

TOWARD A COMPREHENSIVE UNDERSTANDING OF THE FEDERAL APPOINTMENTS PROCESS

MICHAEL J. GERHARDT*

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* Professor, Case Western Reserve University School of Law. I am grateful to the participants in the faculty workshops at Brooklyn Law School, Cardozo Law School at Yeshiva University, Emory University School of Law, and Rutgers-Camden Law School, and especially Hal Bruff, Walter Dellinger, Chris Eisgruber, Jonathan Entin, Jill Fisch, Michael Herz, Ron Kahn, Neal Kinkopf, John McGinnis, Bill Marshall, Michael Stokes Paulsen, David Rudensine, Deborah Schwartz, and Peter Shane for their helpful comments on earlier drafts. I am also grateful to Carrie Menikoff, Class of 1996 at Case Western Reserve University Law School, and to Bill Blaine and Paul Walker, both members of the Class of 1998 at The College of William & Mary Law School, for their exemplary research assistance.

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I. INTRODUCTION

Surprisingly little of the voluminous literature on the federal appointments process is of lasting value. Legal scholars have not identified, much less developed or employed, the essential tools for constructing a comprehensive analysis of that process. Instead, they have tended to analyze the system anecdotally or focus in an ad hoc fashion on isolated aspects of especially dramatic incidents or episodes that otherwise interest them or suit their purposes.¹ At their most useful, legal commentators on

1. See, e.g., STEPHEN L. CARTER, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS 23-28, 37-44, 134, 138-44, 187-88 (1994) (discussing the ways in which Zoe Baird, Lani Guinier, and Anita Hill were abused in the confirmation process); LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME

the federal appointments process have offered significant insights into or analyses of certain aspects of particular episodes or controversies,² such as the personalities or personal ambitions, quirks, or qualities of the presidents, senators, nominees, or other major characters involved in notorious or dramatic incidents. But such analyses have failed, more often than not, to provide the means for systematic comparative evaluations of the performances of the major participants in the appointments process from different historical periods. Nor have these studies explained, or provided the means for developing widespread academic and public understanding of, the broader political, legal, and historical contexts in which federal appointments matters have occurred. Moreover, legal commentators are commonly preoccupied with president-Senate interaction pertaining to judicial selection, particularly with the system for choosing Supreme Court justices, due to concern about the risk posed to judicial independence by Senate inquiries into the likely ideologies of judicial nominees.³ This focus, though, ignores the relationships between such hearings and other judicial confirmation proceedings and between the nomination and confirmation processes for other kinds of officials.

The purpose of this Article is both to identify and to integrate the essential components of a comprehensive understanding or

COURT JUSTICES SHAPES OUR HISTORY 107-10 (1985) (suggesting in the midst of a relatively long period of Republican dominance of the Supreme Court selection process that history justifies a more vigorous Senate inquiry into the likely ideologies of judicial nominees); David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1494-1502 (1992) (arguing that after twelve consecutive Republican appointments to the Supreme Court, the Senate is constitutionally entitled to pressure the president into appointing less-conservative justices for the sake of restoring ideological balance to the Court); see also PAUL SIMON, *ADVICE & CONSENT: CLARENCE THOMAS, ROBERT BORK AND THE INTRIGUING HISTORY OF THE SUPREME COURT'S NOMINATION BATTLES 295-98* (1992) (praising President Ford's method of appointing Supreme Court justices); TRIBE, *supra*, at 130-31 (suggesting that the Senate should assume a more active role in the appointment process); Victor H. Kramer, *The Case of Justice Stevens: How to Select, Nominate, and Confirm a Justice of the United States Supreme Court*, 7 CONST. COMMENTARY 325 (1990).

2. For some of the most thorough and insightful works on the federal appointments process, see HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* (3d ed. 1992); SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* (1997); JOSEPH HARRIS, *THE ADVICE AND CONSENT OF THE SENATE: A STUDY OF THE CONFIRMATION OF APPOINTMENTS BY THE UNITED STATES SENATE* (1953); Calvin R. Massey, *Getting There: A Brief History of the Politics of Supreme Court Appointments*, 19 HASTINGS CONST. L.Q. 1 (1991).

3. See, e.g., CARTER, *supra* note 1, at 99-112.

analysis of the federal appointments process. This undertaking contrasts with the approach of those conventional legal commentators who have become preoccupied with the details of the appointments process, particularly those that reinforce their personal or political agendas, and consequently have missed the larger picture.⁴ Indeed, a comprehensive understanding of how this system operates requires taking the same kind of posture one should assume in trying to appreciate impressionist artwork. If one stands too close, George Seurat's "Sunday in the Park," for example, looks like a mass of colored dots. By standing a few feet back—far enough to look at the painting with some perspective—one can appreciate its structure, composition, and organization. Moreover, by examining the painting's location in the gallery, one can see its relationship to significant art from other periods.

The same holds true for the federal appointments process. The purpose of the Article is not to point out the flaws in other studies of the federal appointments process.⁵ Rather, this Article aims to identify the necessary ingredients of a thorough analysis of the process and then to sketch how these components may be pulled together into a theory of the federal appointments process. This undertaking is necessary to explain and evaluate the operations of the federal appointments process, the performances of *all* of the major participants routinely involved in it, either generally or during specific incidents, and the possible nexus between the nominations of and confirmation proceedings for judicial and nonjudicial officials. In addition, such a comprehensive analysis is essential in order to clarify the larger historical, legal, political, and social contexts in which federal appointments have occurred and must be assessed.

4. See, e.g., CARTER, *supra* note 1, at 187-88 (praising the process used by President Ford in making the nomination of Justice Stevens as "[t]he proper model" for avoiding ideologically charged nominations that would have greater potential for provoking the Senate); SIMON, *supra* note 1, at 295-98 (praising the nomination of Justice Stevens as nonpartisan); TRIBE, *supra* note 1, at 108 (praising the nomination of Justice Stevens as "a nicely balanced act of statesmanship" and "a sound choice on his own merits").

5. For my criticisms of other commentaries on the confirmation process, see generally Michael J. Gerhardt, *The Confirmation Mystery*, 83 GEO. L.J. 395 (1994) (reviewing CARTER, *supra* note 1); Michael J. Gerhardt, *Divided Justice: A Commentary on the Nomination and Confirmation of Justice Thomas*, 60 GEO. WASH. L. REV. 969 (1992) [hereinafter Gerhardt, *Divided Justice*]; Michael J. Gerhardt, *Interpreting Bork*, 75 CORNELL L. REV. 1358 (1990) (reviewing ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1989)).

A comprehensive understanding of the federal appointments process has several components. A close examination of the interaction or interrelationship between the factors described above, including structure, history, and politics, provides the foundation for a sounder and more complete descriptive and normative assessment of the system. The examination helps to explain fully the operations of the process, and the normative assessment helps to prescribe ways to avoid the complications endemic to the present system. The Article employs both types of analysis in order to explain and evaluate thoroughly the roles performed within the federal appointments process by presidents, senators, interest groups, the media, and nominees.

The first three Parts of the Article are primarily descriptive, whereas the last two are predominately normative. Part II discusses the original understanding of the constitutional appointments system. The primary significance of this original understanding is that it supports the basic idea that the federal appointments process was designed largely to avoid certain bad appointments rather than to guarantee or facilitate meritorious ones. Part III describes the most significant features of the constitutional structure for making federal appointments. These aspects include: (1) the absence of compulsory procedures for nominating or confirming different kinds of officials; (2) the presumption of confirmation that ensures that the vast majority of a president's nominees will be confirmed by the Senate, although the Senate gains the advantage of the uncertainty as to which nominees (and on what grounds) it will oppose; (3) the president's possession of the initiative for shaping and energizing the national government; and (4) the pressure on presidents and senators to reach consensus on most federal appointments or risk being held politically accountable for helping paralyze the functioning of the national government.

Part IV examines the two primary ways in which post-ratification history can enrich our understanding of the operations of the federal appointments process. The first of these is through examination of social and political developments that have complicated the operations of the federal appointments process. These developments have turned modern confirmation proceedings into multi-textured events. These complications have not precluded, however, inquiry into a second way in which history can enhance our appreciation of

the operations of the appointments process: A close reading of past practices, which reveals important patterns. Most notably, the basic reasons presidents and senators have had for making, opposing, or supporting nominations, as well as the sequence in which they have taken these reasons into account, have remained constant throughout American history.

Part V provides the means for fully coming to terms with the political dynamics of the federal appointments process. This undertaking is an essential step in developing the appropriate criteria for evaluating fully the performances of all of the major actors routinely involved in the federal appointments process. Two means for making such evaluations are available. The first method, particularly popular with the media and legal scholars, is personalizing the process. The most sophisticated form of this method is game theory.⁶ This approach measures presidents and senators primarily in terms of their personal traits or qualities, such as popularity, character, convictions, intelligence, political acumen, and goals. Moreover, it illuminates the passive and active roles performed by nominees in the appointments process. The major problem with this approach, however, is that it fails to provide meaningful comparative analysis because it treats every difference in performance as resulting from personal characteristics or attachments and neglects to explain the most significant trends in the appointments process.

The second method of evaluation is institutional analysis. This approach evaluates the performances of major political leaders in terms of their power (or duties and available resources) and their authority (or warrants) for changing the constitutional order.⁷ Institutional analysis enables one to determine whether outcomes are attributable to personal actions or traits or to structure, management, and organization. In contrast to the personalized approach, institutional analysis allows comparison of the performances of presidents and senators from different historical periods because the institutional concerns of both the presidency and the Senate have changed little over the course of

6. See *infra* notes 148-50 and accompanying text.

7. For overviews of institutional analyses of political leadership, see JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* (1987); *THE PRESIDENCY IN THE CONSTITUTIONAL ORDER* (Joseph M. Bessette & Jeffrey Tulis eds., 1981); Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 *GEO. L.J.* 347, 348, 353-55 (1994); Stephen Skowronek, *Order and Change*, 28 *POLITY* 91 (1995).

American history. Perhaps most importantly, institutional analysis measures presidential success by the breadth of a president's ambitions for long-term changes in constitutional orderings (or relationships between governmental institutions with each other and the citizenry). The more a chief executive's ambitions are weighted in favor of changing existing governmental operations or arrangements (or the public's understanding of them), the more formidable the obstacles to be faced in order to achieve the preferred agenda, and the more impressive the achievement. Hence, the appointments process may become a notable venue for facilitating or impeding a president's realization of his broader agenda.

Institutional analysis in the form of public-choice theory helps to demonstrate the necessity of examining the motivations and actions of individual senators in order to understand Senate operations.⁸ Institutional analysis also clarifies different administrations', senators', and interest groups' manipulations of different factors in order to trigger support for or opposition to various nominations: identifying nominees with the presidents nominating them; transforming nominees' private traits into public liabilities or strengths; and developing support from the press and from internal institutions. Presidents and senators have used these factors in relatively similar ways to facilitate or impede both judicial and nonjudicial nominations.

Part VI explores the final component of a comprehensive theory of the federal appointments process—whether serious reform is needed. This inquiry requires three steps. The first uses historical and institutional analyses to uncover the likely prospects and requirements for change, and the second assesses the degree to which these conditions can be met by two of the most popular suggestions for reforming the federal appointments process—curtailing the testimony of Supreme Court nominees in confirmation hearings, and crafting legislation to clarify the requisite qualifications for various confirmable posts. Assessing the viability of the latter requires examining the kinds of analyses appropriate for assessing the constitutionality of statutory alterations to the appointments process. Part VI concludes that structural reform of the federal appointments process has rarely been achieved because the

8. See *infra* notes 148-50 and accompanying text.

president and the Senate, as institutions, each have significant investments in the status quo. This historical insight into the institutional dynamics necessary for change is crucial for charting the future course of the federal appointments process. In the final analysis, presidents and senators will agree to change only if doing so is in their mutual institutional interests. Only when the necessary conditions for reform have been met is it appropriate to assess the structural and political implications of changing the federal appointments process.

II. THE ORIGINAL UNDERSTANDING OF THE FEDERAL APPOINTMENTS PROCESS

The Framers' and Ratifiers' debates over the Appointments Clause⁹ illuminate the fundamental purposes of the federal appointments process. Ascertaining the link between these intentions and the basic structure of the federal appointments process is crucial for assessing both the quality of the system's design and its effectiveness.

The original understanding of the federal appointments process has already been fully canvassed elsewhere.¹⁰ Its primary relevance as a component of a comprehensive analysis of this system is its illumination of the Framers' basic aims in devising the process. Contrary to the assumption of many of its critics, the Framers did not design this system to ensure the appointments of the best-qualified people to important governmental offices. Rather, the Framers' primary concern in designing the system was to preclude certain kinds of abusive or inappropriate appointments.¹¹ Some Constitutional Convention delegates were primarily concerned with developing a system that would protect against legislative tyranny,¹² whereas many

9. The Appointments Clause provides in pertinent part that the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States . . ." U.S. CONST. art. II, § 2, cl. 2.

10. See, e.g., NEIL D. MCFEELEY, *APPOINTMENT OF JUDGES: THE JOHNSON PRESIDENCY* 10-27 (1987); HARRIS, *supra* note 2, at 17-35; James E. Gauch, Comment, *The Intended Role of the Senate in Supreme Court Appointments*, 56 U. CHI. L. REV. 337 (1989); John O. McGinnis, *The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 TEX. L. REV. 633 (1993).

11. See generally HARRIS, *supra* note 2, at 17-35; 1 GEORGE H. HAYNES, *THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE* 23-24 (1960); Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146, 1147 (1988).

12. See HARRIS, *supra* note 2, at 20-24.

others were concerned mostly with preventing monarchic despotism.¹³ The groups came together in the last days of the Convention to approve a compromise, embodied in the Appointments Clause, that seeks to protect against the appointments of presidential cronies and legislative flunkies.¹⁴

Proponents of the Appointments Clause in the Constitutional Convention and state ratifying conventions repeatedly assured opponents and skeptics that the Senate would lack the political will to oppose the president repeatedly by defeating a series of the president's nominees to a particular office.¹⁵ In other words, the Clause rests on the assumption that an influential or controlling faction of the Senate would find it difficult, if not impossible, to hold steady in its opposition to presidential nominees. The Framers expected that in a prolonged contest with a president to fill a particular position, the different priorities of the many members of a resistant coalition would eventually overwhelm the bonds joining them in opposing the president's choices and thus ultimately would fracture their opposition. Moreover, the Framers expected that the divergent interests of senators and the largely defensive posture to which the Appointments Clause consigned the Senate would hinder its ability to dictate that the president appoint a particular individual to a certain post.

Furthermore, in designing the Constitution, the Framers believed that two kinds of politics would drive the relationship between the president and the Senate—both generally and on appointments matters.¹⁶ One type was the popular conception of

13. *See id.*

14. Only in the closing days of the Convention did these paths converge in the compromise embodied in the Appointments Clause. *See, e.g.,* FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 228, 255, 272 (1985); 13 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 346 (John P. Kaminski & Gaspare J. Saladino eds., 1981) (recounting George Mason's complaint to Thomas Jefferson about "the precipitate, & intemperate, not to say indecent Manner, in which the Business was conducted, during the last Week of the Convention"); Gauch, *supra* note 10, at 342. This compromise sought to ensure a federal appointments process that provided for public accountability and an energetic national government while avoiding tyranny and intrigue. The problem with the compromise, however, is that it has been difficult, if not practically impossible, to achieve all of its different aims in all or even any particular case.

15. *See, e.g.,* THE FEDERALIST NOS. 66, at 405; 76, at 457; 77, at 460 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* HARRIS, *supra* note 2, at 27-28.

16. *See* Freund, *supra* note 11, at 1157; *see also* Gerhardt, *The Confirmation Mystery*, *supra* note 5, at 407-08, 431; *cf.* MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 10 (1996) [hereinafter GERHARDT,

politics: short-sighted, partisan, and devoted to self-interested dealmaking or maneuvering. The second kind was the loftier, Aristotelian sense of politics: a grander, more high-minded, ennobling endeavor that tested the participants' virtue or character, challenging them to rise above considerations of political advantage and move toward a truer and better conception of the public good.¹⁷ The Framers envisioned that presidents and senators would generally prefer to follow the latter vision of politics in making their respective decisions about federal appointments. The president would do so as the only federal official elected by all of the people of the United States—the only national leader with a potentially genuine national mandate.¹⁸ Senators, because they had longer terms and were elected by state legislatures rather than directly by the people, would be disposed to overcome the presumption of confirmation only if they could articulate compelling reasons for rejecting a nominee.¹⁹ The structure the Framers designed was intended to make this vision of the appointments process a reality.

III. THE STRUCTURE OF THE FEDERAL APPOINTMENTS PROCESS

An attempt to clarify the relevant constitutional structure is also necessary in order to assemble a comprehensive theory of the federal appointments process. This Part will appraise the relationships created by the Appointments Clause in order to assess the resulting balance of power among the branches of government.

A. *The Significance of a Single Appointments Clause*

The Constitution establishes a single mechanism for federal appointments requiring presidential nomination and Senate

IMPEACHMENT PROCESS] (suggesting that the Framers expected a similar political mix to drive the impeachment process).

17. See generally MICHAEL J. GERHARDT & THOMAS D. ROWE, JR., CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES 259-68 (1992) (reviewing the general literature on the republican influences on the origins of the Constitution); cf. Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1548 (1988).

18. See McGinnis, *supra* note 10, at 650.

19. See THE FEDERALIST NOS. 76, at 457; 77, at 461 (Alexander Hamilton) (Clinton Rossiter ed., 1961); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 791 (Ronald D. Rotunda & John E. Nowak eds., 1987); see also McGinnis, *supra* note 10, at 636, 651-56 (arguing that the Framers' intent allows for Senate rejection of nominees only for "special reasons" rather than for reasons of partisanship).

confirmation. To paraphrase Justice Stevens,²⁰ there is only one Appointments Clause. The same clause and the same constitutional structure apply to all federal appointments.

