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THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

ESSAYS

CONFIRMATION GRIDLOCK: THE FEDERAL JUDICIAL APPOINTMENTS PROCESS UNDER BILL CLINTON AND GEORGE W. BUSH

John Anthony Maltese*

One of the most important consequences of the 2002 midterm congressional election will be its effect on federal judicial appointments. With the same political party controlling the White House and the Senate for the first time in eight years, President George W. Bush should have an easier time securing Senate confirmation of his federal judges than he did during his first two years in office.¹ As of January 1, 2003, the president had sixty vacancies to fill on the federal bench, including

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1. In fact, Republicans had nominal control of the Senate from January through May 2001. Despite a fifty-fifty split between Democrats and Republicans, Vice President Dick Cheney had the tie-breaking vote in his constitutional role as president of the Senate. Democrats regained firm control of the Senate when Republican senator James Jeffords of Vermont became an independent in May 2001.

twenty-five on the courts of appeals.² There was also much speculation that Bush would have the opportunity to appoint at least one justice to the Supreme Court in 2003.³ The last Supreme Court vacancy had occurred in 1994 when Harry Blackmun resigned and President Bill Clinton appointed Stephen Breyer. With more than eight years since that vacancy, the nation faced the longest stretch without an opening on the Supreme Court since 1823.

That stretch had been dominated by “divided government.” Democrats controlled the White House while Republicans controlled both houses of Congress from 1995 through 2000. Republicans controlled the White House and the House of Representatives while Democrats controlled the Senate from 2001 through 2002.⁴ Those eight years of all but continuous divided government were part of an emerging pattern. From 1969 through 2002, the same political party had controlled the White House and both houses of Congress for only six out of twenty-four years.⁵ The same party controlled both the Senate and the White House for only twelve of those twenty-four.⁶ Although divided government has been the norm since World War II, unified government had been the norm before that.⁷ Divided control of the White House and the Senate has significant ramifications for judicial appointments because presidents only have the authority under the constitution to *nominate* individuals to fill those posts. Appointment only comes with the “advice and consent” of the Senate.

2. Various groups maintain current online lists of judicial vacancies and advocacy concerning the vacancies. These include the liberal Alliance for Justice, which maintains a website at <<http://www.allianceforjustice.org>>, and the conservative Free Congress Foundation, which maintains a website at <<http://www.judicialselection.org>>.

3. See, for example, Lyle Denniston, *Election 2002/Judicial Impact*, Boston Globe A40 (Nov. 7, 2002); Neil A. Lewis, *Expecting a Vacancy, Bush Aides Weigh Supreme Court Contenders*, 151 N.Y. Times A1 (Dec. 27, 2002).

4. As noted above, Republicans briefly controlled the Senate from January through May 2001, but this had no effect on judicial nominations.

5. Democrats maintained united government from 1977 through 1980, and again from 1993 through 1994.

6. Democrats controlled both the White House and the Senate from 1977 through 1980 and from 1993 through 1994. Republicans controlled both the White House and the Senate from 1981 through 1986.

7. Samuel Kernell & Gary C. Jacobson, *The Logic of American Politics* 259 (2d ed., CQ Press 2003).

The recent period of divided government has been accompanied by a trend toward polarized politics in the United States.⁸ Political scientists Jon Bond and Richard Fleisher have documented the decline in the number of “partisan nonconformists” in Congress (which they define as “moderate and cross-pressured Democrats and Republicans”).⁹

As a result, the parties in Congress have become more polarized, leading to a dramatic increase in partisan voting. The trend began in the House of Representatives after the 1982 midterm elections. The trend did not emerge in the Senate until some years later, but by the mid 1990s the Senate (as measured by party votes) was even more partisan than the House.¹⁰ Another political scientist, Gary Jacobson, has noted that this has been accompanied by an increase in partisanship among the electorate: Party loyalty has increased, ticket splitting has decreased, and the ideological gap between members of the two parties has widened.¹¹ All of this has helped to increase the likelihood of confirmation battles over judicial nominees. It also produced “confirmation gridlock”—a dramatic slowdown of the confirmation process for federal judges—begun by the Republicans after President Clinton’s re-election in 1996 and perpetuated by the Democrats in the first two years of the Bush administration.

Polarized politics led to confirmation battles and confirmation gridlock because judicial appointments were thought by participants in the process to have a potentially profound impact on public policy. White House aide Tom Charles Huston made this clear in a 1969 memorandum to President Richard Nixon. Huston noted that judicial nominations were

8. Richard Fleisher & Jon R. Bond, *Congress and the President in a Partisan Era*, in *Polarized Politics: Congress and the President in a Partisan Era* 1-8 (Jon R. Bond & Richard Fleisher, eds., CQ Press 2000).

9. Jon R. Bond & Richard Fleisher, Presentation of Paper, *The Disappearance of Moderate and Cross-Pressured Members of Congress: Conversion, Replacement and Electoral Change* (Am. Pol. Sci. Assn., Aug. 30-Sept. 2, 2001) (abstract on file with Journal of Appellate Practice and Process).

10. Fleisher & Bond, *supra* n. 8, at 3-4.

11. Gary C. Jacobson, *Party Polarization in National Politics: The Electoral Connection*, in *Polarized Politics: Congress and the President in a Partisan Era*, *supra* n. 8, at 19-23.

perhaps the least considered aspect of Presidential power. . . . *In approaching the bench, it is necessary to remember that the decision as to who will make the decisions affects what decisions will be made.* That is, the role the judiciary will play in different historical eras depends as much on the type of men who become judges as it does on the constitutional rules which appear to [guide them].¹²

Huston therefore urged Nixon to set specific criteria for the types of judges to be nominated (a litmus test) in an effort to influence judicial policymaking. If the president “establishes *his* criteria and establishes *his* machinery for insuring that the criteria are met, the appointments will be *his*, in fact, as in theory.”¹³ A memo from Nixon’s Chief Domestic Affairs Adviser, John Ehrlichman, that transmitted a copy of Huston’s memo to the president said: “Huston’s memorandum is well done and raises some interesting points.” Underneath, Nixon added a handwritten note: “To [Deputy Attorney General Richard] Kleindienst: RN *agrees*. Have this analysis in mind when making judicial nominations.”¹⁴

When the president and the Senate are controlled by the same political party and are in basic agreement about the direction that they believe public policy should take, it is relatively easy for the president to secure confirmation of his nominees. Thus, President Franklin Roosevelt achieved with little opposition a dramatic transformation of the Supreme Court that had significant policy consequences. Seven of his nine nominees were confirmed by voice vote. The remaining two—Hugo Black and William O. Douglas—were confirmed by votes

12. Memo. from Tom Charles Huston, White House aide, to President Richard Nixon, *Memorandum for the President* 1-2 (Mar. 25, 1969) (available as WHCF ExFG 50, the Judicial Branch (1969-1970), Box 1, White House Central Files, FG 50, Nixon Presidential Materials Project, College Park, Md.) (emphasis in original) (copy on file with Journal of Appellate Practice and Process).

13. *Id.* (emphasis in original).

