

CONSTRUCTING COURTS IN POLARIZED TIMES

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U.S. politics has in recent years been characterized by acute polarization. Its two major parties have become more internally cohesive, more extreme ideologically, and more distinct and opposed to one another in their policy preferences. Although there is some disagreement about whether Americans themselves are more extreme and more sharply divided in their policy views and partisan loyalties (Wilson 2006, Fiorina 2006, Glaeser and Ward 2006), it is undisputed that political elites are. Scholars have just begun exploring the consequences of this political development for courts.

Most studies focus on the judicial selection process, as I do in this essay, while others are concerned with polarization's effects in other areas, such as judicial independence and public confidence in courts. For example, Binder (2008) blames on polarization in Congress recent threats to judicial independence like an increased number of jurisdiction-stripping laws and Congressional stalemates over judicial pay. Additional consequences of polarization reported by Binder and Maltzman (2005) are judicial vacancies and associated problems of docket overload and delay. Other scholars are concerned that a contentious Senate confirmation process may undermine confidence in courts, thereby threatening their legitimacy. For example, Maltzmann's survey experiment found that participants, especially independents, were less likely to agree with and trust a hypothetical judge reported to have emerged from a contested confirmation process (discussed in Binder 2008, 125-7). Gibson and Caldeira (2007) found a reduction in public confidence in the Supreme Court and its decisional neutrality following negative ads against the Alito nomination. Finally, Ditslear and Baum (2001) saw polarization at work in the way Supreme Court justices recruit their clerks, drawing increasingly from ideologically-compatible courts of appeals judges.

I review current research on the consequences of polarization for judicial selection, directing it and our attention to a critical normative task: insuring that the selection process enables politically-responsible officials to construct representative courts. Our ultimate aim is improving the democratic construction project that is (or should be) the law.

Two questions will organize this analysis. One question addresses whether, despite polarization, courts can serve as a source of bipartisanship and moderation in the United States, as scholars like Rosen (2005) and Perry and Powe (2004) contend. The second question conditions the answer to the first and asks whether courts can be effectively directed in a politically polarized environment. Many recent assessments say “No,” alleging that the current selection process is broken, characterized by bitter confirmation battles and appointments gridlock. However, these claims are frequently ahistorical and prone to hyperbole. Partisan polarization has not, I will argue, created a host of new problems for judicial selection. It has instead augmented and intensified pre-existing pressures on the judicial selection process, making perhaps too heavy a load the democratic task of constructing representative courts. We must be especially concerned with the potential for executive over-reaching, permitting presidents to appoint judges whose extreme views lack strong electoral support. Nonetheless, confirmation delay and the judicial filibuster are, in my view, signs of resilience in the judicial selection process; they represent logical and positive adaptations to pathological developments in our elective institutions like polarization.

Normative Expectations for Judicial Selection

A focus on the effects of polarization on federal court appointments is certainly justified in light of the considerable partisan rancor and gridlock we have witnessed in recent years. It is

additionally justified because of the important role of court composition in legal policy change. Transformations in constitutional law for example are much more likely to occur through doctrinal changes adopted by the Supreme Court rather than through formal amendments enacted under Article V. This makes critically important whom we place on the federal bench, especially the appellate bench responsible for the development of new legal policy norms. It also makes critically important the task of monitoring the health of the judicial selection process.

The selection of American federal judges has always been more political and partisan than in other democratic nations. In judicial systems in Europe, for example, the tasks of statutory interpretation and constitutional review are assigned to separate courts, with appointments to constitutional courts subject to super-majoritarian approval in light of their more political and discretionary duties. Moreover, European judges are more often recruited through a civil service system emphasizing merit. In contrast, American federal courts exercise both ordinary legal and extraordinary constitutional functions, while its members are selected by the president and a simple majority of senators. Additionally, recruitment has traditionally followed a path of partisan activism.

Scholars like Bruce Ackerman (1988) and Isaac Herzog make much of these differences, noting how structural and procedural characteristics confer legitimacy on judicial interpretation. Herzog observes such commonalities among constitutional interpreters in the democratic world as decision making by large and plenary panels, longer terms, and a membership appointed by several branches through gradual and/or super-majoritarian means. These features, Herzog argues, insure that constitutional law is “immune to the clutch of single majoritarian decisions;” interpreters are broadly representative and their decisions are carefully reflective. Constitutional interpretation rightly demands deliberation and broad public support, as with the original

adoption of constitutional provisions. Bruce Ackerman (1988) similarly observes that formal Article V processes insure that constitutional change earns strong, broad, and enduring support, both popular and elite. In contrast, informal constitutional change accomplished through “transformative appointments” requires only the momentary approval of the president and a Senate majority, with the president enjoying a considerable advantage due to his initiating role. Because it is much weaker in terms of popular responsiveness and “institutional weight,” transformative appointments must be regarded as a faulty and elitist method of constitutional change. The danger, as Ackerman emphasizes, is that presidents may succeed in securing significant changes in constitutional law without the broad and deep political support that such constitutional shifts require in a democracy.

I too have posed certain conditions as enabling democratically-responsible legal policy change. I have argued that when ideology is paramount in the judicial selection decisions of elected officials and a judge’s ideology in turn strongly influences her decisions, the requirement of democratic responsibility is substantially satisfied (1999). These conditions insure that recently elected officials supply an ideological anchor for future judicial decisions. Elections producing a broadly representative president and Senate will also enhance the democratic quality of the judicial selection process, as will a balance of power between the two. Finally, regular turnover on the federal appellate bench, and thus frequent updating of its ideological composition, would also logically contribute to a more representative judiciary. In contrast, when elected officials are more extreme than their constituents or when one institution dominates the selection process, judges with immoderate and unrepresentative views are more likely to be appointed. Additionally, those views receive lengthier representation when judicial terms increase and turnover declines.

How has party polarization affected these conditions supporting an effective judicial appointments process? Has it weakened the ability of elected officials to construct representative appellate courts?

Reconsidering “The Confirmation Mess”

Most recent assessments say yes, claiming that the current selection process is broken. Carter speaks of “the confirmation mess” (1994) and Wittes of “the confirmation wars,” describing the current process as much “uglier, meaner, and rougher than it used to be” (2006). Davis characterizes the appointments process as a “political battleground where groups wage holy war and tactics reflect a no-prisoners approach to combat” (2005). The list of complaints is long: excessive attention to ideology generally and the abortion issue more particularly, heightened media scrutiny, interest group participation that is escalating and increasingly inflammatory, growing Senate delay to the point of gridlock, declining confirmation rates, meaningless if not deceptive dialogue in confirmation hearings, rancorous debate, and extraordinary partisan hostility that jeopardizes judicial independence and legitimacy. Michael Comiskey (2004) has referred to these claims collectively as “the legalist critique,” one that is typically offered by law professors and journalists rather than political scientists. He offers a response with which I largely agree and to which I add.

