

THE POSSIBILITY OF REJECTION: THE FRAMERS' CONSTITUTIONAL DESIGN FOR SUPREME COURT APPOINTMENTS

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I. INTRODUCTION

The nomination and confirmation of a United States Supreme Court Justice is a rare moment in American politics where the Constitution requires the selection of a member of one branch of government by the other two branches. On February 13, 2016, Justice Antonin Scalia died at the age of seventy-nine, creating a vacancy on the Court.¹ The same day that Justice Scalia's death was announced, posturing began on when and how his vacated seat on the Court would be filled, and who should nominate his successor. Republican Senate Majority Leader Mitch McConnell announced that the "American people should have a voice in the selection of their next Supreme Court Justice. Therefore, this vacancy should not be filled until we have a new [P]resident."² Republican Senate Judiciary Committee Chair Chuck Grassley reinforced this position by claiming that "[t]his [P]resident, above all others, has made no bones about his goal to use the courts to circumvent Congress and push through his own agenda. It only makes sense that we defer to the American people who will elect a new [P]resident to select the next Supreme Court Justice."³

President Barack Obama, however, held a press conference that evening in which he stated, "I plan to fulfill my constitutional responsibilities to nominate a successor in due time," asking "the Senate to fulfill its responsibility to give that person a fair hearing and a timely

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1. Amy Brittain & Sari Horwitz, *Justice Scalia Spent His Last Hours with Members of this Secretive Society of Elite Hunters*, WASH. POST (Feb. 24, 2016), https://www.washingtonpost.com/world/national-security/justice-scalia-spent-his-last-hours-with-members-of-this-secretive-society-of-elite-hunters/2016/02/24/1d77af38-db20-11e5-891a-4ed04f4213e8_story.html; Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), http://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html?_r=0

2. Burgess Everett & Glenn Thrush, *McConnell Throws Down the Gauntlet: No Scalia Replacement Under Obama*, POLITICO (Feb. 13, 2016), <http://www.politico.com/story/2016/02/mitch-mcconnell-antonin-scalia-supreme-court-nomination-219248>.

3. *Id.*

vote.”⁴ Senate Democratic Minority Leader Harry Reid expressed his support for the President’s position as well, asserting that the “President can and should send the Senate a nominee right away,” because it “would be unprecedented in recent history for the Supreme Court to go a year with a vacant seat. Failing to fill this vacancy would be a shameful abdication of one of the Senate’s most essential [c]onstitutional responsibilities.”⁵

Just over one month later on March 16, 2016, the President nominated the sixty-three-year-old Chief Judge of the United States Court of Appeals for the District of Columbia, Merrick Garland, who has served on that court since 1997.⁶ During the announcement, the President invoked the Constitution several times, describing how, of “the many powers and responsibilities that the Constitution vests in the Presidency, few are more consequential than appointing a Supreme Court [J]ustice.”⁷ He went on to “ask Republicans in the Senate to give [Garland] a fair hearing and then an up-or-down vote,” because if they failed to do this, “it will not only be an abdication of the Senate’s constitutional duty, it will indicate a process for nominating and confirming judges that is beyond repair.”⁸ He closed his remarks by proclaiming, “I have fulfilled my constitutional duty. Now it’s time for the Senate to do theirs.”⁹

Senator McConnell responded in the Senate the same day, proclaiming that it “is a [P]resident’s constitutional right to nominate a Supreme Court Justice, and it is the Senate’s constitutional right to act as a check on a [P]resident and withhold its consent.”¹⁰ Judiciary Chair Grassley agreed, saying that “[t]oday the President has exercised his constitutional authority. A majority of the Senate has decided to fulfill its constitutional role of advice and consent by withholding support for the nomination during a presidential election year, with millions of votes having been cast in highly charged con-

4. *The Death of Justice Scalia: Reactions and Analysis*, N.Y. TIMES (Feb. 13, 2016), <http://www.nytimes.com/live/supreme-court-justice-antonin-scalia-dies-at-79-video-president-obamas-statement-on-scalias-death/>.

5. Everett & Thrush, *supra* note 2.

6. Nina Totenberg & Carrie Johnson, *Merrick Garland Has a Reputation of Collegiality, Record of Republican Support*, NPR (Mar. 16, 2016), <http://www.npr.org/2016/03/16/126614141/merrick-garland-has-a-reputation-of-collegiality-record-of-republican-support>.

7. *Transcript: Obama Announces Nomination of Merrick Garland to Supreme Court*, WASH. POST (Mar. 16, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/03/16/transcript-obama-announces-nomination-of-merrick-garland-to-supreme-court/>.

8. *Id.*

9. *Id.*

10. Amita Kelly, *McConnell: Blocking Supreme Court Nomination ‘About a Principle, Not a Person,’* NPR (Mar. 16, 2016), <http://www.npr.org/2016/03/16/470664561/mcconnell-blocking-supreme-court-nomination-about-a-principle-not-a-person>.

tests.”¹¹ On the other side of the aisle, Democratic Minority Leader Reid confirmed his support for the President: “The American people expect their elected leaders to do their jobs. President Obama is performing his constitutional duty. I hope Senate Republicans will do theirs.”¹²

Interest groups weighed in as well. Liberal organizations—such as EMILY’s List, the American Constitution Society, and the NAACP—were supportive of Judge Garland and made public comments that the Senate had a constitutional requirement to act on the nomination.¹³ Conservative interest groups—such as the American Conservative Union, National Right to Life, and the Judicial Crisis Network—issued statements supportive of Senate Republicans not confirming the nominee, or any nominee, until after the presidential election; in some cases these groups claimed that constitutional issues they cared for would be decided unfavorably if Garland were confirmed to the Court.¹⁴ In response, the White House created the first Twitter account in support of a Supreme Court nominee, “@SCOTUSnom”; some of the tweets proclaimed the President’s “constitutional duty” to nominate a United States Supreme Court Justice and called upon Senators to “meet their constitutional duty” as well.¹⁵ Vice President Joe Biden stated that if the Senate would not act on the Garland nomination, it “could lead to a genuine [c]onstitutional crisis born out of the dysfunction of Washington.”¹⁶ It appears that most members of the public agreed with the White House at the time of the nomination. In a national CNN poll taken in the days after President Obama nomi-

11. *Id.*

12. *Id.*

13. *EMILY’s List Statement on Supreme Court Nominee Merrick Garland*, EMILY’S LIST (Mar. 16, 2016), <http://emilyslist.org/news/entry/emilys-list-statement-on-supreme-court-nominee-merrick-garland>; *American Constitution Society President on Nomination of Merrick B. Garland to U.S. Supreme Court*, ACS (Mar. 16, 2016), <http://www.acslaw.org/news/press-releases/american-constitution-society-president-on-nomination-of-merrick-b-garland-to-us>; *NAACP Statement on the Nomination of Chief Judge Garland to the US Supreme Court*, NAACP (Mar. 16, 2016), <http://www.naacp.org/latest/naacp-statement-on-the-nomination-of-chief-judge-garland-to-the-us-supreme/>.

14. *Merrick Garland 60-Second Ad*, JCN (Mar. 23, 2016), <http://judicialnetwork.com/judicial-crisis-network-launches-digital-ad-campaign-exposing-merrick-garlands-record-as-a-liberal/>; *ACU Statement on Judge Merrick Garland’s Nomination to the Supreme Court*, AM. CONSERVATIVE UNION (Mar. 16, 2016), <http://conservative.org/acu-statement-on-judge-merrick-garlands-nomination-to-the-supreme-court/>; *National Right to Life: The Next President Will Pick Justice Scalia’s Successor*, NAT’L RIGHT TO LIFE (Mar. 16, 2016), <http://www.nrlc.org/communications/releases/2016/release031616/>.

15. @SCOTUSnom, TWITTER (Mar. 16, 2016), <https://twitter.com/SCOTUSnom?lang=en>.

16. John T. Bennett, *Biden: ‘Constitutional Crisis’ Coming with Split Supreme Court*, ROLL CALL (Mar. 24, 2016, 2:17 PM), <http://www.rollcall.com/news/politics/biden-constitutional-crisis-coming-8-judge-court>.

nated Judge Garland, fifty-two percent of survey respondents wanted to see him confirmed, fifty-seven percent thought President Obama should make the nomination (as opposed to the next President making it), and sixty-four percent thought confirmation hearings should be held for Garland.¹⁷ Nevertheless, Garland was not given a confirmation hearing or a floor vote. When it appeared the Democratic candidate Hillary Clinton might win the Presidency, Texas Republican Senator Ted Cruz even insinuated that the Senate could refuse to confirm any Supreme Court nominees during her term, stating that there is “certainly long historical precedent for a Supreme Court with fewer [J]ustices.”¹⁸ Garland’s Court nomination expired on January 3, 2017, leaving Scalia’s successor to be nominated by President Donald J. Trump.¹⁹

From the outset of this vacancy occurring on the Court, the President, key Senators, other political leaders, and various interest groups all proclaimed that the position they supported—whether it was making a nomination during a presidential election year or refusing to confirm a nominee—was either mandated by the Constitution or was a right granted to the President or the Senate under the Constitution. However, beyond the relatively vague and brief text of Article II that deals with the appointment of United States Supreme Court Justices, what does the Constitution dictate or allow in this process? What did the Framers of the Constitution have in mind with United States Supreme Court appointments?

This Article will recount the discussions and compromises at the 1787 Constitutional Convention over the federal judicial appointment process and the consensus the Framers formed that summer over the power the President and the Senate would exercise. Section II will provide the historical context of the Constitutional Convention, including explaining how the judiciary fit into the larger scheme of the separation of powers, exploring how judicial appointments fulfill the Framers’ concerns with protecting judicial independence, and introducing the five factors the Framers emphasized when deliberating over the structure of judicial appointments. Section III then discusses the Framers’ desire that the process they created would lead to high nominee quality, including nominees who had requisite knowledge,

17. Jennifer Agiesta, *Support for SCOTUS Hearings Remains Strong*, CNN/ORC Poll Finds, CNN (Mar. 25, 2016), <http://www.cnn.com/2016/03/25/politics/merrick-garland-supreme-court-nominee/>.

18. Eugene Scott & Ted Barrett, *Cruz Cites ‘Long Historical Precedent’ of SCOTUS Vacancies, Lays Ground for Potential Fight*, CNN (Oct. 27, 2016), <http://www.cnn.com/2016/10/27/politics/ted-cruz-supreme-court/>.

