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## Judicial Appointment Process: How Broken Is It

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# REMARKS

## THE JUDICIAL APPOINTMENT PROCESS: HOW BROKEN IS IT?

The Honorable Stephanie K. Seymour\*

I chose this topic, the judicial appointment process, because of the significance of the issue to our constitutional form of government. The Constitution creates three branches of government—the executive, the legislative, and the judiciary—and mandates that the president appoint members of the judiciary with the Senate’s advice and consent. The history of judicial appointments makes clear that the process has always been political, and the reason for political battles over appointments is patent. The significance of the president’s power of appointment cannot be overstated. The more than 800 positions on the federal bench, each bestowing life tenure, present the president with an opportunity to create a legacy that far outlasts his or her time in office.<sup>1</sup> The magnitude of this power has long been understood in the context of Supreme Court appointments, but recently we have begun to see greater recognition of the impact of district and circuit court appointments as well.<sup>2</sup> Some argue this heightened attention is deserved because increasingly restrictive rules of certiorari in the Supreme Court have rendered the courts of appeals “the courts of last resort in ninety-nine percent of the cases that come before them.”<sup>3</sup>

I have no quarrel with the political nature of the appointment process. In my judgment, what is broken about the process is the increasing tendency of the Senate to unduly delay individual appointments, particularly to the courts of appeals. This delay impacts the ability of the judiciary to fulfill its responsibility to

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\* Judge, Court of Appeals for the Tenth Circuit; appointed 1979 by President Jimmy Carter. This address was presented February 19, 2004, at the University of Tulsa College of Law as the Distinguished Judge in Residence. I gratefully acknowledge the invaluable assistance I have received from my law clerk, Anne Harden, in the preparation of this lecture.

1. See John Anthony Maltese, *Confirmation Gridlock: The Federal Judicial Appointments Process under Bill Clinton and George W. Bush*, 5 J. App. Prac. & Process 1, 27 (2003) (noting the number of lifetime judicial positions subject to presidential appointment and commenting on their import).

2. See William G. Ross, *The Role of Judicial Issues in Presidential Campaigns*, 42 Santa Clara L. Rev. 391, 482 (2002) (stating that while the Supreme Court receives the lion’s share of public attention, district and circuit court appointments are gaining in importance among voters).

3. Maltese, *supra* n. 1, at 27; see Ross, *supra* n. 2, at 469.

provide expeditious judicial review. I will first describe some of the history of the selection of federal judges to underscore that the current contentiousness between the president and the minority party in the Senate is merely politics as usual, albeit on an escalated scale. Then I will address the increasing slowdown in the appointment process and the direct impact it has on the business of the courts, and therefore on the public.

## I. POLITICS AS USUAL

Article II of the Constitution dictates that the president “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint”<sup>4</sup> members of the federal judiciary. The division of the powers of nomination and confirmation reflects the founders’ deep concern over the concentration of power. James Madison famously cautioned, “Ambition must be made to counteract ambition.”<sup>5</sup> The Senate’s advice and consent was thus presented as a check on the tremendous appointment power placed in the executive.<sup>6</sup> As Alexander Hamilton made clear in *The Federalist Papers*, it was also meant to promote transparency and responsibility in the appointment process:

[A]s there would be a necessity for submitting each nomination to the judgment of an entire branch of the legislature, the circumstances attending an appointment, from the mode of conducting it, would naturally become matters of notoriety; and the public would be at no loss to determine what part had been performed by the different actors. The blame of a bad nomination would fall upon the President singly and absolutely. The censure of rejecting a good one would lie entirely at the door of the Senate; aggravated by the consideration of their having counteracted the good intentions of the Executive.<sup>7</sup>

By constitutional design, therefore, the appointment process is one of public political wrangling between the branches. The current state of affairs is thus neither unexpected nor, perhaps, even unintended.<sup>8</sup>

Ideological debates over nominations have been around since the nation’s founding. The importance of a nominee’s judicial philosophy was not lost on the first Senate, which used the tools of advice and consent as a check on executive power. “In exercising this check, senators generally viewed their core responsibility as determining the fitness of a judicial nominee, and they generally

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4. U.S. Const. art. II, § 2, cl. 2.

5. James Madison, *The Federalist No. 51*, in *The Federalist* 342, 344 (Paul Leicester Ford ed., Henry Holt & Co. 1898).

6. See Alexander Hamilton, *The Federalist No. 76*, in *The Federalist* 505, 508-09 (Paul Leicester Ford ed., Henry Holt & Co. 1898) (noting that the cooperation of the Senate “would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity”).

7. Alexander Hamilton, *The Federalist No. 77*, in *The Federalist* 511, 513-14 (Paul Leicester Ford ed., Henry Holt & Co. 1898).

8. See Michael J. Gerhardt, *Federal Judicial Selection as War, Part Three: The Role of Ideology*, 15 Regent U. L. Rev. 15, 17 (2002-2003) (arguing that criticism of political tension between branches is unfounded, as the Constitution “pits presidents and senators against each other”).

considered ideology as central to their evaluations of a judicial nominee's fitness."<sup>9</sup> The Senate's first "political" rejection of a president's judicial nomination took place in 1795 when it refused to confirm President Washington's selection of the eminently qualified former Associate Justice John Rutledge as Chief Justice because many senators disagreed with his position on this country's treaty with England.<sup>10</sup>

Despite placement of the appointment power primarily in the hands of the executive, "the founders conceived of a major role for the Senate in the selection process."<sup>11</sup> The Senate was expected to give advice as well as consent, and it has revolted when the president failed to consult individual senators before selecting a nominee from their respective states. When President Washington sought to fill a position in Savannah without first conferring with Georgia's Senate delegation, the entire Senate balked and refused to accept the President's selection, effectively forcing the President to withdraw his nomination.<sup>12</sup> This turn of events provides insight into early expectations in the appointment process.

To the President, the [Georgia] senators signaled an intention to regard pre-nomination consultation as a norm of the confirmation process. The other senators signaled to their Georgia colleagues that they could be counted on to support them in their decision, and, consequently, that *they* would be worthy of similar support in the future. The president, on the other hand, by withdrawing the nomination, clearly signaled to the whole Senate that he recognized the validity of the advice norm, and would abide by it.<sup>13</sup>

The identification of candidates for judicial office and eventual selection of nominees is a delicate political process. Presidents have historically placed primary control over the selection process in a single member of the administration. President Washington entrusted his secretary of state with selection, and subsequent presidents followed suit until President Pierce transferred authority to his attorney general in 1853,<sup>14</sup> where it remained until recent times, when the president began using advisors in the White House to assist in the process.

