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Constitution Over Comity: Toward Ensuring that the Senate's Advice and Consent Power Does Not "Take a Seat" to the Opportunistic Use of Senate Rules

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**CONSTITUTION OVER COMITY: TOWARD
ENSURING THAT THE SENATE’S ADVICE AND
CONSENT POWER DOES NOT “TAKE A SEAT” TO THE
OPPORTUNISTIC USE OF SENATE RULES**

Michael C. Macchiarola*

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INTRODUCTION

Even in a tumultuous year for our national politics, with the transition of federal government control uncharacteristically caustic, a single episode on the floor of the United States Senate chamber is remarkable for its acrimony. On February 7, 2017, Senate Majority Leader Mitch McConnell rose and cited an arcane Senate rule to halt Senator Elizabeth Warren's reading from a letter written more than three decades ago.¹ Senator Warren was addressing the Senate in opposition to the nomination of her Senate colleague, Jeff Sessions of Alabama, to the post of Attorney General of the United States.² The letter from which Senator Warren read had been composed by Coretta Scott King, the widow of the late Dr. Martin Luther King, Jr., in opposition to Senator Sessions' prior nomination for a federal judgeship, in 1986.³

Senator McConnell's objection came swiftly and conjured a little-known and seldom used Senate rule prohibiting any Senator from "directly or indirectly, by any form of words, input[ing] to another Senator or to other Senators any conduct or motive unworthy or unbecoming a Senator."⁴ By invoking the rule, Senator McConnell effectively silenced Senator Warren's attack, as she was instructed by the presiding officer to be seated, in accordance with the rule's provisions.⁵ The episode further enflamed heightened passions on both sides of the political aisle.⁶

1. See generally Matt Flegenheimer, *Republican Senators Vote to Formally Silence Elizabeth Warren*, N.Y. TIMES (Feb. 7, 2017), <https://www.nytimes.com/2017/02/07/us/politics/republican-senators-vote-to-formally-silence-elizabeth-warren.html>.

2. *Id.*

3. A full copy of the letter is available in *Read the Letter Elizabeth Warren Got Rebuked for Reading*, BOSTON GLOBE (Feb. 8, 2017), <http://www.bostonglobe.com/news/politics/2017/02/07/read-letter-elizabeth-warren-got-rebuked-for-reading/Nr9jICetEMk5JZtnmP6tUl/story.html>.

4. S. Res. 285, 113th Cong. Rule XIX (2013) (enacted).

5. See generally Ted Barrett and Manu Raju, *Rule 19: Senate GOP defends rebuking Warren with obscure action*, CNN (Feb. 9, 2017) (describing the actions as they transpired in the Senate chamber), <https://edition.cnn.com/2017/02/08/politics/senate-rule-19-explained/index.html>.

6. See, e.g., Matt Viser & Victoria McGrane, *Senate rebukes Warren after reading Coretta Scott King letter*, BOSTON GLOBE (Feb. 8, 2017), <https://www.bostonglobe.com/news/politics/2017/02/07/warren-violates-arcane-rule-sparking-senate-dustup/11quKU944rf5Ltp0AGO3IK/story.html> (observing that "[t]he debate in the Senate was yet another sign of how toxic the political atmosphere has become," and describing the ignited political reaction following the episode); Matt Flegenheimer, *Shutting Down Speech by Elizabeth Warren, G.O.P. Amplifies Her Message*, N.Y. TIMES (Feb. 8, 2017), <https://www.nytimes.com/2017/02/08/us/politics/elizabeth-warren-coretta-scott-king.html> (arguing that "[f]or Ms. Warren's supporters, it was the latest and most visceral example of a woman muzzled by men who seemed unwilling to listen"); Jessica Valenti, *Elizabeth Warren won't be silenced – and neither will American women*, GUARDIAN (Feb. 8, 2017) ("American women simply won't stand for Republicans trying to shut us up."). Cf. Daniel Reagan Diggins, *Triumph Of The*

Absent from the emotional and partisan reaction to the parliamentary tactic was a broader appreciation for the colorful history of Rule XIX, a survey of its prior invocations or an objective analysis of its limitations and shortcomings. More troubling, the acerbic political climate stymied any constructive inquiry into the efficacy of a Senate rule of decorum being employed to limit the Senate's Constitutionally prescribed advice and consent function with respect to an executive branch nominee. This Article seeks to fill that void, and to provide a broader framework to balance the proper inquiry into the fitness of executive nominees chosen from within the Senate with the maintenance of Senatorial gentility.

This Article proceeds in four parts. Part I briefly examines the history and philosophy of the advice and consent power enshrined in the Constitution and vested in the United States Senate. Because much has been written on this subject and the Article does not endeavor to add to that scholarship, this Part serves as a simple survey. Part II examines the tradition of Senate decorum, with an emphasis on the history and intent of Senate Rule XIX. This rule has been invoked infrequently and it is little examined. Unsurprisingly, it is the subject of very little scholarship. Any recounting of the events surrounding the use of Rule XIX to thwart Senator Warren's attack, and thus limit debate on the nomination of Senator Sessions, eschews the politics or merits of the particular nomination altogether. Instead, the Article addresses the recent episode solely to highlight the potential conflict between the Rule's application and the Constitutional power granted to the Senate in the instance where the executive nominates a sitting senator for a post requiring advice and consent. Part III is the Article's main contribution, suggesting several potential arrangements by which the Senate might anticipate and better navigate a similar episode in the future. This section of the Article seeks a solution faithful to the maintenance of civility within the Senate chamber, yet supportive of the Senate's Constitutional responsibility to ensure the proper investigation of the

Turtle: Why Mitch McConnell Is Already On Top of It All, MEDIUM (Feb. 10, 2017), <https://medium.com/@DVNC112/triumph-of-the-turtle-why-mitch-mcconnell-is-already-on-top-a98cd02b0f25> (admiring that Senator McConnell "whipped-out Rule XIX of the Standing Rules of the Senate like Wyatt Earp, and with lightning speed has shown everyone where to find the real sheriff of Washington D.C."); James I. Wallner, *How to Use Senate Rules to Break Supreme Court filibuster*, WASH. TIMES (Jan. 30, 2017), <https://www.heritage.org/political-process/commentary/how-use-senate-rules-break-supreme-court-filibuster> (suggesting that Senator McConnell's invocation of Rule XIX would "neither jeopardize the legislative filibuster nor unduly empower the majority to limit the rights of individual senators more broadly," but would "accomplish the objective of confirming the president's nominee").

merits of a sitting senator nominated for an executive post. Finally, the Article offers a brief conclusion.

I. THE SENATE'S ADVICE AND CONSENT POWER

As the Framers gathered in Philadelphia, in the summer of 1787, they were grounded in the political philosophy of the Enlightenment⁷ and infused with a healthy dose of government mistrust.⁸ King George III had proven to be an unpopular monarch.⁹ The colonists' experience with the unified and unchecked power of a king had proven unsatisfactory. It had led the men assembled to conclude that "the accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . [was] the very definition of tyranny."¹⁰

Yet, the struggles of the new nation under the Articles of Confederation had been significant.¹¹ Those difficulties ensured that the first order for many Framers would not be focused on checking the authority of the executive.¹² The drafters of the state constitutions had each reduced their respective executives to "essentially figureheads."¹³ And, in his notes of the debates of the federal Convention, James

7. For two favorite articulations of the philosophy, see JOHN LOCKE, *THE TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., 3d ed. 1965) (arguing that a division between the legislative and executive powers is fundamental and necessary to secure the liberty of the people); and CHARLES DE SECONDAT BARON DE MONTESQUIEU, *SPIRIT OF LAWS* (Prometheus Books rev. ed. 2002) (identifying the legislative, executive and judicial powers of government and outlining the basis for the separation of powers).

8. See, e.g., Steven I. Friedland, "Advice and Consent" in the *Appointments Clause: From Another Historical Perspective*, 64 *DUKE L.J.* 173, 176 (2015) ("The Framers also were influenced by writers such as Thomas Paine, who asserted that the government should be mistrusted regardless of the source of its power."); see also MATTHEW E. GLASSMAN, *CONG. RESEARCH SERV.*, R44334, *SEPARATION OF POWERS: AN OVERVIEW* 2-3 (2016) (arguing that the preferences of the colonists were "chiefly shaped by two things: the political philosophy of the colonial Americans, and their actual political experiences as English colonists"), https://digital.library.unt.edu/ark:/67531/metadc824814/m2/1/high_res_d/R44334_2016Jan08.pdf.

9. See, e.g., *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776). ("[t]he history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States.").

10. *THE FEDERALIST* NO. 47 (James Madison).

11. See, e.g., *THE FEDERALIST* NO. 15 (Alexander Hamilton) ("There is scarcely anything that can wound the pride or degrade the character of an independent nation which we do not experience.").

12. Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 *U. ILL. L. REV.* 701, 768-69; see also GLASSMAN, *supra* note 8, at 7 ("The failure of the Articles of Confederation as a national governing document further eroded belief in government by legislature alone.").

13. DONALD S. LUTZ, *THE ORIGINS OF THE AMERICAN CONSTITUTIONALISM* 148 (1988); see also Prakash, *supra* note 12, at 756 ("State legislatures seized executive authority from royal governors and wielded that authority themselves.").

