

ADVICE, CONSENT, AND INFLUENCE

*Robert F. Nagel**

Article II, section 2 of the Constitution states that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court . . ." This provision presents important questions about the appropriate division of responsibilities between the President and the Senate. A correlative matter is the extent of the responsibility of a judicial nominee to provide information during the appointment process.

Although some politicians and a few academics continue to articulate doubts and reservations about energetic, substantive Senate review of judicial nominees, we seem—as a matter of both practice and theory—to be drifting toward a norm of active Senate participation. I shall begin by describing this norm, its intellectual bases, and some of its operational implications. I then raise some doubts about the norm and suggest a slightly different role for the Senate. In general terms, the point I want to develop is that screening the beliefs of nominees may be at odds with the goal of establishing political influence over the Supreme Court. Influence may depend not so much on the decision whether to "consent" as on the utilization of the confirmation process as an opportunity to give "advice."

I.

It is somewhat hazardous to generalize about a developing norm of active Senate participation in the judicial selection process. Even very recent history shows considerable variation. Since 1894, only John Parker, Abe Fortas, Clement Haynesworth, G. Harrold Carswell, Robert Bork, and Douglas Ginsburg can fairly be said to have been rejected by the Senate.¹ Indeed, it is common to contrast the vigorous nineteenth-century tradition of Senate review with a relatively mild twentieth-century record.² Despite the recent experiences of Bork and Ginsburg, the

* Rothgerber Professor of Constitutional Law at the University of Colorado School of Law. Work on this Article was also done while the author was Lee Visiting Professor at the Bill of Rights Institute, Marshall-Wythe School of Law.

¹ See Friedman, *The Transformation in Senate Response to Supreme Court Nominations: From Reconstruction to the Taft Administration and Beyond*, 5 CARDOZO L. REV. 1, 1-2, n.1, 2 (1983). Friedman does not count Homer Thornberry because he was not confirmed "for technical reasons." *Id.* at 2 n.2.

² *Id.* at 1-3. See also Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L.

Senate during the past ten years has approved Rehnquist (as Chief Justice), O'Connor, Scalia, and Kennedy. The thoroughness of the evaluation of these individuals has fluctuated, and at least sometimes questioning was casual. Some senators continue to assert that their proper role is a limited one,³ while others can be expected to rediscover the attractions of institutional modesty when the political backdrop changes.

Nevertheless, on the whole, we are developing a norm of active Senate participation—a conscientious effort to evaluate not only the nominees' qualifications, but also their beliefs and probable voting patterns on the Court. The most dramatic evidence of such a norm is the Senate's consideration of Robert Bork's nomination. The Senate's inquiry was prolonged and detailed; it led to the rejection of a person who has been plausibly described as one of the "best qualified candidates for the Supreme Court of this or any other era."⁴ This action was not—or did not appear to be—based on geographic, ethnic, or other narrow political considerations. Rather, it appeared to be based on disagreement with the nominee's judicial philosophy and with dissatisfaction over the positions he was likely to take if appointed to the Court.

There are a number of reasons to believe that the Bork nomination represents not an aberration, but an especially vivid manifestation of the underlying current norm. A judicial nominee first appeared at a confirmation hearing in 1925.⁵ Since 1955, such appearances have become an entrenched practice.⁶ Beginning in 1959, with the hearings on Potter Stewart's nomination, senators have considered it proper to use the occasion of the nominee's appearance to inquire about specific cases, judicial philosophy, and attitudes on issues likely to come before the Court.⁷ While different nominees have set different limits on how willing they are to answer these questions, generally they do not resist the idea that senators should be interested in such matters. Indeed, intellectually strong nominees like Fortas, Rehnquist, and Bork on occasion have openly

REV. 1202, 1202-03 (1988). Nina Totenberg claims that until 1987, Senate hearings illuminated "almost nothing about the nominee's views." Totenberg, *The Confirmation Process and the Public: To Know or Not to Know*, 101 HARV. L. REV. 1213 (1988).

³ E.g., Hatch, *Save the Court from What?* (Book Review), 99 HARV. L. REV. 1347 (1986). See also Friedman, *supra* note 1, at 83.

⁴ Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1106 (1988).

⁵ Comment, *Must a Supreme Court Justice Refuse to Answer Senators' Questions?*, 78 YALE L.J. 696, 705 (1969). As late as 1949, Sherman Minton refused to appear. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146, 1161 (1988).

⁶ See Ross, *The Questioning of Supreme Court Nominees at Senate Confirmation Hearings: Proposals for Accommodating the Needs of the Senate and Ameliorating the Fears of the Nominees*, 62 TUL. L. REV. 109, 119 (1987).

⁷ Freund, *supra* note 5, at 1151-53, 1157; Powe, *The Senate and the Court: Questioning a Nominee* (Book Review), 54 TEX. L. REV. 891, 892 (1976); Rees, *Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution*, 17 GA. L. REV. 913, 945 (1983). Freund, *supra* note 5, at 1151-53, 1157.

praised and welcomed broad inquiries. Ideological review quickly has become the common practice and accepted norm.

