2009

Breaking the Cycle: The Rise of Contentiousness in Judicial Nominations

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On March 17, 2009, President Obama nominated Judge David Hamilton for the 7th Circuit Court of Appeals, the first judicial nomination of his presidency. The New York Times described Judge Hamilton as “a highly regarded trial court judge … [from] his state’s traditionally moderate strain,” and stated that he had the support of both home senators, Richard Lugar (R-IN) and Evan Bayh (D-IN). At the same time, Obama announced that he would submit potential nominees’ names to the American Bar Association (ABA) for pre-nomination evaluation, a longstanding tradition with which President Bush dispensed in 2001, stating that he would permit the ABA to evaluate candidates only after their nominations had been sent to the Senate.

It is difficult to tell what Judge Hamilton’s nomination portends for judicial selection during President Obama’s administration. Given the president’s background as a law professor and his keen appreciation of history, he realizes the significance of the judicial appointments he will make during his time in the White House. It is not certain, however, that he will be able to fulfill his pledge to “end the confirmation wars.” The President set off a firestorm of protest

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2 As discussed in a subsequent section of this paper, in 2001 President Bush advised the ABA that his administration would no longer send candidates’ names to the organization for pre-nomination evaluation but would allow the ABA to comment on nominees only after they have been sent to the Senate. Little, Laura E. “The ABA’s Role In Prescreening Federal Judicial Candidates: Are We Ready To Give Up On The Lawyers?” William and Mary Bill of Rights Journal 10 (December 2001).


from Republican Senators and conservative interest groups, however, when he suggested that he would look for nominees who “recognize what it's like to be a young teenage mom” and who have “empathy to understand what it's like to be poor, or African-American, or gay, or disabled or old.”

On March 2, 2009, forty-one Republican Senators wrote the President concerning judicial nominations. They stated:

We hope your Administration will consult with us as it considers possible nominations to the federal courts from our states. Regretfully, if we are not consulted on, and approve of, a nominee from our states, the Republican Conference will be unable to support moving forward on that nominee. Despite press reports that the Chairman of the Judiciary Committee now may be considering changing the Committee’s practice of observing senatorial courtesy, we, as a Conference, expect it to be observed, even-handedly and regardless of party affiliation. And we will act to preserve this principle and the rights of our colleagues if it is not.

Meanwhile, conservative groups, including the Federalist Society and the Judicial Confirmation Network, are raising money for a prolonged battle. As an opening salvo, they challenged the administration’s assertion that Judge Hamilton is a moderate, calling him a “hard-left political activist,” citing his connection to the ACLU, and decrying rulings that blocked implementation of an informed consent abortion law. The next round in the “confirmation wars” appears, therefore, to be well underway.

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5 Talev and Taylor.
The question is whether anything can be done to break the cycle. For the past twenty years, there has been a higher degree of contentiousness associated with judicial nominations than with other types of presidential appointments. This is in part because federal judges have significant power to enforce or declare invalid laws passed by Congress and by the states. It is in part the courts have in recent years been the venue where disputes concerning controversial social issues have played out. Who decides these issues is important because research shows that “judges from different party affiliations reach distinct legal conclusions on key legal issues . . . [T]he choice of a judge by a president is an inherently political undertaking, and different judicial philosophies of constitutional interpretation can lead to vastly different results in judicial decisions.”

Although it is true that judicial selection has inherently political aspects, the highly contentious manner in which the process presently plays out discourages good candidates from applying, delays appointments, and creates an undue number of vacancies on the bench, hampering the judiciary’s ability to resolve cases promptly. It is appropriate to examine, therefore, whether within the existing constitutional framework, modifications to the selection process can be made that acknowledge the political aspects of judicial nominations, but also

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11 Gerhardt, Michael J. “Judicial Selection as War.” U.C. Davis Law Review 36 (February 2003): 667, 679. Some of the delay occurs during presidential selection of nominees, while some is attributable to Senatorial consideration of nominees. Gerhardt concludes that President George W. Bush was able to make nominations more quickly in part because he eliminated pre-nomination review of candidates by the ABA.
reduce unnecessary contentiousness, and balance partisan and ideological concerns against other
criteria that are relevant in assessing qualifications for judicial office.

This examination begins with a presentation of data collected concerning judicial
nominations from 1988 through 2008 in an attempt to document the fact that the federal judicial
appointments process has become increasingly contentious. The tables and figures provide
information on measures of contentiousness such as length of time from nomination to
confirmation and vote totals for nominees. After documenting the increasingly contentious
nature of the process, I explore the qualities that make a “good” judge, and federal judicial
selection prior to 1989 to determine whether partisan and ideological considerations have any
relevance in selecting and appointing federal judges. With this information as a backdrop, I then
sample existing selection models, including a recent reform proposal endorsed by the American
Bar Association, to ascertain if they offer insights useful in reshaping the federal judicial
selection process. Finally, I propose procedures on which President Obama and the Senate might
agree to improve the overall climate and reduce the “confirmation wars.”

Data

For at least the past twenty years, Republicans, Democrats, interest groups, legal
organizations and judges have decried rising partisanship and contention in the judicial
appointments process. While there is anecdotal evidence of increased contention, little work has
been done to document its existence. This section sets forth data relevant to measure the level of
contentiousness in the current federal judicial selection process and determine whether, in fact,
federal judicial appointments have become more contentious in the past twenty years. The data were obtained from three different sources. First, I reviewed ratings and nominations data compiled by the American Bar Association’s Standing Committee on the Federal Judiciary for the 101st through the 110th Congresses to identify all nominations made by Presidents George H.W. Bush, Bill Clinton, and George W. Bush. Data from the Federal Judicial Center confirmed that provided by the ABA; it also provided information regarding judicial vacancies. The third source of data was Thomas, the Library of Congress online, which provided information regarding hearing dates, recorded votes and vote types.

I gathered data from three sources because the information provided by the Federal Judicial Center was incomplete, in that it covered only “completed” nominations and did not list hearings and other pertinent dates. Using these sources, I charted each nominee’s name, circuit, state, type of judgeship (district, circuit, Supreme Court, DC district court, DC or Federal Circuit court, Court of International Trade, and territorial courts), date of the vacancy for which the individual was nominated (where available), date nominated, date of hearing, date on which the nomination was sent to the Senate floor, date of appointment, ABA rating, Senate vote total, type of vote (unanimous consent, voice vote, roll call vote), whether the nominee received a hearing and/or vote, and whether the nominee withdrew from consideration.

I then evaluated the level of contentiousness (dependent variable) using several different measures – length of time from vacancy to nomination, length of time to hearing or no hearing

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12 1988 was chosen as the starting point because anecdotally, many cite the failed nomination of Robert Bork in 1987 as the incident that touched off the “confirmation wars.” Additionally, relevant information is not available prior to this time.
16 “Completed” nominations refers to nominees who are confirmed by the full Senate.
before the Senate Judiciary Committee, length of time between hearing and nomination being sent to the Senate floor or death of nomination in committee, length of time to full Senate vote or no floor vote, Senate vote total, type of vote (unanimous consent, voice vote, roll call vote), whether the candidate withdrew, and whether a nomination was completed (i.e. received a vote on the Senate floor). I considered several independent variables – court type, point in presidential term and Congress – to determine if some or all of them explained the increase in contentiousness that had occurred.

I addressed several questions: (1) Do the objective measures identified above show an increase in the contentiousness of the confirmation process over the past two decades, such that the number of “contentious” nominations has increased and the percentage of completed nominations has decreased? (2) Do different factors, such as point in presidential term and Congress, affect the level of contentiousness? (3) Do factors such as court type, judicial circuit, or ABA rating, affect levels of contentiousness?

Results and Analysis

This section begins with basic data regarding total nominations between 1989 and 2009. I next explore the effect on contentiousness of the independent variables I have identified – point in presidential term, Congress, and court type. Finally, I examine completed nominations, i.e. those nominees that received a vote, by court type, point in presidential term and Congress.

Numbers of Nominations

To provide a foundation for interpreting the impact of the various independent variables on levels of contentiousness, it is necessary to understand the total number of nominations made
during each President’s term and each Congress by court type. Table 1 shows the total number of nominations made between 1989 and 2009, by presidential term as well as by session of Congress. It reflects that total nominations remained relatively constant across presidencies, averaging 245.5 each term. It also shows that there was no discernible pattern of increase or decrease in nominations between the first and second Congress in a particular president’s term.

Table 1 – Total Nominations by Presidential Term and Congress

<table>
<thead>
<tr>
<th></th>
<th>Total Nominations</th>
<th>Congress</th>
<th>Total Nominations</th>
</tr>
</thead>
<tbody>
<tr>
<td>George H.W. Bush Term I</td>
<td>253</td>
<td>101st Congress</td>
<td>75</td>
</tr>
<tr>
<td></td>
<td></td>
<td>102nd Congress</td>
<td>178</td>
</tr>
<tr>
<td>Bill Clinton Term I</td>
<td>257</td>
<td>103rd Congress</td>
<td>143</td>
</tr>
<tr>
<td></td>
<td></td>
<td>104th Congress</td>
<td>114</td>
</tr>
<tr>
<td>Bill Clinton Term II</td>
<td>238</td>
<td>105th Congress</td>
<td>120</td>
</tr>
<tr>
<td></td>
<td></td>
<td>106th Congress</td>
<td>118</td>
</tr>
<tr>
<td>George W. Bush Term I</td>
<td>267</td>
<td>107th Congress</td>
<td>133</td>
</tr>
<tr>
<td></td>
<td></td>
<td>108th Congress</td>
<td>134</td>
</tr>
<tr>
<td>George W. Bush Term II</td>
<td>212</td>
<td>109th Congress</td>
<td>110</td>
</tr>
<tr>
<td></td>
<td></td>
<td>110th Congress</td>
<td>102</td>
</tr>
<tr>
<td>Total</td>
<td>1226(^a)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

\(^a\) There is a small discrepancy – 1226 vs. 1229 – in the total number of nominations reported by the data sources. I have used 1226 as the total nominations number throughout for consistency.

SOURCE: Compiled by the author from data gathered from ABA Standing Committee on the Federal Judiciary, Federal Judicial Center, and Thomas

Table 2 demonstrates the total number of nominations made in each presidential term, controlling for court type. While the number of judges nominated to some courts – e.g., the Supreme Court and the D.C. Circuit – is too low to permit statistical analysis, these courts remain important because of their relative power and prestige.\(^{17}\) The difference in numbers of nominations per court type is large, but easily explained, as there are many more district

\(^{17}\) The contentiousness evident in the Senate’s consideration of Supreme Court nominations, which garner the most press coverage and public attention, is discussed below.
judgeships (678) than circuit or Supreme Court positions. Additionally, the number of vacancies that occur at any level of court during a particular presidential term is a function of the number of sitting judges who elect to take senior status or retire during the term and/or of new judgeships created by Congress during the term.

Table 2 – Total Nominations by Court Type and Presidential Term

<table>
<thead>
<tr>
<th></th>
<th>Bush I</th>
<th>Clinton I</th>
<th>Clinton II</th>
<th>W. Bush I</th>
<th>W. Bush II</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>District Court</td>
<td>195</td>
<td>206</td>
<td>169</td>
<td>202</td>
<td>141</td>
<td>915</td>
</tr>
<tr>
<td>Circuit Court</td>
<td>45</td>
<td>39</td>
<td>57</td>
<td>51</td>
<td>58</td>
<td>252</td>
</tr>
<tr>
<td>DC/Federal Circuit Court</td>
<td>7</td>
<td>4</td>
<td>5</td>
<td>8</td>
<td>5</td>
<td>31</td>
</tr>
<tr>
<td>Supreme Court</td>
<td>2</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>4</td>
<td>8</td>
</tr>
<tr>
<td>Other Court</td>
<td>2</td>
<td>5</td>
<td>7</td>
<td>4</td>
<td>5</td>
<td>26</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>253</td>
<td>257</td>
<td>238</td>
<td>267</td>
<td>212</td>
<td>1226</td>
</tr>
</tbody>
</table>

a The category “Other Court” includes appointments to the territorial courts (Puerto Rico, the Northern Marianas Islands, and Guam) and the Court of International Trade.

SOURCE: Compiled by the author from data gathered from ABA Standing Committee on the Federal Judiciary, Federal Judicial Center and Thomas

With these general numbers in mind, I next examine possible measures of contentiousness to determine what they show regarding the state of the judicial nominations process.

Vote Type, Hearings and Withdrawals

One possible indicator of increased contentiousness in the nominations process is the type of vote nominees received in the Senate. I thus compiled data to determine the number of

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18 Congress authorizes judgeships for each level of court. Since 1869, there have been nine authorized positions on the Supreme Court. Currently, there are 179 circuit court judgeships and 678 district court judgeships. In 1950, there were only 65 circuit court judgeships and 212 district court judgeships. It is rare that all judgeships are filled at any one time; judges die or retire, creating vacancies that remain open until judges are appointed to replace them. See Federal Judicial Center. “How the Federal Courts Are Organized, Federal judges and how they get appointed.” <http://www.fjc.gov/federal/courts.nsf/autoframe?OpenForm&nav=menu3&menu3c&menu3c&menu3c&page=/federal/courts.nsf/page/A783011AF949B6BF85256B35004AD214?opendocument> (last visited April 14, 2009).
nominees who were confirmed by unanimous consent, voice vote, and roll call vote. For nominees who did not receive any type of full Senate vote, I examined whether or not they had received a hearing in the Senate Judiciary Committee. Finally, I determined how many nominees had withdrawn their names from consideration. Table 3 shows the type of vote nominees received, whether candidates who did not receive a vote did or did not have a hearing in the Senate Judiciary Committee, and the number of withdrawn nominations by presidential term. Table 4 shows the same data by court type.

*Table 3 – Vote Types, Hearing, Withdrawn Nominations by Presidential Term*

<table>
<thead>
<tr>
<th></th>
<th>Bush I</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unanimous Consent</td>
<td>73.8%</td>
</tr>
<tr>
<td>Voice Vote</td>
<td>2.8%</td>
</tr>
<tr>
<td>Roll Call Vote</td>
<td>0.8%</td>
</tr>
<tr>
<td>No Hearing, No Vote</td>
<td>21.8%</td>
</tr>
<tr>
<td>Hearing, No Vote</td>
<td>0.8%</td>
</tr>
<tr>
<td>Withdrawal</td>
<td>-</td>
</tr>
<tr>
<td>Total Nominations (N)</td>
<td>252</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Clinton I</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unanimous Consent</td>
<td>-</td>
</tr>
<tr>
<td>Voice Vote</td>
<td>79.3%</td>
</tr>
<tr>
<td>Roll Call Vote</td>
<td>2.0%</td>
</tr>
<tr>
<td>No Hearing, No Vote</td>
<td>11.3%</td>
</tr>
<tr>
<td>Hearing, No Vote</td>
<td>5.9%</td>
</tr>
<tr>
<td>Withdrawal</td>
<td>1.6%</td>
</tr>
<tr>
<td>Total Nominations (N)</td>
<td>256</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Clinton II</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unanimous Consent</td>
<td>-</td>
</tr>
<tr>
<td>Voice Vote</td>
<td>52.9%</td>
</tr>
<tr>
<td>Roll Call Vote</td>
<td>18.2%</td>
</tr>
<tr>
<td>No Hearing, No Vote</td>
<td>22.3%</td>
</tr>
<tr>
<td>Hearing, No Vote</td>
<td>3.3%</td>
</tr>
<tr>
<td>Withdrawal</td>
<td>3.3%</td>
</tr>
<tr>
<td>Total Nominations (N)</td>
<td>242</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>W. Bush I</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unanimous Consent</td>
<td>-</td>
</tr>
<tr>
<td>Voice Vote</td>
<td>30.7%</td>
</tr>
<tr>
<td>Roll Call Vote</td>
<td>44.6%</td>
</tr>
<tr>
<td>No Hearing, No Vote</td>
<td>18.9%</td>
</tr>
<tr>
<td>Hearing, No Vote</td>
<td>5.1%</td>
</tr>
<tr>
<td>Withdrawal</td>
<td>0.7%</td>
</tr>
<tr>
<td>Total Nominations (N)</td>
<td>296</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>W. Bush II</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unanimous Consent</td>
<td>-</td>
</tr>
<tr>
<td>Voice Vote</td>
<td>28.6%</td>
</tr>
<tr>
<td>Roll Call Vote</td>
<td>28.6%</td>
</tr>
<tr>
<td>No Hearing, No Vote</td>
<td>25.8%</td>
</tr>
<tr>
<td>Hearing, No Vote</td>
<td>11.7%</td>
</tr>
<tr>
<td>Withdrawal</td>
<td>5.2%</td>
</tr>
<tr>
<td>Total Nominations (N)</td>
<td>213</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unanimous Consent</td>
<td>15.2%</td>
</tr>
<tr>
<td>Voice Vote</td>
<td>38.7%</td>
</tr>
<tr>
<td>Roll Call Vote</td>
<td>20.0%</td>
</tr>
<tr>
<td>No Hearing, No Vote</td>
<td>18.9%</td>
</tr>
<tr>
<td>Hearing, No Vote</td>
<td>5.5%</td>
</tr>
<tr>
<td>Withdrawal</td>
<td>1.7%</td>
</tr>
<tr>
<td>Total Nominations (N)</td>
<td>1226</td>
</tr>
</tbody>
</table>

*Data is missing for one nomination*

SOURCE: Compiled by the author from data gathered from ABA Standing Committee on the Federal Judiciary and Thomas
Table 4 – Vote Types, Hearings, Withdrawals by Court Type

<table>
<thead>
<tr>
<th></th>
<th>Unanimous Consent</th>
<th>Voice Vote</th>
<th>Roll Call Vote</th>
<th>No Hearing, No Vote</th>
<th>Hearing, No Vote</th>
<th>Withdrawal</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>District Court</strong></td>
<td>15.7%</td>
<td>43.5%</td>
<td>19.0%</td>
<td>16.6%</td>
<td>4.1%</td>
<td>1.2%</td>
</tr>
<tr>
<td><strong>Circuit Court</strong></td>
<td>14.1%</td>
<td>22.3%</td>
<td>23.0%</td>
<td>27.3%</td>
<td>10.6%</td>
<td>2.7%</td>
</tr>
<tr>
<td><strong>Total Nominations</strong></td>
<td>183 (N)</td>
<td>475 (N)</td>
<td>245 (N)</td>
<td>232 (N)</td>
<td>67 (N)</td>
<td>18 (N)</td>
</tr>
</tbody>
</table>

*a* Because there are so few nominations to the Supreme Court, the territorial courts and the Court of International Trade, a single controversial nomination in one of these categories would have an inordinate effect on the averages. As a result, these nominations are not included in the table. Nominations to the D.C. Circuit and Federal Circuit have been included in the overall averages for circuit court nominees.

