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Christopher L. Eisgruber

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POLITICS AND PERSONALITIES IN THE FEDERAL APPOINTMENTS PROCESS

Christopher L. Eisgruber*

Michael Gerhardt's latest book, The Federal Appointments Process, examines historically both the politics and procedures employed by the president and Congress in selecting, and ultimately appointing, judicial nominees. In this book review, Professor Christopher Eisgruber focuses on some of Gerhardt's most salient observations and illustrates the degree to which the historical trends Gerhardt describes impact current appointment practices.

Michael Gerhardt's wonderful new book, *The Federal Appointments Process*,¹ should change the way people talk about political appointments in the United States. Too often critiques of the appointments process combine nostalgia with moralizing. They lament the passage of a golden era when the process was apolitical, and they urge today's politicians to emulate the more virtuous examples set by their predecessors. Through sober political science and meticulous historical research, Gerhardt destroys the myth of an apolitical appointments process. His work makes clear that the crucial question about the American appointments process is not *whether* it should be political, but *how* it should be political.² In the pages that follow, I summarize a few basic lessons we should take from *The Federal Appointments Process*, and then attempt to draw some preliminary inferences from the evidence, observations, and proposals Gerhardt assembles.

One fact emerges with special clarity from Gerhardt's highly readable treatment of the historical record: the American appointments process, including the process for appointing federal judges, has been fraught with partisan political controversy since the nation's inception. Lawyers ought to understand this point already, if only because that most famous of constitutional cases, *Marbury v. Madison*,³ resulted from the Federalist Party's effort to pack the judiciary on the eve of Thomas Jefferson's inauguration.⁴ Commentators on the appointments process seem, though, either to forget the facts behind *Marbury* or else to regard them as aberrational. They accordingly have much to learn from Gerhardt, who makes clear that political controversy over judicial nominations pre-dates even *Marbury*. When President George Washington nominated John Rutledge of South Carolina to serve

* Director, Program in Law and Public Affairs and Laurance S. Rockefeller Professor of Public Affairs, Woodrow Wilson School and University Center for Human Values, Princeton University.

¹ MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* (2001).

² *Id.* at 254-58.

³ 5 U.S. (1 Cranch) 137 (1803).

⁴ GERHARDT, *supra* note 1, at 52.

as Chief Justice, the Senate blocked the appointment on political grounds: although Rutledge himself was a Federalist and enjoyed Washington's support, Federalist Senators deserted him because of his opposition to the Jay Treaty with Britain.⁵ His nomination was defeated by a vote of fourteen to ten in 1795.⁶ Rutledge thereby became the first Supreme Court nominee to suffer rejection by the Senate, and Gerhardt shows that the process has remained political ever since. Gerhardt reaches the same conclusion as other leading historians and political scientists: "It is . . . beyond question that throughout U.S. history presidents and senators have been concerned about the social or political ramifications of judicial nominations."⁷

More importantly, Gerhardt makes clear that the persistently political character of the American appointments process is not the product of mischievous behavior by rogue politicians, but rather is rooted deeply in the American constitutional structure. Gerhardt's key observation is stunningly simple: the United States Constitution has a single Appointments Clause which governs all major appointments⁸:

[The President,] . . . by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.⁹

This clause applies horizontally — that is, it applies across government functions, to ambassadors, cabinet secretaries, and judges. In practice, and perhaps as a matter of constitutional requirement,¹⁰ the clause also applies vertically within the judicial branch: lower court judges are subject to precisely the same nomination and

⁵ *Id.* at 51-52.

⁶ *Id.* at 51.

⁷ *Id.* at 215 (citation omitted). For a review of the political science and history literature on the point, see TERRI JENNINGS PERETTI, *IN DEFENSE OF A POLITICAL COURT* 85-93 (1999).

⁸ GERHARDT, *supra* note 1, at 39-42.

⁹ U.S. CONST. art. II, § 2, cl. 2.

