13

RESOLVED, The president has too much power in the selection of judges

PRO: David A. Yalof

CON: John Anthony Maltese

Few issues have engendered more controversy in Washington in recent years than the selection of federal judges. Republican president Ronald Reagan's nomination of Robert H. Bork to the Supreme Court in 1987 provoked a bitterly partisan debate between anti-Bork liberals and pro-Bork conservatives. In the end, the Democratic-controlled Senate voted Bork down. Reagan's Republican successor as president, George H. W. Bush, sparked an even fiercer firestorm when he nominated Clarence Thomas, a conservative, to the Court in 1991. Amid charges and countercharges about Thomas's alleged sexual harassment of law professor and former employee Anita Hill, the Senate confirmed him by the narrowest majority of any Supreme Court nominee in history, 52–48. When Bill Clinton, a Democrat, became president in 1993 and the GOP took control of Congress in 1995, Republican members of the Senate Judiciary Committee defeated many of Clinton's appellate court nominations by refusing to send them to the full Senate for a vote. Although Republican George W. Bush enjoyed a Republican Senate for most of his time as president, Democratic senators were able to defeat or delay several of his court of appeals nominees by threatening or launching filibusters. Bush managed to win Senate confirmation of two Supreme Court nominees, John G. Roberts Jr. and Samuel A. Alito Jr., only after succumbing to political pressure to withdraw the nomination of White House counsel Harriet Miers.

Like Bush, President Barack Obama has benefitted from having his party control the Senate, but that has not prevented ever longer delays in the confirmation of appellate and district court judges. According to a 2012 study, the average time between nomination and confirmation to the federal bench in Obama's first term was 224 days: that is, 50 days longer than under George W. Bush and more than twice as long as under Clinton. Obama did secure the appointment of both of his first-term Supreme Court nominees, Sonia Sotomayor and Elena Kagan, but neither justice received much support from across the aisle. Only five Republican senators voted to confirm Kagan, and nine voted for Sotomayor (twenty-two Democrats voted for Roberts but only four for Alito).

The increasing rancor over judicial nominations stems obviously from the bitter ideological partisanship that characterizes contemporary politics, with conservative Republicans and liberal Democrats fighting fiercely about a whole range of issues. But the polarized judicial nomination process also stems from the willingness of the federal courts to wade into controversial issues such as abortion, school prayer, affirmative action, gun rights, and campaign finance reform. In such a climate, seats on the Supreme Court and the thirteen federal courts of appeals are prizes worth fighting about.

The roots of the fights over judgeships, however, extend deep into the Constitution. Although the framers gave federal judges life tenure in order to remove them from partisan politics once they were on the bench, they entrusted the process by which these judges are appointed to intensely political actors. Specifically, the framers mandated that the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint" judges to the federal courts. In other words, the power of judicial selection is a shared power that can be exercised only if both branches cooperate. The Senate cannot "nominate" anyone to serve on a federal court. Nor can the president give a nominee the constitutional "Consent" necessary to make someone a judge.

Does the president have too much power in the selection of federal judges? Although David A. Yalof says yes and John Anthony Maltese says no, both agree that much hinges on the meaning of the other crucial word in the Constitution's judicial appointments clause: "advice." Specifically, did the framers want the president to seek advice from the Senate before making a judicial nomination, or did they intend to restrict the Senate's advisory role to the postnomination phase of the judicial selection process?

PRO: David A. Yalof

The late senator Strom Thurmond, a Republican from South Carolina, used to tell law school audiences a story that reveals just how far the theory of separation of powers sometimes strays from its actual practice. On October 23, 1987, the U.S. Senate rejected President Ronald Reagan's nomination of Judge Robert H. Bork to replace Lewis F. Powell Jr. on the Supreme Court. Within days of that defeat, the president's second choice for the post, Judge Douglas H. Ginsburg, withdrew his name from consideration amid allegations that he had used drugs while a Harvard Law School professor. By all accounts, Reagan, a lame-duck president about to enter his final year in office, should have been near the nadir of his power to influence the appointment process. That is precisely the moment that Thurmond, then the ranking Republican on the Senate Judiciary Committee, chose to pay Reagan a visit at the Oval Office. As Thurmond told it, he had wanted to convince the president to nominate his close friend, U.S. Court of Appeals Judge William Wilkins of South Carolina, to the high court. Thurmond told President Reagan that it might be a good idea to put a southerner on the Court—after all, Powell was a southerner, and his retirement had left the high court without a justice from that region of the country. But Reagan apparently had settled on his own third choice for Powell's seat, and even from this relatively weak political position, he was not about to let Thurmond or any other senators share in the decision-making process. Thurmond even recalled Reagan's quick retort to his pleas for Wilkins: "You're from South Carolina and you want Willie Wilkins on the Court. But I'm from California, and the next Supreme Court Justice will be Anthony Kennedy of California." So much for senatorial advice and consent. With the help of Thurmond and other Senate Republicans, Kennedy was quickly confirmed and sworn in as the next associate justice just a few weeks later.[1]

