# NOTES

# Too Much Advice and Not Enough Consent: How the Senate's Questions in a Highly Publicized Confirmation Process Undermines Presidential Appointment Authority and Judicial Independence

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## I. INTRODUCTION

Senate confirmation hearings have become quite the spectacle over the past few decades. What once was a process without much fanfare has now become a cable broadcast favorite. How did we go from secretive, black-box voting based on a candidate's qualifications and political popularity to a system where Senators attempt to glean from a nominee's confirmation hearing how that nominee would rule in any and every case that comes before them?

The Senate, through questions about whether a nominee is an "originalist," "textualist," "living constitutionalist," "legal realist," or other superlative, attempts to perform exactly this type of appraisal. Similarly, when senators inquire into a nominee's opinion on already-decided cases, they are either trying to gauge the likelihood that the nominee will overturn the precedent or preemptively pressure them into not overruling the precedent. This paper seeks to show that when the Senate engages in this behavior, it violates the separation of powers principles embodied in the Constitution's general governmental scheme as well as those same principles enacted specifically within the Appointments Clause.

Part II will discuss generally the separation of powers aim of the United States Constitution, specifically as it relates to an independent judiciary. It will then discuss the Appointments Clause, including the power of the Senate to provide advice and consent, and what these powers were understood to consist of at the time of the Constitutional Convention debates and the subsequent ratification of the United States Constitution. It will also survey the application of the Appointments Clause and senatorial practice from the eighteenth to the twentieth century. Finally, it will discuss modern-day senatorial practice regarding the confirmation process, providing examples of questions that demonstrate the Senate has stepped outside its constitutional bounds. Part III will discuss specifically

how the senatorial practice outlined in Part II departs from the Framers' understanding of the appropriate role of the Senate in providing advice and consent.

## II. SEPARATION OF POWERS AND THE MEANING AND APPLICATION OF THE APPOINTMENTS CLAUSE IN THE NOMINATION AND CONFIRMATION OF THE FEDERAL JUDICIARY

Pursuant to the Constitution, the President of the United States "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . 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[.]"[1] The power to select the Justices who comprise the United States Supreme Court is divided between the President of the United States and Senate, but the text of the Constitution does not directly address what criteria the President and Senate should consider or whether the criteria should be the same for each decisionmaker. Notwithstanding this textual silence, there is evidence that the Framers and the public would have understood Article 2, Section 2 as prescribing a specific process for the selection of Justices of the United States Supreme Court—a process that included boundaries between the President's power to nominate and the Senate's power to "[advise] and consent."[2] The general scheme of government set out in the Constitution, the pre-ratification debates, the discussion of nomination and confirmation in materials disseminated to the public during ratification, and early senatorial practice all demonstrate there are limits to appropriate exercises of "advice and consent."[3]

### *A. The Appointment of Supreme Court Justices and General Separation of Powers Principles*

Tenure as British colonies and a recent revolution left the soon-to-be United States with a deep mistrust of governmental authority.[4] When the Framers set out to design the Constitution, they were concerned with finding ways to mitigate the risks associated with centralized governmental power.[5] One such way of mitigating these risks and assuaging citizens who were wary of a centralized federal government was incorporating Baron de Montesquieu's doctrine of separation of powers.[6] Montesquieu's theory stressed the necessity of separating the judicial power from the legislative and executive.[7] "There would be an end of every thing," Montesquieu asserted, "were the same man or the same body . . . to

1. U.S. CONST. art. II, § 2, cl. 2.
2. *See id.*; *see also infra* Part II.
3. *See* U.S. CONST. art. II, § 2, cl. 2. *See generally infra* Part II.
4. Russell L. Weaver, *"Advice and Consent" in Historical Perspective*, 64 DUKE L.J. 1717, 1724 (2015).
5. *Id.* at 1722–24.
6. *Id.* at 1725.
7. *Id.*

exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."[8]

Montesquieu's theory of separation of powers was cited at the Constitutional Convention debates, in the Federalist Papers, and in other contemporaneous writings.[9] The theory is also woven throughout the structure of the United States Constitution in concepts such as bicameralism and presentment, the executive's veto power, and judicial review.[10] The Framers were especially careful to guard the independence of the judiciary when applying Montesquieu's principles by vesting all judicial power in the judicial branch through Article III.[11] The importance of the independence of the federal judiciary has gone relatively unquestioned since the founding: "[L]iberty can have nothing to fear from the judiciary alone," wrote Alexander Hamilton, "but would have every thing to fear from its union with either of the other departments."[12] In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,* Justice Brennan stated, "[O]ur Constitution unambiguously enunciates a fundamental principle—that the 'judicial Power of the United States' must be reposed in an independent judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence."[13]

### *B. Debate of the Appointments Clause at the Constitutional Convention*

Article II, Section 2, Clause 2 of the Constitution (the Appointments Clause) is a direct application of the influential theory of separation of powers by the Framers.[14] The Appointments Clause divides the power to choose Justices of the Supreme Court and other Officers of the United States between the executive and legislative branches of government.[15] The nuance of how the Framers sought to divide this power can be better understood in the context of the debates at the Constitutional Convention where the constitutional provision was crafted.

When the Framers sat out to determine how Supreme Court Justices and Officers of the United States would be selected, the initial proposal was to place the appointment power in the Senate.[16] This was supported by delegates Luther Martin (MD) and Roger Sherman (CN) who argued that because the Senate was

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8. *Id.* (quoting BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 154 (Cosimo 2011) (1748)).

9. *Id.*

10. *Id.* at 1725–26.

11. *See* U.S. CONST., art. III, § 1; Burkeley N. Riggs & Tamera D. Westerberg, *Introduction: The Citadel of Public Justice and Security*, 74 DENV. U. L. REV. 337, 339–40 (1997).