The most compelling reason for senators to concern themselves with the ideology and philosophy of nominees is the same reason that Presidents do. Although it is fashionable (and also partially accurate) to characterize the Burger Court's record as vacillating, uninspiring, and moderately conservative,⁸ the deeper truth is that in the twenty years since the appointment of Warren Burger as Chief Justice, the extent of the Supreme Court's influence over public policy has grown significantly and inexorably. Beginning roughly in 1971, the Court began to announce a series of doctrines that vastly increased the range of issues subject to judicial supervision. Thus, under the Burger Court, the federal courts used racial classifications and a host of costly devices to achieve integrated results in hundreds of school districts. Judicial management of prison systems in more than two-thirds of the states was established. For the first time, the Court undertook systematic monitoring of public aid to parochial schools. The Burger Court initiated serious review of governmental use of gender classifications. It insisted on judicial supervision of public regulation of abortion. It imposed minimal procedural protections on the decisionmaking procedures of public schools, prison disciplinary boards, university tenure committees, and other public institutions. It labeled as "speech" advertising, exotic dancing, and campaign contributions and extended first amendment protections to prisoners and corporations. It supervised the design of death penalty statutes and made profoundly important determinations about the operation of the executive branch, including the need for confidentiality in Presidential conversations and the impact of legislative vetoes in hundreds of federal statutes. It opened the door for judicial supervision of patronage, jury selection, political gerrymandering, and criminal sentencing. While the Warren Court made judicial power seem dramatic and morally exciting, the Burger Court made judicial power seem routine and inevitable.

Twenty years ago, it might have been possible to believe that the appointment of a few competent, gray-haired Republicans to the Court would remove the federal judiciary from many areas of political controversy. It is now clear that, in one direction or another, the Court will be a pervasive influence on a wide range of issues that can only in a partial and peripheral way be considered legal rather than political. What legal realism established intellectually, the Burger Court established as a matter of brute fact.

During approximately the same period, as the Burger Court was decisively destroying any possibility of believing that the Court's function is nonpolitical, the less important justifications for limited Senate review

⁸ See V. BLASI, *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* (1983); Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436 (1987).

were also being discredited. Writing in 1970, Charles L. Black, Jr., concluded an important essay on the judicial selection process by stating:

To me, there is just no reason at all for a Senator's not voting, in regard to confirmation of a Supreme Court nominee, on the basis of a full and unrestricted review, not embarrassed by any presumption, of the nominee's fitness for the office. In a world that knows a man's social philosophy shapes his judicial behavior, that philosophy is a factor in his fitness. If it is a philosophy the Senator thinks will make a judge whose service on the Bench will hurt the country, then the Senator can do right only by treating this judgment of his, unencumbered by deference to the President's, as a satisfactory basis in itself for a negative vote. I have as yet seen nothing textual, nothing structural, nothing prudential, nothing historical, that tells against this view.⁹

Although Black ended his commentary with an invitation to his readers to refute him, there have been few significant and no generally accepted efforts to do so. Black's basic constitutional arguments, while stated tentatively, remain persuasive. It is true, as he argued, that the phrase "advice and consent" does not itself suggest a limited role—indeed, the word "advice" connotes free-wheeling consideration of any factor that might be thought relevant to a President's decision. It is also true, as he argued, that Justices are not a part of the executive branch and therefore, that nothing inherent to the President's executive duties requires legislative deference. I have not seen any effort to refute Black's assessment of the framers' intent, an assessment that emphasized early proposals giving sole power of appointment to the Senate and subsequent arguments that seemed to assume a significant role for the Senate.¹⁰

Potentially, of course, the most far-reaching objection to the Black position is based on formalistic assumptions. To the extent that the task of judges is only to find the law in legal texts—if social philosophy does not and should not "shape judicial behavior"—it can be thought that the Senate's role should be restricted to assessing a nominee's technical skills. Yet, inquiry into opinions about specific cases might be relevant here, too, since the best proof of technical skills might be demonstrated by textual or historical interpretation.¹¹ In any event, few today would reject Black's position by rejecting his realist assumptions.

A modern version of the formalist argument does exist, although it is a dissenting view. Some commentators, including Stephen Carter, argue that inquiries into philosophy tend to degenerate into inquiries about

⁹ Black, *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L.J. 657, 663-64 (1970).

¹⁰ For historical analyses consistent with Black's, see Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185, 1187 (1988); Freund, *supra* note 5, at 1147; Monaghan, *supra* note 2, at 1204-07; Rees, *supra* note 7, at 938 n.77. Bruce Fein takes a narrower view of the relevant intent, but only as a matter of emphasis. Fein, *A Circumscribed Senate Confirmation Role*, 102 HARV. L. REV. 672, 677 (1989).

¹¹ See Rees, *supra* note 7, at 932.

probable voting patterns—a result Carter considers inconsistent with judicial review because that institution is intended to “thwart, not to further, the self-interested programs of temporary majorities.”¹² The nature of the judicial function, then, requires that the Senate aim its review at deeper considerations. What kinds of considerations? Because Carter fully accepts the realist view that “[t]here is in every interpretative task a moment when the interpreter’s own experience and values become the most important data,”¹³ he concludes that the Senate should judge the nominee as a person: would she possess “the right moral instincts”?¹⁴ Thus the modern version of the formalist position leads to a kind of moral technocratic standard; the issue is not whether the nominee is a skilled lawyer, but whether the nominee is a good person.

Carter’s position would divert Senate attention from both general and specific legal beliefs to evaluating a candidate’s personal qualities. But even a senator accepting Carter’s position might reach much the same kinds of conclusions about the scope of a proper inquiry as did Charles Black. Probable votes are, by Carter’s own assumptions, one measure of personal moral qualities. And while it may be true that concern about specific decisional outcomes will tend to be associated with narrow self-interest, it is not necessarily true that self-interest is unrelated to the kinds of profound values that Carter and others think judicial review should protect. Indeed, Carter’s concept of judicial review is that fundamental, long-term aspirations can be given expression in the accretion of specific decisions that the Court makes. If so, it is hard to see why political interest in specific results, even if self-interested, cannot also be connected to profound, lasting hopes and beliefs.

