INTRODUCTION

FEW AREAS AT the intersection of constitutional law and politics generate more controversy or opinions than the federal appointments process. It has become like the weather: almost all commentators and many participants gripe about it, but no one seems able (or at least willing or prepared) to do anything about it. Indeed, for most of the history of this republic the federal appointments process has been pilloried. If a government agency had gotten the repeatedly bad ratings that the federal appointments process has received, it almost certainly would have been dismantled (just as the Independent Counsel Act recently was) or radically overhauled by now. Yet, in spite of the extensive and repeated criticism of the performance of national political leaders in the federal appointments process, the institutions responsible for federal appointments have successfully resisted significant reform of the process. Just the opposite. And the resistance to change speaks volumes about the agendas, interests, and practices of the institutional and other actors perennially involved in the federal appointments process.

Just as national political leaders have developed vested interests in their respective institutional prerogatives in the federal appointments process, many scholars have developed vested interests in their opinions or theories about this process and do not easily abandon or broaden their thinking about it. Legal scholars in particular have largely been time-bound in their study of the federal appointments process. That is, they have tended to view single incidents in a vacuum or as unique events without regard to their possible relationships to other incidents in the process; other pending or past legislative matters; or broader social, political, and historical developments.

More often than not, legal scholars have narrowed their coverage of the federal appointments process to focus on dramatic incidents that suit

Downloaded from http://read.dukeupress.edu/books/book/chapter-pdf/612180/9780822384977-001.pdf by guest on 09 August 2024

their particular purposes. For instance, in the hope of insulating the federal judiciary as much as possible from partisan politics, most legal scholars have focused primarily if not exclusively on Supreme Court appointments, and specifically on Senate confirmation hearings. This focus has become especially popular among legal scholars since the Senate's rejection of President Ronald Reagan's nomination of Robert Bork to the Supreme Court in 1987, because of the perceived risk posed to judicial independence by Senate inquiries into judicial nominees' predispositions and viewpoints on pending constitutional issues.[1] The problem is that such inquiries conceivably have pressured judicial nominees (especially those to the Supreme Court) to conform their views to those held by a majority of senators for the sake of securing confirmation.

To be sure, such coverage has produced significant insights into and analyses of particular episodes or controversies, particularly the personalities or personal ambitions, quirks, and qualities of the presidents, senators, nominees, and other major figures involved in notorious incidents. Yet, such analyses have generally failed to provide lasting insights into the federal appointments process, to clarify the social, political, and historical contexts in which appointments controversies arise, and to develop appropriate criteria for analyzing the performances of the major participants in the appointments process from different historical periods.[2]

It is the purpose of this book to offer a different way of thinking about the federal appointments process, one that entails focusing on and illuminating the historical patterns and practices in the process (including the reasons for and the nature of its general resistance to significant reform). The perspective suggested here is by no means the only or even the preferred way of explaining and evaluating the federal appointments process, but it is a useful way to expand academic and popular understanding of its dynamics. The book's historical focus should not be viewed as a liability. While the book does not purport to provide comprehensive overviews, applications, or analyses of all the most current social science and economic theories regarding presidential or congressional decision making, it does make available information that other theorists can use within their own frameworks in the course of developing or promoting their own special perspectives on the federal appointments process.

The broader perspective urged in this book is that of so-called histori-

Downloaded from http://read.dukeupress.edu/books/book/chapter-pdf/612180/9780822384977-001.pdf by guest on 09 August 2024

cal institutionalism, a term that refers to the work undertaken over the past decade by social scientists who have rediscovered the value of studying how institutional arrangements shape and direct political behavior.[3] As applied to the federal appointments process, this perspective focuses on the institutional contexts in which federal appointments have taken place throughout U.S. history. Viewing the federal appointments process from the perspective of historical institutionalism illuminates the patterns and practices that have developed within the process. These patterns and practices reflect the different ways in which the leaders of national political institutions—namely, presidents and senators—have tried to influence or shape the appointments process as well as the ways their internal organizations or decision-making processes have been shaped by their own and others' actions and experiences in the process.

