Advice and Consent for Judicial Nominations: Can the President and the Senate Do Better?

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"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." Putting the Obama administration and Senate Democrats on notice, Republicans senators may have set the course for judicial selection in the 111th Congress. That course is likely to continue the trends of recent years with senatorial foot-dragging, declining confirmation rates, and protestations by both political parties about the broken nature of advice and consent.

In this paper, I explore 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. Assessing patterns over the past sixty years, I show broad trends in the treatment of judicial nominees and pinpoint developments that have fueled conflict over the makeup of the federal bench. In contrast to scholars who claim that the process of selecting federal judges has always been political, I argue that conflict over judicial appointees varies significantly over the postwar period and across the federal bench. Tempered by an appreciation for the difficulty of amending Senate rules and practices, I conclude by considering changes in the Senate's practice of advice and consent and the barriers to such reforms.

Competing Accounts of Judicial Selection

[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 [Accessed March 6, 2009].

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 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 ten 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.

As the media has paid more attention to the difficulties faced by judicial nominees in securing confirmation to the bench, 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 thereafter. Most often, scholars point to the battle over

[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," *Judicature* Vol. 86, no. 1 (July-August, 2002): 24-27. 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* (Ohio State University Press, 2002) and Nancy Scherer, *Scoring Points* (Stanford University Press 2005).

Robert Bork's nomination to the Supreme Court 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 these developments 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)

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[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," *Journal of Politics*, Vol. 64 (2002): 337-361.

[5] See Benjamin Wittes, *Confirmation Wars* (Hoover Institution, 2006), p. 59.

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 and the emergence of the courts as key policy makers—each of these forces have shaped to some degree the emergence of conflict over appointments 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 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 us to 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.

[6] See Nancy Scherer, *Scoring Points* (Stanford University Press, 2005), and Lauren Cohen Bell, *Warring Factions: Interest Groups, Money, and the New Politics of Senate Confirmation* (Ohio State University Press, 2002).

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 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. I certainly recognize the political nature of advice and consent, but also seek to identify the ways in politicians exploit Senate rules and practices to target appointees deemed most likely to shift the ideological tenor of the federal bench.

Patterns in Judicial 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, with confirmation rates dipping below fifty percent in some recent

[7] Lee Epstein and Jeffrey Segal, *Advice and Consent: The Politics of Judicial Appointments* (Oxford University Press, 2005), p. 4.

[8] Epstein and Segal, p. 3.

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.[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 Courts of Appeals for D.C. and for the 4th, 5th and 6th Circuits, for which over half of the nominations have failed since 1992. By focusing on the lower federal bench, we aim to explain both the marked temporal trend, as well as the disparate treatment of the circuits that we see in recent decades.

[Figures 1 and 2 about here.]

As the likelihood of confirmation has gone down, the length of time it takes for presidents to nominate and the Senate to confirm candidates for the bench 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 twenty 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

[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.

year and a half. As the confirmation process has dragged out in recent years, some candidates have become increasingly reluctant to wait it out. 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."[10] Nominees for federal trial courts have also experienced delays, although to a somewhat lesser extent as shown in Figure 3B. As I argue below, these multiple indicators of a judicial selection system potentially near its breaking point deserve attention and explanation. There is certainly something "new under the sun" when it comes to the state of advice and consent for candidates for the federal bench.

[Figures 3A and 3B about here.]

The Politics of Advice and Consent

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.

Partisan and ideological forces:

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

Partisan and ideological forces are inextricably linked in the contemporary Congress as the two legislative parties have diverged ideologically in recent decades. 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.

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 Midwestern 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

[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," *American Journal of Political Science*, 52 (3): 2008, pp. 471-89.

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 preferences 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. That procedural advantage for the majority party enhances the importance of support from the majority leader—and the majority party caucus by extension-- in shaping the fate of presidential appointees.