12. THE FEDERALIST NO. 78 (Alexander Hamilton). As a general matter, this is notwithstanding recent calls to "rein in the Court" and record-low public approval. *See* Editorial Board, *Who Can Rein In the Supreme Court?*, N.Y. TIMES, May 25, 2023, https://www.nytimes.com/2023/05/25/opinion/supreme-court-ethics-act.html [https://perma.cc/4GKZ-6E7C].

13. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 60 (1982). *See* Riggs & Westerberg, *supra* note 11, at 339.

14. Weaver, *supra* note 4, at 1727–28.

15. U.S. CONST. art. II, § 2, cl. 2.

16. John C. Eastman, *The Limited Nature of the Senate's Advice and Consent Role*, 36 U.C. DAVIS L. REV. 633, 640–41 (2003).

composed of representatives of all the states, it would "be best informed of the characters [of nominees] and most capable of making a fit choice."[17] George Mason (VA), argued that the President "would insensibly form local [and] personal attachments."[18]

Senatorial appointment for these positions was opposed because, as delegate Nathanial Ghorum (MA) stated, the Senate was "too numerous, and too little personally responsible, to ensure a good choice."[19] Ghorum believed that the Senate was just as likely to be swayed by "attachments" and that "[p]ublic bodies feel no personal responsibility, and give full play to intrigue and cabal."[20] The President, according to Ghorum, would "be more answerable for a good appointment, as the whole blame of a bad one would fall on him alone."[21] Ghorum, with the support of James Wilson (PA) and Governeur Morris (PA), thus suggested that Supreme Court Justices and Officers of the United States be appointed by the President with the advice and consent of the Senate.[22]

Ghorum's suggestion—Presidential nomination with Senatorial advice and consent—was drawn from the longstanding practice of his home state of Massachusetts.[23] In Massachusetts, appointments were effective only with the "advice and consent" of an executive council that assisted and checked the governor.[24] Some other decisions "were effective 'merely with the advice of council.'"[25] The general practices of the Massachusetts executive council show that "advice and consent" was a term of art in which "advice" referred to the deliberation of the legislative body before consent was given or withheld.[26] Advice and consent did not require direct consultation with the legislative body before a nominee was submitted.[27]

Most of the debate regarding appointment power at the Constitutional Convention was focused on insulating the appointment of Supreme Court Justices and other Officers of the United States from improper influences, such as partisanship, bias, nepotism, or personal attachment.[28] Other concerns included the ability of the decisionmaker to draw from a sufficiently large pool of qualified candidates and political accountability for appointments.[29] These debates seemed to result in favor for presidential appointment; notably, opponents of this position

17. *Id*. at 641 (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 41 (Max Farrand ed., 1911) [*hereinafter* HEARINGS]).
18. *Id*. (quoting HEARINGS, *supra* note 17, at 42).
19. *Id*. (quoting HEARINGS, *supra* note 17, at 41).
20. *Id*. (quoting HEARINGS, *supra* note 17, at 42).
21. *Id*. at 641–42. (quoting HEARINGS, *supra* note 17, at 43).
22. *Id*. at 641.
23. Robert G. Natelson, *"Advice" in the Constitution's Advice and Consent Clause: New Evidence from Contemporaneous Sources*, 19 FEDERALIST SOC'Y REV. 96, 100 (2018).
24. *Id*. at 98.
25. *Id*. at 100.
26. *Id*.
27. *Id*.
28. *See* Eastman, *supra* note 16, at 640–44.
29. *See id*.

did not argue "that the Senate should have the power in order to control the development of case law or regulate judicial philosophy."[30] Such an argument would have been a departure from the "separation of powers" scheme of government the Convention sought to create, as evidenced by delegate James Madison's (VA) defense of his proposal of Presidential appointment accompanied by a veto power to be exercised by 2/3 of the Senate:

> The Executive Magistrate [would] be considered as a national officer, acting for and equally sympathizing with every part of the [United] States. If the [legislative] branch alone should have this power, the Judges might be appointed by a minority of the people, [though] by a majority, of the States, which could not be justified on any principle as their proceedings were to relate to the people, rather than to the States . . .[31]

The Convention chose Ghorum's proposal. The Justices of the Supreme Court and other Officers of the United States would be nominated by the President and the Senate could "withhold confirmation" as a check on the President's appointment power.[32] Along with the Appointments Clause, the Constitutional committee approved a scheme in which the House of Representatives can propose legislation to confer the power of appointment for lower court judges in the President alone under the same article of the Constitution.[33] This makes it far more likely that the Framers envisioned the role of the Senate as limited in the appointment of the judiciary—it would have been odd for the Framers to allow the Senate to waive for expediency's sake a power they believed was structurally important when the rest of the Constitution seems to sacrifice efficiency for structural integrity.

Gouverneur Morris stated, "as the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security."[34] Essentially, the President would appoint judges, but the Senate would be able to refuse to confirm candidates if it believed the President was making appointments due to partisanship, bias, nepotism, personal attachment, or another improper influence.[35] Senatorial control over case law and jurisprudence, however, was not considered because such a scheme would have violated the Framers' intended system of separation of powers.[36] Relatedly, ideological screening by the Senate of the political ideologies of judicial nominees may not have been a concern of

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30. *Id.* at 643. *But see* James E. Gauch, *The Intended Role of the Senate in Supreme Court Appointments*, 56 U. CHI. L. REV. 337, 340 (1989) ("[A]lthough the debates in the convention focused primarily on the dangers of political corruption and patronage, the Framers were also motivated by concerns for their states' political and economic interests.").

31. Eastman, *supra* note 16 at 643–44 (quoting HEARINGS, *supra* note 17, at 81).

32. *Id.* at 643.

33. *Id.* at 634.

34. *Id.* at 643 (quoting HEARINGS, *supra* note 17, at 81).

