Book Review Essay

Understanding the New Politics of Judicial Appointments

CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES. By Benjamin Wittes. Lanham, MD: Rowman & Littlefield Publishers, Inc., 2006. Pp. 168. $22.95.

SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT. By Jan Crawford Greenburg. New York, NY: The Penguin Press, 2007. Pp. 340. $27.95.

Reviewed by David R. Stras*

I. Introduction

Amidst greater polarization in American politics, the process for nominating and confirming federal judges has become more political than ever. Nominees to the federal circuit courts are now being confirmed at historically low rates, the delay between nomination and confirmation of all Article III judges is growing longer, and it is not uncommon for lower court nominees to never receive a vote or hearing before the Senate. Legal scholars have written a litany of articles decrying the increasing politicization of the process and proposing reform measures to make the process more orderly and genteel. The solutions in the scholarly literature range from conferring nearly unbridled discretion to the Executive in appointing judges to advocating a more robust role for the Senate's constitutionally granted "Advice and Consent"[1] power. Put simply, there is no shortage of proposed solutions to the increasing politicization of the judicial appointments process.

* Associate Professor, University of Minnesota Law School. This Review Essay benefited greatly from the excellent research assistance provided by Kyle Hawkins, Ivan Ludmer, Shaun Pettigrew, and especially Kyle Brenton. I would also like to express special appreciation to my political-science colleagues Jason Roberts and Tim Johnson, who assisted me greatly in my initial thinking about this project. Moreover, I would like to thank the faculties of the University of Cincinnati Law School, the University of Minnesota Law School, and the University of Minnesota Department of Political Science for providing superb comments during faculty workshops. Finally, I would be remiss if I did not acknowledge the excellent comments and suggestions provided by Rachel Brand, Allan Erbsen, Michael Gerhardt, Arthur Hellman, Ryan Scott, Michael Solimine, and Jeff Yates on an earlier draft. Of course, all remaining errors are my own.

1. U.S. CONST. art. II, § 2, cl. 2.

Few scholars, however, have analyzed the reasons behind the growing politicization of the process. In two recent books, *Confirmation Wars*[2] and *Supreme Conflict*,[3] Benjamin Wittes and Jan Crawford Greenburg provide an insider's view of the world of judicial appointments and make a persuasive case that the process for appointing judges has indeed changed over the past thirty years. Both books are essential reading for students of the Supreme Court—Greenburg because of her unprecedented access, which transforms *Supreme Conflict* into a fascinating narrative, and Wittes because he illuminates some of the most problematic aspects of the increasing politicization of the judicial appointments process.

Neither, however, is able to capture the whole story. In delivering powerful vignettes about the Supreme Court and the controversies surrounding the appointment of eight Justices since 1982, Greenburg fails to consider the broader normative implications of her narrative. For his part, Wittes makes a forceful argument that aggrandizement of the selection of judicial nominees in the Executive Branch has led to greater conflict during the confirmation process and that confirmation hearings have done nothing to improve the Senate's consideration of judicial nominees. But Wittes undermines his own argument by failing to consider any of the benefits flowing from confirmation hearings or to link his proposed reforms to the harms that he identifies from the increasingly political process. Unfortunately, neither Greenburg nor Wittes is able to provide an analytical account of the reasons for the growing politicization of the judicial appointments process.

Part II of this Review Essay discusses *Supreme Conflict* and *Confirmation Wars* in detail, including the strengths and weaknesses of both books. Part III begins where both books leave off by identifying the structural, judicial, and external factors that account for growing politicization of the judicial appointments process. Structural factors, such as the passage of the Seventeenth Amendment and the proliferation of confirmation hearings for judicial nominees, have driven the Senate to take a more active role at the confirmation stage. External factors, such as the rise of organized interest groups and the mass media, have exerted pressure on the key players in the process, including senators and the president, to act with a keen eye toward pleasing constituent groups and maintaining a consistent policy image. Finally, the Court's own ventures into contentious areas of social policy—such as school integration, abortion, and homosexual rights—have raised the stakes of confirmation battles even higher. In fact, the new politics of judicial appointments have become so contentious, especially with respect to circuit court nominees, that the process for appointments now bears striking similarity to the polarizing legislative process that so many Americans

2. BENJAMIN WITTES, CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES (2006).

3. JAN CRAWFORD GREENBURG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT (2007).

find objectionable. It is an understanding of the new politics of judicial appointments that will permit the relevant actors—presidents, senators, and the nominees—to better navigate what has become an increasingly politicized process.[4]

II. *Supreme Conflict* and *Confirmation Wars*

As journalists, Jan Crawford Greenburg[5] and Benjamin Wittes[6] are accustomed to using powerful titles.[7] In titling their respective books *Supreme Conflict* and *Confirmation Wars*, Greenburg and Wittes create lofty expectations for readers: nothing short of a story of outright combat between the Executive and Legislative Branches over judicial appointments will suffice. While both tell a story of increasing politicization of the appointments process, especially in the confirmation of federal circuit judges, the tale they tell is not one of total warfare between the Branches. It is instead one of politics as usual, which can be brutal and divisive, but is manageable once the relevant actors understand that the new politics of judicial appointments bear striking similarity to other aspects of the ordinary legislative process.

A. Supreme Conflict

In *Supreme Conflict*, Jan Crawford Greenburg uses unprecedented access to members of the Court to thoroughly and forcefully track Supreme Court nominations over the past twenty-five years. Greenburg's book is based on "more than one hundred interviews," including with "nine Supreme Court justices and scores of their law clerks, high-ranking White House and Justice Department officials from four different presidential administrations, numerous federal appeals court judges, and other key players in the appointment and confirmation process, including senators and their staffers."[8]

Unlike many popular books about the Supreme Court, *Supreme Conflict* has a clear theme that permeates many aspects of the book. According to Greenburg, Republicans have tried to remake the Supreme Court over the past twenty-five years, with varying degrees of success, in order to reverse

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4. *See* David R. Stras & Ryan W. Scott, *Navigating the New Politics of Judicial Appointments*, 102 NW. U. L. REV. (forthcoming 2008) (addressing four strategic tools available to presidents to deal with the increasingly politicized judicial appointments process).

5. As Greenburg states in the acknowledgements to the book, she worked for nineteen years as a newspaper journalist for the *Chicago Tribune*. *See* GREENBURG, *supra* note 3, at 318.

6. Wittes was an editorial writer for the *Washington Post*, *see* WITTES, *supra* note 2, at 134, and now writes for the *New Republic*, *see* Benjamin Wittes - Brookings Institution, http://www.brookings.edu/experts/w/wittesb.aspx.

7. Indeed, the hardcover version of *Confirmation Wars* has a cover illustration of a large donkey arm wrestling with an elephant over the roof of the Supreme Court Building. *See* WITTES, *supra* note 2.

8. GREENBURG, *supra* note 3, at 321.

the excesses of the Warren Court.[9] Greenburg discusses at length how some appointments, especially those of Anthony Kennedy and David Souter, have disappointed conservatives, while others, such as those of Antonin Scalia and Clarence Thomas, have served as models for the conservative judicial movement.[10] For conservatives, nothing she says is surprising, and it is clear from her writing and experience that she has a deep understanding of the politics of judicial appointments.

As David J. Garrow pointed out in his review in the *Los Angeles Times*, one overriding virtue of the book is its reporting of "standout stories," which makes it an "absolute must-read for anyone interested in the [C]ourt."[11] From the stories about the internal deliberations over Anthony Kennedy's nomination and Kenneth Starr's candidacy during the presidencies of Ronald Reagan and George H.W. Bush, respectively,[12] to Justice O'Connor's stories about conversations she had with Chief Justice Rehnquist prior to announcing her retirement in July 2005,[13] Greenburg provides new information in virtually every chapter of the book. In delivering these powerful vignettes, Greenburg describes the Justices as human beings rather than as mere pawns moved across an ideological battlefield.[14]

In the course of relaying interesting stories about the Court, Greenburg rarely loses track of her thesis. As Greenburg accurately describes, an overriding principle of judicial conservatism is a limited view of the role of the Judiciary.[15] A constant theme throughout the book, therefore, is the emphasis placed by both Republicans and Democrats on a nominee's view about

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9. *See id.* at 25.

10. *See id.* at 115–16, 124–25, 130–33, 160–63.

11. David J. Garrow, *Breaking Silence and Legal Ground*, L.A. TIMES, Jan. 23, 2007, at E1.

12. *See* GREENBURG, *supra* note 3, at 53–56, 60–63 (Kennedy); *id.* at 89–93 (Starr).

13. *See id.* at 18–20.

14. One of my favorite stories (which also makes clear that Roberts was one of the Justices interviewed for the book) is Greenburg's description of John Roberts's preliminary interview with Bush Administration staff at the Naval Observatory, which is the official home of the Vice President. Greenburg notes that Roberts arrived forty-five minutes early and waited in his car until it was time for the interview. *See id.* at 190.

Another deeply humanizing story in the book also involves Chief Justice Roberts, who underwent a whole host of difficulties while trying to return home from London at the request of the White House prior to being nominated to the Supreme Court. When he arrived at Heathrow Airport for his flight back to Washington, D.C., he discovered that the computers for the airline he was flying had, in an unfortunate choice of words, "crashed." *Id.* at 205. After spending nearly two long hours checking in for his flight, Roberts finally boarded and arrived at Dulles Airport about an hour past the scheduled arrival time. *Id.* He remembered worrying at the time that "Bush would just go down the list to the next nominee" if he was stranded in London. *Id.* After clearing customs, Roberts was told by William Kelley, the Deputy White House Counsel, to be at home for a telephone call around 12:30 p.m. *Id.* at 206. In a stroke of bad luck, Roberts settled into the backseat of a taxicab with a driver who was in his first day on the job. *Id.* The driver reportedly said, "Where is this place, Chevy Chase?," which is the well-known Washington, D.C., suburb in which Chief Justice Roberts lives. *Id.* Fortunately, Roberts made it home just in time for President Bush's call. *Id.*

15. *See id.* at 221.

abortion. As a result of the Court's decision in *Roe v. Wade*,[16] Greenburg states, a "nominee's position on abortion becomes almost a marker of his or her liberalism or conservatism, indicating the way he or she views the role of a judge and the proper approach to the law."[17] The issue of abortion has occasionally played a forthright role in judicial nominations, such as when the "central question" on Capitol Hill regarding Roberts's nomination quickly became his "position on *Roe v. Wade*."[18] Other times references to the abortion issue are masked by obfuscation, such as when presidents like George W. Bush talk about appointing nominees who are "strict constructionists" or those who will not "use the bench to write social policy."[19] That is not to say that other hot-button issues, such as affirmative action, gay marriage, or gun control, do not deeply influence judicial nominations. It is just that Greenburg correctly identifies abortion as the issue that has become the litmus test for judicial nominees of both parties.

President Ronald Reagan—faced with his first opportunity to reshape the Court—placed chief importance on nominating the first woman to the Supreme Court.[20] As O'Connor herself stated to Greenburg, Reagan nominated her for primarily political reasons: "He was hoping to get votes from women, I assume, and rightly so."[21] Although abortion was an important issue and opposition to *Roe* was strong at the time, it did not dominate debate about the courts to the extent it does today.[22] According to Greenburg, it was enough for Reagan that O'Connor was a woman, believed that judges should play a limited role in society, and was personally opposed to abortion, though her vote to overturn *Roe* was far from certain.[23] Despite a lack of clarity regarding many of her views about the law, and particularly about abortion, O'Connor was unanimously confirmed by the Senate.[24] To the ire but perhaps not to the surprise of many conservatives, Justice O'Connor gradually drifted to the left during her tenure on the Court,[25] ultimately voting in *Planned Parenthood v. Casey*[26] to uphold *Roe* as a matter of stare decisis.[27] According to Greenburg, conservatives were especially dismayed when two

16. 410 U.S. 113 (1973).

17. GREENBURG, *supra* note 3, at 221.

18. *Id.*

19. Evan P. Schultz, *Judges à la George: What Does the President Really Want?*, LEGAL TIMES, Nov. 11, 2002, at 42.

20. *See* GREENBURG, *supra* note 3, at 12 ("Reagan had said during his 1980 campaign that he wanted to nominate a woman to the Court . . . .").

21. *Id.* (quoting Justice O'Connor).

22. *See id.* at 222–23 (discussing the role of abortion in the O'Connor nomination).

23. *See id.* at 13, 223.

24. *Id.* at 14.

25. *See id.* at 217; *see also* Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1506–08 (2007) (discussing the drift to the left by Justice O'Connor).

26. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

27. *See id.* at 845–46 (plurality opinion).

other Republican appointees joined O'Connor in *Casey*, demonstrating how difficult it is to reshape the Court.[28]

Some of the most enlightening discussions in *Supreme Conflict* involve other appointments to the Supreme Court that could be deemed disappointments to conservatives. After Robert Bork, the "bright light of judicial conservatism,"[29] was defeated by the Senate after being nominated to fill the seat vacated by Justice Lewis Powell[30] and Judge Douglas Ginsburg was forced to withdraw due to allegations of prior marijuana use,[31] President Reagan had little choice but to select a judicial moderate, Anthony Kennedy, as his nominee. Following two failed nominees and facing an emerging Iran Contra scandal, a Democratic majority in the Senate, and plummeting approval ratings, President Reagan was not able to muster sufficient political capital to nominate a third judicial conservative.[32] Instead, he was forced to settle for Kennedy, who appeared to be scandal free and confirmable and was a favorite of new White House Chief of Staff Howard Baker.[33] President Reagan's decision to settle for Kennedy is an example of how a president's popularity, in addition to external political constraints, such as the composition of the Senate, can deeply influence the selection of a judicial nominee.

Greenburg makes clear, however, that unlike with O'Connor and perhaps even Souter, "many in the [Reagan Administration] knew precisely the kind of justice Anthony Kennedy would be—one who turned out to be a tremendous disappointment to conservatives."[34] Justice Kennedy "spoke very favorably of privacy rights," to the dismay of some Justice Department officials, even going so far as citing *Roe* and other privacy cases "very favorably."[35] Furthermore, according to Administration officials, Kennedy had been far too willing to accept novel constitutional rights beyond those that the Constitution specifically provides and to cite foreign law when it supported his views, which tended to show that Kennedy viewed his role as a judge more broadly than other judicial conservatives.[36] But Greenburg recounts that Kennedy possessed the one attribute that was most important to President Reagan at the time: he was confirmable. Not surprisingly,

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28. *See* GREENBURG, *supra* note 3, at 224.

29. *Id.* at 49.

30. Bork was defeated in the Senate by a 58–42 vote, the largest margin ever for a defeated nominee, after a bruising confirmation process. *See id.* at 50–51. According to Greenburg, Bork was defeated by his own arrogance during the hearings as well as by a White House that was unprepared for the maelstrom over the nomination. *See id.* at 51. The book describes a nominee who was unwilling to listen to his advisors during preparation sessions for the hearings, reporting at one point that Bork would say it "the way [he was] going to say it." *Id.* "That overconfidence would wreck Robert Bork's lifelong dream of sitting on the Supreme Court." *Id.*

31. *Id.* at 60.

32. *See id.* at 47.

33. *See id.* at 52, 60–62.

34. *Id.* at 53.

35. *Id.* at 54.

36. *See id.* at 55.

