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PUTTING PRESIDENTIAL PERFORMANCE IN THE FEDERAL APPOINTMENTS PROCESS IN PERSPECTIVE

Michael J. Gerhardt[†]

INTRODUCTION

For all of the attention given in recent years to dramatic confirmation contests, little or no serious consideration has been given to role of the President in the federal appointments process. Instead, commentators have been absorbed with the Senate's role, particularly in judicial confirmation proceedings (and, even then, primarily only those for Supreme Court justices).¹ The reasons for this focus are easy to identify. First, Supreme Court confirmation

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1. See, e.g., STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* 23-28, 37-44, 134, 138-44 (1994) (discussing the ways in which his friends Zoe Baird, Lani Guinier, and Anita Hill were abused in their respective Senate confirmation proceedings); PAUL SIMON, *ADVICE & CONSENT: CLARENCE THOMAS, ROBERT BORK AND THE INTRIGUING HISTORY OF THE SUPREME COURT'S NOMINATION BATTLES* 295-98 (1992); LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT: HOW THE CHOICES OF SUPREME COURT JUSTICES SHAPES OUR HISTORY* 170 (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 Strauss & Cass Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 *YALE L.J.* 1491, 1494-1502 (1992) (arguing that after 12 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).

proceedings often provide the public (if not legal scholars and political commentators) with a rare internal glimpse into the powerful but largely secretive and mysterious institution of the Supreme Court and the lives and backgrounds of the people who wield its power. Moreover, the clash between the President and the Senate over high stakes nominations, such as those to the Supreme Court, often reveals a lot about the characters and agendas of the political leaders involved. Such clashes also provide a great deal of drama, and the drama in turn attracts considerable public attention. In addition, there is widespread concern among political scientists and particularly legal scholars about the risk posed to judicial independence by Senate inquiries into judicial nominees' likely ideologies.² The concern is that such inquiries have pressured judicial nominees (particularly those to the Supreme Court) to conform their views to those held by a majority of Senators for the sake of securing their confirmations.

The preoccupation with Supreme Court confirmation hearings has left a huge void in the literature on the federal appointments process.³ This symposium's panel on the President's appointments power is to be commended for making a serious effort to fill this void. Indeed, all of the panelists recognize that two perspectives are crucial for fully explaining and evaluating presidential performance. The first is from the inside of the federal appointments process. This inside perspective is concerned with a President's interaction or relations with the Senate on the issue as well as the organization within his administration or executive office for making decisions on appointments matters. The second perspective is from the outside of the process. This view examines the external forces (i.e., the social, political, economic, historical developments or influences originating from outside of the formal or constitutional structure) pressuring or constraining presidential decisions on appointments matters. The outside perspective is concerned with the

2. See RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE CONSTITUTION* 310-11, 324-25 (1996); CARTER, *supra* note 1, at 99-112.

3. For some notable exceptions, see HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* (3d ed. 1992); JOSEPH HARRIS, *THE ADVICE AND CONSENT OF THE SENATE: A STUDY OF THE CONFIRMATION OF APPOINTMENTS BY THE UNITED STATES SENATE* (1953); JOHN MASSARO, *SUPREME POLITICAL: THE ROLE OF IDEOLOGY AND PRESIDENTIAL MANAGEMENT IN UNSUCCESSFUL SUPREME COURT NOMINATIONS* (1990); Calvin R. Massey, *Getting There: A Brief History of the Politics of Supreme Court Appointments*, 19 HASTINGS CONST. L.Q. 1 (1991).

multi-layered, complex contexts in which presidential appointments decisions are made.

The kinds of questions one asks in trying to explain or evaluate presidential performance in the federal appointments process depends on the perspective from which they are being asked. To be sure, there is some overlap between the inside and outside perspectives; fully developing both views leads one to consider the fundamental question of how Presidents restructure their offices in response to, as well as in anticipation of, social, economic, political, and other outside developments or changes. The outside perspective leads one to ask such questions as what social, political, and economic developments have shaped the presidency and presidential performance in the appointments process (and how have they done so); to what extent, if any, the relevant constitutional structure matters and is still something with which we are generally happy; whether the constitutional structure permits suitable accountability, allows for inappropriate or undesirable capture of appointments decisions by factions, and produces good or competent appointments (including a satisfactory fit between talent, ability, or experience and the responsibilities of the offices being filled) and an acceptable quality of discourse between the President and the Senate; and whether the President or the Senate wields too much or too little power on appointments matters. The inside perspective leads one to ask such questions as why or how particular nominations were made, why certain nominations succeeded or failed, what has been the nature of presidential-senatorial interaction over appointments decisions generally or in particular cases, how the relationship between Presidents and Senators on appointment matters compares with presidential and senatorial activities in other areas, and how different Presidents have organized their administrations on appointments matters.

This paper attempts to sketch the answers to some of the questions raised by the inside perspective. In earlier works, I have tried to argue that the confirmation process is a crucial forum for a serious dialogue between the President and the Senate on not just the merits of particular nominations or appointments but also related constitutional and policy matters.⁴ In other works, I explore in

4. See Michael J. Gerhardt, *Divided Justice: A Commentary on the Nomination and Confirmation of Supreme Court Justices*, 60 GEO. WASH. L. REV. 969 (1992); Michael J. Gerhardt, *Interpreting Bork*, 75 CORNELL L. REV. 1358, 1386-91 (1990).

some detail the outside perspective on the appointments process.⁵ Although the focus of the present paper on the inside perspective is, admittedly, somewhat limited in scope, I do not intend to argue for either an imperial presidency or presidential dominance of the federal appointments process.

Instead, I hope to lay some of the groundwork for understanding presidential performance in the federal appointments process, including the significance of the degree to which a President's exercise of his appointment power facilitates his achievement of certain constitutional and policy objectives.

Moreover, as Professor Tulis suggests, the federal appointments process is an important venue in which the President and the Senate are able to and often do discuss or disagree about related constitutional and policy issues,⁶ the relative scope of authority in shared areas of responsibility, or the requisite qualifications for certain positions. The President is a full partner in these dialogues. Neither the presidency nor the Senate should be left out of the equation when the goal is to assess comprehensively the operations of the federal appointments process. Professor Tulis has reminded us about the potential magnitude of the role that the Constitution contemplates for the Senate to play in the federal appointments process, while my aim is to take an important, initial step in the effort to provide some systematic analysis and clarification of the President's role in the same system. This step entails explaining the process from the inside-out (i.e., from the vantage point of those acting as or on behalf of a President).

Providing this perspective should help to improve comprehension of different presidential understandings of their authority in this arena, different presidential organizations for formulating appointments decisions and strategies, and the various factors facilitating or impeding presidential achievements of their objectives in this process. In constructing this perspective, both history and political science are extremely useful disciplines, the latter because it helps to inform our judgments, analyses, and understanding of how institutions such as the presidency and the Senate take shape and oper-

5. See MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS* (forthcoming); Michael J. Gerhardt, *A Comprehensive Theory of the Federal Appointments Process*, HARV. J.L. & PUB. POL'Y (forthcoming 1997).

6. See Jeffrey K. Tulis, *Constitutional Abdication: The Senate, the President, and Appointments to the Supreme Court*, 47 CASE W. RES. L. REV. 1331, 1338-39 (1997).

ate, the former because it is the repository of comparative data, including over two hundred years' worth of meaningful examples, demonstrations, and analogies of presidential performance in the venue of appointments. In drawing on both of these disciplines for purposes of this paper, I aim to flesh out the story of how Presidents interact with the Senate on appointments matters.

The story, as I see it, has several parts, each of which includes a basic principle indispensable to the understanding and evaluation of presidential performance in the federal appointments process. The first basic principle, discussed in Part I of this paper, is that comprehensive clarification of the context is indispensable for both understanding and evaluating the operations of the federal appointments process. Elucidating the historical, political, economic, and social contexts in which Presidents and Senators make decisions on appointments matters helps to explain the external forces vying to influence or control Presidents, or to which Presidents are reacting in the appointments process, or that Presidents are trying to control in or through this system. Further, clarifying such contexts also helps to explain the system's internal dynamics or operations, including the motivations and strategies of key participants.

The second basic principle, explored in Part II, is that the conventional means for explaining and evaluating presidential performance in the appointments process in strictly personal terms has some important advantages but significant, generally overlooked limitations. Although personalizing presidential performance in the federal appointments process helps to illuminate the relevance of some Presidents' personal characteristics to their actions within the system, this approach fails to assess how the institution of the presidency, particularly with respect to its responsibility for federal appointments, has changed over time, because both the nature of the institution and the necessary skills for leading it are not the focus of a personal approach. Nor does personalizing the system provide useful means for comparing presidential performance on appointments matters in different historical periods because it dismisses any differences as resulting from personal quirks.

The third basic principle, considered in Part III, is that institutional analysis is crucial for ensuring comprehensive understanding and evaluation of presidential performance in the appointments process. Institutional analysis requires assessing a President in terms of the quality of his management of the institution of the presidency, including his coordination of his nominating power

with his exercise of other executive powers for the purpose of facilitating his achievement of certain constitutional and policy objectives. The latter conceivably includes changing the institution of the presidency itself, the distribution of power among the three branches of the federal government, or the relative balance of power between the national and state governments. Moreover, understanding presidential performance in the appointments process in institutional terms helps to clarify the external and internal factors cutting across different historical periods that have influenced the performance of different Presidents in different historical periods in the federal appointments process.