19. Jess Bravin, *President Obama’s Supreme Court Nomination of Merrick Garland Expires*, WALL STREET J. (Jan. 3, 2017), <http://www.wsj.com/articles/president-obamas-supreme-court-nomination-of-merrick-garland-expires-1483463952>.

experience, and ethics. Section IV examines how the Framers thought political beliefs would be factored into the appointment process. Section V looks at the Framers' emphasis on nominee representativeness, broadly defined. Section VI uses the Framers' statements to demonstrate that they thought the judicial appointment process they created would be proper because it ensured both the President and the Senate would check and balance each other, thus reinforcing a goal incorporated throughout the Constitution. Section VII then examines the role the Framers thought public input and feedback would play in the process. Finally, Section VIII returns to the Garland nomination to examine how that confirmation battle fit into the larger context of what the Framers desired with respect to United States Supreme Court appointments, as well as how that nomination shaped President Trump's nomination of Judge Neil Gorsuch. As the paragraphs below will demonstrate, many of the alterations over time to the Supreme Court selection process are the result of constitutional changes since the 1780s, both in terms of subsequently ratified constitutional amendments and in terms of new interpretations of the Constitution by the Court itself. However, the general contours of the original system endure, and the same types of considerations the Framers wanted Presidents and Senators to have remain important.

II. JUDICIAL APPOINTMENTS WITHIN THE CONTEXT OF THE SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE

Relatively early during the 1787 Constitutional Convention in Philadelphia, the delegates decided that a national supreme court was necessary and that the judges on that court would be appointed rather than elected.²⁰ However, the delegates spent nearly the entire convention disagreeing over the question of who would select the justices of that court.²¹ To understand why this took so long to decide, it is important to state briefly why the Convention took place, what the major disputes were, and how this appointment process fits within the larger scheme of the separation of powers.

The Articles of Confederation created a unicameral Confederation Congress with a limited set of powers; exercising these powers, and conducting virtually any business, required a two-thirds majority

20. Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 759-61 (1984).

21. Adam J. White, *Toward the Framers' Understanding of "Advice and Consent": A Historical and Textual Inquiry*, 29 HARV. J.L. & PUB. POL'Y, 103, 110-20 (2005).

(nine of thirteen states at the time).²² There was no separate Executive Branch, nor was there any national court system, and the overwhelming majority of powers were left to the states.²³ With no power by the Confederation Congress to directly collect taxes, regulate interstate commerce, or enforce treaties, the national government proved early on to be ineffective.²⁴ The lack of revenue being particularly acute, the Confederation Congress proposed an amendment to the Articles of Confederation to raise revenue directly from tariffs in 1786; however, the states had to ratify unanimously any amendment to the document, and only twelve of thirteen did so.²⁵ Finally, the national government experienced trouble raising funds to put down Daniel Shays's Rebellion in western Massachusetts in 1786-87, when rebels forcibly closed some of the State's courts to prevent indebted farmers from having their lands foreclosed.²⁶

At the 1787 Philadelphia Convention, the delegates initially met for the expressed purpose of revising the Articles of Confederation,²⁷ but they quickly abandoned those plans and instead decided to create a completely new system of government.²⁸ With some key events from 1786-87 in mind, the Framers produced a more powerful national government, giving Congress significantly more authority, including the authority to raise and collect taxes and to regulate interstate commerce; the document also fashioned a national executive with commander-in-chief and foreign affairs powers, as well as the outline of a federal judiciary.²⁹ However, fearing the problems that too much power could entail, they also built a system of separated institutions exercising powers that checked each other, including giving the President veto authority, providing Congress impeachment and removal powers over the President, conferring on Congress the ability to determine federal court jurisdiction, and bestowing upon the President par-

22. BARBARA SILBERDICK FEINBERG, *THE ARTICLES OF CONFEDERATION: THE FIRST CONSTITUTION OF THE UNITED STATES* 37-41 (2002); Donald S. Lutz, *The Articles of Confederation as the Background to the Federal Republic*, 40 *PUBLIUS* 55-70 (1990); Eric M. Freedman, *The United States and the Articles of Confederation: Drifting toward Anarchy or Inching toward Commonwealth*, 88 *YALE L.J.* 142 (1978).

23. Lutz, *supra* note 22.

24. Larry D. Kramer, *Madison's Audience*, 112 *HARV. L. REV.* 611, 618-19 (1999).

25. Robert A. Feer, *Shays' Rebellion and the Constitution: A Study in Causation*, 42 *NEW ENG. Q.* 388, 390 (1969).

26. Rachel R. Parker, *Shays' Rebellion: An Episode in American State-Making*, 34 *SOC. PERSP.* 95, 100-01 (1991).

27. Douglas G. Smith, *An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution*, 34 *SAN DIEGO L. REV.* 249, 270 (1997).

28. Robert N. Clinton, *A Brief History of the Adoption of the United States Constitution*, 75 *IOWA L. REV.* 891, 898 (1990).

29. Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *COLUM. L. REV.* 62 (1994).

doing power over defendants convicted in federal court.³⁰ James Madison explained in *Federalist No. 51* the necessity of this system of checks and balances. He believed that the self-interested human nature we possess has to be reflected in the design of the Constitution as follows: “In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”³¹ He hoped for virtuous persons to be in government, but he also knew there would be no guarantee of that. If tyrants seized authority in this mightier national government, Madison said the Constitution’s design still protected us via federalism and the separation of powers: “[T]he power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people.”³² Since some authority remains lodged at the state level, and by creating three distinct branches of the national government, no one need fear runaway federal power. According to Madison, this arrangement would work because it ensures that “[a]mbition must be made to counteract ambition,” in that each branch will have sufficient ability to check and balance the power of the other two branches.³³

The phrase “checks and balances” is used frequently to refer to this type of institutional checking.³⁴ But the Framers also sought to create “balance” in the groups who selected federal officials and in those officials’ length of time in office. As originally designed, there were four different types of federal officials under the Constitution selected by different groups of people for different terms of office. Members of the House were meant to be closest to the people, so the voters have always directly elected them for the relatively short period of two years.³⁵ The Presidency, as originally formulated by the Framers, was indirectly elected after deliberations in each state by the Electoral College, a group meant to be selected by the voters for its familiarity with potential presidential candidates; Presidents have always had

30. MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 201 (1913); JAMES MADISON, *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787* 23 (1966); RICHARD BEEMAN, *PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION* 226-57 (2009).

31. *THE FEDERALIST* No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

32. *Id.* at 323.

33. *Id.* at 322.

34. See, e.g., David H. Moore, *Taking Cues from Congress: Judicial Review, Congressional Authorization, and the Expansion of Presidential Power*, 90 *NOTRE DAME L. REV.* 1019 (2015); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 *U. CHI. L. REV.* 123 (1994).

35. RALPH A. ROSSUM, *FEDERALISM, THE SUPREME COURT, AND THE SEVENTEENTH AMENDMENT: THE IRONY OF CONSTITUTIONAL DEMOCRACY* 76-77 (2001).

the slightly longer term of four years.³⁶ Until the ratification of the Seventeenth Amendment,³⁷ Senators were chosen by state legislatures to represent state interests, and even today they retain more autonomy with their longer six-year terms.³⁸ Finally, United States Supreme Court Justices are most indirectly tied to the people, given that the President and Senate select them for what are essentially life terms.³⁹ In this sense, each portion of the new federal government would not just have new powers to check the others—we would expect each institution to do so because the personnel in those four different institutions are responsive to different publics at different times. With this greater understanding of both checks *and* balances, as well as the connection to the general public, it is easier to see the theory behind the design of the Federal Judiciary, the need for the Judiciary to be independent of the other two branches, and the reasons for both the President and the Senate having a role in that selection process.

Indeed, in 1787 the Constitutional Convention delegates expressed a concerned desire to protect judicial independence.⁴⁰ None other than James Madison claimed that all branches, including the Judiciary, should be “independent of each other” and that their powers should “be *independently* exercised.”⁴¹ John Dickinson stated that the Judiciary “ought to be made as independent as possible.”⁴² Rufus King wanted “the Executive and the Judiciary” to be “separate and independent.”⁴³ John Francis Mercer claimed at the Convention that it “is an axiom that the Judiciary ought to be separate from the Legislative: but equally so that it ought to be independent of that department.”⁴⁴ For Charles Pinckney, “Judges should be possessed of competent property to make them independent.”⁴⁵ Edmund Randolph believed that the Constitution should not include any provisions that one could interpret “as weakening too much the independence of the Judges.”⁴⁶ James Wilson agreed that the Judiciary and the other two branches should be “distinct and independent.”⁴⁷

36. *Id.*

37. U.S. CONST. amend. XVII.

38. ROSSUM, *supra* note 35.

39. *Id.*

40. Arthur E. Wilmarth, Jr., *Elusive Foundation: John Marshall, James Wilson, and the Problem of Reconciling Popular Sovereignty and Natural Law Jurisprudence in the New Federal Republic*, 72 GEO. WASH. L. REV. 113 (2003).

41. MADISON, *supra* note 30, at 311, 326 (emphasis in original).

42. *Id.* at 56.

43. *Id.* at 333.

44. *Id.* at 462.

45. *Id.* at 425.

46. *Id.* at 537.

47. *Id.* at 61.

This concern for judicial independence at the Convention led the delegates to give Article III federal judges terms of “good behavior” and prohibit Congress from reducing their salaries.⁴⁸ The Framers agreed to these provisions very early on in the Convention. On May 29, the Virginia Plan proposed the federal court life term, and the delegates approved it just one week later on June 5; on the same day, the Convention adopted the provision that judicial salaries could not be diminished while federal judges served.⁴⁹ Although John Dickinson made a motion later in the Convention to permit Presidents to have some removal power over federal judges, several members spoke against the amendment, including Edmund Randolph, Gouverneur Morris, James Wilson, and John Rutledge. The motion was quickly and overwhelmingly defeated.⁵⁰ This concern with judicial independence was expressed by Alexander Hamilton after the Convention in *Federalist No. 78*, where he proclaimed that the “complete independence of the courts of justice is peculiarly essential in a limited Constitution,” and that “nothing can contribute so much to its firmness and independence as permanency in office.”⁵¹

Although the delegates promptly decided on the importance of the separation of powers and the need to protect judicial independence, the decision on how to select those judges plagued the Convention for an extended period of time. Randolph’s Virginia Plan included a stipulation that “a National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature.”⁵² During subsequent debate early in the Convention, Madison successfully moved to eliminate from the provision that federal judges be appointed “by the Legislature,” because he initially advocated for the Senate only to have such power.⁵³ This motion passed; Charles Pinckney, though, announced that on a later date he would try to reintroduce the language permitting appointment by the entire national legislature.⁵⁴ In the meantime, Hamilton proposed that the Executive select judges, with the Senate having “a right of rejecting or approving” the nominees.⁵⁵ With no resolution in sight, Pinckney and Roger Sherman moved to reinsert the language

48. U.S. CONST. art. III, § 1.

49. MADISON, *supra* note 30, at 32, 68-69.

50. *Id.* at 536-37; CHARLES GARDNER GEYH, WHEN COURTS AND CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA’S JUDICIAL SYSTEM 29-30 (2006).

51. THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

52. MADISON, *supra* note 30, at 32.

53. *Id.* at 68; 1 YALE UNIV. PRESS, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 126 (Max Farrand ed., 1966).

54. YALE UNIV. PRESS, *supra* note 53, at 116.

55. *Id.* at 128.

that the House and the Senate jointly appoint federal judges; Madison argued against allowing the House a role in the appointment process, leading Pinckney and Sherman to withdraw their motion.⁵⁶ The delegates then temporarily agreed to create “a national Judiciary,” including “one supreme tribunal,” whose judges were to be appointed by the Senate.⁵⁷ However, when William Paterson subsequently introduced the New Jersey Plan, the small state-centric rival to the Virginia Plan, it included a provision that federal judges would “be appointed by the Executive.”⁵⁸ Two camps had now developed, with some delegates favoring appointment by the Senate, and others advocating appointment by the President.

Still, in June of 1787, Randolph submitted a revised Virginia Plan, which still created a “national Judiciary” consisting of “One Supreme Tribunal” that would have judges appointed by the Senate.⁵⁹ Randolph’s proposal kept that language in the draft Constitution for approximately one month, until mid-July when Nathaniel Gorham recommended that judges be “appointed by the Executive with the advice and consent of the second branch,” by which he meant the Senate.⁶⁰ Gorham developed this position because he believed that even one chamber of Congress would contain too many people to engage effectively in the selection of judges alone.⁶¹ James Wilson, not impressed by what he saw as a half-measure, made a motion to permit the President to have sole appointment power, something seconded by Gouverneur Morris.⁶² In what was some significant debate, Luther Martin, Roger Sherman, George Mason, and Gunning Bedford argued against the motion, and Gorham and Gouverneur Morris spoke in favor of it.⁶³ When the vote was called on the motion to give the President sole appointment authority, it failed.⁶⁴

This led Gorham to seek a compromise, with him proposing that “Judges be nominated and appointed by the Executive by and with the advice and consent of the second branch and every such nomination shall be made at least ___ days prior to such appointment.”⁶⁵ With very little recorded debate, a vote was called with the motion failing

56. MADISON, *supra* note 30, at 112-13.

57. *Id.* at 116.

58. *Id.* at 120.

59. *Id.* at 150.

60. *Id.* at 314.

61. *Id.*

62. *Id.*

63. *Id.* at 314-17.

64. *Id.* at 317.

65. *Id.*

on a tie vote.⁶⁶ Madison responded with a compromise proposal of his own, allowing the Senate to check presidential appointment power, but only if a supermajority of two-thirds of the Senate rejected a nominee.⁶⁷ During subsequent debate, Madison spoke in favor of his amendment, as did Randolph and Morris; but Charles Pinckney, Oliver Ellsworth, and Mason rebutted these arguments, defending the Senate's sole appointment authority.⁶⁸ Because of the strong opposition, Madison modified his amendment so that the Senate could reject a presidential appointment by a majority vote, but this proposal also failed.⁶⁹ Following this, the Convention voted to affirm that judicial appointment power should remain in the Senate.⁷⁰

In late July, the delegates agreed to insert language giving the President power "to appoint to Offices in cases not otherwise provided for," showing a trend in the Convention towards lodging appointment power generally in the Presidency.⁷¹ At the end of July, and throughout most of August, the judicial appointment power stayed with the Senate alone in drafts of the Constitution.⁷² But the tide began to turn at the end of August and early September. Morris took to the Convention floor and argued against the Senate having judicial appointment power because of what he characterized as the unwieldiness of a legislative body exercising that responsibility.⁷³ The levy then broke in early September when the Committee of Eleven brought forth nine compromise proposals to the Convention floor, including that the "President . . . shall nominate and by and with the advice and consent of the Senate shall appoint . . . Judges of the Supreme Court."⁷⁴ Without any debate recorded on the issue of judicial appointment, the delegates unanimously approved that language.⁷⁵ When the Convention finally adjourned, the finalized language of the Appointments Clause read as follows: "The President . . . shall nominate, and by and with the advice and consent of the Senate, shall appoint . . . judges of the Supreme Court."⁷⁶

Regarding judicial appointment power, the Framers initially disagreed over the best way to achieve their goals of separation of pow-

66. 2 YALE UNIV. PRESS, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 38 (Max Farrand ed., 1966).

67. MADISON, *supra* note 30, at 317.

68. *Id.* at 344-46.

69. *Id.* at 346.

70. YALE UNIV. PRESS, *supra* note 66, at 72.

71. *Id.* at 116.

72. *Id.* at 144-45, 169, 183.

73. MADISON, *supra* note 30, at 517.

74. *Id.* at 575.

75. *Id.* at 598-99; YALE UNIV. PRESS, *supra* note 66, at 533.

76. U.S. CONST. art II, § 2.

ers, checks and balances, and judicial independence. However, the Framers eventually settled on that method of appointment because they thought it would best carry out these goals. As the remainder of this Article will explain, the Framers collectively thought five factors would be paramount regarding judicial selection, and these five factors coincided with their goals for the new government overall. Numerous Framers discussed these five factors throughout the Convention, and shortly after the Convention, key Framers wrote about them in the *Federalist Papers*.

When constructing the judicial appointment process, the selection of a highly qualified nominee was the number one factor that the Framers thought was necessary. Second, the Framers knew that political beliefs—including ideology, constitutional vision, and policy attitudes—would ultimately become a consideration factored into the Supreme Court selection process if politicians chose the Justices. Third, the Framers' statements indicated that they understood some level of representativeness would, and should, factor into the selection process for United States Supreme Court Justices, because Senators and Presidents would need to appeal to the different constituencies that put them into office. Fourth, the Framers' emphasis on checks and balances was, and continues to be, on full display in the Supreme Court selection process, meaning that they intended an active role in the process from both the President and the Senate, understanding the other considerations (like those cited above) would drive senators to be more or less likely to confirm a President's nominee. Fifth, the Framers anticipated that there would be some indirect input and feedback from the public in a judicial selection process that was carried out by elected politicians.

III. PRODUCING A QUALIFIED JUDICIAL NOMINEE

The number one factor that the Framers thought was necessary to consider in their construction of the judicial appointment process was the selection of a highly qualified nominee. The criteria they identified at their Convention debates, and shortly after the Convention, were having a legal background and having legal experience, possibly some judicial experience, and devotion to ethics. Benjamin Franklin talked of this early on at the Convention when he claimed, perhaps a bit comically, that in Scotland lawyers chose judges, and in doing so they "always selected the ablest of the profession in order to get rid of him, and share his practice among themselves," and that the delegates should keep in mind "the interest of the electors to make the

best choice, which should always be made the case if possible.⁷⁷ Thus, Franklin not only thought those who were the most capable and knowledgeable about the law should be chosen as judges, but he also thought, like Madison, that the self-interest of human nature should also be incorporated into the structure of government.⁷⁸ Franklin's statement made clear his belief that whoever selects federal judges needs to have an interest in that process that would promote the selection of quality jurists.

Madison continued this same line of thought as Franklin, claiming that if legislators chose judges it would be problematic because "many of [them] were not judges of the requisite qualifications. The Legislative talents which were very different from those of a Judge, commonly recommended men to the favor of Legislative Assemblies."⁷⁹ Madison assailed congressional selection, claiming that the whole Congress would be "incompetent Judges of the requisite qualifications" for a United States Supreme Court Justice because they would likely choose judges with legislative experience or who were owed political favors by members of Congress.⁸⁰ In this way, Madison feared that Congress would select persons "without any of the essential qualifications for an expositor of the laws," permitting such nominees to "prevail over a competitor not having these recommendations, but possessed of every necessary accomplishment."⁸¹ Madison further stated at the Convention that he wanted the selection of federal judges to tend toward those who would possess "every necessary accomplishment," again emphasizing the importance of quality, including requisite experience, in judicial nominees.⁸² Earlier in the Convention Madison supported Senate appointment of judges, but as the Convention progressed, Madison assured his fellow delegates that it would be best if the President has this appointment power, subject to rejection by the Senate, because "the Executive . . . would in general be more . . . likely to select fit characters than the Legislature."⁸³

Several other delegates also emphasized the need for the process to promote the appointment of qualified judges. For instance, Nathaniel Gorham wanted a selection process which would "ensure a good choice."⁸⁴ Several delegates who spoke on the subject emphasized this point, regardless of which appointment method they advo-

77. MADISON, *supra* note 30, at 67-68.

78. Peter C. Ordeshook, *The Calculus of Consent: Reforming Political Science*, 152 PUB. CHOICE 423, 425 (2012).

79. MADISON, *supra* note 30, at 68.

80. *Id.* at 112-13.

81. *Id.* at 113.

82. *Id.*

83. *Id.* at 113, 344.

84. *Id.* at 314.

cated. Roger Sherman specified the need for an ethical nominee and believed appointment by senators was the best way to achieve this; he declared that it “would be less easy for candidates to intrigue with them, than with the Executive Magistrate.”⁸⁵ Charles Pinckney also defended appointment power by the Senate alone because the President would not have “the requisite knowledge of characters.”⁸⁶ According to Elbridge Gerry, he “could not conceive that the Executive could be as well informed of characters throughout the Union, as the Senate.”⁸⁷ Oliver Ellsworth, also emphasizing the need for ethical Justices, claimed of the President that “it was not to be supposed he could have a better knowledge of characters. He will be more open to caresses [and] intrigues than the Senate.”⁸⁸

On the other hand, Edmund Randolph commented that he laid “great stress on the responsibility of the Executive as a security for fit appointments. Appointments by the Legislatures have generally resulted from cabal [or] from personal regard.”⁸⁹ Moreover, Gouverneur Morris maintained that Senators “must take the character of candidates from the flattering pictures drawn by their friends. The Executive in the necessary intercourse with every part of the [United States] required by the nature of his administration, will or may have the best possible information.”⁹⁰ Clearly, there is no doubt that throughout the Convention, the delegates thought there was a need to appoint meritorious candidates, including not just having proper experience, but also, based on comments about fitness and character, possessing ethical qualities.⁹¹

James Madison and Alexander Hamilton emphasized the same themes in the *Federalist Papers*. For instance, Alexander Hamilton expressed the following sentiments regarding the quality of the President’s appointees in *Federalist No. 76*:

The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation. He will . . . investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to them.⁹²

85. *Id.* at 316.