Kennedy, like O'Connor, has drifted to the left over time, joining and coauthoring the joint opinion in *Casey*[37] in addition to writing the majority opinion in *Lawrence v. Texas*,[38] the Supreme Court case that struck down a Texas ban on homosexual sodomy because, according to the Court, the state law violated privacy rights.[39]

While conservatives could have predicted the wavering tendencies of Kennedy, the next nominee defied prognostication. David H. Souter—a reclusive former New Hampshire Supreme Court justice and newly appointed circuit judge on the United States Court of Appeals for the First Circuit—was nominated by George H.W. Bush to the Supreme Court in 1990.[40] Ironically, as Greenburg reports, the other potential contender for the nomination, at least initially, was then-Solicitor General and former D.C. Circuit Judge Kenneth Starr, who was championed by White House Counsel C. Boyden Gray.[41] Worried about Starr's perceived lack of focus and potential for ideological drift,[42] Attorney General Richard Thornburgh and Administration insiders J. Michael Luttig and William Barr set in motion the process that would lead to the nomination of a true "stealth candidate" and one that would turn out to be a reliably liberal vote: David Souter.

Upon the demise of Starr's candidacy, Greenburg reports, White House Chief of Staff John Sununu took control of the process and turned to David Souter, whom Sununu had nominated to the New Hampshire Supreme Court while serving as governor of that state and who had the unwavering support of Republican Senator Warren Rudman.[43] In light of President Bush's desire to fill the vacant seat quickly and the absence of clear warning signs regarding Souter's fitness or jurisprudence, Souter met with little resistance within

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37. *See id.* at 159–63.

38. 539 U.S. 558 (2003).

39. *Id.* at 578. Not surprisingly, like many other commentators, Greenburg has difficulty characterizing the jurisprudence of Justice Kennedy. On the one hand, she describes Justice Kennedy in *Supreme Conflict* as employing a "middle-of-the-road, split-the-difference approach" that is evident from his days as a circuit judge. GREENBURG, *supra* note 3, at 85. According to Greenburg, Kennedy views himself as a fox who believes that "compromise may be a source of strength and legitimacy." *Id.* at 182. On the other hand, in her *Legalities* blog, Greenburg states that "Kennedy doesn't instinctively seek the middle or try to provide balance. He is perfectly willing to vote with conservatives nine times in a row—then vote with them a tenth—if that's how he sees the case. He wants to be consistent." Legalities, http://blogs.abcnews.com/legalities/2007/05/the_roberts_cou.html (May 15, 2007, 11:56).

40. GREENBURG, *supra* note 3, at 94–100. In fact, one particularly amusing anecdote recounts when Greenburg described the reactions of Justices Thurgood Marshall and William Brennan to the nomination of David Souter to the Supreme Court. Marshall said, "I still never heard of him. When his name came down, I listened on television. And the first thing, I called my wife. 'Have I ever heard of this man?'" *Id.* at 102. His wife said no, and he immediately called the retiring Brennan, who was the Circuit Justice for the First Circuit, and Brennan's wife stated that her husband had "'never heard of him, either.'" *Id.*

41. *See id.* at 89.

42. *Id.* at 91.

43. *See id.* at 94.

the Administration.[44] In addition, the political environment was not favorable for Bush, who was facing a backlash from conservatives for proposing to raise taxes despite his pledge not to do so and from liberals for considering a veto of the Civil Rights Act of 1991.[45] As a result, Greenburg explains, Bush did not feel that he had much political capital to expend in a battle over the Supreme Court.[46] When Sununu and Rudman assured Bush that Souter was "clean and confirmable,"[47] Bush decided to offer Souter the job. Unlike O'Connor and Kennedy, however, Souter's testimony at his confirmation hearings indicated that he held liberal leanings from the beginning,[48] and thus it was no surprise when he too joined the joint opinion in *Casey*.[49]

As Greenburg explains, not every Republican appointment to the Supreme Court over the past twenty-five years has been a disappointment to conservatives. To the contrary, in 1986 President Reagan successfully appointed Antonin Scalia to the Supreme Court and elevated then-Justice Rehnquist to the position of Chief Justice.[50] In addition, Bush made partial amends for the Souter fiasco in nominating the solidly conservative Clarence Thomas to replace the reliably liberal Thurgood Marshall in 1991.[51] All three have been viewed as reliably conservative votes over the course of their careers.[52]

Greenburg astutely observes that the failures and triumphs of Ronald Reagan and George H.W. Bush had a profound influence on the two recent appointments to the Supreme Court made by President George W. Bush. Indeed, Greenburg is perhaps at her best in uncovering new information about the deliberative and methodical processes that led to the appointments of John Roberts and Samuel Alito to the Supreme Court. She brings to light the role of all the key players—both the well known, like Alberto Gonzales[53]

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44. *See id.* at 95–96. The one exception was Michael Luttig (for whom I later clerked on the Fourth Circuit), who wrote a two-page memorandum that raised some concerns about the Souter nomination, including his lack of experience on the federal bench. *Id.*

45. *See id.* at 88.

46. *See id.*

47. *Id.* at 97, 96–97.

48. *See id.* at 104–05.

49. *See id.* at 162.

50. *See id.* at 45–46. Greenburg correctly observes that Reagan probably "selected the wrong leadoff man" in Antonin Scalia. *Id.* at 46. With Reagan at the height of his popularity and most of the Senate's attention squarely fixated on Rehnquist, Bork likely would have been confirmed had he been nominated alongside Rehnquist rather than for Powell's vacant seat one year later. *See id.* at 46–47. Because Powell was viewed as a judicial moderate and Reagan's popularity was sagging as a result of the Iran Contra fiasco, the fight over the Supreme Court in 1987 was bitter and divisive. *Id.* The "loquacious and charming" Antonin Scalia—who was the first Italian-American nominated to the Court—would have been a far more difficult nominee for the Democrats to defeat in 1987. *Id.* at 47.

51. *See id.* at 110–11. In the interest of full disclosure, I note that I clerked for Justice Clarence Thomas during the October 2002 Term.

52. *Id.* at 165, 314–15.

53. *See id.* at 246, 266–68.

and Harriet Miers,[54] and the lesser known, like Deputy White House Counsel William Kelley, who played an important role in vetting the legal views of many of the candidates for both vacancies.[55] From dinner discussions involving George Pataki, C. Boyden Gray, and Charles Schumer presaging John Roberts's nomination[56] to Roberts's uncomfortable rendezvous with Richard Thornburgh at Heathrow Airport prior to his White House visit,[57] Greenburg brings to light the often-neglected human element of the appointments process.

The reader understands from the beginning that the chief focus of *Supreme Conflict* is on George W. Bush's two most recent appointments to the Supreme Court. After all, the first chapter of the book is dedicated to laying the framework for those appointments—in particular, the dialogue between William Rehnquist and Sandra Day O'Connor regarding the order and timing of their departures from the Court.[58] As Greenburg relates, nearly everyone in the country, including the other Justices, expected Rehnquist to retire the summer after he was diagnosed with terminal thyroid cancer.[59] However, in a decision that shocked O'Connor, Rehnquist privately told her that he wished "to stay another year"[60] and that the Court did not "need two vacancies."[61] In a passage that demonstrates Greenburg's unparalleled access to the Justices and an understanding of the mutual friendship between O'Connor and Rehnquist, Greenburg relates how O'Connor decided to defer to her friend and retire after the 2004 Term.[62]

O'Connor's retirement put into motion the process that would eventually lead to the appointment of John G. Roberts to the Supreme Court. As Greenburg thoroughly describes, President Bush held lofty expectations for his nominee: he wanted to put someone on the Court with a well-defined conservative philosophy who would be impervious to criticism from the academy and the media, but who would also be collegial and would not ostracize or push other members of the Court to the left.[63] In other words, Bush was looking for a nominee with the conservative jurisprudential philosophy of Justice Scalia but without his "short temper and biting pen."[64] Bush believed that he had found all of those qualities in John Roberts, a judge who

54. *See id.* at 198–99, 230, 251–53.
55. *See id.* at 198–99, 248–49, 255–58.
56. *See id.* at 195.
57. *See id.* at 196–97.
58. *See id.* at 10, 18–20.
59. *See id.* at 18; Garrow, *supra* note 11.
60. GREENBURG, *supra* note 3, at 18.
61. *Id.* at 19.
62. *See id.* at 20.
63. *See id.* at 205.
64. Lorraine Woellert with Richard S. Dunham, *Why Not Scalia: The Pugnacious Darling of the Right Was Sidelined by Political Calculus*, BUS. WK., Sept. 19, 2005, at 56, 57; *see also* GREENBURG, *supra* note 3, at 129–32 (describing Justice Scalia's clashes with Justice Souter).

had served on the prestigious United States Court of Appeals for the D.C. Circuit, a star Supreme Court advocate and partner with Hogan & Hartson, and a former Justice Department and White House lawyer during the Administrations of Ronald Reagan and George H.W. Bush.[65] In the White House's view, Roberts was "just right"[66] as a political choice because he spoke in such a way as to satisfy liberal senators that he was too modest and restrained to overrule *Roe* but, at the same time, convince conservative senators that *Roe* was perhaps such an immodest decision that it should be overruled.[67]

When Chief Justice Rehnquist passed away about a month before the start of the October 2005 Term, Roberts was poised to succeed the Justice he had once clerked for.[68] In fact, according to Greenburg, Roberts "had been his own best advocate for the chief justice position."[69] He was sailing toward confirmation for O'Connor's seat and "had the sheen of a chief executive," to use Greenburg's words.[70] As Greenburg aptly notes, moreover, Rehnquist's death came on the heels of the Administration's failures in handling the Hurricane Katrina disaster, so Bush needed a nominee who would not stir controversy.[71] After persevering for approximately six weeks through a fire-storm of criticism and a whirlwind of Senate interviews, Roberts became the obvious and safe choice to fill Rehnquist's seat.[72] Roberts was eventually confirmed by the Senate 78–22 to become the seventeenth Chief Justice of the United States.[73]

Rehnquist's unexpected death, however, left the Court with the two vacancies that Rehnquist had sought so eagerly to avoid. It also left President Bush with both the pressure and desire to nominate a member of a minority group or a woman for one of the openings.[74] That desire led to the nomination of Harriet Miers, at the time White House Counsel, despite a highly truncated vetting of her background performed by Deputy White House Counsel William Kelley.[75] In discussing the Miers misstep, Greenburg does an effective job of discussing the two (sometimes conflicting) interests within conservative legal circles: the social conservatives, led by Jay Sekulow, and the judicial conservatives,

65. *See* GREENBURG, *supra* note 3, at 187, 220, 230–32.
66. *Id.* at 226.
67. *Id.* at 233.
68. *Id.* at 238.
69. *Id.*
70. *Id.*
71. *See id.* at 243.
72. *Id.* at 238–39.
73. Charles Babington & Peter Baker, *Roberts Confirmed as 17th Chief Justice*, WASH. POST, Sept. 30, 2005, at A1.
74. *See* GREENBURG, *supra* note 3, at 245.
75. *See id.* at 248–49.

represented by the Federalist Society.[76] As Greenburg observes, the interests and membership of those two groups often overlap,[77] but with respect to the Miers nomination, much (but not all) of the opposition came from those who were looking for Bush to nominate a prominent judicial conservative to fill the vacancy created by the retirement of Justice O'Connor.[78] It was the White House's lack of understanding of these two constituencies that perhaps led to the failed nomination of Miers.[79] As Greenburg explains, upon hearing the news, prominent conservatives reacted with alarm, realizing quickly that Miers would likely be seen as a crony and even unqualified for the position.[80] Bush's response, "trust me," just wouldn't suffice to placate a conservative base that had already suffered through David Souter and Anthony Kennedy.[81] Due to her poor performance during preparation sessions and meetings with senators, as well as strident opposition by outspoken conservatives, Miers eventually withdrew from the process.[82]

While discussing at great length the mistaken logic that led to the Miers nomination, Greenburg also highlights Miers's grace under pressure. Instead of turning her back on the process, which no doubt some would have done under the circumstances, Miers stood firmly behind the President's next nominee, Samuel A. Alito, who ironically had been Miers's first choice all along.[83] The chapter discussing the Alito nomination is also filled with deeply humanizing stories, such as the one describing Alito's reaction to the "Scalito" moniker given to him by the press[84] and the reaction of his teenage daughter when she answered a telephone call from Andrew Card, the President's Chief of Staff.[85] Unlike the Miers nomination, both judicial and social conservatives were ecstatic, and despite a difficult battle before the Senate, Alito was eventually confirmed to the Supreme Court by a slim 58–42 margin.[86]

Supreme Conflict ends on a note of seeming optimism about the judicial appointments process. It is true that after years of nominees without a lengthy paper record, "Sam Alito proved that even in the face of a filibuster

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76. *See id.* at 251.

77. *Id.*

78. *See id.* at 272–73, 276.

79. *See id.* at 251, 272–75.

80. *See id.* at 270, 275.

81. *Id.* at 273, 273–75.

82. *Id.* at 278–83.

83. *Id.* at 284.

84. According to Greenburg, Alito responded to the question posed by Karl Rove on the issue, stating that he viewed it as being inappropriate and primarily based on the shared Italian-American ethnicity between Scalia and Alito. *See id.* at 293. In an effort to lighten the mood during the interview, Alito purportedly responded that "'ito' is not an Italian diminutive, it's a Spanish diminutive . . . . It really shouldn't be 'Scalito[]' . . . . It should be 'Scalino.'" *Id.* at 294.

85. *See id.* at 297.

86. David D. Kirkpatrick, *Alito Sworn In as Justice After Senate Gives Approval*, N.Y. TIMES, Feb. 31, 2006, at A21.

threat, a judge with a clearly delineated, solidly conservative judicial philosophy could get confirmed."[87] After all, the three Republican nominees to the Supreme Court prior to Alito—Roberts, Thomas, and Souter—possessed a combined three years of federal judicial experience.[88] Indeed, Justice Souter, though a New Hampshire state court judge for some time, did not even have time to write a single First Circuit opinion before his nomination to the Supreme Court in 1990.[89]

While I generally agree with Greenburg's assessment of Republicans' success (or lack thereof) in past Supreme Court nominations, I do not share her views about the future direction of the Supreme Court. To be sure, the confirmations of John Roberts and Samuel Alito have pushed the Court to the right, as many decisions over the prior Term demonstrate.[90] However, I do not believe, as Greenburg does, that those two appointments will cause the Court to "recede from some of the divisive cultural debates" and that "George W. Bush and his team of lawyers will be shaping the direction of American law and culture long after many of them are dead."[91] Put simply, understanding the Supreme Court is all about counting to five, the number of Justices it takes to determine the victor in any plenary case. The amount of influence that Roberts and Alito can exercise over the Court during the next several years depends on at least two variables, neither of which is completely under their control: first, upon their ability to persuade Justice Kennedy, the Court's swing vote, to take the conservative path and, second, upon the outcome of the 2008 election. With respect to the latter variable, the replacement of Justices Souter, Ginsburg, and Stevens with liberal nominees will leave the Court's status quo essentially unchanged—a Court heavily dependent on the leanings of Justice Kennedy, who, as Greenburg readily concedes,[92] is not a conservative in the mold of Justices Roberts and Alito, much less Scalia and Thomas.

Supreme Conflict is a superb work of descriptive reporting highlighted by its standout stories and new information, but the book suffers when

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87. GREENBURG, *supra* note 3, at 313.

88. *See* The Justices of the Supreme Court 1–2, http://www.supremecourtus.gov/about/biographiescurrent.pdf (providing detailed biographies of each Justice).

89. Adam Liptak, *Court in Transition: The Judicial Record*, N.Y. TIMES, July 22, 2005, at A1.

90. *See, e.g.*, Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553, 2559 (2007) (holding that plaintiffs, who claimed that President George W. Bush's Faith-Based and Community Initiatives Program violated the Establishment Clause, lacked standing to sue because they did not fall within a "narrow exception" to the rule that "payment of taxes is generally not enough to establish standing to challenge an action taken by the Federal Government"); Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2165–66 (2007) (holding that a pay-discrimination claim is time barred if not filed with the Equal Employment Opportunity Commission within 180 days of the date of the pay-setting decision and rejecting the idea that a pay-discrimination claim could be based solely on disparate pay received during the limitations period); Gonzales v. Carhart, 127 S. Ct. 1610, 1619 (2007) (upholding the Partial-Birth Abortion Ban Act of 2003).

