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## Can the President Appoint Principal Executive Officers Without a Senate Confirmation Vote?

**ABSTRACT.** It is generally assumed that the Constitution requires the Senate to vote to confirm the President's nominees to principal federal offices. This Essay argues, to the contrary, that when the President nominates an individual to a principal executive branch position, the Senate's failure to act on the nomination within a reasonable period of time can and should be construed as providing the Senate's tacit or implied advice and consent to the appointment. On this understanding, although the Senate can always withhold its constitutionally required consent by voting against a nominee, the Senate cannot withhold its consent indefinitely through the expedient of failing to vote on the nominee one way or the other. Although this proposal seems radical, and certainly would upset longstanding assumptions, the Essay argues that this reading of the Appointments Clause would not contravene the constitutional text, structure, or history. The Essay further argues that, at least under some circumstances, reading the Constitution to construe Senate inaction as implied consent to an appointment would have desirable consequences in light of deteriorating norms of Senate collegiality and of prompt action on presidential nominations.

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## INTRODUCTION

A widespread, seemingly unquestioned assumption regarding the process for appointing federal officers is that the Constitution requires the Senate to vote to confirm the President's nominee before the appointee may take office on a permanent basis. This Essay challenges that assumption by arguing that as a matter of constitutional text, structure, and history, it is not at all clear that the Senate must affirmatively vote in favor of a nominee in order to provide the required advice and consent. Rather, the Constitution can and should be read to construe Senate inaction on a nominee as implied consent to the appointment, at least under some circumstances.

The motivation for exploring this seemingly radical proposition is the widely shared belief that our system for appointing senior federal officials is a mess, and seems to be getting worse. Although scholars and the popular press have focused on judicial confirmation battles, the politics of executive branch appointments is arguably becoming even more dysfunctional. After all, even though judicial vacancies increase the strain on overworked federal judges (particularly district court judges),<sup>1</sup> the Article III judiciary continues to function reasonably effectively. By contrast, executive branch vacancies—particularly at the senior level—can make it difficult or impossible for important departments and agencies to fulfill their statutorily and constitutionally mandated functions.<sup>2</sup> Moreover, in many cases, the Senate faction that prevents action on executive branch nominees seems motivated less by an objection to the nominees themselves than by a desire to impair the Executive's ability to function or to extract substantive legislative concessions.<sup>3</sup>

1. See JOHN ROBERTS, U.S. SUPREME COURT, 2010 YEAR-END REPORT ON THE FEDERAL JUDICIARY 7-12 (Dec. 31, 2010), <http://www.supremecourt.gov/publicinfo/year-end/2010year-endreport.pdf>; Gordon Bermant, Jeffrey A. Hennemuth & A. Fletcher Mangum, *Judicial Vacancies: An Examination of the Problem and Possible Solutions*, 14 MISS. C. L. REV. 319, 327-28 (1994).
2. See, e.g., Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 935-46 (2009) (discussing how agency vacancies can impede agency functioning); Alexander I. Platt, Note, *Preserving the Appointments Safety Valve*, 30 YALE L. & POL'Y REV. 255, 284-86 (2011); Press Release, Tom Harkin, Senator, Senate Comm. on Health, Educ., Labor & Pensions, Harkin Statement on President Obama's Appointments to the NLRB and CFPB (Jan. 26, 2012), <http://www.help.senate.gov/newsroom/press/release/?id=cf2288b9-4906-448a-91ff-bba7424e9b05&groups=Chair> [hereinafter Harkin Statement].
3. See Jim Puzzanghera, *GOP Stalls Confirmation of Consumer Agency Nominee*, L.A. TIMES, Sept. 7, 2011, <http://articles.latimes.com/2011/sep/07/business/la-fi-consumer-bureau-cordray-20110907>; Press Release, Richard Shelby, Senator, 44 U.S. Senators to Obama: No Accountability, No Confirmation (May 5, 2011), <http://shelby.senate.gov/public/index.cfm/2011/5/44-u-s-sens-to-obama-no-accountability-no-confirmation>; Laura

By contrast, in the Senate, the faction opposing a judicial nominee typically objects to the nominee's ideology or qualifications, but does not seek to cripple the Article III judiciary as an institution. A couple of contemporary examples illustrate the point. For close to a year, a new federal agency—the Consumer Financial Protection Bureau (CFPB)—was hamstrung by the refusal of a minority in the Senate to allow a confirmation vote on President Obama's obviously qualified nominee, Richard Cordray.<sup>4</sup> Likewise, vacancies on the multimember National Labor Relations Board (NLRB) deprived that agency of the necessary quorum to take any action whatsoever, again because the Senate minority refused to allow a confirmation vote on the President's proposed replacements.<sup>5</sup> Although these recent incidents involved Democratic appointments stalled by Republicans in the Senate, the shoe easily could be—and has been—on the other foot.<sup>6</sup> Moreover, while historically the Senate

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- Meckler & Melanie Trottman, *Obama's NLRB Appointments: Why the Rush?*, WALL ST. J.: WASH. WIRE (Jan. 6, 2012, 12:34 PM), <http://blogs.wsj.com/washwire/2012/01/06/obamas-nlr-appointments-why-the-rush>.
4. See Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 765-66 (2012); Ezra Klein, *What's Behind President Obama's Recess Appointments*, WASH. POST, Jan. 5, 2012, [http://www.washingtonpost.com/business/economy/whats-behind-president-obamas-recess-appointments/2012/01/05/gIQAyJgidP\\_story.html](http://www.washingtonpost.com/business/economy/whats-behind-president-obamas-recess-appointments/2012/01/05/gIQAyJgidP_story.html); Puzzanghera, *supra* note 3; Harkin Statement, *supra* note 2. President Obama used a controversial and legally contested recess appointment to appoint Cordray to this post in January 2012. See Helene Cooper & Jennifer Steinhauer, *Bucking Senate, Obama Appoints Consumer Chief*, N.Y. TIMES, Jan. 4, 2012, <http://www.nytimes.com/2012/01/05/us/politics/richard-cordray-named-consumer-chief-in-recess-appointment.html>; Klein, *supra*. In the case of the Consumer Financial Protection Bureau (CFPB), the absence of a director not only has the usual detrimental effects on agency performance, see O'Connell, *supra* note 2, at 935-46, but the CFPB is also legally disabled, by the terms of the Dodd-Frank financial reform legislation, from moving ahead with new regulations of various financial entities, see Puzzanghera, *supra* note 3.
  5. See *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010); Platt, *supra* note 2, at 290-91; Klein, *supra* note 4; Harkin Statement, *supra* note 2. As with the CFPB, President Obama recently sought to circumvent the Senate by making three recess appointments to the NLRB, though the Senate continued to hold pro forma sessions, leading the President's opponents to declare these alleged recess appointments unlawful. See *Uncharted Territory: What Are the Consequences of President Obama's Unprecedented "Recess" Appointments?: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 112th Cong. 23-24 (2012) (statement of Sen. Michael S. Lee), <http://oversight.house.gov/wp-content/uploads/2012/06/02-01-12-Full-Committee-Hearing-Transcript.pdf>; Cooper & Steinhauer, *supra* note 4; Klein, *supra* note 4.
  6. For example, in 2003, Senate Democrats blocked a scheduled vote on President George W. Bush's nomination of Governor Mike Leavitt to head the Environmental Protection Agency by failing to attend the committee hearing, thereby depriving the committee of a quorum under Senate rules. See J.R. Pegg, *Democrats Boycott Vote on Bush EPA Nominee*, ENV'T NEWS SERVICE, Oct. 1, 2003, <http://www.ens-newswire.com/ens/oct2003/2003-10-01-11.html>. The Democrats themselves acknowledged that "the boycott of the meeting ha[d] little to do with Leavitt's qualifications and everything to do with the Bush administration refusal to release

has moved swiftly, and generally deferentially, with respect to the President's top-level appointments (such as cabinet secretaries),<sup>7</sup> if the CFPB and NLRB fights are harbingers of things to come, there is no guarantee that this will remain the case.

Excessive Senate obstructionism is made possible because the Senate's institutional rules give a minority of senators the ability to block an appointment without a formal vote. Under the Senate's current rules, sixty senators must vote in favor of cloture to overcome a threatened filibuster of a nominee, creating a de facto supermajority requirement.<sup>8</sup> Moreover, even a single senator can delay consideration of a nomination by placing a "hold" on the nomination, and can do so anonymously.<sup>9</sup> The Senate majority, or factions thereof, can also refuse to schedule a vote on a nominee even if the nominee would be confirmed if put to a vote.<sup>10</sup> Determined minorities have been known to use other tactics as well, such as refusing to attend committee hearings in order to deprive the committees of the necessary quorum.<sup>11</sup> While informal Senate norms historically constrained the abuse of these powers, such norms appear to have eroded in recent years, as both scholars and many senators themselves have observed.<sup>12</sup>

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information about some of its environmental policies." *Id.*; see also Katharine Q. Seelye, *Contentious Hearing for EPA Nominee / Democrats Pledge To Block Leavitt's Confirmation*, S.F. CHRON., Sept. 24, 2003, <http://sfgate.com/green/article/Contentious-hearing-for-EPA-nominee-Democrats-2572746.php> (discussing this incident). This is but one particularly vivid example. Indeed, in a 2008 speech, President Bush complained about the large number of executive branch offices that remained vacant due to the Senate's failure to vote on his nominees and about the adverse impact this had on the executive branch's ability to fulfill its functions. See President George W. Bush, Address at the White House (Feb. 7, 2008) (transcript available at <http://georgewbush-whitehouse.archives.gov/news/releases/2008/02/20080207-8.html>); see also Press Release, The White House, Office of the Press Secretary, Fact Sheet: Senate Must Act on Nominations to Federal Courts and Agencies (Feb. 7, 2008), <http://georgewbush-whitehouse.archives.gov/news/releases/2008/02/20080207-9.html> (accusing the Senate of failing to act on President Bush's pending nominations, and asserting that Senate inaction is impeding the ability of the executive branch to carry out key functions).

7. See O'Connell, *supra* note 2, at 966-67.

8. See Aaron-Andrew P. Bruhl, *The Senate: Out of Order?*, 43 CONN. L. REV. 1041, 1044-45 (2011); E. Stewart Moritz, "Statistical Judo": *The Rhetoric of Senate Inaction in the Judicial Appointment Process*, 22 J.L. & POL. 341, 357 (2006).

9. See Bruhl, *supra* note 8, at 1045; Alexandra Arney, Recent Development, *The Secret Holds Elimination Act*, 48 HARV. J. ON LEGIS. 271, 271-72 (2011).

10. See Aaron-Andrew P. Bruhl, *If the Judicial Confirmation Process Is Broken, Can a Statute Fix It?*, 85 NEB. L. REV. 960, 971 (2007); Moritz, *supra* note 8, at 357.

11. See *supra* note 6.

12. See *Examining the Filibuster: Hearings Before the S. Comm. on Rules & Admin.*, 111th Cong. 145-47 (2010) (statement of Hon. Walter F. Mondale); MICHAEL J. GERHARDT, *THE FEDERAL*

The response of the White House to Senate obstructionism on appointments—both in the Obama Administration and in its predecessors—has included both political and legal elements. Politically, Presidents have attempted to shame the Senate into acting, claiming that the Senate’s (or Senate minority’s) refusal to allow a vote on contested nominees is irresponsible and partisan. Legally, Presidents have tried to find ways to circumvent an intransigent Senate, most notably by invoking their constitutional power to make “recess appointments” when the Senate is not in session.<sup>13</sup> This was the Obama Administration’s strategy with respect to CFPB and NLRB appointments. That maneuver has in turn provoked Senate countermeasures, most notably the use of pro forma sessions to prevent the Senate from going into recess.<sup>14</sup> Virtually all of the attention to the constitutional aspects of the appointments controversy has focused on the recess appointment power, as scholars, administration lawyers, and others have

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APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 65 (2003); THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* 162-69 (2006); Joel D. Aberbach & Bert A. Rockman, *The Appointments Process and the Administrative Presidency*, 39 *PRESIDENTIAL STUD. Q.* 38, 44-45, 55 (2009); Brannon P. Denning, *Reforming the New Confirmation Process: Replacing “Despise and Resent” with “Advice and Consent,”* 53 *ADMIN. L. REV.* 1, 4, 12-13, 15-17 (2001); Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 *STAN. L. REV.* 181, 184, 220 (1997); Tom Udall, *The Constitutional Option: Reforming the Rules of the Senate To Restore Accountability and Reduce Gridlock*, 5 *HARV. L. & POL’Y REV.* 115, 115, 118, 122 (2011); Tim Devaney, *Consumer Nominee Richard Cordray Facing Filibuster*, *WASH. TIMES*, Dec. 7, 2011, <http://www.washingtontimes.com/news/2011/dec/7/consumer-nominee-richard-cordray-facing-filibuster>. *But see* Aaron J. Saiger, *Obama’s “Czars” for Domestic Policy and the Law of the White House Staff*, 79 *FORDHAM L. REV.* 2577, 2590 n.70 (2011) (arguing that the confirmation process has long been “arduous and slow,” and that this is not a recent development).

