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## Constitutional Law—Separation of Powers—Restoring the Constitutional Formula to the Federal Judicial Appointment Process: Taking the Vice out of "Advice and Consent"

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CONSTITUTIONAL LAW—SEPARATION OF POWERS—RESTORING THE  
CONSTITUTIONAL FORMULA TO THE FEDERAL JUDICIAL APPOINTMENT  
PROCESS: TAKING THE VICE OUT OF “ADVICE AND CONSENT”

I. INTRODUCTION

The first question a potential federal court nominee answers has almost nothing to do with jurisprudence, political ideology, or even constitutional law. The unspoken first question the candidate answers is “are you willing to submit yourself and those in your life to the harsh appointment process with no guarantee that you will ever receive a confirmation vote by the full Senate?” After two years of answering yes to that question, Miguel Estrada changed his answer to no.<sup>1</sup>

In early September 2003, after over two years of partisan controversy, Miguel Estrada withdrew his name from consideration for the United States Court of Appeals for the District of Columbia.<sup>2</sup> Estrada’s withdrawal followed the seventh failed attempt by Republican supporters to break a filibuster preventing a full Senate confirmation vote.<sup>3</sup> With the increasing prevalence of filibusters, anonymous holds, and other stalling tactics, Estrada is not the only appellate court nominee in recent years to endure excessive delay in the appointment process.<sup>4</sup> Senate Democrats have recently filibustered Texas Supreme Court Justice Priscilla Owen and Alabama Attorney General William Pryor, both appellate court nominees, in efforts to block their appointments.<sup>5</sup>

Although political leaders from both parties are quick to blame their adversaries, stalling tactics have no party affiliation, as evidenced by the current Democrat filibusters as well as the Republican slowdown of Democrat nominations during President William J. Clinton’s administration.<sup>6</sup> Judge Richard Paez saw his confirmation to the United States Court of Appeals for the Ninth Circuit delayed over 1,500 days after President Clinton nominated him in 1996.<sup>7</sup> In a 1997 National Public Radio broadcast, White

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1. Helen Dewar, *Estrada Abandons Court Bid*, WASH. POST, Sept. 5, 2003, at A1.

2. *Id.*

3. *Id.*

4. Joan Biskupic, *Embattled Judicial Candidate Withdraws Name*, USA TODAY, Sept. 5, 2003, at A5.

5. *Id.*

6. Sarah Wilson, *Appellate Judicial Appointments During the Clinton Presidency: An Inside Perspective*, 5 J. APP. PRAC. & PROCESS 29, 47 (2003) (calling the delays of Clinton appointees “unprecedented”).

7. Charlie Gonzales & Ruben Navarette, Jr., *Editorial, Judicial Gridlock: Should Mi-*

House aides were quoted as saying "14 judicial nominees have been before the Senate at least 18 months . . . without being brought to a vote."<sup>8</sup> Stall tactics by both parties prompted admonishments by Chief Justice William Rehnquist in year-end reports in both 1997 and 2001.<sup>9</sup> The Chief Justice noted slowdowns by both the Republican controlled Senate in 1997 and the Democratic run Senate in 2001.<sup>10</sup> Rehnquist stated that the "Senate ought to act with reasonable promptness and to vote each nominee up or down."<sup>11</sup>

Stall tactics normally reserved for federal appellate court nominees are even trickling down to the district court level.<sup>12</sup> The waiting period for Arkansas attorney Leon Holmes, who was nominated January 29, 2003 and confirmed on July 6, 2004,<sup>13</sup> for the Eastern District of Arkansas, was over seventeen months from the time the Senate Judiciary Committee forwarded his nomination to the full Senate.<sup>14</sup> While such waiting periods are standard for appellate court nominees subjected to higher scrutiny, reporter Kevin Freking points out that "the longest any other district judge has had to wait this year was three weeks."<sup>15</sup>

The Holmes nomination serves as a useful study of just how politically convoluted and inefficient the federal judicial appointment process has become. Despite home-state backing,<sup>16</sup> including support by Arkansas's Democratic senators,<sup>17</sup> Holmes met strong ideological opposition from national special interest groups who questioned his willingness to follow the law when ruling on abortion.<sup>18</sup> Adherence to established law and ideological

*guel Estrada's Stalled Nomination Lead to Reform? No or Yes*, HISPANIC, Sept. 1, 2003, at 98. Paez endured renomination in 1997 and in 1999 before his eventual confirmation in 2000 by a vote of fifty-nine to thirty-nine; see Sheldon Goldman et al., *Clinton's Judges: Summing up the Legacy*, 84 JUDICATURE 228, 235-36 (2001).

8. *Morning Edition: Federal Judge Shortage* (NPR radio broadcast, Sept. 22, 1997).

9. William Rehnquist, *2001 Year-end Report on the Federal Judiciary* (2001), available at [www.supremecourtus.gov/publicinfo/year-end/2001year-endreport.html](http://www.supremecourtus.gov/publicinfo/year-end/2001year-endreport.html).

10. *Id.*

11. *Id.*

12. Kevin Freking, *Holmes' Judge Nomination Stuck as Parties Debate Why*, ARK. DEMOCRAT-GAZETTE, July 26, 2003, at A3.

13. See Vacancies in the Federal Judiciary, at <http://www.uscourts.gov/vacancies/judgevacancy.htm> (listing current judicial vacancies, nominees, and dates of nomination) (last visited July 19, 2004).

14. Freking, *supra* note 12, at A3. Part of the delay is attributable to the unusual way in which the Senate Judiciary Committee chose to forward Holmes's nomination to the full Senate. *Id.* Holmes is the first judicial nomination since 1951 to be forwarded to the Senate floor without a favorable recommendation. *Id.*

15. *Id.*

16. Sarita Chourey, *The Hill: Centrist Republicans Raising Concerns About Writings by District Court Nominee J. Leon Holmes*, U.S. NEWSWIRE, Oct. 1, 2003, available at 2003 WL 64748044.

17. *Id.* These senators are Blanche Lincoln and Mark Pryor. *Id.*

18. *Id.* Opponents of the nominee also cite excerpts from a 1997 article Holmes co-

considerations are valid parts of the appointment process;<sup>19</sup> consequently, the Constitution provides appropriate executive and senatorial balancing checks that offer opportunities to explore these concerns.

This note examines the political nature of the federal judicial appointment process beginning with a historical foundation of the appointment process and brief identification of the major players involved.<sup>20</sup> Next, the note looks at recent trends that have exacerbated the inherent political nature of the process<sup>21</sup> and makes a few suggestions for procedural reforms that might help diminish some of the more unhelpful politicizing aspects brought on by recent trends.<sup>22</sup>

## II. BACKGROUND

The words Publilius Syrus offered in the first century B.C., “[m]any receive advice, few profit by it”<sup>23</sup> still ring true today in the context of the judicial appointment process. The relatively straightforward foundation for judicial appointment found in Article II of the United States Constitution provides for executive power to nominate and senatorial control over confirmation.<sup>24</sup> But the full measure of the “advice” portion of the senatorial power to give “advice and consent” is still subject to debate.<sup>25</sup> Additionally, the Constitution is silent about other sources of advice the Chief Executive may enlist in making appointment nominations.<sup>26</sup> The following sections of this note identify some of the major players in the confirmation process and provide a historical context for the procedural modifications proposed later in the note. The first section focuses on the constitutional framework for the appointment process. The second section discusses the designated roles of the President and the Senate with an overview of some ancillary players in

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authored with his wife for a religious magazine in which Holmes quoted scripture stating a wife is to be submissive to her husband. Editorials, *On Judging Judges: Familiarity Breeds Respect*, ARK. DEMOCRAT-GAZETTE, Aug. 7, 2003, at B18.

19. See Sheldon Goldman, *Unpicking Pickering in 2002: Some Thoughts on the Politics of Lower Federal Court Selection and Confirmation*, 36 U.C. DAVIS L. REV. 695, 718 (2003) (arguing ideological debate over nominees is healthy for democracy).

20. See *infra* Part II.A–C.

21. See *infra* Part II.D.

22. See *infra* Part III.

23. JOHN BARTLETT, FAMILIAR QUOTATIONS 99 (Justin Kaplan ed., Little, Brown, & Co. 16th ed. 1992) (1882).

24. See U.S. CONST. art. II, § 2; *infra* Part II.A (describing the Constitutional framework).

25. MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENT PROCESS 135 (2000) (noting a long-running disagreement among commentators over the Senate’s role).

26. See U.S. CONST. art. II, § 2.

the process. The third section gives a brief historical synopsis of the past half-century of the appointments process.<sup>27</sup>

#### A. The Constitutional Framework: A Sketch Rather Than a Picture

Article II of the Constitution provides a foundation for the appointments process, stating the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint . . . judges of the Supreme Court, and all other officers of the United States."<sup>28</sup> Most remarkable about the Appointment Clause and the Constitution's general treatment of the judicial branch is the lack of guidance regarding the structure and substance of the judicial branch.<sup>29</sup> The judicial branch received little attention at the constitutional convention, prompting Senator Paul Simon to quip that the framers "spent more time on what the pay should be for [the other] two branches than was spent in toto discussing the judicial branch."<sup>30</sup> The limited time spent formulating the judicial branch focused on the allocation of the power of judicial appointment and the comparative merits of granting authority in either the executive branch or the legislative branch.<sup>31</sup>

Although there was little argument during the constitutional convention over judicial tenure and the need for appointment rather than election,<sup>32</sup> the appointment clause generated considerable debate over the balancing of confirmation power between the Senate and the President.<sup>33</sup> The competing theories were vesting appointment power solely in either the executive branch or legislative branch or delegating part of the process to each of the two branches.<sup>34</sup> George Mason of Virginia and John Rutledge of South Carolina represented a faction that sought to limit executive power by granting the legislature appointment autonomy.<sup>35</sup> The Virginia Plan echoed this philosophy and met with wide opposition by Federalists, such as Alexander Hamilton and James Wilson, who advocated a strong executive branch.<sup>36</sup> Hamilton's faction was concerned that placing the appointment power

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27. Borrowing the words of Justice Oliver Wendell Holmes from another context: "Upon this point a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

28. U.S. CONST. art. II, § 2, cl. 2.

29. See SENATOR PAUL SIMON, *ADVICE AND CONSENT* 151 (1992).

30. *Id.*

31. CHARLES H. SHELDON & LINDA S. MAULE, *CHOOSING JUSTICE: THE RECRUITMENT OF STATE AND FEDERAL JUDGES* 9 (1997).

32. *Id.* at 8.