The uniformity of the constitutional language and design has at least two significant implications for the balance of power between the president and the Senate. First, the structure does not provide explicit recognition of any exceptions, particular procedures, or special accommodations that must be reached between the president and the Senate in the course of making and ratifying different kinds of federal appointments. The Appointments Clause plainly sets forth one basic mechanism: the president will make nominations, and the Senate will confirm or reject nominees. This mechanism applies broadly, regardless of the kind or extent of power to be held by the officials being appointed. The president and the Senate are free to develop, to their mutual satisfaction, special procedures for appointing different kinds of federal officers. Such arrangements, however, are not binding on subsequent presidents, senators, or citizens. If, for example, a senator thinks that Supreme Court nominees, because of the special powers they would wield in office if confirmed,²¹ ought to meet a special burden of proof in order to be confirmed, this senator's only recourse is to convince a critical mass of other senators to agree to this special procedure. Even if enough do agree, no formal mechanism exists for ensuring that every senator applies the appropriate burden of proof; therefore, the enforcement of such a standard would likely be impossible in practice, even if it violated no constitutional stricture.²²

20. Cf. *Craig v. Boren*, 429 U.S. 190, 211 (1976) (Stevens, J., concurring) ("There is only one Equal Protection Clause.").

21. For example, in the Senate debate over Clarence Thomas's nomination to the Supreme Court, then-Senators Al Gore and Paul Simon argued that the burden of persuasion in a Supreme Court confirmation proceeding should be on the president, the nominee, or both, to demonstrate that the person nominated merited a seat on the Supreme Court. See Gerhardt, *Divided Justice*, *supra* note 5, at 993 (citations omitted). Senator Simon maintained further that "the benefit of the doubt" regarding a Supreme Court nominee should be resolved in favor of "the people of this country" and the Constitution." *Id.* (quoting *Senate Debate on the Nomination of Judge Thomas*, Federal News Service, Oct. 15, 1991, available in LEXIS, Nexis Library (remarks by Senator Paul Simon)).

22. Cf. GERHARDT, *IMPEACHMENT PROCESS*, *supra* note 16, at 113 (pointing out the difficulties of enforcing uniform rules of evidence or a uniform burden of proof in impeachment proceedings); Michael J. Gerhardt, *Rediscovering Nonjusticiability: Judicial Review of Impeachments after Nixon*, 44 DUKE L.J. 231, 267 (1994) (same).

The uniform constitutional design for all federal appointments raises a question about the comparative competency of the president and the Senate in selecting different kinds of officials. By its allocation of appointments authority, the Appointments Clause makes the implicit assumptions that the president will be able to make nominations efficiently and that the Senate will be proficient at making confirmation decisions about the qualifications of those nominees. The Clause's allocation of authority means that both the president and the Senate will be involved with a wide variety of appointments. Indeed, at present there are more than three-thousand Article III judgeships and high-level political executive positions that are subject to the nomination-and-confirmation process.²³

The critical question is whether the assumptions underlying the Appointments Clause—regarding the comparative institutional operations, performance, and functions of the president and the Senate—make sense. Many of the officials for whose appointments the president and the Senate will share responsibility exercise very specialized functions. It is not likely that presidents and senators will be experts in the skills necessary to perform these functions. Nor is it likely that presidents or senators will be able to give each federal appointment an equal level of attention. Consequently, presidents and senators will have to rely on numerous experts to advise them on the fitness of candidates to perform those specialized tasks. The Constitution is silent as to who will perform these advisory functions. Yet it is obvious that the choice of advisors by a president or senator is as important as the president's choices about whom to appoint.

Moreover, a serious question exists as to the advantages of making the president or the Senate or both responsible for every federal appointment. Is it worth the time, energy, and political capital of the president or the Senate for those individuals to become involved in the logistics or technicalities

23. See ROGELIO GARCIA, CONGRESSIONAL RESEARCH SERVICE, POLITICAL APPOINTEE POSITIONS: TYPE AND NUMBER (1995); Christopher J. Deering, *Damned If You Do and Damned If You Don't: The Senate's Role in the Appointments Process*, in *THE IN-AND-OUTERS: PRESIDENTIAL APPOINTEES AND TRANSIENT GOVERNMENT IN WASHINGTON* 102-104 (G. Calvin Mackenzie ed., 1987) [hereinafter *IN-AND-OUTERS*]; Linda L. Fisher, *Fifty Years of Presidential Appointments*, in *IN-AND-OUTERS*, *supra*, at 1, 4, 5, 8.

of filling certain positions? It is hard to imagine the president and the Senate even attempting to exert an equal amount of effort in filling each of the offices they are constitutionally responsible for filling.

B. *The Presumption of Confirmation*

The Constitution also establishes a presumption of confirmation that works to the advantage of the president and presidential nominees. By requiring only a simple majority of the Senate to approve a nominee, the Constitution sets a low threshold for confirmation relative to virtually all other significant legislative action, which must satisfy much stiffer procedural requirements. The passage of laws requires the concurrence of both houses of Congress and the president's signature (or, if vetoed, a two-thirds override); ratification of treaties requires the approval of at least two-thirds of the Senate; and the removal of high-level political officers and federal judges requires the agreement of a majority of the House (to approve impeachment) and at least two-thirds of the Senate (for removal and disqualification).²⁴ As a practical matter, the requirement of a bare majority of the Senate for confirmation means that smaller factions cannot thwart a presidential nomination in the absence of special Senate procedures empowering individual senators, or some special subset, with the necessary authority.

Also contributing to the presumption of confirmation is the Constitution's conferral of nomination power in one person and grant of confirmation power to an assembly. By placing the nomination power in an individual president with a national mandate, the Appointments Clause gives to the executive a substantial advantage over the Senate, a diffuse legislative body. The Appointments Clause puts a "political burden on the Senate [that] makes it difficult [for the Senate] to successfully oppose a president of ordinary political strength for narrow or partisan reasons."²⁵ The problem for the Senate is that sustained opposition is difficult for a large body in a prolonged contest with a unitary executive.

24. See generally GERHARDT, *Impeachment Process*, *supra* note 16, at 9-10.

25. McGinnis, *supra* note 10, at 653.

The Senate's defensive posture in the appointments process also favors the confirmation presumption. As a structural matter, the Senate lacks the formal means to take the lead in the nomination or initial stages of the appointments process; indeed, it is largely confined to exercising a veto.

Further, a nominee, once named, is clothed with an aura of respectability, credibility, and presumptive merit, which remains unless a critical mass of senators can prove it unwarranted. Consequently, the focus in the Senate necessarily is less on a nominee's merits than on potentially disqualifying factors.²⁶ Generally, if the case against confirmation cannot be made to the satisfaction of a majority of senators, a nominee secures confirmation.

The existence of this presumption suggests that the percentage of a president's nominees who are actually confirmed is not a worthy basis for evaluation of presidential performance. The structure is set up to ensure a high presidential success rate. Thus, the issue is not whether most of a president's nominees will be confirmed; rather, the question is which nominees will encounter difficulties. Because it is not possible for the Senate to give all presidential nominees the same degree of scrutiny, the Senate must determine which are worth scrutinizing closely or contesting.²⁷ As noted above, a president's uncertainty over which of his nominees—and how many—will encounter confirmation difficulties is the Senate's most important leverage in the federal appointments process. Obstructing presidential nominations almost certainly will not be cost-free to senators, but it is unlikely that a president can afford to lose more than a few confirmation contests with the Senate without sustaining some political damage. Consequently, this knowledge is bound to encourage senators who are interested in causing such damage from doing so by picking

26. Professor Carter identifies the focus on disqualifying factors as a major problem with the confirmation process. See CARTER, *supra* note 1, at 159. Though Professor Carter does not acknowledge it, this focus is a product of the constitutional design of the process.

27. Traditionally, commentators have concluded that the Senate scrutinizes judicial candidates more closely than it scrutinizes nominees to executive or administrative offices. See, e.g., TRIBE, *supra* note 1, at 78. This Article argues, however, that the appointments process as a whole provides a venue for interaction between the institutions of the presidency and the Senate as managed by particular people at particular times for the sake of implementing or realizing a well-defined constitutional agenda, of which judicial appointments are only a part.

more than a few high-profile contests with presidential nominees. Moreover, a president who fears opposition, but does not know on what basis that opposition will come, will be disposed to be more circumspect than otherwise in making appointments.

C. *Agenda-Setting*

The federal appointments process is a mirror image of the traditional lawmaking structure. Whereas Article I empowers the Congress to set the legislative agenda, the Appointments Clause grants agenda-setting power to the president on appointments matters. This power enables the president to be proactive in filling influential federal offices with people committed to his political or constitutional views.

This distribution of power grants presidents a potentially enormous influence over the direction of judicial decisionmaking through nomination of federal judges.²⁸ The Senate's influence is exercised in accepting or vetoing the president's choices. Thus, a president holds the structural advantage for influencing the exercise of judicial power.

The nomination power also enables the president to imprint presidential priorities or views onto the policymaking process through the appointments of every "Officer of the United States,"²⁹ many of whom wield significant policymaking authority. For instance, through the nominations of all U.S. Attorneys, a president may influence the enforcement of the federal criminal laws by, for example, helping to determine which laws are enforced more vigorously and by which level of government. Presidents are also potentially able to dominate the policymaking functions performed within administrative agencies through their nominations of agency heads.

28. Of course, this power is subject to various countervailing political forces, including, but not limited to, congressional authority to preempt it by abolishing at least some vacant federal judgeships before the president has been able to fill them. See MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 21-24 (1980).

29. The Supreme Court has considered the question of who qualifies as an "Officer of the United States" on several occasions, but it has yet to resolve the issue definitively. See *Weiss v. United States*, 510 U.S. 163 (1994); *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991); *Morrison v. Olson*, 487 U.S. 654 (1988); *Young v. United States ex rel. Vuitton*, 481 U.S. 787 (1987); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); *Myers v. United States*, 272 U.S. 52 (1926); *Ex Parte Siebold*, 100 U.S. 371 (1879).

D. *Consensus*

Another noteworthy feature of the constitutional structure for making federal appointments is that its allocation of authority puts pressure on the president and the Senate to reach accord on how to fill most federal offices and thereby ensure the continued functioning of the national government. Consensus is conceivable as long as the president and the Senate recognize two facts. The first is that each will be held politically accountable if it slows the functioning of the national government, for example, by frustrating or complicating the filling of federal offices, or by preventing the offices from remaining fully staffed and operational. The more powerful or high-profile a vacant office, the greater the potential costs paid by the party responsible for keeping it empty. The second fact is that the Senate ought to deliberate carefully about whether to obstruct the president's choices because of the high odds of failure and the high costs both to the institution and to individual Senators.

IV. HISTORICAL CHANGES AND PATTERNS

Post-ratification history—that is, the actual practice of presidents and senators with regard to the nomination process, occurring after the ratification of the Constitution—is another major component of a comprehensive theory of the federal appointments process. Two aspects of this history shed light on the operations and dynamics of the federal appointments process: (1) the social and historical developments affecting federal appointments; and (2) the patterns or past practices within the federal appointments process. This Part examines the significance and implications of each of these aspects of history in order to complete a descriptive analysis of the federal appointments process.

A. *Historical Developments*

Several significant post-ratification developments have helped to clarify and shape the allocation of power among, the relationships between, and the internal organizations of the principal actors routinely involved in appointments matters. These developments are: the rise and partial decline of political parties; the increase in the size and influence of the national

government; the evolution of Senate procedures and committee structures; the growth of organized interest groups; and the expanding media coverage of the federal appointments process. Each of these developments has affected the way in which the president and the Senate have constructed their internal organizations for making administrative and other kinds of decisions; each has also affected president-Senate interaction on federal appointments matters.

1. *The Decline of Political Parties*

Political parties began to take shape during the second term of George Washington's presidency, and party differences culminated in an intensely partisan campaign for the presidency in 1796.³⁰ Washington's successor, John Adams, used fierce loyalty to the Federalist party as a criterion for awarding federal appointments.³¹

Two main reasons explain the early and rather persistent dominance of party membership in the federal appointments process. First, appointments make excellent rewards for repayment of a president's or senator's loyal supporters. Second, a nominee's allegiance to a political party often proves to be a useful proxy for his or her political philosophy. One early example of a politician attempting to take advantage of this phenomenon was President John Adams's attempt to stack the federal judiciary with more than fifty loyal Federalists on the eve of the inauguration of his Democratic-Republican rival, Thomas Jefferson.³²

In the Nineteenth Century, political parties functioned principally as an organizational framework for Senate action.³³ In the current century, however, their influence has declined in this area. Several factors explain this diminishing influence, including the establishment of a large federal bureaucracy; the electorate's increasing concern with personality and issues and

30. See HARRIS, *supra* note 2, at 43.

31. See *id.* at 44-46.

32. See generally James M. O'Fallon, *Marbury*, 44 STAN. L. REV. 219 (1992). Jefferson's refusal to honor these appointments precipitated the well-known case of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803), decided six days after *Marbury*, upheld the Republican Congress's abolition of the judgeships created by the prior Federalist majority.

33. See Freund, *supra* note 11, at 1149.

decreasing tendency to identify with a single political party; split ticket voting; the Supreme Court's striking down on First Amendment grounds of most forms of patronage based on party loyalty; the rise of interest groups; major shifts in the composition and agendas of the national parties; and a shift in the source of presidential authority from personality, parties, and interest groups to independent political apparatuses and mass communications technologies enabling direct appeals to the people.³⁴ This shift has meant that the presidential nominations in this century face some different challenges than those posed in previous eras.

In the Nineteenth Century, stronger party organization meant that sustained opposition to presidential nominees was easier. The most dramatic illustration of this phenomenon occurred in the waning days of John Tyler's presidency,³⁵ when the Senate rejected five of the six nominees whom President Tyler had proposed to fill two Supreme Court vacancies. President Tyler's nominees were generally considered by people at the time—including the Whig leadership—to be well-qualified.³⁶ But several Senate factions, each of which included presidential aspirants, despised Tyler and wanted to save the vacancies for whomever was chosen to succeed him in the upcoming presidential election.³⁷ The degree of sustained opposition

34. See generally DAVID R. MAYHEW, *PLACING PARTIES IN AMERICAN POLITICS: ORGANIZATION, ELECTORAL SETTINGS, AND GOVERNMENT ACTIVITY IN THE TWENTIETH CENTURY* (1986) (examining the relationship between factors such as geography, public economy, government assertiveness, and local political party structure over time); MARTIN P. WATTENBERG, *THE DECLINE OF AMERICAN POLITICAL PARTIES 1952-1988* (1990) (presenting a comprehensive statistical analysis of the decline of party voting and identification during the second half of the Twentieth Century); Gary R. Orren, *The Changing Styles of American Party Politics*, in *THE FUTURE OF AMERICAN POLITICAL PARTIES: THE CHALLENGE OF GOVERNANCE* 31 (Joel L. Fleishman ed., 1982); see also Michael Fitts & Robert Inman, *Controlling Congress: Presidential Influence in Domestic Fiscal Policy*, 80 *GEO. L.J.* 1737, 1741 n.13 (1992) (recognizing that the extent and significance of changes in the roles of political parties in public voting behavior is subject to debate); Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms in the Legislative Process*, 136 *U. PA. L. REV.* 1567, 1604 n.114 (1988) (expressing concern among some political scientists that the decline of political parties will diminish a form of "political organization adopted to the mobilization of majorities"); Larry Kramer, *Understanding Federalism*, 47 *VAND. L. REV.* 1485, 1531-37 (1994) (citing several factors that have led to changes in the roles of political parties in campaigns). Yet another development often cited as a factor contributing to the declining influence of political parties in this century is the Seventeenth Amendment. See *infra* notes 58-64 and accompanying text.

35. See ABRAHAM, *supra* note 2, at 106-08; HARRIS, *supra* note 2, at 66-68.

36. See ABRAHAM, *supra* note 2, at 106-07.

37. See *id.*

achieved by President Tyler's detractors probably would have surprised many Framers, who did not anticipate the rise of political parties in the Nineteenth Century.³⁸

In this century, the Senate has been unable to sustain opposition to a president's Supreme Court nominations to the same degree, although it has come close during two short periods. In the early 1970s, the Senate rejected two of President Nixon's Supreme Court nominations before approving a third.³⁹ In 1987, the Senate rejected President Reagan's nomination of Judge Robert Bork to the Court and then helped to force the withdrawal of the next nominee, Douglas Ginsburg, before it approved the third nominee, Anthony Kennedy.⁴⁰

The decline of political parties has coincided with the infusion into the political process of a much broader range of potential influences—personal and otherwise—and factional interests. Consequently, as political parties have declined, partisanship has not. Indeed, partisanship, by which I mean loyalty to some factional interest, still remains a major factor in the appointments process.⁴¹ For instance, in making federal appointments, presidents have increasingly looked to additional indicia of a prospective nominee's political philosophies. Particularly, presidents make judgments based on the amount of support the prospective nominee possesses from interest groups, the nominee's patrons, and the president's own trusted advisers.⁴²

Even in decline, though, political parties have remained among the most powerful factions contending for control of the federal appointments process.⁴³ After close personal association with the president or one of the president's closest friends, significant stature in the president's political party has consistently been an important qualification for many federal

38. See RICHARD L. MCCORMICK, *THE PARTY PERIOD AND PUBLIC POLICY: AMERICAN POLITICS FROM THE AGE OF JACKSON TO THE PROGRESSIVE ERA* 143-96 (1986).

39. See generally JOHN MASSARO, *SUPREMELY POLITICAL: THE ROLE OF IDEOLOGY AND PRESIDENTIAL MANAGEMENT IN UNSUCCESSFUL SUPREME COURT NOMINATIONS* 78-134 (1990).

40. See generally ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* (1989).

41. See Fisher, *supra* note 23, at 13.

42. See James P. Pfiffner, *Nine Enemies and One Ingrate: Political Appointments during Presidential Transitions*, in *IN-AND-OUTERS*, *supra* note 23, at 66-70.

