Criticizing Judges

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Since the last presidential election, some federal judges have come under unusually tough criticism from politicians. In response, judges, professors, journalists, and leaders of the bar have circled the wagons, claiming that judicial independence in the United States is under attack. What these staunch defenders of the judiciary have gotten wrong is not only that judicial independence is alive and well in this country, but that such criticism is the product of a healthy, robust democracy. Further, such criticism is the natural response of the national political process to nominees with little paper record and to a federal judiciary that – rightly or wrongly – has extended its reach into controversial social and moral issues.

Let's take a realistic look at the state of judicial independence in the United States today. At last inspection, neither the executive nor the legislative branch has tried to order the federal judiciary how to decide the outcome of a case. No one has asked for an advisory opinion. Congress has not engaged in wholesale jurisdiction-stripping in order to influence judicial decisions. No judges have been impeached, nor have any been pressured into leaving the bench. Congress has not tried to cut judicial salaries, but in fact has voted to increase them. Judges continue to serve for life. A seat on the federal bench remains one of the most coveted jobs in the American legal profession. Decisions striking down laws that sought to re-open final judgments have been respected,[1] as have decisions invalidating statutes that attempted to reverse Supreme Court cases.[2]

It is important to recall the constitutional

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1 *Plaut v. Spendthrift Farm*, 115 S. Ct. 1447 (1995).

2 *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997).

guarantees for the institutional independence of the judiciary. Article III, Section 1 guarantees that judges shall hold their positions as long as they are on "good Behavior." Judges receive "a Compensation, which shall not be diminished during their Continuance in Office." Unlike the members of the other branches of government, who may always be voted out of office, federal judges can be removed only by the process of impeachment. As we all know, the framers of the Constitution included these provisions in order to prevent either the other branches or the people from undermining the judiciary's decisional impartiality and its institutional independence. In discussing the good behavior standard, for example, Alexander Hamilton wrote in the guise of Publius that "in a republic it is no less an excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright and impartial administration of the laws." Hamilton argued that the judges' ability to exercise judicial review was inextricably linked to "the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges, which must be essential to the faithful performance of so arduous a duty."[3]

Yet, defenders of the federal judiciary (as if it needed any today) would have us believe that these structural guarantees for judicial independence are under threat from the current crop of political attacks. These observers mistake the criticism of a branch of government that undeniably wields enormous power in our society for an actual attempt to interfere with the decisional and institutional independence of our federal judges. The former is but one aspect of the polity's discussion of contemporary moral and social issues. While the latter would be a serious and undesirable political development, no true attack on judicial independence has occurred in sixty years and none is occurring now. Current criticism of sitting judges and the intensified examination of judicial candidates has more to do with the struggle between the President and the Senate over judicial nomination policy than with judicial independence.

I. The Criticism of Judges

There can be little doubt that criticism of sitting federal judges has increased in recent years, and that the Senate has been subjecting the judicial nominees of the Clinton administration to unusually close scrutiny. The incident that gave rise to the recent hullabaloo about judicial independence was the controversy surrounding Judge Harold Baer of the Southern District of New York, an appointee of President Clinton. In March 1996, Judge Baer issued a decision suppressing significant amounts of drug evidence found during a traffic stop in New York City. Several men dropped duffel bags into the defendant's car and then ran when they saw the police. In part, Judge Baer justified his decision on the ground that in the neighborhood where the stop occurred, people reasonably could fear the police and so the running did not give the police reasonable grounds to conduct a search of the car.[4]

Judge Baer became the focus of sharp, bipartisan criticism for his creative decision that was all the more pronounced because it took place during a presidential election year. President Clinton's spokesman suggested that the Judge ought to resign for his decision, while Senator Bob Dole, then the Republican

3 The Federalist No. 78, at 522, 527 (Jacob Cooke ed., 1961) (Alexander Hamilton).

4 Don Van Natta, Jr., *Judges Defend A Colleague From Attacks*, N.Y. Times, March 29, 1996, at B1.

Party's putative nominee, and Speaker Newt Gingrich suggested that Judge Baer ought to be impeached.[5] Judge Baer then took the extraordinary step of reversing his own decision on the merits. No official impeachment proceedings ever began.

