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BACK TO THE FUTURE ON PRESIDENTIAL APPOINTMENTS

Foreword

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This issue of the *Duke Law Journal* takes readers back in time to the constitutional origins of today's sluggish presidential appointments process, into the present with sharp analysis of recent cases and data on how the process is working, and forward into a more hopeful future of potential innovations that might restore some balance to what appears to be an entirely dysfunctional appointments process. This collection of articles brings fresh insights, data, and even a bit of optimism to resolving the tension between the Senate's advice-and-consent power and the President's obligation to take care that the laws are faithfully executed.

There is little doubt that the presidential appointments process is plagued by partisanship and delay. Presidents require more and more time to find, recruit, vet, and nominate the senior officers of government; nominees require more and more time to answer hundreds of often duplicative questions about all aspects of their personal lives; and the Senate requires more and more time to seemingly do little at all.¹ Off-the-record interviews with presidential personnel officers and White House staff suggest that Presidents have little choice but to pick nominees who have the time and zip codes to

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1. See, e.g., PAUL C. LIGHT, A GOVERNMENT ILL EXECUTED: THE DECLINE OF THE FEDERAL SERVICE AND HOW TO REVERSE IT 80–101 (2008).

outlast the elongated process, meaning that more and more appointees come from inside the Washington Beltway.²

This is not to ignore the recent streamlining that liberated more than 150 presidential appointees from the Senate confirmation process, and produced long-overdue cuts in the number of national security questions, along with slight improvements to the financial disclosure process and the downloadable forms required. The reforms were no doubt helpful, but shaved only a few days off the delays and only a few questions off the forms. And the streamlining completely ignored the President's opaque pre-announcement vetting process, which asks nominees to reveal every possible embarrassment that might be found in their writings, diaries, and emails, any history of gun use, and family conduct, as well as a guess about any individual, organization, or news outlet that might criticize their nomination either "overtly or covertly, fairly or unfairly."³ It is little wonder that the forms drive many appointees directly to their accountants and tax advisers to avoid the kind of false statements that forced Housing and Urban Development Secretary Henry Cisneros to resign in 1995. It is also no surprise that long-time reformer Colby College Professor G. Calvin Mackenzie once described the appointments process as "nasty and brutish without being short."⁴

Despite these frustrations, a majority of civic leaders in the nation's top universities, largest corporations and law firms, and leading think tanks say that it would be an honor to serve as a presidential appointee.⁵ Unfortunately, they also describe the appointments process as unfair, confusing, and embarrassing, and believe that a presidential appointment would create considerable disruption in their personal lives; they also see Washington, D.C. as a difficult place to live. The spirit of service is strong, but the process for entry is a mess. Moreover, many presidential appointees worry that they will not have a job back home once their service is over.⁶

2. *See id.* at 90–95.

3. The Obama administration's 63-item, single-spaced 2008 transition questionnaire is available at http://graphics8.nytimes.com/packages/pdf/national/13apply_questionnaire.pdf.

4. G. Calvin Mackenzie, *Nasty & Brutish Without Being Short: The State of the Presidential Appointment Process*, 19 BROOKINGS REV. 2, 4 (2001).

5. PAUL C. LIGHT & VIRGINIA L. THOMAS, BROOKINGS INST., POSTS OF HONOR: HOW AMERICA'S CORPORATE AND CIVIC LEADERS VIEW PRESIDENTIAL APPOINTMENTS 9–10 (2001), available at <http://www.brookings.edu/~media/research/files/papers/2001/1/10governance-light/januarysurvey.pdf>.

6. *Id.*

Most scholars and commentators agree that the barriers to appointment have worsened over the decades, which has led to one blue-ribbon study group after another, not to mention congressional study commissions and the 2012 White House Working Group on Streamlining Paperwork for Executive Nominations.⁷ The Brookings Institution even sponsored a task force in 2012 that produced a final report entitled “A Half-Empty Government Can’t Govern: Why Everyone Wants to Fix the Appointments Process, Why It Never Happens, and How We Can Get It Done.”⁸