In the final analysis, it might not be possible to develop a comprehensive understanding and evaluation of the President's role in the federal appointments process without also developing a complete theory of the operations of the federal government. This is because a President's activities in this system are inextricably linked to everything else that he does or is expected to do. Nevertheless, the effort to construct the inside perspective on presidential activity in the federal appointments process (i.e., how Presidents have used or structured their nominating power and coordinated it with their other powers) is an important step on the path to developing more comprehensive explanation and evaluation of presidential leadership generally and of presidential-Senate interaction over issues of mutual concern to them.

I. THE INDISPENSABILITY OF CLEAR CONTEXT

Clarifying comprehensively the context in which appointments matters arise is crucial for fully explaining the operations or dynamics of the federal appointments process generally and in particular cases. First, defining context helps to reveal the changes, developments, or movements in society or the polity that a President is trying to control or to which he is reacting in the course of exercising his appointment authority. In other words, context is indispensable for developing a coherent outside perspective on the federal appointments process. Indeed, fully examining the historical, social, political, and economic contexts in which Presidents have operated helps to clarify the various forces that have shaped the institution of the presidency (and presidential decisions on federal appointments), including but not limited to the growth and partial demise of political parties, the rise of interest groups and the phenomenon of identity politics (or the tendency of voters to vote for

or against candidates depending on whether the latter are closely identified or associated with causes, issues, or symbols with which they approve or dislike), and the proliferation of mass communications technology.⁷ In the course of trying to deal with these different forces, Presidents have had to be both pro-active and reactive in defining or wielding their respective powers (with, of course, mixed results) and consequently have helped, along with these external influences, to transform the presidency in ways that have little to do with the formal structure but must still be understood for full and fair evaluation of presidential decision-making on appointments.

Moreover, context helps to clarify the internal dynamics of the federal appointments process, including a President's strategies and organization for making appointments and interaction with the Senate and other major players routinely involved in appointments matters. The interaction among these different actors often leads to or includes informal arrangements or accommodations that must also be understood for a full assessment of the efficacy or limits of the relevant constitutional structure.

A few examples should help to illustrate this basic point. First, the social, political, and historical context in which the decline in the political discourse between the President and the Senate on Supreme Court nominations, mentioned by Professor Tulis, is revealing.⁸ A critical factor is that the size and scope of the authority of the national government has grown enormously, particularly over the past six decades. As the range of responsibility for the national government has grown, Congress has created more executive, quasi-executive, independent, and judicial offices requiring presidential nomination and Senate confirmation. As these offices have grown in number, so too has the President's supervisory and administrative authority, for he has had the primary duty for both choosing the people occupying them and overseeing their actions.⁹

7. For detailed discussions of how these and other forces have shaped the modern presidency, see Martin Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).

8. See Tulis, *supra* note 6.

9. See CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 336 (1993); 1 BRUCE A. ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 105-08 (1991).

This growth has surely had an impact on the Senate's capability and willingness to assert itself aggressively in Supreme Court confirmation proceedings. To be sure, Congress has authorized much of this expansion through its authority to create new federal offices. In doing so, Congress has preserved the Senate's prerogative whenever possible to confirm or reject presidential nominees. The more offices requiring confirmation created by Congress the more chances Senators have had to consult with the President in filling those positions and thus the more bargaining chips Senators have had available to use in dealing with the President on appointments and related legislative matters. In other words, the potential numbers of contestable nominations have expanded considerably, and both the President and the Senate are fully aware of this expansion. While the Senate has not rejected or otherwise blocked Supreme Court nominations to the same degree in this century as it did in the previous one,¹⁰ far more presidential nominations are potentially available for one or more Senators to oppose because of differences with the nominee's or President's constitutional or policy opinions.¹¹ As a practical matter, Senators largely occupy a defensive posture in the confirmation process, so that it is difficult, if not impossible, for them to oppose *all* presidential nominations and still expect to keep the federal government operating effectively or to maintain credibility in claiming a purely nonpartisan motivations for their actions. Consequently, Senators are forced to pick and choose their confirmation fights with the President carefully. Substantial exchanges often occur between Presidents and Senators (particularly those in leadership positions or from the President's party or both) behind closed doors and in public over the appropriate people to nominate to certain, high-profile, influential positions as well as after formal nominations have been made to those offices. Consequently, the interference, particularly over the past two decades, has extended to increased opposition to, forced withdrawals of, and rejections of many presidential nominations to offices

10. In this century, 11% of Supreme Court nominations (7 out of 61) have failed thus far. See ABRAHAM, *supra* note 3, at 359. This contrasts rather dramatically with the failure rate of 29% (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% (2 out of 17). See ABRAHAM, *supra* note 3, at 76.

11. 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).

involving many policy areas of keen concern both to the voting public and to the best organized, financed interest groups. The latter areas include national security,¹² the environment, economics, and civil rights.¹³ Not insignificantly, the increasing number of disputes over nominees to positions in these areas has coincided with some (but by no means complete) abdication of authority by Senators in Supreme Court confirmation hearings.¹⁴ Moreover, the

12. For instance, it is noteworthy that over the past couple of decades some of the most intense confirmation contests have involved nominees to some of the nation's most sensitive national security posts. In 1977, Theodore Sorenson withdrew his nomination by President Carter to head the Central Intelligence Agency "in the wake of assertions that he lacked experience, was a pacifist, and had used secret documents in writing about the Kennedy administration." CARTER, *supra* note 1, at 8. In 1987, President Reagan's nomination of Robert Gates, then Acting Director of the CIA, to become the full-time director foundered fatally, because of unanswered questions involving his involvement in some of the events leading up to the so-called Iran-Contra scandal. Four years later, the Senate confirmed President Bush's nomination of Gates to head the agency but only after a highly contentious confirmation hearing that left the appointee politically weakened. In 1989, the Senate rejected President Bush's nomination of former senator John Tower to become Secretary of Defense based on concerns about his reported drinking and womanizing. *See id.* In 1994, Bobby Ray Inman, President Clinton's choice to replace Les Aspin as Secretary of Defense, withdrew his nomination after "accus[ing] a syndicated columnist of conspiring with Senate Republicans to sabotage his candidacy." *Id.* In 1997, George Tenet became the fifth person nominated by President Clinton to head the CIA in four years. *See* Tim Weiner, *Clinton Picks Acting CIA Boss to Run Agency*, PLAIN DEALER (Cleveland), Mar. 20, 1997, at A1. Tenet received the nomination in the wake of Anthony Lake's withdrawal of his own nomination to head the agency after some influential Republican senators' had delayed the Senate vote on his confirmation indefinitely. Their delay was based on their concerns about his management record as President Clinton's National Security Adviser and possible involvement in dubious fundraising activities on behalf of the administration. *See* Tim Weiner, *Lake Pulls Out as C.I.A. Nominee*, N.Y. TIMES, Mar. 18, 1997, at A1. Lake would have succeeded John Deutsch, who had been confirmed as the head of the agency after Michael Cerns withdrew his nomination to head the agency in 1995. Cerns' withdrawal came on the heels of reports that he had violated immigration laws to hire a Filipino servant. *See id.*

13. *See generally* King & Riddlesperger, *supra* note 11, at 192-99.

14. Professor Tulis criticizes the quality of the dialogue, particularly in the latter half of the twentieth century, between the president and senators in the confirmation process. His concern is that the dialogue has degenerated substantially and the senators have become increasingly preoccupied with petty, partisan bickering rather than with grander political considerations in making confirmation decisions. It is important to understand, however, that the nature of the dialogue between presidents and senators throughout American history has followed largely similar patterns. In another article, I both identify and analyze this phenomenon. *See* Michael J. Gerhardt, *A Comprehensive Theory of the Federal Appointments Process*, HARV. J.L. & PUB. POL'Y (forthcoming 1997). As a descriptive matter, the reasons presidents have made and senators have supported or opposed various nominations have remained relatively constant throughout American history. Presidents have made decisions about federal appointments based on their respective calculations of various long- and short-term considerations. The long-term factors have

House and the Senate each have had other means to check presidential appointees, regardless of whether the latter have been subject to the Senate's confirmation authority. Particularly important among these has been Congress' oversight and appropriations authorities, which have been extended to virtually every aspect of the executive branch.¹⁵

Another revealing example about the importance of context is President Lincoln's nomination of Samuel Freeman Miller to the Supreme Court. Professor Tulis cites this appointment as a good example of the Senate's energetic assertion of its constitutional role in the appointment of Supreme Court justices.¹⁶ Yet, the context of the appointment demonstrates that it was not simply a case of presidential passivity or Senate aggression. On the one hand, President Lincoln's exercise of his appointment authority, throughout his time in office, was influenced by extraordinary external pressures, including the needs to manage and ultimately to win the Civil War, to keep the Union together, and to nurture and keep unified his fledgling political party, including the coalition that brought

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, while the short-term factors have included a nominee's political party, chances for confirmation, domicile, age, and benefactors or supporters. Both long- and short-term concerns have depended on political circumstances, the state of presidential-Senate relations, and presidents' and senators' other priorities and ambitions for the federal office being filled.

