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Advice and Consent In Theory and Practice

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I salute the editors, staff, alumni and faculty advisors of the American University Law Review for the performance of distinguished service to the legal community. Your law review has acquired an outstanding reputation, nationally and internationally, for the publication of articles, notes and comments on the cutting edge of the law. Accurate, timely, well-researched and well-edited, the pieces published in your law review are a tribute to the editors and staff as well as to the authors. I know from personal experience that those able analyses, dynamic discussions, and comprehensive critiques by the contributing authors would never see the light of day without the significant student contributions essential to the publication of each issue.

My personal experience was as a Managing Editor, a position that I regard, naturally, as the most important on the staff. More than 35 years have passed, but I remember my experience well. I recall the lead article of my first issue as Managing Editor. It was written by that great lion of American law, Roscoe Pound, then Dean Emeritus of Harvard Law School. The article, entitled "The Judicial Process in Action," came to us in a form all too familiar to law review staffers -- all messed up, and with much cite and substance work required. "The Judicial Process in Action" -- I have returned to that article time and time again during the last 35 years -- not because it has always remained interesting, informative and timely -- not because it has provided me with valuable insights bearing on my work as a

judge -- and not because it is a great classic of legal literature. I have returned to that article repeatedly over the course of nearly four decades because I never have understood the damn thing! More about the problem of understanding law review articles shortly. Incidentally, there is this quote from one of Pound's books that recently caught my attention: "Law must be stable and yet it cannot stand still." I understand it but do not consider it especially profound.

I also remember the first student note I was responsible for editing. The note seems strangely out of date, since it revolved around a 1954 ruling of a Cook County, Illinois Superior Court to the effect that artificial insemination of a wife by a man other than her husband constituted adultery and that the resulting child was illegitimate. The note has stuck in my mind all these years because I remember the first line of the piece as it was handed in. It read: "Artificial insemination has only lately come into the public eye." I immediately saw the need for some editing on the first line.

Understandable articles -

Incomprehensible articles -

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Article II, Section 2 of the Constitution requires that the President of the United States nominate and, by and with the advice and consent of the Senate, appoint the federal judges who will exercise the judicial power conferred under the authority of Article III of the Constitution. Today, that constitutional command is all but ignored. The President has abdicated his duty to nominate, the Senate provides no advice whatsoever, and the function of senatorial consent is a mere formality in most instances. As regards the appointment of federal judges, the Constitution simply is not working as the Framers intended. That this should be so at a time when the appointment process is in the hands of those who profess a blind adherence to the doctrine of original intent is strange indeed. The difficulty of discerning the original intent of the Framers has been expounded upon at great length and need not be re-examined. I do pause to note that former Senator Eugene McCarthy recently spoke of his support for the constitutional right of the citizenry to bear arms, as long as the arms are of the type in use when the Constitution was written. So much for originalism as a general proposition.

We know that the constitutional provision came about through

compromise. Listen to the debates, summarized as follows in the records of the Constitutional Convention:

> Mr. L. Martin was strenuous for an appt. by the 2d. branch [of the Natl. Legislature]. Being taken from all the States it wd. be best informed of characters & most capable of making a fit choice.[1]
>
> Mr. Sherman concurred in the observations of Mr. Martin, adding that the Judges ought to be diffused, which would be more likely to be attended to by the [Senate] than by the Executive.[2]
>
> Mr. Govr. Morris [spoke as follows:] It had been said that the Executive would be uninformed of characters. The reverse was ye truth. The Senate will be so. They must take the character of candidates from the flattering pictures drawn by their friends. The Executive in the necessary intercourse with every part of the U.S. required by the nature of his administration, will or may have the best possible information.[3]
>
> Mr. Madison disliked the election of the Judges by the Legislature or any numerous body. Besides[] the danger of intrigue and partiality, many of the members were not judges of the requisite qualifications. The Legislative talents which were very different from those of a Judge, commonly recommended men to the favor of Legislative Assemblies. It was known too that the accidental circumstances of presence and absence, of being a member or not a member, had a very undue influence on the appointment. On the other hand He was not satisfied with referring the appointment to the Executive. He rather inclined to give it to the Senatorial branch.[4]
>
> Docr. Franklin observed that two modes of chusing the Judges had been mentioned, to wit, by the Legislature and by the Executive. He wished such other modes to be suggested as might occur to other gentlemen; it being a point of great moment. He would mention one which he had understood was practiced in Scotland. He then in a brief and

