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WHITHER GOEST JUDICIAL NOMINATIONS, BROWN OR PLESSY? — ADVICE AND CONSENT REVISITED

Nathaniel R. Jones*

HE appropriate role of the President and the Senate with respect to considering the ideology and philosophy of federal judicial nominees, have long been debated.1 President Nixon injected the subject into the 1968 campaign and along with it, the issue of school desegregation.2 In nominating Judge Clarence Thomas to fill the seat of Justice Thurgood Marshall on the United States Supreme Court, President Bush again ignited a firestorm and drew into question the way in which the executive branch goes about performing its constitutional responsibility of selecting judicial nominees and the process by which the Senate confirms these nominees for the judicial branch.3 When this is combined with the avowed and openly ex-

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* Speech delivered by Honorable Nathaniel R. Jones, Circuit Judge, United States Court of Appeals for the Sixth Circuit, Cincinnati, Ohio. Eleventh Annual Alfred B. Murrah Lecture, Southern Methodist University, Dallas, Texas, Tuesday, October 15, 1991.

1. See Bruce Fein, A Circumscribed Senate Confirmation Role, 102 Harv. L. Rev. 672, 687 (1989) (finding that the Framers did not intend for judicial philosophy to be a legitimate reason for rejecting a judicial nominee); Albert P. Melone, The Senate's Confirmation Role in Supreme Court Nominations and the Politics of Ideology Versus Impartiality, 75 Judicature 68, 78-79 (1991) (arguing that there is no reason why the Senate should not ask ideological questions); Robert F. Nagel, Advice, Consent, and Influence, 84 Nw. U. L. Rev. 858, 867 (1990) (arguing that screening nominees on the basis of ideology "may be at odds with the goal of establishing political influence over the Supreme Court"); Larry W. Yackle, Choosing Judges the Democratic Way, 69 B.U. L. Rev. 273, 276-83 (1989) (contending that the Constitution allows both the Senate and the President to pursue political objectives in the appointment process but not to the exclusion of everything else).

2. See Melone, supra note 1, at 74 (stating that "Nixon ran on an anti-Warren Court platform and promised judges with a conservative ideology"); Albert P. Melone, Too Little Advice, Senatorial Responsibility, and Confirmation Politics, 75 Judicature 187, 190 (1992) [hereinafter Melone, Too Little Advice] (stating that during his 1968 campaign, President Nixon promised to appoint southerners with strict constructionist views); Robert A. Pratt, White Flight Doomed Racial Integration in Richmond Schools, Richmond News Leader, Mar. 9, 1992, Editorial, at 13 (noting that President Nixon's campaign promised to end forced busing by nominating more conservative judges).

3. See, e.g., What Other Newspapers Are Saying, Chi. Trib., July 13, 1991, at C21 (citing Spain's El Pais) (arguing that the ideological imbalance of the Court, which would be increased by the approval of Judge Thomas, threatens to create a set of regressive laws changing American society); Donald J. Devine, Reform the Judicial Nomination Process Now: Five Proposals for a Return to Senatorial Comity, Heritage Found. Ref., Nov. 12, 1991 (arguing that the Senate's treatment of Thomas shows the need for changing the confirmation process); Jordan Rossen, UAW General Counsel, The Senate Can and Should Reject Thomas, Det. Free Press, Sept. 24, 1991, at 12A (contending that the Senate has "not only the power but the obligation" to achieve some balance in the court and therefore should reject Thomas); William Pratt, An American Morality Without Morals, Seattle Times, Oct. 17, 1991, at A14

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pressed intention of the current and most recent presidents to remake the federal judiciary, wounds that go back to slavery and the abolitionist period are reopened.

Civil rights are at the heart of the effort to revise the role of the federal courts and to restrict the activities of federal judges with respect to their exercise of judicial power to remedy vestiges of slavery. Explore with me, if you will, the implications of this crisis as it bears on selecting judicial candidates and obtaining their confirmation. While the Thomas confirmation hearings placed a bright spotlight on abortion and natural law issues, (later, of course, personal character), with passing reference paid to affirmative action, I nonetheless suggest that it has been the use of judicial power to shape and implement remedies for racial discrimination that has both triggered efforts to consider ideology and unleashed calls for "judicial restraint."