A related argument is that the Senate should confine its evaluation to the nominee’s professional fitness (rather than moral fitness) because narrow professionalism is all the Senate is qualified to judge. As Bruce Fein engagingly writes, “[t]he Senate, simply stated, is ill-suited intellectually, morally, and politically to pass on anything more substantive than a nominee’s professional fitness Because senators tend to be intellectually shallow and result-oriented, their ostensible inquiries into ‘judicial philosophy’ will almost invariably degenerate into partisan posturing.”¹⁵ This is not a basis for a nominee’s refusal to answer questions, unless nominees are entitled to censor the information available to the Senate on the basis of their own assessment of the capacities of those who are supposed to be assessing them. If, on the other hand, the argument is addressed to the Senate, it seems safe to say it is unlikely to succeed. And it should not. Democratic self-government requires that elected officials

¹² Carter, *supra* note 10, at 1193. For similar views, see Fein, *supra* note 10, at 673 and Ross, *supra* note 6, at 145.

¹³ Carter, *supra* note 10, at 1199.

¹⁴ *Id.*

¹⁵ See Fein, *supra* note 10, at 673.

decide issues about which they are not expert. Legislators are obliged to deal with matters, such as nuclear strategy and economic policy, that are at least as esoteric as judicial philosophy. Unless judicial confirmation can be distinguished from all other legislative duties, Fein's argument is in principle an attack on representative government. Moreover, even passing the dubious claim that senators tend to be intellectually more shallow than judicial nominees or the executive branch officials who select them, it still does not follow that the Senate is in fact unqualified to inquire into jurisprudential questions. Philosophy and doctrine are not, after all, self-contained. Legal ideas have consequences—they change lives. Senators are certainly qualified to consider the impact of the law's abstractions.

Other proposals for limiting the Senate's role are relatively modest, and none is especially persuasive. Some are simply prudential. Senator Orrin Hatch, for example, argues that substantive review by the Senate creates a risk of deadlock as each political party retaliates for the last rejection.¹⁶ More generally, some who have studied the often tawdry history of Senate participation in judicial selection conclude that the process can diminish the public's perception of the Court "as an independent institution."¹⁷ In both instances, the concern is ultimately about the effect of Senate review on the functioning of the Court. Such risks are real, but they argue for responsible ideological review rather than for some technocratic standard. Excessive partisanship and diminished respect for the Court are dangers, but another danger is that a functioning and respected Court will, in Black's words, "hurt the country." If the predicted harm is great and seems likely, a senator could sensibly conclude that damage to the Court was the lesser risk. Even a senator who believed that damage to the Court's prestige always outweighs other harms might adopt Black's position; such a senator might conclude that confirming a profoundly misguided nominee would result in judicial policies that represented more of a threat to the Court as an institution than would active Senate screening.

Felix Frankfurter, while conceding the legitimacy of the Senate's interest in a nominee's beliefs, appeared to think that personal appearance was undignified and unnecessary.¹⁸ Paul Freund still takes something close to this view.¹⁹ While many would concede that personal testimony is often an inefficient and even ineffective way to evaluate a nominee, it is surely impossible to take the position that a nominee's answers and demeanor are inevitably unhelpful or irrelevant.

Abe Fortas tried to embellish the Frankfurter position with notions of separation of powers. This argument, constructed on an implausible

¹⁶ Hatch, *supra* note 3, at 1352-53.

¹⁷ Friedman, *supra* note 1, at 85.

¹⁸ See Comment, *supra* note 5, at 705.

¹⁹ Freund, *supra* note 5, at 1163.

analogy to the Speech and Debate Clause, applied only to sitting federal judges and did not rule out most general jurisprudential questions. Fortas's position was icily and effectively criticized in a student note in the *Yale Law Journal*,²⁰ and I doubt that it will be revived. Separation of powers is, however, still invoked in the form of a distinction between questions about general philosophy and questions about specific cases, especially cases that are likely to come before the Court.

This distinction can be couched as an aspect of separation of powers because the articulated concern is to protect the integrity of the Court's decisionmaking process. It is thought that answers about specific cases or issues might bind the nominee in future deliberations or, at the least, appear to be trading a future vote for confirmation. One of the difficulties with this limitation is that its implications for nominees' behavior are so unclear. It can be thought to preclude answers that *bear* on any matter that *might* come before the Court; if so, a nominee could refuse to discuss all issues, opinions, or beliefs relevant to virtually any legal question.²¹ It can be construed more narrowly and preclude only the communication of legal opinions (as distinguished from political philosophy, personal views, and so on).²² More narrowly still, it might apply only to debatable cases or to cases that the nominee actually foresees coming before the Court.²³ Recent nominees have generally thought the limitation consistent with appearing personally and with answering questions about both legal philosophy and at least some specific legal issues.²⁴ The limitation is difficult to maintain during the course of questioning.²⁵ In any event, it does not restrict senators' voting on the basis of predictions about a nominee's positions on cases likely to arise. As usually formulated, it only regulates sources of information rather than the types of information that senators are entitled to consider. The limitation is confusing in its implications and more an irritant than an important challenge to the premises behind the norm of active, ideological review.

