

A Case for Circumscribed Judicial Evaluation in the Supreme Court Confirmation Process

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ABSTRACT

In today's highly contentious judicial confirmation process, the American Bar Association—hardly a disinterested party—takes it upon itself to evaluate the qualifications of federal judicial nominees. The Senate often relies heavily on these evaluations, despite anecdotal evidence and empirical research showing strong political bias.

In an effort to reduce partisan obstructionism and mischaracterization of judicial nominees' records, this Article proposes a change to the Senate's process for providing advice and consent to the President for the confirmation of Supreme Court justices. We begin by analyzing the original meaning of the advice and consent process envisioned by the Appointments Clause. Then, we look at the contemporary judicial appointment process. Finally, we propose the creation of a non-partisan special judicial council, which the Senate could utilize in much the same way it currently relies on the ABA's Standing Committee on the Federal Judiciary. This judicial council would provide the Senate with an objective, analytical report regarding a nominee's legal reasoning and writing, allowing senators to rely on information from experts in the qualifications of being a judge—judges themselves—rather than outsourcing that function to members of a trade organization who are themselves not experts on the qualifications in question and who face serious conflicts of interest based on their organization's political advocacy.

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INTRODUCTION

In recent decades, there has been a rise in the contentiousness and politicization of judicial confirmation proceedings, most notably those involving Supreme Court nominees.¹ Some scholars believe the starting point of this trend toward more politically-polarized proceedings was the nomination of Associate Justice Abe Fortas to replace then-Chief Justice Earl Warren as Chief Justice of the Supreme Court,² while other commentators posit there was a definitive shift in the politicization of the Supreme Court confirmation process after the Court's decision in *Brown v. Board of Education*.³ For example, Professor Stephen Carter argues that the *Brown* decision signaled the Court's role as a "national policy-maker."⁴ This oriented the public's mind to the perception that if a political party could stack the Court with like-minded justices, then the Supreme Court could become a catalyst for policy goals otherwise unachievable through the traditional legislative process.⁵ An increasingly common view of the Court as a policy-making body, rather than an interpretative body, changed the confirmation process:

[O]nce the Court signaled its willingness to be one of the engines of social change, the battleground shifted, both for those who wanted to make society different and for those who wanted to make sure it stayed the same. [It] is only since *Brown* that the Court has become a prize worth spending immense political capital to win.⁶

Carter rightfully expresses great concern about the increased emphasis on a nominee's personal ideology as a potential disqualifier in confirmation proceedings. In Carter's view—a view the authors here share—this shift in focus towards a nominee's individual policy preferences severely threatens judicial independence.⁷ Specifically, the shift turns judicial confirmation hearings into something akin to popular elections to pick Supreme Court justices "whose approaches to enforcing the counter-majoritarian values of the Constitution are most acceptable to the majority."⁸ Such an outcome would severely damage the independence of

1. See generally Russell Wheeler, *Selecting Federal Judges in an Era of Political Polarization*, 42 HUM. RTS. MAG. 3 (June 2, 2017), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2016-17-vol-42/vol-42-no-3/selecting-federal-judges-in-an-era-of-political-polarization/ [https://perma.cc/H9AW-CN5K].

2. E.g., Adam J. White, *Toward the Framers' Understanding of "Advice and Consent": A Historical and Textual Inquiry*, 29 HARV. J.L. & PUB. POL'Y 103, 104 (2005).

3. STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* (1994).

4. *Id.* at 205–06, 57 (referring to the dogged "desire to nudge [the Court's] power, that independent, mystical force, in one direction or another—or, better still, to give it a hard shove. Yielding to that splendid temptation, we have no choice but to ask the nominees questions that will help us predict their votes.").

5. See *id.* at 57.

6. *Id.* at 77.

7. See *id.* at 87.

8. See Michael J. Gerhardt, *The Confirmation Mystery*, 83 GEO. L.J. 395, 401 (1994).

the federal judiciary, and thus our constitutional system of government, which is premised on a separation of powers. For “if presidents and senators are encouraged to exercise the prerogative of appointing Supreme Court Justices who will do what the public wants, we can safely predict that the era of the Court as an important bulwark against majority tyranny will end.”⁹

Other significant landmarks on the road to an increasingly-politicized confirmation process include the controversial and heated battle over D.C. Circuit Judge Robert Bork’s Supreme Court nomination, as well as the previously-unprecedented media coverage surrounding the confirmation hearings for now-Associate Justice Clarence Thomas.¹⁰ Partisanship was further injected into the process during Bill Clinton’s presidency.¹¹ Rather than rejecting judicial nominees for lack of merit, perceived partisan leanings, or accused scandals, the then-existing Republican-led Senate either purposely belabored the confirmation process as a stalling tactic or refused to vote on nominees altogether.¹² As discussed in more detail below, various political parties have employed these tactics at different points in time.

This Article asks whether the current appointment process is consistent with the Senate’s “advice and consent” function as prescribed in the Constitution, and whether there is a better process that adheres to an originalist understanding of the constitutional provision. To this end, the Article conducts a textual analysis of the Appointments Clause’s advice and consent provision, employing canons of construction and examining secondary sources from the Founding Era. For an adherent to textualism and originalism,¹³ it is imperative to seek an objectively

9. CARTER, *supra* note 3, at 117.

10. White, *supra* note 2, at 104.

11. *See id.*

12. *See id.* For more about how the Republican and Democrat-led Senates adopted and utilized these political tactics during the Clinton and Bush presidencies, see *id.* at 105–07.

13. Constitutional Originalism has been described as “a theory, or a family of theories, that holds, roughly, that the original meaning of the constitutional language is both unchanging, and insofar as it is clear and determinate, almost invariably controlling.” Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753 (2015). There is, however, disagreement among self-proclaimed originalists about how originalism is applied, and to what extent it is controlling. For example, originalists disagree about (1) what historical phenomena fix constitutional meaning; (2) whether courts should ever decide cases involving constitutional law based on court precedents that deviate from the originalist meaning of a constitutional provision; and (3) if courts should never deviate from the originalist meaning of a constitutional provision, is the originalist meaning always sufficient to dictate the outcome of a case involving constitutional law, or does such meaning sometimes need to be supplemented by judge-created constitutional “construction.” *See, e.g.*, Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?*, 34 HARV. J.L. & PUB. POL’Y 5, 6–14 (2011). Despite these disagreements, it is nonetheless important to focus on the foundation of originalism—trying to discern the intent of the Founders when the Constitution was written. *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 339–65 (1996) (discussing Madison’s views on originalism). Justice Scalia has told audiences, “The Constitution that I interpret and apply is not living, but dead, or as I prefer to call it, enduring. It means, today, not what current society, much less the court, thinks it ought to mean, but what it meant when it was adopted.” *See* Nina Totenberg, *Supreme Court Justice Antonin Scalia was Known for his Dissents*, NPR (Feb. 15, 2016, 5:08 AM), <https://www.npr.org/2016/02/15/466783882/supreme-court-justice-antonin-scalia-was-known-for-his-acerbic-dissidents> [<https://perma.cc/WBX5-FYM3>].

accurate understanding of the Appointments Clause’s Advice and Consent Clause. In this quest, one should be ever cognizant of the late Justice Antonin Scalia’s instruction in *King v. Burwell*, that “sound interpretation requires paying attention to the whole law, not homing in on isolated words or even isolated sections. Context always matters. Let us not forget, however, why context matters: It is a tool for understanding the terms of the law, not an excuse for rewriting them.”¹⁴

Our analysis reveals that, while the Founding Fathers agreed on a macro-level meaning of the Appointments Clause, their micro-level interpretations regarding process and functionality varied widely: given this state of affairs, it is impossible to distill a single “correct” set of procedures for the appointment process.¹⁵ Nevertheless, our analysis provides a touchstone for discussion of whether the contemporary advice and consent process adheres faithfully to the Founders’ macro-level original intent. While the current process is consistent with the constitutional scheme, this Article argues that we should nonetheless consider whether there is a less partisan, more effective appointment process that comports with the Founders’ macro-level intent.

Ultimately, this Article proposes a change to the Senate’s process for providing “advice and consent” for the President’s nominees to the Supreme Court. The proposed change would not require a constitutional amendment to alter the Appointments Clause, but rather Congress would pass a law creating a special judicial council (“Judicial Council”), comprised of either the chief judges from all federal circuit courts, or a representative judge chosen from each circuit court by a majority vote of the judges within the circuit. The Judicial Council’s role would be similar to the informal role currently played by the lawyers on the American Bar Association (“ABA”) Standing Committee on the Federal Judiciary (“Standing Committee”), which provides the Senate with evaluations and recommendations on nominees based on factors including education, work experience, legal writing, temperament, and legal and jurisprudential views.¹⁶ But the Judicial Council would offer two significant improvements on the service the ABA currently provides.

First, the role of providing information and recommendations to the Senate would be carried out by non-partisan federal judges, whose role as neutral decision makers puts them in the best, most objective position to evaluate judicial nominees’ qualifications. Judges, unlike practicing lawyers, do not have clients whose interests may create the appearance of or actual conflicts of interest;¹⁷ moreover, they do not engage in political advocacy or lobbying efforts like the

14. *King v. Burwell*, 135 S. Ct. 2480, 2497 (2015) (Scalia, J., dissenting).

15. See *infra* Section I.

16. See *infra* Section III.

17. See *infra* Section III.A.

ABA does.¹⁸ The Judicial Council would provide a valuable information-gathering and analysis tool leading to better-informed, more expeditious decisions on a nominee's qualifications to serve on the Supreme Court.

Second, evaluations by judges experienced in neutral assessments of facts, rather than by practicing lawyers accustomed to advocacy, would enhance the value of the resulting evaluations to all senators, regardless of partisan interest. Unbiased evaluations of nominees' work product would help mitigate the partisan battles that all-too-often characterize the current judicial confirmation process and divert focus from the merits of a nominee's qualifications.¹⁹ As discussed below, mitigating partisanship in the confirmation process is consistent with the Framers' original intent, and thus is an appropriate goal for Congress to pursue in reforming this process.²⁰

I. THE APPOINTMENTS CLAUSE'S "ADVICE AND CONSENT" CLAUSE

We begin by analyzing the original meaning of Article II, Section 2, Clause 2, of the U.S. Constitution—the Advice and Consent Clause of the Appointments Clause. Because the advice and consent process is the vehicle by which not only our Supreme Court, but also all inferior Article III courts,²¹ are populated, this analysis carries profound implications. The composition of the federal judiciary affects whether courts will exercise restraint and apply the law or create policy change through judicial activism, which in turn directly impacts public trust in the courts. It also impacts the judiciary's vital counter-majoritarian role of checking the political branches—ensuring the constitutionality of laws and the lawfulness of governmental action.²²

As any good steward of the Constitution should do when discerning its meaning, we begin with the text.²³ After reviewing the two prevailing textualist readings of the Appointments Clause, we will proceed to analyze the early use of the phrase "advice and consent" in English statutes and colonial charters. Then, we will discuss the use of the term, and the process it was intended to connote, during the 1787 Constitutional Convention and the debates that ensued.

A. TWO TEXTUALIST READINGS OF THE APPOINTMENTS CLAUSE

The term "advice and consent" first appears in Article II, Section 2, Clause 2, referring to the Senate's involvement in signing and ratifying treaties. Specifically, Article II, Section 2, Clause 2 provides: "[The President] shall have power, by and with the advice and consent of the Senate, to make treaties,

18. See *infra* Section III.A.

19. See *infra* Section III.A.

20. See *infra* Section III.C.

21. See Diane S. Sykes, *Independence v. Accountability: Finding a Balance Amidst the Changing Politics of State-Court Judicial Selection*, 92 MARQUETTE L. REV. 341, 344 (2008).

22. See *Marbury v. Madison*, 1 Cranch 137 (1803) (establishing the system of judicial review).

23. See, e.g., *King v. St. Vincent's Hosp.*, 502 U.S. 215, 218 (1991).

provided two thirds of the Senators present concur.”²⁴ The term then appears again as Article II, Section 2 immediately proceeds to read:

and he [(the President)] shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law.²⁵

At first blush, the phrase “advice and consent” suggests two plausible meanings. The first reading envisions a two-stage process where “advice” and “consent” are distinct functions, one occurring prior to the other. This reading is supported by the canon against superfluity, under which “[w]e assume that Congress used two terms because it intended each term to have a particular, non-superfluous meaning.”²⁶ Under this reading, the Senate would provide “advice” before the “consent” stage of the process starts, with the “consent” portion of the process occurring after the President has announced a nominee.²⁷ Under this interpretation, all investigations and discussions that follow a formal nomination serve to inform senators’ decisions whether to support a nominee’s confirmation. As discussed below, this interpretation accords with pre-1787 state constitutions that mandated the legislatures or privy councils²⁸ provide advice to the executive for nominees, with the executive thereafter appointing judicial officers.²⁹

The second interpretation would treat “advice and consent” as a unitary phrase, rather than two distinct stages of a process. This reading does not provide for the order or timing of “advice” and “consent.” Advocates for this reading have noted that “advice and consent” “was often used as a single phrase in English and American eighteenth-century governance,” and that the text of both the

24. U.S. CONST. art. II, § 2, cl. 2 (emphasis added). The Appointments Clause and the Treaty Clause differ significantly from each other, *see, e.g.*, Hanah Metchis Volokh, *The Two Appointments Clause: Statutory Qualifications for Federal Officers*, 10 U. PENN. J. CONST. L. 745, 756 (2008). Therefore, apart from one historical episode illustrative of the First Congress’s understanding of the advice and consent provision in the Treaty Clause, *see infra* Section I.C.3, we do not analyze that provision in great detail.

25. U.S. CONST. art. II, § 2 (emphasis added) [hereinafter the Appointments Clause].

26. *See* Bailey v. United States, 516 U.S. 137, 146 (1995). With relation to the Treaty Clause and the canon against superfluities, Professor Raoul Berger argued that “[u]nless ‘advice’ is . . . understood [to refer to pre-negotiation consultation with the Senate], it is superfluous; it would have sufficed to require only Senate ‘consent’ for the ‘making’ of a treaty.” RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 123 (1974).

27. Alternatively, “advice” and “consent” could be separate duties that can be satisfied simultaneously. For example, the Senate could “advise” the President to carry out certain investigative steps of a nominee and conditionally “consent” dependent on the investigative steps being satisfied. For an analysis in the Treaty Clause context, *see* Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1167 (2000) (suggesting the Senate can “consent” to a prepared treaty and then “advise” the President on how to ratify it).

28. A “privy council” is a body that helps to advise the executive branch, or similar, of a state or nation. White, *supra* note 2, at 125–26.

29. *See infra* Section I.B.

Appointments Clause and the Treaty Clause suggest the Framers viewed the Senate's advice and consent role as involving a singular act.³⁰

B. PRE-CONSTITUTIONAL CONVENTION SOURCES OF INFLUENCE ON THE FRAMERS' "ADVICE AND CONSENT" INTENT

The phrase "advice and consent" in the Eighteenth Century carried various meanings depending upon the context. This is evident when comparing the English usage of the phrase to its usage in pre-1787 state constitutions.

1. 18TH CENTURY ENGLISH STATUTES

The phrase "advice and consent" routinely appeared in the enacting clauses of English statutes during the Seventeenth and Eighteenth Centuries. For example: "[B]e it enacted by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same . . ." ³¹ The inclusion of these advice and consent clauses indicates Parliament played a far more active role, often at the expense of the King's legislative power. By 1787, the British Parliament "dominated the legislative process" and the King's legislative function had dwindled to a quasi-veto power of "withholding his royal assent from parliamentary laws with which he disagreed."³² Thus, "advice and consent" in this context implies the full spectrum of legislative engagement, from a bill's origination, through debate and deliberation, all the way to its ultimate passage or failure. If the phrase's use in the Appointments Clause carries this meaning, it would suggest comprehensive—even dominant—Senate involvement in presidential appointments. In such a scenario, one might imagine the Senate canvassing potential nominees in the first instance and proposing names to the President for formal nomination, just as Parliament's advice and consent function had gradually expanded to include drafting and proposing legislation.³³

30. See Jean Galbraith, *Prospective Advice and Consent*, 37 YALE J. INT'L L. 247, 254–56 (2012) (citing Arthur Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined*, 5 SETON HALL L. REV. 527, 545 (1974)). For a similar approach to other constitutional provisions, see generally Samuel L. Bray, "Necessary and Proper" and "Cruel and Unusual": *Hendiadys in the Constitution*, 102 VA. L. REV. 687 (2016).

