

**TOWARD THE FRAMERS’ UNDERSTANDING OF
“ADVICE AND CONSENT”:
A HISTORICAL AND TEXTUAL INQUIRY**

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INTRODUCTION

During President George W. Bush's first term, no domestic issue excited the Republican and Democratic bases like judicial nominations.¹ Upon the President's reelection, attention on the war for the courts continued as the President announced the renomination of twenty people whose first-term nominations had not received up-or-down votes in the full U.S. Senate.² In 2005, President Bush's first nomination to the Supreme Court—that of Judge John Roberts to replace the late Chief Justice William Rehnquist—was confirmed without delay. As of the writing of this article, the President's second nomination—that of Judge Samuel Alito to replace Justice Sandra Day O'Connor—faced scattered threats of opposition-party delay.³

This marks only the most recent battle in the war for the courts. Beginning in earnest with the nomination of then-Justice Abe Fortas to replace outgoing Chief Justice Earl Warren, and continuing through the contentious nomination battle over Judge Robert Bork and the media spectacle of the Clarence Thomas hearings, the fight in the Senate to seat judges had risen to Beltway prominence by the mid-1990s.⁴

During the Clinton presidency, however, Senate refusal to confirm nominations had assumed a markedly different form. No longer was the Senate voting to reject nominees, as it had done with the Bork nomination and many others in the past; instead, the Senate was not voting at all.

President Clinton's nominations to a variety of seats on the courts of appeals failed to result in appointments as the Repub-

1. See, e.g., Editorial, *The Choice on Courts*, WASH. POST, Oct. 23, 2004, at A22.

2. See Michael A. Fletcher & Helen Dewar, *Bush Will Renominate 20 Judges*, WASH. POST, Dec. 24, 2004, at A1.

3. See, e.g., James Kuhnehn & William Douglas, *Senators on Both Sides Brace for Clash on Alito; Republicans, Democrats Warily Mention Filibuster*, CHARLOTTE OBSERVER, Nov. 1, 2005, at 13A.

4. For excellent histories of judicial nominations battles, see generally HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON* (rev. ed. 1999), and HENRY B. HOGUE, CONG. RESEARCH SERV., ORDER CODE RL31171, *SUPREME COURT NOMINATIONS NOT CONFIRMED, 1789–2004* (updated Mar. 21, 2005).

lican Senate majority left many of the nominations to languish in committee without hearings or full Senate votes. From 1995 to 2000, the President nominated 263 people to seats on the district court benches, and 84 to seats on the courts of appeals.⁵ Of the district court nominees, 80% received committee hearings, 78% received committee votes, and 76% received full Senate votes.⁶ Of the court of appeals nominees, 65% received committee hearings, 62% received committee votes, and 55% received full Senate votes.⁷ These figures represent a marked downturn from the two decades preceding the Clinton mixed-government era.⁸ The reduction in hearings and votes became even more significant in the final two years of the Clinton administration: Of the thirty-four nominees to the courts of appeals, only fifteen received committee hearings, committee votes, or full Senate votes.⁹ Democrats decried these Republican tactics for being obstructionist and for exacerbating a judicial vacancy "crisis."¹⁰

George W. Bush's election in 2000 began with five months of a Republican-controlled Congress. But with the Senate divided equally among Republicans and Democrats,¹¹ the defection of Senator James Jeffords of Vermont from the Republican Party effectively returned Senate control to the Democrats. This change to mixed government quickly led to greater numbers of unconfirmed judicial nominations comparable to those of the last two years of the Clinton administration. In 2001 and 2002, President Bush nominated sixty-one candidates to positions on the courts of appeals. Of those, twenty-four received committee

5. DENIS STEVEN RUTKUS & MITCHEL A. SOLLENBERGER, CONG. RESEARCH SERV., ORDER CODE RL31635, JUDICIAL NOMINATION STATISTICS: U.S. DISTRICT AND CIRCUIT COURTS, 1977-2003, at 30 (updated Feb. 23, 2004).

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *See, e.g.,* Patrick J. Leahy, Op-Ed., *Where Are the Judges?*, BOSTON GLOBE, Mar. 1, 1998, at C7 ("Any week in which the Senate does not confirm three judges is a week in which it is failing to address the vacancy crisis. . . . A Republican leader in the House speaks openly about seeking to 'intimidate' federal judges. The confirmation process is not immune to politics, but a particularly virulent strain has infected the Senate's consideration of judicial nominations over the last few years.").

11. The tie-breaking vote of Vice President Cheney gave the Republicans a 51-50 majority.

hearings, nineteen received committee votes, and seventeen received full Senate votes.¹²

The Republicans regained control of the Senate in the 2002 election, but the slim majority left the Democrats with sufficient votes to block certain nominations. Throughout 2003, Democrats focused on six nominations to the courts of appeals and repeatedly prevented successful cloture motions on those nominations. This impasse culminated in a days-long filibuster broadcast nationwide on cable television.¹³ Some Republicans suggested using the “constitutional option,” alternatively known as the “nuclear option,” a parliamentary maneuver capable of circumventing the filibuster.¹⁴ Two factors contributed to the tactic’s falling out of the national spotlight: First, President Bush began to use recess appointments temporarily to appoint filibustered nominees to the courts of appeals without a Senate vote;¹⁵ second, a bipartisan group of fourteen Senators agreed to work together to limit the ability of Republicans to invoke the constitutional option, and in exchange, of Democrats to successfully filibuster a nomination.¹⁶ Throughout this standoff, Republicans decried the Democrats’ tactics as obstructionist and argued that they exacerbated the “crisis” of judicial vacancies.¹⁷

12. RUTKUS & SOLLENBERGER, *supra* note 5, at 30.

13. See Helen Dewar, *Bush, Daschle Trade Charges: Senate’s Talkathon on Judicial Nominees Exceeds 30 Hours*, WASH. POST, Nov. 14, 2003, at A6; Helen Dewar, *Senate Filibuster Ends with Talk of Next Stage in Fight*, WASH. POST, Nov. 15, 2003, at A9.

14. See Helen Dewar & Mike Allen, *Frist Seeks to End Nominees Impasse: Majority Leader’s Plan Would Limit Tactics Used in Senate to Block Judicial Picks*, WASH. POST, May 9, 2003, at A12; see generally Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Over Come the Filibuster*, 28 HARV. J.L. & PUB. POL’Y 205 (2004).

15. See Richard Simon, *Bush, Frustrated by Democrats, Again Bypasses Senate on Judge*, L.A. TIMES, Feb. 21, 2004, at A1; cf. Randy Barnett, *Benching Bork*, NAT’L REV. ONLINE, Apr. 29, 2003, <http://www.nationalreview.com/comment/comment-barnett042903.asp> (recommending that President Bush engage in intentionally controversial recess appointments in order to persuade Democrats to end their filibustering of judicial nominations).

16. See Charles Babington & Shailagh Murray, *A Last-Minute Deal on Judicial Nominees*, WASH. POST, May 24, 2005, at A1.

17. See Senator Orrin Hatch, Press Conference at Room S-207, The United States Capitol (Apr. 12, 2002) (“We’re in the middle of a circuit court of appeals crisis in this country. It’s a constitutional crisis . . . Now the Senate Democrats are trying to create an illusion of movement by creating great media attention concerning a small handful of nominees, in order to make it look like progress, and D. Brooks

President Bush's reelection in 2004 reinvigorated conservative efforts to confirm judicial nominees. In his first post-election announcement on the matter, President Bush challenged the Senate in no uncertain terms: "The Senate has a constitutional obligation to vote up or down on a President's judicial nominees."¹⁸

But does the Senate actually have such a constitutional *obligation*? The text of the Constitution certainly does not include such a provision; nevertheless, some current Senators from both parties have agreed—both recently and historically—with President Bush's sentiments.¹⁹ Professor Douglas Kmiec, among others, has argued that the Senate would contravene its constitutional duty by not bringing a nomination to the floor after committee consideration.²⁰ If these government officials and commentators are correct, then the Senate has acted in dereliction of its constitutional duty on a great number of occasions. In addition to its failure to vote on numerous circuit and district court nominations, the Senate has also failed to vote up or down on nominees to the Supreme Court. On 154 occasions the President has nominated someone for appointment to the Supreme Court. Thirty-four of those nominees have not received senatorial approval.²¹ Of the thirty-four failed nominations, only eleven were rejected by a full vote of the Senate;²² the remainder were either withdrawn by the President without Senate action²³ or defeated in the Senate by means other than an up-or-down vote by the full Senate.²⁴

Smith appears to be the next one who's going to be up for a smearing.") (transcript available through Federal News Service).

18. Press Release, President George W. Bush, Statement on Judicial Nominations (Dec. 23, 2004), available at <http://www.whitehouse.gov/news/releases/2004/12/20041223-1.html>.

19. See John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL'Y 197–99 (2003) ("If the Constitution provides that only a majority is necessary to confirm judges, any Senate rule that purports to prevent a majority of the Senate from exercising that confirmation function directly contradicts and offends our constitutional design."); see also *id.* at 206–11 (citing statements of numerous Senators expressing support for up-or-down votes on judicial nominations).

20. Douglas W. Kmiec & Elliot Minberg, *The Role of the Senate in Judicial Confirmations*, 7 TEX. REV. L. & POL. 235, 262 (2003).

21. HOGUE, *supra* note 4, at 1.

22. *Id.* at 2.

23. William Paterson, nominated by President Washington, was withdrawn February 28, 1793, one day after his nomination. *Id.* at 18. President Washington

Of course, historical persistence in a certain course of conduct for an extended time does not render that conduct, ipso facto, compliant with the Constitution.²⁵ A determination of whether such a constitutional obligation exists must begin with the constitutional text.

Nomination and appointment of federal judges is governed by Article II, Section 2, Clause 2 of the U.S. Constitution: “[The President,] by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law” Although the Constitution lacks an explicit requirement that the Senate act on all nominations, such absence is not necessarily dispositive. If an implicit requirement exists, however, it should be supported by the original meaning of “advice and consent.”

The meaning of advice and consent is not self-evident, and the means of its proper application are not obvious. In attempting to ascertain the original meaning of this constitutional provision, we must first look to the debates at the Constitutional Convention and in the subsequent state ratification conventions.

Although the Framers’ understanding of a term is not necessarily synonymous with the objective meaning of that term, their understanding can serve as a useful step toward the goal of discerning the original meaning of the term.²⁶ This Article

withdrew his nomination because Washington discovered that four days remained on then-Senator Paterson’s term. *Id.* at 2–3. He was confirmed on resubmittal. *Id.* John C. Spencer, nominated by President Tyler, was withdrawn June 17, 1844, the same day as his nomination. *Id.* at 18.

24. *See id.* at 2.

25. *Cf. E. Enters. v. Apfel*, 524 U.S. 498, 538–39 (Thomas, J., concurring) (“In an appropriate case, therefore, I would be willing to reconsider [*Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798)] and its progeny to determine whether a retroactive civil law that passes muster under our current Takings Clause jurisprudence is nonetheless unconstitutional under the *Ex Post Facto* Clause.”).

26. Justice Scalia is particularly succinct in illustrating the difference between “original meaning” and “Framer intent” or “original understanding”: “What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.” ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 38 (1997). One year before publishing those words, he explained the difference more fully in a speech at The Catholic University of America:

does not attempt to authoritatively define the original meaning of advice and consent. Rather, its narrow aim is to further the understanding of what the Framers believed "advice and consent" meant by looking at evidence long unappreciated by scholars of constitutional history.

