



NEW YORK  
CITY BAR

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March 1, 2016

Hon. Chuck Grassley  
United States Senate  
Chair, Committee on the Judiciary  
135 Hart Senate Office Building  
Washington, D.C. 20510

Hon. Mitch McConnell  
United States Senate  
Majority Leader  
317 Russell Senate Office Building  
Washington, D.C. 20510

**Re: Appointments Clause of the U.S. Constitution**

Dear Senators Grassley and McConnell:

I write on behalf of the New York City Bar Association respectfully to urge reconsideration of your recently stated refusal to consider any nomination to the United States Supreme Court made by President Obama. For the reasons stated below, we believe this refusal violates both the Appointments Clause and the longstanding historical practice of the Senate.<sup>1</sup>

The Appointments Clause of the U.S. Constitution, Article II, Section 2, Clause 2 says:

[The President] 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 Councils, 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: but the Congress may by Law vest the Appointment of such inferior Officers as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

This clause sets forth the three things that must happen in order to appoint a Supreme Court Justice: nomination by the President, advice and consent of the Senate, and appointment

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<sup>1</sup> In keeping with the City Bar's tradition since an internal policy was adopted in May 1987, our Executive Committee stands ready to undertake an evaluation of the President's nominee when he or she is named and, whatever the circumstances, to express our findings to the Senate. The Executive Committee has fulfilled this responsibility in an objective, deliberate and non-partisan fashion since the inception of the policy, favorably evaluating the nominations of all Justices currently sitting on the Supreme Court.

by the President. According to John O. McGinnis, George C. Dix Professor in Constitutional Law at Northwestern University School of Law, “[B]oth the debates among the Framers and subsequent practice confirm that the President has plenary power to nominate. He is not obliged to take advice from the Senate on the identity of those he will nominate, nor does the Congress have authority to set qualifications for principal officers. The Senate possesses the plenary authority to reject or confirm the nominee . . . .”<sup>2</sup>

Under the Appointments Clause, then, the President has the duty to nominate an individual to serve on the Supreme Court when a vacancy arises, and the Senate has the duty to evaluate that nominee and provide its advice and consent to the President so as to facilitate the President’s further duty to appoint. This back-and-forth process was meant to create accountability and a check against abuse of power. “The historical record demonstrates that the Senate’s role was conceived as one of the linchpins of the constitutional system of checks and balances.”<sup>3</sup> As explained by Alexander Hamilton in Federalist No. 76:

To what purpose then require the cooperation 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 prevent the appointment of unfit characters from state prejudice, from family connexion, from personal attachment, or from a view to popularity.<sup>4</sup>

This carefully constructed order of actions and balance of powers with respect to the Supreme Court nomination process is now threatened by the Senate’s preemptive and blanket refusal to consider any Supreme Court nominee whom President Obama may name over the remaining ten months of his presidency. In so doing, the Senate purports to be acting in the public interest by waiting until the next president is elected, on the theory that the next president’s nominee may better reflect a changing will of the people. But this argument rings hollow because the public has already cast its vote in electing our current president to serve a (second) four-year term—not just three years and two months of it—and to fulfill the duties and responsibilities of his office accordingly.

Moreover, by effectively rejecting the President’s nominee before the President acts to nominate, the Senate is breaking with longstanding historical practice. Throughout our country’s

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<sup>2</sup> McGinnis, *Advice and Consent: What the Constitution Says (July 19, 2005)* (contributing to the [Heritage Guide to the Constitution](http://www.heritage.org/research/reports/2005/07/advice-and-consent-what-the-constitution-says)), available at: <http://www.heritage.org/research/reports/2005/07/advice-and-consent-what-the-constitution-says> (last accessed March 1, 2016).

<sup>3</sup> *Report on the Senate Confirmation Process*, New York City Bar Association Ad Hoc Committee on the Senate Confirmation Process, 47 Rec. Ass’n B. City N.Y. 543, 546 (1992) (hereinafter “1992 City Bar Report”) citing *The Federalist No. 76* & Rader, *The Independence of the Judiciary: A Critical Aspect of the Confirmation Process*, 77 Ky. L.J. 767, 786-787 (1988-89).

<sup>4</sup> *The Federalist No. 76*, Hallowell: Glazier, Masters & Smith (New Ed. 1842) at 349. See also [http://thomas.loc.gov/home/histdox/fed\\_76.html](http://thomas.loc.gov/home/histdox/fed_76.html) (last accessed March 1, 2016).

history, Supreme Court vacancies have needed to be filled in the final year of a president's term and the Senate has never issued a blanket refusal to consider a nominee before he or she was named by the President. The Senate confirmed President John Adams's nomination of John Marshall to the Supreme Court in the final weeks before Thomas Jefferson's inauguration; confirmed Justice Shiras during an election year when President Harrison was defeated by former President Cleveland (and also confirmed Justice Howell Jackson in the window between President Harrison's defeat and Grover Cleveland's inauguration); confirmed Justice Pitney the same year President Taft was defeated by Woodrow Wilson; and confirmed Justice Cardozo the year President Hoover lost to Franklin D. Roosevelt. Indeed, in the 20th century alone, the Senate has voted on eight Supreme Court nominees in an election year, and confirmed six: Justices Kennedy (Reagan), Murphy (F.D. Roosevelt), Cardozo (Hoover), Clarke (Wilson), Brandeis (Wilson), and Pitney (Taft) were all confirmed during election years.<sup>5</sup> Far from supporting the Senate majority's unprecedented position, history demonstrates that the Senate's role—in accordance with its Constitutional mandate—is to vet the President's Supreme Court nominees, whether there is an anticipated change in leadership or not. The manner in which the Senate is disregarding its constitutional obligation and breaking with tradition is no trivial matter and we respectfully urge reconsideration.<sup>6</sup>

