

# Duke Law Journal Online

---

VOLUME 64

MAY

2015

---

## **“ADVICE AND CONSENT” IN THE APPOINTMENTS CLAUSE: FROM ANOTHER HISTORICAL PERSPECTIVE**

STEVEN I. FRIEDLAND†

“Most of us spend too much time on the last twenty-four hours and too little on the last six thousand years.”<sup>1</sup>

–Will Durant

The sharply contrasting experiences of John G. Roberts, Jr. and William Howard Taft with the Article II, Section 2 appointments process illustrate that the long view of history is governed by perspective. William Howard Taft, the twenty-seventh President, also later became the tenth Chief Justice of the United States.<sup>2</sup> Taft was nominated for the position of Chief Justice of the Supreme Court—a position he openly admired—on June 30, 1921, and was confirmed by the Senate in a closed executive session the very same day. The current Chief Justice, John Roberts, Jr., experienced a more peripatetic journey in his ascension to the high court. President George H.W. Bush first nominated Justice Roberts to the federal bench in 1992.<sup>3</sup> Despite his nomination, he never received a hearing by the Senate Judiciary Committee,<sup>4</sup> which first reviews nominees

---

Copyright © 2015 Steven I. Friedland.

† Professor of Law, Senior Scholar, and Director, Center for Engaged Learning in the Law, Elon University School of Law. The author wishes to thank Lisa Watson for her tireless, always cheerful, and helpful assistance.

1. INTERESTING HISTORY: HISTORY AS YOU WERE NEVER TAUGHT, *Historical Quotes*, <https://sites.psu.edu/interestinghistory/2014/04/26/historical-quotes>.

2. Taft is the only person to serve as both President and Supreme Court Justice.

3. Brad Snyder, *The Judicial Genealogy (and Mythology) of John Roberts: Clerkships from Gray to Brandeis to Friendly to Roberts*, 71 OHIO ST. L.J. 1149, 1229 (2010).

4. *Id.*

before reporting them out to the Senate for a vote. Roberts was nominated a second time a decade later, and again, never received a hearing before the Senate Judiciary Committee. His third nomination—to the United States Court of Appeals for the District of Columbia Circuit, by President George W. Bush in 2003—was the charm. That time, Justice Roberts received a hearing, was reported out favorably by the Senate Judiciary Committee, and received a positive vote by the Senate. Two years later, in 2005, he was nominated and confirmed as Chief Justice of the United States Supreme Court.<sup>5</sup>

Professor Weaver provides his perspective of the Appointments Clause filtered by the lens of history. He eloquently argues that the Article II, Section 2 process that gives the Senate “advice and consent” power over the Executive’s nominations of judges, officers of the United States, and ambassadors “wasn’t supposed to be easy.”<sup>6</sup> In fact, he observes that the Senate’s role in the confirmation process—likely included because of a basic distrust of government—sometimes has been “contentious and ideologically driven.”<sup>7</sup> Professor Weaver’s historical review also emphasizes that Judge Robert Bork’s failed 1987 nomination to the United States Supreme Court was not a watershed moment in the Senate’s consideration of ideology in performing its advice and consent function,<sup>8</sup> with ideological considerations utilized in confirmation proceedings as far back as the country’s nascent years in the late 1700s.<sup>9</sup>

While I align with Professor Weaver about the Bork proceedings and the well-established use of ideology in the appointments process, we hold differing perspectives on what the appointments-process

---

5. Chief Justice Roberts was originally nominated for the position being vacated by Justice Sandra Day O’Connor. After Roberts was nominated, Chief Justice Rehnquist died, and President Bush withdrew his initial nomination and nominated Roberts for the vacant Chief Justice position. 20 THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916–2005, at xix (Roy M. Merskey & Tobe Liebert eds., 2006).

6. Russell L. Weaver, “*Advice and Consent*” in *Historical Perspective*, 64 DUKE L.J. 1717, 1752 (2015).

7. *Id.* at 1753.

8. For some commentators, Judge Bork’s seemingly politicized nomination proceeding was where the appointments process all started unraveling and where arguably major damage was done to the legitimacy of the Advice and Consent function. Neither Professor Weaver nor I think that was the case, despite the addition of the term “Borking” into the popular lexicon.

9. An example would be the rejected nomination of John Rutledge as Chief Justice of the United States Supreme Court in 1795, discussed *infra* notes 38–41 and accompanying text.

history means. Specifically, our divergence extends roughly for 225 years, with the first difference extending to his sanguinity with the Senate's historical deference to presidential nominees—a deference that essentially eschews a responsibility to advise—and the second difference concerning his characterization of the current era as only digressing from traditional functionality by “a matter of degree rather than [representing] a reflection of a fundamental shift in the nature of the confirmation process.”<sup>10</sup> That assessment improperly conflates “a matter of degree” with seismic cultural, technological and political changes over the past several decades that have greatly enhanced the dysfunction of the appointments process.<sup>11</sup>

A central premise of this paper is that the brilliance of the Appointments Clause has become obscured by dysfunction past and present. The Senate's deference to the President's nominees in the past was just as damaging to effective government as some of the political polarization and obstruction of the current day. In other words, the appointments process has changed over time, but not necessarily for the worse. Historical rubber-stamping of nominees by the Senate, with lightning-fast approval, is not preferable to careful and reflective consideration and the opportunity for collaborative competency between two branches of government. Yet, today's new appointments process is fraught with peril, from wholesale refusal to act in a timely manner<sup>12</sup> to staged public hearings designed to reveal nothing. Some of these new tactics are inconsistent with the process values of the clause and have a far-reaching impact.