The problem with these failed efforts has not been a lack of promising ideas and urgent calls for reform, however. Both have been in ample supply over the years, perhaps even to the point where there are not too few proposals, but too many. Nor has the problem been a lack of occasional congressional action. Congress has passed a half-dozen reform statutes over the decades: all small-scale, but all reforms nonetheless. Congress passed the Presidential Transitions Effectiveness Act in 1988,⁹ amendments to the supposedly action-forcing Vacancies Act in 1988 and 1998,¹⁰ the Intelligence Reform and Terrorism Prevention Act in 2004,¹¹ the Pre-Election Presidential Transition Act in 2010,¹² and the 2011 Presidential Appointment Efficiency and Streamlining Act in 2011,¹³ all of which are discussed

7. See WHITE HOUSE WORKING GROUP ON STREAMLINING PAPERWORK FOR EXECUTIVE NOMINATIONS, REPORT TO THE PRESIDENT AND THE CHAIRS AND RANKING MEMBERS OF THE SENATE COMMITTEE ON HOMELAND SECURITY & GOVERNMENT AFFAIRS AND THE SENATE COMMITTEE ON RULES & ADMINISTRATION (2012), available at <http://whitehousetransitionproject.org/resources/briefing/appointments/Report%20of%20S679%20Working%20Group-Final.pdf>.

8. See generally WILLIAM A. GALSTON & E. J. DIONNE, JR., BROOKINGS INST., A HALF-EMPTY GOVERNMENT CAN’T GOVERN: WHY EVERYONE WANTS TO FIX THE APPOINTMENTS PROCESS, WHY IT NEVER HAPPENS, AND HOW WE CAN GET IT DONE (2010), available at http://www.brookings.edu/~media/research/files/papers/2010/12/14-appointments-galston-dionne/1214_appointments_galston_dionne.pdf (reporting on the task force).

9. Presidential Transitions Effectiveness Act of 1988, Pub. L. No. 100-398, 102 Stat. 985 (codified at 3 U.S.C. § 102 note). The Vacancies Act amendments were contained in the Presidential Transitions Effectiveness Act of 1988.

10. Presidential Transitions Effectiveness Act § 7; Federal Vacancies Reform Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (codified at 5 U.S.C. §§ 3345–3349(d)).

11. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638.

12. Pre-Election Presidential Transition Act of 2010, Pub. L. No. 111-283, 124 Stat. 3045 (codified at 3 U.S.C. § 102 note).

13. Presidential Appointment Efficiency and Streamlining Act of 2011, Pub. L. No. 112-166, 126 Stat. 1283 (codified at 3 U.S.C. § 102 note).

here and there in this issue. As we shall also see, the Supreme Court weighed in occasionally over the years to clarify the recess rules.

Alas, these statutes and decisions had minimal lasting effects in either accelerating the process or reducing its burden. Indeed, the streamlining effort may have raised the political returns on delaying the confirmation process of the senior officers who were still subject to Senate review. Nevertheless, there was at least some momentum that could produce comprehensive action. Thus, the 1988 Presidential Transitions Effectiveness Act gave the major-party presidential candidates incentives and funding to begin their post-election planning during the campaign; the amendments to the 1863 Vacancies Act established a new clock for filling vacant presidential appointments; the Pre-Election Presidential Transition Act provided authority for transition planning during the campaign; the Intelligence Reform and Terrorism Prevention Act gave the major-party nominees authority to submit the names of transition-team members for national-security clearance before Election Day; and the Presidential Appointment Efficiency and Streamlining Act cut the number of Senate-confirmed presidential appointments by 163, even as the Senate created a “privileged” review process for 272 appointments, including some of the 163 that were exempted from the traditional confirmation process.¹⁴ The Senate added to the reforms in 2013 when it adopted the “nuclear option,” which effectively ended filibusters on all presidential nominations except for those to the Supreme Court.

It is not yet clear whether these changes have improved the presidential appointments process, be it measured by speed, cost, or the burden on individual nominees. Indeed, this issue of the *Duke Law Journal* strongly suggests that the process continues to be nasty, brutish, and not very short, while Presidents still face significant delays in winning Senate confirmation.¹⁵

14. For a summary of the Presidential Appointment Efficiency and Streamlining Act and its history, see MAEVE P. CAREY, CONG. RESEARCH SERV., R41872, PRESIDENTIAL APPOINTMENTS, THE SENATE’S CONFIRMATION PROCESS, AND CHANGES MADE IN THE 112TH CONGRESS (2012), available at <http://www.fas.org/sgp/crs/misc/R41872.pdf>.