SOURCE: Compiled by the author from data gathered from ABA Standing Committee on the Federal Judiciary, Federal Judicial Center and Thomas

As these tables reflect, the Senate has not confirmed judicial candidates by unanimous consent since the first President Bush’s administration. This is at odds with historical tradition.19 Additionally, there has been an increasing, although not straight line, trend toward roll call votes for all nominees, with circuit court nominees more likely to receive a roll call vote than district court nominees. There is no discernible upward trend in the percentage of nominees not receiving a hearing or not receiving a vote after being sent to the Senate floor. What is clear, however, is that a far greater number of circuit court nominees fell into these categories than district court nominees.

**Vote Averages**

Another potential measure of the level of contentiousness in the confirmation process is the average vote total nominees have received. To measure this across the study period, I

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19 Historically, “roll call votes have been reserved for opposed nominations,” while unanimous consent was the “norm.” Hatch, Orrin B. “Judicial Nomination Filibuster Cause and Cure.” *Utah Law Review* 2005 (2005): 803, 824.
removed data on nominees who did not receive a vote and then averaged vote totals by president and type of court. Nominees who were confirmed by unanimous consent or voice vote were coded as a vote of 100.

As noted, the number of nominees receiving a roll call vote has grown across all court types. The percentage of candidates who received roll call votes moved from a low of 0.8% during President George H.W. Bush’s first term to a high of 44.6% during his son’s first term. Average vote totals declined in inverse proportion to this increase. Candidates confirmed by roll call vote generally received between 50 and 90 affirmative votes while candidates confirmed via unanimous consent or voice vote received 95 to 100 votes. Thus, while the absolute decrease in average vote totals is small, and appears statistically insignificant, it reflects an increase in contested, roll call votes, and thus an increase in contentiousness.

Table 5 shows average vote totals by court type and presidential term. As can be seen, averages for both the district and circuit courts have decreased over the past two decades, from a high of 99.80 during President George H.W. Bush’s first term to a low of 94.39 during his son’s second term. Vote totals for circuit court nominees declined steadily over the study period, while there was a slight uptick in the district court average during President George W. Bush’s second term. Despite this slight increase, district court averages overall have declined since the first President Bush left office.
Table 5 – Vote Averages by Presidential Term and Court Type

<table>
<thead>
<tr>
<th></th>
<th>Bush I</th>
<th>Clinton I</th>
<th>Clinton II</th>
<th>W. Bush I</th>
<th>W. Bush II</th>
<th>Average</th>
</tr>
</thead>
<tbody>
<tr>
<td>District Court</td>
<td>100.00</td>
<td>100.00</td>
<td>97.36</td>
<td>95.50</td>
<td>97.30</td>
<td>98.27</td>
</tr>
<tr>
<td>Circuit Court(^a)</td>
<td>99.09</td>
<td>97.63</td>
<td>92.05</td>
<td>90.79</td>
<td>84.43</td>
<td>93.45</td>
</tr>
<tr>
<td>Average</td>
<td>99.80</td>
<td>99.63</td>
<td>96.25</td>
<td>94.74</td>
<td>94.39</td>
<td>97.35</td>
</tr>
</tbody>
</table>

\(^a\) Nominations to the Supreme Court, the territorial courts and the Court of International Trade are not included, and nominations to the D.C. and Federal Circuit Courts have been included in the overall averages for circuit court nominees.

SOURCE: Compiled by the author from data gathered from Federal Judicial Center and Thomas.

Standing alone, average vote totals suggest minimal increase in the contentiousness of the nominations process. Coupled with the data on roll call votes, which is most probably the cause of the decrease in vote totals, however, the average vote totals are a more meaningful indicator of increased contentiousness.

Wait Time Averages

A common theme in the scholarly literature regarding the contentiousness of the judicial selection process is the increasing amount of time that separates nomination and confirmation.\(^20\) To measure this phenomenon, I looked not only at overall wait time, but separated wait time into three segments for all completed nominations.\(^21\) I also analyzed wait times by presidential term and type of court. The tables show an increase in wait times from the years that President George H.W. Bush was in office to the time his son became president. This is true for all stages of the nomination process – nomination to hearing before the Senate Judiciary Committee,

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\(^{21}\) I restricted the measurement to completed nominations because they are the only nominations for which there is accurate and complete data; for nominees who did not receive a vote, the data is frequently incomplete.
hearing to vote in the Senate Judiciary Committee, and committee vote to confirmation by the full Senate. Nominees during President Clinton’s second term experienced the longest wait times, and wait times decreased once President George W. Bush took office. Nonetheless, wait times under George W. Bush remained well above what they had been during his father’s administration and President Clinton’s first term.

Table 6 – Average Wait Times in Days (Nomination to Hearing, Hearing to Sent to Floor, Sent to Floor to Appointment, and Total Wait Time) by Presidential Term

<table>
<thead>
<tr>
<th></th>
<th>Bush I</th>
<th>Clinton I</th>
<th>Clinton II</th>
<th>W. Bush I</th>
<th>W. Bush II</th>
<th>Average</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nomination to Hearing</td>
<td>73.28</td>
<td>63.16</td>
<td>110.12</td>
<td>91.58</td>
<td>102.13</td>
<td>81.54</td>
</tr>
<tr>
<td>(N=194)</td>
<td>(N=201)</td>
<td>(N=166)</td>
<td>(N=209)</td>
<td>(N=91)</td>
<td>(N=865)</td>
<td></td>
</tr>
<tr>
<td>Hearing to Sent</td>
<td>17.59</td>
<td>13.64</td>
<td>14.29</td>
<td>23.52</td>
<td>21.23</td>
<td>17.92</td>
</tr>
<tr>
<td>(N=195)</td>
<td>(N=199)</td>
<td>(N=166)</td>
<td>(N=204)</td>
<td>(N=86)</td>
<td>(N=853)</td>
<td></td>
</tr>
<tr>
<td>Sent to Appoint</td>
<td>4.80</td>
<td>15.79</td>
<td>33.90</td>
<td>34.92</td>
<td>20.02</td>
<td>22.16</td>
</tr>
<tr>
<td>(N=196)</td>
<td>(N=209)</td>
<td>(N=172)</td>
<td>(N=204)</td>
<td>(N=94)</td>
<td>(N=892)</td>
<td></td>
</tr>
<tr>
<td>Total Wait Time</td>
<td>95.64</td>
<td>94.51</td>
<td>163.99</td>
<td>147.27</td>
<td>131.14</td>
<td>121.06</td>
</tr>
<tr>
<td>(N=195)</td>
<td>(N=211)</td>
<td>(N=172)</td>
<td>(N=209)</td>
<td>(N=99)</td>
<td>(N=904)</td>
<td></td>
</tr>
</tbody>
</table>

SOURCE: Compiled by the author from data gathered from ABA Standing Committee on the Federal Judiciary and Thomas

To better understand the data shown in Table 6, it is useful to separate wait times between district and circuit court nominees. With the sole exception of President George H.W. Bush’s administration, Table 7 shows that there was a longer overall wait time for circuit court than for district court nominees.
Table 7 – Average Wait Times in Days (Nomination to Hearing, Hearing to Sent to Floor, Sent to Floor and Appointment, and Total Wait Time) by Court Type

<table>
<thead>
<tr>
<th></th>
<th>Nomination To Hearing</th>
<th>Hearing to Sent</th>
<th>Sent to Appointment</th>
<th>Total Wait Time</th>
</tr>
</thead>
<tbody>
<tr>
<td>George H.W. Bush</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Term I</td>
<td>District Court</td>
<td>76.36 (N=147)</td>
<td>15.79 (N=147)</td>
<td>3.79 (N=148)</td>
</tr>
<tr>
<td></td>
<td>Circuit Court</td>
<td>68.94 (N=35)</td>
<td>16.35 (N=35)</td>
<td>9.03 (N=35)</td>
</tr>
<tr>
<td>Bill Clinton</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Term I</td>
<td>District Court</td>
<td>61.68 (N=156)</td>
<td>12.79 (N=155)</td>
<td>15.37 (N=164)</td>
</tr>
<tr>
<td></td>
<td>Circuit Court</td>
<td>74.70 (N=28)</td>
<td>14.22 (N=28)</td>
<td>21.57 (N=29)</td>
</tr>
<tr>
<td>Bill Clinton</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Term II</td>
<td>District Court</td>
<td>105.74 (N=130)</td>
<td>13.74 (N=130)</td>
<td>36.65 (N=132)</td>
</tr>
<tr>
<td></td>
<td>Circuit Court</td>
<td>140.77 (N=32)</td>
<td>16.19 (N=32)</td>
<td>9.13 (N=33)</td>
</tr>
<tr>
<td>George W. Bush</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Term I</td>
<td>District Court</td>
<td>82.57 (N=169)</td>
<td>24.09 (N=165)</td>
<td>31.51 (N=165)</td>
</tr>
<tr>
<td></td>
<td>Circuit Court</td>
<td>142.25 (N=33)</td>
<td>24.35 (N=32)</td>
<td>35.87 (N=32)</td>
</tr>
<tr>
<td>George W. Bush</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Term II</td>
<td>District Court</td>
<td>103.08 (N=90)</td>
<td>19.00 (N=89)</td>
<td>23.05 (N=104)</td>
</tr>
<tr>
<td></td>
<td>Circuit Court</td>
<td>96.00 (N=17)</td>
<td>31.00 (N=14)</td>
<td>24.05 (N=21)</td>
</tr>
</tbody>
</table>

SOURCE: Compiled by the author from data gathered from ABA Standing Committee on the Federal Judiciary and Thomas

Completion Rate

Another possible indicator of contentiousness in the confirmation process is the nominee completion rate, i.e., the percentage of a president’s nominees who received a vote. I determined this rate by comparing total nominations receiving a vote with total nominations. This information is depicted in Table 8. Overall completed nominations data shows that the percentage of nominees receiving a vote by the full Senate has remained roughly comparable across presidencies, with the exception of President George W. Bush’s second term, when the number fell precipitously from the 70% range to 49.19%. This is most probably a function of President Bush’s low approval rating, the fact that the Democrats controlled Congress for two years of the term, and the belief that his nominees were, on the whole, more ideologically extreme than those of other presidents. Given the rough comparability of the Clinton, George H.W. Bush and first George W. Bush terms, however, nomination completion appears to be the least reliable of the measures of contentiousness tested.
Table 8 – Completed Nominations by Presidential Term

<table>
<thead>
<tr>
<th></th>
<th>Total Nominations</th>
<th>Nominations Receiving Vote</th>
<th>Nominations Receiving “No Action”</th>
<th>Completed Nominations (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bush I</td>
<td>253</td>
<td>195</td>
<td>59</td>
<td>76.68%</td>
</tr>
<tr>
<td>Clinton I</td>
<td>257</td>
<td>208</td>
<td>49</td>
<td>80.93%</td>
</tr>
<tr>
<td>Clinton II</td>
<td>238</td>
<td>173</td>
<td>66</td>
<td>72.27%</td>
</tr>
<tr>
<td>W. Bush I</td>
<td>267</td>
<td>208</td>
<td>60</td>
<td>77.90%</td>
</tr>
<tr>
<td>W. Bush II</td>
<td>212</td>
<td>122</td>
<td>126</td>
<td>49.19%</td>
</tr>
<tr>
<td>Total</td>
<td>1227</td>
<td>906</td>
<td>321</td>
<td>73.84%</td>
</tr>
</tbody>
</table>

*a This includes withdrawn nominations.

SOURCE: Compiled by the author from data gathered from ABA Standing Committee on the Federal Judiciary and Thomas

Table 9 breaks down completed nominations by court type. The analytically important distinction is the one between completed nominations at the district and circuit court levels.

District court nominees had a completion rate of 77.92% versus 59.13% for circuit court nominees. This 18.79% difference is evidence of the fact that circuit court nominations are more contentious than district court nominations as a group.

Table 9 – Completion Rate by Court Type

<table>
<thead>
<tr>
<th></th>
<th>Total Nominations</th>
<th>Nominations Receiving Vote</th>
<th>Nominations Receiving “No Action”</th>
<th>Completed Nominations (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>District Court</td>
<td>915</td>
<td>713</td>
<td>202</td>
<td>77.92%</td>
</tr>
<tr>
<td>Circuit Court*</td>
<td>283</td>
<td>168</td>
<td>115</td>
<td>59.36%</td>
</tr>
<tr>
<td>Total</td>
<td>1198</td>
<td>881</td>
<td>317</td>
<td>73.54%</td>
</tr>
</tbody>
</table>

*a Nominations to the Supreme Court, the territorial courts and the Court of International Trade are not included, and nominations to the D.C. and Federal Circuit Courts have been included in the overall averages for circuit court nominees.

SOURCE: Compiled by the author from data gathered from ABA Standing Committee on the Federal Judiciary and Thomas
Overall Contentiousness

Overall, a majority of the measures of contentiousness tested – average vote totals, average wait times, and vote types – show increasing contentiousness in the nominations process. Other measures, such as hearing vs. no hearing and completed nominations, show that circuit nominations are substantially more contentious than district court nominations. Figure 1 combines the measures tested to show an overall increase in contentiousness.

*Figure 1 – Vote Types, Hearings, and Withdrawals*

![Graph showing vote types, hearings, and withdrawals over different Congresses.](attachment:image.png)

The data showing that circuit court nominations are more contentious than district court nominations is consistent with anecdotal information and reflects the more important role that circuit courts play in formulating law nationwide. The data – particularly average vote totals, vote type, and wait times – also show increasing contention at the district court level, however. This is analytically important, as district court nominations were historically thought to be non-controversial. The increase in contentiousness at this level suggests an increase in the
contentiousness of the confirmation process overall from President George H.W. Bush’s time in office to the conclusion of his son’s second term.

To chart the shift that has occurred over the last two decades, I defined a “contentious nomination” as one in which the nominee received less than 90 votes, had a longer wait time by 50 days more than the average for the presidential term in which the nomination was made, or withdrew or received “no action” on the nomination. These measures demonstrate contention because (1) 50 days is approximately half again as long as the longest wait time between nomination and hearing in the last twenty years, which is the portion of the nominations process that typically results in the greatest delay; (2) 90 votes is both below the overall average and far enough below 100 to reflect real opposition to a nomination; and (3) the fact the Senate took “no action” or a candidate withdrew is a clear sign that the nomination was contentious. Table 10 shows the number of “contentious” nominations utilizing this definition by presidential term and Congress.