Madison describes the executives of the states as being of no influence compared to the omnipotent legislatures.¹⁴ But, “[t]he weak and servile state and continental executives served as examples to avoid in the construction of the chief executive.”¹⁵ Informed by the frustrations endured under the fledgling system of legislative supremacy favored by the Articles of Confederation, most Framers “understood that a powerful, independent executive was necessary to ensure vigorous, efficient, and responsible law execution.”¹⁶ With so much at stake, considerable detail and great passion attended the deliberations on the extent of the powers to reside in the executive of the general government.¹⁷ Chief among the President’s powers was the selection of the nation’s officers.¹⁸ After due consideration of several alternatives, the Framers coalesced around “an appointments default rule for all officers: the president must appoint, and the Senate must confirm.”¹⁹

A. The Constitutional Basis of the Appointments Clause

Article II, Section 2 of the United States Constitution articulates the process for the appointment of officers of the United States, reading, in relevant part:

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 . . .²⁰

“[T]he Appointments Clause of Article II is more than a matter of ‘etiquette or protocol’; it is among the significant structural safeguards

14. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 312 (W.W. Norton 1987) (1840).

15. Prakash, *supra* note 12, at 768.

16. *Id.* at 769 (“Most delegates understood that execution required vigor, dispatch, and attentiveness, qualities inconsistent with legislative supremacy.”).

17. See generally Louis J. Sirico, Jr., *How the Separation of Powers Doctrine Shaped the Executive*, Villanova Working Paper Series (2008) (examining in detail the debates of the Founders over the separation of powers doctrine as it relates to the executive branch), <http://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=1122&context=wps>.

18. See generally THE FEDERALIST NO. 68 (Alexander Hamilton) (observing that “the true test of a good government is its aptitude and tendency to produce a good administration”).

19. Prakash, *supra* note 12, at 733; see also James D. King and James W. Riddlesperger, Jr., *Senate Confirmation of Cabinet Appointments: Congress-centered, Presidency-centered, and Nominee-centered Explanations*, W. POL. SCI. ASS’N (Apr. 2011) (“After extensive discussion, delegates at the Constitutional Convention favoring a strong executive and those preferring legislative supremacy agreed upon a method to serve the concerns of both sides: appointment by the president with the Senate’s concurrence.”).

20. U.S. CONST., art II, §2.

of the constitutional scheme.”²¹ “Debates over the Appointments Clause, at the Constitutional Convention, focused on devising a structure that would maintain both accountability for appointments and a check on the Executive’s concentrated power.”²² And, there is ample evidence that the Framers intentionally chose a governmental structure more prone to obstruction than comparable systems.²³ Article II’s process for appointments represents the Framers’ purposeful bifurcation of governmental function through separation of powers and the system of checks and balances.²⁴ The design maintains efficiency, yet diversifies power, thereby limiting the possibilities for governmental abuse.²⁵ In this regard, the structure reflects a conscious choice of the Framers to both constrain and diffuse governmental power.²⁶

The two-branch process of appointment and confirmation settled on at the Constitutional Convention is but one manifestation of the broader separation of powers construct. The Framers adopted the proposal offered by New Hampshire delegate Nathaniel Gorham and “modeled after the judicial appointments clause of the Massachusetts Constitution, in which officers would be appointed by the executive with the advice and consent of the Senate.”²⁷ The scheme not only serves as a check on the concentration of governmental power. It is also a nod to the idea that “power flows from the people to the government, rather than the other

21. *Edmond v. United States*, 520 U.S. 651, 659 (1997).

22. *Congressional Restrictions on the President's Appointment Power and the Role of Longstanding Practice in Constitutional Interpretation*, 120 HARV. L. REV. 1914, 1917 (May 2007) [hereinafter *Congressional Restrictions*].

23. See Russell L. Weaver, “*Advice and Consent*” in *Historical Perspective*, 64 DUKE L.J. 1717, 1753 (2015) (observing that the Framers preferred “a governmental structure that was more cumbersome and less efficient than competing governmental systems”); see also ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 140 (Arthur Goldhammer trans., Library of America 2004) (remarking that “the power of the president of the United States is exercised only within the sphere of limited sovereignty, whereas that of the king of France acts within the circle of full sovereignty”).

24. John T. Plecnik, *Officers Under the Appointments Clause*, 11 PITT. TAX REV. 201, 208 (2014) (noting that “the Founders authored the Appointments Clause as a safeguard for the separation of powers”); see also *Freytag v. Commissioner*, 501 U.S. 868, 878 (1991) (acknowledging that the “roots of the separation-of-powers concept embedded in the Appointments Clause are structural and political”).

25. Weaver, *supra* note 23, at 1721.

26. See THE FEDERALIST NO. 77 (Alexander Hamilton) (“To this union of the Senate with the President, in the article of appointments, it has in some cases been suggested that it would serve to give the President an undue influence over the Senate and in others that it would have an opposite tendency, a strong proof that neither suggestion is true.”).

27. See *Congressional Restrictions*, *supra* note 22, at 1917; see also William Grayson Lambert, *The Real Debate Over the Senate's Role in the Confirmation Process*, 61 DUKE L. J. 1283, 1300-01 (2012) (describing the facts surrounding the Convention’s adoption of “an ‘advice and consent’ scheme much like the one Gorham had proposed”).

way around.”²⁸ Too, the appointments process mirrors other parts of state function which foster interdependency – requiring the cooperation of more than one branch of government. As one commentator has noted, “most powers granted under the Constitution are not unilateral for any one branch; instead they overlap.”²⁹

The Senate’s advice and consent regime and its necessary cooperative competence was born of several rounds of design, re-design and refinement.³⁰ As one scholar describes,

[d]uring the debates, a variety of other modes of appointment—including presidential appointment, senatorial appointment, and presidential appointment subject to a discretionary Senate veto—were discussed and sometimes initially accepted. Eventually, all were rejected.³¹

The advice and consent mechanism, “makes a firm distinction between the power of nomination and the power of appointment.”³² The President’s choice of candidate is the emphasis of appointments process, and its catalyst, as the Framers believed that “[t]he sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation.”³³ The Senate’s role is secondary; as it is limited to “see[ing] that no unfit person be employed,”³⁴ yet is

28. Weaver, *supra* note 23, at 1724; Friedland, *supra* note 8, at 176 (“[P]hilosophers such as Baron de Montesquieu contributed to the Constitution’s central idea that the legitimacy of governmental power is derived from the people, from the bottom up, and not from the top down, as with divine right.”); see also Douglas G. Smith, *An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution*, 34 SAN DIEGO L. REV. 249, 293 (1997) (“The real innovation under the Constitution was that the general government depended at all for its authority on the people.”).

29. See GLASSMAN, *supra* note 8, at *Summary* (other examples of the overlapping responsibilities of the branches include the presidential veto power over legislation, the judicial power to review actions of Congress or the President and the Congressional power (by supermajority) to remove judges or the president from office); *id.* at 1.

30. See generally Joseph Larisa, Jr., *Popular Mythology: The Framers’ Intent, the Constitution, and the Ideological Review of Supreme Court Nominees*, 30 B.C. L. REV. 969, 978-79 (1989) (discussing the process of appointment for federal judges and observing that “the Convention as a whole was very much undecided on the proper method of appointment until its unanimous decision in September to place it in the hands of the President”).

31. Adam J. White, *Toward the Framers’ Understanding of “Advice and Consent”*: *An Historical and Textual Inquiry*, 29 HARV. J.L. & PUB. POL’Y 104, 110.

32. Hanah Metchis Volokh, *The Two Appointments Clauses: Statutory Qualifications for Federal Officers*, 10 U. Pa. J. CONST. L. 745, 752.

33. THE FEDERALIST NO. 76 (Alexander Hamilton); see also DE TOCQUEVILLE, *supra* note 23, at 146 (“The Americans rightly judged that in order for the chief executive to carry out his mission and bear full responsibility for his actions, he ought to be left as free as possible to choose his own agents and to dismiss them at will.”).

34. THOMAS JEFFERSON, OPINION ON THE POWERS OF THE SENATE RESPECTING DIPLOMATIC APPOINTMENTS (Apr. 24, 1790) reprinted in 16 THE PAPERS OF THOMAS JEFFERSON 378, 379 (Julian P. Boyd ed., 1961).

intended as an “excellent check upon the spirit of favoritism in the President.”³⁵ The structure fosters an interdependence between the two branches,³⁶ wholly consistent with the larger foundational doctrine of separation of powers attributable to Baron de Montesquieu.³⁷

B. The Purpose of the Appointments Clause

Commentators have identified “four related but distinct purposes of the Appointments Clause.”³⁸ As designed, the Appointments Clause (i) prevents a single branch from creating and filling the same governmental office, (ii) protects the President’s appointment prerogative, (iii) ensures political accountability, and (iv) strives for a higher quality of appointments.³⁹

The Constitution’s qualification of advice and consent checks the unfettered selections of the executive and “eliminates the singular viewpoint and its impulsiveness and susceptibility to a lack of questioning, and instead values the idea of freedom of speech and differing viewpoints—of the Senate and the President, at least—and also emulates an adversary system of truthseeking.”⁴⁰ Convinced that a successful system of government must diffuse and divide authority, the Framers embraced the concept of separation of powers, hoping to avoid the concentration of unbridled appointment power in any single person or entity.⁴¹ As Madison more generally described the theory’s importance, “[a]n independence of the three great departments of each other, as far as possible, and the responsibility of all to the will of the

35. THE FEDERALIST NO. 76 (Alexander Hamilton); *see also* DE TOCQUEVILLE, *supra* note 23, at 136 (“The Senate has the power to nullify certain presidential actions, but it cannot force him to act or share executive power with him.”).

36. THE FEDERALIST NO. 77 (Alexander Hamilton) (“Those who can best estimate the value of a steady administration, will be most disposed to prize a provision which connects the official existence of public men with the approbation or disapprobation of that body which, from the greater permanency of its own composition, will in all probability be less subject to inconstancy than any other member of the government.”).

37. Weaver, *supra* note 23, at 1724-25; *see also* THE FEDERALIST NO. 47 (James Madison) (commenting that “[t]he British Constitution was to Montesquieu what Homer has been to the didactic writers of epic poetry” and commenting that, under the British Constitution, “the legislative, executive, and judiciary departments are by no means totally separate and distinct from each other”).