91. GREENBURG, *supra* note 3, at 315.

92. *See id.*

Greenburg occasionally loses track of her thesis. As a book chiefly designed for nonacademics, Greenburg would no doubt lose many of her readers if she engaged in thorough discussions of legal doctrine and cases. Her compromise is to give brief synopses of key cases and doctrinal areas, but her efforts often fall short. With the exception of the abortion debate, Greenburg gives the reader just enough to provide context but never enough to foster a deep understanding of the important issues facing the Supreme Court. One prominent example is the lack of focus on executive power, an issue that no doubt motivated George W. Bush when he nominated Roberts, Miers, and Alito to the Supreme Court.[93] At many points, Greenburg can't quite decide whether she is writing for the legal academic or the average educated American, or both. She treads quickly and unsatisfactorily over entire substantive areas of the law, such as the Establishment Clause,[94] which partially sets the scene for the later battle over the Miers nomination between judicial and social conservatives. In the final analysis, I wish that Greenburg would have settled on one road or the other, writing either for the legal academic or the ordinary American. Instead, she attempts the difficult task of writing to both audiences, but perhaps completely pleases neither in the process.

Greenburg also loses track of her thesis in her abbreviated discussion of the two Clinton appointments to the Supreme Court, Ruth Bader Ginsburg and Stephen Breyer. *Supreme Conflict* devotes one chapter, or about twenty pages total,[95] to the Democratic appointees, not enough to give the reader a sense of liberal approaches to constitutional jurisprudence or what makes the Clinton appointees distinct from other members of the Court. It is almost as if Greenburg felt compelled to include something about Breyer and Ginsburg because their appointments fell chronologically between Thomas and Roberts, but she gives the reader little meaningful substance. Unlike with any of the Republican nominations, her discussion of the Ginsburg and Breyer appointments provides no new information and suggests that she did not have the same level of access to the liberal wing of the Court and to key officials in the Clinton Administration as she did with their conservative counterparts. For instance, Greenburg inexplicably has a brief substantive discussion of the federalism revolution in the chapter dealing with Breyer and Ginsburg, but she never explains why such a discussion does not more squarely belong in the chapters about Rehnquist or O'Connor.[96] Another four pages are devoted to *Bush v. Gore*,[97] a case that involved the Republican appointees to the Court at least as much, if not more, than Breyer and

93. *Cf.* Michiko Kakutani, *Court No Longer Divided: Conservatives in Triumph*, N.Y. TIMES, Jan. 23, 2007, at E1 (noting Greenburg's brief discussion of executive power).

94. *See* GREENBURG, *supra* note 3, at 141–43, 145–48.

95. *See id.* at 165–83.

96. *See id.* at 172–73.

97. 531 U.S. 98 (2000).

Ginsburg.[98] Because her focus on the Clinton appointees comes off as largely manufactured, readers of *Supreme Conflict* would have been better served if she had incorporated the discussion of Breyer and Ginsburg into discussions about the other members of the Court, particularly Justice Kennedy.[99] After all, her core thesis is about the conservative revolution in the Supreme Court, not about the confirmation process generally over the past two or three decades.

The final shortcoming of *Supreme Conflict* is that it fails to discuss the recent politicization of the appointments process within a broader historical or normative context. To be fair, Greenburg likely intends to stick largely to the facts, except when she briefly offers glimpses into her own opinions about the various approaches to constitutional jurisprudence or the nominees themselves. Nowhere in the book, however, does Greenburg provide any hints as to whether she believes the current appointments process is working, much less whether or how it can be improved. For example, in a unique, inside glimpse at the process from the point of view of a recent nominee, Greenburg reports that Roberts "worried that one answer, one ten-second response to one question over the course of fifteen hours of questioning, could doom his chances,"[100] and that to prepare for the grueling hearings, Roberts had endured a "twelve-hour practice session designed to mirror the intensity of the real thing."[101] But the reader is left wondering whether either Greenburg or Chief Justice Roberts believe that such a process is flawed and, if so, what can be done to remedy it. Similarly, the book explains persuasively that the confirmation process has fundamentally changed since Justice O'Connor was confirmed in 1982,[102] but it again fails to state whether the process has changed for the better or worse. Fortunately, a recent book by Benjamin Wittes, entitled *Confirmation Wars*, begins where *Supreme Conflict* leaves off.

B. Confirmation Wars

Confirmation Wars is the perfect companion to *Supreme Conflict*: it too is clear, concise, and eminently readable. Unlike *Supreme Conflict*, however, *Confirmation Wars* is less concerned with the facts surrounding recent Supreme Court appointments and more focused on a normative assessment of the appointments process. Suiting Wittes's strengths as a former editorial writer for the *Washington Post*, *Confirmation Wars* is really an opinion piece written in the form of a short book. It identifies and explains the problem—increasing politicization of the confirmation process for judicial nominees—

98. *See* GREENBURG, *supra* note 3, at 174–77.

99. Indeed, Greenburg devotes yet another six pages of the chapter on the Clinton appointees to discussing the substantive differences between Justices Kennedy and Breyer. *See id.* at 177–82.

100. *Id.* at 234.

101. *Id.* at 235.

102. *See id.* at 302.

and proposes several solutions, including increased cooperation and communication between the Executive and Legislative Branches prior to the naming of a nominee and the complete elimination of confirmation hearings. The approach he suggests is bold, creative, and ultimately unworkable for reasons I will address below.

Assessing the confirmation process from a largely nonpartisan perspective, *Confirmation Wars* begins from the unobjectionable premise that the judicial appointments process has become increasingly political and less genteel, and has consequently caused an increasing number of potential well-qualified nominees, such as Miguel Estrada,[103] to withdraw their names from consideration for vacancies on the federal courts.[104] Indeed, in a disturbing anecdote describing Estrada's experiences as a D.C. Circuit nominee, Wittes reports that "Estrada discovered that somebody had gone through his garbage, carefully separating bills and papers from other trash."[105] Although Estrada could never establish that the invasion of his privacy was related to attempts to derail his nomination, Wittes observes that "at no prior time in our recent history would a lower-court nominee have seriously entertained the thought, let alone assumed the possibility more likely than not, that such an incident would be part of an effort to oppose his nomination."[106]

Wittes explicitly and correctly rejects the premise that Supreme Court nominations were ever strictly nonideological or that some "golden age" of judicial nominations existed.[107] Nevertheless, he cites empirical evidence of an increasing trend by both parties to stall judicial nominations, sometimes for so long that nominees withdraw rather than having their careers remain in perpetual limbo.[108]

Wittes then moves on to explain four conventional theories about judicial appointments, rejecting the first three and adopting a variant of the fourth. The first view, rejected by Wittes as historically inaccurate, posits that any changes that have taken place are relatively minor and that "[n]ominations are political and always have been political because the

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103. Miguel Estrada is currently a prominent appellate attorney with the law firm of Gibson, Dunn & Crutcher and a former law clerk to Justice Anthony Kennedy. Gibson Dunn - Miguel Estrada, http://www.gibsondunn.com/Lawyers/mestrada. He was nominated by President George W. Bush for a seat on the United States Court of Appeals for the D.C. Circuit. Editorial, *The Democrats' Filibuster*, WASH. TIMES, Dec. 29, 2004, at A16. He was viewed by conservatives as a potential Supreme Court nominee. Editorial, *Thoughts on Associate Justices*, WASH. TIMES, Sept. 25, 2005, at B02.

104. *See* WITTES, *supra* note 2, at 10–11, 13, 22, 38–42.

105. *Id.* at 44.

106. *Id.* at 44, 44–45.

107. *Id.* at 18; *see also id.* at 57 ("[I]f the tradition of non-ideological consideration of nominees 'exists, [it] exists somewhere else than in recorded history.'" (quoting Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L.J. 657, 663 (1970))).

108. *See id.* at 38–39.

judicial function itself is political."[109] This view has been advanced by prominent political scientists, such as Lee Epstein and Jeffrey Segal,[110] and represents a cynical view of the role of judges. Political scientist Michael Comiskey advances a variant of the argument by accepting the story of change in the appointments process but denying that the change has caused any real problems.[111] Wittes rejects the strong form of the argument advanced by Epstein and Segal because he views the politicization of the appointments process as proportional to the amount of intervention by the Court into the "political issues of the day," not as a product of the inherently political nature of judging.[112] He also views as "empirically indefensible" the view that lower court nominations were always subject to political delay and partisan maneuvering.[113] He likewise rejects Comiskey's weaker form of the argument because as an empirical matter, "the process now takes dramatically longer and subjects nominees to often-overt, substantive pressures that would have been quite unthinkable only a few decades ago."[114]

The second theory is a conservative story that the appointments process has changed as a result of the liberal excesses of the Warren Court and the unwarranted rejection by the Senate of Robert Bork's nomination to the Supreme Court in 1987.[115] Adherents of this theory argue that as the Supreme Court has become increasingly involved with cultural and political issues since the 1960s, it is wholly unsurprising that nominations to the Supreme Court have taken on an increasingly political tone.[116] Wittes largely rejects the conservative narrative, but not before identifying several truths of the theory. First, he argues that many liberals do in fact view the Court as a mechanism for political and social change, and thus the ideology of nominees naturally becomes an important component of the confirmation process.[117] Second, the ideological balance of the Court dictates the tenacity of the fight over judicial nominations—that is, when judicial precedents such as *Roe* are threatened, the amount of opposition to conservative appointments increases.[118] But Wittes rejects the conservative narrative because he views conservatives as suffering from the same disease of using the courts to enact political change, albeit a return to a world without the excesses of the Warren

109. *Id.* at 10.

110. *See id.* at 15; LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS 4 (2005).

111. *See* WITTES, *supra* note 2, at 17 (citing MICHAEL COMISKEY, SEEKING JUSTICES: THE JUDGING OF SUPREME COURT NOMINEES 193–94 (2004)).

112. WITTES, *supra* note 2, at 18.

113. *Id.* at 19.

114. *Id.*

115. *See id.* at 20–21.

116. *See id.* at 21.

117. *See id.* at 23.

118. *Id.* at 23–24.

Court.[119] More fundamentally, however, Wittes views the conservative narrative as revisionist history in that it fails to acknowledge that many nominees for the Supreme Court, both conservative and liberal, were rejected for ideological or political reasons prior to 1987, including John Rutledge, President Washington's nominee for Chief Justice, in 1795.[120]

Wittes also dismisses the third theory, which is largely a liberal story about the zeal of conservatives to "pack the courts with extreme right-wingers"[121] to roll back the gains of the civil rights movement and New Deal Era.[122] Among its adherents is Cass Sunstein, who has written that "[s]ince the election of President Reagan, a disciplined, carefully orchestrated, and quite self-conscious effort by high-level Republican officials in the White House and the Senate has radically transformed the federal judiciary."[123] Sunstein goes even further in arguing that even during the Clinton Administration, Republican senators single-mindedly and inappropriately attempted to influence judicial appointments, resulting in a number of blocked nominees.[124] In contrast, he characterizes the role of Democrats as largely passive and Bill Clinton as a president who appointed mostly moderate judges, as evidenced by the appointments of Ruth Bader Ginsburg and Stephen Breyer to the Supreme Court.[125] Wittes concedes as true the view that Richard Nixon was among the first Presidents to so consistently emphasize ideology over patronage in his selection of judges and that Reagan continued down that road in the 1980s.[126] According to Wittes, however, the problem with the liberal narrative is that it "pervasively overstates the radicalism of the conservative judicial project and dramatically understates the aggressiveness of the response."[127] Most Republicans do not talk about a rollback of civil rights, as Sunstein asserts, but to the return of "a more traditional judicial methodology, one better focused on explicit text and clear history."[128] Wittes further states that it is a fallacy for Sunstein and others to "pretend that nothing very ugly has taken place on the liberal side of the

119. *See id.* at 24.

120. *See id.* at 26, 45. Indeed, as Jeff Yates and William Gillespie have observed, "[S]eventeen of the twenty-one Supreme Court nominees rejected by the Senate during the nineteenth century were rejected for political or ideological reasons." Jeff Yates & William Gillespie, *Supreme Court Power Play: Assessing the Appropriate Role of the Senate in the Confirmation Process*, 58 WASH. & LEE L. REV. 1053, 1062 (2001).

121. WITTES, *supra* note 2, at 26.

122. *Id.* at 29–33.

123. *Id.* at 27 (quoting CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 9 (2005)).

124. *See id.* at 27–28 (citing SUNSTEIN, *supra* note 123, at 13).

125. *See id.* at 28 (citing SUNSTEIN, *supra* note 123, at 14 and Cass R. Sunstein, *The Right-wing Assault*, AM. PROSPECT, Mar. 2003, at A2, A2).

126. *See id.* at 28–29.

127. *Id.* at 29.

128. *Id.* at 30.

fight."[129] As the recent appointments of Samuel Alito and John Roberts make clear, Republican appointees face the rhetoric of angry liberal interest groups and aggressive questioning from Democratic senators.[130]

Wittes ultimately adopts a variant of the fourth theory, which posits that the process has fundamentally changed and that both conservatives and liberals have contributed to the deterioration of the judicial appointments process.[131] Among this theory's adherents is Stephen Carter, who has written that the process has worsened because both parties view the federal courts as an opportunity to entrench their preferred policy objectives and any argument against a nominee will do, even if it means the sullying or even complete destruction of a nominee's reputation.[132] According to Wittes, the theory recognizes the "thematic connections between the ferocity of confirmation fights and other signs of greater political polarization."[133] But Wittes deviates from Carter's account of the appointments process by arguing that the ferocity of confirmation fights is of relatively recent vintage, in large part due to the increasing power exercised by the Judiciary and the resulting stakes at issue in Supreme Court appointments.[134] Wittes points to an increase in the exercise of judicial power, especially since the Supreme Court decided *Brown v. Board of Education*,[135] as the impetus.[136] The exercise of increased judicial power has unsurprisingly caused the Senate to assert greater influence and control over the judicial appointments process.[137] As a result, the Senate has not been shy about rejecting lower court nominees in recent years, often through procedural mechanisms and unwarranted delay, and has made a spectacle out of confirmation hearings before the Senate Judiciary Committee, particularly in the case of Supreme Court nominees.[138]

After thoroughly evaluating the four conventional theories on judicial appointments, Wittes attempts to answer the surprisingly difficult question of whether the current appointments process threatens the independence of the Judiciary.[139] He first argues that Senate participation in the appointments process is not inherently negative, as the Founders saw fit to expressly require the Senate's participation by assigning to it the power of "Advice and

129. *Id.* at 31.

130. *Id.*; *see also* STEPHEN L. CARTER, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS 45–50 (1994) (discussing the Senate's rejection of Robert Bork).

131. *See* WITTES, *supra* note 2, at 33–35.

132. *See id.* at 34.

133. *Id.* at 35.

134. *Id.* at 11.

135. 347 U.S. 483 (1954).

136. WITTES, *supra* note 2, at 11.

137. *See id.* at 11–12.

138. *See id.*

139. *See id.* at 87–88.

Consent"[140] to the president's nominees.[141] The problem, according to Wittes, is that the Senate has elected largely to exercise its power only after the president has named a nominee, which means that the confirmation hearings become the stage upon which senators and interest groups focus all of their efforts.[142]

According to Wittes, the aggrandizement of the confirmation process has led the Senate to "deploy[] its considerable and legitimate power against the wrong actors—the nominees—instead of deploying them against the presidency in such fashion as to maximally influence what sort of person presidents put forward in the first place."[143] The confirmation hearings, of course, end up lacking much informative value because senators routinely ask for a nominee's views on substantive legal questions and nominees answer those questions with "pablum that satisfies nobody in the short run and risks angering everybody in the long run."[144] Indeed, though neither Roberts nor Alito said much of substance to many, if any, of the substantive questions posed by senators, Senator Charles Schumer recently suggested that Alito and Roberts "hoodwinked" the Senate into confirming them.[145] Due to the "impossible position" that nominees are faced with today to either give inappropriate concessions on substantive legal issues or face undeserved criticism similar to Senator Schumer's statement, Wittes argues that the current approach to judicial appointments "pose[s] substantial challenges for the maintenance of independent courts over time."[146]

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140. U.S. CONST. art. II, § 2, cl. 2.

