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OBSERVATIONS ON THE STATUS AND IMPACT OF THE JUDICIAL CONFIRMATION PROCESS

*The Honorable Edith H. Jones **

My parents, who met in the coat-closets that held Texas's Republican Party during the 1950s and '60s, introduced me to the idealism and pugilism of politics. On the latter subject, my mother repeated a lesson she had learned: "They will always fight to the last drop of *your* blood." How true that lesson has proved to be!

It is an honor to participate in this Symposium as the only person who has undergone United States Senate confirmation to a judicial post, and thus the only contributor with actual, albeit inconsequential, experience of "bloodletting." From that perspective, and from my judicial experience, I offer observations on the brutality of the current confirmation process.

Partisan fights over the federal judiciary came with the territory of Article III lifetime tenure.¹ They have existed since President Adams appointed federal judges just as he was leaving office, and the new Jefferson Administration retaliated with attempts to abolish their posts and to impeach certain federal—that is to say Federalist—judges.² In more recent times, President

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1. See U.S. CONST. art. III, § 1 (providing that "[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour"); see also LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY* 92 (1985) (arguing that "the upper house of Congress has been scrutinizing Supreme Court nominees and rejecting them on the basis of their political, judicial, and economic philosophies ever since George Washington was President").

2. See JAMES F. SIMON, *WHAT KIND OF NATION* 133–34, 163–66 (2002); see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 137–38 (1803); HERMAN SCHWARTZ, *PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION* 56 (1988); Louise Weinberg, *Our Marbury*, 89 VA. L. REV. 1235, 1237 (2003) (describing how President John Adams appointed the so-called "midnight judges" as he was leaving office and thereafter President Thomas Jefferson refused to honor those appointments). See generally HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT*

Franklin Roosevelt advanced a scheme to overturn the Supreme Court's anti-New Deal rulings by enlarging its membership.³ Richard Nixon ran for office in 1968 with a vow to reverse the trend of the Warren Court's activist decisions through his Supreme Court appointments.⁴ Supreme Court nominees of both Presidents Johnson and Nixon had to withdraw their names after embarrassing revelations surfaced during the confirmation process.⁵ The charges may or may not have justified excluding them, but the heightened scrutiny of the nominees played out against a vociferous debate over the role of federal courts.

Likewise, that debate over the federal courts' role, particularly as arbiter of the Constitution, is nothing new.⁶ Jefferson described the federal judiciary as "the great object of . . . fear."⁷ He predicted that federal judges would steadily usurp jurisdiction as a "subtle corps of sappers and miners constantly working under ground to undermine the foundations of our confederated fabric."⁸ Nevertheless, and painting with a very broad brush, I would state that not until the 1960s did the full power of the federal judiciary prove itself. It was then that the Warren Court undertook to remake society by, inter alia, upending the criminal justice system, changing accepted ideas of the relation of church and state, and

APPOINTMENTS FROM WASHINGTON TO CLINTON (rev. ed. 1999) (reviewing all Supreme Court nominations from 1789 to 1999).

3. See, e.g., Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1175-76 (1988) (describing President Franklin Delano Roosevelt's effort to "pack" courts with Justices who agreed with his New Deal politics).

4. See Paul Finkelman, *You Can't Always Get What You Want. . . : Presidential Elections and Supreme Court Appointments*, 35 TULSA L.J. 473, 477 (2000); see also ABRAHAM, *supra* note 2, at 9-10; ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 180 (2d ed. 1994); SCHWARTZ, *supra* note 2, at 15.

5. See, e.g., Jeffrey K. Tulis, *Constitutional Abdication: The Senate, the President, and Appointments to the Supreme Court*, 47 CASE W. RES. L. REV. 1331, 1342-46 (1997) (describing how some Supreme Court nominees have been denied confirmation due to alleged personal improprieties).

6. See, e.g., *Marbury*, 5 U.S. (1 Cranch) at 173-74, 177-78; Weinberg, *supra* note 2, at 1239-40, 1411.

7. Letter from Thomas Jefferson to Spencer Roane (Mar. 9, 1821), in JAMES F. SIMON, *WHAT KIND OF NATION* 9 (2002) ("The great object of my fear is the federal judiciary. That body, like gravity, ever acting with noiseless foot & unalarming advance, [is] gaining ground step by step. . . . Let the eye of vigilance never be closed.").

