Prevent Federal Court Nomination Battles

De-Escalating the Conflict over the Judiciary

Russell Wheeler

Summary

The process of nominating and confirming federal judges has become infected by the polarization that characterizes much of U.S. politics. Confirmation rates have dropped, and long delays are not unusual. Presidents and senators of both parties, egged on by interest groups, see the effects of judicial decisions in hot-button policy areas and thus battle to control the judiciary's make-up.

The heated selection process harms the courts by creating extended vacancies, scaring off good candidates, and posing a threat to judicial impartiality and independence. And, it harms the presidency and Senate by drawing attention away from other important policy issues and locking the President and senators into contentious positions.

Two changes to deal with this problem are the use of *bipartisan commissions* to aid in the selection and screening of appeals court and district court nominees, and a *timetable* to reduce delays.

With respect to bipartisan commissions, the next President should:

- Create a bipartisan appellate judge nominating commission and give priority consideration to candidates the commission recommends, with the understanding that the President will strongly prefer members of his party
- Urge all senators to appoint bipartisan district judge nominating commissions and give priority consideration to candidates jointly recommended by the home-

state senators and their commissions, with the understanding that the President will strongly prefer members of his party

- Consult in good faith with the bipartisan leadership of the Senate and of its Judiciary Committee, and with home-state senators, before making nominations and
- Urge the Senate to establish time limits for hearings and floor votes on nominees endorsed by bipartisan nominating commissions and whose nominations followed good-faith White House consultation with the leadership.

A timetable should include:

- Early announcement of retirements, with judges' providing a year's advance notice of their intention to leave active judicial service
- Expeditious nominations, with the President's submitting nominations to the Senate within 180 days of receiving notice of an impending vacancy
- Timely hearings, conducted by the Senate Judiciary Committee within 90 days of receiving a nomination—if the nomination follows good-faith White House consideration of the bipartisan nominating commission's list and consultation with Senate leaders of both parties
- Timely floor votes, held on each "good-faith" nominee within 90 days of approval by the Judiciary Committee or, if the Committee does not vote on the nominee, within 180 days after nomination.

Both major party presidential nominees should be asked to commit jointly to these steps, and to urge their Senate colleagues to commit to them. These steps will not compromise the long-standing practice of partisan judicial appointments, but can restore respect and civility to the selection of federal judges. (The appointment process for Supreme Court justices is a separate matter, for which these proposals would be impractical.)

Context

Basic Trends

Presidential candidates in 2008, as in earlier years, differ on the kinds of judges they pledge to appoint, not just to the Supreme Court, but also to the 13 courts of appeal and 94 district courts. Senator John McCain has promised to nominate people "with a proven commitment to judicial restraint . . . who know their own minds, and know the law and know the difference," while Senator Barack Obama has said "I want people on the bench who have enough empathy, enough feeling, for what ordinary people are going through."

As controversy over federal courts rose in the last two decades or so, the ***process*** *of selecting and confirming judges for the appellate and district courts became prolonged, often mean-spirited, and detrimental to those courts, whose collective impact on American society is at least as great as that of the Supreme Court.* Extended vacancies in some courts have caused undue delays in disposing of cases; nominees' reputations have been maligned; the credibility of the judiciary as an impartial adjudicator has apparently been compromised; and service on the federal bench has lost much of its allure to prominent attorneys. The 2008 presidential campaign offers an opportunity, if not to fix the process, at least to curb some of its excesses.

The only formal provision governing these appointments is the "advice and consent" clause in Article II of the Constitution, authorizing the President to nominate judges and the Senate to confirm them. There are no age restrictions, but, since the Carter Administration, appointees have averaged in the 48 to 50-year age range.

Most appointees are at least nominal members of the President's party. In selecting district court nominees, a White House usually defers to home-state senators of its party or to other state party leaders. Because courts of appeal are more involved than district courts in making law—their decisions are precedents that bind the district judges in their respective regional circuits—appellate nominations face greater scrutiny and reflect less White House attention to patronage and more to ideology.

Recent Process Changes

Until fairly recently, unless a home-state senator objected, the Senate almost always confirmed nominees—and did so quickly, regardless of who was President, realizing that someday other feet would fill the nominating shoes. Over the last 20 years or so, the process has become slower, and, especially for appellate nominees, more contentious. The slower pace exists partly because Congress has created more judgeships—179 appellate and 674 district judgeships today, *versus* 132 and 510 in 1981—and thus the Senate has more nominations to process. It's also due partly to more Senate business in general.