Vacancies in the federal courts, in particular, broadly impact the quality of justice in the country.<sup>13</sup> With an implied presumption of confirmation favoring an executive who nominates with discretion, this paper suggests that the Senate ought to provide a robust but controlled check on presidential discretion through due diligence and individualized public evaluation, while also ensuring that its own rules do not get in the way of a timely and effective process.

---

10. Weaver, *supra* note 6, at 1753.

11. Essentially, I disagree with Professor Weaver in two respects: I believe the process was sometimes circumvented historically by Senate deference and that it is circumvented today by wholesale strategies of obstruction.

12. See generally, Adam J. White, *Toward the Framers' Understanding of "Advice and Consent": A Historical and Textual Inquiry*, 29 HARV. J.L. & PUB. POL'Y 103 (2005) (examining the current trend of delayed appointments).

13. See, e.g., Carl W. Tobias, Essay, *Postpartisan Federal Judicial Selection*, 51 B.C. L. REV. 769, 770 (2010).

This Essay first explores the Clause's antecedents in the Age of Enlightenment and its emergence in the Constitutional Convention in 1787, showing how its sturdy separation-of-powers foundation was built. In Part II, the Essay focuses on the historical realities of the Clause's two-branch process, especially how the operability of two political bodies naturally yields results consonant with the etiquette and political sensibilities of the day. Then, in Part III, it offers several suggestions on how to cabin the potentially untrammelled discretion of the Senate in responding to presidential nominations.

#### I. THE HISTORICAL MEANING OF "ADVICE AND CONSENT"

"You know how advice is. You only want it if it agrees with what you wanted to do anyway."

—John Steinbeck<sup>14</sup>

A historical review is helpful in understanding today's appointments process. Professor Weaver divides up his exploration into two parts—historical philosophy and historical realities.<sup>15</sup> These historical markers weave a useful mosaic in highlighting the importance of the philosophical origins of the separation of powers, and the realities of implementing the Appointments Clause. Yet, Professor Weaver understates important points, especially how the brilliance of the collaborative, interdependent structure of the separation of powers has become overwhelmed by the practical imbalance created by unchecked Senate obstructionism.

##### A. *The Separation of Powers and the Adversarial Process*

Professor Weaver traces the philosophical underpinnings of the Constitution to the Age of Enlightenment. He noted that philosophers such as Baron de Montesquieu<sup>16</sup> contributed to the Constitution's central idea that the legitimacy of governmental power is derived from the people, from the bottom up, and not from the top down, as with divine right. The Framers also were influenced by writers such as Thomas Paine, who asserted that the government should be mistrusted regardless of the source of its power.<sup>17</sup> These

---

14. JOHN STEINBECK, *THE WINTER OF OUR DISCONTENT* 146 (1961).

15. See Weaver, *supra* note 6, at 1722, 1730.

16. Charles-Louis de Secondat was a French lawyer who was born in 1689 and died in 1755.

17. See Weaver, *supra* note 6, at 1723.

philosophies, mixed with the pragmatism of the Framers, led to the idea of separating powers into different branches of government.<sup>18</sup>

While separation of powers was not given an express niche in the Constitution, its import is undeniable. Interdependence among the branches can be seen in many places in the Constitution, requiring more than one branch's approval for the completion or enactment of law. Interdependence is required for treaties, for example, with two-thirds Senate approval, and in the making of all domestic laws. It is also required for impeachment: the House of Representatives impeaches, the Senate tries the impeachment, and the Chief Justice of the United States Supreme Court presides.

As Professor Weaver observes, the cooperative intertwining of two branches of government in the Appointments Clause is “fully consistent” with the larger foundational doctrine of the separation of powers, as attributed to Baron de Montesquieu.<sup>19</sup> Professor Weaver views this fundamental division as intentional inefficiency, but that is not the complete story.

The brilliance of this appointments interdependence elides a simple rationale of distrust of government. It pushes beyond the mere fact that each branch is elected, or that overlapping duties force different factions to engage in a dialogue, if not directly, even to the extent of becoming a team of rivals, however begrudgingly. Just knowing that there will be examination and inspection ought to be enough to modify the behavior of the participants, from the Executive who nominates and does not want embarrassment or rejection, to the nominees themselves, and to the Senate.

This structural creation of cooperative competence has other advantages. It eliminates the singular viewpoint and its impulsiveness and susceptibility to a lack of questioning, and instead values the idea of freedom of speech and differing viewpoints—of the Senate and the President, at least—and also emulates an adversary system of truth-seeking.

The recreation of an adversarial process through a public hearing, first established in 1955,<sup>20</sup> promotes the Senate's “advice and consent” accountability, especially if the Senate and President are

---

18. *See id.* at 1724–25.

19. *See id.* at 1727.

20. *See* BETSY PALMER, CONG. RESEARCH SERV., RL31948, EVOLUTION OF THE SENATE'S ROLE IN THE NOMINATION AND CONFIRMATION PROCESS: A BRIEF HISTORY 8 (2009).

from different parties. Public hearings eliminate the shadow of secrecy and the obvious pale of cronyism, where exposure of bias and corruption is more likely to occur than if a confirmation was based on only a unilateral nomination and approval by the same branch.

In addition, the hearing mechanism by itself creates at least a path to transparency, if not to the truth. The concept of scientific truth means negating hypotheses through experiment and replication to arrive at what is fact. The idea of evidentiary truth, by contrast, means to test propositions through the adversarial process. The adversarial process boasts the use of cross-examination, a tool the commentator John H. Wigmore called “the greatest legal engine ever invented for the discovery of truth.”<sup>21</sup> By including Senate hearings as a part of “advice and consent,” opponents can make their case with an alternate narrative about the nominee. As the stakes grow larger, so does the intensity of the evaluation, which can be seen in the fact that three nominees to become Chief Justice of the Supreme Court have been rejected.<sup>22</sup> One example is the failed nomination of Justice Abe Fortas to the position of Chief Justice, which yielded this exchange between North Carolina Senator Sam Ervin and Justice Fortas during the nominee’s Senate committee hearing:

Senator Ervin: But if the Constitution says one thing, and the Justices do not like what the Constitution says, they are certainly not at liberty to change the meaning, are they?