The very structure of the Appointments Clause anticipates that the process may need to occur during a time of conflict between the Senate and the President. The structure also anticipates that both the Senate and the President will carry out their respective duties and fill the office, as history has borne out since John Adams's presidency. Again, Federalist No. 76 is informative as Hamilton expounds on the back-and-forth that might occur after the President's nominee is named:

But his nomination may be overruled: that it certainly may; yet it can 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 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

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<sup>5</sup> See Aisch, Gregor, et al. "Nominees Considered in Election Years Are Usually Confirmed." *The New York Times*. Feb. 15, 2016, available at [http://www.nytimes.com/interactive/2016/02/15/us/supreme-court-nominations-election-year-scalia.html?\\_r=1](http://www.nytimes.com/interactive/2016/02/15/us/supreme-court-nominations-election-year-scalia.html?_r=1) (last accessed Mar. 1, 2016); Perry, Barbara A. "One-Third of All U.S. Presidents Appointed a Supreme Court Justice in an Election Year." *The Washington Post*. Feb. 29, 2016, available at <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/> (last accessed Mar. 1, 2016).

<sup>6</sup> In *NLRB v. Noel Canning, et al.*, 573 U.S. \_\_\_\_ , 134 S.Ct. 2550, (2014), the Supreme Court discussed the importance of historical practice when addressing balance of powers issues between Congress and the President: "[I]n interpreting the {Appointments} Clause, we put significant weight upon historical practice." 134 S.Ct. at 2559. The Court explained that this "principle is neither new nor controversial" and that "our cases have continually confirmed" this view, with "precedents show[ing] that this Court has treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era." 134 S.Ct. at 2560 (*citations omitted*). Here, of course, the practice has existed since the founding era and right up to the present day, including the appointment of a still-sitting nominee, Justice Kennedy.

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.<sup>7</sup>

Professor McGinnis likewise explains that the Appointments Clause “structures the confirmation process so that when two of the Republic's national governing branches are in fundamental disagreement, there will be a struggle to persuade the people of the correctness of their respective positions. In the case of a struggle over constitutional interpretation as in a Supreme Court nomination, the public will be forced to consider the first principles of the Republic—in this case, the role of the judiciary and the proper method of interpreting its governing document.”<sup>8</sup>

In other words, the Framers anticipated the very scenario we are facing today and decided that, under these circumstances, a public confirmation battle would be a good thing. The public has its say, by and through their elected representatives, and the Senate is free to approve or reject the President's choice. If, after a review and confirmation process, the Senate rejects the President's choice, the ball moves back to the President's court to nominate someone else, which is exactly how the Framers wanted the process to work. The Appointments Clause was put in place so that offices could be filled, not remain vacant. Indeed, the Framers included a process to fill offices, albeit on a temporary basis, even when the Senate is not in session, providing for the unilateral recess appointment power of the President.<sup>9</sup> Here, however, with the Senate in session, the Appointments Clause calls for a joint process in order to fill vacancies, consistent with the distinction drawn by Hamilton in Federalist 67.<sup>10</sup>

Based on the above, we urge that you reconsider your position and make public the Senate's willingness to provide advice and consent to the President once he names a nominee. No one wants or expects the Senate to rubber-stamp the President's nominee—and, in fact, the rigorous and public vetting and debate engendered by the Senate confirmation process and, indeed, the entire system of checks and balances built into our Constitution, is a hallmark of

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<sup>7</sup> *The Federalist No. 76*, Hallowell: Glazier, Masters & Smith (New Ed. 1842) at 349. *See also* [http://thomas.loc.gov/home/histdox/fed\\_76.html](http://thomas.loc.gov/home/histdox/fed_76.html) (last accessed March 1, 2016).

<sup>8</sup> *Supra*, n. 2.

<sup>9</sup> U.S. Constitution, Article II, Section 2, Clause 3.

<sup>10</sup> In *The Federalist No. 67*, Hamilton wrote, the “ordinary power of appointment is confided to the president and senate *jointly*, and can therefore only be exercised during the session of the senate; but as it would have been improper to oblige this body to be continually in session for the appointment of officers; and as vacancies might happen *in their recess*, which it might be necessary for the public service to fill without delay, the succeeding clause is evidently intended to authorize the president *singly* to make temporary appointments ‘during the recess of the senate, by granting commissions which should expire at the end of their next session.’” *The Federalist No. 67*, Hallowell: Glazier, Masters & Smith (New Ed. 1842) at 311. *See also* [http://thomas.loc.gov/home/histdox/fed\\_67.html](http://thomas.loc.gov/home/histdox/fed_67.html) (last accessed March 1, 2016).

American democracy. What is unique and unprecedented in this instance is the Senate Majority's preemptive act of rejecting, out of hand, any nominee the President may name, before the President has acted to fulfill his duty to nominate. The Senate's flouting of a sequential process that was painstakingly formulated in the Appointments Clause should not be countenanced.

Thank you for your consideration of our views.

Respectfully,

A handwritten signature in black ink, appearing to read "Debra L. Raskin". The signature is fluid and cursive, with the first name "Debra" being the most prominent part.

Debra L. Raskin

Cc: Hon. Kirsten Gillibrand  
Hon. Patrick Leahy  
Hon. Charles Schumer  
Hon. Harry Reid