"Advice" in the Constitution's Advice and Consent Clause: New Evidence from Contemporaneous Sources

By Robert G. Natelson

Note from the Editor:

This article discusses the proper interpretation of the Constitution's Advice and Consent Clause.

The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. Whenever we publish an article that advocates for a particular position, as here, we offer links to other perspectives on the issue, including ones opposed to the position taken in the article. We also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

• Arthur Bestor, *Respective Roles of Senate and President in the Making and Abrogation of Treaties—The Original Intent of the Framers of the Constitution Historically Examined*, 55 Wash. L. Rev. 1 (1979), https://heinonline.org/HOL/LandingPage?handle=hein.journals/washlr55&div=8&id=&page=.

• Howard R. Sklamberg, *The Meaning of "Advice and Consent:" The Senate's Constitutional Role in Treatymaking*, 18 Mich. J. Int'l L. 445 (1997), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1471&context=mjil.

• Laura T. Gorjanc, *Comment: The Solution to the Filibuster Problem: Putting the Advice Back in Advice and Consent*, 54 Case W. Res. L. Rev. 1435, 1453 (2004), https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1567&context=caselrev.

About the Author:

Robert G. Natelson is Professor of Law (ret.) at The University of Montana, Senior Fellow in Constitutional Jurisprudence at the Independence Institute, and a prominent originalist scholar. His constitutional research is often cited by Supreme Court justices and parties. See https://i2i.org/about/our-people/rob-natelson/. This essay is one of a series written for Federalist Society Review. *Each item in the series includes at least some new material not previously in the scholarly legal literature. Professor Natelson acknowledges the assistance of John Taylor Stafford, a constitutional studies intern at the Independence Institute.*

I. Previous Interpretations

The Constitution provides that certain presidential decisions are made "with the Advice and Consent of the Senate." Article II, Section 2, Clause 2 reads as follows:

> [The President] 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, 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.

Legal commentators have spilled a fair amount of ink over the meaning of "Advice and Consent." Some, although far from all,[1] argue that the word "Advice" refers to senatorial input *before* the president presents treaties or nominations to the Senate for deliberation and approval. In a 1979 article on the treaty power, Professor Arthur Bestor contended:

> On the one hand, the Senate; on the other, the President—treatymaking was to be a cooperative venture from the beginning to the end of the entire process. This, the evidence shows, was the true intent of the framers.[2]

Other commentators have agreed that the Senate has an initiating role in the treaty and nomination processes, although most claim for the Senate a role more modest than that Professor Bestor claimed for it.[3]

This essay examines whether the constitutional word "Advice" contemplates senatorial participation before the

1 For arguments that "advice" does not contemplate a senatorial role in advance of presidential proposals, see John McGinnis, *Appointments Clause* in The Heritage Guide to the Constitution 271 (2d ed. 2014); John C. Eastman, *The Limited Nature of the Senate's Advice and Consent Role*, 36 U.C. Davis L. Rev. 633 (2003).

2 Arthur Bestor, *Respective Roles of Senate and President in the Making and Abrogation of Treaties—The Original Intent of the Framers of the Constitution Historically Examined*, 55 Wash. L. Rev. 1, 135 (1979).

3 Howard R. Sklamberg, *The Meaning of "Advice and Consent:" The Senate's Constitutional Role in Treatymaking*, 18 Mich. J. Int'l L. 445 (1997); Nicole Schwartzberg, *What is a "Recess"?: Recess Appointments and the Framers' Understanding of Advice and Consent*, 28 J. L. & Pol. 231, 259-62 (2013) (concluding that the Senate was to have a strong role in treaty making, without stating specifically what that role was); Laura T. Gorjanc, *Comment: The Solution to the Filibuster Problem: Putting the Advice Back in Advice and Consent*, 54 Case W. Res. L. Rev. 1435, 1453 (2004) (stating that the "plain meaning" of "advice" allows the Senate to prescribe criteria for nominees).

Professor Michael D. Ramsey states that many framers thought the president and Senate would administer the treaty power in an interactive way, but "What is less clear . . . is whether the Constitution actually requires this process, or whether it is only what the Framers assumed would happen." Michael D. Ramsey, *Treaty Clause*, in Heritage Guide, *supra* note 1, at 263, 264-65.

president presents a treaty or makes a nomination and concludes that it does not.