38. *See, e.g.*, Plecnik, *supra* note 24, at 208 (quoting *Tucker v. Commissioner*, 135 T.C. 114, 120 (2010)).

39. *See* Plecnik, *supra* note 24, at 209-10 (summarizing the design intention of the Founders).

40. Friedland, *supra* note 8, at 177.

41. *See, e.g.*, THE FEDERALIST NO. 47 (James Madison) (commenting that “where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted”).

community seemed to be generally admitted as the true basis of a well constructed government.”⁴² The constitutional reformers seized on this maxim and “exploited it with a sweeping intensity and eventually magnified it into the dominant principle of the American political system.”⁴³ The design also respects the primacy of a Presidential choice, “prevent[ing] congressional encroachment upon the Executive and Judicial Branches,”⁴⁴ as “[n]o role whatsoever is given either to the Senate or to Congress as a whole in the process of choosing the person who will be nominated for appointment.”⁴⁵

The appointments process for federal officials is designed “as a shared power held jointly by the President and the Senate.”⁴⁶ The structure seeks to maximize efficiency, yet remains skeptical of undiluted power.⁴⁷ And, the fact that, at times in our nation’s history, nominations have been “difficult and contentious should come as no great surprise.”⁴⁸ Similar to many other constitutional powers, government appointments is a mutual power—requiring a level of cooperation and coordination of two separate branches of the federal government.⁴⁹ That such cooperation will always be forthcoming is by no means assured.⁵⁰ By bifurcating the appointment and confirmation

42. MADISON, *supra* note 14 at 313.

43. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 449 (1969).

44. *Edmond v. United States*, 520 U.S. 651, 659 (1997).

45. *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 483 (1989) (Kennedy, J., concurring in judgment).

46. Ronald J. Krotoszynski, Jr., *Transcending Formalism and Functionalism in Separation-of-Powers Analysis: Reframing the Appointments Power After Noel Canning*, 64 *DUKE L.J.* 1513, 1521.

47. *See* THE FEDERALIST NO. 76 (Alexander Hamilton) (“It is not easy to conceive a plan better calculated than this to promote a judicious choice of men for filling the offices of the Union; and it will not need proof, that on this point must essentially depend the character of its administration.”).

48. Weaver, *supra* note 23, at 1721. *See also* THE FEDERALIST NO. 76 (Alexander Hamilton) (“in every exercise of the power of appointing to offices, by an assembly of men, we must expect to see a full display of all the private and party likings and dislikes, partialities and antipathies, attachments and animosities, which are felt by those who compose the assembly.”).

49. *See* Jonathan Turley, *Constitutional Adverse Possession: Recess Appointments and the Role of Historical Practice in Constitutional Interpretation*, 2013 *WIS. L. REV.* 965, 973 (describing the Framers’ decision to enshrine power jointly in the president and the Senate); *see also* Krotoszynski, *supra* note 46, at 1522 (referring to the powers as “blended, rather than clearly separated, powers”).

50. While the President has the power to nominate federal judges, ambassadors and officers, such nominees are of no governmental import until they gain confirmation following the “advice and consent” of the Senate. *See, e.g.*, Jonathan H. Adler, *The Senate Has No Constitutional Obligation to Consider Nominees*, 24 *GEO. MASON L. REV.* 15, 18 (2016) (arguing that Senator McConnell’s across-the-board opposition to any Supreme Court nominee following the death of Justice Scalia might be “unwise and imprudent,” but is not

powers in separately elected entities, the Constitution encourages a system where political influences must be successfully navigated to achieve confirmation.⁵¹ Such a process ensures at least a modicum of political accountability.⁵²

The genius of the Appointments Clause design and its ability to encourage high quality appointments for executive offices is summarized by one scholar:

The brilliance of this appointments interdependence elides a simple rationale of distrust of government. It pushes beyond the mere fact that each branch is elected, or that overlapping duties force different factions to engage in a dialogue, if not directly, even to the extent of becoming a team of rivals, however begrudgingly. Just knowing that there will be examination and inspection ought to be enough to modify the behavior of the participants, from the Executive who nominates and does not want embarrassment or rejection, to the nominees themselves, and to the Senate.⁵³

II. THE TRADITION OF SENATE DECORUM

A. Jefferson's Contribution

From its earliest days, the Senate codified Thomas Jefferson's view that "[p]arliamentary bodies require written rules of order if their proceedings are to be conducted fairly and efficiently."⁵⁴ The world's most deliberative body⁵⁵ has since maintained an expanding list of rules governing civility and decorum within its chamber.⁵⁶ When he acceded

unconstitutional); Krotoszynski, *supra* note 46, at 1523, 1524 (commenting, in the context of appointments, that the "Framers obviously understood that inaction could lead to gridlock" and adding that "the Senate is free to reject presidential nominations through inaction").

51. Weaver, *supra* note 23, at 1722.

52. *Id.*

53. Friedland, *supra* note 8, at 177.

54. THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE FOR THE USE OF THE SENATE OF THE UNITED STATES v (U.S. Government Printing Office 1993) (1801), <https://www.senate.gov/artandhistory/history/resources/pdf/SDoc103-8.pdf>.

55. For an exegesis on the use of the description of the Senate as "the world's greatest deliberative body," see Barry Popik, *World's Greatest Deliberative Body (U.S. Senate nickname)*, THE BIG APPLE (Aug. 12, 2010), http://www.barrypopik.com/index.php/new_york_city/entry/worlds_greatest_deliberative_body_us_senate_nickname/; see also Horace Towner, *Our Somnolent Senate: Dignity and Deliberation Hedge the Proceedings of America's Elder Statesmen*, 58 MUNSEY'S MAGAZINE 72 (1916) ("Most of the time the 'upper house' is first of all a deliberative, a very deliberative body."); *Remarks by Senator Robert Byrd at the Orientation of New Senators*, UNITED STATES SENATE (Dec. 3, 1996), https://www.senate.gov/artandhistory/history/common/generic/Feature_Homepage_ByrdOrientation.htm [hereinafter *Remarks by Senator Robert Byrd*].

56. Derek Hawkins, *The Silencing of Elizabeth Warren and an Old Senate Rule Prompted by a Fistfight*, WASH. POST (Feb. 8, 2017), <https://www.washingtonpost.com/new>

to his position as the second Vice President of the United States, and, as such, the Senate's second president, Jefferson was aware that his predecessor, John Adams, "had been severely criticized for his inconsistent and subjective manner while presiding" over the Senate.⁵⁷ Committed to avoiding such criticism, Jefferson believed that the Senate's presiding officer must abide by "some known system of rules" and "that he may neither leave himself free to indulge caprice or passion, nor open to the imputation of them."⁵⁸ Well trained in parliamentary practice, and eager to carefully delineate norms to avoid a Senate prone to extremes, Jefferson set about crafting a manual of legislative procedure to guide the Senate's affairs.⁵⁹

Jefferson's work culminated in his *Manual of Parliamentary Practice for the Use of the Senate of the United States*, which included specific references to the applicable text of the U.S. Constitution and was arranged in fifty-three categories, with twenty-three sections devoted to the management of bills.⁶⁰ Primarily concerned with the minutiae of the legislative process, the *Manual* also addressed the behavioral expectation of the Senate's members. Jefferson devoted several parts of his guidance to issues of how senators were to conduct their affairs, both in and out of the Senate chamber.

Among the protections the *Manual* accorded members of the upper chamber was an assurance against "having their persons assaulted, or characters traduced."⁶¹ A lengthier section of the *Manual*, concerning "Order in Debate," outlines basic principles of decorum and rules of conduct. For example, section 17.11 concerns the now familiar manner in which Senators should engage fellow members and offers baseline proprieties, providing that

[n]o person in speaking, is to mention a member then present by his name; but to describe him by his seat in the house, or who spoke last, or on the other side of the question, nor to digress from the matter to fall upon the person by speaking reviling, nipping, or unmannerly words against a particular member.⁶²

s/morning-mix/wp/2017/02/08/the-silencing-of-elizabeth-warren-and-an-old-senate-rule-prompted-by-a-fistfight/?utm_term=.03d1a5857b99.

57. JEFFERSON, *supra* note 54, at vi; *see also No Hissing*, UNITED STATES SENATE (Feb. 27, 1801), https://www.senate.gov/artandhistory/history/minute/No_Hissing.htm [hereinafter *No Hissing*] ("[D]espite Adams' knowledge, senators routinely criticized him for his arbitrary and inconsistent parliamentary rulings.").

58. JEFFERSON, *supra* note 54, at vi.

59. *Id.* at vii.

60. *Id.* at viii.

61. *Id.* §3.1, at 3.

62. *Id.* §17.11, at 27 (internal citations omitted).

Concerned that even the best legislatures could devolve into a mob absent proper standards of orderliness,⁶³ the section provided further that “[w]hen a member shall be called to order he shall sit down until the president shall have determined whether he is in order or not.”⁶⁴ Finally, section 17.12 added that “[n]o one is to disturb another in his speech by hissing, coughing, spitting, speaking or whispering to another.”⁶⁵ The rules established baseline restrictions and signaled broad guidelines for proper behavior within the upper chamber of the nation’s legislature.