*Table 10 – Number of Contentious Nominations by Presidential term and Congress*

<table>
<thead>
<tr>
<th></th>
<th>Congress</th>
<th>Total Nominations</th>
<th>Contentious Nominations</th>
<th>Term Overall</th>
</tr>
</thead>
<tbody>
<tr>
<td>George H.W. Bush</td>
<td>101st Congress</td>
<td>75</td>
<td>10.67%</td>
<td>33.60%</td>
</tr>
<tr>
<td>Term I</td>
<td>102nd Congress</td>
<td>178</td>
<td>43.26%</td>
<td></td>
</tr>
<tr>
<td>Bill Clinton</td>
<td>103rd Congress</td>
<td>143</td>
<td>20.28%</td>
<td>34.24%</td>
</tr>
<tr>
<td>Term I</td>
<td>104th Congress</td>
<td>114</td>
<td>51.75%</td>
<td></td>
</tr>
<tr>
<td>Bill Clinton</td>
<td>105th Congress</td>
<td>120</td>
<td>50.00%</td>
<td>52.52%</td>
</tr>
<tr>
<td>Term II</td>
<td>106th Congress</td>
<td>118</td>
<td>55.08%</td>
<td></td>
</tr>
<tr>
<td>George W. Bush</td>
<td>107th Congress</td>
<td>133</td>
<td>47.37%</td>
<td>49.44%</td>
</tr>
<tr>
<td>Term I</td>
<td>108th Congress</td>
<td>134</td>
<td>51.49%</td>
<td></td>
</tr>
<tr>
<td>George W. Bush</td>
<td>109th Congress</td>
<td>111</td>
<td>70.27%</td>
<td>62.10%</td>
</tr>
<tr>
<td>Term II</td>
<td>110th Congress</td>
<td>137</td>
<td>55.47%</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>101-110th Congress</td>
<td>1226</td>
<td>47.63%</td>
<td></td>
</tr>
</tbody>
</table>

SOURCE: Compiled by the author from data gathered from ABA Standing Committee on the Federal Judiciary, Federal Judicial Center and Thomas
As this table demonstrates, commencing with President Clinton’s second term, the number of contentious nominations increased and remained high. In George H.W. Bush’s administration, 85 judicial nominations, or 33.60%, were contentious. During President Clinton’s first term, there was a slight uptick in this number. In Clinton’s second term, however, there were 125 contentious nominations, or 52.52% of the total. The percentage declined slightly during President George W. Bush’s first term to 49.44% (139 nominations), but increased again during his second term. In that four year span, there were 154 contentious nominations, or 62.10% of the total. Measured by average vote totals, average wait times, and “no action” nominations, therefore, federal judicial selection has grown increasingly contentious.

Figure 2 demonstrates the rise in contentious nominations from George H.W. Bush’s administration to his son’s second term.

*Figure 2 – Contentious Nominations by Congress*

![Contentious Nominations Graph](image)

The increase in contention is also demonstrated by differences in the processing of district and circuit court nominations. Measured by average vote totals, average wait times, and
“no action” nominations, circuit court nominations were consistently more contentious than district court nominations during the study period. The gap between the two, which had ranged from 10% to 25%, widened considerably during President Clinton’s second term, growing to 42.43% during the 106th Congress. The differential remained high during the first two years of President George W. Bush’s first term (at 37.48%) before skyrocketing to 48.51% in the last two years of that term. During President Bush’s second term, when the overall level of contentious nominations reached an all-time high, the gap between contentious district and circuit court nominations returned to historic levels, at 16% to 27%. Figure 3 depicts this information.

*Figure 3 – Contentious Nominations by Congress, District and Appellate Courts*

In sum, the data support anecdotal views in the literature and elsewhere that the nominations process at every court level has become increasingly more contentious between 1989 and 2009. Many observers attribute this trend to an inappropriate emphasis on the ideology of judicial nominees that began with the failed nomination of Judge Robert Bork to the

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22 In that two year period, 42.86% of district court nominations were contentious vs. 85.29% of circuit court nominations.
Supreme Court. This explanation is too simplistic, as I detail below. Because “ideology” has become the focal point of debate over contentiousness in the judicial nominations process, however, I examine what criteria are properly taken into account from both a constitutional and an historical perspective before exploring more fully the reasons for the heightened level of contention surrounding the confirmation federal judges.

**The Characteristics of a “Good Judge”**

Having documented an increase in contentiousness in the federal judicial selection process, it is appropriate to ask whether the trend matters. If the contentiousness of the process has had an impact on the quality of the federal bench – e.g., discouraged highly qualified candidates from applying and/or resulted in the appointment of unqualified individuals – then it is clearly a trend that should be reversed. To explore whether there has been this type of detrimental impact, however, it is first necessary to examine whether there is an agreed definition of “qualifications” for judicial office, and whether partisan or ideological views properly form any part of the definition.

The Constitution does not set forth the qualifications that those seeking judicial office must have. In *Federalist No. 78*, however, Hamilton argued that intellectual ability, legal knowledge, and impeccable ethics were the measure of a judicial candidate’s “merit.” As Hamilton put it:

> [T]here can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges, and making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge.24

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In a later Federalist paper, Hamilton contrasted these qualities with the attributes he anticipated would be emblematic of legislators. He observed that legislators would “rarely be chosen with a view to those qualifications which fit men for the stations of judges,” given their “natural propensity to party divisions” and the “habit” of “marshal[ling themselves] on opposite sides” of an issue.\textsuperscript{25} Hamilton believed that integrity and legal knowledge, coupled with a lifetime appointment, would ensure an independent judiciary that would not be unduly swayed by public opinion, would apply the law impartially, and would protect the rights of the minority against the tyranny of the majority.\textsuperscript{26} Given the manner in which he contrasted the qualities of a judge and the qualities of a legislator, moreover, he appears to have believed that partisan affiliation and ideology were not relevant in assessing an individual’s qualifications for judicial appointment.

Hamilton’s view was at odds with the views of our earliest presidents – Washington and Adams – who saw membership in the Federalist Party as the most important qualification for judicial office.\textsuperscript{27} The fact that they considered partisan affiliation in selecting judges, however, does not mean that they eschewed the “baseline” qualities identified by Hamilton or that they appointed judges who were not qualified in terms of legal knowledge and integrity.\textsuperscript{28}

Indeed, it is generally agreed that legal knowledge, the ability to apply the law to the facts of a particular case, and ethics and integrity in doing so are fundamental qualifications that an


\textsuperscript{26} Ibid.


individual must have to secure appointment to the bench.\textsuperscript{29} Other relatively non-controversial characteristics that most believe judges should possess are good judicial temperament, and neutrality or even-handedness.\textsuperscript{30} The American Judicature Society has defined judicial temperament as

\begin{quote}
\textit{a variety of noble qualities. One of these qualities is dignity. To be dignified a judge must possess “quiet, tactful ways, and calm yet firm assurance.” A jurist with appropriate judicial temperament uses authority gracefully. Judicial temperament also requires sensitivity and understanding. An understanding judge is sensitive to the feelings of those before the court, recognizing that each and every case is important to participants. Finally, a candidate is not temperamentally suited for the bench unless he or she possesses great patience. Patience is simply the ability to be even-tempered and to exercise restraint in trying situations.}\textsuperscript{31}
\end{quote}

While definitions vary, and proper judicial temperament is often in the eye of the beholder,\textsuperscript{32} most agree that it encompasses the ability to be courteous, civil, sensitive, and patient. Most also agree that it requires a “personality free from arrogance.”\textsuperscript{33}

Prior legal or judicial experience is also generally viewed as a necessary qualification for appointment to judicial office. Many states require, and the ABA advocates, that judicial candidates have a minimum number of years in practice or on the bench.\textsuperscript{34} At least in the modern era, however, prior legal experience has not been deemed sufficient for appointment to the appellate bench. Prior judicial experience has been the norm for nominees to the Supreme


Court, and the same is increasingly true for appointment to the Courts of Appeal. Chief Justice Rehnquist decried this trend, noting the likely result that U.S. courts would “too much resemble the judiciary in civil law countries,” where jurists are career civil servants who “simply do not command the respect and enjoy the independence of our[ ]” courts. Nonetheless, it appears that prior judicial experience is considered, if not an absolute prerequisite to an appellate court appointment, at a minimum a strong qualification.

Having defined the generally agreed characteristics that “qualify” an individual for judicial office, it is appropriate to turn to the disputed criteria: ideology and partisan affiliation. As discussed in a later section of this paper, the Constitution created an inherently political process for the selection and appointment of federal judges by failing to delineate the criteria on which nominees were to be evaluated, and by requiring that the Senate consent to the appointment of all nominees selected by the president. Consequently, while ideology and partisan affiliation are not “qualifications” for judicial office in the traditional sense of the word, they are most certainly attributes that are properly taken into account under the constitutional framework governing judicial appointments in this country. While there is disagreement as to whether ideology and partisan affiliation should be given the same weight as, or less weight than, legal knowledge, experience, temperament and integrity in the evaluation process, one or both

35 Peretti suggests that adoption of a de facto requirement of prior judicial experience for Supreme Court nominees began in the 1950’s with President Eisenhower’s second appointment to the Court. Peretti, Terri L. “Where Have All the Politicians Gone? Recruiting for the Modern Supreme Court.” *Judicature* 91 (November-December 2007): 112, 114.
38 In addition to the generally agreed criteria discussed, Goldman lists physical and mental health. These would seem to be a given. Goldman 114.
39 The Oxford English Dictionary defines “qualified” as “[h]aving qualities or possessing accomplishments which fit one for a certain end, office, or function; having an officially recognized qualification to practise as a member of a particular profession; fit, competent.”
are, directly or indirectly, and to greater or lesser degree, components of the relevant judicial selection models studied. Consequently, it is appropriate to include them in the definition of “judicial qualifications” when evaluating the current state of the judicial confirmation process.

This conclusion is supported when one considers how the Founders viewed judicial selection, and how presidents and Senates have exercised their respective constitutional powers in the eighteenth, nineteenth and twentieth centuries.

**Judicial Selection Prior to 1989**

The process used to select federal judges today is a product of early decisions made by delegates to the Constitution Convention. They debated not only the structure of the federal courts but how federal judges would be selected and how long their tenure would be.\(^{40}\) Ultimately, they agreed that the President would appoint judges with the “advice and consent” of the Senate and that, once appointed, they would have life tenure.\(^{41}\) The delegates did not undertake to outline the qualifications candidates for judicial office would be expected to meet, however, nor detail the criteria the Senate was to use in consenting, or declining to consent to, a president’s nominees. By dividing responsibility between the president and Senate, and remaining silent on the criteria to be used in evaluating judicial nominees, the delegates invited interpretation by generations of presidents and Senators from a partisan political perspective.

Delegates to the Constitutional Convention debated four main proposals regarding judicial selection: legislative appointment (by both houses of Congress); executive appointment;
Senate appointment; and executive appointment with the “advice and consent” of the Senate.⁴²

<table>
<thead>
<tr>
<th>Selection Model</th>
<th>Explanation and History</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legislative Appointment</td>
<td>Edmund Randolph recommended the Virginia Plan, which proposed that judges “be chosen by the national legislature.”⁴³ Others, like John Rutledge, supported legislative appointment because he worried that allowing the executive to appoint judges might ultimately lead to a monarchy.⁴⁴</td>
</tr>
<tr>
<td>Executive Appointment</td>
<td>James Wilson of Pennsylvania recommended executive appointment of judges because “experience [showed] the impropriety of [allowing] such appointments [to be made] by numerous bodies.” Executive appointment was incorporated as part of the New Jersey Plan proposed by William Patterson.⁴⁵</td>
</tr>
<tr>
<td>Senate Appointment</td>
<td>James Madison recommended that the Senate appoint judges as a compromise to a proposal for selection of judges by both the House and Senate. Madison feared that the involvement of both houses would lead to disproportionate appointment of former legislators and persons who had done political favors for legislators.⁴⁶</td>
</tr>
<tr>
<td>Advice and Consent</td>
<td>Nathaniel Gorham proposed a compromise to Senate appointment, as he felt that “even that branch [was] too numerous” to ensure unbiased appointments. Gorham’s compromise was to have the executive appoint judges with the advice and consent of the Senate.⁴⁷</td>
</tr>
</tbody>
</table>


⁴³ White 111. Wible 937. Larisa 974.


Unable to agree on the proper method of appointing judges, the delegates referred the matter to the Committee of Detail. The first draft of the Constitution written by the Committee of Detail contemplated Senate appointment of Supreme Court judges, but left appointment of “officers in all cases not otherwise provided for by this Constitution,” including judges of the inferior courts, to the President. Ultimately, the delegates did not adopt this proposal, and elected to have all judges appointed by the president with the advice and consent of the Senate. They favored this model because it created built-in checks and balances by “blending a branch of the Legislature with the Executive.”

The model the delegates adopted reflects their central focus on the relationship between the executive and legislative branches. It also reflects their anticipation that the political system implemented in the United States would not be partisan or contentious. Quite quickly, this latter assumption proved to be untrue, and the delegates’ adoption of a judicial selection process that divided power between the President and the Senate introduced partisanship and ideology into nomination decisions. As one scholar has put it, “[f]rom the earliest days [of the Republic], episodic controversy over ideology and partisanship came into play over federal judicial appointments.”

Reviewing the history of judicial appointments in America, Sheldon Goldman has identified four motivations that have driven presidents when nominating judges: a desire to advance the substantive goals of their administration (a “policy agenda”); an effort to build

48 White 119
49 White 119; Marcotte 529
50 White 119-20; see U.S. Const., art. II, § 2, cl. 2
political support for themselves or their party (a “partisan agenda”); a wish to reward personal friends or associates (a “personal agenda”); or some combination of these. While Goldman’s construct is analytically appealing, contrary to his assumption, historically presidents’ policy and partisan agendas have merged, as presidents assume that members of their party are ideologically attuned to their policy views. Personal motivations, moreover, have played a lesser role than partisan and policy goals, at least in lower court appointments, as most nominees have not been personally known to or associated with the appointing president. What emerges from an historical review of judicial appointments, in fact, is the conclusion that ideology and partisanship have been firmly ensconced as a part of the process from the beginning.

The earliest presidents, Washington and John Adams “packed the Supreme Court with tried and true [members of the] Federalist[ ]” party. When Thomas Jefferson, a Republican, was elected to succeed Adams, the Federalist Congress created a slew of new judgeships and filled them with Federalists on the eve of ceding power. Once installed, the Democratic Congress prevented the Supreme Court from sitting for more than a year, and abolished many of the newly created judgeships. During this era, “Senatorial consideration of a nominee’s

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55 Gerhardt provides the following statistics for same party appointments: Grover Cleveland (100% of all nominees); Franklin Roosevelt (98.5% for district judges and 96% for circuit judges); Harry Truman (93.8% for district judges and 88.5% for circuit judges); Dwight Eisenhower (95.2% for district judges and 93.3% for circuit judges); John F. Kennedy and Lyndon Johnson (92.1% for district judges and 95.1% for circuit judges); Richard Nixon and Gerald Ford (89.6% for district judges and 93.0% for circuit judges); Jimmy Carter (90.6% for district judges and 82.1% for circuit judges); Ronald Reagan (91.7% for district judges and 96.2% for circuit judges); George H.W. Bush (88.5% for district judges and 89.2% for circuit judges); and Bill Clinton (87.5% for district judges and 85.2% for circuit judges). Gerhardt, Michael J. “Judicial Selection as War,” *U.C. Davis Law Review* 36 (February 2003): 667, 673

56 Washington, in fact, went so far as to circumvent the constitutional appointments process, placing some judges on the bench as “recess” appointees who did not need Senate approval. One of these was John Rutledge, whom Washington appointed to succeed Chief Justice John Jay. Ultimately, the Senate refused to confirm Rutledge to a permanent seat on the Court because it disagreed with his position on the controversial Jay Treaty. Freer 495, 500.

politics,” rather than deference to the president or concern for the nominee’s qualifications, was the primary criterion used to evaluate judicial nominees.\textsuperscript{58}

The pattern established in these early years continued as the Republic matured.\textsuperscript{59} In the nineteenth century, “party affiliation increasingly became a useful proxy [for] . . . a nominee’s loyalty to a president’s (or key senator’s) preferred constitutional ideology and policy views.”\textsuperscript{60} Faced with the prospect of civil war, for example, Abraham Lincoln used judicial appointments as a form of “patronage to [consolidate] party [support]” and as a means of “further[ing] his policy initiatives” and “domestic agenda.”\textsuperscript{61}

In the early twentieth century, Theodore Roosevelt was interested in “shaping the direction of the federal bench” and, like others before him, focused on nominees’ ideology as a result.\textsuperscript{62} Little changed as the twentieth century progressed. Although initially Franklin Roosevelt viewed judicial appointments as an opportunity to curry political favor or reward a political operative or friend, his focus shifted after the courts struck down important pieces of New Deal legislation. After many years of Republican administrations, “almost three-fourths of lower court federal judges were Republicans.”\textsuperscript{63} Roosevelt felt he needed to change the ideological direction of the bench in order to protect his legislative achievements and thus began

\textsuperscript{59} Of 154 Supreme Court nominees sent to the Senate between 1789 and 2004, 34 were denied confirmation. Although five were later confirmed, four were nominated unsuccessfully on more than one occasion. While small in absolute numbers, the fact that more than twenty percent of all Supreme Court nominees encountered opposition sufficient to defeat their appointment indicates that politics is a significant part of the judicial selection process. Fair and Independent Courts 1029.
\textsuperscript{60} Several presidents’ judicial appointees reflect this emphasis on party and ideology. Kermit Hall noted that “Martin Van Buren’s judicial appointments were ‘more party directed than [those made] during Jackson’s administrations,’” that “Zachary Taylor ‘wielded . . . judicial patronage in an outwardly party-directed fashion,’” and that Republican presidents Hayes, Garfield, and Arthur did also. All of Grover Cleveland’s thirty-four lower court appointments were the product of party considerations. Gerhardt 686, 673.
\textsuperscript{61} This is especially evident in “his six Supreme Court appointments,” as to which he sought Congressional input before selecting a nominee. Gerhardt 692.
\textsuperscript{62} Goldman \textit{Picking} 285. Freer 500.
\textsuperscript{63} Goldman \textit{Picking} 30-31
to look for appointees whose views were “compatib[le] with [his] economic and social-welfare policy agenda.”

