University of Richmond Law Review

Volume 39
Issue 3 *Allen Chair Symposium 2004 Federal Judicial Selection*

Article 9

3-2005

Judicial Selection as . . . Talk Radio

Michael J. Gerhardt
College of William & Mary, Marshall-Wythe School of Law

JUDICIAL SELECTION AS . . . TALK RADIO

Michael J. Gerhardt *

This Symposium allows me the opportunity to reconsider the analogy that best fits judicial selection. In a series of essays, I previously considered analogizing judicial selection to war.[1] This was an especially apt analogy because confirmation contests often resemble military conflicts in their deployment of guerrilla tactics and the take-no-prisoners approaches of the contending sides.[2] A major reason for the intensifying combat over judicial selection is that we are in the midst of the second longest period in our history without a vacancy arising on the Supreme Court.[3] National political leaders are terribly anxious over who will get to make the next appointment to the Court and thus perhaps be able to determine, for some time to come, how the Court will decide the many divisive questions of constitutional law that it and it alone is empowered to decide.[4] It is no accident that President Reagan's and President George H.W. Bush's appointees continue to domi-

---

* Arthur B. Hanson Professor of Law, College of William & Mary, Marshall-Wythe School of Law; Visiting Fellow, James Madison Program in American Ideals and Institutions, Princeton University, Spring 2004. B.A., 1978, Yale University; M.Sc., 1979, London School of Economics; J.D., 1982, University of Chicago Law School.

1. *See* Michael J. Gerhardt, *Supreme Court Selection as War* (pt. 1), 50 DRAKE L. REV. 393 (2002); Michael J. Gerhardt, *Judicial Selection as War* (pt. 2), 36 U.C. DAVIS L. REV. 667 (2003) [hereinafter Gerhardt, *Judicial Selection as War*]; Michael J. Gerhardt, *Judicial Selection as War, Part Three: The Role of Ideology* (pt. 3), 15 REGENT U. L. REV. 15 (2002).

2. *See, e.g.*, Gerhardt, *Judicial Selection as War*, *supra* note 1, at 674–79 (describing the judicial appointment tactics of several "warrior presidents").

3. *See, e.g.*, Charles Lane & Amy Goldstein, *At High Court, a Retirement Watch; Rehnquist, O'Connor Top List of Possibilities as Speculation on Replacement Grows*, WASH. POST, June 17, 2001, at A4 (stating that the last time the membership in the Supreme Court changed was the 1994 appointment of Justice Stephen Breyer, "creating the second-longest period of stability in the court's history and pent-up anxiety about when the next vacancy will occur"); Charlie Savage, *Win May Bring Power to Appoint 4 Justices; Campaigns Urged to Focus on Impact*, BOSTON GLOBE, July 7, 2004, at A3 ("The decade since the confirmation of Justice Stephen Breyer is the second-longest interval without a vacancy in American history a period just shy of the 11-year record for Supreme Court stability, from 1812 to 1823.").

4. *See generally* Savage, *supra* note 3, at A3.

nate the Rehnquist Court, and this circumstance is not lost on President George W. Bush, the Democrats, and their supporters.[5]

More recently, I have considered analogizing the federal judicial selection process to a bad dream.[6] Confirmation contests have become frightening in their intensity, and anyone who cares about the process is bound to lose sleep over the ease with which negative lessons can be derived from the futility of reforming it. I have pointed to a number of positive lessons that can be found within the process if only one dares to look for them.[7] The fact that "conflict[] [is] a choice rather than an inevitability" calls attention to the discretion and political accountability of our leaders.[8] Knowing that fact might be reassuring, at least for those who believe that the political checks within the system still work.

To be sure, the responses of our leaders and commentators to the friction within the process are, for the most part, predictable. Republicans and Democrats accuse each other of grievous, unprecedented wrongs within the process.[9] Each accuses the other of triggering a crisis in judicial selection.[10] As someone who has written a good deal about federal judicial selection, I have wondered whether things are really as awful as they sound. As I have listened to, observed, and participated in the process, I have also begun to wonder whether what I have heard is the sound in the halls of our Congress of . . . Talk Radio. The more I have pondered the analogy between Talk Radio and judicial selection, the more sense it makes to me. And the more sense it makes to me, the

---

5. *See* James E. DiTullio & John B. Schochet, Note, *Saving This Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms*, 90 VA. L. REV. 1093, 1110–11 (2004); *see also* Lane & Goldstein, *supra* note 3, at A4; Savage, *supra* note 3, at A3; Press Release, John Kerry Campaign, Bush Plays Politics with Judges Today (July 7, 2004), *at* http://www.johnkerry.com/pressroom/releases/pr_2004_0707b.html (last visited Jan. 29, 2005).

