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Abstract

The Founders exerted significant energy and passion in formulating the Appointments Clause, which greatly impacts the role of the Senate and the President in appointing Supreme Court Justices. The Founders, through their understanding of human nature, devised the power to be both a check by the U.S. Senate on the President's nomination, and a concurrent power through joint appointment authority. The Founders initially adopted the Senate election mode via state legislatures as a means of insulation from majoritarian passions of the people too. This paper seeks to understand the Founders envisioning for the Senate's 'Advice and Consent' role as it pertains to the U.S. Supreme Court in its nascent form, and argues for its importance for the independence and legitimacy of the federal judiciary. Additionally, this paper contributes to the literature by analyzing early documents and Constitutional Convention proceedings, and evaluating the original Senate election mode as it impacted the Founders' understanding of the Senate's 'Advice and Consent' role.

Keywords

U.S. Senate, U.S. President, U.S. Supreme Court, appointment power, separation of powers, checks and balances, advice and consent, Federalist Papers, U.S. Constitution

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“It Wasn’t Supposed to Be Easy” What the Founders Originally Intended for the Senate’s Advice and Consent Role in Supreme Court Confirmation Process

Michael Wilt

History and Government

Introduction

Since 2013, the President of the United States has nominated four Supreme Court contenders for the United States Senate to consider. In 2013, President Barack Obama (D-IL) introduced United States Solicitor General Elena Kagan as his choice to succeed retiring Associate Justice John Paul Stevens. Solicitor General Kagan had an impressive career that proceeded her — U.S. Solicitor General during the Obama Administration and an Associate Counsel to President Clinton. At the end of the confirmation process, she received a 63-37 confirmation vote, surpassing the 60-vote threshold necessary for confirmation, and with bipartisan support from moderate Republican senators (Gura). Additionally, Elena Kagan received a favorable reception from most media outlets and a bipartisan response from Republican senators despite her more liberal leanings.

Judge Merrick Garland was not so fortunate. Following the sudden passing of conservative icon and Supreme Court Associate Justice, Antonin Scalia, President Obama had the opportunity to ‘flip’ the conservative seat with a more liberal justice. However, following the 2014 midterm elections, the Republican Party easily claimed control of the Senate, flipping nine Democratic Senate seats in a Republican-wave election season (Elving). Although President Obama was working with a Republican Senate majority (Weaver, 1721), President Obama introduced U.S. District Court of Appeals Judge Merrick Garland as his nominee in March of 2016 (Elving). Senate Majority Leader Mitch McConnell (R-KY) announced that he would block all opportunities of President Obama in flipping the conservative seat on the Supreme Court and declared that the next President — regardless of party — should choose the next Supreme Court nominee (Elving). President Obama countered Majority Leader McConnell on two fronts: First, President Obama declared that the Senate should fulfill its constitutional obligation to confirm or reject the nominee under the guise of its advice and consent function (Elving); and, second, President Obama pointed out that Judge Merrick Garland received bipartisan approval for his current position in the federal judiciary, and he would appeal to both Republican and Democratic constituencies.

However, Majority Leader McConnell calculated the political risks and kept the seat open for 293 days (Bravin). In the end, the Senate full-body and even the Senate Judiciary never official considered Judge Garland for the Supreme Court vacancy (Elving). Per Senate procedure, when the 114th Congress' term expired on 3 January 2017, so did Garland's nomination.

President Donald Trump announced Judge Neil Gorsuch, 49, to serve as the next Supreme Court Justice on January 31, 2017. Judge Gorsuch received an introduction from his home-state Senators of Colorado — Michael Bennet (D) and Cory Gardner (R) — and continued to meet with Senators individually before and during the Senate Judiciary Committee hearings.

Judge Gorsuch's supporters praised his record as bipartisan and steady and cited his record of 97% voting in unanimous decisions (Killough and Barrett). Republicans in the Senate were distraught that Democrats strongly opposed the nomination. Ultimately, attempts were made to clear the 60-vote threshold of avoiding filibusters and to garner a smooth, traditional confirmation. However, Senate Majority Leader McConnell announced that the senate would utilize the "nuclear option" to confirm Judge Gorsuch's nomination. The then-Majority Leader Harry Reid (D-NV) originally used the "nuclear option" in 2013 to confirm lower judicial nominees and executive nominees by requiring simple-majority passage (Killough and Barrett). Many worried that lowering the threshold for votes would result in more ideological nominees to the highest court and a less bipartisan reaction to the confirmation process as a whole (Killough and Barrett). Though senators lamented the use of the nuclear option, many still supported Judge Gorsuch's nomination, resulting in a 54-45 final confirmation (Killough and Barrett).

Most recently, President Trump nominated Judge Brett Kavanaugh of the D.C. Circuit Court of Appeals to replace retiring-Justice Anthony Kennedy on July 9, 2018 (Bowden). After Judge Kavanaugh had been the nominee for twenty days, Christine Blasey Ford accused Judge Kavanaugh of sexual assault back in college in the 1980s (Bowden).

After two grueling weeks of intense FBI investigations, the FBI produced an inconclusive report on the allegations. The Senate voted on cloture for the motion to vote on Judge Kavanaugh's nomination. The final vote was 50-48 (Bowden).

These four confirmation processes to the Supreme Court, all within a five-year timespan, are completely divergent of each other, leading many Americans to question the reliability of the Supreme Court confirmation process — and even the legitimacy of the judiciary. On the one hand, blatant partisanship and polarization has hindered the political process in dramatic, dysfunctional, and unnecessary fashion. On the other hand, complacency in a more subtle way negatively harms the process as a rubber-stamp for the President. There is a definite disconnect in what the American people perceive the Senate's advice and consent function to be in comparison to what the Founders originally intended for the Senate. The terminology of advice and consent is vague and inconclusive, unless in proper context.

A lack of understanding on what the Framers' originally intended for the Senate's advice and consent role has major implications for the health and well-being of the constitutional republic. It affects the process in selecting capable, qualified, and willing justices to the country's highest Court, and the understanding of the role checks and balances play within the constitutionally designed federal framework. The Founders authored the Appointments Clause in a particular manner for a particular reason. The Framers took painstakingly lengthy amounts of time in crafting the

Appointments Clause specifically and cared deeply about the distribution of the appointment power.

Therefore, a proper understanding and review of what the Founders originally intended for the Senate's role in the Supreme Court confirmation process will be both pertinent and beneficial to the overall discussion on the Senate's advice and consent function. Many individuals have developed various theories surrounding this subject. Some argue for a more passive and deferential Senate; one that will support the President's nominee if he or she is highly qualified and within the mainstream of judicial thought (McMillion, 5-6; Olson, 9-23; Ross, 681). Others advocate for a more robust and active Senate that seeks a thorough evaluation of the nominee's background, qualifications, judicial temperance, and judicial philosophies (Sklamberg, 461; Ross, 639; Gauch, 340-1; Kasper, 550). Some even argue that the Senate is constitutionally obligated to hold a full-body Senate vote on the nominee (e.g., President's Obama, Bush, Jr.). These viewpoints will be discussed at length during the literature review.

Therefore, various questions will guide the research project to conclude how the Founders' originally intended for the Senate to act during the Supreme Court confirmation process. First, what did the Founders intend for the Senate's role in the Supreme Court confirmation process as developed through the Constitutional Convention proceedings and other manuscripts like the Federalist Papers? Second, how did the Framers' view on human nature, and the original election method for U.S. Senators affect the Framers' view on the Senate's role? Third, should the Senate defer to the President's nomination and only consider their professional qualifications, or is the Senate afforded certain discretionary powers under the guise of the Appointments Clause to use the candidate's professional qualifications, partisan politics, and constitutional philosophies of the candidate for evaluation? And finally, is the Senate constitutionally obligated to evaluate the nominee and hold a full-body vote on the candidate?

The Founders — as according to their understanding of human natures, early manuscripts, proceedings of the Constitutional Convention, and early development of the Supreme Court confirmation process — originally intended for the Senate's role to be one of actively offering advice to the President on which candidate to nominate to the Supreme Court. The Senate was expected to evaluate the President's nominee in a manner in which the Senate chooses, in the Senate's timetable, and under the guise of its established procedures — which allowed for the review of professional qualifications, partisan considerations, and judicial philosophy. The electorate changed the original Senate election method, which provided for a degree of separation between the Senate and the American electorate, to direct election of senators by the electorate, thereby inaugurating a new level of partisanship into the Supreme Court confirmation processes. Moreover, the legitimacy of the judiciary has been called into question as a result. Ultimately, the Founders intended for the Senate to hold a vote on the Supreme Court nominee.

Literature Review

Understanding the Senate's advice and consent role within the scope of the Appointments Clause has been an issue of constitutional matter since its inception at the Constitutional Convention. As the records show in the Constitutional Convention, the Founders constantly disagreed on the best branch of government to position the appointment power and to what extent that power reached

(see Max Farrand's anthology; Gauch, 351, 361; Hunt). Despite the breadth of discourse over the appointment power, Adam White, a Harvard Law graduate, notes that "[the] meaning of advice and consent is not self-evident, and the means of its proper application are not obvious" (108). Some scholars argue that while consent may be an easier concept to comprehend, advice is not completely understood (Sklamberg, 447-8). Advice usually indicates that the "recipient is not obliged to receive it" (Sklamberg, 447-8; McMillion, 5-6). The advice and consent role is a nebulous undertaking and requires a broad context in order to fully grasp the implications involved in reviewing the Founders' original intent for the Senate's role (Gauch, 339).

