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Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts

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JUDICIAL CONFIRMATION WARS: IDEOLOGY AND THE BATTLE FOR THE FEDERAL COURTS *

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Over the past two decades, there have been highly contentious battles over the confirmation of federal court judges, battles that have been increasing in intensity and number—virtual judicial confirmation wars.[1] In this Article, I explore why this has come about, focusing on the role of ideology in judicial selection as well as the empirical reality of the confirmation process as it has evolved over the more than a quarter century since Jimmy Carter was elected president. I also explore ways to end these so-called confirmation wars while offering an alternative take on these phenomena.

I. WHY THE FOCUS ON IDEOLOGY?

Ordinarily, with the exception of the nomination of U.S. Supreme Court Justices, the nomination and confirmation of federal judges is not a subject of extensive media attention and consequently not on the minds of most Americans. During recent

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* This Article in part draws from, revises, and updates portions of my earlier works: SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN (1997); and Sheldon Goldman, *Assessing the Senate Judicial Confirmation Process: The Index of Obstruction and Delay*, 86 JUDICATURE 251 (2003). Some of the material in this Article was used in a public lecture I delivered at the University of Massachusetts on October 20, 2004. I would like to thank Department Chair M.J. Peterson, Dean Janet Rifkin, Provost Charlena Seymour, and Chancellor John Lombardi for their support. I am also grateful to Dean Rodney A. Smolla and Professor Carl W. Tobias for the opportunity to participate in the Allen Chair Symposium at the University of Richmond School of Law on April 16, 2004. Finally, I am indebted to Sean Roche and his fellow editors for their work on my article.

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1. *See, e.g.*, Michael J. Gerhardt, *Judicial Selection as War*, 36 U.C. DAVIS L. REV. 667 (2003); Sheldon Goldman, *Unpicking Pickering in 2002: Some Thoughts on the Politics of Lower Federal Court Selection and Confirmation*, 36 U.C. DAVIS L. REV. 695 (2003); Ellen Goodman, *The War over the Judiciary*, BOSTON GLOBE, May 15, 2003, at A15.

presidential election campaigns including the most recent one in 2004, the opposing sides have raised the issue of the appointment of federal judges.[2] The major party platforms adopted by each party's national convention mention judicial selection, and it is clear that the party division over judicial selection is profound. The 2004 Democratic Party platform is succinct in what it has to say about the selection of judges: "We support the appointment of judges who will uphold our laws and constitutional rights, not their own narrow agendas."[3]

The 2004 Republican Party platform is more expansive in what it has to say about judges and judicial selection.[4] In a special section of the ninety-two-page platform, titled "Supporting Judges Who Uphold the Law," the platform states in part:

> In the federal courts, scores of judges with activist backgrounds in the hard-left now have lifetime tenure. Recent events have made it clear that these judges threaten America's dearest institutions and our very way of life. In some states, activist judges are redefining the institution of marriage. The Pledge of Allegiance has already been invalidated by the courts once, and the Supreme Court's ruling has left the Pledge in danger of being struck down again—not because the American people have rejected it and the values that it embodies, but because a handful of activist judges threaten to overturn commonsense and tradition. And while the vast majority of Americans support a ban on partial birth abortion, this brutal and violent prac-

2. *See* Neil A. Lewis, *Bush, in Edward's State, Declares His Confidence in Carrying it Once More*, N.Y. TIMES, July 8, 2004, at A14 (detailing President Bush's comments on the campaign trail accusing his presidential rival of wanting "activist judges who will rewrite the law from the bench," and the rejoinder from the Kerry campaign taking the President to task for "playing politics in stumping for judicial nominees who would roll back the freedoms that make America great"). Senator Kerry was already on record as stating: "I am prepared to filibuster, if necessary, any Supreme Court nominee who would turn back the clock on a woman's right to choose or the Constitutional right to privacy, on civil rights and individual liberties, and on the laws protecting workers and the environment." Adam Nagourney, *Senator Ready to Filibuster over Views of Court Pick*, N.Y. TIMES, June 21, 2003, at A13.

3. DEMOCRATIC NATIONAL COMMITTEE, 2004 DEMOCRATIC NATIONAL PLATFORM COMMITTEE REPORT, STRONG AT HOME, RESPECTED IN THE WORLD: THE DEMOCRATIC PLATFORM FOR AMERICA 35 (2004), http://www.dems2004.org/atf/cf/{59B09D55-4544-D5F-965C-8DBD20B51054}/Platform%202004%20-%20by%20Comm%20(2).pdf (last visited Jan. 22, 2005). This is the only explicit mention of the appointment of judges in the entire forty-one page platform document.

4. The Republican Party platform specifically addresses activist judges. *See* REPUBLICAN NATIONAL PLATFORM COMMITTEE REPORT, 2004 REPUBLICAN PARTY PLATFORM: A SAFER WORLD AND A MORE HOPEFUL AMERICA 76–77 (2004), http://www.gop.com/media/2004platform.pdf (last visited Jan. 22, 2005).

> tice will likely continue by judicial fiat. . . . President Bush has established a solid record of nominating only judges who have demonstrated respect for the Constitution and the democratic processes of our republic, and Republicans in the Senate have strongly supported those nominees. We call upon obstructionist Democrats in the Senate to abandon their unprecedented and highly irresponsible filibuster of President Bush's highly qualified judicial nominees, and to allow the Republican Party to restore respect for the law to America's courts.[5]

In another section of the platform there is a clear statement of the use of ideological litmus tests for the appointment of judges: "We support the appointment of judges who respect traditional family values and the sanctity of innocent human life."[6]

The core constituencies of both parties, as well as scholars of law and courts, understand that judging is an art and not a science. It is a process of applying the provisions of statutes or constitutions—which may be vaguely worded—to a specific set of facts. The judge must figure out for herself what the words of the Constitution, the statute, or the precedent mean as applied to the case at hand. The study of the use of discretion by judges and how that judicial discretion impacts the claims of the parties is the study of judicial behavior, a major facet of the public law subfield within the Political Science discipline.

Studies of judicial behavior have identified judges who are judicially liberal in their willingness to give a generous interpretation to those asserting their civil rights, political liberties, or due process rights.[7] Other judges have been identified as judicially conservative in their willingness to support government's claims that regulation of rights and liberties is in the greater public interest.[8] And there are judicial moderates who by definition fall somewhere in between the judicially liberal and the judicially conservative.[9]

There are abundant examples of federal judges exercising their

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5. *Id.*

6. *Id.* at 84.

7. JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 329–31, 422–24 (2002).

8. *Id.* at 422–24 (analyzing the Rehnquist Court's support of state and federal action restricting civil liberties).

9. *Id.*

discretion in liberal or conservative directions.[10] The Supreme Court is widely understood by those who follow the Court to be split between the three hardcore conservatives consisting of Chief Justice William Rehnquist, Justices Antonin Scalia and Clarence Thomas, and four Justices on the left wing of the Court consisting of Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer.[11] Occupying the right of center middleground are Justices Sandra Day O'Connor and Anthony Kennedy.[12] Judicial liberals, moderates, and conservatives populate the lower federal courts as well.[13]

Federal judges can and do rule on almost every facet of life in the United States. Indeed, it matters who sits on the Supreme Court of the United States and on the lower federal courts. And Justices and judges are not fungible, something very well understood by advocacy groups on the right and left who have mobilized their forces and resources in the judicial confirmation wars seeking to influence presidents and senators.[14]

II. IDEOLOGICAL POLARIZATION AMONG PARTY ELITES, ADVOCACY GROUPS, AND THE BORK AND THOMAS NOMINATIONS

A phenomenon in American politics that helps explain why the confirmation wars have come about is the ideological divide be-

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10. *Id.* at 115–77 (describing the political history of the Supreme Court of the United States).

11. *Id.* at 1; *see also* Bob Egelko, *Election at the Crossroads; Supreme Court: Aging Judiciary Heralds Historic Transformation*, S.F. CHRON., Oct. 18, 2004, at A1.

12. SEGAL & SPAETH, *supra* note 7, at 1; *see also* Egelko, *supra* note 11, at A1; Linda Greenhouse, *The Year Rehnquist May Have Lost His Court*, N.Y. TIMES, July 5, 2004, at A2 (describing the different positions Justices have taken on key issues during the Rehnquist Court).

13. *See, e.g.*, C.K. ROWLAND & ROBERT A. CARP, POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS 24–57 (1996); Robert A. Carp, Kenneth L. Manning & Ronald Stidham, *The Decision-Making Behavior of George W. Bush's Judicial Appointees: Far-Right, Conservative, or Moderate?*, 88 JUDICATURE 20, 25–27 (2004); Susan B. Haire, Martha Ann Humphries & Donald R. Songer, *The Voting Behavior of Clinton's Courts of Appeals Appointees*, 84 JUDICATURE 274, 278–81 (2001).

14. *See* LAURA COHEN BELL, WARRING FACTIONS: INTEREST GROUPS, MONEY, AND THE NEW POLITICS OF SENATE CONFIRMATION 70–85, 147–57 (2002); *see also* NANCY SCHERER, SCORING POINTS: POLITICIANS, ACTIVISTS AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS (forthcoming 2005) [hereinafter SCHERER, SCORING POINTS]; Nancy Scherer, *The Judicial Confirmation Process: Mobilizing Elites, Mobilizing Masses*, 86 JUDICATURE 240, 240–50 (2003) (describing how special interest groups exploit their mobilization power to influence the judicial confirmation process).

tween Democratic and Republican party activists. Politics among political elites has become more ideologically polarized while at the same time the large majority of Americans are more moderate or indifferent to politics. This has come about over the past forty years as the old patronage-based political party machines have atrophied to be replaced by issue-oriented party organizations taken over or fueled by policy-oriented activists.[15] The issues of the 1960s and 1970s—civil rights of African-Americans and other ethnic minorities, the rights of women, the Vietnam War, and the Watergate scandals and abuse of governmental power—all stimulated the move toward issue-oriented party organizations.[16] So did abortion, affirmative action, crime, the heavy hand of government, and like issues that formed the basis of Ronald Reagan's political revolution.[17]

Where once patronage jobs were the incentives for people to work for the party organizations and their candidates, now policy positions provided the new incentives.[18] At the same time numerous advocacy non-profit groups formed to promote their individual agendas which ultimately included the appointment of sympathetic judges to the federal bench.[19] These groups could give or withhold their political support to politicians, which meant that they could mobilize their membership with a well conceived mailing or telephone campaign. At the same time, these groups developed their own paid bureaucracy which required that there be a continuing if not growing base of paid memberships in the organization as well as ongoing fundraising. Emphasizing the organization's issues and dramatizing the conflicts with opposing groups became a way for the groups to keep their core supporters committed to their organizations and to recruit new members.

