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Congress and the Courts: Current Policy Issues

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Summary

Federal courts, like Congress and the presidency, are important forums for resolving the political, economic, and social conflicts that characterize American society. From the beginnings of the republic, when federal courts handed down decisions that strengthened the national government, to many of today's most hotly debated issues — affirmative action, war powers, racial redistricting, and abortion — federal judges have been at the storm center of numerous controversies.

The American constitutional system of separate institutions sharing power inevitably produces tension between Congress and the courts. Conflicts between Congress and federal courts are common when the elective branches are called to account by decisions of the nonelective judicial branch, composed of judges with lifetime tenure.

The purposes of this report are to examine the Congress-court connection along several discrete, but overlapping, dimensions. First, the constitutional authority of Congress and the judiciary is summarized briefly. Second, the report highlights the court's role as legislative-executive "umpire" and federal-state "referee" in our constitutional system. Third, the report discusses the court's part in statutory interpretation as well as the diverse ways Congress may "check and balance" the judiciary. Fourth, the paper reviews several current controversies associated with the judicial nominations process. Fifth, the state of play with respect to the so-called "nuclear" or "constitutional" option for ending judicial filibusters is discussed along with the compromise that so far has averted use of this procedural maneuver in the Senate. Finally, the report closes with several observations about the judicial nominations process. This report will not be updated.

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Federal courts, like Congress and the presidency, are important forums for resolving the political, economic, and social conflicts that characterize American society. "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial one," wrote the famous French chronicler Alexis de Tocqueville in *Democracy in America*, his classic 1835 study of early American life.[1] From the beginnings of the republic, when federal courts handed down decisions that strengthened the national government, to many of today's most hotly debated issues — affirmative action, war powers, racial redistricting, and abortion — federal judges have been at the storm center of numerous controversies.

Bolstered by its prerogative of judicial review, as asserted by the Supreme Court in the landmark case of *Marbury v. Madison* (1803) — and the public's perception that the highest court is the primary, but not exclusive, interpreter of the Constitution — federal jurists regularly pass judgment on the compelling issues that confront the nation.[2] Meanwhile, Congress and the White House also interpret the Constitution. As the Supreme Court stated in *United States v. Nixon* (1974): "In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others."[3]

The American constitutional system of separate institutions sharing power inevitably produces tension between Congress and the courts. While the framers outlined the structure and authority of Congress in some detail in Article I, little by comparison is in Article III dealing with the courts. Thus, the beginnings of the court owe less to constitutional mandates and more to legislation establishing its structure (the Judiciary Act of 1789, for example) and to the rulings of the early justices, such as Chief Justice John Marshall (1801-1835). As a noted legal scholar explained:

> Congress was created nearly full blown by the Constitution itself. The vast possibilities of the presidency were relatively easy to perceive and soon, inevitably materialized. But the institution of the judiciary needed to be summoned up out of the constitutional vapors, shaped and maintained. And the

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[1] Alexis de Tocqueville, *Democracy in America* (New York: American Library, 1956), p. 1.

[2] Richard L. Pacelle, Jr., *The Role of the Supreme Court in American Politics: The Least Dangerous Branch?* (Boulder, CO.: Westview Press, 2001). See *Marbury v. Madison*, 1 Cranch 137 (1803).

[3] *United States v. Nixon*, 418 U.S. 683 (1974).

> Great Chief Justice, John Marshall — not single-handed, but first and foremost- — was there to do it and did.[4]

These early jurists rebuffed challenges to judicial power and conclusively established the Court's right to determine the constitutionality of acts of Congress.

Conflicts between Congress and federal courts are common when the elective branches are called to account by decisions of the nonelective judicial branch, composed of judges with lifetime tenure. A famous instance occurred during the New Deal when the Supreme Court arguably acted as a super-legislature, making policy through its judicial interpretations, invalidating 13 acts of Congress in one term (1935-1936). So frustrated was President Franklin D. Roosevelt that he tried in 1937 to have Congress pass legislation expanding the size of the Court so he could nominate judges more sympathetic to his New Deal program. Widespread legislative and public opposition to the so-called court-packing plan led to a huge defeat for Roosevelt. Nonetheless, sensitive to the economic and social problems (joblessness, dislocation, and so on) affecting the country, the Court soon began to shift its attitude in constitutional interpretation. For example, the Court handed down a decision in 1937 upholding a minimum wage law that only a few months earlier it had ruled unconstitutional.[5] This turnabout by the Court, ending its penchant for limiting congressional power, was, as a wit of the period put it, "the switch in time that saved nine."[6]

The purposes of this report are to examine the Congress-court connection along several discrete, but overlapping, dimensions. First, the constitutional authority of Congress and the judiciary is summarized briefly. Second, the report highlights the court's role as legislative-executive "umpire" and federal-state "referee" in our constitutional system. Third, the report discusses the court's part in statutory interpretation as well as the diverse ways Congress may "check and balance" the judiciary. Fourth, the paper reviews several current controversies associated with the judicial nominations process. Fifth, the state of play with respect to the so-called "nuclear" or "constitutional" option for ending judicial filibusters is discussed along with the compromise that so far has averted use of this procedural maneuver in the Senate. Finally, the report closes with several observations about the current judicial nominations process.

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[4] Alexander Bickel, *The Least Dangerous Branch* (Indianapolis, IN: Bobbs-Merrill, 1962), p. 1.

[5] Dexter Perkins and Glyndon Van Deusen, *The United States of America: A History*, vol. II (New York: Macmillan and Co., 1962), pp. 560-566.

[6] The Court started to shift its views on Roosevelt's policies even before the court-packing plan. The Senate Judiciary Committee adversely reported FDR's plan and rejected it in strong terms. See Louis Fisher, *American Constitutional Law*, 6th ed. (Durham, NC: Carolina Academic Press, 2005), pp. 1032-1033.

Constitutional Authority: Broad Features

Whether it is enacting minimum wage, health, or other laws, Congress derives its policymaking authority from two key parts of the Constitution: Article I and the Fourteenth Amendment. Article I, Section 8, grants Congress the right to legislate in a number of specific areas, such as laying and collecting taxes, coining money, and raising and supporting armies. In addition, an elastic clause gives Congress the authority to "make all laws which shall be necessary and proper" to carry out its enumerated powers.

