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The Topsy-Turvy World of Judicial Confirmations in the Era of Hatch and Lott

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Articles

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Stephan O. Kline*

> *The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for . . . .*[1]

I. Overview

The years since the Republicans gained a majority in the United States Senate have proved to be most contentious for the federal judicial confirmation process. During President William Jefferson Clinton's first two years in office, the Democratic Senate confirmed scores of federal judges in a bipartisan fashion.[2]

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1. U.S. CONST. ART. II, § 2, cl. 2.

2. The federal judges referred to throughout this paper are Article III life-tenured judges who are nominated by the President and confirmed by the Senate. They include the

Following change in control of the Senate, the number of judges confirmed dropped precipitously in 1996 and 1997, while the acrimony and bitterness on the issue intensified.

The Senate confirmed twenty-eight judges in 1993[3] and 101 in 1994. Following the elections of 1994,[4] the number of judges confirmed was reduced substantially to fifty-five in 1995, twenty in 1996,[5] and thirty-six in 1997, or a total of 111 for the three full years, not much more than in 1994, before rebounding to 65 judges in 1998.[6]

William Fletcher, presently a judge on the United States Court of Appeals for the Ninth Circuit, is emblematic of the long delays that the Senate created for judicial nominees. He was originally nominated in April of 1995, and the Senate did not vote to confirm him until September 28, 1998. While his nomination took the longest to proceed through the Senate gridlock, his situation is not unique, as it took the Senate more than a year to confirm seventeen nominees in the 105th Congress.[7] This delay is startling

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justices of the Supreme Court and the judges who sit on the courts of appeals (including the Federal Circuit), the district courts, and the Court of International Trade.

3. Traditionally, the number of judges confirmed in a President's first year in office are low as there are delays in forwarding nominations to the Senate. 1993 was no exception, as President Clinton's first judicial nomination was for Ruth Bader Ginsburg's elevation to the Supreme Court in June, more than five months after his inauguration. Similarly, the Senate confirmed only 15 judges in 1989, President Bush's first year in office.

4. The Senate changed from a composition of 57 Democrats and 43 Republicans in the 103d Congress, 1993-1994, to 54 Republicans and 46 Democrats in the 104th Congress, 1995-1996 (including the switch from Democrat to Republican of Senators Richard Shelby of Alabama and Ben Nighthorse Campbell of Colorado). After the 1996 election the ratio changed to 55 Republicans and 45 Democrats for the 105th Congress, and it remains the same for the 106th Congress in the aftermath of the November, 1998 elections.

5. The Republican nominee for President in 1996, former Senate Majority Leader Robert Dole (R-Kansas), attacked judges and the courts, and the confirmation process suffered—no appellate court judges were confirmed in that extremely contentious year. In contrast to the 20 judges approved in 1996, the Democratic Senate had confirmed more judges in 1992, an election year in which it appeared that President Bush would not win a second term, than in any other year of the Bush Administration.

6. For the 20 years from 1979 through 1998, the Senate confirmed an average of 54 judges per year: 1979-135, 1980-64, 1981-41, 1982-47, 1983-32, 1984-43, 1985-84, 1986-44, 1987-43, 1988-41, 1989-15, 1990-56, 1991-58, 1992-66, 1993-28, 1994-101, 1995-55, 1996-20, 1997-36, and 1998-65. Data obtained from Administrative Office of U.S. Courts; Senate Judiciary Committee; and U.S. Department of Justice's Office of Policy Development.

7. The 17 judges are listed in order of the length time between nomination and confirmation: William Fletcher for the Ninth Circuit (41 months); Hilda G. Tagle for the Southern District of Texas (31 months); Susan Oki Mollway for the District of Hawaii (29 months); Ann Aiken for the District of Oregon (26 months); Margaret McKeown for the Ninth Circuit (23 months); Margaret Morrow for the Central District of California (21

because only three of the 195 judges confirmed during the entire Bush Administration had to wait nine or more months from nomination to confirmation, none waited more than a year, and most were confirmed in two to four months.[8] The average length of time from nomination to confirmation was 192 days for the thirty-six judges who were confirmed in 1997, and this grew to 232 days for the sixty-five judges confirmed in 1998. In contrast, the average time from nomination by a President to confirmation by the full Senate over the past twenty years is ninety-one days,[9] and of the 101 judges confirmed in the 105th Congress, only nineteen were confirmed in ninety-one or fewer days.[10] Moreover, the Senate adjourned and failed to take a final vote on seven nominees approved by the Judiciary Committee in the 104th Congress, and four at the end of the 105th Congress, compared to zero at the end of the 101st, 102d, and 103d Congresses.[11]

The Republican majority has tried to alter the traditional judicial appointment process in which the senior Senator from the President's party makes recommendations for district court nominees. The Republicans have ended the arrangement in which the American Bar Association assisted in screening judicial nominees and made formal presentations to the Senate Judiciary Committee. Nominees have had holds placed on them, even after they have been voted to the Senate floor, and they are regularly

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months); Merrick Garland for the District of Columbia Circuit (18 months); Joseph Bataillon for the District of Nebraska (18 months); Christina Snyder for the Central District of California (18 months); Eric Clay for the Sixth Circuit (16 months); Richard Lazzara for the Middle District of Florida (16 months); Arthur Gajarsa for the Federal Circuit (15 months); Thomas Thrash for the Northern District of Florida (14 months); Sonia Sotomayor for the Second Circuit (14 months); Ivan Lemelle for the Eastern District of Louisiana (13 months); Colleen Kollar-Kotelly for the District of Columbia District Court (12 months); and Jeffrey Miller for the Southern District of Florida (12 months). *See* United States Senate Comm. on the Judiciary, *Alphabetical List of Nominees for the 105th Congress* on its web site: www.senate.gov/~judiciary/105alpha.htm; *see also* Alliance for Justice, *Judicial Selection Project: Annual Report 1998,* at 19 (1999); The White House Office of the Counsel to the President, *President Clinton's Judicial Nominees* (Aug. 7, 1996) (both on file with author).

8. The three Bush judges who took nine or more months to secure confirmation were Timothy Leonard for the Western District of Oklahoma (9 months), Anita Brody for the Eastern District of Pennsylvania (10 months), and Ursula Mancusi Ungaro for the Southern District of Florida (11 months). *See* Senate Judiciary Committee, *Ranking Member Staff Statistics* (Jan. 1998).

9. *See* Alliance for Justice, *Judicial Selection Project: Annual Report 1998,* at 13 (1999).

10. *Department of Justice Judicial Selection Group Status and Assignment Memorandum 105th Congress* (Dec. 14, 1998).

11. *See* 144 CONG. REC. S12,964 (daily ed. Oct. 21, 1998) (statement of Senator Patrick Leahy).

approved through roll call votes instead of by unanimous consent agreements. Judicial candidates face unprecedented and intrusive levels of questioning as Senators probe personal beliefs, looking for jurists who might become "judicial activists."[12]

The Senate Judiciary Committee chaired by Orrin Hatch (R-Utah) contributed to the gridlock as it held only six confirmation hearings in 1996, and nine during 1997 (none in January, February, April, August, and December, 1997), before holding thirteen in 1998.[13] In addition, the Committee required unusual second hearings for ten nominees who were renominated in the 105th Congress,[14] retained others without even holding a hearing,[15] and

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12. Politicians often toss around the term "judicial activism," in an effort to justify their decisions to criticize the judiciary. Judiciary Committee Chairman Orrin Hatch (R-Utah) spoke to the Utah Federalist Society and said:

> A judicial activist is, simply put, a judge who exceeds the proper limits of his or her authority and usurps the authority delegated to another branch (or institution) of government. In its most basic sense, activism is when judges make the law instead of applying it. The limits on judicial authority are fairly simple in principle, but vitally important in a constitutional democracy such as ours.

Orrin Hatch, Address to University of Utah Federal Society Chapter (Feb. 18, 1997), *available in* 1997 WL 4429673. Senator Hatch's House counterpart, Representative Henry Hyde (R-Illinois), Chairman of the House Judiciary Committee, views judicial activism similarly:

> My own view is that judicial activism is conduct by a judge that egregiously trespasses into legislation. When [judges] run school districts, when they run jail systems and order legislative acts to be initiated that cannot avoid raising taxes, questions arise whether they are not beyond their charter. In truth, you look at each case individually.

Editorial, *Interview with Henry Hyde, Hyde on Judging Judges - And Presidents*, INV. BUS. DAILY, June 16, 1997, at A32.

13. This is far fewer than the number of hearings conducted during the last two years of the Reagan Administration and the four years of the Bush Administration. There were 17 hearings in 1987, 16 in 1988, 7 in 1989, 17 in 1990, 16 in 1991, and 15 in 1992. *See* Letter from Nan Aron, Executive Director, Alliance for Justice, and Barbara Moulton, Staff Attorney, Alliance for Justice, to Abner Mikva, White House Counsel (Dec. 23, 1994) (on file with author). Senator Patrick Leahy noted at the first confirmation hearing of 1997:

> I just think it is great to be here. This is the first hearing of the 105th Congress on nominees to a few of the almost 100 vacancies—vacancies that are creating a crisis for the federal judiciary. We have never had to wait until the Ides of March for our first confirmation hearing.

Confirmation Hearings of Federal Appointments: Hearings Before the Comm. on the Judiciary Part 1, 105th Cong. 2 (1997) (statement of Senator Patrick Leahy).

14. The following nominees had confirmation hearings in both the 104th and 105th Congresses and were ultimately confirmed: Ann Aiken for the District of Oregon (September 24, 1996 and October 28, 1997); Joseph Bataillon for the District of Nebraska (July 31, 1996 and July 22, 1997); Eric Clay for the Sixth Circuit (March 27, 1996 and May 7, 1997); William Fletcher for the Ninth Circuit (December 19, 1995 and April 29, 1998); Arthur Gajarsa for the Federal Circuit (June 25, 1996 and May 7, 1997); Susan Oki Mollway for the

kept some in the Committee for months after their hearings without permitting a vote.[16]

Senator Jeff Sessions (R-Alabama), one of the more aggressive members of the Judiciary Committee, is particularly disapproving of those nominees who have had any affiliation with the American Civil Liberties Union. In one memorable question, he grouped together multiple views of the ACLU to ask: "[T]hey oppose the death penalty, they oppose the three strikes sentencing laws, they are in opposition to school vouchers for sectarian schools, they oppose V-chips for television sets to limit what is shown, opposition

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District of Hawaii (March 27, 1996 and February 4, 1998); Margaret Morrow for the Central District of California (June 25, 1996 and March 18, 1997); and Thomas Thrash, Jr. of the Northern District of Georgia (July 31, 1996 and May 7, 1997). In addition, two others had two hearings but were not confirmed: Richard Paez for the Ninth Circuit (July 31, 1996 and February 25, 1998) and Clarence Sundram for the Northern District of New York (July 31, 1996 and June 25, 1997). *See Confirmation Hearings on Federal Appointments: Hearings Before the Senate Comm. on the Judiciary Part 2*, 104th Cong. IX (1995); *Confirmation Hearings on Federal Appointments: Hearings Before the Senate Comm. on the Judiciary Part 3*, 104th Cong. III-X (1996); *Confirmation Hearings on Federal Appointments: Hearings Before the Senate Comm. on the Judiciary Part 1*, 105th Cong. III-IX (1997); *Confirmation Hearings on Federal Appointments: Hearings Before the Senate Comm. on the Judiciary Part 2*, 105th Cong. VI (1997); *Confirmation Hearings on Federal Appointments: Hearings Before the Senate Comm. on the Judiciary Part 3*, 105th Cong. III-IX (1998).

Referring to multiple hearings, Senator Mike DeWine (R-Ohio) spoke to Ninth Circuit nominee William Fletcher:

> Mr. Fletcher, the committee, as Senator Feinstein has pointed out, has already held a hearing in the last Congress, and so we have that record available. In addition to the transcript of that hearing, of course, we also have copies of the written questions that were submitted to you at the time and the responses that you made. So that is available. It is now a different Congress. We feel it is necessary to hold a different hearing. But the transcript from the first hearing is, of course, available to any member of the Judiciary Committee or any member of the Senate who wishes to examine it.

Confirmation Hearings of Federal Appointments: Hearings Before the Comm. on the Judiciary, Part 3, 105th Cong. 1031 (1998) (statement of Senator Mike DeWine).

15. Hilda Gloria Tagle, for example, a nominee for the Southern District of Texas, was first nominated in August of 1995 and was renominated in early 1997. She had no hearing until February of 1998 and was finally confirmed in March of 1998. Fourth Circuit nominee James Beaty was first nominated in December of 1995 and was renominated in January, 1997, but he never received a hearing.

16. Clarence Sundram, a nominee for the Northern District of New York, was first nominated in September of 1995, received a hearing in 1996, was renominated at the beginning of 1997, received a second hearing in June of 1997, but his nomination was not voted on by the Judiciary Committee in either the 104th or 105th Congresses. The 105th Congress adjourned with the Judiciary Committee having held confirmation hearings for three other nominees without bringing those nominations to a vote: Ninth Circuit nominee Marsha Berzon, Northern District of Illinois nominee Matthew Kennelly, and District of Puerto Rico nominee Anabelle Rodriguez.

to voluntary labeling of albums, and support of partial-birth abortion, support of the constitutionality of racial preferences and the decriminalization of drugs. . . . Do you agree with all of those views?"[17]

Professional court watchers like Sheldon Goldman, a political scientist at the University of Massachusetts who has tracked judicial confirmations for three decades, believe that the current gridlock has been unique. Goldman noted: "What's unparalleled is to start so early with delay. We've never had this done in a President's first year of a new term. Sure, people have played hardball in the past, but not on such a sustained level as they are doing now."[18] Frustrated at the tactics employed by the Senate majority, a spokesman for Senator Patrick Leahy (D-Vermont), the Ranking Member of the Judiciary Committee, analogized judicial gridlock to the government "shutdown" in 1995. "They tried to shut down the executive branch, and that didn't work. So they are aiming at judges, who are an easier target, and at the same time throwing red meat to their right wing."[19]

Even though there have routinely been conflicts over the appointment of Supreme Court Justices, going back to the Senate's 1795 rejection of John Rutledge as President George Washington's second Chief Justice, Senators ordinarily have not tried to prevent the appointments of lower court nominees. During the Reagan and Bush administrations, besides the highly publicized efforts to defeat Robert Bork and Clarence Thomas' elevations to the Supreme Court, only four other nominations were defeated, and questions were raised on only a few other nominees. This provides a stark contrast to the current era in which most nominees are targeted as potential judicial activists, and the scrutiny results in the slow down of entire confirmation process.

The confirmation gridlock on display since the Republicans gained control in the 104th and 105th Congresses is only part of a multi-faceted attack on the federal courts. Senior Republicans have articulated their desires to impeach and "intimidate" federal judges

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17. *Confirmation Hearings on Federal Appointments: Hearings before the Committee on the Judiciary United States Senate, Part 3*, 105th Cong. 338 (1998) (statement of Senator Sessions).

18. Marcia Coyle, *Confirmations at Last? The Stalemate Over Appointing Federal Judges May Finally be Over*, NAT'L L.J., March 2, 1998, at A1.

19. David A. Price, *So Many Cases, So Few Judges*, INV. BUS. DAILY, Jan. 15, 1998, at A1.

because of distaste for specific judicial decisions.[20] Congress has considered constitutional amendments that would eliminate life tenure for Article III judges.[21] National legislation has been enacted that limits the jurisdiction of the federal courts,[22] Con-

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20. On March 11, 1997, Tom DeLay (R-Texas), the Majority Whip of the House of Representatives, announced that he favored impeachment of "activist" federal judges. He stated:

> The articles of impeachment are being written right now. . . . As part of our conservative efforts against judicial activism, we are going after judges. Congress has given up its responsibility in [overseeing] judges and their performances on the bench, and we intend to revive that and go after them in a big way.

Ralph Z. Hallow, *Republicans Out to Impeach Activist Jurists*, WASH. TIMES, March 12, 1997, at A1. A few months later, Majority Whip DeLay again made news by telling the WASHINGTON POST: "The judges need to be intimidated. They need to uphold the Constitution. [If they don't behave] we're going to go after them in a big way." Joan Biskupic, *Hill Republicans Target "Judicial Activism"; Conservatives Block Nominees, Threaten Impeachment and Term Limits*, WASH. POST, Sep. 15, 1997, at A1. Senate Majority Leader Trent Lott (R-Mississippi) said that he agreed with DeLay's underlying sentiment:

> [I]t sounds like a good idea to me. I mean, you know who some of the most unpopular people in America are, I think they've got, you know, they maybe are at the top of the list. When I go home, nobody says, oh, please, give us some more federal judges. A lot of them say, these people are out of control and they are goin' beyond what the Constitution intended.

Morning Edition: Judicial Intimidation (Nat'l Public Radio Broadcast, Sep. 26, 1997).

21. During the 104th and 105th Congresses, at least seven constitutional amendments were introduced that would have eliminated life tenure for federal judges, replacing it with a fixed term of between six and 12 years and sometimes permitting reappointment. *See* S.J. Res. 26, 105th Cong. (1997); H.R.J. Res. 77, 105th Cong. (1997); H.R.J. Res. 74, 105th Cong. (1997); H.R.J. Res. 63, 105th Cong. (1997); H.R.J. Res. 164, 104th Cong. (1995); H.R.J. Res. 160, 104th Cong. (1995); and H.R.J. Res. 63, 104th Cong. (1995). Senator Bob Smith (R-New Hampshire) introduced Senate Joint Resolution 26 at a Judiciary Committee hearing, claiming it was necessary to protect the public from activist judges:

> No longer could they abuse their authority with impunity. Under the Term Limits for Judges Amendment, judges who abuse their offices by imposing their own policy views instead of interpreting the laws in good faith could be passed over for new terms by the President or rejected for reappointment by the Senate. . . . Insulated by life tenure and free . . . of the threat of impeachment, activist judges feel free to impose their political will instead of their neutral judgement about what the law is—with impunity.

Judicial Activism: Defining the Problem and its Impact: Hearings on S.J. Res. 26, A Bill Proposing a Constitutional Amendment to Establish Limited Judicial Terms of Office. Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Comm. on the Judiciary, 105th Cong. 133-34 (1997) (statement of Senator Smith).

22. In the Spring of 1996, Congress passed four pieces of legislation that limited the jurisdiction of the federal courts by restricting access for immigrants, prisoners, and the impoverished. The legislation includes the Prison Litigation Reform Act in the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Title VIII, Pub. L. No. 104-134, 110 Stat. 1321-1366; restrictions on the Legal Services Corporation in the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Section 504, Pub. L. No. 104-134, 110 Stat. 1321-1353; the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132,

gress has considered other bills that aim to strip judicial remedies,[23] and Members of the House and the Senate have convened a number of hearings to study and control "judicial activism."[24] In a hearing entitled "Judicial Misconduct and Discipline," Representative Bob Barr (R-Georgia) summarized how he believes the judicial system must be changed:

> It is time to begin exploring how and in what way we might take steps to "re-balance" and restore integrity to our federal judicial system. This includes, but is not limited to, exploring the manner in which the constitutional tenure for judges to hold their office during "good behavior" can be fully effectuated to take into account the consequences for misbehavior—a problem plainly presented to the American people by the assumption of

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110 Stat. 1214; the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 in the Department of Defense Appropriations Act of 1997, Division C, Pub. L. No. 104-208, 110 Stat. 3009-3546. While Congress used this legislation to target three of the least powerful constituencies, much of this legislation responded to decisions that Congress interpreted as judicial activism. According to Lucas Guttentag, Director of the ACLU's Immigration Rights Project: "I think there was a misperception among some Members of Congress that the courts were playing too large a role in reviewing the government's immigration policies and orders. But more fundamentally, the new restrictions on the courts are part of a larger hostility to the independence of the judiciary." *New Immigration Law Threatens People and Principles, an Interview with Lucas Guttentag*, TEXAS LAWYER, Jan. 12, 1998, at 24.

23. During the 105th Congress, then-Speaker Newt Gingrich (R-Georgia) pressured House Judiciary Chairman Henry Hyde (R-Illinois) to "look at the issue of judicial activism" and to produce a bill that would respond to Republican concerns. Louis Fisher, *Have U.S. Courts Overreached?* L.A. TIMES, Feb. 2, 1997, at M1. Chairman Hyde introduced H.R. 1252, entitled the "Judicial Improvements Act of 1997." The bill contained provisions requiring the substitution of three judge panels for a single judge considering challenges of state initiatives, allowing either side in litigation to strike the presiding judge for any reason, preventing a judge from entering an order that might lead to a tax increase, and changing the judicial discipline procedure. As Representative Howard Berman (D-California) argued, to no avail: "It is simply wrong to manipulate court jurisdiction and procedure as this bill would do to try to make it more or less likely that the Federal courts will reach particular results." 30 THE THIRD BRANCH, Number 5, at 1, *House Passes "Judicial Activism" Bill*, (May, 1998). The House of Representatives passed H.R. 1252, but companion legislation did not proceed in the Senate, and the bill died at the end of the Congress. *See* S. 2163, 105th Cong. (1998).

24. *See e.g.*, "Judicial Activism, Defining the Problem and its Impact" (June 11, 1997), "Judicial Activism, Assessing the Impact" (July 15, 1997), and "Judicial Activism, Potential Responses" (July 29, 1997), all in: *Judicial Activism: Defining the Problem and its Impact. Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Comm. on the Judiciary*, 105th Cong. (1997); *Hearings on H.R. 1252, the Judicial Reform Act of 1997. Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. (1997); *Judicial Misconduct and Discipline. Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. (1997); and *Congress, the Court, and the Constitution. Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1998).

> power beyond the scope of the office. There are, as with other problems confronting our institutions, a number of ways that the problems of judicial activism or overreaching can be addressed: defining "good behavior;" limiting tenure of judges; limitations on the jurisdiction of judges and impeachment.[25]

Collectively, these attacks on the courts have posed the most serious problem to judicial independence since President Franklin Delano Roosevelt unveiled his court packing proposal in 1937 to expand the size of the federal courts, including the Supreme Court, and to change the outcome of anti-New Deal decisions. The Republicans treatment of the judicial confirmation process has been the most visible component of these attacks with the gridlock placing the judiciary on notice that it will not receive reinforcements if it engages in "judicial activism."

II. The 104th Congress—Initial Skirmishes

A. 1995, Post-takeover Jockeying

Following the election of 1994 when the Republicans gained control of the Senate, the change did not initially appear to have a significant impact on judicial confirmations as the Judiciary Committee held twelve confirmation hearings and confirmed fifty-five judges in 1995. What was most notable about the year was President Clinton's willingness to avoid battles on judges. Soon after the election, the President was encouraged by Senator Hatch and others not to renominate several of his "controversial" nominees who had not yet been confirmed by the end of the 103d Congress. R. Samuel Paz had been nominated for a judgeship in the Central District of California and Judith McConnell for one in the Southern District of California. Paz faced opposition from police organizations for his longtime representation of police brutality victims and McConnell, a California state trial judge, was criticized for a 1987 ruling in which she had granted the request of a sixteen-year old boy to live with his father's gay partner instead of with his mother. Sam Paz said he "received a phone call from Senator Boxer saying the President asked me to withdraw my

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25. *Judicial Misconduct and Discipline Before the Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary*, 105th Cong. 8 (1997) (statement of Representative Barr).

name. I didn't have any real alternative."[26] Judge McConnell received the same treatment.[27]

According to Ninth Circuit Judge Stephen Reinhardt, "They were two excellent nominees, and the administration wouldn't stand up for them. They are clearly people that an administration with principles would have stood up for. There was no legitimate beef against them."[28] Abner Mikva, then White House Counsel, said at the time: "[T]he nomination and confirmation of judges is a political process. If we find that objections are raised that mean [nominees] won't get hearings or that we will end up with a fight that looks like it won't go anywhere," the administration will turn to other candidates.[29] Former-Senator Paul Simon (D-Illinois) objected to this approach and said, "[W]e're giving up on fights too early. I think it is important that we stand up and fight for the people who are nominated."[30]

Peter Edelman's candidacy for a judgeship was also notably discarded by the Clinton Administration. Edelman, who had been serving as counselor to the Secretary of the Department of Health and Human Services, is a long-time advocate of progressive welfare policies. He was also a close friend of President Clinton and was considered a likely appointment for a vacancy on the United States Court of Appeals for the District of Columbia Circuit. Threatened with a difficult confirmation fight, President Clinton backed away from nominating Edelman to the District of Columbia Circuit, and

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26. Peter S. Cannellos, *For ex-Clinton Picks, Cold Comfort; Former Nominees Cite an Uncaring Side of the President*, BOSTON GLOBE, Oct. 27, 1996, at A1. Formally, Paz withdrew his nomination, but it had actually died at the end of 1994 with the 103d Congress, and the President would had to have renominated Paz.

27. Following his withdrawal, Paz wrote: "it saddens me to think that I and those other judicial nominees who have acted competently within our profession as advocates can be prevented from serving on the federal bench. Would not each and every Republican senator want to be represented by a competent civil rights attorney should they or their family be the victim of an unjust police conduct." Joan Biskupic, *Facing Fights on Court Nominees, Clinton Yields*, WASH. POST, Feb. 13, 1995, at A1. Judith McConnell stated in retrospect: "I would have appreciated a chance to discuss my case, and I think all the others who were dropped would have appreciated it. . . . There isn't a person in California who thinks I made the wrong decision. I wanted a chance to explain the case." Cannellos, *supra* note 26, at A1. According to the Alliance for Justice's Deborah Lewis, "Bork and Thomas were told it was going to get ugly, but were given the option to fight it out. Clinton just leaves these things hanging in the air." *Id.*

28. Naftali Bendavid, *Seeking Diversity Not Confrontation*, RECORDER, Sep. 13, 1995, at 1.

29. Biskupic, *supra* note 27, A1.

30. *Id.*

then considered nominating him for a seat on the district court for the District of Columbia but chose not to do that either.

Judiciary Chairman Hatch had said that he would have supported Edelman for the trial court: "District court judges don't make policy as much as the judges on the circuit courts do. He's very liberal, but he's also an extremely fine man and I told the White House that I would support him for the district court."[31] Nan Aron, president of the Alliance for Justice, responded to the administration's decision not to nominate Edelman, by stating: "[T]his President ought to be leading the national conversation about the role of the courts and not backing down all the time."[32] Jack Quinn, Abner Mikva's successor as White House Counsel, said:

> I take exception to the idea that the President refrained from doing something he wanted to do because he might have been afraid of the consequences. I genuinely believe that he has been determined to nominate a group of federal judges who were extremely well-qualified, who would in fact go on to the federal bench with broad support, who would sit on the federal bench and carry out the common ground—give life to the common-ground values that would be indicated by the fact that they had such bipartisan support.[33]

Throughout 1995, the White House and the Department of Justice had routinely consulted with Senator Hatch on judicial confirmations. According to Hatch in 1995:

> We've been together hours and hours and hours, regularly, each week. They keep running [potential nominees] by us. I have worked with countless people on judges—from various White Houses, Republican and Democrat—and I have yet to work with anyone who is as straight-up as [Associate White House Counsel] Vicki Radd, [White House Counsel] Ab Mikva and [Assistant Attorney General, Office of Policy Development] Eldie Acheson.[34]

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31. Neil Lewis, *Clinton, Fearing Fight, Shuns Bid to Name Friend as Judge*, N.Y. TIMES, Sep. 1, 1995, 18.