II. Two Errors

Although commentators contending for advance senatorial participation have examined the 1787-90 constitutional debates[4] and pre-constitutional practice,[5] they have misinterpreted the historical record because of two methodological errors I identified in earlier essays in this series.[6] The first is failing to take into account changes in language. The second is failing to consult the Anglo-American jurisprudence that served as the backdrop for the Supreme Law of the Land.

Today we almost invariably think of an "agent" as a person acting on behalf of another. Several commentators have assigned that modern meaning in inappropriate contexts to the Founders' use of the word "agent."[7] Hence, when expounding on the president's role as an "agent" in foreign affairs, commentators have understood the term to mean he would serve the Senate in the way a real estate agent represents the seller of a home—merely implementing the will of his principal. In context, however, Founders were using the word in the Latinate sense of "one who acts." They meant only that the president would be the official who acts in foreign affairs.[8]

Similarly, nearly all modern writers have assumed the constitutional term "Advice" means "recommendations." This has led some to conclude the Senate should be offering, and the president considering, senatorial guidelines and other prescriptions in advance of presidential action.[9] As explained below, however, when eighteenth century documents used "Advice" as the framers did, the word meant *deliberation* or *consideration*, so the Senate, upon receiving a proposed treaty or nomination from the president, would deliberate about the proposal (Advice) and then vote on it (Consent). Failure to notice this deliberative meaning is largely a product of the second of the common errors noted above: inattention to the jurisprudence of the time.

That jurisprudence, moreover, informs us that the correct rendition of the phrase under consideration is not "the Advice and Consent of the Senate." Rather, it is "*by and with* the Advice and Consent of the Senate"—or, more succinctly, "*with* the Advice and Consent of the Senate." The entire phrase means "with the deliberation and approval of the Senate."

III. "With the Advice" in General Eighteenth Century Usage

The deliberative meanings of the noun "advice" and the verb "advise" survive in modern speech only in a few phrases, such as "take under advisement."[10] When the Constitution was ratified, however, both recommendatory and deliberative meanings were common. Benjamin Franklin employed both in a single sentence of his autobiography when he wrote of Pennsylvania's governor that "He would, therefore, sometimes call in a friendly way to advise with me [i.e., deliberate with me] on difficult points, and sometimes, tho' not often, take my advice [i.e., recommendations]."[11]

As Franklin's words suggest, whether the recommendatory or deliberative meaning was intended could be deduced from the context. A very important contextual factor was the presence or absence of the preposition *with*. That preposition usually signaled the deliberative meaning. Thus, in Samuel Johnson's famous dictionary, the second definition for the verb "advise" was "To consider; to deliberate." The third definition for the noun "advice" was "Consultation; deliberation: with the particle *with*."[12] Definitions in other dictionaries were less comprehensive, but point toward similar results.[13]

To be sure, the preposition *with* may not have guaranteed that the bare words "advice" or "advise" were deliberative.[14] Nor was the preposition absolutely necessary to give those words the

4 *E.g.*, Bestor, *supra* note 2, at 73-131.

5 *E.g.,* Sklamberg, *supra* note 3, at 448-49.

6 Robert G. Natelson, *Why Constitutional Lawyers Need to Know Latin*, 19 Fed. Soc. Rev. 74 (2018) (discussing how Latin usage gives rise to unexpected meanings in eighteenth century English); Robert G. Natelson, *Does the Constitution Grant the Federal Government Eminent Domain Power? Using Eighteenth Century Law to Find the Answer*, 19 Fed. Soc'y Rev. 88 (2018) (illustrating the use of eighteenth century jurisprudence largely neglected by constitutional commentators).

7 *E.g.*, Sklamberg, *supra* note 3, at 455 (1997) (stating that Alexander Hamilton's use of the word "agent" in referring to the treaty power "suggests a limited presidential role"); Bestor, *supra* note 2, at 109 (reaching the same conclusion based on Madison's use of the word "agent").

8 *Why Constitutional Lawyers Need to Know Latin*, *supra* note 6.

9 *E.g.,* Gorjanc, *supra* note 3, at 1453:

> Attributing the plain meaning to the words "advice" and "consent" yields the conclusions that the Constitution allows the members of the Senate to articulate to the President the characteristics that they would prefer in his judicial nominees . . . The Oxford English Dictionary defines advice as "[o]pinion given or offered as to action; counsel."

10 *Cf.* the phrase by which a king vetoed an act of Parliament: *Le Roy s'advisera*, meaning "The King will consider it."

