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THE CONFIRMATION PROCESS: LAW OR POLITICS?

*Henry Paul Monaghan**

In testimony before the Senate Judiciary Committee, I argued (and still believe) that Judge Robert Bork possessed surpassing qualifications for an appointment to the Supreme Court. Subsequently, I became persuaded that my submission was incomplete. Additional argument was necessary to establish that my testimony, if accepted, imposed a constitutional duty on senators to vote for confirmation. To my surprise, further reflection convinces me that no such argument is possible.

From the beginning, presidential nominations to the Supreme Court¹ have been embroiled in public controversy. President Washington's nomination in 1795 of John Rutledge to succeed Chief Justice Jay was a harbinger of things to come. Judge Rutledge had been a member of the constitutional convention, an Associate Justice of the Supreme Court between 1789 and 1791, chief justice of the Supreme Court of South Carolina, and Chief Justice of the Supreme Court for four months under a recess appointment. Nonetheless, the Federalist-dominated Senate rejected the nomination, largely because of Judge Rutledge's public opposition to the Jay Treaty.² During the following century, the Senate rejected or tabled Supreme Court nominations for virtually every conceivable reason, including the nominee's political views, political opposition to the incumbent President, a desire to hold the vacancy for the next President, senatorial courtesy, interest group pressure, and on occasion even the nominee's failure to meet minimum professional standards.³ Indeed, in the first 105 years of American constitutional history, almost one-fourth of the nominees (20 out of 81) failed to win confirmation;⁴ others were confirmed only after intense controversy. However, during the past century, the Senate's actual role in the appointment process has diminished. In the twen-

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¹ The Constitution provides:

The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II, § 2.

² See I C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 124-39 (1922). The Federalists also expressed concern that Judge Rutledge's opposition to the treaty was evidence of his deteriorating mental stability. See *id.* at 130-31.

³ See H. ABRAHAM, *JUSTICES AND PRESIDENTS* 71-153 (2d ed. 1985) (summarizing the history of Supreme Court appointments during the nineteenth century). For a recent study, see Segal, *Senate Confirmation of Supreme Court Justices: Partisan and Institutional Politics*, 49 J. POL. 998 (1987).

⁴ See R. HARRIS, *THE ADVICE AND CONSENT OF THE SENATE* 303 (2d ed. 1958).

tieth century, presidential ascendancy has so increased that public controversy seldom has resulted in unfavorable Senate action.

The intense and highly publicized controversy accompanying the Senate's rejection of Judge Robert Bork and the withdrawal of Judge Douglas Ginsburg nine days later are occasions for taking stock. Do these incidents portend important and lasting shifts in the existing structure of the appointment process? Do they signify that the Senate now can and should reclaim the early constitutional pattern by adopting a more aggressive role in the appointment of Supreme Court judges?

In this commentary, I want to submit two claims — one normative, the other empirical — and to raise one question. The normative claim is that the Senate's role in the appointment of Supreme Court judges is properly viewed as largely "political" in the broadest sense of the term: no significant affirmative constitutional compulsion exists to confirm any presidential nominee. So viewed, the Senate can serve as an important political check on the President's power to appoint. Moreover, the political nature of the Senate's role, like that of the President, helps ameliorate the "countermajoritarian difficulty": by increasing the likelihood that Supreme Court judges will hold views not too different from those of the people's representatives, the Senate can reduce the tension between the institution of judicial review and democratic government.⁵

The empirical claim is that, at least for the foreseeable future, the overriding political power of the modern Presidency will continue to confine the Senate's actual role in the appointment process to its current dimensions. The Senate is incapable of systematically assuming any role greater than that of providing a check against the appointment of nominees perceived to be morally unworthy or too radical. In this respect, the unanimous confirmations of Judges Kennedy and Scalia reveal far more than does the rejection of Judge Bork.

Finally, the question I wish to raise is suggested by the nomination (not the withdrawal) of Judge Douglas Ginsburg. Should limits be imposed on the tenure of persons appointed judges of the Supreme Court?

I.

