



Advice and consent during the Bush Years

The politics of confirming federal judges

by SARAH BINDER and FORREST MALTZMAN

AP PHOTO/ CHARLES TASNADI

“The judicial appointments process has become needlessly acrimonious.”¹ So intoned Senate Republicans in 2009—even as they reserved the right to filibuster any of President Barack Obama’s judicial nominations deemed unacceptable to the Republican conference. “Regretfully, if we are not consulted on, and approve of, a nominee from our states, the Republican Conference will be unable to support moving forward on that nominee.”

Coming on the heels of an eight-year contentious battle between Democrats and Republicans over the Democrats’ treatment of President George W. Bush’s nominations to the lower federal courts, the Republicans’ warning reminds us of the intensely divisive character of judicial selection, characterized in the Bush years by senatorial foot-dragging, declining confirmation rates, and protestations by both political parties about the broken nature of advice and consent.

This article explores the politics of judicial selection, focusing on partisan, institutional, and temporal forces that shape the fate of presidential appointments to the federal trial and appellate courts. Putting the experiences of the Bush administration into historical perspective, it assesses patterns over the past 60 years, shows broad trends in the treatment of judicial nominees, and pinpoints developments that have fueled conflict over the makeup of the

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federal bench. It suggests that polarization of advice and consent worsened over the Bush years, but was broadly consistent with the deterioration of judicial selection over the past several decades.

For better or worse, federal judges in the United States are today asked 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 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

This article draws on the authors’ forthcoming book *Advice & Dissent: The Struggle to Shape The Federal Judiciary* (Brookings Institution Press).

1. Senate Republican Communications Center, “Letter To The President On Judges,” The Leader Board, March 2, 2009. [Jttp://republican.senate.gov/public/index.cfm?FuseAction=Blogs.View&Blog_ID=3c522434-76e5-448e-9ead-1ec214b881ac&Month=3&Year=2009](http://republican.senate.gov/public/index.cfm?FuseAction=Blogs.View&Blog_ID=3c522434-76e5-448e-9ead-1ec214b881ac&Month=3&Year=2009) [Accessed March 6, 2009].

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contentious at numerous junctures in American 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 is expanding to an exceptionally heavy level.

Competing accounts

As the media has paid more attention to the difficulties faced by judicial nominees in securing confirmation, political science and legal scholars have offered diverging approaches to

understanding recent conflict over the selection of federal judges. Legal scholars have questioned the growing salience 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.² 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 the crisis in judicial selection, two alternative accounts have been proposed—neither of which fully captures the political and institutional dynamics that underlie contemporary advice and consent. One account—call it 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 fell 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—call it 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. Most often, scholars point to the battle over Robert Bork's nomination

in 1987 that precipitated a new regime in the treatment of presidential appointments 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.³

The president's willingness to nominate a strong conservative deemed outside the mainstream by the Democratic majority, and 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.⁴

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.”⁵ Still other versions of the big bang 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.⁶

No doubt, the Bork debacle, the changing character of elite activists,

2. Legal studies addressing judicial selection are surveyed, for example, by Stephen B. Burbank, *Politics, Privilege, & Power: The Senate's role in the appointment of federal judges*, 86 JUDICATURE 24-27 (July-August, 2002). On the impact of presidential agendas, see Sheldon Goldman, *PICKING FEDERAL JUDGES* (Yale University Press, 1997), and on the role of interest groups see Lauren Cohen Bell, *WARRING FACTIONS: INTEREST GROUPS, MONEY, AND THE NEW POLITICS OF SENATE CONFIRMATION* (Ohio State University Press, 2002) and Nancy Scherer, *SCORING POINTS* (Stanford University Press 2005).

3. John Anthony Maltese, “Anatomy of A Confirmation Mess: Recent Trends in the Federal Judicial Selection Process,” A JURIST Online Symposium (2004) <http://jurist.law.pitt.edu/forum/Symposium-jc/Maltese.php#2>.

4. See, for example, Wendy L. Martinek, Mark Kemper, and Steven R. Van Winkle, *To Advise and Consent: The Senate and Lower Federal Court Nominations, 1977-1998*, 64 J. POL. 337-361 (2002).

5. See Benjamin Wittes, *CONFIRMATION WARS* 59 (Hoover Institution, 2006).

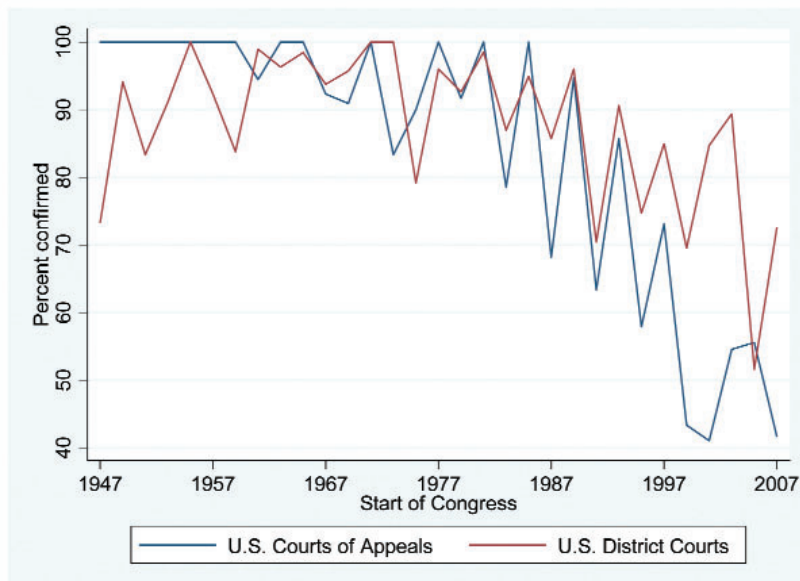
6. See Scherer, *supra* n. 2, and Bell, *supra* n. 2.

