

Bench Brawl

by Lyle Denniston

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Bench Brawl JUDICIAL CONFIRMATIONS AND THE CONSTITUTION

The Process and the Debate

The day a new president goes to work in the Oval Office, a challenging assignment is already there on the desk, waiting. It is a responsibility that can stretch the influence of that presidency for a generation or more, so presidents covet it. This particular assignment comes from the Constitution itself: the selection of judges to sit on the U.S. Supreme Court and two layers of lower federal courts. It is not uncommon for a federal judge to remain on the bench, helping to shape America's destiny, for three or four times the tenure of even a two-term president.

The nation's chief executives, as they use this authority, routinely stress its importance to America (usually without mentioning its importance to their own legacies). When President Barack Obama introduced his second nominee to the Supreme Court, Elena Kagan, he said: "Of the many responsibilities accorded to a President by our Constitution, few are more weighty or consequential than that of appointing a Supreme Court justice."1 Presidents and senators, in fact, have ranked the assignment as a close rival in ultimate importance to a declaration of war.

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Lower court judges, too, have lasting impact on law in America. Not all presidents have a chance to name new members of the Supreme Court, but they nevertheless have scores, even hundreds, of opportunities to influence the law through lower court appointments. President Jimmy Carter, for example, had no Supreme Court appointments, but he named 262 federal judges, including 56 judges to the appeals courts and 206 to the trial courts.2 Two of his appointees, Ruth Bader Ginsburg and Stephen G. Breyer, were considered influential appeals court judges before President Bill Clinton promoted them to the Supreme Court. (All nine members of the Supreme Court in 2010 had served previously on federal appeals courts.)

But through most of American history, presidents have frequently succeeded in this constitutional assignment only after waiting out or overcoming a struggle with the political forces that have developed around the process of Senate confirmation. In fact, judicial nominations do not always survive such a struggle: Elena Kagan herself failed to gain a judgeship on a federal appeals court in just such an episode in 1999, when the Republicans controlled the Senate. Two years later, after the Democrats took control of the Senate, the same thing happened to John G. Roberts on the first

The Senate has many tools not least, the process-halting filibuster— to use in working its will on presidential selections for federal judgeships. attempt to place him on an appeals court. He made it on the second try, after a two-year wait, and served as an appeals judge for two years before being chosen to be Chief Justice of the United States – the "first among equals" on the Supreme Court.

The Senate has many tools – not least, the process-halting filibuster – to use in working its will on presidential selections for federal judgeships.

And in some eras it has not hesitated to use them, especially when considering nominations to the lower federal courts.

With some exaggeration, Brookings Institution constitutional scholar Benjamin Wittes has titled a book on this process in the modern era, *Confirmation Wars*.

And yet, even though this is one of the most thoroughly analyzed of all aspects of today's federal government, there is no consensus that the system is now flawed, or even that it ever was. It has its critics, who insist that not just change but fundamental reform is now necessary to salvage an independent judiciary. But it has its defenders, too, who argue with equal conviction that the flaws, if any there are, merely reflect the rough–and–tumble of democratic choice and are not fatal to anything of lasting importance in the constitutional order.

The reasons for this disparity are many, but one of the core differences focuses on whether the system has become "politicized" in a way that somehow deviates from what the Founding Fathers intended or would have wanted, or whether indeed the process has always been political and more or less faithfully reflects the politics of each era.

On one side of this debate are those who perceive the present-day shared enterprise of choosing federal judges as reduced to little more than ridiculous theater – a form of stagecraft masquerading as statecraft (the dismissive phrase "Kabuki theater" shows up in many critiques). The process, some have said, proceeds without significant alteration because those within it will not concede that it is broken. Indeed, it seems that many senators see actual or potential political gain from it, just as it is.

At stake is a system that, at the most fundamental level, is as much a constitutional necessity as it is a political opportunity. On the other side are those who see the struggles that do develop as moments of legitimate democratic drama, when those who are politically accountable to attentive constituencies exploit an all-toobrief opportunity to assess where a nominee will take the law in all of those years, and perhaps decades, that will pass after the donning of the robe that signifies the independent judiciary.

Whichever perception is closer to past or contemporary reality, there is one unarguable fact about it: At stake is a system that, at the most fundamental level, is as much a constitutional necessity as it is a political opportunity. Judicial review – translated over generations to mean that the courts will have the last or at least the definitive word on the Constitution's meaning – is as critical a part of America's system of checks and balances as is the presidential veto or congressional primacy on taxing and spending. In James Madison's phrase, all of those are "parchment barriers" to the dreaded concentration of government power in one branch, a long-lasting carryover of the resentment against monarchy, and especially against George III.

And because the Founding Fathers concluded that it was necessary that the Constitution be supreme law, it falls to judges, in Chief Justice John Marshall's simple but celebrated words written in 1803, "to say what the law is."³ State judges share in that process of definition, but not to the same degree or extent as federal judges.

Given the centrality of that judicial power in the entire constitutional order, it is essential – again, for the sake of checks and balances – that the filling of judgeships not be left to the president's choice alone. However it is exercised in particular instances, the authority of the United States Senate to provide "advice and consent" to presidential nominations to the federal courts is a critical assignment that also is traced to the Constitution itself.

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Given the centrality of that judicial power in the entire constitutional order, it is essential—again, for the sake of checks and balances—hat the filling of judgeships not be left to the president's choice alone. authority by requiring the Senate's consent before they may serve. (The House of Representatives has no designated role in the process, though its members individually are free to comment on and even try to influence a matter of such moment.) The Constitution does not give the judiciary a specific role in the process, but Article III gives both Supreme Court and lower court judges life tenure – "during good behavior" – and that has the effect of making their selection far more consequential because, once seated, they are presumably insulated from political management or manipulation.

America's citizenry – individually and in groups – also has a constitutionally assured role. The First Amendment guarantees "the right of the people...to petition the Government for a redress of grievance." That means they are free to lobby the White House and Congress on the initial selection and on the confirmation process for federal judges.

Those are the constitutional arrangements. But are they merely naïve formalisms that, in the real world of contemporary politics, have become something else? The debate over the answer to that question is now as warm, and as inconclusive, as it has been for generations. Perhaps four assessments can sum up where the debate presently stands. America's citizenry individually and in groups also has a constitutionally assured role. The First Amendment guarantees "the right of the people... to petition the Government for a redress of grievance." That means they are free to lobby the White House and Congress on the initial selection and on the confirmation process for federal judges.

Brookings scholar Wittes, in an opinion column in the *Washington Post* in 2006, lamented what he saw as the serious degradation of the process:

If the history of judicial confirmation proves anything, it is that the [Senate Judiciary Committee] hearings were never meant to be a thoughtful inquiry into a nominee's judicial philosophy. Rather, their point has always been to wring concessions from would-be jurists or to tar them as unworthy...The hearings function coercively not because they are failing their intended purpose. Coercion is their intended purpose.⁴

Yale law professor Stephen L. Carter, in a book–length commentary on the loss of civility in the process, summed up his deep concern this way:

We have reached in our confirmation processes a strange pass at which, once we decide to oppose a nominee, any argument will do. Nobody is interested in playing by a fair set of rules that supersede the cause of the moment; still less do many people seem to care how much right and left come to resemble each other in the gleeful and reckless distortions that characterize the efforts to defeat challenged nominations. All that seems to matter is the end result.⁵

That is one side.