13. U.S. CONST. art. II, § 2, cl. 3 (“The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”); *see infra* note 15.
14. *See* Cooper & Steinhauer, *supra* note 4. When the positions were reversed, Senate Democrats also used the device of pro forma sessions to stop President George W. Bush from making recess appointments of several controversial nominees, most notably by blocking Steven Bradbury’s appointment to head the Department of Justice’s Office of Legal Counsel. *See* Associated Press, *Senate Meets Briefly To Block Bush Appointment*, *USA TODAY*, Dec. 26, 2007, [http://www.usatoday.com/news/washington/2007-12-26-quick-senate\\_N.htm](http://www.usatoday.com/news/washington/2007-12-26-quick-senate_N.htm); *see also* Carl Hulse, *Democrats Move To Block Bush Appointments*, *N.Y. TIMES*, Nov. 21, 2007, <http://www.nytimes.com/2007/11/21/washington/21recess.html> (discussing Senate Democrats’ use of pro forma sessions to prevent President Bush from making recess appointments). President Obama, however, took a step that President Bush declined to take by declaring that the pro forma sessions did not count as a legitimate recess for purposes of the Recess Appointments Clause. *See* Jonathan Weisman, *Appointments Challenge Senate Role, Experts Say*, *N.Y. TIMES*, Jan. 7, 2012, <http://www.nytimes.com/2012/01/08/us/politics/experts-say-obamas-recess-appointments-could-signify-end-to-a-senate-role.html>.

developed ever more intricate arguments regarding the nature of senatorial “recess” and the extent of the President’s recess appointment power.<sup>15</sup>

In this Essay, I propose a simpler constitutional route around (or through) the problem presented when an intransigent Senate minority prevents a vote on important executive branch appointments. The proposal is this: when the President nominates an individual to a principal office in the executive branch, where filling that office is essential for the President to fulfill his or her duty faithfully to execute the laws, the Senate’s failure to act on the nomination within a reasonable period of time, despite good faith efforts of the nominee’s supporters to secure a floor vote, shall be construed as providing the Senate’s tacit or implied “Advice and Consent” to the appointment within the meaning of the Appointments Clause.<sup>16</sup> The argument, in other words, is that the appointment of certain senior executive officers does not require a Senate confirmation vote as a matter of constitutional law. Rather, although the Senate can always withhold its constitutionally required consent by formally voting *against* a nominee, the Senate cannot withhold its consent indefinitely through the expedient of failing to vote on the nominee one way or the other. Thus, according to this argument, instead of resorting to a recess appointment, it would have been constitutional for President Obama to declare (say, in late 2011 or early 2012) that Cordray, who was nominated to head the CFPB in July 2011, had been appointed to that position with the Senate’s (tacit) consent—as a regular appointment, not a recess appointment—given that the Senate had failed formally to vote down his nomination within a reasonable period of time.

This Essay has two goals. The first is to offer some reasons why the lawsuit that would inevitably follow such drastic presidential action ought to be resolved in favor of the administration. The second is to “normalize” the arguments in favor of that seemingly radical legal conclusion, in the hope that the very existence of such arguments, if taken seriously in mainstream

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15. See, e.g., Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 36 Op. O.L.C. 1 (2012); VIVIAN S. CHU, CONG. RESEARCH SERV., RL33009, RECESS APPOINTMENTS: A LEGAL OVERVIEW (2011); Blake Denton, *While the Senate Sleeps: Do Contemporary Events Warrant a New Interpretation of the Recess Appointments Clause?*, 58 CATH. U. L. REV. 751 (2009); T.J. Halstead, *Recess Appointments: A Legal Overview*, in RECESS APPOINTMENTS: AN END-AROUND PRACTICE (Chambers Y. Nells ed., 2006); Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 CARDOZO L. REV. 377 (2005); Michael Herz, *Abandoning Recess Appointments?: A Comment on Hartnett (and Others)*, 26 CARDOZO L. REV. 443 (2005); Steven M. Pyser, *Recess Appointments to the Federal Judiciary: An Unconstitutional Transformation of Senate Advice and Consent*, 8 U. PA. J. CONST. L. 61 (2006); Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487 (2005); Platt, *supra* note 2.

16. U.S. CONST. art. II, § 2, cl. 2.

constitutional discourse, might alter the bargaining game between the President and the Senate in ways that decrease Senate obstructionism and help restore norms of Senate deference to senior executive branch appointments. Put another way, this Essay is an exercise in constitutional (re-)imagination in response to some important and detrimental changes in constitutional practice (on the Senate side) that render old assumptions about the meaning of “Advice and Consent” less compelling as a functional matter. To that end, I suggest that a question that had seemed settled by practice – that a Senate confirmation vote is required – ought to be unsettled.

Part I of the Essay briefly sketches the pragmatic case for allowing the President to appoint certain senior officials without a Senate confirmation vote. Part II – the heart of the argument – seeks to establish that such a scheme is consistent with constitutional text, structure, precedent, and history. To be clear, I do not argue that the rule I propose is constitutionally *required*. Rather, Part II seeks only to establish that the Constitution is sufficiently *ambiguous* with regard to the necessity of a Senate confirmation vote that pragmatic arguments of the sort sketched in Part I can and should carry the day. Part III discusses and defends limits on the scope of the proposed constitutional rule. A brief Conclusion suggests that the simple recognition of the potential plausibility of my constitutional argument might have positive effects on the dysfunctional politics of appointment and confirmation, even if that argument were never tested.

## I. THE PRAGMATIC CASE FOR PRESIDENTIAL APPOINTMENTS WITHOUT A SENATE CONFIRMATION VOTE

The pragmatic case for allowing the President to appoint senior executive branch officials without a formal Senate confirmation vote is a straightforward application of a set of familiar arguments for strong presidential control over the administration – arguments that emphasize the President’s political accountability, comprehensive vision, and capacity for energetic and decisive action.<sup>17</sup> The current understanding of the Senate’s role in confirming presidential nominees both creates a de facto supermajority requirement and releases senators opposed to an appointment from the disciplining effect of having to cast a formal and public “no” vote. This gives the Senate – or a

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17. See, e.g., Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 48-70, 81-86 (1995); Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1081-82 (1986); Philip J. Harter, *Executive Oversight of Rulemaking: The President Is No Stranger*, 36 AM. U. L. REV. 557, 568 (1987); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331-46 (2001); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 85-106 (1994).

minority of senators whose views would not prevail in a formal up-or-down confirmation vote—too much power, significantly and excessively weakening the President and impeding the functioning of the executive branch.

To be clear, I do not argue for the outright elimination of those features of the Senate's process that create *de facto* supermajority requirements for legislation (or, for that matter, for the appointment of judges and lower-level federal officials<sup>18</sup>). But supermajority requirements seem particularly ill suited to senior executive branch positions. For starters, one of the alleged virtues of supermajority rules is that they create or intensify a bias in favor of the status quo.<sup>19</sup> That may or may not be desirable when it comes to legislative action, but it seems like a particularly hard position to defend in the case of senior executive branch appointments, where the status quo is often a vacant office (or an office staffed by a less effective acting official<sup>20</sup>). Furthermore, the political accountability arguments often invoked to justify strong presidential control seem particularly salient in the context of presidential appointment of senior executive officers. After all, the nation elects (or re-elects) the President every four years with the expectation that the President will execute the nation's laws, and the incumbent President (or his or her copartisans and heir apparent) receives the credit or blame for how well the executive branch (or the government as a whole) has performed. Given this concentration of responsibility and accountability in the President, it is sensible to empower the President to staff key positions.

Moreover, minority obstructionism in the Senate is problematic because it leads to a lack of transparency—and hence a lack of accountability—to the electorate. This is a general problem,<sup>21</sup> but it may be particularly acute with respect to executive branch appointments, as the lack of transparency enables

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18. See *infra* text accompanying notes 104–112; *infra* Part III.

19. See John O. McGinnis & Michael B. Rappaport, *Majority and Supermajority Rules: Three Views of the Capitol*, 85 TEX. L. REV. 1115, 1120, 1155–58 (2007) (discussing how the combination of supermajority rules and an attractive status quo can improve welfare); Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1468–69 & n.117 (2011).

20. See *infra* Part III.

21. For a discussion of this problem in the context of judicial appointments, see Brannon P. Denning, *The “Blue Slip”: Enforcing the Norms of the Judicial Confirmation Process*, 10 WM. & MARY BILL RTS. J. 75, 89–90 (2001); Denning, *supra* note 12, at 28; Christopher L. Eisgruber, *Politics and Personalities in the Federal Appointments Process*, 10 WM. & MARY BILL RTS. J. 177, 183–84 (2001); Moritz, *supra* note 8, at 394; E. Martín Enriquez, Comment, *Tyranny of the Minority: The Unconstitutional Filibuster and the Superimposed Supermajority on the Advice and Consent Clause of the Constitution*, 21 T.M. COOLEY L. REV. 215, 235–36 (2004); and Lee Renzin, Note, *Advice, Consent, and Senate Inaction—Is Judicial Resolution Possible?*, 73 N.Y.U. L. REV. 1739, 1741–51 (1998).

the President's political opponents in the Senate to undermine the effectiveness of the White House without the senators' ever having to take a formal and public vote rejecting the President's nominee. True, sophisticated political insiders know exactly what is going on, but forcing senators to vote on a nominee may affect their political calculations, as evidenced by cases in which nominees whose appointments had been bottled up are eventually approved by overwhelming majorities.<sup>22</sup>

This is not necessarily to endorse the strongest forms of the "unitary executive" argument, nor is it necessarily to say that the Senate should play no role in senior executive appointments (even if that were a constitutional option). It is simply to say that in this particular context—appointment of the most senior officials in the executive branch—the case for strong presidential authority is at its apex. The Senate does play an important checking role, even in the appointments context, and could continue to play this role by affirmatively voting down unacceptable nominees within a reasonable time (and taking the political heat for doing so). Yet it is plausible—and, in my view, probable—that the ability of a minority of senators to block senior executive branch appointments without the transparency associated with a formal confirmation vote shifts too much power away from the President.

Of course, this claim is virtually impossible to prove: it involves both contestable normative propositions regarding the appropriate balance of power between the President and the Senate and unproven (and perhaps unprovable) empirical conjectures about the probable consequences of different institutional arrangements.<sup>23</sup> I do not attempt, in this Essay, to marshal all the evidence and arguments that might be needed to convince a reader skeptical of my pragmatic case for recognizing a greater power in the President to appoint senior officers without a formal confirmation vote. Rather, this Essay is directed principally at readers who are sympathetic to the pragmatic arguments sketched above, but who believe that the Constitution requires an affirmative Senate confirmation vote for senior appointments. My goal in Part II is to convince such readers that this latter view is not correct.

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22. See Josh Chafetz & Michael J. Gerhardt, Debate, *Is the Filibuster Constitutional?*, 158 U. PA. L. REV. PENNUMBRA 245, 256 (2010), <http://www.pennumbra.com/debates/pdfs/Filibuster.pdf> (Gerhardt); Tom Harkin, *Fixing the Filibuster: Restoring Real Democracy in the Senate*, 95 IOWA L. REV. BULL. 67, 74 (2010); Arney, *supra* note 9, at 276.

23. For example, changing the default rules related to appointment might affect the bargaining game between the President, the House, and the Senate at the earlier legislation stage, thus changing the substance of any legislation that is enacted. Cf. Nolan McCarty, *The Appointments Dilemma*, 48 AM. J. POL. SCI. 413, 420-24 (2004) (deploying a formal game-theoretic model to explore how different appointment and removal rules can affect the strategic interaction between an executive and a legislature).

## II. THE CONSTITUTIONAL CASE FOR PRESIDENTIAL APPOINTMENTS WITHOUT A SENATE CONFIRMATION VOTE

### A. *The Textual and Structural Argument that Senate Silence May Imply Consent*

Although scholars, judges, and laypeople speak casually of a constitutional requirement of Senate “confirmation” of presidential nominees,<sup>24</sup> the key constitutional text—Article II, Section 2’s Appointments Clause—does not speak of Senate “confirmation,” nor, for that matter, of a Senate “vote” on appointments.<sup>25</sup> Rather, the Appointments Clause reads:

[The President] shall nominate, and 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 . . . .<sup>26</sup>

The critical phrase in this clause, for present purposes, is “by and with the Advice and Consent of the Senate.” The question is whether this phrase necessarily implies an affirmative confirmation vote—that is, a form of *express* consent—or whether it is possible to read this phrase, in the context of the Appointments Clause, as entailing the possibility of *tacit*, *implied*, or *constructive* consent to a presidential nominee.