and the emergence of the courts as key policy makers have each shaped to some degree the emergence of conflict over appointments in the postwar period. Still, these explanations do not help 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 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 appointment was within the bounds of acceptable behavior after 1987.

Still, isolating the impact of the Bork fight cannot help explain the significant variation in the Senate's treatment of judicial nominees before and after the 100th Congress. It is also important to recall that executive branch appointments also experienced a sea change in the late 1980s and 1990s, taking much longer to secure confirmation. Thus, evidence to support the big bang account is incomplete. More likely, episodes like the Bork confirmation battle are symptoms, rather than causes, of the more taxing road to confirmation in recent 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."⁷ 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."⁸ These

Figure 1. Confirmation rates for judicial nominations, 1947-2008



Source: Compiled by authors from *Final Legislative and Executive Calendars*, U.S. Senate, Committee on the Judiciary, 80th-107th Congresses. Data for 108th-110th Congresses (through December 18, 2008) drawn from data compiled by the Department of Justice, Office of Legal Policy, <http://www.usdoj.gov/olp/> [Accessed December 18, 2008.]

scholars' views of legislators, judges, and presidents as strategic, political actors are important. We should expect to see legislators and presidents engage in purposeful behavior shaped by their goals.

But that is only a starting point in accounting for the dynamics of advice and consent. It is quite difficult to explain variation in the Senate's treatment of judicial appointments—both over time and across circuits—if we maintain that the process has always been politicized. We certainly recognize the political nature of advice and consent, but also seek to identify the ways politicians exploit Senate rules and practices to target appointees deemed most likely to shift the ideological tenor of the federal bench.

Patterns in selection

Numerous indicators suggest that something has gone awry in the process of advice and consent for selecting federal judges. The broad pattern can be seen in Figure 1, which shows confirmation rates for appointees to the U.S. district

courts and courts of appeals between 1947 and 2008. The bottom has clearly fallen out of the confirmation process, especially so during the Bush years, with confirmation rates dipping below 50 percent in half of Bush's four 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 12 circuits.⁹ As seen in Figure 2, nominations for some appellate vacancies attract reasonably little controversy, such as the Midwest's 7th Circuit. Not so for the Court of Appeals for D.C. and for the 4th, 5th and 6th Circuits, for which over half of the nominations have failed since 1992.

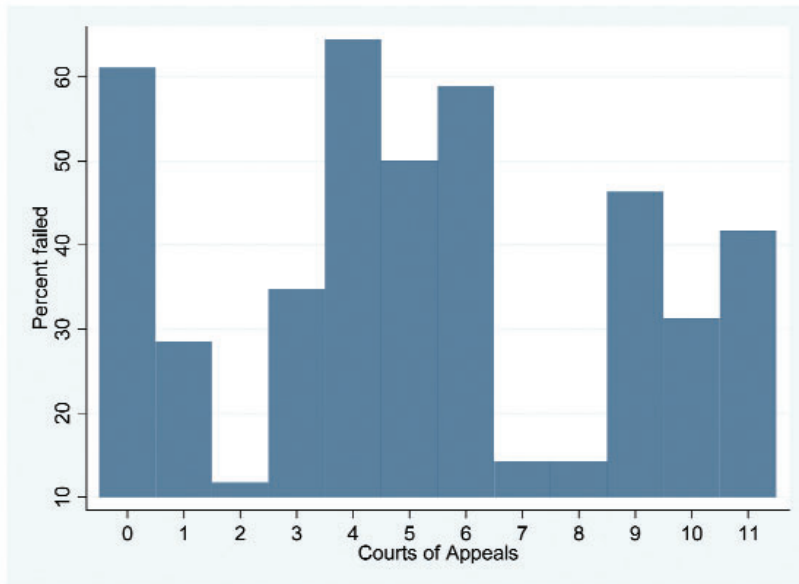
As the likelihood of confirmation

7. Lee Epstein and Jeffrey Segal, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 4 (Oxford University Press, 2005).

8. *Id.* at 3.

9. We exclude the Federal Circuit (created in 1982) from our purview, due to its fixed jurisdiction that focuses primarily on appeals arising under U.S. patent laws.

Figure 2. Failure rates for nominations made to the courts of appeals (1991-2008)



Note: Graph shows the percent of nominations to each court of appeals that failed, averaged across all congresses in the period. "0" court indicates Court of Appeals for the District of Columbia.

has gone down, the length of time it takes for presidents to nominate and the Senate to confirm candidates has increased. At the end of the 1950s, it took on average about 200 days, or just over six months, for presidents to select nominees once a vacant judgeship occurred. By the end of the 1990s, nominees were selected on average after 600 days, roughly 20 months from vacancy to nomination.