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 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 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 encountered by judicial nominees 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 in the recent past. 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 ten of the 24 nominations to the federal Courts of Appeals made by President Bush during the 110th Congress. Nominees for the less controversial federal trial courts did not fare much

better in the 110th, with just over sixty percent confirmed before the fall of 2008. More generally, over the past sixty 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 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 for 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 the data in 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 slow-down 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

[12] See Robert Kagan, *Adversarial Legalism* (Harvard University Press, 2001), Martin Shapiro, "Comment" in *Red and Blue Nation? Consequences and Correction of America's Polarized Politics*, Pietro S. Nivola and David W. Brady, Eds., (Washington, D.C.: Brookings Institution Press, 2008); Gordon Silverstein, *Law's Allure: How Law Shapes, Constrains, Saves and Kills Politics (*Cambridge University Press, forthcoming).

more central to the making of public policy, we should expect to find broader and heightened concern amongst politicians and political parties about the makeup of the bench.

Explaining Trends in Advice and Consent

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? Our answers to these questions are consequential as they help us 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, I track the fate of all nominations to the lower federal courts, focusing here on the Courts of Appeals between 1947 and 2006.[13] I use these data to estimate a model of the likelihood of confirmation for appellate court nominees, controlling for the forces noted above. The results shown in Table 1 can help us to disentangle the forces that shape the Senate's treatment of presidential appointees to the bench.[14] First, the

[13] I 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/. I 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

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 (the 109th, 2005-6), we estimate a thirty-three percent chance of being confirmed. As the two parties take increasing 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 ten percent when we control for the other forces at their mean values.[15]

[Table 1 about here.]

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 ninety percent; the chance of confirmation slips six 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

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American Bar Association and are available for the 101st-110th Congresses here: http://www.abanet.org/scfedjud/ratings.html. I thank Sheldon Goldman for ABA ratings for the previous congresses.

[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.

his or her home state. We also see a noticeable impact of an approaching presidential election, as confirmation is nearly thirty 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 seven 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% of the bench.[16] That tight ideological balance led the parties to stalemate over additional appointments to that bench, 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

[16] We determine the partisan balance of the bench from Gary Zuk, Deborah Barrow, and Gerald S. Gryski, "A Multi-user Database on the Attributes of U.S. Appeals Court Judges, 1801-1994." 1st ICPSR version. Ann Arbor, MI: Inter-University Consortium for Political and Social Research. For the period after 1994, we rely on the Historical Database of Federal Judges at http://www.fjc.gov and the roster of active judges maintained by the Alliance for Justice http://www.allianceforjustice.org [both accessed May 23, 3008].

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 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 likely have with the return of unified Democratic control under President Obama. 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 twenty 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. To the extent that President Obama can select nominees who are perceived to be moderate, if not right of center, the prospects for confirmation improve.

The New Wars of Judicial Selection

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 leaves no doubt that advice and consent has changed markedly in recent years. Far more attention is paid to these confirmation battles by the

[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.

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 three hundred 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 continuing 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 for the nomination. 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

[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, *Political Research Quarterly* 51:3 (September, 1998), 617-631, and Lauren Cohen Bell, *Warring Factions: Interest Groups, Money and the New Politics of Senate Confirmation* (Ohio State University Press, 2002).

Bush's focus on judicial nominations in stumping for Republican Senate candidates throughout his tenure in office.

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, my 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

[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.

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 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 twelve 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] Intense ideological disagreement coupled with the rising importance of a closely balanced federal bench has brought combatants in the wars of advice and consent to new tactics and new crises as the two parties struggle to

[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," *Perspectives on Politics* 5 (December 2007): 729-40.

shape the future of the courts. Of course, eight years of Republican rule still left an imprint on the bench: roughly 60 percent of the appellate court judges had been appointed by Republican presidents, up from 49 percent six years earlier.

How the arrival of the Obama administration will affect the confirmation process remains to be seen. Although the return of unified party control increases the prospects for confirmation of Obama's eventual nominees, the persistence of polarized Senate parties means that most nominees can expect a rocky confirmation road in the Senate. Of course, the president can smooth that path by selecting nominees deemed acceptable to Republican home state senators for any vacant judgeship.

Still, because the election of a Democrat to the White House is likely to speed up the retirement of sitting judges appointed by Democratic presidents, Democratic senators may be loath to sign off on centrist or right-leaning nominees to fill "Democratic" vacancies. Moreover, it is possible that arrival of unified Democratic control will break the log-jam that has prevented expansion of the federal judiciary since the last omnibus judgeship bill was enacted in 1990. Where new judgeships are created will likely reflect judicial caseloads, but also the party makeup of each state's Senate delegation, and potentially the partisan balance of the appellate courts. In short, there will be many opportunities in the 111th Congress to test the new president's commitment to bipartisanship and Democrats' willingness to apply that spirit and strategy to the shape and makeup of the federal bench.