Several presidents added innovations. For example, President Eisenhower invited the American Bar Association (ABA) to play a formal role in the process,<sup>15</sup> which continued until President George W. Bush took office,<sup>16</sup> and

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9. Michael J. Gerhardt, *Norm Theory and the Future of the Federal Appointments Process*, 50 Duke L.J. 1687, 1705 (2001); see Erwin Chemerinsky, *Ideology and the Selection of Federal Judges*, 36 U. Cal. Davis L. Rev. 619, 624-25 (2003); Maltese, *supra* n. 1, at 10.

10. Chemerinsky, *supra* n. 9, at 625; see Maltese, *supra* n. 1, at 10.

11. Sheldon Goldman, *Picking Federal Judges: Lower Court Selection from Roosevelt through Reagan* 6 (Yale U. Press 1997).

12. Brannon P. Denning, *The "Blue Slip": Enforcing the Norms of the Judicial Confirmation Process*, 10 Wm. & Mary Bill Rights J. 75, 92-93 (2001).

13. *Id.* at 93 (footnote omitted).

14. Goldman, *supra* n. 11, at 6.

15. *Id.* at 115.

16. See Gerhardt, *supra* n. 8, at 25. The current administration removed the ABA from its screening process, but Senate Democrats on the Judiciary Committee still receive input from the organization.

President Carter employed merit selection commissions for circuit judgeships.<sup>17</sup> Each president identifies which members of his administration will participate, and those officials seek senatorial recommendations, particularly from senators representing states where vacancies exist. Governors, members of Congress, and party loyalists suggest candidates from time to time. Administration officials perform an initial screening and then send surviving candidates a questionnaire. The Justice Department and the ABA Standing Committee on Federal Judiciary receive copies of completed questionnaires, and the ABA rates the candidate. FBI screening follows. Then the attorney general sends the nomination to the president, and if he approves, the nomination proceeds to the Senate Judiciary Committee, and ultimately to the Senate floor.<sup>18</sup>

The nominees that have emerged reveal the persistent import of politics and patronage in the selection process. Presidents Washington and John Adams appointed Federalists like themselves.<sup>19</sup> Nominations became particularly "party-dominated" under Presidents Jackson and Van Buren, and party loyalty prevailed in the selection process through the Tyler, Polk, Taylor, and Fillmore presidencies.<sup>20</sup> All presidents principally have nominated members of their own party, and President Eisenhower even had all of his nominees cleared by the Republican National Committee.<sup>21</sup>

The first president to recognize the significance of appointments in furthering a policy agenda may have been President Lincoln.<sup>22</sup> By 1896, that awareness had grown, and the Democratic platform laid blame for the national deficit on the Supreme Court's decision striking down the income tax.<sup>23</sup> Presidents Theodore Roosevelt, Taft, Wilson, and Coolidge were also cognizant of the role of the courts in promoting their policy goals,<sup>24</sup> and President Franklin Roosevelt saw appointment of judges with ideologies similar to his own as essential to the success of the New Deal.<sup>25</sup> The political landscape of the 1930s provides particular insight into the interplay of judicial appointments and presidential policy. Over a third of federal district and circuit courts issued close to 1,600 injunctions in 1935 and 1936, preventing enforcement of President Roosevelt's New Deal legislation.<sup>26</sup> At the time, approximately three-fourths of the federal judiciary was Republican.<sup>27</sup> Putting it plainly, Judge William Denman of the Ninth Circuit Court of Appeals wrote to President Roosevelt in 1936,

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17. Goldman, *supra* n. 11, at 238.

18. *Id.* at 9-11.

19. *Id.* at 7.

20. *See id.* at 7-8.

21. *Id.* at 113.

22. *See* Goldman, *supra* n. 11, at 8.

23. Ross, *supra* n. 2, at 398.

24. Goldman, *supra* n. 11, at 9; *see* Ross, *supra* n. 2, at 399-412.

25. *See* Goldman, *supra* n. 11, at 19-20.

26. *Id.* at 30-31.

27. *Id.* at 31.

stating, "The New Deal needs more Federal judges."<sup>28</sup> Over President Roosevelt's twelve years in office, he succeeded in appointing numerous federal judges sympathetic to the New Deal.<sup>29</sup>

Presidents Kennedy and Johnson sought to ensure that civil rights gains in the legislative arena would not be undermined in the courts.<sup>30</sup> In the Kennedy administration, "[i]t was the determined policy not to appoint segregationists to the Fourth and Fifth circuits,"<sup>31</sup> which at the time were the circuits covering most of the southern states. On all courts, an anti-segregationist stance could save an otherwise right-leaning nominee.<sup>32</sup> In the 1964 election, Barry Goldwater used President Johnson's support of controversial Supreme Court decisions as a conservative rallying cry, and his views were echoed in conservative quarters such as the *Wall Street Journal* editorial page.<sup>33</sup> As President Johnson saw his popularity plummet in the quagmire of Vietnam, however, raw politics overtook commitment to racial equality; the White House wrested central command of appointments from the attorney general's office, and "loyalty" to the president arguably became the chief attribute sought in nominees.<sup>34</sup>

According to one scholar on the subject, "[j]udicial issues may have influenced the outcome of the 1968 election more than any other election in the nation's history."<sup>35</sup> In a presidential race with Hubert Humphrey, Richard Nixon ran a campaign against a "liberal" federal judiciary and promised to restore "conservative law and order"<sup>36</sup> through his power of appointment.<sup>37</sup> In office, President Nixon expressed support for a potential constitutional amendment requiring reconfirmation of all federal judges after a ten-year term.<sup>38</sup> "Undoubtedly, this was tied to policy concerns."<sup>39</sup>

These presidential policy agendas have had to compete with senatorial courtesy.<sup>40</sup> Failure to consult with senators, particularly those from the president's party, before selecting a nominee can have disastrous political repercussions.<sup>41</sup> As noted above, this norm emerged early, cowing President Washington into withdrawing a nomination.<sup>42</sup> President Hoover wanted to improve the quality of the federal judiciary and thus attempted to impose new standards on candidates

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28. *Id.* at 32 (quoting Letter from William Denman, J., 9th Cir., to Franklin D. Roosevelt, Pres., 208 *U.S. District Judgeships 1933-1945* (Nov. 7, 1936)) (internal quotations omitted).

29. *Id.* at 38.

30. See Goldman, *supra* n. 11, at 166, 170.

31. *Id.* at 168.

32. See generally *id.* at 168-70.

33. Ross, *supra* n. 2, at 428-34.

34. Goldman, *supra* n. 11, at 160, 163.

35. Ross, *supra* n. 2, at 434.

36. Goldman, *supra* n. 11, at 198.

37. *Id.*

38. *Id.* at 207.