11 The Autobiography of Benjamin Franklin, *available at* https://www.gutenberg.org/files/20203/20203-h/20203-h.htm.

12 1 Samuel Johnson, A Dictionary of the English Language (6th ed. London, 1785) (unpaginated).

13 *E.g.*, 1 John Ash, The New and Complete Dictionary of the English Language (London, 1775) (unpaginated) (containing only the recommendatory meaning of "advice," but defining "advise" to mean "To consult, to consider, *with* with: *as,* "He advised with his friends"). Bailey's dictionary contained only modern definitions for "advice," but his entry for "advise" included the deliberative meaning "to consider or weigh in mind." Nathan Bailey, An Universal Etymological English Dictionary (Edinburgh, 1783) (unpaginated). Sheridan's dictionary handled the words similarly. Thomas Sheridan, A Complete Dictionary of the English Language (London, 1789) (unpaginated).

14 Several state constitutions authorized the chief executive to act "with the advice" of the executive council where no consent was required. *E.g.*, Del. Const. (1776), art. 7 ("he [the state president] may, with the advice of the privy council, lay embargoes"); Mass. Const. (1780), Part the Second, ch. II, § 1, art. VIII (providing that the governor may issue pardons "by and with the advice of council"). One might argue "advice" in that context was recommendatory, although it may have required only deliberations in which the chief executive participated.

deliberative sense.[15] But *with* greatly increased the likelihood of the deliberative sense. And if it preceded "advice and consent," then the meaning of "advice" was almost certainly deliberative. That is why the constitutional phrase usually rendered "Advice and Consent" is better rendered "with the Advice and Consent."

IV. "With the Advice and Consent" In Eighteenth Century Documents

The phrase "with the Advice and Consent" was exceedingly common in eighteenth century writings: A search for it in the Gale database *Eighteenth Century Collections Online* produced 3,247 documents—of which nearly half were legal documents—and that database tends to undercount.[16] The phrase appeared in legal instruments such as grants and charters by which one party was required to seek, or did seek, the "advice and consent" of a single person before making a decision.[17] Usually, however, advice and consent was required from one or more pre-established groups or assemblies.[18] Provisions for group advice and consent appeared in legislative records,[19] in colonial charters,[20] and in many of the early state constitutions.[21]

The colonial charters and state constitutions commonly required the colonial or state governor or president to obtain the "advice and consent" of the executive council.[22] In other cases they required the governor or president to obtain only the council's "advice."[23] The small size of executive councils—ranging from four to twelve members[24]—renders it easy for a modern interpreter to imagine members of the council actively presenting recommendations to the executive in a roundtable format. This may have encouraged the belief that "advice" had a recommendatory sense.

However, other documents show that, when used in the phrase "with the advice and consent," the word "advice" could not have referred to consensus recommendations offered in roundtable format of the kind feasible in small executive councils.[25] In some cases in which advice and consent were required from multiple groups, members of each group could only have deliberated with other members of their own group, since the groups were far too remote or dispersed to consult together or arrive at common recommendations.[26] And in many cases, the entities whose "advice and consent" was required or recited were *far* too large to reach consensus recommendations in a roundtable setting, as some modern writers assume the Senate was to do. For example, the 1681 Pennsylvania charter empowered the "proprietary" (governor) to pass laws "by and with the advice, assent, and approbation of the Freemen of the said Countrey."[27] It seems unlikely the governor signed laws only after consulting with all of Pennsylvania's freemen. Similarly, some instruments applied

15 *E.g.*, John Bonar, *An Inquiry into the Nature of Religious Fellowship*, in The Duty and Advantage of Religious Societies 88 (1783) (pledging not to infringe or dispense with rules "unless . . . the societies with which we correspond . . . shall advise or consent thereto"); 4 The Claims of the People of England (J. Stockdale, London, 1782) ("all Resolutions taken thereupon shall be signed by such of the Privy Council as shall advise and consent to the same").

16 Restricting the search to legal documents produced 1,456 results. *Eighteenth Century Collections Online* searches commonly result in undercounting because damage in the old texts causes the search engine to miss words and phrases. Searches restricted to legal documents in that database miss some legal documents because they were not classified as legal by those constructing the database.

17 *E.g*, 2 Edward Wood, A Compleat Body of Conveyancing in Theory and Practice 397 (London, 1770) (referring to assignment of an apprentice's indenture "by and with the Advice and Consent of . . . his said Father"); The Royal Charter of the Dublin Society 3 (1766) ("by and with the Advice and Consent of our right trusty and right well beloved Cousin and Counsellor").