The first unappreciated consideration is the actual practice of advice and consent in the Commonwealth of Massachusetts, the example after which constitutional advice and consent was explicitly created. The second unappreciated consideration is James Madison's alternative to advice and consent: a majority veto of presidential nominations by the Senate, to be used at its discretion.

Part I of this Article traces the framing of the Constitution's provision for Senate advice and consent of judicial appointments from the Constitutional Convention through the ratification debates. Part II explores the history of advice and consent in Massachusetts, outlining the historical relationship between the Governor and the Executive Council, and detailing long-ignored evidence contained in the official eighteenth-century records of the council. Part III focuses on Madison's alternative to advice and consent—a discretionary Senate veto—and offers a framework for analyzing the textual differences between the veto and advice and consent. Marshalling these findings, this Article concludes that this evidence does not support an assertion that the constitutional provision for advice and consent contains an implicit obligation to act on the President's nominations.²⁷

The theory of originalism treats a constitution like a statute, and gives it the meaning that its words were understood to bear at the time they were promulgated. You will sometimes hear it described as the theory of original intent. You will never hear me refer to original intent, because as I say I am first of all a textualist, and secondly an originalist. If you are a textualist, you don't care about the intent, and I don't care if the framers of the Constitution had some secret meaning in mind when they adopted its words. I take the words as they were promulgated to the people of the United States, and what is the fairly understood meaning of those words.

Associate Justice Antonin Scalia, Address at the Catholic University of America (Oct. 18, 1996), *available at* <http://www.courtstv.com/archive/legaldocs/rights/scalia.html>.

27. This analysis focuses on the duties and obligations of the Senate as a singular body. As Gold and Gupta so thoroughly demonstrated in their recent article in this Journal's pages, *see* Gold & Gupta, *supra* note 14, the will of the Senate—by its own rules and precedents—can be effectively determined by a simple majority vote of its members. For that reason, this Article should in no way

I. THE FRAMING AND RATIFICATION OF THE ADVICE AND CONSENT CLAUSE

The constitutional provision for Senate advice and consent of presidential nominations for judicial appointments was developed in the debates at the Constitutional Convention of 1787. During the debates, a variety of other modes of appointment—including presidential appointment, senatorial appointment, and presidential appointment subject to a discretionary Senate veto—were discussed and sometimes initially accepted. Eventually, all were rejected. According to Madison’s record of the debates, the advice and consent model was initially presented with reference to the Massachusetts model of executive appointment, in which the Governor appointed officers subject to the advice and consent of an executive council. Upon the conclusion of the Convention, discussion of Senate involvement in executive appointments continued, albeit briefly, in the *Federalist Papers* and in state ratification debates.

A. *The Constitutional Convention*

At the 1787 Federal Constitutional Convention, the delegates were divided—often sharply—over the proper allocation of power among the various branches of federal government and over the mode of selecting officeholders. The appointment of judges was specifically discussed in the course of these deliberations, but these discussions were interspersed in the discussion of the larger issues of the powers and election of the President and Senate. As such, the debate over appointment of judges was shaped and directed by these larger structural debates.

1. *Appointment of Judges and Other Officers*

Toward the conclusion of the Convention, the delegates were clearly divided on the question of appointments. One group of delegates, led by James Wilson, Nathaniel Gorham, Alexander Hamilton, and Gouverneur Morris, favored control of appointments by a strong executive. The opposing camp, led by

be taken as an endorsement of the efforts of vocal members of the Senate’s current minority party to dictate the agenda of the full body through the threatened use of filibusters. That is an intrabranched debate, not an interbranch debate relevant to the Advice and Consent Clause.

Charles Pinckney, Luther Martin, George Mason, Roger Sherman, Oliver Ellsworth, and John Rutledge, favored legislative control of the appointment process.

a. May 29: Appointment by the Legislature

The power to appoint judges initially was assigned to the legislature. This arrangement was proposed on May 29 by Edmund Randolph in what came to be known as the Virginia Plan. In his fifteen-point plan for a national government, Randolph recommended that "a national judiciary be established . . . to be chosen by the national legislature . . ." ²⁸ The Virginia Plan, which also provided for a bicameral legislature ²⁹ and a national executive chosen by the legislature, ³⁰ initially contained no provision for the appointment of nonjudicial officers. ³¹ In a later session, however, the delegates voted overwhelmingly, and with only minimal debate, to allocate the power of officer appointment to the Executive. ³²

On June 5, the Committee of the Whole considered the Virginia Plan's method of judicial appointment. That Plan's first critic was James Wilson of Pennsylvania, who supported executive control over judicial appointments on the ground that "[e]xperience shewed the impropriety of such appointments by numerous bodies. Intrigue, partiality, and concealment were the necessary consequences." ³³ Wilson's call for "unity in the executive" would continue throughout the debates.

Benjamin Franklin suggested that federal judges might be chosen, in the Scottish tradition, by lawyers. ³⁴ This suggestion was not extensively considered in the course of the convention.

28. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., rev. ed. 1937) [hereinafter CONVENTION RECORDS].

29. *Id.* at 20.

30. *Id.* at 21.

31. *See id.* at 20–23. The Virginia Plan did make reference to the impeachment of "any National officers." *Id.* at 22.

32. *See id.* at 63. The States, voting on June 1, supported the proposal nine-to-zero. *Id.* at 67. Connecticut's delegates were divided and thus did not vote. *Id.*

33. *See id.* at 119.

34. *Id.* at 119–20. According to Franklin, who related the Scottish tradition "in a brief and entertaining manner," lawyers would tend to select the best among them for a judgeship "in order to get rid of him, and share his practice among themselves." *Id.* at 120.

James Madison, a critic of appointment by the legislature, recommended appointment by the Senate alone. Those of “Legislative talents” would, in “intrigue and partiality,” support candidates on the basis of membership in the legislature.³⁵ But Madison also disagreed with Wilson’s suggestion of appointment by the Executive—although he provided little substantive argument against such appointment. Madison favored appointment by the Senate as a matter of pragmatic compromise: The Senate was “numerous eno’ to be confided in—as not so numerous as to be governed by the motives of the [House of Representatives]; and as being sufficiently stable and independent to follow their deliberate judgments.”³⁶ Madison did not submit his proposal for a vote; rather, he submitted that “*appointment by the Legislature*” be struck from the Plan and replaced by blank space, to be filled upon “maturer reflection.”³⁷ The motion passed, nine states to two.³⁸

b. June 13: Appointment by the Senate

The issue of judicial appointments was reconsidered on June 13, when the delegates reconvened to fill the blank left by the vote of June 5. Madison resumed his argument in favor of appointment of judges by the Senate. He argued that appointment by the whole legislature would be biased in favor of nominees who had served in the legislature and who may have provided fellow legislators with political favors.³⁹ Madison supported appointment by the Senate, “a less numerous & more select body” that would be a better judge of a candidate’s qualifications and that would be “sufficiently numerous to justify such a confidence in them.”⁴⁰ Madison’s argument was successful; Roger Sherman of Connecticut and Charles Pinckney⁴¹ of South Carolina withdrew their motion for appointment

35. *See id.* at 120.

36. *Id.*

37. *Id.*

38. *See id.*

39. *See id.* at 232–33.

40. *Id.* at 233.

41. Throughout his account, Madison incorrectly spelled the delegate’s name “Pinkney.” The correct spelling is “Pinckney.” *See* Library of Congress, Documents from the Continental Congress and the Constitutional Convention, 1774–1789, Charles Pinckney (1757–1824), <http://memory.loc.gov/ammem/collections/continental/pinckney.html> (last visited Nov. 20, 2005).

by the legislature, and senatorial appointment was agreed upon without opposition.⁴²

On June 15, William Paterson⁴³ of New Jersey presented the "New Jersey Plan," a structural alternative to the Virginia Plan that was much more favorable to the interests of small states.⁴⁴ Among its provisions was an allocation of the power to appoint judges to the Executive,⁴⁵ who himself was selected by the then-unicameral legislature.⁴⁶

In the following days the delegates discussed the relative merits of the New Jersey and Virginia Plans. On June 18, in response to the New Jersey Plan, Alexander Hamilton presented his own plan of government, under which the Executive would be empowered "to have the sole appointment of the heads or chief officers of the departments of Finance, War and Foreign Affairs; to have the nomination of all other officers (Ambassadors to foreign Nations included) subject to the approbation or rejection of the Senate."⁴⁷ Hamilton's plan did not explicitly refer to the appointment of judges, but "all other officers" appears to include judges.⁴⁸ Hamilton's choice of language describing the relationship between the Executive and Senate on appointments—to wit, "subject to the *approbation or rejection* of the Senate"—is noteworthy: It represents the first usage of language comparable to the advice and consent clause ultimately adopted by the Convention.⁴⁹ The Hamilton Plan was not put to a vote; the convention was adjourned for the day following Hamilton's speech.

On June 19, without debate on the specific issue, the delegates reaffirmed their earlier support of Senate appointment of

42. See 1 CONVENTION RECORDS, *supra* note 28, at 233.

43. Throughout his account, Madison incorrectly spelled the delegate's name "Patterson." The correct spelling is "Paterson." See William Paterson University, Biography of William Paterson, Patriot and Statesman 1745–1806, <http://www.wpunj.edu/aboutus/wpbio.htm> (last visited Oct. 19, 2005).

44. See 1 CONVENTION RECORDS, *supra* note 28, at 242–45.

45. *Id.* at 244.

46. See *id.* The New Jersey Plan's legislature was the same as that under the Articles of Confederation: It was to consist of equal representation among the States (like the eventual U.S. Senate). See *id.* at 286.

47. *Id.* at 292.

48. See *id.*

49. See *id.* (emphasis added). Hamilton also noted the "advice and approbation of the Senate" relationship with respect to the President's treaty power. See *id.*

judicial nominees,⁵⁰ the Paterson and Hamilton proposals notwithstanding. The delegates' resolution also provided that the Executive would appoint all other officers unless otherwise provided by law.⁵¹

c. July 18: Gorham Proposes Advice and Consent

The question of judicial appointment lay dormant for a month following the June 19 vote. In that month, the delegates enacted major changes to the mode of election of the President and the Senate.⁵² On July 18, the delegates returned to the matter for extended debate on a day that would prove to be pivotal in the delegates' consideration of the question of judicial appointments. Nathaniel Gorham⁵³ of Massachusetts initiated the debate by urging an alternative to Senate appointment of judges:

Mr. Ghorum, wd. prefer an appointment by the 2d branch to an appointmt. by the whole Legislature; but he thought even that branch too numerous, and too little personally responsible, to ensure a good choice. He suggested that the Judges be appointed by the Execuve. with the advice & consent of the 2d branch, in the mode prescribed by the constitution of Masts. This mode had been long practised in that country, & was found to answer perfectly well.⁵⁴

Gorham argued that Senate appointment would be inefficacious because Senators would be partial to nominees hailing from their own home States; the President, on the other hand, would "be careful to look through all the states for proper characters" in making appointments.⁵⁵

50. *See id.* at 322.

51. *See id.*; *see also id.* at 233.

52. *See infra* Part I.A.2.

53. Throughout his account, Madison misspelled the delegate's name as "Ghorum." The correct spelling is "Gorham." *See* John O. McGinnis, *The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 TEX. L. REV. 633, 640 n.29 (1993) (citing 7 *DICTIONARY OF AMERICAN BIOGRAPHY* 433 (Dumas Malone ed., 1931)).