33. *Id.* at 9.

34. *Id.*

35. *Id.*

36. *Id.* at 11 (discussing Hamilton's support of limited executive power); see GERHARDT, *supra* note 25, at 21 (naming Wilson as a supporter of limited executive power).

solely with Congress would foster excessive dependency of the nation's principal officers<sup>37</sup> on the Congress that ruled over appointments.<sup>38</sup> Proponents of executive autonomy also feared that unchecked congressional power of appointment would overly politicize the appointment process.<sup>39</sup> As Wilson explained, "[e]xperience sh[ow]ed the impropriety of such appointments by numerous bodies. Intrigue, partiality, and concealment were the necessary consequences. A principal reason for unity in the Executive was the officers might be appointed by a single, responsible person."<sup>40</sup> In opposition to these beliefs, supporters of senatorial appointment proclaimed the Senate as, in the words of James Madison, "sufficiently stable and independent" to make "deliberate judgments."<sup>41</sup> John Rutledge offered a similar opinion stating that he "was by no means disposed to grant [such] a power to any single person."<sup>42</sup>

After considerable posturing by both sides, the resulting compromise<sup>43</sup> vested the power of nomination with the Chief Executive, checked by the "advice and consent" of the Senate.<sup>44</sup> Hamilton's *Federalist Papers* elucidate the rationale behind the compromise, stating that "one man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices, than a body of men of equal or perhaps even of superior discernment."<sup>45</sup> Hamilton continued:

[T]he necessity of [the Senate's] concurment would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.<sup>46</sup>

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37. SHELDON & MAULE, *supra* note 31, at 9. Offices encompassed by the appointment clause include, *inter alia*, ambassadors, Supreme Court justices, federal judges, and presidential cabinet members. U.S. CONST. art. II, § 2, cl. 2.

38. SHELDON & MAULE, *supra* note 31, at 9.

39. *See id.* at 11.

40. MICHAEL GERHARDT, *supra* note 25, at 21 (quoting THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1966)).

41. SHELDON GOLDMAN, PICKING FEDERAL JUDGES 5 (1997) (quoting THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911)).

42. *Id.*

43. DAVID M. O'BRIEN, JUDICIAL ROULETTE: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION 30-31 (1988).

44. U.S. CONST. art. II, § 2, cl. 2.

45. THE FEDERALIST NO. 76 (Alexander Hamilton).

46. *Id.*

## B. Major Players in the Appointment Process

Despite requiring participation among political leaders, the Constitution's structure of the appointment process invites conflict from the major participants.<sup>47</sup> Within this structure, each of the actors has assigned duties and implicit limits on these duties designed to facilitate constructive debate and prevent overreaching by either involved branch of government.<sup>48</sup> The framers allocated authority over judicial appointments so that, in the words of James Madison, "[a]mbition . . . be made to counteract ambition."<sup>49</sup> This section discusses the duties and powers of the major actors in the appointment process. First, this section explores the President's power to nominate.<sup>50</sup> The section continues by discussing the Senate's prerogative to provide "advice and consent" including examining some of the mechanisms and institutional norms that the Senate uses to perform this duty.<sup>51</sup>

### 1. *The Presidential Role in the Appointment Process*

The presidential role in the appointment process begins with the power of nomination expressly granted by Article II of the Constitution.<sup>52</sup> This nomination is not only the beginning of the appointment process but also the culmination of a lengthy procedure of its own.<sup>53</sup> Prior to making a formal judicial nomination, the President receives input from a variety of sources, including White House general staff such as the Committee on Judicial Selection and the Attorney General as well as other members of the Department of Justice.<sup>54</sup> The role of advisors and other outside sources in counseling the President on nominees has increased exponentially, enjoying great expansion during the Carter administration.<sup>55</sup> President James Carter increased the role of advisors in an effort to bring more racial and gender

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47. Michael Gerhardt, *Federal Judicial Selection as War, Part Three: The Role of Ideology*, 15 REGENT U. L. REV. 15, 16–17 (2003) (evaluating the role ideological concerns play in the confirmation process).

48. *See id.* at 17.

49. THE FEDERALIST NO. 51 (James Madison).

50. *See infra* Part II.B.1.

51. *See infra* Part II.B.2.

52. U.S. CONST. art. II, § 2.

53. *See* SHELDON & MAULE, *supra* note 31, at 150.

54. *Id.*

55. *Id.* at 151. Carter's remarkable record of appointing close to 300 federal judges was diminished only slightly by the absence of a Supreme Court appointment. HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS 280 (1999). Congress's enactment of the Omnibus Judgeship Act of 1978 created 152 Carter appointed judicial positions, placing Carter in the top five in total number of judicial appointments, surpassed only by presidents who served more than one term. *Id.* Despite serving only one term, Carter left the office of the presidency having appointed 40.2% of the federal judiciary. *Id.*

diversity to the federal judiciary.<sup>56</sup> Changes implemented by Carter included the creation of the United States Circuit Judge Nomination Commission to help identify and promote qualified minority candidates.<sup>57</sup> Carter's nominating commissions met wide criticism, mainly because they were seen as "far from bipartisan—an estimated eighty-five percent of their members were active Democrats—and that they did not eliminate politics or establish 'true' merit selections."<sup>58</sup> Political historians Robert Carp and Ronald Stidham belie Carter's professed goal of "representativeness" noting that "it is clear that [Carter's] judges were selected with a keen eye toward their liberal voting tendencies."<sup>59</sup> Subsequent presidents followed Carter's lead in enrolling advisors and political allies to generate lists of potential nominees.<sup>60</sup>

President Ronald Reagan also enlisted numerous sources of advice to promote his judicial appointment agenda, including a nine member President's Committee on Federal Judicial Selection, established to replace Carter's United States Circuit Judge Nomination Commission.<sup>61</sup> The agenda for Reagan's Committee differed, however, from Carter's commission in that Reagan acknowledged the ideology of the judges as the primary subject of committee scrutiny.<sup>62</sup> In a 1986 memorandum to then Attorney General Edwin Meese, Assistant Attorney General Stephen Markman stated, "This administration has in place what is probably the most thorough and comprehensive system for recruiting and screening federal judicial candidates of any administration ever."<sup>63</sup> To further clarify, Markman added, "This administration has, moreover, attempted to assert the President's prerogatives over judicial selection more consistently than many of its predecessors."<sup>64</sup>

Advisory committees tailored to the goals of the presidential administration would be employed by the next two occupants of the White House. President George H. W. Bush inherited much of Reagan's appointment infrastructure<sup>65</sup> including the systematic screening of prospective lower court

56. ABRAHAM, *supra* note 55, at 280.

57. *Id.* Carter defined his overriding goal in federal judicial appointments as a "perceived political obligation of 'representativeness' based on race and gender." *Id.* As such, he did more than any preceding president to nominate nontraditional candidates for the federal bench. *Id.*

58. O'BRIEN, *supra* note 43, at 59.

59. ROBERT A. CARP & RONALD STIDHAM, *JUDICIAL PROCESS IN AMERICA* 242 (1998).

60. *See infra* notes 61–69 and accompanying text.

61. HERMAN SCHWARTZ, *PACKING THE COURTS* 60–61 (1988).

62. *Id.*

63. O'BRIEN, *supra* note 43, at 60–61 (quoting Memorandum from Stephen Markman to Attorney General Edwin Meese (Sept. 8, 1986)).

64. *Id.*

65. Sheldon Goldman, *The Bush Imprint on the Judiciary: Carrying on a Tradition*, 74 *JUDICATURE* 294, 295 (1991). In addition to the basic procedural structure, Bush also inherited Reagan-appointed Attorney General Dick Thornburgh. *Id.* The retention of Thornburgh,



nominees.<sup>66</sup> Professor Sheldon Goldman has characterized President Bush's judicial appointment process as "carrying on a tradition" established by Reagan and Nixon.<sup>67</sup> Subsequently, President William J. Clinton dismantled this structure and replaced it with advisory mechanisms similar to those Carter had employed.<sup>68</sup> Clinton, like his Democratic predecessor Carter, professed increasing diversity in the federal judiciary as his judicial appointment agenda<sup>69</sup> and encouraged senators to reinstitute district court nominating commissions to encourage female and minority nominations.<sup>70</sup>

## 2. *The Role of the Senate in the Appointment Process*

The Appointment Clause provides that the President shall appoint, "by and with the advice and consent of the Senate."<sup>71</sup> In efforts to develop and expand the senatorial role of advising, the Senate has developed a number of tools to influence presidential nominations.<sup>72</sup> Chief among these are senatorial courtesy, filibuster, indefinite senatorial holds on nominees, informal private meetings between senators and nominees, public confirmation hearings, and creation of the Senate Judiciary Committee.<sup>73</sup> While an exploration of all the tools is beyond the scope of this note, some of the tools that have gained greater prominence in recent years are potential subjects of reform and need contextual background. The following section begins by examining senatorial courtesy and then concludes with a brief overview of the appointment role played by the Senate Judiciary Committee.

### a. The rise of senatorial courtesy

The seed for senatorial courtesy<sup>74</sup> was planted during Washington's presidency and has continued to grow relatively unchecked since sprouting

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who was instrumental under Reagan in the appointment process, sent a message that Bush intended to follow Reagan's approach to judicial appointments. *Id.* at 305-06.

66. *Id.* at 295.

67. *Id.* In fact, nine of the first ten Bush appointments to federal appellate courts were elevations of district court judges appointed by Reagan. *Id.* at 306.

68. See John Anthony Maltese, *Confirmation Gridlock: The Federal Appointment Process Under Bill Clinton and George W. Bush*, 5 J. APP. PRAC. & PROCESS 1, 15 (2003).

69. *Id.*

70. Carl Tobias, *Judicial Selection at the Clinton Administration's End*, 19 LAW & INEQ. 159, 162 (2001).

71. U.S. CONST. art. II, § 2, cl. 2.

72. See *infra* Parts II.B.2.a-b.

73. See Brannon P. Denning, *Reforming the New Confirmation Process: Replacing "Despise and Resent" with "Advice and Consent,"* 53 ADMIN. L. REV. 1, 14-25 (2001).