The main reason for the slower pace, though, is increased contentiousness over judicial policy and thus who should be judges. *When* the process began to get more contentious is hard to pinpoint. President Nixon recognized the policy as well as patronage significance of judicial appointments, as did President Carter, who also stressed demographic diversity, but neither faced widespread lower-court confirmation fights. Tensions began heating up in the late 1980s, and judicial selection became a battleground during the Clinton Administration and has remained so during the Bush Administration.

Disputes over judges are one front in the country's polarized politics. Federal courts now affect more areas of American life than ever before. Controversy over the judiciary is partly home-cooked by the judiciary—consider abortion and redistricting, for example—and partly due to federal statutes that have thrust courts into environmental regulation, employment discrimination, worker safety and benefit programs, and other fields of great import to individuals and businesses. Although the decisional differences between Democratic and Republican appointed judges are much smaller than one might think based on news from cable TV or talk radio, there are differences, especially in ideologically charged cases.

Inescapably, a broader judicial role means more attention to ideology in deciding whom to nominate and confirm. Both the White House and Senate are pressured by

groups on the left and right that focus laser-like on the federal judiciary, mobilize voters and campaign contributors, and use nomination fights to raise their own funds.

Given the important role federal judges play in a republic, some disagreement over their appointments is understandable, even desirable. But principled disagreement has often given way to what Benjamin Wittes calls "nastiness." He observed the process up close during the Clinton and second Bush Administrations and wrote in 2006: "[S]enators and interest groups—and sometimes the press as well—have an unfailing tendency to focus on marginalia and irrelevancies, often quite painful for the nominees, while getting the big picture wrong." *The process has pained both the Clinton and Bush Administrations, and the next president has it in his interest to find some new approach to facilitating appointments.*

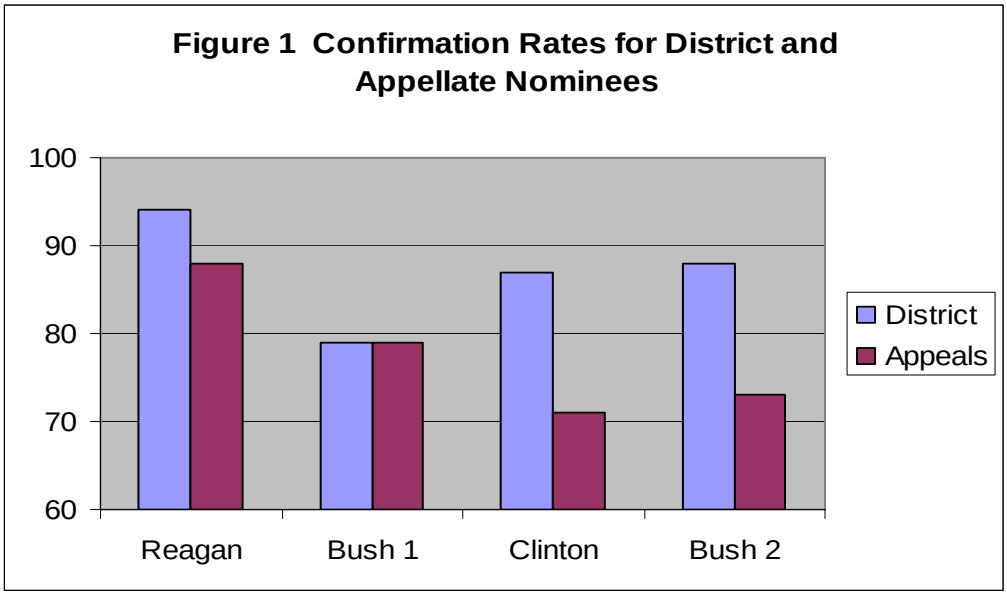
Comparing the fate of nominees since the Reagan Administration shows lower proportions of nominees confirmed and of nominees receiving Judiciary Committee hearings, and longer times between vacancies and confirmation of replacements.[1]

Lower Confirmation Rates

In general, confirmation rates have fluctuated modestly for district nominees, but declined noticeably for appellate nominees (Figure 1). Almost all Reagan nominees were confirmed, and most district court nominees still get confirmed, the lowest rate being 79 percent for the first President Bush. For court of appeals nominees, the confirmation rate dropped from 88 in the Reagan Administration to 71 and 73 in the Clinton and Bush Administrations.