8. Letter from Thomas Jefferson to Thomas Ritchie (Dec. 25, 1820), in 10 *THE WRITINGS OF THOMAS JEFFERSON* 170 (Paul Leicester Ford ed., 1899).

challenging conventional morality.⁹ Whatever one thinks of the wisdom of these policies, they were ordained in court decisions by unrepresentative, unelected, politically unaccountable judges. Since that momentous decade, it has been feared, or hoped, as the case may be, that a different corps of judges, appointed by succeeding presidents, would change these policies by changing the constitutional law. The judicial confirmation process has thus been seen as key to controlling the federal courts and, not so indirectly, our constitutional system.¹⁰

As the social policy stakes have gotten higher, confirmation battles have extended from the Supreme Court to a large portion of appellate court appointments. My own nomination to the Fifth Circuit in 1985 occurred at the dawn of this development. I will use my experience as a foil for the subsequent deterioration of the process.

On paper, I hope, I looked like a good candidate for the federal bench. I graduated from Cornell University (an Ivy League institution), made it into the top ten percent of the University of Texas School of Law, and was a *University of Texas Law Review* editor. My specialties in law practice were litigation and bankruptcy. I became the first woman partner at Andrews, Kurth, Campbell & Jones, a major Houston law firm, after we had had two sons. Still, it took about nine months from the day I received an inquiry about a federal judgeship until Senate confirmation. Two initial hurdles in the confirmation process are often overlooked and deserve mention, as they alone may deter qualified lawyers from even seeking judicial posts. These are the intrusive financial disclosure requirements and the redundant personal and professional background checks.¹¹ The financial revelations were en-

9. See generally Jim Chen, *Come Back to the Nickel and Five: Tracing the Warren Court's Pursuit of Equal Justice Under Law*, 59 WASH. & LEE L. REV. 1203 (2002); Edith H. Jones, *The Nature of Man According to the Supreme Court*, 4 TEX. REV. L. & POL. 237 (1999); Ronald J. Krotoszynski, Jr., *A Remembrance of the Things Past?: Reflections on the Warren Court and the Struggle for Civil Rights*, 59 WASH. & LEE L. REV. 1055 (2002).

10. See generally Lee Epstein et al., *The Supreme Court as a Strategic National Policymaker*, 50 EMORY L.J. 583, 610 (2001) (reviewing Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957)) (stating the theory that the Constitution can be controlled by controlling the judiciary).

11. See generally J. Harvie Wilkinson III, *The Role of Reason in the Rule of Law*, 56 U. CHI. L. REV. 779, 785 (1989). Note that the former statutory requirements, formerly codified at 28 U.S.C. app. §§ 301-09, were repealed in 1991 and financial disclosure statements are no longer required of judicial nominees, while extensive background checks are still in place. At the same time, information on an individual's finances are often easily obtainable with the increase of information available through the Internet.

tirely out of proportion to the public's need to know or to the demands of recusal. The background checks, completed independently by the White House, Senate, F.B.I., and ABA, involve considerable overlap and an enormous paperwork burden even for the candidate without significant opposition.¹² Especially problematic is the F.B.I. investigation, in which information on the candidate is gathered and reported but not necessarily verified. In my case, after dozens of interviews, the F.B.I. agent returned to my office with follow-up questions. He seriously inquired about a jesting comment of a friend of ours that my husband was "addicted" to Coke (Coca-Cola)! The agent also asked about the deed to our former home, because the chain of title, which originated in Houston in the 1950s, included a racially restrictive covenant. We purchased the house long after such covenants became unenforceable and did not know it existed. From this kind of feedback, and from having observed other background investigations of judicial candidates, I came to conclude that F.B.I. background checks, though undoubtedly necessary, can too easily degenerate into gossip-mongering and misunderstandings.

While I supplied information and had some control over these parts of the process, the progress of my nomination and confirmation was otherwise frustratingly opaque. I knew nothing direct about any opposition at the time, and received only a few phone calls suggesting, in veiled terms, that confirmation might be dubious. Both the ABA Judicial Qualifications Committee and Senator Strom Thurmond, then the Chairman of the Senate Judiciary Committee, apparently had misgivings about my relative youth. Nevertheless, my confirmation hearing lasted less than ten minutes, and Senator Thurmond was the only senator present.

Ignorance may be bliss, or it may just be ignorance. Believing I could and should not influence my chances, I went about law practice as usual. Some clients were concerned about my longevity at the firm, but fortunately, we had sufficient depth to reassure them of adequate representation during this period of uncertainty.

My confirmation experience was thus protracted and discomfiting, but not unbearable. No one assailed my character, dissected my nascent judicial philosophy, or interrupted our family life. In

12. See Ronald D. Rotunda, *The Role of Ideology in Confirming Federal Court Judges*, 15 GEO. J. LEGAL ETHICS 127, 128 (2001).

fact, I am unaware whether the Democrats, then in the minority in the Senate, raised any concrete objections to my confirmation.