In the modern appointment process, presidential arrogance is business as usual when selecting federal judges and Supreme Court justices. Indeed, up through President George W. Bush, chief executives tended to choose their high court nominees without giving most senators the privilege of even a cursory consultation beforehand.[2] Even leading senators from the president's own party may discover the name of the president's nominee only a short time before everyone else. With its constitutional advice function a virtual dead letter, can the Senate fall back on its power to withhold consent for Supreme Court nominees? In theory, that power remains, but in practice it is only rarely exercised. For all the attention given to the nomination debacles of Bork, Douglas Ginsburg, Clarence Thomas, and most recently, Harriet Miers, of

those four only Bork was actually rejected by a vote of the Senate (Ginsburg and Miers withdrew, and Thomas was confirmed). In fact, between 1932 and 2010 only three of forty-six Supreme Court nominees have been rejected in an actual Senate vote on the merits of the nomination.[3]

Nor can senators find much consolation in the appointment process for the federal district and appeals courts, the venue in which senatorial advice has traditionally received its due. The era in which senators confidently instructed the White House whom to nominate for federal judgeships in their home states is long gone. Recent presidents have dominated the lower-court selection process, reducing senators from their own party to the status of well-respected advisers, on a par with important interest groups and other significant presidential constituents. Despite this shift in practice, Senate resistance to all but the most objectionable nominees remains muted. Until the practice was eliminated in November of 2013, the frequent resort by senators in the minority to filibuster lower-court nominees has garnered considerable attention. In practice this amounted to a sixty-vote minimum required for the approval of lower-court judges. Yet based on raw numbers, both presidents George W. Bush and Barack Obama have largely gotten their way despite the procedural obstacles placed in their respective paths. Democrats outright blocked fewer than 20 of Bush's 373 lower-court judicial nominees with a filibuster or negative vote. And with the parties' roles flipped starting in 2009, Senate Republicans stopped a mere 15 of Obama's 186 first-term lower-court nominees.[4] So much for fears that the president can no longer dominate the appointment process.

How did the presidency come to enjoy such a stranglehold over judicial selections? Some of the chief executive's increased leverage in this area mirrors the growth of presidential power as a whole during the twentieth century. Yet there is something especially disconcerting about the growth in the president's power to appoint judges. In foreign affairs, the nation, arguably, must speak with a unified voice. But lively dialogue between the nominating institution (the president) and the advising and consenting institution (the Senate) hurts no one, save those nominees whose credentials are so thin that they stand little chance of surviving more intense forms of review.

THE FOUNDERS AND THE JUDICIAL APPOINTMENT PROCESS

Judicial appointments were a hotly debated subject at the Constitutional Convention in 1787. The initial efforts to vest the appointment authority in the executive were soundly defeated. A proposal by James Madison, delegate from Virginia, to give the president the power to appoint judges "unless disagreed to"

by two-thirds of the Senate was rejected, because it would tip the balance too far toward the executive. Proposals to have the Senate make all appointments enjoyed the support of a majority of delegates for nearly two months, but that plan was eventually discarded. In the end, the convention settled on a shared arrangement between the two branches. The final scheme of presidential appointment with the Senate's advice and consent was eventually approved as a way to create a mutually dependent process.

One noted scholar contends that by separating the act of nomination from the act of appointment (the Constitution says that the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . ."), the framers meant to keep the Senate's advice and consent out of the nomination phase.[5] Such an interpretation would effectively merge the advice and consent functions into one: if the Senate must wait until after the president has submitted a nomination to advise, what difference is there between advising the president that a nominee will be rejected and actually rejecting the nominee with a formal vote? The framers would never have identified a separate advice function if they did not intend that function to have real influence in the nominating process.

The Constitution gives no specific criteria to guide the selection of justices, but this absence of criteria does not mean that the president was expected to have unlimited authority over the selection process. Consider the views of New York delegate Alexander Hamilton, perhaps the foremost advocate among the founders of a strong executive. In *Federalist* No. 77, Hamilton argued that Senate influence over presidential appointments was intended to provide a formidable check on the chief executive: "If by influencing the President be meant restraining him, this is precisely what must have been intended." At the same time, in *Federalist* No. 76 Hamilton assumed that the Senate would only rarely reject a president's nominees—after all, why would the Senate routinely reject candidates who emerge from a process in which the Senate offers significant assistance in the first place?[6]

In the early years of the republic, the Senate quickly learned to practice what the founders preached. Although only one of President George Washington's nominees to the high court was rejected, that rejection was based on the Senate's *political* objections to the nominee, a clear rebuke to the notion that the Senate was intended to be merely a screening mechanism to ensure the minimal competence of judges. When, in 1795, Washington nominated John Rutledge of South Carolina to be chief justice, Rutledge's credentials were impressive, including previous service on the Supreme Court as an associate justice. But Rutledge had openly opposed ratification of the Jay Treaty with England, and he had urged Washington not to sign it. That stand put Rutledge

squarely at odds with the Federalist majority in the Senate, which rejected his nomination. President Washington may have been disappointed by this turn of events, but he never openly challenged the Senate's power to reject his nominees on political grounds. Because he had acted as president of the Constitutional Convention, Washington knew firsthand that the appointment authority had been granted to two branches rather than one.