Most of the existing literature focuses in on the current confirmation process and the partisanship that has plagued the evaluation of Supreme Court nominees by the U.S. Senate. However, the literature that details the Founder's original view of the Senate's role in the Supreme Court confirmation process centers on the Constitutional Convention and the development of the proceedings (Farrand; White, 111-113; Harris, 21-25; Ross; Gauch). However, there is room to explore an originalist approach to the confirmation process as understood by the Founders. As mentioned above, there was a constant back-and-forth debate over which branch to install the appointment power. Adam White wrote in review of the Convention that "[one] group of delegates, led by James Wilson, Nathaniel Gorham, Alexander Hamilton, and Gouverneur 9 Morris, favored control of appointments by a strong executive" while the "opposing camp, led by Charles Pinckney, Luther Martin, George Mason, Roger Sherman, Oliver Ellsworth, and John Rutledge, favored legislative control of the appointments process" (110-1).

There are also a number of different writings by Thomas Jefferson, James Madison, and other Founders that display the ambiguity and complexity over the development of the Appointments Clause (Gauch, 351, 361; Hunt). There are even competing views on how Alexander Hamilton interpreted the Appointments Clause. Bruce Fein, a Washington Times author, suggests that Hamilton would have opposed the use of ideology or partisanship from plaguing the judicial confirmation process, thereby affirming a more passive Senate role (672). Likewise, New York Bar member William Ross writes that Hamilton saw the Appointments Clause as mostly resting in the President's authority, and not in the Senate. Therefore, the Senate should acquiesce to the President's nominee unless disqualifying factors become apparent. In contrast, Eric Kasper believes that because Hamilton viewed the Appointments Clause of Article II in the U.S. Constitution as a shared power between the executive and the Senate, the Senate should be allowed to evaluate nominees' ideologies. Continuing, Kasper asserts that Hamilton would advocate for an energetic Senate that would hold a more active role of the Senate (567).

However, the issue with these analyses centers on the lack of evaluating their original intent in formulating the advice and consent clause of the Appointments Clause. By not fleshing that out in the text itself, the Framers then left the Senate's function open for interpretation to the Senate as to what their function should be. A simple reading of the text will showcase the clause's elusiveness: "...[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..." (Article II, Section 2, Appointments Clause, U.S. Constitution) As a result, various analyses that combine elements of either a more passive Senate role or a more active and energetic Senate function have led to different interpretations of the literature.

Multiple scholars assert that the Senate should take a more active and energetic role under the guise of the Senate's advice and consent function (Sklamberg, 461; Ross, 639; Gauch, 340-1; Kasper, 550). Howard Sklamberg, a Harvard Law School graduate, suggests that the Senate is a powerful body when placed in the proper context, and that the Senate should assume a more active role in its advice and consent duty (461). William Ross and James Gauch, respectively, would both agree with this assertion and point to the development of the Appointments Clause as evidence that the Framers intended for a more active Senate (Ross, 639; Gauch, 340-1).

Those in support of a more active Senate as part of the Founders' original understanding tend to point to early state actions. Sklamberg — writing of the Senate's advice and consent role as it pertains to treaty-making — discussed the governor's broad power as it related to the legislative branch of state governments, which was usually the Privy Council (461). Overall, Sklamberg stresses the importance of context surrounding the meaning of advice and consent. Sklamberg finds that American state governments at the time of ratification of the U.S. Constitution perceived a shared power between the executive and legislative arms of government, indicating implicitly that an active Senate is required (461).

Contrasting the more active Senate model, multiple scholars claim that the Framers intended for the Senate's role in the Supreme Court confirmation process to be passive and deferential to the president's choice in general (Olson, 9-23; Ross, 681). Separation of powers scholar for the Library of Congress, Barry J. McMillion, notes the more deferential Senate theory without endorsing its framework: "The Framers...contemplated the Senate performing an advisory, or recommending, role to the President prior to his selection of a nominee, in addition to a confirming role afterwards" (McMillion 5-6). Here, McMillion's depiction of a more deferential Senate role seems to mirror the text of the Appointments Clause (Art. II, Sec. 2, U.S. Constitution). While the Senate — whether individually or collectively — can recommend to the President a set of potential Supreme Court nominees, the President would be the one in charge of nominating (Gauch, 351; Grossman & Wasby, 559; Ross, 642; Fisher, 21-27). Then, the Senate would offer a deferential response through a confirmation vote by the Senate body.

The ambiguous language of the Senate's advice and consent function in the Supreme Court confirmation process makes it difficult to understand the role of individual senators. The literature does not clarify how much depth the Senators could individually — or collectively — influence the President to nominate someone to the Supreme Court, save for Schweitzer's work. Such a deficiency of existing discourse on an individual senator's impact on the confirmation process can be an avenue for further research.

When discussing the role of individual senators, some scholars have commented on possible actions. McMillion stresses the importance of the role an active Senator can provide by "candidly inform[ing] a President of their objections to a prospective nominee". In informing the President, the senator "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" (McMillion, 6). Here, McMillion suggests that an active, individual Senator can make a difference in reviewing potential Supreme Court candidates. However, some scholars argue that a single Senator's ability to block the nomination of a judicial candidate during the confirmation process — whether through a filibuster (Schweitzer, 916), or even a Senate Judiciary chairman (Denning, 28) — can be detrimental to the

constitutional framework. Schweitzer sees this as an institutional issue that harms the overall confirmation process (916).

Several senators have written about their responsibility of advice and consent. Senator Susan Collins (R-ME) spoke on the Senate floor about her decision to confirm Judge Kavanaugh to the Supreme Court in 2018. Based on Federalist No. 76, she has “interpreted this to mean that the president has broad discretion” in nominating a candidate, and that her position as a Senator is to “focus on the nominee’s qualifications as long as that nominee’s philosophy is within the mainstream of judicial thought” (Collins). Here, Senator Collins qualifies a more deferential philosophy to her advice and consent role. Senator Ben Sasse (R-NE) stated that the Senate must review whether or not Judge Kavanaugh has “the temperament and the character to take his policy views and his political preferences and put them in a box marked irrelevant set it aside every morning when he puts on the black robe” (Sasse). Joseph Harris quoted Senator Paul Douglas in his book *The Advice and Consent of the Senate* on page 302 about the role of the Senate:

The “advice and consent” of the Senate required by the Constitution for such appointments was intended to be real and not nominal...By requiring joint action of the legislature and the executive, it was believed that the judiciary would be made more independent. There was a second advantage...This was that a Senator from a given state would normally know the ability, capacities and integrity of the lawyers and judges within that state better than could a President.

Senator Douglas cites the belief the Founders had in producing a more legitimate judiciary through dual-appointment mode (Harris, 302).

Scholars differ most over the Senate’s ability to review a potential Supreme Court nominee’s judicial philosophy, constitutional beliefs, or political tendencies. Such divergent opinions influence how the scholars support a more active or more passive Senate role. Bruce Fein argues that under the “Hamiltonian model,” judicial philosophy questioning could not be sufficient ground to reject a Supreme Court nominee (672). Fein believed that concerning the Bork hearings, Senators abused their advice and consent function by opposing his nomination based on ideological grounds of which they were not qualified to judge given their disposition to partisanship (673). Fein contributes to the literature in a unique way by pointing to how state legislature originally elected senators. Fein implicitly argues that re-election considerations should not be made when evaluating Supreme Court nominees (674). There is, however, more room to explore on the Senate’s original election methods, and how that impacted the Framers’ understanding of external forces factoring into Senators’ evaluation of Supreme Court nominees.

Stephen Carter — a foremost thinker on the issue and a Yale law professor — discussed the ways for the Senate to review nominees. Carter argues that the Senate should assume that the nominee is unqualified and should actively seek to find out the nominee’s qualifications (159). Such an argument departs from the deference accorded to most Supreme Court nominees in years past (Fein; Ross, 681). However, Carter believes this should focus solely on understanding the Supreme Court candidate’s moral character, “legal aptitude, skills, and experience” (161-62), and should remain detached from his or her judicial philosophy and constitutional beliefs (Kagan, 931). Supreme Court Justice Elena Kagan finds this view both naïve and impractical. She believes that the Senate and President should review the nominee carefully and understand what the candidate’s vision of the Court is as well as how the candidate would influence the Court if appointed (934).

Kasper's view, among others, contrasted Fein's view in that he believed that "some political partiality would be acceptable in judicial appointments" (555). Kasper, and other researchers held to this view of the Supreme Court confirmation process given Madison's view on rejecting Supreme Court nominees (Gauch, 347; Grossman & Wasby, 561; Ross, 634-5; Harris, 43). Many arguing for the more active Senate believed that the Senate should be afforded the opportunity to find out where the nominee stands on judicial philosophy, moral vision, and the overall role of the Supreme Court (Kagan, 934).