Justice Fortas: Absolutely not. Of course not. That would be a violation of their oath.”<sup>23</sup>

The adversarial confirmation process borrows some of its fact-finding and truth-telling mechanisms from the legal system. Within an adversarial context, the Bork confirmation hearing in some sense was a success. It involved a public vetting of a nominee whose views were stated and debated. It became clear that the consent standard was not simply about minimum qualifications, but rather about broader political “balance” questions as well.

---

21. *Lilly v. Virginia*, 527 U.S. 116, 214 (1999) (quoting John H. Wigmore).

22. See generally Joseph Larisa, Jr., *Popular Mythology: The Framers’ Intent, the Constitution, and Ideological Review of Supreme Court Nominees*, 30 B.C. L. REV. 969 (1989) (documenting the rejection of Supreme Court nominees).

23. 9 THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916–1972, at 113 (Roy Merskey & J. Myron Jacobstein eds., 1975).

*B. The Narrative of the Constitutional Convention: The Value of the Framers' Intent*

Perhaps more than any source other than the text itself, the Constitutional Convention of 1787 affords insight into the decision to split the appointments power between two branches. It is not just what the Framers did with appointments that matters—but also what they chose not to do.

In briefly describing the Convention's relevance, Professor Weaver explains that the Framers were not “in complete agreement regarding the need to ‘check’ and ‘balance’ the President's appointments power.”<sup>24</sup> This observation is a considerable understatement, and it misses a significant opportunity to provide further texture to the meaning of the “advice and consent” mandate. The narrative of the Appointments Clause at the Convention was far from quotidian;<sup>25</sup> it appeared to be more like a pinball in an arcade game than a ship's anchor. There were more than enough positions to go around, and some influential individual framers, such as James Madison, even modified their own initial positions.

The initial proposal at the Convention placed the appointment of federal judges solely in the hands of the Congress, with “a National Judiciary” to be selected “by the National Legislature.”<sup>26</sup> This proposal was rejected as too unwieldy, leading to alternate suggestions.<sup>27</sup> Representative James Wilson of Pennsylvania, for example, suggested that the Executive be given sole power over judicial appointments, but that was rejected as well. Soon thereafter, in late July of 1787, a proposal giving the Senate exclusive control over judicial nominations received a favorable vote. The exclusivity of senatorial control, which was supported by James Madison, father of the Virginia Plan, was also vocally opposed by George Mason of Virginia; the Appointments Clause was subsequently grouped with other problematic items to be considered by the Committee on Postponed Matters. That Committee issued a report in early

---

24. Weaver, *supra* note 6, at 1730.

25. Of course, the original thirteen colonies were also split on how to select judges, with eight states implementing solely legislative selection and five states utilizing executive selection. Larry C. Berkson, *Judicial Selection in the United States: A Special Report*, 64 JUDICATURE 176, 176 n.1 (1980).

26. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 (1966); see Larisa, *supra* note 22, at 973.

27. See, e.g., Larisa, *supra* note 22, at 973.

September, sharing the power of appointments for the first time with the Executive; that is where it ended up.

The convoluted twists and turns of the appointments provision at the Convention reveal the lack of a single shared Framers' vision of the Appointments Clause.<sup>28</sup> As one commentator summarized the wildly divergent ideas advanced by various Framers:

The Convention also considered having the legislature nominate, the Senate nominate, the President nominate, the President nominate with the concurrence of one-third of the Senate, and the Senate nominate subject to the approval of the President.<sup>29</sup>

The lack of cohesion among the Framers allowed commentators, such as then-professor Walter Dellinger, and various politicians, including then-Senator and member of the Judiciary Committee, Joseph Biden, to declare that the Framers intended ideological review of nominees by the Senate.<sup>30</sup> The strongly divided approaches indicate, if nothing else, that the Framers did not trust placing these important decisions wholly within one branch of government. Viewed from a positive perspective, the divided placement also creates a robust constitutional balance between political entities.<sup>31</sup> While the various representatives were cognizant that the appointments would be initiated and approved by politicians, they clearly wanted to check unexamined and unfettered appointments.

---

28. *See id.* at 978–79 (finding that “the Convention as a whole was very much undecided on the proper method of appointment until its unanimous decision in September to place it in the hands of the president”).

29. *Id.* at 978 n.36 (citing JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, 345 (1968) (remarks of O. Ellsworth)).

30. Then-Senator Biden, of Delaware, was the Chair of the Senate Judiciary Committee, which held the nomination hearings. The Convention, when added to Alexander Hamilton's views expressed in *Federalist No. 77*, led Biden to think the consideration of ideology was “beyond dispute from an historical perspective.” 133 CONG. REC. 22,796 (1987) (statement of Sen. Biden); *see also* Walter Dellinger, *Choosing Judges, The Framers' Intent*, 132 CONG. REC. 22,796 (1986) (statement of Sen. Biden) (eschewing political philosophy is “simply inconsistent with both the text and original intent of the appointments clause”); Charles A. Black Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L.J. 657, 660 (1970) (arguing that the Constitution “permits, if it does not compel,” political considerations by the Senate).

31. Commentators often referred to the Federalist Papers to divine the Framers' intent. *See, e.g.*, THE FEDERALIST NO. 76 (Alexander Hamilton) (advancing the Senate's role as an “excellent check upon the spirit of favouritism in the President”); Larisa, *supra* note 22, at 980 (quoting same).