THE ADVICE FUNCTION

For much of U.S. history, presidents have sought senators' advice on judicial appointments, not just because the words of the Constitution encouraged them to do so. Involving senators at an early stage in the process was smart politics—it invested senators in the appointment process, thereby creating critical allies for the confirmation stage. Many senators were also knowledgeable Washington insiders, and most presidents valued their advice. Thomas Jefferson even relied on House and Senate members to scout out potential Supreme Court nominees. When Associate Justice Alfred Moore of North Carolina retired in 1804, Jefferson looked to two members of the South Carolina congressional delegation, Sen. Thomas Sumter and Rep. Wade Hampton, to help him find a replacement. Presidential-Senate dialogue over judicial nominees continued into the early twentieth century. For example, in 1902 Republican senator Henry Cabot Lodge of Massachusetts championed Oliver Wendell Holmes for a seat on the Supreme Court.

By contrast, presidents today rarely seek senatorial advice on Supreme Court vacancies. Modern presidents tend to mobilize their administrations to identify and research prospective nominees behind the scenes, leaving senators to learn about the shortlist of nominees only at the tail end of the process, after the president and his advisers have already performed the most critical vetting functions. On the rare occasion when the president publicly seeks legislators' advice, the process often entails meaningless consultations between presidential aides and senators about a decision that has already been made. For example, Chief of Staff Howard Baker insisted, even after Robert Bork became President Reagan's clear choice to fill a Court vacancy, that White House officials go through the charade of meeting with key senators and asking their advice about an artificial list of "potential nominees." Some observers believe that President Bill Clinton leaned heavily on key senators for advice before making his two Supreme Court nominations, but in fact they enjoyed no special insider status, learning of the names of possible nominees at the same time as the public at large. Even Barack Obama, the first senator elected directly to the White House in nearly half a century, ultimately settled on a short list of

high court nominees dominated by friends, cabinet members, and others he knew personally.

Even more dramatic changes have occurred in the lower-court appointment process, and once again senators have seen their opportunities to exert influence over such appointments sharply reduced. In the nineteenth century, such judgeships were mostly a matter of senatorial patronage. Well into the twentieth century, presidents continued to defer to senators—particularly those of the president's own party—on nominees to judgeships in their states. Indeed, that practice continued up until the 1970s. A president who violated this norm by nominating his own candidate over the objections of the home-state senator risked seeing that nomination permanently buried by the Senate Judiciary Committee. That was precisely the fate suffered by William B. Poff, President Gerald R. Ford's nominee for the federal district court in Virginia. Sen. William Scott, who preferred another candidate and made his views known to the president. When Ford boldly went ahead with Poff's nomination, the Senate Judiciary Committee, though run by the Democrats at the time, tabled the nomination in deference to their Senate colleague from the other party.[7]

Of course no amount of deference to home-state senators would keep the White House from exercising free rein over all the seats on the U.S. Court of Appeals for the D.C. Circuit, now widely recognized to be the second most powerful court in America. Meanwhile, in the other lower courts, presidents during the last quarter century have been increasingly willing to disregard the preferences of home-state senators. President Reagan, for example, insisted that Republican senators identify three individuals for every judicial vacancy, and he required that those names meet his administration's stringent ideological criteria.[8] His successor in office, George H. W. Bush, continued this practice. At the end of the twentieth century, the rising use of "blue slips" by senators—a blue slip was in effect a veto over judicial appointments in a senator's state—allowed them to reassert some of their authority, but it did not result in a greater advisory role for the Senate.

In summary, today presidents control the choice of Supreme Court and D.C. Circuit Court nominees. For all other courts, senators play an active, if somewhat curtailed, role in the nominating process. The judicial appointment process now in place thus seems a far cry from the shared dialogue imagined by the framers.

THE CONSENT FUNCTION

While the senators' advisory function has been reduced substantially, the Senate can theoretically exert considerable leverage by withholding consent for the

president's judicial nominees. In practice, however, the Senate only rarely exercises that right. In his award-winning book, *The Selling of Supreme Court Nominees,* my debate partner John Anthony Maltese speaks of the "increasingly contentious nature of recent confirmations."[9] Political scientist Mark Silverstein notes that in 1968 the politics of judicial confirmations underwent an abrupt transformation as "the presumption respecting presidential control was honored more in the breach than in the observance."[10] Yet what has the Senate actually gained in this supposedly new era of relative parity between the branches? As noted earlier, since 1932 only three Supreme Court nominees have been rejected outright by the Senate, while thirty-nine have been confirmed (four others withdrew before the Senate voted). Meanwhile, sixteen of the last nineteen nominees have been confirmed, often by comfortable margins. Compared with the nineteenth century, when one in four Supreme Court nominees was rejected, institutional relations in the modern era seem downright cooperative.

Changes in the procedures for confirmation have contributed to Senate deference to the president. Nominees appeared at public confirmation hearings for the first time in 1925, but such appearances did not become routine until 1955.[11] Yet instead of clarifying matters for senators considering a possible challenge, public confirmation hearings have made evasion and obfuscation by nominees the norm. As Maltese notes, "Most nominees have refused to discuss cases with members of the Judiciary Committee."[12] Judge Antonin Scalia's refusal in 1986 even to comment on such a well-settled precedent as *Marbury v. Madison* made a near mockery of the proceedings. The exception was Robert Bork in 1987, and by all accounts, his willingness to wrestle candidly with all the hot-button issues of the day contributed mightily to his appointment's undoing. Three years after the Bork fiasco, nominee David H. Souter deftly ducked pointed questions about his position on *Roe v. Wade;* in doing so, he denied potential conservative and liberal critics of his nomination any real ammunition with which to defeat him.

