The

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The FEDERAL APPOINTMENTS PROCESS

A Constitutional and Historical Analysis

Michael J. Gerhardt

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INTRODUCTION

FEW AREAS AT the intersection of constitutional law and politics generate more controversy or opinions than the federal appointments process. It has become like the weather: almost all commentators and many participants gripe about it, but no one seems able (or at least willing or prepared) to do anything about it. Indeed, for most of the history of this republic the federal appointments process has been pilloried. If a government agency had gotten the repeatedly bad ratings that the federal appointments process has received, it almost certainly would have been dismantled (just as the Independent Counsel Act recently was) or radically overhauled by now. Yet, in spite of the extensive and repeated criticism of the performance of national political leaders in the federal appointments process, the institutions responsible for federal appointments have successfully resisted significant reform of the process. Just the opposite. And the resistance to change speaks volumes about the agendas, interests, and practices of the institutional and other actors perennially involved in the federal appointments process.

Just as national political leaders have developed vested interests in their respective institutional prerogatives in the federal appointments process, many scholars have developed vested interests in their opinions or theories about this process and do not easily abandon or broaden their thinking about it. Legal scholars in particular have largely been time-bound in their study of the federal appointments process. That is, they have tended to view single incidents in a vacuum or as unique events without regard to their possible relationships to other incidents in the process; other pending or past legislative matters; or broader social, political, and historical developments.

More often than not, legal scholars have narrowed their coverage of the federal appointments process to focus on dramatic incidents that suit

courts the kinds of decisions that he would likely reward through elevation. Moreover, judges are appointed for life, so a president can affect policies well after his term through his judicial appointments.

In contrast, a president has a number of tools through which he can exert continuing influence over policies implemented by executive branch officials. He can directly order changes in policy, he can structure decision making through executive orders, he can meet with officials privately to persuade them, and he can remove them (although he is limited in this power with respect to some officials). Of course, such actions are likely to be costly for a president, so he is likely to prefer to appoint agents who will carry out his wishes without requiring much additional oversight or subsequent discipline. And obviously a president may use his nominating authority to reward appointees or staffers for their loyal service or to encourage or entice appointees or staffers to implement his preferences faithfully.

CONSENSUS

Another noteworthy feature of the constitutional structure for making federal appointments is that its allocation of authority puts pressure on presidents and senators to reach some accord on how to fill most federal offices and thereby to ensure the continued functioning of the national government. Consensus is conceivable as long as the president and the Senate each recognize two needs. First, each actor must recognize that it may be held politically accountable for taking action that slows down the functioning or efficiency of the national government, such as frustrating or complicating agreement on filling various federal offices. The more powerful or high-profile a vacant office, the greater the potential costs to the party responsible for keeping it empty. Second, senators tend to recognize (as a consequence of the presumption of confirmation) that they must deliberate carefully about whether to obstruct a president's choices (particularly for high-profile positions), because the odds of failure and the costs of failure to both the institution and individual senators are potentially high.

Chapter Three

HISTORICAL CHANGES AND PATTERNS

THE HISTORY OF the federal appointments process can enrich our understanding of the system's operations in several ways. First, it provides an important lens through which to view and understand the operations of the federal appointments process both generally and in particular cases. Second, history illuminates social and political developments that have helped to transform or shape the institutional arrangements or power relationships in the federal appointments process. These developments have turned modern confirmation proceedings into multitextured events. Third, a close reading of past practices reveals important patterns in the ways political institutions have approached and formulated decisions regarding some federal appointments.

THE INDISPENSABILITY OF CLEAR CONTEXT

Clarifying comprehensively the context in which appointments arise is crucial for fully explaining the operations of the federal appointments process. Defining the context helps to reveal the changes, developments, or movements in society or the polity that presidents and senators are trying to control or to which they are reacting in the course of exercising their respective appointment authorities. In other words, context is indispensable for developing a coherent external perspective on the federal appointments process. Indeed, fully examining the historical, social, political, and economic contexts in which presidents and senators have operated clarifies the various forces (and norms) that have shaped the institutions of the presidency and the Senate (including their interaction on appointments matters), such as the growth of and partial demise of politi-

permit Senator Edmund Muskie to become secretary of state; and Congress's enactment of special legislation in 1993 to allow President Clinton to nominate Senator Lloyd Bentsen to become secretary of the treasury.