43. See *infra* notes 178-79 and accompanying text.

appointments. In this century, at least eighty-two percent of presidential appointees, either to judicial or nonjudicial offices, legitimately have been able to claim the president's political party as their own.⁴⁴

2. *The Growth of the National Government*

The expansion of the size of the national government and of the scope of presidential authority is another important historical development shedding light on the meaning of the appointments power. To most political scientists and historians, this is old news. Nevertheless, a spate of recent articles⁴⁵ has analyzed the congruity between the original conception of the presidency and its present, expanded status. Regardless of one's opinion on this issue, two related facts are clear. First, it is plain that the United States presently has a presidential rather than a congressional government.⁴⁶ Second, the Appointments Clause has provided an opportunity for shifts in authority to occur.⁴⁷ As the amount of responsibility assumed by the national government has grown, Congress has created more offices requiring presidential nomination and Senate confirmation. Further, as these offices have become more numerous, the president's supervisory and administrative authority has also grown. Under the Appointments Clause, the president has primary responsibility both for choosing the people occupying these new offices and for overseeing their actions.⁴⁸ Thus, the

44. See MCFEELEY, *supra* note 10, at 26, 161; Fisher, *supra* note 23, at 11-14.

45. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1155 (1992); Michael A. Fitts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U. PA. L. REV. 827 (1996); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996); A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346 (1994); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994); Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1 (1993); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994); Michael B. Rappaport, *The President's Veto and the Constitution*, 87 NW. U. L. REV. 736 (1993); see also Symposium, *The Law of the Presidency*, 48 ARK. L. REV. 1 (1995).

46. See FORREST McDONALD, *THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY* 277 (1994).

47. See Flaherty, *supra* note 45, at 1817.

48. See 1 BRUCE A. ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 105-08 (1991); CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 336 (1993); see also Lessig & Sunstein, *supra* note 45, at 93-106.

president now has responsibility for a much larger segment of the government than do the Congress and the Judiciary.

The growth of presidential power has not gone unnoticed by Congress. Indeed, Congress authorized much of the expansion through its power to create new federal offices. In doing so, however, it carefully preserved, whenever possible, the Senate's authority to confirm or reject presidential nominees.⁴⁹ As a practical matter, as more offices are created by Congress, senators have more chances to consult with the president on federal appointments and related legislative matters. Senators also possess more bargaining chips to use in these consultations. Therefore, the potential number of contestable nominations has expanded considerably.

Although the Senate has not in fact rejected or otherwise blocked Supreme Court nominations to the same degree in this century as it did in the last,⁵⁰ it has had available more presidential nominations that could potentially be blocked. Further, a trend is emerging in which the Senate has interfered increasingly with presidential nominations.⁵¹ The interference, particularly over the past two decades, has taken the form of increased opposition to (rather than the outright rejection of) more presidential nominations. The opposition has occurred with particular frequency with respect to judicial nominations and nominations in the areas of national security, the environment, economics, and civil rights.⁵² Moreover, the potential to keep presidential appointees in check exists regardless of whether these appointees have been subject to the Senate's constitutional confirmation authority. Particularly important among Congress's means of interfering have been Congress's oversight and appropriations authorities, which have

49. See Deering, *supra* note 23, at 100, 102-04. See also ABRAHAM, *supra* note 2, *passim*; HARRIS, *supra* note 2, *passim*.

50. In this century, 11 percent of Supreme Court nominations (7 out of 61) have failed thus far. See ABRAHAM, *supra* note 2, at 359. This contrasts rather dramatically with the failure rate of 29 percent (20 out of 70) in the Nineteenth Century. See TRIBE, *supra* note 1, at 142-47. In the Eighteenth Century, the failure rate was 12 percent (2 out of 17). See ABRAHAM, *supra* note 2, at 76.

51. See generally James D. King & James W. Riddlesperger, Jr., *Senate Confirmation of Appointments to the Cabinet and Executive Office of the President*, 28 SOC. SCI. J. 189, 192-95 (1991).

52. See *id.* at 192-99.

been extended to cover virtually every aspect of the executive branch.⁵³

Although this trend of increased opposition might seem to indicate that the Congress is gaining power in the appointments arena, the president has retained an upper hand in the federal appointments process. This is because, although the number of confirmable posts has increased multifold, the Senate's capacity to defeat some portion of the nominees for these posts, during a given legislative session, has remained relatively static.⁵⁴ Although the supposition of presidential ascendancy could be challenged on the ground that senators do not need many chances to thwart or embarrass the president on appointments matters in order to hurt the presidency or help themselves politically, it is clear at least with respect to appointments (if not the separation of powers generally) that the executive, and not the legislature, has become potentially the most dangerous branch.⁵⁵ This is true because the president has unparalleled ability to energize, direct, and shape the national government's performance and agenda through his formal powers, not the least of which is his nominating authority.⁵⁶ This danger is tempered, however, by the fact that the presidency is also the most accountable branch. The president, as a single figure, is watched more closely by the public and by the media than any other government official or institution.⁵⁷

3. *Evolution of the Senate*

A third historical development shedding light on the Appointments Clause is the structural changes that have occurred regarding the election of senators and the operations of the Senate. For example, the Seventeenth Amendment,⁵⁸ passed in 1913, provided for popular election of senators, as opposed to election by state legislatures. This Amendment was the product of the Progressive Era, in which the Senate was

53. *See id.* at 199.

54. *See, e.g., id.* at 102.

55. *See, e.g., Flaherty, supra* note 45, at 1817-28; Paulsen, *supra* note 45, at 223-24.

56. *See Flaherty, supra* note 45, at 1826-28.

57. *See id.* at 1824-25.

58. U.S. CONST., amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof . . .").

widely condemned for being out of touch with the electorate.⁵⁹ Thus, the Amendment was widely viewed at the time as an endorsement of the importance of the popular will in lawmaking.

One obvious effect of the Seventeenth Amendment was to make the Senate's constitutionally imposed duties, such as the confirmation of presidential nominees, subject to popular review, comment, and reprisal.⁶⁰ Although there is no hard evidence establishing precisely how much the Seventeenth Amendment has influenced the kinds of people elected to the Senate or the nature of the Senate's proceedings or activities, this change has surely had at least some effect.

Prior to the Seventeenth Amendment's adoption, conflicts between the president and the Senate during confirmation proceedings were not unusual. Such proceedings were further complicated, on a few occasions, by the control state legislatures exercised over a senator's votes.⁶¹ This control was exerted through "instruction"—the passage of resolutions directing a senator on how to vote on a particular matter⁶²—or through political party channels.⁶³ The Seventeenth Amendment's

59. See Dennis J. Hutchinson, Symposium, *Confirmation Controversy: The Selection of a Supreme Court Justice: A Comment on Danelski*, 84 NW. U. L. REV. 925, 927 (1990); Kris W. Kobach, Note, *Rethinking Article V: Term Limits and the Seventeenth and Fourteenth Amendments*, 103 YALE L.J. 1971, 1976-80 (1994).

60. See generally 2 HAYNES, *supra* note 11, at 1070-83; see also Todd J. Zywicki, *Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment*, 73 OR. L. REV. 1007, 1033-47 (1994).

61. See, e.g., CARL B. SWISHER, ROGER B. TANEY 190-288 (1935) (describing the Senate's rejection of then-Attorney General Roger Taney as secretary of the treasury).

62. See Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500, 517-30 (1996).

63. See *supra* notes 30-44 and accompanying text. President Jackson's ill-fated nomination of then-Attorney General Roger Taney as secretary of the treasury, the first cabinet nomination ever rejected by the Senate, was rejected in part because of the influence of state legislatures. See SWISHER, *supra* note 61, at 190-288. Similarly, the adoption of the Seventeenth Amendment did not save President Woodrow Wilson from a number of confirmation conflicts with the Senate, including one of the most contentious battles over a Supreme Court nomination in the first half of this century: the hotly contested but ultimately successful nomination of Louis Brandeis to the Supreme Court in 1916. See HARRIS, *supra* note 2, at 93-98, 99-114 (recounting President Wilson's difficulties in filling more than a dozen federal positions because of his resistance to patronage, his occasional willingness to consult with Republican senators, infighting within the Democratic party, and the business connections of some of his appointees). The opposition to prospective-Justice Brandeis was largely based on the unpopularity of his social and economic views. See Gerhardt, *Divided Justice*, *supra* note 5, at 975 (discussing Justice Brandeis's and other confirmed justices' contentious confirmation hearings).

passage coincided with the increasing tendency of senators to take stances on legislative matters—including federal appointments—with an eye to how these stances would affect their reelection chances, their popular or political support, and their relationships with the president.⁶⁴ Consequently, the friction between presidents and the Senate over nominations has not subsided after the Amendment's passage.

Beyond the reforms instituted by the Seventeenth Amendment, the Senate has made several important changes in its internal operations and procedures in response to its growing agenda, the television age, and the expansion of presidential power.⁶⁵ Provoked by the decline in power of political parties, the rise of interest groups and factions, and the expansion of media coverage of the Senate since the 1960s, these changes have caused the evolution of the Senate from a collegial body into one dominated by individuals with separate agendas, and from a body deliberating as a whole into one in which delegations of substantial authority regarding agenda setting and scheduling are made by the whole body of the Senate to smaller units within it. These Senate committees, led by their powerful chairpersons, often have a disproportionate influence on debates.⁶⁶ Chroniclers of the rise in presidential power have glossed over these developments. Yet, an understanding of these events is crucial to appreciating the nature and operations of the appointments process.

Only since 1929 has the Senate operated under the rule that its sessions are open to the public unless ordered closed by a majority vote. By contrast, from 1789 until 1929, the Senate with very few exceptions considered all nominations in closed executive session.⁶⁷ The move to public hearings was prompted partly by uncontrollable press leaks about Senate business (mostly by the senators interested in applying public and other pressure to open them) and the desire of many senators to conduct Senate business in public so that the public would be

64. See BARBARA SINCLAIR, *THE TRANSFORMATION OF THE U.S. SENATE* 188-216 (1989).

65. See generally *id.*

66. See *id.* at 102-40, 205-16.

67. See HARRIS, *supra* note 2, at 249-55. Two notable exceptions during this early period were the contentious confirmation hearings for Associate Justices Brandeis in 1916, and for Harlan Fiske Stone in 1925. See *id.* at 103, 117-18.

more aware of its actions. Public hearings have raised the stakes for all concerned in confirmation hearings.

Requiring a nominee to appear personally to testify before the appropriate Senate committee or subcommittee is another major procedural change. The first instance of this practice occurred in 1925. Harlan Fiske Stone, President Calvin Coolidge's attorney general, appeared on his own initiative to answer specific questions posed by Senator Thomas Walsh, a member of the Senate Judiciary Committee, about then-Attorney General Stone's refusal to dismiss an indictment against another senator.⁶⁸ The Senate easily confirmed Justice Stone after he distinguished himself with the reasonableness, candor, and professionalism of his answers. For the next thirty years, nominees appeared intermittently.⁶⁹ One of the most important such appearances during this period was made in 1939 by Felix Frankfurter, who became the first nominee to a high governmental post to answer a Senate Committee's questions fully and in person.⁷⁰ The pattern of Supreme Court and other nominees appearing to answer Senate committee questions firmly took hold, however, in the 1950s.⁷¹ This trend was triggered by the Warren Court's decision in *Brown v. Board of Education*,⁷² striking down segregation of the races in public schools. Southern segregationist senators who dominated the Judiciary Committee demanded that the very next nominee—John Harlan in 1955—appear before the Committee to express his views on desegregation or risk rejection.⁷³ He agreed, and the pattern was set. All subsequent Supreme Court nominees have appeared before the Senate Judiciary Committee and have been questioned about their jurisprudence or opinions about “the hot constitutional issues of the moment.”⁷⁴

The aggrandizement of Senate committees has made it easier for smaller blocs of senators, committee chairpersons, or even individual senators to thwart nominations.⁷⁵ Moreover,

68. See *id.* at 117-19.

69. See CARTER, *supra* note 1, at 58.

70. See HARRIS, *supra* note 2, at 245-47.

71. See CARTER, *supra* note 1, at 58, 65-68.

72. 347 U.S. 483 (1954).

73. See CARTER, *supra* note 1, at 58.

74. *Id.* at 58.

75. See SINCLAIR, *supra* note 64, at 89, 102-04.

numerous procedural mechanisms and Senate rules have been developed that committees and their chairs have frequently manipulated to impede nominations. The first signs of opposition to a nomination usually have surfaced in the Senate Judiciary Committee, which is responsible for conducting preliminary confirmation hearings.⁷⁶ Its members have often tried, with mixed success, to project the image of being more independent and less partisan than their colleagues on other committees, and achievement of this appearance has frequently worked to their political advantage. This nonpartisan stance, when it has been achieved, has been important to the status of the Judiciary Committee and is encouraged and bolstered by the popular conception of an independent federal judiciary.

4. *The Advent of Interest Groups*

The proliferation, especially in the past three or four decades, of organized interest groups is yet another important development. The watershed event signaling the importance of interest groups in influencing noteworthy federal appointments was President Wilson's nomination of Louis Brandeis to the Supreme Court in 1916.⁷⁷ The fight to confirm Justice Brandeis lasted over four months. The main opposition came from big business and a number of prominent Bostonians and the current and six past presidents of the ABA. The opposition questioned prospective-Justice Brandeis's character and judicial temperament, sometimes openly exhibited anti-Semitism, and generally stressed the repugnance of his social and economic views. Labor, consumer groups, and some religious organizations were influential in convincing both the Judiciary Committee and the full Senate to confirm Justice Brandeis. In 1930, organized labor and civil-rights groups joined forces to ensure the Senate's rejection of President Hoover's nomination of Judge John Parker to the Supreme Court.⁷⁸

In the ensuing sixty years, interest groups have grown in number, political strength, and influence over federal

76. See *id.* at 103; see also C. LAWRENCE EVANS, LEADERSHIP IN COMMITTEE: A COMPARATIVE ANALYSIS OF LEADERSHIP BEHAVIOR IN THE U.S. SENATE 22-24 (1991).

77. See generally HARRIS, *supra* note 2, at 99-114.

78. See *id.* at 127-30.

appointments.⁷⁹ This influence has been manifested largely in the campaign donations, lobbying, and other assistance provided by interest groups for the purposes of persuading executive branch officials, including the president, or members of Congress to support the policies favored by these interest groups. Hence, the pressure these groups exert over presidential and senatorial decisions on appointments matters derives from the expectations of the parties that, in exchange for interest group support, presidents will bestow favors, including nominations, on favored interest groups, or that members of Congress will cast votes favoring their preferred groups' interests.⁸⁰ Moreover, interest groups have frequently helped to provide presidents or senators with rhetoric in which to clothe their partisan positions in the nomination and confirmation processes. Interest group activity has also sent messages to presidents and senators about whether there has been sufficient public interest to trigger the groups' support for or against various nominees. High levels of group activity have proven to be an important factor in creating sufficient public sentiment to influence particular nomination or confirmation decisions. Ultimately, the degree of influence wielded by interest groups has depended on how successfully they have exchanged their concerns about a nomination with those of the decisionmaking authorities; the higher the rate of congruence, the greater the influence of these forces over particular appointments.

No case better illustrates the impact of interest groups on a nomination's fate than that of President Reagan's nomination of Judge Robert Bork to be an associate Supreme Court justice in 1987.⁸¹ The Bork nomination faced early, united, and vociferous opposition from the alliance of labor and civil-rights interest groups traditionally tied to the Democratic party.⁸² Feminist and pro-choice groups also joined this alliance, although until the battle over Judge Bork's confirmation, these groups had

79. See Fitts, *supra* note 34, at 1567-70; see generally Martin Shapiro, *Interest Groups and Supreme Court Appointments*, 84 NW. U. L. REV. 935 (1990).

80. This tracks the so-called "exchange" theories of interest-group influence. See generally JOHN E. CHUBB, *INTEREST GROUPS AND THE BUREAUCRACY: THE POLITICS OF ENERGY* (1981); MICHAEL T. HAYES, *LOBBYISTS AND LEGISLATURES: A THEORY OF POLITICAL MARKETS* (1984); KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, *ORGANIZED INTERESTS AND THE AMERICAN DEMOCRACY* (1986).

81. See generally BRONNER, *supra* note 40.

82. See Gerhardt, *Interpreting Bork*, *supra* note 5, at 1387-88.

functioned largely as single-issue interest groups, cutting across party lines.⁸³ They became potent supporters of the Democratic cause in an effort to prevent Judge Bork from tipping the ideological orientation of the Court too far to the right. The participation of these groups signaled to Democrats that the Bork nomination was an occasion for attacking the Republican party for having corrupted the Court. They also persuaded moderate Republicans from marginal constituencies who had feared the potency of this important single issue to oppose Bork's nomination. In the aftermath of Judge Bork's defeat, many conservatives have moved to form their own organizations to counteract the influence of liberal interest groups closely aligned with the Democratic party.⁸⁴

5. *The Media's Expansion*

In the Twentieth Century, the development of new media outlets, including radio, network television, and cable, has expanded news coverage about federal appointments, subjecting the process to increasing public scrutiny.⁸⁵ This increased coverage has had several consequences. It raises the stakes for the nominee and the other political actors involved in the process by making it much harder to downplay missteps;⁸⁶ by pressuring a president to name a nominee quickly in the hopes

83. Judge Bork's 1987 confirmation hearings were a watershed event insofar as the Senate's interest in preserving *Roe v. Wade*, 410 U.S. 113 (1975), is concerned. Prior to the hearings, *Roe's* fate was primarily the concern of those responsible for judicial selection in the Reagan administration. See generally HERMAN SCHWARTZ, *PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION* (1988). During the hearings regarding Judge Bork, Senate Democrats and groups interested in preserving *Roe* forged an alliance. Subsequently, *Roe's* status has figured prominently in Supreme Court confirmation hearings.

84. See Gregory Caldeira, *Commentary on Senate Confirmation of Supreme Court Justices: The Roles of Organized and Unorganized Interests*, 77 KY. L. REV. 531, 536-38 (1988); see also Ruth Shalit, *Borking Back: The Right Gets Even*, NEW REPUBLIC, May 17, 1993, at 18 (noting that after the election of President Clinton, conservative groups joined forces to create the Judicial Selection Monitoring Project to lobby for the appointments of conservative judicial candidates and against the appointments of liberal ones).

85. See Kramer, *supra* note 34, at 1549-53; see generally Richard Davis, *Supreme Court Nominations and the News Media*, 57 ALB. L. REV. 1061 (1994).