Conditions changed rapidly, however, after the Democrats regained control of the Senate in the 1986 elections.¹³ It had been no secret that President Reagan was seeking judicial nominees who would interpret the Constitution according to its "original intent" rather than as a "living document" that must be updated to modern times.¹⁴ Professor Lino Graglia reflected the Administration's view when he wrote early in 1986 of the burgeoning recognition that most of the noted Supreme Court decisions of recent years had little to do with the Constitution.¹⁵ Accordingly, he complained, serious constitutional interpretation had more or less been abandoned.¹⁶ Professor Graglia predicted that the intellectual effort to interpret the Constitution without regard to its language and history must ultimately fail, because such judicial activism is at war with our principles of democratic self-government.¹⁷ These views were anathema to many Democrats, who favor an expansionist view of federal courts in order, they believe, to secure the rights of individuals against majority oppression. Consequently, just after the Democrats re-took a majority in the Senate during President Reagan's second term, Professor Sheldon Goldman, who has studied the judicial confirmation process for many years, opined that confirmation battles would become more contentious.¹⁸ But he added that neither side wanted to reject judges on ideology alone.¹⁹ From both Graglia and Goldman, then, famous last words.

13. See generally ABRAHAM, *supra* note 2, at 291-326 (describing the historical context of the recent confirmation tension); SCHWARTZ, *supra* note 2, at 74-149 (describing how the confirmation process intensified after 1985).

14. See, e.g., ABRAHAM, *supra* note 2, at 291-92.

15. Lino A. Graglia, *How the Constitution Disappeared*, in INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 35, 38-39 (Jack N. Rakove ed., 1990).

16. See *id.* at 39-42.

17. *Id.* at 49.

18. Sheldon Goldman, *Reagan's Second Term Judicial Appointments: The Battle at Midway*, 70 JUDICATURE 324, 339 (1987).

19. *Id.* Professor Goldman stated:

As a practical matter, ideology alone cannot be the basis for turning down a lower court nominee because liberals are not in a majority in the Senate. Also, liberal Democrats, by using ideology as the sole basis for opposition, would provide a precedent for Republicans to oppose liberal Democratic nominees sent by a future Democratic president.

If ideology were to become the basis for opposition to lower court nominations, the result would be a continual series of battles between liberals and

In late 1987, Judge Bork's confirmation battle occurred, and a new verb was added to the English vocabulary.²⁰ Contrary to Professor Goldman's prediction, Judge Bork's "ideology" was the principal focus of the Senate hearings.²¹ And, contrary to Professor Graglia, Professor Ronald Dworkin proclaimed, after the Bork nomination failed, that original intent "has suffered a strong reversal."²² The Bork nomination was a watershed. While opponents of judicial nominees had long been politically motivated, for the first time they challenged an extraordinarily well-qualified nominee not for his fitness or character but for his judicial views.²³ Further, the confirmation struggle proceeded much like an election contest, resulting in the perception that one side's "policies" had prevailed when Judge Bork's nomination was defeated.²⁴ The intertwining of the nominee's views and the outcome of constitutional cases exposed and promoted the cynical principle that constitutional adjudication is little more than the continuation of "politics by other means."²⁵

Nearly twenty years after the Bork nomination, Graglia's and Dworkin's approaches to constitutional interpretation still con-

the administration, with the federal judiciary held hostage during an inevitably prolonged confirmation process. It is doubtful that either side desires such an outcome.

Id.

20. BORK (bork), *vb.* *Slang.* 1. (Of the U.S. Senate) to reject a nominee, esp. for the U.S. Supreme Court, on grounds of the nominee's unorthodox political and legal philosophy. • The term derives from the name of Robert Bork, President Ronald Reagan's unsuccessful nominee for the Supreme Court in 1987. 2. (Of political and legal activists) to embark on a media campaign to pressure U.S. Senators into rejecting a President's nominee. 3. Generally, to smear a political opponent.

BLACK'S LAW DICTIONARY 196 (8th ed. 2004).

21. See, e.g., Taylor McConkie, Note, *The Senate's New Battlefield: The Role of Ideology in Supreme Court Confirmation Hearings*, 1 GEO. J.L. & PUB. POL'Y 175, 184-85 (2002) (discussing Senator Ted Kennedy's opposition to Judge Bork's "reactionary ideology" and Kennedy's belief that "the Senate has every right to take that ideology into account in acting on the nomination").