Even this minimal restriction has been subjected to powerful criticism. Grover Rees, who had some responsibility for judicial selections in the Reagan Justice Department, argues that views on specific cases are a relevant and important basis for understanding a nominee's actual philosophy and temperament, and that questions can be framed to ask for present opinions rather than for commitments.²⁶ Of course, public cyni-

²⁰ Comment, *supra* note 5.

²¹ Something like this view might underlie a refusal to appear at all.

²² This was close to Justice Sandra Day O'Connor's position, which is criticized severely in Rees, *supra* note 7, at 949.

²³ For samples of nominees who took these positions, see *id.* at 958-60.

²⁴ Robert Bork, of course, answered such questions for days. For earlier illustrations, see Rees, *supra* note 7, at 954-55.

²⁵ For examples, see *id.* at 955, 965. This would be an especially acute problem for a nominee attempting to follow the sorts of fine distinctions suggested by Ross, *supra* note 6, at 145-72.

²⁶ Rees, *supra* note 7, at 962.

cism is sufficient to create some danger of an appearance of impropriety, but this is a problem even if nominees resist public expression of opinions about particular cases. After all, the whole point of active Senate review is to decide whether a nominee's "service on the Bench will hurt the country"—a determination which, as a practical matter, requires predicting a nominee's votes on particular cases. Questions about personal background, general philosophy, and judicial approach are patently designed to afford a basis for such predictions. Moreover, the nominee's answers are usually designed to provide vague reassurance about future voting behavior. In this circumstance, avoiding direct discussion of what everyone is interested in seems at best a nicety and at worst a charade.²⁷ The appearance of impropriety is implicit in a process where probable legal positions of a nominee are thought to be the proper business of the Senate. Such an appearance can be reduced, as Rees argues, by carefully maintaining the distinction between a nominee's preliminary opinion and a judge's final determination. The public either understands and credits the significance of the adjudicatory process and of a judge's life tenure, or it does not. Dancing around important topics at confirmation hearings does not seem a useful additional protection.

The perplexing issue is not whether a nominee should refuse to answer questions about cases that might arise; the difficult issue is to identify the outer limits to a proper exchange on this subject. Suppose a nominee is asked, "Will you commit here and now to vote to overturn [or to uphold] *Roe v. Wade*?" Suppose, further, that the inquiring senator adds, "Before you answer, let me emphasize that your response will largely determine for me whether your service on the bench will hurt the country, so unless you tell me you are going to reverse [uphold] *Roe*, I am going to vote against you." Now, assume a nominee answers the question directly: "Senator, read my lips; I will vote to reverse [uphold] *Roe v. Wade* at the first opportunity." This exchange at first seems reprehensible. The nominee has indicated how a case should be decided and has done so in an apparent effort to gain appointment to the Court. However, the exchange only takes realism seriously. To use Professor Black's words again, "in a world that knows that a man's social philosophy shapes his judicial behavior," it is necessary to admit that personal

²⁷ During the Bork hearings, for example, Senator Specter piously disclaimed any intent to ask the nominee how he would decide any "specific case." *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. 719 (1987) [hereinafter *Bork Hearings*]. At many other points, however, Specter seemed to be pressing for specific commitments and, in any event, he understood that his more general questions were aimed at discerning probable positions that Bork would take on later cases. See *id.* at 415 ("if you still disagree philosophically with *Brandenburg*, . . . that raises a question in my mind as to how you will apply it to the next set of facts"). See also *id.* at 264 (Bork tells Specter that "my doubts about the substantive due process of *Bolling v. Sharpe* does not mean that I would ever dream of overruling *Bolling v. Sharpe* . . ."), and 695 (Specter asks "to be sure" whether Bork would not reverse commerce clause decisions).

belief can influence a judge's decision and in some circumstances might be determinative. This is to say that any self-aware person could know, without regard to the particulars of a lawsuit, how she is going to vote in at least some cases. It is unimportant that the nominee's answer is made in an effort to gain confirmation, because an honest nominee would want his or her intentions to coincide with the preferences of both the President and the Senate. That is what makes the nomination appropriate to begin with.

Suppose the question is changed to this: "Will you commit here and now not to vote to reverse *Brown v. Board of Education*?" As others have suggested,²⁸ anyone who could not answer this question probably does not deserve to be a judge. It is not a significant distinction between the question about *Brown* and the question about *Roe* that *Brown* is "settled" law. The content of an answer about *Brown* can communicate predispositions with respect to those desegregation issues likely to be litigated.²⁹ Anyway, one reason for asking about a settled case is to ensure that it remains settled; the nominee's answer about *Brown* is in a sense more of a commitment than the answer about *Roe*, because the former is a commitment not even to hear a case. Both answers would be relevant to the Senate's inquiry because both cases are exceedingly important. Nominees can provide firm answers, not because the legal problems in either case are easy, but because both cases turn on basic issues of legal philosophy and personal morality. The Senate's job in the nomination process is to get such commitments, and the nominees' responsibility is to give the best present opinions that they can.

This does not mean that a nominee should make specific commitments with respect to any case or with respect to long "laundry lists" of potential cases. But this proviso does not rest on the need to protect the judicial process. The problem is not that "commitments" are being made. If it is a president's or a senator's task to use the nomination process to shape a Court that will not harm the country, a nominee's detailed set of commitments would seem better than a few commitments on major issues like desegregation or abortion. But the longer the list of cases on which the nominee is willing to take positions, the less plausible is the claim that the particulars of the facts or the argumentation should make no difference. Thus, willingness to make commitments on many cases (and hence on close cases) would not exactly be improper; it might, however, indicate reckless disregard for specifics. The problem is not separation of powers; the problem is an unjudicious nominee. A nominee trying to avoid this impression need not refuse to answer, but instead might simply resort to Rees's distinction and emphasize the tentative na-

²⁸ Cf. Friedman, *supra* note 1, at 94.

