

Selecting Supreme Court Justices: Preserving the System, Protecting with Professionalism

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Not long ago, I witnessed my one-year-old daughter stand up in her playpen, raise her right arm, pause, and waive at now Chief Justice John G. Roberts, Jr. being sworn in at his confirmation hearing before the United States Senate Committee on the Judiciary. It was then that my pride reached new heights. Three months later I experienced the same feeling when she repeated the process, again unprovoked, with now Justice Samuel A. Alito, Jr. I would love to believe that my bright little prodigy understood the significance behind the proceedings and the impact they will have on her as she grows up. Alas, that will take some time because as far as she was concerned, the Justices were waiving at her. Even for the advanced scholar, however, fully understanding and appreciating the intricacies of the proceedings involving the replacement of a Justice of the United States Supreme Court takes curiosity, research, reflection, and emotional commitment.

I. INTRODUCTION

Unsurprisingly, the American public is cynical toward lawyers and the government. While Senators, the President, and members of the executive administration all strive to improve our country, many times continuous political bickering leaves a distaste in the public's opinion. The process of confirming a nominee to the Supreme Court serves as such an example. At first glance, the confirmation process appears to be a series of petty arguments between politicians with a mutual dislike for one another. Sadly, much of the media exacerbates this negative image by depicting the President announcing a candidate followed by a number of Senators, many of whom represent a different political party, immediately expressing their disagreement with the selection. A series of senatorial debates follow concerning the implications of this nominee sitting on the bench for life, swaying colleagues toward one political side versus another.¹ Interestingly, many politicians admit the

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1. See DENIS STEVEN RUTKUS, U.S. CONGRESSIONAL RESEARCH SERVICE, SUPREME COURT APPOINTMENT PROCESS: ROLES OF THE PRESIDENT, JUDICIARY COMMITTEE, AND SENATE 23 (2003), available

necessity of working together to focus on resolving the issues at hand rather than simply debating party ideals. Often times, however, these admissions seem to be made in vain and reiterated after each political battle. Are they just comments, or was work performed at a much more complicated level than we realize?² Despite the differences of opinion, and the occasional strong remarks, the system functions effectively and continues to evolve. Still, we must always be prepared to take action as society evolves due to tragedies, changes in the environment, breakthroughs in science, and countless other reasons. Fortunately, the Framers drafted the United States Constitution to account for such change and keep the co-equal legislative, executive, and judicial branches of government in check with one another.³ Goals may not be accomplished as swiftly as some would prefer, but in most instances we find that issues are rightfully thought through and thoroughly debated, at least with respect to the task of selecting Supreme Court Justices.⁴

at <http://fpc.state.gov/documents/organization/50146.pdf>.

2. See Press Release, President Attends Swearing-In Ceremony for Associate Justice Alito (Feb. 1, 2006) (remarks of Associate Justice Samuel Alito) [hereinafter President Attends], available at <http://www.whitehouse.gov/news/releases/2006/20060201-4.html>. Justice Alito noted the hard work and effort put forth by members of the Senate and the Judiciary Committee to ensure a fair and complete assessment of his nomination. *Id.*

3. See THE FEDERALIST NO. 78, at 433 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

It is safe to say that a respect for the principle of separation of powers is deeply ingrained in every American. The nation subscribes to the original premise of the framers of the Constitution that the way to safeguard against tyranny is to separate the powers of government among three branches so that each branch checks the other two. Even when this system thwarts the public will and paralyzes the processes of government, Americans have rallied to its defense.

Leslie Gray & Wynell Burroughs, *Constitutional Issues: Separation of Powers*, 51 SOC. EDUC. 28, 28-30 (1987), available at <http://www.archives.gov/education/lessons/separation-powers/index.html>.

4. See President's Remarks at Swearing-In Ceremony of Chief Justice John Roberts (Sept. 29, 2005) (remarks of Chief Justice Roberts), available at <http://www.whitehouse.gov/news/releases/2005/09/20050929.html> (detailing extensive debates among Senators and the President as exemplifying constitutional principles).

Senator Frist, other members of the Senate, I view the vote this morning as confirmation of what is for me a bedrock principle, that judging is different from politics. And I appreciate the vote, very much.

The process we have just completed epitomizes the separation of powers that is enshrined in our Constitution. My nomination was announced some 10 weeks ago here in the White House, the home of the executive branch. This morning, further up Pennsylvania Avenue, it was approved in the Capitol, the home of the executive [sic] branch. And tomorrow, I will go into the Supreme Court building to join my colleagues, the home of the judicial branch, to undertake my duties. The executive and the legislature have carried out their constitutional responsibilities and ensured the succession of authority and responsibility in the judicial branch.

What Daniel Webster termed, "the miracle of our Constitution" is not something that happens every generation. But every generation in its turn must accept the responsibility of supporting and defending the Constitution, and bearing true faith and allegiance to it. That is the oath that I just took. I will try to ensure, in the discharge of my responsibilities, that with the help of my colleagues, I can pass on to my children's generation a charter of self-government as strong and as vibrant as the

Denis Steven Rutkus, reporting for the Library of Congress's Congressional Research Service, observed the significance of these historical events when he noted that:

The appointment of a Supreme Court Justice is an infrequent event of major significance in American politics. Each appointment to the nine-member Court is significant because of the enormous judicial power that the Court exercises, separate from and independent of, the executive and legislative branches. The appointments are infrequent, as a vacancy may occur only once or twice, or even never at all, during a particular President's years in office.⁵

While replacing Justices may be infrequent events, we must be prepared as a society because they are events that can occur at any time. Protecting and preserving our legal system is critical in protecting and preserving our national heritage.⁶

By way of this essay, my goal is to enlighten and inspire members, and even nonmembers, of the legal profession by exploring the process by which Justices are selected to serve on the United States Supreme Court, an entity which was created to protect us, and an entity which we too, must protect. After briefly reviewing the Court itself, I will explore the process by which the Justices are selected to serve and confirmed to sit on the Supreme Court, followed by an examination of the role of the ethical attorney in the entire process.

Through this article, I have attempted to bring together different perspectives of leading scholars regarding the selection of Justices to Supreme Court. Armed with this knowledge, readers will be better equipped to put themselves into the role of attorneys, Senators, and the President to understand and appreciate more fully the public actions of these key figures in selecting Supreme Court Justices. Each, after all, must respond differently to varying factors created by the nature of their positions. It is my hope that with this new

one that Chief Justice Rehnquist passed on to us.

Id.

5. RUTKUS, *supra* note 1, at 1. Mr. Rutkus is a Specialist in American National Government for the Government and Finance Division. *Id.*

6. See Stephen Breyer, Assoc. Justice, Supreme Court of the United States, The Legal Profession and Public Service, Address at the Gauer Distinguished Lecture in Law and Public Policy Sponsored by the National Legal Center for the Public Interest (Sept. 12, 2000), in 57 N.Y.U ANN. SURV. AM. L. 403, 414 (2000). Justice Breyer opined that

[T]he constitutional system that protects our liberties consists not simply of fine words on paper, but also of habits, customs, expectations, settled modes of behavior engaged in by judges, by lawyers, by the general public. And those habits and expectations have developed gradually over 200 years of a history that has included a Civil War and many years of racial segregation. I see the result illustrated in our Courtroom every day, as men and women of all races, religions, nationalities, and every possible opinion come to settle under law matters that elsewhere might be settled in the streets. That is a legal heritage, a treasure, which we must work to preserve.