Well aware that reactions to individual episodes of behavioral transgression within the Senate chamber were likely to be subjective and that comity would be tested at moments of heightened passion, Jefferson took care to outline a detailed process to reach judgments on civility. In a procedure which presages today’s Rule XIX, the Manual provided that:

[d]isorderly words are not to be noticed till the member has finished his speech. Then the person objecting to them, and desiring them to be taken down by the clerk at the table, must repeat them. The Speaker then may direct the clerk to take them down in his minutes.⁶⁶

Although the Senate traditionally has not considered Jefferson’s *Manual* as a direct authority on parliamentary practice, the work has retained an influence fundamental to Senate proceedings.⁶⁷ In 1888, the Senate first began publishing a compilation of laws, rules and regulation known as the *Senate Manual*, a book which continues to guide the operations of the body today.⁶⁸ The Senate has regularly published the *Manual* alongside Senate rules.⁶⁹

In February 1801, after Thomas Jefferson was informed that he had been elected President of the United States, he bade farewell to the Senate over which he had presided, offering an observation as he parted:

I owe to truth and justice . . . to declare that the habits of order and decorum, which so strongly characterize the proceedings of the Senate, have rendered the umpirage of their President an office of

63. See, e.g., THE FEDERALIST NO. 55 (James Madison) (“In all very numerous assemblies, of whatever characters composed, passion never fails to wrest the scepter from reason. Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob.”).

64. JEFFERSON, *supra* note 54, §17.11, at 28 (internal citations omitted).

65. *Id.* §17.12, at 28.

66. *Id.* §17.16, at 29 (internal citations omitted).

67. See *No Hissing*, *supra* note 57 (“Jefferson’s Manual, with its emphasis on order and decorum, changed the way the Senate of his day operated.”).

68. JEFFERSON, *supra* note 54, at xiii; see S. COMM. ON RULES AND ADMIN., 133TH CONG., S. MANUAL CONTAINING THE STANDING RULES, ORDERS, LAWS, AND RESOLUTIONS (2014), <https://www.gpo.gov/fdsys/pkg/SMAN-113/pdf/SMAN-113.pdf>.

69. *Id.*

little difficulty; that, in times and on questions which have severely tried the sensibilities of the house, calm and temperate discussion has rarely been disturbed by departures from order.⁷⁰

B. Senate Comity is Tested

As he exited the Senate chamber, the Gentleman from Virginia could not have foreseen the rancor that would befall his beloved legislative body in the years to follow. Nor could he predict the “seismic cultural, technological and political adjustments” on the horizon or the profound effect they would have on the dysfunction of the appointments process.⁷¹ Little more than a half century after Jefferson departed the Senate, the deterioration began in earnest, when in “one of the most dramatic and deeply ominous moments in the Senate’s entire history,” a Congressman entered the upper chamber and “savagely beat a senator into unconsciousness.”⁷²

On May 22, 1856, Senator Charles Sumner, an antislavery Republican from Massachusetts, delivered an explosive speech, pleading that the Kansas territory should be admitted to the Union as a free state.⁷³ In the course of his fiery presentation, Senator Sumner identified two Democratic colleagues as the principal culprits of a “Crime Against Kansas”⁷⁴ which “compel[ed] it to the hateful embrace of slavery”—Stephen Douglas of Illinois and Andrew Butler of South Carolina.⁷⁵

Shortly after the Senate had adjourned for the day, Congressman Preston Brooks of South Carolina entered the chamber, and approached Senator Sumner at his desk.⁷⁶ Congressman Brooks was a close friend of Senator Butler and had not taken kindly to Senator Sumner’s attack on his fellow statesman.⁷⁷ With little warning, Congressman Brooks proceeded to strike Senator Sumner repeatedly over the head with his

70. *Id.* at ix.

71. Friedland, *supra* note 8, at 175.

72. *The Caning of Senator Charles Sumner*, UNITED STATES SENATE (May 22, 1856), https://www.senate.gov/artandhistory/history/minute/The_Caning_of_Senator_Charles_Sumner.htm [hereinafter *Sumner Caning*].

73. *Id.*

74. Charles Sumner, *The Crime Against Kansas*, DIGITAL HISTORY (May 19-20, 1856), http://www.digitalhistory.uh.edu/dispatch_textbook.cfm?smtID=3&psid=3915.

75. *Id.* (In the speech, Senator Sumner labeled Senator Douglas a “noise-some, squat, and nameless animal” and compared Senator Butler’s support of slavery with taking “a mistress . . . who, though ugly to others, is always lovely to him.”); see *Sumner Caning*, *supra* note 72.

76. *Id.*

77. Towner, *supra* note 55, at 74.

metal-topped cane.⁷⁸ Stunned, Senator Sumner “rose and lurched blindly about the chamber, futilely attempting to protect himself.”⁷⁹ The episode ended quickly, with Senator Sumner carried away, bleeding from the head and Congressman Brooks calmly exiting the Senate chamber.⁸⁰ Meanwhile, “[t]he nation, suffering from the breakdown of reasoned discourse that this event symbolized, tumbled onward toward the catastrophe of civil war.”⁸¹

The caning episode paled in comparison to the argument between Senators Henry S. Foote of Mississippi and Thomas H. Benton of Missouri six years earlier. By at least one account, their antics qualified as “[p]robably the most serious scene of disorder that ever occurred in the Senate.”⁸² After Senator Foote publicly denounced Senator Benton, the Missourian “suddenly rose and started toward the speaker in a belligerent manner.”⁸³ Senator Foote “drew a large pistol from his hip-pocket, and flourished it at Benton.”⁸⁴ After the Senate was thrown into an uproar, tempers were settled and the pistol was locked away by the sergeant-at-arms.⁸⁵

Yet another violent episode involved Senators John L. McLaurin and Benjamin R. Tillman of South Carolina:

On February 22, 1902, the Senate debated a bill relating to the Philippine Islands. Benjamin Tillman, known to be less than courteous on the Senate floor, used the occasion to direct scathing remarks toward John McLaurin's empty chair, charging that his colleague had succumbed to ‘improper influences’ in changing his position on the treaty to annex the Philippines . . . Word of Tillman's remarks quickly reached McLaurin in a committee meeting and, incensed, he dashed into the Senate Chamber and denounced Tillman's statement as ‘a willful, malicious, and deliberate lie.’⁸⁶

Challenged by his colleague, Senator Tillman physically attacked Senator McLaurin, landing a “series of stinging blows” before efforts to separate the two legislators “resulted in misdirected punches landing on

78. *Sumner Caning*, *supra* note 72; *see also* Towner, *supra* note 55 (“without warning Brooks began to beat [Sumner] violently over the head”).

79. *Sumner Caning*, *supra* note 72.

80. *Id.*

81. *Id.*

82. Towner, *supra* note 55, at 74.

83. *Id.*

84. *Id.*

85. *Id.* (recounting the episode).

86. *The Censure Case of John L. McLaurin and Benjamin R. Tillman of South Carolina (1902)*, UNITED STATES SENATE (Feb. 28, 1902), https://www.senate.gov/artandhistory/history/common/censure_cases/090Tillman_Laurin.htm [hereinafter *Censure Case*].

other members.”⁸⁷ Following the melee and a two-hour debate in closed session, both Senators were declared in contempt of the Senate and “later in the afternoon, both of them apologized to the august assembly.”⁸⁸ The apologies of Senators Tillman and McLaurin were handled “in such unpleasant and bitter terms that the ruckus threatened to explode anew.”⁸⁹ This violent breach of comity prompted members of the Senate to reexamine their rules in an effort to enforce “stricter guidelines for the decorum of floor debate.”⁹⁰

C. Stricter Guidelines for Senate Decorum – The Introduction of Rule XIX

On August 8, 1902, the Senate adopted Rule XIX(2),⁹¹ requiring that, “[n]o Senator in debate shall, directly or indirectly, by any form of words impute to another Senator or to other Senators any conduct or motive unworthy or unbecoming a Senator.”⁹² A contemporary critique charged that “[u]nder this rule personalities are severely suppressed whenever they are resorted to in debate.”⁹³ In fact, the accounts of sample precedents where senators were declared out of order most often included cases described as the “lie indirect,” similar to Senator Thomas Benton’s accusation that Senator John C. Calhoun’s speech represented “a bold attack upon the truth.”⁹⁴ Other early examples cited by the commentator of words to be deemed out of order in the Senate included Senator Dolliver’s characterization of the Democratic members of the chamber as a “syndicate of vituperation” and Senator Zachariah Chandler’s declaration that certain members gained their seats “by fraud and violence.”⁹⁵

D. Invocations of Rule XIX

Following its adoption, Rule XIX remained in relative obscurity, and largely without incident, for more than three-quarters of a century. Then, in June 1979, Republican Senator John Heinz, of Pennsylvania,

87. *Id.*

88. *Id.*; John Elfresth Watkins, *The Quarrels of Congress: The Tillman-McLaurin Battle*, 3 THE SCRAP BOOK 219 (1907).

89. *See Censure Case*, *supra* note 86.

90. *Id.*

91. *See generally* Lily Rothman, *The Fistfight Behind the Rule That Silenced Elizabeth Warren, as Described in 1902*, TIME (Feb. 8, 2017), <http://time.com/4663698/elizabeth-warren-rule-xix-history/> (describing Senator George Hoar’s introduction of what became Rule XIX(2)).

92. S. Res. 285, 113th Cong. Rule XIX (2013) (enacted).

93. Towner, *supra* note 55, at 74.

94. *Id.* (recounting the episode).