18 *E.g.*, Semhill v Bayly, Precedents in Chancery [Ch. 1721] 562, 563 (1750) (reciting a will: "if she shall marry with the Advice and Consent of my Executors"). This case does not appear to be in *English Reports*); The Petition of William Urquhart of Meldrum 14 (1761) (referring to a grant "made with the Advice and Consent of the Barons of the Exchequer").

19 *Infra* notes 30 & 31 and accompanying text.

20 *E.g.*, Mass. Charter (1691) (appointment of officials with the advice and consent of the council); *cf.* Pa. Charter (1681) (empowering the proprietary [governor] to pass laws "by and with the advice, assent, and approbation of the Freemen of the said Countrey").

21 *E.g.*, Del. Const. (1776), art. 9 ("The president, with the advice and consent of the privy council, may embody the militia, and act as captain-general and commander-in-chief of them, and the other military force of this State"); Mass. Const. (1780), ch I, § I, art. IV (stating that the governor may spend money "with the advice and of the council"); Md. Const. (1776), art. XXXIII (". . . the Governor, by and with the advice and consent of the Council, may embody the militia; and, when embodied, shall alone have the direction thereof"); N.H. Const. (1784), Part II (taxes to be "to be issued and disposed of by warrant under the hand of the president of this State . . . with the advice and consent of the council"); N.Y. Const. (1777) (stating that the governor shall appoint certain officers "with the advice and consent of the said council"); S.C. Const. (1778), art. XVII (providing that the governor may summon the legislature in certain circumstances "by and with the advice of the privy council").

22 *Supra* note 21. *See also* Mass. Charter (1691) (appointment of officials with the advice and consent of the council); Mass. Const. (1780), Part the Second, ch. II, § I, art. IX (similar provision).

23 *E.g.*, Mass Const. (1780), Ch. II, Sect. 1, art. V ("The governor, with advice of council, shall have full power and authority, during the session of the general court, to adjourn or prorogue the same at any time the two houses shall desire . . . ."); *see also supra* note 14.

24 Mass. Const. (1780), Part the Second, ch. II, § 3, art. I (nine members plus the lieutenant governor); Del. Const. (1776), art. 8 (four members); Md. Const. (1776), art. XXVI (five members); N.C. Const. (1776), art. XIV (seven members); Pa. Const. § 19 (twelve); Va. Const. 1776 (eight).

25 *Cf.* 4 The Claims of the People of England (J. Stockdale, London, 1782) ("all Resolutions taken thereupon shall be signed by such of the Privy Council as shall advise and consent to the same") (suggesting the result of a vote rather than consensus advice).

26 *E.g.*, John DeWitt, True Interest and Political Maxims of the Republick of Holland and West-Friesland 168 (London, 1702) ("with Advice and Consent of the Gentry and Council of the said Countries [Holland and Zealand]"); John Bonar, *An Inquiry into the Nature of Religious Fellowship*, in The Duty and Advantage of Religious Societies 88 (1783) (pledging not to infringe or dispense with rules "unless . . . the societies with which we correspond . . . shall advise or consent thereto").

27 Pa. Charter (1681).

the phrase "with the Advice" to one of the two chambers of the British Parliament, each of which had hundreds of members.[28]

When applied to legislative bodies, in fact, "with the advice and consent" seems to have referred simply to the ordinary legislative process of deliberating and voting. Thus, Parliament consisted of members who, it was said, were sent "to advise, and consent, on their behalfe that sent them,"[29] and parliamentary statutes began with the words, "Be it enacted by King's most excellent Majesty, *by and with the Advice and Consent* of the Lords spiritual and temporal, and Commons in this present Parliament assembled."[30] Colonial legislation often began with some variation of the phrase, "Be it enacted by the Governour, with the advice and consent of the general assembly."[31] At the Constitutional Convention, James Wilson suggested that treaties be approved "by and with the advice and consent of" the House of Representatives, a much larger assembly than any executive council or the proposed federal Senate.[32] At the North Carolina ratifying convention, James Iredell characterized the advice and consent process thus:

> The President proposes such a man for such an office. The Senate has to consider upon it. If they think him improper, the President must nominate another, whose appointment ultimately again depends upon the Senate.[33]

In sum, when eighteenth century records refer to a measure being adopted "with Advice and Consent" of a group, those records mean the deliberation and consent characteristic of a legislative body.