Reforming Advice and Consent

I like to think that I am not naïve about reforming the Senate. The high threshold of Rule 22, requiring a two-thirds vote to end debate over resolutions to change the rules,

stands as a significant barrier to reforming the practice of advice and consent. Absent crisis or a widespread recognition that the current system of rules is broken and in need of change, efforts to reform the Senate typically fail.[22] Still, the practice of advice and consent is not fixed in stone. Senators do at times consider changes in Senate rules and practices, as evidenced by episodic reform of Rule 22 over the twentieth century and more recently by the attempt to ban judicial filibusters in 2005 via the nuclear option. Harnessing changes in the rules to senators' and presidents' incentives, I argue, is essential for designing politically feasible reforms. Here, I consider three potential reforms of judicial selection, offering an assessment of the benefits and drawbacks of each.

Commissions to Suggest Potential Nominees

Senators have at times used commissions to recruit and recommend candidates for federal district court judgeships, and, during the Carter administration, Courts of Appeals judgeships. As of early 2009, the count of old and new commissions stands at eight states: California, Colorado, Florida, Georgia, Hawaii, Texas, Washington, and Wisconsin—some of which followed a bipartisan model during the Bush years, ensuring an even or near even balance of commission members from both parties.[23] Does the use of commissions affect either the rate or pace of confirmation for nominations from those states? Because we need to control as much as possible for the nature of the selection process and the electoral and political contexts, I isolate nominations to the U.S. District

[22] On the history of the Senate filibuster and senators' mixed efforts at reform, see Sarah A. Binder and Steve S. Smith, *Politics or Principle? Filibustering in the U.S. Senate* (Washington, D.C.: Brookings Institution Press, 1997).

[23] There also appear to be moves afoot to create commissions in Massachusetts, Michigan, and Vermont.

Courts made by President George W. Bush during the 108th (2003-4) and 109th (2005-6) Congresses. In these two congresses, there were 156 nominations made to the federal district courts; in 42 of these nominating opportunities, selection commissions in five states were in operation and recommended nominees either to the senior home state senator from the president's party or directly to the White House.[24]

To assess the effects of commissions, I compare the rate and pace of confirmation for nominations from states employing a commission and from states with no commission—keeping in mind that selection by a commission does not guarantee nomination by the president. If commissions select nominees less likely to stir partisan opposition (and if they are nominated by the president), then we would expect nominations from commission states to move more swiftly through the Senate and encounter higher rates of confirmation.[25]

I find evidence that suggests the positive impact of nominating commissions.[26] Across the 108th and 109th Congresses, there were a total of 74 nominations made to federal trial courts located in states represented by two Democratic senators. Of those 74, 27 nominations were made in states with commissions in operation.[27] I find a twelve percent increase in the likelihood of confirmation for nominations from commission

[24] The states with operating commissions in place and that had a district court with at least one vacancy to be filled during the 108th and 109th Congresses included California, Florida, Georgia, Texas, and Washington .

[25] Here, I isolate the use of commissions in states with two Democratic senators during the Bush administration, since nominations from states with Republican senators should *a priori* move more quickly through the Senate to confirmation.

[26]

[27] In the 108th commission states with two Democratic senators included Florida, California, and Washington; in the 109th Congress, California and Washington.

states (an increase from 66 to 74 percent).[28] Drop the most contentious state of California, and the confirmation rate increases by some 35 percent. Nominations from Democratic-represented commission states committee states were pending on average just under five months; for nominees from Democratic states without commissions, the wait was nearly twice as long.[29] Granted, a full analysis of the impact of selection commissions requires more data, better information on whether or not presidents select nominees from commission lists, and an understanding of why, when, and under what conditions senators create commissions in the first place.[30]

A Judicial fast-track

In the wake of Democratic filibusters of several Courts of Appeals nominees, Republican majority leader Bill Frist of Tennessee in 2003 advocated creating a sliding scale for cloture on nominations, successively reducing the number of votes needed to invoke cloture so that a majority vote would be sufficient to invoke cloture on nominations on the fourth cloture motion. Adoption of the Frist proposal, of course, was never very likely, as motions to change Senate rules are debatable and require a two-thirds vote to invoke cloture.