In preliminary support of the latter conclusion, consider that the ordinary understanding of the term “consent,” as defined in both eighteenth-century and modern dictionaries, is broad enough to include both express and implied consent, depending on the context. For example, Samuel Johnson’s 1755 *Dictionary of the English Language* defined “consent” as, among other things, “[t]he act of *yielding* or *consenting*.”<sup>27</sup> Moreover, the term “consent,” as used in

24. See, e.g., David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 *FORDHAM L. REV.* 71, 117 (2009); Jeffrey S. Sutton, *What Does—and Does Not—Ail State Constitutional Law*, 59 *U. KAN. L. REV.* 687, 702 (2011); Arthur Ago, Case Note, *Presidential Appointments and the Doctrine of Constitutional Estoppel*, 65 *GEO. WASH. L. REV.* 584, 584 (1997).

25. The only provision of the Constitution that refers directly to a confirmation vote is Section 2 of the Twenty-Fifth Amendment, which states: “Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.” U.S. CONST. amend. XXV, § 2; see *infra* Section II.B.

26. U.S. CONST. art. II, § 2, cl. 2.

27. SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* 452 (1755) (emphasis added). Likewise, Frederick Barlow’s 1772–73 dictionary defined the verb form of “consent” as “to

other areas of law, is not always limited to express consent. Rather, consent can be understood *either* as requiring some affirmative, express act or declaration, *or* as something that can be given tacitly, through inaction or failure to object, depending on the context. Examples of settings where consent may be implied through a failure to object include criminal procedure,<sup>28</sup> tort law,<sup>29</sup> contract

- agree in opinion,” “[t]o comply with a request,” and “[t]o permit.” FREDERICK BARLOW, *THE COMPLETE ENGLISH DICTIONARY* 284 (1772-73). The current version of *Black’s Law Dictionary* defines “consent” as “[a]greement, approval, or permission as to some act or purpose, esp. given voluntarily by a competent person; legally effective assent,” BLACK’S LAW DICTIONARY 346 (9th ed. 2009), and further defines, as types of consent, both “express consent” (“[c]onsent that is clearly and unmistakably stated”) and “implied consent” (“[c]onsent inferred from one’s conduct rather than from one’s direct expression”), *id.*
28. For example, failure to object may indicate legal consent to a police search that goes beyond the scope of the initial search. *See* *United States v. Jones*, 356 F.3d 529, 534 (4th Cir. 2004) (“Thus, a suspect’s failure to object (or withdraw his consent) when an officer exceeds limits allegedly set by the suspect is a strong indicator that the search was within the proper bounds of the consent search.”); *United States v. Espinosa*, 782 F.2d 888, 892 (10th Cir. 1986) (similar); Audrey Benison, Matthew J. Gardner & Amy S. Manning, Annual Review, *Warrantless Searches and Seizures*, 87 GEO. L.J. 1124, 1165 (1999) (“In addition to express consent, consent may be implied by the circumstances surrounding the search, by the person’s prior actions or agreements, or *by the person’s failure to object to the search.*” (emphasis added) (footnotes omitted)). However, while consent to an initial search can also be implied rather than express, courts have held that such implied consent requires some affirmative action (including body language), rather than mere failure to object. *See* *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1017 (9th Cir. 2008) (suggesting that implied consent to a search requires some affirmative action by the occupant suggesting assent); *United States v. Shaibu*, 920 F.2d 1423, 1428 (9th Cir. 1990) (“[I]n the absence of a specific request by police for permission to enter a home, a defendant’s failure to object to such entry is not sufficient to establish free and voluntary consent.”).
29. For example, in most jurisdictions, consent is a complete defense to a battery claim. *See* *Giron v. Corr. Corp. of Am.*, 191 F.3d 1281, 1288 (10th Cir. 1999); *Nelson v. City of Irvine*, 143 F.3d 1196, 1207 (9th Cir. 1998); RESTATEMENT (SECOND) OF TORTS § 892A(1) (1979). Many courts have held that such consent can be inferred by the plaintiff’s silence or failure to object to the defendant’s alleged battery. *See* *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 148 (3d Cir. 1998) (“[I]mplied consent may be manifested when a person takes no action, indicating an apparent willingness for the conduct to occur.”); *Young v. Oakland Gen. Hosp.*, 437 N.W.2d 321, 324 (Mich. Ct. App. 1989); RESTATEMENT (SECOND) OF TORTS § 892 cmt. b (1979) (stating that consent “may be equally manifested by silence or inaction”). Likewise, a negligence claim can be defeated by a showing that the plaintiff assumed the risk via her implied or tacit consent, which can be shown by silence or failure to object despite knowledge of the risk. *See* *Farmers Coop. Elevator Ass’n Non-Stock v. Strand*, 382 F.2d 224, 230 (8th Cir. 1967) (citing *Schwab v. Allou Corp.*, 128 N.W.2d 835, 841 (Neb. 1964), for the proposition that “[a]ssumption of risk is predicated upon an implied consent to be treated negligently”); *Anderson v. Hedstrom Corp.*, 76 F. Supp. 2d 422, 432 (S.D.N.Y. 1999) (citing *Turcotte v. Fell*, 508 N.E.2d 964, 968 (N.Y. 1986), for the proposition that the assumption of risk doctrine is that “participants properly may be held to have consented, by their participation, to those injury-causing events which are known, apparent or reasonably foreseeable consequences of the participation”).

law,<sup>30</sup> and evidence law,<sup>31</sup> among others.<sup>32</sup> Indeed, a hoary English common law maxim, derived from Roman law, asserts that *qui tacet consentire videtur* (“one who keeps silent is understood to consent”)<sup>33</sup>—a principle famously (and successfully) invoked by Thomas More at his trial for treason.<sup>34</sup> The notion that consent may be implied by failure to object in a timely fashion is also present in certain aspects of legislative practice, including in the U.S. Congress.<sup>35</sup>

30. For example, some courts have held that one party’s failure to object to the other party’s material modification of a contract can, in some circumstances, manifest consent to the modification (though in this context courts more often use the term “ratification” or “assent” rather than “consent”). See *Union Oil Co. of Cal. v. Mercantile Ref. Co.*, 97 P. 919, 921 (Cal. Ct. App. 1908) (“[W]here a document has been altered, and notice of such alteration is brought to the attention of the parties affected, it is their duty to disavow it . . . or they are bound by the document as altered.”); 30 WILLISTON ON CONTRACTS § 75:11 n.79 (4th ed. 2012); see also Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821 (1992) (arguing that according to a consent theory of contract, silence can be meaningful, and that its meaning should sometimes influence policymakers’ choice of default rules).
31. For example, it is generally the case that the failure of a litigant (or litigant’s counsel) to object to the introduction of particular evidence or testimony constitutes consent to the introduction of that evidence, thus waiving any future objection that the evidence was inadmissible. See, e.g., *Israel v. McMorris*, 455 U.S. 967, 969 (1982) (Rehnquist, C.J., dissenting from denial of certiorari) (“In our adversarial system of criminal procedure, testimony from witnesses and documentary exhibits are generally admitted into evidence unless the opposing party objects. In a sense, any such objection by the prosecution is a ‘refusal’ to consent or to stipulate to the admissibility of the evidence.”). Additionally, a client’s failure to object to disclosures otherwise in violation of the attorney-client privilege may be construed as having waived the privilege, at least in some contexts. See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 2 FEDERAL EVIDENCE § 5:33, at 666 (3d ed. 2007) (“A client who fails to object to disclosure impliedly consents to disclosure.”).
32. A couple of additional miscellaneous examples should suffice. In *United States v. Midwest Oil Co.*, 236 U.S. 459, 481 (1915), the Supreme Court found that Congress had implicitly consented to presidential deviation from a statute regulating oil on public lands. And in *United States v. Butler*, 426 F.2d 1275 (1st Cir. 1970), the First Circuit rejected a claimed violation of the Sixth Amendment speedy trial right, reasoning that “where a defendant is aware of his rights and *implicitly consents to a delay by remaining silent*,” he cannot subsequently raise a speedy trial objection. *Id.* at 1278 (emphasis added).
33. See Frank R. Herrmann & Brownlow M. Speer, *Standing Mute at Arrest as Evidence of Guilt: The “Right to Silence” Under Attack*, 35 AM. J. CRIM. L. 1, 6 & nn.32-33 (2007); see also *United States v. Irvine*, 511 U.S. 224, 242 (1994) (Scalia, J., concurring) (providing a rare modern judicial citation of the *qui tacet* maxim by its Latin name).
34. See Peter Marshall, *The Last Years*, in THE CAMBRIDGE COMPANION TO THOMAS MORE 116, 130 (George M. Logan ed., 2011). Of course, despite More’s successful invocation of the *qui tacet* canon, the trial ended badly for him.
35. For example, the Senate, and to a lesser extent the House of Representatives, regularly uses the procedural device of “unanimous consent agreements” to limit debate and amendment for a specific bill (as well as for other matters). When a senator seeks unanimous consent for

Of course, the fact that consent can *sometimes* cover tacit or implied consent does not necessarily mean that the term should be understood that way in Article II, Section 2—particularly since there are also many other legal contexts in which consent *does* require some form of express, affirmative statement of agreement.<sup>36</sup> Nonetheless, the above evidence on the ordinary meaning of the term, as well as its usage in law and legislative practice, establishes that the text of Article II, Section 2 does not provide any *prima facie* reason to conclude that an affirmative Senate confirmation vote is always necessary.

Moreover—and here is where the interpretive argument intersects most strongly with the pragmatic arguments developed in Part I—the case for reading “Advice and Consent” in the Appointments Clause as encompassing tacit consent to the appointment of senior executive branch officials is bolstered by the Take Care Clause in Article II, Section 3, which declares that the President “shall take care that the Laws be faithfully executed.”<sup>37</sup> The sheer breadth of the federal government’s many functions means that the President

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some alteration or waiver of the usual procedural rules, there does not need to be a formal vote granting such consent; rather, the failure of any senator to make a timely objection is construed as unanimous consent. See FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK’S SENATE PROCEDURE: PRECEDENTS AND PRACTICES, S. DOC. NO. 101-28, at 1355-56 (1992) (“When a unanimous consent request is submitted and the Chair inquires if there is objection, and hearing none, announces that the request is agreed to, it is too late for another Senator to object.”); *Senate Legislative Process*, U.S. SENATE, [http://www.senate.gov/legislative/common/briefing/Senate\\_legislative\\_process.htm](http://www.senate.gov/legislative/common/briefing/Senate_legislative_process.htm) (last visited Oct. 2, 2012); see also WM. HOLMES BROWN, HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS AND PROCEDURES OF THE HOUSE 861-69 (1996) (describing procedures for unanimous consent agreements in the House of Representatives). Indeed, the use of unanimous consent agreements—and that particular terminology—has a long history. See *Senate Legislative Process*, *supra* (“Even several of the Senate’s early rules incorporated unanimous consent provisions to speed the Senate’s routine business.”).

