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## *The Struggle to Shape the Federal Judiciary*

For better or worse, federal judges in the United States are asked today to resolve some of the most important and contentious public policy issues. Although some hold onto the notion that the federal judiciary is simply a neutral arbiter of complex legal questions, the justices and judges who serve on the Supreme Court and the lower federal bench are in fact crafters of public law. In recent years, for example, the Supreme Court has bolstered the rights of immigrants, endorsed the constitutionality of school vouchers, struck down Washington, D.C.'s ban on hand guns, and most famously, determined the outcome of the 2000 presidential election. The judiciary clearly is an active partner in the making of public policy.

As the breadth and salience of federal court dockets has grown, the process of selecting federal judges has drawn increased attention. Judicial selection has been contentious at numerous junctures in U.S. history, but seldom has it seemed more acrimonious and dysfunctional than in recent years. Fierce controversies such as the battles to confirm Robert Bork and Clarence Thomas to the Supreme Court are emblematic of an intensely divisive political climate in Washington. Alongside these high-profile disputes have been scores of less conspicuous confirmation cases held hostage in the Senate, resulting in declining confirmation rates and unprecedented delays in filling federal judgeships. At times over the past few years, over 10 percent of the federal bench has sat vacant. Although Senate parties reach periodic agreements to release their hostages, conflict over judicial selection

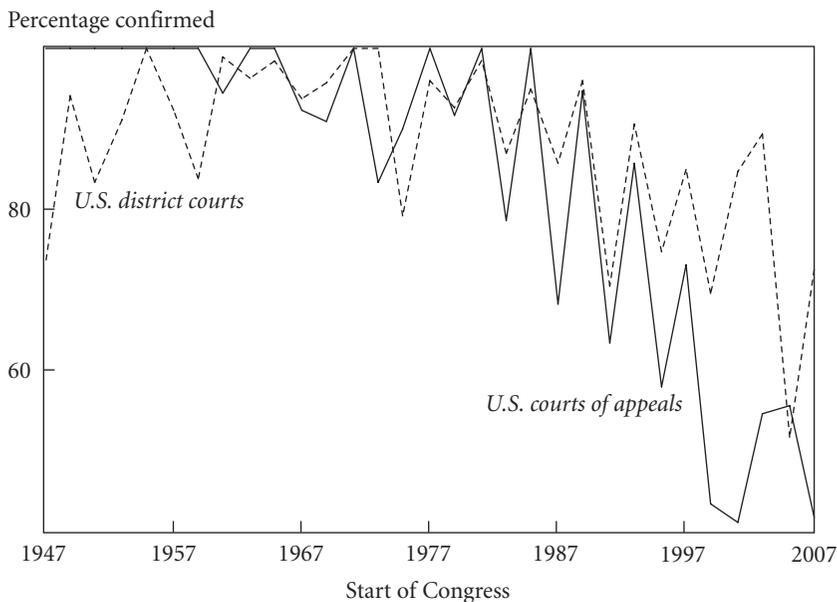
continues to rise. All the while, the caseload of the federal judiciary over the past two decades has expanded to an exceptionally heavy level.

This book explores the state of the nation's federal judicial selection system—beset, as we perceive it, by deepening partisan polarization, obstructionism, and a deterioration of the practice of advice and consent. We set aside the more celebrated Supreme Court to focus on the selection of judges for the U.S. courts of appeals and the U.S. district courts. We do so for several reasons. First, the lower federal courts are the workhorses of the federal judiciary, with more than 380,000 cases filed in the appellate and district courts in 2007.<sup>1</sup> Moreover, the Supreme Court issues opinions in only a small percentage of the cases filed by parties seeking redress from decisions of the federal courts of appeals. For the Supreme Court's October 2006 term (running from October 1, 2006 through September 30, 2007), for example, the Court issued full opinion decisions in 73 cases, approximately 1 percent of the more than 7,100 appeals for *writ of certiorari* that emerged that term from decisions of the federal courts of appeals.<sup>2</sup> More often than not, these are the courts of last resort for plaintiffs seeking justice in the federal courts. Who sits on the trial and appellate court benches is thus highly consequential for the shape of public law.