14. Memo. from John D. Ehrlichman, President’s Chief Domestic Affairs Adviser, to Staff Secretary, copy to the President, *Tom Huston’s Memorandum re Federal Judgeships* (Mar. 27, 1969) (available in News Summaries (Mar. 1969), Box 30, President’s Office Files, Nixon Presidential Materials Project, College Park, Md.) (bearing Nixon’s handwritten note) (emphasis in original) (copy on file with Journal of Appellate Practice and Process).

of sixty-three to sixteen and sixty-two to four, respectively.¹⁵ At the Supreme Court level, presidents have made thirty-three of their 149 nominations when the opposition party controlled the Senate.¹⁶ Of the thirty-three nominations, only eighteen were successful—a success rate of 54.5 percent.¹⁷ This compares with a success rate of almost ninety percent when the same party controls the White House and the Senate (102 successful nominations out of 114 nominations).¹⁸

It is not surprising, then, that the long stretch of divided government at the end of the twentieth-century led to what Stephen Carter has called a “confirmation mess.”¹⁹

15. See Laurence H. Tribe, *God Save This Honorable Court* 148-49 (Random House 1985) (table).

16. I count the nominations made by presidents John Tyler and Andrew Johnson as occurring during periods of divided government. One might quibble with this, especially in the case of Tyler. Technically, Tyler was a member of the Whig party and Whigs controlled the Senate, but as a southerner Tyler disagreed with many of the policy positions of northern Whigs. (He had started out his career as a Democrat.) He was vice president under William Henry Harrison (chosen to balance the ticket in 1836), and assumed the presidency when Harrison died. He quickly made it clear that he would not act as a pawn of the Whig Party. As a result, all of Harrison’s original cabinet resigned in protest. Throughout his presidency, Tyler fought bitterly with the Whig-controlled Congress, and it was clear that Tyler was a Whig in name only. He ultimately disassociated himself from the party. Similarly, Vice President Andrew Johnson became president when Abraham Lincoln (a Republican) was assassinated. Johnson was a Democrat who, as senator, had opposed secession. As a symbol of bipartisan support for the Civil War, northern Republicans (calling themselves the National Union party) nominated him as Lincoln’s running mate in 1864. He fought relentlessly throughout his presidential term with the Republican majority in Congress (which tried, unsuccessfully, to remove him from office through impeachment). Tyler made six of the thirty-three nominations that I count as occurring during a period of divided government, and Johnson made one.

17. Omitting Tyler’s nominations (of which only one was successful), the success rate increases to 62.9 percent (seventeen out of twenty-seven nominations). Omitting both Tyler and Johnson, the success rate increases to 65.4 percent (seventeen out of twenty-six nominations).

18. Again, a caveat is in order. Presidents actually made 116 Supreme Court nominations through 2002 when the same political party controlled the White House and the Senate. (The nominations made by Tyler and Johnson are excluded from this figure.) Two, though, were withdrawn on technicalities and are not counted here: William Paterson in 1783 (whose subsequent re-nomination is counted as one of the 114 nominations) and Homer Thornberry in 1968. (Lyndon Johnson withdrew his nomination when the anticipated vacancy of Justice Abe Fortas’s seat failed to materialize.) If Tyler’s six nominations are included, the success rate drops to 85.8 percent (103 out of 120 nominations). If both Tyler and Andrew Johnson are included, the success rate drops to 85.1 percent (103 out of 121 nominations).

19. Stephen Carter, *The Confirmation Mess: Cleaning Up the Federal Appointments Process* (Basic Books 1994).

Compounding the mess have been contentious public policy debates—a “cultural civil war,” as reporter E.J. Dionne has put it, over some of the most divisive issues imaginable (with race and abortion at the forefront).²⁰ Race prompted senators to start asking how judicial nominees might vote in specific cases. The landmark Supreme Court ruling in *Brown v. Board of Education*²¹ served as the catalyst. Conservative southern Democrats condemned the unanimous decision as an activist ruling that changed the meaning of the Civil War amendments to the constitution and invaded states’ rights. It is probably no coincidence that only since 1955 has every Supreme Court nominee testified.²² Before 1955, testimony by nominees was a rare phenomenon. No nominee testified until Harlan Fiske Stone in 1925 (although some earlier nominees, such as George Williams in 1873 and John Marshall Harlan in 1877, did communicate in writing to the committee).²³ Of the next eighteen nominees from Charles Evans Hughes in 1930 through Earl Warren in 1954, only three testified (William O. Douglas in 1939, Frank Murphy in 1940, and Robert Jackson in 1941).²⁴

In the years after 1955, southern Democrats used their questioning of nominees to decry the Court’s activism in *Brown* and to ask the nominees about their judicial philosophy. Sometimes the questioning was indirect, as when Sen. James O. Eastland of Mississippi, the chair of the Senate Judiciary Committee, asked William Brennan in 1957: “Do you think the Constitution of the United States could have one meaning this week and another meaning next week?”²⁵ The question clearly

20. *Nightline, A Town Hall Meeting* (ABC News Oct. 16, 1991) (comments of E.J. Dionne) (notes taken during broadcast on file with author).

21. 347 U.S. 483 (1954).

22. The lone exception is Douglas Ginsburg in 1987, who would have testified, but was forced to withdraw before committee hearings.

23. John Anthony Maltese, *The Selling of Supreme Court Nominees* 93-97 (Johns Hopkins U. Press 1995).

24. John J. Parker wanted to testify in 1930, but did not. Later that same year, Owen Roberts attended the hearings on his nomination in case the committee had any questions. (It did not.) It has been erroneously reported that Reed did testify. See James A. Thorpe, *The Appearance of Supreme Court Nominees Before the Senate Judiciary Committee*, 18 J. Pub. L. 371, 375 (1969). The transcript of the hearing shows no testimony, however, and the committee was in executive session just long enough to vote on Reed. See Maltese, *supra* n. 23, at 101, 167 n. 52.

25. See Carter, *supra* n. 19, at 67 (quoting Sen. Eastland).

referred to *Brown*, which had overturned the “separate but equal” doctrine of *Plessy v. Ferguson*,²⁶ but did not directly name it. On the other hand, southern Democrats asked Potter Stewart very pointed questions about the case in 1959. After Stewart evaded South Carolina Senator Olin Johnston’s query as to whether he was a “creative judge” or one who followed precedent, Senator John McClellan of Arkansas asked point blank: “Do you agree with the view, the reasoning and logic applied . . . and the philosophy expressed by the Supreme Court in arriving in its decision in the case of *Brown v. Board of Education* on May 17, 1954?”²⁷

Six years later, southern Democrats led the opposition to Lyndon Johnson’s nomination of Thurgood Marshall, the first African American nominated to sit on the Court and the NAACP lawyer who had argued and won in *Brown*. Marshall’s opponents used a variety tactics. Senator Sam Ervin of North Carolina accused Marshall of repudiating and ignoring the original intent of the fourteenth and fifteenth amendments.²⁸ Senator Strom Thurmond of South Carolina asked Marshall more than sixty complicated questions emphasizing facts about political figures from the 1860s, all designed to make Marshall look inept and hostile to original intent.²⁹ Chairman Eastland hinted that Marshall had Communist tendencies by noting that one of Marshall’s judicial opinions had cited a book by Herbert Aptheker whom Eastland alleged “had been for many years an avowed Communist and was the leading Communist theoretician in the United States.”³⁰ Marshall was ultimately confirmed by a large margin (sixty-three to eleven), with all of the opposition coming from southern senators.

Part of Richard Nixon’s southern strategy for winning the White House in the 1968 presidential election included a pledge to appoint strict constructionists to the Supreme Court. His success paved the way for Republican inroads into the south

26. 163 U.S. 537 (1896).