Id.

understanding and an increased awareness of our ethical obligations, lawyers will be more productive in society. If more attorneys acted as the leaders and role models that society expects them to be, welcoming in this instance their part (no matter how big or how small) in the selection of our Supreme Court Justices, the legal system as a whole can only improve and regain the respect that it has tragically lost along the way. By enhancing the legal system, our national heritage will be both protected and preserved for years to come.⁷

II. THE ENTITY WE STRIVE TO PROTECT

A. *The Birth of Our Highest Court*

The Supreme Court of the United States has existed for over 200 years.⁸ Despite the Court's age, the original plan for the judicial branch remains intact today as "a supreme appellate court to interpret the Federal Constitution and laws; a system of lower federal courts, separated geographically by state boundaries and exercising basically the same jurisdiction; and reliance on state courts to handle the bulk of adjudication in the nation."⁹

The Judiciary Act of 1789 divided the United States into thirteen judicial districts, organized into the Eastern, Middle, and Southern circuits.¹⁰ The Supreme Court, consisting of the Chief Justice and five Associate Justices, sat in the nation's capital which was located at that time in New York City. Justices were also required to "ride circuit" and hold court twice per year in each judicial district for most of the first 101 years of the Supreme Court's existence.¹¹ Many people take the Court's existence for granted and are unaware of the multitude challenges it has faced throughout history. Special recognition should be given to the difficulties—particularly travel—that the original Justices faced. For example, Chief Justice John Jay postponed the first assembly of the Supreme Court, which took place at the Merchant's Exchange

7. See *id.* at 415. "History makes clear that the Constitution can work only with the understanding, active support, and participation of millions of ordinary Americans. And here there is enough evidence of indifference to, or distrust of, government by those ordinary Americans to provide cause for concern." *Id.*

8. See U.S. CONST. art. III, § 1 (establishing United States Supreme Court). This provision states: "[T]he Judicial Power of the United States, shall be vested in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish." *Id.* The Supreme Court of the United States was created in accordance with this provision and by authority of the Judiciary Act of September 24, 1789, 1 Stat. 73, and was organized on February 2, 1790. See A BRIEF OVERVIEW OF THE SUPREME COURT, available at <http://www.supremecourtus.gov/about/abriefoverview-supremecourt.pdf> (last visited Apr. 9, 2007).

9. RUSSELL R. WHEELER & CYNTHIA HARRISON, FEDERAL JUDICIAL CENTER, CREATING THE FEDERAL JUDICIAL SYSTEM 1 (1994), available at [http://www.fjc.gov/public/pdf.nsf/lookup/creating.pdf/\\$File/creating.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/creating.pdf/$File/creating.pdf).

10. See PUBLIC STATUTES AT LARGE, 1st Cong., 1st Sess. 73 (1789), available at <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=196>.

11. See THE COURT AS AN INSTITUTION, available at <http://www.supremecourtus.gov/about/institution.pdf>.

Building in New York City, for one day, to February 2, 1790, because some Justices were not able to reach New York in time.¹²

The Court did not sit in New York for long. In 1790, the Court moved with the nation's capital to Philadelphia, Pennsylvania. Justices held chambers in Independence Hall and later in City Hall.¹³ In 1800, when the nation's capital moved to its permanent location in Washington, D.C., the Court moved as well. Chambers was located in a space lent by Congress in the new Capitol Building, although it was unfortunately changed approximately six times. The Court also sat in a private house during the War of 1812 because the British set fire to the Capitol building. When the Court returned to the Capitol Building, it sat from 1819-1860 in what is now called the "Old Supreme Court Chamber." The Court then sat in the "Old Senate Chamber" from 1860-1935.¹⁴ In 1929, Chief Justice William Howard Taft, a former President of the United States from 1909 to 1913, persuaded Congress to construct a permanent place for the Court.¹⁵ With Congressional approval and \$9,740,000 in authorized funds, Taft hired architect Cass Gilbert to design "[a] building of dignity and importance suitable for its use as the permanent home of the Supreme Court of the United States."¹⁶ Construction began in 1932, at which time then Chief Justice Hughes stated "[t]he Republic endures and this is the symbol of its faith."¹⁷ Construction was completed in 1935, but sadly, Chief Justice Taft, along with architects Cass Gilbert and John R. Rockart, passed away before the building's completion and the impressive return of \$94,000.00 in unused funds to the Treasury. The Court immediately took residence in its new home where it has remained ever since.¹⁸

B. Judicial Challenges

The building—an impressive presence—houses the most important jurists in the nation. Currently, John G. Roberts, Jr. serves as Chief Justice and his eight Associate Justices include John Paul Stevens, Antonin Scalia, Anthony M. Kennedy, David H. Souter, Clarence Thomas, Ruth Bader Ginsburg, Stephen G. Breyer, and Samuel A. Alito, Jr.¹⁹ The Chief Justice, however, serves a special and unique role in the American judicial system, the extent to which many do not realize.

12. *See id.*

13. THE COURT BUILDING, available at <http://www.supremecourt.us.gov/about/courtbuilding.pdf>.

14. *See id.* (detailing history of Court's location over the years).

15. *See id.*

16. *Id.*

17. *Id.*

18. *See* THE COURT BUILDING, *supra* note 13.

19. *See* THE JUSTICES OF THE SUPREME COURT, available at <http://www.supremecourt.us.gov/about/biographiescurrent.pdf>; *see also* THE COURT AS AN INSTITUTION, *supra* note 11 (noting number of Justices has remained the same since 1869).

The United States Constitution assigns the Chief Justice the role of serving “as the presiding officer of the Senate during an impeachment trial of the President.”²⁰ The obligations, however, extend much further than that. The Chief Justice is, after all, “the Court’s most highly visible and identifiable figure—by virtue of the position’s prominence and prestige, and the powers it has acquired by statute or through custom.”²¹ As leader of the federal judicial branch of government, the Chief Justice

[p]resides at the private conference during which the Court decides which lower court decisions to accept from the large number received on appeal; presides over the public sessions, or hearings of cases, that come before the Court; chairs the private conference at which cases are discussed among the nine members of the Court and eventually decided by a vote of the Justices; and assigns, when in the majority, the writing of the Court’s opinion on the case either to himself or to one of the Associate Justices.²²

The Chief Justice also serves as manager of Court operations and the actual building. In today’s society, the Chief Justice must arguably use greater care than Chief Justices of the past, given the increased number of cases presented to the court, advances in technology, and more involved security concerns (particularly since the events of September 11, 2001). Additionally, he or she must oversee the rules of the Supreme Court Library, appointments of some Court employees, and Court security.²³ The Chief Justice’s obligations continue outside the Supreme Court building, and include (1) chairing the Judicial Conference of the United States and the Board of the Federal Judicial Center; (2) supervising the Administrative Office of the United States Courts; (3) appointing two judiciary members to serve on the Commission on Executive, Legislative and Judicial Salaries; (4) reporting to Congress on changes in the Federal Rules of Criminal Procedure; (5) serving, along with the Associate Justices, as circuit Justice amongst the circuits; (6) assigning duties within said circuits to Justices, including retired Justices if they agree; (7) serving as a member on the Board of Regents of the Smithsonian Institution, the Board of Trustees of the Joseph H. Hirshhorn Museum and Sculpture Garden, and the National Gallery of Art; (8) appointing non-judicial officials to the National Commission on Reform of Federal Criminal Laws and the National Historical Publications Commission; and finally, (9) administering the oath of office to the President.²⁴

20. See DENIS STEVEN RUTKUS & LORRAINE H. TONG, U.S. CONGRESSIONAL RESEARCH SERVICE, THE CHIEF JUSTICE OF THE UNITED STATES: RESPONSIBILITIES OF THE OFFICE AND PROCESS FOR APPOINTMENT 3-4 (2005), available at <http://www.bespacific.com/mt/resources/2005.09.22.crssab.pdf>.

21. *Id.* at 4.

22. See *id.* (quoting JOHN J. PATRICK, THE SUPREME COURT OF THE UNITED STATES: A STUDENT COMPANION 70 (Oxford University Press, 2d ed. 2001)).

23. *Id.* at 4.