86. Note, for instance, the lingering negative effects that helped to block President Clinton's nomination of Henry Foster as Surgeon General because of the initial mistake a White House aide had made in answering a question about how many abortions Dr. Foster had performed. See *Surgeon General Gets Cautious Support*, WASH. POST, February 7, 1995, at A3.

of avoiding leaks and putting the opposition off guard;⁸⁷ by inducing a president to be overly cautious before naming a nominee in order to ensure his or her confirmability;⁸⁸ and by facilitating mobilization for or against a nomination through the greater dissemination of information that supporters or opponents might need. The expansion of new information technologies has helped to strengthen the media's control of the news and consequently the public's perception of circumstances surrounding appointments matters.⁸⁹

B. *Confirmation Patterns*

Despite the influence exerted by history on the operations of the appointments process, the reasons for presidential nominations and senatorial support or opposition to those nominations have remained remarkably constant over time. Presidents and senators have made appointments decisions based on their respective calculations regarding various long-term and short-term considerations.⁹⁰ The long-term factors have entailed a nominee's philosophy about the role of the national government in American society and the relationship between the different branches of the federal government.⁹¹ Short-term factors have included a nominee's political party, chances for confirmation, domicile, age, and benefactors or supporters.⁹² Both long- and short-term concerns have been influenced by political circumstances, the state of presidential-Senate relations, and presidents' and senators' other priorities and ambitions for the federal office being filled. For instance, the relevant political

87. This arguably was a problem with the nomination of Judge Douglas Ginsburg to the Supreme Court in the aftermath of Judge Bork's defeat. See Stuart Taylor, Jr., *Haste and Ideological Fights Set Nomination on Course Ending in its Doom*, N.Y. TIMES, November 8, 1987, at 34; see also BRONNER, *supra* note 40, at 328-36.

88. This was common to both of President Clinton's searches for Supreme Court nominees. See Chris Reidy, *Clinton Gets His Turn*, BOSTON GLOBE, Aug. 8, 1993, at 69; Gloria Borger et al., *A-Courting He Will Go*, U.S. NEWS & WORLD REP., June 21, 1993, at 22; Frank J. Murray, *Clinton 'Reflection' Delays Selection*, WASH. TIMES, June 9, 1993, at A1.

89. Professor Carter cites the mishandling of this control as posing a fatal problem to Lani Guinier's nomination to the position of assistant attorney general for the Civil Rights Division in the Clinton administration. See CARTER, *supra* note 1, at 38. According to Professor Carter, the press was not sufficiently conversant with Professor Guinier's writings to inform the American public adequately about her qualifications and views and to keep administration officials and senators honest in talking about those views.

90. The Framers termed these grand and petty political concerns, respectively.

91. See Gerhardt, *The Confirmation Mystery*, *supra* note 5, at 431.

92. See *id.*

philosophy for nonjudicial nominees invariably has been their viewpoints on the appropriate functions or duties of the offices to which they have been nominated and on the office's significance to the president's agenda,⁹³ whereas for judicial nominees, the relevant ideology relates to their basic attitudes about constitutional interpretation generally and sometimes about specific areas such as property, economics, federalism, race, privacy, or gender.⁹⁴

Presidents and senators have differed in the ways in which they have combined these factors and the sequence in which they have taken them into account. For example, in deciding on a broad pool of suitable candidates for a confirmable post, presidents have been influenced by grander political concerns, such as commitment to a particular constitutional philosophy or the long-term relations between the federal and state governments or between federal institutions. In making a choice from within this set, however, presidents have been guided by pragmatic concerns, such as party loyalty, ease of confirmation, and the potential ramifications of confirmation on presidential popularity.

Compare, for example, the criteria President Clinton used to narrow the pool of candidates for replacement of Justice Blackmun down to Interior Secretary Bruce Babbitt and Judges Richard Arnold and Stephen Breyer with the standards that guided his choice among these three individuals. President Clinton instructed his staff to assemble a list of prospective candidates for the Court based on capacity for taking a leadership role on the Court and possession of a "progressive" judicial ideology, including a commitment to constitutional stability, an energetic national government, and a sensitive reading of the individual-rights provisions of the Constitution.⁹⁵

93. See, e.g., Pfiffner, *supra* note 42, at 62-70; see also Janet M. Martin, *George Bush and the Executive Branch*, in LEADERSHIP AND THE BUSH PRESIDENCY: PRUDENCE OR DRIFT IN AN ERA OF CHANGE? 37 (Ryan A. Barilleaux & Mary E. Stuckey eds., 1992); see generally JOHN W. MACY ET AL., AMERICA'S UNELECTED GOVERNMENT (1983); G. CALVIN MACKENZIE, THE POLITICS OF PRESIDENTIAL APPOINTMENTS (1981).

94. See ABRAHAM, *supra* note 2, at 6; see also Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1175-76 (1988) (discussing the Senate's consideration of Robert Bork's principles during his Supreme Court confirmation hearings).

95. See Stephen Labaton, *Clinton is Relying Less on Advisers in Finding Supreme Court Nominee*, N.Y. TIMES, April 6, 1993, at A18. Reportedly, President Clinton sought a nominee "progressive on social policy, civil rights and privacy issues. He [had] a strong

The President chose from among the names assembled, however, on the grounds of their appeal to certain constituencies, age and health, and likelihood for confirmation.⁹⁶

The converse is true once a nomination reaches the Senate. In the Senate, opposition to a nomination initially develops for partisan or even personal reasons; the opposition generally succeeds, however, only if it can be framed in terms of grander political factors, including the preservation of constitutional ideals such as federalism or the preservation of individual liberties.

Consider, for example, senators' reactions to the nominations of Robert Bork and Zoe Baird. Initially, the opposition to Judge Bork followed partisan lines.⁹⁷ By the time of his nomination, Democratic senators were eager to block additional Republican nominees to the Supreme Court. They could not block Judge Bork's confirmation, however, unless they found a way to frame their opposition in nonpartisan terms that would resonate with a majority of the Senate, including some moderate Republican senators. In the aftermath of Judge Bork's defeat, Republican senators eagerly sought a chance to get even with Democrats; President Clinton's election gave them their first meaningful opportunity.⁹⁸ Their challenge was to find a nominee whom it would be appropriate to oppose. They chose Zoe Baird, successfully grounding their opposition on nonpartisan bases. They argued that her failure to pay Social Security taxes for domestic servants deprived her of the moral authority she would need as attorney general to oversee enforcement of the law.⁹⁹

preference for someone who would be able to forge coalitions in a fractured and changing court." *Id.*

96. *See id.*

97. *See* BRONNER, *supra* note 40, at 98-126.

98. *See* CARTER, *supra* note 1, at 24; *see also* John Hanchette, *Why Can't Clinton Get His Act Together on Nominees?*, GANNETT NEWS SERV., March 15, 1995, available in Westlaw Allnews File (describing the resistance to many of President Clinton's nominations as "payback" for Democratic opposition to President Reagan's nomination of Robert Bork to the Supreme Court and President Bush's nomination of John Tower to be secretary of defense); Ruth Marcus & Ann Devroy, *Another Lesson in Confirmation Pitfalls*, WASH. POST, June 5, 1993, at A1 (attributing the failed nominations of Zoe Baird and Lani Guinier to political "payback" by the conservative right, who sought a "good nomination fight to avenge . . . the failed Supreme Court nomination of Robert H. Bork").

99. *See generally* Gerhardt, *The Confirmation Mystery*, *supra* note 5, at 404-05, 411-12 (1994).

Different presidents have reached different assessments regarding the proper mix of long-term and short-term considerations in the appointments process. As the next Part explains, these differences among presidents as well as between presidents and senators provide useful bases for evaluating presidential and senatorial performance within the appointments process. The reasons for the differences also helps to explain the consistency in presidential and Senate actions in confirmation proceedings throughout American history.

V. EVALUATING PERFORMANCES WITHIN THE APPOINTMENTS PROCESS

Perhaps the most crucial component of a comprehensive analysis of the federal appointments process is the development of useful criteria for evaluating the performances of all of the major actors involved in the process, including presidents, senators, interest groups, the media, and nominees. This inquiry, unlike those of the previous two Parts, is primarily normative; it seeks to provide standards for evaluating the contributions and performances of each of these actors in the appointments process rather than to explain past events. This inquiry will also help to develop a systematic method for making comparative judgments about the performances of presidents and senators across historical periods.

Three options for making such evaluations are available. Below, I consider the relative advantages of each alternative as well as the criteria each would entail.

A. *Personalizing the Appointments Process*

Most commentators have tended to personalize the confirmation process. This approach is quite natural, for the focus of the confirmation process is primarily on the fate of a single person—the nominee. Moreover, the often dramatic conflicts over nominees' fates shed considerable light on presidents' and senators' respective priorities, political skills, allegiances, and personal values. Niccolo Machiavelli was among the first to recognize this phenomenon, as reflected in his observation that

[t]he first indications of the intelligence of a ruler are given by the quality of the men around him. If they are capable and

loyal, he should always be taken to be shrewd, because he was able to recognize their ability and retain their loyalty. But if they are mediocre and disloyal, a low estimate of him will never be mistaken, because the most important error he has made is to choose them.¹⁰⁰

In our federal system, a president's choice of nominees to critical positions provides significant insights into his personal priorities, as it reflects the persons on whose advancement he prefers to spend political coinage.¹⁰¹ Similarly, senators reveal a great deal about themselves in the midst of intensely contested confirmation proceedings.¹⁰²

1. *Personalizing Presidents and Senators*

Personality may be used to explain a variety of types of incidents in the federal appointments process. In some cases, the close personal relationship and history between the president and the nominee explains why the nomination was made at all, as with President John Kennedy's selection of his brother Robert as his attorney general.¹⁰³ Personal factors may also explain the failure of a nomination once it is made. For instance, the failure of Judge Bork's nomination is frequently blamed in part on President Reagan's delay in coming to his defense.¹⁰⁴ Similarly, President Clinton was denounced personally for having nominated his long-time acquaintance

100. NICCOLO MACHIAVELLI, *THE PRINCE* 80 (Quentin Skinner & Russell Price eds., 1988) (1513).

101. See RICHARD TANNER JOHNSON, *MANAGING THE WHITE HOUSE: AN INTIMATE STUDY OF THE PRESIDENCY* xx (1974) (discussing how the relationship between a president and his aides provides insight into that president's character); see also ROBERT SCIGLIANO, *THE SUPREME COURT AND THE PRESIDENCY* 148-57 (1971) (discussing how different presidents' Supreme Court appointments have reflected their personal biases and partisan affiliations).

102. See Henry P. Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1207 n.21 (1988) (recognizing that a senator's decision is the result of the tension between political self-interest and personal principles); Ronald Dworkin, *One Year Later, The Debate Goes On*, N.Y. TIMES BOOK REV., October 25, 1992, § 7, at 1 (noting that the Clarence Thomas hearings "taught us much about the character of some of our most prominent officials"); Steven V. Roberts, *In Confirmation Process, Hearings Offer a Stage*, N.Y. TIMES, February 8, 1989, at B7 (describing the ways in which senators' performances in confirmation hearings reflect their personalities and agendas); see also Freund, *supra* note 11, at 1157-63 (tracing the origins and influences leading to the development of open confirmation hearings).

103. See STEPHEN HESS, *ORGANIZING THE PRESIDENCY* 81, 171 (1976).

104. See, e.g., BRONNER, *supra* note 40, at 160, 202-03.

Lani Guinier without having read her legal scholarship.¹⁰⁵ In other cases, a president's support for a nominee despite the damage it causes him or her has been attributed to personal stubbornness (as with President Nixon's allegiance to his nomination of Harold Carswell to the Supreme Court in spite of widespread condemnation)¹⁰⁶ or to loyalty to presidential allies (as in the case of President Bush's willingness to stand by his controversial nominations of John Tower as secretary of defense¹⁰⁷ and Clarence Thomas as Supreme Court justice).¹⁰⁸ Similar depictions have been used to explain senators' actions, as with the portrayals of many Republican senators as sexist based on their ardent defense of Clarence Thomas or questioning of Anita Hill.¹⁰⁹

Characterizing the confirmation process in personal terms clearly affects the criteria employed to evaluate the performance of the president and Senate in the appointments process. Under this approach, presidents and senators are made responsible for every action or decision made in their name or on behalf of those (such as the nominee) aligned with them. Moreover, performance is measured in terms of personal traits, such as intelligence, popularity, charisma, strength of character or conviction, loyalty, stubbornness, ambition, or political acuity.¹¹⁰

Perhaps the most sophisticated method of personalizing the federal appointments process is game theory, which assesses performance as strategic behavior. At the risk of oversimplification, one could describe the federal appointments process as a multi-iteration game of chicken with multiple

105. See Maureen Dowd, *In 1994-Model Politics, Loyalty Is Often Optional Equipment*, N.Y. TIMES, March 20, 1994, § 4, at 3.

106. Cf. ABRAHAM, *supra* note 2, at 15-19.

107. See Michael Oreskes, *Bush's Man and Mandate on the Line*, N.Y. TIMES, February 26, 1989, § 4, at 1.

108. See TIMOTHY M. PHELPS & HELEN WINTERNITZ, *CAPITOL GAMES* 138, 305 (1992).

109. See, e.g., JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* 351-54 (1994).

110. See, e.g., Henry C. Kenski, *A Man for All Seasons? The Guardian President and His Public*, in *LEADERSHIP AND THE BUSH PRESIDENCY: PRUDENCE OR DRIFT IN AN ERA OF CHANGE?* 91 (Ryan J. Barilleaux & Mary E. Stuckey eds., 1992) (discussing the importance of public approval and popularity as a measure of presidential success); see also Barbara Hinckley, *Beyond Reform*, in *THE PRESIDENCY IN AMERICAN POLITICS* 105 (Paul Brace et al. eds., 1989) (examining the link between presidential performance and public perceptions of the president); cf. Fitts, *supra* note 45, at 872 (arguing that because the public assessment of presidential performance is based on "a standard of moral assessment appropriate for individuals, rather than for institutions," presidential power is undermined).

players (as opposed to the usual chicken game, which involves two players).¹¹¹ A good illustration is President Bush's nomination of Clarence Thomas to replace Justice Thurgood Marshall on the Supreme Court.¹¹² President Bush dared Democrats, who at the time were criticizing his opposition to affirmative action, to reject a conservative African-American nominee. President Bush gambled that at least the Southern Democrats would be unable to oppose the nomination, regardless of the nominee's views. Justice Thomas also played chicken with the Senate, daring it to ignore his moving life story and to reject him on the basis of his weak and sometimes unbelievable testimony before the Senate Judiciary Committee. Later, he played the race card by denouncing the second phase of his hearings investigating Anita Hill's charges of sexual harassment as a "high-tech lynching" and thereby forcing his critics to prove their opposition was not racist.¹¹³ The nomination and hearings damaged President Bush in part because of his desire to charge ahead at the expense of his credibility. Similarly, many senators were damaged by blind allegiance to the president, seemingly oblivious to the risk of appearing cowardly in deferring to the choice of a weak but sympathetic nominee.

The process leading up to President Clinton's two Supreme Court nominations is another example of confirmation contests as a special game of chicken. In both cases, each party engaged in extensive maneuvering, including strategic leaks to the press,¹¹⁴ in order to influence the choice of a nominee and to engineer a confirmation hearing that would enhance its image and agenda.¹¹⁵ For instance, the many rumors generated by the Clinton administration about likely nominees were designed to keep senators off guard, test other possible nominations, or even gain momentum or build support within the administration

111. See generally DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* 44 (1994).

112. See Gerhardt, *Divided Justice*, *supra* note 5, at 976-77.

113. *The Thomas Nomination: Excerpts from Senate's Hearings on the Thomas Nomination*, N.Y. TIMES, Oct. 12, 1991, at A12.

114. See Carl M. Cannon & Nelson Schwartz, *Clinton's 'Trial Balloon' Strategy Tends to Burst*, CHI. SUN-TIMES, June 22, 1993, at 28; Holly Idelson, *Clinton Closes in on a Nominee; Choices Winnowed to Two*, 51 CONG. Q. WEEKLY REP. 1482, 1485 (1993); Paul Richter, *Clinton Takes More Time on Court Choice*, L.A. TIMES, May 13, 1994, at A4.

115. See generally Sheldon Goldman, *Judicial Selection under Clinton: A Midterm Examination*, 78 JUDICATURE 276, 277-78 (1995).

itself for or against a particular nomination. In the end, both sides accomplished their goals in part, but did not realize the greatest benefit possible. As game theory suggests, the greatest aggregate benefit is produced when survival depends on one side choosing not to flinch in the face of confrontation with the other and that side does not falter. When, on the other hand, both parties flinch and prefer to avoid damage, both suffer.¹¹⁶

Game theory is not without its limitations. The dynamics of the federal appointments process are much too complex to be captured accurately within the terms of a single game. Moreover, neither the presidency nor the Senate is monolithic or unified in its operations. The internal operations of the executive and the Senate are structured differently, the former functioning as a hierarchy with a single individual at the top, and the latter operating as a multi-membered body in which the members are equally powerful. Consequently, the two institutions do not make decisions in the same manner. In addition, neither institution can unilaterally make appointments decisions; the strategic decisions of each must account for the potential reaction of the general public, interest groups, the media, and the nominee. No game can portray the interaction between all or some of these actors fully, even with regard to a single appointment. Another analysis is required to measure the dynamics of presidential and senatorial interaction in the confirmation process.

2. *The Role of the Media in the Appointments Process*

The popularity of personalizing the appointments process is attributable in large part to the media's widespread use of this technique in covering appointments matters. The predominance of this practice is understandable for several reasons. First, describing appointments matters in personal terms makes intuitive sense, given that the rise or fall of a

116. A confirmation skirmish could also be described as a special game of tit-for-tat. See generally BAIRD ET AL., *supra* note 111, at 171-72, 174, 316. Tit-for-tat is an "infinitely repeated game," *id.* at 316, with cooperation as its ultimate goal but played in a potentially unending series of periods in each of which one player tries to cooperate while the other retaliates for wrong done in a previous period. See *id.* at 171-72. Numerous confirmation contests including, but not limited to, the forced withdrawals of Zoe Baird and Lani Guinier, see *supra* note 98, and the Senate's rejections of both Haynesworth and Carswell, could be explained in terms of this game. See Freund, *supra* note 11, at 1155.

particular individual—the nominee—plays a central role, and that other persons, including presidents and senators, have serious stakes in the outcomes. Second, this practice provides a convenient hook for grabbing a substantial audience because people will be more interested in stories that cater to their emotions. In addition, describing appointments matters in personal terms is relatively easy for reporters because the approach does not require any special training.