Gorham was personally acquainted with the advice and consent procedures of the Massachusetts Constitution. At least once, on March 19, 1781, the Governor nominated him to appointment (in this case, to the office of Justice of the Peace & Quorum), and his nomination was confirmed by the Council on March 27, 1781. *See* 26 *COUNCIL RECORDS* 202 (March 19, 1781); *see id.* at 221 (March 27, 1781).

54. 2 *CONVENTION RECORDS*, *supra* note 28, at 41.

55. *Id.* at 42.

Gorham's suggestion sparked a renewed debate among the now-familiar advocates of senatorial and presidential control. Wilson warmed to it as a matter of political pragmatism: Although he still preferred executive appointment of judges, he would accept Gorham's proposal as a second-best option.⁵⁶ Luther Martin of Maryland supported Senate appointment, as the Senate "would be best informed of characters & most capable of making a fit choice."⁵⁷

Sherman, who had supported legislative appointment on June 13, eventually returned to support of Senate appointment.⁵⁸ He argued that the collected Senators would have "more wisdom" than the President alone; they would bring "a more diffusive knowledge of characters," and they would be less likely to suffer the effects of intrigue than the solitary President.⁵⁹ Sherman did concede, however, that the advice and consent model was preferable to pure executive appointment.⁶⁰ Randolph, originally a proponent of vesting the appointment power in the whole legislature, concurred with Sherman's support of senatorial selection,⁶¹ and recommended that the confirmation votes of each Senator be recorded in the Senate's Journal.⁶²

In response to Gorham's advice and consent proposal, Madison proposed a noteworthy alternative. Although his proposal was, on its face, similar to Gorham's, Madison specified the level of Senate support required for successful approval of the nomination:

Mr. M^{adison}, suggested that the Judges might be appointed by the Executives with the concurrence of $\frac{1}{3}$ at least, of the 2d. branch. This would unite the advantage of responsibility in the Executive with the security afforded in

56. *See id.* at 41.

57. *Id.*

58. *Id.*

59. *Id.* at 43.

60. *Id.* at 44.

61. While Randolph's support for Senate appointment of judges was unqualified on July 18, he abruptly reversed position, without explanation, mere days later. *See infra* notes 74–77 and accompanying text.

62. 2 CONVENTION RECORDS, *supra* note 28, at 43.

the 2d. branch agst. any incautious or corrupt nomination by the Executive.⁶³

At this point in the debate, therefore, Madison was supporting a position to the contrary of his Senate appointment model, the arrangement at that time endorsed by the Convention.

Following the debate over the merits of the Gorham proposal, the delegates proceeded to vote. First, they voted on vesting the appointment power solely in the Executive. The motion failed, two states to six.⁶⁴ Next, they voted on Gorham's advice and consent proposal as seconded by Gouverneur Morris.⁶⁵ The motion failed, with the delegations deadlocked, four states to four.⁶⁶ Two states that had voted against appointment by the Executive alone, Maryland and Virginia, voted in favor of the advice and consent plan.

Upon the failure of the Gorham motion, Madison proposed a variation of his earlier plan. Under his revised proposal, the Executive did *not* need Senate *concurrence* for his appointment; rather, he merely needed the Senate to *decline* to *oppose* explicitly the nomination: "<Mr.> M<adison> moved that the Judges should be nominated by the Executive, & such nomination should become an appointment <if not> disagreed to within [blank] days by $\frac{2}{3}$ of the 2d. branch."⁶⁷ Gouverneur Morris again seconded this motion, but it was postponed without a vote.⁶⁸

On July 21 the delegates resumed the debate, with Madison offering a more comprehensive justification for his Senate-veto plan: It would place primary responsibility on the President, who would be the most "capable & likely" to choose men of

63. *Id.* at 42–43.

64. *Id.* at 44. The motion was supported by Massachusetts and Pennsylvania. It was opposed by Connecticut, Delaware, Maryland, Virginia, North Carolina, and South Carolina. Georgia voted "absent." *Id.*

65. *Id.* ("Mr. Gorham moved 'that the Judges be <nominated and appointed> by the Executive, by & with the advice & consent of the 2d branch <& every such nomination shall be made at least [blank] days prior to such appointment'>. This mode he said had been ratified by the experience of 140 years in Massachussts. If the appt. should be left to either branch of the Legislature, it will be a mere piece of jobbing.").

66. *Id.* The motion was supported by Massachusetts, Pennsylvania, Maryland, and Virginia. It was opposed by Connecticut, Delaware, North Carolina, and South Carolina. Again, Georgia voted "absent." *Id.*

67. *Id.*

68. *Id.*

good character for the nomination. It would also be harder for the President to hide "selfish motives" behind collective action. To the extent that a President did choose men out of selfish motives, the Senate veto would provide a sufficient check.⁶⁹ Madison also pointed out that when the Senate was originally entrusted with the appointment power, its seats were apportioned among the States according to population; under later compromises, however, the Senate's seats were now apportioned equally among the States.⁷⁰ Entrusting the appointment power to the Senate would enable representatives of a national popular minority to control appointments; the President, "considered as a national officer, acting for and equally sympathising with every part of the U. States," would not be as likely to be dominated by a popular minority.⁷¹

The delegates responded with a variety of counterproposals. Pinckney persisted in his support of Senate appointment.⁷² Elbridge Gerry of advice-and-consent Massachusetts agreed with Pinckney.⁷³ But Randolph—who previously had allied with Pinckney to support Senate appointment,⁷⁴ and who was the author of the Virginia Plan, which would have assigned appointment power to the national legislature as a whole⁷⁵—supported the Madison proposal. He argued that he would have preferred Gorham's advice and consent model, but, in its absence, Madison's discretionary Senate veto was better than Senate appointment.⁷⁶ Echoing Madison's argument, he set forth his enthusiasm in no uncertain terms: He "thought the motion . . . so great an improvement of the clause as it stands, that he anxiously wished it success."⁷⁷ Morris also echoed

69. *Id.* at 80.

70. Equal representation of the States in the Senate was approved on July 16, by a vote of five states to four. *Id.* at 15.

71. *Id.* at 81.

72. *Id.*

73. *Id.* at 82.

74. See *supra* notes 61–62.

75. See *supra* note 28 and accompanying text.

76. 2 CONVENTION RECORDS, *supra* note 28, at 81. Randolph's explicit differentiation between Gorham's advice and consent model and Madison's Senate-veto model is particularly probative in this Article's analysis of the original meaning of advice and consent. See *infra* Part III.A.

77. 2 CONVENTION RECORDS, *supra* note 28, at 81. James Gauch attributes Randolph's abrupt about-face to belated appreciation of the advantages the Madison model would provide to such a large state as Virginia, whose power in

Madison's arguments.⁷⁸ Oliver Ellsworth⁷⁹ argued in favor of Senate nomination of appointments, subject to an executive veto, with the Senate empowered to override such a veto by a two-thirds vote; Ellsworth thought that the Executive, located in one place, could not be as knowledgeable of nominees as could the Senators of the several States.⁸⁰ George Mason of Virginia was thoroughly unimpressed by the differences between any of the plans of joint President-Senate appointment, arguing that "[n]otwithstanding the form of the proposition . . . the appointment was substantially vested in the [Executive] alone."⁸¹ He saw executive appointment to be "a dangerous prerogative. It might even give him an influence over the Judiciary department itself."⁸²

Elbridge Gerry of Massachusetts criticized Madison's plan on, among other things, the ground that the one-third Senate vote needed to prevent a Senate veto was too low. Madison's response was very revealing with respect to his understanding of the differences between his plan and Gorham's:

Mr. <Madison>, observed that he was not anxious that $\frac{2}{3}$ should be necessary to disagree to a nomination. He had given this form to his motion chiefly *to vary it the more clearly from one which had just been rejected*.⁸³ He was content to obviate the objection last made, and accordingly so varied the motion *as to let a majority reject*.⁸⁴

the Senate was reduced by the equal-representation allocation of seats. James E. Gauch, Comment, *The Intended Role of the Senate in Supreme Court Appointments*, 56 U. CHI. L. REV. 337, 349–50 (1989). Gauch argues that the Convention's debate on appointments was driven in part by rivalry between large and small states. *See id.* at 340, 347–50.

78. 2 CONVENTION RECORDS, *supra* note 28, at 82.

79. Throughout his account, Madison misspelled the delegate's name "Elseworth." The correct spelling is "Ellsworth." *See, e.g.*, Members of the Supreme Court of the United States, <http://www.supremecourtus.gov/about/members.pdf> (last visited Nov. 20, 2005).

80. 2 CONVENTION RECORDS, *supra* note 28, at 81.

81. *Id.* at 83.

82. *Id.*

83. The full import of this distinction is discussed in greater detail further below. *See infra* Part III.A.

84. 2 CONVENTION RECORDS, *supra* note 28, at 82 (emphases added).

The delegates first put Madison's proposal to a vote. It was defeated, three states to six.⁸⁵ Maryland, which voted in favor of Gorham's advice and consent plan days earlier, voted against Madison's plan. Georgia, which had voted "absent" on both the Executive-only proposal and on the Gorham advice and consent proposal, also voted against Madison's Senate-veto plan. The delegates immediately voted to reaffirm senatorial appointment of judges. The motion carried, six states to three.⁸⁶

On July 26, the delegates referred the matter, along with its progress on other issues, to the Committee of Detail.⁸⁷ Among the provisions sent to the committee was a provision for appointment of judges by the Senate.⁸⁸ The Executive retained full power for appointment of officers "in cases not otherwise provided for."⁸⁹ The Committee on Detail returned its report on August 6.⁹⁰ Its text provided for appointment of Supreme Court judges and ambassadors by the Senate,⁹¹ and appointment of "officers in all cases not otherwise provided for by this Constitution" by the President.⁹²

On August 23, Gouverneur Morris resumed his criticism of appointment of officers by the Senate. He relied primarily on the threat of cabal present in such a "numerous" body; Wilson concurred.⁹³ But their criticisms did not result in a formal motion and vote.

85. *Id.* at 83. Voting in favor: Massachusetts, Pennsylvania, and Virginia. Voting against: Connecticut, Delaware, Maryland, North Carolina, South Carolina, Georgia. *Id.*

86. *Id.* Voting in favor: Connecticut, Delaware, Maryland, North Carolina, South Carolina, and Georgia. Voting against: Massachusetts, Pennsylvania, and Virginia. *Id.*

87. *Id.* at 128.

88. *See id.* at 83. The July 21 resolution that judges be appointed by the Senate was sent to the Committee. *Id.* at 128.

89. *Id.* at 120–21. The July 26 resolution that the Executive appoint officers in cases "not otherwise provided for" was sent to the Committee. *Id.* at 128.

90. *Id.* at 177.

91. *Id.* at 183.

