

Due Process Denied?

Exploring the Constitutionality of the Senate's Failure to Timely Consider and Vote on Federal Judicial Nominees

by Jeffrey A. Goldberg

In 1787, our Founding Fathers agreed to compromise when they determined which branch of government would have the power to fill judicial vacancies in the federal courts. As the process has evolved, the President's power to nominate and the Senate's power to confirm have been the subject of intense scrutiny and heated debate. But in recent years, a Republican-controlled Senate has caused discussion on the issue to escalate by employing non-substantive methods to avoid acting upon President Clinton's selections.

This article discusses the Senate's role in the judicial appointment process and examines its procedural misconduct. Part I recounts the early development of the selection process and summarizes the prevailing views on the issue at the Constitutional Convention. Part II reports on the current state of the federal judiciary and cites specific examples of unreasonable delay. Part III analyzes the problem through a due process inquiry and challenges the status quo on public policy grounds. Ultimately, this article criticizes the Senate's abuse of its advise-and-consent authority and questions the legal and ethical grounds for its stall tactics.

I. HISTORICAL BACKGROUND

The Constitution provides that the President "shall nominate, and by and with the [a]dvice and [c]onsent of the Senate, shall appoint ... [j]udges of the [S]upreme Court, and all other [o]fficers of the United States, whose [a]ppointments are not herein otherwise provided for" ¹ The Framers settled on this language after significant debate over whether the power to appoint federal judges should be given to the President or to Congress. The cooperative structure adopted above was first proposed on June 18, 1787, by Alexander Hamilton, who suggested that—instead of granting the entire appointment power to one body—the executive could select candidates "subject to the approbation or rejection of the Senate."²

Supporters of total executive control had argued, among other things, that (1) there would be greater accountability if the President alone were responsible, (2) groups of individuals are more vulnerable to "intrigue," (3) the President would be more capable of selecting qualified persons, and (4) since senators—unlike the executive—would not represent the entire

nation, a powerful senator could convince his colleagues to appoint a candidate from his own state.³

Those who lobbied in favor of absolute senatorial authority asserted that (1) placing the appointment power solely in the hands of the President would resemble a monarchy, (2) the President would not really be accountable since he would be immune from punishment for poor selections, (3) the President—not the Senate—would be more susceptible to intrigue, and (4) the Senate would be far more familiar with the pool of possible nominees.⁴

While some scholars have concluded that the records of the debates and the resulting text indicate that the Founding Fathers' intent was for the Senate to play a major role in the appointment process,⁵ Hamilton's writings imply otherwise. He wrote that "one man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices, than a body of men of equal, or perhaps even of superior discernment."⁶ Moreover, he commented, a "single, well directed man ... cannot be distracted and warped by that diversity of views, feelings and interests, which frequently distract and warp the resolutions of a collective body."⁷ The Federalist Papers also espouse Hamilton's view that the Senate should give great deference to the President's choices.⁸

But history and practice have not confirmed his position; the Senate—as early as its first term—has taken an active role in assessing the President's appointments.⁹ As a result, legal minds have not seriously questioned the constitutionality of a hawkish Senate. But neither the text of the Constitution nor the debates in 1787 provide much guidance as to what factors may be considered by the President when nominating and by the Senate when consenting. Much debate, therefore, has centered on the criteria by which candidates should be evaluated, and the appropriate grounds on which to base a rejection of a president's nominee.¹⁰

But also conspicuously absent from the text, the Convention records, and the Federalist Papers is any mention or guidance as to the *procedure* by which the President and Senate are to carry out their appointment responsibilities. Once an opening occurs, for example, the Constitution does not specify how quickly the President must forward to the Senate the name of a

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Court Review also contains an interview with Eleanor Dean Acheson, the Assistant Attorney General who works on judicial appointments within the Justice Department. More recent data on judicial appointments can be found in that interview.

replacement. Nor does it state how the Senate is to effectuate its advise-and-consent duty. Are hearings necessary? If so, who may testify? Must the candidate attend? If not, should absence create negative implications?