Under the post-Civil War Fourteenth Amendment, no state shall deny any person of life, liberty, or property without due process of law or the equal protection of the laws. The amendment provides that Congress "shall have the power to enforce [these provisions], by appropriate legislation." Congress, as the courts have noted, also has "implied" or "inherent" powers not specifically mentioned in the Constitution, such as its right to conduct investigations as an adjunct to its lawmaking function. Federal courts, however, can impose constraints on the exercise of these constitutional pillars of legislative authority.[7]

As for the courts, Article III of the Constitution states: "[T]he judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." Left to Congress was the establishment of the elaborate judicial structure of district and circuit courts of appeals that exist today, not to mention the legislature's authority to create a number of specialized courts, such as bankruptcy and tax courts, where judges serve fixed terms. The Constitution also specifies the "cases and controversies" over which the court has original jurisdiction, such as issues involving the Constitution, federal law, and treaties. In addition, the Supreme Court has appellate jurisdiction (the authority to review cases on appeal) under the Constitution but with such exceptions as Congress may determine. The President's appointment of judges to the federal courts is subject to the "advice and consent" of the Senate. Basically, these provisions define the core authorities and limitations of the federal judiciary.

Judicial Role

The judiciary's role is carried out in three main ways. First, its interpretive decisions can uphold or broaden the legislative powers of Congress. "Congress acted within its authority," said Supreme Court Justice Ruth Bader Ginsburg, who agreed with a Court decision upholding a 1998 law further extending copyright privileges for authors, artists, and inventors, such as commercial artist Walt Disney, who created the world-famous animated cartoon character Mickey Mouse.[8] Second, it can check overreaching by the Congress through its implied power of judicial review.

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[7] For an authoritative and comprehensive analysis and interpretation of the Constitution, see Johnny H. Killian, George A. Costello, and Kenneth R. Thomas, eds., *The Constitution of the United States of America: Analysis and Interpretation* (Washington: GPO, 2004).

[8] Joan Biskupic, "Justices Defer to 'Congress' Power to Extend Copyright," *USA Today*, Jan. 16, 2003, p. 4A.

Third, and equally significant, the Supreme Court can act as a policymaking catalyst, especially when the House or Senate is stymied in making decisions.

The landmark civil rights case of *Brown v. Board of Education* (1954) is a classic example.[9] The decision struck down the separate but equal doctrine upholding state laws that permitted racially segregated public schools. Until this decision, majorities in the Senate could not enact civil rights bills because of filibusters conducted by southern Senators. The *Brown* case galvanized Congress to enact the Civil Rights Act of 1957, the first civil rights law since 1875. "The genius of a system of divided powers," wrote a law professor, "is that when one branch is closed to the desires of the populace or the demands of justice, another may open up."[10] The *Brown* decision had little immediate effect on the enactment of new anti-discrimination laws until Congress — responding to large-scale civil rights demonstrations — began to pass landmark legislation, such as the Civil Rights Act of 1964 prohibiting racial discrimination in public accommodations.[11]

Checks and Balances

Each national branch of government has the constitutional wherewithal to influence the others. The Supreme Court affects Congress "whenever justices interpret the meaning of the Constitution, treaties, federal statutes, administrative [rules and regulations], and the decisions of [lower] federal and state courts."[12] In turn, Congress has the authority to affect the size, funding, and jurisdiction of federal courts, and the Senate alone is directed under the Constitution to approve or reject court nominees chosen by the chief executive. Federal courts issue rulings but they depend on the political branches to enforce those decisions. Alexander Hamilton, in distinguishing judicial power from legislative or executive power, wrote in *The Federalist* No. 78: The judiciary "has no influence over either the sword [the president] or the purse [Congress] ... and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment."[13]

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[9] *Brown v. Board of Education*, 347 U.S. 483 (1954).

[10] Jamin Raskin, "Courts v. Citizens," *The American Prospect*, vol. 14 , March 2003, p. A25.

[11] Some law professors and political scientists suggest that courts "rarely mount serious challenges to the preferences of political majorities. As Stanford Law Dean Larry Kramer put it, 'There is now a general consensus among social scientists that courts have not been a strong or consistent counter-majoritarian force in American politics.' In other words, Supreme Court decisions are more of a mirror than a catalyst, reflecting public opinion far more than they shift it." See Rosa Brooks, "A Court That Nudges More Than It Leads," *Los Angeles Times*, July 20, 2005, p. A15.

[12] Colton C. Campbell, Jr. and John F. Stack, Jr., "Diverging Perspectives on Lawmaking: The Delicate Balance Between Congress and the Court," in Colton C. Campbell, Jr. and John F. Stack, Jr., eds., *Congress Confronts the Court* (Lanham, MD.: Rowman and Littlefield, 2001), p. 2.

[13] Typically, when the Supreme Court rules an Act of Congress unconstitutional, the result is that the act is no longer enforced by the President, and Congress, if it wishes to promote the policy of the nullified act, drafts new legislation without features that the Court is likely

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Nevertheless, federal courts have issued many rulings that require large financial expenditures in areas such as improvements in prison conditions and mental health institutions. In the area of war, contemporary Presidents have taken military action either with or without authority from Congress. Important functions of federal courts in the military arena are to check presidential power and to adjudicate the proper allocation of war-making authority between Congress and the White House.

The Court as Referee and Umpire

The Referee Role

The Supreme Court serves as both referee between the two national elective branches and as the umpire of federal-state relations. Ever since the Court claimed the power of judicial review in 1803 and struck down an act of Congress, it has considered a large number of separation of power issues, most notably during the New Deal and in the past few decades. Super-legislature, or legislating from the bench (the charge of judicial activism), is an oft-repeated epithet. In general, judicial activism means one of several things: the willingness of judges to invalidate decisions of the elective branches or officials; "to make up the meaning of the Constitution or of a statute to realize their policy preferences;" or to "overturn precedent" (the doctrine of *stare decisis*) to suit their personal views.[14]

Someone's view of activism, however, often depends on whether he or she supports the direction of the court. Decisions that expand Congress's authority to legislate may be opposed by those who prefer matters to be handled by the states. Conversely, decisions that restrict the reach of the legislative branch are likely to be opposed by those who favor a national approach to problems. Criticism has been lodged against judicial activism by the Rehnquist Court. "In its first seventy-five years, the Supreme Court struck down only two acts of Congress," wrote law professor Cass Sunstein. "In the eighteen years since Ronald Reagan nominated

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[13] (...continued)
to strike down. When the Court declares an executive branch action unconstitutional, the executive has commonly acquiesced to the Court, ceasing to engage in the action at issue.

[14] Vikram Amar, "'Legislating From the Bench': It's A Matter of Opinion," *Los Angeles Times,* June 26, 2005, p. A19 See Paul Gewirtz and Chad Golder, "So Who Are the Activists?" *New York Times,* July 6, 2005, p. A23. Former Senator Sam Ervin said a judicial activist is "a judge who interprets the Constitution to mean what it would have said if he, instead of the founding fathers, had written it." See Douglas W. Kmiec, "Judges: The Law Is the Law," *Los Angeles Times*, June 26, 2005, p. A24. *Stare decisis*, according to Supreme Court Justice John Paul Stevens, suggests that judges should "decide like cases in the same way," which "increases the likelihood that judges will in fact administer justice impartially and that they will be perceived to be doing so." See John Paul Stevens, "The Life Span of a Judge-Made Rule," in Norman Dorsen, ed., *The Evolving Constitution* (Middletown, CT.: Wesleyan University Press, 1987), pp. 196-197.