As the analysis below indicates, many of these standard criticisms of the current selection process are exaggerated, lacking historical perspective and an appreciation of powerful confounding influences. There are, in fact, significant areas of historical continuity, such as interest group and media involvement, ideological review, and strong but intermittent conflict. Additionally, sorting out cause and effect is quite difficult, with a number of modern

developments competing with polarization as possible causes for recent confirmation clashes: divided government, an expanded policy making role for courts (beginning with *Brown*), an increasingly open and democratic Senate, an explosion in interest group numbers and activity, the loosening of the New Deal's stranglehold on American politics, and a federal bench that is closely balanced in partisan terms. Where polarization fits in this complex of political forces affecting judicial selection remains an open question, though I am inclined to agree with Martin Shapiro that it has not necessarily caused recent "confirmation heat" though it has no doubt "influence[d] the shape and temperature of the flame" (2008: 137). Finally, I regard recent developments in the judicial appointments process---strategic presidential selection behavior, confirmation delay, and the judicial filibuster---as healthy adaptations in an increasingly pressured environment. These responses should be commended not lamented, although they may ultimately prove insufficient in enabling politicians to construct representative courts that serve as a source of moderation in American politics.

A primary legalist objection focuses on the lengthy and intensive scrutiny to which Senators have recently subjected judicial nominees, with additional concern expressed over its increasingly contentious and confrontational style. The truth of the matter is more complex, as a broader historical view reveals. For example, with regard to nominations to the Supreme Court, Senate rejections were far more frequent in the nineteenth century, when one out of every three nominees was rejected. In the 74-year span between 1894, when the Senate rejected two nominees, and its refusal to vote on Abe Fortas's proposed elevation to Chief Justice in 1968, only one nominee was rejected by the Senate---Judge John Parker, nominated by President Hoover in 1930. Additionally, few Supreme Court nominees generated conflict or opposition votes, with Mahlon Pitney, Louis Brandeis, and Charles Evans Hughes as notable exceptions.

The critics are correct that we have since witnessed a return to a higher rejection rate, with three nominees formally defeated since 1968 (Haynsworth, Carswell, and Bork) and four more rejected informally by withdrawal or the Senate's refusal to act (Abe Fortas as Chief Justice, Homer Thornberry, Douglas Ginsburg, and Harriet Miers). In addition, nine nominees since 1949 (Minton, Harlan, Stewart, Marshall, Rehnquist (twice, as associate and Chief Justice), Thomas, Roberts, and Alito) have received at least ten negative votes, and the last two (Roberts and Alito) more than twenty.

It is in the lower courts where confirmation changes have been most significant. Confirmation rates for both district and circuit court judges have seen a steady decline since the 1970s and are currently at a fifty-year low. As Wittes reports, 92 percent of President Carter's circuit court nominees were confirmed, compared to 71 percent for President Clinton (2006, 39). Nearly 100 percent of appellate court nominees were confirmed in the 1950s and about 90 percent in the 1970s, but only half of George W. Bush's circuit court nominees have been confirmed, including a startling drop to less than 40 percent in the 2001-2002 Congressional session (Binder 2008, 115-6; Binder & Maltzman 2005, 300-1). However, there is some historical precedent, as Binder (2008) points out; confirmation rates for appellate court judges dropped to 60 percent in 1911-1912 and 58 percent in 1931-1932, both a result of Democratic senators wishing to save judicial vacancies for a Democratic president.

The growing length of the confirmation process also serves to document more aggressive Senate review. Of course, in the past, Senate inquiry was quite minimal and committee hearings were held only sporadically. Supreme Court nominees did not testify at Judiciary Committee hearings until 1925 and, even after that, nominees often did not participate either because they were not invited or refused to testify, with Sherman Minton the last nominee declining to appear.

Judiciary Committee hearings were in any case quite short, for example devoting only one day to the controversial nomination of Judge Parker (who did not testify). That has certainly changed. As Comiskey notes, the number of pages necessary to transcribe the Senate's confirmation hearings for Supreme Court justices has risen exponentially---from an average of 42 pages from 1930 to 1949, to 264 pages from 1950 to 1969, to a 1,117-page average from 1970 to 1994 (2004: 12). Supreme Court nominees from the presidency of Warren Harding through that of John Kennedy only had to wait an average of twenty-three days between the announcement of their nomination and the Senate's confirmation vote; in contrast, Ginsburg and Breyer, two rather uncontroversial nominees, had to wait seven and eleven weeks respectively (Comiskey 2004, 152). Only 12.6 days elapsed on average from 1931-1950, nearly 58 for the 1951-1970 period, about 39 for the 1970s, over 94 for the 1980s (including 115 for Robert Bork) and nearly 76 from 1991 to 1994 (Davis 2005, 67-8). Additionally, Senate questioning is increasingly negative according to a study by Williams and Baum (2006). Clearly, Senate scrutiny of Supreme Court nominees is greater than before, though few for obvious reasons advocate a return to the highly casual proceedings of the past, when confirmations were handled over the course of a few days without open hearings, debate, or publicly-recorded votes.

Confirmations have become more protracted for lower federal court nominees as well. Compared to Reagan's judicial nominees, Clinton's district court nominees had to wait five times as long and his appellate court nominees seven times as long to receive Senate confirmation (Binder & Maltzman 2005, 299). In the 1945-1946 Congressional session, the average number of days between nomination and confirmation was 17 for district court nominees and 20 for circuit court nominees, while the 100th Congress that included the Democratic Senate defeating Robert Bork took an average of 136 days to consider district court nominations and

172 days for circuit court nominees (Wittes 2006, 38-9). This increased again in the Republican Senate of 1995-1996 to 194 days for appellate court nominees and increased further in the next two Congressional sessions (262 and then 304 days) (Wittes 2006, 39). According to most measures, George W. Bush's nominees have fared even worse. Though it is certainly more commonplace today, significant delay in the confirmation process is not unique to modern times. Binder and Maltzman report that the Democratic Senate stalled some of Eisenhower's nominees for longer than seven months (2005, 300).

Recent confirmation delay has increasingly taken the form of obstruction, with more nominations stalled in committee, "blue-slipped," or filibustered. For example, only 85 percent of district court nominees and 55 percent of circuit court nominees in the 107th Congress received hearings at all, compared to 100 percent in the 95th Congress (Goldman 2003), and only 47 percent of Clinton's circuit court nominees received confirmation hearings during his last two years in office (Law & Solum 2006, 89). Sheldon Goldman's index of obstruction and delay (2003) shows over 50 percent of circuit court nominees being stalled from the 102nd Congress (1992-1992) through the 107th (2001-2002) (Basinger & Mak 2006, 33). Additionally, Senate Democrats filibustered four appellate court nominees in the 107th Congress and 10 in the 108th, a sharp contrast to the eight cloture petitions filed for circuit court nominees in 11 previous Congressional sessions (Basinger & Mak 2006). Only 2.6% of cloture votes concerned judicial nominations from 1949 to 2002, with this figure spiking to 45.5% in the 108th Congress (Stras 2008, 1075). Democratic filibusters in turn prompted the so-called nuclear option (initially dubbed "the Hulk") in which Republicans would defeat the judicial filibuster through a parliamentary move requiring only majority support. Despite Democrats threatening to shut down critical Senate business if the nuclear option was adopted, the Republican leadership in

spring 2005 began to take steps to execute its plan, preferring to use “the constitutional option” moniker. The so-called “Gang of Fourteen” (or “Mod Squad”), a bipartisan group of fourteen moderate senators, averted the crisis by drafting a compromise in which the seven Republicans agreed not to vote for the nuclear option and the seven Democrats agreed to vote on three filibustered nominees and use judicial filibusters in the future only under “extraordinary circumstances.”