95. *Id.*

halted debate in the Senate chamber after his Republican colleague, Senator Lowell Weicker, of Connecticut, referred to him as “an idiot” and labelled him “devious.”⁹⁶ During heated debate over an appropriations bill, Senator Weicker attempted to eliminate \$13 million in proposed loan guarantees to the Wheeling-Pittsburgh Steel Co., a company located in Senator Heinz’s home state.⁹⁷ Senator Heinz’s comments on the Senate floor implied that Senator Weicker might be “acting on behalf of another steel mill.”⁹⁸ The insinuation angered the Connecticut senator, who rose to his feet to respond: “[w]hen a member substitutes innuendo for fact or the persuasion of logic . . . he is either an idiot or devious and the senator from Pennsylvania qualifies in both ways.”⁹⁹

Senator Heinz marched to the Senate president's desk with the Senate rule book in hand.¹⁰⁰ After Senator Heinz cited Rule XIX to the presiding senator, Senator Weicker was directed to sit down, in accordance with the rule.¹⁰¹ Accounts suggest that more than ten minutes of confusion ensued before Democratic Senate Majority Leader Robert Byrd brought the two men together to shake hands and make half-hearted non-apologies, before debate resumed, and the incident was stricken from the Senate record.¹⁰² By best evidence, the incident involving Senators Weicker and Heinz marked the first invocation of Rule XIX in the Senate’s history. And, while the rule and its full remedy would not again be implicated until the recent episode involving Senator Warren and Majority Leader McConnell, it would be cited and its invocation threatened several times in the years that followed.

Just two years later, in 1981, Senator Lowell Weicker again found

96. *Senate Dispute Over Steel Mill Bill Degenerates to Name-calling Spat*, DAILY IOWAN, Jun. 26, 1979, at A3, <http://dailyiowan.lib.uiowa.edu/DI/1979/di1979-06-26.pdf> (“Before the smoke cleared, Weicker said Heinz was either an ‘idiot’ or ‘devious’—very probably both.”).

97. *Id.*

98. *Id.*

99. *Id.* (quoting from the Senate proceedings); *Standing Rules of the United States Senate, Rule XIX*, WIKIPEDIA [https://en.wikipedia.org/wiki/ Standing_Rules_of_the_United_States_Senate_Rule_XIX](https://en.wikipedia.org/wiki/Standing_Rules_of_the_United_States_Senate_Rule_XIX) (last visited May 22, 2018).

100. *Id.*

101. *Id.* (“Heinz then got out a rule book, took the floor and used Senate regulations to force Weicker to sit down.”). Notably, the rule’s remedy is wholly consistent by that first suggested by section 17.11 of Thomas Jefferson’s *Manual*. See discussion *supra* Section II.A.

102. See Andrew J. Tobias, *Arcane Senate Rule Used to Silence Elizabeth Warren Has Been Mentioned Frequently Through The Years, But Rarely Used*, CLEVELAND.COM (Feb. 8, 2017, 5:17 PM), http://www.cleveland.com/politics/index.ssf/2017/02/arcane_senate_rule_used_to_sil.html (“After about 10 minutes, Democratic Senate Majority Leader Robert Byrd got both men to shake hands, and debate resumed. The incident was stricken from the Senate record.”).

himself at the center of a Rule XIX controversy following his long oratory aimed at blocking the expected final approval of a Congressional limitation on the Justice Department's participation in school busing cases.¹⁰³ After an impassioned and stirring presentation during which the Connecticut Senator roared that "[d]emagoguery is afoot" and paced about the Senate chamber, Senator Jesse Helms of North Carolina objected, asserting that Senator Weicker had impugned his motives in violation of Rule XIX.¹⁰⁴ Idaho Republican Senator James McClure, then presiding over the Senate, proceeded to "read a rule stating that no senator in a debate can 'impute to the motives of another senator any conduct or motive unbecoming a senator.'" ¹⁰⁵ Accounts of the episode provide no further description, and, in time, Senator Weicker's legislative tactics proved unsuccessful, as the Senate passed a cloture vote on the measure he opposed several months later.¹⁰⁶

One of the more colorful incidents involving Senate Rule XIX occurred in 1992 when the Senate's senior Democrat, Robert Byrd, "got into a dispute with Sen. Hank Brown R-Colo., a supporter of the balanced-budget amendment."¹⁰⁷ Senator Brown complained of excessive government spending and labeled the Appropriations Committee, chaired by Senator Byrd, as "the most irresponsible appropriations committee in the history of our republic."¹⁰⁸ Matching the hyperbole, Senator Byrd rose to his feet to call Senator Brown's comments "as irresponsible a statement as I have ever heard in my 34 years in the Senate."¹⁰⁹ Senator Byrd raised the stakes, "read[ing] aloud from a June 15 letter Brown had sent Byrd asking that the appropriations panel provide him with millions of dollars for special projects in Colorado."¹¹⁰ Senator D'Amato of New York entered the fray, accusing Senator Byrd of violating Rule XIX. After Senator Byrd denied the

103. See Francis X. Clines, *Weicker Uses Oratory in Bid to Stall a Busing Curb*, N.Y. TIMES (Jun. 17, 1981), <http://www.nytimes.com/1981/06/17/us/weicker-uses-oratory-in-bid-to-stall-a-busing-curb.html> ("The legislation would stop the Justice Department from 'any sort of action to require directly or indirectly' school busing beyond the school nearest a student's home except for the physically or mentally handicapped.").

104. *Id.*

105. *Id.*

106. Steven V. Roberts, *Senate, 61-36, Ends Filibuster on Busing Issue*, N.Y. TIMES, (Sep. 17, 1981), <http://www.nytimes.com/1981/09/17/us/senate-61-36-ends-filibuster-on-busing-issue.html> (commenting that "the vote to end the filibuster, which carried by 61 votes to 36, clearly indicated that a majority of the Senate was ready to end busing as a means of achieving racially balanced schools").

107. See *Byrd in Floor Spat Said 'Shut Mouth'*, INDIANA GAZETTE 14 (Jun. 27, 1992), <https://www.newspapers.com/newspage/14043113/>.

108. *Id.*

109. *Id.*

110. *Id.*

charge, “there ensued an extraordinary shouting match between the two senators that saw Senator Byrd ask his colleague from New York, ‘Would the senator shut his own mouth to let the chair rule?’”¹¹¹ The chair found no violation, and the Senate resumed debate “in its usual decorous manner.”¹¹²

In February 1995, during debate over a balanced budget amendment to the Constitution, Senator Byrd accused his Republican colleagues of “a sleazy, tawdry effort to win a victory” after the Republican Leader, Senator Bob Dole, reneged on a promise to vote on the measure and, instead gaveled the chamber into recess.¹¹³ “I think my colleague from West Virginia came close, if not a violation of Rule 19,” Senator Dole said on the Senate floor the next day, before reading the relevant portion of Rule XIX aloud and commenting that the “tawdry” and “sleazy” references were “uncalled for.”¹¹⁴

On November 16, 2005, Senator Ted Stevens of Alaska complained that “[i]t has been brought to my attention that the Senator from Illinois unfairly maligned my character in direct violation of rule XIX of the Standing Rules of the Senate.”¹¹⁵ Senator Stevens was bristling at Senator Durbin’s suggestion that he had purposely avoided swearing in witnesses before a joint hearing of the Senate Commerce and Energy Committees. “To suggest I did not administer an oath to these witnesses to help them lie to Members of Congress is false, inexcusable, and in violation of rule XIX, the longstanding practice of Senatorial courtesy, and I expect an apology from the Senator from Illinois,” Senator Stevens bawled.¹¹⁶ The record is unclear as to whether such an apology was ever extended.

In 2007, Majority Leader Harry Reid drew the ire of Senator Arlen

111. *Id.*

112. *Id.*

113. See Michael Wines, *Republicans Postpone a Balanced-Budget Vote*, N.Y. TIMES, (Mar. 1, 1995), <http://www.nytimes.com/1995/03/01/us/the-104th-congress-balanced-budget-republicans-postpone-a-balanced-budget-vote.html?pagewanted=all>.

114. See *Balanced Budget Amendment*, C-SPAN (Mar. 1, 1995), at 8:34 *et seq.*, <https://www.c-span.org/video/?63648-1/balanced-budget-amendment>. But see 141 CONG. REC. S18969 (daily ed. Dec. 20, 1995) (statement of Sen. Byrd), 141 Cong Rec S 18969, <https://www.gpo.gov/fdsys/pkg/CREC-1995-12-20/pdf/CREC-1995-12-20-pt1-PgS18969.pdf> (Sen. Byrd defending his comments, several months later, following a long oratory on Senate civility: “I am very careful, I try to be careful, and sometimes I speak in haste. And subsequent to that remark on this very floor one evening, I referred to my having spoken in haste, and to my having used some words, which I wish I had chosen differently. So nobody needs to remind this Senator as to what this Senator has said. I am ready to defend anything I say”).

115. See 145 CONG. REC. S12899 (daily ed. Oct. 20, 1999) (statement of Mr. Lot), 145 Cong Rec S 12899.

116. See *id.*

Specter, then a Republican, of Pennsylvania. Frustrated by entrenched Republican opposition to the Democrats plan for altering the Alternative Minimum Tax, the Senator from Nevada had quipped that “President Bush is the man that’s pulling the strings on the 49 puppets he has here.”¹¹⁷ Not content to let the comment stand unchallenged, Senator Specter accused the Majority Leader of violating Rule XIX, adding that the puppet label represented “a term of derision” and a “a term of ridicule.”¹¹⁸

E. Recent Rule XIX Forbearance

In recent history, three contentious incidents which passed without reference to Rule XIX are also of note. First, in 2004, as one newspaper account reported, “[a] brief argument between Vice President Cheney and a senior Democratic senator led Cheney to utter a big-time obscenity on the Senate floor.”¹¹⁹ While Vice President Cheney was in the Senate chamber for photographs, he engaged in a heated argument with Senator Patrick Leahy, the Vermont Democrat and Chairman of the Judiciary Committee.¹²⁰ In comments that the Vice President’s spokesman characterized as a “frank exchange of views,” the Vice President instructed Senator Leahy to “[f]**k yourself.”¹²¹ As the Senate was not in session, rule XIX was likely inapplicable.¹²² In July 2015, Senator McConnell might have had cause to invoke Rule XIX against a fellow Republican, Senator Ted Cruz after the Texan accused Senator McConnell, the leader of his own party, of lying “over and over and over again” with respect to a vote on the Export-Import Bank.¹²³ According to press reports, Senator McConnell “ignored Cruz’s diatribe and pointedly did not respond to it when he spoke on the Senate floor later in the day.”¹²⁴ In May 2016, Senator Tom Cotton of Arkansas offered a stinging attack of Minority Leader Harry Reid in comments unusual for

117. See Matthew Hay Brown, *Specter: You Take That Back, Harry Reid*, CHICAGO TRIBUNE (Dec. 5, 2007, 9:08 AM), http://www.chicagotribune.com/chinews-mtblog-2007-12-specter_you_take_that_back_har-story.html.