92. *Id.* at 185. The Committee on Detail's report was the first to bestow the title of "President" upon the national Executive. *Id.*

93. *Id.* at 389.

d. September 4: Advice and Consent

On September 4, the convention broke from its agreement on Senate appointment without explanation, resurrecting appointment by the President with the advice and consent of the Senate. David Brearley of New Jersey presented the report of the Committee on Compromise, which provided for appointment of judges, ambassadors, and other officers by the President and Senate together:

The President by and with the advice and Consent of the Senate, shall have power to make Treaties; and he shall nominate and by and with the advice and consent of the Senate shall appoint ambassadors, and other public Ministers, Judges of the Supreme Court, and all other Officers of the U—S—, whose appointments are not otherwise herein provided for.⁹⁴

In debate on the provision three days later, the delegates once more considered this commingling of Executive and Senate involvement. Wilson, who had accepted this model as a second-best option when Gorham first proposed it in July,⁹⁵ objected to the “blending [of] a branch of the Legislature with the Executive.”⁹⁶ He proposed instead that the President’s appointments be assisted by the nonbinding advice of a “privy council.”⁹⁷ The involvement of a privy council was opposed by Rufus King of Massachusetts, a state that used such a council in its own appointments.⁹⁸ King supported the Senate’s advice and consent role.⁹⁹ Morris continued in his support for the advice and consent plan.¹⁰⁰

Pinckney, who initially had supported appointment by the legislature,¹⁰¹ and who later supported Senate appointment,¹⁰² now opposed Senate involvement in appointments by the

94. *Id.* at 498–99.

95. *See supra* notes 53–56 and accompanying text.

96. 2 CONVENTION RECORDS, *supra* note 28, at 538.

97. *Id.* at 539; *see also infra* Part I.A.2.b (discussing the proposal of a “privy council”).

98. *See infra* Part II.

99. 2 CONVENTION RECORDS, *supra* note 28, at 539.

100. *Id.*

101. *See supra* Part I.A.1.b.

102. *See supra* Part I.A.1.c.

President. (He did, however, support appointment of ambassadors by the Senate alone.)¹⁰³

The delegates approved the Committee on Compromise's language with only slight modification.¹⁰⁴ The motion, which had been opposed so strenuously in earlier votes, passed without opposition.¹⁰⁵ On September 12, the Committee of Style presented what would become the final version of the Appointments Clause,¹⁰⁶ which the delegates finally accepted on September 17.¹⁰⁷

2. *Matters Related to Senate Advice and Consent*

a. *Election of and Representation in the Senate*

The idea of the Senate—a second house of the national legislature—was first proposed in Randolph's Virginia Plan, to serve as a compromise in the apportionment battles between large and small states.¹⁰⁸ As detailed on May 29, the Virginia Plan called for the second house of the bicameral national legislature to consist of members nominated by the legislatures of the several States and elected by the other house of the national legislature.¹⁰⁹ On June 7, Dickinson and Sherman proposed that members of the Senate be chosen by the individual state legislatures.¹¹⁰ Madison was a vigorous opponent of this mode of election; he warned that such a plan would require the Convention to “depart from the doctrine of proportional representation; or admit into the Senate a very large number of members.”¹¹¹ The former was rejected out of hand as “evidently

103. 2 CONVENTION RECORDS, *supra* note 28, at 539.

104. *Id.* (adding the parenthetical term “(and Consuls)” between “other public ministers” and “Judges of the Supreme Court”).

105. *Id.*

106. *Cf. id.* at 599, with U.S. CONST. art. II, § 2, cl. 2. Three days later, following minimal debate, the Convention approved an additional clause allowing Congress to vest in the President, courts of law, and heads of departments the appointment of inferior officers. 2 CONVENTION RECORDS, *supra* note 28, at 627–28.

107. 2 CONVENTION RECORDS, *supra* note 28, at 648–49.

108. See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 59–65 (1996).

109. 1 CONVENTION RECORDS, *supra* note 28, at 20.

110. *Id.* at 150.

111. *Id.* at 151. Election by the State legislatures was assumed to require an enlargement of the number of Senators because, at this point in the debate, no one had suggested that the States should be represented equally. Under a system of

unjust.” But his critique of the latter point, which he deemed “inexpedient,” revealed his vision for the second branch of the Legislature:

The use of the Senate is to consist in its proceeding with more coolness, with more system, & with more wisdom, than the popular branch. Enlarge their number and you communicate to them the vices which they are meant to correct.¹¹²

The arguments of Madison and others notwithstanding, the delegates approved election of Senators by state legislatures unanimously.¹¹³

The apportionment of seats in the Senate was a contentious point. On June 11, the closely divided committee of the whole voted to apportion votes in the Senate proportionally among the States according to their respective populations, the same manner in which suffrage was to be based in the House of Representatives.¹¹⁴

Mere days later, the New Jersey Plan was introduced; it proposed a unicameral legislature wherein each state would have one vote.¹¹⁵ This proposal incited a number of proponents of the Virginia Plan to present critiques of Paterson’s plan. Hamilton denounced the unicameral legislature of the New Jersey plan in his extensive remarks on June 18.¹¹⁶ The following day, Madison himself extensively criticized the New Jersey Plan.¹¹⁷ Following his remarks, the New Jersey Plan was rejected, seven states to three, with Maryland divided.¹¹⁸

Following the defeat of the New Jersey plan, the delegates offered a variety of compromise proposals for representation in

proportional representation, giving small states a Senator would mean that each Senator could only represent a population as big as the smallest state. Thus, as Pinckney warned, “If the small States should be allowed one Senator only, the number will be too great, there will be 80 at least.” *Id.* at 150.

112. *Id.* at 151.

113. *Id.* at 156.

114. *Id.* at 202.

115. *Id.* at 243. The New Jersey Plan would have retained the unicameral, equal representation of the Congress of the Articles of Confederation.

116. *Id.* at 286–87.

117. *Id.* at 314–22.

118. *Id.* at 322. Voting in favor: Massachusetts, Connecticut, Pennsylvania, Virginia, North Carolina, South Carolina and Georgia. Voting against: New York, New Jersey, and Delaware. *Id.*

the two houses of the legislature. On June 28, John Lansing of New York and Jonathan Dayton of New Jersey proposed that the States enjoy equal representation in the House of Representatives.¹¹⁹ The motion was defeated the next day, four states to six, with Maryland divided.¹²⁰ The same day, Ellsworth proposed that the States enjoy equal representation in the Senate.¹²¹ It was defeated by a tie vote on July 2.¹²² Having reached apparent deadlock, the delegates—over strenuous objection by Madison—assigned the issue to a Committee on Compromise.¹²³

In committee, it was Benjamin Franklin who brokered the compromise: in the House the States would be represented in proportion to their population; in the Senate the States would be represented equally. This compromise “was barely acquiesced in by the members from the states opposed to an equality of votes in the 2d. branch and was evidently considered by the members on the other side, as a gaining on their point.”¹²⁴ From July 5 to July 16, the delegates debated the compromise proposal generally. On July 16, they voted in favor of equal representation of States in the Senate.¹²⁵

As intimated above, the July 16 change in Senate representation—from a proportional-representation scheme to one of equal representation—caused change in the Convention’s allocation of appointment power.¹²⁶ On July 21, Madison noted the change in his defense of his Senate-veto plan for appointments, which would (according to him) prevent control of the ap-

119. *Id.* at 445. Lansing and Dayton proposed that representation in the House of Representatives be “according to the rule established by the Confederation,” which granted one vote to each state. *Id.*

120. *Id.* at 468. Voting in favor: Connecticut, New York, New Jersey, and Delaware. Voting against: Massachusetts, Pennsylvania, Virginia, North Carolina, South Carolina, and Georgia. *Id.*

121. *Id.*

122. *Id.* at 510. Voting in favor: Connecticut, New York, New Jersey, Delaware, and Maryland. Voting against: Massachusetts, Pennsylvania, Virginia, North Carolina, and South Carolina. Georgia’s vote was divided. *Id.*

123. *Id.* at 515–16.

124. 1 CONVENTION RECORDS, *supra* note 28, at 526 n.*.

125. 2 CONVENTION RECORDS, *supra* note 28, at 15. Voting in favor: Connecticut, New Jersey, Delaware, Maryland, and North Carolina. Voting against: Pennsylvania, Virginia, South Carolina, and Georgia. Massachusetts’s vote was divided. *Id.*

126. *See supra* Part I.A.1.c.

pointments by representatives of a national popular minority. In light of this change, he advocated entrusting primary responsibility for appointments in the President, a national officer, with a discretionary veto held by the Senate.

b. The President and an Executive Council

Although the Senate eventually came to be seen as an advisory body to the President in appointments and other matters, some participants in the Constitutional Convention urged the creation of bodies within the executive branch for the purpose of advising and counterbalancing the singular Executive. Such a council was no mere abstraction to the delegates: In the twelve years between the Declaration of Independence and the Constitutional Convention, at least nine states utilized an executive council in the making of appointments.¹²⁷

The first delegate to propose an executive advisory council was Elbridge Gerry of Massachusetts, a state that long had utilized such a council. On June 1, Gerry suggested that a council to the Executive would “give weight & inspire confidence.”¹²⁸

Gerry’s proposal came amidst a larger discussion of whether the national Executive should be a unitary office or a multiperson body. The major proponent of a multiperson Executive was Randolph, who regarded a unitary Executive as “the foetus of monarchy.”¹²⁹ The question of the form of the Executive was set aside until June 4. Wilson favored the unitary Executive, citing the experience of the several States.¹³⁰ Sherman noted that all thirteen states featured not only a unitary executive, but also “a Council of advice, without which the first magistrate could not act.”¹³¹ Wilson immediately disclaimed any appearance that he supported such a council.¹³² Gerry, an apparent supporter of

127. SYDNEY GEORGE FISHER, *THE EVOLUTION OF THE CONSTITUTION OF THE UNITED STATES 172–73* (1910) (naming South Carolina, Virginia, New Jersey, Delaware, Pennsylvania, Maryland, Vermont, Massachusetts, and New Hampshire). In addition, New York utilized a council selected out of the state senate. *Id.* at 173. Alexander Hamilton cited New York’s appointment process as an example of a dangerous cabal. *THE FEDERALIST NO. 77*, at 461 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

128. 1 CONVENTION RECORDS, *supra* note 28, at 66.

129. *Id.*

130. *Id.* at 96.

131. *Id.* at 97.

132. *Id.*

such a council as a check on the Executive, then specifically disclaimed the notion of a multiperson Executive. The proposed unitary Executive was accepted by the convention, seven states to three.¹³³

The question of whether the unitary Executive should be advised by a privy council was again raised on August 18.¹³⁴ Ellsworth suggested that such a council consist of the "President of the Senate—the Chief-Justice, and the Ministers as they might be estab[lished] for the departments of foreign & domestic affairs, war finance, and marine, who should advise but not conclude the President."¹³⁵ Pinckney warned that an executive council would be an instrument of pure presidential discretion, for him to utilize as he saw fit: "Give him an able Council and it will thwart him; a weak one and he will shelter himself under their sanction."¹³⁶

On August 20, Pinckney and Gouverneur Morris proposed a "Council of State" consisting of the Chief Justice and the heads of various departments.¹³⁷ The President would be free to submit matters for their discussion, and to require the written opinions of any of them,¹³⁸ but he was not to be bound by their views. This proposal was submitted to the Committee on Detail, which, on August 22, proposed that the President should have a privy council composed in a manner comparable to the Ellsworth and Morris proposals.¹³⁹ The proposal did not go to vote.

George Mason persisted in his support for a privy council as the delegates debated the Compromise Committee's proposal that appointments be made by the President with the advice and consent of the Senate.¹⁴⁰ Opposed to vesting appointment power in the Senate, but also wary of vesting such absolute

133. *Id.* at 97. Voting in favor: Massachusetts, Connecticut, Pennsylvania, Virginia, North Carolina, South Carolina, and Georgia. Voting against: Delaware, Maryland, and New York. *Id.*

134. On August 18, the Convention still had assigned the power of appointment to the Senate.

135. 2 CONVENTION RECORDS, *supra* note 28, at 329.