In his book, former Solicitor General of the United States Theodore Olson discusses the major problems with contemporary Supreme Court confirmations including the "nothing is off-limits" mentality that plagues the Supreme Court confirmation process (9-23). Olson contends that the Senate's role should be passive and only act in response to the President's nomination. Olson suggests that the Senate has transcended its constitutional role in its partisan evaluation methods for Supreme Court nominees. Other scholars would agree with Olson's view of allowing for more deference to the President's nominee to the Supreme Court (Ross, 161).

However, some researchers counter this argument, asserting that throughout history, the Senate's deference has simply amounted to "rubber-stamping," and it is not true to the spirit of the Constitution (Friedland 175; Carter, 85; Carter, 159). Dr. Steven Friedland — a Law Professor at Elon University School of Law — contends that the ratification model does not allow room for the Senate to do its due diligence in fulfilling its advisory role. Moreover, Professors Joel Grossman and Stephen Wasby argue against the notion that the same deference accorded to a president's cabinet nominee should be extended to judicial nominees as an "unsound argument" (561). Grossman and Wasby believe there are fundamental differences between the judiciary and the cabinet that necessitate a deeper evaluation of judicial candidates: duration of office; the judiciary is a co-equal branch; presidential actions were political (561).

Several scholars — especially those favoring an active Senate role in checking presidential appointments — strongly believed in a collaborative nature between the legislative and executive branches on the appointment of the judiciary (Kasper 556-7; Ross, 653; Fisher, 35; Lively; Carter, 85; Gauch 340-1). Moreover, Kasper argues that Hamilton anticipated an energetic role for the Senate, one in which the Senate would be "actively offering 'advice' on whom future Supreme Court nominees should be" (568). Arthur Bestor, Professor Emeritus at the University of Washington, writes that the Founders at the time understood "by and with the advice and consent of the Senate" to mean that the Senate would be directly involved in consulting with the President where constitutionally applicable (726). In doing so, Bestor and Kasper each offer the reader an example of how the Senate and the President can interact when it comes to the appointment process.

The Founders' level of distrust for the government served as the rationale for a collaborative format in nominating candidates to the Supreme Court (Weaver, 1724). Moreover, Weaver discusses the nature of checks and balances as well as the separation of powers as installed by the Framers' in order to provide a check on the President's selection power. Weaver describes the system as purposefully inefficient (1752-53). McMillion also pointed out that senators have grasped the critical importance of the function they serve in checking presidential appointments to the third, co-equal branch of government, and have done their due diligence overall in their review of those candidates (2). Donald Lively writes that it is even unconstitutional if the Senate does not diligently review the nominee (Lively).

Eric Kasper also points to the Federalist Papers' authority in his research, specifically tracking James Madison's argument for the necessity of checks and balances to counteract the depravity of man and man's ultimate desire to accomplish his own ambition (545). Kasper quotes Hamilton at length to describe the more active role the Senate should pursue within the judicial confirmation process — especially for the Supreme Court nominees, given that the Supreme Court is a third, co-equal branch of government (557). Other authors cite this theme of human depravity and a distrust of the government frequently (see Madison's Fed. Nos. 48-51). Stephen Friedland authors a rebuttal to Weaver's article. Friedland writes that this system develops an outlet for transparency and allows for the Senate to properly check the President by fully investigating and evaluating the nominee (177-178). Friedland believes this advice and consent function will serve as a check to the presidential appointment in a way that will even “modify the behavior of the participants” (177).

Another interpretation of the Appointments Clause — as an extension of the active Senate model — holds to the notion that the Senate is constitutionally obligated to offer advice to the President as well as consent to the nominee through a thorough review of each nominee (Herman; White; Fisher). Most of the scholarship that demands a vote on any Supreme Court nominee stems mostly from recent statements. Specifically, modern Presidents like President Obama in 2017 and George Bush in 2005 articulated that the Senate held a constitutional obligation to vote on the President's nominee (Herman, 2-3). Adam White, however, opposed the notion that the Senate must hold a full-body, up-or-down vote on every Supreme Court nominee presented by the President (109). Critically acclaimed separation of powers scholar, Louis Fisher argues that the Constitution's vagueness affords the Senate some flexibility in its dealings with potential Supreme Court nominations (34-35). Both White and Fisher would argue that the U.S. Constitution does not explicitly call for the Senate to act on all nominations (White, 109; Fisher, 34-35). Supporting Fisher's assertion, Herman provides a textual analysis of the Appointments Clause and correctly points out that the Appointments Clause does not contain a “shall” that would require the Senate to officially act (2).

Moreover, Fisher argued that the Senate does not even have to hold hearings or review the nominee, as it is within the scope of the Senate's powers to withhold its advice and consent power by either dragging out the timetable on the confirmation process or killing the nomination by not holding hearings (34-35). To that end, there are a number of resources that discuss the confirmation processes that the Senate has undertaken since the adoption of the U.S. Constitution (see Suggested Further Readings). Additionally, there are a lot of references to review the extent of support each nominee received in their respective confirmation hearings as well as the length of the process. Epstein, Segal, Spaeth, and Walker pulled together a massive compendium on the Supreme Court that reviews these processes (374-424). Moreover, the Senate itself has established a number of rules, precedents, and traditions by which it operates. As a formal institution, these rules — though sometimes archaic by nature — govern the processes and proceedings of the Senate. Therefore, it is important to note where those resources can be found. Martin Gold offers a comprehensive, up to date listing of those rules that govern the appointment process. Gold's work states that the Senate can utilize the traditions and precedents it has established to slow down or kill a Supreme Court nomination (Gold, 216-17).

Contrastingly, Schweitzer contends that by not completing an evaluation of the nominee — especially if a single senator chooses to filibuster the nomination — then the Senate is sequestering too much power from the President. Schweitzer would oppose Fisher's assertion that the Senate is

accorded discretion in how it proceeds on each nomination. Schweitzer decries the inaction of the Senate as a constitutional problem (916). Schweitzer in a way confirms the constitutional obligation model in quoting Hamilton by stating that Hamilton viewed the Advice and Consent Clause as providing for a ratification or rejection plan (919-920). However, Schweitzer still argued that the Senate's advisory role came prior to the President's nomination, thereby following the more recommendation model approach (920).

Overall, the complexity of the Appointments Clause is apparent and glaring. Especially given the recent heated Supreme Court confirmation hearings, dramatic votes, and partisan exchanges over the nominee, a clarification on the Senate's proper role as understood by the Founders is necessary. Several scholars have presented possible ways to reform or clarify the Senate's role within the appointment process. Denning and Carter serve as strong resources in understanding possible reforms for the Supreme Court confirmation process. However, despite the abundant amount of resources that discuss the appointment power, the lack of agreement among the various others on the Founders' view of the Senate's role offers a chance to provide analytical clarity. Moreover, the dearth of information regarding how the original election methods for the senators plays into their confirmation role, or how individual senators can influence the outcome of who is appointed by the President and evaluated by the Senate will be avenues for further discussion. In all, an originalist approach to the Founders' understanding of the Senate's role in the confirmation process for Supreme Court justices will contribute to the on-going debate over how the current U.S. Senate should act and behave during the confirmation process.

Research Design

Terminology

Defining terms will be both pertinent and beneficial to develop a strong foundation and baseline understanding of the terms in use throughout the research process. For example, as the research process unfolds, the definitions for words such as 'advice' and 'consent' will be analyzed and scrutinized. Some individuals have tried to define these two terms based on contemporary understanding. However, the issue with this understanding dilutes the meaning of the clause in its proper context. This leads to a dysfunctional confirmation process with multiple competing viewpoints that do not consider a balanced approach to reviewing Supreme Court nominees. However, the respective context of these terms will give more substantive meaning to their usage and application, while simultaneously pointing the research to a more conclusive end on the Framers' understanding.

Law Professor Steven Calabresi defines 'originalism' as when "the constitutional text ought to be given the original public meaning that it would have had at the time that it became law" (Calabresi). Additionally, the original meaning of the text can be "inferred from the background legal events and public debate that gave rise to the constitutional provision" (Calabresi). Moreover, these authors view intention of the provision's application and original understanding as independent of each other (Calabresi). David Forte, a Senior Policy Analyst at the Heritage Foundation, defines originalism as the following: "those who make, interpret, and enforce the law ought to be guided by

the meaning of the United States Constitution – the supreme law of the land – as it was originally written” (Forte). Forte believes the “Constitution of 1787 is as much a constitution for us as it was for the Founding generation.”

Additionally, Forte posited a list of components that would serve as guiding principles in ascertaining original intent: “the evident meaning of the words”; “the meaning according to the words by the Framers suggesting the language”; “the words in the context of political philosophy shared by the Founding generation...”; “the commentary in the ratification debates”; “the subsequent historical practice by the Founding generation to exemplify the understood meaning”; and, “evidence of long-standing traditions,” among many others (Forte). Forte’s developed components will serve as the driving principles by which the analysis will be conducted.