Second, although these courts issue decisions on some of the most important economic, social, and political issues of the day, a typical nomination to the lower federal courts receives far less scrutiny than would a nomination to the Supreme Court. Out of the public spotlight, a nominee's detractors have a far easier time blocking appointments they oppose. Senators understand the latitude they have to block nominations, and they often do so surreptitiously by exploiting the Senate's formal rules and informal practices. Given the potential impact of lower court appointments and given how little scrutiny these appointments often receive, we focus exclusively on appointments to the lower courts.

Third, indicators of the health of the nomination and confirmation process suggest that something has gone astray in the Senate's practice of advice and consent. If we compare confirmation rates for nominees to the Supreme Court and to the courts of appeals since 1947, their success rates are roughly the same: about 80 percent of both sets of nominations confirmed. If we narrow our focus to the period after 1992, however, the likelihood of confirmation for Supreme Court nominees remains high (80

Figure 1-1. *Confirmation Rates for U.S. District Courts and U.S. Courts of Appeals, 1947–2008*



Source: Data for the 80th to 107th Congresses compiled by authors from U.S. Senate, Committee on the Judiciary, *Legislative and Executive Calendar*, final edition. Data for 108th to 110th Congresses (through December 18, 2008) compiled by the Department of Justice, Office of Legal Policy ([www.usdoj.gov/olp/](http://www.usdoj.gov/olp/) [December 18, 2008]).

percent confirmed), but the confirmation rate falls to under 60 percent for nominations to the appeals courts.<sup>3</sup> The broader pattern can be seen in figure 1-1, which shows confirmation rates for nominations to the federal district and appeals courts. The bottom has clearly fallen out of the confirmation process, with confirmation rates dipping below 50 percent during some recent Congresses. Moreover, perhaps most often missed in discussions of confirmation patterns is that conflict over the selection of federal judges has not extended equally across all twelve circuits.<sup>4</sup> As seen in table 1-1, nominations for some appellate vacancies attract very little controversy, such as the Midwest's Seventh Circuit. Not so for the Courts of Appeals for the District of Columbia and for the Fourth and Sixth Circuits, for which roughly half of all appellate nominations have failed since 1991. By focusing on the lower federal bench, we aim to explain both the marked

Table 1-1. *Confirmation Failure Rates for the Courts of Appeals*<sup>a</sup>

<i>Circuit</i>	<i>Percentage of nominations that failed</i>
District of Columbia	61
1st	29
2nd	12
3rd	35
4th	65
5th	50
6th	59
7th	14
8th	14
9th	46
10th	31
11th	42

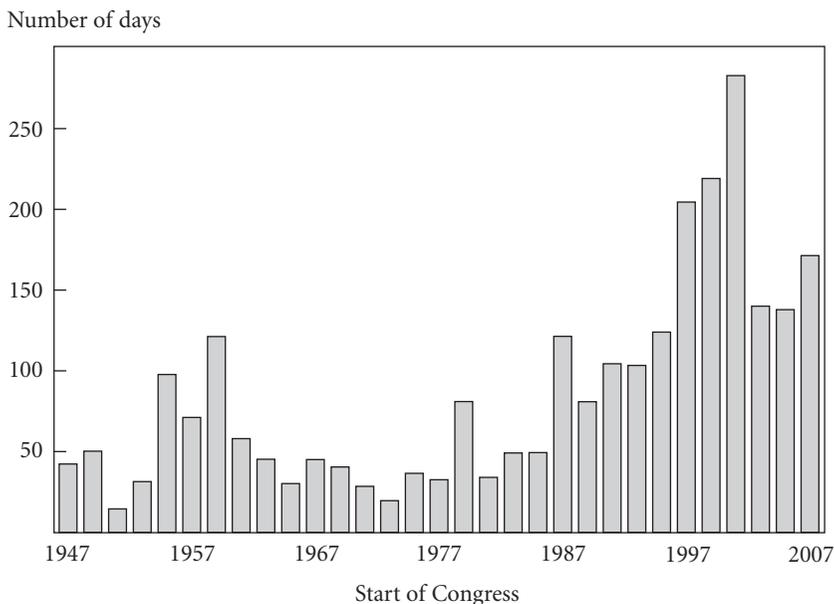
Source: Data for the 80th to 107th Congresses compiled by authors from U.S. Senate, Committee on the Judiciary, *Legislative and Executive Calendar*, final edition. Data for 108th to 110th Congresses (through December 18, 2008) compiled by the Department of Justice, Office of Legal Policy ([www.usdoj.gov/olp/](http://www.usdoj.gov/olp/) [December 18, 2008]).