36. This is true in many areas. One of the most obvious is sovereign immunity. The Supreme Court has consistently held that waivers of sovereign immunity—that is, consent by the sovereign to be sued—must be express and may not be implied. See *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003).
37. U.S. CONST. art. II, § 3. There is a longstanding academic and jurisprudential debate over whether the Take Care Clause is an affirmative grant of *power* to the President, or whether it is better seen as the imposition of a *duty* on the President. Compare Mary M. Cheh, *When Congress Commands a Thing To Be Done: An Essay on Marbury v. Madison, Executive Inaction, and the Duty of the Courts To Enforce the Law*, 72 GEO. WASH. L. REV. 253, 275 (2003) (arguing that the Take Care Clause imposes a duty on the President but does not confer any powers), and Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 613 (1989) (same), with John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 2036-37 (2011) (suggesting that the imposition of duties on the President under the Take Care Clause could imply the grant of sufficient powers to ensure those duties are fulfilled). For the purposes of my argument, one need not resolve this question.

cannot perform this constitutional task without assistance. As Chief Justice Taft put it in *Myers v. United States* (in a somewhat different doctrinal context): “The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates.”<sup>38</sup> Thus, the inability of the President to staff the most senior offices of the executive branch makes it extraordinarily difficult for the President to fulfill this constitutional function. An 1846 Opinion of the Attorney General on the Recess Appointments Clause makes a similar point, explicitly drawing out the connection between the Appointments Clause and the Take Care Clause:

The constitution . . . requires that the President shall take care that the laws be faithfully executed. In the performance of public executive duties, it is important that officers filling the offices authorized by law shall be appointed. Offices without officers are useless to the public; and the constitution may fairly receive such a construction as will accomplish its ends without doing violence to its terms.<sup>39</sup>

To be clear, the argument here is *not* that the Take Care Clause supersedes

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38. 272 U.S. 52, 117 (1926). Chief Justice Taft cited several earlier Court opinions in support of this proposition. See *Russell Motor Car Co. v. United States*, 261 U.S. 514, 523 (1923) (“Executive power, in the main, must of necessity be exercised by the President through the various departments.”); *In re Neagle*, 135 U.S. 1, 63–64 (1890) (“The Constitution, section 3, Article 2, declares that the President ‘shall take care that the laws be faithfully executed,’ and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and, by and with the advice and consent of the Senate, to appoint the most important of them and to fill vacancies . . . . [The heads of the executive departments] aid him in the performance of the great duties of his office, and represent him in a thousand acts to which it can hardly be supposed his personal attention is called, and thus he is enabled to fulfil the duty of his great department, expressed in the phrase that ‘he shall take care that that the laws be faithfully executed.’”); *Williams v. United States*, 42 U.S. (1 How.) 290, 297 (1843) (“The President’s duty in general requires his superintendence of the administration; yet this duty cannot require of him to become the administrative officer of every department and bureau, or to perform in person the numerous details incident to services which, nevertheless, he is, in a correct sense, by the Constitution and laws required and expected to perform.”); *United States v. Eliason*, 41 U.S. (16 Pet.) 291, 302 (1842) (“The Secretary of War is the regular constitutional organ of the President for the administration of the military establishment of the nation; and rules and orders publicly promulgated through him must be received as the acts of the executive, and as such, be binding upon all within the sphere of his legal and constitutional authority.”); *Wilcox v. Jackson*, 38 U.S. (13 Pet.) 498, 513 (1839) (“The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties.”).
39. *Power of the President To Appoint to Office During Recess of Senate*, 4 Op. Att’y Gen. 523, 525–26 (1846).

or overrides the Appointments Clause's advice-and-consent requirement. Rather, the argument is that because the Appointments Clause is susceptible of multiple readings, we should prefer a reading that minimizes the tension between the role for the Senate specified in the Appointments Clause and the President's more general obligations under the Take Care Clause. As the above Attorney General opinion put it, we should strive to give the Constitution "such a construction as will accomplish its ends without doing violence to its terms."

Moreover, reading the Appointments Clause in light of the Take Care Clause suggests some important limitations on the idea that the Senate's silence may be construed as consent. In particular, Senate consent should be implied only when prolonged failure to staff a particular office would substantially impede the President's ability to take care that the laws are faithfully executed within the meaning of Article II. This means that the implied consent theory may be limited to a narrow class of senior executive officers (for example, cabinet secretaries, agency heads and commissioners, and senior deputies with significant policy responsibilities), and that for other officials—including judges, inferior officers, and some nominally principal officers who perform less central functions—an affirmative Senate confirmation vote should still be required.<sup>40</sup> Using the Take Care Clause as both an inspiration for, and a limitation on, the tacit consent theory of appointments may also imply that this theory has no purchase when Congress has provided some alternative mechanism to ensure that an executive department can continue to perform its functions even when the department's senior positions remain formally vacant.<sup>41</sup> These possibilities will be taken up in Part III. For now, the key argument is that although the Take Care Clause cannot be read as authority for presidential *disregard* of the Appointments Clause's requirement of Senate "Advice and Consent," the Take Care Clause can influence how one should *construe* the Appointments Clause, and in particular how one should resolve any ambiguity in the latter's text.

A possible objection to the argument that the Senate's silence can be construed as consent is that the Senate itself, pursuant to its constitutional power under Article I, Section 5 to establish its own rules of procedure,<sup>42</sup> has specified that it gives its advice and consent to a nomination only after a formal confirmation vote. The objection, in other words, would be that the Senate has the power to define what counts as consent for constitutional purposes, and the Senate has formally adopted rules pursuant to which only active, express

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40. See *infra* text accompanying notes 104–119.

41. See *infra* text accompanying notes 113–119.

42. U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . .").

consent (in the form of a vote) counts. This interpretation of consent, as I acknowledge above, is consistent with one possible meaning of the constitutional text.<sup>43</sup> Thus, the argument continues, although perhaps the Senate itself could implement my proposal in the form of a rules change,<sup>44</sup> the President and the courts could not treat senatorial silence as consent absent such a rules change.

There are two main responses to this objection, one more specific, and the other more general. The more specific response is that the Senate rules, as they currently stand, do not clearly state that Senate inaction may not be construed as consent (though concededly this seems to be what the senators themselves have assumed). The relevant Senate rule is Rule XXXI, which states that when the President makes a nomination, the final question referred shall be, "Will the Senate advise and consent to this nomination?" and also provides for various procedural rules regarding committee referrals, reconsideration, and final vote.<sup>45</sup> The only reference in Rule XXXI to Senate inaction is a passage that states that "[n]ominations neither confirmed nor rejected during the session at which they are made shall not be acted upon at any succeeding session without being again made to the Senate by the President."<sup>46</sup> This provision does not state explicitly that such inaction may not be construed as consent (though, again, this is likely the prevailing assumption). So, even if it might hypothetically be possible for the Senate to adopt a rule stating explicitly that inaction may not be construed as consent, the Senate has not yet adopted any such rule.

The more general response is that although Article I, Section 5 gives the

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43. See, e.g., Laura T. Gorjanc, Comment, *The Solution to the Filibuster Problem: Putting the Advice Back in Advice and Consent*, 54 CASE W. RES. L. REV. 1435, 1455 (2004) ("The Rules of Proceedings Clause grants the Senate the authority to decide how to express its consent to a nominee.").

44. This idea has recently been floated, though not yet developed or defended in the scholarly literature. See Gordon Bermant, Jeffrey A. Hennemuth & A. Fletcher Mangum, *Judicial Vacancies: An Examination of the Problem and Possible Solutions*, 14 MISS. C. L. REV. 319, 344 n.78 (1994); Adam D. Chandler, Letter to the Editor, N.Y. TIMES, Mar. 3, 2012, <http://www.nytimes.com/2012/03/04/opinion/sunday/sunday-dialogue-getting-judges-confirmed.html?pagewanted=2>; Tom Davis, *90-Day Up-or-Down Vote on Presidential Nominations*, THE HILL'S CONGRESS BLOG (Feb. 13, 2012, 4:47 PM), <http://thehill.com/blogs/congress-blog/politics/210375-90-day-up-or-down-vote-on-presidential-nominations>.

45. *Rule XXXI: Executive Session—Proceedings on Nominations*, U.S. SENATE COMMITTEE ON RULES & ADMIN., <http://www.rules.senate.gov/public/index.cfm?p=RuleXXXI> (last visited Oct. 2, 2012).

46. *Id.* This section of the Rule also states that if the Senate adjourns or takes a recess of greater than thirty days, all pending nominations "shall be returned . . . to the President." *Id.*

Senate the power to determine its own internal rules of procedure, the Constitution does not give the Senate the power to define the constitutional term “Consent.”<sup>47</sup> The Senate can (and has) created a de facto supermajority requirement by requiring sixty votes to invoke cloture and bring up a measure for a floor vote.<sup>48</sup> But this is quite different from allowing the Senate unilaterally to resolve the meaning of the ambiguous term “Consent” by rule, particularly given that this term implicates not only the Senate’s internal practices, but also the relationship between the Senate and the President. Thus, if the courts were to construe “Advice and Consent” of the Senate as “absence of express Senate objection,” the Senate could not invoke its power under the Rules of Proceedings Clause to declare that “Advice and Consent” means “express Senate approval.” Admittedly, there is little authoritative judicial doctrine and much scholarly disagreement about the scope of each chamber’s powers under the Rules of Proceedings Clause.<sup>49</sup> But it is certainly possible,

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47. Cf. Tuan Samahon, *The Judicial Vesting Option: Opting Out of Nomination and Advice and Consent*, 67 OHIO ST. L.J. 783, 801-03 (2006) (arguing that the Senate filibuster is constitutionally suspect because although Article I, Section 5 gives the Senate the power to make its own procedural rules, this power cannot be construed to impose a supermajority requirement for confirmation rather than the simple majority requirement implicit in the Appointments Clause, because “no rule promulgated pursuant to the Rules of Proceedings Clause may conflict with another provision of the Constitution or else the Rules of Proceedings Clause would defeat the Framers’ carefully enumerated safeguards by permitting the rest of the Constitution to be swallowed by the exercise of power under the Clause”). This assertion implicates a related debate about whether the Rules of Proceedings Clause authorizes the House and Senate to adopt supermajority rules for passing legislation. See Bruce Ackerman et al., Comment, *An Open Letter to Congressman Gingrich*, 104 YALE L.J. 1539 (1995); Neals-Erik William Delker, *The House Three-Fifths Tax Rule: Majority Rule, the Framers’ Intent, and the Judiciary’s Role*, 100 DICK. L. REV. 341, 344-56 (1996); John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 485-500 (1995); John O. McGinnis & Michael B. Rappaport, *The Rights of Legislators and the Wrongs of Interpretation: A Further Defense of the Constitutionality of Legislative Supermajority Rules*, 47 DUKE L.J. 327 (1997); Max Minzner, *Entrenching Interests: State Supermajority Requirements To Raise Taxes*, 14 AKRON TAX J. 43 (1999); Jed Rubinfeld, *Rights of Passage: Majority Rule in Congress*, 46 DUKE L.J. 73 (1996).
48. Even this has been challenged as unconstitutional, precisely because the effect of this nominally “procedural” rule is to alter the constitutional rules for passing legislation or appointing officials, which the Rules of Proceedings Clause does not permit. See Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003, 1011-17 (2011); Samahon, *supra* note 47, at 801-03; Enriquez, *supra* note 21, at 252-54. My argument is less ambitious in that it does not require attention to de facto effects of nominal procedural rules. Rather, I argue that the Senate should not be able unilaterally to define, by rule, the constitutional term “Consent.”
49. See *INS v. Chadha*, 462 U.S. 919, 955-56 n.21 (1983); *United States v. Ballin*, 144 U.S. 1, 5 (1892) (“The Constitution empowers each house to determine its rules of proceedings [but i]t may not by its rules ignore constitutional restraints . . . .”); see also *supra* notes 47-48

and, as I argue, desirable, to limit such power so as not to enable the Senate to withhold consent via inaction.

*B. Consideration of Other Interpretive Resources*

The affirmative case that the Constitution allows the President to appoint senior executive branch officials without a formal Senate vote relies on the conjunction of two claims: (1) that the key constitutional phrase “Advice and Consent” is ambiguous with respect to whether express consent is required or whether the failure to object may be construed as implied consent; and (2) that the latter interpretation, at least in the case of certain senior executive officers, would achieve greater harmony with the Take Care Clause and better advance the pragmatic objectives developed in Part I of this Essay. However, the surface ambiguity of the text, even if established, might not necessarily establish that the Appointments Clause is actually ambiguous on this point. Depending on one’s theory of constitutional interpretation, apparent textual ambiguity might be resolved by a number of additional interpretive tools, including the usage of the relevant term in other parts of the constitutional text, extrinsic evidence of the original understanding of the term, and authoritative resolution of the seemingly ambiguous provisions by subsequent judicial decisions or historical practice. There are plausible—though in my view ultimately unconvincing—arguments that each of these interpretive tools indicates that the meaning of “Advice and Consent” in the Appointments Clause is limited to active, express consent (that is, a formal confirmation vote). Let us consider them in turn.

*1. Other Constitutional Provisions*

Although a surface reading of the term “Advice and Consent” in the Appointments Clause does not seem to restrict the term’s meaning to active as opposed to passive consent, perhaps it is a mistake to consider the Appointments Clause in isolation. After all, in both constitutional and statutory interpretation, courts often draw inferences about the meaning of particular words or phrases by looking to how those terms are used elsewhere in the document.<sup>50</sup> And indeed, most of the other places where the Constitution refers to legislative consent seem to imply (or have been assumed to require) some form of more active consent, rather than mere failure to

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(summarizing the debate).

50. See generally Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) (discussing this methodology for use in the constitutional context).

object. Ultimately, though, the inferences that one can draw from these other parts of the constitutional text seem too weak to defeat the proposition that the Appointments Clause is ambiguous on this score.