22. Bill Blum, *The Hearings and Original Intent*, A.B.A. J., Dec. 1, 1987, at 78, 80.

23. See ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* 214-26 (1989).

24. See *id.* at 322-52.

25. See CHRIS HABLES GRAY, *POSTMODERN WAR: THE NEW POLITICS OF CONFLICT* 258-59 (1997) (quoting Michel Foucault in stating that "politics and power are 'war continued by other means,'" an inversion of the famous quote by Carl von Clausewitz that "war is politics pursued by other means"); see also Aaron Schwabach, *Kosovo: Virtual War and International War*, 15 CARDOZO STUD. L. & LIT. 1, 7 (2003) (discussing the Clausewitz quote and the political nature of war and the war-like nature of politics). See generally BRONNER, *supra* note 23, at 341.

tend for ascendancy on the Supreme Court, and the Court's self-assertion into critical areas of social and even war policy has hardly diminished.²⁶ Unsurprisingly, the politicization of judicial confirmations that began with Judge Bork has spread down to nominees for the lower federal courts.²⁷

The theme has been repeated in this Symposium that partisan fights over lower court nominees blossomed during the Clinton Presidency when the Republicans, as the majority in the Senate after 1994, arbitrarily withheld hearings and confirmation votes on well-qualified candidates. No doubt, the Senate Republicans engaged in such tactics, but I disagree that obstructionism began with President Clinton's nominees.²⁸ During the Reagan and Bush Administrations, the ABA's Judicial Qualifications Committee was highly political and used its insider position, from which it vetted candidates *before* their nomination by the president, to undermine or delay nominations.²⁹ The ABA Committee ratings often seemed unnaturally stingy for candidates whose views might augur an originalist judicial approach, while they showed no bias against probable activist appointees.³⁰ Most prominent, of course, was the Committee's decision that Judge Bork—former Yale professor, Solicitor General, prolific author, and an appellate judge whose decisions had never been overturned by the Supreme Court—was “unqualified.”³¹ Other examples of the Committee's

26. BRONNER, *supra* note 23, at 348–49.

27. See *infra* notes 31–47 and accompanying text.

28. See, e.g., ABRAHAM, *supra* note 2, at 291–326; SCHWARTZ, *supra* note 2, at 74–149.

29. See generally Victor Williams, *The ABA Judgemaker Committee is Exposed, Albeit Shaded from FACA Sunshine*, 12 GEO. MASON L. REV. 249, 253–60 (1989) (describing the history of the ABA in the nomination process).

30. See, e.g., *id.*; see also James Lindgren, *Examining the American Bar Association's Ratings of Nominees to the U.S. Courts of Appeals for Political Bias, 1989–2000*, 17 J.L. & POL. 1, 26 (2001) (concluding based on a statistical analysis that the ABA ratings, controlled for educational credentials and non-judicial experience, significantly favored Clinton nominees compared to Bush nominees); Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1482 (1998).

31. Laura E. Little, *The ABA's Role in Prescreening Federal Judicial Candidates: Are We Ready to Give up on the Lawyers?*, 10 WM. & MARY BILL RTS. J. 37, 44 (2001). President George W. Bush responded to the politicized ABA ratings system by removing the committee from the pre-nomination process. *Id.* at 37; see also Letter from Alberto Gonzales, Counsel to President George W. Bush, to Martha W. Barnett, President, American Bar Association (Mar. 22, 2001), <http://www.whitehouse.gov/news/releases/2001/03/20010322-5.html> (last visited Jan. 29, 2005). Senate Democrats, currently in the minority, continue to seek ABA ratings for the President's nominees. Interestingly, the ABA's ratings have been more evenhanded in recent years. See, e.g., Lindgren, *supra* note 30, at 2. But see Michael J. Saks & Neil Vidmar, *Asserted But Unproven: A Further Response to the Lindgren*

apparent bias arose in my circuit. There were at least three district court candidates, one of whom was a Democrat and another of whom had served as president of a major bar organization, who were denied hearings by the ABA Committee for many months. There was also a candidate for the Court of Appeals for the Fifth Circuit who had been first in his law school class, had clerked for the Supreme Court of the United States, and had been a respected and successful lawyer in Texas, but the ABA rated him "not qualified." Because the ABA Committee impeded nominations of Reagan and Bush judges from inside the process, and because it cloaked its actions in nonpartisan rhetoric, its obstructionism from the 1980s until 1993 is occasionally, but unjustifiably, overlooked.