Moreover, historical institutionalism integrates history and institutional analysis with an appreciation of the strategies constitutional actors use to cultivate or develop legal and other norms to protect their respective prerogatives and to achieve their desired objectives. An important purpose of this book is to demonstrate that the Constitution establishes a very loose framework that provides little constraint on the institutional actors empowered to make decisions on federal appointments. Consequently, the driving force of the appointments process are the norms developed by presidents and senators to constrain or guide their decision making. Historical institutionalism further suggests that institutional norms also can change the behavior of actors, who develop strategies for using existing norms to their advantage and for developing new or different ones.

Two viewpoints of the federal appointments process are particularly important to historical institutionalists. The first is the inside view of the system. This internal viewpoint is concerned with the interaction—both formal and informal—between the major actors who routinely participate in the appointments process, their respective organizations for decision making on appointments matters, their perceptions of the norms constraining or affecting their behavior,[4] and the degree to which the performances of these actors in the appointments process have facilitated their achievement of the political or constitutional objectives of greatest concern to them.

Downloaded from http://read.dukeupress.edu/books/book/chapter-pdf/612180/9780822384977-001.pdf by guest on 09 August 2024

The second viewpoint important to historical institutionalists examines the external forces—the social, political, economic, and historical developments or influences originating from outside the formal or constitutional structure—pressuring or constraining presidential and senatorial decision making and actions taken on appointments matters. The outside viewpoint is concerned with the multilayered, complex contexts in which the power structure for dealing with appointments has developed and in which nomination and confirmation decisions have been made.

Combining the inside and outside perspectives helps to illuminate many aspects of the federal appointments process largely overlooked in prior studies of the system. The outside perspective leads to such important questions as, How have social, political, and economic developments shaped the institutions centrally involved in the appointments process—namely, the presidency and Senate—as well as the performances of presidents and senators in this system? And does constitutional structure matter; permit accountability; produce competent appointments in terms of the fit between talent, ability, and experience and the particular responsibilities of an office; and allow capture of the appointments process by factions? The outside perspective also allows an evaluation of the quality of the discourse between the president and the Senate and examines whether the president or the Senate wields too much or too little power on appointments matters. The development of an outside view of the presidency and the Senate would allow scholars to develop standards for evaluating presidential and senatorial contributions and performances in the appointments process that cut across different historical periods.

The inside perspective of the federal appointments process leads to a different set of questions, including, among others, Why or how were particular nominations made and why did certain nominations succeed or fail? What is the nature of presidential-senatorial interactions within the appointments process? And what kind of relationship exists between judicial and other kinds of nominations and confirmation, and between certain appointment decisions and other presidential choices and senatorial activities? By looking at both internal and external perspectives scholars can consider the fundamental question of how presidents and senators coordinate or perceive their different powers or restructure their respec-

Downloaded from http://read.dukeupress.edu/books/book/chapter-pdf/612180/9780822384977-001.pdf by guest on 09 August 2024

tive offices in response to, as well as in anticipation of, social, economic, political, and other outside developments or changes.

This book sketches answers to some of the basic questions raised by the inside viewpoint of the federal appointments process,[5] drawing on law and particularly history to illuminate the internal perspective of the system, including the patterns and practices different institutions and actors have developed for dealing with appointments. The book consists of three parts. Part 1 examines the origins, constitutional structure, and evolution of the federal appointments process. It reviews the original understanding; the different aspects or implications of the basic constitutional design (particularly those characterizing the modern operations); and the degree to which certain historical, social, and political developments have shaped the operations or dynamics of the federal appointments process.

Part 2 analyzes the powers available to and the criteria appropriate for evaluating the performances of or contributions made by each of the major actors routinely involved in the federal appointments process. Individual chapters are devoted to analyzing the roles performed in the appointments process (including the patterns or practices developed and the lessons learned) by presidents, senators, nominees, the media, interest groups, and the public.

Part 3 analyzes proposals for reforming the federal appointments process. In particular, this part examines several modest recommendations for altering some Senate procedures to streamline the appointments process as well as some radical proposals for amending the Constitution to reduce presidential or senatorial input or to diminish the (perceived if not proven) negative consequences of factional dominance within the appointments process (though there is, even with respect to judicial selection, widespread disagreement among scholars and political analysts about whether or to what extent such dominance is undesirable). This part also examines the strategies for developing new norms (or informal arrangements) and fortifying deteriorating norms that might be important (to the extent one agrees with this objective) for reducing delays in judicial confirmation proceedings.