The natural place to begin is the only other place in the Constitution where the phrase “Advice and Consent” appears: the Treaty Clause, also in Article II, Section 2. According to that Clause, “[the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”<sup>51</sup> One could argue that because the phrase “Advice and Consent” in the Treaty Clause seems more clearly to contemplate a Senate vote (one that prevails by a two-thirds majority), the same “Advice and Consent” phrase in the adjacent Appointments Clause must also entail an affirmative Senate vote. But this does not follow. First of all, one could just as easily emphasize the *contrast* between the Treaty Clause, which specifically includes a requirement that two-thirds of the “Senators present concur,” and the Appointments Clause, which includes no such additional requirement. In other words, one could take the position that the phrase “Advice and Consent,” when used *by itself*, could mean either affirmative, express consent or tacit, implied consent. The Treaty Clause contains additional language that narrows “Advice and Consent” *as used in that Clause* to the former meaning, but the Appointments Clause contains no such additional restrictive language, and so in that Clause the phrase remains ambiguous.<sup>52</sup> Moreover, the notion that the same word or phrase necessarily (or even

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51. U.S. CONST. art. II, § 2, cl. 2.

52. One could conceivably make an even more aggressive form of *expressio unius* argument, in that the specific reference to the concurrence of two-thirds of the Senate in the Treaty Clause, combined with the absence of any such language in the Appointments Clause, indicates that a Senate vote is not required in the latter context. I do not think such a strong inference can be drawn, however; it is more plausible to conclude that the meaning of “Advice and Consent” is ambiguous in both Clauses, and that the additional language in the Treaty Clause does not resolve the ambiguity in the Appointments Clause one way or the other.

It is also worth noting that the meaning of “Advice and Consent” in the Treaty Clause is perhaps less clear-cut than has traditionally been assumed. Jean Galbraith, for example, has argued persuasively that the Constitution does not require the Senate to ratify a treaty *after* it has been negotiated, but rather that the Treaty Clause permits the President to get the Senate’s *prospective* advice and consent to negotiate and sign a treaty. See Jean Galbraith, *Prospective Advice and Consent*, 37 YALE J. INT’L L. 247 (2012). Although Professor Galbraith’s argument is necessarily different from mine, she presumes, as do I, that an affirmative vote is still required in the Treaty Clause context, and argues that this vote can take place before the President negotiates and signs a treaty. Her argument is also similar in spirit and motivation to mine, in that it also seeks to unsettle assumptions about the meaning of “Advice and Consent,” and to show that the longstanding conventional practices are both pragmatically undesirable and not, in fact, constitutionally required.

presumptively) has the same meaning in different legal provisions is both normatively questionable and inconsistently applied, and for these reasons has attracted sustained criticism.<sup>53</sup> As Chief Justice Marshall observed, “[T]he same words have not necessarily the same meaning attached to them when found in different parts of the [Constitution]: their meaning is controlled by the context.”<sup>54</sup> And, as Michael Gerhardt has pointed out specifically with respect to Article II, Section 2, “the record [of the Constitution’s drafting] is silent on the question of whether the phrase ‘advice and consent of the Senate’ was meant to have the same meaning in the contexts of treaty ratifications and . . . appointments.”<sup>55</sup>

The phrase “Advice and Consent” appears nowhere else in the Constitution, but the Constitution does discuss the consent of Congress (or of one or the other chamber of Congress, or a state legislature) in a few other places. The Adjournment Clause in Article I, Section 5 prohibits either chamber of Congress from adjourning for more than three days without the “Consent” of the other chamber<sup>56</sup>—a provision that has figured into the recent tangling between the House, Senate, and President over recess appointments.<sup>57</sup> The Enclave Clause in Article I, Section 8 enables Congress to exercise legislative authority over land used for military facilities and other “needful Buildings” when purchased with the “Consent” of the state legislature.<sup>58</sup> The Emoluments Clause in Article I, Section 9 prohibits any U.S. officer from accepting any gift, office, or title from a foreign state or ruler without Congress’s “Consent.”<sup>59</sup>

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53. See Adrian Vermeule & Ernest A. Young, Commentary, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730 (2000); cf. Walter Wheeler Cook, “Substance” and “Procedure” in the Conflict of Laws, 42 YALE L.J. 333, 337 (1933) (“The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against.”).

54. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 19 (1831).

55. GERHARDT, *supra* note 12, at 16.

56. U.S. CONST. art. I, § 5, cl. 4 (“Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.”).

57. See Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 36 Op. O.L.C. 1 (2012); Gary L. Goldberg, *Dodd-Frank Act at One Year: An Overview*, 65 CONSUMER FIN. L. Q. REP. 229, 234-35 (2011); Dan Friedman, *Why Pro Forma Has Become a Way of Life*, NAT’L J. DAILY (D.C.), Dec. 11, 2011, <http://www.nationaljournal.com/member/daily/why-pro-forma-has-become-a-way-of-life-20111211>.

58. U.S. CONST. art. I, § 8, cl. 17.

59. *Id.* art. I, § 9, cl. 8 (“[N]o Person holding any Office of Profit or Trust under [the United

Article I, Section 10 prohibits states from imposing certain tariffs, maintaining armed forces in peacetime, initiating hostilities with a foreign power, or entering into interstate compacts or international agreements without the “Consent” of Congress.<sup>60</sup> Article IV, Section 3 provides that the admission into the union of any state formed within the jurisdiction of another state, or formed by a combination of some or all of two or more existing states, requires the “Consent” of Congress as well as the states concerned.<sup>61</sup> Article V states that no state shall be deprived of equal suffrage in the Senate without that state’s “Consent.”<sup>62</sup> There is also one other constitutional reference to consent that involves the consent of individuals rather than a legislative body: the Third Amendment states that soldiers may not be quartered in a private home during peacetime without the owner’s “consent.”<sup>63</sup>

These provisions, which have generated relatively little case law or scholarly commentary, seem to involve sufficiently different contexts that they have little relevance to the meaning of “Consent” in the Appointments Clause. That said, it is worth noting that the consent required in a few of these other provisions has been interpreted or understood as affirmative consent, rather than mere failure to object. For instance, the Adjournment Clause has generally been interpreted to require the active consent of the other chamber to an adjournment, rather than to permit implicit consent through inaction.<sup>64</sup> And in the limited case law on the Emoluments Clause, courts have apparently assumed (though they have not clearly held) that congressional consent must be express.<sup>65</sup> Likewise, some cases interpreting the Enclave Clause seem to require express rather than tacit or implied consent, though the decisions are not altogether clear

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States] shall, without the Consent of the Congress, accept any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”).

60. *Id.* art. I, § 10, cls. 2-3 (“No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws . . . . No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”).
61. *Id.* art. IV, § 3, cl. 1 (“New States may be admitted by the Congress into this Union; but no new States shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.”).
62. *Id.* art. V.
63. *Id.* amend. III.
64. See, e.g., *Wright v. United States*, 302 U.S. 583, 590 (1938); *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. 1 (2012).
65. See *Ward v. United States*, 1 Cl. Ct. 46, 48-49 (1982).

on this point.<sup>66</sup> By contrast, several cases interpreting the Compact Clause in Article I, Section 10 have held that congressional consent to an interstate compact need not take the form of a formal vote, but may instead be implied, at least in certain circumstances.<sup>67</sup> However, it is not at all clear whether the meaning of consent in these contexts has much relevance to the meaning of consent in the appointments context.<sup>68</sup> Overall, the usage of the term elsewhere in the Constitution may cut against the proposal I advance here, but the contexts seem sufficiently different, and the case law and practice is sufficiently sparse, that the Constitution's other provisions shed relatively little light on the meaning of "Advice and Consent" in the Appointments Clause—certainly not enough to foreclose a reading that would allow silence to imply consent.

The only other constitutional provision that might bear on the question is Section 2 of the Twenty-Fifth Amendment—the one clause in the Constitution that refers explicitly to a legislative confirmation vote on an appointment. The Twenty-Fifth Amendment states that "[w]hen there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress."<sup>69</sup> One could conceivably argue that the Twenty-Fifth Amendment indicates a background assumption that vacant offices are filled via presidential nomination and a subsequent confirmation vote, which might imply that this is how the Appointments Clause should be understood. But, as with the Treaty Clause, one could just as easily turn this argument on its head by asserting that the specification in the Twenty-Fifth Amendment of the need for a confirmation vote, rather than use of the familiar "Advice and Consent" language, indicates that the phrase "Advice and Consent," by itself, does *not* require a confirmation vote.<sup>70</sup> Moreover, the Twenty-Fifth Amendment was adopted almost two hundred years after the original Constitution, and clearly differs from the Appointments Clause in other ways (particularly in requiring the participation of the House of Representatives), so its relevance would seem minimal.

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66. See *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 538-39 (1885); *Hayes v. United States*, 367 F.2d 216, 219 (10th Cir. 1966).

67. See *Virginia v. Tennessee*, 148 U.S. 503, 519-21 (1893). That said, implied consent in this context is thought to require some form of legislative act implicitly endorsing or acquiescing to the compact, rather than mere inaction. See *id.*

68. See *supra* text accompanying notes 56-63.

69. U.S. CONST. amend. XXV, § 2.

70. Indeed, one might go further and suggest a structural reason why it makes sense to require a confirmation vote in the Twenty-Fifth Amendment context but not in the context of other executive branch appointments: the selection of a Vice President (ordinarily an elected position) should require more input from the House and the Senate (as representatives of the people).

2. *Original Understanding*

Even if the text of the Appointments Clause appears ambiguous enough to read “Consent” as including tacit consent implied by silence, it is possible that the men who wrote and ratified the Constitution would have understood that term more narrowly—as limited to active, express consent. Indeed, a thoughtful article by Adam White argues that the evidence from the Philadelphia Convention debates indicates that the phrase “Advice and Consent” does *not* preclude the Senate from stopping an appointment simply by failing to act on the nomination.<sup>71</sup> White adduces two pieces of evidence for the claim that the original understanding of “Advice and Consent” required an affirmative Senate vote.

First, White points out that the phrase “Advice and Consent” was introduced at the Philadelphia Convention by one of the Massachusetts delegates, Nathaniel Gorham, who took the phrase from a provision in the Massachusetts state constitution that required the governor to seek the “advice and consent” of an Executive Council before making appointments.<sup>72</sup> White’s research into Massachusetts state practice found that on those rare occasions that a Massachusetts gubernatorial nominee failed, there was no recorded vote entered into the official Council records despite another state constitutional requirement that all Council “advice” be so recorded.<sup>73</sup> From this, White infers that the Council must have rejected gubernatorial nominees without a formal vote, which in turn indicates that the Massachusetts Constitution’s requirement that the Council give its “advice and consent” to the governor’s appointment did not prevent the Council from rejecting an appointment via refusal to vote one way or another.<sup>74</sup> However, nothing in White’s evidence actually demonstrates that the Massachusetts Council could block a nominee through inaction, as opposed to a negative vote. Indeed, White’s own argument is that the term “advice,” as used in the Massachusetts Constitution

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71. Adam J. White, *Toward the Framers’ Understanding of “Advice and Consent”: A Historical and Textual Inquiry*, 29 HARV. J.L. & PUB. POL’Y 103 (2005). White frames his article as a response to a different claim from the one I advance in this Essay: he takes on the claim that the Senate is constitutionally obligated, by the Appointments Clause, to vote on all presidential nominees. Nonetheless, his originalist arguments would cut against my proposal as well.

72. MASS. CONST. art. IX (“All judicial officers . . . shall be nominated and appointed by the governor, by and with the advice and consent of the council . . .”); see White, *supra* note 71, at 114 (citing 1 THE RECORDS OF THE FEDERAL CONVENTION 1787, at 41 (Max Farrand ed., rev. ed. 1937)).

73. See White, *supra* note 71, at 135-37.

74. See *id.* at 137-39.

(and consistent with historical English practice), meant “approval,” which is why rejections were not recorded.<sup>75</sup> But if that is so, then it is not clear that the handful of unsuccessful nominations were rejected without an affirmative vote of disapproval. Thus the records White examines cannot tell us (and could not have told the Framers or ratifiers) what would have happened if the Massachusetts Executive Council simply failed to act on an appointee.<sup>76</sup> Furthermore, my argument is that the President *may* construe senatorial inaction as implied consent, not that the President *must* do so; the President is always free to withdraw a nomination or leave it in limbo if the Senate fails to act, as indeed Presidents have traditionally done. If Massachusetts governors in the late eighteenth century followed that practice as well, then the evidence White uncovers would not resolve the (untested) legal issue of whether the governor *could have* treated mere inaction by the Council as implied consent. Finally, and perhaps most importantly, it is not at all clear that anyone at the Philadelphia Convention (including Gorham himself), or at the state ratification conventions, had any inkling that Massachusetts practice allowed the Executive Council to block the governor’s nominees through inaction, if this was in fact the case (which, again, is not clear from the records). Indeed, it is likely that they never thought about the matter, or simply assumed that the Senate would of course vote on all presidential nominees.<sup>77</sup>

White’s second argument presents a more compelling originalist objection to my proposal. He observes that at the Philadelphia Convention, James Madison proposed an alternative version of the Appointments Clause that would have given the Senate a discretionary veto over the President’s nominees. In other words, Madison proposed a system quite close to what this Essay advocates: the President would make nominations, and the default outcome in the case of Senate inaction would be appointment. However, Madison’s proposal failed, while Gorham’s “Advice and Consent” language

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75. See *id.* at 138-40.