> entertaining manner related a Scotch mode, in which the nomination proceeded from the Lawyers, who always selected the ablest of the profession in order to get rid of him, and share his practice among themselves.[5]

How prescient they were! Consider this entry in the record under the name of Mr. Ghorum:

> As the Executive will be responsible in point of character at least, for a judicious and faithful discharge of his trust, he will be careful to look through all the States for proper characters. -- The Senators will be as likely to form their attachments at the Seat of Govt where they reside, as the Executive. If they can not get the man of the particular State to which they may respectively belong, they will be indifferent to the rest.[6]

Actually, Mr. Ghorum only had it half right. Presidents also have formed their attachments at the seat of government. The geographical origins of the following Supreme Court nominees of recent years are illustrative: Burger, Scalia, Bork, Ginsburg and Thomas from the D.C. Circuit; Marshall, White and Rehnquist from Department of Justice headquarters. Long before there was a Washington, D.C., and long before there was a Beltway, the Founding Fathers warned of the myopic vision that would attend residence at the seat of government.

What Luther Martin, that doughty Anti-Federalist said about Senators also applies now to Congressmen and even the President:

> If he has a family, he will take his family with him to the place where the government shall be fixed, <u>that</u> will become his <u>home</u>, and there is every reason to expect, that his <u>future</u> views and prospects will <u>centre</u> in the <u>favours</u> and <u>emoluments</u> either of the <u>general government</u>, or of the government of <u>that State</u> where the seat of empire is established: -- In <u>either</u> case, he is <u>lost</u> to

his own State.[7]

It is rare indeed to find a former Member of Congress who does not continue to reside in Washington, D.C. in a new incarnation. Senator Warren B. Rudman of New Hampshire recently announced that he would not be a candidate for re-election. He indicated that he was not inclined to return to the practice of law, although he was sure that "the offers would be stupendous."[8] There certainly is a great lure for those who leave office to remain in Washington. It goes by the name of wealth. According to Senator Rudman, there is no challenge left in serving in a government that is "not functioning."[9] This from the man who said that his "warmest memory"[10] of the Senate was his support for David H. Souter for the Supreme Court.

The fact remains that a compromise was reached and that the Senate was given a role to play in the appointment of federal judges. The Federalist Papers, the greatest public relations job in the history of the Republic, confirms this notion. The media market gurus of today just cannot compare to the folks who wrote the Federalist Papers, in my opinion. Of course, the Papers were designed to reach a literate audience, which is difficult to find in the last decade of the twentieth century. In Federalist No. 76, Hamilton put forth an extraordinary effort to sell the citizenry the compromise worked out at the Constitutional Convention. He aimed some persuasive language at those who preferred appointment by the Executive alone and some equally persuasive language at those who preferred appointment by the

Senate alone. He referred to the cooperative function to be performed by the Senate in the appointment process and described the purpose of that function in the following words:

> To what purpose then require the co-operation of the Senate? I answer that the necessity of their concurrence would have a powerful, though in general a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to preventing the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.[11]

If the cooperation function of the Senate is to be performed, the constitutional imperative of Senatorial advice must be fulfilled. "Advice" means the same thing today as it did when the Constitution was written. I have a dictionary almost 175 years old, and it defines "advice" as "counsel" and "instruction."[12] A more modern dictionary defines advice as "an opinion or recommendation offered as a guide to action, conduct, etc."[13] It seems clear to me that the Senate cannot fulfill the advice requirement unless it has input in the nomination itself. That has not happened for many years. It did happen with excellent effect when Herbert Hoover was looking for a successor to Oliver Wendell Holmes. Although Hoover sought a non-controversial mid-western Republican for political reasons, heavy advice from the Senate impelled him to name Benjamin N. Cardozo of New York. The nomination was made despite the fact that there were already two New Yorkers on the bench -- Stone and Hughes, and one Jew, Brandeis. There is a well known story that Hoover