Just as the *substantive* factors that the Senate should consider when determining whether a particular candidate is fit to be a federal judge have evolved over time, so have the *procedural* nuances of the Senate's fact-finding mission. For example, the Senate Judiciary Committee now routinely questions nominees and recommends whether the entire Senate should approve the candidate.

II. RECENT DEVELOPMENTS

Despite an historical record of relative cooperation on appointments, the federal judiciary has become severely strained in recent years due to numerous vacancies and an ever-increasing docket. The congestion in the courts has been caused primarily by the failures of the President and the Senate, collectively, to timely appoint judges to fill a growing pool of open positions. On December 31, 1997, Chief Justice William H. Rehnquist, in his annual report on the federal courts, summarized the problem:

If Federal jurisdiction remains at its current level—or, worse, increases—judicial vacancies will aggravate the problem of too few judges and too much work. Currently, 82 of the 846 Article III judicial offices in the Federal judiciary—almost 1 out of every 10—are vacant. Twenty-six of the vacancies have been in existence for 18 months or longer and on that basis constitute what are called “judicial emergencies.” In the Court of Appeals for the Ninth Circuit, the percentage of vacancies is particularly troubling, with over one-third of its seats empty.

Judicial vacancies can contribute to a backlog of cases, undue delays in civil cases, and stopgap measures to shift judicial personnel where they are most needed. Vacancies cannot remain at such high lev-

els indefinitely without eroding the quality of justice that traditionally has been associated with the Federal judiciary. Fortunately for the judiciary, a dependable corps of senior judges has contributed significantly to easing the impact of unfilled judgeships.

[T]he federal judiciary has become severely strained in recent years

... The Senate is, of course, very much a part of the appointment process for any Article III judge. One nominated by the President is not “appointed” until confirmed by the Senate. The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote for him up or vote him down. In the latter case, the President can then send up another nominee....¹¹

While most have acknowledged that the Clinton Administration has been slow to nominate candidates,¹² it has become clear that the Senate has been the primary culprit. As the Chief Justice also wrote:

Whatever the size of the Federal judiciary, the President should nominate candidates with reasonable promptness, and the Senate should act within a reasonable time to confirm or reject them. Some current nominees have been waiting a considerable time for a Senate Judiciary Committee vote or a final floor vote. The Senate confirmed only 17 judges in 1996 and 36 in 1997, well under the 101 judges it confirmed during 1994.¹³

Much of the debate over the failure of the Senate to confirm many of the President's nominations has focused on the ideal-

Footnotes

1. U.S. CONST. art. II, § 2, cl. 2.
2. JAMES MADISON, NOTES ON DEBATES IN THE FEDERAL CONVENTION OF 1787, at 138 (A. Koch ed., 1966).
3. William G. Ross, *The Functions, Roles, and Duties of the Senate in the Supreme Court Appointment Process*, 28 WM. & MARY L. REV. 633, 636-38 (1987).
4. *Id.* at 636-38.
5. See, e.g., Charles Black, *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L.J. 657 (1970); see also Richard D. Manoloff, *The Advice and Consent of the Congress: Toward a Supreme Court Appointment Process for Our Time*, 54 OHIO ST. L.J. 1087, 1101-04 (1993).
6. THE FEDERALIST NO. 76, at 492 (Alexander Hamilton) (Modern Library ed. 1937).
7. *Id.*
8. Ross, *supra* note 3, at 640-41.
9. *Id.* at 642-44.
10. See, e.g., Larry W. Yackle, *Choosing Judges the Democratic Way*, 69 B.U. L. REV. 273 (1989).
11. William H. Rehnquist, *1997 Year-End Report on the Federal Judiciary*.
12. See, e.g., *Emergency in the Courts*, N.Y. TIMES, Apr. 6, 1998, at A22 (“President Clinton has been inexcusably slow in making nominations.”).
13. Rehnquist, *supra* note 11. Much has been made of those nominees who have waited years to get a hearing. A January 1998 editorial highlighted these egregious situations:
It is almost unbelievable that one of President Clinton's nominees to the federal bench is still waiting for Senate action on his nomination after almost three years. That is not a typographical error. Nor is William A. Fletcher—a well-reputed law professor who was nominated to serve on the U.S. Court of Appeals for the 9th Circuit—the only one of Mr. Clinton's nominees to live in confirmation limbo for such periods of time. There are actually seven would-be judges who have been waiting for a Senate vote since 1995.