Finally, one must identify the evaluation criteria to establish a common understanding on the various forms of consideration senators place in evaluating judicial nominees. ‘Judicial temperance’, as written by separation of powers scholar for the Library of Congress Barry J. McMillion, refers to “a personality that is evenhanded, unbiased, impartial, courteous yet firm, and dedicated to a process, not a result” (McMillion, “President’s Selection,” 12). Additionally, ‘professional qualifications’ of judicial nominees can refer to a number of things: biographical information; financial disclosures; prior experiences; professional positions and prior judgeships or clerkships; prior judicial rulings, opinions, and dissents, among others.

Early Writings

For the purposes of this research project, various early writings will be cited in order to fully ascertain the intentions of the Founders. Such early writings include the Appointments Clause, the Federalist Papers, manuscripts and letters between various Founders and Constitutional Convention delegates, and the Constitutional Convention proceedings. The Federalist Papers are a collection of eighty-five essays submitted to newspapers in New York to persuade voters and delegates to attend the Constitutional Convention and support the ratification of the newly proposed Constitution. James Madison, John Jay, and Alexander Hamilton contributed to the overall argument by asserting why certain sections were included in the final document and why others were excluded. Moreover, early writings from James Madison, James Wilson, George Washington, and Thomas Jefferson will be cited for the purposes of better understanding what the Founders believed the appointments process to look like. Finally, Max Farrand’s Records on the Constitutional Convention Proceedings (vol. I-III) will be utilized to refer to the development of the Appointments Clause and appointment power.

Methodology

Throughout the research process, two pertinent forms of qualitative methodology will be deployed for a conclusive review of the Framers’ intentions: content analysis and a historic analysis by way of a case study. Content analysis, according to Lune and Berg, is “a careful, detailed, systematic examination and interpretation of a particular body of material in an effort to identify patterns, themes, assumptions and meanings” (172). By using content analysis, one can critically evaluate and analyze the development of the Constitutional Convention proceedings and developments, the Federalist Papers, and other manuscripts for key insights. Specific subset writings will be focused

on more as they pertain specifically to the appointment power. Moreover, special references to the appointment power, advice and consent, or Supreme Court will provide a more targeted approach.

In doing so, historical context, documented assumptions, and intentions underlying the Appointments Clause will become more apparent, giving clearer insight into an original understanding. Additionally, a critical evaluation of the Founders' writings will affirm credibility and reliability in the authenticity of their intentions. Moreover, the original questions posed at the beginning of the paper will be better answered according to the texts themselves. As a reminder, the first question considered what the Founders intended for the Senate's role in the Supreme Court confirmation process as developed through the Constitutional Convention proceedings and other manuscripts like the Federalist Papers. The second question surveyed the Framers' view on human nature which will be best understood in light of the early writings and Federalist Papers. Additionally, the original election method for U.S. Senators will be best understood in light of the Federalist Papers as the Founders expressed a desire for insulation for the Senate.

One can define a 'case study' as "an approach capable of examining simple or complex phenomenon, with units of analysis varying from single individuals to large institutions to world-changing events; it entails using a variety of lines of action in its data-gathering segments and can meaningfully make use of and contribute to the application theory" (Lune & Berg, 160). Moreover, in using the case study approach, historical analysis will be deployed to garner historical significance of the writings of the Founders and proceedings of the Constitutional Convention and ratification process. Such a case study can also provide critical insight for areas of institutional shortcomings and areas for potential reform. In doing so, other questions that served as guiding questions will be further answered in as the advice and consent function was applied early in the nascent republic's years. Moreover, there will be more clarity in understanding what the Founders considered appropriate in evaluating the Supreme Court nominees, as well as understanding further the expectation — not obligation — that the Senate would consider the nominee through a formal vote by the Senate body.

Content Analysis

The Appointments Clause

An analysis of the text of the Appointments Clause will reveal assumptions and clues into the Founders' plan for the appointment power. Below is the Appointments Clause, which is found in Article II, Section 2, Clause 2 of the U.S. Constitution:

The President...shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law...

Based on the text alone, one can make a number of apparent assumptions. First, the Appointments Clause itself is in Article II of the Constitution. It lays out the requirements for the Executive branch. The Founders anticipated the Executive would initiate the use of the appointment power with the words "The President...shall...appoint" (emphasis added). Here, the Founders required presidential

leadership within the appointments process by requiring the initial action of choice from the President.

Second, the Framers gave the Senate the advice and consent function with the key words “by and with” (Appointments Clause). Here, the Founders indicated that the Senate, “by and with” its advice and consent “shall appoint” — or jointly appoint — the proposed candidate (Appointments Clause). In other words, the Senate and President, together, were expected to collaborate their efforts in evaluating and approving the candidate for the office under consideration. However, that the Founders did not place a ‘shall’ in the advice and consent portion for the Senate. This has profound implications for the Senate’s advice and consent role. The Founders knew how to require action from a specific branch of government. The fact that they chose not to require such action from the Senate indicates a level of discretion that is afforded to the Senate in applying the meaning of the text practically. One can reject the idea that the Senate is constitutionally obligated to vote on the Supreme Court candidate’s nomination, thereby answering one of the driving questions of this research paper.

However, this does not exactly entitle the Senate to a passive and deferential role. Quite the contrary. The Founders expected, within the constitutional framework, for the Senate to be able to develop its own system of rules, procedures, customs, and traditions that would govern the institution. Such an understanding can be referenced in Article I, Section 5: “Each House may determine the Rules of its Proceedings....” In affording loose language for the Appointments Clause, the Framers understood that the Senate would determine its own rules in how it chose to proceed on Supreme Court confirmations. Therefore, the Framers afforded the Senate certain discretionary powers within the appointment power itself to act according to its own rules and procedures on various appointments, including the Supreme Court. However, one must note that the Framers, in assuming man’s depravity, knew that various issues would arise with such discretion in the Senate body on appointments. Therefore, to ascertain whether the Senate should serve an active or passive role, one must look beyond the scope of the text itself to understand the Framers’ intentions. The Appointments Clause drafting at the Constitutional Convention of 1787, in the Federalist Papers, in other manuscripts and letters by the Founders, and in the early practice can ascertain the Framers’ intentions.

The Constitutional Convention Proceedings

Thankfully, the Framers provided succeeding generations with a transcript of the debates and proceedings of the Constitutional Convention in 1787. James Madison – the author of the U.S. Constitution – recorded the proceedings of the Convention. Not much of the literature has surveyed what implications those proceedings have on the advice and consent function. Therefore, this portion of the paper will briefly review the two groups, the compromise, and the assumptions underpinning the development of the Appointment Clause.

As synthesized by Adam White, “One group of delegates, led by James Wilson, Nathaniel Gorham, Alexander Hamilton, and Gouverneur Morris, favored control of appointments by a strong executive” (110). On the other hand, “Charles Pinckney, Luther Martin, George Mason, Roger Sherman, Oliver Ellsworth, and John Rutledge favored legislative control of appointments” (White, 110-111). These two groups had convincing arguments for each. Executive control over appointments would result in unity of thought, accountability, and transparency in who is at fault

for a bad appointment, but individuals could persuade the President. Senate dominance over appointments, however, could result in a strong check on bad appointments and would also be susceptible to cabals or political patronage concerns if given the sole appointment power.

As the Convention pressed onward, Edmond Randolph of Virginia put forth the 'Big State' Plan — or 'Virginia Plan' — on May 29 (White, 111). Favoring population as a means for determining representation in the U.S. Congress, Randolph believed a national judiciary would be best chosen by a national legislature (White, 111). James Wilson — an ardent defender of a strong executive — detested the plan and believed “unity in the executive” would produce a better judiciary (White, 111). The motion of appointment by the national legislature was tabled. On June 13, the method for selecting the national judiciary was once again brought up and delegates — such as Madison — proposed allowing the Senate more exclusively the role of selecting the justices (White, 112). After the debate, the motion was agreed to surprisingly. However, William Paterson presented the 'Small State' Plan — or 'New Jersey Plan' — under which the people would elect the national legislature the executive. This plan also would establish a unicameral legislature where each state has equal votes (Library of Congress).

However, as noted by Eric Kasper, “the judicial appointment power stayed with the Senate alone in drafts of the Constitution” from July through August (549). The central fear coming forward from some delegates on the Senate’s appointment power stemmed from the notion that “too much input into the judicial selection process would result in legislators appointing judges as a way to repay political favors” (Kasper, 569). Following these debates, Alexander Hamilton proposed that the Executive should appoint or nominate the judiciary to the Senate, which should have the right of rejecting or approving the nominee (Harris, 21). Hamilton proposed the final product essentially of the Appointments Clause. It is surprising to note that the proposal came from Hamilton, the ardent proponent of executive power. Nominating would be in the hands of the Executive; considering and approving or rejecting would be the role of the Senate; and finally, the executive would ultimately appoint the individual if he or she so desired (Harris, 21). It is interesting to note that Hamilton saw the benefits of dividing the appointment power.