showed his list of proposed nominees, with Cardozo at the bottom, to Senator William E. Borah of Idaho. Borah is reported to have said, "Your list is all right, but you handed it to me upside down."[14] Cardozo was easily confirmed, supported as he was by business, labor, liberals, conservatives, academics and the entire legal community. As to the religion question, Senator Borah told Hoover: "[A]nyone who raises the question . . . is unfit to advise you concerning so important a matter."[15] Hoover, of course, was the only Republican President ever to appoint a person of the Jewish faith to the United States Supreme Court,[16] and he was not too wild about it, either.

The Cardozo appointment was a real case of merit selection. The Framers of the Constitution really thought that merit would prevail in judicial appointments. How wrong they were! Listen once again to Hamilton, this time in Federalist No. 78:

> [T]he records of those [legal] precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them. Hence it is that there can be but few men in this society, who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge.[17]

Hamilton was sure that the Senate would advise and consent only on the basis of merit. He wrote:

> [I]t could hardly happen that the majority of the senate would feel any other complacency towards the object of an appointment, than such, as the appearances of merit, might inspire, and the proofs of the want of it,

destroy.[18]

How does one define merit for purposes of federal judicial service? I think that Professor Henry Abraham, a great Supreme Court scholar, had it right when he said that it could be defined in terms of six components: demonstrated judicial temperament; professional expertise and competence; absolute personal as well as professional integrity; an able, agile, lucid mind; appropriate professional background or training; and the ability to communicate clearly, both orally and in writing.[19]

Objective merit no longer is the lodestar of federal judicial appointments. It probably never was, entirely. Even in the beginning, when there were no political parties, the Federalists seemed to get the nod over the Anti-Federalists. The Federalists still get the nod, as I shall demonstrate shortly. Professor Abraham has identified three other bases for presidential nominations to the Supreme Court: personal friendship; the balancing of representation or representativeness on the court; and real political and ideological compatibility.[20] These factors, singly or in combination, have formed the basis for judicial selection over the years in the Supreme Court and in the lower courts as well. To these, I would add another factor that has surfaced in recent years -- confirmability, that is, the ability not to create too great a stir when an indolent Senate undertakes its consent function. Indeed, it is the ideological factor (concealed and obfuscated to the greatest extent possible) and the confirmability factor that have most occupied the Chief

Executives in recent years.[21] Merit has been more or less consigned to the back seat. In that connection, I think that it can safely be said that the President's characterization of the most recent appointee to the Supreme Court as "the best person for this position"[22] did not find unanimous acceptance in the legal community. It seems that the center of all activity relating to judicial appointments at present is centered in the office of the Counsel to the President, Mr. C. Boyden Gray.[23] It is there that the hot flame of ideology burns brightly, tended by those who consider themselves the descendants of the original Federalists but who indeed are not. Just as the original Federalists dissembled in the use of their name to gain political ascendancy, so do the Federalists of today. The originals of course wanted to strengthen the new nation and to build a strong central government at the expense of the states. However, they adopted a name that was indicative of just the opposite. Luther Martin opposed ratification of the Constitution and railed against being labelled an Anti-Federalist. He wrote that those

> who advocate the system [of national government established in the Constitution] pretend to call themselves federalists [but] in convention the distinction was quite the reverse: those who opposed the system[] were there considered and styled the federal party, those who advocated it, the anti-federal.[24]

Despite the carping of Luther Martin, those who supported the Constitution made the label stick, and history ever will know them as Federalists.