35. *Id.*

36. *Id.* at 643–44. *See supra* Part II.A. *But see* Gauch, *supra* note 30, at 340.

the Convention because the delegates would not have considered judges to be policymakers—therefore, judges' political views may not have been not considered relevant to judicial appointments.[37]

### *C. Ratification of the Appointments Clause*

The understanding of a limited role of the Senate was reaffirmed during the ratification debates.[38] The Federalist Papers confirm that the ratifying states would have understood the "advice and consent" role of the Senate to focus primarily on screening judicial candidates for improper influence rather than a judicial ideology they did not agree with.[39] For example, in Federalist 66, Hamilton wrote, "There will, of course, be no exertion of [choice] on the part of the Senate."[40] The Senate would "merely sanction the choice of the Executive."[41] At the North Carolina Ratification Convention, James Iredell (who would later become Justice Iredell) echoed this framing, stating "[a]s to offices, the Senate has no other influence but a restraint on improper appointments[.]"[42] By "improper appointments," Iredell likely was referring generally to those listed in Federalist 76: Federalist 76 states that the advice and consent of the Senate "would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity."[43] This echoes the rationales discussed in the Constitutional Convention debates and similarly omits justifications of the requirement of Senatorial consent based on a prerogative of the Senate to influence the development of constitutional law.

Federalist 78 provides additional evidence against the appropriateness of Senatorial consideration of jurisprudential philosophy. Federalist 78 asserts that the "legislative body [being] constitutional judges of their own powers, [with] the construction they put upon them [being] conclusive upon the other departments . . . cannot be the natural presumption."[44] While this refers to judicial review and not directly to the appointment of judges, the general sentiment

37. Christopher Wolfe, *The Senate's Power to Give "Advice and Consent" in Judicial Appointments*, 82 MARQ. L. REV. 355, 357 (1999). Wolfe also argues that delegates were not concerned with the "constitutional philosophies" of judges because competing interpretations of the Constitution had not yet developed. *Id.*

38. Eastman, *supra* note 16, at 644. *But see* THE FEDERALIST NO. 38 (James Madison) ("In the eyes of one the junction of the Senate with the President in the responsible function of appointing to offices, instead of vesting this executive power in the Executive alone, is the *vicious* part of the organization.") (emphasis added); David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1495 (1992) (quoting Letter from George Mason to James Monroe (Jan. 30, 1792), *reprinted in* 3 PAPERS OF GEORGE MASON 1255 (William T. Hutchinson & William M.E. Rachal eds., 1970)).

39. *See* THE FEDERALIST NOS. 66, 76, 78 (Alexander Hamilton).

40. THE FEDERALIST NO. 66 (Alexander Hamilton) (emphasis omitted).

41. *Id.*

42. Eastman, *supra* note 16, at 646 (quoting James Iredell, Debate in the North Carolina Ratifying Convention (July 28, 1788), *reprinted in* 4 THE FOUNDERS' CONSTITUTION 102 (Philip B. Kurland & Ralph Lerner eds., 1987)).

43. THE FEDERALIST NO. 76 (Alexander Hamilton).

44. THE FEDERALIST NO. 78 (Alexander Hamilton).

against a departmentalism constitutional approach to legislative power makes it far less likely that the "advice and consent" role of the Senate was designed or understood to be a mechanism through which the Senate can control the interpretation of the Constitution.

### *D. The Development of the Senate Confirmation from Ratification to the Twentieth Century*

#### 1. Post-Ratification and the Eighteenth Century

The actual practice of the Senate following the ratification of the Constitution does not cleanly map onto the convention and ratification debates' formulation of Senate influence over the judicial selection process.[45] This is true even though discerning discrete rationales for why certain nominees were not confirmed can prove difficult.[46] For example, the refusal of the Senate to confirm President George Washington's nomination of John Rutledge for the position of Chief Justice was likely due to Rutledge's opposition to the Jay Treaty (which was supported by the Federalist-led Senate).[47] But, it may have also been motivated by questions regarding Rutledge's mental health.[48] So, while it is certain that some nominees were not confirmed due to political or ideological unpopularity in the Senate, quantification of how many justices were not confirmed for political rather than character or competence reasons requires speculation.[49] Exacerbating this issue is the fact that the Senate held the vast majority of debates regarding Supreme Court nominees in secret.[50]

In the period directly following the ratification of the Constitution, the Senate quickly acted on most presidential nominations.[51] For example, all six of President Washington's initial nominations to the Court were confirmed within two days.[52] But, while some nominees were quickly confirmed, others were rejected on ideological grounds.[53] Washington's nomination of William Paterson and John Quincy Adams's nomination of John Crittenden are both examples.[54] Note, however, that at this point there may not have been a clear distinction between political ideology and jurisprudential ideology.[55]

The mass rejection of President John Tyler's judicial nominees provide support for the notion that early Congresses were rejecting candidates primarily for *political* ideological differences (rather than jurisprudential). The Senate rejected eight

45. Wm. Grayson Lambert, *The Real Debate over the Senate's Role in the Confirmation Process*, 61 DUKE L.J. 1283, 1305 (2012).
46. *Id.* at 1302–04.
47. *Id. See also* Weaver, *supra* note 4, at 1732.
48. Lambert, *supra* note 45, at 1302–04.
49. *See id.*
50. Weaver, *supra* note 4, at 1734.
51. *Id.* at 1731–32.
52. *Id.*
53. *Id.* at 1732.
54. *Id.*
55. *See* Wolfe, *supra* note 37, at 357.

of President Tyler's judicial nominees presumably because of President Tyler's strained relationship with his own political party (the Whigs).[56] Similarly, President Millard Fillmore's nomination of George E. Badger failed because the Senate, controlled by Democrats, decided not to vote on Badger's nomination during the final months of President Fillmore's term.[57] Once President Fillmore was replaced by a Democrat, the Senate confirmed his successor's nominees.[58]

