

**WHO’S RUNNING THIS PLACE? A COMPARATIVE
LOOK AT THE POLITICAL APPOINTMENT
SYSTEM IN THE UNITED STATES AND
BRITAIN, AND WHAT THE UNITED
STATES CAN LEARN**

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I.	BACKGROUND.....	296	R
II.	INTRODUCTION	299	R
III.	THE UNION JACK	301	R
	A. <i>Primus Inter Pares</i>	301	R
	B. <i>The Written – and Unwritten – Rules of the Game</i>	304	R
	C. <i>Civil Service in High Places</i>	309	R
IV.	THE STARS AND STRIPES	311	R
	A. <i>All the President’s (soon to be) Men</i>	312	R
	B. <i>Tools of the Trade</i>	316	R
V.	ALL IS FAIR IN LOVE, WAR, AND POLITICS	319	R
VI.	IF WE KNEW THEN WHAT WE KNOW NOW.....	321	R
	A. <i>Officer and an Employee</i>	321	R
	B. <i>Hold Up</i>	325	R
VII.	CONCLUSION	327	R

ABSTRACT

The political appointment power represents a power that was, and is, aggregated in Britain, and which was divided in the U.S. through the separation of powers in the Constitution. Today’s political appointment power remains as different between Britain and the U.S. as it always has, but while one’s system is relatively smooth, the other’s is a morass.

Over time, the Prime Minister’s appointment power steadily grew, while the President’s powers have ceded towards the Senate. A combination of fewer political appointees, no “advice and consent” process, and a more professionalized civil service allows the British process to run faster and smoother. On the other hand, an army of political

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appointees, advice and consent, and senatorial holds slow the American process to a crawl. Can this be fixed?

Following Britain, where civil servants hold positions in the highest reaches of government, many politically appointed positions in the U.S. can be turned into non-appointed positions. Moreover, most politically appointed positions in the U.S. do not constitutionally need to be confirmed by the Senate. And along these lines, the senatorial hold procedure gives the Senate a degree of power over the appointments process not given to it in the Constitution.

In comparing the British and U.S. political appointment systems, this note will recommend that the U.S. system can be streamlined and the constitutional balance of power can be realigned by: (1) limiting the Senate's practice of retaining confirmation authority when the Constitution does not require it, and (2) restricting the practice of senatorial holds.

*We live in a political world
Where mercy walks the plank
– Bob Dylan¹*

I. BACKGROUND

It is March 5, 2009, 45 days after President Obama took office,² and over a month since Secretary of the Treasury Timothy Geithner was confirmed.³ The United States is in the middle of one of its worst economic declines. Today, Senator Chris Dodd (Chairman of the Senate Banking Committee) is holding a hearing regarding American International Group Inc (AIG), a major player in the financial crisis.⁴ AIG received bailouts totaling over \$170 billion, so naturally Senator Dodd would like someone from the Treasury Department to appear at the hearing.⁵ One problem – there is no one available.⁶ Why? Well, as one of President Obama's advisors, Paul Volcker, put it “[t]he secretary of the treasury is sitting there without a deputy, without any undersecretaries, without any, as far as I know, assistant secretaries responsible in substantive areas”⁷ And the next day it was reported that Annette Nazareth, who was

¹ BOB DYLAN, *Political World, on OH MERCY* (Sony 1989).

² President Obama took office on January 20, 2009, pursuant to U.S. CONST. amend. XX, § 1.

³ David Cho, *Taking Office at Treasury, Geithner Vows Swift Action*, WASH. POST, Jan 27, 2009, at D1.

⁴ Daniel Wagner, *Understaffed Geithner Can't Keep Up, Critics Say*, ASSOCIATED PRESS, March 5, 2009, available at <http://www.utsandiego.com/news/2009/mar/04/understaffed-treasury-030409/?ap>.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

to be Secretary Geithner's chief deputy, withdrew from consideration.⁸ This problem was not limited to the Treasury Department. Fast-forward six months. On August 19, 2010, President Obama made four recess appointments⁹ to fill positions that had been stuck in the Senate on average 303 days.¹⁰ As of September 10, 2010, the seven-member Federal Reserve Board of Governors had but four members.¹¹

Contrast with Great Britain. On May 6, 2010, Britain had its general election. On May 7, 2010, it became clear Britain had a hung parliament¹² and Conservative Party Leader David Cameron reached out to the Liberal Democrat Party to form a coalition government.¹³ On May 12, 2010 – Prime Minister (PM) David Cameron's first day in office – “[a] procession of [favored] Conservative and Liberal Democrat [Members of Parliament] entered 10 Downing Street to . . . accept control of government departments.”¹⁴ Britain's speedy transition applies beyond the Minister¹⁵ level to include “junior ministers” and “younger policy officials” as well.¹⁶ In less than a week Britain had an election, formed a coalition government, and filled key appointed positions.

⁸ Daniel Wagner, *Treasury Secretary's Choice for Deputy Withdraws*, ASSOCIATED PRESS, March 6, 2009, available at <http://cnsnews.com/news/article/treasury-secretarys-choice-deputy-withdraws>.

⁹ Recess appointments are those made while the Senate is in recess, and “shall expire at the end of their next session.” U.S. CONST. art. 2, § 2, cl. 3.

¹⁰ *Obama Makes Four Appointments, Bypassing Senate*, REUTERS, Aug. 19, 2010, <http://www.reuters.com/article/idUSTRE6715Y020100819> (appointees were the Ambassador to El Salvador, the Undersecretary for Food Safety at the Department of Agriculture, Chief Counsel of Advocacy at the Small Business Administration, and the Assistant Secretary for Public Affairs at the Department of Health and Human Services).

¹¹ Sewell Chan, *Vacancies Strain White House's Goals for Economy*, N.Y. TIMES, Sept. 10, 2010, at A1.

¹² This is where no single party has a majority of seats, which would be required to select a Prime Minister.

¹³ Andrew Porter and Robert Winnett, *General Election 2010: David Cameron Closes in on Deal with Nick Clegg*, THE DAILY TELEGRAPH (London), May 7, 2010, at 1.

¹⁴ Michael White, *Guardian Election Daily: David Cameron Names His Cabinet*, GUARDIAN (May 12, 2010), <http://www.guardian.co.uk/world/audio/2010/may/12/guardian-election-daily-podcast>.

¹⁵ I am using “Minister” here and throughout this note as a generic term for someone “who is a member of the Cabinet, or in sole charge of a ministry outside the Cabinet,” though many Cabinet members are titled otherwise. RICHARD ROSE, *MINISTERS AND MINISTRIES: A FUNCTIONAL ANALYSIS* 18 (1987). It should be noted that Ministers need not be in the Cabinet. *See id.* I also use “junior Minister” to describe all political appointees other than Minister.

¹⁶ David Fontana, *The Permanent and Presidential Transition Models of Political Party Policy Leadership*, 103 NW. U. L. REV. COLLOQUY 393, 396 (2009).

Needless to say, the political appointments process in Britain is worlds away from the process that the United States has constitutionalized and institutionalized. The British system is, in many ways, smoother, faster, and easier than the U.S. system, though in other ways it is much more complicated.¹⁷ As will be explained in detail, *infra* Part III.A., a PM's appointment power is both broader and narrower than a President's. Politics plays a key role in both systems, though in different respects. In Britain, politics defines who is appointable,¹⁸ while in the U.S., politics defines whether and when the Senate will allow an appointee to take office.¹⁹

The polarized nature of the American political appointment process is underscored by the fact that many American institutions "marked a direct reaction against things British, and were adopted by the Americans as a means of avoiding problems which they perceived as prompted by British error."²⁰ The U.S. Constitution carries through it a "fragmentation or diffusion of power, which stands in sharp contrast to the constitutional system that . . . simultaneously evolve[ed] in Great Britain."²¹

¹⁷ The lack of many written rules makes the British appointment system complicated, even though Britain has only a fraction of the political appointees the U.S. has. The U.S. process is slightly more coherent, though involving many more appointees, by virtue of being written down.

¹⁸ The PM has no written or defined appointment powers, just a few legal boundaries. Because of this, politics play a significant role in determining his power. The PM's own party affiliation may dictate to some degree his power of high-level appointment. See Graham P. Thomas, *PRIME MINISTER AND CABINET TODAY* 97 (Bill Jones ed., Manchester University Press 1998) (explaining the Parliamentary Labour Party's Standing Order E, applying only to the Labour Party, which limits the range of the PM's cabinet appointment power to those the party chose – a limit the Conservative Party does not put on itself). Politics also defines who is appointable insofar as the vast majority of appointees come from the Parliament, particularly the House of Commons. See Richard Heffernan, *Why the Prime Minister cannot be a President: Comparing Institutional Imperatives in Britain and America*, *Parliamentary Affairs*, 58 *PARLIAMENTARY AFFAIRS* 53, 65 (2005) [hereinafter Heffernan, *Why the PM*].

¹⁹ U.S. CONST. art. II, § 2, cl. 2.

²⁰ William S. Livingston, *Britain and America: The Institutionalization of Accountability*, 38 *J. POL.* 879, 880 (1976). See also L. Kinvin Wroth, *Quebec, Canada and the First Nations: The Problem of Secession*, 23 *Vt. L. REV.* 709, 711 (1999) ("The principle of separation of powers, so fundamental to the structure of the United States Constitution, was intended by the American Framers as a direct rejection of this British model.").

²¹ Livingston, *supra* note 20, at 880. See also Bernard Schwartz, *Curiouser and Curiouser: The Supreme Court's Separation of Powers Wonderland*, 65 *NOTRE DAME L. REV.* 587, 587-88 (1990) ("In Britain, with its virtual fusion of executive and legislative powers, the separation of powers was . . . only a political theory. In the United States, it was elevated to . . . constitutional doctrine as soon as full separation from the mother country made a new governmental structure necessary.").

Through comparing the British and U.S. political appointment systems, this sharp contrast becomes even clearer, illuminating the separation of appointment powers in the U.S.²² against the backdrop of the aggregation of appointment power in Britain.

II. INTRODUCTION

This section begins by briefly noting a few key differences between the British style of government and that of the United States. These differences are important, but given the scope of this note, justice will certainly not be done to them. In any event, a short mention is necessary to lay a basic foundation.

The differences between the PM and the President are as wide as the ocean that separates them. The PM, since 1867, has almost always been the both the “head of government *and* . . . leader[] of the majority party” in the House of Commons,²³ while the President is head of one branch of government and frequently at party-odds with one or both houses of Congress. The PM’s appointment power has been aggregating in him over time,²⁴ to the point where he now enjoys a complete,²⁵ though politically restricted,²⁶ power to appoint. The President’s power to appoint has not budged since 1787 – and now, as then, the President is at the whim of Congress as to the mode of appointment for inferior Officers.²⁷ The President has an unrivaled power to appoint in the U.S. system, but, because of the Senate, his power is restricted politically *and* legally.

Two related differences are also worth noting here briefly for the time being, and will be discussed more fully *infra*. First, Britain has a far more professionalized civil service. Many officials, who in the U.S. would be

²² The appointments clause delineates roles of power for both the President and Senate. U.S. CONST. art. II, § 2, cl. 2.