Luther Martin asserted that the Senate would be the “best informed of characters” to appoint to the Supreme Court and other positions given their proximity to the states (Harris, 21). Roger Sherman again advocated for the Senate’s primacy in appointment power as there would be “better security” as it would “be less easy for candidates to intrigue with [or bribe] them, than with the Executive Magistrate” (Harris, 22). On July 21, Edmond Randolph disagreed with Sherman’s accusation and stated that the Senate would be susceptible to “cabals, personal regard, and other considerations unrelated to qualifications” (Harris, 22). George Mason detested executive appointment power on July 18 as he asserted sole executive appointment would lead to more appointments from the executive’s home state (Harris, 22).

These debates, though divisive in nature, afford incredible insight into the delegate’s thoughts and developments of the appointment power as it progressed throughout the Convention. The various plans developed throughout the Convention— both the Small State and Large States Plans — demonstrate the complexity behind crafting a strong Constitution that would last for the ages. But the Compromise merged both the Small State and Large State Plans together. Under the Great Compromise, the Committee of the Eleven — or the committee of eleven delegates in charge of rectifying the disagreements in the Convention — proposed the formation of the Senate which

would allow each state's legislatures to elect two senators from each state. The people would elect The House of Representatives every two-years and would be based solely on representation. These developments had profound impacts on the consensus-building for the appointment power to the Supreme Court.

As August came, the Committee of Eleven met and proposed changes to the Constitution. Appointment by the executive and by and with the advice of the Senate came more naturally as an acceptable proposition to provide a strong check and balance between the executive and the legislature after the approval of the bicameral legislation with a House and a Senate. On September 7, the delegates officially approved the President's and Senate's shared appointment powers for Supreme Court Justices (Harris, 24). The passage was approved as the President was given the power to make recess appointments (Harris, 24).

Massachusetts' Advice and Consent Model

The Founders used Massachusetts as the model for the Appointments Clause when they were reviewing the appointment power. Chiefly, Nathaniel Gorham referred to the Massachusetts Constitution as the leading document for influence in securing the dual-appointment method. The Appointments Clause for the Massachusetts Constitution states, "All judicial officers, [the attorney general], the solicitor-general, [all sheriffs], coroners, [and registers of probate], shall be nominated and appointed by the governor, by and with the advice and consent of the council" (Massachusetts Constitution). Clearly, the language is similar to the Appointments Clause within the U.S. Constitution; however, the council advises and consents to the nominee instead of the legislature.

In order for the Massachusetts' governor and council to work through the advice and consent inclusion, the governor appointed the judicial nominee, and within one to three weeks, the council had responded (White 136). The council only recorded the appointments in which it advised and consented to, excluding the ones they did not confirmed (White 137). This is an interesting component to wrestle with since the Senate from its inception has publicly recorded the Supreme Court nomination votes. Now, some votes were recorded by voice and considered with unanimous support. Even Supreme Court nominees who were rejected were publicly declared. Regardless, in both scenarios the Founders acknowledged a Senate that would be actively involved in reviewing the Supreme Court nominee, offering advice on the nominee or potential candidates to nominate, and eventually approving or rejecting the nominee. The Massachusetts advice and consent model supports this notion.

Throughout the process, certain items were pertinent to understanding advice and consent. First, the Founders seemed to collectively agree upon what advice and consent meant without the necessity to debate its inherent meaning. Such a common understanding probably resulted from their prior experiences in recording the Massachusetts' council when advising the governor on judicial appointments. Second, the Founders merged the Virginia Plan and the New Jersey Plan in the Committee on Detail. Such a compromise established the election of senators via the state legislatures. Hence, the Founders believed this would be a wise and necessary check against both the president in the appointment power over Supreme Court Justices among other areas of checks and balances, as well as a check against the passions of the people.

One should also remember that the final plan that was eventually adopted was first proposed by Alexander Hamilton. Hamilton's belief in a strong, unitary executive contrasted differently from the plan adopted at the Constitutional Convention. His viewpoints will be explained through his

contributions in the next section. In the end, the Founders believed that dividing the appointment power between the president and the Senate would produce a safer, less tyrannical government. The Senate's check upon the president would effectively curb the appointment of improper officials to the Supreme Court.

The Federalist Papers

The Framers created a constitutional framework and federal system that was based on separation of powers, division of responsibilities and accountability, and checks and balances associated within each new branch of government. In other words, the framework was “more prone to obstructionism than comparable systems” (Weaver 1717). Specifically, the advice and consent function has served as a check upon the president given that 37 out of 163 nominations to the Supreme Court have not survived the Supreme Court confirmation process within the U.S. Senate (“Supreme Court nominations”). In contrast, between the Founding and 2011, the Senate has rejected only fifteen cabinet nominees, demonstrating a more robust application of the Senate's advice and consent power (Weaver 1730). Moreover, the Senate also demonstrates the importance of the Supreme Court and the federal judiciary as a whole in the national government.

Under the guise of checks and balances, each participant within the Supreme Court confirmation process—the president and his staff, the Senate Judiciary Committee and the Senate body, and the judicial nominee—must “modify their behavior” to achieve an optimal outcome (Friedland 177). Specifically, the president must moderate his selection of a nominee on occasion in order to assure a smoother confirmation process by avoiding ideologues and extreme candidates (Weaver 1731). The Senate has adjusted its review methods concerning the various candidates at times as well, especially concerning party considerations of the Senate majority and the party of the president (Friedland 177). Even the judicial nominee may have to modify his or her behavior by being more precise or more ambiguous and withholding during the confirmation process on his or her philosophical viewpoints.

One should note that this level of inefficiency within the federal framework is good. Stephen Friedland touched on the benefits of having a thorough, comprehensive confirmation process. Specifically, he evaluated having more input from a variety of sources as a positive aspect that would only strengthen the overall government:

It eliminates the singular viewpoint and its impulsiveness and susceptibility to a lack of questioning, and instead values the idea of freedom of speech and differing viewpoints—of the Senate and the President, at least—and also emulates an adversary system of truth seeking...In addition, the hearing mechanism by itself creates at least a path to transparency, if not to the truth (177-178).

Friedland's reflections on the adversarial system of checks and balances underscores the Framers' mindset found in Federalist Papers Nos. 48-51, which were written by James Madison.

In Federalist No. 48, Madison argues that the three branches of government should “provide practical security for each, against the invasion of the others” (No. 48). In Federalist No. 51, Madison continues this theme of distrust of the government and a desire to uphold a “constitutional equilibrium” (No. 49) by devising a system of checks, which he referred to as “auxiliary

precautions” (No. 51). He rationalized that instituting these seemingly obstructionist and inefficient checks was necessary because “[ambition] must be made to counteract ambition” (No. 51). Madison and the Framers understood all too well that devising a system of divided powers on paper was not enough; additionally, the Framers also knew that the “fountain of authority, the people,” were not always the most trustworthy in selecting people for specific positions within the government—especially the independent judiciary (No. 51). For this reason, the Framers installed the appointment of the judiciary by the president and the Senate. The “peculiar qualifications” of the justices combined with their “permanent tenure” must not be based on an election by the people for fear of majoritarian, mob-rule-like consequences (No. 51).

One of the more famous portions of the Federalist Papers appears in Federalist No. 51, in which Madison attributes human nature as the rationale for such a level of inefficiency and obstructionism. Madison wrote the following in Federalist No. 51:

But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

Madison demonstrates the fallen aspect of human nature and how the sinful habits of mankind have led to the necessity to design a government in a way that would reflect those attributes. Man is naturally prideful, selfish, and seeking his own will; when given the chance, he will pursue his personal ambition and desires to their naturally conclusive ends and will use any means to accomplish them. Federalist No. 51 is the genius justification of the framework of the federal government.

The Framers’ discussion continued as the Founders believed the legislature to be the most dangerous of the branches as it is “everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex” (No. 48). Madison noted that history has shown the “tendency of republican governments” to aggrandize the legislature “at the expense of the other departments” (No. 49), and that it “necessarily predominates” in the republican governmental models (No. 51). Therefore, to avoid an “elective despotism” (No. 48), the Framers divided the legislature into the House and the Senate with provisions of powers enumerated or granted to each branch of the legislature. Furthermore, to craft a more distinct, bicameral legislature, the Founders rendered “different modes of election and different principles of action” (No. 51). These electoral differences and responsibilities have profound implications for even the Supreme Court confirmation process.