### 2. The Nineteenth and Twentieth Centuries

During the eighteenth century, the confirmation process for judicial nominees became not only more politically contentious, but also more formalized and complex.[59] By 1868, judicial nominees began to be referred to the Senate Committee on the Judiciary.[60] During the following decades, the Committee would report to the full Senate on a nomination, and the nomination would generally be confirmed or rejected by the Senate within two days.[61] Some candidates who were reported out of the committee continued to be rejected for political reasons, such as Ebenezer Rockwood Hoar, who had angered senators by ignoring their recommendations for circuit-court judges as sitting Attorney General.[62] Generally, the Senate's rejection of Supreme Court nominees remained political, but not ideological (jurisprudential).[63]

By the beginning of the twentieth century, the Senate disregarded some of the secrecy that had veiled the confirmation process.[64] Debates regarding Supreme Court nominations were now regularly held in public.[65] The 1955 nomination of John Harlan II marked the beginning of the norm of hearings before the Senate Judiciary Committee.[66] Before then, nominations moved through the Committee with less debate—the nominees themselves rarely appeared before the Committee.[67]

The nomination process also became more contentious—focusing more on nominees' judicial rulings rather than political ideology.[68] For example, in 1930, President Herbert Hoover's nomination of John J. Parker to the Supreme Court failed in part due to his previous judicial rulings on "yellow dog" labor contracts.

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56. Weaver, *supra* note 4, at 1732–33.
57. *Id.* at 1733.
58. *Id.*
59. *Id.* at 1733–34.
60. *Id.*
61. *Id.*
62. *Id.*
63. David J. Danelski, *Ideology as a Ground for the Rejection of the Bork Nomination*, 84 NW. L. REV. 900, 919 (1990).
64. Weaver, *supra* note 4, at 1734.
65. *Id.*
66. Dion Farganis & Justin Wedeking, *"No Hints, No Forecasts, No Previews": An Empirical Analysis of Supreme Court Nominee Candor from Harlan to Kagan*, 45 LAW & SOC'Y REV. 525, 527 (2011).
67. *Id.*
68. *See* Weaver, *supra* note 4, at 1734–35.

(Also relevant, however, were racist comments made by Parker as candidate for Governor of North Carolina.)[69] Other notable examples of judicial nominees who were rejected or not confirmed based on ideological grounds include Abraham Fortas (nominated by President Johnson), John Harlan II[70] (nominated by President Eisenhower), and Clement Haynsworth, Jr. (nominated by President Nixon).[71] The nomination of William H. Rehnquist by President Nixon also proved to be contentious when the Senate raised questions regarding the nominee's commitment to civil rights, but Rehnquist was eventually confirmed.[72]

### *E. O'Connor, Bork, and the Advent of the Modern-Day Senate Confirmation Hearing*

#### 1. Televised Confirmation Hearings

The 1981 confirmation hearing of Sandra Day O'Connor marked the beginning of "gavel-to-gavel" television coverage of judicial confirmation hearings.[73] C-SPAN was the first to televise the hearings, and by 1986 coverage was expanded to public television.[74] Televising confirmation hearings seems to have changed the nature of these hearings substantially.[75] In the decade preceding Justice O'Connor's confirmation hearing, an average of 665 statements were made at hearings. 868 statements were made at O'Connor's hearing, and following the O'Connor hearing, the average reached at least 1,779 statements.[76] One study found that early nominees such as John M. Harlan, William Brennan, Charles Whittaker, and Byron White were asked fewer than 100 questions, while more recent nominees such as John Roberts and Samuel Alito faced more than 700 questions each.[77] Senators began using judicial confirmation hearings, which could now be spliced into digestible soundbites and disseminated to the public, as means to take positions, boast, and advertise.[78] The increased attention this placed on the hearings has led to an increase in scrutiny of Supreme Court nominees.[79]

#### 2. "Borked:" the Controversial Failed Confirmation of Robert Bork

Just after (and perhaps because)[80] Supreme Court Justices and Senators became temporary reality TV stars for their confirmation hearings, President

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69. *Id.*
70. Harlan was renominated and confirmed.
71. *See* Weaver, *supra* note 4, at 1736–37.
72. *Id.* at 1737.
73. Paul M. Collins, Jr. & Lori A. Ringhand, *The Institutionalization of Supreme Court Confirmation Hearings*, 41 LAW & SOC. INQUIRY 126, 137 (2016).
74. *Id.*
75. *See generally* Farganis & Wedeking, *supra* note 64; Collins, Jr. & Ringhand, *supra* note 71.
76. Collins, Jr. & Ringhand, *supra* note 73, at 137.
77. Farganis & Wedeking, *supra* note 66, at 528.
78. *See* Collins, Jr. & Ringhand, *supra* note 73, at 137–38.
79. *Id.*
80. *See* STEPHEN CARTER, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS 17 (1994) ("Television gave us the Bork hearings.").