Because Roosevelt packed the courts with judges willing to uphold the New Deal, Harry Truman was able to focus less on policy concerns and more on strictly patronage appointments. Although Truman thought that his selections were partisan rather than ideological, he faced a Republican majority in the Senate after the 1946 mid-term elections, which equated ideology with partisan affiliation and viewed his selections as ideological. To limit the president’s ability to appoint “leftists, . . . New Dealers, . . . women and blacks,” Republican Senator Richard Wiley asked the ABA to evaluate the president’s judicial nominees.

Previously, there had been little pushback by the Senate to judicial nominations driven by ideological or partisan concerns, since, for the most part, the same party controlled both the presidency and the Senate. With Truman, however, it is possible to discern the seeds of the contentiousness that partisan or ideological appointments have generated in more recent eras of divided government. Between 1946 and 1947, the number of district and circuit judges confirmed by the Republican-controlled Senate dropped from sixteen to ten. In 1948, only two district judges and one circuit judge were confirmed. After Democrats regained control of the Senate in 1948, these numbers jumped dramatically; during the next two years, sixty-three district and circuit court judges were approved.

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64 Ibid.
65 Goldman Picking 76
66 Ibid.
68 Ibid.
69 Ibid.
70 Ibid.
When President Eisenhower was elected in 1952, Republicans retook the Senate. By 1955, however, and through the balance of his term, Eisenhower faced a Democratic Senate. Perhaps for this reason, Eisenhower wanted judges who were noncontroversial and “whose views ‘reflect[ed] a middle-of-the-road political and governmental philosophy.’”\textsuperscript{71} As a result, he focused on ensuring “that his appointees [were] of high quality and [met] the approval of the ABA.”\textsuperscript{72}

The one twentieth century president whose approach to judicial appointments appears to be somewhat anomalous is Jimmy Carter. Although he had a Democratic majority in the Senate, President Carter sought to reduce partisanship in the judicial nominating process by establishing the United States Circuit Court Judge Nominating Commission in 1977, and charging it with recommending candidates for circuit judgeships.\textsuperscript{73} He also “encourag[ed] Senators to establish local merit-based commissions to select federal district court judges whenever vacancies occurred in their home states.”\textsuperscript{74}

The adoption of a less partisan approach to judicial nominations was short-lived.

\textsuperscript{71} President Gerald Ford, who also focused on qualifications in selecting judicial nominees, had “little concern for the impact of judicial selection on [his] policy agenda,” and was interested only in “quality appointments.” It is clear that Ford wanted to escape the cloud of Watergate and ignore partisanship as much as possible. Goldman \textit{Picking} 208. Additionally, the Democrats had a sixty-forty seat majority in the Senate, making it difficult for Ford to pursue an aggressive policy agenda in making judicial appointments. Law, David S. and Lawrence B. Solum. “Judicial Selection, Appointments Gridlock, and the Nuclear Option.” \textit{Journal of Contemporary Legal Issues} 15 (2006) pg. 51, 83.

\textsuperscript{72} Goldman \textit{Picking} 152

\textsuperscript{73} Goldman \textit{Picking} 238

\textsuperscript{74} To some extent, Carter’s approach reflected a policy agenda, as he was most interested in appointing more women and people of color to the bench, and believed that basing appointments on merit would have this result. Owens, Annie L. “All Politics Is Local: The Politics of Merit-Based Federal Judicial Selection in Wisconsin.” \textit{Marquette Law Review} 88 (2005): 1031, 1035. Symposium. “Twenty Years of Legal Ethics: Past, Present, And Future.” \textit{Georgetown Journal of Legal Ethics} 20 (Spring 2007): 321, 342. Goldman \textit{Picking} 283. Additionally, members of the merit selection commissions included Democratic Party activists, and the final choice of nominee was made by the White House, thus ensuring that some element of partisanship remained in the process. Haire, Susan B. “Judicial Selection and Decisionmaking in the Ninth Circuit.” \textit{Arizona Law Review} 48 (Summer 2006): 267, 269
When Ronald Reagan was elected, he “saw the federal courts as frustrating [his] policy agenda…”\textsuperscript{75} and made it a priority to change “politically liberal judicial policy by changing the judges.”\textsuperscript{76} He sought out candidates “who believed in ‘judicial restraint,’”\textsuperscript{77} and who would be sympathetic to his policy positions. Reagan also changed the process by which judicial nominees were selected in an effort to increase focus on the nominees’ ideology. In prior administrations, the Department of Justice had screened and recommended nominees for appointment. President Reagan moved the process of identifying and vetting nominees into the White House.\textsuperscript{78}

As this brief survey suggests, ideology and partisanship have been part of the judicial selection process, to a greater or lesser degree, since the earliest days of the Republic. For the most part, use of partisan or ideological criteria to select nominees has not generated significant controversy or contention because presidents have sent their nominations to Senates controlled by members of their own party. When this has not been the case, however – e.g., during the Truman and Eisenhower administrations – presidents either moderated the role of ideology and party in appointments, or saw the number of judges they were able to confirm drop precipitously. The only exception to the historical trend appears to be Jimmy Carter. Although the Senate was in Democratic hands during the Carter administration, he attempted – unsuccessfully in the long run – to reduce the emphasis on partisan and ideological concerns and to elevate consideration of

\textsuperscript{75} Goldman \textit{Picking} 285
\textsuperscript{76} Goldman \textit{Picking} 345
\textsuperscript{77} President Reagan did encourage senators “to utilize merit selection screening procedures, including commissions,” similar to those established by President Carter, and to submit numerous names to the Justice Department. Goldman \textit{Picking} 286, 289, 297. Republican Senators like Pete Wilson (R-CA), however, appointed “political commissions” to ensure “that those potential appointees found to be meritorious also ha[d] the appropriate conservative political and judicial philosophy.” Goldman \textit{Picking} 289. Rowland, C. K., Donald Songer, Robert A. Carp. “Presidential Effects On Criminal Justice Policy In The Lower Federal Courts: The Reagan Judges.” \textit{Law and Society Review} 22 (1988): 191, 194
\textsuperscript{78} His administration also created a new department in DOJ called the Office of Legal Policy to coordinate judicial selection efforts. Goldman \textit{Picking} 291-92
qualifications such as legal knowledge, temperament and integrity. Even this approach, however, was in aid of a policy agenda.\textsuperscript{79} The merit commissions Carter appointed were stocked with Democratic activists.\textsuperscript{80} The pattern of judicial selection prior to 1988 suggests, therefore, that attempting to eliminate partisan and ideological concerns entirely from the confirmation process would be both unwarranted and futile.

**The Causes of Contentiousness**

As the preceding history demonstrates, partisanship in federal judicial appointments is not a new phenomenon. What has changed, however, as reflected in the data, is the contentiousness of the confirmation process. Supreme Court nominations have been a point of contention since the beginning of the Republic. Judith Resnik, a well-known judicial appointments scholar, cites the fight over Washington’s nomination of John Rutledge as Chief Justice as evidence of this fact.\textsuperscript{81}

Over the course of the nation’s history, the Senate has rejected twelve Supreme Court nominees and defeated fourteen others through delay.\textsuperscript{82} Twenty of these twenty-six nominations

\textsuperscript{79} Slotnick, Elliot E. “Appellate Judicial Selection During The Bush Administration: Business as Usual or a Nuclear Winter?” *Arizona Law Review* 48 (Summer 2006): 225, 230

\textsuperscript{80} Goldman *Picking*. Haire 269.

\textsuperscript{81} Resnik, Judith. Personal Interview. 18 March 2009. After John Jay retired from the Supreme Court, Washington exercised his recess appointment power to elevate Rutledge to the position of Chief Justice. Before Rutledge learned of Washington’s action, he expressed public opposition to the Jay Treaty, an effort by Washington to keep America out of the war between France and Britain. “Rutledge became a vocal opponent [and] subscrib[ed] to a strongly worded statement condemning the agreement between the United States and Great Britain.” He took the position that he would prefer to have the country go to war than have the treaty take effect. Maltese, John Anthony. *The Selling of Supreme Court Nominees*. Baltimore, MD: John Hopkins University Press, 1995, 26-28. Davis, Richard. *Electing Justice: Fixing the Supreme Court Nomination Process*. New York, NY: Oxford University Press, 2005. The Federalists supported ratification of the Jay Treaty. Rutledge’s comments were reprinted in newspapers across the country, and he was identified as one of the leaders of opposition to the treaty. Federalists, who held a majority in the Senate and voted to ratify the treaty, were displeased by Rutledge’s public opposition. They expressed their displeasure by refusing to confirm Rutledge as Chief Justice on a 10-14 vote. Marcus, Maeva and James R. Perry. *The Documentary History of the Supreme Court of the United States, 1789-1800*. New York, NY: Columbia University Press, 1985, 780

\textsuperscript{82} Freer 495, 499
were put forward prior to 1896. Of the remaining six, “five have come since 1968.”

Writing in 1999, Richard Freer, a law professor at Emory University, stated: “[E]ven successful [Supreme Court] nominations have been increasingly contentious: of the past fifteen nominations to the Supreme Court, the Senate has rejected three; and seven confirmations over that span have generated at least twenty-five negative votes in the Senate.”

Freer attributes the increased contentiousness in recent times at least in part to divided government, noting that “[f]rom 1896 until 1969, only two Presidents – Truman and Eisenhower – faced a Senate in opposition hands. Since then, however, every President except Carter . . . has faced opposition Senates for at least part of his tenure.” Indeed, it is clear from Fiorina’s work on divided government that one of its consequence is an increase in the percentage of unconfirmed presidential appointees overall; as reflected in the data, judicial appointments are simply one part of this trend.

Freer asserts that it was the nomination of Abe Fortas by President Johnson in 1968 that ushered in a new era in Supreme Court nominations. He posits that, certain they would win the White House in the upcoming election, Republicans wanted to stall the Fortas nomination, and raised issues both about Fortas’ financial dealings and about his judicial philosophy. Their tactics were successful and President Johnson ultimately withdrew the Fortas nomination; after Richard Nixon was elected, he nominated Warren Burger, who was easily confirmed. Fortas remained on the Supreme Court but was ultimately forced to resign based on alleged ethical

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83 Ibid.
84 As Freer notes, “President Hoover's 1930 nomination of Chief Judge John J. Parker of the Fourth Circuit was the only Supreme Court nomination rejected by the Senate between 1896 and 1969.” Ibid.
85 Ibid.
86 Ibid.
87 As an example, 18% of Truman’s nominees and 7% of Reagan’s nominees went unconfirmed in two divided government Congresses. Fiorina, Morris. Divided Government. Needham Heights, MA: Allyn & Bacon, 1996, 97.
88 Freer 504-05.
89 Ibid.
violations. At this point, Democrats vowed to retaliate and did so when considering President Nixon’s subsequent nominations of Judges Haynsworth and Carswell.

If the Haynsworth and Carswell nominations were pay-back for Fortas, the nomination battle that really marks the beginning of the modern day “confirmation wars” is that of Judge Robert Bork. President Reagan had made clear his desire to transform the ideological make-up of the federal courts; Judge Bork was viewed as a staunch conservative. At the time he was nominated, Democrats had gained control of the Senate. Given President Reagan’s earlier appointment of William Rehnquist as Chief Justice, and Antonin Scalia as Associate Justice, the Bork nomination represented a tipping point in terms of future control of the Court. Thus, Democrats vigorously opposed his confirmation on ideological grounds. The report of the Senate Judiciary Committee recommending rejection of the nomination praised Judge Bork as an academic and legal scholar and said explicitly that “[t]he central issue” surrounding his confirmation was his “judicial philosophy.” Senator Arlen Specter (R-PA), who opposed the nomination, took pains to state that he did not question Judge Bork’s integrity or honesty, and made it clear that his no vote was based on Bork’s judicial philosophy and views. The minority report decried the majority’s focus on Judge Bork’s ideology, and noted – presciently – that the majority’s approach would “see the judiciary have its independence threatened by

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90 Freer 505.
91 Freer 505-07.
92 Freer 507.
93 Ibid.
94 Freer 508.
95 Ibid.
96 United States. Senate Committee on the Judiciary, “Senate Executive Report No. 100-7: Nomination of Robert H. Bork to Be An Associate Justice of the United States Supreme Court.” 1987, 193
97 Senate Executive Report 214.
activist special interest groups.\textsuperscript{98} Bork’s nomination was ultimately rejected by a vote of 52 to 48.\textsuperscript{99}

The vote provoked outrage and controversy. Noted conservative columnist William Safire coined a new verb – to “bork,” meaning “[to] attack viciously a candidate or appointee, especially by misrepresentation in the media.”\textsuperscript{100} Judge Bork wrote a book attacking the Senate’s focus on political philosophy as improper.\textsuperscript{101} Although, as has been noted, ideology had long played a role in the confirmation process, Bork’s nomination was unusual in the sense that ideology was the sole reason given for rejecting his nomination. No attempt was made to couch ideological opposition in the guise of concerns about qualifications, conflict of interest or other more politically neutral issues.\textsuperscript{102} For this reason, some have argued that Judge Bork’s nomination “departed from what was then the norm,” and “established a new norm for confirmation hearings.”\textsuperscript{103}

Perhaps more importantly, the Bork nomination marked the beginning of a heightened role for interest groups in the judicial nominations process.\textsuperscript{104} By the time President Clinton took office, interest groups had expanded their involvement in the nominations process from the Supreme Court to include the lower courts as well. Professor Nancy Scherer reports that

\textsuperscript{98} Senate Executive Report 310.
\textsuperscript{100} Ibid.
\textsuperscript{101} Ibid.
\textsuperscript{102} Marcotte 554
\textsuperscript{104} Interest group participation in Supreme Court nominations dates back to 1881. As early as the 1930’s, interest groups took public positions regarding nominees, including John Parker, Abe Fortas, Homer Thornberry, Clement Haynsworth and Harold Carswell, in addition to Robert Bork and Clarence Thomas. Interest groups became an increasingly important part of the nomination/confirmation process starting in the late 1980’s, however. Maltese 119. Cohen, Lauren M. “Missing In Action: Interest Groups And Federal Judicial Appointments.” \textit{Judicature} 82 (Nov./Dec. 1998): 119, 120.
organized interest groups did not oppose a single lower court nominee between 1933 and 1972; between 2001 and 2004, by contrast, they publicly opposed thirty nominees.105

Interest groups’ most important impact on the confirmation process, however, has come about not through formal participation at Judiciary Committee hearings, but through informal, indirect efforts to influence Senators. These include disseminating information regarding a candidate to constituents in the hope that they will communicate their views to their Senators; organizing grassroots efforts for or against particular nominees (e.g., letter writing and email campaigns); and directly lobbying Senators to vote yea or nay on particular nominations.106

According to Professor Scherer, the interest groups’ involvement reflects the fact that lower court judgeships, which were traditionally patronage appointments by individual senators, have become “a means [of] satisfy[ing] the activists’ policy demands.”107 For this reason, Scherer asserts, interest group participation in the judicial confirmation process has become an “elite mobilization strategy.”108 In this era when party bosses are a thing of the past, candidates use activists, who are not beholden to either political party, to mobilize voters, secure election and stay in office.109 Activists care about who is appointed to the courts, Scherer asserts, because the courts have changed “from [being] … closed institution[s] that [decided] the
property and business-oriented claims of corporations into . . . open institution[s] that [decide the] individual rights claims of the disadvantaged.”