We take for granted that the President will nominate a person whose general constitutional philosophy the President endorses. "There is," as Chief Justice Rehnquist recently stated, "no reason why

⁵ See A. BICKEL, *THE LEAST DANGEROUS BRANCH* 16-23 (1962) (describing this countermajoritarian difficulty).

a President should not do this.”⁶ For the President, the confirmation process itself is entirely political in the ordinary sense of the term. He has selected an appointee satisfactory to him — a judgment that may include the nominee’s philosophy, as well as a wide range of factors not associated with merit in a narrow sense, such as the appointee’s contribution to the diversity of the Court. The President then seeks the Senate’s consent, not its advice, and usually he can count on ordinary politics to obtain that consent. But nothing in the language of the appointments clause, in its origins, or in the actual history of the appointment process supports a constitutionally based presidential “right” to mold an independent branch of government for a period extending long beyond his electoral mandate. Rather (and to my surprise), all the relevant historical and textual sources support the Senate’s power when and if it sees fit to assert its vision of the public good against that of the President.

At the time of the constitutional convention, the American governmental structure reflected pronounced popular distrust of executive power. The power of governors to appoint was everywhere sharply restricted⁷ and, not surprisingly, several delegates to the constitutional convention (including John Rutledge) urged a restricted presidential appointment power.⁸ Although the Virginia plan contemplated that appointments to all national offices would be made entirely by the legislature, the desirability of a significant presidential role gained early recognition, and presidential authority to appoint all officers “not otherwise provided for” was quickly and firmly established.⁹ However, the appointment of federal judges remained controversial throughout the entire convention. On Madison’s motion, the power to appoint Supreme Court judges was vested in the Senate, where it remained until nearly the end of the convention.¹⁰ After certain delegates objected that the Senate was too large to discharge this function effectively, the existing constitutional provisions finally emerged as a compromise.¹¹

⁶ W. REHNQUIST, *THE SUPREME COURT* 235 (1987).

⁷ “No state constitution granted to the governor an independent appointing power. In several states the governor had little or no appointing power; in those states in which he exercised a limited appointing power, it was always with the advice and consent either of a council appointed by the legislature, or by the legislature itself. Only in Massachusetts, Maryland, New Hampshire, and Pennsylvania were judges appointed by the governor, and in three of these states he shared the appointing power with a council.” R. HARRIS, *supra* note 4, at 19 (footnotes omitted).

⁸ C. WARREN, *THE MAKING OF THE CONSTITUTION 177-79*, 327-28, 639-43 (1937), contains a lucid summary of the convention proceedings with respect to the appointment of judges. For an account of the more general debate at the convention about the appointment process, see R. HARRIS, cited above in note 4, at 17-25.

⁹ 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 67 (M. Farrand rev. ed. 1966).

¹⁰ *See id.* at 232-33.

¹¹ *See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 498-99 (M. Farrand

The Constitution is silent on what criteria the Senate should use in giving "Advice and Consent," but the goal of the provision was clearly to help secure meritorious appointees. In this endeavor, both the constitutional text and its historical origins indicate that "Advice" was intended to be more than a redundant synonym for "Consent."¹² President Washington actually sought and received advice on appointments, as he did on foreign affairs and treaties.¹³ However, the Constitution failed to provide any regular institutional mechanism for securing meaningful Senate "Advice" — as distinguished from the Senate's "Consent," which could be rendered simply with a vote. This omission allowed the authors of *The Federalist* to accept the goal of meritorious appointments, but to discount the Senate's affirmative role in that regard. *The Federalist* assumed that the power to appoint was an inherently executive function and insisted that the President's power to nominate was virtually equivalent to the power to appoint.¹⁴ The constitutional scheme described in *The Federalist* limited the Senate to the role of "an excellent check" against presidential corruption and incompetence.¹⁵ Envisioning the Senate's role thus constrained, *The Federalist* opined that "[i]t is . . . not very probable that [the President's] nomination would often be overruled."¹⁶ Interestingly, *Federalist* No. 78 assumes that the mode of appointing Supreme Court judges raises no issue distinct from that of "appointing officers of the union in general."¹⁷

rev. ed. 1966) (Report of the Committee of Eleven). The committee proposal was adopted on September 7, 1787. *See id.* at 539.