Even in an era of greater openness and transparency, nominees continue to obfuscate in their confirmation hearings with few or no repercussions. As a nominee for associate justice in January 2006, Samuel A. Alito Jr. was confronted with a "personal qualifications statement" he had submitted decades earlier when applying to be an assistant attorney general under President Ronald Reagan. Alito had forthrightly declared on the form that the Constitution "does not protect the right to abortion"; responding to outrage expressed by Sen. Charles E. Schumer and others, the nominee volunteered only that he would "respect *stare decisis*" and the "judicial process." Alito's willingness to fall back on such vague platitudes obviously did not derail his

confirmation prospects. Fears that Barack Obama's initial Supreme Court nominee, Judge Sonia Sotomayor, would face intense resistance proved misguided as well. Sotomayor conceded to her Senate interrogators that remarks she made several years earlier that a "wise Latina" would more often than not reach a "better conclusion" than a white male amounted to a "bad attempt" at a rhetorical flourish.[13] In the end, few votes shifted either way, and she coasted to a 63–37 confirmation victory.

Another obstacle in the path of concerted Senate resistance to a president's judicial nominees has been the marked increase in partisan polarization. In the past, senators from the president's party would sometimes refuse to go along with a proposed Supreme Court nomination. More often than not, when Senate opposition takes on a bipartisan cast in such proceedings, controversial nominees can find their appointments in serious jeopardy. For example, six Senate Republicans joined fifty-two Senate Democrats to defeat Robert Bork's nomination for the Supreme Court in 1987. By contrast, just four years later, the only two Republican senators remaining from that sextet to oppose the controversial nomination of Clarence Thomas were Sen. Robert Packwood of Oregon and Sen. James M. Jeffords of Vermont, the latter of whom bolted the Republican Party once and for all in 2001. (Thomas was thus able to squeak out a 52–48 confirmation victory.) Senators from the president's party have learned that in this current era of hyper-partisanship, the political cost of voting against the president's nominee tends to be prohibitive. As a result, Supreme Court nominees tend to coast to victory if their appointing president enjoys majority support in the Senate. Consider that not one Republican senator voted against either of George W. Bush's two Supreme Court nominees, while a combined sixty-four votes were cast against them by Senate Democrats. President Obama did nearly as well: Sen. Ben Nelson was responsible for the lone Democratic vote cast against either of Obama's two Supreme Court nominees. So long as the political costs of defection appear so high, it will be a rare occasion indeed when senators choose to cross their own party leader in the White House.

On one recent occasion, senators from the president's own party *did* make themselves heard to a degree in the appointment process. In October of 2005 some conservative Republican senators, including Sam Brownback, helped to convince President Bush of the need to withdraw his second nominee for the high court, Harriet Miers. Miers, they felt, lacked a reliably conservative track record and was creating a serious split within the president's conservative base of support. Yet those senators pressing for her withdrawal were hardly acting from a position of strength. Minority Leader Harry Reid had already offered his open support for Miers, and several Republican senators,

including John Cornyn, still supported the controversial nominee at the time of her withdrawal. Thus Brownback and Miers's other detractors were most fearful that an up-or-down vote on Miers would go in her favor—certainly most headcounts of the Senate at that time indicated that a pro-Miers alliance between Democrats and moderate Republicans offered her more than enough votes to secure her confirmation. Most telling was the fact that key senators from President Bush's own party had been excluded from the decision-making process—how else can one explain their vocal frustration with Miers's candidacy? Thus while the president may occasionally confront resistance in the confirmation process, those occasional flare-ups should not be confused with what the framers hoped would be a truly deliberative appointment process.

What about the lower courts, where senators once enjoyed the upper hand? During his first term in office, President Obama's lower-court nominees could count on a significant degree of support from the Democratic-controlled Senate. The upper chamber that convened during the 111th Congress included nearly sixty members allied with Obama's party; fifty-three senators then caucused with the Democrats during the 112th Congress that followed. Because Democratic senators rarely vote against Obama's nominees, the Senate filibuster quickly became the primary tool by which Senate Republicans could block judicial nominees, up until Senate leaders ended the practice in 2013. The need to resort to such extreme measures in order to block even the most ideologically extreme nominees illustrates just how desperate the legislature has become in this process. As was already noted, during his two terms as president, George W. Bush successfully made 324 appointments to the lower courts. His record of successful appointments is comparable to those of other recent presidents: the elder president Bush appointed 187 lower-court judges during his one term as president, and President Clinton made 366 judicial appointments in eight years. During Obama's first term, even with the president and the Senate seemingly at loggerheads over the confirmation of federal judges, the wheels just kept turning, and the vast majority of nominees (171 out of 186) were eventually confirmed, putting Obama on track to make the same number of successful appointments as his two-term predecessors.

In truth, some of the harshest critics of Obama's lower-court appointments have come from the left. One liberal interest group, The Alliance for Justice, charged that Obama's picks have rarely strayed from the so-called "ideological safety zone," reducing Republican opposition at the price of far more liberal nominees not reaching the bench. This complaint—if accurate—serves as a critique of Obama's presidential priorities more than it suggests any overall reduction in executive power. If President Obama prioritized the passage of

health care and other legislative initiatives ahead of staffing the courts with liberal ideologues, it means he strategically chose to channel elsewhere the power he normally enjoys over judicial appointments. That he was even in a position to make such a choice is testament to the modern reality that presidents still hold most of the cards in this clash between the political branches.

