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THE CONSTITUTION THAT COULDN'T: EXAMINING THE  
IMPLICIT IMBALANCE OF CONSTITUTIONAL POWER IN  
THE CONTEXT OF NOMINATIONS, AND THE NEED FOR  
ITS REMEDY

*James E. Britton*<sup>†</sup>

INTRODUCTION

Supreme Court Justice Antonin Scalia passed away on February 13<sup>th</sup>, 2016, after having served on the nation's highest court for thirty years.<sup>1</sup> Just over a month later, on March 16<sup>th</sup>, Judge Merrick Garland was nominated by President Obama to fill the late Justice Scalia's vacant seat on the bench.<sup>2</sup> In response to the nomination—a perfunctory presidential duty<sup>3</sup> involving an ostensibly unobjectionable and eminently qualified appointee<sup>4</sup>—several members of the Senate's Republican majority unilaterally refused to consider approval of Judge Garland.<sup>5</sup> Their reasoning was predicated upon the claim that a nebulous “precedent” existed against the consideration of Supreme Court nominees appointed by an exiting Executive during an election year.<sup>6</sup>

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<sup>1</sup> Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES, (Feb. 13, 2016), [https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html?\\_r=0](https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html?_r=0).

<sup>2</sup> Lawrence Hurley, *Supreme Court Nominee Out in Cold as Election Heats Up*, REUTERS, (July 19, 2016), <http://www.reuters.com/article/us-usa-election-garland-idUSKCN0ZZ17L>.

<sup>3</sup> See U.S. CONST. art. II, § 2, cl. 2. (“He shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and 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 . . .”).

<sup>4</sup> See Nolan D. McCaskill, *American Bar Association: Garland 'Well Qualified' for Supreme Court*, POLITICO, (June 21, 2016), <http://www.politico.com/story/2016/06/merrick-garland-american-bar-association-224593> (highlighting a review of Judge Garland's body of scholarship and experience conducted by the American Bar Association and their conclusion that he is “a preeminent member of the legal profession with outstanding legal ability and exceptional breadth of experience. He meets the highest standards of integrity, professional competence and judicial temperament.”).

<sup>5</sup> Hurley, *supra* note 2.

<sup>6</sup> Glenn Kessler, *Does the Senate Have a Constitutional Responsibility to Consider a Supreme Court Nomination?*, WASH. POST, (Mar. 16, 2016), [https://www.washingtonpost.com/news/fact-checker/wp/2016/03/16/does-the-senate-have-a-constitutional-responsibility-to-consider-a-supreme-court-nomination/?utm\\_term=.a0543d6d3732](https://www.washingtonpost.com/news/fact-checker/wp/2016/03/16/does-the-senate-have-a-constitutional-responsibility-to-consider-a-supreme-court-nomination/?utm_term=.a0543d6d3732).

Even if one were to grant such an electoral courtesy, however, some of these recalcitrant legislators would evidently still be unsatisfied; a small number went so far as to suggest that, in the event of a Democratic Presidential victory in the then-impending 2016 election, Republican legislators should continue to stonewall any appointees nominated to the Supreme Court by the newly-minted President, on no other basis than simple partisanship.<sup>7</sup> Though other members of the party, including the chairman of the Senate Judiciary committee,<sup>8</sup> swiftly voiced their objections to the malcontents' proposal of outright intractability, a sitting Senator's mere suggestion of an indefinite, unqualified boycott of a President's appointees, validly made within their vested constitutional authority, nonetheless raises the frightening specter of a nascent constitutional crisis. While the immediate threat of such a catastrophe may have been temporarily obviated by Donald Trump's victory in the 2016 election,<sup>9</sup> the lid of that Pandora's box has nonetheless been lifted, leaving open the possibility of the Senate unleashing the full force of its obstructive woes in the future.

The importance of the President's power to make appointments to the Supreme Court in times of vacancy should be readily apparent. Since Justice Scalia's passing, the eight-member Court has already issued one equally-divided opinion regarding the posture of a pretrial injunction in the case of *United States v. Texas*,<sup>10</sup> affirming the decision of the United States Court of Appeals for the Fifth Circuit while setting no precedent, providing no elaboration, and leaving the injunction issued by District Judge Hanen for the United States District Court for the Southern District of Texas<sup>11</sup> in place pending trial there. The case concerned the Deferred Action for Parents of Americans initiative, which was intended to temporarily halt the deportations of illegal immigrants who had become parents to U.S. citizens or permanent residents.<sup>12</sup> The District Court issued an injunction blocking the implementation of the plan following Texas's challenge to it; the Government sought a halt on the injunction pending trial, or a geographical limitation on the scope of the injunction, but was rebuffed—a holding which the Court of Appeals for the Fifth Circuit then affirmed. With the Supreme Court's "equally divided" opinion offering no insight into their

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<sup>7</sup> Among this obstinate faction was former Republican Presidential nominee and longtime Arizona Senator John McCain, who called for a Senate boycott on any nominees made by the Democratic candidate Hillary Clinton; Texas Senator and former Trump adversary Ted Cruz, while not going so far, had also implicitly voiced support for the notion of keeping Justice Scalia's seat vacant. See David Weigel, *Cruz Says there's Precedent for Keeping Ninth Supreme Court Seat Empty*, WASH. POST, (Oct. 26, 2016), [https://www.washingtonpost.com/news/post-politics/wp/2016/10/26/cruz-says-theres-precedent-for-keeping-ninth-supreme-court-seat-empty/?utm\\_term=.0331aceab9a4](https://www.washingtonpost.com/news/post-politics/wp/2016/10/26/cruz-says-theres-precedent-for-keeping-ninth-supreme-court-seat-empty/?utm_term=.0331aceab9a4).

<sup>8</sup> Senate Judiciary Committee Chairman and Republican Senator Charles Grassley was quoted as saying that "[i]f [the] new president happens to be Hillary, we can't just simply stonewall." *Id.*

<sup>9</sup> Trump's somewhat surprising election to the White House was also accompanied by Republicans managing to maintain their control of the Senate, thereby effectively removing any barriers for Trump's future appointees. See Matt Flegenheimer & Michael Barbaro, *Donald Trump is Elected President in Stunning Repudiation of the Establishment*, N.Y. TIMES, (Nov. 9, 2016), <https://www.nytimes.com/2016/11/09/us/politics/hillary-clinton-donald-trump-president.html>.

<sup>10</sup> The entirety of the Court's Per Curiam opinion reads: "The judgment is affirmed by an equally divided Court." *United States v. Texas*, 136 S. Ct. 2271, 2272 (2016) (per curiam).

<sup>11</sup> *Texas v. United States*, 86 F.Supp. 3d 591 (S.D. Tex.), *aff'd*, 809 F.3d 134 (5<sup>th</sup> Cir. 2015).

<sup>12</sup> Haeyoun Park & Alicia Parlapiano, *Supreme Court's Decision on Immigration Case Affects Millions of Unauthorized Immigrants*, N.Y. TIMES, (Jun. 23, 2016), <https://www.nytimes.com/interactive/2016/06/22/us/who-is-affected-by-supreme-court-decision-on-immigration.html>.

deliberative process, and holding no precedential value due to the impasse it represents, the injunction was upheld, and deportation procedures for the unauthorized immigrants the program was meant to protect could proceed as before.<sup>13</sup>

Though the impact may be relatively narrow, the case nonetheless demonstrates the possibility of the real-world ramifications that an eight-person (or perhaps even fewer) Court can carry, especially given the proportion of 5-4 decisions the Court has issued in its late-20<sup>th</sup> and 21<sup>st</sup> century iterations.<sup>14</sup> The ability for the Senate to be able to essentially force such judicial inefficiency by paralyzing the nation's highest court through a refusal to consider any and all appointees made by a president of the opposing party should be concerning indeed. As I will endeavor to show, this activity either falls outside the scope of the power meant to be afforded to Congress in the appointment process outright, amounting to an abrogation of the Executive's power by an obstreperous Senate and thus a dereliction of their sworn oath<sup>15</sup> to uphold the Constitution,<sup>16</sup> or, even in the event that it is not, that it nonetheless should be considered as such now.

To that end, the first section of this Note is dedicated to exploring the original understanding of the Appointments Clause, and the intended role of the Senate's powers of confirmation pursuant to that clause's "advice and consent" stipulation, including various instances of failed Supreme Court nominations, and how they are facially distinguishable from the outright refusal to consider Presidential nominees on display here. As stated above, the result I intend to show is that the original intention of the drafters of the clause was to limit the phrase "advice and consent" to a specific, relatively narrow means of objection in an otherwise largely deferential role that they assumed relative to the President in this respect. Furthermore, even if one is unconvinced from the circumstantial evidence presented, I also intend to argue that the Legislature's own understanding of the clause has advanced implicitly along these same lines until now, and, in the political environment of the present day, it would be more desirable to adopt the restricted view of the Senate's participation than the unqualified right of objection under which we evidently now operate.

Similarly, the second section of this Note details the intended balance of power between the Executive and Legislative branches—and, as an ancillary consideration, the role the Judiciary plays between them by interpreting the system of checks and balances as it has developed. Following from the first section, this section advances the argument that, as an overstepping of the intended understanding of the limits of

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<sup>13</sup> *Id.*

<sup>14</sup> David Paul Kuhn, *The Incredible Polarization and Politicization of the Supreme Court*, ATLANTIC, (Jun. 29, 2012), <https://www.theatlantic.com/politics/archive/2012/06/the-incredible-polarization-and-politicization-of-the-supreme-court/259155/>.

<sup>15</sup> The current oath is "I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God." 5 U.S.C. § 3331 (2016).

<sup>16</sup> "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution. . . ." U.S. CONST. art. VI, cl. 3.

their power, the Senate's (in)actions concerning Executive appointees constitutes a legislative appropriation of the power properly afforded to the Executive. Accordingly, the Senators' knowing and purposeful action in so doing must, I argue, be considered a willful dereliction of their constitutionally-mandated duties, which they are sworn to uphold as elected representatives. A senatorial embargo on Executive appointees thus amounts to a fundamental breakdown of one of the core workings of the federal government by giving them the power to outright deny the President his power of appointment as contemplated by the Constitution, if not even going so far as to effectively seize it for themselves through a game of political "chicken." The end result, either way, is a deleterious delay in appointing qualified candidates to fill important government positions for no reason other than partisanship, the harm of which is passed on to their electors, the people of the United States.

The third section specifically details why those electors presently lack an adequate means of recourse against this particular problem, owing to the staggered terms that Senators serve and the lack of other available options outside of the electoral process. The Speech or Debate Clause specifically grants immunity for legislators in actions they take in their official capacity, including abstaining from actions that could be undertaken within that capacity. The Senate itself is the only body able to impeach or expel its own members, but, from both a historical and practical perspective, this is an unreliable means of enforcement when the actions causing the injury necessarily require the endorsement of a majority of Senators. Given the prospective ramifications of leaving certain important appointments unfilled during the two-year period between Senate elections, and the lack of any more immediate alternative, I argue that it is necessary to equip the people with an additional tool to rein in Senators who stray from their constitutional duties.

In the fourth section, I propose that the tool best-suited to the task mentioned above would be allowing for recall elections for sitting United States Senators. Though there are, admittedly, a number of issues that this proposal presents, I argue that they all may be avoided or mitigated by means of carefully tailoring the instances where such a recall would be effectuated to acts amounting to a dereliction of a Senator's constitutional duty, as discussed above and further elaborated upon here. Many states already afford their populations the ability to recall Senators—some subject to more stringent standards than others—and these pieces of legislation can serve as both historical testaments to the efficacy of recall legislation and legislative blueprints for a piece of federal legislation concerning United States Senators. If effectively drafted and implemented, such a piece of legislation would allow for both direct action concerning the problems it was meant to address, as well as help to circumvent the problem from arising in the first place owing to its deterrent effect, thus promoting a more efficient federal government by loosening one of its partisan fetters.

## I. THE APPOINTMENTS CLAUSE

The “Appointments Clause,” as it has been dubbed, is found in Article 2, Section 2, Clause 2 of the Constitution, and empowers the President with the ability to “nominate” and “appoint” all “Ambassadors, other public Ministers and Consuls, Judges of the supreme court, and all other Officers of the United States” pursuant to the “advice and consent of the Senate.” The precise scope of the Executive and Senate’s respective responsibilities pursuant to this pithy pronouncement has been the subject of debate.

From the plain language of the clause, it is beyond question that the President was meant to be endowed with the sole ability of selecting the nominees to fill the posts therein enumerated. From the records of the Constitutional Convention, we can see that this was a very deliberate determination: previously, the Convention had contemplated putting the power to appoint judges solely in the hands of the Legislature.<sup>17</sup> James Wilson was the first to protest this arrangement, on the grounds that vesting the responsibility in the entire legislative body of Congress could engender collusion regarding appointments while creating a shared lack of responsibility due to the absence of individual identification for any decision, thus diffusing any potential dissent to the point of impotence; he thus advocated for vesting the appointment power solely in the President, as he could be readily held responsible for his choices.<sup>18</sup> James Madison was evidently receptive to the concerns voiced by Wilson, but instead compromised by suggesting limiting the appointment power to the Senate alone, instead of the entire Legislature. Wilson’s cause was then renewed by Nathaniel Ghorum, who argued in favor of vesting appointment power in the President, with the power of confirmation being left to the Senate, but this proposal was also ineffective.<sup>19</sup> Madison then reversed course, suggesting instead that the President would be more apt to select “fit characters” to nominate, proposing that the President be given power to appoint, while the Senate would retain the ability to reject nominations by a two-thirds vote, but the motion was again frustrated, with appointment power once more being resolved as residing in the Senate alone.<sup>20</sup> However, shortly thereafter the clause in its final and current form was finally incorporated into the Constitution, with Gouverneur Morris remarking that the arrangement would provide responsibility in nominations via the President, and security in their aptitude through the confirmation of the Senate.<sup>21</sup>

The somewhat nebulous wrinkle, of course, concerns the extent to which the Senate’s “advice and consent” in this proposal is meant to be an absolute check on the President’s ability to exercise his power of appointment. The various schemes of appointment proposed prior to the clause actually adopted speak voluminously to the amount of care the drafters obviously attached to this issue, only to ultimately enshrine it in such an inscrutably succinct form. From the foregoing debates at the

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<sup>17</sup> David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L. J. 1491, 1496–97 (1992).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 1497.

<sup>20</sup> *Id.* at 1498.

<sup>21</sup> *Id.*

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Constitutional Convention, it seems fairly apparent that the intention was inarguably to compromise between expediency and democracy by splitting responsibility for appointments between the President's nomination power and the Senate's confirmation power—but to what extent?

Valuable contemporary insight into this question can be gleaned from the commentaries of Alexander Hamilton, as he exhorted the States to ratify the recently-drafted Constitution. Within the *Federalist Papers*, Hamilton addresses the issue of vesting the powers of nomination and confirmation for appointments into the President and the Senate, respectively.<sup>22</sup> Naturally, as Hamilton's goal was to encourage the adoption of the Constitution, Hamilton's papers present a defense of the clause therein included, and thus an endorsement of its approach to the problem. Hamilton's comments elaborate at length upon several justifications for the convention's rationale in adopting the appointments arrangement as they did:

The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation. He will, on this account, feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to them. He will have FEWER personal attachments to gratify, than a body of men who may each be supposed to have an equal number; and will be so much the less liable to be misled by the sentiments of friendship and of affection. A single well-directed man, by a single understanding, cannot be distracted and warped by that diversity of views, feelings, and interests, which frequently distract and warp the resolutions of a collective body. There is nothing so apt to agitate the passions of mankind as personal considerations whether they relate to ourselves or to others, who are to be the objects of our choice or preference. Hence, in every exercise of the power of appointing to offices, by an assembly of men, we must expect to see a full display of all the private and party likings and dislikes, partialities and antipathies, attachments and animosities, which are felt by those who compose the assembly. The choice which may at any time happen to be made under such circumstances, will of course be the result either of a victory gained by one party over the other, or of a compromise between the parties. In either case, the intrinsic merit of the candidate will be too often out of sight. In the first, the qualifications best adapted to uniting the suffrages of the party, will be more considered than those which fit the person for the station. In the last, the coalition will commonly turn upon some interested equivalent: "Give us the man we wish for this office, and you shall have the one you wish for that." This will be the usual condition of the bargain. And it will rarely happen that the advancement of the public service will be the primary object either of party victories or of party negotiations.<sup>23</sup>

Clearly, Hamilton considered the President's ability to avoid unnecessary partisanship within the context of the nomination process as an important motivation for vesting the power of nomination solely in the President, with the concomitant benefit of streamlining the vetting process for qualified candidates, as only one decision

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<sup>22</sup> See THE FEDERALIST NO. 76 (Alexander Hamilton).

<sup>23</sup> *Id.*

maker would need to state their case for the candidate. However, Hamilton specifically also addresses the possibility of simply vesting the appointment power entirely in the President, and soundly rejects it as authoritarian, stating: “every advantage to be expected from such an arrangement would . . . be derived from the power of NOMINATION . . . while several disadvantages which might attend the absolute power of appointment . . . would be avoided.”<sup>24</sup> In fact, Hamilton goes on to state in defense of the Senate’s involvement that the requirement that the nomination be subjected to the review of others will encourage the President to select qualified appointees and avoid a “spirit of favoritism,” lest he risk damage to his reputation from such partiality being found odious by the Senate.<sup>25</sup> Further, Hamilton considered it unlikely that the Senate would reject a nominee, were there not “special and strong reasons for the refusal,” which would “tend greatly to prevent the appointment of unfit characters” to important positions.<sup>26</sup>

On this point, it must be noted that Hamilton himself elsewhere considers the role of the Senate as being limited explicitly to the power to reject or accept nominations made by the President. Hamilton positively rejects the notion that the language of the clause empowers Congress to make their own recommendations for nomination, and contemplates that this would foreclose them from considering nominations made by the President on the basis of anything other than their merit alone.<sup>27</sup> However, by virtue of the fact that each individual Senator must themselves take an oath to uphold the Constitution, just as the President must, it seems intrinsically true as well that the Senate has an implicit duty to reject nominees of fundamentally unsound jurisprudential opinions just as well as for lack of meritorious qualifications.<sup>28</sup> Hamilton further states outright his own belief that the public nature of appointments will preclude the Senate from abusing their power of confirmation, as a political scandal would certainly follow their rejection of a good candidate nominated by the President, resulting in disgrace to the offending legislators.<sup>29</sup>

What, then, to make of the Senate’s actual role in the appointment process in light of Hamilton’s thoughts on the matter? Hamilton clearly believed that the structure of the Appointments Clause was meant to function such that the President would have sole power to nominate appointees, and the Senate would then have the ability

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> “Thus it could hardly happen, that the majority of the Senate would feel any other complacency towards the object of an appointment than such as the appearances of merit might inspire, and the proofs of the want of it destroy.” THE FEDERALIST NO. 66 (Alexander Hamilton).

<sup>28</sup> “The Senate is ‘independent’ in that it may legitimately refuse to confirm a nominee who, in the opinion of a majority of the Senate, holds fundamentally incorrect principles of constitutional interpretation. While concern over . . . jurisprudential ‘point of view’ was not among the kinds of concerns listed by the Framers as justifying the requirement of advice and consent, the Senators too have taken an oath ‘to support the Constitution.’ It is thus reasonable to infer that the Framers located the process of advice and consent in the Senate as a check to prevent the President from appointing jurists of unsound principles as well as . . . unsound character or competence.” John O. McGinnis, *Essay: The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 TEX. L. REV. 633, 653 (1993).

<sup>29</sup> “The censure of rejecting a good [nominee] would lie entirely at the door of the Senate; aggravated by the consideration of their having counteracted the good intentions of the Executive.” THE FEDERALIST NO. 77 (Alexander Hamilton).



to either accept or reject them—nothing more. Further, within his musings on the subject, Hamilton goes on to claim that, given the responsibility and visibility that would be conferred on the President by virtue of having sole power to make such nominations, they would almost invariably nominate qualified appointees—and, by virtue of this process, as well as their own public visibility, the Senate would thus only ever reject a Presidential appointee for extremely compelling reasons.<sup>30</sup> Such was Hamilton’s understanding of the right of the Senate to properly accept or reject a nomination made by the President.

Naturally, Hamilton, as one of the leading advocates for a strong Executive, had his own thoughts on how to interpret the scope of the clause as it ultimately appeared, just as every other member of the committee must have had their own. It cannot be debated that the Senate was certainly meant to play an integral role in the confirmation process, as otherwise the words “with the advice and consent of the Senate” would never appear in the Constitution. Some have argued that the scope should be construed so wide as to effectively parallel the President’s ability to veto legislation.<sup>31</sup> I have no objection to this assertion, and in fact no disagreement—Senators are not mandated to have the same judgment as the President; that tenant has always been central to our philosophy of government. It must be remembered that the position I am arguing is not that the Senate is to have no role in the appointment process; rather, it is in fact the opposite—that they *must* take a role in it, but a legitimate one. Refusing to participate as a form of passive veto does not satisfy this standard of conduct, nor does disregarding the actual character or qualifications of the person that is nominated and deciding to refuse them out of hand. From the comments we have just reviewed, it seems apparent that the Framers—or Hamilton, at least—viewed that prospect as outlandish when considering how to best allocate the power between the President and the Senate.

Of course, such an idealistically designed system in theory seldom holds true once placed into practice. Such was the case with the Appointments Clause, which encountered its first significant test when George Washington’s nomination of John Rutledge for Chief Justice of the Supreme Court was rejected by the Senate in 1795.<sup>32</sup> The cause for this rejection was entirely political in nature, and actually involved Hamilton himself: Rutledge was vocally opposed to the Jay Treaty securing trading rights and other important peacetime rights between the United States and Great Britain, which the Federalists supported.<sup>33</sup> Hamilton, as a champion of the Federalist cause, marshaled opposition to the appointment and succeeded in defeating it in the Senate.<sup>34</sup> However politically-motivated such a maneuver may have been, it can also hardly be said that the Jay treaty, which secured valuable peace between a young United States and Great Britain (for a time, at least), could not have been an important

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<sup>30</sup> Henry Paul Monaghan, *Essays on the Supreme Court Appointment Process: The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1205 (1988).

<sup>31</sup> Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L.J. 657, 659 (1970) (“Nothing anywhere suggests that some duty rests on the Senator to vote for a nomination he thinks unwise, any more than a duty rests on the President to sign bills he thinks unwise.”).

<sup>32</sup> Monaghan, *supra* note 30, at 1202.

<sup>33</sup> Strauss & Sunstein, *supra* note 17, at 1500.

<sup>34</sup> *Id.*

consideration to the members of Congress who voted against Rutledge's confirmation. There was debate and a discernable focal point around which it gravitated—that is, the issue of the treaty—with Rutledge being an ancillary casualty of that schism in Congress. Though Rutledge was victim of the political predations of his adversaries, his nomination and its subsequent rejection was not without actual cause. Whether this cause would rise to the level of “special and strong” reasons as described by Hamilton at the time of the clause's writing is not necessarily clear,<sup>35</sup> but it is certainly distinct from a steadfast refusal to consider any candidates nominated by an Executive as a means of purposefully frustrating his power.

The ensuing Nineteenth Century provided a similarly contentious battleground for Supreme Court appointments and their confirmation by the Senate, with approximately one out of every four nominees being rejected over the course of the century.<sup>36</sup> These nominees were rejected “for every conceivable reason, including the nominee's political views, political opposition to the incumbent President, a desire to hold the vacancy for the next President, senatorial courtesy, interest group pressure, and on occasion even the nominee's failure to meet minimum professional standards.”<sup>37</sup> Of course, the question of how much of this was attributable to the nature of the system itself, as designed, versus how much was the product of the rampant political corruption of the era is debatable,<sup>38</sup> and will likely never be resolved definitively. While certainly important in terms of precedential tradition, the nominations of this period are muddled and of limited use for any examination of how the government *should* function, as opposed to how it *does* function; a question for which both early and recent developments in the process provide more insight (in the terms of the former) and greater observable and probative evidence (in the case of the latter). Though this approach may appear somewhat dismissive, the legacy of the 19<sup>th</sup> century grew from the earlier nominations and led to influence the later ones, making the independent observation of this interim period somewhat unnecessary here.

There are, however, two critical points that demand examination from the 19<sup>th</sup> Century nomination process. Firstly, the Nineteenth Century had a much longer average length of vacancy on the Supreme Court, with nine of the ten longest vacancies (the other, that of Justice Fortas' nomination, being discussed below) occurring in

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<sup>35</sup> It is perhaps also worth noting that Rutledge's speech denouncing the Jay treaty was severe enough in its language to allow his enemies to cast doubt on his mental competency, though the validity of those claims is largely questioned. Either way, within the context of selecting meritorious candidates, it is not inconceivable that making comments of that nature could cast legitimate doubt on his character and fitness for the office. See James E. Gauch, *The Intended Role of the Senate in Supreme Court Appointments*, 56 U. CHI. L. REV. 337 (1989) (detailing the Rutledge nomination and rejection, and finding that claims of mental defect were likely fabricated by Federalists to discredit his appointment).

<sup>36</sup> Monaghan, *supra* note 30, at 1202.

<sup>37</sup> *Id.* See also Strauss & Sunstein, *supra* note 17, at 1501 (detailing various instances of Nineteenth Century nominees being rejected on political grounds).

<sup>38</sup> See Stephen E. Sachs, *Corruption, Clients, and Political Machines: A Response to Professor Issacharoff*, 124 HARV. L. REV. F. 62, 66–67 (2011) (“By 1878, as much as ‘ninety percent of the money raised by the Republican congressional committee came from assessments on federal officeholders’”); See also EDWARD L. GLAESER & CLAUDIA GOLDIN, CORRUPTION AND REFORM: LESSONS FROM AMERICA'S ECONOMIC HISTORY 14–16 (2006) (examining and indexing the levels of American political corruption and finding that the highest levels were throughout the mid-to-late Nineteenth Century).

that period.<sup>39</sup> Additionally, the century saw the longest duration of a vacancy on the Supreme Court by far, at 841 days between the death of Justice Baldwin and the Senate's confirmation of his successor, Justice Grier.<sup>40</sup> Secondly, the alleged "custom" of Senatorial abstinence in considering the nominees of a lame-duck President in his outgoing year, as mentioned above, seems to have developed over the course of this century. I write "seems" because, as will be seen, no such custom actually exists, with the closest reasonable analogue appearing in this century.

The average length of the nominations in this century, as should be apparent, is no indication they are the product of the government system functioning as it should be. In the case of the longest single vacancy, the aberration was owing to President John Tyler, whose tenure in office also saw another of the ten longest vacancies in the history of the Court.<sup>41</sup> Tyler assumed the presidency following the death of William Henry Harrison and was reviled by both the Democrats and Whigs in the Senate, who stymied his attempts to appoint personal friends and beneficiaries to important positions.<sup>42</sup> Two more of the top-ten longest vacancies were attributable to the crisis of the Civil War during Abraham Lincoln's time in office, not to any uncommon animosity between the President and the Senate.<sup>43</sup> Indeed, atypical circumstances such as these may in fact be the exception that proves the rule; Tyler's nominations were, by all accounts, actually unfit for office. As such, the Senate made appropriate use of its power to vet them in order to protect the legitimacy of these positions until Tyler's term expired.<sup>44</sup> Thus, judging by the record of nomination actions taken both in its entirety, and particularly, the years following 1900,<sup>45</sup> the tactic of strategic stalling finds little credible support from these abnormally lengthy 19<sup>th</sup> Century examples.

The assertion made by Republican Senators that there exists a long-held tradition of Presidents refraining from nominating a Supreme Court Justice in their outgoing year of office similarly provides their actions with insufficient color of validity, plainly demonstrated by a simple examination of the appointments record. Fourteen of the now-45 Presidents have appointed Justices to the Supreme Court during an election year.<sup>46</sup> Additionally, six "lame-duck" Presidents (outgoing Presidents who could or would not be reelected) were able to successfully appoint nominees to the

<sup>39</sup> Drew DeSilver, *Long Supreme Court Vacancies Used to be More Common*, PEW RES. CTR., (Feb. 26, 2016), <http://www.pewresearch.org/fact-tank/2016/02/26/long-supreme-court-vacancies-used-to-be-more-common/>.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Michael J. Gerhardt & Michael Ashley Stein, *The Politics of Early Justice: Federal Judicial Selection, 1789–1861*, 100 IOWA L. REV. 551, 587 (2015).

<sup>43</sup> DeSilver, *supra* note 39.

<sup>44</sup> Gerhardt, *supra* note 42 at 592.

<sup>45</sup> BARRY J. McMILLAN, CONG. RESEARCH SERV., IN10559, SUPREME COURT: LENGTH OF THE SCALIA VACANCY IN HISTORICAL CONTEXT (2016), available at <https://fas.org/sgp/crs/misc/IN10559.pdf>. ("[S]ince 1791 . . . the average number of days a vacancy existed was 111 days, whereas the median number of days . . . was 57 . . . [o]f the 59 vacancies . . . since 1900 . . . the average number of days was . . . 58 . . . whereas the median number . . . was 36.").

<sup>46</sup> Barbara A. Perry, *One-Third of All U.S. Presidents Appointed a Supreme Court Justice in an Election Year*, WASH. POST, (Feb. 29, 2016), [https://www.washingtonpost.com/news/monkey-cage/wp/2016/02/29/one-third-of-all-u-s-presidents-appointed-a-supreme-court-justice-in-an-election-year/?utm\\_term=.64d47e09c666](https://www.washingtonpost.com/news/monkey-cage/wp/2016/02/29/one-third-of-all-u-s-presidents-appointed-a-supreme-court-justice-in-an-election-year/?utm_term=.64d47e09c666).

Supreme Court: Harrison, Hayes, Tyler, Jackson, Van Buren, and Adams.<sup>47</sup> Of course, these Presidents all served prior to the 20<sup>th</sup> Century, and given my cursory treatment of the 1800's, it hardly seems fair to weigh this evidence very heavily against the Republican's present claim. However, the 20<sup>th</sup> Century affords us ample examples of Presidential appointments successfully made either in or immediately before an election calendar year, including Anthony Kennedy, John Paul Stevens, and William Rehnquist.<sup>48</sup>

Furthermore, there seems to be little precedent for this supposed "Presidential courtesy" (in refraining from nominating justices in an election year), aside from the Senate's hostility towards President Tyler's nominees. As described above, the Senate's refusal to confirm Tyler's large number of appointees could plausibly be seen as a direct demonstration of the advice and consent power being used in its intended form: preventing Presidential abuse and ensuring qualified appointees. However, this is clearly not analogous to the circumstances surrounding Judge Garland's nomination, and we therefore will need to move beyond the Nineteenth Century in order to find any possible justification for these actions.

The Twentieth Century represents the most helpful and relevant time period to determine the modern understanding of the Appointments Clause, its justifications, and, when looking back at the original intent earlier discussed, whether it should be different. The beginning of the century represented one of comparative stability in the context of the appointments process; indeed, only one Supreme Court nominee had been rejected by the Senate in the 20<sup>th</sup> century prior to 1968.<sup>49</sup> This was characteristic of a prolonged period of Senatorial deference to Presidential nominees during the first part of the 20<sup>th</sup> century. 1968 was something of a watershed moment, as it marked the Senate's rejection of President Johnson's nomination of Justice Abe Fortas for Chief Justice.<sup>50</sup>

In that case, Fortas enjoyed a very close relationship with President Johnson, having been appointed to the Court by him and subsequently meeting with him frequently, even helping him to draft campaign speeches.<sup>51</sup> Republican Senators attacked Fortas' credibility on the basis of this seeming impropriety, while also alleging various illicit financial dealings. These charges ultimately were found to be true, resulting in his resigning from the Judiciary entirely.<sup>52</sup> While Republican frustration with the Warren Court of the era may have motivated the Senators' refusal to confirm Fortas to the position of Chief Justice,<sup>53</sup> it can hardly be argued that allegations of

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<sup>47</sup> *Id.*

<sup>48</sup> Neil J. Kinkopf, *A Brief History of Supreme Court Nominations During a Presidential Election Year*, AM. CONST. SOC. (Feb. 15, 2016), <http://www.acslaw.org/acsblog/a-brief-history-of-supreme-court-nominations-during-a-presidential-election-year-0>.

<sup>49</sup> Strauss & Sunstein, *supra* note 17, at 1491.

<sup>50</sup> Jeffrey K. Tulis, *Constitutional Abdication: The Senate, the President, and Appointments to the Supreme Court*, 47 CASE W. RES. L. REV. 1331, 1333 (1997).

<sup>51</sup> *Id.* at 1344.

<sup>52</sup> *Id.*

<sup>53</sup> See William F. Swindler, *The Warren Court: Completion of a Constitutional Revolution*, 23 VAND. L. REV. 205 (1970) (for a thorough examination of the Warren Court's various constitutional decisions, including *Brown v. Board of Education*, 347 U.S. 483 (1954), and the friction they caused with conservative members of Congress).

financial misconduct<sup>54</sup>—which are ostensibly serious enough to motivate a Justice to step down of his own accord—do not rise to the level of “special and strong reasons” for Senatorial rejection as contemplated by Hamilton.

Fortas’ rejection by the Republican bloc of the Senate could conceivably be seen as the impetus for the following two rejections in the Court’s history—namely, those of Clement Haynsworth and, in the face of his rejection, G. Harrold Carswell.<sup>55</sup> Certainly their nominating patron, President Richard Nixon, saw it that way, voicing this frustration with the Senate’s rejection of his nominees to which he felt he had a right of appointment through a letter to Senator (and, later, Nixon’s Attorney General) William Saxbe.<sup>56</sup> However, even these rejections were based on viable, though perhaps spurious, objections to the nominees’ character and qualifications: Judge Haynsworth, in much the same way as Fortas before him, held ownership in business interests that represented potential conflicts of interest in rulings his Court had handed down,<sup>57</sup> and Judge Carswell was putatively rejected both for the abnormally high reversal rate of his decisions as a district judge, as well as an apparent pattern of racially-discriminatory behavior both before and during his time on the bench.<sup>58</sup> Once more, although the Senators voting against these nominees may have been motivated by spite and partisanship, it cannot be said either that they were not colored by reasonable concerns as to the integrity of the candidates’ characters or qualifications.<sup>59</sup>

The failed nominations of Fortas, Haynsworth, and Carswell were followed by the high-profile nomination—and subsequent rejection—of Judge Robert Bork by President Reagan.<sup>60</sup> From the perspective of the Senators who opposed Judge Garland’s nomination, this may be the most important of the Senate’s rejections of Presidential nominees, owing to the fact that Bork’s constitutional ideology was openly admitted as being the primary cause of his rejection.<sup>61</sup> Judge Bork had made many contributions in the areas of originalism, antitrust, law and economics, and other fields of massive importance.<sup>62</sup> Indeed, his professional aptitude and qualifications

<sup>54</sup> Tulis, *supra* note 50, at 1345. Fortas was involved with a foundation as a putative “consultant” during his time on the bench, for which he received a considerable salary that would be paid in perpetuity, and pass onto his wife following his death; the director of the foundation was being investigated by the SEC, of which Fortas was apparently aware.

<sup>55</sup> *Id.* at 1336.

<sup>56</sup> *Id.*

<sup>57</sup> John Anthony Maltese, *The Selling of Clement Haynsworth*, 72 JUDICATURE 338, 341 (1989) (“Critics raised questions about his ownership of stock in . . . companies whose cases appeared before him. Haynsworth, like Fortas, was guilty of no crime. Still, the Senate was in an awkward position.”).

<sup>58</sup> Joel B. Grossman & Stephen L. Wasby, *The Senate and Supreme Court Nominations: Some Reflections*, 1972 DUKE L. J. 557, 571–72 (1972) (elaborating on the circumstances of Carswell’s rejection, including an increasingly-frequent reversal rate over the course of his judgeship, and a “variety of . . . actions indicat[ing] a commitment to racial segregation.”).

<sup>59</sup> Tulis, *supra* note 50 at 1345. Indeed, it has even been suggested by some commentators that Nixon’s nomination of Carswell was in effect solely a retaliatory act following the rejection of his nomination of Haynsworth.

<sup>60</sup> Andrew Cohen, *The Sad Legacy of Robert Bork*, THE ATLANTIC, (Dec. 19, 2012), <https://www.theatlantic.com/politics/archive/2012/12/the-sad-legacy-of-robert-bork/266456>.

<sup>61</sup> Robert Post & Reva Siegel, *Questioning Justice: Law and Politics in Judicial Confirmation Hearings*, 115 YALE L. J. 38, 41 (2006).

<sup>62</sup> John O. McGinnis, *Robert Bork: Intellectual Leader of the Legal Right*, 80 U. CHI. L. REV. DIALOGUE 235, 235 (2013).

for the bench were never seriously<sup>63</sup> in question; rather, the substance of his constitutional interpretations, and their potential ramifications on subsequent Supreme Court decisions, were at the center of the controversy.<sup>64</sup> Ultimately, the Senate rejected Bork by a vote of 42-58.<sup>65</sup>

While Bork's nomination and rejection may seem to follow the same ostensible rationale as that followed by the present Senate in declining to consider the nomination of Judge Garland—*i.e.* a rejection of the nominee's political and judicial philosophy independent of their professional qualifications—this assertion does not withstand closer scrutiny. All of the preceding rejections examined up to this point, excluding President Johnson's nomination of Abe Fortas for Chief Justice, differ from Judge Garland's in one material respect: the same President who nominated them also successfully nominated their eventual replacements. Following Rutledge's rejection by the Senate, President Washington successfully nominated Oliver Ellsworth.<sup>66</sup> Nixon was able to successfully fill the Fortas vacancy by nominating Harry Blackmun, who was confirmed by a unanimous vote,<sup>67</sup> as was also the case in Reagan's nomination of Anthony Kennedy following the rejection of Bork.<sup>68</sup> As discussed above, the Fortas nomination at least appears to have been decided on viable objections to his fitness for the office, as evinced by his eventual resignation amid personal scandal following his unsuccessful nomination to Chief Justice. Every other vacancy in the Twentieth and Twenty-First centuries was successfully filled by the sitting President prior to the nomination of Judge Garland.<sup>69</sup>

Thus, we come again to the critical distinction separating Judge Garland's nomination to those of his predecessors: the Senate outright refused to consider him as a nominee to the Supreme Court simply owing to the fact that the President who nominated him was of the opposing political party. The unanimous acceptance of Justice Kennedy following the bitterly contested nomination of Judge Bork would seem to be a ready parallel to predict the outcome of Judge Garland's case, given that Kennedy was essentially a nonpartisan "compromise candidate" who had no readily identifiable objectionable material in his track record, personally, professionally, or philosophically.<sup>70</sup> Indeed, one commentator predicted that, upon Scalia's passing, President Obama would appoint "a responsible moderate," explicitly making refer-

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<sup>63</sup> Stuart Taylor Jr., *A.B.A. Panel Gives Bork a Top Rating but Vote is Split*, N.Y. TIMES, (Sep. 10, 1987), <http://www.nytimes.com/1987/09/10/us/aba-panel-gives-bork-a-top-rating-but-vote-is-split.html?page-wanted=all> ("Of the 15 members of the A.B.A.'s Standing Committee on Federal Judiciary, 10 gave Judge Bork the highest rating, 'well qualified,' four voted 'not qualified' and one 'not opposed,' one source said.")

<sup>64</sup> Post, *supra* note 61; See also *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary of the U. S. Sen.*, 100<sup>th</sup> Cong. 12-16 (1987) (Statement of Sen. Robert Dole).

<sup>65</sup> U.S. SENATE, SUPREME COURT NOMINATIONS, 1789-PRESENT (2017), <http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm>.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Lee Epstein & Tonja Jacobi, *Super Medians*, 61 STAN. L. REV. 37, 44-45 (2008) (describing Judge Kennedy as the "median justice" ideologically upon his taking the bench).

ence to the likelihood of finding such a candidate in Judge Garland, musing that “Republicans would have a hard time justifying rejection of a judge who in many ways is a model of what a nation who believes in the rule of law seeks.”<sup>71</sup> However, a nominee’s qualifications are of little import when the Senate essentially refuses to recognize the legitimacy of the President’s power to appoint them.

When looking back at this corpus of contentious confirmations, it may seem there is very little continuity between reasons why a nominee was rejected or confirmed and whether a decision was either nearly-unanimous or highly contentious. I believe, however, that the common thread connecting all the above examples is that all of those whose nominations were rejected were rejected for something that could be plausibly considered “special and strong” reasons, as articulated originally by Hamilton. Whether these reasons were merely specious or the actual cause of a Senator’s objection to the President’s nomination is almost certainly unknowable. However, so long as the fact remains that their integrity, competence, or even—in radical cases—judicial philosophy may be reasonably in question, then it cannot be said that the Senate is operating outside of any fair interpretation of their powers of advice and consent.

Of course, what we have here is not an instance of the Senate objecting to a candidate, but rather, the Senate objecting to the President. While the Tyler presidency does arguably share many similarities with the present situation in Senate opposition to the President, it differs in that Tyler was elevated to the Presidency only through the death of his predecessor, and indeed did not even have enough support to run in the ensuing election,<sup>72</sup> whereas President Obama was elected to two terms in normal elections.<sup>73</sup> The contention that the Senate should have the authority to simply unilaterally refuse to take action on important nominees if the President happens to not be of their party is a double-edged sword that will invariably bring woe to those who insist on drawing it from their arsenal, and worse, to those who depend on those same Senators (whether by having voted them into office or not) to exercise their constitutionally-delegated powers correctly and responsibly.<sup>74</sup>

Of course, there exist other arguments against my above interpretation of the Appointments Clause beyond mere difference of interpretation. Accordingly, these arguments must be addressed and, if possible, differentiated from my thesis expounded above. Immediately preceding the Appointments Clause is the Treaties Clause: “He shall have power, by and with the advice and consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . .”<sup>75</sup> Given that

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<sup>71</sup> Richard Lempert, *Not Replacing Scalia: Game Theory in the Real World*, BROOKINGS, (Feb. 15, 2016), <https://www.brookings.edu/blog/fixgov/2016/02/15/not-replacing-scalia-game-theory-in-the-real-world/>.

<sup>72</sup> WILLIAM A. DEGRIGORIO, *THE COMPLETE BOOK OF U.S. PRESIDENTS*, 158 (2d ed. 1989).

<sup>73</sup> David A. Fahrenthold, *Obama Reelected as President*, WASH. POST, (Nov. 7, 2012), [https://www.washingtonpost.com/politics/decision2012/after-grueling-campaign-polls-open-for-election-day-2012/2012/11/06/d1c24c98-2802-11e2-b4e0-346287b7e56c\\_story.html](https://www.washingtonpost.com/politics/decision2012/after-grueling-campaign-polls-open-for-election-day-2012/2012/11/06/d1c24c98-2802-11e2-b4e0-346287b7e56c_story.html).

<sup>74</sup> See generally Matthew C. Stephenson, *Can the President Appoint Principal Executive Officers Without a Senate Confirmation Vote?*, 122 YALE L. J. 940 (2013) (examining the problems currently facing Executive appointments and arguing that Senate inaction should be construed differently from Senate disapproval if appointments are expected to be made efficiently).

<sup>75</sup> U.S. CONST. art. II, § 2, cl. 2.

the Appointments Clause follows directly afterwards, and reiterates the same language, a strong argument could be made that the function of the Senate was meant to be identical in both contexts. Indeed, from the arguments of the Founders, many of the same fears regarding dissemination of power and its abuse that were discussed above also reappear in the Treaties Clause context.<sup>76</sup> However, as Professor Stephenson points out, this does not necessarily imply that the two clauses were meant to be interpreted identically:

One could argue that because the phrase “Advice and Consent” in the Treaty Clause seems more clearly to contemplate a Senate vote (one that prevails by a two-thirds majority), the same “Advice and Consent” phrase in the adjacent Appointments Clause must also entail an affirmative Senate vote. But this does not follow. First of all, one could just as easily emphasize the contrast between the Treaty Clause, which specifically includes a requirement that two-thirds of the “Senators present concur,” and the Appointments Clause, which includes no such additional requirement. In other words, one could take the position that the phrase “Advice and Consent,” when used by itself, could mean either affirmative, express consent or tacit, implied consent. The Treaty Clause contains additional language that narrows “Advice and Consent” as used in that Clause to the former meaning, but the Appointments Clause contains no such additional restrictive language, and so in that Clause the phrase remains ambiguous.<sup>77</sup>

So, strictly from an even textual standpoint, there need not be any definitive proof that the phrase “advice and consent” was meant to be used in the same manner in both contexts, as the confines of the grammar differ between the two instances—perhaps materially. Thus, the additional “concur” requirement in Treaty actions which is absent in the appointments context would seem to be consistent with my above understanding of the phrase “advice and consent” in the appointments context, as a treaty—being “the Supreme law of the land”<sup>78</sup>—is something that may easily be understood to require debate as to its pros and cons in a legislative capacity,<sup>79</sup> whereas their role in the appointments power may be understood as one of mere vetting of a primarily Executive function.

The other obvious argument involves the fact that there is no “duty to act” in the context of appointments in the Constitution; indeed, other areas of the Constitution expressly stipulate what will happen during periods of inaction,<sup>80</sup> and their inclusion elsewhere may speak volumes about their absence in the Appointments Clause. It cannot be avoided that there is no such “duty to act” found within the text of the Constitution, much less anything that would counsel as to what an appropriate timeframe for such action may be. However, as the review of the above debates concerning appointments makes clear, “accountability is at the core of the Senate’s advice and consent responsibilities.”<sup>81</sup> The measures for accountability taken by the

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<sup>76</sup> See Ted Cruz, *Essay: Limits on the Treaty Power*, 127 HARV. L. REV. 93, 97–100 (2014) (discussing the early history of the Treaties Power and its original understanding among the founders, including Madison, Hamilton, and Jay).

<sup>77</sup> Stephenson, *supra* note 74, at 959 (internal citations omitted).

<sup>78</sup> U.S. CONST. art. VI, cl. 2.

<sup>79</sup> See Cruz, *supra* note 76, at 98.

<sup>80</sup> U.S. CONST. art I, § 7, cl. 2. (“If any Bill shall not be returned by the President within ten Days . . . after it shall have been presented to him, the Same shall be a Law, in like Manner as if he has signed it.”).

<sup>81</sup> Lee Renzin, *Advice, Consent, and Senate Inaction—Is Judicial Resolution Impossible?*, 73 N.Y.U. L. REV.



Founders in both the drafting of the Constitution and the subsequent procedural changes they made in the Senate<sup>82</sup> to accommodate the fair and open voting on Appointees are rendered moot if one is to allow for the proposition that they may simply discharge their duties as assigned by doing nothing. Thus, the duration of time for which the Senate may take inaction would be of less concern than *why* they are taking inaction—is it a “legitimate” delay, or merely a stalling measure designed to frustrate the ability of the President to make their appointments? The flexibility to afford for this distinction is, I believe, provided by the suggestion in the fourth section of this article.

In this section I have shown, I believe, that the course of action undertaken historically by the Senate in confirming or rejecting nominees of the President is both most desirably modeled on—and most accurately explained by—an understanding that those actions are motivated by atypical, singular objections to the circumstances. I both allow and admit the argument that the Constitution, from a plain reading of its words, could just as viably offer the alternative conclusion. However, if both are equally possible, and necessarily only one must be followed, I see no compelling argument, following from the facts recounted above, that the latter interpretation either was meant to be, or should be, the correct one at the expense of the former. The obvious, and likely strongest, argument to the contrary is that every Senator is elected democratically just as the President is, and a majority of Senators must be voted in in order to effectively block the nominations made by the President, and that therefore one democratically-elected branch effectively may totally paralyze the other through a legitimately democratic process. Two branches holding nugatory power over one another at the expense of the very functioning of the government but under a threadbare veil of validity is an absurdity for which no immediate remedy presently exists. However, when the act of the Senate’s naked refusal to cooperate with a President performing their own duties is viewed—and, I again submit, reasonably viewed—not as a legitimate exercise of Senatorial power, but as an impermissible encroachment of Executive power, the first step towards that ultimate and salutary remedy may be taken.

## II. THE COURT’S VIEW ON SEPARATION OF POWERS

As James Madison stated, “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”<sup>83</sup> This basic premise became the foundation the rest of our system of government was built on—the separation of powers. Though not explicitly referred to at any point in the Constitution itself,<sup>84</sup> the Founders made frequent and explicit

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1739, 1756 (1998).

<sup>82</sup> *Id.* at 1754–55.

<sup>83</sup> THE FEDERALIST NO. 47 (James Madison).

<sup>84</sup> John F. Manning, *Separation of Powers: An Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1944 (2011).

reference to the doctrine throughout the drafting<sup>85</sup> and ratification processes.<sup>86</sup> Furthermore, the Court has consistently recognized the doctrine and the limits it places on the powers of the three respective branches, including itself.

Though there are many important and varied cases wherein the separation of powers doctrine has been implicated throughout our nation's history, for the sake of focus I will limit the scope of this section specifically to the Appointments Clause, as should be appropriate. To that end, this section (and the ensuing ones) will be mercifully more concise, following from both the establishment of the initial premise of the argument in the first section above, and the fact that "[u]nlike the removal power, the President's appointment power has received little attention, either from judicial opinions or academic commentators."<sup>87</sup>

A familiar example of the Court's approach to the balance of power between the Senate and the President in appointments is *Myers v. United States*, concerning the removal of a postmaster from his position by the President.<sup>88</sup> In ultimately determining that the sole power to remove the postmaster rested with the President, the Court noted that:

Article II expressly and by implication withholds from Congress power to determine who shall appoint and who shall remove except as to inferior offices. To Congress under its legislative power is given the establishment of offices, the determination of their functions and jurisdiction, the prescribing of reasonable and relevant qualifications and rules of eligibility of appointees, and the fixing of the term for which they are to be appointed, and their compensation—all except as otherwise provided by the Constitution.<sup>89</sup>

The import of the Court's language here, and elsewhere throughout the opinion, was that the appointment power cannot be appropriated by the Legislature from the Executive. Though the Court in this case was examining the power to remove officers appointed by the President, the essential holding of the case was that the Legislature had no right to interfere with Executive power to remove, as the appointment of Executive officials was an extension of the Executive's own power as understood at the time of the Convention.<sup>90</sup> Thus, the Court (albeit largely in *dicta*) made explicit reference to the intended constitutional understanding of the Founders at the time of the drafting in determining that the Appointments Clause is an Executive power subject to limitation by the Senate's power of advice and consent.<sup>91</sup>

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<sup>85</sup> Jonathan L. Entin, *Separation of Powers, the Political Branches, and the Limits of Judicial Review*, 51 OHIO ST. L. J. 175, 179 (1990).

<sup>86</sup> See THE FEDERALIST NO. 48 (James Madison); See also Stephenson, *supra* note 74.

<sup>87</sup> Note, *Congressional Restrictions on the President's Appointment Power and the Role of Longstanding Practice in Constitutional Interpretation*, 120 HARV. L. REV. 1914, 1916 (2007).

<sup>88</sup> *Myers v. United States*, 272 U.S. 52 (1926).

<sup>89</sup> *Id.* at 129.

<sup>90</sup> *Id.* at 176 ("When, on the merits, we find our conclusion strongly favoring the view which prevailed in the First Congress, we have no hesitation in holding that conclusion to be correct . . .").

<sup>91</sup> See also *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (denying President unilateral removal authority when subject officer was not a member of the Executive branch).

The issue of the original intent of the Appointments Clause is further explored in *Buckley v. Valeo*, a case involving campaign finance regulation. As concerns our purposes, the Court at one point considered the contention “that because the Framers had no intention of relegating Congress to a position below that of the coequal Judicial and Executive Branches . . . the Appointments Clause must somehow be read to include Congress or its officers as among those in whom the appointment power may be vested.”<sup>92</sup> Specifically, the Court was examining whether Congress had authority to appoint officers to carry out functions for an area that they had plenary authority to regulate pursuant to the Constitution—the area of Federal election practices. Even despite recognizing this plenary authority, the Court nonetheless still held that “[u]nless their selection is elsewhere provided for, all officers of the United States are to be appointed in accordance with the [Appointments] Clause.”<sup>93</sup> This was another clear demarcation of the line separating the powers of the Executive and the Legislature by the Court, and it was once again drawn by examining the record of the Founders at the Convention.<sup>94</sup>

The Appointments Clause (and *Buckley* itself) was brought up in *Edmond v. United States*, and again, the Court articulated its central importance to the separation of powers doctrine, as they believed it to have been contemplated by the Founders:

the Appointments Clause of Article II is more than a matter of "etiquette or protocol"; it is among the significant structural safeguards of the constitutional scheme. By vesting the President with the exclusive power to select the principal (noninferior) officers of the United States, the Appointments Clause prevents congressional encroachment upon the Executive and Judicial Branches.<sup>95</sup>

The Court then once more made reference to the earliest understandings of the appointment power—including several of the same sources discussed above in the first section of the article, such as the Federalist Papers written by Alexander Hamilton.<sup>96</sup> I also note, with obvious approval, that the Court here aligns with my own understanding of the intention of the clause as explained above, specifically that it was meant to simultaneously “curb executive abuses of the appointment power” and “to promote a judicious choice of [persons] for filling the offices of the Union.”<sup>97</sup> The Court’s own interpretation, as applied to the issue of determining whether an officer appointed is either principal or inferior, very plainly advanced from the starting point of the original intention of the Appointments Clause and its function within the government, while explicitly noting that that function was meant to curb Legislative “encroachment.”<sup>98</sup>

As should be made clear from the above line of cases, the Court’s consistent interpretation of the line between where Legislative power ends and Executive power

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<sup>92</sup> *Buckley v. Valeo*, 42 U.S. 1, 128–29 (1976).

<sup>93</sup> *Id.* at 132.

<sup>94</sup> *Id.* at 129–31.

<sup>95</sup> *Edmond v. United States*, 520 U.S. 651, 659 (1997).

<sup>96</sup> *Id.* at 660.

<sup>97</sup> *Id.* at 659–60.

<sup>98</sup> *Id.*

begins is that, regardless of whatever qualifications or restrictions Congress may ordain for officers when establishing an office to be filled by an appointment by the President, the Legislature *cannot effectively make the nomination itself*.<sup>99</sup> When the acts of the Legislature reach such a point as to effectively wrest the functional appointment power from the President and reserve it to the Legislature, then those acts become unconstitutional.

Plainly, Congress's willful inaction in thwarting any and all appointments made by the President could not be said to be anything less than seizing the appointment power for themselves; they essentially hold hostage the President's ability to appoint, with the ransom demanded being a nominee that they would appoint themselves if they had the rightful authority. As we have seen above, such a total taking of a power delegated explicitly to another branch of government is a violation of the separation of powers doctrine, as obvious as it is odious. The Senate has mustered the requisite numbers to effect such a boycott, effectively did manage such a boycott, and succeeded in thwarting President Obama's rightful power to nominate and appoint until President Trump was able to assume office.<sup>100</sup> From a Republican supporter's viewpoint, this is a victory; to a Democrat, a disaster. Regardless of the side of the aisle from which an observer hails, what is nearly certain is that the Senate will eventually make use of these ill-gotten tactics again, whether it is against a Republican President or a Democratic one. Though the precedents of history seem to weigh towards Congress restricting itself to acceptable uses of the power, the threat articulated to reject any nominees made by a President is cause enough for alarm, especially since the seeds of this power's misuse have now been planted. It is not inconceivable that its abuses become more egregious in the future. Hence, it is all the more necessary to address this cancerous defect quickly, before it can grow into a tumorous mass that overthrows the fair balance of power as we know it.

### III. THE LACK OF AN ADEQUATE REMEDY

Once it has been accepted that the powers of "advice and consent" were always intended to be subject to reasonable, serviceable purposes, and that the abuse of this power results in an unconstitutional breach of the doctrine of separation of powers, the search for a solution can begin. However, as I will show, there exists no adequate remedy for this particular constitutional shortcoming at present.

Under Article I of the Constitution, members of Congress may be removed pursuant to guidelines established by their own body.<sup>101</sup> A member of Congress may only be removed from their elected seat before the end of their term by means of "death, resignation, declination, withdrawal, or action of the House in declaring a

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<sup>99</sup> Harvard Law Review *supra* note 87 at 1921.

<sup>100</sup> Adam Chandler, *Trump Takes Office, Kills TPP*, THE ATLANTIC, (Jan. 23, 2017), <https://www.theatlantic.com/business/archive/2017/01/trump-tpa-dead/514154/>.

<sup>101</sup> U.S. CONST. art. I, § 5, cl. 2. ("Each house may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.")

vacancy as existing or causing one by expulsion.”<sup>102</sup> Expulsion is the sole means of involuntarily vacating the seat of a living member of the Federal Legislature once their oath of office has been administered and their seat taken.<sup>103</sup> Leaving each House of Congress the sole authority to discipline its own members was yet another manifestation of the Separation of Powers Doctrine, as otherwise the Founders feared that the Legislature would not be insulated enough from the censure of the other branches to legislate properly.<sup>104</sup> Indeed, the Constitution, through the Speech or Debates Clause, explicitly confers an immunity upon Senators from being “questioned in any other Place” for any of their official actions taken within Senate.<sup>105</sup>

Considering the fact that the Senate is the only body capable of disciplining its members for their misconduct, it should be apparent from the circumstances that they cannot be relied upon to do so here. There must be a majority of like-minded Senators in order to block a Presidential nominee from being appointed; it also requires a two-thirds majority to expel any Senator,<sup>106</sup> and of course this supermajority will never be reached if a majority of sitting Senators are engaging in the very misconduct meriting discipline. Moreover, there are no impeachment proceedings available against Senators, and the expulsion power has historically been used sparingly.<sup>107</sup> Thus, internal discipline is not likely to be forthcoming, and (as mentioned above) any external cause of action is likely precluded by the scope of the Speech or Debate Clause immunity conferred upon members of Congress.

The Supreme Court has “interpreted [the Clause] broadly, refusing to confine the protections it affords solely to words spoken or acts undertaken during speech or debate. Instead, the Court has invoked the Clause to protect legislators from judicial review of legislative actions that are within the sphere of legitimate legislative activity.”<sup>108</sup> What constitutes “legitimate legislative activity,” and whether the understanding of the Senate’s inactivity in appointments would be considered “legitimate” for such purposes, is unclear.<sup>109</sup> In *Gravel v. United States*, the Court clearly held that any act taken within the “legislative sphere” was protected by the Speech or Debate Clause.<sup>110</sup> Though the Court also made clear that criminal exemptions do not apply under the Speech or Debate Clause, they denoted “speech, voting, and other legislative acts” as those exempted under the Clause.<sup>111</sup>

<sup>102</sup> JACK MASKELL, CONG. RESEARCH SERV., RL30016, RECALL OF LEGISLATORS AND THE REMOVAL OF MEMBERS OF CONGRESS FROM OFFICE 1 (2012).

<sup>103</sup> Gerald T. McLaughlin, *Congressional Self-Discipline: The Power to Expel, to Exclude, and to Punish*, 41 *FORDHAM L. REV.* 43, 45 (1972).

<sup>104</sup> *Id.* at 43–44.

<sup>105</sup> U.S. CONST. art. I, § 6, cl. 1.

<sup>106</sup> See Maskell, *supra* note 102, at 3.

<sup>107</sup> See *id.* at 2–4 (“In the United States, 15 Senators have been expelled . . .”).

<sup>108</sup> Renzin, *supra* note 81, at 1778.

<sup>109</sup> See John C. Raffetto, *Balancing the Legislative Shield: The Scope of the Speech or Debate Clause*, 59 *CATH. U. L. REV.* 883, 902–908 (2010) (examining the history and development of the Court’s understanding of the Speech or Debate immunity); see generally ALISSA M. DOLAN & TODD GARVEY, CONG. RESEARCH SERV., R42648, *THE SPEECH OR DEBATE CLAUSE: CONSTITUTIONAL BACKGROUND AND RECENT DEVELOPMENTS* (2012).

<sup>110</sup> See *Gravel v. United States*, 408 U.S. 606, 624–25 (1972).

<sup>111</sup> See *id.* at 626; see also *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880) (extending Speech or Debate liability coverage to “things generally done in a session of the House by one of its members in relation to the

Within the same session, the Court further examined the scope of this “legislative sphere” in *United States v. Brewster*, wherein it was stated that the immunity “tolerate[s] and protect[s] behavior on the part of Members not tolerated and protected when done by other citizens, but the shield does not extend beyond what is necessary to preserve the integrity of the legislative process.”<sup>112</sup> The Court explained that no acts tangentially related to the Legislative process receive the immunity of the Speech or Debate Clause, but only those that “relate to the due functioning of the legislative process.”<sup>113</sup> These foregoing conclusions were reinforced when the Court later decided the case of *Hutchinson v. Proxmire*, holding that Speech or Debate Clause privileges did not extend to libelous comments made by a Senator within his official capacity when they had no legitimate purpose for the legislative function.<sup>114</sup>

At first glance, the above precedents may seem to auger well for the Court’s ability to remedy our specific defect since, as I have argued above, the action complained of does not constitute a legitimate exercise of the constitutionally-delegated “advice and consent” powers, and thus its abuse in this manner should fall outside the scope of the Speech or Debate Clause immunity; indeed, others have advanced similar arguments.<sup>115</sup> However, there remains a likely problem looming over this seemingly simple solution: the political question doctrine.

The political question doctrine is the Court’s resolution to abstain from deciding cases that fall outside of the ambit of its own constitutionally-delegated powers and into those of the other two branches of government.<sup>116</sup> As the Court stated in *Baker v. Carr*, “[i]n determining whether a question falls within [the political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations.”<sup>117</sup> The Court went on to elaborate certain criteria to evaluate when attempting to determine whether it should abstain from deciding an issue on the basis of the Doctrine:

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>118</sup>

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business before it.”).

<sup>112</sup> *United States v. Brewster*, 408 U.S. 501, 517 (1972).

<sup>113</sup> *Id.* at 513.

<sup>114</sup> *See generally* *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) (reviewing Supreme Court’s treatment of the Speech or Debate Clause and finding that its immunities extended to official legislative acts, but not all acts of legislators).

<sup>115</sup> *See* Renzin, *supra* note 81, at 1779.

<sup>116</sup> *Id.* at 1780.

<sup>117</sup> *Baker v. Carr*, 369 U.S. 186, 210 (1962) (citing *Coleman v. Miller*, 307 U.S. 433, 454–55 (1939)).

<sup>118</sup> *Id.* at 217.

From the factors enumerated above, it seems plainly obvious that at least the first three are present in the circumstances examined here, as well as arguably the fourth. As discussed above, there is in fact a “textually demonstrable constitutional commitment of the issue” to the Senate and the President, as they are explicitly named in the Appointments Clause. Notwithstanding the fact that I believe the Court *should* interpret the Clause as confining the Senate’s power as described above, the Court would be more likely to adopt the interpretation that the Senate is merely exercising powers delegated to it, and expressly denied to the Court. Moreover, there simply exist no “judicially discoverable and manageable standards for resolving it,” as the Court cannot simply compel the Senate to accept a nominee any more than the President can.<sup>119</sup> The policy determination would essentially be whether the will of the Senate, supposedly an independent and coequal branch of the government, is to be made subservient to that of the Executive in being forced to capitulate to accept qualified nominees, rather than capriciously rejecting them. Obviously the Court—being on no higher of a footing than either of the other two branches—should be reluctant to make such a decision, which also implicates the fourth criterion.

Therefore, it seems either unlikely or impossible that the Senate, aggrieved outside parties, or the courts will be able to rectify the problem presented by a total freeze on nominee appointments, should one ever occur. Given the staggered terms of U.S. Senators,<sup>120</sup> this means that such a crisis could conceivably continue for at least two years before the electoral process would have an opportunity to rectify it. While Professor Stephenson’s proposal of treating senatorial inaction as tacit acceptance of an appointee is a plausible one,<sup>121</sup> it unfortunately need only be circumvented by way of taking concerted action in actually voting “no” regardless of reason, which would satisfy the procedural requirements while still allowing for the substantive abuse to continue. However, there is a potential solution that could assuage all of these concerns.

#### IV. RECALL ELECTIONS OF UNITED STATES SENATORS

I submit that the most effective means—both procedurally and practically—of solving the constitutional conundrum presented here is to allow the Senators’ electors the opportunity to remove them from office themselves when their Senator’s conduct falls into certain categories. Obviously, there currently exists no apparatus for recall elections of U.S. Senators.<sup>122</sup> Indeed, such a grant of removal power to a Senator’s constituents was apparently considered by the Framers and expressly dismissed.<sup>123</sup> Those who argued in favor of providing the ability to recall Senators included Gilbert Livingston, who saw senatorial entrenchment as a legitimate threat to democratic

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<sup>119</sup> See *Baker v. Carr*, 369 U.S. 186, 217 (1962) (discussing how discretionary actions of the Executive are political in nature, and thus non-justiciable; surely, the acts of the Senate must be considered discretionary here as well).

<sup>120</sup> U.S. CONST. art I, § 3, cl. 2.

<sup>121</sup> See Stephenson, *supra* note 74, at 972.

<sup>122</sup> Maskell, *supra* note 102, at 5.

<sup>123</sup> *Id.* at 5–6.

principles should the term limits be absolute; however, the proposal was ultimately struck down by the Federalists (including Hamilton personally), who imagined that the advantages of a stable Federal government were so great, and the threat of a Senator acting outside of their constituents' interests so remote, that the inclusion of recall powers would be a net loss in the constitutional scheme.<sup>124</sup>

Much in the same way as with the Appointments Clause (discussed above), I grant that Hamilton's faith in mankind to honor above all else the integrity of their office is noble, but mistaken. Though it is true that, in aggregate, the actions of the government seem to have conformed to the ideal comparatively well for the 200 or so years since its erection by Hamilton and the rest of the Founders, it has not been without hiccups, as I have shown in the appointments process. Though, as said, I believe that all of those instances were eventually resolved under a colorable claim of constitutional authority, the prospect of abuse remains ever present, and unnecessarily so. To say that leaving an infant in a room with a loaded gun is a good idea simply because it has not shot anyone yet is lunacy.

The best way to accomplish the reform sought would be by Constitutional Amendment. Of course, this is also the most difficult path, as it requires a vote of two-thirds of both houses of Congress, followed by ratification by three-fourths of the States.<sup>125</sup> The fact that it is difficult, however, is exactly why it is the most agreeable path. By being able to muster enough support for a Constitutional Amendment, there could be no question of the legitimacy of the movement. Popular support for similar ideas gave us prohibition,<sup>126</sup> its repeal,<sup>127</sup> voting rights,<sup>128</sup> and term limits.<sup>129</sup> Obviously, it may be more difficult to lobby for members of Congress to pass an Amendment that essentially places their own job in jeopardy. The very fact that, in order for the Amendment to work those bound by it must acquiesce to pass it, would be ample evidence of their good will in doing so, and the Amendment would thus be mostly obviated considering it is exactly that lack of governmental goodwill that we would be attempting to address. To this I can only respond that I am submitting here no more than what would be a theoretical improvement to the present situation; as to the practical difficulties of actually implementing it, I must admit that I am at a loss as to how to overcome them. Allow me, then, to at least defend my submission on the theoretical grounds on which I can.

The people already have won a victory in their control over their Senators in the past, through the ratification of the Seventeenth Amendment.<sup>130</sup> With that, state voters were able to wrest appointment of their Federal Senators away from their state

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<sup>124</sup> See Timothy Zick, *The Consent of the Governed: Recall of United States Senators*, 103 DICK. L. REV. 567, 576–85 (1999) (detailing in-depth the debates between the Founders at the convention concerning the need for recall elections).

<sup>125</sup> See U.S. CONST. art. V. Although the Constitution also provides for another method of amendment by convention, this has never been used, and the problems that may arise from its implementation are outside of the scope of this paper.

<sup>126</sup> See U.S. CONST. amend. XVIII.

<sup>127</sup> See U.S. CONST. amend. XXI.

<sup>128</sup> See U.S. CONST. amend. XV; U.S. CONST. amend. XIX; U.S. CONST. amend. XXVI.

<sup>129</sup> See U.S. CONST. amend. XXII.

<sup>130</sup> U.S. CONST. amend. XVII (“The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof. . . .”).



legislators and place it within their own hands.<sup>131</sup> The existence of the Seventeenth Amendment, while lending credibility to the spirit of the proposed amendment, also speaks to its necessity; simple legislation would be easier to pass, but ineffective at altering terms already provided for in the Constitution, such as those governing the manner of electing Senators.

At present, nineteen states have statutes allowing for some form of recall of elected officials, as well as the District of Columbia.<sup>132</sup> Of these states, the various statutes tend to fall into one of three forms: those allowing recall for any reason; those allowing recall for enumerated reasons; and those allowing recall only for official misconduct.<sup>133</sup> The latter two types differ in that the former requires a reason to be provided for the recall, whereas the lattermost requires that the provided reason be an instance of incompetence or criminal conduct.<sup>134</sup>

As may be imagined when dealing with state legislatures, many different nuances and combinations are found across the available body of State recall statutes. Although the statutes may differ in their scope of applicability and process of execution, they

generally take the same three-part form. First, voters interested in seeking a recall must circulate a petition. Second, election officials review the petition . . . and determine whether the petition has the requisite number of . . . signatures. Finally, if the election officials determine that the petition and signatures are sufficient, a recall election is held.<sup>135</sup>

Given the gravity of the proposed Amendment, and the implications it would undoubtedly have on the electoral landscape, it makes sense to make it much more narrow than these examples would suggest. Firstly, it seems facially evident that allowing for a recall election absent an intelligible reason would be conducive to the abuse of the system.<sup>136</sup> The proposed Amendment would need to be narrow in scope and not prone to over-interpretation, so as to make it applicable only in the clearest instances of actual abuse of power. Consider, for example, the recall standards provided for in Virginia, which state that any elected officer may be removed: “[f]or neglect of duty, misuse of office, or incompetence in the performance of duties when that neglect of duty, misuse of office, or incompetence in the performance of duties has a material adverse effect upon the conduct of the office . . . .”<sup>137</sup>

The Virginia Statute also makes reference to various other sufficient grounds for removal, including drug offences,<sup>138</sup> but only the language quoted above concerns my purpose here. This language comes close to what we need for a Federal Recall

<sup>131</sup> Zick, *supra* note 124, at 599–600.

<sup>132</sup> *Recall of State Officials*, NAT’L CONF. OF STATE LEG., (2017), <http://www.ncsl.org/research/elections-and-campaigns/recall-of-state-officials.aspx>.

<sup>133</sup> See Elizabeth E. Mack, *Use and Abuse of Recall: A Proposal for Legislative Recall Reform*, 67 NEB. L. REV. 617, 625–29 (1988).

<sup>134</sup> *Id.* at 626–29.

<sup>135</sup> *Id.* at 625.

<sup>136</sup> Zick, *supra* note 124, at 609.

<sup>137</sup> VA. CODE ANN. § 24.2-233 (2014).

<sup>138</sup> See *id.*

Amendment, but falls short in that it is still somewhat too broad; if it may be subject to too wide of an interpretation, then it would be worse than ineffective—it could hinder the work of the government more than the problem it is meant to address.<sup>139</sup> Perhaps instead we should tailor it as such: That any duly elected United States Senator may subject to a petition bearing a number of qualified elector signatures not less than one-third of those registered to vote within the State of their election, for reasons of dereliction of their constitutionally-appointed duties as determined by an Independent Board of Review, be recalled from their seat in the United States Senate pursuant to a new election, should any other Candidate besides the Incumbent manage a supermajority of the votes cast in said election; that dereliction of constitutionally-appointed duties as herein used refers only to those actions taken in an Official capacity, under no color of constitutional grant of authority, or any Official inactivity undertaken outside of color of constitutional authority, to the direct and demonstrated detriment of that system of which they are a part, the United States Government.

Of course, such a wording is still far from perfect. However, as Professor Zick has pointed out, the high threshold requirement is a necessity to insulate a system from abuse, as is the requirement of a challenger winning a supermajority of votes should the recall election take place, as it ensures that the electors who passed the signatory muster also felt strongly enough for the challenger to justify granting them the recalled Seat.<sup>140</sup> There can be no doubt that this would be a high bar to clear in any circumstance.

The requirement that an independent board of review also determine that the claim for dereliction of constitutional duty (ill-worded though it may be in my example) be meritorious provides a double layer of security to the Senator should they in fact find themselves the victim of an unwarranted grassroots campaign after having won their seat legitimately. Of course, the Board would need to be established by another act of the Legislature, pursuant to a grant of authority to do so from this Amendment and the Necessary and Proper Clause; ideally, it would function as an independent body comprised of individuals who are legal experts but exist outside of the public sector—perhaps, for instance, law professors, retired judges, and other legal scholars. This would in effect function to add the sanction of professional expertise to the public sanction of removal represented by the petition process, while avoiding the conflicts of the separation of powers that were discussed above. Ultimately, of course, the real power of the recall election is not the recall itself, but the threat of it and the effect it would have on the actions of the Senate.

#### CONCLUSION

In this Note, I have first argued that the actions of the Senate in refusing to consider nominees for appointments made by the President was an unconstitutional overstepping of authority on the part of the Senate. In so doing, these Senators are disregarding the plain assumption underlying the Constitution that, while checks and

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<sup>139</sup> *But see* Zick, *supra* note 124, at 604 (discussing the infrequency of recall elections).

<sup>140</sup> *See id.* at 608–9.

balances are necessary for the government to function properly, it still must be allowed to function in the first place. I advanced the theory that the Framers of the Constitution drafted the Appointments Clause with the understanding that appointees would likely only be rejected for “special and strong” reasons, and not merely for Senatorial disdain of the Executive; even allowing for such discretion in rejecting nominees, I expanded this argument into an effective abrogation of the Executive power, in contravention of the established doctrine of Separation of Powers. The Senate, by refusing to honor any of the appointment power rightfully vested in the elected President, effectively seizes it for themselves. I then demonstrated how there are no viable, existing resolutions to this problem in an expedient manner, and that consequently the nation would be without a remedy for at least two years if the proposed total misuse of Senate power ever comes to pass (unlikely though that may seem to an optimistic observer). Finally, I explored the possibility of rectifying the constitutional defect with an Amendment allowing for recall elections of U.S. Senators, and proposed a (very) modest draft of one form such an Amendment could take.

It is of paramount importance that we, the people, not become complacent with our government as it is. As our present record of Constitutional Amendments has shown, we have continually striven towards remedying defects with the Great Article as they are discovered. In this instance, I believe that it would be more prudent to remedy one such defect before it has a chance of showing the full extent of its destructive entelechy. Making Senators responsible to the people for their abuses cannot be said to be un-democratic. Conversely, it would be despotic to allow Senators to abuse their power. It would center the power of appointing any official squarely in the hands of the Legislature, where it was meant to be kept from. Rather, that power should be returned to where the Constitution originally intended it to reside—safely in the hands of the people, by way of their Executive trustee.