32. *Id.*

33. Interview, *Campaigning for Clinton's Judges*, LEGAL TIMES, April 15, 1996, at 18.

34. Naftali Bendavid, *Seeking Diversity Not Confrontation*, RECORDER, Sep. 13, 1995, at 1.

Radd said: "I think the relative collegiality of the process speaks, first, of the President's belief that it's important to consult on these matters, and second, of the caliber of the candidates. When you have outstanding candidates, even if they are Democrats, you will find that Republican will support them."[35] "Most on my side have been very good about [confirming judges]," Hatch said of his fellow Republicans. "But there are always a few who don't want to give anything to this administration, who want to slow the process down, who want to deny the administration the chance to nominate judges."[36]

B. 1996, Presidential Election Politics

For judicial nominees, 1996 began optimistically, because on January 3, 1996, three judges were confirmed, including two judges for the Ninth Circuit. That, however, was the last day of the first session of the 104th Congress, and for the rest of the year—the entire second session—the Senate only confirmed seventeen more judges and no judges were confirmed to the courts of appeals. Much of the attention on judicial confirmations in 1996 was ensnared in Presidential election politics as Senate Majority Leader Robert Dole (R-Kansas), who was soon to become the Republican nominee for President, hoped that by raising the issue of future "liberal" appointments to the Supreme Court and the lower courts, he would earn the allegiance of voters. During the course of the campaign he said: "If we give President Clinton the opportunity to make just one more appointment to the Supreme Court, we could end up with the most liberal court since the Warren Court of the sixties."[37] He soon focused on Clinton's lower court appointments, and, in a major speech to the American Society of Newspaper Editors, he questioned: "Do we really want the majority of judges on the federal bench to think like Judges Barkett, Baer, Brinkema, and Sarokin—an all-star team of liberal leniency—judges who seem intent on dismantling the rule of law from the bench."[38] Chairman Hatch had laid the groundwork for these comments a

35. *Id.*

36. *Id.*

37. Robert Dole, *Dole Tells How He Would Pick Judges*, INSIGHT, April 29, 1996, at 10-11.

38. Robert Dole, *Verbatim, Dole Strafes Clinton Judges*, LEGAL TIMES, April 22, 1996, at 19.

few weeks earlier by criticizing Third Circuit judge and Clinton Appointee Lee Sarokin: "Judge Sarokin has repeatedly come down on the side of criminals and prisoners in a series of cases and he recently voted to overturn the death sentences of two Delaware men who, in separate cases, killed several elderly people."[39]

In June of 1996, when Senator Dole departed from the Senate to campaign full-time for the Presidency, Senate Minority Leader Tom Daschle (D-South Dakota) could still say:

> Not one judge has been confirmed in this session of Congress—not one. This to our knowledge is unprecedented. . . . We have to resolve this matter. It is just unacceptable that that number of judges would not be given their opportunity to be considered. Careers, families, futures are all at stake here. They are all on the line. It is one thing to deal with a bill—I understand that—but to deal with somebody's life, to deal with somebody's future and career and to deal with it so cavalierly is unacceptable.[40]

Attorney General Janet Reno stated: "Zero judicial confirmations in this session of Congress is an extremely discouraging record. Vacancies cause delays and, as victims, prosecutors, defendants, and civil litigants will all confirm, justice delayed is indeed justice denied."[41]

Senator Dole's replacement as majority leader, Trent Lott (R-Mississippi), and Senator Daschle worked together to attempt to confirm some of the twenty-three nominees whose nominations had been voted out of the Judiciary Committee. Senator Lott said on July 9, 1996:

> In an abundance of good effort to try to see if we cannot move some of these nominations where there are not, and, in fact, should not be objections, I have decided now I will try to bring up a judge each day over the next several days to see if we cannot get them cleared. I think it is a legitimate way. I

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39. 142 CONG. REC. S2790 (daily ed. March 25, 1996) (statement of Senator Hatch).

40. *Id.* S7342-43 (daily ed. June 28, 1996) (statement of Senator Daschle). Even while participating in a Presidential campaign in which he contributed to attacks on federal judges, Senator Bob Dole purported to disfavor a confirmation slow-down: "[I]t seems to me that the Democratic Leader is correct. We should not be holding people up. If we need a vote, vote them down or vote them up, or whatever, but they ought to be voted on because they probably have plans to make and there are families involved." *Id.* S5654 (daily ed. May 24, 1996) (statement of Senator Dole).

41. Richard Liefer, *Senate Faulted for Not Confirming Judges*, CHICAGO TRIB., June 28, 1996, at 6.

> have tried to do them in a group of four. I have tried to do them in a group of nine. Now I will try to do them one-by-one. Some of these judges—three or four—are supported by Republicans. The others are Democratic nominees. I would go back and forth for a while. But, overall, there will be several more that are being actively supported by the Democrats than by the Republicans. Once again, I am trying to be fair in how we do that. . . . If we are getting some of these done, we will continue to try to do them. If we hear objections every day, I do not know what else to do. . . . I wanted to lay that predicate and explain what is happening. Some feel that none of these judges should be confirmed. Others, including myself, feel like several of them have been pending for a good long while, and unless there is a serious problem with the education, or qualifications, or ethics, we ought to try to move them. That is what I have been working assiduously to do. I am not doing it just by picking a name out of the hat. I am carefully looking at the judges and finding out if there are any problems, and as we get them cleared we can move down the line.[42]

This arrangement proved unacceptable to Democrats because nominees primarily supported by Republican Senators, like Lawrence Kahn of the Northern District of New York, who was a candidate proposed by Senator Alphonse D'Amato (R-New York), would have been considered first. Senator Daschle objected on behalf of his Democratic colleagues:

> So if [Lott] is not willing to do all 23, but is willing then to do 100 percent of the Republican nominees—and there are only 3 or 4—and leave all of the balance on the Democratic list to be taken up at some uncertain time, with no commitment that we are ultimately going to at least be able to try to deal with these issues between now and the August recess, our colleagues have indicated to me as late as just a few minutes ago that, on that basis, on that limited assurance, they are not satisfied that they are going to be able to address their judgeships as well, and they are not convinced that this is a satisfactory way to go. . . . So, Mr. President, based upon those concerns and the reservations expressed to me by my colleagues, as I said, just a matter of moments ago, I will have to object to this unanimous-consent request.[43]

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42. 142 CONG. REC. S7503 (daily ed. July 9, 1996) (statement of Senator Lott).
43. *Id.* at 7,503-04.

Eventually Senators Lott and Daschle reached a compromise to consider one or two nominations per day until the Senate recessed for its summer vacation. Both leaders recognized the tenuous nature of the agreement, and Lott stated: "If we get cooperation on [appropriation] bills that need to be done for the good of the country . . . then that would probably make it a little easier for me to be able to continue to move some of these [judges]."[44] The Senate had confirmed no judges from January 2, 1996 (the last day of the first session of the 104th Congress) until July 10 when three judges were confirmed: Gary Fenner for the Western District of Missouri, Marry Ann Vial Lemmon for the Eastern District of Louisiana, and Walker Miller for the District of Colorado. The arrangement between the two leaders soon broke down. Senator Byron Dorgan (D-North Dakota) said on September 18, 1996:

> The confirmation process on judges has virtually ground to a halt. That is unfair. It is unfair to the judges that have been appointed and are awaiting confirmation. It is unfair to the federal court system, unfair to the American people. This is only about politics. . . . There was a need for these judges to be placed in the federal judiciary, and this Senate has a responsibility to act. As I said previously, this is not a circumstance that existed in prior years. But this year it has been like pulling teeth to get any judgeships through this Senate, because some believe that since they control the Senate, there should be no judges appointed by an opposing party.[45]

By the end of the session only seventeen judges were confirmed, and none were confirmed after August 2, 1996. No judges were confirmed for the appellate courts, which was unprecedented in the post-World War II era.[46] At the end of the Congress twenty-eight of President Clinton's judicial nominees remained before the Senate including seven who had been voted out of committee. Senator Leahy said:

> The Senate had an abysmal record [in 1996] in dealing with federal judicial vacancies—a better description might be in not

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44. Harvey Berkman, *Three Judges Confirmed*, NAT'L L.J., July 22, 1996, at A6.

45. 142 CONG. REC. S10,740-41 (daily ed. Sep. 18, 1996) (statement of Senator Dorgan).

46. *See* Democratic Policy Committee, *Shutdown on Judges: The Republicans' Dismal Record Threatens the Judiciary*, Oct. 7, 1996, at 1; Sheldon Goldman, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN (1997).

> dealing with these vacancies. . . . In spite of the pendency of several nominations for the many vacancies on the courts of appeals through the year, for the first time in at least 40 years, the Senate did not confirm a single nominee to a federal court of appeals. . . . The Senate is not fulfilling its constitutional responsibility, it is interfering with the President's authority to appoint federal judges, and it is hampering with the third co-equal branch of our government. Republicans controlling the 104th Congress shut down the Executive Branch trying to extort a political victory. In this Congress, they seem intent on shutting down the Judicial Branch for political gain. This is a scandal in the making. It is high time for the Senate to do its duty and consider and confirm judges to the vacancies that have persisted far too long.[47]

Congressional Democrats believed that the slowdown in the judicial confirmation process was designed to deny President Clinton the opportunity to make Democratic appointments to a bench still dominated by conservative judges appointed by Presidents Reagan and Bush. According to Representative Martin Frost (D-Texas), the recent gridlock "is an outrageous, national effort on the part of Republicans to block qualified Democrats from becoming judges."[48] Senator Leahy noted: "I have never known the Senate to create such a deliberate stall on judges," and he then speculated, "[T]hey just want to block virtually all judges for the next 3 and ½ years of Clinton's term. . . . It really is an attempt to undermine the independence of the judiciary."[49] Two of his colleagues agreed. Senator Joe Biden (D-Delaware), referring to efforts to fill a vacancy on the District of Columbia Circuit, said: "This is about trying to keep the President of the United States of America from being able to appoint judges, particularly as it relates to the courts of appeals."[50] Richard Durbin (D-Illinois) stated: "They don't like the fact that Clinton

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47. *Confirmation Hearings of Federal Appointments Hearings Before the Comm. on the Judiciary, Part 1*, 105th Cong. 3 (1997) (statement of Senator Leahy).

48. April M. Washington, *Controversy Brewing Over Pace of Judicial Confirmation Process Democrats Say GOP Derailing Nominees*, DALLAS MORNING NEWS, Sep. 7, 1997, at 10.

49. Deborah Mathis, *Federal Courts Clogged as Judicial Vacancies Mount*, GANNET NEWS SERVICE, Aug. 22, 1997, *available in* 1997 WL 8835099.

50. 143 CONG. REC. S2538 (daily ed. March 19, 1997) (statement of Senator Biden).

is President and has the power to appoint federal judges. They're out to stop these nominations, and any excuse will do."[51]

It might seem intuitive that the judicial confirmation process would slow down in a Presidential election year, if the political party in control of the Senate is different from the President's, because then, if political fortunes shift, the Senate could present the President of its own party with a series of judicial vacancies to fill. In fact, the few Senate confirmations of 1996 were contrary to recent history. In 1992, a Democratic Senate had confirmed sixty-six judges, the most in any year of the Bush Presidency, even though President Bush's approval ratings had plummeted, and he was far from likely to be reelected. Thirty-two of those confirmations occurred between June and September of 1992, and the Senate even confirmed seven judges on the last day of its session.

At the end of the 1996 Session, Senator Biden, who was then Ranking Member of the Judiciary Committee, said: "The Senate, under Democratic Leadership, faithfully confirmed Republican judges in Presidential election years. All year, Republicans have been offering assurances that the Senate would continue this bipartisan approach and put judges through. But today, it has become crystal clear that the bipartisan spirit of the past has been broken."[52] Senator Leahy commented: "It is 11 appeals court judges, 55 district court judges with a Republican President and a Democratic Congress. Switch it to a Democratic President and a Republican Congress—zero, nada, zip, goose egg for the court of appeals judges and only 17 for the district court judges. Not too good."[53] And in 1988, the Democratic Senate had confirmed forty-four judges, close to the forty-seven judges confirmed on average in each year of the entire Reagan Presidency. It appears that when the roles are reversed, Senate Republicans seek to halt the process.

C. The Vacancy Crisis

Judiciary Committee Chairman Orrin Hatch frequently attempted to deflect criticism from the Senate gridlock by making comparisons to the Bush years: "There are more sitting judges

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51. Tim Poor, *Ashcroft Hearings Targeting Judicial Activism but Critics Say Eliminating Liberal Judges is Main Goal*, ST. LOUIS POST-DISPATCH, June 13, 1997, at 2F.

52. 142 CONG. REC. S12,289 (daily ed. Oct. 3, 1996) (statement of Senator Biden).

53. 143 CONG. REC. S2518 (daily ed. March 19, 1997) (statement of Senator Leahy).

today than there were throughout virtually all of the Reagan and Bush administrations. . . . As of August 10 [1997], we had 742 active Federal judges. Let's just be honest about it. In the 101st Congress and the 102d Congress by contrast, when a Democrat controlled Congress was processing President Bush's nominees, there were only 711 and 716 active judges."[54] He was particularly defensive about the high number of vacancies, and said on May 21, 1998 [nine months after the number of vacant seats had peaked above 100]:

> [L]et's compare today's vacancy level of 76, with those that existed during the early 1990's when the Democratic and Republican parties' fortunes were reversed. In May of 1991, there were 148 federal judicial vacancies. One year later, in May of 1992, there were 117 federal judicial vacancies. I remember those years. I don't however, remember one comment about it in the media. I don't recall one television show mentioning it. I don't recall one writer writing about it. Nobody seemed to care.[55]

Senator John Ashcroft echoed this statement at a Committee hearing:

> You spent some time lecturing this subcommittee on the confirmation of judges . . . . I guess the point that I would make to you is that in May 1991, the number of vacancies in the Democratic Senate was 148, at the end of George Bush's time in office, and I don't recall your outcry. In May 1992, there were 117 vacancies, and I don't recall the same outcry.[56]

Senator Russell Feingold (D-Wisconsin) responded:

> I just want to note for the record . . . that the 1991 figure that you were citing does include, apparently, a passing of 60 new judicial seats through legislation. So I would suggest for the record there was a perhaps artificially high figure at that time that doesn't really reflect lack of intent on the part of either the Congress or President Bush to move forward. To me, the question is not whether it was historically true that

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54. *Id.* S9163 (daily ed. Sep. 11, 1997) (statement of Senator Hatch).

55. *Id.* S5316 (daily ed. May 21, 1998).

56. *Judicial Activism: Defining the Problem and its Impact, and Hearings on S.J. Res. 26, A Bill Proposing a Constitutional Amendment to Establish Limited Judicial Terms of Office. Before the Subcomm. on Constitution, Federalism, and Property Rights of the Comm. on the Judiciary*, 105th Cong. 93 (1997) (statement of Senator Ashcroft).

> there were those high figures or not. The question is are there enough judges now to do the job, and that is our job right now.[57]

Beginning in 1996, the number of judicial vacancies began to rise significantly. Following the 1990 judicial expansion that added eighty-five new seats to the active federal bench for a total of 843, the backlog in vacancies peaked in 1991 with 140 vacancies, even though the Democratic-controlled Senate had confirmed fifty-six judges in 1990, fifty-eight in 1991, and sixty-six in 1992. By the time President Clinton was elected, there were 113 vacancies, many still attributable to the 1990 expansion. With the twenty-eight judges confirmed in 1993, the 101 judges confirmed in 1994, and the fifty-five judges confirmed in 1995, the vacancy level dropped below fifty in 1995. With few subsequent confirmations during the next two years, it again soared, cresting at 103 empty seats in September of 1997 (more than twelve percent of the federal bench), with the vacancy level hovering near 100 judicial seats for more than six months.[58]

In his speech on the status of the federal courts at the end of 1996, Chief Justice William Rehnquist warned of the consequences to the judiciary that were caused by the vacancies:

> The number of judicial vacancies can have a profound impact on a court's ability to manage its caseload effectively. Because the number of judges confirmed in 1996 was low in comparison to the number confirmed in preceding years, the vacancy rate is beginning to climb. When the 104th Congress adjourned in 1996, 17 new judges had been appointed and 28 nominations had not been acted upon. Fortunately, a dependable corps of senior judges contributes significantly to easing the impact of unfilled judgeships. It is hoped that the Administration and Congress will continue to recognize that filling judicial vacancies is crucial to the fair and effective administration of justice.[59]

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57. *Id.* at 95. Senators Ashcroft and Hatch's facts are accurate but misleading. The size of the federal judiciary expanded by 85 seats at the end of 1990 to its current size, and those vacancies took some time to fill. Moreover, federal jurisdiction and case filings have increased dramatically since 1990.

58. *See* REPORTS: ADMINISTRATIVE OFFICE OF U.S. COURTS (1997) (hereinafter ADMINISTRATIVE OFFICE REPORTS).

59. WILLIAM REHNQUIST, 1996 YEAR-END REPORT ON THE JUDICIARY 7-8 (1996).

By the end of 1997, the Chief Justice's message was darker, and he referred to the high number of judicial vacancies "as the most immediate problem we face in the federal judiciary."[60]

The confirmation gridlock had a significant impact on litigation in certain parts of the country. The United States Court of Appeals for the Ninth Circuit had 10 vacancies on a 28 member court for most of 1997, leading Chief Judge Proctor Hug to cancel 600 hearings.[61] At the beginning of 1998, the Second Circuit had five vacancies on the thirteen member court forcing Chief Judge Ralph Winter to declare a judicial emergency.[62] This allowed him to create circuit panels using only one active Second Circuit judge, and he believed that 80% of the panels would have to be supplemented by visiting judges.[63] Senator Leahy introduced legislation to ameliorate the vacancies in the Second Circuit, which included his home state of Vermont, and said:

> Must we wait for the administration of justice to disintegrate further before the Senate will take this crisis seriously and act

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60. WILLIAM REHNQUIST, 1997 YEAR-END REPORT ON THE JUDICIARY 4 (1997).

61. *Morning Edition*: *Judges* (Nat'l Public Radio Broadcast, Sept. 23, 1997). Senator Hatch made the following statement near the end of 1997:

> The Ninth Circuit Court of Appeals, in particular, has been very, very difficult to fill, and one of the reasons is . . . it is so difficult is because of the activism of that court, and these judges think that they are standing up for liberal principles when, in fact, they are undermining the judiciary across the board, and even members of the judiciary from the left to the right are very critical of what they are doing.

Confirmation Hearings of Federal Appointments: Hearings Before the Comm. on the Judiciary, Part 2, 105th Cong. 1372 (1997) (statement of Senator Hatch). Senator Jeff Sessions often refers to the Ninth Circuit as being out of step with the rest of the judiciary.

> Obviously the biggest circuit in the country is the Ninth Circuit, and most of you know . . . that the Ninth Circuit is having a lot of trouble with the U.S. Supreme Court . . . , and over the years that has been a pattern since I was a federal prosecutor. And, in fact, many prosecutors around the country or judges wouldn't even consider opinions on discovery matters and so forth out of the Ninth Circuit because they were out of step with the current state of the law in the other circuits. And so I guess that is causing me to give some thought to your philosophy and the importance of correcting and getting the Ninth Circuit back into the right sync with the rest of the law in America.

Id. Part 3, 105th Cong. 330 (1998) (statement of Senator Sessions). The Senate filled five vacancies in 1998. However, two new ones opened up so there were still seven by the end of the year.

62. *See* 28 U.S.C. § 46 (1994).

63. *See* Larry Neumeister, *Second Circuit Declares Judge Shortage Emergency*, ASSOCIATED PRESS, March 26, 1998, *available in* 1998 WL 7399928; *Confirmation Hearings of Federal Appointments: Hearings Before the Comm. on the Judiciary, Part 2*, 105th Cong. 351 (1997) (statement of Senator Patrick Leahy).

> on the nominees pending before it? I hope not. As part of my efforts to encourage the Senate to do its job, I am today introducing the Judicial Emergency Responsibility Act. The purpose of this bill is to supplement the law by which Chief Judge Winter certified the emergency and to require the Senate to do its duty and to act on judicial nominations before it recesses for significant stretches of time when a circuit court is suffering from a vacancy emergency.[64]

While four of the five vacancies were ultimately filled by the end of the 105th Congress, Senator Leahy's bill was not acted upon.

The Sixth Circuit only had three vacancies during 1997 and Chief Judge Boyce Martin said:

> There are assignments to be made, cases to be heard and no judges to hear them. We have [about] a year's worth of work we would like to have heard earlier. We're perceived to be the thoughtful, careful writers that help the courts below us function smoothly and efficiently. If you cut the time available for that thoughtful process of sitting and reading and thinking to one-quarter, you end up with what we are now finding more and more—which are conflicts in circuits and conflicts in opinion.[65]

The situation was equally alarming in a number of district courts. For the entire 1997 calendar year the Southern District of Illinois had two vacancies on a four person court, and the Central District of Illinois had two vacancies on a five person court. The District of Oregon had two vacancies on a six person court, the Middle District of Pennsylvania had three vacancies on a six member court, and the Northern District of New York has had one, two, and sometimes three judicial vacancies on a five person court for all of the 1990s.[66]

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64. 144 CONG. REC. S3123 (daily ed. April 2, 1998) (statement of Senator Leahy).

65. *Court Vacancies Creating Backlog*, ASSOCIATED PRESS POLITICAL SERVICE, June 6, 1997, *available in* 1997 WL 2530833.

66. ADMINISTRATIVE OFFICE REPORTS, *supra* note 58. David Sellers, Director of Public Affairs at the Administrative Office of United States Courts, acknowledges that vacancies in the Northern District of New York are a continual problem: "It's known as a district that has very hard-working judges but not enough of them. For years we have talked about vacancies in the Northern District. It's been a perennial issue." Laura Suchowolect, *Backlog Clogs Federal Courts*, SCHENECTADY GAZETTE, June 20, 1997, at 12. Lawrence Baerman, clerk for the Northern District, said the court's docket continued to grow with a backlog of 3906 civil and 254 criminal cases at the end of the 1997 fiscal year: "It's headed in the wrong direction, I'm afraid. The pending docket has really haunted the district for a number of years, primarily because of vacancy problems. . . . If you don't have judges on

Senator Leahy noted on October 28, 1997, that:

> At the snail's pace that the Committee and the Senate are proceeding with judicial nominations, we are not even keeping up with attrition. When we adjourned last Congress there were 64 vacancies on the federal bench. After the confirmation of 22 judges in 10 months, there has been a net increase of 28 vacancies, an increase of almost 50 percent in the number of federal judicial vacancies. Thus, vacancies have been increasing not decreasing over the course of this year and the vacancy crises [sic] remains.[67]

He also regularly spoke out about the problems caused by judicial vacancies. For instance, on September 11, 1997, he told his Senate colleagues:

> Those who delay or prevent the filling of these vacancies must understand that they are delaying or preventing the administration of justice. We can pass all the crime bills we want, but you cannot lock up criminals if you do not have judges. The mounting backlogs of civil and criminal cases in the dozens of

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the bench to try the cases, and rule on the dispository motions, there's not much to do." William F. Hammond, Jr., *Delmar Man's Judicial Nomination an Uphill Battle*, THE SUNDAY GAZETTE, Nov. 23, 1997, at 7.

Thomas McAvoy, Chief Judge of the Northern District of New York, states that "[w]e have one of the highest national average caseloads per judge in the United States with . . . four judges . . . out of a full complement of five, our case load is about 830 cases per judge . . . about 450, I think, is the national average." *CBS Sunday Morning*, (March 8, 1998), *available in* 1998 WL 7202125. According to Judge Lawrence E. Kahn:

> We do have a tremendous backlog and it could reach crisis proportions if we don't get the vacancy filled as quickly as possible. We are all overloaded with work. . . . What often happens is that the civil cases are often put on the back burner. That certainly is not fair to the civil litigants who deserve justice and a quick resolution to their differences.

Laura Suchowolect, *Backlog Clogs Federal Courts*, SCHENECTADY GAZETTE, June 20, 1997, at 12. President Clinton nominated Clarence Sundram in September of 1995, and his nomination was still pending at the end of the 105th Congress. President Clinton also elevated Rosemary Pooler, formerly a Northern District of New York judge, to the Second Circuit in June of 1998. Her district court vacancy was readily filled by the appointment of Norman Mordue. The Judiciary Committee's last (and only unannounced) confirmation hearing of the 105th Congress was held on October 7, 1998, solely for Mordue's benefit, at the request of his patron, former-Senator Alfonse D'Amato (R-New York). Mordue was nominated on October 5, the Judiciary Committee voted Judge Mordue to the Senate floor on October 8, and he was confirmed on October 21, the swiftest confirmation dash of any judge ever nominated by President Clinton.

67. *See Confirmation Hearings of Federal Appointments: Hearings Before the Comm. on the Judiciary Part 2*, 105th Cong. 684 (1997) (statement of Senator Leahy).

> emergency districts, in particular, are growing taller by the day.[68]

One week later, he said: "You have cases that cannot be tried. Some of the same people holding this up will talk law and order, but you have criminal cases where the U.S. attorneys have to lower the charges, have to not bring charges, have to plea bargain because there are no judges . . . ."[69]

As the number of vacancies increased in 1997, Judiciary Committee Chairman Orrin Hatch (R-Utah) and the Senate Republican leadership were criticized for the confirmation gridlock. Senator Hatch responded: "I want to emphasize that the primary criteria [sic] in this process is not how many vacancies need to be filled but whether President Clinton's nominees are qualified to serve on the bench and will not upon receiving their judicial commissions spend a lifetime career rendering politically-motivated, activist decisions."[70] His press secretary, Jeanne Lopatto, denied that the Judiciary Committee was at fault: "Our job is to make sure the nominees the President sends to us are qualified for the federal bench. This is not a numbers game, and it's not a slow-down."[71] And one professional court watcher partially agrees: "It's not just a numbers game. It's treating people fairly and treating the judiciary with respect."[72]

III. The 105th Congress, Perfecting Illegitimate Tactics

A. 1997, Gridlock Exacerbated

While the judicial confirmation process deteriorated in the 104th Congress, it worsened during the 105th Congress. The Senate majority tried to alter the traditional judicial appointment process in which the senior Senator from the President's party makes recommendations for district court nominees in that state, but the President has much more latitude with appellate nominations. In the Judiciary Committee, nominees were subjected to unprecedented questioning designed to determine their personal

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68. 143 CONG. REC. S9163-9164 (daily ed. Sep. 11, 1997) (statement of Senator Leahy).

69. Carolyn Skorneck, *Democrats Blame GOP Intimidation for Judicial Vacancies*, ASSOCIATED PRESS, Sep. 16, 1997, *available in* 1997 WL 4883750.

70. *Morning Edition: Senate and Judges*, (Nat'l Public Radio broadcast, Sep. 24, 1997).

71. Washington, *supra* note 48, at 1.

72. Kenneth Jost, *The Federal Judiciary, Are the Attacks on U.S. Courts Justified*, 8 C.Q. RESEARCHER 10, at 236 (1998) (quoting Stephan Kline).

viewpoints, multiple hearings were required, and nominees faced long delays.