²⁹ That was why Senator Specter, for example, said he was asking about *Brandenburg v. Ohio*. See *Bork Hearings*, *supra* note 27, at 415.

ture of preliminary opinions. The less fundamental or the more numerous the issues, the more plausible the distinction.

In sum, the major modern limitation on the Senate's role—the rule that nominees should not answer questions about how they will vote on specific issues that might come before the Court—is a weak constraint. While it can be used as an excuse for avoiding controversial issues, as a conscientious position it should not prevent answers on a few major issues about which a nominee can properly have inflexible views; nor should it prevent answers on any number of minor issues if the nominee's response is framed carefully to maintain the distinction between opinions of a nominee and decisions of a Justice.

We are developing a norm of substantive, ideological Senate review of nominees to the Supreme Court because, as Charles Black saw almost twenty years ago, there is one very strong reason for active review—that is, the broad impact that the Court's performance has on public policy—and no strong reasons against it. In addition to Black, those who have endorsed the norm of active Senate participation represent a wide range of philosophies and include Bruce Ackerman, William Brennan, Robert Bork, Ronald Dworkin, Abe Fortas, John Harlan, Philip Kurland, Henry Monaghan, Grover Rees, William Rehnquist, and Laurence Tribe. It is now the conventional wisdom to view the appointment process as an appropriate occasion for the political culture to communicate its views on legal issues to the federal judiciary and thereby to shape the development of the law.³⁰ For so many to agree that politics should influence law, perhaps, is not surprising today. But given the realistic assumptions underlying the conventional wisdom, it is surprising that so much emphasis is placed on controlling the identity of the specific individuals appointed to the bench.

II.

The logic of the conventional wisdom seems straightforward. If it is a proper responsibility of politicians to influence the development of the law, then politicians should carefully screen individual nominees to maximize the chances that preferred values will be reflected in the Court's opinions. The assumption is that trying to predict judicial behavior will at least be more effective than the alternatives, which are usually assumed to amount only to some form of non-ideological review (or “rubber-stamping”). This is the innocent logic of purposeful behavior: why not at least try?

One answer is that in the area of judicial selection, as in so many

³⁰ Evidence for this proposition is collected in Rees, *supra* note 7, at 923-24. See also Ross, *supra* note 6, at 109. For a fairly typical articulation of the accepted realist position, see Lively, *The Supreme Court Appointment Process: In Search of Constitutional Roles and Responsibilities*, 59 S. CAL. L. REV. 551 (1986).

other areas, intentional behavior can backfire. Full Senate review will, for example, tend to legitimate the Supreme Court's decisions because the Justices, by definition, will have satisfied the Senate not only as to their general qualifications and character, but also as to their political values, judicial philosophy, and even their probable voting behavior. To the extent that senators are publicly identified with Justices, it might be more difficult for senators to engage in public criticism of later judicial decisions, to vote for either substantive or jurisdictional bills that cut against the Court's positions, or to consider the drastic remedy of impeachment. If the evident goal of the Senate's advice and consent function is to pick Justices who will make good decisions, bad judicial performance reflects poorly on senatorial skill and judgment. Moreover, to the extent that the Senate has taken public responsibility for the views of the Justices, political accountability is spread and thereby obscured. If the public disapproves of the work of the Rehnquist Court, it will not be sufficient to hold the President responsible at the polls; to the extent that the Senate's role is to shape the Court's performance, it will also be necessary to replace key senators, a more complex and unlikely eventuality.³¹ In short, the methods for achieving political influence over the shape of public law include post-appointment controls; it is at least possible that "rubber-stamping" nominees may be more compatible with some of these than is active screening during the appointment process.

Such risks become more serious to the extent that Senate review creates only an appearance of selectivity and control. Illusory screening would create indirect costs for other forms of political control without direct gains from accurate predications about judicial behavior. There are a number of reasons to expect more illusion than reality in the screening process.³² It is commonplace to note that even Presidents are frequently surprised by the behavior of their appointees. This seems inevitable. The role, viewpoint, associations, and institutional perspective of a Justice are drastically different than for any other job. There is probably no way even for a nominee to be sure how he or she will react to those unique circumstances. Presidents at least have the opportunity to search and select actively; the Senate, no matter how ambitious its announced objectives, can only reject. No one really knows how Robert Bork would have voted as a Justice, and it is certainly impossible to know how different Justice Kennedy will turn out to be than Bork might have been. In addition, even if thorough ideological screening could be successful, as Henry Monaghan has noted,³³ there are natural limits to public interest and senatorial energy. Although conscientious review can be expected to be consistently honored as a matter of rhetoric and form,

³¹ See Fein, *supra* note 10, at 674-75.

³² For some difficult and undramatic matters that would be relevant to serious inquiry, see *Bork Hearings*, *supra* note 27, at 1473-75 (testimony of Paul Bator).

³³ Monaghan, *supra* note 2, at 1209.

thorough screening has been and is likely to be episodic, so that actual influence over the Court's performance will be limited even under the most optimistic assumptions.