The legalists’ concern is not only with the confirmation process being long, intense, and gridlocked, but with the nature of that inquiry, believing that it is, but should not be, driven by ideology, interest groups, and media coverage, and an excessive emphasis on scandal and controversy. With regard to ideology, Epstein and Segal (2005) make clear in their historical analysis that partisanship and ideology have long been the dominant considerations in the president’s selection of Supreme Court nominees and their subsequent treatment at the hands of the Senate. Following George Washington’s lead---he selected Federalists for all of his fourteen Supreme Court nominations---Presidents have recruited nominees from within their own political party nearly 90 percent of the time; 133 out of 150 individuals have been same-party nominees (Epstein & Segal 2005, 26-7). Additionally, no president has chosen an opposite-party nominee since 1971 when Richard Nixon selected Lewis Powell, a conservative Democrat, as part of the president’s electoral strategy of wooing the South. Nemacheck (2007) further finds that presidents systematically select the most ideologically proximate nominee from the short list of candidates when they are free to do so (i.e., when the president’s party controls the Senate).

Partisan and ideological considerations are also paramount in Senate confirmation voting. Same-party senators support their president’s nominees with 94 percent of their votes, with opposite-party senators providing only 76 percent of their votes (Epstein & Segal 2005, 107).

From 1953 to 2004, ideologically-proximate nominees received 98 percent of senators' votes, while ideologically-distant nominees received only 57 percent of senators' votes (Epstein & Segal 2005, 113). Finally, Supreme Court nominees are much more likely to be confirmed when the presidency and Senate are controlled by the same party (90 percent) than when they are controlled by different parties (59 percent) (Epstein & Segal 2005, 107). This holds true for nominations to the lower federal bench as well, with 94 percent of district and appellate court nominees confirmed during unified government and only 80 percent during divided government over the last 55 years (Binder & Maltzman 2005, 302). Partisanship is influential in another way as well: judicial nominations to circuit courts that are evenly split in terms of partisanship produce greater confirmation conflict and delay (Shipan & Shannon 2003, Binder & Maltzman 2005, 302). Clearly, partisanship and ideology have exerted, and continue to exert, a powerful influence in the decision making of presidents and senators when selecting new members to the federal bench. Whittington, however, offers an interesting twist, observing that ideology-based Senate rejections of Supreme Court nominees "without an overhanging election, is a modern phenomenon" (2006), with the defeat of Haynsworth, Carswell, and Bork as examples of this new development; he thus regards the modern Senate as "extraordinarily activist by historical standards." Comiskey too observes an increased willingness by senators to cast "ideologically inspired" votes in recent Supreme Court nominations (2008).

It is not only ideological review, but the "abortion obsession" that has received significant criticism. Recent Republican Presidents have sought judicial nominees opposed to *Roe v. Wade*, with Democratic Senators struggling to keep them off the bench. Fueled by intense group pressure, senators on both sides of the aisle use abortion as a litmus test and try to extract policy commitments from nominees, potentially threatening judicial independence in the process.

We witness the spectacle of nominees either refusing to answer senators' questions or evading them with vague, meaningless responses or apparent lies, as with Justice Thomas's claim that he had never developed an opinion, not even privately, on the Court's abortion decisions. Thomas in fact was asked more than seventy questions relating to the Court's *Roe v. Wade* decision in his confirmation hearings (Stras 2008, 1069), and Ward's study confirmed that abortion, along with executive authority, was more frequently addressed than all other substantive issues in Alito's Senate Judiciary Committee hearings (2008).

Media coverage of lower federal court nominees in the past was virtually nonexistent; although it has increased, it remains limited and sporadic. For Supreme Court nominees, however, the media's presence and scrutiny is much greater compared to the past. According to Richard Davis, the number of stories on Supreme Court nominations reported in *The New York Times* increased 38 percent when comparing the pre-Bork and post-Bork periods (2005, 98). Additionally, during the seven-week period between the nomination of Ruth Bader Ginsburg and her confirmation by the Senate, the *New York Times* ran 42 more stories about her than the justice she was replacing---Byron White (2005, 98). The *New York Times* ran sixty more articles about William Rehnquist when nominated for Chief Justice compared to Warren Burger's nomination to the same position eighteen years earlier (Eptein et al. 2005, 1151-2). Included in this reporting is an abundance of poll data. This represents a dramatic increase, according to an American Enterprise Institute study which reports a single poll question posed by Gallup regarding Frankfurter's nomination, a dozen questions by Louis Harris regarding Fortas's elevation to the Chief Justice seat, about 200 survey questions in 1986 and 1987 regarding Robert Bork and Douglas Ginsburg, and over 400 poll questions about Clarence Thomas's nomination (Bowman 2006). Increased polling and expanded media coverage afford far more

opportunities for public posturing by interest groups and politicians and more reporting of public statements by presidents, senators, and nominees.

Nonetheless, media attention to Supreme Court nominees is not a modern phenomenon, nor is negative coverage or reports of scandal. For example, harmful press coverage of George Washington's nominee John Rutledge, both on personal and political grounds, set in motion a vigorous public debate and rejection by the Senate, leading Prof. Maltese to conclude that "John Rutledge had been 'Borked'" (Maltese 1995, 31). Alexander Wolcott, Louis Brandeis, and Hugo Black, all nominated prior to the modern era of televised hearings and intensive media attention, also suffered harsh attacks reported in or generated by the press (Epstein & Segal 2005, 93). It is accordingly difficult to attribute negativity and conflict to the recent advent of televised Supreme Court confirmation hearings or to increased media coverage. Additionally, Comiskey points out that: television ratings for Supreme Court confirmation hearings are generally quite poor; the well-publicized charges against Fortas, Haynsworth, and Carswell did not require televised hearings to fuel them; and there are positive effects of television coverage, with senators more likely to show up, make an opening statement, ask more questions, and stay for the entire hearing (2004, 78-82).

Legalists are also strongly concerned about the growing involvement of interest groups in judicial selection and their zealous and confrontational style. The policy making activities of federal courts have definitely made it onto interest groups' radar, and their leaders have learned that involvement in judicial nominations provides a relatively low-cost vehicle for advancing the group's policy, membership, and policy objectives. Davis (2005), Bell (2002), and Scherer et al. (2008) believe interest groups have transformed the appointments process into a something closely resembling normal electoral and legislative battles with "warring factions" competing for

control. Interest groups, in their view, have raised the stakes of judicial appointments by mobilizing their grass roots, injecting both money and vitriol into the process, and exerting strong pressure on senators to take the correct ideological position in approving or rejecting particular nominees.