The 1995 Seven, WASH. POST, Jan. 9, 1998, at A20.

... the more vexing problem has been the Senate's procedural misconduct

ogy of the candidate—the Senate, for example, has refused to confirm any nominee deemed too liberal or “activist.”¹⁴ Although the Clinton Administration has criticized this practice, most agree that the Senate has wide discretion in determining the basis on which to reject a nominee.¹⁵

But relatively little has been written about the Senate's procedural maneuvers (e.g., neglecting to consider a nominee *altogether*). Again, as Justice Rehnquist commented in his 1997 report:

[T]he Senate should act within a reasonable time to confirm or reject them. Some current nominees have been waiting a considerable time for a Senate Judiciary Committee vote or a final floor vote....

The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote for him up or vote him down.¹⁶

It is within this procedural arena that the Senate's abuse of its advice and consent authority is most glaring.

III. CRITICAL ANALYSIS

As stated previously, most commentators do not question the Senate's right to evaluate and, if it so desires, block the confirmation of a particular nominee of the President.¹⁷ What's more, although most rejections are based on substantive disagreements, from the earliest days we have known that the Senate is not required to give any reason at all for rebuffing a candidate.¹⁸ But the more vexing problem has been the Senate's procedural misconduct—the refusal in many cases even to grant a hearing

or call a vote on the nominee. Such stall tactics do not comport with traditional notions of due process and are impermissible as a matter of public policy.

A. Due Process

Although Congress may legislate in whatever manner is “necessary and proper” to carry out its powers,¹⁹ it may not act if to do so would violate other constitutional provisions.²⁰ Similarly, Congress may determine its own internal rules and procedures,²¹ but the Supreme Court has—on at least one occasion—announced that congressional proceedings may not infringe other parts of the Constitution. In the century-old case of *United States v. Ballin*,²² the Court, in considering the validity of a House of Representatives rule, wrote that

[t]he [C]onstitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained.²³

Both the Fifth and Fourteenth Amendments guard against the deprivation of “life, liberty, or property without due process of law.”²⁴ Could the Senate's refusal to hold hearings or call votes on announced nominees be considered a violation of procedural due process? Perhaps. A closer examination of such an assertion reveals that the biggest impediments to a claim of this kind would be demonstrating justiciability and establishing the presence of a protectable interest.

1. DEMONSTRATING JUSTICIABILITY

Any claim that an interest was unconstitutionally deprived would fail if a judge considered it non-justiciable. This may occur if a reviewing court rules that the Senate's refusal to hold hearings or conduct votes is a “political question” and, therefore, one that the judiciary should not pass upon.²⁵ Although

14. See, e.g., Marianne Means, *GOP Puts Choke-Hold on Courts*, ROCKY MTN. NEWS, Jan. 26, 1998, at 38A.

15. See generally Ross, *supra* note 3.

16. Rehnquist, *supra* note 11.

17. See *supra* note 9.

18. George Washington once wrote: “[A]s the President has a right to nominate without assigning his reasons, so has the Senate a right to dissent without giving theirs.” JOSEPH HARRIS, *THE ADVICE AND CONSENT OF THE SENATE: A STUDY OF THE CONFIRMATION OF APPOINTMENTS BY THE UNITED STATES SENATE* 39 (1953).

19. U.S. CONST. art. I, § 8, cl. 18 (“The Congress shall have [p]ower [t]o make all [l]aws which shall be necessary and proper for carrying into [e]xecution the foregoing [p]owers, and all other [p]owers vested by this Constitution in the [g]overnment of the United States, or in any [d]epartment or [o]fficer thereof.”).