¹⁰ It is debatable whether lower court judges are "inferior officers" within the meaning of the Appointments Clause; if so, then Congress would presumably have statutory authority to vest their appointment elsewhere than in the president, or to dispense with the need for Senate confirmation. Compare Larry W. Yackle, *Choosing Judges the Democratic Way*, 69 B.U. L. REV. 273, 323 (1989) (contending that lower court judges are indeed "inferior officers"), with Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 YALE L.J. 255, 275 n.103 (1992) (contending that lower court judges are not "inferior officers").

confirmation procedure applicable to Supreme Court justices.

The fact that the American Constitution has only one Appointments Clause is the sort of fact that everybody knows but nobody appreciates. Gerhardt draws attention to it and, once he does, it becomes apparent that this feature of the American Constitution is both unusual and important. There is no obvious reason why identical procedures should govern the appointment of a district court judge, an ambassador to Luxembourg, and the secretary of defense. Indeed, many foreign constitutions provide a complex array of appointments procedures to meet the needs of different positions. For example, in the Constitution of the Fifth French Republic, Article 8 sets out a procedure for the appointment of ministers; Article 56 sets out a very different procedure for the appointment of justices of the *Conseil Constitutionnel*; and Article 64 sets out yet another procedure for the appointment of the members of the *Conseil Supérieur*, who then play a complex role in the appointment of French judges.¹¹

If the American Constitution had a more highly differentiated appointments process, it might have insulated some appointments from political pressures. For example, it would be possible, in principle, to choose district court judges through something like a civil service examination. The existence of a unitary appointments procedure means that all appointments will be subject to roughly the same pressures and incentives. The initial nomination will be made by one elected politician, the president, and it will be subject to review by another body of elected politicians, the Senate. If vesting these politicians with power to appoint other policymakers had resulted in an apolitical process, that development would have been astonishing. In fact, as we have already noted, the process has been thoroughly and consistently political.

The Constitution's political appointments process serves a valuable purpose. Appointed officials exercise considerable discretion and power. There are thus serious questions of principle and policy at stake in nominations, and these ought to be publicly debated. The need for public deliberation about judicial nominees is, if anything, even greater than the need for public deliberation about executive branch officials.¹² Judging is not a matter of purely technical expertise. For example, William Rehnquist and John Paul Stevens are among the smartest and most able lawyers one could hope to meet, but they interpret the Constitution very differently. Once appointed, a new judge (unlike a new cabinet secretary) can serve for life, unsupervised by any elected official. It therefore matters enormously

¹¹ For a thorough account of the French processes for appointing judges, see John Bell, *Principles and Methods of Judicial Selection in France*, 61 S. CAL. L. REV. 1757 (1988).

¹² GERHARDT, *supra* note 1, at 258-59. Gerhardt reports that, as an historical matter, "the Senate defers far more to a president's nominees for executive offices than to his nominees to judicial offices, particularly to the Supreme Court." *Id.* at 162 (citation omitted). In my view, those divergent standards of deference are entirely reasonable.

whether a new judge will be more like Rehnquist or more like Stevens, and it is absurd to suppose that presidents should ignore such differences. It is equally absurd to suppose that senators should simply defer to a president's choices. The political stakes in who gets appointed to the federal bench are large, and such nominations are appropriate matters for public deliberation and debate.

For these reasons, we should welcome the public political contests entailed by the Constitution's unitary appointments procedure. In Gerhardt's words:

The rough-and-tumble of institutional, partisan, and interest group efforts to establish dominance over federal appointments is a natural consequence of the allocation of power in the present system; it is the price of having a constitutional scheme for making appointments of which politically accountable authorities are in charge.¹³

Of course, there is a risk that the political character of the appointments process will undermine the independence and the integrity of the judiciary: presidents and senators might seek to stock the Supreme Court, and the federal bench more generally, with judges who are pledged to a particular ideological or partisan platform. Yet here again, constitutional structure comes into play and shapes the political debate in desirable fashion. The Constitution has only one Appointments Clause, but the appointments process cannot be wholly separated from the removal process. The Constitution guarantees federal judges life tenure: they serve "during good Behaviour."¹⁴ This constraint upon removal radiates backward into the appointments process. Although the president and the Senate may try to extract promises from judges as conditions for nomination and confirmation, they have no power to enforce those promises.¹⁵ Moreover, because judges serve for so long, it is not even clear what promises presidents or senators should want from them: the issues and party divisions that arise ten years down the road may bear no resemblance to those that exist when a judge first takes the bench.