118. *Id.* (also quoting Senator Specter as commenting that “[i]t is my view that being called a puppet is in direct violation of the rule”).

119. Helen Dewar & Dana Milbank, *Cheney Dismisses Critic with Obscenity*, WASH. POST (Jun. 25, 2004), <https://www.washingtonpost.com/archive/politics/2004/06/25/cheney-dismisses-critic-with-obscenity/03c4e75d-3c1f-43d5-9173-791ff4d49220/>.

120. *Id.*

121. *Id.*

122. *Id.*

123. Russell Berman, *Ted Cruz’s Cry for Attention*, THE ATLANTIC (Jul. 24, 2015), <https://www.theatlantic.com/politics/archive/2015/07/ted-cruz-mitch-mcconnell-donald-trump-liar-senate/399590/>.

124. *Id.*

a freshman Senator.¹²⁵ “I’m forced to listen to the bitter, vulgar, incoherent ramblings of the minority leader,” Senator Cotton charged.¹²⁶ As one newspaper account described, Senator Cotton “smashed through decorum on the typically reserved Senate floor” to attack the leadership of the retiring Senator from Nevada, offering that “the happy by-product of fewer days in session in the Senate is that this institution will be cursed less with his cancerous leadership.”¹²⁷ The incident passed without any reference to Rule XIX.

Decorum within the upper chamber of a nation’s legislative body is a noble goal. And, the reverence for the institution shared by its members is admirable.¹²⁸ The desire for collegiality within the Senate chamber traces its roots to the first days of the republic.¹²⁹ It also represents a prerequisite for any effectively functioning legislature.¹³⁰ Rule XIX is far from the only tool available to enforce that civility. In fact, its history suggests that it plays something less than a meaningful role in the process. Adopted in 1902, the rule was not employed until 1979. And, until the most recent incident surrounding the nomination of Senator Sessions, Rule XIX had not been used to gain advantage in

125. See Amber Phillips, *Sen. Tom Cotton Really, Really, Really Doesn’t Like Harry Reid*, WASH. POST (May 25, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/05/25/sen-tom-cotton-really-really-really-doesnt-like-harry-reid/?utm_term=.140508a0f173 (describing the incident).

126. *Id.*

127. *Id.*

128. See, e.g., ROBERT C. BYRD, *THE SENATE OF THE ROMAN REPUBLIC: ADDRESSES ON THE HISTORY OF ROMAN CONSTITUTIONALISM* 11 (1995) (quoting former Vice President Aaron Burr, upon exiting the Senate as observing “[t]his house is a sanctuary; a citadel of law, of order, and of liberty; and it is here—it is here, in this exalted refuge; here, if anywhere, will resistance be made to the storms of political phrensy and the silent arts of corruption; and if the Constitution be destined ever to perish by the sacrilegious hand of the demagogue or usurper, which God avert, its expiring agonies will be witnessed on this floor.”); see also GEORGE HENRY HAYNES, *THE SENATE OF THE UNITED STATES, ITS HISTORY AND PRACTICE* vii (1938) (quoting William Gladstone as labeling the U.S. Senate “that remarkable body, the most remarkable of all the inventions of modern politics”).

129. See generally Orrin G. Hatch, *I am Re-Committing to Civility*, TIME (Jun. 28, 2017), <http://time.com/4835019/orrin-hatch-civility-politics/> (“Civility is the indispensable political norm. It is the public virtue that has greased the wheels of our democracy since its inception.”).

130. See *Remarks by Senator Robert Byrd*, *supra* note 55 (observing that “bipartisanship and comity [are] necessary if members wish to accomplish much of anything”).

legislative debate or on any question before the body. Instead, its function had been limited to the means by which Senators respected one another within the chamber. In that regard, the most recent invocation of the rule represents a new and unwelcome development.

F. In Defense of the Senate as an Institution

Over the Senate's history, various highly respected Senators have addressed the chamber in defense of the institution, and its values, mores and customs. Such orations have often been delivered at times of heightened emotion in the legislative process or upon a significant retirement. Perhaps the first such soaring oration was offered by Senator Henry Clay upon his retirement from the Senate in 1842. Known as his *Valedictory to the Senate*, Senator Clay's words offered great collegiality and warmth:

At the time of my entry into this body, . . . I regarded it, and still regard it, as a body which may be compared, without disadvantage, to any of a similar character which has existed in ancient or modern times. . .

[D]uring my long and arduous services in the public councils, and especially . . . in the Senate, the same ardor of temperament has characterized my actions, and has no doubt led me, in the heat of debate . . . to use language offensive and susceptible of ungracious interpretation towards my brother senators.

If there be any who entertain a feeling of dissatisfaction resulting from any circumstance of this kind, I beg to assure them that I now make the amplest apology . . . I assure the Senate, one and all, without exception and without reserve, that I leave the Senate Chamber without carrying with me to my retirement a single feeling of dissatisfaction towards the Senate itself or any one of its members. I go from it under the hope that we shall mutually consign to perpetual oblivion whatever of personal animosities or jealousies may have arisen between us during the repeated collisions of mind with mind.¹³¹

Also among the Senate's ablest members and its most celebrated defenders was Robert Byrd, the longest serving member of the chamber in the nation's history¹³² and one who "forced the Senate to grapple with its history, specific duties, and unique place in the architecture of the

131. *Civility in the Senate – Henry Clay's Valedictory to the Senate*, UNITED STATES SENATE (Mar. 31, 1842), https://www.senate.gov/artandhistory/history/idea_of_the_senate/1842Clay.htm.

132. See Caitlin Taylor and Huma Khan, *Robert C. Byrd, Senate's Longest Serving Member, Dead at 92*, ABC NEWS (Jun. 28, 2010), <http://abcnews.go.com/Politics/robert-byrd-dead-92-senates-longest-serving-senator/story?id=6692830>.

Madisonian separation of powers.”¹³³ In one particularly stirring speech, Senator Byrd took to the floor to ask his colleagues “[h]ave civility and common courtesy and reasonableness taken leave of this Chamber?”¹³⁴ In a talk filled with historical reference and sprinkled with instruction on Senatorial heritage and ritual, the white haired West Virginian challenged legislators to “rein in our tongues and lower our voices and speak to each other and about each other in a more civil fashion?”¹³⁵ Senator Byrd ended his lesson on civility with the soaring rhetoric that had become his calling card, offering colleagues his wish for the future of his beloved Senate:

may a temperate spirit return to this chamber and may it again reign in our public debates and political discourses, that the great eagle in our nation seal may continue to look toward the sun with piercing eyes that survey, with majestic grace, all who come within the scope and shadow of its mighty wings.¹³⁶

Taken as a whole, those episodes implicating and threatening to implicate Rule XIX are of little precedential value. First and foremost, the rule was not a part of the Senate for its first century. Tellingly, the Senate managed its affairs and generally maintained its collegiality during those years, despite a few isolated episodes of fisticuffs and firearms. Moreover, the rule’s seven-decade dormancy following its adoption speaks to its irrelevance in the Senate’s daily function for the better part of two centuries. The rule’s more frequent implication of late is also of little matter, other than to validate the seeming “normalization . . . of using the Senate rules as shirts-and-skins exercises.”¹³⁷ In that sense, the rule’s newfound relevance serves more as an indictment of the declining civility in today’s Senate and a reflection of the coarsening of the broader political culture than of anything else.¹³⁸ “Politics is now

133. See *Senator Ben Sasse’s Maiden Speech*, U.S. SENATOR FOR NEBRASKA BEN SASSE (Nov. 3, 2015), <https://www.sasse.senate.gov/public/index.cfm/2015/11/senator-ben-sasse-s-maiden-speech> [hereinafter *Senator Sasse’s Maiden Speech*].

134. See generally Helen Dewar, *Senate Hears a Word From Byrd on a Manner of Speaking*, WASH. POST (Dec. 21, 1995).

135. See 141 CONG. REC. S18965, (daily ed. Dec. 20, 1995) (statement on civility in the Senate), 141 Cong Rec S 18965 (reminding colleagues that “[p]olitical partisanship is to be expected in a legislative body . . . but bitter personal attacks go beyond the pale of respectable propriety”).

136. *Id.*

137. See *Senator Sasse’s Maiden Speech*, *supra* note 133.

138. See, e.g., Jennifer Steinhauer, *In Senate, Traditional Decorum Gives Way to New Discord*, N.Y. TIMES (Feb. 1, 2013), <http://www.nytimes.com/2013/02/02/us/politics/in-hidebound-senate-decorum-becomes-less-traditional.html> (describing the difficult time faced by former Senator Hagel at his confirmation hearing to become Secretary of Defense and observing that “[w]ith the current hyperpartisanship in Washington, the intra-Senate discord has reached new levels in the usually approbatory chamber in recent months, a place where a

not just a serious business but a highly polarized one,” and the “core values that underlie American political culture have atrophied, as have the associated prescriptions for action (norms) in the society.”¹³⁹

The uneven nature of Rule XIX’s invocation also undermines any meaningful support for its responsible use as a tactical legislative cudgel. Any support is further strained against the gravity of the occasion of the nomination of a sitting senator for a position requiring the Senatorial advice and consent prescribed by Article II. Until the events surrounding the Senator Sessions nomination, Rule XIX had been little more than a parliamentary tool available when Senatorial vitriol had violated a subjective and floating standard or offended a colleague beyond his/her personal tolerance. The rule lacks meaningful historical significance, with its incoherent and arbitrary utility offending Jefferson’s paramount desire that the Senate’s system of rules be free from caprice or passion in their application.