As shown in Figures 3A and 3B, the length of time it takes for the Senate to act on nominees has also increased. Between the 1940s and 1980s, a typical appellate court judge was confirmed within two months of nomination. By the late 1990s, the wait for successful nominees had stretched to about six months. These average waits, however, pale in comparison to the experiences of nominees during the Clinton and George

W. Bush administrations who failed to be confirmed. Since the mid-1990s, a typical appellate nominee who fails to secure confirmation lingers before the Senate for almost a year and a half (albeit the wait for confirmation was longer for Clinton nominees than for Bush nominees).

As the confirmation process has dragged out, some candidates have become increasingly reluctant to wait it out. As Bush nominee 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."¹⁰ Nominees for federal trial courts have also experienced delays, as shown in Figure 3B. There is certainly something "new under the sun"—especially so during the Bush years—when it comes to the state of advice and consent for candidates for the federal bench.

10. As cited in Carl Hulse and David Stout, *Embattled Estrada Withdraws as Nominee for Federal Bench*, New York Times, September 4, 2003.

Advice and consent politics

How do we account for the Senate's uneven performance in confirming federal judges? Why have confirmation rates slid downwards over the past couple of decades and why does it take so long for the Senate to render its decisions? Four forces shape the fate of nominations sent to the Senate. First and foremost are ideological forces: the array of policy views across the three branches affects the probability and speed of confirmation. Second, partisan forces matter: political contests between the president and the opposing Senate party help account for the Senate's treatment of judicial nominees. Third, institutional rules and practices in the Senate shape the likelihood of confirmation. Fourth, the electoral context matters. All four of these forces came into play during the Bush years, significantly raising the heat of judicial selection over the president's two terms.

Partisan and ideological forces. Partisan and ideological forces are inextricably linked in the contemporary Congress as the two parties have diverged ideologically. Not surprisingly, Washington pundits assessing the state of judicial selection have often pinpointed poisoned relations between conservative Republicans and President Clinton and between liberal Democrats and President Bush as the proximate cause of the slowdown in advice and consent. They suggest that partisan and ideological antagonisms between Clinton and far-right conservatives led Republican senators to delay even the most highly qualified nominees.

Democrats' foot-dragging of several of Bush's nominees in the 108th Congress (2003-4) was similarly attributed to ideological conflict and partisan pique, as liberal Democrats criticized Bush's tendency to nominate extremely conservative (and presumably Republican) judges. The rise of intense ideological differences between the two parties over the past two decades, in other words, may be directly affecting the pace and rate of confirming new federal judges. Given that polarization of the parties was higher during the Bush

than Clinton years, no surprise that confirmation rates continued to plunge for Bush nominees.

Partisan politics may affect the process of advice and consent more broadly in the guise of divided party government. Because judges have life-time tenure and the capacity to make lasting decisions on the shape of public law, senators have good cause to scrutinize the views of all potential federal judges. Because presidents overwhelmingly seek to appoint judges who hail from the president's party, Senate scrutiny of judicial nominees should be particularly intense when two different parties control the White House and the Senate. Not a surprise then that nominees considered during a period of divided control take significantly longer to be confirmed than those nominated during a period of unified control. Judicial nominees are also less likely to be confirmed during divided government: Over the past six decades, the Senate has confirmed on average 87 percent of appellate court nominees considered during a period of unified control, while confirming 70 percent of nominees during divided government.

Partisan control of the branches is particularly likely to affect nominations when presidents seek to fill vacancies on appellate circuits whose judges are evenly balanced between the two parties. Because most appellate court cases are heard by randomly-generated three judge panels, nominations to courts that are evenly divided are likely to have a more significant impact on the law's development, as compared to appointments to courts that lean decidedly in one ideological direction or the other. Senate majorities appear especially reluctant to confirm nominees to such courts when the appointment would tip the court balance in the favor of a president from the opposing party.

One of the hardest hit courts is the 6th Circuit Court of Appeals, straddling populous states such as Michigan and Ohio. In recent years, a quarter of the bench has been

vacant, including one seat declared a judicial emergency after sitting empty for five years. Moreover, the 6th Circuit has recently been precariously balanced between the parties, with the bench roughly half-filled by judges appointed by Democrats. The Senate slow-down on appointments to the circuit during the Clinton and Bush administrations was likely motivated by the strategic importance of the circuit. Blocking Clinton's Democratic nominees allowed Senate Republicans to prevent the Democrats from transforming the party-balanced court into a Democratic-dominated bench. Similarly, once Bush took office, the two Michigan senators (both Democrats) went to great lengths to prevent the Senate from taking action on Bush's conservative nominees for that court. In short, partisan dynamics—fueled in part by ideological conflict—strongly shape the Senate's conduct of advice and consent, making it difficult for presidents to stack the federal courts as they see fit.

Institutional forces. Partisan and ideological forces likely provide senators with an incentive to probe the opposition party's judicial nominees. But the capacity to derail nominees depends on the rules and practices of advice and consent—a set of institutional tools that distributes power across the institution. Thus, to explain the fate of the president's judicial nominees, we need to know something about the institutional context of the confirmation process.

