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# Appointing Federal Judges: The President, the Senate, and the Prisoner's Dilemma

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## **Public Law and Legal Theory Research Paper Series**

**September 2004**

**Appointing Federal Judges: The President, the Senate,  
and the Prisoner's Dilemma**

**David S. Law**

## APPOINTING FEDERAL JUDGES: THE PRESIDENT, THE SENATE, AND THE PRISONER'S DILEMMA

David S. Law\*

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### I. INTRODUCTION

The recent withdrawal of George W. Bush's nomination of Miguel Estrada to the D.C. Circuit, bemoaned by Senate Republicans as the first-ever successful filibuster of an appeals court nomination,<sup>1</sup> underlines a growing sense that the federal judicial appointments process has degenerated, in the words of one senator, into a vicious cycle of "payback on top of payback on top of payback."<sup>2</sup> Tempers, to be sure, are fraying. Republican leaders blame "rank and unbridled Democratic partisanship"<sup>3</sup> for what they have dubbed a "political hate crime"<sup>4</sup> and a "constitutional disaster,"<sup>5</sup> and the White House has taken to bypassing the Senate entirely with the use of recess appointments.<sup>6</sup> Meanwhile, Democrats bitterly accuse Republicans of employing a "double standard"<sup>7</sup> – and even

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<sup>1</sup> See Helen Dewar, *Polarized Politics, Confirmation Chaos*, WASH. POST, May 11, 2003, at A5; CNN, *Estrada withdraws as judicial nominee* (Sept. 4, 2003), at <http://www.cnn.com/2003/ALLPOLITICS/09/04/estrada.withdraws/index.html>.

<sup>2</sup> Helen Dewar, *Confirmed Frustration With Judicial Nomination Process*, WASH. POST, Mar. 10, 2003, at A19 (quoting Democratic Senator Mark Pryor).

<sup>3</sup> Helen Dewar, *Estrada Abandons Court Bid*, WASH. POST, Sept. 5, 2003, at A19 (quoting Senate Majority Leader Bill Frist).

<sup>4</sup> *Id.* at A19 (quoting House Majority Leader Tom Delay).

<sup>5</sup> Helen Dewar, *An All-Nighter in the Senate*, WASH. POST, Nov. 13, 2003, at A1 [hereinafter Dewar, *All-Nighter*] (quoting Senate Judiciary Committee Chairman Orrin Hatch on Democratic obstruction of judicial nominees).

<sup>6</sup> See Mike Allen, *Bush Again Bypasses Senate to Seat Judge*, WASH. POST, Feb. 21, 2004, at A1, available at <http://www.washingtonpost.com/wp-dyn/articles/A58072-2004Feb20.html> (describing the recess appointments of embattled circuit court nominees Charles Pickering and William Pryor to the Fifth and Eleventh Circuits).

<sup>7</sup> Helen Dewar, *Battle Over Judges Continues*, WASH. POST, July 31, 2003, at A17 (quoting Senator Patrick Leahy); see also, e.g., Nicholas Confessore, *This Time, It's Personal*, AMERICAN PROSPECT,

political espionage<sup>8</sup> – to achieve their political goals. Efforts by the Republican leadership to generate public outrage over stalled judicial nominations by insisting upon all-night debate have even prompted the Senate chaplain to pray for civility.<sup>9</sup> Both sides recognize that they have settled into a pattern of destructive behavior that seems only to be worsening.<sup>10</sup> It is often suggested that the failure (or near-failure) of one or more Supreme Court nominations between the late 1960s and early 1990s – for example, the Bork nomination – is to blame for dragging the politics of judicial selection into a vicious cycle of retribution.<sup>11</sup>

There are problems with this conventional account. It is fundamentally circular: the bitterness of conflict over judicial nominations cannot be used to explain itself. It also uses a constant to explain a change: Supreme Court nominations have failed with some regularity since the early days of the

June 4, 2001, at 13 (quoting exchange between Leahy and NPR reporter Nira Totenberg); Erwin Chemerinsky, *Ideology and the Selection of Federal Judges*, 36 U.C. DAVIS L. REV. 619, 620 (2003) (arguing that Senate Republicans are guilty of "just plain hypocrisy" in light of their behavior during the Clinton administration).

<sup>8</sup> The Senate Judiciary Committee has launched an investigation into the use and dissemination by Republican aides of Democratic strategy memoranda stored on a shared computer server. On the Republican side, Senator Hatch has called the conduct "unethical," if not "criminal"; on the Democratic side, Senator Kennedy has likened it to the Watergate scandal. See Kelley Beaucar Vlahos, *Former Aide in Memo Leak Seeks Probe of Dems*, FOX NEWS, Feb. 12, 2004, at <http://www.foxnews.com/story/0,2933,111286,00.html> (quoting Senators Hatch and Kennedy); Dahlia Lithwick, *Memogate*, SLATE, Feb. 19, 2004, at <http://slate.msn.com/id/2095770>. To make matters worse, a Republican aide who was pressured to resign as a consequence of the leaked documents has since petitioned the Senate Ethics Committee to investigate the Democratic members of the Judiciary Committee for ethics violations that he alleges are evidenced by the memoranda themselves. See Vlahos, *supra*; Lithwick, *supra*.

<sup>9</sup> See Steve Turnham, *Reid blasts Frist in the Senate*, CNN (Nov. 10, 2003), at <http://www.cnn.com/2003/ALLPOLITICS/11/10/senate.spat/index.html> (quoting Senate Chaplain Barry Black's opening prayer). So far, the prayers do not appear to be working. See Dewar, *All-Nighter*, *supra* note 5, at A1 ("The Republicans are like children in the playground. They want all the toys.") (quoting Senator Patrick Leahy, ranking Democrat on the Senate Judiciary Committee, on the Republican-sponsored all-night debate).

<sup>10</sup> See, e.g., Dewar, *supra* note 2, at A19 (quoting Republican Senators Lindsey Graham and John Cornyn and Democratic Senator Mark Pryor); Jesse J. Holland, *Dems claim votes to block Bush nominee*, SALON (May 1, 2003), at <http://www.salon.com/news/wire/2003/05/01/nominee/index.html> (quoting Senator Cornyn and Democratic Senator Charles Schumer on the need for reform of the judicial appointments process); Dewar, *supra* note 1, at A5 ("it's gotten into a retribution mode") (quoting former Senate Judiciary Committee staff member Laura Cohen Bell).

<sup>11</sup> See, e.g., Mark Silverstein & William Haltom, *You Can't Always Get What You Want: Reflections on the Ginsburg and Breyer Nominations*, 12 J. OF LAW & POLITICS 459, 461-62 (1996) (drawing the line at 1968, with the defeat of Johnson's effort to elevate Abe Fortas to Chief Justice); Stephen O. Kline, *The Topsy-Turvy World of Judicial Confirmations in the Era of Hatch and Lott*, 103 DICKINSON L. REV. 247, 326 (1999) (quoting Orrin Hatch as faulting Democratic handling of the Bork, Souter, and Thomas nominations, as well as Rehnquist's elevation to Chief Justice); *id.* at 327 (quoting Yale law professor Robert Gordon as drawing the line at the Bork nomination); Joan Biskupic,

Republic,<sup>12</sup> but gridlock and ideological conflict over lower court nominations are more novel phenomena. A search for underlying historical and institutional causes may instead be in order. This paper argues that expansion of the White House's role in judicial appointments since the late 1970s, at the expense of the Senate, has made a cooperative equilibrium exceptionally difficult to achieve or sustain. It is further suggested that the mere possibility of divided government exacerbates the difficulty of achieving cooperation by increasing uncertainty about both the benefits of cooperative behavior and the costs of retaliation.

Part II of this paper describes the federal judicial appointments process and attempts to place it in historical, political, and institutional context. Part III introduces relevant game theory concepts and explains how relations among the players in the judicial appointments process fall roughly into the same mold of strategic interaction as the classic Prisoner's Dilemma. Part IV suggests that the possibility of divided government affects the strategic calculations of senators and presidents alike, for the worse. Part V identifies broader research questions suggested, but left unanswered, by the argument posed here. It also considers the shortcomings of various solutions and concludes that current patterns of behavior will prove highly resistant to change.

## II. THE FEDERAL JUDICIAL APPOINTMENTS PROCESS

### A. *Historical background*

The Judiciary Act of 1789 established the nation's first federal judgeships, 19 in all: 6 justices of the Supreme Court, and 13 district court judges.<sup>13</sup> Today, over 850 such judgeships are authorized by statute.<sup>14</sup> The Appointments Clause provides that the President

shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the

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*Clinton Avoids Activists in Judicial Selections*, WASH. POST, Oct. 24, 1995, at A1 (quoting political scientist Sheldon Goldman on the consequences of the Bork nomination).

<sup>12</sup> See *infra* note 104 and accompanying text.

<sup>13</sup> See Administrative Office of the U.S. Courts, *History of Federal Judgeships* tbl.k (2003), available at <http://www.uscourts.gov/history/tablek.pdf> (last visited Jan. 6, 2003).

<sup>14</sup> See *id.*

Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by law. But the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.<sup>15</sup>

The allocation of nominating authority to the President, on the one hand, and of the undefined powers of "advice and consent" to the Senate, on the other, is a formula that has yielded its share of political conflict and unfilled judicial vacancies. Nor is Congress as a whole excluded from the process: the Appointments Clause confers on Congress the power to determine which offices, apart from those enumerated in the text of the clause itself, require Senate confirmation. It is understood that a president cannot simply declare that district or circuit judges do not require confirmation; nor has any president attempted to do so.

In its historical origins, the Appointments Clause, like many provisions of the Constitution, reflected a compromise between those such as Madison and Hamilton who favored a stronger central government, and others who feared executive power: the former wished to vest the appointment power entirely in the President, while the latter preferred to entrust it exclusively to the Senate or to the entire Congress. As adopted, the compromise proposed by Hamilton purported to balance considerations of efficiency, accountability, expertise, and quality assurance. It gave exclusive responsibility for making nominations to the President on grounds of efficiency, accountability, and predisposition to consider the interests of the nation as a whole, but also accorded the Senate the responsibility of checking presidential abuse and lapses of judgment.<sup>16</sup>

This division of power is not an even one. In any conflict with the President, the Senate begins with several institutional handicaps. It is difficult for a divided multi-member body – especially one as notorious for the independence of its members as the United States Senate – to muster sustained opposition to a unitary leader such as the president; problems of coordination and coalition-building abound. The president's ability to appeal directly to voters nationwide, and to mobilize them against recalcitrant politicians, also tips

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<sup>15</sup> U.S. CONST. art. II, § 2.

<sup>16</sup> See MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS* 28 (2000).

the scales in his favor.<sup>17</sup> By design, the Appointments Clause further favors the president by granting him the power of nomination, and thus of initiative, while casting the Senate in a reactive role.<sup>18</sup> The power to nominate includes the power to resubmit a nomination repeatedly -- a power that, as Gerhardt observes, "will enable him sooner or later to get his way unless the Senate has a sufficiently good reason that can persuade or move a majority to put its own political capital repeatedly on the line against it."<sup>19</sup> Alternatively, a president may simply threaten to nominate an even less palatable candidate.<sup>20</sup> Thus, at least in the context of Supreme Court appointments, it is generally the case that "the role of

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<sup>17</sup> See, e.g., *id.* at 305 ("It is no coincidence that President Clinton's public denouncement of the paralysis in judicial selection at the end of 1997, coupled with the Chief Justice's criticisms of the Senate's slowdown in 1997 and 1998, produced some movement, albeit temporary, in the judicial confirmation process.").

<sup>18</sup> As Hamilton makes clear in *Federalist No. 66*, an imbalance in favor of the President was not only anticipated, but intended:

It will be the office of the President to *nominate*, and, with the advice and consent of the Senate, to *appoint*. There will, of course, be no exertion of *choice* on the part of the Senate. They may defeat one choice of the Executive, and oblige him to make another; but they cannot themselves *choose* – they can only ratify or reject the choice of the President. They might even entertain a preference to some other person, at the very moment they were assenting to the one proposed, because there might be no positive ground of opposition to him; and they could not be sure, if they withheld their assent, that the subsequent nomination would fall upon their own favourite, or upon any other person in their estimation more meritorious than the one rejected.

THE FEDERALIST NO. 66, at 373 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>19</sup> GERHARDT, *supra* note 16, at 36.

<sup>20</sup> For example, had Clarence Thomas not been confirmed, for example, Bush could have nominated someone even less palatable to liberals like Senator Orrin Hatch, who would have benefited from the unwillingness of the Senate to reject one of their own. Abhorred by many liberals, Hatch has surfaced repeatedly as a Supreme Court candidate when Republican presidents have been faced with Supreme Court vacancies. See Viveca Novak, *Off the Bench?*, TIME, Feb. 26, 2001, at 54; Ted Gest, *The ball's in Reagan's court*, U.S. NEWS & WORLD REPORT, July 6, 1987 at 20. Such threats, however, do not always succeed. A determined Senate of an opposing party may prevail, particularly when the nominees themselves display vulnerabilities. Nixon's nomination of Clement Haynsworth for the Supreme Court was rejected following vigorous opposition from labour and civil rights groups and ethical questions over his financial interests. Vowing to keep nominating southern conservatives until one was confirmed, Nixon next named G. Harrold Carswell, who was also rejected. Carswell's abilities were so suspect that "[e]ven Nixon Administration insiders considered him a 'boob' and a 'dummy'"; nor was his nomination helped by film of an early speech in which he had endorsed white supremacy. JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 137 (1993). Nixon was forced finally to settle upon Lewis Powell, a moderate southerner. See *id.* at 135-37.

Conversely, senators may make successful threats of their own: for example, having concluded that southern senators would block the appointment of blacks or civil rights lawyers to appeals courts in the south, the Kennedy administration simply declined to propose any such candidates. See Donald R. Songer, *The Policy Consequences of Senate Involvement in the Selection of Judges in the United States Courts of Appeals*, 35 WESTERN POLITICAL Q. 107, 109 (1982).

the Senate in Supreme Court nominations has been limited to consent.<sup>21</sup> At the same time, however, the practices and traditions of the Senate have enabled it to play an active and historically dominant role in the appointment of district and circuit judges, as will be discussed below.

*B. Presidential practices in the selection of judicial nominees*

In selecting judicial nominees, presidents employ a mix of criteria that includes objective merit, party loyalty, personal friendship with the president, demographic diversity, and what might be termed "agreement with the president's basic political and constitutional philosophy" or, more simply, ideology.<sup>22</sup> For their part, judges themselves tend to attribute their appointment to a combination of "political participation, professional competence, personal ambition, plus an oft-mentioned pinch of luck."<sup>23</sup> Though the relative importance of these factors is in no way fixed, ideology can be expected to weigh heavily, especially in appointments to more important posts.<sup>24</sup> As Segal and Spaeth put it: "Given the Supreme Court's role as a national policy maker, it would boggle the mind if Presidents did not pay careful attention to the ideology and partisanship of potential nominees."<sup>25</sup> Presidents have also emphasized diversity to varying degrees, both as a goal in itself and as a means of securing political support from particular constituencies. Carter and Clinton, in particular, have been noted for their attention to diversity at all levels of the federal bench: a record 58% of Clinton's judicial appointees were women or minorities, with Carter a distant second at 35%.<sup>26</sup> While high-profile

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<sup>21</sup> SEGAL & SPAETH, *supra* note 20, at 126.

<sup>22</sup> GERHARDT, *supra* note 16, at 129; *see also* SEGAL & SPAETH, *supra* note 20, at 130 (noting that 60% of Supreme Court appointees have been personally acquainted with the presidents who appointed them).

<sup>23</sup> J. WOODFORD HOWARD JR., *COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS* 90 (1981).

<sup>24</sup> *See, e.g.,* Chemerinsky, *supra* note 7, at 624-26; GERHARDT, *supra* note 16, at 129-30 (noting Bush Sr.'s rate of cross-party district court appointments); SEGAL & SPAETH, *supra* note 20, at 127.

<sup>25</sup> SEGAL & SPAETH, *supra* note 20, at 127.