As noted, the Senate Republicans retaliated by delaying some of President Clinton's nominations inordinately.³² But Republican tactics, at least, neither besmirched the candidates' reputations nor waged open warfare on their judicial philosophy. President Clinton, in any event, succeeded in having a number of "progressive" jurists confirmed, as their opinions subsequently prove, and his two "progressive" Supreme Court nominees sped through the process unscathed.³³ All in all, during his two terms in office, President Clinton appointed as many federal judges as did President Reagan.³⁴

Now we arrive at President George W. Bush's courts of appeals nominees. The process was destined to reach a new low when Senator Schumer announced at the outset of the Administration that some Democrats would oppose any nominees "who are of a particular ideological cast."³⁵ This threat is particularly bellicose,

Study's Claim That the American Bar Association's Ratings of Judicial Nominees Are Biased, 19 J.L. & POL. 177 (2003) (contesting Professor Lindgren's theory that the ABA ratings are biased).

32. See John Anthony Maltese, *Confirmation Gridlock: The Federal Judicial Appointments Process Under Bill Clinton and George W. Bush*, 5 J. APP. PRAC. & PROCESS 1, 14-15 (2003).

33. See, e.g., ABRAHAM, *supra* note 2, at 318-26 (discussing the appointments of Justice Ginsburg and Justice Breyer).

34. See Free Congress Foundation, *Federal Judicial Vacancies*, at <http://www.judicialselection.org/> (last visited Jan. 29, 2005) (showing that President Clinton appointed a total of 374 federal judges, while President Reagan appointed a total of 378); see also CRS REPORT FOR CONGRESS, JUDICIAL NOMINATION STATISTICS: U.S. DISTRICT AND CIRCUIT COURTS, 1977-2003, at CRS-13 tbl.2(b) (2004), available at <http://www.senate.gov/reference/resources/pdf/RL31635.pdf> (last visited Feb. 4, 2005).

35. Jonathan Ringel, *High-Minded Chat Doesn't End Discord*, NAT. L.J., July 9, 2001, at A20. Senator Charles Schumer (D.-N.Y.), Chairman of the Judiciary Subcommittee on

given that lower court judges are required, regardless of their judicial philosophy, to follow Supreme Court precedent. Ten of the Bush nominees are being filibustered in the Senate despite their being satisfactory to an absolute majority of senators who would vote on confirmation.³⁶ Some of these individuals were nominated as far back as May 2001 and continue to be filibustered.³⁷ The delaying tactics have thus extended throughout the first Bush term.³⁸ One extraordinarily talented nominee, Miguel Estrada, was forced to withdraw his name after repeated attempts to break a filibuster were unsuccessful, and Estrada found he could not continue to pursue his law practice under a cloud of uncertainty.³⁹ Other nominees were confirmed only after unfounded public assaults on their integrity, judicial philosophy, and impartiality.⁴⁰

The intemperance and injustice of the overtly ideologized confirmation process are, in my view, amply demonstrated by the fate of two nominees to the Fifth Circuit. One of them graduated at the top of her law school class, had the highest grade on the bar exam, became a partner in a prestigious Texas law firm, is a distinguished member of the Texas Supreme Court, has routinely been endorsed by all of the major Texas newspapers, and received the highest qualification rating of the ABA Committee.⁴¹ Nominated over three years ago, she has undergone days of uninformed and hostile Senate debates.⁴² She has yet to receive a Senate vote. That person, Justice Priscilla Owen, is being filibus-

Administrative Oversight and the Courts, made the following statement: "If the president sends countless nominees who are of a particular ideological cast, Democrats will likely exercise their constitutionally given power to deny confirmation so that such nominees do not reorient the direction of the federal judiciary." *Id.*; see also John S. Baker, Jr., *Ideology and the Confirmation of Federal Judges*, 43 S. TEX. L. REV. 177, 177 n.1 (2001).

36. See 150 CONG. REC. S8593 (daily ed. July 22, 2004) (statement of Sen. Hatch). For a brief summary of the ten filibustered nominees see the Independent Judiciary website at <http://www.independentjudiciary.com/nominees/index.cfm?CategoryID=8> (last visited Jan. 29, 2005).

37. 147 CONG. REC. S5765 (daily ed. May 25, 2001) (nominating Charles W. Pickering, Sr. to be United States Circuit Judge for the Fifth Circuit).

38. 149 CONG. REC. S5832 (daily ed. May 7, 2003) (statement of Sen. Cornyn) (describing the unprecedented "anniversary" of judicial delays).

39. See 149 CONG. REC. S11,062-65 (daily ed. Sept. 4, 2003); see also 150 CONG. REC. S3525-26 (daily ed. Apr. 1, 2004) (statement of Sen. Cornyn).

40. See generally 149 CONG. REC. S15,952 (daily ed. Nov. 25, 2003) (statement of Sen. Cornyn) (asking that past grievances be set aside).