²³ Thomas, *supra* note 18, at 51. Thomas also stated that, formally, the monarch appoints the Prime Minister, “the person appointed is the one most likely to command a majority in the Commons.” *Id.*

²⁴ *See id.* at 97 (stating that the Prime Minister’s power of appointment and dismissal has “grown over time” and “has grown in scope” since the monarch stopped substantively making Cabinet appointments).

²⁵ *See id.* (reminding, though, that a “host of political factors . . . must be taken into consideration . . .”).

²⁶ This issue will be discussed in great depth later in this note, but for the time being suffice it to say that the PM has great power to appoint from a select group of people (namely those in the House of Commons), and, depending on which party he is a part of, an even more limited group (for instance, the elected Labour Shadow Ministers).

²⁷ Inferior Officer is explained *infra*, Part VI.A. For inferior Officers, Congress can choose from four appointment methods: presidential nomination with advice and consent of the Senate, presidential appointment, appointment by the Courts of Law, or appointment by the Head of a Department. U.S. CONST. art. II, § 2, cl. 2.

political appointees, are in Britain non-political employees.²⁸ Subsequently, Britain has fewer political appointees than an average incoming law school class, while the political appointees in the U.S. could fill an entire liberal arts college. Britain has just over 100 government appointees while the U.S. has over one thousand subject to Senate approval²⁹ and many more not subject to confirmation. Second, by requiring Senate confirmation when not Constitutionally required, and through the practice of senatorial holds, the Senate exercises a blockade role that has no British equivalent. The House of Commons has no similar tools to control the process, though the political parties hold a degree of non-legal control.

This note will explore the depths of the British and American political appointment systems, in order to illustrate the areas of the British system from which the U.S. can learn, and in order to illustrate the areas of the U.S. system that are capable of reform. Sections III and IV will describe both systems, looking at the key players involved in each country's political appointments (focusing only on agency appointments). Section III will also detail the British civil service. These sections will illustrate two key trends separating the two systems: (1) Britain has a more professionalized civil service, and (2) the British appointment power aggregated over time in the PM, while the U.S. appointment power aggregated over time in the Senate. Section V will then detail the dangers of the U.S. appointment system, and Section VI will provide an analysis of the aspects that are most deleterious and in need of reform – the Senate's practice of retaining confirmation authority when the Constitution does not require it, and the practice of senatorial holds.

Section VII will conclude with two contentions regarding what the U.S. can learn from Britain and how the U.S. can reform the painstaking appointments process. First, Britain has fewer political appointees and instead has many high-ranking positions filled by apolitical civil servants.³⁰ There are many Officers in the U.S. who could be made mere

²⁸ See William Plowden, *The Higher Civil Service of Britain, in THE HIGHER CIVIL SERVICE IN EUROPE AND CANADA: LESSONS FOR THE UNITED STATES* 20, 21 (Bruce L. R. Smith, ed. 1984) (“[L]ower-level appointments (90 percent of the total) are made by individual departments according to rules laid down by the Civil Service Commission,” an independent organization that oversees recruitment); *id.* at 38 (“[A]ll posts up to the very top are open to insiders” in the senior civil service). The highest of these positions are referred to as Permanent Under-Secretary of State. See *infra* note 104, 107-11 and accompanying text.

²⁹ For the British figure, see RODNEY BRAZIER, *MINISTERS OF THE CROWN* 36 n.105 (1997). For the U.S. figure, see Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 917 (2009).

³⁰ Section 14 of the Civil Service Code requires impartiality. Civil Service Code § 14 (2010), available at http://www.civilservice.gov.uk/Assets/civil-service-code-2010_tcm6-37859.pdf. While some lower civil servants are allowed engage in some political activity, the highest ranking civil servants “are prohibited from engaging in

employees (who do not need to be appointed) or inferior Officers (who can be appointed without Senate confirmation) with no resulting harm to the separation of powers. Second, in the political appointment arena, the Prime Minister's powers are ever-changing and seemingly on the rise. On the other hand, the President's powers are unchanged from the 18th Century while the Senate's power is on the rise. Senatorial holds, plainly, are hampering the President's constitutional appointment role, while expanding the Senate's beyond the bounds of the Constitution.

III. THE UNION JACK

Politics is prominent in both the British and U.S. systems of political appointment – but in Britain, politics is the appointment system. There are few laws regarding, let alone Constitutional provisions prescribing, an appointments process. And their laws, as will be illustrated, give a circuitous, if not useless description of the process. The British system is quiet, relatively smooth, but entirely political and centered on the party. Political strength dictates the actual extent of the PM's appointment, dismissal, and reappointment power, and the political strength of others often dictates likely appointees.

The British system is well described by this quote: “The British prime minister . . . is a working politician who has made it to the top. He is the head of government, but he is not the head of state.”³¹ That quote lays the foundation for a system that is grounded in politics – not separated in powers, but self-consciously unified in them. As the head of his party and Parliament, the PM is the politician's politician – something Presidents would never claim. So, with politics as the background, forefront, and everything in between, how does the system work? This section will detail the PM, cabinet, and Parliament, the British appointment system, and the British Civil Service.

A. *Primus Inter Pares*

This section begins by describing the PM and his cabinet for the same reason Willie Sutton robbed banks – because that is where the power (money) is. For Americans familiar with a government based on separation of powers, a primer on the British power structure is necessary to understand the appointment power. The PM appoints his cabinet ministers to be sure, but the cabinet, typically made up of high-ranking Members of Parliament (MPs), is a political powerhouse in and of itself. So how power flows between the PM, his cabinet, and Parliament can dictate

‘national political activities’ ANDRÉ BLAIS, DONALD E. BLAKE & STÉPHANE DION, *GOVERNMENTS, PARTIES, AND PUBLIC SECTOR EMPLOYEES: CANADA, UNITED STATES, BRITAIN, AND FRANCE* 119 (Bert A. Rockman, ed. 1997).

³¹ ANTHONY KING, *THE BRITISH PRIME MINISTER* vii (Anthony King, ed., 2d ed. 1985).

the degree with which the PM can appoint, dismiss, and reappoint his Ministers.

The PM, though often conceptualized as the *primus inter pares*, is, at least in recent history, simply the *primus*. Tony Blair was once quoted as reminding a few MPs that “I’m running the show.”³² To call the PM *primus inter pares* at this point would be akin to calling a baseball manager the same, just because a manager wears the same uniform as his team. The player-manager simply does not exist anymore.³³ In the appointments arena, since the 18th century, when the Monarch stopped appointing cabinet Ministers, the PM’s appointment power has been “grow[ing] over time.”³⁴ The appointments power seemed to accumulate naturally in the PM, rather than elsewhere in Parliament. Though the Monarch retains some power in this area, it is largely ceremonial and honorific at this point.³⁵

It is normal for a PM to spend a decade or more in the House of Commons before ascending – through political prosperity – to the top.³⁶ It is no wonder, then, that the most important tool a PM can have is none other than “considerable political capital.”³⁷ This is not entirely different from a President, but even a President with no political capital has a set term and set powers in the Constitution. With no political capital, the PM may find himself without a job.³⁸ One author described the PM’s power and constraints as such: “prime ministers are never free to do everything they would wish To enhance their authority prime ministers need to exercise considerable power.”³⁹ If that seems somewhat contradictory

³² Lynda Lee-Potter, *I Am An Emotional Person, But Cherie Is Very Tough With Me If I Get Down*, DAILY MAIL (London), Apr. 17, 1998, at 16.

³³ On an unabashedly tangential note, there has not been a player-manager in baseball since Pete Rose in 1986. See Andrew Zercie, *What Happened to the Player-Manager in Baseball?*, BLEACHER REPORT (June 4, 2009), <http://bleacherreport.com/articles/192261-whatever-happened-to-the-player-manager-in-baseball>.

³⁴ Thomas, *supra* note 18, at 97.

³⁵ The Monarch has the formal power to approve appointments, though this is rarely, if ever, exercised. See Guy I. Seidman, *The Origins of Accountability: Everything I Know About the Sovereign’s Immunity, I Learned from King Henry III*, 49 ST. LOUIS U. L.J. 393, 459 (2005) (noting that the Monarch’s functions are limited essentially to signing executive documents and that the current conventions limit her discretion).

³⁶ Richard Heffernan, *Prime Ministerial Predominance? Core Executive Politics in the UK*, 5 BRIT. J. POL. & INT’L REL. 347, 351 (2003) [hereinafter Heffernan, *Prime Ministerial Predominance*] (noting Margaret Thatcher spent 20 years in the House of Commons, while John Major spent 11).

³⁷ *Id.*

³⁸ See *id.* at 354 (quoting John Major, “every leader is leader only with the support of his party,” and quoting Margaret Thatcher, “a prime minister who knows that his or her cabinet has withheld its support is fatally weakened.”).

³⁹ *Id.* at 349.

and circular at the same time, it is. What the British system giveth, the British system can containeth, unless the PM has the political power to taketh. As British Conservative politician and former Chancellor of the Exchequer (Chancellor)⁴⁰ Nigel Lawson said, “the power of the Prime Minister does vary from Prime Minister to Prime Minister, and perhaps it also varies according to the political strength that a particular Prime Minister has at a given time.”⁴¹ Not every PM has an equal interest or ability to take power. PMs Thatcher and Blair had the desire and political strength to take, whereas PM Major lacked political strength.⁴² This is similar to Presidents – some come into office on a wave of great political strength, while others do not. The difference, again, is that a PM *needs* political support, while a President *wants* political support.

Beyond general public political support, the PM needs political support from his cabinet, which is typically made up of high ranking MPs who were either elected by the party (in the Labour Party) or most likely in line for the PM to appoint (in the Conservative Party).⁴³ Ministers naturally have power to influence and a “range of tactics” to do so “from threats of resignation, to building coalitions, to leaks of information to defeating the Prime Minister”⁴⁴ Even the powerful Margaret Thatcher found herself essentially forced out in part by cabinet colleagues.⁴⁵ Thatcher recognized that the PM comes with natural authority, putting the position above all others, but a PM without cabinet support “is fatally weakened.”⁴⁶ She needed support of her cabinet to have “the real authority to govern.”⁴⁷ In the U.S., the President does not need any measure of support from his cabinet to have authority to govern because

⁴⁰ Similar to the Secretary of the Treasury, but more powerful. *See, e.g.*, MARTIN J. SMITH, *THE CORE EXECUTIVE IN BRITAIN* 149 (1999) (describing the power one Chancellor, Gordon Brown, had, including “control over key aspects of social policy”).

⁴¹ *Id.* at 73.

⁴² *Id.* at 78.

⁴³ *See* BRAZIER, *supra* note 29, at 58 (noting that in recent history, it is common for a Conservative PM to appoint most of his Shadow Ministers). Shadow Ministers are described *infra*, Part III.B.

⁴⁴ SMITH, *supra* note 40, at 34. And for political reasons, it is hard to dismiss a powerful Minister. *See infra* notes 51-52.

⁴⁵ Heffernan, *Prime Ministerial Predominance*, *supra* note 36, at 354. *See also* SMITH, *supra* note 40, at 97 (“Thatcher was forced to resign because she failed to recognize her dependency on colleagues within the core executive [R]ather than building alliances with her colleagues she chose to ignore them.”).

⁴⁶ SMITH, *supra* note 40, at 79 (quoting Margaret Thatcher).