15. Moreover, I expect that some future scandal will force Congress to reconsider many of the exceptions embedded in the Presidential Appointment Efficiency and Streamlining Act, especially for assistant secretaries, who have historically exercised significant policymaking responsibilities through the management, budget, and legislative-clearance process within their departments and agencies.

Some blame this sorry state of affairs on vengeful Republicans.¹⁶ But Democrats have been equally cavalier, if not quite so active in delaying appointees. Even Vice President Joe Biden exercised the Advice and Consent Clause to delay two George W. Bush administration Department of Transportation nominees. Even as he extolled each nominee's qualifications, then-Senator Biden (D-Delaware) told his colleagues that his "frustration is reaching the boiling point." Biden was not frustrated with the administration, however. He was frustrated with the lack of Senate action and angered by the Senate's opposition to his \$1.8 billion railroad infrastructure bill.¹⁷

Like a football scrum, it hardly matters which party threw the first punch in the pileup. Nor is the first punch particularly relevant in an era when both parties have ample incentive to use the appointments process to score political points that cannot find a home anywhere else in the legislative process. What matters is the impact on the faithful execution of the laws.

More importantly, complaints about the presidential appointments process predate the current era of hyper-partisanship. Indeed, the first indictment of the contemporary appointments process came from the National Academy of Public Administration in a 1985 report entitled *Leadership in Jeopardy: The Fraying of the Presidential Appointments System*. Its conclusions could be used today:

The time is nigh to recognize the importance of the presidential appointments system in the operation of government in the United States and to face up to the problems that currently beset that system. If we do so now, we can revitalize a unique leadership selection mechanism that has long been one of the adornments of the American experiment in self-government. If we fail, that adornment will continue to corrode and the price—to those who run the government and to those who are served by it—will be high indeed.¹⁸

16. See generally, e.g., NORMAN J. ORNSTEIN & THOMAS E. MANN, *IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* (2012).

17. Paul C. Light, *The Other March Madness*, CHRISTIAN SCI. MONITOR (Apr. 11, 2002), <http://www.csmonitor.com/2002/0411/p09s02-coop.html>.

18. NAT'L ACADEMY OF PUB. ADMIN., *LEADERSHIP IN JEOPARDY: THE FRAYING OF THE PRESIDENTIAL APPOINTMENTS SYSTEM* 30 (1985), available at <http://www.politicalappointeeproject.org/sites/default/files/leadershipInJeopardy.pdf>.

The passage could be cut and pasted into almost any editorial on the current process, but is especially apt for this issue of the *Duke Law Journal*. Although there are occasional references to partisanship in the following pages, the five authors who have contributed to this body of work are ever aware of the constitutional history embedded in the current tension. Yet, even as they puzzle about the current state of the process, they clearly understand that today's delays and frustration were sown at the Founding.

University of Louisville Professor Russell L. Weaver explores these early decisions through a particularly accessible summary of the Founders' intent in creating what eventually became today's crushing appointments process.¹⁹ Leading with a quick introduction about the so-called "Borking" of especially visible and controversial Supreme Court nominees,²⁰ Weaver rightly acknowledges slight improvements in the wake of the many reforms discussed above, but argues that the process has become more sluggish and polarized nonetheless.²¹ So noted, he finds the source of the problems in the Framers' intent. The process was designed to be inefficient, or so I interpret his argument, and it is clearly fulfilling this promise.²² The appointments power is another of those shared powers that may be particularly sensitive to partisanship, but it is intentionally structured for conflict nonetheless.

Weaver's article makes the point by returning to the Founding itself, and its embrace of the principles of the Enlightenment. The Founders trusted neither people nor government, and therefore created a system that remains highly sensitive to stalemate and delay.²³ As Weaver argues in drawing upon the Federalist Papers, the Constitution's Appointments Clause is "fully consistent with the doctrines of separation of powers and checks and balances."²⁴ Although one can easily argue that legislative productivity is a sign of the constitutional apocalypse, the Founders might congratulate themselves for designing a system that stops so much bad legislation. Just imagine what the policy agenda would look like if Congress had been highly productive in recent years—the American public might

19. See generally Russell L. Weaver, "Advice and Consent" in *Historical Perspective*, 64 DUKE L.J. 1717 (2015).

20. *Id.* at 1719.

21. *Id.*

22. *Id.* at 1752.

23. *Id.* at 1724.

24. *Id.* at 1727.

be just as distrustful, but the statutes would be crowded with endless contradictions and strikeouts.