Though President Obama's second term has proven to be just as contentious as his first, his judicial nominees continue to receive mostly favorable treatment in a process that is all but dominated by the executive branch. That is because in American politics today, presidents nominate judges for the federal judiciary, and with very few exceptions, the Senate obediently confirms those choices.

CON: John Anthony Maltese

What exactly does Article II, Section 2, of the Constitution mean when it says that the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme court"? (By law, the same procedure is used for appointing lower federal court judges.) The Constitutional Convention of 1787 considered and ultimately rejected several different methods of judicial appointment: by Congress as a whole, by the Senate alone, and by the president alone. New York delegate Alexander Hamilton was among the most articulate defenders of the final constitutional language, and his explanation of that language in *Federalist* No. 76 is worth considering.[1]

Hamilton assumed that the Senate would rarely reject nominees put forth by the president. It is "not very probable," he wrote, that the Senate would often overrule the president's nomination. Only when there were "special and strong reasons for the refusal" would the Senate risk placing a "stigma" on a nominee through rejection and thereby call into question "the judgment of the chief magistrate."[2]

What might these "special and strong reasons" be? Could they include a nominee's failure to comply with a "litmus test" of how he or she should vote on particular issues? Anyone seeking to answer these questions must look at the precise wording of the Constitution and consider the intent of those who framed it.

The Constitution says that only the president has the power to *nominate*. As Hamilton wrote in *Federalist* No. 76, the president exercises "his judgment alone" in the act of nomination.[3] Even George Mason of Virginia, who opposed

executive appointment of judges, conceded as much in a letter to fellow Virginian James Monroe: "There is some thing remarkable in the Ar[r]angement of the Words: 'He shall nominate.' This gives the President *alone* the Right of *Nomination*."[4]

Hamilton argued in *Federalist* No. 76 that the president's power to nominate meant that the "person ultimately appointed must be the object of his preference."[5] Why? Because "one man of discernment is 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."[6] This is so, Hamilton said, because "a single well directed man . . . cannot be distracted and warped by that diversity of views, feelings, and interests, which frequently distract and warp the resolutions of a collective body."[7]

The Constitutional Convention ultimately rejected the legislative appointment of judges largely because the delegates feared that legislative appointments would be subject to intrigue and corrupted by factions. The Virginia Plan had originally proposed that Congress as a whole choose federal judges. When the convention debated that proposal on June 5, 1787, James Wilson of Pennsylvania objected. Experience among the states showed "the impropriety of such appointments in numerous bodies," he said. "Intrigue, partiality, and concealment were the necessary consequences. A principal reason for unity in the Executive was the officers might be appointed by a single, responsible person."[8]

On July 18, the convention considered appointment by the Senate alone. Nathaniel Gorham of Massachusetts argued that the Senate was still "too numerous, and too little personally responsible, to ensure a good choice."[9] He suggested a compromise: presidential appointment subject to the advice and consent of the Senate. James Madison of Virginia, who originally had been wary of executive appointment, conceded on July 21 that the executive would be more likely than any other branch "to select fit characters." He added that requiring Senate consent would check "any flagrant partiality or error" on the part of the president.[10] Madison's interpretation sheds light on what "advice and consent" means. It suggests that the Senate should withhold consent only in exceptional circumstances ("flagrant partiality or error" on the part of the president).

What, then, does the word "advice" in the appointments clause mean? Some scholars have suggested that it gives the Senate broad power to advise the president on whom to nominate. But this view runs counter to Hamilton's position in *Federalist* No. 76 by suggesting that the power to nominate is *not* one held solely by the president but rather is a power shared with the Senate.[11] Such a view conforms neither to a strict reading of the advice and consent clause nor to the intent of the framers. As legal scholar John O. McGinnis has persuasively argued:

> The very grammar of the clause is telling: the act of nomination is separated from the act of appointment by a comma and a conjunction. Only the latter act is qualified by the phrase "advice and consent." Furthermore, it is not at all anomalous to use the word "advice" with respect to the action of the Senate in confirming an appointment. The Senate's consent is advisory because confirmation does not bind the President to commission and empower the confirmed nominee. Instead, after receiving the Senate's advice and consent, the President may deliberate again before appointing the nominee.[12]

In short, the Senate's proper role is limited to offering advice on the nominee presented by the president.

This brings us back to the question: On what grounds should the Senate withhold its consent? When is a nominee "an unfit character" unworthy of confirmation? Hamilton, in *Federalist* No. 76, regards the Senate's power to withhold consent as primarily "a check upon the spirit of favoritism in the President" designed to prevent individuals from being appointed because of "family connection" or "personal attachment."[13] This statement corresponds with Madison's notion that the check be used to prevent "flagrant partiality or error." Some scholars have argued that the Constitutional Convention viewed Senate confirmation as a way of preventing the president from making too many appointments from large states.[14]

The failure of a nominee to pass a "litmus test" imposed by senators who want him or her to rule in cases in certain ways does not rise to the level of "special and strong reasons" for rejection. For one thing, this notion runs counter to the ideal of judicial independence, which the framers took great pains to protect. Moreover, it opens the door to the intrigue and the threat of factions that the framers sought to avoid. As noted earlier, Hamilton argued that because the president is best fitted to analyze the qualities necessary for each judgeship to be filled, the person appointed "must be the object of his preference." For senators to reject a nomination on the basis of a litmus test is to substitute improperly their preferences for those of the president.