Since 1980 the judicial nominating process has been the subject of considerable comment because of the expressed determination of President Reagan to effect a "sea change" in the selection and makeup of the federal judiciary. (arguing that Bush's nomination of the unqualified Thomas for ideological reasons showed a contempt for the court and characterizing it as an act "of aggression against the constitutional order").

4. See Melone, Too Little Advice, supra note 2, at 190 n.28 (stating that President Bush, as well as other recent Republican Presidents, set a goal to change Supreme Court decisions well into the future); Henry J. Reske, White House Begins Sifting Names for Brennan Replacement, UPI, July 21, 1990, available in LEXIS, Nexis Library, UPI File (noting that Bush was likely to choose from a number of federal judges appointed by Reagan during his attempt to remake the judiciary in nominating a successor to Brennan); Now It's the Bush Court, N.Y. TIMES, May 7, 1992, at A26 (arguing that the Court's decision in Keeney v. Tamayo-Reyes was "another payment on Mr. Bush's pledge to remake the federal judiciary").

5. William E. Kovacic, Reagan's Judicial Appointees and Antitrust in the 1990s, 60 FORDHAM L. REV. 49, 55 n.33 (1991) (recognizing that one of the Reagan Administration's stated goals was to change the judiciary to generate different judicial results than those produced by President Carter's appointees); Lawrence M. O'Rourke, Reagan's Judges May Leave Enduring Marks, ST. LOUIS POST DISPATCH, Nov. 16, 1988, at 1B (asserting that Reagan interpreted his election victories as endorsements of his call to change the Supreme Court and quoting an Assistant Attorney General who said that the Administration's ideological screening was "probably the most thorough and comprehensive system for recruiting and screening federal judicial candidates of any administration ever"); see also, Al Kamen, Two Conservatives Likely to Join Appeals Court, WASH. POST, Oct. 9, 1985, at A1 (citing Reagan's nomination of two conservatives for spots on the D.C. Circuit as part of his "overall effort to secure a conservative federal judiciary"); Lincoln Caplan, Robert Bork, He Is an Opportunist, NEWSDAY, July 12, 1987, at 4 (arguing that if the Senate approved Bork, Reagan would have "finally put the ideological stamp on the Court that conservatives have yearned for").


7. THOMAS HEARINGS, supra note 6, at 11; SENATE REPORT NO. 15, supra note 6, at 12-13 (citing TRANS., Sept. 10, 1991, at 135-37).

8. THOMAS HEARINGS, supra note 6, at 43, SENATE REPORT NO. 15, supra note 6, at 44 (citing TRANS., Sept. 11, 1991, at 164-65).

9. See Andrea Neal, Reagan To Have Lasting Legacy on Courts, UPI, Sept. 4, 1988, available in LEXIS, Nexis Library, UPI File (President Reagan's determination was stated by Stephen J. Markman, Assistant Attorney General in charge of the Office of Legal Policy in the
The objective, Markman said, was to bring an end to "judicial activism" and to fill the federal courts with ideologically compatible judges who would exercise "judicial restraint" as opposed to those, who, it was complained, "legislate from the bench."

This attempt has provoked reactions from scholars, and political and civil rights leaders. A 1987 Columbia Law Review article, for instance, discussed the subject of appointees to the various courts of appeals, noting that the change represented "the most consistent ideological or policy-orientation screening of judicial candidates since the first term of Franklin Roosevelt." The two nominations that President Bush offered up to the Senate for its "advice and consent" appear to have involved an application of an ideological litmus test, one of the aims of such a test being the curbing of judicial activism.

Civil rights lawyers, particularly those who carry the Charles Houston brief, regarded the shift in the appointment of minority judges to the federal courts to be ominous. They cited to appointments in the eighties, as con-
trasted to those made during the Carter four-year presidency of the seventies, and worried over what this portends for the Houstonian school of jurisprudence in light of the attacks leveled against judicial activist judges. To these lawyers, the very heart of the Houstonian view of constitutional interpretation and enforcement of civil rights requires the affirmative use of judicial power.