William H. Rehnquist as chief justice, the Court has invalidated more than three dozen."[15]

A 1983 Supreme Court decision — *Immigration and Naturalization Service v. Chadha* — invalidated many more laws than three dozen. *Chadha* also demonstrates how the legislative and executive branches can achieve workable accommodations in the aftermath of a major Court ruling. *Chadha* declared many forms of the legislative (or congressional) veto unconstitutional. A legislative veto is a statutory enactment that permits Presidents and agencies to take certain actions, subject to later approval or disapproval by one or both houses, including designated committees of each chamber. With unelected executive officials necessarily involved in the complexities of modern policymaking, Congress has little choice but to delegate authority to administrative entities to craft the rules, regulations, and policies required to implement various laws. Congress may, however, attach "strings" to such delegated authority, such as the legislative veto.

In *Chadha*, the Court held that the legislative veto violated the separation of powers, the principle of bicameralism, and the Presentation Clause of the Constitution (legislation passed by both chambers must be presented to the President for his signature or veto.) The decision, wrote Justice Byron R. White in a vigorous dissent, "strikes down in one fell swoop provisions in more laws [nearly 200] enacted by Congress than the court has cumulatively invalidated in its entire history."[16]

Congress repealed some legislative vetoes, amended others, and employed its wide range of oversight techniques to monitor executive actions. Yet, despite the *Chadha* decision, legislative vetoes — many requiring an agency to seek the approval of specific House or Senate committees before implementing an agency decision — continue to be enacted into law (more than 400 by the end of 2004).[17] The legislature and executive each recognize their value — the executive wants to receive delegated authority and Congress wants to retain some control over that authority short of passing another law.

> Are they constitutional? Not by the Court's definition. Will that fact change the behavior between committees and agencies? Probably not. An agency might advise the committee: "As you know, the requirement in this statute for committee prior-approval is unconstitutional under the court's test." Perhaps agency and committee staff will nod their heads in agreement. After which the agency will seek the prior approval of the committee.[18]

Since *Chadha*, the Supreme Court has heard no challenges to the continued use of legislative vetoes.

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[15] Cass R. Sunstein, "The Rehnquist Revolution," *The New Republic*, vol. 231, Dec. 27, 2004-Jan. 10, 2005, p. 32.

[16] *INS v. Chadha*, 462 U.S. 919 (1983).

[17] Fisher, *American Constitutional Law*, p. 217.

[18] Louis Fisher, "Legislative Vetoes, Phoenix Style," *Extensions*, a Newsletter for the Carl Albert Congressional Research and Studies Center, University of Oklahoma, spring 1984, p. 2.

A classic Supreme Court decision involving the emergency power of the President was *Youngstown Sheet & Tube Co. v. Sawyer* (1952). During the Korean War, and in the face of a threatened strike by steel workers, President Harry Truman issued an executive order directing Secretary of Commerce Charles Sawyer to seize control of the nation's steel mills. Steel companies brought suit to restrain Sawyer from taking control of the mills. In a 6-3 decision, the Supreme Court held that in the absence of congressional authorization, Truman lacked the authority to take possession of the mills, even as commander-in-chief. The fatal flaw in Truman's executive order, wrote Justice Hugo Black in the majority opinion, was that the "President's order does not direct that a congressional policy be executed in a manner prescribed by Congress — it directs that a presidential policy be executed in a manner prescribed by the President."[19]

Lawmakers are not reluctant to bring separation of power challenges to the judiciary. Mindful of the Court's referee role, they sometimes seek to employ it for their own goals. Increasingly, Members turn to the court to accomplish ends they were unable to achieve in Congress. Often, they ask the court to defend congressional prerogatives against perceived usurpation by the President. War making is the principal example. Not since World War II has Congress declared war, although it may enact legislation that is its functional equivalent. Recent Presidents of both parties have committed American troops to combat on their own initiative. As a public law scholar pointed out with respect to war power suits brought by Members:

> From the Vietnam War to the present day, members of Congress have gone to court to contest presidential wars and defend legislative prerogatives. In most of these cases, the courts held that the lawmakers lacked standing to bring the case. Even when legislators were granted standing, the courts refused relief on numerous grounds. Judges pointed out that the legislators represented only a fraction of the congressional membership and that often another group of legislators had filed a brief defending the president's action. Courts regularly note that Congress as a whole has failed to invoke its institutional powers to confront the president.[20]

Usually, courts dismiss these suits and offer two rationales: (1) the lawsuits raise political questions best left to the elective branches to resolve; and (2) they represent

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[19] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Whether in the majority or in dissent, the Justices outlined many different positions with respect to Truman's action. "All six justices in the majority wrote separate opinions, each taking a slightly different view of emergency power. Only Justices Black and Douglas advocated a doctrine of express and enumerated powers. The other seven Justices, in four concurrences and three dissents, recognized that implied and emergency powers might have to be invoked. [Justice] Jackson developed a theory of constitutional powers that had three scenarios. Presidential authority reaches its highest level when the President acts pursuant to congressional authorization. His power is at its 'lowest ebb' when he takes measures incompatible with the will of Congress. In between these two categories lay a 'zone of twilight' in which Congress neither grants nor denies authority. In such circumstances, 'congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures of independent responsibility.'" Fisher, *American Constitutional Law*, p. 259.

[20] Louis Fisher, "The Law: Litigating the War Power with Campbell v. Clinton," *Presidential Studies Quarterly*, vol. 30 (Sept. 2000), p. 568.

conflicts between groups of lawmakers pitted against each other, not constitutional clashes between Congress and the president.[21]

The Umpire Role

As the federalism umpire, the Supreme Court has sometimes taken a more limited view of federal authority in relation to state prerogatives. As one law professor noted: "The revival of a doctrine of federalism that constrains the power of Congress has been a signature feature of the Rehnquist court."[22] The Rehnquist Court stressed states' rights in several cases through use of the Tenth Amendment (powers not delegated to the national government or prohibited to the states are reserved to the states or to the people) and the Eleventh Amendment (states are protected from being sued in federal court).

In *United States v. Lopez* (1995), the Supreme Court overturned a federal law banning guns near school grounds.[23] For the "first time since the New Deal ... the Court found Congress to have exceeded the bounds of its constitutional authority to regulate interstate commerce" — in this case the movement of guns across state lines that could end up on school playgrounds.[24] Quickly, Congress moved to pass legislation that made clear its authority under the commerce clause to restrict guns from school zones. In 1996 it enacted a measure, which the President signed, that said: "It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone."[25] This legislation has not been subject to legal challenge.