On the other, political scientists Lee Epstein and Jeffrey A. Segal see no deviation from past history – and no problem:

[T]he appointments process is and always has been political because

federal judges and justices themselves are political...What has not changed is that, almost without exception, presidents from the early years of the United States to the present day have sought to exploit vacancies on the bench for ideological and partisan purposes. Senators have done much the same, supporting or opposing nominees who help further their own goals, primarily those that serve to advance their chances of reelection, their political party, or their policy interests... Until judges and justices stop reaching political decisions, the process will never become any less political.⁶

The former chairman of the Senate Judiciary Committee, now Vice President Joseph R. Biden, Jr., a longtime, direct participant in the process, has described it in loftier terms than professors Epstein and Segal, as the

one democratic moment...before a lifetime of judicial independence when the people of the United States are entitled to know as much as we can about the person that we're about to entrust with safeguarding our future and the future of our kids.⁷

The process, however evaluated, has a past, a present and a future. The first two are known; the last may depend on which side prevails in the debate over what the process is or may have become.

In the Beginning

When the English colonies won their independence from Britain, the "United States of America" had no national courts – indeed, no national government at all. When a joint government was formed by the 13 "sovereign and independent states," under the 1877 Articles of Confederation that actually went into effect in 1780, it had only one, moreor-less functional branch, the Continental Congress. The courts that did exist (and had existed in the colonies) remained at the state level, and one state's courts had no authority over the affairs in any other state, and certainly no authority to second-guess anything done by the Continental Congress.

The 55 delegates to the Constitutional Convention who assembled in Philadelphia in May of 1787 to try to repair the Articles of Confederation ultimately created an entirely new national government. That government came into being with ratification of the Constitution in 1788 by the minimum number of nine states. Borrowing heavily from Montesquieu's theories on divided government, and influenced by the English experience with "balanced government," the founding document created three branches – in significant degrees, both independent and interlocking.

Although some parts of the Constitution were crafted with little or no debate, that definitely was not the case with Article II, Section 2, Paragraph 2, declaring that the president "shall nominate, and, by and with the advice and consent of the Senate, shall appoint...Judges of the Supreme Court, and all other officers of the United States..." Over 12 days in the summer and into September of 1787, the Philadelphia delegates intensively debated how judges were to be chosen and placed on the bench.

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The language finally adopted was, as described by University of Virginia government professor Henry J. Abraham, "a compromise between those who, like Benjamin Franklin, James Madison, and John Rutledge, feared monarchical tendencies in strong solo executive prerogatives on the issue and called for a potent legislative role, and those who, like James Wilson, Alexander Hamilton, and Gouverneur Morris, favored broadly independent executive appointive powers. It was the latter group that did most of the compromising, resulting in the largely James Madison–fashioned ultimate adoption of Art. 2, Sec. 2, the provision having remained unchanged to this day."⁸

It is reasonable to assume that, although the Founders were not yet aware of the role that organized party politics would come to play in the selection of federal judges, they were not so naïve as to assume that this process would routinely be carried out with disinterested statesmanship all around. Madison, of course, was deeply fretful about the tendency for "factions" to develop, but he rejected out of hand any notion that such fractious instincts should be suppressed, because that would be at the cost of the people's liberty. His solution was to have constitutional arrangements made that pitted faction against faction – hopefully, with the common good emerging out of such clashes. Here is the way he analyzed the preferred response to factions in the *Federalist Papers*, promoting ratification of the Constitution:

It is in vain to say, that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm.....The inference to which we are brought, is, that the *causes* of faction cannot be removed; and that relief is only to be sought in the means of controlling its *effects*.⁹

Madison and others at Philadelphia expected presidents and senators to respond to such "clashing interests." It was not meant to demean either the presidency or the Senate that constitutional draftsmen thought of each as a *political* branch of the national government. They understood that elected officials owed their democratic legitimacy to being agents, accountable to a free electorate. To be sure, presidents and senators respond to different constituencies, so the political promise – or the political peril – of judicial nominations can look quite different from opposite ends of Washington's main government thoroughfare, Pennsylvania Avenue.

It was, then, perhaps inevitable that those perspectives themselves would clash, at least some of the time. And so they have, throughout history.

From John Rutledge to Earl Warren

Before the mid–point of the 20th Century, the "clashing interests" that rose up around federal judicial nominations were most heavily concentrated around Supreme Court justiceships.¹⁰ With the strongly liberal decisions that emerged from the Court led by Chief Justice Earl Warren, the conservative–dominated Senate began a more rigorous examination of every nominee to the Supreme Court, a process that would later surround lower court selections, too.

But the Senate has always had a mind of its own on Supreme Court justiceships. Since 1789, presidents have sent the Senate 160 nominations to the Court, and 36 of those have failed. But the Senate has always had a mind of its own on Supreme Court justiceships. Since 1789, presidents have sent the Senate 160 nominations to the Court, and 36 of those have failed. By contrast, only 15 presidential nominations to Cabinet posts have failed, out of hundreds submitted by all 44 presidents.¹¹

From the very beginning, perceived political imperatives have influenced the choice of Justices. George Washington, staffing the first Court, leaned toward naming John Rutledge of South Carolina, a key figure at the Constitutional Convention, to be the first Chief Justice, on the merits of his legal acumen. The President opted instead for John Jay, a New Yorker, as a gesture of gratitude to that state for its decisive role in ratifying the Constitution. Rutledge, instead, was given one of the first Associate Justice seats.

Washington, revered though he was, even while in office, was not spared the humiliation of having a nominee of his to the Supreme Court rejected by the Senate. Justice Rutledge hoped for a promotion to the Chief Justiceship when Jay resigned in 1795 to become New York's governor. Washington gave Rutledge a temporary appointment while the Senate was in recess, but Rutledge served only a few months, before the Senate rejected him. He received only 10 of the 24 votes cast in the Senate. Held against him was his noted opposition to the Jay Treaty of 1794 winding up still-unresolved issues with Britain over the American Revolution. Rutledge had incurred the wrath of Treasury Secretary Alexander Hamilton, who had a hand in crafting the Jay Treaty and had major influence in the Federalist-controlled Senate.¹²

After the bitterly partisan election of 1800, often called the "Jeffersonian Revolution," when the dominance of the nationalistic Federalists gave way to Thomas Jefferson's states rights and agrarian Republicans, it already had become routine for politics to dictate how the Court's seats were to be filled. As president, in fact, Jefferson did not hide his insistence that he would name only those known to be loyal to Jeffersonian principles. His most notable appointment was William Johnson, who gained fame as a strong dissenter to Chief Justice John Marshall's Federalist leadership of the Court.¹³

In the early annals of the judicial selection process, no chief executive's experience with the Senate was more dismal – and no outcomes were more blatantly politically driven – than that of President John Tyler. On taking office in 1841 after the death (and very short tenure) of President William Henry Harrison ("Tippecanoe and Tyler, too," had been their campaign slogan), Tyler quickly alienated the Whig party, which controlled the Senate. Over a two-year period, Tyler tried nine times to get Senate approval of a Supreme Court nominee, and only one gained confirmation.¹⁴

Still, for much of those early decades, and indeed on into the latter part of the 19th century, the Senate was more kindly than hostile toward the president's choices. Although, in the beginning, most of the White House's choices went through swiftly – usually, by the second day, the Senate's procedures gradually became more formalized as that century unfolded, and the confirmation process consequently began to take longer. A key facet of this new procedural response was to give the Senate Judiciary Committee (originally created in 1816) an expanding role – merely advisory at first, and then more toward a distinct filtering authority as time went on.