74. See GERHARDT, *supra* note 25, at 143-44. Gerhardt defines senatorial courtesy as follows:

during the first session of Congress.<sup>75</sup> During the first Congress, both Georgia senators opposed President Washington's nomination of Benjamin Fishbourn as a naval officer in the Port of Savannah.<sup>76</sup> When Washington realized the full Senate would support the Georgia senators and deny confirmation of Fishbourne despite his uncontested qualifications, Washington withdrew Fishbourne's nomination and successfully nominated someone more favored by the two senators.<sup>77</sup>

This showing of unity among senators heightened presidential consideration of home state senatorial approval and would eventually lead to the modern practice of "blue slips."<sup>78</sup> Upon receiving the President's nominee for district court, the chair of the Senate Judiciary Committee sends a blue piece of paper to each of the senators from the state in which the district court is located.<sup>79</sup> A single negative blue slip results in the committee chair tabling the nomination rather than allowing the nomination to proceed to a full Senate vote likely to fail.<sup>80</sup>

The blue slip procedure for circuit court nominations differs because the court presides over several states.<sup>81</sup> Circuit court seats are traditionally earmarked for representatives from particular states within the circuit<sup>82</sup> and are usually treated as belonging to that state.<sup>83</sup> Despite this general treatment, the role of senatorial courtesy in circuit court nominations is considerably smaller than the "prime" role senatorial courtesy plays in district court recruitment.<sup>84</sup>

Senatorial courtesy originated with the Senate's realization that a united front would be the most effective means of asserting the power of

Traditionally, the term *senatorial courtesy* has referred to the deference the president owes to the recommendations of senators from his own political party on the particular people whom he should nominate to federal offices in the senators' respective states. A second form of senatorial courtesy is the deference a member of Congress, particularly a senator, expects to get from his or her Senate colleagues . . . with respect to his or her own nomination to a confirmable post.

*Id.* Other scholars acknowledge that senatorial courtesy applies to senators from opposing political parties. See, e.g., Laura E. Little, *Loyalty, Gratitude, and the Federal Judiciary*, 44 AM. U. L. REV. 699, 735 (1995) (examining the roles of senatorial patronage and senatorial courtesy in judicial appointments); see also Gerald N. Rosenberg, *Incentives, Reputation, and the Glorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 637, 643 (2000).

75. SHELDON AND MAULE, *supra* note 31, at 158.

76. ABRAHAM, *supra* note 55, at 19.

77. *Id.*

78. SHELDON & MAULE, *supra* note 31, at 159.

79. *Id.*

80. *Id.*

81. See *id.* at 158–59.

82. Rosenberg, *supra* note 74, at 643.

83. LAURENCE BAUM, AMERICAN COURTS: PROCESS AND POLICY 102 (2001).

84. SHELDON & MAULE, *supra* note 31, at 158.

confirmation.<sup>85</sup> Historians Charles Sheldon and Linda Maule note, “[e]ven though Senators might not personally dislike the President’s choice, they recognized that at a later time they might need the help of their colleagues in similar circumstances.”<sup>86</sup> By forsaking their own evaluation of the nomination and deferring to the negative blue slip from the home-state senator, the Senate has effectively placed the power of confirmation assigned to the entire senatorial body in the hands of either of the two home-state senators.<sup>87</sup>

Presidents have shown varying levels of deference to senatorial courtesy in district court appointments.<sup>88</sup> President Warren Harding used federal appointments, including judicial appointments, to reward those that helped him in his hard-fought battle to earn the Republican nomination in 1920.<sup>89</sup> When it came to federal appointments within individual states, however, President Harding gave substantial deference to Republican home-state senators.<sup>90</sup> In contrast, President Teddy Roosevelt acquiesced to the nomination suggestions of home-state senators only if he found the nominees met his own professional and ideological standards for the office.<sup>91</sup>

More recently, Presidents Jimmy Carter and Ronald Reagan requested that home-state senators send a recommendation list of three to five names for consideration as nominees to fill a district court vacancy.<sup>92</sup> The recommendation process promotes Senate involvement at the front-end of the process and allows for more overall involvement among state actors.<sup>93</sup> The increased involvement on the front-end of the process facilitates easier confirmation of those nominees that survive initial senatorial courtesy by building support for the nominees and encouraging nomination of moderate candidates.<sup>94</sup>

Although primarily a tool for the consideration of nominations of district judges,<sup>95</sup> the practice of senatorial courtesy accounts, at least partially, for the rejection of several nominations to the Supreme Court.<sup>96</sup> One histori-

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85. *Id.*

86. *Id.*

87. See O’BRIEN, *supra* note 43, at 71.

88. GERHARDT, *supra* note 25, at 145.

89. *Id.*

90. *Id.*

91. *Id.*

92. O’BRIEN, *supra* note 43, at 70.

93. SHELDON & MAULE, *supra* note 31, at 159.

94. Brannon P. Denning, *The “Blue Slip”: Enforcing the Norms of the Judicial Confirmation Process*, 10 WM. & MARY BILL RTS. J. 75, 82 (2001).

95. SHELDON & MAULE, *supra* note 31, at 158.

96. ABRAHAM, *supra* note 55, at 19. [Senatorial courtesy] appears to have been the sole factor in Grover Cleveland’s unsuccessful nominations of William B. Hornblower (1893) and Wheeler H. Peckham (1894), both of New York; the senate successfully rejected them by votes of 24:30 and 32:41, respectively. *Id.* In each instance David B. Hill (D.-N.Y.) in-

cal justification offered for senatorial courtesy is that same-state senators are likely more familiar with nominees from their own state and in a better position to evaluate such nominees.<sup>97</sup> Proponents also defend senatorial courtesy as a means of sanction by the Senate that encourages the President to consult with the Senate prior to making a nomination.<sup>98</sup>

b. The Senate Judiciary Committee

The eighteen-member Judiciary Committee performs several crucial functions within the Senate's "advice and consent" authority.<sup>99</sup> Some of the more noteworthy functions are conducting hearings on the nominee and deciding to recommend or withhold recommendation of a full Senate confirmation vote.<sup>100</sup> Membership on the committee usually reflects the proportional make-up of the Senate with the majority party assigning the chairperson.<sup>101</sup> The Senate Judiciary Committee wields considerable power by determining when the nomination will receive a confirmation vote from the full Senate.<sup>102</sup>

The committee chairperson possesses great influence over the confirmation process through his prerogative not only to set dates for hearings but also to oversee the hearings themselves.<sup>103</sup> David O'Brien summarized the committee chairperson's influence stating, "[t]he approach of the chairman of the Judiciary Committee toward judicial nominees determines, to a large extent, whether the Senate exercises its check on the [P]resident's choices for the federal bench."<sup>104</sup> History supports O'Brien's assertion, especially during times the chairperson enjoys great political clout, such as the chairmanships of James Eastland, Edward Kennedy, and Joseph Biden.<sup>105</sup>

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voked senatorial courtesy; Cleveland had snubbed Hill in his quest for a replacement for the seat vacated by Justice Samuel Blatchford of New York. *Id.* Cleveland then had his revenge when he refused to name a third New Yorker to the vacancy—instead, he turned to the Democratic majority leader in the Senate, Edward D. White of Louisiana. *Id.*

97. Denning, *supra* note 94, at 82.

98. *Id.* at 90.

99. See SHELDON & MAULE, *supra* note 31, at 156–58.

100. *Id.*

101. *Id.* at 156.

102. O'BRIEN, *supra* note 43, at 72.

103. *Id.* O'Brien also notes that delay of Senate action on confirmation might be used, *inter alia*, to pressure the President or to test the presidential and senatorial support of the nominee. *Id.*

104. *Id.*

105. *Id.* Eastland chaired the committee from 1956 to 1979 "maintain[ing] almost complete control over appointments." *Id.* Kennedy succeeded Eastland and made radical changes such as a restructuring of blue slips so that silence would now equal consent, conducting greater independent investigation of the nominees, and instituting a Judiciary Committee questionnaire. *Id.* Biden presided over the contentious Bork nomination hearings. SHELDON

The Judiciary Committee does not begin formal consideration of a candidate until the President has officially named a nominee.<sup>106</sup> The Committee may initiate an independent investigation of the candidate, although the chairperson will already have received the Federal Bureau of Investigation (FBI) report<sup>107</sup> on the nominee and will receive the American Bar Association (ABA) committee's report and recommendation.<sup>108</sup> Based on these findings, the Committee decides whether and when to schedule hearings for the nominee.<sup>109</sup> These hearings allow senators to question nominees regarding the qualifications and general judicial philosophy of the nominee and also provide a forum for public scrutiny of the nominee.<sup>110</sup> After any hearings, the Judiciary Committee takes a vote to determine if the nomination will be forwarded to the full Senate.<sup>111</sup>

### C. Outside Players in the Appointment Process

#### 1. *The ABA Standing Committee on Federal Judiciary*

Although the ABA has taken an interest in the appointment process since the organization's founding in 1878,<sup>112</sup> the ABA's involvement in the judicial process was limited until 1948 when the Senate Judiciary Committee requested a formal opinion on every judicial nomination.<sup>113</sup> Four years after the Senate Judiciary Committee's request, President Harry S. Truman requested the same opinions, a procedural norm followed by subsequent presidents until President George W. Bush's determination in 2001 that the President no longer required the ABA rating prior to official nomination.<sup>114</sup> The Senate Judiciary Committee requested that the ABA continue its ratings

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& MAULE, *supra* note 31, at 73.

106. SHELDON & MAULE, *supra* note 31, at 156.

107. *Id.* The FBI gathers information about the nominee without evaluating or recommending the nominee. *Id.* The purpose of this report is to check on the candidate's personal credibility. *Id.* During the nomination of Clarence Thomas, Anita Hill's allegations of sexual harassment originally surfaced in the FBI report, although the allegation would be downplayed until public scrutiny required further investigation. GERHARDT, *supra* note 25, at 249.

108. *See infra* Part II.

109. SHELDON & MAULE, *supra* note 31, at 157.

110. *See id.* at 157-58. Sheldon and Maule contend that these open hearings instill a "modicum of accountability" in the nominee. *Id.* at 158.

111. *Id.* at 156-59.

112. *See* EDSON R. SUNDERLAND, HISTORY OF THE AMERICAN BAR ASSOCIATION AND ITS WORK, 3-12 (1953) (discussing the circumstances and goals surrounding the founding of the ABA).