The media's predominant practice of personalizing the appointments process has been both a blessing and a curse. It has been a blessing to the extent that the media has helped to shed light on a process that for much of American history occurred behind closed doors.¹¹⁷ Before the Senate made its proceedings public, the press had to rely on leaks from participants for information about such proceedings.¹¹⁸ Today's more widespread coverage has helped to educate the public about the interaction between the president and the Senate in this area and about the backgrounds and qualifications of some of the nation's most powerful leaders.

The media's coverage of the appointments process has also posed two serious problems. First, the press often gets carried away. It has frequently been involved as much in making the news as it has in reporting it.¹¹⁹ Perhaps no incident better illustrates this tendency than the reports made about Judge Bork's video rentals in the later stages of his confirmation hearings.¹²⁰ Judge Bork's substantial public and academic record should have provided more than enough fodder for meaningful Senate debate about the propriety of his nomination to the Supreme Court. Second, the media's relentless quest for drama within the appointments process often has come at the expense of coverage of the significant legal issues surrounding confirmation contests. For example, the media helped to fuel the controversy over President Clinton's nomination of Lani Guinier to head the Justice Department's Civil Rights Division by spending considerably more time reporting the opposing side's

117. See *supra* notes 64-66 and accompanying text.

118. See HARRIS, *supra* note 2, at 249-55.

119. See generally Nelson W. Polsby, *Public Opinion Is Led*, 84 NW. U. L. REV. 1031 (1990).

120. See BRONNER, *supra* note 40, at 274.

representations about her academic writings than independently assessing the accuracy of those representations.¹²¹

There are two possible solutions to these dilemmas that would not diminish the benefits of the media's coverage of the federal appointments process. The first is to hold the media accountable for its mistakes. The most obvious way to do this is to encourage competing press organizations to check each other's coverage. Given that different media outlets cover many of the same events in the appointments process, they already are in a position to keep each other honest. The second solution is for the media to modify its focus. The media has rarely attempted to put into broader context a president's method of choosing a nominee or the confirmation contests between presidents and senators. For example, a great deal of attention during President Clinton's first search for a Supreme Court nominee was placed on his indecision and his reluctance to provoke controversy and weaken his sagging popularity.¹²² The media paid almost no attention to his need to appoint a justice who fit his criteria and also preserve the necessary political coinage to get health-care reform and other portions of his then-pending legislative agenda through Congress.¹²³ Media discussion of such pragmatic concerns would have helped to increase the public's appreciation of the institutional ramifications of such confrontations. The next Part explores in more detail the significance of such analysis.

B. *Institutional Analysis*

Given the frequent turnover in the personnel responsible for making federal appointments decisions, personalizing the system cannot explain why presidential and senatorial actions on appointments matters have remained relatively constant throughout American history. Presidents and senators are more than the people who occupy certain federal offices; they are also the leaders of powerful governmental institutions, and their official actions need to be understood within this context. In addition, they do not manage these institutions in a vacuum;

121. *See id.* at 39, 44, 211 n.17.

122. *See, e.g.*, Conor O'Clery, *Nomination Adds to Disarray*, IRISH TIMES, June 16, 1993, at 8.

123. *See, e.g.*, GERHARDT, *The Confirmation Mystery*, *supra* note 5, at 406, 409-10.

presidents and senators operate in different historical periods subject to different social and political developments. The challenges of institutional leadership require a different set of criteria for evaluating performance than those suggested by a personality-oriented approach. These standards include political management; organizational and rhetorical skills; power and authority; clarity of vision; programmatic accomplishments; and historical significance.¹²⁴ In the next two Parts, I explore the various techniques for institutional analysis of the presidency and the Senate and the factors impeding confirmation.

1. *Options for Institutional Analysis*

Earlier, I suggested that a close reading of history indicates that presidents and senators weigh grand and petty political concerns in different orders in making their respective appointments decisions.¹²⁵ When they undertake such balancing, they operate as political leaders. Short-term concerns, such as their own political survival, have institutional ramifications, for these concerns will influence how presidents and senators marshal the resources of their institutions. Long-term political objectives are also institutional by definition, for they are directed at effectuating lasting change on the institutions they oversee.

a. *Evaluating Presidential Performance*

In his paradigm-shifting study of presidential performance,¹²⁶ Professor Stephen Skowronek of Yale University has suggested that presidential leadership should be measured in institutional terms by whether a president has been able to wield the powers and resources of his office to change both the popular understanding of the Constitution and the distribution of governmental power and authority.¹²⁷ Though Skowronek does not analyze how a president's nominating power should be evaluated in institutional terms, his general analysis suggests that

124. See generally STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH* 28 (1993) (suggesting that the political effects of presidential action will only be loosely related to a president's success in implementing his own agenda).

125. See *supra* notes 90-99 and accompanying text.

126. See SKOWRONEK, *supra* note 124.

127. See *id.* at 21, 22.

it is significant as one means of accomplishing a broader agenda. In other words, the most successful presidents would have to meet the test of filling offices with people who facilitate their larger objectives.¹²⁸

Generally, Skowronek sets a high threshold for presidential success. A president needs to be an activist who has both articulated and implemented a broad vision of constitutional change.¹²⁹ The broader the vision implemented, the greater the presidential success. Under this standard, very few presidents succeed, and those who do are the obvious choices for greatness, including Andrew Jackson and Abraham Lincoln in the Nineteenth Century and Franklin Roosevelt in the Twentieth Century. All three presidents used every conceivable means, including federal appointments, to implement their respective constitutional visions.¹³⁰

It is possible to identify levels of presidential success depending on the breadth of their vision and their subsequent success in fulfilling it. If a president chooses his nominees based on predicted ease of confirmation or nominee loyalty, success is

128. *See id.* at 28-29.

129. It is important to recognize that this measure of success does not turn on a normative or critical evaluation of a president's agenda. Success depends on the articulation and implementation of an agenda of change, so that presidents who state as their primary objectives the preservation of some (or perhaps all) of an existing constitutional order are destined to be measured less favorably under the applicable criterion. Under this criterion, it is possible to conceive of President Lincoln as doing nothing more than preserving the original Union, but this misperceives the nature and significance of Lincoln's achievement. First, even if one thought that Lincoln were trying to preserve nothing more than the status quo, it would be clear that he faced challenges of unprecedented scope in trying to do so. Preserving some type of constitutional order in the conditions under which Lincoln operated required extraordinary management skills. Lincoln, however, did more than preserve the status quo ante. He also "shatter[ed] existing power arrangements" by ending slavery. *Id.* at 208. Under any credible system of evaluation, this accomplishment, coupled with the preservation of the Union, must be considered extraordinary.

To be sure, preserving an existing constitutional order under difficult circumstances is a significant presidential accomplishment in its own right. For instance, one could argue that one of President Clinton's primary objectives has been to protect both the New Deal and the Great Society from being dismantled by the Republican Congress that came into office in 1994. He could be scored highly for having accomplished his objectives, but not as highly as the presidents who put these programs into effect in the first place. Moreover, he has chosen not to turn certain areas into battlefields. Such has been the case with his judicial appointments, which have largely been made to meet with consensus. Lastly, he has sometimes purposely avoided articulating a clear constitutional vision, so that he has left himself maneuvering room for both reelection and compromise. Perhaps nothing confirms more clearly the merits of his strategy than his reelection to the presidency in 1996.

130. *See id.* at 130-54 (Jackson), 198-207 (Lincoln), 288-324 (Roosevelt).

not difficult to achieve under these standards. If success were measured strictly in terms of the percentages of confirmed nominations, the figures would be misleading because of the presumption of confirmation and because they could be explained as much by the lack of a clearly articulated and well-executed presidential vision as by the presence of one. The figures, for instance, could conceivably reflect a president with no capacity or desire to withstand even the threat of opposition.

In effect, the more weighted a president's calculations of his objectives for his appointments generally, the greater his chances for measuring highly in an institutional analysis. The bolder a president's vision in making appointments, the more likely it is that he will be challenged. Even dramatic losses can serve a president well by underscoring his commitments and by setting the stage for further contests. Andrew Jackson, for example, experienced more confirmation contests than almost any other nineteenth-century president, including ten nominations rejected by the Senate in his first year in office. Jackson, however, waged these battles as part of an overall strategy to wrest from Congress control of certain prerogatives, and, in the end, he succeeded in putting his people into place and implementing his program of weakening the national bank and invigorating states' rights without nullification or succession.¹³¹

Conversely, a president's string of short-term successes within the federal appointments process, with no larger political objectives articulated, has little potential for lasting impact. George Bush, for instance, won far more than he lost in the federal appointments process,¹³² but his victories had little lasting value because they were made largely on the basis of his need to obtain short-term political advantage rather than his implementation of a long-term political vision.¹³³

131. See LEONARD D. WHITE, *THE JACKSONIANS: A STUDY IN ADMINISTRATIVE HISTORY* 106-07 (1954).

132. See generally Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 *JUDICATURE* 282, 284 (1993) [hereinafter Goldman, *Bush's Judicial Legacy*] (explaining that 95 percent of Bush's appointments to lifetime district judgeships made before October 1991 were approved; 74 percent of such appointments made between October 1991 and December 1991 were approved; and 41 percent of such appointments made in 1992 were approved).

133. See Martin, *supra* note 93, at 37, 53; see also Goldman, *Bush's Judicial Legacy*, *supra* note 132, at 295, 297.

Two other examples provide insight into the significance of particular appointments as a measure of presidential success. Woodrow Wilson once suggested that his appointment of Louis Brandeis to the Supreme Court was one of his greatest achievements in office.¹³⁴ Roughly sixty years later, Gerald Ford, looking back at his presidency, remarked that his greatest success was his appointment of Justice Stevens.¹³⁵ In terms of institutional analysis, these assessments reflect the limitations of both presidents as political leaders. To be sure, President Ford helped to revitalize the public trust in the ethics of the national political leadership,¹³⁶ and his appointment of Justice Stevens furthered this effort. His pardoning of Richard Nixon, however, sent a contrary signal.¹³⁷ President Wilson helped to shift the balance of power within the national government from Congress to the presidency, though he suffered serious loss of prestige and power in his attempt to do so in the crucial area of foreign relations.¹³⁸ The fact that both presidents fell short of their grandest visions left each, as they left office, acknowledging limited success. Making a successful appointment is one thing; the quality of the work that the appointee does is quite another.

The appointment of an able, well-qualified individual is a significant short-term accomplishment, but it ultimately says little on its own about a president's achievement of certain long-term goals, such as influencing the direction of the Supreme Court, which usually requires appointing several justices.¹³⁹ The problem is that individuals acting alone and not in tandem with others can accomplish very little in the national government.

134. See SAMUEL J. KONEFSKY, *THE LEGACY OF HOLMES AND BRANDEIS: A STUDY IN THE INFLUENCE OF IDEAS* 301 (1956); ALPHEUS T. MASON, *BRANDEIS—A FREE MAN'S LIFE* 435 (1946); see also MELVIN I. UROFSKY, *A MIND OF ONE PIECE: BRANDEIS AND AMERICAN REFORM* 71 (1971).

135. See GERALD R. FORD, *A TIME TO HEAL* 335 (1979).

136. See HESS, *supra* note 103, at 19.

137. See JOHN ROBERT GREENE, *THE LIMITS OF POWER: THE NIXON AND FORD ADMINISTRATIONS* 202-04 (1992); A. JAMES REICHLEY, *CONSERVATIVES IN AN AGE OF CHANGE: THE NIXON AND FORD ADMINISTRATIONS* 284 (1981).

138. See Lessig & Sunstein, *supra* note 45, at 45, 46 n.189; Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 735 (1988).

139. See ABRAHAM, *supra* note 2, at 71-79 (discussing the significance of President Washington's Supreme Court appointments—he nominated fourteen, twelve were confirmed, and ten served), 95-104 (discussing the significance of President Jackson's six appointments), 165-75 (discussing the significance of President Taft's six appointments), 208-40 (discussing the significance of President Franklin Delano Roosevelt's nine appointments).

This difficulty is compounded when a president does not have the means to control directly his appointee's exercise of power.¹⁴⁰ Change is much more likely to be achieved through the combined efforts of a team of people; hence, a string of appointments and the consequent activities of those people as coordinated by a president provides a much more extensive foundation for assessing presidential management. One should also be careful not to read too much into a single success. For instance, President John Adams undoubtedly regarded his appointment of John Marshall as a great achievement, but Justice Marshall accomplished all that he did on the Supreme Court without Adams's help,¹⁴¹ and Adams's other appointments, including re-appointment of George Washington's entire cabinet, reflected his lack of awareness of the importance of a unified administration to ensure the achievement of his desired policy objectives.¹⁴²

Finally, it is important to understand that different presidents have had different agendas for appointments. Compare, for instance, the presidencies of Dwight Eisenhower and William Howard Taft. The former proved to be "a master" at not attempting more than he could realistically accomplish; hence, he "was content to prune the radical edge off New Deal liberalism."¹⁴³ He achieved a relatively well-defined, modest goal, but his achievement "faded quickly as a national political alternative upon his departure [from office]."¹⁴⁴ Eisenhower's agenda did not include a radical overhauling of the federal judiciary. Whereas he preferred that his nonjudicial nominees share his political commitments, he did not link his choice of judicial nominees to a strict ideological litmus test. Consequently, Eisenhower's overall performance in the appointments process was not neatly linked to a general policy agenda. He deliberately chose not to pursue a full-scale assault

140. Obviously, this would be the difficulty with judicial appointments or with the appointments of the heads of independent or quasi-independent agencies. In contrast, the president's ability to remove politically appointed officials within the executive branch enables him to control their activities directly.

141. See ABRAHAM, *supra* note 2, at 82-84.

142. See ENCYCLOPEDIA BRITANICA 85 (15th ed. 1992) (reporting that President Adams's retention of President Washington's cabinet until 1800 was a "serious mistake," due in part to Adams's failure to recognize the importance of political parties).

143. SKOWRONEK, *supra* note 124, at 46.

144. *Id.*

on the constitutional foundations of the New Deal, an assault that would have required significantly different judicial appointments.

Whereas President Eisenhower generally succeeded in constraining legislative expansions of the New Deal but not in reshaping the federal judiciary, President Taft was almost completely passive in legislative matters but took an active interest in judicial appointments.¹⁴⁵ Taft selected judges based primarily on their adherence to economic due process and antipathy towards progressive legislation.¹⁴⁶ Through the six Supreme Court appointments he had made in a single term¹⁴⁷ and the influence he exerted over lower-court nominations for almost three decades, Taft was instrumental in putting into place a federal judiciary that resisted progressive legislation until Franklin Roosevelt's second term in office.

b. *Evaluating Senate Performance*

The Senate should be understood in different institutional terms than the presidency. Unlike the presidency, the Senate acts primarily through collective action. With the decline of political parties as an organizing construct for Senate action, it has become increasingly misleading to conceive of the Senate as having an agenda separate from the individual or aggregate agendas of its members.

Public-choice theory is especially helpful in clarifying the Senate's operations, for it helps to explain the apparent ad-hoc nature of Senate decisionmaking.¹⁴⁸ When institutions make decisions by a majority vote, the majority will generate logically inconsistent results unless the voters have very similar preferences. In fact, Senate confirmation deliberations and even sometimes presidential nominations are group decisionmaking efforts, and the individual participants in these decisions bring different values and preferences that must be identified in order to understand fully how the process has worked in any given case. Senators, for example, each have orderings of preference with respect to the long-term and short-term political objectives

145. See GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 272-75 (1994).

146. See *id.* at 273.

147. See ABRAHAM, *supra* note 2, at 166.

148. See generally DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991).

at stake in a particular confirmation proceeding.¹⁴⁹ Given that the Senate's final action on a nomination is an aggregate of many different orderings of preference, it is not likely to provide much insight into the particular dynamics giving rise to the outcome in question.

Moreover, public-choice theory suggests that the most effective means by which to change the orderings of preferences of the individuals participating in a group decisionmaking process is through structural alterations to the system. For instance, the Senate has attempted to check the growth of presidential appointment authority by the efforts of its individual members to exercise senatorial courtesy and by delegating often decisive authority (such as agenda setting) to committees or their chairs, which are potentially subject to domination by a single faction.

In assessing the limits of applying public-choice theory to the federal appointments process, it is useful to consider the similarities and differences between senatorial decisionmaking on legislation and senatorial decisionmaking on federal appointments. In legislation, logrolling—that is the building of support for a bill by agreeing to support other legislation—is popular.¹⁵⁰ Such trading is difficult, but not absent, in federal appointments. To be sure, as long as a position is not unique or a president is trying to fill several fungible positions (such as federal district judgeships), a senator can build support for a nominee he wants by agreeing to support a nominee sponsored by some other senator for a similar position or perhaps even some legislation sponsored by another senator or the president. Similarly, the president, who is responsible for formally making nominations, might be able to get support for one nominee in exchange for abandoning another or supporting a senator's preferred nominee for a similar position or preferred legislation. Such trading is much more difficult, although it still exists, with respect to a unique position such as a cabinet secretary or Supreme Court justice. With regard to the latter positions, the president has no similar positions, and fewer

149. See, e.g., John D. Felice & Herbert F. Weisberg, *Senate Confirmation of Supreme Court Justices: The Changing Importance of Ideology, Party, and Region in Supreme Court Nominees, 1953-88*, 77 *Ky. L.J.* 509, 511-12 (1989).

150. See Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 *VA. L. REV.* 471, 490-92 (1988).

bargaining chips generally, with which to trade for support, and there are few things either side in a confirmation contest is likely to consider the functional equivalent of the appointment. In short, public-choice theory is not designed to explain decisionmaking by a hierarchical division such as the executive branch, or between one branch and a part of another on a series of matters mutually entrusted to them, but on which they are not precisely on equal footing. Public-choice theory is ill-equipped to clarify the interaction between the presidency and the Senate at the heart of the appointments process.