41. 149 CONG. REC. S5458 (daily ed. Apr. 29, 2003) (statement of Sen. Hatch).

42. See *id.* at S5458-72.

tered.⁴³ The second nominee should be considered a hero of the Civil Rights Movement in Mississippi in the 1960s: a man courageous enough to send his children to a desegregated school at a time when few other whites did so; a man who courted personal danger by prosecuting Ku Klux Klan members; and a man who was earlier confirmed to a federal district court bench with little or no opposition.⁴⁴ Yet this nominee, Judge Charles Pickering, was also filibustered and labeled a racist.⁴⁵ Judge Pickering ultimately accepted a recess appointment that allows him to hold office on the Court of Appeals until the end of 2004 unless he receives a Senate vote.⁴⁶ Though journalist Mike Wallace became Judge Pickering's defender in a detailed story on CBS's "60 Minutes" news show, even that endorsement has not garnered him a vote.⁴⁷

While the fights over the Pickering and Owen nominations were waged in Washington as political battles, the nominees could not ethically "campaign" or defend themselves against attacks. All they could do was respond to literally hundreds of detailed questions about hundreds of their prior legal opinions. Each candidate spent many days preparing for contentious Senate confirmation hearings. For months, these nominees' normal personal and professional lives came to a standstill. Unfortunately, the experiences of Justice Owen and Judge Pickering typify what other contested nominees have recently endured. Highly qualified professionals have been targeted for attack almost randomly and then subjected to public character assassination and humiliation; all because they were among the relatively few talented lawyers willing to take a significant cut in pay in order to serve on the federal bench.⁴⁸ The Senate's process has come to re-

43. 149 CONG. REC. S5832 (daily ed. May 7, 2003) (statement of Sen. Cornyn); *see also* 150 CONG. REC. S3525 (daily ed. Apr. 1, 2004) (statement of Sen. Cornyn).

44. *See* 149 CONG. REC. S13,842-43 (daily ed. Nov. 4, 2003) (statement of Sen. Chambliss); *see also* 150 CONG. REC. S170-74 (daily ed. Jan. 22, 2004) (statement of Sen. Leahy).

45. 149 CONG. REC. at S13,843 (daily ed. Nov. 4, 2003).

46. 150 CONG. REC. S170 (daily ed. Jan. 22, 2004) (statement of Sen. Leahy). Judge Pickering has recently retired from the bench and withdrawn his name from further consideration for a permanent appointment to the United States Court of Appeals for the Fifth Circuit. *See* Adam Liptak, *Judge Appointed by Bush after Impasse in Senate Retires*, N.Y. TIMES, Dec. 10, 2004, at A22.

47. *60 Minutes: Judge Pickering Denies Racism* (CBS television broadcast, Mar. 28, 2004), at <http://www.cbsnews.com/stories/2004/03/25/60minutes/main608667.shtml> (last visited Jan. 29, 2005).

48. *See, e.g.*, 149 CONG. REC. S15,952-53 (daily ed. Nov. 25, 2003) (statement of Sen. Cornyn).

semble not a deliberative function, but a spectacle like those at the Roman Coliseum where prisoners were thrown to wild beasts with only the barest tools of self-defense.

That the current confirmation process has deleterious effects on judicial appointments is obvious.⁴⁹ Both the number and quality of candidates are reduced. The partisan bullying over a nominee's ideology is intended to and does exert a chilling effect on prospective candidates for judgeships.⁵⁰ Lawyers who aspire to the bench understand that they must adapt their career paths to a strategy most congenial to assuming judicial office. Thus, they will neither write nor speak publicly on controversial subjects. They may avoid representing clients in certain high-profile or pro bono cases. They may refuse to become involved in public policy debates where their positions might come back to haunt them. Self-muzzling by prospective judicial candidates limits their careers and preparation for the federal bench, yet it affords the only hope of avoiding a bloody confirmation process. Many qualified lawyers, moreover, will simply never consider a judgeship either because they will not be muzzled or because they have no desire to suffer the indignities and capriciousness of the confirmation process.

These chilling effects will ultimately reverberate throughout the legal marketplace of ideas as bright, ambitious individuals become discouraged from investigating and discussing the means and ends of constitutional adjudication. Anyone who believes in the importance of political speech guaranteed by the First Amendment should recoil at this prospect. The politicization of judicial confirmations insidiously deters the open and honest debates that are essential to the development of our legal system.⁵¹

49. See, e.g., Tracey E. George, *Judicial Independence and the Ambiguity of Article III Protections*, 64 OHIO ST. L.J. 221, 233–37 (2003); see also 150 CONG. REC. S3525–26 (daily ed. Apr. 1, 2004) (statement of Sen. Cornyn); 149 CONG. REC. S11,062–65 (daily ed. Sept. 4, 2003) (discussing the withdrawal of Miguel Estrada's nomination); 149 CONG. REC. S5832 (daily ed. May 7, 2003) (statement of Sen. Cornyn).