In his book, Confirmation Wars, Benjamin Wittes argues that lower court nominations have become more contentious in part because the courts have increasingly been put in the position of deciding important issues of social, political and moral policy. Ninth Circuit Judge Milan Smith echoes this view, observing that, “beginning with the Warren court, and [continuing] since, judges have been way ahead of the [political] curve on a number of issues.” Lower courts, in fact, “today serve as the final arbiter of more than 99 percent of all federal court litigation” because the Supreme Court grants review in so few cases each year.

While the increasing importance of decisions by the lower federal courts, the greater involvement of interest groups in the confirmation process, and the use of elite mobilization strategies by both the president and members of the Senate have contributed to the increased contentiousness of judicial selection, they are but part of the story.

Presidential changes to the process used to identify and vet judicial candidates is a second important cause of increasing contention. Starting with President Reagan, there has been a trend toward centralizing power for the selection of judicial nominees in the White House rather than in the Department of Justice. Historically, judicial selection was the responsibility of the Deputy

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110 Scherer Scoring 28
111 Wittes cites Brown v. Board of Education as the starting point of the courts’ involvement in the momentous social and political issues of our day. Wittes 11-13.
Attorney General’s Office. As political science and law professor David Law noted, however, “sensitive political activities – namely, those critical to successful execution of the President’s policy agenda – [must] be conducted by those loyal to the President.” In the case of judicial nominations, this has been achieved by “centralization,” i.e., “the relocation of sensitive functions into the White House itself.” While there has by no means been a straight-line progression, administrations since the time of Richard Nixon have experimented with a variety of institutional arrangements for selecting judges. Over time, the result has been consolidation of power in the White House, and a diminished role for the Department of Justice and home state Senators.

Prior to the administration of President Jimmy Carter, home state Senators exercised a great deal of control over the selection not only of district judge nominees, but of circuit court judges as well. In the words of Ninth Circuit Judge William Fletcher, nominations in the pre-Carter era were “controlled by the Senate.” California Judge Carolyn Kuhl agreed, noting that nominations to both the district and circuit courts traditionally originated outside the White House with Senators from the appointing state. There was a well-entrenched tradition of deal-making between Senators and Presidents, Judge Fletcher noted, which resembled a patronage system in some respects, and allowed all players to advance personal and policy agendas.

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116 Ibid.
117 Fletcher, William. Personal Interview. 26 February 2009. While some earlier presidents were personally involved in judicial selection – e.g., Franklin Roosevelt – they were typically involved for patronage reasons, i.e., to reward friends and supporters.
118 Law 488.
120 Kuhl, Carolyn. Personal Interview. 25 November 2008. Judge Kuhl was involved in selecting judicial nominees for President Reagan, and was unsuccessfully nominated to the Ninth Circuit by President George W. Bush.
121 Ibid.
give-and-take of the process naturally reduced the contentiousness of debates over individual nominations.

By appointing a presidential nominating commission in each circuit, Carter removed members of the Senate the sway they had previously had over the selection of circuit court judges. As Professor Law puts it, “the balance of power [with respect to circuit court appointments] shifted decisively under Carter and has not been restored since.”122

Carter’s successor, Ronald Reagan, cemented control of all nominations, not just circuit court nominations, in the White House with the creation of a “new joint White House/Justice Department Judicial Selection Committee” that “included key White House staff persons as well as the Attorney General, Deputy Attorney General and the Assistant Attorney General” for the Office of Legal Policy.123 While the committee included members of the Justice Department, it was chaired by the White House Counsel to ensure that the group would “ideologically vet[ ] candidates for judicial office.”124 President George H.W. Bush continued to use this screening process, requiring nominees to submit to extensive interviews by the White House Committee on Federal Judicial Selection.125

Although President Clinton ceded some power over judicial nominations to the Justice Department, creating “a joint Justice Department/White House committee ([known as] the Judicial Selection Group),”126 the Justice Department was involved primarily in vetting candidates’ credentials, while the White House managed the political aspects of the process.127 President George W. Bush returned selection power to the White House; he formed a Judicial

122 Law 488.
123 Goldman, Sheldon. “Judicial Confirmation Wars” 871, 880
124 Ibid.
125 Ibid.
126 Ibid.
127 Slotnick 232
Selection Committee, chaired by White House Counsel Alberto Gonzalez, which developed lists of potential nominees that were presented to President Bush for initial approval.\textsuperscript{128} While the Justice Department coordinated the investigation and vetting of candidates, interviews were conducted in the White House.\textsuperscript{129}

Reagan centralized responsibility for judicial nominations in the White House to ensure that his administration’s “judicial nominees were compatible with [his own] philosophical and policy orientation.”\textsuperscript{130} As subsequent administrations followed suit, the importance of ideology and partisanship in the process increased. Opportunities for give-and-take or negotiations between the president and Senators who held opposing points of view were reduced or eliminated, and the airing of philosophical differences regarding particular nominees was pushed back to the point at which the nominations were considered in the Senate. The contentiousness of the process overall increased.

An additional word must be said about the phenomenon of divided government. Divided government alone does not explain judicial appointment outcomes. Rather, it is the closeness of the division within the Senate – not simply the fact that different parties control the White House and the Senate – that is relevant to the analysis.\textsuperscript{131} As Professors Law and Solum note, for example, although in the second half of his first term and the beginning of his second term, President George W. Bush worked with a Republican-controlled Senate, he nonetheless encountered stiff opposition in connection with judicial nominations.\textsuperscript{132} Similarly, although President Clinton had a Democratic majority in the Senate during the first two years of his first

\textsuperscript{128} As had become customary, names of possible nominees for the district court were submitted by home state Senators, while names of potential circuit court appointees were generated internally within the administration. \textit{Ibid.}
\textsuperscript{129} \textit{Ibid.}
\textsuperscript{130} Goldman 880
\textsuperscript{131} Law 512
\textsuperscript{132} Law and Solum 75.
term, he had difficulty confirming circuit court nominees. Law and Solum explain President Bush’s difficulty confirming nominees by comparing his relatively conservative philosophy with that of the “median” Senator; in a Senate where Republicans held only a narrow majority, the large number of relatively liberal Senators (presumably Democrats), coupled with a group of moderate Senators (some of whom were Republicans), moved the ideological “median” to the left, and made opposition – even filibuster – of conservative nominees more likely.

Thus, it is not so much party affiliation, but the relative ideological views of the president and Senators involved in the confirmation process that matters. It is not possible to capture this information statistically. Nonetheless, “party identification . . . conveys some rough information about [presidential and Senatorial] ideological leanings [because,] while neither party may fit anyone perfectly, legislators can be expected to choose their party affiliation based on the extent to which they share the policy goals of other party members. Party membership therefore offers an imperfect, but convenient, means of situating individual political actors relative to one another on the ideological spectrum.” This is particularly true since the ideological gap between the Democratic and Republican parties has grown steadily wider since the time Ronald Reagan was president.

The impact that closely divided government has on judicial nominations is perhaps best captured by the data on roll call votes during the George H.W. Bush, Bill Clinton and George W. Bush administrations. At times when there have been fewer than 49 Democratic Senators, 16.92% of judicial nominees received roll call votes. At times when there have been more than 51 Democratic Senators, only 1.52% of nominees were confirmed on a roll call vote. But in

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133 Law and Solum 89.
134 Law and Solum 90
135 Law and Solum 82.
periods where there were 49 to 51 Democratic Senators – i.e., a closely divided chamber – the percentage of roll call votes jumped to 43.64%.

The factors that have contributed to increasing contention in judicial selection in the last twenty years are not likely to change soon. It is unlikely, for example, that the role of the lower federal courts in deciding important social and political issues will diminish, just as it is unlikely that interest groups will cease attempting to affect the make-up of the courts. Campaigns have become more – not less – sophisticated in their use of elite mobilization strategies, and close ideological and party divisions in the Senate reflect the ongoing “red-blue” make-up of the country. As a result, and absent process reform, judicial nominations will likely remain contentious for the foreseeable future. Before examining possible models for reform, therefore, it is appropriate to ask whether this matters.

The Results of Contentiousness

As one observer noted, the confirmation process, at least at the Supreme Court level, has begun to resemble “an election campaign, a media event complete with an avalanche of stump speeches and a bombardment of negative advertising, all accompanied by extensive direct mail advertising, campaign buttons, and solicitation of funds.” Sheldon Goldman argues that it is not yet known whether heated Supreme Court battles and contentious lower court nominations have undermined public confidence in the courts. He offers, in fact, “[a] contrarian perspective on contentiousness, obstruction, and delay” – namely, that it reflects “Republicans

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136 Statistics compiled by the author from data gathered from the ABA Standing Committee on the Federal Judiciary and Thomas.
138 Goldman, Slotnick, Gryska and Schiavoni 275
and Democrats . . . engaged in debating public policy and the role of the judiciary,” which is precisely the type of debate “one expects from a vibrant democracy.”

Whatever its impact on public perception of the impartiality and independence of the courts, it appears clear that the contentiousness of the confirmation process has discouraged some qualified applicants from seeking appointment. While other factors – such as workload and low salaries – contribute, there is anecdotal evidence that the prospect of enduring a confirmation battle has deterred qualified individuals from applying. Chief Justice William Rehnquist raised the problem in his 2001 Year-End Report on the Federal Judiciary, noting that it had become “increasingly difficult to find qualified candidates for federal judicial vacancies” in part because of “the often lengthy and unpleasant nature of the confirmation process.”

Professor David Vladeck of Georgetown University Law School has commented that “the intensively partisan nature of today's appointment process is a serious disincentive for even the most highly qualified individuals to throw their hat into the judicial-appointment ring. Not only does the process threaten to be emotionally bruising, but many nominees also have to place their careers on hold for a year or more while the process grinds ahead, only to be rejected for political reasons or to see their nominations lapse because Congress goes out of session or the President's term expires.”

Brooklyn Law Professor Jeffrey Stempel has similarly observed:

Once a crowning jewel capping a distinguished career, many view appointment to the bench as an unattractive job offering poor working conditions and inadequate compensation. In addition, the confirmation process has become more politicized both in terms of the ‘vetting’ of nominees, a practice that may discourage some candidates, and the more conscious consideration of their political orientation.

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139 Goldman 902
These concerns are borne out by interviews of sitting judges. Ninth Circuit Judge Richard Paez, for example, who survived one of the lengthiest and most contentious confirmation battles in recent memory, confirmed that he found the process personally difficult. Judge Carolyn Kuhl, who declined to be re-nominated by President George W. Bush, said that she thought long and hard about whether to allow her name to be put forward again, but decided against it because “her husband had had it with the process,” and her continued status as a nominee led to many awkward moments when lawyers appearing before her in state court constantly offered to lobby Senators on her behalf. Similarly, Ninth Circuit Judge William Fletcher, appointed by President Clinton, called the process “nasty,” “dishonest,” and “distorted.”

Individuals seeking appointment to the bench have long known that they must open their private lives to scrutiny during the vetting process. They often opt not to participate, however, where there is a risk that their good name and reputation will be sullied. As Ninth Circuit Judge Milan Smith noted, “there are people who would never think of being a judge because their careers would be destroyed if they raised their heads above the sand.”

In addition to discouraging good candidates, it is clear that delays in confirming judges have also delayed the disposition of cases and led to mounting workload pressures on judges. In 1992, more than sixty-one percent of the federal judges responding to a Federal Judicial Center survey rated delay in filling judicial vacancies a “grave” or a “large” problem. That same year, Chief Justice Rehnquist said that “[t]here is perhaps no issue more important to the

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146 Smith, Milan. Personal Interview. 25 February 2009.
judiciary right now than this serious judicial vacancy problem."^{148} In 1997, and again in 2001, Chief Justice Rehnquist raised the issue in his Year-End Report on the Federal Judiciary.\(^{149}\) Between 1970 and 1992, the vacancy rate in the circuit courts almost doubled; the vacancy rate in the district courts more than doubled. During this period, vacancies in the district courts averaged 8%; they reached a high of 17% in 1992. Vacancies in the court of appeals averaged 7%.\(^{150}\) Several authors attribute the vacancy problem more to executive branch delay in nominating individuals to fill vacant judgeships than to Senate delay in confirming them.\(^{151}\) While this may be true, Hennemuth and Magnum found that the wait time from vacancy to nomination increased only 52% between 1979 and 1992, while the time from nomination to confirmation by the Senate increased 115%. This trend shows that the increasing contentiousness of the confirmation process is contributing to the courts’ vacancy problem in a statistically significant way.\(^{152}\)

It thus appears that there are real-world negative consequences that flow from the contentiousness present in the federal judicial selection process. To determine whether there is any appropriate remedy for the problem, I next examine a variety of potentially relevant selection models.

**Judicial Selection Models: United States and Abroad**

150 Hennemuth, Jeffrey and Mangum, A. Fletcher. “Judicial Vacancies: An Examination of the Problem and Possible Solutions.” Mississippi College Law Review 14 (1994): 319, 323
152 Hennemuth and Magnum 329-30
In prior sections of this paper, I concluded that partisan and ideological concerns are properly considered in making judicial selection decisions, but demonstrated that the contentiousness of the federal judicial selection process has presently increased beyond acceptable limits to the point that, during the study period, almost 50% of all nominations qualified as “contentious.” I also discussed why it is important, if possible, to reduce the level of contentiousness. I now examine existing selection models to determine what, if any, lessons they offer for reducing the level of contentiousness in the federal confirmation process.

**Selection Models in the States**

At present, states in the United States use one, or some combination, of four judicial selection methods: appointment by the governor; partisan election; non-partisan election; or selection by a merit selection commission. Some states use different methods for selecting trial judges than they do when appointing appellate judges. Table 15 details the variety of judicial selection methods presently used in the states.

*Table 15 – Selection Methods for Initial, Intermediate and Last Resort Courts*

<table>
<thead>
<tr>
<th></th>
<th>Merit</th>
<th>Partisan Election</th>
<th>Non-Partisan Election</th>
<th>Gubernatorial</th>
<th>Legislative</th>
<th>Combined</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trial</td>
<td>17</td>
<td>9</td>
<td>17</td>
<td>2</td>
<td>2</td>
<td>4</td>
<td>51</td>
</tr>
<tr>
<td>Intermediate</td>
<td>18</td>
<td>6</td>
<td>11</td>
<td>2</td>
<td>2</td>
<td>0</td>
<td>39^a</td>
</tr>
</tbody>
</table>

153 In more recent years, the number has exceeded 50%. During President Clinton’s second term, 52.52% of all nominations were “contentious.” This figure declined slightly during President George W. Bush’s first term to 49.44% but increased substantially to 62.10% during his second term.

154 Because, once appointed, federal judges serve for life or good behavior, state methods of determining whether sitting judges should continue in office (i.e., be retained) are beyond the scope of this paper.


156 *Ibid*.
This number does not equal 51 because not all states have intermediate appellate courts.

SOURCE: Recreated by author from data from the American Judicature Society

As can be seen, an equal number of states presently use merit selection and nonpartisan elections to select trial judges; a significantly smaller number use partisan elections or appointment by the governor or legislature. The prevalence of merit selection increases at the appellate and court of last resort levels. Although at the trial court level, the number of states that employ merit selection is equal to the number that select judges in nonpartisan elections, the number using merit selection increases at the intermediate appellate level, and exactly half the states use merit selection – as opposed to one of multiple other alternatives – to select members of the state high court. These statistics actually understate the prevalence of merit selection, as states that are classified as executive or legislative appointment states tend to employ some form of merit selection committee – however partisan or non-binding – to recommend candidates to the appointing authority. The fact that these appointive systems incorporate merit selection in some form, and that states use merit selection more than other selection mechanisms at virtually every court level, indicates that the concept has gained legitimacy. The experience in the states, therefore, suggests that incorporating some aspects of merit selection into the federal appointments process would be viewed as legitimate by a majority of the public.

Certain aspects of the federal process are constitutionally mandated, of course, and would be difficult to change. The question thus becomes whether adding certain state practices or using them in tandem with the federal constitutional process would be effective in reducing contentiousness. One fact that can be gleaned from the states’ experience with merit selection is that retaining some role for the public in selecting judges is important to satisfy the public’s
desire for accountability. It is for this reason that several states elect their trial judges but use merit selection to appoint appellate and court of last resort judges.

