Judicial Appointments and Democratic Controls

Mitchel A. Sollenberger

Judicial Appointments and Democratic Controls

Mitchel A. Sollenberger
Assistant Professor of Political Science
University of Michigan-Dearborn

Carolina Academic Press
Durham, North Carolina

Library of Congress Cataloging-in-Publication Data

Sollenberger, Mitchel A.
Judicial appointments and democratic controls / Mitchel A. Sollenberger.
p. cm.
Includes bibliographical references and index.
ISBN 978-1-59460-785-1 (alk. paper)
1. Judges--Selection and appointment--United States. I. Title.
KF8776.S685 2010
347.73'14--dc22

2010036937

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

Judicial Appointments and Democratic Controls

In Memory of
Bernie and Gary Smith,
beloved uncles

Acknowledgments

I owe many debts for the completion of this book. First, I thank my wife, Julie, for her patience and encouragement. I also thank my parents and family for their love and support. During the research for this book I relied heavily on the library staffs at the University of Michigan-Dearborn, University of Michigan-Ann Arbor, and George Mason University. I am grateful to them for assisting in the retrieval of books and articles that seemed impossible to find. A special appreciation goes to the staff of the Library of Congress Manuscript Reading Room and the National Archives and Records Administration who provided advice and direction in the search for lawmakers' papers and Senate Judiciary Committee documents.

Since joining the faculty at the University of Michigan-Dearborn my colleagues have encouraged and supported my development as a scholar and teacher. I want to in particular thank my department chair, Martin Hershock, who has not only proven to be an excellent leader, but has also made the department a wonderful place to work. A number of current and former colleagues, friends, and scholars have generously provided their time to discuss or read parts of this book for me. These individuals include: Richard B. Bernstein, Elaine Clark, Robert Dudley, Larry Evans, Harold Forsythe, Roger Hartley, Elizabeth Hays, Kevin Kosar, Gerald Moran, Walter Oleszek, Michael Rosano, Mark Rozell, Denis Steven Rutkus, Ronald Stockton, and Paul Sunstein. Louis Fisher remains a valuable advisor. Like many presidency and constitutional scholars, I owe him a huge debt that I feel will never be repaid. Last but not least, I want to express my appreciation of the editors and staff at the Carolina Academic Press, especially Linda Lacy, Kelly Miller, and Zoë Oakes. I value their enthusiasm and kindness in seeing this project through to the end.

I have dedicated this book to the memories of Bernie and Gary Smith. They were model uncles whose love and encouraging words I will always remember. Their loss gives me an even greater appreciation of the support and love of my remaining family members.

Contents

Judicial Appointments and Democratic Controls

Introduction

The framers gave to the Senate and the president, as in many other cases, the shared responsibility of making judicial appointments. Each institution claims superiority because the ultimate result of a judicial appointment is, for all practical purposes, a lifetime position on the federal bench. Presidents sometimes assert ownership of the appointment process despite the existence of a shared power with the Senate as codified by the directives coming from the text of the Constitution. An important exception, to be addressed later, is the unilateral power of the president to make recess appointments. That power, when applied to federal judges, does such damage to legislative prerogatives and judicial independence that strict limits have been placed on the president's authority to make recess appointments for federal judges. In establishing that the judicial appointment process is one shared by the legislative and executive branches, this study argues that the most useful interpretation of the judicial appointment process is one that understands that republican and structural safeguards abound in shaping the federal government and the operation of its powers.

It makes sense, in studying the judicial appointment process, to begin by tracing the ebb and flow of presidential power and its impact on our constitutional system. Addressing the war and spending powers, constitutional scholar Louis Fisher noted that the increase in presidential power in those areas "reveals an alarming decline in congressional confidence and institutional self-esteem."[1] Historian Arthur M. Schlesinger Jr. coined the phrase "the imperial presidency" to stand for the history of power grabs by the chief executive.[2] Many examples show presidents breaching century-old boundaries established by the framers to guard against a concentration of power. In 1933, at the start of his administration, President Franklin D. Roosevelt arguably exercised more power in 100 days than any other president before him. In 1950, Roosevelt's successor, Harry Truman, launched American military action against North Korea without the consent of Congress. In 1964, after extensive and bitter debate within the executive branch, President Lyndon B. Johnson browbeat Congress into enacting the Tonkin Gulf Resolution authorizing American military action in the Vietnam Conflict. In his first term, President Richard M. Nixon expanded the scope of the Vietnam war and repeatedly impounded congressionally appropriated funds all in direct opposition to the wishes of Congress. More recently presidential scholar Andrew Rudalevige has dubbed President George W. Bush's actions in the "global war on terror" the "new imperial presidency."[3]