Moreover, presidents have differed from senators in the ways in which they have combined these different factors and the sequence in which they have taken these concerns into account. For example, in deciding on a set of suitable candidates for a confirmable post, presidents have tended to be guided by grander rather than baser political concerns, such as objective merit, commitment to a particular constitutional philosophy or vision, 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 disposed to be guided by pragmatic concerns, such as ease of confirmation, the ramifications for their popularity, party loyalty, or the need to appease certain constituencies. Presidents have tended to differ, depending on their relative mixes of long- and short-term considerations in making appointments. In contrast, 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 some grander political factors, including the preservation of certain constitutional ideals such as federalism.

As a normative matter, one can assess presidents and senators based on their relative or respective mixes of long- and short-term political objectives. The more weighted decisions are made in favor of grander concerns the greater challenges their implementation is likely to face (and, hence, the greater the achievement of implementing them), because grander concerns are likelier to make bigger targets and require the marshaling of greater forces or widespread political and public support for their implementation.

15. See King & Riddlesperger, *supra* note 11, at 199.

16. See Tulis, *supra* note 6, at 1353.

him into office. None of these were small matters; each required considerable time, attention, and energy. He was not inclined to jeopardize any of these at the time the vacancy to which Miller was ultimately nominated arose.

On the other hand, President Lincoln understood the stakes involved in Supreme Court nominations, and he had his own criteria for selecting them, including geographic suitability (as was true for all nineteenth and early twentieth century Presidents), loyalty to the party and to the preservation of the Union and the Constitution, opposition to slavery, and professional ability or judicial experience.¹⁷ By all accounts, Miller easily met these criteria. Moreover, Miller enjoyed the support of virtually all Western governors and the entire western delegation in Congress as well as a unique congressional petition containing the names of 129 out of 140 members of the House and all but four Senators. This unprecedented lobbying effort, which would never again be matched in size or intensity in American history, grabbed Lincoln's attention.¹⁸ Nevertheless, the effort was made on behalf of a person whose credentials were impeccable and whose constitutional views were fully consistent with those the President sought for Supreme Court nominees. In the end, the choice of Miller was remarkably straightforward, for it fully satisfied the short- and long-term interests of both the President and Congress.

President Lincoln took a different tack in finding a replacement for Chief Justice Roger Taney, who died in October 1864 shortly before the presidential election.¹⁹ President Lincoln deliberately postponed announcing his choice until after his reelection campaign was over. By then, the circumstances for making the nomination were different than those that existed at the time of

17. See ABRAHAM, *supra* note 3, at 117.

18. Only two other instances of such assertive congressional support have occurred in American history. The first happened in 1869, when a large majority of both the House of Representatives and the Senate signed a petition urging President Ulysses Grant to nominate President Lincoln's Secretary of War Edwin M. Stanton to the Supreme Court. Although President Grant did so, Stanton died four days after having been confirmed by the Senate. See *id.* at 127-28. The second episode occurred in 1932, when law school deans and labor and business leaders strongly urged President Herbert Hoover to nominate then-New York Court of Appeals Judge Benjamin Cardozo to the Supreme Court. President Hoover eventually acquiesced but only after having been pressured to do the same by the then-powerful Chair of the Senate Foreign Relations Committee, William Borah of Idaho. See TRIBE, *supra* note 1, at 97-98.

19. See generally DAVID HERBERT DONALD, LINCOLN 536-52 (1995).

Justice Miller's appointment. The Union's prospects for winning the Civil War had improved, and the President had received a solid majority of support for his reelection bid. Although the President retained his same selection criteria for the Court, he had the additional concern that the Republican party had suffered some significant losses in the 1864 congressional elections and needed serious mending. Although the President preferred to nominate his longtime friend and political ally, Postmaster General Montgomery Blair, Lincoln had some doubts about the latter's ability to unify disparate groups within the Republican party. Instead, after eight weeks of deliberation, President Lincoln settled on his former Treasury Secretary and longtime political rival, Salmon Chase, because "first, he had no doubt that Chase's policy views on the war and future reconstruction were sound and reliable[;] second, if anyone could heal the widening breach in the Republican party, it would be Chase[; and] third, Chase [had] campaigned hard and effectively for Lincoln's [re]election."²⁰ Whereas the broader list of potential candidates for Chief Justice was based on a variety of significant factors including constitutional philosophy and commitment to the preservation of the Union and Lincoln's reconstruction policies, the President chose Chase because Chase could satisfy better than any other possible nominee both those concerns and the immediate, important need to keep the Republican party unified.

President Lincoln's concerns about keeping both the Union together and the Republican party unified also influenced his non-judicial appointments. Of course, in his first term the outside pressures competing for his time and attention and constraining or imposing challenges on his exercise of presidential powers were the same as those he had to confront in nominating Justice Miller, and the inside pressures were almost identical, with a few exceptions. For one thing, the President made patronage appointments for people who had assisted his presidential campaigns.²¹ Moreover,

20. ABRAHAM, *supra* note 3, at 123. See also DONALD, *supra* note 19, at 552 ("[Lincoln] chose Chase to be Chief Justice because he thought him worthy—but he expected to receive political advantages from his choice. The appointment was part of the broader program of conciliating all the factions within the Republican party.").

21. See HARRIS, *supra* note 3, at 72. Interestingly, Lincoln had signaled earlier in his career the kind of approach he thought a president should take in making federal appointments. Lincoln had strongly urged President Zachary Taylor, on behalf of whose election he had tirelessly worked, to take party loyalty and service seriously into account in awarding significant federal appointments. See DONALD, *supra* note 19, at 138.

his agenda for his first term was to put less emphasis on appointing people personally loyal to him and more emphasis on acknowledging and rewarding party leaders instrumental to his initial election as President, maintaining political support for his administration, and the success of his reelection campaign. Consequently, President Lincoln brought into his administration some of his most ardent political rivals, who were then put in the uncomfortable positions of either doing his bidding as President or appearing to be disloyal to his administration or the Union. President Lincoln often, but not always, deferred to his cabinet secretaries in their choices of subordinates, so that it was not unusual for the former to choose their most loyal followers to serve under them. The disadvantage of this practice was that it resulted in the choice of a cabinet in his first term that was doomed from the start to lack harmony and loyalty to him.²²

In his second term, the President took a different tack in making high-level, non-judicial appointments in part because his support from the American people and the prospects for keeping the Union together and resolving the Civil War favorably appeared to be stronger. As Professor David Herbert Donald has suggested:

In contrast to the members of the original cabinet, none of these appointees was a major party leader and none had aspirations for the presidency. Lincoln now felt so strong that he did not have to surround himself with the heads of the warring Republican factions. He did not require ideological conformity of the men he chose. . . . The President did not want his cabinet members to be rubber stamps, and he was supremely confident of his ability to handle disagreement among his advisers. Unlike his original cabinet, his new appointees—like his holdovers, [William] Seward [as Secretary of State], [Edwin] Stanton [as Secretary of War], and [Gideon] Welles [as Navy Secretary]—were warmly attached to Lincoln personally. He could now afford the luxury of a loyal cabinet.²³

As the external and internal pressures changed during President Lincoln's time in office, so did his strategy for dealing with them. No doubt, Lincoln's coordination of various presidential powers,

22. See DONALD, *supra* note 19, at 267.

23. *Id.* at 551.

including his appointment authority, to deal with virtually unparalleled challenges and to facilitate his (and the country's) achievement of certain constitutional and political objectives, is the hallmark of his presidency. To fully appreciate why this is so, it is necessary to do more than just to describe the historical, political, or social contexts in which Lincoln—or, for that matter, any President—has acted. Context helps to elucidate the challenges confronting the different actors involved in the federal appointments process, but it does not suggest the appropriate ways for measuring how well different Presidents operating under different circumstances and in different time periods deal with the internal and external difficulties confronting them. The next steps, undertaken in Parts II and III, are to develop useful or meaningful criteria for evaluating presidential performance within different historical, social, and political contexts.

II. THE LIMITATIONS OF A PERSONALIZED EVALUATION

Constitutional scholars have not yet fully developed useful criteria for evaluating presidential performance in the federal appointments process. This exercise is primarily a normative one; it aims to develop standards for evaluating presidential contributions and performances in the appointments process rather than just to define context or explain some past events. This exercise is crucial for making comparative judgments about presidential performances that cut across different historical periods.