<sup>26</sup> David O'Brien, *Judicial Legacies: The Clinton Presidency and the Courts*, in *THE CLINTON LEGACY* 114 (Colin Campbell & Bert A. Rockman eds. 2000); *see also* GERHARDT, *supra* note 16, at 130-31; Sheldon Goldman, Elliott E. Slotnick, Gerard Gryski & Gary Zuk, *Clinton's Judges: Summing up the legacy*, 84 *JUDICATURE* 228, 242-45 (2001). The *Washington Post* reports that the current Bush administration is so anxious to identify ideologically suitable minority candidates that "after

appointments might be dismissed as tokenism, the potential electoral rewards are obvious and tempting to leaders from both parties.<sup>27</sup>

Over time, the White House has adopted organizational strategies by which judicial selection at all levels has been fashioned into an instrument of policy. It is a requirement of any effective presidency, Moe has argued, that sensitive political activities – namely, those critical to successful execution of the president's policy agenda – be conducted by those loyal to the president. He identifies two successful strategies by which presidents extend and consolidate their control over policy: *politicization*, or the embedding of likeminded political appointees ever deeper into the various departments of government; and *centralization*, or the relocation of sensitive functions into the White House itself.<sup>28</sup>

With respect to politicization, it is difficult to imagine a set of political appointees more irrevocably embedded in government than federal judges with life tenure. Whereas regular political appointees face replacement by subsequent presidents, federal judges continue to make or break policy long after the presidents who appointed them have lapsed into history. From wrangling over the establishment of a federal banking system<sup>29</sup> to obstruction of the New Deal,<sup>30</sup> history has demonstrated how presidents leave judicial legacies that can frustrate

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officials have exhausted their personal networks in particular geographic areas, they have scoured the directories of federal and state judges, and even the rosters of major law firms." Mike Allen & Helen Dewar, *Second Judicial Nominee Targeted*, WASH. POST, Apr. 30, 2003, at A1.

<sup>27</sup> For example, Eisenhower sought for electoral reasons to appoint a Catholic to the Court, while Reagan boasted of being the first to appoint a woman. See SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 116, 329 (1997); Goldman, Slotnick, Gryski & Zuk, *supra* note 26, at 245; GERHARDT, *supra* note 16, at 130-31. The elder Bush's claim that his nomination of Clarence Thomas was based solely on merit, to the exclusion of race, met with contradiction from his own officials. See John E. Yang & Sharon LaFreniere, *Bush Picks Thomas for Supreme Court*, WASH. POST, July 2, 1991, at A1. More recently, during the 2000 presidential election campaign, both contenders coveted the opportunity to be the first to appoint a Hispanic to the Supreme Court. See Alexander Wohl, *Contenders for the High Court*, AMERICAN PROSPECT, Nov. 20, 2000, at 30, 30.

<sup>28</sup> See Terry M. Moe, *The Politicized Presidency*, in THE NEW DIRECTION IN AMERICAN POLITICS (John E. Chubb & Paul E. Peterson eds. 1985).

<sup>29</sup> See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401-21 (1819) (holding that the federal government possessed the constitutional authority to incorporate the Bank of the United States); GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN & MARK V. TUSHNET, CONSTITUTIONAL LAW 52 (2d ed. 1991) (citing Andrew Jackson's 1832 veto on constitutional grounds of an act to recharter the Bank of the United States, 2 MESSAGES AND PAPERS OF THE PRESIDENTS 576, 581-82 (J. Richardson ed. 1900), notwithstanding the Court's decision in *McCulloch*).

<sup>30</sup> See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 520-50 (1935) (holding unconstitutional a statute that authorized the executive to fashion and approve a "code of fair competition" for the poultry industry).

their successors. Truman went so far as to call the appointment of federal judges "the most important thing that I do," though his own choices tended to reflect considerations of political patronage rather than policy.<sup>31</sup> Nixon, by comparison, adopted the ideological screening of judicial candidates on the explicit recognition that his judicial appointments would continue to "influence the course of national affairs for a quarter of a century,"<sup>32</sup> while commentators have singled out Reagan for taking the politicization of the judiciary to new heights by implementing a centralized high-level process for the ideological vetting of judicial candidates.<sup>33</sup> There is even evidence to suggest that Reagan made a point of selecting younger judges for the purpose of prolonging his judicial legacy.<sup>34</sup>

With respect to centralization, developments over the last thirty years have strengthened the role of the White House in judicial appointments at the expense of other institutions. Since the Nixon administration, presidential experimentation with various institutional arrangements for identifying potential judicial nominees has eroded the roles played by the Justice Department and individual senators. Within the executive branch, the movement away from historical reliance upon the Justice Department toward centralization in the White House has been piecemeal and irregular. Nixon and Reagan opted for a high degree of centralization, while Ford and Carter retained a more substantial role for the Justice Department; Clinton, meanwhile, found himself caught between approaches for reasons not of his own choosing.<sup>35</sup> To the extent that

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<sup>31</sup> See GOLDMAN, *supra* note 27, at 76.

<sup>32</sup> Elliot E. Slotnick, *Federal Judicial Selection in the New Millennium: Prologue*, 36 U.C. DAVIS L. REV. 587, 589-90 (2003) (quoting memo from Tom Charles Huston, which Nixon endorsed in writing); GOLDMAN, *supra* note 27, at 205-06 (same).

<sup>33</sup> See *id.*; see also Michael J. Gerhardt, *Judicial Selection As War*, 36 U.C. DAVIS L. REV. 667, 678 (2003) (remarking upon Reagan's reputation for attending to the ideology of his judicial nominees).

<sup>34</sup> See GOLDMAN, *supra* note 27, at 336-37, 353.

<sup>35</sup> See GERHARDT, *supra* note 16, at 117-118. Within the Justice Department, the selection of judicial nominees was historically the responsibility of the deputy attorney general's office. Under Reagan, the task was reassigned to a special office within the Department, the aptly named Office of Legal Policy. See *id.* at 120. Reagan further dismantled Carter's nominating commissions and instituted in their place a President's Committee on Federal Judicial Selection, which drew together high-level officials and trusted presidential advisors on a weekly basis. See *id.* at 120. The elder Bush downgraded the Office of Legal Policy (renaming it the Office of Policy Development in the process) and moved principal responsibility into the White House Counsel's office. Gerhardt reports that "[t]his approach sometimes created friction with Justice Department personnel, whose background work and verification of nominees' qualifications were closely reviewed to the point of being almost completely redone - and sometimes undone - by White

centralization entails duplication of Justice Department functions within the White House, it also comes at the risk of conflict and inefficiency.<sup>36</sup>

Whatever the specific institutional configuration, the goal has been to ensure that the politically sensitive task of judicial selection falls to trusted presidential advisers. By the mid-1990s, this circle of participants, spanning the White House and Justice Department, numbered sixty or so.<sup>37</sup> The demands of identifying and evaluating judicial candidates in every part of the country, however, outstrips this relatively modest institutional capacity. Consequently, these officials have historically turned to their vast personal networks of "friends, acquaintances, and friends of friends."<sup>38</sup> Unlike their counterparts in a number of other countries,<sup>39</sup> sitting federal judges are not themselves consulted in any systematic way regarding potential appointments: one commentator has suggested that such a role, if formalized, could raise separation of powers concerns, insofar as it might "require the federal judiciary to perform a clearly nonjudicial function."<sup>40</sup> Given the judiciary's interest and expertise in the matter, however, it is not disturbing that informal consultations do occur. It can further

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House officials. This duplication cost Bush precious time in processing potential judicial nominations." *Id.* at 121. Under Clinton, greater chaos ensued. Though his plan was to revive Reagan's system by upgrading the Office of Policy Development, Clinton's delays in appointing an attorney general and assistant attorney general tied up his intended mechanism for making judicial appointments, and the White House Counsel's office was forced to take up the slack. No sooner was leadership restored at the Justice Department than it began to struggle with the White House Counsel's office for control of the process, as under Bush. At the same time, the Democrats lost control of the Senate, and to conserve scarce political capital, the White House resorted to leaking the names of potential nominees to the Senate and to the media as a means of gauging potential opposition. See Silverstein & Haltom, *supra* note 11, at 471 (discussing the choice of Stephen Breyer to replace Harry Blackmun). The combination of infighting, cautiousness, and Senate opposition greatly slowed the appointments process. See GERHARDT, *supra* note 16, at 122; O'Brien, *supra* note 26, at 113; Silverstein & Haltom, *supra*, at 474 (noting that Clinton took three times as long to nominate Supreme Court justices as any president since Nixon).

<sup>36</sup> See *supra* note 35; see also, e.g., GOLDMAN, *supra* note 27, at 254-59 (describing conflict between Carter's Justice Department and White House Counsel over judicial selection).

<sup>37</sup> See GERHARDT, *supra* note 16, at 119 (quoting Judge Harold Tyler).

<sup>38</sup> *Id.* (quoting Sheldon Goldman, *Judicial Appointments to the United States Courts of Appeals*, 1967 WISC. L. REV. 186); see also Allen & Dewar, *supra* note 26, at A1 (reporting that officials in the current administration have exhausted their personal networks in the hunt for ideologically suitable female and minority candidates).

<sup>39</sup> See Department of Constitutional Affairs, *Constitutional Reform: a new way of appointing judges*, at Annex B 66-80 (July 2003), available at <http://www.lcd.gov.uk/consult/jacommission/index.htm>.

<sup>40</sup> GERHARDT, *supra* note 16, at 232.

be expected that presidential advisers selected for the bench may remain in contact with those responsible for their appointment.<sup>41</sup>

The relative influence of presidents and senators over judicial appointments has varied over time. Historically, senators have enjoyed considerable influence over both district and circuit court appointments within their respective states.<sup>42</sup> By tradition, home-state senators of either party have effectively enjoyed a veto over such nominations,<sup>43</sup> while senators of the president's party have viewed the naming of district judges in particular as virtually their birthright.<sup>44</sup> Conversely, presidents have tended to exercise greater influence over the filling of circuit court vacancies, particularly those created by new judgeships, which can be reallocated to a different state if negotiations with a particular state's senators stall.<sup>45</sup> The net result has been that neither presidents nor senators have been able simply to impose their will: Robert Kennedy estimated, for example, that his brother's administration rejected approximately one in five of the judicial nominees recommended by Democratic senators, thereby necessitating often difficult negotiations.<sup>46</sup> With respect to circuit court appointments, however, the balance of power tilted

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<sup>41</sup> An obvious example is Justice Fortas, who remained a close adviser to Lyndon Johnson even after his appointment. *See id.* at 126-27.

<sup>42</sup> Though judicial circuits embrace multiple states, specific seats are traditionally identified with specific states to such an extent that senators are understood to have a stake in how they are filled. *See* Slotnick, *supra* note 32, at 590; GOLDMAN, *supra* note 27, at 136-37.

<sup>43</sup> As Deputy Attorney General in the Johnson administration, Warren Christopher prepared a memorandum to his successor emphasizing the importance of a senator's views: "Recommendations of a Senator of the President's Party from the state where a vacancy exists are very important. Moreover, the views of any Senator, whatever his Party, from the state where the vacancy exists cannot be ignored, for Senate tradition gives them a virtual right of veto." GOLDMAN, *supra* note 27, at 10; *see also* GERHARDT, *supra* note 16, at 118; Donald R. Songer & Martha Humphries Ginn, *Assessing the Impact of Presidential and Home State Influences on Judicial Decisionmaking in the United States Courts of Appeals*, 55 POL. RES. Q. 299, 312-22 (2002) (finding that home state senators of the president's party, but not those of the opposing party, have a statistically significant influence upon the ideology of circuit court appointments); *infra* Part II.D (discussing senatorial courtesy and the blue slip).

<sup>44</sup> *See* GOLDMAN, *supra* note 27, at 79; ROBERT A. KATZMANN, *COURTS AND CONGRESS* 13 (1997). Even minor limitations upon senatorial prerogative in the appointment of district judges have been rebuffed. Upon his initial election, Reagan negotiated with the then-Republican Senate leadership to have Republican senators submit a list of four or five names for each vacancy from which the White House might choose. After a period of initial cooperation, Republican senators began to insist upon a return to earlier practice, under which a senator would suggest a single candidate who would receive the nomination unless found unqualified. *See id.* at 287-90.

<sup>45</sup> *See* ASHLYN K. KUERSTEN & DONALD R. SONGER, *DECISIONS ON THE U.S. COURTS OF APPEALS* 11 (2001).

<sup>46</sup> *See id.* at 173.

decisively under Carter and has not been restored since.<sup>47</sup> Before he had even assumed office, Carter sought to fulfill a campaign pledge to base judicial appointments on merit, to the exclusion of patronage.<sup>48</sup> In his negotiations with James Eastland, then chair of the Senate Judiciary Committee, Carter secured Eastland's agreement to the creation in each circuit of a presidentially appointed nominating commission that would recommend to Carter the five individuals best qualified for a given judgeship.<sup>49</sup> These reforms damaged Carter's relations with members of his own party in the Senate,<sup>50</sup> and his efforts to secure a similar system for the selection of district judges were rebuffed by Eastland and a number of other senators.<sup>51</sup> Meanwhile, within the Carter administration, infighting developed between the White House counsel's office and Attorney General Griffin Bell over the initially slow pace of affirmative action in judicial appointments. Bell was forced to yield, and the outcome was increased White House involvement in the selection process at the expense of the Justice Department.<sup>52</sup>

The inroads made by Carter upon senatorial prerogative, together with the greater role now played by the White House in selecting nominees, paved the way for his successor to centralize control over the process and thereby to pursue

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<sup>47</sup> See Roger E. Hartley & Lisa M. Holmes, *Increasing Senate Scrutiny of Lower Federal Court Nominees*, 80 JUDICATURE 274, 277 (1997) ("[P]rior to Carter lower court nominations and confirmations were more routine. Norms of senatorial courtesy in recruitment and confirmations were quite strong and there is some evidence that the Justice Department deferred many lower court nomination decisions to senators. ... Attention to lower court nominations became more pronounced with institutional changes that centralized judicial recruitment under Carter and Reagan."); Garland W. Allison, *Delay in Senate Confirmation of Federal Judicial Nominees*, 80 JUDICATURE 8, 9 (1996) ("Beginning with President Jimmy Carter, presidents have taken a more active role in selecting candidates for federal judgeships.").

<sup>48</sup> See GERHARDT, *supra* note 16, at 676; GOLDMAN, *supra* note 27, at 238; Sanford Levinson, *U.S. Judges: The Case for Politics*, 226 NATION 228, 228 (1978).

<sup>49</sup> See Slotnick, *supra* note 32, at 590.

<sup>50</sup> See GERHARDT, *supra* note 16, at 676; Slotnick, *supra* note 32, at 591; Levinson, *supra* note 48, at 228 (recounting the open displeasure expressed by Democratic Senator Robert Morgan).

<sup>51</sup> Eastland agreed only to "help the president persuade senators" to institute nominating commissions for district judges. GOLDMAN, *supra* note 27, at 238. By 1980, senators in 31 states had done so in some form. See *id.* at 244. Others, however, proved more resistant. When Carter sent handwritten letters to every Democratic senator urging them to adopt his scheme, Senator Lloyd Bentsen is said to have responded: "I am the merit commission for Texas." See Slotnick, *supra* note 32, at 590-91. A subsequent effort by Reagan to assert greater White House control over district judge selection met with a similar fate. See *supra* note 44 (citing GOLDMAN, *supra* note 27, at 287-90).

<sup>52</sup> See GOLDMAN, *supra* note 27, at 283.

ideological considerations to an entirely new level.<sup>53</sup> Reagan had Carter to thank for taking the politically costly step of wresting power from the Senate; his own important contribution was to place that power in the hands of his closest advisers. His goal in doing so was hardly surreptitious. The Republican platform of 1980 openly proclaimed a commitment to the appointment of conservatives to the federal bench:

We pledge ... the appointment of women and men...whose judicial philosophy ... is consistent with the belief in the decentralization of the federal system and efforts to return decision making 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>54</sup>

To that end, Reagan abolished Carter's regional nominating commissions and instituted in their place a single high-level Committee on Federal Judicial Selection.<sup>55</sup> He further created within the Justice Department an office dedicated to the task of judicial selection, the Office of Legal Policy, aptly named to reflect the intimate relationship of that task with his policy agenda.<sup>56</sup> What Reagan carried forward from Carter was not any particular institutional structure or even a professed commitment to exclusively merit-based selection, but rather a willingness to place senatorial demands second to his own selection criteria. Senators bore the burden of dispelling any ideological suspicions raised about the candidates they favored.<sup>57</sup> By all accounts, Reagan succeeded in making ideological considerations paramount: by Goldman's count, over three-quarters of his circuit court appointees furthered his conservative agenda, with the balance appearing to reward the party faithful.<sup>58</sup>

The tail end of the Reagan years also saw the rejection of Robert Bork's nomination to the Supreme Court, an event which has been frequently blamed

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<sup>53</sup> See, e.g., GERHARDT, *supra* note 16, at 26; GOLDMAN, *supra* note 27, at 307 (characterizing as "inordinate" Reagan's "emphasis on ideology as an indispensable criterion for appointment").