[1] The sources used here are the data sets underlying Sarah Binder, Forrest Maltzman, and Alan Murphy,"Op-Chart: History's Verdict," *New York Times*, May 19, 2005; Sheldon Goldman, "Assessing the Senate Judicial Confirmation Process: The Index of Obstruction and Delay," 86 *Judicature* 251 (2003); Denis Rutkus land Mitchel Sollenberger, *Judicial Nominating Statistics: U.S. District and Circuit Courts, 1977-2003,* Congressional Research Service, updated February 23, 2004; the Federal Judicial Center's Federal Judges Biographical Data Base (www.fjc.gov) and underlying data; and the Justice Department website at http://www.usdoj.gov/olp/nominations.htm. Sources vary in the judgeships they include, sometime excluding the special-jurisdiction Court of Appeals for the Federal Circuit, the District Court of Puerto Rico, and the territorial courts. The overall trends, though, are consistent. Whatever the source, figures are subject to qualification; for example, confirmation rates get misleadingly deflated by nominations submitted despite no chance of confirmation.

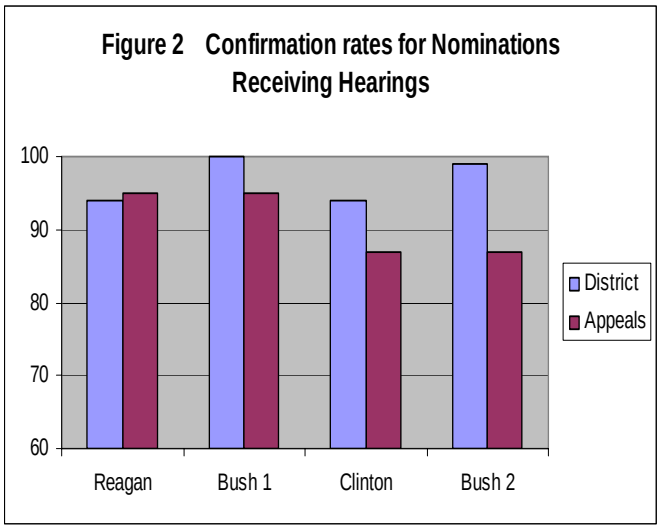
President Clinton nominated 91 individuals to the courts of appeals. Sixty-five of them (71 percent) were eventually confirmed, sometimes after renomination in a subsequent Congress. As of August 1, 2008, President Bush had nominated 82 individuals to those courts, and 60 (73 percent) had been confirmed, again, sometimes after renominations. Twenty-four district court nominees are pending for 29 vacancies. Eight appellate nominees are pending for ten vacancies. Action after the August recess on some district nominees is conceivable but appellate confirmations are probably over.

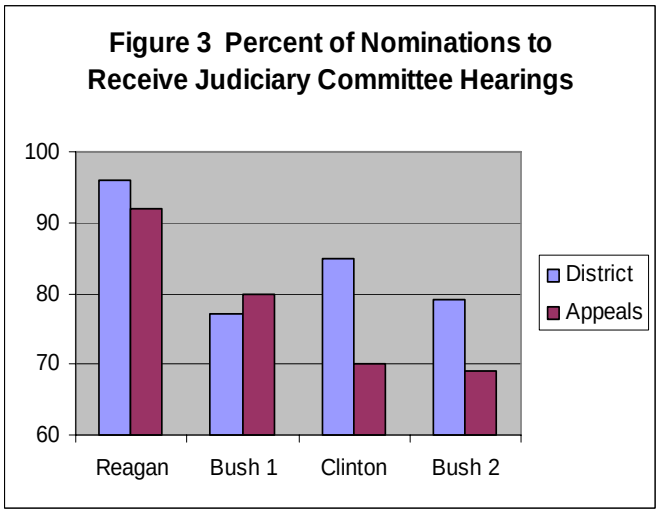


Receiving a Senate Judiciary Committee hearing remains a fairly reliable predictor of confirmation, more so for district than appellate nominations (Figure 2). Ninety-five percent of Reagan Administration appellate nominations that received hearings got confirmed, a figure that declined to 87 percent for the Clinton and Bush Administrations' appellate nominees. But the proportion of nominations that receive hearings has declined more sharply (Figure 3). Almost all Reagan nominations received hearings, declining to the 70 to 85 percent range since then, with a low of 70 and 69 percent for Clinton and Bush appellate nominations.