24. *Id.* at 5-6. As to the ninth enumerated duty, any Justice could technically administer the President’s

Former Chief Justice Evans Hughes noted that

The Chief Justice as the head of the Court has an outstanding position, but in a small body of able men with equal authority in the making of decisions, it is evident that his actual influence will depend on the strength of his character and the demonstration of his ability in the intimate relations of the Judges Courage of conviction, sound learning, familiarity with precedents, exact knowledge due to painstaking study of the cases under consideration cannot fail to command that profound respect which is always yielded to intellectual power conscientiously applied.²⁵

C. *Guarding the Constitution and Judicial Review*

The importance of assigning independent judges to the task of constitutional interpretation or “judicial review,” as opposed to the confusing and unpredictable realm of the political process, was not taken lightly by our founding fathers. James Madison argued that constitutional interpretation relies on “the reasoned judgment of independent judges, rather than to the tumult and conflict of the political process. If every constitutional question were to be decided by public political bargaining . . . the Constitution would be reduced to a battleground of competing factions, political passion and partisan spirit.”²⁶ In 1803, Chief Justice John Marshall confirmed the Court’s power of judicial review in *Marbury v. Madison*.²⁷

D. *An Increasingly Diverse and Heavy Docket*

Many people visit the Supreme Court building in Washington, D.C., yet fail to understand or appreciate the scope of the work that the Justices undertake on a daily basis. Work does not end with hearing arguments, as Justices must render decisions on cases, write concurrent or dissenting opinions, and issue orders. Every Term the Court publishes nearly 5,000 pages of written opinions. Each decision is revised as many as a dozen times before publishing, so that the entire legal world may accurately cite to them.²⁸

The increase of lawyers and litigation brought an increase in the Court’s

oath of office. *Id.* at 6 n.27.

25. RUTKUS & TONG, *supra* note 20, at 9 (quoting CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 57 (Columbia University Press 1928)).

26. THE COURT AND CONSTITUTIONAL INTERPRETATION, *available at* <http://www.supremecourtus.gov/about/constitutional.pdf> (last visited Apr. 7, 2007).

27. *See generally* *Marbury v. Madison*, 5 U.S. 137 (1803) (invoking for first time the power of Court to strike down a Congressional Statute). Judicial review is limited to rendering opinions on specific cases. It does not include providing advisory opinions, even those sought by the President. In fact, the first Chief Justice, John Jay, refused to opine on a foreign policy proposal for then President George Washington. *See* *The Court and Constitutional Interpretation*, *supra* note 26.

28. *See* THE JUSTICES’ CASELOAD, *available at* <http://www.supremecourtus.gov/about/justicecaseload.pdf>.

caseload. In 1860, the court had 310 cases on its docket; presently, more than 7,000 civil and criminal matters are docketed each term.²⁹ Approximately 100 cases are granted plenary review with oral arguments by counsel. Formal written opinions are delivered in eighty to ninety cases, and approximately fifty to sixty additional cases are disposed of without granting plenary review.³⁰ Each term, approximately 1,200 applications containing various legal issues are filed, as are approximately 8,000 petitions for review by the Court.³¹

The types of cases that the Court hears are diverse. The Constitution proscribes that jurisdiction lies in:

all Cases in Law and Equity arising under the Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all cases affecting Ambassadors, other public Ministers and Consuls; to all cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a party; to Controversies between two or more states; between a State and Citizens another state; between Citizens of different states; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.³²

Decisions rendered by the Supreme Court are only altered by a new ruling or by constitutional amendment. When the Court interprets a statute, Congress may take new legislative action allowing for the evolution of law and society.³³ As Chief Justice Marshall once expressed, “[w]e must never forget that it is a *constitution* we are expounding . . . intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs.”³⁴

E. Tradition and Reverence

Part of the Supreme Court’s mystery stems from its many traditions. For instance, since 1800 Justices have worn black robes while in session. Prior to 1800, the Justices wore robes, but with some color similar to early colonial and English judges.³⁵ In the early days, all attorneys were required to wear formal “morning clothes” when appearing before the Court. Today, “formal dress is followed only by the Department of Justice and other government lawyers, who serve as advocates for the United States Government,” as well as the Clerk of

29. See WHEELER & HARRISON, *supra* note 9, at 16 (describing history of Court’s docket); see also THE COURT AND CONSTITUTIONAL INTERPRETATION, *supra* note 26 (noting 7,000 cases filed each year); A BRIEF OVERVIEW OF THE SUPREME COURT, *supra* note 8 (detailing the length of Court’s terms).

30. See THE JUSTICES’ CASELOAD, *supra* note 28.

31. See A BRIEF OVERVIEW OF THE SUPREME COURT, *supra* note 8.

32. U.S. CONST. art. III, § 2.

33. See THE COURT AND CONSTITUTIONAL INTERPRETATION, *supra* note 26.

34. THE COURT AND CONSTITUTIONAL INTERPRETATION, *supra* note 26.

35. See THE COURT AND ITS TRADITIONS, available at <http://www.supremecourt.us/about/traditions.pdf>. Chief Justice Jay’s original robe “of black and salmon” may be viewed today at the Smithsonian Institution. *Id.*

the Court.³⁶

Another tradition of the Court includes “the Conference handshake.” “When the Justices assemble to go on the Bench each day and at the beginning of their private Conferences at which they discuss decisions, each Justice shakes the hands with each of the other eight.”³⁷ This practice was instituted by Chief Justice Fuller to remind everyone “that differences of opinion on the Court did not preclude overall harmony of purpose.”³⁸

Finally, the Court has an official seal, which the Clerk of the Court stamps on official papers.³⁹ The current seal is the fifth in the Court’s history, consisting of one “similar to the Great Seal of the United States, but which has a single star beneath the eagle’s claws - symbolizing the Constitution’s creation of ‘one Supreme Court.’”⁴⁰ The Supreme Court of the United States is invaluable as the leader of our judicial branch of American government. The nine Justices with the privilege of sitting on the Court have incredible obligations placed upon them. As each Justice is replaced over time, extreme caution must be utilized.

III. THE PROCESS OF SELECTING JUSTICES TO SERVE ON THE UNITED STATES SUPREME COURT

A. Presidential Nomination

The Constitution mandates that the President make certain appointments, including nominations of Justices to the Supreme Court, with “the advice and consent” of the Senate.⁴¹ Alexander Hamilton felt that senatorial “advice and consent” in appointing a Justice to the Supreme Court

[w]ould be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. In addition to this, it would be an efficacious source of stability in the administration.⁴²

36. *See id.*

37. *See id.*

38. *Id.*

39. *See* THE COURT AND ITS TRADITIONS, *supra* note 35. An example of an official paper is a “certificate given to [an] attorney newly admitted to practice before the Supreme Court.” *Id.*

40. THE COURT AND ITS TRADITIONS, *supra* note 35.

41. *See* U.S. CONST. art. II, § 2, cl. 2; *see also* THE FEDERALIST NO. 76, at 422 (Alexander Hamilton) (Clinton Rossiter, ed. 1961).

“[A]nd [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 otherwise provided for [in the Constitution].” U.S. CONST. art. II, § 2, cl. 2.

42. THE FEDERALIST NO. 76, *supra* note 41, at 425.

Two schools of thought exist on the interpretation of the phrase “advice and consent”: (1) “the Senate gives its ‘advice’ about whether the President should appoint someone by giving or withholding its ‘consent’”; and (2) “[Senators] separate ‘advice’ from ‘consent,’ applying the former to nomination and the latter to confirmation.”⁴³ Irrespective of the theory, input from the Senate has great merit and is taken quite seriously.⁴⁴ Certain effects of this input occur when

Senators who candidly inform a President of their objections to a prospective nominee may help in identifying shortcomings in that candidate or the possibility of a confirmation battle in the Senate, which the President might want to avoid. Conversely, input from the Senate might draw new Supreme Court candidates to the President’s attention, or provide additional reasons to nominate a person who already is on the President’s list of prospective nominees.⁴⁵

Senators provide private advice to the President as well as make public statements of their disapproval or support. Many times, Senators issue these public statements in the hopes of influencing the President.⁴⁶ Certain Senators are more influential than others, especially those representing the nominee’s home state. If one of these Senators disapproves of the nominee, their other colleagues often follow their lead in what is called “senatorial courtesy.”⁴⁷ The effects of this “unwritten” policy are even more dramatic if the President and Senator are from the same party.⁴⁸ In either case, not only does the President face Senate rejection of the nomination, but also a significant drop in public opinion, particularly if the nominee has already been announced.