¹² *See* Black, *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 *YALE L.J.* 657, 659 (1970) (arguing that simply as a matter of ordinary language the inclusion of "Advice" in the text of the Constitution means that the Senate must do more than merely consent); *see also* R. HARRIS, *DECISION 94-96* (1971) (describing the impact upon the Carswell confirmation proceedings of Charles Black's argument that the constitutional text alone establishes an active role for the Senate). For a discussion of state practice, see note 7 above.

¹³ *See* Silbey, "Our Successors Will Have an Easier Task": *The First Congress Under the Constitution, 1787-1791*, in *THIS CONSTITUTION* No. 17, Winter 1987, at 4, 7.

¹⁴ *See* *THE FEDERALIST* No. 76, at 512 (A. Hamilton) (J. Cooke ed. 1961) ("There can in this view be no difference between nominating and appointing.").

¹⁵ *Federalist* No. 66 emphasized that the Constitution vests the power of choice in the President, not the Senate. *See id.* No. 66, at 449 (A. Hamilton). *Federalist* No. 76 and No. 77 addressed the appointment process in detail, and argued that presidential nominations would secure good and stable public administration. As for requiring Senate confirmation, "[i]t would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to preventing the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity." *Id.* No. 76, at 513 (A. Hamilton).

¹⁶ *Id.* No. 76, at 512 (A. Hamilton).

¹⁷ *Id.* No. 78, at 522 (A. Hamilton). This premise is particularly curious because it does not reflect the procedures employed at the time in the existing state governments, or the special attention that the convention gave judicial appointments, both generally and in textual provisions concerning Supreme Court judges specifically. Even more importantly, it ignores the fact that Supreme Court judges head an independent branch of the government and are expected to hold

Nonetheless, once the new government began to operate, the actual process of appointment took on a shape different from that envisaged by either the Framers or the authors of *The Federalist*. Patronage became important, and the senators quickly established a powerful role in the nomination of federal officials who functioned within their states.¹⁸ More importantly, Supreme Court nominations moved along their own track, one in which the Senate viewed the nominee's judicial ideology — to say nothing of overtly partisan political considerations — as relevant. The latter development was perhaps inevitable. Concepts such as "merit" and "the public interest" might have seemed relatively uncontroversial to the Framers, but they became far more problematic as social divisions first generated and then legitimated political parties.¹⁹ The line between notions like public interest and merit on the one hand and simple party advantage on the other blurred in practice, partly because it was unclear in principle.

The relevant constitutional law is minimal, and largely negative in character. In theory, the President alone can nominate; beyond that, both the President and the Senate share a common responsibility for the appointment of morally and professionally fit persons to the Court. The Senate has the duty to reject any nominee whose appointment it believes will not advance the public good as the Senate understands it. But the polycentric nature of the common good and the actual history of the appointments clause persuades me to go one step further: generally stated, no affirmative constitutional compulsion to confirm exists.²⁰

office long after the President who nominates them. Such an oversight, if it be one, is at least understandable. The analogy between Supreme Court appointments and other administration appointments was more plausible because *The Federalist* assumed that the officials confirmed by the Senate could not be removed without its consent. *See id.* No. 77, at 515 (A. Hamilton). Moreover, the older idea that adjudication was simply part of the execution of law was perhaps not yet completely dead. *See* G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 159-61 (1969); Powell, *How Does the Constitution Structure Government?*, in *A WORKABLE GOVERNMENT?* 13, 27 (B. Marshall ed. 1987). Finally, *The Federalist* simply did not envisage that the Supreme Court would become as powerful and contentious as it has.

¹⁸ *See* R. HARRIS, *supra* note 4, at 40-41, 44, 50-51 (describing the emergence of "senatorial courtesy" for local appointments); *see also* C.G. MACKENZIE, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS* 215-32 (1981) (discussing the impact of congressional pressure on appointments in more recent years); L. FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 28-59 (1985).