A strict or formalist reading of the Ineligibility Clause (sometimes called the Emoluments Clause), such as the one given by Michael Stokes Paulsen,[76] construes violation of the so-described clause as unconstitutional. The strict view is that the clause does not explicitly provide any exceptions. Consequently, it means what it says and therefore does not allow Congress any discretion or authority to disregard its directive by passing legislation trying to undo a violation of the clause that has occurred beforehand (because a member of Congress has been nominated or appointed to an office whose salary he or she has previously voted to increase). If such legislation is constitutional, it must be as the result of different constitutional analysis. Such legislation might be construed as constitutional if the critical inquiry is not whether the letter of the law has been broken (it has) but rather whether the problem that the clause exists to preclude—conflicts of interest in nominating a member of Congress who has been able to vote himself or herself a raise—has been avoided. The corrective legislation conceivably achieves this end.

OTHER SIGNIFICANT PATTERNS AND PRACTICES

During the course of U.S. history, senators have engaged in several significant practices in the federal appointments process besides those already canvassed. These practices further reflect the compromises and other efforts that have been made by senators in their never-ending quest to preserve and sometimes to expand their prerogatives.

Senatorial Practices Regarding Presidential Nominations of Executive Officials and Judges

Generally, the Senate defers far more to a president's nominees to executive offices than to his nominees to judicial offices, particularly to the Supreme Court.[77] There are many reasons for such deference. Many if not most senators, for example, support a president's need to have his own agents assist him in trying to implement his agenda, because they want to be president (and thus would like to have that privilege someday), they

have previously served in high-level executive offices, or they can curry favor with a president by doing so.

Twenty-six Supreme Court nominations, however—nearly one in six—have not secured Senate confirmation, including those whose names were withdrawn before a floor vote. Invariably, senators have insisted on closely scrutinizing Supreme Court nominees because justices, once confirmed, enjoy life tenure and will wield enormous power in reviewing the constitutionality of federal and state laws. Consequently, it should not be surprising that political factors, including a judicial nominee's political or constitutional views or other indications of how he or she would perform as a judge or justice (and thus his or her fitness to serve on the Court), are the most important reason for failed Supreme Court nominations (and, for that matter, failed nominations to other Article III courts). Nominees whose political or constitutional views had an important effect on their confirmation to the Supreme Court include the following: John Rutledge (rejected in part for opposing the Jay treaty), Alexander Wolcott (rejected for vigorously enforcing the Embargo and Nonintercourse Acts as the federal customs collector for Connecticut), George Woodward (rejected for supporting restricted immigration and discrimination against ethnic groups), Ebenezer Hoar (rejected for opposing senators' control of political patronage and the impeachment of Andrew Johnson), Caleb Cushing (rejected for shifting political allegiances too often throughout his political lifetime), John Parker (rejected in part for uttering racist sentiments as a gubernatorial candidate in North Carolina and for upholding yellow-dog contracts), Abe Fortas (rejected in part for being too closely linked to the liberalism of the Warren Court and the troubled presidency of his close friend, Lyndon Johnson); Clement Haynesworth (rejected because of his allegedly antiunion attitudes and racism), Harold Carswell (rejected in part for racist statements and activities), and Robert Bork (rejected in part for opposing the 1964 Civil Rights Act and for firing the first special Watergate prosecutor).

Even some justices who have been confirmed have faced stiff opposition because of senators' concerns about their political and constitutional views. Such justices include Nathan Clifford (barely confirmed after bitter debate over his support for slavery), Louis Brandeis (attacked for being too liberal), Charles Evans Hughes (opposed by a significant minority

them accumulate in a presidential election year, when they are least likely to get hearings, much less committee or final votes.

First, it rarely makes sense for a president to make judicial nominations that he is not prepared to defend publicly.[52] Moreover, a president's choice of a consensus candidate has been a surefire way for a quick, uneventful confirmation. This practice depends in part on a president's assembling a competent support staff who are responsible for evaluating candidates and making timely and reliable recommendations to him.[53] However, backroom negotiations between a president and senators might undermine the value of a process that is open and accountable to the public. It is possible, for example, that consultations could produce deals to keep certain harmful information about a nominee from the public or the media. The eventual public reaction to the Senate Judiciary Committee's initial decision not to hold a separate hearing on Anita Hill's sexual harassment allegations against Justice Thomas demonstrates how well such deals can be contained.