20. See *Sheldon v. Sill*, 49 U.S. 441 (1850).

21. U.S. CONST. art. I, § 5, cl. 2 (“Each [h]ouse may determine the [r]ules of its [p]roceedings . . .”).

22. 144 U.S. 1 (1892).

23. *Id.* at 5 (emphasis added).

24. U.S. CONST. amend. V (“No person shall be . . . deprived of life,

liberty, or property, without due process of law . . .”); *id.* at amend. XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .”).

25. The modern explanation of the political question doctrine may be found in *Baker v. Carr*, 369 U.S. 186 (1962). The Supreme Court outlined six factors which may define political question cases:

Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.

there have been many cases dealing with the political question doctrine, one recent decision, involving the impeachment of a federal judge, is particularly relevant to the issues addressed in this paper.

In *Nixon v. United States*,²⁶ a unanimous Supreme Court affirmed the lower courts' dismissals of an action brought by former federal district court judge Walter L. Nixon, Jr., against the Senate challenging the circumstances of his impeachment. Nixon had asserted that the Senate's procedures, whereby a committee would conduct an evidentiary hearing and then report findings to the entire Senate for consideration prior to a full vote, were unconstitutional.²⁷ Specifically, he argued that a Senate rule prohibiting the entire Senate from taking part in the hearings was inconsistent with the Constitution's mandate that the Senate is to try all impeachments.²⁸ In ruling that the case presented a non-justiciable political question, the Court relied primarily on the fact that there was a textually demonstrable constitutional commitment of the issue to the legislative branch. It reasoned that the most plausible interpretation of the relevant text led to a conclusion "that the Framers did not intend to impose additional limits on the form of the Senate proceedings"²⁹

But *Nixon* would not necessarily control in the appointments context. Although the Court overwhelmingly voted to affirm, the justices were divided, 7-2, on the issue of justiciability³⁰ and, more importantly, most of the features of the impeachment clause which the majority cited when reaching its holding cannot be found in the appointments language. For example, the Court made much of the fact that the Senate had been given the "sole" responsibility to try impeachments; such limiting language is not present in the advice and consent area.³¹ Justice White emphasized that judicial review exists in many areas that are "textually demonstrable" to other branches.³²

Moreover, the *Nixon* majority essentially reaffirmed the proposition stated in *Ballin*³³ when it distinguished *Powell v. McCormack*.³⁴ In that case the House of Representatives sought to exclude a newly elected member, Adam Clayton Powell, Jr., based on reports that he had deceived House authorities during a prior investigation.³⁵ Powell claimed that the House could only prevent him from taking office if it found that he failed to meet the qualifications specifically set forth in the

Constitution.³⁶ Noting that the House's assertions would fly in the face of an explicit textual limitation elsewhere in the Constitution, the Court agreed.³⁷

The *Nixon* Court explained that, since there was no separate constitutional provision limiting the Senate's impeachment power, *Powell* could not be applied to the *Nixon* dispute.³⁸ But the Court observed—as it had in *Ballin* seventy-seven years earlier—that expressed powers could not be exercised in violation of and in contradiction to other parts of the Constitution:

In the case before us, *there is no separate provision of the Constitution that could be defeated by allowing the Senate final authority to determine the meaning of the word "try" in the Impeachment Trial Clause. We agree with Nixon that courts possess power to review either legislative or executive action that transgresses identifiable textual limits. As we have made clear, "whether the action of [either the Legislative or Executive Branch] exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."*³⁹

This was essentially the position taken by Judge Harry T. Edwards when he dissented at the appellate level. He noted that

[i]t is clear from the Supreme Court's rulings . . . that while the courts may well be barred from second-guessing Congress' fact-finding and policy judgments within the zones of discretion assigned it by the Constitution, the courts may review claims that Congress has exceeded an explicit textual limitation on its powers. . . .

But this assignment of power, like the assignment of

... Nixon would not necessarily control in the appointments context.