¹⁹ *See generally* R. KETCHAM, *PRESIDENTS ABOVE PARTY* (1984) (describing the emergence and legitimation of the party system). The gradual development of a partisan, nationwide, two-party system between 1789 and 1844 profoundly affected the dynamics and procedure of electing even the President. *See generally* R. MCCORMICK, *THE PRESIDENTIAL GAME* (1982).

²⁰ No doubt the Senate could not rightly refuse confirmation on the basis of a constitutionally impermissible criterion, such as racial prejudice. That aside, the only other plausible source for an affirmative constitutional compulsion is structural: the Senate may not act so as materially to impair the functioning of the Court. I am unsure of where this potential limitation leads, however. I am clear that appointments can properly be made with an explicit design to reverse

The entire appointment process is best understood as largely beyond the operation of norms of legal right or wrong; instead it involves mainly questions of prudence, judgment, and politics.²¹ We are better off recognizing a virtually unlimited political license in the Senate not to confirm nominees. Most current assessments of the Senate's role reject this, either explicitly or implicitly. For example, many insist that Presidents have a "right" to appoint any "qualified" nominee.²² Moreover, in both the Bork and Kennedy confirmation hearings, the senators rejected any open-ended view of their authority. They seemed to assume that they were under a duty to confirm unless Judge Bork fell outside the mainstream of legal thinking.²³ If I am right, however, that the Senate's role in the appointment process should be political in nature, then a nominee may be rejected on the basis of statesmanship, prudence, common sense, and politics, rather than constitutional right and duty. Therefore, a nominee may be rejected without the Senate having to establish humiliating propositions, such as that the nominee is a dangerous radical. More generally, a political view of the appointment process of Supreme Court judges "affords the Senate an opportunity to carry on in another context its persistent struggle with the executive branch to shape the contours of public policy."²⁴ In addition, the entire appointment process — nomination and confirmation — can be seen as an additional way to moderate

established constitutional doctrine, as Franklin Delano Roosevelt's first appointments did. See Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1166 (1988). Although this process arguably "delegitimizes" the Supreme Court, I cannot believe that such appointments are improper.

²¹ The reason for treating this process as wholly political is only partly rooted in the inability to formulate standards. The political conception permits me to avoid squarely facing the question whether the confirmation process permits a senator properly to examine only his own self-interest — refusing to confirm only out of fear of voter retaliation — or whether he also must invoke some idea of the common good. This is not the occasion to explore whether simply reflecting one's constituency discharges the representative's duty, or what role self-interest properly may play in his vote. But politicians face many issues at once, and I am unsympathetic with the position that they are obliged to view all of them as matters of principle all the time. I can well imagine a conscientious senator believing that he should not sacrifice a public career simply because the President has submitted a qualified but controversial nominee.

To be sure, a prolonged impasse over confirmation eventually could threaten the constitutional requirement that there be a Supreme Court. Moreover, it is possible that a refusal to confirm in order to retain the vacancy for the next President might be viewed as a threat to judicial independence. However, any such cases are likely to be marginal and fact-dependent. Whatever dangers they present in theory do not seem to provide the basis for a working rule that legally or politically limits the Senate's role.

²² Cf. N.Y. Times, Dec. 14, 1987, at A22, col. 1 (editorial) (referring on the first day of the hearings on Judge Kennedy to "the President's right, within reasonable limits, to propose Justices of comparable philosophy").

²³ This view persisted during the confirmation hearings on Judge Kennedy. See N.Y. Times, Feb. 4, 1988, at A18, col. 1.

²⁴ C.G. MACKENZIE, *supra* note 18, at 95.

the countermajoritarian difficulty. Chief Justice Rehnquist recently wrote: "When a vacancy occurs on the Court, it is entirely appropriate that that vacancy be filled by the President, responsible to a national constituency, as advised by the Senate, whose members are responsible to regional constituencies. Thus, public opinion has some say in who shall become judges of the Supreme Court."²⁵ I would add only that when the Senate musters enough votes to reject a nomination, its "regional" constituencies are likely to be the equivalent of a "national" constituency.²⁶

II.