Fairly often in this period, the Senate moved through judicial nominations that had aroused little or no controversy by unanimous consent. (In ensuing decades, the deepening awareness of senators that they were members of what they deemed the "world's greatest deliberative body" contributed to the lengthening of the process and, in order to avert gridlock, the rising use of unanimous consent agreements to keep things moving.)

Until the Senate moved into the 20th century, its deliberations on the floor over judgeships, when there were such deliberations, were done behind closed doors – although then, as now, leaks inevitably emerged. That, of course, reduced the opportunity for outside interest groups to influence the process. In 1929, after years of debating the issue, the Senate changed its rules to hold open sessions routinely on judicial nomination debates. (The Senate had made some exceptions to the closed–door norm in the past, as in 1916, when it opened the doors to allow the public to witness the In all of the history of judicial selection, there is no better example of Senate resistance to presidential designs on the Supreme Court than the frustration of President Franklin Roosevelt's impatient attempt in 1937 to "pack" the Court with Justices who would ratify the social and economic program of the New Deal. unfolding of the venomous controversy over the nomination of the first Jew to the Supreme Court, Justice Louis D. Brandeis. The Brandeis nomination also led to the first public hearings by the Senate Judiciary Committee, although the nominee himself did not appear to testify.)¹⁵

It was in this period, in 1925, when for the first time a nominee to the Court would actually appear to testify before the Senate Judiciary Committee. Harlan Fiske Stone, at the time Attorney General, was summoned to defend his prior investigation of a senator. But it did not set a precedent that would be routinely followed. Nominees would not routinely appear to testify until the middle of the 20th century.

A significant constitutional shift also occurred in the early years of the 20th century, but its most significant impact on the politics of judicial confirmations would not be fully felt until decades later. The 17th Amendment, ratified in 1913, abandoned the appointment of senators by the legislatures of the states, as provided in the original Article I. From then on, senators were elected directly by the people of their states. In time, this would make senators more responsive, in all that they did, to the demands of their constituents, including pressure groups, sometimes even more than to the blandishments of a leader of their own party in the White House.

In all of the history of judicial selection, there is no better example of Senate resistance to presidential designs on the Supreme Court than the frustration of President Franklin Roosevelt's impatient attempt in 1937 to "pack" the Court with Justices who would ratify the social and economic program of the New Deal. Even a landslide reelection victory for Roosevelt in 1936 would not prove sufficient to salvage in the Senate his plan to fundamentally remake the Court in his own philosophical image. The plan, at its simplest, was to give the President potentially six new appointments if no aging Justice would retire. (To be sure, as the years of his lengthening presidency stretched out, Roosevelt would ultimately place nine Justices on the Court – second only to George Washington's ten.¹⁶)

Whatever credit or blame the Senate may have earned for refusing to accept Court "packing" when it was attempted as structural alteration under Roosevelt's plan, the Senate never did resist to the point of rejecting any of his actual nominees. Indeed, after the Senate's rejection of President Herbert Hoover's nomination in 1930 of federal judge John J. Parker (primarily because of the effective lobbying against him by organized labor), the Senate would not actually vote down a nominee to the Supreme Court for another 40 years.¹⁷

Looking back from the 21st century, it is simply astonishing that Earl Warren would become Chief Justice of the United States after only one day of floor debate in the Senate, and by a unanimous voice vote. Looking back from the 21st century, it is simply astonishing that Earl Warren would become Chief Justice of the United States after only one day of floor debate in the Senate, and by a unanimous voice vote. His nomination had been held up for some two months amid protests by a few southern Democratic senators that he was a "left winger" (and by a North Dakota senator who was protesting the failure to choose a nominee from his state), but the opposition never seriously threatened Warren's confirmation.

He won Senate approval on March 1, 1954.¹⁸ Just 77 days later, what would be regarded almost universally as a constitutional revolution

began under Warren's leadership of the Court: On May 15, *Brown v. Board of Education*¹⁹ was decided. The process of selecting federal judges would, from then on, be very different – first for Supreme Court nominees, and then for those chosen for the lower courts.

The Aftermath of Brown

Eight months after the Supreme Court ruled that racial segregation in public schools was unconstitutional, President Eisenhower named John Marshall Harlan, a federal appeals court judge in New York, to succeed the late Justice Robert H. Jackson. Although Harlan was closely associated with a key Eisenhower adviser, Attorney General Herbert

Brownell, Harlan's choice was widely regarded then – and since – as one made on merit more than political virtue. Harlan, of course, would go on to become a model of judicial restraint – and a frequent dissenter to Earl Warren's progressive agenda – but at the time of his selection, he was aggressively attacked by southern Democrats as "ultraliberal." They were able to stall, but not to defeat, his nomination.

Close observers of the confirmation process now regard Harlan's troubles as a new beginning of its own. The early establishment of the Warren Court's activism would be matched by new activism among senators so that, after Harlan, no nominee to a Justiceship would even attempt to avoid testifying before the Judiciary Committee. "Harlan's nomination," according to Brookings scholar Wittes, "marked the first time the Senate sought live testimony from a nominee in order to grill him about his views of specific cases and about his judicial philosophy – a change from which the process has never quite recovered."²⁰

Four years later, with the Supreme Court moving to implement the *Brown* decision against what came to be known as the South's "massive resistance," nominee Potter Stewart would be met by Georgia Sen. Richard B. Russell's complaint that the nomination was "a part of a deliberate policy of the Department of Justice to perpetuate some recent decisions of the Court in segregation rulings." Stewart, testifying before the Judiciary Committee, was straightforward: "I would not like you to vote for me on the assumption…that I am dedicated to the cause of overruling that decision. Because I am not."²¹ He had to wait more than four months for his nomination to come to a favorable vote.²²

The full force of the resistance among southern senators would emerge in 1967, with President Lyndon B. Johnson's nomination of Thurgood Marshall – the civil rights lawyer who had won the *Brown* decision, and the first African-American chosen for the Court. "Marshall's opponents," Benjamin Wittes has written, "not only painted him as a dangerous radical but also engaged in a particularly vile set of smears, reminiscent of the attacks on Brandeis a half-century before."²³

The politics of race would not be the only brand of politics used against Court nominees by the newly assertive Senate. The simple fact that Johnson was a "lame duck" president, and that an election was looming, assured a vigorous opposition when, in 1968, he sought to elevate Justice Abe Fortas to be Chief Justice to replace Earl Warren, who had decided to retire. Fortas' nomination would ultimately fail. His nomination was withdrawn after the Senate refused to stop a Republican–led filibuster – the only time that that tactic has been used successfully to defeat a Supreme Court choice.²⁴ Warren continued to serve a year longer than he had planned, until the newly elected Republican President, Richard M. Nixon, named Warren E. Burger to be Chief Justice.