(Figures 2 and 3, like Figures 4 and 5 but unlike Figure 1, show action on nominations during the Congress in which the nomination was submitted. Some nominees who

received no hearing when first nominated received a hearing when renominated during a subsequent Congress. Eighty-five percent of Bush 2 appellate nominees, and 89 percent of his district nominees, for example, eventually got hearings.)





There is of course no historically validated rate for hearings or confirmations, and different people give different reasons for the patterns documented above. Some point to presidential obstinacy, others to Senate obstructionism. Some point to a reassertion of the Senate's constitutional role, others to presidential allegiance to electoral mandates. But the decline in confirmations is undeniable, and along with it, longer times from nomination to confirmation. The vacancy rate in August 2008 was low by historical standards, four percent on the district courts, six percent on the courts of appeals. Its ebb and flow over the last two administrations, though, has harmed the courts and subjected increasing numbers of nominees to long disruptions in their professional and personal lives—and discouraged potential nominees from letting their names be considered.

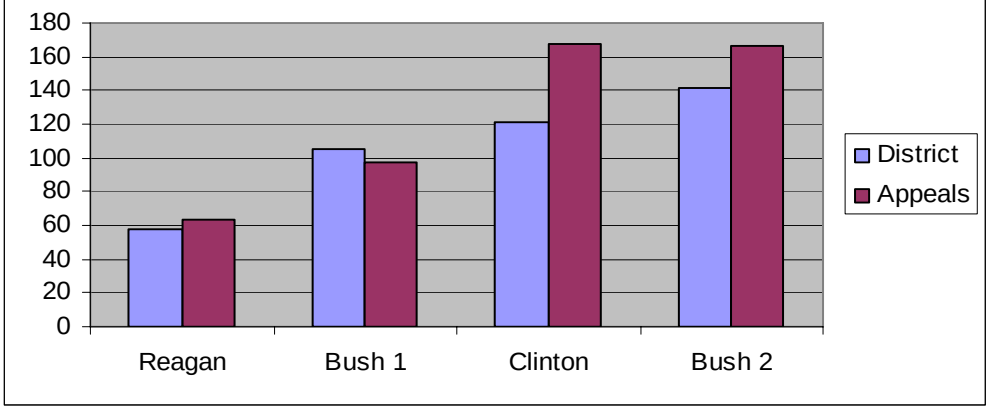
Longer Waits

The time between vacancy and nomination has grown, as has the time between nomination and confirmation. Sarah Binder and Forrest Maltzman found that, for

nominees eventually confirmed, average days between the vacancy's creation and the nomination's submission were fewer than 200 in the 1950s, but have risen to close to 400 since the first Bush Administration (and at one point in Clinton's administration exceeded 600 days). Binder and Maltzman attribute the longer vacancy-to-nomination periods to disagreements among Presidents, senators, and others involved in choosing nominees.

Average days from nomination to confirmation for Reagan appointees huddled in the 50 to 60 range but ballooned after that, topping 165 days (on average) for Clinton's and George W. Bush's appellate appointees (Figure 4). District judges waited on average about two months for confirmation in the Reagan Administration, and now wait more than four months. (Some additional days in the nomination-to-confirmation phase for Bush 2 judges may be because senators ask the American Bar Association Standing Committee on the Federal Judiciary to evaluate potential judges after the Senate receives their nominations; until the current administration, the ABA did so, for the White House, in the pre-nomination phase.)

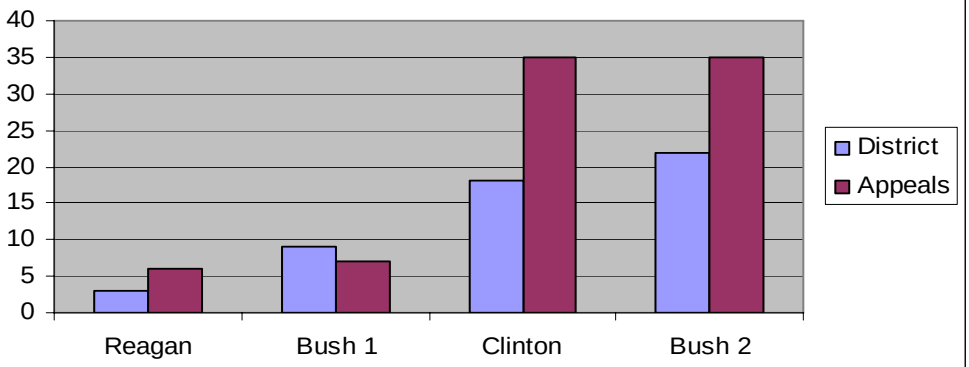
Figure 4 Average Days from Successful Nomination to Confirmation