2. *The Major Catalysts for Mobilizing Support for or Against Nominations*

One of the challenges in any confirmation proceeding is for the president and the Senate (as well as interest groups, nominees, and the media) to mobilize public opinion in the direction each prefers. Although presidents and senators weigh the long-term and short-term objectives at stake in a confirmation proceeding, some factors have greater impact than others in making or breaking a nomination. A close study of the history of the federal appointments process suggests that the same factors have helped consistently to swing political opinion for and against presidential nominees. Planning for and controlling these factors are perhaps the most significant challenges presidents and senators have had to meet in the appointments process.

a. *The Role of the Nominee*

Even though it makes sense to analyze nominees in personal terms, it is important to understand that analyzing nominees in personal terms provides a limited glimpse into the functions they perform in the federal appointment process. Whether they are seeking to be nominated or confirmed, nominees do not operate in a vacuum. To wind their way through the system, they must marshal, or have others marshal on their behalf, certain institutional powers. It is difficult, if not impossible, to understand fully the fates of various nominees without analyzing the larger framework that includes the institutional settings—the executive branch and the Senate—within which confirmation disputes arise.

Indeed, nominees perform either of two roles in the federal appointments process: functioning passively, as objects or targets around or against which groups or people have rallied; or functioning actively, as agents lobbying on their own behalf. This Part considers each of these functions.

i. *The Nominee as Object*

Both the private and public aspects of a nominee's record are important in determining the fate of a nomination. The more appealing the public persona, the greater the chances for confirmation. For example, one significant factor in Clarence Thomas's confirmation was the so-called Pin-Point strategy.¹⁵¹ More recently, President Clinton's characterization of Ruth Bader Ginsburg as the "Thurgood Marshall of the feminist movement"¹⁵² helped, at the outset of her hearings, to build support for her as a progressive lawyer and jurist who had paid her dues.

Making the case that something personal about a nominee ought to be of concern is a sure way to defeat a nomination.¹⁵³ A president's critical safeguard against such an outcome is control over whom to nominate in the first place. The challenge for the opposition is to tear apart or find some glaring flaw in the portrait that the president has tried to draw of his nominee.

Consequently, linking some personal or private flaw of a nominee to some public concern provides a basis for mobilizing opposition. The more easily articulable or the more immediate the danger a particular appointment poses to the public because of some private lapse, the more likely its defeat becomes. For instance, John Rutledge's strident public criticism of the Jay Treaty became an easy basis on which to rally opposition from within the President's own party in the Senate. Taking this public action to a personal level, Rutledge's opponents characterized his criticism of the treaty as reflecting his mental

151. This strategy required Justice Thomas to remind the senators on the Judiciary Committee whenever possible about his difficult childhood and upbringing in Pin Point, Georgia, in order to keep them from focusing the hearings on his public record. See Richard L. Berke, *The Thomas Hearings: In Thomas' Hearing Room, Spirits of Hearings Past*, N.Y. TIMES, Sept. 11, 1991, at A25; see also Gerhardt, *Divided Justice*, *supra* note 5, at 971, 977, 981.

152. Sara Fritz, *Nominee Called Trailblazer who Kept Low Profile*, L.A. TIMES, June 15, 1993, at A1.

153. Cf. CARTER, *supra* note 1, at 20-22, 24, 30-31, 159-78.

instability and thus as disqualifying him for the Court.¹⁵⁴ Similarly, no sooner had President Reagan's nomination of Robert Bork to the Supreme Court been made official than Senator Kennedy pronounced the dangers of living in "Robert Bork's America."¹⁵⁵ This became the rallying cry for opposition to the nomination. More recently, Lani Guinier, referred to as President Clinton's "Quota Queen,"¹⁵⁶ saw her nomination as assistant attorney general for the Civil Rights Division scuttled, in part because of the alleged threat that she posed to white America.

A nominee's personal shortcomings can be exploited in at least four ways. The first is that a nominee's unethical conduct either exhibits a lack of the kind of judgment that one would need in order to exercise power responsibly or deprives the nominee of the moral authority necessary to exercise that power. Four prominent examples in which this problem undid a nomination are: (1) Abe Fortas's advising of President Johnson and his acceptance of a substantial fee (which had been raised by dubious means) for teaching a seminar while sitting on the Court;¹⁵⁷ (2) Clement Haynesworth's failures to divest himself of all corporate directorships upon first being confirmed for a federal appellate judgeship and to seek recusal from all cases in which he had a direct financial interest in the business of one of the litigants;¹⁵⁸ (3) Douglas Ginsburg's smoking marijuana as a tenured Harvard Law School professor;¹⁵⁹ and (4) John Tower's drinking and womanizing.¹⁶⁰ In all four cases, support for the nominees quickly evaporated once the charges were confirmed. Both Fortas and Ginsburg were forced to withdraw, and the Senate rejected both Haynesworth and Tower.

A second factor that can be used to bolster or defeat a nomination is the nominee's political views or record. The political views of a nonjudicial nominee can become problematic either because they provide an easy way to retaliate

154. See David Danelski, *Ideology as a Ground for the Rejection of the Bork Nomination*, 84 NW. U. L. REV. 900, 901-06 (1990).

155. BRONNER, *supra* note 40, at 98 (citation omitted).

156. Clint Bolick, Editorial, *Clinton's Quota Queens*, WALL ST. J., Apr. 30, 1993, at A12.

157. See MASSARO, *supra* note 39, at 52-55.

158. See *id.* at 6, 79-93.

159. See BRONNER, *supra* note 40, at 332-35.

160. See CARTER, *supra* note 1, at 8.

against the president for holding the same views or because they are controversial in their own right. For instance, President Carter was forced to withdraw his nomination of Ted Sorenson to head the Central Intelligence Agency (CIA) partly because of widespread doubt about the compatibility of Sorenson's self-declared pacifism with the official duties Sorenson would carry out if confirmed as CIA director.¹⁶¹ Similarly, the Senate Judiciary Committee rejected President Reagan's nomination of Brad Reynolds as associate attorney general because of its disapproval of the way he had been running the Justice Department's Civil Rights Division.¹⁶² The political views of a judicial nominee can become problematic because they are controversial on their own (though here their relevance can be contested) or because they comprise a controversial judicial ideology.

The third factor that can be used to defeat a nomination is one over which a nominee has very limited control: opposition to him or her as payback for an earlier failed or frustrated nomination.¹⁶³ Because of the longevity of some senators and staffers and the continued influence of political parties, the Senate has a good institutional memory of past confirmation controversies; consequently, it is not uncommon for some senators (sometimes comprising a critical mass) to coalesce against a nomination as payback for some earlier injustice. For instance, at least thirteen Democratic senators claimed that their opposition to President Nixon's nomination of Clement Haynesworth was based on the fact that the nominee had ethical lapses even more serious than those that had led to the forced withdrawal of the Fortas nomination not long before.¹⁶⁴ More recently, Senator Jesse Helms stalled President Clinton's nomination of Walter Dellinger as assistant attorney general for the Office of Legal Counsel for several months because of the Senator's belief that, among other things, Dellinger had worked behind the scenes several years earlier to assist Democrats on the Senate Judiciary Committee in building a case against the

161. *See id.* at 8.

162. *See* Aaron Freiwald, *William Bradford Reynolds*, AM. LAW., Mar. 1989, at 147.

163. *See, e.g., supra* notes 97-99 and accompanying text.

164. *See* MASSARO, *supra* note 39, at 80-81.

confirmation of Judge Robert Bork.¹⁶⁵ Similarly, Senator Charles Grassley stalled the nomination of Merrick Garland to the U.S. Court of Appeals for the District of Columbia for well over a year in part to get revenge for his Democratic colleagues' prevention of final Senate action on President Bush's nomination of John Roberts to the same court pending the outcome of the 1992 election.¹⁶⁶

The final defect that can be used to mobilize support for or against a nomination is a nominee's relative level of competence. In many respects, this is the most difficult ground on which to object to a nomination, because no consensus exists about the appropriate qualifications for most confirmable positions, and a credible case can be made for almost any nominee's competence.¹⁶⁷ Even so, attacking a nominee for lacking the appropriate qualifications for the position to which he or she has been nominated can damage or be fatal to the nomination. For instance, the Senate rejected President Nixon's nomination of Harold Carswell largely on the ground that Carswell simply was perceived as not qualified to sit on the Supreme Court.¹⁶⁸ Serious doubts about Ted Sorenson's qualifications also led President Carter to withdraw Sorenson's nomination to become director of the CIA.¹⁶⁹ Moreover, serious questions about Zoe Baird's qualifications to be attorney general weakened her chances for confirmation.¹⁷⁰ A similar argument impeded, but ultimately did not defeat, Clarence Thomas's nomination to the Court.¹⁷¹

In spite of the various personal shortcomings that can be converted into public difficulties to undo a nomination, it is important to remember that the attacks on a nominee can

165. See Ellen J. Silberman, *Senate Confirms Dellinger Nomination*, NEWS & OBSERVER, Oct. 14, 1993, at A3; see also Editorial, *Courtesy and Senator Helms*, N.Y. TIMES, October 11, 1993, at A16.

166. See Editorial, *Judicial Gridlock*, WASH. POST, July 10, 1996, at A16; see also Sheldon Goldman, *Bush's Judicial Legacy*, *supra* note 132, at 284 ("Traditionally, minimal confirmation activity occurs during presidential years, especially when the Senate is controlled by one party and the White House by another.").

167. See Gerhardt, *The Confirmation Mystery*, *supra* note 5, at 417.

168. See MASSARO, *supra* note 39, at 108-16.

169. See CARTER, *supra* note 1, at 33.

170. For a description of Baird's other nomination difficulties, see Sidney Blumenthal, *Adventures in Babysitting*, NEW YORKER, Feb. 15, 1993, at 53, 58.

171. See *The Thomas Nomination: Excerpts from Remarks by Members of Senate Judicial Panel on Thomas*, N.Y. TIMES, Sept. 28, 1991, at A8 (recounting doubts about Justice Thomas's qualifications raised by Senators Metzenbaum, Leahy, and Kohl).

backfire by creating a martyr. The martyr syndrome is a phenomenon that occurs when a nominee is attacked publicly on the basis of some personal trait, such as his political philosophy, that is in the president's advantage to defend. Even a loss can sometimes be turned into a victory if the loss builds sympathy for both the defeated nominee and the disappointed president. Perhaps the most dramatic example of this phenomenon was the fallout from the Senate's rejection of President Jackson's nomination of Martin Van Buren to become Minister to Great Britain. The Senate had confirmed Van Buren only three months before as secretary of state, but in the interim Jackson had removed his vice president, John Calhoun, from any formal role in his administration and anointed Van Buren as Calhoun's heir apparent. Calhoun retaliated by casting the decisive vote against Van Buren's nomination as Minister to Great Britain in the subsequent cabinet reorganization. Jackson turned defeat into victory by publicly extolling Van Buren's virtues and blaming the latter's defeat on Jackson's political enemies. Jackson also named Van Buren as his running mate to illustrate his faith in the latter's abilities, and Van Buren succeeded Jackson as president.¹⁷²

Another example of the martyr syndrome is President Clinton's nomination of Henry Foster as Surgeon General. Opposition to the nominee initially formed within the Senate because Foster had performed abortions and had misstated the number of abortions he had carried out as an obstetrician.¹⁷³ Defending Foster on the ground that the abortions he had performed had been both necessary and constitutional worked to President Clinton's political advantage; thus, he supported the nomination in spite of the fact that it was doomed almost from the start. The loss helped to confirm for the public

172. See 2 ROBERT V. REMINI, *ANDREW JACKSON AND THE COURSE OF AMERICAN FREEDOM, 1822-1832*, at 345-52 (1981). Similarly, President Jackson turned defeat into victory after the Senate had rejected his nomination of his Attorney General Roger Taney as secretary of the treasury. See SWISHER, *supra* note 61, at 286-288, 317, 322. Powerful factions in the Senate led the movement to defeat Taney's nomination because of the lead he had played in advising President Jackson to withdraw all federal deposits from the National Bank as the means by which to kill it. Roughly a year later, Jackson repaid Taney by nominating him to become chief justice, and Jackson's Democrats, who by then had taken control of the Senate, rewarded Taney as well for his loyal service by confirming the nomination. See ABRAHAM, *supra* note 2, at 99-100.

173. See Gary Lee, *Administration Mobilizes Behind Foster; Embattled Surgeon General Designee Gets Support From Panetta, Shalala*, WASH. POST, Feb. 13, 1995, at A5.

President Clinton's resolve not to compromise in a case involving abortion rights.

An even more recent instance of the martyr syndrome, or at least an attempt to cultivate it, was President Clinton's nomination of Republican Governor William Weld of Massachusetts as Ambassador to Mexico in July, 1997. Well before the nomination's formal announcement, Senator Jesse Helms, Chairman of the Senate Foreign Relations Committee, declared his opposition to it. Helms opposed the nomination because he believed that Weld's support for legalizing the medicinal use of marijuana and needle exchanges for drug addicts undermined the credibility Weld would need in order to work effectively, as Ambassador to Mexico, with the Mexican government to stop the flow of illegal drugs into the United States.¹⁷⁴ Senator Helms also believed that Weld's support for abortion and gay rights made him an inappropriate representative of American values and thus unsuitable to serve as an ambassador.¹⁷⁵ In a surprising response to Helms's threatened opposition, Weld publicly accused the Senator of "ideological extortion" and declared that he was not, nor did he want to be, "Senator Helms' kind of Republican."¹⁷⁶ Shortly after making this announcement, Weld resigned the Massachusetts governorship to fight full-time for his nomination, but his public statements apparently ensured that his nomination was dead on arrival.¹⁷⁷ Weld's nomination and his chance to become a martyr

174. See Editorial, *Weld Deserves a Hearing on Mexico Nomination: The Battle Is Mostly Politics, but Principle Is at Stake Too*, L.A. TIMES, July 29, 1997, at B6.

175. See Peter Baker & Helen Dewar, *Clinton Taps Weld for Post Despite Helms Objection; Mexico Ambassadorship Caught in GOP Divisions*, WASH. POST, July 24, 1997, at A1.

176. *Id.*

177. There existed, however, much reason for Weld's apparent madness in resigning his governorship to fight for his ambassadorial nomination and for publicly chastising Senator Helms. Weld's aides explained that Weld's resignation was "part of a campaign to win himself the posting in Mexico City or highlight his long-held belief that the Republican Party must be more inclusive if it hopes to regain the White House." *Weld Steps Down as Governor; Faces Battle for Diplomatic Post*, PLAIN DEALER, July 29, 1997, at 6A. They calculated that if Weld were to win the nomination somehow, he would appear to have risen above partisan politics to be of service to an administration led by a member of the opposition party. If he were to lose the nomination, his aides believed, he might still look as though he had won if he had succeeded in spotlighting the critical political differences between himself and Helms—differences that reflect a larger divide between conservative Republicans on one hand, represented by Senator Helms, and moderate and liberal Republicans on the other hand, represented by Weld. In other words, Weld and his aides figured that he could help himself by positioning himself favorably and appear to have paid a price for being a leader of the moderate wing of the Republican party.

failed for several reasons. First, despite Weld's efforts to win public and Republican support in his fight with Senator Helms, he showed little concern or interest in the fate of his nomination. Second, the position at stake was not one about which the American people appeared to be concerned. Third, Republicans avoided public display of divisions within their party. Fourth, Weld's apparently patrician view that he could take or leave the governorship did not endear him to the public. Finally, President Clinton did not rally publicly to Weld's defense, thereby leaving Weld largely on his own in his quixotic quest.

Apart from a nominee's personal shortcomings, a major factor with the potential to undo a nomination is a fight over an unpopular presidential policy or program. In this situation, a nominee can become a political casualty because of a grievance that one or more senators has with a president. Because this kind of opposition treats the nominee effectively as a proxy for a president, it constitutes an awkward basis for mobilizing public opinion against a particular nominee.

Nevertheless, opposing a nominee because of a desire to punish a president may be strategically advantageous for the Senate. The president has little or no control in preventing such opposition, so it is potentially problematic for a president whenever the Senate considers a nomination. For example, the steady opposition in the Senate to President Tyler's Supreme Court nominees derived not from flaws in the nominees' records but rather from widespread contempt for Tyler, who was viewed as a weak president destined to serve only one term.¹⁷⁸ Another example is the forced withdrawal of Abe Fortas's

Interestingly, this was not the first time Weld had put himself in such a position. In 1988, he resigned as associate attorney general in the Reagan Justice Department to protest then-Attorney General Edwin Meese's decision to remain in office while being investigated by an independent counsel. See Lori Santos, *Two Top Justice Officials Resign; Departures are Linked to Meese and his Legal Problems, Sources Say*, SEATTLE TIMES, Mar. 29, 1988, at A1. In 1992 and 1996, Weld made waves during the Republican National Conventions by calling for a plank supporting abortion rights. See Robert Connolly, *Pro-Choice Forces Strong-Arm Gov. Weld*, BOSTON HERALD, Aug. 17, 1992, at 1 (reporting that Weld told abortion-rights activists on the eve of the 1992 Republican National Convention that they could "count on Massachusetts" as they tried to "seek a debate on the platform's abortion plank"); Robert A. Jordan, *Weld Campaigning Even in San Diego*, BOSTON GLOBE, August 11, 1996, at D5 (reporting that "Weld, who favors abortion rights, vowed a floor flight on the [abortion plank] issue" at the 1996 Republican National Convention).