III. TOWARD A MORE PROPER ARRANGEMENT FOR THE FUTURE NOMINATION OF A SITTING SENATOR

Today’s Senate is presented with an opportunity to consider the proper protocol for a future event involving the nomination of a sitting senator.¹⁴⁰ Such consideration is best engaged absent the partisan energy that often attends a pending nomination fight, and should also be undertaken with little regard for the majority or minority status of individual members, as the political party affiliations of presidents and the Senate majority shift like the wind, and are not relevant to the procedural foundations of the legislative branch.¹⁴¹ Today’s Senate ought to restore advice and consent to its rightful place, as “a robust but controlled check on presidential discretion through due diligence and

certain level of respect for fellow and retired members of the same party is generally more or less a given”); *see also* Hatch, *supra* note 129 (complaining that “[w]hen I first came to Washington, the culture of Congress was vastly different than it is today,” adding that “[t]here was a level of respect and congeniality among colleagues that was hard to find anywhere else”); Edwin J. Feulner, *A Renewed Call for Senate Civility*, THE HERITAGE FOUND. (Nov. 10, 2015), <https://www.heritage.org/political-process/commentary/renewed-call-senate-civility> (offering that “there’s something different about today’s poisonous atmosphere” in the Senate).

139. *See* ERIC M. USLANER, *THE DECLINE OF COMITY IN CONGRESS 1-2* (1993) (observing too that “[w]e have lost the collective sense of humor that is so necessary to sustain cordiality and the trust in others that is essential to reciprocity”).

140. *See, e.g.,* Viser & McGrane, *supra* note 6 (quoting Senator Orrin Hatch of Utah: “[e]verything doesn’t have to lead to a gut fight on the floor . . . [b]ut that’s where we’re going . . . [w]e’ve got to grow up.”).

141. *See, e.g.,* *Remarks by Senator Robert Byrd*, *supra* note 55 (noting in 1996, that “[s]ince the Republican Party was created in 1854, the Senate has changed hands 14 times”).

individualized public evaluation, while also ensuring that its own rules do not get in the way of a timely and effective process.”¹⁴² To anoint the objective of Senate comity as on par with the Constitutional charge of advice and consent is a mistake, and represents a false equivalence. The latter embodies the considered handiwork of the Framers, enshrined in the Constitution. It also animates their intentional and considerable effort to establish the proper balance and mutual function of two branches and “to promote a judicious choice of men for filling the offices of the Union.”¹⁴³ Careful examination exposes the former as a mere rule respecting an uneven and inconsistent tradition of convenience, accommodation and privilege for the Senate’s members. Failing to assert, reestablish and maintain a more proper balance in the wake of the recent incident would represent a meaningful failure of the Senate. A deliberate consideration and articulation of the proper interplay of advice and consent with Rule XIX is important to both the execution of the Senate’s proper role in the appointments process and to Senate comity.

Challenged with striking harmony between the appropriate level of investigation of presidential nominees and the long-held tradition of Senate comity, the Senate might chart any one of several courses. Whatever path it chooses, the upper chamber must remain steadfast to its Constitutional assignment, as the Framers’ allocation of an activity to one branch of government rather than to another represents a purposeful choice and is “critical to maintaining the rule of law, the accountability of officials, and the efficiency of government.”¹⁴⁴

A. The Possibility of Embracing the Status Quo

The Senate might reject tradition and reason and favor collegiality within its chamber as paramount, opting for no change to a system that would presumably enforce a Rule XIX challenge should an episode similar to the Senator Sessions nomination again arise. It is an unfortunate reality that such inaction might represent the Senate’s most likely course of action, as a body at rest tends to stay at rest.¹⁴⁵ As some commentators have suggested, the legislature has increasingly reclined

142. Friedland, *supra* note 8, at 175.

143. THE FEDERALIST NO. 76 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

144. William B. Gwyn, *The Indeterminacy of the Separation of Powers in the Age of the Framers*, 30 WM. & MARY L. REV. 263, 267 (1989); *see also* Volokh, *supra* note 30, at 750-51 (“If a procedure embodies a careful set of checks and balances, deviating from the procedure upsets the Framers’ intended allocation of power between the branches of government.”).

145. *See generally* Newton’s First Law, THE PHYSICS CLASSROOM, <http://www.physicsclassroom.com/class/newtlaws/Lesson-1/Newton-s-First-Law> (describing Newton’s law of inertia).

toward a reactive posture, addressing issues only after circumstances absolutely dictate legislative attention.¹⁴⁶ In this case, Senate inaction would be unwise, as it would frustrate the proper function of separation of powers and would represent an abdication of the traditional Senatorial responsibility to provide the president with the benefit of the proper level of advice and consent with respect to his nominees.¹⁴⁷

Of note, comity is not the only Senate tradition due consideration in reviewing the most recent Rule XIX invocation. By truncating a colleague's argument, Senator McConnell also frustrated, by some measure, the Senate's traditional preference for extended debate.¹⁴⁸ While the Senate has abandoned the romantic notion that such inclination could be without limit,¹⁴⁹ in recent years, Senator McConnell himself has signaled a great affinity for the tradition.¹⁵⁰ Such a principled position is difficult to square with the Majority Leader's tactics in respect of Senator Sessions' nomination.

Objections and political posturing aside, the Senate also has a tradition of deferring to executive nominees.¹⁵¹ Cabinet level rejections

146. See, e.g., THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* 7, 15 (2006) (suggesting that Congress looks "like an arm of the Second Branch, a supine, reactive body more eager to submit to presidential directives than to assert its own prerogatives").

147. See THE FEDERALIST NO. 76 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

148. See, e.g., *Remarks by Senator Robert Byrd*, *supra* note 55 ("The Senate was intended to be a forum for open and free debate and for the protection of political minorities."); see also Towner, *supra* note 55, at 77 (observing, prior to certain rule changes of more recent vintage that "[i]t is, of course, only consistent with Senatorial dignity that a member should be allowed to speak as long as he chooses, and the rules give this privilege to every Senator").

149. For example, pursuant to precedent established on November 21, 2013, the Senate can invoke cloture on nominations other than those to the U.S. Supreme Court by a majority of Senators voting (a quorum being present). See, e.g., VALERIE HEITSHUSEN, CONG. RESEARCH SERV., R43331, MAJORITY CLOTURE FOR NOMINATIONS: IMPLICATIONS AND THE "NUCLEAR" PROCEEDINGS (2013), <https://fas.org/sgp/crs/misc/R43331.pdf>.

150. At significant political cost to himself and Senate colleagues of his party, Senator McConnell has resisted calls to drop the threshold for cloture votes from its current sixty vote level to a simple majority. See generally Matt Korade, *Trump Blasts Senate Rules in Saturday Morning Tweets*, CNN (Jul. 29, 2017, 9:10 AM), <https://www.cnn.com/2017/07/29/politics/trump-health-care-senate-votes-tweet/index.html> (summarizing various tweets from President Trump attacking Senator McConnell's inability to change Senate rules to push the President's agenda); cf. Michael McAuliff & Jennifer Bendery, *Mitch McConnell Goes 'Nuclear' To Break Supreme Court Filibuster*, HUFFINGTON POST (Apr. 6, 2017, 12:08 PM), https://www.huffingtonpost.com/entry/republicans-nuclear-option_us_58e664ace4b05894715eabda (describing the nomination of Neil Gorsuch to the Supreme Court and the procedure by which Senator McConnell changed Senate rules to require "51 votes to advance a Supreme Court nominee").

151. Weaver, *supra* note 23, at 1730 (asserting that, generally, the Senate has been "relatively deferential" to the President's nominations, especially in the eighteenth and nineteenth centuries").

have been particularly rare.¹⁵² According to the Senate's own archives, in the nation's history, only nine Cabinet nominees have been rejected by the Senate.¹⁵³ The last such rejection occurred in 1989, following President George H. W. Bush's selection of John Tower for the post of Secretary of Defense.¹⁵⁴ Tower had served twenty-four years in the Senate before retiring in 1985, and "[d]uring those years his Senate colleagues came to resent his abrasive manner."¹⁵⁵ After Tower's opponents built a "case against his character rather than his competence," which included evidence of "womanizing, abuse of alcohol, and questionable financial dealings with defense contractors, the Senate engaged" in a fractious debate before rejecting the nomination by a forty-seven to fifty-three vote.¹⁵⁶ Today, Tower remains both the only "nominee of a new president's initial cabinet ever to be rejected," and the only "former Senator to be turned down by his former colleagues for a cabinet post."¹⁵⁷

In the years following the unsuccessful nomination of former Senator Tower and preceding the nomination of Senator Sessions, the Senate has also considered the nominations of former colleagues John Ashcroft and Chuck Hagel as Attorney General and Secretary of Defense, respectively.¹⁵⁸ Both men were treated to rather hostile receptions upon their return to the Senate chamber, before obtaining the consent of their former colleagues.¹⁵⁹

152. There have been nine candidates for Cabinet posts rejected by the Senate and an additional fourteen nominations withdrawn. See *Unsuccessful nominations to the Cabinet of the United States*, WIKIPEDIA https://en.wikipedia.org/wiki/Unsuccessful_nominations_to_the_Cabinet_of_the_United_States (last visited Feb. 4, 2018). For the story of the first such rejection, see *First Cabinet Rejection*, UNITED STATES SENATE (Jun. 24, 1834), https://www.senate.gov/artandhistory/history/minute/First_Cabinet_Rejection.htm; see also Elizabeth King, *This is What Happened Last Time a Cabinet Nomination Was Rejected*, TIME (Feb. 3, 2017), <http://time.com/4653593/cabinet-rejection-john-tower/> (summarizing the episode of Senator Tower's unsuccessful nomination to the post of Secretary of Defense in 1989 and noting that "the President usually gets his way when it comes to his cabinet appointees").