a. Pooled data, 1991–2008.

temporal trend as well as the disparate treatment of the circuits that we see in recent decades.

Not only has conflict become more pronounced over time and in certain places, the duration of the nomination and confirmation processes has stretched out in recent decades. From the 1940s to the 1980s, a typical court of appeals nominee was confirmed within two months of nomination. By the late 1990s, the wait for successful nominees had stretched to about six months. Since the beginning of George W. Bush's presidency, even successful nominees to the U.S. courts of appeals have waited on average more than six months to be confirmed (see figure 1-2). That number may be misleading, however, since many nominees were submitted during more than one session of Congress before achieving Senate confirmation. These average waits, moreover, pale in comparison to the experiences of nominees who failed to be confirmed during the Bill Clinton and George W. Bush administrations. Since the mid-1990s, the typical nomination that failed to be confirmed (at least the first time he or she was nominated) has lingered before the Senate for almost a year and a half. As the confirmation process has

Figure 1-2. *Nominations to the U.S. Courts of Appeals: Length of Time from Nomination to Confirmation, 1947–2008*

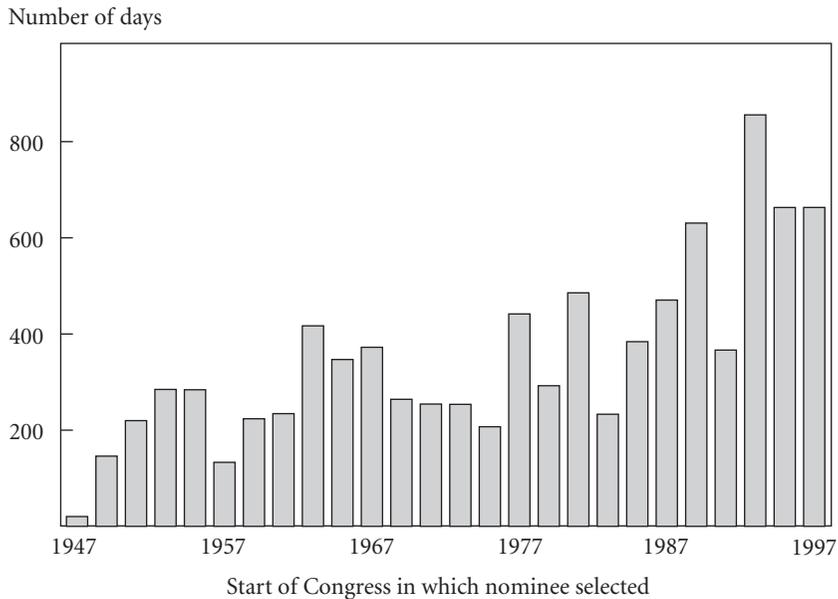


Source: Data for the 80th to 107th Congresses compiled by authors from U.S. Senate, Committee on the Judiciary, *Legislative and Executive Calendar*, final edition. Data for 108th to 110th Congresses (through December 18, 2008) compiled by the Department of Justice, Office of Legal Policy ([www.usdoj.gov/olp/](http://www.usdoj.gov/olp/) [March 29, 2009]).

dragged on in recent years, some candidates have become increasingly reluctant to wait it out. Numerous nominees for these cherished lifetime appointments pull themselves out of the running after waiting months and often years for the Senate to act. As Miguel Estrada said in 2003 upon abandoning his two-year-long quest for confirmation, “I believe that the time has come to return my full attention to the practice of law and to regain the ability to make long-term plans for my family.”<sup>5</sup>