76. To be clear, and as noted above, see *supra* note 71, White’s main concern is with the claim, advanced by other scholars, that the phrase “advice and consent” *requires* the Senate to vote on all nominees, or else the Senate would be withholding its constitutionally obligatory “advice,” see *infra* note 103. Therefore, the point that White emphasizes, and persuasively establishes, is that under the Massachusetts Constitution, the term “advice and consent” was equivalent to the term “advice,” and that both meant “assent” (as opposed to “formal opinion one way or the other”). Insofar as White establishes that claim, it would indeed undermine at least some of the arguments to the effect that a Senate vote is constitutionally required. It would not, however, refute the claim that Senate consent could be implied even in the absence of such a vote—which is the claim I advance here.

77. In fact, White’s own evidence indicates that the Council expeditiously confirmed the overwhelming majority of appointees, suggesting an almost pro forma function. See White, *supra* note 71, at 136-37.

was eventually adopted (though it too was defeated when first proposed).<sup>78</sup>

Although this is stronger evidence that the original understanding of “Advice and Consent” included only express consent rather than implied consent through failure to object, there are problems here, too. First, as modern originalists emphasize, what matters is not original *intent* but original *meaning* or *understanding*;<sup>79</sup> moreover, the understanding of the Framers at the Philadelphia Convention matters considerably less than the understanding of the voters who ratified the document.<sup>80</sup> Furthermore, the Philadelphia Convention debates and proceedings were supposed to be (and were, at the time of ratification) secret—so, notwithstanding the cottage industry of law review articles that carefully trace the intricacies of the internal drafting process, there is a powerful argument that all this should be irrelevant, except insofar as it sheds light on how a representative (informed) participant in the ratification process would have understood the document.<sup>81</sup> When one keeps those qualifications in mind, the inferences one can draw from the fact that the Appointments Clause included Gorham’s proposed language rather than Madison’s become much weaker, not least because much of the public discussion preceding and immediately following ratification seems to have presumed that the Senate would always (and perhaps would be obligated to) vote up or down on all presidential nominees. As White’s admirably even-handed discussion acknowledges, Alexander Hamilton’s influential defense of the Article II appointments process in the *Federalist* papers assumed that the Senate had either to ratify or to reject the President’s nominee; the possibility of Senate *inaction*, and its consequences for the appointment in

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78. See *id.* at 141-43.

79. See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and the Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 35-38 (Amy Gutmann ed., 1997).

80. See Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 444-45 (2007); Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77, 79 (1988); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 375 n.130 (1981).

81. See Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power To Execute the Laws*, 104 YALE L.J. 541, 576 (1994); Stephen L. Carter, *Constitutional Improprieties: Reflections on Mistretta, Morrison, and Administrative Government*, 57 U. CHI. L. REV. 357, 372 n.48 (1990); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1801-02 (1996); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985). But see Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1118 (2003) (asserting that, contrary to the “conventional wisdom,” the secret drafting history can shed light on the original meaning of the Constitution, but also cautioning that this material should not be used to try to discern the Framers’ or ratifiers’ subjective intentions).

question, seems not to have entered his mind.<sup>82</sup> Other influential members of the Founding generation, including James Wilson, James Iredell, and John Adams, also made remarks suggesting that they assumed the Senate would take up all the President's nominees.<sup>83</sup> As White points out, the remarks of Hamilton, Wilson, Iredell, Adams, and others are ambiguous with respect to whether the Senate would necessarily *vote* on all nominations.<sup>84</sup> More relevant here, these and other public statements reveal little about the constitutional implications of the Senate's failure to act one way or the other. As White acknowledges,

[I]n the course of the rare discussions actually conducted on the issue of appointments [in the post-Convention state ratification debates], speakers did not illuminate the Ratifiers' nuanced impressions of the specific roles of President and Senate so much as criticize the mix, variously favoring vesting absolute appointment power in either the President or the legislature.<sup>85</sup>

Thus, even if one were to accept the claim that the participants in the Philadelphia Convention clearly understood Gorham's "Advice and Consent" as an *alternative* to Madison's proposal of a discretionary Senate veto—an

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82. See THE FEDERALIST NO. 66, at 405 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[The Senators] 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, [the President] may have made . . . . Thus it could hardly happen that the majority of the Senate would feel any other complacency towards the object of an appointment than such as the appearances of merit might inspire and the proofs of the want of it destroy."); THE FEDERALIST NO. 76, *supra*, at 457 (Hamilton) ("[The President's] nomination may be overruled . . . , yet it can only be to make place for another nomination by himself."); THE FEDERALIST NO. 77, *supra*, at 461 (Hamilton) ("The censure of rejecting a good [nomination] would lie entirely at the door of the Senate, aggravated by the consideration of their having counteracted the good intentions of the executive.").

83. See John Adams, *Three Letters to Roger Sherman, on the Constitution of the United States*, in 6 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 427, 436 (Charles Francis Adams ed., Boston, Charles B. Little & James Brown 1851); *Debates in the Convention of the State of North Carolina on the Adoption of the Federal Constitution*, in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 1, 134 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott Co. 1891) (quoting the speech of James Iredell); *James Wilson in the Pennsylvania Convention*, in PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787-1788, at 327 (John Bach McMaster & Frederick D. Stone eds., 1888), *reprinted in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 162 (Max Farrand ed., 1911).

84. See White, *supra* note 71, at 129-31.

85. See *id.* at 129.

alternative that would allow the Senate to defeat nominations through inaction—there is no evidence that this understanding of the otherwise ambiguous “Advice and Consent” language was more widely shared outside the Convention.

Moreover, while one interpretation of the adoption of Gorham’s language over Madison’s is that the Framers preferred to require affirmative Senate consent rather than to allow a discretionary Senate veto, an equally plausible interpretation is that the Framers chose to finesse the issue by using ambiguous language so that both sides could claim victory (or simply avoid further discussion of the issue).<sup>86</sup> After all, the delegates debated and rejected many different appointment schemes—including those involving the whole legislature, the President alone, the Senate alone, Madison’s proposed Senate veto, and Gorham’s “Advice and Consent” proposal. Close to the end of the Convention, they unanimously (and without much debate) accepted the Committee on Compromise’s language, which used the previously rejected “Advice and Consent” formulation and became (with only slight modification) the final version of the Appointments Clause.<sup>87</sup> Thus, the evidence of original understanding is at best murky and inconclusive—which, again, is all I seek to establish here.

### 3. *Subsequent Practice*

The strongest argument against my proposal, in my view, is that even if the “Advice and Consent” language was originally ambiguous as to what could or should happen in case of Senate inaction, this ambiguity has since been resolved. After all, on several theories of constitutional interpretation, the meaning of textually ambiguous provisions may be clarified by subsequent

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86. See William G. Ross, *The Senate’s Constitutional Role in Confirming Cabinet Nominees and Other Executive Officers*, 48 SYRACUSE L. REV. 1123, 1131 (1998) (“The fact that so many delegates who had favored appointment by the Senate alone were willing to assent to [the advice and consent language] suggests that those delegates did not contemplate that the Senate would passively exercise its power of ‘advice and consent.’ On the other hand, the consent of those delegates who favored sole appointment by the President indicates that many delegates did not foresee a particularly active role for the Senate.”); cf. Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627 (2002) (discussing this phenomenon in the statutory context); Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1749 (2005) (arguing that “constitutional ambiguity on federalism . . . represents a deliberate strategy on the part of the Framers to allow the mechanics of federalism to be worked out and adapted through practice over time”).

87. See White, *supra* note 71, at 120–21.

judicial construction or historical practice.<sup>88</sup> In this case, subsequent *judicial* construction is not really an issue, as there is almost no case law directly on point.<sup>89</sup> However, there is a much more compelling argument that longstanding historical practice has resolved any ambiguity that one might find in the text of the Appointments Clause. After all, since the early days of the Republic, it has apparently been presumed that the Senate must affirmatively act to confirm presidential nominees, and that therefore the Senate can block nominations simply by failing to act on them.<sup>90</sup> For many skeptical readers,

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88. See Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012), <http://ssrn.com/abstract=1999516>; Michael J. Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 713, 714-18 (2008); Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109 (1984); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003); Peter J. Smith, *The Marshall Court and the Originalist's Dilemma*, 90 MINN. L. REV. 612, 623-40 (2006); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 916-24 (1996).

89. There are a handful of district court cases that touch on issues related to presidential appointment of executive branch officials without Senate consent; these cases reject the idea that the President has inherent constitutional power to make appointments outside the Appointments Clause or duly enacted statutory requirements, but none of these cases is really germane. In both *Olympic Federal Savings & Loan Ass'n v. Director, Office of Thrift Supervision*, 732 F. Supp. 1183 (D.D.C. 1990), and *Williams v. Phillips*, 360 F. Supp. 1363 (D.D.C. 1973), federal district courts held that the President does not have the inherent constitutional power to appoint officers temporarily, absent a Senate recess, emergency situation, or legislation allowing the President to make temporary appointments. See *Olympic*, 732 F. Supp. at 1199-1200; *Williams*, 360 F. Supp. at 1368-69, 1371. In *George v. Ishimaru*, 849 F. Supp. 68 (D.D.C. 1994), a district court rejected a presidential attempt to appoint an agency staff director—not an “officer” in the constitutional sense—without following a statutorily mandated procedure, concluding that Article II gave the President no such power. *Id.* at 71-72.

The only court of appeals opinion even somewhat on point is the D.C. Circuit’s denial of the government’s request for a stay in the *Williams* case, in which the court stated that

[i]t could be argued that the intersection of the President’s constitutional obligation to “take care that the laws be faithfully executed” and his obligation to appoint the director of [the agency in question] “with the Advice and Consent of the Senate” provides the President an implied power, in the absence of limiting legislation, upon the resignation of an incumbent [agency] director, to appoint an acting director for a reasonable period of time before submitting the nomination of a new director to the Senate. Even if the court should sustain such a view, in its disposition on the merits, that would not establish that the President was entitled, for a period of four and a half months from the date the President obtained the resignation of the incumbent director, to continue the designation of Phillips as acting director without any nomination submitted for Senate consideration.

*Williams v. Phillips*, 482 F.2d 669, 670-71 (D.C. Cir. 1973).

90. See generally Ross, *supra* note 86, at 1133-43 (discussing the history of Senate scrutiny of executive branch nominees, and giving several examples of nominations that were effectively blocked by the Senate, or by a minority of Senators, without a formal vote).

this may be dispositive evidence against my proposal—either because longstanding practice can settle the meaning of initially ambiguous constitutional provisions,<sup>91</sup> or because the fact that we have gone for so long without anyone interpreting the text in the way I have suggested is *prima facie* evidence that this interpretation is simply implausible, notwithstanding the arguments I have advanced above. I share these misgivings to some degree. Let me nonetheless offer three reasons why reading the Appointments Clause to construe Senate inaction as passive consent may be acceptable, even though longstanding historical practice is to the contrary.

First, as a matter of constitutional doctrine, the fact that a practice by the executive and legislative branches is longstanding does not necessarily entrench that practice as a constitutional norm, as opposed to a nonconstitutional convention; this is particularly true when the Supreme Court has never weighed in on the matter. Indeed, many longstanding practices and understandings do not “harden” into constitutional rules. For example, there is a longstanding practice that Presidents will consult the senators (of the President’s party) from a potential judicial nominee’s home state and yield in the face of objections from those senators.<sup>92</sup> But it is doubtful that many observers would view this consultation as a *constitutional* obligation, as opposed to a politically prudent practice. Likewise, many executive agencies have adopted the practice of consulting with the relevant congressional appropriations committees when they wish to transfer funds from one purpose to another, within a single statutory appropriations category.<sup>93</sup> Yet this practice, though longstanding, is not considered a legally enforceable constitutional requirement as opposed to a politically enforced custom.<sup>94</sup> Other conventions, including a number of perceived constraints on the President, may be considered entrenched as (quasi-)constitutional norms, but turn out to yield once they are challenged or violated.<sup>95</sup> In short, sometimes longstanding

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91. See, e.g., *The Pocket Veto Case*, 279 U.S. 655, 689 (1929) (asserting that “[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions [relating to separation of powers]”); Nelson, *supra* note 88.