Finally, both life tenure and the Senate's participation in the appointments process help to reduce the likelihood that judges will regard themselves as the personal agents of the presidents who appointed them. Different appointments procedures could produce different incentives. For example, in France, the president of the Fifth French Republic, the president of the National Assembly, and

¹³ *Id.* at 258-59.

¹⁴ U.S. CONST. art. III, § 1.

¹⁵ The impossibility of enforcing promises is not always sufficient to deter politicians from extracting them. For an example, see the exchange between Senator Joseph McCarthy and Justice William J. Brennan at Brennan's confirmation hearing, as reprinted in WALTER MURPHY, JAMES E. FLEMING, & SOTIRIOS A. BARBER, *AMERICAN CONSTITUTIONAL INTERPRETATION* 472-77 (2d ed. 1995).

the president of the Senate each appoint one justice to the *Conseil Constitutionnel* every three years. There is no confirmation requirement, and justices serve for nine years. The French system's division of appointments among three competing political officials seems to presuppose that the justices should be "nominated (albeit without specific instructions) to ensure that the interests of the nominating group are fully considered."¹⁶ As a result, there is a risk that the justices will develop specific constituencies: appointing officials will feel themselves entitled to select partisan loyalists, and the justices will regard themselves as representing the particular officials or parties who chose them.¹⁷

In my view, then, fights such as those about Robert Bork and Lani Guinier, which have provoked much criticism of the confirmation process, should be regarded as (on balance) healthy. People quite reasonably disagree about whether Bork and Guinier should have been confirmed, and about whether the candidates' views were accurately depicted by politicians and the press. Yet, for our purposes, what matters most is that in both cases the public debate was tied to a substantive and important question of policy: in Bork's case, whether the Supreme Court should aggressively protect individual rights; in Guinier's case, how the interests of minorities should be protected within the political process. There is no doubt that presidential appointments can affect the direction of policy on questions of this kind, and there is no reason that the president should have unfettered discretion to do what he likes. The intellectual quality of the debates may not have lived up to the standards academics prefer, but then political argument never does.¹⁸

Nevertheless, Gerhardt's careful history of the appointments process suggests that real problems exist within it. Some of the most troubling behavior arises not in the great public battles over the most prominent and controversial nominees, but in less conspicuous skirmishes conducted outside the media spotlight. The evidence compiled by Gerhardt shows that the confirmation process often operates as a vehicle not for public deliberation about policy issues, but for conflict between

¹⁶ Bell, *supra* note 11, at 1783.

¹⁷ For a useful discussion of the appointments system for the *Conseil Constitutionnel* and its effects on the court, see *id.* at 1783-86. Bell concludes that while "nominators have frequently been concerned about having their [views] reflected [by their appointees], other expectations about the role and tasks of the Council have prevented its becoming a straightforwardly partisan political body." *Id.* at 1786. See also ALEC STONE, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE* 8-10, 50-52, 234 (1992) (discussing the politics of judicial appointments and performance in France).

¹⁸ Although the Bork hearings were far from perfect, I tend to agree with Ronald Dworkin that "[t]he argument and discussion of the hearings were often of extremely high quality — foreign visitors who tuned in were astounded — and were sometimes, as during a long Saturday morning discussion between Bork and Senator Arlen Specter, of academic depth and rigor." RONALD M. DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 278 (1996).

individual senators and the president, or even between two or more different senators. Gerhardt's exhaustive documentation of such battles is one of the many valuable contributions made by his book. Especially stunning is what he reveals about Jesse Helms. According to Gerhardt, by 1999 Helms had "bottled up 493 of President Clinton's ambassadorial and other foreign relations nominations."¹⁹ This number is mind-boggling. Indeed, it is so large that one suspects that Gerhardt, who devotes separate chapters to major players (such as the Senate, the president, and the news media) in the appointments process, could have given Helms a chapter all to himself.