141. *See* WITTES, *supra* note 2, at 85, 87–88; *see also* David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453, 494, 500 n.327 (2007) (arguing that because Article III judges are not inferior officers, their appointment requires action by both the president and the Senate).

142. *See* WITTES, *supra* note 2, at 128. Wittes is not entirely correct in his assertion that the Senate only wields its influence after the president has named a nominee. With respect to both district and circuit court nominees, home-state senators have historically taken an active role in influencing the appointments made by presidents through the norm of "senatorial courtesy," which has been defined by at least one prominent commentator as "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." MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS 143 (2000). The norm continues to be strong, especially for district court appointments, and one political-science article estimates that at least 65% of judicial appointments involve senatorial courtesy. *See* Micheal W. Giles et al., *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623, 635–38 (2001).

143. WITTES, *supra* note 2, at 128.

144. *Id.* at 100.

145. Press Release, Senator Charles E. Schumer, New York, Schumer Declares Democrats Hoodwinked into Confirming Chief Justice Roberts, Urges Higher Burden of Proof for Any Bush Nominees (July 27, 2007), *available at* http://www.senate.gov/~schumer/SchumerWebsite/pressroom/record.cfm?id=280107.

146. WITTES, *supra* note 2, at 91. As Wittes further observes, "[T]here exists no appropriate way for a nominee to answer such questions without eroding his or her later maneuvering room." *Id.* at 95.

Having diagnosed the current judicial appointments process as unhealthy for both the nominees and the continued independence of the federal Judiciary, Wittes proposes reforming the current process to eliminate confirmation hearings and to encourage greater prenomination consultation between the Senate and the president.[147] With respect to the utility of Senate testimony, Wittes argues that "we do not learn much about nominees from their testimony" and that "one struggles to identify a single instance when a Supreme Court nominee's testimony has proved genuinely revealing about his or her future career on the Court."[148] He adds that confirmation hearings are not an indispensable tool in the appointments process, as the first such hearing of consequence occurred only after Harlan Fiske Stone was nominated to the Supreme Court in 1925.[149] Despite the increasing power and voice of political interest groups over the judicial appointments process, Wittes clearly believes that eliminating the confirmation hearings will elevate the Senate debate over each judicial nomination and shift the focus away from the hearings to greater prenomination consultation between the Senate and the president.[150] Indeed, he notes that "the Senate debates over Charles Evans Hughes and John Parker in 1930 were conducted at a level dramatically more sophisticated and informed than anything that followed Harlan's hearing in 1955, and all without the benefit of nominee testimony."[151] In arguing for the elimination of confirmation hearings, Wittes echoes the sentiments of the late Justice Felix Frankfurter, who said at his own hearings that "neither [the] examination [of the nominee] nor the best interests of the Supreme Court will be helped by the personal participation of the nominee" in the process.[152]

Confirmation Wars suffers from at least two weaknesses connected to Wittes's proposed reform. At a fundamental level, Wittes underestimates the value of confirmation hearings, largely because he focuses myopically throughout the book on their value (or lack thereof) in bringing clarity to a nominee's ideological views. Because senators focus so much of their questioning on a nominee's ideological views, it is easy to forget that the hearings may be valuable for filtering unqualified nominees. After all, Jan Crawford Greenburg reports that Harriet Miers's withdrawal was motivated in large part by the realization of high-ranking officials in the Bush Administration that Miers would not perform well during the hearings.[153] Of course, Miers's courtesy calls were faring no better, with Senator Tom Coburn of Oklahoma

147. *See id.* at 115, 119, 128–29.

148. *Id.* at 119.

149. *See id.* at 61.

150. *See id.* at 115, 119.

151. *Id.* at 122.

152. *Id.* at 123 (quoting *Nomination of Felix Frankfurter to Be an Associate Justice of the Supreme Court: Hearing Before a Subcomm. of the S. Comm. on the Judiciary*, 76th Cong. 107 (1939)).

153. *See* GREENBURG, *supra* note 3, at 278–80.

telling her bluntly that she had "flunked."[154] Greenburg eventually concludes that what Bush had not anticipated with respect to the Miers nomination was her "inability to get through the hearings."[155] It was apparently the threat of her poor performance at the hearings, a rough proxy for or consequence of her lack of qualifications for the position, that eventually led to Miers's withdrawal.

Wittes seemingly forgets at times "that the nominees' qualifications play a significant role in accounting for the choices Senators make" on judicial nominees.[156] In a 2005 article, Lee Epstein, Jeffrey Segal, Nancy Staudt, and René Lindstädt demonstrate using empirical data that qualifications of a nominee "have a significant impact on Senators who are ideologically distant from a [Supreme Court] nominee."[157] As the Miers nomination demonstrates, qualifications (or lack thereof) can also play a role in shaping senators' views of ideologically proximate nominees as well.[158] In arguing for an end to confirmation hearings, however, Wittes utterly fails to discuss a comparable method for senators to assess the competence and professional merit of judicial nominees in the absence of hearings.

Nor does Wittes really consider the other benefits of confirmation hearings, such as their public-information function or providing the nominee with an opportunity to be heard. The only mention of either of those benefits is his brief quotation of Chief Justice Roberts, who recounted that during his confirmation hearings, he was under oath and that senators could "ask [him] anything and [he got] a chance to tell them what [he] really think[s] about what judges do and about who [he is]."[159] *Supreme Conflict* in particular highlights the importance of the hearings as an opportunity for the nominee to be heard, arguing that the hearings played an important role in Justice Alito's confirmation. After Alito delivered an effective opening statement during his confirmation hearings, Greenburg reports, "The hearing room was still. The Democrats were quiet. Their expressions had changed. Some, like Dianne Feinstein, seemed surprised. This was not the man they thought they'd be subjecting to a brutal cross-examination, the one portrayed as so dangerous to the future of the nation."[160] At another point, Senator Orrin Hatch reportedly told Senator Lindsey Graham that he thought that Alito was

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154. *Id.* at 278.

155. *Id.* at 283, 282–83.

156. Lee Epstein et al., *The Role of Qualifications in the Confirmation of Nominees to the U.S. Supreme Court*, 32 FLA. ST. U. L. REV. 1145, 1148 (2005).

157. *Id.*

158. *See* GREENBURG, *supra* note 3, at 278 (noting that Republican senators were hesitant to support Miers in part because of her lack of qualifications and poor performance during courtesy calls); Epstein et al., *supra* note 156, at 1159 (describing the case of Harold Carswell, who was deemed "mediocre" even by his supporters).

159. WITTES, *supra* note 2, at 126 (quoting Interview with John G. Roberts, Jr., Chief Justice, U.S. Supreme Court (Jan. 13, 2006)).

160. GREENBURG, *supra* note 3, at 310.

even better than Roberts.[161] As importantly, nominees do not speak to the press prior to the confirmation hearings, so the hearings provide them with the first opportunity to address the public in an "unfiltered, unedited, and unspun form," which can turn public opinion in favor of smart and temperate nominees such as Alito and Roberts.[162] With a 58–42 party-line vote in the Senate,[163] it is not hard to imagine that Alito would not be a Supreme Court Justice today had he not had the opportunity to appear before the Senate or had performed poorly during the hearings.

On the other hand, Greenburg notes that though it is unclear whether Robert Bork ever had any chance to be confirmed, Bork's poor performance during the hearings surely wrecked his "lifelong dream of sitting on the Supreme Court."[164] Bork came across as "arrogant and dismissive, playing into the hands of his opponents, who effectively portrayed him as cold, uncaring, and unsympathetic to the problems of ordinary Americans."[165] *Supreme Conflict* makes clear that the hearings can play an important role in the confirmation of a Supreme Court nominee, either negatively or positively, refuting Wittes's observation that it is difficult to find even a single instance where the hearings proved probative.[166]

Much like the role of circuit riding during the earliest days of the Republic,[167] confirmation hearings today also serve an important public-information function. The federal Judiciary is arguably the most secretive (and certainly the most cloistered) branch of government,[168] at least insofar as internal deliberations are concerned. To be sure, federal judges issue opinions, either published or unpublished, on nearly all of the cases that they hear on the merits, but it is often not clear to the average American how the decisions are actually reached.[169] One can certainly argue that the confirmation hearings do not *effectively* educate Americans about the federal court

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161. *Id.*

162. E-mail from Rachel L. Brand, former Assistant Attorney General for the Office of Legal Policy, U.S. Department of Justice, to author (Dec. 11, 2007) (on file with author).

163. Charles Babington, *Alito Is Sworn In on High Court*, WASH. POST, Feb. 1, 2006, at A1.

164. GREENBURG, *supra* note 3, at 51.

165. *Id.*

166. *See* WITTES, *supra* note 2, at 122.

167. *See* David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710, 1716, 1716–17 (2007) (arguing that circuit riding "provided a unique opportunity for the education and persuasion of local citizens about the benefits and responsibilities of the new constitutional system").

168. *See id.* at 1711 (pointing out that Supreme Court Justices spend approximately nine months per year in Washington, D.C., and that many people are unfamiliar with the role the Court plays in government and the mechanisms by which it operates).

169. Indeed, a recent survey revealed that only 17% of Americans can name at least three Supreme Court Justices. *See A Look at the U.S. by the Numbers*, LONG BEACH PRESS TELEGRAM, July 31, 2007, at 2A. Another survey indicated that while 23% of Americans could name the last *American Idol* winner, "slightly less than half that number were able to name" the last Justice confirmed to the Supreme Court, Samuel Alito. *We Know Bart, but Homer Is Greek to Us*, L.A. TIMES, Aug. 15, 2006, at A14.

system, but the media spectacle and intense interest surrounding the confirmation hearings of Supreme Court Justices at least provide Americans with *some* exposure to the work of the courts. Without confirmation hearings, Americans would lose one of their exceedingly rare opportunities to learn and hear about the function and operations of the court system, exacerbating the existing cloistered perception of the federal Judiciary.[170]

Finally, Wittes's proposed reform—the elimination of confirmation hearings for judicial nominees—is not closely tailored to the harms that he identifies in *Confirmation Wars*. In the chapter assessing the problems with the current process, Wittes initially focuses on the fact that as an empirical matter, the appointments process now takes longer than ever, an average of 394 days for President George W. Bush's circuit court nominees and 162 days for his district court nominees.[171] He then proceeds to argue that the confirmation rates for circuit judges are also falling, from 92% during the Carter Administration to 74% during the Administration of President George W. Bush.[172] He concludes, therefore, that "[t]he general trend at the lower-court level . . . is that the ability of presidents to win confirmation for their judicial nominees has eroded steadily since the mid-1980s."[173] He also concedes, however, that "[o]ne sees the trend less clearly at the Supreme Court level."[174]

To be fair, he does argue that the appointments process for Supreme Court nominees has become "uglier, meaner, and rougher than it used to be."[175] He then readily admits, however, that there was no golden age of Supreme Court nominations, that the ideology of Supreme Court nominees has always been important to the Senate, and that the ugliest confirmation fight of them all (over the nomination of Louis Brandeis) occurred nearly ninety years ago without an appearance by the nominee.[176] Because the

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170. *Cf.* James L. Gibson & Gregory Caldeira, *Supreme Court Nominations, Legitimacy Theory, and the American Public: A Dynamic Test of the Theory of Positivity Bias* 24–25, 32–33 (July 4, 2007) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=998283 (finding that the influence of advertisements during the Alito nomination eroded support for the Court, while paying attention to the hearings enhanced support for the Court). The theory of positivity bias, which posits that "anything that causes people to pay attention to the Supreme Court—even highly controversial events—enhances institutional legitimacy because citizens are simultaneously exposed to legal symbols that portray the judiciary as a unique institution and therefore impart and reinforce judicial legitimacy," explains in part why the hearings serve such an important role in imparting information to the public about the court system. *Id.* at 4. According to positivity-bias theory, nearly any information about the Court is better than a complete absence of exposure.

171. *See* WITTES, *supra* note 2, at 39.

172. *See id.* at 39–40.

173. *Id.* at 41.

174. *Id.*

175. *Id.* at 44.

176. *See id.* at 45, 54–57. He also fails to persuasively make the case that an increase in the sheer number of transcript pages has in any way negatively impacted the appointments process. *See id.* at 42.

impetus for the underlying change, according to Wittes, is the growth of judicial power, it is not clear how the elimination of confirmation hearings will lead to a better process. It will remove some of the ugliness of the process from the public's view, to be sure, but it is likely only to transfer it from the hearings to the senatorial debates over the nomination. Moreover, most of the changes in the process, according to Wittes, have occurred with respect to lower court appointments and mostly from an inexcusable delay in giving qualified nominees a vote before the Senate. He does not explain how eliminating confirmation hearings will lead to fewer delays or even whether it will lead to an increased number of confirmations. As a result, there is a fundamental disconnect between the harms he identifies in the appointments process and his proposed reforms that undermines the power of his proposals.[177]

In the next Part, I will use the important lessons from *Supreme Conflict* and *Confirmation Wars* to critically analyze the judicial appointments process and discuss the reasons for its increasing politicization.

III. A Critical Analysis of Judicial Appointments

Both *Supreme Conflict* and *Confirmation Wars* amply establish that the judicial appointments process has displayed an overwhelming political current in recent years, as evidenced by increasing senatorial delay in confirming circuit court nominees and the proliferation of personal attacks against judicial nominees. Neither book, however, gives a coherent account of why the judicial appointments process has become increasingly politicized. To be sure, both Wittes and Greenburg raise some of the potential explanations: the proliferation of interest groups,[178] the growth of abortion as a rallying cry for liberal and conservative interest groups,[179] and the Court's increasing participation in cases with pervasive social and cultural significance.[180] Though Wittes claims that his account of the judicial appointments process is largely institutional,[181] he fails to discuss several key structural alterations and some specific changes in the country's political environment over the past 100 years.

177. His other proposed reform—greater prenomination consultation between the Senate and the president—has more potential and is far better supported by the nature of the harms that he discusses. *See id.* at 115. Indeed it is one of the tools that I will discuss in a forthcoming piece on how presidents can navigate the new politics of judicial appointments. *See* Stras & Scott, *supra* note 4.

178. *See* GREENBURG, *supra* note 3, at 250–51, 301; WITTES, *supra* note 2, at 12.

179. *See* GREENBURG, *supra* note 3, at 221–26.

180. *See* WITTES, *supra* note 2, at 11–12, 60.

181. *See id.* at 57.

A. Reasons for the Changes in the Judicial Appointments Process

To some, it is no doubt surprising that judicial appointments have taken on such a key role in the nation's political discourse. Gone are the days of the one-day confirmation hearing that yields very little in the way of public interest or media attention.[182] No one factor can explain the transformation of the process, and few scholars have attempted to comprehensively account for it.[183] In this subpart, I will attempt to unravel the judicial appointments process by analyzing three broad categories of explanations—structural, external, and judicial factors—that clarify why the process has become so much more politicized in recent years.

1. Structural Factors.—To understand the changes to the judicial appointments process, a brief review of the constitutional foundations of the appointments process is warranted. Article II, Section Two of the Constitution states that the president "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."[184] Article II, Section Two, by its terms, applies to the appointment of Supreme Court Justices, and lower court judges have traditionally been treated as noninferior "Officers of the United States," subject to nomination by the president and the advice and consent of the Senate.[185] Although there is some scholarly disagreement as to whether the Senate must act affirmatively with respect to every judicial nomination as a constitutional matter,[186] there is no question as an historical matter that the Senate has viewed its role as a compulsory part of the process because absent constitutionally authorized recess appointments by the president,[187] the Senate has historically and regularly voted on nominees for Article III

182. *See* Michael Comiskey, *Not Guilty: The News Media in the Supreme Court Confirmation Process*, 15 J.L. & POL. 1, 28–29 (1999) (describing how television coverage of confirmation hearings has led to longer hearings).