⁴⁷ *Id.* (quoting Margaret Thatcher).

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cabinet department heads have no constitutional authority,⁴⁸ while the President has a constitutionally guaranteed measure of authority.⁴⁹

What makes the British balance of power so interesting then is that “[i]f a Prime Minister wants to exercise power then he or she is dependent on his or her colleagues,” and, simultaneously, “Ministers need the Prime Minister’s patronage and support.”⁵⁰ So while ministers owe their position to the PM, the PM is well aware that the extent of his power is owed in part to his cabinet, built of powerful MPs. During Tony Blair’s tenure, he appointed Gordon Brown, a powerful MP in the same party, as Chancellor. This was done in part because “Brown agreed not to challenge Blair for the leadership of the [Labour] Party,” meaning “Blair owe[d] his position, to some extent, to Brown.”⁵¹ Thatcher recognized as well that she was well within her power to “sack” Chancellor Nigel Lawson for pushing policy positions directly contrary to hers, but did not because of his political clout and because she was dependent on him for policy support.⁵² Thus, a PM may tend to appoint powerful MPs to powerful positions because they seem (ironically) more likely to challenge a PM, and with the collateral ironic effect that it is harder to account for them.

This is undoubtedly over-simplistic. A successful Chancellor, with a range of authority and power over the treasury, will rarely be challenged by a PM.⁵³ The balance of power between the PM, powerful MPs, and cabinet ministers in general is surely a more complex story. Surely, too, a PM’s power is derived from numerous other factors, like public and party support, and policy successes and failures. What is clear is that the balance of power between a PM, powerful MPs, and the cabinet, or those likely to serve in the cabinet, can determine a PM’s political appointment flexibility. Moreover, the PM must work to maintain a measure of appointment power that the President has secured by the Constitution.

B. *The Written – and Unwritten – Rules of the Game*

The PM appoints cabinet Ministers and appoints, or delegates to Ministers to appoint, various other, lower level political positions. These include a number of types of “junior Ministers,” like Ministers of State, Parliamentary Under-Secretaries, and Parliamentary Private Secretaries,

⁴⁸ U.S. CONST. art. II, § 2, cl. 2 foresees that there will be executive departments, but does not create any.

⁴⁹ U.S. CONST. art. II.

⁵⁰ SMITH, *supra* note 40, at 85.

⁵¹ *Id.* at 93.

⁵² *Id.* at 94.

⁵³ *Id.* at 149.

as well as Whips.⁵⁴ Those titles are defined in a scattered manner,⁵⁵ though their duties are better detailed.⁵⁶ The term “junior Minister” will be used throughout this note to describe anyone politically appointed below the Minister level, although other technical titles exist.⁵⁷ To give an idea of the number of political appointees in a given department, “[t]he average ministry [has about] four politicians – a Secretary of State [the Minister], a Minister of State, and two Under-Secretaries,” though the typical ministry has more or less.⁵⁸

Junior Ministers differ from “full” Ministers in much the same way the American Deputy and Under Secretaries differ from the Secretary. Junior Ministers “are responsible to the full Minister,” but “are not in charge of a department of state.”⁵⁹ The Minister of State is directly below the department Minister in rank, and, like an American Under-Secretary, has control of a specific aspect of the department.⁶⁰ A Parliamentary Secretary, more typically called a Parliamentary Under-Secretary of State, “includes someone who is a ministerial assistant to a member of the Government” and is “at the bottom of the ministerial pecking-order.”⁶¹ However, any technical differences between Ministers of State and Parliamentary Under-Secretaries of State are not large in practice.⁶² Parliamentary Private Secretaries (PPS) assist mostly Ministers, but may assist junior Ministers as well. They are not members of the government, but are solely private Members of Parliament who serve as PPSs, unpaid, at the discretion of the Minister.⁶³ Even though not technically part of the government, the PM must approve any PPS.⁶⁴ Whips are “incontrovertibly members of the Government” but are wholly different from other junior Ministers in that “[t]heir duties are entirely parliamentary and

⁵⁴ See BRAZIER, *supra* note 29, at 12-15.

⁵⁵ A Minister is defined in the Ministers of the Crown Act of 1975, while the definition of a Junior Minister is inferred in part from the House of Commons Disqualification Act of 1975 and the Ministerial and other Salaries Act of 1975. *Id.* at 23-26.

⁵⁶ The duties of Ministers and Junior Ministers are contained in the *List of Ministerial Responsibilities*. *Id.* at 13; Parliament, *List of Ministerial Responsibilities* (July 2010), available at <http://www.parliament.uk/deposits/depositedpapers/2010/DEP2010-1387.pdf>.

⁵⁷ BRAZIER, *supra* note 29, at 13.

⁵⁸ ROSE, *supra* note 15, at 77-78.

⁵⁹ BRAZIER, *supra* note 29, at 12.

⁶⁰ *Id.* at 14.

⁶¹ *Id.* at 25.

⁶² *Id.*

⁶³ *Id.* at 126.

⁶⁴ *Id.*

party-political, and not departmental at all.”⁶⁵ The PM’s appointment power extends even to approval over a Minister’s advisors.⁶⁶

It is difficult to understand the totality of the political appointment process without first a brief explanation of the Shadow Cabinet,⁶⁷ which for both major British parties, and to a greater extent for the Labour Party, provides a list of individuals likely to be appointed Ministers. The Shadow Cabinet is the party-out-of-power’s leadership, whose members shadow acting Ministers of the party in power and criticize in opposition.⁶⁸ The Shadow Cabinet members will “essentially mimic the policy portfolio of an official cabinet agency.”⁶⁹ Shadow Cabinet members include not only the party’s most powerful, but also include junior officials – those ready to jump into the junior ministerial posts.⁷⁰ The two parties differ substantially in their approaches to the Shadow Cabinet, especially as it affects the appointment power. While the “Conservative leader has unfettered discretion in choosing his Shadow Cabinet,” a “large majority of the Labour Shadow Cabinet is . . . elected” by the party.⁷¹ As such, the Conservative Party leader can appoint and dismiss at will, while the Labour Party leader can only reshuffle⁷² the Shadow Ministers’ duties amongst the elected members.⁷³

The Shadow Cabinet has major implications for appointed Ministers after a change in power. Following a change in power, the opposition leader will become the new PM. In the Labour Party, pursuant to Standing Order E, the new PM must appoint those previously elected Shadow Ministers who maintained their seats in parliament.⁷⁴ However, a Labour PM is free to place those previously elected Shadow Ministers in whatever Ministerial office he wants. Standing Order E is only binding on the Labour Party, and is only politically binding at that – the PM has no legal obligation to follow it.⁷⁵ The Labour Party is also governed by Standing Order G, which requires that “Junior Posts . . . be appointed by the Leader but the list shall be submitted to the [Labour Party] for its approval and any change effected by the Leader shall be notified to the

⁶⁵ *Id.* at 26.

⁶⁶ *Id.* at 141-42.

⁶⁷ The Shadow Cabinet is far more complicated than can be made clear here, but it is important for this note how the Shadow Cabinet affects Minister appointment.

⁶⁸ BRAZIER, *supra* note 29, at 45. *See also id.* at 52 (“[A]ny Shadow Cabinet wants to look like an alternative Government.”).

⁶⁹ Fontana, *supra* note 16, at 395.

⁷⁰ *Id.*

⁷¹ BRAZIER, *supra* note 29, at 47.

⁷² Reshuffling is to take ministerial portfolios, or duties, and exchange them among other Ministers. *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 55.

⁷⁵ *Id.*

[Labour Party]”⁷⁶ This order not only gives the Labour Party veto power over initial appointment of junior Ministers, but also over changes made.⁷⁷ It seems unlikely, however, that the Labour Party could do anything if a Labour Party PM disregarded the Standing Orders, since they have no legal force.⁷⁸ There are no such orders for the Conservative Party, but Conservative PMs tend to, at least relatively recently, form their cabinets with a majority of their Shadow Ministers.⁷⁹

To the degree he is not hobbled by his party's rules,⁸⁰ the PM has control over appointment powers (excluding the Queen's formal approval power) subject to both tradition and law. The first and primary constraint on the PM is not written down, but finds its grounds in tradition – PMs almost always appoint Ministers and junior Ministers from Parliament, and almost always from the House of Commons.⁸¹ This constraint is limited to some extent by law. Section 2 of the House of Commons Disqualification Act of 1975 limits to ninety-five the number of ministerial officers “entitled to sit and vote in the House of Commons at any one time.”⁸² That is not to say ninety-five is a firm limit, but rather the “last Minister in the Commons appointed over the statutory limit, first excluded from sitting and voting there.”⁸³ There is no similar law regarding the House of Lords, but the number of ministers selected from the House of Lords is usually low.⁸⁴

A second significant constraint is imposed legally, and speaks to the number of political positions in government a PM may appoint. The Ministerial and other Salaries Act of 1975 sets restrictions on the number of appointees through pay-grade categories.⁸⁵ The pay-grade of those appointees sitting in the cabinet (group 1) is capped at twenty-one.⁸⁶ Group 2 is limited to fifty appointees and includes cabinet level officers not part of the cabinet at the time and ministers of state.⁸⁷ Group 3 salaries are limited to eighty-three and consist of Parliamentary Secretaries and all those included in groups 1 and 2.⁸⁸ For a quick recap, that leaves

⁷⁶ *Id.* at 56.

⁷⁷ *Id.*

⁷⁸ *Id.* at 55-57.

⁷⁹ *Id.* at 58.

⁸⁰ See *supra* notes 75-77 (describing the Labour Party's Standing Orders E and G).

⁸¹ Heffernan, *Why the PM*, *supra* note 18, at 65.

⁸² House of Commons Disqualification Act, 1975, c. 24, § 2 (Eng.).

⁸³ BRAZIER, *supra* note 29, at 36.

⁸⁴ *Id.* (stating that a PM, in practice, rarely fills more than twenty ministerial roles from the House of Lords). See also *id.* at 77 (“[T]here will often only be two [members of the House of Lords] in the Cabinet, the Lord Chancellor, and the Leader of the House of Lords.”).

⁸⁵ Ministerial and other Salaries Act, 1975, c. 27, sch. 1, pt. V (Eng.).

⁸⁶ *Id.* at pt. V(2)(a).

⁸⁷ *Id.* at pt. V(2)(b).