Although *average* days to confirmation have not exceeded 180 for any administration in any Congress, an increasing proportion of appointees wait longer than 180 days for floor votes (Figure 5). Until the Clinton Administration, less than 10 percent of confirmations—district or appellate—took more than 180 days, but for both Clinton and

Bush, 35 percent of appellate nominations have taken that long. (Figures 4 and 5, moreover, show times only for nominations that were confirmed, not the time it took failed nominees to discern their fate.)

Figure 5 Percent of Confirmations Occuring More than 180 Days After Nomination



And Figures 4 and 5 show only times from *successful* nominations to confirmation, not the total time to confirmation for judges whose initial nominations were unsuccessful but who were renominated and confirmed in subsequent Senates. Presidents Reagan and George H.W. Bush renominated small handfuls of failed nominees in successive Congresses, but 26 percent of President Clinton's appellate nominees, and 30 percent of President George W. Bush's, were resubmissions. The Senate eventually confirmed half of the Clinton renominations and 64 percent of Bush's. For Bush's 16 renominees who were eventually confirmed, the average time from *initial* nomination to eventual confirmation is 769 days.

The Consequences of Contentiousness

Delays in filling vacancies leave some courts shorthanded and discourage interest in judgeships, especially by private attorneys whose law practices fall into limbo while Washington wrangles over their nominations. Charges and counter-charges about nominees' character, credentials, and policy views further discourage prospective

nominees from letting their names go into the wringer—and deplete public confidence in the courts.

Another consequence involves independent judicial decision making. To the extent that the contentiousness involves executive and legislative efforts to get potential judges to say how they might decide cases, the process jeopardizes the long-standing norm that the executive branch and the Senate will not try to extract decisional commitments from judicial candidates in return for nomination or confirmation. This norm—like norms that discourage impeachment, abolition or underfunding of courts, and drastic jurisdictional curtailment—has helped protect the judicial branch from undue encroachment by the other two, even though the Constitution specifically bars none of these steps. Courts-Congress scholar Charles Geyh warns: "If the President and Senate are prepared to jettison long-standing conventions in the service of judges who will decide cases to their liking, they may also be willing to rethink the independence norms that have long obstructed their control of judges and the judiciary in other areas of court governance."

Alleviating the Problem

Observers have offered a variety of fixes to tone down confirmation battles, including appellate judge term limits to reduce the stakes, party balance requirements in judicial appointments (as with independent regulatory commissions), and supermajority confirmation requirements to encourage consensus nominees. Whether any of these interventions would work is unclear, and all would require statutory change if not constitutional amendment, an unlikely prospect even in the most harmonious of times.

Two non-statutory proposals that hold greater promise, even in an era of polarized politics, are bipartisan commissions to help identify nominees and fixed timetables for processing them. *The time to press candidates to commit to these improvements is before the election.* Pre-election mutual disarmament may prevent knock-down, drag-out battles once the new administration and Senate are in place. A pre-election

agreement could save both institutions from unnecessary drains on their time, prestige, and ability to deal with vital policy issues.

The major 2008 presidential nominees should be asked, in a joint public forum, to pledge to take these four steps as President:

- Create a bipartisan appellate judge nominating commission and give priority consideration to candidates the commission recommends, with the understanding that the President will strongly prefer members of his party
- Urge all senators to appoint bipartisan district judge nominating commissions and give priority consideration to candidates jointly recommended by the same-state senators and their commissions, again with the understanding that the President will strongly prefer members of his party
- Observe pre-established time limits for selecting nominees for vacancies and consult in good faith with the bipartisan leadership of the Senate and of its Judiciary Committee, and with home-state senators, before making appointments and
- Urge the Senate to establish time limits for hearings and floor votes on nominees endorsed by bipartisan nominating commissions and whose nominations followed good-faith White House consultation. (Indeed, both nominees should agree to urge senators of their party to observe the time limits regardless of who is in the White House.)