This is not to argue that the Founders were unified about the need to “check” and “balance” the appointments power, but their worries were mostly unfounded during the first century or so of the Republic. Although Weaver uses judicial appointments to illustrate his points, his analysis of the contemporary sources of delay is relevant to even obscure executive nominations. Once again, however, he writes that none of this should surprise us.²⁵ It might undermine effective administration, but it is easily explained given checks and balances on partisan steroids.

University of Alabama Professor Ronald J. Krotoszynski brings Weaver’s historical analysis into sharp relief²⁶ by examining the Supreme Court’s 2014 decision in *National Labor Relations Board v. Noel Canning*.²⁷ As he writes, the decision “confirms that the federal appointments process resists any easy or obvious separation-of-powers analysis.”²⁸ Presidents are free to interpret vague language to their comfort, but so are senators and justices. Faced with seemingly endless schoolyard brawls over well-qualified nominees, Presidents often search for end-arounds and “innovations” that just might break the stalemates, end the suffering of long-stalled nominees, and, most importantly, secure the faithful execution of the laws.

Krotoszynski dissects the *Noel Canning* decision with great skill and thoroughness. Framing his analysis as a contest between formalism and functionalism, he shows great respect for the deftness embedded in Justice Stephen Breyer’s majority opinion, which Krotoszynski describes as a novel “third way” of resolving separation-of-powers questions “when conflicting specific constitutional mandates make it impossible to advance one constitutional imperative without, at the same time, doing violence to another.”²⁹

Krotoszynski reminds us that the Framers understood that “inaction could lead to gridlock,”³⁰ which might seem like a contradiction, but the insight leads him to thoughtful reminders about

25. *Id.* at 1721.

26. See generally Ronald J. Krotoszynski, Jr., *Transcending Formalism and Functionalism in Separation-of-Powers Analysis: Reframing the Appointments Power after Noel Canning*, 64 DUKE L.J. 1513 (2015).

27. *Nat’l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550 (2014).

28. Krotoszynski, *supra* note 26, at 1515.

29. *Id.* at 1515–16.

30. *Id.* at 1523.

defaults, workarounds, and other “innovations,” as other authors in this issue call them, that might convert inaction into progress. Some innovations reflect the creation of policy czars within the White House for every issue imaginable; others reflect the rise of intensely loyal “at-will” presidential appointees, such as the lower-level “personal and confidential” Schedule-C assistants created in the 1950s through executive order,³¹ and the much higher-level noncareer members of the Senior Executive Service created under the 1978 Civil Service Reform Act.³² I estimate that there are about 1500 of these at-will political appointees, all of whom discharge what the *United States Code* defines as “policy-determining” responsibilities.³³ I have yet to find a study of how these at-will appointees behave in the absence of Senate-confirmed leadership, but there is ample evidence that they are presidential partisans, and serve only on the basis of intense loyalty.

Noel Canning involves the Recess Appointments Clause, which has arguably generated the most innovations in today’s appointments process. After summarizing the facts of the case, and the past debate about just what constitutes a Senate recess, Krotoszynski reviews the decision and soon turns to the judicial response to similar interbranch disputes. In doing so, he tackles tough issues such as the role of the courts in deciding the merits of such conflicts, whether to use historical practice as a tiebreaker for especially tough decisions, and the wisdom of taking the “least unconstitutional path” in deciding cases such as *Noel Canning*. The analysis is quick and to the point, and exhorts us to accept the reality that not all questions will yield absolute results in tough cases. Instead, the courts are well advised to use “pragmatic formalism,” which relies on a blend of text, history, practice, and policy to reach decisions. Such courts would be wise to

31. See 5 C.F.R. § 212.301 (2014) (“Competitive status is acquired by completion of a probationary period under a career-conditional or career appointment, or under a career executive assignment in the former executive assignment system, following open competitive examination, or by statute, Executive order, or the Civil Service rules, without open competitive examination.”).

32. Civil Service Reform Act of 1978, Pub. L. No. 94-454, 92 Stat. 1111. For recent controversies and proposed repairs in the Act, see generally MAEVE P. CAREY, CONG. RESEARCH SERV., R41801, THE SENIOR EXECUTIVE SERVICE: BACKGROUND AND OPTIONS FOR REFORM (2012), available at <http://www.fas.org/sgp/crs/misc/R41801.pdf>.