39. *Id.*

40. Gerhardt, *supra* n. 9, at 1702.

41. Gerhardt, *supra* n. 8, at 27-28.

42. See *supra* nn. 11-13 and accompanying text.

for appointment.<sup>43</sup> The Senate, however, saw the President's plan as an intrusion into senatorial prerogatives in identifying nominees, and eventually President Hoover caved to political pressure.<sup>44</sup> President Truman saw nominees from Georgia, Illinois, and Iowa blackballed for his failure to consult with their home-state senators.<sup>45</sup> President Kennedy was forced to break his promise not to appoint segregationists to the bench when the Arkansas senators threatened to hold up all of the President's nominees if their selection for an Eighth Circuit appointment was not approved.<sup>46</sup>

In appointing members of my court, President Reagan encountered similar problems with Republican Senator Bill Armstrong of Colorado. The President attempted to appoint Steven Williams, then a professor at the University of Colorado Law School, to a vacancy created when my Colorado colleague William Doyle took senior status in 1984. He did so without consulting Senator Armstrong, and the Senator made it very clear that if Mr. Williams were nominated, the Senator would oppose him. The result was a stalemate. The President finally acquiesced and withdrew Mr. Williams from consideration for the Tenth Circuit, appointing him to the D.C. Circuit instead. The President then requested a list of names of potential nominees from Senator Armstrong and ultimately appointed David Ebel from that list in 1988. The process left my court with a vacancy for four years.

When President Carter took office in 1977, he took issue with the political patronage that resulted from senatorial preeminence in identifying judicial candidates.<sup>47</sup> His primary goal in judicial appointments was to diversify the federal bench, and in order to do so, he had to wrench control over selection away from the Senate. After intense negotiations with Senator James Eastland of Mississippi, Chair of the Senate Judiciary Committee, President Carter agreed to leave primary control in identifying district court candidates with the Senate, but he established merit selection commissions for nominees to the courts of appeals.<sup>48</sup> As mandated by an executive order establishing the commissions,<sup>49</sup> the President appointed selection panels for each circuit and required each panel to "include members of both sexes, members of minority groups, and approximately equal numbers of lawyers and nonlawyers."<sup>50</sup> When the panels' initial nominations included few women and minorities, President Carter issued a revised executive

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43. See Goldman, *supra* n. 11, at 9.

44. See *id.*

45. *Id.* at 71-72, 75, 79-80.

46. *Id.* at 168.

47. See *id.* at 236.

48. Goldman, *supra* n. 11, at 238. There was a fair amount of dissension in the Senate. Democratic Senator Lloyd Bentsen of Texas reportedly expressed the frustration of many of his colleagues in complaining: "I am the merit commission for Texas." *Id.* at 260 (citing Charles R. Babcock, *Picking Federal Judges: Merit System vs. Pork Bench* Wash. Post A4 (Nov. 7, 1978) for the quoted language and Martin Tolchin, *Carter Issues Guide for Naming Judges* 128 N.Y. Times A18 (Nov. 9, 1978) for Sen. Bentsen's report that he did not recall making the statement).

49. Exec. Or. 11972, 42 Fed. Reg. 9659 (Feb. 17, 1977).

50. *Id.* at 9660; see Goldman, *supra* n. 11, at 238.

order explicitly encouraging the panels “to make special efforts to seek out and identify well qualified women and members of minority groups as potential nominees.”<sup>51</sup>

At the time, there were a total of 510 Article III federal judges.<sup>52</sup> The number of federal appeals had grown to almost 20,000 per year.<sup>53</sup> This exploding caseload resulted in the Omnibus Judgeship Act of 1978,<sup>54</sup> which created 117 new district court judgeships and thirty-five new positions on the circuit courts.<sup>55</sup> These positions presented President Carter with a unique “opportunity to place women and minorities on the bench.”<sup>56</sup> When the Attorney General’s Office and the Senate seemed insufficiently committed to affirmative action for these new judgeships, the White House applied additional pressure.<sup>57</sup>

The previous “excruciatingly slow pace of diversification of the federal bench”<sup>58</sup> sped up dramatically with President Carter at the helm.<sup>59</sup> When he left office in 1981, he had appointed nearly forty percent of the federal judiciary and placed unprecedented numbers of women and minorities in lifetime positions on the bench.<sup>60</sup> Prior to his administration, for example, only two women had ever been appointed to a federal court of appeals, Florence Allen by President Franklin Roosevelt to the Sixth Circuit and Shirley Hufstедler by President Johnson to the Ninth Circuit.<sup>61</sup> President Carter appointed eleven women to the courts of appeals, 19.6 percent of his appeals court appointees.<sup>62</sup>

My own appointment illustrates both the political nature of the process and President Carter’s hands-on involvement. I was a beneficiary both of President Carter’s commitment to place more women on the federal courts and the Omnibus Judgeship Act, which created an eighth position for the Tenth Circuit that was designated an Oklahoma position by the President. Knowing President Carter was affirmatively seeking female candidates, I applied in the fall of 1978 to the nominating commission for the Tenth Circuit. The commission’s eleven seats were held by six lawyers and five lay people, several women and one minority, and representatives from each of the six states comprising the Tenth Circuit. This

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51. Exec. Or. 12059, 43 Fed. Reg. 20949, 20950 (May 16, 1978); see Goldman, *supra* n. 11, at 239.

52. See Admin. Off. of U.S. Cts., *Table C: U.S. Courts of Appeals: Additional Judgeships Authorized by Judgeship Acts* <<http://www.uscourts.gov/history/tablec.pdf>> (accessed Mar. 10, 2004) [hereinafter U.S. Cts., *Table C*]; Admin. Off. of U.S. Cts., *Table H: U.S. District Courts: Additional Authorized Judgeships* <<http://www.uscourts.gov/history/tableh.pdf>> (accessed Mar. 10, 2004) [hereinafter U.S. Cts., *Table H*]. These charts indicate that there were 404 authorized district judgeships and 97 authorized courts of appeals judgeships in 1977. Adding the nine Supreme Court Justices brings the total number to 510.

53. Dir. Admin. Off. of U.S. Cts., *Management Statistics for the U.S. Courts* 13 (Admin. Off. of U.S. Cts. 1979).

54. Pub. L. No. 95-486, 92 Stat. 1629 (1978).

55. Goldman, *supra* n. 11, at 241-42.

56. *Id.* at 242.

57. *Id.* at 239-40, 248-49, 254, 257.

58. *Id.* at 3.

59. See *id.* at 238.

60. Goldman, *supra* n. 11, at 238.

61. See *id.* at 357.

62. *Id.* at tbl. 9.2, 356.



same commission had previously been charged with proposing nominees to the Tenth Circuit from Kansas and Utah and had no women applicants for either of those positions.