183. *But see* GERHARDT, *supra* note 142, at 50–74 (listing, inter alia, the growth in the size and influence of the federal government and of the media as factors that have contributed to shaping and changing the appointments process).

184. U.S. CONST. art. II, § 2.

185. For a more thorough discussion of the constitutional status of federal circuit and district judges under the Appointments Clause, see Stras & Scott, *supra* note 141, at 494–95, 500 n.328. Some scholarly disagreement exists about whether circuit and district judges can be considered noninferior officers, but the practice has "invariably been that the President nominates and the Senate confirms all Article III judges." Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 970 n.18 (2007).

186. *Compare* Adam J. White, *Toward the Framers' Understanding of "Advice and Consent": A Historical and Textual Inquiry*, 29 HARV. J.L. & PUB. POL'Y 103, 107–09 (2005) (arguing that the Senate has no constitutional obligation to act on a judicial nomination), *with* Douglas W. Kmiec & Elliot Mincberg, *The Role of the Senate in Judicial Confirmations*, 7 TEX. REV. L. & POL. 235, 262 (2003) ("There's a constitutional duty for the full Senate to take up judicial nominees that have been heard by the Committee.").

187. *See* U.S. CONST. art. II, § 2.

courts.[188] In other words, while the word "advice" may have a discretionary component,[189] "consent" has been interpreted to "require confirmation by majority vote" of the Senate.[190] The divided responsibilities of nomination by the president and confirmation by the Senate were designed to enhance democratic accountability:

> The blame of a bad nomination would fall upon the president singly and absolutely. The censure of rejecting a good one would lie entirely at the door of the senate; aggravated by the consideration of their having counteracted the good intentions of the executive. If an ill appointment should be made the executive for nominating and the senate for approving would participate though in different degrees in the opprobrium and disgrace.[191]

Although ideology has always played a role in the judicial appointments process,[192] structural changes have expanded the role of politics in the Senate's consideration of judicial nominees. Many commentators have stated that the federal Judiciary—and the Supreme Court in particular—is the most countermajoritarian branch of the United States government.[193] But the United States Senate could also be described as countermajoritarian in some respects because as opposed to members of the House, senators serve six-year, rather than two-year, terms in office.[194] Moreover, prior to the passage

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188. *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, at 25 (1997) (noting that in the early years of the Constitution, the Senate simply voted yes or no on judicial appointments and did not give "advice" to the president on whom to nominate). *See generally* HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON 135 (rev. ed. 1999) (reporting Senate-vote totals for all Justices for whom roll-call votes were recorded).

189. *See* 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 4 (New York, S. Converse 1828) (stating that "advice" means "[c]ounsel; an opinion recommended, or offered, as worthy to be followed").

190. Jackson, *supra* note 185, app. ii at 1031; *see also* White, *supra* note 186, at 107–08 (arguing that while the approval of the Senate is required for a judge to sit permanently on a federal court, there is no constitutional requirement that the Senate vote on each of the president's nominations).

191. THE FEDERALIST NO. 77, at 433 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* Stras & Scott, *supra* note 141, at 495–96 (discussing accountability in the context of appointments).

192. *See* WITTES, *supra* note 2, at 129–30 (discussing the Senate's history of rejecting nominees on political grounds); John C. Eastman, *The Limited Nature of the Senate's Advice and Consent Role*, 36 U.C. DAVIS L. REV. 633, 648–49 (2003) (noting that objections to John Rutledge, President Washington's nominee for Chief Justice in 1795, were based largely on ideology).

193. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 19–23 (1962); Ronald M. George, Chief Justice of Cal., Brennan Lecture: Challenges Facing an Independent Judiciary (Jan. 26, 2005), *in* 80 N.Y.U. L. REV. 1345, 1350 (2005); John O. McGinnis & Michael B. Rappaport, *The Judicial Filibuster, the Median Senator, and the Countermajoritarian Difficulty*, 2005 SUP. CT. REV. 257, 258–59; Martin H. Redish, *Same-Sex Marriage, the Constitution, and Congressional Power to Control Federal Jurisdiction: Be Careful What You Wish For*, 9 LEWIS & CLARK L. REV. 363, 378 (2005); Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333, 380 (2006).

194. *See* Todd J. Zywicki, *Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and Its Implications for Current Reform Proposals*, 45 CLEV. ST. L. REV.

of the Seventeenth Amendment in 1913, senators were appointed directly by state legislatures.[195] Yet the Founders unhesitatingly put the power of advice and consent in the less democratically accountable Senate. As Alexander Hamilton presciently stated in *Federalist No. 77* regarding the House of Representatives:

> A body so fluctuating and at the same time so numerous can never be deemed proper for the exercise of [the appointment] power. Its unfitness will appear manifest to all when it is recollected that in half a century it may consist of three or four hundred persons. All the advantages of the stability, both of the Executive and of the Senate, would be defeated by this union, and infinite delays and embarrassments would be occasioned.[196]

Hamilton believed that placing any part of the appointment power within the House of Representatives would lead to pervasive politicization and instability in the appointments process. What Hamilton—and the Founders—could not have foreseen was that the Senate would look more like the House following passage of the Seventeenth Amendment, which for the first time placed in a state's electorate the right to popularly elect its senators.[197] Indeed, at the state ratification conventions and the Constitutional Convention, there was strong, even close to unanimous, support for election of senators by state legislatures.[198] James Madison believed that senators who were elected by state legislatures would be dependent upon and loyal to the interests of the states that they represented and that the Senate as a body would serve as a check on the expansion of the powers of the federal government.[199]

A number of causes or rationales have been advanced for passage of the Seventeenth Amendment, but none consider the impact that the direct election of senators would have on the judicial appointments process. One reason for the Seventeenth Amendment was that many states experienced deadlock in the election of senators when one party controlled one state

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165, 182 (1997) (describing the Senate as being structured to provide "an anti-democratic check in the government").

195. *See* U.S. CONST. art. I, § 3 (setting forth the structure and organization of the Senate).

196. THE FEDERALIST NO. 77 (Alexander Hamilton), *supra* note 191, at 463.

197. *See* U.S. CONST. amend. XVII.

198. Zywicki, *supra* note 194, at 190.

199. *See* THE FEDERALIST NO. 62 (James Madison), *supra* note 191, at 377 ("[State-legislature appointment of Senators] is recommended by the double advantage of favoring a select appointment[] and of giving to the State governments such an agency in the formation of the federal government as must secure the authority of the former . . . ."); *see also* THE FEDERALIST NO. 59 (Alexander Hamilton), *supra* note 191, at 363–64 (explaining the role of the Senate in protecting the interests of states); Ralph A. Rossum, *The Irony of Constitutional Democracy: Federalism, the Supreme Court, and the Seventeenth Amendment*, 36 SAN DIEGO L. REV. 671, 682 (1999) ("Rather than attempt to draw precise lines between the powers of the federal and state governments, the Founders preferred to rely instead on such structural arrangements as the election of the Senate by the state legislatures to ensure that the vast powers they provided to the national government would not be abused and that the federal design would be preserved.").

legislative chamber and a different party controlled the other.[200] Another factor supporting passage of the Seventeenth Amendment was widespread charges of bribery and corruption in Senate elections by state legislatures.[201] Between 1866 and 1900, the Senate commenced nine different investigations into instances of alleged bribery in Senate-election cases.[202] Still others have asserted that the Seventeenth Amendment was largely a result of Progressive reform aimed to reduce the aristocratic nature of Senate politics and to give senators a greater accountability to the people.[203]

Not only did almost no one pause for a moment to assess the consequences of the Seventeenth Amendment on federalism,[204] but no one at the time considered the impact of the Seventeenth Amendment on judicial appointments. But why would they? Judicial appointments had proceeded at a brisk pace, and though Supreme Court nominees would occasionally stall in the Senate, the appointments process was not infested with the type of partisanship and ugliness that we see today.[205] Following passage of the Seventeenth Amendment, however, senators had to be more aware than ever of how each legislative decision—including federal appointments—would affect "their reelection chances, popular or political support, and relationship with the president."[206]

The fact that the Seventeenth Amendment led to greater politicization of the judicial appointments process, even though some of its effects were not revealed immediately,[207] is not surprising. Using a political-choice model, Todd Zywicki argues that the Seventeenth Amendment was supported by many political interest groups precisely because it would benefit them the

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200. In fact, legislative deadlock over the election of senators was quite serious in the state of Delaware because it was represented by only one senator in three Congresses and none at all from 1901 to 1908. *See* Rossum, *supra* note 199, at 706.

201. Laura E. Little, *An Excursion into the Uncharted Waters of the Seventeenth Amendment*, 64 TEMP. L. REV. 629, 639 (1991); Rossum, *supra* note 199, at 707.

202. Rossum, *supra* note 199, at 707.

203. *See, e.g.*, Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500, 544 (1997). After passage of the Seventeenth Amendment, the number of senators with a relative who served in the federal government showed a significant declining trend while the number of Senate seats held by "truly wealthy individuals" declined 35%. Sara Brandes Cook & John R. Hibbing, *A Not-So-Distant Mirror: The Seventeenth Amendment and Congressional Change*, 91 AM. POL. SCI. REV. 845, 848 (1997). In other words, Progressives were successful in reducing the aristocratic nature of the United States Senate after passage of the Seventeenth Amendment.

204. Rossum, *supra* note 199, at 711–12.

205. *See* WITTES, *supra* note 2, at 10–11.

206. GERHARDT, *supra* note 142, at 66. Indeed, as Michael Gerhardt has noted, "One obvious effect of the Seventeenth Amendment has been to make the Senate's constitutionally imposed duties, such as the confirmation of presidential nominees, subject to electoral review, comment, and reprisal." *Id.*

207. *See* MARK SILVERSTEIN, JUDICIOUS CHOICES: THE NEW POLITICS OF SUPREME COURT NOMINATIONS 141 (1994) (arguing that no judicial nomination was sufficiently visible to have major electoral consequences until the 1960s).

most.[208] First, Zywicki observes that the Seventeenth Amendment led to decreased monitoring of senators by state legislatures, enabling senators to focus on "their own desires and those of special-interest groups."[209] Second, the passage of the Seventeenth Amendment diluted the importance of states' rights and federalism to the Senate, and simultaneously increased the impact of interest groups and individual interests on the legislative process.[210] Finally, by permitting special interest groups to lobby senators directly, rather than through the intermediary of state legislatures, the Seventeenth Amendment made rent-seeking behavior by individual groups easier and less costly.[211]

Just three years after passage of the Seventeenth Amendment, its effects were already apparent. President Woodrow Wilson sparked a firestorm by nominating Louis Brandeis to the Supreme Court in 1916.[212] Henry Abraham calls the Brandeis nomination the "most bitter and most intensely fought in the history of the Court,"[213] and Benjamin Wittes adds that it "ma[de] even Clarence Thomas's [nomination] look pleasant" by comparison.[214] The Brandeis nomination, full of lobbying by both conservative and liberal interest groups,[215] was the first time when "[p]opularly elected senators had begun investigating nominees with one eye on their constituents" rather than on state legislatures.[216] Similarly, just fourteen years later, the nomination of John Parker to the Supreme Court was defeated largely by the opposition of interest groups composed of civil rights and prolabor advocates.[217]

Other structural changes in the Senate after passage of the Seventeenth Amendment also increased accountability for senators to both special interest groups and the electorate. In 1929, the Senate rules were amended to require a roll-call vote for all judicial nominations, which ensured that a paper record

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208. *See* Zywicki, *supra* note 194, at 204.

209. *Id.* at 207.

210. *Id.* at 210–11, 214–15.

211. *Id.* at 215–18.

212. ABRAHAM, *supra* note 188, at 135–36.

213. *Id.* at 135.

214. WITTES, *supra* note 2, at 44.

215. *See* GERHARDT, *supra* note 142, at 69 (arguing that the Brandeis conformation was the "watershed event signaling the importance of interest groups in influencing federal appointments"); Ernesto J. Sanchez, *John J. Parker and the Beginning of the Modern Confirmation Process*, 32 J. SUP. CT. HIST. 22, 23 (2007) ("[N]umerous business interests . . . pressured Senators to oppose [the Brandeis] nomination . . . .").

216. WITTES, *supra* note 2, at 48. It is true that much of the opposition to Brandeis stemmed from anti-Semitism and fear that he would become a radical vote on the Court in favor of the interests of unions, socialists, and other, similar left-wing groups. *See id.* at 46. Though the Brandeis nomination was somewhat unique, the public-choice model would suggest that those characteristics may have taken on increased visibility and importance in light of the increased influence of interest groups after passage of the Seventeenth Amendment.

217. *See* WITTES, *supra* note 2, at 51; GERHARDT, *supra* note 142, at 70.

would exist for the votes of each senator on a judicial appointment.[218] That same year, the Senate also opened all sessions on the debate of a judicial nominee to the public, which has further "raised the stakes for all concerned in confirmation hearings."[219] Finally, as Benjamin Wittes so forcefully argues, the requirement that nominees personally appear before the Senate Judiciary Committee, which firmly took hold in the 1950s and democratized the process even more, has further politicized the process.[220] These structural changes in the Senate "have helped to change the Senate from a collegial body to one dominated by individuals with separate agendas."[221]

2. External Factors.—The prominence and influence of external forces, most notably organized interest groups, have also grown over the past twenty years, further politicizing the judicial appointments process.[222] To be sure, interest groups have been part of the process since as early as 1881, when the National Grange—an organization of farmers opposed to the domination of national politics by the railroads—nearly sunk President Garfield's nomination of Stanley Matthews, a former senator and railroad lawyer, to the Supreme Court.[223] But the number and influence of organized interest groups participating in judicial nominations has skyrocketed over the past sixty years.[224] Between 1930 and 1960, a total of twenty-six interest groups testified before the Senate Judiciary Committee with respect to Supreme Court nominations; between 1960 and 1994, that number ballooned to 206.[225] Forty-three interest groups testified during Clarence Thomas's hearings

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218. *See* JOHN ANTHONY MALTESE, THE SELLING OF SUPREME COURT NOMINEES 52–53 (1995) (noting that the Senate often did not produce roll-call votes on Supreme Court nominees prior to 1929 when rule changes opened the proceedings to the public).

219. GERHARDT, *supra* note 142, at 67.

220. *See supra* subpart II(B).

221. GERHARDT, *supra* note 142, at 66.

222. *See* Lisa M. Holmes, *Presidential Strategy in the Judicial Appointment Process: "Going Public" in Support of Nominees to the U.S. Court of Appeals*, 35 AM. POL. RES. 567, 569 (2007) ("The rise of interest group involvement has also been linked to increased conflict in the lower court appointment process." (citation omitted)).

223. *See* EPSTEIN & SEGAL, *supra* note 110, at 94 (discussing interest-group opposition to the nomination of Justice Stanley Matthews); MALTESE, *supra* note 218, at 41–44 (chronicling the National Grange's opposition to Matthews's nomination).

224. *See* MALTESE, *supra* note 218, at 90 tbl.5 (documenting the increasing number of organizations testifying at confirmation hearings since 1930).