1. Louis Fisher, *Congressional Abdication on War and Spending* (College Station: Texas A&M University Press, 2000), 3.

2. Arthur M. Schlesinger, Jr., *The Imperial Presidency* (Boston: Houghton Mifflin, 1973).

3. Andrew Rudalevige, *The New Imperial Presidency* (Ann Arbor: The University of Michigan Press, 2006).

Presidents have not limited themselves to gaining power in the areas of war and spending. The appointment process also has been part of the power struggle between Congress and the presidency. Interestingly, the trend in the area of judicial appointments appears to cut against the general movement of waxing presidential power and waning congressional authority. Despite the rise of the "imperial presidency," Congress has done much to limit the president's strength when it comes to judicial appointments. Presidents from Franklin D. Roosevelt to George W. Bush have pressed their institutional position in the appointment process in varying attempts to seize from Congress the control over shaping the federal judiciary. Even so, through the years, lawmakers have been able to counter presidential power and remain at the center of the judicial appointment process. Even when presidents attempted to pull appointment authority away from the legislative branch, the Senate has been able to maintain or regain its position.

This is not to say that presidents have been unable to dominate certain appointment decisions or negotiate around a fractured Senate. Nonetheless, when Congress enters any period of subservience to the president on judicial appointments, the loss of its position is not permanent; it still retains the institutional powers to check the executive branch. However, all of Congress's latent traditional resources are no match against a president when its members are divided. Once split into pro-administration and anti-administration factions, the congressional position is weakened. Senators must realize that short-term partisan gains should not displace the need for safeguarding Congress's institutional position. A balanced system of government must be one of the primary goals in maintaining a functioning appointment process.

Presidents might try to take advantage of partisan divisions within the Senate to see their preferred nominees confirmed. However, their formal power is limited to the ability to nominate. To some commentators that power is the most significant aspect of the appointment process. In *The Federalist* No. 66, Alexander Hamilton stated: "It will be the office of the President to *nominate*, and, with the advice and consent of the Senate, to *appoint*. There will, of course, be no exertion of *choice* on the part of the Senate. They may defeat one choice of the Executive, and oblige him to make another; but they cannot themselves *choose* — they can only ratify or reject the choice of the President."[4] Hamilton's analysis failed to foresee an important development: as the constitutional system has evolved, lawmakers have acquired a significant role in choosing a nominee. Furthermore, the power to reject, even Hamilton concedes, is a vital part of the appointment process. Without confirmation, a judicial appointment cannot occur and the president must nominate someone else, more likely guided this time by the pragmatic desire to recognize and comply with legislative preferences.

Democratic Controls of the Judicial Appointment Process

This book is premised on the idea that republican and structural safeguards matter when assessing governing relationships. These principles, which are rooted in the Constitution, are what I call the democratic controls that guide the judicial appointment

4. *The Federalist* No. 66, in *The Federalist*, Benjamin F. Wright, ed. (New York: MetroBooks, 2002), 434 (Italics in original).

process. The text of the Constitution specifies the design of the appointment process: the president "shall nominate and by and with advice and consent of the Senate appointment" federal judges. From this express language, the Senate and the president have built rather complex selection and confirmation mechanisms that give structure and meaning to the Appointments Clause. Implied within the authority to make appointments is the duty of the executive branch to conduct background checks, require nominees to fill out questionnaires, and comply with other review procedures used by the president. The Senate, invoking the "advice and consent" language, has established a process of recommending nominees to the president and also has created additional review procedures taking the form of committee investigations and hearings, blue slips, senatorial courtesy, holds, and filibusters. Both chambers of Congress take part in enacting statutes that specify the qualifications of federal judges.

None of these review mechanisms are explicitly stated in the Constitution. In fact, the text of the Appointments Clause provides little guidance either to Congress or to the president. Instead, both branches have institutionalized their roles in the appointment process through repeated practice. As Supreme Court Justice Felix Frankfurter explained: "The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them." Continuing, he noted that one takes an unduly restrained view of the Constitution if there is not an acknowledgement that practice gives it meaning.[5]

Defining the Constitution through the actions of Congress and the president is an important aspect of democratic controls. The initiatives of the political branches shape the landscape of the judicial appointment process. Each decision establishes its own precedent that future lawmakers and presidents often follow. And yet the Constitution is never fixed as it continues to evolve.[6] Given that the judicial appointment process consists largely of the actions and decisions made by lawmakers and the president, the importance of democratic controls to guide them cannot be overstated.