A close cousin of the diminishing cloture threshold would be for the Senate to provide judicial nominations with the type of "fast track" consideration that has become common for treaty ratifications and even defense base closing recommendations. Fast-track authority for these other policy areas have been set statutorily by the Senate, limiting overall debate time on

[28] The difference is statistically significant at $p<.1$ (one-tailed t-test).

[29] Note here that I include the experiences of confirmed and failed nominees. Time elapsed for a failed nominees runs from the day the nomination is referred to the Senate until the nomination is rejected (rarely), withdrawn (occasionally), or left lingering in the Senate until the end of the Congress (the modal outcome). The differences reported are statistically significant at the $p< .01$ (one-tailed t-test).

[30] Are senators from states with less contentious political climates more likely to adopt these commissions than other senators? If so, the selection of commissions may reflect- rather than produce—consensus.

measures and guaranteeing an up or down vote at the end of the allotted time. By creating a fast track for judicial nominations—either by statutes or by Senate order-- filibusters would no longer be possible. But the creation of fast track for nominations would itself be subject to a filibuster, meaning that the Senate is unlikely to adopt this proposal alone under the current polarized environment. With the perceived stakes of judicial appointments high, the minority party is unlikely to agree to any procedural reform that diminishes its existing ability to influence the course of advice and consent.

One potential solution to this impasse would be to try a hybrid solution-- A potential solution to the partisan and institutional wars that have waged over judicial selection would be to try on a pilot basis a hybrid solution. The Senate could detail procedures for establishing acceptable bipartisan commissions. If the president selected a judicial candidate from a list of candidates recommended by a bipartisan commission, then the nominee would be afforded fast-track protection during the confirmation process. If the president selected someone not recommended by a bipartisan commission, fast-track protection would not apply. Presumably, presidents would make a strategic choice of which route to follow for each nomination. But by providing both parties and branches incentives to participate, the hybrid proposal might be attractive to enough to secure supermajority support for adoption. That said, the incentive to adopt the hybrid solution would presumably be stronger in periods of divided government when majority party senators seek input into the selection of judges and presidents anticipate a tougher path to confirmation for their nominees.

Requiring Sixty Votes for Confirmation

One other potential reform of judicial selection merits reflection. In contrast to recent efforts to reduce the number of votes required to cut off debate on nominations, prominent

legal scholars have suggested that the threshold for confirmation be increased. As Judith Resnick has argued, "A supermajority rule of sixty could…create incentives for the President to put forth individuals about whom a broad consensus of approval exists."[31] Although the Senate's Rule 22 currently requires sixty votes to cut off debate on a motion to confirm a nominee, the Resnick proposal would require sixty votes for the actual vote to confirm. Looking at the decade between 1993 and 2003, Resnick notes that relatively few nominees have been confirmed with fewer than sixty votes. In part because she believes that "the Senate has been too accommodating, approving too many candidates, too quickly," Resnick suggests that the overall impact of the rule would be benign, if not beneficial.[32]

I see things quite differently. My hunch is that the unintended consequence of raising the threshold for confirmation would be to reduce the rate of confirmation and likely would not encourage the selection of nominees with broad Senate support. First, under the Senate's Rule 22, there is a *de facto* supermajority requirement already in place. However, because nominees can be confirmed on a simple majority vote, a successful filibuster to prevent an up or down vote to confirm requires intensity on the part of senators; otherwise they would not carry the costs of mounting and sustaining a filibuster, often in face of stringent criticism from the president and organized interests. If a supermajority vote is required for confirmation, the costs of filibustering will go down as the minority now only needs to vote together, rather than to sustain a campaign against the nominee. Moreover, so long as the Senate lacks a previous question motion (which puts the Senate into the position of requiring unanimous consent to call up a nominee in executive session), senators' ability to place anonymous holds on nominees

[31] See Judith Resnick, "Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure," *Cardozo Law Review* 26(2):638.

[32] Resnick, "Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure," p. 638

would remain. The blue slip practice would also remain in place, suggesting that home state senators might still attempt to kill nominations at the committee stage.