As another example, in *Alabama v. Garrett* (2001), the Supreme Court held that states are immune from suits brought by handicapped state employees under the 1990 Americans with Disabilities Act (ADA). Writing for the majority, Chief Justice Rehnquist indicated that states are not required by the equal protection clause of the Fourteenth Amendment "to make special accommodations for the disabled, so long as their actions towards such individuals had a rational basis." The reason lay in an expanded notion of states' "sovereign immunity" from suits by private citizens, even if they can show they have been injured in violation of federal law — an interpretation disputed by some legal scholars.[26]

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[21] Tom Campbell, *Separation of Powers in Practice* (Stanford, CA: Stanford University Press, 2004), Chapter 15.

[22] Richard Briffault, "A Fickle Federalism," *The American Prospect*, vol. 14 (Mar. 2003), p. A26.

[23] *United States v. Lopez*, 514 U.S. 549 (1995).

[24] Linda Greenhouse, "High Court Faces Moment of Truth in Federalism Cases," *New York Times*, Mar. 28, 1999, p. 3.

[25] Fisher, *American Constitutional Law*, p. 355.

[26] John T. Noonan, Jr., *Narrowing the Nation's Power: The Supreme Court Sides With the States* (Berkeley, CA: University of California Press, 2002). See CRS Report RS20828, (continued...)

Another dispute between the Court's majority and minority in *Alabama v. Garrett* involved opposing views of legislative and judicial powers. Rehnquist asserted that it is "the responsibility of the United States Supreme Court, not Congress, to define the substance of constitutional guarantees" — a claim broader than Chief Justice John Marshall's famous 1803 pronouncement in *Marbury v. Madison* that the duty of the courts is "to say what the law is." Evidence of discrimination against disabled state employees had been amassed by congressional panels, but Rehnquist dismissed this evidence as anecdotal.

Justice Stephen G. Breyer, dissenting in *Garrett*, countered: "In fact, Congress compiled a vast legislative record documenting 'massive, society-wide discrimination' against persons with disabilities." He appended a 39 page list of findings from the ADA's legislative history. Breyer (a one-time Capitol Hill staff member) went on to remind his colleagues of the constitutional primacy of legislative judgments.

> Unlike courts, Congress can readily gather facts from across the nation, assess the magnitude of a problem, and more easily find an appropriate remedy.... Unlike courts, Congress directly reflects public attitudes and beliefs, enabling Congress to better understand where, and to what extent, refusals to accommodate disability amount to behavior that is callous or unreasonable to the point of lacking constitutional justification. Unlike judges, Members of Congress can directly obtain information from constituents who have first-hand experience with discrimination and related issues.[27]

Federalism cases are filled with complexities. Unsurprisingly, the court does not exhibit a fixed view as to whether it will read Congress's power broadly or narrowly. Three years later, in *Tennessee v. Lane* (2004), the court took a different view from *Garrett* with respect to state sovereignty under the ADA.[28] Briefly, George Lane was a paraplegic who had to crawl up two floors to reach a county courtroom in Tennessee because there was no elevator. (Lane had been charged with a crime.) At a subsequent hearing, he refused to crawl up the stairs and was arrested for failure to appear at the hearing on his case. He sued Tennessee under the ADA and won a financial settlement. Why the different outcome in *Lane* compared to *Garrett*? Part of the explanation is that the court considered a wider range of evidence. In *Garrett*, the court considered only state employers such as the University of Alabama; in *Lane*, it also examined Tennessee's treatment of the disabled by county and city employers. Significantly, *Lane* involved access to the courts, one of the country's key political institutions. The court is concerned about access to employment by disabled persons, but it has traditionally demonstrated greater concern for access to political institutions by disadvantaged groups.

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[26] (...continued)
University of Alabama v. Garrett: Federalism Limits on the American with Disabilities Act, by Nancy Lee Jones.

[27] *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001).

[28] *Tennessee v. Lane*, 124 S. Ct. 1978 (2004).

A 2005 case raised some question about whether federalism would be a long-lasting legacy of the Rehnquist Court.[29] In *Gonzales v. Raich*, the Court deferred to congressional power when it ruled that a federal law banning marijuana trumps state laws allowing its use for medical purposes.[30] In the judgment of American University Law Professor Herman Schwartz, despite *Gonzales*, "the federalism revolution is very much alive. The Court's current federalism doctrines will likely be extended and expanded in coming years — with or without Rehnquist."[31]

The Terrorist Threat and Federalism

As the nation confronts an ongoing terrorist threat against the homeland, it is uncertain whether the Supreme Court's recent tendency to defer to state sovereignty will continue. "Whenever you see a national emergency, federalism disappears," stated a law professor. "In a national emergency, you give the national government the power to get done what needs to get done."[32] It is the President who gains power during wartime, when the balance between liberty and security tilts toward the latter and not the former.

A possible condition of extended war against terrorists raises a number of important issues: whether and to what extent federal courts will sanction infringements of individual privacy, allow terrorist suspects to be imprisoned without normal legal protections, permit greater governmental secrecy, and authorize more searches of personal records. An issue is whether curbs on civil liberties (stricter surveillance of the populace, for example) are effective strategies for fighting terrorism.

After September 11, 2001, federal district Judge Gladys Kessler said, "[T]he court fully understands and appreciates that the first priority of the executive branch in time of crisis is to ensure the physical security of its citizens." By the same token, she added, "the first priority of the judicial branch must be to ensure that our government always operates within the statutory and constitutional constraints which distinguish a democracy from a dictatorship."[33] The Supreme Court demonstrated that it can rein in executive power even during wartime when in June 2004 it handed

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[29] Linda Greenhouse, "The Rehnquist Court and Its Imperiled States' Rights Legacy," *New York Times*, June 12, 2005, p. E3 and John Yoo, "What Became of Federalism?" *Los Angeles Times*, July 11, 2005, p. 11.

[30] *Gonzales v. Raich*, 125 S. Ct. 2195 (2005).

[31] Herman Schwartz, "A Deeply Rooted Revolution," *Legal Times*, July 11, 2005, p. 51. See CRS Report RL30315, *Federalism, State Sovereignty and the Constitution: Basis and Limits of Congressional Power*, by Kenneth R. Thomas.

[32] Linda Greenhouse, "Will the Court Reassert National Authority?" *New York Times*, Sept. 30, 2001, p. E14. The quotation is from Law Professor Robert C. Post, University of California, Berkeley.