⁸⁸ *Id.* at pt. V(2)(c).

room for a minimum of twelve Parliamentary Secretaries. Group 4 includes up to five Junior Lords of the Treasury; group 5 includes up to seven Assistant Whips in the House of Commons; and group 6 includes up to five Lords in Waiting.⁸⁹ This makes for a grand-total of 100, though it exempts a handful of other appointees.⁹⁰

In making the appointment, the PM has either complete control or final say. Appointment of Ministers may only be done by the PM,⁹¹ and in this sense is not altogether different from the Constitutional division of principal and inferior Officers. However, his ability to make controversial appointments is defined by his political leverage, rather than the Senate's confirmation. For junior Ministers, the PM may make the selection after consulting with the Minister of that particular department, or the PM may delegate the authority to the Minister of that particular department.⁹² Whips are appointed on recommendation of the PM and may be dismissed at his will.⁹³

Reflecting upon the British system thus far, it is apparent that the British and U.S. models of government strongly diverge at the point of MPs as political appointees. The PM and vast majority of appointed Ministers and junior Ministers come from within government and continue to hold their positions in Parliament while holding their newly appointed positions. It is a well-known clause of the Constitution that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."⁹⁴ Nearly all Presidential appointees, with the exception of a few top posts in a given Administration, come from outside Congress. Not only is it a rare occasion that the PM appoints someone outside of Parliament, but it is considered a virtue to come from within – for "[i]t is only by being a Member of Parliament that a Minister will fully understand what [Members of Parliament] . . . want, and what they will tolerate."⁹⁵ That may be why an appointment from the outside would "be looked askance by all those who fought to win and retain their Commons seats; and as a consequence the Prime Minister's judgment in making it undoubtedly would be questioned."⁹⁶ So strongly is it felt that someone holding a ministerial position should come from Parliament that it is not unheard of for a PM to try to find a seat in the House of Commons for a seat-less Minister during a by-elec-

⁸⁹ *Id.* at pt. V(2)(d)-(f).

⁹⁰ As of 1995, the total number of office holders was 110. BRAZIER, *supra* note 29, at 36 n.105.

⁹¹ *Id.* at 28.

⁹² *Id.*

⁹³ *Id.* at 26.

⁹⁴ U.S. CONST. art. I, § 6, cl. 2.

⁹⁵ BRAZIER, *supra* note 29, at 64.

⁹⁶ *Id.*

tion (akin to a U.S. special election)⁹⁷ – though this requires getting a sitting member to leave.⁹⁸

Selecting appointees from within Parliament obviates the need for a confirmation process, not simply because there is not one available, but because appointees are typically well known (and, in the case of the Labour Party, already voted on) MPs. The U.S. confirmation process would likely be less cumbersome if most appointees were sitting in Congress.⁹⁹ The lack of a confirmation process only adds to the speed of British appointments, as was illustrated by PM Cameron's appointments described at the beginning of this note. Adding to that speed is the level of control the PM has and the relatively small number of appointments he makes.

C. *Civil Service in High Places*

Known as the Home Civil Service,¹⁰⁰ the British Civil Service is an apolitical¹⁰¹ workforce staffing up to nearly the highest reaches of government ministries. Notably, the term does not include most categories of employees typically thought of in the U.S. civil service (i.e. teachers and law enforcement), but is meant to only describe the fewer than 500,000¹⁰² employees supporting the Ministers and government officials. The PM has the title of Minister for the Civil Service,¹⁰³ but so far as appointment powers go, he only has a hand in appointing the Cabinet Secretary (who also holds the title of Head of the Home Civil Service), as well as the Permanent Under-Secretaries of State, who are appointed on the advice of other high ranking civil servants and the particular department's minister.¹⁰⁴ Outside of that, the Civil Service Commission gov-

⁹⁷ See, e.g., John F. Burns, *Labour Party in Britain Wins a By-Election*, N.Y. TIMES, Jan. 15, 2011, at A7.

⁹⁸ BRAZIER, *supra* note 29, at 64. Though this is not done frequently. *Id.* at 65, n.20.

⁹⁹ The Senate, for example, generally supports the nomination of senators. Stephen Hess, *First Impressions: Presidents, Appointments, and the Transition, in INNOCENT UNTIL NOMINATED: THE BREAKDOWN OF THE PRESIDENTIAL APPOINTMENTS PROCESS* 107, 131 (G. Calvin Mackenzie ed., 2001).

¹⁰⁰ See *Leadership*, CIVIL SERVICE, <http://www.civilservice.gov.uk/about/leadership/index.aspx> (last visited Jan. 08, 2011).

¹⁰¹ See Civil Service Code, *supra* note 30.

¹⁰² See *Civil Service Employment since 1902*, CIVIL SERVICE, http://www.civilservice.gov.uk/Assets/Graph1902_tcm6-34582.jpg (last visited Jan. 8, 2011).

¹⁰³ The PM is also First Lord of the Treasury. See *Prime Minister's Office*, CABINET OFFICE, <http://www.cabinetoffice.gov.uk/content/prime-ministers-office> (last visited Jan. 08, 2011).

¹⁰⁴ See *Role of the Cabinet Secretary*, CIVIL SERVICE, <http://www.civilservice.gov.uk/about/history/cabinet-secretary/index.aspx> (last updated Feb. 1, 2010); BRAZIER, *supra* note 29, at 207; DENNIS KAVANAGH, *BRITISH POLITICS: CONTINUITIES AND CHANGE* 243 (2d ed. 1990).

erns most appointments,¹⁰⁵ and, unlike political appointees, “careers are normally for a lifetime, especially in the senior grades.”¹⁰⁶

The highest ranking British Civil Servant in each department is typically titled the Permanent Under-Secretary of State (PSS),¹⁰⁷ whose duty is to support their department’s Minister heading their department.¹⁰⁸ The PSS is the day-to-day department manager, and “‘accounting officer’ for their department,” responsible to Parliament for “mak[ing] sure their department spends the money allocated to them appropriately.”¹⁰⁹ Moreover, “it is to [the PSS] that the Minister . . . will look for authoritative departmental advice on policy issues, and in that capacity the [PSS] acts as the Minister’s chief adviser on policy.”¹¹⁰ Though the PM formally appoints the PSS, the PSSs (as all other civil servants) differ from political appointees in tenure, politicization, and as to whom they serve.¹¹¹

An area of sharp distinction between the British civil service and the U.S. civil service is that in Britain “senior civil service . . . posts up to the very top are open to insiders.”¹¹² Some positions in the British Civil Service, which in the U.S. would have to be appointed under the appointments clause, are professional civil servants. Largely, the British Civil Service is not unlike the U.S.’s, “carry[ing] out routine activities that produce the great bulk of the government’s day-to-day output.”¹¹³ As one former MP noted “the vast majority of administrative decisions affecting individual people have to be made by a large number of civil servants without the knowledge of a Minister.”¹¹⁴ That in and of itself is not so different from the U.S.,¹¹⁵ but what is different is the level of departmental policy control and influence high-ranking civil servants appear to

¹⁰⁵ BRAZIER, *supra* note 29, at 207.

¹⁰⁶ Plowden, *supra* note 28, at 25.

¹⁰⁷ BRAZIER, *supra* note 29, at 32-33. A department can have more than one PSS. See KAVANAGH, *supra* note 104, at 236.

¹⁰⁸ See *Leadership, CIVIL SERVICE*, <http://www.civilservice.gov.uk/about/leadership/index.aspx> (last visited Jan. 08, 2011).

¹⁰⁹ *Id.*

¹¹⁰ BRAZIER, *supra* note 29, at 129.

¹¹¹ See also KAVANAGH, *supra* note 104, at 237-38 (“The modern Civil Service has the features of impartiality, permanence, and anonymity. . . . Commitment to the impartiality of civil servants is evidenced by their formal status as servants of the Crown with an interest that is permanent and above party.”).

¹¹² Plowden, *supra* note 28, at 38.

¹¹³ ROSE, *supra* note 15, at 32.

¹¹⁴ PATRICK GORDON WALKER, *THE CABINET: POLITICAL AUTHORITY IN BRITAIN* 66 (1970).

¹¹⁵ Social Security Administration employees do this all the time. Administrative law judges for the SSA, for example, are not officers, and are appointed by the agency pursuant to 5 U.S.C. § 3105 (2006), and can only be removed for cause pursuant to 5 U.S.C. § 7521(a)-(b) (2006).

have.¹¹⁶ British civil servants serve important advisory, administrative, and oversight duties.¹¹⁷ Some Ministers even “see themselves as selecting a particular measure from a menu of choices deemed practicable by their civil service advisors.”¹¹⁸

Looking back to the average number of politically appointed officials in a given department – four¹¹⁹ – it becomes clear just how few political appointees serve in a British department, relative to a U.S. department. And with that in mind, it also becomes clear that a high level British civil servant would likely have significant influence over “the policy process and . . . [policy] implementation.”¹²⁰ With so few political appointees, each with limited time and availability, civil servants must have the discretionary power to act where Ministers have not formed policy.¹²¹ Some high-ranking civil servants especially may have the discretion to “make decisions within discrete policy areas.”¹²² This results in a chicken or the egg question: are there fewer political appointees because civil servants hold policy-influencing positions, or do civil servants hold policy-influencing positions because there are fewer political appointees? In any event, Britain opens its civil service to the highest reaches of government, putting civil servants in positions that would likely be political appointees in the U.S.

IV. THE STARS AND STRIPES

In the U.S., political appointees and their method of appointment are set out in law. It is typically known in advance what positions the President will need to appoint and whether or not they will need Senate confirmation. Generally, the U.S. system looks cleaner on paper than the British system – partly because it is actually written down on paper – and it is objectively less political, since Article II delineates the President’s power. Article II guarantees a level of power *sans*-politics, and political capital will not make or break most appointments. What complicates the system, though, is that a branch other than the Executive holds an almighty power over many political appointments. There are numerous tools by which Congress forces the President’s hand in appointment. Some of these tools, like delineating the mode of appointment by statute, voting to confirm or deny an appointee, and run-of-the-mill politics are

¹¹⁶ WALKER, *supra* note 114, at 66 (“[d]etailed administration had become so vast . . . that it could not be brought under close Ministerial supervision. The only method of control was to lay down . . . broad lines of policy . . . but this, except in regard to major policies, had necessarily to be done by higher civil servants.”).

¹¹⁷ ROSE, *supra* note 15, at 58.

¹¹⁸ *Id.* at 80.

¹¹⁹ ROSE, *supra* note 15, at 77-78. *See also supra* text accompanying note 58.

¹²⁰ SMITH, *supra* note 40, at 124.

¹²¹ *Id.* at 125.

¹²² *Id.* at 122.

well known. Others, however, are less well known. The senatorial hold is a controversial procedural tool in the Standing Rules of the United States Senate¹²³ used to delay a President's nominee, oftentimes anonymously.

It first must be noted that in the U.S. that there are two types of constitutionally defined Officers. There are "principal"¹²⁴ and "inferior" Officers (terms that will only be used herein in reference to the U.S.), and these terms determine who can appoint and whether confirmation is necessary. Principal Officers are "Ambassadors, other public Ministers and Consuls, Judges of the supreme Court," and "Heads of Departments."¹²⁵ Principal Officers *must* go through the advice and consent process,¹²⁶ so there is little wiggle room for serious debate in structural change outside of amendment to the Constitution. The definition of inferior Officers will be analyzed later in this note, but suffice to say for now that they make up the bulk of those appointed and do not *have* to go through advice and consent.¹²⁷ Inferior Officers can be appointed by the President, the Courts of Law, or the Heads of Departments, without advice and consent by the Senate.¹²⁸

When all is said and done, there are well over 1,000 Officers, principal and inferior, that go through advice and consent.¹²⁹ This section will detail the President's power, Congress' power, and how they both contribute to the U.S. appointment system.