Senators can exploit multiple potential vetoes when they seek to affect the fate of a nominee—including an array of Senate rules and practices wielded in committee and on the floor by individual senators and the two political parties.¹¹ In theory, nominees only have to secure the consent of a floor majority, as nominations are considered for an up or down vote in the Senate's executive session. In practice, nominees must secure the support of several pivotal Senate players—meaning that more than a simple majority may be needed for confirmation.

The initial institutional hurdle for any nominee is securing approval

from the Senate Judiciary Committee. By tradition senators from the home state of each judicial nominee take the lead on casting first judgment on potential appointees. The veto power of home state senators is institutionalized in Judiciary panel procedures. Both of the home state senators are asked their views about judicial nominees from their home state pending before the committee. Senators can return the "blue slip" demarking their support or objection to the nominee, or they can refuse to return the blue slip altogether—an action signaling the senator's opposition to the nominee. One negative blue slip from a home state senator traditionally was sufficient to block further action on a nominee.

As the process has become more polarized in recent years, committee chairs have been tempted to ignore objections from minority party senators. Indeed, Senator Pat Leahy's equivocation at the start of the 111th Congress over how he would treat blue slips from Republican senators lies at the heart of the warning sent by Republican senators that they would filibuster nominees from states with Republican senators if their prior consent was not secured. At a minimum, blue slips today weigh heavily in the committee chair's assessment on whether, when, and how to proceed with a nominee, but senators' objections do not necessarily prevent the committee from proceeding.

Historically, greater policy differences between the president and the home state senator for appellate nominees have led to longer confirmation proceedings, suggesting the power of home state senators to affect panel proceedings. Conversely, the strong support of one's home state senator is essential in navigating the committee successfully. Given the often fractured attention of the Senate and the willingness of senators to heed the prefer-

11. The relative effects of these multiple potential vetoes are explored in David M. Primo, Sarah A. Binder, and Forrest Maltzman, *Who Consents? Competing Pivots in Federal Judicial Selection*, 52 AM. J. POL. SCI. 471-89 (2008).

ences of the home state senator, having a strong advocate in the Senate with an interest in seeing the nomination proceed is critical in smoothing the way for nominees.

Once approved by committee, a nomination has a second institutional hurdle to clear: making it onto the Senate's crowded agenda. By rule and precedent, both majority and minority party coalitions can delay nominations after they clear committee. Because the presiding officer of the chamber gives the majority leader priority in being recognized to speak on the Senate floor, the majority leader has the upper hand in setting the chamber's agenda. When the president's party controls the Senate, this means that nominations are usually confirmed more quickly; under divided control, nominations can be kept off the floor by the majority leader, who wields the right to make a non-debatable motion to call the Senate into executive session to consider nominees. With Democrats presiding over the Senate in the 107th (2001-2) and 109th (2007-8) congresses, no wonder that the confirmation rates for Bush nominees in those congresses were nearly 15 points lower than the rates in the two congresses in which Republicans controlled the Senate during the Bush years.

The majority leader's discretion over the executive session agenda is not wielded without challenge, however, as nominations can be filibustered once called up in executive session. The chance that a nomination might be filibustered typically motivates the majority leader to seek unanimous consent of the full chamber before bringing a nomination before the Senate. Such consultation between the two parties means that nominations are unlikely to clear the Senate without the endorsement of the minority party.

The *de facto* requirement of minority party assent grants the party opposing the president significant power to affect the fate of nominees, even if that party does not control the Senate. As policy differences increase

Figure 3A. Length of confirmation process for successful courts of appeals nominees (1947-2008)

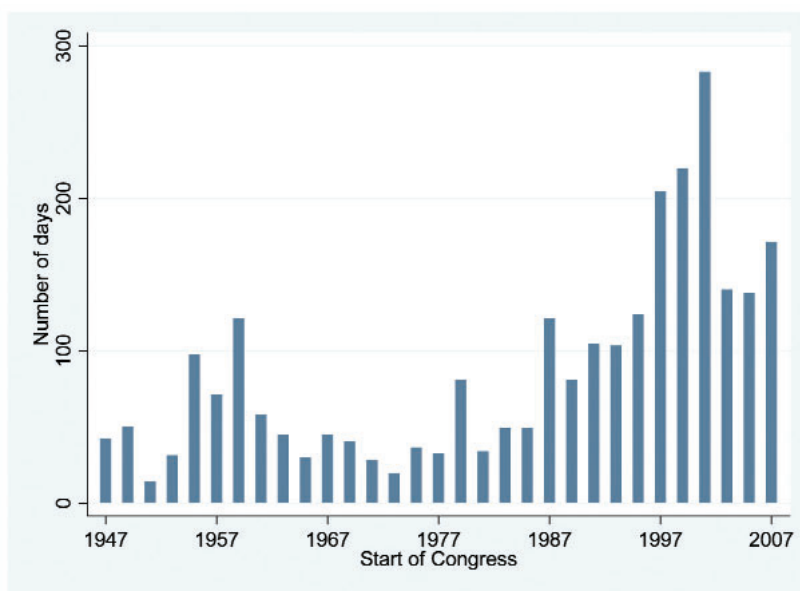
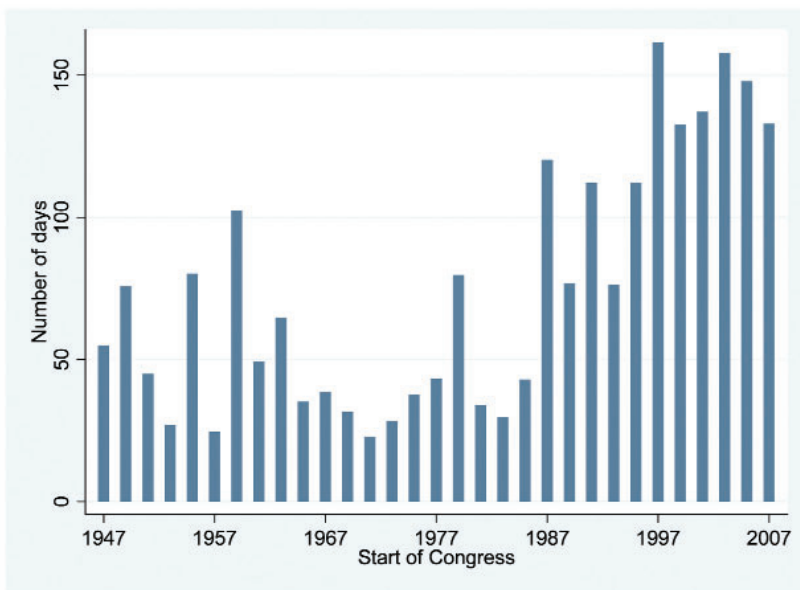