6. *See* Michael J. Gerhardt, *Confirmation Dreams*, 2004 JURIST ¶ 2 (Apr. 15, 2004), *at* http://jurist.law.pitt.edu/forum/symposium-jc/gerhardt.php (last visited Jan. 29, 2005).

7. *See id.*

8. *Id.*

9. *See* Patrick Leahy, Joseph Lieberman, William Rehnquist, Edward Kennedy & John Cornyn, *From the Bag: Irrecusable & Unconfirmable*, 7 GREEN BAG 2d 277 (2004) (containing various pieces of correspondence between these political and judicial figures concerning judicial selection).

10. *See id.*; *see also* John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL'Y 181 (2003); Nick Anderson, *Battle over Judiciary Enters New Phase*, L.A. TIMES, Apr. 26, 2003, at A16; Alison Mitchell, *New Senate Leader Agrees to Hold Votes on 2 Judicial Issues*, N.Y. TIMES, June 20, 2001, at A20.

more I have worried about the quality and civility of constitutional dialogue within our national political process. As a teacher and father, I am particularly troubled about what young people and the general public might take away from what they hear in the vicious debates over judicial nominations.

Talk Radio ought to be familiar to just about everyone. It has become a phenomenon over the past few decades and involves the broadcasting equivalent of political pamphleteering. Talk Radio hosts engage in nothing more or less than partisan polemics. While they purport to be purveying the truth or facts, their specialty is the broadcast of soft news, or speculation and commentary.[11] Republicans largely dominate this forum, just as they largely dominate the federal political process by virtue of their occupancy of the presidency and majorities in the House and the Senate.[12] Below, I hope to illustrate various ways in which the rhetoric in confirmation contests has begun to resemble Talk Radio, followed by brief discussions of the possible causes of and possible remedies for the collapse of the judicial selection process into Talk Radio.

I.

The hallmarks of Talk Radio are not difficult to identify. They include a regrettable decline in the quality (and civility) of public discourse, demonizing the other side, paranoia (in dividing the world into "us" and "them"), and proliferating unthinking and unfounded overgeneralizations.

The rhetoric in recent confirmation contests reflects all of these attributes of Talk Radio. First, and foremost, there has been a distressing degeneration in the quality of the debate.[13] Each of the contending sides in confirmation contests must take some responsibility for this decline. Indeed, each side blames the other

11. BILL KOVACH & TOM ROSENSTIEL, WARP SPEED: AMERICA IN THE AGE OF MIXED MEDIA 59–60 (1999).

12. *See* Howard Kurtz, *Laura Ingraham, Reporting for W2004*, WASH. POST, Aug. 30, 2004, at C1. The key word is "largely," for neither party is immune from lapsing into Talk Radio in the course of disagreements over judicial nominations.

13. *See, e.g.*, John Cornyn, *Restoring Our Broken Judicial Confirmation Process*, 8 TEX. REV. L. & POL. 1, 3–4 (2003).

for the decline and for intellectual dishonesty and hypocrisy.[14] You need not listen to much Talk Radio in order to know that it is filled with a good deal of intellectual dishonesty and hypocrisy, but we expect more, or ought to expect more, from our political leaders. Even so, three examples illustrate the poor quality of constitutional argumentation in confirmation skirmishes. The first is the switch in the major parties' positions on the constitutionality of the filibuster, by which I mean endless debate permitted by the Senate rules and intended to protract and sometimes to preclude floor votes.[15] Republicans have been absolutely irate over the Democrats' filibusters of ten of President Bush's judicial nominations.[16] In response to the filibusters, the Senate Majority Leader Bill Frist and some other Republican senators have proposed dismantling the filibuster, and propose adopting the Democrats' own initiatives during the 1990s to reform the filibuster.[17] Democrats are quick to point out that nothing came from their proposals because the Republican leadership rejected them all and stood steadfastly by the filibuster.[18] Neither side can escape the appearance of hypocrisy on this issue, while both sides in recent debates over the filibuster relish citing supporting statements for their positions from the other.[19]

A second example of the poor quality of argumentation is the Republicans' insistence that the filibusters against President Bush's nominees are "unprecedented."[20] This is only true if you

---

14. *Compare* Press Release, Office of Senator Patrick Leahy, Setting the Record Straight on Judicial Nominations in North Carolina and Across the Country (July 7, 2004), *at* http://leahy.senate.gov/press/200407/070704a.html (last visited Jan. 19, 2005), *with* Cornyn, *supra* note 13, at 2.

15. *See* Cornyn, *supra* note 13, at 3.