Those who call themselves Federalists today are hardly of the same order. They are extremely conservative and see little good in a strong central government.[25] For some reason, they do believe in a strong Executive, but consistency is not their strong suit. Those who seek to maintain the modern Federalist label are entitled to one or more liberal thoughts. To them is attached the label "libertarian" Federalists.[26] The modern movement started among some law students in the 1980s. These students perceived a clear and present danger in the concept of the Constitution as a living document and organized as a protest against the liberal law professors who they accused of advocating a too-expansive reading of the Charter and of ignoring original intent.[27] They tended to cluster around such academics as Bork and Scalia.[28] The force of history and attachment to the coattails of political winners has catapulted them to positions of power, first as law clerks, then as movers and shakers in the office of the Attorney General and now in the office of the President. This has been accomplished not by acquiring political power but by coopting it. Lee Liberman, a founder of the new Federalists and now Assistant Counsel to the President, examines all candidates for federal judgeships for ideology purity.[29] It is well known that no federal judicial appointment is made without her imprimatur. A recent dispatch in the New York Law Journal reports the President's nomination of a judge to my court, the nominee being described as a litigator in a New York City law firm and as "a director of the local chapter of the

Federalist Society."[30]

And so the center of power for the appointment of federal judges has shifted away from Presidents and Senators to staff. In the case of district judges, Senators of the President's party still are afforded the right in the first instance to submit the names of proposed nominees for approval by the Presidential staff.[31] This process should be known as nomination by a Senator and advice and consent by the Presidential staff. The incumbent President is known to have no interest in the process. In former administrations, the Attorney General played a large role in judicial selection. During the regime of Attorney General Thornburgh, one Murray Dickman, a political operative and a non-lawyer who came to Washington from Pennsylvania with his boss, was the Attorney General's "point man" on judicial nominations.[32] Obviously, he deferred to Ms. Liberman.[33] The present Attorney General seems to be little more than a conservative adjunct of the White House Counsel's office.[34]

While a candidate must for any federal court appointment pass muster by the Attorney General, the American Bar Association (which is known to cave in whenever the Administration threatens to disregard it), the FBI and the IRS, the most important muster point is the office of the Counsel to the President. Staff is the key, just as staff is the key in all of government. If one desires response from a Congressman, a Senator, a Justice, the Secretary of a Department or an Agency head, one must go to staff. It is no different in the judicial selection process. It

is becoming no different in the adjudicatory process itself.

With no input from the President and no advice from the Senate (except perhaps the right of first refusal in district court appointments), the next step in the appointment of federal judges is Senate confirmation. Again, there is the intervention of staff. The confirmation hearings make that clear, as staffers are seen passing notes to the Senators during the proceedings. Staffers also are known to leak confidential information received by the Senate regarding nominees.[35] Do these hearings serve any purpose? In the vast majority, they do not. The questions are mostly pro forma in the case of district and circuit judge confirmations. During my confirmation hearing for the Circuit Court, Senator Thurmond asked me whether I understood that it was the duty of a Judge to interpret the law and not make the law. I said that I did. From the other side of the aisle, Senator Simon asked if I understood that it might not always be the case that a Judge should interpret the law and not make the law. I said that I understood that too. That was about the size of my hearing, except for a unanimous confirmation vote in Executive Session. The Senate seems to turn its attention briefly to the confirmation process only in the case of Supreme Court Justices. While it is true that a number of nominees to the Supreme Court have been rejected, the reason for rejection today would seem to depend solely on the polls taken by the Senators and general public reaction to the nominee.

It is interesting that no nominee for the Supreme Court made

a personal appearance before the Judiciary Committee until 1925, when Harlan Fiske Stone appeared. Despite hostile questioning, it is said that "he came through with flying colors in a performance marked by strength, dignity, and articulateness."[36] Recent Supreme Court nominees have shown little of these qualities in appearances before the Senate Judiciary Committee. Of course, neither have those who asked the questions. We are now treated to what is in effect a staged, albeit bumbling, performance on both sides. The nominee, aided by public relations experts, Justice Department briefers and those on the other side of the table who support confirmation, try to say as little as possible, using the old dodge: "I may have to decide that matter."

