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THE ADVICE AND CONSENT OF THE SENATE. A Study of the Confirmation of Appointments by the United States Senate. By Joseph P. Harris. Berkeley and Los Angeles: University of California Press, 1953

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BOOK REVIEWS

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> *The president shall nominate, and by and with the Advice and Consent of the Senate shall appoint Ambassadors, other Public Ministers and Consuls, Judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law...*
> United States Constitution, Article II, Section 2.

Like most of the provisions of the Constitution, Article II, Section 2 was the result of a compromise between divergent points of view advanced in the Constitutional Convention of 1787. One faction comprising Roger Sherman, Oliver Ellsworth, Elbridge Gerry, Benjamin Franklin, Gunning Bedford, George Mason, and John Rutledge, fearful that granting the power of appointment to the executive would tend toward monarchy, advocated that the power of appointment be lodged in the Senate. An opposing group, including Gouverneur Morris, James Wilson, Nathaniel Gorham, Alexander Hamilton and James Madison, favoring the creation of a strong executive, were of the opinion that the executive should be endowed with the appointing power. This group was mindful of the lack of responsibility, the intrigues, deals, and machinations which had been engendered by the placement of the power of appointment in the various state legislatures.

The final compromise, Article II, Section 2, sharing the appointing power between the President and the Senate was not considered as a defeat to their objectives by the proponents of a strong executive. Alexander Hamilton wrote:

> It will be the office of the President to NOMINATE, and with the advice and consent of the Senate to APPOINT. There will, of course, be no exertion of CHOICE on the part of the Senate. They may defeat one choice of the Executive and oblige him to make another; but they cannot themselves CHOOSE – they can only ratify or reject the choice of the President. *The Federalist*, No. 66.

The author of this book states: "History has proved Hamilton to be in error." By virtue of the custom of "senatorial courtesy" the senators of the party in power have assumed the power of selecting federal appoint-

ments within their states. By stating that a presidential nominee within his state is "personally obnoxious" to him, an objecting senator can usually, through the "rule of courtesy", obtain rejection of the nominee by the Senate. In effect, this places the selection of the respective federal officers in the hands of the senators from the respective states in which the offices are located.

The author, Professor of Political Science at the University of California, deprecates the custom of senatorial courtesy, which to him appears to be a perversion of the intent of the framers of the Constitution. Alarmed at the series of bills and riders which were introduced in the Congress during the decade from 1935 to 1945, designed to extend the requirement of senatorial confirmation to many subordinate positions, Professor Harris undertook this study of the history, operation and effects of senatorial confirmation.

The book opens with a review of the debate on the appointing power in the Constitutional Conventions of 1787, and follows with an historical narrative of the major rejections and confirmations of presidential nominees in each administration from George Washington's to the present. An entire chapter is devoted to the contest over the appointment of Louis D. Brandeis to the United States Supreme Court, and there are chapters treating solely the contests over the appointments of David E. Lilienthal and Gordon R. Clapp to the Atomic Energy Commission and the rejection of Leland Olds as a member of the Federal Power Commission. The account of these important contests is at times as dramatic as it is instructive.

Professor Harris devotes a chapter to an analysis of rule of senatorial courtesy, and discusses separately the operation and effect of senatorial confirmation for each of the major types of federal offices, including cabinet officers, heads of independent agencies, diplomatic officers, judges, and administrative and military officers. He discusses at length recent proposals to extend senatorial confirmation.

Professor Harris concludes that the requirement of senatorial confirmation of presidential nominees is a basic part of the Constitution and there is no prospect that this part of the Constitution will be repealed; if such requirement is limited to those offices named in the Constitution and other major policy-determining offices of the government, then it serves a useful purpose in promoting a harmonious relationship between the President and the Senate over broad governmental policy, and thus is not objectionable. However, when senatorial confirmation is made a prerequisite to presidential appointment of subordinate officers it draws the fire of the author. At the present there are approximately 124,000 governmental positions which require senatorial confirmation. The appointment and confirmation of most of these officers has degenerated into "an empty formality."

The author recommends that the number of such positions be reduced and states that such a move would result in the following significant improvement in the federal service:

> It would lead to the extension of the career system to many posit-

> ions now filled by political appointees and would thus make the federal service more attractive to persons of ability. It would enable the government to utilize better the expertness and experience of its qualified, regular employees by advancing them to higher administrative positions now filled by political appointment. It would establish greater internal responsibility for the operation of executive departments and agencies, for subordinate officials would owe undivided loyalty to their administrative superiors. It would give the President and his department heads a freer hand in the selection of their principal assistants, which is essential if they are to be held responsible for the conduct of the government. Instead of weakening, it would strengthen the role of the President as the leader of his party and would lessen the disputes over patronage, which in the past have often marred his relations with the Senate. It would also strengthen the role of the Senate in passing upon the President's selections for the chief policy-determining offices of the government.[1]

The author's conclusions and criticisms are based on documented facts, and mention must be made of the prodigious research that preceded the writing of this work. While there certainly are apologists for the system of senatorial confirmation, they will have to expend great effort to present a defense which is as substantial and thorough in its scope as the indictment of the system of senatorial confirmation and its trend toward expansion which has been handed down by Professor Harris in this book.

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FREEDOM, LOYALTY, DISSENT. By Henry Steele Commager. New York: Oxford University Press 1954. Pp. viii, 155 $2.50.

Professor Commager, in the true Holmes tradition, fears that when a society achieves a set of absolute values it has "no need for further truth, and properly silences those who submit unorthodox ideas." It is worthy of note that this thesis coincides with that of Professor MacIver, reknowned political theorist, who contends that democracy, unlike any other political school of thought, lacks a uniform and orthodox philosophy.

MacIver, in what might be described as a socio-psychological approach, postulates a safety valve theory of democracy which by providing a vent for dissatisfaction, prevents explosions and allows for gradual evolutionary change. Democracy thrives under criticism while, conversely, dictatorship is destroyed by it.

The recognition of the importance of this right to differ led the New Deal Supreme Court to declare that the area of expression was so indispensable

1. Page 398.