The shift that has seemingly provoked anxiety relates to these judicial appointments. Between 1981 and 1988, the Reagan administration appointed a total of 372 judges. Of that number, only seven were African American, fifteen were Hispanic and two were Asian Americans. During the same period, there were thirty-five appointments made to the Court of Appeals for the Sixth Circuit and the district courts within the Sixth Circuit. None of them were African American or Hispanic. Between 1989 and 1992, the Bush Administration made 206 district and court of appeals appointments with eleven being African American, and thirteen being Hispanic. During this period, there were sixteen additional appointments made within the courts of the Sixth Circuit. Again, there were no African Americans in those appointments. The district court seat once held by Judge Robert M. Duncan, an African American of the Southern District of Ohio, was filled by a white appointee.

In summary, during the Reagan-Bush years (1981-1992) there have been 579 federal judges appointed with only nineteen being African Americans and twenty-six being Hispanics. By way of a contrast, in the period between 1976 and 1980, President Carter appointed a total of fifty-six judges to the

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18. See, e.g., Sheldon Goldman, Reaganizing the Judiciary: The First Term Appointments, 68 JUDICATURE 313, 321-22, 326 (1985) (noting that the first term of the Reagan presidency spawned the lowest number of African Americans since the Eisenhower administration, which appointed none; and, however, the number of Hispanics appointed during Reagan's first term was second only to the Carter Administration); Kovacic, supra note 13, at 56-114 (examining the votes of Carter, Reagan and Bush judicial appointees to the federal courts of appeals in antitrust cases).

19. See, e.g., Archibald Cox, The Role of The Supreme Court: Judicial Activism or Self-Restraint?, 47 MD. L. REV. 118, 121 (1987) (arguing that judicial activists view the Supreme Court as a "political body actually and properly engaged in pursuing policy goals"); Goldman, supra note 18, at 329 (noting that the Reagan Administration has "seized[d] the historic opportunity to reshape American politics" through its judicial appointments).

20. See Cox, supra note 19, at 135-37 (discussing the application of judicial activism to cases such as affirmative action, abortion and individual rights).


22. Id. at 322.


24. Letter from Elaine R. Jones, Deputy Director-Counsel 1, NAACP Legal Defense and Educational Fund to Nathaniel R. Jones, Circuit Judge, United States Court of Appeals for the South Circuit (Dec. 9, 1992) (on file with author) [hereinafter NAACP Letter].


27. NAACP Letter, supra note 24.

Of that number, nine were African American, two were Hispanic and one was an Asian American. Of those appointed to the district courts, there were 202 appointments made of which twenty-eight were African American, fourteen Hispanic and one Asian American. Judge A. Leon Higginbotham of the United States Court of Appeals for the Third Circuit has noted that the Reagan-Bush record reveals only two of 115 appeals court appointments have gone to African Americans. The breakdown is as follows: In the eight years of the Reagan administration there were eighty-three appellate appointments. Only one went to an African American—Clarence Thomas. After a brief stint on the D.C. Court of Appeals, he was tapped to be an Associate Justice of the Supreme Court. As Judge Higginbotham further noted, by 1993, six of the ten African Americans sitting on the courts of appeal will be eligible for retirement. Many of these judges were appointed during the period when the federal courts were enforcing civil rights remedies.

The phrase, "judicial activism," is a euphemism for describing what courts have been doing since Brown v. Board of Education to implement remedies fashioned to redress violations of the constitutional and other civil rights of American racial minorities. With the enactment of the 1964 Civil Rights Act, and the other civil rights statutes, federal courts have provided the forum for additional categories of litigants, including women and persons with disabilities, who have a broad range of claims. The drive

29. Id. at 303.
30. Id.
31. Id. at 299.
33. Id.
34. 347 U.S. 483 (1954).
against this "activism" collides with the use of the courts by aggrieved persons in search of redress. Effects of this collision have penetrated the judicial nomination and confirmation process provided for in the Constitution.40

The move to rein in judicial power by selecting less active judges, it seems to me, imposes a greater obligation on the Senate to be meticulously resolute in discharging its advice and consent duty. If care is not taken by the Senate, which is charged with confirming Supreme Court justices and federal judges,41 I predict that the rush to curb judicial activism may likely result in a turning back of the clock on civil rights remedies.