Most commentators have tended to personalize the confirmation process. This approach is quite natural, for the dominant focus of the appointments process is usually on the fate of a single person—the nominee. Moreover, the often dramatic conflicts that arise between Presidents and Senators over a nominee's fate shed considerable light on their respective priorities, temperaments, political skills, allegiances, and personal values. In our federal system, the choices a President makes in the people he nominates to critical positions provide significant insights into his personal priorities, including the persons on whose advancement he prefers to spend political coinage.²⁴ Similarly, Senators reveal a great deal about

24. See RICHARD TANNER JOHNSON, *MANAGING THE WHITE HOUSE: AN INTIMATE STUDY OF THE PRESIDENCY* xx (1974); see also ROBERT SCIGLIANO, *THE SUPREME COURT AND THE PRESIDENCY* 148-57 (1971) (discussing how different presidents' Supreme Court appointments have reflected their personal values and partisan affiliations).

themselves (things often hidden from public view in the absence of such proceedings) in the midst of intensely contested confirmation proceedings.²⁵

The temptation is intense to draw on personal angles to explain particular incidents in the federal appointments process. Consequently, some choices, such as President John Kennedy's selection of his brother Robert as his Attorney General, make the most sense in terms of the close personal ties and trust shared by the two.²⁶ Moreover, in the case of a failed nomination, a President is made singularly responsible for the outcome. For instance, the failure of the Robert Bork nomination is frequently blamed in part on President Reagan's delay in coming to the defense of his embattled Supreme Court nominee,²⁷ while President Clinton took the blame for having nominated Lani Guinier, a friend from law school, without having read her legal scholarship.²⁸ In still other cases, a President's support for a nominee in spite of the damage it causes him can be explained in terms of stubbornness, as with Nixon's sticking to his Supreme Court nominee Harold Carswell in spite of widespread condemnation,²⁹ or loyalty to his allies, as with George Bush's willingness to stand by his embattled nominees John Tower (as Secretary of Defense)³⁰ and Clarence Thomas (as Associate Justice).³¹ Similar depictions have been used to explain Senators' actions, as with the portrayals of many Republican Senators as being vicious, ignorant, or sexist based on their ardent defense of Clarence Thomas or questioning of Anita Hill.³²

25. See Ronald Dworkin, *One Year Later, The Debate Goes On*, N.Y. TIMES, Oct. 25, 1992, § 7, at 1 (noting that the 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, Feb. 8, 1989, § B, at 7 (describing the ways in which senators' performances in confirmation hearings reflect their personalities and agendas); Henry P. Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1207 n.21 (1988) (suggesting that a senator's decision is the result of the tension between political self-interest and personal principles).

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

27. See, e.g., ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* 160, 202-03 (1989).

28. See Maureen Dowd, *In 1994-Model Politics, Loyalty is Often Optional Equipment*, N.Y. TIMES, Mar. 20, 1994, § 4, at 3.

29. Cf. ABRAHAM, *supra* note 3, at 15-19.

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

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

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

Characterizing the confirmation process in personal terms clearly has implications for the criteria employed to evaluate the performance of the President or the Senate in the federal appointments process. Under this approach, Presidents are made personally 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 or qualities, such as intelligence, popularity, charisma, strength of character or conviction, loyalty, stubbornness, ambition, or political acuity.³³ Hence, in evaluating presidential performance in the appointments process, many people might ask about how well Presidents knew the people whom they were nominating to particular posts, whether Presidents made intelligent choices on which people to nominate or which people's advice to follow, to whom a President felt indebted, whether a President had strong convictions (and, if so, regarding what), what benefits a President received from making a particular appointment, what price(s) a President paid for certain successful or failed nominations, whether Presidents were sufficiently or perhaps too loyal, to what extent a President's stubbornness or anger influenced his actions in the appointments process, or how well a President understood or handled the state of his relations with the Senate.³⁴

Perhaps the most sophisticated version of personalizing the federal appointments process is game theory. It helps to assess performance as strategic behavior. At the risk of some oversimplifi-

33. See, e.g., JAMES DAVID BARBER, *THE PRESIDENTIAL CHARACTER: PREDICTING PERFORMANCE IN THE WHITE HOUSE* (2d ed. 1977) (arguing that presidential character heavily influences performance in office); 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). Cf. Michael 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, 872 (1996) (claiming 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); see also BARBARA HINCKLEY, *BEYOND REFORM*, in *THE PRESIDENCY IN AMERICAN POLITICS* 105 (P. Brace, C.B. Harrington, & G. King eds., 1989) (examining the link between presidential performance and public perceptions of the President).

34. It is important to understand that the President is not the only actor whose performance in the federal appointments process has been understood or evaluated in personal terms. It is also quite common for political scientists and particularly legal scholars to treat senators in a similar manner (i.e., to ask about senators' backgrounds, personal or partisan loyalties, motivations, aptitudes, integrity, characters, temperaments, or convictions).

cation, one could describe the federal appointments process as a game of chicken with multiple iterations and players (as opposed to its normal form with two players).³⁵ A good illustration of the confirmation process as a game of chicken is President Bush's nomination of Clarence Thomas to replace Justice Thurgood Marshall on the Supreme Court.³⁶ President Bush dared Democrats, who at the time had been 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. He dared 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.³⁷ The nomination and hearings damaged President Bush in part because of his desire to charge ahead into some blind alleys that resulted in harm to his credibility. Similarly, many Senators were damaged because they too charged ahead into some of the same blind alleys, seemingly oblivious to the risk they would look cowardly rather than statesmanlike by deferring to the President's choice of a weak but sympathetic nominee.

Another example of confirmation contests as a special game of chicken is the process leading up to President Clinton's two Supreme Court nominations. In both cases, each side engaged in extensive maneuvering to influence the choice of a nominee and to engineer a confirmation hearing that would help its image and agenda.³⁸ Along the way, both sides leaked information to the press strategically to influence the choice of a nominee and the ultimate confirmation decision.³⁹ Sometimes the leaks came from

35. See generally D. BAIRD, R. GERTNER, & R. PICKER, *GAME THEORY AND THE LAW* 44 (1994).

36. See Gerhardt, *Divided Justice*, *supra* note 4, at 969, 976-77.

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

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

39. See Paul Richter, *Clinton Takes More Time on Court Choice*, L.A. TIMES, May 13, 1994, § A, at 4; Carl M. Cannon & Nelson Schwartz, *Clinton's 'Trial Balloon' Strategy Tends to Burst*, CHI. SUN-TIMES, June 22, 1993; Holly Idelson, *Clinton Closes in on a*

within the same camp, as with the many rumors from within the Clinton administration on likely nominees. These rumors were designed to keep Senators off guard, test other possible nominees, pressure the President to support or oppose certain possible nominees, or even to gain momentum or build support within the administration itself for or against a particular nomination. In the end, both sides got something but neither gets the biggest possible payoff. As game theory suggests, the biggest payoff occurs when survival depends on one side's choosing not to flinch in the face of confrontation with the other and the former does not falter; when both parties flinch and prefer to avoid damage, neither gets the biggest possible payoff.⁴⁰

Game theory is not without its limitations. The dynamics of the federal appointments process are much too complex to be captured accurately within the simple terms of a single game. Moreover, neither the President nor the Senate is monolithic or unified in its operations. In terms of their internal operations, the presidency and the Senate are structured differently, with the former functioning as a hierarchy with a single executive at the top but with substantial staff underneath and the Senate operating as a multi-membered body in which the members each formally has a single vote in the process but each does not wield equal influence within the body or with the President. Consequently, Presidents and Senators do not come at things in precisely the same manner. In addition, decisions about federal appointments are not the province of a single person or branch; formally the process involves the President and the Senate, but in practice the federal appointments process has entailed or depended to varying degrees on the participation of not just those political actors but also the general public, interest groups, the media, and the nominee, to name just the most prominent players potentially involved. No game can assess the interac-

Nominee; Choices Winnowed to Two, 51 CONG. Q. WKLY. REP. 1482, 1485 (1993).

40. A confirmation skirmish could also be described as a special game of tit-for-tat. See generally BAIRD, ET. AL, *supra* note 35, 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 is retaliating for wrong done in a previous period. See *id.* at 171-72. Numerous confirmation contests could be explained in terms of this game, including but not limited to the forced withdrawals of Zoe Baird and Lani Guinier, see, e.g., Dowd *supra* note 28, and the Senate's rejections of both Clement Haynesworth and Harold Carswell. See Paul Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146, 1155 (1988).

tion between all or some of these players fully or even within a single appointments matter. Consequently, another analysis is required to ensure comprehensive measurement of the dynamics of presidential and senatorial interaction in the confirmation process.

III. THE SIGNIFICANCE OF INSTITUTIONAL ANALYSIS

Personalizing the federal appointments process is of limited utility in explaining and evaluating the performances of different Presidents from different historical periods in the federal appointments process. The problems are that it ignores the significance of presidential efforts to manage and shape both the institution of the presidency, including its authority relating to the making of federal appointments, and dismisses any differences in presidential performance in the federal appointments process as a function of different personal traits, values, or quirks.⁴¹

It behooves us to remember that Presidents and Senators are more than the people who occupy certain federal offices; they are also the leaders of powerful governmental institutions, and they act as such when they operate within the federal appointments process. Moreover, they do not try to manage these institutions in a vacuum; Presidents operate in different social, economic, historical, and political contexts. Presidents must react to various kinds of developments or movements within both government and society at large. The presidency is not static; its responsibilities and structure have evolved over the course of American history. Consequently, no study of presidential performance within the federal appointments process would be complete without assessing the relationship between such performance and changes within the office or powers of the presidency (and the reasons for those changes).

The challenges of leading or managing the institution of the presidency, including defining and coordinating its various powers, require a different set of criteria for evaluating performance than those suggested by an approach grounded in personal traits or character.⁴² In the next two sections, I explore (a), the kinds of

41. Nor does personalizing the system adequately explain the consistent patterns in presidential and senatorial decision-making on appointments in different historical periods.