16. *See, e.g.*, Nick Anderson & Richard Simon, *Debate Marathon Over Judges Ends, but the Battle Goes On*, L.A. TIMES, Nov. 15, 2003, at A12; Helen Dewar, *Senate Democrats Block 3 More Bush Judicial Nominees*, WASH. POST, July 23, 2004, at A5; Helen Dewar, *Senate Partisanship Worst in Memory, Key Legislation Languishes as Democrats and Republicans Jockey for Power*, WASH. POST, May 2, 2004, at A5; Helen Dewar, *Senate Filibuster Ends with Talk of Next Stage in Fight*, WASH. POST, Nov. 15, 2003, at A9; Neil A. Lewis, *Marathon in the Senate: The Talk is Long, but Temper Short*, N.Y. TIMES, Nov. 14, 2003, at A24; Neil A. Lewis, *Angered by Filibusters on Nominees, Republicans Stage Their Own Protest*, N.Y. TIMES, Nov. 13, 2003, at A29.

17. *See* S. Res. 138, 108th Cong. (2003); *see also* 149 CONG. REC. S8843 (daily ed. June 27, 2003) (statement of Sen. Frist).

18. *See* 149 CONG. REC. S6614–17 (daily ed. May 19, 2003) (statement of Sen. Leahy).

19. *See, e.g., id.* at S6614.

20. *See, e.g.*, 149 CONG. REC. S11,107 (daily ed. Sept. 4, 2003) (statement of Sen. Sessions); 149 CONG. REC. S14,528 (daily ed. Nov. 12, 2003) (statement of Sen. Frist); *see also* 149 CONG. REC. S14,533 (daily ed. Nov. 12, 2003) (statement of Sen. Hatch) (describing the

ignore history.[21] Indeed, you need only go back to the prior decade for proof of the falsehood of this statement. For, in the 1990s, Republican senators, including the current Majority Leader, supported filibusters of judicial and other nominations.[22] Two of the filibusters worked—those against the nominations of Sam Brown as Ambassador and Henry Foster as Surgeon General.[23] While all of the filibusters against judicial nominations ultimately failed to block floor votes, it is hard to deny—at least with a straight face—that a filibuster is a filibuster is a filibuster. Its constitutionality does not depend on its success. Even if it did, Republicans cannot deny that a filibuster ended Abe Fortas's nomination as Chief Justice in 1968.[24] At least one Republican witness proposed, without any contradiction from Republican senators, distinguishing the Fortas filibuster on the ground that it was "bipartisan."[25] This argument does not pass what lawyers sometimes call "the straight face test."[26] It makes no sense why the constitutionality of the filibuster depends somehow on the political parties of the senators supporting it. Even if this were the case, the current filibusters are bipartisan, because Jim Jeffords, an Independent, has voted for them.[27] It is not clear why a genuinely "bipartisan" filibuster must have the support of members of both the major parties. Nor is it clear why an Independent is not techni-

---

recent filibuster trend as something that has happened "never [before] in the history of this country").

21. *See, e.g.*, 149 CONG. REC. S14,687 (daily ed. Nov. 12, 2003) (statement of Sen. Leahy); 149 CONG. REC. S5907 (daily ed. May 8, 2003) (statement of Sen. Leahy); 149 CONG. REC. S3337 (daily ed. Mar. 6, 2003) (statement of Sen. Leahy).

22. *See, e.g.*, 149 CONG. REC. S5911 (daily ed. May 8, 2003) (statement of Sen. Leahy).

23. *Id.*

24. *See* HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 297–98 (3d ed. 1992); *see also* JOHN ANTHONY MALTESE, THE SELLING OF SUPREME COURT NOMINEES 139 (1995); Oona A. Hathaway, Note, *The Politics of the Confirmation Process*, 106 YALE L.J. 235, 236 (1996).

25. *Judicial Nominations, Filibusters, and the Constitution: When a Majority is Denied its Right to Consent: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the Senate Comm. on the Judiciary*, 108th Cong., 1st Sess. 3–4 (May 6, 2003), *available at* http://www.gpoaccess.gov/databases.html (last visited Feb. 6, 2005) (statement of Sen. Cornyn) [hereinafter *Judicial Nominations Hearing*].

26. *See, e.g.*, Peter Jeremy Smith, *Commas, Constitutional Grammar, and the Straight-Face Test: What if Conan the Grammarian Were a Strict Textualist?*, 16 CONST. COMMENT. 7, 29 (1999).