Harold Cruse speaks of "cycles of civil rights."42 He reminds us of the first civil rights movement, which began immediately after the Civil War ended. During that time, the reconstruction era, blacks or African Americans found themselves for the first time in positions of leadership and engaged in meaningful participation in the governance of the nation.43 That era ended all too soon, in 1896 with Plessy v. Ferguson,44 and the civil rights cycle would not wax again for sixty years.45

Cruse goes on to say that, looking back, it becomes obvious that the second most recent civil rights cycle had already begun to wane in the late sixties.46 How the brakes began to be applied and by whom, need to be understood if any sense is to be made out of what is happening with respect to judicial nominations and the confirmation process in these times. Therefore, I submit, that if Harold Cruse's thesis is correct, and the civil rights cycle had begun to wane in the sixties, surely in this day, with the retirement of Justice Thurgood Marshall from the United States Supreme Court, it may be reaching its lowest ebb.

Granted, Justice Marshall's retirement was inevitable. It need not, however, signal the end of this civil rights cycle. It has come at a time when African Americans had placed much of their hope in the judicial system, particularly the Supreme Court. In the words of Harvard legal scholar Randall Kennedy, "with Marshall, we were assured at least one justice who would insist that the interests of those who have been oppressed receive fair and full consideration before the country's highest tribunal."47

I earlier made a reference to the Houston brief and the Houstonian school of jurisprudence.48 It was the late Charles Hamilton Houston who devel-

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40. U.S. CONST. art. II, § 1, cl. 2.

41. Id.

42. HARROLD CRUSE, PLURAL BUT EQUAL: A CRITICAL STUDY OF MINORITIES AND AMERICA'S PLURAL SOCIETY 7-8 (1987).

43. Id. at 12-17, 179, 354.

44. 163 U.S. 537 (1986).

45. Id. at 8.

46. Id. at 7.

47. Telephone Interview with Randall Kennedy, Professor of Law, Harvard Law School (Mar. 3, 1993).

oped what has come to be known as the Houstonian school of jurisprudence. Houston was the Dean of Howard Law School at the time Thurgood Marshall studied there. He developed the rationale, used in the *Brown v. Board of Education*, litigation of attacking discrimination under the equal protection clause of the Fourteenth Amendment. The basis of this rationale was his theory of social engineering, a concept which he taught to students in his jurisprudence course at Howard, and on the road in his continuing legal education seminars. We learn from his biographer, Genna Rae McNeil, that Houstonian jurisprudence necessitated thinking broadly about "societies, laws, and classes of people." Houston asked his students to consider questions such as: "which nineteenth century school of jurisprudence emphatically denied the power of conscious effort to change or modify the course of law and why?" To pass his jurisprudence course, one had to be able to "sketch the philosophy of Kant," and to "[w]rite a short discussion of the sociological aspect of capital punishment as applied under our present form of the administration of justice in criminal cases." Houston insisted that African American lawyers and lawyers-to-be not avoid their duty to be social engineers. A social engineer was, in his definition, "a highly skilled, perceptive, sensitive lawyer who understood the Constitution of the United States and knew how to explore its uses in the solving of problems . . . and 'bettering the conditions of the underprivileged citizens.'" Houstonian jurisprudence interprets the Constitution creatively and innovatively for the protection of a minority group "unable to adopt direct action to achieve its place in the community and nation."

Houston envisioned cadres of African American lawyers litigating cases across the country, using theories based on his jurisprudence. Thurgood Marshall, a shaper and disciple of Houstonian jurisprudence, as well as a protege of Houston, did just that, and managed to tear down the wall of legalized segregation locked in place in 1896 by *Plessy v. Ferguson*. Houston left an enduring mark on the Howard Law School and American civil rights litigation. He required that these lawyers, as social engineers, "use the constitution, statutes, and 'whatever science demonstrates or imagination invents' both to foster and to order social change for a more humane society."