Contributing to the polarization of party elites has been the role of the media in dramatizing the issues and the differences between the groups in their sustaining effort to gain readers or

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15. *See* MORRIS P. FIORINA ET AL., CULTURE WAR? THE MYTH OF A POLARIZED AMERICA 33–50 (2005); *see also* SCHERER, SCORING POINTS, *supra* note 14.

16. L.A. Powe, Jr., *The Not-So-Brave New Constitutional Order*, 117 HARV. L. REV. 647, 656–63 (2003) (reviewing MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER (2003)).

17. *Id.* at 664–66.

18. For the first book-length study of what was then an emerging phenomenon, see JAMES Q. WILSON, THE AMATEUR DEMOCRAT: CLUB POLITICS IN THREE CITIES 200–25, 348–49 (1962).

19. *See* BELL, *supra* note 14, at 68–72.

viewers so that the various media outlets can attract advertising income. Interestingly, there is evidence that the conflicts between the elites do not mirror the reality of the mass public.[20]

Advocacy or interest groups have assumed a place of prominence in the selection and particularly the confirmation processes.[21] There were occasional instances before the 1980s when these groups became involved in a judicial nomination, but those were relatively small-scale compared to the battle over federal appellate court judge Robert Bork, nominated by President Ronald Reagan to the Supreme Court of the United States in 1987.[22]

The Bork nomination mobilized the advocacy groups opposed to the nomination, and they poured an unprecedented amount of resources into media ads attacking Judge Bork.[23] These groups also actively lobbied senators. Robert Bork himself was a distinguished conservative legal scholar who had an impressive professional background—Yale Law School professor, Solicitor General of the United States, a partner in a major District of Columbia law firm—and in the several years prior to his Supreme Court nomination he was serving as a judge on the United States Court of Appeals for the District of Columbia Circuit, a post to which he had been easily confirmed by the United States Senate.[24] But when he was nominated to the Supreme Court, his legal writings challenging the constitutional basis for *Roe v. Wade*,[25] the landmark 1973 decision that established the right of a woman to abort a non-viable fetus, formed one of the bases for opposing his nomination.[26] At his confirmation hearing, Judge Bork promised to keep an open mind on the issue of abortion and the right to privacy.[27] Liberal and moderate Democratic and Republican senators

20. *See* FIORINA ET AL., *supra* note 15, at 51–111.

21. *See* BELL, *supra* note 14, at 149–57.

22. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 275–321 (1990); *see also* HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON 297–99 (rev. ed. 1999).

23. BORK, *supra* note 22, at 282–93.

24. COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE: NOMINATION OF ROBERT H. BORK TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT 3 (1987).

25. 410 U.S. 113 (1973).

26. *See* BORK, *supra* note 22, at 281.

27. *See* COMMITTEE ON THE JUDICIARY, *supra* note 24, at 34.

did not believe him, and they were right not to.[28] Bork, after he resigned from the federal bench, admitted that he believed *Roe v. Wade* was wrongly decided and all but explicitly said that had he been on the Supreme Court he would have provided the fifth vote to overturn *Roe v. Wade*.[29] Were Bork on the Court instead of Anthony Kennedy, who filled the slot originally slated for Bork, *Roe v. Wade*—a woman's constitutional right of privacy to terminate a non-viable fetus from an unwanted pregnancy—would be history.

After Bork, conservative activist groups joined their liberal counterparts in vetting judicial nominees and mounting pressure at the executive branch level as well as the senatorial level, promoting the candidacies of ideological soul-mates and opposing nominees or potential nominees they found particularly objectionable. The confirmation wars were on!

When George H.W. Bush was elected president and took office in 1989, the Democrats controlled the Senate.[30] Interestingly, the confirmation wars cooled down, perhaps because the American people had spoken decisively at the ballot box and perhaps because the nominees were not seen by the Democrats as beyond the pale.[31] When Bush had his first Supreme Court position to fill in 1990, he named a non-controversial moderate conservative—David Souter—who subsequently went onto the Court and eventually became one of the more liberal members of the Court.[32] Then in 1991, President Bush went full force in trying to shift the federal courts ideologically to the right along the lines of his predecessor in office, Ronald Reagan.[33] This was signaled not only by highly conservative nominees to the courts of appeals and district courts, but also by the nomination of Clarence Thomas to replace Thurgood Marshall, the legendary hero of the civil rights movement, who retired from the Court in 1991.[34]

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28. *See* ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULES OF JUDGES 71 (2003).

29.. *See id.*

30. Sheldon Goldman, *The Bush Imprint on the Judiciary: Carrying on a Tradition*, 74 JUDICATURE 294, 295 (1991).

31. BELL, *supra* note 14, at 57.

32. *See* BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 368 (1993); SEGAL & SPAETH, *supra* note 7, at 416.

33. *See* Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 JUDICATURE 282, 296–97 (1993).

34. *See* SCHWARTZ, *supra* note 32, at 369.

The Clarence Thomas hearings were extraordinary. During the first set of hearings Clarence Thomas swore under oath that as a law student he had neither discussed *Roe v. Wade* nor expressed any views of the decision.[35] In the second set of hearings, Clarence Thomas had to defend himself against the sexual harassment charges brought by Professor Anita Hill.[36] The daytime televised hearings broke new ground in live television as to the descriptions of alleged sexual harassment.[37] At the end, Thomas was barely confirmed by a vote of 52-48.[38] But ideological selection of judges was not confined to the Supreme Court.[39]

III. IDEOLOGY AND JUDICIAL SELECTION

In the presidential papers of Ronald Reagan and his immediate successor George H.W. Bush can be found numerous examples of how both administrations sought out the most ideologically compatible judicial candidates for nomination. This was not, however, the first time that a presidential administration warmed to the idea of naming ideological soul-mates to the courts.[40] There are numerous examples throughout American history. For example, there is evidence that President Franklin D. Roosevelt, particularly during his second term, aimed to appoint supporters of the New Deal to the United States courts of appeals.[41] This was especially important at that time because the federal courts were generally hostile to the President's programs.[42]

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35. *See* MICHAEL COMISKEY, SEEKING JUSTICES: THE JUDGING OF SUPREME COURT NOMINEES 111–12 (2004); JANE MAYER & JILL ABRAMSON, STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS 219 (1994); TIMOTHY M. PHELPS & HELEN WINTERNITZ, CAPITOL GAMES: THE INSIDE STORY OF CLARENCE THOMAS, ANITA HILL, AND A SUPREME COURT NOMINATION 192–93 (1992); PAUL SIMON, ADVICE AND CONSENT: CLARENCE THOMAS, ROBERT BORK AND THE INTRIGUING HISTORY OF THE SUPREME COURT'S NOMINATION BATTLES 88–91 (1992).

36. Goldman, *supra* note 33, at 283.

37. *See* MAYER & ABRAMSON, *supra* note 35, at 290–91.

38. Goldman, *supra* note 33, at 283.

39. *See, e.g.*, ROWLAND & CARP, *supra* note 13, at 51–53.

40. *See, e.g.*, Sheldon Goldman, *Judicial Appointments and the Presidential Agenda*, *in* THE PRESIDENCY IN AMERICAN POLITICS 19–47 (Paul Brace, Christine B. Harrington & Gary King eds., 1989).

41. *See* SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 26–38 (1997).

42. *Id.* at 30–31.

But it was in the Administration of Richard Nixon that the idea was put forward to search and screen for candidates who would agree with the Administration across the broad spectrum of issues.[43] The idea to use federal judicial selection as an arm of public policymaking came from a young White House aide, Tom Charles Huston, who just two months into the Nixon presidency wrote a detailed memo to the President that read in part:

> Through his judicial appointments, a President has the opportunity to influence the course of national affairs for a quarter of a century after he leaves office. . . . *In approaching the bench, it is necessary to remember that the decision as to who will make the decisions affects what decisions will be made.* . . . [T]he President [should] establish precise guidelines as to the type of man he wishes to appoint—his professional competence, his political disposition, his understanding of the judicial function—and establish a White House review procedure to assure that each prospective nominee recommended by the Attorney General meets the guidelines.[44]

Huston concluded by observing that if the President "establishes *his* criteria and establishes *his* machinery for insuring that the criteria are met, the appointments he makes will be *his*, in fact, as in theory."[45]

Nixon not only read the memo carefully, but he directed it to Deputy Attorney General Kleindienst with a handwritten notation: "RN *agrees*—Have this analysis in mind in making judicial nominations."[46]

But there was no follow-through. There was no bureaucratic apparatus established to ideologically screen candidates for judgeships—that was to await the presidency of Ronald Reagan.[47]

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43. *Id.* at 205–06.

44. Memorandum from Tom Charles Huston, White House Aide, to Richard M. Nixon, President, United States 2 (Mar. 25, 1969) (on file with the Nixon Presidential Materials Project of the National Archives & Records Administration, College Park, Maryland); *see also* GOLDMAN, *supra* note 41, at 206.

45. Memorandum from Tom Charles Huston, White House Aide, to Richard M. Nixon, President, United States 7 (Mar. 25, 1969) (on file with the Nixon Presidential Materials Project of the National Archives & Records Administration, College Park, Maryland); *see also* GOLDMAN, *supra* note 41, at 206.

46. Memorandum from John D. Ehrlichman, Assistant to the President for Domestic Affairs, to the Staff Secretary (Mar. 27, 1969) (on file with the Nixon Presidential Materials Project of the National Archives & Records Administration, College Park, Maryland); *see also* GOLDMAN, *supra* note 41, at 206.