These critics are correct that interest group activity in the judicial selection process is more voluminous and routine today. Nonetheless, it is not new. Interest group activity in the Supreme Court confirmation process can be traced to 1881, when progressive groups hostile to railroad interests lobbied against Justice Stanley Matthews' ascent to the Court. Opposition by labor and civil rights groups played a critical role in the defeat of John Parker in 1930 and Clement Haynsworth in 1969. There is also historical precedent for interest group pressure on presidents in selecting their Supreme Court nominees (Nemacheck 2007, 47-51). Although interest group activity in the Supreme Court confirmation process has existed historically, it was fairly sporadic until the late 1960s. No formal interest group testimony was given in four of the nine Supreme Court confirmation hearings from 1954 to 1967 and in only one of the five instances (Harlan's hearings) was there more than one or two groups providing testimony; however, from 1968 through 2006, a median of fourteen groups testified (Epstein et al. 2007, 391-2). Of course, Bork and Thomas both experienced extraordinary interest group mobilization, with 38 and 43 groups (respectively) participating in their Senate confirmation hearings; this grew to 69 groups offering their views on the Roberts nomination and 72 on Alito's nomination. The average number of interest groups participating in Supreme Court confirmation hearings increased sharply from 8.9 in the 1968-1981 period to 35.1 from 1986 to 2006 (Epstein et al. 2007, 391-2). Interest group activity, particularly since the 1980s, has extended to the lower federal bench as well (Caldeira, Kojnacki & Wright 2000). Bell found that

interest groups participated in federal judicial nominees 12.9 percent of the time from 1979 to 1998, though more frequently for circuit court nominees (19%) than other lower court nominees (9%); additionally, such participation is effective, significantly reducing the likelihood of confirmation (112-3, 118). Scherer reports that no lower court nominee attracted official interest group opposition between 1933 and 1972, while thirty nominees were opposed between 2001 and 2004 (2005, 4). Finally Comiskey (2008) observes in the last few years an increase in the number, resources, and sophistication of interest group participants (particularly conservative groups) in Supreme Court appointments, with more effective grassroots mobilization and more spending, including \$4.3 million on television commercials on the Roberts, Miers, and Alito nominations (with the bulk, \$2.4 million, spent on Alito) and a promise (though unfulfilled) by Progress for America to spend \$18 million to insure conservative replacements for O'Connor and Rehnquist. Interest groups are now very well-organized and effectively poised to respond promptly and vigorously to judicial vacancies, as with the National Abortion and Reproductive Rights Action League emailing 800,000 activists within 15 minutes of hearing of O'Connor's retirement (Jehl 2005, A7).

Critics postulate several negative consequences from this more open and contentious process. One is a concern for candidate quality, with fears that superior candidates will be deterred and that judicial nominees will be chosen more for their confirmability than their objective qualifications. Because of the presumably more hostile environment in which candidates are today placed, presidents, it is argued, will hesitate and likely refrain from selecting brilliant and inventive legal thinkers. Instead they will choose uncontroversial figures who are "merely competent," possess no paper trail, and around whom an effective confirmation strategy can be designed. A related concern is that senators, in their obsessive focus with

nominee ideology and interest group opposition, will fail to scrutinize a candidate's legal skills and professional credentials.

Empirical evidence suggests that concern over nominee quality is unjustified, at least with regard to the Supreme Court. Comiskey's review of various scholarly surveys rating Supreme Court justices offers mixed evidence: while the justices appointed since 1967 are not in general any less competent than in the past, there do seem to be somewhat fewer "great" justices (2004, Ch. 4). Epstein and Segal observe that qualifications have always been a concern of presidents in their nomination decisions. Measuring nominee qualifications by analyzing newspaper editorials prior to confirmation, there have been only a few nominees since 1953---Haynsworth, Carswell, and Thomas, with Harriet Miers a recent addition---whose abilities and experience raised serious objections. Epstein and Segal also demonstrate in Senate confirmation voting a strong concern with nominee qualifications. Since 1953, nominees regarded as highly-qualified have received on average nearly 45 more votes than nominees regarded as unqualified, indicating that "senators almost always vote for candidates perceived as highly qualified but are far more suspect of those with lower merit" (Epstein & Segal 2005, 103). The argument that ideological conflict and partisan gamesmanship in the contemporary selection process has crowded out a proper concern with merit appears groundless according to these social science studies.

A final criticism concerns the poor quality and deceptive nature of the national dialogue over judicial nominees, particularly those to the Supreme Court. Presidents frequently fail to disclose their true ideological motives in their selection decisions, as with the persistent claims of Republican presidents like Nixon, Reagan, and W. Bush that they will only select "strict constructionists" or when presidents succumb to the temptation to put forward stealth nominees

lacking a paper trail like David Souter and Harriet Miers. Nominees continue the charade by offering empty platitudes regarding their devotion to the law, justice, the constitutional text, separation of powers, judicial restraint and, of course, their admiration for (the second) Justice Harlan, with Justice Jackson recently joining the short list of justices who can be safely admired in confirmation hearings. The interplay between senators and nominees in the confirmation process, now a “carefully scripted [and]...nationally televised spectacle” (Grossman 2005, 159), is nothing short of farcical. Confirmation hearings have become “a meaningless charade” (www.salon.com/news/feature/2006/01/12/alito_hearing/) a “partisan pony show” (Ward 2008, 9), “a meaningless Kabuki dance” (Sen. Biden) and “ a subtle minuet, with the nominee answering as many questions as he thinks necessary in order to be confirmed” (Sen. Specter, *Washington Post* 1/9/06). Senators belonging to the president’s party praise the nominee and disingenuously lob soft-ball questions;¹ opposition-party senators struggle to extract information regarding the nominee’s decisional propensities, resulting routinely in refusals to answer, vague generalities, or simple factual assertions about existing precedents. Among presidents, nominees, and senators, few participants are forthcoming about where they wish to take the Court and the law. An empirical study by Czarnezki, Ford and Ringhand (2007) found that recent confirmation hearings have provided little valid information that effectively correlates with nominees’ future decisions. It is no wonder that we have seen numerous calls for reform, perhaps by shortening confirmation hearings (Davis 2005), improving senators’ ability to pose effective questions (Eisgruber 2007, Post & Siegel 2006, Chemerinsky 2006, Czarnezki et al.

¹ Senators Hatch, Sessions, and Graham were among the most prolific lobbies in the Alito hearings, asking such questions as: “Can you assure us that you will have the courage and the determination to rule according to your best and highest judgment?...You were a member of the ROTC---is that true? You were a proud member of the ROTC? Did you enjoy your time in the ROTC and in the Army afterward?...How many branches of government are there? Are there more than three branches of government?...Should judges make up their minds about cases before they hear oral argument?...Do you take the position that judges have a duty to respect constitutional restraints?” And the question that brought Alito’s wife to tears: “are you a closet bigot?”

2007), no longer requiring nominees to appear before the Senate Judiciary Committee (Stuntz 2005, Wittes 2006, O'Brien 1988), or requiring pre-nomination consultation and screening (Wittes 2006, Wheeler 2008).

In response, Prof. Comiskey defends Senate confirmation hearings not for their ability to uncover new evidence but for their ability to confirm what we already know (2008). He has considerable confidence in the Senate's ability to identify the ideological views of Supreme Court nominees and thereby to resist presidential attempts to pack the Court. Though they may be unable to compel nominees to state their views honestly, that does not inhibit senators from accurately grasping those views. After all, there is typically a sufficient pre-nomination record, particularly for Supreme Court nominees, to make a valid ideological appraisal, with David Souter a rare exception to that rule. Additionally, recent appointees---including Rehnquist, O'Connor, Scalia, Kennedy, Thomas, Ginsburg, and Breyer---have performed very much as expected. Furthermore, greater candor carries risks, Comiskey argues, including the possible rejection of acceptable nominees like Souter, Kennedy, and O'Connor and deadlock over judicial appointments.

