



## A Guide to Historical Sources Related to Judicial Appointments under the United States Constitution

**Article II, Section 2, Clause 2 of the United States Constitution:** “The President . . . 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. . .”

### Debates in the Constitutional Convention

- [May 29, 1787](#): The Virginia Plan is introduced, which resolved to give the power of judicial appointments to “the national legislature.”
- [June 5, 1787](#):
  - James Wilson of Pennsylvania “opposed the appointmt (of Judges by the) national Legisl: Experience shewed the impropriety of such appointmts. by numerous bodies. Intrigue, partiality, and concealment were the necessary consequences. A principal reason for unity in the Executive was that officers might be appointed by a single, responsible person.”
  - “Mr. Madison disliked the election of the Judges by the Legislature or any numerous body. Besides, the danger of intrigue and partiality, many of the members were not judges of the requisite qualifications. The Legislative talents which were very different from those of a Judge, commonly recommended men to the favor of Legislative Assemblies. It was known too that the accidental circumstances of presence and absence, of being a member or not a member, had a very undue influence on the appointment. On the other hand He was not satisfied with referring the appointment to the Executive. He rather inclined to give it to the Senatorial branch, as numerous eno' to be confided in — as not so numerous as to be governed by the motives of the other branch; and as being sufficiently stable and independent to follow their deliberate judgments. He hinted this only and moved that the appointment by the Legislature might be struck out, & a blank left to be hereafter filled on maturer reflection.”
- [June 13, 1787](#):
  - “Resold. that a Natl. Judiciary be established, to consist of one supreme tribunal, the Judges of which to be appointed by the 2d branch of the Natl. Legislature, to hold their offices during good behaviour, & to receive punctually at stated times a fixed

compensation for their services, in which no increase or diminution shall be made, so as to affect the persons actually in office at the time of such increase or diminution.”

- [July 18, 1787:](#)
  - “Mr. Ghorum, wd. prefer an appointment by the 2d branch to an appointmt. by the whole Legislature; but he thought even that branch too numerous, and too little personally responsible, to ensure a good choice. He suggested that the Judges be appointed by the Execuve. with the advice & consent of the 2d branch, in the mode prescribed by the constitution of Masts. This mode had been long practised in that country, & was found to answer perfectly well.”
  - “Mr. Wilson, still wd. prefer an an appointmt. by the Executive; but if that could not be attained, wd. prefer in the next place, the mode suggested by Mr. Ghorum. He thought it his duty however to move in the first instance "that the Judges be appointed by the Executive." Mr. Govr. Morris 2ded. the motion.”
  - “Mr. L. Martin was strenuous for an appt. by the 2d. branch. Being taken from all the States it wd. be best informed of characters & most capable of making a fit choice.”
  - “Mr. Sherman concurred in the observations of Mr. Martin, adding that the Judges ought to be diffused, which would be more likely to be attended to by the 2d. branch, than by the Executive.”
  - “Mr Mason. The mode of appointing the Judges may depend in some degree on the mode of trying impeachments, of the Executive. If the Judges were to form a tribunal for that purpose, they surely ought not to be appointed by the Executive. There were insuperable objections besides agst. referring the appointment to the Executive. He mentioned as one, that as the seat of Govt. must be in some one State, and the Executive would remain in office for a considerable time, for 4, 5, or 6 years at least he would insensibly form local & personal attachments within the particular State that would deprive equal merit elsewhere, of an equal chance of promotion.”
  - “Mr. Ghorum. As the Executive will be responsible in point of character at least, for a judicious and faithful discharge of his trust, he will be careful to look through all the States for proper characters. — The Senators will be as likely to form their attachments at the seat of Govt where they reside, as the Executive. If they can not get the man of the particular State to which they may respectively belong, they will be indifferent to the rest. Public bodies feel no personal responsibly and give full play to intrigue & cabal. Rh. Island is a full illustration of the insensibility to character produced by a participation of numbers, in dishonorable measures, and of the length to which a public body may carry wickedness & cabal.”