47. GOLDMAN, *supra* note 41, at 291–93.

To be sure, most appointees of Richard Nixon were conservative Republicans[48]—but a few relatively liberal individuals were appointed because they were sponsored by the small group of moderate to liberal Republican senators then in the Senate.[49]

At the outset of the presidency of Ronald Reagan, an institutional apparatus was created to ensure that Reagan judicial nominees were compatible with the philosophical and policy orientation of the President.[50] That institutional apparatus was the new joint White House-Justice Department Judicial Selection Committee.[51] That committee included key White House staff persons as well as the Attorney General, Deputy Attorney General, and the Assistant Attorney General heading the new office created by the Reagan Administration to oversee judicial selection.[52] That office was appropriately called the Office of Legal Policy.[53]

The joint committee was chaired by the White House Counsel, whose office had become involved in judicial selection during the previous Carter Administration.[54] By designating the White House Counsel as chair of the Judicial Selection Committee, the Reagan Administration signaled that there would be a more systematic involvement of the White House in judicial selection.[55]

The new Office of Legal Policy and an expanded White House Counsel's office undertook the task of ideologically vetting candidates for judicial office.[56] The Judicial Selection Committee then coordinated the selection process and made the final decisions as to whom to recommend to the President.[57] At the same time, advocacy groups actively sought to influence the selection process so that even a candidate that seemed to have survived the vetting

48. *See generally id.* at 198–235 (analyzing the use of ideology during the Nixon presidency and the ensuing nomination of primarily conservative Republicans to the courts).

49. For example, the Ninth Circuit decision in *Newdow v. U.S. Congress*, 328 F.3d 466 (9th Cir. 2003), ruling the phrase "under God" in the Pledge of Allegiance to be in violation of the Constitution, was authored by a Republican Nixon appointee, Alfred T. Goodwin.

50. GOLDMAN, *supra* note 41, at 291–92.

51. *Id.* at 292.

52. *Id.*

53. *Id.* at 291.

54. *Id.* at 283, 292.

55. *Id.* at 293.

56. *Id.* at 292.

57. *Id.* at 293.

process could be sabotaged in the end.[58] A good example of this from the Reagan Administration concerned Judith Whittaker.[59]

Judith Whittaker was an associate general counsel of Hallmark Cards in Kansas City.[60] She came from a prominent Republican family including her father-in-law, Charles E. Whittaker, who had been an Associate Justice on the Supreme Court of the United States.[61] She was one of five persons from Missouri recommended to the Administration by then Republican Senator John Danforth in the spring of 1981 for a seat on the United States Court of Appeals for the Eighth Circuit.[62]

At first, Whittaker's prospective nomination seemed to be on track. Jonathan Rose, head of the Office of Legal Policy, recommended that she be named to the Eighth Circuit seat.[63] In a memo for the Judicial Selection Committee, dated July 14, 1981, he noted: "I have personally interviewed her and found her to possess common sense, be aware of women's issues but not radical, and feel she is one of the best qualified women available for our consideration. . . . She is a Republican."[64]

Reagan's Judicial Selection Committee discussed Whittaker at its July 23 meeting and decided that more work had to be done before going ahead with the nomination.[65] Behind the scenes at the White House, opposition mounted against Whittaker and during its July 30 meeting the Committee decided to drop her as a candidate.[66]

Supporters of Whittaker then mounted an intense campaign on her behalf.[67] Her candidacy was embraced by prominent Republican women.[68] For example, in a letter to President Reagan, Re-

58. *See, e.g.*, *id.* at 295–96 (describing how advocacy groups such as the NAACP can influence nominations).

59. *Id.* at 330–34.

60. *Id.* at 330–31.

61. *Id.* at 331.

62. *Id.* at 330–31.

63. *Id.* at 331.

64. *Id.* (quoting Memorandum from Jonathan Rose, Office of Legal Policy, to Edward C. Schmults and William Smith, Judicial Selection Committee (July 14, 1981) (on file with the Ronald Reagan Library, Simi Valley, California)).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

publican congresswoman Claudine Schneider from Rhode Island pointed out that Whittaker had graduated first in her class at the University of Missouri Law School and was a distinguished member of the legal profession.[69] "Further," wrote Schneider, "she possesses a strong background as a Republican . . . [and] has long engaged in Party activities in Kansas City."[70]

The Committee then reconsidered Whittaker but there was hesitation within the Administration, with opponents of Whittaker calling into question her Republican credentials.[71] On August 18, Rose wrote a strongly supportive memo in which he pointed out Whittaker's strong Republican credentials and strong Republican home state support.[72]

Finally, at its September 3, 1981 meeting, the Committee decided to go ahead with Whittaker.[73] The Committee authorized FBI and ABA investigations, with the presumption that Whittaker would be nominated in the absence of unexpected negative and disqualifying results.[74] To answer the charge that she was not really a Republican, the Committee agreed that an aide would check on her voter registration and report back to the Justice Department.[75] As one informed individual later put it, "they [the FBI and ABA] found Mrs. Whittaker to have exemplary qualifications."[76] Indeed, the ABA reported Whittaker to be "well qualified."[77] The nomination papers were prepared and sent to the White House in early November, and Whittaker was told by the Justice Department that her appointment would be an-

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69. *Id.*

70. *Id.* (quoting Letter from Claudine Schneider, Rhode Island Representative, United States Congress, to Ronald Reagan, President, United States (Aug. 6, 1981) (on file with the Ronald Reagan Library, Simi Valley, California)).

71. *Id.*

72. *Id.* (citing Memorandum from Jonathan Rose, Office of Legal Policy, to Edward C. Schmults and William Smith, Judicial Selection Committee (Aug. 18, 1981) (on file with the Ronald Reagan Library, Simi Valley, California)).

73. *See id.*

74. *See id.*

75. *Id.* (citing Notes of Fred R. Fielding from a meeting of President Reagan's Judicial Selection Committee (Sept. 3, 1981) (on file with the Ronald Reagan Library, Simi Valley, California)).

76. *Id.* at 331–32 (quoting Letter from Donald P. Lay, Chief Judge, United States Court of Appeals for the Eighth Circuit, to Edward Zorinsky, Nebraska Senator, United States Senate (Dec. 29, 1981) (on file with the Ronald Reagan Library, Simi Valley, California)).

77. *Id.* at 332.

nounced in a matter of days.[78] But Whittaker was never nominated.[79]

What had happened was that as the FBI and ABA were conducting their investigations, extremely conservative Republicans within and outside of Missouri mounted an intense campaign to keep Whittaker from being nominated.[80] Richard Viguerie, a right-wing activist, attacked Whittaker in his newsletter, *New Right*, as a pro-abortion "strong feminist."[81] Viguerie and others sharing his views orchestrated a letter-writing campaign in opposition to Whittaker.[82] The nature and scope of the anti-Whittaker campaign is illustrated by a letter that Terry Branstad, then Lieutenant Governor of Iowa, wrote to the President on October 14, 1981.[83] Branstad wrote:

> It has just been called to my attention that there is a possibility of you appointing Judith Whitaker [sic] . . . . I have been told that she is a liberal democrat and a pro-abortionist. A number of my constituents are very concerned and upset about this possibility. I certainly hope that Judith Whitaker [sic] will not be appointed to this position as it would be a real blow to some of your most ardent and active supporters here in the states covered by the Eighth Circuit.[84]

Branstad's letter was brought to the attention of White House Chief of Staff James A. Baker III.[85]

In November, the Administration put the Whittaker nomination on hold.[86] Within weeks, the prospective nomination was dropped because, in the words of the Deputy Attorney General, she lacked enough "broad-based support."[87]

Some other examples from the Reagan presidential papers demonstrate the ideological vetting process. For instance, a

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78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* (quoting *Woman Off List for Judgeship*, N.Y. TIMES, Dec. 24, 1981, at B8).
82. *Id.*
83. *Id.*
84. *Id.* (quoting Letter from Terry Branstad, Lieutenant Governor, Iowa, to Ronald Reagan, President, United States (Oct. 14, 1981) (on file with Ronald Reagan Library, Simi Valley, California)).
85. *Id.* at 333.
86. *Id.*
87. *Id.* (quoting *Woman Off List for Judgeship*, N.Y. TIMES, Dec. 24, 1981, at B8).

memorandum sent by Reagan's White House Counsel Fred F. Fielding to the members of the joint White House-Justice Department Judicial Selection Committee provided an analysis and recommendation for filling a vacancy on the district court bench of Montana.[88] The memo discussed three candidates for the nomination: Charles C. Lovell, Jack D. Shanstrom, and Sam E. Haddon.[89] Fielding saw Charles Lovell as a highly qualified lawyer who "has always been an active member of the Republican Party . . . . [h]is views on crime issues and social policy appear consistent with those of this Administration."[90]

The second candidate, Jack Shanstrom, had entered public life when he was elected county attorney running on the Republican ticket.[91] Shanstrom eventually went on the state bench but was defeated for re-election.[92] He subsequently was appointed the first full-time United States Magistrate for the District of Montana.[93] Fielding reported:

> As a trial judge, Jack Shanstrom had a consistent reputation for being strong on law enforcement—he has upheld the death penalty, lobbied actively for a "good faith" amendment to the exclusionary rule, and was rated one of the state's toughest judges in sentencing criminals. Though not regarded as a scholar, his service and experience on the bench are highly regarded by both the judiciary and the bar throughout Montana. . . . Although all three leading candidates are clearly conservative, [the Department of] Justice notes that Judge Shanstrom's long track record on the bench makes him the "safest" nomination in terms of the consistency of his judicial philosophy with that of this Administration.[94]

The third candidate, Sam Haddon, graduated first in his law school class at the University of Montana and was "the most scholarly and articulate of the judicial candidates considered here. . . [He is] one of the smartest and finest trial lawyers in the

88. Goldman, *supra* note 1, at 698–700 (citing Memorandum from Fred F. Fielding, White House Counsel, to Federal Judicial Selection Committee 1 (Dec. 1984) (on file with the Ronald Reagan Library, Simi Valley, California) [hereinafter Dec. 1984 Fielding Memo]).

89. *Id.* at 699–700 (citing Dec. 1984 Fielding Memo, *supra* note 88, at 1).

90. *Id.* at 699 (quoting Dec. 1984 Fielding Memo, *supra* note 88, at 1).