## II. THE HISTORICAL REALITIES OF THE APPOINTMENTS PROCESS

Professor Weaver's review of the historical realities of the confirmation process provides additional insights. The history offers precedent with which to contrast today's political gridlock.

For much of the nation's history, confirmation controversies were few.<sup>32</sup> Professor Weaver asserts that, generally, the Senate has been "relatively deferential" to the President's nominations, especially in the eighteenth and nineteenth centuries.<sup>33</sup> For example, Professor Weaver notes that the Senate has rejected only fifteen cabinet-level nominees and thirty-six Supreme Court nominees.<sup>34</sup>

This level of approval of nominees might reflect functionality, but it also masks the failings of a process that lacked public and robust debate, making it easier for presidents to nominate non-diverse candidates<sup>35</sup> chosen by patronage rather than merit. For many years, nominees were approved within days of their nomination—sometimes even on the same day.<sup>36</sup> This lightning-fast approval process raises questions about the nature and scope of due diligence. Presidents may, in fact, need to be saved from themselves. As President Dwight Eisenhower once said, "I made two mistakes and both of them are sitting on the Supreme Court."<sup>37</sup>

---

32. Richard Lugar, *Address to the Seventh Circuit Bar Association and the Seventh Circuit Judicial Conference Annual Joint Meeting May 6, 2013*, 47 IND. L. REV. 787, 787–88 (2014).

33. Weaver, *supra* note 6, at 1730.

34. *Id.* at 1730–31. This disparity is perhaps explained, at least in part, by the difference in the confirmation of cabinet officers and federal judges. Federal judges are appointed for life, unless they are impeached or voluntarily resign, unlike political officers, who generally hold office at the pleasure of the president, a much more transitory tenure in comparison. Senatorial review, therefore, takes on even greater meaning when it involves a likely lifetime appointment.

35. John Schwartz, *For Obama, A Record on Diversity But Delays on Judicial Confirmations*, N.Y. TIMES, Aug. 7, 2011, at A17 ("The federal judiciary is growing more diverse. President Obama has nominated a higher percentage of female, minority and gay judges than any previous president."). As of 2011, 47 percent of confirmed judges who were nominated by President Obama and confirmed by the Senate were women, compared to 23 percent for President G. W. Bush, and 29 percent for President Clinton. Additionally, 21 percent of the judges nominated and confirmed during the Obama administration were African Americans, with just 7 percent during the Bush presidency and 16 percent during the Clinton presidency. *Id.*

36. One prominent example, discussed above, involved Chief Justice William Howard Taft.

37. Eisenhower was referring to Justices Earl Warren and William Brennan, Jr. Lewis M. Wasserman, & James C. Hardy, *U.S. Supreme Court Justices' Religious and Party Affiliation, Case-Level Factors, Decisional Era and Voting in Establishment Clause Disputes Involving Public Education: 1947–2012*, 2 BRIT. J. AM. LEGAL STUD. 111, 155 n.149 (2013). Note, however, that there is some question as to whether Eisenhower actually uttered this line. *See, e.g.,* Theo Lippman, Jr., *Anecdotes are Dangerous to Biographers and Truth Mistakes: When*

While approval without much advice was the historical norm, there were occasional ripples of rejection—even based on ideology—that provided precedent for the politicized Bork hearing. The consideration of ideology often occurred within the context of party politics, particularly for judges. This context sometimes framed nominations to the extent that the inflection points overwhelmed objective assessment. Perhaps the best illustration of how politics played a role in early confirmation proceedings was the Senate’s refusal to confirm John Rutledge as Chief Justice of the United States.<sup>38</sup> President George Washington nominated Rutledge for the position on July 1, 1795.<sup>39</sup> Rutledge had been previously nominated by Washington as a Justice and confirmed, but he subsequently resigned to become the Chief Justice in his home state, South Carolina. Before his second confirmation process, however, Rutledge initiated a political firestorm by giving a public speech opposing the controversial Jay Treaty with England,<sup>40</sup> which was strongly supported by the Federalists, who happened to make up a large part of the Senate. The speech created a “sensation.”<sup>41</sup> Having sparked the ire of the Federalists, Rutledge’s second nomination was defeated.

#### A. *Partisan Politics*

The polarized politics of the past decade have left an indelible mark on the Appointments Clause. An exchange during an oral argument before the Supreme Court illustrates the effect of politicization during the last two decades. During the 2012 argument of *National Federation of Independent Business v. Sebelius*,<sup>42</sup> which involved a challenge to the Patient Protection and Affordable Care Act, one of the advocates argued that even if part of the law were found unconstitutional, severability would be appropriate because

---

*Essential Little Details are Distorted Vast Damage is Done*, THE BALTIMORE SUN (Sept. 7, 1997), available at [http://articles.baltimoresun.com/1997-09-07/news/1997250003\\_1\\_brennan-eisenhower-eisler](http://articles.baltimoresun.com/1997-09-07/news/1997250003_1_brennan-eisenhower-eisler).

38. See Larisa, *supra* note 22, at 975–76. *But see id.* at 982 (arguing that Rutledge was not rejected for ideological reasons).

39. *Id.* at 976.

40. J. MYRON JACOBSTEIN AND ROY M. MERSKY, THE REJECTED: SKETCHES OF THE 26 MEN NOMINATED FOR THE SUPREME COURT BUT NOT CONFIRMED BY THE SENATE 8 (1993). It was not known whether Rutledge was aware of his nomination at the time of the speech. Communications in those days “were very slow; there were no telephones, telegraphs, or fax machines.” *Id.*

41. *Id.*

42. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

Congress would have desired to keep some of the provisions intact.<sup>43</sup> Justice Kennedy responded to the advocate's claim by asking, "[T]he real Congress or a hypothetical Congress?"<sup>44</sup> This reply might be humorous coming from the mouth of a Supreme Court justice—and actually drew laughter at the time<sup>45</sup>—if not for the fact that the underlying premise was widely recognized as true.