31. See Bestor, *supra* note 30, at 541; see, e.g., BERGER, *supra* note 26, at 122 n.23 (describing "[a]n early version, 3 Hen. V, 1 Stat. at Large 466 (1415), [which] states: 'Our Lord the King, at his Parliament . . . by the Advice and Assent of the Lords Spiritual and Temporal, and at the Request of the Commons . . . hath ordained and established divers Statutes and Ordinances.'").

32. See Howard R. Sklamborg, *The Meaning of "Advice and Consent": The Senate's Constitutional Role in Treaty-making*, 18 MICH. J. INT'L L. 445, 448 (1997) (citing 1 William Anson, *The Law and Custom of the Constitution* 300 (5th ed. 1922)); see also 1 WILLIAM BLACKSTONE, *COMMENTARIES* *49–51; WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* 20–30 (2d ed. 1872).

33. Although the Senate as a body does not perform this role, it is not uncommon for individual senators to play an active role in proposing, and advocating for (or against), judges in their home states. See, e.g., Brannon P. Denning, *The Judicial Confirmation Process and the Blue Slip*, 85 JUDICATURE 218, 221 (2002) (noting "home state senators are in the best position to evaluate a nominee and provide unique insights").

This historical context, however, should not be viewed in a vacuum. While the Framers drew from English legal principles and political forms, the debate surrounding the Constitution's drafting and ratification also largely reflects the perceived shortcomings of the English form of government.³⁴ Thus, it is important to consider other sources as well.

2. THE CONSTITUTIONS OF THE THIRTEEN COLONIES

While colonial legislatures played an important role in advising the colonial Executive at the time of the Constitutional Convention,³⁵ their power did not approach Parliament's in the English government, where the "Monarch fulfilled her limited role by granting her symbolic royal assent."³⁶ Six pre-1787 state constitutions specifically mentioned "advice and consent" in discussing the power to be shared between a legislative council and chief executive.³⁷

For example, South Carolina Constitution Article 35 provided: "the governor and commander-in-chief . . . , by and with the advice and consent of the privy council, may lay embargoes . . . for any time not exceeding thirty days, in the recess of the general assembly."³⁸ However, even South Carolina's use of "advice and consent" changed during the period leading up to the U.S. Constitution's ratification. As Professor Charles Thach has noted, "[t]he first South Carolina constitution provided that the council's advice need be asked only where the constitution expressly required it, but in [its] second [constitution] the matter was left entirely to legislative determination."³⁹ Maryland followed suit, adopting the latter approach.⁴⁰

As for the allotment of appointment power, many pre-1787 state constitutions "granted the appointment power to their legislatures, or to a council that the legislature appointed."⁴¹ For example, the Massachusetts Constitution—particularly relevant here because its pre-1787 state constitutional method of judicial nominee

34. See James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 HARV. L. REV. 1613, 1646 (2011) (noting that "the Framers felt free to depart from English structures; they not only distrusted the English, but also shared the heady notion that they were crafting a government that would assimilate and improve upon the wisdom of the ages").

35. See Bestor, *supra* note 30, at 643–44.

36. Sklamberg, *supra* note 32, at 461.

37. See Bestor, *supra* note 30, at 644–45. The six states were Delaware, Maryland, Massachusetts, New York, New Hampshire, and South Carolina. *Id.*

38. Sklamberg, *supra* note 32, at 449 n.15 (citing 6 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3255 (Francis Newton Thorpe ed., 1909)) (emphasis added); see also Bestor, *supra* note 30, at 646 n.435.

39. CHARLES C. THACH, JR., THE CREATION OF THE PRESIDENCY, 1775–1789, at 28 n.7 (1969).

40. *Id.*

41. *Nominations: A Historical Overview*, UNITED STATES SENATE, <https://www.senate.gov/artandhistory/history/common/briefing/Nominations.htm> [<https://perma.cc/Y7T2-A62Z>] (last visited Feb. 20, 2020).

selection and confirmation served as the model for the U.S. Constitution's Advice and Consent Clause⁴²—split the appointment power between the governor, who made nominations, and a legislative council, which confirmed (or not) the nominations.⁴³ By contrast, the governor only had to secure the advice, but not the consent, of the council before acting on other matters.⁴⁴

While these appointment councils varied in the power they exercised,⁴⁵ they shared several similarities. Executives generally took their councils' advice seriously—if not in substance, at least in form.⁴⁶ The majority of state constitutions required that these councils practice certain record-keeping procedures.⁴⁷ Further, the votes of each councilmember were recorded, and any resulting advice was produced in a written record.⁴⁸ The importance of these councils' influence is also implied by the frequent subordination of the executive to a strong legislature. Many state constitutions included strong checks on executive power,⁴⁹ with the Virginia legislature exerting so much power that then-Governor Edmund Randolph described himself as only “a member of the executive.”⁵⁰

This context suggests the Constitution's use of advice and consent does not limit the Senate to the role of a confirming body, but rather assigns the Senate some active role in the nomination process. Of course, pre-1787 sources provide only limited guidance, as the Founders consciously departed from the English system of government and the U.S. Constitution differed significantly from pre-1787 state constitutions.⁵¹

42. White, *supra* note 2, at 109.

43. See *The Senate and the United States Constitution*, UNITED STATES SENATE, https://www.senate.gov/artandhistory/history/common/briefing/Constitution_Senate.htm [<https://perma.cc/T6ES-7CFM>] (last visited Feb. 20, 2020).

44. MASS. CONST. pt. 2, ch. 2, § 1, art. V (to adjourn the General Court); *id.* pt. 2, ch. 2, § 1, art. VIII (to pardon offenses); *id.* pt. 2, ch. 2, § 1, art. X, cl. 4 (to appoint various military officers); *id.* pt. 2, ch. 2, § 1, art. X, cl. 7 (to appoint officers of the Continental Army); see also *In re Op. of the Justices to the Governor and Council*, 190 Mass. 616, 617–20 (1906).

45. See Thach, *supra* note 39.

46. See *id.*

47. See Bestor, *supra* note 30, at 646.

48. *Id.*

49. See Thach, *supra* note 39, at 28 (noting that the state constitutions “included almost every conceivable provision for reducing the executive to a position of complete subordination”).

50. *Id.* at 29 (quoting Letter from Edmund Randolph to George Washington (Nov. 24, 1786), available at <https://www.loc.gov/item/mgw435745/> [<https://perma.cc/W8TD-C64C>]). Admittedly, not all pre-1787 state governments had legislature-dominant constitutional schemes. Both Delaware and New Jersey provided that the governor could, but did not have to, summon councils of certain legislators for special advisory functions. *Id.* at 28 n.7. Likewise, New York had a very strong executive who enjoyed unilateral appointment power. *Id.* at 34–38.

51. See Pfander & Birk, *supra* note 34, at 1646.

C. THE CONSTITUTIONAL CONVENTION AND PRE-RATIFICATION DOCUMENTS

1. THE CONSTITUTIONAL CONVENTION

During the Philadelphia Constitutional Convention of 1787, delegates extensively debated the proper division of power among the three branches of government, as well as the way in which officeholders would be selected.⁵² However, relatively little of this debate concerned the judicial branch—especially the issue of appointments.⁵³ And from the discussion that did occur, there was no consensus on how judges should be chosen.⁵⁴ Most delegates looked to their prior experiences at the state level for guidance.⁵⁵ As described above,⁵⁶ most state constitutions “granted appreciable the appointment-related power to their legislatures, or to a council that the legislature appointed.”⁵⁷ Such practices were reflected in the Articles of Confederation, under which Congress—then a unicameral legislature—made all appointments “based on recommendations of the delegates from the state involved.”⁵⁸

There were two outspoken camps of Constitutional Convention delegates in the appointments debate—again with the dividing line being whether the executive or legislative branch should control the process.⁵⁹ The pro-legislative control camp was led by Charles Pinckney, George Mason, Roger Sherman, Luther Martin, John Rutledge, and Oliver Ellsworth.⁶⁰ The pro-executive control camp was led by Alexander Hamilton, Gouverneur Morris, Nathaniel Gorham, and James Wilson.⁶¹

Soon after the Convention began, Virginia Representative Edmund Randolph proposed a set of resolutions termed the “Virginia Plan.”⁶² The Virginia Plan only briefly discussed a judicial branch, calling for the establishment of a judiciary “to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature,” and initially did not provide for a method of judicial appointments.⁶³ When delegates discussed the plan in more detail on

52. See Matthew D. Marcotte, *Advice and Consent: A Historical Argument for Substantive Senatorial Involvement in Judicial Nominations*, 5 N.Y.U. J. LEGIS. & PUB. POL’Y 519, 527 (2002).

53. *Id.*

54. See *Nominations: A Historical Overview*, *supra* note 41.

55. *Id.*

56. See generally *supra* Section I.B.2.

57. *Nominations: A Historical Overview*, *supra* note 41.

58. *Id.*

59. White, *supra* note 2, at 110–11.

60. *Id.*

61. *Id.*

62. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20–23 (Max Farrand ed., rev’d ed. 1966) [hereinafter CONVENTION RECORDS].

63. *Id.* at 21.

June 1, 1787, the delegates voted nine-to-zero in favor of a proposal vesting the appointment power in the Executive.⁶⁴

Debate on this issue continued on June 5, 1787 in the Committee of the Whole—this time with significantly more disagreement on the issue.⁶⁵ Pennsylvania Representative James Wilson supported centralizing the judicial appointment power in the Executive.⁶⁶ He feared that the Legislature’s handling of the process would encourage partisan behavior and result in “[i]ntrigue, partiality, and concealment.”⁶⁷ On the flipside, South Carolina Representative John Rutledge opposed giving unilateral judicial appointment power to the Executive,⁶⁸ arguing that doing so would make “[t]he people . . . think we are leaning too much towards Monarchy.”⁶⁹

Benjamin Franklin and James Madison, representing Pennsylvania and Virginia respectively, took middle-of-the-road approaches.⁷⁰ Both were unsatisfied with providing either the Legislature or the Executive with unilateral judicial appointment power.⁷¹ Franklin suggested that judges be chosen by lawyers—something not afforded substantial consideration.⁷² Madison, whose views sparked considerably more discussion, hesitated to entrust the power to the legislative branch, fearing legislators “were not [good] judges of the requisite qualifications” for federal judges.⁷³ But he equally feared unilateral executive control of the appointment power.⁷⁴ So Madison sought a compromise: he proposed dividing the power between the Executive and the Senate.⁷⁵

Realizing that the topic warranted further discussion, Madison moved to strike the words “appointment by the Legislature” from his originally-proposed language, replacing it with “a blank left to be hereafter filled on maturer reflection.”⁷⁶ While this motion passed by a vote of nine to two, the obvious discord among representatives was not over, with South Carolina Representative Charles

64. *Id.* at 63, 67. Connecticut’s delegates could not decide how to vote, and thus abstained. *Id.* at 67.

65. *Id.* at 119.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 119–20.

71. *See id.* at 119.

72. *Id.* at 119–20. Franklin, playing his usual role of entertainer, relayed that in a lawyer-focused appointment system—something embraced by the Scottish—lawyers would select the best among them for a judgeship “in order to get rid of him, and share his practice among themselves.” *Id.* at 120. As Madison described it, some of the 81-year-old Franklin’s more eccentric proposals at the Convention were “treated with great respect, but rather for the author of [them], than from any apparent conviction of [their] expediency or practicability.” *Id.* at 85.

73. *Id.* at 120.

74. *Id.*

75. *Id.* at 119.

76. *Id.*

Pinckney stating his intent to restore the previous language when given the opportunity.⁷⁷

As with other hotly-contested issues at the Convention, the appointment process question was assigned to a special committee.⁷⁸ This committee debated the issue for several days, and numerous alternative plans were put forward, including two executive-dominated proposals from William Paterson of New Jersey and from Alexander Hamilton.⁷⁹ Paterson suggested the President be selected by a unicameral legislature, and the President would then have plenary power to appoint judges.⁸⁰ In response to Paterson's plan, Hamilton proposed the Executive's role in nominating judges be "subject to the approbation or rejection of the Senate."⁸¹ Hamilton's language is significant, as it is the first identifiable instance of language approaching what would become the Advice and Consent Clause.⁸²

When the delegates revisited the issue on June 19, 1787, Massachusetts Representative Nathaniel Gorham advocated for a system where "Judges be appointed by the Execu[tive] with the advice & consent of the 2d branch [(the Senate)]."⁸³ Gorham noted that his suggestion was based on the "mode prescribed by the constitution of Mas[sachusetts]," where the arrangement "had been long practised . . . & was found to answer perfectly well."⁸⁴ He further argued that whereas appointment by the Senate would invite bias toward home-state nominees, the chief executive would be "careful to look through all the states for proper characters."⁸⁵

Gorham's proposal apparently gained traction, and New Jersey Representative David Brearley, chair of the Committee on Compromise, proposed the following language:

The President by and with the advice and Consent of the Senate, shall have power to make Treaties; and he shall nominate and by and with the advice and consent of the Senate shall appoint ambassadors, and other public Ministers, Judges of the Supreme Court, and all other Officers of the U-S-, whose appointments are not otherwise herein provided for.⁸⁶

The language provided a compromise between the Executive and Legislative branches with regard to the selection of judges and other principal officers. The President would have the power of appointment, which the Senate would check

77. *Id.* at 121.

78. *See id.*

79. *Id.*

80. *Id.* at 244.

81. *Id.* at 292.

82. *See generally id.*

83. 2 CONVENTION RECORDS, *supra* note 62, at 41.

84. *Id.*

85. *Id.* at 42.

86. *Id.* at 498–99.

through its advice and confirmation powers. Representative Pinckney renewed his objections to the amended language when it was submitted to the Convention, thereafter moving to amend the language to return the advice and consent power to both houses of the legislature.⁸⁷

Not surprisingly, Madison renewed his objections to Representative Pinckney's proposed system—reflecting Madison's view that the House of Representatives was far more susceptible to improper forms of influence.⁸⁸ Madison's arguments won the day, and Pinckney withdrew his motion calling for the House's inclusion in the appointment process.⁸⁹ This proposal apparently alleviated the representatives' earlier concerns, as the special committee's recommendation generated little subsequent debate and was thereafter adopted unanimously.⁹⁰

2. THE FEDERALIST PAPERS

The most salient public discussions of this issue are contained in the *Federalist Papers*.⁹¹ *Federalist Papers Nos. 66, 76, 77, and 78* discuss the judicial selection and appointment process. When read together, these documents support the view that several of the most prominent and influential Founding Fathers viewed the Senate as having a limited role in the advice and consent process.⁹² In particular, in *Federalist 66*, Hamilton noted:

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 he may have made.⁹³

Hamilton goes on to note in *Federalist 76* that while the President's nominee “may be overruled . . . it is also not very probable that his nomination would often be overruled.”⁹⁴ The clear statement that the Senate's rejection of the President's nominee would be an irregular occurrence supports the view that the Senate should generally accept the President's nominees—in line with the view

87. 1 CONVENTION RECORDS, *supra* note 62, at 230–32.

88. *Id.* at 232–33.

89. *Id.*

90. 2 CONVENTION RECORDS, *supra* note 62, at 539. This same language would go on to be adopted by the Constitutional Convention with the signing of the Constitution. *Id.* at 659–67.

91. See Lana Ulrich, *On This Day: The First Federalist Paper is Published*, NATIONAL CONSTITUTION CENTER (Oct. 27, 2018), <https://constitutioncenter.org/blog/on-this-day-the-federalist-papers-are-published> [<https://perma.cc/Y8DV-B87Y>].