Unbeknownst to me at the time, my application did not enjoy smooth sailing in the commission. I was later told the following story by a friend in Colorado who had heard it from Josie Heath, a member of the commission from Colorado. The story was subsequently confirmed to me by Ms. Heath herself. Unlike the procedure used for the Kansas and Utah positions, at the initial meeting of the group considering the Oklahoma position the chairman announced that the commission would narrow the field by allowing each member to eliminate one obviously unqualified candidate. He started by stating he was eliminating me. Josie Heath, who was sitting halfway around the table from the chairman, was dumbfounded; she thought my qualifications were quite good. When she asked the chairman why he was eliminating me, he responded that I had four children and obviously could not handle the job. Ms. Heath was so stunned she was temporarily speechless. Fortunately for me, by the time the elimination process got around to her, she had gathered her wits. Her choice for elimination was a male justice on the Oklahoma Supreme Court, who, as it turned out, was the chairman's favorite candidate. It was the chairman's turn to be stunned; he asserted that this applicant was obviously highly qualified. Ms. Heath responded that the applicant was clearly not qualified since he had five children. After a discussion about the merits of eliminating applicants on the basis of the number of their children, the commission members agreed it was not a proper basis for disqualification and that both of us should remain under consideration.

I was one of a number of candidates invited for an interview with the commission. When I arrived at the appointed time, I was given a number of questions I was told I would have to answer and then placed in a room by myself for half an hour to contemplate my responses. One question asked me to explain what I had done to further the cause of justice. Another asked what I thought my qualifications were for the position and what I would add to the court. After I answered the general questions at the beginning of the interview, each member of the commission was given an opportunity to question me. Among other things, I was asked my opinion of *Roe v. Wade*.<sup>63</sup> I was also asked how having four children might impact my handling of the job. One of the female members of the commission vociferously objected to what she viewed as an unlawful employment question. Unaware of the history of the controversial question, I replied that, knowing Congress was not covered by Title VII of the Equal Employment Opportunity Act,<sup>64</sup> I assumed the judiciary was not covered either. I answered the question.

The end result of the application process was that my name was one of four forwarded to President Carter for his consideration, the others being Pat Irwin,

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63. 410 U.S. 113 (1973).

64. Pub. L. No. 92-261, 86 Stat. 103 (1972).

the justice on the Oklahoma Supreme Court, Dale Cook, a sitting federal district court judge who had been appointed by President Nixon, and Lee West, a former state court trial judge and FAA commissioner who was by then practicing law in Tulsa. I was thirty-nine years old at the time, practicing at Doerner, Stuart, Saunders, Daniel & Anderson in Tulsa, and I faced formidable competition from these gentlemen in terms of both legal and judicial experience. Needless to say, the four of us lobbied hard for the position. I had no connections with either senator from Oklahoma, but I did have a friend in Washington, D.C.—R. Dobie Langenkamp, my former law partner and now a professor at this law school, who had taken a job in the Carter administration in the Department of Energy. Dobie helped me make some contacts in Washington, one of whom worked for Rosalyn Carter in the White House. The women's groups in Washington were agitating for women to be appointed, and they did their own lobbying. I was finally nominated.

I did not know until I was doing research for this paper that President Carter was actively involved in my selection. Bob Lipshutz, one of the White House staffers who advised the President on judicial appointments, was asked by the President to write a memo regarding the proposed nominees so the President would be informed.<sup>65</sup> With respect to the vacancy on the Tenth Circuit, Lipshutz's memo listed my name "with the notation: '(white female)—private practice, first female partner in a major Oklahoma firm; first woman to serve as an Oklahoma Bar examiner; experience in complex litigation.'"<sup>66</sup> The three other proposed nominees were also described. The President indicated on the memo his interest in me.<sup>67</sup> The rest is history.

In focusing on affirmative action in its judicial appointments, the Carter administration was, of course, making a political statement. And notwithstanding the use of merit selection commissions, only 7.1 percent of President Carter's circuit court appointees were Republican.<sup>68</sup> When Attorney General Griffen Bell was asked why a large percentage of those surviving this "merit" selection process were Democrats, I recall him responding, "We're not running an affirmative action program for Republicans."

When President Reagan took office, he abandoned the merit selection commissions.<sup>69</sup> He returned to the practice of previous presidents, relying on people within the administration to propose and vet potential candidates. Like Richard Nixon, Ronald Reagan ran for office against the courts. In 1980, the Republican Party platform included a promise:

We pledge . . . the appointment of women and men . . . whose judicial philosophy is characterized by the highest regard for protecting the rights of law-abiding citizens, and is consistent with the belief in the decentralization of the federal government

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65. Goldman, *supra* n. 11, at 249.

66. *Id.* (quoting Memo. from Bob Lipshutz, White H. counsel, to Jimmy Carter, Pres., *Judicial Nominees* (Apr. 7, 1979)) (footnote omitted).

67. *Id.*

68. *Id.* at tbl. 9.2, 355.

69. See Maltese, *supra* n. 1, at 9-10 (describing the ideological vetting of President Reagan's nominees).

and efforts to return decisionmaking power to state and local elected officials. We will work for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life.<sup>70</sup>

President Reagan "fram[ed] his appointment goals in terms of the judicial philosophy he believed would accomplish his political purposes,"<sup>71</sup> and viewed successful appointments as key to promoting his domestic policy agenda.<sup>72</sup>

The Reagan administration took the appointment process very seriously. Attorney General Edwin Meese hired a Department of Justice special assistant whose sole and specific purpose was investigating the judicial philosophies of prospective nominees.<sup>73</sup> While the administration insisted it was not quizzing candidates on how they would rule in specific cases, several nominees, especially women, claimed they were asked how they would rule in potential cases concerning abortion.<sup>74</sup>

President Reagan experienced some early problems in the Senate with respect to confirmation of nominees perceived by Democrats as particularly conservative.<sup>75</sup> People for the American Way launched the first media campaign against district and circuit judge nominees in 1985, preventing confirmation of Jefferson Sessions III to a district judgeship in Alabama and nearly keeping Daniel Manion off the Seventh Circuit.<sup>76</sup> Senate Democrats initiated a filibuster of then-Justice Rehnquist's elevation to Chief Justice, but Republicans quickly overcame it to confirm him.<sup>77</sup> Justice Scalia was confirmed without much noise.<sup>78</sup> Then, in 1987, came the nomination of Robert Bork to the Supreme Court. Judge Bork's 1982 confirmation to the Court of Appeals for the District of Columbia had been relatively uneventful.<sup>79</sup> His background as a D.C. Circuit judge, professor at Yale Law School, and solicitor general and acting attorney general under President Nixon made him particularly suited by experience for the Supreme Court nomination. His position as a "conservative intellectual leader"<sup>80</sup> made him attractive to President Reagan. The administration viewed Judge Bork as the person who could turn the tide on the Supreme Court. However, Senate Democrats and liberal interest groups saw the fate of *Roe v. Wade* in Judge Bork's hands and launched an all-out war against his nomination.<sup>81</sup> The result was a fifty-

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70. Goldman, *supra* n. 11, at 296-97 (quoting *1980 Republican Platform Text*, 38 Cong. Q. Wkly. Rpt. 2030, 2046 (July 19, 1980)) (internal quotations and footnote omitted).