The phenomenon is by no means limited to Helms. Senate rules give individual senators tremendous power to block nominations. Individual senators have the "prerogative . . . to put any nomination on indefinite hold"²⁰ and may also resort to other tactics, including filibusters, to prevent confirmation.²¹ While no other senator has abused these devices so outrageously as Helms, they are easily and regularly used as weapons for partisan bickering and personal retaliation. The dynamic is neatly illustrated by Gerhardt's description of a tit-for-tat battle that unfolded in 1997. It began when "then-Senator Carole Moseley-Braun, a Democrat, put a hold on President Clinton's nomination of Joe Dial" for reappointment to the Futures Trading Commission.²² Texas Senator Phil Gramm struck back by putting a hold on two judicial nominees from Moseley-Braun's home state of Illinois. The other senator from Illinois, Richard Durbin, countered by stalling the Republican Party's education bill. Eventually, President Clinton placated Gramm by nominating a Republican to succeed Dial on the Commission.²³

Sometimes senators manipulate Senate procedures as part of much larger strategies. For example, Gerhardt documents a general slow-down orchestrated by the Republican Party with regard to the Clinton Administration's judicial nominees. "By the end of 1997, the average number of days from nomination to confirmation or final vote in the Senate was 212, the longest such average for any administration in American history."²⁴ "In contrast, the corresponding [numbers] for [the] Reagan and Bush [Administrations] were 65 and 120, respectively."²⁵ Nominations delayed became appointments denied: the percentage and numbers of Clinton judicial nominees confirmed established record lows.²⁶

Unlike the publicly reported controversies over Bork and Guinier, these delaying tactics, whether deployed by a single senator or through a party-line

¹⁹ GERHARDT, *supra* note 1, at 65.

²⁰ *Id.* at 140.

²¹ *Id.* at 143.

²² *Id.* at 140.

²³ *Id.* at 140-41.

²⁴ *Id.* at 124 (citation omitted).

²⁵ *Id.*

²⁶ *Id.* at 167.

strategy, involve little or no public deliberation. Indeed, when one senator stops an obscure appointment, public accountability is at a minimum. The senator, after all, has a mandate only from the majority of voters in a single state. The senator's opposition to a candidate may be more personal than principled. Senators may use their prerogatives to help political friends or harm political enemies, as Senator Helms almost certainly did in his crusade to prevent Walter Dellinger from serving as assistant attorney general of the Office of Independent Counsel.²⁷

To make matters worse, it is unlikely that senators will be held accountable for blocking a nomination without a full vote by the Senate. Even when the nominee is well-known and the office involved is important, the public's interest in most nominations is very limited.²⁸ That fact was underscored by the brouhaha over President Clinton's nomination of Massachusetts Governor William Weld, a Republican, to be Ambassador to Mexico.²⁹ Senator Helms refused to schedule hearings on the nomination. Governor Weld was nationally prominent (he had been mentioned from time-to-time as a possible presidential candidate); American relations with Mexico are obviously important; and, what's more, Senator Richard Lugar, another prominent Republican, publicly rebuked Senator Helms. Nevertheless, "the public showed little concern or interest in the fate of [Weld's] nomination. The position at stake was not one about which Americans apparently had much concern."³⁰ Weld eventually asked Clinton to withdraw his nomination.³¹

Of course, to some extent, these events are typical of congressional practice in general. With regard to legislation as well as appointments, senators may exercise considerable power through filibusters and other dubious procedural prerogatives,³² and more often than not the public will pay no attention — indeed, the public may find the personalities of the appointments process more riveting than the gritty details of policy-making.³³ There is, however, an asymmetry in the appointments process that exacerbates the incentives for bad behavior by senators: with regard to any particular appointment, the personal stakes (for the nominee, the president, and for senators) will vastly outweigh the policy stakes. There will always be another candidate, more or less equally qualified, available to fill a government post. It is possible to have an argument about whether Derek Jeter is uniquely suited to be the shortstop for the New York Yankees,³⁴ but it would be just silly to

²⁷ *Id.* at 152.

²⁸ *Id.* at 172.

²⁹ *Id.* at 138-39, 191-92.

³⁰ *Id.* at 192.

³¹ *Id.* at 139.

³² See Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181 (1997) (analyzing some of the tactics permitted by Senate rules).

³³ I owe this observation to David Strauss.