[33] Linda Greenhouse, "The Imperial Presidency vs. the Imperial Judiciary," *New York Times*, Sept. 8, 2002, p. E5.

down a series of rulings that denied the President's right to hold citizens or captured terrorists as prisoners without allowing them their day in court.[34]

Congress also must address how to protect the homeland against terrorism without trampling on constituents' civil liberties.[35] The challenge it faces is that partisan polarization in Congress makes it difficult to reach consensus on many issues involving the clash between liberty and security. Polarization on the Supreme Court is also not unusual, as highlighted by its recent spate of 5-4 decisions on the balance of power between national and state governments. (Both *Garrett* and *Lane* were 5-4 judgments.) These and other rulings have raised again the issue of how assertive courts should be in overturning decisions of the popularly elected Congress. Lawmakers are accountable to their constituents every time they face reelection. Although judges are not immune to the tides of public opinion, they do not face accountability through elections. The tension between policymaking by lawmakers versus judge-made decisions is perennial.

Statutory Interpretation

It is the conventional view that the Supreme Court is the ultimate arbiter of constitutional law, and this is often the case; but Congress, like the President, is also involved in constitutional interpretation. Neither of the three national branches has a monopoly on constitutional or statutory interpretation as each branch often tests and retests decisions made by the other(s). A good example how the interpretive decisions of the court can trigger both a legislative response and a further ruling by the court is highlighted by the controversial case of *Miranda v. Arizona* (1966).

Chief Justice Earl Warren, who delivered the opinion of the Supreme Court, stated that the case goes to the "roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime." He added that the "constitutional issue we decide ... is the admissibility of statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action in any significant way."[36] The court decided, among other things, that a suspect taken into custody by police must be accorded certain procedural safeguards. A suspect must be told, prior to any questioning by police, of his right to the presence of an attorney (retained or appointed), his right to remain silent, and cautioned that anything he said might be used as evidence against him in a court of law.

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[34] Charles Lane, "Justices Back Detainee Access To U.S. Courts," *Washington Post*, June 29, 2004, A1. For an analysis of federal judicial action involving terrorists, see Louis Fisher, *Military Tribunals and Presidential Power* (Lawrence, KS: University Press of Kansas, 2005), ch. 8.

[35] Brad Knickerbocker, "America Wrestles With Privacy vs. Security," *Christian Science Monitor*, July 22, 2005, p. 3.

[36] *Miranda v. Arizona*, 384 U.S. 436 (1966).

The "*Miranda* warnings" by police proved quite controversial, and the court was attacked for hamstringing the ability of police to convict criminals. "It was asserted that between 75 and 80% of the convictions in major crimes were dependent upon confessions, and police officers and prosecutors across the country ... echoed the sentiments of New York City's police commissioner, Michael J. Murphy, that 'if suspects are told of their rights they will not confess.'"[37] Congress responded to the criticism of *Miranda* by including within the Omnibus Crime Control and Safe Streets Act of 1968 (P.L. 90-351) a provision allowing, under appropriate circumstances, voluntary confessions of arrested persons whether or not they were informed of their rights before questioning.[38] This provision, however, was never implemented because of doubts about its constitutionality. The Supreme Court resolved the doubts in *Dickerson v.United States* (2000), "holding that *Miranda* was a constitutional decision that could not be overturned by statute, and consequently [the 1968 provision] was unconstitutional."[39]

Such disagreements between Congress and the courts occur, in part, because communications between the legislative and judicial branches are less than perfect. Neither branch understands the workings of the other very well.[40] Judges are generally aware that ambiguity, imprecision, or inconsistency may be the price for winning enactment of legislative measures. The more Members try to define the language of a bill, the more they may divide or dissipate congressional support for it. Abner J. Mikva, a four-term House Democrat from Chicago who went on to become a federal judge and later counsel to President Bill Clinton, recounted an example from his Capitol Hill days. The issue involved a controversial strip-mining bill being managed by Representative Morris K. Udall, then chairman of the House Interior (now called Resources) Committee:

> They'd put together a very delicate coalition of support. One problem was whether the states or the feds would run the program. One member got up and asked, "Isn't it a fact that under this bill the states would continue to exercise sovereignty over strip mining?" And Mo replied, "You're absolutely right." A little later someone else got up and asked, "Now is it clear that the Federal Government will have the final say on strip mining?" And Mo replied, "You're

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[37] Robert F. Cushman, *Leading Constitutional Decisions*, 15th ed. (Englewood Cliffs, NJ: Prentice-Hall, Inc., 1977), p. 372.

[38] CRS Report 97-645, *Repealing Miranda?: Background of the Controversy over Pretrial Interrogation and Self-Incrimination*, by Paul Wallace.

[39] Killian, Costello, and Thomas, *The Constitution of the United States of America*, p. 1423. See *Dickerson v. United States*, 530 U.S.428 (2000).

[40] See Robert A. Katzmann, ed., *Judges and Legislators* (Washington: The Brookings Institution, 1988) and Robert A. Katzmann, *Courts and Congress* (Washington: The Brookings Institution, 1997). To be sure, there are many lawmakers, especially those who serve on House and Senate judiciary panels, who have a good understanding of federal courts. By the same token, there are federal judges such as Supreme Court Justice Stephen Breyer — who once served as a professional staff aide on the Senate Judiciary Committee — who also have a good understanding of how Congress works.

> absolutely right." Later, in the cloakroom, I said, "Mo, they can't both be right." And Mo said, "You're absolutely right."[41]

Called upon to interpret statutes, judges may not appreciate the efforts required to get legislation passed on Capitol Hill or understand how to divine legislative history, as manifested in hearings, reports, and floor debate. For example, prior to House passage in the 109th Congress (2005-2007) of a bill dealing with class-action law suits, the Judiciary chairman and other lawmakers "read into the House record a lengthy colloquy meant to guide federal judges."[42] The courts are debating what is the proper way to approach statutory interpretation. Should judges focus only on the plain meaning of the statutory language, or should legislative history be consulted to help judges ascertain what Congress intended when it employed certain statutory phrases?

Role of Legislative History

A group of federal judges, led by Supreme Court Justice Antonin Scalia, argues that legislative history is open to manipulation by individual Members of Congress, executive officials, congressional staffers, and lobbyists and therefore is unreliable as an indicator of statutory intent. (Of course, decisions by executive and judicial officials are also influenced by the ideas, legal briefs, or written reports submitted to them by lobbyists, law clerks, and others.) The essence of Scalia's view is that laws "mean what they actually say, not what legislators intended them to say but did not write into the law's text for anyone ... to read."[43] Other federal judges, including Supreme Court Justice Breyer, defend the value of legislative history, finding it useful in statutory interpretation. "It is dangerous," Breyer asserted, "to rely exclusively upon the literal meaning of a statute's words."[44]

The dispute over legislative history is well illustrated by Congress's passage of the Civil Rights Act of 1991. The law overturned, in whole or in part, seven civil rights cases decided by the Supreme Court.[45] Yet the 1991 legislation was filled with ambiguities, and so lawmakers created their own legislative history during floor debate. A memorandum was even put in the *Congressional Record* stating that this written report was the exclusive legislative history for certain contested provisions. During debate on the legislation, a Senator pointed out the pitfalls of relying on legislative history. His position essentially endorsed Justice Scalia's view that

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[41] "Q&A: Abner J. Mikva; On Leaving Capitol Hill for the Bench," *New York Times*, May 12, 1983, p. B8.