136. *Id.*

137. *Id.* at 342–43.

138. *Cf.* U.S. CONST. art. II, § 2, cl. 1 ("The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments . . .").

139. 2 CONVENTION RECORDS, *supra* note 28, at 367–68.

140. *See supra* Part I.A.1.d.

power in the Executive, he proposed a six-member privy council to assist the President in making appointments.¹⁴¹ Wilson agreed with Mason, as he saw Senate advice and consent as representing inappropriate blending of the executive and legislative branches.¹⁴² But Rufus King of council-experienced Massachusetts opposed the creation of such a council, arguing that Senate involvement would be no more costly than council involvement and would require no “unnecessary creation of New Corps which must increase the expence as well as influence of the Government.”¹⁴³ The delegates then voted in favor of appointments by the President with the advice and consent of the Senate.¹⁴⁴

Mason tried once more to persuade the delegates to create a council, warning that a President lacking such restraint would be “an experiment on which the most despotic Governments had never ventured.”¹⁴⁵ Franklin agreed, suggesting that a council “would not only be a check on a bad President but be a relief to a good one.”¹⁴⁶ Gouverneur Morris argued that the council had been considered and rejected by the Council on Compromise in order to focus responsibility upon the President. Wilson, Dickinson, and even Madison voiced support for the council, but Mason’s motion was defeated, eight states to three.¹⁴⁷ The Convention ended days later, leaving the Senate alone to serve as the advisory council for the President on appointments and treaties.

B. *Post-Convention Debates*

Upon the close of the convention, discussion of the proposed Constitution continued throughout the thirteen states. This dis-

141. 2 CONVENTION RECORDS, *supra* note 28, at 537–38. But not in the making of treaties or the appointment of ambassadors, which he deemed to be a “legislative” endeavor. *Id.* at 537.

142. *Id.* at 538–39.

143. *Id.* at 539.

144. *Id.* at 539–40.

145. *Id.* at 541.

146. *Id.* at 542.

147. *Id.* Voting in favor: Maryland, South Carolina, and Georgia. Voting against: New Hampshire, Massachusetts, New Jersey, Pennsylvania, Delaware, Virginia, Connecticut, and North Carolina. *Id.* Of the States voting in favor, Maryland and South Carolina used councils. See FISHER, *supra* note 127, at 172–73. Of the States voting against, New Hampshire, Massachusetts, New Jersey, Pennsylvania, Delaware, and Virginia used councils. *Id.*

cussion, which in a few instances touched on the issue of appointments, was conducted primarily in two ways: in written advocacy—both public (most notably, the *Federalist Papers*) and private—and in state ratification conventions.

1. *The Federalist Papers*

In three of his contributions to the famous series of essays to the People of the State of New York, Alexander Hamilton discussed the advice and consent model of appointment. In *Federalist Papers* Nos. 66, 76, and 77, he presented arguments that described the operation of the Senate in executive appointments. His arguments reflected in many ways the arguments regarding appointments presented by delegates at the Convention, although his arguments regarding appointments were not wholly reflective of the Convention debate or of the appointment process in practice.

Hamilton's *Federalist No. 66*, the "leading defense as well as the most thorough exposition of the provisions in the Constitution concerning the appointing power,"¹⁴⁸ gives a clear description of Hamilton's overall view of the advice and consent process. He did not expect the Senate to play any role in choosing the initial nominee:

It will be the office of the President to *nominate*, and, with the advice and consent of the Senate, to *appoint*. 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 he may have made.¹⁴⁹

Hamilton's defense of joining the President and the Senate in appointments echoed a major argument from the Convention: Vesting primary responsibility in the President would provide for responsibility and freedom from regional bias, while Senate consent would provide security from personal attachment. Hamilton's language implies that Senate rejection of the President's nominee would not be a regular occurrence: "But his nomination may be overruled: this it certainly may, yet it can only be to make place for another nomination by himself It

148. JOSEPH P. HARRIS, *THE ADVICE AND CONSENT OF THE SENATE* 27 (1953).

149. *THE FEDERALIST NO. 66* (Alexander Hamilton), *supra* note 127, at 405.

is also not very probable that his nomination would often be overruled.”¹⁵⁰

Hamilton’s *Federalist* remarks provide insight into *his* perception of the mechanics of advice and consent, but, on closer examination, they do not appear to be a reliable indicator of what the delegates endorsed in advice and consent. First, as noted above, Hamilton described the Senate’s consent action in binary terms: “they can only *ratify or reject* the [Executive’s] choice.”¹⁵¹ Later, he describes the Senate’s “consent” power in “veto” terms: “their right of negative upon his nominations”;¹⁵² “[t]he censure of rejecting a good [nomination] . . .”¹⁵³ This characterization—that the Senate approves or rejects—harkens back not so much to the Gorham advice and consent proposal, which provided for consent but left implicit the Senate’s duty to affirmatively reject, but to Hamilton’s own proposal of June 18, preceding the Gorham proposal, in which the President nominated officers “subject to the *approbation or rejection* of the Senate.”¹⁵⁴ Indeed, Hamilton was not himself present at the Convention July 18 through 21 when Gorham proposed, described, and defended the advice and consent model.¹⁵⁵

Hamilton’s *Federalist* argument used the appointment process of New York—home of the *New York Packet*, an original publisher of the *Federalist* essays—as an example of a poor appointment process. New York relied on a Council of Appointments, composed of the Governor and four others.¹⁵⁶ Hamilton criticized the council’s lack of public visibility—a “small body, shut up in a private apartment, impenetrable to the public eye”—as contributing to an environment of “cabal.”¹⁵⁷

Hamilton’s argument that the Senate is the appropriate size for advising on appointments does not just focus on the advantages of the Senate relative to a smaller council; rather, he also

150. THE FEDERALIST NO. 76 (Alexander Hamilton), *supra* note 127, at 457.

151. *Id.* at 405 (emphasis added).

152. THE FEDERALIST NO. 77 (Alexander Hamilton), *supra* note 127, at 460.

153. *Id.* at 461.

154. 1 CONVENTION RECORDS, *supra* note 28, at 292 (emphasis added); *see supra* Part I.A.1.c.

155. RON CHERNOW, ALEXANDER HAMILTON 235, 238 (2004). Hamilton left the Convention after offering some remarks on June 29 and did not return until around August 13. *Id.*

156. THE FEDERALIST NO. 77 (Alexander Hamilton), *supra* note 127, at 461.

157. *Id.*

argues its advantages over the much larger legislature as a whole: "A body so fluctuating and at the same time so numerous can never be deemed proper for the exercise of that power."¹⁵⁸ Under the original Constitution, the Senate consisted of twenty-six members, the House sixty-five: in total, nine members smaller than the current Senate alone.¹⁵⁹

In sum, a close reading of Hamilton's discussion provides much insight into his perception of the Senate's advice and consent role: The Senate could not exercise its own choice of nominee; the Senate would generally accept the President's nominee; the Senate would act in a transparent manner, preventing intrigue or cabal; the Senate would act in a majoritarian fashion; and the size of the 1789 Senate was pragmatically superior to a small council of five men or a larger Congress of ninety-one men. But most importantly, Hamilton clearly equated his "approbation or rejection" proposal with the mechanics of the final advice and consent proposal. Hamilton's arguments may be indicative of the opinions of one of the Federalist contingent's leaders, but they more plausibly represent not so much the appointments framework accepted by the Framers, but rather the appointments framework proposed by Hamilton but never voted upon at the Convention.¹⁶⁰

2. *State Ratification Debates*

The appointment power did not receive extensive scrutiny in most of the state ratification conventions, as the Ratifiers focused more closely on the larger, more prominent issues of the federal government's structure and powers. Furthermore, in the course of the rare discussions actually conducted on the issue of appointments, speakers did not illuminate the Ratifiers' nuanced impressions of the specific roles of President and Senate so much as criticize the mix, variously favoring vesting absolute appointment power in either the President or the legislature.

An exception to this trend is found in the remarks of James Wilson before the Pennsylvania Convention. Although he ad-

158. *Id.* at 463.

159. See U.S. CONST. art. I, § 2, cl. 3.

160. See generally THE FEDERALIST NO. 77 (Alexander Hamilton), *supra* note 127, at 457. New York's Ratifiers, however, may have shared Hamilton's understanding, other states' Ratifiers notwithstanding.

mitted that “the senate was not a favorite of mine,”¹⁶¹ he endeavored to defend its form. To those who feared that the Senate would exert too much power over the President in the appointment process, he argued that “the Senate stands controlled; if it is that monster which it said to be, it can only show its teeth, it is unable to bite or devour.”¹⁶² His remarks may or may not imply an obligation upon of the Senate to vote on nominations: “[T]he President must nominate before they can vote.”¹⁶³ He clearly saw a vote involved at least in the process of consenting to a nomination. But he said “can vote,” not “would vote,” or “do vote.” This description falls short of an explicit note of awareness of obligation.

Likewise, in North Carolina, delegate James Iredell spoke in terms that may or may not imply an affirmative obligation upon the Senate to act on the nomination: “The President proposes [a nominee]. The Senate has to consider upon it. If they think him improper, the President must nominate another”¹⁶⁴ According to Iredell, the Senate must “consider” it; but Iredell did not explicitly say whether “consideration” must culminate in a vote. Moreover, Iredell was not a party to the initial Convention. While his statements may have had an impact on the North Carolina ratification, they are of limited probative value beyond the extent that they indicate that the “reasonable North Carolina Ratifier” may have shared his impressions.

Beyond these meager pieces of evidence, little insight into the intended mechanics of Senate involvement in appointments can be gleaned from the state ratification debates.¹⁶⁵ The great majority of discussions on the matter of appointments focused

161. *James Wilson in the Pennsylvania Convention*, in *PENNSYLVANIA AND THE FEDERALIST CONSTITUTION, 1787–1788* (John Bach McMaster & Frederick Stone eds., 1888), reprinted in 3 *CONVENTION RECORDS*, *supra* note 28, at 162. As shown in the discussion of the Federal Convention above, Wilson had been a staunch supporter of vesting appointment power in the President alone. See *supra* Part I.A.

162. *Id.*

163. *Id.*

164. Speech of James Iredell at the North Carolina Ratifying Convention, in 4 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA* 134 (Jonathan Elliot ed., 2d ed. 1881) [hereinafter *ELLIOT'S DEBATES*].

165. See generally *RATIFYING THE CONSTITUTION* (Michael Allen Gillespie & Michael Lienesch eds., 1989).

on broader questions of policy surrounding the perceived "dangerous[] blending [of] the executive and legislative powers,"¹⁶⁶ on the threat of Senate control of the Executive through appointments,¹⁶⁷ or on fears that the Senate's check on the President in appointments will be chimerical, allowing the President, "when he pleases, to become a king in *name*, as well as in substance."¹⁶⁸

3. *Post-Ratification Debate*

Following the ratification of the Constitution, John Adams, a man quite familiar with the Massachusetts Constitution, continued to debate the efficacy of the new Constitution with Roger Sherman. In a 1789 letter, Adams used language implying that he perceived a Senate duty to act on nominations: "The whole senate must now deliberate on every appointment . . ."¹⁶⁹ Adams argued that the President should be advised on appointments by a privy council, not by the Senate, because, among other things, the burden of deliberating on every nomination for appointment would be intolerable. In his response, Sherman did not refute Adams's contention that the Senate would have to deliberate on every nomination.¹⁷⁰ But neither party suggested that "deliberation" would have to culminate with a formal vote.