33. PAUL C. LIGHT, THICKENING GOVERNMENT: FEDERAL HIERARCHY AND THE DIFFUSION OF ACCOUNTABILITY 45 (1995).

read congressional actions broadly to explore the context in which seemingly simple acts such as declaring a recess occur.³⁴

University of California Berkeley Professor and Associate Dean Anne Joseph O’Connell takes readers from the recent past and into a possible future using the Weaver and Krotoszynski platform³⁵ to analyze the actual delays in filling the “plum jobs” that open and close throughout an administration.³⁶ The *Plum Book*, published every four years by alternating chambers, contains only the positions forwarded to the House or Senate by the agencies, however, and does not contain the “at-will” inferior political positions discussed above.

Nevertheless, the *Plum Book* is no doubt one of the most frequently downloaded Government Printing Office documents in the months before and after an election, and is assuredly earning many more downloads even as this issue goes to print. More to the point of O’Connell’s work, this volume of data gives O’Connell an enormous opportunity to test her patience in monitoring every presidential appointment that is open for occupancy throughout an administration. As noted above, this process is filled with a host of seemingly irrelevant personal questions and financial disclosures, many of which show up again and again in slightly different variations across the long list of forms that potential nominees must complete, many with help from their accountants and even their high-school yearbooks.

If the aim of the appointments process is to fill an administration with talented leaders, that goal can never be reached. Senior officers come and go with regularity and last two to three years on average before (as some would say) they “cash out” and return to the lobbying firms, think tanks, universities, nonprofits, and corporations that loaned them to the government for short engagements. Although cabinet secretaries almost always stay at least a term, lower-level offices often spin open and closed—rather like the revolving door at Macy’s during the annual Thanksgiving parade.

34. See generally ROBERT A. KATZMANN, *JUDGING STATUTES* (2014).

35. See generally Anne Joseph O’Connell, *Shortening Agency and Judicial Vacancies Through Filibuster Reform? An Examination of Confirmation Rates and Delays from 1981 to 2014*, 64 *DUKE L.J.* 1645 (2015).

36. H. COMM. ON OVERSIGHT & GOV’T REFORM, 112TH CONG., *POLICY AND SUPPORTING POSITIONS* app 1, at 197 (Comm. Print 2012) (summarizing positions subject to noncompetitive appointment in a quadrennial report commonly referred to as the “Plum Book”).

Much as they might wish to serve, the process exacts great patience, and not just because of the delays so carefully documented in O'Connell's impressive database. Nominees must answer hundreds of questions along the way, not the least of which is the long White House questionnaire that precedes the announcement of a nominee. As I have argued many times over the years, a bad nominee stings the President to a greater degree than a great nominee brings acclaim. Better to withdraw before a small fact explodes than to suffer the slings and arrows of a national controversy.

O'Connell's careful analysis produces three findings that will help scholars analyze the ups-and-downs in filling what Benjamin Franklin called the "posts of honor" that should attract the nation's most talented citizens to service.³⁷ First, O'Connell shows that failure rates for certain positions, such as appellate courts and independent regulatory commissions, are much higher than for other Senate-confirmed posts, such as department and agency chiefs.³⁸

Second, O'Connell finally provides precise numbers on the actual delays in the process. According to O'Connell's data, the average number of days from nomination to confirmation from 1981 to 2014 was about 88.5, compared with 127.2 days during the first six years of the Obama administration.³⁹ She also shows that the trend has been rising year by year, and was not reserved just for the Obama administration.⁴⁰ Other data suggest that the trend dates back to the 1960s,⁴¹ but O'Connell's work will stand as the definitive figure for years to come as she updates her database year after painstaking year.

Third, O'Connell shows that delays declined with the Senate's recent filibuster reform, but only for judicial nominees, not for executive branch officers.⁴² At least for now, the Senate's "nuclear option" has turned out to be a firecracker at best, and one with more of a pop than a bang.

37. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 83 (Max Farrand ed., 1966).

38. O'Connell, *supra* note 35, at 1661.

39. *Id.* at 1669.

40. *Id.* at 1660–61, 1669.

41. NAT'L ACADEMY OF PUB. ADMIN., *supra* note 18, at 11. Looking back to 1965, the time from Inauguration Day to final confirmation of each presidential advice-and-consent appointee accelerated from about six weeks for Lyndon Johnson (which is no doubt an outlier given his earlier tenure in office following John F. Kennedy's assassination) to nine weeks for Richard Nixon, eleven weeks for Gerald Ford, twelve weeks for Jimmy Carter, and fourteen weeks for Ronald Reagan.