113. SHELDON & MAULE, *supra* note 31, at 153.

114. AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 1 n.1 (2002).

despite the change in executive policy, and the ABA complied.<sup>115</sup> Although no longer done before the President makes the nomination, the ABA has continued to evaluate and rate nominees, utilizing essentially the same criteria and procedures developed over the past fifty years.<sup>116</sup> Because the investigation of circuit and district court candidates differs significantly from the more intensive investigation and rating of Supreme Court nominees, both processes demand brief examination.<sup>117</sup>

a. ABA evaluation of lower court nominees

The evaluation process for lower court nominees begins when the fifteen-member Standing Committee receives the name of the nominee from the Attorney General.<sup>118</sup> The Standing Committee typically assigns the investigation to the Standing Committee member who represents the region housing the judicial vacancy.<sup>119</sup> The investigation includes an examination of the legal writing of the nominee, the completion of the Justice Department's "Personal Data Questionnaire," and extensive interviews of acquaintances and associates of the nominee that might provide insight into the integrity, competence, and judicial temperament of the nominee.<sup>120</sup> The investigating committee member then meets with the nominee to discuss and to address any areas of concern resulting from the interviews or questionnaire.<sup>121</sup> If the investigating committee member recommends the nominee as "qualified," an informal report is drafted for the chair of the Standing Committee.<sup>122</sup> A determination by the committee member that the nominee is "not qualified" results in another committee member repeating the investigation to help ensure an unbiased rating.<sup>123</sup>

b. ABA evaluation of Supreme Court nominees

The ABA employs the same general evaluation process for Supreme Court nominees but on a much larger and more intensive scale.<sup>124</sup> Because all members of the Standing Committee participate in the investigation and

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115. *Id.*

116. *Id.*

117. SHELDON & MAULE, *supra* note 31, at 153.

118. *Id.* Because of the 2001 change in executive policy, this process takes place after the nominee has already survived pre-nomination senatorial courtesy as well as Justice Department screening. See AMERICAN BAR ASSOCIATION, *supra* note 114, at 1 n.1.

119. SHELDON & MAULE. *supra* note 31, at 153.

120. *Id.* at 153-54.

121. *Id.* at 154.

122. *Id.*

123. *Id.*

124. *See id.*

interviews are conducted nationwide, evaluation of Supreme Court nominees can take considerably longer than for the lower courts.<sup>125</sup> Members of the legal education community and former Supreme Court clerks help review the nominee's written work.<sup>126</sup> The process results in a rating of either "well qualified," "qualified," or "not qualified" from each committee member.<sup>127</sup> The full committee report on a Supreme Court nominee includes a separate rating from each committee member.<sup>128</sup>

## 2. *Special Interest Group Influence on Judicial Appointments*

The recent heightened scrutiny of the appointment process can be traced to the influx of interest generated in judicial appointments following federal decisions on polarizing issues such as race and abortion.<sup>129</sup> Judge Simon H. Rifkind describes federal courts as "the problem solvers of our society: Shall we prosecute a war, or make peace? What is life; when does death begin? How should we operate prisons and hospitals? No problem seems to go beyond the desire of the American people to entrust to the courts."<sup>130</sup> The historical and quite logical progeny of the Supreme Court's increasing role as "social engineer" has increased emphasis on evaluation of the political ideologies of the justices.<sup>131</sup> If, as some constitutional scholars theorize, the judicial branch assumes the policy-determining role of societal "problem-solver,"<sup>132</sup> the public interest in determining the judicial philosophies of the justices becomes as significant as determining the philosophies of the legislative officials elected to establish policy.<sup>133</sup>

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125. See AMERICAN BAR ASSOCIATION, *supra* note 114, at 9.

126. *Id.*

127. *Id.* at 10. The ABA currently uses three ratings. *Id.* The ABA abandoned a fourth rating of "exceptionally well qualified" during George H.W. Bush's term. Laura E. Little, *The ABA's Role in Prescreening Federal Judicial Candidates: Are We Ready To Give Up on the Lawyers?*, 10 WM. & MARY BILL OF RTS. J. 37, 41 n.19 (2001).

128. AMERICAN BAR ASSOCIATION, *supra* note 114, at 9.

129. See William G. Ross, *The Supreme Court Appointment Process: A Search for Synthesis*, 57 ALB. L. REV. 993, 995 (1994).

130. Ruggero J. Aldisert, *The Role of the Courts in Contemporary Society*, in JUDGES ON JUDGING 284 (David M. O'Brien ed., 1997) (quoting Simon H. Rifkind, Address to the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice in St. Paul, Minn. (April 8, 1976).

131. See Stephen L. Carter, *Why the Confirmation Process Can't Be Fixed*, 1993 U. ILL. L. REV. 1, 6 (1993).

132. Aldisert, *supra* note 130, at 284.

133. See generally John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures*, 77 VA. L. REV. 833 (1991).

Special interest group involvement in the appointment process has significantly increased since the 1970s,<sup>134</sup> leading Professor William Ross to note that organized interest groups “have become a permanent and prominent feature in the federal selection process.”<sup>135</sup> Special interest groups did not play a substantial role in the appointment process during the early years of the republic largely because of the original understanding of the Supreme Court and the nature of the first special interest groups.<sup>136</sup> The Supreme Court was seen by some founders as the weakest of the three branches,<sup>137</sup> and the first politically active special interest groups tended to be economically centered and uninvolved in the make-up of the judiciary.<sup>138</sup>

Effective special interest group participation in federal appointments dates to the 1881 opposition to Rutherford B. Hayes’s nomination of Stanley Matthews.<sup>139</sup> Populist groups representing farmers, such as the National Grange,<sup>140</sup> waged a successful lobby effort against Matthews because of his extensive ties to big business interests.<sup>141</sup> Despite the lobbying efforts, President James Garfield, Hayes’s successor, renominated Matthews.<sup>142</sup> The renomination prompted a lobbying response by individuals and groups with big business interests, culminating in Matthews’s successful, though tumultuous, confirmation later that same year.<sup>143</sup>

Special interest group involvement reached a new high during the 1916 confirmation contest over Supreme Court nominee Louis Brandeis.<sup>144</sup> President Woodrow Wilson’s nomination of Brandeis met ideological opposition from groups representing big business interests and the current and several past presidents of the ABA.<sup>145</sup> Although the lobbying groups generally based opposition on Brandeis’s supposed radical social and economic views, many also questioned his character; sometimes these lobbying groups “openly exhibited anti-Semitism.”<sup>146</sup>

134. Ross, *supra* note 129, at 1022–23.

135. *Id.* at 1023.

136. See GERHARDT, *supra* note 25, at 69–72.

137. SIMON, *supra* note 29, at 149.

138. See GERHARDT, *supra* note 25, at 69–72.

139. *Id.* at 69.

140. The oldest national agricultural organization in the nation, the National Grange formed in the years following the Civil War to “unite private citizens in improving the economic and social position of the nation’s farm population.” National Grange, *The National Grange: 137 Years of Service to Rural America!* at <http://www.nationalgrange.org/about/history.html> (last visited Sept. 8, 2003).

141. GERHARDT, *supra* note 25, at 69–72.

142. *Id.*

143. *Id.* For a more detailed account of Matthews’s nominations and appointment, see ABRAHAM, *supra* note 55, at 102–04.

144. Gerhardt, *supra* note 25, at 69–70.

145. *Id.*

146. *Id.* The Senate eventually confirmed Brandeis, making him the first Jewish justice



Today's special interest groups are not limited to economic agendas, as such groups predominately were prior to the Brandeis era, but encompass all sorts of political agendas.<sup>147</sup> Modern special interest groups use a wide arsenal of tactics in attempting to influence judicial appointments, including campaign donations, lobbying, advertising, and media campaigns directed at both the executive and legislative branches.<sup>148</sup> While the current emphasis may be on shaping the direction of appointments, efforts are not only aimed at trying to get the right person into the robe.<sup>149</sup>

Additionally, special interest groups often win simply by playing the game. As Michael Gerhardt points out, "It is also clear that many groups or organizations use confirmation proceedings as events in which they will try to focus on or bring attention to issues that are especially salient for their members or major contributors."<sup>150</sup> In such cases, the value of the proceeding is not necessarily the opportunity to influence the appointment but the chance to use the forum for attention on the issue.<sup>151</sup>

### 3. *The Role of Procedural Norms in the Appointment Process*

The appointment clause leaves considerable leniency in the exercise of the nomination power.<sup>152</sup> This leniency produces potential procedural differences each presidential term in both the nomination and the confirmation processes.<sup>153</sup> Procedural variations occur because the President and the Senate are at liberty to agree on whatever procedures and requirements they see fit,<sup>154</sup> but no means of enforcing such arrangements exists nor are such agreements binding to subsequent actors in the confirmation process.<sup>155</sup>

Despite the lack of enforcement mechanisms or binding precedent, subsequent actors adopt many arrangements because the arrangements are

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on the Supreme Court. ABRAHAM, *supra* note 55, at 47.

[Brandeis's] daughter, Susan, heard the news [of his appointment] in New York City from a woman seated next to her at a meeting, who commented: 'I hear they confirmed that Jew Brandeis to the Supreme Court.' Susan responded calmly: 'You are speaking to the right person. Mr. Brandeis happens to be my father.'

*Id.* at 137. Brandeis became one of the most highly regarded justices in the history of the Supreme Court. *Id.* at 6-7.

147. See GERHARDT, *supra* note 25, at 70.

148. *Id.*

149. *Id.*

150. *Id.* at 71.

151. *Id.* at 70-71.

152. See *supra* notes 27-33 and accompanying text.

153. GERHARDT, *supra* note 25, at 40.

154. *Id.*

155. *Id.*

beneficial to one actor or the process as a whole.<sup>156</sup> Professor Gerhardt, among others, has referred to these unwritten arrangements as procedural norms and detailed their impact on the appointment process.<sup>157</sup> Gerhardt believes that political conflict over individual appointments frequently occurs when either the Senate or the President chooses to ignore or attempts to alter established norms.<sup>158</sup> Consequently, appointment reform needs to adequately accommodate the norms that shape the process.<sup>159</sup>

#### D. Recent Trends: The Confirmation Process Crawls into the Twenty-first Century

In the years following Nixon's two failed Supreme Court nominees, the country's infatuation with the political aspects of the appointment process has continued to grow.<sup>160</sup> This unprecedented focus, along with increased partisan involvement, has raised concerns among legal scholars that the confirmation process is losing efficiency.<sup>161</sup> In the eight years since President Bill Clinton and the 104th Senate filled the last Supreme Court vacancy by appointing Stephen Breyer, the nation has endured almost continuous divided government.<sup>162</sup> Confirmation slowdowns have always been a foreseeable consequence of divided government.<sup>163</sup> Professor Robert Scigliano notes that Presidents enjoy only a forty-two percent success rate for Supreme Court nominations when a President's party is in the minority in the Senate as opposed to just over a ninety percent rate of success when the same party controls the White House and the Senate.<sup>164</sup> The drop in success rate is less dramatic for lower court appointments as a result of greater

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156. Michael J. Gerhardt, *Norm Theory and the Future of the Federal Appointment Process*, 50 DUKE L.J. 1687, 1687 (2001).