One of the key components of democratic controls, and a cornerstone of the Constitution, is the belief that a fully functional government must be based on the idea of representation. In *The Federalist* No. 49, James Madison confirmed this view. "The people are the only legitimate fountain of power," Madison declared, "and it is from them that the constitutional charter, under which the several branches of government hold their power...."[7] Hamilton agreed, noting in *The Federalist* No. 9 that republican government is maintained through "the representation of the people in the legislature by deputies of their own election...."[8] At the founding, opponents of the Constitution likewise believed in this concept. Anti-Federalist author "Brutus" wrote that "[i]n a free republic ... all laws are derived from the consent of the people...."[9] Another Anti-Federalist, Melancton Smith

5. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter's concurring opinion).

6. Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Cambridge: Harvard University Press, 1999).

7. *The Federalist* No. 49, in *The Federalist*, 348.

8. *The Federalist* No. 9, Ibid., 125. For a detailed account of Hamilton's views on republican government see, Gerald Stourzh, *Alexander Hamilton and the Idea of Republican Government* (Stanford: Stanford University Press, 1970).

9. Brutus, Oct. 18, 1787, in *The Anti-Federalist Papers*, Ralph Ketcham, ed. (New York: Mentor Book, 1986), 276.

of New York, stated that "the scheme of representation had been adopted, by which the people deputed others to represent them."[10] Both sides in the ratification controversy could agree that the people were at the heart of government authority, giving it energy, direction, and legitimacy.

Equally important to the concept of republicanism is the notion that significant governing power is possessed by Congress, not the president. "In republican government," Madison declared in *The Federalist* No. 51, "the legislative authority necessarily predominates."[11] That is why the Constitution first provides for the structure and powers of Congress and then moves to the presidency, where nearly no executive power functions without the consent of the legislative branch.

The framers tended to view Congress as the primary institution for carrying out the will of the people. "The genius of republican liberty seems to demand on one side, not only that all power should be derived from the people," Madison noted in *The Federalist* No. 37, "but that those intrusted with it should be kept in dependence on the people, by a short duration of their appointments; and that even this short period the trust should be placed not in a few, but in a number of hands."[12] Congress, not the president, offers the protection of the many over the few that Madison's republican liberty commands. Even Hamilton, more committed to executive power, argued in *The Federalist* No. 77 that protection against executive influence is best secured by placing power in the hands of the many.[13] Republicanism therefore helps guide the implementation of the Appointments Clause by ensuring that the legislative branch has a significant say in the process of making judicial appointments.

Republican government also provides a link between citizens and their government. As the elected representatives of the people, members of Congress have a constitutional duty to express the people's opinions on various matters including appointments. Not only does this provide protection against unworthy candidates from taking office, it also gives indirect public support for the unelected officials who make up the federal bench. As an early nineteenth century U.S. senator once explained, no branch of government "can exist without the affections of the people," and if any are "placed in such a situation as to be independent of the nation," they "will soon lose that affection which is essential to its durable existence."[14] Therefore a close link between the elected and unelected helps to assure citizens that the government is responsive to their wishes. Perhaps nothing is more important in a republican form of government.

The framers, however, wanted to do more to guard against the concentration of power than merely making the people the ultimate source of government structure and authority. Further safeguards against misguided government actions were needed. To be sure, in a republican government the people's voice must prevail. The question was how to do that but still protect against the accumulation of power. "In framing a government which is to be administered by men over men," Madison memorably declared in *The Federalist* No. 51, "the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." Rejecting the idea that merely relying on popular control of the government would be enough, Madison argued

10. Speeches of Melancton Smith, June 20–27, 1788, Ibid., 341.
11. *The Federalist* No. 51, *The Federalist*, 356.
12. *The Federalist* No. 37, Ibid., 268.
13. *The Federalist* No. 77, Ibid., 487–488.
14. Virginia Senator Stevens Thomas Mason quoted in Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004), 107.

in support of separation of powers, checks and balances, and federalism, or what he called "auxiliary precautions," which would help guard against the concentration of power.[15]

