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Advice and Consent

Introduction

“Elections have consequences!” That is the drumbeat to which some members of the Senate dance, arguing senators should defer to the president in the selection of appointed figures, especially federal judges. Similarly, other senators argue, when it is expedient to do so, that judicial nominees should never be filibustered. Thus, the question persists, what is the role of the Senate in the nomination and appointment process, and more specifically, in the nomination and appointment of federal judges?

While some attempt to differentiate between the Senate’s duty with regard to judicial and executive branch nominees, the Constitution is clear that the duty applies equally to all nominations. Article II, Section 2, of the Constitution of the United States says,

[The President], ... by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

The President shall have the Power to fill up all vacancies that may happen during the recess of the Senate, by granting Commissions which shall expire at the End of their next session.¹

Thus, the Senate may consent, or refuse to consent, to presidential nominations, including judicial nominations, unless or until Congress vests that power in the President alone.

Preserving the Duty to Advise

While according to the Constitution, Congress has the ability to defer to the President and allow him to unilaterally appoint “inferior officers,” relinquishing advice and consent check on executive power would be a disservice to the American people.

Consider the recess appointment. The Constitution provides the President with the authority to unilaterally fill vacancies when they occur during the Senate’s recess. However, presidents routinely use this power to appoint controversial nominees to positions that had been vacant for months and years, contravening the Constitution. In May of 2011, republican senators were forced to resort to petitioning the House of Representatives to prevent the adjournment of the Senate because they feared if the Senate was able to adjourn, President Obama would recess

¹ U.S. Const. art. II, § 2, cl. 2-3.

appoint controversial nominees who had not been able to garner the consent of a majority of senators. Thus, the Senate did not officially have a Memorial Day Recess.

Providing Advice and Consent as the Founders Intended

While the President can avoid the Senate altogether through recess appointments, when the Constitution is followed and consent is sought, the Senate, through the rules that govern the body, determines the procedure by which it decides whether to provide consent.² When the Senate votes on judicial nominations, a senator generally requests unanimous consent to move the nomination to the floor for a vote, which would effectively end debate.³ If unanimous consent is granted, the Senate moves to a vote on the nominee, which requires a majority of the voting members, provided a quorum is present.⁴ However, if a senator objects to unanimous consent, debate continues, and the continuation of this debate is often referred to as a filibuster.⁵ In order to cut off debate in these circumstances, cloture is invoked.⁶

Cloture, which effectively limits consideration and debate of a bill to thirty additional hours, is invoked when sixteen senators sign a petition for cloture and three-fifths of the full Senate, normally sixty members, vote for cloture.⁷ If cloture is invoked, at the conclusion of the thirty hours, the senators vote on whether to confirm the nominee.⁸ This vote requires only a majority of the voting members, provided a quorum is present, and if a majority votes to confirm the nominee, consent is granted; otherwise, the Senate has refused its consent of the nominee.⁹

Alexander Hamilton, in his Federalist Papers, had much to say about the role of the Senate in providing advice and consent regarding the President's nominations. In Federalist Paper No. 76, Hamilton anticipated that some nominations would not receive the advice and consent of the senate when he stated that a "nomination may be overruled."¹⁰ Hamilton states the purpose of the advice and consent requirement is to temper the president, noting a

[President] would be both ashamed and afraid to bring forward, for the most distinguished or lucrative stations, candidates who had no other merit than that of coming from the same State to which he particularly belonged, or of being in some way or other personally allied to him, or of possessing the necessary

² U.S. Const. art. I, § 5, cl. 2 ("Each House may determine the rules of its proceedings....").

³ How Congress Works, *Rules of the Senate: Voting Procedure*, <http://rules.senate.gov/public/index.cfm?p=RuleXII> (last visited June 9, 2011).

⁴ How Congress Works, *Rules of the Senate: Voting Procedure*, <http://rules.senate.gov/public/index.cfm?p=RuleXII> (last visited June 9, 2011).

⁵ United States Senate, http://www.senate.gov/reference/glossary_term/filibuster.htm (last visited June 9, 2011).

⁶ How Congress Works, *Rules of the Senate: Precedence of Motions*, <http://rules.senate.gov/public/index.cfm?p=RuleXXII> (last visited June 9, 2011).

⁷ How Congress Works, *Rules of the Senate: Precedence of Motions*, <http://rules.senate.gov/public/index.cfm?p=RuleXXII> (last visited June 9, 2011).

⁸ How Congress Works, *Rules of the Senate: Precedence of Motions*, <http://rules.senate.gov/public/index.cfm?p=RuleXXII> (last visited June 9, 2011).