42. In this part, I primarily discuss the presidency from the inside perspective. This discussion is just one step in a larger effort to understand and evaluate presidential performance in the federal appointments process. A comprehensive discussion should also include careful consideration, which I intend to undertake in future writing on this topic, of several other questions such as the degree to which the presidency has been shaped or

critical measurements of presidential leadership required by institutional analysis, including perhaps most significantly the relative quality of a President's coordination of his appointing authority with his other executive powers for the purpose of achieving the objectives of greatest importance to him, and (b), some of the potential challenges that a President needs to be prepared to confront or take into consideration in the course of trying to satisfy such measurements.

A. *The Implications of Institutional Analysis*

Every President faces a peculiar combination of external and internal challenges in the course of trying to put his own individual stamp on the office of the presidency—if not also on the Constitution and the nation's course in history. Some of the external challenges have included, *inter alia*: world wars; governmental corruption; the need to appease certain constituencies pivotal to a President's initial election or reelection; civil war; the institution of slavery; the Depression; and the civil rights, labor, states' rights, and popular sovereignty movements. The internal challenges have included: the desire among powerful constituencies or supporters within an administration to control its appointments or policies; senatorial courtesy;⁴³ ideological, policy, or personality disputes among a President's advisers; and the pressure to negotiate with Senate leaders or trade some choices for certain appointments for critical support on certain legislative matters. The measure of a President's performance is largely based on how well he has managed—or marshalled the powers of his office to control—the particular combinations of challenges confronting him in the course of trying to achieve certain long- and short-range objectives.⁴⁴ In the

influenced by other governmental or social institutions, forces, or interests.

43. Senatorial courtesy is the practice begun under President George Washington and followed to varying degrees by all subsequent presidents. It involves presidential deference to the choices of the senators (from his political party) of the people to nominate to certain federal offices within their respective states. See generally HARRIS, *supra* note 3, at 215-37.

44. Cf. Arthur Schlesinger, Jr., *The Ultimate Approval Rating*, N.Y. TIMES MAGAZINE, Dec. 15, 1996, 50-51. Schlesinger notes:

To succeed, Presidents must have a port to seek and must convince Congress and the electorate of the rightness of their course. Every President stands in Theodore Roosevelt's "bully pulpit." National crisis widens his range of options but does not automatically make the man. The crisis of rebellion did not spur Buchanan to greatness, nor did the Depression turn Hoover into a bold and

course of managing these challenges and pursuing their legislative and other objectives, Presidents are called upon to develop or exercise a variety of different management skills, including cultivating and maintaining a good working relationship with the Senate; organizing or deploying judiciously and effectively the resources and personnel of their office and administration; appreciating the full range of executive powers and presidential authority; articulating and implementing a clear constitutional vision and program; and keenly understanding their time and place in history.⁴⁵

In his paradigm-shifting study of presidential performance,⁴⁶ Professor Stephen Skowronek has suggested that presidential leadership should be measured in institutional terms or by whether a President has been able to wield the powers of and resources available to his office to change in some relatively lasting fashion both the Constitution's popular understanding and distribution of governmental power and authority.⁴⁷ Though Skowronek does not analyze how a President's nominating power should be evaluated in institutional terms, it would follow from his general analysis that it is another significant means for accomplishing a broader agenda. In other words, a successful President would have to meet the rather demanding test of using his appointment authority in ways that have facilitated his achievement of the larger objectives Skowronek has suggested are crucial for distinguishing presidential leadership.⁴⁸

Generally, Skowronek sets a very high threshold for presidential success (i.e., a President needs to be an activist who has both articulated and implemented a broad vision of constitutional change).⁴⁹ The broader the vision implemented the greater the de-

imaginative leader. Their inadequacies in the face of crisis allowed Lincoln and the second Roosevelt to show the difference that individuals can make to history.

Id.

45. See generally STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH* 28 (1993).

46. See *id.*

47. See *id.* at 21.

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

49. This measure of success does not turn on a normative evaluation of a president's agenda. Success depends on articulating and implementing an agenda for changing constitutional or governmental orderings, so that generally presidents who state as their primary objectives the preservation of some (or perhaps all) of an existing order are destined to be measured or graded less well under the applicable criteria. Under this criteria, it is possible to conceive of President Lincoln, for instance, as doing nothing more than pre-

gree of presidential success. Under this standard, very few Presidents will rank high, and those who do are relatively easy to guess, 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.⁵⁰ These Presidents used their nominating power, along with their other powers, to effect substantial, enduring constitutional changes.

To some, this test might sound too demanding because it requires a President to demand a lot more from his nominations than just relatively easy confirmations or loyalty once they have been confirmed. Yet, that is precisely the point. Success is not difficult to achieve if one merely lowers one's sights. Consequently, it is possible to identify different levels of Presidents' success depending on the breadth of their vision or the scope of their ambition for the nation (and subsequent success in fulfilling it).

Indeed, if success was measured strictly in terms of the percentages of a President's confirmed nominations, the figures would be misleading. These statistics would be misleading partly because the Constitution generally establishes a presumption of confirmation by putting "a political burden on the Senate [that] makes it diffi-

serving the original Union, but this misperceives the nature and significance of Lincoln's achievement. First, even if one were to think that Lincoln were simply trying to preserve nothing more than the status quo, he faced challenges of unprecedented scope. Preserving meaningful constitutional order under the conditions under which Lincoln operated required extraordinary management skills. Lincoln, however, did more than that. He also "shatter[ed] existing power arrangements" by ending slavery. *Id.* at 208. Under any credible system of evaluation, Lincoln's accomplishment, coupled with the preservation of the Union, has to be considered to be a truly remarkable feat.

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 during the mid-term elections of 1994. He could be scored high on these counts for having accomplished his objectives, but not as well as the presidents who first put these programs into effect. Moreover, he has done so by choosing not to turn some areas into battlegrounds. Such has been the case with his judicial appointments, which have largely been made to garner consensus. He has also sometimes purposely avoided articulating a perfectly clear constitutional vision, so that he has left himself maneuvering room for reelection and compromise. Perhaps nothing confirms more clearly the merits of his strategy than his reelection to the presidency in 1996.

50. See SKOWRONEK, *supra* note 45, at 130-54 (Jackson), 198-207 (Lincoln), 288-324 (F.D. Roosevelt).

cult [for the Senate] to successfully oppose a President of ordinary political strength for narrow or partisan reasons."⁵¹ The problem for the Senate is that small factions typically cannot unravel or stop a presidential nomination, in the absence of some special Senate procedures empowering them to do so. Moreover, as a collegial body, the Senate faces a substantial challenge in maintaining a majority in opposition for a prolonged contest with the unitary executive over the latter's choices to fill a confirmable post. Also, the Senate's task is made more difficult because it occupies a defensive posture in the appointments process in which it is largely confined to exercising a veto. In addition, a high percentage of successful confirmations could be explained as much by the lack as by the presence of a clearly articulated, well-executed presidential vision. The figures could conceivably reflect a President with no ability or desire to withstand even the threat of opposition.

In effect, this means that the more weighted a President's calculations of his objectives for his appointments are in the direction of long-range governmental or constitutional change the greater his chances for measuring highly in this area in terms of institutional analysis. This does not necessarily mean that a President must make bold appointments decisions but rather that the appointment power be used in a manner inextricably linked to his achievement of something bold in office. The more successful a President is in implementing his vision through his appointments the more obstacles through which he will have to maneuver the institution of the presidency to realize his vision. Consequently, presidential performance can be assessed in terms of the institutional objectives sought, the obstacles confronting them, the strategy adopted or skills employed for achieving the objectives or bypassing the obstacles, and the goals actually achieved.

Andrew Jackson's record on federal appointments provides a good illustration of how such assessment would work. Jackson came into office riding the crest of a wave of democratic fervor among the voting public. He dedicated his presidency in large part to democratize the national government (i.e., to make it more responsive (and thus more accountable) to the common man).⁵² He

51. John McGinnis, *The President, the Senate, and the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 TEX. L. REV. 633, 653 (1993).

52. See ARTHUR M. SCHLESINGER, JR., *THE AGE OF JACKSON* 43 (1945).

also came into office at a time when Congress claimed to be the preeminent, most truly representative national institution. The movement, particularly in the South, in favor of states' rights was gaining momentum; the national government, especially the executive branch, was suffering from unprecedented corruption; and his political party was new and not yet fully stabilized nor established. It was against this backdrop that Jackson served as President for two terms from 1829-1837, during which he repeatedly vied with Congress to establish the President as the only true national leader (because of its status as the only federal official elected by all of the American electorate). Thus, he set out to eliminate congressional supremacy and to establish instead the supremacy of the presidency as national policymaker. A significant portion of the contest was played out in the appointments process. Indeed, Jackson confronted an unprecedented number of confirmation contests.⁵³ In his first year of office, the Senate thwarted ten of his nominations, and in his first term it rejected Roger Taney twice—once as Secretary of the Treasury and later as an Associate Justice.⁵⁴ Yet, in the end Jackson won far more contests than he lost; his tenacity is evidenced by his repeated efforts to expand the President's prerogative in filling national offices with his preferred choices, to test the resolve of a majority of Senators to remain organized in opposition to a string of well qualified nominees, and willingness time and time again to test the popularity of his actions (and his nominees and policies) against those of opposing Senators.