42. O'Connell, *supra* note 35, at 1678.

I would argue that O’Connell’s sobering data actually understate the delays. She can count only the time elapsed between the President’s formal nomination of a candidate and final confirmation, or the lack thereof. But there is an invisible process that involves presidential vetting in the weeks and months before a nominee is announced, and it is extensive.⁴³ No one knows quite how long this process lasts—nor how many people are offered a post before someone finally accepts—but it is almost certainly a long process, and is no doubt intrusive. The Obama administration’s pre-nomination questionnaire not only asks about anything that might embarrass the nominee, the nominee’s family, and the President, but it also contains many questions linked to past appointee and even vice-presidential scandals, including a request for all “handles” a potential nominee has used to “communicate on the Internet,” and one question about gun ownership and usage that is almost certainly related at least in part to Vice President Dick Cheney’s 2006 shotgun mishap.⁴⁴

O’Connell lingers briefly on the sources of delay, but it is up to University of Michigan Professor Nina A. Mendelson to explore what she calls the “uncertain effects” of Senate delays on executive agencies.⁴⁵ One could argue that many Senate-confirmed appointees eventually “go rogue” on the President, and Mendelson is absolutely right to argue that the lack of swift appointment undermines democratic accountability. Even though Mendelson acknowledges the bad news contained in this issue, she suggests that there might be a silver lining somewhere in the presidential appointments cloud.⁴⁶

Mendelson pursues the argument with some of O’Connell’s data. For starters, confirmation delays are not evenly spread across appointees.⁴⁷ Department secretaries are usually confirmed within the first month or so of an administration, and deputy secretaries move

43. See Philip Rucker, *Potential Obama Appointees Face Extensive Vetting*, WASH. POST (Nov. 18, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/11/17/AR2008111703037.html>.

44. See, e.g., Anne E. Kornblut, *Cheney Shoots Fellow Hunter in Mishap on a Texas Ranch*, N.Y. TIMES (Feb. 13, 2006), <http://www.nytimes.com/2006/02/13/politics/13cheney.html> (describing an accident in which then-Vice President Dick Cheney accidentally fired his shotgun at lawyer Harry Whittington during a quail-hunting trip).

45. See generally Nina A. Mendelson, *The Uncertain Effects of Senate Confirmation Delays in the Agencies*, 64 DUKE L.J. 1571 (2015).

46. *Id.* at 1574.

47. *Id.*

almost as quickly.⁴⁸ As a result, the delays fall heaviest on the lower-level appointees at the undersecretary, assistant-secretary, and administrator ranks, and their equivalent ranks in independent agencies. Most of these lower-level jobs are easily filled, moreover, and (I might argue) should be filled by career members of the Senior Executive Service.

Mendelson also notes that the delays do not rain on all department and agency silos. Implementation of well-established programs such as Social Security and Medicare can handle most delays with ease—their administrative systems are generally strong, and careerists are well trained to operate the levers without much direction. Regulatory activity is much more sensitive both to delays and external lobbying. Decapitating a regulatory agency such as the Environmental Protection Agency can have enormous effects in delaying regulatory development.⁴⁹

The silver lining does not reside in this procedural inequality, however, but in the President's role in leading the executive branch. Mendelson implies that Presidents may not have any less control over the execution of the laws simply because intermediate layers of appointees are missing.⁵⁰ Moreover, the confirmation delays may actually create a de facto layering of the federal bureaucracy's bloated hierarchy. Presidents have long believed that more layers of leaders, and more leaders per layer, equal near-absolute bureaucratic control. But, as I have long argued in my work on the thickening of government, the reality is exactly the opposite. Additionally, Mendelson reminds us that the 1868 Vacancies Act, as amended in 1988 and 1998, gives the President ample incentive to appoint career officers to fill vacant posts, which is almost always a good thing from my perspective.⁵¹

Having more leaders increases the distance between the top and bottom of agencies, which increases the vulnerability to bureaucratic

48. See ANNE JOSEPH O'CONNELL, CTR. FOR AM. PROGRESS, WAITING FOR LEADERSHIP: PRESIDENT OBAMA'S RECORD IN STAFFING KEY AGENCY POSITIONS AND HOW TO IMPROVE THE PROCESS 1 (Apr. 2010), available at https://cdn.americanprogress.org/wp-content/uploads/issues/2010/04/pdf/dww_appointments.pdf (noting that the previous five administrations filled their cabinets faster than President Obama by a month, but that even his secretaries were in place by the end of April, 2009).