Nevertheless, as recent history demonstrates, the norm of ideological screening can be expected to produce an occasional event like the Bork hearings—hearings which represent the most effort and intellectual seriousness that can reasonably be expected. Bork had an unusually full record of intellectual writing and of public service, so that senators had a tempting amount of material from which to make predictions and judgments. The public could be interested in the process because it was plausible to believe that Bork might have significant impact on the Court's decisions and because some of his expressed views and public behavior had been controversial. And political efforts expended on the Bork hearings held the promise of a real payoff; that is, since Bork was closely identified with an Administration that was politically injured and at the end of its term, the classic conditions for rejection existed.³⁴

If the Bork hearings represent a high water mark for the modern norm, what do they tell us about the effectiveness of ideological screening for achieving political influence over the Court? An answer to this question depends on assumptions about the sorts of political considerations that should influence the development of public law. There is far less consensus about this than there is about the more general proposition that politics should shape law through the appointment process. It is usually thought that senators should give effect to high-toned reflections on law and public policy. Thus, Bruce Ackerman describes the Bork hearings "as a part of this ongoing project in self-government" under a Constitution which "provid[es] us with institutions and a language by which we may discriminate between the passing show of normal politics and the deeper movements in popular opinions which . . . ultimately *earn* a democratic place in the constitutional law . . ."³⁵ Stephen Carter criticizes the Bork hearings for emphasizing "whether a Bork appointment would further or hinder the articulated interests . . . of women, or of nonwhites, or of . . . Congress . . ."³⁶ He suggests that the hearings should have focused instead on "the fundamental aspirations and long-term interests of the American people."³⁷ Ronald Dworkin's description is different from Carter's, but his prescription is also high-minded. He says the hearings were "an extended seminar on the Constitution" and humbly urges that they represent a rejection of "crude historicism" and

³⁴ For efforts to identify factors that favor rejection, see Segal, *Senate Confirmation of Supreme Court Justices: Partisan and Institutional Politics*, 49 J. OF POL. 998 (1987); Tannenbaum, *Explaining Controversial Nominations: The Fortas Case Revisited*, 17 PRESIDENTIAL STUD. Q. 573 (1987).

³⁵ Ackerman, *supra* note 4, at 1178-79 (emphasis in original).

³⁶ Carter, *supra* note 10, at 1192.

³⁷ *Id.* at 1196.

an acceptance of "a jurisprudence . . . of principle."³⁸ And Laurence Tribe writes that the ideal is a "concerted, collective effort by the upper house of Congress to articulate a vision of the Constitution's future, and to scrutinize potential Justices in that vision's light . . ."³⁹

It is only to be expected that if the Senate is to understand its function as creating something so august as constitutional law, we should gravitate to the most familiar and reassuring model for guiding the Senate's deliberations. And that model, obviously, is judging. Thus, one paradoxical consequence of self-conscious commitment to political law-creation is the suppression of the political character of senatorial politics. Senators should act, we are told, like meta-Justices: since senators, by choosing the Justices who will develop the law, create the law indirectly, they should themselves make overarching determinations about the role of historicism in interpretation, the enduring values of the American people, and so on. In short, we are willing to tolerate political influence over the law during the process of appointment, but only if politicians adopt the perspective and the vocabulary of judges.

This gravitational pull of the legal culture was amply illustrated during the Bork hearings. Senators were praised in the press for their learned questions on textualism, judicial restraint, the place of stare decisis in constitutional law, and other matters of legal philosophy. There were elaborate debates about arcane legal doctrines, including the proper standard of review in gender discrimination cases—senators talking about tiers of scrutiny!—subtle variations in the clear and present danger test, and the inter-relationship between fifth amendment due process and fourteenth amendment equal protection. Senators' brows were furrowed about penumbras and the ninth amendment, about the containability of the category "political speech," and about the objectivity of the reasonable relationship test as compared to that of the rationality test.

The effects of legalizing political discourse are, given the realist assumptions that underlie the norm of active ideological review, mostly unfortunate. Because the focus is on legal philosophy and legal doctrine, nominees have a natural advantage if their views on these subjects are difficult to ascertain. The issue before the Senate is whether there is some reason for rejection—that is, whether a nominee has committed or will commit some intellectual offense. Thus, nominees who are forthcoming during the hearings or have established records on legal issues will be at risk more than those whose legal opinions are obscure, nonexistent, or withheld. One effect, then, of trying to predict judicial behavior is to favor nominees who are relatively unpredictable. The consequences are graphically illustrated by the meandering, and often astonishing, performance of the Burger Court.

³⁸ Dworkin, *From Bork to Kennedy*, XXXIV N.Y. REV. BOOKS 36, 38-40.

³⁹ L. TRIBE, *GOD SAVE THIS HONORABLE COURT* 131 (1985).

It is true, on the other hand, that although the Senate cannot be sure what direction it is giving the Court, ideological review does tend to keep those with expressed and unacceptable views off the bench. While this is negative influence over the development of the law, it is influence. However, the legalization of political discourse that accompanies ideological review means that the legal establishment is likely to control the exercise of this negative influence. Someone has to advise the senators on how to participate in judge-like conversations and on how to evaluate the nominees' answers. Who better than the elites of the practicing bar and the academy? Is Bork outside the mainstream of legal thought? Better ask those who make up the mainstream.⁴⁰ Hence, not only the general values but even specific pet theories of a few eminent professors—theories about the unenumerated rights of the ninth amendment or the breadth of the principle at stake in *Griswold*—can momentarily masquerade as deep political consensus. This professorial influence accounts for what seems in retrospect to be the dream-like quality to much of Bork's interrogation. Did senators really insist that constitutional text and framers' intent cannot serve as guides to interpretation and that a judge's fidelity to such materials would be inconsistent with a two-hundred year "tradition"?⁴¹ Did members of Congress actually welcome judicial readiness to negate legislative decisions and to invite such actions on the basis of the Justices' feelings about the "needs of the Nation" or the fact of an individual's existence?⁴² And did politicians repeatedly take positions that could be characterized as supporting judicial solicitude for such politically controversial causes as homosexuality, obscenity, and subversive speech?⁴³ All these lines of questioning did occur, and in the argumenta-