Moreover, President Jackson had to manage a struggle for power within his administration for control of appointments. Indeed, a palace struggle had been going on within the Jackson administration from the moment Jackson announced his initial cabinet selections. Vice President John Calhoun and Secretary of State Martin Van Buren, who had been equal partners in forging the victorious Jackson coalition, were vying with each other for influence over key federal appointments and for Jackson's support in naming a successor.⁵⁵ Consequently, Jackson's initial cabinet appointments had been based on such diverse factors as close personal friendships and political expediency, thus they differed widely in terms of quality and loyalty to him. Increasingly bitter

53. See HARRIS, *supra* note 3, at 53.

54. See *id.* at 58-62, 259-60.

55. See SKOWRONEK, *supra* note 45, at 137.

and open conflicts between Jackson and Calhoun (and Calhoun's allies within the administration) led Jackson eventually to purge his cabinet of Calhoun supporters.⁵⁶ Jackson's second cabinet was a marked improvement in terms of quality and loyalty to him and his policies. Nevertheless, the struggle did not end with Jackson's announcements of his reconfigured cabinet, for the Senate still had to confirm its new members, and it stood waiting with some of Jackson's most bitter political foes, including Henry Clay, Vice-President Calhoun, and Daniel Webster, as members.

Jackson's foes wasted little time in trying to thwart some of Jackson's key appointments, including rejecting President Jackson's nomination of Martin Van Buren to become Minister to Great Britain. The Senate had confirmed Van Buren only three months before the latter nomination as Secretary of State, but the circumstances were had changed because of Jackson's open break with Calhoun (and his supporters) and Jackson's designation of Van Buren as his heir apparent. Calhoun retaliated by casting the decisive vote against Van Buren's nomination as Minister to Great Britain. Jackson turned defeat into victory by publicly extolling Van Buren's virtues and blaming the latter's defeat on Jackson's political enemies. Never doubtful of his popularity with a majority of the electorate, Jackson decided to use the Senate's blatant partisanship against it in the next presidential election. Thus, he named Van Buren as his running mate to illustrate his faith in the latter's abilities, and Van Buren later succeeded Jackson as President.⁵⁷ Jackson's victory was not just a personal triumph; it reinforced his claim of the presidency rather than the Congress as the branch more representative of the will of the American people, and it signaled widespread support for his efforts to reform the national government and preserve the Union.

Whereas Jackson could boast significant confirmation victories in the aftermath of intense struggles with the Senate, a President's string of short-term successes within the federal appointments process does not necessarily represent an achievement of lasting significance. George Bush, for instance, won far more than he lost in the federal appointments process (in part due to the presumption of confirmation embodied in the constitutional structure),⁵⁸ but his

56. See ROBERT V. REMINI, *THE LIFE OF ANDREW JACKSON* 205-06 (1988).

57. See ROBERT V. REMINI, *ANDREW JACKSON AND THE COURSE OF AMERICAN FREEDOM 1822-1832* 345-52 (1981).

58. See generally Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76

victories had little enduring value because they were made largely on the basis of his perceived need to obtain short-term political advantage rather than to implement a clearly conceived, articulated, long-term constitutional or political vision.⁵⁹ In all likelihood, the absence of such a vision (particularly one that could easily be identified as a unifying theme for his presidency) spelled doom for the Bush presidency insofar as both the voters were and future historians remain concerned.

Nor do a series of serious differences of opinion with the Senate or presidential concessions in the confirmation process necessarily signal a failed presidency or poor institutional leadership. The critical thing is to examine how a President's handling of the contests or concessions have figured into his attempt to achieve some lasting change in the constitutional order. For instance, in the nineteenth century President Jackson had more than his fair share of heated confirmation battles with the Senate, but they often entailed thinly veiled tugs of war between Jackson and his Senate rivals—won more often than not by the former—over dismantling the national bank, reforming and democratizing the national government, and establishing presidential supremacy in formulating national policy.⁶⁰ In contrast, President Lincoln had no serious confirmation skirmishes to speak of because he used patronage to secure the unity of the Republican party *and* popular and Senate support for dismantling slavery, ensuring a strong chief executive, preserving the Union, and setting the stage for Reconstruction.⁶¹

As Presidents Jackson's and Lincoln's performances in office demonstrated, the management or leadership skills a President has used (or not used) in the appointments process reflect or draw on the same skills or judgment a President has employed (or has failed to employ) generally to achieve the objectives of greatest importance to him. Hence, the Senate's dramatic rejection of President Bush's Secretary of Defense nominee John Tower and near rejection of his Supreme Court nominee Clarence Thomas overshadowed his many other successes in the confirmation process.

JUDICATURE 282, 284 (1993).

59. See Janet M. Martin, *George Bush and the Executive Branch*, in LEADERSHIP AND THE BUSH PRESIDENCY: PRUDENCE OR DRIFT IN AN ERA OF CHANGE? 37, 53 (Ryan J. Barilleaux & Mary E. Stuckey eds., 1992); see also Goldman, *supra* note 58, at 295, 297.

60. See SKOWRONEK, *supra* note 45, at 137-54.

61. See HARRIS, *supra* note 3, at 72.

This was because the Tower and Thomas episodes highlighted Bush's failure to map out beforehand a successful confirmation (or legislative) strategy (including developing consensus within the country or the Senate before acting) and to articulate (or command public respect for) the vision underlying the nominations. In contrast, President Clinton has assiduously avoided controversy and looked for compromise in the appointments process after having made a few missteps early in his presidency. President Clinton's willingness to compromise in making appointments, to map out beforehand a strategy for making a successful nomination, to reorganize his office or staff to maximize its quality of performance, and to ensure to the extent possible public support for his most high-profile nominees parallel his performance generally to look for common ground with congressional leaders, to stand firm on a few critical issues, and to compromise for the sake of keeping the federal government energized and moving generally in a direction of his liking.

To be sure, merely securing the appointments of people of high quality and like mind (i.e., who largely agree with or support his constitutional and programmatic visions) has been no guarantee of a President's achievement of his preferred short- and long-term institutional objectives. Generally, some relationship between a President's use of his nominating power and exercise of other executive powers almost always exists; the problem is to determine the extent to which this has been constructive insofar as the presidency and the nation's welfare are concerned, including the seriousness of any missteps and the nature and ramifications of the objectives sought. For example, President Teddy Roosevelt, who saw himself initially as a President operating within the "Jackson-Lincoln tradition" of presidential leadership (i.e., of trying to construct a new constitutional order and understanding of the powers of the presidency and the national government),⁶² had enormous success in the appointments process. Indeed, in the course of expanding the domain of presidential power, particularly in transforming it into a "bully pulpit," fighting the power of private corporations, and in championing "his vision of a better, more egalitarian society,"⁶³ Roosevelt insisted on maintaining high standards (including ideological compatibility) for all of his federal appoint-

62. See THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 379 (1913).

63. ABRAHAM, *supra* note 3, at 156.

ments (including his three to the Supreme Court) and refused to accept the recommendations of Senators of his party of people who did not meet his standards.⁶⁴ In spite of this rather aggressive stance, Roosevelt had few contested nominations largely because of the intimidating zeal with which he promoted his nominations and his resolve to draw on his extraordinary popularity whenever it suited his purposes. Nevertheless, Roosevelt, by his own admission and the judgment of history, failed to anticipate or deal adequately as President with all of the political fallout from or consequences of many of the governmental and party reforms he had initially championed and set into motion.⁶⁵ In the end, it was a special kind of appointment that symbolized Roosevelt's partial failure as a leader. In choosing William Howard Taft as his successor, Roosevelt failed to do the wise thing. In making this choice he not only terminated his own institutional leadership but also chose a successor who failed to exercise the kind of institutional leadership Roosevelt had proven himself capable of exercising.⁶⁶

Ironically, Roosevelt's subsequent split from the Republican party and its leader (and his successor), Taft, paved the way for the election of another committed reformer, Woodrow Wilson, who was the advocate for and personification of the New Freedom's quest for social and political justice. Unlike Roosevelt, Wilson preferred to work behind the scenes whenever possible in the appointments process and experienced only a few seriously contested nominations, including most notoriously the first of his three Supreme Court appointments, Louis Brandeis, who was closely associated with the boldness of Wilson's presidential vision and was a controversial lawyer in his own right; thus he became the center of one of the most protracted, heated, vicious, and bitter confirmation contests in the century.⁶⁷ In contrast, Wilson studiously avoided

64. See *id.* at 156-57; HARRIS, *supra* note 3, at 80.

65. See SKOWRONEK, *supra* note 45, at 232.

66. Roosevelt is far from being alone in making a less than perfect choice of a successor. In spite of his many premonitions of his own death, President Lincoln chose Andrew Johnson as his second running mate. Johnson proved to be a disastrous choice, who lacked leadership skills and failed completely to maintain good will or a good working relationship with Congress. Similarly, President Jackson chose his close political ally Martin Van Buren as his successor, but Van Buren proved incapable of rising to the challenges of leading the nation on the path set by Jackson or, more importantly, out of its first great depression.