27. *See* United States Senate, *U.S. Senate Roll Call Votes 108th Congress—1st Session: Vote Number 450* (Nov. 14, 2003), *at* http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=108&session=1&vote=00450 (last visited Jan. 22, 2005) (showing Jim Jeffords, Independent, voting against a motion to invoke cloture on a U.S. Circuit judge nomination).

cally different from Democrats for purposes of the constitutionality of the filibuster. Moreover, Republicans have distinguished their successful filibusters of President Clinton's nominations of Sam Brown as Ambassador and Henry Foster as Surgeon General on the ground that these were not filibusters of judicial nominations, which are unique because they involve the third branch.[28] It is, however, hard to see why this distinction makes a difference for constitutional purposes. After all, the Constitution provides that the President, with the advice and consent of the Senate, may appoint "Officers of the United States," including judges and certain other high-ranking officials.[29] The Constitution does not set up, in other words, a separate or distinct appointment process for federal judges; they are subject, by virtue of the uniform text, to the same constitutional procedures for appointments as every other officer of the United States.[30] Presumably, this includes being subject as well to Article I's grant to each chamber of the Congress the authority to devise its own rules for its respective proceedings.[31] There is nothing in either Article I or the Appointments Clause directing that judges may not be subject to the same procedural rules as other nominations for appointment purposes.[32]

My third example comes from hearings before the Senate Judiciary and Rules Committees at which I testified last summer. I testified and presented a written statement on behalf of the constitutionality of the filibuster,[33] while Republican witnesses argued that it was unconstitutional.[34] There are quite credible arguments against the constitutionality of the filibuster,[35] but the

28. *See generally* 149 CONG. REC. S3442 (daily ed. Mar. 11, 2003) (statement of Sen. Leahy) (describing the Republicans' efforts to filibuster Executive Branch nominees).

29. U.S. CONST. art. II, § 2, cl. 2.

30. *See id.*

31. U.S. CONST. art. I, § 5, cl. 2.

32. *Compare* U.S. CONST. art. II, § 2, cl. 2, *with* U.S. CONST. art. I, § 5, cl. 2.

33. *Judicial Nominations Hearing*, *supra* note 25, at 26–28, 265–76 (testimony and statement of Michael Gerhardt, Arthur B. Hanson Professor of Law, College of William & Mary, Marshall-Wythe School of Law).

34. *See, e.g.*, *id.* at 16–19 (testimony of Sen. Arlen Specter).

35. *See* Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 247 (1997) (arguing that entrenchment of the filibuster violates the principles that "[o]ne legislature cannot bind subsequent legislatures" and examining the constitutionality of the modern filibuster); *see also* Michael J. Gerhardt, *Norm Theory and the Future of the Federal Appointments Process*, 50 DUKE L.J. 1687, 1708 (2001); John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and*

Republican witnesses did not limit themselves to these. I had argued, among other things, that the filibuster was constitutional for the same reasons as other procedures within the Senate allowing small minorities, such as committee chairs, to sometimes make what are final decisions on the fates of nominees.[36] I pointed out that the Chair of the Judiciary Committee, acting alone, had prevented his committee as well as the Senate from acting on more than sixty of President Clinton's judicial nominations.[37] In response, Republican witnesses argued that these procedures, too, must be unconstitutional, with no Republican on the Constitution Subcommittee coming to the defense of the Chair of the Judiciary Committee, Senator Orrin Hatch.[38] I was the only witness who defended the constitutionality of all of Senator Hatch's actions as Chair of the Judiciary Committee in the 1990s.[39]

The second way in which confirmation contests resemble Talk Radio is that senators (or their staffs) will demonize the opposition.[40] Recall the famous advertisement that warned people about "Robert Bork's America."[41] Recall, as well, how ultimately successful nominee Clarence Thomas turned the tables on his opposition by denouncing their responsibility for his hearings becoming "'a high-tech lynching.'"[42] The Senate, by a vote strictly along party lines, rejected the nomination to a district court of Missouri Supreme Court Justice Ronnie White, whom some senators de-

---

Vermeule, 91 CAL. L. REV. 1773, 1780–81 (2003); Benjamin Lieber & Patrick Brown, Note, *On Supermajorities and the Constitution*, 83 GEO. L.J. 2347, 2382 (1995). *See generally Judicial Nominations Hearing*, *supra* note 25, at 1–63.

36. *Judicial Nominations Hearing*, *supra* note 25, at 266 (statement of Michael Gerhardt, Arthur B. Hanson Professor of Law, College of William & Mary, Marshall-Wythe School of Law).

37. *See id.* at 272–73.

38. *See id.* at 10–46 (testimony of various witnesses).

39. *See id.* at 272–73 (statement of Michael Gerhardt, Arthur B. Hanson Professor of Law, College of William & Mary, Marshall-Wythe School of Law).

