(/legal-commentary/akhil-amar-and-vikram-amar-archive)

THE GROUND RULES OF THE APPOINTMENTS GAME: Understanding The Structure Of Nominations And Confirmations

By AKHIL REED AMAR AND VIKRAM DAVID AMAR
(/legal-commentary/akhil-amar-and-vikram-amar-archive)

Friday, Jan. 11, 2002

As Salt Lake City readies for the Olympics, another high-stakes game is afoot in Washington, DC. Call it the appointments game, in which the President nominates persons to high federal office, and the Senate decides whether and when to confirm the nominees.

The game has heated up in recent weeks. On December 31, Chief Justice William Rehnquist issued a report chiding the Senate for its delay in confirming President Bush's nominees to lower federal courts. Pundits and editorialists are also scolding the Senate for bottling up the nominations of various lower level executive branch appointees-most prominently, Eugene Scalia (son of you know who).

Some writers, including Victor Williams in Findlaw's *Writ* (/legal-commentary/why-president-bush-should-use-recess-appointments-to-fill-wartime-vacancies.html), have urged the President to sidestep Senate hurdles by making temporary "recess appointments" whenever the Senate leaves town. Other opinion leaders have condemned the idea, and Senate Majority Leader Tom Daschle and Minority Leader Trent Lott have sounded cautionary notes. In late December, the President announced that he was mulling the matter; and this week, with the Senate adjourned, Bush used his recess appointment power to name John McGaw to a new subcabinet position overseeing transportation security.

To evaluate all this, citizens need to understand the basic ground rules of the appointments game. We hasten to add that, by calling appointments a "game," we seek not to trivialize the principals and principles involved, but rather to highlight the range of permissible moves and countermoves that give the appointments process a coherent structure.

These ground rules-deduced from the Constitution's letter and spirit and from the institutional practices that have emerged over the years-define what is fair play and what is out of bounds.

Rule One: Appointments Are Not the only Game in Town

The basic constitutional text governing appointments appears in Article II, Section 2 of the Constitution, which provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint" various high-level executive and judicial officers.

Congress by law can allow "inferior" officers to be appointed without Senate confirmation; and the President may also fill "Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of [the Senate's] next Session."

This basic text does not exist in a vacuum. Rather it is nested in a Constitution that has much to say about Presidents and Senators in other contexts, including legislation, treatymaking, and constitutional amendment.

The appointments game is thus one of many interrelated games governed by the Constitution. Just as a team that overuses its ace reliever in game 1 of the World Series might end up losing later games as a result, so too an overly aggressive President might end up winning an appointments game only to lose more important legislative games down the road.

For example, a President who uses recess appointments too vigorously risks offending Senatorial barons whose support the President may need for other parts of his agenda.

Not all recess appointments pose this risk. If an office falls vacant when the Senate is away on a long break, and is filled by a nominee believed to be likely to win easy confirmation when the Senate returns, such a recess appointment fits the obvious spirit of Article II and squares with past practice. (This week's recess appointment of McGaw approximates this description. Though the Senate will be back in session soon, there is an urgent need to fill the transportation-security position; and McGaw had already won the support of the key Senate committee, even though the full Senate has yet to vote on him.)

But at the other end of the spectrum, consider a long-vacant position where the Senate has pointedly declined to confirm a controversial presidential nominee. If the President then tries to ensconce this nominee when the Senate leaves town on a short break, key Senators might cry foul: Rarely has the recess appointments clause been deployed in this type of situation so as to defy the Senate's partnership in the general appointments process.

Sometimes, a President would be wise to play appointments hardball even at the risk of angering Senators. Some victories, however ugly, can generate positive political momentum for a President's overall agenda. If the Senate's reasons for resisting a nominee are utterly discreditable, an aggressive recess appointments strategy can raise the stakes and put the issue in the spotlight for all the spectators to see.

Those spectators-the American people-are also the game's ultimate referees and scorekeepers, with the ability to penalize inept or unfair players at the next election.