According to Assistant Attorney General for the Office of Policy Development Eleanor Acheson:

> It seems as if the thinking on the majority side is that—the obstruction and stall operation of 1996 was such a success, let's continue it for four years. The cover for this maneuver seems to be the outcry over "judicial activism." But "judicial activism" does not seem to mean judges who knowingly or recklessly or even negligently refuse or decline to know and apply precedent and other binding law; rather, it appears to be used to attack judges who rule in ways with which the majority disagrees. And, now, some of the work of the Senate Judiciary Committee seems focused on rooting out potential judicial activists. The means employed to expose "judicial activism" have included litmus test questions for nominees such as their personal views on a number of controversial social issues, their positions on state initiatives and referenda on similar subjects, the philosophical and social views deconstruction of any writing or commentary on current social or political issues and the burden to demonstrate why membership or leadership activity with a public interest or pro bono organization does not make one a likely judicial activist.[73]

The Republicans also altered the Senate's long-standing arrangement with the American Bar Association, which had assisted with the screening of the judicial nominees.

1. Revisiting the ABA's Role in Judicial Confirmations—In 1947, the Senate Judiciary Committee first requested that the American Bar Association evaluate all federal judicial nominees, and every President since Dwight Eisenhower has relied on the organization's expertise to screen and rate potential nominees. In a February 18, 1997, speech, Senator Hatch stated: "I think the time has come, once and for all, to decide what role, if any, the ABA should play in the Senate's judicial confirmation process."[74] Less than one week later, he informed his colleagues that the ABA

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73. Eleanor Acheson, *Pro and Con Government Relations Forum, Improving the Process of Appointing Federal Judges*, 44 FED. LAW 51, 55-56 (December 1997).

74. Neil Lewis, *Head of Senate Judiciary Panel Reconsiders A.B.A. Advisory Role*, N.Y. TIMES, Feb. 19, 1997, at A15.

would have no formal role in the Senate's evaluation process, because in his words:

> The ABA as a whole has taken on a series of political issues on which the bar has little, if any, special expertise or experience. . . . One cannot seriously dispute that the ABA has become a political interest group. . . . I have come to the conclusion that it is plainly inappropriate for the ABA to continue to enjoy a preferred, official status in evaluating judicial nominees. Since it was the Chairman of the Judiciary Committee who first invited the ABA to advise the Committee regarding the qualifications of judicial nominees, I believe it is now my responsibility to withdraw this invitation.[75]

Some colleagues lamented the Chairman's decision to end the association's formal role in the nominations process. Senator Edward Kennedy (D-Massachusetts) stated that "[t]his is one of the most important public functions of the ABA. It's assessments are vital to assuring that only the most qualified lawyers are appointed to the bench."[76]

In recent years, conservatives have routinely argued that the ABA is a liberal special-interest group. Bob Dole used rhetoric against the organization to serve as another rallying point in his faltering 1996 campaign in which he attacked the federal judiciary:

> In a Dole administration, the American Bar Association will no longer have a retainer at the White House and the trial lawyers will not be calling the shots. In place of the narrowly partisan and ideologically liberal ABA, I will create a nonpartisan Judicial Integrity Panel, consisting of police, prosecutors, crime victims, and representatives of other legal and professional organizations. As President, I will look to this panel—not the ABA—to advise me who is and who isn't qualified to sit on the federal bench.[77]

Responding to this statement, Nan Aron said that "the ABA has long been the target of certain Senators who dislike certain judges. . . . [Dole] has voted for all but three of President Clinton's

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75. Letter from Orrin Hatch, Chairman of Senate Judiciary Committee, to Senate colleagues (Feb. 24, 1997) (on file with author).

76. Edward Kennedy, Speech at the Alliance for Justice Luncheon (April 30, 1997).

77. Robert Dole, *supra* note 38, at 19.

nominees. So this newfound displeasure with the ABA and some of the judges . . . is clearly a political tact."[78]

In 1996, Senator Hatch convened a hearing to focus on the role the ABA should have in the nomination process. Senator Hatch stated:

> This hearing is about the future of the judicial nominations process and whether it can operate openly, with decency, fairness and integrity, despite the participation of any group that openly advocates political positions on the most controversial issues of the day, and whether that group should exercise greater procedural influence than another.[79]

In particular, he condemned the ABA for taking "positions on abortion, affirmative action, flag desecration, religious liberty, the use of evidence in sexual assault cases, exclusionary rule reform, habeas corpus reform, prison conditions reform, mandatory minimum sentences, welfare reform, deportation of criminal aliens, medical liability reform, and product liability reform, among others."[80]

Senator Strom Thurmond (R-South Carolina) argued that the ABA should be treated simply as another advocacy organization:

> I believe the ABA should not be accorded the deference they have been given in the past in rating judicial nominees. . . . Neither the Constitution nor federal statute provide a formal role for the ABA's Standing Committee to evaluate choices made by the President to serve in the Federal judiciary. . . . [I]t is my belief that we should receive testimony and give consideration to the views of the ABA, but we should treat them equally with other groups and private associations in the nominating process.[81]

Former Reagan administration Attorney General Ed Meese, who has criticized the ABA's role in judicial confirmations ever since it had given a low rating to Robert Bork when he was nominated for the Supreme Court, stated:

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78. Saundra Torry, *In Speech, Dole Reignites Feud Over Bar Association*, WASH. POST, April 20, 1996, at A10.

79. *The Role of the American Bar Association in the Judicial Selection Process, Hearing before the Senate Comm. on the Judiciary*, 104th Cong. 2 (1996) (statement of Senator Hatch) (hereinafter *Judicial Selection Hearings*).

80. *Id.* at 2-3.

81. *Id.* at 4-5 (statement of Senator Thurmond).

> I fear that, because of its overtly partisan activity, continued official involvement of the ABA in the judicial evaluations process will weaken the public's respect for our federal judiciary as the vanguard of the rule of law. If judicial confirmations are merely a fight over policy results and political ideology, how can the public be expected to think that judges act as neutral and objective arbiters of Constitutional issues and legal questions when they serve on the bench.[82]

Richard Thornburgh, another former Attorney General, concurred with Meese: "I strongly believe that unless the ABA undertakes a scaling-back of its overreach in the policy area, it will continue to erode its credibility as a detached evaluator of the professional qualifications of judicial nominees."[83]

Daniel E. Troy, a partner at Wiley, Rein & Fielding and a former law clerk for Judge Bork, focused on the probable linkage between the ABA as a liberal lobbying entity and its position on judicial nominations:

> These people are expected to vigorously advocate in the Congress on behalf of these liberal positions every day, but to maintain perfect neutrality when assessing nominees to the bench. I submit that is a very difficult, if not impossible task and that the point is that there is a culture that the ABA has gone away from and the culture of the ABA is no longer one of objectivity.[84]

Lee Cooper, former president of the American Bar Association, emphatically rejected the view that there was any correlation between the ABA as a policy-making entity and its committee which screens judicial nominees:

> There is a total and absolute disconnect between the policies adopted by the ABA House of Delegates and the ratings of judicial candidates by the ABA Committee on the Judiciary. . . . Unlike this Committee which reports to the Senate, the ABA Committee reports only to the administration and to this Committee. It does not report to the House of Delegates, the ABA Board of Governors, or the officers of the association. The Standing Committee makes a final determination on evaluations of candidates for the federal bench and there is no

82. *Id.* at 13 (statement of Edwin Meese).
83. *Id.* at 8 (statement of Richard Thornburg).
84. *Judicial Selection Hearings, supra* note 79, at 86 (statement of Daniel Troy).

> appeal. So one of the suggestions of the witnesses earlier is maybe we ought to disconnect. We have, and we have historically.[85]

Spencer Abraham (R-Michigan) focused on the ABA's influence in rating judicial nominees:

> It seems to me that if we ask the ABA for a rating and the ABA rules somebody not qualified, it is almost the same thing as a veto. It is very hard to overcome that. It is very hard to justify to your constituents or to people in general why you would vote to put somebody into a lifetime appointment on the federal bench who was overwhelmingly voted not qualified. . . . It bothers me, therefore, that when I see some of the stances taken on issues . . . that the ABA has become as active as it has been in taking issue stances.[86]

Senator Joe Biden (D-Delaware) disagreed, suggesting that while the ratings are of tremendous importance, they should be only one factor to use in the decisions on which nominees to support. Senator Biden stated:

> [The ABA's] review of judicial nominees is generally the broadest and most fact intensive. But I would also point out that the ABA's ratings is one of many factors I use in evaluating candidates for the federal bench. The Judiciary Committee receives information from a variety of sources—from the administration, from our own investigations, from individuals who contact us, and directly from the nominees. None of these sources enjoys a veto power over my decision whether to support or oppose—or when I was chairman [from 1987 through 1994], whether the committee should move forward on—a nominee.[87]

Former Senator Paul Simon (D-Illinois) also believes that the ABA provides great value in evaluating judicial nominations, even though the views of the organization should not be automatically adopted:

> Mr. Chairman, could I just make a comment here, because the ABA's evaluations have become a matter of controversy. My overall impression is that they have rendered a great public service through their evaluations. I do not think the Judiciary

85. *Id.* at 109 (statement of Lee Cooper, president of the American Bar Association).
86. *Id.* at 82 (statement of Senator Abraham).
87. *Id.* at 68 (statement of Senator Biden).

> Committee or the Senate should just automatically say, because the ABA has taken a certain stand, and specifically if a nominee is rejected, and that is when we really run into the problem, when the ABA has not given a favorable review to a judicial nominee, I think neither the White House nor the Senate should just automatically rubber stamp or agree with what the ABA has done. But my impression is, over all, they have rendered a great service to the nation and to the federal judiciary by what they have done. My hope is that we will not, in response to some unhappiness with one or two things, say we are going to get rid of this whole process.[88]

Former Attorney General Nicholas Katzenbach, co-chair of a national bipartisan commission sponsored by the University of Virginia's Miller Center of Public Affairs that studied judicial confirmations said: "If we didn't have the ABA to do what [Eisenhower] Attorney General Herbert Brownell first asked it to do, we would have to find some other guarantor of professional competence."[89]

Despite Senator Hatch's decision in 1997 to officially change his Committee's policy on the role of the ABA, President Clinton has continued to rely on the American Bar Association for its screening expertise, and the rating information remains available to all members of the Judiciary Committee, so the effect of the Chairman's unilateral decision has been essentially symbolic. According to Judah Best, the 1997 Chair of the ABA judicial evaluation committee, "Nothing has changed from our point of view. We're going to do the same careful, professional, responsible job of reviewing . . . that we did before."[90]

One effect of the conservative concern about the ABA is that the Senate majority has incorporated standard questions into the confirmation hearings that are posed to judicial nominees about the appropriate role of the American Bar Association in policy matters. For example, Senator Arlen Specter (R-Pennsylvania) asked Third Circuit nominee Marjorie Rendell: "Do you believe it is appropriate for the American Bar Association to take stands on political

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88. *Confirmation Hearings on Federal Appointments: Hearings Before the Committee on the Judiciary, Part 3*, 104th Cong. 466-467 (1996) (statement of Senator Simon).

89. Marcia Coyle, *Panel Issues Report on Judicial Selection Gridlock*, NAT'L L.J., May 27, 1996, at A10.

90. Harvey Berkman, *Hatch to ABA: You're Out. ABA: So What*, NAT'L L.J., March 3, 1997, at 24.

issues such as abortion, affirmative action, gun control? . . . I am not sure about the appropriateness of that question, but it is part of the boilerplate."[91] At his confirmation hearing, District of Columbia Circuit nominee Merrick Garland was pushed by Senator Specter to state his intentions as to whether he would remain a member of the ABA. Specter stated: "You have been a longtime member of the American Bar Association. Do you think it is appropriate for the ABA to take stands on political issues such as abortion and affirmative action?" Garland replied: "Well, that is an organization and every organization is free to take, under the first amendment, positions." Specter responded: "Well, what is your intention with respect to maintaining membership in the ABA once you are confirmed?" Garland answered: "Whatever the ethics rules are with respect to judges that the administrative office and its ethics people establish in that area I will certainly follow. I am not—" Specter: "Well, what is your judgment? Do you think you ought to stay a member?" Garland: "Well, I really don't know. . . . But, you know, if this is an issue that the ethics people would rule on, I will, of course, follow any way they rule."[92]

Senator Spencer Abraham (R-Michigan) made the following statement:

> We see the ABA taking an increasingly active role in terms of participating before the courts in various ways, submitting amicus briefs on issues like the good faith exception to the exclusionary rule, the constitutionality of the independent counsel statute, a variety of things that really do essentially represent clear legal positions. I wonder, do you feel that as a member of the bench, in light of that increased activism that it is possible to also retain an involvement in the bar association, or do you think that there is a potential for a conflict of interest as a member of the judiciary, also being part of an organization that is, in fact, injecting itself into these kinds of legal matters.[93]

As a result of this type of questioning, a number of nominees promised to withdraw from the American Bar Association, if they were confirmed as judges.

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91. *See Confirmation Hearings of Federal Appointments: Hearings Before the Comm. on the Judiciary, Part 2*, 105th Cong. 11 (1997) (statement of Senator Spector).

92. *Id.* at *Part 1*, 104th Cong. 1062 (1995).

93. *Id.* at *Part 3*, 104th Cong. 257 (statement of Senator Abraham).

2. Intrusive Questioning—Certain Senators on the Judiciary Committee, particularly Senators Jeff Sessions (R-Alabama) and John Ashcroft (R-Missouri),[94] have deliberately impeded the confirmation process in order to "weed out judicial activists."[95] In

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94. Ironically Jeff Sessions himself was rejected by the Judiciary Committee for a district court seat on the Southern District of Alabama in June of 1986, for repeated instances of racist remarks, for referring to groups such as the NAACP and the ACLU as "un-American," and for bringing voting-rights cases against civil rights activists. *See Nomination of Jefferson B. Sessions, III, to be U.S. District Judge for the Southern District of Alabama, Before the Comm. on the Judiciary*, 99th Cong. 1-3 (1986) (statement of Senator Kennedy). Former-Senator Howell Heflan (D-Alabama), who was replaced by Sessions in the Senate, cast the deciding vote against Sessions, noting: "Perhaps my caution . . . would not be as great if only a six-year term or a four-year term of office were involved." Chris Collins, *Alabamian Could End Up on Senate Committee that Rejected Him for Judgeship*, GANNETT NEWS SERVICE, July 20, 1996, *available in* 1996 WL 4381671. In 1996, as Sessions was running for election to the Senate, he claimed to have "no bitterness about [the Committee's previous rejection]. . . . I really don't feel any sense of any revenge." *Id.* Senator Biden, who had voted against Sessions in 1986, said:

> I find it kind of humorous, in a sense, that the man that didn't clear this committee may be on this committee. . . . It's very different to state the obvious, being in the U.S. Senate and being a lifetime on the court. I don't think that anyone here will view it in personal terms—but then, we're not the one who was rejected.

Id.

Asked in 1998 what perspective he brought to the Judiciary Committee, Senator Sessions stated:

> I think the best thing that I want to bring to the committee is to raise the confirmation process to a higher level. I think the Clarence Thomas, Rehnquist nominations—and my own, really—did not reflect credit on the Senate. And in everything I've tried to do, I've tried to be open and above-board, to give the nominee the benefit of the doubt, and to ask them questions I thought were important, and try to deal with the issue that was covered. We should not try to use the confirmation process as an attempt to destroy a nominee, and try to dig up dirt, such as what movies they may have checked out at the rental place.

Interview, *Sessions: A Judge-picker's Philosophy*, LEGAL TIMES, Feb. 9, 1998, at 7.

95. While the Senate majority's most aggressive questioning of nominees occurred in 1997 and 1998, in 1995 Chairman Hatch asked Janet Bond Arterton, a nominee for the District of Connecticut who specialized in employment discrimination law, to describe with her "best independent legal judgment, irrespective of existing judicial precedent, on the lawfulness . . . of the use of race, gender or national origin-based preferences in employment decisions." Joan Biskupic, *Hatch Raises Sensitive Topics with Nominees*, WASH. POST, March 11, 1995, at A9. Chairman Hatch then requested that Charles Kornmann, a district court nominee from South Dakota, answer "irrespective of existing judicial precedent, on whether a property owner is entitled to compensation under the Takings Clause when the government, through land use, environmental or endangered species statutes or regulations, limits or prohibits that owners otherwise lawful use or development of his or her private property." *Id.* Senator Patrick Leahy responded: "I would be concerned if we were starting to move toward political and philosophical litmus tests for judicial nominees," but, Chairman Hatch stated at the time that "this should not be seen as a signal that we're taking a big step

order to probe the viewpoints of nominees, these Senators have focused much of their efforts on those who have contributed to pro bono causes, those who worked for public interest organizations, and those who claimed membership in particular specialty bars. Senator Ashcroft has said:

> I look for federal judges who will defend the Constitution, not amend the Constitution. If the Senate's going to be responsible for the philosophy expressed by members of the judiciary, then it's incumbent upon us to take the philosophy of the judiciary into consideration when we evaluate the suitability of those nominees.[96]

Senator Majority Leader Trent Lott (R-Mississippi) agrees with this approach: "We should look not only at their education, background, and qualifications, but also—particularly when it comes to circuit judges—what is their philosophy with regard to the judiciary and how they may be ruling. We have a legitimate responsibility to ask those questions."[97]

Many of the questions seek out not an understanding of the law passed by the Supreme Court or a particular circuit, but the personal credo of the nominees. For instance, Chairman Hatch asked:

> Please state in detail your best independent legal judgement, irrespective of existing judicial precedent, on the lawfulness under the equal protection clause of the 14th Amendment and federal civil rights laws of the use of race-, gender-or national organization based preferences in such areas as employment decisions as hiring, promotion, or layoffs, college admissions and scholarship awards, and the awarding of government contracts.[98]

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to the right, that there will be a litmus test on judges." *Id.* Both lawyers were ultimately confirmed.

96. Tim Poor, *Judge Not if John Ashcroft Can Help It*, ST. LOUIS POST-DISPATCH, Nov. 2, 1997, at 12.

97. 142 CONG. REC. S9418 (daily ed. Aug 1, 1996) (statement of Senator Lott).

98. *See Confirmation Hearings of Federal Appointments: Hearings Before the Comm. on the Judiciary Part 2*, 105th Cong. 1367 (1997) (statement of Senator Hatch). The emphasis of this question is quite different from one asked by Chairman Hatch at an earlier confirmation hearing:

> Please state in detail your understanding of the decision in *Adarand v. Pena* and the lawfulness under the equal protection clause of the Fourteenth Amendment and the federal civil rights laws of the use of race-, gender-, or national origin-based preferences in such areas as employment decisions which would include

He also asked a similar question on the "just compensation" provision of the Takings Clause:

> Judge Miller, under the takings clause of the fifth amendment [sic], private property may not be taken by the government for public use without the payment of just compensation to the owner. Could you give us in detail your best independent legal judgment, irrespective of existing judicial precedent, on whether a property owner is entitled to just compensation under the takings clause when the government . . . through a national monument or wetlands designation or through other land use or environmental regulations that prohibits or substantially limits an owner's otherwise lawful use or development of his or her private property, or the otherwise lawful development or use of public land by the individual or company pursuant to government contract or permit?[99]

Senator Jon Kyl (R-Arizona) asked this question: "Please state your best independent legal judgment, irrespective of existing U.S.

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hiring, promotion, or layoffs, college admissions and scholarship awards, and the awarding of government contracts, including the standard to be applied by a federal court in reviewing statute or government actions which create or employ classifications based on race, gender, or national origin.

Id. at *Part 1*, 105th Cong. 23 (1997). Senator Sessions also formulated a reasonable and appropriate question on this topic: "If confirmed, you will preside over many employment discrimination cases as a federal judge. . . . In a suit challenging a government racial preference, quota, or set-aside, will you follow the 1995 *Adarand v. Pena* decision and subject that racial preference to the strictest judicial scrutiny." *Id.* at *Part 3*, 105th Cong. 264 (Feb. 4, 1998) (written question from Senator Sessions).

99. *Id.* at *Part 2*, 105th Cong. 1367 (1997) (statement of Senator Hatch). Chairman Hatch's emphasis was different a year earlier in a similar question directed to nominee Ann Aiken:

> Under the takings clause of the Fifth Amendment, private property may not be taken by the Government for public use without the payment of just compensation to the owner of such private property. Please state, in detail, your best independent legal judgement on whether a property owner is entitled to just compensation under the takings clause when the federal government—through the implementation of a national monument, and naturally we are interested in that, or wetlands designation or through land use, environmental or endangered species statutes or regulations—subsequently limits or prohibits an owner's otherwise lawful use or development of his or her property and otherwise lawful use or development of public land by an individual or entity pursuant to Government contract or permit?

Id. at *Part 1*, 104th Cong. 1360 (1996) (statement of Senator Hatch).

precedent, on the constitutionality of capital punishment."[100] He also asked:

> May I just ask if any of the other members of the panel have a personal or moral position which would not enable them to apply the death penalty, if warranted, in an appropriate case? And if you don't, then I will take your silence as a statement you would not have such a problem.[101]

Senator Sessions directed a series of questions to Christina Snyder, a nominee for the Central District of California, at her July, 1997 confirmation hearing.

> People are concerned about intervention of courts in the social and legal system of America, and you served on the board of directors of Public Counsel, a public interest law firm, and this organization at one point challenged the constitutionality of a Santa Monica ordinance that prohibited sleeping in the parks . . . do you believe that there is a constitutional right to sleep in the parks in America? . . . You have served on the board of directors of the Western Center for Law and Poverty. This group has repeatedly filed suits . . . to invalidate the welfare reform efforts in California. . . . Do you believe that there is a constitutional right to welfare? . . . I believe you were involved in California Women Lawyers and maybe one of these other groups that strenuously opposed the California civil rights initiative. Were you involved in that in any way, in the opposition to the civil rights initiative in California? . . . In your opinion, is the California civil rights initiative constitutional? . . . And does that reflect your personal decision? . . . With regard to *Adarand*, would you express an opinion as to whether you feel that is correctly decided, your own personal opinion?[102]

Senator Russell Feingold (D-Wisconsin) reacted to these questions:

> Let me first say that the nominee was asked a series of questions as to her personal views on a number of specific cases, including a United States Supreme Court case. And the last time I checked, there is no opening on the U.S. Supreme Court. I think the question for the nominee should primarily

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100. *Id.* at *Part 2*, 105th Cong. 1009 (1997) (statement of Senator Kyl). Probing personal beliefs on capital punishment is the one area in which Democrats have joined with Republicans.

101. *Id.* at 1015-1016.

102. *Id.* at *Part 1*, 105th Cong. 778-781 (1997) (statement of Senator Sessions).

> be whether she will apply the law, irrespective of her personal views, because the position she is appointed to is a district court. . . . It is kind of an irony when we get to the day where if you don't participate in pro bono activities, you are somehow in a situation where your record is a little safer vis a-vis being appointed to a federal judgeship. . . . That can't be an encouragement for lawyers to get involved in pro bono activities on behalf of people who don't have the ability to go to court very easily.[103]

Senator Sessions responded: "I certainly didn't mean to suggest I didn't favor pro bono work. . . . You have been a member of some groups that advocated some pretty aggressive positions and I wanted to ask your opinion where you stood on those, and I think that is appropriate."[104]

Immediately after the Senate voted to confirm Christina Snyder in November of 1997, Senator Leahy told his colleagues:

> She was first nominated in May 1996, over 17 months ago. Her hearing was finally held in July of this year and after another 2-month delay, she was reported by the Judiciary Committee without objection. She has been pending on the Senate Calendar without action and without any explanation for the 2-month delay that has since ensued. It seems that the delay in considering her nomination had nothing to do with her outstanding qualifications or temperament or ability to serve as a federal judge. Rather, it seems that some opposed this fine woman and held up her nomination to a very busy court because she had encouraged lawyers to be involved in pro bono activities. Ms. Snyder has been held up anonymously for

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103. *Confirmation Hearings of Federal Appointments: Hearings Before the Comm. on the Judiciary, Part I*, 105th Cong. 782 (1997) (statement of Senator Sessions).

104. *Id.* at 783. Sessions also said:

> [I]f you're a member of a board, a board of an organization that files lawsuits that are outside the mainstream of current legal thinking, I think we have every right to inquire about it. I'm a pro bono lawyer. I mean, I participated in that program in Mobile whenever I've had the chance, whenever I've been in private practice. So I think that, again, is offensive to me, that anybody would suggest that we objected to [Snyder] because she was involved with a pro bono organization. That is not true. It is wrong to say so.

Interview, *supra* note 94, at 7. But as Nan Aron, president of the Alliance for Justice, said in reference to this nomination: "Some of the Senators on the Judiciary Committee seem to be setting a standard of what is politically correct pro bono work and what isn't. If it is not pro bono in service of the conservative legal movement, it is automatic grounds for scrutiny and perhaps disqualification." Robert Schmidt, *Volunteering for Trouble*, LEGAL TIMES, Nov. 10, 1997, at 6.

> months and months. When the Judiciary Committee finally met to consider her nomination, I was curious to learn who and what had delayed her confirmation for over a year. But no one spoke against her and no one voted against her.[105]

Senator Sessions has also focused on any connection that nominees may have to the American Civil Liberties Union, even asking an updated version of Joseph McCarthy's dread phrase, which had damned peripheral connections to the Communists: "[A]re you a member of the American Civil Liberties Union or have you ever been?"[106] Senator Session's press secretary John Cox said:

> [T]he Senator may be troubled by association with certain organizations, and the ACLU would be one example. But more frequently, it's not the association with the organization, it's the belief in certain ideas about American law. One could say that pro bono work is more likely to reflect passions that the individuals may have.[107]

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105. 143 *Cong. Rec.* S11,938 (daily ed. Nov. 7, 1997) (statement of Senator Leahy).

106. *Confirmation Hearings on Federal Appointments: Hearings before the Committee on the Judiciary United States Senate, Part 3*, 105th Cong. 338 (998) (statement of Senator Sessons). As Georgetown Law Professor Ester Lardent said: "It's kind of like the 1950s and fellow travelers and guilt by association. It would produce people we would never want on the bench, and that is people who have never seen beyond their own practice and own clients." Schmidt, *supra* note 104, at 6. David Pasternak, president of the Los Angeles County Bar Association, said:

> In pursuing a guilt-by-association tactic that is all too reminiscent of the have you now or were you ever assault of Senator Joseph McCarthy, these legislators have embarked on a non-too-subtle campaign to discourage bar involvement by highly capable attorneys who may have aspirations to serve on the bench someday. At the same time, these efforts are intended to sway local bar associations such as ours to remain silent on issues of public concern, such as providing adequate access to justice.

David J. Pasternak, *The Judiciary Under Attack*, L.A. LAWYER, Sep. 1997, at 11.

107. Schmidt, *supra* note 104, at 6. The American Civil Liberties Union inspires awe among certain conservatives. For instance, University of Texas law professor Lino A. Graglia has said:

> The . . . final thing to understand about constitutional law . . . is that it has almost uniformly served to enact a left liberal agenda, invalidating . . . policy choices favored by a majority of the American people, almost always only an order to substitute policy choices further to the left; those favored, for example, by the American Civil Liberties Union. It is not a coincidence that the Court disallows prayer in the schools, which is the ACLU position; restricts capital punishment, which is the ACLU position; removes restrictions on pornography, which is the ACLU position, and so on down the line. It's not a coincidence; it's virtually uniform. In effect, the Court functions as the mirror and mouths piece of liberal academia.

