rejected (39/41)</td>
<td>P6</td>
</tr>
<tr>
<td>24. Abe Fortas</td>
<td>Johnson</td>
<td>Withdrawn</td>
<td>L, E</td>
</tr>
<tr>
<td>25. Homer Thornberry</td>
<td>Johnson</td>
<td>Not Acted Upon</td>
<td>U</td>
</tr>
<tr>
<td>27. G. Harrold Carswell</td>
<td>Nixon</td>
<td>Rejected (45/51)</td>
<td>Q</td>
</tr>
<tr>
<td>29. Robert H. Bork</td>
<td>Reagan</td>
<td>Rejected (42/58)</td>
<td>P7</td>
</tr>
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</table>

* Note: This appendix covers 29 nominees. The Article discusses 28 nominees. The difference is William Paterson (1) who was a member of the Congress when first nominated and thus ineligible under article I, section 6, clause 2. His nomination was resubmitted after expiration of his elected term and he was confirmed.
A = Not confirmed because of Senate antipathy to the President.
E = Not confirmed because of ethics concerns.
L = Not confirmed because of lame duck status of the President.
Q = Not confirmed because of qualifications concerns.
S = Not confirmed on grounds of senatorial courtesy.
T = Withdrawn as improperly timed, resubmitted and confirmed.
U = Position for which nomination made unavailable.
P = Arguably politically based rejections, as explained below.

1. Rutledge was rejected after publicly condemning the Jay Treaty, one of the most emotional political issues of the eighteenth century. It also became apparent during the confirmation that Rutledge suffered from fits of insanity.

2. Taney was rejected because he carried out President Jackson's orders to remove government deposits from the Bank of the United States. When Jackson subsequently nominated him for Chief Justice, Taney was confirmed by a vote of 29 to 15.

3. Hoar was rejected because he had opposed the impeachment of President Johnson and had supported Civil Service reform.

4. Cushing was attacked as a political chameleon; his name was withdrawn after it was discovered that he wrote a friendly letter of introduction to Jefferson Davis in March 1861.

5. Although initially rejected as a tool of corporate interests and because of ethical concerns, Matthews was later renominated by President Garfield and confirmed by the Senate.

6. Parker was rejected because of alleged insensitivity to labor and racial problems. Parker continued as a judge on the Fourth Circuit.

7. Bork was rejected because a majority of the Senate disagreed with his views on a wide variety of judicial issues.