Another practice that would expedite the making of judicial nominations is for presidents to direct their staffs to develop lists of viable candidates for each judicial vacancy.[54] This practice is advantageous because it enables an administration to move more quickly both in initially proposing nominations and in those cases when its initial choices failed. The obvious problem is that it could produce delays in making nominations, because developing lists involves an expenditure of both time and resources. Once such lists have been developed, however, the administration can rely on them in filling subsequent vacancies. If an administration develops lists of viable judicial candidates, those names will be at hand should another vacancy arise in the same district or circuit. An administration could, alternatively, identify districts or circuits in which vacancies are likely to arise and develop lists of viable candidates prior to the actual occurrence of a vacancy.

The more quickly presidents move in nominating judges, the more time they allow pressure to build for senators to move on those nominations. Presidents could issue challenges to the Senate Judiciary Committee to move quickly, perhaps within a set period of time, and to explain publicly its reasons for not moving more expeditiously. Obviously, a set time limit provides an incentive for some senators to try to run out the

clock. The next subsection considers possible procedural reforms to address unreasonable delays in judicial confirmation proceedings.

Containing or Shaping Norms through Procedural Reforms

The absence of specific procedural rules to govern certain aspects of judicial selection have introduced, no doubt, flexibility in the process. It is also clear that adopting or changing some rules, even if it were possible, would not necessarily alter the dynamics substantially, because some senators would develop informal practices for working around the rules or would learn how to manipulate them to maximize or facilitate their preferred outcomes.

Nevertheless, some proposed procedural changes or rules do merit special consideration if for no other reason than to clarify the areas in which informal practices or norms rather than formal rules will prevail as the primary mechanisms for constraint. Of particular concern are procedural alterations that might be in the interests of both presidents and senators to adopt. I will explore more than a dozen such proposed formal changes. Though all suggested modifications involve Senate practices or procedures, I organize them in terms of the institutions or participants whose interests they are likeliest to implicate.

The Senate. Although many of the proposed procedural changes discussed below can be defended as preserving if not enhancing individual senators' roles in judicial selection, many senators will probably not see it that way. Their resistance is likely to reveal their vested interests in the status quo and their opinions about the stakes involved in judicial selection.

One proposal is the adoption of a rigidly enforced, specific time limit on nomination holds. Divided government has no doubt led to a weakening of a rigid time limit. Of course, senators are unlikely to abandon nomination holds altogether, for holds allow them to protect the interests that they perceive have been jeopardized as a result of some nomination. But they might also resist a time limit as long as stalling nominations is in their interest. Obviously, they are most likely to do so when their party does not control the White House. Nevertheless, putting a rigid time limit on holds might further the interest of every senator. For one thing, when a senator is from the same party as a president, it ensures that

6 See R. Posner, *An Affair of State,* 115–16.

7 In their book *Politics by Other Means: The Declining Importance of Elections in America* (1990), Benjamin Ginsburg and Martin Shefter argue that as a substitute for elections (whose importance, they claim, has been steadily declining in American society) the major parties have developed, with the complicity of the media and the federal judiciary, "a major new technique of political combat—revelation, investigation, and prosecution." Id. at 26. Without stretching the analogy beyond the breaking point, I explore confirmation skirmishes as possibly other fora for "postelection politics" in chapter 6.

8 See, e.g., Dan M. Kahan, "Social Influence, Social Meaning, and Deterrence," 83 *Va. L. Rev.* 349, 373–89 (1997). See also Jeffrey Rosen, "The Social Police: Following the Law Because You'd Be Too Embarrassed Not To," *New Yorker,* Oct. 20, 27, 1997, 170. For criticisms of Kahan's views, see, e.g., James Q. Whitman, "What Is Wrong with Inflicting Shame Sanctions," 107 *Yale L.J.* 1055 (1998).

9 See the Miller Center of Public Affairs, *Improving the Process of Appointing Federal Judges: A Report of the Miller Center Commission on the Selection of Federal Judges* (1996); Citizens for Independent Courts, *Uncertain Justice: Politics and America's Courts* (The Century Foundation 2000).

10 See, e.g., R. C. Ellickson, *Order without Law: How Neighbors Settle Disputes* (Harvard University Press 1991).

11 The respondents whom I surveyed served in one or more administrations as cabinet secretaries, deputy cabinet secretaries, under- and assistant secretaries, attorneys general, deputy attorneys general, assistant attorneys general, chiefs and deputy chiefs of staff, and chief and deputy White House counsels.