[42] David Rogers and Monica Langley, "Bush Set to Sign Landmark Bill On Class Actions," *Wall Street Journal*, Feb. 18, 2005, p. A7.

[43] Amy Gutmann, "Preface," in Antonin Scalia, ed. *A Matter of Interpretation* (Princeton, NJ: Princeton University Press, 1997), p. vii.

[44] Jonathan Kaplan, "High Court to Congress: Say What You Mean," *The Hill*, Feb. 5, 2003, p. 21. See Jess Bravin, "Scalia, Breyer: High Court Polar Opposites," *Wall Street Journal*, July 5, 2005, p. A4, and Louis Fisher, "Statutory Construction: Keeping A Respectful Eye on Congress," *SMU Law Review*, vol. 53 (winter 2000), pp. 49-80.

[45] Ruth Marcus, "Lawmakers Override High Court," *Washington Post*, Oct. 31, 1991, p. A1.

Congress should state clearly what it means or wants in the law instead of in floor debate or other explanatory statements.[46]

Supreme Court Justice John Paul Stevens expressed a different opinion, saying that a "stubborn insistence on 'clear statements' [in the law] burdens the Congress with unnecessary reenactment of provisions that were already plain enough." A House Member once stopped committee members from putting explanatory language in a committee report by saying "Justice Scalia." This lawmaker further said that if Scalia's view on legislative history became dominant, Congress would be required to develop a new category of legislation: "the 'No, we really meant it' statute."[47] The disagreement between Congress and federal judges over the utility of legislative history was summed up by the chief counsel of the Senate Judiciary Committee: "The textual interpretation encourages us to write clearer legislation. But unclear bills are still written. If they were not, we would not have this fight over [the confirmation of] judges."[48] Judges who favor the plain meaning principle of statutory construction may still search legislative history to confirm their understanding of the legal language.

Legislative Checks on the Judiciary

Decisions of the Supreme Court can have profound effects on Congress and its Members. Cases involving the redistricting of House seats, the line-item veto, and term limits for lawmakers are recent examples. If the court arouses the ire of Congress when it rules on statutory questions, the legislative branch can enact new legislation. Scores of interest groups also monitor court decisions, and, if they disagree with them, these groups are not reluctant to lobby Congress to seek their statutory reversal.

Congress has a number of ways by which it can influence the behavior and actions of the Supreme Court and lower federal courts. Setting aside the Senate's advice and consent role, which will be discussed in separate sections below, Congress might assert its authority over the judiciary by employing one or more of these four options: amending the Constitution, withdrawing certain matters from the court's appellate jurisdiction, impeaching judges, or determining organizational or institutional features of the judiciary, such as the pay of judges or the size of the Supreme Court.[49]

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[46] "Compromise Civil Rights Bill Passed," *Congressional Quarterly Almanac*, vol. XLVII (Washington: Congressional Quarterly, Inc., 1992), pp. 257, 260.

[47] Joan Biskupic, "Scalia Sees No Justice in Trying to Judge Intent of Congress on a Law," *Washington Post*, May 11, 1993, p. A4. Justice Stevens' comment is also taken from this article.

[48] Kaplan, "High Court to Congress," p. 21.

[49] See CRS Report RL32926, *Congressional Authority Over the Federal Courts*, by Elizabeth B. Bazan, Johnny Killian, and Kenneth R. Thomas.

Constitutional Amendment

Generally, if the Supreme Court bases its decisions on constitutional grounds, then Congress can only change them by constitutional amendment.[50] On four occasions, Congress successfully used the arduous process of amending the Constitution to overturn decisions of the Supreme Court. In *Chisholm v. Georgia* (1793), the Court held that citizens of one state could sue another state in federal court. To prevent a rash of citizen suits against the states, the Eleventh Amendment reversed this decision. It guarantees the states immunity from suits by citizens outside its borders. The *Dred Scott v. Sandford* (1857) decision, which denied African-Americans citizenship under the Constitution, was nullified by the Thirteenth (abolishing slavery) and Fourteenth (granting African-Americans citizenship) Amendments. The Sixteenth Amendment overturned *Pollock v. Farmer's Loan and Trust Co.* (1895), which struck down a federal income tax. The Twenty-sixth Amendment invalidated *Oregon v. Mitchell* (1970), which said that Congress had exceeded its authority by lowering the minimum voting age to eighteen for state elections.[51]

Lawmakers are often reluctant to amend the Constitution. As one House member said: "I just think the Constitution has served us very well over a long, long period of time and one needs to make a compelling case before we start amending the Constitution to do anything."[52] The Constitution has been amended only twenty-seven times; by comparison, there have been about 11,000 proposals introduced since 1789 to change this fundamental document.[53] There are occasions when certain

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[50] Congress can also respond to constitutional rulings through statutory means, as noted in the earlier discussion of *Miranda*. As public law scholar Louis Fisher wrote: "A 1986 decision [*Goldman v. Weinberger]* again illustrates how the First Amendment is shaped not merely by court opinion but by legislative action as well. An Air Force regulation provided that headgear may not be worn indoors except by armed security police in the performance of their duties. An Air Force officer (an Orthodox Jew and ordained rabbi) claimed that the regulation prevented him from wearing his yarmulke (skullcap) and therefore infringed on his freedom to exercise his religious beliefs. The Supreme Court, split 5-4, upheld the regulation as necessary for military discipline, unity, and order. In one of the dissents, Justice [William] Brennan claimed that the Court's response 'is to abdicate its role as primary expositor of the Constitution and protector of individual liberties in favor of credulous deference to unsupported assertions of military necessity.' However, other institutions of government are capable of protecting individual liberties, Congress among them. As Brennan later noted: 'Guardianship of this precious liberty [*of religious freedom*] is not the exclusive domain of federal courts. It is the responsibility of the States and other branches of the Federal Government.' Congress passed legislation in 1987 to permit military personnel to wear conservative, unobtrusive religious apparel indoors, provided that it does not interfere with their military duties." See Fisher, *American Constitutional Law*, pp. 571-572.

[51] Fisher, *American Constitutional Law*, p. 1024.

[52] Jennifer Dlouhy, "Congress Reluctant to Change Constitution," *CQ Today*, February 11, 2003, p. 9.

[53] See CRS Report 95-316, *Ratification of Amendments to the U.S. Constitution*, by David C. Huckabee.

constitutional amendments appear regularly on the legislative calendar, often because the political or social circumstances of the day give rise to them.