<sup>54</sup> Slotnick, *supra* note 32, at 592; GOLDMAN, *supra* note 27, at 297. The 1984 Republican Party platform pledged to continue these efforts. See GOLDMAN, *supra* note 27, at 300.

<sup>55</sup> See GERHARDT, *supra* note 16, at 120; GOLDMAN, *supra* note 27, at 292.

<sup>56</sup> See *id.*

<sup>57</sup> See GOLDMAN, *supra* note 27, at 305.

<sup>58</sup> See *id.* at 307.

for ushering in the current era of conflict over judicial appointments.<sup>59</sup> However, as convenient as it may be to trace present-day ideological conflict in the judicial appointments process to particular high-profile episodes, Senate rejection of Supreme Court nominees was hardly a new phenomenon in 1987, as will be discussed below.<sup>60</sup> Indeed, statistical analysis suggests that Bork's rejection fits historical trends in the confirmation of Supreme Court justices.<sup>61</sup> Rather, it is conflict over the appointment of circuit and perhaps even district judges that appears to have escalated.<sup>62</sup> Moreover, this escalation was under way before the defeat of the Bork nomination. If one looks to both the percentage of nominees confirmed and the speed with which they are confirmed,<sup>63</sup> the level of conflict appears to have increased first under Carter, then again sharply in the last years of the Reagan presidency, before reaching unprecedented levels in the Clinton years following the 1994 Republican takeover of Congress.<sup>64</sup>

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<sup>59</sup> See, e.g., KATZMANN, *supra* note 44, at 19; Silverstein & Haltom, *supra* note 11, at 461-62; Biskupic, *supra* note 11, at A1 (quoting Sheldon Goldman); Joan Biskupic, *Facing Fights on Court Nominees, Clinton Yields*, WASH. POST, Feb. 13, 1995, at A1; cf. Kline, *supra* note 11, at 272-73 (tracing Republican distrust of the ABA back to the failure of the Bork nomination).

<sup>60</sup> See *infra* Part II.D.

<sup>61</sup> See Peter H. Lemieux & Charles H. Stewart, III, *Senate Confirmation of Supreme Court Nominations from Washington to Reagan*, Working Papers in Political Science P-90-3, Domestic Studies Program, Hoover Institution 24-25 (April 1990) (available at Hoover Institution Archives, Hoover Institution Records, box 550) (employing a multivariate logit model to predict Bork's actual confirmation vote, and concluding that "[w]hat defeated Bork was partisanship and the lengthened process that resulted, but Bork was certainly not the first to fall victim to these two factors.").

<sup>62</sup> District court nominees have tended to face higher confirmation rates and shorter delays than circuit court nominees. From the beginning of the Ford administration through the first six years of the Reagan presidency, however, district court nominees were no more likely - and sometimes less likely - to be confirmed than circuit court nominees. See Allison, *supra* note 47, at 11 tbl.4; Sheldon Goldman, *Assessing the Senate Judicial Confirmation Process: The Index of Obstruction & Delay*, 86 JUDICATURE 251, 253-55 & tbls.1-2 (2003); Roger E. Hartley & Lisa M. Holmes, *The Increasing Senate Scrutiny of Lower Federal Court Nominees*, 117 POL. SCI. Q. 259, 268-70 & 269 tbl.1, 271-73 & 272 tbl.2 (2002). Inside observers agree that circuit court nominees, not district court nominees, are those over which "the fights always have been, are now, and will be in the future." See Sheldon Goldman, Elliot E. Slotnick, Gerard Gryski, Gary Zuk & Sara Schiavoni, *W. Bush Remaking the Judiciary: Like Father Like Son?*, 86 JUDICATURE 282, 302 (2003) (quoting C. Boyden Grey, White House Counsel under the first Bush administration, and citing Brett Kavanaugh, Associate White House Counsel under the current Bush administration).

<sup>63</sup> These two measures may be combined: Goldman calculates a single "index of obstruction and delay" for each Congress by adding the number of unconfirmed nominees to the number of nominees for whom confirmation took longer than 180 days, then dividing that sum by the total number of nominees submitted to that Congress. See Goldman, *supra* note 62, at 255.

C. *The Senate Judiciary Committee and confirmation hearings*

While the practices by which the Senate considers judicial nominees have evolved considerably over the last century, a constant since 1816 has been the central role of the Senate Judiciary Committee. It is the Committee's responsibility to schedule hearings on judicial nominees, to report to the full Senate on the nominees, and in particular to vote on whether to recommend confirmation. A nominee can in theory be confirmed by the full Senate even if the Committee does not recommend confirmation. If, however, the Committee fails to act upon the nomination – if, for example, it fails to schedule a hearing or a vote upon the nominee – the nomination is never forwarded to the floor of the Senate for a confirmation vote and perishes at the end of the congressional session (subject, of course, to the possibility of renomination by the president in a subsequent session – and then to the possibility of identical treatment the next time around).<sup>65</sup> While there exists an unbroken tradition of allowing Supreme Court nominees to reach the floor for a confirmation vote, the same cannot be said of circuit and district court nominees.<sup>66</sup>

Through the 1920s, and in stark contrast to the heavily televised Bork and Thomas debacles of more recent memory, confirmation hearings were closed affairs in which the nominees themselves did not even testify. Prior to 1929, the Senate considered judicial nominations in closed executive session, with the notable exceptions of Louis Brandeis in 1916 and Harlan Fiske Stone in 1925. Neither nomination was typical for its time: Brandeis, the Supreme Court's first Jewish nominee, was plagued by open anti-Semitism, while Stone, the first nominee to testify on his own behalf, had earned himself political enemies as attorney general by refusing to dismiss indictments against a sitting senator.<sup>67</sup>

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<sup>64</sup> See Hartley & Holmes, *supra* note 62, at 260; cf. Goldman, *supra* note 62, at 257 (concluding that obstruction and delay in the judicial appointments process "has generally been creeping upward" since the beginning of the Reagan administration).

<sup>65</sup> See Silverstein & Haltom, *supra* note 11, at 474; CNN, *Judicial nominees to get new Senate hearing* (Jan. 24, 2003), at <http://www.cnn.com/2003/ALLPOLITICS/01/24/senate.judges.ap/index.html>.

<sup>66</sup> See O'Brien, *supra* note 26, at 125-32 (describing appointments "gridlock" under Clinton); Kline, *supra* note 11, *passim* (same); Jason Hoppin, *Kuhl May Be Boxed In on Circuit Hopes*, THE RECORDER, Nov. 6, 2001, at 1 (citing Boxer's refusal to return "blue slip" on Bush nominee Carolyn Kuhl).

<sup>67</sup> See GERHARDT, *supra* note 16, at 67, 69, 199-200.

Katzmann has defined four periods in the contemporary history of Supreme Court confirmation hearings: 1925-55, "when senators infrequently questioned nominees"; 1955-67, the Warren Court era, "when the nominee's appearance before the Senate Judiciary Committee became a regular feature of the confirmation hearings"<sup>68</sup>; 1968-87, a transitional period inaugurated by the rejection of three Supreme Court nominations in a single year<sup>69</sup>; and 1987 to the present, a period beginning with the rejection of Robert Bork and "in which the hearing has become a venue of conflict and consensus."<sup>70</sup>

The openness of today's confirmations process is certainly more consistent with the idea of democratic government than the practice of closed hearings, but for that same reason has proved something of a mixed blessing in practice. On the one hand, it has encouraged electoral accountability, perhaps even at the expense of partisan considerations: Southern Democrats who might otherwise have opposed Clarence Thomas, for example, nevertheless voted to confirm him partly for fear of antagonizing their black constituents.<sup>71</sup> On the other hand, high-profile confirmation proceedings demand that interest groups participate vigorously, not simply to secure the outcomes they favor, but also to establish their own political influence. As Gerhardt has observed:

[P]ublic hearings have raised the stakes for all concerned in confirmation hearings. Interest groups can use the occasion to gain greater attention for their agendas. The more attention they receive, the more they can signal (and perhaps mobilize) their membership to put pressure on senators to comply with their demands.<sup>72</sup>

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<sup>68</sup> The regularization of personal appearances by judicial nominees in this period can be attributed in particular to the unhappiness of Southern segregationist senators with the Court's decision in *Brown v. Board of Education*. See STEPHEN L. CARTER, *THE CONFIRMATION MESS* 66 (1994).

<sup>69</sup> See Silverstein & Haltom, *supra* note 11, at 461-62.

<sup>70</sup> KATZMANN, *supra* note 44, at 19; see also Silverstein & Haltom, *supra* note 11, at 461-62.

<sup>71</sup> See L. Marvin Overby, Beth M. Henschen, Michael H. Walsh & Julie Strauss, *Courting Constituents? An Analysis of the Senate Confirmation Vote on Justice Clarence Thomas*, 86 AM. POL. SCI. REV. 997, 1000-01 (1992) (finding on the basis of logistical regression analysis that senators with large African-American constituencies who faced reelection were significantly more likely to vote to confirm Thomas); Thomas B. Edsall & E.J. Dionne Jr., *Core Democratic Constituencies Split*, WASH. POST, Oct. 16, 1991, at A1.

<sup>72</sup> GERHARDT, *supra* note 16, at 67; see also KATZMANN, *supra* note 44, at 34-35.

The political character of judicial selection in the U.S. is thus self-reinforcing: by freely exposing the appointment of judges to the play of political forces, the process increases the extent to which such forces will be brought to bear.

D. *Senatorial courtesy and the blue slip*

In an institution already notorious for the individualism of its members,<sup>73</sup> the rules and practices of the Senate confer upon individual senators a number of means to obstruct and frustrate judicial appointments. Perhaps the best known of the senatorial prerogatives is the filibuster, whereby one or more senators have the right to engage in "extended debate" that can be halted only by a three-fifths vote of the full Senate.<sup>74</sup> Although new procedural rules mean that a filibuster no longer brings unrelated Senate business to a grinding halt,<sup>75</sup> it remains an extreme measure that antagonizes colleagues.<sup>76</sup> Perhaps for these reasons, no judicial nomination had (until now) been successfully filibustered in over twenty years,<sup>77</sup> although there is ultimately little that the Senate leadership can do to prevent such attempts.<sup>78</sup> Another powerful tool at a senator's disposal is the ability to place an indefinite hold upon any number of nominations, for any reason of the senator's choosing. At the extreme, individual senators have on occasion placed indefinite holds on *all* of a president's pending nominees - judicial and otherwise - for reasons unrelated to any characteristic of the nominees themselves.<sup>79</sup>

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<sup>73</sup> In the words of one unnamed "Capitol Hill veteran": "There are a lot of key senators who don't really think they need any leadership[.] Leadership is not a problem in the Senate. Followership is." David Von Drehle, *The Doctor as Deal Maker? Top Leadership Post Will Test Frist's Image and Résumé*, WASH. POST, Dec. 21, 2002, at A1.

<sup>74</sup> See GERHARDT, *supra* note 16, at 143; Helen Dewar, *Democrats Set to Fight Pickering Nomination*, WASH. POST, Jan. 9, 2003 at A7.

<sup>75</sup> See SARAH A. BINDER & STEVEN S. SMITH, *POLITICS OR PRINCIPLE?: FILIBUSTERING IN THE UNITED STATES SENATE* 15 (1997).

<sup>76</sup> See *id.* at 111-15; Silverstein & Haltom, *supra* note 11, at 467-68 (citing Donald Matthews).

<sup>77</sup> See Thomas L. Jipping, *From Least Dangerous Branch to Most Profound Legacy: The High Stakes in Judicial Selection*, 4 TEX. REV. L. & POL. 365, 455-56 (2000); Helen Dewar, *Democrats Split on Plan to Block Bush Nominee*, WASH. POST, Feb. 9, 2003, at A5.

<sup>78</sup> See Dan Eggen & Helen Dewar, *Ashcroft Opponents Question Veracity*, WASH. POST, Jan. 26, 2001, at A10 (quoting then-Senate Majority Leader Tom Daschle).

<sup>79</sup> See GERHARDT, *supra* note 16, at 142 (describing the hold placed by Robert Byrd on over 1,000 Reagan nominees, and a similar hold placed by James Inhofe on all of Clinton's nominees, both in retaliation for the president's resort to unannounced recess appointments)

Whereas the filibuster and the indefinite hold are the bludgeons in the senatorial arsenal, there exist better accepted and more precise means by which senators are entitled to block appointments in which they have a particular interest. The best known of these is the multi-faceted notion of senatorial courtesy, which refers in part to "the deference the president owes to the recommendations of senators from his own political party on the particular people whom he should nominate to federal offices in the senators' respective states."<sup>80</sup> While neither this norm nor the consequences of its violation are anywhere specified in writing, presidents who disregard senatorial courtesy risk indefinite holds placed under color of right, or outright rejection of their nominees, given the reciprocal respect that senators accord each other's prerogatives. In practice, senatorial courtesy tends to be decisive in the case of district court appointments, but also influential in the case of circuit court appointments. By tradition, senatorial courtesy is invoked when a senator declares a particular nominee to be "personally obnoxious."<sup>81</sup>

Senatorial courtesy has been institutionalized by the Senate Judiciary Committee in the form of the so-called "blue slip" procedure. For over thirty years, there has existed no actual rule authorizing or defining the blue slip procedure. Nevertheless, the Committee has routinely sent slips of blue paper to the two senators of a nominee's home state. The ostensible purpose of the slips is to obtain the views of the relevant senators upon the nominee. Its real significance, however, is that failure to return the slip brings the process of evaluating the nominee to a halt. The ultimate effect of the withholding of a blue slip has depended upon the practice adopted by the committee chair. Under some chairs, the absence of a blue slip has amounted to "an automatic and mechanical one-member veto over nominees"; under others, it has imposed merely a substantial obstacle that might be overcome by a decision of the full committee.<sup>82</sup> There has historically been no requirement, however, that the

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<sup>80</sup> *Id.* at 143.

<sup>81</sup> See, e.g., GOLDMAN, *supra* note 27, at 308 (discussing Senator Alan Cranston's decision not to invoke the "personally obnoxious" formula against a Reagan district court nominee he opposed on ideological grounds).

<sup>82</sup> Through the first half of the Carter administration, it remained the case that the absence of a blue slip amounted to "an automatic and mechanical one-member veto over nominees." Brannon

objecting senator and president be of the same party for the blue slip to be effective.<sup>83</sup>

The blue slip has in recent years become the subject of heated controversy in the Senate. Historically, its use does not appear to have been very aggressive. Slotnick's 1980 survey of senators and their staff found that 88% had never disapproved of any candidate via the blue slip procedure, and of the six senators who indicated they had ever withheld blue slips, only two had not eventually returned them.<sup>84</sup> The blue slip appears to have enjoyed a resurgence at the hands of Republican senators under Clinton, which Democratic senators are now continuing under George W. Bush.<sup>85</sup> Through the first half of Clinton's first term, with the Democrats still in control of the Senate and thus the Judiciary Committee as well, the practice continued to be that either of a nominee's home-state senators could effectively veto the appointment by declining to return the form. Serious conflict developed after Republicans took control of the Senate in

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P. Denning, *The "Blue Slip": Enforcing the Norms of the Judicial Confirmation Process*, 10 WM. & MARY BILL OF RTS. J. 75, 77-78 (2001) (quoting memorandum prepared by Judiciary Committee staff for incoming chair Ted Kennedy). Upon his assumption of the chairmanship in 1979 from the conservative southern Democrat James Eastland, under whom a number of Democratic nominations had languished, Ted Kennedy liberalized the procedure and declared that in the absence of a blue slip, a nomination would be referred to the full committee to decide upon a course of action. *See id.* at 77-78; GOLDMAN, *supra* note 27, at 12 & n.j. Within these bounds, the effect of the blue slip has continued to wax and wane under subsequent chairmanships. *See* Goldman, Slotnick, Gryski & Zuk, *supra* note 26, at 238 (describing the practices of chairs Strom Thurmond and Joseph Biden); GOLDMAN, *supra* note 27, at 307.