86. *Id.* at 344.

87. *Id.* at 345.

88. *Id.*

89. *Id.* at 344.

90. *Id.* at 345.

91. William G. Ross, *The Functions, Roles, and Duties of the Senate in the Supreme Court Appointment Process*, 28 WM. & MARY L. REV. 633, 638-50 (1987).

92. THE FEDERALIST NO. 76, at 455-56 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Put another way, Hamilton believed that Presidents' concerns with their legacies would lead them to make quality appointments. He then claimed that if instead the Senate had the appointment power, "the intrinsic merit of the candidate will be too often out of sight" due to the logrolling of candidates.⁹³ Such horse-trading would be less likely under the Constitution's design, according to Hamilton, leading to the selection of better candidates. In the same paper, Hamilton argued that the Senate would confirm most nominees: "[I]t is not likely that their sanction would often be refused, where there were not special and strong reasons for the refusal."⁹⁴ The Senate would approve most nominations if the President chose a meritorious candidate with no ethical problems. For Hamilton, it is the Senate checking the President that will "tend greatly to prevent the appointment of unfit characters."⁹⁵ In other words, Hamilton predicted that overall, candidates of real quality, not cronies, were likely to be appointed.⁹⁶

In *Federalist No. 51*, Madison wrote similar thoughts to those he expressed at the Convention and by his colleague, Hamilton. Referring to the Federal Judiciary, Madison wrote that "peculiar qualifications being essential in the members, the primary consideration ought to be to select that mode of choice which best secures these qualifications."⁹⁷ This line leaves no doubt that Madison, like the other Framers who wrote and spoke on the subject, thought judges needed to have specific qualifications and that the Constitution's selection process would best ensure candidates of such merit.

Thus, there is ample evidence among many key Framers' statements that indicate an overriding concern with making sure that United States Supreme Court Justices would be of the highest quality, broadly defined. They believed in the need for minimum basic qualifications for federal jurists. They did not place on federal judges any formal qualifications—such as the age, residency, and citizenship qualifications they required for Presidents,⁹⁸ Senators,⁹⁹ and House members¹⁰⁰—but they did consistently express during the Constitutional Convention and afterwards the need for qualified, ethical appointees to the Court. There is no question that Presidents and Senators through today have been concerned about the quality of a Court nominee. Indeed, all nominees have been lawyers, almost all

93. *Id.* at 456.

94. *Id.* at 457.

95. *Id.*

96. Ross, *supra* note 91, at 640.

97. THE FEDERALIST NO. 51, at 321 (James Madison) (Clinton Rossiter ed., 1961).

98. U.S. CONST. art II, § 1.

99. *Id.* art I, § 3.

100. *Id.* § 2.

have had governmental (often judicial) experience, and many in the modern era have attended elite law schools.¹⁰¹ On the Senate side, nominees ranked as highly qualified in newspaper editorials tend to receive many more votes than those who are unqualified,¹⁰² and nominees with ethical shortcomings will often provide Senators with reasons to vote against them,¹⁰³ making them less likely to be confirmed.

IV. THE ROLE OF POLITICAL BELIEFS

In addition to wanting qualified, meritorious, ethical Justices, the Framers believed they were setting a process in motion where other factors would be relevant. Being the political scientists they were, they also believed that political beliefs (including ideologies, constitutional visions, and policy attitudes) would be considered in the United States Supreme Court nomination process. The Constitution has sometimes been referred to as a “bundle of compromises,”¹⁰⁴ and in this sense, it demonstrates that the Framers at the Constitutional Convention were practical politicians.¹⁰⁵ Thus, this group also knew that, as a practical matter, they were establishing a selection process in which Presidents, and indirectly Senators, would try to put Justices on the Court who held beliefs commensurate with their own. In doing this, they envisioned a system in which politics would be an inevitable part of the federal judicial appointment process.¹⁰⁶ Although this factor was frequently articulated in implicit (as opposed to explicit) statements by the delegates, because they were uneasy about this consideration dominating the process, their statements reveal that they were aware they were creating a process where political beliefs would be regularly contemplated during judicial appointments. One point is noteworthy in this regard. Political parties as we understand them today did not exist at the Constitutional Convention. However, the delegates disagreed strongly over states’ rights—including the fissures between large states and small states, as well as the one that divided slave states from free states—and these disagreements were

101. Susan Navarro Smelcer, *Supreme Court Justices: Demographic Characteristics, Professional Experience, and Legal Education, 1789-2010*, CONG. RES. SERV. 11-31 (Apr. 9, 2010), <https://fas.org/sgp/crs/misc/R40802.pdf>.

102. LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 103-06 (2005).

103. JOHN MASSARO, *SUPREME POLITICAL: THE ROLE OF IDEOLOGY AND PRESIDENTIAL MANAGEMENT IN UNSUCCESSFUL SUPREME COURT NOMINATIONS* 8 (1990).

104. FARRAND, *supra* note 30, at 201.

105. Richard B. Bernstein, *Charting the Bicentennial*, 87 COLUM. L. REV. 1565, 1584 (1987).

106. James E. Gauch, *The Intended Role of the Senate in Supreme Court Appointments*, 56 U. CHI. L. REV. 337, 355-57 (1989).

comparable to the partitions that eventually arose between political parties in the early United States during the 1790s.¹⁰⁷

Regarding this factor, James Madison was once again a leading figure at the Convention. When he proposed for Justices to be appointed by the President unless rejected by a two-thirds vote of the Senate, he claimed that “in case of any flagrant partiality or error, in the nomination it might be fairly presumed that [two-thirds] of the second branch would join in putting a negative on it.”¹⁰⁸ Madison’s language here is telling. He could have stated that if there were *any* partiality by the President in judicial appointments, then the Senate would be justified in rejecting the appointment. Instead, he proclaimed that the Senate would be able to reject an appointment involving “*flagrant* partiality or error.” This implies that *some* political partiality would be acceptable in judicial appointments, and it is something we should expect in a political selection process. Edmund Randolph also expressed his concerns with too much partiality injected into judicial appointments if Congress controlled the entire process: “Appointments by the Legislatures have generally resulted from cabal, from personal regard, or some other consideration than a title derived from the proper qualifications.”¹⁰⁹ Randolph’s characterization of some “other consideration” is most logically understood as overt partiality or similar political considerations. It cannot be “cabal” or “personal regard,” as he had already cited those factors. Since Randolph’s statement was during the same debate as Madison’s above, one can conclude that the “other consideration” was something akin to political or ideological contemplations. This potential problem of legislative judicial appointments, Randolph and Madison argued, would not occur as much with presidents making the selections, although their wording suggests that political considerations will still surface in any appointment made by public officials.¹¹⁰

Those delegates who wanted a stronger role for the Senate in the appointment process made similar statements about political considerations. As noted above, George Mason defended unilateral Senate power over judicial appointments. Before the Convention had decided on which body would conduct presidential impeachments, he made the following statement: “The mode of appointing the Judges may depend in some degree on the mode of trying impeachments of the Executive. If the Judges were to form a tribunal for that purpose, they surely

107. *Id.* at 357-58.

108. MADISON, *supra* note 30, at 344.

109. *Id.*

110. John C. Eastman, *The Limited Nature of the Senate’s Advice and Consent Role*, 36 U.C. DAVIS L. REV. 633, 643 (2003).

ought not to be appointed by the Executive.”¹¹¹ Mason believed that if federal judges formed an impeachment tribunal (which the delegates eventually placed in the duties of the Senate),¹¹² a Justice who has the same political views or ideology as a President, particularly a President who appointed that Justice, would be likely to keep that President in office when the evidence clearly would suggest otherwise to a neutral observer. There could be other reasons for Mason to have this concern about executive influence, such as Presidents engaging in nepotism in their Supreme Court appointments, but political similarities also lead to this concern.¹¹³ During the same debate, Gouverneur Morris implied a comparable concern about the potential for ideological or political closeness between Justices and the Presidents who appointed them, when he proclaimed that “it would be improper for an impeachment of the Executive to be tried before the Judges. The latter would in such case be drawn into intrigues with the Legislature and an impartial trial would be frustrated.”¹¹⁴ This was an even more forthright claim, and it is evidence that the Framers thought federal judges, including Supreme Court Justices, would be political actors. This would also then be something they would expect Presidents and Senators to factor into their decisions on appointments, although they could not have precisely envisioned the effects of partisan polarization in contemporary American politics.¹¹⁵

Once the Convention ended, Hamilton addressed this factor multiple times in *The Federalist Papers*. For instance, in *Federalist No. 66*, Hamilton told his readers that, since the President would be permitted to nominate a second Justice if the Senate rejected the first one, “it could hardly happen, that the majority of the Senate would feel any other complacency towards the object of an appointment than such as the appearances of merit might inspire, and the proofs of the want of it destroy.”¹¹⁶ Like Madison and Randolph above, Hamilton’s word choice is telling. He noted not that *actual* merit, but rather the *appearance* of merit, would be a factor that Senators would use when voting on a judicial nomination. Therefore, one can deduce that Hamilton expected Senators to publicly claim they were searching for proof of merit, but by stating that they would be interested in the *appearance* of merit, he was implying that both Presidents and Senators

111. MADISON, *supra* note 30, at 315.

112. U.S. CONST. art. I, § 3.

113. Gauch, *supra* note 106, at 344-45.

114. MADISON, *supra* note 30, at 315.

115. James I. Wallner, *The Foundations of Advice & Consent: Original Intent & the Judicial Filibuster*, 31 J.L. & POL. 297, 329 (2016).

116. THE FEDERALIST NO. 66, at 405 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

could collaborate on the appointment of Justices, focusing on the public “merit” of a nominee, when the real reason behind their support of the candidate is because of the similarity of political/ideological beliefs. Although others have used this passage by Hamilton as evidence that Hamilton thought merit should be the only criterion considered by the Senate during Court confirmations,¹¹⁷ a more careful reading of Hamilton’s choice of language here implies otherwise.

Indeed, Hamilton continued this line of reasoning in *Federalist No. 69*, where he made this statement: “In the national government, if the Senate should be divided, no appointment could be made.”¹¹⁸ This short sentence does not just explain procedurally the appointment process, but also implies that he expected the President and the Senate to consider the political views of judicial nominees. Hamilton’s use of the word “divided” cannot be read to mean that there would be a tie vote in the Senate, as then the Vice President would cast the tie-breaking vote, which one would typically expect to be in support of the President’s nominee,¹¹⁹ even before the formation of political parties that led to presidential and vice-presidential candidates to run on tickets together. Again, unlike House members, Senators, and Presidents, the Constitution does not require any qualifications for Justices,¹²⁰ so it is not unreasonable to expect that political considerations would factor into the process accordingly. Moreover, if Senators were “divided” politically, then they would likely reject a nominee out of line with their political beliefs.

