



# On Truisms and Constitutional Obligations: A Response

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# Response

## On Truisms and Constitutional Obligations: A Response

David A. Strauss\* & Cass R. Sunstein\*\*

In our essay on the confirmation process of Supreme Court Justices,<sup>1</sup> we sought to support four propositions:

1. The current confirmation process is working poorly.<sup>2</sup>
2. In a development that is without precedent in our history, presidents of a single party made eleven consecutive appointments to the Supreme Court, even though the Senate, except for a brief period of time, was controlled by another party.<sup>3</sup> This development threatened to create a Court that lacks the appropriate range of views on constitutional issues.<sup>4</sup>
3. The Constitution contemplates an independent role for the Senate in deciding whether to consent to presidential nominations.<sup>5</sup> Such a role would be especially desirable under the conditions described in (2), even if it leads to the rejection of nominees because of their likely voting patterns.
4. The Constitution authorizes the Senate to advise the President on prospective nominees to the Court.<sup>6</sup> It would be especially appropriate for

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1. David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491 (1992).

2. *See id.* at 1491.

3. *See id.* at 1503-04.

4. The election of a President and a Senate majority of the same political party in 1992 means that our arguments are now largely moot—likely to have little practical significance in the immediate future. The distinctive circumstances that justified an active senatorial role no longer exist. The circumstances we describe, however, could recur (as they did after the period 1977-1981, when one party controlled both the presidency and the Senate); or they might arise in a slightly different form if important jurisprudential rifts developed between the Senate and the executive.

5. *See Strauss & Sunstein, supra* note 1, at 1494.

6. *See id.* at 1494-95.

the Senate to assume such a role, given our recent experience, both to decrease the level of distraction and antagonism in the recent nomination proceedings<sup>7</sup> and to produce greater quality and diversity on the Court.

Professor McGinnis's vigorous response does not take issue with proposition (1), says little about proposition (2),<sup>8</sup> and explicitly agrees with our reading of the Constitution in proposition (3), which is the heart of our paper.<sup>9</sup> The principal subject of his article is proposition (4).

Professor McGinnis advances two principal arguments against our suggestion that the Senate should advise the President on prospective nominees to the Court. The first is that the Constitution contemplates no "formal prenomination advisory role" for the Senate<sup>10</sup> but "reserves the act of nomination exclusively to the President."<sup>11</sup> If we understand Professor McGinnis correctly, we have no disagreement with him on this point; indeed, he is obviously right. We do disagree, however, that his demonstration of this point undermines our position.

Professor McGinnis's second argument is that the President has a constitutional obligation *not* to appoint anyone out of a desire to compromise with the Senate on legal philosophy.<sup>12</sup> The President, Professor McGinnis says, violates his oath of office if he appoints someone who does not share his approach to constitutional interpretation.<sup>13</sup> Here we really do have a disagreement; we think Professor McGinnis's argument is unpersuasive on this score.

## I. A "Formal" Role?

Professor McGinnis argues extensively that the President alone has the power to nominate candidates for the Supreme Court. He marshals a

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7. Our essay referred particularly to the emphasis placed on the nominee's telegenic qualities, to distortions of Judge Robert Bork's record, to the effects of television on some Senators' behavior, and to the uninformative generalities offered by some recent nominees. *See id.* at 1518-19, 1518 n.107, 1519 n.110.

8. Professor McGinnis briefly argues that intellectual diversity is an unnecessary goal for the Supreme Court, on the grounds that liberal law professors and others will offer criticism of conservative outcomes, and that persuasion of one justice by another is rare. *See* John O. McGinnis, *The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 TEX. L. REV. 633, 650-52 (1993). These premises may be right, but we think that there remains a need for diversity within the Court. It is important for Justices of varying views to confront one another in conference, outside of conference, and during the circulation of opinions. This is a valuable internal check on both arguments and outcomes.

9. *See id.* at 653 ("The Senate is 'independent' in that it may legitimately refuse to confirm a nominee who, in the opinion of the majority of the Senate, holds fundamentally incorrect principles of constitutional interpretation.")

10. *Id.* at 642; *see also id.* at 638-46.

11. *Id.* at 645.

12. *See id.* at 635.

13. *See id.*

great deal of evidence to support this claim, and he criticizes us for not discussing some of this evidence.