Along with republicanism, these structural safeguards make up the core principles of democratic controls. As they relate to the judicial appointment process the most important protections are separation of powers and checks and balances. The framers did not want the power of appointment to be vested solely in the hands of the president. Their colonial experience cautioned them against such an institutional arrangement because royal governors had abused their appointment power by giving offices to personal supporters, and because judges so appointed had felt no connection with the people whose law they were entrusted with administering. The governors conspired to grow "weeds of tyranny" that subjected the legislative body and other parts of the community to executive control.[16] But during the Revolutionary War the framers learned that placing appointment control solely in the legislative branch was equally troublesome, as battles ensued over patronage and no clear lines of responsibility were drawn. Eventually the Continental Congress realized it needed administrative help in governing and created a number of executive positions to assist it in carrying out the war effort. These executive officers, however, were not part of a separate branch. They were clearly agents of the Congress. Some of those executive officers were given appointment authority that was shared with either the Congress or the states.[17] The state governments also found that vesting the appointment power solely in the legislative branch created problems because they experienced many of the same administrative inefficiencies plaguing the national government.[18]

Although most states had established legislative dominated appointment models, there were exceptions. New York, Massachusetts, and New Hampshire each adopted constitutions that included a shared system of making appointments. The New York Constitution of 1777 gave the governor, with the "advice and consent" of the Council of Appointments, the power to make appointments.[19] Presidential scholar William B. Michaelsen explained that the New York appointment arrangement "can be considered the genesis of the involvement of the Senate in the appointing process at the federal level."[20] In 1780, Massachusetts followed New York by adopting a constitution that provided: "All judicial officers ... shall be nominated and appointed by the Governor, by and with the advice and consent of the Council."[21] To ensure clarity in the division of powers the clause contin-

---

15. *The Federalist* No. 51, in *The Federalist*, 356.

16. Gordon S. Wood, *Creation of the American Republic, 1776–1787* (Chapel Hill: University of North Carolina Press, 1998), 143. See also, Evarts Boutell Greene, *The Provincial Governor in the English Colonies of North America* (New York: Longmans, Green, and Co., 1907), 46–64; William B. Michaelsen, *Creating the American Presidency, 1775–1789* (Lanham, MD: University Press of America, 1987), 3–5; Marc W. Kruman, *Between Authority and Liberty: State Constitution Making in Revolutionary America* (Chapel Hill: University of North Carolina Press, 1999), 116; Mitchel A. Sollenberger, *The President Shall Nominate: How Congress Trumps Executive Power* (Lawrence: University Press of Kansas, 2008), 9.

17. Sollenberger, *The President Shall Nominate*, 9–12.

18. Wood, *Creation of the American Republic*, 435.

19. New York Constitution of 1777, in Francis Newton Thorpe, ed., *The Federal and State Constitutions, Colonial Charters, and other Organic Laws of the States, Territories, and Colonies now or heretofore forming the United States of America* (Washington, D.C.: GPO, 1909), vol. 5, 2633. The Council consisted of the governor and four senators elected by the New York Assembly.

20. William B. Michaelsen, *Creating the American Presidency, 1775–1789* (Lanham, MD: University Press of America, 1987), 16.

21. Massachusetts Constitution of 1780, in *Federal and State Constitutions*, vol. 3, 1902. Ronald M. Peters states, the "Council was to be an advisory body to the governor. Nine members from those elected to be senators were chosen to sit on the Council by joint ballot of the Senate and House."

ued: "every such nomination shall be made by the governor." Finally, in 1784, New Hampshire became the last state to adopt a mixed system approach to appointments before the Constitutional Convention of 1787. Its Constitution required: "All judicial officers ... shall be nominated and appointed by the president and council."[22] As a result, all three states moved away from the earlier state constitutions and pushed for a more balanced appointment process.

Soon the national government followed the examples of New York, Massachusetts, and New Hampshire by calling for a revamping of its administrative functions as well. At the Constitutional Convention, the initial Virginia Plan submitted by Edmund Randolph created the framework for a new government with separate legislative, executive, and judicial branches, but it did not resolve the debate over the proper placement of the appointment power. At first "the National Legislature" controlled the appointment of judges with no mention of executive responsibility.[23] As the Convention progressed, and the delegates realized that they might want to create separate federal courts, they began to shape the judicial appointment power into one of shared responsibility, under which the president nominated and the Senate confirmed. Gouverneur Morris of Pennsylvania argued the shared appointment power offered dual protection: first "that as the President was to nominate, there would be responsibility," and second, "as the Senate was to concur, there would be security."[24] Still, not all were convinced of the propriety of the emerging system of judicial appointments. "The Executive will possess neither the requisite knowledge of characters," Charles Pinckney of South Carolina protested, "nor confidence of the people for so high a trust."[25] Edmond Randolph of Virginia disagreed, believing that it was not the executive that the delegates should be concerned with: "appointments by the Legislatures have generally resulted from cabal, from personal regard, or some other consideration than a title derived from the proper qualifications."[26] Despite these disagreements, the Convention eventually settled on the appointment power being shared by the president and Senate (see the Appointments Clause section in chapter two for more detail).[27]