- “Mr. Govr. Morris supposed it would be improper for an impeachmt. of the Executive to be tried before the Judges. The latter would in such case be drawn into intrigues with the Legislature and an impartial trial would be frustrated. As they wd. be much about the seat of Govt they might even be previously consulted & arrangements might be made for a prosecution of the Executive. He thought therefore that no argument could be drawn from the probability of such a plan of impeachments agst. the motion before the House.”
- “Mr. M(adison), suggested that the Judges might be appointed by the Executives with the concurrence of ( of the 2d. branch. This would unite the advantage of responsibility in the Executive with the security afforded in the 2d. branch agst. any incautious or corrupt nomination by the Executive. at least)”
- “Mr. Sherman, was clearly for an election by the Senate. It would be composed of men nearly equal to the Executive, and would of course have on the whole more wisdom. They would bring into their deliberations a more diffusive knowledge of characters. It would be less easy for candidates to intrigue with them, than with the Executive Magistrate. For these reasons he thought there would be a better security for a proper choice in the Senate than in the Executive.”
- “Mr. Randolph. It is true that when the appt. of the Judges was vested in the 2d. branch an equality of votes had not been given to it. Yet he had rather leave the appointmt. there than give it to the Executive. He thought the advantage of personal responsibility might be gained in the Senate by requiring the respective votes of the members to be entered on the Journal. He thought too that the hope of (receiving) appts. would be more diffusive if they depended on the Senate, the members of which wd. be diffusively known, than if they depended on a single man who could not be personally known to a very great extent; and consequently that opposition to the System, would be so far weakened.”
- “Mr. Bedford thought there were solid reasons agst. leaving the appointment to the Executive. He must trust more to information than the Senate. It would put it in his power to gain over the larger States, by gratifying them with a preference of their Citizens. The responsibility of the Executive so much talked of was chimerical. He could not be punished for mistakes.”
- “Mr. Ghorum remarked that the Senate could have no better information than the Executive They must like him, trust to information from the members belonging to the particular State where the Candidate resided. The Executive would certainly be more answerable for a good appointment, as the whole blame of a bad one would fall on him alone. He did not mean that he would be answerable under any other penalty than that of public censure, which with honorable minds was a sufficient one.”

- “Mr. Ghorum moved "that the Judges be (nominated and appointed) by the Executive, by & with the advice & consent of the 2d branch (& every such nomination shall be made at least[ ] days prior to such appointment"). This mode he said had been ratified by the experience of 140 years in Massachussts. If the appt. should be left to either branch of the Legislature, it will be a mere piece of jobbing.”
  - Question on Mr. Ghorum's motion Mas. ay. Con. no. Pa ay. Del. no. Md. ay. Va. ay. N. C. no. S. C. no. Geo. (absent.) [Ayes — 4; noes — 4; absent — 1.]
- [July 21, 1787:](#)
  - The motion made by Mr. (Madison) July 18. & then postponed, "that the Judges should be nominated by the Executive & such nominations become appointments unless disagreed to by of the 2nd. branch of the Legislature," was now resumed.
  - “Mr. Madison stated as his reasons for the motion. 1 that it secured the responsibility of the Executive who would in general be more capable & likely to select fit characters than the Legislature, or even the 2d. b. of it, who might hide their selfish motives under the number concerned in the appointment- 2 that in case of any flagrant partiality or error, in the nomination, it might be fairly presumed that of the 2d. branch would join in putting a negative on it. 3. that as the 2d. b. was very differently constituted when the appointment of the Judges was formerly referred to it, and was now to be composed of equal votes from all the States, the principle of compromise which had prevailed in other instances required in this that their shd. be a concurrence of two authorities, in one of which the people, in the other the states, should be represented. The Executive Magistrate wd be considered as a national officer, acting for and equally sympathising with every part of the U. States. If the 2d. branch alone should have this power, the Judges might be appointed by a minority of the people, tho' by a majority, of the States, which could not be justified on any principle as their proceedings were to relate to the people, rather than to the States: and as it would moreover throw the appointments entirely into the hands of ye Nthern States, a perpetual ground of jealousy & discontent would be furnished to the Southern States.”
  - “Mr. Pinkney was for placing the appointmt. in the 2d. b. exclusively. The Executive will possess neither the requisite knowledge of characters, nor confidence of the people for so high a trust.”
  - “Mr. Randolph wd. have preferred the mode of appointmt. proposed formerly by Mr Ghorum, as adopted in the Constitution of Massts. but thought the motion depending so great an improvement of the clause as it stands, that he anxiously wished it success. He laid great stress on the responsibility of the Executive as a security for fit appointments. Appointments by the Legislatures have generally

