The erroneous argument the Senate has a 'constitutional duty' to consider a Supreme Court nominee

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By Jonathan H. Adler

In anticipation of a Supreme Court nomination, the progressive Alliance for Justice is circulating a letter signed by more than 350 law professors arguing that the Senate has a "constitutional duty" to provide a hearing and vote on a nominee to the Supreme Court. While there are reasonable policy and political arguments that the Senate *should* consider a nominee by President Obama, the claim that the Senate has a constitutional "obligation" is quite weak.

The AFJ letter reads, in part:

> *The Senate's obligation in this circumstance is clear. Under Article II of the Constitution, the president "shall appoint . . . judges to the Supreme Court," and the Senate's role is to provide "advice and consent." Yet before the president has even made a nomination to fill the current vacancy, a number of senators have announced that they will not perform their constitutional duty. Instead, they plan to withhold advice and consent until the next president is sworn in nearly a year from now. This preemptive abdication of duty is contrary to the process the framers envisioned in Article II, and threatens to diminish the integrity of our democratic institutions and the functioning of our constitutional government.*

Whereas the AFJ's law professors argue the Senate's "obligation" is "clear," legal scholars to have seriously considered this question have reached the opposite conclusion. In a post at The Originalism Blog, Professor Michael Ramsey readily dismantles the AFJ letter's arguments. The appointments clause of the Constitution gives the president the power to nominate judges, but it also gives the Senate the power to provide "advice and consent" and places no limits on how the Senate discharges this power. The Senate may withhold its consent by voting down a nominee, but it may also withhold its consent by refusing to act, or otherwise failing to confirm a nominee. (Ramsey has more on supposed "originalist" arguments in support of a supposed Senate "duty" here.) At NRO's Bench Memos, Ed Whelan reaches similar conclusions.

Although many prominent liberal law professors signed the AFJ's letter, serious liberal scholars who have studied the history of judicial confirmation fights are conspicuously absent from the list of signatories. Given the weakness of the constitutional argument, this should not surprise. It's hard to argue with a straight face that the Senate has a constitutional obligation to, say, hold a confirmation hearing on a Supreme Court nominee when no such public hearings were held for most of the nation's history.

> *[Regarding] the Senate's "advice and consent," it's hard to argue that this requires the body to put a nominee to a vote. The Senate has essentially complete control over its own rules and practices. Most prominently, it has long used the filibuster, which is a rule of procedure that deviates from the principle of majority rule. You might think the filibuster is undemocratic and unconstitutional, but you can't do anything about it, because it's up to the Senate to decide how to operate.*

Feldman further notes that it is up to Congress to determine how many justices sit on the Supreme Court in the first place, making even more difficult the argument that there is a *constitutional* obligation to consider, let alone confirm, a ninth justice. We have become quite used to the idea of a nine-justice court — and ensuring an odd number of justices is a good idea — but it is not constitutionally required.

Vikram Amar, dean of the University of Illinois College of Law, likewise concludes that the constitutional arguments made by the AFJ letter are without merit:

> *Some analysts have argued that the Senate has a "duty" to hold hearings and vote on a President's nominee.*
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> *It is hard to see where such a legal duty comes from. The text of the Constitution certainly does not use any language suggesting the Senate has a legal obligation to do anything; instead, Article II, Section 2, says the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint" various high-level executive and judicial officers. This simply means that the president may not appoint a justice without the Senate's "consent" or approval, not that the Senate must express its lack of consent in any particular way or along any particular timeline. (The clause does use the word "shall," but that sometimes mandatory verb applies to the subject of the sentence—the president—and not to the Senate. And since a president can always decline to issue a commission to a justice, it is not even clear that the president is under any mandatory legal duties here.)*
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> *If we look at other constitutional settings in which one entity must consent to the proposal of another actor before the proposal can take legal effect, we have as a general matter not inferred any duty on the part of the second actor to do anything. For example, no credible argument can be made that after the House of Representatives passes a bill and sends it to the Senate for consideration, the Senate must hold hearings and/or take votes. Or that the Senate has a duty to take up a treaty desired by the president. Or that state legislatures have a duty to debate and vote on federal constitutional amendments that Congress proposes (and that require ¾ of the states to ratify before they can take effect). In fact, in one place the Constitution does seem to create a duty on the second actor to make an up-or-down decision; if the president does not return a bill passed by Congress to Congress with reasons for his veto within 10 days, the bill becomes law. So when the Constitution seeks to attach some legal consequences to inaction within a particular timeline, it seems to know how to say so.*

Amar goes on to argue that there are practical consequences and political risks should Senate Republicans refuse to consider a SCOTUS nominee, but arguing that it would be prudent, wise, responsible, or otherwise proper for the Senate to give full consideration to whomever the president nominates is quite different from arguing that the Senate is somehow obligated to take this course.