1. The Original Understanding of the Federal Appointments Process

1 U.S. Const., art. II, sec. 2, cl. 2.

2 See U.S. Const., art. I, sec. 5 ("Each House may determine the Rules of its Proceedings . . .").

3 See, e.g., Tim Groseclose and David C. King, *Committee Theories and Committee Institutions* (1997); Burdett A. Loomis, *The Contemporary Congress* (2d ed. 1998).

4 See J. Harris, *The Advice and Consent of the Senate,* 19–25.

5 Id. at 19 (footnotes omitted). See also Gerhard Casper, "An Essay in Separation of Powers: Some Early Versions and Practices," 30 *Wm. & Mary L. Rev.* 211, 217 (1989) (the state constitutions adopted between 1776 and 1787 "distributed the power of appointments in various ways, but legislative controls predominated").

6 1 *The Records of the Federal Convention of 1787* 67 (Max Farrand ed., 1966) (hereafter *Records*).

7 See, e.g., Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* 228, 255, 272 (1986); John P. Kaminski and Gaspare J. Saladino, eds., 13 *The Documentary History of the Ratification of the Constitution* 346 (Historical Society of Wisconsin 1981) (recounting George Mason's complaint to Thomas Jefferson about "the precipitate, & intemperate, not to say indecent Manner, in which business was conducted,

during the last Week of the Convention"); Goebel, 1 *Supreme Court* at 244 (describing the atmosphere of the final days as "supercharged with discontent"); James E. Gauch, Comment, "The Intended Role of the Senate in Supreme Court Appointments," 56 *U. Chi. L. Rev.* 337, 342 (1989) (noting the haste with which the Constitutional Convention concluded).

8 1 *Records* 21.

9 Id. at 66.

10 Id. at 67.

11 Id.

12 Id. at 244.

13 Id. at 292.

14 2 *Records* 136.

15 Id. at 132.

16 Id.

17 Another resolution provided "that a National Judiciary be established, to consist of one supreme tribunal, the judges of which shall be appointed by the second branch of the National Legislature," and for the appointment of inferior tribunals, the authority for which likewise would be vested in the national legislature. Id. at 132–33. Apparently, the judges to be appointed to the inferior courts were to be appointed by the body creating such courts, but no specific mention of this is made.

18 Id. at 182–83.

19 Id. at 389.

20 Id.

21 Id. at 405.

22 Id.

23 Id.

24 Id. at 314–15.

25 Id. at 315.

26 Id. at 614. Sherman opposed the motion because he believed that "as the two Houses appropriate money it is best for them to appoint the officer who is to keep it." Id. Gorham and Rufus King (also from Massachusetts) contended that the people were "accustomed and attached" to the appointment of the treasurer by the legislature. Id. Pinckney supported the motion, pointing out that in South Carolina, where the legislature appointed the state treasurer, "bad appointments are made and the Legislature will not listen to the faults of their own officer." Id.

27 1 *Records* 119.

28 Id.

29 Id.

30 Id. at 120.

31 Id.

32 Id.

33 Id. (footnote omitted).

torney General. Reno had merely requested something she thought was pro forma; indeed, the practice was honored at the outsets of the Carter, Reagan, and Bush administrations. The refusals to tender resignations embarrassed (indeed, probably were intended to embarrass) Janet Reno, though she was not doing something by any means unprecedented.

42 See generally chapter 6.

43 It is important to recognize that senatorial courtesy has degraded over the past few decades. The reasons include the decline in the influence of political parties, the decline in civility or collegiality in the Senate (due to various causes, including issue salience, identity politics, and the disappearance of the moderate middle in the Senate), and norm ambiguation (conflict over the meaning and scope of the norm). Nevertheless, senatorial courtesy is still the strongest norm in the appointments process. Its strength derives in part from the structure of the process, in which the Senate is empowered to give its advice and consent on nominations and senatorial courtesy constitutes one of the means for giving advice.

44 I discuss the different meanings of senatorial courtesy in more detail in chapter 5.

45 There are numerous examples of senators' deferring not just to a president's choice of one of their colleagues for a confirmable office but also former House members. One recent example is President Clinton's decision in June 1999 to nominate as ambassador to Argentina Toby Moffett, who served as a U.S. representative from Connecticut from 1975 to 1983. The Democratic and Republican leaderships of the Senate quickly expressed their support for Moffett's appointment, and all signs indicated that he would be quickly (and perhaps unanimously) confirmed once his background check had been completed. Though there were no signs whatever of anything problematic in Moffett's background, he nevertheless withdrew his nomination in early January 2000 when it became clear that the background check was far from over and required more time. He explained that there was little, if any, upside to uprooting his family for a position that might last only a few months.