91. *Id.*

92. *Id.* (stating that Shanstrom was appointed to the bench by Montana's governor and was defeated for re-election eighteen years later).

93. *Id.*

94. *Id.* (quoting Dec. 1984 Fielding Memo, *supra* note 88, at 1).

state. Haddon has been active in supporting Republican candidates, a very pro-law enforcement NRA member; and he is regarded by his colleagues as conservative."[95]

The Reagan Justice Department recommended selecting Shanstrom but the Judicial Selection Committee recommended Lovell who had the strongest political backing.[96] Lovell was nominated and confirmed in 1985.[97] Shanstrom was subsequently nominated to fill another vacancy on the federal district bench by President George H.W. Bush in early 1990 and was confirmed later that year.[98] President George W. Bush picked Haddon in 2001 to the seat made vacant when Lovell took senior status.[99] Haddon was easily confirmed several months later.[100]

The Reagan Administration's rigorous vetting of judicial nominees is also apparent in another example, this one involving a position on the Tenth Circuit, which was to be filled by a citizen of Colorado.[101] White House Counsel Fred Fielding reported that Colorado Republican Senator Armstrong backed the elevation of Federal District Judge John P. Moore.[102] Fielding further noted that four members of the Colorado congressional delegation recommended elevating United States District Court Chief Judge Sherman G. Finesilver.[103] As for Moore, Fielding wrote, "[the] Justice [Department] states that a preliminary review of Judge Moore's reported decisions indicate his judicial philosophy is compatible with the President's."[104] This was not Fielding's take on Judge Finesilver, first appointed to the district bench by Rich-

95. *Id.* (quoting Dec. 1984 Fielding Memo, *supra* note 88, at 1); *see also* Sam E. Haddon biography, http://www.usdoj.gov/olp/haddonbio.htm (last visited Jan. 22, 2005).

96. *Id.* at 700.

97. 131 CONG. REC. S4090 (daily ed. Apr. 3, 1985); *see also* Goldman, *supra* note 1, at 700.

98. 136 CONG. REC. S6157 (daily ed. May 14, 1990) (statement of Sen. Baucus); *see also* Goldman, *supra* note 1, at 700.

99. 147 CONG. REC. S5100 (daily ed. May 17, 2001); *see also* Goldman, *supra* note 1, at 700.

100. Haddon was confirmed by the United States Senate by a vote of 95-0, with five senators absent for the vote. 147 CONG. REC. S7992 (daily ed. July 20, 2001).

101. Goldman, *supra* note 1, at 700–01.

102. *Id.* at 700 (citing Memorandum from Fred F. Fielding, White House Counsel, to Federal Judicial Selection Committee 1 (Aug. 1984) (on file with the Ronald Reagan Library, Simi Valley, California) [hereinafter Aug. 1984 Fielding Memo]).

103. *Id.* (citing Aug. 1984 Fielding Memo, *supra* note 102, at 1).

104. *Id.* (quoting Aug. 1984 Fielding Memo, *supra* note 102, at 1).

ard Nixon.[105] The memo stated:

> [The Department of] Justice's review of Judge Finesilver's articles and reported decisions showed that he is a "hardliner" on crime, but that he is relatively moderate on civil rights issues . . . Justice has expressed particular concerns over Judge Finesilver's analysis of constitutional rights in *Foe v. Vanderhoof*. In *Foe*, Judge Finesilver declared unconstitutional a Colorado statute which required parental consent before an unmarried minor could obtain an abortion, and stated that "the right to privacy as expounded in *Roe* and *Doe* to include a decision to terminate a pregnancy extends to minors." Additionally, the judge referred to parents in *Foe* as "third parties" who should not have "exclusive control over the activities of minors in this area." Based on an analysis of Judge Finesilver's writings, Justice has concluded that he is not a suitable candidate for the Tenth Circuit.[106]

Judge Finesilver's candidacy was thus aborted.[107]

When George H.W. Bush was elected president in 1988, his Administration, early in his term, perhaps to demonstrate its independence from Ronald Reagan, renamed the Office of Legal Policy.[108] Its new name was the Office of Policy Development.[109] Furthermore, the Bush Administration moved judicial selection to the Deputy Attorney General's office—where judicial selection before Reagan had historically been undertaken in the Justice Department.[110] The Bush Administration, however, continued with the joint White House-Justice Department Judicial Selection Committee, and the White House Counsel's office continued as the center for the ideological vetting of judicial candidates.[111]

An example from the Bush papers concerns Jose Cabranes who was then a federal district court judge.[112] His record was evaluated in terms of the possibility of elevating him to the United

105. *Id.* at 700–01 (citing Aug. 1984 Fielding Memo, *supra* note 102, at 1).

106. *Id.* (quoting Aug. 1984 Fielding Memo, *supra* note 102, at 1) (citations omitted).

107. *Id.* at 701. Senator Armstrong's candidate, Judge Moore, was appointed to the Tenth Circuit.

108. Sheldon Goldman, *The Bush Imprint on the Judiciary: Carrying on a Tradition*, 74 JUDICATURE 294, 295 (1991).

109. *Id.*

110. *Id.*

111. *Id.* at 295–98.

112. *See* Goldman, *supra* note 1, at 701–02 (citing Memorandum on Jose A. Cabranes (on file with the George H.W. Bush Library, College Station, Texas) [hereinafter Cabranes Memo]).

States Court of Appeals for the Second Circuit.[113] The memo concerning Judge Cabranes acknowledged that his "judicial writings are scholarly, reflecting a lucid style and careful attention to detail. He is seldom reversed . . . ."[114] Nevertheless, the memo asserted, "In general . . . Judge Cabranes' academic writings and judicial opinions mark him as a judicial activist with deeply held views regarding the power of the courts to bring about social change."[115] The evidence offered by the memo for this sweeping characterization was a speech Cabranes made during a 1982 symposium in which he defended the federal courts as a forum for protecting individual rights, particularly when state courts do not.[116] In addition, the memo reflected, "Some of Judge Cabranes' criminal law decisions reflect a greater solicitude for the rights of criminal defendants than is found among conservative jurists."[117] Finally, the memo concluded that "in construing the Constitution, Judge Cabranes is willing to look beyond the text and the intent of its Framers."[118] Jose Cabranes, it should come as no surprise, was not promoted by the Bush Administration.[119] However, Bush's successor in office, President Bill Clinton, elevated Judge Cabranes to the Second Circuit in 1994.[120]

Another example of ideological vetting by the Bush Administration, this time concerning a district court post, can be found in a memo that evaluated Joseph A. DiClerico, Jr., who had been serving as a New Hampshire Superior Court judge.[121] His judicial decisions, according to the memo, "were generally conservative in outcome and indicated little disposition to endorse far reaching contentions by criminal defendants or civil plaintiffs. . . . DiClerico's civil decisions also reflected a generally restrictive and cautious interpretation of statutory and constitutional claims."[122]

113. *Id.* at 701.
114. *Id.* (quoting Cabranes Memo, *supra* note 112).
115. *Id.* (quoting Cabranes Memo, *supra* note 112).
116. *Id.*
117. *Id.* at 701–02 (quoting Cabranes Memo, *supra* note 112).
118. *Id.* at 702 (quoting Cabranes Memo, *supra* note 112).
119. *Id.*
120. 140 CONG. REC. 20,458 (1994); *see also* Goldman, *supra* note 1, at 702.
121. Memorandum from Barbara S. Drake to Lee Liberman (Jan. 9, 1992) (on file with the George H.W. Bush Library, College Station, Texas).
122. *Id.*

DiClerico was nominated and confirmed in 1992.[123]

Candidates for judgeships touted their conservative credentials to Bush Administration officials. For example, one candidate for a Second Circuit judgeship wrote:

> I am enclosing articles indicating my conservative philosophical leanings. The highlighted passages in the enclosed articles demonstrate: (a) support for the death penalty; (b) abolishment of the Parole Board; (c) support for lower taxes; (d) opposition to Medicaid funding for abortions; (e) opposition to abortion generally; (f) support for nuclear power; (g) support for reducing the size of government.[124]

Another example concerns a candidate for a district court judgeship who was serving as a state judge and who wrote:

> [A]s a trial judge I upheld our then [pre-*Roe v. Wade*] existing abortion statutes and sentenced Oregon's most notorious abortionist to prison at age 74 at a time when she was dying of cancer. So far as I can determine, I am the only trial judge in the history of Oregon to have sentenced an abortionist to prison. That sentence was upheld by the Oregon Supreme Court . . . .[125]

While campaigning for the Republican Party's presidential nomination, George W. Bush committed himself to naming judges like Justices Antonin Scalia and Clarence Thomas.[126] As president, he stated bluntly that he is looking to appoint "conservatives" to the courts.[127] His Administration followed through and almost all of the over 225 nominees to the lower federal courts during Bush's first term can fairly be characterized as conservatives who share the President's judicial philosophy.[128] To an even

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123. 138 CONG. REC. 23,441 (1992).

124. Letter from Richard M. Rosenbaum to William Crystal (June 4, 1991) (on file with George H.W. Bush Library, College Station, Texas). Rosenbaum was not nominated.

125. Letter from Robert E. Jones to Lee Liberman (Oct. 6, 1989) (on file with the George H.W. Bush Library, College Station, Texas). Jones was nominated the following February and confirmed two months later. 136 CONG. REC. 1280 (1990) (announcing the nomination of "Robert E. Jones, of Oregon, to be United States District Judge for the District of Oregon"); 136 CONG. REC. 5284 (1990) (announcing the confirmation of "Robert E. Jones, of Oregon" to be District Judge for the District of Oregon).

126. Elisabeth Bumiller, *Bush Vows to Seek Conservative Judges*, N.Y. TIMES, Mar. 29, 2002, at A24 (noting that in November 1999, Bush "singled out Justices Antonin Scalia and Clarence M. Thomas, the two most conservative members [of the Supreme Court of the United States] as justices whom he held in high regard").