The only time the President may circumvent Senate approval is if Congress is not in session, in which case the President may make what is called a “recess appointment.” In that instance, the appointee will serve, but only until the end

43. United States Senator Orrin G. Hatch, *Presidential Privilege: You Win the White House, you Make the Judicial Nominations*,

NAT’L REV. ONLINE, July 14, 2005, <http://www.nationalreview.com/comment/hatch200507140809.asp>. Senator Hatch argues that the first interpretation adheres to the plain text of the Constitution while Senators who employ the second interpretation are perverting the true intent of the Framers. *Id.*

44. See RUTKUS, *supra* note 1, at 4 n.10. Senator Daniel P. Moynihan stated that the Senate

is perhaps most acutely attentive to its [advice and consent] duty when it considers a nominee to the Supreme Court. That this is so reflects not only the importance of our Nation’s highest tribunal, but also our recognition that while Members of the Congress and Presidents come and go . . . , the tenure of a Supreme Court Justice can span generations.

Id. (quoting 139 CONG. REC. 18, 142 (1993) (statement of Sen. Moynihan)).

45. See RUTKUS, *supra* note 1, at 8.

46. See RUTKUS, *supra* note 1, at 8.

47. See RUTKUS, *supra* note 1, at 8.

48. See RUTKUS, *supra* note 1, at 8. Senatorial courtesy is most often used to block lower federal court judicial nominations but has been used on numerous occasions to reject Presidential nominees to the Supreme Court. *Id.*

of the next congressional session at which time the Senate may formally consider the nomination.⁴⁹ The President must always use caution in making recess appointments as it is not enough to review a resume and conduct a cursory background check. Administration of the official business of the Court could be adversely affected before the nominee has been subject to the careful and rigorous scrutiny of the Senate, after which the nominee may not even be granted a permanent seat on the Bench.⁵⁰ The goal of the President is to nominate a person who will be swiftly confirmed and considered by all the most qualified for the position. The last thing on the President's agenda is to jeopardize the reputation of the executive branch and waste precious political capital by selecting an inadequate nominee or by showing improper favoritism to an unworthy candidate.⁵¹ Today, factors for consideration include the candidate's gender, religion, party affiliation, ethnicity, and geographic origin, in addition to his or her professional qualifications.⁵²

The factors to consider in selecting a candidate are endless, as are the sources available to assist the President along the way. Fortunately for modern Presidents, one source of inspiration is the expertise of those who have similarly faced the task of replacing Justices. President Dwight D. Eisenhower's memoirs emulate his desire to appoint federal judges that would "command the respect, confidence, and pride of the population."⁵³ To that end, President Eisenhower suggested the following areas for consideration:

"[C]haracter and ability would be the first qualifications to seek"; [a]pproval of the American Bar Association's Committee on Federal Judiciary and "the respect of the community in which he lived"; [a] "thorough investigation of the prospective appointee's reputation and of every pertinent detail of his life" by the Federal Bureau of Investigation; [a]n upper age limit for initial appointment of 62 ("allowing a margin of a year or so if other qualifications were unusually impressive"); "[g]eneral health"; "[s]olid common sense," which would "exclude . . . candidates known to hold extreme legal or philosophic views."⁵⁴

In appointing a Chief Justice, President Eisenhower felt that even stricter standards were necessary:

A chief justice, I felt, should in addition to meeting all the criteria I had

49. See U.S. CONST. art. II, § 2, cl. 3; see also THE FEDERALIST NO. 76, *supra* note 41, at 422. "The President shall have power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. CONST. art. II, § 2, cl. 3.

50. See RUTKUS, *supra* note 1, at 16. Recess appointments to the Supreme Court have been extremely rare, the last ones occurring in the 1950s under President Eisenhower. Further, they are quite controversial as a recess appointment bypasses the role of the Senate to give their "advice and consent." See *id.* at 16 n.46.

51. See THE FEDERALIST NO. 76, *supra* note 41, at 426.

52. See RUTKUS & TONG, *supra* note 20, at 16.

53. See RUTKUS & TONG, *supra* note 20, at 19 (quoting 1 DWIGHT D. EISENHOWER, THE WHITE HOUSE YEARS 227 (1965)).

54. See RUTKUS & TONG, *supra* note 20, at 19-20 (quoting 1 DWIGHT D. EISENHOWER, THE WHITE HOUSE YEARS 226-27 (1965)).

established for the selection of other judges, be a man of national stature, who had such recognized administrative ability as to promise an efficient conduct of the affairs of the Court and who could be expected to provide a leadership that would be favorably received by all of the courts of the land.⁵⁵

With respect to nominees and past judicial experience, following the appointment of Chief Justice Earl Warren, President Eisenhower decided to make sure that all future Supreme Court nominees had some prior experience as a judge either on a state supreme court or a federal court so that the nominee would have a record which would help ascertain their judicial philosophy.⁵⁶ The President may also wish to consider the candidate's privacy before formally announcing a nominee. "Such secrecy may allow a President to reflect on the qualifications of prospective nominees, and the background investigations to proceed, away from the glare of publicity, news media coverage and outside political pressures."⁵⁷ Conversely, "[o]penness may . . . serve various purposes –among them, to test public or congressional reaction to potential nominees, please political constituencies who would identify with identified candidates, or demonstrate the President's determination to conduct a comprehensive search for the most qualified person available."⁵⁸

The President must always consider the political landscape of the government. Again, society is in a constant state of flux and important political considerations may lurk behind the confirmation process of every potential nominee. Perhaps the outcome of highly publicized constitutional issues before the Court is at stake or sharp partisan or ideological differences exist between the White House and Senate. These issues are further exacerbated when the candidate expresses controversial views.⁵⁹ The President must keep all of these factors in mind when choosing a candidate since a more publicized analysis of the nominee immediately follows the announcement during the next stage.

B. *Judiciary Committee on the Judiciary's Investigation*

Once the nominee has been selected and announced, focus shifts to the Senate. Each Senator, elected by the people of his or her state, serves a six year term until death, resignation, or expulsion.⁶⁰ According to the Constitution, each Senator must be at least thirty years of age, a United States citizen for the

55. See RUTKUS & TONG, *supra* note 20, at 20 (quoting 1 DWIGHT D. EISENHOWER, THE WHITE HOUSE YEARS 230 (1965)).

56. See RUTKUS & TONG, *supra* note 20, at 20.

57. See RUTKUS, *supra* note 1, at 13.

58. See RUTKUS, *supra* note 1, at 13.

59. See RUTKUS, *supra* note 1, at 9.

60. See U.S. CONST. amend. XVII, § 1. A two-thirds majority is necessary to expel a Senator. To date, fifteen members have been expelled. United States Senate, Expulsion and Censure, http://www.senate.gov/artandhistory/history/common/briefing/Expulsion_Censure.htm (last visited May 23, 2007).

past nine years, and at the time of election, an inhabitant of the state he or she represents.⁶¹

Presently, there are 100 members of the United States Senate, with one-third of the total seats open for election every two years.⁶² The Senate is historically considered the more deliberative, elite, collegial, and publicly insulated body because it is comprised of fewer members than the House of Representatives.

Before the full Senate considers the nominee, the Committee on the Judiciary, also referred to as the “Judiciary Committee,” conducts an in-depth investigation. The Judiciary Committee was established on December 10, 1816, and since then its jurisdiction has encompassed the entire spectrum of the law from criminal justice to intellectual property.⁶³ Originally, judicial nominations were referred to the Committee by motion only, but after 1868 “the Senate determined that all nominations should be referred to appropriate standing committees [Since then], almost all Supreme Court nominations have been referred to the Judiciary Committee.”⁶⁴

The Judiciary Committee, one of sixteen standing committees of the Senate, is led by a chairperson chosen from the majority party. Senator Patrick Leahy (D-Vermont) currently acts as Chairperson of the Judiciary Committee and nine Senators from each political party join him.⁶⁵ Over one-half of the Senators of the current 110th Congress are attorneys. Specifically, fifty-eight Senators have Juris Doctor degrees. Additionally, of the nineteen Senators comprising the Judiciary Committee, only Senators Coburn, Feinstein, Grassley, and Kohl are not lawyers, leaving the fifteen remaining senators as members of the profession.⁶⁶

In 1955, the process of public hearings, in which the nominee testifies before a fully constituted Judiciary Committee, became routine.⁶⁷ Recently, Americans witnessed a Judiciary Committee faced with a task of great importance—reviewing nominations to permanently replace two Justices within a couple of months, one of whom would serve as Chief Justice. The

61. See U.S. CONST. art. I, § 3.

62. See U.S. CONST. art. I, § 3.

63. See United States Senate Committee on the Judiciary, <http://judiciary.senate.gov/information.cfm> (last visited Apr. 7, 2007).