49. See, e.g., Mendelson, *supra* note 45, at 1591 (describing apparent need for lengthy OIRA review of the EPA's "waters of the United States" rule).

50. See, e.g., *id.* at 1582 (observing that appointment delays do not often leave the agency politically headless).

51. *Id.* at 1584–85.

breakdowns, such as the 2014 Department of Veterans Affairs waiting-list scandal. Indeed, I am convinced that the department's secretary, Eric Ken Shinseki, was telling the truth when he told Congress that he did not know of the delays. How could he? The decisions were being made fifteen to twenty layers below him, with all of the associated opportunities for obfuscation and outright lying.

Having explored the inventory of despair in the presidential appointments literature, Mendelson actually gives us a bit of hope, particularly those of us who worry about bureaucratic sclerosis. Her work should be required reading for any scholar preparing to write an angry criticism about the current process, not because she forgives the delays and harassment, but because she helps readers understand the little-understood impacts of a sluggish system on administrative design. This is not to suggest that Mendelson is an advocate of what I have called a "neck-less government" filled with unoccupied positions, but she has created enormous traction here on how Presidents behave. Imagine if the Obama administration had to talk to careerists before launching *healthcare.gov*. The launch might have turned out very differently.

The logic of this issue concludes with a deep review of causes, consequences, and solutions from Columbia University Professor Gillian E. Metzger.⁵² Although the title of this foreword suggests that today's complaints about delays have a "been there, done that" feel, she is quite right to see some kind of confluence of concern coming together today. And this concern just might be enough to spark another run at reform in the next year or so. After all, the last two years of a two-term presidency have long been a staging ground for major administrative reforms.⁵³ Flush with confidence about the coming presidential election, both parties have some incentive to find common ground on appointments reform.

If so, Metzger provides ample argument for action. After reviewing the appointments issue from a judicial and executive perspective, she tackles the role of partisan polarization in spurring innovation in governance.⁵⁴ She supports this novel argument with a strong inventory of evidence that includes innovations such as the use

52. See generally Gillian E. Metzger, *Appointments, Innovation, and the Judicial-Political Divide*, 64 DUKE L.J. 1607 (2015).

53. See, e.g., PAUL C. LIGHT, *THE TIDES OF REFORM: MAKING GOVERNMENT WORK, 1945-1995*, at 90-130 (1997).

54. Metzger, *supra* note 52, at 1630-36.

of the reconciliation process to drive major legislation untouched through the minefield of potential filibusters.⁵⁵ Although last year's shutdown-avoiding "cromnibus" is not on her list of innovations, the combination of a short-term continuing resolution (cr) and a long-term appropriations package (omnibus) was no doubt a clever respite from frustration.

Metzger's concern is that the current judicial-political divide will render such innovations constitutionally suspect. She does note the salutary effects of the divide in preventing the perversion of the constitutional structure for partisan advantage, but ends with a stern warning that the courts could intervene in ways that might amplify the effects of polarization.⁵⁶ Innovation is not just good for economic growth, one might argue, but also quite helpful in generating agreement, if not comity. Alas, she writes that the Supreme Court's recent decisions suggest an anti-innovation bent, which could undermine legitimate action on reforms aimed to address forms of polarization that may well be even worse than they look.⁵⁷

Read in order from past to present to future, these five articles raise important concerns, provide essential historical and textual context, and even create a glimmer of hope for reformers. All is not an accident, nor is all an unmitigated disaster. The authors also strongly suggest that continued innovations designed to accelerate the process and reinforce the take-care duty may encounter a dubious Supreme Court. Although the Court is no doubt performing well as a constitutional overseer, there has to be something more than minor tinkering with the current appointments process. Perhaps the Senate and the President will actually sit down to bargain in the old-fashioned way, but do not be surprised if they use an extra-constitutional conference committee to achieve agreement with a fiery House. One can only wonder whether the Court might opine on that ancient innovation if given the chance. If so, I believe the Court would be stepping well outside its own role in a separation-of-powers system.

55. *Id.* at 1633.

56. *Id.* at 1636-43.

57. *Id.* at 1619-20.