From this, other attacks followed. In April of 1996, Senator Dole gave a speech in which he introduced a Clinton "Judicial Hall of Shame," and he later criticized a Clinton nominee for the U.S. Court of Appeals for the Eleventh Circuit, Charles "Bud" Stack, for buying a judicial seat via campaign contributions. In part, Senator Dole suggested that Mr. Stack was not qualified for the appellate bench because he could not answer questions at his confirmation hearing about the constitutionality of affirmative action. Mr. Stack apparently had not heard of or ever read *Adarand Constructors Inc. v. Pena*, decided just the Term before, Senator Dole noted, but he had raised millions of dollars for President Clinton's presidential campaign. The President eventually withdrew Mr. Stack's nomination at his request.[6]

Republicans followed up by conducting a sustained review of the performance of President Clinton's first-term judicial appointments. Senator Orrin Hatch, chairman of the Judiciary Committee, gave several speeches on the floor of the Senate from March to June of 1996 that criticized many of the President's nominees for activist decisions. In particular, Senator Hatch criticized two nominees whom he and other Republicans had opposed in 1993: Judge Rosemary Barkett of the U.S. Court of Appeals for the Eleventh Circuit, and Judge Lee Sarokin of the U.S. Court of Appeals for the Third Circuit. In a March 1996 speech, Senator Hatch carefully reviewed the judges' appellate opinions that he believed had improperly interpreted constitutional law and procedure. In later speeches, the Senator criticized other decisions, particularly in the criminal law and procedure area, reached by Clinton appointees in almost every circuit court.

In response, one of those individuals, Judge Lee Sarokin, resigned and publicly declared that he was leaving the bench rather than become a "prime target" during the presidential campaign. There was some suggestion that Judge Sarokin's real reason for resigning was the Circuit's refusal to allow him to move his chambers to California.[7] While the Ninth Circuit is large, however, it has yet to encompass New Jersey. In resigning, Judge Sarokin declared that criticism of judges "will affect the independence of the judiciary and the public's confidence in it, without which it cannot survive," and that his resignation because of political attacks was "a defeat for our judicial system and its most essential ingredient – an independent judiciary."[8]

Judges, professors, leaders of the bar, and journalists joined Judge Sarokin in responding to these interbranch critiques as an assault on judicial independence. Four judges of the Court of Appeals for the Second Circuit claimed that the attacks on Judge Baer went "too far" and constituted "extraordinary intimidation." Chief Justice Rehnquist gave a well-publicized speech at American University in

5 *See, e.g.*, Alison Mitchell, *Clinton Pressing Judge to Relent*, N.Y. Times, March 22, 1996, at A1; Linda Greenhouse, *Judges as Political Issues*, N.Y. Times, March 23, 1996, at A1; Katherine Seelye, *Dole Tours Death Chamber in San Quentin and Calls for Speedier Executions*, N.Y. Times, March 24, 1996.

6 Joan Biskupic, *Appeals Court Nominee Says No Thanks; GOP Had Made Issue of Stack's Credentials*, Wash. Post, May 10, 1996, at A17.

7 Joan Biskupic, *Blaming Politics, Judge Quits*, Wash. Post, June 5, 1996, at A21; Editorial, *Sarokin's Final Decision*, The Record (N.J.), June 10, 1996, at A12.

8 *Sarokin's Letter of Resignation*, N.J.L.J., June 10, 1996.

the midst of the Baer controversy to defend judicial independence.[9] Law professors and newspapers came to the defense of the judges by criticizing the critics, and the president of the American Bar Association convened a special commission to investigate whether the attacks on judges threatened judicial independence and the separation of powers. In testimony before the ABA commission, Judge John Walker of the Court of Appeals for the Second Circuit concluded that the political criticism of judges "crossed the line of propriety and stood as a clear threat to judicial independence."[10]