These proposals will have an intuitive appeal to voters who expect candidates to endorse sensible changes. The steps are largely transparent, facilitating news media monitoring and good-faith implementation. And, although procedures endorsed bilaterally in 2008 could fall apart in 2009 over what constitutes "bipartisan commissions" or "good faith consultation," the near consensus that the process is not working well now makes a strong case for trying something different. (An August 2008 resolution of the American Bar Association House of Delegates, supported by a diverse array of court and legal groups, encouraged steps similar to those outlined here, except that instead of a timetable, it urged "the President and Senate to promptly fill

judicial vacancies, and act expeditiously, especially with respect to nominees recommended by bipartisan commissions."[3])

Bipartisan Commissions

Bipartisan commissions to recruit, evaluate, and recommend potential nominees can serve four important purposes. *First,* bipartisan commissions of respected leaders of the bar (and not just plaintiffs' lawyers), citizens' groups, and the business, labor, and academic communities can be forums of genuine, constructive consultation in the initial phase of nominee selection. *Second,* commissions can place a bipartisan stamp of approval on nominees—going beyond the American Bar Association's reports on nominees' professional qualifications. *Third,* commissions can attract qualified candidates whose lack of political clout discourages them from pursuing what they perceive—correctly or not—as purely patronage nominations. Fourth, commissions can help senators and the President strain out fringe candidates who have more political clout than potential judicial ability. That these things will happen is speculation to a degree, because state and federal nominating commissions used to date provide limited guidance on how those proposed here might perform.

State Commissions

Two-thirds of the states use commissions to help select judges for at least some courts. Procedures vary, but generally statutory or constitutional commissions, comprising judges, attorneys, and non-lawyers, develop short lists of candidates, from which the governor must fill the vacancy. Judges then stand for retention elections. Court reform groups have long endorsed this approach as superior to judicial elections, and a general consensus exists that it has improved the quality of the state judiciary. Criticisms of commissions in some states are part of broader claims that judges have become too unaccountable and too closely tied to the trial bar.

The approach proposed here differs from this typical state method in several particulars. It's obviously not a substitute for judicial elections; federal judges are appointed, not elected. And it doesn't bind the executive to name someone

[3] Disclosurer: I served on the ABA task force that drafted the resolution.

recommended by the commission, although a President who consistently ignored commission recommendations would lose the high ground in debates on judicial nominations, as well as the willingness of opposition senators to agree to a timetable for considering nominations.

Federal Commissions

The main federal experience with commissions comes from the U.S. Circuit Judge Nominating Commission appointed by President Carter in 1977 and the 30 commissions for district court nominees that senators created at Carter's urging. President Reagan disbanded the circuit-level commission soon after taking office, but his attorney general urged senators to use commissions to screen district court candidates. Today, senators in eight states use them; [4] in five of those states, both senators are Democrats.

Assessing the federal commissions' impact on the selection process and the quality of judges is difficult. The commissions functioned only briefly in numbers large enough to analyze. Furthermore, evaluations of the Carter-era commissions are bound up with whether they served Carter's goal of appointing more women and members of racial minorities as federal judges, and with some commissions' partisan character (80 percent of Carter's appellate commissioners were Democrats).

Evidence of the effect of the commissions currently in use is also sketchy. As of August 1, 2008, 63 of the Bush Administration's 244 district court appointees were nominated when senators had commissions in place (although it's not clear that all 63 were commission recommendations, or how bipartisan each of the commissions is). In any event, the 63 differ from the 181 other appointees in small ways. On average, they were confirmed slightly faster, have slightly higher American Bar Association

[4] *See* American Judicature Society, Federal Judicial Selection, Federal Judicial Nomination Commissions at http://www.judicialselection.us/federal_judicial_selection/federal_judicial_nominating_commissions.cfm?state=FD

[6] Based on data in the Federal Judicial Center's Biographical Directory of Federal Judges (www.fjc.gov); the nominee ratings of the ABA Standing Committee on the Federal Judiciary (http://www.abanet.org/scfedjud/ratings.html); and information on stated political party preferences of judges confirmed in the 107th-109th Senates, provided me by Professor Sheldon Goldman of the University of Massachusetts. Sarah Binder and Forrest Maltzman also find evidence that commission-recommended nominees may get confirmed faster than other judges, in *Advise and Dissent: The Struggle to Shape the Federal Bench and Why It Matters,* Ch. 7, Brookings Institution ms.

ratings, include slightly more ethnic minorities, and reported slightly lower Republican party membership and party activism.[6] These findings are suggestive, not dispositive, and may be artifacts of the greater proportion of former state judges among the 63.