27. See Maltese, *supra* n. 23, at 109-10 (quoting Sen. McClellan); see also Carter, *supra* n. 19, at 67-68.

28. Carter, *supra* n. 19, at 130.

29. Henry J. Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court*, 293-94 (3d ed., Oxford U. Press 1992).

30. See Carter, *supra* n. 19, at 76 (quoting Sen. Eastland).

(Nixon won North and South Carolina, Tennessee, Virginia, and Florida in 1968). But the Senate, controlled by the opposition, defeated Nixon's first two attempts to appoint a southern strict constructionist to the bench: Clement Haynsworth in 1969 and G. Harrold Carswell in 1970. Both were defeated by a coalition of northern Democrats and moderate to liberal Republicans spurred on by lobbying from organized labor and the NAACP. In retrospect, Haynsworth's defeat was probably a mistake. Carswell's was not. His voting record as a federal judge suggested a hostility to desegregation, but the smoking gun that secured Carswell's defeat was a 1948 speech that he made when running for a seat on the Georgia state legislature. "I am a southerner by ancestry, birth, training, inclination, belief, and practice," he had said.³¹

I believe the segregation of the races is proper and the only practical and correct way of life in our states. I have always so believed, and I shall always so act. . . . I yield to no man . . . in the firm, vigorous belief in the principles of white supremacy, and I shall always be so governed.³²

Nixon finally filled the vacancy with Harry Blackmun from Minnesota who, ironically, went on to write the majority opinion in *Roe v. Wade*.³³ The seven-to-two ruling, which expanded the unenumerated constitutional right of privacy, led to new debates about judicial activism and plunged the Court into the middle of a moral debate about abortion. By 1987, changes in the composition of the Court had eroded its support for *Roe* to a bare five-four majority. With Lewis Powell's resignation that year, the Court was evenly divided. Powell's successor would decide the fate of *Roe*. President Ronald Reagan's nomination of Robert Bork, who had publicly stated his belief that *Roe* should be overturned, created a storm of controversy. Opposition Democrats controlled the Senate, and more than 400 interest groups lobbied for and against Bork's confirmation.³⁴ Unlike his

31. See Maltese, *supra* n. 23, at 14 (quoting Carswell).

32. *Id.*; see also *id.* at chs. 1, 5 (including discussions of Carswell and Haynsworth).

33. 410 U.S. 113 (1973).

34. Maltese, *supra* n. 23, at 36. Interest groups had participated sporadically in the Supreme Court confirmation process since at least 1881, and had helped to defeat the nominations of John J. Parker in 1930, Abe Fortas in 1968, Clement Haynsworth in 1969, and G. Harrold Carswell in 1970, but the scope of their involvement in the Bork confirmation was unprecedented. See *Id.* at ch. 3; see also Scott H. Ainsworth & John

predecessors, Bork willingly answered questions about his judicial philosophy and how he might vote in specific cases. That confirmation battle was a watershed in the sense that Bork was clearly a highly qualified nominee. Unlike earlier nominees who had been rejected, Bork could not be linked to conflict of interest charges or overtly racist statements. Critics did charge that Bork would “turn back the clock” on civil rights and reproductive freedoms, but the real debate was about policy, not character or qualifications.

In short, Bork’s nomination brought to the forefront the question of when it was legitimate for the Senate to reject a nominee. Could it reject a nominee on pure policy grounds? On this question, the constitution is not clear.³⁵ Reagan had complicated the matter by establishing the President’s Committee on Federal Judicial Selection, staffed by representatives of the White House and the Department of Justice, to screen all judicial nominees. Political scientist Sheldon Goldman called it “the most systematic judicial philosophical screening of judicial candidates ever seen in the nation’s history.”³⁶ In essence, Reagan had institutionalized what Huston had suggested to Nixon in his 1969 memo.

Critics called Reagan’s screening an ideological litmus test designed to promote judicial policymaking, and members of his administration did not disagree. White House counsel Fred Fielding said the system was designed to choose “people of a certain judicial philosophy,” and Attorney General Edwin Meese III said that it was a way to “institutionalize the Reagan revolution so it can’t be set aside no matter what happens in future presidential elections.”³⁷ Meese overstated the power of judicial appointments, but given the life tenure enjoyed by federal judges, careful oversight of judicial selection would allow Reagan to influence judicial policymaking long after

Anthony Maltese, *National Grange Influence on the Confirmation of Stanley Matthews*, 20 *Soc. Sci. History* 41 (Spring 1996).

35. For an excellent overview of the relevant constitutional language, and the framers’ debates over it, see James E. Gauch, *The Intended Role of the Senate in Supreme Court Appointments*, 56 *U. Chi. L. Rev.* 337 (1989).

36. Sheldon Goldman, *Reagan’s Judicial Legacy: Completing the Puzzle and Summing Up*, 72 *Judicature* 318, 319-20 (Apr.-May 1989).

37. Fielding and Meese were both quoted in David M. O’Brien, *Judicial Roulette* (Priority Press 1988). *See id.* at 61-62, 21-24.

leaving the White House. By the time Reagan did leave office, he had set a record for the number of lower federal judges appointed: 290 district court judges and seventy-eight appeals court judges.³⁸ He had also elevated William Rehnquist to Chief Justice and appointed three associate justices to the Supreme Court (Sandra Day O'Connor, Antonin Scalia, and Anthony Kennedy).

Democrats who controlled the Senate asked: If the president selects nominees on the basis of their judicial philosophy (how they will vote in certain cases), why can't the Senate, under its constitutional power to offer "advice and consent," reject nominees for the same reason? Liberals became the ones applying strict scrutiny to judicial nominees and asking questions at confirmation hearings about their judicial philosophy. In the end, they rejected Bork's nomination. Republicans cried foul. President Reagan said that "the process of confirming a Supreme Court Justice has been reduced to a political, partisan struggle."³⁹ Yet the Senate has rejected nominees on purely political grounds since the very earliest days of our history (witness the Senate's rejection of George Washington's nomination of John Rutledge to be chief justice of the Supreme Court in 1795—an event I have described elsewhere as the first borking of a Supreme Court nominee).⁴⁰ Lord Bryce, the British chronicler of American government, observed in the 1800s that the Senate could reject a nominee "on any ground which it pleased, as for instance, if it disapproved his political affiliations, or wished to spite the President."⁴¹ Even George Washington wrote in 1789 that "as

38. Sheldon Goldman, *Picking Federal Judges: Lower Court Selection from Roosevelt through Reagan* 348-50, 354-56 (Yale U. Press 1997) (tbl. 9.1, 9.2). The number increases slightly if you include Reagan's appointment of non-Article III judges, who staff specialized courts and do not have life tenure.

39. Ronald W. Reagan, *Informal Exchange With Reporters on the Nomination of Robert H. Bork To Be an Associate Justice* (Oct. 1, 1987) in *Weekly Compilation of Presidential Documents* vol. 23, no. 39, 1105 (Pres. Docs. Serv., Off. of the Fed. Register, Natl. Archives & Records Admin. Oct. 5, 1987).

40. Maltese, *supra* n. 23, at 31; *see also id.* at ch. 2 (describing circumstances of Rutledge's nomination and Senate's failure to confirm his appointment).

41. Eugene W. Hickock, Jr., *Judicial Selection: The Political Roots of Advice and Consent*, in *Judicial Selection: Merit, Ideology, and Politics* 10 (Natl. Leg. Ctr. for the Pub. Interest 1990) (quoting Lord Bryce).

the President has a right to nominate without assigning reasons, so has the Senate a right to dissent without giving theirs.”⁴²

In fact, one might argue that the Bork battle and the ensuing confirmation mess is not so much a sign that the process itself is broken, as it is a byproduct of the gridlock created by divided government and an electorate unwilling to give a clear mandate to a single political party—or even a president. Neither George W. Bush in 2000, nor Bill Clinton in either 1992 or 1996, received fifty percent of the popular vote. (Indeed, Al Gore won the popular vote in 2000.) Even Ronald Reagan’s “landslide” in 1980 amounted to only 50.7 percent of the popular vote (although he won 90.9 percent of the electoral college vote). It is this stalemate that has fostered the confirmation mess.