<sup>83</sup> *See* GOLDMAN, *supra* note 27, at 12 & n.j (quoting an internal memorandum prepared during the Johnson administration by Warren Christopher, then Deputy Attorney General, explaining that if a blue slip were marked "objection" by either home-state senator "regardless of party," "the custom is that no hearing will be scheduled").

<sup>84</sup> *See* Elliott E. Slotnick, *Reforms in Judicial Selection: Will They Affect the Senate's Role? Part 1*, 64 JUDICATURE 60, 69 (1980).

<sup>85</sup> *See* Denning, *supra* note 82, at 83-88. A recent example of the blue slip gone awry is that of Senator Jesse Helms and his successful efforts to prevent Clinton from filling any vacancies on the Fourth Circuit. Intent on appointing the first ever black judge to a court in a heavily black region of the country, Clinton nominated a total of four African Americans to the court's three vacancies. While two of the vacancies belonged to Helms's own state of North Carolina, the third belonged to Virginia, and Clinton's nominee for this position, Roger Gregory, enjoyed the support of both Republican senators from Virginia. Nevertheless, Helms successfully opposed all four nominees and further responded by introducing legislation to reduce the number of judgeships on the court. *See* GERHARDT, *supra* note 16, at 153; Goldman, Slotnick, Gryski & Zuk, *supra* note 26, at 247-48. In addition, as chair of the Foreign Relations Committee, Helms successfully stalled over 400 of Clinton's ambassadorial and foreign relations nominees. *See* GERHARDT, *supra* note 16, at 153. Under George W. Bush, Democrats have in turn proven capable of wielding the blue slip against Republican nominees, as evidenced by Senator Barbara Boxer's withholding of a blue slip for a California nominee who had argued as a government lawyer for overturning *Roe v. Wade*. *See* Hoppin, *supra* note 66, at 1; *infra* note xx and accompanying text.

1994 and Orrin Hatch assumed the chairmanship of the Committee.<sup>86</sup> As nominations stalled in committee – in some cases for years – angry Democrats accused the Republican majority of exploiting the blue slip and indefinite hold in unprecedented ways, to the point where a Republican senator could anonymously veto nominees from a different state.<sup>87</sup>

No sooner had the events of the 2000 election awarded the presidency to George W. Bush, however, than Hatch announced that the blue slip rule would be changed: henceforth, only the failure of *both* home-state senators to return their blue slips would block a judicial nomination.<sup>88</sup> In so doing, Hatch argued that he was merely following the practice established by previous Democratic chairs who gave considerable weight to negative responses but did not necessarily consider them dispositive.<sup>89</sup> Hatch himself, however, had rewritten the text of the blue slip in 1998 to make explicit that no proceedings on a nominee would be scheduled "until both blue slips have been returned by the nominee's

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<sup>86</sup> The extent to which Hatch acted as committee chair according to his own wishes, as opposed to those of the Republican caucus, is open to question. To be sure, Hatch had previously demonstrated himself to be one of the most conservative and ideologically aggressive members of the committee. See GOLDMAN, *supra* note 27, at 315-16 (describing Hatch's aggressive questioning of Reagan district court nominee Joseph Rodriguez). Nevertheless, Hatch encountered criticism not only from Democrats on his left, but also from conservative elements of his own party to his right, and he may have been unable to satisfy either side even had he sought to do so. See Kline, *supra* note 11, at 295-96 (quoting Senator Leahy, ranking Democrat on the Judiciary Committee, on how Hatch is personally cooperative but constrained by his caucus); *id.* at 258 (quoting Hatch) ("Most on my side have been very good about [confirming judges.] But there are always a few who don't want to give anything to this administration, who want to slow the process down, who want to deny the administration the chance to nominate judges."). As the *Washington Post* has summed it up, "despite [his] record, Mr. Hatch was seen as one of the good guys -- among the only prominent members of his caucus with whom the Clinton White House could do business at all on the subject of judges." *Mr. Hatch's Revisionism*, WASH. POST, Dec. 30, 2001, at B6.

<sup>87</sup> See Goldman, Slotnick, Gyski & Zuk, *supra* note 26, at 238-39 (citing the plight of California nominees Dolly Gee and Frederic Woocher). Objected Senator Leahy, the Committee's ranking Democrat: "Anonymous Republican Senators are becoming unfair ... we remain in a situation where I do not even know who is objecting to proceeding to schedule a vote on the nominations, let alone why they are objecting." *Id.* at 239. In 1982, the then-Republican Senate leadership had amended the rules precisely to prevent senators from placing holds on judicial appointments in states other than their own. See GOLDMAN, *supra* note 27, at 320-22 (describing the Republican leadership's response to a threat by Republican South Dakota Senator Abdnor to prevent confirmation of a candidate from Missouri to the Eighth Circuit).

<sup>88</sup> Helen Dewar & Thomas B. Edsall, *Democrats Block Justice Picks*, WASH. POST, May 4, 2001, at A10; Michael J. Gerhardt, *Norm Theory and the Future of the Judicial Appointments Process*, 50 DUKE L.J. 1687, 1713-14 (2001)

<sup>89</sup> See Dewar & Edsall, *supra* note 88, at A10; see also Goldman et al., *supra* note 62, at 301 (quoting Assistant Attorney General Viet Dinh's position that Hatch is merely following a precedent set during Democratic Senator Joseph Biden's chairmanship).

home-state senators.<sup>90</sup> Infuriated Democrats threatened to filibuster all of Bush's nominees.<sup>91</sup> Hatch's plan to change the blue slip procedure was aborted four months into Bush's presidency when the departure of Jim Jeffords from the Republican Party returned the Senate to Democratic control. Following the 2002 election, however, the Republicans once again control the Senate and its committees, and Hatch appears to be making good on his initial plan, even in the face of bitter Democratic opposition.<sup>92</sup>

E. *The political realities of judicial appointment*

In an influential 1957 article that continues to shape the research agenda for political scientists today,<sup>93</sup> Robert Dahl confronted the tension between judicial review and democracy with a handful of empirical observations. First, notwithstanding the fact that federal judges have life tenure, every president has enjoyed an opportunity to remake the federal bench. Second, presidents have generally paid careful attention to the ideology of their judicial nominees, with an eye both to their eventual legacies and to what political circumstances enable them to secure. Third, and in direct consequence of the first two facts, the

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<sup>90</sup> *Id.*

<sup>91</sup> Hatch's proposed change was not only unwelcome, but also unexpected:

When NPR reporter Nina Totenberg confronted Leahy ... with Hatch's statement, Leahy reportedly swore, informed Totenberg that "we'll follow the rule the same way Senator Hatch followed it for the last six years" and stalked off to find his Republican colleague. During two closed-door meetings that followed, the committee's Democrats threatened to filibuster all of Bush's nominees if Hatch denied them blueslip privileges.<sup>91</sup> By the time the Democratic caucus convened in Pennsylvania for a retreat just a few days later, blue slips had reached the top of the Democratic agenda. "Interest runs deep among Democratic senators on this issue," one Democratic aide notes wryly. "The session they had on this issue at the retreat was the only one that ran long."

Confessore, *supra* note 7, at 13.

<sup>92</sup> See Dewar, *supra* note 7, at A17 (quoting Senator Patrick Leahy's objection to the Republican "double standard"); Dee-Ann Durbin, *Hatch Pushes for Bush Judicial Nominees*, GUARDIAN (London), July 21, 2003, at xx (describing the progress of two Michigan circuit court nominees over the objections of both Democratic home-state senators); see also Gerhardt, *supra* note 33, at 684-85 (noting that the attempted holds by Michigan's two senators are "in retaliation against the Republicans' fatal blocks of two Democratic nominees to the same court").

<sup>93</sup> See Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policymaker*, 6 J. OF PUB. L. 279 (1957), reprinted in 50 EMORY L.J. 563 (2001); Gerald N. Rosenberg, *The Road Taken: Robert A. Dahl's Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 50 EMORY L.J. 613 *passim* (2001) (discussing the intellectual legacy of Dahl's article); THOMAS R. MARSHALL, PUBLIC OPINION AND THE MODERN COURT 68-70 (1989) (same).

ideological orientation of the federal bench rarely strays for long from that of the dominant forces in American politics. As Dahl observed of the Supreme Court:

Over the whole history of the court, on the average one new justice has been appointed every twenty-two months. Thus a president can expect to appoint about two new justices during one term of office; and if this were not enough to tip the balance on a normally divided Court, he is almost certain to succeed in two terms. ... Presidents are not famous for appointing justices hostile to their own views on public policy nor could they expect to secure confirmation of a man whose stance on key questions was flagrantly at odds with that of the dominant majority in the Senate.  
...

Consequently it would be most unrealistic to suppose that the Court would, for more than a few years at most, stand against any major alternatives sought by a lawmaking majority.<sup>94</sup>

Dahl's observations have not only withstood the test of time, but also proved true for the federal judiciary as a whole. Every two-term president in the last century, save Clinton, has appointed at least three Supreme Court justices,<sup>95</sup> while Carter has until now been the only president in history to serve a full term without appointing a single justice.<sup>96</sup> Three-quarters of the presidents who have served since Reconstruction have succeeded in appointing 30% or more of the entire federal judiciary,<sup>97</sup> a feat aided by the periodic creation of new judgeships.<sup>98</sup> The

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<sup>94</sup> Dahl, *supra* note 93, at 284-85; *see also, e.g.*, ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 14 (Sanford Levinson ed., 3d ed. 2000) ("In truth the Supreme Court has seldom, if ever, flatly and for very long resisted a really unmistakable wave of public sentiment."); MARSHALL, *supra* note 93, at 78-79 (suggesting on the basis of quantitative evidence that the Supreme Court is "roughly as consistent with public opinion" as other governmental decisionmakers); McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1668 (1995) (concluding on the basis of game-theoretic analysis that "[o]ver the long run, judicial choice of doctrine reflects the preferences expressed in the electoral arena").

<sup>95</sup> *See* Joan Biskupic, *Court Followers Tensely Await Justice Stevens's Verdict: To Stay or Go?*, WASH. POST, June 14, 1998, at A2.

<sup>96</sup> *See* David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, & the Confirmation Process*, 101 YALE L.J. 1491, 1503-04 (1992). It may not simply be coincidence that Carter and Clinton, the only Democrats to reach the White House in the last thirty years, were both deprived of the opportunity to make as many Supreme Court appointments as pure chance would have allowed. Rather, there is statistically significant evidence that judges time their departure from the bench strategically so as to enable presidents of their own party to appoint their successors. The effect of strategic departures has, moreover, favored Republican presidents over the last century: nearly half of Republican judicial appointments have been to seats vacated by voluntarily departure, a figure fifteen percent higher than that for Democrats. *See* Gary Zuk, Gerard S. Gryski & Deborah J. Barrow, *Partisan Transformation of the Federal Judiciary, 1869-1992*, 21 AM. POLITICS Q. 439, 444-45, 448-49 (1993).

<sup>97</sup> *See* DEBORAH J. BARROW, GARY ZUK & GERARD S. GRYSKI, *THE FEDERAL JUDICIARY & INSTITUTIONAL CHANGE* 23 (1996).

result has been that nearly all presidents leave behind a federal bench on which their party's appointees constitute a majority.<sup>99</sup> Nor, on the whole, have presidents approached judicial appointments as an exercise in bipartisanship: historically, over 85% of appellate and Supreme Court nominees have come from the president's party.<sup>100</sup>

It is another brute fact that the Senate is no rubber stamp of judicial nominations,<sup>101</sup> particularly not in times of divided government<sup>102</sup> or presidential weakness.<sup>103</sup> While the defeat (or near-defeat) of a Supreme Court nominee may be a high-profile event, it is neither novel nor exceptionally rare. Since George Washington's unsuccessful nomination of John Rutledge in 1795, the Senate has succeeded in killing nearly one in six Supreme Court nominations, or 27 nominations in total.<sup>104</sup> Nor are Supreme Court nominees the only ones at risk of rejection: Clinton alone was forced to withdraw over 60 nominations to the lower courts.<sup>105</sup> Not surprisingly, party and ideology matter considerably. The Senate confirms 90% of Supreme Court nominees when controlled by the president's

<sup>98</sup> Gerald Ford is the only president since the mid-1800s not to have filled a single new judgeship. *See id.* at 69-70. The impact of new judgeships upon the ideological balance of the bench is felt particularly in times of unified government: Congress is more likely to create new judgeships when it is controlled by the president's party. *See id.* at 36tbl.3.4, 56tbl.4.1; John M. de Figueiredo & Emerson H. Tiller, *Congressional Control of the Courts: A Theoretical & Empirical Analysis of Expansion of the Federal Judiciary*, 39 J.L. & ECON. 435, 447-60 (1996) (finding on the basis of econometric analysis that political alignment of the White House and Congress is a more important determinant of growth in the judiciary than caseload pressure); McNollgast, *supra* note 94, at 1656-59 (arguing that, following realigning elections, the elected branches expand the judiciary as a means of securing the doctrinal outcomes they favor).

<sup>99</sup> Grover Cleveland and Richard Nixon are the only presidents since 1869 not to have done so. *See* BARROW, ZUK & GRYSKI, *supra* note 97, at 23.

<sup>100</sup> *See* SEGAL & SPAETH, *supra* note 20, at 127 (discussing Supreme Court nominations); Goldman et al., *supra* note xx, at 46, 52 (discussing circuit court nominations).

<sup>101</sup> *See, e.g.*, LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT* 77-92 (1985) (attacking on historical grounds the "myth of the spineless Senate"); KATZMANN, *supra* note 44, at 10 (arguing that "the existence of golden 'good old days' free of controversy is exaggerated").

<sup>102</sup> *See, e.g.*, SEGAL & SPAETH, *supra* note 20, at 128 (discussing Ford's appointment of Stevens); Biskupic, *supra* note 11, at A1 (quoting political scientist Sheldon Goldman on Clinton's "unwillingness to wage a war that [he was] sure to lose"); Biskupic, *supra* note 95, at A2; O'Brien, *supra* note 26, at 117-25; Paul Gigot, *How Feinstein Is Repaying Bush on Judges*, WALL ST. J., May 9, 2001, at A26 (discussing similar problems encountered by George W. Bush).

<sup>103</sup> For example, a president's approval rating is a better predictor of a senator's confirmation vote than the senator's own party affiliation. *See* SEGAL & SPAETH, *supra* note 20, at 157. Conversely, presidents are less likely to win confirmation of their nominees in the last year of their term, when it is unclear whether they will return to fight another day and are thus "likely to have minimal influence over senators of either party." *Id.* at 144.

<sup>104</sup> *See* GERHARDT, *supra* note 16, at 163; SEGAL & SPAETH, *supra* note 20, at 132.

<sup>105</sup> *See* GERHARDT, *supra* note 16, at 166; Biskupic, *supra* note 11, at 1; O'Brien, *supra* note 26, at 117-25.

party, but only 59% when the president's party is in the minority.<sup>106</sup> Even individual senators have proven to affect the ideology of judicial appointees within their states.<sup>107</sup> Ideology appears to interact with a nominee's qualifications in determining the likelihood of confirmation: in the case of Supreme Court nominees, senators are often prepared to ignore either ideology (in the case of highly qualified candidates) or qualifications (in the case of ideologically like-minded candidates), but not both.<sup>108</sup>

When presidents intent upon remaking the judiciary have confronted contrary-minded senators capable of obstructing them, the result, not surprisingly, has been gridlock. In the first two years of the Carter administration, federal judicial vacancies took an average of 38 days to fill; by the end of the Clinton administration, that figure had increased to 226 days.<sup>109</sup> The existence of divided government certainly does not help: for example, while a Republican-controlled Senate confirmed 93% of President Reagan's first-year judicial nominees in 1981, a Democratic Senate confirmed just 44% of George W. Bush's first-year nominees in 2001. However, even after one factors in the existence of divided government, judicial confirmations are proceeding more slowly than ever before. In George W. Bush's first year in office, during which time the Senate passed from Republican to Democratic control, the average time to confirmation hit 112 days – a record exceeded only by the 133-day average achieved by the Republican Senate at the beginning of Clinton's second term.<sup>110</sup>

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<sup>106</sup> See SEGAL & SPAETH, *supra* note 20, at 144; Jeffrey A. Segal, *Senate Confirmation of Supreme Court Justices: Partisan & Institutional Politics*, 49 J. OF POLITICS 998, 1007 (1987); see also GERHARDT, *supra* note 16, at 111 (citing ROBERT SCIGLIANO, *THE SUPREME COURT AND THE PRESIDENCY 97-98* (1971)).