To summarize, legalist critics correctly point to several important developments in the judicial selection process. Media coverage has greatly expanded; interest group participation has increased in volume, passion, and regularity; and partisan conflict and delay have increased, as have Senate rejection rates for lower court judges and negative votes for confirmed Supreme Court nominees. However, there is historical precedent for many of these phenomena. Political sabotage of a nominee's confirmation through interest group lobbying and inflammatory charges in the press is nothing new. Nor is the intensive consideration of a nominee's ideology by the Senate. While partisan rancor has escalated, we must remember that conflict periodically

erupted in the past and that a larger proportion of Supreme Court nominees were rejected in the 19th century than in the 20th. Finally, most judicial nominations attract little controversy and are confirmed in the Senate, both historically and currently. This evidentiary clarification by political scientists helps to rein in and lend perspective to many of these exaggerated claims.

Broader Forces Transforming the Selection Process

Identifying more carefully and precisely what the “new” developments are that need explaining, however, is only the first challenge. Additionally critics too often casually rather than carefully attribute these developments to polarization. Many commentators in fact make no effort to test or prove causation, and the few who do, most notably Binder (2008) and Binder and Maltzman (2005), often run into difficulty. Major obstacles include the small number of occurrences, particularly for Supreme Court nominations, and the fact that they take place over a considerable period of time during which other forces intervene and contribute as well. In fact, a number of factors in addition to polarization have been at work influencing the politics of the judicial selection process.

An accurate causal narrative of recent developments in judicial selection would include a variety of factors. First, we have a more open and democratic Senate, with direct election of members after adoption of the Seventeenth Amendment in 1913. This led in turn to pressure for a more public legislative and appointments process. In fact, the Senate held open hearings on a Supreme Court nominee for the first time in 1916 (for Louis Brandeis), and in 1925 a Supreme Court nominee (Harlan Fiske Stone) first appeared before the Senate Judiciary Committee, although the latter---personal testimony by nominees---did not become routine until the 1950s.

In 1929, the Senate amended its rules to open judicial nominations debate to the public and to require roll-call votes on all judicial nominations.

A more democratic process for consideration of judicial nominees permitted if not invited interest groups into the judicial appointments process (Bell 2002). Since 1960, interest groups have exploded in number and variety, and they have increasingly seen courts as important in terms of policy and properly so (Maltese 1995; Holmes 2007; Bell 2002). As the policy making activity and power of federal courts has grown, most notably beginning with *Brown*, so has political attention to them. *Brown* for example prompted aggressive questioning by Southern senators regarding the integrationist views of Supreme Court nominees like John Harlan and Potter Stewart. Modern courts are increasingly involved in a variety of high-stakes policy areas of great interest to organized groups, including affirmative action, religion, privacy, gun control, abortion, gay marriage, and government regulation of the workplace, consumer products, and environmental quality. Enhanced awareness of courts' lawmaking role and growing acceptance of the legal realist view that judges' personal views affect their decisions (Segal & Spaeth 2002) naturally leads to greater salience for ideology in judicial selection (Scherer 2005). We should not be surprised that the nominations process has consequently become "the flashpoint in the struggle over constitutional meaning" and "constitutional law...little more than a political spoil" (Marshall 2004-2005, 526).

Recognition of the enhanced policy making power of the lower courts has more sharply focused political attention on who sits on these courts as well. The fact that Supreme Court justices are increasingly drawn from the lower federal bench (Peretti 2007) further magnifies the importance of district and especially appellate court appointments. That certainly played a role in Democratic Senators stalling the nomination of Miguel Estrada who was frequently touted as a

possible Supreme Court nominee. In May 2001, President Bush nominated Estrada to the D.C. Circuit, a court from which many recent Supreme Court nominees have been drawn. The strong reservations of Senate Democrats and liberal groups led them to delay his nomination. Bush renominated Estrada in 2003, but Democrats used the filibuster to prevent a vote on his nomination. After 28 months in limbo and seven failed cloture votes, Estrada withdrew his name from consideration in September 2003.

The Estrada episode illustrates a sea change in the politics of lower court appointments. Federal district and especially appellate courts are now seen as having great policy relevance and have become the subject of considerable political interest by both parties and both executive and legislative branches. The geographic distribution of lower federal courts among the several states led early on to a sense of ownership on the part of senators. Seats on the lower federal bench were regarded as a valuable source of patronage, and institutional rules and practices grew up around that expectation. Thus, home-state senators could use the blue-slip procedure to indicate their support or opposition to presidential nominees to federal courts in their state, and Judiciary Committee chairs accorded great weight to those judgments. In fact, for most of our history, the judgments of home-state senators were dispositive. As the policy and thus political significance of lower courts has increased, presidents have given them greater attention, using lower court appointments to satisfy electoral and policy goals. This represents a remarkable shift in the politics of lower court appointments---from a Senate-controlled patronage model to a presidentially-led ideological model. It is no wonder that we have experienced major bumps along this road.

Also competing with polarization as a cause of judicial selection changes, particularly the escalation of partisan conflict, are three final developments: the increasing prevalence of divided

government, a close partisan balance on the federal bench, and the decline of the New Deal's hold on national politics. There is broad agreement that divided government has contributed to increased friction in the selection process in recent years. We know that 90 percent of Supreme Court nominees are confirmed when the same party controls the presidency and Senate, but only 59 percent under conditions of divided government (Epstein & Segal 2005, 107), and 80 percent of elections from 1980 to 2006 have produced divided party control of the legislative and executive branches, with 60 percent of elections from 1968 to 2006 resulting in divided party control of the White House and Senate. Heightened conflict, confirmation delay, and more votes to reject are logical consequences of nearly half of the Supreme Court nominations from 1954 to 1994 (fifteen of thirty-one) occurring under conditions of divided government, compared to only two of thirty-six nominations from 1897 to 1954 (Comiskey 2004, 17). Whittington's historical study found, however, that it was the combination of divided government and an approaching presidential election that doomed Supreme Court nominations before 1900; since 1900, divided government has operated powerfully on its own to reduce the chances of Senate confirmation (2006).