Today's judicial nomination battles, for example, have led some to suggest term-limits (15 or 18 years, for instance) for federal judges. "If the Senate can't figure out how to reach a truce in its battles over these all-important jobs," wrote one analyst, "maybe the best solution is to make the jobs not quite so important."[54] According to one commentator, "something of a consensus has developed around a constitutional amendment to limit justices' terms" to 18 years.[55] A group of lawyers contends that Supreme Court justices serve too long (18.7 years is the average length of tenure on the Rehnquist Court), which gives rise to aging justices who may become out-of-touch with the times or too impaired to know it. To avoid the difficulties of winning approval of a constitutional amendment, they propose a complex legislative approach that would "force justices into senior status after roughly 18 years on the high court."[56]

Withdrawal of Jurisdiction

Under its constitutional authority to determine the court's appellate jurisdiction, Congress may threaten to withdraw the Supreme Court's authority to review certain categories of cases.[57] The cases that promote court jurisdictional-stripping actions by Congress share certain features: they are controversial (abortion and school prayer, for example); they are triggered by state or federal court decisions (the Massachusetts Supreme Court's decision that it is discriminatory to prohibit gay marriages, for example); and they arouse partisan and ideological passions among lawmakers and the electoral groups affiliated with each party. Despite numerous legislative threats to constrict or withdraw jurisdiction, on only one occasion in American history did Congress prevent the Supreme Court from deciding a case by removing its appellate jurisdiction.

> This extraordinary action was taken by a Congress dominated by Radical Republicans who wanted to prohibit the Supreme Court from reviewing the constitutionality of the Reconstruction Acts of 1867. The acts substituted military rule for civilian government in the ten southern states that initially refused to rejoin the Union and established procedures for those states to follow to gain readmittance and representation in the federal government.[58]

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[54] Norman Ornstein, "To Break the Stalemate, Give Judges Less Than Life," *Washington Post*, Nov. 28, 2004, p. B3. See Stuart Taylor, Jr., "Life Tenure Is Too Long for Supreme Court Justices," *National Journal*, June 25, 2005, pp. 2033-2034.

[55] Bruce Bartlett, "Fusillades ... and Tenure Traps," *Washington Times*, July 6, 2005, p. A14.

[56] Tony Mauro, "Profs Pitch Plan for Limits on Supreme Court Service," *Legal Times*, Jan. 3, 2005, p. l.

[57] See CRS Report RL32171, *Limiting Court Jurisdiction Over Federal Constitutional Issues: "Court Stripping,"* by Kenneth R. Thomas.

[58] Joan Biskupic and Elder Witt, *Guide to the U.S. Supreme Court*, 3rd ed., vol. II (continued...)

Congress passed legislation repealing the Supreme Court's right to hear appeals involving these matters and prevented "a possibly hostile Court from using the power of judicial review to invalidate a piece of legislation that was of vital concern to those who controlled the legislative body."[59]

Recently, a number of lawmakers have expressed concern over certain federal court decisions, and they have strived to remove these issues from judicial review. During the 108th Congress, for example, many lawmakers expressed strong opposition to a Ninth Circuit Court of Appeals decision that a 1954 federal law adding the phrase "one Nation under God" to the Pledge of Allegiance was unconstitutional on First Amendment grounds. As explained by the House Judiciary Committee in its response to the Ninth Circuit's ruling:

> The purpose of H.Res. 132 ... is to express the sense of the House of Representatives that the phrase "one Nation under God," should remain in the Pledge of Allegiance; that the Ninth Circuit Court of Appeals ruling in Newdow v. U.S. Congress is inconsistent with the Supreme Court's interpretation of the First Amendment; that the Attorney General of the United States should appeal the Ninth Circuit's ruling; and the President should nominate, and the Senate confirm, Federal circuit court judges who will interpret the Constitution consistent with the Constitution's text.[60]

On March 20, 2003, the House adopted H.Res. 132 by a vote of 400 to 17. A Member reminded the court that Congress could do more than just adopt a sense of the House resolution. "I think that [legislation to limit the court's jurisdiction] would be a very good idea to send a message to the judiciary [that] they ought to keep their

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[58] (...continued)
(Washington: CQ Press, 1997), p. 720.

[59] William H. Rehnquist, *Grand Inquests: The Historic Impeachment of Justice Samuel Chase and President Andrew Johnson* (New York: William Morrow, 1992), p. 132.

[60] U.S. Congress, House, Committee on the Judiciary, *Expressing the Sense of the House of Representatives That the Ninth Circuit Court of Appeals Ruling in NEWDOW v. UNITED STATES CONGRESS Is Inconsistent with the Supreme Court's Interpretation of the First Amendment and Should Be Overturned*, 108th Cong., 1st sess., H.Rept. 108-41 (Washington: GPO, 2003), p. 2. In June 2005, the Supreme Court ruled (*Kelo v. New London*) that local governments could use their power of eminent domain to force people to sell their property for private commercial development. This decision stirred anger in the Congress and among lawmakers' constituents. As a result, the House on June 30 adopted an amendment to an appropriations bill that would "deny federal funds to any city or state project that used eminent domain to force people to sell their property to make way for a profit-making project such as a hotel or mall. Historically, eminent domain has been used mainly for public purposes such as highways or airports." See Mike Allen and Charles Babington, "House Votes To Undercut High Court On Property," *Washington Post*, July 1, 2005, p. A1. The amendment stated: "None of the funds made available in this [transportation appropriations] Act may be used to enforce the judgment of the United States Supreme Court in the case of Kelo v. New London, decided June 23, 2005." See *Congressional Record*, daily edition, vol. 151 (June 30, 2005), p. H5504. That same day, the House also adopted a resolution (H.Res. 340) "Expressing the Grave Disapproval of the House Regarding Majority Opinion of Supreme Court in Kelo v. City of New London." p. H5577.

hands off the Pledge of Allegiance."[61] On September 23, 2004, the House passed a bill (H.R. 2028) that barred federal courts, including the Supreme Court, from reviewing cases that challenged the phrase "under God" in the Pledge of Allegiance. The bill stated: "No court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, the Pledge of Allegiance."[62]

H.R. 2028 tracked a bill (H.R. 3313) the House passed earlier on July 22, 2004, which would prevent any federal court from hearing cases that grant states the right not to recognize gay marriages. Congress could also pass legislation prohibiting the use of appropriated funds to enforce judicial decisions.[63] None of these measures was enacted into law but they underscore the heightened legislative concern with the judiciary.

Lawmakers have acted in other ways to challenge federal courts. Illustrative of this tendency are these examples. Many Members co-sponsored a House measure chastising the Supreme Court for citing international law in several of their decisions; a bill was introduced allowing Congress to overturn Supreme Court decisions by a two-thirds vote of each chamber; another measure was proposed to forbid the courts from reviewing the constitutionality of public displays of the Ten Commandments; and Congress and the courts have clashed over judicial discretion in sentencing convicted criminals.[64]

Members of Congress may also employ strong rhetoric against federal courts. When federal courts refused to order the reinsertion of life-prolonging feeding tubes for the brain-damaged Terri Schiavo — especially after the GOP-led Congress expected that to occur given that it acted quickly to enact a law shifting jurisdiction for the case from Florida courts to federal courts — conservative lawmakers and

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[61] *Congressional Record*, daily edition, vol. 150 (July 22, 2004), p. H6581.