<sup>107</sup> See Songer, *supra* note 20, at 111-12, 118 (reporting a statistically significant correlation between the policy positions of judicial nominees and their home-state senators, at least where the senator and the president are of the same party).

<sup>108</sup> See SEGAL & SPAETH, *supra* note 20, at 152.

<sup>109</sup> See Gerhardt, *supra* note 33, at 679.

<sup>110</sup> See *id.*

### III. THE JUDICIAL APPOINTMENTS GAME

#### A. *The nature of the problem*

To bemoan that the federal judicial appointments process has become "politicized" merely obscures what it is, precisely, that we find objectionable about the process. At a semantic level, the term itself - "politicization" - illuminates rather little. The appointment of federal judges is an inherently political process - namely, one conducted exclusively by political actors free to pursue whatever goals they see fit, and limited only by instrumental and electoral considerations. To object that the appointments process is becoming political, is akin to objecting that sin is sinful.

To be more precise, there are three related but distinct phenomena that might be singled out for criticism. The first is an increasing emphasis upon the ideology of judicial candidates, for which some term more specific than "politicization" must be coined: for lack of a better word, let us call it *ideologification*. The second is the actual appointment of ideologically extreme judges, which might be called *extremism*. The third is *gridlock*, or the inability to appoint judges in a timely and efficient manner.<sup>111</sup> Though extremism presupposes ideologification, these phenomena need not otherwise coincide. Presidents can more easily accomplish extremism absent any threat of gridlock; conversely, gridlock may occur precisely because senators are attempting to resist extremism. Ideologification can occur without either extremism or gridlock, if ideology is carefully considered for the purpose of selecting only moderates. Nor must all three phenomena be considered equally objectionable. It is, arguably, both necessary and appropriate to examine closely the ideological leanings of those seeking lifetime appointment to high federal office.<sup>112</sup> Even

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<sup>111</sup> Gridlock is defined differently, and more precisely, in the political science literature as a lack of policy change despite the existence of a legislative majority that favors change. See KEITH KREHBIEL, *PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING* 26 (1997); DAVID W. BRADY & CRAIG VOLDEN, *REVOLVING GRIDLOCK* 14-20 (1998) (citing Krehbiel).

<sup>112</sup> See, e.g., Helen Dewar & Amy Goldstein, *Appeals Court Choice Rejected*, WASH. POST, Mar. 15, 2002, at A1 (quoting Senator Charles Schumer's vow to reject nominees "who threaten to throw the courts out of whack with the country"); KATZMANN, *supra* note 44, at 10, 38-39 ("[O]pen and serious discussion of the nominee's values, approach to the law and to decisionmaking, and declared policy preferences may have the salutary effect of reducing the temptation to do battle

those who insist that judges ought to be appointed primarily or exclusively on the basis of merit – a problematic criterion in its own right<sup>113</sup> - might consider ideology a more relevant or less objectionable basis on which to select judges than patronage, personal friendship with a president or senator, or longstanding service to a particular party.

By comparison, gridlock and its consequences seem incontestably undesirable. As the judiciary itself has long complained,<sup>114</sup> unfilled judicial vacancies translate into increasing case backlogs<sup>115</sup> and impair the judicial system in fundamental ways. Existing judges shoulder greater burdens, individual litigants face the hardships of delay, and the quality of adjudication, and even of federal law, may suffer. It is not suggested that the speed with which judges are appointed does or even should trump other considerations; assuming ideological preferences of even moderate strength, one could reasonably prefer a judicial vacancy crisis to a full bench consisting entirely of judges whose understanding of the nation's constitutional, moral, and political values is wholly anathema to

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in highly personal terms."); *id.* at 30 (quoting Senator Arlen Specter); TRIBE, *supra* note 101, at 93-110; Chemerinsky, *supra* note 7, at 628 (making the Dahl-esque argument that "ideology should be considered because the judicial selection process is the key majoritarian check on an anti-majoritarian institution"); *cf.* Cass R. Sunstein, David A. Schkade & Lisa M. Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation* (forthcoming 2003) (arguing for "reasonable [ideological] diversity" on bench). *But see, e.g.,* CARTER, *supra* note 68, at 187-88 ("[I]t is at least a little peculiar that we are told that scrutiny of 'judicial philosophy' is crucial to provide a democratic check ... but at the same time, that the Court should not be responsive to political pressure or public protest.").

<sup>113</sup> See, e.g., TRIBE, *supra* note 101, at xi (attacking the "myth that it would be possible and desirable to choose Justices solely in terms of the intellectual acumen with which they can 'decode' the mysteries of the Constitution's language and history, without reference to their own beliefs about society"). In actual experience, those who purport to assess the objective qualifications of judicial nominees risk having their own impartiality called into question. See, e.g., Laura E. Little, *The ABA's Role in Prescreening Federal Judicial Candidates: Are We Ready to Give Up on the Lawyers?*, 10 WM. & MARY BILL OF RTS. J. 37, 37-44 (2001) (detailing the current Bush administration's elimination of the ABA's prescreening role); Kline, *supra* note 11, at 272-73 (quoting Ed Meese, attorney general under Reagan, on Republican distrust of the ABA following its mixed evaluation of Robert Bork).

<sup>114</sup> See, e.g., William H. Rehnquist, *2002 Year-End Report on the Federal Judiciary* (Jan. 1, 2003), available at <http://www.supremecourt.us.gov/publicinfo/year-end/2002year-endreport.html> (including unfilled judicial vacancies among the "issues that seem regularly to crop up, or perhaps ... never go away").

<sup>115</sup> See DONALD R. SONGER, REGINALD S. SHEEHAN & SUSAN B. HAIRE, CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS 15 tbl.1.2, 16 fig.1.2 (2000).

one's own.<sup>116</sup> Nevertheless, it should be of some value to those on both the left and the right that judicial vacancies be filled in a timely manner by objectively qualified candidates. As de Figueiredo & Tiller observe, political actors pursue both political and institutional goals when staffing the judiciary: their political goal is to foster a judiciary that reaches politically desirable outcomes, but their institutional goal is to foster a judiciary that "decides cases fairly in a cost efficient and timely manner, irrespective of politics."<sup>117</sup> The existence of institutional goals should lead political actors to prefer the appointment of moderate judges over gridlock. From the perspective of either the left or the right, the addition of moderate appointees furthers institutional goals without worsening the ideological balance of the bench.

How might participants in the appointments process balance these political and institutional goals? The tradeoffs they face can be expressed in terms of the gains and losses to be had from cooperative and noncooperative behavior. Cooperative behavior furthers shared institutional goals, while noncooperative behavior furthers contested political goals. On the one hand, there are gains to be had by both sides from cooperative behavior. On the other hand, these gains from cooperation may be outweighed by the gains to be had from noncooperative behavior, or defection. Thus, if a liberal senator considers it somewhat beneficial that judicial vacancies in her state be filled, but highly detrimental that they be filled with conservative judges, she will choose not to cooperate with the appointment of conservative judges. If a conservative president simultaneously happens to place a higher premium upon the appointment of like-minded judges than upon the mere filling of vacancies, neither player may choose to cooperate. Yet the outcome for both sides – gridlock – will be worse than if they had chosen to cooperate. While each side would prefer above all to have a full bench consisting of ideologically like-minded judges, both sides nevertheless benefit more from the appointment of

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<sup>116</sup> See, e.g., de Figueiredo & Tiller, *supra* note 98, at 444 ("We assume that each actor prefers judges from its own party over no new judges and no new judges over judges of an opposing political party.").

<sup>117</sup> See *id.* at 438-39, 456-60 (finding on the basis of statistical analysis that congressional expansions of the judiciary have been motivated by both political and institutional goals).

moderate judges than from the appointment of no judges at all.<sup>118</sup> The crucial question is, if each would benefit more in the long run from mutual cooperation than from mutual defection, why does cooperation not occur?

B. *The challenge of cooperation*

The judicial appointments process, described in this deliberately simplified way, poses the same important question as the classic Prisoner's Dilemma.<sup>119</sup> Both can be described as games of strategy, in the sense that each player decides how to act based upon how it expects the other player to act, and what gains and losses it attaches to each of the possible outcomes. That is, each player chooses a strategy based upon its beliefs about the world and the payoffs it faces. The Prisoner's Dilemma poses the following set of payoffs:

		Player 2	
		cooperate (C)	defect (D)
Player 1	cooperate (c)	(5, 5)	(-10, 10)
	defect (d)	(10, -10)	(-5, -5)

For any given combination of strategies, the first number in the parentheses denotes the payoff to player 1, the second the payoff to player 2. Each player perceives (correctly) that the other faces a strong temptation to defect. Defection is player 1's best reply<sup>120</sup> to *either* cooperation *or* defection by player 2: if player 2 cooperates, player 1 receives a windfall of 10, whereas if player 2 defects, player suffers a loss of only -5, as opposed to a loss of -10 had player 1 cooperated. The same is true for player 2. In the Prisoner's Dilemma, defection is what game theorists call a dominant strategy: the alternative, cooperation, is never better

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<sup>118</sup> More specifically, it is assumed that each player would prefer, in descending order, (1) an ideologically like-minded and fully staffed bench, (2) a moderate, fully staffed bench, (3) a like-minded but understaffed bench, (4) an understaffed but contrary-minded bench, and finally, least of all, (4) an ideologically contrary-minded but fully staffed bench.

<sup>119</sup> See, e.g., JAMES D. MORROW, GAME THEORY FOR POLITICAL SCIENTISTS 78-79, 262-68 (1994); RUSSELL HARDIN, COLLECTIVE ACTION ch. 2 (1982).

<sup>120</sup> A *best reply* is simply "the strategy that gives the first player its highest payoff against the particular strategy of the other player." MORROW, *supra* note 119, at 75.

and potentially worse. Rational players will therefore choose to defect. The resulting payoffs of (-5, -5) are worse than the (5, 5) they would obtain if they were both to cooperate. For better or for worse, however, defection by both players constitutes an equilibrium: their behavior is stable because neither player can hope to do better by behaving differently, given what it believes the other player will do.<sup>121</sup>

In the language of game theory, both the Prisoner's Dilemma and judicial appointments are noncooperative, non-zero-sum games. *Non-zero-sum* simply means that there are combinations of strategies available that make *both* players better off: in this case, cooperation benefits both players at the expense of neither. *Noncooperative* is a term of art and refers not to the behavior of the players, but to the fact that they are unable to coordinate their behavior in advance through binding agreements.<sup>122</sup> There is no court or other third party available to enforce a promise by a player to behave (or refrain from behaving) a certain way. Most real-world games of strategy – including interactions among political actors<sup>123</sup> – are, in this sense, noncooperative; to assume otherwise is to assume away the crucial questions of how, when, and why cooperation occurs.<sup>124</sup> In such games, if a promise to cooperate is to be enforced, the players must enforce it themselves.

It is a redeeming feature of real-world games, however, that they tend to be played more than once. By creating the possibility of retaliation, repeat play offers the players a way to enforce particular behaviors.<sup>125</sup> Under the right conditions,<sup>126</sup> players can plausibly threaten retaliation that is costly enough to

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<sup>121</sup> See *id.* at 8. In particular, defection by both players constitutes a common, well-known form of equilibrium called a *Nash equilibrium*, in which each player's choice of strategy is the best reply to the strategy it expects the other player to choose. See *id.* at 93.

<sup>122</sup> See *id.* at 76.

<sup>123</sup> See THRAINN EGGERTSON, *ECONOMIC BEHAVIOR & INSTITUTIONS* 71-72 (1990) ("In exchanges between politicians, transaction costs tend to be high ... because there is no powerful third party that helps to enforce contracts in these areas, unlike the situation in the marketplace. Therefore, self-enforcement of contracts is relatively important in political exchanges.") (citing Kenneth A. Shepsle, *Institutional Equilibrium & Equilibrium Institutions*, Working Paper No. 82, Center for the Study of American Business, Washington University at St. Louis (1983)).

<sup>124</sup> See MORROW, *supra* note 119, at 76.

<sup>125</sup> See DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE & ECONOMIC PERFORMANCE* 12-13, 56-57 (1990).

<sup>126</sup> To simplify, "wealth-maximizing individuals will usually find it worthwhile to cooperate with other players when the play is repeated, when they possess complete information about the other players' past performances, and when there are small numbers of players." *Id.* at 12; see also *id.* at 56-57. To be more precise, cooperation requires, in addition to the fact of repeat play, that the

discourage even the most selfish and calculating opponents from defecting. Threats are more effective, in particular, when made between players who are expected to be around indefinitely. In the real world, for example, politicians know that they will not be in office forever, and it is often possible to know when they are likely to depart. The knowledge that one will soon be leaving office undermines the efficacy of retaliation by rendering future losses moot.

C. *The folkways of the Senate*

In the game of judicial appointments, as in politics generally, no one gets to play forever. On the whole, however, senators get to play a lot longer than presidents do, and this fact constitutes reason to expect more cooperative behavior *among fellow senators* than *between presidents and senators*. At any given time over the last thirty years, between one-quarter and one-half of those in the Senate had already served longer than twelve years, while approximately one-fifth had more than eighteen years of service behind them.<sup>127</sup> By comparison, only one-fifth of presidents – including, in recent times, just two of George W. Bush's eight immediate predecessors – have managed to serve a full eight years in office,<sup>128</sup> while another fifth have served less than one term.<sup>129</sup>

The Senate's relative continuity of membership over time has helped to foster what Donald Matthews famously described as the "folkways" of the

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players do not discount future payoffs, *see* MORROW, *supra* note 119, at 267; that there is no foreseeable end to the game (else backwards induction leads to defection at the very outset, *see id.* at 279-80); and that retaliation does not inflict on the retaliator losses so steep as to make the threat noncredible, *see id.* at 273-77. In the alternative, threats can be effective even in infinite games as long as the players do not know each others' payoffs. *See id.* at 280-81, 290-91.

In the political context, not all of these assumptions are realistic, particularly the assumption of indefinite play. If senators were game theorists, a process of backwards induction should lead them, from the fact of political mortality, to defect in the first round. *See* MORROW, *supra* note 119, at 156-58, 279-81 (discussing how backwards induction leads players to defect at the very outset of a game if they know that the game will end). Nevertheless, it is reasonable to think, for example, that legislators prefer to cut deals with colleagues in good physical and political health, as opposed to those whose departure seems imminent. This sort of judgment may commonly be called "trust" but combines knowledge of a person's reputation with an element of strategic calculation.

<sup>127</sup>NORMAN J. ORNSTEIN, THOMAS E. MANN & MICHAEL J. MILBIN, VITAL STATISTICS ON CONGRESS 2001-2002 (2002). Incumbency rates, though lower than those in the House of Representatives, tell a similar story: over the last fifty years, with the exception of the 1980 election, between 60% and 97% of senators seeking reelection have been returned to office. *Id.* at 70.

<sup>128</sup> *See* STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE 22 (1997).

Senate.<sup>130</sup> Matthews' seminal 1960 study of the Senate depicted a collegial institution characterized by, *inter alia*, strong norms of courtesy and reciprocity that enable competitors to cooperate.<sup>131</sup> On his account, the norm of reciprocity explains how the Senate manages to conduct its business despite the array of individual prerogatives and procedural powers that enable any given senator to disrupt that business:

The spirit of reciprocity results in much, if not most, of the senators' actual power not being exercised. If a senator *does* push his formal powers to the limit, he has broken the implicit bargain and can expect, not cooperation from his colleagues, but only retaliation in kind. "A man in the Senate," one senator says, "has just as much power as he has the sense to use. For this very reason he has to be careful to use it properly or else he will incur the wrath of his colleagues."<sup>132</sup>

It is Matthews' enduring insight that reciprocity characterizes the operation of the Senate. The suggestion that a norm of reciprocity *causes* cooperation, however, risks circularity, for cooperation is itself a form of reciprocity. What Matthews calls "the spirit of reciprocity" might be better described, in game-theoretic terms, as a widely shared tit-for-tat strategy: senators cooperate with those who cooperate, and retaliate against those who do not. The threat of retaliation is effective at sustaining cooperation, in turn, because senators are, by and large, repeat players.