127. *Id.*

128. *See generally* Sheldon Goldman, Elliot Slotnick, Gerard Gryski, Gary Zuk & Sara Schiavoni, *W. Bush Remaking the Judiciary: Like Father Like Son?*, 86 JUDICATURE 282,

greater extent than during the Reagan and first Bush Administrations, the White House Counsel's Office has taken responsibility for screening and interviewing potential candidates to determine their compatibility with the President's judicial philosophy.[129]

The judicial selection process is, of course, a political process with many facets. The trend has been unmistakably to move away from primarily patronage concerns of the past to concerns about furthering the president's policy agenda through judicial appointments.

These developments in judicial selection—the avowed and open use of an ideological vetting process that would assure insofar as possible the selection of philosophically compatible individuals to the federal bench—has set the stage for judicial confirmation wars.

IV. OBSTRUCTION AND DELAY IN THE CONFIRMATION PROCESS

We have seen that the trend in judicial selection has been to move away from primarily patronage concerns to concerns about furthering the president's policy agenda through judicial appointments. Since the 1980s, senators have increasingly openly opposed judicial nominees on policy and judicial philosophical grounds.[130] Most of that opposition, when it has occurred, aside from Supreme Court nominations, has centered around nominees to the courts of appeals.[131] This was true during the last six years of the Clinton presidency when some Republican senators op-

302–09 (2003) (analyzing President George W. Bush's judicial nominees).

129. *Id.* at 284–85.

130. See GOLDMAN, *supra* note 41, at 307–19 for examples during the presidency of Ronald Reagan. For examples during the George H.W. Bush Administration, see Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 JUDICATURE 282, 291 (1993) and Sheldon Goldman, *The Bush Imprint on the Judiciary: Carrying on a Tradition*, 74 JUDICATURE 294, 304–05 (1991). For examples during the Clinton Administration, see Sheldon Goldman et al., *Clinton's Judges: Summing up the Legacy*, 84 JUDICATURE 228, 231–41 (2001); Sheldon Goldman & Elliot Slotnick, *Clinton's Second Term Judiciary: Picking Judges Under Fire*, 82 JUDICATURE 264, 267–73 (1999); Sheldon Goldman & Elliot Slotnick, *Clinton's First Term Judiciary: Many Bridges to Cross*, 80 JUDICATURE 254, 273 (1997); Sheldon Goldman, *Judicial Selection Under Clinton: A Midterm Examination*, 78 JUDICATURE 276, 288–89 (1995). For examples during the George W. Bush Administration, see Goldman et al., *supra* note 128, at 293–303.

131. *See* Goldman et al., *supra* note 128, at 309.

posed and either delayed or killed some nominations.[132] And it has been true with Democratic senators during the presidency of George W. Bush.[133]

For the courts of appeals during the last six years of the Clinton presidency with a Democrat in the White House and Republicans in control of the Senate:

- 8 nominees waited more than one year from their initial nomination to confirmation;
- another 23 nominees went unconfirmed, 20 of whom did not even receive hearings; and
- a total of 43 nominees were confirmed for a confirmation rate of 65.2%.[134]

For the courts of appeals during the first four years of George W. Bush's presidency,[135] with Democrats narrowly controlling the Senate for the first two years, and Republicans narrowly controlling the Senate for the last two:

- 8 nominees waited more than one year from their initial nomination to confirmation;
- another 17 nominees went unconfirmed, 2 of whom had no hearings; and
- 34 nominees were confirmed for a confirmation rate of 66.7%.

For the district courts during the last six years of the Clinton presidency:

- 14 nominees waited over one year from nomination to confirmation;
- 40 never made it through confirmation, 34 of whom had no hearings;
- a total of 198 were confirmed for a confirmation rate of 83.2%.[136]

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132. *See* Sheldon Goldman et al., *Clinton's Judges: Summing up the Legacy*, 84 JUDICATURE 228, 252 (2001).

133. *See* Goldman et al., *supra* note 128, at 309.

134. *See generally* Sheldon Goldman, *Assessing the Senate Judicial Confirmation Process: The Index of Obstruction and Delay*, 86 JUDICATURE 251, 251–52 (2003) (analyzing the obstruction of President Bill Clinton's courts of appeals nominees).

135. These figures are for the 107th and 108th Congresses combined.

136. *See generally* Goldman, *supra* note 134, at 252 (analyzing the obstruction of Presi-

For the district courts during the first four years of George W. Bush's presidency:[137]

- 5 nominees waited over one year from nomination to confirmation;
- 9 remained unconfirmed, 7 of whom had no hearings;
- a total of 168 were confirmed for a confirmation rate of 94.9%.

In opposing the Bush nominees, Democratic senators have argued that they are concerned that President George W. Bush, like his father and Ronald Reagan, is committed to packing the courts with conservative activists.[138] These out-of-the-mainstream judges, according to the critics, have an agenda that would negate abortion rights, weaken the separation of church and state, undermine the rights guaranteed in the Bill of Rights to those accused of crimes, unsympathetically view the rights of workers and organized labor, weaken the laws and regulations meant to protect the environment, and compromise gender and racial equality.[139]

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dent Bill Clinton's court of appeals nominees).

137. These figures are for the 107th and 108th Congresses combined.

138. *See* Goldman, *supra* note 128, at 309.

139. For example, at a nomination hearing on February 7, 2002, before the Senate Committee on the Judiciary, Democratic Senator Diane Feinstein noted:

> I think it is very hard to overstate the importance of an appointment to the United States Courts of Appeals. . . . Many of the issues that we wrestle with as a nation . . . a woman's right to choose, civil rights, the relationship between church and state . . . are essentially decided by the courts.

United States Senate, Committee on the Judiciary, Judicial Nominations, Transcript of Proceedings, February 7, 2002, at 2 (on file at the Senate Judiciary Committee Library).

At the Committee on the Judiciary's March 14, 2002, Committee Business Meeting, which debated and voted on the Pickering nomination, Democratic Senator Charles Schumer stated: "The Administration is . . . sending up waves of Scalias and Thomases. Our courts are in danger of slipping out of balance. We are seeing conservative judicial activism erode Congress's power to enact laws that protect the environment, women's rights, workers' rights, just to name a few." Committee Business Meeting, United States Senate, Committee on the Judiciary, Transcript of Proceedings, March 14, 2002, at 59–60 (on file with the Senate Judiciary Committee Library).

In the floor debate over another appeals court nominee, Senator Schumer argued that the Bush nominees "are committed to an ideological agenda which turns the clock back to maybe the 1930s, maybe the 1890s." He declared, "I am not going to vote to give the judge a lifetime appointment [with] the power to invalidate the laws passed in this legislative, duly elected body; laws that protect privacy, laws that protect working people, laws that protect women, the environment [and] civil rights." 148 CONG. REC. S7563–64 (daily ed. July 30, 2002) (statement of Sen. Schumer).

Republicans in turn argue that it is not the job of judges to create rights and to veer from the intent of the framers.[140] They suggest that liberal judicial activists overlook compelling competing values such as states rights and federalism, the right of a fetus to life, the guarantee of the free exercise of religion, the rights of victims of crimes, the rights of those who own property, and the right to be treated fairly and not be discriminated against by ethnic and gender preference programs.[141]

Ideological warfare between liberal and conservative senators, fueled by advocacy groups since the late 1980s, was especially severe when there was divided government with the White House controlled by one party and the Senate by the other.[142] Democrats were particularly resentful at how President Clinton's nominees were treated during the last six years of his presidency when Republicans controlled the Senate.[143] Republicans, in turn, were resentful when Democrats controlled the Senate during the 107th Congress and were furious during the 108th Congress that, even with Republican control of the Senate, the Democrats successfully filibustered or otherwise held up sixteen appeals court nominations including Miguel Estrada (who subsequently withdrew his candidacy), Charles Pickering (who was subsequently given a recess appointment by President Bush on January 16, 2004), Priscilla Owen, William Pryor (subsequently given a recess appointment on February 20, 2004), Janice R. Brown, Carolyn Kuhl, and four nominees from Michigan to the Sixth Circuit.[144]

The full ramifications of the obstruction and delay phenomena as they have emerged over the past three decades are presented in Tables 1 through 4. Table 1 for the district courts and Table 2 for the appeals courts show the number and percentage of nominees who received hearings, the average number of days from the

140. *See, e.g.*, Sheldon Goldman, *The Bush Imprint on the Judiciary: Carrying on a Tradition*, 74 JUDICATURE 294, 306 (1991).

141. *See, e.g., id.*

142. *See generally* Goldman et al., *supra* note 128 (stating throughout that typically divided governments exacerbate the tension of the judicial selection process).

143. *Id.* at 294.

144. In addition, William H. Steele was nominated to the United States Court of Appeals for the Eleventh Circuit on October 10, 2001. He was not confirmed by the 107th Congress. At the start of the 108th Congress he was nominated to a district court position on the southern district of Alabama and was confirmed a little more than two months later.

time the nomination was received to the date of the hearing, the average number of days from the hearing to the date the nomination was reported, and the number and percentage of nominees confirmed by the full Senate. The proportion of district court nominees who received hearings was at a high point for the 95th Congress when all nominees had hearings and for the 97th and 99th Congresses when 98% or higher of the nominees received hearings.[145] For the courts of appeals, during the 95th, 97th, and 99th Congresses all nominees received hearings. In those three Congresses, the same party controlled the Senate and the White House.[146] The low points for the district courts were the 102nd and the 106th Congresses with about 70% of the nominees receiving hearings.[147] For the appeals courts the low point was about 47% during the 106th Congress.[148] Both the 102nd and 106th Congresses had different parties controlling the Senate and the White House.[149]

The proportion of nominees confirmed has fluctuated.[150] For the district courts, the low points were the 102nd and 106th Congresses at about 70%.[151] For the appeals courts the 95th, 97th, and 99th Congresses had a high of a 100% confirmation rate while the low point was for the 106th Congress at about 41%.[152]

In general, Congresses that included a presidential election year (the even-numbered Congresses), with the exception of the 108th Congress, had a lower proportion of confirmations than Congresses that did not.[153] The same was true for Congresses with divided government, with the exception of the 101st Congress.[154] The findings in Tables 1 and 2 hint that major obstruct

145. *See infra*, Appendix, Table 1, at 904.

146. *See infra*, Appendix, Table 2, at 905.

147. For a complete breakdown of party division in the United States Senate from 1789 to the present, see the United States Senate's website at http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm (last visited Jan. 22, 2005).