Stalemate seemed particularly inevitable after the contested 2000 presidential election. When George W. Bush took office in January 2001, the Senate was evenly divided between Democrats and Republicans for the first time since 1883. Bush was the first president since Benjamin Harrison in 1888 to take office after losing the popular vote.⁴³ In the highly controversial case, *Bush v. Gore*,⁴⁴ a five-four Supreme Court stopped further recounts in Florida, thereby guaranteeing that Bush would win the White House. Yale law professor Bruce Ackerman was not alone in calling the decision an unprincipled ruling, but he went even further. As he wrote in February 2001:

In our democracy, there is one basic check on a runaway Court: presidential elections. And a majority of the justices have conspired to eliminate this check. The Supreme Court cannot be permitted to arrange for its own succession. To allow this president to serve as the Court’s agent is a fundamental violation of the separation of powers. It is one thing for unelected judges to exercise the sovereign power

42. George Washington, *Conference with a Committee of the United States Senate, August 8, 1789*, in *The Papers of George Washington* 401 (W.W. Abbot ed., U. Press of Va. 1989).

43. As a point of comparison, Gore’s popular vote margin of 539,898 votes over Bush was almost five times the size of John F. Kennedy’s 1960 popular vote margin of 114,673 votes over Richard Nixon, and almost 30,000 more votes than Nixon’s 1968 margin of 510,645 votes over Hubert Humphrey. See Kernell & Jacobson, *supra* n. 7, at 579-80 (app. 8) (showing vote totals).

44. 531 U.S. 98 (2000).

of judicial review; it's quite another for them to insulate themselves yet further from popular control. When sitting justices retire or die, the Senate should refuse to confirm any nominations offered up by President Bush. . . . The right-wing bloc on the Court should not be permitted to extend its control for a decade or more simply because it has put George W. Bush into the White House.⁴⁵

Bush entered office under a cloud of illegitimacy and with the highest *disapproval* rating of any incoming president since polling began (twenty-five percent according to the Gallup Poll).⁴⁶ When Democrats regained control of the Senate in May 2001, it seemed unlikely that Bush could achieve sweeping change on the judiciary. Nominating the types of ideal justices that he had touted during his presidential campaign (Antonin Scalia and Clarence Thomas) would surely provoke strong Senate opposition, especially given the highly partisan voting patterns observed there. An analysis by Congressional Quarterly of roll-call voting in the Senate during Bush's first six months in office showed a dramatic increase in partisan voting. It found "party unity" (defined as the percentage of recorded floor votes on which a majority of one party voted against a majority of the other party) up from 48.6 percent in 2000 to 64.1 percent in the first months of the Bush administration.⁴⁷

At the same time, the president's public approval was slipping. A Gallup poll conducted September 7-10, 2001, showed it at a new low: fifty-one percent.⁴⁸ Then came the dramatic terrorist attacks on September 11 and Bush's approval ratings skyrocketed. Virtually overnight they jumped to eighty-six percent approval. Gallup called the thirty-five-point jump

45. Bruce Ackerman, *The Court Packs Itself*, in *The American Prospect* (Feb. 12, 2001) (online edition) (available at <<http://www.americanprospect.com>>; copy on file with Journal of Appellate Practice and Process).

46. David W. Moore, *Initial Job Approval for Bush at 57 Percent, But Highest Disapproval of Any President Since Polling Began* (Feb. 6, 2001) (Gallup poll release) (available at <http://www.gallup.com/subscription/?m=f&c_id=9878> (subscription-only service); copy of summary on file with Journal of Appellate Practice and Process).

47. Dana Milbank, *In the Rose Garden, Bush, Aides Revel in Their Successes*, Wash. Post A4 (Aug. 4, 2001).

48. See *Bush Job Approval Was at 51% Immediately Before Tuesday's Attacks* (Sept. 12, 2001) (Gallup poll analysis) (available at <http://www.gallup.com/subscription/?m=f&c_id=10843> (subscription-only service); copy of summary on file with Journal of Appellate Practice and Process).

“the highest rally effect for any president in the past half century.”⁴⁹ By September 22, 2001, Bush’s approval rating had reached ninety percent: the highest ever recorded by the Gallup organization for a president.⁵⁰ Though moderating some, Bush’s approval ratings remained high through 2002 (staying above eighty percent for almost six months, above seventy percent for another four, and not dipping below sixty-one percent through December 2002).

Bush attempted to use his newly found support to secure his policy initiatives and appoint conservative judicial nominees. He reiterated his vow to get “good conservative judges appointed to the bench and approved by the United States Senate.”⁵¹ But despite an initial period of bipartisanship after September 11, the Senate objected and handed President Bush his first defeat of a judicial nominee on March 14, 2002, when the Senate Judiciary Committee rejected his nomination of District Judge Charles W. Pickering of Mississippi to fill a vacancy on the Fifth Circuit. Voting strictly along party lines, the nineteen-member Senate Judiciary Committee rejected the nomination by a vote of ten-to-nine, and refused to send the nomination out of committee for a full Senate vote. Race again played a role in the defeat. Democrats pointed to Pickering’s previous record as a judge and his contacts, as a Mississippi state legislator in the 1970s, with the Sovereignty Commission—created by the state in 1956 to lead the effort to preserve segregation (although a thorough investigation of Pickering’s past by the Atlanta Journal-Constitution has since suggested that the evidence does not support the charges of racism leveled against him).⁵²

49. David W. Moore, *Confidence in Leaders: Americans Rally Around Government Leaders in Wake of Terrorist Attacks* (Sept. 14, 2001) (Gallup poll analysis) (available at <<http://www.gallup.com>> (subscription-only service); copy on file with Journal of Appellate Practice and Process).

50. Gallup began its presidential approval polls in 1938 when Franklin Roosevelt was in the White House. See Jeffrey M. Jones, *Gallup Tuesday Briefing: Bush Approval Ratings One Year After the Peak* (Oct. 1, 2002) (available at <<http://www.gallup.com/poll/tb/goverPubli/20021001b.asp?Version=p>> (subscription-only service); copy on file with Journal of Appellate Practice and Process).

51. Reuters, *President Says “Good, Conservative” Judges Needed*, San Diego Union-Tribune A-6 (Mar. 29, 2002) (quoting Pres. George W. Bush).

52. Neil A. Lewis, *Divisive Words: Judicial Appointments*, 151 N.Y. Times A30 (Dec. 17, 2002); Janita Poe & Tom Baxter, *Trials of a Southern Judge: Evidence Doesn’t*

White House press secretary Ari Fleischer criticized the Democratic leadership in the Senate for turning Pickering's confirmation into a political battle—one “marred by partisanship and ideology, when it should be marked by success and bipartisanship.”⁵³ Fleischer added:

The American people want to be able to look at Washington and say that even though they have differences of approach and differences of opinion, at the end of the day the Democrats and Republicans are able to get together and get things done for the country. And that's what's so distressing about the process that the Senate leadership has chosen to take in this matter with Judge Pickering. They have chosen a process that is a partisan one, that defies bipartisanship.”⁵⁴

Democrats responded that it was the president who had defied bipartisanship by failing to nominate consensus candidates and for choosing, instead, to “stack the courts” with conservative ideologues.⁵⁵ To them, consensus nominees were especially important given the tenuousness of the president's electoral victory in the 2000 election. Where was the mandate for a major ideological overhaul of the federal courts? As Senator Charles Schumer of New York put it:

The choice is this: nominate reasonable, moderate men and women who belong on the bench and we'll confirm them right away. Nominate ideologues willing to sacrifice the interests of many to serve the interests of a narrow few, and you'll have a fight on your hands. It's that simple.⁵⁶

Democrats were also angry about actions taken by Republicans—both during the last six years of the Clinton administration, and during the brief period from January through

Support Charges of Racism Against Charles Pickering, Atlanta Journal-Constitution 1E (Mar. 9, 2003).

53. Ari Fleischer, Press Briefing (Mar. 14, 2002) (transcript and audio available at <<http://www.whitehouse.gov>>; copy of transcript on file with Journal of Appellate Practice and Process).

54. *Id.*

55. Joan Biskupic, *Senate Panel Rejects Bush's Judicial Nominee 10-9*, USA Today 8A (Mar. 15, 2002) (quoting Sen. Schumer).