Based on its analysis of the federal appointments process from the perspective of historical institutionalism, the book reaches several conclusions. The first is that clarifying the social, political, and historical con-

Downloaded from http://read.dukeupress.edu/books/book/chapter-pdf/612180/9780822384977-001.pdf by guest on 09 August 2024

texts in which appointments decisions are made or controversies arise is indispensable for understanding and evaluating the operations of this special system. Elucidating the complex contexts in which presidents and senators make decisions on appointments helps to explain the external forces that affect the process. Further, clarifying such contexts also helps to explain the system's internal dynamics and operations, including the motivations of key participants, the actors' understanding of their respective authorities in this arena, and executive and legislative institutional arrangements for formulating appointments decisions and strategies. In constructing this perspective, both history and political science are extremely useful disciplines, the latter because it helps to inform our judgments, analyses, and understandings of how institutions such as the presidency and the Senate take shape and operate; and the former because it is the repository of useful lessons and comparative data, including more than two hundred years worth of meaningful examples, demonstrations, and analogies of presidential and senatorial performances in the venue of appointments.

For example, studying past practices and patterns of decision making and activity in the federal appointments process allows participants and observers to predict confirmation conflicts, failures, and successes, and their spillover effects. Some of these effects include the increased likelihood or intensity of confirmation skirmishes over nominations made to federal offices with substantial responsibilities in especially sensitive areas such as national security, civil rights, and the environment. Outcomes also turn on the degree of fallout from very contentious or unpopular policies and the relative quality of presidential or senatorial preparation, organization, strategizing, and coordination of interest group support or opposition.

The book concludes further that institutional analysis of the federal appointments process has comparative advantages over the conventional mode (particularly popular with legal scholars) of understanding the system in purely personal terms. The major problem with the latter approach is that it fails to provide meaningful comparative analysis of different presidents' and senators' decisions or actions regarding appointments because it treats every difference in performance as resulting from personal

Downloaded from http://read.dukeupress.edu/books/book/chapter-pdf/612180/9780822384977-001.pdf by guest on 09 August 2024

characteristics or attachments and neglects to explain the most significant trends in the process.

In contrast, historical institutionalism evaluates the performances of major political leaders in terms of their power (or their duties and available resources) and authority (or their warrants) for changing the constitutional order. Historical institutionalism illuminates the extent to which outcomes are attributable to personal actions or traits and to governmental structure, management, and organization. Historical institutionalism also allows a comparison of the performances of different presidents and senators, because the institutional concerns of the presidency have remained relatively constant over the course of U.S. history.

By providing for the direct election of senators, the Seventeenth Amendment altered the institutional dynamics of senatorial operations regarding appointments. Historical institutionalism illuminates the implications of this alteration. For example, in the form of public choice theory, it helps to demonstrate the necessity of examining the motivations and actions of individual senators for understanding Senate operations.

Institutional analysis also illuminates the learning curve of each of the major actors routinely involved in the federal appointments process. The lessons learned are passed down or shared within (and across) the executive and legislative branches by means of the institutional memories each branch has cultivated or developed. For example, in the Senate, veteran senators overlap with junior members, parliamentarians span several Congresses, and party organizations and interest groups can serve as repositories of learning. Executive branch officials foster institutional memory through such means as internal memoranda, career civil servants, the employment of people with substantial prior experience in the executive or legislative branches (or both), official opinion letters, memoirs or diaries, and personal interaction or communications.

Among the most important lessons learned by presidents and senators (as well as other unofficial participants routinely involved in the process, including interest groups) is that, much like the recent impeachment proceedings against President Clinton,[6] confirmation skirmishes often reflect the increasingly prevalent phenomenon of "postelection politics," in which the major political parties continue to wage in a variety of fora (in-

Downloaded from http://read.dukeupress.edu/books/book/chapter-pdf/612180/9780822384977-001.pdf by guest on 09 August 2024

cluding but by no means limited to confirmation proceedings) the fights they began in presidential contests.[7]

In addition, through their interaction in the federal appointments process, presidents and senators have learned about their respective authorities and abilities to influence outcomes as well as the actions and performances of other important actors, the significance of formal constraints and informal arrangements, and the preconditions for change. They have learned from their own experiences or those of other institutional actors about the factors they need to control in order to cultivate support for or opposition to various nominations, including the popularity of presidents or their policies, the potential for nominees' private traits to be transformed into public liabilities or strengths, and the need and the ways in which to develop good press as well as solid internal institutional support or organization. In short, the performance of each institutional actor within the appointments process provides examples for other actors to avoid or follow in accordance with their particular objectives (and, of course, within the contexts or constraints of their particular circumstances).