Figure 3B. Length of confirmation process for successful district courts nominees (1947-2008)



Source: Compiled by authors from *Final Legislative and Executive Calendars*, U.S. Senate, Committee on the Judiciary, 102nd -107th Congresses. Data for 108th-110th Congresses drawn from data compiled by the Department of Justice, Office of Legal Policy, <http://www.usdoj.gov/olp/> [Accessed September 24, 2008.] Note the different scales on the Y axis.

between the president and the opposing party, that party is more likely to exercise its power to delay nominees. Given the high degree of polarization between the two parties today and the centrality of federal courts in shaping public law, it is not surprising that judicial nominations have become such a flash point for the parties. Indeed, when Democrats lost control of the Senate after the 2002 elections, they turned to new tactics to block Bush nominees they disliked—the filibuster.

To be sure, some contentious nominations have in the past been subject to cloture votes. But all of those lower court nominees were eventually confirmed. In 2003, however, numerous of these judicial filibusters were successful. Use of such tactics likely flowed from the increased polarization of the two parties and from the rising salience of the federal courts across the interest group community. Much of the recent variation in the fate of judicial nominees before the Senate is thus likely driven by ideologically motivated players and parties in both the executive and legislative branches exploiting the rules of the game in an effort to shape the makeup of the federal bench.

Temporal forces. Finally, it is important to consider how secular or cyclical elements of the political calendar may shape the fate of judicial nominees. It is often suggested that delays may be a natural consequence of an approaching presidential election. Decades ago, the opposition party in the Senate might have wanted to save vacancies as a pure matter of patronage: foot-dragging on nominations would boost the number of positions the party would have to fill if it won the White House. More recently, the opposition might want to save vacancies so that a president of their own party could fill the vacancies with judges more in tune with the party's policy priorities.

There is ample evidence of vacancy-hoarding in presidential election years. For example, with control of both the Senate and the White House up for grabs in November 2008, Democrats had by the fall confirmed

only 10 of the 24 nominations to the courts of appeals made by President Bush during the 110th Congress. Nominees for the less controversial trial courts did not fare much better, with just over 60 percent confirmed before the fall of 2008.

More generally, over the past 60 years, the Senate has treated judicial nominations submitted or pending during a presidential election year significantly different than other judicial nominations. First, the Senate has historically taken longer to confirm nominees pending in a presidential election year than those submitted earlier in a president's term. Second, and more notably, these presidential-election year nominees are significantly less likely to be confirmed. For all judicial nominations submitted between 1947 and 2008, appointees to the courts of appeals pending in the Senate in a presidential election year were nearly 40 percent less likely to be confirmed than nominees pending in other years.

Finally, there is a generally held belief that the confirmation process has become more protracted over time. That sense is confirmed by Figures 3A and 3B, which show the increase in how long it takes the Senate on average to confirm lower court nominations. Granted, it is difficult to separate the effects of a secular slowdown in the confirmation process from a concurrent rise in partisan polarization. But it is important to keep in mind that ideological disagreement between the parties should only affect advice and consent if the parties hold different views

about the courts and their impact on public policy. The rising importance of the federal courts since the 1950s, as interest groups and politicians have used the courts as a means of resolving intractable policy disputes, may well have encouraged the parties to take a more aggressive stance in reviewing nominations made by the opposition party.¹² As the federal courts become more central to the making of public policy, we should expect to find broader and heightened concern among politicians and political parties about the makeup of the bench.

Explaining trends

How do we account more systematically for variation in the degree of conflict over judicial nominees? The multiple forces outlined above are clearly at play. For social scientists investigating patterns over time, this raises a key question. Taking each of these forces together, how well do the trends noted here hold up? Once subjected to multivariate controls, what can we conclude about the relative impact of partisan, ideological, and institutional forces on the pace and rate of judicial confirmations? Answers to these questions are consequential as they help to evaluate how well the president and the Senate discharge their constitutional duties of advice and consent.

