CONTRA PUBLIUS: THE HOUSE AS CURE FOR THE COMPLAISANCE AND VENALITY OF THE SENATE

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"Though it might . . . be allowable to suppose that the Executive might occasionally influence some individuals in the Senate, yet the supposition, that he could in general purchase the integrity of the whole body, would be forced and improbable."

—Alexander Hamilton[1]

We find ourselves in improbable times. The time has come to amend the Constitution to address one of its glaring errors: the assignment of the Senate, and the Senate alone, to provide advice and consent to the President regarding nominations to the Supreme Court.[2]

The power to advise and consent regarding Supreme Court nominations should fall to the full Congress. This is so as a matter of ensuring representative-democratic principles in the Supreme Court confirmation process, in contrast to the existing countermajoritarian system of exclusive reliance on the Senate. Put simply, the people of the United States deserve a one-person–one-vote backstop in the confirmation process, even though the Constitution's framers did not see fit to provide one.

The rationales provided by Hamilton for Senate-only confirmation, in Federalist 76 and Federalist 77,[3] are no longer valid in the present circumstances with a Senate that has come to exhibit the kind of executive "complaisance" that Hamilton said could not come to pass.[4] In fact, the rationales likely were not valid in the first place, as we can now see with the benefit of hindsight.

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1 THE FEDERALIST No. 76 (Alexander Hamilton).

2 U.S. CONST. art. II, § 2, cl. 2.

3 THE FEDERALIST Nos. 76–77 (Alexander Hamilton).

4 THE FEDERALIST No. 76 (Alexander Hamilton).

In Federalist 76 and 77, Alexander Hamilton, writing under the nom de plume Publius, presented his defense of the Senate's confirmation role as to presidential appointments.[5] Hamilton acknowledged fears of the "venalty [sic] in human nature" and the concern that "the President, by the influence of the power of nomination, may secure the complaisance of the Senate to his views."[6] However, he insisted that that the Senate's independence from the President could never be meaningfully compromised.[7] He argued that parliamentary independence and integrity would hold true even where some members of the legislature are "corrupt[ed] or seduce[d]":

> It has been found to exist in the most corrupt periods of the most corrupt governments. The venalty [sic] of the British House of Commons has been long a topic of accusation against that body, in the country to which they belong as well as in this; and it cannot be doubted that the charge is, to a considerable extent, well founded. But it is as little to be doubted, that there is always a large proportion of the body, which consists of independent and public-spirited men, who have an influential weight in the councils of the nation. . . . Though it might therefore be allowable to suppose that the Executive might occasionally influence some individuals in the Senate, yet the supposition, that he could in general purchase the integrity of the whole body, would be forced and improbable. A man disposed to view human nature as it is, without either flattering its virtues or exaggerating its vices, will see sufficient ground of confidence in the probity of the Senate, to rest satisfied, not only that it will be impracticable to the Executive to corrupt or seduce a majority of its members, but that the necessity of its co-operation, in the business of appointments, will be a considerable and salutary restraint upon the conduct of that magistrate.[8]

To test Hamilton's theory of an incorruptible Senate that cannot be bent in service of the President, a review of the history of Supreme Court confirmation votes is instructive. On only several occasions since 1900 have a significant number of senators of the same party as the President voted against a Supreme Court nominee—and never has a majority of senators of the same party as the President voted against a Supreme Court nominee.[9] That is so even in the case of Judge G. Harrold Carswell, a nominee of President Nixon who had described

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5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 *Supreme Court Nominations (1789–Present)*, U.S. SENATE, https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm [https://perma.cc/UH24-X5YB].

civil rights as "Civil Wrongs,"[10] and about whom Senator Roman Hruska, a Republican who voted yes, said, "[e]ven if he were mediocre, there are a lot of mediocre judges and people and lawyers, and they are entitled to a little representation, aren't they? We can't have all Brandeises, Frankfurters, and Cardozos."[11] Even counting nominations withdrawn by the President in cases in which rejection may have been likely, the number of exercises of the Senate's "salutary restraint"[12] are few. It may be argued, of course, that the nominees submitted to the Senate for advice and consent were, by and large, well-qualified and deserved confirmation because Presidents shape their nomination decisions according to an expectation of the Senate's vote. This is no doubt true, but the sharply partisan nature of the votes suggests that political loyalty to the President's party plays an outsized role in senators' confirmation votes. Among the nine sitting Justices, plus former Justice Ginsburg, the percentage of voting senators who voted in favor of the nominee by a President of the same party ranged from about 95% (in the case of Justice Thomas's nomination) to 100% (in the cases of Justices Ginsburg, Breyer, Sotomayor, Gorsuch, Barrett, and Chief Justice Roberts).[13] Similarly, the percentage of voting senators who cast a vote against the nominee by a President of a different party has been extremely high, and increasingly so. While the opposition rejection-vote percentage was about 81%, 7%, and 21% for the Justices who were nominated in the 1990s (Justices Thomas, Ginsburg, and Breyer, respectively), and was 50% in the case of Chief Justice Roberts, the last six confirmation votes have seen opposition rejection-vote rates of about 93% (Justice Alito), 78% (Justice Sotomayor), 88% (Justice Kagan), 93% (Justice Gorsuch), 98% (Justice Kavanaugh), and reaching 100% in the most recent vote (Justice Barrett).[14] This predominantly and increasingly party-aligned voting behavior argues sharply against Hamilton's faith in an independent Senate, uninfluenced by Presidential favor.