It can be objected that the courtly folkways of the Senate have deteriorated since Matthews first described them.<sup>133</sup> One might respond that senatorial cooperation remains more viable with respect to judicial appointments than in other contexts. Harsher economic times and the resulting heightened political competition for scarce resources since the 1960s have played a critical role in the emergence of today's "pit-bull politics."<sup>134</sup> This logic of shrinking-pie conflict does not apply to federal judgeships, the number of which has increased tenfold in the last century and, indeed, has doubled every thirty years since

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<sup>129</sup> *See id.*

<sup>130</sup> *See* DONALD R. MATTHEWS, *The Folkways of the Senate*, in U.S. SENATORS & THEIR WORLD 92 (1960).

<sup>131</sup> *See id.* at 97-101.

<sup>132</sup> *Id.* at 100-01.

<sup>133</sup> *See* ERIC M. USLANER, *THE DECLINE OF COMITY IN CONGRESS* 5-22 (1993).

Reconstruction.<sup>135</sup> Nevertheless, as detailed in Part II, there is ample evidence to suggest that conflict in the Senate over judicial nominations has increased at the same time as overall levels of comity in Congress have declined.<sup>136</sup> How, then, can it be said that repeat play has sustained cooperation, in light of this increasingly unhappy history?

D. *The consequences of greater presidential involvement*

The answer lies in distinguishing between what would happen if senators were left largely to their own devices to select judges, and what happens when presidents assume an increasing role. There are reasons to think that today's levels of ideological conflict and gridlock have more to do with presidential efforts to push ideologically unpalatable nominees past unwilling senators, than with any inability of repeat play to sustain cooperation among fellow senators. Where the Senate is by tradition courtly and collegial, presidents are transformative and disruptive. The White House is occupied by individuals of high ambition with the desire to make a lasting mark upon the nation, but little time in which to do it. Effective presidents are thus, by definition and by necessity, masters of political disruption.<sup>137</sup> The presidency, writes Skowronek, "is a battering ram, and the presidents who have succeeded most magnificently in political leadership are those who have been best situated to use it forthrightly as such."<sup>138</sup> This description brilliantly captures, for example, how Reagan approached judicial appointments: having campaigned against liberal judges, he could claim a mandate to remake the federal bench in his own ideological image and in fact did so. To shift the balance of power over lower court appointments

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<sup>134</sup> *Id.* at 7-8, 16-17.

<sup>135</sup> See Russell R. Wheeler & Cynthia Harrison, *Creating the Federal Judicial System* (1994), Federal Judicial Center, available at <http://www.fjc.gov/newweb/jnetweb.nsf/hisc>; BARROW, ZUK & GRYSKI, *supra* note 97, at 3.

<sup>136</sup> See, e.g., Goldman, Slotnick, Gryski & Zuk, *supra* note 26, at 239 (describing Senator Leahy's objection to the placing of holds on judicial nominees by anonymous Republican senators from other states); Dewar, *supra* note 2, at A19 (quoting Republican Senator John Cornyn) ("I'm very concerned not only about the broken judicial confirmation process but also how badly it seems to have poisoned relations in the Senate ... and hurt our ability to do other things as well."); Dewar, *supra* note 1, at A5 ("[T]he invective and partisanship have grown unusually intense in recent months").

<sup>137</sup> See SKOWRONEK, *supra* note 128, at 19-20, 27-28 (emphasis in original).

from the Senate to the White House is to take the matter away from an essentially cooperative institution, and to place it into the hands of an essentially disruptive institution.

Presidents possess stronger incentives to emphasize ideology in judicial appointments than senators do. The lessons of history are, again, too clear for those in the White House not to grasp the impact of judicial selection upon their policy agenda.<sup>139</sup> The involvement of federal judges in sensitive policy areas makes it prudent, if not critical, to heed the ideology of those being appointed. Moreover, unlike senators, presidents can be expected to take a greater and more systematic interest than senators in the ideological balance of the bench as a whole. The ideological composition of the federal judiciary is, by its very nature, a national issue with a national constituency that senators are ill-positioned to exploit. Thus, Nixon and Reagan campaigned on the issue; individual senators generally do not. Once in office, presidents are then rewarded for their continuing attention to the issue: ideological appointments are an inexpensive way for presidents to mollify the ideologically motivated voters and elites who constitute their political base.<sup>140</sup>

By contrast, it is largely implausible for individual senators to have a noticeable impact on the ideological balance of the bench, much less to claim electoral credit for doing so.<sup>141</sup> Indeed, the mere attempt may prove costly: a senator who seeks to use her powers to affect judicial vacancies in other states must contend with the fact that her ninety-nine colleagues enjoy comparable powers of retaliation - to say nothing of presidential retaliation. Overall,

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<sup>138</sup> *Id.* at 27-28.

<sup>139</sup> See *supra* text accompanying notes xx-xx (discussing the judicial legacies that presidents leave).

<sup>140</sup> As one Republican insider observed of the last election: "Everyone on the right agreed in 2000 that judicial nominations were the single most important reason to be for Bush." Mike Allen & Charles Lane, *President Renominates Miss. Judge, 29 Others*, WASH. POST, Jan. 18, 2003, at A1 (quoting Clint Bolick, former Justice Department official under Reagan); see also, e.g., Ronald M. Peters, Jr., *Judicial Nomination Wars*, EXTENSIONS, Spring 2004, at 2, 2-3 (observing that the increasing ideological divergence of the Republican and Democratic parties rewards behavior that appeals to "base voters," such as conflict over judicial nominees); *President bypasses Senate, seats disputed Judge*, SEATTLE TIMES, Feb. 21, 2004, at A1, available at [http://seattletimes.nwsource.com/html/nationworld/2001862365\\_pryor21.html](http://seattletimes.nwsource.com/html/nationworld/2001862365_pryor21.html) (quoting political scientists Larry Sabato and Elliot Slotnick on the possible electoral motivations behind William Pryor's recess appointment to the Eleventh Circuit).

<sup>141</sup> See Lemieux & Stewart, *supra* note 61, at 2-3 (suggesting that senators have little to gain electorally even from fighting Supreme Court nominations).

individual senators may find it more profitable to dispense judicial appointments as patronage, than to fight for small pieces of ideological turf in an ongoing struggle that is largely beyond their control. For senators to further greater goals with respect to the overall bench requires collective action, which does not occur spontaneously. Coordination can be accomplished through the medium of party, but not without ongoing and perhaps prohibitive expenditure of effort.<sup>142</sup> To fight effectively for ideological control of the bench poses a strenuous test of party organization and discipline: each side faces not just one bill to be passed or one vote to be won, but ongoing warfare over a continual stream of nominations, the effects of which are cumulative.

Greater presidential involvement thus appears likely to bring ideological considerations to the fore of the judicial selections process. For this reason alone, one might expect an appointments game between presidents and senators to be characterized less by compromise, and more by conflict, than a game played largely among senators. There are more compelling reasons, however, why dealings between presidents and senators may not proceed as smoothly as dealings among fellow senators. First, the relative brevity of presidential tenure means that presidents and senators alike will be less disciplined by the threat of retaliation over repeat play. The fact that judicial confirmation rates drop in presidential election years<sup>143</sup> is strong evidence that senators behave less cooperatively when faced with an opponent whose days are numbered. Second, in politics as in nature, the strong need not cooperate with the weak. Between senators – that is, among equals – brute force is unlikely to prevail. By comparison, both the characteristics of the respective institutions and the

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<sup>142</sup> The show of force mustered by both parties during the recent all-night Senate debate over a small number of Bush nominees is an example of how senators can pander to their political base on the issue of judicial appointments, but also demonstrates that the effort required may be extraordinary. See *Waiting for Godot*, *ECONOMIST*, Nov. 15, 2003, at 39 ("Filibustering allows Democratic senators to prove to their rank-and-file that they are capable of standing up to the hated Bush White House. The talkathon shows Republican senators are willing to fight for conservative nominees.").

<sup>143</sup> See Allison, *supra* note 47, at 10-11 & 11 tbl.4 (finding that "confirmation rate declines year by year into the president's term"); Goldman, *supra* note 33, at 257 (documenting how obstruction and delay in the judicial appointments process rise in presidential election years, and suggesting that "the problem may be an institutional one" rather than the fault of a particular party); SEGAL & SPAETH, *supra* note 20, at 144 (observing that Supreme Court nominations are likelier to fail in the

constitutional division of power over appointments confer a variety of advantages upon the White House over the Senate.<sup>144</sup> These advantages may lead presidents to believe - rightly or wrongly - that they will get their way in a showdown with the Senate, provided that they are willing and able to commit the necessary political resources.

Indeed, presidents may even select extreme nominees whom they do not necessarily expect to prevail. It is politically costly for senators to resist judicial nominations, and certain nominees may be especially costly to resist.<sup>145</sup> Examples include the elder Bush's nomination of Clarence Thomas, well calculated to divide Democrats from their black supporters<sup>146</sup>; the Estrada nomination, the failure of which has enabled the younger Bush to attack Senate Democrats for being both anti-Hispanic and "obstructionist"<sup>147</sup>; and, most recently, the nomination of the outspokenly conservative black jurist Janice Rogers Brown.<sup>148</sup> By nominating candidates from the demographic core of the opposing party, presidents stand to gain regardless of the outcome: opposing senators are forced either to incur political damage,<sup>149</sup> or to support nominees they might otherwise reject on ideological grounds.<sup>150</sup> Senators, by contrast, would presumably be less likely to choose unpalatable nominees for the purpose

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last year of a presidential term, when the president is "likely to have minimal influence over senators of either party").

<sup>144</sup> See *supra* Part II.A.

<sup>145</sup> To follow the example set by Bailey & Chang, the costs of resistance might be modeled as a function of presidential approval, the race, religion, and gender of the nominee, and the nominee's perceived qualifications. See Michael Bailey & Kelly H. Chang, *Extremists on the Court: The Inter-Institutional Politics of Supreme Court Appointments* 21-23 (paper presented at the annual meeting of the American Political Science Association, Philadelphia, August 2003).

<sup>146</sup> See *supra* note 71 and accompanying text (citing Overby et al. and Edsall & Dionne).

<sup>147</sup> Helen Dewar, *Democrats Split on Plan to Block Bush Nominee: Senators Weigh Risks of Filibuster*, WASH. POST, Feb. 9, 2003, at A5; Dewar, *supra* note 3, at A1 (reporting that Senate Republicans have described Democratic opposition as an insult to Hispanics and have vowed to make Democrats suffer at the polls); see also Sheldon Goldman, *The Senate and Judicial Nominations*, EXTENSIONS, Spring 2004, at 4, 6 (observing that selection of a Hispanic nominee for the Supreme Court will pressure senators from states with large Hispanic populations to vote in favor of confirmation).

<sup>148</sup> See *Fueling the Fight*, WASH. POST, Oct. 30, 2003, at A22 (describing Brown as a nominee Bush "cannot reasonably expect Democratic senators to support").

<sup>149</sup> Republican officials report that the current White House has adopted a conscious strategy of nominating right-leaning women, blacks, and Hispanics partly in the hope of damaging Senate Democrats who oppose them. See Allen & Dewar, *supra* note 26, at A1.

<sup>150</sup> See Bailey & Chang, *supra* note 145, at 6-17, 29-31 (concluding that the political costs to senators of rejecting certain types of nominees enable presidents to select more extreme nominees).

of damaging or embarrassing their colleagues, if only because such behavior clearly begs retaliation over the course of repeat play.

In sum, presidents are likely to be more sensitive to ideology and less inclined to cooperate than senators when it comes to appointing judges. Gridlock is the result when senators do not simply surrender ideological ground but instead insist that presidents either logroll or moderate their choices. For senators, logrolling goes unremarked as collegiality or business as usual.<sup>151</sup> Such behavior does not, however, characterize the presidency. Thus, the greater the role that the White House assumes in judicial selection, the more difficult it will become to reach or sustain a cooperative equilibrium. The implications of this argument should not be overstated: a lack of cooperation between presidents and senators does not imply that all nominees will become mired in conflict. There are various reasons why many – indeed, most – nominees will encounter little resistance.<sup>152</sup> Nevertheless, all other things being equal, presidential displacement of senatorial involvement in the appointment of lower court judges should entail the more frequent selection of nominees who attract a heightened level of conflict.

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<sup>151</sup> See MATTHEWS, *supra* note 130, at 99-101.

<sup>152</sup> Reasons that are compatible with the argument presented here include the following. First, it is costly for senators to resist judicial nominations, not least of all because presidents can bring political pressure to bear. Indeed, presidents may deliberately select candidates who are especially costly to resist, as suggested by the plight of Senate Democrats faced with conservative female and minority nominees. See *supra* notes xx-xx and accompanying text (discussing the Thomas, Estrada, and Brown nominations). Having taken into account these costs, senators may acquiesce in the appointment of nominees whom they would otherwise oppose on ideological grounds. See Bailey & Chang, *supra* note 145, at 8, 10, 14-17. Second, within limits, political actors may tolerate and perhaps even prefer a mix of judges. If presidents and senators alike wish to appoint a range of judges, any overlap in their ideal ranges will result in the selection of consensus candidates, notwithstanding the absence of any intent to cooperate. Third, the supply of ideologically suitable judicial candidates is finite, if not also discontinuous. Presidents who wish to fill the bench with nominees of a highly specific ideological timbre may discover that the available supply is inadequate to the task, especially to the extent that characteristics other than ideology are valued as well. See *supra* note xx (citing Allen & Dewar on the limited numbers of right-leaning female and minority judicial candidates). Finally, uncertainty as to the ideological stance of nominees aids confirmation, insofar as the appointments process favors the resolution of such doubts in favor of the nominee. The deliberate fostering of such uncertainty is reflected both in the withholding of information about nominees, and the selection of so-called "stealth nominees" whose records contain little overt indication of their ideological stance, though the experience of the Estrada nomination suggests that neither tactic guarantees success. See Helen Dewar, *Senate Panel Approves Estrada's Nomination*, WASH. POST, Jan. 31, 2003, at A4 (describing

#### IV. THE STRATEGIC CONSEQUENCES OF DIVIDED GOVERNMENT

##### A. *Divided government, filibusters, and gridlock*

By now, we should be prepared to reject two possible explanations of appointments gridlock. The first is the widely expressed view that gridlock is the result of politicians engaging in "payback on top of payback on top of payback." Properly understood, retaliation does not *prevent* cooperation; rather, it is the threat of retaliation that *sustains* cooperative behavior. The second is that gridlock occurs merely because parties disagree over what kind of judges they wish to see appointed. Gridlock does not occur simply because more than one ideological viewpoint is represented at any given time in political decisionmaking. If ideological disagreement alone were enough to cause gridlock, cooperation could not be an ongoing phenomenon in a body like the Senate that is always divided along party lines.<sup>153</sup> This paper has emphasized instead that political institutions such as the White House and Senate differ in character, and that these differences determine the likelihood and sustainability of cooperative behavior.

A third explanation should also be considered – namely, that appointments gridlock is a consequence of divided government. Intuitively, it is not difficult to see how divided government might render judicial appointments problematic: divided government requires agreement to be reached not only across parties, but also across institutions, each with competing interests. Empirically, it is true that judicial nominations are significantly more likely to fail when the Senate and White House are controlled by different parties.<sup>154</sup> As the conflict over Miguel Estrada and other controversial Bush nominees has

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Democratic objections to alleged White House efforts to hide Estrada's views, and to Estrada himself as a "stealth nominee").

<sup>153</sup> See KREHBIEL, *supra* note 111, at 4 (detailing how most congressional business proceeds by broad bipartisan coalition).

<sup>154</sup> See SEGAL & SPAETH, *supra* note 20, at 143-45 & tbl.4.2 (finding that control of Senate is a significant predictor of whether Supreme Court nominations succeed); P.S. Ruckman Jr., *The Supreme Court, Critical Nominations, and the Senate Confirmation Process*, 55 J. POL. 793, 799-801 & 801 tbl.1 (1993) (same), Hartley & Holmes, *supra* note 62, at 275 tbl.5 (reporting higher confirmation rates and shorter delays for lower court nominees under unified government).

demonstrated,<sup>155</sup> however, gridlock does not disappear merely because the same party holds both the White House and the Senate. Supermajority requirements, of the kind that govern filibusters, ensure that even legislative minorities can obstruct nominations.<sup>156</sup> Moreover, only rarely does unified government entail a filibuster-proof majority in the Senate; such conditions have existed only three times in the last century.<sup>157</sup>

At best, it can be said that divided government increases the *potential* for gridlock – and, even then, only under certain conditions.<sup>158</sup> Gridlock will occur even under unified government if presidents submit nominations that some critical number of senators finds ideologically unacceptable. To be specific, a judicial nomination will fail on ideological grounds if the president nominates someone far enough from center to attract the opposition of (1) 50 or more senators who are prepared to vote against the nomination on the floor; (2) 40 or more senators who are prepared to filibuster; or, in the case of lower court nominees, (3) a majority of the Senate Judiciary Committee.