92. See GERHARDT, *supra* note 12, at 143-44; Denning, *supra* note 21, at 76.

93. See Harold H. Bruff, *The Incompatibility Principle*, 59 ADMIN. L. REV. 225, 249 (2007).

94. Indeed, after the invalidation of the legislative veto in *INS v. Chadha*, 462 U.S. 919 (1983), a legal requirement that the appropriations committees must play this role would be unconstitutional.

95. For example, there was a longstanding practice, beginning with Thomas Jefferson, that the President would only deliver his State of the Union message to Congress in writing; this was no mere convenience, but came to be seen as a reflection of constitutional values. But President Woodrow Wilson broke with this practice, and the ultimate acquiescence by other political actors and the general public in President Wilson’s action demonstrated (after the

practice fixes the meaning of constitutional ambiguities, but sometimes it does not, and no one (to the best of my knowledge) has propounded a comprehensive and convincing theory that distinguishes these cases.<sup>96</sup>

Second, in this case the historical practice (as opposed to apparent traditional understandings or assumptions) does not, in fact, directly contradict my proposed constitutional interpretation. After all, I do not argue that if the Senate fails to take action on a nominee, that nominee is automatically appointed. Rather, I argue that if the Senate fails to take action, the President *may* declare that he or she construes the Senate's silence as tacit consent to the nomination. No President has ever done so. While I acknowledge that one reason may be that no President ever thought he could do so as a matter of constitutional law, it is nonetheless fair to say that this constitutional limit has never actually been tested. Put another way, one need not conclude that failure to exercise (or even to recognize) that a power exists necessarily leads to its atrophy,<sup>97</sup> even if one does accept the proposition that the regular exercise of a power (with the acquiescence of other constitutional

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fact) that what many had assumed was an entrenched constitutional rule was in fact not. See Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. (forthcoming 2012) (manuscript at 20-21), <http://ssrn.com/abstract=2103338> (citing HERBERT W. HORWILL, *THE USAGES OF THE AMERICAN CONSTITUTION* 199 (1925)).

96. Recent work by Curtis Bradley and Trevor Morrison, building on earlier work by Michael Glennon and others, has made some progress on developing a more general theory, or set of mid-level principles, that could help distinguish those patterns of interbranch interaction that generate new constitutional understandings from those that do not. See Bradley & Morrison, *supra* note 88; Glennon, *supra* note 88. Some of Bradley and Morrison's suggestions might cut against the proposal advanced here, in that they suggest historical practice is more likely to resolve (constitutional) separation of powers questions when the executive acquiesces in a congressional assertion of power (rather than the other way around), and when the practice has attracted the support of both parties. Without fully engaging Bradley and Morrison's substantive arguments here, it suffices to say that even if their claims are correct (and they are certainly plausible), they are clearly not absolute, as the examples in the main text illustrate—and Bradley and Morrison never claim otherwise. The other recent work on this general question is by Adrian Vermeule, who in related papers has explored both the emergence of constitutional “conventions,” see Vermeule, *supra* note 95, and the phenomenon of the “atrophy” of constitutional powers (whereby a power, if not used, becomes unusable, not only politically but legally), see Adrian Vermeule, *The Atrophy of Constitutional Powers*, 32 O.J.L.S. 421 (2012). Vermeule provides a lucid exploration of the mechanisms by which conventions can emerge and atrophy can occur, but his analysis does not directly answer the question of whether a court (or other relevant actor) *should* decide that a given actor, in this case the President, cannot exercise a particular power because he or she has not exercised it, particularly when such an exercise seems not to have been seriously considered.
97. *But see* Vermeule, *supra* note 95 (manuscript at 19-21 & n.93) (noting that, as an empirical matter, this does sometimes occur).

actors) can establish its legitimacy.<sup>98</sup>

Third, and perhaps most importantly, changing circumstances have undermined the relevance of historical practice to the contemporary question of whether the President may sometimes deem the Senate to have consented to an appointment without a formal confirmation vote. There are two (nonexclusive) versions of this argument—one more general, the other more specific.

The more general argument is somewhat similar to Lawrence Lessig and Cass Sunstein's influential argument that the Constitution gives the President broad powers to direct and control the administration, even though—on Lessig and Sunstein's reading of the historical materials—the Constitution was not originally understood as granting the President such powers.<sup>99</sup> Lessig and Sunstein make a “living Constitution” argument: they emphasize that under modern conditions, particularly in light of the massive expansion of the federal administrative state, the core virtues that the Framers associated with the President—energy, accountability, and speed—require a stronger and more centralized executive than the Framers envisioned.<sup>100</sup> So too, one could argue, the expansion of the federal administrative state requires giving the President more power to staff key executive branch positions than was required in an earlier period. Again, the argument here is not that changing circumstances allow the President to disregard the clear meaning of the Constitution. Indeed, as I have tried to establish, nothing in my proposal contradicts anything explicit in the text or original understanding; my argument is less bold than Lessig and Sunstein's in that respect. Rather, the claim is that past historical practice and understanding do not necessarily settle constitutional meaning when the surrounding circumstances—particularly the role and responsibility of the federal executive branch—have changed so drastically.

The second, more specific, and probably more important “changed circumstances” argument focuses on the deterioration of Senate norms

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98. See Seth Barrett Tillman, *Noncontemporaneous Lawmaking: Can the 110th Senate Enact a Bill Passed by the 109th House?*, 16 CORNELL J.L. & PUB. POL'Y 331, 342 (2007) (“[H]istory only ratifies one of a number of ambiguous meanings of a constitutional provision, if the asserted meaning was actually contested and the non-prevailing institution acquiesced or otherwise adopted the practice.”). *But see* Aaron-Andrew P. Bruhl, *Against Mix-and-Match Lawmaking*, 16 CORNELL J.L. & PUB. POL'Y 349, 361-62 (2007) (arguing that the failure of political actors ever to attempt something that might seem expedient is valid evidence of a widespread understanding that such action would be constitutionally impermissible).

99. See Lessig & Sunstein, *supra* note 17, at 12-42. Other scholars have challenged Lessig and Sunstein's interpretation of the original understanding, *see, e.g.*, Calabresi & Prakash, *supra* note 81, at 599-635, but that disagreement is not relevant here.

100. See Lessig & Sunstein, *supra* note 17.

regarding confirmation votes on key executive branch officials.<sup>101</sup> Although it is true that historically the President has never attempted to appoint a senior official without a Senate confirmation vote, it is also the case that historically the Senate operated pursuant to norms that required confirmation votes, perhaps not on all nominees, but certainly on cabinet officials and other senior officers of the executive branch.<sup>102</sup> So, it is reasonable to suppose that one historical norm—that the President would never appoint an official without express Senate consent in the form of a confirmation vote—was dependent on (and presumed the existence of) another norm—that a Senate minority would not delay indefinitely votes on the most critical executive branch appointments. The latter norm may not be constitutional (though some have suggested that it might be<sup>103</sup>), but its historical existence and recent decay ought to influence the interpretive weight we attach to historical adherence to the former norm. We especially ought to question whether the former norm ought to be deemed to have *constitutional* status even if the constitutional text and other indicia of meaning are ambiguous.

For these reasons, although it is true that longstanding historical practice would seem to imply that “Advice and Consent” in the Appointments Clause entails an affirmative confirmation vote, this practice does not foreclose the possibility that this language could now be interpreted to allow tacit consent to be inferred through prolonged Senate inaction on the most senior executive branch appointments. If the pragmatic arguments sketched in Part I are strong enough for breaking with the traditional understanding, then the tradition itself should not pose an insurmountable barrier.

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101. See *supra* note 12 and accompanying text.

102. See Ross, *supra* note 86, at 1133-43 (providing a history of the appointments process); *supra* note 12 and accompanying text.

103. See, e.g., John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL'Y 181, 197-99 (2003); Douglas W. Kmiec & Elliot Minberg, *The Role of the Senate in Judicial Confirmations*, 7 TEX. REV. L. & POL. 235, 252, 262 (2003); Renzin, *supra* note 21, at 1751-52. Note in this regard that this argument, like mine, proceeds from the premise that there are two norms that ought to go together: the norm that the President only appoint officials whom the Senate confirms in an up-or-down vote, and the norm that the Senate actually hold such votes for all (important) presidential nominees. The sources cited above presume that the first norm is constitutionally required, and argue that the second norm—which has eroded—should therefore also be constitutionally required. My approach is the mirror image: because the second norm has eroded, the first norm should as well, and should not be construed as constitutionally required. Nor should historical practice be deemed dispositive with respect to the constitutional question, in light of the fact that the historical practice emerged primarily when the latter norm, though nonconstitutional, was firmly in place.

### III. SOME LIMITS AND CAVEATS

Even if one were to accept the pragmatic and interpretive arguments that I have advanced in Parts I and II, a number of open questions remain regarding the appropriate doctrinal response. Under what circumstances should Senate silence be construed as tacit consent for Appointments Clause purposes, and when should express Senate consent be required? Here I consider five questions regarding the scope of the proposal that silence can indicate consent: (1) whether this principle should also apply to judicial appointments; (2) to which executive branch offices the principle should apply; (3) whether the principle applies when statutory law provides for the appointment of acting or interim officers to fill the position; (4) whether silence should be read as consent only when a nominee's supporters make a good faith effort to secure a floor vote; and (5) how much time must pass before the Senate's silence can be read as tacit consent. Below I offer my provisional answers to these questions, but anyone who accepts the core argument in Parts I and II might reasonably disagree with my resolution on each of these questions. This Part is included for the sake of rounding out the contours of the doctrinal proposal, but nothing here is essential to the basic points I wish to make.

First, I would not extend this proposal to judges; for judicial appointments, it would make more sense to read "Advice and Consent" as requiring an affirmative confirmation vote. The reason for this limitation is principally pragmatic. Federal judges, once appointed, cannot be removed (except in extreme circumstances), while executive branch appointments change with the election of a new President (and often before then).<sup>104</sup> For that reason, there is a strong pragmatic case for preserving a supermajority requirement for judicial appointments. Furthermore, as noted in the Introduction, Senate holdups of judicial nominations are typically due to objections to the ideology or qualifications of those particular nominees, rather than an interest in preventing the Article III judiciary from performing its functions. Indeed, even those senators opposed to the President's political agenda and judicial philosophy have an interest in the continued functioning of the Article III courts, and this creates incentives to negotiate and compromise on judicial appointments—as has happened several times in recent years.<sup>105</sup> Thus, despite the frequency with which the Senate refuses to act on certain judicial

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104. That general statement is not entirely accurate for independent agencies headed by directors or commissioners who serve fixed terms, but in practice each President has ample opportunity to replace such officials, and there is regular turnover.

105. See, e.g., Charles Babington & Shailagh Murray, *A Last-Minute Deal on Judicial Nominees*, WASH. POST, May 24, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/23/AR2005052301970.html>.

nominations, this obstructionism seems not to have impeded the overall functioning of the federal courts (though it has certainly increased caseload strain, especially at the trial court level).<sup>106</sup> This is not always the case with executive agencies, where the opposition may be perfectly happy to cripple the agency by refusing to confirm senior leaders.<sup>107</sup> As discussed in Part II, these pragmatic arguments may be cast in constitutional terms by emphasizing that “Advice and Consent” in the Appointments Clause should be read to produce as much harmony as possible with the Take Care Clause. It is the responsibility of the President, not Congress, to “take Care that the Laws be faithfully executed,”<sup>108</sup> and this justifies an unusual (but textually permissible) reading of “Consent” in the context of appointing the most senior executive branch officials, who act as the President’s surrogates. Article III judges, though appointed by the President, perform a different constitutional function, and the Take Care Clause has little bearing on how one should interpret the process for judicial appointments.<sup>109</sup>

Second, I would limit the proposal to senior executive officers—cabinet secretaries, agency heads, commissioners, senior deputies, and ambassadors<sup>110</sup>—who are indispensable to carrying out the core programs and missions of the executive branch. The argument here is again partly pragmatic and partly derived from reading the Appointments Clause in conjunction with the Take Care Clause. There are a great many executive branch positions that require Senate advice and consent (either under the Appointments Clause or by statute). Other pressing business may prevent the Senate from taking up all of these nominations in a timely fashion, and there might be concern about a President strategically inundating the Senate with more nominations than it can process if silence were construed as consent in all cases. Furthermore, for nominations to certain offices—the ones that are more like patronage

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106. See *supra* note 1 and accompanying text.