Robert Bork, for all his faults, including his desire to attend an intellectual feast when he had not yet been invited to eat, may have been the last of the straight shooters. He answered honestly, directly, without guile and with some intellect, all the questions put to him. His answers scared the hell out of everybody, and he was not confirmed. He accurately predicted that direct answers would never again be the norm, because nominees would be selected from those who have not written or spoken about important issues.[37] Those who followed him have studiously avoided any controversial responses to questions put to them, in one case even ignoring what the nominee himself had said and written previously. The hearings have become an exercise in futility because of the failure to ask

proper questions and get proper answers.[38] These public spectacles should be eliminated unless they can be rendered meaningful. Perhaps counsel should do the questioning. Perhaps the nominees should be required to appear immediately upon nomination without being given time to prepare evasive answers. Perhaps it should not profit the President's staff to seek out "trackless" nominees rather than certified intellectuals like Bork. Of course, intellectual distinction has no political constituency. Perhaps staff shouldn't be involved at all -- Senatorial staff or Presidential staff.

If I were a Senator, I would not tolerate evasion or stonewalling in answering my questions. While a nominee may not disclose how he or she would decide a particular case, there are a number of questions that he or she should be required to answer -- questions respecting an understanding of history; questions about important prior decisions of the Court; questions designed to elicit an understanding of the current issues confronting the Court; questions of approach to judging, of philosophy, of adherence to stare decisis. I would not accept an answer that obviously is untrue, such as one that denies having taken any position on a controversial issue before the Court that is under discussion by the entire nation. If I could not get the answers I wanted, I would vote "no." I do not think that there is anything out of bounds about requiring answers to questions about financial, sexual or other misdeeds. Because of the importance of the federal judiciary in our nation, one who aspires to

membership in it must demonstrate excellence in all things. That excellence should be demonstrated to the personal satisfaction of the President and the personal satisfaction of each and every member of the Senate.

Excellence! What a wonderful and rare thing it is! Yet, it is the cornerstone of all human achievement and is found in every vocation. James Bryant Conant said: "Each honest calling, each walk of life, has its own elite, its own aristocracy, based on excellence of performance."[39] It seems to me that the ability to recognize legal excellence is one of the most important benefits you have gained from your legal education and from your participation in the Law Review. Aristotle tells us that "[w]ith regard to excellence, it is not enough to know [it], but we must try to have and use it."[40] Although we all should strive to excel, as Aristotle urges, not everyone can acquire excellence. What everyone can and should acquire, however, is the ability to appreciate excellence in others. To have such an appreciation, we must understand that people have different abilities, just as they have different qualities and talents. All are not equal when it comes to excellence. There are but a few who have that surpassing ability to achieve exceptional performance in the law. As lawyers, you should strive to identify and acknowledge superior legal talent and ability and to insist, as the bar did in that shining hour when Cardozo was appointed, that only the best among you be selected to serve on the Supreme Court and on the lower federal courts.[41] The process of nomination, advice

and consent may have broken down for now and may not be functioning as the Framers intended,[42] but the political process can make it work again. That is the beauty of our system. And that is where you come in and where I, as a Federal Judge, cannot go.

ENDNOTES

* Judge, United States Court of Appeals for the Second Circuit. Adjunct Professor of Law, New York Law School.

1. 2 **The Records of the Federal Constitution of 1787**, at 41 (Max Farrand ed. 1937), reprinted in 4 **The Founders' Constitution** 31 (Philip B. Kurland and Ralph Lerner eds. 1987) [hereinafter **Founders' Constitution**].

2. Id.

3. Id. at 80, reprinted in **Founders' Constitution**, supra note 1, at 33.

4. 1 id. at 119, reprinted in **Founders' Constitution**, supra note 1, at 30.

5. Id.

6. 2 id. at 41, reprinted in **Founders' Constitution**, supra note 1, at 31-32.

7. Luther Martin, Objections of Non-Signers of the Constitution, reprinted in 2 **The Complete Anti-Federalist** 46 (H.J. Storing ed. 1981).

8. Adam Clymer, Rudman, Irked by the Senate, Is Retiring, **N.Y. Times**, March 25, 1992, at A14.

9. Id.

10. Id.

11. **The Federalist No.** 76 (Alexander Hamilton).

12. **Walker's Dictionary** 12 (1819).