In the modern era, some of the strongest critics of the Senate's handling of Supreme Court nominees focus on the deeply partisan divisions that developed over one failed nomination, and one successful one – those of Robert H. Bork in 1987, and Clarence Thomas in 1991.

The Bork episode has now given a popular name to a procedure that critics believe was thoroughly politicized and thoroughly unfair to him: He was "Borked."²⁵ Bork's rejection, after 12 acrimonious days of hearings in the Senate Judiciary Committee, delving deeply and critically into his conservative judicial philosophy, came first on a 9–5 vote in the Committee to send the nomination to the full Senate with an unfavorable recommendation, and then, when Bork insisted that the procedure run its full course, a Senate rejection by a vote of 58–42 against. The entire process stretched over 108 days after his selection. The Bork episode has now given a popular name to a procedure that critics believe was thoroughly politicized and thoroughly unfair to him: He was "Borked."²⁵ Thomas, an African–American who was the first President Bush's choice to replace Thurgood Marshall, withstood an 11–day hearing in the Judiciary Committee that he would denounce, from the witness chair, as a "high–tech lynching." It focused as much on allegations of personal misconduct as on his conservative legal philosophy. The Committee split 7–7 on the first attempt to report the nomination to the Senate, and then cast a 13–1 vote to report it out without a recommendation. The nomination was scheduled to go to the floor for debate, but then that was put off for further hearings at which the most accusatory testimony emerged. Finally, after a process that had run for 99 days, Thomas won Senate approval by the narrowest margin of a modern successful nominee – 52–48.²⁶

These two episodes were proof, at least to critics, of the new era in the Senate's consideration of judicial nominees. More proof, according to critics, came as the new approach extended to the review of nominations for federal appeals and trial courts. "Two dramatic events unfolded during the 1950s and 1960s – both at the behest of a new breed of policy-driven political activists – that would eventually lead to a lower court appointment process rife with partisan politics," according to political scientist Nancy Scherer. Here is her summary:

First, the political party system changed, from a loosely connected system of local patronage-driven organizations into a national, policy-driven organization. Second, the federal judiciary changed, from a closed institution that adjudicated the property and business-oriented claims of corporations into an open institution that adjudicated individual rights claims of the disadvantaged.²⁷

This became evident as senators, reacting in part to their own constituencies (recalling that they now were popularly elected, under the Seventeenth Amendment), but also reacting to the rise – in numbers and intensity – of political pressure groups, saw judgeships at all levels as instruments for achieving policy goals. Scherer and some other scholars have suggested that the seeds of a sturdy variety of partisan polarization were then beginning to germinate.

When the political dimension of choosing judges was focused on Supreme Court seats, there were few enough of them that senators could take the time necessary to delve deeply into what they saw as the political implications of each nominee's selection. But with the spreading political demand to staff the lower courts with judges presumed to be of a preferred ideological approach to the law, senators would increasingly have to delegate the exploration of each of the lower court nominees to their limited staffs – but, more often, to outside pressure or activist groups.

It would take some time for activist groups to develop meaningful influence on the lower court selection process – some observers have found that this would not occur in its fullest form until the 1980s –but the potential for a basic shift in the entire confirmation process was taking shape in the wake of the civil rights revolution in politics and in the courts.

With formal organizations from Right to Left using judgeships as a rallying point (and a fund-raising stimulant) for their followers, the outside organizations steadily moved toward filling any void in the personal staffs of the senators and of the Senate Judiciary Committee.

The change in the political dimensions of the process – what some have called the new politicization – would soon begin to alter outcomes.

Previously, it had been common for presidents to succeed more or less routinely with their nominations to the federal circuit and districts courts. President Eisenhower's nominees to the federal appeals court and district courts gained approval in more than four out of five cases – 85.9 percent. That high rate of approval, or even higher, would continue: President John F. Kennedy, 84.9 percent; President Johnson, 91.5 percent; President Nixon, 97.9 percent; President Gerald R. Ford, 82.4 percent;²⁸ President Carter, 90.7 percent.²⁹

However, beginning with the Reagan presidency, in 1981, a different trend set in. The total of Court of Appeals and District Court nominees selected by Reagan and confirmed by the Senate began what would be a downward shift: from Carter's 90.7 percent to 85.6 percent. For President George H. W. Bush, it fell further, to 75.9 percent, and it fell slightly for President Clinton, to 74.6 percent, then dropped sharply in the first two years of President George W. Bush's term, to 54.5 percent.³⁰ After a heated controversy over whether the Senate had a constitutional obligation to act on presidential selections,³¹ the Bush number rose, to 84.3 percent. But this latter figure is misleading: While the Senate confirmed 86.4 percent of Bush's nominees to District Court (trial level) seats, only 75 percent of his nominees to Courts of Appeals won approval.

That was a reflection, in raw numbers, of not only what was happening in the Senate, but also what was happening in the federal courts. The Supreme Court in more recent years has been deciding fewer cases than previously, with the total number of decisions in any one term usually not reaching 100. The 13 regular and specialized Circuit Courts of Appeal decide hundreds and hundreds of cases each year. And just as senators and organized lobbying groups recognized that the Supreme Court had become an institution capable of and interested in re–shaping the law in perhaps fundamental ways, they saw increasingly the same thing happening in the lower appeals courts. Unlike District Court judges, whose capacity to shape the law is far more restricted by the trial processes, particularly the primary emphasis upon developing the facts (and by their position on the lowest judicial rung), judges at the appeals court level focus only on the substance of the law at issue in any case. And with the Supreme Court using its discretion to choose its cases – and using it more sparingly – the last word on many legal issues of the day would emerge from the appeals courts.

For decades, scholars have found, the Senate's usual response to lower court nominations was to defer to the president. "This norm of presidential deference," according to one study done in 2008, "served the Senate well, as it would be virtually impossible for the Senate to function were it to spend as much time and as many resources on each and every lower court nomination as it so often does on nominations to the Supreme Court."³²

That same study, based on interviews with leaders of national lobbying groups, said the habit of deferring to presidential choice "began to erode in the mid–1980s…Fearing Ronald Reagan would follow through on his campaign promise to appoint conservatives to the lower federal courts,…issue activists on the left began to monitor systematically lower court nominations in Reagan's second term."³³ Conservative groups similarly began to mobilize during the Clinton presidency.