225. *Id.* It bears mentioning that though there is no evidence that interest-group activity in judicial nominations has waned in recent years, the amount of direct testimony at confirmation hearings by organized interest groups has decreased during the last four confirmation hearings—for Ruth Bader Ginsburg, Stephen Breyer, John Roberts, and Samuel Alito. *See* Karen O'Connor, Alixandra B. Yanus & Linda Mancillas Patterson, *Where Have All the Interest Groups Gone?: An Analysis of Interest Group Participation in Presidential Nominations to the Supreme Court of the United States*, *in* INTEREST GROUP POLITICS 340, 346 (Allan J. Cigler & Burdett A. Loomis eds., 7th ed. 2007). The study attributes the decline in interest-group participation in judicial confirmation hearings not to decreased interest but as a possible result of "the successful efforts of Senator Specter and other Republicans on the [Judiciary Committee] to assure that hearings appeared less controversial." *Id.* at 352.

alone.[226] Notably, interest groups have also become increasingly involved in lower court nominations in recent years. According to Nancy Scherer, organized interest groups did not oppose a single lower court nominee between 1933 and 1972, but they openly opposed thirty such nominees between 2001 and 2004.[227] Moreover, interest groups have become more sophisticated since the Bork nomination, tailoring their messages to the geographic regions of the senators they wish to influence; for instance, "anti-Bork activists stressed his threat to environmental protection in the West but in the South stressed that Bork would 'turn back the clock' on civil rights."[228]

According to Professors Greg Caldeira and John Wright, who have studied extensively the influence of interest groups on judicial nominations, interest groups employ several strategies to influence the votes of senators.[229] First, interest groups disseminate information about a nominee to a senator's constituents "in hopes of crystallizing constituency opinion in their favor."[230] Second, they facilitate the organization and the message of grassroots campaigns for or against a nominee, such as "organizing letter-writing and by encouraging constituents to phone their representatives or send telegrams."[231] Third, interest groups engage in direct lobbying to inform senators about the policy implications of their votes on judicial nominees and to reinforce the views of constituents engaged in grassroots efforts.[232]

These efforts have apparently been effective in influencing senators. For instance, Caldeira and Wright estimate that a 25% reduction in opposition lobbying against Justice Thomas would have increased the number of votes in favor of his confirmation by thirty-three votes.[233] Likewise, if conservative interest groups had not mobilized as quickly and efficiently as they did after Thomas was nominated, their model predicts that Justice Thomas would have been defeated handily in the Senate.[234] Their regression model revealed that "[i]nterest group lobbying was statistically significant" in influencing the votes of senators in the nominations of Robert Bork, Clarence Thomas, and David Souter, "even after controlling for the factors of party, ideology, constituency, and campaign contributions."[235] According to Caldeira and Wright, the impact of lobbying is especially powerful for

226. MALTESE, *supra* note 218, at 90 tbl.5.

227. *See* NANCY SCHERER, SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS 4 (2005).

228. MALTESE, *supra* note 218, at 91.

229. *See* Gregory A. Caldeira & John R. Wright, *Lobbying for Justice: Organized Interests, Supreme Court Nominations, and the United States Senate*, 42 AM. J. POL. SCI. 499, 520–21 (1998).

230. *Id.* at 503.

231. *Id.*

232. *Id.* at 504.

233. *Id.* at 519.

234. *Id.*

235. *Id.* at 520.

interest groups that oppose a judicial nomination.[236] A similar study conducted by Professors Jeffrey Segal, Charles Cameron, and Albert Cover reached comparable results, finding that "strong interest group mobilization against a nominee can hurt a candidate, while interest group mobilization for a nominee can have substantively slight but statistically significant positive effects."[237] In short, interest groups mobilize in response to judicial nominations because their efforts are effective in influencing senators' votes.[238]

Since the early days of the Republic, the print media has played a prominent role in judicial appointments, especially for Supreme Court nominees. In 1795, for example, Federalist newspapers around the country questioned John Rutledge's fitness for Chief Justice because of his vocal opposition to the Jay Treaty.[239] Likewise, New England newspapers actively undermined the nomination of Alexander Wolcott to the Supreme Court in 1811, with one going so far as saying that "Wolcott was 'more fit by far to be arraigned at the bar than to sit as a judge.'"[240] In 1916, the *New York Times* and the *Wall Street Journal* were among the most strident critics of Louis Brandeis, using such labels as a "dangerous 'radical'" to describe him.[241] But even the print media has played an increasingly active role in judicial nominations in the past twenty years[242]: nearly every nominee since 1980 has had significantly more stories in the *New York Times* about their nomination than his or her predecessor.[243] For example, William Rehnquist had nearly sixty more articles written about him in the *New York Times* during his nomination for Chief Justice than did his predecessor, Warren Burger.[244]

Of course, judicial appointments have also undergone greater public scrutiny as a result of increased television and radio coverage of the nominees and the hearings. As Michael Gerhardt has noted, the press has gone from passively reporting the news to actively determining the news about judicial nominees.[245] For instance, the media was responsible for leaking the

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236. *See id.* at 521.

237. Jeffrey A. Segal et al., *A Spatial Model of Roll Call Voting: Senators, Constituents, Presidents, and Interest Groups in Supreme Court Confirmations*, 36 AM. J. POL. SCI. 96, 112 (1992). The study found that organized interest groups had a devastating impact on the nomination of Clement Haynsworth for the seat vacated by Abe Fortas in 1969: "Senators who would have had a .99 probability of voting for the judge without any interest group involvement would lean against confirmation ($p = .43$) after the lobbying campaign." *Id.*

238. *See* Holmes, *supra* note 222, at 569–70 (tracing the effects of interest-group efforts on the judicial appointments process).

239. Comiskey, *supra* note 182, at 24.

240. EPSTEIN & SEGAL, *supra* note 110, at 93 (quoting a New England newspaper).

241. *Id.*

242. *See* Epstein et al., *supra* note 156, at 1151–52 (tracing the increase in newspaper coverage of judicial nominations).

243. *See* Richard Davis, *Supreme Court Nominations and the News Media*, 57 ALB. L. REV. 1061, 1074 (1994) (describing the increased coverage given by the *New York Times* to recent controversial nominees as compared to such nominees in the past).

244. Epstein et al., *supra* note 156, at 1151–52.

245. *See* GERHARDT, *supra* note 142, at 228.

news about Robert Bork's video rentals in the later stages of his confirmation hearings.[246] Likewise, Nina Totenberg of National Public Radio was responsible for reporting the results of a confidential investigation regarding whether Clarence Thomas had sexually harassed Anita Hill[247] and the story that Douglas Ginsburg had smoked marijuana with his students at Harvard in the 1970s.[248] These types of intensely dramatic stories reported by the press have had the unfortunate consequences of personalizing the judicial appointments process to the point of making it an ugly affair for nominees[249] and of drawing the public's attention away from the "significant legal issues surrounding confirmation contests."[250]

Widespread media coverage of judicial appointments has also empowered organized interest groups to take an even greater role in the process. Senator Edward Kennedy likely fully understood that he was playing to the media and Democratic interest groups when he made his infamous "Robert Bork's America" speech just forty-five minutes after Bork's nomination.[251] As Richard Davis has observed, interest groups "have used mass media campaigns in recent nominations to sway public opinion and indirectly affect the outcome in the Senate."[252] Similarly, many senators no doubt view the hearings as an opportunity to please prominent constituents and organized interest groups by demonstrating their ideological bona fides on national television.[253] Indeed, it is astonishing that senators asked very few questions of John Roberts regarding how he would administer the federal Judiciary and whether he had adequate experience to lead the Supreme

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246. *Id.* at 238.

247. Davis, *supra* note 243, at 1065. Totenberg said after the incident that Democratic Senator Joe Biden, the Chairman of the Senate Judiciary Committee at the time of Thomas's nomination, had dismissed and refused to go forward with Hill's allegations against Thomas until Totenberg released them publicly. Ann Louise Bardach, *Nina Totenberg: Queen of the Leaks*, VANITY FAIR, Jan. 1992, at 46, 50.

248. GREENBURG, *supra* note 3, at 60.

249. It would have been unthinkable several decades ago that anyone would have searched through the trash of any judicial nominee like Miguel Estrada, much less one that was not even nominated to a seat on the Supreme Court. WITTES, *supra* note 2, at 44–45.

250. GERHARDT, *supra* note 142, at 503.

251. *See* ABRAHAM, *supra* note 188, at 298, 297–98 ("Robert Bork's America is a land in which women would be forced into back alley abortions, blacks would sit at segregated lunch counters, rogue policemen could break down citizen[s'] doors in midnight raids, school children could not be taught about evolution, writers and artists could be censured at the whim of government." (quoting Senator Kennedy)). In 2005, President George W. Bush hoped to avoid a similar failure by nominating Roberts to the Supreme Court on prime-time television after keeping the identity of the nominee secret, even from some of his own staff, which ensured that Bush would be the first to pitch Roberts to the American people and thus potentially control the initial media spin after the appointment. GREENBURG, *supra* note 3, at 209–10; Nina J. Easton, *Bush Picks Jurist for Top Court, Calls for a "Dignified" Process*, BOSTON GLOBE, July 20, 2005, at A1.

252. Davis, *supra* note 243, at 1069.

253. *See* DAVID M. O'BRIEN, TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION, JUDICIAL ROULETTE 9–10 (1988) (suggesting that in light of extensive media coverage, measures should be taken to depoliticize the confirmation process).

Court.[254] Instead, the questions were primarily about how he would decide certain issues that might come before the Court, such as abortion and affirmative action, and whether he would have due respect for precedent, which was just another way of questioning his views about *Roe v. Wade*.[255] In light of the fact that Joe Biden described the recent hearings on the nominations of Samuel Alito and John Roberts as more of a "Kabuki dance" than an opportunity to find out substantive information about a nominee,[256] it is not unfair to characterize the seemingly futile questioning of a nominee by senators as a stage on which they can posture to and please constituents and interest groups.

Senators also face external pressure from their representative responsibilities on behalf of their constituents, who often have strong opinions on certain judicial nominations as a result of campaigns by organized interest groups and widespread media coverage. Votes for judicial nominees, particularly at the level of the Supreme Court, are among the most highly visible votes that a senator will cast. Because of that high visibility, senators are under powerful pressure to vote consistently with their own policy "brand"[257]—which is the policy reputation that senators seek in order to boost their own standing with like-minded constituents who may "economize on information about politicians."[258] For instance, Delaware citizens may not know (or want to know) how Senator Joseph Biden casts each of his votes in the Senate, including those for minor initiatives or bills, but votes on Supreme Court nominees tend to be highly scrutinized. Thus, regardless of whether Senator Biden believed that John Roberts was highly qualified for the position of Chief Justice in 2005, he could not cast a "yea"

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254. An exception, of course, is Senator Lindsey Graham, who asked Roberts whether he believed that Harlan Fiske Stone had been an effective Chief Justice and whether Roberts would run a "tight ship." *Transcript: Day Two of the Roberts Confirmation Hearings*, WASH. POST, Sept. 13, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091301838.html.

255. *See* GREENBURG, *supra* note 3, at 221 (asserting that Roberts's position on *Roe v. Wade* was the central question of his nomination); Adam Liptak, *Roberts Drops Hints in "Precedent" Remarks*, N.Y. TIMES, Sept. 18, 2005, § 1, at 30 (suggesting that senators and Roberts spoke in a kind of code and that "[w]henever they talked about precedent, they were talking about *Roe*" (typeface altered)).

256. Editorial, *How Conservative Is Judge Roberts?*, N.Y. TIMES, Sept. 15, 2005, at A30; *see also* CHRISTOPHER L. EISGRUBER, THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS 4 (2007) (recounting Senator Arlen Specter's characterization of confirmation hearings as a "subtle minuet").

257. Professor Helmut Schneider's research reveals that politicians consciously shape their perceived brands and voters rely on those brand images in making electoral decisions. *See* Helmut Schneider, *Branding in Politics—Manifestations, Relevance and Identity-Oriented Management*, J. POL. MARKETING, Number 3 2004, at 41, 49–50. According to Schneider, policy branding serves three main purposes: (1) it provides informational shortcuts for voters who may be faced with mountains of complicated data about their elected representatives; (2) it serves a risk-reduction function because it is based on past performance rather than speculative future promises; and (3) it establishes and draws upon sentimental utility, allowing a voter to feel solidarity with a like-minded group. *See id.* at 51–52.

258. Segal et al., *supra* note 237, at 100, 100–01.

vote without being keenly aware of the consequences that such a vote would have for his reputation or policy brand.[259] Biden was, in fact, one of only twenty-two senators to vote against Roberts's nomination for Chief Justice.[260] The consequences of votes on Supreme Court nominees are even more compelling for centrist senators, such as former Republican Senator Lincoln Chafee of left-leaning Rhode Island, because their policy brand can be effectively defined by taking a strong stand one way or another on judicial nominees.

Indeed, electoral accountability and the importance of policy branding can have consequences for senators even before a Supreme Court vacancy occurs. In 2004, Senator Arlen Specter, a centrist Republican who has long supported abortion rights, was running for his fifth consecutive term in the Senate, and his long service on the Senate Judiciary Committee meant that he would become chairperson of that powerful committee if he won.[261] In the Republican primary, however, Specter faced stiff opposition from Pat Toomey, an extremely conservative state senator who repeatedly criticized Specter for his longstanding support for *Roe v. Wade*.[262] At the time Specter had not decided whether he could support Eleventh Circuit-nominee William Pryor, who had publicly expressed his disagreement with *Roe*.[263] Toomey was extremely critical of Specter, telling the *Pittsburgh Post-Gazette* that Specter "is consistently against what the president is trying to accomplish on tort and judicial reform and the conservative agenda. I think the topic of his lack of support for President Bush's judicial nominees would certainly be an issue in the campaign."[264] Although Specter narrowly defeated Toomey in

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259. None of this is to suggest, however, that Biden cast his vote purely for policy-branding reasons. Obviously, Senator Biden is a long-time Democrat and his liberal bona fides are not in jeopardy from any single vote. Thus, he likely had other reasons, both representational and personal, for voting against Roberts.

260. U.S. Senate Roll Call Votes 109th Congress, 1st Session, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=1&vote=00245 [hereinafter Senate Roll Call]. Interestingly, Senator Hillary Clinton also voted against Roberts's nomination, likely so she could boast to potential supporters on the presidential-campaign trail that she was only one of twenty-two senators to vote "nay" on the appointment. *See* David Brooks, Op-Ed., *A Competent Conservative*, N.Y. TIMES, July 21, 2005, at A29 (describing Clinton's vote as "defining and momentous" because it required her "to choose between the militant wing of the party, important in primary season, and the nation's mainstream center, which the party needs if it is to regain its majority status"); Peter Baker, *Courtin' the Left and the Right: Roberts Scare Seizes the Trail*, WASH. POST, Aug. 2, 2007, http://blog.washingtonpost.com/the-trail/2007/08/02/courtin_the_left_and_right_rob.html (describing a Clinton appearance before the American Association for Justice in which she told the group that she had warned her colleagues in the Senate that if Roberts were appointed to the Supreme Court, he could become part of a majority that could undo years of precedent).

261. James Dao, *G.O.P. Senate Race in Pennsylvania Heats Up*, N.Y. TIMES, Apr. 23, 2004, at A14.

262. Ann McFeatters, *Judge Vote Puts Specter on the Spot*, PITT. POST-GAZETTE, July 16, 2003, *available at* http://www.post-gazette.com/pg/03197/203089.stm.

263. *Id.* Specter ultimately voted "yea" on the nomination of William Pryor, who was confirmed 53–45 by the Senate. Senate Roll Call, *supra* note 260.