A. *All the President's (soon to be) Men*

If the PM is the politician's politician, the President is, or tries to be, the people's politician. In recent history not only is it rare for a President to have come from within Washington,¹³⁰ but it would be unheard of for a candidate to proclaim himself a Washington insider. Presidential campaigns tend to digress into a dead sprint away from the Washington establishment.¹³¹ And upon winning the presidency, it becomes a dead sprint

¹²³ The hold is implied from section 2 of Rule VII of the Standing Rules. *Rule VII: Morning Business*, COMMITTEE ON RULES AND ADMINISTRATION, <http://rules.senate.gov/public/index.cfm?p=RuleVII> (last visited Jan. 08, 2011).

¹²⁴ U.S. CONST. art. II, § 2, cl. 2 speaks only of "inferior" Officers, who do not *have* to go through the advice and consent process. As such, "principal" is the inferred alternative regarding those who must go through the advice and consent process. "Principal" does appear in article 2, § 2, clause 1, in a semi-related context.

¹²⁵ U.S. CONST. art. II, § 2, cl. 2.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ See O'Connell, *supra* note 29, at 917.

¹³⁰ Prior to the election of Barack Obama, no Senator ran successfully for President since John F. Kennedy.

¹³¹ This is somewhat ironic, given that in the 2008 "change" Presidential election, of the major candidates, Barack Obama, John Edwards, Hillary Clinton, John McCain, and Fred Thompson all served time in Congress.

to cobble together nominees, all while beginning to undertake the other great powers of the Office.¹³²

In order to understand the President's role in the modern appointment process, it is necessary to take a quick look from whence we came. The President's current role in the appointment process, overseeing the appointment of thousands of positions, may never have been imagined in 1787, but delegates to the Constitutional Convention were certainly not short of imagination. Plans were offered splitting, combining, molding, and bending the appointment power every which way. One, the Virginia Plan, divided the appointment authority between the President and Legislature, depending on the type of appointment.¹³³ Another, the New Jersey Plan, gave the President the authority "to appoint all federal officers not otherwise provided for."¹³⁴ Alexander Hamilton proposed another giving the President the sole power to appoint certain named department heads, leaving all others to be confirmed by the Senate.¹³⁵ And a fourth plan would have put all the power in Congress.¹³⁶ It was not until the end of the Constitutional Convention that the adopted language even appeared.¹³⁷ The authors of the Federalist Papers saw a single nominator as better suited for the appointments process and the Senate as a proper check against favoritism and unfit officers.¹³⁸ Other delegates to the Constitutional Convention varied in their sentiment during state ratification from Luther Martin of Maryland, who told his legislature it would make the President essentially king without the title, to James Wilson of Pennsylvania, who had to fend off objections that it gave the Senate too much power.¹³⁹ With that background, it appears clear the Framers knew they were grappling with a complex and potentially problematic issue.

Like the PM, the President's political power significantly influences his appointment power as confirmation weaves through the Senate. Unlike the PM, the President can select whomever he wishes. In the short run this may be a viable strategy, "but the President's freedom to make that determination is not a constant."¹⁴⁰ Inevitably, the President's appointment power is largely correlated with the support he has in Congress and

¹³² A President-elect has only about two and a half months from Election Day until January 20, the day of inauguration. U.S. CONST. amend. XX, § 1.

¹³³ MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS* 19 (Neal Devins ed., 2000).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 24-25.

¹³⁸ *See generally* THE FEDERALIST NO. 76 (Alexander Hamilton).

¹³⁹ GERHARDT, *supra* note 133, at 26-28.

¹⁴⁰ G. CALVIN MACKENZIE, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS* 231 (1981) [hereinafter MACKENZIE, *POLITICS*].

his popularity.¹⁴¹ Lame duck Presidents and those with little chance of reelection face a particularly difficult time.¹⁴² While it seems the PM's ability to appoint, dismiss, and reappoint Ministers rests largely on political capital, to a degree such is the same for Presidents filling open positions throughout their tenure.

In two ways a President enjoys more freedom than a PM: (1) appointment of non-politicians and (2) appointment of non-party members. That the President need not appoint politicians is an illusory benefit for two reasons. First, it is done out of necessity (there are too many appointees). Second, it can be as much a burden as a benefit (it expands the list of potential nominees, but the Senate treats favorably fellow members up for appointment).¹⁴³ The ability to appoint non-party members is more real, but relatively rarely used. Oftentimes appointments across the aisle are looked at as smart politics, as coalition building, and rarely criticized.¹⁴⁴ Party affiliation in the U.S. certainly plays a role, but it is not the *sine qua non*, as it is in Britain. The current British coalition government notwithstanding, appointment of non-party members offers the President an avenue the PM effectively does not have.

Even with more freedom, the appointment process haunts the President throughout his term. The President's role is immediately more complicated than the PM's because the President cannot just fill his political appointments with members of Congress. Among other reasons, it would be impossible given the sheer number of appointments. The President makes so many appointments that since the 1960s the Office of Presidential Personnel (OPP) and its group of "full-time personnel aides" have been dedicated solely to the political appointment process.¹⁴⁵ The OPP started with less than one dozen aides and now employs over fifty.¹⁴⁶ The existence of the OPP is no surprise given the staggering number of

¹⁴¹ *Id.* at 232.

¹⁴² President Clinton experienced this in 2000, when by July "the Senate had confirmed a total of thirty judicial nominations for the year" leaving seventy-five vacancies, of which there were only thirty-seven nominations. GERHARDT, *supra* note 133, at 124.

¹⁴³ Prior to John Tower in 1989, only one former Senator, in 1868, had ever lost a cabinet nomination. Hess, *supra* note 99.

¹⁴⁴ President Obama was largely lauded for his across-the-aisle appointments, including Republicans Jon Huntsman as Ambassador to China, Ray LaHood as Transportation Secretary, Robert Gates as Defense Secretary, and Judd Gregg as Commerce Secretary (Gregg eventually withdrew). See, e.g., Edwin Chen and Susan Decker, *Obama Names Republican Governor Huntsman to Be Envoy to China*, BLOOMBERG (May 17, 2009), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aHiPLpT1zQLU>; Carol D. Leonnig, *LaHood Gets a Warm Welcome on the Hill*, 44 BLOG (Jan. 21, 2009, 6:13 PM), http://voices.washingtonpost.com/44/2009/01/21/lahood_gets_a_warm_welcom_on_t.html.

¹⁴⁵ MACKENZIE, POLITICS, *supra* note 140, at xvi.

¹⁴⁶ *Id.*

resumes that come flowing in for each new President. For instance, by President George H.W. Bush's inauguration, his transition operation received about 16,000 resumes, and by the time Clinton left office, the OPP computers were estimated to hold 190,000 resumes.¹⁴⁷ However, the President is haunted not only by the number of appointees, but also by the high turnover rate. The President is perpetually filling positions,¹⁴⁸ and because many of those new appointments go back through the confirmation process, many offices go unfilled for prolonged periods of time.

The President has two tools to help cope with unfilled positions. Constitutionally, the President can make recess appointments. The Constitution provides that "[t]he 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."¹⁴⁹ This clause appears intended to do no more than fix the problem of positions opening during Congress' recesses, which used to be much longer than they are now. However, use of this power has become a common yet controversial¹⁵⁰ way for the President to make appointments that the Senate did not act upon for whatever reason. By its own words, though, it is a temporary solution if the Senate does not act when it reconvenes. A second, and less controversial, tool is provided by the Vacancies Reform Act,¹⁵¹ which allows offices to continue functioning under an interim, acting officer. Through the Vacancies Reform Act, generally "an acting officer [can] serve for a 210-day period prior to the submission of a nomination," and if a nomination is submitted, can continue to serve until the Senate acts or the nomination is withdrawn.¹⁵²

The President's tools to address the problems brought about by the number of appointments and high turnover rates, however, do not go far

¹⁴⁷ James P. Pfiffner, *Presidential Appointments: Recruiting Executive Branch Leaders*, in *INNOCENT UNTIL NOMINATED: THE BREAKDOWN OF THE PRESIDENTIAL APPOINTMENTS PROCESS* 50, 61 (G. Calvin Mackenzie ed., 2001).

¹⁴⁸ See U.S. GEN. ACCOUNTING OFFICE, *GAO/GGD-94-115FS, TURNOVER RATES IN EXECUTIVE SCHEDULE REQUIRING SENATE CONFIRMATION* 3 (1994) (finding a turnover rate between 2 and 3 appointees per presidentially appointed, senatorially confirmed position from 1981-1991).

¹⁴⁹ U.S. CONST. art. 2, § 2, cl. 3.

¹⁵⁰ Use of recess appointment powers is controversial in part because it tends to incite the Senate, which does not like being end-arounded. In response to President Clinton's recess appointment for the Ambassador to Luxembourg, Senator Inhofe placed a hold on all nonmilitary nominees. CHERYL Y. MARCUM ET AL., *RAND, NAT'L DEFENSE RESEARCH INST., DEP'T OF DEF. POLITICAL APPOINTMENTS: POSITIONS AND PROCESS* 33 (2001).

¹⁵¹ 5 U.S.C. §§ 3345-3349d (2006).

¹⁵² Memorandum from Beth Nolan, Office of Legal Counsel, *Guidance On Application Of Federal Vacancies Reform Act Of 1998* (Mar. 22, 1999), available at <http://www.justice.gov/olc/finalqa.htm>.

enough in comparison to the tools Congress has to preside over and delay the appointments process.

B. *Tools of the Trade*

Congress has many tools when it comes to the appointment of Officers. Congress' role in the appointments process was, as mentioned previously, as debated as the President's. Only the Senate, technically, has any direct role to speak of. But, the role the Senate has taken on is in actuality far more expansive than the role it was originally granted by the strict text of the Constitution, and the role Representatives now play is infinitely more expansive, given that they have no direct Constitutional role to begin with.

In the Federalist Papers, Alexander Hamilton claimed that “[t]here will, of course, be no exertion of *choice* on the part of the Senate . . . they can only ratify or reject the choice [the President] may have made.”¹⁵³ That may be true technically, but it would be naïve to believe now, or ever, that Congress cannot or could not exert some level of power and influence on that choice. Presidents dating back to George Washington have consulted with Senators regarding appointments, especially in their respective states.¹⁵⁴ That may speak more toward practicality and political need than anything else, but Congress exerts power in such a way that Presidents have a less than free hand regarding many appointments. What necessarily gives the President a less than free hand is the same as what gives the PM a less than free hand – politics. In Britain, a PM going against the wishes of powerful politicians can be akin to political suicide. Similarly, but less drastically, if a President nominates someone against the express wishes of a powerful member of Congress, he may run into potential political embarrassment,

To be certain, Congress does not put up much of a fight over the vast majority of nominations,¹⁵⁵ but it can, and does, in a variety of ways. It is not altogether infrequent that Congress attempts to influence the appointment process through legislation. Over time, Congress has attempted to bypass the traditional appointments clause process for principal Officers – perhaps most famously for members of the Federal Election Commission under the Federal Election Campaign Act, which was eventually disallowed in *Buckley v. Valeo*.¹⁵⁶ More deceptive, though, is Congress's practice of inserting language within legislation regarding the appointment of Officers, both principal and inferior. For example, Section 302 of the National Affordable Housing Act (NAFA), while creating

¹⁵³ GERHARDT, *supra* note 133, at 31.

¹⁵⁴ *Id.* at 32.