Institutional analysis clarifies further that institutional norms (such as the rule of law and precedent), informal practices (such as senatorial courtesy), and social norms (regarding, e.g., homosexuality, free speech, privacy, and lying) also fit into the learning process. Individual actors do not act independently of everything else in the political process; rather they attempt to influence and are affected by the various norms they have developed for their own benefit and around which they learn to maneuver or with which they try to align themselves in order to achieve their desired objectives. Reform recommendations should fit the structure of this learning curve in order to correspond or conform to the actors' short- and long-term interests or needs, formal constraints and informal arrangements, persistent (and perhaps irreconcilable) conflicts, potential for accommodation, common ground, and feasible objectives.

For example, it is noteworthy that some norms that goven the federal appointments process are in flux (such as the practice of allowing senators to put nominations on temporary rather than indefinite hold). The flux suggests that perhaps norms, more so than structure or formal Senate procedures, are malleable. How much a given norm is amenable to

Downloaded from http://read.dukeupress.edu/books/book/chapter-pdf/612180/9780822384977-001.pdf by guest on 09 August 2024

change depends on the degree to which presidents and senators can be convinced change is in their mutual interest.

To be sure, it is by no means certain that significant reform of the appointments process (at least of any formal aspects) is possible. Innovation (such as President Carter's efforts to bypass senators and use special commissions to recommend candidates for circuit court appointments) is generally resisted (at least by many of the principal actors), and the last significant structural changes that have affected performance within the system date back to Civil Service reform, the opening of congressional hearings, and the adoption of the Seventeenth Amendment. Such resistance to change suggests that the structure and formal practices might not be the proper focus of reform efforts. Instead, norms might constitute more appropriate targets. For example, a notion that has become popular with some legal theorists who study the relationship between law and social norms is the use of shaming penalties to ensure compliance with community norms.[8] Indeed, President Clinton attempted just such a strategy when in the fall of 1997 he publicly rebuked the Republican leadership for allowing inordinate delays of his judicial nominations. Not long thereafter, in his annual report on the state of the federal judiciary, Chief Justice Rehnquist also denounced the Senate's delays in processing judicial nominations. These rebukes helped to break (at least temporarily) the logjam in the judicial selection process. Consequently, the media (or other public leaders), drawing on the Rehnquist and Clinton models, might consider asking public officials (such as the president or senators) whether they favor significant reform of the federal appointments process (if so, why? if not, why not?). The media or interest groups or interested senators could pressure public officials to defend their failure to give serious consideration to recent proposals for streamlining the appointments process made by two highly respected bipartisan organizations, The Century Foundation and the Miller Center for the Study of Public Affairs at the University of Virginia.[9] Moreover, the media might consider asking presidents and senators whether they would support legislation defining the qualifications for different confirmable offices (and if they wouldn't, why not?). Alternatively, presidents and senators could be asked to define or set forth the requisite qualifications for certain officials, particularly federal judges. Or presidents or senators could be asked whether it is possible

Downloaded from http://read.dukeupress.edu/books/book/chapter-pdf/612180/9780822384977-001.pdf by guest on 09 August 2024

to define qualifications of federal judges without mentioning ideology (if so, how? if not, why not?). Refusal to answer such questions would give the public some clear understanding of the reasons for resistance to change in the federal appointments process. Given the vested interests of key players in the status quo, serious or significant change is not likely to occur without altering or changing the incentives or vested interests of these institutional actors. Hence, one might ask, What is likely to change the institutional orientation of presidents or senators with respect to particular nominations or appointments generally? (Relying on some of the recent insights of theorists who study social norms,[10] one might figure out the particular kinds of information or data that are important to the relatively close-knit community responsible for federal appointments and tailor messages accordingly.)