40. *See, e.g.*, 133 CONG. REC. S9188 (daily ed. July 1, 1987) (statement of Sen. Kennedy) (stating that Robert Bork, who had been nominated to the Supreme Court, had an "ominous" mindset).

41. *See id.*

42. Mark C. Niles, *Clarence Thomas: The First Ten Years Looking for Consistency*, 10 AM. U. J. GENDER SOC. POL'Y & L. 327, 335 (2002) (quoting Mortimer B. Zuckerman, *Black and White in America*, U.S. NEWS & WORLD REP., Oct. 28, 1991, at 92); *see also* Erwin Chemerinsky, *October Tragedy*, 65 S. CAL. L. REV. 1497, 1511 (1992); Yxta Maya Murray, *The Cultural Implications of Judicial Selection*, 79 CORNELL L. REV. 374, 393 (1994) (reviewing TONI MORRISON, RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY (1992)).

nounced as being soft on crime and opposed to the death penalty (in spite of some evidence to the contrary).[43] Racism is almost the worst charge that can ever be made against a nominee.[44] Perhaps the worst thing to be called is a "liberal," while Democrats sometimes try to soften the support or even defeat a nomination by suggesting the nominee is a "right-wing ideologue."[45] Republicans complain that Democrats are now responsible for the worst "crisis" in the history of federal judicial selection,[46] even though Democrats have joined in approving, at a record pace, record numbers of the President's judicial nominees.[47]

A third way in which judicial selection resembles Talk Radio is paranoia, or strong resistance to acknowledging that the other side is capable of doing something good in the process. It is not unusual for the contending sides in Senate debates to make reference to "us" and "them."[48] "We" are the good guys, because we are on the side of all that is good, while "they" are almost always the bad guys responsible for whatever ails the Congress.[49] In recent debates over the filibuster, Republicans denounced Democrats for being un-American in opposing the great principle of "majority rule,"[50] while Democrats roundly complained that Republicans were simply interested in facilitating "tyranny of the majority."[51]

Fourth, recent confirmation contests increasingly resembled Talk Radio in the opposing sides' deployment of unthinking and unfounded generalizations.[52] One of the most common is to accuse a targeted nominee of being an activist, even though the person

---

43. 150 CONG. REC. S5576–77 (daily ed. May 18, 2004) (statement of Sen. Leahy).

44. *Cf.* 150 CONG. REC. S172 (daily ed. Jan. 22, 2004) (statement of Sen. Leahy).

45. 149 CONG. REC. S10,199 (daily ed. July 30, 2003) (statement of Sen. Leahy).

46. Sen. John Cornyn, *Falsities on the Senate Floor*, NAT'L REV. ONLINE, Nov. 13, 2003, *at* http://www.nationalreview.com/comment/cornyn200311131044.asp (last visited Jan. 22, 2005); *see also* 149 CONG. REC. S14,528 (daily ed. Nov. 12, 2003) (statement of Sen. Frist) (describing the norms for federal judicial selection as having been "shattered").

47. 150 CONG. REC. S7744 (daily ed. July 7, 2004) (statement of Sen. Leahy).

48. *See, e.g.*, 149 CONG. REC. S14,528 (daily ed. Nov. 12, 2003) (statement of Sen. Frist); 149 CONG. REC. S10,199 (daily ed. July 30, 2003) (statement of Sen. Leahy); Cornyn, *supra* note 46.

49. *See, e.g.*, 149 CONG. REC. S14,528 (daily ed. Nov. 12, 2003) (statement of Sen. Frist); 149 CONG. REC. S10,199 (daily ed. July 30, 2003) (statement of Sen. Leahy).

50. *See* 149 CONG. REC. S2644 (daily ed. Feb. 25, 2003) (statement of Sen. Domenici); *see also* Fisk & Chemerinsky, *supra* note 35, at 185 ("[The filibuster's] net effect seems . . . to undermine majority rule.").

51. 149 CONG. REC. S3678 (daily ed. Mar. 13, 2003) (statement of Sen. Kennedy).