The effects of divided government and the threat of filibuster can be illustrated with a simple spatial model, in which the players are depicted as falling along a left-right ideological continuum:<sup>159</sup>

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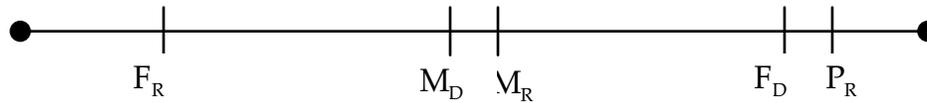
<sup>155</sup> See George F. Will, *Dean and Big Differences*, NEWSWEEK, Sept. 15, 2003, at 72 (listing as likely victims of Democratic opposition – in addition to Miguel Estrada - Janice Rogers Brown, Prisdlla Owen, Carolyn Kuhl, William Pryor, Charles Pickering, and Terrence Boyle). In the cases of Pryor and Pickering, the White House has bypassed the Senate entirely by making recess appointments. See Allen, *supra* note 6, at A1.

<sup>156</sup> See BRADY & VOLDEN, *supra* note 111, at 3.

<sup>157</sup> The most recent occasion was in the aftermath of Watergate, when Democrats held sixty-one seats and lowered the number of votes required to break a filibuster from two-thirds of the Senate to sixty. Democrats also enjoyed filibuster-proof majorities in the mid-1960s and during the Great Depression. See ORNSTEIN, MANN & MILBIN, *supra* note 127, at 56-58 tbl 1-19. As a practical matter, the prevalence of conservative southern Democrats through the 1960s and into the 1970s means that these raw numbers overstate the party's effective political strength.

<sup>158</sup> In a legislative context, if the status quo policy is centrist and each party holds enough seats and is cohesive enough to sustain a filibuster, all changes in policy will be filibustered, even under unified government. See BRADY & VOLDEN, *supra* note 111, at 34. An analogy can be made to judicial appointments that affect the ideological balance on a court – for example, the replacement of a Supreme Court justice who casts the deciding vote in close cases. Such "critical nominations" are in fact significantly more prone to fail. See Ruckman, *supra* note 154, at 796-803; Lemieux & Stewart, *supra* note 61, at 3-6, 14 tbl.2, 15, 16 tbl.3, 17 tbl.4.

<sup>159</sup> For an introduction to spatial models, see ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 114-41 (1957). For a thorough discussion of legislative gridlock using spatial models, see KREHBIEL, *supra* note 111, at 21-47.



$M_R$  represents the position of the median senator when Republicans hold a majority in the Senate, while  $M_D$  represents the median senator when Democrats hold a majority. To win the support of the median senator is to win a simple majority.<sup>160</sup> Thus, if Democrats hold a majority, nominees to the left of  $M_D$  will win a floor vote; equally, under a Republican majority, nominees to the right of  $M_R$  will win on the floor. The two points labeled  $F_D$  and  $F_R$  are filibuster pivots: nominees to the right of  $F_D$  face a successful filibuster by forty or more Democrats, while nominees to the left of  $F_R$  face the same from Republicans. For the sake of simplicity, the Senate Judiciary Committee is omitted from the model,<sup>161</sup> as are individual senators who might enjoy veto power over specific nominees by virtue of senatorial courtesy.

Let us assume that divided government exists, in the form of a conservative Republican president faced with a Democratic Senate. The president's ideal point is  $P_R$ : that is, he would like to appoint judges as close to  $P_R$  as possible. However, any attempt to appoint someone to the right of  $M_D$  will be rejected on a floor vote. Conversely, nominees to the left of  $F_R$  will face a filibuster from members of the president's own party. Thus, the best that the president can do is to nominate someone at  $M_D$ . Now assume that the Republicans bring about unified government by taking over the Senate. The president can now appoint judges to the right of  $M_R$  who are closer to his ideal point, but still cannot appoint judges to the right of  $F_D$ . Regardless of who

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<sup>160</sup> For purposes of identifying the median senator, the vice president counts as the 101st member of the Senate, on the side of the party in control of the White House. For an introduction to median voter theory, see, for example, KREHBIEL, cited above in note 111, at 12-14; or AVINASH DIXIT & SUSAN SKEATH, *GAMES OF STRATEGY* 481-88 (1999).

<sup>161</sup> The Senate Judiciary Committee can be omitted if one assumes that the median member of the committee shares the same ideal point as the median member of the full Senate, but that assumption is open to question. For a game-theoretic example of how committees with gatekeeping power, such as the Senate Judiciary Committee, can affect the range of possible outcomes, see William N. Eskridge & John Ferejohn, *Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State*, 8 J. L. ECON. & ORG. 165, 180-86 (1992).

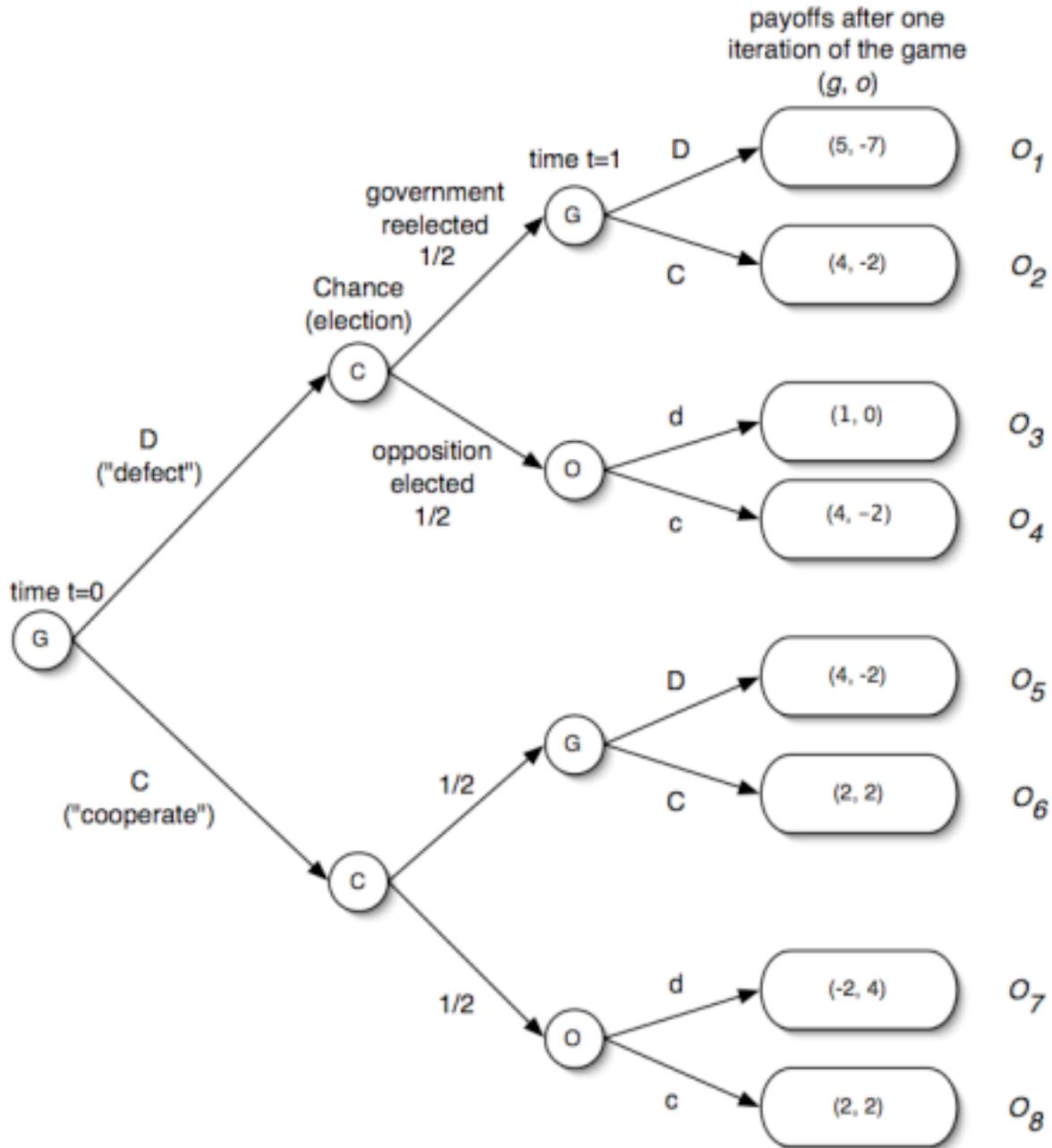
controls either the White House or the Senate, any nominee left of  $F_R$  or right of  $F_D$  will be filibustered. That is, gridlock occurs even under unified government if presidents are aggressive and ideologically extreme enough to submit nominations that fall beyond the other party's filibuster pivot. And as argued above, presidents possess both the incentive and the means to try their luck repeatedly at precisely such behavior. It is thus no accident that their increasing involvement in the selection of lower court judges has coincided with increasing gridlock of the judicial appointments process.

B. *The simple case: a world without divided government*

There are, however, less obvious implications of divided government not captured by the spatial model. That is, the mere *possibility* of divided government may make cooperation more difficult to achieve. Consider a simple game between two players, a governing party (G) and an opposition party (O), in which governments are unitary and a party in power has its unrestricted way over what judges it will appoint.<sup>162</sup> A game tree illustrates the sequence of play:

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<sup>162</sup> The astute reader may wonder whether the introduction of a model of strategic interaction between political parties constitutes an unexplained shift in the analytical premises of the discussion: whereas the spatial model in Part IV.A depicts individual legislators as the relevant players, Parts IV.B and IV.C rely upon a model of strategic interaction between parties, not individual legislators. As a general matter, spatial models of political decisionmaking tend to embody an assumption - not uncommon in political science - that the aggregate behavior of individual legislators, not the behavior of unified political parties, determines policy outcomes. For a leading example of this view, see Krehbiel, cited above in note 111, at 26-28, 165-85. In Part IV.B, however, the use of parties in lieu of individual legislators is necessary because the discussion focuses upon a system of unitary government, along the lines of a parliamentary system. Unlike the American system of separated executive and legislative power, such systems are characterized by strong party discipline, such that it is only realistic to suppose that the party leadership guides the behavior of party backbenchers. See, e.g., The Hon. Sir John Laws, *Law and Democracy*, 1995 PUB. L. 72, 90 & n.51 (quoting Lord Hailsham's notorious description of the British Parliament as an "elective dictatorship").



Each node of the game tree, represented by a circle (or oval), is a point at which one of the players – G, O, or chance – makes a move. Chance determines, in the form of an election, whether G or O has the next move; the  $1/2$  probability denotes an assumption that both parties are equally likely to win elections. As in the Prisoner's Dilemma, the strategies available to the players in this game are cooperation and defection, where defection consists of pursuing highly ideological appointments and cooperation consists of appointing either a mixed

bag or a consistently moderate set of judges. The players move along the branches of the game tree according to the choices they make, until they arrive at an outcome. Each outcome (numbered  $O_1$  through  $O_8$ ) contains a set of payoffs of the form  $(g, o)$ , where  $g$  is the utility of that particular outcome to G and  $o$  is its utility to O.

Though the actual numbers used to depict the payoffs are to some extent arbitrary, they convey some important information that may not be immediately obvious. First, they have been specified in such a way as to make this a noncooperative, non-zero-sum game, like the Prisoner's Dilemma, in that the parties stand to gain from cooperation but cannot bind themselves in advance to do so. Second, they crudely capture the notion that the players have *discount factors*. Consider outcome  $O_3$ : in reaching that outcome, G has defected against O, then O has defected against G, yet G still receives a higher payoff than O. Why might this be so? All other things being equal, players tend to prefer rewards now over rewards later (and, conversely, punishments later over punishments now). Discount factors simply measure the extent to which they do so.<sup>163</sup> For example, people prefer to have money now rather than money later, and the price they pay to do so takes the form of an interest rate, which is a type of discount factor. By the same token, G benefits by enjoying the gains of defection first, and suffering the pain of retaliation only later.

### C. *Divided government and uncertainty*

Introducing the possibility of divided government complicates the game by introducing the equivalent of two sets of payoffs, one of which applies when government is divided, the other when government is unified. A president stands to make much larger gains from behaving ideologically under unified government, than under divided government when confronted with an opposing Senate that will limit his gains. The same is true for senators of the majority

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<sup>163</sup> The traditional game theory notation for a discount factor is  $\delta$ , where  $0 < \delta < 1$ . One multiplies a given payoff,  $x$ , by the player's discount factor,  $\delta$ , to calculate the *discounted payoff*, which is the value to the player of receiving  $x$  at a later time. The more impatient the player, the lower  $\delta$  will be. For example, a player with a discount factor of  $\delta = .8$  discounts future payoffs by 20%. A

party confronted with a same-party president as opposed to someone from the opposing party.

This variance in the potential payoffs creates a double-bind for would-be cooperators. Consider first a divided-government scenario in which party G initially controls the White House while party O controls the Senate. Let  $P_G$  stand for a president of party G, and  $S_O$ , a Senate under control of party O.  $P_G$  yearns for an end to ideologification and gridlock and understands that if cooperation is to begin anywhere, it must begin somewhere.  $P_G$  thus chooses to behave cooperatively, either by nominating only moderate judges or by allowing  $S_O$  to choose half the judges. Party O then captures the White House while keeping control of the Senate. Though  $P_O$  understands that it is to everyone's benefit to reach a cooperative equilibrium,  $P_O$  also fears exploitation.  $P_O$ 's best choice of strategy depends, as always, upon how  $P_O$  expects  $P_G$  to behave in the future, and the best guide to  $P_G$ 's future behavior is  $P_G$ 's past behavior.

How, then, should  $P_O$  interpret  $P_G$ 's earlier cooperation? The payoff that  $P_O$  would now give up by behaving cooperatively under *united* government ( $P_O$ ,  $S_O$ ) is much greater than the payoff G gave up by behaving cooperatively under *divided* government ( $P_G$ ,  $S_O$ ). Should  $P_O$  believe that  $P_G$  would have cooperated even under a united government ( $P_G$ ,  $S_G$ )? Or will  $P_O$ , by cooperating now, end up sacrificing more than it will ever receive in return?  $P_G$ 's willingness to cooperate when party G controlled only *half* the government is not necessarily a convincing signal that  $P_G$  would have behaved the same way had party G controlled the *whole* government.  $P_G$  has risked only minor exploitation in order to encourage  $P_O$  to risk much greater exploitation. Meanwhile, for her part,  $P_G$  may choose never to cooperate in the first place because  $P_G$  can foresee that  $P_O$  will have precisely these doubts. There is no reason for  $P_G$  to cooperate at the outset if even actual cooperation will not convince  $P_O$  of  $P_G$ 's desire to cooperate.

The point of this scenario is to illustrate that divided government creates uncertainty, and that such uncertainty undermines efforts to reach a cooperative equilibrium. There is no convincing way for members of a party that controls

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payoff of 100 tomorrow is worth the same to her as a payoff of 80 today. 80 is therefore her discounted payoff. See MORROW, *supra* note 119, at 38.

only the White House to demonstrate that they would still cooperate if their party controlled the Senate as well. The most credible signal of cooperative intent that a player can send, is to behave cooperatively. When government shifts from divided to unified control, however, the players face a different set of payoffs, and neither side can be sure that the other will behave as cooperatively as before. Not knowing how to interpret the other player's earlier cooperation in light of the change in payoffs makes reciprocal cooperation risky. Moreover, to the extent that even cooperation cannot be relied upon to beget cooperation, neither side will want to make the initial cooperative move, and a cooperative equilibrium becomes that much more difficult to achieve.