³⁴ The affirmative case is summarized in Murray Chass, *Money Can't Measure Jeter's Value to Yankees*, N.Y. TIMES, Feb. 3, 2001, at D6.

suggest that anybody is “uniquely qualified” to be, say, a federal circuit court judge — there are a lot of good lawyers, and getting a judicial nomination is inevitably a matter of luck, connections, and so on. So, for example, William Fletcher (whose nomination to the Ninth Circuit was the subject of a nasty political fight and who was confirmed only after an unusual political deal)³⁵ was an excellent lawyer and very well qualified to be a circuit court judge, but it would be absurd to suggest that only he was able to serve as a judge — if Fletcher cannot serve, there will be somebody else to take his place. On the other hand, it certainly mattered to Fletcher himself, to the president, and to Fletcher’s friends that he in particular (rather than some other excellent lawyer) be appointed to the bench. The appointments process therefore provides senators and the president with opportunities to inflict personal damage upon political opponents while plausibly claiming that they have not eliminated *any* particular policy option.

In light of these incentives and the unappealing practices they have spawned, there appears to be a serious defect in the constitutional structure of the appointments process. As we have already seen, it is clear enough (whether one likes the practice or not) why the Senate should have the power of advice and consent on appointments: there is no reason why the president should have unfettered discretion to make politically controversial appointments. But what purpose is furthered by giving individual senators — or, for that matter, the Senate as a whole — the power to block appointments without ever putting the nomination to a formal vote? That power, of course, is not explicitly granted by the constitutional text; it is instead the product of Senate rules together with an ambiguity in the constitutional text which permits (though it certainly does not compel) the inference that Senate inaction is tantamount to rejection of a nomination. The Constitution treats the presidential veto power quite differently: Article I, Section 7 provides that “[i]f any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law.”³⁶ I am inclined to think the country would be better served if the Senate’s confirmation power were subject to a similar, if perhaps longer (say, four weeks), time limit. The Senate could then reject nominees only on the basis of a publicly recorded majority vote, not on the basis of an individual senator’s prerogatives. Such a reform would not be perfect, of course; many confirmation fights would still be uninteresting, and the Senate might develop practices to evade the requirement (for example, by casting votes in deference to the prerogatives of individual senators). Still, one suspects that accountability would improve if senators were forced to go on the record with their positions about nominations in order to reject them.³⁷

³⁵ GERHARDT, *supra* note 1, at 139-40.

³⁶ U.S. CONST. art. I, § 7, cl. 2.

³⁷ See GERHARDT, *supra* note 1, at 298-301 (discussing reforms of this kind).

Gerhardt's thorough review of the appointments process suggests another serious concern, and this one applies both to very public confirmation battles and to more obscure ones. Gerhardt notes the existence of "a modern trend (dating back to at least the 1970s) in which senators have significantly increased the proportion of high-level political nominations they have opposed."³⁸ It would appear that the Senate is not only increasingly prone to reject nominees, but also more inclined to do so on grounds related to personal integrity. In the pages of Gerhardt's book one finds many stories of distinguished public figures whose nominations were felled during the 1970s, 1980s, and 1990s after allegations of immoral or illegal behavior. Examples include: Theodore Sorenson, accused of using secret documents when writing about the Kennedy administration;³⁹ Douglas Ginsburg, accused of smoking marijuana;⁴⁰ John Tower, accused of womanizing and excessive drinking;⁴¹ Robert Gates, accused of improprieties in the Iran-contra scandal;⁴² Zoe Baird, Michael Carns, and Kimba Wood, all accused of hiring illegal aliens or failing to pay social security taxes;⁴³ Anthony Lake, accused of failing to prevent inappropriate fundraising;⁴⁴ John Ralston, accused of an extra-marital affair;⁴⁵ and Herschel Grober, accused of a potential conflict-of-interest in connection with an investigation that had cleared him of a sexual harassment charge.⁴⁶ To this list we can now add Linda Chavez, whose nomination foundered after disclosures that she had housed, and perhaps employed, an illegal alien.⁴⁷

Gerhardt does not say whether the confirmation process has become more focused on questions of personal integrity. I might be mistaken to suppose that it has; perhaps I am, in this regard, myself guilty of the nostalgia which seems to infect so many critiques of modern-day appointments practices. Nevertheless, the numerous battles over personal character reported in Gerhardt's study are, at a minimum, suggestive of a trend, and it is irresistible to speculate about why such a trend might have developed, whether it is a good thing, and what (if anything) ought to be done about it. With regard to causes for the trend, Watergate looms large. Constitutional theorists sometimes look upon the Watergate crisis as a violent but temporary squall, one which the ship of state weathered without significant damage, thanks in no small part to the prescient design of the generation

³⁸ *Id.* at 168.