71. *Id.* at 297.

72. *Id.* at 2, 297-98.

73. *Id.* at 301-02.

74. *See id.* at 304-05 (citing a Justice Department official's recollection and an NPR report on such questioning of female candidates).

75. Goldman, *supra* n. 11, at 308.

76. *Id.* at 308-13.

77. *Id.* at 316.

78. *Id.* at 316-17.

79. *Id.* at 316.

80. Goldman, *supra* n. 11, at 317.

81. Maltese, *supra* n. 1, at 8.

eight to forty-two vote against confirmation. Such prolonged and virulent attacks on presidential nominees have since become known as “borking.”<sup>82</sup>

The Senate ultimately confirmed Judge Anthony Kennedy of the Ninth Circuit to the Supreme Court position, and the saga came to a close. President Reagan continued to face an increasingly active Democratic opposition, however, and even saw conservative groups doom one nominee to the Eighth Circuit by labeling her as a “strong feminist” and criticizing her “pro-abortion” stance despite the fact she had never publicly taken a position on abortion issues.<sup>83</sup> Still, despite this turbulence, President Reagan’s success in judicial appointments was tremendous. Indeed, he believed the judiciary he appointed to be “his most enduring legacy.”<sup>84</sup>

Though with far less fanfare than his predecessor, the first President Bush continued President Reagan’s efforts to “reshape constitutional law”<sup>85</sup> with appointments to the federal bench.<sup>86</sup> The pledge to appoint pro-life judges remained in the 1988 Republican platform, although then-Vice President Bush denied he would employ a “litmus test” if elected president.<sup>87</sup>

President Clinton’s focus in judicial appointments was on confirming diverse and highly qualified candidates.<sup>88</sup> He was apparently less concerned with a potential nominee’s ideological bent.<sup>89</sup> During his first campaign, he implied he would only put forth nominees who expressed support for abortion rights but retreated somewhat from this pledge once in office.<sup>90</sup> Ultimately, with an aggressive legislative agenda, and eventually impeachment proceedings to confront, President Clinton did not want to waste political capital in the appointment process.<sup>91</sup> To ward off potential Senate battles, President Clinton engaged Republican Senator Orrin Hatch of Utah, Chair of the Judiciary

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82. See Jeffrey W. Stempel, *Forgetfulness, Fuzziness, Functionality, Fairness, and Freedom in Dispute Resolution: Serving Dispute Resolution through Adjudication*, 3 Nev. L.J. 305, 340 (2002-2003) (describing the coining of the phrase “borking”).

83. Goldman, *supra* n. 11, at 318, 332 & n. ff.

84. *Id.* at 301.

85. Neal Devins, *Congress and the Making of the Second Rehnquist Court*, 47 St. Louis U. L.J. 773, 774 (2003).

86. *Id.*; see Ross, *supra* n. 2, at 446 (noting the relatively obscure role of judicial issues in the 1988 election).

87. Ross, *supra* n. 2, at 447.

88. Gerhardt, *supra* n. 8, at 36.

89. See Jonathan L. Entin, *Judicial Selection and Political Culture*, 30 Cap. U. L. Rev. 523, 545 (2002); Ross, *supra* n. 2, at 457 (describing the lack of ideologies among President Clinton’s nominees and quoting a political scientist’s observation that “the main criticism of [Justice] Breyer was that he had too many holdings in Lloyd’s of London” (quoting Harvey Berkman & Claudia MacLachlan, *Don’t Judge a Book . . .*, Natl. L. Rev. A1 (Oct. 21, 1996))); Carl Tobias, *The Bush Administration and Appeals Court Nominees*, 10 Wm. & Mary Bill Rights J. 103, 106 (2001).

90. See Neal Devins, *Through the Looking Glass: What Abortion Teaches Us about American Politics*, 94 Colum. L. Rev. 293, 304-05 (1994) (detailing President Clinton’s pro-choice judicial agenda); David Lauter, *Clinton Calls for Tougher Gun Controls*, L.A. Times A3 (Oct. 4, 1993) (noting President Clinton’s retreat on a pro-choice “litmus test”).

91. Gerhardt, *supra* n. 8, at 33.

Committee, in negotiations when the Senator assumed the chairmanship in 1995.<sup>92</sup> This move was to the great benefit of the Tenth Circuit because it enabled us to have four vacancies filled in relatively short order. The working relationship between the President and Senator Hatch could not be sustained, however. The conservative Judicial Selection Monitoring Project attacked a number of nominees as elite left-wingers ready to “blaze[] an activist trail.”<sup>93</sup> Majority Whip Tom DeLay suggested impeaching “liberal” judges already appointed.<sup>94</sup> A conservative media blitz made it difficult for Republican senators to support the administration’s candidates, and they began to hold up nominations.<sup>95</sup> Senator Hatch himself held up all of the administration’s judicial nominations in order to win a controversial appointment to the district bench favored by conservatives in Utah.<sup>96</sup> Senator James Inhofe of Oklahoma placed a hold on thirty judicial nominees in anger over President Clinton’s recess appointment of an openly gay man as Ambassador to Luxembourg.<sup>97</sup> When at the end of 1997 Chief Justice Rehnquist issued a then-rare chastising of the Senate for its slow pace of confirmations, Senator Hatch blamed President Clinton’s nomination of “activist” judges for the delay.<sup>98</sup> Notwithstanding the political rhetoric, however, I know from my experience at the time as Chief Judge of the Tenth Circuit that Senator Hatch did a great deal to help President Clinton get his nominees through the Senate as long as it was feasible for him to do so.

When President Clinton left office, a strong Republican opposition, inconsistent Democratic support, and the distractions of impeachment left him with an unimpressive rate of appointment. Forty-two nominees remained unconfirmed, most of whom never received a hearing,<sup>99</sup> and there were nearly 100 vacancies on the federal bench.<sup>100</sup> At the same time, yearly appeals had grown to over 50,000.<sup>101</sup>

With so many vacancies and several aging Supreme Court Justices, it is not surprising that judicial issues became a prominent feature in the 2000 presidential campaign.<sup>102</sup> Sophisticated members of the public were aware that “the election

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92. See Carl Tobias, *Judicial Selection at the Clinton Administration's End*, 19 L. & Ineq. 159, 169 (2001).

93. Maltese, *supra* n. 1, at 15.

94. *Id.* at 16.

95. *Id.*

96. Brannon P. Denning, *Reforming the New Confirmation Process: Replacing “Despise and Resent” with “Advice and Consent,”* 53 Admin. L. Rev. 1, 10 (2001).

97. Sarah Binder, *The Senate as a Black Hole: Lessons Learned from the Judicial Appointment Experience*, 19 Brookings Rev. 37 (Spring 2001) (available at <<http://www.brookings.edu/press/REVIEW/spring2001/binder.htm>>); Maltese, *supra* n. 1, at 19.