Second, the moderating effect of supermajority rules is unclear. The effect of a supermajority rule on the ideology of the candidates selected by the president is conditional on the underlying distribution of opinion in the Senate. In a Senate in which ideology follows a bell-shaped curve—with a large moderate center and narrow tails—a supermajority rule could encourage the president to select a nominee close to the middle of the ideological spectrum. In a Senate in which the ideological distribution is bipolar—as we have had for the past three decades-- presidents have fewer incentives to select someone from the ideological center. In a bipolar Senate, the sixtieth senator—whose vote would be required for confirmation—is unlikely to be someone at the center of public opinion. A supermajority threshold might also encourage log-rolling among senators each seeking to help favored nominees secure confirmation, further undermining the likelihood that a sixty vote requirement would produce moderate nominees. Moreover, the moderating effect of a sixty vote rule also assumes that presidents' only goal is securing confirmation. The record of many recent nominations, however, is that presidents can use nominations to signal their ideological and policy commitments to organized interests and to conservatives or liberals within the legal profession. President Bush's efforts—re-nominating candidates whom Senate Democrats had previously filibustered—suggests that a supermajority requirement would not necessarily tame the president into making consensus appointments.

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."[33] 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.

Why should we care about the state of the confirmation process—especially if it brings to light the array of legal philosophies and policy views that potential judges would bring to the bench? Elsewhere, I explore the potentially harmful consequences of confirmation conflict for the performance of the courts and the public's views of judges and their decisions.[34] Here, I conclude with a brief thought about the impact of confirmation conflict on judicial legitimacy. As Fifth Circuit Court of Appeals Judge Carolyn King has observed, "Judicial independence is undermined…by the high degree of political partisanship and ideology that currently characterizes the process by which the President nominates and the Senate confirms federal judges." Such a process, King continues, "conveys the notion to the electorate that judges are simply another breed of political agents, that judicial decisions should be in accord with political ideology, all of

[33] 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=washingtonstory&sid=aPaxOvQrYI7k [Accessed August 7, 2008].

[34] See Sarah A. Binder and Forrest Maltzman, *Advice and Dissent: The Struggle to Shape the Federal Bench and Why it Matters* (Brookings Institution Press, forthcoming).

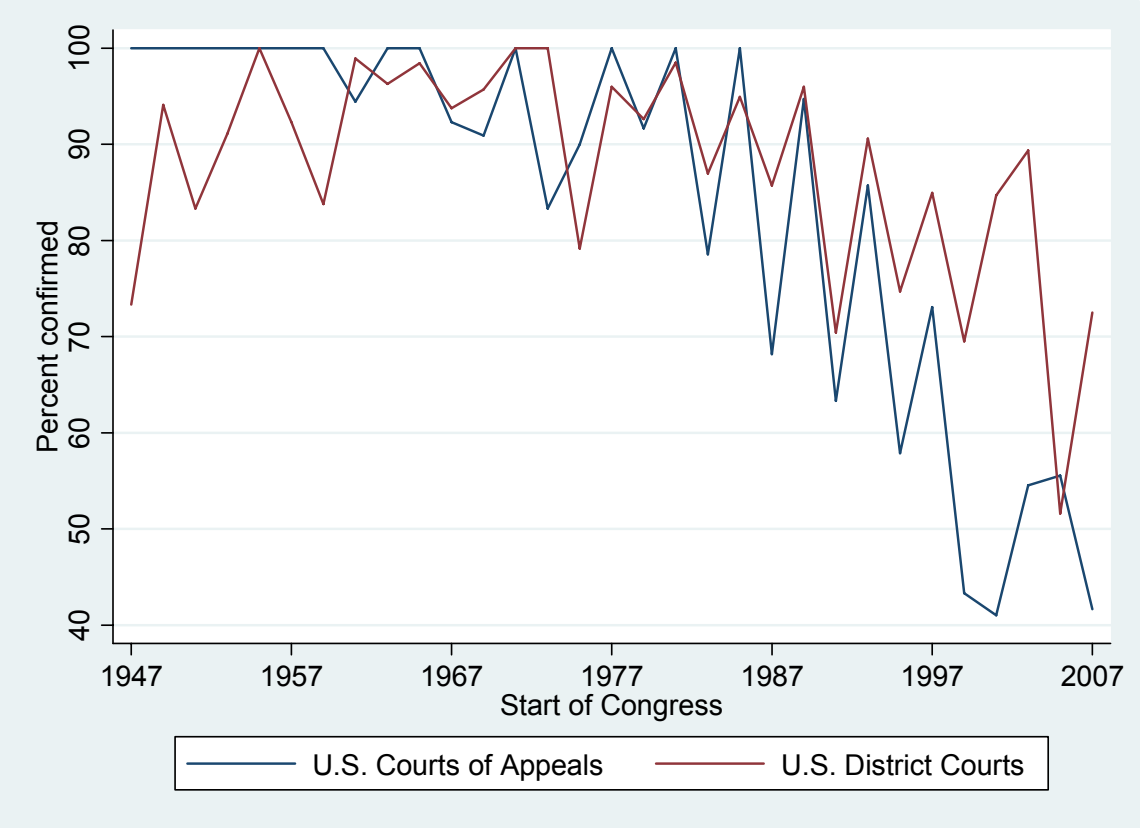
which tends to undermine public confidence in the legitimacy of the court."[35] Equally troubling, King suggests that the polarization of the appointments process may be undermining the very act of judging, as judges on the right or the left may produce opinions not "true to the rule of law."[36]