Imposing such tests, however, is precisely what senators of both parties have done at all levels of the federal judicial appointment process in recent years. Senate opposition led to the rejection or withdrawal of six out of twenty-three Supreme Court nominations from 1968 through 2012 (a failure rate of 26 percent).[15] If one omits the unsuccessful renominations of individuals already blocked by the Senate, the rate of failed Supreme Court nominations before 1968 was 17.1 percent (21 out of 123 nominations).[16] For many observers of the Court, the Senate's rejection of President Ronald Reagan's nomination of Robert H. Bork in 1987 was a watershed event. After an intense fight against

Bork led by a coalition of some three hundred liberal interest groups, the Democratic-controlled Senate rejected his nomination—not because of any improprieties or lack of qualifications, but because of how Bork might vote on the Court.

The Senate also now plays a more aggressive role in the lower federal court confirmation process. At that level, senators have resorted to procedural tactics to prevent the Senate Judiciary Committee from holding hearings on nominees as well as to filibusters to keep the Senate from voting on them. Obstruction and delay became common during the administrations of Bill Clinton and George W. Bush and has continued during the administration of Barack Obama. Such pressure has motivated senators of both political parties to use a variety of procedural tactics to block nominations. These include the use of the "blue slip" procedure to block hearings, "holds" used by individual senators or groups of senators to block floor consideration of nominees, and the filibuster.

Presidents and fellow senators have traditionally turned to the senators from the state where a lower-court vacancy occurs for advice on nominees. Once the president nominates someone, the home-state senators receive a form on blue paper (hence the term "blue slip"). If they have no objection to the nominee, they return the blue slip. Failure to return the blue slip or returning it with a negative response effectively vetoes committee hearings. Currently, senators of both political parties can exercise their blue slip power, though during some periods of time that power was limited to home-state senators from the party controlled by the White House.[17] In contrast, "holds" are requests by individual senators or groups of senators to their party leader asking for a delay in floor action. It is up to the majority leader to decide whether to honor a hold, and for how long.[18] In recent years, both parties have even resorted to filibusters of judicial nominees. However, a strong argument can be made that filibusters are not an appropriate tool for senators to use to block a judicial nominee.

The filibuster is not a power granted by the Constitution. As political scientists Sarah A. Binder and Steven S. Smith have noted, "Delegates to the convention did not write into the Constitution any procedural protections for Senate minorities."[19] The Senate's original rules are also instructive. These rules did not allow for a filibuster. Instead, they allowed for a simple majority to close debate. A senator would make a "motion for the previous question," and an up-or-down majority vote would follow. Not until an 1806 rules change eliminated "previous question motions" was a filibuster even possible. Nonetheless, Binder and Smith point out that because previous question motions "had not been used as a means of limiting debate, its deletion could not have signaled a commitment to extended debate."[20] Lawyers Martin

B. Gold and Dimple Gupta not only concur but also argue that the 1806 rules change that opened up the possibility of filibusters was "a sheer oversight."[21] Indeed, no filibusters occurred in the Senate until the late 1830s. In 1917 the Senate enacted a cloture rule for ending debate by a two-thirds vote, and in 1975 the Senate changed the rule to a three-fifths vote.

The use of filibusters in the Senate has skyrocketed since the 1960s.[22] Using them to block judicial nominees is a relatively recent phenomenon. A coalition of progressive Republicans and Democrats considered filibustering against President Herbert Hoover's nomination of Charles Evans Hughes to the position of chief justice in 1930, but they decided not to take that path because they did not have the votes to sustain the filibuster.[23] In 1968 Republicans mounted a successful filibuster against President Lyndon B. Johnson's nomination of Abe Fortas to be chief justice (the nomination was withdrawn).[24] But only since 2002 has the practice become commonplace. Senate Democrats used the filibuster to block ten of President George W. Bush's first-term appellate court nominees. In response, Republicans threatened to retaliate with the so-called nuclear option, a tactic that would prevent filibusters of judicial nominees. The Senate averted the nuclear option by agreeing to a compromise that allowed judicial filibusters only in "extraordinary circumstances" and put off until the future any formal changes to the filibuster rule. But with filibusters becoming more routine by the outset of Obama's second term, Senate Majority Leader Harry Reid revived the nuclear option.[25] He and his fellow Senate Democrats enacted a rules change in November 2013 to allow a simple majority of senators present and voting to end debate and proceed to a vote on most executive and judicial nominations (excluding those to the U.S. Supreme Court).[26]

The combined effect of these various obstructionist tactics has been profound. Both President Bill Clinton and President George W. Bush declared "vacancy crises" as a result of the obstruction. A look back reveals how much more aggressive the Senate had become. A Democratic Senate blocked none of Republican Richard Nixon's lower-court nominations and confirmed 224 during his five-and-a-half years in office (1969–1974). In Ronald Reagan's eight years as president (1981–1989), the Senate blocked 43 lower-court nominees and confirmed 368.[27] In Clinton's eight years as president (1993–2000), the Senate blocked 114 of his lower-court nominations and confirmed 366.[28] During Obama's first term, the Senate confirmed 30 of his 42 courts of appeals nominees and 143 of his 173 district court nominees.[29]