50. See, e.g., George, *supra* note 49, at 241–47 (noting that “[p]oliticized selection is likely to produce . . . more political decisionmakers Moreover, the autonomy of federal judges as well as their personal ambition may also prevent them from reaching decisions free from bias”).

51. *Id.* at 246 (“Judges who hope to be promoted have reason to believe that their rulings, at least in visible cases, will affect their chances of success.”); cf. Mark A. Cohen, *Explaining Judicial Behavior or What’s “Unconstitutional” About the Sentencing Commission?*, 7 J.L. ECON. & ORG. 183, 192–95 (1991) (finding that federal judges who were more likely to be promoted were also more likely to vote to uphold the Federal Sentencing

Contentious confirmation battles also carry the Senate into dangerous territory. The threat of an intrusive, ceaseless, and highly-charged confirmation process may well lead judicial nominees to tailor their views to secure easier confirmation. Having been forced to compromise their principles and take public stands on issues during confirmation, the now-confirmed judges may feel morally obliged to decide cases in accordance with those compliant—but hastily formed—opinions. The ideological confirmation process in this way imperils the independence of the judiciary.⁵² Further, when the price of Senate confirmation is essentially a demand for ideological conformity, the confirmation process encroaches on the President's appointment power. Some senators' insistence that President George W. Bush nominate individuals who were nominated but not confirmed during the Clinton Administration signaled confusion, to say the least, as to which branch of the federal government holds the constitutional appointment power.⁵³ Even if the precise scope of the Senate's advise and consent authority is debatable, it cannot be coequal with the appointment power.⁵⁴

How far the Senate processes have strayed from their proper scope was confirmed last winter by the revelation of documents which showed that certain interest groups were attempting to delay confirmation hearings and thus appointments to the United States Court of Appeals for the Sixth Circuit in order to influence

Guidelines and to impose harsher penalties in antitrust cases).

52. See generally George, *supra* note 49, at 246 (arguing that the politicization of judicial selection imposes dangerous political pressure on the judiciary and creates a political culture that can both directly and indirectly influence the independence of the judiciary).

53. 149 CONG. REC. S9433-34 (daily ed. July 16, 2003) (noting that Senators Levin and Stabenow would continue to object to George W. Bush's judicial nominees to the United States Court of Appeals for the Sixth Circuit until former President Bill Clinton's nominees to the same circuit were renominated).

54. See, e.g., Dr. John C. Eastman, *The Limited Nature of the Senate's Advice and Consent Role*, 36 U.C. DAVIS L. REV. 633, 635 (2003). Dr. Eastman refutes the claim that the Senate has a co-equal role in nominating judges and states:

[The claim that the Senate has a co-equal role in nominating judges] is inconsistent with the Constitution's text and the history of the advice and consent power.

... [T]he Framers of the Constitution assigned to the President the sole power to nominate and the primary power in appointing judges. They did this because they wanted the accountability that came with placing the appointment power in a single individual. They specifically refused to give the power of appointment to the Senate because they knew the tendency of public bodies to feel no personal responsibility and to give full play to intrigue and cabal.

Id.

the outcome of pending cases.⁵⁵ Any such attempt to control the federal judiciary from the halls of the Senate must be investigated and punished. This kind of manipulation is intolerable; it strikes at the basic integrity of the judicial process.

Finally, notwithstanding our life tenure, judges currently on the bench are affected by the partisan confirmation battles (even beyond the Sixth Circuit instance just mentioned).⁵⁶ Should the delays in confirmations continue, the courts of appeals will suffer further attrition from deaths or retirements, and the appellate caseload may become intolerable.⁵⁷ The orderly and thoughtful disposition of appeals will be at risk. There are also subtly corrosive effects on the development of the law. A judge who harbors the aspiration to a higher judicial office may strive to confine his rulings to narrow or non-controversial issues even though a more definitive ruling would be desirable.⁵⁸ The temptation to trim one's sails in pursuit of an ambitious career path has always existed in the judiciary as elsewhere, but the temptation may turn into a trend when confirmation battles are more expressly political contests.⁵⁹ The nominee with the shortest paper trail, and arguably the least contribution to the law, will satisfy political expediency. By sure but quiet steps, the process threatens the independence of judicial pronouncements. And, in any event, the overarching impact of a crassly political process diminishes the credibility of federal courts and respect for the law itself.⁶⁰

55. 149 CONG. REC. S15,952–54 (daily ed. Nov. 25, 2003) (statement of Sen. Cornyn). These documents can be viewed at http://fairjudiciary.com/cfj_contents/press/collusion_memos.shtml (last visited Jan. 29, 2005).