How widely Judge King's sentiment is shared within and beyond the Fifth Circuit we do not know, but her vantage point as former chief judge of the Circuit and her three decades on the appellate bench should encourage scholars and observers of judicial selection and the courts to take note of her warning and concerns. Unfortunately, there are few signs that the wars of advice and consent will abate anytime soon. More likely, they will intensify—especially when the next vacancy on the Supreme Court occurs. Unless the president selects someone with moderate ideological stripes, past battles over confirming judges will pale in comparison. 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.

[35] Carolyn Dineen King, "Challenges to Judicial Independence and the Rule of Law: A Perspective from the Circuit Courts." Hallows Lecture, Marquette University Law School, February 20, 2007. http://law.marquette.edu/s3/site/images/alumni/HallowsLecture2007.pdf [Accessed August 8, 2008], pp. 11 and 24.

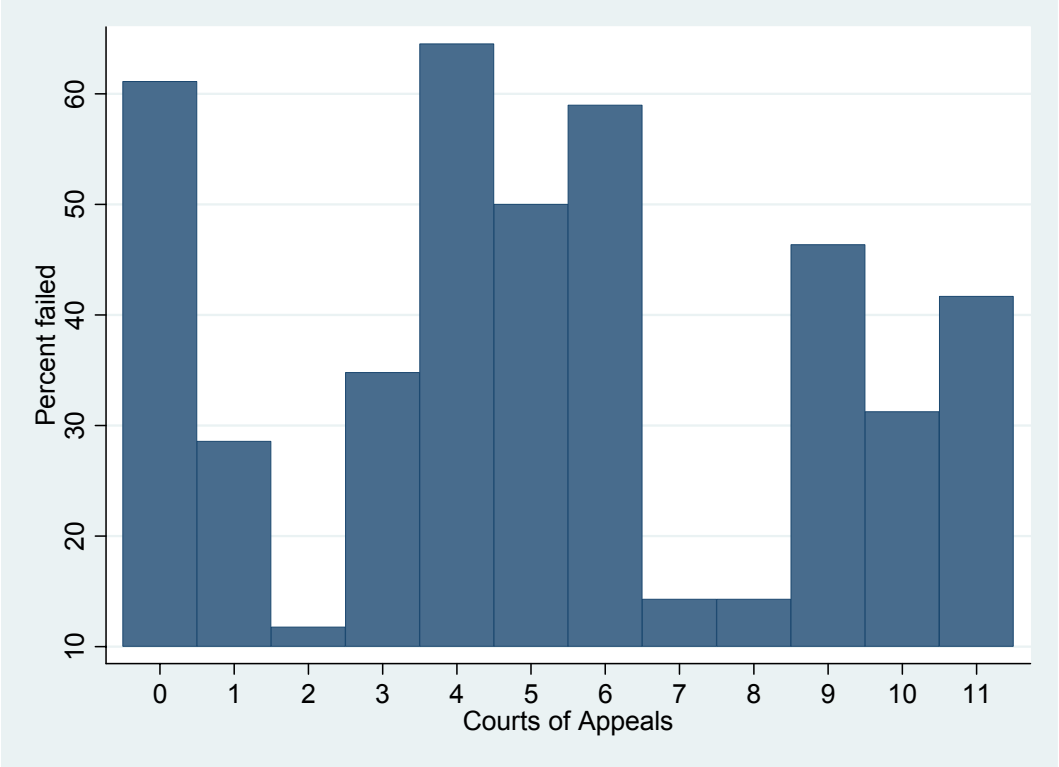
[36] King, p. 27.