64. See RUTKUS & TONG, *supra* note 20, at 28 n.103.

65. See United States Senate Committee on the Judiciary, *supra* note 63. The members from the Democratic Party include Edward Kennedy (MA), Joseph Biden, Jr. (DE), Herb Kohl (WI), Dianne Feinstein (CA), Russell Feingold (WI), Charles Schumer (NY), Richard Durbin (IL), Benjamin Cardin (MD), and Sheldon Whitehouse (RI). *Id.* The Republican members are Arlen Specter (PA), Orrin Hatch (R), Charles Grassley (IA), Jon Kyl (AR), Jeff Sessions (AL), Lindsey Graham (SC), John Cornyn (TX), Sam Brownback (KS), and Tom Coburn (OK). *Id.*

66. See E-mail from Mary Baumann, Researcher-Writer of the U.S. Senate Historical Office (May 10, 2007) (on file with author). Ms. Baumann also noted that further information pertaining to the profile of the current 110th Congress is available at <http://www.senate.gov/reference/resources/pdf/RS22007.pdf>.

67. See RUTKUS & TONG, *supra* note 20, at 30. Justice John Harlan was the first nominee to experience this process. See *id.*

new Justices would join their colleagues as a Court “charged with ensuring the American people the promise of equal justice under law and, thereby, [it] also functions as guardian and interpreter of the Constitution.”⁶⁸

In order to conduct a confirmation hearing properly, the Judiciary Committee collects information for analysis over the course of several weeks. A number of sources are called by the Committee to assist in its collection, including the Federal Bureau of Investigation.⁶⁹ Senators must make use of their time carefully, keeping in mind the magnitude of the Court’s decision and its effect on society, the controversial nature of the nominees, and the fact that so many cases have been decided by a vote of 5-4, which exemplifies the difference a single justice makes.⁷⁰ Properly sifting through all of the information is time-consuming, particularly since both the personal and private affairs of the candidate are subject to scrutiny. Additionally, whether a nominee espouses “judicial temperament” must be considered even if at first glance the candidate appears appropriate. Judicial temperament has been described as “a personality that is evenhanded, unbiased, impartial, courteous yet firm, and dedicated to a process, not a result.”⁷¹ At the formal confirmation hearing, Senators question the nominee vigorously as to his or her views, qualifications, philosophy, and judgment.⁷² Many Senators routinely address “social and political issues, the Constitution, particular Court rulings, current constitutional controversies, constitutional values, judicial philosophy and the analytical approach a nominee might use in deciding issues and cases.”⁷³ The nominee leaves many of these questions unanswered. Those that seek insight into opinions on prospective or current cases are considered inappropriate by many judges, particularly since answering them may appear to commit the

68. See THE COURT AND CONSTITUTIONAL INTERPRETATION, *supra* note 26.

69. See RUTKUS & TONG, *supra* note 20, at 10 (discussing candidate investigation); RUTKUS, *supra* note 1, at 12 (noting FBI examination into candidate’s background).

70. See RUTKUS, *supra* note 1, at 6 (detailing developments causing increased Senate investigations into Supreme Court nominees). Rutkus notes that controversy surrounding the Supreme Court began in 1950s under Chief Justice Earl Warren and has continued unabated until today due in large part to “the perceived potency of the Court as catalyst for change [in society].” *Id.* Another factor leading to the intense scrutiny arises from the practice of Presidents to announce a judicial philosophy and value system that they seek when searching for nominees. *Id.* This puts many Senators, who do not share the same views as the President, immediately on alert. *Id.*

71. See RUTKUS, *supra* note 1, at 12 (quoting MILLER CTR. OF PUB. AFFAIRS, IMPROVING THE PROCESS OF APPOINTING FEDERAL JUDGES: A REPORT OF THE MILLER CENTER COMMISSION ON THE SELECTION OF FEDERAL JUDGES 10 (1996)).

72. See RUTKUS, *supra* note 1, at 23-24 (outlining procedures of confirmation hearing). The Chair of the Judiciary Committee begins the hearing by welcoming the nominee and explaining how the hearing is expected to proceed. Other members deliver their opening statements and then the nominee delivers his or her opening statement after they are introduced by a panel of presenters. Formal questioning, which is timed, commences with the Chairperson, followed by the ranking minority member, and then the remaining members in descending order of seniority and alternating between the parties. Subsequent rounds of questioning follow at the Chairperson’s discretion. *Id.*

73. See RUTKUS, *supra* note 1, at 24.

candidate to future rulings.⁷⁴ Justice David Souter, on examination responded to one of his questions in the following manner, “[C]an you imagine the pressure that would be on a judge who had stated an opinion, or seemed to have given a commitment in these circumstances to the Senate of the United States, and for all practical purposes, to the American people?”⁷⁵

Once the nominee has been questioned, witnesses are called. One routine witness is the chair of the ABA Standing Committee on Federal Judiciary “who explains the committee’s rating of the nominee.”⁷⁶ Other witnesses may include representatives of advocacy groups. Before their appearances, curriculum vitae and written statements of testimony from each witness are requested and reviewed by the Committee, as directed by the Committee on the Judiciary’s rules of procedure.⁷⁷

In addition to the public hearings, part of the confirmation process also includes a closed-door session with the nominee. The purpose of the closed-door session is to address any information that may have been obtained through confidential background investigations. In order to prevent public speculation, the Senate conducts these close-door proceedings for all nominees even when there is nothing to discuss.⁷⁸

At the conclusion of the hearing, usually within one week, the Judiciary Committee meets in open session to discuss whether they will confirm, reject, or make no recommendation in its report to the full Senate. The results are then sent to the full Senate for deliberation and debate.⁷⁹ The only way to prevent the full Senate from deliberating the nomination would be for the Committee to refrain from reporting to the Senate. The practice since the 1880s, however, has been to present the report, which includes both supporting and opposing views of the Committee members.⁸⁰ Negative or no recommendations by the Judiciary Committee in effect alerts the full Senate to the Committee’s reservations, but still allows the nomination to go forward.

74. See RUTKUS, *supra* note 1, at 24.

75. See RUTKUS, *supra* note 1, at 24 n.69 (quoting *Nomination of David Souter to be Associate Justice of the Supreme Court of the United States: Hearing Before S. Comm. on the Judiciary, 101st Cong., 2d Sess. 194* (1990) (statement of David Souter, Associate Justice, United States Supreme Court)).

76. See RUTKUS, *supra* note 1, at 26.

77. See United States Senate Committee on the Judiciary, Rules of Procedure, http://judiciary.senate.gov/committee_rules.cfm (last visited May 23, 2007).

78. See RUTKUS, *supra* note 1, at 26.

79. See RUTKUS, *supra* note 1, at 26.

Usually within a week of the end of hearings, the committee meets in open session to determine what recommendation to “report” to the full Senate. The committee may report favorably, negatively, or make no recommendation at all. A report with a negative recommendation or no recommendation permits the nomination to go forward, while alerting the Senate that a substantial number of committee members have reservations about the nominee.

Id.