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50. U.S. CONST. amend. XIV
51. McNeil, supra note 17, at 76-85.
52. Id. at 67, 70-71.
53. Id. at 66.
54. Id.
55. Id. at 67 (quoting Charles Hamilton Houston, "Jurisprudence Examination," Dec. 18, 1924, CHH Papers).
56. Id. at 84.
57. Id.
59. Id. at 76-85.
60. 163 U.S. 537 (1896).
61. McNeil, supra note 17, at 133.
The modern trend of the judicial selection and confirmation process places Houstonian jurisprudence at risk, and with it, the gains racial minorities have realized by using it. Until recently, presidents generally carried out their duty to nominate justices to the Supreme Court, without necessarily elevating political philosophy or ideology above the more significant national interest of appointing people whose careers indicated that they would serve creditably on the bench. Presidents Reagan and Bush, even more so than President Nixon, consistently departed from that custom in selecting judicial candidates by instituting a process that ensures that the candidates' beliefs are in ideological — as distinguished from political — alignment with their own. These presidents have made it clear that they want to appoint only "strict constructionists," or nonactivist judges. In other words, a candidate has had to pass an ideological, as distinguished from political party affiliation, litmus test in order to be nominated. Tragically, as recent events have demonstrated, there is a fundamental and near irreconcilable clash between the test of non-activism and Houstonian jurisprudence. Houston and Marshall argued, and record evidence in countless civil rights cases demonstrated, that, historically, law was used to reinforce discrimination. Thus, a vigorous use of the legal system is required to dismantle that which was built.

Racial minorities are not the only groups that will mourn the passing of this jurisprudence, if indeed it goes. Part of the brilliance of Houston's rationale of the Fourteenth Amendment is that it can be used, and has been used, to remedy discrimination across the board, including, notably, age and gender discrimination. Enforcement of the widely heralded Americans with Disabilities Act (ADA) will also be premised on Houston's theories.

The search for judicial nominees of a "non-active" stripe indicates the Houstonian-based laws and legal theories are likely to result in much nar-
rower relief. It remains to be seen how non-activists will distinguish between race cases and, for instance, ADA cases. The Supreme Court, however, in another context, is already poised to minimize the effectiveness of — if not outright overturn — such laws and theories, as Justice Marshall emphasized in his final dissent in *Payne v. Tennessee.* The *Payne* majority overruled two recent Supreme Court cases: *Booth v. Maryland,* which "held that 'victim impact' evidence . . . could not constitutionally be introduced during the penalty phase of a capital trial;" and *South Carolina v. Gathers,* which upheld *Booth* against an attack on that ruling. These rulings are particularly important to African Americans because of the disproportionate application of capital punishment to African Americans. In a puzzling departure from a traditional notion of judicial restraint, the Supreme Court majority in *Payne,* on the third try, upheld the constitutionality of such evidence over the force of the precedential cases. Justice Marshall, in his dissent, explains why, saying:

Power, not reason, is the new currency of this Court's decisionmaking . . . . Neither the law nor the facts supporting *Booth* and *Gathers* underwent any change in the last four years. Only the personnel of this court did.

In dispatching *Booth* and *Gathers* to their graves, today's majority ominously suggests that an even more extensive upheaval of this court's precedents may be in store. . . . [This opinion] sends a clear signal that scores of established constitutional liberties are now ripe for reconsideration. . . . Thus, Justice Marshall explicitly linked the appointments of justices and judges during the last two administrations to the erosion of the laws protecting various politically unempowered minority groups.

Judge A. Leon Higginbotham has expressed this view eloquently:

[That]ough one cannot always rely on the United States Supreme Court or the federal courts for a total vindication of human rights of minorities, nevertheless until now, the United States Supreme Court has been the institution of government that most consistently has checked governmental efforts to discriminate on the basis of race. With this historical insight, it is obvious that the most effective way to weaken the fabric of human and civil rights for minorities would probably be to change the balance of the Court so that gradually, in a slow but determined process, the Court would repudiate its historic role in the protection of

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69. *Id.* at 2599.
70. 482 U.S. 496 (1987).
73. *Id.* at 810.
74. See generally *Furman* v. Georgia, 408 U.S. 238, 250 (1972) (citing study which found that application of death penalty is unequal between blacks and whites); Marc Riedel, *Discrimination in the Imposition of Death Penalty: A Comparison of the Characteristics of Offenders Sentenced Pre-*Furman* and Post-*Furman,* 49 TEMP. L.Q. 261 (1976) (finding continuing disproportionate death sentencing of non-whites after *Furman*).
75. *Payne,* 111 S. Ct. at 2607.
76. *Id.* at 2619.
individual and minority rights. I contend that what Judge Higginbotham suggested hypothetically is, in fact, happening now, and has been happening for some years.