92. See THE FEDERALIST NO. 65 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

93. THE FEDERALIST NO. 66 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

94. THE FEDERALIST NO. 76 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

advanced that there is a type of presumption of confirmation.⁹⁵ However, as other scholars on this topic have noted, Hamilton's defense of the Advice and Consent Clause is probably less a reflection of the majority of the delegates' views on the subject, and more a reflection of Hamilton's personal views on the proposal he put forth during the Convention.⁹⁶ This argument is supported by the fact that Hamilton was absent from the Convention July 18–21, 1787—during which Representative Gorham's advice and consent proposal was put forth and discussed.⁹⁷

On a related note, in *Federalist 64*, John Jay addressed “The Power of the Senate.”⁹⁸ While he did not address the Appointments Clause, he did discuss the Treaty Clause, which contains the Constitution's other advice and consent clause.⁹⁹ Jay interpreted the Treaty Clause's use of “advice and consent” as empowering the President to decide if and when he wanted to seek such advice and consent from the Senate.¹⁰⁰ This view contrasted with that of several Founding Fathers, who viewed the Senate as having a more active role in the treaty process.¹⁰¹

3. THE YOUNG REPUBLIC SOURCES OF UNDERSTANDING

President Washington apparently had a hybrid understanding in which pre-nomination Senate advice is allowable but not mandatory.¹⁰² In making his selections for the federal bench, Washington sought advice from close advisers and various members of Congress.¹⁰³ Despite this, Washington was steadfast in his belief that the President alone was responsible for the final nomination, and that the Senate's role of providing advice was to approve the President's nomination.¹⁰⁴ This, of course, contrasted sharply with several of the prevailing state systems, which required the governor to seek his council's advice before making a nomination.¹⁰⁵ Further, as discussed below, it is likely that Washington, as well as his Vice President John Adams, expected advice and consent would be given contemporaneously and expeditiously.

95. See generally Michael J. Gerhardt, *Toward A Comprehensive Understanding of the Federal Appointments Process*, 21 HARV. J.L. & PUB. POL'Y 467, 479–81 (1998).

96. White, *supra* note 2, at 128.

97. See RON CHERNOW, ALEXANDER HAMILTON 235, 238 (2004).

98. THE FEDERALIST NO. 64 (John Jay) (Jacob E. Cooke ed., 1961).

99. *Id.*

100. *See id.*

101. *See id.*

102. *Nominations: A Historical Overview*, *supra* note 41 (“In selecting nominees, Washington turned to his closest advisers and to members of Congress, but the president resolutely insisted that he alone would be responsible for the final selection. He shared a common view that the Senate's constitutionally mandated ‘advice’ was to come after the nomination was made.”).

103. *Id.*

104. *Id.*

105. *See supra* Section II.B.2.

One of the earliest and most illustrative instances of a President seeking the Senate's advice and consent came in President George Washington's August 21, 1789 request for the Senate's advice on a proposed Indian treaty.¹⁰⁶ This interaction is unusually well-documented, thanks in part to Senator William Maclay of Pennsylvania, who narrated the event in his personal journal.¹⁰⁷ Senator Maclay noted that when President Washington entered the Senate chamber, he commanded the delegation's attention and informed them that he had "called on [the Senate] for [its] advice and consent to some propositions respecting the treaty to be held with the Southern Indians."¹⁰⁸ President Washington proceeded to read the entirety of the proposed treaty twice, after which Vice President John Adams questioned the full chamber of senators: "Do you advice and consent[?]"¹⁰⁹ To this, Senator Maclay recalls there was a "dead pause," followed by Senator Maclay asking for the proposed treaty to be further examined so the senators could "inform [themselves] as well as possible on the subject."¹¹⁰ It appears the senators were troubled by what Senator Maclay characterized as President Washington's attempt to "over awe the timid and neutral part of the Senate."¹¹¹ Senator Maclay led the Senate's response, asking President Washington to leave the draft terms of the treaty for the Senate to analyze and discuss.¹¹² The Senate would then send President Washington their answer.¹¹³

Apparently President Washington did not take kindly to Senator Maclay's request, as Senator Maclay noted that President Washington "wore an aspect of stern displeasure."¹¹⁴ Without any further prompting, Pennsylvania Senator Robert Morris requested that the proposed treaty "be referred to a committee of five."¹¹⁵ To this, South Carolina Senator Pierce Butler objected, "Committees [are] an improper mode of doing business," as they "thr[o]w business out of the hands of the many [, and] into the hands of the few."¹¹⁶ A rebuttal by Senator Maclay ensued, where he defended the utilization of committees generally, and

106. Galbraith, *supra* note 30, at 256.

107. See generally WILLIAM MACLAY, THE JOURNAL OF WILLIAM MACLAY (1890). Other sources have confirmed the general details of this interaction between President Washington and the Senate. See S. JOURNAL, 1st Cong., 1st Sess. 2021 (1789) (describing President Washington as going to the Senate "for their advice and consent" with regard to negotiating a treaty with the Creek Indians).

108. MACLAY, *supra* note 107, at 128.

109. *Id.* at 129.

110. *Id.*

111. William Maclay, THE DIARY OF WILLIAM MACLAY AND OTHER NOTES ON SENATE DEBATES (1789-1791), reprinted in 9 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 130 (Charlene Bangs Bickford et al. eds., 1992).

112. R.B. Bernstein, *The Constitution as an Exploding Cigar and Other "Historian's Heresies" About A Constitutional Orthodoxy*, 55 N.Y.L. SCH. L. REV. 1073, 1087 (2011).

113. MACLAY, *supra* note 107, at 129.

114. *Id.*

115. *Id.* at 130.

116. *Id.*

further suggested that a vote on the proposed treaty be shelved until the following Monday, despite the “possible inconvenience” the postponement would create.¹¹⁷

This suggestion by Senator Maclay seems to have triggered such great frustration in the usually stoic and reserved President Washington as to cause him to “start[] up in a violet fret.”¹¹⁸ As if the General’s physical cues were not enough to indicate his anger with the situation, Senator Maclay’s journal entry relates Washington’s verbal displeasure: “*This defeats every purpose of my coming here.*”¹¹⁹ President Washington’s anger was most likely augmented by the fact that he had requested Secretary of War Henry Knox to accompany the President to the Senate, so Secretary Knox could provide the senators with “every necessary information” for the senators to make an adequately informed decision regarding the treaty.¹²⁰

President Washington “cooled [down] . . . by degrees,” reverted to his composed self, and withheld a formal objection to a vote on the proposed treaty being postponed until the following Monday.¹²¹ President Washington did note, however, that he did not see the assignment of the treaty’s analysis to a committee as necessary¹²²—thereafter taking leave of the chamber with a “discontented air” that Senator Maclay described as “sullen dignity.”¹²³

The following Monday, President Washington again visited the reconvened Senate, donning “a different aspect” from his visit the week before.¹²⁴ This time the proposed treaty inspired a “tedious debate” and senators made numerous modifications.¹²⁵ But finally, the Senate provided its advice and consent.¹²⁶ As Senator Maclay’s journal indicates, the Senate’s advice and consent “closed the business [of the treaty]. The President of the United States withdrew, and the Senate adjourned.”¹²⁷

Multiple accounts quoted President Washington as stating “he would be damned if he ever went there [(the Senate)] again.”¹²⁸ Although the episode concerns advice and consent in the context of treaty ratification, its insight into the role of this separation-of-powers mechanism is relevant to judicial nominations. President Washington’s interaction with the Senate indicates his belief that advice and consent be given contemporaneously, in an expeditious manner, and

117. *Id.* at 131.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* (“Declar[ing] he did not understand the matter of commitment [to a committee].”)

123. *Id.*

124. *Id.*

125. *Id.* at 132.

126. *Id.*

127. *Id.*

128. RALSTON HAYDEN, *THE SENATE AND TREATIES 1789-1817: THE DEVELOPMENT OF THE TREATY-MAKING FUNCTIONS OF THE UNITED STATES SENATE DURING THEIR FORMATIVE PERIOD* 23 n.4 (1920) (citing John Quincy Adams); *see also id.* at 23 (citing Senator William Maclay’s diary).

in response to the President's initial decision on the matter in question—here a proposed treaty, but in the case of the Appointments Clause, judicial and other principal officer nominees. But the above episode shows Washington's view of the process did not prevail in the First Congress: although Washington fully expected the Senate to promptly affirm his decision, the Senate insisted on playing a more active role in the decision-making process. This further illustrates the dominance, even very early on, of the view that the Senate should play a meaningful advisory role in the appointment process.

II. TODAY'S STATE OF AFFAIRS

A. THE CURRENT APPOINTMENT PROCESS

The current appointment process generally goes as follows:¹²⁹ when a President wants to fill an Article III judicial vacancy, the President will usually, but not always, informally consult with individuals and entities ranging from Senators and party leaders¹³⁰ to legal think-tanks and organizations.¹³¹ The President then formally nominates a person to fill a vacancy.¹³² At this point, the Senate Judiciary Committee carries out three distinct stages of the advice and consent process: (1) a pre-hearing investigation, (2) public hearings, and (3) a

129. To be sure, this does not describe the process for recess appointments. See BARRY J. McMILLION & DENIS STEVEN RUTKUS, SUPREME COURT NOMINATIONS, 1789 TO 2017: ACTIONS BY THE SENATE, THE JUDICIARY COMMITTEE, AND THE PRESIDENT, CONGRESSIONAL RESEARCH SERVICE 1 (July 6, 2018), available at <https://fas.org/sgp/crs/misc/RL33225.pdf> [<https://perma.cc/5DEJ-DGNM>]. When the recess appointment power is invoked, the recess appointee does not serve on the bench for life, but rather until the end of the Senate's next session. *Id.* A Supreme Court recess appointment has not occurred since the 1950s. *Id.* The likelihood of a recess appointment is even slimmer after the Supreme Court's decision in *N.L.R.B. v. Noel Canning*, 573 U.S. 513 (2014) (holding that a pro forma session does not create a recess long enough to trigger the Recess Appointments Clause and that while the term "recess" refers to both inter- and intra-session recesses, the recess clause's legislative history indicates that the term "recess" should be presumed to mean a recess of substantial length—with a ten-day break being the appropriate lower limit to place on the exercise of the Clause). Therefore, this Article does not address recess appointments at length.

130. These individuals often include members of the Senate Judiciary Committee and party leaders. See JOHN FERLING, THE SENATE AND FEDERAL JUDGES: THE INTENT OF THE FOUNDING FATHERS, CAPITOL STUDIES 66 (Winter 1974); see also GEORGE L. WATSON & JOHN A. STOOKEY, SHAPING AMERICA: THE POLITICS OF SUPREME COURT APPOINTMENTS 78 (1995) ("To a certain extent, presidents have always looked to the Senate for recommendations and subsequently relied on a nominee's backers there to help move the nomination through the Senate."); see, e.g., Gwen Ifill, *President is Said to Pick Babbitt for Court Despite Senate Concern*, N.Y. TIMES, May 11, 1994, at A17 (reporting that during President Clinton's search for a successor to retiring Justice Harry A. Blackmun, President Clinton, after holding his potential nominees "close to the vest" for more than a month, "began for the first time to consult with leading senators about his top candidates for the Court seat and solicited advice about prospects for easy confirmation.").

131. See Jason Zengerle, *How the Trump Administration is Remaking the Courts*, N.Y. TIMES MAGAZINE (Aug. 22, 2018), <https://www.nytimes.com/2018/08/22/magazine/trump-remaking-courts-judiciary.html> [<https://perma.cc/8GZZ-RWA7>] (discussing how President Donald Trump and White House Counsel Donald McGahn have relied on the advice of the Federalist Society for Law and Public Policy Studies and The Heritage Foundation when selecting nominees for federal courts vacancies).

132. McMILLION & RUTKUS, *supra* note 129, at 1.

vote to determine what recommendation the Senate Judiciary Committee will provide to the Senate.¹³³

The pre-hearing investigation starts as soon as the President announces a nominee, and consists of, among other steps, examination of a nominee's legal qualifications, judicial record (if any), criminal records, judicial temperament, and previous political activity.¹³⁴ Next, the Senate conducts public hearings, during which the nominee is usually subjected to a range of legal, political, and social questions.¹³⁵ These public hearings are usually justified as providing information to undecided Senators that may sway their votes.¹³⁶ Some commentators have characterized the hearing process as a "line of questioning designed to probe the validity of [Senators'] initial favorable predisposition[s]."¹³⁷

After public hearings conclude, the Senate Judiciary Committee reconvenes to determine what recommendation it will report to the Senate as a whole.¹³⁸ The three recommendation options are: (1) favorably, (2) negatively, or (3) no recommendation at all.¹³⁹ While it has become expected that a nominee will first be voted out of the Judiciary Committee with a "favorable" recommendation before proceeding to the Senate floor for a vote, this is not a constitutional necessity—a nominee may proceed to the full Senate for a vote regardless of the Judiciary Committee's recommendation.¹⁴⁰

Next, the nomination reaches the Senate for debate and a confirmation vote.¹⁴¹ The "debate" may range from no debate and a swift vote to heated, drawn-out discussions.¹⁴² In times of heightened political partisanship, Senate "debate" may take the form of stalling tactics or a series of pre-planned speeches to ensure that a Senator's constituency knows the Senator either tried to support or oppose the

133. See generally BARRY J. McMILLION, SUPREME COURT APPOINTMENT PROCESS: CONSIDERATION BY THE SENATE JUDICIARY COMMITTEE, CONGRESSIONAL RESEARCH SERVICE (Aug. 14, 2018), available at <https://fas.org/sgp/crs/misc/R44236.pdf> [<https://perma.cc/YM76-T5GG>]; see also *Nominations & Confirmation Process*, GEORGETOWN LAW LIBRARY, <https://guides.ll.georgetown.edu/c.php?g=365722&p=2471070> [<https://perma.cc/TC6D-4NLL>]. For additional rules governing the Senate Judiciary Committee's operations, see *Rules of Procedure United States Senate Committee on the Judiciary*, COMMITTEE ON THE JUDICIARY, <https://www.judiciary.senate.gov/about/rules> [<https://perma.cc/7N8Q-MA3L>] (last visited Feb. 18, 2020).

134. See *Nominations & Confirmation Process*, *supra* note 133.

135. *Id.*

136. McMILLION, *supra* note 133, at 13–14.

137. James A. Thorpe, *The Appearance of Supreme Court Nominees Before the Senate Judiciary Committee*, 18 J. PUB. L. 371, 380–85 (1969); see also GEORGE L. WATSON & JOHN A. STOOKEY, *SHAPING AMERICA; THE POLITICS OF SUPREME COURT APPOINTMENTS* 150 (1995).

138. McMILLION, *supra* note 133, at 17.

139. *Id.*

140. *Id.* That said, the Senate usually votes in line with the Committee's recommendation, making a "favorable" recommendation from the Committee very important. *Id.* The Judiciary Committee has only provided a negative recommendation of a Supreme Court nominee seven times since the Committee was created in 1816. *Id.* at 19.

141. *Nominations & Confirmation Process*, *supra* note 133.

142. See Olivia B. Waxman, *Supreme Court Confirmation Hearings Weren't Always Such a Spectacle. There's a Reason That Changed*, TIME (Sept. 6, 2018), <http://time.com/5382104/brett-kavanaugh-supreme-court-confirmation-hearing-history/> [<https://perma.cc/D5P9-6JCQ>].

judicial nominee in question.¹⁴³ And to an extent unseen during the last two decades, during the Trump Administration, the Senate minority, Democrats, are using the Senate's "debate" period as a political party stalling tactic.¹⁴⁴

There are, however, Senate rules that can be utilized to shorten the time of discussion.¹⁴⁵ Until 2017, Senate rules provided for unlimited debate, known as filibustering.¹⁴⁶ To end debate under the unlimited debate system, a vote of three-fifths of the Senate was required—known as a cloture vote.¹⁴⁷ However, in April 2017, the Senate amended these rules, to lower the requisite votes needed for cloture on Supreme Court nominations from sixty to fifty-one.¹⁴⁸ Some saw this procedural amendment as a partisan counterpunch by Republicans to defeat Democrat partisan efforts to obstruct President Donald Trump's nominees.¹⁴⁹ While invoking cloture speeds up the process (as compared to a long, drawn out filibuster), it still allows the minority party to significantly slow down the confirmation process. Delays have been an appreciable occurrence during President Trump's first presidential term. For example, from the date President Trump took office on January 20, 2017, to September 11, 2018, the Senate minority Democrats used the cloture rule¹⁵⁰ "to force at least 30 hours of debate on 112 nominees," slowing down more nominees "than Trump's four immediate predecessors combined."¹⁵¹ On April 3,

143. See, e.g., L. Marvin Overby et al., *Courting Constituents? An Analysis of the Senate Confirmation Vote on Justice Clarence Thomas*, 86 AM. POL. SCI. REV. 997, 1000–01 (1992).