The delay of nominations by both parties, sometimes for years after hearings,<sup>46</sup> lends credibility to Justice Kennedy's reply. The process for many appointees has slowed considerably, leading one commentator to write in 2010, "The data indicate that the entire nomination-and-confirmation process (from when the President first learned of a vacancy to final Senate action) has generally taken almost twice as long for nominees after 1980 than for nominees in the previous eighty years."<sup>47</sup> Judge William A. Fletcher, for example, was first nominated to the Ninth Circuit Court of Appeals in April of 1995. He had his first hearing in December of 1995 and was favorably reported out to the Senate in May 1996.<sup>48</sup> The Senate of the 104th Congress did not take a vote on the report, and the nomination died. In January of 1997, he was re-nominated. A second hearing was held in April of 1998. He was reported out favorably in May of 1998. Finally, in October of 1998, he was confirmed.<sup>49</sup> His multiple nomination history without Senate votes was shared by several well-known judges and officials.<sup>50</sup>

Delays have not just affected the nominees and served as a political back-and-forth; they have had direct impacts on judicial and governmental operability. With substantial vacancies<sup>51</sup> in the courts,

---

43. Transcript of Oral Argument at 78–79, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (Nos. 11-393, 11-400).

44. *Id.* at 79.

45. Justice Kennedy's question did, in fact, evoke laughter. *Id.*

46. See Sheldon Goldman, *A Simple Index Offers a Simple New Way to Measure Objectively the Phenomenon of Obstruction and Delay in Confirming Federal Judges*, 86 JUDICATURE 251, 251 (2003) (discussing nominees who waited more than one year between nomination and confirmation).

47. R. SAM GARRETT & DENIS STEVEN RUTKUS, CONG. RESEARCH SERV., RL33118, SPEED OF PRESIDENTIAL AND SENATE ACTIONS ON SUPREME COURT NOMINATIONS, 1900-2010, SUMMARY (2010).

48. Goldman, *supra* note 46, at 251.

49. *Id.*

50. Chief Justice John Roberts, for example, was nominated three times before he was voted upon and confirmed by the Senate.

51. White, *supra* note 12, at 107 (noting that in order to clear vacancies, several commentators offered solutions based on their interpretations of the Constitution. Some law

for example, burgeoning caseloads and needy litigants have taken a back seat to partisan politics.<sup>52</sup>

The political polarity of the present times has had a ripple effect on the branches of government, ranging from partisan statutory overrides of the Supreme Court<sup>53</sup> to government shutdown.<sup>54</sup> It is not hard to imagine a slippery slope where a contrarian Senate decides to oppose or unduly delay all of the President's nominations for the federal courts and officers, or, conversely, to imagine a President who refuses to nominate candidates primarily because they will be disapproved or held up indefinitely. While these scenarios are easier to visualize between a Senate and President of opposing political parties, this also could occur with differing factions within the same party.<sup>55</sup> Would the Senate and President be faithfully discharging their duties if each collaborator took a lack of good-faith participation to an extreme? Would Antonin Scalia, nominated to the Supreme Court in 1986 by President Reagan and confirmed by a Senate vote of 98-0, have received a remotely similar vote?<sup>56</sup> These and other questions raise pragmatic concerns about which strategies are legitimate and which ones are constitutional outliers.

While Professor Weaver is undoubtedly correct in saying that the current appointment process's ills were not caused by the Bork

---

professors and even President George W. Bush, for example, argued that the Senate was constitutionally obligated to vote on nominees).

52. See, e.g., Tobias, *supra* note 13, at 769–72.

53. One commentator noted, “[W]e see a new, but rarer, phenomenon—partisan overriding—that appears to require conditions of near-unified control of both branches of Congress and the presidency. Two recent examples are (1) the Military Commissions Act of 2006, in which Republicans overturned the Court’s statutory interpretation decision in *Hamdan v. Rumsfeld* on the habeas corpus rights of enemy combatants, and (2) the Lilly Ledbetter Fair Pay Act of 2009, in which Democrats overturned the Court’s statutory interpretation decision in *Ledbetter v. Goodyear Tire & Rubber Co.*” Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court and Congress*, 86 S.C. L. REV. 205, 209 (2013).

54. The term government “shutdown” really refers to a funding gap, where appropriations are not made for continued government operations. The last such shutdown occurred in 2013, from October 1 to October 16.

55. One example is President George W. Bush’s nomination of Harriet Miers to the Supreme Court. As one commentator stated, “A Democrat had recommended her. Republicans had opposed her. . . . [Her nomination] caused political chaos . . . .” JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* 300 (2007).

56. Furthermore, would it have been legitimate for him to not have been reported out of the Judiciary Committee or otherwise received a negative vote? See generally, e.g., Lee Epstein, Rene Lindstadt, Jeffrey A. Segal & Chad Westerland, *The Changing Dynamics of Senate Voting on Supreme Court Nominees*, 68 J. OF POLITICS 296 (2006).

nomination proceedings,<sup>57</sup> the Framers' vision of a shared and collaborative constitutional process has been substantially disrupted in the post-Bork hearing era<sup>58</sup> and is in need of repair.<sup>59</sup> This disruption is a mainstream perception today, if not the reality. Many see the federal political system overall—of which the appointments process is merely a part—as gridlocked, if not broken. The approval ratings of Congress and even the Supreme Court have sunk to precipitous depths.<sup>60</sup> The current perceptions find no refuge in history, despite Professor Weaver's optimism.