V. Dealing with Problems

In the real world, of course, the executive might seek the recommendations of key members of the legislature before making formal proposals. Roger Sherman thought the Senate might advise the president and that it was "a convenient body" to do so "from the smallness of its numbers."[34] But Sherman did not issue this statement as an interpretation of the constitutional phrase "with the Advice and Consent." Moreover, other Founders likely would have disagreed with the proposition that the Senate was of proper size to serve as a recommendatory council.[35] Although the Senate would be small compared to chambers of Parliament or the lower houses of most state legislatures, as a "kitchen cabinet" it would be unwieldy: The original thirteen states would produce 26 Senators, and the impending admission of Vermont, Kentucky, and Tennessee soon would push the number above thirty. That was triple the size of the largest state executive council.

Some framers recognized that the Senate would not serve as an executive council, and they favored a real one. At the federal convention, Gouverneur Morris suggested a Council of State consisting of six members and a secretary: "The President may from time to time submit any matter to the discussion of the Council of State . . . and may require the written opinions of any one or more of the members."[36] The convention did not adopt Morris' idea, but it did insert a presidential power to require written opinions from department heads. The latter provision, the Opinion Clause,[37] is the surviving fragment of the executive council idea. The Senate's "Advice and Consent" role is not.

It is true that, during the first session of the First Congress, President Washington came to the Senate for "advice" or "advice and consent." He apparently was seeking some *advice* in the sense of recommendations,[38] but to the extent he sought *advice and consent* in the constitutional sense, he was asking only for senatorial consideration and approval of his proposals.[39]

Understanding the phrase "with the Advice and Consent" to mean "with deliberation and consent" resolves some otherwise unsettled questions. It explains why, during the ratification

28 2 Wood, *supra* note 17, at 136 ("with the Advice of the Lords and others of his Majesty's most Honourable Privy Council").

29 2 Whitelockes Notes Uppon the King's Writt 67-68 (Charles Morton ed., London 1766).

30 (Italics added). For this kind of enacting language, see The Statutes at Large From the Twenty-sixth Year of the Reign of King George the Third 3, 7, 18 & *passim* (London, 1789); Wood, *supra* note 17, at 4; The Lords Protest on a Motion to Address His Majesty 1-2 (London, 1743) (complaining of measures adopted by the Crown "without the *Advice* or *Consent* of Parliament"); Read v. Snell [Ch. 1743] 2 Atkyns 642, 654, 26 Eng. Rep. 784, 790 ("[N]othing is so undoubtedly such, as that no new laws can be made to bind the whole people of this land, but by the King, with the advice and consent of both houses of parliament, and by their united authority . . . ."); Edward Wynne, Eunomus: or, Dialogues Concerning the Law and Constitution of England 129 (London, 1785) (stating that all laws are enacted "with the advice and sent of the Lords Spiritual and Temporal, and Commons").

31 *E.g.*, *Act of the North Carolina General Assembly concerning the election of General Assembly representatives*, Nov. 28, 1746, in 4 Colonial and State Records of North Carolina 1154, *available at* https://docsouth.unc.edu/csr/index.php/document/csr04-0358 ("And be Enacted by his Excellency Gabriel Johnston Esqr Captain General and Governour and Commander in chief in and over this Province by and with the Advice and Consent of His Majestys Council and the General Assembly of the said Province."); The Acts of Assembly of the Province of Pennsylvania (Philadelphia 1775), *passim* ("by the Proprietary and Governor, by and with the Advice and Consent of the Freeman of this Province and Territories").

32 2 Records of the Federal Convention 538 (Max Farrand, ed. 1937) (Sept. 7, 1787) (James Madison).

33 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 134 (Jonathan Elliot ed., 1891).

34 Roger Sherman to John Adams, July 1789, in The Founders' Constitution (Philip B. Kurland & Ralph Lerner eds., 1986), *available at* http://press-pubs.uchicago.edu/founders/.

35 At the Constitutional Convention, Sherman argued the Senate should appoint judges, 2 Farrand, *supra* note 32, at 41 & 43 (July 18, 1787) (James Madison). Nathaniel Gorham disagreed, contending that the Senate would be "too numerous, and too little personally responsible." *Id.* at 41.

36 2 Farrand, *supra* note 32, at 342-43 (Aug. 20, 1787) (James Madison).