144. Fred Lucas, *Trump Fumes Over Senate Democrats' Stalling Tactics on Nominees*, THE DAILY SIGNAL (Sept. 11, 2018), <https://www.dailysignal.com/2018/09/11/trump-fumes-over-senate-democrats-stalling-tactics-on-nominees/> [<https://perma.cc/WT6B-UDBT>].

145. *Nominations & Confirmation Process*, *supra* note 133.

146. *Id.*

147. *Id.*

148. *Id.*

149. See, e.g., Matt Flegenheimer, *Senate Republicans Deploy 'Nuclear Option' to Clear Path for Gorsuch*, N.Y. TIMES (Apr. 6, 2017), <https://www.nytimes.com/2017/04/06/us/politics/neil-gorsuch-supreme-court-senate.html> [<https://perma.cc/Q59C-6BZD>]. Democrats accused Senator McConnell of blatant partisanship for employing tactics like this to hasten President Trump's confirmations less than two years after a Republican Senate refused to consider Judge Merrick B. Garland, whom President Obama had nominated for the Supreme Court. *Id.*

150. The Senate's cloture rule is the only formal Senate procedure by which a filibuster—an attempt to delay Senate action on a matter by continuous debate—can be broken. *History Briefing: Filibuster and Cloture*, U.S. SENATE, https://www.senate.gov/reference/reference_index_subjects/Cloture_vrd.htm [<https://perma.cc/LQ6R-VP3C>]. While Democrats compose the Senate minority during President Trump's first term, they nonetheless can utilize procedural rules like the cloture rules to significantly slow the confirmation of nominees, the passage of bills, and approval of other matters. See *id.* Traditionally, the cloture rules allowed the minority party to force thirty hours of debate for each nominee. *Id.* However, newly proposed rules, which are expected to be adopted by the Senate majority Republicans, would limit debate to two hours per nominee. Thomas Jipping, *How Republicans Are Battling Judicial Obstructionism Today*, THE HILL (Apr. 9, 2019, 1:00 PM), <https://thehill.com/opinion/judiciary/438029-how-republicans-are-battling-judicial-obstructionism-today> [<https://perma.cc/VP98-BNHK>].

151. Lucas, *supra* note 144. Another dynamic may provide a non-partisan explanation for at least some of these delays: President Trump "has had unprecedented early turnover in his Cabinet," necessitating more high-level nominations. *Id.* Because "[t]he Senate prioritizes filling the top spots," Max Stier, president of the Partnership for Public Service, argues that this situation "further stall[ed] confirmations for lower-level nominees." *Id.*

2019, however, the Senate's Republican majority voted to decrease the time for formal debate from thirty hours to two hours, circumventing much of the procedural gridlock that had previously stalled many of President Trump's nominations.¹⁵²

B. CONTEMPORARY COMMENTATORS' VIEWS ON THE CURRENT PROCESS

Given the lack of specificity of the Appointments Clause and general dearth of constitutional instruction on a required procedure, it is not surprising that the appointment process has changed over time.¹⁵³ In fact, for most of the nation's history, hearings for judicial nominees were rare.¹⁵⁴ Prior to Justice Hugo Black's confirmation, and subsequent discovery that he was a member of the Ku Klux Klan, only a controversial nominee warranted a hearing,¹⁵⁵ and when a hearing occurred, it often took place "behind closed doors and only outside witnesses would testify."¹⁵⁶ This contrasts sharply with the nationally-televised hearings that are now commonplace.

The Appointments Clause has also generated considerable academic debate.¹⁵⁷ Some commentators emphasize the Senate's duty of providing "advice," and analyze what fulfilling that duty looks like.¹⁵⁸ Others characterize the Senate's advice-providing role as more passive and limited, focusing on the Senate's responsibility to decide whether to provide "consent" in the form of a confirmation vote.¹⁵⁹ While yet other scholars and commentators have addressed the advice and consent process by focusing on issues that include whether (1) judicial

152. Paul Kane, *Republicans Change Senate Rules to Speed Nominations as Leaders Trade Charges of Hypocrisy*, WASH. POST (Apr. 3, 2019), https://www.washingtonpost.com/politics/republicans-change-senate-rules-to-speed-nominations-as-leaders-trade-charges-of-hypocrisy/2019/04/03/86ec635a-5615-11e9-aa83-504f086bf5d6_story.html?noredirect=on&utm_term=.ae07fa6dc7cf [<https://perma.cc/PN6G-R4M9>].

153. See Waxman, *supra* note 142. See generally McMILLION & RUTKUS, *supra* note 129, at 1.

154. Waxman, *supra* note 142.

155. See *id.* The first hearing for a Supreme Court nominee occurred in 1873 with the nomination of then-Attorney General George H. Williams. *Id.* Controversy surrounded Williams's nomination due to an investigation into his potential misuse of DOJ funds for household expenses. *Id.* The first public hearing was called for in 1916 with the nomination of Louis Brandeis, who was criticized for his public interest work and disliked by a sizable anti-Semitic population. *Id.*

156. *Id.*

157. The time frame that constitutes the "Founding Era" varies depending on the commentator. For the purposes of this paper, "Founding Era" refers to 1774–1797. See John F. Wilson, *The Founding Era (1774–1797) and the Constitutional Provision for Religion* (2011), available at <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780195326246.001.0001/oxfordhb-9780195326246-e-1> [<https://perma.cc/29XF-FDD7>].

158. See, e.g., William G. Ross, *The Supreme Court Appointment Process: A Search for a Synthesis*, 57 ALB. L. REV. 993, 999–1001 (1994); David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1493 (1992).

159. See, e.g., Carl Tobias, *Rethinking Federal Judicial Selection*, 1993 BYU L. REV. 1257, 1284–85 (1993); see also Galbraith, *supra* note 30, at 255 (arguing that a viable reading of the Appointments Clause cannot be read as anything other than the Senate playing a role in confirming appointments, and therefore the Senate does not have a meaningful role in providing "advice" outside of its role in providing consent).

nominees should be afforded a “presumption of confirmation”;¹⁶⁰ (2) the Senate’s role in the appointment process is outlined in Article I, in the enumeration of presidential powers of Article II, or both;¹⁶¹ and (3) public hearings and the increasingly political nature of confirmation battles have hurt the Judiciary’s reputation and legitimacy.¹⁶²

At least one constitutional and Founding Era scholar, John Ferling, has argued that the order of the current process is incorrect.¹⁶³ He contends the proper process entails the President seeking the Senate’s counsel regarding potential nominees *before* making a formal nomination, with the Senate’s only post-nomination role being a confirmation vote to determine whether to provide “consent” (or not) for the nominee.¹⁶⁴

Also worth noting, currently sitting Supreme Court Justices from across the ideological spectrum have lamented the increasingly partisan nature of the confirmation process. Chief Justice John Roberts noted that the current process “is not functioning very well,” and warned that confirmation hearings focused on partisan motivations, as opposed to a nominee’s fit for the Court, damage the Supreme Court’s legitimacy and authority.¹⁶⁵ Specifically, Chief Justice Roberts stated in 2016:

160. *See, e.g.*, Henry T. Reath, *Restoring Integrity and Credibility*, 75 JUDICATURE 185, 186 (1992) (arguing that a President’s judicial nominee “selection be entitled to a strong presumption of confirmation, and that such a candidate should only be turned down upon an affirmative showing that the candidate is not qualified.”). *But see* Erwin Chemerinsky, *October Tragedy*, 65 S. CAL. L. REV. 1497, 1509 (1992) (“Under the Constitution there is no reason why a President’s nominees for the Supreme Court are entitled to any presumption of confirmation. The Constitution simply says that the President shall appoint federal court judges with the advice and consent of the Senate. The Senate is fully entitled to begin with a presumption against the nominee and confirm only if persuaded that the individual is worthy of a lifelong seat on the Supreme Court.”).

161. Jeffrey K. Tulis, *Constitutional Abdication: The Senate, The President, and Appointments to the Supreme Court*, 47 CASE W. RES. L. REV. 1331, 1339 (1997) (arguing that a reasonable reading of the Constitution’s text suggests that the Senate’s role is limited in the appointment of judges when one examines Article II (presidential powers)).

162. *See* Chris Schmidt, *Do Controversial Confirmation Hearings Hurt the Court?*, ISCOTUS (Sept. 19, 2018), <http://blogs.kentlaw.iit.edu/iscotus/controversial-confirmation-hearings-hurt-court/> [<https://perma.cc/YF5T-CVTM>]; Lucas Rodriguez, *The Troubling Partisanship of the Supreme Court*, STAN. POL. (Jan. 7, 2016), <https://stanfordpolitics.com/the-troubling-partisanship-of-the-supreme-court-da9fd5a900ac#.2m85xox6a> [<https://perma.cc/4QSA-UKM6>] (arguing that polarization of the Court will have serious consequences, especially with regards to the Court’s legitimacy); The Associated Press, *Chief Justice Roberts: Confirmation Process for Justices Too Politicized*, POLITICO (July 26, 2017, 8:43 AM), <https://www.politico.com/story/2017/07/26/chief-justice-roberts-confirmation-process-for-justices-too-politicized-240979> [<https://perma.cc/WV8P-CGNW>] (quoting Chief Justice Roberts’s statement that “[j]udges are not politicians, and they shouldn’t be scrutinized as if they were You’re not electing a representative, so you’re not entitled to know what their views on political issues are.”).

163. *See* FERLING, *supra* note 130.

164. *See id.*

165. Adam Liptak, *John Roberts Criticized Supreme Court Confirmation Process, Before There Was a Vacancy*, N.Y. TIMES (Mar. 21, 2016), <https://www.nytimes.com/2016/03/22/us/politics/john-roberts-criticized-supreme-court-confirmation-process-before-there-was-a-vacancy.html> [<https://perma.cc/8G9E-6U6Y>].

When you have a sharply political, divisive hearing process, it increases the danger that whoever comes out of it will be viewed in those terms If the Democrats and Republicans have been fighting so fiercely about whether you're going to be confirmed, it's natural for some member of the public to think, well, you must be identified in a particular [political] way as a result of that process.¹⁶⁶

Justice Elena Kagan has echoed Justice Roberts' sentiments and voiced her displeasure with the current state of the confirmation process, noting that recent partisan confirmation battles "make[] the world think we [(Supreme Court justices)] are sort of junior varsity politicians."¹⁶⁷

Perhaps the Court's most vocal critic of the partisan nature of the current confirmation process is Justice Ruth Bader Ginsburg, who has noted several times how "dysfunctional" it is,¹⁶⁸ and how the atmosphere surrounding the process has changed significantly since she was nominated to the Court twenty-six years ago.¹⁶⁹ Justice Ginsburg has highlighted that at the time of her nomination, Supreme Court hearings were "truly bipartisan" and that she garnered the votes of almost all the then-sitting Republican senators, despite Justice Ginsburg being viewed as left-of-center in terms of her judicial philosophy.¹⁷⁰ She has made clear her view that such a bipartisan atmosphere is "the way it should be, instead of what it's become, which is a highly partisan show. The Republicans move in lockstep, and so do the Democrats. I wish I could wave a magic wand and have it go back [to the way it was]."¹⁷¹

III. A POTENTIAL SOLUTION—THE CASE FOR CIRCUMSCRIBED JUDICIAL EVALUATION

Given the lack of clear guidance in the Constitution and contemporaneous writings regarding the Appointments Clause, as well as the heated disagreement on this subject among many of the most prominent Founding Fathers, it is impossible to distill a single set of "correct" procedures for the advice and consent process. But the preceding discussion does offer some broad guidance for designing

166. *Id.* ("We don't work as Democrats or Republicans . . . and I think it's a very unfortunate impression the public might get from the confirmation process.").

167. Jamie Ehrlich, *Kagan: Confirmation Gridlock Makes Supreme Court Look Like 'Junior Varsity Politicians'*, CNN (July 25, 2018), <https://www.cnn.com/2018/07/25/politics/kagan-kavanaugh-junior-varsity-politicians/index.html> [<https://perma.cc/PW9A-F5VZ>].

168. *See, e.g.*, Kimberly Strawbridge Robinson, *Ginsburg Laments SCOTUS Confirmation 'Dysfunction' in Senate (1)*, BLOOMBERG LAW (July 24, 2019, 6:15 PM), <https://news.bloomberglaw.com/us-law-week/ginsburg-laments-high-court-confirmation-dysfunction-in-senate> [<https://perma.cc/XF5R-7LRD>].

169. *See, e.g.*, Carla Herreria, *Ruth Bader Ginsburg Slams Senate Hearings as A 'Highly Partisan Show'*, HUFFPOST (Sept. 13, 2018, 12:48 AM), https://www.huffpost.com/entry/ruth-bader-ginsburg-senate-supreme-court-hearings_n_5b999d0fe4b0162f4733cf91?guccounter=1 [<https://perma.cc/T3QM-LHAZ>].

170. *Id.* Justice Ginsburg also highlighted how all the Democrats in the Senate in 1986 voted to confirm the famously conservative Justice Antonin Scalia. *Id.*

171. *Id.*

confirmation procedures consistent with the Founders' originally-intended scheme. On one hand, it suggests that the Senate should accord some degree of deference to the President's choice of nominee: although the Senate has the power to reject or obstruct an appointment, the Constitution unambiguously entrusts the President with the power of choice in the first instance.

Further complicating the Senate's role is the fact that, as elected officials, Senators unquestionably play a political function—a role that, although generally consistent with our constitutional scheme, the Framers presciently feared would devolve into “[i]ntrigue, partiality, and concealment”¹⁷² in situations where Senators undertake to objectively evaluate judicial nominees. Discussing the “fact-finding” role of the Senate in highly contentious proceedings, such as the hearing pitting Anita Hill against Justice Clarence Thomas,¹⁷³ Professor Elizabeth DeCoux observed that Senators “are not neutral—being neutral is inconsistent with their responsibility—and they are ill-at-ease with neutrality. They fight for their constituents, their parties, and their principles—and rightfully so, when they act as legislators making policy, but not so when they function as fact-finders.”¹⁷⁴ Because of the inherently political role they play, and because many Senators simply lack the requisite expertise to evaluate whether a nominee would make a good jurist,¹⁷⁵ Madison's fear that Senators were “not good judges” of the requisite qualifications for judicial nominees seems quite reasonable.¹⁷⁶

Nevertheless, the Constitution entrusts the Senate with a critical role in the appointment process. This role is much more than that of a “rubber stamp”: widespread pre-1787 practice, as well as the Framers' own remarks, suggest the Executive would receive the benefit of the Senate's substantive advice on

172. CONVENTION RECORDS, *supra* note 62, at 119.

173. While such an adversarial narrative is unsettling, this is a common view of the Thomas/Hill episode among commentators from all sides. *See, e.g.,* Dahlia Lithwick, *Joe Biden Still Doesn't Understand What He Did to Anita Hill*, SLATE (Apr. 29, 2019), <https://slate.com/news-and-politics/2019/04/joe-biden-anita-hill-apology-problem-misunderstand-concern.html> [<https://perma.cc/63Z6-N3XE>] (“In the end, this meant that Hill was left alone in a his-word-against-hers contest that pitted her dignified answers against Clarence Thomas' furious, unhinged anger.”); Isaac Stanley-Becker, *Anita Hill's Claims Echo in Allegation Against Kavanaugh. Three Decades Later, Will Anything Be Different?*, WASH. POST (Sept. 17, 2018), <https://www.washingtonpost.com/news/morning-mix/wp/2018/09/17/anita-hills-claims-echo-in-allegations-against-kavanaugh-27-years-later-will-anything-be-different/?noredirect=on> [<https://perma.cc/RZ57-7PLP>] (referring to “the controversy that pitted the word of Thomas against that of Hill”).

174. Elizabeth DeCoux, *Does Congress Find Facts or Construct Them? The Ascendancy of Politics Over Reliability, Perfected in Gonzales v. Carhart*, 56 CLEV. ST. L. REV. 319, 355 (2008) (proposing that “Congress either employ neutral fact-finding bodies or adopt rules of evidence to promote reliability in its hearings,” and that courts accord deference to Congressional fact-finding only to the extent it employs such procedures).