Finally, in *Federalist No. 76*, Hamilton reasoned that “in every exercise of the power of appointing to offices, by an assembly of men, we must expect to see a full display of all the private and party likings and dislikes, partialities and antipathies, attachments and animosities, which are felt by those who compose the assembly.”¹²¹ Therefore, according to Hamilton, the “choice which may at any time happen to be made under such circumstances, will of course be the result either of a victory gained by one party over the other, or of a compromise between the parties.”¹²² Put another way, Hamilton shows us why we

117. See, e.g., Matthew D. Marcotte, *Advice and Consent: A Historical Argument for Substantive Senatorial Involvement in Judicial Nominations*, 5 N.Y.U. J. LEGIS. & PUB. POL’Y 519, 533 (2001); Roger D. Miner, *Advice and Consent in Theory and Practice*, 41 AM. U. L. REV. 1075, 1079 (1992).

118. THE FEDERALIST NO. 69, at 421 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

119. Wallner, *supra* note 115, at 311-12.

120. JOHN ANTHONY MALTESE, THE SELLING OF SUPREME COURT NOMINEES 17-18 (1998).

121. THE FEDERALIST NO. 76, at 456 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

122. *Id.*

should fear a legislature exclusively holding judicial appointment power, because in that case, party consideration would be on *full* display; nevertheless, the implication is that if a legislative body is involved in an appointment process, we would expect *some* party consideration to occur. Indeed, although a confirmation does not involve an exclusive decision by a legislative body, similar considerations would certainly arise in that same setting. In other words, we can never completely take the politics out of the appointment process, even if the Framers tried to minimize it by also requiring the President's involvement.

The Framers were well aware of how political the process would be, and they saw a balance in a Court that was both independent, with life terms and salary protections, but also subject to political accountability via selection by politicians like Presidents and Senators. Although the Framers did not express their concern with this factor as explicitly as they did regarding the necessity for quality in Supreme Court appointees, a critical inspection of the Framers' relevant statements and writings reveal that they knew politics would inevitably be part of the selection process. This factor has remained an indelible part of the Supreme Court appointment process, with more than four of five Court nominees over the last century being of the same political party as the President, and with political ideology remaining an important consideration for Presidents when choosing nominees.¹²³

V. REPRESENTATIVENESS OF JUDICIAL NOMINEES

Another factor the Framers contemplated was representativeness, which also can be understood when one thinks of the Framers' concern with accountability, noted above. What constitutes "representativeness" has changed over time—initially from geographical representativeness to religion, and then to race and gender—but it is another persistent part of the judicial appointment process.¹²⁴ There are multiple reasons why a judicial nominee's background, specifically geographical origins, were important at the Constitutional Convention. First, the Framers permitted federal courts to have diversity jurisdiction in Article III,¹²⁵ ensuring that a judge's state of origin would be an important consideration. Second, the Framers gave a role in the appointment process to the Senate, a body intended to protect

123. Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 HARV. J.L. & PUB. POL'Y 467, 485-95 (1998).

124. William J. Daniels, *The Geographic Factor in Appointments to the United States Supreme Court, 1789-1976*, 31 WESTERN POL. Q. 226 (1978); SMELCER, *supra* note 101, at 6-11.

125. Stone Grissom, *Diversity Jurisdiction: An Open Dialogue in Dual Sovereignty*, 24 HAMLINE L. REV. 372, 378-81 (2001).

state interests, particularly small state interests; in this sense, the Framers put in place a system in which geography would not go unnoticed in judicial appointments.¹²⁶ Third, the state-based Electoral College elects the President, so there would be reasons for the President to think about the geography of Supreme Court nominees when considering reelection.¹²⁷ Later, constitutional amendments expanding the right to vote and Supreme Court decisions protecting religious liberty helped to promote other demographic factors being considered in judicial nominations, including religion,¹²⁸ race,¹²⁹ and gender.¹³⁰ Nevertheless, under the unamended Constitution, the type of representativeness that Presidents and Senators were most concerned with initially involved geographical diversity. Put succinctly by Gouverneur Morris, “the States in their corporate capacity will frequently have an interest staked on the determination of the Judges.”¹³¹

Delegates raised this geographical concern multiple times at the Constitutional Convention, especially while the delegates were arguing over which of the first two branches should appoint members of the third branch. Those who initially advocated for appointment solely by the Senate saw this as a particularly striking argument in favor of their position. According to Roger Sherman, “the Judges ought to be diffused, which would be more likely to be attended to by the second branch, than by the Executive.”¹³² Clearly, one very reasonable reading of Sherman’s use of the term “diffused” is to support geographical distribution in the Judiciary, although one can also understand this to include diversity in other forms.¹³³ For Edmund Randolph, “the hope of receiving appointments would be more diffusive if they depended on the Senate, the members of which would be diffusively known, than if they depended on a single man who could not be personally known to a very great extent.”¹³⁴ Gunning Bedford agreed,

126. Gauch, *supra* note 106, at 350.

127. See Bradley W. Joondeph, *Law, Politics, and the Appointments Process*, 46 SANTA CLARA L. REV. 737, 760 (2006) (reviewing LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* (2005)).

128. See U.S. CONST. amend. I; *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Reynolds v. United States*, 98 U.S. 145 (1879).

129. See U.S. CONST. amend. XIV, § 1; *id.* amend. XV, § 1; *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

130. See U.S. CONST. amend. XIV, § 1; *id.* amend. XIX; *Craig v. Boren*, 429 U.S. 190 (1976).

131. MADISON, *supra* note 30, at 345.

132. *Id.* at 315.

133. See David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1499 (1992).

134. MADISON, *supra* note 30, at 316.

stating that smaller states in particular would be more likely to be represented on the Supreme Court if the Senate did the appointing, because the President “would put it in his power to gain over the larger States, by gratifying them with a preference of their Citizens,”¹³⁵ in order to get reelected. George Mason feared that if the President had sole judicial appointment power,

as the Seat of Government must be in some one State, and as the Executive would remain in office for a considerable time, for [four], [five], or [six] years at least, he would insensibly form local and personal attachments within the particular State that would deprive equal merit elsewhere, of an equal chance of promotion.¹³⁶

Put another way, for Mason, geography would inevitably enter into the judicial appointment process, but he wished for that to be minimized (when compared to merit), and he thought the best way to do this would be to give the Senate that power because the Senators collectively would not be beholden to special interests from the same place.

However, delegates who early on at the Convention advocated for the President to have sole appointment power also argued that geographical diversity would be better served under their proposal. For instance, Nathaniel Gorham claimed that as “the Executive will be responsible in point of character at least, for a judicious and faithful discharge of his trust, he will be careful to look through all the States for proper characters.”¹³⁷ On the other hand, he argued that members of the Senate “will be as likely to form their attachments at the seat of Government where they reside, as the Executive. If they cannot get the man of the particular State to which they may respectively belong, they will be indifferent to the rest.”¹³⁸ Moreover, for Gorham, “the Senate could have no better information than the Executive. They must like him, trust to information from the members belonging to the particular State where the Candidates resided.”¹³⁹ James Madison claimed that the “Executive Magistrate would be considered as a national officer, acting for and equally sympathizing with every part of the United States,”¹⁴⁰ implying that the President would be better suited to choosing Justices from throughout the country because the President would represent the entire country.¹⁴¹ Madison continued

135. *Id.*

136. *Id.* at 315.

137. *Id.*

138. *Id.*

139. *Id.* at 316.

140. *Id.* at 344.

141. Laura S. Fitzgerald, *Cadenced Power: The Kinetic Constitution*, 46 DUKE L.J. 679, 753 (1997).

on to note, however, that if the Senate “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.”¹⁴² For example, the smallest states might band together to ensure that judicial nominees come from their states, something possible in an institution like the Senate that gives equal representation to each state. In particular, Madison expressed worry that slavery would divide the Senators too much, as he opined that the issue would “throw the appointments entirely into the hands of the Northern States, [and] a perpetual ground of jealousy and discontent would be furnished to the Southern States.”¹⁴³ According to Madison, the sectional interests on each side of the slavery issue, divided geographically, would be better and more equitably represented on the federal bench with appointment by the President.¹⁴⁴

Thus, there is no question that delegates on both sides of the “Presidency versus Senate” judicial appointment debate believed that a representative Court was important. Once they agreed to a joint appointment method and concluded their business at the Convention, Alexander Hamilton in the *Federalist Papers* continued to stress this concern. For instance, in *Federalist No. 76*, Hamilton made clear his belief that since the President, who represents the entire country, initiates the judicial appointment process, this prevents the President from choosing someone because of “[s]tate prejudice,”¹⁴⁵ something more likely to be seen in legislative appointments. Put another way, Hamilton assured his readers that the President would not typically select a nominee “from the same State to which he particularly belonged,”¹⁴⁶ a factor which might become the norm in a legislative appointment process. For a final post-Convention validation about the relevance of geographical diversity in the judicial selection process, one can turn to a letter from James Madison to Thomas Jefferson on June 27, 1823. In Madison’s estimation, the Constitutional Convention “intended the Authority vested in the Judicial Department as a final resort in relation to the States,” which one can see in the fact that the appointment process requires “the concurrence of the Senate chosen by the State Legislatures, in appointing the Judges.”¹⁴⁷ For

142. MADISON, *supra* note 30, at 344.

143. *Id.*

144. Jack N. Rakove, *The Madisonian Moment*, 55 U. CHI. L. REV. 473, 488 (1988).

145. THE FEDERALIST NO. 76, at 457 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

146. *Id.* at 458.

147. *Letter from James Madison to Thomas Jefferson (Jun. 27, 1823)*, in MADISON: WRITINGS 801 (Jack N. Rakove ed., 1999).

an older Madison looking back at the Convention's work, Senators from each state have an opportunity to scrutinize judicial nominees and protect their regional interests, yet another proclamation that this type of representativeness would be factored into the judicial appointment process.