80. See RUTKUS, *supra* note 1, 26-27.

C. Senate Deliberation

Once the Senate receives the report, the executive clerk of the Senate assigns it an Executive Calendar number.⁸¹ At that time, the Majority Leader consults with the Minority Leader to schedule the Senate's consideration of the nomination. If the Senate is in legislative session, the Majority Leader will bring a motion to enter executive session. This is done through either a non-debatable motion or by unanimous consent (also referred to as "UC").⁸² The Majority Leader will request the Senate proceed to executive session to consider the nomination immediately or at a specified date and time in the future. Usually, he or she will divide the time for debate equally amongst the two parties and also request a time limit for debate, otherwise known as "cloture," and usually set at thirty hours.⁸³ The cloture motion attempts to avoid a "filibuster," which opponents of the nomination employ in order to delay a vote by holding unlimited debate.⁸⁴ Closing the debate on a motion to consider the nomination when UC is unattainable requires an affirmative vote by a super-majority of three-fifths of the Senate body.⁸⁵ A motion to consider the nomination made during legislative session, however, is non-debatable, and the Senate must proceed to executive session to consider the nomination.⁸⁶

At the conclusion of the deliberations, the Senate votes for or against the nominee.⁸⁷ A simple majority confirms the nomination. Should there be a tie, the Vice President, who presides over the Senate, casts the deciding vote.⁸⁸

Between 1789 and 2004, United States Presidents presented approximately 154 Supreme Court candidates to the Senate. Of that group, only thirty-four nominees failed to obtain Senate approval.⁸⁹ Reasons for non-confirmation included "Senate opposition to the nominating President, the nominee's views, or the incumbent Court; senatorial courtesy; perceived political unreliability of the nominee; perceived lack of ability; interest group opposition; and fear of

81. See RUTKUS, *supra* note 1, at 28.

82. See RUTKUS, *supra* note 1, at 29 (outlining procedure for full Senate debate on nominee).

83. See RUTKUS & TONG, *supra* note 20, at 36. The purpose of cloture is to ensure that a final vote on the nominee takes place. *Id.*

84. See RUTKUS, *supra* note 1, at 30. Rutkus notes that "[i]f the majority leader moves to consider the nomination during executive session, the motion is debatable under Senate rules, 'and so it can be filibustered.'" *Id.*

85. See RUTKUS, *supra* note 1, at 30.

86. See RUTKUS, *supra* note 1, at 31.

87. See RUTKUS, *supra* note 1, at 39. In putting the nomination to a vote "the presiding officer typically states, 'The question is, Will the Senate advise and consent to the nomination of [nominee's name] of [state of residence] to be an Associate Justice [or Chief Justice] on the Supreme Court?'" *Id.*

88. U.S. CONST. art. I, § 3. The Constitution reads, "The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided." *Id.*; see also Georgetown Law Center, *U.S. Supreme Court Nominations*, http://www.ll.georgetown.edu/guides/supreme_court_nominations.cfm (last visited Feb. 8, 2006).

89. See HENRY B. HOGUE, U.S. CONGRESSIONAL RESEARCH SERVICE, SUPREME COURT NOMINATIONS NOT CONFIRMED, 1789-2004 1 (2005), available at <http://www.fas.org/sgp/crs/misc/RL31171.pdf>.

altering the balance of the Court.”⁹⁰ The timing of the vacancy can affect the nomination as well. For example, a President may be serving his or her final year of Presidency. Similarly, the President may not be seeking re-election or the chances of doing so are slim. Senators who would otherwise approve the President’s choice may be at the end of their terms. The Senate may then favor delaying action on a nomination in order to allow the next Senate to deliberate, or to allow the next President to appoint someone of his or her own choice.⁹¹

D. Confirmation and Swearing-In

Once a candidate secures a nomination and the Senate confirms it, the Secretary of the Senate transmits the resolution of the confirmation to the White House, where the President signs a commission officially appointing the nominee to the Court. The President then sends the signed commission to the Justice Department where officials engrave it with the date of appointment, and the Attorney General signs and fixes it with the Justice Department seal. Next, the Deputy Attorney General prepares a formal package and ships it by registered mail to the incoming Justice. The package contains the official commission, the oath of office and a photocopy of the Senate confirmation document.⁹²

Once the appointee receives the commission and accompanying documents, the incoming Justice takes two oaths of office representing the final step in the process. The appointee first takes “a judicial oath, as required by the Judiciary Act of 1789, and [then] a constitutional oath, which, as required by Article VI of the U.S. Constitution, is administered to Members of Congress and all executive and judicial officers.”⁹³ The constitutional oath is typically administered at the White House during a televised ceremony, while the appointee typically takes his or her judicial oath in the privacy of the Court building. Notably, the Court “regards the date the Justice takes the judicial oath as the beginning of his or her service, ‘for until that oath is taken he/she is not vested with the prerogatives of the office.’”⁹⁴

IV. THE ETHICAL ATTORNEY’S ROLE

Attorneys are invaluable in replacing Supreme Court Justices because they have both personal and specialized knowledge that those without a Juris Doctor degree lack.⁹⁵ Interestingly, while no rule exists requiring a Supreme Court

90. *See id.*

91. *See* RUTKUS, *supra* note 1, at 41.

92. *See* RUTKUS, *supra* note 1, at 46 (highlighting post-confirmation process issuing official commission).

93. *See* RUTKUS, *supra* note 1, at 46.

94. *See* RUTKUS, *supra* note 1, at 46 n.156 (quoting SUPREME COURT OF THE UNITED STATES, THE SUPREME COURT OF THE UNITED STATES 24 (undated)).

95. *See* D.C. CODE OF PROF’L RESPONSIBILITY EC 8-9 (1991). “The advancement of our legal system is

Justice to have been an attorney, to date, each has carried the title.⁹⁶ Given the expectations required of Justices today, particularly those of the Chief Justice, part of the evaluator's checklist will always include the legal background of the nominee. Since the 1990s, the American Bar Association (ABA) has served a major role in the process of selecting Supreme Court Justices. The ABA assists the Judiciary Committee in evaluating nominees by way of an extremely organized and comprehensive study, the results of which are presented by the Committee's chair at the nomination hearing.⁹⁷ In doing so, the ABA scrutinizes integrity, professional competence, and judicial temperament.

[T]he Supreme Court requires a person with exceptional professional qualifications. The significance, range and complexity of the issues considered by the Supreme Court, the importance of the underlying societal problems, the need to mediate between tradition and change and the Supreme Court's extraordinarily heavy docket are among the factors that require a person of exceptional ability.⁹⁸

Stephen Tober, Chair of the ABA Standing Committee on Federal Judiciary, explains the ABA's extensive study as extremely complex: "The Standing Committee of the American Bar Association provides the only nonpartisan, non-ideological, comprehensive peer review of nominees to the federal bench. With every nomination we talk to a significant cross-section of judges, lawyers and community members both in the legal community and in the bigger senses of the word."⁹⁹ The Committee analyzes the writings, opinions, and speeches composed by the nominee.

The ABA analyzes his or her background, and applies three standards of "integrity, professional competence, and judicial temperament," after which a vote of "well qualified," "qualified," or "not qualified" is then called.¹⁰⁰ All fourteen of the circuit members throughout the country, in addition to the chair, perform an evaluation as though the nominee was a member in his or her circuit. In the case of now Chief Justice Roberts, Tober describes the process as having

had all members of the committee across the land interviewing people, reaching out to people way beyond the judges and lawyers who are the logical starting place, and then working together to read and understand the material that Judge Roberts has authored, and read and understand the interview of the nominee

of vital importance in maintaining the rule of law and in facilitating orderly changes; therefore lawyers should encourage and should aid in making needed changes and improvements." *Id.*

96. See RUTKUS & TONG, *supra* note 20, at 7.

97. See RUTKUS, *supra* note 1, at 13 n.39.

98. RUTKUS, *supra* note 1, at 13 n.39.

99. American Bar Association, *Q & A with the chair of the ABA Standing Committee on Federal Judiciary*, A.B.A., Sept. 2005, <http://www.abanet.org/media/youraba/200509/article06.html>.