148. *See infra*, Appendix, Table 2, at 905.

149. *See infra*, Appendix, Table 2, at 905.

150. In the 102nd Congress, a Republican, George H.W. Bush, was president and the Democrats controlled Congress. *See* United States Senate, Party Division in the Senate, 1789–Present, http://www.senate.gov/pagelayout/history/one_item_and_teasers/party div.htm (last visited Jan. 22, 2005). The inverse was true in the 106th Congress. *See id.*

151. *See infra*, Appendix, Table 1, at 904.

152. *See infra*, Appendix, Table 2, at 905.

153. *See infra*, Appendix, Tables 1 & 2, at 904–05.

154. The 101st Congress was controlled by the Democrats in the Senate by a margin of

and delay tactics for judicial nominations started with the 100th Congress,[155] which was the only Congress during Reagan's presidency with the Senate controlled by the Democrats.[156] Subsequent Congresses on the whole show increases in the average number of days from the time of nomination to hearing and from the date the nomination was reported out of committee and sent to the floor of the Senate, although there are some fluctuations.[157]

Hints of the obstruct and delay phenomena are even more apparent with the findings in Table 3 for the district courts and Table 4 for the appeals courts.[158] What once was a routine process when a nomination was favorably reported out of committee and sent to the floor of the Senate—with significant proportions of nominees confirmed the same day reported or one day after—has significantly changed.[159] The average number of days from the date the nomination was reported to the date of confirmation ranged from a low of 1.8 days for the 97th Congress, for district court appointees, and for the same Congress 1.9 days, for appeals court appointees, to 42.2 days for district court appointees from the 108th Congress and 68.5 days for appeals court appointees for the 106th.[160] The proportion of district court nominees confirmed the same day reported or one day after fluctuated sharply but showed major decreases during the last three Congresses, reaching low points of under four percent during the 105th and 107th, and for the first time ever, none for the 108th Congress.[161] For the

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55-45, with the Republican President George H.W. Bush in the White House. *See* United States Senate, Party Division in the Senate, 1789–Present, http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm (last visited Jan. 22, 2005). Nevertheless, Tables 1 and 2 show that the confirmation rate for the 101st Congress was one of the highest of any Congress. *See infra*, Appendix, Tables 1 & 2, at 904–05.

155. *See infra*, Appendix, Tables 1 & 2, at 904–05.

156. *See, e.g.*, United States Senate, Party Division in the Senate, 1789–Present, http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm (last visited Jan. 22, 2005) (showing that the Senate was controlled by the Republicans during the 97th, 98th, and 99th Congresses, while the Senate was controlled by the Democrats during the 100th Congress).

157. *See infra*, Appendix, Tables 1 & 2, at 904–05 (showing that the confirmation process generally slowed after the 100th Congress, though the 101st and 103rd Congresses demonstrated that the process was still capable of proceeding fairly quickly, relatively speaking).

158. *See infra*, Appendix, Tables 3 & 4, at 906–07.

159. *See infra*, Appendix, Tables 3 & 4, at 906–07.

160. *See infra*, Appendix, Tables 3 & 4, at 906–07.

161. *See infra*, Appendix, Table 3, at 906.

appeals courts, the high was about 78% in the 101st Congress, to the single digits with the 104th through the 106th Congresses, and down to zero for the 108th.[162]

The proportion of district court and appeals court nominees favorably reported who received confirmation floor votes was below 100 percent for five of the fourteen Congresses.[163] The all-time low is for the 108th Congress[164] and can be attributed to the Democratic filibuster of ten appeals court nominees.[165]

The portrait given thus far suggests that the confirmation process has deteriorated in recent years and that the return to unified government in 2003 has not greatly improved the situation.[166] An objective summary statistic of obstruction and delay is helpful in getting a better grasp of what actually has been occurring. Toward that end, I have devised an objective summary indicator, the Index of Obstruction and Delay[167] and present the find-

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162. *See infra*, Appendix, Table 4, at 907.

163. *See infra*, Appendix, Tables 3 & 4, at 906–07.

164. *See infra*, Appendix, Table 4, at 907 (showing that during the 108th Congress only 58.1% of appeals court nominees who were reported favorably were actually confirmed).

165. *See, e.g.*, Neil A. Lewis, *Deal Ends Impasse over Judicial Nominees*, N.Y. TIMES, May 19, 2004, at A19. As this Article prepares to go to publication, the judicial nominees who were or currently are being filibustered are Miguel Estrada, Richard Allen Griffin, Judge Carolyn Kuhl, David W. McKeague, William G. Myers III, Justice Priscilla Owen, Judge Charles W. Pickering, Sr., William H. Pryor, Jr., Janice Rogers Brown, and Henry Saad. For a detailed list of the filibustered nominees, see http://www.independentjudiciary.com/nominees/index.cfm?CategoryID=8 (last visited Jan. 22, 2005). Miguel Estrada eventually withdrew his nomination on September 4, 2003 after several failed cloture votes. *See id.* William H. Pryor, Jr. was given a recess appointment by President Bush to the United States Court of Appeals for the Eleventh Circuit on November 6, 2003. *See, e.g., id.* Likewise, Judge Charles W. Pickering, Sr. was given a recess appointment by President George W. Bush to the United States Court of Appeals for the Fifth Circuit on January 16, 2004. *See, e.g., id.*

166. For statistical studies of lower federal court confirmation delay, see generally Garland W. Allison, *Delay in Senate Confirmation of Federal Judicial Nominees*, 80 JUDICATURE 8 (1996); Sarah A. Binder & Forrest Maltzman, *Senatorial Delay in Confirming Federal Judges, 1947–1998*, 46 AM. J. POL. SCI. 190 (2002); Sheldon Goldman, *The Judicial Confirmation Crisis and the Clinton Presidency*, 28 PRESIDENTIAL STUD. Q. 838 (1998); Roger E. Hartley & Lisa M. Holmes, *The Increasing Senate Scrutiny of Lower Federal Court Nominees*, 117 POL. SCI. Q. 259 (2002); Roger E. Hartley, *Senate Delay of Minority Judicial Nominees: A Look at Race, Gender, and Experience*, 84 JUDICATURE 191 (2001); Roger E. Hartley & Lisa M. Holmes, *Increasing Senate Scrutiny of Lower Federal Court Nominees*, 80 JUDICATURE 274 (1997); Wendy L. Martinek, Mark Kemper & Steven R. Van Winkle, *To Advise and Consent: The Senate and Lower Federal Court Nominations, 1977–1998*, 64 J. POL. 337 (2002); and David C. Nixon & David L. Goss, *Confirmation Delay for Vacancies on the Circuit Courts of Appeals*, 29 AM. POL. RES. 246 (2001).

167. *See* Goldman, *supra* note 134, at 255–57; Goldman, *supra* note 1, at 713–16.

ings in Table 5 for the district and appeals courts from the 95th Congress through the 108th Congress.[168]

Obstruction is defined as the practice of taking no action on a nomination to confirm or reject.[169] Delay is defined as taking more than 180 days from nomination to confirmation.[170] The Index is determined by the number of nominees who remained unconfirmed at the end of the Congress, added to the number for whom the confirmation process took more than 180 days, which is then divided by the total number of nominees for that Congress.[171] When the same party remained in control of the Senate in the subsequent Congress, a re-nominated individual had the date of the original nomination counted in the calculation of delay. Also, nominations made after July 1 of the second session of each Congress were not included in the calculations so as not to inflate the Index artificially on account of end-of-second-session nominations that realistically would not ordinarily be able to move through the process under an approximately 180-day time frame. The Index is calculated to four places to the right of the decimal point and thus ranges from 0.0000, which indicates an absence of obstruction and delay, to 1.0000 which indicates the maximum level.[172]

As suggested in Table 5, for the district courts there were low levels of obstruction and delay until the 100th Congress, and that was followed by a further increase in the 102nd Congress.[173] The same was true for the appeals courts during the 100th and 102nd Congresses, whose indexes were even higher than those for the district courts.[174] As I stated in a previous article, "Since the Senate of these Congresses was controlled by the Democrats with a Republican in the White House, the Republicans' charge that the Democrats were responsible for initiating the obstruction and delay phenomenon is supported by the objective evidence."[175] But

168. *See infra*, Appendix, Table 5, at 908.

169. *See* Sheldon Goldman, *Assessing the Senate Judicial Confirmation Process: The Index of Obstruction and Delay*, 86 JUDICATURE 251, 255 (2003).

170. *See id.*

171. *See id.*; *see also* Goldman, *supra* note 1, at 713.

172. *See* Goldman, *supra* note 169, at 255–56.

173. *See infra*, Appendix, Table 5, at 908.

174. *See infra*, Appendix, Table 5, at 908.

175. *See* Goldman, *supra* note 169, at 256.

with the situation reversed, with a Democrat in the White House and the Republicans in control of the Senate, the evidence clearly shows that the Republicans escalated obstruction and delay so that it reached all-time records for the district and appeals courts, including the then unprecedented index of 0.7931 for appeals court nominees in the 106th Congress.[176] It should be noted that in every even-numbered Congress (with the exceptions of the district courts for the 106th and the appeals courts for the 108th Congresses), which always overlaps a presidential election year, the Index was higher than for the previous non-presidential year Congresses.[177]

The Democrats assumed control of the Senate after the first five months of the 107th Congress with a Republican in the White House, and the Index for the appeals courts reached its highest point for the period analyzed—0.8387.[178] However, the Index for the district courts dropped significantly from the 104th Congress to the 106th Congress and was even lower than that for the 102nd Congress.[179] This appears to reflect a decision of the Democrats to focus their attention on the appeals courts and to readily expedite almost all of Bush's district court nominees.[180]

With the Republicans once again in control of the Senate in 2003 and with a Republican still in the White House, we might have expected sharp drops in the Index. For the 108th Congress, the Index for the appeals court nominees did indeed fall—from 0.8387 to 0.6471—but the Index nevertheless was the highest ever for unified government (at least from the 95th Congress to the present).[181] This undoubtedly reflected the efforts by the Democrats to use whatever means they had at their disposal, including filibusters, to obstruct and delay the confirmation process of nominees whom they found objectionable.[182] On the other hand, the Index for district court nominees, although lower than that for the appeals court nominees, was nevertheless 0.3258, also the

176. *See infra*, Appendix, Table 5, at 908.
177. *See infra*, Appendix, Table 5, at 908.
178. *See infra*, Appendix, Table 5, at 908.
179. *See infra*, Appendix, Table 5, at 908.
180. *See* Goldman, *supra* note 169, at 257.
181. *See infra*, Appendix, Table 5, at 908.
182. *See* Neil A. Lewis, *Deal Ends Impasse over Judicial Nominees*, N.Y. TIMES, May 19, 2004, at A19.

highest ever for unified government (from the 95th Congress to the present).[183] Part of the problem for the district court nominees seems to have been related to the elimination of the American Bar Association from the pre-nomination process, resulting in the nomination of some unqualified or barely qualified (by ABA standards) nominees.[184] Additionally contributing to the delay was that the Democrats shut down the confirmation process for several months in early 2004 in protest of President Bush's use of recess appointments to place Pickering and Pryor on the bench.[185] Only when the White House gave assurances that it would not name any other judge by way of a recess appointment did the Democrats agree to stop their obstruction—but even then part of the deal was to only vote on twenty-five nominees.[186] The indexes for the 108th Congress were relatively high.[187] Previously it was just divided government that had been associated with high indexes.[188] It appears that obstruction and delay are becoming more common under unified government and what once was a relatively civilized and functional process has increasingly become an unpleasant, prolonged, and perhaps dysfunctional process.[189]

Should something be done to blunt the sharp edges of contemporary confirmation politics?