There is no question, then, that the Framers were concerned about Supreme Court nominees being representative. The first informal form of representativeness was based on geography, which is an expected consequence of having a Senate representing states and a President who is eligible for reelection by the state-based Electoral College. The Justices' circuit riding during the Court's first century intensified this factor.¹⁴⁸ As circuit riding ended, however, and as presidential elections changed and Senators were subject to direct election, identity politics became the norm.¹⁴⁹ This led to geography being superseded by religion, then by race and gender.¹⁵⁰ Indeed, as Supreme Court decisions more strongly protected the freedom of religion under the First Amendment,¹⁵¹ and as constitutional amendments were ratified mandating that the right to vote may not be denied based on race and gender,¹⁵² this (along with social movements and supportive Supreme Court decisions) eventually spurred on more political participation by women, persons of color, and persons of different religious faiths.¹⁵³ This resulted in more emphasis on these factors during the Supreme Court nomination process, demonstrating the enduring importance of representativeness, even if the forms of representation most strongly considered by Presidents and Senators have changed over time. Indeed, representativeness—measured geographically, or more modernly in terms of race, gender, or religion—has been an enduring factor in Court appointments since 1789.¹⁵⁴

148. Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 475 (1989).

149. Ken I. Kersch, *Constitutional Conservatives Remember the Progressive Era*, in *THE PROGRESSIVES' CENTURY: POLITICAL REFORM, CONSTITUTIONAL GOVERNMENT, AND THE MODERN AMERICAN STATE* 130, 146 (Stephen Skowronek et al. eds., 2016).

150. SMELCER, *supra* note 101, at 6-11.

151. *See Cantwell*, 310 U.S. 296; *Everson*, 330 U.S. 1.

152. *See* U.S. CONST. amend. XV, § 1; *id.* amend. XIX.

153. *See* Lauren E. Smith & Lee Demetrius Walker, *Belonging, Believing, and Group Behavior: Religiosity and Voting in American Presidential Elections*, 66 POL. RES. Q. 399 (2013); Tasha S. Philpot et al., *Winning the Race: Black Voter Turnout in the 2008 Presidential Election*, 73 PUB. OPINION Q. 995 (2009); Glenn Firebaugh & Kevin Chen, *Vote Turnout of Nineteenth Amendment Women: The Enduring Effect of Disfranchisement*, 100 AM. J. SOC. 972 (1995).

154. *See* SMELCER, *supra* note 101, at 6-11.

VI. CHECKS AND BALANCES

In many ways, the factors above lead to the conclusion that the judicial selection process is part of the larger system of checks and balances that the Framers forged at the Constitutional Convention. Specifically, this selection process was meant to offer active roles to both the President and the Senate,¹⁵⁵ meaning that the types of nominees ultimately selected would be a product of the relative standing of the President and Senate. In other words, Presidents in more powerful political positions would be more likely to get nominees of their choosing confirmed, and those in a less powerful position would be less likely to accomplish this feat. Likewise, if the Senate were in a more advantageous position politically, it would be more likely to force the President's hand when making a nomination or rejecting a nominee on the Senate floor.¹⁵⁶ What the Framers envisioned here was that the factors cited above would ultimately lead to either an agreeable or a hostile Senate, resulting in either confirmation or some form of non-appointment. The most important consideration with this factor is that since the delegates could not agree on one or the other (the President or the Senate) appointing Justices, they ensured that the two branches would need to work together and moderate each other.

As demonstrated above, during much of the Convention, the delegates were divided into two camps over judicial appointment: those who supported unilateral appointment by the Senate and those who advocated sole appointment by the President. Each side believed that the other side's position would lead to some type of danger, which is why they collectively had difficulty reaching a consensus over who should appoint the Justices. For instance, James Wilson defended Executive appointment because he believed that "[i]ntrigue, partiality, and concealment" would result from Legislative appointment, whereas a "principal reason for unity in the [E]xecutive was that officers might be appointed by a single, responsible person."¹⁵⁷ According to James Madison early in the Convention, "the election of the Judges by the Legislature or any numerous body" was disagreeable.¹⁵⁸ For Madison, if Congress selected federal judges, members of Congress would be "too much influenced by their partialities," and instead of appointing persons of merit, the legislators would appoint those to whom they owed political favors.¹⁵⁹ Nathaniel Gorham agreed, claiming of the Senate that the body was "too numerous, and

155. Strauss & Sunstein, *supra* note 133, at 1494.

156. MASSARO, *supra* note 103, at 33.

157. MADISON, *supra* note 30, at 67.

158. *Id.* at 68.

159. *Id.* at 112.

too little personally responsible.”¹⁶⁰ Gorham would later remark that “[p]ublic bodies feel no personal responsibility, and give full play to intrigue & cabal,” when compared to a singular President.¹⁶¹

On the other side of the argument, John Rutledge wanted the Senate to choose judges because he “was by no means disposed to grant so great a power to any single person. The people will think we are leaning too much towards Monarchy.”¹⁶² Roger Sherman agreed, stating to the Convention that he “was clearly for an election by the Senate. It would be composed of men nearly equal to the Executive, and would of course have on the whole more wisdom.”¹⁶³ Edmund Randolph thought that the debate and method of tallying the votes in a legislative body like the Senate would be better than leaving the choice to a single person with no record of deliberation on the issue: “[T]he advantage of personal responsibility might be gained in the Senate by requiring the respective votes of the members to be entered on the Journal.”¹⁶⁴ Along the same lines, Gunning Bedford thought there were “solid reasons against leaving the appointment to the Executive,” due to the fact that the President “must trust more to information than the Senate.”¹⁶⁵ For Oliver Ellsworth, the “Executive will be regarded by the people with a jealous eye” because “[e]very power for augmenting unnecessarily his influence will be disliked”¹⁶⁶ if the President would have the sole appointment power of federal judges. Finally, George Mason considered “appointment by the Executive as a dangerous prerogative. It might even give him an influence over the Judiciary department itself,”¹⁶⁷ something Mason saw as upsetting the balance of power in the inability of the branches to check each other.

The delegates disagreed over which potential appointer—the President or the Senate—would be more dangerous, yet everyone in the Convention seemed to believe that at least *one* institution would be dangerous. As noted above, this sentiment led Madison initially to propose a compromise position in which the President would appoint federal judges as long as at least one-third of senators agreed.¹⁶⁸ Madison told his fellow delegates that his compromise position would “unite the advantage of responsibility in the Executive with the security afforded in the second branch against any incautious or corrupt

160. *Id.* at 314.

161. *Id.* at 315.

162. *Id.* at 67.

163. *Id.* at 316.

164. *Id.*

165. *Id.*

166. *Id.* at 345.

167. *Id.*

168. *Id.* at 316.

nomination by the Executive.”¹⁶⁹ This emphasis on checks and balances is something Madison later averred as sensible because “the Executive . . . would in general be more capable . . . than the Legislature, or even the second branch of it, who might hide their selfish motives under the number concerned in the appointment.”¹⁷⁰ Madison believed that a presidential nomination and some form of Senate confirmation would work best because the Senate would be “composed of equal votes from all the States,” and “the principle of compromise” would prevail “in this that there should be a concurrence of two authorities.”¹⁷¹ For Madison (as well as Hamilton),¹⁷² the membership of the House would be too numerous to handle judicial appointments, but the smaller Senate would be so divided by its system of equal representation for each state that it could not effectively appoint judges either. If some of his colleagues feared giving the President too much power with appointments, and others were concerned about giving the Senate too much power (Madison had concerns about either institution exercising the power unilaterally),¹⁷³ why not share the power between the President and the Senate? Furthering the notion that checks and balances should be built into the Constitution, Madison thought that his approach was in line with the “principle of compromise,” something that permeated the entire Convention.¹⁷⁴ George Mason, however, thought that Madison’s “compromise” position was really giving the appointment power to the President: “Notwithstanding the form of the proposition by which the appointment seemed to be divided between the Executive and Senate, the appointment was substantially vested in the former alone.”¹⁷⁵ As described above, this compromise failed when Madison proposed it, and it probably did so because, in the eyes of too many delegates, it gave the President an inordinate amount of power in the appointment process, as it would have required Senate rejections to be by the supermajority vote of two-thirds.¹⁷⁶

When the Committee of Eleven recommended the compromise position that the Convention eventually affirmed, it did offer the Senate

169. *Id.*

170. *Id.* at 344.

171. *Id.*

172. Mary L. Clark, *Advice and Consent vs. Silence and Dissent?: The Contrasting Roles of the Legislature in U.S. and U.K. Judicial Appointments*, 71 LA. L. REV. 451, 459 (2011).

173. Wallner, *supra* note 115, at 305-06.

174. FARRAND, *supra* note 30, at 201.

175. MADISON, *supra* note 30, at 345.

176. Brent Wible, *Filibuster vs. Supermajority Rule: From Polarization to a Consensus—and Moderation—Forging Mechanism for Judicial Confirmations*, 13 WM. & MARY BILL RTS. J. 923, 939 (2005).

more checking power in the process, including the ability to reject a nominee with a simple majority vote.¹⁷⁷ When this proposal went before the Convention in September, there was no recorded debate specific to judicial appointments, with the delegates instead generally discussing the President's appointment power over all federal offices. There were at least two delegates, James Wilson and Charles Pinckney, who expressed concerns with the sharing of appointment power between the President and the Senate.¹⁷⁸ However, that portion of Article II, Section 2 was adopted by the Convention, and before it was, Gouverneur Morris maintained that "as the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security."¹⁷⁹ This short statement clearly surmises that the delegates believed the President and the Senate would check and balance each other on judicial appointments, meaning that each institution would have a significant role in the process.

Alexander Hamilton confirmed the importance of this factor in a series of statements he made in the *Federalist Papers*. For example, Hamilton wrote favorably of the "expediency of the junction of the Senate with the Executive, in the power of appointing to offices."¹⁸⁰ This was a confirmation that Hamilton wanted to see power exercised by both the Senate and the President in the judicial appointment process. In this vein, Hamilton viewed the President's role as relatively constrained within a checks and balances framework.¹⁸¹ In *Federalist No. 69*, he wrote that there is

a great inferiority in the power of the President, in this particular, to that of the British king; nor is it equal to that of the governor of New York, if we are to interpret the meaning of the constitution of the State by the practice which has obtained under it.¹⁸²

Hamilton went on to characterize the President's role as one of nothing more than a "concurrent authority in appointing to offices."¹⁸³ Later, in *Federalist No. 76*, he explained that giving the Senate a role in the appointment process prevents the "disadvantages which might attend the absolute power of appointment in the hands of" the Presi-

177. MADISON, *supra* note 30, at 598-99.

178. *Id.* at 598.

179. *Id.*

180. THE FEDERALIST NO. 66, at 403 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

181. Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 269 (2009).