II. THE MASSACHUSETTS EXPERIENCE

As noted above, when Nathaniel Gorham introduced his advice and consent model of executive appointments, he pointed to Massachusetts as his inspiration: "This mode had been long practised in that country, & was found to answer perfectly

166. George Mason, An Address Before the Virginia Ratifying Convention (1788), in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES; PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, at 330 (Paul L. Ford ed., 1888), reprinted in HARRIS, *supra* note 148, at 25.

167. 4 ELLIOT'S DEBATES, *supra* note 164, at 116-18, quoted in HARRIS, *supra* note 148, at 26 (argument of Samuel Spencer, delegate to the North Carolina Ratifying Convention).

168. Luther Martin, *Genuine Information*, MD. GAZETTE & BALT. ADVERTISER, Dec. 28, 1787, reprinted in 3 CONVENTION RECORDS, *supra* note 28, at 218.

169. John Adams, Third Letter to Roger Sherman on the Constitution of the United States, in 6 THE WORKS OF JOHN ADAMS 436 (Charles Francis ed., 1851).

170. See Roger Sherman, Reply to John Adams' Third Letter on the Constitution of the United States, in 6 THE WORKS OF JOHN ADAMS, *supra* note 169, at 440-42.

well.”¹⁷¹ That the delegates to the Federal Convention in Philadelphia used Massachusetts as their paradigm for advice and consent has hardly gone unnoticed by contemporary commentators.¹⁷² But although commentators often have highlighted Gorham’s reference to Massachusetts as a model for advice and consent, none have ventured to shed light on how advice and consent actually operated in Massachusetts in the years preceding the Convention. Investigation into records of executive appointments in 1780s Massachusetts demonstrates that, although the overwhelming majority of the Governor’s nominations were approved by the constitutionally mandated advising Council, when nominations were not approved, no formal rejection of the nominees was announced. Moreover, the advising Council announced its decisions in a single voice; no records were kept of vote tallies in council decisionmaking.

The terms of the Massachusetts Constitution of 1780 obligated the Governor to secure the advice and consent of the Council, not just in the appointment of judges and officers, but also in the spending of treasury monies.¹⁷³ In other matters, the Governor had to secure the *advice* of the Council before acting, but he was not required to seek its *consent*.¹⁷⁴

A. *The History of the Council*

Although the Council today plays only a limited role in Massachusetts’s government,¹⁷⁵ its roots in Massachusetts’s history stretch back long before the Constitution of 1780. Privy councils advised the Governor as early as the Seventeenth Century. The

171. 2 CONVENTION RECORDS, *supra* note 28, at 41; *see supra* Part I.A.1.c.

172. *See, e.g.,* Gauch, *supra* note 77, at 348; Matthew D. Marcotte, Note, *Advice and Consent: A Historical Argument for Substantive Senatorial Involvement in Judicial Nominations*, 5 N.Y.U. J. LEGIS. & PUB. POL’Y 519, 530 (2001); William G. Ross, *The Functions, Roles, and Duties of the Senate in the Supreme Court Appointment Process*, 28 WM. & MARY L. REV. 633, 637–38 (1987).

173. MASS. CONST. pt. 2, ch. 2, § 1, art. IX (1780); *id.* pt. 2, ch. 2, § 1, art. XI.

174. *Id.* pt. 2, ch. 2, § 1, art. V (to adjourn the General Court); *id.* ch. 2, § 1, art. VIII (to pardon offenses); *id.* pt. 2, ch. 2, § 1, art. X, cl. 4 (to appoint various military officers); *id.* pt. 2, ch. 2, § 1, cl. 7 (to appoint officers of the Continental Army); *see also* Op. of the Justices to the Governor and Council, 190 Mass. 6, 617–20 (1906).

175. Robert L. Turner, *A Council Whose Time Has Passed*, BOSTON GLOBE, Feb. 27, 1992, at 19 (“For decades, the council has proved itself to be close to useless, or worse. Its duties have gradually been trimmed to a point at which confirmation of judges and clerks is its only real job.”).

Charter of 1691 was the first to vest in the Governor the power to appoint judges, justices of the peace, and sheriffs, with the advice and consent of the Council.¹⁷⁶ That Council, the upper house of the General Court,¹⁷⁷ consisted of twenty-eight members selected initially by the King, later by the Governor, and thereafter by the Governor upon nomination by the General Court.¹⁷⁸ Colonial strife led the King to reassert control over the Council beginning in August 1774, although, under that British legislation, the Governor no longer needed council consent in the appointment of judges and other officials.¹⁷⁹ In 1775, as the Continental Congress steeled itself against the British, the Congress authorized the Provincial Congress (a shadow government outside of British-controlled Boston) to hold elections and to select a new Council to assume partial control of executive responsibilities (the Governor's and Lieutenant Governor's offices having been declared vacant by the Provincial Congress).¹⁸⁰

The Council proceeded to exert substantial control over local government on the reasoning that, under the Charter of 1691, the Council was to exercise the executive power in the absence of the Governor and Lieutenant Governor. Although the House did question whether the Council or a House majority should be considered the "Governor," exigent circumstances soon forced their hand. On December 10, 1776, with Rhode Island occupied by British troops, the House resolved that "the whole power of the General Court, be during the recess of the Court devolved on the Council of this State, so far forth as are necessary for the purpose of protecting and defending this State . . . and any seven shall be considered as a quorum."¹⁸¹

When both the General Court and the Council were in session, they managed to coexist relatively peacefully. From 1775 to 1779, civil officers were appointed "without difficulty" by

176. 2 COMMONWEALTH HISTORY OF MASSACHUSETTS 8, 11 (Albert Bushnell Hart ed., 1928).

177. The "General Court" is the name of the Massachusetts state legislature. *Id.* at 11–12.

178. *Id.* at 12.

179. 3 COMMONWEALTH HISTORY OF MASSACHUSETTS 64 (Albert Bushnell Hart ed., 1929).

180. *Id.* at 67–68.

181. *Id.* at 70.

the Council and the House of Representatives together.¹⁸² But after the Declaration of Independence, the ill-fitting colonial Charter of 1691 came under question. Local leaders began to call for a new constitution.

In 1776 and 1777, the General Court called on towns to send representatives for a constitutional convention, but received no effective response. Thus, the General Court and Council gathered themselves into a constitutional convention and produced a draft constitution. This constitution established a Senate and a House of Representatives,¹⁸³ a Governor and Lieutenant Governor,¹⁸⁴ but no Council. All civil officers were to be selected annually by vote of the General Court. All other officers, military and civil, including judges, were appointed by the Governor and Senate.¹⁸⁵

The proposed constitution was rejected overwhelmingly by statewide popular vote, 2,083 to 9,972.¹⁸⁶ The towns of Essex County gathered in convention to publicly enumerate their reasons for rejecting the Constitution of 1778.¹⁸⁷ Among their grievances were the improper intermingling of executive and legislative powers through Governor-Senate cooperation;¹⁸⁸ the impropriety of vesting appointment power in a numerous body prone to vote-trading and cabal;¹⁸⁹ and, most noteworthy

182. *Id.* at 73.

183. A CONSTITUTION AND FORM OF GOVERNMENT FOR THE STATE OF MASSACHUSETTS-BAY art. I (1778), *microformed* at the Harvard Law School Library [hereinafter CONSTITUTION OF 1778]; *see also* REPORT OF A COMMITTEE OF CONVENTION OF A FORM OF GOVERNMENT FOR THE STATE OF MASSACHUSETTS-BAY (1777), *microformed* at the Harvard Law School Library [hereinafter CONSTITUTIONAL REPORT OF 1777].

184. CONSTITUTION OF 1778, *supra* note 183, art. II.

185. *Id.* art. XIX. The Constitution did not provide for the mode of cooperation between the Governor and Senate. *See id.*

186. 2 COMMONWEALTH HISTORY OF MASSACHUSETTS, *supra* note 176, at 184.

187. *See* RESULT OF THE CONVENTION OF DELEGATES HOLDEN AT IPSWICH IN THE COUNTY OF ESSEX, WHO WERE DEPUTED INTO CONSIDERATION THE CONSTITUTION AND FORM OF GOVERNMENT PROPOSED BY THE CONVENTION OF THE STATE OF MASSACHUSETTS BAY (1778), *microformed* at the Harvard Law School Library [hereinafter THE ESSEX RESULT].

188. *See id.* at 4–5. More specifically, the document laid out that Article XIX of the 1778 constitution was “exceptional, because a due independence is not kept up in between the supreme legislative, judicial, and executive powers, nor between any two of them.” *Id.* This language, which was kept in the Massachusetts Constitution of 1780, was cited with approval by James Madison in his seminal defense of separation of powers. *See* THE FEDERALIST NO. 47 (James Madison), *supra* note 127, at 304–05.

189. THE ESSEX RESULT, *supra* note 187, at 37–38, 46–47, 65–66.

for present purposes, the lack of an executive privy council selected by the legislative branch.¹⁹⁰

In response to *The Essex Result*, a second constitutional convention was called, resulting in the Constitution of 1780. In his address at the close of the convention, President James Bowdoin highlighted the retention of the Privy Council and its role in the appointment of civil officers, which would "prevent the governor from abusing the Power which is necessary to be put into his hands."¹⁹¹ Thus, the new constitution retained a strong privy council as a check on the Governor.

B. *The Council in Practice: "Advice" and "Consent"*

The Constitution of 1780 required that the nine-member Council record all of its resolutions and advice in a register, signed by the members present and available at all times for inspection by either house of the legislature.¹⁹² Moreover, "any member of the council may insert his opinion contrary to the resolution of the majority."¹⁹³ In the years immediately preceding and following the effective date of the Constitution of 1780, these records were maintained in bound, handwritten volumes entitled *Council Records*.¹⁹⁴ This author investigated the records of two separate year-long periods between the effective date of the Constitution and the beginning of the Federal Constitutional Convention of 1787: First, November 1780 to November 1781 (the first year under the new Constitution), and second, May 1786 to May 1787 (the final year leading up to the Federal Constitutional Convention). According to the *Council Records*,

190. *See id.* at 58–60.

191. AN ADDRESS OF THE CONVENTION FOR FRAMING A CONSTITUTION OF GOVERNMENT, FOR THE STATE OF MASSACHUSETTS-BAY, TO THEIR CONSTITUENTS 15 (1780), *microformed at the Harvard Law School Library* [hereinafter BOWDOIN ADDRESS].

192. MASS. CONST. pt. 2, ch. 2, § 3, art. V (1780).

193. *Id.*

194. The *Council Records* are available on microfiche at the Massachusetts State Archives at the University of Massachusetts at Boston. Having been handwritten rather than printed, individual records vary in legibility. Their legibility is further reduced because the documents were reproduced in negative form (white text on a black page). But given the imaging tools of the microfiche readers, and the subsequent double-checking of all entries, the author is confident that his account of the *Council Records* is highly accurate. An Appendix detailing the entirety of his data is on file with the author.

these two years involved approximately 900 nominations for appointments.