Original Senate Election

This section of the paper will seek to understand the Founders’ view of the original Senate election mode by which they established in the Constitution and how that impacted their decision for the advice and consent power. With the Senate removed a degree from the people, it can be insulated from the people’s strong passions. James Madison considered the passions of factions to be the most concerning issue within the nascent United States political sphere, and the rise of factions could lead to significantly negative implications for the government (No. 10). Elective despotism would become the norm as the passions of most individuals would only be played out against the will of the minority (No. 48). However, the Senate acts as a direct check to the people on a few levels. First, the election of the Senate by the state legislatures was chosen because the Founders

believed the Senate should have a degree of separation between the Senate and the people (No. 39). Second, a third of the Senate is re-elected every two years on a six-year term basis. Logistically, it would take a protracted amount of time to inaugurate significant change to the governmental structure, which the Founders believed would be necessary for preventing a dangerous level of revolutionary change. Third, the Senate was intended to be an equal body of two senators from each state. Such a plan was to counteract the population-based House of Representatives and would therefore further the distinctions between the two branches and their purposes (Article II). Fourth, the Senate was expected to check the president in a variety of functions, from treaty confirmation processes to legislation and on appointments. Even James Madison indicated that some level of public opinion would factor into the Supreme Court confirmation process, saying, “Even the judges, with all other officers of the Union, will, as in the several States, be the choice, though a remote choice, of the people themselves, the duration of the appointments is equally conformable to the republican standard” (No. 39). However, this degree of autonomy was intended to insulate the Senate from majoritarian moods, as well as preserve the independence and legitimacy of the judiciary. The Founders believed the Senate’s removal from the people via their election mode would not only give the Senate a certain level of autonomy from the electorate from directly influencing their advice and consent function, but also their removal from the people would afford the Senate the discretion and reflection it needed in reviewing and choosing to accept or reject the nominee.

Coming on the heels of the populist movement in the early twentieth century, the Senate’s mode of election was changed in the Seventeenth Amendment, which called for the “Senate of the United States...[to be] elected by the people...” (Clause 1, Seventeenth Amendment, U.S. Constitution). Such a change affected the role of the Senate in a subtle, yet substantial way; the Senate was no longer afforded the level of insulation in their individual responses to a Supreme Court nomination. Each senator was now expected to explain to voters why they decided to vote to approve or reject the nominee placed forward by the president to the Supreme Court. Such a change has had direct impacts on senatorial and presidential elections. Specifically, public opinion can become the determinative factor in influencing how certain Senators choose to vote on a Supreme Court nomination, especially in their re-election year (Davis 87). The presidential and midterm elections from the 2010s are great examples of such partisanship, polarization, and political posturing that flows forward from direct Senate elections. The appointment of candidates like Neil Gorsuch and Brett Kavanaugh placed Red-State Democrats—or Democratic Senators from traditionally Republican states—like Joe Manchin (D-WV), Heidi Heitkamp (D-ND), Claire McCaskill (D-MO) in a position to either support the president’s nominee and expect favorable reaction from their state voters in November or to follow the party line and oppose the nominee in the hopes that the consequences do not outweigh the benefits (Arkin).

In his book *Electing Justice*, Richard Davis explores the divisive process as a result of more impact from interest groups and media agencies. For example, some interest groups provide lists of judicial candidates for presidential consideration (Davis 109); interest groups offer questions for Senators to use (Davis 111), and both media agencies’ interest groups also provide public support or condemnation to influence the outcome of a Supreme Court nomination (Davis 111). Interest groups spend millions of dollars to influence the outcome of senatorial elections in the hopes that future Supreme Court nominations will go in the direction the interest group prefers. Moreover, how media groups portray the nominee will impact how the American electorate perceives the nominee, even if the public is unaware of potential biases or misrepresentations. The media’s

portrayal of Supreme Court nominees significantly impacts the way voters perceive the nominee as well, thereby impacting senatorial considerations (Davis 87).

Therefore, if both the media and interest groups are actively influencing the Supreme Court nomination processes, then Senate elections will be significantly impacted by their presence. Though the Founders anticipated some level of public influence in the Supreme Court confirmation process, it was more or less anticipated in the general desire of a qualified nominee who was above reproach that the public would find acceptable. The Founders did not anticipate the people to essentially 'elect' the Supreme Court justices by virtue of direct Senate elections. The Founders saw the importance of establishing and preserving an independent judiciary. Such a position was blatantly argued for in Federalist No. 78, which states, "The complete independence of the courts of justice is peculiarly essential in a limited Constitution" (No. 78). Furthermore, some Anti-Federalists suggested the judiciary would check Congress and the people by voiding a popular piece of legislation passed by Congress. Hamilton corrects these critiques of the Constitution by asserting the following in Federalist No. 78:

Where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

Hamilton believes that the judiciary is to uphold the Constitution above all else, including the expressed will of the people. Therefore, the judiciary is called to a high standard of independence and removal from the people. Even more so, Hamilton questions the appointments and who should make them. Hamilton asserts that a single branch would not afford the proper character for the Supreme Court (No. 78). He writes of public opinion's effect on Supreme Court nominations in Federalist No. 78:

If [the power of making appointments was given] to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.

How much more than should the Senate, which either confirms or rejects Supreme Court nominees and was originally elected by the state legislatures, be detached from momentary passions of the people? The Founders certainly considered this to be an issue of the utmost importance; therefore, their original understanding of Senate's election via the state legislatures and not by the people was for the protection of not only the judiciary in preserving its independence, but also for the Senate in preserving its prestige and importance in appointing judicial nominees to the nation's highest bench in the land.

The Federalist Papers (Continued)

In Federalist No. 66, Hamilton offers the reader a number of important assumptions on the extent of the Senate's powers within its advice and consent role. First, Hamilton assumes an energetic and active Senate. For example, Hamilton writes in objection to detractors who feared an aristocracy that the Senate "is to have concurrent authority with the Executive in the formation of treaties and in the appointment to offices" (No. 66). Moreover, Hamilton praises this dual-appointing method as

it will lead to “a more intelligible, if not a more certain result” (No. 66). Furthermore, Hamilton rejects the notion that patronage will dominate within the dual-appointment method between the executive and legislative branches. Hamilton asserts instead that those involved in the appointment process will be interested in the “respectable and prosperous administration of affairs” of the laws enacted and will reject candidates who have “proved themselves unworthy of the confidence” by the two branches to fulfill the duties and obligations instilled in them (No. 66). In other words, Hamilton and the Federalists believed the legislature and the executive would take care in appointing an individual who was above reproach, well-qualified for the role, and faithful in discharging the duties of the judiciary.

Hamilton offers insight into the process of appointment as found within the guise of the Appointments Clause. He declares that the president’s role will be to nominate and with the concurrence of the Senate appoint the individual confirmed to the office (No. 66). One can assume that Hamilton understood the appointment power to be a shared power and responsibility between the two branches. Hamilton claims there will be no “exertion of CHOICE on the part of the Senate” (No. 66). Rather, the Senate “may defeat one choice of the Executive and oblige him to make another; but they cannot themselves CHOOSE, they can only ratify or reject the choice of the President” (No. 66).

Hamilton makes several assumptions for the reader. First, the choice is ultimately up to the president; he or she alone must choose to nominate an individual to the Supreme Court or other offices as they arise. Second, the Senate may “entertain a preference to some other person” (No. 66), but that does not imply that the president will subsequently nominate such an individual. Hamilton hints at the Senate’s pre-advisory role by asserting that the Senate may make it known to the president which candidates or type of candidates the Senate would find favorable to appoint to the Supreme Court. Third, the Senate’s responsibility is to either “reject or ratify” (No. 66). Surprisingly enough, Hamilton does not leave room for the Senate to forego an action on the nomination; he would rather the Senate hold a full-body vote in the least to reject or ratify the nominee. Next, if the Senate chose to reject the nomination, there would be no guarantee that the president would subsequently nominate their preferred candidate (No. 66). Hamilton implies that the Senate would inherently be an active body and could not afford to not act within the scope of its powers on a nomination, especially to the Supreme Court. However, the absence of a declaration of necessity to hold an up or down vote on nominees put forward by the president still leaves open the room for the Senate to act under the guise of its own rules and procedures. While it may be conceded that Hamilton asserts that the Senate could “feel any other complacency towards the object of an appointment than such as the appearances of merit might inspire,” Hamilton also declared that both branches would each be interested in appointing the right character (No. 66).

Federalist No. 76 was written in direct response to concerns over the Appointments Clause. Hamilton states that the president would be “better fitted to analyze and estimate the peculiar qualities adapted to particular offices, than a body of men of equal or perhaps even of superior discernment” (No. 76). Hamilton indicates that the appointment powers’ nominations would be best suited under the guise of a single individual who would not be distracted by a number of different proclivities. Furthermore, an individual would be better suited to “investigate with care the qualities requisite to the stations to be filled” (No. 76) and will seek out individuals based on the pre-requisite of filling the office with the proper individual. Contrastingly, if the Senate were to nominate, the distraction and “diversity of views, feelings and interests” would unnecessarily

dominate the process, and “the intrinsic merit of the candidate will be too often out of sight” (No. 76).

Hamilton provides four areas for the Senate to consider for review. He ensures that the Senate’s check upon the president in appointing persons to the Supreme Court and other offices would have a “silent operation” that would serve as an “excellent check upon a spirit of favoritism in the president” (No. 76). Moreover, the Senate’s advice and consent check would “prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view of popularity” (No. 76). Such a pronouncement has profound implications for the Supreme Court confirmation process. It should be stressed that Hamilton did not mention political allegiance, constitutional philosophy, or even general ideology as reasons to oppose a nominee. Therefore, the absence speaks volumes in terms of general acceptance of these aspects in moderation for Supreme Court nomination considerations. In order to counteract extreme partisan politics from overcoming the system, Hamilton even includes the notion that popularity should not play a factor in supporting a Supreme Court nominee. Hamilton uses the word ‘popularity’ to also refer to candidates who may be politically expedient or popular, but unfit to serve on the Court given their lack of experience.