After the presidential election, Congress continued its criticism of decisions by the federal judiciary. In particular, decisions by District Judge Fred Biery of San Antonio concerning voting and by District Judge Thelton Henderson of San Francisco, who issued a preliminary injunction against enforcement of California's Proposition 209, sparked suggestions of impeachment. Representative Tom DeLay of Texas, the House Majority Whip, testified during hearings on judicial activism in 1997 that judges could be impeached for "usurping the legislative function," rather than only for indictable offenses, and cited Henderson's decision and the district judge who had raised taxes in the *Missouri v. Jenkins* litigation as examples.[11]

As this was all going on, the Senate slowed the pace of its confirmation of nominees. In the second session of the 104th Congress, for example, the Senate confirmed no nominees for the Courts of Appeal and only 17 nominees to the U.S. District Courts. Senator Grassley, who chairs a Judiciary Committee subcommittee on judicial administration, issued a survey to all federal judges about their workload and began a series of hearings into whether declining caseloads justified leaving some judicial seats open. Critics claimed that the Senate now was seeking to "micromanage" the judiciary.

While part of this slowdown was the usual product of a presidential election year – the Democratic Senate in 1992 left dozens of Bush administration nominees without a hearing or floor vote – the slow pace of confirmations continued into the 105th Congress. President Clinton gave a radio address criticizing this combination of confirmation delay and criticism of judges as "a very real threat to our judicial system,"[12] and he demanded in his 1998 State of the Union Address that the Senate move swiftly to vote on his nominees. Chief Justice Rehnquist also criticized the delay in confirmations in his annual state of the judiciary report,[13] and as this Essay goes to press it appears that some nominees are moving through the Senate.

II. Sticks and Stones?

No doubt this litany of events suggests that the federal judiciary has become the subject of intense political scrutiny that has not been the norm in the recent past. However, much of this excitement is a byproduct of the Supreme

9 Joan Biskupic, *A Declaration of Independence: Though Open to Criticism, Judges' Rulings Must Not Jeopardize Their Jobs, Rehnquist Says*, Wash. Post, April 10, 1996.

10 An Independent Judiciary, Report of the Commission on Separation of Powers and Judicial Independence, American Bar Association, July 4, 1997.

11 Neil A. Lewis, *Impeach Those Liberal Judges! Where Are They?*, N.Y. Times, May 18, 1997.

12 Peter Baker, *Clinton Says Republicans are 'Threat' to Judiciary; Hill GOP Blamed for 'Intimidation,' Delays*, Wash. Post, Sept. 28, 1997.

13 William H. Rehnquist, 1997 Year-end Report on the Federal Judiciary, Jan. 1, 1998, found at www.uscourts.gov/cj97.html.

Court's decisions, beginning at least with *Roe v. Wade* and occurring most recently in cases such as *Adarand Constructors v. Pena* and *Romer v. Evans*, that have reviewed and invalidated social and moral legislation. In these cases, the Court has decided to override the democratic lawmaking process, particularly in areas where people feel very strongly for religious, political, or philosophical reasons. As the Court has decided such issues with increasing frequency, it is only natural that criticism of judges has increased. Once the federal judiciary has removed an area of policymaking from the political arena, the chief if not the only way for the people to participate in setting policy is by discussing judicial decisions, in the hopes of influencing future judicial appointments. Attacking federal judges is just one facet of the ongoing discussion that our polity must engage in concerning the values that will govern our society.

Judicial criticism might be unusually intense today, but it is by no means new. In fact, recent events involving the judiciary do not come anywhere near the level of controversy that has erupted in the past over the role of the Court. Politicians are not criticizing "nine old men," as President Franklin D. Roosevelt did, for blocking progressive economic reform. No one today is trying to pack the Court to reverse its course of decisions. No one is seriously arguing now, as President Lincoln did, that a Supreme Court decision should bind only the parties in the case before it. No President is suggesting, as Presidents Jackson and Jefferson did, that he has no obligation to enforce judicial decisions he disagrees with. Congress is not impeaching judges of the other party, as occurred in the early years of the Jefferson administration, nor are the political branches eliminating lower federal courts or fiddling with the appellate jurisdiction of the Supreme Court in an effort to prevent the decision of certain constitutional questions. When examined in the light of history, contemporary claims of threats to judicial independence seem rather overblown.