52. *See* 150 CONG. REC. S8531 (daily ed. July 21, 2004) (statement of Sen. Stabenow).

may never have been a judge or might have disavowed any inclination towards activist decision-making on the bench.[53] Nevertheless, each side accuses the other of trying to appoint "activists" to the bench.[54] An activist is someone who would legislate from the bench, presumably striking down the policies he dislikes and approving those he likes.[55]

This rhetoric is disturbing for at least two reasons. The first is what it is likely to lead neutral, uninformed, or non-partisan observers to think about our political process. It is likely that they will wonder whether both sides are correct. If so, the rhetoric merely confirms what social scientists have argued for years—namely, that judges are merely policymakers who wear robes.[56] They argue that judges do one of two things when they decide cases—they either vote their policy preferences directly or manipulate the law in order to facilitate their personal or policy objectives.[57] Without a doubt, both sides in confirmation contests appear to be trying to do the same thing—control judicial outcomes. Imagine what law students must wonder when they witness these events, for each side argues that the other is interested in appointing people who will merely vote to uphold their side's policies as constitutional, but not the policies of the other side.[58] Law professors expend a lot of energy contesting the characterizations and findings of social scientists,[59] but it is hard for them to dispel the impression left by debate after debate that what is up for grabs in these cases are the outcomes of judicial disputes.[60] Neither side in the debate concedes that the other's criteria for judicial selection are legitimate.

---

53. *Id.*

54. *See, e.g.*, *id.* at S8528 (statement of Sen. Sessions).

55. *See id.* at S8527 (statement of Sen. Sessions).

56. *See, e.g.*, Michael R. Dimino, *Pay No Attention to That Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians*, 21 YALE L. & POL'Y REV. 301, 304 (2003); Lee Epstein et al., *The Supreme Court as a* Strategic *National Policymaker*, 50 EMORY L.J. 583, 583–84 (2001). *See generally* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002); Michael J. Gerhardt, *Judicial Decisionmaking: Attitudes About Attitudes*, 101 MICH. L. REV. 1733 (2003) (reviewing SEGAL & SPAETH, *supra*).

57. *See* Dimino, *supra* note 56, at 304; *see also* Epstein, *supra* note 56, at 584–85 (arguing that justices "effectuate their own policy and institutional goals" by also taking into account the "goals and likely actions of the members of the other branches").

58. *See, e.g.*, 150 CONG. REC. S8588 (daily ed. July 22, 2004) (statement of Sen. Leahy).

59. *See, e.g.*, Gerhardt, *supra* note 56, at 1733.

60. *See id.* at 1741.

Indeed, confirmation contests reflect all too clearly the absence of consensus on what qualifies someone as a good judge or Justice. When one side derides the other for favoring activists, it is charging them with appointing people who will put their views ahead of, or in place of, the law.[61] The ensuing disagreements are likely to be discouraging to young people who might be inclined to think each side is interested in merit. While President George W. Bush defends each of his nominees on the grounds of merit,[62] it is hard to take him at his word. He has been careful not to define precisely what he means by "merit." He has left it to senators (and others) to infer his nominating criteria. Hence, Democrats plausibly infer two things from his judicial nominations—they have been largely picked on the bases of ideology and youth.[63] President Bush's nominees all seem to share a common ideology—none is pro-choice or gay or in favor of affirmative action in any form.[64] At least one nominee—Charles Pickering, Sr.—is one of the most often reversed district judges in his circuit.[65] Some have strong records in public service or in law school, but most are less than fifty-five years old.[66] President Bush is rapidly approaching the point of having appointed the youngest appellate court judges in history.[67]

---

61. *See, e.g.*, 150 CONG. REC. S8588 (daily ed. July 22, 2004) (statement of Sen. Leahy).

62. President George W. Bush, Remarks by the President During Federal Judicial Appointees Announcement, (May 9, 2001), *at* http://www.whitehouse.gov/news/releases/2001/05/20010509-3.html (last visited Jan. 19, 2005).

63. DiTullio & Schochet, *supra* note 5, at 1113–15; ALLIANCE FOR JUSTICE, JUDICIAL SELECTION IN THE FIRST TWO YEARS OF THE GEORGE W. BUSH ADMINISTRATION: ALLIANCE FOR JUSTICE JUDICIAL SELECTION PROJECT, 2001-02 BIENNIAL REPORT 2, 23 (2003), *at* http://www.allianceforjustice.org/images/collection_images/2001-02_AFJ_Biennial_Report.pdf (last visited Jan. 19, 2005). *See generally* Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts*, 39 U. RICH. L. REV. 871 (2005).

64. *See What's at Stake—Bush's Nominations to the U.S. Court of Appeals*, *at* http://www.adaction.org/bushcourt2003.html (last visited Jan. 19, 2005). *See generally* Perry Bacon, Jr., *What About the Supremes?*, TIME ONLINE, Sept. 7, 2004, *at* http://www.time.com/time/election2004/article/0,18471,693850,00.html (last visited Jan. 19, 2005); Stephen B. Presser, Remarks at the Senate Committee Hearings on the Judicial Nomination Process (June 26, 2001), *reprinted in* 50 DRAKE L. REV. 429, 453–61 (2002).