157. *Id.* Gerhardt defines norms as "the behavioral regularities of presidents and senators regarding appointments that persist in the absence of formal rules and that deviations from which trigger sanctions." *Id.*; see also Denning, *supra* note 73, at 14–25 (reviewing the rise and fall of various norms applicable to federal appointments).

158. See generally Gerhardt, *supra* note 156.

159. See generally *id.*

160. Ross, *supra* note 129, at 1022–23. Nixon nominated Clement F. Haynsworth Jr. to fill the Supreme Court vacancy created by the resignation of Justice Abe Fortas. See ABRAHAM, *supra* note 55, at 10–13. After the defeat of Haynsworth's nomination prompted by questionable ethical decisions involving conflicts-of-interest, Nixon responded by nominating the even more controversial G. Harold Carswell. *Id.* at 10–11. The Senate also refused to confirm Carswell. *Id.* at 12.

161. Maltese, *supra* note 68, at 3 (discussing the appointment slow-down and rise of partisan conflict during the last eight years).

162. *Id.* at 2.

163. See *id.*

164. Michael J. Gerhardt, *Towards a Comprehensive Understanding of the Federal Appointments Process*, 21 HARV. J.L. & PUB. POL'Y 467, 522 (1998).

deference to presidential nominees<sup>165</sup> and the traditional input given to the Senate on the front end of the process through senatorial courtesy.<sup>166</sup>

The recent slowdown has been exacerbated by acrimonious debate over public policy in highly divisive areas such as abortion and race.<sup>167</sup> As the federal courts increasingly attempt to resolve these issues through judicial review, the political stakes go up over the judges and justices who make these monumental decisions.<sup>168</sup>

The landmark case of *Brown v. Board of Education*<sup>169</sup> ignited heightened scrutiny of the Supreme Court's composition by demonstrating the extent of the Court's power over public policy.<sup>170</sup> The decision would prompt senators to begin more thorough questioning of nominees' judicial philosophies in confirmation hearings.<sup>171</sup> In 1957, just three years after the Court's ruling in *Brown*, Senator James Eastlands asked William Brennan, "Do you think the Constitution of the United States could have one meaning this week and another meaning next week?"<sup>172</sup> The questioning of judicial philosophy became even more direct two years later during confirmation hearings for Potter Stewart when Arkansas Senator John McClellan asked, "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?"<sup>173</sup>

165. See O'BRIEN, *supra* note 43, at 65-69. Another primary reason for greater success among lower court nominees is the "rubber stamp" approach taken by the Senate prior to the recent increased scrutiny of all federal judicial appointments. *Id.* This can be seen as either greater deference towards the President's nomination or as senatorial apathy towards who sits on the lower court bench. See *id.*

166. See *supra* notes 73-98 and accompanying text.

167. Maltese, *supra* note 68, at 6.

168. See Carter, *supra* note 131, at 12.

169. 347 U.S. 483 (1954).

170. See SIMON, *supra* note 29, at 31.

171. Maltese, *supra* note 68, at 6.

172. *Id.* At the time, Eastland was the sitting Chair of the Senate Judiciary Committee. *Id.* Brennan replied, "I think that puts it in rather a narrow compass, Senator. The application of the Constitution is a problem of applying to living matter, cases that come before us." Nomination of William Joseph Brennan, Jr. (Feb. 26-27, 1957), in 6 THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916-75, at 38 (Roy M. Mersky & J. Myron Jacobstein eds., 1977).

173. Maltese, *supra* note 68, at 6. Stewart answered:

It is a question that I have never directly asked myself. I was a Circuit Judge, exactly the same time as that particular decision was announced. And I understand that you are not asking me for any indication how I would vote or decide cases now before our court or coming before it.

Nomination of Potter Stewart to be Associate Justice of the Supreme Court of the United States (April 9, 1959), in 6 THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916-1975, at 34 (Roy M. Mersky & J. Myron Jacob-

Senators were not the only political leaders to recognize the increasing importance of judicial appointments in the furtherance of political policy. In a 1969 memorandum to President Richard Nixon, White House aide Tom Charles Huston emphasized the value of judicial appointments, calling them the “least considered aspect of Presidential power.”<sup>174</sup> Huston elaborated:

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].<sup>175</sup>

Huston’s letter prompted Nixon to develop a comprehensive strategy for the appointment of judges that shared his political ideology.<sup>176</sup> This tactic marked a revival of the federal judiciary as presidential legacy by continuing to enact the political philosophy of a president long after his term has ended.<sup>177</sup>

Subsequent presidential administrations have recognized the potential for policy reform through the judiciary and have consistently sought to use the judiciary as an “instrument of power and a way to ensure a president’s legacy.”<sup>178</sup> During the Reagan presidency, Attorney General Edwin Meese noted the administration may use selective judicial appointments to “institutionalize the Reagan revolution so it can’t be set aside no matter what happens in future presidential elections.”<sup>179</sup> Professor Sheldon Goldman contends that the Reagan administration tactically appointed younger judges in an attempt to extend Reagan’s legacy.<sup>180</sup> Reagan’s appointments, either through direct design or as a result of the demographics of those who shared his ideology, tended to be younger judges who had more potential years on the bench ahead of them.<sup>181</sup>

Contrary to his Republican predecessors, President William J. Clinton chose not to make federal judicial appointments a primary focus of his ad-

stein eds., 1977).

174. Maltese, *supra* note 68, at 3 (quoting Memorandum from Tom Charles Huston, White House aide to President Richard Nixon, Memorandum for the President 1–2 (Mar. 25, 1969) (available at WHCF ExFG 50, the Judicial Branch (1969–1970), Box 1, White House Central Files, FG 50, Nixon Presidential Materials Project, College Park, Md.)).

175. *Id.*

176. *Id.*

177. O’BIEN, *supra* note 43, at 20–21.

178. *Id.*

179. *Id.* at 21–24 (quoting D. M. O’Brien, *Meese’s Agenda for Ensuring the Reagan Legacy*, L. A. TIMES, Sept. 28, 1986, at 3).

180. GOLDMAN, *supra* note 41, at 337.

181. See O’BIEN, *supra* note 43, at 64.

ministration.<sup>182</sup> Some historians argue that this was a conscious decision made in an attempt by President Clinton to depoliticize the process by decreasing the presidential role.<sup>183</sup> Perhaps Clinton preferred to concentrate on other matters of national interest he considered more compelling, for example, health care and balancing the budget.<sup>184</sup>

Regardless of motivation, less presidential involvement only facilitated the Senate slowdown by exposing nominations to increased delay tactics.<sup>185</sup> President Clinton's unwillingness to focus on judicial selection left Clinton nominees vulnerable to attack by Republican opposition that was willing to expend political capital on blocking appointments.<sup>186</sup> Many Republican senators recognized Clinton's reluctance to fight for judicial appointments and employed delay tactics to provoke public contests.<sup>187</sup> Clinton nomination insider Eleanor Dean Acheson summarized the Clinton administration's distaste for judicial selection battles by stating, "There are a couple of cases in which we decided that even if we thought we had a shot at winning a fight . . . that it was not worth the time and resources."<sup>188</sup>

The limited judicial strategies adopted by the Clinton administration proclaimed many of the same goals espoused by the Carter administration.<sup>189</sup> Prime among these goals was the objective of creating a more demographically representative judiciary.<sup>190</sup> Despite the diverse backgrounds of Clinton appointees, Professor Theresa Beiner notes that the voting statistics of these judges in cases involving issues relevant to women and minority group members demonstrate that Clinton appointees were "philosophically similar, and ultimately, quite moderate philosophically."<sup>191</sup>

Clinton's nomination agenda prompted one conservative public interest group to respond with an assertion that Clinton's judicial legacy would be an "out-of-control" judiciary prone to judicial activism.<sup>192</sup> Voting statistics on Clinton's appointees belie this characterization, instead supporting the assertion that Clinton largely appointed moderates.<sup>193</sup> The moderate behavior and diverse characteristics of Clinton's appointees lend credence

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182. GERHARDT, *supra* note 25, at 306.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 307.

188. CARP & STIDHAM, *supra* note 59, at 243-44.

189. *See* Maltese, *supra* note 68, at 15.

190. *See id.*

191. Theresa Beiner, *The Elusive (But Worthwhile) Quest for a Diverse Bench in the New Millennium*, 36 U.C. DAVIS L. REV. 597, 608 (2003).

192. Maltese, *supra* note 68, at 15. The Judicial Selection Monitoring Project made this assertion in a fundraising letter signed by former Reagan nominee Robert Bork. *Id.*

193. CARP & STIDHAM, *supra* note 59, at 243.

to Clinton's claim that diversity rather than ideology was the driving force behind his appointment decisions.<sup>194</sup> Regardless whether diversity was Clinton's prime objective or simply concealed a more politically motivated agenda, Clinton's appointments did increase diversity in the federal judiciary.<sup>195</sup>

In 1997 the conflict intensified when political leaders began to acknowledge conscious efforts to slowdown the confirmation of nominees.<sup>196</sup> In his 1997 year-end report to Congress on the federal judiciary, Chief Justice William Rehnquist expressed concern about "serious delays in the appointment process" that threatened the quality of the federal judiciary.<sup>197</sup> Although the Chief Justice's reprimand temporarily quelled the judicial slowdown, the stall tactics would return as the 2000 election approached.<sup>198</sup> Some scholars, however, downplay the significance of the backlog just prior to the 2000 election recognizing election year slowdowns as a regularly occurring norm in the judicial appointment process.<sup>199</sup>

The unusual circumstances surrounding President George W. Bush's victory in the 2000<sup>200</sup> election further complicated the judicial appointment process by generating extensive controversy over potential judicial nominations, especially Supreme Court nominations, that Bush would make during his term.<sup>201</sup> Constitutional scholar Bruce Ackerman called for the Senate to "refuse to confirm any [Supreme Court] nominations offered up by President Bush."<sup>202</sup> Some observers theorize that the debate surrounding recent Bush nominees such as Estrada, Owen, and Holmes is intended to set the stage for any potential Bush Supreme Court nomination.<sup>203</sup>

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194. *Id.*

195. Beiner, *supra* note 191, at 599–600. "The Clinton administration successfully appointed 51 women and 42 judges of color, for a total of 29% and 24%, respectively, of its 174 appointments." *Id.* at 601.