Certainly judges do not enjoy having their opinions criticized, but these actions really do not warrant such panic. Judges are grown men and women. They are not children who need to be shielded from the harsh realities of life. So long as criticism of the judiciary does not transform itself into attempts to eliminate the Constitution's guarantees for judicial independence or to misuse the impeachment power, there seems to be nothing to worry about. Judges do not need protection from criticism; they are the only officials of our national government who are institutionally insulated from political pressure and popular opinion. Judges should welcome all criticism (much like academics) in order to help them improve the quality of their work.

Ironically, what was cause for concern in the Baer episode was not the public criticism, but Judge Baer's response. Judge Baer need not have reconsidered his decision in response to the attacks by President Clinton and Senator Dole. He still had his job for life at an irreducible pay. His decision stood, unless reversed by a higher court. Judge Baer no doubt contends that his decision to reverse himself was not politically motivated. Nonetheless, Judge Baer did reverse himself, and the timing of his actions suggested that he was readily influenced by the political winds. Similarly, Judge Sarokin's effort to portray his resignation as the result of political attacks did more to damage the credibility of the judiciary than any criticism that any congressman or political opponent could inflict. The simple fact is that judges whose opinions and actions are swayed by politics outside of the judiciary were probably unsuited to the federal bench in the first place. Judge Baer and Judge Sarokin, and not Senator Dole or President Clinton, are the individuals responsible for threatening judicial independence, specifically by showing themselves so influenced by partisan politics.

III. Using Consent to Give Advice

Controversy about the criticism of sitting federal judges has occurred, not without reason, in the context of a debate about the Senate's proper role in the judicial nomination process. Since the Republican takeover of Congress in the November 1994 elections, the Senate has slowed the pace of confirmations. Although the Senate Judiciary Committee has sent nominees to the floor with regularity, the full Senate has delayed its consideration of many nominees in the last three years. Further, several potentially controversial nominees have failed to emerge from committee or have been the subject of "holds" on the floor of the Senate, whereby a Senator has exerted senatorial privilege to prevent a vote on a specific nominee. Several Republican Senators have vowed to closely scrutinize nominees, with Chairman Hatch declaring in a November 1996 speech shortly after President Clinton's re-election that he would oppose nominees who would be "judicial activists" of the same sort as Judges Barkett and Sarokin.[14]

Administration critics argue that this policy, when combined with the Senate's ongoing attacks on the decisions of sitting federal judges, amounts to nothing less than a double-barreled assault on the independence of the federal judiciary. In August of 1997 Attorney General Janet Reno criticized the Senate's delay in confirming judicial nominees as a subversion of the appointments process. According to Reno, "the framers did not intend Congress to obstruct the appointment of much-needed judges, but rather simply to ensure that well-qualified individuals were appointed to the bench."[15] Expanding on these statements, President Clinton in September 1997 declared that "[t]he intimidation, the delay, the shrill voices must stop so that the unbroken legacy of our strong, independent judiciary can continue for generations to come."[16]

The Clinton administration is surely correct to argue that there is a connection between the ongoing criticism of sitting federal judges and the slowdown in the pace of judicial confirmations. Apparently, Senators wish to restructure the appointments process so that attention is paid to the judicial ideology not just of Supreme Court nominees, but also of appointees throughout the lower federal courts. Slowing down the confirmation process allows the Senate to more carefully scrutinize the qualifications of nominees, who often come before the Senate with little information or paper record concerning their likely performance as federal judges. Heightened scrutiny of nominees has the further effect of communicating senatorial preferences concerning judicial nomination policy to the executive branch. By refusing to confirm or consider nominees, the Senate can use its constitutional advice and consent power to leverage changes in the executive branch's approach to judicial appointments.