153. See *Cabinet Nominations Rejected*, UNITED STATES SENATE (last visited Feb. 4, 2018), <https://www.senate.gov/artandhistory/history/common/briefing/Nominations.htm#10>.

154. Ed O'Keefe and David Weigel, *In Sessions hearing, 'senatorial courtesy' is lost in the tumult of Trump*, WASH. POST (Jan. 10, 2017) ("The last Cabinet nominee to lose a high-profile confirmation battle, in 1989, was former Texas senator John Tower).

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* (describing the Senate's reaction to the nominations of former colleagues Chuck Hagel and John Ashcroft).

159. See, e.g., Jessica Reaves, *Ashcroft Hearings Start with a Bang*, TIME (Jan. 16, 2001), <http://content.time.com/time/nation/article/0,8599,95433,00.html> ("Never far beneath all the gentlemanly back-patting and hand-shaking, a deep vein of hostility surfaced on the first afternoon of John Ashcroft's confirmation hearing."); Jeremy W. Peters, *Hagel Approved for*

Politically, the choice for *status quo* is unappealing for the Senate, as it would ensure contentious hearings involving the future nominations of sitting senators. Such a scenario might prove frustrating to the nominated senator, and to both those Senate colleagues in favor of and opposed to the nomination. Maintaining the existing threat of Rule XIX as a tactic to be employed in a manner echoing the most recent affair, in and of itself, seems destructive to Senate amity. Senatorial action is necessary to eliminate any possibility that the rule's most recent usage might represent the proverbial camel's nose under the tent. Senators should also consider that there is no assurance that the Senate will be controlled by the President's same political party. In such a case, the tactical invocation of Rule XIX might be unavailable to extinguish an attack from senators opposed to a President's nominee, creating the inverse scenario of the Senator Sessions episode, but likely to be no less deleterious to both Senate comity and to the effective administration of advice and consent.

B. The Possibility of Waiving the Rule XIX Protections

As a second option, the Senate might establish an express preference for its advice and consent role by adopting a rule whereby any senator nominated for a position requiring advice and consent waives the protection afforded by Rule XIX in favor of a more fulsome inquiry into his/her fitness for the nominated office. Presumably, such a mechanism could be instituted via simple appendage to the existing Rule XIX framework. By adopting a rule that a sitting senator nominated for a post requiring advice and consent waives the potential protection of Rule XIX with respect to matters involving his/her nomination, the Senate would signal a fidelity to the Senate's Constitutionally-charged role as a check on presidential prerogative over the inconvenience or embarrassment that might attach to a single senator-turned-nominee. Notably, such a structure would be wholly consistent with the first hundred years of the republic, where there was no rule available to shield a senator-turned-nominee from attack. Under such a structure, the unavailability of Rule XIX style protection would also be known in advance, and could be weighed by the president in selecting nominees.

Defense in Sharply Split Senate Vote, N.Y. TIMES (Feb. 26, 2013), <http://www.nytimes.com/2013/02/27/us/politics/hagel-filibuster-defense-senate-confirmation.html> (describing former Senator Hagel's confirmation process as an "unusually contentious nomination fight, one that surprised many in Washington for how personal and bitter it became, considering that Mr. Hagel worked alongside many of his antagonists until just four years ago").

Considered at a moment of relative calm, and away from a slew of pending nominations, such a rule might enjoy broad appeal within the Senate. If adopted, a subsequent senator-nominee would be no less advantaged than any non-senator-nominee for whom no such protection is available.¹⁶⁰

A variation on the Rule XIX waiver would leave the existing Rule XIX unaltered, but have the Senate adopt an expressed preference that any nominee from within the Senate for a post requiring advice and consent voluntarily waive the Rule XIX protection upon his/her nomination. Such a sense of the Senate would put the onus on a nominated senator to affirmatively signal his/her own preference for Constitutional fidelity over personal convenience, or to reject both the Senate's Constitutional responsibility and its stated predilection in one fell swoop. It is reasonable to assume that waivers by nominated senators in such a regime would be routinely provided, and each such waiver would signal a willingness to absorb the inconvenience and personal embarrassment that might result from the attack by Senate colleagues in favor of ensuring that the Senate is free to conduct an inquiry as faithful to Constitutional design and thorough as that provided any other nominee.

Regardless of the Senate's chosen approach, the chamber and the public would both benefit from a robust and wholesome discussion of the wisdom of the current system which seems to afford a sitting senator more protections than any other nominee simply by virtue of his/her senatorial status.¹⁶¹ Also, regardless of whichever course of action the Senate chooses, it might be wise to consider an agreement in advance that the hearings for sitting Senators nominated to positions requiring advice and consent be conducted in private.¹⁶² By removing such an inquiry from contemporaneous public view and in an accommodation to comity, the potential negative effects of any aggressive challenge by

160. The fact that the tactical application of Rule XIX might provide a potential advantage for nominees from within the Senate is particularly unpleasing given the somewhat related considerations of the Constitution's Article I, Section 6: "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." U.S. CONST. art. I, § 6.

161. Notably, Article 1, Section 6 of the Constitution expressly rejects special treatment for sitting legislators, albeit in a slightly different context. *Id.*

162. Interestingly, "[t]he first sessions of the Senate were held entirely behind closed doors" and there were "no galleries and no provision for outsiders." See Towner, *supra* note 55, at 73 (noting that "[t]reaties and confirmations of Presidential appointments have always been considered behind closed doors").

Senate colleagues would likely be substantially reduced. Any such decision would necessarily put a nominee from within the Senate on an unequal footing with more pedestrian nominees and must also be weighed against the clubby appearance it fosters and against the educational and transparency benefits of conducting such inquiries in full view of the public.¹⁶³

CONCLUSION

Whatever course of action or inaction the Senate may choose, the events surrounding the Senator Sessions nomination have uncovered an unpleasant reality.¹⁶⁴ Whether by design, political expedience or emotion, today's version of the world's most deliberative body has allowed a simple rule of conduct and decorum to distend beyond a Constitutional prerogative. Such a regime must be extinguished before it advances. The future use of Rule XIX as a cudgel must be prohibited as contrary to the vision of the Framers. The weaponization of a simple rule of decorum is as inefficient as it is unbecoming and it cannot be allowed to stand. Rule XIX's most recent incarnation represents an abdication of Senatorial responsibility—and, one of the Senate's own making. By legislative contrivance, the most recent tactical invocation of Rule XIX created an opportunity to thwart the fulsome investigation of a nominee for federal office. Troublingly, the precedent breathes possibility into a fear given little likelihood by the Framers:

Though it might therefore be allowable to suppose that the Executive might occasionally influence some individuals in the Senate, yet the supposition, that he could in general purchase the integrity of the whole body, would be forced and improbable.¹⁶⁵

The process of advice and consent need not descend in a downward spiral. As one optimistic commentator has observed with respect to judicial nominations, “there have been times, including in the recent past, when voices of restraint in the process of confirmation have been deeply respected by the world's greatest deliberative body.”¹⁶⁶ Those

163. See generally Donald R. Matthews, *The Folkways of the United States Senate: Conformity to Group Norms and Legislative Effectiveness*, 53 AM. POL. SCI. REV. 1064 (1959) (referring to the Senate as a “club” and commenting that “there are unwritten but generally accepted and informally enforced norms of conduct in the chamber”).

164. See, e.g., Steven T. Dennis & Chris Strohm, *Warren's Speech Goes Viral After GOP Tries to Silence Her*, BLOOMBERG (Feb. 8, 2017), <https://www.bloomberg.com/news/articles/2017-02-08/gop-silences-warren-as-senate-debate-over-sessions-turns-bitter> (arguing that “[t]he Warren episode . . . marked a new low in a bitter Senate debate over Trump's Cabinet nominees”).

165. THE FEDERALIST NO. 76 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

166. Kenneth W. Starr, *Legislative Restraint in the Confirmation Process*, 38 U. RICH. L.

voices of restraint must again be raised.

The path to rectifying the most recent tint on the Senate's business is not a difficult one. But, it requires the foresight to anticipate a similar set of events in the future and the courage to re-establish Constitutional priorities. Senators must confront the reality that reasserting the proper balance in this realm means that a sitting senator nominated to an executive post may, in the future, be at some risk of being traduced by his/her colleagues.¹⁶⁷ Such a task is best addressed prospectively and in the abstract, before the reputation or good character of any particular member is under current threat. It is hoped that this Article may, in some small way, encourage the Senate to embrace its Constitutional charge over its comity, and to move toward ensuring that its advice and consent power does not again take a seat to the opportunistic employ of Senate rules.

REV. 597, 602 (2004).

167. At least one commentator has suggestion that, absent a change to Rule XIX, "presidents should be barred from nominating sitting Senators for cabinet positions." This position seems motivated by the partisan politics of the day and is both hostile to executive prerogative and wrongheaded. See Libbe Anne, *Amend Rule XIX or Prohibit Sitting Senators from Being Nominated for Cabinet Positions*, PATHEOS (Feb. 8, 2017), <http://www.patheos.com/blogs/lovejoyfeminism/2017/02/need-amend-rule-xix-prohibit-sitting-senators-nominated-cabinet-positions.html#1JOh0j4F011m9oZO.99>.