Delays in filling vacant judgeships, however, do not lie solely with the Senate. The time it takes for nominees to be chosen by the president to fill the nation’s trial courts has also increased in recent decades. At the end of the 1950s, it took an average of about 200 days, or just over six months, for presidents to select nominees once a vacancy occurred. By the end of the

Figure 1-3. *Nominations to the U.S. District Courts: Length of Time from Vacancy to Nomination, 1947–98<sup>a</sup>*



Source: Data for the 80th to 105th Congresses compiled by authors from U.S. Senate, Committee on the Judiciary, *Legislative and Executive Calendar*, final edition (through December 1998).

a. Duration of vacancy is calculated as the number of days elapsed between the original vacancy for a judgeship and the referral of a nomination to the Senate. Vacancy dates for nominations announced before the opening of a vacancy are set to one day before the nomination date. Vacancy dates for vacant judgeships inherited by a new presidential administration are kept at the original vacancy date.

1990s, it took more than 600 days, or roughly twenty months, from vacancy to nomination (see figure 1-3). More recently, a typical judicial vacancy for the U.S. district courts during the One Hundred Ninth Congress (2005–06) lasted more than seven months before a nominee was named. Despite the low salience of so many of the nominations to the lower courts, senators clearly take stock of these nominees and often exploit the rules of the game to derail the nominations on their way to confirmation. These multiple indicators of a judicial selection system near its breaking point deserve concerted attention, and their variation cries out for explanation.

## Our Contribution

Although we detect signs of conflict over federal judges as early as the 1970s, scholars have yet to offer a comprehensive treatment of the politics and processes of judicial selection. The topic of lower court judicial selection has certainly attracted interest. Legal scholars have questioned the growing importance of ideology in confirmation hearings, while judicial scholars have examined how presidential ambitions shape the selection of judges and how interest groups succeed in derailing nominees they oppose.<sup>6</sup> Such studies provide excellent, but partial, portraits of the forces shaping the contemporary politics of advice and consent.

To the extent that scholars have attempted to provide a broader explanation of patterns in judicial selection, two alternative accounts have been proposed—neither of which, we argue, fully captures the political and institutional dynamics that underlie contemporary advice and consent. One account—which we will call the *big bang theory* of judicial selection—points to a breaking point in national politics, after which prevailing norms of deference and restraint in judicial selection have fallen apart. The result, according to partisans of the big bang, is a sea change in appointment politics, evidenced by the lengthening of the confirmation process and the rise in confirmation failure. A strong alternative account—which we will call the nothing-new-under-the-sun theory of judicial selection—suggests that ideological conflict over the makeup of the bench has been an ever-present force in shaping the selection of federal judges and justices. Judicial selection has always been political and ideological as senators and presidents vie for influence over the bench.

Adherents of the big bang account typically point to a cataclysmic event in Congress or the courts that had an immediate and lasting impact on the process and politics of judicial selection thereafter. Most often, scholars point to the battle over Robert Bork's nomination to the Supreme Court in 1987 as the event that precipitated a new regime in the treatment of presidential nominations by the Senate. As John Maltese has argued about Supreme Court appointment politics,

The defeat of Robert Bork's 1987 Supreme Court nomination was a watershed event that unleashed what Stephen Carter has called "the confirmation mess." There was no question that Bork was a highly

qualified nominee. He was rejected not because of any lack of qualification, or any impropriety, but because of his stated judicial philosophy: how he would vote as a judge.<sup>7</sup>

The president's willingness to nominate a strong conservative deemed outside the mainstream by the Democratic majority and the Senate Democrats' willingness to challenge a qualified nominee on grounds of how he would rule on the bench together are said to have radically altered the practice of advice and consent for judicial nominees. Adherents of the big bang account have also argued that the Bork debacle spilled over into the politics of lower court nominations, significantly increasing the politicization of selecting judges for the lower federal bench.<sup>8</sup>