Soliciting responses from Margaret McKeown, then a nominee for the Ninth Circuit who had served on the ACLU's national litigation committee during the early 1980s, Senator Sessions posed a series of questions: "Do you believe that there is a constitutional protection for partial-birth abortions?" "With regard to the ACLU, it has taken some very good positions over the years and stood for some very important positions. But it also has a history of taking positions that I think are outside the mainstream. Are you still a member?" McKeown: "No. My participation in the ACLU was sometime approximately early 1980s." Sessions: "Let me just ask a few questions. Do you believe that the death penalty violates the Constitution of the United States?" "Just briefly, the ACLU has opposed officially the three strikes you're out sentencing laws that have appeared around the country. Do you share that view?" "They have opposed school vouchers for sectarian schools, arguing that it is unconstitutional. Do you share that view?" "Just briefly, opposition—they have opposed using V chips in televisions to screen violence, presumably under the Constitution, some principle of the Constitution. Do you adhere to that view?" "Opposition to voluntary labels on music albums have been one of the positions, and opposition—do you share that view." "And they have supported decriminalization of drugs. Do you favor that? and have you ever spoken in favor of that?" "What about a moment of silence in school? The ACLU has opposed that, the organization that you have been a member of. Do you favor that? Do you oppose a moment of silence in school?" "Well, you know, I don't think you are bound by the positions, every position of an organization that you join. But I think for some of the reasons I have just raised, that is why I have not chosen to be a member of the ACLU."[108]

Richard Durbin (D-Illinois), the only Democratic Senator present at the hearing, said:

> [I]t comes as a surprise to me, as I hear many of these witnesses who are questioned seriatim on a wide array of issues which

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Judicial Misconduct and Discipline Before the Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary, 105th Cong. 79 (1997) (statement of Lino A. Craglia, professor University of Texas School of Law).

108. *Confirmation Hearings on Federal Appointments: Hearings before the Committee on the Judiciary United States Senate, Part 3*, 105th Cong. 24-29 (1998) (statement of Senator Sessions).

> many of us demand time to reflect on before we would respond to questionnaires. And I just heard the array of ACLU issues that you were asked to respond to, and I thought your answers were all reasonable. But it really is a departure, I think, from what I recall has happened in previous Congresses before the Judiciary Committee. Those questions were usually reserved for Supreme Court nominees, and most of the time they would say, "I'd rather not answer. I may have a case coming before me that might have an issue of that type." And so I wonder if maybe we are going down a path here that might be a little dangerous.[109]

Almost two years after she was nominated for the Ninth Circuit, Margaret McKeown was confirmed by the Senate in March of 1998.[110]

To Ninth Circuit nominee Susan Graber, Senator Sessions managed to include all of these ACLU issues in a single question:

> Well, it is a remarkable organization. It has some fine people who are members of it. But it does adhere to a number of positions such as they oppose the death penalty, they oppose the "three strikes" sentencing laws, they are in opposition to school vouchers for sectarian schools, they oppose V-chips for television sets to limit what is shown, opposition to voluntary labeling of albums, and support of the partial-birth abortion, support of the constitutionality of racial preferences, and the

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109. *Id.* at 32 (statement of Senator Durbin). Senator Hatch was present for this hearing and stated that he believed this was an appropriate line of questioning. In 1989, however, he had written:

> I personally believe that any Senator is privileged to follow whatever line of questioning he or she believes to be appropriate. But with privilege comes responsibility, and each of us may be validly criticized for questions which are out-of-bounds, which are beneath the dignity of the Senate, or which diminish and demean the position being filled.

Orrin Hatch, *The Politics of Picking Judges*, VI J. L. & Pol. 1, at 47 (1989).

110. Margaret McKeown was also questioned by Senator Thurmond about her role in the ABA. Senator Thurmond asked:

> Ms. McKeown, you stated during your hearing testimony that the American Bar Association should take a very hard look at whether it should take positions on controversial social issues, such as a position on abortion that you advocated in a proposed ABA resolution in August 1992. If you were a member of the House of Delegates today and were presented with a resolution that would require the ABA to remain neutral on controversial issues like abortion or needle exchange programs, do you believe you would support or oppose this resolution?

Confirmation Hearings of Federal Appointments: Hearings Before the Comm. on the Judiciary, Part 3, 105th Cong. 252 (1998) (written question of Senator Thurmond).

> decriminalization of drugs. . . . Well, do you agree with all of those views? Do you have any concern about them?[111]

After heated objections by Senator Leahy, Senator Sessions withdrew the question. Judge Graber was also confirmed for the Ninth Circuit in March of 1998.

To Susan Oki Mollway, a nominee to the District of Hawaii and a former volunteer member of the Hawaiian Civil Liberties Union's Board of Directors, Senator Sessions asked:

> In Hawaii, we had the controversy over the same-sex marriage issue. Has the Hawaiian ACLU taken a position on same-sex marriages and, if so, do you agree with that position? . . . The [Hawaiian ACLU] director there, Patrick Talmai, stated in February of 1995 "The ACLU opposes random and indiscriminate drug testing in the workplace not only on privacy grounds, but also because such drug testing does not detect current impairment. . . ." Does that reflect your view? . . . This is just a statement. He made a statement. Do you agree with that statement?[112]

Senator John Ashcroft (R-Missouri) picked up on this refrain and asked her: "Were there policy positions that were advocated by the Hawaii ACLU while you were a board member with which you disagreed?" He then questioned Mollway about pending Hawaiian legislation: "You may or may not be familiar with this, but I think it is appropriate for us to be able to provide notification. Do you have a view that is consistent with the ACLU's there, or is it distinguishable from that?"[113] He also presented a similar set of written questions to Ms. Mollway, including "Has the Hawaii ACLU taken a position on the legality of same-sex marriages? Do you agree with that position?" He sought her views on the Prison Litigation Reform Act, and on an "ordinance banning sleeping in

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111. *Id.* at 338.

112. *Id.* at 49-50. Unsurprisingly, Senator Sessions opposed this nomination and said on the Senate floor: "I believe, based on this nominee's background, her positions on issue after issue, her activities with the ACLU in Hawaii, that we have indications that instead of being a part of a renaissance in the Ninth Circuit, to improve the Ninth Circuit and bring it back into the mainstream of American law, that she would, in fact, be more of the same: the same liberal, activist, anti-law-enforcement mentality that has gotten this circuit out of whack with the rest of the nation." 144 CONG. REC. S6755 (daily ed. June 22, 1998) (statement of Senator Sessions).

113. *Confirmation Hearings on Federal Appointments: Hearings before the Committee on the Judiciary United States Senate, Part 3*, 105th Cong. 46-47 (1998) (statement of Senator Ashcroft).

public parks overnight," "community notification provisions contained in pending sex offender legislation," "random and indiscriminate drug testing in the workplace," "mandated HIV testing," and mandatory minimum sentences.[114]

Senator Thurmond asked her whether there were "any official positions of the Hawaii ACLU on legal issues, such as the death penalty or the scope of the right to privacy, during your involvement with the organization that you did not agree with?"[115] Mollway, who was originally nominated in September of 1995, and was voted to the Senate floor in 1996 but was not then confirmed, received her second hearing before the Judiciary Committee in February of 1998.[116] Two months later, her nomination was again approved by the Judiciary Committee, and she was confirmed by the full Senate in June, 1998.

To Ronald Gilman, a nominee to the Sixth Circuit who was ultimately confirmed by the Senate on November 6, 1997, Senator Ashcroft stated:

> Mr. Gilman, I was interested in Senator Sessions' question about the Boy Scouts, who for a time were deprived of an opportunity to conduct a ceremony at the zoo because their organization espoused a belief in a supreme being. I was more interested in your response. You seemed to express some uncertainty about whether or not that should be a disabling characteristic of an organization. Do you think that organizations or groups of people that express a belief in a supreme being should be subject to differential access to public facilities or should have fewer rights than others?[117]

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114. *Id.* at 270-274 (written questions of Senator Ashcroft).

115. *Id.* at 282 (written question of Senator Thurmond).

116. The questions posed to Susan Oki Mollway at her 1998 judicial confirmation hearing were in striking contrast to those asked at her 1996 hearing. *Compare Confirmation Hearings on Federal Appointments: Hearings Before the Committee on the Judiciary, Part 3*, 104th Cong. 271-272 (1996) *with Confirmation Hearings of Federal Appointments, Hearings Before the Comm. on the Judiciary, Part 3*, 105th Cong. 49-50 (1998).

117. *See Confirmation Hearings of Federal Appointments: Hearings Before the Comm. on the Judiciary, Part 2*, 105th Cong. 359 (1997) (statement of Senator Ashcroft). Senator Sessions asked Ninth Circuit nominee Margaret McKeown a similar question:

> Recently the American Civil Liberties Union (ACLU) sued the City of Chicago over the city's sponsorship of the Boy Scouts. The ACLU argued that the city's involvement with the Boy Scouts violates the Establishment Clause because the Boy Scouts require a religious oath. The ACLU further argued that the Boy Scouts' ban on admitting homosexuals is discriminatory. The city of Chicago severed ties with the Boy Scouts to settle the ACLU lawsuit. Do you agree with the ACLU that state or local government involvement with the Boy Scouts

After a long delay in Committee and on the Senate floor, Margaret Morrow was finally confirmed in February, 1998.

3. A Disturbing Trend—At the end of 1997, the Alliance for Justice, an advocacy organization that focuses on judicial selection, distributed information that showed a disturbing trend—the Senate's confirmation process disproportionately delayed judicial nominees who were white women and people of color.[118] In 1997, the Senate had confirmed twenty-five white men, six white women, and five men of color. The race and gender contrast between those confirmed in the shortest amount of time in 1997 and those whose nominations were pending the longest at the end of the year was even more pronounced. Of the fifteen nominees confirmed in the shortest time between the date they were nominated by President Clinton and the date the full Senate voted on their nominations, twelve were white men. In contrast, by the end of 1997, of the fifteen judicial nominees who nominations remained pending for the longest time period, thirteen were white women or persons of color.[119]

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violates the Establishment Clause because of the Boy Scouts' religious oath? Do you agree with the ACLU that the Boy Scouts' ban on homosexuals constitutes unlawful discrimination?

Id., Part 3, 105th Cong. 256 (1998) (written question of Senator Sessions).

118. The Senate's disparate treatment by race and gender of judicial nominees actually appears to have begun in 1996, when the Senate confirmed 20 judges: 11 white men, five white women, two African-American men, one Hispanic man, and one Asian-American man, but of the 28 nominees who the Senate failed to confirm by the end of the 104th Congress, only 12 were white men, and the rest included seven white women, two African-American men, two African-American women, one Hispanic man, two Hispanic women, one Asian-American woman, and one Asian man.

119. *See* ALLIANCE FOR JUSTICE, JUDICIAL SELECTION PROJECT ANNUAL REPORT 1997 16-17. Those 15 nominees confirmed in the shortest amount of time in 1997 included: Norman Moon (white male), Stanley Marcus (white male), Dale Kimball (white male), Lynn Adelman (white male), Frank Hull (white female), Algenon Marbley (African-American male), Robert Chambers (white male), Richard Casey (white male), James Gwin (white male), Christopher Droney (white male), Janet Hall (white female), Bruce Kauffman (white male), Richard Caputo (white male), Charles Siragusa (white male), and Charles Breyer (white male). Those 15 nominees pending the longest at the end of 1997 included: William Fletcher (white male), Hilda Tagle (Hispanic female), Clarence Sundram (Asian male), Ann Aiken (white female), Susan Oki Mollway (Asian-American female), Michael Schattman (white male), James Beaty, Jr. (African-American male), Richard Paez (Hispanic male), Anabelle Rodriguez (Hispanic female), Margaret McKeown (white female), Margaret Morrow (white female), Helene White (white female), Ivan Lemelle (African-American male), Lynne Lasry (white female), and Sonia Sotomayor (Hispanic female).

As the Alliance for Justice released these lists, its legislative counsel publicly referred to this information and stated:

> I think it will cause some of the conservatives to rethink [their actions]. Is this the message they want to put out: 'If you're a woman or a minority, don't apply to be a judge because you're going to go to the back of the bus.' . . . We're not suggesting that there is a specific slowdown because the [nominees] are women or minorities. But that is clearly the outcome.[120]

Tom Jipping, director of the Free Congress Foundation's Judicial Selection Monitoring Project, called this statement "really offensive . . . the most shameless and disgusting thing you can do. . . . No one is asking whether or why President Clinton is choosing to make his most liberal, activist nominees women and minorities. The President is deliberately doing that to grease the skids for nominees that are otherwise unacceptable."[121] And Jeanne Lopatto, press secretary for the Senate Judiciary Committee, said: "Claims that Republicans have attempted to hold up women or minorities are so baseless as to be irresponsible."[122]

Senator Edward Kennedy (D-Massachusetts) referred to similar information in the confirmation debate for Ann Aiken, a nominee to the District of Oregon. Senator Kennedy stated:

> On the average, it is taking twice as long for Senate Republicans to confirm President Clinton's nominees as it took for Democrats to act on President Bush's nominations to the federal courts. For women, the problem is especially serious. Women nominated to federal judgeships are being subjected to greater delays by Senate Republicans then men. So far in this Republican Congress, women nominated to our federal courts

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120. Robert Schmidt, *Racial Politics?* LEGAL TIMES, Dec. 8, 1997, at 6 (statement of Stephan Kline). Seeing this pattern, Yvonne Scruggs-Leftwich, executive director of the Black Leadership Forum, Inc. said that "there is a conscious and almost conspiratorial intention to eliminate or delay the appointment of African-American and minority jurists." Black Leadership Forum, Inc. Press Release, *Black Leaders Deplore Senate Judiciary Committee Action* (Sept. 18, 1998).

121. Schmidt, *Racial Politics?, supra* note 120, at 6. Jipping later said: "Clinton's most activist nominees have a female face or a minority race [because they're] more difficult to vote against. Bill Clinton set it up that precisely so that his liberal interest groups can point the finger [if the nominations are jeopardized.]" Mark Murray, *Stayed From the Bench,* NAT'L J., Nov. 21, 1998, at 2799.

122. Schmidt, *supra* note 120, at 6.

> are four times—four times—more likely than men to be held up by the Republican Senate for more than a year.[123]

Senator Leahy frequently acknowledged the disturbing nature of these statistics and noted that:

> with the delays in the Senate consideration of Margaret Morrow and Margaret McKeown earlier this year, we had the opportunity to consider why it is that the Senate takes so much longer to consider and confirm so many woman nominees. That question has yet to be answered adequately. . . . For some unexplained reasons, judicial nominees who are women or racial or ethnic minorities seem to take the longest. . . . What all these nominees have in common is that they are either women or members of racial or ethnic minorities. That is a shame.[124]

The Chairman of the Judiciary Committee sharply disagreed with his colleague, stating:

> Anyone can cite individual isolated examples of unexpedited consideration but I flatly reject that these amount to what my colleague called a "disturbing pattern" of "ethnic and gender bias." I do not think it would be appropriate for me at this point to discuss why each of his examples fails to support his point. Suffice it for me to say here that members of the Judiciary Committee are well aware that many nominees lack the support of home-state Senators, have a record that raises serious questions of character and judicial temperament, or have some other background difficulty that necessitated further investigation. I do not believe it does the Senate well, nor do I believe it does the Committee well, to engage in this sort of "wedge" politics. I hope my colleagues will refrain from such unproductive attacks. They are not only unproductive, they are unfair and, in my opinion, somewhat vicious. To suggest that the Committee or this majority is motivated by improper bias of any kind is simply wrong, and the record shows it. In addition, I will not allow such accusations to force us to abdicate the Senate's responsibility to ensure that the Senate adequately and fully discharges its constitutional advise and consent function for nominees for life-tenured judicial office.[125]

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123. 144 CONG. REC. S85 (daily ed. Jan. 28, 1998) (statement of Senator Kennedy).
124. *Id.* S5424-5425 (May 22, 1998) (statement of Senator Leahy).
125. *Id.* S6753 (June 22, 1998) (statement of Senator Hatch).

Senator Hatch was angered by reports that the White House was going to attempt to paint Republicans as anti-women and anti-minority in its treatment of judicial nominees:

> There is no depth to which they will stoop in trying to win political points down there. . . . This is certainly a poor way to begin what I hope will turn out to be a cooperative effort to confirm federal judges. We should not play race or gender politics with judges, and I personally resent that. I have never considered, much less kept track of, the race or gender of the nominees that have been submitted for the committee's approval. And I don't think anyone else does. I oppose, and support, nominees on the basis of their professional qualifications and their commitment to uphold the rule of law—their commitment or lack of commitment. In the final analysis, all that matters is whether a nominee will make a good judge. I hope this is the standard the White House uses as well.[126]

Other Republicans also took offense. Senator Sessions said:

> Senator Leahy stated on the floor of the Senate that the reason Morrow had a problem was—he said it three times—"she's a woman, she's a woman, she's a woman." That is absolutely false. And he knows that, in my opinion. And I am disappointed that he would say that. It questions the integrity of those of us who work together on a daily basis to try to reach an accord on nominations.[127]

Senator Grassley concurred:

> To suggest, as some misguided Members have, that Ms. Morrow's gender is a factor in our decision to ask her questions, or even oppose her nomination, is both irresponsible and absurd. As others may have noted, we've processed around 50 women judicial nominees for President Clinton, including Justice Ginsberg, and I've supported almost all of them. As a matter of fact, the first nominee unanimously confirmed last year was a woman candidate [Colleen Kollar-Kotelly], and we've already confirmed a couple this year. It's absurd to think that any Senator makes his or her decision on a nominee based on gender or race.[128]

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126. *Id.* S74 (Jan. 28, 1998).
127. Interview, *supra* note 94, at 7.
128. 144 CONG. REC. S654-655 (daily ed. Feb. 11, 1998) (statement of Senator Grassley).

In 1998, the demographic portrait of those confirmed changed dramatically—of sixty-five nominees confirmed, thirty-two were women or minorities,[129] but the picture was still far different for those who the Senate failed to confirm—eight of the twelve nominees who had been nominated six or more months before the Senate adjourned were women or minorities,[130] as were seven of eight of those pending more than a year.[131] Moreover, as the Senate adjourned, there were four nominations pending on the Senate floor, and three of the nominees were minorities.[132] Finally, eight of eleven of the judges who the Senate delayed more than a year before confirming in 1998 were women or minorities.[133]

Even on the last day of the 105th Congress, Chairman Hatch was still defensive about this issue, when he stated that "according to the Alliance for Justice, a liberal judicial watch group, almost 50% of the judges confirmed by the Republican Senate in this Congress have been women and/or members of a minority group."[134] He then went on:

> There are a range of factors which make a nominee controversial or difficult to confirm, such as lack of experience or questionable information contained in materials not in the

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129. UNITED STATES DEPT. OF JUSTICE, OFFICE OF POLICY DEVELOPMENT STATISTICS (December 1998).

130. Listed in order of nomination, the twelve nominees whose nominations were pending for more than six months by the end of the 105th Congress included: Clarence Sundram (Asian male), James Beaty, Jr. (African-American male), Richard Paez (Hispanic male), Anabelle Rodriguez (Hispanic female), Helene White (white female), Ronnie White (African-American male), Jorge Rangel (Hispanic male), Jeffrey Colman (white male), Ron Gould (white male), Marsha Berzon (white female), James Klein (white male), and Timothy Dyk (white male). *See, e.g.,* Alliance for Justice, *Judicial Selection Project: Annual Report 1998*, at 18 (1999).

131. The eight nominees whose nominations were pending more than one year included: Sundram, Beaty, Paez, Rodriguez, Helene White, Ronnie White, Rangel, and Colman. *Id.*

132. Richard Paez (Hispanic), Ronnie White (African-American), Timothy Dyk (white), and William Hibbler (African-American). *Id.* at 19.

133. The eleven judges who were confirmed in 1998, but more than a year lapsed from the time of their nominations, include: William Fletcher (white male), Hilda Tagle (Hispanic female), Susan Oki Mollway (Asian-American female), Ann Aiken (white female), Margaret McKeown (white female), Margaret Morrow (white female), Howard Matz (white male), Sonia Sotomayor (Hispanic female), Rebecca Pallmeyer (white female), Ivan Lemelle (African-American male), and Dan Polster (white male). *Id.*

134. 144 CONG. REC. S12,964 (daily ed. Oct. 21, 1998) (statement of Senator Hatch). In the 105th Congress, 43 out of 101 confirmed judges were women and/or minorities, in contrast to 32 out of 65 in 1998. *See Alliance for Justice: Annual Report 1998*, at 18.

> public domain or in their past records that may be at variance with the proper role of judges in society. But I assure you that gender, ethnicity, and race are not included in the determination.[135]

The most likely explanation for the confirmation process' disproportionate effect on women and minorities is not direct animus to race or gender but some Senators' hyper-sensitivity towards alternative bar associations, pro bono work, and public-interest experience, all of which were more available for women and minorities when they entered the profession in larger numbers twenty-five years ago. Judge Sonia Sotomayor commented on this stereotyping that she believed had held up her confirmation to the Second Circuit in 1998: "That series of questions, I think, were symbolic of a set of expectations that some people had [that] I must be liberal. It is stereotyping, and stereotyping is perhaps the most insidious of all problems in our society today."[136] Judge Sotomayor also noted:

> I don't think anybody looked at me as a woman or as a Hispanic and said "we're not going to appoint her because of those characteristics." Clearly that's not what occurred. But I do believe there are gender and ethnic stereotypes that propel people to assumptions about what they expected me to be. I obviously felt that any balanced view of my work would not support some of the allegations being made. And so long as people of good will are participating in the process and attempting to be balanced in their approach, then the system will remain healthy.[137]

According to Harvard Law Professor Charles Ogletree:

> [T]he irony is that Thurgood Marshall had a much greater chance of being confirmed in 1967 than he would 30 years later. The litmus tests applied to judicial candidates with any relevant experience in civil rights and civil liberties are so stringent that you either have to have no record, or a record that does not suggest you are promoting the rights of minorities, women or

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135. *Id.*

136. Greg B. Smith, *Judge's Journey to Top Bronx, Sotomayor Rose From Projects to Court of Appeals*, DAILY NEWS, Oct. 24, 1998, at 17.

137. Larry Neumeister, *Judge Finds Humility in Journey From Housing Projects to High Court*, ASSOCIATED PRESS, Nov. 9, 1998, *available in* 1998 WL 7464502.

> other groups that have historically been disadvantaged in our legal system.[138]

4. Senatorial Deals—In the traditional nomination procedure for federal judges, the senior Senator in a particular state from the President's party makes a recommendation to the White House on district court nominees. If there is no Senator from the President's party, then senior Representatives from that state or ranking state officials make such recommendations. The President has always had much more latitude in nominating circuit court judges, although he might seek advice from relevant Senators.[139] Particularly in the 105th Congress, certain Republican Senators have sought to eradicate these traditional arrangements by attempting to seize control of the nomination's process. Responding to these proposed changes, Ranking Judiciary Committee Member Patrick Leahy said: "They're trying to do it behind the scenes, but they are trying to interfere with the most independent judiciary in the world, the envy of the rest of the world. No Democratic or Republican leader of the Senate before this would ever countenance this kind of irresponsible activity."[140]

Senator Phil Gramm (R-Texas) drafted a proposal in 1997 that would have allowed Republican Senators to veto nominees from their circuit. If a two-thirds majority of Republican Senators from

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138. Trevor Coleman, *Minority Judges Under Assault*, DETROIT FREE PRESS, March 24, 1997, at 20.

139. In Eleanor Acheson's 1993 confirmation hearing to serve as Assistant Attorney General for the Office of Policy Development, the division that currently processes judicial nominations, Senator Hatch asked her: "What role in the process of selecting Federal judges would you anticipate for this Office?" Acheson described the traditional arrangements as she answered:

> The President will be sending over candidates for the district court, and also for the court of appeals. The administration has indicated that it will follow the traditional policy of, with respect to the district court, having Senators from the Democratic party nominate or recommend to the President candidates for the district court judges, and the White House has indicated that it is welcoming from every quarter suggestions for people to serve on the Federal courts of appeals.

Confirmation Hearings for the Department of Justice, Before the Comm. on the Judiciary, 103d Cong. 437 (1993) (statement of Eleanor Acheson, nominee for Assistant Attorney General). Hatch then asked: "What do you do if both Senators are Republicans in a particular State?" Acheson replied: "Well, I believe then we will look to the senior ranking Democratic person either in Congress or the Governor, or whoever is the senior Democratic elected official for that suggestion or for that nomination." *Id.*

140. *Morning Edition: Federal Judge Shortage* (Nat'l Public Radio Broadcast, Sep. 22, 1997).

the states covered by a circuit objected to a nominee, then the Republican majority on the Judiciary Committee would have had to vote to reject the nomination. Senator Slade Gorton (R-Washington), who chaired a Republican Caucus task force on judicial nominations, circulated a proposal that would have required the White House to gain advance approval of a nominee from the Senators in a particular circuit or the Republicans would refuse to confirm the nominee. Others wanted to require the White House to clear names of potential nominees with both Senators from a specific state, regardless of party affiliation, before the nomination could be forwarded to the Senate.

Not all Republican Senators agreed with these proposals. Charles Grassley (R-Iowa) said: "This dog can bite twice. If we do this for a Democratic President and a Republican Senate, you can be darn sure that if there's a Democratic Senate and a Republican President, we're going to have to live with it."[141] Democratic Leader Tom Daschle (D-South Dakota) reacted to the plans to change nomination process: "If they're willing to guarantee us that they would always keep that policy, even under a Republican President, then we'll consider it. But they'd never agree to that."[142]

Many observers saw these proposals as criticism of Orrin Hatch's performance as Judiciary Committee Chairman, because these plans would have diminished his power on the committee. One of the Senate's most conservative members,[143] Chairman Hatch has been in a difficult position since he assumed control of the Judiciary Committee in 1995. He is simultaneously barraged by liberals to do more to fill judicial vacancies and by conservatives to take a more combative stance in opposing the potential judicial activists coming before the Senate. Accordingly, he has presented

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141. Chuck McCutcheon & Elizabeth Palmer, *GOP Task Force Will Urge Preclearance of Judicial Nominees*, PULSE OF CONGRESS, March 20, 1997.

142. *Id.*

143. Senator Hatch has a lifetime American Conservative Union rating of 92 compared to 90 for Senator Strom Thurmond (R-South Carolina). *See* David Brock, *The Real Orrin Hatch*, AM. SPECTATOR, Nov. 1997. Hatch has said: "I will match my conservatism with anybody else on my side, and I think I will stand up rather well. If you mean, am I extreme?— the answer to that is no. I'm not. I'm proud that I'm not." Kirk Victor, *Bashing the Bench*, NAT'L J., May 31, 1997, at 12. Soon after he was elected Senator in 1976 and was believed to be part of the New Right, Hatch told conservative icon Paul Weyrich: "One thing I am not going to be is a captive of the ultra-conservatives in Washington." David Brock, *The Real Orrin Hatch*, AM. SPECTATOR, Nov. 1997.

two conflicting public images on the issue of judicial gridlock, and one part is much more aggressive and partisan. He frequently scapegoats the judiciary and President Clinton's nominees by stating: "If you want blame somebody for the slowness of approving judges to the Ninth Circuit, blame the Clinton and Carter appointees who have been ignoring the law and are true examples of activist judging."[144] In a speech to the Federalist Society, Hatch claimed:

> [A]t least 22 of the 30 Court of Appeals judges President Clinton has appointed have joined or written activist decisions that have either sympathized with criminal defendants at the expense of legitimate law enforcement interests, or have sought to substitute the judges' policy preferences for those of the people and their elected representative. These are not just isolated instances, but part of a consistent pattern of activism repeated over the course of dozens upon dozens of decisions.[145]

Chairman Hatch's other image is much more accommodating as he appears willing to work with the Senate Democrats. He has said that it is:

> [T]otally wrong to believe we should politicize the process for nominating judges. Only if nominees are off-the-wall should you reject them. But if they are in the mainstream then you have no reason to block them. There are wonderful liberal judges in the courts who really apply the law, just as there are wonderful conservative judges. There are also some lousy liberal and conservative judges.[146]

Senator Leahy has referred to this accommodating side: "Senator Hatch is probably getting his orders directly from the Republican Caucus. And I think if it was left to Orrin Hatch and myself, we'd get most of these judges through."[147] According to Johnny Killian, a legal analyst for the Congressional Research Service, "[T]here have always been attacks on the judiciary by both sides, but never a permanent battle. I don't think Hatch wants to

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144. *Rep. DeLay Admits Trying to Intimidate Activist Federal Judges*, STAR-TRIBUNE, Sep. 21, 1997, at A6.