175. It is not uncommon for Senators to demonstrate their ignorance of basic judicial process and jurisprudence, even during high-profile, televised hearings. Consider, for example, Senator Cory Booker's question whether D.C. Circuit nominee Neomi Rao—then a member of the Trump administration with no experience as a judge—“ever had any LGBTQ law clerks.” *See Cory Booker: “Have you ever had an LGBTQ law clerk?”*, C-SPAN.ORG (Feb. 5, 2019), <https://www.c-span.org/video/?c4777922/cory-booker-have-lgbtq-law-clerk> [<https://perma.cc/MQ8C-8MDX>].

176. *Id.*

appointment decisions.¹⁷⁷ The First Congress strongly confirmed this understanding when it rebuffed an early attempt to short-circuit the advice and consent process, even by an executive as trusted and judicious as President Washington.¹⁷⁸

In sum, we can confidently say that the appointment process hews closest to the constitutional design when the Senate makes a candid, objective, and well-informed assessment of a President's nominee, then votes based on that assessment—but refrains from bad-faith obstructionism, mischaracterizations, and characterizations that are irrelevant to their qualifications for the job in question. With this in mind, and in light of the increasingly partisan nature of judicial confirmation battles, this Article proposes a change to the process by which Supreme Court Justices are confirmed.¹⁷⁹ This change would be facilitated by a congressional act establishing a Judicial Council.

The Judicial Council, as proposed, would conduct an analysis of a Supreme Court nominee's previous judicial opinions, litigation record, and legal writings, if any. The Judicial Council would be comprised of either the chief judges from each federal circuit court, or a representative chosen from each circuit court by a majority vote of that circuit's appellate judges. If the former option is used and one of the chief judges is named as the Supreme Court nominee, then the chief judge's replacement on the Judicial Council would be a representative chosen from the nominee's circuit by a majority vote of that circuit's appellate judges. Those judges would work together to draft an evaluation of a Supreme Court nominee based on that nominees' record. This evaluation probably would be similar in form to a typical judicial opinion.

In many ways, the Judicial Council's role would be similar to the role the ABA Standing Committee informally plays today:¹⁸⁰ it would provide the Senate with an objective evaluation and recommendation as to a Supreme Court nominee's suitability for the court based on factors such as education, work experience, legal writing, temperament, and whether his/her legal and judicial philosophy views are within the mainstream. But unlike the Senate's informal reliance on the ABA Standing Committee, the use of a statutorily-established Judicial Council would result in a substantially more valuable evaluation by judges, rather than lawyers, of a nominee's qualifications to discharge judicial responsibilities. Rather than the "Well Qualified," "Qualified," and "Not Qualified" rating system currently

177. *See supra* Section I.C.2.

178. *See supra* Section I.C.3.

179. Although there could be similar benefits to Judicial Council evaluation of lower-court nominees, our proposal focuses exclusively on Supreme Court nominees for two reasons. First, it would be immensely burdensome for the judges on the Judicial Council to evaluate dozens of lower-court nominees per year; by contrast, Supreme Court nominations are relatively rare and would pose a far smaller burden. Second, we believe there is a greater chance of a proposal limited to Supreme Court nominations gaining bi-partisan support, since—as we have discussed—partisanship and lack of objectivity in the Senate's advice and consent process have long hindered Supreme Court appointments by presidents from both parties.

180. *See* ABA Standing Comm., *Ratings*, ABA, https://www.americanbar.org/groups/committees/federal_judiciary/ratings/ [<https://perma.cc/R2BN-LCD9>] (last visited Feb. 20, 2020).

employed by the ABA's Standing Committee,¹⁸¹ the Judicial Council would not provide a formal recommendation in favor of, or against, the nominee's confirmation. Instead, the Judicial Council would narrowly tailor its evaluation to the judicial nominee's previous legal analysis and commentary—notably a nominee's litigation record, judicial record, and other assorted legal writings (e.g., law review articles, amicus briefs, op-eds, etc.) and presentations (e.g., guest lectures, CLE presentations). Furthermore, the Judicial Council would not evaluate other criteria traditionally considered by the Senate, such as education and temperament.¹⁸² Because these criteria do not plainly bear on a judge's specialized skills in analyzing and evaluating legal arguments, they would best be left to senators and their staffers to consider.

The Judicial Council would present its analysis in a four-part report: (1) an overview of the nominee's decisions, if any, broken down by category (e.g., constitutional law, administrative law, immigration law, civil rights, habeas actions, etc.); (2) case summary-like digests for each of the nominee's dissents;¹⁸³ (3) an overview of the nominee's litigation record, if any; and (4) an overview of the nominee's legal commentary pieces, broken down by category. Limiting analysis in this way to judicial opinions, briefs, and other similar legal sources would make a nominee's previous legal commentary more digestible and less susceptible to mischaracterization by senators who oppose a nominee's confirmation to fit political narratives. Such antics have occurred time and again in recent years, with one of the most notable recent examples involving now-Justice Neil

181. *Id.*

182. William G. Ross, *The Functions, Roles, and Duties of the Senate in the Supreme Court Appointment Process*, 28 WM. & MARY L. REV. 633, 644–53 (1987).

183. Requiring the Judicial Council to produce case summary-like digests for all of a nominee's judicial opinions would be unduly burdensome and time-consuming in the event of a nominee who had served on the state or federal bench for any significant length of time. See, e.g., United States Senate Committee on the Judiciary, Brett M. Kavanaugh Questionnaire for Nominee to the Supreme Court, at 42, 63, [https://www.judiciary.senate.gov/imo/media/doc/Brett%20M.%20Kavanaugh%20SJC%20\(PUBLIC\).pdf](https://www.judiciary.senate.gov/imo/media/doc/Brett%20M.%20Kavanaugh%20SJC%20(PUBLIC).pdf) [<https://perma.cc/3MGP-5TUS>] (detailing how at the time of his nomination to the Supreme Court, now-Justice Brett Kavanaugh had participated in approximately 2,700 cases on the D.C. Circuit and was the main author of approximately 300 opinions (including dissents and concurrences)). Dissents, on the other hand, are far less frequently authored, making the Judicial Council's more detailed method of analysis for these writings practical. Lee Epstein, William M. Landes, & Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis* 20 (John M. Olin Program in Law and Econ. Working Paper No. 510, (2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1542834 [<https://perma.cc/CR76-DH2S>] (noting that in a review of federal court of appeals cases between 1990 and 2006, only 2.8% of the examined opinions included dissents). Furthermore, dissents tend to be more controversial than majority opinions or concurrences because dissents signal outright disagreement with the majority's conclusion, whereas concurrences usually indicate different reasons for reaching the same or a similar opinion as the majority. Because dissents are inherently more controversial and indicate instances where the nominee in question deviated from what was otherwise the prevailing legal thought among his/her judicial peers, dissents are more likely to be polarizing and draw scrutiny during the confirmation process, and therefore have a higher likelihood of being mischaracterized for political gain. These legal writings deserve a more detailed evaluation by the Judicial Council.

Gorsuch and his dissent in the Tenth Circuit case of *TransAm Trucking, Inc. v. Administrative Review Board, U.S. Department of Labor*.¹⁸⁴

During Justice Gorsuch's confirmation hearings, he was berated by a host of Democratic senators for this dissent, which opined the court should have found that the TransAm truck driver in question was lawfully terminated after he disregarded a supervisor's instructions to stay with the truck driver's disabled trailer despite below-freezing temperatures, no source of heat in the cab, and the driver being in danger of hypothermia.¹⁸⁵ Several Democratic senators viewed Justice Gorsuch's dissent as favoring corporate interests over employee welfare and indicating that Gorsuch was void of sufficient human connection and sympathy to be an effective justice.¹⁸⁶ Such critiques missed the rationale underlying Justice Gorsuch's dissent. Justice Gorsuch argued for judicial restraint and the proper role of federal courts, highlighting how it was not within the court's purview of constitutionally-vested duties to determine whether TransAm's decision to terminate the truck driver for his decision to leave the trailer was "a wise or kind one."¹⁸⁷ Rather, Justice Gorsuch emphasized that the court's "only task is to decide whether the decision was an illegal one," subsequently noting that "[t]here's simply no law anyone has pointed us to giving employees the right to operate their vehicles in ways their employers forbid."¹⁸⁸ Thus, Justice Gorsuch's dissent does not stand for his favoritism of corporate interests or his heartlessness, but rather acknowledges how it is the courts' duty to apply the law as written, regardless if such application results in an unfortunate individual outcome.¹⁸⁹ The Judicial Council's report would conduct similar analyses—placing such "controversial" decisions into their proper context and hashing out whether the reasoning entailed is within the legal mainstream.¹⁹⁰

184. 833 F.3d 1206 (10th Cir. 2016). Another controversy over the proper characterization of a nominee's previous judicial record occurred with now-Justice Brett Kavanaugh and his opinion in the D.C. Circuit case of *Garza v. Hargan*, No. 17-5236, 2017 WL 9854552 (D.C. Cir. Oct. 24, 2017), *vacated in part on rehearing en banc*, 874 F.3d 735 (D.C. Cir. 2017). See Margot Cleveland, *The First Untruth About Judge Kavanaugh*, NAT'L REV. (Jul. 12, 2018), <https://www.nationalreview.com/2018/07/brett-kavanaugh-ruling-in-garza-v-hargan-case-about-due-process/> [<https://perma.cc/559Q-AB2S>].

185. Michelle Mark, *Al Franken Slams Gorsuch Over 'Absurd' Dissent in Frozen-Trucker Case: 'It Makes me Question your Judgment'*, BUS. INS. (Mar. 21, 2017, 7:03 PM), <https://www.businessinsider.com/senators-grill-gorsuch-over-absurd-dissent-in-frozen-trucker-case-2017-3> [<https://perma.cc/7A47-M7A2>].

186. *Id.*; see also *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch To Be an Associate Justice of The Supreme Court of The United States: Hearing Before the Sen. Comm. on the Judiciary*, 115th Cong. 28, 279 (2017) (statement of Sen. Richard J. Durbin); *id.* at 47–48 (statement of Sen. Richard Blumenthal); *id.* at 52–54, 222 (statement of Sen. Mazie Hirono); *id.* at 168–70 (statement of Sen. Al Franken).

187. *TransAm Trucking, Inc. v. Admin. Review Bd., United States Dep't of Labor*, 833 F.3d 1206, 1215 (10th Cir. 2016).

188. *Id.*

189. *Id.*

190. Similarly, a Judicial Council evaluation might have facilitated a more productive discussion during Judge Amy Coney Barrett's confirmation proceedings, in which several senators seriously misunderstood (or, less charitably, mischaracterized) an article she co-authored as a law student. The article grappled with the question of how judges should handle conflicts between religious beliefs and professional responsibilities, concluding, "Judges cannot—nor should they try to—align our legal system with the Church's moral teaching

Another key characteristic of the Judicial Council's proposed report is that it would be penned anonymously and issued per curiam—meaning that no one Judicial Council member would claim authorship of the written opinion, but rather the Council as a whole would “author” the report.¹⁹¹ While traditionally per curiam decisions were short, and dealt with relatively obvious and non-controversial issues, the Supreme Court, among other courts, has increasingly used this type of decision as “a protective shield from controversial issues.”¹⁹² A shield of this type would be of great use to the Judicial Council. Despite the fact that Judicial Council reports would not tend toward being controversial, it would likely be the case that the overall Supreme Court justice nomination and confirmation process would be highly politicized and thus controversial.

Notably, legal commentators have questioned whether the expansion of per curiam opinions for this shielding purpose is a positive development, or whether it undermines public trust in the courts by reducing transparency and accountability.¹⁹³ The same concerns are not as compelling with respect to use by the proposed Judicial Council. Courts produce rulings that not only directly affect the legal rights and duties of the parties involved, but also the rights and duties of parties outside the litigation who may become subject to a court's ruling through the cemented judicial doctrine of stare decisis. In such an arena, the arguments for increased transparency and accountability are compelling. The Judicial Council, on the other hand, would produce a report that would be an evaluation, rather than an adjudication of rights, and would not have any precedential value beyond the Supreme Court nominee's confirmation process. Utilizing a per curiam report format would have the added benefit of strengthening the perceived import of the Judicial Council's collective convictions in the soundness of their legal analysis by “convey[ing] a message of consensus while engaging in more complicated and substantive decision-making.”¹⁹⁴

While the objective, focused structure of the proposed report would drastically reduce the likelihood of disagreements among Council members, disagreements would be nonetheless bound to occur. When disagreement does occur, whether

whenever the two diverge.” See John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303, 350 (1998). Senator Diane Feinstein incorrectly claimed the article demonstrated Barrett's “long history of believing that [her] religious beliefs should prevail.” See, e.g., Editorial, *JFK, Amy Coney Barrett and Anti-Catholicism*, NAT'L CATH. REG. (Sept. 22, 2017), <http://www.ncregister.com/daily-news/jfk-amy-coney-barrett-and-anti-catholicism> [<https://perma.cc/A4W8-F368>].

191. *Glossary of Supreme Court Terms*, SCOTUSBLOG, <https://www.scotusblog.com/reference/educational-resources/glossary-of-legal-terms/> [<https://perma.cc/C8MG-YE5N>].

192. Ira P. Robbins, *Scholarship Highlight: The Supreme Court's Misuse of Per Curiam Opinions*, SCOTUSBLOG (Oct. 5, 2012, 11:13 AM), <https://www.scotusblog.com/2012/10/scholarship-highlight-the-supreme-courts-misuse-of-per-curiam-opinions/> [<https://perma.cc/L8AU-TBEF>].

193. See generally Ira P. Robbins, *Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions*, 86 TUL. L. REV. 1197 (2012).

194. *Id.* To be sure, the Council's evaluation would likely be more straightforward than many judicial opinions, but it would still involve complex decision-making insofar as it analyzes and critiques a judge's past work product.

relating to a Council member's analysis of the reasoning a nominee used to reach a specific legal conclusion or otherwise, the disagreeing Council member would have the option to utilize separate, anonymous commentaries. These commentaries would be analogous to concurrences (if the authoring Council member were to believe the nominee's reasoning in question is within the legal mainstream, but believes the reasoning stands for a different proposition or thought process than the majority of the Council) or dissents (if either the authoring Council member were to (1) agree with the Council majority's analysis of the reasoning in question but believes it to be outside the legal mainstream or (2) disagree with the Council majority's analysis of the reasoning in question and believe the reasoning to be outside the legal mainstream). Even these pseudo-concurrences and dissents are unlikely to create the appearance of significant discord among the Judicial Council, as majority opinions, concurrences, and dissents usually refer to each other in respectful terms and recognize the merits of other arguments, even if they disagree.¹⁹⁵

The legislation creating the Judicial Council would not only require production of the above-discussed report, but would also vest the Chairman of the Senate Committee on the Judiciary with the discretionary power to secure case summary-like digests of specific opinions or other legal writings from the Judicial Council once it has completed its report. This mechanism would more likely be used as a shield than as a sword. For if the presidency and Senate are controlled by the same party—the scenario with the greatest likelihood of a nominee being confirmed—it is unlikely that the Chairman of the Senate Committee on the Judiciary, ostensibly a member of the majority party, would utilize the Judicial Council's stand-by function¹⁹⁶ unless necessary to advance a nominee's confirmation (e.g., the mischaracterization of a legal writing is giving important swing-vote senators pause and the Judicial Council's evaluation of that legal opinion would quell a sufficient number of senators' worries so as to secure the requisite number of votes in favor of confirmation). For while the stand-by function can provide further clarity on a piece of the nominee's legal writing, the function also takes time to effectuate—time the majority party would not want to expend unless otherwise advantageous.

Additional benefits of the Judicial Council, and other related considerations, are discussed below.

195. See Note, *From Consensus to Collegiality: The Origins of the "Respectful" Dissent*, 124 HARV. L. REV. 1305, 1325 (2011) (discussing "[t]he implications for the collegial norm and the respectful dissent as legitimating tools").

196. That is, its optional function of providing digests of specific work product by a nominee. The Judiciary Committee could, of course, do the same if the Senate were controlled by the opposite party—particularly if it believes there is legitimate disagreement about the meaning or soundness of a nominee's judicial decisions or other writings. Such a move could certainly demonstrate the Senate majority's commitment to fairness. To be sure, a Senate majority that opposes the President's nominee might utilize the function as a sword, to highlight the nominee's incompetence or extreme beliefs. But doing so would carry considerable political risk, as this move could backfire if the Council instead gives the nominee's writings a positive review.