46 The two dissenting votes came from Senator Helms (who had tried to block confirmation hearings as well as a committee vote) and Senator Peter Fitzgerald (who had tried, with Helms's support, to block a floor vote, because of concerns raised initially in his successful campaign to replace her in the Senate).

47 A related point is that Paez and Berzon had the added advantage of a senator (namely, Barbara Boxer from California) fighting for them. Paez and Berzon were nominees in whom Boxer felt a vested interest, because they had been recommended to her by her Ninth Circuit nominating commission. Nominees who do not have a senator (or a group of senators, as did Paez and Berzon) fighting for them are not likely to fare as well in the judicial selection process.

The difference that a senator's intense support can make for nominations is apparent when one contrasts Paez's and Berzon's fates with the present status of the nomination of Elena Kagan (a former University of Chicago law professor and Clinton White House official) to the federal court of appeals for the D.C. Circuit. Nominated by President Clinton for the post in 1999, Kagan is yet to have a committee hearing, much less a committee

vote or final action by the Senate. One problem with Kagan's nomination is that it did not comport (in the views of some senators with particular interest in the composition of the D.C. Circuit) with the apparent bargain, struck almost a decade before by the president, the local bar association in the District of Columbia, and interested senators, to nominate a local lawyer (or judge or academic) to the D.C. Circuit. The deal was made to avoid having members of the D.C. bar underrepresented on D.C. courts (or effectively nullified from being considered for judgeships because of their domicile).

Moreover, Kagan's nomination presented an especially easy case for payback. Ever since the Judiciary Committee stalled and effectively nullified more than a dozen of President Bush's judicial nominations in 1992, some Republican senators (notably Iowa's Charles Grassley) have been determined to retaliate. One nomination commonly cited by these Republicans as having been improperly scuttled is that of John Roberts. Like Roberts, Kagan was under forty at the time of her nomination to the federal court of appeals. Also like Roberts, Kagan is a Harvard Law School graduate with prestigious clerkships but not a record of long public service or substantial litigation experience. Perhaps most important, these problems with Kagan's nomination have been exacerbated by the fact that the District of Columbia has no senators. Thus, there is no senator disposed to spend substantial political coinage to salvage her nomination.

48 The Senate confirmed Paez 59 to 39, and Berzon 67 to 31.

49 Indeed, the president's willingness to make judicial selection is one of the classic conditions for limiting the abuses of judicial nominees. The second is that the president and a majority of senators are from the same political party. If a president's party controls the Senate, his nominees have a much better chance to get hearings and final action. The third condition is that a president should establish clear, relatively easily implemented directives to the administration officials responsible for judicial selection. The fourth condition is that the president should assemble a competent staff to process judicial nominations and coordinate interaction with senators over them. The final condition is the choice of confirmable people, that is, people who do not make easy or obvious targets.

As one might expect, these five conditions are rarely all in place at the same time. When they are, judicial selection obviously tends to proceed more efficiently, as it did during most of President Franklin Roosevelt's time in office and the first six years of Ronald Reagan's presidency. In the latter two instances, the norms operated in large part to facilitate a president's objectives in judicial selection.

In contrast, the absence of one or more of these conditions allows for existing norms to function more as impediments than facilitators. Thus, it has not been terribly surprising to find, after the midterm elections of 1994, that the norms have worked against the efficient processing of President Clinton's judicial nominations (at least from his or their perspectives) for several reasons: the Republicans took control of the Senate, he had no desire to make judicial nominations a priority, he adopted criteria for selection that became difficult to fill in some instances (involving gender, ethnic, or geographic diversity as well as other concerns), and he had a high rate of turnover on his staff. Given these factors, President Clinton's appointment of 346 Article III judges as of March 10, 2000, is no mean feat,

MICHAEL J. GERHARDT is a Professor of Law at The College of William and Mary. He is the author of various works, including *The Federal Impeachment Process: A Constitutional and Historical Analysis* (2d ed., 2000) and (with Thomas D. Rowe Jr., Rebecca Brown, and Girardeau Spann), *Constitutional Theory: Arguments and Perspectives* (2d ed., 2000).

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