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No, The Senate Doesn't Have To Confirm Obama Appointees

The Senate is doing exactly what the Constitution allows. In fact, if many Framers had their way, the president, not the Senate, would have nothing to do with Supreme Court selections.

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Justice Scalia's recent passing has stirred up controversy, with Senate Republicans committing to stop any President Obama appointees from filling the vacancy on the Supreme Court.

According to the Constitution, the president "shall" nominate a new justice, with the Senate's "advice" and "consent." "Advice and consent" does not mean any sort of duty, but leaves to the Senate, in its best judgment, what to do. Yet many on the Left are criticizing Senate Republicans for their position that no Obama nominee will receive the Senate's consent. Sen. Chuck Schumer (D-New York)—in a rich bit of irony—claims this "kind of obstructionism isn't going to last," as the president still has a year left to appoint a new justice.

Schumer and his fellow critics are no doubt disappointed about losing the opportunity to have a conservative justice replaced by a progressive (whether "moderate" or otherwise), but they ought to realize that the Senate is doing nothing wrong. The Senate is doing exactly what the Constitution allows: acting as a check on executive power.

Originally, the President Had Nothing to Do with It

Indeed, the president's very involvement in appointments is the product of the Constitutional Convention compromising on *legislative* prerogative. At the Convention, the Framers agreed unanimously on June 13, 1787, that the Senate should have the exclusive power to appoint the Supreme Court. On June 18, the Convention rejected a motion to give the president the sole appointment power.

According to Madison's notes on that day, Roger Sherman believed that "[i]t would be less easy for candidates to intrigue with the [Senate], than with the Executive . . . there would be a better security for a proper choice in the Senate than in the Executive." George Mason "considered the appointment by the Executive as a dangerous prerogative. It might even give him an influence over the Judiciary Department itself."

The Convention *again* approved of giving the Senate full power over judicial appointment on June 21. It took until September 7 for the Convention to pass the "advice and consent" clause as it now stands. The reasoning for the change was, "as the President was to nominate, there would be responsibility; and as the Senate was to concur, there would be security. As Congress now make[s] appointments, there is no responsibility." In *Federalist 76*, Hamilton added that "several disadvantages which might attend the absolute power of appointment in the hands of that officer would be avoided [by requiring the assent of the Senate]."

It's Not Consent If You Can't Refuse

Again, "advice and consent" does not mean "shall, after due consideration, confirm" or even "shall vote on." The Senate retains the power to refuse assent for as long as it desires and at its discretion. This clause is not merely some technicality, but a robust part of constitutional design that was instituted after lengthy debate and consideration of other options at the Constitutional Convention.

Constitutional design does not envision the legislative branch abdicating its duty. The Senate ought to consent to only those judges it deems proper. The notion of "consent" advocated by the likes of Schumer in the wake of Scalia's death—that the Senate can reject nominees, but ultimately must approve one because the power to appoint belongs to the president—is a perfectly understandable political argument, but it is not a legal requirement found in constitutional text.

Imagine applying such a principle of consent to an employment contract. Simply because a hypothetical person could be appointed to the role of employee does not mean that the potential employer must consent to that relationship—he or she can obviously withhold it. To say otherwise destroys the very concept of consent. Consent is only meaningful if it can be freely given or withheld; this applies equally for contract law and appointments to the Supreme Court.

Voters Don't Just Elect a President

In addition to ignoring constitutional history, those advocating that the Senate abdicate its responsibility rely on the notion that the president was "democratically elected" to have the power to appoint.

same constitutional clause. To assume that the appointment power is somehow special because the president was elected is, to quote the late justice, "interpretive jiggery-pokery."

Replacing a Supreme Court justice is a constitutional process involving both the legislature and the president. Just as The New York Times urged the Senate to block President Reagan's nominees after Democrats took the Senate in 1987, just as Schumer pushed to block any George W. Bush Supreme Court nominees in 2007, Republicans now seek to block any of Obama's in 2016.

But this is not simply a case of turnabout being fair play. The role of the legislature is no less powerful than that of the president. It is time to stop chiding Congress for doing exactly what the Framers planned for it to do.

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