### B. *The Downstream Dangers of Partisanship*

Of the lessons learned from these historical realities, the most important one (overlooked by Professor Weaver) is the danger of political partisanship on several levels.<sup>61</sup> This danger adversely impacts not only the electorate, but also the nominees themselves. For judges who survive partisan wrangling, there is arguably more temptation to be partisan as well. As former U.S. Senator Richard Lugar has noted, “If nominating and confirming judges becomes a purely partisan affair, it will be far more likely that judges subjected to such proceedings will feel less inclined to uphold strict norms of impartiality and non-partisanship.”<sup>62</sup> As expectations grow that partisan civilians will become partisan judges and officials, pressures to fill specific roles increase accordingly.<sup>63</sup> In addition, the

---

57. It is clear, however, that the Bork proceedings contributed to the increasing politicization of the process.

58. The issues are most heavily pronounced in cases not just relating to Supreme Court nominations, but to lower federal court nominations as well. “That emphasis could be a consequence of any number of factors: growing interest group attention to these nominations, the lack of vacancies on the Supreme Court in recent years, the increasing tendency of presidents to select high court justices from the circuits, violations of long-standing norms on the part of contemporary senators (and presidents), or simply the growing importance of the courts of appeals.” LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 5 (2005).

59. In a regime of checks and balances, both the strength and the weakness is its forced collaboration; it is necessary for all participants in the decision-making process to participate properly and fully. If not, such a system is particularly susceptible to gridlock.

60. *See, e.g.*, Hasen, *supra* note 53, at 207 (“A 5-4 party split in the health care case threatened the legitimacy of the Supreme Court, which had already begun to see an unprecedented decline in popularity among the public.”).

61. *See, e.g.*, Lugar, *supra* note 32, at 790.

62. *Id.*

63. This expression of displeasure extends to the judiciary as well. Chief Justice John Roberts likely generated disappointment in the Supreme Court's healthcare law decision in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), after siding with

partisanship of the Senate hearings likely reflects the lack of a true dialogue in other parts of the political process, providing a barometer for the state of our democracy.<sup>64</sup>

This lack of a dialogue, or even of any respectful discourse, likely also impacts the delays facing nominees.<sup>65</sup> Excessive delays can be as harmful as a denial, placing lives on hold and having ripple effects into connected government operations. This is now seen in federal district court and courts of appeals nominations, where what were once same-day approvals now often stretch for several months.<sup>66</sup> At one point there were fifty-nine unfilled executive branch positions with waiting nominees and seventeen vacant judgeships with waiting nominees.<sup>67</sup> Today, there are forty-five federal judgeship vacancies with only ten nominees to fill them,<sup>68</sup> indicating that political polarization perhaps makes the president reluctant to nominate, potential nominees reluctant to accept, and the Senate reluctant to expeditiously advise and consent.

### C. *The Senate's Traditions and Procedural Rules*

The potential roadblocks created by some of the Senate's own practices relating to the appointments process provide an additional layer of political partisanship. In another understatement, Professor Weaver asserts that these rules "can slow or obstruct the presidential confirmation process."<sup>69</sup> While Professor Weaver discusses the filibuster rule that, until it was modified, caused the appointment of ambassadors and senior state department officials to "languish"<sup>70</sup> without cloture, other practices weigh heavily on a smooth and robust

---

the four Democrat-appointed justices to form a five-justice majority. Hasen, *supra* note 53, at 205.

64. "If the Senate routinely treats judicial nominees as objects to be exploited for political advantage, hopes for bipartisan unity and productivity throughout our democracy would be much dimmer." *Id.*

65. *See, e.g.,* White, *supra* note 12, at 107.

66. Lauren C. Bell, *Federal Judicial Selection In History and Scholarship*, 96 JUDICATURE 296, 296 (2013); Sheldon Goldman, *A Simple Index Offers a Simple New Way to Measure Objectively the Phenomenon of Obstruction and Delay in Confirming Federal Judges*, 86 JUDICATURE 251, 252 (2003).

67. *See* Weaver, *supra* note 6, at 1719.

68. *See Current Judicial Vacancies*, UNITED STATES COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/CurrentJudicialVacancies.aspx>, (last visited Feb. 1, 2015).

69. Weaver, *supra* note 6, at 1738.

70. *Id.* at 1739.

process as well.<sup>71</sup> These guidelines have favored long-standing traditions as well as formal rules.

One tradition is called “blue-slipping,” a form of senatorial courtesy. This informal practice can be traced back to 1917<sup>72</sup> and is used only by the Senate Judiciary Committee—not by other Senate committees.<sup>73</sup> It allows the senators of the nominee’s home state to essentially veto a nomination by not returning a blue piece of paper indicating approval.<sup>74</sup> The blue slip has been lauded as another layer of scrutiny in the role of advisor, but also roundly criticized as a political, not a professional, safeguard.<sup>75</sup> Another tradition involves “holds,” where senators can block or delay a nomination by asking for such a hold from a party leader.<sup>76</sup> While holds are primarily delay tactics, they can also terminate a nomination.

### III. LIMITS ON THE SENATE GOING FORWARD: IMPLICIT CHECKS AND BALANCES?

There are no substantive limits<sup>77</sup> to the exercise of the Senate’s advice and consent powers, either stated or implied.<sup>78</sup> While Professor Weaver looks at the system as intentionally inefficient, it has become unintentionally ineffective as well. The following checks show that unofficial limits—based on politics, tradition and culture, as well as

---

71. *Id.* at 1739–40.