56. CBS News, *Squabbling Over Judges* (May 9, 2002) (video of Sen. Schumer's remarks) (available at <<http://www.cbsnews.com>>; copy of transcript on file with Journal of Appellate Practice and Process).

May 2001, when Republicans had nominal control of the Senate. During the Clinton administration, the Republicans orchestrated a major slowdown of the Senate confirmation process and worked hard to block Clinton nominees. The slowdown had its genesis when Republicans won control of the Senate in the 1994 midterm elections, but it really took off after Clinton's re-election in 1996. Pressure from conservative groups, such as the Judicial Selection Monitoring Project, also helped to precipitate the Republican strategy. The Judicial Selection Monitoring Project criticized Republican senators for voting to support Clinton's nominees in 1995 and 1996. (The Senate confirmed ninety-nine percent of Clinton's first-term judicial nominees without a roll-call vote.)

Since the 1994 midterm elections, Clinton had consulted with members of the Republican majority in the Senate. He seemed less interested in appointing ideologically rigid judges than with using his appointments to create a demographically representative judiciary filled with more women and minorities.⁵⁷ Early studies of the voting behavior of Clinton's first-term judges (including those appointed when Democrats controlled the Senate) showed a moderate voting record on the bench.⁵⁸ His nominees also had the highest American Bar Association ratings of the past four presidents.⁵⁹ Nonetheless, a fundraising letter for the Judicial Selection Monitoring Project signed by Robert Bork in September 1997 charged that "over the past 4½ years, [Clinton's] more than 200 . . . judicial appointments have been drawn almost exclusively from the ranks of the liberal elite. These judges blazed an activist trail, creating an out-of-control judiciary."⁶⁰ Earlier that year, the Project had sent an open letter to President Clinton and all one

57. Sheldon Goldman & Matthew D. Saronson, *Clinton's Nontraditional Judges: Creating a More Representative Bench*, 78 *Judicature* 68 (Sept.-Oct. 1994).

58. Ronald Stidham, Robert A. Carp, & Donald Songer, *The Voting Behavior of President Clinton's Judicial Appointees*, 80 *Judicature* 16, 20 (July-Aug. 1996); Sheldon Goldman & Elliot Slotnick, *Picking Judges Under Fire*, 82 *Judicature* 265 (May-June 1999); Nancy Scherer, *Are Clinton's Judges "Old" Democrats or "New" Democrats?* 84 *Judicature* 151 (Nov.-Dec. 2000); Alliance for Justice Jud. Selection Project, *Fourteenth Annual Report on the State of the Judiciary* § 1(C) (2000) (available at <<http://www.afj.org/jsp/report2000>>; copy on file with *Journal of Appellate Practice and Process*).

59. Goldman & Slotnick, *supra* n. 58.

60. Henry Weinstein, *Drive Seeks to Block Clinton Judicial Nominees*, L.A. Times A3 (Oct. 26, 1997).

hundred senators announcing that it would “promote judicial restraint and fight judicial activism with whatever tools and resources are legitimately at our disposal.”⁶¹

Republican senators responded to the pressure in 1997 by stalling the confirmation of the president’s nominees to the lower federal courts. Senator John Ashcroft of Missouri was among the leaders of the slowdown.⁶² In October 1997, the Judicial Selection Monitoring Project released a fifteen-minute videotape as part of a \$1.4 million fund-raising campaign to block the confirmation of “activist liberal judges.”⁶³ The tape portrayed the specter of “judicial tyranny” through Clinton appointments, and highlighted several examples to back up its claim.⁶⁴ A Los Angeles Times analysis of the tape and its claims noted that several of the tape’s examples of “judicial tyranny” were actually decisions made by judges that President George H.W. Bush had appointed. For example, the tape showcased a 1997 decision by District Judge Stewart Dalzell to release from prison a woman convicted of murder in 1992. The tape clearly implied that Clinton’s judges were soft on crime and unconcerned with victims’ rights. But Dalzell was appointed by President Bush in 1991 and, as the Los Angeles Times concluded: “Nowhere on the tape are the judge’s detailed reasons for releasing the woman, including his conclusions that another man committed the murder and that there were 25 instances of police and prosecutorial misconduct.”⁶⁵

In March 1997, House Majority Whip Tom DeLay, Republican of Texas, further escalated the rhetoric and suggested that congressional Republicans should impeach liberal federal judges.⁶⁶ Attorney General Janet Reno responded by saying that DeLay’s “heated rhetoric” had the effect of

61. Press Release, Alliance for Justice Jud. Selection Project (Jan. 23, 1997) (notes made from press release on file with author).

62. Tim Poor, *Judge Not; If John Ashcroft Can Help It, A Lot of President Clinton's Nominees to the Federal Bench Aren't Going to Make It*, St. Louis Post-Dispatch 1B (Nov. 2, 1997).

63. Weinstein, *supra* n. 60.

64. *Id.*

65. *Id.*

66. Michael Kelly, *Judge Dread*, New Republic 6 (Mar. 31, 1997) (quoting Rep. DeLay).

undermining the “very credibility of the judiciary.”⁶⁷ She also criticized Senate Republicans for stalling the confirmation of Clinton nominees, as did the president in a radio address on September 27, 1997. Clinton lamented the “vacancy crisis in our courts,” and charged that the Senate’s “failure to act on my nominations, or even to give many of my nominees a hearing, represents the worst of partisan politics.”⁶⁸ The president noted that there were nearly a hundred vacancies on federal courts, but that the Senate had confirmed only seventeen judges in all of 1996—the lowest election-year confirmation rate in forty years.⁶⁹ In comparison, the Senate confirmed 101 judges in 1994.⁷⁰

Senate Judiciary Committee chairman Orrin Hatch, Republican of Utah, replied that the “Senate’s advise-and-consent function should not be reduced to a mere numbers game. The confirmation of an individual to serve for life as a Federal judge is a serious matter and should be treated as such.”⁷¹ Senate Republican leader Trent Lott was already on record saying: “Should we take our time on these federal judges? Yes. Do I have any apologies? Only one: I probably moved too many already.”⁷² Republicans also charged that Clinton was slow to nominate judges and that he was responsible for many of the vacancies on the federal judiciary.⁷³

In his 1997 year-end report to Congress on the federal judiciary, the Chief Justice pointed out that by the end of 1997, one in ten seats on the federal judiciary were vacant, twenty-six of them had been vacant for at least eighteen months, and a third

67. Associated Press, *Reno Criticizes Senate in Delay on Nominees*, 146 N.Y. Times A15 (Aug. 6, 1997).

68. Ronald Brownstein, *GOP Stall Tactics Damage Judiciary, President Charges*, L.A. Times A1 (Sept. 28, 1997).

69. *Id.*

70. Annual Report, Alliance for Justice Jud. Selection Project 2 (1994).

71. *Reno Criticizes Senate in Delay on Nominees*, *supra* n. 67.

72. People for the American Way, *President Bush, the Senate, and the Federal Judiciary* (2001) (quoting Sen. Lott) (available at <<http://www.pfaw.org>>; copy on file with Journal of Appellate Practice and Process).

73. Orrin G. Hatch, U.S. Sen., Address (Fed. J. Assn., May 14, 1997) (copy on file with Journal of Appellate Practice and Process).

of the seats on the Ninth Circuit were vacant.⁷⁴ He rebuked his fellow conservatives for “serious delays in the appointment process,” a tactic that he said was threatening the nation’s “quality of justice.”⁷⁵ “The Senate is surely under no obligation to confirm any particular nominee,” Rehnquist wrote, “but after the necessary time for inquiry it should vote him up or down. In the latter case, the president can then send up another nominee.”⁷⁶ Senate Republicans backed away from their stall tactics and the backlog of vacancies eased up in 1998.

