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Extract from Matthew C. Stephenson, Can the President Appoint Principal Executive Officers Without a Senate Confirmation Vote? Yale Law Journal (2013), citing Bruhl-Tillman exchange

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

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

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

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

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