V. PROPOSALS FOR REFORM AND RESOLUTION OF THE CONFLICT

If the current state of obstruction and delay is a cause for concern because of potentially deleterious effects on the judicial branch of government, there are steps that can be taken to reform the process. But before the confirmation wars can be resolved, there first must be recognition by the Republicans of the legitimacy of the Democrats' complaint that Republican obstructionism kept open vacancies that the Clinton Administration, by right,

183. *See infra*, Appendix, Table 5, at 908.

184. *See* Robert S. Greenberger, *ABA Loses Major Role in Judge Screening*, WALL ST. J., Mar. 23, 2001, at B8.

185. *See, e.g.*, Helen Dewar, *President, Senate Reach Pact on Judicial Nominations; Bush Vows He Won't Use Recess Appointments*, WASH. POST, May 19, 2004, at A21; *see also* Lewis, *supra* note 182, at A19.

186. *See* Dewar, *supra* note 185, at A21; *see also* Lewis, *supra* note 182, at A19.

187. *See infra*, Appendix, Table 5, at 908.

188. *See infra*, Appendix, Table 5, at 908.

189. *See infra*, Appendix, Table 5, at 908.

should have filled.[190] It is not enough to dismiss this grievance as ancient history or simply payback for the Democrats' actions during the 102nd Congress. As the Tables suggest, the Republicans subsequently took obstructionism to new and sustained levels.[191] There must be recognition that this has poisoned the atmosphere and that both sides need to clear the air and to lay old grievances to rest.

Second, President Bush, in his second term, should be more sensitive to the likely reactions of the Democrats. President Clinton shied away from those perceived by Republicans to be liberal activists.[192] A re-elected President Bush should aim for more moderate conservatives for all three court levels. This would surely lessen much of the contentiousness.

Third, Senate Republicans and Democrats should agree to a permanent change in the confirmation ground rules, either by formal rule change or a Senate resolution, that no matter what party controls the White House and the Senate, the Senate Judiciary Committee will hold hearings on every nominee. No senator, even from the nominee's state, should be able to prevent the committee from holding a hearing on a nominee. Of course, the Committee can vote not to recommend and even not to send the nomination to the Senate floor.[193] The wishes of home state senators can be respected by fellow senators at this stage if they so desire, but the Senate Judiciary Committee should vote nominees up or down.

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190. *See* Goldman, *supra* note 1, at 716.

191. *See infra*, Appendix, Tables 1–5, at 904–08.

192. *See generally* ORRIN HATCH, SQUARE PEG: CONFESSIONS OF A CITIZEN SENATOR 179–80 (2002); Sheldon Goldman et al., *Clinton's Judges: Summing up the Legacy*, 84 JUDICATURE 228 (2001); Sheldon Goldman & Elliot Slotnick, *Clinton's Second Term Judiciary: Picking Judges Under Fire*, 82 JUDICATURE 264 (1999); Sheldon Goldman & Elliot Slotnick, *Clinton's First Term Judiciary: Many Bridges to Cross*, 80 JUDICATURE 254 (1997); Sheldon Goldman, *Judicial Selection Under Clinton: A Midterm Examination*, 78 JUDICATURE 276 (1995).

193. In an earlier article I stated:

> Because the Senate works by the committee system, it is reasonable to argue that a vote by the Committee not to send a nomination to the floor of the Senate fulfills the advise and consent requirement of the Constitution. But by not holding hearings and votes in committee, or by delaying floor action when nominations are sent to the floor, the Senate has been engaged in obstruct and delay, not advise and consent.

Goldman, *supra* note 1, at 716; *see also* U.S. CONST. art II, § 2, cl. 2 ("[the president] shall

Fourth, the Senate majority leader should schedule a vote in a timely manner on all nominees sent to the floor by the Senate Judiciary Committee. By allowing one or more senators to place secret or perhaps not-so-secret holds on nominees, thus delaying perhaps indefinitely a vote, the Senate majority leader undermines the confirmation process (as happened during President Clinton's second term).[194] The Senate should do its constitutional duty and vote to confirm or reject the president's nominees. If a sufficient number of senators choose to filibuster a nomination, repeated failure to obtain cloture should be recognized as a manifestation of advise and consent.[195] Although it can be argued that this would turn confirmation from a simple majority to confirmation by a supermajority—sixty votes needed to close off debate[196]—it should be recognized that the Constitution only requires "advice and consent;" there is nothing explicitly requiring a simple majority vote for judicial confirmation.[197] Supporters of a

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nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court and all other Officers of the United States.").

194. *See generally* Sheldon Goldman, *The Judicial Confirmation Crisis and the Clinton Presidency*, 28 PRESIDENTIAL STUD. Q. 838 (1998) (discussing throughout the article how a Senate majority leader can undermine the entire confirmation process).

195. *See generally* Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 239–45 (1997) (defending the constitutionally of judicial filibusters); Virginia A. Seitz & Joseph R. Guerra, *A Constitutional Defense of "Entrenched" Senate Rules Governing Debate*, 20 J.L. & POL. 1 (2004) (defending the constitutionality of filibustering judicial nominees); Laura T. Gorjanc, Comment, *The Solution to the Filibuster Problem: Putting the Advice Back in Advice and Consent*, 54 CASE W. RES. L. REV. 1435 (2004) (describing the unproductive result of judicial filibusters though also supporting their constitutionality). *But see* John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL'Y 181 (2003) (challenging the constitutionally of judicial filibusters). Rule XXII of the Standing Rules of the Senate provides that cloture of a filibuster can only be obtained by "three-fifths of the Senators duly chosen and sworn." SENATE COMM. ON RULES & ADMIN., STANDING RULES OF THE SENATE, S. DOC. NO. 106-15, 106th Cong., 2d Sess., R. XXII, at 15–16 (2000), *available at* http://rules.senate.gov/senate rules/ rule22.htm (last visited Jan. 22, 2005).

196. STANDING RULES OF THE SENATE, *supra* note 195, R. XXII, at 15–16, *available at* http://rules.senate.gov/senater ules/rule22.htm (last visited Jan. 22, 2005). The fact that the Senate rules require three-fifths of the Senate to end a filibuster—meaning the votes of sixty senators—creates the obvious problem that a substantial minority of senators can essentially turn the Senate's judicial confirmation majority requirement into a supermajority requiring sixty votes to confirm. *See generally* John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 495–96 (1995) (defending the legislative supermajority requirements, such as the filibuster); Jed Rubenfeld, *Rights of Passage: Majority Rule in Congress*, 46 DUKE L.J. 73, 87–88 (1996) (analyzing the "three-fifths rule" that creates legislative supermajority requirements).

197. *See* U.S. CONST. art. II, § 2, cl. 2 ("[the president] shall nominate, and by and with

nominee who is truly controversial should have to be able to persuade sixty senators that he or she indeed has the judicial temperament to administer justice fairly.

Fifth, if the Senate fails in its responsibilities by not holding hearings, committee votes, or floor debate, due to the actions of one or a few senators, the president should utilize his constitutional power of making recess appointments.[198] The power of installing judges onto the bench through recess appointment has been used by presidents since the founding of the United States.[199] In fact, it was a common practice up to the Johnson Administration.[200] Some 300 judges over the course of the nation went on the bench first as recess appointees, including Chief Justice Earl Warren and Associate Justice William Brennan.[201] Of course, they received their appointments not because of a constitutional impasse due to the intransigence of a minority of senators, but because it was necessary to have a full strength judiciary and the recess appointment method permitted this.[202] There were, however, some instances in the past when recess appointments were used or contemplated in such impasse situations. The recess appointment of Thurgood Marshall to the United States Court of Appeals for the Second Circuit (racism was the issue) and a few of President Truman's recess appointments come to mind.[203] President George W. Bush's recess appointments of

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the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court and all other Officers of the United States.").

198. U.S. CONST. art. II, § 2, cl. 3 ("The President shall have the Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.").

199. *See, e.g.*, STUART BUCK ET AL., FEDERALIST SOCIETY, JUDICIAL RECESS APPOINTMENTS: A SURVEY OF THE ARGUMENTS 1–4 (2004), http://www.fed-soc.org/pdf/recapp.pdf (last visited Jan. 22, 2005) (providing a brief history of judicial recess appointments, starting with President George Washington who made a total of nine judicial recess appointments, and calculating that "[t]he first five Presidents made a total of twenty-nine recess appointments of judges"); Maeva Marcus, *Federal Judicial Selection: The First Decade*, 39 U. RICH. L. REV. 797, 807 (2005).

200. BUCK, *supra* note 199, at 2–4, 16–26. Though the Buck article was prepared prior to President George W. Bush's two recent recess appointments, it shows that since the Johnson Administration recess appointments have been rare. *Id.* at 17. In fact, only Presidents Jimmy Carter and Bill Clinton used the power and they each made only one recess appointment, respectively. *Id.*

201. *Id.* at 2.