From end to end on the ideological spectrum, the pressure groups became sources of richly detailed analyses of lower courts nominees' backgrounds and perceived ideological orientations, and these were shared readily with Judiciary Committee members and staffs, "with sympathetic senators throughout the chamber," and with the media, which hardly matched in its own research the scope of the interest groups' findings. The intensity of the pressure groups' interest in the process extended to issuing direct political admonitions. "Interest groups are not shy about threatening a senator with electoral retribution should he or she ignore the interest groups' demands by voting to confirm" a nominee they oppose.³⁴

Notably, this part of the process occurs at a very low level of public visibility, in most cases. The nationwide television broadcasts of the Supreme Court confirmation process – in the Senate Judiciary Committee – is seldom imitated for a lower court nomination. While the C-SPAN cable network does broadcast Senate floor debates, and that, of course, includes debates on court nominations, the audience for such broadcasts when lower court nominations are on the floor comes nowhere close to matching the numbers who follow the process for the Supreme Court.³⁵

Whatever ultimately happens when a judicial nomination reaches the Senate floor, no part of the process so shapes the outcome as the work that is done by, and the influence that is exerted upon, the Senate Judiciary Committee. For lower court nominations, a good many simply never emerge from the Committee. For those that do, the Committee's

filtering process is vital. And that same process is just as vital for Supreme Court nominees.

The Committee— Its Processes and Its Politics

Officially in existence as a "standing," or permanent, committee since 1816, the Senate Judiciary Committee has had a role since then in reviewing Supreme Court nominations, but that role has increased substantially in modern times. Beginning in 1868, those nominations were routinely referred to the Committee after the selection by the president. But it was not until 1916, its centennial year, that the Committee ended the process of consideration of all such nominations behind closed doors.

The first such open hearing was on the nomination of Louis D. Brandeis in 1916 (he did not appear), and the 19 days devoted to those hearings remain the longest on record. Public hearings became common in 1925, but until 1946, these hearings were often "brief and perfunctory in nature, held only long enough to accommodate the small number of witnesses who wished to testify against a nominee."³⁶ Since Tom C. Clark's nomination in 1949, all nominees have received a hearing, varying in length, up to 11 days. The norm is about four days, and usually only a part of that time has been set aside for the nominee's appearance; outside witnesses took up the remaining time.

the Judiciary Committee has become an especially vivid center of partisan conflict - exacerbated, some argue, by the insistent demands of pressure groups that the confirmation inquiry center on dueling ideologies and policy preferences, not over judicial "temperament" or professional qualifications. Although political instincts and appetites govern much of what the entire Senate does, on much of its business, the Judiciary Committee has become an especially vivid center of partisan conflict – exacerbated, some argue, by the insistent demands of pressure groups that the confirmation inquiry center on dueling ideologies and policy preferences, not over judicial "temperament" or professional qualifications. "Once policy was injected into the appointment process," Nancy Scherer has argued, "the once sacrosanct 'gentleman's agreement' among senators and the president – which allowed lower court judges to be selected and confirmed swiftly under the patronage system – began to break down. In its place is an appointment system rife with partisan politics, as politicians exploit lower court judgeships to 'score points' with their elite constituents."³⁷

If, indeed, partisan politics is now driving the process, in some greater

or lesser ways, the Senate's traditions and habits provide both voice and opportunity to provide "advice" – with or without "consent." Historians and legal analysts of the Senate have always insisted that the "upper chamber" has never felt bound by one approach to its "advice and consent" task, but rather has felt free, from one era to the next, to fashion the processes that most meet its political and organizational needs. But over time the Senate has fashioned a variety of techniques that, together or singly, can work as modes of stubborn opposition, or mere convenient inaction. They range from the innocuous to the most feared – and least controllable –mode of obstruction: the filibuster.

From "Courtesy" to Filibuster: Modes of Opposition

A truly remarkable event occurred on the Senate floor in November 2003 – a 38-hour debate, stretching over two days, on the nature of the Senate's obligation – if it *is* an obligation –to provide "advice and consent" to judicial nominations. It was not a filibuster, but it was about filibustering. It was provoked by the political and institutional frustration of the Republicans who then held numerical control of the Senate. It is, perhaps, a reflection of the times that this debate focused on lower court nominations, not those to the Supreme Court.

It was a discussion of two traditions that are nearest to the heart of the Senate: the custom of majority rule, and the custom of unlimited debate (these are, in fact, only traditions, not constitutionally mandated requirements). Given that political controversy surrounds virtually any nominee to a federal court seat, the availability of unlimited debate to

senators who cannot command a majority of votes would be naturally tempting. The alternative to such a filibuster, of course, is majority rule.

In 2003, the Democratic minority in the Senate was not resisting the temptation. It had filibustered four of President George W. Bush's nominees to federal appeals courts, and the Republican majority did not have the votes to stop the filibusters (by invoking what is called "cloture" – that is, a debate–ending motion, which requires 60 votes of the Senate's 100).³⁸ (The Republicans' frustration was only deepened when, after the extended debate over filibustering, the Democrats staged unlimited debate that scuttled two more Bush nominees.)

The filibuster, of course, is the weapon of last resort for a minority in the Senate that is determined to resist the will of the majority. While an individual senator cannot mount a filibuster unaided, another tradition of the body does allow a single member to obstruct action, at least for a time. In the very first Senate session, the concept of "senatorial courtesy" originated. That is the notion that, if an individual senator objects to a nominee chosen by the president, that senator's objections will be respected by colleagues. It worked some of the time when the nominee was from that senator's home state, and at times when the president chose a number from a party different from the objecting member.³⁹ As Professor Michael Gerhardt has written, "Much more often than not, presidents have paid dearly for ignoring or failing to give adequate respect to senatorial courtesy."⁴⁰

Another mode of individual expression on a nomination is what is called the "blue slip." It is a procedure, used since 1816, and is confined to the Judiciary Committee. When a nominee is submitted to the Senate and referred to that Committee, the home-state senators of the nominee are sent a piece of light blue paper on which they can indicate approval or disapproval. It is largely left to the Committee chairman to decide whether to respect the response. Sometimes, a senator may accomplish something close to a veto by simply refusing to return a blue slip.⁴¹

Still another resistance technique is the "hold." A senator can simply tell the leader of his party in the chamber that a nomination should be put on hold. It is up to the leader to decide whether to go along, and for how long. The Congressional Research Service's Betsy Palmer has said that "because every Senator can attempt to place a hold at any time for any reason, situations can get complicated with 'multiple holds' and 'counter holds.'"⁴²

In addition, the authority that the chairman of a committee – such as Judiciary – has to control committee business can be used (within tolerable limits) to keep a nomination from even emerging from the panel to the full Senate. In more recent years, however, Judiciary Committee chairmen have tried to run committee business in a more cooperative way, working out agreements with the highest-ranking member of the other party.

No other device, however, ranks in the arsenal of opposition with the filibuster. The word seems to have come from a Dutch word for an individual who lived off the loot or "booty" stolen by another; the concept of "freebooting" – the English translation of this phenomenon – seemed to parliamentary historians to describe well what was happening when a legislator had "pirated" the normal processes of the chamber, and thus "freebooting" became known as "filibustering."