Close review and, if need be, criticism, of sitting federal judges also furthers this goal. In an era of stealth candidates, candidates with no paper records, and candidates with little or no previous judicial or public service experience, perhaps the best way to predict future judicial performance is to examine the track record of previous nominees of the same administration. And, of course, congressional criticism of the decisions of certain judges serves to convey to the executive branch the

14 Orrin G. Hatch, Speech before the Federalist Society National Lawyers Convention, Washington, D.C., Nov. 15, 1996.

15 *Reno Criticizes Senate in Delay on Nominees*, N.Y. Times, Aug. 6, 1997, at A1.

16 Peter Baker, *Clinton Say Republicans Are 'Threat' to Judiciary; Hill GOP Blamed for 'Intimidation,' Delays*, Wash. Post, Sept. 28, 1997, at A6.

policy preferences of the Senate on judicial nominations. Rather than an assault on the independence of the judiciary, slowing down the nominations process and criticizing judicial decisions are legitimate efforts by the Senate to negotiate changes in the executive branch's approach to nominations. The Senate merely has chosen to use methods of communicating its preferences that fall short of the outright rejection of nominees.

A critic of the Senate's actions might claim that the President enjoys the constitutional prerogative to nominate judges, and that the Senate should limit its role to reviewing a nominee's qualifications. Underlying this reading of the advice and consent clause is the idea that it is the President, as the winner of the only nationwide federal election, who has the right to establish a comprehensive judicial ideology, which he then advances through individual nominations. The framers of the Constitution, however, had a more vigorous role for the Senate in mind when they designed the advice and consent process. To be sure, the Constitution vests in the President the sole power over the actual choice of a nominee, but the Senate has the right to suggest names and to provide its advice to the President about candidates. The Senate has the power to refuse to consent to an appointment, and the text of the Constitution places no explicit restrictions on what reasons the Senate may base its decisions upon. While historically the grounds for a refusal to confirm have included concerns about judicial ideology, politics, and qualifications, as a constitutional matter, the Senate could even refuse to confirm nominees because it believes that the President did not give appropriate consideration to the Senate's advice.

To grasp this issue, it is necessary to examine, first, what role the Senate has in the confirmation of an individual nominee, and then second, the Senate's role in general appointments policy. Although there is substantial academic controversy over what the Senate can consider in voting for or against a candidate, it is important to note that the text of the Constitution places only the lightest of substantive limits upon the scope of the Senate's evaluation of a nominee. At a minimum, the Constitution requires that the Senate approve only those nominees whom it believes will interpret the Constitution in accordance with its beliefs concerning the Constitution. As Professor John McGinnis, one of the staunchest defenders of presidential authority in the appointments process, has observed, the Appointments Clause "is a check to prevent the President from appointing jurists of unsound principles as well as jurists of unsound character or competence"[17] because a President's oath to uphold the Constitution requires that the President appoint only those judges whom he believes will interpret the Constitution faithfully. The same obligation must apply to Senators, who take a similar oath to uphold and defend the Constitution. If a Senator truly believes that a nominee will reach interpretations of the Constitution which do not comport with the Senator's beliefs about the Constitution, he has a duty to reject the nomination. Of course, if the Senator is unsure about ambiguous areas of the Constitution, or believes that reasonable minds can differ over certain interpretations, then the Senator has the discretion to give the nominee the benefit of the doubt.

Beyond that, the Constitution appears to establish no other substantive restrictions on the criteria that a Senator may impose upon a judicial nominee. If the Framers, for example, had understood the Senate's review to be limited only to qualifications, they could have

17 John McGinnis, Essay, *The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 Tex. L. Rev. 633, 653 (1993).

patterned Article II, Section 2, after Article I, Section 5, in which each House of Congress is made "the Judge of Elections, Returns and Qualifications of its own Members."[18] Instead, the framers only used the phrase "Advice and Consent." To be sure, early drafts of the Constitution contained provisions that vested the entire appointment power in the Senate.[19] But the transfer of the nomination power from the Senate to the President does not lead naturally to the conclusion that the framers meant to divest the Senate of its own discretion in confirming nominees. This conclusion is buttressed by the example of the 1795 nomination of John Rutledge to become Chief Justice, which the Senate rejected because of doubts about his character, judgment, and political views, and the numerous 19th century examples of Supreme Court nominees who similarly failed to be confirmed. Until the last century, it appears that the Senate was not reluctant to use its advice and consent power to reject judicial nominees for reasons that went beyond their professional qualifications.