202. *Id.* at 4–14; *see also* U.S. CONST. art. II, § 2, cl. 3.

203. *See* GOLDMAN, *supra* note 41, at 65–108 (discussing President Harry Truman's judicial selections). *See generally* BUCK, *supra* note 199, at 4–14 (providing a brief analysis

Charles Pickering and William Pryor in the face of over forty Democratic senators' opposition—evidenced by their support of and participation in the filibusters against those nominations—although constitutionally permissible, was unwise in that it worsened the rift between Democrats and Republicans over the confirmation process and brought about unnecessary delay of the confirmation of non-controversial judges.[204]

A contrarian perspective on contentiousness, obstruction, and delay ought to be considered: Republicans and Democrats are engaged in debating public policy and the role of the judiciary. Robust, even contentious, debate is what one expects from a vibrant democracy. And it is well to keep in mind that, despite the obstruction and delay, when all was told and done, substantial numbers of judicial nominees were indeed confirmed under Presidents Reagan, H.W. Bush, Clinton, and W. Bush.[205] It is likely that the use of judicial appointments to further a president's ideological policy agenda will continue to occur as long as the courts are vehicles for the articulation of public policy. There is little indication that federal judges, whether appointed by Democrats or Republicans, are refraining from using their power to interpret the federal Constitution. There is also little indication that advocacy groups, now firmly entrenched with substantial ties to senators on both sides of the policy debate, will refrain from pursuing their agendas. When we have a President and senators whose policy agendas are in conflict with the courts', we can expect the judicial appointment process to continue to be a contentious one although there are steps that can be taken, as previously suggested, that can make the process a smoother one.

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of the constitutionality of judicial recess appointments); Richard L. Revesz, *Thurgood Marshall's Struggle*, 68 N.Y.U. L. REV. 237 (1993) (discussing Justice Thurgood Marshall's nomination to the United States Court of Appeals for the Second Circuit); Thomas A. Curtis, Note, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 COLUM. L. REV. 1758 (1984) (providing a general discussion of the use of judicial recess appointments).

204. *See* Goldman, *supra* note 1, at 716. *See generally* BUCK, *supra* note 199, at 4–14 (analyzing the use and constitutionality of recess appointments).

205. *See infra*, Appendix, Tables 1 & 2, at 904–05.

APPENDIX

FEDERAL JUDICIAL SELECTION – DATA TABLES

TABLE 1

DISTRICT COURT NOMINEES AT THE COMMITTEE STAGE				
Congress	Number and Percentage of Nominees Who Received Hearings	Average Number of Days from Time Nomination Received to Date of Hearing	Average Number of Days from Hearing to Date Nomination Reported	Number and Percentage of Nominees Confirmed by Full Senate
95th (1977–78)	49/49 100%	25.9	13.4	48/49 97.9%
96th (1979–80)	161/168 95.8%	57.7	21.0	154/168 91.7%
97th (1981–82)	68/69 98.6%	20.8	11.1	68/69 98.6%
98th (1983–84)	69/75 92.0%	18.0	10.5	61/75 81.3%
99th (1985–86)	98/100 98.0%	37.9	26.1	95/100 95.0%
100th (1987–88)	74/78 94.9%	94.1	28.3	66/78 84.6%
101st (1989–90)	48/50 96.0%	59.9	14.8	48/50 96.0%
102nd (1991–92)	100/143 69.9%	92.1	16.4	100/143 69.9%
103rd (1993–94)	109/118 92.4%	58.5	13.3	107/118 90.7%
104th (1995–96)	70/85 82.4%	85.5	13.2	62/85 72.9%
105th (1997–98)	85/94 90.4%	164.7	18.6	79/94 84.0%
106th (1999–00)	60/83 72.3%	103.9	19.7	57/83 68.7%
107th (2001–02)	83/98 84.7%	96.3	16.5	83/98 84.7%
108th (2003–04)	87/94 92.6%	82.8	25.9	85/94 90.4%
Note: The 100th, 101st, 102nd, 104th, 105th, 106th, and 107th Congresses were in a divided government situation with one party controlling the Senate and the other the presidency.				
Note: Table includes nominations to lifetime appointments to the district courts. Territorial district courts with set terms are excluded.				
Source: Statistics derived from data reported in Committee on the Judiciary, United States Senate, Legislative and Executive Calendars, or other committee documents.				

TABLE 2

COURT OF APPEALS NOMINEES AT THE COMMITTEE STAGE				
Congress	Number and Percentage of Nominees Who Received Hearings	Average Number of Days from Time Nomination Received to Date of Hearing	Average Number of Days from Hearing to Date Nomination Reported	Number and Percentage of Nominees Confirmed by Full Senate
95th (1977–78)	12/12 100%	21.2	8.9	12/12 100%
96th (1979–80)	47/48 97.9%	47.7	25.2	44/48 91.7
97th (1981–82)	19/19 100%	25.8	6.2	19/19 100%
98th (1983–84)	14/15 93.3%	14.8	29.7	12/15 80.0%
99th (1985–86)	32/32 100%	40.8	12.2	32/32 100%
100th (1987–88)	17/23 73.9%	90.9	41.5	15/23 65.2%
101st (1989–90)	18/19 94.7%	63.7	14.5	18/19 94.7%
102nd (1991–92)	21/30 70.0%	80.8	19.6	19/30 63.3%
103rd (1993–94)	19/21 90.5%	77.4	17.0	18/21 85.7%
104th (1995–96)	14/19 73.7%	79.0	37.0	11/19 57.9%
105th (1997–98)	22/28 78.6%	230.9	41.4	19/28 67.9%
106th (1999–00)	15/32 46.9%	235.3	52.2	13/32 40.6%
107th (2001–02)	19/31 54.8%	238.4	40.6	16/31 51.6%
108th (2003–04)	33/34 97.1%	144.8	54.0	18/34 52.9%
Note: The 100th, 101st, 102nd, 104th, 105th, 106th, and 107th Congresses were in a divided government situation with one party controlling the Senate and the other the presidency.				
Note: Table includes nominations to court of appeals of general jurisdiction. This means that the U.S. Court of Appeals for the Federal Circuit is excluded.				
Source: Statistics derived from data reported in Committee on the Judiciary, United States Senate, Legislative and Executive Calendars, or other committee documents.				

TABLE 3

DISTRICT COURT NOMINEES ON THE SENATE FLOOR			
Congress	Average Number of Days from Date Nomination Reported to Date of Confirmation	Proportion of Nominees Reported Who Were Confirmed the Day Reported or One Day After	Percentage of Nominations Reported Favorably That Were Confirmed
95th (1977–78)	2.7	52.1%	100%
96th (1979–80)	4.6	40.0%	100%
97th (1981–82)	1.8	61.8%	100%
98th (1983–84)	7.8	32.8%	92.4%
99th (1985–86)	8.1	41.7%	100%
100th (1987–88)	9.8	17.9%	98.5%
101st (1989–90)	6.2	64.6%	100%
102nd (1991–92)	3.3	80.0%	100%
103rd (1993–94)	4.6	31.8%	100%
104th (1995–96)	34.8	11.3%	95.4%
105th (1997–98)	38.3	3.7%	96.3%
106th (1999–00)	25.6	12.3%	98.3%
107th (2001–02)	24.8	3.6%	100%
108th (2003–04)	42.2	0.0%	100%
Note: The 100th, 101st, 102nd, 104th, 105th, 106th, and 107th Congresses were in a divided government situation with one party controlling the Senate and the other the presidency.			
Note: Table includes nominations to lifetime appointments to the district courts. Territorial district courts with set terms are excluded.			
Source: Statistics derived from data reported in Committee on the Judiciary, United States Senate, Legislative and Executive Calendars, or other committee documents.			

TABLE 4

COURT OF APPEALS NOMINEES ON THE SENATE FLOOR			
Congress	Average Number of Days from Date Nomination Reported to Date of Confirmation	Proportion of Nominees Reported Who Were Confirmed the Day Reported or One Day After	Percentage of Nominations Reported Favorably That Were Confirmed
95th (1977–78)	3.2	25.0%	100%
96th (1979–80)	5.2	34.1%	100%
97th (1981–82)	1.9	52.6%	100%
98th (1983–84)	21.3	13.3%	92.3%
99th (1985–86)	13.3	40.6%	100%
100th (1987–88)	21.5	33.3%	93.8%
101st (1989–90)	2.5	77.8%	100%
102nd (1991–92)	14.4	63.2%	100%
103rd (1993–94)	6.7	38.9%	100%
104th (1995–96)	33.5	8.3%	84.6%
105th (1997–98)	40.7	5.3%	95.0%
106th (1999–00)	68.5	7.7%	100%
107th (2001–02)	26.4	20.0%	100%
108th (2003–04)	44.2	0.0%	58.1%
Note: The 100th, 101st, 102nd, 104th, 105th, 106th, and 107th Congresses were in a divided government situation with one party controlling the Senate and the other the presidency.			
Note: Table includes nominations to court of appeals of general jurisdiction. This means that the U.S. Court of Appeals for the Federal Circuit is excluded.			
Source: Statistics derived from data reported in Committee on the Judiciary, United States Senate, Legislative and Executive Calendars, or other committee documents.			

TABLE 5

INDEX OF OBSTRUCTION AND DELAY IN THE SENATE PROCESSING OF DISTRICT AND APPEALS COURT NOMINEES		
Congress	District Court Index	Appeals Court Index
95th (1977–78)	0.0000	0.0000
96th (1979–80)	0.0750	0.0682
97th (1981–82)	0.0000	0.0000
98th (1983–84)	0.0545	0.1429
99th (1985–86)	0.1364	0.0690
100th (1987–88)	0.2800	0.4762
101st (1989–90)	0.0488	0.0625
102nd (1991–92)	0.3465	0.5000
103rd (1993–94)	0.0375	0.0625
104th (1995–96)	0.3780	0.5263
105th (1997–98)	0.5000	0.6932
106th (1999–00)	0.4722	0.7931
107th (2001–02)	0.2432	0.8387
108th (2003–04)	0.3258	0.6471