But of course we do not deny that the power to nominate rests with the President alone. We do not suggest that the nomination power is shared. If the President makes a nomination without seeking or accepting advice from the Senate, the nomination is no less effective. If this is what Professor McGinnis is saying when he insists that the Senate has no "constitutional prenomination advisory role,"<sup>14</sup> then we have no disagreement with him; nothing we said suggests a Senate role in this sense.

Professor McGinnis, for his part, does not insist on the hermetic separation of the Senate and the President; on the contrary, he seems to acknowledge that the President may consult with the Senate on nominees "out of comity or political prudence."<sup>15</sup> Our disagreement might therefore appear to be quite narrow: he admits that consultation is sometimes a good idea, and we do not claim that consultation is formally necessary to make a nomination effective.

We suspect, however, that our disagreement is more significant than that. Especially in conditions of prolonged divided government, we think that consultation between the President and the Senate is more than just a matter of "political prudence." If the Senate has, and exercises, an independent role in considering nominees—and Professor McGinnis says that it is entitled to do so—consultation is a necessary means of establishing a workable and sensible appointments process. Whether that makes it a "constitutional obligation"<sup>16</sup>—the issue to which Professor McGinnis attaches such significance—seems to us practically an unimportant question and theoretically one of doubtful coherence. Under the conditions we discuss in our essay, conditions of long-term divided government in which one party's Presidents have made an extraordinary number of consecutive appointments, the President and the Senate are not properly discharging their roles in the constitutional scheme unless they consult about nominations.

Suppose, for example, that a President repeatedly vetoed bills passed by Congress without letting Congress know ahead of time what his objection was, even though the objection might have been met easily by an amendment. Congress would then have to repass the bill, guessing (on the basis of the President's veto message) precisely what amendment would satisfy the President. As a result, the legislative process would be wastefully delayed and disrupted. Surely we would say that the President, by failing to make his objections known while the bill was pending, did not

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14. *Id.* at 638.

15. *Id.* at 646.

16. *Id.*

carry out his duty to make the Constitution a workable scheme. Whether this is characterized as a duty of "comity," or instead as a "constitutional obligation," does not really matter. It would be the President's responsibility—notwithstanding the undoubted fact that the Constitution does not say that the President may play a role in congressional consideration of a bill, and even though the President certainly has no formal role before a bill is presented for his signature.

Our suggestion is that consultation with the Senate about Supreme Court appointments is, under conditions of prolonged divided government, a similar sort of responsibility. Professor McGinnis's extended discussion of the history of the Appointments Clause is essentially irrelevant to this relatively modest claim.<sup>17</sup> Professor McGinnis finds a number of instances in which people emphasized the President's power to nominate candidates of his own choosing; but nothing in our argument is inconsistent with that truism.<sup>18</sup>

Professor McGinnis has also not persuaded us that the language of the Appointments Clause argues against our view. That language is unavoidably awkward, at least to the modern ear: "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court. . . ."<sup>19</sup> Professor McGinnis's explanation is that "[t]he Senate's consent is advisory because confirmation does not bind the President to commission . . . the confirmed nominee."<sup>20</sup> This is a plausible explanation of the wording of the text, but it has the serious drawback of making the key word—"Advice"—redundant: the "advisory" character of the Senate's consent is fully secured by the separation of nomination and appointment.

Our interpretation is, of course, also not free of textual difficulties. We do note, however, that Professor McGinnis's own misunderstanding of our position suggests an explanation of why "advice" is not directly linked with "nominate" in the Clause: if the Clause specified that the President, "with the Advice of the Senate, shall nominate," then questions might arise

17. We are grateful to Professor McGinnis for correcting some errors in identifying the first names of certain delegates. *Id.* at 639 n.29. We do not believe, however, that these errors are relevant to the correctness of the propositions discussed in our essay.

18. Thus Professor McGinnis's detailed discussion of related issues in *The Federalist Papers* confirms proposition (3) and does not speak to proposition (4). Professor McGinnis is concerned about our omission of George Mason's reference to the President's exclusive right of nomination. *See id.* at 644-46. But we do not at all deny what Mason was asserting—that the President alone has the power to make an effective nomination—and we continue to be unable to see how Mason's statement of that truism bears on the question of prenomination advice. For the same reason, none of the quotations in Professor McGinnis's response suggests that Congress is disabled from offering prenomination advice. Advice is only that; it does not bind anyone, much less force the President to nominate someone of whom he disapproves.