145. Orrin Hatch, Address to University of Utah Federal Society Chapter (Feb. 18, 1997), *available in* 1997 WL 4429673.

146. Jamie Dettmer & Lisa Leiter, *Judicial Choices Raise Objections*, INSIGHT, April 29, 1996, at 8.

147. *Morning Edition, Senate and Judges* (Nat'l Public Radio broadcast, Sep. 24, 1997).

hold the judiciary hostage; he believes in hearings and votes. But he has to deal with the far right of his party."[148]

Tom Jipping of the ultraconservative Free Congress Foundation, the right's group leading the campaign against Clinton judges, now claims that "Orrin Hatch has been the chief lobbyist for a number of the most liberal Clinton nominees."[149] Seizing on a statement Senator Hatch made in a speech to the Utah Federalist Society, Jipping drafted the Hatch Pledge, and ten Senators, but not Hatch, signed it: "Those nominees who are or will be judicial activists should not be nominated by the President or confirmed by the Senate, and I personally will do my best to see they are not."[150] Hatch finally responded: "Jipping has absolutely no influence on me. He has been so loud on some of these issues—and so wrong and so partisan."[151] Jipping's boss Paul Weyrich, the founder of the Free Congress Foundation, said:

> What [Hatch] does behind the scenes in cooperation with the liberals renders his committee chairmanship useless. . . . The man had tried to get judges confirmed that even Democrats didn't want confirmed. I'm sorry, but I can only take so much of this stuff. I have been in Washington for 31 years. I am accustomed to members of Congress shading things, but there is a limit to what even I can tolerate.[152]

Chairman Hatch had annoyed some of his Republican colleagues when he cosponsored a provision with Edward Kennedy (D-Massachusetts) that would have raised cigarette taxes to pay for health insurance for poor children.[153] A GOP aide stated:

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148. Robert Marquand, *Will War Over Judges Become Permanent?*, CHRISTIAN SCIENCE MONITOR, Dec. 19, 1997, at 3.

149. Donald M. Rothberg, *Conservatives Can't Agree On How to Deal With Judicial Activism,* CHICAGO TRIB., March 5, 1997, at 12.

150. Terry Carter, *A Conservative Juggernaut*, A.B.A.J., June, 1997, at 32.

151. *Righter Than Right on Clinton's Judges*, NAT'L J., Nov. 22, 1997, at 2345.

152. Kirk Victor, *Hatch's High-Wire Act*, NAT'L J., April 4, 1998, *available in* 1998 WL 2089053.

153. *See* S. 526, 105th Cong. (1997). Hatch's friendly relationship with Senator Kennedy is viewed with suspicion by some members of the Senate. For example, Slade Gorton said: "I wish he were less deferential to Senator Kennedy. I have been in groups in which he was told that." Victor, *supra* note 152. Talking about his work with Senator Kennedy, Chairman Hatch said:

> I happen to like Ted Kennedy. . . . Every Hatch-Kennedy battle [the two working together] sticks in the craw of the Republican leadership. Sometimes they let the bygone political battles, where Kennedy can be very brutal and very political, stand in the way of getting things done. . . . I take a tremendous beating every

"[T]here is a concern that when [Hatch] does things, he may not have the best interests of the [Republican] conference at heart," and that "Hatch should realize that half of his Conference is not happy with the way he is handling the Judiciary Committee." "Hatch is on notice . . . there's going to be continuing tension."[154] As Gramm and Gorton's proposals were about to be voted on by the Republican Conference, Hatch's only public comment was: "I believe that Republicans approach the judicial confirmation process from a fair and principled and apolitical perspective, and I am confident that whatever the conference chooses to do, if anything, will reflect those principles."[155]

The proposals were put to a vote of the Republican Conference on April 29, 1997, and none passed. Hatch, who had lobbied vigorously against these encroachments on his authority, received support from most of his Republican colleagues on the Judiciary Committee and from the other Senate Chairmen, many of whom were reluctant to support measures that decreased the authority of a fellow Chairman.[156] In the fall of 1998, Senator Hatch was again threatened by more conservative Republican Senators with the loss of his chairmanship because of conciliatory remarks he made to President Clinton on the Monica Lewinsky scandal and his suggestion that censure might be an appropriate punishment for Clinton's conduct.[157]

Senator Jon Kyl (R-Arizona) and others suggested that 50% of the vacancies be turned over to the Republicans to fill with their

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> time I do that, but I don't care. If I am here just to please an ideological team, then I probably should leave, because I'm here to do what is right and I am here to do what I believe in. Sometimes I get a little sick of the two-bit ideological battles.

Id. Senators Hatch and Kennedy also teamed up in an effort to provide funding for AIDS treatment and research which resulted in the Ryan White bill. According to Hatch: "I brought the first AIDS bill to the Senate floor. Kennedy helped write it. It was a top-flight research bill that put us on the path of finding a cure for AIDS." Brock, *supra* note 143.

154. Ed Henry, *His Power Being Judged, Hatch Beats Back Leaders*, ROLL CALL, May 1, 1997, at 25.

155. Neil Lewis, *Republicans Seek Greater Influence in Naming Judges,* N.Y. TIMES, April 27, 1998, at 14.

156. Some of Hatch's colleagues were disappointed. Senator Rick Santorum (R-Pennsylvania) said: "If my worse expectations come true, we will have bad nominations, and we may have to revisit the issue next year." Henry, *supra* note 154, at 25.

157. *See* John Bresnahan, *Hatch Gets Threats for Moderate Views*, ROLL CALL, Sep. 21, 1998, at 1.

nominees. Senator Joe Biden (D-Delaware) responded on the Senate floor:

> In the Republican caucus there are some who say, No. We want to change the rules. We want to make sure, of all the people nominated for the federal bench, that the Republican Senators should be able to nominate half of them, or 40 percent of them, or 30 percent of them. That is malarkey. That is flat-out malarkey. That is blackmail. . . . I will not name certain Senators. But I have had Senators come up to me and say, "Joe, here is the deal. We will let the following judges through in my State if you agree to get the President to say that I get to name three of them." Now folks, that is a change of a deal. That is changing precedent. That isn't how it works. The President nominates. We dispose one way or another of that nomination. And the historical practice has been—and while I was chairman we never once did that—that never once that I am aware of did we ever say, "By the way, we are not letting Judge A through unless you give me Judges B and C."[158]

Senator Biden addressed this issue in a similar fashion at a confirmation hearing:

> Some of the rumblings I have heard, that have been communicated to me, is that Republicans believe that in the next 4 years they should get 50 percent of all the nominees. If that is true, I hope hell freezes over until that happens. No one has ever done that. No party has ever done that. I know you would never do that. And I would just like the message to go forth, as they say, from this time and place that, Connie, you ain't getting 50 percent. We have never done that.[159]

While Senator Biden, did not appreciate Republican demands for selection authority, he felt some arrangements were appropriate:[160]

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158. 143 CONG. REC. S2538 (daily ed. March 19, 1997).

159. *Confirmation Hearings of Federal Appointments: Hearings Before the Comm. on the Judiciary, Part 1*, 105th Cong. 6 (1997).

160. Vermont is one state where the Senators have cooperatively formed a bipartisan screening committee for judges. Senators Patrick Leahy (D-Vermont) and James Jeffords (R-Vermont) formed a committee: "made up of members of the bar and members of the public. Senator Jeffords and I appoint equal number of people to it, and the bar association does, to screen candidates that might be recommended." *Confirmation Hearings on Federal Appointments: Hearings Before the Committee on the Judiciary, Part 1*, 104th Cong. 577 (1995) (statement of Senator Leahy). In Oregon, Senators Ron Wyden (D-Oregon) and Gordon Smith (R-Oregon) formed a similar committee.

> Now, let me set the record totally straight here. There are states where precedents were set years ago. The Republican and Democratic Senator, when it was a split delegation, have made a deal up front in the open. In New York, Senator Javits and Senator Moynihan said: Look. In the State of New York, the way we are going to do this is that whomever is the Senator representing the party of the President. . . . For every two people that Senator gets to name, the Senator in the party other than the President gets to name one. OK, fine. Jacob Javits did not go to Pat Moynihan and demand that he was going to do that. Moynihan made the offer, as I understand it, to Jacob Javits. That is not a bad way to proceed.[161]

Other Senators have forced changes within the home-state patronage system. Senator Arlen Specter (R-Pennsylvania) demanded and received an arrangement with the White House that for every three judicial appointments from Pennsylvania, one would be a Republican nominee,[162] but in the summer of 1998, Republican Senator Rick Santorum of Pennsylvania blocked consideration of all five pending Pennsylvania's judicial nominees. He blamed the White House for failing to live up to its agreement. Senator Santorum said:

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161. 143 CONG. REC. S2538 (daily ed. March 19, 1997) (statement of Senator Biden). Former-Senator Al D'Amato (R-New York) and Senator Daniel Moynihan (D-New York) continued this practice under the last three Presidents. Senator D'Amato described the arrangement as follows:

> Senator Moynihan more than 20 years ago came to bring about a system with Senator Javits which has, I think, produced a model in which both of us, regardless of which party has been in the White House, have had an opportunity to be part of this process. Over the years, when the Republican had the White House, Senator Moynihan had the opportunity to present one out of four candidates, and over the years I have also had that same opportunity when the Democrats controlled the White House. So it has worked well. It has provided us, I think, with an opportunity to add to the diversity and to the strength of our benches, and I think we are proud of the distinguished record.

Confirmation Hearings on Federal Appointments: Hearings Before the Committee on the Judiciary, Part 1, 104th Cong. 2 (1995). Senator D'Amato was defeated in the election of November, 1998, and Senator Charles Schumer (D-New York) formed his own nominations committee.

162. This has resulted in the appointment of two prominent Republicans to the Pennsylvania district courts, former Pennsylvania Supreme Court Justice Bruce Kauffman and Secretary of the Commonwealth Yvette Kane. During the Bush Administration when then-Senator Harris Wofford (D-Pennsylvania) proposed a similar arrangement in 1991, Senator Specter refused to consider the proposal.

> I know the White House would love to lay this one on me, but it's them. Clinton is balking over the one Republican that I want, Pittsburgh lawyer Arthur Schwab. If their complaints are about competence and temperament, then that's different, but ideology—a lot of their nominees I certainly wouldn't agree with on those grounds. . . . The President's holding the hostages, not me. All he has to do is follow through with his commitment.[163]

According to Senator Specter, "I think the whole judgeship matter is something that we have to come to an accommodation on. Nobody gets exactly what they want in terms of who serves."[164]

Senator Jon Kyl effectively used holds to veto Ninth Circuit nominees from Arizona, refusing to accept two potential nominees, Noel Fidel and Andrew Hurwitz, before assenting to Barry Silverman's nomination to the court in November of 1997. He also forced the White House to agree to a joint recommendation of district court nominees with Representative Ed Pastor (D-Arizona), which led to the confirmations of Judges Frank Zapata and Raner Collins.

William Fletcher, a University of California at Berkeley law professor, was nominated to the Ninth Circuit on April 29, 1995. He was caught up in the general confirmation gridlock of 1996 and 1997 but was also perceived by conservatives to be another judicial activist[165] for his writings on federal court jurisdiction. In a move labeled by some as "throw Momma from the bench,"[166] Republicans also stated that based on their interpretation of an obscure anti-nepotism statute, 28 U.S.C. Section 458, Fletcher could not sit on the Ninth Circuit because his mother, Judge Betty Fletcher (a Carter appointee), sat on the same court. Section 458 was passed in 1887 and last amended in 1911. It states that "no person shall be appointed to or employed in any office or duty in any court who is related by affinity or consanguinity within the degree of first

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163. Pete Leffler, *Santorum Puts Federal Judge Nominees on Ice*, MORNING CALL, August 12, 1998, at A1.

164. *Id.*

165. Tom Jipping of the Free Congress Foundation stated soon after Mr. Fletcher was nominated: "I'm quite confident his substantive record will reveal a liberal activist judicial philosophy which characterizes many of Clinton's picks." Henry Weinstein, *Law Professor Nominated for Key Judgeship*, L.A. TIMES, April 27, 1995, at A3.

166. Paul Elias, *William Fletcher Confirmed to Ninth Circuit*, THE RECORDER, Oct. 9, 1998, at 1; *see also Morning Edition: Senate and Judges* (Nat'l Public radio broadcast, Sept. 24, 1997).

cousin to any justice or judge of such court." Not only was the law designed to prevent judges from hiring their relatives as court personnel, but the law was never applied in similar situations—two brothers, Richard and Morris Arnold, are currently serving on the Eighth Circuit, and Learned and Augustus Hand were cousins who served on the same New York federal courts early in the 20th Century.

As Deborah Lewis of the Alliance for Justice contended: "This is beyond the Senate's constitutional role of advice and consent. This is targeting a judge [Betty Fletcher] because she is an outspoken liberal. Clearly, they wouldn't be doing this if William Fletcher's mother was a Republican appointee."[167] Senator Hatch said that he had been unaware of the nepotism statute when he voted for Morris Arnold in 1992, but he believed "it is wrong as a matter of policy to have people related so closely by blood on any circuit court, and especially the Ninth Circuit which serves more than 50 million people."[168] In 1996, Betty Fletcher agreed to take senior status if her son was confirmed,[169] but more than a year passed without the nomination receiving action from the Senate.

William Fletcher received a second confirmation hearing on April 30, 1998. On the same day that Senator Kyl introduced a bill that would prevent relatives within the first degree from sitting as judges on the same court,[170] but the legislation did not apply to individuals nominated before its effective date. The Judiciary Committee reported Fletcher's nomination and Kyl's bill to the Senate floor on May 21, 1998. The Senate then voted to approve the legislation on October 6, 1998, and Fletcher's nomination on October 8, 1998, by a vote of 57-41, the greatest number of negative votes to date against any Clinton judicial appointee. Senator Mike DeWine (R-Ohio), who voted against the confirmation, said: "Mr. Fletcher's writings and statements simply do not convince me that he will move the Ninth Circuit closer to the

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167. Richard Carelli, *California Judge Benches Self to Aid Son*, CHICAGO SUN TIMES, May 9, 1996, at 25.

168. Neil A. Lewis, *Judge Agrees to Step Aside to Aid Her Son*, N.Y. TIMES, May 8, 1996, at A1.

169. Betty Fletcher pledged in a letter to Senator Hatch: "In light of your concern that close relatives should not serve on the same circuit court, I commit to take senior status as soon as my son's commission is signed and not to sit on the same panel with him." *Id.*

170. S. Res. 1892, 105th Cong. (1998) (enacted).

mainstream of judicial thought."[171] Judge Betty Fletcher took senior status on November 1, 1998.

The Fletcher story had implications on other judicial nominations. In April of 1997, in a letter to Senator Patty Murray (D-Washington), Senator Slade Gorton (R-Washington) wrote: "I will not consent to any current or prospective nominations of federal judges from Washington state unless my advice has been sought in a timely manner and has been given significant weight."[172] This was far different from a statement he had made in a 1995 confirmation hearing in which he had informed the Judiciary Committee about a nominee for the Eastern District of Washington whom he supported, but recognized that Senator Murray was not obligated to include him in the selection process. Senator Gorton stated:

> I want to tell you that I believe that this selection was the selection process working at its very best. At the time of the vacancy which Judge Whaley has been nominated to fill, Senator Murray picked a group of people, lawyers and nonlawyers, from eastern Washington to advise her on that possible appointment. They interviewed more than a dozen lawyers, most of them well-qualified lawyers, and when they recommended three to her, she asked that I interview those three finalists with her and help her in making a selection to recommend to President Clinton. First, I was honored to be asked to do this. It was not a request that she had to make under our custom. But second it turned out to be an easy task.[173]

Barely a year later, Senator Gorton demanded a substantial share of the power to nominate federal judges in Washington State.

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171. Louis Freedberg, *Senate Oks Clinton's Pick for 9th Circuit*, S.F. CHRON., Oct. 9, 1998, at A3. Senator Sessions made an ironic comment during the Fletcher confirmation debate:

> We want to support the President. We support the President time and again. I have seen some Presidential nominees that are good nominees. I am proud to support them. There are two [from Alabama] here today who I know personally that I think would be good federal judges. But I can't say that about [Fletcher]. We need to send the President of the United States a message, that those Members of this body who participate in helping select nominees cannot in good conscience, continue to accept nominations to this circuit who are not going to make it better and bring it back into the mainstream of American law.

144 CONG. REC. S11,872 (daily ed. Oct. 8, 1998) (statement of Senator Sessions).

172. Editorial, *OK Judges Now, Change Rules Later*, SEATTLE POST-INTELLIGENCER, April 27, 1997, at F2.

173. *Confirmation Hearings on Federal Appointments: Hearings Before the Committee on the Judiciary, Part 1*, 104th Cong. 1001 (1995) (statement of Senator Gorton).

Both Senator Murray and the White House initially resisted, and, in retaliation, Senator Gorton placed holds on all Washington nominees in 1996 and part of 1997, preventing their confirmation. Eventually, White House Counsel Charles Ruff agreed in April of 1997 to a deal that included several parts. Senator Gorton would support the nominations of Margaret McKeown and Ron Gould for two Ninth Circuit seats located in Washington, Ed Shea for a district court position in the Eastern District of Washington, and William Fletcher to a California seat on the Ninth Circuit. In exchange, Senator Gorton would be permitted to nominate Chief Justice Barbara Durham of the Washington Supreme Court to a third Washington state Ninth Circuit seat that would become vacant once William Fletcher was confirmed and his mother Betty took senior status, and Senator Gorton would receive the opportunity to nominate someone to the Western District of Washington. Chief Justice Durham is described as "the anchor of the conservative faction,"[174] and she is rigid in her approach to criminal law, a strong supporter of property rights, and one who has only provided the most limited support for access to justice issues and legal services for the poor.[175]

Senator Murray, in March of 1998, made the following statement:

> [W]hile I have been the Senator of the same party as the President, I have invited and encouraged Senator Gorton to participate in judicial nominations. I recognize this is a tremendous break in tradition, but I know our citizens are best served when we work together. I intend to continue working with Senator Gorton to find the very best and most able members of the Washington bar to recommend to President Clinton.[176]

The previous month, Senator Gorton had announced: "If a California nominee, Mr. Fletcher, is confirmed, there will be a resignation or a retirement to senior status of another Washington judge, and we have agreed with the President on an appointment

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174. Patti Epler, *Election 1996: Two Incumbents Far Apart in Philosophy*, NEWS-TRIB., Sept. 1, 1996, at B1.

175. *See* Alliance for Justice, *Report on the Potential Nomination of Chief Justice Barbara Durham of the Washington Supreme Court to the United States Court of Appeals for the Ninth Circuit* (July 8, 1998); Alliance for Justice, *Report on the Nomination of Barbara Durham to the Ninth Circuit* (January 29, 1999).

176. 144 CONG. REC. S2695 (March 27, 1998) (statement of Senator Murray).

or a nomination to that position as well."[177] Since this deal was agreed to Margaret McKeown and William Fletcher[178] have been confirmed to the Ninth Circuit, Ed Shea and Robert Lasnik have been confirmed respectively to the Eastern and Western Districts of Washington, Betty Fletcher took senior status, and President Clinton nominated Barbara Durham to the Ninth Circuit.

The failure of the Senate to act on Judge James Beaty, Jr.'s nomination during the 104th and 105th Congresses highlights another problem with the confirmation process. Nominated by President Clinton in December 1995 for elevation to the Fourth Circuit, Judge James Beaty would have been the first African-American and the first person of color ever to sit on this court that has the highest percentage of African-Americans of any circuit in the country. According to Cornell University law professor John Blum, the Fourth Circuit is "[T]he black hole of capital litigation. It is by far the most conservative appeals court in the country. You lose cases you would win in any other circuit."[179] Civil rights lawyer C. Christopher Brown believes that "the constitution is enforced less [in the states covered by the Fourth Circuit] than in other circuits."[180]

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177. *Confirmation Hearings on Federal Appointments: Hearings Before the Committee on the Judiciary United States Senate, Part 3*, 105th Cong. 17 (1998) (statement of Senator Gorton).

178. At the time that William Fletcher was confirmed, Senator Gorton stated:

> I believe [the advice and consent clause] does permit a Senator to vote against a judicial nominee on the grounds that the Senator disagrees with the fundamental legal philosophy of that nominee. I also believe, however, that when the President has sought the advice as well as the consent of the Senate, and when that advice has been heeded, at least to the extent of being given significant weight, it is then appropriate to vote for the confirmation of a judicial nominee, even one, as an individual Senator, might well not have nominated that individual had he, the Senator, been President of the United States. . . . He would certainly not have been my first choice had I been the nominating authority in this case. But I am not. I am an individual Senator. At the same time, the President of the United States and his officers have, in fact, sought my advice as well as my consent on judicial nominees, both to the district courts in the State of Washington, and to the Ninth Circuit Court of Appeals when those nominees come from the State of Washington. While again I have not necessarily gotten my first choices for those positions, I believe that in a constitutional sense my advice has been sought and my advice has been given considerable weight by the President of the United States.

144 CONG. REC. S11,874 (daily ed. Oct. 8, 1998) (statement of Senator Gorton).

179. Brooke A. Masters, *A Chance to Tip Scales of Justice*, WASH. POST, April 26, 1998, at B5.

180. *Id.*

After thirteen years as a judge on the North Carolina Superior Court, the Senate unanimously voted to confirm Judge Beaty to the Middle District of North Carolina in 1994, but in his subsequent nomination for elevation to the court of appeals, Judge Beaty never received a hearing from the Judiciary Committee. Beaty is under attack for his vote on a single case, *Sherman v. Smith*,[181] which he decided while sitting by designation on the Fourth Circuit. In a *per curiam* decision, the panel ruled that a new trial had to be given to the defendant because one juror had made an unauthorized visit to the crime scene, a visit that may have influenced the other jurors' decisions.[182] While the Fourth Circuit sitting *en banc* ultimately reversed the Fourth Circuit panel on which Beaty had sat, finding that the unauthorized visit to the crime scene constituted harmless error,[183] the small panel's decision was clearly reasonable. Senator Hatch believed otherwise and attacked Judge Beaty on the Senate floor:

> Will the President chastise Judge Beaty, or does he agree with his decision to release a convicted double murderer on a technicality? I am not alone in my criticism of Judge Beaty—the *Wall Street Journal* has said that Judge Beaty and his Carter-appointed colleague took "a view of defendants' rights that is so expansive that they are willing to put a murderer back out on the streets because a juror took a look at a tree." The entire Fourth Circuit has voted to grant en banc review of the case, and I fully expect the court to do the right thing and reverse Judge Beaty's misguided opinion. But President Clinton has not called upon Judge Beaty to resign. Instead, he is rewarding Judge Beaty by promoting him. He has nominated Judge Beaty to the Fourth Circuit.[184]

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181. 70 F.3d 1263 (4th Cir. 1995) (per curiam).

182. *See id.* at 1263.

183. *See* Sherman v. Smith, 89 F.3d 1134 (4th Cir. 1996) (en banc).

184. 142 CONG. REC. S2790 (daily ed. March 25, 1996) (statement of Senator Hatch). Andrew Frey, Sherman's lawyer, and a former Deputy Solicitor General and Reagan nominee to the District of Columbia Circuit, wrote to Senator Hatch:

> Far more disturbing to proponents of judicial restraint (as I believe we both are) should be the action of the Fourth Circuit in granting rehearing of Tim Sherman's case *en banc*. As you may know, the panel decision in Tim's favor was an unpublished, non-precedential opinion that did not purport to create any new law or modify any existing principles. . . . The lack of any principled reason for an *en banc* rehearing suggests that the results-oriented judicial activism may be its cause.

Letter from Andrew Frey to Senator Orrin Hatch (Feb. 19, 1996) (on file with author).

While Judge Beaty's nomination was dangled for three years without coming to a vote, two moderate white male jurists who had previously served as prosecutors were nominated for vacancies on the Fourth Circuit created in early 1998. Judge William Traxler of the District of South Carolina, a former campaign worker for Senator Strom Thurmond (R-South Carolina), was also acceptable to Senator Fritz Hollings (D-South Carolina) who was in a close race in the 1998 general election. Hollings believed that elevating Traxler would help him in the Greenbelt part of South Carolina, where Traxler sat and which was the home of Hollings' rival, South Carolina Republican Representative Bob Inglis. Traxler's district court vacancy would then be filled by Margaret Seymour, an African-American magistrate-judge. According to College of Charleston political scientist William Moore,

> [B]oth nominations can have positive political implications for Fritz's campaign. Each one targets a different constituency. In Traxler, it's a white regional constituency, the other the African-American community, but certainly from a political point of view, both are appointments that should be beneficial to Fritz's image with those groups.[185]

Traxler, Robert King, a former United States Attorney from West Virginia who was nominated to the Fourth Circuit, and Margaret Seymour were all confirmed by unanimous consent.

Although Chairman Hatch was perhaps most vocal in his distaste for Judge Beaty, the nomination was actually blocked by the harsh resistance of North Carolina Republican Senators Jesse Helms and Lauch Faircloth. For more than three years, Senator Helms has insisted that his candidate for the Fourth Circuit, Terrence Boyle, a Bush appointee to the Eastern District of North Carolina, should receive one of two North Carolina vacancies. Through his intransigence, Helms was successful in blocking the nomination of Charles Becton, a former North Carolina state appellate judge, and the confirmation of litigator J. Richard Leonard who was nominated in 1995 but was not renominated during the 105th Congress.