Many Senators rejected this position during the nomination of Judge Robert Bork to the Supreme Court. In response to that affair, some Senators argued that the Senate can only judge a nominee's qualifications, and that substantial deference is owed to the President. However, this is an over-reaction to the Bork confirmation fight. The problem with the Bork hearings was not the Senate's questioning concerning the nominee's opinions on various constitutional and legal issues. The Senate certainly has the right to ask nominees questions about their jurisprudential views, just as a nominee has a right to refuse to answer questions that may cross the line into pre-judging cases. The disturbing aspect of the Bork hearings was the manner in which Judge Bork's opponents distorted and misrepresented his qualifications and views. It is important to note, however, that this was a problem of political, and not of constitutional, dimensions.

While the Senate may reject nominees, however, it is quite clear that the Senate cannot choose them, contrary to suggestions made by some scholars.[20] The framers believed that democratic accountability would be enhanced by centralization of the nomination function in the Presidency, rather than in a collective entity such as the Senate. As Alexander Hamilton wrote in *The Federalist*: "The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation. [The President] will on this account feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the person who may have the fairest pretensions to them."[21] The framers ultimately chose to transfer the nomination power from the Senate because they feared that an "assembly of men" would be more prone to "private and party liking and dislikes, and partialities and antipathies, attachments and animosities."[22]

A simple desire to improve accountability and responsibility, however, does not translate

18 The Supreme Court has read the Qualifications Clause as imposing limitations on Congress' ability to refuse to seat Members of Congress on the ground that they lack necessary qualities. *Powell v. McCormack*, 395 U.S. 486 (1969).

19 *See, e.g.*, James E. Gauch, Comment, *The Intended Role of the Senate in Supreme Court Appointments*, 56 U. Chi. L. Rev. 337, 341-42 (1989).

20 David Strauss & Cass Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 Yale L.J. 1491 (1992).

21 The Federalist No. 76, at 511 (Alexander Hamilton).

22 *Ibid*.

into a wholesale exclusion of the Senate from the process of selecting nominees. Indeed, such an interpretation would render a word in the Constitution – "Advice" in "Advice and Consent" – meaningless, contrary to the commonsense rule that every word of the Constitution must be given meaning and effect.[23] As Hamilton's discussion of the appointment power in *The Federalist No. 66* makes clear, it is the President's sole right to nominate judges, but that understanding does not preclude the Senate from advising the President on suitable nominees and rejecting those it finds unfit, for whatever reason.[24] "It will be the office of the president to *nominate*, and with the advice and consent of the senate to *appoint*. There will of course be no exertion of *choice* on the part of the senate. They may defeat one choice of the executive, and oblige him to make another; but they cannot themselves *choose* – they can only ratify or reject the choice, of the president."[25] Indeed, such an arrangement already governs the appointment of judges to the federal district courts, in which the President usually solicits and often follows the advice of home-state Senators on potential candidates.

Hamilton's explanation of the appointments clause suggests that some of the framers believed that the Senate's role in the appointments process, while it did not include the power to choose a nominee, included more than just rubber stamping the President's choice. Criticism by the framers of the ability of a legislature to nominate judges cannot suddenly be transmogrified into a constitutional prohibition on legislative participation in the nominations process. If the framers had wanted to bar the Senate from suggesting names, or had wished to limit their review only to consent, they could have said so in the Constitution. The framers may have believed that centralizing nominations in the President would enhance the democratic accountability of judicial appointments, but that does not mean that the Constitution requires deference to presidential nominees. The framers may have chosen to shift nominations from the Senate to the President because of fears that a legislative body would be prone to "intrigue and cabal,"[26] but that does not mean that the Constitution prohibits the Senate from attempting to influence and guide the President's use of his nomination power.