resulted from cabal, from personal regard, or some other consideration than a title derived from the proper qualifications. The same inconveniencies will proportionally prevail if the appointments be referred to either branch of the Legislature or to any other authority administered by a number of individuals.”

- “Mr. Elsworth would prefer a negative in the Executive on a nomination by the 2d. branch, the negative to be overruled by a concurrence of of the 2d. b. to the mode proposed by the motion; but preferred an absolute appointment by the 2d. branch to either. The Executive will be regarded by the people with a jealous eye. Every power for augmenting unnecessarily his influence will be disliked. As he will be stationary it was not to be supposed he could have a better knowledge of characters. He will be more open to caresses & intrigues than the Senate. The right to supersede his nomination will be ideal only. A nomination under such circumstances will be equivalent to an appointment.”
- “Mr. Govr. Morris supported the motion. 1. The States in their corporate capacity will frequently have an interest staked on the determination of the Judges. As in the Senate the States are to vote the Judges ought not to be appointed by the Senate. Next to the impropriety of being Judge in one's own cause, is the appointment of the Judge. 2. It had been said the Executive would be uninformed of characters. The reverse was ye truth. The Senate will be so. They must take the character of candidates from the flattering pictures drawn by their friends. The Executive in the necessary intercourse with every part of the U. S. required by the nature of his administration, will or may have the best possible information. 3. It had been said that a jealousy would be entertained of the Executive. If the Executive can be safely trusted with the command of the army, there can not surely be any reasonable ground of Jealousy in the present case. He added that if the Objections agst. an appointment of the Executive by the Legislature, had the weight that had been allowed there must be some weight in the objection to an appointment of the Judges by the Legislature or by any part of it.”
- “Mr. Gerry. The appointment of the Judges like every other part of the Constitution shd. be so modeled as to give satisfaction both to the people and to the States. The mode under consideration will give satisfaction to neither. He could not conceive that the Executive could be as well informed of characters throughout the Union, as the Senate. It appeared to him also a strong objection that of the Senate were required to reject a nomination of the Executive. The Senate would be constituted in the same manner as Congress. And the appointments of Congress have been generally good.”
- “Mr. (Madison), observed that he was not anxious that should be necessary to disagree to a nomination. He had given this form to his motion chiefly to vary it the more clearly from one which had just been rejected. He was content to obviate the

objection last made, and accordingly so varied the motion as to let a majority reject.”