72. *See* PALMER, *supra* note 20, at 8 (citing National Archives and Records Administration, Record Group 46, Records of the U.S. Senate, 65th Cong., Records of Executive Proceedings, Nomination Files, Judiciary Committee, Robert P. Steward, Blue Slip (1917)).

73. *Id.* It became firmly entrenched. Senator James O. Eastland (D-MS), for example, the chair of the Senate Judiciary Committee from 1956-1978, would not move a candidate out of committee if he did not receive two blue slips from the home state senators endorsing the judicial nominees in question. *Id.*

74. *Id.* at 8.

75. *Id.* at 8 (citing a statement by Senator Paul Laxalt (R-NY) in 1979, calling the blue slip, “effective scrutiny,” and a statement by Professor Jonathan Turley criticizing the opportunity for senators to block nominations for “nefarious or arbitrary” reasons.).

76. *Id.* at 9.

77. The ultimate limit involves exercise of the franchise. The public can vote senators out of office if their performance is not deemed acceptable

78. Of course, the interpretation of what the terms “advice” and “consent” mean ordinarily falls within the auspices of the judiciary, as final arbiters of the meaning of the Constitution. *See* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

the rule of law—can evolve to promote an effective appointments process.<sup>79</sup>

#### A. *Presidential Concessions*

The Senate plays a purely reactive role under the Clause, with no input as to who is nominated. The focus on restraining the Senate, however, should not be exclusive. The President can be proactive in defusing political confrontations, offering an olive branch of sorts, by agreeing to the recommendations of independent, bipartisan nominating groups. President Jimmy Carter, for example, instituted judicial nominating commissions<sup>80</sup> to assist with the nomination of federal judges. This up-front concession puts added pressure on the Senate to match the president—or at least have a greater justification for rejecting or holding in abeyance nominations.

#### B. *Presidential Recess and Vacancy Appointments*

The Recess Appointments Clause of the Constitution has given many presidents the opportunity to give their own nominees “tryouts” through temporary appointment during a congressional recess. Several famous civil servants, including Justice Thurgood Marshall,<sup>81</sup> were given the chance to serve in this manner. While the Supreme Court’s decision in *National Labor Relations Board v. Noel Canning*<sup>82</sup> cut back this presidential appointment power to situations where congressional recesses occurring at the end of a session last at least ten days, it still affords a president the opportunity to fill in gaps and provide an on-the-job interview for permanent positions.

The Federal Vacancies Reform Act of 1998<sup>83</sup> provides a similar presidential outlet to fill in gaps in the operation of government. Under this law, the president is given the power to fill positions with individuals who serve in an “acting capacity.”<sup>84</sup> While this is another stopgap measure, it promotes government operability over politics.

---

79. This is not entirely surprising: when a constitutional process operates entirely within the political system, it will have political limits, if nothing else.

80. The American Bar Association ranking of candidates offers a similar objective perspective on nominees.

81. Bill Mears, *Justices Rule for Congress in White House Fight Over Recess Appointments*, CNN (June 26, 2014), <http://www.cnn.com/2014/06/26/justice/supreme-court-recess-appointments/index.html>.

82. *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014).

83. Federal Vacancies Reform Act of 1998, 5 U.S.C. §§ 3345–3349d (2012).

84. *Id.*

### C. *The Senate's Rules*

The Senate's rules and customs have had a mixed impact over time, but can be a significant source of processes that limit obstruction and inaction.<sup>85</sup> One such obstructionist tool is the filibuster. This strategy uses lengthy speeches to delay congressional votes. The filibuster not only pushes back a vote on a particular matter, but also serves to delay productive Senate action on other matters as well.<sup>86</sup> Filibusters have been used to stall nominations for well over a century.<sup>87</sup> Yet, the Senate recognized the dangers of unrestrained filibustering in the early twentieth century and added its first cloture rule to end debate (and filibusters) in 1917.<sup>88</sup> Today, the Senate has limited filibusters on all nominees, save those nominations for the Supreme Court.<sup>89</sup>

In 1929, the Senate also generally opened its actions to the public on the confirmation of nominations, a change from its previously closed executive sessions.<sup>90</sup> The addition of nominee hearings and the creation of a Judiciary Committee staff that investigates candidates were both positive modifications to the process that occurred within the past sixty years.<sup>91</sup>

The creation of a hearing step in the process also has had various ramifications. While a hearing permits the nominee to argue his or her position and assuage skeptical senators, it also could become an additional obstacle. If a nominee did not get a hearing, for example, the Senate would not take any action, causing some nominations to languish unless the candidates were re-nominated. As noted earlier, Chief Justice Roberts was initially nominated by President George H. W. Bush to become a judge on the U.S. Court of Appeals for the District of Columbia Circuit. Because Roberts did not receive a hearing, his nomination was effectively ended.

---

85. One Senate procedural rule that can be seen as streamlining the process, for example, is the practice of first sending nominations to the Senate Judiciary Committee for a vote.

86. PALMER, *supra* note 20, at 10.

87. *Id.*

88. *Id.*

89. Jeremy W. Peters, *In Landmark Vote, Senate Limits Use of Filibuster*, N.Y. TIMES (Nov. 21, 2013), [http://www.nytimes.com/2013/11/22/us/politics/reid-sets-in-motion-steps-to-limit-use-of-filibuster.html?\\_r=0](http://www.nytimes.com/2013/11/22/us/politics/reid-sets-in-motion-steps-to-limit-use-of-filibuster.html?_r=0).

90. *Id.*

91. LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 88 (2005).

#### *D. Legislation*

The Senate's own recognition of the impact of these rules has been evidenced by several changes it made in recent years. The Presidential Appointment Efficiency and Streamlining Act of 2011, for example, which took effect in 2012, attempted to streamline the framework by expediting the confirmation process for dozens of nominees. The Act also established a working group to look carefully at the functionality of the appointments process.<sup>92</sup> These and other rule changes will be important to the future operability of the appointments process.