Florida is an example of this pattern. Florida uses merit selection to fill vacancies on the Supreme Court and Courts of Appeals. State trial judges are selected in non-partisan elections, however, unless a majority of the voters in the jurisdiction approves merit selection and retention as a local option. Like the history of federal judicial selection reviewed earlier, this pattern of electing trial judges demonstrates that any attempt to exclude partisan or ideological considerations from the federal judicial selection process would not only be unsuccessful, but be bad from a policy perspective as well. As Goldman has noted, having presidents and Senators debate the merits of candidates’ ideology serves a legitimate function in a representative democracy just as electing trial judges does in the states.

It is also clear from the states’ experience that the composition of a merit selection committee is key to the legitimacy of the appointments process. Merit selection commissions in most states have lawyer and/or judge members as well as non-lawyers appointed by the governor. In Missouri, for example, members of trial and appellate merit selection commissions include a sitting judge, attorneys selected by the bar, and non-lawyers appointed by the

159 Goldman. “Judicial Confirmation Wars.” 902.
governor. The lawyer members are chosen in bar association elections and typically represent a mix of plaintiff’s and defense attorneys. The composition of the selection commissions in Florida was similar to Missouri’s prior to 2001, in that the governor and the Florida Bar Association appointed an equal number of members, who then selected the remaining members. As a result of legislation passed that year, however, the governor was given authority to appoint all of the commission members. The only limitation on this power is a requirement that lawyer members come from a list provided by the bar association.

In Massachusetts, there is no statutory or constitutional mandate that the governor use merit selection commissions in making judicial appointments. All governors since 1975 have done so, however. As in Missouri and Florida, the members of the Massachusetts commission are lawyers and non-lawyers appointed by the governor. Maine governors too have, since at least the 1990’s, voluntarily appointed a judicial selection committee to recommend nominees for possible appointment. In a break from the practice in most states,

160 Missouri Constitution, Art. V., § 25(d)
163 Rodriguez 17. If the governor does not wish to appoint any of the individuals nominated by the bar, however, he has the power to require the bar association to submit new names. Salokar, Rebecca Mae and Kimberly A. Shaw. “The Impact of National Politics on State Courts: Florida After Election 2000.” Justice System Journal 23 (2002): 57, 61.
165 Ibid.
all members of the merit selection commission under Governor Baldacci have been practicing lawyers.\textsuperscript{167}

Although California utilizes a hybrid system of elections and gubernatorial appointment to select its judges, the governor retains substantial power to fill positions on the state court bench.\textsuperscript{168} In making appointments, the governor does not use the type of merit selection commission found in Missouri, Florida, Massachusetts and Maine. Rather, the governor is statutorily required to submit the names of both appellate and trial court nominees to a State Bar commission, known as the Commission on Judicial Nominees’ Evaluation (JNE Commission), for investigation and evaluation prior to appointment.\textsuperscript{169} Like the commissions appointed by governors in most other states, the JNE Commission is comprised of lawyers and non-lawyers. Unlike these commissions, the State Bar is statutorily empowered to make the appointments.\textsuperscript{170}

The state models suggest that the public is more likely to accept the involvement of a merit selection commission in judicial selection if it has representation from both the legal community and the public sector.\textsuperscript{171} To demonstrate to the public that the commission is publicly accountable, and that the candidates it selects will not be out of the mainstream of

\textsuperscript{167}Ibid.

\textsuperscript{168}In California, the governor appoints judges to fill vacancies on the Supreme Court and courts of appeal; they sit until the next general election, when they must run in a non-partisan retention election to retain the seat. Cal. Const. art. VI, § 16(a); Cal. Elec. Code § 9083; American Judicature Society. “California: Current Methods of Judicial Selection.” <http://www.ajs.org/js/CA_methods.htm> (last visited Dec. 2, 2008). Wiseman, Rebecca. “So You Want to Stay a Judge: Name and Politics of the Moment May Decide Your Future.” \textit{Journal of Law and Politics} 18 (Summer 2002): 643, 646-47. The governor also appoints judges to fill vacancies on the state’s trial courts. Trial judges appointed by the governor must run in non-partisan contested elections at the next general election; if no one files to run against them, the judges’ names do not appear on the ballot, and they are automatically elected. Individuals not appointed by the governor may challenge sitting judges or run for an open seat in these periodic elections. Cal. Const. art. VI, § 16(a); Cal. Elec. Code § 9083.

\textsuperscript{169}Cal. Gov’t Code § 12011.5. Appellate court appointees must also be confirmed by the Commission on Judicial Appointments. Cal. Const., art. VI, § 16(d); Kiley 2. This non-partisan body is comprised of the Attorney General, the Chief Justice, and the senior appellate justice for the district in which the new judge will sit. Cal. Elec. Code § 9083; Current Methods of Judicial Selection; Wiseman 646-47.

\textsuperscript{170}Cal. Gov’t Code § 12011.5

\textsuperscript{171}Lawyers and judges are perhaps in the best position to evaluate the legal knowledge, temperament and integrity of judicial candidates, while members of the public are in the best position to protect against the cronyism that could infect a committee drawn only from the legal community.
political thought, it is also important for political officeholders to appoint at least some of the commission members. Finally, officeholders have to buy in to the involvement of a commission in the appointments process if it is to have any impact.

More fundamentally, it is important that elected officials retain control over the ultimate appointment decision. In effect, merit selection commissions operate as a control on political motivations to ensure that appointees are minimally qualified in the traditional sense (i.e., in terms of legal knowledge, temperament and integrity). Most merit selection systems are structured in such a way, however, that ultimately, the appointment decision is in the hands of a politician who is accountable at election time to the public. Thus, in Missouri, the governor appoints from three nominees submitted by the commission. In Florida, the governor picks from among three to six nominees recommended by the judicial nominating commission. Both Maine’s and Massachusetts’ governors similarly retain ultimate authority to appoint individuals to the bench. In Massachusetts, the governor appoints judges from nominees selected by the commission, with the concurrence of the executive council, a constitutionally authorized group that advises the governor on various types of issues. In Maine, based on the recommendations of the commission, the governor nominates judges who are appointed with the advice and consent of the state Senate.

In California, the ultimate appointment decision lies even more completely with the governor. Although obligated to solicit and consider the input of the JNE commission regarding

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172 If the governor fails to make an appointment within sixty days after the list is submitted, the nonpartisan judicial commission is empowered to fill the vacancy. Missouri Constitution, Art. V., § 25(a).<http://www.moga.mo.gov/const/T05.HTM> (last visited Nov. 9, 2008).
173 Florida Constitution, Art. V., § 11(a)
a prospective nominee, the governor may appoint any candidate he chooses. If he appoints a candidate to the trial court who received a “not qualified” rating from the commission, however, the State Bar may publicly disclose that fact. Additionally, a representative of the commission testifies at the confirmation hearing of each appellate and Supreme Court justice and reveals the rating the candidate received at that time. As a result, the commission effectively serves as a check on the governor’s appointment power in the same manner as the merit selection commissions in Missouri and Florida, where the governor must appoint from the names forwarded by the commission. In all three states, however, ultimate authority for the appointments lies in the hands of an elected official.

Selection Models Abroad

Just as the selection methods used in the various states are instructive in evaluating changes to the federal judicial selection process, so too it may be helpful to look to the manner in which other common law countries appoint judges. While a comprehensive survey is outside the

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178 The experience in these states is in sharp contrast to judicial selection in states like Texas. Texas judges are elected. Although the Texas constitution does not mandate partisan judicial elections, the state’s general election law encourages – almost compels – judges to affiliate with a political party and run as partisan candidates. Beginning in the 1970’s, the cost of judicial elections skyrocketed. Douglass, Susan G. “Comment, Selection and Discipline of State Judges in Texas.” Houston Law Review 14 (1977): 672, 674-75. Tex. Elec. Code §§ 142.002, 142.007. Becker, Daniel and Malia Reddick. “Judicial Selection Reform: Examples from Six States.” American Judicature Society (2003). <http://www.ajs.org/js/jsreform.pdf> (last visited April 15, 2009): 19, 21-22. The result of the escalating financial contributions was predictable. Cases in which a judge decided in favor of a litigant or lawyer who had contributed heavily to his campaign were widely publicized, and public confidence in the courts fell. This downward spiral culminated in 1987, when the Texas Supreme Court declined to review an $11 billion judgment in favor of Pennzoil and against Texaco. Pennzoil’s lawyers had contributed far more to the campaigns of sitting Supreme Court judges than had Texaco’s. Champagne, Anthony and Kyle Cheek. “The Cycle of Judicial Elections: Texas as a Case Study.” Fordham Urban Law Journal 29 (2002): 907, 913. Despite public concern, proposals for merit selection have been rejected by the voters. Becker and Reddick 22-23.
scope of this paper, I have examined judicial selection in England and Canada, with whom America has both historic and geographic ties.

In Britain, judges were historically selected by the Lord Chancellor. Working with staff, the Lord Chancellor selected judges using a process known as “secret soundings.” He consulted confidentially with sitting members of the judiciary and senior members of the bar, obtained their “anonymous subjective views,” and picked judges using “a mysterious system of osmosis and grapevine.” The result was a bench that comprised primarily of “male[s], from upper-middle class families, [who were] educated in [private] schools, [were] graduates of Oxford or Cambridge, and [were] Conservatives.” Almost all were Barristers (the most elite members of the British legal profession) and Queen’s Counsel – “a narrow pool of lawyers with strikingly [similar and] homogeneous backgrounds.” Consequently, there was little diversity of viewpoint, race, or gender among judicial officers. The system “encourage[ed] self-replication of the bench” because the Lord Chancellor turned to those already appointed to advise him on new appointees. This “skew[ed] the judiciary and inhibit[ed] efforts to increase its representativeness.” It also eliminated from consideration lay advocates and solicitors, who were not known to, and/or not respected by, those advising the Lord Chancellor.

Complaints that the system lacked transparency and was elitist led to passage of the Constitutional Reform Bill of 2005, which introduced “independent, non-governmental

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180 Because the Lord Chancellor solicited the views of other judges and members of the bar in determining whom to appoint, the criteria for selection were often no more rigorous than whether those being consulted thought the candidate was a “good chap.” Kenney, Sally J. “United Kingdom's Judicial System Undergoes Major Reform.” *Judicature* 87 Judicature (Sept.-Oct. 2003): 79, 82.
181 Maute 396-7; see also Maute 396
183 Kenney 81
184 Maute 397
185 Traditionally, solicitors were lower-tier members of the legal profession, who performed services other than advocacy in the courts; today, solicitors can appear in the High Court as solicitor-advocates.
These were a Supreme Court Selections Commission, charged with selecting candidates to fill Supreme Court vacancies, and a Judicial Appointments Commission (JAC), responsible for handling appointments to the lower courts. Like the selection commissions in various states of the United States, Britain’s commissions include judges, lawyers, and laypersons. Unlike a majority of the judicial selection commissions in the United States, however, members are not selected by the appointing authority but rather through an “open competition” by “meticulously-structured selection panels.”

Although the Lord Chancellor retains the right to reject candidates recommended by the commission and to seek reconsideration of any particular recommendation, he cannot select a candidate who has not been put forward by the commission. The commission structure adopted by Britain in 2005, therefore, incorporates many of the elements present in the state judicial selection models previously discussed—while the ultimate appointment decision rests with a political figure, the selection commission acts as a restraint on that individual’s ability to exercise complete and unfettered discretion in picking judges.

Another interesting aspect of the Reform Act of 2005 is its specific identification of “merit” and “diversity” as goals of the selection process. In enacting reforms to the

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189Maute 414
appointments process, Britons were concerned not so much about ensuring that appointees were objectively qualified to sit as judges as about making the selection process more transparent and the bench more representative of the diversity of the country. To achieve these objective, the Reform Act states that the “[s]election must be solely on merit.”\(^{190}\) At the same time, however, the Act mandates that “in performing its functions under this Part, [the Commission] must have regard to the need to encourage diversity in the range of persons available for selection for appointments.”\(^{191}\) To clearly establish the hierarchy between these potentially conflicting goals, the statute makes the diversity requirement “subject to” the merit requirement.\(^{192}\)

These goals are surprisingly comparable to those adopted by certain of the states. In Massachusetts, for example, the governor’s selection commission is charged with evaluating candidates for “intellect, integrity, work ethic, judgment, temperament, experience, competence and the demonstrated capacity and commitment to sensibly, intelligibly, promptly, impartially and independently interpret the laws and administer justice.”\(^{193}\) It is also charged with ensuring racial, gender and geographic diversity among appointees to the bench.\(^{194}\) Whether nominating commissions incorporated in the federal selection process could address more than legal knowledge, temperament and integrity without undermining their legitimacy is unclear. Before they could do so, there would have to be general agreement among the political participants in the process that it was proper to take race, gender and other diversity factors into account.

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\(^{193}\) Executive Order No. 500

\(^{194}\) Ibid.
Absent such agreement, employing diversity criteria might undermine the legitimacy of the commissions’ work. \(^{195}\)

Canada originally modeled its judicial selection methodology on Great Britain’s, providing that the head of state would appoint judges with advice from the executive branch. \(^{196}\) In practice, provincial trial and appellate judges are appointed by the minister of justice, with the prime minister appointing chief justices. \(^{197}\) Appointments to the federal courts are made by the minister of justice and the prime minister, who consult with other ministers, including regional ministers, as necessary. \(^{198}\)

Historically, the Prime Minister and the Cabinet had complete discretion when appointing federal judges, \(^{199}\) and used that power to reward political supporters or members of their political party. \(^{200}\) Concerns about the patronage aspects of the appointments system led to modification of the appointments process in 1988. The minister of justice created the Office of the Commissioner for Federal Judicial Affairs (OCFJA) to solicit applications from individuals interested in appointment, determine whether the applicants meet minimum qualifications, and

\(^{195}\) It is notable, however, that both in Britain and certain American states, diversity of bench officers has been identified as a goal of the selection process.


\(^{197}\) Technically, the Constitution Act, 1867 provides that these appointments will be made by the Governor General, who is the representative of the Queen of England and performs all ceremonial functions that the monarch would perform if she were present in the country. While all political power in Canada is exercised by the Prime Minister and the House of Commons, the Governor General must give “royal assent” to any piece of legislation before it becomes law. She follows the direction of the Prime Minister in appointing members of the Cabinet and judges. Riddell, Troy, Lori Hausegger, and Matthew Hennigar. “Federal Judicial Appointments: A Look at Patronage in Federal Appointments Since 1988.” University of Toronto Law Journal 58 (Winter 2008): 39, 43. Makarenko, Jay. “Government & Institutions, Office of the Governor General of Canada.” <http://www.mapleleafweb.com/features/office-governor-general-canada#government> (last visited Dec. 9, 2008)

\(^{198}\) Riddell, Hausegger, and Hennigar 43. Once again, the Constitution Act, 1867 provides that these appointments will be made by an order in council signed by the Governor General. An order in council is used to implement decisions of the Cabinet or the Prime Minister that do not require the approval of the Parliament. Brennan, Denise. “Government & Institutions, Crown Corporations in Canada.” <http://www.mapleleafweb.com/features/crown-corporations-canada> (last visited Dec. 9, 2008). Orders in council are issued by the Governor General of Canada. Munroe, Susan. “Orders in Council.” <http://canadaonline.about.com/cs/cabinet/g/orderincouncil.htm> (last visited Dec. 9, 2008)

\(^{199}\) Neudorf 56-57; Comparison of the Judicial Role 17-18

\(^{200}\) Riddell, Hausegger, and Hennigar 43; Neudorf 58.
refer those who do to advisory committees in each province and territory that rate the applicants. The members of the advisory committees are overwhelmingly lawyers and judges, although there are some non-lawyer members as well.\(^{201}\) They are appointed by the courts, bar associations and territorial and federal officeholders. In this regard, the committees are reminiscent of the merit selection commissions found in the several states; courts and bar associations have some control over their membership, as do elected officeholders. Additionally, members are both lawyers and non-lawyers.

Unlike the Lord Chancellor in Britain, and governors in certain of the states, the Canadian minister of justice is not prohibited from appointing a candidate who has not been recommended by the committees. Nonetheless, ministers have generally committed voluntarily to appoint only candidates who have been recommended or highly recommended.\(^{202}\) It is important to note, moreover, that the advisory committee system is not constitutionally or statutorily mandated and could be eliminated at any time.\(^{203}\) In this respect, it provides a more relevant model for federal judicial selection than Britain and states other than Massachusetts and Maine. Overall, the experience in Canada demonstrates that stakeholders – most particularly, the appointing authority – must be convinced that the public perceives a problem that requires fixing before they will act voluntarily to limit their own discretion in selecting judges.