⁹ United States Senate, http://www.senate.gov/reference/glossary_term/vote.htm (last visited June 9, 2011).

¹⁰ Alexander Hamilton, No. 76: The Appointing Power of the Executive (1788), *reprinted in* The Federalist Papers 453, at 455 (Clinton Rossiter ed., Penguin Group 1999).

insignificance and pliancy to render them the obsequious instruments of his pleasure.¹¹

Thus, Hamilton assumed presidents would be ashamed to appoint judges to do their ideological bidding, and would instead be committed to “tak[ing] the law as they find it, discover[ing] what it already means, and apply[ing] it to the legal cases and controversies that come before them.”¹²

Filibustering Judicial Nominees

While some may argue that “[a]ppointing judges ... is an exercise in executive, not legislative, power”¹³ because of the Presidents duty to vet and nominate a candidate, Hamilton acknowledged that “[t]he ordinary power of appointment is confined to the President and Senate JOINTLY.”¹⁴ Thus, senators should seriously consider their responsibility in the confirmation process when determining whether and when a filibuster is appropriate.

Over the years, both democrats and republicans have clung to the mantra that it is permissible to filibuster a nominee who is an “extremist” or out of the “mainstream;”¹⁵ however, those terms should be discarded. The question of a nominee’s ability to fairly apply the law has nothing to do with what is or is not in the “mainstream,” but has everything to do with the nominee’s concept of the Constitution and how it is to be applied, whether the meaning of the document changes over time, whether social norms should impact judicial decisions, and whether empathy should be invoked by judges. Additionally, it is important for senators to understand that the newness of the use of the filibuster on judicial nominees may not reflect so much on the constitutionality of the filibuster as it reflects on the disparities in the understanding of the role of the judiciary and on the importance of the nomination process.

Conclusion

Voting on judicial nominations is one of the most important duties of senators, as the nominees serve for their lifetimes and determine the constitutionality of the actions of both, the Executive and Legislative Branches of government. The question of whether a judicial nominee receives a vote is up to the majority leadership in the Senate, as the Majority Leader sets the schedule.¹⁶ If the Majority Leader is willing to schedule a nominee on the Senate’s calendar, he or she is

¹¹ Alexander Hamilton, No. 76: The Appointing Power of the Executive (1788), *reprinted in* The Federalist Papers 453, at 456 (Clinton Rossiter ed., Penguin Group 1999).

¹² Orrin G. Hatch, *Judicial Nomination Filibuster Cause and Cure*, 2005 Utah L. Rev. 803, 809 (2005) (“In the traditional framework, however, the law controls the judiciary, not the other way around. In *Marbury v. Madison*, Chief Justice John Marshall reminded us that ‘the framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature.’ It can only serve that purpose if judges take the law as they find it, discover what it already means, and apply it to the legal cases and controversies that come before them.”).

¹³ Orrin G. Hatch, *Judicial Nomination Filibuster Cause and Cure*, 2005 Utah L. Rev. 803, 829 (2005).

¹⁴ Alexander Hamilton, No. 67: The Executive Department (1788), *reprinted in* The Federalist Papers 405, at 408 (Clinton Rossiter ed., Penguin Group 1999).

¹⁵ Orrin G. Hatch, *Judicial Nomination Filibuster Cause and Cure*, 2005 Utah L. Rev. 803, 832 (2005).

¹⁶ Valerie Heitshusen, *The Legislative Process on the Senate Floor: An Introduction*, Congressional Research Service, December 1, 2010, at 8 (“In attempting to devise a schedule for the Senate floor, the majority leader seeks to promote the legislative program of his party (and perhaps the President) as he also tries to ensure that the Senate considers necessary legislation in a timely fashion.”).

guaranteed at least one vote; however, that one vote may be a cloture vote, and consent may be refused through that cloture vote. While the Senate should certainly not become a “stagnant pond”¹⁷ for nominees, the pond becomes stagnant when the Majority Leader refuses to schedule nominees, not when, in accordance with the process the Senate set in place, senators refuse to consent to nominations.

Thus, the filibuster of nominees, whether for District Courts, Circuit Courts, or the Supreme Court, is a constitutional tool in the arsenal of those who wish to confirm, for lifetime appointments, judges and justices who will adjudicate in accordance with the original meaning of the Constitution and the rule of law, rather than allowing their sympathies and ideologies to reign.

¹⁷ Orrin G. Hatch, *Judicial Nomination Filibuster Cause and Cure*, 2005 Utah L. Rev. 803, 837 (2005) (“Senator Mike Enzi put it correctly when he said: ‘Our Founding Fathers intended for the Senate to be the cooling saucer for legislation. I don’t think they intended it to become a stagnant pond.’”).