264. McFeatters, *supra* note 262.

the primary and went on to win the general election, the 2004 Pennsylvania Senate race and Arlen Specter's policy brand were largely defined by the stands he had taken, and was expected to take if reelected, on judicial nominations.[265]

An empirical study published in 1992 by political scientists Jeffrey Segal, Charles Cameron, and Albert Cover supports the importance of constituent views about judicial nominees.[266] After conducting a logit analysis of senators' roll-call votes on Supreme Court nominees from 1955 to 1988,[267] the authors found that "the votes of senators are highly dependent on the ideological distance between a senator's constituents and the nominee, on the perceived qualifications of the nominee, and on the interaction between the two."[268] Although the study found some evidence of nonrepresentational behavior by senators,[269] the views of constituents "decisively affected" the roll-call votes of senators on Supreme Court nominees.[270] An increase of one standard deviation in the ideological distance between a senator's constituents and judicial nominees in their model resulted in a 32% decrease in the probability of a "yea" vote by that senator, while an increase of one standard deviation in qualifications affected the probability of a "yea" vote by only 17%.[271]

As the foregoing discussion demonstrates, external factors have decidedly altered the judicial appointments process. Although exact quantification of these external factors is elusive, there is little doubt that the heightened influence of organized interest groups, widespread media coverage of judicial appointments, and increased interest and pressure from constituents have all resulted in greater politicization of judicial appointments in recent years.

3. Judicial Factors.—No explanation of the state of judicial appointments would be complete without consideration of the role the Judiciary has played in politicizing the process. In *Confirmation Wars*, Benjamin Wittes astutely observes that the politicization of judicial appointments is largely a response to the aggrandizement of power in the federal

265. *See* Sheryl Gay Stolberg, *G.O.P. Colleagues Backing Specter in Judiciary Post*, N.Y. TIMES, Nov. 19, 2004, at A1 (noting that subsequent to Specter's reelection, Republican senators felt the need to publicly back him as chairman of the Judiciary Committee in the face of attacks from some conservatives).

266. *See* Segal et al., *supra* note 237, at 109.

267. *See id.* at 96, 100, 109.

268. *Id.* at 113.

269. *See id.* at 114.

270. *Id.* at 109.

271. *Id.* at 109–10. Although their methodology for measuring constituent ideology is fairly complicated, the authors used "state-level presidential election results" from 1964, 1972, and 1984 in determining such ideology, eliminating data from other presidential elections because they were not strongly ideological or included third party candidates. *Id.* at 104–05. For nominee ideology, the authors turned to the content of editorials in "four of the nation's leading papers." *Id.* at 107.

Judiciary.[272] Whatever one thinks about the role of the Supreme Court in American politics, it is unsurprising that the stakes for each judicial nomination become higher as the federal courts are increasingly injected into matters of social, religious, and political importance.[273] Rather than looking to the political process for answers about abortion, race, and gay marriage, citizens and legislators are relegated to observers as the Supreme Court determines the extent of existing and new rights in those areas. Once the Supreme Court has removed an issue from the democratic legislative process, one of the only ways for citizens to affect the setting of public policy is to attempt to influence the judicial appointments process.[274] As the courts become more political, the process of appointing judges also becomes more political.

In Wittes's opinion, judicial nominations became more contentious beginning with the Court's decision in *Brown v. Board of Education*. Indeed, the first aggressive questioning of a nominee's ideological views occurred just one year after *Brown*, when John Marshall Harlan was asked directly about his views on international treaties and indirectly about *Brown*.[275] Although Harlan evaded the question regarding *Brown*,[276] the questioning of nominees' ideological views has only become more aggressive since 1955. Potter Stewart, for example, was asked directly about *Brown*, stare decisis, and the citation of scholarly articles in judicial opinions.[277] In 1967, Thurgood Marshall was thoroughly questioned about *Miranda v. Arizona*[278] and the Court's Voting Rights Act cases.[279]

But perhaps no modern decision has generated as much controversy or nominee questioning as *Roe v. Wade*. Clarence Thomas faced more than seventy questions regarding *Roe* in his hearings,[280] and many believe that Robert Bork's nomination was derailed in part based upon his strident criticism of a constitutional right to privacy.[281] In a recent *60 Minutes* interview, Justice Thomas expressed the opinion that the battle over his nomination was

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272. *See* WITTES, *supra* note 2, at 11–12.

273. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 348 (1990) (concluding that it is "a logical development as law becomes politicized" that "nominees will be treated like political candidates, campaigns will be waged in public, lobbying of senators and the media will be intense, the nominee will be questioned about how he will vote, and he will be pressed to make campaign promises about adhering to or rejecting particular doctrines"); *cf.* EISGRUBER, *supra* note 256, at 3 (stating that one reason for the current appointments process is a "politically prominent and controversial Court").

274. *See* John C. Yoo, *Criticizing Judges*, 1 GREEN BAG 2D 277, 282 (1998) ("Heightened scrutiny of nominees has the . . . effect of communicating senatorial preferences concerning judicial nomination policy to the executive branch.").

275. WITTES, *supra* note 2, at 66–67.

276. *See id.*

277. *Id.* at 70–71.

278. 384 U.S. 436 (1966).

279. WITTES, *supra* note 2, at 74–75.

280. KEN FOSKETT, JUDGING THOMAS: THE LIFE AND TIMES OF CLARENCE THOMAS 228 (2004).

281. *See* COMISKEY, *supra* note 111, at 58.

really about abortion, not him.[282] Moreover, so many of the questions asked of Alito and Roberts during their recent hearings were aimed at eliciting their views on abortion[283] that it is difficult to underestimate the issue's importance to senators and the public. Indeed, Wittes aptly calls abortion the issue that has "formed a big part of the heart and soul of every nomination hearing since Bork's."[284]

If it goes without saying that issues such as abortion and race are important, recent academic research suggests that attention to judicial appointments is well founded. Many political scientists have long contended that judicial decisions, especially at the highest levels of the federal Judiciary, are the product of the policy preferences of judges.[285] Jeffrey Segal and Harold Spaeth, for instance, studied all 217 of the Court's search-and-seizure decisions between 1962 and 1988 and found that the ideological preferences of the Justices permitted them to predict 71% of the individual votes by the Justices.[286] Another recent study found that in cases involving "controversial issues that seem especially likely to reveal divisions between Republican and Democratic appointees,"[287] a three-judge appellate panel consisting entirely of Democratic appointees is "about *twice* as likely to vote in the stereotypically liberal fashion" than a panel consisting of entirely Republican appointees.[288] More interestingly, the study revealed that a single Democratic appointee sitting with two Republican appointees is less likely to vote in a stereotypically liberal fashion, a phenomenon the study's authors term ideological dampening.[289] In other words, the party of the president who appoints a judge, which can serve as a rough proxy for a judge's ideological preferences, can greatly influence the decisions of a court on hot-button social, moral, and political issues, especially at the level of the Supreme Court. It is unsurprising, therefore, that the arguably political positions of Supreme Court Justice and circuit court judge have become the focus of keen attention for organized interest groups, the print and broadcast

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282. *See 60 Minutes: The Private Clarence Thomas* (CBS television broadcast Sept. 30, 2007), *available at* http://www.cbsnews.com/stories/2007/09/27/60minutes/main3305443.shtml.

283. *See generally Confirmation Hearing on the Nomination of Samuel A. Alito, Jr., to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (asking Alito more questions regarding abortion than any other subject); *Confirmation Hearing on the Nomination of John G. Roberts, Jr., to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 142–43 (2005) (asking Roberts four questions regarding abortion in the first ten minutes of the session on Tuesday morning).

284. WITTES, *supra* note 2, at 95.

285. David R. Stras, *The Incentives Approach to Judicial Retirement*, 90 MINN. L. REV. 1417, 1421 (2006).

286. *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 314, 325 (2002).

287. CASS SUNSTEIN ET AL., ARE JUDGES POLITICAL? 8 (2006).

288. *Id.* at 10, 8–10.

289. *See id.* at 10.

media, and politically active constituents, as even a single Supreme Court appointment can shift the ideological balance of the Court.[290]

One objection to the judicial account of increasing politicization of the appointments process is that some scholars, such as Cass Sunstein and Chris Eisgruber, seem to argue that the judicial appointments process has become more politicized as a result of the increasingly ideological executive appointments to the federal courts since the presidency of Richard Nixon.[291] In particular, a case can be made that the recent practice of "grooming" potential Supreme Court nominees, such as John Roberts and Miguel Estrada, by first nominating them to lower federal courts, such as the D.C. Circuit, has increased the stakes surrounding many lower court appointments, leading to contentious confirmation fights.[292]

While there is no doubt some truth to the notion that selecting ideologically controversial nominees has increased the divisiveness of the judicial appointments process, especially in recent years,[293] I view ideologically driven selection as more of a symptom than a cause of the new politics of judicial appointments.[294] In other words, presidents would not feel *as*

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290. *Cf.* Editorial, *Roberts' Revolution*, INVESTOR'S BUS. DAILY, June 28, 2007, *available at* http://www.investors.com/editorial/editorialcontent.asp?secid=1501&status=article&id=267923632321136 (describing the rightward move of the Court as a result of the confirmations of Samuel Alito and John Roberts).

291. *See* EISGRUBER, *supra* note 256, at 14 ("[O]ver the last forty years, presidents have raised the stakes for confirmation hearings by applying ideological litmus tests to candidates more aggressively than has been done in the recent past."); *supra* notes 121–30 and accompanying text.

292. *See, e.g.*, Steven G. Calabresi, *Minority Rule?*, WKLY. STANDARD, May 9, 2005, at 11 (arguing that the Democratic party aimed to prevent conservative African-Americans, Hispanics, women, and Catholics from being groomed for nomination to the Supreme Court through court of appeals appointments); Editorial, *Democrats' Poor Memo-ries*, INVESTOR'S BUS. DAILY, Mar. 23, 2007, *available at* http://www.ibdeditorials.com/IBDArticles.aspx?id=259542111580906 (discussing a staff memo of the Democratic Judiciary Committee describing Estrada as "especially dangerous," in part because he was being groomed by the White House for a Supreme Court appointment).

293. *Cf.* SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 361 (1997) (suggesting that ideologically driven selection, especially during the Nixon and Reagan years, has driven much of the politicization of the process); Giles et al., *supra* note 142, at 638 (stating that their study indicates that "policy preferences have been operative throughout the postwar period when the President is not constrained by senatorial courtesy").

294. Nancy Scherer has written that, beginning in the 1960s, lower court judicial appointments transformed from a patronage-based system to one based more on advancing particular policy goals. *See* SCHERER, *supra* note 227, at 21. The transformation occurred, according to Scherer, as a result of the dismantling of mass political-party systems and of party bosses in the 1960s. *See id.* Under this new model of selecting lower court judges, which she calls elite mobilization, politicians select judicial nominees based upon ideological positions in order to curry favor with elite interest groups. *See id.* at 24. Scherer further identifies four distinct elite-mobilization strategies employed since 1960: "(1) presidents choosing judges pursuant to ideological litmus tests, (2) presidents choosing judges pursuant to affirmative action criteria, (3) senators engaging in 'obstructionist' confirmation tactics against nominees found ideologically objectionable, and (4) political challengers on the campaign trail exploiting an incumbent's prior selection or confirmation decision." *Id.* at 23.

much pressure to nominate candidates as close to their ideal policy points (and those of their political party) as possible if the federal courts were not as embroiled in deciding some of the most divisive social and cultural issues facing our country today.[295] If the federal courts decided issues solely of technical federal law, such as tax, bankruptcy, and even federal-preemption cases, the judicial appointments process would hardly be controversial except in extreme and rare cases. It is only because the stakes are so high for each judicial appointment, especially at the level of the Supreme Court, that presidents and senators are willing to fight so vehemently over judicial nominees. Indeed, as Wittes correctly points out in *Confirmation Wars*, though ideology has always played some role in the selection of federal judges, Richard Nixon was among the first Presidents to so consistently elevate ideology over other considerations in selecting judicial nominees,[296] but his strategy was almost entirely a response to what he perceived as the liberal excesses of the Warren Court.[297]

B. The New Politics of Judicial Appointments

Much of the scholarly commentary on judicial appointments starts from the premise that there is effectively a presumption in favor of a president's judicial nominees.[298] There is no doubt that the historical rate of

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I am not fully convinced by Scherer's account in part because it coincides chronologically with the controversial decisions of the Warren Court, which is a factor that she fully agrees has led to greater politicization of the appointments process. *See id.* at 5 (stating that the other reason for the change in the judicial appointments process was that "the federal judiciary became particularly receptive to expanding individuals' constitutional rights"); *id.* at 14–15 (discussing the numerous controversial individual-rights decisions of the Warren Court). Thus, it is possible, perhaps even likely, that elite mobilization was simply a response to the controversial decisions of the Warren Court in the 1950s, 1960s, and 1970s. Nonetheless, I mention Scherer's theory because it is plausible and reinforces the vital role of elite interest groups in further politicizing the judicial appointments process. *See supra* notes 222–42 and accompanying text.

295. *Cf.* EISGRUBER, *supra* note 256, at 142 ("The Warren Court's rulings about school desegregation, school prayer, privacy, and criminal procedure carved out a role for the Court that ensured its prominence in future presidential campaigns."); O'BRIEN, *supra* note 253, at 19 ("The [federal] courts are now deciding questions of social policy that would have been virtually unthinkable fifty, twenty, or even ten years ago."); SCHERER, *supra* note 227, at 13–14 ("In the 1930s, less than 10 percent of the Supreme Court's decisions involved cases other than property rights. . . . In stark contrast, by the 1960s, individual, constitutional rights cases made up almost 70 percent of the Court's docket." (citation omitted)).

296. *See* WITTES, *supra* note 2, at 28–29.

297. *Cf.* EISGRUBER, *supra* note 256, at 11 ("Presidents have, in fact, paid a lot of attention to the judicial philosophies of their nominees, especially in the years since the civil rights revolution of the 1960s.").

298. *See, e.g.*, GERHARDT, *supra* note 142, at 41–42 (arguing that the Constitution establishes a presumption of confirmation by requiring only the relatively low threshold of a bare majority of approving senators and by pitting a politically streamlined unitary Executive against a more unwieldy collegial body); Michael M. Gallagher, *Disarming the Confirmation Process*, 50 CLEV. ST. L. REV. 513, 549 (2003) (citing historical evidence that judicial nominees were presumed worthy of confirmation); Glen S. Krutz et al., *From Abe Fortas to Zoe Baird: Why Some Presidential Nominations Fail in the Senate*, 92 AM. POL. SCI. REV. 871, 871 (1998) (listing reasons for the existence of this presumption).

confirmation for judicial nominees is high, even for nominees to the Supreme Court.[299] For ordinary legislation, in contrast, presidential proposals only have about a 25% success rate, much lower than for judicial nominees.[300] The success rate for legislative proposals by senators and representatives is even lower, indicating that "for legislation introduced in Congress, there is a presumption of failure."[301] While we have not reached the point where judicial nominations are failing as often as legislative proposals, the judicial appointments process is clearly changing, especially for appointments to the federal circuit courts.

As Wittes points out in *Confirmation Wars*, "The general trend at the lower court level . . . is that the ability of Presidents to win confirmation for their judicial nominees has eroded steadily since the mid-1980s."[302] In contrast to the 92% confirmation rate for President Carter's circuit court nominees, President Clinton had only 71% of his circuit court nominees confirmed by the Senate.[303] President George W. Bush, meanwhile, has similarly experienced a low 74.6% confirmation rate for his circuit court nominees through October 2007.[304] In addition, judicial nominees are now subjected to unprecedented delay in receiving a Senate vote. During the Administration of George W. Bush through April 7, 2006, it took more than one year, or a total of 394 days, to confirm the average circuit court nominee, and the delay is sure to lengthen as we approach the end of President Bush's second term.[305] For sixteen circuit court nominees who were renominated by George W. Bush after their nominations lapsed in a prior Congress, it took an average of 769 days, or more than two years, for them to secure confirmation.[306] In contrast, between 1945 and 1986, the average circuit court nominee took between one and two months to confirm.[307] In short, though the success rate for judicial nominees is still comparably high, the judicial appointments process is beginning to look a lot more like the ordinary legislative process. While the process has not changed nearly so much

299. The Senate has confirmed 122 of the 158 nominees for the Supreme Court over the course of United States history, resulting in a 77% confirmation rate. *See* DENIS STEVEN RUTKUS & MAUREEN BEARDEN, CONG. RESEARCH SERV., SUPREME COURT NOMINATIONS, 1789–2005: ACTIONS BY THE SENATE, THE JUDICIARY COMMITTEE, AND THE PRESIDENT 1 (2006), *available at* http://fpc.state.gov/documents/organization/59367.pdf; *see also* Krutz et al., *supra* note 298, at 874 (finding that for the period from 1965 to 1994, only 71 of 1,464 presidential nominations failed).