Persons may and are legitimately asking whether the judicial appointment process is being well served when it is used to effect such a dramatic ideological change in the makeup of the courts. This is not to suggest that past administrations have not nominated persons whose political views were compatible with those of the sitting president. What is being debated now is a practice that goes beyond this. Thus, it has been questioned whether the presidents who look to ideology are properly carrying out their constitutional role in nominating candidates for the Supreme Court.

Another daunting question is whether the Senate, which has an equal constitutional role in the appointment process, is ultimately fulfilling its role in confirming — or not confirming — those nominees. Article II, section 2 of the United States Constitution confers upon the President the duty to “nominate, and by and with the Advice and Consent of the Senate, [to] appoint . . . Judges of the Supreme Court.” Unless the Senate gives its “advice and consent,” the nominee may not become a Justice. The language of the Constitution alone shows that the Senate’s role in the process is equally important to that of the President. No one can persuasively argue that the Senate’s job is merely to “rubber stamp” the President’s choice of candidates. But it is not enough to say what the Senate’s job is not.

If the number of discussions, articles and other aspects of the debate on the issue are any indication, many people agree that defining the Senate’s role is critical. I was quite interested to read the views of Senator Orrin Hatch on this subject, written in 1989, after the rejection of Judge Robert A. Leon Higginbotham, Racism in America and South African Courts: Similarities and Differences, 65 N.Y.U. L. REV. 429, 587 (1990).

79. See TRIBE, supra note 78, at 125-37 (examining the role of each branch of government in the appointment process, and arguing that single issue or cases justices will decide cases long after the particular controversy has been decided); Michael J. Gerhardt, Divided Justice: A Commentary on the Nomination and Confirmation of Justice Thomas, 60 GEO. WASH. L. REV. 969 (1992) (condemning George Bush for nominating Thomas based on latter’s race and ideology, but arguing that the process is fundamentally sound).
81. Id.
Bork's Supreme Court nomination.\(^83\) Senator Hatch wrote that the Senate's role is quite secondary to the President's, not only in time, but in significance.\(^84\) From the constitutional language previously quoted, Senator Hatch infers a "common sense observation," on the part of the framers, that a diverse congressional body would have difficulty overcoming politics, jealousies, and intrigues to select the best candidate,\(^85\) and, therefore, they "voted to vest the nomination power in the President.\(^86\) He added that the Senate's function is merely a check, to "[p]revent nepotism and unfit characters.\(^87\)

Besides this "Constitutional" objection to the type of active role the Senate played in Judge Bork's hearings, Senator Hatch argues that it is simply bad policy:

When we undertake to judge a judge according to political, rather than legal, criteria, we have stripped the 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 political criteria, we will have lost the reasoning processes of the law which have served so well to check political fervor over the past two hundred years.\(^88\)

This argument has, at first blush, some appeal. Upon closer examination, however, the argument appears to be flawed. Hatch's comments are directed toward the Senate; however, they are just as applicable to the President. If Judge Bork was defeated "simply" because of the Senate's politics, he was all the same, nominated — and other candidates were not nominated — "simply" because of a President's concern for ideology. Thus, this question may be asked: When a President openly sets out to appoint only those who pass his ideological, as distinguished from a political litmus test, does not the Senate then have, not just a right, but an obligation to assure itself that the candidate's ideological views will not interfere with that person’s ability to be fair?