With the defeat of Senator Faircloth in the 1998 election and his replacement by Democrat John Edwards, it is unclear what will

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185. Dan Hoover, *Hollings Taps First African-American Woman for S.C. Federal Bench*, GANNETT NEWS SERVICE, July 14, 1998, *available in* 1988 WL 5630547.

happen with the two remaining vacancies on the Fourth Circuit that by tradition have been assigned to North Carolina.[186] Judge Beaty said: "I'm not sure what the next step will be. I patiently await the decision of the President and the Senators."[187] Dr. Joseph Lowery, Chairman of the Black Leadership Forum, noted:

> [R]acial inequality has become a disgraceful hallmark of the Fourth Circuit. It is a lily-white court serving a heavily Black district. . . . We believe this confirmation process [with the rapid confirmations of Traxler and King] has taken advantage of the media's lack of attention to issues other than the Starr Report and is deliberately elevating judges who don't help the Fourth Circuit court to look anything like the district which it represents. This blatant action contributes to a frightening inequity in our justice system.[188]

5. Senate Holds—Another tactic employed in the 104th and 105th Congresses to prevent or slowdown the confirmation of judges was the increased use of the Senatorial hold to prevent the confirmation of judges after the nominee was approved by the Judiciary Committee. As Senate Majority Leader Trent Lott said in 1996:

> [A]ny one Senator might have a judge on the list of 17, and his one judge may not be qualified, or may have some sort of a judicial problem based on his experience, or there may be some personal problem. As a general rule, if any Senator says a judge or a judicial nominee is personally repugnant to that Senator, that carries great weight around here.[189]

Some holds were publicly placed on some of the "controversial" nominees: Mike Enzi (R-Wyoming) placed a hold on District of Oregon nominee Ann Aiken for two months in 1997 based on a single sentencing decision; Senators Sessions and Ashcroft placed a hold on Central District of California nominee Margaret Morrow, mostly because of her purported disdain for the California initiative

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186. Senator Helms has introduced legislation which would eliminate the two vacant seats on the Fourth Circuit, but the Judiciary Committee has not acted upon this bill. *See* S. 570, 106th Cong. (1999).

187. Murray, *supra* note 121, at 2799.

188. Black Leadership Forum, Inc., Press Release, *Black Leaders Deplore Senate Judiciary Committee Action*, Sep. 18, 1998.

189. 142 CONG. REC. S5909 (daily ed. June 6, 1996) (statement of Senator Lott).

process,[190] in early 1998; Senator Paul Coverdell (R-Georgia) placed a hold on Susan Oki Mollway of the District of Hawaii for no reported reason; and Senator Lauch Faircloth (R-North Carolina) had placed a hold on Mollway in 1996, claiming "she represents a lot of very, very liberal ideas I simply don't agree with."[191] All of these holds were eventually lifted and the nominees were confirmed by the full Senate, but other Senators used confidential holds that were then permissible under Senate rules and Senators did not have to acknowledge their responsibility for preventing a vote on legislation or a nomination on Second Circuit nominee Sonia Sotomayor, who was eventually confirmed, and on Ninth Circuit nominee Richard Paez and Eastern District of Missouri nominee Ronnie White whose nominations died at the end of the 105th Congress.[192] The hold process was so secre-

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190. The Judiciary Committee held a confirmation hearing for Margaret Morrow in May of 1996, shortly after she was nominated to the Central District of California, and soon reported her to the Senate floor by a unanimous vote but her confirmation was delayed by election year politics. Renominated in January of 1997, the Judiciary Committee required a rare second hearing, but she was again voted to the Senate floor in June of 1997 where her nomination sat for the remainder of the session. On October 22, 1997, Senator Leahy reported:

> [L]ast week [Senator Ashcroft] announced at a speech before a policy institute that he has a hold on the Morrow nomination. . . . because he wants to "be able to debate the nomination and seek a recorded vote." I, too, want Senate consideration of this nomination and am prepared to record my vote. After being on the Senate calendar for a total of 7 months, this nomination has been delayed too long. I believe all would agree that it is time for the full Senate to debate this nomination and vote on it.

143 CONG. REC. S10,925 (daily ed. Oct. 22, 1997) (statement of Senator Patrick Leahy). Two weeks later, Leahy said:

> Again the Republican majority leader has refused to bring up this well-qualified nominee for such debate and vote. . . . We can discuss the nomination in sequential press conferences and weekend talk show appearances but not in the one place that action must be taken on it, on the floor of the U.S. Senate. The Senate has suffered through hours of quorum calls in the past few weeks which time would have been better spent debating and voting on this judicial nomination. The extremist attacks on Margaret Morrow are puzzling—not only to those of us in the Senate who know her record but to those who know her best in California, including many Republicans. They cannot fathom why a few senators have decided to target someone as well-qualified and as moderate as she is.

Id. S11,709 (daily ed. Nov. 5, 1997).

The nomination sat for three more months, but ultimately Morrow was confirmed on February 11, 1998.

191. Jennifer Senior, *Senators Thwart Lott Plan to Confirm Judges*, THE HILL, July 31, 1996, at 4.

192. Judge Richard Paez was nominated for the Ninth Circuit Court of Appeals in January 1996. After directing the Legal Aid Foundation of Los Angeles, Paez was appointed

tive[193] that sometimes it is difficult to tell exactly which nominees have had holds placed on them. According to University of Massachusetts Professor Sheldon Goldman:

> What they're doing in their court-blocking strategy is really unprecedented. We've never had a Senate majority leader [Trent Lott] allowing so-called holds on people who have been cleared and moved to the full Senate for a vote. This is a personal humiliation of Orrin Hatch. The whole Senate committee system is being challenged.[194]

Senator Enzi halted the nomination of Ann Aiken to the District of Oregon, because of a single sentencing decision that she had made. Enzi stated:

> I asked for a rollcall vote because I want to be on record as opposing this nominee. I put a hold on this nominee before we left on recess, with adequate time, I assure, for a rollcall vote. I made that a public, not a secret, hold. I wanted anyone interested in the case to know that I wanted a rollcall vote.[195]

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to the Los Angeles Municipal Court in 1981 and served in that position until he was unanimously confirmed by the Senate in 1994 as the first Mexican-American judge on the Central District of California. Several Senators objected to Judge Paez's Ninth Circuit nomination because of a speech he made before passage of the anti-affirmative action California Proposition 209, in which he referred to the then-proposed legislation as "anti civil rights," *Confirmation Hearings on Federal Appointments: Hearings before the Committee on the Judiciary United States Senate, Part 3*, 105th Cong. 332 (1998), although 45% of California's voters agreed with his viewpoint on this divisive referendum. Judge Paez's nomination was forwarded to the Senate floor in March 1998, and it remained there for the rest of the Congress.

Judge Ronnie White was nominated in June 1997 by President Clinton to serve on the Eastern District of Missouri. Following a career as a St. Louis public defender and a private litigator, Judge White was elected to the Missouri State House of Representatives, where he chaired the Committee on the Judiciary. In 1993, he was appointed to the Missouri Court of Appeals and was soon elevated to the state supreme court, becoming the first African-American to serve on the court. Judge White's nomination remained lodged in the Judiciary Committee for almost a year because of an objection from Senator Ashcroft. It was then forwarded to the Senate floor in May of 1998 by unanimous consent, where it languished for the remainder of the session.

193. In February of 1999, Senate Majority Leader Trent Lott (R-Mississippi) and Senate Minority Leader Tom Daschle (D-South Dakota) agreed to lift the secrecy surrounding the holds. While Senators can still use holds to block legislation or nominations, they now have to identify themselves and the specific legislation that they are holding up. *See, e.g.*, John Bresnahan, *Senate Leaders End Secrecy of 'Holds'*, ROLL CALL, March 8, 1999, at 1; Editorial, *No More Secret Holds*, WASH. POST, March 10, 1999, at A22.

194. John Jacobs, *GOP's Ideological War on the Federal Judiciary*, SACRAMENTO BEE, Nov. 6, 1997, at 20.

195. 144 CONG. REC. S79 (daily ed. Jan. 28, 1998) (statement of Senator Enzi).

Aiken, a state trial judge, had sentenced Ronny Lee Dye, a twenty-six year old man convicted of raping a five year old. Under sentencing guidelines passed by the Oregon legislature, Judge Aiken had the option of sentencing the defendant to a short jail term and a rehabilitation program, or a longer jail term, and she chose the rehabilitation option because Oregon did not have a sex offender rehabilitation program in its state prisons. According to Senator Enzi: "I believe that Judge Aiken's handling of this case and others illustrates an inclination toward an unjustified tendency for convicted criminals."[196] Senator Enzi stated:

> I for one cannot vote to confirm a nominee to the federal court who I believe is inclined to substitute his or her personal policy preferences for those of the United States Congress and the various state legislatures. I have strong concerns about this judge. If confirmed, would she be inclined to this type of judicial activism?[197]

Aiken, of course, had followed the Oregon sentencing guidelines when she made that decision, and thus would not fit most definitions of a judicial activist. She was ultimately confirmed on January 28, 1998, more than two years after she was originally nominated, and during a period in which half of Oregon's district court seats were vacant.[198]

A hold was placed on Second Circuit nominee Sonia Sotomayor who was held-up for months without anyone claiming direct responsibility. Sotomayor, a judge on the Southern District of New York, had been nominated by President Clinton for one of five vacancies on the Second Circuit on June 25, 1997. She was soon targeted as a judicial activist for allowing a *habeas* case to go to trial and, possibly for, not standing to acknowledge the presence of Supreme Court Justice Clarence Thomas in a meeting with the Second Circuit (she did, however, stand). Her nomination was delayed both in the Judiciary Committee and on the Senate floor. One reason for her hold was that some Republican Senators believed that President Clinton was eager to position a Hispanic nominee for the Supreme Court and delaying Sotomayor would

196. Jim Barnett & Dave Hogan, *Wyoming Senator Stalls Aiken's Federal Court Confirmation*, THE OREGONIAN, Nov. 14, 1997, at 1.

197. Associated Press Political Service, *Senate Delays Vote on Judge Aiken's Nomination to Federal Bench*, ASSOCIATED PRESS, Nov. 14, 1997, *available in* 1997 WL 2562774.

198. *See* 144 CONG. REC. 573 (daily ed. Jan. 28, 1998).

reduce her chances of elevation.[199] According to the *New York Times*, quoting Republican staffers, some of these Senators worried that it would be difficult to vote against Judge Sotomayor for the Supreme Court because she is Hispanic.[200] This reasoning, which had also been expressed in the *Wall Street Journal*, angered Senator Leahy:

> Last week, a lead editorial in the *Wall Street Journal* discussed this secret basis for the Republican hold against this fine judge. The *Journal* reveals that these delays are intended to ensure that Sonia Sotomayor not be nominated to the Supreme Court, although it is hard to figure out just how that is logical or sensible. In fact, how disturbing, how petty, and how shameful: Trying to disqualify an outstanding Hispanic woman judge by an anonymous hold. I have far more respect for Senators who, for whatever reason, wish to vote against her. Stand up; vote against her. But to have an anonymous hold—an anonymous hold—in the U.S. Senate with 100 members representing 260 million Americans, which should be the conscience of the Nation, should not be lurking in our cloakrooms anonymously trying to hold up a nominee. If we want to vote against somebody, vote against them. I respect that. State your reasons. I respect that. But don't hold up a qualified judicial nominee.[201]

Judge Sotomayor was finally confirmed by the Senate on October 2, 1998, by a vote of sixty-eight to twenty-eight.

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199. *See* Deborah Goldberg, *Lott's Hispanic Quota*, THE NATION, Oct. 5, 1998, at 7; Neil Lewis, *GOP, Its Eyes on High Court, Blocks a Judge*, N.Y. TIMES, June 13, 1998, at A1; Larry Neumeister, *Judge Finds Humility in Journey From Housing Projects to High Court*, ASSOCIATED PRESS, Nov. 9, 1998; Greg B. Smith, *Judge's Journey to Top Bronx' Sotomayor Rose From Projects to Court of Appeals*, DAILY NEWS, Oct. 24, 1998, at 17; Daniel Wise, *Sotomayor Confirmed by Senate*, N.Y.L.J., Oct. 5, 1998, at 1.

In retaliation for the anonymous holds placed on Sotomayor, Senator Leahy placed a hold on Second Circuit nominee Chester Straub at the end of May 1998 in an effort to force a vote on Sotomayor, and, according to a Leahy aide, "they [the four pending Second Circuit nominees] all needed to be acted on quickly, and Judge Sotomayor should not be left behind. It's been so long, and he has no other leverage." Frank J. Murray, *Leahy Pushes in Public, Undermines in Private*, WASH. TIMES, May 29, 1998, at A4. Leahy soon lifted his hold and Straub, and the two other nominees to the Second Circuit, Rosemary Pooler and Robert Sack were all confirmed by the middle of June.

200. *See* Lewis, *supra* note 199, at A1.

201. 144 CONG. REC. S6521 (daily ed. June 18, 1998) (statement of Senator Leahy).

Senator Conrad Burns (R-Montana) placed holds on all Ninth Circuit nominees in May of 1995 to aid his efforts to split the court.[202] His holds blocked the advancement Wallace Tashima of California and Sidney Thomas of Montana to the Ninth Circuit, until both were finally confirmed on January 2, 1996. Burns lifted the hold, stating that "I am now satisfied that the wheels are rolling toward broad bipartisan support on a bill I'm co-sponsoring to split that circuit, and I did not want to jeopardize Montana representation on the federal circuit."[203]

Phil Gramm (R-Texas) informally[204] placed a hold on former Texas trial judge Michael Schattman, who had been nominated to the Northern District of Texas by President Clinton on December 19, 1995. Schattman had been a conscientious objector during the Vietnam War, and Gramm questioned "his ability to fairly consider cases brought before him involving the defense industry. The Dallas-Fort Worth area has a lot of defense contractors, and so how is a guy who is opposed to all war going to make a fair shake

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202. For more than a decade, conservative western Senators have repeatedly introduced legislation to divide the Ninth Circuit, ostensibly for efficiency reasons because it is the country's largest court of appeals in terms of population, land mass, and number of case filings, but actually because of the timber mining and other extraction industries' distaste for "California justice" in environmental decisions. *See, e.g.,* Neil A. Lewis, *Western Senators Are Pushing to Break Up Circuit Court*, N.Y. TIMES, Sep. 1, 1997, at A16; Carol M. Ostrom, *Fuming Senators Ready to Carve Up 9th Circuit*, SEATTLE TIMES, Nov. 2, 1997, at A1. These Senators would like to carve out a new Twelfth Circuit out of the old Ninth that would likely include the states of Idaho, Montana, Oregon, and Washington.

203. Rex Bossert, *Senate Oks Tashima for 9th Circuit, Action Foils End to Hold Placed by Montana Senator*, L.A. DAILY J., Jan. 3, 1996, at 1. Senator Mike DeWine (R-Ohio) did not place holds on Ninth Circuit nominees, but in rejecting William Fletcher's nomination, he said:

> All of us—all of us—should be concerned about what has been going on in the Ninth Circuit over the last few years. Based on the alarming reversal rate of the Ninth Circuit, I have said before and I will say it again for the Record today, I feel compelled; to apply a higher standard of scrutiny for Ninth Circuit nominees than I do for nominations to any other circuit. Mr. President, I will only support nominees to the Ninth Circuit who possess the qualifications and whose background shows that they have the ability and the inclination to move the circuit back towards the mainstream of judicial thought in this country. Before we consider future Ninth Circuit nominees, I urge my colleagues to take a close look at the evidence, evidence that shows that we have a judicial circuit today that each year continues to move away from the mainstream.

144 CONG. REC. S11,872, S11,878 (daily ed. Oct. 8, 1998) (statement of Senator DeWine).

204. While the formal hold is used by Senators to block action once legislation or nominations have reported to the Senate floor by committees, Senators can use other leverage to insure that a nomination is not acted upon within the Judiciary Committee.

to people whose job it is to make the weapons of war?"[205] Judge Schattman was considered, by Republicans and Democrats alike, to be a fine judge for a district in which he was already handling defense contractor cases without complaint. The Judiciary Committee took no action on this nomination, and Judge Schattman withdrew his candidacy in June of 1998. After he was first nominated to the federal bench in 1995, Schattman still planned to run for reelection to the state court in 1996 in the event he was not confirmed. Assuming he would soon be a federal judge, Schattman agreed to a Clinton administration suggestion that he not seek reelection because of the unseemly appearance caused by the need to raise money for expensive Texas judicial elections. In 1997 Schattman became a litigator at a Texas firm and is now being considered for an administration appointment that does not require Senate approval.

Senator Gramm also publicly acknowledged placing holds on all nominees originating from Illinois in response to former-Senator Carol Moseley-Braun's (D-Illinois) refusal to recommend the reappointment of Joseph Dial to the Commodity Future Trading Commission. Gramm, whose wife was a former Chair of the CFTC, is a close friend of Dial's. While Gramm also put holds on nominees to the State Justice Institute and on the acting United States Attorney for the Northern District of Illinois, his holds had a significant impact on the nominees for longstanding vacancies in the Southern and Central Districts of Illinois. Senator Richard Durbin (D-Illinois) worked fruitlessly to get Gramm to lift the hold, saying "I've spoken to Phil Gramm more often than people from Texas. He doesn't really have any particular thing that he's looking for. That's when I became frustrated. I understand the strategy, but there reaches a point where this has to come to an end."[206] Eventually, Durbin responded by blocking key Republican legislation. He said, "I've tried everything. But I've reached the point where the only thing I can do is to exercise my right as a Senator to hold up legislation."[207] Durbin did not place holds

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205. Mark Shields, *Commando Phil Gramm*, WASH. POST, Nov. 23, 1997, at A22.

206. Tim Poor, *Hardball Politics Creates Gridlock in Southern Illinois Courts*, ST. LOUIS POST DISPATCH, March 15, 1998, at A11.

207. Dori Meinert, *Durbin Pushes for Judgeships*, STATE J.-REG., March 14, 1998, at 3. Durbin's predecessor Senator Paul Simon (D-Illinois) did the same thing in 1996 because the Judiciary Committee had failed to approve five judicial nominees. According to Simon, "I want to put some pressure on my Republican counterparts to get something done." John

on Sam Lindsay of the Northern District of Texas and Hilda Gloria Tagle of the Southern District of Texas, who were confirmed in March of 1998.[208] Dubin stated: "I haven't declared war on the Lone Star State. I'm just doing my best to make sure the Land of Lincoln has two more federal judges." Senator Gramm, after the intervention of some Republican officials from Illinois, eventually agreed to lift his hold, and Central District of Illinois Judge Michael P. McCuskey and Southern District Judge G. Patrick Murphy were finally confirmed on April 2, 1998.

6. Roll Call Votes—In the 105th Congress, roll call votes on judicial confirmations became much more routine, in contrast to the traditional unanimous consent agreements and voice votes. During President Clinton's first term, the Senate held roll call votes on only four judicial nominees, and two of these were for the Supreme Court.[209] In January of 1997, Lauch Faircloth (R-North Carolina) proposed that roll call votes be used for all nominees. His colleagues acquiesced. The Senate introduced this rule at the conclusion of the debate of Merrick Garland's nomination to the District of Columbia Circuit in March of 1997.[210] According to Senator Faircloth:

> [O]ur vote today is an important precedent, since it marks the beginning of the Senate's new commitment to hold roll call

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Flynn Rooney, *Presidential Politics Has Slowed Judicial Confirmations, Senator Says*, CHICAGO DAILY L. BULL., Sep. 23, 1996, at 1.

208. Meinert, *supra* note 207, at 1.

209. During President Clinton's first term, the Senate held only four roll call votes on judicial nominees, all in 1993 and 1994. Two of them were on Clinton's nominations to the Supreme Court. Ruth Bader Ginsberg was confirmed 96-3 on August 3, 1993, *see* Martin Kasindorf & Timothy Phelps, *In Supreme Company, Ginsburg's Nomination to Top Court Is Confirmed*, NEWSDAY, Aug. 4, 1993, at 1, and Stephen Breyer was confirmed 87-9 on July 29, 1994, *see* Carolyn Skorneck, *Bipartisan Majority Votes for Supreme Court Nominee*, SEATTLE TIMES, July 29, 1994, at 1. The Senate also used roll call votes to confirm two controversial nominations to the courts of appeal, Rosemary Barkett for the Eleventh Circuit, confirmed 61-37 on April 14, 1994, *see* Craig Crawford, *Senate Confirms Florida Chief Justice Barkett for Federal Judgeship*, ORLANDO SENTINEL, April 15, 1994, at 1, and Lee Sarokin for the Third Circuit, confirmed 63-35 on October 4, 1994, *see* Robert Cohen, *Sarokin Confirmed for Circuit Seat Over Loud Conservative Protests*, STAR-LEDGER, Oct. 5, 1994, at 1. James Dennis, who was a nominee to the Fifth Circuit, was ultimately approved by a voice vote on September 28, 1995, but this followed a 54-46 vote by the Senate rejecting a request to conduct an additional investigation on this nomination. *See* Bruce Alpert, *Dennis Okayed as Federal Judge; Senators Reject Tulane Probe*, NEW ORLEANS TIMES-PICAYUNE, Sep. 29, 1995, at 1.

210. 143 CONG. REC. S2529-2530 (daily ed. March 19, 1997) (statement of Senator Faircloth).

> votes on all judicial nominees. This is a policy change which I had urged on my Republican colleagues by letter of January 8, 1997, to the Republican Conference. Voting on federal judges, who serve for life and who exert dramatic—mostly unchecked influence over society, should be one of the most important aspects of serving as a U.S. Senator. Roll call votes will, I believe, impress upon the individual judge, the individual Senator, and the public the importance of just what we are voting on. I hope that my colleagues will regard this vote, and every vote they take on a federal judge, as being among the most important votes they will ever take.[211]

There were roll call votes held on twenty-seven judicial nominations during the 105th Congress, and dissent was recorded on eleven of them.[212] Senator Faircloth voted against eight judges during the Congress, more than any of his colleagues, and he cast the only negative votes against three judges.[213] The Free Congress Foundation's Tom Jipping was pleased with the expanded use of the roll call vote: "There were almost twice as many negative votes cast against them [after the Ann Aiken and Margaret Morrow nominations]—58—as in all of 1997 (33 no votes on Clinton nominees), and from a historical stance, just having the Senate take a vote on a district court nominee, I see that as a positive thing."[214]

7. Presidential Disinterest—The Clinton Administration routinely failed to react in a visible manner to much of the confirmation gridlock, quietly acquiescing to the Senate's stripping

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211. *Id.*

212. In order of most negative votes cast against the nominee, the Senate confirmed the following judges by roll call votes in which dissents were recorded: William Fletcher to the Ninth Circuit on October 8, 1998 (57-41), Susan Oki Mollway to the District of Hawaii on June 22, 1998 (56-34), Ann Aiken to the District of Oregon on January 28, 1998 (67-30), Margaret Morrow to the Central District of California on February 11, 1998 (67-28), Sonia Sotomayor to the Second Circuit on October 2, 1998 (68-28), Merrick Garland to the District of Columbia Circuit on March 19, 1997 (76-23), Margaret McKeown to the Ninth Circuit on March 27, 1998 (80-11), Christina Snyder to the Central District of California on November 7, 1997), Patrick Murphy to the Central District of Illinois on April 2, 1998 (98-1), Ronald Gilman to the Sixth Circuit on November 6, 1997 (98-1), and Janet Hall to the District of Connecticut on September 11, 1997 (98-1).

213. Senator Faircloth was the only dissenter on the confirmation votes of Judge Patrick Murphy, Judge Ronald Gilman, and Judge Janet Hall. Additionally, he was also absent for the confirmation votes on Ann Aiken and Margaret McKeown.

214. Marcia Coyle, *Confirmations—At Last? The Stalemate Over Appointing Federal Judges May Finally be Over*, NAT'L L.J., March 2, 1998, at A20.

of the President's appointment privileges. This unwillingness to redress the power balance is consistent with President Clinton's apparent disinterest in staffing the federal courts, unusual given his former employment as a constitutional law professor at the University of Arkansas and an Attorney General for the state of Arkansas.

When President Clinton was elected in 1992, he had the opportunity to remake the federal courts both because of the significant numbers of vacancies that then existed and because he would, presumably, appoint a different type of judge than his predecessors.[215] Three quarters of the way through his term, there are more active judges appointed by President Clinton on the bench than those of any other President,[216] but in terms of ideology, President Clinton has not taken the opportunity to significantly change the jurisprudential outlook of those on the bench. Instead, President Clinton has selected judges who have

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215. There are currently 843 Article III federal judicial positions, nine on the Supreme Court, 179 on the courts of appeal (including the 11 regional courts, the District of Columbia Circuit, and the Federal Circuit), 646 on the district courts, and nine on the Court of International Trade. At the end of the Bush Administration on election day, 1992, the federal courts included 561 Republican appointees and 185 Democratic appointees. *See* Alliance for Justice, *The Federal Courts at a Crossroads, Judicial Selection Project Annual Report 1992*, February 15, 1993, at 2. On December 1, 1994, at the close of the 103d Congress, the federal courts included 525 Republican appointees and 261 Democratic appointees. *See* Alliance for Justice, *Judicial Selection Project Annual Report 1994*, at 2 (1995). By the end of President Clinton's first term, the federal courts included 470 Republican appointees and 284 Democratic appointees. *See* Alliance for Justice, *Judicial Selection Project Annual Report 1996*, at 20 (1997). At the end of 1998, the active bench included 419 Republican appointees and 365 Democratic appointees. *See* Alliance for Justice current data, obtained from Administrative Office of U.S. Courts, and the U.S. Senate Judiciary Committee. *See* Alliance for Justice, *Judicial Selection Project: Annual Report 1998*, at 5 (1999).

216. At the close of 1998, President Clinton had appointed 298 of the 843 active members of the life-tenured federal judiciary—two Supreme Court justices, 48 courts of appeal judges, 244 district court judges, and four judges on the United States Court of International Trade. This number does not double-count for the four Clinton appointees who were elevated from district to circuit court judges: Frank Hull (11th Circuit); Rosemary Pooler (2d Circuit); Marjorie Rendell (3d Circuit); and Kim McLane Wardlaw (9th Circuit). It also does not reflect the two Clinton judicial appointees who have died, Eighth Circuit Judge John Kelly and Eastern District of Louisiana Judge Okla Jones, as well as Third Circuit Judge Lee Sarokin who retired. At the end of 1998, the judiciary also included 181 members appointed by President Bush, 220 by President Reagan, 63 by President Carter, 22 by earlier Presidents Eisenhower through Ford, and 59 vacant seats. Twelve of the Clinton judges were originally appointed to the federal bench by previous Presidents: eight by President Carter, three by President Bush, and one by President Reagan, and they were then elevated by President Clinton; the statistics listed above do not reflect their original appointments. *See id.* at 6.

largely proven unable to assert ideological leadership on the federal district and circuit courts. Political scientist Robert A. Carp, a twenty-five year observer of judicial politics, asserts that the Clinton judges "tend to be moderate, measurably less liberal than the appointments of Carter or Johnson, more liberal than those of Reagan and Bush, somewhere in between, about equal with Ford's."[217] Michael Gerhardt, dean of Case Western University School of Law, said that contrary to conservative fears: "Bill Clinton has not made any effort to move the judiciary in a liberal direction. Actually, he's done everything he can to avoid even the suggestion that he is appointing liberals."[218]

This appointments trend is unsurprising. Jamie Gorelick, a former Deputy Attorney General, noted: "The president is quite a conservative person, and the people he is attracted to judicially are moderate."[219] Former White House Counsel Jack Quinn agreed that "this president is a moderate, who brings mainstream, Main Street values to the job of selecting judges,"[220] and Quinn admitted that "[O]ur mission is not to counteract the conservative appointments of the Reagan and Bush years."[221] Ninth Circuit Judge Stephen Reinhardt has scathingly referred to the President's appointments' philosophy:

> The Reagan-Bush effort to change the philosophy of the judiciary and the judicial system has won by default. Clinton has allowed the basic objectives of the Reagan-Bush efforts with respect to the courts to be accomplished. Those who used to be able to look to the courts as their saviors certainly cannot do that anymore. That's not where their best hope lies these days. The Warren-Brennan-Marshall-Blackmun era is over, at least until there is a different President who seems to consider the courts important.[222]

This has troubled many progressive activists like Nan Aron, president of the Alliance for Justice: "While the Administration

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217. Dan Carney, *Clinton Picks Diversity Over Ideology*, C.Q., Feb. 8, 1997, at 367.