Ronald Reagan's nomination of Judge Robert Bork for Associate Justice of the Supreme Court led to an infamous confirmation hearing.[81] It was immediately apparent that Bork's confirmation hearing was going to focus not on unfit character, State prejudice, family connection, or personal attachment as was described in the Federalist 76.[82] In fact, the Senate was generally unconcerned with Bork's mental ability, qualifications, personal dealings, or familial relations.[83] Instead, the confirmation hearing of Judge Bork focused primarily on his judicial philosophy and theory of constitutional interpretation.[84] Bork's conservative theory of constitutional interpretation was framed as a desire for either conservative or regressive policy outcomes.[85] On the day of Robert Bork's nomination, Senator Edward Kennedy of Massachusetts stated:

> Robert Bork's America is a land in which women would be forced into back-abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists would be censored at the whim [of the] government, and the doors of the Federal courts would be shut on the fingers of millions of citizens for whom the judiciary is often the only protector of the individual rights that are the heart of our democracy.[86]

With a similar sentiment, Chairman Biden stated in his opening statement that the confirmation process required the Senate to consider Judge Bork's judicial philosophy and whether it "was an appropriate one at this time in our history."[87] In response, Bork described his judicial philosophy as one "which gives the Constitution a full and fair interpretation but, where the Constitution is silent, leaves the policy struggles to the Congress, the President, the legislatures and executives of the fifty states, and to the American people."[88] Some members of the Senate supported this "conservative" approach, while others would have rather had a Justice who embraced the "expansive, judicially active approach of the Warren Court."[89] In a parallel, some members of the Senate believed that this jurisprudential philosophy was well within their purview to consider as they "advised" and potentially "consented," while others believed such considerations

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81. *See* William G. Myers III, *Advice and Consent on Trial: The Case of Robert H. Bork*, 66 DENVER L. REV. 1, 3 (1988).

82. *See id.;* THE FEDERALIST NO. 76 (Alexander Hamilton).

83. Meyers III, *supra* note 81 at 3.

84. *Id.* at 4.

85. *See id.* at 3–5.

86. *Id.* at 5 (quoting 133 *Cong. Rec.* S9.188 (daily ed. July 1, 1987)).

87. *Id.* at 8 (quoting *Hearing on the Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on Judiciary,* 100th Cong. 66 (1987) [hereinafter *Hearings*].

88. *Id.* at 9 (quoting *Hearings*, pt 1, 75–77).

89. *Id.* at 10.

were left up to the President when he nominates a candidate for a seat on the Court.[90]

The positions of Joe Biden and Mitch McConnell illustrate part of the disagreement within the Senate regarding what the Senate should consider when exercising its check on the President's power to appoint Justices of the Supreme Court.[91] Senator Biden wanted the Senate to consider a nominee's intellectual capacity, competence, judicial temperament, good moral character, freedom from conflicts of interest, and whether the nominee would faithfully uphold the Constitution.[92] Senator Mitch McConnell believed that appropriate criteria for advice and consent included a nominee's judicial competence, sufficient level of achievement or distinction, judicial temperament, no violation of existing ethical standards, and a clean record in the judge's life off the bench.[93] Senator Biden's criteria of whether a nominee would faithfully uphold the Constitution is likely coterminous with whether the nominee has an acceptable jurisprudential philosophy. But, this type of departmentalism—the legislature screening the executive's judicial nominees for whether the nominee agrees with the *legislature's* interpretation of constitutional meaning is not compatible with the Montesquieu-inspired tripartite government the Framers designed and marketed to the ratifying states.[94]

### 3. Post-Bork Hearings

Neither Senator Biden nor Senator McConnel's criteria require delving into nominees' beliefs on specific precedent, cases, or mainstream jurisprudential labels (originalist, living constitutionalist, textualist, etc.) *per se*. But, delving into nominees' opinions on specific precedent, cases, and jurisprudential convictions seem to be an exceedingly common tactic in modern-day confirmation hearings. Whether this increase in invasive questioning is a result of increased partisanship generally, the publicity for Senators that comes from higher television ratings, or a direct consequence of the Bork hearing[95], it has become an in-your-face feature of the confirmation hearings of recent Supreme Court nominees. Take for example some of the questions asked to current sitting Supreme Court Justices:

#### *a. John G. Roberts, Jr.*

***Roe v. Wade.*** At his 2005 confirmation hearing, then-Judge Roberts was asked several questions about *Roe v. Wade*.[96] After a line of questioning regarding the

90. *See id.*

91. *See id.* at 16–17.

92. *Id.* (quoting 133 CONG. REC. S10.527 (daily ed. July 23, 1987)).

93. *Id.* (quoting Mitch McConnell, *Haynsworth and Carswell: A New Senate Standard of Excellence*, 59 KY. L.J. 7 (1970)).

94. *See* THE RATIFICATION OF THE APPOINTMENTS CLAUSE, *supra* Part II.C.*;* THE FEDERALIST NO. 78 (Alexander Hamilton) ("[The legislative body [being] constitutional judges of their own powers [with] the construction they put upon them [being] conclusive upon the other departments . . . cannot be the natural presumption.").

95. *But see* Weaver, *supra* note 4 at 1731.

96. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary,* 109th Cong. 142 (2005).

legal principle of stare decisis, Chairman Specter asked Roberts, "But, there is no doctrinal basis erosion in *Roe*, is there[?]" After Roberts explained his general opinion on stare decisis but declined to comment on particular cases, Chairman Specter doubled down: "Well, do you see any erosion of precedent as to *Roe?*"[97] Roberts again declined to discuss "particular issues that are likely to come before the Court."[98] This back and forth continued for several questions, with Chairman Specter claiming he would not ask "whether [Roberts] are going to vote to overrule *Roe* or sustain it," but pressing Roberts on the strength of *Roe* and subsequent cases (such as *Casey*) resting on *Roe's* holding as precedent.[99] Roberts maintained he would not engage in an "application of legal principles to particular cases."[100]

***Franklin County v. Gwinnett Public Schools.*** Senator Leahy described a case in which Roberts had filed a brief—the arguments in which were rejected by the Court.[101] Senator Leahy then asked, "So, do you now personally agree with and accept as binding law the reasoning of Justice White's opinion in *Franklin*?"[102] Roberts responded, "Well, it certainly is a precedent of the Court that I would apply under principles of *stare decisis*."[103]