37 U.S. Const. art. II, § 2, cl. 1 ("The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices").

38 *E.g.*, 1 *Sen. Exec. J.* 21-22 (Aug. 22, 1789) (asking for advice about Indian policy).

39 *E.g.*, William Maclay, Journal of William Maclay 80, 81, 122, 127 & 282 (Edgar S. Maclay ed. 1890) ("advice and consent" expressed merely in voting).

debates, advocates of the Constitution emphasized the president's initiating role in appointments.[40]

It also answers a question posed by Adam J. White.[41] White has pointed out that, during the Constitutional Convention, someone suggested the "advice and consent" procedure used in Massachusetts as a model for the federal level.[42] The Massachusetts constitution provided for an executive council to assist and check the governor. It further provided that appointments and financial decisions were effective only with the "advice and consent" of the council,[43] while other decisions were effective merely "with the advice of council."[44] The instrument also required the council to record its "advice."[45] The text of the document makes clear that when it referred to "advice" alone, the recommendatory sense was intended. But as to those actions—appointments and financial decisions—that were valid only "with the advice and consent" of the council, the council never recorded its "advice." All that was recorded was approval of the proposal. White observes:

> In each of the *Council Records* entries announcing the Council's approval of the nomination, the Council used a variation of the phrase "advised and consented to" as a whole; in no case did it specify any added "advice" beyond the mere approval of the candidate, coupled with its consenting to the nomination. . . . *In not a single case* do the *Council Records* note the council advising *against* spending; all entries involve the *allowance* of spending.[46]

Although White explained this as deriving from a custom by which only approving advice was recorded, there is a more persuasive explanation: The purpose of the constitutional provision requiring recording of "advice" was to put council members on record as to the recommendations they offered the governor. But "advice" in the phrase "with the Advice and Consent" did not refer to recommendations at all, but to intra-council deliberation. Because no recommendations were required for appointments and financial decisions, none was recorded.[47]

VI. Conclusion

Eighteenth century legal documents show that "with the Advice and Consent" was a term of art meaning "with the deliberation and consent." When used of legislative bodies, it meant the debate and voting characteristic of legislative action. When an executive's proposal was subject to the advice and consent of a legislative assembly, no specific action was required in advance of presentation of the proposal to the assembly. Although it is often prudent for the president to consult individual Senators before submitting a nomination or a treaty, there is no constitutional requirement that he do so.

40 *E.g.*, The Federalist No. 66 (Alexander Hamilton):

> It will be the office of the President to *nominate* and, 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.

See also id. No. 76 (Alexander Hamilton) (referring to ". The sole and undivided responsibility of one man" in presidential appointments; 4 Elliot, *supra* note 33, at 134 (quoting James Iredell):

> As to offices, the Senate has no other influence but a restraint on improper appointments. The President proposes such a man for such an office. The Senate has to consider upon it. If they think him improper, the President must nominate another, whose appointment ultimately again depends upon the Senate.

41 Adam J. White, *Toward the Framers' Understanding of "Advice and Consent:" A Historical and Textual Inquiry*, Harv. J.L. & Pub. Pol'y 103 (2005).

42 2 Farrand, *supra* note 32, at 41& 44 (July 18, 1787) (James Madison) (reporting comments by Nathaniel Gorham).

43 Mass. Const. (1780), Part the Second, ch. II, § I, art. IX (advice and consent required for appointing certain officers); *id*, Part the Second, ch I, § I, art. IV (advice and consent required for tax warrants), *id.*, ch. II, § I, art. XI (advice and consent required for withdrawal of money from the treasury).

44 *E.g.*, *id.* Part the Second, ch. II, § I, art. V (advice required for adjourning or proroguing the legislature); *id.* art. X (advice required for appointment of certain military officers).

45 *Id.*, Part the Second, Chapter II, § 3, art. V.

46 *White*, *supra* note 41, at 137-38. (Italics in original.)

47 A stronger argument for the proposition that "with the Advice and Consent" includes an advance recommendatory component is that the framers used other words ("ratify," "approve") for mere deliberation and approval. However, they used "ratify" only to refer to resolutions of constitutional dimension. U.S. Const., art. V (ratification of amendments) & art. VII (ratification of the Constitution). Moreover, "with the advice and consent" was an established phrase for legislative action, so "approve" seems a more sensible term for approval of bills by a single person—the president. *Id.* at art. I, § 7, cl. 2.