218. Nat Hentoff, *Bill Clinton's Judges: Clinton's Nominees Are Less Liberal Than Ford's and Nixon's*, VILLAGE VOICE, Oct. 29, 1996, at 25.

219. Bruce D. Brown & Eva M. Rodriguez, *A Judicial Legacy Can Now be Written*, LEGAL TIMES, Nov. 11, 1996, at 6.

220. Neil Lewis, *In Selecting Federal Judges, Clinton Has Not Tried to Reverse Republicans*, N.Y. TIMES, Aug. 1, 1996, at A20.

221. *Id.*

222. John Nichols, *The Clinton Courts, Liberals Need Not Apply*, THE PROGRESSIVE, at 28 (Sept. 1996).

deserves much credit for both the excellence and diversity of its judicial appointments, it is clearly disappointing that the President failed to address the issue of correcting the imbalance of the courts from the previous Republican Presidents."[223]

Part of the Administration's problem in responding to the Senate-created gridlock was that it was slow in forwarding names of judicial nominees to the Senate in 1996 and 1997. Even though the Judiciary Committee failed to process most nominees in an expeditious fashion,[224] Chairman Hatch would still say:

> The claim of some that the Senate has engineered an "unprecedented slowdown" in the confirmation process and that the federal judiciary is laboring under a "vacancy crisis" is misleading. The facts show that the major cause for the vacancies lies with the White House. . . . [on] Jan. 1, 1998, there were 86 judicial vacancies. To date, the Senate Judiciary Committee has received nominations for only 41 of these openings. . . . I do not begrudge the president for taking time in selecting judicial nominees. These individuals, if confirmed, serve for life and should be of the highest caliber—personally and professionally. As hard as the committee works, however, it cannot confirm an individual who has not yet been nominated.[225]

President Clinton received criticism for his treatment of the judicial confirmation process from many perspectives. Washington College of Law Professor Herman Schwartz referred derisively to the White House's nominating behavior:

> They're very, very slow. I don't know what the excuse is. I'd have thought they'd have a whole bank of nominees ready. This is not a President who has very strong views on anything,

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223. Lewis, *supra* note 220, at A20.

224. From the first day of the First Session of the 105th Congress in January, 1997, until September of 1998, there were always at least 20 nominees who had not received a confirmation hearing. The Judiciary Committee ended the 105th Congress with 17 nominees who had not been voted on, 13 of whom did not receive a hearing.

225. Orrin Hatch, *Judicial Nominees: The Senate's Steady Progress,* WASH. POST, Jan. 11, 1998, at C9. At the end of 1997, Chairman Hatch praised the record of his Committee and of the full Senate on judicial confirmations and then said, "By the way, we have about 40 vacancies that have not gotten any nominees, and as hard as I try, I have never quite been able to get nominees confirmed who are not nominated. So, you know, I get a little tired of all the screaming and shouting. . . ." *Confirmation Hearings of Federal Appointments: Hearings Before the Comm. on the Judiciary, Part 2,* 105th Cong. 1374 (1997) (statement of Senator Hatch).

> apparently. He has an aversion to any kind of conflict. . . . The President seems to have very little interest in the state of the legal system. And if the President isn't willing to risk anything, there's very little anybody can do.[226]

Some believed that if President Clinton had publicly fought for some of his nominees, he could have sped up the process. Again, Schwartz: "Every time a President has fought, if it looks like he's fighting for principle, he wins politically. People would pay attention. Americans like an independent judiciary."[227] Conservative Bruce Fein, a Reagan Administration Deputy Associate General who was in charge of judicial selection, concurred: "[The Senate is] stalling. Because President Clinton himself has displayed gross disinterest in the judicial nomination process. It's like he's orphaned it. And if the President doesn't push, it's pretty easy to stop what's goin' on."[228] Even a federal judge criticized President Clinton for failing to take initiative in this area. According to Sam C. Pointer. Jr., Chief Judge of the Northern District of Alabama, which had two vacancies for all of 1997 and most of 1998: "The President is guilty of neglect and political ineptitude. We need him to take action. We can't serve the people here without him taking

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226. Daniel A. Shaw, *Federal Judicial Vacancies Hit 100*, L.A. DAILY J., May 19, 1997, at 20.

227. Terry Carter, *Is Jihad on Judicial Activism about Principle or Politics?*, L.A. DAILY J., Nov. 6, 1997, at 10. President Clinton has long had a difficult time with Senate confirmation of nominees, beginning with his efforts to appoint Zoe Baird and then Kimba Wood as Attorney General, Henry Foster for Surgeon General, Lani Guinier as Assistant Attorney General for Civil Rights, and most recently Bill Lann Lee, also for the Civil Rights post. As Temple Law Professor David Kairys said: "The conclusion seems inescapable: The President is not willing to risk an endless series of fights over appointments that seem minor in comparison with the major legislation he wants to pass. No nominations means no embarrassing defeats. The President has saved his chits for another day." David Kairys, *Senate Keeps 100 Judgeships Unfilled in U.S.*, THE SACRAMENTO BEE, Oct. 5, 1997, at 12.

228. *Morning Edition: Federal Judicial Shortage* (Nat'l Public Radio broadcast, Sept. 25, 1997). The contrast between President Clinton's and Presidents Reagan and Bush's interest in filling the judiciary is enormous. Fred Fielding, White House Counsel under President Reagan, said:

> I think that the secret of our success was that the President was interested in filling these positions; he was interested in them being filled expeditiously. There were some controversies. But at least President Reagan was clear from his record in that he was willing to take on a fight, he wouldn't be intimidated just because of the possibility that there was a potential confirmation fight.

Id.

action. I'm exasperated and know of nothing else to do that may help the situation.[229]

The Administration has shown its commitment to this issue by making only three public statements to rebut the Republican-inspired gridlock.[230] Attorney General Janet Reno spoke to the American Bar Association at a highly publicized forum at the Association's 1997 summer meeting in San Francisco. Calling the delay in confirmations an "unprecedented slowdown," General Reno said that it has had:

> [A] very real and very detrimental impacts on all parts of our justice system. Litigants, judges, the quality of justice that our system is able to deliver—all are impacted. . . . The federal courts may not always reach people in their day-to-day lives, as local courts do, but the federal courts do affect a worker seeking justice for employment discrimination, a small-business person seeking trademark protection for her company, major corporations litigating takeover suits, a criminal defendant receiving the full protection of the Constitution, and the government being able to fully prosecute criminal cases or bringing cases to protect the environment.[231]

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229. Peggy Sanford, *Judge: Clinton's Slack Puts Backlog in Alabama Court,* BIRMINGHAM NEWS, Oct. 25, 1997, at 1.

230. On a few occasions, other Administration officials reacted to the judicial confirmation gridlock. For instance, John Podesta, now White House Chief of Staff, said on more than one occasion:

> This is a Congress that likes to experiment with shutting down government. And I fear that what we're experimenting with now is a kind of slow-rolling shutdown of the federal judiciary. I think it may be intended to intimidate judges and certainly intended to try to retain the current ideological makeup, I guess of the federal courts.

ABA panel, *Judicial Independence: Real Threat or Feeling Threatened*, ABA Summer Meeting, (August 1997), *available in* 37 JUDGES J. VOL. 1, at 31 (1998). President Clinton referred to the judicial confirmation crisis on a few other occasions. For instance, in a phone call with Trent Lott at the end of 1997, when Senator Lott said he had good news, President Clinton responded: "You confirmed all my judges." Dan Carney, *More Challenges to Clinton Nominees Cause Judicial Stalemate*, CONG. Q. WKLY. REP., 2912, 2914 (1997). Or, when he contemplated naming Bill Lann Lee to a recess appointment as Assistant Attorney General for Civil Rights, the President said:

> I think that retaliation is not only inappropriate and unwarranted, it would be wrong. As far as the pace of confirmation of judges, I don't think its's been adequate to date anyway. The Senate has a constitutional responsibility to consider these judges in a timely fashion, and I want them to do much better, not worse.

White House Press Release (Dec. 15, 1997).

231. Janet Reno, *Speech to the American Bar Association* (August 5, 1997). Attorney General Reno earlier had explained to a reporter:

President Clinton gave a Saturday radio address on September 27, 1997, in which he sharply and directly criticized the Senate:

> We can't let partisan politics shut down our courts and gut our judicial system. . . . The intimidation, the delay, the shrill voices must stop so the unbroken legacy of our strong, independent judiciary can continue for generations to come. . . . The Senate's failure to act on my nominations, or even to give many of my nominations a hearing, represent the worst of partisan politics. . . . Under the pretense of preventing so-called judicial activism, they've taken aim at the very independence our founders sought to protect. . . . So today I call upon the Senate to fulfill its constitutional duty to fill these vacancies. This age demands that we work together in bipartisan fashion and the American people deserve no less, especially when it comes to enforcing their rights, enforcing the law, and protecting the Constitution.[232]

The White House appeared to pay more attention to the status of judicial confirmations in 1998. President Clinton inserted two sentences into his State of the Union Address, in which he admonished the Senate to vote on his judicial nominees:

> Police, prosecutors, and prevention programs, as good as they are, they can't work if our court system doesn't work. Today, there are large numbers of vacancies in our federal courts. Here is what the Chief Justice of the United States wrote: "Judicial vacancies cannot remain at such high levels indefinite-

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> You can take off the gloves in a polite way. You can try to get things done without shrill rhetoric. You point out what the impact of 102 vacancies in the judiciary is, without getting into bloody verbal fisticuffs. I think it's important . . . how we engage in thoughtful political discussion, and [that we] do it with civility, do it with politeness. We can set examples for kids in the classroom, we can set examples for motorists who start hollering at each other and end up in a shooting match, we can set examples for this country. So, I think I can succeed politely.

Michael J. Sniffen, *Attorney General Reno Takes Gloves Off,* ASSOCIATED PRESS, July 17, 1997, *available in* 1997 WL 2540070.

232. William J. Clinton, *Saturday Radio Address* (Sept. 27, 1997). Senator Hatch and House Whip Tom DeLay (R-Texas) respectively went to the Senate and House floors to denounce this speech as partisan politics. Senator Leahy responded:

> It is a sad day when the President must remind the Senate of its constitutional responsibilities to consider and confirm qualified nominees to the federal bench. I regret that we have reached this point. The President's address was an important one. I hope that his call for an end to the intimidation, the delay, the shrill voices of partisanship will be heeded.

143 CONG. REC. S10,924 (daily ed. Oct. 22, 1997) (statement of Senator Leahy).

> ly without eroding the quality of justice." I simply ask the United States Senate to heed this plea and vote on the highly qualified nominees before you, up or down.[233]

Criticized in 1997 for being slow to produce nominees, on January 27, 1998, the same day as the State of the Union, the White House forwarded the names of twelve judicial nominees to the Senate, and for most of 1998, the White House nominated individuals to fill at least half of the vacancies, which dropped from eighty-six at the beginning of 1998 to fifty by the end of the session.[234] More importantly the White House produced nominees for most of the judicial emergencies—seats that have been vacant for more than eighteen months.

The administration had planned much more. Early in January of 1998, White House officials announced an aggressive campaign for filling vacancies that was to be led by White House Communications Director Ann Lewis and then-Deputy Chief of Staff John Podesta. According to Lewis, the campaign was "going to be much more aggressive. The Congress has the right to advise and consent, but not to duck and delay, and what they have effectively done by a delaying process is causing some courts almost to grind to a halt."[235] Chairman Hatch responded to these public statements by saying:

> I was disappointed to read in the *Washington Post* a week or so ago that the Clinton White House "galvanized by the critique by Chief Justice Rehnquist," has tapped communications director Ann Lewis to head a "full scale political confrontation" over judicial appointments. According to the *Post*, part of the so-called "campaign" plan is to paint Republicans as anti-women and anti-minority.[236]

Before the campaign was publicly launched, it became side-tracked by the Monica Lewinsky scandal that quickly permeated the White House.

8. Gridlock Redux—On December 31, 1997, Chief Justice William Rehnquist had warned in his Report on the status of the

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233. William Clinton, *1998 State of the Union Speech*, N.Y. TIMES, Jan. 28, 1998, at A24-25.

234. Administrative Office of U.S. Courts, Monthly Reports.

235. Thomas B. Edsall, *Clinton Plans Judicial Offensive*, WASH. POST, Jan. 16, 1998, at A1.

236. 144 CONG. REC. S74 (daily ed. Jan. 28, 1998) (statement of Senator Hatch).

Federal Judiciary that the large amount of judicial vacancies could not persist "without eroding the quality of justice that traditionally has been associated with the federal judiciary."[237] He went on to criticize the Senate's dilatory tactics, declaring: "The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or vote him down."[238]

While most conservatives were appalled that Chief Justice Rehnquist had spoken critically of the Republican Senate's role in the confirmation deals, Bruce Fein, the Reagan Administration official responsible for judicial nominations, approved: "Senate Republican yahoos are in the saddle. Their gallop towards a constitutional abyss behind the stern-visaged chairman of the Senate Judiciary Committee through abuse of the confirmation power has alarmed even the unflappable chief justice of the United States . . . ."[239] Like the Chief Justice, Ninth Circuit Chief Judge Proctor Hug, Jr. targeted his ire towards the Senate: "We are the third branch of government and are dependent on the other two to do our job right. We're just asking them to do their duties. That isn't being done. And right now the problem rests with the Senate."[240] White House Counsel Charles Ruff noted:

> If we've got candidates who have views with which the Senators disagree, then I think the way to deal with that is to have a hearing, let them be heard, let the Senators question them, put them up for a vote, and we'll count on the merits of our candidates to make it through the system.[241]

Court watchers believe this gridlock is unique. University of Massachusetts political scientist Sheldon Goldman said:

> What's unparalleled is to start so early with delay. We've never had this done in a President's first year of a new term. Sure, people have played hardball in the past, but not on such a

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237. William Rehnquist, THE 1997 YEAR-END REPORT ON THE FEDERAL JUDICIARY 5 (1997).

238. *Id.*

239. Bruce Fein, *The Chief Justice vs. Hatch*, WASH. TIMES, Jan. 6, 1998, at A12.

240. Dan Carney, *More Challenges to Clinton Nominees Cause Judicial Stalemate*," CONG. Q. WKLY. REP. 2912, 2914 (1997).

241. *Morning Edition: Federal Judge Shortage* (Nat'l Public Radio broadcast, Sept. 22, 1997).

> sustained level as they are doing now. Whether nominations are going to move forward for a short while or go back to business as usual, we don't know.[242]

Another commentator noted: "The pace has really been dragging. It is very seriously undermining the integrity of the judicial branch of government. This is a rather urgent matter."[243] Senator Leahy agreed: "[T]his hasn't happened in 200 years. It's being done to pander to the ultra-right and pander to some of these fundraising appeals. But what it is done is damaging the integrity and the independence of the federal judiciary."[244]

However, many senior Senate Republicans denied that there had been any attempt to slow down the process. According to Senate Majority Whip Don Nickles (R-Oklahoma): "There's been no effort to slow down nominations. We've been trying to be pretty cooperative."[245] Or, as Majority Leader Lott said: "The problem is not judges. It's good judges. We want judges who will interpret and enforce the law."[246] Orrin Hatch would claim disingenuously: "Far from being a bottleneck, the Senate is on pace to confirm a record number of Clinton judges. . . . Frankly, the record of judicial activism demonstrated by so many of President Clinton's nominees calls for all the more vigilance in reviewing his nominations."[247] Senator Hatch also stated:

> [T]his so-called "crisis" has been fomented, frankly, by partisan people at the White House and some at the Justice Department, and, frankly, it is beneath their dignity to do this. I will say that there is room for improvement, and certainly we on the Judiciary Committee want to do everything we can to improve it. I hope that those who manage the floor will feel the same way and do the same thing.[248]

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242. Coyle, *supra* note 214, at A1.

243. John Aloysius Farrell, *Republicans Take Aim at the Federal Judiciary*, BOSTON GLOBE, Sept. 24, 1997, at A1.

244. *Morning Edition: Senate and Judges*, (Nat'l Public Radio broadcast, Sept. 24, 1997).

245. Helen Dewar, *Confirmation Process Frustrates President*, WASH. POST, July 25, 1997, at A16.

246. Helen Dewar, *Sen. Leahy Blasts Republicans for Slow Pace of Judge Confirmations*, WASH. POST, Feb. 13, 1997, at A14.

247. William F. Hammond, Jr., *Delmar Man's Judicial Nomination an Uphill Battle*, SUNDAY GAZETTE, Nov. 23, 1997, at B1.

248. 144 CONG. REC. S74 (daily ed. Jan. 28, 1998) (statement of Senator Hatch).

Others have acknowledged a deliberate slow-down, and even took credit for instigating it. Senator Jeff Sessions was asked: "Is there, as you can see it, any attempt to sit on the nominations of people who have been perceived as activist or liberal?" He responded: "Well, I think there is . . . a desire to slow down the ones that we have the most concerns about."[249] The Free Congress Foundation has helped to perpetuate the gridlock, and Tom Pendleton, one of its lobbyists, said, "Those who support a restrained judiciary . . . are weeding out liberal activists. That requires a 'slowdown' in the confirmation process."[250] Alex Acosta of the Ethic and Public Policy Center's Project of the Judiciary shared these sentiments and said, "We shouldn't be involved in the numbers game. The Senate has to take an individual look at each nominee. If that means it's slow, that's good, because these nominations are for life."[251] And, in a speech to the Federalist Society, Senator Hatch acknowledged that "there are plenty of people back in Washington who are coming to me and saying that the Republican-controlled Senate has to stop confirming Clinton judges, or should oppose nominees whom a Republican President would not appoint, or who are politically liberal."[252]

In demanding that the Senate majority vote on judicial nominees, Democrats did not suggest that the Republicans neglect their advice and consent role, simply that they perform it in a more expeditious fashion. Senator Joe Biden (D-Delaware) said:

> It is totally appropriate for Republicans to reject every single nominee if they want to. That is within their right. But it is not, I will respectfully request, Madam President, appropriate not to have hearings on them, not to bring them to the floor and not to allow a vote, and it is not appropriate to insist that we, the Senators . . . get to tell the President who he must nominate if it is not in line with the last 200 years of tradition.[253]

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249. *CBS Sunday Morning* (March 8, 1998), *available in* 1998 WL 7202125.

250. Farrell, *supra* note 243, at A1.

251. David A. Price, *So Many Cases, So Few Judges*, INV. BUS. DAILY, Jan. 15, 1998, at A1.

252. Orrin Hatch, Address to University of Utah Federal Society Chapter (Feb. 18, 1997), *available in* 1997 WL 4429673.

253. 143 CONG. REC. S2541 (daily ed. March 19, 1997) (statement of Senator Biden).

Mark L. Fleischaker, Co-chair of the Lawyers' Committee for Civil Rights Under Law, agreed:

> The Senate has the right and duty to review the qualifications of nominees to the federal courts and can, if it chooses, reject nominations when called for. But we urge you not to simply delay and delay and refuse even to vote on nominations and not to use unfounded allegations, or even founded allegations, frankly, of judicial activism as an excuse for doing so and failing to fulfill the Senate's obligation to the administration of justice in America.[254]

Republicans have implied that the gridlock of the 104th and 105th Congresses is designed to pay back Democrats for their treatment of Reagan and Bush judicial nominees, particularly Robert Bork's 1987 and Clarence Thomas' 1991 nominations for the Supreme Court. Senator Hatch has said:

> [I]f [the Clinton Administration is] going to send up more activists, there is going to be war. . . . I have a lot of respect for the judiciary. So I take this seriously, and I don't want politics ever to be played with it. I get a little tired of the other side bleating about politics, after the years and years of mistreatment of Reagan and Bush judges and the glaring, inexcusable examples where they treated Republican nominees in a shamefully unfair way. Nobody could ever forget the Rehnquist nomination, the Bork nomination, and even the Souter nomination, where he wasn't treated quite as well as he should have been—and above all, the Clarence Thomas nomination; it was abysmal. Those were low points in Senate history. So I don't think either side has a right to start bleating about who is righteous on judges.[255]

Commentators frequently mention the Bork analogy. An unnamed judicial nominee said: "This isn't the 10th anniversary of

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254. *Judicial Activism: Defining the Problem and Its Impact, and Hearings on S.J. Res. 26: A Bill Proposing a Constitutional Amendment to Establish Limited Judicial Terms of Office. Before the Subcomm. on Constitution, Federalism, and Property Rights of the Comm. on the Judiciary*, 105th Cong. 76 (1997) (statement of Mark L. Fleischaker, Co-chair for Lawyer's Committee for Civil Rights).

255. 143 CONG. REC. S2537 (daily ed. March 19, 1997) (statement of Senator Hatch).

the Bork Battle. It's the 10th year of the Bork Battle."[256] Likewise, Yale University Law Professor Robert Gordon stated:

> Part of this is continuing payback for the Democratic defeat of the Bork nomination to the Supreme Court. I think in the Reagan years, the pattern was established in which the conservative movement identified the judiciary as one of the places where it was likely to be able to carry out its program. I think cultural conservatives in particular blamed the liberal Warren court for many of the problems that they saw with society. And they really vowed that they would try to retake the judiciary. And so, even with a Democratic President in the White House, they are still fighting over the composition of the judges.[257]

But the analogy to the Bork fight is misplaced for a number of reasons. First, Bork, then a District of Columbia Circuit judge, was nominated for the Supreme Court, and Supreme Court appointments are treated differently. Moreover, Bork and later Clarence Thomas (who was later appointed to the Supreme Court in 1991 to replace Thurgood Marshall) were both subjected to a harsh debate, but in both cases, the confirmation process proceeded in a timely fashion. The Senate has frequently exercised its advice and consent function and refused to confirm Supreme Court nominees,[258] but

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256. Linda Greenhouse, *Why, a Decade Later, Bork is Still a Fighting Word*, SACRAMENTO BEE, Oct. 10, 1997, at 1. Robert Bork, then a conservative judge on the D.C. Circuit and a former solicitor general infamously known for firing Watergate Special Presecutor Archibold Cox, was nominated to the Supreme Court in 1987 to replace retiring Justice Lewis Powell. Most Democratic Senators and some Republicans believed tht Bork's views were too far outside of the mainstream, and he was defeated in ths most bitter judicial fight of the Reagan Administration, *See, e.g.*, MARK GITENSTEIN, MATTERS OF PRINCIPLE: AN INSIDER'S ACCOUNT OF AMERICA'S REJECTION OF ROBERT BORK'S NOMINATION TO THE SUPREME COURT (1992); DAVID G. SAVAGE, TURNING RIGHT, THE MAKING OF THE SUPREME COURT, 133-146 (1992).

257. *Morning Edition: Federal Judge Shortage* (Nat'l Public Radio broadcast, Sept. 22, 1997).

258. Since 1789 there have been 113 justices of the Supreme Court. *See* HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS, A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 426 (1992). The Senate has formally rejected 12 nominations for the Court, beginning with John Rutledge's in 1795. Rutledge was President Washington's second nominee for Chief Justice after the resignation of John Jay. The other rejected nominees include Alexander Wolcott in 1811, John C. Spencer in 1844, George W. Woodward in 1846, Jeremiah S. Black in 1861, Ebenezer R. Hoar in 1870, William B. Hornblower in 1894, Wheeler H. Peckham in 1894, John J. Parker in 1930, Clement F. Haynsworth, Jr. in 1969, G. Harold Carswell in 1970, and Robert H. Bork in 1987. In addition, 17 other nominees from William Paterson in 1793 through Douglas H. Ginsburg in 1987 withdrew because of Senate pressure in the midst of controversy, or the Senate took no action because of its

before the current era, this rarely occurred with district and circuit court nominations.[259] For instance, during the entire twelve years of the Reagan and Bush Administrations, even if Democrats disagreed with the ideology of many of the nominees, only four nominations were rejected—Jeff Sessions for the Middle District of Alabama in 1986, Bernard H. Siegan for the Ninth Circuit in 1988, Susan W. Liebler for the Federal Circuit, also in 1988, and Kenneth Ryskamp for the Eleventh Circuit in 1991[260]—and only a handful of other nominees were strictly scrutinized by the Judiciary Committee or the full Senate. As Clint Bolick of the conservative Institute for Justice concluded, "Typically, in both Republican and Democratic administrations and Senates, this [advice and consent role in the judicial confirmation process] has been a passive one. With the exceptions of highly controversial nominations, the Senate typically ratifies the President's nominees."[261] Senator Joe Biden made this point during an acrimonious confirmation debate:

> I respectfully suggest that it is a rare . . . district court nominee by a Republican President or a Democratic President who, if you first believe they are honest and have integrity, have any reason to vote against them. I voted for Judge Bork, for example, on the circuit court, because I believed Judge Bork to be an honest and decent man, a brilliant constitutional scholar with whom I disagreed, but who stood there and had to, as a circuit court judge, swear to uphold the law of the land, which also meant following Supreme Court decisions. A circuit court cannot overrule the Supreme Court. So any member who is nominated for the district or circuit court who, in fact, any Senator believes will be a person of their word and follow stare decisis, it does not matter to me what their ideology is, as long as they are in a position where they are in the general mainstream of American political life and they have not committed

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opposition. *See* LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT, HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY 172-181 (1985).

259. One exception was during the 1950s and 1960s, when conservative Southern Senators often delayed Eisenhower, Kennedy, and Johnson nominees to the Fourth and Fifth Circuits, if the nominees were perceived as potentially liberal on civil rights issues. Southerners also delayed Thurgood Marshall's confirmation to the Second Circuit for almost two years during the Kennedy Administration.

260. Betsy Palmer, *Judiciary's Rejected Nominees*, CONG. Q. WKLY. REP. 2037 (1989).

261. Clint Bolick, *Clinton's Judges: A Preliminary Analysis*, April 1996, at 5 (on file with author).

> crimes of moral turpitude, and have not, acted in a way that would shed a negative light on the court.[262]

In contrast to the lengthy delays imposed by the 104th and 105th Congresses, Bork received swift consideration by the 100th Congress, as he was nominated in July of 1987, received an adverse vote from the Judiciary Committee but was voted onto the Senate floor, and was ultimately rejected by the full Senate less than four months after his original nomination. Clarence Thomas, too, was processed in an expeditious fashion by the 102d Congress. Nominated in July of 1991, he received a split vote and no recommendation from the Judiciary Committee, and was confirmed on October 14, 1991, 114 days after his nomination. While the debate over current nominees often focuses on a single speech or decision, Robert Bork was a prolific writer and speaker in his careers as Solicitor General, Yale Law Professor, and Judge on the District of Columbia Circuit.

The Constitution sets out in Article II, section 2, that "by and with the Advice and Consent of the Senate," the President has the prerogative to "appoint Judges of the supreme Court, and all other Officers of the United States. . . ." Jack Quinn, a former Clinton White House Counsel, was not being alarmist when he stated: "There's a constitutional crisis on the horizon here. The Republicans in the Senate appear determined not to let the President exercise the constitutional prerogative that the people of the United States granted to him last November when they reelected him."[263]

Since the Republicans took over the Senate in 1995, many Republican Senators have publicly acknowledged that they plan to revisit the meaning of the advice and consent power. As Phil Gramm (R-Texas) said:

> We are trying to get a clearer definition of what the founders meant in the Constitution when they gave the Senate the power to advise and consent on judicial nominations. Given the importance of the appellate courts and given the clear power given the Senate in the Constitution, we need to define what

262. 143 CONG. REC. S2541 (daily ed. March 19, 1997) (statement of Senator Biden).
263. *Morning Edition: Judicial Intimidation* (Nat'l Public Radio broadcast, Sept. 26, 1997).