Also, Hamilton makes the case for presidential preference in the selection of the judicial nominee. Hamilton argues that, though the Senate must confer approval upon the nominee, the eventual appointee to the office in any case will come from the president’s preference in the end, “though perhaps not in the first degree,” Hamilton writes (No. 76). He asserts that because the Senate can reject the nominee, “the danger to his own reputation”—both politically and personally—would motivate the president to take special care in appointing a strong candidate (No. 76). Hamilton rejects patronage arguments as the Senate would have no benefit to “confer” upon the president (No. 77). Rather, the Senate’s ability to influence the president would rest solely in “restraining” the president (No. 77). In other words, Hamilton notes that the Senate’s ability to reject a nominee would have such an effect as to fully check the president. Regarding responsibility, Hamilton wrote the following: “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” (No. 77).

In all, it is imperative to note that Hamilton confers the ability of the Senate to review the nominee’s fitness for the office, approve the nominee, or fully check the president by rejecting the nominee. The Federalist Papers’ timely warnings are a harbinger of confirmation processes to come. The difficulty in reviewing the exhaustive amount of data within the Federalist Papers is the lack of direct discussion on specific reasons for the Senate’s rejecting of the nominee—save for presidential favoritism, state preference, familial linkage, or against general popularity. Moreover, Hamilton does not discuss ways to review the nominee, specifically what could be “fair game” within that review process. Therefore, it is safe to assume that since the Founders afforded the Senate and House each discretion in establishing their own chamber rules and procedures, Hamilton understood the Senate would broadly and strongly hold its discretionary powers within the context of appointment.

Early Writings

Various other writings serve as important indicators in ascertaining the original meaning behind advice and consent as considered by the Founders. Various individuals—former Constitutional

Convention delegates, prominent members in American society, and even early U.S. presidents—discussed the appointment power process that afforded key insight into the Senate’s advice and consent role. President George Washington wrote that he believed Thomas Jefferson and John Jay concurred with his assertion of executive dominance within the appointment power. He recorded his thoughts in his diary, saying, “The Senate’s powers “extend no farther than to an approbation or disapprobation of the person nominated by the President, all the rest being Executive and vested in the President by the Constitution” (McGinnis). Washington assumes here that the Senate plays a more limited role in the context of appointment power and believes that the Senate should limit itself to only acceptance or rejection of the nominee. After submitting the first treaty for consideration by the U.S. Senate under its ‘Advice and Consent’ role for the Jay Treaty, Washington wrote the following entry in his journal on August 8, 1789, which reads, “Neither of which might be agreeable; and the latter improper; for as the President has a right to nominate without assigning his reasons, has the Senate a right to dissent without giving theirs” (Harris 39). Granted, this was in response to a treaty ratification which is different from the appointment power; however, it should be noted that the Senate’s advice and consent role was not too distinguishable in treaty ratification or judicial confirmation. Therefore, it is safe to assume that President Washington understood their critical role of confirmation or rejection was similar in both scenarios, and he knew that their ability to reject a nominee or treaty would be the prerogative of the Senate. He assumed an active Senate model that would “dissent” on the nomination by a vote, which matches much of what the other Founders understood at the time.

James Madison spoke on the House floor concerning the issue of removal power because some contested the executive alone had the authority to remove while others moved to involve the Senate since it was a part of the appointment power. Concerning the notion that the Senate should be involved, Madison stated, “If the constitution had not qualified the power of the president in appointing to office, by associating the senate with him in that business, would it not be clear that he would have the right by virtue of his executive power to make such appointment?” (Selected Writings of James Madison 180). Though he recognizes the advice and consent of the Senate as a shared power in the appointment power, Madison expresses that removal power is not of the same mold. Suffice it to say that Madison assumes an active Senate involved in the appointment process of the judicial nominees to the Supreme Court. When it comes to appointing individuals during recess appointments, he writes that “[the President] can place no man in the vacancy whom the senate shall not approve” (Selected Writings of James Madison 184). Again, Madison is assuming here an active Senate that would hold at least a vote on the nominee for the Supreme Court.

James Iredell, a former Supreme Court Justice and prominent North Carolina delegate to the Constitutional Convention, wrote about the advice and consent role of the Senate:

As to offices, the Senate has no other influence but a restraint on improper appointments. The President proposes such a man for such an office. The Senate has to consider upon it. If they think him improper, the President must nominate another, whose appointment ultimately again depends upon the Senate. (McGinnis)

One could argue that this refutes the pre-nomination role many considered the Senate to have for the Supreme Court nominations. However, one could also argue that the Senate would assume the prerogative of telling the president of an individual or type of individual that the Senate—or select Senators, Senate Majority leader, or Senate Judiciary Committee members—would support.

Another important aspect to consider comes from those who opposed the Constitution, many of whom were considered Anti-Federalists. Virginia Delegate George Mason refused at the close of the Constitutional Convention to sign his name to the Committee of Style report, which demonstrated that he opposed the drafted Constitution (Mason, Gunston Hall). In a letter printed for the public on November 22, 1787 in the Virginia Journal, George Mason wrote of the appointment power by saying, "From this fatal defect has arisen the improper power of the Senate in the appointment of public officers, and the alarming dependence and connection between that branch of the legislature and the supreme Executive" (Mason, Gunston Hall).. Mason seems to suggest that he objects to the active Senate role that the Founders installed for the appointment power. This objection to the Senate's power indicates that the Founders collectively understood at least in some level the active power the Senate had in its advice and consent power.

Both Edmund Randolph and Luther Martin refused to sign the Constitution in support of its ratification. One of their main objections centered around the dual-appointment mode of the Supreme Court nominations. In the appointment power, Randolph opposed the inclusion of the president as that would necessarily lead to the increase in his powers (Marcotte 533). Luther Martin also refused to sign the Constitution, but he feared the lack of a check on the president in the appointment process (Marcotte 534). These two declarations alone indicate that there was favor in the utilization of an active Senate in the appointments process for the Supreme Court.

James Wilson, who was argued to be the inventor of the modern presidency, "objected to the mode of appointing, as blending a branch of the Legislature with the Executive" was a mistake in his eyes (Farrand 538, Vol. II). Wilson believed that "there can be no good Executive without a responsible appointment of officers to execute" (Farrand 530, Vol. II). Gouverneur Morris also understood the complexity of the Senate's advice and consent check against the president. In contrast to James Wilson's comments, Morris stated, "As the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security" (Farrand 530, Vol. II). Morris indicates that there is a dual mode of appointing individuals to the Supreme Court, of which the U.S. Senate would be an active participant.

Historic Analysis & Case Studies

An early version of Senate opposition to a judicial nominee to the Supreme Court came early in the nascent country's history under President George Washington. John Rutledge—a delegate to the Constitutional Convention and a signer to the U.S. Constitution—was originally appointed by President George Washington to the Supreme Court in 1789 to be an Associate Justice. He served from 1789 to 1791 before resigning to serve as South Carolina's Chief Justice for the state supreme court (Harris 42-3). Chief Justice John Jay announced his resignation (Harris 42-3). When he heard of the open position to serve as the Chief Justice, John Rutledge wrote George Washington "a letter remarkable letter...applying for the Supreme Court appointment" (Harris 43). President Washington promptly offered him the position (Harris 43).

However, prior to his appointment, Rutledge spoke publicly at a Charleston event, decrying the Jay Treaty which normalized trading relations with former colonizer, Great Britain (Harris 43). Many viewed Rutledge as mentally deranged with "eyewitness testimony" to his speech in South Carolina against the Jay Treaty cited as a proof of this claim (Ross 642). Some attributed his mental insanity

to the overall rationale to oppose his nomination. After all, evaluating his mental capacities in this specific case would only be fair and in keeping with the review of the nominee's general fitness to serve. However, James Gauch provides strong reasoning to oppose the notion that his nomination could have been rejected on grounds of his mental instability. He believes that in order for him to have been appointed to the highest bench in the land, he would have had to pass Washington's "stiff criteria," which would also simultaneously call into question Washington's judgment (360). Next, the people of South Carolina trusted his judgment by electing him Chief Justice of the South Carolina Supreme Court (Gauch 360). His recess appointment "evidenced no mental unsoundness" (Gauch 360). Nothing but Rutledge's opposition to the Jay Treaty should be accredited to the failure of his nomination to the Supreme Court. In doing so, scholars place Rutledge's rejection for Chief Justice to the Supreme Court squarely in the box as a politically motivated opposition to his nomination. Though Rutledge served as the Chief Justice via a recess appointment, he lost in the Senate by a vote of fourteen to ten (Ross 642). Thomas Jefferson wrote William Giles a letter in response to the Rutledge nomination, saying, "The rejection of Mr. Rutledge by the Senate is a bold thing, because they cannot pretend any objection to him but his disapprobation of the treaty" (Gauch 361).