19. U.S. CONST. art. II, § 2.

20. McGinnis, *supra* note 8, at 639.

about whether a nomination was effective (even if it was consented to by the Senate) if the President did not obtain the proper form of "advice" before making it. Further, our position does have the virtue of not making the term "Advice" superfluous.

In any event, the relevant provisions of the text are too ambiguous to be decisive on the question of the Senate's role. That issue will have to be resolved on the basis of the kinds of considerations of history, structure, and practicality that we discussed in our earlier essay.

Finally, Professor McGinnis suggests that we are mistaken in saying that a nominee bears the burden of proof because, in his view, the Appointments Clause makes it difficult for the Senate to reject a judicial nominee without "compelling reasons."<sup>21</sup> This is so, according to Professor McGinnis, because a "political burden" is placed on the Senate whenever it publicly rejects a presidential choice.<sup>22</sup> We agree with both of these points. But again they are, we think, essentially irrelevant to the Senate's assessment of its constitutional responsibilities. In general, it seems quite sensible to say that a nominee should be rejected only for "special and strong reasons."<sup>23</sup> But under the extremely unusual circumstances of the recent past,<sup>24</sup> we believe that such reasons exist if the nominee is unable to show that he would add quality and an appropriate degree of intellectual diversity to the Supreme Court. No one has a right to serve on the Court. In the face of eleven consecutive appointments by Republican Presidents, a Senate controlled by the Democrats would be perfectly entitled to insist on its constitutional prerogatives—and this is so even if the Senate may face political barriers to this course of action, and even if the President insists on continuing to choose people of whom the Senate disapproves.

## II. An Obligation to Ignore the Senate?

If Professor McGinnis's first claim, that the President alone makes nominations to the Supreme Court, is a truism that we do not and need not dispute, his second claim is more nearly the opposite: it seems to us implausible. This is the claim that because the President swears to "preserve, protect and defend the Constitution of the United States"<sup>25</sup> he is "under a constitutional obligation to nominate an individual who he believes will interpret the Constitution in a manner that generally accords

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21. *Id.* at 655.

22. *Id.* at 653.

23. THE FEDERALIST No. 76, at 457 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

24. See *supra* text accompanying note 3.

25. U.S. CONST. art. II, § 1, cl. 8.

with his view of its lawful construction.”<sup>26</sup> Accordingly, a President who accepted our arguments “and agreed with the Senate in advance to nominate a jurist whose constitutional views differed substantially from his own would abrogate this most solemn oath.”<sup>27</sup>

This is a striking claim. It would mean, to give just one example, that unless President Hoover “substantially” agreed with the principles of early Legal Realism, he violated his oath of office when he nominated Benjamin Cardozo to the Supreme Court. In our view, Professor McGinnis’s argument rests on a simple misunderstanding, a form of category mistake. Professor McGinnis’s reliance on the President’s oath of office<sup>28</sup> is a makeweight argument: invoking the oath just raises the question of what the Constitution requires. In order to determine the President’s duty under the Constitution—in this case, under the Appointments Clause—one must interpret that Clause, using all appropriate textual, historical, and structural arguments.

Undoubtedly Presidents have certain obligations under the Appointments Clause. For example, a President would surely violate the oath if he nominated a person who was sworn to subvert the constitutional order. And we do not think that it is *unconstitutional* for a President to seek, as recent Presidents have often sought, to nominate people whose jurisprudential or ideological views agree with the President’s.

But we do not see any basis at all for saying that the Appointments Clause makes it unconstitutional for a President to look past his own jurisprudential conceptions and to consider other factors: a nominee’s distinction; the Court’s need for appropriate intellectual diversity; and the fact that, on some constitutional matters, the composition of the Congress, not just that of the executive branch, reflects the appropriate benchmark for appointments to the Supreme Court. Not only is it constitutionally permissible for the President to act that way, but sometimes—such as in a period of prolonged divided government when one party has made an unusually large number of consecutive appointments—such an approach is more in keeping with the constitutional scheme.

The contrary understanding of the appointments process is, we think, responsible for some of the unfortunate aspects of that process as it has been carried out in recent years. We think the President and the Senate can do better.

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26. McGinnis, *supra* note 8, at 647.

27. *Id.*

28. *Id.*