98. Denning, *supra* n. 96, at 9-10.

99. Maltese, *supra* n. 1, at 21.

100. Gerhardt, *supra* n. 9, at 1701.

101. *Statistical Tables for the Federal Judiciary: December 31, 2000*, at 6 (Admin. Off. of U.S. Cts. 2000).

102. See Ross, *supra* n. 2, at 460 (arguing “[j]udicial issues were more prominent in the 2000 election than in any election since 1968”).

could shift the balance of the [Supreme] Court.”<sup>103</sup> Nine days before the election, in the battleground state of Michigan, Vice President Al Gore warned:

The Supreme Court is at stake. There are going to be three, maybe four . . . maybe even five justices . . . appointed by the next president . . . . Think about civil rights. Think about women’s rights. Think about human rights. Think about antitrust law. Think about Federalism. All of these issues are on the ballot . . . .<sup>104</sup>

Pro-life activist Gary Bauer predicted Governor George W. Bush’s election would lead to the overturning of *Roe v. Wade*,<sup>105</sup> and many commentators believed the election would have a significant effect on federalism and affirmative action.<sup>106</sup> The awareness among presidents that courts could determine the success of their domestic policy agendas was spreading to the public.

Under the second President Bush, judicial selection procedures underwent immediate changes. President George W. Bush moved central command from the attorney general’s office to the White House.<sup>107</sup> Citing a perceived bias in the ABA, he cut the organization out of the screening process.<sup>108</sup> In the Senate Judiciary Committee, Senator Hatch dramatically altered the mysterious “blue slip” procedure. At the time, either senator from a judicial candidate’s home state could withhold a “blue slip,” or in essence, his or her approval, and block a nomination.<sup>109</sup> Senator Hatch had allowed this Senate tradition to continue during the Clinton administration, when Senator Jesse Helms of North Carolina used it to block all of President Clinton’s nominees to the Fourth Circuit.<sup>110</sup> But in 2001, Senator Hatch announced that both senators from a state would have to withhold a “blue slip” for a nomination to be blocked, essentially giving Republican senators the ability to trump their Democratic colleague’s disapproval.<sup>111</sup> Having lost the ability to block nominations by other means, Senate Democrats began threatening to filibuster President Bush’s nominees.<sup>112</sup> This step marked a significant escalation in the confirmation wars. While moderate nominees have received relatively easy confirmation, those perceived as too conservative now face a stormy Senate.<sup>113</sup> For example, Miguel Estrada did not survive the filibustering and finally withdrew as a nominee to the D.C. Circuit.<sup>114</sup> White

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103. *Id.* at 461.

104. *Id.* at 461-62 (quoting *Gore in His Own Words*, N.Y. Times News Serv. (Oct. 30, 2000)) (internal quotations and footnote omitted).

105. *Id.* at 463-64.

106. *Id.* at 464.

107. Gerhardt, *supra* n. 9, at 1697.

108. See Gerhardt, *supra* n. 8, at 25. Senator Hatch had ended the ABA’s testimony at confirmation hearings in 1997, but President Clinton continued to consult the organization and receive formal ratings of potential nominees. *Id.*

109. Denning *supra* n. 12, at 84; Maltese, *supra* n. 1, at 21-22.

110. Denning, *supra* n. 12, at 83 n. 58.

111. *Id.* at 84; Maltese, *supra* n. 1, at 21-22, 26.

112. Denning, *supra* n. 12, at 84.

113. See Maltese, *supra* n. 1, at 26.

114. The Estrada nomination and President Clinton’s nomination of Elena Kagan to the D.C. Circuit make for interesting comparison. Both were nominated to the D.C. Circuit, but Mr. Estrada fell to a filibuster, and Ms. Kagan never received a hearing, let alone a vote on the Senate floor. Mr. Estrada

House Press Secretary Ari Fleischer criticized Senate Democrats' lack of bipartisan spirit, but Democrats responded by reminding the White House that judicial appointments had entailed political battles long before the current administration took office.<sup>115</sup>

President Bush has chosen his nominees with politics in mind, and the Senate has responded in kind. That the ideology of nominees matters to both the president and the Senate is nothing new. Professor Erwin Chemerinsky has aptly summarized the situation:

I once saw it written that every generation believes that it is the first to really discover sex. So, too, it seems that every generation has the sense that it is the first to uncover that ideology has a role in the judicial selection process. This is nonsense. Every President in American history, to a greater or lesser extent, has chosen federal judges . . . based on their ideology. Likewise, since the earliest days of the nation, the United States Senate also has looked to ideology in the confirmation process. This is exactly how it should be.<sup>116</sup>

## II. DANGEROUS DELAY

In my judgment, the breakdown in the judicial selection process comes not so much from the political nature of the process, but from the inordinate delays engendered in recent times by the divisive nature of Congress and the increasing level of retaliation for prior wrongs allegedly done by the opposing party in confirmation battles. Major vacancies on the courts of appeals are the result.

What President George W. Bush faces is not a Senate more focused on the ideology of judicial nominees than prior Senates. Rather, he faces a Senate almost evenly split between Republicans and Democrats and a public exceptionally polarized politically. Divided government—the situation in which Congress and the presidency are controlled by different parties—has been the norm since 1969.

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earned his undergraduate degree from Columbia. Ms. Kagan earned hers from Princeton, and then received a Masters in Philosophy from Oxford. Both graduated from Harvard Law School, where they were both editors of the *Harvard Law Review*, and both proceeded into prestigious appellate clerkships—Mr. Estrada for Judge Amalya Kearsse on the Second Circuit, and Ms. Kagan with Judge Abner Mikva on the D.C. Circuit. Mr. Estrada then clerked for Justice Kennedy on the United States Supreme Court, Ms. Kagan for Justice Marshall. After clerking, Mr. Estrada worked for one year with the New York law firm Wachtell, Lipton, Rosen & Katz, then joined the U.S. Attorney's Office in the Southern District of New York. From 1992 to 1997, he worked as an assistant to the Solicitor General of the United States. Mr. Estrada then became a partner in the Appellate and Constitutional Law Practice Group of the D.C. office of Gibson, Dunn & Crutcher. Following her clerkship with Justice Marshall, Ms. Kagan joined the highly regarded D.C. litigation firm of Williams & Connolly. She then took on law school faculty positions, teaching constitutional and administrative law, initially at the University of Chicago and then at Harvard. In addition, she served as deputy director of the Domestic Policy Council in the Clinton administration. Ms. Kagan is presently serving as Harvard Law School's first female dean. Clearly, both Dean Kagan and Mr. Estrada were eminently qualified for the positions for which they were nominated. Neither, however, managed to survive the judicial selection process. For brief biographies of the two nominees, see U.S. Department of Justice, *Office of Legal Policy*, Miguel A. Estrada: *Biography* <<http://www.usdoj.gov/olp/estrada/bio.htm>> (accessed Mar. 10, 2004) and Harvard Law School, *Elena Kagan Named Next Dean of Harvard Law School* <[http://www.law.harvard.edu/news/2003/04/03\\_kagan.php](http://www.law.harvard.edu/news/2003/04/03_kagan.php)> (Apr. 3, 2003).