Rule Two: Executive and Judicial Appointments are Very Different Ballgames

The language of Article II, read in isolation, might seem to suggest that all major (non-inferior, non-recess) appointments are identical, governed by a uniform "advice and consent" standard. But here too, it makes sense to construe the clause in light of the rest of the Constitution, and traditional institutional practice.

The rest of the Constitution identifies key differences between executive officers serving the President in Article II and judicial officers independent of the President in Article III. Executive officers answer to the President (quite literally, in the Article II, section 2 Opinions Clause) and will typically leave when he leaves. A President is generally entitled to have his branch filled with his people, whom he directly oversees. If these underlings misbehave, voters can hold the President responsible.

Federal judges (especially Supreme Court Justices) are different. They do not answer directly to the President. They are not part of his Administration. When he leaves his office, they will stay in theirs.

Because of these differences, the Senate has always given a President more leeway in picking his Cabinet than in picking Justices. The pattern began in 1795 when the Senate rejected George Washington's pick for Chief Justice, John Rutledge. By 1835, the Senate had stymied four Supreme Court nominees, but had yet to nix any Cabinet nominees.

Since 1960, although Presidents have nominated roughly ten times as many persons to the Cabinet as to the Supreme Court, there have actually been fewer failed Cabinet nominations than failed Court nominations. (Compare John Tower, Zoe Baird, and Linda Chavez on the Cabinet side with Abe Fortas, Clement Haynsworth, G. Harrold Carswell, Robert Bork, and Douglas Ginsburg on the Court side.)

Thus it is unsurprising that the Senate moved quickly a year ago to confirm Bush's Cabinet nominees in record time, but has proceeded much more slowly in processing his judicial nominees.

The key structural distinction between executive and judicial nominees further illuminates the current recess appointment debate. Whatever one's views on recess appointments for executive jobs, in which mid-level appointees (like McGaw) would be subject to Cabinet and Presidential control, controversial recess appointments to the judiciary would raise special problems.

Our Constitution generally envisions independent federal judges whose life tenure allows them to resist the other branches when the need arises. A probationary judge with an exploding commission and doubtful confirmation prospects would be uncomfortably dependent on the whims of leading politicians. If such a judge ruled against the government, she would risk losing her job. (The President could simply withdraw her nomination for the permanent judgeship, or the Senate could torpedo her at will.)

Recess appointments for judges make more sense if they are limited to nominees highly likely to be confirmed, or to very distinguished elders who refuse to be considered for permanent judgeships and are merely filling in until permanent replacements can be agreed to.

Rule Three: The Foul Lines are the Same for Both Sides

If, as we argue below, the President may properly consider a judicial candidate's overall ideology and predicted performance in office in deciding whom to nominate, the Senate may likewise properly consider these factors in deciding whether to confirm.

Nothing in the Constitution's text or structure says that the President may consider judicial ideology while the Senate may consider only personal character and professional competence. In general, the Appointment Clause text envisions a partnership in which the President goes first and the Senate goes second, but both may consider the same general factors.

Elsewhere in the Constitution, the actor who goes second is generally entitled to consider the same things as the one who went first. In treatymaking, the Senate may weigh the same things as the President who proposed the treaty; in lawmaking, the President is free to veto a bill based on the same broad range of policy factors that the Congress considered when enacting it; and in the constitutional amendment process, the states acting at the end have the same broad discretion as the Congress acting at the beginning.

Institutional practice supports this reading of text and structure: Senators have often (sometimes openly, sometimes quietly) gone beyond nominees' character and credentials to consider judicial ideology and likely judicial voting patterns.

Rule Four: He Who Goes First Often Laughs Last

As with chess and tennis, the appointments game gives the first mover an advantage. The President defines the appointments agenda by going first, forcing the Senate to confront not merely an abstract ideology by an actual person who embodies that ideology. Voting down a real person is harder than voting down an abstract idea or bill, especially if the person is exceptionally articulate or charming, or has a compelling biography.

Even if the Senate succeeds in defeating a nominee, there is no guarantee that next nominee will be better (from its perspective). The President may threaten to send up a second nominee who may be worse but harder to oppose, politically. (The President might be bluffing, but Senators cannot always be sure.)