- “Col. Mason found it his duty to differ from his colleagues in their opinions & reasonings on this subject. Notwithstanding the form of the proposition by which the appointment seemed to be divided between the Executive & Senate, the appointment was substantially vested in the former alone. The false complaisance which usually prevails in such cases will prevent a disagreement to the first nominations. He considered the appointment by the Executive as a dangerous prerogative. It might even give him an influence over the Judiciary department itself. He did not think the difference of interest between the Northern and Southern (States) could be properly brought into this argument. It would operate & require some precautions in the case of regulating navigation, commerce & imposts; but he could not see that it had any connection with the Judiciary department.”
- “On the question, the motion now being "that the executive should nominate, & such nominations should become appointments unless disagreed to by the Senate"
  - “Mas. ay. Ct. no. Pa. ay. Del. no. Md. no. Va. ay. N. C. no. S. C. no. Geo. no. [Ayes — 3; noes — 6.]”
- “On question for agreeing to the clause as it stands by which the Judges are to be appointed by 2d. branch Mas. no. Ct. ay. Pa. no. Del. ay. Md. ay. Va. no. N. C. ay. S. C. ay. Geo. ay. [Ayes — 6; noes — 3.]”
- [August 6, 1787 \(Committee of Detail Report, the first complete draft of the Constitution\):](#)
  - “The Senate of the United States shall have power to make treaties, and to appoint Ambassadors, and Judges of the Supreme Court.”
- [September 4, 1787 \(Committee of Eleven – also known as Committee on Remaining Matters – Report\):](#)
  - “ Sect— 4 The President by and with the advice and Consent of the Senate, shall have power to make Treaties; and he shall nominate and by and with the advice and consent of the Senate shall appoint ambassadors, and other public Ministers, Judges of the Supreme Court, and all other Officers of the U— S—, whose appointments are not otherwise herein provided for. But no Treaty shall be made without the consent of two thirds of the members present.”
- [September 7, 1787:](#)
  - “[Col. Mason] . . . took occasion to express his dislike of any reference whatever of the power to make appointments to either branch of the Legislature. On the other hand he was averse to vest so dangerous a power in the President alone. As a method for avoiding both, he suggested that a privy Council of six members to the president should be established; to be chosen for six years by the Senate, two out of

the Eastern two out of the middle, and two out of the Southern quarters of the Union, & to go out in rotation two every second year; the concurrence of the Senate to be required only in the appointment of Ambassadors, and in making treaties. which are more of a legislative nature. This would prevent the constant sitting of the Senate which he thought dangerous, as well as keep the departments separate & distinct. It would also save the expence of constant sessions of the Senate. He had he said always considered the Senate as too unwieldy & expensive for appointing officers, especially the smallest, such as tide waiters &c. He had not reduced his idea to writing, but it could be easily done if it should be found acceptable.”

- “Mr. Wilson objected to the mode of appointing, as blending a branch of the Legislature with the Executive. Good laws are of no effect without a good Executive; and there can be no good Executive without a responsible appointment of officers to execute. Responsibility is in a manner destroyed by such an agency of the Senate — He would prefer the Council proposed by Col: Mason, provided its advice should not be made obligatory on the President Mr. Pinkney was against joining the Senate in these appointments, except in the instances of Ambassadors who he thought ought not to be appointed by the President Mr. Govr. Morris said that 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 appointments there is no responsibility.”
- “Mr King. As the idea of a Council proposed by Col. Mason has been supported by Mr. Wilson, he would remark that most of the inconveniencies charged on the Senate are incident to a Council of Advice. He differed from those who thought the Senate would sit constantly. He did not suppose it was meant that all the minute officers were to be appointed by the Senate, or any other original source, but by the higher officers of the departments to which they belong. He was of opinion also that the people would be alarmed at an unnecessary creation of New Corps which must increase the expence as well as influence of the Government.”
- “Doctor Franklin 2ded. [Col. Mason’s] motion [for an Executive Council]. We seemed he said too much to fear cabals in appointments by a number, and to have too much confidence in those of single persons. Experience shewed that caprice, the intrigues of favorites & mistresses, &c were nevertheless the means most prevalent in monarchies. among instances of abuse in such modes of appointment, he mentioned the many bad Governors appointed in G. B. for the Colonies. He thought a Council would not only be a check on a bad President but be a relief to a good one.”
- “The motion of Mr. Mason was negatived. Maryd. ay. S. C. ay. Geo. ay— N. H. no. Mas. no. Ct. no. N. J. no Pa. no. Del. no. Va. no. N C no.) [Ayes — 3; noes — 8.]”
- [September 12, 1787 Committee of Style Report:](#)

- “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; 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.”