The process also takes dramatically longer than it used to. According to a May 2013 report by the Congressional Research Service, the *median* length of time from nomination to confirmation for Obama's first-term courts of appeals nominees was 225.5 days (meaning that half of the nominees took

longer than 225.5 days and half took less) and the median length of time for his district court nominees was 215 days. In comparison, the median length of time from nomination to confirmation under Ronald Reagan's first term was 28 days for both courts of appeals and district court nominees.[30]

Polarized politics has made obstruction and delay by the Senate a routine part of confirmation politics. The cost is a confirmation mess. Helped (and spurred) by interest groups, opposition party senators now look for ways to disqualify nominees who do not meet their approval. The result, as law professor Stephen Carter puts it, is often a "bloodbath."[31] Public confirmation hearings and public relations campaigns are designed less to reveal nominees' knowledge and understanding of the law than to highlight their positions on policy issues and to expose embarrassing details of their past. Indeed, the confirmation gauntlet has become a political free-for-all. As the Twentieth Century Fund Task Force on Judicial Selection reported in 1988, the modern confirmation process has become "dangerously close to looking like the electoral process," with the use of "media campaigns, polling techniques, and political rhetoric that distract attention from, and sometimes completely distort, the legal qualifications of the nominee." The task force warned that "choosing candidates for anything other than their legal qualifications damages the public's perception of the institutional prestige of the judiciary and calls into question the high ideal of judicial independence."[32] The prospect of enduring the gauntlet may also discourage potential nominees from engaging in public service.

In light of this recent history, it is difficult to conclude that the president has too much power in the selection of judges. If anything, the pendulum has swung in the direction of the *Senate* exercising too much power. A "vacancy crisis," with senators misusing their power by obstructing the confirmation process for partisan and ideological reasons, is now the norm. That sounds a lot like what some of the framers sought to avoid: a process corrupted by factions and subject to intrigue.

NOTES

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1. Senator Thurmond apparently told this story to various law school audiences. The author was present on one such occasion when Thurmond spoke to students at the University of Virginia Law School during the spring of 1988.
2. By all accounts, President Barack Obama—the first chief executive with Senate experience in thirty-five years—bucked this trend by phoning every member of the Senate Judiciary Committee for committee members' personal advice prior to choosing Sonia Sotomayor as his first Supreme Court nominee in May 2009.

According to Sen. Charles Grassley, a longtime member of the committee, it was "the first time I've ever been called by a president on a Supreme Court nomination, be it a Republican or a Democrat." If anything, Grassley's sentiment only serves to confirm just how alienated senators of both parties have been from actual judicial selections in recent decades. Moreover, there is little evidence that President Obama either (1) deferred to the senators' suggestions in choosing Sotomayor; or (2) sought similar advice from senators the following year when he chose Elena Kagan to fill the seat vacated by Justice John Paul Stevens.

3. That threesome does not include Abe Fortas, whose ill-fated bid for chief justice in 1968 was technically filibustered by the Senate, thereby preventing a formal vote on the merits of his nomination.
4. These figures include unsuccessful nominees who were stalled in committee, filibustered on the Senate floor, or outright defeated with a vote on the merits.
5. John O. McGinnis, "The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein," *Texas Law Review* 71 (February 1993): 638–39.
6. Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (New York: New American Library, 1961).
7. See Sheldon Goldman, *Picking Federal Judges: Lower Court Selection from Roosevelt through Reagan* (New Haven, CT: Yale University Press, 1997), 210.
8. Michael Gerhardt, *The Federal Appointments Process: A Constitutional and Historical Analysis* (Durham, NC: Duke University Press, 2000), 145.
9. John Anthony Maltese, *The Selling of Supreme Court Nominees* (Baltimore: Johns Hopkins University Press, 1995), 7.
10. Mark Silverstein, *Judicious Choices: The New Politics of Supreme Court Confirmations* (New York: Norton, 1994), 4.
11. Maltese, *Selling of Supreme Court Nominees*, 93–109.
12. Ibid., 110.
13. "Sotomayor Explains Wise Latina Comment," CBS News, July 22, 2009.

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1. Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (New York: New American Library, 1961), 454–59.
2. Ibid., 457.
3. Ibid., 456.
4. George Mason to James Monroe, January 30, 1792, quoted in Michael J. Gerhardt, *The Federal Appointments Process: A Constitutional and Historical Analysis* (Durham, NC: Duke University Press, 2000), 346, 92n. James Wilson of Pennsylvania likewise argued that presidential nomination should be "unfettered and unsheltered by counselors" (31).
5. Hamilton, Madison, and Jay, *Federalist Papers,* 457.
6. Ibid., 455.