¹⁵⁵ MACKENZIE, POLITICS, *supra* note 140, at 95 (“[The Senate] routinized much of the process by which it considers the vast majority of the sixty thousand or seventy thousand nominations it receives from the President each year.”).

¹⁵⁶ 424 U.S. 1 (1976).

a Board to oversee National Homeownership Trust, prescribed that the President shall appoint “[one] individual representing consumer interests.”¹⁵⁷ This prompted President George H.W. Bush to say, in his signing statement regarding NAFA, that the language in NAFA “does not constrain the President’s constitutional authority to appoint officers of the United States, subject only to the advice and consent of the Senate.”¹⁵⁸ Congress has even gone so far as to actually name by statute the Director of the Office of Thrift Supervision, an action which was found to be unconstitutional by the DC district court (though the decision was later vacated as moot by the DC Circuit).¹⁵⁹

Congressmen and Senators also attempt to influence the President by making their views as to filling positions known to the Executive branch.¹⁶⁰ A common practice for Senators of the President’s party is referred to as senatorial courtesy, in which “Senators from the state in question select the nominee who is then (usually) nominated by the President”¹⁶¹ Pending the politics and position at issue, some congressmen can have significant power and influence over nominees.¹⁶² Normally “the Senate . . . reject[s] presidential nominees when the President refused to exercise senatorial courtesy and the slighted Senator then presse[s] his claim”¹⁶³

Within its constitutional bounds, Congress can also affect the breadth of the President’s nomination powers by specifying the mode of appointment for inferior Officers. Perhaps the most well-known of Congress’s tools is the one constitutionally prescribed to the Senate – advice and consent – which can garner much media attention and range from a swift yes, to a long investigation and confirmation hearing.¹⁶⁴ But one of the

¹⁵⁷ 42 U.S.C. § 12851(b)(7) (2006).

¹⁵⁸ Presidential Statement on Signing the Cranston-Gonzalez National Affordable Housing Act, 26 WKLY. COMP. PRES. DOC. 1931 (Nov. 28, 1990).

¹⁵⁹ GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 129 n. 33 (5th ed. 2009) (citing *Olympic Federal Savings & Loan Ass’n v. Director, Office of Thrift Supervision*, 732 F.Supp 1183 (D.D.C. 1990)).

¹⁶⁰ See MACKENZIE, POLITICS, *supra* note 140, at 217. Because Congressmen have no formal role in the confirmation process, recommendations to the White House are popular and can be numerous. *Id.* at 218. These recommendations can range in the hundreds. *Id.* (“Frederic Malek wrote that five hundred [recommendations] were received from Congress each month during his tenure as Director of the White House Personnel Operation.”).

¹⁶¹ *Id.* at 121. This practice is typically granted only to Senators of the same party as the President, and when the President follows a Senator’s recommendation, confirmation is almost assured. *Id.* at 121-22.

¹⁶² See *id.* at 228-32.

¹⁶³ *Id.* at 122.

¹⁶⁴ In-depth investigations are by no means reserved for Cabinet Secretaries and Supreme Court Justices. In 1969, during the consideration of William L. Martin for a U.S. Marshal position, none other than the chief counsel of the Senate Judiciary

most, if not the most, powerful tools a Senator has is without the Constitution and is less publicly known¹⁶⁵ – the senatorial hold.

A senatorial hold, rather than a long, drawn out confirmation process, is so powerful because it is easy, it can have nothing to do with the appointee, and it is relatively anonymous. The overwhelming majority of the President's nominees are not subjected to drawn out, Supreme-Court-nominee-type hearings, but many nominees, principal and inferior, are subject to senatorial holds.¹⁶⁶ Senatorial holds "seem[] to have emerged out of the thin air of Senate practice," having no Constitutional basis.¹⁶⁷ It began as a courtesy to give a Senator more time to gather information, but has since developed into a popular way to postpone confirmation votes indefinitely.¹⁶⁸ While it is possible for the Senate to continue in spite of a hold, they typically do not in order to "preserve the freedom to place future holds of their own," and efforts to remove the anonymity of holds have had inconsistent results.¹⁶⁹ Holds are frequently used for reasons in no way connected to the nominee at hand. President Clinton's Treasury Secretary nominee, Lawrence Summers, was held up "by a few senators in retaliation for some recess appointments" President Clinton made.¹⁷⁰ In 1999, Senator Orrin Hatch held up *all* of President Clinton's judicial nominees in an effort to get the President to nominate Hatch's *one* preferred candidate for a federal judgeship in Utah.¹⁷¹ Another example was the hold Senator Richard Shelby placed on all of President Obama's executive branch nominees because of "the Pentagon's bidding

Committee was dispatched to Georgia to investigate segregationist charges. *Id.* at 112.

¹⁶⁵ One reason why it is not a well-known tool is due in part to the fact that a senatorial hold is generally anonymous, and though anonymity is supposed to be lost after six legislative days, that rule is rarely enforced. See Amanda Becker, *Senators' Use of 'Anonymous Hold' Contributes to Backlog of Stalled Judicial Nominations*, WASH. POST'S CAPITAL BUSINESS, Sept. 27, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/24/AR2010092406035.html>.

¹⁶⁶ President Clinton, notably, had 493 of his ambassadorial and foreign relations nominees held up by Senator Jesse Helms, the then chair of the Senate's Foreign Relations Committee. GERHARDT, *supra* note 133, at 65. Helms was, however, a bipartisan hold user, putting holds on four of President Reagan's regional State Department nominees. *Id.*

¹⁶⁷ G. Calvin Mackenzie, *The State of the Presidential Appointments Process*, in INNOCENT UNTIL NOMINATED: THE BREAKDOWN OF THE PRESIDENTIAL APPOINTMENTS PROCESS 1, 32 (G. Calvin Mackenzie, ed., 2001) [hereinafter Mackenzie, INNOCENT].

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* "In 1999 two senators, Charles Grassley and Ron Wyden, sought to open up [the hold] slightly by convincing their colleagues that a senator who places a hold should at least be identified. That has happened inconsistently since"

¹⁷⁰ GERHARDT, *supra* note 133, at 103.

¹⁷¹ *Id.* at 141.

process for air-to-air refueling tankers . . . [and] funds . . . for a Terrorist Explosive Device Analytical Center,” both of which could affect jobs in his home state¹⁷² – but neither of which, presumably, had anything to do with the nominees themselves.

All of the above, admittedly, somewhat misses the point that for Senate-confirmed positions, the Senate is free to not confirm whomever it wants for any reason at all. The Senate can reject appointees for as little reason as they “preferred another candidate for the position,”¹⁷³ – although relatively few major nominees are actually flatly rejected at any point in the process.¹⁷⁴ Some Presidents are more concerned about a smooth confirmation process for major nominees than others, typically allowing those presidents to avoid an embarrassing drawn out process, or possible or actual rejection.¹⁷⁵ Regardless, though, of the President’s political capital and concern for a smooth confirmation process, it is clear that he is much constrained in his appointment power.

V. ALL IS FAIR IN LOVE, WAR, AND POLITICS

The U.S. advice and consent appointment process takes a great deal of time, resources, and sanity. Not only does the process inflame a group of people already prone to political battles, but “[c]onfirmation activities compose a significant portion of the Senate’s actual work load.”¹⁷⁶ If the President did not utilize a growing Office of Political Personnel, the thousands of nominations the President sends to the Senate every year¹⁷⁷ would take an intolerable amount of the President’s time. As it is, though, the U.S. appointments system has deleterious effects.

Senatorial holds have turned “advice and consent” into something of a mockery, and, coupled with the high number of Senate confirmed appointees, is inherently dangerous. Senators who are hardly accountable for their actions – since their constituents are likely unaware – and not accountable for the nominee, leave agencies, departments, and other

¹⁷² Meredith Shiner & Manu Raju, *Richard Shelby puts hold on President Obama’s nominees*, POLITICO (Feb. 5, 2010), <http://www.politico.com/news/stories/0210/32584.html>.

¹⁷³ GERHARDT, *supra* note 133, at 64 (quote regarding the Senate’s rejection of President Washington’s nomination of Benjamin Fishbourn for naval officer of the Port of Savannah).

¹⁷⁴ See MACKENZIE, POLITICS, *supra* note 140, at 177 (showing rejections of major nominees by floor vote, committee vote, and forced withdrawals from 1961-1977).

¹⁷⁵ President Bush suffered two embarrassing nomination fights, losing with his secretary of defense nominee John Tower, and narrowly escaping with Supreme Court justice nominee Clarence Thomas. GERHARDT, *supra* note 133, at 96. President Clinton, however, was known for compromising and planning out his appointments process. *Id.*

¹⁷⁶ MACKENZIE, POLITICS, *supra* note 140, at 95

¹⁷⁷ *Id.*

areas of government with leaks that cannot be plugged. Combine this with appointees' short tenures in office, and the President is continually filling positions in a system that is perpetually backed up. The Banking Committee situation discussed at the beginning of this note was demonstrative of this point. Advice and consent can leave important departments without politically authoritative officials.

In a system where "Senate-confirmed positions were empty (or filled by acting officials), on average, one-quarter of the time,"¹⁷⁸ it must be asked, "what is going on?" Chief Justice Rehnquist was wondering the same thing in his 1997 State of the Judiciary Report regarding judicial vacancies when he stated: "The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry, it should vote him up or vote him down."¹⁷⁹ A political process so problematic that even the Chief Justice of the Supreme Court criticizes it must truly be questionable. If the problem does not seem to be serious on its face, consider a report issued by the U.S. General Accounting Office in the mid-1990's, detailing the turnover rate of positions subject to Senate confirmation. The study found that from 1981-1991 there was an average of two to three appointees per position, with an average tenure of 2.1 years.¹⁸⁰ Eighteen of the 409 positions surveyed had at least five turnovers in ten years.¹⁸¹ What makes those statistics so astounding is that today it takes so long for another appointment to get through. While the average Kennedy appointee took 2.4 months to get confirmed, the average H.W. Bush and Clinton appointee took over eight months.¹⁸² To put those numbers in perspective, if there is an average of two appointments to any given position per term, one third of a Presidential term would be spent trying to fill the average position. That is the equivalent of having a three hour commute per nine hour work day. While waiting for confirmation, "necessary decisions pile up in administrative limbo as stand-ins wait for the presidential appointee to finally arrive."¹⁸³

At first blush, the average person would not take a job with a three-hour commute, all things being equal. Without good reason to do so, the average person would avoid it. What is most frustrating about the confir-

¹⁷⁸ O'Connell, *supra* note 29, at 921 (studying executive agency vacancies from Presidents Carter to W. Bush).

¹⁷⁹ John H. Cushman, Jr., *Senate Imperils Judicial System, Rehnquist Says*, N.Y. TIMES, Jan. 1, 2008, <http://www.nytimes.com/1998/01/01/us/senate-imperils-judicial-system-rehnquist-says.html>.

¹⁸⁰ U.S. GEN. ACCOUNTING OFFICE, *supra* note 148, at 3.

¹⁸¹ *Id.* One position in this ten-year span, the Assistant Secretary for Trade Development in the Department of Commerce, experienced six turnovers. *Id.* at 7.

¹⁸² Michael H. Armacost, *Foreword*, INNOCENT UNTIL NOMINATED: THE BREAKDOWN OF THE PRESIDENTIAL APPOINTMENTS PROCESS vii, vii (G. Calvin Mackenzie, ed., 2001).