The form of nomination and consent varied little throughout the span of records. In 1780 and 1781, nominations were announced with, "His Excellency was this day pleased to nominate [name(s)]."¹⁹⁵ Council response generally was phrased as, "His Excellency was pleased this day agreeable to his Nomination of [date] to appoint with the Advice and Consent of the Council [name(s)]."¹⁹⁶ By 1786 and 1787, the wording had changed slightly. Nominations were still announced with, "His Excellency nominated to the council the following Gentlemen, viz. [name(s)],"¹⁹⁷ but council response was announced with, "Agreeable to His Excellency's nomination of [date], The Council advised and consented to the appointment of [name(s)]."¹⁹⁸ In the latter cases, no specific record of the Governor's appointment was included in the Council's records, following the records of advice and consent.

The swift and consistent manner with which the Council dispatched its advice and consent is apparent. The constitution itself required that the Governor submit his nominations at least seven days before the planned appointment.¹⁹⁹ In the vast majority of cases, the Council responded to the Governor's nominations within one to three weeks. In most cases the Council announced its advice and consent in the same batches in which the nominations were originally received.

The results of investigation into the *Council Records* were further illuminating. Most notably, of the approximately nine hundred nominations presented to the Council by the Governor, only fifty-seven of them did not appear to receive the advice and consent of the Council—more than half of which were

195. See, e.g., 26 COUNCIL RECORDS 202 (Mar. 19, 1781) (noting the nominations of Nathaniel Gorham et al.).

196. See, e.g., 26 COUNCIL RECORDS 221 (Mar. 27, 1781) (noting the appointments, upon the Council's advice and consent, of Nathaniel Gorham et al.).

197. See, e.g., 30 COUNCIL RECORDS 130 (Apr. 7, 1787) (noting the nominations of James Bowdoin, Jr. et al.).

198. See, e.g., 30 COUNCIL RECORDS 149 (Apr. 26, 1787) (noting the appointments, upon the Council's advice and consent, of the nominations of James Bowdoin, Jr. et al.).

199. MASS CONST. ch. II, § I, art. IX.

nominated en masse for a single office.²⁰⁰ Of these fifty-seven, not a single rejection was explicitly recorded in the *Council Records*; only nominations advised and consented to by the Council and appointed by the Governor can be found.

This finding appears at first blush to reveal a practice inconsistent with the Massachusetts constitution's requirement that "[t]he resolutions and *advice* of the Council *shall* be recorded in a register."²⁰¹ This leads to three possible conclusions:

- (1) the Council acted contrary to the explicit requirement of the constitution in the first year of the constitution's existence, by not recording its advice that the Governor not appoint a nominee; or
- (2) the term "advice," standing alone in the constitutional council records requirement, was not synonymous with the advice component of constitutional "advice and consent" of nominees (that is, "advice and consent" was a term of art), such that the council's "advice" not to appoint a nominee was not constitutionally required to be recorded in the *Council Records*; or
- (3) the Council's consent to a nomination was a matter of advice that was constitutionally required to be recorded in a register, but the Council's *lack* of consent to a nomination was *not* a matter of advice required to be recorded in a register.

The first of the three possible conclusions seems to be the least plausible, because the Council made extensive records of even the smallest spending resolutions.²⁰² To suggest that the Council followed the requirement of the constitution in cases involving such small expenditures while ignoring the same requirement with respect to the constitutional appointment process at the center of the constitutional debates of 1777 to 1780 is a dubious proposal.

The second possible conclusion is at least more plausible than the first. In each of the *Council Records* entries announcing the Council's approval of the nomination, the Council used a variation of the phrase "advised and consented to" as a whole;

200. 26 COUNCIL RECORDS 149–50 (Feb. 17, 1781) (thirty-three unconfirmed nominations to the post of "Justice for the Taking of Dangerous Persons").

201. MASS. CONST. pt. 2, ch. 2, § 3, art. V (1780) (emphasis added).

202. See, e.g., 26 COUNCIL RECORDS 151 (Feb. 19, 1781) (authorizing expenditure of twenty pounds).

in no case did it specify any added “advice” beyond the mere approval of the candidate, coupled with its consenting to the nomination. This precise repetition of the full phrase suggests that “advice and consent” may have been a term of art. But constitutional provisions before and after the appointments provision also require the Governor to obtain the “advice” of the Council but not the consent. For example, the article preceding the appointment provision requires that the Governor obtain the “advice” of the Council before granting pardons.²⁰³ In addition, the article following the appointment provision requires the Governor to seek the “advice” of the Council before appointing military officers and Continental Army officers;²⁰⁴ the article following those provisions requires council “advice and consent” before spending Treasury monies.²⁰⁵ Further refuting the term-of-art reading of “advice” and “advice and consent,” James Bowdoin, in announcing the then-new constitution, used the term “advise” in the context of appointments, in the very place of “advice and consent”: “[W]e have provided that he shall have a Council to *advise* him at all times and upon all important Occasions, and he with the *advice* of his Council is to have the Appointment of Civil Officers.”²⁰⁶ In light of these considerations, it appears unlikely that “advice” within “advice and consent” was intended to be a term of art not synonymous with other uses of “advice” at the time of Nathaniel Gorham’s proposal at the Federal Convention.²⁰⁷

The most plausible conclusion, then, is that the Council conveyed dissatisfaction with executive nominations for appointment in a manner not qualifying as official advice for the

203. MASS. CONST. pt. 2, ch. 2, § 1, art. VIII (1780).

204. *Id.* pt. 2, ch. 2, § 1, art. X.

205. *Id.* pt. 2, ch. 2, § 1, art. XI.

206. BOWDOIN ADDRESS, *supra* note 191, at 15 (emphasis added).

207. The Massachusetts Supreme Judicial Court has agreed with this conclusion in an advisory opinion, interpreting “advice” alone and “advice” in “advice and consent” to be synonymous:

We do not think that these different phrases, used in different parts of the Constitution, namely, “by and with the advice of council,” “by and with the advice and consent of the council,” “with the advice and consent of the council,” “with advice of council,” and “with advice of the council,” differ at all in legal effect. They all recognize the fact that the act, first of all, and afterwards for all time, is to be the act of the Governor. The only connection that the council can have with it is advisory. Whether the Governor takes advice or not, his conclusion must rest finally upon his own judgment.

Op. of the Justices to the Governor and Council, 190 Mass. 616, 619–20 (1906).

purposes of the constitution. In essence, under this theory, "advice" would have been a term of art not just with respect to "advice and consent" situations, but all of the constitutional advice situations: "advice" would have referred only to certain types of responses of the Council to the Governor. At first blush, this seems as implausible as the preceding conclusion; the framers of the Constitution of 1780 clearly wanted a general advisory board for the Governor, one that would meet with the Governor nearly every day²⁰⁸ and provide him with its opinions on executive matters. But the absence of any negative, nonappointment advice in the spans of *Council Records* investigated for this Article implies that either the Council gave virtually no advice, or that its advice was limited to rare occasions, and only to occasions in which it affirmatively *condoned* action, never when it advised *against* action.²⁰⁹

This can be illustrated by example: The overwhelming majority of *Council Records* entries relate to warrants on spending. *In not a single case* do the *Council Records* note the council advising *against* spending; all entries involve the *allowance* of spending. It appears that Massachusetts's Council, in the execution of its constitutional powers and duties, did not find its "advice" to extend beyond limited matters of *affirmative* espousal of proposals set before it.

This interpretation of advice and consent also reflects the traditional use of the phrase in England, which, long before 1787, customarily noted that the King's law was enacted "by and with the advice and consent of the lords spiritual and temporal and commons in parliament assembled" (or a functionally equivalent reference to "advice and consent") in pronouncements of law that received the concurrence of Parliament.²¹⁰ "Advice and consent" did not refer to parliamentary

208. See generally 26 COUNCIL RECORDS (1780–1781).

209. See, e.g., 26 COUNCIL RECORDS 24 (Nov. 16, 1780) ("Advised that Deacon Thomas Foster, Keeper of the Powder House, be & hereby is directed to deliver to Messers. Otis and Henley four Tons of powder lodged in the Magazine in Boston being the property of the United States."); *id.* at 42 (Dec. 2, 1780) ("Advised that a warrant be drawn on Treasury for thirty three hundred & four pounds seven shillings . . ."). In the overwhelming majority of cases, warrants of spending were phrased without the term "advice." See, e.g., *id.* at 50 (Dec. 13, 1780) ("Warrant drawn on the Treasury for . . .").

210. See Arthur Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined*, 5 SETON HALL L. REV. 527, 541–47 (1974).

rejection of the King's proposed course of action, but only its endorsement of that proposal. In this respect, "advice" was not a synonym for "opinion," but rather, it was a synonym for "approval."²¹¹

Outside of the above conclusions regarding the advice of the council, investigation into the *Council Records* illuminates one further feature of the Council's norms: In no apparent case did the Council record a vote tally or include dissenting opinions of any Councilors. The Council consisted of nine members, each with a constitutional right to include his dissenting opinions in the *Council Records*.²¹² Neither in the year following the effective date of the constitution, nor in the year preceding the 1787 Federal Constitutional Convention, did a single member include a dissenting opinion. Furthermore, in no apparent case did the *Council Records* record any vote tallies. It recorded only the ultimate resolution of issues and spoke in apparently unanimous terms.

Finally, it should be noted that, according to the plain text of the constitution, the council was a majoritarian body.²¹³ Whether the council followed this rule in practice is not known, especially given that the *Council Records* did not record vote tallies.

C. Summary

The Massachusetts process of council advice and consent for executive nominations served as Nathaniel Gorham's model in proposing an advice and consent model of judicial appointment in the Federal Constitutional Convention. As seen in the colonial history of the council, and in the Essex controversy, the people of Massachusetts deemed a strong Council essential to the effective restraint of the Governor; it was a core feature of the revised Massachusetts Constitution of 1780. It was originally envisioned as a majoritarian body, per the text of its con-

211. *See id.* at 545. Bestor notes that, although the U.S. Constitution uses the term "advice" with respect to relationship between the President and the Senate on matters of appointment and ratification, it uses the term "opinion" with respect to the relationship between the President and his Cabinet, U.S. CONST. art. II, § 2, cl. 1, suggesting that the terms were not synonyms. But note that, in describing the Massachusetts Constitution of 1780, James Bowdoin appeared to use the term "advise" as a synonym for "opine." *See supra* note 206 and accompanying text.

212. MASS. CONST. pt. 2, ch. 2, § 3, art. V (1780).

213. *Id.*

stitutional mandates. But as seen in the investigation of its records, its advice appears to have been limited to formal pronouncements on matters of spending and appointment, not including any general advice it offered the Governor in their near-daily meetings. It appears that its formal advice and "consent" did not include rejections of nomination or of other gubernatorial requests; rather, it was limited to the affirmative, explicit approval of matters before it. The Massachusetts Council never evidenced obedience to any obligation to actively and publicly reject those nominees who failed to receive its consent, at least not in any way that comported with the explicit mandate of the then-new state constitution, in the brief interim between ratification of the state constitution of 1780 and the Federal Constitutional Convention of 1787. This stands as strong evidence against the suggestion that the Federal Constitution's advice and consent provision includes an implicit obligation that the Senate actively and publicly reject those nominations that fail to secure the Senate's consent.

III. MADISON'S ALTERNATIVE, AND COMPLETIONS VERSUS VETOES

As noted above, Nathaniel Gorham's advice and consent proposal was met by a variety of competing plans for appointment of judges: presidential appointment, senatorial appointment, legislative appointment, and presidential appointment subject to a discretionary senatorial veto.²¹⁴ The last of these plans, proposed by James Madison with specific reference to the Gorham plan, provides an interesting counterpoint to the Gorham plan, because in its final version, it would have allowed the Senate to veto the nomination with merely a majority vote.

Because James Madison explicitly differentiated his Senate veto from Gorham's advice and consent, his plan serves as an invaluable piece of evidence in the search for the meaning of Gorham's plan. Nevertheless, Madison's plan has been wholly overlooked in scholarship on the matter. Although Madison's proposal does not completely resolve the questions of advice and consent, it does contribute to the debate, highlighting cru-

214. *See supra* Part I.A.1.c.

cial textual differences between interbranch relationships that call for obligations to act and relationships where no such obligations exist.

A. *Madison's Proposal Versus Gorham's Advice and Consent*

On July 18, in response to the Gorham advice and consent proposal,²¹⁵ James Madison recommended an alternative means of appointment of judges and other officers: presidential appointment subject to a discretionary Senate veto.²¹⁶ In its final form on July 21, Madison's proposal ultimately allowed for the Senate to veto the President's appointment by *majority* vote.²¹⁷

Undoubtedly, Madison saw a qualitative difference between the Gorham plan, by which the President's nominations could be appointed subject to Senate advice and consent via majority vote, and his own plan, by which the President's nominations were effective subject to Senate veto by majority vote. Madison was not the only one to recognize a difference between the plans. Randolph, for example, noted that he preferred advice and consent to the Senate veto.²¹⁸ Moreover, the Maryland delegation, earlier a supporter of Senate control of appointments, supported Gorham's advice and consent proposal, but voted *against* the Madison plan. And Georgia, which had earlier supported Senate control of appointments, and which voted "absent" on Gorham's plan, also voted *against* the Madison plan.

Madison, a proponent of executive control over appointments; Randolph, the pro-Senate-appointment Maryland delegates; and the pro-Senate-appointment Georgia delegates recognized that the Gorham plan provided the Senate with more power in appointments than the Madison plan. Appointment by the President upon the Senate's advice and consent would empower the Senate more than would appointment by the President subject to the Senate's discretionary veto. In the former, the burden is on the President and supporters of his nominee to engage in organization of Senate support; in the latter, the burden is on the Senate's opponents of the nomina-

215. See *supra* note 54 and accompanying text.

216. See *supra* note 63 and accompanying text.

217. See *supra* note 84 and accompanying text.

218. See *supra* note 28 and accompanying text.

tion to engage in organization of Senate action, because the President wins merely by maintaining the status quo. Moreover, the Senate's relative power is increased further when advice and consent includes no obligation to vote either up or down, as compared to when advice and consent includes an obligation to vote either up or down, because the obligation to vote eliminates the President's burden of persuading the Senators to vote, leaving only the burden of persuading them to vote affirmatively. In sum, then, the Senate's relative power increases as the framework moves from presidential appointment subject to discretionary Senate veto, to presidential appointment subject to Senate advice and consent with the Senate obligated to vote, to presidential appointment subject to Senate advice and consent with the Senate not obligated to vote.

But while the relative mechanics of Madison's and Gorham's proposals explain which of the two plans empowered the President and which empowered the Senate, they do not answer the question of whether the relative differences were merely large (that is, discretionary veto versus advice and consent with an obligation to vote) or yet larger (that is, discretionary veto versus advice and consent *without* an obligation to vote). Fortunately, a textual analysis provides further information on this point.

B. *A Textual Framework: Completion Versus Veto*

The intersection of the legislative and executive branches in appointments, with the responsibility of the President reinforced by the security of the Senate, constitutes a core interbranch "check and balance." It is not, of course, the only one. Other interbranch checks and balances include presidential veto of legislation,²¹⁹ presidential "pocket veto" of legislation,²²⁰ congressional review of presidential vetoes,²²¹ Senate ratification of treaties,²²² congressional impeachment of judges, Presidents, and executive officers,²²³ and vice-presidential service as President of the Senate.²²⁴ While generally known as checks

219. U.S. CONST. art. I, § 7, cl. 2.

220. *Id.*

221. *Id.*

222. *Id.* art. II, § 2.

223. *Id.* art. I, §§ 2–3.

224. *Id.* art. I, § 3, cl. 4.

and balances, these powers in fact break down into two categories, which can be referred to as “veto power” and “completion power.” Although these categorizations may not necessarily be self-evident when looking at the Constitution, they are quite obvious upon comparing the two plans found to be so different at the Constitutional Convention: Gorham’s advice and consent and Madison’s veto. But before considering the respective proposals, further development of the analytic framework is appropriate.

1. *Veto or Completion?*

In matters of veto power, the act of one branch becomes complete without participation by another branch, but another branch may step in to negate the first branch at its discretion. For example, a bill having passed both houses of Congress shall become law if not returned by the President within ten days after being presented to him.²²⁵ If the President disagrees with the bill, then he may in his discretion return it to Congress with his objections, but his failure to act results in enactment of a law.²²⁶ Likewise, impeachments and subsequent removals constitute a veto of general executive or judicial action: The President may conduct himself in perceived execution of the law, but Congress may, in its discretion, veto his general execution through impeachment and removal.

Matters of completion power, on the other hand, consist of checks and balances in which the act of one branch does not realize its desired effect unless and until completion by another branch. An impeachment trial of the President cannot occur until the Chief Justice presides over it.²²⁷ Counterintuitively, the presidential pocket veto represents completion power—or, more precisely, the nonexecution of completion power—because when a bill is presented to the President within ten days of a congressional adjournment, it cannot become a law

225. Except in the cases where the ten-day time limit will lapse after congressional adjournment. *Id.* art. I, § 7, cl. 2.

226. Such a veto constitutes, in its own right, an action subject to veto by another branch: The Congress can overturn a Presidential veto by a two-third vote in each house. U.S. CONST. art. I, § 7, cl. 2.

227. *Id.* art. I, § 3, cl. 6.

unless the President completes Congress's work by signing it.²²⁸

Madison's discretionary Senate veto clearly falls into the former category, veto power. Just as the President, for ten days, enjoys the discretion to veto legislation presented to him upon bicameral passage, Madison's proposal would have given the Senate a span of time during which to veto, at its discretion, the President's nomination. In contrast, Senate advice and consent with respect to nominations and treaties clearly falls into the latter category, completion power. By comparing advice and consent to other examples of completion power, one can see more clearly whether there exists an obligation to act on judicial nominations.

2. *Discretionary Completion or Mandatory Completion?*

In cases of veto power there is, by definition, no obligation to act. The power is wholly discretionary. But in cases of completion power, there is no obvious answer to the question of whether an obligation exists. In some cases, such as the Chief Justice's constitutional role as president of presidential impeachment trials, there is obvious completion power, and an obligation to execute it: "the Chief Justice shall preside."²²⁹ This may be referred to as "mandatory completion." In the pocket veto context, where the President has received a bill within ten days of congressional adjournment, there is obviously no obligation to complete; on myriad occasions Presidents have thwarted legislation by not acting on it. This may be referred to as "discretionary completion."²³⁰

In which of these cases does the advice and consent to presidential nominations for judicial office fall? The most obvious difference between the Senate's advice and consent power and clear examples of mandatory completion power is the absence of an unqualified "shall" directive. The Constitution explicitly states that, upon conditions precedent, one branch will function in completion of another branch. Upon commencement of a trial of presidential impeachment, the Chief Justice "shall"

228. *Id.* art. I, § 7, cl. 2.

229. *Id.* art. I, § 3, cl. 6.

230. Like "Veto Power" and "Completion Power," the labels "Discretionary Completion" and "Mandatory Completion" are the invention of the present author.

preside.²³¹ The Vice President “shall” preside over the Senate generally.²³² In clear cases of discretionary completion, the constitutional directive lacks an unqualified “shall.” For example, the Pocket Veto Clause describes the conditions in which the President may allow a bill to expire uncompleted; it provides no “shall” with respect to the President’s decision to act.²³³

In light of these differences, senatorial advice and consent to treaties and nominations appears to fall into the discretionary category. The structure of the clause provides no specific directive for the Senate to act; indeed, the language of the clause makes Senate advice and consent a condition precedent to the President’s power to appoint.²³⁴

Although this first point may seem trivial, its importance can be illustrated by looking to the full text of the Constitution. In matters of mandatory action, in interbranch activities or otherwise, the Constitution uses “shall” prescriptions to ensure action: In the context of the Constitution’s Appointment Clause, the document prescribes presidential actions using the “shall” directive; it makes no “shall” directive for the condition precedent, Senate consent. The directive “shall” is nowhere to be found in matters of discretionary vetoes or discretionary completion, including the Advice and Consent Clause. The Framers’ choice of words on that matter is compelling evidence that the Senate is under no constitutional duty to act on nominations.

C. Summary

Just as the Constitution contains no explicit requirement that the President act in the pocket veto context, it contains no explicit obligation that the Senate act to demonstrate its lack of consent to a judicial nomination. Moreover, the structure of Madison’s alternative proposal does little to suggest that the Advice and Consent Clause contains any implicit obligation. As seen in the discussions of Madison’s plans, the Framers knew how to create an explicit majority-vote requirement if they wanted. Moreover, they knew how to require the Senate

231. U.S. CONST. art. I, § 3, cl. 6.

232. *Id.* art. I, § 3, cl. 4.

233. *Id.* art. I, § 7.

234. *Id.* art. II, § 2, cl. 2.

to complete an interbranch action when they wanted it so to act.²³⁵

IV. CONCLUSION

Despite suggestions by the President, various Senators, and numerous commentators that the Senate has a constitutional obligation to act on judicial nominations, the text of the Constitution contains no such obligation. Moreover, the suggestion that the obligation is implicit in the Advice and Consent Clause does not appear to comport with the Framers' understanding of the term. This analysis is limited, of course, to a consideration of (1) the Framers' reliance on the example of the Commonwealth of Massachusetts's advice and consent model; and (2) the structure of their choice of constitutional text, particularly by contrast with James Madison's failed alternative to advice and consent.

President Bush suggests that the Senate bears a "constitutional obligation" to act on judicial nominations,²³⁶ but it is difficult, if not impossible, to demonstrate that the Framers would have agreed with such an assertion. The Framers' understanding of the terms of the Constitution is not necessarily synonymous with the reasonable meaning of the Constitution's terms

235. The Department of Justice's Office of Legal Council recently came to a similar conclusion in answering the question whether the President "has a legal duty to appoint and commission a nominee once the Senate has given its advice and consent to the nomination." The OLC, looking to the Appointments Clause, noted:

The Constitution thus calls for three steps before a presidential appointment is complete: first, the President's submission of a nomination to the Senate; second, the Senate's advice and consent; third, the President's appointment of the officer, evidenced by the signing of the commission. All three of these steps are discretionary. Even after the Senate's advice and consent, up to the moment that the President signs the commission, he can grant or withhold an appointment in accordance with his will and judgment.

Appointment of a Senate-Confirmed Nominee, Op. Off. Legal Counsel (Oct. 12, 1999), http://www.usdoj.gov/olc/marbury_ltr.htm. Although this opinion letter rightfully states that the President is under no duty to nominate someone to fill a vacant office—despite the Constitution's instruction that he "shall" so nominate—this does not contradict this Article's theory of "mandatory" and "discretionary" completion. When the President offers a nomination, he does not "complete" the efforts of another branch. Of course, the President's appointment does complete the work of the Senate, and that discretionary action is not preceded by a "shall" term in its constitutional mandate.

236. Press Release, President George W. Bush, *supra* note 18.

as written, but understanding what the Framers may have understood a term to mean certainly is a useful starting point for further analysis.