26. 506 U.S. 224 (1993).

27. *Id.* at 228.

28. The Impeachment Trial Clause provides that the "Senate shall have the sole [p]ower to try all [i]mpeachments." U.S. CONST. art. I, § 3, cl. 6.

29. *Nixon*, 506 U.S. at 230.

30. Justices White and Blackmun concluded that the case was justiciable, but voted to affirm "because the Senate fulfilled its constitutional obligation to 'try' [the] petitioner." *Id.* at 239 (White, J., concurring).

31. Although by its terms the advice and consent task is one solely for the Senate, the context of the language and the circumstances of its adoption suggest a more collaborative situation.

32. *Nixon*, 506 U.S. at 240 (White, J., concurring) ("There are numerous instances of this sort of textual commitment, e.g., Art. I, § 8 . . .").

33. See *supra* note 23 and accompanying text.

34. 395 U.S. 486 (1969).

35. *Id.* at 490.

36. U.S. CONST. art. I, § 2. The entire provision reads: "The House of Representatives shall be composed of [m]embers chosen every second [y]ear by the [p]eople of the several [s]tates, and the [e]lectors in each [s]tate shall have the [q]ualifications requisite for [e]lectors of the most numerous [b]ranch of the [s]tate [l]egislature."

37. *Powell*, 395 U.S. at 550.

38. *Nixon*, 506 U.S. at 236-237.

39. *Id.* at 237-238 (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1962)) (alternations in original) (emphasis added).

[T]he candidate would still have to demonstrate that a protectable interest was present.

power to Congress to regulate interstate commerce or to provide for the general welfare, may be exercised only within the constraints of other constitutional provisions.⁴⁰

Accordingly, although *Nixon* may be viewed as weighing against a finding of justiciability, the case is distinguish-

able in key factual areas. Moreover, the Court reaffirmed—albeit in dicta—the fundamental principle noted in *Ballin*: congressional procedural rules may not run afoul of other constitutional provisions.

2. ESTABLISHING THE PRESENCE OF A PROTECTABLE INTEREST

But even if a judicial nominee could persuade a tribunal to maintain an action over claims that it is non-reviewable, the candidate would still have to demonstrate that a protectable interest was present.

In order to establish a procedural due process violation, a claimant must first assert that a “liberty” or “property” interest existed.⁴¹ Could a nominee have a legitimate and foreseeable interest in a federal judgeship? As the Supreme Court has noted:

“Liberty” and “property” are broad and majestic terms. They are among the “[g]reat [constitutional] concepts . . . purposely left to gather meaning from experience. . . . [T]hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.”⁴²

While the term “property” has traditionally been used to categorize *tangible* effects, the Court has made clear that “property interests protected by procedural due process *extend well beyond actual ownership* of real estate, chattels, or money.”⁴³

Accordingly, the Supreme Court has ruled, for example, that

those reaping welfare benefits under certain qualification standards may have a protectable property interest in their *continuous* receipt.⁴⁴ And, in a related case, the Court held that a lawyer who had been denied the right to practice before a state tax board—without a prior hearing or statement explaining the reasons for the rejection—had a property interest and claim to practice because the state board had published eligibility rules.⁴⁵ In areas of public employment, the existence of a protectable property right has frequently been found when professors have been dismissed in the face of explicit tenure standards or contract provisions.⁴⁶

But the *absence* of formal rules—either in eligibility regulations, tenure rules, or contract provisions—has not been deemed dispositive on the issue of whether there exists a claim of a protectable property interest.⁴⁷ Instead, the Court has looked to see whether the interests could have accrued based on the facts and circumstances surrounding the dispute: “[Property interests] . . . are created and their dimensions are defined by . . . rules or *understandings* that secure certain benefits and that support claims of entitlement to those benefits.”⁴⁸

So in the public employment context, for example, the Supreme Court, in *Perry v. Sindermann*,⁴⁹ held that an allegation that a college had a *de facto* tenure policy—which allegedly arose from existing rules and understandings at the institution—entitled a professor to prove the legitimacy of his claim that he deserved tenure.⁵⁰ Even though the Court made clear that a mere subjective expectancy of employment is not protected by procedural due process,⁵¹ it established a framework that is helpful for analyzing whether Presidential nominees have a legitimate interest in taking office.