A. REASONS THE JUDICIAL COUNCIL IS PREFERABLE TO THE ABA'S
STANDING COMMITTEE FOR EVALUATING JUDICIAL NOMINEES

The ABA's Standing Committee has been rightfully criticized for its increasingly partisan evaluations of judicial nominees. As commentators have noted, in 1953,¹⁹⁷ when the ABA's Standing Committee recommendations took on an institutional role in the Senate's advice and consent process, the ABA reports focused on the nominee's qualifications and experience as a reflection of his or her ability to do the job in question.¹⁹⁸ Now, in contrast, the report "includes speculation about people's points of view and [matters addressed in his/her] previous employment."¹⁹⁹

One prominent example of the increased politicization in the ABA Standing Committee's evaluations and recommendations is the Standing Committee's treatment of Judge Robert Bork. In 1982, the ABA unanimously approved Judge Bork during his nomination to the D.C. Circuit, giving Bork the ABA's highest ranking.²⁰⁰ Despite this, when Bork was nominated for the Supreme Court five years later, several members of the ABA's Standing Committee classified Bork as "unqualified."²⁰¹

Rather than keeping to objective, unbiased professional evaluation of judicial nominees' abilities, the ABA Standing Committee has repeatedly (and increasingly) found itself squarely in the middle of partisan fights over nominees' ideologies and subjective qualities. The committee twice downgraded its evaluation of Brett Kavanaugh from an initial "highly qualified" rating to a "qualified" rating midway through the confirmation process: first in 2006, after allegedly hearing that the D.C. Circuit nominee was "very stubborn and frustrating to deal with" and "sanctimonious," and then again in 2018, after sexual assault allegations nearly derailed Kavanaugh's Supreme Court confirmation.²⁰² Although it is possible that the committee could learn material new information about a nominee after issuing its initial report, such changes of position in the midst of a heated

197. Lee Rawles, *Its Rating System Under Fire, ABA Stresses Importance of Federal Judicial Candidate Evaluations*, ABA J. (Jan. 2018), http://www.abajournal.com/magazine/article/federal_judicial_candidate_evaluations [<https://perma.cc/34B5-H9Q8>].

198. David Nammo, *Guilty: The ABA Was Rightfully Sidelined from Judge Kavanaugh Debate*, NAT'L REV. (Aug. 30, 2018, 6:30 AM), <https://www.nationalreview.com/2018/08/american-bar-association-acts-as-left-wing-advocacy-group/> [<https://perma.cc/E94L-VLQW>]. By contrast, some commentators have observed that the ABA's role was ideological from its very conception. *See, e.g.*, Lindgren, *infra* note 210, at 1–3 (discussing how the ABA "was first brought into the [confirmation] process for political reasons—to reduce the ability of Harry Truman to appoint minorities, women, and 'leftists'").

199. Nammo, *supra* note 198.

200. *Id.*

201. *Id.*

202. Avi Selk, *The American Bar Association Had Concerns About Kavanaugh 12 Years Ago. Republicans Dismissed Those, Too.*, WASH. POST (Sept. 28, 2018), https://www.washingtonpost.com/politics/2018/09/28/american-bar-association-had-kavanaugh-concerns-years-ago-republicans-dismissed-those-too/?noredirect=on&utm_term=.bf68797cc4bc [<https://perma.cc/PD2Q-3ULS>].

partisan confirmation battle undermine the Standing Committee's claims to objectivity and impartiality in the public eye.²⁰³

Nebraska Republican Senator Ben Sasse, a prominent member of the Senate Judiciary Committee, recently noted, "The American Bar Association is not neutral. The ABA is a liberal organization that has publicly and consistently advocated for left-of-center positions for more than two decades now. The ABA has no right to special treatment by members of this body."²⁰⁴ Fellow Nebraska Senator Deb Fischer has also voiced disapproval of the ABA's partisan, biased recommendations.²⁰⁵ Senators Fischer and Sasse, in a co-ed authored op-ed, stated:

Hoping to drive a political agenda, the American Bar Association rated [(then judicial nominee)] Steve [Grasz] as "not qualified" to serve on the federal circuit court. We were shocked by its assessment, given Steve's considerable legal experience. But our examinations of the ABA report revealed intense bias and an evaluation based on limited facts.

The two evaluators who performed this ABA analysis discounted Steve for his association with political organizations, an action integral to our democracy. This charge is absurd because the ones lobbing the attack have engaged in political participation themselves.

The first evaluator, an Arkansas law professor named Cynthia Nance, was given multiple awards from affiliates of the Democratic Party of Arkansas. The second, Laurence Pulgram, has worked as a liberal activist and donated thousands of dollars to the Democratic Party.²⁰⁶

Fellow Judiciary Committee member Senator Ted Cruz noted the "ABA is a liberal advocacy organization masquerading as a neutral reviewer evaluating judicial nominees."²⁰⁷ Even judicial nominees have questioned the ABA Standing Committee's objectivity and professionalism.²⁰⁸

203. See, e.g., Elizabeth Olson, *Kavanaugh Uproar Casts Uncomfortable Spotlight As ABA Struggles*, BLOOMBERG LAW, BIG LAW BUSINESS (Oct. 2, 2018), <https://biglawbusiness.com/kavanaugh-uproar-casts-uncomfortable-spotlight-as-aba-struggles> [<https://perma.cc/5KL4-4VG2>].

204. Press Release, Office of Sen. Ben Sasse, *Sasse to ABA: "The American Bar Association Is Not Neutral"* (Nov. 16, 2017), <https://www.sasse.senate.gov/public/index.cfm/2017/11/sasse-to-aba-the-american-bar-association-is-not-neutral> [<https://perma.cc/MG3B-B4HY>].

205. Deb Fischer & Ben Sasse, *Deb Fischer and Ben Sasse: Grasse Deserves Seat on Court*, OMAHA WORLD-HERALD (Nov. 5, 2017), https://www.omaha.com/opinion/deb-fischer-and-ben-sasse-grasz-deserves-seat-on-court/article_6c4bf54c-9648-50df-a8e6-b02763760106.html [<https://perma.cc/TKH2-42LJ>].

206. *Id.*

207. Cogan Schneier, *Cruz Rails Against ABA Vetting Amid Confusion About 8th Circuit Nominee*, NAT'L L.J. (Nov. 15, 2017, 5:15 PM), <https://www.law.com/nationallawjournal/sites/nationallawjournal/2017/11/15/cruz-rails-against-aba-vetting-amid-confusion-about-8th-circuit-nominee/> [<https://perma.cc/TC3N-QYZL>].

208. See, e.g., Cogan Schneier, *Trump's 8th Circuit Nominee Criticizes the ABA Interviewer After 'Not Qualified' Rating*, NAT'L L.J. (Nov. 1, 2017, 2:58 PM), <https://www.law.com/nationallawjournal/sites/nationallawjournal/2017/11/01/trumps-8th-circuit-nominee-criticizes-aba-interviewer-for-not-qualified-rating/?back=law> [<https://perma.cc/593Y-6NUT>].

Further bolstering these sorts of criticisms are several empirical studies demonstrating a meaningful correlation between a president's political affiliation and the ABA Standing Committee's treatment of his judicial nominees.²⁰⁹ In 2001, Professor James Lindgren of Northwestern University's Pritzker School of Law analyzed data on the confirmations of 108 circuit court judges, all nominated during the Clinton and George H.W. Bush administrations.²¹⁰ He conducted a logistic regression analysis to predict a nominee's odds of receiving a "highly qualified" rating.²¹¹ Without controlling for the nominees' qualifications, he found that "the odds of getting a Well Qualified rating [were] 9.1 times higher for Clinton appointees than for Bush appointees."²¹² Controlling for "background credentials," including practice experience, judicial experience, federal clerkship experience, and attending an elite school, he found an even greater disparity: Clinton nominees were 9.7 to 15.9 times more likely to receive a "highly qualified" rating than Bush nominees were, depending on which group of similarly-credentialed nominees he analyzed.²¹³ In sum, he found, "[d]espite having no better measured credentials than Bush nominees, the Clinton nominees were rated as more qualified."²¹⁴ Other studies have reached similar conclusions.²¹⁵

Researchers have hypothesized various causes for this consistent partisan bias. Professor Lindgren emphasized the "highly subjective process" the ABA uses to evaluate candidates, which heavily weights criteria such as "integrity" and "judicial temperament."²¹⁶ In his research highlighting the many ways in which subjectivity opens the door to partisan bias in the evaluation process, John R. Lott of the Crime Prevention Research Center has observed, for example, that Republican nominees who have written opinion pieces suffer much more than their Democratic nominees for perceived ideological leanings.²¹⁷

209. Thomas Jipping, *What to Make of Kavanaugh's ABA Rating*, HERITAGE FOUND. (Sept. 10, 2018), <https://www.heritage.org/courts/commentary/what-make-kavanaughs-aba-rating> [<https://perma.cc/8F5S-QD56>] (summarizing studies "showing systematic and even dramatic bias against Republican nominees").

210. James Lindgren, *Examining the American Bar Association's Ratings of Nominees to the U.S. Courts of Appeals for Political Bias, 1989–2000*, 17 J.L. & POL. 1, 1 (2001).

211. *Id.* at 9–14.

212. *Id.* at 9.

213. *Id.*

214. *Id.*

215. See generally John R. Lott, Jr., *The American Bar Association, Judicial Ratings, and Political Bias*, 18 J.L. & POL. 41 (2001) (supplementing Lindgren's regression analysis); see also John R. Lott, *What Does the American Bar Association Judicial Rating Really Measure?*, 156 PUB. CHOICE 139 (2013) (finding weaker bias against older Republican nominees who will not be on the court for long, and stronger bias in favor of younger Democratic nominees; also finding Republican nominees who have written opinion pieces suffer lower ratings than Democratic nominees who have done the same); Susan Navarro Smelcer, Amy Steigerwalt & Richard L. Vining, Jr., *Bias and the Bar: Evaluating the ABA Ratings of Federal Judicial Nominees*, 65 POL. RES. Q. 827 (2012).

216. Lindgren, *supra* note 210, at 26.

217. Lott, *What Does the ABA Judicial Rating Really Measure?*, *supra* note 215, at 2.

In contrast to the ABA's Standing Committee, the proposed Judicial Council will consist of experienced jurists who themselves already have been subjected to the Senate's confirmation process. These Council members are already experts on the responsibilities of judging and the qualifications a nominee must have to discharge those responsibilities consistent with enumerated constitutional requirements. Moreover, members of the proposed Judicial Council are bound to impartial decision-making pursuant to 28 U.S.C. § 453, and should thus be less likely to be driven by partisan influences. This provision requires each federal judge to take the "following oath or affirmation before performing the duties of his office:"

'I, ___ ___, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that *I will faithfully and impartially discharge and perform all the duties incumbent upon me* as ___ under the Constitution and laws of the United States. So help me God.'²¹⁸

Judges' commitment to non-partisanship starkly contrasts with the ABA's uneasy dual role as advocate and evaluator. Many commentators have rightfully questioned the ABA's purported "wall of separation" between its Standing Committee and its policy-making branches,²¹⁹ which routinely take public stands on hot-button partisan issues.²²⁰ Particularly troubling is the fact that many of these stances—including detailed policy statements on abortion rights, gun control, religious liberty, freedom of speech, and capital punishment—touch intimately on the sorts of issues judicial nominees, if confirmed, will be asked to address.²²¹ Also noteworthy, given the ABA's Standing Committee's current role in evaluating nominees' past legal scholarship and other writings, is the ABA's recent adoption of an amended Model Rule 8.4(g) in its *Model Rules of Professional Conduct*.²²² This rule, as amended, would subject lawyers to professional discipline for an "unprecedentedly broad range of speech," including any "conduct related to the practice of law" that a "lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion,

218. 28 U.S.C. § 453 (blanks spaces original; emphasis added).

219. See, e.g., Laura E. Little, *The ABA's Role in Prescreening Federal Judicial Candidates: Are We Ready to Give Up on the Lawyers?*, 10 WM. & MARY BILL OF RTS. J. 37 (2001).

220. For a comprehensive list of policy positions, see LEGISLATIVE POLICIES OF THE A.B.A. (A.B.A., 2017) <https://www.americanbar.org/content/dam/aba/uncategorized/GAO/legislativeissueslist.pdf> [<https://perma.cc/K7KB-RVS5>].

221. See generally *id.* For a brief history of the "campaign within the ABA to ensconce abortion rights as a featured policy of the organization" and the "sorely depleted trust" resulting from "ideologically one-sided activism on matters of law and public policy," see Michael S. McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 HARV. J. L. & PUB. POL. 173, 225–28 (2019).

222. MODEL RULES OF PROF'L CONDUCT. R. 8.4(g) (2016).

national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status.”²²³

Professor Eugene Volokh observed that the amended Rule 8.4(g) would open the door, for example, to state bar discipline being imposed on a speaker at a Continuing Legal Education event expressing views “on same-sex marriage, or on whether there should be limits on immigration from Muslim countries, or on whether people should be allowed to use the bathrooms that correspond to their gender identity rather than their biological sex.”²²⁴ It is difficult to imagine the same organization that promulgated this rule (and that continues to advocate for its adoption)²²⁵ simultaneously engaging in fair-minded and objective evaluation of statements by judicial nominees who do not share the organization’s perspectives on controversial social, cultural, and political issues.

Even if the ABA could somehow advocate with one hand while providing unbiased evaluations of judicial nominees with the other, the cognitive dissonance of playing this dual role while functioning as a trusted adviser to the Senate in a core constitutional function risks grave appearance of impropriety. If the advisory role could instead be entrusted to a group of judges who are already legally and ethically committed to refrain from such advocacy, it would reduce the appearance, if not the actual presence, of bias and double-dealing.

The Judicial Council’s collective evaluation of the nominee’s qualifications and previous work product is far more likely to be respected and deferred to by members of the Senate, as well as by the general public. This deference to non-partisan experts would likely deter politically-motivated mischaracterizations of a nominee’s previous judicial and litigation records, and therefore refocus the Senate’s advice and consent process on whether the nominee is sufficiently qualified to perform a judge’s responsibilities.

223. *Id.* The ABA considered and ultimately declined to adopt language “mak[ing] clear that a lawyer does retain a ‘private sphere’ where personal opinion, freedom of association, religious expression, and political speech is protected by the First Amendment.” ABA Standing Comm. on Ethics & Prof’l Responsibility, Draft Proposal to Amend Model Rule 8.4, at 5 (2015), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/rule_8_4_amendments_12_22_2015.pdf [<https://perma.cc/US3Z-F9BJ>]. Professor Josh Blackman has argued this omission reveals “a deliberate effort” to authorize regulation of such speech. See Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 241, 248–50 (2017).

224. See Eugene Volokh, *A Speech Code for Lawyers, Banning Viewpoints that Express “Bias,” Including in Law-Related Social Activities*, WASH. POST (Aug. 10, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/> [<https://perma.cc/HEJ7-CLBH>] (arguing that “the ABA wants to do exactly what the text [of Model Rule 8.4(g)] calls for: limit lawyers’ expression of viewpoints it disapproves of.”).

225. See, e.g., Dennis Rendleman, *The Crusade Against Model Rule 8.4(g)*, ETHICS IN VIEW, YOURA.B.A. (Oct. 2018) (dismissing concerns about Rule 8.4(g) threatening religious liberty as being rooted in “objection to legal equality for LGBTQ”; referring to “victims of [lawyers’] ‘sincerely held religious belief’”); see also *ABA Rule 8.4 Finding Few Followers, But Sparking Lots of Encouraging Discussion*, A.B.A. NEWS (Aug. 3, 2018), https://www.americanbar.org/news/abanews/aba-news-archives/2018/08/aba_rule_8_4_finding/ [<https://perma.cc/P8HM-232S>].

Furthermore, not only are judges routinely asked to separate their political beliefs from their job responsibilities, but they are also subject to strict judicial ethics rules that disallow many types of political action and expression.²²⁶ The combination of the responsibilities entrusted to judges, the nature of their work, and the judicial ethics rules to which they must adhere are but a few of the reasons why members of the legislature usually voice public respect and deference towards the federal judiciary. That deference supports making judges the initial evaluators of a Supreme Court nominee's qualifications.