178. See ABRAHAM, *supra* note 2, at 106-07.

nomination as chief justice after his Democratic supporters were unable to stop a filibuster against the nomination in part because of President Johnson's unpopularity and the expectation that Johnson would be replaced by Richard Nixon, whom Fortas's Republican opponents preferred to appoint a replacement for Earl Warren.¹⁷⁹

ii. *Nominees as Active Agents on Their Own Behalf*

A perennial concern of observers of and participants in the federal appointments process is the extent to which nominees have exerted influence over their own appointments. Obviously nominees have exerted more control over presidential nomination decisions than over senators' confirmation votes. This is primarily because a nominee must convince far fewer people to achieve nomination than to be confirmed.¹⁸⁰

The easiest means of securing nomination is to be close personally to the president or to those primarily responsible for advising him in making nominations. Moreover, it is quite common for potential nominees to wage campaigns to be nominated or to have others wage such campaigns on their behalf. Unfortunately, a good deal of the negotiating that culminates in a nomination occur outside the public eye, and it is often left to historians to enlighten subsequent generations on the precise reasons for presidential choices. One available illustration of a successful campaign is the one waged by Martin Ginsburg, a prominent and well-connected tax professor at Georgetown, to secure President Clinton's nomination of his wife, then-Judge Ruth Bader Ginsburg, to the Supreme Court.¹⁸¹ Working with influential senators from both parties, including Senator Moynihan, then the chair of the Senate Finance Committee (critically important to the success of President Clinton's budget-cutting and health-care reform plans), Professor Ginsburg worked to keep his wife's candidacy alive until she was the only prominent choice acceptable to all sides at the end of President Clinton's long search for a successor for Justice White. By contrast, a notable example of an unsuccessful

179. See MASSARO, *supra* note 39, at 55-77.

180. See Gerhardt, *The Confirmation Mystery*, *supra* note 5, at 414 n.88.

181. See Eva Rodriguez, *Most Ginsburg Critics Lay Down Their Arms; Even Conservatives Expect Easy Confirmation*, LEGAL TIMES, July 19, 1993, at 2.

campaign is the one waged by Justice Frankfurter in 1942 to persuade President Roosevelt to nominate Judge Learned Hand to the Supreme Court. Justice Frankfurter's campaign was virtually doomed from the start because he no longer wielded any significant influence with President Roosevelt; Judge Hand was seventy-two years old and thus not likely to be on the Court as many years as the President would have preferred; Judge Hand's likely judicial philosophy conflicted with the one the President hoped to bolster; and Judge Hand had never been the kind of party loyalist the President preferred to nominate to the Court.¹⁸²

Once nominated, it becomes considerably more difficult for nominees to influence the fates of their confirmations. One reason is that it is not unusual for the fates of particular nominations to have been largely sealed by the actions taken by nominees and others acting on their behalf prior to the formal nominations to win favorable public opinion or bipartisan Senate support.

Moreover, nominees have rarely been able to help themselves through their testimony before the Senate. The better strategy has usually been to say less rather than more or at least to avoid expressing any controversial opinion. For instance, Justice Scalia avoided making waves in his Supreme Court confirmation hearings by saying little about his likely judicial ideology.¹⁸³ Although this tactic frustrated Senate Judiciary Committee members, it deprived them of a target. In contrast, Judge Bork hurt himself by trying to explain his views on a broad range of constitutional issues, and many senators subsequently cast votes against him because of the inconsistencies between his testimony and previously expressed viewpoints or due to their disagreements with the substantive positions he had taken.¹⁸⁴

In rare situations, however, nominees have used their personal appearances before the Senate to help themselves. For instance, prior to his testimony before the Senate Judiciary Committee, Justice David Souter was an enigma.¹⁸⁵ His testimony proved, however, to be remarkably articulate, poised, refreshing,

182. See GUNTHER, *supra* note 145, at 458-60, 561-66.

183. See Gerhardt, *The Confirmation Mystery*, *supra* note 5, at 409.

184. See Gerhardt, *Interpreting Bork*, *supra* note 5, at 1386-89.

185. See DAVID G. SAVAGE, *TURNING RIGHT: THE MAKING OF THE REHNQUIST COURT* 356-58 (1992).

candid, and witty; it has virtually set the standard for all subsequent Supreme Court nominees. Even more dramatically, Justice Thomas salvaged his appointment through his testimony before the Senate Judiciary Committee. His repeated emphasis on his impoverished youth and the distance he had come,¹⁸⁶ and especially his characterization of the second phase of his confirmation hearings as a "high-tech lynching," put opposing Democrats on the defensive, forcing them to prove that their opposition was not racially motivated.¹⁸⁷

b. *The President's Organizational Capability
or Institutional Support*

Another factor that can make or break a nomination is a president's organizational capability or institutional support, including the strength of his party in the Senate. This factor implicates presidential leadership more clearly than any of the others, for it includes a president's management and communication skills, sense of timing, and ability to assemble and coordinate a good support staff and to mobilize public support. Given the potency of this factor, it is helpful to examine more closely the ways in which it can be used determine a nomination's fate.

i. *The Opposition Party's Strength in the Senate*

The composition of the Senate significantly affects the president's ability to implement his preferred judicial and nonjudicial appointments. For example, the correlation between party membership and Supreme Court confirmation votes has remained strong throughout American history.¹⁸⁸ In one study, Professor Robert Scigliano found that the confirmation rate for Supreme Court justices was 91 percent when a president's party controlled the Senate, whereas the rate dropped to 42 percent when a president's party was in the minority in the Senate.¹⁸⁹ Another study found that the confirmation rate was 90 percent

186. See Berke, *supra* note 151.

187. See Gerhardt, *Divided Justice*, *supra* note 5, at 982-83, 989.

188. See, e.g. Felice & Weisberg, *supra* note 149, at 511-12 (1989) (discussing the correlation between political parties and Supreme Court confirmation votes).

189. See SCIGLIANO, *supra* note 101, at 98.

in the first three years of office but less than 67 percent in the fourth year.¹⁹⁰

Moreover, the political realities of divided government have proved to be significant in evaluating presidential performance generally and particularly in the federal appointments process. For example, even though Andrew Jackson's party did not control the Senate until near the end of his presidency,¹⁹¹ he did not hesitate throughout his presidency to do battle with the Senate on both judicial and nonjudicial appointments to further his agenda.¹⁹² More often than not, Jackson found ways to divide Senate opposition to his nominees in order to place the kinds of individuals he wanted (if not his favorites) into the positions he wanted for them.

During presidential election years, presidents have faced the stiffest opposition to their nominations from their political foes in the Senate.¹⁹³ The opposition party has usually slowed or stalled judicial nominations, particularly to the Supreme Court, as the date of a presidential election has drawn nearer.¹⁹⁴ Indeed the Democratic Senate majority effectively stopped confirmation hearings for President Bush's judicial nominees beginning in the summer preceding the 1992 presidential election.¹⁹⁵ Consequently, President Clinton inherited dozens of judicial vacancies because the Senate never had taken final action on

190. See STEPHEN L. WASBY, *THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM* 127 (4th ed. 1993). In yet another study, Professor Segal provided the first multivariate analysis of the historical record, using a probit analysis to study the determinants of the confirmation of appointments. See Jeffrey A. Segal, *Senate Confirmation of Supreme Court Justices: Partisan and Institutional Politics*, 49 J. POL. 998, 1003-05 (1986); see also Jeffrey A. Segal and Harold J. Spaeth, *If a Supreme Court Vacancy Occurs, Will the Senate Confirm a Reagan Nominee?*, 69 JUDICATURE 186, 189 (1986). Segal's final model shows significant effects for a number of factors, including whether the opposition party controlled the Senate, whether the nominee was a sitting senator, whether the nomination occurred in the fourth year of a president's term, whether the nominee was a member of the cabinet, how long the nominee had served in the national legislature, and whether the nomination occurred in the Twentieth Century. See *id.* Professors Lemieux and Stewart have also used logit analysis of the same historical record and found a close proximity between the party mixes on the Court and in the Senate. See Peter H. Lemieux & Charles H. Stewart, *Advise? Yes. Consent? Maybe.: Senate Confirmation of Supreme Court Justices* (1988) (paper presented at the Annual Meeting of the American Political Science Association).

191. See HARRIS, *supra* note 2, at 63.

192. See *id.* at 53.

193. See Thomas Halper, *Senate Rejection of Supreme Court Nominees*, 22 DRAKE L. REV. 102, 108-09 (1972).

194. See *supra* note 166.

195. See Goldman, *Bush's Judicial Legacy*, *supra* note 132, at 284.

many of the stalled nominations.¹⁹⁶ No sooner did the Republicans retake control of the Senate in 1994 than they began to slow the processing of President Clinton's judicial appointments, confirming only seventeen federal district judges and no federal appellate judges during all of 1996.¹⁹⁷

ii. *Poor Confirmation Management*

Presidents have mismanaged the appointments process in many ways. One common problem has been delays in naming nominees. If presidents delay their nominations for too long, opposing forces in the Senate, as described above, may try to slow the processing of these nominations pending the outcome of the sitting president's re-election effort. As suggested, numerous judicial nominations made by both Presidents Bush and Clinton have fallen prey to this difficulty.

Timing can also become a problem when presidents move too slowly in coming to the defense of an embattled nominee. For instance, President Reagan nominated Robert Bork to the Supreme Court in the middle of the summer of 1987, but he allowed the Democrats in control of the Senate to postpone Judge Bork's confirmation hearings until after Labor Day.¹⁹⁸ Bork's opposition used the summer to organize itself and to attack the nomination publicly. By the time President Reagan rallied to Bork's defense, the hearings had begun, and the nominee was already seriously wounded. A similar problem arose with President Clinton's nomination of Lani Guinier to head the Civil Rights Division of the Justice Department.¹⁹⁹ The nomination quickly drew fire from conservatives, but neither President Clinton nor any of his top political appointees came to Guinier's defense, and she was forced to withdraw her nomination without the President ever having come publicly to her defense.

A badly conceived defensive strategy can hurt a nomination almost as much as no defense. Consider, for example, Richard Nixon's first two attempts to fill Abe Fortas's seat on the Supreme Court. In both cases, Nixon failed to devise and

196. *See id.* at 277.

197. *See* Marcia Coyle, *Circuit Vacancies Need Filling Now*, NATIONAL L.J., Feb. 24, 1997, at A14.

198. *See* BRONNER, *supra* note 40, at 202-03.

199. *See* CARTER, *supra* note 1, at 168.

employ effective operations within his administration for evaluating nominees' backgrounds; to develop intelligent strategies for securing confirmation; and to provide the means for maintaining a good working relationship with the Senate.²⁰⁰

Poorly conceived staffing can also undo nominations. Such was the problem with George Bush's system for evaluating prospective judicial nominees.²⁰¹ Whereas President Reagan had delegated primary responsibility for assessing the ideological credentials of prospective judicial nominees to the Justice Department, President Bush delegated this task to both his Justice Department and White House Counsel's Office. This duplication cost President Bush precious time in processing potential judicial nominations.²⁰²

A counterexample to President Bush's flawed system for judicial selection is the one adopted by President Ford for nominating a replacement to Justice Douglas.²⁰³ President Ford divided the advisory responsibility between his attorney general, Edward Levi, and his White House counsel, Phil Buchen; he charged Levi with the task of assembling a list of potential candidates based largely on professional ability and a moderate judicial ideology, and he asked Buchen to assess the political ramifications of the various potential nominees. Levi's and Buchen's offices interacted smoothly, and once a nominee was chosen, the Senate moved quickly to approve him unanimously.

Sometimes the best trigger for mobilizing public opinion for or against a nomination is associating a nominee with a potential danger to the public or some problematic characteristic of the president. This fact has serious consequences for constitutional law. The exploitation of such factors suggests that the president and the Senate have tended to treat judicial and nonjudicial nominations in strikingly similar ways. For instance, the first factor treats the person's philosophy about government as a potentially disqualifying concern. The policy could be related to the judiciary—for example, its role within the constitutional order—but does not have to be. Consequently, one finds that nominees will be rejected for their political philosophies,

200. See MASSARO, *supra* note 39, at 79, 106, 144.

201. See generally Sheldon Goldman, *The Bush Imprint on the Judiciary: Carrying on a Tradition*, 74 JUDICATURE 294, 296-98 (1991).

202. See *id.* (contrasting both presidents' organizations for judicial selection).

203. See, e.g., Kramer, *supra* note 1, *passim*.

regardless of the positions they are seeking. To be sure, judicial and nonjudicial nominees do receive some different treatment; for instance, the former are often scanned more closely by both the president and the Senate because they will have life tenure. Even so, the higher the profile of the nominee, the more outrageous the person's philosophy has to be in order to create a plausible case for public concern about the person's appointment. As the nominee's chances for elevation to more powerful positions rises so too do the costs of supporting or opposing the nomination.

C. *Interest-Group Exchange Theory*

As previously suggested, interest groups exert influence in the appointments process by signaling to key decisionmakers their willingness to give their support in exchange for certain outcomes, nominations, or votes.²⁰⁴ Such exchanges have been attempted for various purposes, including representing the special interests of a segment of the public; educating the public and policymakers about the organizations' concerns and agendas; shaping or informing policy and public opinion; sensitizing the public or policymakers to certain issues; ensuring the nomination of persons either sympathetic to the groups' views or with a history of support for those views. Interest groups also increasingly have used a variety of means of achieving these objectives, including studying, evaluating, and rating the records or qualifications of nominees or potential nominees; lobbying presidents, presidential advisers, senators, and senatorial staffs; preparing suggested questions for senators to pose during confirmation hearings; and media advertising.

At present, the participation of interest groups is a benefit to the extent that it is a proxy for more direct citizen participation within the system. In the Nineteenth Century, extremely wealthy or powerful individuals exercised unusual influence over the appointments process without much media coverage or notice.²⁰⁵ In the Twentieth Century, by contrast, although this kind of activity has not disappeared, it has been counterbalanced and complicated by the infusion of organized interest groups purporting to act on behalf of the public. The main problem

204. See *supra* note 80 and accompanying text.

205. See Freund, *supra* note 11, at 1149.

presented by this development is that interest groups have manipulated the evaluation of nominees' qualifications.²⁰⁶ This problem is counterbalanced by the fact that interest groups have acted in many cases to cancel each other's influence. This latter phenomenon puts pressure on groups to make preemptive strikes or to move faster in response to particular nominations. One possible means of reducing such conduct is restricting the ways in which interest groups participate in the system—restricting their chances to testify, for example. But interest groups almost certainly will continue to find ways to influence the process behind the scenes; it is difficult to conceive of a way to bar their participation altogether.

Ironically, the media are in a position to help solve this dilemma. If the media were to cover the influence of interest groups over the federal appointments process more fully, two things could be accomplished. First, it would be easier to hold interest groups accountable for their performance in the appointments process. Second, media coverage would illuminate the institutional aspects of the system by demonstrating how interest groups have influenced policymaking. Such coverage would make it possible for the public and the members of Congress to make better-informed judgments about the propriety of interest-group influence peddling.

The need for more extensive media coverage of interest-group participation in the federal appointments process as a means for educating the public about the system's operations underscores the potential significance of the public as a force in the confirmation process. Every other major actor involved in the process claims to act in the public's interest. Ironically, the public lacks the means, available to these other actors, to exert influence over formal decisionmaking in the federal appointments process. The public participates indirectly through representation by interest groups and directly through the ballot box (though it is difficult to assess the degree to which votes are cast on the basis of performance in the federal appointments process), polling data,²⁰⁷ and personal contacts

206. See, e.g., Stephen L. Carter, *The Confirmation Mess, Revisited*, 84 NW. U. L. REV. 962, 972-75 (1990); Jack Fuller, *When Confirmation Becomes a Brawl*, 84 NW. U. L. REV. 976, 976-77 (1990).

207. One potential problem with reliance by senators on polling data is that they might effectively turn to the public to determine the popularity of Supreme Court

with the major decisionmakers. Whereas small, well-organized, well-financed interest groups are able, by virtue of their superior organization, focus, and financing, to wield disproportional influence over formal decisionmaking in the appointments process, the public is by nature unorganized and widely dispersed and thus less able to exert pressure on the process. Nevertheless, the fallout from the Thomas-Hill hearings illustrates the potential for the public and the media to influence the federal appointments process. When the Senate Judiciary Committee initially learned about Anita Hill's charges that Clarence Thomas had sexually harassed her while she was

nominees. This popularity, in turn, depends on how the prospective justices would vote in cases involving major constitutional issues. Such a focus poses a potential threat to judicial independence because it transforms judicial confirmation hearings into popular elections in which the majority will approve only those nominees who express agreement with its preferences regarding constitutional interpretation. See, e.g., CARTER, *supra* note 1, at 98-99.

This concern is mitigated by several factors. First, the Constitution does not protect judicial independence absolutely. It does not require the Senate to back off whenever its actions might influence the functioning of the judiciary. In fact, the opposite is true. One critical way in which the Constitution limits judicial independence is by empowering the executive and legislative branches to make the determinative judgments about the direction and composition of the federal judiciary. See Gerhardt, *The Confirmation Mystery*, *supra* note 5, at 419-22. The nominating power and confirmation process serve effectively as checks on the judiciary. Once a federal judge is confirmed, he or she is immune to political reprisals except impeachment, but the Constitution clearly allows judicial nominees to account to the political branches at the confirmation stage.

Second, such concerns about judicial independence rest partly on the mistaken premise that confirmation hearings operate like judicial elections in which a majority empowered to vote dictate whom is chosen. In fact, confirmation proceedings are more similar to a public referendum in which those empowered to vote have the authority to strike down a nominee but do not have power to choose an alternative. In other words, the Senate in a confirmation proceeding decides whether a judicial nominee is acceptable, not whether that nominee is the Senate's first choice. Thus, once a nomination has reached the Senate, the public's and the Senate's powers to shape outcomes are limited.

Third, the argument that questioning judicial nominees about their likely ideologies poses a threat to judicial independence does not acknowledge the limited utility of such questioning or the risks such questioning poses to senators. Nominees can make statements sufficient to attain confirmation and then do whatever they please once on the bench. This risk has led presidents and senators to seek insights into judicial nominees' ideologies from their political or public-service activities. Cf. Michael J. Gerhardt, *Models to Learn From: Good, Bad, and Ugly*, LEGAL TIMES, Nov. 9, 1992, at 27, 38 (suggesting that one can "accurately measure judicial excellence, philosophy, and temperament by examining the level, nature, and kinds of professional accomplishments, public-service and political activities, sponsors, speeches, and academic writings for each nominee").

Lastly, no nominee has promised during his or her confirmation hearings to vote in a particular way in a case likely to come before the Court. In fact, no nominee to the Court has ever been rejected for saying too little in a confirmation hearing. Thus, the most serious part of the threat to judicial independence—the coercion of a vote—has never been realized.

an employee in his office, it had refused to hear her testimony or hold any special hearings. When the public and interest groups learned about this refusal, they immediately responded with calls, faxes, and telegrams to the Judiciary Committee, leading the Committee to agree quickly to a public hearing on Hill's charges.²⁰⁸ In spite of the apparent impact of the public and interest groups on the Thomas hearings, the challenge for the public in the future depends on the degree to which other players accurately reflect or are sensitive to its concerns.

VI. CONFIRMATION REFORM

The final concern to be resolved in constructing a comprehensive analysis of the federal appointments process relates to the need for reform. This issue entails two inquiries. The first seeks to ascertain the requisite conditions for reform, and the second weighs the merits of the most significant suggestions that satisfy those conditions or enjoy relatively widespread popular support.