65. *See, e.g.*, People for the American Way, *Opposing the Confirmation of Charles W. Pickering, Sr. to the United States Court of Appeals for the Fifth Circuit; Judge Pickering's Troubling Record of Reversals in the Court*, *at* http://www.pfaw.org/pfaw/general/default.aspx?oid=1207# (last visited Jan. 19, 2005).

66. DiTullio & Schochet, *supra* note 5, at 1115.

67. *See id.*

II.

There are several possible causes for the increasing resemblance between judicial selection and Talk Radio. One may be the twenty-four-hour news cycle on cable. The proliferation of media outlets has arguably made it harder for someone to get on television, cable, or in news print if he or she makes relatively bland, deliberate statements. Instead, visibility depends a great deal on drama. The more dramatic someone is, the more likely he or she can make the news. A number of studies show that the media is reporting less hard news—facts and figures—and more soft news—speculation and commentary.[68]

A second possible cause is the need for both candidates and interest groups to raise money. Campaign finance reform has not eliminated the need and thus the incentive for senators or interest groups to condemn the other side as extremist. This kind of characterization helps them solicit money, particularly from their base.

Yet another possible cause in the increasing resemblance between Talk Radio and confirmation contests is the disappearing middle in the Senate.[69] The Senate no longer resembles how it looked in the 1980s.[70] Today, there are fewer people who characterize themselves as moderates in either party, and voting along party-lines has been increasing.[71] The disappearing moderate middle in the Senate makes it harder to find common ground.

A fourth possible cause is the high stakes involved in judicial selection. As I have indicated, each side is painfully aware that we are in the midst of the second longest period in our history without a vacancy arising on the Supreme Court.[72] Moreover, each side is aware of the fact that it has become a norm for circuit court judges to be the pool from which to select Supreme Court nominees.[73] The last nominees to the Court to come straight from

---

68. *See Global Blinders; The End of the Cold War Hastened a Retreat from Foreign News—Until September 11*, COLUM. JOURNALISM REV., Nov./Dec. 2001, at 110 (discussing the "intensified soft-news phenomenon").

69. *See* Sarah A. Binder, *The Disappearing Political Center: Congress and the Incredible Shrinking Middle*, BROOKINGS REV., Fall 1996, at 36, 38–39.

70. *Id.* at 36, 39.

71. *Id.* at 39.

72. *See supra* note 3 and accompanying text.

73. Lee Epstein et al., *The Norm of Prior Judicial Experience and Its Consequences for*

private or governmental practice were Lewis Powell and William Rehnquist in 1971.[74] Hence, each side has come to believe that it might be easier to defeat a potential nominee to the Court the first time he is nominated rather than wait for the higher-profile moment when he might be nominated to the Court from a circuit court judgeship (for which the Senate has confirmed him).[75] Moreover, each side recognizes that the federal circuit courts have the final say over the vast majority of cases they decide.[76]

III.

The remaining question is whether reform of the judicial selection process is possible. Reform of the process has been rare, but it is not, as some might be disposed to say, unprecedented.[77] To begin with, education of the public is essential. It is important for people to understand the genuine stakes in judicial selection and particularly how to stem the collapse of the process into Talk Radio. For instance, few people, outside of the nation's Capitol, are probably aware that the Senate has approved the vast majority of the President's judicial nominations.[78] His record of success is, in fact, the best ever.[79]

Moreover, it is a mistake to think that conflict is inevitable within the process. Conflict is a choice rather than an inevitability. For example, Democrats reached an agreement with the President earlier this summer to allow twenty-five "noncontroversial" judicial nominations to be fully processed within the Senate in exchange for his agreeing not to make any recess

---

Career Diversity on the U.S. Supreme Court, 91 CAL. L. REV. 903, 907 (2003).

74. *Id.* at 906.

75. *See generally id.*

76. *See* Michael Wells, *Naked Politics, Federal Courts Law, and the Canon of Acceptable Arguments*, 47 EMORY L.J. 89, 104 (1998).

77. *See, e.g.*, SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 236–50 (1997) (describing President Jimmy Carter's reform of judicial selection).

78. *See generally* 150 CONG. REC. S7744 (daily ed. July 7, 2004) (statement of Sen. Leahy) (stating that President George W. Bush's nominees are being confirmed at a rate higher than any recent president); *see also* Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts*, 39 U. RICH. L. REV. 871, 904–08 app., tbls.1–5 (2005).