Figure 1: Confirmation Rates for Judicial Nominations, 1947-2008



Source: Compiled by author 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.]

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 congress in the period. "0" court indicates Court of Appeals for the District of Columbia.

Figure 3A:
Length of Confirmation Process for Successful Courts of Appeals Nominees (1947-2008)

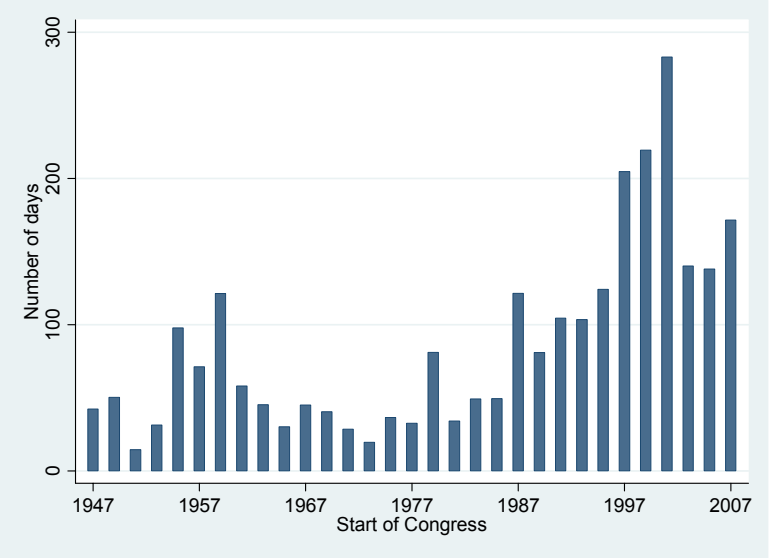
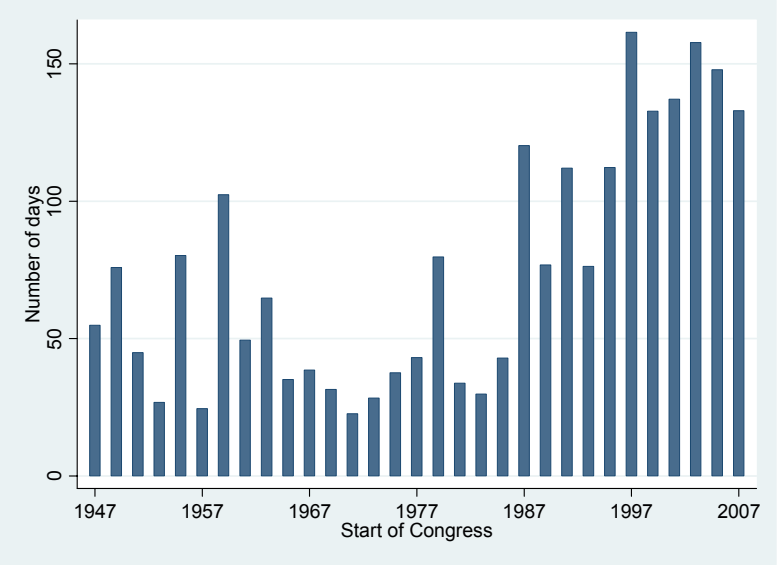


Figure 3B:
Length of Confirmation Process for Successful District Courts Nominees (1947-2008)



Source: Compiled by author 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.

Table 1
Determinants of Senate Confirmation (1947-2006)
(Nominations to the U.S. Courts of Appeals)

Variable	Coefficient (Robust SE)
Divided government	-.989 (.341)**
Balanced bench	-.695 (.307)*
Degree of partisan polarization	-9.593 (1.155)***
Ideologically distant home state senator	-.690 (.311)*
Nomination pending during a presidential election year	-2.297 (.293)***
Well qualified nominee	.458 (.296)
Constant	9.878 (.999)***
N	524
Log pseudolikelihood	-161.348
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.