The Senate's actual role in the confirmation process depended upon the shifting balance of political power between Congress and the President. The Senate's significant nineteenth-century role reflected the general congressional dominance of that era. Scarcely one hundred years ago, Woodrow Wilson argued that national government was congressional government — more precisely, "government by the chairmen of the Standing Committees of Congress."²⁷ Wilson put aside the President with the dismissive observation that his "business . . . occasionally great, is usually not much above routine."²⁸ Although some such model of congressional government could be defended as late as the beginning of the New Deal, modern government

²⁵ W. REHNQUIST, *supra* note 6, at 236.

²⁶ Explicit recognition of the absence of any legal constraints on the confirmation process accords with political reality. Certain academic critics overlook this and seem to suggest that it is possible to articulate a Senate role bounded in some meaningful way. This position is inherent in the claim that the Senate should be guided by "the Court's overall balance and equilibrium." L. TRIBE, *GOD SAVE THIS HONORABLE COURT* 106-11 (1985); *see id.* at 132-37. Although the Senate might be able to implement this standard on a rough basis on rare occasions, it cannot — and ought not — apply it on a sustained and systematic basis.

Taken seriously, Professor Tribe's position implies that the nominee's views on various constitutional issues must be compared with those held by each of the eight current members, and then assessed against the likely frequency that any given issues would in fact arise before the Supreme Court. Even more importantly, because there are no apparent criteria for determining what constitutes a proper "balance," efforts to overcome the uncertain nature of the inquiry simply would spawn attempts to define the boundaries of "proper" constitutional disagreement.

Moreover, this conception of the confirmation process cannot be reconciled easily with core principles of separation of powers. The judicial task is "to say what the law is," not to reflect some Senate-prescribed equilibrium. For the Senate invariably to focus on some supposedly ideal balance may in the long run compromise judicial independence, ultimately converting the Court into a purely political organ.

²⁷ *See* W. WILSON, *CONGRESSIONAL GOVERNMENT* 82 (1981).

²⁸ *Id.* at 170.

is presidential government, at least in its most important aspects.²⁹ Presidential ascendancy in the appointment process reflects this fact.

The modern Presidency, even a lame-duck Presidency facing a Senate controlled by the opposite party, has enormous resources for mobilizing support and for disciplining those senators who refuse to go along. Such resources — party discipline, ideology, and various carrots and sticks — can be concentrated on any issue of significant importance to the President. One could speculate extensively about why those resources failed in the case of Judge Bork. For us it suffices that the Bork proceedings themselves arose in a special context, one in which the administration's hard-line attitude on judicial nominations had left a bitter residue. Many parties were spoiling for a fight, and Judge Bork, who was perceived as far outside the mainstream of legal thinking,³⁰ was the perfect catalyst to provoke one. Such a configuration is unlikely to be repeated frequently, suggesting Judge Bork's rejection portends no important institutional changes in the President's ability to win confirmation of nominees.

The institutionally important point is that it takes enormous energy for senators to unite in order to resist the President.³¹ Once undertaken, such conduct cannot easily be sustained, as evidenced by the relief with which the Senate greeted Judge Kennedy's nomination. The senators made every effort to see him as different from Judge Bork, regardless of whether he actually was. Commenting on Judge Kennedy's "smooth sailing" on his initial Senate visit, Senator John McCain, a conservative Republican from Arizona, put the point well: the Senate was simply "weary" of fighting. "Nobody wants to go through that again. There's just too much blood on the floor."³² At most, Judge Bork's hearings may have established a tradition of more probing Senate interrogation of a nominee, but the political background in which the entire confirmation process functions remains one with a powerful Presidency. To be sure, the rejection reminds us that

²⁹ The displacement of congressional government by presidential government and its implications for constitutional theory are considered in Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. (forthcoming 1988).