### **Selections from Debates in State Ratifying Conventions**

- [Thomas Lloyd’s Notes on the Pennsylvania Ratifying Convention \(December 4, 1787\):](#)
  - “[James Wilson] As I mentioned before, so I will beg leave to repeat, that this Senate can do nothing without the concurrence of some other branch of the government. With regard to their concern in the appointment to offices, the President must nominate before they can be chosen; the President must acquiesce in that appointment. With regard to their power in forming treaties, they can make none, they are only auxiliaries to the President.”
- [John McKesson’s of the New York Ratifying Convention Debates \(July 4, 1788\):](#)
  - “MELANCTON SMITH. The Senate are the Court of Impeachmts. to try all officers Impeached—And yet the Council for the appointmt. of all Officers— Mr Smith Moved & secon[d]ed by Mr Yates for the followg Amendmt. to the 2d & 3d Parag. Resolved as the opinion of this Committee that the Congress shall appoint in such manner as they may think proper, a Council to advise the President in the Appointment of Officers—That the said Council should continue in Office for four years—That they should keep a Record of their Proceedings and Sign the Same; and always be responsible for their Advice, and impeachable for mal Conduct in Office— That the Counsellors should have a reasonable Allowance for their Services fixed by Standing Laws—And that no man should be elected a Counsellor who shall not have attained to the Age of 35 years, And who is not either a natural born Citizen or has become a Citizen before the 4th. day of July 1776.”
- [Journal Notes of the Virginia Ratifying Convention \(June 10, 1788\):](#)
  - “[Edmund Randolph] Seven States are a majority, and can in most cases bind the rest; from which reason, the interest of certain States will alone be con-sulted. Although the House of Representatives is calculated on national principles, and should they attend contrary to my expectations, to the general interests of the Union, yet the dangerous exclusive powers given to the Senate, will, in my opinion, counter-balance their exertions. Consider the connection of the Senate with the



Executive. Has it not an authority over all the acts of the Executive? What are the acts which the President can do without them? What number is requisite to make treaties? A very small number. Two-thirds of those who may happen to be present, may, with the President, make treaties that shall sacrifice the dearest interests of the Southern States—which may relinquish part of our territories—which may dismember the United States. There is no check to prevent this—There is no responsibility, or power to punish it. He is to nominate, and by and with the advice and consent of the Senate, to appoint Ambassadors, other public Ministers, and Consuls, Judges of the Supreme Court, and all other officers of the United States. The concurrence of a bare majority of those who may be present, will enable him to do these important acts. It does not require the consent of two-thirds, even of those who may be present. Thus, I conceive the Government is put entirely into the hands of seven States; indeed into the hands of two-thirds of a majority. The Executive branch is under their protection, and yet they are freed from a direct charge of combination.”

- [North Carolina Ratifying Debate \(July 28, 1788\)](#):
  - Mr. Spencer. Mr. Chairman, I rise to declare my disapprobation of this, likewise. It is an essential article in our Constitution, that the legislative, the executive, and the supreme judicial powers, of government, ought to be forever separate and distinct from each other. The Senate, in the proposed government of the United States, are possessed of the legislative authority in conjunction with the House of Representatives. They are likewise possessed of the sole power of trying all impeachments, which, not being restrained to the officers of the United States, may be intended to include all the officers of the several states in the Union. And by this clause they possess the chief of the executive power; they are, in effect, to form treaties, which are to be the law of the land; and they have obviously, in effect, the appointment of all the officers of the United States. The President may nominate, but they have a negative upon his nomination, till he has exhausted the number of those he wishes to be appointed. He will be obliged, finally, to acquiesce in the appointment of those whom the Senate shall nominate, or else no appointment will take place. Hence it is easy to perceive that the President, in order to do any business, or to answer any purpose in this department of his office, and to keep himself out of perpetual hot water, will be under a necessity to form a connection with that powerful body, and be contented to put himself at the head of the leading members who compose it. I do not expect, at this day, that the outline and organization of this proposed government will be materially altered. But I cannot but be of opinion that the government would have been infinitely better and more secure, if the President had been provided with a standing council, composed of one member from each of the states, the duration of whose office might have been the same as that of the President's office, or for any other period that might have been

thought more proper; for it can hardly be supposed, if two senators can be sent from each state, who are fit to give counsel to the President, that one such cannot be found in each state qualified for that purpose.”