115. Maltese, *supra* n. 1, at 14.

116. Chemerinsky, *supra* n. 9, at 620.

In half of those twenty-four years, the White House and the Senate have been in opposite hands.<sup>117</sup> The electorate, moreover, has been growing increasingly polarized, with less ticket-splitting and less of a moderate center.<sup>118</sup> The House of Representatives began to reflect this shift in the population after the 1982 mid-term elections, but polarized politics did not truly take hold in the Senate until the mid-1990s.<sup>119</sup> Now, however, the Senate appears even more polarized than the House.<sup>120</sup> It is no coincidence, therefore, that “confirmation gridlock” began in earnest in 1996.<sup>121</sup> And the controversial 2000 election only increased party unity.<sup>122</sup> The hostile reception judicial nominees face in the Senate appears not to represent a constitutional breakdown, but is instead a “byproduct” of the current political climate.<sup>123</sup> The problem for the administration of justice by the courts is not the political nature of judicial selection, but a failure on the part of the Senate to fill vacant positions expeditiously.

The delay in the judicial appointment process spawned by fierce political battles has grown exponentially over the last decade. The average time from nomination of a judicial candidate to final Senate action ballooned to 201 days in 1997, from a low of thirty-two days in President Reagan’s first year in office.<sup>124</sup> The 1997 delay was particularly protracted for courts of appeals’ nominees, who languished an average of 258 days.<sup>125</sup> One of President Clinton’s nominees to the Sixth Circuit, Judge Helene White of the Michigan Court of Appeals, waited four years without a hearing only to have her nomination die with the end of President Clinton’s time in office.<sup>126</sup> Her time in confirmation limbo surpassed that of any judicial nominee in American history.<sup>127</sup> And the length of the vacancies on the various courts of appeals were, in actuality, much longer than the time any particular nominee waited in the Senate, given the delay from the time a judicial seat *becomes vacant* to the time a nomination is made. For example, the seat President Clinton nominated Judge White to fill was vacated on May 1, 1995, when Judge Damon Keith took senior status.<sup>128</sup> Nearly a decade later, the position remains vacant.<sup>129</sup>

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117. Maltese, *supra* n. 1, at 2.

118. *Id.* at 3.

119. *Id.*

120. *Id.*

121. *Id.*

122. See Maltese, *supra* n. 1, at 12 (noting that party unity was especially strong when George W. Bush took office).

123. See *id.* at 11-12.

124. *Uncertain Justice: Politics and America’s Courts* 46 (Century Found. Press 2000) [hereinafter *Uncertain Justice*].

125. *Id.* at 50.

126. Carl Tobias, *Sixth Circuit Federal Judicial Selection*, 36 U. Cal. Davis L. Rev. 721, 742 (2003).

127. *Id.* at 722.

128. See Admin. Off. of U.S. Cts., *Vacancies in the Federal Judiciary, December 1, 1999* <<http://www.uscourts.gov/vacancies/12011999/judgevacancy.htm>> (accessed Mar. 10, 2004).

129. See Admin. Off. of U.S. Cts., *Vacancies in the Federal Judiciary, February 23, 2004* <<http://www.uscourts.gov/vacancies/judgevacancy.htm>> (accessed Mar. 10, 2004) [hereinafter *Vacancies in the Federal Judiciary, Feb. 23, 2004*].



At the close of President Clinton's second term, more than one in nine slots on the federal bench stood empty.<sup>130</sup> Now, nearing the end of President George W. Bush's first term, the vacancy rate is down to just over one in twenty.<sup>131</sup> Certainly, these numbers indicate improvement. Nevertheless, the time between nomination and confirmation remains substantial. Only fifty-four percent of President Bush's nominees for existing vacancies have received hearings.<sup>132</sup> While a third of those nominees have been waiting less than ninety days for a hearing, two-thirds have been waiting 180 days or more, and a third have been waiting more than a year.<sup>133</sup> Of those nominees who have received a hearing, only a quarter have been reported out of the Judiciary Committee, and of those favorably reported out, several have been waiting more than 180 days for a vote on the Senate floor.<sup>134</sup>

Some circuits have suffered more than others amid undue delay. The Sixth Circuit has been hit particularly hard.<sup>135</sup> President Clinton was unable to secure confirmation for four vacancies on that court.<sup>136</sup> Then, in the year he left office, four Sixth Circuit Judges took senior status. The court—with sixteen approved slots and two more recommended by the Judicial Conference of the United States—had only eight judges at the start of the George W. Bush presidency.<sup>137</sup> While President Bush successfully appointed four judges to the Sixth Circuit,<sup>138</sup> his four additional nominees have been waiting more than a year for final Senate action.<sup>139</sup> Michigan's Democratic senators are committed to blocking President Bush's nominees from Michigan until he agrees to re-nominate President Clinton's selections for the Sixth Circuit, whose consideration was blocked by the Republican Senate.<sup>140</sup> This extended vacancy necessarily has taken its toll. That court publishes fewer opinions than most circuits, takes longer to resolve the matters before it, and relies more on visiting judges to complete its workload.<sup>141</sup> The stress of laboring at half capacity may also have hampered the court's

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130. See Tobias, *supra* n. 89, at 108 (noting the number of vacancies at the time President Clinton left office).

131. See U.S. Sen. Comm. on Jud., *Nominations in the 108th Congress, Status of Article III Judicial Nominations* <<http://senate.gov/judiciary/nominations.cfm>> (Mar. 8, 2004) (noting eighteen vacancies in courts of appeals and twenty-nine district court vacancies).

132. Compare *Vacancies in the Federal Judiciary, Feb. 23, 2004, supra* n. 129 with Off. of Sen. Patrick Leahy, *Judicial Nominations Summary for the 108th Congress* <<http://leahy.senate.gov/issues/nominations/cover.htm>> (last updated Feb. 11, 2004) [hereinafter *Summary for the 108th Congress*] (providing names and dates for nominees receiving hearings).

133. Compare *Vacancies in the Federal Judiciary, Feb. 23, 2004, supra* n. 129 with *Summary for the 108th Congress, supra* n. 132.

134. Compare *Vacancies in the Federal Judiciary, Feb. 23, 2004, supra* n. 129 with *Summary for the 108th Congress, supra* n. 132.

135. Tobias, *supra* n. 126, at 722.

136. *Id.* at 742.

137. See *id.* at 723, 742-43.

138. See *Vacancies in the Federal Judiciary, Feb. 23, 2004, supra* n. 129 (citing four current vacancies on the Sixth Circuit).