⁴⁰ Of course, the elites were not unanimous in these judgments about Bork; both his supporters and opponents in the Senate relied on the expressed opinions of legal academics and well-known practitioners. Most of the witnesses were law professors, including some who were also advising Committee members, and an astonishing 2,000 law teachers wrote to express their opposition to confirmation. *Bork Hearings, supra* note 27, at 1899.

⁴¹ See, e.g., *id.* at 259 (Senator Specter arguing that *Brown v. Board of Education* was "at very sharp variance with what the Framers had intended"), 578 (Specter arguing that the Court has a "consistent tradition" of protecting values rooted in conscience of the people rather than in specific language), 682 (Specter claiming a popular "consensus by the tradition of our Court" that judges should rule even though they had no law), and 683 (Specter arguing that "law does not depend on an understanding of original intent" and that original intent may be impossible to identify).

⁴² See, e.g., *id.* at 262 (Senator Specter's approval of *Bolling v. Sharpe* based on Justices' "feelings" about "the needs of the nation.") and 296 (Senator Biden arguing that right to privacy arises because humans exist).

⁴³ Regarding homosexuality, see *id.* at 88 (Senator Biden asking whether any legislative body can regulate sexual behavior of "a married couple, or anyone else"). See also *id.* at 124-25 (Bork linking right to privacy with protection of homosexual conduct and use of cocaine and asking Senator Kennedy, "Privacy to do what, Senator?"). As to obscenity, see *id.* at 256 (Senator Specter apparently criticizing Bork for having written that the first amendment does not reach pornography or obscenity). As to subversion, see *id.* at 412 (Senator Specter defending Holmes's statement that if proletarian dictatorship is "destined to be accepted by the dominant forces of the community . . . they should be given their chance and have their way.").

tive, intellectualized atmosphere of the hearings they did not seem to create political embarrassment for senators. But they do not exactly have those qualities of stolid common sense and moderation that we like to think characterize the general public's instincts. The questions certainly reflect views that are fashionable in academic circles. It is a sad irony that purposeful effort to democratize the Court should result in enhanced power for groups that already have disproportionate influence over the shape of the law.

Legalized discourse, of course, did not entirely replace normal politics during the Bork hearings. Although some of the tactics were rough and unfair, we must look to some of these unjudicious moments to see how political screening can be constructive. Two of the most troubling but also most useful parts of the hearings were the exchanges on *Griswold v. Connecticut*⁴⁴ and *Shelley v. Kraemer*,⁴⁵ cases that are routinely demolished in first-year law school classrooms. Bork's doubts about the rea-

⁴⁴ There were exchanges on *Griswold* throughout the hearings. In my opinion, early questioning on this case by Senator Biden put Bork on the defensive throughout much of the rest of the process. Biden began by asking whether Bork believed "that the government has as much right to control a married couple's decision about . . . a child . . . as . . . to control the public utility's right to pollute the air." *Id.* at 114. Bork replied that "where the Constitution does not speak—there is no provision . . . that applies to the case—then a judge may not say, I place a higher value upon a marital relationship than I do upon an economic freedom." *Id.* Biden again suggested that under Bork's view economic freedom "has no more or less constitutional protection than the right . . . to use . . . birth control . . ." *Id.* at 145. Bork retreated to criticizing how the Court in *Griswold* had derived the right. Biden tried to elicit Bork's opinion on whether a right to privacy exists in the Constitution, and Bork continued his attempt to confine the discussion to his criticism of the reasoning in *Griswold*. Biden, seemingly weary from the evasions, then asked:

Well, let me say it another way then . . . Does a state legislative body, or any legislative body, have a right to pass a law telling a married couple, or anyone else, that behind . . . their bedroom door . . . they can or cannot use birth control? Does the majority have the right to tell a couple that they cannot use birth control?

Id. at 116. To this admirably blunt question, Bork replied, "[t]here is always a rationality standard . . . All I have done was point out that the right to privacy, as defined or undefined by Justice Douglas, was a free-floating right that was not derived in a principled fashion from constitutional materials." *Id.* Against this vague and intellectualized answer, Biden counterposed Douglas's eloquent language about a "right of privacy older than the Bill of Rights. Marriage is a coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred. . . ." Bork replied that the quoted language was not "the rationale of the case [but only] rhetoric . . ." *Id.* at 86-89.

As a challenge to law students or scholars, Bork's claims about the parity—as a matter of legal authority—between privacy and economic freedom are powerful, but as an implicit expression of values they seemed cold. And Biden could certainly have assumed that their audience was more concerned with inferring the nominee's values than with assessing arguments. Similarly, Bork's emphasis on other defects in *Griswold*'s reasoning only publicized problems that are profoundly troubling to the legal mind but not to those whose predominate concern is that the police not enter their bedrooms. Douglas' language, which Bork formally endorsed (even as he denigrated its legal significance), was the most moving statement in all the confusing argumentation, and thus it was probably the most authoritative to the audience of nonlawyers.