³⁰ See, e.g., Dworkin, *The Bork Nomination*, 9 CARDOZO L. REV. 101, 101 (1987) (describing Judge Bork as a "constitutional radical" whose "views do not lie within the scope of the longstanding debate between liberals and conservatives" about the proper role of the Supreme Court); Kurland, *Bork: The Transformation of a Conservative Constitutionalist*, 9 CARDOZO L. REV. 127, 130-34 (1987) (criticizing Judge Bork's views on minority and individual rights).

³¹ It is no accident that in his book on the Supreme Court Chief Justice Rehnquist barely mentions the Senate's role in the chapter on the appointment process. See W. REHNQUIST, *supra* note 6, at 235-51. On this issue, at least, *The Federalist* correctly predicted our present: the Senate's role is marginal, and "[i]t is not very probable that [the President's] nomination would often be overruled." THE FEDERALIST No. 76, at 512 (A. Hamilton) (J. Cooke ed. 1961).

³² Wash. Post, Nov. 13, 1987, at A3, col. 4. The article added that "Democrats also appeared reluctant to engage in another battle, although they continued to insist that Kennedy would be subject to intense scrutiny."

periodically the American people seem to need a battle over a Supreme Court appointment. But symbolism aside, the hard fact is that the President's vision of what is proper judicial philosophy ultimately will prevail, as Judge Kennedy's confirmation demonstrates.

Nonetheless, some believe that Judge Bork's rejection shows that the Senate's role is less marginal than I have argued. The Senate's failure to confirm Judge Bork is said to reflect popular rejection of original understanding theory and popular acceptance of a general constitutional right to privacy. Although these contentions initially appear plausible, when carefully analyzed their flaws become apparent. In fact, Judge Bork did not avow original understanding as the sole basis for legitimate judicial decisionmaking.³³ Moreover, the abortion cases, the most frequently cited illustration of Judge Bork's rejection of a constitutional right to privacy, actually involve autonomy or freedom from regulation, not privacy.³⁴ Furthermore, the claim that, at least in exceptional circumstances, the Senate acts as a court of popular opinion endorsing or rejecting certain constitutional views is unpersuasive.³⁵ Confirmation proceedings cannot be construed as referenda of any sort on judicial philosophies — except perhaps at the far margins — because the Senate is simply not equipped to proffer or register constitutional judgments of such magnitude.³⁶ This is particularly true when, as in the case of Judge Bork, commentators seek to extract such judgments from a bitter, wide-ranging, and complex nomination proceeding that focused upon a multitude of issues involving the Reagan Presidency and a number of Supreme Court decisions.

³³ See, e.g., *Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States*, 100th Cong., 1st Sess. 84–85 (1987) (testimony of Judge Bork) (pointing to the commerce clause and legal tender cases as examples of nonoriginalist constitutional interpretation that deserve to be respected as precedent); see also Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 22 (1971) (arguing that the Framers “had no coherent theory of free speech” and concluding that we thus “cannot solve our [free speech] problems simply by reference to the text or to its history”).

³⁴ See Henkin, *Privacy and Autonomy*, 74 *COLUM. L. REV.* 1410, 1424–27 (1974).

³⁵ Those who would argue otherwise must explain why Judge Bork's rejection implicitly endorses a liberal judicial philosophy, whereas the Senate's rejection of Justice Fortas as Chief Justice did not repudiate the same philosophy. Not surprisingly, claims of this nature tend to reflect the ideological commitments of their advocates. Compare Dworkin, *From Bork to Kennedy*, *N.Y. Rev. of Books*, Dec. 17, 1987, at 36, 38 *passim* (stating that liberals contend that Judge Bork's rejection was a declaration of popular will) with H. ABRAHAM, *supra* note 3, at 43–45 (arguing that the rejection of Justice Fortas' nomination as Chief Justice reflected a referendum on the Warren Court).

³⁶ Cf. Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 *GEORGIA L. REV.* 57, 82–83, 98–101 (1987) (arguing that Congress is not institutionally equipped to serve as a disinterested constitutional decisionmaker). In any event, the Senate's views would not be binding on members of the Supreme Court. See *Marbury v. Madison*, 5 *U.S.* (1 Cranch) 137 (1803).

III.