Bipartisanship

Bipartisan commission membership is essential in this period of polarized politics, with both majority and minority senators ready and able to contest nominations. Realizing this, the Democratic senators who use commissions today appoint some Republican commissioners, named either by themselves or by state Republican leaders, similar to what Republican senators did during the Carter Administration.

Bipartisan commissions, though, won't mean bipartisan appointments. Commission or not, nominees will be heavily weighted with members of the President's party. A "winner take (almost) all" rule seems a strange way to award lifetime judgeships in a deeply divided country that settles presidential elections by narrow margins. But the rule is ingrained in our politics even while resting on the questionable notion that presidential and Senatorial elections indicate voter preferences for the type of judges to be put in office. Still, it would be asking too much for either party to allocate more than a handful of judgeships to members of the other party.

Good-faith bipartisan consultation, however, can provide the White House and senators with insight about nominees likely to provoke conflicts with costs greater than benefits to the President, Senate, potential nominees, and the courts. Former Senator Connie Mack (R-Fla.) used a bipartisan commission during the first Bush Administration. The commission would suggest three names, and then Mack would consult Democratic Senator Bob Graham, who, Mack recalled, "had an opportunity to say 'Connie, I think if you go with this particular candidate, we are going to have problems in the Senate.' . . . I did not take it as a political effort to try to stop somebody. I took it as a genuine concern on his part that needed to be addressed."

Commissions, of course, are hardly panaceas. Senators not of the President's party who object to the presidents' appointing heavily from his or her own party won't find

commissions of much use. And an administration that wants to use nominees to provoke confrontations demanded by a base of supporters is not going to spend much time on advice from bipartisan nominating commissions. But even if the commissions fall apart, would the system be any worse off for trying them?

Timetable

A self-imposed Senate timetable for processing nominations is a reasonable idea that's gotten tagged as a partisan ploy. In 1996, a bipartisan commission of the University of Virginia's Miller Center of Public Affairs, concerned about delays in processing President Clinton's nominees, called on the executive branch to nominate judges within 180 days of a vacancy's creation and on the Senate to vote on confirmation within 60 days of the nomination. Four years later, a Constitution Project Task Force endorsed this schedule.

President Bush proposed a timetable in 2002. He encouraged sitting judges to provide a year's notice of their intention to step down and proposed presidential nominations within 180 days of receiving notice of a vacancy or intended retirement; Judiciary Committee hearings within 90 days of nomination; and floor votes on each nominee within 180 days of nomination. The time frames themselves were reasonable, but the President doomed any chance it might have had by announcing it six days before the mid-term elections, while charging Democrats with obstructionism on judicial nominations. Further, the plan made no provision for presidential bipartisan consultation with Senate leaders and required floor votes even for nominees rejected by the Judiciary Committee. In March 2008, as Senate Republicans began a push for confirmation of more nominees, ranking Senate Judiciary Committee member Arlen Specter proposed a similar timetable but with a presumptive 90 day schedule from nomination to Senate floor vote.

Here is a more realistic timetable, which complements the use of bipartisan commissions:

1. Early announcement of retirements. Judges should provide a year's advance notice of their intention to resign from the bench or go on "senior status" (a form of semi-retirement during which most continue to do judicial work). Although judges cannot be compelled to announce their intentions, many do, and the Judicial Conference of the United States encourages such advance notice.

2. Expeditious appointments. The President should submit nominations to the Senate within 180 days of receiving notice of a vacancy.

3. Timely hearings. The Senate Judiciary Committee should hold a hearing within 90 days of receiving a nomination—if the nomination followed good-faith consideration of the bipartisan nominating commission's list and good-faith White House consultation with the Senate and Judiciary Committee leadership, and home-state senators. The Committee also could report out some nominations without hearings, which are often time-consuming formalities for district nominees.

4. Reliable floor votes. The Senate should hold an up-or-down floor vote on each "good faith" nominee within 90 days of approval by the Judiciary Committee and within 180 days after nomination if the Committee declines to act on a nomination.