100. See *id.*

that was conducted by three members of the committee.¹⁰¹

To fulfill its role in the proceedings successfully, the ABA welcomes the assistance of reading groups as well as groups of academicians and practitioners. According to the ABA, academicians “tend to be in areas such as constitutional law, federal courts, [and/or] areas of concentration that the nominee may have written in or worked in.”¹⁰² Practitioners, on the other hand, contribute their experience in appellate practice of the highest nature. Attorneys nationwide are involved in the confirmation process through the ABA, including former Presidents of the United States. While the obligations of the 58 of our 100 current Senators differ from those of attorneys, all attorneys, including Senator-attorneys, must honor the various sets of ethical rules they are subject to, which often vary from jurisdiction to jurisdiction.¹⁰³ The District of Columbia Rules of Professional Conduct, differing slightly from the more common ABA’s Model Rules of Professional Conduct, describes the conduct expected of lawyers who are admitted to practice in the District of Columbia. The D.C. Bar Legal Ethics Committee, which interprets the D.C. Rules of Professional Conduct, favors the mission to improve the legal profession. In fact, one rule specifically encourages lawyers to assist in improving the administration of justice by participating in activities aimed at improving the legal profession.¹⁰⁴

We, both lawyers and non-lawyers alike, must acknowledge the inevitability of societal change, as did the drafters of the Constitution. It is our duty to ensure proper change and system stability by actively participating in the process of appointing for life only the most qualified persons to serve on the Supreme Court.¹⁰⁵

In order to be successful in our quest for new Justices, we must keep in mind the rules of ethics. A recurring theme throughout the law includes the mandatory admonishment of false statements of fact and interference with the administration of justice. If attorneys were to freely exaggerate facts or knowingly provide false information to the detriment of an honest lawyer, judge, or President, the Judicial Branch would crumble. Public trust in the legal profession is already in a fragile state. Willingly partaking in such unethical actions against honest leaders of our government would result in immeasurable harm.¹⁰⁶

101. *See id.*

102. *See id.*

103. *See generally* S. COMM. ON RULES AND ADMINISTRATION, STANDING RULES OF THE SENATE, XXXVII, CONFLICT OF INTEREST, *available at* <http://rules.senate.gov/senaterules/> (last visited Apr. 8, 2007).

104. *See* D.C. RULES OF PROF’L CONDUCT 6.4(a) (2007).

105. *See* Breyer, *supra* note 6, at 415. “As judges and lawyers we have a related special responsibility, that of helping to preserve the traditions, habits, and expectations of behavior that make the Constitution’s guarantees of freedom a reality” *Id.*

106. *See* Ky. State Bar Ass’n v. Lewis, 282 S.W.2d 321, 326 (Ky. 1955).

“[E]very lawyer, worthy of respect, realizes that public confidence in our courts is the cornerstone of our

With respect to participation in tribunals, the rules continue to reinforce such warnings, forbidding a lawyer from knowingly:

- (i) Making a false statement of material fact or law to a tribunal; (ii) Counseling or assisting a client to engage in conduct the lawyer knows is criminal or fraudulent;
- (iii) Failing to disclose to the tribunal controlling legal authority not disclosed by opposing counsel and known by the lawyer to be dispositive of a question at issue and directly adverse to the position of the lawyer's client; or
- (iv) Offering evidence that the lawyer knows to be false.¹⁰⁷

The Rules specifically instruct counsel to refrain from, and instead actively oppose, dishonesty, fraud, deceit, or misrepresentations in all judicial hearings.¹⁰⁸ Consider the potential number of attorneys—to whom these rules apply—who are directly involved with judicial confirmation hearings, including some witnesses and Senators.¹⁰⁹ While the duties of a Senator must come first, for Senator-attorneys, those duties must not conflict with their legal responsibilities. Otherwise, he or she risks suspension or revocation of his or her license to practice law from each jurisdiction to which the Senator has been admitted.¹¹⁰ In defending questionable public remarks regarding the selection of Supreme Court justices, however, Senator-attorneys do have the protection of Article I of the Constitution¹¹¹ and perhaps positions similar to those found in the former D.C. Code of Professional Responsibility which states that,

Lawyers should protest earnestly against the appointment or election of those who are unsuited for the bench and should strive to have elected or appointed thereto only those who are willing to forego pursuits, whether of a business, political, or other nature, that may interfere with the free and fair consideration of questions presented for adjudication.¹¹²

The ethical rules assume that attorneys are fit to judge others of the legal

governmental structure, and will refrain from unjustified attack on the character of the judges, while recognizing the duty to denounce and expose a corrupt or dishonest judge." *Id.*

107. D.C. RULES OF PROF'L CONDUCT 3.3(a) (2007).

108. *See* D.C. RULES OF PROF'L CONDUCT 8.4(c) (2007). This provision is often applied in conjunction with others relating to more specific acts of professional misconduct. It can apply to a lawyer's professional activities, or to conduct outside the scope of his or her law practice, such as Rule 8.4(d), which prohibits conduct that "seriously interferes with the administration of justice." D.C. RULES OF PROF'L CONDUCT 8.4(d) (2007).

109. *See* D.C. Bar v. Kleindienst, 345 A.2d 146, 146-47 (D.C. 1975) (noting misrepresentations made to Senate committee by United States Attorney General nominee necessitated thirty-day suspension).

110. *See* D.C. CODE OF PROF'L CONDUCT 8.5(a) (2007). "A lawyer admitted to practice in [the District of Columbia] is subject to the disciplinary authority of this jurisdiction" even through the lawyer may be engaged in practice elsewhere. *Id.* If the lawyer also is admitted to practice in another jurisdiction, the lawyer may be subject to the disciplinary authority of both jurisdictions for the same conduct. *Id.*

111. U.S. CONST. art. I, § 6, cl. 2.

112. D.C. CODE OF PROF'L RESPONSIBILITY EC 8-6 (1991).

profession.¹¹³ As such, Senator-attorneys are encouraged to address the competency of the nominee. In evaluating comments then, perhaps we should take things one step further and consider the competency requirements of both the Senator-attorney and the proposed candidate, focusing on such ideals as:

(a) A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

(b) A lawyer shall serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters.¹¹⁴

While this author's curious inquisitors were unfortunately unable to identify the Senators to which they were referring, rendering specific quotes unavailable for analysis in this article, their concern is understandable. Some comments make us question how close they fall to the ethical line. Senators subject to both the rules of the Senate and the ethical rules of counsel must always be cognizant of their powerful positions in the public eye.¹¹⁵ Public comments

113. See D.C. RULES OF PROF'L CONDUCT 8.3 (2007) (emphasizing lawyer's duty to bring to light unethical conduct of fellow attorneys as well as judges).

114. D.C. RULES OF PROF'L CONDUCT Rule 1.1 (2007); see also D.C. CODE OF PROF'L RESPONSIBILITY EC 8-6 (2001)

Judges and administrative officials having adjudicatory powers ought to be persons of integrity, competence, and suitable temperament. Generally, lawyers are qualified, by personal observation or investigation, to evaluate the qualifications of persons seeking or being considered for such public offices, and for this reason they have a special responsibility to aid in the selection of only those who are qualified. It is the duty of lawyers to endeavor to prevent political considerations from outweighing judicial fitness in selecting judges.

D.C. CODE OF PROF'L RESPONSIBILITY EC 8-6 (2001).

The notes which follow also provide interesting insight into the role lawyers should play.

Lawyers are better able than laymen to appraise accordingly the qualifications of candidates for judicial office. It is proper that they should make that appraisal known to others in a proper and dignified manner. A lawyer may with propriety endorse a candidate for judicial office and seek like endorsement from other lawyers. But the lawyer who endorses a judicial candidate or seeks that endorsement from other lawyers should be actuated by a sincere belief in the superior qualifications of the candidate for judicial service and not by personal or selfish motives; and a lawyer should not use or attempt to use the power or prestige of the judicial office to secure such endorsement. On the other hand, the lawyer whose endorsement is sought, if he believes the candidate lacks the essential qualifications for the office or believes the opposing candidate is better qualified, should have the courage and moral stamina to refuse the request for endorsement.

Id. at n.6 (quoting ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 189 (1938)).