Even if the ABA had not become increasingly political, its Standing Committee on the Federal Judiciary still lacks the experience and knowledge to provide the most informed evaluation of a nominee's readiness for the bench. The Standing Committee currently consists of fifteen lawyers, none of whom have served as a judge at the state or federal level.²²⁷ Lawyers are inherently partisan because they are tasked with being advocates. Judges should be inherently non-partisan because they are tasked with being impartial adjudicators. The confirmation process for Supreme Court nominees should not be about advocacy for a certain policy position or political affiliation. Rather, it should focus on the nominee's qualifications and ability to faithfully carry out his or her judicial duties, if confirmed. This is best accomplished via the proposed Judicial Council, whose collective evaluation should be significantly more authoritative regarding judicial philosophy, reasoning, and judicial temperament than evaluations and recommendations by lawyers or elected official advocates.²²⁸

Another benefit of a Judicial Council over the ABA Standing Committee is the fact that it would be norm-reinforcing. Currently, the only formal institutional forces in the nomination and confirmation process—a presidential administration, the Senate, the ABA, and other non-governmental legal and policy organizations—are all subject, in one way or another, to majoritarian influence. The judiciary is fundamentally different: as Hamilton observed in *Federalist* 78, the judiciary was designed to be sheltered from majoritarian forces so that it could “be an essential safeguard against the effects of occasional ill humors in the society.”²²⁹ Congress's relegation of the objective assessment of a judicial nominee's competence to current members of the judicial branch in the form of the proposed Judicial Council would help insulate the judiciary from majoritarian influences by allowing it to transmit its own values and judicial philosophies

226. See MODEL CODE OF JUDICIAL CONDUCT Canon 5 (AM. BAR ASS'N 2012).

227. *Members - Standing Committee on the Federal Judiciary 2019-2020*, A.B.A. GROUPS, https://www.americanbar.org/groups/committees/federal_judiciary/about_us/members/ [<https://perma.cc/JM7H-P2E6>].

228. The Judicial Council proposal is partly inspired by Benjamin Franklin's proposal for having lawyers evaluate potential judges. See *supra* note 72 and accompanying text. However, unlike Franklin, the proposed Council would have no formal nomination or confirmation powers, just an advisory role. The proposal is an improvement on Franklin's idea, not only because of the power-checking structure already inherent in the Appointments Clause, but also because judges are likely to be the best inspector of qualifications to serve as a judge.

229. THE FEDERALIST NO. 78 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

intergenerationally, resisting outside forces (from any ideological camp) that seek to fundamentally reshape the judiciary.²³⁰

Of course, the Constitution plainly contemplates *some* intergenerational influence by the elected branches on the judiciary. Judges do not choose their own successors; the President chooses them, with the advice and consent of the Senate.²³¹ To be clear, then, this argument in favor of a Judicial Council is not rooted in any constitutional mandate. Rather, it merely shows that Congress would be acting consistent with a fundamental constitutional norm of an independent judiciary if it chose to create a limited pathway²³² for currently-prevailing judicial philosophies to inform the selection of future judges.

B. THE RISKS

1. A THREAT FROM THE OUTSIDE: DRAGGING THE JUDICIARY INTO THE PARTISAN FRAY

The most obvious risk of creating the proposed Judicial Council would be dragging members of the federal judiciary into the existing partisan fray. This is a serious concern, given the judiciary is the only remaining branch of government that still enjoys broad trust and approval from the American people.²³³ Furthermore, public confidence in the judiciary is essential to the maintenance of the rule of law.²³⁴ As Hamilton observed in *Federalist* 78, the judiciary possesses “neither force nor will, but merely judgment;” it has “no influence over either the

230. Arguing against the idea of having judges sit on commissions to screen and evaluate candidates for lower court appointments, Professor Mary L. Clark adduced a similar argument: that “judges’ . . . service might constitute a counter-majoritarian, rather than democracy-reinforcing, force” and “undermin[e] the goal of bench diversity.” Mary L. Clark, *Judges Judging Judicial Candidates: Should Currently Serving Judges Participate in Commissions to Screen and Recommend Article III Candidates Below Supreme Court Level?*, 114 PENN ST. L. REV. 49, 86, 100–01 (2009). To the extent Professor Clark suggests such an arrangement would undermine *ideological* diversity by holding candidates to prevailing academic and jurisprudential norms, we agree, and we argue introducing a norm-reinforcing mechanism is consistent with the constitutional vision of an independent judiciary. But Professor Clark’s main concern seems to be with “*demographic* diversity”: that is, that judicial evaluation would allow a “disproportionately white and male” judiciary to “self-replicat[e].” *Id.* at 101. We disagree. Because the Judicial Council would be statutorily limited to professional evaluation of nominees’ prior decisions, work product, and other writings, it would allow much less bias and undue “self-replication” than the ABA Standing Committee’s open-ended evaluations currently allow.

231. U.S. CONST., art. II, § 2, cl. 2.

232. It would be critical to keep this pathway limited. The Senate should welcome currently-prevailing judicial philosophies insofar as they inform whether a nominee is a competent lawyer and jurist; it should take care to avoid unleashing these philosophies to freely critique a nominee based on her allegiance to prevailing ideological orthodoxies, as we have argued the ABA’s evaluation process has improperly done.

233. See Jeffrey M. Jones, *Trust in the Judicial Branch Up, Executive Branch Down*, GALLUP (Sept. 20, 2017), <https://news.gallup.com/poll/219674/trust-judicial-branch-executive-branch-down.aspx> [<https://perma.cc/5LY6-A3NY>] (analyzing a Gallup poll that shows the Judicial branch is the only branch that has consistently been trusted by more than 50% of responding Americans since 1972; has, for all but two years since 1972, engendered the most trust among respondents; and currently has the highest trust rating (68) among respondents by a significant 23 percentage points).

234. See, e.g., *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1666–67 (2015) (discussing how “[t]he judiciary’s authority . . . depends in large measure on the public’s willingness to respect and follow its decisions”).

sword or the purse; no direction either of the strength or of the wealth of the society.”²³⁵ Accordingly, it depends entirely upon the elected branches—particularly the executive—for “the efficacy of its judgments.”²³⁶ Even if the Judicial Council were to bring a measure of objectivity and non-partisanship to the Supreme Court confirmation process, any benefits should be carefully weighed against the:

danger of depleting the store of capital amassed over the last two hundred plus years that has allowed judges to make impartial decisions and protect individual rights. An independent judiciary is essential to a constitutional democracy; without it we have no trustee capable of enforcing the terms of the constitutional trust instrument against the impulses of its intended beneficiaries.²³⁷

The danger of politicizing the judiciary—either by actually compromising its independence, by undermining public confidence in its independence, or both—should motivate Congress to carefully delineate the proper role of a Judicial Council. Unlike the ABA Standing Committee,²³⁸ the Judicial Council’s assessment of a Supreme Court nominee should be strictly limited to the nominee’s legal and jurisprudential competence. Judges who sit on the Judicial Council must resist the temptation to inject their ideological predilections into that objective assessment, and Congress must resist the temptation to rope Judicial Council members into Congress’s partisan battles. And while this might seem a tall order, it is demonstrably realistic: federal judges already abide by a strict code of ethics that protects them from expressing bias (or the appearance thereof),²³⁹ and they have generally proven themselves capable of abiding by that code—even while speaking, teaching, writing, and serving in non-adjudicatory functions like those discussed in the preceding Section. Even if Congress tried to weaponize the

235. *Id.*

236. *Id.*

237. Bea Ann Smith, *Alarming Attacks on Judges: Time to Defend Our Constitutional Trustees*, 80 OR. L.R. 587, 589 (2001). Some have argued that the contemporary paradigm of the apolitical judge, sphinxlike and devoid of partisan leanings, might not be as essential to the integrity of an independent judiciary as we often assume. See, e.g., Dmitry Bam, *Seen and Heard: A Defense of Judicial Speech*, 11 LIBERTY U. L. REV. 765 (2017). Examples abound of American jurists in other eras, including highly-respected justices, simultaneously occupying roles now considered fundamentally incompatible with judicial impartiality: consider Justice Robert Jackson serving as chief American prosecutor in the Nuremberg trials, or Justice John Jay actively participating in President Washington’s administration while serving as first Chief Justice of the Supreme Court. For an examination of the history of, and attitudes toward, extrajudicial conduct, see Jonathan Lippman, *The Judge and Extrajudicial Conduct: Challenges, Lessons Learned, and a Proposed Framework for Assessing the Propriety of Pursuing Activities Beyond the Bench*, 33 CARDOZO L. REV. 1341 (2012).

238. See *supra* text accompanying notes 180–84, 197–232.

239. See generally *Code of Conduct for United States Judges*, 2 GUIDE TO JUDICIARY POLICY, ch. 2, available at https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf [<https://perma.cc/3RLB-8Q8U>]; see also MODEL CODE OF JUDICIAL CONDUCT Canon 2 Rule 2.3(A) (AM. BAR ASS’N 2014), available at https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_3biasprejudiceandharassment.html/ [<https://perma.cc/UKK6-WULD>] (“A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.”).

Judicial Council, its members' obligations as judges would hopefully keep them from saying anything that could indicate political bias.²⁴⁰

In assessing the risk of dragging the judiciary into partisan confirmation battles, it is also important to keep in mind that, for better or worse, federal judges already have significant influence in the nomination and confirmation process. Time and again, this open secret makes its way into the headlines—particularly during controversial confirmation battles. Shortly after President Trump announced his nomination of Judge Brett Kavanaugh to replace Justice Anthony Kennedy, the *New York Times* speculated that President Trump's earlier appointment of Judge Neil Gorsuch (another Kennedy clerk) to the Supreme Court, along with several circuit-court appointments of Kennedy clerks, may have been a bid to reassure Kennedy he need not worry about his own successor if he retired.²⁴¹ Other news sources speculated, based on a later-deleted tweet by an NBC reporter, that Kennedy had made a "secret deal" with the White House to retire provided he could name his replacement.²⁴²

In a similar vein, it was widely reported that Justice Clarence Thomas had met privately with some Republican senators and encouraged them to support his former law clerk, Neomi Rao, for her confirmation to the D.C. Circuit.²⁴³ Likewise,

240. Judges have not always upheld these obligations successfully. Consider Justice Ruth Bader Ginsburg's *New York Times* interview in July 2016 when she remarked, "I can't imagine what this place would be—I can't imagine what the country would be—with Donald Trump as our president." Adam Liptak, *Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term*, N.Y. TIMES (July 10, 2016), <https://www.nytimes.com/2016/07/11/us/politics/ruth-bader-ginsburg-no-fan-of-donald-trump-critiques-latest-term.html> [https://perma.cc/E2UN-GB8E]. Justice Ginsburg expanded further on her criticism of Trump in a subsequent interview with CNN, calling Trump a "faker," and adding "[h]e has no consistency about him. He says whatever comes into his head at the moment. He really has an ego." Chris Cillizza, *How Ruth Bader Ginsburg Became the Trump Resistance*, CNN (Aug. 31, 2018), <https://www.cnn.com/2018/08/31/politics/ruth-bader-ginsburg-democrats/index.html> [https://perma.cc/4JTB-T42Y]. Perhaps most troubling for our analysis, Justice Ginsburg even opined on how a Trump presidency would affect the Supreme Court. See Liptak, *supra* note 241 ("For the country, it could be four years. For the court, it could be—I don't even want to contemplate that."). But even this incident is the sort of exception that proves the rule: Justice Ginsburg's remarks drew prompt criticism from both sides of the aisle, and Justice Ginsburg herself conceded days later her comments "were ill-advised and [she] regret[ted] making them." Tessa Berenson, *Ruth Bader Ginsburg Regrets Criticizing Donald Trump*, TIME (July 14, 2016), <http://time.com/4406160/ruth-bader-ginsburg-donald-trump-regret-comments> [https://perma.cc/VHU9-TAM2]; see also Bam, *supra* note 237, at 772–94 (detailing the "torrent of criticism" Justice Ginsburg's comments provoked from various ideological sectors).

241. Adam Liptak & Maggie Haberman, *Inside the White House's Quiet Campaign to Create a Supreme Court Opening*, N.Y. TIMES (June 28, 2018), <https://www.nytimes.com/2018/06/28/us/politics/trump-anthony-kennedy-retirement.html> [https://perma.cc/498F-B8V5].

242. See, e.g., Aaron Rupar, *White House Doesn't Deny Report Trump Made Secret Deal With Kennedy Over Retirement, Replacement*, THINKPROGRESS.ORG (July 10, 2018), <https://thinkprogress.org/trump-anthony-kennedy-brett-kavanaugh-corrupt-secret-deal-13fd59473ecf/> [https://perma.cc/4W8H-BKDZ]. For the reporter's explanation of her deleted tweet, see Leigh Ann Caldwell (@LACaldwellDC), TWITTER (July 10, 2018, 8:19 AM), <https://twitter.com/LACaldwellDC/status/1016703464137723904/photo/1> [https://perma.cc/663W-Y3NL].

243. See, e.g., Ann E. Marimow & Seung Min Kim, *Justice Thomas Was Working Behind the Scenes to Boost Trump's Court Nominee*, WASH. POST (Feb. 28, 2019), <https://www.washingtonpost.com/powerpost/trumps-court-nominee-overcomes-gop-concerns-secures-panels-backing/2019/02/28/fa33bc86-3adc-11e9->

during Justice Alito's confirmation hearing for the Supreme Court, seven of his then-colleagues on the U.S. Court of Appeals testified to his character.²⁴⁴ Other federal judges have gone so far as publicly expressing their views on judicial appointments: Judge Carlton Reeves of the Southern District of Mississippi recently criticized President Trump's judicial appointments for their lack of diversity, arguing the Supreme Court only "captures . . . a narrow set of perspectives" and a "diverse bench" is a necessary first step to "democratize the judiciary."²⁴⁵

In sum, concerns that institutionalizing the judiciary's role in the appointment process would politicize the judiciary are unrealistic because the judges who would form the Council would already be ethically and legally bound to avoid partisanship. Moreover, given that many judges are already informally involved in the judicial selection process, concerns about involving judges *at all* are moot. It is unlikely that the Judicial Council would increase the politicization of the nomination and confirmation process, and the Council would at least add some transparency and structure to the process by which judges exert influence over judicial appointments.

2. A THREAT FROM THE INSIDE: STRAINING JUDICIAL INTEGRITY AND COLLEGIALLY

Another risk of tasking a Judicial Council with evaluating nominees would be the danger of creating fault lines within the judiciary, straining collegiality and undermining the judiciary's integrity by having judges candidly evaluate their peers and superiors. Perhaps the worst-case scenario would be a nominee confirmed over the Judicial Council's disapproval: a vote of no confidence by the federal judiciary in its highest tribunal. While a result of this kind is unlikely given the outstanding qualifications of every recent Supreme Court nominee, numerous less-extreme scenarios threaten to strain the judiciary's core operating principles of mutual respect and non-partisanship.²⁴⁶ Take, for example, a non-unanimous decision by the Judicial Council: would there be a dissenting evaluation? Similarly, suppose a sitting circuit court judge is nominated for the Supreme Court, the Judicial Council disapproves, and the nominee is not confirmed. When that previous nominee resumes her former job on the lower

aaae-69364b2ed137_story.html?utm_term=.0e3f5e1fc65a [https://perma.cc/T98Z-Q2M3]. We do not suggest that a judge's favorable recommendation of a former clerk, as in the cases of Justices Kennedy and Thomas, is necessarily improper. Rather, we cite these examples merely to show that the notion of judges exercising influence in the judicial appointment process is nothing new.

244. Sheryl Gay Stolberg, *7 Federal Appeals Judges to Testify to Alito's Character*, N.Y. TIMES (Jan. 7, 2006), <https://www.nytimes.com/2006/01/07/politics/politicsspecial1/7-federal-appeals-judges-to-testify-to-alitos.html> [https://perma.cc/R3RM-PSF9].

245. Hon. Carlton W. Reeves, *Defending the Judiciary: A Call for Justice, Truth, and Diversity on the Bench*, Prepared Remarks Upon Receiving the Thomas Jefferson Foundation Medal in Law (Apr. 11, 2019).

246. See, e.g., Harry T. Edwards, *The Effects of Collegiality on Judicial Decision-Making*, 151 U. PA. L. REV. 1639, 1645–52 (2003).

court,²⁴⁷ she might sit on panels with a colleague who publicly repudiated her competence as a jurist.