Binder and Maltzman's evidence indicates that divided party control increases "confirmation risk" for circuit court appointments as well, particularly for "critical" nominations, i.e., when partisan control of that circuit is at stake (2005, Shipan & Shannon 2003). This has been a major problem for the Sixth Circuit, with a long-running stalemate leaving up to one-quarter of the seats vacant, including one for five years, as Democrats have been determined not to allow Bush to fill several vacancies he inherited as a result of Republican obstruction of Clinton's nominations to those seats.² Partisan balance, both generally and on particular circuits

² A recent compromise was developed in which two controversial Bush nominees to the 6th Circuit would be withdrawn, several others allowed to proceed, and Democratic Senators permitted to fill one seat. However, the

like the Sixth, plays a significant role in confirmation politics. Thus, it is quite important that the federal courts were evenly balanced between the two parties after the 2002 elections, with Republican presidents having appointed 398 of the active judges and Democratic presidents having appointed 400 (Binder & Maltzman 2005, 313). The Democrats made a conscious decision to fight aggressively to minimize future losses on the federal bench, particularly on closely divided circuit courts. Strategic use of the judicial filibuster and appointments gridlock were the result. That strategy has met with some success, given that the federal bench remains fairly balanced, with Republicans at the start of 2007 enjoying a slight edge in the district courts and a small but growing advantage on the appellate bench (Goldman et al. 2007). However, as pointed out by Goldman et al., Democrats have been assisted in their efforts to prevent significant partisan imbalance on the federal courts by the fact that most recent vacancies have been supplied by retiring Republicans (2007, 278-9).

A final confounding influence is offered by Shapiro (2008) who regards “confirmation heat” as the natural result of the weakening of the New Deal. When all three branches were united in furthering New Deal aims, he argues, conflict was reduced and the policymaking role of the judiciary was “masked” (Shapiro 2008). With Republicans winning seven of ten presidential elections from 1968 to 2004 and periodically winning control of Congress as well, it became clear to them that the New Deal judiciary was political and needed to be “diluted” if not reconstructed (Shapiro 2008). As long as Democrats retained some power in the government, however, there would be significant resistance to Republican efforts to dismantle the New Deal and create right-leaning courts, particularly as partisan balance approached and was then at risk.

Democratic choice, Janet Neff, was stalled by Senator Sam Brownback. Despite Brownback’s previous statement that all judicial nominees deserve an up or down vote, he placed a hold on Neff’s nomination because she had attended a lesbian civil commitment ceremony. This was not warmly received given the difficulties in securing this delicate compromise. After two subsequent 6th Circuit nominations were stalled, Brownback withdrew his hold, with this longstanding stalemate perhaps nearing an end.

The Role of Polarization in Selection Politics

So where exactly does partisan polarization fit into this narrative of the changes affecting the politics of judicial selection? Clearly, significant conflict would have occurred even without polarization, as Republicans gained power and sought to move courts rightward, but with Democrats retaining sufficient power to defend the status quo. Fueling this intensified competition to shape the bench was a potent interest group community mobilizing their grassroots and pressuring senators on appointments to all levels of the more activist and salient federal courts.

Pinpointing the nature and size of the contribution of polarization in these transformations has proven quite difficult. For example, Binder (2008) has argued that polarization increased Court-curbing bills in Congress, caused Congressional stalemates over judicial pay, reduced confirmation rates, and enhanced the power of presidents to place extreme judges on the bench. However, proof of causation is sometimes not offered or attempted. Additionally, the logic and testing of the latter nominee ideology claim are weak. Binder reasons that polarization reduces the number of moderate senators whose support presidents must obtain if they desire confirmation of extreme nominees. This is counter-intuitive, however, as “off-center presidents” facing a hostile, divided, and partisan Senate would be more likely to moderate their nomination choices in light of this constraint (McGinnis & Rappaport 2006). Additionally, Binder infers nominee ideology from the extremism of the confirmation coalition in the Senate. This leads to some surprising results, including a finding of high coalition extremity during Clinton’s second term indicating, in Binder’s logic, that his judicial nominees were extreme, which we know to be false (Wittes 2008). A more conclusive finding by Binder is

that polarization significantly affects confirmation rates for appellate court judges, exerting an even stronger influence than party control. The Binder and Maltzman study (2005) tested for the relative impact of polarization, finding for example that the size of the ideological gap between the president and opposing party in the Senate had a significant and negative effect, reducing by 50 percent the chance of a swift confirmation for courts of appeals nominees from 1957 to 1998. The authors conclude that “ideological differences between the parties encourage senators to exploit the rules of the game to their party’s advantage” (2005, 313), a claim borne out by recent history.

In my view, the most promising studies for understanding the impact of polarization on judicial selection borrow from Congressional scholars who study “pivotal politics” and seek to explain how the distribution of veto power shapes legislative outcomes (Krehbiel 1998). Judicial politics scholars seek to explain confirmation outcomes and borrow these analytical tools, with “the filibuster pivot” entering our lexicon. The pivotal politics approach fits well with several leading studies of the judicial selection process. For example, Cameron et al. (1990) and Segal et al. (1992) have demonstrated the importance of ideological distance between the nominee and senator in explaining confirmation voting. Moraski and Shipan’s influential game-theoretic model (1999) finds that presidents strategically choose Supreme Court nominees to bring the Court’s ideology closer to the president’s ideal point while accommodating Senate preferences and the need for confirmation. These studies make clear that ideological distance between the key players---the president, Senate, nominee, and Court---strongly affects presidential selection and Senate confirmation decisions. It logically follows that polarization, as a function of ideological distance between the two parties and thus often between the president and Senate, will strongly and directly influence selection process dynamics and outcomes. For example,

polarization expands the filibuster gridlock interval as fewer senators are moderate and more are found at the extremes (Rohde & Shepsle 2007).

These new studies productively focus on the ideological alignment among pivotal players in the judicial confirmation game---the nominee, the median senator, the filibuster pivot (the senator providing the 41st vote needed for cloture), the president, and the Court median---with confirmation success and duration dependent on how those pivotal players are arrayed. For example, increases in ideological distance between the president and filibuster pivot reduce both success and duration (Shipan and Shannon 2003, Binder & Maltzman 2005).

These studies, however, often over-predict gridlock and fail to account for such anomalies as presidents typically enjoying high confirmation rates and succeeding in appointing ideologically extreme nominees like Scalia and immoderate nominees who fall in the gridlock region and receive fewer than sixty votes, such as Thomas and Alito³ (Rohde & Shepsle 2007). A big part of the answer is the fact that not all appointment vacancies enable the president to secure judicial policy change by “moving the Court median” (Krehbiel 2007, Rohde & Shepsle 2007, Ruckman 1993). Thus, delay or gridlock is likely only when presidents have the opportunity and motive to shift the status quo (or “reversion policy”); not all judicial vacancies offer such opportunities and, in fact, many do not, thus helping to explain generally high judicial confirmation rates. Law and Solum’s pivotal-politics analysis (2006) of judicial appointments since 1976 effectively explains the rise and fall of confirmation delay and gridlock, and not simply as a function of divided government, as Bush’s recent difficulties with the Republican Senate suggest. Rather, appointments gridlock requires that vacancies have the potential to shift the status quo and not simply that the players’ preferences are heterogeneous. Additionally,

³ Thomas was confirmed by a bare 2-vote margin, and Alito received 58 votes, although 72 senators (including the entire Gang of 14) voted to end cloture on an attempted filibuster.

presidents can try to maneuver out of the gridlock region. They can react strategically to Senate constraints by selecting more moderate nominees, helping to explain the 90 percent confirmation rate for Supreme Court nominees since the end of the Civil War (Shipan & Shannon 2003). Presidents can also carefully select highly qualified candidates that even ideologically-opposed senators would find difficult to reject, such as John Roberts (Johnson & Roberts 2005), or they might go public or otherwise use their political capital to help secure confirmation for their nominees (Johnson & Roberts 2004).