¹⁸³ Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 708 (2000).

mation process is not necessarily the practice of confirmation delays, but the reasons behind those delays. As it stands, “issues of nominee fitness are close to irrelevant in the contemporary appointments process”¹⁸⁴ And oftentimes, as noted earlier, the reason for delaying through senatorial hold has *nothing* to do with the nominee personally. The nominee is a convenient political tool which can be used by Congress to attain some unrelated goal.

The confirmation process has digressed into a reasonless three-hour commute. Without any good reason to stay the course, changes are necessary.

VI. IF WE KNEW THEN WHAT WE KNOW NOW

Of the great many differences between the British and U.S. political appointment systems, two aspects stand out for the purposes of analyzing how the U.S. system can learn from its friends across the Atlantic. First, the British civil service system is a model worth following in regards to political appointees. Some U.S. political nominees may be mere employees who constitutionally do not require appointment at all, and many appointments made by the President are of inferior Officers that, constitutionally, do not require Senate confirmation. Second, as Britain, Parliament, and the PM have evolved, so too has the PM’s appointment power. Appointment power has been gradually accumulating in the PM. On the other hand, as the U.S., Congress, and the Presidency have evolved, the President’s appointment powers have remained stagnant, and the process has slowed considerably. With the increasing use of senatorial holds and delays in the appointments process, power seems to be accreting in Congress. This is power that the Senate, through procedural tools, gave itself. The President is accountable for political appointees, not the Senate, which has nonetheless turned confirmation into a political game. Perhaps it is time to write legislation so inferior Officers can avoid Senate confirmation, and perhaps it is time to change the Senate’s procedural rules to limit or avoid holds altogether.

A. *Officer and an Employee*

The default method of political appointment of any Officer in the U.S. is Presidential nomination and Senate confirmation. But for many political appointees, this default could be eliminated by asking two questions: (1) Is this position an Officer? (2) Is this position an inferior or principal Officer? The two questions are distinct, the first delineating who needs to be appointed, and the second delineating how they need to be appointed.

Regarding the first question, two cases decided in the last 35 years help draw the line. *Buckley v. Valeo*¹⁸⁵ was the first major case speaking to

¹⁸⁴ Mackenzie, INNOCENT, *supra* note 167, at 28.

¹⁸⁵ 424 U.S. at 1.

the issue in about 100 years,¹⁸⁶ but even then, it left nothing more than a vague sketch of an answer. The *Buckley* Court cited language from precedent¹⁸⁷ stating that an Officer is anyone “who can be said to hold an office under the government,” but then seems to narrow that position by adding that an Officer is “any appointee exercising significant authority pursuant to the laws of the United States.”¹⁸⁸ The D.C. Circuit more recently spoke to the same issue in a second important case, *Landry v. FDIC*.¹⁸⁹ Though this case is precedent only in the D.C. Circuit, if its logic is adopted universally, it could render many political appointees mere employees, rather than Officers. Following perceived logic from the Supreme Court’s decision in *Freytag v. Commissioner*,¹⁹⁰ the D.C. Circuit held the “power of final decision” instrumental in determining whether one was an employee or an Officer.¹⁹¹ Both *Buckley* and *Landry* make clear that a certain level of authority draws the line – *Buckley* drawing the line at “significant,” and *Landry* drawing it at “final decision” making. If the holding from *Landry* were to become uniform, it would likely mean that an employee with “purely recommendatory powers”¹⁹² would be simply an employee. *Buckley*, on the other hand, would require a case-by-case analysis.

Looking to the second question, there are again two cases authoritative on the issue. The Supreme Court in *Morrison v. Olson*¹⁹³ took a multi-factor approach to determining whether an Officer was inferior or principal. It considered whether an Officer: (1) was “subject to removal by a higher Executive Branch official;” (2) has specific, limited duties; (3) has limited jurisdiction; and (4) has limited tenure.¹⁹⁴ However, not long after that decision, the Supreme Court unanimously relied almost entirely on a hierarchy approach to determine inferiority. In *Edmond v. United States*,¹⁹⁵ the Court considered whether there was a level of supervision between a given Officer and the President, and, if so, that Officer must be inferior. Importantly, *Edmond* did not overrule *Morrison*, which means there are two partially inconsistent tests in this arena. While *Edmond* offers a test of easier applicability, both tests tilt the scales in favor of Officers being inferior. *Morrison* involved the independent counsel from

¹⁸⁶ *United States v. Germaine*, 99 U.S. 508 (1879) is oft cited in *Buckley* as the Court’s last (relatively) clear statement on the issue.

¹⁸⁷ *Id.* at 510.

¹⁸⁸ *Buckley*, 424 U.S. at 126.

¹⁸⁹ 204 F.3d 1125 (D.C. Cir. 2000).

¹⁹⁰ 501 U.S. 868 (1991).

¹⁹¹ *Landry v. FDIC*, 204 F.3d 1125, 1133 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 924 (2000).

¹⁹² *Id.* at 1132.

¹⁹³ 487 U.S. 654 (1988).

¹⁹⁴ *Id.* at 671-72.

¹⁹⁵ 520 U.S. 651 (1997).

the Ethics in Government Act,¹⁹⁶ who Justice Scalia argued forcefully in dissent was clearly a principal Officer, having essentially no direct oversight even by the President.¹⁹⁷ If the independent counsel in *Morrison* was found inferior, and with the hierarchy test from *Edmond* in mind, most appointees would be presumptively inferior.

With the answers¹⁹⁸ to the two aforementioned questions in mind, it becomes clear that the overwhelming number of appointees, even if found to be Officers, do not need to be appointed by the President with advice and consent of the Senate. Appointment of inferior Officers could instead be made solely by the President, the Courts of Law, or Heads of Departments.¹⁹⁹ So the bulk of Senate committee hours and manpower dedicated to confirming appointees are presumptively unnecessarily spent confirming appointees that could be appointed without its help.

Take for instance, the National Oceanic and Atmospheric Administration (NOAA), an agency within the Department of Commerce (DOC). NOAA has a Head, known as the Administrator, and also has a Deputy Administrator, a Chief Scientist, and a General Counsel, among many other positions.²⁰⁰ The Administrator, Deputy Administrator, and Chief Scientist are all appointed by the President with advice and consent of the Senate.²⁰¹ The General Counsel is appointed by the Secretary, with approval by the President.²⁰² Subjecting these positions to the first of the aforementioned questions, let us assume *arguendo* that the Administrator and Deputy Administrator are both Officers of some kind. What about the Chief Scientist? The Chief Scientist is “the principal scientific adviser to the Administrator, and . . . perform[s] such other duties as the Administrator may direct.”²⁰³ According to the DOC’s Department Organization Order, the Chief Scientist is “the senior scientist for the agency and drives policy and program direction”²⁰⁴ But, further description within that Order notes that the Chief Scientist is directly supervised by the Administrator. Moreover, the Chief Scientist provides direction and implementation only insofar as directed by the Administrator.²⁰⁵ Is that

¹⁹⁶ 487 U.S. at 660 (“[T]he Ethics in Government Act . . . allow[ed] for the appointment of an ‘independent counsel’ to investigate and, if appropriate, prosecute certain high ranking Government officials for violations of federal criminal laws.”).

¹⁹⁷ See generally *Morrison*, 487 U.S. at 708-13.

¹⁹⁸ Well . . . the best answers the courts are likely to give us.

¹⁹⁹ U.S. CONST. art. 2, § 2, cl. 2.

²⁰⁰ Reorganization Plan No. 4 of 1970, 3 C.F.R. 202-06 (1970), reprinted with amendments in 5 U.S.C. app. at 196-97 (1994), and reprinted in 84 Stat. 2090-93 (1970).

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ Office of Management and Organization, *National Oceanic and Atmospheric Administration*, U.S. DEPT. OF COMMERCE, http://www.osec.doc.gov/omo/dmp/doors/doo25_5.html (last updated July 23, 2010).

²⁰⁵ *Id.*

the “significant authority” *Buckley* had in mind? It seems close to the “purely recommendatory powers” *Landry* had in mind as indicative of employee status. What about the second question? Under *Morrison*, perhaps the Administrator would be principal, but under *Edmond*, arguably no NOAA Officer is principal because they have at least one level of Officer separating them and the President.

Why then is the Chief Scientist appointed by the President with advice and consent of the Senate, while NOAA’s General Counsel is not? The General Counsel is “the chief legal officer for all legal matters which may arise in connection with the conduct of the functions of the Administration.”²⁰⁶ Presumably, the only difference between the scientist and the lawyer is policy influence. But why then is the General Counsel to the DOC appointed by the President with advice and consent?²⁰⁷ The General Counsel for the DOC has a laundry list of duties, all of which amount to his being the department’s legal advisor.²⁰⁸ So is there a rhyme or reason to this? Why does Congress care to have final say over one lawyer but not another?

All of this means, basically, that Congress does whatever it wants. Does NOAA’s Chief Scientist hold comparable weight to the DOC’s General Counsel, such that they both need appointment by the President, with advice and consent? Surely not. Congress does not typically act to limit its own discretion and authority,²⁰⁹ but would anyone in the Senate miss holding a confirmation vote on NOAA’s Chief Scientist? The Chief Scientist plays an advisory role to the Administrator and, even if constitutionally an Officer, is certainly inferior. So long as the Senate retains confirmation power over the NOAA Administrator, it would retain just as much oversight and political control as it does now if the Chief Scientist were appointed by the Secretary of Commerce, or the President without advice and consent. Congress would retain just as much oversight and political control as it does now if the Chief Scientist were a permanent civil servant, which I believe it could constitutionally be. In Britain, anyone under the Administrator would likely be a permanent civil servant, with the possible exception of the Deputy Administrator. Arguably, just within NOAA, a sliver of the DOC, at least two appointees (the Deputy Administrator and Chief Scientist) could avoid Senate confirmation, one of which could avoid politics altogether as a non-Officer. Furthermore, it takes only a stroke of the pen to alter the duties of any inferior Officer to turn that person into a nonpolitical employee, lacking

²⁰⁶ Reorganization Plan No. 4 of 1970, 3 C.F.R. 202-06 (1970), *reprinted with amendments in* 5 U.S.C. app. at 196-97 (1994), *and reprinted in* 84 Stat. 2090-93 (1970).

²⁰⁷ 15 U.S.C. 1508 (2006).

²⁰⁸ Office of Management and Organization, *Office of General Counsel*, U.S. DEPT. OF COMMERCE, http://www.osec.doc.gov/omo/dmp/doos/doo10_6.html (last updated Feb. 16, 2010).

²⁰⁹ U.S. CONST. amend. XXVII, notwithstanding.

“significant authority.”²¹⁰ Thus while the Senate may lose confirmation power, it could still avoid giving any more power to another branch.