67. See ABRAHAM, *supra* note 3, at 176-84.

controversy in his nonjudicial appointments.⁶⁸ This proved to be an astute judgment because Wilson was a plurality President who needed to use patronage appointments to unify party loyalty and support. Indeed, when Wilson became President in 1913, the Democrats had been out of office for sixteen years, and there was a substantial rush of aspiring appointees. Nonetheless, Wilson took the advice of his closest advisers to turn over to the departments the primary responsibility for handling most of the appointments of significant officials within them. Moreover, when elected to the presidency, Wilson had few political or personal debts to pay and was able to pick his cabinet with great care, appointing the persons he believed to be best qualified and generally committed to his progressive policies.⁶⁹ Generally, President Wilson secured the unified support of his party by withdrawing cabinet or subcabinet nominations if they met with significant opposition within his party and by deferring whenever possible to party leaders interested in securing the appointments of their favorites to certain important offices. In dealing with the Senate on appointments, Wilson, like Lincoln, rarely permitted patronage disputes to deflect him from trying to coordinate his powers for the purpose of achieving certain broader objectives and avoiding the alienation of members of his party whose support he needed to ensure the success of his legislative program.

Subsequently, Presidents have delegated to subordinates the important tasks of gathering, evaluating, and making recommendations, if not the actual selection, of important federal appointments. Modern Presidents have coordinated the challenges of overseeing substantially larger administrations (than those overseen by their nineteenth century counterparts) with the personal obligations expected of all chief executives to interact with other political leaders and constituents and the management of their other administrative, policymaking, and speechwriting responsibilities.

68. See generally HARRIS, *supra* note 3, at 93-98.

69. In some cases, he chose people with whom he was not personally acquainted. This practice brought him into conflict, however, with only one significant Cabinet appointee—William Jennings Bryan, who as Secretary of State embarrassed Wilson because of his untiring efforts to find offices for many of his friends and supporters. See *id.* at 94.

Of course, appointing someone is one thing, the work that appointee does with others, including a President, is quite another. Even in the latter case, it is asking a lot to attribute significant constitutional change to the action(s) of a single appointee, especially that of a judge. The problem is that individuals acting alone and not in tandem with others can accomplish very little in the national government. This difficulty is compounded when a President does not have the means to control directly his appointee's exercise of power.⁷⁰ Significant change is much more likely to be achieved through the combined or coordinated efforts of a team of people; hence, a string of appointments and the consequent activities of those people as coordinated or managed by a President provides a much more extensive record for assessing presidential management. For example, President Jackson succeeded, despite considerable resistance from the Senate during his eight years in office, in reforming the national government and thus "providing the American people with one of the most honest and least corrupt administrations in the early history of the nation."⁷¹ Moreover, in making six, five, and nine appointments to the Supreme Court, Presidents Jackson, Lincoln, and Roosevelt, respectively, succeeded in changing its ideological composition.⁷²

Although the appointment of an able, well-qualified individual is a significant short-term accomplishment, it ultimately says little on its own about a President's management of his office or branch to achieve certain long-term goals, such as influencing the direction of the Supreme Court, which a President usually has achieved only by having appointed several justices. 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 Marshall accomplished all that he did on the Supreme Court without Adams' help.⁷³ Otherwise, Adams' presidency generally gets average marks.⁷⁴

70. 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.

71. REMINI, *supra* note 57, at 331.

72. See ABRAHAM, *supra* note 3, at 95-103 (Jackson), 117-24 (Lincoln), 208-40 (F.D. Roosevelt).

73. See *id.* at 82-84.

74. See *id.* app. B at 415-17; see also Schlesinger, *supra* note 44, at 48-49 (generally

Finally, it is important to understand that different Presidents have had different agendas for diverse kinds of appointments (or different appointments have sometimes figured differently into different Presidents' agendas). Compare, for instance, the presidencies of Dwight Eisenhower and William Howard Taft. Eisenhower proved to be, in Stephen Skowronek's estimation, "a master" at not doing more than he could realistically accomplish; hence, he "was content to prune the radical edge off New Deal liberalism."⁷⁵ He achieved a relatively well-defined, modest goal, but his achievement "faded quickly as a national political alternative upon his departure [from office]."⁷⁶ Moreover, Eisenhower did not include a radical overhauling of the federal judiciary within his agenda. While 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 on the constitutional foundations of the New Deal, an assault that would have required significantly different kinds of judicial appointments.

Whereas President Eisenhower generally succeeded (at least for a short time) in constraining legislative expansions of the New Deal but not in reshaping the federal judiciary, William Howard Taft was almost completely passive on legislative or policy matters but took an active interest in judicial appointments.⁷⁷ Both as President and later as Chief Justice, Taft selected judges based primarily on their adherence to economic due process and antipathy towards progressive legislation.⁷⁸ Through the six Supreme Court appointments he made in a single term⁷⁹ 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.

describing the criteria for measuring the quality of different presidencies and concluding with a rating of "average" for President John Adams).

75. SKOWRONEK, *supra* note 45, at 46.

76. *Id.*

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

78. See *id.* at 273.

79. See ABRAHAM, *supra* note 3, at 166.

*B. Factors Impeding or Facilitating Presidential
Control of the Appointments Process*

A close examination of the internal dynamics of the federal appointments process reveals that some factors have made more of a difference than others to presidential achievements of their most precious objectives in this area (without undue political costs attached). For instance, a President's popularity is potentially a powerful weapon to wield, for it signals to anyone or any institution bent on crossing the President of the possibility of a serious backlash from the American people. The challenge for a popular President is to take advantage of his popularity judiciously (i.e., to use it when it can benefit him and his administrative goals the most and to avoid squandering it on unimportant things). Ironically, presidential popularity can be crucial for triggering political support for important nominations or related causes. Conversely, Presidents who have squandered their popularity have found this problem to come back to haunt them frequently in the confirmation process. Indeed, one major factor that has the potential to undo a nomination is to treat a nomination as embodying some unpopular program, policy, or feature. In this situation, a nominee can become a political casualty because of some serious grievance one or more Senators have with a President. Because this kind of opposition treats the nominee as effectively a proxy or substitute for the President, it can constitute a relatively awkward basis for mobilizing public opinion against a particular nominee. Nevertheless, opposing a nominee because of a desire to punish a President has two advantages insofar as the Senate is concerned. The first is that the President has little or no control to prevent it. The second is that it is potentially a problem for a President whenever the Senate considers a nomination and thus is difficult to anticipate or plan for.

Invariably, the federal appointments process provides a venue or forum in which to test the popularity of Presidents or their policies. The more unpopular a President or the more controversial one of his policies the likelier it will be that a confirmation contest will arise with respect to a nominee closely associated with those things that have made a President or policy unpopular. An excellent example of this phenomenon is the Senate's rejection of Roger Taney as President Jackson's second Secretary of the Treasury—the first time in American history the Senate formally rejected a cabi-

net nominee.⁸⁰ Although the Senate had confirmed Roger Taney as President Jackson's second Attorney General in 1831, it rejected his nomination three years later as Secretary of the Treasury. This rejection occurred because a majority of Senators disapproved of Taney's conduct in the interim as Acting Treasury Secretary in overseeing the withdrawal of funds from and effective dismantlement of the national bank in response to what Jackson regarded as its corrupt mismanagement. No one questioned Taney's ability, but Taney's nomination as Treasury Secretary (and not long thereafter as an Associate Justice) provided a perfect opportunity for the Senate to debate the propriety of the President's policies and Taney's own actions regarding the national bank.

Another more recent example of this is President Clinton's unsuccessful nomination of his National Security Adviser Anthony Lake in 1997 to head the CIA.⁸¹ Lake ultimately withdrew his nomination when it became apparent that some powerful Republican Senators were delaying indefinitely the final Senate vote because of unresolved questions about his managerial skills and possible involvement in inappropriate fundraising activities undertaken by his staff. Even though the latter might not have been illegal, Lake, like Taney before him in dealing with the national bank, was associated with and had allegedly engaged in or allowed something to occur that the President's political foes in the Senate regarded as inappropriate.

Sometimes the unpopularity of a President is so widespread or extreme as to trigger resistance. For example, the steady opposition in the Senate to President Tyler's nominees for the Supreme Court seats derived not from flaws in the nominees' records but rather from widespread contempt in the Senate for Tyler, who was viewed as a weak President destined to serve only one term.⁸² Another example is the forced withdrawal of President Lyndon Johnson's nomination of Abe Fortas as Chief Justice after Fortas' Democratic supporters failed to stop a filibuster against the nomination based in part on Johnson's growing unpopularity and the expectation among Senate Republicans that Johnson would be

80. See generally C.B. SWISHER, ROGER B. TANEY 190-288 (1935).

81. See *supra* note 12.

82. See ABRAHAM, *supra* note 3, at 106-07.

replaced by Richard Nixon, whom Fortas' opponents preferred to fill Earl Warren's seat.⁸³

Another significant 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 clearly implicates a President's leadership and administrative skills, for it requires assessing both generally and in particular cases a President's management and communication skills; sense of timing; ability to cultivate and take advantage of good relations with key Senate leaders or forces; and abilities to assemble and coordinate a good support staff and to mobilize public support and opinion.