Having sampled existing selection models to determine what they suggest about possible modifications to the federal process, it is now appropriate to consider a recent reform proposal.

\(^{201}\) The committees include a representative of the provincial or territorial law society, a representative of the provincial or territorial branch of the Canadian Bar Association, a representative of the Chief Justice of the province or the Senior Judge of the territory, a representative of the provincial Attorney General or territorial minister of justice, three representatives of the federal minister of justice (two of whom must be non-lawyers); and an ex officio non-voting representative of the OCFJA. Riddell, Hausegger, and Hennigar 46.

\(^{202}\) The minister of justice can request that a committee reevaluate a candidate and can also solicit supplemental input from judges or lawyers, provincial justice ministers, or the Chief Justice of the court to which the candidate seeks appointment. \textit{Ibid.}

\(^{203}\) Neudorf 55.
promulgated by the American Bar Association, and thereafter to offer thoughts and recommendations for reducing contentiousness to a level that will eliminate unnecessary delay and return an element of bipartisanship to federal judicial appointments.

ABA Resolution 118

The American Bar Association’s House of Delegates recently adopted a resolution proposing modifications to the existing federal judicial selection process designed to address excessive contentiousness in the process. Denise Cardman, the ABA’s Deputy Director for Governmental Affairs, explained ABA President Tommy Wells’ decision to focus on this issue as follows:

[S]ince the 103rd and 104th Congress, there ha[d] been . . . increased politicization . . . more and more nominees were getting hung up having to wait for a hearing, or when there was a hearing, there would be scathing rhetoric used against them. Instead of members of the Senate working with the President to [identify and appoint] good nominees, it was all about politics, what you could do to advance your nominee, or what you could do to destroy the nominee of the other party. This created a number of vacancies.

Wells wanted the ABA House of Delegates to pass a resolution that he could present to the 2008 presidential candidates for their consideration; he wanted to secure a commitment from the candidates that they would incorporate the procedures set forth in the resolution in their judicial selection method if elected. Wells appointed a Judicial Nomination Task Force that included lawyers, judges and judicial appointments scholars to define the scope of the problem, and craft modifications that would reduce contentiousness for both district and appellate nominees.

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204 Cardman, Denise. Personal Interview. 20 February 2009. Saferstein, Harvey. Personal Interview. 18 February 2009. Harvey Saferstein, a Los Angeles lawyer who was a member of the task force, reported that Wells “wanted to revisit some of the issues around the appointment of judges, to make it less contentious, and better and faster because he thought that the process was deterring good people from applying, and was injurious to the system.”

205 Cardman, Denise. Personal Interview. 20 February 2009

206 Wells and every judge and scholar with whom I talked believes that the process has grown more contentious. It is probably for this reason that the task force bypassed a definition of the scope of the problem.
The committee first met in January 2008. Russell Wheeler, principal author of the resolution the task force ultimately produced, reported that members were leery about characterizing the nature or level of partisanship in the current process because they did not want to alienate the officeholders they were attempting to influence. Thus, neither the resolution nor the accompanying report discusses or adopts existing proposals for reducing contentiousness such as eliminating Senators’ blue slip right, processing nominations within a set period of time, or foregoing roll call votes on lower court nominees.207

The task force also made other strategic decisions to encourage political acceptance of the proposal. It first decided not to advocate a return to the mandatory rating of candidates by the ABA Standing Committee on the Federal Judiciary. President Bush announced in 2001 that his administration would no longer send candidates’ names to the ABA for pre-nomination evaluation and would treat the organization like other "interest groups and individual citizens," which are able to comment on nominees only after they have been sent to the Senate.208 Harvey Saferstein, a member of the task force, acknowledged that in a perfect world, “[the task force] would [have] love[d] to have the ABA back in the process.” It ultimately concluded, however, that such a proposal would detract from the balance of the recommendations being made. The task force also decided to suggest that Senators establish bipartisan commissions in their states because it believed that the commissions would encourage bipartisan input at the front end of the process, give nominees a “good housekeeping seal of approval,” and help to ensure their confirmation.

The product of the task force’s work was Resolution 118, a politically sophisticated proposal that demonstrated an understanding of the complicated dynamic of judicial nominations.

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208 Little 37; Tartt 128
under Presidents Clinton and Bush, the impact of divided government and the influence of
interest groups. Resolution 118 advanced four proposals to accelerate the confirmation process
and return control of aspects of the selection of district and circuit court nominees to home-state
Senators.

First, the resolution recommended that Senators establish bipartisan state commissions to
identify and recommend nominees for appointment in their state. The task force believed
that a bipartisan committee would be particularly well situated to identify partisan or ideological
problems with potential nominees at an early stage, and thus to ensure that the most controversial
nominees did not move forward. It hoped that the bipartisan committees would vet candidates
against a set of relatively neutral, non-partisan criteria. The report noted that currently
“senators in eight states . . . use[d] commissions . . . to screen potential district judge nominees”
and suggested that the use of such groups be expanded to encompass the recommendation of
nominees for the appellate courts as well.

Second, the resolution urged that judges be requested to announce the date on which they
plan to take senior status or resign from the bench, so that the President would have enough time
to consult with the home state Senators, and the Senators would be able to solicit input from the
bipartisan commissions. The Federal Judicial Conference has already adopted a policy asking
that judges announce their “change of status” at least 12 months prior to retirement or election of

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209 The resolution urged that Senators jointly establish committees to “provide bipartisan assistance to senators and
to the President in identifying nominees.” The task force contemplated that commission members would
independently identify candidates in addition to vetting candidates suggested by the Senators.
210 The task force noted that the appointment of commissions to vet potential judges and recommend candidates to
those responsible for making the appointments had, by most accounts, improved the judicial selection process in the
states (Appendix A, pg. 2).
211 “This recommendation urges that the two senators in every state jointly appoint truly bipartisan commissions of
lawyers and non-lawyers to develop lists of potential district judge nominees for the consideration of the senators
and the White House. When a state’s senators are of the same political party, it may be appropriate to share the
appointing authority with legislators and others in the state of the opposite party.” (Appendix A, pg. 2)
212 ABA Resolution 118 Report to the House of Delegates. (Appendix A, pg. 2)
senior status. The task force underscored the importance of such notification, and noted that
many judges already provide advance notice “pursuant to the United States Judicial Conference’s
suggestion.”

Third, the resolution recommended that, in selecting circuit court nominations, the
president should “consult, before deciding on nominees, with the Senate leadership and home
state senators of both parties.” Interviews with sitting judges and judicial nomination experts
indicate that this practice has rarely been followed.

Finally, Resolution 118 called for “expeditious action by the president and senate [on a
nomination] if a nominee passes the bipartisan commission.” According to Saferstein and
Wheeler, the task force felt that nominees who had earned a “good housing keeping seal” of
approval by securing the recommendation of a bipartisan committee should be deemed qualified
and not contentious, and be expeditiously confirmed. Wheeler also expected that the bipartisan
commissions would “weed out candidates unlikely to be confirmed.”

This view is borne out by experience with bipartisan commissions that operated during
the Bush administration in California, Colorado, Florida, Georgia, Hawaii, Texas, Washington
and Wisconsin. Wheeler, who has studied the success of these commissions, reports that
Senators in these states had more success recommending nominees than their colleagues in non-

214 The report accompanying the resolution noted that “such consultation, far from compromising the President’s
authority to nominate judges, would serve that authority well, helping to avoid battles whose costs outweigh their
benefits to the President, the Senate, the nominees, and the courts on which they may serve.”
Such consultation has been the norm for district court nominations. When he was nominated to the district court, for
example, Judge Brock Hornby was one of three candidates submitted by the Maine Senators to the President for
216 Wheeler, Russell. "Bush 2 District Court Appointees from Commission and Non Commission States." Brookings
Institute Memo, Unpublished.
217 Two of the bipartisan state commissions cited by Wheeler are no longer in existence – Pennsylvania (indeed, it is
not clear that Senators Casey and Specter ever formed a commission) and Colorado (Senator Salazar is now in the
Obama administration).
commission states. There are, of course, exceptions. James Rogan, a California Superior Court Judge and a former congressman, was unsuccessfully nominated by President Bush for the California district court after being recommended by a Judicial Advisory Committee established jointly by President Bush and Senators Dianne Feinstein and Barbara Boxer.\footnote{United States. Senator Diane Feinstein. “Senators Boxer and Feinstein Announce Bipartisan Judicial Nomination Panel.” May 22, 2001. <http://feinstein.senate.gov/releases01/judicial_nomination_panel.html> (last visited April 15, 2009); The committee was generally known as the “Parsky Committee,” because all recommendations made by the committee had to be approved by Gerald Parsky, the President’s point person on judicial nominations in California. The make-up of the committee was as follows: “The Judicial Advisory Committee will be comprised of four six-member subcommittees – one for each judicial district in the state. Each subcommittee will have one member selected by Senator Boxer, one selected by Senator Feinstein and one jointly by both Senators along with three members named by Gerald Parsky, President Bush’s State Chair for judicial appointments.” The committee operated as follows: “Each Subcommittee will be responsible for naming three to five possible nominations for a vacancy in that Subcommittee’s jurisdiction. To move a candidate forward a majority vote is required. Once the selections have been made, Parsky will review them and forward them to the White House for final selection.”} Rogan’s nomination was anomalous, however; of the twenty-five candidates recommended by the Judicial Advisory Committee in California, he was the only individual who was not confirmed. This can be traced to unique political factors that made Rogan’s nomination controversial – in the words of Senator Boxer’s spokesperson, “Rogan was one of the most enthusiastic backers of impeachment – he thought President Clinton had committed high crimes and misdemeanors.”\footnote{Rogan, James. Personal Interview. 27 February 2009. Boxer also believed that Rogan’s strongly conservative positions on gun control, abortion and other issues put him “out of step with California.” Goldmacher, Shane. “Boxer v. Rogan.” The Sacramento Bee. 29 November 2007. <http://www.sacbee.com/static/weblogs/capitolalertlatest/009366.html> (last visited April 15, 2009).} Because of this, and pressure from various interest groups, Senator Boxer blocked his nomination despite the fact that her representatives on the Judicial Advisory Committee had, with other members, unanimously recommended his appointment.

Once passed by the ABA House of Delegates, Resolution 118 generated immediate public debate. On August 14, 2008, the Wall Street Journal ran an op-ed entitled “The ABA Plots a Judicial Coup.” Observing that “some bad ideas never die,” the Journal suggested that the bipartisan commissions the ABA had recommended would simply “institutionalize the role of home-state Senators as Presidential equals in nominating federal judges” and “steadily...
march[] . . . courts to the left.” 220 A Los Angeles Times editorial entitled “The ABA Way to Pick Judges,” countered that the resolution “would improve the quality of the federal judiciary without infringing on the constitutional prerogatives of the president or the Senate,” and would reduce the “ tiresome partisan tit-for-tat in the Senate that has blocked the confirmation of qualified and moderate judicial nominees.” 221 The Times observed that “the vast majority of the work done by federal judges . . . doesn’t involve hot-button social issues” and that only the “judge's intelligence and sense of fair play, not his or her ideology” matters.

Despite the divided media attention it garnered, the ABA’s proposal was a modest one. By limiting the recommended modifications to the creation of bipartisan commissions and prompt action on nominees recommended by those commissions, the ABA recognized the inherently political nature of the nomination and confirmation process. As Professor Judith Resnik, a member of the task force, commented, the resolution was “carefully drafted” to ensure that there would be “robust” interaction between the Senate and President. 222 It thus recognized, and did not attempt to alter, the inherently political nature of the “advice and consent” procedure established in the Constitution. It proposed merely to counterbalance that political give-and-take with front-end, bipartisan consideration of potential nominees’ qualifications for judicial office.

In the section that follows, I explore whether such a proposal would effectively reduce contentiousness in the judicial selection process, and if so, whether it goes far enough.

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222 Resnik, Judith. Personal Interview. 18 March 2009.
The Ideal System

Any proposal to modify the process used to select federal judges must not only satisfy the dictates of the Constitution, but the political demands of the executive and legislative branches as well. Article II, Section 2 and Article III, Section 1 of the U.S. Constitution vest certain powers respecting judicial appointments in the executive and legislative branches; these powers must remain with those branches absent constitutional amendment. The proposals set forth below work within this constitutional framework and can only be implemented if the executive and legislative branches voluntarily agree to modify the way the current selection process operates.

To determine what modifications to the current federal judicial selection process are appropriate, one must first identify the values an ideal selection method would promote. Paramount among these is safeguarding judicial independence and ensuring that well-qualified individuals who would be “good” judges are appointed to the bench.\(^\text{223}\) In order to ensure independence and a qualified bench, the nominating process should be transparent, and involve minimal levels of partisan gamesmanship.\(^\text{224}\) It must be structured in such a way that both the political branches and the public will have confidence in it.

While it is clear that partisanship and party identification properly play a role in judicial selection, there are other criteria that are equally important – legal knowledge, integrity, judicial temperament, and legal or judicial experience.\(^\text{225}\) These qualities should be viewed as minimum qualifications for judicial office. Once a candidate demonstrates that he or she is has the requisite knowledge, temperament and integrity, partisan or ideological criteria are properly

\(^\text{223}\) As defined earlier, a “good” judge has the legal knowledge, temperament and integrity to perform well as a bench officer. Some consideration of the nominee’s partisan affiliation and ideology is also appropriate.

\(^\text{224}\) In this context, it is not overly contentious to take a nominee’s political or ideological philosophy into account in deciding to support or oppose a particular nomination. It is overly contentious to block consideration of the nominee on this basis, however.

considered. Perhaps envisioning such a model, one commentator has observed that the judicial nominating process is not so much about identifying the most qualified candidate or candidates, as it is about weeding out those who appear to be qualified on paper, but who in fact are not.226

In addition to ensuring the appointment of well-qualified judges, the selection process should promote a free and independent judiciary. Judicial independence, as the Justice at Stake campaign as described it, is the freedom “to decide cases fairly and impartially, relying only on the facts and the law. . . . Judges are protected from political pressure, legislative pressure, special interest pressure, media pressure, public pressure, financial pressure, or even personal pressure.”227 Given our constitutional system of checks and balances, ensuring that judges are free to decide the cases that come before them without fear of political repercussions is perhaps the most important goal of any judicial selection method.228 Most interviewed emphasized the importance of judicial independence and the need to ensure that judges are able to decide cases based on the law and the facts in the record, without reference to the political implications of their decisions.

Some believe, however, that judicial accountability, rather than judicial independence, is the primary objective of the judicial appointments system. Typically, individuals who hold this view favor judicial elections rather than an appointment system.229 At least at the federal level, the Constitution has resolved this debate. By providing life tenure for judges and vesting power in the courts to void the acts of the other two branches, the Founders endorsed judicial independence, rather than judicial accountability, as the goal.

229 Zeidman 473
To promote public confidence in the courts – a requirement if the courts are to have the credibility necessary to maintain their independence – the appointments process must also be transparent. Because interest groups have participated so actively in the federal judicial selection process in recent years, and because politicians have made the issue of appointments to the bench a rallying cry in election campaigns, information must be made available concerning the manner in which the nominating system identifies and recruits candidates and the standards it applies to vet and evaluate them. If this information is public, elected officials and members of the public can assure themselves that the process is fair and that it has not been co-opted by those holding opposing views.\(^{230}\) More generally, the public can be assured that candidates are not being “selected through ‘the old-boy system’ or some other process that has little to do with the qualifications of the candidate.”\(^{231}\)

Set forth below are four proposed modifications to the current federal judicial nominating process. Individually and in combination, these changes attempt to address some of the more serious concerns that have been raised regarding the manner in which the process currently operates. Adoption of some or all of these proposals would reduce the contentiousness that is presently a hallmark of federal judicial selection, focus attention on the legal knowledge, temperament and integrity of nominees, and increase public confidence in the process and the judiciary. The proposals are:

- Create a bipartisan Federal Judicial Appointment Commission (FJAC) for each circuit comprised of individuals appointed by the President, Senators, members of the legal

\(^{230}\) Information regarding the process used to identify candidates and the standards used to evaluate them does not implicate the privacy rights of the nominees themselves. The disclosure of certain information that nominees are required to provide during the vetting process, e.g., medical information, might give rise to privacy concerns. Much of the personal information provided by nominees, however, is already made publicly available during the confirmation process. Successful nominees, moreover, must disclose financial interests and relationships on an ongoing basis. Judges are public figures and seek nomination and appointment knowing that certain aspects of their personal life will become public.