To explain variation in conflict over judicial nominees, we track the fate of all nominations to the U.S. courts of appeals between 1947 and 2006, and use these data to estimate a model of the likelihood of confir-

12. See Robert Kagan, *ADVERSARIAL LEGALISM* (Harvard University Press, 2001), Martin Shapiro, *Comment* in Pietro S. Nivola and David W. Brady, eds., *RED AND BLUE NATION? CONSEQUENCES AND CORRECTION OF AMERICA'S POLARIZED POLITICS*, (Washington, D.C.: Brookings Institution Press, 2008); Gordon Silverstein, *LAW'S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES AND KILLS POLITICS* (Cambridge University Press, forthcoming).

13. We compile data on judicial nominations from the *Final Calendars* printed each congress by the Senate Committee on the Judiciary. Nominations data for the 108th–110th congresses (2003–8) are drawn from the Department of Justice's Office of Legal Policy website: <http://www.usdoj.gov/olp/>. We include the Court of Appeals for the District of Columbia, but exclude the appellate court for the Federal Circuit on account of its limited jurisdiction.

14. The independent variables are measured as follows. We measure polarization as the

difference in the mean ideology for each Senate party (as measured by DW-NOMINATE scores available at <http://www.voteview.com>). The partisan balance of each circuit in each congress is measured as the proportion of active courts of appeals judges appointed by Democratic presidents and serving during the congress. We determine whether the nominee's home state senator is ideologically distant from the president by selecting those home state senators for the nomination who are equal to or greater than one standard deviation of the mean DW-NOMINATE distance between the president and the more distant home state senator. Nominee quality is rated by the Standing Committee on the Federal Judiciary of the American Bar Association and are available for the 101st–110th Congresses here: <http://www.abanet.org/scfedjud/ratings.html>. We thank Sheldon Goldman for ABA ratings for the previous congresses.

Table 1. Determinants of Senate confirmation (1947-2006) (Nominations to the U.S. courts of appeals)

Variable	Coefficient (Robust SE)
Divided government	-1.106 (.342)***
Balanced bench	-.484 (.283)*
Degree of partisan polarization	-9.355 (1.168)***
Ideologically distant home state senator	-.713 (.311)*
Nomination pending during a presidential election year	-2.245 (.288)***
Well qualified nominee	.434 (.292)
Constant	9.745 (.993)***
N	524
Log pseudolikelihood	-162.683
Prob. Chi2	.000***

Notes: Parameter estimates are logit coefficients generated by the logit routine in Stata 9.0. *** $p < .001$, ** $p < .01$, * $p < .05$ (all one-tailed tests). The dependent variable is coded 1 if nominee confirmed in the Congress in which s/he was nominated, 0 otherwise. Independent variables described in text.

mation.¹³ The results shown in Table 1 can help disentangle the forces that shape the Senate's treatment of presidential appointees to the bench.¹⁴

First, the degree of partisan polarization matters strongly. As the two parties diverge ideologically, the likelihood of confirmation goes down. The magnitude of the effect is substantial. During the least polarized Senate of the postwar period (the 83rd Congress, 1953-4), the likelihood of confirmation was 99 percent, estimated by holding all the other variables at their mean values. During the most polarized Congress under Bush (the 109th, 2005-6), we estimate a 63 percent chance of being confirmed. As the two parties take increasingly different

positions on major policy issues, they are less and less likely to give the other party's nominees an easy path to the bench. That effect in fact is much stronger than the effect we detect for divided party control. Nominations are less likely to be confirmed in periods of divided government. The magnitude of the effect, however, is less than 10 percent when we control for the other forces at their mean values.¹⁵

We also detect an impact of ideologically distant home state senators on a nominee's chances of confirmation. When the more distant home state senator for a nomination is still reasonably close to the president, the chance of confirmation is over 90 percent; the chance of confirmation slips 7 percent when one of the home state senators is ideologically distant from the president (and presumably then from the nominee). Lodging an objection through the blue slip—perhaps because the senator's objection may be backed up by the threat of a party filibuster—confers leverage on a senator seeking to derail a president's pick for a judgeship in his or her home state. We also see a noticeable impact of an approaching presidential election, as confirmation is nearly 40 percent

less likely when control of the White House—and hence the power to select judicial nominees—is at stake.

The partisan balance of the circuit also seems to affect the chances of confirmation. The likelihood of confirmation drops 3 percent when senators consider a nomination for a balanced circuit (assuming all other variables are set at their mean values). That finding puts into perspective debates in the late 1990s over the makeup of the 6th Circuit. In 1997 and 1998, the circuit was nearly evenly balanced between Democrats and Republicans, as Democrats made up roughly 45 percent of the bench.¹⁶ That tight ideological balance led the parties to stalemate over additional appointments, despite the fact that nearly a quarter of the bench was vacant during that period. Michigan's lone Republican senator blocked Clinton's nominees by exploiting the blue slip in the late 1990s, and the Republican chair of the Judiciary panel recognized his objections. Michigan's two Democratic senators after the 2000 elections then objected to Bush's appointments to the 6th Circuit. General disagreement over the policy views of the nominees certainly fueled these senators, but their opposition was particularly intense given the stakes of filling the judgeships for the ideological balance of the regional bench.