⁴⁵ Bork's position on *Shelley* was a clear statement of the classic criticism first made by Herbert Wechsler. *Id.* at 85-86.

soning in these decisions did not put him outside the mainstream; intellectually, those doubts and arguments put him near the heart of the law's commitment to clarity, consistency, and principle. Nevertheless, Bork came away the loser on both subjects. Why did arguments, which seem strong in the nation's law school classrooms and in its legal journals, seem weak in the arena of politics?

The reason, obviously, is that what counts in political life is different from what counts in the legal culture. In politics, ideas and justifications matter less and they matter differently; consequently, interest in nuance and abstraction seems suspicious rather than admirable. The position on *Griswold* that seemed powerful had little to do with theories of interpretation or the ninth amendment. What was compelling was that people have come to expect some judicial protection of their sexual privacy and that they want such protection. The position on *Shelley* that seemed powerful had little to do with the legal mainstream's views on state action. What was compelling was that racially exclusionary covenants are no longer usual or expected, and that the interest of minority groups in integrated housing has gained wide acceptance and legitimacy. It seemed quirky, if not sinister, for a nominee to dwell on explanations in arenas where widespread perceptions of normalcy, intense desires, and strongly-felt interests are what count.

By exposing legal thinking to broader political values and forms of discourse, the Bork hearings provided a useful testing ground. While not a plebiscite or anything close to one, the tone and content of the hearings sent important messages about the acceptability of decisional outcomes and justificatory norms to the executive branch, to sitting judges, and to would-be judges. This sort of influence depends not on selection, but on communication. It is "advice." The desire to give advice is one reason senators want to confront nominees personally. As Senator Specter said after a mutually respectful exchange with Bork on the tradition of extra-textual interpretation in American jurisprudence:

But perhaps it is sufficient, Judge Bork, if you say that the argument is a powerful argument from strong tradition, because part of our process here . . .—this is the only time that anyone gets to talk to a potential Supreme Court nominee or to a Federal Judge

So if you are confirmed, we will never have a chance to talk to you again. [Bork replied,] "Well, you can talk to me, Senator; it may not be under these lights." [And Specter said,] "[I]t will not be under these lights, and it will not be quite this way."⁴⁶

Unfortunately, the legalization of discourse during the Bork hearings crowded out much of the politics, giving nonlegal standards only occasional and implicit force. Consider how little information was developed, in all those days of witnesses and questioning, on the actual effects of the Supreme Court's doctrines and decisions. A few representatives of

⁴⁶ *Id.* at 686.

law enforcement organizations spoke about crime and dangers to police officers,⁴⁷ and black politicians emphasized the importance of the changes that the Warren Court achieved in the South,⁴⁸ and economist Thomas Sowell offered an opinion about the effects of affirmative action.⁴⁹ On the other hand, an overwhelming proportion of the witnesses were law professors who spoke of philosophy and doctrine, and these subjects also dominated the senators' statements and questions.

There was virtually no interest in whether the performance of the Court in the last ten or twenty years has been good for the country or in how that performance might be improved. What have the federal courts done to public schooling? Have they in fact reduced discipline and sapped local involvement? How much racial integration has been achieved, and should numerical balance be given more or less priority in the years ahead? Have the Court's separation of powers decisions on matters such as the legislative veto turned out to be, as many at first feared, harmful to maintaining accountability over administrative agencies? Have the privacy decisions strengthened or undermined family life? How serious an impediment has the exclusionary rule been to effective law enforcement? Has extension of free speech protections in areas like campaign finance regulation and defamation been healthy or destructive for our system of free debate? Are there threats to our constitutional values to which the Court has attached too little importance? Have standing rules barred the adjudication of important claims? Are religious minorities being treated fairly in our schools and other public places? Such questions could not have been answered definitively; it would not have been possible even to begin to deal with all of them. But time would better have been spent on these kinds of questions than on the bottomless jurisprudential and doctrinal issues to which the senators devoted most of their resources. Given their extraordinary character, the Bork hearings could have been the occasion for a usefully concrete assessment of the work of the Court.

If the legal culture is properly concerned with ideas, the political culture is properly concerned with the consequences of ideas—with the everyday effects of abstractions on perception, aspiration, and self-interest. The Senate's pre-occupation with the decision whether to consent to Bork's nomination left little room for the development of the sort of information and overt pressure that could have amounted to important advice about whether and in what respects the Supreme Court should be changing direction.

⁴⁷ *Id.* at 642 (statement of John Bellizzi).

⁴⁸ *Id.* at 785 (statement of Barbara Jordan).

⁴⁹ *Id.* at 906-07, 914-17.

CONCLUSION

The Bork hearings were the most that can be hoped for from the modern norm of active Senate review. This norm is based on the assumption that politics should help shape the law. To the extent that the hearings required a judicial nominee to listen to and speak the language of politics, they provided limited but significant political influence over the Court. Unfortunately, this language was often excluded or submerged. The Bork hearings, therefore, certainly raise a serious doubt about whether, especially on more ordinary occasions, purposeful, self-conscious efforts to predict and control outcomes are consistent with the assumption that politics can bring something important to bear on public law through appointment decisions. The hearings were at their best when they created a political forum—a place where the answers that dominate in the legal culture were not fully satisfactory and where legal discourse seemed limited and sounded tinny. They were at their worst when senators tried to be judges, which they did as a natural result of their efforts to exert indirect control over doctrines and outcomes. Achieving appropriate democratic influence over the Supreme Court requires more concern with past performance and less with prediction, more self-assurance about politics and less pre-occupation with law.