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10 G. Harrold Carswell, *"Excerpts from Carswell Talk,"* N.Y. TIMES, Jan. 22, 1970, at 22, *available at* https://timesmachine.nytimes.com/timesmachine/1970/01/22/80017022.html?pageNumber=22 [https://perma.cc/8K3D-ADP8].

11 Philip Hamburger, *Comment*, NEW YORKER, Apr. 4, 1970, at 34, *available at* https://archives.newyorker.com/newyorker/1970-04-04/flipbook/032 [https://perma.cc/KWS8-ZUMM].

12 THE FEDERALIST No. 76 (Alexander Hamilton).

13 *Supreme Court Nominations (1789–Present)*, U.S. SENATE, https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm [https://perma.cc/UH24-X5YB]; *Senate Vote 262—Nomination of Sonia Sotomayor to the Supreme Court*, PROPUBLICA (Aug. 6, 2009, 3:03 PM), https://projects.propublica.org/represent/votes/111/senate/1/262 [https://perma.cc/SHU5-ZQPE].

14 *See* sources cited *supra*, note 13.

Indeed, one might wonder whether, if Hamilton were alive today, he might reconsider his assumptions—perhaps in response to the sudden change of heart of Senator Lindsey Graham in 2020. Senator Graham, in 2016, expressed opposition to even holding a vote on the nominee of a President of another party. In an effort to display his "probity,"[15] as Hamilton might have put it, Senator Graham said, "I want you to use my words against me. If there's a Republican president in 2016 and a vacancy occurs in the last year of the first term, you can say Lindsey Graham said let's let the next president, whoever it might be, make that nomination."[16] Four years later, Senator Graham led the effort, as chair of the Senate Judiciary Committee, to fast-track a vote on a nominee of a President of his own party.[17] It is not hard to imagine that Hamilton might have chosen to make use of adjectives such as "venality" and "complaisance"—or perhaps other adjectives altogether—in describing this sequence of events.

Hamilton considered the notion of including the House in the Appointments Clause and found it so unworthy of serious thought that he wrote that he would "do little more than mention it, as I cannot imagine that it is likely to gain the countenance of any considerable part of the community."[18] Hamilton made two arguments against the House's inclusion: first, the short duration of its members' terms and the likely turnover rate, and, second, the sheer number of its members:

> A body so fluctuating and at the same time so numerous, can never be deemed proper for the exercise of that power. Its unfitness will appear manifest to all, when it is recollected that in half a century it may consist of three or four hundred persons. All the advantages of the stability, both of the Executive and of the Senate, would be defeated by this union, and infinite delays and embarrassments would be occasioned.[19]

Admittedly, exclusive reliance on the Senate as the body to review Supreme Court nominations has become somewhat less egregious over time, with the ratification of the Seventeenth Amendment requiring that senators be selected by the voters of their states rather than by state

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15 THE FEDERALIST No. 76 (Alexander Hamilton).

16 *Executive Business Meeting, S. Comm. on the Judiciary*, 114th Cong. 1:28:53 (Mar. 10, 2016) (statement of Sen. Lindsey Graham, Member, S. Comm. on the Judiciary), *available at* https://www.judiciary.senate.gov/meetings/executive-business-meeting-03-03-16 [https://perma.cc/AS3J-VXQT].

17 *Chairman Graham Statement on Nomination of Judge Barrett*, COMMITTEE ON JUDICIARY (Sept. 26, 2020), https://www.judiciary.senate.gov/press/rep/releases/chairman-graham-statement-on-nomination-of-judge-barrett [https://perma.cc/K5BV-DG8Z].

18 THE FEDERALIST No. 77 (Alexander Hamilton).

19 *Id.*

legislators.[20] However, the Senate of course remains deeply undemocratic in that its members' votes are allocated in equal number by state, rather than by reference to the population size of each state.

This arrangement is perhaps best explained by a centuries-old case of psychological inertia—a refusal to acknowledge that Hamilton and the other Framers made a grave error on this issue. It is not too late to correct that error. The House of Representatives should share the power of advice and consent on Supreme Court appointments.[21]

To accomplish this, the Congress should proceed by steps. First, the Senate should immediately adopt a rule providing that a Senate confirmation vote shall not be held without the prior approval of a majority of the House. Second, both houses should vote on and pass, by the necessary two-thirds majority, a joint resolution to amend the Appointments Clause by requiring the House, in addition to the Senate, to provide advice and consent on the President's Supreme Court nominations.[22] The Congress should then submit the amendment to the states for ratification. This process would provide a path forward in the immediate term for the full and fair consideration of nomination made prior to ratification, and it would begin the path to adoption of a constitutional amendment.

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20 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 . . . .").

21 Several scholars have suggested this solution. *See, e.g.*, Richard D. Manoloff, *The Advice and Consent of the Congress: Toward a Supreme Court Appointment Process for Our Time*, 54 OHIO ST. L.J. 1087, 1090 (1993) ("Involvement by the House of Representatives would further the goal of separating and balancing the powers of the branches of government and would bring coherence to a process which, in the opinion of many, has gone awry.").

22 Manoloff presents these first two steps as options in the alternative. *Id.* at 1106–07. To the contrary, they are perfectly complementary.