We find only weak evidence that the quality of the nominees, as signaled by the American Bar Association, has much bearing on the likelihood of confirmation. One possibility is that the ABA might not be seen as a neutral evaluator of judicial nominees, and thus senators may systematically ignore the Association's recommendations. Alternatively, judicial qualifications may not be terribly important for most nominees. Very few nominees are actually rated unqualified, and senators may not perceive much of a difference between a nominee deemed well-qualified, as opposed to qualified. Thus, senators' calculations about whether to confirm would be influenced more heavily by other considerations.

Collectively, these institutional

15. Interestingly, the impact of polarization on the likelihood of confirmation is resilient across the time period studied. If we look only at the period before Ronald Reagan came to office (1947-1980), increases in polarization still reduce the chances of confirmation, as does the misfortune of being a nominee pending during a presidential election year.

16. Data on the partisan balance of active judges on each court of appeals are available in Jonathan Kestel, "Panel Composition and Voting on the U.S. Courts of Appeals." Paper presented at the annual meeting of the American Political Science Association, Hyatt Regency Chicago and the Sheraton Chicago Hotel and Towers, Chicago, IL, Aug 30, 2007.

and electoral forces matter quite a bit. Imagine a period of unified party control in which the two Senate parties are reasonably close ideologically. If the home state senator is reasonably compatible in ideological terms with the president and if the vacant judgeship occurred on a court of appeals firmly in one partisan camp or the other, then confirmation is all but guaranteed. In contrast, imagine a nomination submitted to the Senate in a period of unified government that featured ideologically polarized parties—just as we saw for the middle four of Bush’s eight years. If that nomination is slotted for a judgeship on a roughly balanced court and the home state senator has strong policy disagreements with the president, then the chance of confirmation drops by 40 points.¹⁷ This all assumes, of course, that the nominee more closely resembles the president’s policy outlook than the views of the home state senator. Had President Bush selected nominees perceived by Democrats to have been more moderate, the President’s batting average for securing confirmation of his judicial picks would have been significantly better.

The new wars

Statistical analysis suggests the enduring impact of partisan, institutional, and temporal forces on the fate of presidential appointments to the federal bench. Still, the fall-off in confirmation rates during the Bush years leaves no doubt that advice and consent has changed markedly. Far more attention is paid to these confirmation battles by the media and interest in the fate of presidential appointees now extends beyond the home state senators. Both parties—often fueled by supportive groups outside the chamber—have made the plight of potential judges central to their campaigns for the White House and Congress.¹⁸ The salience of judicial nominations to the two political parties—inside and outside of the halls of the Senate—is *prima facie* evidence that there is definitely something “new under the sun”

when it comes to the selection of federal judges. To be sure, not every nominee experiences intense opposition, as Democrats acquiesced to over 300 of President Bush’s judicial nominees just as Republicans supported scores of Clinton nominees. But the salience of the process seems to have increased sharply starting in the early 1980s and continued with full force under the presidencies of Clinton and Bush.

The rising salience of federal judgeships is visible on several fronts. First, intense interest in the selection of federal judges is no longer limited to the home state senators. Second, negative blue slips from home state senators no longer automatically kill a nomination, as recent Judiciary panel chairs have been hesitant to accord such influence to their minority party colleagues. Third, recorded floor votes are now the norm for confirmation of appellate court judges, as nominations are of increased importance to groups outside the institution. And fourth, nominations now draw the attention of strategists within both political parties—as evidenced by President Bush’s focus on judicial nominations in stumping for Republican Senate candidates throughout his tenure in office. Indeed, Senate Republicans claimed that the role played by Democrat Tom Daschle (then minority leader of the Senate) in leading the charge against Bush’s nominees contributed to his losing his Senate race in 2004.

How do we account for the rising salience of federal judgeships to actors in and out of the Senate? It is tempting to claim that the activities of organized interests after the 1987 Supreme Court confirmation battle over Robert Bork are responsible. But interest groups have kept a close eye on judicial selection for quite some time. Both liberal and conservative groups were involved periodically from the late 1960s into the 1980s. And in 1984, liberal groups under the umbrella of the Alliance for Justice commenced systematic monitoring of judicial appointments, as had the conservative Judicial Reform Project of the Free Congress Foundation earlier

in the decade.

Although interest group tactics may have fanned the fires over judicial selection in recent years, the introduction of new blocking tactics in the Senate developed long after groups had become active in the process of judicial selection.¹⁹ Outside groups may encourage senators to take more aggressive stands against judicial nominees, but by and large Senate opposition reflects senators’ concerns about the policy impact of judges on the federal bench.

Rather than attribute the state of judicial selection to the lobbying of outside groups, our sense is that the politics of judicial selection have been indelibly shaped by two concurrent trends. First, the two political parties are more ideologically opposed today than they have been for the past few decades. The empirical analysis above strongly suggests that ideological differences between the parties encourage senators to exploit the rules of the game to their party’s advantage in filling vacant judgeships or blocking new nominees.