The joint control of the appointment power might seem like a misguided way of managing government affairs, since in recent decades the presidency has come to be seen as the dominant force in national politics. One of the initial objections concerning the Constitution centered on the claim that the framers violated Montesquieu's separation of powers maxim in not adequately dividing the powers of government between the branches. As James Winthrop of Massachusetts, opposing the Constitution under the pen-name "Agrippa," pointed out, "It is now generally understood that it is for the security of the people that the powers of the government should be lodged in different branches."[28] At the Pennsylvania ratification convention, the dissenting delegates protested "the undue and

---

Ronald M. Peters, *The Massachusetts Constitution of 1780: A Social Compact* (Amherst: University of Massachusetts Press, 1978), 61.

22. New Hampshire Constitution of 1784, in *Federal and State Constitutions*, vol. 3, 2464. The council consisted of two senators and three House members chosen by joint ballot of both chambers of the legislative assembly. Ibid., 2465.

23. Max Farrand, ed., *Records of the Federal Convention of 1787*, (New Haven, CT: Yale University Press, Rev. ed., 1966), vol. 1, 21.

24. Ibid., vol. 2, 539.

25. Ibid., 81.

26. Ibid.

27. Ibid., 539.

28. The Letters of "Agrippa" in *The Antifederalists*, Cecelia M. Kenyon, ed. (New York: Bobbs-Merrill, 1966), 153.

dangerous mixture of the powers of government; the same body possessing legislative, executive, and judicial powers."[29] There is much to be said against the accumulation of power in the hands of a small group of individuals or one person. For this reason, the framers purposely designed a system of government where each branch could check the other through the use of shared powers.

Critics of the Constitution lambasted the placing of the judicial appointment power in the hands of the president and the Senate. The respected Anti-Federal pamphleteer "The Federal Farmers" argued that the "check" on the president's appointment power "is badly lodged" in the Senate.[30] George Mason of Virginia, a non-signing delegate to the Federal Convention and a leader of Anti-Federalists in Virginia, argued that the appointment power had been "substantially vested" in the president since the "false complaisance which usually prevails in such cases will prevent a disagreement to the first nominations."[31] Some wanted to rewrite the Appointments Clause to place that judicial appointment power solely in the hands of the President. At the Pennsylvania ratification convention, the dissenting minority proposed to create a council that would prevent the president from acting if a majority disagreed.[32] The framers had rejected this council of appointments, derived from the 1777 New York constitution. In *The Federalist* No. 77, Hamilton, who as a New Yorker had full experience of that state's flawed appointment system, called it "a conclave, in which cabal and intrigue will have their full scope." He added that a council "would also be more liable to executive influence than the Senate, because they would be fewer in number, and would act less immediately under the public inspection." In the end, Hamilton insisted, a council of appointment produced added expense, favoritism, instability in government, and limited protection against executive influence.[33]

Although he was a proponent of executive power, Hamilton still believed that the Senate offered the most useful check on the president's appointment power. In *The Federalist* No. 76, he even stated that giving the appointment power to one person would end badly because the president "would be governed much more by his private inclinations and interests, then when he was bound to submit the propriety of his choice to the discussion and determination of a different and independent body, and that body an entire branch of the legislature."[34] Hamilton maintained the president should be held to account in appointment matters through external checks by an independent and separate branch of government.

Again, the framers did not create a government where power rested in one branch. Instead of separate departments each possessing their own unique powers, the framers designed a system where the branches shared power to better check one another. As Madison said in *The Federalist* No. 51, "the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defence must in this, as in all other cases, be made

29. "The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents," in *The Anti-Federalist Papers*, 251.

30. The Federal Farmer, Letter IV in *Empire and Nation*, Forrest McDonald, ed. (Englewood Cliffs, NJ: Prentice-Hall, 1962), 119.

31. "The Appointment of Judges," in *The Anti-federalist Papers*, 127.

32. "The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents," in *The Anti-Federalist Papers*, 252.

33. *The Federalist* No. 77, in *The Federalist*, 487–488.

34. *The Federalist* No. 76, Ibid., 483.