7. This sentence appeared in the original publication of *Federalist* No. 76 in the *New-York Packet* but was omitted in the so-called McLean edition (the first collected edition), which serves as the basis for the New American Library edition cited above. The McLean edition was published in 1788 and was corrected and edited by Hamilton and Jay but not by Madison. Most online sources of *Federalist* No. 76, however, include this sentence, including those based on the McLean edition.
8. Gerhardt, *Federal Appointments Process,* 21. Other positions were taken by different members of the convention. Some, such as John Rutledge of South Carolina, remained fearful of too much executive power.
9. Ibid., 22.
10. Ibid., 24. The convention originally rejected the compromise (which required a two-thirds vote of the Senate to confirm) and voted 6–3 in July to vest the appointment power in the Senate alone. In September, however, the Convention unanimously agreed to the "advice and consent" language for federal judges that ended up in the Constitution (24–25).
11. For an articulation of this view, see, for example, David A. Strauss and Cass R. Sunstein, "The Senate, the Constitution, and the Confirmation Process," *Yale Law Journal* 101 (1992): 1491ff.
12. John O. McGinnis, "The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein," *Texas Law Review* 71 (February 1993): 638–39 (footnotes omitted).
13. Hamilton, Madison, and Jay, *Federalist Papers,* 457.
14. James E. Gauch, "The Intended Role of the Senate in Supreme Court Appointments," *University of Chicago Law Review* 56 (1989): 347–48.
15. These numbers do not include Lyndon B. Johnson's nomination or withdrawal of Homer Thornberry in 1968 or George W. Bush's withdrawal of the nomination of John G. Roberts Jr. to fill Sandra Day O'Connor's associate justice seat in 2005. Thornberry's name was withdrawn only because the anticipated vacancy in Abe Fortas's associate justice seat failed to materialize. Roberts was withdrawn so that he could be nominated to fill the vacancy left by the death of Chief Justice William H. Rehnquist. The numbers do include Ronald Reagan's nomination and withdrawal of Douglas H. Ginsburg in 1987, even though his nomination was never formally submitted to the Senate. Harriet Miers's nomination was submitted to the Senate in 2005 but was withdrawn before her confirmation hearings.
16. President John Tyler renominated three "failed" nominees in 1844: John C. Spencer (after Senate rejection), Edward King (after the Senate blocked his confirmation by postponement), and Reuben H. Walworth (twice renominated—first after a Senate vote to postpone and then again after no action was taken by the Senate). The 123 total nominations before 1968 do not include consecutive resubmissions of the same nominee by the same president for the same vacancy; nor do they include the 7 nominees who declined. They do include Edwin M.

Stanton (who was confirmed in 1869 but died before taking office) and Stanley Matthews (who was consecutively renominated by two different presidents in 1881). Confusion over how to count renominations has led to some disagreement about the precise number of Supreme Court nominees. The official U.S. Senate website lists eight consecutive resubmissions of nominations of the same person by the same president for the same seat (usually for merely technical reasons).

17. Barry J. McMillion, "President Obama's First-Term U.S. Circuit and District Court Nominations: An Analysis and Comparison with Presidents since Reagan," *Congressional Research Service Report*, May 2, 2013, http://www.fas.org/sgp/crs/misc/R43058.pdf
18. Walter J. Oleszek, "'Holds' in the Senate," *Congressional Research Service Report*, May 19, 2008, http://'www.fas.org/sgp/crs/misc/98–712.pdf
19. Sarah A. Binder and Steven S. Smith, *Politics or Principle? Filibustering in the United States Senate* (Washington, DC: Brookings, 1997), 5.
20. Ibid., 33, 37.
21. Martin B. Gold and Dimple Gupta, "The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster," *Harvard Journal of Law and Public Policy,* 28 (Fall 2004): 216. Gold served as floor adviser to Senate majority leader Bill Frist in 2003–2004; Gold served in the George W. Bush Justice Department.
22. See Figure 2-5 in Binder and Smith, *Politics or Principle?* 48.
23. John Anthony Maltese, *The Selling of Supreme Court Nominees* (Baltimore, MD: Johns Hopkins University Press, 1995), 55.
24. Ibid., 71.
25. Jeremy W. Peters, "Republican Drive to Block Cabinet Picks May Spur Change to Senate Rules," *New York Times,* May 16, 2013, http://www.nytimes.com/2013/05/17/us/politics/obama-appointees-fight-may-change-senate-rules.html?_r=0
26. Zachary A. Goldfarb, "Senate's filibuster rule change should help Obama achieve key second-term priorities," *Washington Post,* November 21, 2013, http://www.washingtonpost.com/politics/senates-filibuster-rule-change-will-help-obama-achieve-key-second-term-priorities/2013/11/21/ccf43c4c-52dd-11e3-9fe0-fd2ca728e67c_story.html.
27. Statistics for Franklin D. Roosevelt through George W. Bush can be found in a chart accompanying Neil A. Lewis, "Bitter Senators Divided Anew on Judgeships," *New York Times,* November 15, 2003, sec. A. The Senate did reject two of Nixon's Supreme Court nominees.
28. Sheldon Goldman, Elliot Slotnick, Gerard Gryski, and Gary Zuk, "Clinton's Judges: Summing Up the Legacy," *Judicature* 84 (March–April 2001): Tables 3 and 6.
29. McMillion, "President Obama's First-Term U.S. Circuit and District Court Nominations," 4–5.

30. Ibid., 13–15. The *average* length of time from nomination to confirmation under Obama's first term was 240.2 days for courts of appeals nominees and 221.8 days for district court nominees, compared with 45.5 for courts of appeals nominees and 34.7 days for district court nominees during Reagan's first term.
31. Stephen Carter, *The Confirmation Mess: Cleaning Up the Federal Appointments Process* (New York: Basic Books, 1994), 187.
32. *Judicial Roulette: Report of the Twentieth Century Fund Task Force on Judicial Selection* (New York: Priority Press, 1988), 4, 9.