Second, it is important to remember that if the courts were of little importance to the two parties, then polarized relations would matter little to senators and presidents in conducting advice and consent. However, the federal courts today are intricately involved in the interpretation and enforcement of federal law. The rising importance of the federal courts makes extremely important the second trend affecting the nature of judicial selection. When Democrats lost

17. Both simulations assume that the nominee has been rated highly by the ABA and is not pending before the Senate in a presidential election year.

18. Involvement of interest groups in lower court judicial selection reaches back decades, but a marked increase in their organized involvement occurred in the early 1980s. See Gregory A. Caldeira and John R. Wright, *Lobbying for Justice: The Rise of Organized Conflict in the Politics of Federal Judgeships*, in Lee Epstein, ed., *CONTEMPLATING COURTS* (Washington, D.C.: Congressional Quarterly Press, 1995). See also Roy B. Flemming, Michael B. MacLeod, and Jeffery Talbert, *Witnesses at the Confirmations? The Appearances of Organized Interests at Senate Hearings of Federal Judicial Appointments, 1945-1992*, 51 *POL. RES. Q.* 617-631 (September, 1998), and Bell, *supra* n 2.

19. Tactics of two leading interest groups are detailed in Bob Davis and Robert S. Greenberger, *Two old foes plot tactics in battle over judgeships*, *Wall Street Journal*, March 2, 2004.

control of the Senate after the 2002 elections, the federal courts were nearly evenly balanced between Democratic and Republican appointees: the active judiciary was composed of 380 judges appointed by Republican presidents and 389 judges appointed by Democratic presidents.²⁰ Across the 12 appellate courts, 75 judges had been appointed by Republican presidents; 67 by Democratic presidents.

Having lost control of the Senate, distrusting the ideological orientation of Bush appointees, and finding the courts on the edge of partisan balance, it is no surprise that Democrats made scrutiny of judicial nominees a caucus priority starting in 2003 and achieved remarkable unity in blocking nominees they deemed particularly egregious. No small wonder that Republicans responded in kind in 2005, threatening recalcitrant Democrats with the “nuclear option.”²¹ Republicans envisioned a series of procedural steps that would have led the Senate to a new interpretation of the chamber’s Rule 22, the mechanism for ending debate on contentious measures and nominations. The new interpretation would have banned judicial filibusters, requiring only 51 votes to end debate and come to a confirmation vote. Republicans backed down when a bipartisan “Gang of 14” emerged to defuse tensions over the nuclear option. Although one could say that the parties fought to a draw—though the Republicans clearly “lost” by failing to secure 51 votes for their nuclear option—it is important to recognize the imprint that eight years of Republican rule left on the bench. When Bush left office in 2009, roughly 60 percent of the appellate

court judges had been appointed by Republican presidents, up 11 points from just six years before.

Conclusions

In the run up to the 2008 presidential elections, nomination and confirmation of judges for the lower federal courts ground to a halt. Reflecting on the impasse, Texas Republican Senator John Cornyn observed that Democrats were playing “a short-sighted game, because around here what goes around comes around....When the shoe is on the other foot, there is going to be a temptation to respond in kind.”²² The senator’s point was certainly on the mark: Each party’s intolerance of the other party’s nominees has recently been reciprocated when the parties swap positions in the Senate. Such behavior by both political parties—and the breach of Senate trust that appears to accompany it—does not bode well for lifting the Senate out of its confirmation morass.

Unfortunately, there are few signs that the wars of advice and consent will abate anytime soon. More likely, they will intensify—especially now that President Obama has nominated court of appeals judge Sonia Sotomayor to fill Justice David Souter’s seat on the Supreme Court. Sotomayor is likely to be confirmed, but not before interest groups dig deep into her judicial record and personal past in an effort to turn the tides against confirmation. The stakes of who sits on the federal bench are simply too high for combatants in the wars of advice and consent to view the contest from the trenches. ☐

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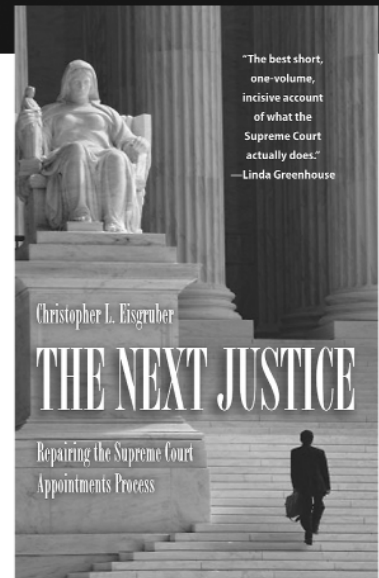
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20. See Alliance for Justice Judicial Selection Project, *2001-2 Biennial Report*, Appendix 3, 2002.

21. The nuclear option conflagration in the Senate in 2005 is detailed in Sarah A. Binder, Anthony Madonna, and Steven S. Smith, *Going Nuclear: Senate Style*, 5 PERSPECTIVES ON POL. 720-40 (December 2007).

22. As quoted in James Rowley, *Senate Standstill to Let Obama or McCain Tip Balance on Courts*, Bloomberg News, August 7, 2007. <http://www.bloomberg.com/apps/news?pid=newsstory&sid=aPaxOvQrY17k>