196. Maltese, *supra* note 68, at 17–18.

197. *Id.*

198. *Id.* at 18. Slowdowns in appointments typically occur around elections, when the party in the minority has incentive to stall in hopes of winning a majority and gaining control over nominations. See GERHARDT, *supra* note 25, at 301.

199. See GERHARDT, *supra* note 25, at 301.

200. See *Bush v. Gore*, 531 U.S. 98 (2000) (ending, in a five-to-four decision, the recounting of Florida votes in the 2000 presidential election and guaranteeing George W. Bush the presidency).

201. See Bruce Ackerman, *The Court Packs Itself*, in *THE AMERICAN PROSPECT* (Feb. 12, 2001) available at <http://www.prospect.org/print/V12/3/ackerman-b.html> (suggesting that the Senate deny deferential treatment to Bush nominees for lower court bench and patently withhold confirmation of any Supreme Court nominations).

202. Maltese, *supra* note 68, at 12 (quoting Bruce Ackerman).

203. See *id.* at 27.

## III. PROPOSAL

Although scholars frequently argue that the appointment process should be apolitical,<sup>204</sup> this blanket criticism undervalues the historical reality that the process is inherently political.<sup>205</sup> Christopher L. Eisgruber notes in his review of Michael Gerhardt's *The Federal Appointments Process*, "Gerhardt reaches the same conclusion as other leading historians and political scientists: 'It is . . . beyond question that throughout U.S. history presidents and senators have been concerned about the social or political ramifications of judicial nominations.'"<sup>206</sup> Eisgruber reiterates Gerhardt's hypothesis that "the crucial question about the American appointments process is not *whether* it should be political, but *how* it should be political."<sup>207</sup> As Gerhardt states, "Different solutions are required, depending on the politics one would like to eradicate or reduce in the confirmation process."<sup>208</sup>

This section begins by discussing the policy behind the constitutional design of the appointment process followed by a brief examination of the implications of the policy on reform. The section concludes by discussing three suggestions for procedural reform that reflect the constitutional policy concerns examined in the beginning of the section.

## A. The Groundwork for Reform: Procedural Rather Than Structural

Political conflict is the natural consequence of an appointment process that allocates power between two politically accountable actors: the President and the Senate.<sup>209</sup> Many constitutional scholars recognize that the founders designed a process that included conflict in order to ensure appropriate consideration and evaluation of nominees.<sup>210</sup> The accountability of the actors, the life tenure of the judges, and the polarizing nature of the issues all support the need for deliberation and debate over nominees.<sup>211</sup>

Although many commentators contend judicial philosophy and general ideology should be included in presidential nomination of candidates as

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204. GERHARDT, *supra* note 25, at 256.

205. Christopher L. Eisgruber, *Politics and Personalities in the Federal Appointments Process*, 10 WM. & MARY BILL RTS. J. 177, 178 (2001).

206. *Id.* at 178 (quoting GERHARDT, *supra* note 25, at 215). For a review of the political science and history literature on the point, see TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 85-93 (1999).

207. Eisgruber, *supra* note 205, at 177.

208. GERHARDT, *supra* note 25, at 256.

209. *Id.* at 258-59.

210. Little, *supra* note 127, at 49.

211. Eisgruber, *supra* note 205, at 179-80.

well as in the Senate's advisory role of confirmation,<sup>212</sup> the downside of including ideology is the fueling of political rhetoric that is unhelpful in the assessment of nominees.<sup>213</sup> Record distortion is one detrimental norm that has developed as a result of increased ideological scrutiny.<sup>214</sup> Potential reform should aim not at the chilling of ideological and philosophical debate, but at removing the more undesirable and unhelpful aspects of the process such as partisan payback,<sup>215</sup> personal bias,<sup>216</sup> and record distortion in the form of unusual or exaggerated claims about nominees.<sup>217</sup>

If, as some constitutional scholars posit, the recent problems with the judicial appointment process are a product of the procedural application of the structure rather than the structure itself,<sup>218</sup> then any potential reforms should be aimed at curtailing the offensive actions instead of revamping the structure of the process.<sup>219</sup> Gerhardt goes even further, contending that under our present system of government radical structural change will remain impossible without dramatic political changes beyond just the judicial aspects of the process.<sup>220</sup> If Gerhardt is correct, then efforts to reform the appointment process need to be procedural in nature and gradual in application

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212. *See id.*

213. *See* Gerhardt, *supra* note 156, at 1706.

214. *Id.*

215. *See, e.g.,* Gerhardt, *supra* note 156, at 1706–07 (discussing payback as a standard practice in the appointment process). Gerhardt defines payback as the willingness for political actors, such as senators, to oppose a nomination in retaliation for the prior contesting of the leaders' preferred nominee. *Id.*

216. *See, e.g.,* Eisgruber, *supra* note 205, at 183.

217. *See, e.g.,* Gerhardt, *supra* note 156, at 1707 (identifying media coverage as facilitating outlandish claims about nominees). President Clinton's nomination of Ronnie White to become a federal district judge in Missouri illustrates the problems of both rhetoric and payback. *Id.* at 1706. During White's hearings, White's Republican adversaries described him as "pro-criminal" and having a "tremendous bent toward criminal activity." *Id.* at 1707. Republicans hold no monopoly on exaggeration, though, as evidenced by the eloquent but arguably overreaching "Robert Bork's America" speech delivered by Senator Edward Kennedy on the Senate floor only forty-five minutes after the announcement of Bork's nomination in which Kennedy exclaimed "Robert Bork's America is a land in which women would be forced into back alley abortions, blacks would sit at segregated lunch counters, rogue policemen could break down citizen's doors in midnight raids, school children could not be taught about evolution, writers and artists could be censured at the whim of government." ABRAHAM, *supra* note 55, at 298 (citing ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA 98 (1989)).

218. *See* Ross, *supra* note 129, at 998 (discussing various subjects of potential reform). Ross specifically notes, "The more unsavory aspects of recent confirmation struggles, particularly the distortions of Robert Bork's record, were the fault of individuals and organizations rather than the confirmation process itself." *Id.* at 998; *see also* Carter, *supra* note 131, at 1 (arguing that "[t]here is nothing wrong with the confirmation process as such or, for that matter, with the nomination process as such").

219. Ross, *supra* note 129, at 998.

220. GERHARDT, *supra* note 25, at 259.



while retaining the President and the Senate as the key decision makers in the appointment process. Additionally, reform suggestions that dramatically alter the allocation of appointment power encounter practical difficulties in enactment because, by redefining the role of our political leaders, these proposals raise questions of constitutionality and potentially require constitutional amendment.<sup>221</sup>

Considering the improbability and undesirability of radical political restructuring, the best hopes for reform lie in procedural rather than structural changes.<sup>222</sup> Remedying the appointment process's departure from its "constitutional roots" is one potential goal of procedural reform.<sup>223</sup> In pursuit of this end, proper reflection of the policy considerations implicit in the framers' original structural formulation should be a primary requirement.<sup>224</sup> The founders recognized the political nature of the appointment process and extensively debated the allocation of appointment power to properly address the concerns accompanying the process.<sup>225</sup> Reform should accord with the original goals envisioned by our nation's founders: goals still laudable today such as judicial independence, efficiency, and minimization of unhelpful political partisan bickering.<sup>226</sup> Current norms should be evaluated to see if they facilitate or hinder these underlying goals. The presidential prerogative of nomination should be properly checked by the Senate's power of confirmation or denial.<sup>227</sup> The exercise of the Senate's power to advise and consent should be consistent with the designs of the founders and not serve as either a usurpation of the presidential nomination power or a rubber stamp endorsement of any candidate the President puts forward.<sup>228</sup> The advice and consent functions of the Senate should also comport with the founders' requirement of only a simple majority to confirm.<sup>229</sup>

The following procedural changes could all operate in accordance with the reformation concerns discussed above. While none of the proposed changes represents the type of "radical reform" Professor Gerhardt acknowledges as unlikely, each involves compromise designed to help the process operate more efficiently. The difficulty in implementing the reforms

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221. See, e.g., Ross, *supra* note 129, at 1039 (discussing the practical difficulties of enacting a two-thirds requirement for judicial appointments).

222. *Id.*

223. See Denning, *supra* note 73, at 3.

224. See W. William Hodes, *The Overtly "Political" Character of the Advise and Consent Function: Offsetting the Presidential Veto with Senatorial Rejection*, 7 ST. JOHN'S J. LEGAL COMMENT. 109, 114-15 (1991).

225. See *supra* Part II.A.

226. See *supra* Part II.A.

227. See generally Hodes, *supra* note 224.

228. See generally *id.*

229. See *infra* Part III.B.

manifests in persuading the political leaders responsible to relinquish control over particular aspects of the process.<sup>230</sup>

#### B. Curtailing the Use of the Filibuster in Judicial Appointments: Choosing Not To Decide

Democratic and Republican political leaders alike in recent years have criticized the use of the filibuster as a means of blocking a full senate vote.<sup>231</sup> No other widely used tactic in the federal judicial appointment process so arguably contravenes constitutional design.<sup>232</sup> Although a majority vote on federal judicial nominees is not expressly precluded by the Constitution, treaty ratification and the overriding of presidential vetoes both require a two-thirds Senate vote while no similar limits are placed on federal judicial appointments.<sup>233</sup> Professor Ross notes that “the simple majority requirement appears to have been contemplated by the framers and the plain language of the constitution.”<sup>234</sup> Senate procedural rules, however, allow any individual senator to continue with a filibuster unless broken by a cloture vote of at least sixty senators,<sup>235</sup> nine more than the simple majority needed to reach a final decision on a judicial nominee.<sup>236</sup>

Because withholding a vote yields the same outcome as voting the nominee down,<sup>237</sup> the nine vote discrepancy results in a de facto raising of the senator count needed for confirmation from the simple majority to the filibuster breaking total of sixty.<sup>238</sup> Assuming the two hundred and fourteen year history of a simple majority approval in judicial appointments has been

230. Gerhardt, *supra* note 156, at 1698.

231. For a Republican reprimand see “Letter from President George W. Bush to Senator Bill Frist and Senator Tom Daschle, President Calls for Action on Judicial Nominations,” (March 11, 2003), *available at* <http://www.whitehouse.gov/news/releases/2003/03/20030311-1.html>. For a summary of Democratic denouncements see Goldman, *supra* note 7, at 231–35.