If a President has a slight preference for Smith over Jones, that slight preference may suffice to give Smith the nomination. But if the Senate has a slight preference for Jones over Smith, they should hesitate before rejecting Smith; there is no guarantee that they will end up with Jones.

Rule Five: The President has Home Field Advantage

The President's recess appointment power compounds this first-mover advantage. Presidents live in Washington, DC. Constitutionally speaking, they are always "in session." But Senators must return home every so often; and when they do, they give the President a window to put a nominee temporarily in office.

While there are limits to the proper use of recess appointments, occasions arise when the President can use such appointments at little cost; and the mere threat to use such appointments may sometimes pry out a few extra Senate votes.

Rule Five: One Head Is Better than Two (or One Hundred)

The unity of the President gives him additional advantages.

Even if a single Senator resolves to vote against all nominees falling below the mark of excellence, she cannot be sure that her colleagues will be similarly resolute, or will share her rankings.

Indeed, while the President will typically choose a nominee that he considers best overall, there may be no single nominee that the Senate *as a group* considers superior to all rivals. Each Senator may have her favorite candidate, but the Senate as a whole may be unable to identify a clear favorite. (In fancy game-theory lingo, there may be no Condorcet winner in the Senate.)

Each Senator also tends to care most about nominees from her own state, and appointments in her own substantive field of committee specialization. As a result, each Senator is willing to trade much of her influence on other appointments in exchange for more input on the handful of appointments she cares most about.

As a result, the President is the only actor with his eye on the entire package of appointments, involving nominees from every region and on every subject matter. Also, he and his staff may easily meet with potential nominees behind closed doors; it is harder for the Senators as a group to do this.

Rule Six: Judicial Promises are Out of Bounds

Appointments-even to the judiciary-are part of a political process. In some European countries, judges are picked and promoted by fellow judges. In America, they are picked and promoted by politicians.

But once confirmed, federal judges are to be shielded from further dependence on the political branches. Thus it is generally impermissible for politicians to seek promises from judicial nominees about how they will vote once confirmed. Such promises impermissibly leverage politics past the Article II appointments process into the actual Article III adjudication process, where it has no proper place.

Conversely, those who suggest that judicial ideology should play no role in appointments impermissibly seek to bleach politics out of the place where it does constitutionally belong. Unlike the European model, the American model allows political leaders and voters to weigh more than technical legal competence and personal character in deciding who shall be our judges.

The proper line is one dividing predictions from promises. Presidents and Senators are free to base (and often have based) their decisions on the likely voting patterns of nominees, but may not extract (and typically have not tried to extract) pledges or promises. During the nomination and confirmation process, candidates may be questioned about their past and current legal views and should try to answer candidly; but once confirmed, judges must be free to change their minds when presented with sound legal arguments.

Though the line between prediction and promise is sound in theory, it may be difficult to honor in practice. Is the Senate really capable of having candid conversations about judicial ideology? How might such conversations best unfold?

In our next column, we will try to offer concrete conversational guidelines for constitutionally conscientious Senators confronting judicial nominees with diverse legal backgrounds, from private practice and the government to the academy. In the column after that, we shall exemplify these guidelines and give them a human face by explaining why we strongly support Professor Michael McConnell, who has been nominated by President Bush to sit on the U.S. Court of Appeals for the Tenth Circuit.

Akhil Reed Amar and Vikram David Amar are brothers who write about law. Akhil graduated from Yale College and Yale Law School, clerked for then-judge Stephen Breyer, and teaches at Yale Law School. Vikram graduated from U.C. Berkeley and Yale Law School, clerked for Judge William Norris and Justice Harry Blackmun, and teaches at U.C. Hastings College of Law. Their "brothers in law" column appears regularly in Writ, and they are also occasional contributors to publications such as the New York Times, the Los Angeles Times, and the Washington Post. Jointly and separately, they have published over one hundred law review articles and five books.

BACK TO TOP