The events surrounding President Reagan's efforts to fill the vacancy left by Justice Powell's retirement raise an additional question. When nominated, Judge Ginsburg was 41 years old. His relative youth cannot by itself be treated as a disqualification.³⁷ Benjamin Curtis was 41 when nominated, and Judge Story only 32. Because confirmation effectively carries life tenure, Judge Ginsburg might well have served for four decades. The nomination for such a potentially lengthy period of service provides a singular occasion for reexamining the advisability of life tenure for Supreme Court judges. For some, the same premises that justify the free play of politics in the confirmation process might also weigh against life tenure. Also some limits on judicial tenure would help reconcile judicial review with democratic government. My concerns lie elsewhere, however.

The most common defenses of life tenure, contained in Hamilton's writing in *The Federalist*, are not fully persuasive. In *Federalist* No. 78, Hamilton argued that life tenure is indispensable to insulate the judiciary from the other branches of government, and thus to ensure its independence.³⁸ But even assuming that such complete judicial independence is desirable, eliminating life tenure need not materially undermine it.³⁹ Presumably, what relieves judges of the incentive to please is not the prospect of indefinite service, but the awareness that their continuation in office does not depend on securing the continuing approval of the political branches. Independence, therefore, could be achieved by mandating fixed, nonrenewable terms of service.⁴⁰ Hamilton's objection in *Federalist* No. 79 to a state constitutional provision imposing mandatory retirement on judges at sixty is similarly unpersuasive. He stated that such a provision was unsound in "a republic, where fortunes are not affluent, and pensions not expedient."⁴¹ Given the current prevalence of pensions, however, Hamilton's argument no longer carries weight.

I propose the consideration of two kinds of limitations on judicial tenure. The first is an age limit. I think it quite astounding that a

³⁷ Walter Dellinger suggests that youth might be a handicap. He observes that for some young appointees, the problem is not that they lack sufficient experience, but that they will cease to grow further because of the constant special treatment that Supreme Court judges receive.

³⁸ See *THE FEDERALIST* No. 78, at 522-30 (A. Hamilton) (J. Cooke ed. 1961).

³⁹ See Oliver, *Systematic Justice: A Proposed Constitutional Amendment to Establish Fixed, Staggered Terms for Members of the United States Supreme Court*, 47 *OHIO ST. L.J.* 799, 816-21 (arguing that a constitutional amendment limiting the term of Supreme Court judges to 18 years would have only very modest effect on judicial independence).

⁴⁰ Anyone who suspects that a fixed term would not allow sufficient time for judges to develop and display independence need only recall how quickly Chief Justice Warren and Justices Brennan, Stewart, and Blackmun defied the expectations of their respective appointers.

⁴¹ *THE FEDERALIST* No. 79, at 533 (A. Hamilton) (J. Cooke ed. 1961).

majority of Supreme Court judges bordered on eighty years of age before Chief Justice Burger and Justice Powell retired. The Court's workload is very heavy, and it is doubtful that many octogenarians would be able to devote the energy necessary to the task. As Aristotle said, "that judges of important causes should hold office for life is a disputable thing, for the mind grows old as well as the body."⁴² The graying of the Court can only work to ensure even greater delegation of responsibility to law clerks.

My second suggestion is premised on a distrust of relatively unaccountable powerholders. The suggestion is that no one be permitted to serve for more than some fixed and unrenovable term, such as fifteen or twenty years. Governor Winthrop once described judges as "gods upon earth," and that surely is true of the Supreme Court judges.⁴³ It seems dubious policy to leave such power in any person's hands for too long. In light of these concerns, and of the defects in the original justifications for life tenure, the burden should be on those who favor the continuation of the present arrangement to come forth with their argument. Or is the short response to both of my suggestions, "If it ain't broke, don't fix it"?

⁴² ARISTOTLE, *POLITICS*, bk. II, ch. 9 (B. Jowett trans. 1943).

⁴³ Outside the context of high-visibility constitutional decisions, the important restraints on the Supreme Court in its ordinary operations ultimately are not those imposed by the political process, but the norms that the judges internalize before they reach the Supreme Court.