107. See *supra* text accompanying notes 2-5.

108. U.S. CONST. art. II, § 3.

109. One could imagine an extreme case in which this might not be true. For example, suppose that as a result of Senate intransigence, there were so many judicial vacancies that the courts could not function, and the President could not execute the laws because there were too few courts to handle the enforcement activities initiated by the executive. In that case, one could perhaps construct a scenario in which the President’s obligations to take care that the laws are faithfully executed might conceivably justify a reading of the Appointments Clause that would enable the President to circumvent a recalcitrant Senate minority. I do not, however, take up that possibility here.

110. In the case of ambassadors, the case for inferring Senate consent from silence is buttressed not only by implications from the Take Care Clause, but also by the President’s long-acknowledged authority as the voice of the nation in foreign affairs.

positions—the objection of a small number of senators may be a more legitimate reason to hold up the nomination. Vacancies in these less important positions, while surely an inconvenience, are unlikely to deprive the White House, or any particular agency or department, of the capacity to fulfill its core functions.<sup>111</sup> As was the case with judicial appointments, then, the Take Care Clause is unlikely to be implicated with respect to these more junior appointments, and there is not as strong a case for deviating from historical practice by reading “Consent” to include tacit as well as express consent.<sup>112</sup>

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111. As with the judiciary, one can imagine situations in which widespread vacancies even in more junior executive officer positions do significantly impede the President’s ability to carry out the functions of the executive branch, even if the most senior positions are filled. See *supra* note 109. (For evidence that widespread vacancies, even at more junior levels, can undermine the performance of the executive branch, see O’Connell, *supra* note 2.) If so, this might justify a more expansive version of my proposal. In this Essay, however, I defend only the more limited version of my proposal, restricted to senior positions.

A related difficulty here is identifying the senior executive positions to which my proposal should apply. As is true with many legal rules that try to draw categorical distinctions of this sort, although there are some positions that should clearly be covered and others that clearly should not, there is a potentially large gray zone in between. But that is a generic problem, and one to which I have little new to contribute. My instinctive preference, in this context, is to use a relatively simple categorical rule based on hierarchy within the relevant department or agency, rather than trying to make finer distinctions based on how important the agency is to the overall functioning of the executive branch (for instance, by trying to decide which ambassadorships are critical to U.S. foreign policy and which are more like ceremonial positions given to loyal supporters of the President).

112. My tentative suggestion to allow silence to imply consent only in the case of senior executive appointments, but not in the case of judicial or more junior executive appointments, concededly creates an interpretive anomaly, in that the term “Consent” as used in the Appointments Clause means two different things depending on the officer being appointed. This is admittedly awkward, but it is not unheard of for the same term (in the same clause) to mean somewhat different things. For example, the Fifth Amendment states that “[no] person [shall] be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself.” U.S. CONST. amend. V. (The former provision is the Double Jeopardy Clause; the latter is the Self-Incrimination Clause.) Courts have construed the same word—“person”—to include corporations for purposes of the Double Jeopardy Clause but not for purposes of the Self-Incrimination Clause, despite the fact that both Clauses take the same (single) use of the word “person” as their subject. See Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 956 (2000) (citing *E. Enters. v. Apfel*, 524 U.S. 498, 557 (1998) (Breyer, J., dissenting)). While this sort of differentiation is unusual and generally disfavored, it may sometimes be justified. Indeed, Akhil Reed Amar—one of the leading expositors of an “intratextualist” methodology that strives to give words or phrases consistent meaning throughout the Constitution, see Amar, *supra* note 50—has argued specifically (though in relation to a somewhat different question) that the phrase “Advice and Consent” in the Appointments Clause may mean different things depending on the official being appointed:

The above discussion naturally implicates a third question: When filling an office is essential to carrying out an agency's—and the President's—core functions, but the President has the ability to appoint an “acting” officer to fill that position when Senate confirmation is pending, may the President still constitutionally construe Senate inaction as tacit consent to the appointment? After all, when the President may designate an acting secretary, commissioner, or agency head who can exercise the powers of the office on a temporary basis, it is harder to make the case that the President must be able to make a permanent appointment to that office in order to “take Care that the Laws be faithfully executed.”<sup>113</sup> That said, under the existing statutory framework (the Vacancies Act, amended in 1998 by the Federal Vacancies Reform Act<sup>114</sup>), there are a number of important limits on the President's ability to appoint acting officials. First, the wording of the Vacancies Act only permits the appointment of an acting officer if the previous officeholder dies, resigns, or is sick or absent.<sup>115</sup> This has been understood to mean that for new agencies, like the CFPB, the President has no power to appoint an acting agency head because there was no predecessor.<sup>116</sup> Second, the Vacancies Act does not apply to the

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The Constitution gives the Senate the power of Advice and Consent, as to both Cabinet officials and Supreme Court Justices. But these words sensibly mean different things in these two contexts. Constitutionally, Cabinet officers are members of the President's team; Justices are not. Thus, the Senate historically gives more deference to the President's nominees when Cabinet officers (who will leave when the President leaves) are at stake, than when Justices (who will be in place for life) are involved. The same words—“advise [sic] and consent”—must be understood in different ways when they interact with different clauses with different structural implications.

Akhil Reed Amar, *On Prosecuting Presidents*, 27 HOFSTRA L. REV. 671, 673-74 (1999) (footnotes omitted). *But see* Jonathan Turley, “From Pillar to Post”: *The Prosecution of American Presidents*, 37 AM. CRIM. L. REV. 1049, 1058-61 (2000) (disputing the plausibility of Professor Amar's interpretive claim).

The limitation of my proposal to senior executive officers, as noted in the text, is based primarily on pragmatic arguments and structural implications from the Take Care Clause, which in my view probably outweigh the interpretive anomaly created by allowing Senate silence to imply consent for some but not all appointees covered by the Appointments Clause. That said, as noted at the beginning of Part III, this limitation is not critical to my central argument, and it would certainly be plausible to allow Senate silence to imply consent in all cases.

113. U.S. CONST. art. II, § 3.

114. *See* 5 U.S.C. §§ 3345-3349d (2006).

115. *See id.* § 3345(c)(2).

116. *See* Spencer Bachus, Op-Ed., *Obama Should Not Appoint Consumer Financial Protection Bureau Head in Recess*, POLITICO (D.C.), May 27, 2011, <http://www.politico.com/news/stories/0511/55771.html>.

commissioners of multimember independent agencies like the NLRB.<sup>117</sup> Third, the amount of time that an official can serve in an acting capacity is limited.<sup>118</sup> Fourth, as Anne O’Connell and others have determined, on average agencies may be much less effective when they are headed by acting or interim leaders, for a variety of interrelated political, institutional, and psychological reasons.<sup>119</sup> For these reasons, my tentative view is that even if the Vacancies Act (or some similar statutory provision) provides for the appointment of an acting official to carry out the functions of a vacant office on an interim basis, the President should still be able to treat the Senate’s failure to act on the President’s nominee for that office within a reasonable period of time as implicit consent. But it might also be possible, under some circumstances, to conclude that statutory provisions for acting officials are sufficient such that such an interpretation of the Appointments Clause is not essential to preserve the President’s ability to take care that the laws are faithfully executed. My proposal is on its surest footing in those cases where there is no statutory provision whatsoever for the appointment of an acting official to assume the duties of the office.

Fifth, my proposal includes the caveat that Senate inaction may be construed as consent to an appointment only if the supporters of the nominee in the Senate make good faith efforts to secure an up-or-down vote on that nominee (or, more modestly, that there not be evidence that the nominee’s supporters were the ones preventing opponents from forcing an up-or-down vote). This qualification is designed to avoid a situation in which the President’s Senate allies game the system in order to secure the appointment of a nominee who would be voted down if the full Senate had the opportunity to vote. In other words, we want to avoid a situation in which the President nominates someone who is unacceptable to a majority of senators, but the President’s allies in the Senate prevent a vote, allowing the President to claim that the Senate’s inaction constitutes consent to the nomination. Such gaming would be hypothetically possible under an unqualified rule that allowed

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117. See 5 U.S.C. § 3349c(1)(a); Catherine L. Fisk, *The Role of the Judiciary When the Agency Confirmation Process Stalls: Thoughts on the Two-Member NLRB and the Questions the Supreme Court Should Have, but Didn’t, Address in New Process Steel, L.P. v. NLRB*, 5 FLA. INT’L U. L. REV. 593, 610 (2010); O’Connell, *supra* note 2, at 933 n.103.

118. See 5 U.S.C. § 3346. That said, according to this statutory provision, a duly appointed acting official can continue to serve in that capacity indefinitely while the (first or second) nomination for the office is pending in the Senate, so the time limitation on acting officials under the Vacancies Act is a less important concern than the other limitations discussed in this paragraph.

119. See O’Connell, *supra* note 2, at 937-46. *But see id.* at 946-50 (discussing some potential benefits of acting officials).

inaction to be construed as consent. But it would not be all that hard to police and eliminate if courts refused to credit such claims when it is plain that the President's Senate allies were the ones preventing a vote from taking place.

Sixth, a difficulty with my proposal is that it requires some judgment as to how long the President must wait before construing Senate inaction as consent. For those who prefer clear rules, the best approach would be to pick a number, like 90 days or 120 days or 210 days. I would advocate something relatively short, like ninety days, but reasonable people could disagree. For those who prefer standards, one could simply frame the relevant principle as the notion that silence can be interpreted as consent after a "reasonable time," where it would be up to the courts to determine what counts as "reasonable" on a case-by-case basis, and it would be up to the President and senators to make educated guesses (and to take calculated risks) when deciding what to do in the case of an impasse. My instinct is that the interest in certainty and predictability with respect to the powers of executive officers militates in favor of a rule—something like ninety days—despite the fact that such a rule is inevitably somewhat arbitrary and cannot be derived in any direct way from the constitutional text. That said, because the primary aim of this Essay is to make the case that Senate inaction can in some circumstances be construed as tacit consent, rather than to make another contribution to the ongoing and probably irresolvable rules/standards debate, I will not discuss this issue further. If one finds the constitutional claim I advance in this Essay persuasive, one could implement that understanding via a rule or a standard, or some combination.

## CONCLUSION

This Essay has argued that under some circumstances, the President should be able to appoint senior executive branch officers without a Senate confirmation vote. The pragmatic justification for this proposal derives from the concern that Senate obstruction of executive branch appointments seems to be getting out of hand. Admittedly, there are other ways one might address this concern, such as sanctioning more aggressive presidential use of the recess appointment power,<sup>120</sup> reviving the so-called "nuclear option" (that is, the elimination of the Senate filibuster through a rule change that would arguably require only a simple majority of senators to approve<sup>121</sup>) for senior executive

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120. See *supra* note 15 and accompanying text.

121. See, e.g., BETSY PALMER, CONG. RESEARCH SERV., RL 32684, CHANGING SENATE RULES: THE "CONSTITUTIONAL" OR "NUCLEAR" OPTION (2005); Michael J. Gerhardt, *The Constitutionality of the Filibuster*, 21 CONST. COMMENT. 445, 474 n.82 (2004); Martin B. Gold

appointments, or making other changes to Senate rules. But these proposals have their own difficulties (both political and legal), and it seems worth considering whether there might be a cleaner, more direct response to the problem: the simple idea that Senate silence can in some cases be construed as consent for constitutional purposes.

I am under no illusions that the President is likely to pursue this route any time soon, both because its confrontational nature makes it politically risky, and also because, notwithstanding the arguments I have tried to develop in this Essay, as a predictive matter, the Supreme Court might well reject such a move as unconstitutional. Nonetheless, it might still be beneficial if the argument suggested above came to be seen as at least a plausible and legitimate constitutional position—one that the Supreme Court *might* accept—even if (perhaps especially if) the President never actually forced the issue. In the ongoing bargaining between the White House and the Senate over nominations, the idea that there is an extreme—but legally plausible—option that the President might invoke if Senate obstruction becomes intolerable may induce the Senate to become somewhat more willing to compromise. This is all the more true if, as seems likely, the probability that the Court would seriously entertain the sort of constitutional argument advanced here rises as the Senate’s obstructionism appears more extreme and unreasonable. The aspiration of this Essay is to normalize and legitimize a seemingly radical constitutional argument in favor of what seems like a dramatic expansion of presidential power, precisely because the mere possibility that the President might successfully invoke this power could stem the erosion of traditional norms of Senate deference to senior executive branch appointments, and restore a more sensible and balanced politics of appointment.

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& Dimple Gupta, *The Constitutional Option To Change Senate Rules and Procedures: A Majoritarian Means To Overcome the Filibuster*, 28 HARV. J.L. & PUB. POL’Y 205 (2005); John C. Roberts, *Majority Voting in Congress: Further Notes on the Constitutionality of the Senate Cloture Rule*, 20 J.L. & POL. 505 (2004).