182. THE FEDERALIST NO. 69, at 421 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

183. *Id.* at 422.

dent.¹⁸⁴ He would go on to succinctly state that the Senate’s advice and consent power would have “a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President.”¹⁸⁵ Thus, the Senate could exercise its power both before and after the President makes a nomination. According to Hamilton’s commentary in *Federalist No. 77*, the Senate’s role is one of “influencing the President” in the sense of “restraining him” before the choice is even made.¹⁸⁶

Indeed, Hamilton argued in the *Federalist Papers* that there would be inherent dangers if the President had sole appointment power, surmising that “a man who had himself the sole disposition of offices, would be governed much more by his private inclinations and interests, than when he was bound to submit the propriety of his choice to the discussion and determination of a different and independent body.”¹⁸⁷ Under the system laid out in Article II of the Constitution, though, the “possibility of rejection [by the Senate] would be a strong motive to care in proposing” nominees.¹⁸⁸ When viewed in light of his statements above, Hamilton in this passage was asserting to his readers that Presidents would need to assess the political environment of the Senate and make nominations not just of the President’s liking but also of the liking of a sufficient number of Senators. This way of limiting the President protects the public from poor choices in judicial nominees, as “the restraint would be salutary,” while also not “destroy[ing] a single advantage to be looked for from the uncontrolled agency of that Magistrate.”¹⁸⁹ In other words, involving both branches in the nomination process would “produce all the good, without the ill”¹⁹⁰ because they would check each other in this regard similar to how it was expected that Congress and the President would check each other over treaties, laws, and other matters.¹⁹¹

Yet, Hamilton also had to assuage the fears of those who were opposed to the President having too small of a role in the judicial appointment process. He largely did this in *Federalist No. 66* by stating

184. THE FEDERALIST NO. 76, at 456 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

185. *Id.* at 457.

186. THE FEDERALIST NO. 77, at 460 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

187. THE FEDERALIST NO. 76, at 457 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

188. *Id.* at 458.

189. THE FEDERALIST NO. 77, at 460 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

190. *Id.*

191. Hanah Metchis Volokh, *The Two Appointments Clauses: Statutory Qualifications for Federal Officers*, 10 U. PA. J. CONST. L. 745 (2008).

that it would be the duty of “the President to *nominate*, and, with the advice and consent of the Senate, to *appoint*,” and that there “will, of course, be no exertion of *choice* on the part of the Senate. They may defeat one choice of the Executive, and oblige him to make another; but they cannot themselves *choose*, they can only ratify or reject the choice of the President.”¹⁹² According to Hamilton, even though there would be a sharing of power between these two institutions, the President would have the choice of nominees, with the Senate holding the power to evaluate these nominations.¹⁹³ Granted, the Senate could “entertain a preference to some other person, at the very moment they were assenting to the one proposed, because there might be no positive ground of opposition to him,” but Senators would also need to be careful in rejecting a nomination because “they could not be sure, if they withheld their assent, that the subsequent nomination would fall upon their own favorite, or upon any other person in their estimation more meritorious than the one rejected.”¹⁹⁴ Nevertheless, Hamilton envisioned an energetic role for the Senate, and one of not just deciding whether or not to give consent, but also, based on his comments, one of actively offering “advice” on whom future Supreme Court nominees should be by entertaining their preference for someone else.

Throughout the statements and writings of the Constitutional Convention, delegates expressed, repeatedly, that a reliance on checks and balances within a system of separated powers would help promote the best possible judicial selections. The Framers had a strong distrust of any persons who held power in government generally,¹⁹⁵ and their views on whoever would fill the office of President and U.S. Senators were no different. In this regard, they thought that checks and balances would help ensure that a quality, representative nominee would be chosen. Indeed, based on Framers statements cited in Section IV,¹⁹⁶ we can also infer that, although the Framers thought political considerations would filter into the judicial selection process, those considerations would be tempered by having both the Executive and the Senate jointly participating in these appointments. Overall, a President’s Court nominee is less likely to be confirmed if the President is in a relatively weak position compared to the Senate, or if the

192. THE FEDERALIST NO. 66, at 405 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis in original).

193. William G. Ross, *The Supreme Court Appointment Process: A Search for a Synthesis*, 57 ALB. L. REV. 993, 998 (1994).

194. THE FEDERALIST NO. 66, at 405 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis in original).

195. See, e.g., THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) (emphasis in original).

196. See *supra* notes 108-09, 111, 114, 116, 118, 121-22 and accompanying text.

Senate is not controlled by the President's party,¹⁹⁷ demonstrating that the world's greatest deliberative body continues to serve as a check on the President's ability to pack the Court, just as the Framers envisioned.

VII. INPUT AND FEEDBACK FROM THE PUBLIC

One last major factor the Constitutional Convention delegates considered in 1787 was the function public feedback and input would play in Supreme Court nominations. Much like the role of checks and balances, some ability of the people (beyond U.S. Senators) to be involved in the selection process was seen as a way to help guarantee both quality and representativeness on the Court. In this sense, the Framers believed that members of the public would offer input to Presidents before nominations were made, and that they would give feedback on nominations to Senators during the confirmation process; the system was also designed so that after a confirmation or rejection, the public could offer its feedback to both the President and the Senate at the ballot box. Even though the ability of the public to influence the President and the Senate was relatively limited under the original Constitution,¹⁹⁸ the Framers saw a role for members of the public to offer input both before and during the selection process.

To be sure, James Madison professed at the Constitutional Convention that appointment solely by Congress (including both the House and the Senate) was problematic because members of a large legislature would tend to appoint judges who had "assisted . . . members in the business of their own, or of their Constituents."¹⁹⁹ Put another way, Madison was expressing a fear that too much input into the judicial selection process would result in legislators appointing judges as a way to repay political favors. However, as the paragraphs below demonstrate, Madison and his colleagues did believe that some input by, or feedback from, the public would be proper, and even encouraged by the selection process. Hamilton confirmed that he believed in this being factored into judicial appointments as well, when he proclaimed at the Constitutional Convention that in a representative government, "magistrates" should be "appointed, and vacancies . . . filled, by the people, or a process of election originating with the people."²⁰⁰

Indeed, at the Convention, there were several other statements by the delegates advocating for some, but not too much, public involve-

197. See, e.g., MASSARO, *supra* note 103, at 33; MALTESE, *supra* note 120, at 5.

198. See ROSSUM, *supra* note 35.

199. MADISON, *supra* note 30, at 113.

200. *Id.* at 136.

ment in the judicial nomination and confirmation process; however, what was envisioned at the time was a much lower level of public input and feedback compared to what we see in contemporary judicial nominations.²⁰¹ This was a sentiment shared by those who had more fear of the President—and those who had more fear of the Senate—holding the appointment power. Gunning Bedford, noting the power of elections to moderate politicians' behaviors, believed that Senators could be punished for poor choices by not being returned to office, but for the more powerful President, the "responsibility of the Executive so much talked of was chimerical. He could not be punished for mistakes."²⁰² For Bedford, Presidents would be in a position of too much power to ever be "punished" by those who selected them, unlike Senators, who could face such wrath when up for re-selection, at that time by state legislators.²⁰³ Similarly, Luther Martin announced at the Convention that he was "strenuous" for senatorial appointment because "[b]eing taken from all the States it would be best informed of characters and most capable of making a fit choice."²⁰⁴ In other words, Martin believed that the Senators' constituents would help supply them with more information on potential judges. Roger Sherman also thought that Senators "would bring into their deliberations a more diffusive knowledge of characters."²⁰⁵ For these Framers, then, some limited role for the public to influence the judicial selectors was paramount, and senatorial appointment of the Justices was the best way to ensure this.

However, there were also delegates who wanted a strong (and early in the Convention, a unilateral) role for the President in the Supreme Court selection process, and they thought public involvement was important, too. Nathaniel Gorham advocated for sole presidential appointment power because he argued that the President "would certainly be more answerable for a good appointment, as the whole blame of a bad one would fall on him alone."²⁰⁶ In other words, since the President was one person, and the Senate was a collective body, it would be easier to determine that the President made a good or bad appointment to the Court, and take action appropriately, than it would against a collective body like the Senate, where membership changes and Senators may even decline to vote.²⁰⁷ When Madison put

201. Charles W. "Rocky" Rhodes, *Navigating the Path of the Supreme Appointment*, 38 FLA. ST. U. L. REV. 537, 549-50 (2011).

202. MADISON, *supra* note 30, at 316.

203. William G. Ross, *Participation by the Public in the Federal Judicial Selection Process*, 43 VAND. L. REV. 1, 56 (1990).

204. MADISON, *supra* note 30, at 314.

205. *Id.* at 316.

206. *Id.* at 316-17.

207. Volokh, *supra* note 191, at 767.

forth a proposal to share appointment power between the President and the Senate, he alluded to the role of public input, in that their joint appointment roles would ensure “in one of which the people, in the other the States, should be represented.”²⁰⁸ Likewise, Elbridge Gerry claimed that the “appointment of the Judges . . . should be so modelled as to give satisfaction both to the people and to the States.”²⁰⁹ Again, these delegates consistently support the public having a role, albeit indirectly, in the judicial selection process.²¹⁰

That this factor—of limited involvement of the public in judicial selection—was on the Framers’ minds is confirmed if one reads the *Federalist Papers*. For instance, commenting on the appointment power in *Federalist No. 76*, Hamilton claimed that the “exercise of it by the people at large will be readily admitted to be impracticable [as] it would leave them little time to do anything else.”²¹¹ Furthermore, if the public directly voted for federal judges, Hamilton feared that the people might make choices out of the “spirit of cabal and intrigue.”²¹² Nevertheless, even though Hamilton did not think it was feasible for the public to select judges directly, he saw an important, albeit indirect, role for them in the process outlined in the Constitution. Indeed, Hamilton thought that the President would need to be mindful of the public in nominations because of the “danger to his own reputation, and . . . to his political existence” if the President were to make an appointment out of “favoritism.”²¹³ Hamilton believed that presidential concerns about legacy and reelection would serve as a “barrier” to the President making poor nominations.²¹⁴

Hamilton further explained that the Senate would be constrained by the desires of the public, too, when deciding whether to confirm nominations. Writing in *Federalist No. 77*, he claimed that “the public would be at no loss to determine what part had been performed by the different actors.”²¹⁵ Indeed, according to Hamilton, the “blame of a bad nomination would fall upon the President singly and absolutely,” but the “censure of rejecting a good one would lie entirely at the door of the Senate; aggravated by the consideration of their having counteracted the good intentions of the Executive.”²¹⁶ Furthermore, if “an ill

208. MADISON, *supra* note 30, at 344.

209. *Id.* at 345.

210. *See* ROSS, *supra* note 203, at 56.

211. THE FEDERALIST NO. 76, at 455 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

212. *Id.*

213. *Id.* at 458.