56. See George, *supra* note 49, at 245–46 (arguing that some judges “may limit their behavior to prevent a possible challenge to their promotion” to a higher court).

57. For a discussion of the delays in judicial confirmations see *supra* notes 35–48 and accompanying text.

58. George, *supra* note 49, at 244–47.

59. *Id.* at 247 (“Judicial selection accordingly is inherently political and not strictly merit-based. Politicized selection is likely to produce relatively more political decision-makers, and it does. Moreover, the autonomy of federal judges as well as their personal ambition may also prevent them from reaching decisions free from bias.”).

60. Professor Marshall agrees about the deleterious consequences of the current confirmation process, but he argues that judicial conservatism is as “activist” in pursuit of policies allegedly desired by political conservatives as is liberal judicial activism on behalf of liberal political goals. See William P. Marshall, *The Judicial Nominations Wars*, 39 U. RICH. L. REV. 819, 826–32 (2005). Hence, according to Professor Marshall, political liberals are fully justified in selectively opposing President Bush’s judicial nominees. *Id.* at 828. Space does not permit a point-by-point refutation of Professor Marshall’s examples of “activism.” Suffice it to state here that his reciting a crude scorecard that categorizes parties to Supreme Court litigation as “low-income, minority, or otherwise disenfranchised” (a)

These observations would not be complete without some prediction of what the future will bring or some prescription to resolve the current impasse. In a previous article, I concluded that:

The problems of judicial selection, in my view, are not so much a cause as a symptom of the deeper division in views as to what constitutes the rule of law. If the purpose of law, broadly speaking, is to effectuate political change, then, clearly, judges are political actors who must be accountable to the public like other politicians. If, on the other hand, the principal role of judges is to interpret existing law, while changes of legal policy are within the province of the executive and legislative branches of government, then judges have a more limited, though still essential, role in democratic government. For much of the twentieth century, mandarins of the law viewed the courts as agents of social change and the law as contingent, evolutionary, and ultimately subservient to political expediency. Federal judges long ago caught on to this heightened view of their power, and it was inevitable that state judges would do the same. As judge-made law became more involved in politically sensitive areas, the appointing authorities reacted accordingly. The politicization of selection processes followed the politicization of judicial decision-making, which in turn followed twentieth century currents of judicial philosophy. Today's "ethics" of judicial selection recognizes the politicization of the judges' role.

The restoration of more civil and objective selection processes will not occur until the reigning legal philosophy becomes less ambitious and overweening. That is to say, when the rule of law is again tethered to respect for the executive and legislative branches of government; to traditional legal craftsmanship, to continuity, to moral values; and to limited social aims, judicial selection will not provoke such battles. Philosophical change of this dimension often takes decades to mature and influence society's thinking.⁶¹

Three years later, my diagnosis of the root problem and the timeline for its ultimate solution remain the same. The prospect for a short-term remedy to the politicized judicial confirmation process is grim, however, barring a decisive change of personnel or rules in the Senate. The indiscriminate use of the filibuster

assumes his conclusion; (b) insults anyone who has taken a judicial oath; and (c) fails to do what good lawyers should do—evaluate each decision on its legal merits. Should the reader assume that because certain Justices less frequently agree on decisions with, for example, Justices Scalia or Thomas, those Justices are biased *against* non-low-income, non-minority, and popular (non-disenfranchised) parties? If so, where does the *Constitution* justify any such judicial bias? These debates would surely move forward if, rather than stooping to the simplistic political slogans in evaluating judicial candidates and discussing constitutional issues, the actors would behave more like the talented lawyers many of them are, rather than like hucksters.

61. Judge Edith H. Jones, *Foreword to Symposium: The Ethics of Judicial Selection*, 43 S. TEX. L. REV. 1, 6–7 (2001).

and the resort to public character assassination in hearings are reminiscent of tactics employed fifty years ago by southern senators and Joseph McCarthy to achieve their ends.⁶² We now know, of course, that those tactics represented the dying gasp of doomed movements. Politicizing the selection of federal judges ought to share the same fate.

62. *See generally* JACK ANDERSON & RONALD W. MAY, MCCARTHY: THE MAN, THE SENATOR, THE "ISM" 341-48 (1952) (describing the McCarthy era and Joseph McCarthy's use of politics to shape both the judiciary and society).