139. See *id.*

140. Tobias, *supra* n. 126, at 722.

141. *Id.* at 743.

collegiality, as betrayed by several non-legal disagreements aired in the form of recent Sixth Circuit opinions.<sup>142</sup>

The Fourth Circuit has fared only slightly better in this time of increasing confirmation wrangling. President Clinton sent the Senate nine nominations to the Fourth Circuit in his two terms, but when he left office, five of the court's fifteen positions were vacant.<sup>143</sup> One seat had been open for over a decade, and no judge from North Carolina sat on the court for eight years.<sup>144</sup> The Fourth Circuit now operates with thirteen judges, but it has experienced strain in these years of vacant seats. The court publishes a lower percentage of its opinions than any circuit but one and provides oral argument in a lower percentage of cases than any other federal appellate court.<sup>145</sup>

The D.C. Circuit and the Ninth Circuit are viewed as particularly important courts—the D.C. Circuit because of its exclusive jurisdiction in a variety of cases and the Ninth Circuit because of the sheer number of people for whom it is, essentially, the court of last resort. Likely because of their perceived significance, however, each court has seen substantial nomination delay. From 1977 through 1998, it took a record-breaking average of 157 days for the Senate to take final action on nominees to the Ninth Circuit.<sup>146</sup> In 1997 and 1998, the average time was an incredible 310 days.<sup>147</sup> Judges Marsha Berzon and Richard Paez waited more than two and four years respectively before being confirmed in 2000.<sup>148</sup> The position for which Judge Paez was ultimately confirmed had been vacant for a full four years, Judge Berzon's for over three years.<sup>149</sup> President Bush has been unable to fill the two additional vacancies on that court, one of which was vacated in September of 2000, the other in November of last year.<sup>150</sup>

One quarter of the D.C. Circuit is now vacant. President Clinton's nominations of Elena Kagan and Allen Snyder were stalled in the Senate for eighteen and fifteen months, respectively.<sup>151</sup> Neither received a vote in the Judiciary Committee, and Ms. Kagan never even received a hearing although she

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142. See e.g. *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) *aff'd*, 539 U.S. 306 (2003); *Memphis Planned Parenthood, Inc. v. Sundquist*, 184 F.3d 600 (6th Cir. 1999) (denying petition for rehearing en banc).

143. Carl Tobias, *Federal Judicial Selection in the Fourth Circuit*, 80 N.C. L. Rev. 2001, 2028 (2002).

144. See *id.* at 2003. President Bush has filled these lingering vacancies with Judge Roger Gregory of Virginia in 2001 and Judge Allyson Duncan of North Carolina in 2003.

145. *Id.*

146. *Uncertain Justice*, *supra* n. 124, at 55.

147. *Id.*

148. Elliot M. Minberg, *Federal Judicial Nominations and Confirmations During the Last Two Years of the Clinton Administration*, in *Rights at Risk: Equality in an Age of Terrorism*, 21, 29 (Dianne M. Piche et al. eds., Citizen's Commn. on Civ. Rights 2002) (available at <http://www.cccr.org/chapter3.pdf>).

149. See Admin. Off. of U.S. Cts., *Vacancies in the Federal Judiciary, January 27, 1999* <<http://www.uscourts.gov/vacancies/01271999/judgevacancy.htm>> (accessed Mar. 11, 2004).

150. See *Vacancies in the Federal Judiciary, Feb. 23, 2004*, *supra* n. 129 (noting two vacancies on the Ninth Circuit, two nominees by President Bush, and Senate delay of over four months on each).

151. E.J. Dionne, Jr., *They Started It*, Wash. Post A27 (Feb. 21, 2003).

was a highly qualified nominee.<sup>152</sup> Two of President Bush's nominees have been waiting since July 2003 for a hearing before the Senate Judiciary Committee.<sup>153</sup> As previously mentioned, his third nominee, D.C. attorney Miguel Estrada, withdrew his name when it became clear a Democratic filibuster would doom his nomination.<sup>154</sup>

On my own court, the Tenth Circuit, four of my colleagues took senior status in the period from October 1999 to January 2001. One position was vacant for three and a half years, one was vacant for three years, and the other two were vacant for eleven months each. All of the nominees were highly qualified people, but two were quite controversial because of their perceived views on hot-button issues. While their nominations languished, the work of our court piled up. And the vast majority of our work has nothing to do with the issues that stalled my colleagues' appointments. The delays were thus for perceived views that matter naught to most of the cases we decide. Moreover, even if they did matter, both nominees were eventually confirmed, so the delays were meaningless except to the extent they contributed needlessly to the backlog of my circuit.

With the Democrats now filibustering circuit court nominees, President Bush has upped the ante further by making appointments of filibustered nominees under his recess appointment powers.<sup>155</sup> He has made two such appointments to date: Judge Charles Pickering to the Fifth Circuit and William Pryor to the Eleventh Circuit.<sup>156</sup> If the Democrats keep filibustering and the President continues to make recess appointments, the courts of appeals potentially could be left with a series of one-year-term judges.

### III. CONCLUSION

From my perspective as a member of the judiciary, the judicial appointment process is quite broken. While the judiciary has cause to complain about it, as Chief Justice Rehnquist has repeatedly done on our behalf, only the president and the Senate have the power to fix the problem. I leave you with this thought: more than 60,000 cases are now filed in the courts of appeals each year.<sup>157</sup> The increasing likelihood of long vacancy rates and the impact on the expeditious handling of this enormous caseload looms large. When judges are appointed to the federal courts, what principle of our democracy should we value the most—

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152. *Consult on Judges*, Wash. Post A34 (Oct. 24, 2002); Jonathan Groner, *Bush May Need to Show Restraint in Judge Picks: Even Split in Senate, Modest Mandate Mean Conservative Court Nominees May Face Confirmation Battles*, 23 Leg. Times 9 (Nov. 13, 2000). For a discussion of Dean Kagan's qualifications, see *supra* note 114.

153. See *Vacancies in the Federal Judiciary*, Feb. 23, 2004, *supra* n. 129.

154. John Cornyn, *Restoring Our Broken Judicial Confirmation Process*, 8 Tex. Rev. L. & Pol. 1, 4-5 (2003); Peter M. Shane, *When Inter-Branch Norms Break Down: Of Arms-for-Hostages, "Orderly Shutdowns," Presidential Impeachments, and Judicial "Coups,"* 12 Cornell J.L. & Pub. Policy 503, 531-32 (2003).

155. See *Vacancies in the Federal Judiciary*, Feb. 23, 2004, *supra* n. 129.

156. *Id.*

157. Off. of Judges Program, *Federal Judicial Caseload Statistics: March 31, 2003*, at 7 (Admin. Off. of U.S. Cts. 2003).

the right of the president and the Senate to play politics as usual, or the admonition that justice delayed is justice denied?