Former Republican Senator Charles Mathias has a well-reasoned response to that question. He says:

A President is entitled to reflect his judicial and political philosophy in his judicial nominations. If a nominee is an intelligent and capable individual, and is qualified by reasons of temperament, training in the law, experience at the bar, and commitment to community service, no senator will object to the nomination simply because the nominee shares the President's political orientation. History provides ample testimony to this fact, of which the unanimous confirmation of Justice Scalia is the most recent example. If, however, it should become apparent that an individual has been selected because of his philosophical orientation rather than his professional competence, the Senate has a duty to

\(^{84}\) Id. at 898.
\(^{85}\) Id.
\(^{86}\) Id.
\(^{87}\) Id.
intervene. 89

Mathias' point is crucial to the current debate on this topic. President Bush has presented two successive candidates whose fitness was called into question. Some argue that the presidential search for candidates utilizes a closed list — closed, for example, to those who might be susceptible to a Houstonian-type briefs. The point is that a line is drawn at the ideological rather than political borders; far to the right of the traditional division between Republican and Democrat, or liberal and conservative.

Two other rationales are offered for active Senate participation in the appointment process. First, Professor Lawrence Tribe offers a thesis that pure and simple historical precedent justifies the Senate's ideological investigations of nominees. 90 Notwithstanding Senator Hatch's assertion to the contrary, Tribe cites six occasions — not including Bork's candidacy — on which the Senate scrutinized and rejected "Supreme Court nominees...on the basis of their political, judicial, and economic philosophies." 91 Notably, the first such rejection was of a candidate nominated by George Washington. 92

The second rationale offered by Professor Charles L. Black, Jr., more like that of Mathias, 93 argues that the Constitution itself requires the Senate to reject certain candidates on ideological grounds. 94 In his own words, "a Senator properly may, or even at some times in duty must, vote against a nominee to [the Supreme] Court, on the ground that the nominee holds views which when transposed into judicial decisions, are likely, in the Senator's judgment, to be very bad for the country." 95 Black has found "nothing textual...structural,...prudential,...[or] historical" that supports any need for senatorial deference to the President's choice of candidate, or for a "presumption of the nominee's fitness for the office." 96 Contrary to Hatch, Black believes that the framers designed a "broad role" for the Senate to play in the appointment process. 97 Alexander Hamilton, in The Federalist Papers, called the Senate's role "a considerable and salutary restraint upon the [President's] conduct." 98

Senator Mathias recognizes the dual nature of the Senate's role. 99 While "advice and consent" is treated by many as redundant, Mathias addresses what actions the Senate might properly take in advising the President before he makes his nomination. 100 He suggests that Senators can form committees

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90. See Tribe, supra note 78, at 107.
91. Id. at 92.
92. Id. at 86-90.
93. Mathias, supra note 89.
95. Id.
96. Id. at 663-64.
97. Id.
98. THE FEDERALIST No. 76, at 576 (Alexander Hamilton).
99. Mathias, supra note 89, at 201.
100. Id. at 203.
of lawyers and laypersons within their respective states to help field recommendations for vacant seats. Supra notes 34-40 and accompanying text.

As I have indicated, the term "judicial activism" has come to be a term of derision for decisions of courts that commanded the implementation of remedies designed to correct discriminatory conditions. An obvious political judgment was made to restrict the activity of federal judges with respect to reshaping institutions affected by decisions of courts. Because this intention was expressed during political campaigns and those who espoused it were elected, it is being contended that the majority of Americans have thereby consented to the alteration of the makeup of and redirection of the federal courts. This change is justified on the basis of the majority having prevailed politically. Of course, under our Constitution, the majority is limited as to what it can do with respect to overriding the rights of minorities. Thus, there are those raising questions about the extent to which election results are being used to validate policies that can drastically affect the ability of persons to vindicate basic constitutional rights. They reasonably insist that to the extent that ideology controls the judicial selection process, it becomes imperative that the other half of the constitutional duty, i.e., advice and consent, be discharged with great sensitivity and care by the Senate.

What to one person is judicial overreaching or "judicial activism," is, to another person, judicial power being exercised in the vindication of fundamental rights. From the standpoint of the national interest, the appropriate questions are whether the various remedies that courts have been enforcing relate to injustices suffered by minorities or women, and how are they working? Also, is positive change taking place? The answer to each question is "yes." Civil rights enforcement by courts, as well as voluntary actions, have resulted in positive change. It is the fear of having these remedies undercut by judicial selection policies premised on ideology that has intensified and heated up the debate over the confirmation process.