> our policy should be with regard to the degree of influence Senators should have on nominees for those courts.[264]

Former Reagan Attorney General Ed Meese helped to set the tone for the debate on the advice and consent role of the Senate. Meese stated:

> I believe that the Senate should use its confirmation authority to block the appointment of activist federal judges. I think that very extensive investigations of each nominee—and I don't worry about the delay that this might cause because, remember, those judges are going to be on the bench for their professional lifetimes, so they have got plenty of time ahead once they are confirmed, and there is very little opportunity to pull them out of those benches once they have been confirmed—I think a careful investigation of the background of each judge, including their writings, if they have previously been judges or in public positions, the actions that they have taken, the decisions that they have written, so that we can to the extent possible eliminate persons who would turn out to be activist judges from being confirmed.[265]

And Senator John Ashcroft picked up this refrain:

> It is time to heed the counsel of Ed Meese by scrutinizing fully the nominees who come before the Senate for "advice and consent." Meese is right: there must be a dialogue between the President and the Senate regarding judicial nominees. And, if the White House fails to solicit our "advice," perhaps we should withhold our "consent."[266]

Timothy Flanagan, Assistant Attorney General for the Office of Legal Counsel during the Bush Administration, the office then in charge of coordinating the judicial nomination process, suggests that the Senate play an even more aggressive role in examining the records of judicial nominees:

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264. Neil Lewis, *Republicans Seek Greater Influence in Naming Judges*, N.Y. TIMES, April 27, 1997, at 14.

265. *Judicial Activism: Defining the Problem and its Impact, and Hearings on S.J. Res. 26: A Bill Proposing a Constitutional Amendment to Establish Limited Judicial Terms of Office. Before the Subcomm. on Constitution, Federalism, and Property Rights of the Comm. on the Judiciary*, 105th Cong. 19 (1997) (statement of Edwin Meese, former Attorney General of the United States).

266. John Ashcroft, *Courting Disaster: Judicial Despotism in the Age of Russell Clark*, CPAC Annual Meeting (March 6, 1997), *available in* 1997 WL 10024388.

> There are those proposals which are clearly within the power of Congress and which deserve serious consideration. First among these, in my view, is the need for the Judiciary Committee and the full Senate to be extraordinarily diligent in examining the judicial philosophy of potential nominees. In evaluating judicial nominees, the Senate has often been stymied by its inability to obtain evidence of a nominee's judicial philosophy. In the absence of such evidence, the Senate has often confirmed a nominee on the theory that it could find no fault with the nominee. I would reverse the presumption and place the burden squarely on the shoulders of the judicial nominee to prove that he or she has a well-thought-out judicial philosophy, one that recognizes the limited role for federal judges. Such a burden is appropriately borne by one seeking life tenure to wield the awesome judicial power of the United States.[267]

Gary Bauer, who is the director of the Family Research Council, warned that "Senate conservatives" must not "wave feebly as the president adds more constitutionally illiterate votes to the federal bench," and "pro-family conservatives" should not "shrink from this battle."[268] A number of Republican Senators agree with this sentiment. Senator Slade Gorton (R-Washington) said: "On the cabinet, the president deserves the benefit of the doubt. [But] it's perfectly legitimate to vote against someone for a lifetime appointment based on ideology."[269] And, a year later: "Mixed government 'imposes on all of us, Democrats and Republicans alike, not only the prerogative but the duty to advise the Senate, as well as simply to respond as a rubber stamp to that President's nomination.'"[270] Majority Leader Trent Lott said: "Should we

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267. *Defining the Problem and Its Impact: Hearings Before the Subcommittee on the Constitution, Federalism, and Property Rights on S.J. Res. 26, A Bill Proposing a Constitutional Amendment to Establish Limited Judicial Terms of Office: Before the Subcomm. on Constitution, Federalism, and Property Rights of the Comm. on the Judiciary*, 105th Cong. 166 (1997) (statement of Timothy Flanagan, former Assistant Attorney General for the Office of Legal Counsel).

268. Gary Bauer, *Vantage Point*, CITIZEN, Dec. 23, 1996.

269. Paul A. Gigot, *GOP Mulls Fighting Bill's Dread Judges*, WALL ST. J., March 7, 1997, at A14.

270. *Confirmation Hearings of Federal Appointments: Hearings Before the Comm. on the Judiciary, Part 3*, 105th Cong. 17 (1998) (statement of Senator Gorton).

take our time on these federal judges? Yes. Do I have any apologies? Only one: I probably moved too many already."[271]

While many in the Senate appear to be taking these sentiments to revisit the concept of the Senate's role in the advice and consent process to heart, this still appears to be a minority viewpoint. Bruce Fein expressed the views of the majority:

> As the sole elected officeholder with a nationwide constituency, the President is constitutionally entitled to appoint judges entrusted with corresponding interpretative powers. The Founding Fathers endowed the Senate with a subordinate confirmation power to screen only for competence, corruption, or cronyism. They rejected a proposal to lodge the appointment power in the Senate. Thus, if Mr. Clinton desires "activist" judges who conscientiously pledge adherence to their constitutional oaths, the Senate should bow to his nominating prerogative. Ditto when a Republican occupies the White House and confronts a Senate controlled by Democrats.[272]

Even Orrin Hatch usually agrees:

> Just because we Republicans now control the Senate and the Democrats control the Presidency is no reason for us to ignore our fundamental principles of fairness, decency and respect for the Constitution. I am ensuring that the next Republican President will have his full term to appoint judges as well. When we are dealing with something as important as the judiciary, we Republicans must think for the long term. . . . I believe that the Senate must defer to the President's choice, so long as the nominee is qualified, intelligent, experienced in the law and understands that it is the job of judges to interpret the law, not legislate from the bench.[273]

After the 1996 election, Hatch announced:

> To simply stop all nominees or those who are politically liberal would, in my view, be an improper exercise of the Senate's advice and consent power. . . . I do not, therefore, believe that the Senate should use its advice and consent power to block all

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271. Kirk Victor, *Hatch's High-Wire Act*, NAT'L J., (April 4, 1998), *available in* 1998 WL 2089053.

272. Bruce Fein, *The Chief Justice vs. Hatch*, WASH. TIMES, January 6, 1998, at A12.

273. Richard Carelli, *Senate Confirming Few Clinton Judge Appointees*, ASSOCIATED PRESS, May 24, 1996.

> judicial appointees whose political views we do not agree with.[274]

At the height of the confirmation gridlock, Senator Edward Kennedy (D-Massachusetts) accurately summed up the situation:

> In Congress today, . . . there is increasing talk of stricter scrutiny of judicial nominees. Fair scrutiny makes sense. But it is painfully evident with each passing month that the scrutiny they have in mind is passing all reasonable bounds of service to justice—and turning into obstruction of justice. . . . What we are witnessing today is a direct assault on the President's constitutional power to nominate and appoint judges. Deliberate efforts are being made in Congress to undermine the judicial independence that is at the heart of the rule of law. Advice and consent in the Senate is becoming abuse and dissent.[275]

Senator Leahy mirrored the Chief Justice's New Year's admonishment, when he said:

> Now I think it is time to say that for whatever reasons-political, ideological or otherwise, for whatever reasons-the Senate went slowly last year on nominations. The distinguished chairman and I want to be allowed by our respective caucuses to move forward, fulfilling our roles as chairman and ranking member of the Judiciary Committee, to move nominations forward. I do not question the integrity of the chairman of the Judiciary Committee, who has worked very hard on this, and has on more than one occasion strongly supported somebody who would not have been his nominee had he been the one

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274. Orrin Hatch, Address to University of Utah Federal Society Chapter (Feb. 18, 1997), *available in* 1997 WL 4429673. Hatch did repeat the refrain that:

> [T]he Senate's advice-and-consent function is not a mere numbers game. The confirmation of a single judge to serve for life is a serious matter, and should be treated as such. While of course both the administration and the Senate should work to fill needed judicial vacancies, the confirmation process should turn on the quality of nominees, not on finger-pointing regarding vacancy statistics.

Orrin Hatch, *There's No Vacancy Crisis in the Federal Courts,* WALL ST. J., Aug, 13, 1997, at 18.

275. Edward Kennedy, Alliance for Justice Luncheon Speech (April 30, 1997). Senator Kennedy also said:

> The claim that Clinton judges are activist judges is a transparent ruse being used to slow down the confirmation process. The reason is obvious. The Republican majority in Congress is doing all it can to prevent a Democratic President from naming judges to the federal courts. The courts are suffering, and so is the nation.

144 CONG. REC. S296 (daily ed. Feb. 3, 1998) (statement of Senator Kennedy).

> appointing; in the same way, I have strongly supported nominees of past Presidents who would not have been mine had I been the person making the nominations. . . . I hope, so that the U.S. Senate does not send the wrong image to the Judiciary and to the American people, that we would be able to move forward in the way the Senator from Utah and I have preferred to work in the past and move these judges, vote them in or vote them down.[276]

B. 1998, A Mixed Record on Judicial Confirmations

The Senate appeared to respond to this chastising. On January 28, 1998, the first day of its session, the Senate began its legislative business by holding a floor debate on Ann Aiken, the nominee for the District of Oregon. The Senate affirmatively voted for Judge Aiken, and then approved Barry Silverman for the Ninth Circuit and Richard Story for the Northern District of Georgia by unanimous consent. Chairman Hatch noted in his floor statement:

> Although some have complained about the pace at which the Senate has moved on judicial nominees, I would note that this body has undertaken its constitutional obligation in a wholly appropriate fashion. Indeed the first matter to come before the Senate this session are the confirmation of three of President Clinton's judicial nominees. Senator Lott is to be commended for giving these nominees early attention.[277]

By the end of February, the Judiciary Committee had held two confirmation hearings and had voted to send ten nominees to the Senate floor, and the full Senate had confirmed two more nominees. This pace was in sharp contrast to 1997 when the first judge was not confirmed until March 17, and the Committee had not held a hearing until late March. The confirmation pace proceeded with two more confirmation hearings in March, one in April, one in May, one in June, two in July, one in September, and three in October for a total of thirteen in 1998. The full Senate then voted to confirm nine judges in March, eight judges in April, four judges in May, seven judges in June, six judges in July, four judges in September, and twenty-two judges in October. These numbers compare favorably with the six confirmation hearings and twenty

276. *Id.* (statement of Senator Leahy).
277. *Id.* S74 (daily ed. Jan 28, 1998) (statement of Senator Hatch).

judges confirmed in 1996 and the nine hearings and thirty-six judges confirmed in 1997.

Senator Hatch said of this pace in June of 1998:

> I have been working with White House Counsel Chuck Ruff to ensure that the nomination and confirmation process is a collaborative one between the White House and the Members of the Senate. I think it is fair to say that after a few bumpy months in which the process suffered due to inadequate consultation between the White House and some Senators, the process is now working rather smoothly. I think the progress is due to the White House's renewed commitment to good-faith consultation with Senators of both parties.[278]

Assistant Attorney General Eleanor Acheson then stated: "I think this is a great beginning. We're not Pollyannaish about this process. The Senate clearly has an obligation to say 'no' when it thinks somebody is not qualified, and we have nothing to complain about if we get a debate."[279]

Despite the increased number of judicial appointments in 1998, the road to judicial confirmation continued to be contentious, with an unprecedented degree of scrutiny levied against lower court nominees. For instance, even though it symbolically began the year by considering Ann Aiken's nomination to the Oregon district court as its first official business, the Senate had already delayed her confirmation for twenty-six months because of that single criminal sentencing decision, and while she was ultimately confirmed the vote was by a margin of sixty-seven to thirty, the most "no" votes at that time recorded against any judge confirmed by the Senate during the 105th Congress.[280]

On February 11, the Senate voted sixty-seven to twenty-eight to confirm Margaret Morrow to the Central District of California. Morrow, a corporate litigator and former president of the California State Bar, was originally nominated on May 9, 1996. Despite her outstanding record, she became the target of a coordinated effort by ultraconservative groups and Senators who subjected her to a campaign of misrepresentations, distortions, and attacks on her record, and branded her a "judicial activist." According to some of her opponents, she deserved to be targeted because "she is a

278. *Id.* S6752 (daily ed. June 22, 1998).

279. Coyle, *supra* note 214, at A20.

280. *See supra* text accompanying note 194 (discussing sentencing decisions).

member of California Women Lawyers," an absurd charge given that this bipartisan organization is among the most respected in the state.[281] Another "strike" against her was her concern, expressed in a sentence from a 1988 article, about special interest domination of the ballot initiative process in California.[282] Her opponents viewed the statement as disdain for voter initiatives such as California's term limits law; however, they overlooked the fact that the article outlined a series of recommended reforms to preserve the process. They attacked Justice William Brennan, the "evangelist of judicial activism," and connected Morrow to him through a reference she made in a speech to "law as an engine of social change,"[283] even though she was advocating changes in the legal system as it operated in California to address widespread dissatisfaction in her profession.

Senator Charles Grassley (R-Iowa) had asked Morrow whether there are "any initiatives in California in the last decade which you have supported? If so, why?" and "Are there any initiatives in California in the last decade you have opposed. If so, why?"[284] There had been 160 initiatives in the previous decade, and the request was later reduced to the ten most publicized initiatives, but, as the *San Francisco Chronicle* editorialized: "Something is terribly amiss when Senators—under the pretense of protecting the Constitution—are demanding to know how would-be federal judges are voting beyond the curtain in a secret ballot."[285] When questioned on the propriety of this request, Senator Grassley said, "The people have a right to know whether we are going to confront another judge who may attempt to overturn another initiative that a majority of people voted for."[286] In the floor debate on Ms. Morrow's nomination, Senator Barbara Boxer (D-California) said:

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281. Thomas Jipping, *A Judge Strikes Out*, WASH. TIMES, Oct. 29, 1997, at A21.

282. Senators John Ashcroft, Charles Grassley, Jeff Sessions, and Strom Thurmond, *Dear Colleague Letter on Margaret Morrow* (Oct 29, 1997).

283. *Id.*

284. *Confirmation Hearings of Federal Appointments: Hearings Before the Comm. on the Judiciary, Part 1*, 105th Cong. 245 (1997) (Written questions from Senator Grassley). Senator Grassley also asked Ms. Morrow the following question: "Judge Miller brought up the controversial retention vote in California regarding Rose Byrd. What was your view regarding the retention of Rose Byrd to the California Supreme Court?" *Id.* at 249.

285. Editorial, *Judging the U.S. Judges,* S.F. CHRON., Oct. 5, 1997, at 18.

286. Robert Shogan, *GOP, Clinton Now Fighting Over Federal-Judge 'Crisis'*, THE IDAHO STATESMAN, May 16, 1997, at A4.

> I also want my colleagues to understand that the Senator from Iowa asked Ms. Morrow in an unprecedented request which, frankly, had Senators on both sides in an uproar, to answer the question how she personally voted on 10 years' worth of California initiatives. It was astounding. I remember going over to my friend . . . and I said, "Senator, I can't imagine how you would expect someone to remember how they voted on 160 ballot measures," some of which had to do with parks, some of which had to do with building railroads, some of which had to do with school bond measures. And besides, I always thought . . . we had a secret ballot in this country; it is one of the things we pride ourselves on.[287]

Following Morrow's confirmation, Nan Aron stated that the vote by the full Senate "revealed in very stark terms that some of the ultraconservatives in the Senate and their advocacy colleagues have made some missteps by targeting lawyers who have excellent credentials and wide bipartisan support."[288]

The most contentious confirmation issue of 1998 revolved around the nomination of Philadelphia Court of Common Pleas Judge Frederica Massiah-Jackson to the United States District Court for the Eastern District of Pennsylvania. Massiah-Jackson, who would have been the first African-American woman to sit on a federal court in Pennsylvania, withdrew on the eve of her confirmation vote that she was likely to lose.[289] The Philadelphia District Attorney's Office, unhappy with a handful of Massiah-

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287. 144 CONG. REC. S656-657 (daily ed. Feb. 11, 1998) (statement of Senator Boxer).

288. Coyle, *supra* note 214, at A20.

289. While some candidates have withdrawn from consideration as candidates for a judgeship, and the Clinton administration failed to renominate others as particular nominations died at the end of a Congress, no Clinton judicial nomination has been killed by a vote of the Judiciary Committee or the full Senate. However, a few other nominees, besides Massiah-Jackson, withdrew to avoid likely defeats on their confirmation votes, including James Ware, a district judge from the Northern District of California, who withdrew his nomination to the Ninth Circuit because his compelling personal story about being the brother of a black youth killed in the aftermath of a 1963 church bombing in Birmingham, Alabama, turned out to be a lie. *See* Joan Biskupic, *U.S. Judge Admits Lie, Withdraws as Nominee*, WASH. POST, Nov. 5, 1997, at 1. Charles Stack, the finance chairman of the Clinton-Gore campaign in Florida, who was nominated for the Eleventh Circuit, withdrew his name after a confirmation hearing in which it appeared that he did not understand rudimentary principles of constitutional law. *See* Sheldon Goldman & Elliot Slotnick, *Clinton's First Term Judiciary: Many Bridges to Cross*, 80 JUDICATURE 6, at 273 (May-June 1997).

Jackson's rulings, attacked her fourteen years on the state court with a highly inaccurate portrait to paint her as "soft on crime."[290]

Senators Arlen Specter (R-Pennsylvania), Rick Santorum (R-Pennsylvania), and Joe Biden (D-Delaware) held a special hearing in Philadelphia to address allegations against Massiah-Jackson. According to Senator Specter, "[I]n advance of the hearing, we had invited people to come if they had anything adverse or favorable to say. There was no adverse witness."[291] At her confirmation hearing before the Judiciary Committee, Senator Specter said, "The reason that Senator Santorum and Senator Biden and I went to Philadelphia was to give people a chance to come in and speak up, and they have a chance to have a hearing now." Some Senators expressed reservations about a series of criminal cases that she had ruled upon at the beginning of her tenure that reportedly evidenced a pro-defense attitude and a hostility towards the police force as well as intemperate language she had twice used on the bench,[292] but she was approved by the committee on November 6, 1997. Senator Specter, who became Massiah-Jackson's major champion, had rebuffed these attitudes by showing that she had handled 4000 criminal cases between 1984 and 1991, that only ninety-five of these had been appealed and only fourteen were reversed.[293]

Public attacks on her reputation continued, and after a short debate before the full Senate in February, the full Senate voted to return this nomination to the Judiciary Committee for a rare special hearing on March 11, 1998. At that hearing Massiah-Jackson faced a barrage of new allegations based on material forwarded from the Philadelphia District Attorney to Senator Mike DeWine (R-Ohio) about some additional criminal cases decided at

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290. In analyzing her history of sentencing defendants, a special committee appointed by the Chancellor of the Philadelphia Bar Association noted that Judge Massiah-Jackson departed below Pennsylvania guidelines only 2.3% more than the average Pennsylvania judge, and that for some years, she imposed sentences far above the sentencing guidelines. In fact, on her last full year on the criminal docket when she was hearing the most serious offenses, Massiah-Jackson imposed sentences above Pennsylvania sentencing guidelines at a rate of five times higher than the average Pennsylvania judge. *See Report of the Special Committee Appointed By the Chancellor of the Philadelphia Bar Association to Analyze the Report of the Pennsylvania District Attorneys Association on Frederica Massiah-Jackson* (March 10, 1998).

291. *Confirmation Hearings of Federal Appointments: Hearings Before the Comm. on the Judiciary, Part 2*, 105th Cong. 1005 (Letter from Senator Specter to Senator Hatch, Oct. 8, 1997).

292. *Id.* at 1019-1022 (Oct. 29, 1997).

293. 144 CONG. REC. S12,240 (Nov. 9, 1997) (statement of Senator Specter).

the beginning of her judicial career. Senator Specter was "outraged" and said, "I think it was wrong for her to be questioned on materials that she had not seen. It is a matter of fundamental due process that one receives notice to prepare a defense."[294] She continued to try to respond to the charges,[295] but on March 16, she withdrew her nomination stating:

> [A]fter being found qualified to serve by the Specter-Santorum Judicial Selection Commission, the Department of Justice, FBI, the American Bar Association and the Senate Judiciary Committee, I recently have been subject to an unrelenting campaign of vilification and distortion as I waited for a vote on my nomination by the full Senate. All of these mischaracterizations occurred when I lacked a forum or platform from which to respond. Having finally been accorded a hearing to respond to these charges last week, I attempted to do so only to have hurled at me additional "new" charges. I have now responded to these new charges and believe the record has been set straight once again at least the record to which I have been given full opportunity to respond. Today, however, the Senate is set to debate my nomination for an unprecedented six hours, a process which will not accord me any role or opportunity to set the record straight yet one more time. I have been a fighter in what I believe all my life, but allowing still more and more selective, one-sided and unsubstantiated charges to go unanswered in the politicized environment is not acceptable to me after my long journey.[296]

As Nan Aron said, soon after the nominee withdrew, "By using this eleventh hour evidence, permitting this line of inquiry to proceed,

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294. Michael A. Riccardi, *Specter Criticizes DA for Last-Minute Faxes to Foes on Senate Committee*, LEGAL INTELLIGENCER, March 12, 1998, at 1.

295. For instance, Massiah-Jackson was severely criticized by Senators for one case involving two undercover police officers who arrested a man for drug possession. At the defendant's trial Massiah-Jackson purportedly publicly identified and thus endangered the police officers by stating: "Take a good look at these guys and be careful out there." *Pennsylvania v. Johnson*, C.P. No. 8609-2897 (Pa. Ct. Com. Pleas 1986). What was infrequently mentioned was that a school class had visited Massiah-Jackson's courtroom on that day, and that the Judge routinely encouraged school students to stay in school and out of trouble. Not only does her remark make sense within the context of the visit, but the two detectives had already testified by name and identification in open court during the trial. *See* Michael Matza, *Courtroom "Outing" Ignites Latest Dire Around Judge*, PHILA. INQUIRER, Feb. 15, 1998, at A1; Michael A. Riccardi, *Massiah-Jackson: I did Not "Out" Undercover Cops*, THE LEGAL INTELLIGENCER, March 12, 1998, at 1.

296. Frederica Massiah-Jackson, *Letter of Withdrawal*, LEGAL INTELLIGENCER, March 17, 1998, at 10.

and giving Judge Massiah-Jackson no fair opportunity to respond, the Senate and its Judiciary Committee denied Judge Massiah-Jackson the fundamental due process rights to which all Americans are entitled."[297] Senator Ashcroft used the withdrawal by Massiah-Jackson to insist that his strategy of slowing down the confirmation process was appropriate:

> The failure of this nomination at literally the last possible moment helps put to rest the partisan claim that the Senate has been moving too slowly on judicial nominees. The Senate came dangerously close to confirming this nominee. The nearness of Judge Massiah-Jackson to confirmation means that we should pay more attention to this President's nominations, not less. Finally, this nomination exposed a shocking failure of quality control. In November, I was notified that my hold on the nomination was the only remaining barrier to confirmation. I refused repeated requests to lift this hold. If I had permitted the nomination to go forward, Judge Massiah-Jackson would be a federal judge at this time.[298]

The Judiciary Committee continued to ask intrusive and inappropriate questions, particularly of District of Hawaii nominee Susan Oki Mollway and Ninth Circuit nominees Margaret McKeown and Susan Graber, all of whom were ultimately confirmed, and Marsha Berzon who was not approved by the Judiciary Committee by the close of the 105th Congress, and the continued use of holds by the full Senate delayed the confirmation votes on other nominees. Senator Sessions stated in the Fletcher confirmation debate:

> Mr. President, I have been here 2 years. One nominee withdrew before a vote, and we hadn't voted [against] any nominees. So we are not abusing our advice and consent power. As a matter of fact, I don't think we have been aggressive enough in utilizing it to ensure that the nominees to the federal bench are mainstream nominees.[299]

By the end of the session the Senate had confirmed sixty-five judges, including seventeen on the day it adjourned. The number of judges confirmed in 1998 is substantially higher than the average

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297. Alliance for Justice, Press Release, *Alliance for Justice Criticizes Senate's Treatment of Judge Frederica Massiah-Jackson* (March 16, 1998).

298. John Ashcroft, *Press Release*, UNITED STATES NEWSWIRE (March 16, 1998).

299. 144 CONG. REC. S11,883 (daily ed. Oct. 8, 1998) (statement of Senator Sessions).

of fifty-four judges confirmed by the Senate for each of the past twenty years, and the newly confirmed judges reduced the number of vacant judicial seats from eighty-six at the beginning of 1998 to fifty at the end of the Congressional session and fifty-nine by the close of the year. According to Assistant Attorney General Acheson: "I think the session was remarkably collegial and productive. The administration is very pleased with the progress we made in filling vacancies."[300] The Free Congress Foundation's Tom Jipping reacted differently noting, "The spectacle of Lott and Orrin Hatch stumbling over each other to give a President who is about to be impeached every judicial nominee they can is disgusting beyond words."[301]

IV. Looking Ahead

With the Clinton Administration weakened politically in 1999 by the scandals and impeachment, it is likely that President Clinton will prove incapable of regaining the traditional and constitutional Presidential role as the preeminent force in judicial appointments. Responding to the higher number of confirmations in 1998, which were produced in part by the admonitions of Chief Justice Rehnquist, Judiciary Chairman Orrin Hatch said:

> The demagogues and naysayers can continue to impugn the purported secret motives of the Republicans and continue to malign those who exercise their constitutional duty to thoroughly evaluate and review the complete record and background of each nominee before casting a vote in favor or in opposition thereto. And the Republican Senate will continue to plow ahead in the next Congress, honorably and fairly discharging its constitutional duties without wavering.[302]

Even with the new judges confirmed in 1998, multiple parts of the gridlock continued. As Nan Aron of the Alliance for Justice has said: "[S]crutiny [of judicial nominees] is important for any administration, but that's not what's going on here. What's different is the use of blatantly unfair tactics—placing secret holds on nominees, failing to hold hearings, reporting nominees out and

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300. Robert Schmidt, *A Pretty Good Year for the Federal Bench; Congress Makes Progress Filling Judicial Slots*, TEXAS LAWYER, Nov. 9, 1998, at 4.

301. *Id.*

302. 144 CONG. REC. S12,963 (daily ed. Oct. 21, 1998) (statement of Senator Hatch).

not voting—backdoor tactics designed to deny confirmation."[303] In fact, the Senate has affirmatively pushed its way into this process in the manner sought by Senator John Ashcroft, who claims:

> Given the vast power wielded by the judiciary and the Clinton administration's pattern of flawed nominees, the Senate must take proper care in its consideration of candidates for judgeships. Activist, out-of-control judges pose a clear and present danger to constitutional freedom. It is the Senate's solemn duty to set a higher standard than we have seen so far from the Clinton Administration.[304]

In the 106th Congress, we can expect to see more of the tactics first advanced in the 104th and 105th Congresses to diminish the influence of Clinton appointments to the federal bench.

303. Coyle, *supra* note 214, at A20.

304. John Ashcroft, *Symposium*, INSIGHT MAGAZINE, (March 2, 1998), *available in* 1998 WL 9105346.