13. **The Random House College Dictionary** 20-21 (Revised ed. 1980).

14. **Henry J. Abraham, Justices and Presidents: A Political History of Appointments to the Supreme Court** 203 (2d ed. 1985).

15. Id.

16. The appointments were: Louis D. Brandeis (by President Wilson, a Democrat, in 1916); Cardozo (by President Hoover, a Republican, in 1932); Felix Frankfurter (by President Roosevelt, a Democrat, in 1939); Arthur J. Goldberg (by President Kennedy, a Democrat, in 1962); and Abe Fortas (by President Johnson, a Democrat, in 1965). See id. at 389-91.

17. **The Federalist No.** 78 (Alexander Hamilton).

18. **The Federalist No.** 66 (Alexander Hamilton).

19. **Abraham**, supra note 14, at 4.

20. Id. at 5.

21. See generally **Herman Schwartz, Packing the Courts: The Conservative Campaign to Rewrite the Constitution** xiv (1988) (discussing historical background and recent developments in "ideological judge-picking").

22. Gene Gibbons, Bush Names Thomas to Succeed Marshall on Supreme Court, Reuters, July 1, 1991, available in LEXIS, Nexis Library.

23. Michael Wines, A Spotlight on Counsel With Clout, **N.Y. Times**, November 25, 1991, at A16.

24. Martin, supra note 7, at 47.

25. See generally Jill Abramson, Right Place at the Right Time, **The American Lawyer.**

26. Judge Scalia's Cheerleaders, **N.Y. Times**, July 23, 1986, at B6.

27. See Mark Rust, Our Forefathers, Ourselves, **Student Lawyer**, March 1987, at 36-37.

28. Al Kamen, Federalist Society Quickly Comes of Age, **Wash. Post**, February 1, 1987.

29. W. John Moore, The White House Lawyer Nobody Knows, **National Journal**, June 8, 1991, at 1357.

30. **N.Y.L.J.**, March 26, 1992, at 1 (Update Section).

31. A Friend of the Constitution (Pseudonym), Congress, the President, and Judicial Selection: Lessons From the Reagan Years, in **Judicial Selection: Merit, Ideology, and Politics** 49, 54-55 (1990); Sheldon Goldman, The Bush Imprint on the Judiciary: Carrying on a Tradition, 74 **Judicature** 294, 297 (1991).

32. Goldman, supra note 30, at 296-97.

33. See Moore, supra note 28, at 1357.

34. David Johnston, New Attorney General Shifts Department's Focus, **N.Y. Times**, March 3, 1992, at A17; Anthony Lewis, The Attorney Corporal, **N.Y. Times**, March 5, 1992, at A27.

35. Helen Dewar, Senate Effort to Find Source of Leaks May Become Trip to a Bottomless Pit, **Wash. Post**, February 9, 1992, at A5 (discussing investigation by independent counsel of Senate leaks relating to Anita Hill's accusation of sexual harassment by Clarence Thomas).

36. **Abraham**, supra note 14, at 194.

37. **Robert H. Bork, The Tempting of America** 347 (1990).

38. F. Lee Bailey, Where Was the Crucible? The Cross-Examination That Wasn't, **ABA Journal**, January 1992, at 46; Stuart Taylor, Jr., Confirmation Process Flawed . . . by Senate Cowardice, **N.J.L.J.**, November 21, 1991, at 18.

39. James Bryant Conant, Our Fighting Faith (baccalaureate sermon June 16, 1940). The title is taken from a statement in an address by James A. Garfield, The Future of the Republic: Its Dangers and Its Hopes, (1873).

40. **Aristotle, Nicomachean Ethics**, bk. 10, ch.9.

41. Henry J. Abraham, "A Bench Happily Filled:" Some Historical Reflections on the Supreme Court Appointment Process, 66 **Judicature** 282, 288-90 (1983).

42. Albert P. Melone, Alan R. Morris & Marc-George Pufong, Too Little Advice, Senatorial Responsibility, and Confirmation Politics, 75 **Judicature** 187, 187-88 (1992).