115. See D.C. CODE OF PROF'L RESPONSIBILITY EC 8-8 (1991).

Lawyers often serve as legislators or as holders of other public offices. This is highly desirable, as lawyers are uniquely qualified to make significant contributions to the improvement of the legal system. A lawyer who is a public officer, whether full or part time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official

should be crafted with care and clearly within the rules of ethics, whether they are for or against the President and his or her nominees. Speech emanating from raw emotion is rarely received as intended, especially by those who do not understand the studies of public policy, government, and the law. What we must not forget is that public trust is extremely unstable and quickly lost if our valuable public officials do not take the rules of ethics and conflicts of interest seriously.¹¹⁶

While a background in government is useful, it would be a grave mistake to believe that its absence prevents individual attorneys from making a difference in improving the law, particularly in selecting Supreme Court Justices. Attorneys can help repair public respect by providing testimony and information to the Senate or the ABA, working with the ABA on a committee to assist in the gathering of information pertaining to a particular nominee, or simply assisting the general public in understanding the nomination process and why a Senator may have remarked as he or she did. Otherwise, the public may take information out of context resulting in negative inclinations towards the government and the nomination process. Nevertheless, excelling in multiple areas is an extremely useful way to make the most out of our Juris Doctor degrees and contribute to our profession. As Associate Justice Breyer once commented,

Public confidence in the law depends upon widespread provision of legal services. Sound law - law that works properly for those whom it affects - requires the lawyer's participation in its creation. Government benefits significantly when lawyers from the private sector spend at least a portion of their careers as public servants. And our constitutional democracy, built on assumptions of public confidence and participation, also presumes that members of our profession will act as teachers, at least through example.¹¹⁷

Enhancing professional competence by gaining experience in a variety of

duties.

Id.

116. See ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 192 (1939). "[A]n attorney holding public office should avoid all conduct which might lead the layman to conclude that the attorney is utilizing his public position to further his professional success or personal interests." *Id.*

This principle is subject to an important exception. [An attorney] should not appear as counsel where the matter is subject to review by the legislative body of which he is a member We are of the opinion that where a lawyer does so appear there would be a conflict of interests between his duty as an advocate for his client on one hand and the obligation to his governmental unit on the other.

D.C. CODE OF PROF'L RESPONSIBILITY 8-8 n.11 (1991) (quoting *In re Becker*, 158 N.E.2d 753, 756-57 (Ill. 1959)).

117. Breyer, *supra* note 6, at 417.

legal areas also allows lawyers to understand and appreciate the perspectives of other positions more fully. Again, Justice Breyer notes that,

[a]t the same time, the need for interchange, for a mix of career experiences, would seem greater than ever. Government benefits from the first hand experience of those who have worked successfully elsewhere. The individual lawyer brings to private sector work a knowledge of how government works. And that lawyer's professional life will be enriched by an understanding of the problems that face, say, the environmentalist, consumer advocate, securities regulator, prosecutor, or public defender.¹¹⁸

Enhancing professional competence also enables us to better educate the public and serve as better role models in our communities. Justice Breyer suggests that "the lawyer's role as teacher is the most important role in public service, for it encompasses all the others."¹¹⁹

Thus, the next time a neighbor mocks the President whose nominee faces rejection, we should stifle the snickering. Similarly, the next time a Senator or media analyst discussing a senatorial comment makes a questionable comment, we should consider deciphering the reasons behind the comments before opining in haste, and if possible, note whether or not he or she is an attorney. Every day we should answer our call to public service no matter how we currently use our law degree. Every day we should practice teaching by example, and render all the tasteless lawyer jokes moot.

I have called to mind the negative, contemporary image of the well paid, but narrow, hostile, and detached lawyer in order to contrast it with a more positive and more traditional professional ideal. The second, more positive, ideal is that of the lawyer as a generalist, as a problem solver, as a "statesman," as a productive participant in public life. Roscoe Pound defined a "profession" as a group of people "pursuing a learned art as a common calling in the spirit of public service." That is the ideal I have in mind.¹²⁰

Ethical rules may often appear to be statements of the obvious, however, it is important to remember that they were carefully crafted and recorded for very specific reasons. It is our duty as attorneys to honor these rules by participating in thorough and honest investigations of judicial nominees to promote proper appointments to our highest court. It is also our duty to advise our peers—as well as the general public—competently, teach by example, and answer our call to public service. Just because we do not serve on the Senate Judiciary Committee does not mean that we do not have significant roles in this process.

Many practitioners understandably feel that there is simply not enough time to complete their basic obligations let alone additional ones in public service. Still, it is possible. One way to do so is to contact a local bar association such

118. Breyer, *supra* note 6, at 413.

119. Breyer, *supra* note 6, at 416.

120. Breyer, *supra* note 6, at 404.

as the ABA and participate in their discussions of the law and public policy.

Lawyers . . . love meetings, including Bar Association meetings, for example of the ABA with its 600,000 members and 800,000 committees, for it is in those committee meetings that law reform begins. A senior teaching colleague once told me, "Go to those meetings." For any lawyer who intends to participate in the creation of sound public policy, that was good advice. And that advice remains part of the "public service" challenge.¹²¹

V. CONCLUSION: MOVING FORWARD

"The first thing we do, let's kill all the lawyers."¹²² These words of William Shakespeare continue to cause quite a stir 400 years later. Some people read the line literally and take offense. Others read the line and tip their hats, part of a group which is not fond of the legal profession. Others read the line with pride because they understand that the lawyers would stand in the way of the planned coup d'état. Lawyers should stand in the way. It is our obligation to protect against the overthrow of our government. It is our obligation to ensure the rule of law. These are some of our many obligations.

The Supreme Court, as the highest Court in the United States, is subject to universal examination. Having conquered countless challenges since its inception, the Court is as strong and revered as the Framers intended. Without its strength, our Constitution, our government, and our nation are vulnerable. Without the judicial branch, our three co-equal branches of government and our separation of powers would fail. The government would crumble and we would not enjoy the privileges we have today. Selecting the most appropriate candidates to serve as Justices is, therefore, a task of the highest priority.

We live in a technologically advanced society where everything is recorded and accessible. The American public expects great debate concerning potential candidates for a seat on the bench. Similarly, it is essential to conduct a well organized, comprehensive, and committed investigation to determine the character, competency, and fitness of the candidate. Absent active participation by all parties, the system fails. Alexander Hamilton noted:

The blame of a bad nomination would fall upon the President singly and absolutely. The censure of rejecting a good one would lie entirely at the door of the Senate; aggravated by the consideration of their having counteracted the good intentions of the Executive. If an ill appointment should be made, the Executive for nominating, and the Senate for approving, would participate, though in different degrees, in the opprobrium, and disgrace.¹²³

We, as members of the legal profession, have a significant role in this

121. Breyer, *supra* note 6, at 411.

122. WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH act 4, sc. 2.

123. THE FEDERALIST NO. 77, at 429 (Alexander Hamilton) (Clinton Rossiter, ed., 1961).

process, be it direct or indirect, depending on where we are, what we do, and our relationship, if any, to the nominee. All legal scholars, practicing or not, have a call to public service and a duty to promote respect and integrity for the bar. As we have committed ourselves to the ethical rules of various jurisdictions, we must remember that we have voluntarily subjected ourselves to their mandates twenty-four hours a day. If we made it a point to understand fully what is expected of each key role, we would render more educated opinions and provide better advice to our peers.

Our peers should be advised that Senators draft questions and comments in certain ways for many reasons. While it is true that sometimes the questions and comments are inherently negative, it may be just that the tone of the speaker's voice is negative but the comments are acceptable. Other times it may be that the media edited the comments improperly—a pitfall of living in an age of imperfect technology—or that the edits were purposefully crafted to convey a certain message. Irrespective of tones or high-tech errors, Senator-attorneys are subject to additional ethical rules, which in good practice they will take into account.

In discussing potential Justices, we also need to advise our peers that it is improper to choose candidates in order to secure specific opinions because the role of a judge is to impartially apply the law to the facts. We, as members of the legal profession must explain to friends why such heated debates engulf the media. We, especially Senator-attorneys, must use care when we have the privilege of speaking in public. We must gain experience in different areas of the law, and teach by example on a daily basis. We, by writing and reading this essay, all serve a part of our public service role as attorneys, which is an obligation that we share no matter how we use our degrees or whether we ever file a petition in the Supreme Court. If we were a little more aware of our actions, our power, and our presence in society, the process of selecting Justices would run more efficiently, and certainly with less conflict and negative news.

My daughter was captivated in her own way by this process. We should be as well. Let us embrace our roles in preserving and protecting the system with professionalism while we proudly and ethically select our legal role models: the Justices of the Supreme Court of the United States of America.