Just as majority rule and unlimited debate are nowhere mentioned in the Constitution, neither is the filibuster. Just as majority rule and unlimited debate are nowhere mentioned in the Constitution, neither is the filibuster. Senate historians have been unable to determine exactly when it was first used, because the records of the years when the Senate considered nominations in secret are not reliably available to show what went on behind closed doors. It is clear, though, that in 1917, the Senate decided that it wanted a means of stopping unlimited debate. The first "cloture rule" was adopted

then. In 1949, apparently for the first time, the Senate agreed that cloture could be invoked on a debate over "executive business" – that is, treaties and, by implication, nominations.

As the cloture rule (Rule XXII) now stands, debate can be shut off if there are 60 votes in the Senate to do so. In recent years, with the Senate closely divided along party lines, nearly any controversial matter can be held up by a filibuster because gathering 60 votes can be extremely difficult. (The Senate, of course, can act on virtually anything if there is unanimous consent to do so. Indeed, throughout a typical Senate day, one observing the proceedings will hear the chair say, over and over again, "Without objection, it is so ordered" – an indication that every one in the chamber is willing to let a particular action occur or a matter proceed. The filibuster is the antithesis of unanimous consent.)

The Constitution clearly authorizes the Senate to adopt the rules to govern its own proceedings, and spells out explicitly when it mandates that some vote greater than a majority is needed to transact a particular piece of business (for example, a two-thirds vote of the Senate is required to convict a government official in an impeachment trial.)

There is, though, a constitutional argument that has been made against the use of a filibuster to block a judicial nomination – an argument that, to be sure, is likely to be resorted to only by the party that has a majority in the Senate at any give time. The Republicans made the argument in that extended debate in November 2003 over the Democratic filibusters of appeals court nominees.

The argument proceeds from a constitutional negative. Since there is no requirement for a "super-majority" spelled out in the Constitution to vote on a judicial nomination, any requirement for 60 votes to allow the Senate to proceed to an up-or-down vote on a nomination arguably imposes just such a requirement. The argument is coupled with the view that the Senate ordinarily proceeds by majority rule, and that the Constitution, by giving the Senate the power to provide "advice and consent," did not anticipate that the Senate would do neither, opting instead to simply avoid taking final action.⁴³

Countering that argument is the view that the Senate's constitutionally grounded authority to write its own rules is sufficient to validate a choice to allow debate to go on until there is strong enough sentiment that it is time for the Senate to move on. Since a "super-majority" is only required to end a debate, not to actually approve a nominee once an up-or-down vote is at hand, there is no constitutional violation, according to this view. That is coupled with tradition-based arguments about respecting the sentiments and voices of the minority.

The Congressional Research Service's Jay R. Shampansky has suggested⁴⁴ that the filibuster is "entrenched" in the Senate's procedures to a degree that insulates it from change, or at least from easy change. Proposed changes in Senate rules are themselves open to filibuster, with an ever greater vote necessary to stop such a debate on a rule change (two-thirds of the senators present and voting).

Moreover, the Senate's rules remain in effect from one Congress to the next, so there is no option to start fresh with new rules for each new session. These "entrenchment" features, Shampansky has noted, have given rise to a separate constitutional argument: that requiring a "super-majority" even to change the filibuster rule frustrates the constitutional authority for the Senate to adopt its own rules – presumably, by majority vote.

The Republicans' frustration with Democratic filibusters of Bush nominees to appeals courts reached a new level in May 2005. The Republican Senate leaders announced that, if the filibusters continued, they would attempt a drastic procedure – one that soon would be called the "nuclear option" for its capacity to destroy the capacity of the Senate to work together at all. Those who suggested the procedure preferred to call it the "constitutional" option because they believed it was an approach that would restore constitutional normalcy to the judicial confirmation process. The threat was raised as the Senate was about to take up the nomination of a nominee, Priscilla Owen, to be a federal appeals court judge – a nomination that had been blocked by four prior Democratic filibusters.⁴⁵

Under the suggested option, the Republic majority leader would call up a proposal to change Senate rules to end the filibuster (at least as to judicial nominations). A "point of order" would then be raised, claiming that the Senate

could adopt a rule change by simple majority vote (since, it would be argued, the two-thirds rule for changing the rules violated the Constitution). Such a point of order would then be referred to the Vice President, presiding over the Senate. The Vice President, a Republican, would uphold the point of order. The Vice President's ruling would then be put to the Senate for a vote; only a simple majority would be necessary to sustain it. The rules would then be altered.⁴⁶

In the midst of a fairly anxious discussion of that idea, a group of 14 senators, from both parties (soon called the "Gang of 14") issued a joint announcement that cooled off the sentiment for the drastic option. The 14 said they would vote to invoke cloture and stop debate on three pending court nominations, so that those could then go to up-or-down votes. They went on to declare their opposition to the "nuclear" or "constitutional" option, and expressed their view that filibusters on judicial nominees should be reserved only for "extraordinary circumstances." The crisis of the moment abated, without the Senate having to vote on any rule provision to carry out the initiative of the "Gang of 14."⁴⁷

At a minimum, however, the lengthy debate in November 2003 and the "nuclear option" discussion of May 2005 had demonstrated that, while there was nothing close to a consensus in the Senate that the judicial confirmation process was deeply troubled, it did appear that there were a considerable number of senators who had begun to wonder whether there should be another way.

Is There Another Way?

In the early fall of 2006, some eight months after the Senate had filibustered and then confirmed Justice Samuel A. Alito, Jr., for the Court, he remained uncomfortable about the experience. In a talk to a judges' conference in Colorado, he recalled that his sister, on a trek to the African bush, had had to escape from a pack of wild dogs. Without changing his expression, he said that was the way it had been for him before the Senate Judiciary Committee.⁴⁸ (He did not mention it, but during those hearings, his wife had broken down in tears at the spectacle she was witnessing.)

For those who have been through the modern judicial confirmation process, it may matter little that there is an ongoing debate about whether anything needs to be done about that process. Justice Clarence Thomas, years afterward, has displayed a lingering anger over what he felt he had to endure.

Chief Justice John G. Roberts, Jr., who had an easy time of it before the Committee and the Senate, nonetheless seemed to wish for the process to have been different. He told an interviewer in January 2006:

Of course it can be different. If there are serious questions about qualifications, senators should explore them. If there are serious questions about ethics, senators should explore them. If there are disputes about appropriate judicial philosophy and approach, talk about those. But barring that...everybody doesn't have to think that this is an opportunity for them to be the incarnation of Clarence Darrow....People don't have to view it as a grilling or a cross-examination, or an effort to come upon a 'gotcha'moment.⁴⁹

Beyond those who have been through it, and with the exception of scholars who believe that politically-minded judges, not the Senate, are the problem,⁵⁰ there are others who are discussing possible changes, and they are advancing those thoughts whether or not they see a realistic chance for real change actually to occur. One of the most pervasive suggestions is that nominees simply cease taking part in the process – staying away from the Judiciary Committee hearings, avoiding the now-routine practice of making the rounds of the Senate before the hearings for private get-acquainted sessions with the members, letting others promote their candidacies, and, at least in the short term, hoping for the best.