Other versions of the big bang theory point to alternative pivotal events, including the Supreme Court's 1954 *Brown v. Board of Education* decision. As Benjamin Wittes has argued, "We can reasonably describe the decline of the process as an institutional reaction by the Senate to the growth of judicial power that began with the *Brown* decision in 1954."<sup>9</sup> Still other versions of the big bang account point to the transformation of party activists (from seekers of material benefits to seekers of ideological or policy benefits) and the mobilization of political elites outside the Senate seeking to affect the makeup of the bench.<sup>10</sup>

No doubt, each of these forces—the Bork debacle, the changing character of elite activists, and the emergence of the courts as key policymakers—have shaped to some degree the emergence of conflict over nominations in the postwar period. Still, these explanations do not help us to pinpoint the timing or location of conflict over judges. The increasing relevance of the Warren court on a range of controversial issues certainly must have played a role in increasing the salience of judicial nominations to senators. Had the Court avoided engaging in controversial social, economic, and political issues, senators would have had little incentive to try to influence the makeup of the bench. But neither do we see large changes in the dynamics of advice and consent until well after the 1954 decision and until well after the emergence of more ideological activists in the 1960s. And certainly the no-holds-barred battle over the Bork nomination may have shown both parties that concerted opposition to a presidential choice was within the bounds of acceptable behavior after 1987. Still, isolating the impact of the Bork fight

cannot help us to explain the significant variation in the Senate's treatment of judicial nominees before and after the One Hundredth Congress. It is also important to recall that executive branch appointments also experienced a sea change beginning in the late 1980s and through the 1990s, taking much longer to secure confirmation. Thus evidence to support the big bang account remains incomplete. More likely, as we suggest later in the book, episodes like the Bork confirmation battle are symptoms, rather than causes, of the more taxing road to confirmation during the past decades.

Lee Epstein and Jeffrey Segal's nothing-new-under-the-sun alternative suggests instead that "the appointments process is and always has been political because federal judges and justices themselves are political."<sup>11</sup> As these scholars argue, presidents have always wanted to use the appointment power for ideological and partisan purposes, and senators have always treated appointees to "help further their own goals, primarily those that serve to advance their chances of reelection, their political party, or their policy interests."<sup>12</sup> We certainly share these scholars' views of legislators, judges, and presidents as strategic political actors. We should expect to see legislators and presidents engage in purposeful behavior shaped by their prevailing goals. But that is a starting—not ending—point for attempting to explain the dynamics of advice and consent. It is quite difficult to account for variation in the Senate's treatment of judicial nominees—both over time and across circuits—if we simply maintain that the process has always been politicized. Thus we recognize the political nature of advice and consent but also seek to identify the ways in which the players' changing incentives interact with the Senate's institutional rules and practices to encourage senators to target appointees who would most shift the ideological tenor of the federal bench.

In the chapters that follow, we do not limit ourselves to arbitrating between the alternative accounts by means of confirmation statistics. Instead, our book promises a broader investigation of the constitutional processes of advice and consent. First, most recent studies have focused on the confirmation stage, which occurs after the critical stage of selecting nominees.<sup>13</sup> Studying only the confirmation process risks missing considerable conflict over the makeup of the bench that plays out as senators and White House officials vie for the right to name judicial nominees. We also include within our purview the contests within Congress and between Congress and the president over where newly created federal judgeships should be

located.<sup>14</sup> One aim of this book is to broaden our field of vision in studying judicial selection, with an eye to understanding the wider landscape over which politicians attempt to mold the federal bench.