[62] See CRS Report RS21250, *The Constitutionality of Including the Phrase "Under God" in the Pledge of Allegiance*, by Angie A. Wellborn.

[63] *Congressional Record*, daily edition, vol. 151 (June 15, 2005), pp. H4532-H4534, H4550-H4551. The House adopted an amendment which stated: "None of the funds appropriated in this act may be used to enforce the judgment of the United States District Court for the Southern District of Indiana in the case of *Russelburg v. Gibson County* [involving the display of the Ten Commandments on the county courthouse lawn], decided January 31, 2005."

[64] See T. R. Goldman, "Full-Court Pressure," *Legal Times*, March 28, 2005, p. 1; *Congressional Record*, daily edition, vol. 150 (Mar. 4, 2004), pp. H845-H846; Jess Bravin, "Congress May Fight Court on Global Front," *Wall Street Journal*, Mar. 21, 2005, p. A4; Warren Richey, "Court Orders Changes in Sentencing," *Christian Science Monitor*, Jan. 23, 2005, p. l; Laurie Cohen and Gary Fields, "New Sentencing Battle Looms After Court Decision," *Wall Street Journal*, Jan. 14, 2005, p. A1; and Keith Perine and Seth Stern, "Gonzales Pushes for Minimum Sentencing Guidelines for Federal Crimes," *CQ Today*, June 22, 2005, p. 7. In June 2005, the Court handed down divergent opinions on the public display of the Ten Commandments. See Tony Mauro, "Court Offers Split Decisions on Commandments," *Legal Times*, July 4, 2005, p. 12.

outside groups were outraged. Many Members complained about an out-of-control and unaccountable judiciary that needed to be reined in by the legislative branch.

The mounting criticism from Congress prompted Chief Justice Rehnquist, in his 2004 annual report on the federal judiciary, to stress the importance of judicial independence and the need to protect judges from political threats because of the decisions they make. Judges "do not always decide cases the way their appointers might have anticipated," he said. "But for over 200 years it has served our democracy well and ensured a commitment to the rule of law."[65]

Impeachment of Judges

Federal judges, like other national civil officers, are subject to impeachment under Article II of the Constitution. They are appointed for life "during good behavior." Only one Supreme Court justice, Samuel Chase, was impeached by the House. This occurred in 1804, during bitter partisan battles between Federalists and Jeffersonian Republicans. The judiciary was the last bastion of Federalist influence after Thomas Jefferson won the presidency in the 1800 election. Intemperate and arrogant behavior on Chase's part, including campaigning for John Adams's reelection in 1800, aroused the ire of the President and his Republican allies in Congress. On March 12, 1804, the House voted 73-32 along party lines to impeach Chase. The Senate, however, failed to convict Chase. The importance of Chase's acquittal by the Senate was underscored by Chief Justice William Rehnquist.

> The acquittal of Samuel Chase by the Senate had a profound effect on the American judiciary. First, it assured the independence of federal judges from congressional oversight of the decisions they made in the cases that come before them. Second, by assuring that impeachment would not be used in the future as a method to remove members of the Supreme Court for their judicial opinions, it helped to safeguard the independence of that body.[66]

Other Supreme Court justices have either been threatened with impeachment or been the subject of impeachment investigations (for example, William O. Douglas in 1953 and in 1970). More recently, a few lawmakers have suggested that judges who base their decisions on international precedents risk being impeached. Chief Justice Rehnquist responded to these impeachment threats by stating that "a judge's *judicial* acts may not serve as the basis for impeachment. Any other rule would destroy judicial independence," since "judges would be concerned about inflaming any group that might be able to muster the votes in Congress to impeach and convict them."[67]

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[65] "Rehnquist Backs Life Tenure for Judges," *The Washington Times*, Jan. 1, 2005, p. A1. See David G. Savage, "Rehnquist Sees Threat to Judiciary," *Los Angeles Times*, Jan. 1, 2005, p. A1 and Linda Greenhouse, "Rehnquist Resumes His Call For Judicial Independence," *New York Times*, Jan. 1, 2005, p. A10.

[66] Rehnquist, *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson*, p. 114.

[67] Greenhouse, "Rehnquist Resumes His Call For Judicial Independence," p. A10.

Fewer than a dozen federal judges have been impeached and even a smaller number have been convicted and removed from office. "The three most recent impeachment efforts led to the removal of Judges Harry E. Claiborne (1986), Walter Nixon (1989), and Alcee L. Hastings (1989)."[68] Claiborne was removed for tax evasion, Nixon for perjury, and Hastings for bribery. None of the three, however, was barred from holding further federal office by a separate Senate vote following their conviction.

Size, Procedure, and Pay

Historically, on a half-dozen occasions the size of the Supreme Court has varied anywhere from six to ten members. "Generally, laws decreasing the number of justices have been motivated by a desire to punish the president; increases have been aimed at influencing the philosophical balance of the Court itself," such as Roosevelt's court-packing plan.[69] Not since 1869 has Congress changed the Supreme Court's size from its current nine justices.

Procedurally, lawmakers have sometimes proposed that court decisions overturning federal laws must be accomplished by a super-majority vote of the justices. Some of the "more extreme proposals have urged that such decisions be unanimous."[70] None of these initiatives has been agreed to by Congress. They are often a form of message sending to highlight lawmakers' dissatisfaction with certain court decisions.

Members are interested, too, in a range of other legislative-judicial issues: the need for stronger ethical guidelines for judges to ensure their impartiality; security in and away from courthouses in the wake of several murders of judges; the continuity of court operations in the event of a calamity, such as 9/11; and opening courtrooms to television.[71] Justices on the Supreme Court oppose the televising of their proceedings, in part because the cameras might alter decision making and intrude on the privacy of the justices, making them public celebrities.

Recently, concern has arisen about fewer aspirants seeking federal judgeships. Part of the reason for this may be pay. "Salaries are far lower [for federal judges] than what fresh-faced law-school grads can make at big corporate firms."[72] Chief

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[68] CRS Report 97-497, *Congressional Checks on the Judiciary*, by Louis Fisher.

[69] Biskupic and Witt, *Guide to the U.S. Supreme Court*, p. 717. For a discussion of Roosevelt's failed court-packing plan, see James McGregor Burns, *Roosevelt: The Lion and the Fox* (New York: Harcourt, Brace, 1956), ch. 15.

[70] Biskupic and Witt, *Guide to the U.S. