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Advice and Consent: Ensuring Judicial Freedom

Patrick J. Leahy

ADVICE AND CONSENT: ENSURING JUDICIAL FREEDOM

*Patrick J. Leahy**

Throughout this nation's history, Americans have turned to the Supreme Court to protect their rights against excesses of the legislative and executive branches. To protect this crucial role of the Court, the Framers realized that neither the executive nor the legislature should have the power to cast the Court in its own image. To prevent this usurpation of one branch by another, the Framers wisely required the President to obtain the advice and consent of the Senate in making appointments to the Supreme Court.

There has been significant debate recently about the proper role the Senate should play in the advice and consent process. The Constitution requires a vigorous, active role. Moreover, if the President gave greater credence to the process laid out in the Constitution, seeking the Senate's advice as well as its consent, I expect that we would see a smoother process more satisfactory to our people and resulting in better appointments to the Court.

The Framers viewed advice and consent as a powerful check on the President's discretion in making appointments to the Supreme Court. As Alexander Hamilton wrote:

> In the act of nomination, [the President's] judgment alone would be exercised; and as it would be his sole duty to point out the man, who with the approbation of the Senate should fill an office, his responsibility would be as complete as if he were to make the final appointment.
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> . . . .
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> To what purpose then require the cooperation of the Senate? I answer, that . . . [i]t would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters.[1]

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* United States Senator from Vermont and member of the Senate Judiciary Committee. B.A., 1961, St. Michaels College; J.D., 1964, Georgetown Law Center.

1. THE FEDERALIST, No. 76, at 512-13 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

Indeed, until the very last days of the Constitutional Convention, drafts of the Constitution called for the Senate to have the sole role in appointing Supreme Court justices. After certain delegates objected that the Senate was too large to fulfill this duty effectively, a compromise was reached whereby the President and the Senate would share responsibility for the appointment of Supreme Court justices.[2]

That shared responsibility has resulted in the rejection of several nominees. As early as 1795, President Washington's nomination of John Rutledge to be Chief Justice was rejected by the Senate because of Rutledge's opposition to the Jay Treaty.

While presidents may object to the Senate's participation in the appointment process, the Constitution envisions co-equal roles for the Senate and the President. For the Senate to do less is to abdicate its constitutional duty to guarantee the independence of our courts and the rights of our citizens.

2. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 498-99 (Max Ferrand ed., 1966).