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Kagan, Confirmation, and the Constitution

Elena Kagan's responses to the questions put to her by the Senate are worthy of comment since she has been nominated for a significant position. A companion piece to this article will review some of her answers and check them against the standard handed down to us by our noble Founding Fathers — namely, the Constitution of the United States. Apart from that analysis, however, there is the equally compelling question of just whether this whole business of the modern nomination hearing circus was ever anticipated by the Framers or provided for by the provisions of the Constitution itself.

Article 2, Section 2 of the Constitution sets forth the power of the President to "nominate … judges of the Supreme Court" "by and with the advice and consent of the Senate." The plain language of the text reveals no legal or constitutional mandate that a candidate nominated by the President testify before the Senate or any particular committee thereof. In truth, such an elaborate system as the one being played out today seems incongruous with the simplicity of the black letter of the Constitution.

As with so many evaluations of constitutional issues, *The Federalist Papers* are an appropriate jumping off point. *The Federalist Papers* were essays written pseudonymously by Alexander Hamilton, James Madison, and John Jay. They were composed quickly and published in critical newspapers throughout the country in an attempt to win ratification of the newly proposed national constitution.

The number of that compilation that deals most directly with the subject at hand (the nomination process for a proposed justice of the Supreme Court) is *Federalist* Number 66. In that essay, Alexander Hamilton explains the delicate checks and balances established among the three branches that will impede any one branch from usurping the powers of another. One of the foci of Number 66 is the power of the President to nominate federal justices.

In the letter, Hamilton reassures those readers concerned that the Senate would have too great a sway over the nomination of officers (judges, secretaries, and the like) that it is the President alone who is endowed by the Constitution with the choice of whom to nominate. The Senate sole anticipated contribution in the operation is to "ratify or reject the choice he [the President] may have made."

That is a very simple and seemingly very black and white role. The Senate, bringing to bear their collected wisdom and experience, is to ratify or reject the nominee. While they may, if the choice was left to them, have chosen another person to fill the position, such is not within their province and such an exercise is not provided by the Constitution.

In fact, Hamilton goes on to describe a situation where the Senate "might even entertain a preference to some other person" but they ratify the choice placed before them by the President because there

exists "no positive ground of opposition" other than their own preference for someone who might (or might not) prove "more meritorious" than the one they would be rejecting.

Watching the nomination hearings on television seems somehow appropriate, with Republican senators working to paint Kagan as a liberal determined to legislate from the bench, and Democrats portraying her as a fair-minded centrist with a history of consensus building. However, the fact is that she is President Obama's choice and it is the Senate's job to give her the thumbs up or the thumbs down, without undue regard for her personal or professional writings or ruminations on legal and social matters that may come before her were she to be confirmed as the newest justice of the Supreme Court.

As a matter of fact, during the Constitutional Convention of 1787 in Philadelphia, John Rutledge of South Carolina, himself a future Chief Justice of the Supreme Court (July to December 1795), opined that a prospective member of the judiciary should never be required to "give their [sic] opinion on a law till it comes before them [sic]." The minutes of the convention reveal that he along with others (including James Madison himself) worried that should a nominee be pressed to pronounce a decision on a case hypothetically, then such opinions might impinge upon that person's ability and freedom to later on accurately and fairly judge the issue solely on the merits when such came before them while sitting on the bench.

Given the choices made by recent Presidents, it seems they are less concerned with selecting a man or woman who is the most well qualified than with one who is most likely to survive the confirmation gauntlet.

Furthermore, with the ever-increasing politicization of the Supreme Court, the process of vetting the President's nominee has become a tug of war between the President on one side and the Congress on the other. Both sides pulling mightily to prove they are the more powerful branch.

Historically, in fact, Presidents have nominated friends to the federal bench. Such is within their constitutional right, as a fair reading of Article 2 reveals. A majority of the Senate must confirm the nominee, that is true, but it is not left to them constitutionally speaking to act as bloodhounds tracking down any tell-tale scent of a nominee's political posture or legal disposition.

Besides, as evidenced by the televised confirmation hearings of the past couple of decades, nominees are generally cagey enough to evade all attempts by Senators to elicit any substantive response to a policy query. They, and we, have witnessed the hearings of the past and are prepared to duck and dodge their way right onto the bench without ever revealing anything more significant than their vocabulary and their wit.

Therefore, as the nomination dog and pony show carries on, it would be wise to detach oneself from partisan alignment and political disagreement and recall the wisdom of the Founding Fathers as enshrined in our national charter. The Senate is empowered with the right of "advice and consent" and regardless of one's own disdain for the (possible) politics of a nominee, the Senate should be neither expected nor allowed to exert more control over the process than that wisely allotted to them in Article 2, Section 2 of the Constitution.

Photo of Elena Kagan at confirmation hearing: AP Images

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