232. See Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 185 (1997).

233. Ross, *supra* note 129, at 1039.

234. *Id.*

235. Fisk & Chemerinsky, *supra* note 232, at 184. In 1908, Senator Robert M. LaFollete lodged one of the most notorious filibusters in history. *Id.* at 196. LaFollete held the floor for eighteen hours sustaining himself with eggnog and turkey sandwiches. *Id.* Unfortunately for LaFollete, the eggnog was adulterated and made the Senator quite ill. *Id.* After buying some time by forcing roll calls, LaFollete continued for another eight hours until Senator Gore, who was blind, yielded the floor to a fellow senator who had just excused himself to the cloakroom. *Id.*

236. The author’s calculations assume a full vote by all 100 members of the Senate requiring either a majority of fifty-one or fifty plus the vice president’s vote.

237. Christopher L. Eisgruber, *Politics and Personalities in the Federal Appointments Process*, 10 WM. & MARY BILL RTS. J. 177, 184 (2002).

238. Fisk & Chemerinsky, *supra* note 232, at 215.

a correct interpretation of Article II, the raising of the threshold seems unwarranted. Filibustering results in the anomalous situation in which a decision to hold a vote on the nominee requires greater support from the Senate than is needed to actually decide the fate of the nominee.

Proponents justify filibuster as an exercise of the senatorial power to adopt procedural measures to facilitate the operation of the Senate.<sup>239</sup> Congressman Charlie Gonzalez praises the filibuster as a "nonpartisan legislative tool that gives all senators the power to secure information, facilitate negotiation, and seek compromise."<sup>240</sup> The problem with such a powerful tool in the confirmation process, considering the simple majority needed to confirm, is the dramatic shifting of the balance of power into the hands of a minority of senators by requiring a three-fifths supermajority for Senate action.<sup>241</sup> In other senatorial processes, when compromise is more easily accomplished through the alteration of the proposed legislation, the coalition building function of the filibuster is easier to justify.

Although the Senate has developed a reputation as a deliberative legislative body, some historical accounts dispute the widespread practice of dilatory debate in the early days of the Senate.<sup>242</sup> Fisk and Chemerinsky note that while filibuster "seems to have occurred, the rules probably prohibited it,"<sup>243</sup> and determine it unclear if dilatory debate was "considered an established practice at this point" or just a distasteful habit of some Senators.<sup>244</sup>

In the context of judicial nominations, filibuster can rarely be characterized as a tool for securing information because the senator filibustering has frequently already adopted a firm position on the issue.<sup>245</sup> The resolute senator is then using the filibuster to gain bargaining strength rather than information, as well as to demonstrate her resolve on the issue. This tactical use of the filibuster undermines the responsibility that both the Senate and the President have in expeditious selection of federal judges.<sup>246</sup> Commenta-

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239. See *supra* notes 155–57 and accompanying text.

240. Charlie Gonzalez, *supra* note 7, at A3.

241. Fisk & Chemerinsky, *supra* note 232, at 215–17.

242. *Id.* at 188–90.

243. *Id.* In support of this assertion, Fisk and Chemerinsky note that early Senates informally adopted Thomas Jefferson's *Manual of Parliamentary Procedure*, which specified: "No one is to speak impertinently or beside the question, superfluously or tediously." *Id.*

244. *Id.* at 189. Senator (and former member of the House) John Randolph was so noted for his loquaciousness that Thomas Jefferson adopted the term "a John Randolph" to describe one who rambles during a congressional proceeding. *Id.*

245. See, e.g., Gerhardt, *supra* note 164, at 515 (noting Senator Jesse Helms's use of delay tactics to oppose President Clinton's nomination of Walter Dellinger). Senator Helms frequently employed filibuster to oppose Clinton nominees for ideological reasons. *Id.* The Senator's opposition to Dellinger was primarily payback for Dellinger's role in bolstering the Senate Judiciary Committee's opposition of Robert Bork in 1987. *Id.*

246. See Thomas O. Sargentich, *Report of the Task Force on Federal Judicial Selection*

tors have characterized the filibuster as a “minority veto”<sup>247</sup> having “little to do with deliberation and less to do with debate.”<sup>248</sup> Similarly, characterizing the filibuster as a means of “*facilitating* negotiation” is misleading.<sup>249</sup> Filibuster, like a minority veto or other strategies that dramatically shift power to a minority, does not make negotiation easier; it makes negotiation necessary.

Providing a minority veto in the confirmation process disrupts the allocation of power granted by the founders in the constitutional design of the appointment process. The Constitutional construction for appointments embodies the idea that Congress would generally operate by majority rule.<sup>250</sup> As Fisk and Chemerinsky state, “The Constitution is specific about the situations where more than a simple majority is required for Congress, or a house of Congress, to act.”<sup>251</sup> For example, there are only seven enumerated circumstances in which the Constitution imposes a two-thirds requirement.<sup>252</sup>

The Constitution calls for a supermajority requirement primarily, if not exclusively, in circumstances in which there is a presumption of disapproval of the act proposed.<sup>253</sup> A presidential nomination for judicial appointment carries with it a presumption of approval.<sup>254</sup> The imposition of a supermajority requirement for confirmation of appointments abrogates the presumption of presidential approval and upsets the allocation of power in the constitutional design of the process.

The constitutional implication of majority consent in the advice and consent function of the Senate supports curtailing the use of the filibuster in judicial appointments. One solution to objectionable use of the filibuster is the weakening of the filibuster in the federal appointment process by a progressive lowering of the cloture vote required to break a filibuster.<sup>255</sup> Professor Brannon Denning has proposed a sliding scale that starts at sixty

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of *Citizens for Independent Courts*, 51 ADMIN. L. REV. 1031, 1044 (1999).

247. Fisk & Chemerinsky, *supra* note 232, at 184.

248. *Id.*

249. Webster’s Dictionary defines facilitate as “to make easier.” WEBSTER’S NEWORLD DICTIONARY 500–01 (2d ed. 1984).

250. Fisk & Chemerinsky, *supra* note 232, at 239.

251. *Id.*

252. *Id.* Fisk & Chemerinsky list the seven instances as: removal after impeachment, expulsion of a member from either Congressional house, overriding of a presidential veto, treaty ratification, congressional proposal of a constitutional amendment, approval of the election to Congress of a candidate who has engaged in insurrection or rebellion, and disabling of a President under the twenty-fifth amendment. *Id.* at n.341. For a detailed discussion of supermajority requirements see Benjamin Lieber & Patrick Brown, Note, *On Supermajorities and the Constitution*, 83 GEO. L. J. 2347, 2350 (1995).

253. GERHARDT, *supra* note 25, at 297.

254. Gerhardt, *supra* note 164, at 479.

255. Denning, *supra* note 73, at 32.

votes, as presently required, and decreasing over a series of votes until the fourth cloture vote, which would only require a majority.<sup>256</sup> A sliding scale would allow filibuster to play a diminished, but not insignificant, role in the appointment process while restoring the balance of power envisioned by the founders and better comporting with the constitutional design for the process.

Unfortunately, such reform seems unlikely because political leaders “rarely agree to any formal alterations in the structure of the appointments process unless they are convinced change is in their mutual institutional interests.”<sup>257</sup> Reforming the use of filibuster in the context of judicial appointments would require senators to act contrary to their own present benefit and instead act for the future efficiency of the appointment process.<sup>258</sup>

### C. Senatorial Courtesy: Balancing the Interests of the President and Home-State Senators

A second potential procedural reform is formalization of the well-established practice of senatorial courtesy. Senatorial courtesy has survived primarily because abandoning the practice provides little benefits to the Senate but would come at the expense of a formidable negotiating tool.<sup>259</sup> Consequently, senators recognize the benefits of honoring their fellow senators’ exercise of senatorial courtesy; “in fighting for a colleague’s privilege to take advantage of this practice, a senator protects his own entitlement to it.”<sup>260</sup> Considering the longstanding endurance of the practice and the sacrifice of power involved, for the Senate as a whole and Senators individually, senatorial courtesy is not likely to be abandoned. Greater standardization in the process, however, along with procedural changes to bring senatorial courtesy more in line with constitutional design is both possible and desirable.

The previous sections discussed the policies behind senatorial courtesy,<sup>261</sup> but the implications of these policies weigh differently depending on the hierarchical level of the appointment. When examined in light of the political and policy implications, senatorial courtesy becomes much less objectionable in the context of district court appointments. These same considerations, however, make adherence to senatorial courtesy less desirable

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256. *Id.* Denning proposed a sliding scale decreasing in increments of three: sixty, fifty-seven, fifty-four, and finally fifty-one. *Id.*

257. Gerhardt, *supra* note 156, at 1698.

258. *See id.*

259. *See* Gerhardt, *supra* note 164, at 530.

260. *Id.*

261. *See supra* Part II.

for circuit court nominations<sup>262</sup> and much more egregious for potential Supreme Court appointments. This section begins by supporting senatorial courtesies in district courts and concludes by discussing the need to curtail the use of senatorial courtesies in appellate court appointments.

### 1. *Senatorial Courtesy in District Court Appointments*

For district court appointments, senatorial courtesy plays a substantial role in the process.<sup>263</sup> Senatorial courtesy is a procedural norm that should be encouraged by presidents because it increases efficiency and public involvement without substantially undermining of the constitutional design of the process. On the district court level, senators from the state housing the district court vacancy are likely to be more familiar than the President with potential nominees.<sup>264</sup>

Additionally, direct election by the state population allows home-state senators to claim a more direct mandate from the electoral body over which the judge will preside. The President potentially has less interest in spending the political capital needed to overcome an objecting home-state Senator regarding an individual district court nomination. As a result of the imbalance of interest in the appointment, senatorial courtesy allows the President to defer the nomination power to the home-state senators without substantial political sacrifice.

### 2. *Senatorial Courtesy in Appellate Court Appointments*

The balance between presidential nomination autonomy and senatorial courtesy shifts noticeably at the circuit court level<sup>265</sup> where the court presides over several states. This operates to diminish the Senator's claim of electoral mandate and bolster the constitutional policy arguments that originally supported presidential nomination discretion.<sup>266</sup> Circuit court nominations frequently generate more attention and conflict than district court nominations because the stakes are higher for the Senate and the President,

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262. See John C. Eastman, *The Limited Nature of the Senate's Advice and Consent Role*, 36 U.C. DAVIS L. REV. 633, 661–62 (2003).