79. *See generally* 150 CONG. REC. S7744 (daily ed. July 7, 2004) (statement of Sen. Leahy).

appointments of federal judges.[80] Once these nominations go through, the federal judiciary, in Professor Carl Tobias's judgment, "will be closer to full strength than at any time in the last 13 years."[81] Of course, this is no accident, given that the time period to which Professor Tobias refers was the final year of President George H.W. Bush's administration.[82]

Last but not least, one other thing needed in the process is greater, rather than lesser, deliberation. The President has excluded the American Bar Association from the selection process in order to expedite the confirmation of his nominees.[83] He has been largely successful in achieving his objective, but at a price.[84] For one thing, he has cut out the likeliest body that could keep the players honest.[85] Moreover, speed is not necessarily a virtue in the selection process, and the American people are sometimes disserved when the President's party rubber stamps his nominees. For instance, President Bush insisted that the Senate quickly confirm his nominee, Jay Bybee, for a seat on the prestigious United States Court of Appeals for the Ninth Circuit.[86] Some senators wanted to delay the nomination in order to find out more about what Bybee had done as the head of the prestigious Office of Legal Counsel in the Justice Department.[87] The Justice Department refused to release memos he had written or authorized addressing the President's obligations to comply with federal or international law on torture.[88] Without this information, Republi-

---

80. *See, e.g.*, Helen Dewar, *President, Senate Reach Pact on Judicial Nominations; Bush Vows He Won't Use Recess Appointments; 25 to Get Vote*, WASH. POST, May 19, 2004, at A21.

81. Carl W. Tobias, *Deal Creates Respite*, NAT'L L.J., June 7, 2004, at 23.

82. *See id.*

83. *See* Letter from Alberto Gonzales, Counsel to President George W. Bush, to Martha W. Barnett, President, American Bar Association (Mar. 22, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/03/20010322-5.html (last visited Jan. 22, 2005) (declaring the termination of ABA approval); *see also* 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, 37–38 (2001); Terry Carter, *Squeeze Play: Bush Acts to Limit ABA Role in Screening Judicial Nominations*, A.B.A. J., May 2001, at 18; Jonathon Groner, *ABA Adjusts to Role on Judges*, LEGAL TIMES, Aug. 5, 2002, at 10.

84. *See* 150 CONG. REC. S8589 (daily ed. July 22, 2004) (statement of Sen. Leahy).

85. *See* Little, *supra* note 83, at 51–53.

86. *See generally* 149 CONG. REC. S3679–80 (daily ed. Mar. 13, 2003) (statement of Sen. Ensign) (declaring the nomination of Jay S. Bybee, of Nevada, to be a judge on the United States Court of Appeals for the Ninth Circuit).

87. *See* 150 CONG. REC. S7547 (daily ed. July 6, 2004) (statement of Sen. Leahy).

88. *See id.*

cans pushed the nomination through the Senate.[89] The problem is that, a few months later, the administration released the memoranda sought by the Democrats.[90] Moreover, it did so only after the White House Counsel, in an extraordinary move, publicly rejected the memoranda as too "abstract" or too "academic."[91] There is no doubt whatsoever that Democrats never would have allowed the Bybee nomination to reach the Senate floor had they received the documents they had requested.[92] It is possible that some Republicans might have been troubled, too.

* * *

President Bush, Senator John Kerry, and other senators have not yet avoided their political accountability for what they have done or not done on judicial nominations, the Iraq War, and other matters. The political accountability of our leaders serves as a principal check on what people do in the judicial selection process. Presidents and senators often act the way they do in this process because, to paraphrase President Clinton, they can.[93] If you want greater consensus within this process, then you might want to vote for a president capable of statesmanship—someone who really is, to coin a phrase, a uniter, rather than a divider. Whether judicial selection continues to be like Talk Radio or whether we can restore more dignity to it depends, in the end, on our remembering what the sign that sat on President Harry Truman's desk said—the buck stops here.

89. *See id.*

90. *See id.*

91. Toni Locy & Joan Biskupic, *Interrogation Memo to Be Replaced; Justice Dept. Official Calls Legal Advice Overly Broad*, USA TODAY, June 23, 2004, at 2A.

92. *See* 150 CONG. REC. S7547 (daily ed. July 6, 2004) (statement of Sen. Leahy).

93. *See, e.g.*, Howard Kurtz, *Bill Clinton's Very Personal Reflections: In '60 Minutes' Interview, Ex-President Calls Affair 'Terrible Moral Error'*, WASH. POST, June 17, 2004, at C1 (stating that when Bill Clinton was asked why he had an extramarital affair with Monica Lewinsky, he responded by saying "because I could"); Abigail Trafford, *Bill and Dan's Midlife Adventure*, WASH. POST, July 6, 2004, at F1.