In examining this book's basic themes and argumentation, readers should keep three caveats in mind. The first relates to the organization of the book. The chapters are designed to provide overlays for viewing the different dimensions of particular incidents in or aspects of the federal appointments process. To underscore the multidimensional aspects of appointments matters, I examine more than once some of the more controversial nominations and confirmation contests in American history. For instance, the Senate's rejections of President Andrew Jackson's nominations of Roger Taney as secretary of the treasury and as an associate justice and subsequent confirmation of Taney as Chief Justice illustrate how a president learns from his (and his predecessors') past mistakes in the appointments process and adapts or responds to the ways senators try to achieve their own (often opposing) agendas through the exercise of their confirmation authority. Taney's rejections as secretary of the treasury and associate justice and confirmation as Chief Justice illustrate further a nominee's limited ability to exert direct influence over the outcome of his or her confirmation proceeding. These rejections also illustrate how senators try to shape the president's agenda in the appointments process (and on other legislative matters). Other incidents that reveal similarly complex lessons about the federal appointments process include the Senate's rejection of President Lyndon Johnson's nomination of then–Associate Justice Abe Fortas to be Chief Justice, the Senate's rejection of President Reagan's nomination of Robert Bork as an associate justice,

Downloaded from http://read.dukeupress.edu/books/book/chapter-pdf/612180/9780822384977-001.pdf by guest on 09 August 2024

Clarence Thomas's narrow confirmation as an associate justice, and President Clinton's forced withdrawals of his nominations of Zoë Baird as attorney general and Lani Guinier as assistant attorney general to head the Justice Department's Civil Rights Division.

The second caveat is that it is practically impossible to develop comprehensive statistical or empirical data on the actions of presidents and senators in the federal appointments process. To begin with, presidents in the late eighteenth century and nineteenth century did not maintain comprehensive or detailed records on their nominations or appointments. Nor did the Senate maintain records on its actions regarding presidential nominations during that period, a period that coincided with the Senate's general rule against open hearings. Collecting data has not become easier in this century. There is no central clearinghouse on pending nominations, vacancies, or confirmations. No single statute specifies all confirmable offices. There are hardly any formal requirements for making available to the public data on pending or prospective nominations. The few include the General Accounting Office's mandate to monitor payment to all salaried federal officers, the Congressional Research Service's limited studies of the federal appointments process undertaken at the request of members of Congress or their staffs, and the *Congressional Record*'s transcriptions of formal confirmation proceedings and votes. Otherwise, there are gaps in the information that can be collected. For instance, one can only speculate about the total number of temporary or nonconfirmed officials now occupying confirmable offices throughout the federal government. Neither the executive branch nor the Senate keeps track of all of the vacancies in confirmable offices (or if they do, as required by statute, they refuse to release such data). Even if one were to call every single confirmable office in the country to determine if its occupant has been confirmed or not, many offices would not respond (as my research assistants discovered in their contacts with the Office of Personnel Management and the General Accounting Office, among others). Nor have presidents or senators ever systematically maintained records on forced withdrawals of presidential nominations. Thus, the desire to quantify fully the activities within the federal appointments process, even for the most recent presidents, needs to be balanced against the relative paucity of collected *and* collectable data on such activities.

Downloaded from http://read.dukeupress.edu/books/book/chapter-pdf/612180/9780822384977-001.pdf by guest on 09 August 2024

The third caveat relates to the book's methodology and endnotes. I have undertaken some original historical and empirical research as well as relying on a wide range of secondary sources, but I have restricted my citations in the endnotes to quotes from primary sources or secondary materials, including, in some cases, past empirical studies of certain aspects of the federal appointments process.

In my analysis of post–World War II appointments controversies and developments, I rely to some extent on the results of an informal survey that I conducted of fifty-nine officials with firsthand experiences with the federal appointments process because of their service in one or more administrations.[11] I have complied with the requests of virtually all of these respondents to keep their identities confidential but have made use of their (and of course other respondents') insights throughout the book. I am most grateful for their public service as well as their candor in sharing their experiences and insights with me.

11

Downloaded from http://read.dukeupress.edu/books/book/chapter-pdf/612180/9780822384977-001.pdf by guest on 09 August 2024