A. *The Lessons of the Past*

Suggesting improvements to the federal appointments process is pointless without a systematic appraisal of the system's operations and a realistic assessment of its potential for reform. The federal appointments process does not operate in a vacuum; it must be understood in the context within which it has developed over the past two-hundred years. Consequently, learning why certain alterations have been made or rejected in the past provides important insights into the prospects for change in the future.

A close study of the history of various efforts to reform the appointments process reveals that both presidents and the Senate have recognized that each has a significant stake in controlling the selection of key personnel in the national government, including the federal judiciary. Neither side has been eager to give up the influence it has achieved over these choices in the past.

Consider the practice of senatorial courtesy. Even though this practice would seem to turn the division of authority in the

208. See Susan Page, *Thomas Case Subpoenas; Senate Wants to Question Reporters on Leaks*, NEWSDAY, Feb. 4, 1992, at 15.

Appointments Clause on its head by enabling senators to make the initial suggestions as to whom should be nominated for confirmable posts in their respective states and by merely reserving veto power in the president, senatorial courtesy persists.²⁰⁹ The practice has continued in large part because the Senate as an institution has nothing to gain, but a great deal to lose, by abandoning it. Senatorial courtesy provides senators the opportunity to bestow political favors on their supporters and to pick ideologically aligned persons for important federal offices. Senators also have a vested interest in ensuring that their colleagues are entitled to senatorial courtesy; in fighting for a colleague's privilege to take advantage of this practice, a senator protects his own entitlement to it.

At first glance, it might seem that presidents lose significant authority when they accede to this practice, for it requires that they give up some of their control over important posts and forego political favors that they otherwise could bestow upon their friends and allies. Yet, the vast majority of presidents have taken senatorial courtesy seriously and have not taken serious steps to abandon it. Only two presidents—Herbert Hoover²¹⁰ and Jimmy Carter²¹¹—have tried to buck this system; they tried to do so early in their terms and paid the political cost for their resistance by forfeiting, for the remainders of their terms, good relations with many influential senators from their own political

209. See HARRIS, *supra* note 2, at 228-31, 380.

210. Almost immediately after taking office, President Hoover informed Republican leaders in the Senate that he wanted to make judicial appointments based primarily on merit rather than senatorial courtesy. Toward this end, he authorized making public the names of those people officially endorsing or supporting judicial nominees. See *id.* at 116. The problem was that this stance alienated most of the senators from Hoover's own party and helped to set the stage for their joining forces with senators from the other party to block Hoover's progress in implementing his agenda. By the end of his presidency, he had no clout whatsoever when it came to making federal appointments.

211. Once in office, President Carter vowed to replace senatorial courtesy with merit selection panels for both federal district and circuit-court judgeships. Democrats in the Senate, joined by Republicans eager to embarrass the new president, balked. Carter persisted, eventually succeeding in persuading some Democratic senators to adopt special judicial nominating commissions for making recommendations on federal district-court nominations and issuing an executive order creating special presidentially appointed commissions to make recommendations for circuit-court nominations. See generally W. Gary Fowler, *A Comparison of Initial Recommendation Procedures: Judicial Selection under Presidents Reagan and Carter*, 1 YALE L. & POL'Y REV. 299 (1983) (comparing the initial recommendation procedures for judicial appointments under the Carter and Reagan Administrations). In the end, however, Carter's commissions helped him to appoint an above-average number of well-qualified, diverse judges, see *id.* at 336, 345-47, but at the price of straining relations with many influential Democrats in the Senate.

parties. The price paid by Presidents Hoover and Carter provides some insight into the reason other presidents have not tried to abandon senatorial courtesy; trying to do away with the practice provokes a widescale battle with almost every senator over perhaps the only appointments issue concerning which all of them could claim a vested interest—the privilege of making recommendations for filling posts within their respective states. Moreover, presidents have found that the practice of senatorial courtesy has given them bargaining chips in negotiating with senators to fill federal offices and in conducting legislative business. Consequently, neither the president nor the Senate has been convinced that it is in the interest of either to abandon the practice.

A different dynamic has been in effect in the few instances in which the president and the Senate have agreed to serious structural reform. For instance, senators have a vested interest in maintaining confirmation proceedings open to the general public. In spite of the initial ambivalence of the Senate in making confirmation hearings public,²¹² this practice has provided senators with the opportunity, especially in high-profile cases, to get free publicity for their activities. Moreover, the practice of having nominees testify *personally* before Senate committees has become entrenched because it has increased the Senate's leverage over the appointments involved. Nominees no longer resist invitations from the Senate to make personal appearances before it because their noncompliance is likely to stall their confirmations or produce opposition.

The overarching lesson derived from the history of efforts to reform the confirmation process is that structural alteration has occurred only when it has been in the interest of the president, Senate, or both to adopt change. Take, for example, the fallout from the Thomas-Hill hearings. Though the Senate Judiciary Committee initially declined to hold any hearing—even behind closed doors—to consider Anita Hill's charges that Clarence Thomas had sexually harassed her while she was an employee in his office, the same Committee agreed to hold public hearings on the matter once it became aware of the public outrage at that decision.²¹³ After Justice Thomas's confirmation, the Committee

212. See HARRIS, *supra* note 2, at 249-55.

213. See Page, *supra* note 208, at 15.

agreed that in all future cases it would hold closed-door proceedings to consider charges of personal misconduct leveled against judicial nominees.²¹⁴ The ostensible reason was that public hearings, as in the Thomas-Hill controversy, would make it easier to damage an innocent nominee's reputation purely for political reasons, whereas closed-door hearings would allow the opportunity for a more dispassionate, more candid, less intense inquiry to determine the validity of any allegations.

Because the constitutional structure grants the president the balance of power in the federal appointments process,²¹⁵ the president and the Senate have had different agendas in evaluating the ramifications of reform proposals. Presidents have striven to retain the executive's advantage, whereas the Senate has had to work harder to wrest some of the authority over federal appointments away from the president for the sake of creating a more equal, if not a more favorable, playing field. The critical issue in whether a proposal is accepted is the institutional ramifications of the proposal. To the extent that a proposal puts at risk the gains in the appointments process already achieved by either the president or the Senate, it is sure to fail. To the extent that a proposal works to the mutual advantages of both the president and the Senate, it is likely to succeed, though it would probably take some time to convince both institutions that such mutual interest exists. If a proposal works to the relative advantage of one branch over the other, the former must persuade the latter that it is also in the latter's interest to advance in that particular direction. Consequently, the likeliest changes are those that will benefit both equally.

Not surprisingly, few proposals are likely to meet this test. This conclusion is not necessarily a negative one, however, because it reflects the wariness of both the president and Senate about the other institution's involvement in the appointments process, an apprehension that reflects the vitality of checks and balances and the small chance that change will occur in this system for short-sighted, partisan reasons rather than for far-sighted, institutional benefit.

214. *See id.*

215. *See supra* Part III.B.

B. *Appraising Likely Future Reforms*

The remaining question is which, if any, of the most prominent suggestions for reform have sufficient merit to secure the institutional support of the presidency, the Senate, or both. One such proposal is curtailing or eliminating the testimony of nominees to the Supreme Court, and perhaps to all federal courts.²¹⁶ This change would arguably put additional pressure on presidents to nominate, and on the Senate to confirm, only those candidates whose accomplishments and records could speak sufficiently for themselves. This proposal also arguably would protect judicial independence from being threatened in the confirmation process by overly aggressive senatorial questioning about nominees' likely voting patterns or judicial ideologies.

Nevertheless, this proposal is ill-considered for at least two reasons. First, as a practical matter, the tradition of having judicial nominees testify before the Senate is already too well-established to be abandoned. Although restricting the personal testimony of judicial nominees would probably be welcome news to the nominees themselves, presidents would hesitate to support such a proposal because they might be criticized for hiding their nominees from public scrutiny; and senators would similarly be inclined not to support such a reform because they might be criticized for deferring too much to the president and not exercising their constitutional authority to advise and consent more energetically. Second, nominee testimony provides, in many cases, the only chance for most of the public to learn about the nominees. Testimony is often the last, if not only, forum in which a nominee can be held accountable for his or her professional record, which is directly reflective of his or her qualifications.²¹⁷

216. See, e.g., CARTER, *supra* note 1, at 191-94; Donald J. Devine, Reform the Judicial Process Now: Five Proposals for a Return to Senate Comity, Address at the Heritage Foundation's Heritage Lecture Series, Nov. 12, 1991.

217. Evaluating nominees' records also includes assessing their integrity, which is relevant in predicting the nominees' professional judgments and performances. The problem is that once a nominee's character is made fair game, it appears as if anything goes. Yet, everyone involved with the process, including the president, has tended to evaluate nominees on the bases of their accomplishments and characters. If this tendency persists, then the only realistic alternative would be for those making evaluations in the appointments process to do so as candidly as possible. Moreover, the more professionally accomplished the nominee is, the less important a separate character analysis will be. For example, Zoe Baird's nomination as attorney general failed

A second popular proposal is enactment of legislation requiring specific qualifications for certain positions.²¹⁸ The constitutionality of this proposed legislation depends on at least two major factors. First, the nature of the positions involved is relevant—whether, for example, they are posts within the executive office of the president or offices requiring Senate confirmation. If the former type of office is involved, it is likely that no congressionally mandated qualifications for its occupant would be constitutional because any such requirements would constitute illegitimate legislative attempts to hinder a president's ability to exercise a core prerogative of his office—choosing his closest advisers. Nor does Congress lack less directly threatening, but still effective, means of influencing the president's choices for filling these positions, such as exercising its oversight and appropriations authority, or attempting, through the individual members, to cut deals with the president in exchange for certain appointments.

If, however, the offices involved are congressionally created and require Senate confirmation, a different constitutional analysis is required. With respect to these offices, a great deal depends on whether one uses formal or functional separation-of-powers analysis. Formal analysis generally is "premised on the beliefs that the text of the Constitution and the intent of its drafters are controlling and sometimes dispositive, that changed circumstances are irrelevant to constitutional outcomes, and that broader 'policy' concerns should not play a role in legal decisions."²¹⁹ Formal analysis would likely dictate that congressional attempts to legislate qualifications for certain posts would be unconstitutional because they would directly burden, impede, or restrict the president's discretion to nominate whomever he pleases. Formalists would argue that the Appointments Clause makes Senate approval the only constraint on the president's discretion to exercise his nominating power; any attempt to constrain this discretion through legislation

in part because she did not have the kind of distinguished professional record needed to counterbalance the questions raised about her character and professional judgment as a result of her and her husband's failure to pay social-security taxes on domestic help. See Gerhardt, *The Confirmation Mystery*, *supra* note 5, at 405.

218. See, e.g., CARTER, *supra* note 1, at 166.

219. Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 493 (1987).

would plainly constitute an attempt by Congress to aggrandize itself at the expense of the presidency.

Under functional analysis, on the other hand, the relevant inquiry is whether “present [or proposed] practices undermine constitutional commitments that should be regarded as central.”²²⁰ Functional analysis would uphold any reform of the federal appointments process as long as it did not unduly interfere with a basic function of the presidency, the Senate, or the judiciary. Functional analysis would lead a federal court to uphold a wide range of legislation attaching requirements to offices created by Congress, particularly those within federal agencies. Functional analysis would likely also accept extension of such legislation to other positions, such as the Supreme Court or cabinet posts, because the president would still have considerable latitude to choose nominees from within the set of nominees qualified under the legislative requirements. With respect to the Supreme Court, judicial independence does not depend fundamentally on the availability of an unlimited range of people for nomination. In other words, judicial independence does not depend on a presumption that virtually every citizen, regardless of merit, must be available for presidential nomination.²²¹

The constitutionality or legitimacy of other statutory proposals to alter the federal appointments process will turn on functional or formal separation-of-powers analysis. For instance, a recent controversy relates to the need to broaden or clarify the reach of the Vacancies Act.²²² This statute provides that a vacancy in the top confirmable position in a government department or agency may be filled temporarily, either by the first assistant in that

220. *Id.* at 495.

221. Under a functional analysis, the fact that the confirmation process establishes a presumption of confirmation is not necessarily determinative of the question of constitutionality. To be sure, the Appointments Clause contemplates a certain balance of power between the president and the Senate on appointments matters, and any legislation setting forth requirements for confirmable positions would have to be analyzed in terms of whether it upsets this balance unduly. The presumption of confirmation is meant to work primarily to the advantage of the president rather than that of a particular nominee or class of nominees. From the standpoint of the judiciary, the critical question is what it loses institutionally if its members must meet certain legal qualifications, such as a minimum number of years of legal training or practice. At least from a functional perspective, the answer would seem to be little or nothing, because satisfying these criteria arguably helps to improve the chances for confirmation. In other words, satisfying the criteria would actually heighten the presumption of confirmation.

222. 5 U.S.C. §§ 3345-49 (1994).

agency or by an individual designated by the president to fill the position for no more than 120 days. This period may be tolled pending the outcome of Senate proceedings regarding a formal presidential nomination to the vacant office. The current controversy relating to the Act is that the Justice Department has claimed that the Act is not the exclusive means by which acting officials may be designated, and thus appointments have been made for indefinite periods of time without Senate approval.²²³ The Justice Department's organic statute²²⁴ provides that "all functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General."²²⁵ In a different section, the statute provides that the attorney general "may from time to time make such provisions as [she] considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the attorney general."²²⁶ A natural consequence of this language is that the attorney general delegates when necessary some of her authority temporarily to her subordinates. Moreover, the Vacancies Act's references to executive "agencies" and "bureaus" are terms of art and do not refer to subcabinet-level offices, such as the Office of Legal Counsel or the Civil Rights Division, within an executive branch department.

Regardless of the propriety of the Justice Department's position regarding its obligation to make temporary appointments in compliance with the Vacancies Act, there is strong congressional interest in revising the Vacancies Act to cover temporary appointments to all confirmable offices in the executive branch. Such revisions would clearly be constitutional. First, under formal separation-of-powers analysis, the Constitution empowers Congress to create and fund offices; this power presumably encompasses regulating the length of time an occupant may serve without confirmation. Moreover, the president's only explicit constitutional authority given to make

223. See ROGELIO GARCIA, CONGRESSIONAL RESEARCH SERVICE, ACTING OFFICIALS IN POSITIONS REQUIRING SENATE CONFIRMATION IN EXECUTIVE DEPARTMENTS, AS OF FEBRUARY, 1998, at 1, 5-9 (1998) (suggesting that sixty-four such appointments have been made in the fourteen executive departments in violation of the requirements of the Vacancies Act).

224. 28 U.S.C. §§ 509-10 (1994).

225. *Id.* at § 509.

226. *Id.* at § 510.

temporary appointments to confirmable offices without the Senate's approval is to make recess appointments, which expire at the end of the next session of the Congress during which they were made.²²⁷ Under functional separation-of-powers analysis, a congressional effort to broaden the reach of the Vacancies Act would restore some of the advise-and-consent power lost or frustrated by an administration's apparent ability to make "temporary" appointments indefinite. Additionally, such broadening would not unduly interfere with a president's discretion to exercise his nominating power, for it would not direct whom he may nominate. Instead, any revisions would restrict the length of time during which he may act unilaterally in filling confirmable offices.²²⁸

VII. CONCLUSION

This Article has had two basic purposes. The first has been to identify the necessary ingredients for a comprehensive analysis of the federal appointments process. The most significant explanatory components are structure, history, and politics. Institutional analysis provides the most useful means for clarifying and evaluating the performances and complex motivations of the president and the Senate within the system.

The second purpose has been to sketch how these components may be pulled together into such a comprehensive analysis. For instance, historical and institutional analyses combine to explain the consistency in the considerations taken into account by presidents and senators in making decisions about federal appointments. Moreover, such analyses explain the federal appointments process as a clash, occurring under particular historical and political circumstances, between the persons managing two distinct institutions with unique structures and different agendas.

Institutional analysis suggests further that the confirmation process is a struggle between a president and the Senate over selection of those people who will help or hinder the president's

227. See U.S. CONST. art. II, § 2, cl. 3.

228. The policy advantages of extending the coverage of the Vacancies Act are twofold. First, such an extension would inform decisionmakers about their respective powers in making temporary appointments. Second, such an extension would provide uniformity in making temporary appointments, and such uniformity would improve the administration and oversight of the process for making temporary appointments.

achievement of his grandest ambitions for the presidency, the nation, and the Constitution. The broader a president's agenda, the more formidable the obstacles he will have to surmount to fulfill it and the more impressive his achievement of it. Under this view of the confirmation process, presidents' success with respect to appointments may be measured by the degree to which they fulfill these ambitions. In other words, evaluating performance in the federal appointments process requires measuring leadership and management skills—those of a president in articulating his grandest ambitions for his office and in organizing, managing, and deploying his branch to facilitate the implementation of those goals, and those of senators in implementing their own agendas or in supporting or impeding a president's priorities.

Moreover, historical and institutional analyses of the federal appointments process suggest that, perhaps contrary to popular opinion, it works better than commonly supposed. The process has become more open while at the same time becoming more complex. The greater media coverage of events related to the process is desirable because it provides for greater accountability of each major actor within it—the president, Senate, interest groups, the public, and nominees. The increasing complexity of the system is not a detriment because the system remains susceptible to rational analysis.

The critical task in an analysis of the appointments process is development of more sophisticated means of explaining and evaluating performances of all major actors within the system. Institutional analysis is integral to this inquiry because it helps to clarify the nature of the interaction between the president and the Senate on federal appointments matters and the constructive and destructive roles performed in the process by nongovernmental actors, such as interest groups and the media. Such analysis also helps to clarify the dynamic relationship between appointments controversies and larger, long-standing constitutional or policy disputes between presidents and senators. Moreover, institutional analysis provides a means for comparing the performances of presidents and senators in the appointments process as reflections of the relative quality of their management of their respective powers.

Ultimately, it would be difficult to overstate the utility of such a comprehensive analysis of the federal appointments process. It

will help to demystify crucial aspects of the federal appointments process, particularly the preconditions for change, for observers and participants of that process. In the absence of analytical tools provided by such an analysis, the federal appointments process will remain a mystery, particularly for those legal scholars who profess to be its oracles.