## **Essays Published During State Ratification Process**

- [Federalist No. 66 \(1788\)](#):
  - “It will be the office of the president to nominate, and the with the advice and consent of the senate to appoint. There will, of course be no exertion of choice on the part of the senate. They may defeat one choice of the executive, and oblige him to make another; but they cannot themselves choose – they can only ratify or reject the choice, of the president. They might even entertain a preference to some other person, at the very moment they were assenting to the one proposed; because there might be no positive ground of opposition to him; and they could not be sure, if they withheld their assent, that the subsequent nomination would fall upon their own favorite, or upon any other person in their estimation more meritorious than the one rejected. 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.”
- [Federalist No. 76 \(1788\)](#):
  - “I proceed to lay it down as a rule, that one man of discernment is better fitted to analyse and estimate the peculiar qualities adapted to particular offices, than a body of men of equal, or perhaps even of superior discernment. 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." The truth of the principles here advanced seems to have been felt by the most intelligent of those who have found fault with the provision made in this respect by the Convention. They contend that the President ought solely to have been authorized to make the appointments under the Federal Government. But it is easy to shew that every advantage to be expected from such an arrangement would in substance be derived from the power of nomination, which is proposed to be conferred upon him; while several disadvantages which might attend the absolute power of appointment in the hands of that officer, would be avoided. In the act of nomination his 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. There can in this view be no difference between nominating and appointing. The same motives which would influence a proper discharge of his duty in one case would exist in the other. And as no man could be appointed, but upon his previous nomination, every man who might be appointed would be in fact his choice. (But might not his nomination be overruled-I grant it might, yet this could) only be to make place for another nomination by himself. The person ultimately appointed must be the object of his preference, though perhaps not in the first degree. It is also not very probable that his nomination would often be overruled. The Senate could not be tempted by the preference they might feel to another to reject the one proposed; because they could not assure themselves that the person they might wish would be brought forward by a second or by any subsequent nomination. They could not even be certain that a future nomination would present a candidate in any degree more acceptable to them: And as their dissent might cast a kind of stigma upon the individual rejected; and might have the appearance of a reflection upon the judgment of the chief magistrate; it is not likely that their sanction would often be refused, where there were not special and strong reasons for the refusal."

- "To what purpose then require the co-operation of the Senate? I answer that the necessity of their concurrence would have a powerful, though in general a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to preventing the appointment of unfit characters from State

prejudice, from family connection, from personal attachment, or from a view to popularity. And, in addition to this, it would be an efficacious source of stability in the administration. It will readily be comprehended, that a man, who had himself the sole disposition of offices, would be governed much more by his private inclinations and interests, than when he was bound to submit the propriety of his choice to the discussion and determination of a different and independent body; and that body an entire branch of the Legislature. The possibility of rejection would be a strong motive to care in proposing.-The danger to his own reputation, and, in the case of an elective magistrate, to his political existence, from betraying spirit of favoritism, or an unbecoming pursuit of popularity, to the observation of a body, whose opinion would have great weight in forming that of the public, could not fail to operate as a barrier to the one and to the other. He would be both ashamed and afraid to bring forward for the most distinguished or lucrative stations, candidates who had no other merit, than that of coming from the same State to which he particularly belonged, or of being in some way or other personally allied to him, or of possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure.”

- [Federalist No. 77 \(1788\)](#):
  - “[A]s there would be a necessity for submitting each nomination to the judgement of an entire branch of the legislative, the circumstances attending an appointment, from the mode of conducting it, would naturally become matters of notoriety; and the public would be at no loss to determine what part had been performed by the different actors. The blame of a bad nomination would fall upon the president singly and absolutely-The censure of rejecting a good one would lie entirely at the door of the senate; aggravated by the consideration of their having counteracted the good intentions of the executive. If an ill appointment should be made the executive for nominating and the senate for approving would participate though in different degrees in the opprobrium and disgrace.”
- [Luther Martin: Genuine Information I \(1787\)](#):
  - “11. That a national judiciary be established, to consist of one supreme tribunal, the judges of which, to be appointed by the second branch of the national legislature, to hold their offices during good behaviour, and to receive punctually, at stated times, a fixed compensation for their services, in which no increase or diminution shall be made, so as to affect the persons actually in office at the time of such increase or diminution. 12. That the national legislature be empowered to appoint inferior tribunals.”
- [Luther Martin: Genuine Information IX \(1788\)](#):