The results of the Senate's actions speak boldly. For one, the Senate acted on the nomination and neither delayed a response, nor did they completely ignore the nomination. Second, President Washington did not consider the rejection unconstitutional (Ross 642). Instead, Washington proceeded to nominate another individual to fill the position, following in the mold of his position earlier when he said, "for as the President has a right to nominate without assigning his reasons, has the Senate a right to dissent without giving theirs" (Harris 39). The former delegates to the Constitutional Convention of 1787 were notably Senators who rejected a fellow colleague from the Convention purely on partisan grounds (Marcus and Perry 99). Another major aspect to consider concerns the fact that the Senate used political disagreements as a basis for rejection of the nominee. Harris writes that the "Senate thus established a precedent of inquiring into the political views and ideas of persons nominated for public office and of rejecting a nominee whose views do not correspond to those of the majority of the Senate" (43). Ross considered Rutledge's failed nomination as political by nature, and "unrelated to his fitness to serve on the Court" (643).

The Senate's political considerations that were attached to Rutledge's confirmation process—along with acquiescence by key individuals, including President Washington and other Founding Fathers—clearly indicated that political considerations were to some extent acceptable to the confirmation process. Such an acceptance has ushered in an unnecessary amount of political and judicial philosophy considerations into the Supreme Court confirmation process. Joseph Harris wrote the following on the early development of Supreme Court confirmation processes:

Appointments were influenced greatly by political consideration, and the action of the Senate was fully as political as that of the President. Few of the rejections of Supreme Court nominations in this period can be ascribed to any lack of qualifications on the part of the nominees; for the most part they were due to political differences between the President and a majority of the Senate. (303) Ross records in his book a number of other failed Supreme Court nominations that were the result of political considerations instead of qualifications, including Alexander Wolcott in 1871, Ebenezer Hoar in 1870, and both William B. Hornblower and Wheeler H. Peckham in 1894 (643). The lack of direct limitation in the Constitution of the Senate's ability to utilize political considerations, personal character attributes, or someone outside of the mainstream of judicial philosophy indicate that the Founders understood that some level of these considerations would inevitably fall within

the guise of the advice and consent function. Heritage Foundation scholar McGinnis writes that the Senate has a right to check the president to prevent him from appointing individuals that “have unsound principles as well as blemished characters.”

As stated before, the major evaluation criteria for early Founders in developing the framework for the appointment power rested in the nominee’s qualifications. The dual-appointment power ensured that the individual ultimately appointed to the Supreme Court would be of the highest qualifications and background with the strong capability to fulfill the role of Justice on the Court. However, the Founders began a trend of using political evaluative criteria for review. This is not new, and one should note that the Founders believed some political considerations were necessary for the review of the nominee.

When considering the judicial appointment power, James Madison wrote a proposal that said the president would submit a nomination, and unless two-thirds vote by the Senate rejected the nomination on the grounds of “any flagrant partiality or error,” the nomination would proceed as approved (Kasper 555). Kasper draws an interesting point in his review of this portion of writing. Madison assumes that some level of partiality would be acceptable in the Supreme Court confirmation process or that some level of political consideration would be appropriate. Madison’s use of the words “flagrant partiality or error” indicates that the Founders anticipated judicial qualifications as the most suitable route for questioning and considering nominees to the Supreme Court with some amount of political consideration acceptable (emphasis added). This places the Senate in a difficult position, though, given the fact that in order to determine what some political consideration looks like, one would almost have to install a limit in terms of reviewing nominees, which may put the Senate at a disadvantage politically during the Supreme Court confirmation process.

Discussion & Conclusion

One can see the myriad of complexities concerning the Senate’s advice and consent function. Though the Founders did not explicitly state to what extent they believed certain qualifications would be used, they did implicitly provide context in how they anticipated the appointment power to be used. One can deduce certain points from their early writings such as letters amongst each other and the Federalist Papers, as well as from the developments of the Constitutional Convention and early practices of the appointment power in the formative years of the country following ratification of the Constitution.

Overall, the Founders originally intended for an active Senate advice and consent function, one that would be powerful enough and effective enough to check the president from appointing an unfit individual to the Supreme Court. They anticipated a back and forth in prior advisement on nominees, as well as advisement on the judicial candidate officially nominated by the president. The Senate was then expected to review the eventual judicial nominee for the Supreme Court. However, based on the vague text of the Appointments Clause and combined with the understanding the Founders provided in the Federalist Papers, the Founders expected the Senate to decide how to best proceed in evaluating the candidates in the context of Article I, Section 5 powers to determine its own rules and procedures. They anticipated professional qualifications and judicial temperance to be reviewed as major components in evaluating the candidate. The Founders also believed some

level of political consideration would be used in the appointment of Justices. They built the Senate election method as a way of checking the popularity of a candidate or president from influencing how Senators viewed political qualifications in the Supreme Court confirmation process.

Following this research process, one should consider certain themes. First, the Founders exerted energy and effort in deciding how the appointment power would be distributed. They understood the risks involved in wrongly assigning this particular power and how just one branch could accumulate too much power in its own hands at the expenses of the other two branches. Second, the Founders also drew from specific principles of governmental power, which informed their understanding of how to best establish a government that would fulfill the intent of pursuing good governance and justice for the people of the United States of America. These driving principles included the following: human nature and man's selfish motives hindered an individual's ability to not desire more power; separation of powers became a consistent theme as the Founders understood the necessity in apportioning certain powers amongst three separate, distinct, and independent branches of the federal government; and, checks and balances informed the practice of government, and delineated the extent of the branches' powers and how they balanced against each other. Such principles are seen blatantly in the designing of the advice and consent function throughout the Constitutional Convention, Federalist Papers and other writings, as well as early practices of the government.

Third, as described under the notion of checks and balances, the appointment power as designed by the Founders was intended to be a shared power and responsibility between the executive and legislative branch. The Founders expected formal and informal negotiation between the Senate and the president on appointing the most suitable individuals to the U.S. Supreme Court. Therefore, the Founders intended for the Senate to 'check' the president for presidential favoritism, state preference, familial linkage, or against general popularity. The Founders envisioned the Senate reviewing the individual's qualifications, judicial temperance, and general fitness to discharge the duties of a Justice on the Supreme Court. Senators were also afforded some level of discretion in reviewing the nominee's political and judicial philosophy. By no means did the Founders hope or anticipate these considerations—political and judicial philosophy—would be the determining factor for denial of the judicial nominee. While the Founders may have foreseen such a scenario given the ambiguous language in the Appointments Clause, they did not believe such "flagrant partiality" would amount to reason enough to reject the nominee altogether on political considerations alone.

This discretionary power in reviewing the president's judicial nominee is found within the vague language of the Appointments Clause. The lack of a direct call to action from the Senate affords it certain flexibility in determining how it intends to review the nominee. The Senate's ability to determine the rules and procedures of its own chamber as according to Article I, Section 5 garners a stronger sense of duty and responsibility to check the president. Such a power should embolden the Senate to soberly understand the immense role it has been given and recognize its responsibility to assume an active role in properly checking the president, not in the sense of rejecting the nominee as the only means to check the president but to view the role of evaluating the nominee as balancing and checking the president.

Fourth, the Founders originally intended the Senate to be elected by the state legislatures to avoid the direct, majoritarian pressures upon Senators for these momentous decisions. The Founders

desired this degree of separation from the people in order to produce a more independent and legitimate Supreme Court. The direct election of senators has only increased the use of partisanship and political posturing amongst senators, as well as among the potential Supreme Court nominees as presidents seek to pick ideological candidates who may boost their standing amongst their constituents. Senators have felt the intense pressures from interest groups, media agencies, and the voters themselves as millions of dollars pour into Senate elections. Such constitutional shifts have produced dangerous consequences for the future of the judiciary, as well as the role of the Senate as senators may seek to satisfy their voters over their conscience for their vote on a Supreme Court nominee.

The Founders originally envisioned for the Senate to assume an active role in advising and consenting on the Supreme Court nominees. Based on their early writings and manuscripts, their drive for philosophical and political principles, and their proceedings at the Constitutional Convention, the Founders intended for the Senate to assume a strong responsibility in reviewing the nominee by advising which nominee to appoint and by consenting—or rejecting—the nominee. The Founders anticipated for a level of inefficiency. Such a level of inefficiency is a good thing and would promote a stronger level of rigor in checking the president from appointing the wrong individual to the Supreme Court. The Founders anticipated at least some form of either accepting or rejecting the Supreme Court nominee, and this expectation was practiced in the early years of the American republic, such as John Rutledge’s nomination.

Regardless, the Founders did not want for the Senate to be caught up in a political circus over Supreme Court nominees. If the Senate abdicated from its responsibilities in evaluating the nominee in a respectful and sober-minded manner, then the Supreme Court’s respectability would only diminish. The Senate’s reputation as a credible institution to check the president’s nominating power would be severely questioned, leading more ideologically oriented candidates to the Supreme Court versus level-headed and even-handed justices. The risks are too high for the Senate to not fulfill its proper advice and consent role in the context of the Founders’ original intentions and aspirations.

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