The Court in *Perry* wrote that the professor’s “interest, though not secured by a formal contractual tenure provision, was secured by a no less binding *understanding fostered by the college administration*.”⁵² The professor had alleged that he relied on, among other things, an obscure provision in the college’s faculty guide and guidelines promulgated by the state board, both of which could be interpreted as establishing a *de facto* tenure program.⁵³ Declining to require that formal, written tenure pronouncements be a prerequisite to a protectable interest finding, the Court explained that

“property” denotes a broad range of interests that are secured by “existing rules or understandings.”

40. *Nixon v. United States*, 938 F.2d 239, 255-56 (D.C. Cir. 1991) (Edwards, J., dissenting).

41. *Cleveland Bd. of Educ. v. Loudermill*, 408 U.S. 564, 576-78 (1972).

42. *Board of Regents v. Roth*, 408 U.S. 564, 571-72 (1972) (citations omitted).

43. *Id.* (citations omitted) (emphasis added).

44. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

45. *Goldsmith v. United States Bd. of Tax Appeals*, 270 U.S. 117 (1926). In *Goldsmith* the rules indicated that the state board had the discretion to turn down any applicant, but the Supreme Court ruled that the discretionary power could only have been “exercised after fair investigation, with such a notice, hearing and opportunity to answer for the applicant as would constitute due process.” *Id.* at 123.

46. See, e.g., *Slochower v. Board of Educ.*, 350 U.S. 551 (1956) (tenure provisions); *Wieman v. Updegraff*, 344 U.S. 183 (1952) (contracts).

47. See, e.g., *Perry v. Sindermann*, 408 U.S. 593, 599 (1972) (“The respondent’s lack of formal contractual or tenure security in continued employment . . . is highly relevant to his procedural due process claim. *But it may not be entirely dispositive.*” (emphasis added)).

48. *Roth*, 408 U.S. at 577 (emphasis added).

49. 408 U.S. 593 (1972).

50. *Id.* at 599-602.

51. *Id.* at 603.

52. *Id.* at 599 (emphasis added).

53. *Id.* at 600.

A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.⁵⁴

Just as in *Perry*, where a candidate for tenure cited the college's typical practices in support a claim of entitlement to a hearing on his qualifications, a Presidential nominee should be able to point to the Senate's traditional function in the appointment process as evidence that the nominee is entitled to some congressional action. Although recent scenarios may cause some to question the premise,⁵⁵ the Senate's role has consistently and regularly included holding hearings and calling votes. Accordingly, when the President selects an individual for a federal office, "rules and mutually explicit understandings" make it reasonable to assume that the Senate will, in the vast majority of cases,⁵⁶ eventually act upon the nomination.

In light of this reasoning, and based on the holdings of the cases discussed previously, an argument could be made that, when the President carries out his or her constitutional duties and nominates an individual to fill a vacant seat in the federal courts, a legitimate and foreseeable property interest of public employment inures to that nominee.⁵⁷ In turn, that interest becomes protected by procedural due process and any attempt to deprive an individual of that interest without a fair hearing or a formal decision, within a reasonable period of time, could be viewed as unconstitutional.⁵⁸

B. Public Policy

Demonstrating that the Senate or some of its members have violated the procedural due process rights of a Presidential nominee by refusing to hold hearings or call a vote would be, admittedly, a difficult task to accomplish. The legal hurdles cited and explored above would be hard to overcome. These realities notwithstanding, there are

strong policy reasons why the Senate should halt its stall tactics. Most notably, the Senate's disregard for the advice and consent process has adversely affected the administration of justice and will likely be cited by future Senates as an "appropriate" way of expressing dissatisfaction with the President's nominees.