³⁹ *Id.* at 169.

⁴⁰ *Id.* at 196.

⁴¹ *Id.* at 150.

⁴² *Id.* at 169.

⁴³ *Id.* at 195-96, 170.

⁴⁴ *Id.* at 170.

⁴⁵ *Id.* at 185.

⁴⁶ *Id.* at 166.

⁴⁷ Steven A. Holmes & Steven Greenhouse, *Bush Choice for Labor Post Withdraws and Cites Furor of Illegal Immigrant Issue*, N.Y. TIMES, Jan. 10, 2001, at A1.

that created it. It is indeed remarkable that, nearly two hundred years after the Constitution was drafted, its procedures proved capable of bringing about a peaceful, mid-term presidential transition in the midst of an unprecedented scandal. It is a mistake, however, to suppose that Watergate left no lasting marks upon our political life. There is considerable evidence that the crisis changed both our civic culture and our political practices so that people now care more about the personal morality of politicians.⁴⁸ We are caught up in what Frank Anechiarico and James B. Jacobs have called "the pursuit of absolute integrity," in which, through special prosecutors and other means, we are constantly investigating the ethics of public officials.⁴⁹ The tendency of the appointments process to focus on the personal character of nominees is one instance of this more general pattern.

Should we welcome or lament this trend? The answer will depend upon one's broader understanding of politics. There is, of course, nothing good to be said about immoral behavior, and rarely anything good to be said about illegal behavior. Moreover, most Americans believe that personal morality is an essential element of political leadership, although they are divided about how much weight to give it.⁵⁰ On the other hand, "[i]f men were angels, no government would be necessary."⁵¹ Because candidates and public officials are only human, none are unblemished. There is thus a risk that, as the focus upon personal character intensifies, essential policy-making activities will be displaced by endless government investigations.⁵²

⁴⁸ See, e.g., FRANK ANECHIARICO & JAMES B. JACOBS, *THE PURSUIT OF ABSOLUTE INTEGRITY: HOW CORRUPTION CONTROL MAKES GOVERNMENT INEFFECTIVE* XI, 24 (1996); PETER W. MORGAN & GLENN H. REYNOLDS, *THE APPEARANCE OF IMPROPRIETY: HOW THE ETHICS WARS HAVE UNDERMINED AMERICAN GOVERNMENT, BUSINESS, AND SOCIETY* 47-48, 68-72 (1997); ROBERT WUTHNOW, *THE RESTRUCTURING OF AMERICAN RELIGION: SOCIETY AND FAITH SINCE WORLD WAR II* 200-01 (1988).

⁴⁹ ANECHIARICO & JACOBS, *supra* note 48, at 24-25 (describing a repertoire of surveillance techniques used, after and partly because of Watergate, to control public officials).

⁵⁰ Exit polls from the November 2000 presidential election disclosed that 34 percent of voters believed that the president's "ability to provide moral leadership" was more important than his "ability to manage the government," while 60 percent believed the opposite. Robin Toner & Janet Elder, *An Electorate Largely Split Represents a Race So Very Tight*, N.Y. TIMES, Nov. 8, 2000, at B1.

⁵¹ THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961). For a probing reflection on the connection between Madison's insight and the American reaction to Watergate, see Robert A. Goldwin, *Of Men and Angels: A Search for Morality in the Constitution*, in *THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC* 24-41 (Robert H. Horwitz ed., 1977).

⁵² See, e.g., ANECHIARICO & JACOBS, *supra* note 48, at XVII ("the present-day anticorruption project is committed to forms of disciplinary control that nurture and exacerbate bureaucratic pathologies and make fundamental public administration reform all but impossible").