The basic aspiration behind that idea is that the nominees would cease to be bit players in the senators' impersonation of Clarence Darrow, and would avoid the necessity of uttering either bromidic or evasive responses in order to avoid being pinned down to something they would later regret (or have to repudiate) on the bench.

Presidents, it is said, might simply instruct their nominees not to go before the Senate personally, or nominees themselves could simply make that choice – as Felix Frankfurter unsuccessfully tried to do, before being dissuaded by friends lest it cost him the seat on the Court.

A variation on this idea is that the nominee should appear right after being nominated, and that other witnesses who then want to battle it out would appear after a separation in time that might keep the nominee away from the political part of the hearings. There are other suggestions related to the hearings, all seemingly hopeless prospects –such as turning off the television cameras or cancelling public hearings altogether.

Some proposals suggest a kind of unilateral or bilateral "disarmament," with either the Senate or the president, acting alone or in concert, agreeing to forsake some of the current prerogatives that may be contributing to a widening chasm between the two political branches.⁵¹ Calls for reform of the Senate's filibuster rule – an initiative the Senate could take on its own – are fairly common. And so are suggestions that the White House could actually take the Senate into its confidence before a nominee is chosen, making consultation a genuine process and giving senators an investment in the individuals chosen. A variation on that idea is more confrontational: that the Senate send down to the White House a list of nominees, with a clear message that only someone on that list would be considered for confirmation.

Another proposal is for a constitutional amendment, to require a super-majority in the Senate for final approval of judicial nominees – a suggestion that appears aimed at encouraging the president to pick more widely acceptable candidates.

Turning to the judiciary, some are suggesting that this, too, could be a place for some form of "disarmament" – with judges working more diligently to apply the law according to "neutral principles" (assuming that such principles might be defined to the satisfaction of Left and Right equally). There are also those who seem persuaded that the Constitution should be amended so that federal judges are elected, not appointed –on the theory, apparently, that political accountability would draw judicial decision–making away from politically polarizing results. And, at least in the academy, there appears to be a widening interest in an amendment to end life tenure for federal judges, and especially for Supreme Court Justices – again, perhaps, to make them more responsive to the broader political change that comes over time.

As would-be reformers generate new ideas for change, there seems to be little active interest in trying to "disarm" the lobbying groups that, since the 1980s, have asserted themselves to the point of near-dominance, at least of the Judiciary Committee's part in the process. The First Amendment, of course, stands as a barrier to shutting them out of the process altogether. But more modestly, reformers say the Senate might well increase and improve its own staff resources, to lessen the dependence on groups that bring their polarization with them into the process. During the administration of George W. Bush, the White House simply cut the American Bar Association out of the nominee-screening process. That was, however, a narrowly targeted exclusion that, on balance, left other organization gladiators to fashion their own, competing screening techniques.

One refrain that runs through many of the suggestions advanced to reform the modern judicial confirmation process is that it is too much to expect to undo the new dynamics entirely. The same basic question, perhaps, will go on being asked: Is there a way, within reach, to prevent the search for what Chief Justice Roberts called that " 'gotcha' moment"? He recalled the advice he was given: " 'Look, you're going to be sitting there for 12 hours. If you make a 10-second mistake, that's all anyone's going to know about.' "

It was, he told his interviewer, "an arduous process."52.

Notes

Some citations in the notes are abbreviated. The full title of the works cited is included in the reading list that follows the notes.

¹Available at <u>http://www.whitehouse.gov/the-press-office/remarks-president-and-solicitor-general-elena-kagan-nomination-solicitor-general-el</u> (last visited July 21, 2010).

²Congressional Research Service Report, RL31635, table on p. 12.

- ³ *Marbury v. Madison*, 5 U.S. 137 (1803). "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other the courts must decide on the operation of each "
- ⁴ Benjamin Wittes, "Borking Predates Bork," Washington Post, July 30, 2006, p. B–4. (Available in archives at <u>www.</u> <u>washingtonpost.com</u>.) At the time, Wittes was an editorial writer for the Post; he is now a resident scholar at the Brookings Institution in Washington.
- ⁵ Stephen L. Carter, The Confirmation Mess: Cleaning Up the Federal Appointments Process, preface, at p. ix.
- ⁶ Lee Epstein and Jeffrey A. Segal, Advise and Consent: The Politics of Judicial Appointments, at pp. 2–4.
- ⁷ As quoted in Wittes article, *supra*, n. 4.

⁸ Henry J. Abraham, Justices & Presidents: A Political History of Appointments to the Supreme Court (3rd edition), at p. 25.

- ⁹ James Madison, Federalist Papers, No. 10.
- ¹⁰ Indeed, some scholars have concluded that, "for most of our nation's history, the Senate norm was to give almost complete deference to the president on lower court nominations," and it was not until the 1980s that the private pressure groups began making serious efforts to influence who got named to, and confirmed for, lower court seats in the federal judiciary. Scherer, Bartels and Steigerwalt, "Sounding the Fire Alarm," *The Journal of Politics, Vol. 70, No. 4, at p. 1027.*
- ¹¹ CRS Report RL33247, at p. 1.
- ¹² This account, and other discussion here of the early history, is drawn principally from Professor Abraham's book, *supra*, n. 8. Washington's experience is recounted in Chapter 5.
- ¹³ It is beyond the scope of this paper, but the fight over the appointment of quasi-judicial justices of the peace in the District of Columbia, ultimately resulting in the famous declaration of the concept of judicial review by Marshall in Marbury v. Madison, 5 U.S. 137 (1803), is a perfect illustration of how political maneuvering can contribute to the development of constitutional doctrine in America. For an engaging discussion of this episode, see James F. Simon, What Kind of Nation: Thomas Jefferson, John Marshall, and the Epic Struggle to Create a United States, Simon & Schuster, New York, 2002, especially Chapter 8, "Mr. Marbury's Missing Commission.". For a full treatment of the election of 1800, see John Ferling, Adams vs. Jefferson: The Tumultuous Election of 1800, Oxford University Press, Oxford, 2004, part of the series, Pivotal Moments in American History.
- ¹⁴ CRS Report RL33247, at pp. 6–7.
- ¹⁵ The preceding discussion of the development of Senate procedures is drawn from CRS Report RL33247. A good deal of history on Senate procedures on nominations is also explored in Betsy Palmer's study, most recently updated in July 2008, *Evolution of the Senate's Role in the Nomination and Confirmation Process: A Brief History*, CRS Report RL31948.
- ¹⁶ Abraham, Justices & Presidents, supra, n. 8, at p. 71.
- ¹⁷ President Richard M. Nixon's nominees, federal appeals judges Clement Haynsworth, Jr., and G. Harrold Carswell, were both rejected in 1970 – Haynsworth by a vote of 45–55, Carswell by 45–51. President Lyndon B. Johnson's attempt to elevate Justice Abe Fortas to replace Earl Warren as Chief Justice was withdrawn in 1968, after the Republicans – looking forward to a presidential election that Fall – staged a filibuster. CRS Report RL33247, supra, n.11, tables at pp. 32–36. (The atmosphere in the Senate at the time of the Fortas nomination, and the role, in general, of the filibuster on judicial

nominations are explored more fully below.)