1. ADVERSELY AFFECTING THE ADMINISTRATION OF JUSTICE

As noted previously, Chief Justice Rehnquist has warned that "[v]acancies cannot remain at such high levels ... without eroding the quality of justice"⁵⁹ This sentiment has proven true in many jurisdictions and has been echoed at length by the media and other interested groups.

In March 1998, Second Circuit Chief Judge Ralph Winter declared a "judicial emergency" and, among other things, cancelled some arguments scheduled for April 1998.⁶⁰ Noting that only eight of the circuit's thirteen seats were filled, he authorized the practice of using as many as two visiting judges for the three-person panels.⁶¹ The Fifth Circuit had also previously declared such a crisis.⁶²

The mainstream media has been quick to highlight the problem. The Gannett News Service recently reported the following:

With one out of every 10 federal judgeships now vacant, a backlog of cases is forcing widespread cancellation of hearings, delays in civil trials that can go on for years and is prompting some courts to rely more heavily on retired volunteer judges.

Retired judges, who often travel between courts at

"[R]ules and mutually explicit understandings" make it reasonable to assume that the Senate will ... eventually act upon the nomination.

54. *Id.* at 601 (citations omitted) (emphasis added).

55. Several notable cases of Senate stalling have prevented the confirmation of some non-judicial nominees in recent years. See, e.g., Wendy Koch, *Senator Torpedos Hormel Nomination*, S.F. EXAMINER, Feb. 12, 1998, at A-1 (James Hormel for U.S. Ambassador to Luxembourg); David LaGesse, *Weld Ends Fight to Be Ambassador*, DALLAS MORNING NEWS, Sept. 16, 1997, at 1A (William Weld for U.S. Ambassador to Mexico).

56. To be sure, the Senate has throughout the past two centuries failed to act on certain nominations. See Ross, *supra* note 3, at n.61. But they can easily be viewed as isolated incidents.

57. The issue of whether a judicial candidate has a protectable interest in a vacant position was addressed in *Bason v. Judicial Council of the District of Columbia Circuit*, 86 B.R. 744 (1988). In that case, an incumbent bankruptcy judge, George Francis Bason, Jr., who was not chosen for reappointment, sought injunctive relief to prevent the appointing body from installing someone else; he asserted that his right to procedural due process was violated. *Id.* at 747. Bason contended that subsection 120(b) of the Bankruptcy Amendments and Federal Judgeship Act of 1984,

which directs the courts of appeals to select individuals to serve as United States bankruptcy judges, entitled him to a legitimate claim of reappointment after his term had expired. *Id.* at 748. That subsection mandated that incumbent judges receive "consideration equal to that given all other potential nominees for such [vacant] position." *Id.* In denying Bason's motion, the court noted that nothing in the statute's words granted an incumbent a right to the seat; the appointing body could, after giving due and "equal" consideration, select another candidate. *Id.*

But Bason's reasoning cannot be applied to the federal judgeship appointment process. Unlike in *Bason*, until the Senate formally votes a nomination down, the President's candidate is the only individual who may be considered for the vacancy.

58. At least one court has viewed a "possible reappointment" as worthy of some protection, if not the "full panoply" of due process. See *Halleck v. Berliner*, 427 F. Supp. 1225, 1236 (1977).

59. Rehnquist, *supra* note 11 and accompanying text.

60. *Today's News Update*, N.Y.L.J., Mar. 25, 1998, at 1.

61. *Id.*

62. *Id.*

taxpayer expense to hear cases, now are hearing one in five district court trial cases, up from 14.6 percent of such cases in 1990. At the same time, the number of trials conducted has dropped.

... Meanwhile, local judges say average citizens are being caught in the crossfire.

— Chief Judge Proctor Hug of the 9th Circuit Court ... is facing the most vacancies, with nine of 28 slots on his bench empty. Hug says 600 hearings were canceled last year and civil trials have been pushed back, often for years, to give criminal cases priority. “Examples are persons with claims for Social Security, insurance, environmental suits, and contract disputes in corporate cases ... and people who have disability claims,” Hug said. “They all have to wait.”