In fact, neither Hamilton's comments in *The Federalist* nor the comments of other framers rule out the idea that the Senate can enjoy a joint role with the President in setting judicial appointments policy. For example, the Constitution does not prohibit the Senate from using its confirmation power in a strategic manner to influence the President's selection of judicial candidates. In fact, the framers believed that by exercising, or by threatening to exercise, its power to block nominees, the Senate would encourage the President to nominate better qualified judges. As Hamilton wrote in *The Federalist No. 76*: "The necessity of [the Senate's] concurrence would have a powerful, though in general a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and

23 *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

24 Professors David Strauss and Cass Sunstein have argued that the Senate has a constitutional right to propose Supreme Court nominees, and that the President has an obligation to consider them. Strauss & Sunstein, 101 Yale L.J. 1491. This surely goes too far, for the President also takes an oath to uphold the Constitution, and thus he cannot nominate individuals he believes advocate an improper approach to constitutional interpretation.

25 The Federalist No. 66, at 449 (Alexander Hamilton).

26 3 Max Farrand, ed., The Records of the Federal Convention of 1787, at 42 (1917); *see also* Gauch, *supra*, at 343-46.

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." By threatening the President with a confirmation fight if he nominated a candidate for such reasons, Hamilton believed, the Senate "would be an efficacious source of stability in the administration." The threat of rejection, he concluded, was critical to the objective of forcing the President to nominate good judges. "The possibility of rejection would be a strong motive to care in proposing."[27]

In other words, the President's knowledge of the Senate's spectrum of preferences for judicial candidates will force the President to put forward nominees who lie within that range. Under Hamilton's approach, the Senate can communicate its preferences to the President by rejecting nominees as well as by declaring which characteristics it finds disqualifying for office. It also appears that the first Senate of the United States understood its role in the appointments process as encompassing more than just consenting to presidential nominations. During the first years of the Washington Presidency, the Senate created a committee for the express purpose of conferring with the President concerning "appointments to office." Apparently the committee met with President Washington at least twice, until difficulties involving the advice and consent process for treaties led to a different arrangement.[28] Nonetheless, the creation of the committee indicates that the first Senate of the United States understood its duty of advice and consent to include consultations with the President concerning nominations. President Washington's willingness to meet with the committee suggests that the first President accepted this understanding.

In short, the historical understanding supports a broader role for the Senate in providing advice to the President concerning judicial nominations than exists today. No doubt, Presidents have consulted informally with Senators about judicial choices, and home-state Senators currently have a significant role in picking district court nominees. Nothing prevents the Senate from transforming a process of informal, ad hoc consultation with the President into a formal, open system in which Senators routinely advise the executive branch concerning nominees as judicial vacancies occur. Recent criticism of nominees and the slowdown in confirmations represent the Senate's efforts to express new policy preferences to the President on judicial appointments and perhaps an attempt to restructure the political process of choosing judges. Those who are afraid that recent criticism of judges threatens judicial independence mistake a struggle between the political branches for an attack by the political branches.

Misunderstanding the nature of the fight over judicial decisions and appointments, some have suggested that bar organizations adopt canons of ethics prohibiting lawyers from criticizing judges and their decisions. Such a regulation almost certainly would violate the right to freedom of speech, and it would make for bad policy as well. As part of their mission to educate the public about the

27 The Federalist No. 76, at 513 (Alexander Hamilton). As further examples of the grounds upon which the Senate could reject a nominee, Hamilton lists "favoritism" by the President, "an unbecoming pursuit of popularity" by the President, "no other merit" on the part of the nominee "than that of coming from the same State" as the President, "of being in some way or other personally allied to" the President, or of nominees' "possessing the necessary insignificance and pliancy to render them the obsequious instruments of [the President's] pleasure." *Ibid*.

28 Stanley Elkins & Eric McKitrick, The Age Of Federalism: The Early American Republic, 1788-1800, at 56 (1993).

judicial process, lawyers should favor any discussion or debate – of whatever nature – concerning the law and judges. Because of their important role in our national political system, judges sometimes will become the focus of our nation's robust political debate. Limiting that debate will not enhance an already independent judiciary. Rather than adopting speech codes, lawyers should adopt a far simpler rule for judges – the First Amendment. GB