263. SHELDON & MAULE, *supra* note 31, at 158. President Dwight Eisenhower's Deputy Attorney General Lawrence Walsh summed up the importance of district court appointments by noting that he found it virtually impossible to have a person confirmed for a federal judgeship if one of the Senators from the candidate's home state is either "openly or secretly opposed to the nomination." Carl Tobias, *Federal Judicial Selection in a Time of Divided Government*, 47 EMORY L.J. 527, 582 n.12 (1998) (quoting Lawrence E. Walsh, *The Federal Judiciary-Progress and the Road Ahead*, 43 J. AM. JUDICATURE SOC'Y 155, 156 (1960)).

264. See SHELDON & MAULE, *supra* note 31, at 159.

265. *Id.* at 158.

266. See *supra* Part II.

largely because the circuit courts act as the court of last resort for the majority of federal cases; those not granted certiorari by the United States Supreme Court.<sup>267</sup>

On the circuit court level, the balance of interests warrants some front-end consideration of the opinions of senators whose constituents are covered by the circuit but fails to justify substantial deference. Instead, any objections to circuit court nominees should cost the opposing Senator the political capital expenditures consistent with other political positions the Senator supports.

The nomination and confirmation of Clarence Thomas provide a useful illustration of the difference between a circuit court nomination and a nomination to the Supreme Court. Thomas's nomination to the Court of Appeals for the D.C. Circuit was approved with only two opposing votes,<sup>268</sup> while his nomination to the Supreme Court resulted in more votes cast against him than any other successful nominee in Supreme Court history.<sup>269</sup> Senatorial courtesy and sponsorship offer a plausible explanation for these seemingly inconsistent votes. As a circuit court nominee, Thomas enjoyed sponsorship by Missouri Senator John Danforth.<sup>270</sup> Thomas had previously worked for Danforth, and the Senator was one of his most outspoken supporters.<sup>271</sup> The practice of senatorial courtesy played a much less significant role in Thomas's Supreme Court nomination. The decreased deference to sponsoring senators, along with increased scrutiny of all nominees (and particularly Supreme Court nominees) resulted in dramatically different votes when Judge Thomas sought to become a justice.<sup>272</sup>

Nominations to the United States Supreme Court naturally invoke higher attention than any other federal judicial appointments. Senatorial courtesy plays no significant role in modern Supreme Court appointments because of the political magnitude of these appointments.<sup>273</sup> Because all senators have a clear interest in the appointment of Supreme Court justices and all are individually accountable to their constituents, no single senator's vote should be given greater weight through senatorial courtesy.

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267. See Michael J. Mazza, *A New Look at an Old Debate: Life Tenure and the Article III Judge*, 39 *Gonz. L. Rev.* 131, 133 (2003–2004).

268. *Morning Edition: Federal Judge Shortage*, *supra* note 8.

269. Senator Dennis DeConcini, *Examining the Judicial Nomination Process: The Politics of Advice and Consent*, 34 *ARIZ. L. REV.* 1, 15 (1992). The Senate confirmed Thomas by a vote of 52–48. LAWRENCE BAUM, *THE SUPREME COURT* 51 (1998).

270. See Simon, *supra* note 29, at 77–81.

271. See *id.*

272. See *id.*

273. See Joseph S. Larisa, *Popular Mythology: The Framers' Intent, the Constitution, and Ideological Review of Supreme Court Nominees*, 30 *B.C. L. REV.* 969, 985 n.66 (1989).

#### D. The Imposition of Time Structure on the Appointment Process

In October 2002, President Bush offered a four-part proposal establishing a timeline for the judicial appointment process.<sup>274</sup> Bush's proposal calls for all three branches of the federal government to adhere to set deadlines to increase efficiency within the appointment process.<sup>275</sup> Specifically, Bush's plan calls for retiring appellate and district court judges, when possible, to notify the President of their intention to retire at least one year in advance.<sup>276</sup> The President would then have 180 days in which to submit a nomination to the Senate for approval.<sup>277</sup> After receiving the President's nomination, the Senate Judiciary Committee would have ninety days to hold a hearing.<sup>278</sup> The full Senate would have 180 days from the date of receipt of the nomination by the Senate Judiciary Committee to hold a vote for the nominee.<sup>279</sup>

In a May 2003 radio address, Bush restated the timeline proposal and proclaimed "[t]he goal is to have a new judge ready to take the bench on the same day the sitting judge retires."<sup>280</sup> On the day of that radio address, Bush also issued an executive order as a formal expression of his commitment to adhere to the 180-day timeline.<sup>281</sup> In an effort to promulgate Bush's proposal, the Judicial Conference strongly urged compliance with the one-year advance notice recommendation.<sup>282</sup> Despite this limited support and a demand for "the return of dignity and civility to the [appointment] process" by a group of freshmen senators from both parties,<sup>283</sup> the Senate has not endorsed the President's plan. Additionally, the President has no means of compelling Senate compliance with his timeline. This lack of authority is rightfully so, as such compulsion would very likely be an invasion on the Senate's power to establish its own rules.<sup>284</sup>

As a means of expediting the process, imposition of a timeline warrants more than a perfunctory glance. Although it would require congres-

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274. Molly McDonough, *Bush Proposes Changes to Judicial Confirmation*, 1 No. 42 A.B.A. J. E-REPORT 2, Nov. 1, 2002.

275. *Id.*

276. *President Calls for Judicial Reform* (national radio broadcast, May 9, 2003), available at [www.whitehouse.gov/news/releases/2003/05](http://www.whitehouse.gov/news/releases/2003/05).

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *President Calls for Judicial Reform* (national radio broadcast, May 9, 2003), <http://www.whitehouse.gov/news/releases/2003/05/20030509-4.html>.

283. *Id.*

284. See Fisk & Chemerinsky, *supra* note 232, at 227–31 (arguing that the Senate is free to establish its own procedural rules).



sional self-restraint to enact either through alteration of Senate procedure or through legislation, a variation of Bush's plan is not unattainable. Congress has already statutorily enacted procedural rules enacting strict time limits on debate and other procedural delay in the context of the budget process.<sup>285</sup> The willingness of Congress to adopt time limits in the financial context is an encouraging sign that Congress will take appropriate steps to promote efficiency when necessary. With the role of the federal judiciary increasing regularly<sup>286</sup> perhaps Congress will recognize the need to increase efficiency in the appointment process and institute a timetable for the appointment of federal judges.

Although one commentator has criticized Bush's proposal as an attempt to "centralize power in the White House" and "diminish the Senate's capacity to affect composition of the federal courts,"<sup>287</sup> the basic design of the plan compliments the constitutional framing of the appointment process. Any "diminishing" of the Senate's role in the process comes from eliminating filibuster as an acceptable means of advising; however, as discussed above, silence is not especially useful advice.<sup>288</sup>

A few modifications to Bush's proposal might help alleviate some of the criticism and facilitate Senate adoption. First, a primary alteration would be the inclusion of the Senate in the determination of what timelines are realistic for each phase of the process. Supreme Court nominations carry greater national significance than district court nominations and the difference in scrutiny required could be incorporated into the time process by making the amount of time for consideration vary with the judicial level of the appointment.

Second, to help counter the diminished ability of a Senate minority to prevent the confirmation of a nominee with questionable qualifications, the ABA Committee should be restored to its previous, more prominent role of consultation prior to formal nomination. The ABA provides a much-needed examination of nominees' professional qualifications and judicial temperament sufficiently removed from the ideological beliefs of the nominee.<sup>289</sup> The ABA's relatively objective evaluation helps ensure a high level of professional proficiency and opens the door, through a lower ABA rating, for legitimate senatorial concerns regarding inadequate professional qualifications.<sup>290</sup> Without this objective third party input, professional concerns are more easily dismissed as ideological condemnation in disguise.

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285. *Id.* at 215.

286. Rehnquist, *supra* note 9, at 4.

287. E. J. Dionne Jr., *Bush's Judges*, WASH. POST, Nov. 1, 2002, at A35.

288. *See* Eastman, *supra* note 262, at 657.

289. *See* Little, *supra* note 127, at 51-53 (2001).

290. *See id.* at 52.

Another potential problem with Bush's proposal is the complete lack of any effective enforcement mechanism for policing adherence to the timetable because the President lacks authority to change procedural rules of the Senate.<sup>291</sup> One solution to the policing dilemma is public agreement by all parties involved to adhere to such a timeline. Exposure to public scrutiny would serve to police all parties through political accountability at the polls for their assurances. In addition to potentially influencing voting, this public accountability would provide grounds for legitimately objective criticism if timetables were ignored.

#### IV. CONCLUSION

The first step in reforming the appointment process is recognizing that much of the political confrontation surrounding the process is the natural result of the constitutional design. Although the founders anticipated conflicts over nominations, the adversarial roles assigned to the major players were designed to facilitate efficient resolutions. Within the structure provided by the framers, presidents and senators should be encouraged to vigorously debate and scrutinize the qualifications and ideology of each candidate. Problems have developed when this scrutiny has taken the form of delay tactics that predominately serve the interests of individual political leaders rather than facilitating a more efficient and productive appointment process.

The process does not need rebuilding so much as it needs disinfecting; a cleansing of the unhelpful and undesirable practices that have altered the balance of power by placing too much control over appellate court—especially Supreme Court—appointments in the hands of individual senators. Curtailing the use of filibuster as a negotiation tool by a decreasing cloture structure would allow senators in a minority party an opportunity to publicly express concern over a nominee without imposing a supermajority requirement for confirmation. Similarly, the formalization of senatorial courtesy in district court appointments ensures that senators are heard in the appointment of district judges in their states. In circuit courts, where the judges are frequently final arbiters of justice for a wider population and political leaders have a more prominent interest in promoting their ideological goals, home-state senators should play a significant but not overwhelming role in the appointment process. Supreme Court appointments are of such national importance that no single senator's voice should be allowed, through any form of senatorial courtesy, to drown out those of her fellow senators.

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291. See *supra* notes 155–57 and accompanying text.

A time requirement for nomination, confirmation, and appointment would further increase efficiency and discourage some of the recent detrimental practices that stymie the process. Time limitations, however, should be accompany procedures, such as more official inclusion ABA evaluations, which ensure that time requirements do not diminish scrutiny of nominees' qualifications. By implementing these proposed procedural reforms, federal political leaders can increase efficiency in the judicial appointment process while retaining the apportionment of power in the original constitutional design.

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