To state the obvious, such scenarios, if they came to pass, would not promote friendly relations or mutual respect in the federal judiciary. Nevertheless, these fears do not cast any real doubt on the viability and efficacy of the proposed Judicial Council. For one thing, because virtually every nominee for the Supreme Court possesses stellar credentials, it seems unlikely that the Judicial Council would often have occasion to lodge a disapproving evaluation of a nominee.²⁴⁸ Furthermore, even assuming the Judicial Council (or some portion thereof) disapproves of a nominee, the federal judiciary has plenty of experience with judges harshly criticizing each other in published opinions and even convening disciplinary committees to investigate, and potentially sanction, each other's misconduct.²⁴⁹ While such unpleasanties strain collegiality, we already take for granted that the judiciary is composed of professionals capable of handling these situations with objectivity and integrity.

C. MAY CONGRESS CONSTITUTIONALLY ASSIGN NON-JUDICIAL RESPONSIBILITIES TO ARTICLE III JUDGES?

While Congress is constitutionally restricted from mandating that federal judges carry out non-judicial duties that violate the separation of powers, Congress's passage of an act creating the proposed Judicial Council would likely be deemed constitutional.

There are many instances of judges serving the federal government in non-judicial capacities, most notable of which is then-Chief Justice John Jay's service as special envoy to Great Britain to negotiate the "Treaty of Amity, Commerce and Navigation," commonly referred to as the "Jay Treaty."²⁵⁰ However, judges serving in non-judicial roles does not necessarily provide a constitutional basis for Congress to give a directive to the federal judiciary to carry out non-judicial tasks. Whether a congressional directive of this nature is constitutional was raised in *Hayburn's Case*, which involved a congressionally-created scheme that allowed for disabled veterans of the American Revolution to apply for pensions

247. While the authors cannot find a rule stating as much, it appears it is standard practice for Supreme Court nominees to stop all judicial work as soon as they are nominated. See, e.g., Michael Macagnone, *Judge Kavanaugh Stops DC Circ. Work for Confirmation Fight*, LAW360.COM (July 17, 2018), <https://www.law360.com/publicpolicy/articles/1063995/judge-kavanaugh-stops-dc-circ-work-for-confirmation-fight> [<https://perma.cc/D4CJ-3JZT>].

248. See UNITED STATES SENATE, SUPREME COURT NOMINATIONS: PRESENT—1789, <https://www.senate.gov/pagelayout/reference/nominations/Nominations.htm> [<https://perma.cc/N4J5-A2L6>]; see also James J. Brudney, *Recalibrating Federal Judicial Independence*, 64 OHIO ST. L.J. 149, 157 (arguing that a "focus on lawyerly competence [in judicial nominations] is surely rational" because "neither the Justice Department nor the White House has an interest in installing mediocre or disreputable individuals on the federal bench").

249. See generally Sambhav N. Sankar, *Disciplining the Professional Judge*, 88 CAL. L. REV. 1233 (2000).

250. See generally John P. Kaminski, *Honor and Interest: John Jay's Diplomacy During the Confederation*, 83 N.Y. HIST. 293 (2002). It should be noted that, among other things, the Jay Treaty led to Jay's resignation from the Supreme Court. *Id.*

to the U.S. Circuit Courts, subject to the review of the Secretary of War.²⁵¹ While the Supreme Court did not directly address the constitutional questions raised, as Congress passed an Act that relieved the Circuit Courts of the aforementioned non-judicial duties,²⁵² many sources indicate that the Court would have found the Act unconstitutional if the issue had not become moot.²⁵³

The judges who refused to hear William Hayburn's pension claim—Justices James Wilson and John Blair of the Circuit Court of the District of Pennsylvania, and District Judge Richard Peters—sent a letter to President Washington explaining that Congress's attempt to assign duties to the circuit courts that were not judicial in nature violated the idea of the federal judiciary being a distinct and independent branch of government, and therefore violated the separation of powers.²⁵⁴ Wilson, Blair, and Peters also noted that should circuit court judges be directed to process these requests, the judges' decisions would then be reviewed by the Secretary of War, an executive branch official—something the jurists viewed as “radically inconsistent” with constitutional judicial independence.²⁵⁵ President Washington received similar letters from a variety of other justices and judges, who agreed that the Act at issue in *Hayburn's Case* was unconstitutional, but that judges could nonetheless act as commissioners in the administration of the Act.²⁵⁶

Most damning of all, however, was the fact that five of the six Supreme Court justices at the time of *Hayburn's Case* had, in their capacity as circuit court judges in three different circuits, found the Act unconstitutional for its requirement that circuit court judges carry out non-judicial functions falling outside of Article III.²⁵⁷ Thus, it is likely that if the Supreme Court ruled on this issue, it would have found the Act unconstitutional. A similar congressional Act was apparently addressed in the unreported 1794 Supreme Court case of *United States v. Yale Todd*.²⁵⁸ In the note that addresses *Yale Todd* at the end of the decision in *United States v. Ferreira*,²⁵⁹ Chief Justice John Jay stated:

The result of the opinions expressed by the judges of the Supreme Court of that day in the note to Hayburn's case, and in the case of the United States v. Todd, is this:

251. See generally *Case of Hayburn*, 2 U.S. 408 (1792).

252. *Hayburn's Case: The Issue of Justiciability*, CONSTITUTIONAL LAW REPORTER, <https://constitutionalawreporter.com/2015/07/21/hayburns-case-the-issue-of-justiciability/> [<https://perma.cc/A2WQ-43QV>].

253. See, e.g., Maeva Marcus & Robert Teir, *Hayburn's Case: A Misinterpretation of Precedent*, 527 WISCONSIN L. REV. 529–33, 539 (1988).

254. *Hayburn's Case*, FEDERAL JUDICIAL CENTER, <https://www.fjc.gov/history/timeline/hayburn's-case> [<https://perma.cc/C95T-DYCP>].

255. *Id.*

256. *Id.*

257. See *id.*

258. *Yale Todd* was unreported and only comes up in the context of the *Ferreira* comments. See generally Wilfred J. Ritz, *United States v. Yale Todd (U.S. 1794)*, 15 WASH. & LEE L. REV. 220 (1958).

259. 54 U.S. 40, 52 (1851).

3. That the power proposed to be conferred on the Circuit Courts of the United States by the act of 1792 was not judicial power within the meaning of the Constitution, and was, therefore, unconstitutional, and could not lawfully be exercised by the courts.²⁶⁰

However, the proposed Judicial Council is distinguishable from the congressional mandates involved in cases recounted above. The Act involved in *Hayburn's Case* calls for the courts to reach formal administrative decisions—ones which would impact the substantive rights of U.S. citizens.²⁶¹ Further, the resulting decision would have been reviewable by an executive branch official—the Secretary of War.²⁶² The Judicial Council, on the contrary, would not carry out an administrative function, make a determination relating to a citizen's rights, nor reach a decision that is appealable to and reviewable by either of the other branches of government. Rather, the Judicial Council would only provide information in the form of an evaluation—not make a formal, procedurally reviewable decision.

A congressional mandate and structure of the above-described type is constitutional under the Supreme Court's current constitutionality test for when Congress passes an act that vests in the federal courts non-adjudicatory responsibilities. That test, provided in *Mistretta v. United States*, is as follows:

Our approach to other nonadjudicatory activities that Congress has vested either in federal courts or in auxiliary bodies within the Judicial Branch has been identical to our approach to judicial rulemaking: consistent with the separation of powers, Congress may delegate to the Judicial Branch nonadjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary.²⁶³

While the executive and legislative branches are involved in the appointment process, the Judicial Council would not “trench upon”²⁶⁴ either branch's prerogatives. By the time the Judicial Council would be involved in the appointment process, the President will have already made his or her nomination. Additionally, the Judicial Council will not intrude on the Senate's responsibility to provide advice and consent, as the Judicial Council will only be providing its evaluation and recommendation to the Senate so that the Senate can make a better-informed decision. As the majority in *Mistretta* noted in upholding the constitutionality of

260. *Id.* at 53.

261. *See Hayburn's Case: The Issue of Justiciability*, *supra* note 252.

262. *Id.*

263. 488 U.S. 361, 388 (1989). In arriving at this test, the Court reaffirmed its earlier reasoning in *Chandler v. Judicial Council*, which upheld not only Congress's power to confer on the Judicial Branch the rulemaking authority contemplated in the various enabling Acts, but also to vest in judicial councils authority to make “all necessary orders for the effective and expeditious administration of the business of the courts.” 398 U.S. 74, 86 n.7 (1970) (quoting 28 U.S.C. § 332 (1970 ed.)).

264. *Mistretta*, 488 U.S. at 388.

an Act that required at least three federal judges to serve on a sentencing commission, “Nor does our system of checked and balanced authority prohibit Congress from calling upon the accumulated wisdom and experience of the Judicial Branch in creating policy on a matter uniquely within the ken of judges.”²⁶⁵ The Judicial Council’s use of its “accumulated wisdom” to analyze the quality of previous judicial and litigation records is a matter “uniquely within the ken of judges.”²⁶⁶

In fact, the proposed Judicial Council is similar in many ways to the congressional Act analyzed, and found constitutional, in *Mistretta*.²⁶⁷ That statute, 28 U.S.C. § 331, created the Judicial Conference of the United States, the national policymaking body of the federal courts.²⁶⁸ The statute also notes that the “Conference shall make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment of judges to or from circuits or districts where necessary.”²⁶⁹ The proposed Judicial Council would be comparable in composition to the Judicial Conference of the United States,²⁷⁰ and would carry out analogous information gathering and analysis responsibilities with the shared end goal of providing Congress with accurate information to make an informed decision.

Given the *Mistretta* test and how similar the proposed Judicial Council is to the above-discussed non-adjudicatory functions, a congressional act creating a Judicial Council of the kind proposed would almost certainly be found constitutional.

D. PRACTICAL LIMITATIONS IN IMPLEMENTING THE JUDICIAL COUNCIL

Federal Courts are already overburdened.²⁷¹ If the proposed Judicial Council is to be effectual, then several institutional hurdles would have to be overcome.

The first hurdle to overcome would be determining funding for the proposed Judicial Council. Funding for the federal judiciary accounts for only two-tenths of a cent out of every U.S. tax dollar.²⁷² Federal courts, which are already facing

265. *Id.* at 412.

266. *Id.*

267. *Id.* at 361.

268. For more about the Judicial Conference, see generally *About the Judicial Conference*, U.S. COURTS, <https://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference> [<https://perma.cc/359H-QLX9>].

269. 28 U.S.C. § 331 (2008).

270. The Judicial Conference consists of the Chief Justice of the Supreme Court, chief judge of each judicial circuit, the Chief Judge of the Court of International Trade, and a district judge from each regional judicial circuit. See *About the Judicial Conference*, *supra* note 268.

271. See Jennifer Bendery, *Federal Judges Are Burned Out, Overworked, And Wondering Where Congress Is*, HUFFINGTON POST (Sept. 30, 2015, 2:15 PM), https://www.huffpost.com/entry/judge-federal-courts-vacancies_n_55d77721e4b0a40aa3aaf14b [<https://perma.cc/Z22F-3SSQ>].

272. See Thomas Kaplan, *Federal Courts, Running Out of Money, Brace for Shutdown’s Pain*, N.Y. TIMES (Jan. 18, 2019), <https://www.nytimes.com/2019/01/18/us/politics/courts-money-government-shutdown.html> [<https://perma.cc/YMC8-SZAR>].

tight budgets,²⁷³ likely do not presently have significant discretionary funds to hire additional staff and pay for related investigative resources. This problem could be solved by the very tool that creates the Judicial Council. Specifically, because the proposed Judicial Council would be created by congressional act, that act could create a fund to be used specifically to cover the costs associated with the Judicial Council's functioning. An analysis of Congress's change in funding when it enacted 28 U.S.C. § 331 should prove especially instructive in determining the method and amount of funding necessary to facilitate the Judicial Council.

The appropriated funds will, among other things, pay for the augmented staff needed to carry out the Judicial Council's functioning. Judges on the Judicial Council should not heavily rely on traditional federal court staff, such as judicial assistants or term or full-time law clerks, during the investigative and analysis process. Vetting of judicial nominees is not comparable to any of these staff members' usual responsibilities. Furthermore, the infrequency with which Supreme Court nominations occur and the high turn-over rate of much court staff (such as term law clerks) would mean valuable expertise developed during one confirmation proceeding could be lost by the time of the next confirmation proceeding.²⁷⁴

One potential solution would be using magistrate judges—court-appointed, non-Article III judges who serve an unrestricted number of eight-year terms.²⁷⁵ Magistrate judges are not only well versed in judicial decision-making and legal writing, but also are more likely than traditional federal court staff to remain available for repeat service on the Judicial Council given their relatively lengthy terms on the bench. The Judicial Council would consist solely of Article III judges who bear ultimate responsibility for the substantive evaluation process. However, magistrate judges could significantly mitigate the Judicial Council's workload by performing research, conducting an initial review of the nominees' (often voluminous) past opinions, and perhaps providing an initial summary of a nominee's unpublished dispositions—all under the supervision of the Judicial Council.

The second hurdle is accommodating judges' existing caseloads. It would be essential to determine how the caseloads of Judicial Council members are to be distributed among other judges to allow each respective Judicial Council member the time he or she requires to properly participate in the evaluation and recommendation of a Supreme Court nominee. One way to accomplish this is a quite

273. See generally THE CONSTITUTION PROJECT, *THE COST OF JUSTICE: BUDGETARY THREATS TO AMERICA'S COURTS* (2006), <https://constitutionproject.org/wp-content/uploads/2012/10/36.pdf> [<https://perma.cc/QD4R-PZFH>].

274. See generally G. Mitu Gulati & Richard A. Posner, *The Management of Staff by Federal Court of Appeals Judges*, 69 VAND. L. REV. 479 (2016).

275. *FAQs: Federal Judges*, U.S. COURTS, <https://www.uscourts.gov/faqs-federal-judges> [<https://perma.cc/MWF3-MUYL>] (last visited Jan. 24, 2020).

simple, already-existing mechanism for case load redistribution when a certain court is overloaded.²⁷⁶ Most notably, the Chief Judge of a circuit can submit a request to the Judicial Conference's Committee on Intercircuit Assignments, which will assign federal judges from other circuits, who have volunteered their services to help alleviate the case load issue, to the circuit where the caseloads are too high.²⁷⁷ This mechanism would ameliorate any case load distribution problems that arise from a Chief Judge's participation on the Judicial Council.

CONCLUSION

The ambiguity surrounding the appointment process, both in the Constitution's language and in the Founding Fathers' views on the topic, makes it difficult to discern what an objectively accurate formulation of the appointment process would entail. There are, however, clear macro-level confines in which the procedures must fit. The proposed Judicial Council not only fits within those confines by facilitating the Senate's ability to give meaningful advice on nominees; it also has the added benefit of decreasing the political partisanship that has lately characterized the Supreme Court confirmation process. The proposed Judicial Council's evaluation and recommendation are likely to be viewed as significantly more authoritative, and warranting more deference, than other traditionally-considered evaluations and recommendations, such as the one produced by the ABA. The Senate's prior confirmation of Judicial Council members in conjunction with the Senate hypothetically passing the act that creates the Judicial Council, makes it likely that the Senate would provide informal, presumptive deference to the Judicial Council's evaluation and recommendation.

To be sure, the appointment process is inescapably political. The Framers consciously entrusted the duties of nomination and confirmation to members of the political branches, and we do not deceive ourselves that those duties could (or even, arguably, should) ever be fully purged of ideological bias or partisanship. But the proposed Judicial Council would add a measure of objectivity to the process and guard against some of the worst abuses, such as blatant mischaracterization of nominees' records. While it would not (and probably should not) prevent senators from advocating forcefully for or against nominees based on their records, it would ensure some accountability by giving the public and fellow senators an objective, easily accessible benchmark against which to compare this advocacy.

276. See *Judges Help Judges When Courts Face Heavy Caseloads*, U.S. COURTS (Nov. 8, 2018), <https://www.uscourts.gov/news/2018/11/08/judges-help-judges-when-courts-face-heavy-caseloads> [https://perma.cc/6HXD-YF69].

277. *Id.*