Second, a key contribution of this book is our institutional perspective. We examine the constitutional provisions, formal chamber rules, and informal Senate practices that sustain advice and consent; we determine the origins of home state senators' privileged role in reviewing nominees; and we explore the consequences of the Senate's rules and practices for the selection and confirmation of federal judges. Most recent studies pay only passing attention to the institutional maze that nominees must maneuver to make it onto the bench.<sup>15</sup> Once nominated, a candidate for the federal bench normally needs to gain the approval of the Senate Committee on the Judiciary, of both home state senators for the vacant judgeship, of the majority party that wields control over the nominations agenda, of those senators who would be able to sustain a filibuster against the nominee, and of course the up or down support of the median senator. Potential vetoes are widely distributed across the Senate, begging questions of why advice and consent has evolved in this way and under what conditions institutional rules and practices afford senators effective vetoes over the selection and confirmation of nominees. We also look briefly at selection mechanisms used by senators to identify candidates for the bench and consider whether the ways in which senators lend advice to the president affects the fate of nominees.

Third, most recent studies, with the exception of Sheldon Goldman's *Picking Federal Judges*, begin their analysis in the late 1970s and conclude that increased partisanship since that period is to blame for increasing confirmation delays and falling confirmation rates. Because evidence is lacking from before the recent past, these conclusions about contemporary confirmation politics are premature. In this book, we recreate the history of judicial selection reaching back to 1789 and use the period after World War II to model how rising partisan polarization has encouraged senators to exploit formal and informal rules of advice and consent to affect the fate of judicial nominees. Our historical sweep allows us to put into perspective arguments about appointment politics that are typically based on the period after the 1970s.

Marshalling decades of data on nomination and confirmation outcomes, we offer an institutional account of advice and consent politics. We show that

partisan pique and the rise of ideological disagreement are necessary, but insufficient, to explain the fate of appointments to the bench. One must also account for the array of institutional vetoes that senators are increasingly willing to exploit to shape judicial selection. Moreover, we show that such resistance is not a costless endeavor to senators, as senators narrowly target their opposition where they perceive it to matter the most: The courts of appeals are targets more often than the district courts, and appellate courts that are evenly balanced between the parties are more often targeted than appellate courts that have already tipped to one party or the other. We provide further evidence of the impact of institutions in our analyses of two recent congressional efforts to create and locate new judgeships for the federal district courts. The placement of new judgeships corresponds to judicial demand but also to the electoral and institutional preferences of the legislators who create them.

Finally, others have examined the causes of conflict over filling federal judgeships. To our knowledge, however, the consequences of conflict over judicial selection have escaped systematic attention. In this book, we examine two ways in which controversy over judicial nominations may have harmful effects. First, we explore the impact of prolonged vacancies on the federal bench—vacancies that occur when presidents and senators delay filling federal judgeships. There is reason to suspect that empty judgeships are one of the key causes of heavy court dockets, delays for litigants, and diminished morale on the federal bench. In harnessing more than three decades of performance measures for the federal appellate courts, we explore whether and to what degree vacant judgeships limit the efficiency and capacity of the federal courts. Second, we explore the broader impact of confirmation conflict on the public's trust of federal judges and their decisions. We offer evidence from a survey experiment that suggests that partisan differences over judicial nominees may be undermining the perceived legitimacy of the federal judiciary—a worrisome development for an unelected branch in a system of representative government.

Before turning to a plan of the book, a brief aside about the concept of judges as political actors is in order. We assume throughout the book that senators and presidents perceive judicial nominees and lower court judges in general—primarily those on the appellate courts—to have ideologies or sets of policy views that can be discerned with some degree of certainty. We

are not claiming that judges' votes on the appellate bench are solely based on the set of policy views that judges bring to the bench. Clearly, a range of ideological, philosophical, institutional, and case-specific forces shape judges' voting behavior.<sup>16</sup> Nor do all—nor most of, for that matter—the decisions released by the lower federal courts lend themselves to categorization as liberal or conservative. Still, the concept of ideological voting has adherents among legal scholars, such as Cass Sunstein, as well as among political scientists, given the evidence that Democratic-appointed judges tend to vote more often in a liberal direction than do their Republican-appointed colleagues. We assume throughout the book that judges (and thus nominees) can be considered as political actors who hold a set of policy views and who reach their decisions in part by applying those views of the world to the cases before the court. Certainly the concept fits less well for judges than it does for legislators, and less well for judges who serve on federal trial courts compared with those who serve on federal appellate courts. Still, the increased presence of district judges among nominees to the appellate courts and appellate judges among nominees to the Supreme Court in recent years means that senators may increasingly have come to scrutinize both trial and appellate court nominees for their policy views. The decline in confirmation rates for both levels of federal courts in recent Congresses certainly suggests such a change has occurred in senators' priorities in reviewing potential candidates for lifetime appointments to the federal bench.