Navigating the Perfect Storm

The pivotal players in the confirmation game have faced in the last few decades a confluence of forces comparable to “the perfect storm.” The competition for control in constructing the federal bench has greatly intensified as the New Deal has weakened; as federal courts gained policy making power and political salience; as organized groups focused on courts have multiplied in number, resources, and aggression; as divided government became more frequent; as federal courts approached partisan balance; and, yes, as parties have polarized and ideological distance between them and the two institutions controlling court composition has grown.

Politicians have responded to this perfect storm in logical and predictable ways, though some are more salutary than others. Confirmation delay and the judicial filibuster, for example, I regard as helpful in enabling the Senate’s advice and consent role and guaranteeing what the Constitution intends: shared power over judicial appointments. Less praiseworthy adaptations are “spite” and “stealth” nominations, recess appointments, and other attempts at unilateralism.

As courts have assumed greater policy making power, they logically and properly draw the attention of the public, interest groups, and elected officials who then invest greater energy in the appointments process. As Shapiro puts it, “Just how much ‘judicial independence’ can people who believe in electoral democracy be expected to take? And why shouldn’t they seek out one of the few avenues to democratic control available to them---the confirmation process?” (2008: 135). When appointments to the federal appellate bench become focused on policy and ideology, they naturally become the objects of partisan competition, with politicians using whatever tools and resources are available to them. When Republicans gained control of the Senate in 1994, they used that opportunity to block Clinton’s judicial appointments, with the confirmation rate of his circuit court judges dropping from 86.4% to 55.0% and Goldman’s index of obstruction and delay jumping from 0.063 to 0.526 (Basinger & Mak 2006, 33). The Democrats repaid the Republicans with delay and obstruction of their own beginning in 2001. After losing control of the Senate and thus the Judiciary Committee in 2002, blocking Bush’s nominees required an alternate method---the filibuster. Of course, Republicans have condemned the Democrats’ recent use of the judicial filibuster as “unprecedented” and a violation of Senate tradition and the Constitution (Cornyn 2003). They seem to have forgotten, however, their own successful filibuster in 1968 (with the aid of Southern Democrats), defeating LBJ’s nomination of Abe Fortas as Chief Justice. In any case, the Republicans formulated the nuclear option in response to Democratic filibusters, an option which was only narrowly averted. As Law and Solum (2006) remind us, judicial filibusters can now be used only to the extent that the “nuclear pivot” is willing to tolerate them, though this issue was recently rendered moot with Democrats regaining control of the Senate in 2006. What is clear is that each party seeks to exploit institutional rules and practices to its advantage and, of course, more polarized parties do so

more eagerly and aggressively. Toxic effects on inter-party relations can occur, however, when those rules and norms are breached too strongly and regularly, as some claim occurred with Orrin Hatch who, as Judiciary Committee Chair, began to disregard blue slips for appellate nominations and from a single home state senator.

“Strategic presidential selection” can be viewed as another adaptation----though a more positive one---to partisan and institutional conflict over judicial appointments. Nemacheck (2007) studied Presidents Hoover through (W.) Bush and found that, in devising the short list of Supreme Court candidates and making a final choice from that list, presidents seek to reduce uncertainty about both future nominee behavior and the likelihood of Senate confirmation. To accomplish the latter in times of constraint such as divided government, presidents have been more likely to open up the selection process, solicit input from Congress, and act on Congressional endorsements, particularly from senators in key positions; additionally, presidents have been less likely to choose ideologically-proximate nominees from the short list during divided government as compared to periods of unified government. Nemacheck believes that modern presidents have become more adept at such anticipatory selection behavior, explaining their surprisingly high rate of success since 1952 in securing Senate confirmation of their Supreme Court nominees, despite the increased incidence of divided government. Such strategic behaviors are quite constructive, particularly given the president’s built-in advantage in judicial selection: he initiates and leads the process, leaving the Senate merely to react, and his decision making process is far less visible to the public.

Of course, not all recent presidents have sought to accommodate Senate opposition. Some have ignored the constraint posed by partisan opposition in the Senate and have even sought to antagonize their rivals. McMahon observes a willingness by recent “presidents to

use...nominations as electoral bait in a nation divided along Red/Blue cultural lines” (2007, 945). Comiskey (2004) similarly believes it is presidents who have raised the judicial appointments stakes, deliberately provoking controversy with their strongly ideological nominations. Thus, presidents deserve the lion’s share of the blame for recent confirmation difficulties. Goldman (1997) and Eisgruber (2007) agree. As a leading study of the Senate confirmation process observed, presidents, even those who are weak politically, sometimes surprisingly choose to nominate candidates who are ideologically extreme or not well-qualified (Watson and Stookey 1995). Such choices inevitably trigger conflict in the confirmation process, tempting the president’s opponents in the Senate and interest group community to respond with a spirited campaign to defeat or at least challenge the nominee. For example, Lyndon Johnson was far too weak politically to get away with elevating a crony and symbol of Warren Court liberalism to the Chief Justice seat, particularly as Richard Nixon’s possible election victory drew near. It is neither a surprise nor a tragedy that, following the Senate’s rejection of Clement Haynsworth, Nixon’s “spite” nomination of the racist and poorly-qualified Harrold Carswell went down in flames. Comiskey characterizes the nominations of Robert Bork, Douglas Ginsburg, and Clarence Thomas as consciously provocative, with Reagan and Bush being well advised by White House staff and Congressional leaders regarding certain Senate opposition. Thus, “Presidents Johnson, Nixon, Reagan, and the first President Bush ignited every confirmation controversy of the last third of the twentieth century by nominating figures who were of questionable qualifications and/or ethics, or who held views that were known to be objectionable to a majority or a large minority of the Senate” (Comiskey 2004, 71). Failure in the case of Harriet Miers might also have been avoided had Bush exercised greater caution and employed wider consultation.

In contrast to these provocative presidential choices, the politically vulnerable Gerald Ford wisely or by necessity nominated the highly-qualified and ideologically moderate John Paul Stevens, instead of his preferred choice of Robert Bork. President Clinton similarly employed an accommodationist strategy, choosing Ruth Bader Ginsburg and Stephen Breyer, both of whom were regarded as strongly-credentialed, centrist, and relatively non-ideological nominees unlikely to provoke Republican opposition and a Senate battle. The lesson, in Comiskey's view, is that opposition will not occur nor will divisive or distasteful tactics emerge if presidents wisely nominate "well-qualified, ethically clean, and politically moderate nominees whose views are acceptable to a majority of the Senate" (Comiskey 2004, 66). Even George W. Bush, who aggressively sought conservative nominees for the lower federal bench, including many Federalist Society members, exercised caution in his Supreme Court appointments, selecting John Roberts and Samuel Alito over the more acerbic and probably less confirmable Michael Luttig (Nemacheck 2007).