For better or worse (and I suspect it is for worse), we may be locked in a spiral leading to ever greater scrutiny of nominees' personal ethics. The force driving that trajectory results from the asymmetry mentioned earlier: in appointments proceedings, the personal stakes can be huge while the policy stakes are modest. As a result, Washington insiders cultivate grudges over incidents the general public quickly forgets. For example, most Americans (even those who read a newspaper daily, and that is a distinct minority) have never heard of John Roberts, and they are not upset that his appointment to the District of Columbia Court of Appeals was blocked by Democratic senators. As Gerhardt reports, however, Republican Senator Charles Grassley recollected the incident quite keenly, and he later exacted pay-back by stalling the nomination of Merrick Garland to the court for "well over two years."⁵³ Of course, Garland undoubtedly had his own friends in the Senate. They will remember what Grassley did and perhaps seize the opportunity for revenge when it arises. And there is nothing special about Roberts or Garland: anybody who is sufficiently well-connected to receive a nomination from the president, and then to draw fire from enemies in the senate, is likely to have some friends in the senate too.⁵⁴

This dynamic also plays out on a grander scale. Even though nearly all observers now regard the congressional investigation into Watergate as fully justified, some Republican Party insiders harbored continuing resentments about the way their leaders were treated during the episode. Two decades later, they relished the opportunity to turn the tables on Democrats during the scandals of the Clinton Administration.⁵⁵ It is hard to believe that committed Democrats will feel differently about the attacks on their own officials. The public in general may soon forget the impeachment proceedings against Clinton, or consider them justified, or recollect them as diverting political entertainment. Those who experienced the episode personally, however, are likely to feel a continuing bitterness.

⁵³ GERHARDT, *supra* note 1, at 189.

⁵⁴ Some people might consider the Senate fight over John Ashcroft as another case in point. When George W. Bush nominated Ashcroft for the position of Attorney General, Ashcroft's opponents criticized him for his own successful campaign to stop the confirmation of Ronnie White, whom Bill Clinton had nominated for a federal judgeship. The Ashcroft debate, however, strikes me as different from the Roberts/Garland contretemps for three reasons: first, Ashcroft had led the opposition to White in the Senate (whereas Garland had not played any similar role with respect to Roberts); second, the fight over Ashcroft (who was eventually confirmed) focused for the most part on substantive issues of policy; and third, the Ashcroft controversy led the national news for weeks. In that respect, the debate about Ashcroft was much more like the Bork or Guinier episodes than the Roberts or Garland episodes. The basic details of the controversy are reported in Alison Mitchell, *Senate Confirms Ashcroft as Attorney General, 58-42, Closing a Five-Week Battle*, N.Y. TIMES, Feb. 2, 2001, at A1.

⁵⁵ Alison Mitchell, *Will the Gentleman Yield a Minute to Bipartisanship? No!*, N.Y. TIMES, Dec. 19, 1998, at B1.

Ideally, politicians would put the national interest ahead of partisan loyalties, forget their grievances, and so end the destructive cycle of investigation-and-reprisal. It seems naive, though, to hope that real people will be so magnanimous in their reaction to personal attacks that have destroyed careers and subjected well-meaning individuals, on both sides of the political aisle, to national embarrassment. A dramatic national crisis (such as a war or an economic depression) could unify the country and induce public officials to bury their hatchets. Before the tragic events of September 11, 2001, it seemed obvious that, in the words of Robert Putnam, “for better *and* for worse, America at the dawn of the new century faces no . . . galvanizing crisis.”⁵⁶ In the absence of any dramatic national emergency that might lead us to forget our differences, we Americans bickered about personalities and who should hold office. It remains to be seen whether the new “war on terrorism” will unite the nation in a way that diminishes the partisanship over the long run.

It is hard to know what, if anything, can be done about the (apparently) increasingly personal character of the confirmation process. Gerhardt’s excellent book, however, at least points us in the right direction. It makes clear that we should be arguing about how to make the appointments process political in the right way — how to make it about policies and values rather than personalities — instead of arguing about how to make the appointments process apolitical. It also provides us with the resources needed to develop and test a wide range of hypotheses about how American leaders should proceed. Gerhardt’s book thus deserves the careful attention of politicians, scholars, and anybody else interested in the American appointments process.

⁵⁶ ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 402 (2000).