### **Plan of the Book**

Our goals in this book are threefold: We seek to reconstruct the history and contemporary practice of advice and consent, to identify the causes of conflict over the makeup of the federal bench in the post–Second World War period, and to explore the consequences of battles over appointments to the federal courts. We take up the first task in chapter 2, assessing how decisions made at the Constitutional Convention and by legislators serving in the first Congress in the late eighteenth century shaped the future politics of judicial selection—in particular setting the stage for home state senators to exercise disproportionate power over the selection of nominees to judgeships in their states. We reconstruct the history of confirmation outcomes back to 1789 and use this history to explore patterns in judicial selection.

This history leads us to raise questions about why and when formal and informal veto rights over the fate of nominees have been distributed so widely across the Senate. In particular, we burrow deep inside the Senate's institutional past to determine the origins of the advice and consent practice known as the *blue slip*—the informal practice maintained by the Judiciary Committee that grants senators a special voice in the consideration of judicial appointments to judgeships in their states. We conclude chapter 2 with a sketch of the institutional maze through which appointees today must maneuver to secure nomination and confirmation—including the need to avoid confirmation traps set by committee, filibuster, and party players.

We turn in chapter 3 to explain patterns in nomination outcomes, explaining why presidents select some nominees swiftly, while other vacancies linger months or years before a nominee is selected. We pay particular attention to the role played by home state senators from the president's party, challenging the conventional wisdom that home state senators through the practice of senatorial courtesy dominate the selection of nominees. In chapter 4, we explore the dynamics of confirmation, identifying the forces that affect the fate of nominees in the Senate. We show how players' exploitation of the rules and practices of advice and consent limit the president's influence over the shape of the bench, even given his "first mover" advantage in selecting nominees. We conclude with a review of the "nuclear option" scenario in the Senate in 2005. We consider why the impasse over nominations in the Bush administration led Republicans to propose such a contentious reform of Senate debate practices and why their plan failed.

Having shown that the confluence of partisan incentives and institutional arrangements alters the course of nomination and confirmation processes alike, we argue in chapter 5 that the distribution of power within Congress also helps to explain the allocation of new federal judgeships across the states. Not surprisingly, legislators' incentives to shape the makeup of the federal bench also encourage them to make their mark on the structure of the bench. Although new judgeships are located in part to help existing courts deal with overloaded dockets, legislators' partisan, institutional, and electoral interests also come to the fore in determining where new judgeships are placed and thus how the bench expands.

We conclude our analysis by examining the consequences of conflict over judicial selection. In chapter 6, we explore the impact of vacant judgeships

on the performance of the federal courts, showing that judgeships that sit empty contribute to rising caseloads for sitting judges and slow down their ability to dispose of cases on their dockets. We then report the results of an experimental study of the impact of confirmation conflict on individuals' perceptions of federal judges, showing that citizens' trust in federal judges is directly affected by what they know about a judge's road to confirmation. Divisive confirmation contests reduce confidence in those federal judges and their decisions, suggesting that the legitimacy of the unelected branch is put at risk when senators and presidents go to battle over the records and qualifications of potential jurists. There is a cost, we argue, to the breakdown in advice and consent—even if debate over the views of judicial candidates may be desirable for those seeking greater prospective accountability of unelected judges with lifetime appointments to the bench.

We conclude in chapter 7 with proposals for reforming the institutions of judicial selection with an eye to encouraging greater efficiency and accountability in the practice of advice and consent. We advocate reforms that harness the incentives of presidents and senators together. We consider pragmatic reform of advice and consent to be a key challenge for those concerned not only about the health of the Senate as a partner in the separation of powers, but also about the legitimacy of an unelected judiciary in a representative political system.