— Florida’s Middle District Chief Judge Elizabeth Kovachevich said although a vacancy open since 1995 was recently filled, the system is still heavily clogged. “Everybody is at max, and when you have a vacancy, the people who are going to get hurt are the litigants,” she said. “The chief justice stated it eloquently: The system will be on verge of collapse and there is no quick fix for this.”

— Henry Politz, chief judge of the 5th Circuit Court, said his judges no longer have time for civil cases. “Our judges in divisions on the border, from Brownsville (Texas) west, have such a heavy criminal docket that getting to a civil case is very difficult,” he said. “I don’t see any relief in that.”

— Chief Judge Juan Torruella of the 1st Circuit Court ... said he has been relying heavily on visiting judges during the past year, because one of six positions has been left open. The vacancies “affect the quality of justice and the speed at which justice can be applied to the citizenship,” he said.⁶³

Given these testimonials, it is troubling to witness the delays in the Senate. Combining congressional postponements with an ever-increasing docket creates a recipe for disaster. Individual senators must come to realize that their actions—or, rather, inactions—have a direct impact on the everyday litigant. And,

as such, they have a higher duty: to ensure that unnecessary political posturing does not disable our system of justice.

2. SETTING AN INAPPROPRIATE STANDARD FOR FUTURE SENATES

Although, as stated previously, the decision to withhold action on particular nominations is not a new phenomenon,⁶⁴ there is little doubt that the degree to which the Senate is seeking to delay the appointment process is greater than that seen in any recent term.⁶⁵ Whatever the Senate’s motivation,⁶⁶ some predict that—should the political tides shift in future years—the stall tactics exhibited now will likely be cited as “precedent” to justify later abuses of the advise-and-consent authority.⁶⁷

In light of the probability that such a “backlash” will occur, the Senate has a duty to rectify the situation as soon as possible. Should it fail to reverse the current course the impasse will escalate with every change in executive and legislative control. As a result, the cooperative procedure the Framers delicately set forth to fill vacancies will likely be reduced to a mechanism for political manipulation at the expense of the judiciary.

IV. CONCLUSION

There is little doubt that the Founding Fathers did not intend for the President to have a free hand at elevating individuals to the federal bench. But—at the same time—it is unlikely that they would have envisioned that their carefully crafted compromise would cause a judicial gridlock and hinder the administration of justice. It is high time that the Senate recognize that its authority under the advice and consent clause is not absolute, and must be exercised with due regard to constitutional safeguards applicable to all citizens.

As one journalist has concluded: “It is troubling that the Senate has largely abdicated its responsibility to give judicial nominees a timely hearing and an up-or-down vote. By such tactics in pursuit of a partisan campaign, it has broken faith with the Constitution and the American people.”⁶⁸



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63. Sarah Pekkanen & Nicole L. Gill, *Judicial Bench Vacancies Take Center Stage: Some Calling Foul*, GANNETT NEWS SERVICE, Feb. 7, 1998.

64. See *supra* note 56.

65. In 1988, a Democratic Senate approved 41 of President Reagan’s 64 nominees, and in 1992, it confirmed 66 of President Bush’s 75 nominees. By comparison, in 1996, a Republican Senate confirmed only 20 of President Clinton’s 48 nominees.

66. See, e.g., The Chief Justice and Mr. Hatch, N.Y. TIMES, Jan. 5, 1998, at A18 (“It is not simply that conservatives are eager for

revenge over what they still feel was unwarranted Democratic hostility to the Supreme Court nominations of Robert Bork and Clarence Thomas. More important, Republican strategists have decided that fulminating about liberal judges fires up the faithful and raises money.”).

67. See The 1995 Seven, *supra* note 13 (“This is not merely hardball politics but a tactic that borders on an illegitimate exercise of power that Republicans will come to loathe when it is next flexed against them.”).

68. Michael Loftin, *The Senate’s Breach of Faith*, THE CHATTANOOGA TIMES, Jan. 6, 1998, at A4.