This essay has sought to pose the question of whether the judicial selection process, as recently conducted, is propelling the nation backward toward Plessy v. Ferguson's separate-but-equal doctrine, or forward toward the further fulfillment of the promise of Brown v. Board of Education. The
holding of *Plessy* in 1896 and *Brown’s* 1954 decision are polar opposites. The Houston-Marshall strategy that led to the overturning of *Plessy* relied upon skillful advocacy and what, as I have noted, many today derisively dismiss as "judicial activism."\(^{108}\) Also, as previously indicated, the last two presidents, as did Nixon and candidate Wallace before them, have led the assault on so-called "activist judges" and promised to appoint only those who eschew the Houstonian type of activism.\(^{109}\) Of late, those promises, to a disturbing degree, have been kept.

The promise to stack the courts with judges who will refrain from the affirmative exercise of judicial power led to the recent convulsive confirmation battles in the Senate. Both the presidential power to appoint, and the Senate’s power to advise and consent, while derived from the Constitution, are essentially political exercises. At the same time, however, the purpose is to produce judges for the third branch of government — a branch charged with interpreting the Constitution and in the words of the late Chief Justice John Marshall, of "saying what the law is."\(^{110}\)

What has fanned the flames of controversy in recent years is the charge that presidents, in discharging their constitutional duty of appointment, have loaded the dice by injecting ideological considerations into the process on a take it or leave it basis. Thus, the search to determine the ability of nominees to fairly discharge their judicial duties, at least with respect to the controversies of historic social import, is conducted more searchingly by senators who have the constitutional duty to either give or withhold advice and consent.

Those who are criticizing the loading of the dice are dismissed as being nothing more than special interest groups. That characterization by persons in power is perplexing, indeed. Such a characterization of organized citizen activity is cynical at best, and demeans an essential component of the democratic process. The Constitution establishes the three coordinate branches of government with roles for each. When one branch, the Executive, exercises its power in a way that may adversely affect the ability of citizens to seek vindication of their rights through another branch, citizens so affected have every right to organize and utilize the channels open to them for an expression of their views to those with a constitutional duty of commensurate granting.

The condition that is currently being complained of is this: that the Executive branch of government has sought to preempt and control the other two branches of government. It is said that through its judicial appointing

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109. See supra notes 21-33 and accompanying text.

power, the Executive has reshaped, from an ideological point of view, the federal judiciary. It is expected that this reshaped judiciary will interpret the Constitution, construe civil rights statutes and those dealing with individual rights, narrowly, and do so with little regard to the intent of Congress. Moreover, the Executive, through the use of the veto (also a constitutionally derived power) or the threat thereof, frustrates attempts of Congress to clarify what it perceives to be a misconstruction of its intent with respect to civil rights remedies. Then, it is charged, the Executive rounds it all off by selectively and narrowly enforcing laws, with the assurance that the "reshaped" judiciary, eschewing an "activist" role, will not disturb those decisions.

If critics are correct, this can lead to a return to the frustration of the pre-
Brown period and may generate the same anger that led to the public disruptions associated with direct action campaigns and civil disorders of the Sixties. It is the latter concern that prompts me to raise this question in the hope that lawyers will take the lead in helping the public understand the risks involved in the judicial selection and nomination process being used, to the extent that it is used, as an instrument for returning the nation to an inglorious past — a past of which the nation cannot be very proud.


112. See Goldman, supra note 25, at 306.

113. U.S. CONST. art I, § 7, cl.2.

114. For example, this occurred when President Bush vetoed the Civil Rights Act of 1990. See Steven R. Greenberger, Civil Rights and the Politics of Statutory Interpretation, 62 U. COLO. L. REV. 37, 37-38 (1991) (noting that Congress has enacted eight statutes expressly to overrule Supreme Court decisions in the field of civil rights); Leland Ware, The Civil Rights Act of 1990: A Dream Deferred, 10 ST. LOUIS U. PUB. L. REV. 1 (1991) (stating that the 1990 Civil Rights Act was enacted to overrule recent Supreme Court Decisions but was vetoed by Bush).