B. *Hold Up*

In the prior section, I asked semi-rhetorically whether anyone in the Senate would miss holding a confirmation hearing for NOAA's chief scientist. Unfortunately, the answer is “yes.” His name is Senator David Vitter. As of December 10, 2010, Senator Vitter had a hold on President Obama's NOAA Chief Scientist nominee²¹¹ – an office that had been vacant for years.²¹² Why does Senator Vitter care? Because he wants “two key [Presidential] advisers . . . available for a Small Business Committee hearing” on deepwater drilling and “to get the administration's attention about” job loss in Louisiana due to obstacles in the way of offshore drilling.²¹³ Senator Vitter apparently has no qualms with the nominee himself, thus making a prime example of what the hold has become. Should not a procedural tool used against a nominee have something to do with the nominee? Today's senatorial hold is “a form of hostage-taking.”²¹⁴ So why would the Senate miss confirmation hearings for obscure Officials? Fewer political hostages. But political hostage-taking appears to impliedly violate the purpose of the Appointments Clause.

The Supreme Court once explained that “[o]ur separation-of-powers jurisprudence generally focuses on the danger of one branch's aggrandizing power at the expense of another branch. The Appointments Clause . . . guards against this encroachment”²¹⁵ Taking that characterization of the Appointments Clause, the senatorial hold is an egregious violator of the Founding Fathers' vision. Political hostage-taking is a clear example of the Senate aggrandizing power at the expense of the President. The Founding Fathers were certainly unsure about how the interaction between the President and the Senate would play out,²¹⁶ but it does not appear that the framers envisioned anything other than a “yes” or a

²¹⁰ *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

²¹¹ *David Vitter Takes Heat for Holding up Scientist's Confirmation*, TIMES-PICAYUNE, Dec. 12, 2010, http://www.nola.com/politics/index.ssf/2010/12/david_vitter_takes_heat_for_ho.html.

²¹² Scott Ramos, *White House Nominates Chief Scientist for NOAA*, OCEAN LEADERSHIP BLOG (Aug. 6, 2010, 7:40 AM), <http://www.oceanleadership.org/2010/white-house-nominates-chief-scientist-for-noaa/>.

²¹³ *David Vitter Takes Heat for Holding up Scientist's Confirmation*, *supra* note 211.

²¹⁴ Mackenzie, INNOCENT, *supra* note 167, at 33.

²¹⁵ *Freytag v. Comm'r*, 501 U.S. 868, 878 (1991) (citing *Mistretta v. United States*, 488 U.S. 361, 382 (1989)).

²¹⁶ For example, Alexander Hamilton strongly desired a strong executive; Luther Martin thought it made the President king in everything but title; Samuel Spencer believed the Senate had a strong check; Richard Henry Lee believed the Senate would have a strong role. See GERHARDT, *supra* note 133, at 25-27.

“no” for political appointees. One framer, George Mason, commented that “[t]he word ‘Advice’ here clearly relates in the Judgment of the Senate on the Expediency or Inexpediency of the Measure, or Appointment; and the word ‘Consent’ to their Approbation or Disapprobation of the Person nominated.”²¹⁷ Alexander Hamilton once said, “[the Senate] can only ratify or reject the choice [the President] may have made.”²¹⁸ Both Mason and Hamilton mention explicitly two powers and no others. They both failed to mention a purgatory-esque “hold.” Certainly the terms “advice” and “consent” are broad, but do they embrace the Senate’s Standing Rule VII, from which the hold comes?²¹⁹ Of advice and consent’s many possible definitions, all involve some kind of action, not indefinite inaction.²²⁰

Presidents of both parties have been frustrated by the prominence of the super-Constitutional means by which Congress involves itself in the appointments process.²²¹ Significantly, the hold allows Congress to take appointment power away from the President without taking on any of the President’s accountability. While in Britain appointment power appears to be ceding to the PM in part because of his gradually increasing accountability, in the U.S., the President is losing power and retaining equal accountability. The President bears accountability to the public over nominees and performance of the Officers in office. In theory, and to a degree in practice, the Senate “is expected to defer to the President’s right to select his own subordinates in order that he may be held accountable for the operation of the executive branch.”²²² Congress, ironically, is

²¹⁷ *Id.* at 30-31.

²¹⁸ *Id.* at 31.

²¹⁹ See *supra* note 123 and accompanying text for description of the Senate’s Standing Rule VII.

²²⁰ Regarding this issue, the Senate passed a resolution in 1789 declaring “[t]hat when nominations shall be made in writing by the President . . . a future day shall be assigned, unless the Senate unanimously direct otherwise, for taking them into consideration [A]nd the Senators shall signify their assent or dissent”. S. EXEC. JOURNAL, 1st Cong., 1st Sess. 19 (1789). See also John C. Eastman & Timothy Sandefur, *The Senate is Supposed to Advise and Consent, Not Obstruct and Delay*, 7 NEXUS J. OP. 11, 18 (2002) (“The refusal to hold hearings . . . is not advise or consent”).

²²¹ “The confirmation process has turned into a never ending-political game where everyone loses.” Peter Baker, *Bush Urges Vote on Nominees; Senate Democrats Aim to Stall Till ‘09*, WASH. POST, Feb. 7, 2008, at A17 (quoting President George W. Bush); “[I]f you needed one example of what’s wrong with this town, it might be that one senator can hold up 70 qualified individuals . . . because he didn’t get his earmarks.” Kate Phillips & Jeff Zeleny, *White House Blasts Shelby Hold on Nominees*, THE CAUCUS BLOG (Feb. 5, 2010, 11:28 AM) <http://thecaucus.blogs.nytimes.com/2010/02/05/white-house-blasts-shelby-hold-on-nominees/> (quoting White House Press Secretary Robert Gibbs).

²²² MACKENZIE, POLITICS, *supra* note 140, at 186.

not worried about delegating broad swaths of power, but is worried about even the most minor Officers it delegates to. It seems shortsighted to delegate a great amount of power to an agency, but retain a hold power to be used in ways irrelevant to that agency's nominees. The President, though "accountable for the overall performance of the bureaucratic establishment,"²²³ can only oversee as much of the bureaucratic establishment as the Senate will allow to take office. With the hold, and no accompanying liability, the Senate appears to be getting its cake and eating it too. Political scientist William S. Livingston once wrote, "the institutionalization of accountability in America either is unnecessary or has already long been accomplished."²²⁴ In many respects, that is true and is accomplished through the vigilant press and "an aroused public."²²⁵ But given the public's finite attention span, the odds of most people noticing or caring that a hold was placed on an obscure Officer is probably not great. How accountable, then, is that Senator?

Senatorial holds may, if used appropriately, serve genuinely beneficial purposes, like allowing committees and Senators more time to make informed decisions. That, however, would require that the holds be used only for reasons actually pertaining to the individual nominee. The current practice of using indefinite holds for reasons wholly unrelated to the nominee insults a form of government heavily reliant on accountability and administrative agencies. Restricting the reasons for which one can use holds, though, seems impractical. But, as one author recommended, maybe a limit on their currently indefinite length would be helpful.²²⁶ Not only would a time limit ensure the process keeps moving and integral positions are filled, but it would ensure what the founding fathers appeared to believe "advice and consent" entailed – an action.

VII. CONCLUSION

Yale law professor Bruce Ackerman once wrote, "[a]lthough the relative strength of the prime minister varies among European systems, none of them pretends to have the absolute preeminence that an American President takes for granted."²²⁷ When making political appointments, the President takes nothing for granted. The PM cannot really be stopped from making an appointment,²²⁸ while the most popular President can be stopped from appointing an inferior Officer by just *one* Senator. While in Britain, the PM is gradually accreting power, it seems that the Senate is doing the same in the U.S. To be sure, the President could

²²³ Ackerman, *supra* note 183, at 700.

²²⁴ Livingston, *supra* note 20, at 894.

²²⁵ *Id.*

²²⁶ See Mackenzie, INNOCENT, *supra* note 167, at 46.

²²⁷ Ackerman, *supra* note 183, at 661.

²²⁸ It is unclear what the Labour Party could do if Standing Order E was violated. See *supra* note 78 and accompanying text.

simply concede to a Senator, which would ensure a fast track for nominees, but that would make the President's power merely nominal. The Senate also could simply say "no," but that fails to recognize that (1) the Senate does not need to reserve confirmation power for many political appointees, and (2) instead of the envisioned "yes" or "no" the Senate gave itself the power to say ". . . let me get back to you in eight months," or "not until you do X."

The Constitution separated the powers of political appointments,²²⁹ but the Senate's insatiable demand to require advice and consent, and inability to do so promptly, often leaves political appointee gaps in many departments large enough to drive a truck through. Not only is the process time consuming, but as the story that began this note illustrated, and as scholars have commented, the number of vacancies that remain unfilled as a result of the modern day U.S. appointment process has real consequences.²³⁰

Taking the British system as providing options for what could be done, it is evident that changes to the U.S. system could be made well within the four corners of the Constitution. The PM appoints a small fraction of the political officials the President appoints, leaving civil service to hold high-level permanent positions – many of which the Senate would almost certainly reserve confirmation authority over. With relative ease, the U.S. could attain a lower number of political appointees, a lower number of political appointees subject to confirmation, and a faster confirmation process. There are conceivably many positions that do not exercise "significant authority" for which no appointment is actually constitutionally required, and at the least Congress is more than able to redraw the duties of any inferior Officer in order to turn that Officer into an employee. Furthermore, the Senate could give up confirmation authority over any inferior Officer. The easiest change to the U.S. system, however, would require no new law, no passage by both houses, nor signature by the President. The Senate could ease the burden of the appointments system simply by altering its Standing Rules and putting some kind of limit on senatorial holds. The Constitution does not require the hold and the appointments clause may implicitly prohibit it, at least in its current form. Advice and consent may mean many things, but in any event it requires

²²⁹ The appointments power is automatically separated for principal Officers, but only if the Senate retains advice and consent authority does the Constitution separate the appointments power for inferior Officers. Even then, the Senate could choose to vest the power within the President, Heads of Departments, or the Courts of Law as it wants.

²³⁰ See, e.g., O'Connell, *supra* note 29, at 937-46 (detailing such consequences as "agency inaction, confusion among nonpolitical workers, and decreased agency accountability"). As O'Connell points out, at the time of Hurricane Katrina, "more than one-third of FEMA's important policy positions were vacant," though not all were Senate-confirmed positions. *Id.* at 940.

2012]

WHO'S RUNNING THIS PLACE?

329

an action of some sort. No plausible interpretation of advice and consent opens the door for indefinite nothingness.

Both the Senate's unnecessarily retaining advice and consent power and then abusing that power through holds presents a trend in the U.S. opposite to that of Britain. As the PM slowly accumulates appointment power, the President slowly loses it. For every political hostage taken by the Senate, the President cedes a portion of his ability to choose those for whom he is responsible. The PM is Britain's most accountable politician, as the President is the U.S.'s. The PM is accountable for his political appointees, as the President is for his. The Senate has, politically, a measure of accountability during confirmation hearings, but political hostage-taking renders difficult the President's duty to "take care that the laws be faithfully executed."²³¹ The President, not the Senate, is inevitably responsible for his team and his team's performance. Power should accumulate toward, not away from, the most accountable. Advice and consent is certainly a *check* on the President's power, but it is being used to *take* the President's power. It is counterintuitive to make the President accountable for the Treasury Department, but then hold his nominees hostage for extended periods of time. Super-Constitutional blockades should not be erected to prevent the President from putting a team in place for which he is to be responsible.

²³¹ U.S. CONST. art. 2, § 3.