\(^{231}\) Greene 60
community and laypersons for all circuit court nominations, similar to the commission President Carter created in 1977 by executive order. Secure the commitment of the president that no individual will be nominated for a circuit judgeship unless he or she has received at least a qualified rating from the commission.  

- Encourage home-state senators to work together to form bipartisan state commissions that will vet and propose candidates for nomination for the district courts.

- Rewrite the internal rules of the Senate to ensure that the Senate will not consider any nominee until he or she has been vetted by the FJAC or a bipartisan state commission and been found to be qualified or well qualified. Also, modify the Senate’s rules to ensure that every nominee who has passed commission muster receives a Senate Judiciary Committee hearing within a specified period of time, and preclude Senators from placing holds on nominees.

- Restore and maintain the ABA Standing Committee on the Federal Judiciary’s role in evaluating judicial nominees before their nominations are forwarded to the Senate.

I expand on these proposals below.

**Federal Judicial Nominating Commission:** To be effective and politically acceptable, a federal judicial nominating commission must have bipartisan membership. Some of its members must be selected by officials in the executive and legislative branches, and some must be chosen by private individuals and/or groups. I envision a Federal Judicial Appointment Commission (FJAC) for each circuit, with members appointed by the president, Senators of the opposing party, bar associations and neutral civic or good government groups (e.g., the League of Women Voters). The FJAC would have both lawyer members and non-lawyer members with significant

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background in government, public policy or community issues. Much like the Federal Elections Commission, the balance between lawyer and non-lawyer members would be worked out by the president and the Senate.

It is critically important that members of the commission “have varied professional experiences and backgrounds,” and be of different ethnicities and genders, to ensure diversity of viewpoint, and thus diversity of nominees for judicial positions. Much like the JAC in the United Kingdom, the JNE Commission in California and the ABA Standing Committee on the Federal Judiciary, the FJAC would rate candidates on the basis of legal experience and credentials, integrity, and temperament.

The fact that some of the members of the FJAC would be appointed by the President and by Senators of the opposing political party should make nominees more palatable to the Senate as a whole, and, much like the bipartisan state commissions recommended by Resolution 118, give nominees a “good housekeeping seal of approval.” Commissioners appointed by the political branches would be attuned to the political views of their party and vet candidates with their concerns in mind. This should assure Senators that candidates at either extreme of the

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233 Lawyer members of the commission could include a former Justice of the United States Supreme Court or a former Chief Judge of a circuit court, and prominent lawyers from a variety of practice backgrounds.

234 Non-partisan appointees, namely lawyers and knowledgeable laypeople, would comprise a majority of the FJAC. Since the commission would have to have an odd number of commissioners, I suggest that twelve non-partisan commissioners be appointed to counterbalance the commissioners selected by elected officeholders. If non-partisan commissioners are a majority, they can help ensure that merit, i.e. the capacity to perform judicial duties, is a central criterion employed in selection. It is also important that the commission be as non-partisan and balanced as possible. The commission must be “independent” in the sense that a majority of its members should not be from a single political party, or be liberals or conservatives. American Bar Association What it Is. In an ideal world, members of the commission would be completely independent of the executive and legislative branches (Greene 56). Given the constitutional structure within which any such commission would have to operate, however, and the need for political buy-in to the process, it appears that the commission would gain legitimacy if at least some members were selected by the President and some by Senators of the opposing party (Greene 57). Finally, the commission should have both lawyer and non-lawyer members to ensure diversity of viewpoint and reinforce the notion that the group is not a captive of the organized bar (Greene 57).

235 Much like the JAC, the FJAC would be required to adopt and publish detailed evaluation criteria so that citizens would know the standards against which nominees were being judged.

236 I do not mean to suggest that these commissioners would use political criteria to vet nominees rather than the neutral qualifications of legal knowledge, temperament and integrity. I mean rather to suggest that these
ideological spectrum have been weeded out, and that nominees sent up for confirmation are
generally consensus candidates rather than extreme partisans on either side. The bipartisan
nature of the FJAC would also provide political “cover” for Senators in the opposition party who
wish to support a presidential nominee. Finally, the fact that the FJAC would evaluate only
appellate nominees would ensure that home-state senators retain the patronage privilege they
have now with respect to district court nominees.

Bipartisan State Commissions for District Court Nominees: Similar to the manner in
which FJACs in the circuits would identify candidates for the appellate court, bipartisan
commissions in the states would identify candidates for the district court. They would use
similar criteria, and be attuned to issues that might arise during the nomination process so as to
reduce partisanship down the road. The commissions would recognize the prerogative of home
state Senators to recommend candidates for nomination and give the Senators’ favored nominees
a leg up in the public relations battle if they receive the commission’s “good housekeeping seal
of approval.”

Rules Governing Senate Consideration of Judicial Nominees: In addition to creating
commissions to evaluate, in a neutral fashion, the qualifications of candidates for judicial office,
I propose that the rules of the Senate be amended to streamline the confirmation process and

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237 The fact that such a process is in place would not prevent a president from making a recess appointment of an
individual who had not been vetted by the FJAC. If the President has voluntarily agreed to participate in the FJAC
nominating process by issuing an executive order, however, it is less likely that this type of appointment would be
made.
238 President Carter “encourag[ed] Senators to establish local merit-based commissions to select federal district court
judges whenever vacancies occurred in their home states.” Because, under the current system, Senators recommend
candidates for district judge positions to the President, it may be necessary to proceed in the fashion President Carter
did, and encourage, rather than mandate, the creation of separate nominating commissions in each of the fifty states.
Because I propose that the Senate adopt an internal rule that would preclude consideration of a candidate until he or
she had been vetted by a state bipartisan commission, there would hopefully be more compulsion to create such a
committee than there was during the Carter administration. Owens 1035-36.
ensure that, once nominated, candidates receive an up-or-down vote. Delays in considering individual nominees have become a significant problem in recent years, as noted in the data.\textsuperscript{239}

Blue slips, holds and hearings are all matters governed by the Senate’s internal operating rules. As a consequence, they are all things that rule changes can address. Sheldon Goldman, who has studied the judicial nomination/confirmation process in both Democratic and Republican administrations, has suggested that the Senate implement a “formal rule change or a Senate resolution” to ensure that “no matter which party controls the White House and the Senate, the Senate Judiciary Committee will hold hearings on all nominees.”\textsuperscript{240} There is a basic fairness to this idea. As Goldman notes, once a hearing is held, “the Committee can vote not to recommend and even not to send the nomination to the Senate floor.”\textsuperscript{241} The candidate, however, will have been given an opportunity to defend his or her qualifications for judicial appointment in an appropriate forum.\textsuperscript{242} If the candidate is voted out of committee, there should be further rules changes to ensure that the nominee receives a timely vote on the Senate floor. The use of holds – secret or not – to block consideration of a nominee by the full Senate should be prohibited as holds “subvert[ ] the constitutional directive that the Senate advise and consent.”\textsuperscript{243}

While some have argued that Senators should be prevented from filibustering a nomination, Goldman argues persuasively that “[i]f a sufficient number of senators choose to

\textsuperscript{239} Senators have employed a variety of tactics to deny candidates they oppose a vote on their nominations. Home-state Senators have failed to return a blue slip on a nominee selected by the President to sit on a court in their state. Senators from other states have placed secret holds on nominees. Members of the Senate Judiciary Committee have delayed scheduling a hearing for particular nominees.


\textsuperscript{241} Ibid.

\textsuperscript{242} Presumably, if the FJAC proposal is implemented, nominees will be more generally acceptable to the Judiciary Committee, and the likelihood of a negative vote in committee will be reduced.

\textsuperscript{243} Goldman, “Judicial Confirmation Crisis”
filibuster a nomination, repeated failure to obtain cloture should be recognized as a manifestation of advice and consent.”

He explains:

Although it can be argued that this would turn confirmation from a simple majority to confirmation by a supermajority – 60 votes needed to close off debate – it should be recognized that the Constitution only mentions advise and consent, thus leaving it to the Senate to determine how it gives that advice and consent. There is nothing in the Constitution requiring a simple majority vote for judicial confirmation. Supporters of a nominee who is truly controversial should have to be able to persuade 60 senators that the nominee indeed has the judicial temperament to administer justice fairly.

If the FJAC is operating properly, moreover, the likelihood of a filibuster should be reduced.

**Restoring the Role of the ABA:** The President should once again ask the ABA Standing Committee on the Federal Judiciary to vet candidates before they are sent to the Senate. Created during Truman’s administration, the ABA committee served for years as a check against the nomination of unqualified candidates; for the most part, it understood and did not exceed its limited role. It is important to have a lawyers’ organization vet the professional qualifications and professional reputation of potential nominees, since lawyers will have the best information regarding the professional abilities of individual candidates.

The changes proposed – creating an FJAC for appellate nominees, encouraging the creation of bipartisan state commissions to identify and vet district court nominees, and modifying the Senate rules – will decrease the measures of contentiousness found in the data, and formalize examination of a nominee’s record and qualifications as a key part of the confirmation process that is equal to, if not greater than, partisan or ideological considerations. These changes may be difficult to achieve, especially because the only tools minority Senators have to stop nominations they oppose are placing holds, blocking hearings and failing to return

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244 Ibid.
245 Ibid.
246 On March 19, 2009, President Obama announced that he had taken the step of requesting that the ABA conduct a pre-nomination evaluation of candidates before they are sent to the Senate.
blue slips. Ultimately, however, rational people in both parties must understand that power in
the Senate shifts over time from one party to the other, and that, proverbially speaking, what is
sauce for the goose is sauce for the gander. The fact that, as matters now stand, it is difficult, and
sometimes impossible, to confirm candidates at either the extreme left or extreme right of the
ideological spectrum should make it more palatable for all involved to give up some of the tools
that presently enable them to block up-or-down votes on nominees.

Conclusion

President Obama has vowed to end the “confirmation wars” that have infected the federal
judicial selection process for the past two decades. There are signs, however, that the “wars” are
about to begin anew, with interest groups and Senators gearing up for a fight over Obama’s first
nominee, David Hamilton. Even before Judge Hamilton’s nomination was announced, the
Republican Conference warned that if it was not “consulted on, and approve[d] of, a nominee
from our states, [it would] be unable to support moving forward on that nominee.” Conservative
interest groups, moreover, have been raising money to combat President Obama’s nominees for
some months.247

Absent fundamental reform, we seem destined to continue the rancor and extend the
already substantial wait times nominees experienced during the Clinton and Bush
administrations. We may well see a repeat of 2003-2007, when Republicans controlled both the
White House and the Senate, and Democrats threatened to filibuster any nomination they felt

247 Republican Senate Conference. “41 Senate Republicans Send Letter To President Obama Urging Consultation
<http://republican.senate.gov/public/index.cfm?FuseAction=blogs.view&blog_id=3c522434-76e5-448e-9ead-
1ec214b881ac> (last visited April 15, 2009). Falcone, Michael. “Conservatives Plan Offensive on Obama’s Judicial
visited April 15, 2009)
was too extreme. Democrats made the threat largely in reaction to the “nominations hard ball” Republicans had played Clinton’s presidency. The same tit-for-tat may play out again if President Obama selects nominees without the concurrence of home state Republican Senators. The idea of straight party line votes on all nominees is not outside the realm of possibility. To the extent they are not consulted regarding home state nominees, moreover, Republican Senators may well use blue slips, holds and even filibusters to block district court as well as circuit court nominees. This is, in fact, is precisely what the Republican minority has threatened.

Like Republicans during the Bush administration, Democrats presently do not have a filibuster proof majority in the Senate, and may be unable to thwart such a strategy. As the Hamilton nomination demonstrates, moreover, interest group pressure will be brought to bear even where a candidate has bipartisan home state support. All of these facts indicate that wait times are likely to remain high, that vote averages will continue to decline and that any honeymoon Obama has will be brief. Qualified candidates will continue to exercise caution before offering themselves up for nomination, and those that are brave enough to do so may see their reputation suffer as a result. Absent reform, the contentiousness that has marked the confirmation process for the last twenty years will keep ratcheting up in what can only be described as a vicious cycle.

President Obama has already taken an important step in asking the ABA to evaluate judicial nominees before their names are sent to the Senate. While this will assist in providing solid information regarding the legal credentials and reputation of nominees, it will not reduce

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contentiousness, in part because the right views the ABA with suspicion. Nonetheless, President Obama should follow this first step by continuing to seek bipartisan support for his nominees, as he did with Judge Hamilton, by establishing a FJAC and by urging members of the Senate to establish bipartisan commissions in their states. Members of both parties in the Senate should explore rule changes that would work in tandem with creation of the commissions to reduce contentiousness in the selection process.

In attempting to implement this type of reform, President Obama will have to persuade not only Republicans, but members of his own party as well. Despite the history of bipartisan selection in Texas – there has been a Federal Judiciary Evaluation Committee in Texas since 1986 – House Democrats from the state recently suggested that it was “their place to send names [of potential judicial nominees] to the White House,” not that of the home state Senators, both Republicans.249 This drew an immediate rebuke from Senator Cornyn (R-TX), who stated that “that the Senate [and especially the home state Senators have] a special role in any nomination process.”250 He noted that “when Bill Clinton was president, he negotiated with GOP senators in states without a Democratic senator. That's what the Texas Republicans want now.”251 Endorsing the creation of bipartisan commissions will give President Obama an opportunity to avoid controversies such as this one, and give home state Senators who support consensus choices cover in dealing with their base, be it left or right.

I predict that President Obama will shy away from contentious nominations fights if he can. Ultimately, however, he is likely to nominate consensus choices for the district court, and employ the same type of elite mobilization strategy Bush did in nominating circuit court judges

250 Ibid.
251 Ibid.
who will appeal to his base. If he proceeds in this fashion, the only way to end the vicious cycle of contentious nomination battles will be to take the steps I have outlined – create bipartisan Federal Judicial Appointments Commissions to vet circuit judges and bipartisan state commissions to recommend district court nominees; modify internal Senate rules to ensure that every nominee receives a hearing after he or she has been vetted by an FJAC or bipartisan state commission; and maintain the ABA’s role in the evaluations process. Effecting these changes will take a substantial act of will on the part of the President and members of the Senate. It will take quieting the frenzy of the interest groups on both sides. It will, however, be well worth it in the end. It will encourage strong, qualified candidates to seek appointment to the federal bench. It will reduce the chronic vacancy problem the courts have experienced, which has eroded their ability to resolve disputes in a timely fashion. Perhaps most important, it will ensure an independent and not overly politicized judiciary.
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Appendix A – Documents


ADOPTED AS REVISED

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON FEDERAL JUDICIAL IMPROVEMENTS
SECTION OF LITIGATION
SECTION OF ANTITRUST
NATIONAL CONFERENCE OF FEDERAL TRIAL JUDGES
NATIONAL CONFERENCE OF STATE TRIAL JUDGES
STANDING COMMITTEE ON JUDICIAL INDEPENDENCE
SECTION OF STATE AND LOCAL GOVERNMENT LAW
NATIONAL LESBIAN AND GAY LAW ASSOCIATION
COALITION FOR JUSTICE
AMERICAN JUDICATURE SOCIETY
COMMISSION ON SEXUAL ORIENTATION AND GENDER IDENTITY
NATIONAL CONFERENCE OF WOMEN’S BAR ASSOCIATIONS
SECTION OF LABOR AND EMPLOYMENT LAW
CENTER FOR RACIAL AND ETHNIC DIVERSITY

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, That the American Bar Association supports the selection as federal judges of men and women of diverse backgrounds and experiences, whose professional competence, integrity, and judicial temperament, including commitment to equal justice under law, fully qualify them to serve in the federal judiciary;

FURTHER RESOLVED, That the American Bar Association supports the practice of federal judges providing advance notice of their intention to leave active federal judicial service in order to facilitate the timely nomination of individuals to vacant judgeships;

FURTHER RESOLVED, That the American Bar Association encourages the senators in each state jointly and the delegates in each territory to appoint (in cooperation with others not of their party when appropriate) bipartisan commissions of lawyers and other leaders, reflecting the diversity of the profession and the community, to evaluate the qualifications of prospective district judges and to recommend possible nominees whom their senators or delegate might suggest for the President’s consideration;
FURTHER RESOLVED, That the American Bar Association endorses the use of bipartisan commissions to consider and recommend prospective nominees for the United States Courts of Appeals;

FURTHER RESOLVED, That the American Bar Association recommends that the President consult with Senate leaders of both parties and the home state senators or delegate in advance of submitting nominations;

FURTHER RESOLVED, That the American Bar Association urges the President and Senate to promptly fill judicial vacancies and act expeditiously, especially with respect to nominees recommended by bipartisan commissions; and

FURTHER RESOLVED, That this resolution supersedes the August 1977 resolution (appended) concerning the judicial nomination and confirmation process.