A Better Way to Appoint Justices

By Lee Epstein

WITH rumors abounding that George Bush may have a chance to appoint another justice to the Supreme Court, we must reexamine the process before we are enmeshed in it. As the confirmation proceedings for Clarence Thomas last fall indicated, something is seriously wrong with the way we appoint justices to the nation's highest court.

We need to take a radical step to alter the entire nomination and confirmation process – and thus the political calculus of the president and the Senate: Let's amend the Constitution and require two-thirds of the Senate to confirm Supreme Court justices. This is a drastic proposal. No one likes to tinker with the Constitution. The framers erected an intricate system of government in which manipulation of one part inevitably affects the way another functions.

But the framers had little idea of the role the Supreme Court would come to play in United States politics. Nor did they envision the role politics would play in the court's decisions. Rather they imagined, as Alexander Hamilton wrote, a court full of principled justices who would "declare the sense of the law" through "inflexible and uniform adherence to the rights of the Constitution and of individuals."

That is why the framers developed the unique system of nomination, confirmation, and life tenure: to keep justices above partisan politics. Had they foreseen courts of recent eras, courts composed largely of legal activists eager to see their values etched into law, they would have devised a different scheme.

From the beginning, presidents have tried to pack the court with partisan or ideological soulmates. After his party lost the election of 1800, President John Adams and lame-duck Federalist senators hastily appointed a host of like-minded federal judges before the Jeffersonians came into power.

Although neither the confirmation process nor the court itself has ever measured up to the Constitution's lofty expectations, at no time in the past were they simultaneously so out of control. Requiring a two-thirds confirmation vote for justices would start to realize the framers' vision.

■ A two-thirds vote would change, for the better, the political calculations of the president. Presidents – be they Democrats or Republicans – would have to rethink whom they nominated to the court. To gain approval of their nominees, they would need true bipartisan support, not just a few crossover votes. That would require them to place far more stock in candidates' legal credentials. It also would compel presidents to seek the advice of senators of both parties before making nominations.

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■ A two-thirds vote would also change, for the better, thinking in the Senate. If presidents gave senators a greater role at the "advice" stage, it would help to eliminate the sort of proceedings we have experienced in recent years – unacceptable candidates would never make it that far. Confirmation hearings would serve as forums to discern nominees' legal qualifications to sit on the Supreme Court, rather than as showcases for senators on the Judiciary Committee.

■ A two-thirds vote is required for the approval of treaties (by the Senate) and the proposal of constitutional amendments (both Houses); who sits on the Supreme Court is today of similar importance. The framers required two-thirds votes for matters of great national importance. What has become more important – at least on domestic matters – than decisions of the US Supreme Court? Courts of the last three decades have enunciated public policy on reapportionment, affirmative action, and abortion.

■ A two-thirds vote would not eliminate qualified candidates. Since the emergence of the modern Supreme Court (a date scholars fix at around 1937), only one successful nominee to be an associate justice might have failed to gain 67 Senate votes – Mr. Thomas. William Rehnquist might still have attained confirmation as an associate justice (he had 68 votes in 1971), but he might not have been able to ascend to the chief justiceship (he received only 65 votes in 1986).

I stress the word "might," because a change in the rules would significantly alter the calculus of both the president and the Senate. With a two-thirds requirement, Ronald Reagan might not have sought to elevate Mr. Rehnquist (or pursued the confirmation of Robert Bork), nor might President Bush have nominated Thomas. Alternatively, Rehnquist might have received more votes from the Senate if it was operating under the constraints of a two-thirds rule.

My point is not to second-guess past votes; it is to suggest that a two-thirds requirement would not restrict the pool of serious candidates. It may, though, reduce it just enough to eliminate those who have no business sitting on the most important judicial body in our nation.

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