Strategic presidential selection, Senate delay, and minority-party filibusters are, in my view, signs of resilience in the judicial selection process, as are presidents who nominate more qualified candidates or seek public support for their nominees. Officials must by necessity assess the preferences of the other party and competing institutions and decide whether to fight or conciliate. If the choice is to fight, other actors are not without resources. Resistance, delay, and the creative use of institutional rules are valid weapons in the inter-institutional struggle to shape the courts. The filibuster is simply one of those tools that lessen presidential dominance and insure advice and consent. Thus, presidents can attempt to nominate extreme candidates, even without sufficient ideological and partisan support in the Senate, but there will be a fight and possible defeat. Presidents can attempt to sneak an ideologically-preferred candidate onto

the Court in the form of a stealth nomination, such as David Souter or Harriet Miers, but that tactic may (and should) fail. Unilateralist strategies such as recess appointments to slip controversial nominees onto the bench violate the requirement of shared power in judicial selection. However, there will likely be a response, as President Bush learned with his use of recess appointments to bypass Democratic opponents in the Senate. Democrats retaliated with a two-month blockade of all judicial and executive appointments (Binder & Maltzman 2005, 312) and additionally refused to formally adjourn.

There are no doubt some ethical limits to the use (and abuse) of institutional rules in the partisan battle to control the courts. I am no doubt inclined more than most to the “all’s fair in love, war, and judicial selection” point of view. I grant legitimacy to these various tactics because of two facts. First, they help to insure that the appointment power is shared as intended. Second, it is elections that determine the relative power of the key players in the appointments process. Both conditions contribute to the democratic construction of representative courts. Of course, that does not mean that aggressive tactical measures don’t carry with them potential costs, such as judicial vacancies, docket overload, or reduced public regard for courts and the political branches. These associated costs would normally be part of the players’ decision making calculus. The danger of polarization is that hostile opponents engaged in vicious appointments battles ignore those risks and that ultimately these pressures on the selection process will exceed its ability to adapt.

The Future of Moderate (and Modest) Courts

Confirmation conflict is planned and inevitable given that competing parties and institutions share control of the judicial selection process. Polarization fuels that conflict,

though much remains to be learned about precisely how and how much. There also remains considerable disagreement over whether recent clashes have been excessive and dangerous, though political scientists studying the courts tend to have greater tolerance than law professors. My own view is that confirmation heat or fervor is tolerable and even desirable to the degree that it insures input from both branches and mutual consent, even if forced and reluctant, thereby contributing to more representative courts. If Republican presidents seek to shift the judiciary to the right, Democrats in the Senate may legitimately resist that effort and with whatever tools they need to use to accomplish that goal. Of course, the same is true for Senate Republicans in regard to a leftward shift attempted by a Democratic president. While a more deferential Senate attitude toward the president's judicial nominees might reduce conflict and delay, it would in my view come at too great a cost to moderate and representative courts.

Can courts, however, remain moderate and representative, in spite of the partisan maelstrom that has surrounded them in recent years? Some, like Jeffrey Rosen, regard the Supreme Court as "the most democratic branch," regularly and properly practicing bipartisanship, restraint, and deference to the mainstream political consensus (2006). Perry and Powe (2004) similarly observe the Court forging a moderate and bipartisan path that can no longer emerge from our polarized parties and elective institutions. The "third Constitution" recently advanced by the Supreme Court contrasts with the more extreme Constitutions espoused by America's two main parties. This "third way" is "holding" in their view, perhaps because of appointments gridlock or *stare decisis*. Eisgruber would applaud this outcome, as he praises moderation on the bench as an important value (2007). He urges senators to insist that presidents nominate moderate justices, since they are more open-minded and help to pull liberal and conservative factions back to the center where most Americans reside.

It is not clear, though, why courts should be moderate, since philosophical diversity is a virtue as well. After all, there was no call for moderate judges when FDR and his Democratic successors packed the courts with liberals, and the recent clamor for moderate judges and judicial restraint has typically come from liberal law professors fearful of the federal courts' recent tilt to the right (Sunstein 2005). It is in any case undemocratic and unrealistic to hope for moderate judges irrespective of the ideology of presidents and senators. Nominee ideology is both empirically and properly a function of the ideology of critical players in the selection system. As a practical matter, that often means moderate judges are selected, but there is certainly no guarantee. In fact, one of the most significant obstacles to insuring that the Supreme Court remains a moderate or at least representative institution is the irregular if not haphazard occurrence of vacancies (Peretti 2006). Since Watergate, for example, Democrats and Republicans have each won the popular vote in four presidential elections. Yet, Republicans have appointed eight justices during that time while Democrats have appointed only two. This is not a reflection of Republican dominance at the polls, but luck in the timing of retirements (and in the case of George W. Bush, the assistance of the electoral college and the Court itself). Because the Democrats controlled the Senate for roughly half of that time period, they have limited the freedom of those Republican presidents to construct the Court of their dreams, particularly with regard to abortion, which of course is what the shared-power norm is all about (McMahon & Keck 2007).

It is clear that influence over federal court composition is an enormous electoral prize. Representative courts will result if elections produce a representative President and Senate, if both inject their ideological views into the selection process, and if there is regular turnover. Republicans have enjoyed considerable success in presidential elections since 1968 and thus

considerable success in remaking the federal bench. The Bush Administration has approached this task with great dedication and has appointed a large number of very conservative judges. For example, Bush's district court judges vote the liberal position in civil liberties and civil rights cases less often (only 27 percent of the time) than appointees even of other Republican presidents like Reagan and H.W. Bush (with an average of 32%) (Carp et al. 2007). The President might have had an even stronger conservative impact on the Supreme Court had a normal vacancy rate occurred, giving him four rather than just two seats to fill in his two terms. The critical question is whether Bush earned sufficient electoral support to legitimate that conservative reconstruction of the courts and whether Democratic senators resisted enough on behalf of their own supporters.

There is a final factor to consider with regard to this hope that courts, particularly the Supreme Court, can serve as the last bastion of bipartisanship and moderation in the United States. As Schauer's study has revealed (2006-2007), the Court's policy agenda is quite different from that of Congress and the nation. Surveys show that the public is rather consistently concerned with issues like taxes, social security, education, the economy, health care, and major foreign policy disputes. In contrast, the Court has focused its decisional attention on issues that are more peripheral to Americans' concerns such as, in recent years, flag desecration, affirmative action, abortion, religion, same-sex marriage, the death penalty, and prisoners' rights. As Schauer puts it, "[f]or most of the highly salient issues of modern times, the Court has been largely absent" (2006-2007, 44). While this may alleviate some of our concern with its allegedly counter-majoritarian power, it also lowers any expectations that the Supreme Court can save us from our polarizing politics. Given that the Court "operates at a distance from the center of gravity of the nation's policy portfolio" (Schauer 2006-2007, 9), it cannot offer much assistance

in insuring that government policy reflects Americans' moderate preferences, particularly on the issues the public cares most about.

Judges could, as Shapiro suggests (2008), decide to be more modest in their approach to controversial issues like abortion and same-sex marriage that draw the ire of interest groups and thus politicians. This might indeed help to reduce the ferocity of the fights over judicial appointments. Then again, why? Courts, particularly appellate courts, are permitted to participate in the development of public policy, and they are frequently invited to do so by a variety of governmental and interest group actors. If judges bring special skills and perspectives into the lawmaking process, reducing their role, even temporarily, might be too high a price to pay for a reduction in partisan conflict.

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