¹⁸ Warren had actually begun serving on the Court on January 11, 1954. The Senate was in recess when the President decided to get Warren started on the work of the Court; he thus began his service with a recess appointment – as had George Washington's second nominee for the Chief Justiceship, John Rutledge. Since the Founding, 12 Justices have been given recess appointments, but none since Potter Stewart in 1968. The Constitution expressly gives the President the authority to fill vacancies on the Court, and other federal offices. However, unless such a nominee is approved by the Senate, the service of such an appointee must end at the close of the next session of Congress.

¹⁹ 347 U.S. 483 (1954).

²⁰ Wittes goes on to say, more critically: "Few commentators today remember the Harlan nomination, yet in initiating the Senate's unfortunate and sordid history of taking live testimony from judicial nominees on their judiciai philosophy, it laid the groundwork for much that is happening today." Both parts of the quotation are from *Confirmation Wars*, at p. 60.

²¹ The quotations are from Abraham, *supra*, n. 8, at pp. 272–273.

²² CRS Report RL31948, n. 15.

- ²³ Wittes, Congirmation Wars, at p. 54.
- ²⁴ CRS Report RL31989, at p. 43. In more recent times, a debate has arisen over whether the procedure that forced the withdrawal of the Fortas nomination was, in fact, a filibuster. See CRS Report RL, 31948, n. 50, at p. 13. On only three other occasions in history has the Senate filibustered a Supreme Court nomination; the other three ultimately were ended by decisions to cut off debate, and the nominations then won approval: twice involving William H. Rehnquist, in 1971 when he was first appointed to the Court, and in 1986 when he was elevated to the Chief Justiceship, and Samuel A. Alito, Jr., when he was named to the Court in 2005.
- ²⁵ CRS Report RL33225, table, at p. 38. The seat for which Bork was chosen by President Reagan was that of retired Justice Lewis F. Powell, Jr., who had come to be the Court's most frequent "awing voter" to bridge the gap between two oppositeleaning blocs. It was thus commonly assumed that, if Bork were approved, he would help swing the Court more decisively toward the conservative bloc. As matters turned out, the Justice who did fill that seat, Anthony M. Kennedy, has, in fact, emerged as the holder of an exceptionally decisive "swing vote," though he has tended to swing, from time to time, between one bloc and its opposite – s centrist, with a somewhat conservative bent.
- ²⁶ CRS Report RL33225, table, at p. 38.
- ²⁷ Scherer, Scoring Points, at p. 28.
- ²⁸ CRS Report RL32122, table, p. 9, for the period 1945–1976.
- ²⁹ CRS Report RL31635, table, p. 12, for the period 1977–2003.

³⁰ Ibid.

³¹ See the discussion of the filibuster, below.

³² Scherer, Bartels and Steigerwalt, *supra* n. 10, at p. 1027.

³³ Ibid.,, at p. 1028.

³⁴ Ibid., at p. 1029.

³⁵ It is beyond the scope of this paper to analyze, closely or in any detail, the effect that television and other broadcasting of the judgeship process in the Senate has had and continues to have on the Senators themselves. It is sufficient to note that no one seems to doubt that the Senators regard as a prized opportunity the appearance not only on commercial and cable network television, but also on a rapidly rising number of streamed presentations on the Internet. The various media provide, at no cost, an immediate contact – a "democratic moment" of accountability –between Senators and their homestate constituencies, and the more important or salient parts of the "political base" of their party.

³⁶ CRS Report RL33225, at p. 7.

³⁷ Scherer, Scoring Points, at p. 5.

- ³⁸ Ibid., at p. 2. See also CRS Report RL32102, at p. 1, n. 1, citing to 149 Congressional Record S14528–14785, daily edition, November 12, 2003.
- ³⁹ The various techniques of opposition or delay available in the Senate are discussed in CRS Report RL 31948.
- ⁴⁰ Gerhardt, The Federal Appointments Process, at p. 145.
- ⁴¹ CRS Report RL31948, at pp. 9–10.
- ⁴² Ibid., at p. 11.
- ⁴³ For a non-partisan discussion of the constitutional question, see CRS Report RL 32102.
- ⁴⁴ Ibid., at pp. 5–6.
- ⁴⁵ CRS Report RL31989, at p. 45.
- ⁴⁶ A year earlier, Republican leaders pondered a somewhat less drastic "nuclear option": changing the rules to reduce the number of votes it took to close off debate, each time "cloture" was attempted, until the requirement had dropped to a simple majority of the Senate – 51 votes. That proposal actually won approval in the Senate Rules Committee, but was never considered on the Senate floor. See CRS Report RL32684, at pp. 2–3..
- ⁴⁷ CRS Report Rl32102, at p. 7, text and fn. 29. The report also cites to Gold & Gupta, *The Constitution Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster*,28 Harvard Journal of Law and Public Policy 205 (2004).
- ⁴⁸ Notes, in author's possession, of remarks at the Tenth Circuit Conference in Colorado Springs, September 2006.
- ⁴⁹ Quoted by Benjamin Wittes in Washigton Post column, supra, n. 4, and in his book, Confirmation Wars, at p. 1.
- ⁵⁰ Epstein and Segal, *supra*, n. 6, at pp. 144–145.
- ⁵¹ The prospects for Senate change from within may ultimately depend on the efforts of individual Senators interested in working to alter at least the atmospherics, if not the procedures. In describing why he would vote for President Obama's nomination of Elena Kagan to be a Supreme Court Justice, Sen. Lindsey Graham of South Carolina the only Republican on the Judiciary Committee to vote "yea" offered some provocative thoughts in that vein. A press release describes some of those remarks; it can be found at http://lgraham.senate.gov/public/index.cfm?FuseAction=PressRoom. PressRelease&ContentRecord_id=flc50b01-802a-23ad-49a5-fe470dcd6056&Region_id=&Issue_id="(last visited July 21, 2010).

⁵² Wittes interview, *supra*, n. 48.

The literature on the selection of Supreme Court Justices is far more extensive than that available on lower court judgeships. However, some serious scholarly work has been done on the lower court process; examples are the work of Sheldon Goldman of the University of Massachusetts and Nancy Scherer of Wellesley College. In addition, much research on that level of the process has been done as part of the Congressional Research Service's studies (listed separately, below).

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Thomas E. Mann and Norman J. Ornstein, *The Broken Branch: How Congress Is Failing American and How to Get It Back on Track*, Oxford University Press, New York, 2006 (especially Chapter 4). (For a further critique of modern partisanship and its effects on Congress, see Juliet Eilperin, *Fight Club Politics: How Partisanship Is Poisoning the House of Representatives*, Bowman & Littlefield, Lanham, 2006.)

The most comprehensive, detailed and rigorously non-partisan analyses of the federal judicial nomination process—especially, the Senate's procedures and the case-by-case results—have been done by the Library of Congress' Congressional Research Service. Most of the reports are available, by report number, at http://opencrs.com/ From time to time, new editions are published. Among those used here are these:

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