But in 1999, as the 2000 election loomed, Republicans again slowed down the confirmation process. Despite Attorney General Meese’s claim that President Reagan’s judicial appointments would “institutionalize the Reagan revolution so it can’t be set aside no matter what happens in future presidential elections,”⁷⁷ President Clinton—just ten years after Reagan left office—was close to appointing a new majority on the federal bench. Senate Republicans wanted to prevent that, and they hoped that a Republican president would be elected in 2000 to fill any remaining vacancies that they managed to keep open.

As the 106th Congress prepared to adjourn in November 1999, the Senate had confirmed only twenty-five of Clinton’s seventy judicial nominations made that year. The Congressional Black Caucus and other lawmakers and legal experts began to suggest that the president use his constitutional power from Article II, section 2 to make temporary “recess appointments” to fill some of those posts. Such appointments, which can only be made when the Senate is in recess and only last until the end of the next session of Congress, had been used by presidents since George Washington. As a point of comparison, Jimmy Carter made sixty-nine recess appointments during his four years in office, Ronald Reagan made 238 during his eight years, George H.W. Bush made seventy-eight during his four years,

74. William H. Rehnquist, *1997 Year-End Report on the Federal Judiciary* 7 (available at <<http://www.supremecourtus.gov>>; copy on file with Journal of Appellate Practice and Process).

75. *Id.* at 7, 12.

76. *Id.* at 9.

77. O’Brien, *supra* n. 37.

and Clinton had made sixty-eight in his first seven years.⁷⁸ Judicial recess appointments were somewhat more problematic than other types of recess appointments because of the Article III requirement that federal judges serve “during good Behaviour.” Still, judicial recess appointments were common (some 300 throughout our history, with fifteen to the Supreme Court—ranging from Washington’s appointment of John Rutledge in 1795 to Dwight Eisenhower’s appointments of Earl Warren in 1954, William Brennan in 1957, and Potter Stewart in 1959), and their constitutionality had been upheld by the Ninth Circuit as recently as 1985.⁷⁹

In the summer of 1999, Clinton had used his recess appointment power to appoint James Hormel as ambassador to Luxembourg. A majority of the Senate supported Hormel’s nomination, but it had languished for two years. A small group of Republican senators including James Inhofe of Oklahoma prevented a full Senate vote on the nomination because they said the sixty-six year-old Hormel, who was homosexual, would promote a gay agenda and was unfit to represent the United States.⁸⁰ In retaliation for Clinton’s recess appointment of Hormel, Inhofe put a block on all other Clinton appointments, which he lifted only when Clinton agreed to notify Senate leaders in advance of any future recess appointments.⁸¹ But several months later, proponents of judicial recess appointments pointed to ongoing examples of Senate obstructionism that were similar to the one used against Hormel.

For example, Clinton’s nomination of Richard A. Paez to the Ninth Circuit had been pending for three and a half years, and his nomination of Marsha L. Berzon—also to the Ninth Circuit—had been pending for almost two years.⁸² There had

78. Deirdre Shesgreen, *President’s “Recess Power” May Relieve Jam of Bench Nominees*, St. Louis Post-Dispatch A10 (Oct. 31, 1999); Kamen, *Recess-Appointment Repercussions*, Wash. Post A2 (Jan. 26, 2000).

79. *U.S. v. Woodley*, 751 F.2d 1008 (1985) (discussing historical practices dating back to the time of the framers, and noting frequency of recess appointments).

80. Marc Sandalow, *Clinton Bypasses Senate, Names Hormel Ambassador*, S.F. Chron. A1 (June 5, 1999).

81. David E. Rosenbaum, *Clinton Vow to Congress Ends a Threat to His Nominations*, 148 N.Y. Times (June 17, 1999).

82. Helen Dewar, *In Session: Congress; Scores of Judges Float in Senate Logjam*, Wash. Post A19 (Nov. 8, 1999).

also been long delays on nominations to the conservative Fourth Circuit. No African American had ever served on the Fourth Circuit (covering North and South Carolina, Virginia, West Virginia, and Maryland), even though it was the federal circuit with the highest percentage of African American population in the country.⁸³ Clinton was determined to appoint an African American there, but conservative Republicans led by Sen. Jesse Helms of North Carolina had blocked every African American nominee that Clinton had submitted.⁸⁴ Three never received a hearing.⁸⁵ A fourth, James A. Beaty, Jr., was approved by the Senate Judiciary Committee, but his nomination was blocked from receiving a vote of the full Senate. Helms claimed that filling the four vacancies on the fifteen-member appeals court was unnecessary and would actually make the court less efficient (a position he reversed when George W. Bush became president).⁸⁶ And, in October 1999, the Senate had outright rejected a judicial nominee by a full vote of the Senate for the first time since Robert Bork in 1987. The nominee, Ronnie White, had been tapped by Clinton to fill a federal District Court post in Missouri. The Senate Judiciary Committee approved him in a bipartisan vote, but he became caught up in the judicial logjam that stalled his nomination for the next two years. When his name finally went to the floor of the Senate for a vote, Missouri Senator John Ashcroft led the opposition, calling White, who is an African American, “pro-criminal.”⁸⁷ The Senate defeated White along a party-line vote. Later, when President Bush nominated Ashcroft to be Attorney General, Ashcroft had to respond to repeated allegations that he had distorted White’s record.⁸⁸

Clinton rejected suggestions that he make judicial recess appointments when the Senate adjourned in late 1999, but he did

83. Joan Biskupic, *Politics Snares Court Hopes of Minorities and Women*, USA Today 1A (Aug. 22, 2000).

84. *Id.*

85. *Fourteenth Annual Report*, *supra* n. 58, at § I(B)(2).

86. David Firestone, *With New Administration, Partisan Battle Resumes Over a Federal Appeals Bench*, 150 N.Y. Times A13 (May 21, 2001).

87. Deirdre Shesgreen, *Ashcroft Leads Attack as Senate Weighs White’s Nomination*, St. Louis Post-Dispatch A1 (Oct. 5, 1999).

88. Deirdre Shesgreen, *Ashcroft’s Treatment of Nominees May Haunt Him*, St. Louis Post-Dispatch A8 (Jan. 11, 2001).

make nine recess appointments to a variety of non-judicial posts. Sen. Inhofe felt that two of the recess appointments, Sarah M. Fox to the National Labor Relations Board and Stuart E. Weisberg to the Occupational Safety and Health Review Commission, violated Clinton's agreement to clear recess appointments with Senate leaders in advance.⁸⁹ Once again he put a hold on all of Clinton's judicial nominations, this time arguing that none should be confirmed for the remaining year of Clinton's term. Apparently among those who initially supported Inhofe's hold was John Ashcroft.⁹⁰ Senate Majority Trent Lott, however, rejected Inhofe's position, and convinced the Senate to confirm two judges in February 2000.⁹¹ Still, the Senate confirmed only thirty-nine of the eighty-one judicial nominees that Clinton sent to the Senate in 2000. In all, forty-two judicial nominees remained unconfirmed when Clinton left office in January 2001. Thirty-eight of them never received a hearing.⁹² One of Clinton's last acts as president was to resort to a judicial recess appointment, making Richmond lawyer Roger Gregory the first African American ever to sit on the Fourth Circuit Court of Appeals.⁹³

The bitter taste of the Republican slowdown stayed in the mouths of Democrats when Bush became president in 2001. Democrats also resented efforts by Senate Republicans in the first months of the Bush administration to take away from them the power that opposition Republicans had used against Clinton nominees. As part of its slow-down of judicial nominations during Clinton's last term, Republicans used the so-called blue-slip procedure, which allows senators from the state where the federal judicial vacancy occurs to prevent committee hearings on that nominee.⁹⁴ The Senate institutionalized the practice in the

89. Kamen, *supra* n. 78.

90. Deirdre Shesgreen, *Senator Says Ashcroft Supports Plan to Block Judicial Appointments*, St. Louis Post-Dispatch A14 (Feb. 9, 2000).