The extent to which a President has any or all of these skills or abilities is one thing, while another is the context in which he has been challenged to develop or exercise one or more of them. Figuring out the context clarifies the size and range of challenges that he must confront and overcome in order to achieve his priorities. For instance, the composition of the Senate generally makes a big difference and can be a huge obstacle a President must overcome in implementing his agenda, including his preferred judicial and nonjudicial appointments. Whether or not the President's political party has controlled the Senate has posed serious consequences for presidential performance in the federal appointments process. For example, the correlation between party membership and Supreme Court confirmation votes has remained quite strong throughout American history.⁸⁴ In one study, Professor Robert Scigliano found that the confirmation rate for Supreme Court justices was ninety-one percent when the President's party controlled the Senate, while the rate dropped to forty-two percent when the President's party did not control the Senate.⁸⁵ Another study found that the confirmation rate was ninety percent in the first three years of office but less than sixty-seven percent in the fourth year.⁸⁶

83. See MASSARO, *supra* note 3, at 55-77.

84. See generally John D. Felice & Herbert F. Weisber, *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) (discussing the correlates between political parties and Supreme Court confirmation votes).

85. See SCIGLIANO, *supra* note 24, at 97-98.

86. See S. WASBY, *THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM* 128 (3d ed. 1988). 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.

Moreover, the political realities of divided government have proved to be a significant challenge for Presidents, particularly those eager for great change or reform, in the federal appointments process. For example, President Andrew Jackson's newly organized Democratic party controlled half of the seats in the Senate from 1833-35.⁸⁷ Jackson understood the magnitude of this dilemma. Thus, after the Senate blocked Roger Taney's nomination as an Associate Justice only six months after rejecting Taney for Treasury Secretary,⁸⁸ Jackson continued to look for ways in which to vindicate his friend and his policies regarding the national bank. His last year in office coincided with another cycle of elections to the Senate, and Jackson stumped for Democratic candidates. In the meantime, Chief Justice Marshall had died, and Jackson nominated Taney yet again. Jackson's campaigning paid off, because it helped to ensure his party's control of the Senate by the largest margin yet in his term of office. The new majority confirmed Taney as Chief Justice. Jackson had won.⁸⁹ Jackson's persistence, awareness of the significance of the composition of the Senate, and willingness to use his popularity and his office to work for changing the composition of the Senate enabled him to wrest from Congress presidential control of certain prerogatives, such as articulating national policy or claiming the entitlement to a popular mandate as the only nationally elected official; in the end, he succeeded in putting certain key people into place, implementing his program of

Segal & 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).

87. See HARRIS, *supra* note 3, at 63.

88. See generally *id.* at 62, 63.

89. Neither the irony nor the significance of Jackson's victory eluded him. Two days before his second term came to an end in 1837, Jackson wrote to a friend that he was looking forward with deep satisfaction to the "glorious scene of Mr. Van Buren, once rejected by the Senate, sworn into office by Chief Justice Taney, who [had twice] been rejected by the factious Senate." HARRIS, *supra* note 3, at 64 (citation omitted).

weakening the national bank, and invigorating states' rights without acceding to nullification or succession.⁹⁰

Lame duck Presidents or Presidents facing reelection have faced the stiffest opposition to their nominations from their political foes in the Senate during presidential election years.⁹¹ For example, in the closing days of the Taft administration, the Progressives joined with the Democrats to prevent the Senate from going into executive session to confirm 1,300 nominations submitted by Taft.⁹² Moreover, the opposition party has generally slowed down or stalled judicial nominations, particularly to the Supreme Court, as the date of a presidential election has drawn nearer.⁹³ The Democratic majority in the Senate effectively stopped holding confirmation hearings for President Bush's judicial nominees beginning in the summer preceding the 1992 presidential election.⁹⁴ Consequently, President Clinton inherited dozens of judicial vacancies.⁹⁵ No sooner did the Republicans retake control of the Senate in 1994 than they began to slow down the processing of President Clinton's judicial appointments, precipitating one of the longest periods of paralysis in processing judicial appointments in American history.⁹⁶ At year's end in 1996, the Senate had approved only seventeen judicial nominations—none on the federal courts of appeals. This is the lowest number of successful lower court nominations ever made in a single year by a post-World War II President.

Timing can become a problem in a different way. Sometimes Presidents move too slowly in nominating someone (i.e., waiting until too late in the term)⁹⁷ or coming to the defense of an embat-

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

91. See generally Thomas Halper, *Supreme Court Appointments: Criteria and Consequences*, 21 N.Y. L. FORUM 563, 563-84 (1976); Thomas Halper, *Senate Rejection of Supreme Court Nominees*, 22 DRAKE L. REV. 102, 102-12 (1972).

92. See HARRIS, *supra* note 3, at 94.

93. See Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 JUDICATURE 282, 284 (1993) ("Traditionally, minimal confirmation activity occurs during presidential years, especially when the Senate is controlled by one party and the White House by another.").

94. See *id.*

95. See *id.* at 277.

96. See *id.*

97. Sometimes delaying nominations can turn into a problem. Presidents may wait until too late in their terms of office to avoid having opposing forces in the Senate, as described above, try to slow down or stall the processing of their nominations pending

tled nominee or in organizing support for a 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 who controlled the Senate to postpone Bork's confirmation hearings until after Labor Day.⁹⁸ Bork's opposition used the summer to organize 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.⁹⁹ The nomination quickly drew fire from conservatives, but neither President Clinton nor any of his top political appointees came to the nominee's defense. Guinier was forced to withdraw her nomination without any show of support from the President.

A badly conceived defensive strategy can hurt a nomination almost as much as a belated or nonexistent defense. Consider, for example, Richard Nixon's first two attempts to fill Abe Fortas' seat on the Supreme Court. In both cases, Nixon failed to devise or employ effective operations within his administration for evaluating nominees' backgrounds; to develop intelligent strategies for securing confirmation; and to provide the means for overseeing and maintaining a good working relationship with the Senate.¹⁰⁰

Poorly conceived staffing can also undo or impede nominations. Such was the problem with George Bush's system for evaluating prospective judicial nominees.¹⁰¹ 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 the Justice Department and White House Counsel's Office. This duplication cost the President precious time in processing potential judicial nominations.¹⁰²

the outcome of the sitting president's reelection effort. As I have already suggested, numerous judicial nominations made by both Presidents Bush and Clinton prior to the final years of their first terms fell prey to this difficulty.

98. See BRONNER, *supra* note 27, at 202-03.

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

100. See MASSARO, *supra* note 3, at 79, 106, 144.

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

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

A contrasting example to Bush's flawed system for judicial selection is the one adopted by President Ford for nominating someone to replace Justice Douglas on the Court.¹⁰³ Ford divided the responsibility for counseling him 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, while he asked Buchen to assess the political ramifications of different potential nominees. Levi's and Buchen's offices interacted like clockwork, and once a nominee was chosen the Senate moved quickly to approve him unanimously.

The fact that institutional organization or support or associating a nominee with some potential danger to the public or something problematic with the President constitutes the strongest trigger for mobilizing public support for or against a nomination has serious consequences for constitutional law. The utilization of such factors suggests that the President and the Senate have tended to treat judicial and nonjudicial nominations in some strikingly similar ways. For instance, the first factor's focus on the potential for demonizing or creating a halo effect for a nominee treats the person's philosophy about government as a potentially disqualifying concern. The policy could be related to the judiciary (such as its role within the constitutional order) but does not have to be. Consequently, one finds that nominees will be rejected for their political philosophies, regardless of the positions they are seeking. To be sure, judicial and nonjudicial nominees do receive some different treatment; the former are often scanned more closely by both the President and the Senate because they will have life tenure. Even so, the lower 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 a President's—or, for that matter, a Senator's—supporting or opposing the nomination.

103. See generally Victor H. Kramer, *The Case of Justice Stevens: How to Select, Nominate, and Confirm a Justice of the United States Supreme Court*, 7 CONST. COMM. 325 (1990).

CONCLUSION

The temptation to explain or analyze complex events in simplistic terms is understandably strong. For over two hundred years, it has dominated efforts to understand and evaluate presidential performance in the federal appointments process. This paper's purpose has been to suggest the significance of both the outside and inside perspectives for such efforts. On the one hand, as Professors Lowi and Tulis have suggested, it is important not to lose sight of the external social, political, economic, and historical forces constraining or influencing presidential decision-making or performance; these factors demonstrate, *inter alia*, the limitations or the value of constitutional or formal structure. On the other hand, a President's organization within his office or administration for assisting with appointments matters, and a President's interaction with the Senate or other interested constituencies, clearly reflects his management skills and effects the quality of his appointments decisions.

Moreover, this paper has given special attention to the internal dynamics of the federal appointments process in the hopes of providing a crucial step in expanding understanding and developing meaningful criteria for evaluating presidential performance in the appointments process. Institutional analysis is especially helpful for focusing attention on the special significances of a President's managerial or leadership skills in shaping or organizing the office of the presidency and in coordinating constructively his exercise of his nominating power with his use of other executive powers for the purpose of achieving lasting constitutional and political change or improvement. In addition, institutional analysis helps to provide the means for comparing presidential performance in the appointments process that cuts across different historical periods. Both institutional analysis and sensitivity to historical changes, developments, and movements involving the evolution of the presidency will help to demystify the appointments process. Demystifying the appointments process is crucial for measuring presidential achievement of certain short- and long-term objectives and the quality and nature of presidential-senatorial interaction regarding matters of mutual concern to each institution. In the end, it is a mistake in practice or study to divorce the appointments process from the larger contexts of which it is a part. Until constitutional scholars learn this simple lesson, the federal appointments process will remain a mystery to many of those who profess to be its oracles.