**Separation of powers and war.** "I will give you a hypothetical", began Senator Leahy. "Congress passes a law for all U.S. Forces to be withdrawn from the territory of a foreign nation by a said date. The President vetoes the law. The Congress overrides that, and sets into law, you must withdraw by a certain date. Now, is there any question in your mind that the President would be bound to faithfully execute that law?"[104] Roberts responded that he didn't "want to answer a particular hypothetical that could come before the Court[.]"[105] Senator Leahy continued to press Roberts for an answer, to no avail.[106]

**Constitutionality of federal statutes.** Roberts was asked by Senator Kennedy of his appraisal of the constitutionality of various federal civil rights statutes.[107] These included the 1964 Civil Rights Act and the 1965 Voting Rights Act. Roberts generally expressed "[caution] . . . about expressing an opinion on a matter that might come before the Court."[108]

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97. *Id.*
98. *Id.*
99. *Id.* at 142, 146.
100. *Id.* at 146.
101. *Id.* at 156.
102. *Id.*
103. *Id.*
104. *Id.* at 150.
105. *Id.*
106. *Id.* at 150-51.
107. *Id.* at 169-70.
108. *Id.* at 169.

**Judicial philosophy.** Senator Hatch flatly asked Roberts about his jurisprudential philosophy: "Some of the philosophies [Cass Sunstein] discussed were whether a judge should be an originalist, a strict constructionist, a fundamentalist, a perfectionist, a majoritarian, or a minimalist. Which of those categories do you fit in?"[109] Roberts responded that he "resist[s] the labels" and "[does] not have an overarching judicial philosophy."[110]

*b. Clarence Thomas*

**Validity of specific regulations.** Senator Grassley described two recent decisions by federal judges—one in which a library's requirement that library material be used for its intended purposes was struck down and one in which panhandling was found to potentially be protected speech under the First Amendment.[111] The Senator recognized that then-Judge Thomas would likely not answer, but nevertheless asked, "Can you see these as examples of a court's usurping the function of legislative bodies and making rather than applying or interpreting the law?"[112] Thomas responded, "[U]nfortunately, I don't know the full facts in those cases, and I think it would be inappropriate for me to try to comment on those particular cases."[113]

**Judicial philosophy and *Roe v. Wade*.** Senator Leahy asked Thomas, "[D]o you rely on theology? Do you rely on jurisprudence? Do you rely on medical information? Or do you rely on experience."[114] Thomas responded briefly, and then stated that he "would like to refrain from further speculation in this very difficult area." Pushing forward, Senator Leahy began asking Thomas about whether he had previously discussed *Roe v. Wade* with law school classmates or otherwise.[115] "Have you ever, in private gatherings or otherwise, stated whether you felt that [*Roe*] was properly decided or not?"[116] Thomas responded that he could not recall.[117]

**Natural law.** Thomas's views on natural law as a political/philosophical concept and as a potential influence in his judicial decision-making was a frequent point of contention at his confirmation hearing.[118] Too many questions regarding natural law were posed to Thomas to catalog, but the Senate was obviously very interested in Thomas's ideological views regarding natural law theory.[119]

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109. *Id.* at 158.
110. *Id.* at 158–59.
111. *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary,* 102nd Cong. 216–17 (1991).
112. *Id.* at 217.
113. *Id.*
114. *Id.* at 221.
115. *Id.* at 221–22.
116. *Id.* at 222.
117. *Id.*
118. *See generally id.* at 111, 146, 270.
119. *See id.*

*c. Samuel A. Alito, Jr.*

**Judicial philosophy.** Senator Grassley asked then-Judge Alito, "How would you go about your duties as a Justice in determining where the right of the silent majority ends and where the right of the individual begins?'[120] He continued, "What principles of constitutional interpretation help you to begin your analysis if whether a particular statute infringes upon some individual right."[121] Alito candidly responded, "I would look to the text of the provision. I would look to anything that sheds light on what that would have been understood to mean."[122]

**Precedent and *Roe v. Wade*.** Alito was criticized by Senator Kohl for not taking a supportive stance regarding *Roe v. Wade*.[123] Senator Kohl stated, "Now, I understand that there will be cases where plaintiffs argue on the margins about *Roe* and *Casey* . . . But you are willing to stand by those other legal principles and yet you are not taking the same position with regard to the principles embodied in *Roe* and *Casey*."[124] When Alito asserted that *Roe* involves an issue that "is involved in a considerable amount of litigation before the courts," Senator Kohl continued the line of questioning.[125] Senator Kohl essentially (through a bit of monologuing) asked Alito whether there was a possibility he looked at the principles underlying *Roe* and felt the case should be overturned.[126] After explaining an abstract decision-making process, Alito, stated, "And I don't believe that it would be appropriate and it wouldn't even be realistic for me to go further than that."[127]

**Constitutional interpretation.** Senator Brownback asked Alito, "I just want to get your thoughts of how you view the Constitution, how you would review it. There are these different schools of thought on this of strict constructionist, living document, originalist, and there are several others that float around there. How do you generally look at the Constitution?"[128]

*d. Sonia Sotomayor*

**Judicial philosophy.** When asked whether she was a legal realist, Sotomayor replied she was not.[129] Senator Graham followed with, "Would you be considered a strict constructionist, in your own mind?"[130] "I don't use labels to describe what

120. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary,* 109th Cong. 358 (2006).
121. *Id.*
122. *Id.*
123. *Id.* at 517–18.
124. *Id.* at 517.
125. *Id.*
126. *Id.* at 517–18.
127. *Id.* at 518.
128. *Id.* at 465.
129. *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary,* 111th Cong. 135 (2009).
130. *Id.*

I do," replied Sotomayor. Graham then asked Sotomayor if she was an originalist. Once again, Sotomayor replied, "I don't use labels."[131]

**Foreign law.** Senator Schumer asked then-Judge Sotomayor what she "believe [d] is the appropriate role of any foreign law in the U.S. Courts."[132] This was in reference to previous criticism she had received regarding a 2009 speech discussing whether it is permissible to use foreign or international law to decide cases. Hounding the point, Senator Schumer stated, "And you have never relied on a foreign court to interpret U.S. law nor would you."[133]