91. Associated Press, *Lott Persuades GOP in Senate to Allow Two Judges' Confirmation*, St. Louis Post-Dispatch A10 (Feb. 11, 2000).

92. *Fourteenth Annual Report*, *supra* n. 58, at § II(A)(1).

93. Dan Eggen, *Clinton Names Black Judge to Appeals Court; Recess Choice for Richmond Circuit is Challenge to GOP*, Wash. Post A1 (Dec. 28, 2000).

94. For a more detailed discussion of this process, see Joseph A. Pika, John Anthony Maltese & Norman C. Thomas, *The Politics of the Presidency* 257-61 (5th ed., CQ Press 2002).

1940s. As interpreted during the Clinton administration by the Republican chairman of the Senate Judiciary Committee, Orrin Hatch, home-state senators of both political parties could use the blue-slip procedure to block hearings. Thus, a home-state Republican (like Jesse Helms in the Fourth Circuit) could block a Democratic nominee put forward by President Clinton. Once a fellow Republican became president, however, Hatch abruptly shifted gears. With President Bush making the nominations, Hatch now said that support of a home-state Republican should overcome the opposition of a home-state Democrat. Democrats reacted with fury. All nine Democrats on the Judiciary Committee signed a letter of protest that all fifty Senate Democrats supported.⁹⁵ The New York Times editorialized that Hatch's reversal was both ironic and audacious, since Republicans had for six years "routinely obstructed" Clinton's judicial nominations and were now trying to remove the possibility that Democrats could do the same.⁹⁶ Before the impasse could be resolved, however, Sen. Jeffords defected, the Democrats took control of the Senate, Senator Patrick Leahy, the Vermont Democrat, became chair of the Senate Judiciary Committee, and the blue-slip procedure remained unchanged.

With Democrats in control of the Senate, Republicans charged them with a judicial slowdown. President Bush had submitted sixty judicial nominations, but by the beginning of October 2001 the Senate had confirmed only eight. Emboldened by President Bush's high public approval ratings after the September 11 terrorist attacks, and claiming that judicial vacancies would hamper the war on terrorism, Senate Republicans mounted a filibuster against a \$15.6 billion foreign-aid spending bill, saying that it was retaliation for Democratic stonewalling of judicial nominees.⁹⁷ Democrats denied a deliberate slowdown of the sort Republicans had orchestrated under Clinton, pointing out that the Republican-controlled Senate had held no judicial confirmation hearings from January through May. They also pointed out that since their taking

95. Thomas B. Edsall, *Democrats Press Bush for Input on Judges*, Wash. Post A4 (Apr. 28, 2001).

96. Editorial, *Doing Business in the Senate*, 150 N.Y. Times A22 (June 19, 2001).

97. Helen Dewar, *Foreign Aid Bill Held Up by GOP; Senators Demand Action on Nominees*, Wash. Post A3 (Oct. 13, 2001).

control of the Senate in June, several events had intervened to slow the legislative agenda. These included the summer recess, the terrorist attacks, and the major disruptions caused by the anthrax scare on Capitol Hill. Senator Leahy further countered that they were “ahead of the pace of confirmations for judicial nominees in the first year of the Clinton administration and the pace in the first year of the first Bush administration.”⁹⁸ The Chief Justice also re-entered the fray, saying in his 2001 year-end report that after the tragic events of September 11

the role of courts becomes even more important in order to enforce the rule of law. To continue functioning effectively and efficiently, however, the courts must be appropriately staffed. This means that necessary judgeships must be created and judicial vacancies must be timely filled with well-qualified candidates.⁹⁹

In the ensuing months, the Democratic majority on the Judiciary Committee rejected not only Bush’s nomination of Charles Pickering, but also his nomination of Priscilla Owen (also to the Fifth Circuit), describing both as ideological extremists. Democrats renewed their pledge to confirm moderate judges but, as Senator Schumer put it, they were “not going to be bullied into letting this administration stack the courts for decades to come.”¹⁰⁰ President Bush quickly condemned the Democrats for their judicial “obstructionism,” and turned it into a campaign issue for the 2002 midterm elections. Campaigning against Senator Max Cleland of Georgia, a Democrat, shortly after the Pickering defeat, Bush said: “We’re going to have more fights when it comes to the judiciary.” He then criticized Cleland for voting against Pickering: “I put up a good man from Mississippi the other day, and I don’t remember the senior senator from Georgia defending this man’s honor.”¹⁰¹

98. Dewar, *supra* n. 97 (quoting Sen. Leahy).

99. Charles Lane, *Rehnquist Decries Vacancies; Stalled Judgeships Hurt War on Terror, Chief Justice Says*, Wash. Post A2 (Jan. 1, 2002) (quoting the Chief Justice).

100. Neil A. Lewis, *Party Leaders Clash in Capitol Over Pace of Filling Judgeships*, 151 N.Y. Times A33 (May 10, 2002) (quoting Sen. Schumer).

101. George W. Bush, Pres. of U.S., *Remarks at a Fundraiser for Senatorial Candidate Saxby Chambliss in Atlanta* (Mar. 27, 2003) in *Weekly Compilation of Presidential Documents* 530 (Pres. Docs. Servs., Off. of the Fed. Register, Natl. Archives & Records Admin. Mar. 29, 2003) (available at <<http://www.access.gpo.gov/nara/nara003.html>>; copy on file with Journal of Appellate Practice and Process).

Then, on May 9, 2002—the one-year anniversary of the president’s announcement of his first eleven nominations to the Courts of Appeals—the White House launched an offensive. Just as Clinton had done five years earlier, Bush decried the “vacancy crisis” on federal courts.¹⁰² Speaking in the Roosevelt Room of the White House, Bush accused the Democrats of playing “raw politics” on the issue.¹⁰³ The White House also released a Fact Sheet highlighting the crisis.¹⁰⁴ In the coming months, the president focused attention on that crisis again and again, and Republicans around the country joined the refrain. The president made the vacancy crisis the topic of his weekly radio address the week before the midterm elections, charging the Democrats with “a disturbing failure to meet a responsibility under the Constitution” and of “harming the administration of justice in America.” “Our country deserves better,” he concluded.¹⁰⁵ Even ninety-nine year-old Strom Thurmond, who—with Jesse Helms—had spearheaded efforts to block President Clinton’s nominees to the Fourth Circuit, took to the floor of the Senate on October 9, 2002, to express outrage at the Democrats for delaying a confirmation vote on his former aide, Dennis W. Shedd, whom Bush had nominated to sit on the Fourth Circuit. “I am hurt and disappointed by this egregious act of destructive politics,” he said. “In my 48 years in the United States Senate, I have never been treated in such a manner.”¹⁰⁶

Republicans regained control of the Senate in the midterm elections, and the road seemed clear for President Bush to re-nominate Charles Pickering and Priscilla Owen, and to push forward other conservative nominees. But then the new Senate majority leader, Trent Lott—Pickering’s strongest supporter—

102. George W. Bush, Pres. of U.S., *Remarks After Meeting with Members of Congress on Federal Judicial Nominations* (May 9, 2002) (transcript and audio available at <<http://www.whitehouse.gov>>; copy of transcript on file with Journal of Appellate Practice and Process).

103. *Id.*

104. White House Fact Sheet, *Judicial Vacancy Crisis* (May 9, 2002) (available at <<http://www.whitehouse.gov>>; copy on file with Journal of Appellate Practice and Process).

105. George W. Bush, Pres. of U.S., Radio Address to the Nation (Nov. 2, 2002) (transcript and audio available at <<http://www.whitehouse.gov>>; copy of transcript on file with Journal of Appellate Practice and Process).