#### *E. Public Pressure*

In today's volatile environment, considerations such as mutating political cultures, advances in social media, and globalization can significantly impact the appointments process. In particular, the current appointments process is very public in a way never seen before, primarily as a result of advancing technology and tools such as the Internet, Twitter, and other forms of microbroadcasting. Media scrutiny often starts even before an official nomination occurs. The new public nature is generally a positive development, bringing the appointments process to people across the country in considerable numbers. In some ways, the expanded scrutiny has generated more dialogue and transparency. Prior to 1955, for example, nominees usually did not testify before the Senate Judiciary Committee. Now such testimony is routine.

On the other hand, the public pressure can play a distorting role. The glare of the multimedia spotlights puts new pressures on the Senate to perform as if on stage. With the 24/7 news cycle, the nominee's every word is dissected and re-analyzed. "Public hearings" become more than a confirmation process, turning into a media event. The Supreme Court nominees become well-known personalities within the popular culture.<sup>93</sup> An illustration of the intensity that can develop surrounding nominations involved an earlier statement by Justice Sonia Sotomayor closely examined at her

---

92. MAEVE P. CAREY, CONG. RESEARCH SERV., R41872, PRESIDENTIAL APPOINTMENTS, THE SENATE'S CONFIRMATION PROCESS, AND CHANGES MADE IN THE 112TH CONGRESS 1-3 (2012).

93. For example, Justice Ruth Bader Ginsburg has a website devoted to her that is titled "Notorious RBG." See NOTORIOUS R.B.G., <http://notoriousrbg.tumblr.com> (last visited Mar. 26, 2015).

confirmation hearing.<sup>94</sup> In a prior speech, Justice Sotomayor had commented about her Latina heritage.<sup>95</sup> This not only drew the attention of the Senators, but the media as well.<sup>96</sup>

Consequently, responsive strategies have made the public hearings more like Kabuki theater than a spontaneous give-and-take. Nominees have learned to reveal their views and philosophies as little as possible in order to avoid social media's insatiable desire for "sound bites" and pithy phrases. As one professor wrote about the confirmation hearings of then-judges Ruth Bader Ginsburg and Stephen Breyer, "both nominees felt free to decline to disclose their views on controversial issues and cases. They stonewalled the Judiciary Committee to great effect, as senators greeted their 'nonanswer' answers with equanimity and resigned good humor."<sup>97</sup> This professor was Elena Kagan,<sup>98</sup> who, of course, followed the same script during her own Senate confirmation hearing when she was nominated to the Supreme Court.<sup>99</sup>

#### CONCLUSION

The essential constitutional framework involving interdependent branches of government is reflected in the Appointments Clause and its "Advice and Consent" requirement. The President has the initial opportunity to nominate with discretion, but the Senate has the final say and can check presidential discretion with scrutiny of its own.

Professor Weaver provides a useful historical review, showing how the seeds of the Appointments Clause emanated from the Enlightenment philosophers well before our Constitutional Convention erected the separation-of-powers structure. Both Professor Weaver and I agree that the structure was indeed a

---

94. Carolina A. Miranda, *Just What is a 'Wise Latina,' Anyway?*, TIME (Jul. 14, 2009), <http://content.time.com/time/politics/article/0,8599,1910403,00.html>; Charlie Savage, *A Judge's View of Judging Is on the Record*, N.Y. Times (May 14, 2009), <http://www.nytimes.com/2009/05/15/us/15judge.html>.

95. Savage, *supra* note 94.

96. *Id.*

97. Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919, 920 (1995).

98. Before becoming a Supreme Court justice, Kagan was the Dean at Harvard Law School.

99. On August 5, 2010, Justice Kagan was confirmed by the Senate to succeed Justice John Paul Stevens. She was sworn in on August 7, 2010. See THE OYEZ PROJECT, [http://www.oyez.org/justices/elena\\_kagan](http://www.oyez.org/justices/elena_kagan) (last visited Mar. 26, 2015).

masterstroke<sup>100</sup> that has withstood the test of time, despite being, in his view, intentionally inefficient.

Although I respect Professor Weaver's historical mosaic, I do not share the conclusions he draws in two respects. First, the appointments process has changed over time, but not necessarily for the worse. Professor Weaver fails to hold the Senate accountable for its long history of deference to presidential discretion. At times, this deference has bordered on a "rubber stamping" of approval of nominees, as exemplified by the same-day confirmation of William Howard Taft as Chief Justice of the Supreme Court. The downstream consequences of less Senate oversight could well have been less effective government.

Second, the real danger today from political polarization is not the use of ideology in reviewing nominees, but rather the widespread seepage of poison from partisanship, which produces wholesale strategies of obstruction and a plethora of vacancies. These vacancies, particularly for judgeships in the federal courts, have a significant impact on the operability of the government and justice system.

While Professor Weaver does not believe a fundamental shift in the process has occurred,<sup>101</sup> the gridlock from political partisanship shows no signs of abating. Further, the impact of social media and the 24/7 news cycle on the process cannot be overstated. The process is more public than ever—but also more staged as well. Recent nomination proceedings appear to be less about the truth than about managing public perceptions.

Despite an apparent fundamental shift in the appointments process, there is hope. Through well-grounded "in-house" Senate rules, legislation designed to streamline the process, and senators and an Executive who take a long view, the fundamental shift that has occurred can be for the better.

---

100. The fact that "advice and consent" was inserted into the Constitution near the end of the Constitutional Convention after consideration of many alternative formulations was either a masterstroke of genius—or luck.

101. Weaver, *supra* note 6, at 1753.