*e. Elena Kagan*

**Legal ideology.** Senator Sessions asked Kagan, "[D]o you agree with the characterization that you are a legal progressive?"[134] Kagan responded, "I honestly do not know what that label means."[135] Similarly, Senator Kohl asked, "Back in that 1995 article you wrote that one of the most important inquiries for any nominee, as you are here today, is to 'inquire as to the direction in which he or she would move the institution.' In what direction would you move the Court."[136] Kagan replied, "I will try to decide each case that comes before me as fairly and objectively as I can. I cannot tell you I will move the Court in a particular way on a particular issue. . ."[137]

***McDonald* and stare decisis.** Senator Cornyn asked Kagan, "And do you believe like the majority in *McDonald*—do you agree with that decision that the Second Amendment is fully applicable to the States, has full stare decisis effect? And is there any reason that you know of why it would not be controlling?"[138] Kagan replied, "There is no reason I know of, that *McDonald*, as well as *Heller*, as settled law and entitled to all the weight that precedent usually gets [sic]."[139]

*f. Neil M. Gorsuch*

**Judicial philosophy.** Senator Sasse asked then-Judge Gorsuch about his professed judicial philosophy of originalism: "But, many have critiqued originalism, including in some statements yesterday and today here, as backward focused, or 'too rigid' in adapting to our changing culture. Do you believe that originalism is

131. *Id.*
132. *Id.* at 132.
133. *Id.* at 132–33. Note that if the line of questioning is referring to treating foreign law as binding on the United States Constitution, this would not be inappropriate. Such a practice would likely bear on the competence of a judicial candidate in a way suited for the Senate to consider. If the line of questioning is in reference to canons of constructions that refer to foreign law for reasoning by analogy, then it may be inappropriate.
134. *The Nomination of Elana Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary,* 111th Cong. 70 (2010).
135. *Id.*
136. *Id.* at 80.
137. *Id.*
138. *Id.* at 165.
139. *Id.*

just one judicial philosophy among many, or is it a description of what judges do?"[140] Gorsuch responded, "I think it is what we all want to know. I do not know a judge who would not want to know what the original understanding is of a particular term in the Constitution or a statute. That is information that would be valuable to any judge. . ."[141]

**Precedent.** Senator Klobuchar asked Gorsuch, "[C]an you give me an example of a Supreme Court case that you believe was wrongly decided under the law but that you will continue to follow if you are confirmed because the precedent is so strong?"[142] Gorsuch responded: "Senator, I think that is just another way, honestly, of trying to get at which Supreme Court precedents I agree with and I disagree with."[143] After some back and forth, Senator Klobuchar stated, "One of the reasons I am asking this is that several past nominees have made this promise about respecting precedent before this Committee . . . and they later became Justices with a lifetime appointment and they overturned precedent."[144]

*g. Brett M. Kavanaugh*

***Roe v. Wade.*** Senator Blumenthal asked Kavanaugh, "Can you commit, sitting here today, that you would never overturn *Roe v. Wade*?"[145] In response, then-Judge Kavanaugh responded, "[E]ach of the eight Justices currently on the Supreme Court, when they were in this seat, declined to answer that question."[146]

*h. Amy Coney Barrett*

**Judicial philosophy.** Chairman Graham asked Barrett, "You said you're an originalist. Is that true?"[147] Barret responded, "Yes."[148] Similarly, Senator Crapo asked Barrett "I assume you would consider yourself both an originalist and a [textualist]?" to which Barrett agreed.[149]

*i. Ketanji Brown Jackson*

***Roe v. Wade.*** Senator Feinstein asked Jackson, "Do you agree with Justice Kavanaugh that *Roe v. Wade* is settled as precedent. . . [W]ill you like Justice

140. *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary,* 115th Cong. 180 (2017).

141. *Id.*

142. *Id.* at 151.

143. *Id.*

144. *Id.*

145. *Confirmation Hearing on the Nomination of Hon. Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary,* 115th Cong. 246 (2018).

146. *Id.*

147. *Amy Coney Barrett Senate Confirmation Hearing Day 2 Transcript,* REV.COM (Oct. 13, 2020), https://www.rev.com/blog/transcripts/amy-coney-barrett-senate-confirmation-hearing-day-2-transcript [https://perma.cc/85N7-XATY].

148. *Id.*

149. *Id.*

Barrett commit to obey all the rules of stare decisis in cases related to the issue of abortion?"[150] Jackson replied, "I do agree with both Justice Kavanaugh and Justice Barrett on this issue. *Roe* and *Casey* are the settled law of the Supreme Court concerning the right to terminate a woman's pregnancy."[151]

## III. HOW MODERN-DAY CONFIRMATION HEARINGS DIVERGE FROM AN APPROPRIATE "ADVICE AND CONSENT" POWER

Whether the Appointments Clause and advice and consent power of the Senate is best understood to be faithful to the scheme envisioned by the Framers, debated by the delegates at the Constitutional Convention, and ratified by the several States, or instead should be aligned with early congressional practice; the Senate is likely encroaching on both on the executive's prerogative to select judicial nominees and the judiciary's institutional interest in independence. Furthermore, cable broadcast of previously private confirmation hearings increases the risk that Congress can abuse its advice and consent power to undermine either the independence or legitimacy of the judiciary.

Under a true originalist understanding of the Senate's power to advise and consent, the Senate should be seeking to "prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity."[152] That is, appointments based on improper influences, such as partisanship, bias, nepotism, or other conflicts of interest.[153] Assuming that the Senate also has the baseline expectation to screen for competency and good character, ironically, the most scandalous topics covered at confirmation hearings are likely perfectly constitutional.[154] Many of the lines of questioning the Senate routinely subjects judicial nominees to, however, consider topics well outside the constitutional purview of the Senate.