- “To that part of this article also, which gives the president a right to nominate, and with the consent of the senate to appoint all the officers, civil and military, of the United States, there were considerable opposition- it was said that the person who nominates, will always in reality appoint, and that this was giving the president a power and influence which together with the other powers, bestowed upon him, would place him above all restraint and controul. In fine, it was urged, that the president as here constituted, was a king in every thing but the name- that though he was to be chosen but for a limited time, yet at the expiration of that time if he is not re-elected, it will depend entirely upon his own moderation whether he will resign that authority with which he has once been invested- that from his having the appointment of all the variety of officers in every part of the civil department for the union, who will be very numerous- in them and their connexions, relations, friends and dependants, he will have a formidable host devoted to his interest, and ready to support his ambitious views.- That the army and navy, which may be encreased without restraint as to numbers, the officers of which from the highest to the lowest, are all to be appointed by him and dependant on his will and pleasure, and commanded by him in person, will, of course, be subservient to his wishes, and ready to execute his commands; in addition to which, the militia also are entirely subjected to his orders- That these circumstances, combined together, will enable him, when he pleases, to become a king in name, as well as in substance, and establish himself in office not only for his own life, but even if he chooses, to have that authority perpetuated to his family.”

### **Letters and Commentaries Drafted and/or Published After Ratification**

- [George Mason to James Monroe \(January 30, 1792\)](#):
  - “The Question lately agitated in the Senate is a most important one. I am decidedly of opinion, that the Words of the Constitution "He shall nominate, and by & with the Advice and Consent of the Senate, appoint Ambassadors" &c. give the Senate the Power of interfering in every part of the Subject, except the Right of nominating. There is some thing remarkable in the Arrangement of the Words "He shall nominate." This gives to the President *alone* the Right of *Nomination*. And if the Senate were to refuse their Approbation of the person nominated (which the subsequent Part of the Clause puts in their Power) they wou'd have no Right to nominate another Person; the Right of Nomination being complete in the President. "And by and with the Advice & Consent of the Senate appoint Ambassadors" &c. The Word "*Advice*" here clearly relates in the Judgment of the Senate on the Expediency or Inexpediency of the Measure, or Appointment; and the Word "*Consent*" to their Approbation or Disapprobation of the Person nominated;

otherwise the word *Advice* has no Meaning at all—and it is a well known Rule of Construction, that no Clause or Expression shall be deemed superfluous, or nugatory, which is capable of a fair and rational Meaning. The Nomination, of Course, brings the Subject fully under the Consideration of the Senate; who have then a Right to decide upon it's Propriety or Impropropriety. The peculiar Character or Predicament of the Senate in the Constitution of the General Government, is a strong Confirmation of this Construction.”

- “The Senate are not the immediate Representatives of the people at large, nor elected by them. They are elected by the Legislatures of the different States, and they represent respectively, the Sovereignty of the separate States, in the general Union. Upon no other Principle can the Equality of Representation, in the larger and smaller States be justified. The Senate act in a diplomatic, as well as a legislative Character; and it is in the former Capacity that they give advice to the President; and partake of some Executive Powers. The Constitution therefore wisely & Properly directs, that Ambassadors &c. shall not be appointed, but with the Advice & Approbation of the States, which form the Union, thro' their Organ, or Representative, the Senate. I wish this important Subject to be fairly discussed, upon it's merits, and decided upon, in the Infancy of the new Government, and in the presidency of General Washington; who, I am sure, is strongly attach'd to the Rights & Liberty of our country; but we are not sure, that this will be the Case with his Successors.”
- [William Rawle, A View of the Constitution of the United States \(1829\):](#)
  - If it were left entirely to [the President] to select such agents as he might deem qualified for public duties, he would of course be scrupulous in his choice; but if a senate, either actuated by party motives, or for want of information of the fitness of the individual, rejects the nomination, not only may the public interests suffer in the immediate case, but the president be impelled to inadequate substitutions. It is true, that the converse of this proposition may also be admitted. Improper nominations, proceeding from personal or party influence, may be properly rejected by a virtuous and inflexible senate; but in the latter case, if it ever should be our misfortune to have a man so actuated, in possession of this high office, we may see him immediately after the rising of the senate, dismiss the incumbent, or in case of their rejecting one nomination, withholding another, and availing himself of the power to appoint during the recess. It would, therefore, appear upon the whole, that with the possibility of an evasion which would render the constitutional provision so entirely nugatory, it would have been more beneficial to have left this power in the president without restraint, and the more so, as the consent of the senate is not required for the dismissal of the officer.
- [Chancellor James Kent's Commentaries on American Law \(1826-1830\):](#)

- The association of the senate with the president in the exercise of [the appointment] power, is an exception to the general delegation of executive authority, and if he were not expressly invested with the exclusive right of nomination in the instances before us, the organization of this department would be very unskillful, and the government degenerate into a system of cabal, favoritism, and intrigue. But the power of nomination is, for all the useful purposes of restraint, equivalent to the power of appointment. It imposes upon the president the same lively sense of responsibility, and the same indispensable necessity of meeting the public approbation or censure. This, indeed, forms the ultimate security that men in public stations will dismiss interested considerations, and act with a steady zealous, and undivided regard for the public welfare. The advice and consent of the senate, which are requisite to render the nomination effectual, cannot be attended, in the nature of the ease, with very mischievous effects. Having no agency in the nomination, nothing but simply consent or refusal, the spirit of personal intrigue and personal attachment must be pretty much extinguished, from a want of means to gratify it. On the other hand, the advice of so respectable a body of men will add still further inducements to a coolly reflected conduct in the president, and will be at all times a check on his own misinformation or error.
- [Joseph Story's Commentaries on the Constitution \(1833\):](#)
  - **§1525** The President is to nominate, and thereby has the sole power to select for office; but his nomination cannot confer office, unless approved by a majority of the senate. His responsibility and theirs is thus complete, and distinct. He can never be compelled to yield to their appointment of a man unfit for office; and, on the other hand, they may withhold their advice and consent from any candidate, who in their judgment does not possess due qualifications for office. Thus, no serious abuse of the power can take place without the co-operation of two co-ordinate branches, of the government, acting in distinct spheres; and, if there should be any improper concession on either side, it is obvious, that from the structure and changes, incident to each department, the evil cannot long endure, and will be remedied, as it should be, by the elective franchise. The consciousness of this check will make the president more circumspect, and deliberate in his nominations for office. He will feel, that, in case of a disagreement of opinion with the senate, his principal vindication must depend upon the unexceptionable character of his nomination. And in case of a rejection, the most, that can be said, is, that he had not his first choice. He will still have a wide range of selection; and his responsibility to present another candidate, entirely qualified for the office, will be complete and unquestionable.
  - **§1526** Nor is it to be expected, that the senate will ordinarily fail of ratifying the appointment of a suitable person for the office. Independent of the desire, which such a body may naturally be presumed to feel, of having offices suitably filled,

(when they cannot make the appointment themselves,) there will be a responsibility to public opinion for a rejection, which will overcome all common private wishes. Cases, indeed, may be imagined, in which the senate from party motives, from a spirit of opposition, and even from motives of a more private nature, may reject a nomination absolutely unexceptionable. But such occurrences will be rare. The more common error, (if there shall be any) will be too great a facility to yield to the executive wishes, as a means of personal, or popular favour. A president will rarely want means, if he shall choose to use them, to induce some members of such a body to aid his nominations; since a correspondent influence may be fairly presumed to exist, to gratify such persons in other recommendations for office, and thus to make them indirectly the dispensers of local patronage. It will be, principally, with regard to high officers, such as ambassadors, judges, heads of departments, and other appointments of great public importance, that the senate will interpose to prevent an unsuitable choice. Their own dignity, and sense of character, their duty to their country, and their very title to office will be materially dependent upon a firm discharge of their duty on such occasions.