300. Krutz et al., *supra* note 298, at 871.

301. *Id.*

302. WITTES, *supra* note 2, at 41.

303. *Id.* at 39.

304. *See* RUSSELL WHEELER, BROOKINGS INST., PREVENT FEDERAL COURT NOMINATION BATTLES: DE-ESCALATING THE CONFLICT OVER THE JUDICIARY 6 (2007), *available at* http://www.brookings.edu/papers/2007/~/media/Files/Projects/Opportunity08/PB_JudicialPolicy_Wheeler.pdf (noting that fifty-three of seventy-one Bush circuit court nominees have been confirmed, a rate of 74.6%).

305. WITTES, *supra* note 2, at 39.

306. WHEELER, *supra* note 304, at 10.

307. WITTES, *supra* note 2, at 38.

for Supreme Court nominations, perhaps due to the high visibility of such nominations and the perceived importance of not leaving the Court short-handed for too long, it certainly has been as ugly and divisive over the past twenty years as ever. As Professor Keith Whittington has observed, "The increased polarization of American politics raises the prospect of greater conflict over judicial nominations and presumably the greater likelihood of their defeat."[308]

As stated above, interest groups, the Senate, and the media have been aware of the new politics of judicial appointments for some time. Interest groups, for example, use the same tools to influence judicial appointments as they do in opposing or supporting any piece of legislation. An interest group such as the National Rifle Association can employ a variety of tools to influence the electoral process, including: (1) "grading" candidates for office in terms of their support for the organization's goals; (2) making independent expenditures to purchase radio and television advertisements for its chosen candidates or positions; (3) utilizing its vast membership to write, call, and lobby members of Congress to support the organization's preferred bills or positions; and (4) making direct monetary contributions to candidates.[309] All of these same tools are employed with only slight variation to influence judicial appointments. A number of interest groups took formal positions on the nominations of John Roberts, Harriet Miers, and Samuel Alito,[310] for instance, and they spent millions of dollars on print, television, and radio advertisements to either support or oppose those nominees.[311] Moreover, NARAL Pro-Choice America launched a widespread campaign shortly after John Roberts was nominated to the Supreme Court to encourage its members and supporters to call their senators to urge them to oppose his confirmation.[312] As one anonymous senator said about the power of interest groups in judicial appointments, "If an interest group says 'this is a key vote,

308. Keith E. Whittington, *Presidents, Senates, and Failed Supreme Court Nominations*, 2006 SUP. CT. REV. 401, 402.

309. *See* Kelly D. Patterson & Matthew M. Singer, *Targeting Success: The Enduring Power of the NRA*, *in* INTEREST GROUP POLITICS, *supra* note 225, at 37, 52–53.

310. *See* Liz Halloran, *All About a Guy Named John*, U.S. NEWS & WORLD REP., Sept. 12, 2005, at 42, 42–43 (discussing the tactics of interest groups opposing the appointment of John Roberts); Steven Thomma, *Alito Nomination Helps Bush Win Back Conservatives but It Might Also Spark Liberals' Passion in 2008*, LEXINGTON HERALD-LEADER, Nov. 1, 2005, at A4 (listing some of the interest groups opposing and supporting the nominations).

311. *See* Maura Reynolds & Richard Simon, *Senate Panel's Vote on Alito Is Put Off*, L.A. TIMES, Jan. 14, 2006, at A16 (discussing campaigns aimed at "swing" senators); Shawn Zeller, *Alito Debate Burns Few Airwaves*, 64 CQ WKLY. 260 (2006) (discussing the millions of dollars spent by interest groups for television advertising to either support or oppose the nominations of Alito and Roberts).

312. Gary Martin, *GOPers Discount Federalist Society Flap*, SAN ANTONIO EXPRESS-NEWS, July 26, 2005, at 3A.

we're watching this vote,' then the easy thing to do is to vote the way the group wants."[313]

As Wittes points out, the Senate has also become increasingly sophisticated, and political, in its opposition to judicial nominees in recent years.[314] In May 2005, for example, the Senate was deadlocked over a number of President George W. Bush's circuit court nominees.[315] Among the most controversial were Priscilla Owen, Janice Rogers Brown, and William Pryor, Jr., all of whom Senate Democrats vowed to filibuster in order to block a Senate vote on their nominations.[316] Senate Republicans, in turn, threatened to exercise the so-called nuclear option, a change of Senate procedures to eliminate the filibuster for judicial nominees.[317] Such a drastic step would have, according to *Washington Post*-columnist David Broder, changed "[t]wo of the main props of the Senate's identity": debate limited only by cloture[318] and the continuity of Senate rules, which carry over from Congress to Congress.[319]

Increasing use of the filibuster against President George W. Bush's judicial nominees clearly signals that the politics of judicial appointments have changed. Although the filibuster has been employed against judicial nominees in the past, most notably to block President Lyndon B. Johnson's nomination of Abe Fortas to be Chief Justice in 1968,[320] there is little doubt that the tool has been used more frequently by minority senators to block judicial nominees over the past six years. From 1949 until 2002, only 2.6% of cloture votes occurred with respect to judicial nominations,[321] but that figure jumped to 45.5% in the 108th Congress alone,[322] meaning that filibusters are now employed almost as often against judicial nominees as they are with

313. Lauren C. Bell, *Senate Confirmations in an Interest Group Age*, EXTENSIONS, Spring 2004, at 19, 22, *available at* http://www.ou.edu/special/albertctr/extensions/spring2004/Bell.html (quoting an anonymous senator).

314. *See* WITTES, *supra* note 2, at 3 ("Nominations to the high court today represent major political confrontations, grand mobilizations of the political bases of both parties, along with their affiliated interest groups and sympathetic academics.").

315. Charles Babington & Shailagh Murray, *A Last-Minute Deal on Judicial Nominees*, WASH. POST, May 24, 2005, at A1.

316. *Id.*

317. *Id.*

318. The Senate's cloture rule permits a supermajority of senators—now sixty votes—to close debate on an issue and thus end a filibuster. *See* STANDING RULES OF THE SENATE, S. DOC. NO. 110-9, at 15–16 (2007).

319. David S. Broder, *Nuclear Cloud over the Senate*, WASH. POST, May 19, 2005, at A27.

320. ABRAHAM, *supra* note 188, at 218–19. Michael Gerhardt notes that the filibuster was first used to "clearly and unambiguously" defeat a judicial nominee in 1881 when the Republican majority in the Senate was unable to end a filibuster against Stanley Matthews, who was originally nominated to the Supreme Court by President Rutherford B. Hayes. Michael J. Gerhardt, *The Constitutionality of the Filibuster*, 21 CONST. COMMENT. 445, 453 (2004). Matthews was later confirmed when he was renominated to the position by Hayes's successor, James Garfield. *Id.*

321. Orrin G. Hatch, *Judicial Nomination Filibuster Cause and Cure*, 2005 UTAH L. REV. 803, 824.

322. *Id.* at 824 n.108. The 108th Congress served from January 3, 2003, to January 3, 2005.

respect to all other types of legislation. Although use of the filibuster against judicial nominees is not necessarily a "new tactic" as Senator Orrin Hatch argues,[323] its rise is certainly historically aberrational because the filibuster has been employed predominantly to block votes on ordinary legislative initiatives, not judicial appointments.[324]

As prominent and powerful as filibusters have become in obstructing judicial appointments, some of President George W. Bush's circuit court nominees—including Priscilla Owen, Janice Rogers Brown, and William Pryor, Jr.—have been confirmed as a result of ordinary, bipartisan political compromise. On the eve of the showdown about the filibuster in May 2005, fourteen senators (colloquially known as the Gang of 14)—seven Democrats and seven Republicans, all from the moderate wings of their parties—crafted a political solution to a seemingly intractable political problem over use of the filibuster against judicial nominees. In a two-page "memorandum of understanding," the Republicans agreed to oppose the nuclear option while the Democrats consented to voting in favor of cloture on Owen, Brown, and Pryor.[325] The seven Democrats also pledged to use the filibuster on future judicial nominees only in "extraordinary circumstances."[326] As a result, though the politics of judicial appointments had clearly changed, the key players looked to ordinary political compromise, or "politics as usual," to reach a mutually agreeable outcome.

In addition to the filibuster, logrolling has become an increasingly prevalent practice with respect to lower court nominations. Indeed, Senator Orrin Hatch has stated that logrolling has become:

> [the] norm. Today, votes on nominees are often traded like commodities—ten judges in exchange for a vote on this, two commissioners for a vote on that. This objectionable practice is so

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323. *Id.* at 804.

324. C. Boyden Gray, *Democracy at Home*, 9 TEX. REV. L. & POL. 205, 206 (2005); Hatch, *supra* note 321, at 824, 838. An exhaustive treatment of filibusters against judicial nominees is beyond the scope of this Review Essay. Indeed, an extensive literature has grown discussing the constitutionality of the filibuster and whether its use against judicial nominees is sound policy. *See, e.g.*, Catherine Fisk & Erwin Chemerinsky, *In Defense of Filibustering Judicial Nominations*, 26 CARDOZO L. REV. 331 (2005) (arguing that the existence of the filibuster serves as a moderating influence on the selection of judicial nominees and advocating against the nuclear option); Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Over Come* [sic] *the Filibuster*, 28 HARV. J.L. & PUB. POL'Y 205 (2004) (encouraging the abolishment of the filibuster for judicial nominees via the nuclear option); McGinnis & Rappaport, *supra* note 193 (stating that the filibuster rule produces more moderate judicial appointments in line with the ideology of the median senator); Arthur L. Rizer III, *The Filibuster of Judicial Nominations: Constitutional Crisis or Politics as Usual?*, 32 PEPP. L. REV. 847 (2005) (arguing that the filibuster of judicial nominees is unconstitutional); Brent Wible, *Filibuster Vs. Supermajority Rule: From Polarization to a Consensus- and Moderation-Forcing Mechanism for Judicial Confirmations*, 13 WM. & MARY BILL RTS. J. 923 (2005) (advocating a formal supermajoritarian process for confirming all judicial nominees). I only mention the filibuster because its recent use has changed, even elevated, the political nature of judicial appointments.

325. Babington & Murray, *supra* note 315.

326. *Id.*

> common and accepted that it has become as important in keeping the Senate functioning as unanimous consent and other key parliamentary rules.[327]

Current Supreme Court Justice Stephen Breyer reportedly received his seat on the United States Court of Appeals for the First Circuit through an executive–legislative swap: Senator Edward Kennedy supported Jimmy Carter's candidacy for a second presidential term in exchange for Carter naming Breyer—then serving as chief counsel to the Senate Judiciary Committee—to a vacant First Circuit seat.[328] The logrolling on judicial nominees even extends to unrelated pieces of legislation. For example, President Lyndon Johnson purportedly appointed a South Carolinian to an open judicial seat in exchange in part for Senator Strom Thurmond's support for civil rights legislation.[329] Though legislators have decried the practice of "judicial pork barreling,"[330] it has nonetheless become an important part of the judicial appointments process.[331]

The new politics of judicial appointments look strikingly similar to the politics accompanying the passage of controversial pieces of legislation. For instance, President George W. Bush faced staunch opposition to his No Child Left Behind[332] initiative in 2001. As a key component of his presidential campaign, President Bush was committed to educational reform, including extensive testing of public schools and federal funding for private schooling of students who attend underperforming public schools.[333] Because Democrats enjoyed a slight majority in the Senate, Bush had to turn to members of the opposition party in order to enact his reform package.[334] For support, Bush looked to Senator Edward Kennedy, who "set aside his desire for more school construction and smaller class sizes while consenting to few-strings-attached federal grants to states, the easing of regulations, rigorous

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327. SCHERER, *supra* note 227, at 152 (quoting ORRIN HATCH, SQUARE PEG: CONFESSIONS OF A CITIZEN SENATOR 123 (2002)).

328. GOLDMAN, *supra* note 293, at 261. Ironically, President Carter's Administration pushed federal judicial-merit selection commissions to create slates of candidates from which President Carter could choose. *Id.* at 238–41. Breyer did end up on the commission's list of candidates for the vacant First Circuit post, but the list was not formulated until after Kennedy selected Breyer as his choice for the seat. *Id.* at 261.

329. SCHERER, *supra* note 227, at 152.

330. *Id.* at 153 (quoting Senator Joe Biden).

331. Although President George W. Bush has largely avoided the practice of judicial logrolling, at least according to Scherer, President Clinton attempted such logrolls on at least four occasions, including in an agreement with Senator Hatch to push through the appointments of Richard Paez and Marsha Berzon to the Ninth Circuit in exchange for Clinton's appointment of Ted Stewart to a vacancy on the United States District Court for Utah. *See id.* at 155–56.

332. *See* No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified in scattered sections of 20 U.S.C.).

333. David E. Sanger, *Bush Pushes Ambitious Education Plan*, N.Y. TIMES, Jan. 24, 2001, at A1.

334. Richard W. Stevenson, *Bush's Capitol Hill Two-Step*, N.Y. TIMES, May 6, 2001, § 1, at 34.

testing and the first major use of federal education funds for private programs."[335] But Bush also had to compromise on several major provisions of the bill, including agreeing to a diluted version of his school-vouchers program and to nearly $4 billion more in federal spending than he had originally anticipated.[336] Though there were no serious threats by Democrats to filibuster No Child Left Behind, the compromise reached by the Gang of 14 and the practice of judicial logrolling demonstrate that, as with ordinary legislation, political negotiation, strategy, and even coercion have become a routine part of the judicial appointments process.

IV. Conclusion

As *Supreme Conflict* and *Confirmation Wars* amply demonstrate, the politics of judicial appointments have clearly changed over the past thirty years. Gone are the days of the short, routine confirmation hearing for Supreme Court nominees or the fast-track confirmation processes for many lower court nominees. As discussed above, the politicization of the process has been the product of a number of factors—some internal to the Senate and others external to the government—that have combined to create a process that mirrors the divisive political environment surrounding other legislative debates. Structural factors, such as passage of the Seventeenth Amendment and the creation of confirmation hearings, have led to a process for judicial appointments that has made senators especially sensitive to interest-group and constituent pressures. External factors, such as the rise of powerful interest groups and extensive media coverage of confirmation hearings and nominees' backgrounds, have put judicial appointments at the center of the American political stage. Finally, the Judiciary, because of its propensity to embroil itself in important cultural, social, and political issues over the past fifty years, has made the stakes surrounding each appointment to the federal courts higher than ever.

It is an understanding of the new politics of judicial appointments that will permit more probing scholarly inquiries into the normative and foundational questions about appointments on which legal scholars have been so intently focused over the past twenty years. A better understanding of the process is also essential to crafting strategies for dealing with appointments—especially for presidents, who have been met with stiff resistance to their appointments at all levels of the federal Judiciary, but especially to the circuit courts, in recent years. It is to that question of navigating the new politics of judicial appointments to which I will next turn my attention.[337]

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335. Dana Milbank, *Bush's Democratic Weapon*, WASH. POST, May 10, 2001, at A1.

336. Helen Dewar, *Landmark Education Legislation Gets Final Approval in Congress*, WASH. POST, Dec. 19, 2001, at A8.

337. *See* Stras & Scott, *supra* note 4.