214. *Id.*

215. THE FEDERALIST NO. 77, at 461 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

216. *Id.*

appointment should be made, the Executive for nominating, and the Senate for approving, would participate, though in different degrees, in the opprobrium and disgrace.”²¹⁷ Throughout these statements by Hamilton, there is an underlying theme: the public is listening and speaking, so both Presidents and Senators should pay attention to this fact when making these appointments.²¹⁸

Some of Madison’s contributions to the *Federalist Papers* emphasize this same concept, and they do so in papers that are not primarily on the topic of appointment power or the Judiciary. In *Federalist No. 10*, Madison expressed his concerns about factions taking power and abusing the rights of others.²¹⁹ Indeed, he characterized factions as “a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”²²⁰ Madison believed that a well-constructed government would prevent these factions from taking power.²²¹ However, since he was also committed to a representative republic (as opposed to either a direct democracy or a monarchy), he thought that the form of representative government under the Constitution, including the Senate and the Presidency, would “refine and enlarge the public views by passing them through the medium of a chosen body of citizens.”²²² Thus, public input on all matters, clearly including on Supreme Court appointments, was important to Madison, although he wanted this to be an indirect involvement, so that the “refined” leaders would make the ultimate appointment decisions. In *Federalist No. 39*, Madison substantiates the theory that Presidents and Senators should consider the people’s views on judicial appointments when he admits that “[e]ven the judges . . . will . . . be the choice, though a remote choice, of the people themselves.”²²³

Overall, then, the Framers wanted some limited public input and feedback in the judicial selection process. This was evident both at the Convention itself and during the subsequent ratification debate on the Constitution. Moreover, this factor fit very well with the notion of checks and balances to promote the appointment of Justices who would represent the qualities desired by the Framers. Indeed, there

217. *Id.*

218. Stephanie K. Seymour, *The Judicial Appointment Process: How Broken Is It?*, 39 TULSA L. REV. 691, 692 (2004).

219. Larry D. Kramer, *Madison’s Audience*, 112 HARV. L. REV. 611, 634 (1999).

220. THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

221. *Id.* at 77 (emphasis added).

222. *Id.* at 82.

223. THE FEDERALIST NO. 39, at 343 (James Madison) (Clinton Rossiter ed., 1961).

has consistently been involvement of the public in offering input and feedback,²²⁴ although this has certainly grown over time, particularly after the ratification of the Seventeenth Amendment mandating the direct election of Senators.²²⁵ Today, this means that confirmation battles give the public an opportunity to give input to their Senators about what they think is the proper interpretation of the Constitution itself.²²⁶

VIII. CONCLUSIONS

At the 1787 Constitutional Convention, the Framers focused on five factors regarding judicial appointments. When constructing the process by which federal judges, including United States Supreme Court Justices, would be appointed, they emphasized: (1) appointing qualified jurists, (2) the inevitability of politics, (3) representativeness, (4) the need for checks and balances, and (5) public input and feedback. Remarkably, these factors, in modified forms, all remain part of the appointment process for Justices. This is not to discount that there were other concerns on the minds of the Framers when they were debating judicial nomination and confirmation. Nor does it mean that during judicial selection we should consider only what the Framers wanted the Appointments Clause to mean, as there are certainly other, non-originalist methods of constitutional interpretation that merit consideration.²²⁷ Nevertheless, what the Framers thought about the constitutional aspects of judicial appointment remains relevant to understanding what is required and appropriate in selecting Justices today.

Returning to the Garland nomination, both sides can claim support, at least in part, from the Framers, as both sides emphasized factors important to the delegates at the Constitutional Convention. On President Obama's side, Garland undoubtedly was a high-quality nominee, with a distinguished history as a federal prosecutor and court of appeals judge.²²⁸ There were no ethical questions raised about him. The fact that Garland, at the time of his nomination, was considered moderately liberal politically²²⁹ is not out of line with what

224. See Ross, *supra* note 203.

225. PAUL M. COLLINS, JR., & LORI A. RINGHAND, *SUPREME COURT CONFIRMATION HEARINGS AND CONSTITUTIONAL CHANGE* 36 (2013).

226. *Id.* at 71-74.

227. See Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987); Mark Tushnet, *A Note on the Revival of Textualism*, 58 S. CAL. L. REV. 683 (1985).

228. See Totenberg & Johnson, *supra* note 6.

229. Adam Liptak, *Where Merrick Garland Stands: A Close Look at His Judicial Record*, N.Y. TIMES (Mar. 17, 2016), https://www.nytimes.com/2016/03/18/us/politics/merrick-garlands-record-and-style-hint-at-his-appeal.html?_r=0.

we should expect from a Democratic President; that President Obama chose someone more moderate and slightly older to appease Republican Senators shows that he took the Framers' notion of checks and balances into account with his selection. And yet, Republicans in the Senate also had ground to stand on regarding the Framers' factors. President Obama was in a relatively weak position, in that his approval rating was hovering right around fifty percent²³⁰ in his last year in office. Since the other political party controlled the Senate, we should expect President Obama's chances to place someone he wanted on the Court to be lower when considering checks and balances. With no mandate in Article II that the Senate *must* vote on a nominee, the Senators can still comply with the Constitution without taking action. Indeed, the Senate has failed to take action on Supreme Court nominations ten times over the country's history.²³¹ Nevertheless, outside of nominations that have occurred at the end of the legislative session, the Senate failing to take *any* action on a nominee has been relatively rare, with its last mid-session occurrence before 2016 being in 1866.²³² Such inaction risks creating a new norm of senatorial-presidential conflict for Court nominations when different political parties control the two institutions, which could stretch the notion of checks and balances farther from what was intended. Finally, both sides had interest groups and citizen activists extolling the virtues of their respective positions,²³³ meaning that there was public feedback supportive of both confirmation and rejection. The White House's creation of a Twitter account to connect directly with the public was also in line with this factor, as it was clearly an attempt to increase public support for the nominee, with the hopes that more constituents would contact their Senators to advocate for confirmation of Judge Garland. The Framers could not have envisioned something like Twitter, but they did understand the public's connection to the President and the Senate.

These same factors can also help us understand the nomination by President Trump of Neil Gorsuch for the Court vacancy President Obama tried to fill with Judge Garland. Judge Gorsuch was nominated at the relatively young age of forty-nine, but in that time amassed impeccable credentials, earning a law degree from Harvard

230. *Presidential Job Approval Center*, GALLUP, <http://www.gallup.com/interactives/185273/presidential-job-approval-center.aspx> (last visited Feb. 12, 2018).

231. *See Supreme Court Nominations: present-1789*, U.S. SENATE, <https://www.senate.gov/pagelayout/reference/nominations/Nominations.htm> (last visited Feb. 12, 2018).

232. Richard S. Beth & Betsy Palmer, *Supreme Court Nominations: Senate Floor Procedure and Practice, 1789-2011*, CONG. RES. SERV. 17 (Mar. 11, 2011), <https://fas.org/sgp/crs/misc/RL33247.pdf>.

233. *See supra* notes 13-14 and accompanying text.

and a doctorate from Oxford, clerking for both Justice Byron White and Justice Anthony Kennedy, and working in private practice and for the United States Justice Department before serving for over ten years as a judge for the United States Court of Appeals for the Tenth Circuit.²³⁴ During the 2016 presidential campaign, Donald Trump pledged to nominate a Justice to this seat who shared a similar ideology and constitutional vision as Justice Scalia, and the available evidence at the time of the nomination suggested that Judge Gorsuch fit that mold as a conservative jurist.²³⁵ Representativeness in terms of religion may have also played a role in the pick, as Gorsuch, an Episcopalian, became the only Protestant on a Court that, before his nomination, held five Catholics and three Jewish Justices.²³⁶ Considering checks and balances, this nomination was ultimately successful, although the vote was relatively close.²³⁷ President Trump's public approval rating (forty-five percent) in January 2017 was lower than President Obama's was when nominating Garland in 2016,²³⁸ but the Gorsuch nomination was made very early in President Trump's first year in office with a Republican-controlled Senate, giving President Trump more freedom to nominate a more conservative Justice. And from the outset of the nomination, it was clear that the public would be relevant in the confirmation battle. Not to be outdone by the Twitter account for the Garland nomination, the Trump White House created an account titled "Gorsuch Facts" the same night the nomination was announced²³⁹ to help manage the confirmation and give its readers ammunition to sway Senators. Furthermore, interest groups began lining up right away to take sides by lobbying Senators, most notably with the conservative Judicial Crisis Network immediately announcing plans after the nomination was made to spend ten million dollars in favor of confirmation.²⁴⁰

Without taking a position on whether Judge Garland was the best choice by President Obama or whether Republican Senators in 2016

234. Ariane de Vogue, *President Trump Nominates Neil Gorsuch for Supreme Court*, CNN (Feb. 1, 2017), <http://www.cnn.com/2017/01/31/politics/donald-trump-supreme-court-nominee/>; Julie Hershfeld Davis & Mark Landler, *Trump Nominates Neil Gorsuch to the Supreme Court*, N.Y. TIMES (Jan. 31, 2017), <https://www.nytimes.com/2017/01/31/us/politics/supreme-court-nominee-trump.html>.

235. Alicia Parapiano & Karen Yourish, *Where Neil Gorsuch Would Fit on the Supreme Court*, N.Y. TIMES (Jan. 31, 2017), <https://www.nytimes.com/interactive/2017/01/31/us/politics/trump-supreme-court-nominee.html?hp&action=click&pgtype=Homepage&clickSource=g-artboard%20g-artboard-v3%20&module=b-lede-package-region®ion=top-news&WT.nav=top-news>.

236. Davis & Landler, *supra* note 234.

237. 163 CONG. REC. S2435-46 (daily ed. Apr. 7, 2017).

238. See GALLUP, *supra* note 230.

239. @GorsuchFacts, TWITTER (Jan. 31, 2017), <https://twitter.com/GorsuchFacts>.

240. Davis & Landler, *supra* note 234.

made the right decision in taking no action on the nomination, what can be said is that each side could legitimately claim that their actions had some basis in both the Constitution and the Framers' understanding of judicial appointments. The President certainly had the power to nominate Garland, but the Senate also had the authority to withhold its consent. The public was able to offer feedback about the actions (or inactions) taken by the political actors involved. Indeed, the factors that played a part in Garland's unsuccessful nomination were some of the same ones emphasized by the Framers. Thus, President Obama went too far in asserting that failing to confirm Garland meant the system of judicial appointment was "beyond repair." At the same time, while Senate Republicans were acting constitutionally by denying Garland so much as a hearing, that does not mean they were morally justified in their inaction. Likewise, without taking a position on Justice Gorsuch's nomination to the Supreme Court, President Trump and his advisors certainly paid attention to these same factors emphasized by the Framers. Given the constitutional structure created by the Framers, these longstanding factors will continue being a part of the Supreme Court selection process for the foreseeable future.