*D. Divided government and impatience*

The particular problem of uncertainty described above disappears if the initial cooperative move is made under conditions of unified government. A president faced with a like-minded Senate who nevertheless appoints moderate judges can only be acting in the hope of establishing a cooperative equilibrium; there is no other plausible interpretation of such behavior. An initial cooperative move under conditions of unified government is unlikely, however, for reasons that are again exacerbated by the possibility of divided government.

Consider this time a unified-government scenario in which party G begins in control of both the White House and the Senate ( $P_G, S_G$ ). As before,  $P_G$  understands that a cooperative equilibrium would be better for all concerned in the long run. In the meantime, however, defection is very tempting. First,  $P_G$  can make considerably greater headway at remaking the bench ideologically under unified government than under divided government. Second,  $P_G$  cannot be sure when such an opportunity will arise again. Third, in order for O to inflict commensurate retaliation, O will have to capture both the White House and the Senate. That, in turn, may take some time. Over the long run, assuming that the players enjoy comparable electoral success, the payoffs they receive from cooperation should even out. But the possibility of divided government means it may take a while for today's cooperation to be repaid commensurately, or for today's defection to be punished commensurately.

To behave cooperatively today taxes  $P_G$ 's patience or, more precisely, demands a relatively low discount factor. Steep discount factors make defection more attractive because they make gains today more attractive relative to losses tomorrow and thus undermine the efficacy of retaliation. It is unlikely, in turn, that presidents have especially low discount factors, given the relatively short window of opportunity that they face. We might expect them to be less patient than senators, in particular, for the same reason that they are less disciplined by the threat of retaliation: they are not repeat players to the same extent. Thinking about patience and discount factors turns out to be another way of arriving at the same conclusion reached throughout – namely, that presidents will be less prone to cooperate than senators.

In sum, uncertainty and impatience are endemic to strategic interactions, and the appointment of federal judges is no exception. Both are barriers to cooperation, and the possibility of divided government contributes to both. Insofar as presidents are less patient than senators, moreover, their increased involvement in the judicial appointments process will work against cooperation.

## V. CONCLUSION

This paper has argued that conflict over the appointment of federal judges – in particular, circuit judges - has escalated due at least in part to the fact that the White House has played an increasing role in the selection process since the late 1970s. The explanatory force of the argument rests upon the notion of repeat play, which facilitates cooperation among political actors of opposing ideological stripes but binds presidents and senators differently. As with most theories, crucial questions remain unanswered, by design or otherwise. For example, might an increase in interparty conflict over judicial appointments have been inevitable regardless of the relative roles played by the White House and Senate? The postwar period has seen sustained increases in the ideological distance between Republicans and Democrats. The Eisenhower years were a period of unprecedented ideological convergence among both voters and congressional

parties.<sup>164</sup> By the 1970s, polarization of the electorate had produced divisive presidential elections and candidates, but the advantages of incumbency postponed comparable polarization in Congress into the 1990s.<sup>165</sup> To the extent that conflict over judicial appointments is a function of the ideological distance between the relevant political actors, the displacement of senators by presidents in the appointments process may merely have hastened or exacerbated conflict and gridlock that were already bound to increase for reasons of party and electoral polarization. Polarization and presidential involvement can be deemed complementary explanations for the heightened levels of judicial appointments conflict and gridlock observed over the last quarter-century. Their relative importance, however, remains to be evaluated.

One might also ask why expansion of the White House's role did not occur prior to the 1970s, particularly in light of the incentives that presidents face to take greater control of judicial appointments. A plausible story might implicate popular reaction to the work of the Warren Court: the opposition of a substantial proportion of the population to controversial Warren Court decisions, not least of all in the electorally pivotal South, provided right-leaning politicians with the incentive to campaign against the existing judiciary.<sup>166</sup> Viewed in this light, Reagan's consolidation of the selection process in the White House becomes unsurprising, insofar as he was the first post-Warren Court Republican president to face a Senate of his own party and hence enjoyed an opportunity to act that was denied both Nixon and Ford.

That Carter, a Democratic president, was the one to wrest power from senators of his own party may not have been a historical accident either. Rather, it may have reflected an unusual institutional configuration of ostensibly unified government under an unevenly divided party. Though himself a southerner, Carter's views on civil rights aligned him with the increasingly dominant liberal

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<sup>164</sup> See David W. Brady & Hahrie Han, *Party Polarization in the Post WWII Era: A Two Period Electoral Interpretation* 4-8 (forth coming 2004) (manuscript on file with author).

<sup>165</sup> See *id.* at 8-22 (using regression analysis to predict changes in the ideological positioning of House members over the post-war period); see also USLANER, *supra* note 133, at 4-6 (suggesting that partisan conflict within Congress grew considerably between the 1960s and 1980s).

<sup>166</sup> See, e.g., Jonathan D. Casper, *The Supreme Court and National Policy Making*, 70 AM. POL. SCI. REV. 50, 59 (1976) (criticizing in other respects the argument made by Dahl, cited above in note

northern wing of the Democratic Party, at a time when Senator Eastland, chair of the Senate Judiciary Committee, epitomized its waning conservative southern wing. Moreover, it has been observed, and there is empirical reason to believe, that senatorial courtesy places a president under a greater obligation to senators of his own party than to those of the opposing party.<sup>167</sup> Thus, insofar as senators from the southern states remained both conservative and Democratic, senatorial courtesy may have imposed more onerous ideological constraints upon Carter than upon his Republican predecessors, especially with respect to the appointment of judges in the south.<sup>168</sup> Under the Kennedy and Johnson administrations, decentralization of the selection process may have been in the best interest of the Democratic Party, insofar as it enabled both northern and southern Democrats to have their share of judicial picks and thus defused a potential source of intraparty tension. By Nixon's time, however, Republicans had made political inroads in the south, and Carter's desire and ability to wrest power from senators of his own party<sup>169</sup> may have reflected - if not hastened - the decline of the party's southern wing. Whatever the explanation, the means by which Carter chose to pursue his stated goals of merit and diversity may have borne consequences he did not intend.

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93, but conceding the likelihood that "unpopular [judicial] decisions became part of the country's political agenda, and changes in political regimes affected recruitment to the Court").

<sup>167</sup> Commentators often note that senators of the president's party have an unusually strong influence upon the selection of *district* judges. See GOLDMAN, *supra* note 27, at 13 (observing that district court appointments "typically are dominated by senators of the president's party"); GERHARDT, *supra* note 16, at 143, 147 (noting that senatorial courtesy traditionally "has referred to the deference the president owes to the recommendations of senators from his own party," but also reporting that the blue slip is supposedly effective regardless of the home state senator's party); J.W. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION 5-6, 24 (Kenneth N. Vines ed., 1971 ed.) (1961) (suggesting that senatorial courtesy constitutes a binding rule only "in the case of *district* judges" and "if the senator belongs to the same party as the President" (emphasis in original)). Empirical research suggests, however, that this same-party favoritism extends to the selection of circuit judges as well: Songer and Ginn have found that home-state senators of the president's party, but not those of the opposing party, have a statistically significant influence upon the ideology of circuit court appointees. See Songer & Ginn, *supra* note 43, at 312-22.

<sup>168</sup> See Comment, *Judicial Performance in the Fifth Circuit*, 73 YALE L.J. 90, 109 (1963) ("Since senators from the southern states are almost unanimously both segregationist in sentiment and Democrat in name, these practices will create the strongest pressure for the appointment of judges with segregationist leaning when there is a Democratic President."); cf. GOLDMAN, *supra* note 27, at 129-30 (noting that, despite his own indifference to civil rights matters, Eisenhower succeeded in appointing a number of segregation opponents to the battleground Fourth and Fifth Circuits).

<sup>169</sup> See *supra* text accompanying notes xx-xx (discussing Carter's preinaugural confrontation with Senator Eastland).

Just as this paper does not seek to resolve these larger questions of electoral and political causation, it does not purport to offer solutions to the problems of ideologification, extremism, and gridlock. This reticence stems in part from the fact that there are no obvious solutions – or, at least, none that appear likely to work. First, it is as pointless as it is popular for commentators to call for civility, cooperation, and ideological restraint.<sup>170</sup> Ill will is not the real problem. Though human and thus prone to fits of pique, politicians are also rational, goal-oriented individuals who can be expected to put aside animosity if it is in their best interest to do so. Hence the Senate folkways of courtesy and reciprocity observed by Matthews: senators cooperate and behave courteously toward each other because it enhances their ability to get things done. The real obstacle to cooperation is that no one perceives it to be in their best interest to take the risky first step toward cooperation. To say that defection is an equilibrium, as has been argued here, means that the players are already doing the best that they can, in light of the payoffs they face and how they believe others will react. To ask that they behave differently is to ask that they act against their perceived self-interest, and political actors – the kind who occupy the White House and Senate – are not known for martyrdom.

Second, proposals by the players themselves to fix the situation are likely to be too blatantly self-interested to be taken seriously. Predictably, given their control of the White House and filibuster-prone majority in the Senate, Republicans have proposed to weaken the filibuster rules and to create binding timelines for committee and floor action,<sup>171</sup> while Democrats have called upon the White House to cede power to nominating commissions or to the minority party in the Senate.<sup>172</sup> Not surprisingly, when it comes to taking a leap of faith

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<sup>170</sup> See, e.g., *Fueling the Fight*, *supra* note 148, at A22; Carl Tobias, *Sixth Circuit Federal Judicial Selection*, 36 U.C. DAVIS L. REV. 721, 754-55 (2003); Slotnick, *supra* note 32, at 593; *Escalation in the Senate*, WASH. POST, Mar. 7, 2003, at A32; *Contempt for the courts*, S.F. CHRON., Sept. 14, 2003, at D4; Dewar, *supra* note 2, at A19; CARTER, *supra* note 68, at 187-88.

<sup>171</sup> See Dewar, *supra* note 2, at A19 (noting lack of Democratic enthusiasm for current Republican proposals to set binding timelines); Jason M. Roberts, *Parties, Presidents, and Procedures: The Battle Over Judicial Nominations in the U.S. Senate*, EXTENSIONS, Spring 2004, at 13, 17 (describing the Republican proposal to require only a simple majority to end filibusters of judicial nominees, after a specified period of floor debate and four cloture motions).

<sup>172</sup> See E.J. Dionne Jr., *Order and the Courts*, WASH. POST, May 9, 2003, at A35 (describing Democratic Senator Charles Schumer's proposal to set up bipartisan nomination commissions); Walter Dellinger, *Broaden the Slate*, WASH. POST, Feb. 25, 2003, at A23 (proposing that the White

toward cooperation, each side is quick to demand that the other go first. It has been suggested that the players might avert the temptation to make self-interested proposals by imposing upon themselves a veil of ignorance and adopting reforms that would not become effective until some future date at which partisan control of the branches remains unknown.<sup>173</sup> In practice, however, such a Rawlsian solution presupposes that political actors can be expected to observe self-imposed restraints once circumstances change and the gains to be had from lifting those restraints become apparent. There is little to prevent a party that gains the upper hand in the future from changing the rules of judicial selection yet again.

A third way out of the current predicament might be to retrace our steps by devolving power over lower court nominations from the White House back to individual senators, in a manner reminiscent of pre-Carter days. Like the two considered above, this solution is problematic for the simple reason that it demands self-sacrifice. Voluntary transfers of power between White House and Senate are most plausible under unified government, which offers at least a common aegis of party and ideology. Even under such conditions, however, political actors are not keen to surrender power to other institutions, as evidenced by the opposition Carter encountered within his own party to the introduction of merit commissions. Indeed, as compared to senators, presidents may be particularly unwilling to cede power over judicial appointments, given both their value as presidential campaign fodder and their salience to the national policy agenda. Practical difficulties aside, the notion that presidents should abdicate responsibility for the selection of lower court judges is open to criticism on constitutional grounds as well: though some have argued that the Constitution contemplates a pre-nomination advisory role for the Senate,<sup>174</sup> none

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House invite members of the opposition party in the Senate to participate in selecting an indivisible slate of nominees). Dellinger was solicitor general in the Clinton administration.

<sup>173</sup> This approach is raised - and promptly dismissed - by one Senate staffer in the bluntest of terms: "We should say we will start this with the next president. This is an interesting [suggestion]. Let's start it with the next set of guys so that none of us really benefit. Well, I can assure you that will never be offered." Goldman et al., *supra* note 62, at 293 (quoting unnamed Senate aide).

<sup>174</sup> See, e.g., Senator Charles Mc. Mathias, Jr., *Advice & Consent: The Role of the United States Senate in the Judicial Selection Process*, 54 U. CHI. L. REV. 200 *passim* (1987); Strauss & Sunstein, *supra* note 96, *passim*.

seem prepared to suggest that the actual selection of nominees is properly a task for senators.

Yet another possibility is outside enforcement of cooperative behavior, in the form of an attentive polity ready and able to sanction its elected officials for defection. In theory, elections provide a regulative mechanism by which the electorate can reward or punish the players for their behavior. If the players could claim electoral credit for sacrificing their ideological interests in judicial appointments, their actions would no longer constitute sacrifices. In practice, however, low levels of public knowledge about the judicial system<sup>175</sup> preclude effective electoral accountability. Nor can the public be expected to sanction undesired behavior in the judicial appointments process through so crude a mechanism as an up-or-down vote between two parties, with other, more important issues crowding the agenda.

A last possibility to consider is not a solution at all but perhaps offers the greatest hope – namely, acceptance of the status quo. At least for now, gridlock over controversial nominees does not seem likely to impair the work of the federal judiciary. By the end of the Clinton administration, the vacancy rate on the federal bench had reached a noteworthy 12%.<sup>176</sup> Yet even as Senate Democrats continue to block a number of appeals court nominees,<sup>177</sup> the overall vacancy rate has declined to 4.5%, its lowest rate in thirteen years.<sup>178</sup> Nor does

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<sup>175</sup> See, e.g., Charles H. Franklin & Liane C. Kosaki, *Media, Knowledge, and Public Evaluations of the Supreme Court*, in CONTEMPLATING COURTS 352, 352-73 (Lee J. Epstein ed., 1995) (reporting low levels of media coverage and public awareness of Supreme Court decisions on controversial topics); Rosenberg, *supra* note 93, at 627-29 ("[S]urveys have consistently shown that only about forty percent of the American public, at best, follows Supreme Court actions, as measured by survey respondents having either read or heard something about the Court."); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 264 (1987) (citing Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WISC. L. REV. 379). But see VALERIE J. HOEKSTRA, PUBLIC REACTION TO SUPREME COURT DECISIONS 72-86 (2003) (finding that evaluation of the Supreme Court in local communities changes in response to decisions that resolve controversies originating in those communities).

<sup>176</sup> See Lee Davidson, *Hatch Threatens Tit-for-tat Tactic*, DESERET NEWS (Salt Lake City), May 12, 2001, at A1.

<sup>177</sup> See Will, *supra* note 155, at 72.

<sup>178</sup> See David G. Savage, *Vacancy Rate on Federal Bench Is at a 13-Year Low*, L.A. TIMES, Nov. 6, 2003, at A14. The overall figure conceals the fact that the vacancy rate on the circuit bench is higher than on the district bench – 10% versus 3.3% – but in absolute terms, the number of vacancies on each court is roughly equal: as of early 2004, the Senate Judiciary Committee's webpage lists 18 circuit court vacancies and 22 district court vacancies. See Senate Judiciary Committee, Status of Article III Judicial Nominations (Nov. 5, 2003), at <http://www.senate.gov/~judiciary/nominations.cfm> (listing 18 circuit court vacancies and 22

attention to the ideology of nominees appear to threaten the quality of adjudication. Those opposed to consideration of ideology would presumably urge exclusive reliance on ability instead. Notably absent from criticism of the appointments process, however, is any serious suggestion that today's judges are less able than those appointed in less contentious times. At the same time, ideology would seem to be a more relevant and defensible consideration than others that have been historically prevalent, such as patronage or party service. Indeed, those concerned by the countermajoritarian implications of judicial lawmaking ought perhaps to welcome open conflict in a democratic forum over the views of those seeking lifetime appointment.<sup>179</sup> And if such conflict does serve a useful democratic purpose, it makes little sense to ask that either side – White House or Senate, Democrat or Republican – back down.

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district court vacancies); Administrative Office of the U.S. Courts, *supra* note 13, at tbl. k (listing 179 authorized circuit judgeships and 661 authorized district judgeships, both permanent and temporary).

<sup>179</sup> See, e.g., Sanford Levinson, *How to judge future judges*, DISSENT, Fall 2002, at 63, 67-68.