106. Helen Dewar, *Thurmond Berates Democrats for Delay on Judicial Vote*, Wash. Post A31 (Oct. 10, 2002) (quoting Sen. Thurmond).

was forced to resign his leadership post after his controversial remarks at the 100th birthday party of Strom Thurmond. Lott said Mississippi was “proud” to have voted for Thurmond in his segregationist 1948 campaign for president on the Dixiecrat ticket, adding: “If the rest of the country had followed our lead, we wouldn’t have had all these problems over all these years, either.”¹⁰⁷ Lott had said almost the identical thing in 1980, had said in 1983, “Sometimes, I feel closer to Jefferson Davis than any other man in America,” had praised the Council of Conservative Citizens in 1992 (saying it stood for “the right principles and the right philosophy,” despite its roots in the white citizens councils of the segregation era), had voted against the Martin Luther King, Jr., national holiday in 1983, and was the only senator in a ninety-three-to-one vote to reject President Bush’s 2001 nomination of Roger Gregory, the African American whom President Clinton had made a recess appointment and whom Bush nominated to the Fourth Circuit when he became president.¹⁰⁸ Concerns about Pickering’s attitudes on race took on new significance, and even Lott—in his interview on Black Entertainment Television shortly before he resigned his leadership post—had said about Pickering: “The things—many of the things said against him he was not guilty of. But having said that, you know, I’ll have to weigh all my actions differently and more carefully.”¹⁰⁹ In their subsequent searches for judicial nominees, it appeared that the Bush administration would have to be concerned about the issue of race.

The Lott affair seemed to signal at least a short-term setback for the Bush administration’s attempts to appoint conservative jurists to the bench. Emboldened, Democrats renewed their pledge to block (through use of a filibuster, if need be) judges that they perceived to be ideologues. Fearing that Senator Hatch, who had regained chairmanship of the Judiciary Committee, would follow through on his 2001 threat

107. Jesse J. Holland, *Lott Comments Give Pickering Critics New Ammunition Against Renewed Nomination* (Dec. 13, 2002) (AP release) (quoting Sen. Lott) (copy on file with Journal of Appellate Practice and Process).

108. Derrick Z. Jackson, *Brother Lott’s Real Record*, Boston Globe A23 (Dec. 18, 2002).

109. Lewis, *supra* n. 52 (quoting Sen. Lott).

to alter the blue-slip procedure, Democrats also threatened to filibuster Bush nominees if Republicans took away blue-slip power from home-state Democrats.¹¹⁰ But neither Bush nor Hatch backed down. On January 7, 2003, President Bush re-submitted thirty judicial nominations that had not been confirmed by the 107th Congress. The list included both Charles Pickering and Priscilla Owen.¹¹¹ Then, at the first January meeting of the Judiciary Committee, Hatch announced changes in the blue-slip procedure that would prevent home-state Democrats from blocking Bush nominees.¹¹² Hatch's decision allowed the Committee to hold hearings on Ninth Circuit nominee Carolyn Kuhl in April over the objection of home-state Senator Barbara Boxer, the California Democrat. In a letter to Chairman Hatch, Boxer complained of his "disregard" of her "prerogatives as one of the home-state senators," and charged that Hatch's decision to alter the blue-slip procedure "will have ramifications for years to come."¹¹³

Democrats did not back down either. In February, they mounted a successful filibuster against Miguel Estrada, Bush's nominee for a vacancy on the D.C. Circuit. Although Democrats recognized that such filibusters had to be used sparingly, they had shown that they could follow through on their threat to use them. While deciding whether to filibuster the nomination of Priscilla Owen, which had secured Judiciary Committee approval by a ten-to-nine party-line vote, Democrats on the Judiciary Committee joined Republicans to confirm another Texas nominee for the Fifth Circuit, Edward Prado, by a unanimous vote on April 3. The vote suggested that Democrats would support moderate nominees put forward by the

110. Albert Eisele, *Senate Dems Threaten to Block Judges*, The Hill (Jan. 2, 2003) (online edition) (available at <<http://www.hillnews.com>>; copy on file with Journal of Appellate Practice and Process)

111. Jonathan Groner, *Judicial Battles Start Anew*, 228 Leg. Intelligencer 4 (Jan. 15, 2003).

112. Jason Hoppin, *9th Circuit Nominee Draws Opposition*, 228 Leg. Intelligencer 4 (Jan. 28, 2003).

113. Jonathan Groner, *Senate Democrats Grill 9th Circuit Nominee*, 4 Recorder (Apr. 2, 2003) (quoting Sen. Boxer).

president.¹¹⁴ But Bush's nomination of Alabama Attorney General William H. Pryor, Jr., to a seat on the Eleventh Circuit just six days later showed that the president was not afraid to proceed with conservative nominees.

As the tension mounted, both sides plotted how to use the issue for political gain in the 2004 elections. One Republican source said, "Our plan is to continue to allow Democrats to build a record of obstruction."¹¹⁵ Democrats, on the other hand, felt that their opposition of "extremist" judges would win over swing voters. During the fight over Miguel Estrada, both sides produced television ads focusing on the judicial nominee.¹¹⁶ The tactic was not new. Opponents of Robert Bork's 1987 nomination to the Supreme Court had mounted a television ad narrated by actor Gregory Peck, who had portrayed the noble lawyer Atticus Finch in the movie version of *To Kill a Mockingbird*.¹¹⁷ But television ads focusing on judicial nominees remained rare. Mike Mihalke, a Republican public affairs consultant, predicted that would change. The Estrada ads were "just warm-up calisthenics for a fight down the road for a Supreme Court nomination," he said.¹¹⁸ Confirmation gridlock showed no signs of abating.

The ability to appoint the more than 800 federal judges is one of the most important powers of the president. Through the power of judicial review, courts have the power to significantly impact public policy. Although rulings of the United States Supreme Court get most of the attention, the Courts of Appeals can be equally important, because they are effectively the court of last resort in more than ninety-nine percent of the cases that come before them.¹¹⁹

114. Editorial, *A Tale of Two Texas Judges; The 19-0 Vote of the Senate Judiciary Committee for Ed Prado Shows That Moderate Judges Will Win Approval*, Express-News (San Antonio, Tex.) 6B (Apr. 9, 2003).

115. James Gordon Meek, *Dems Aim to Down 2 Judges*, N.Y. Daily News 20 (Apr. 9, 2003) (quoting unnamed GOP source).

116. Jonathan Groner, *Air Wars: Spinning the Estrada Showdown*, Leg. Times 1 (Mar. 10, 2003).

117. Michael Pertschuk & Wendy Schaetzel, *The People Rising: The Campaign Against the Bork Nomination* 172-76 (Thunder's Mouth Press 1989).

118. Groner, *supra* n. 116.

119. G. Alan Tarr, *Judicial Process and Judicial Policymaking* 40 (2d ed., West/Wadsworth 1999).

Political expediency explains many of the actions of participants in the judicial-appointment process. At various times both liberals and conservatives have supported strict scrutiny of judicial nominees and decried judicial activism. The conservatives' rallying cry against judicial activism at the start of the twenty-first century is exactly the same rallying cry used by liberals in the 1920s and '30s decrying the judicial activism of conservative judges who read economic rights into the constitution.¹²⁰ Democrats supported the borking of nominees when Reagan was president, but urged a kinder, gentler treatment of nominees when Clinton was in office. Republicans embraced the confirmation slowdown of judicial nominees when Clinton was president, but condemned it when Bush became president. At root, the judicial appointment process is a political one: shaped by changing political dynamics and balances of power. As long as the balance of power remains divided, the process promises to be a contentious one.



120. Senator Clarence Dill, Democrat of Washington, said in 1930 that by putting property rights above personal rights, the confirmation of Charles Evans Hughes as chief Justice would "overturn and destroy practically everything that liberals like Jefferson and Jackson stood for." After the Senate confirmed Hughes, liberal senators threatened to end "judge-made law" by curbing the power of the Supreme Court through constitutional amendment. *See* Maltese, *supra* n. 23, at 21, 55-56.