For example, when the Senate asks nominees about their judicial ideology, jurisprudential philosophy, or other types of legal schools of thought, the Senate is really trying to gauge how each nominee will vote on cases concerning specific issues that may come before the Court—this is especially true for issues that spark national controversy or particularly interest a Senator's constituency. When Chairman Graham asks then-Judge Barrett whether she's an originalist or textualist, he is not doing so because he thinks living constitutionalism is a moral failing that disqualifies Barrett from public office; he is doing so to gauge the likelihood

150. Khaleda Rahman, *What Ketanji Brown Jackson Said About Roe v. Wade as She Joins SCOTUS*, NEWSWEEK (June 30, 2022), https://www.newsweek.com/what-what-ketanji-brown-jackson-said-roe-v-wade-1720660 [https://perma.cc/D497-E59F].

151. *Id.*

152. THE FEDERALIST NO. 76 (Alexander Hamilton).

153. *See* Eastman, *supra* note 16, at 640–44.

154. *See generally* Jill Smolowe, *Sex, Lies and Politics: He Said, She Said*, TIME (Oct. 21, 1991), https://content.time.com/time/magazine/article/0,9171,974096,00.html [https://perma.cc/2PDC-4296]; Haley Sweetland Edwards, *How Christine Blasey Ford's Testimony Changed America*, TIME (October 4, 2018), https://time.com/5415027/christine-blasey-ford-testimony/ [https://perma.cc/8JRS-Z9WD].

she votes the way his constituents would like her to on specific issues.[155] Such a practice is inappropriate even given early post-ratification congressional practice of rejecting judicial nominees on ideological grounds if those ideological grounds were *political* rather than jurisprudential.

This is also true when candidates are questioned on their opinions regarding the legal doctrine of stare decisis. When Senator Klobuchar asks Gorsuch for an example of a Supreme Court case that he believed was wrongly decided, but would nevertheless follow on stare decisis grounds, she is not testing his judicial temperament. She is attempting to either appraise his likelihood to leave intact precedent her constituents favor or to get the nominee on the record stating that he would not overrule a precedent. The former represents no more than the Senate's attempt to speculate on future judicial rulings, while the latter applies political pressure on the nominee once confirmed to leave intact a precedent the then-Justice may develop ideological discomfort with. Gorsuch knew this when he replied, "Senator, I think that is just another way, honestly of getting at which Supreme Court precedents I agree with and I disagree with." The Senator admitted as much: "One of the reasons I am asking this is that several past nominees have made this promise about respecting precedent before this Committee . . . and they later became Justices with a lifetime appointment and they overturned precedent."[156]

The aim of putting political pressure on judicial nominees to constrain them after confirmation is acutely obvious in Senators' questions regarding specific cases. When Roberts, Thomas, Alito, and Kavanaugh are asked about their opinion on *Roe v. Wade*, it is at best to screen out nominees who do not agree with a specific precedent and at worst (and most likely) to preemptively exert pressure on the Justices once confirmed so that they hesitate before disturbing caselaw popular with their constituency. This is also true when Kagan is questioned on her opinion regarding stare decisis and *McDonald*.[157] Attempts by the Senate to exert this type of pressure on the judiciary is an encroachment into the independence of the federal judiciary the Framers sought to protect. It also likely contributes to the Supreme Court's current PR crisis—the declining public approval rating and criticisms regarding legitimacy of the Court.[158] There are plenty of good reasons a nominee for Supreme Court of the United States would not want to go on the record on the floor of the Senate as believing a certain precedent should be overturned; there is an equal number of good reasons why that then-Justice would later overturn the precedent.

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155. *See* O'CONNOR, BORK, AND THE ADVENT OF THE MODERN-DAY SENATE CONFIRMATION HEARING, *supra* Part II.E.

156. *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary,* 115th Cong. 151 (2017).

157. *See* O'CONNOR, BORK, AND THE ADVENT OF THE MODERN-DAY SENATE CONFIRMATION HEARING, *supra* Part II.E.

158. *Cf. Who Can Rein In the Supreme Court?, supra* note 12.

## IV. CONCLUSION

Some argue that the Senate violates separation of powers principles when it abstains from voting on or scheduling hearings for judicial nominations.[159] The basis for this alleged separation of powers violation is that Senate slowdown of filling judicial vacancies "undermines the balance not only by reducing the significance of the President's role as nominator, but more importantly by causing severe disruption to the judiciary."[160] Such disruption is also created when Congress attempts to intrude into the appointment power of the President by basing confirmation decisions on factors not assigned to the Senate through the "advice and consent" language in the Constitution or when Congress attempts to exert pressure on the judiciary through specific types of questioning in public confirmation hearings. The appropriate boundaries between Legislative, Executive, and Judicial powers, the original understanding of the Appointments Clause, the "advise and consent" language in Article 2, and longstanding congressional practice in eighteenth, nineteenth, and twentieth century confirmations all suggest that a more limited criteria upon which the Senate conducts confirmation hearings for judicial appointees is necessary to preserve appropriate separation of powers. As a prudential matter, the judiciary is unlikely to force upon the Senate limitations on its "advice and consent" power for judicial nominees. This limited criteria could be accomplished through internal Senate rules, but the Senate is not likely to impose on itself such limitations absent outside political pressure from voters or the executive branch. The latter is far more likely than the former, but it is doubtful that the executive has the political bargaining power to persuade the Senate to take its boot off the President's power to appoint Supreme Court Justices.

159. Lee Renzin, *Advice, Consent, and Senate Inaction—Is Judicial Resolution Possible*, 73 N.Y.U. L. REV. 1739, 1758 (1998).

160. *Id.*