Like bipartisan commissions, a timetable can bring procedural regularity to the process but requires only a minimum level of comity between the White House and the majority and minority parties in the Senate. (And, like commissions, informally agreed upon timetables could go off track; commission endorsements and good faith consultation might be insufficient to prevent filibusters.)

Concluding Observations

The proposal for a fair judicial appointments process advanced here is squarely in the interest of any President who wants to avoid judicial nomination minefields. In fact, both major candidates have called for confirmation battle restraint by some who are part of or affiliated with their own constituencies. Senator McCain joined the bipartisan "Gang of 14" senators who agreed to limit nomination filibusters while opposing the "nuclear option" Senate rule change to ban them. Senator Obama criticized "largely Democratic advocacy groups" for a "knee-jerk" attack on Senate Judiciary Committee chair Patrick Leahy for supporting Chief Justice John Roberts' confirmation, a confirmation that Obama opposed.

The interest groups that have driven the contentiousness in the judicial appointment process will likely press their White House or Senate contacts to reject these proposals. Here again is a trade-off. President Clinton traded praise from court-reform groups for his consultation with Senate Republicans and his moderate nominees in return for disappointment from more strident groups. That's a trade-off any candidate must consider, and, as the Clinton experience shows, it does not necessarily guarantee high confirmation rates.

This two-part proposal can defuse that situation, without hampering the President's ability to appoint party members, and it will shield the President from demands to appoint fringe candidates whose selection would stir controversy and weaken the quality of the judiciary. The proposal also is in the interest of senators, as former Senate majority leader Tom Daschle can attest. He lost his Senate seat in 2004, partly because of Democratic filibusters of judicial nominees.

Implementation of the proposal can significantly shorten the time that judgeships are vacant, especially when judges provide advance notice of their intention to leave. And, as implementation not only shortens the process but also makes it less of a gauntlet of attacks and probes, federal judicial service will become more inviting to the best candidates.

Acknowledgement

This paper was made possible in part by financial support from the Dwight D. Opperman Foundation (which had no role in its preparation), and by research support by former Brookings Governance Studies intern Allison Dwyer and former Governance Studies program assistant Michael Golgin.

Additional Resources

Berkson, Larry, Carbon, Susan, Neff, Alan. A Study of the U.S. Circuit Judge Nominating Commission. *Judicature 63*:105, September 1979.

Binder, Sarah A., and Maltzman, Forrest. Congress and the Politics of Judicial Appointments. In *Principles and Practice of American Politics, 3rd edition.* Washington, D.C.: CQ Press, 2007.

Geyh, Charles Gardner. *When Courts and Congress Collide, The Struggle for Control of America's Judicial System*. Ann Arbor, Mich.: University of Michigan Press, 2006 (especially chapters 4 through 6).

Goldman, Sheldon. *Picking Federal Judges: Lower Court Selection from Roosevelt Through Reagan*. New Haven, Conn.: Yale University Press, 1997.

Maltzman, Forrest. Advice and Consent: Cooperation and Conflict in the Appointment of Federal Judges. In *Institutions of American Democracy: The Legislative Branch.* Paul Quirk and Sarah A. Binder, eds. New York: Oxford University Press, 2005.

Neff, Alan. Breaking with Tradition: A Study of the U.S. District Judge Nominating Commissions. *Judicature 64*:257, 1981.

Scherer, Nancy. *Scoring Points: Politicians, Activists, and the Lower Federal Court Appointment Process.* Palo Alto, Calif.: Stanford University Press, 2005.

Wittes, Benjamin. *Confirmation Wars: Preserving Independent Courts in Angry Times.* United Kingdom: Rowman & Littlefield, 2006.

About the Author and the Project

Russell Wheeler

Russell Wheeler is a visiting fellow at the Brookings Institution. He studies the selection of U.S. judges and how courts function with other branches of government and the press, among other judicial topics. He is a former deputy director of the Federal Judicial Center, the research and education agency for the federal court system. He has also held positions at the National Center for State Courts and at the U.S. Supreme Court. He is the president of the Governance Institute.

Opportunity 08 aims to help 2008 presidential candidates and the public focus on critical issues facing the nation, presenting policy ideas on a wide array of domestic and foreign policy questions. The project is committed to providing both independent policy solutions and background material on issues of concern to voters.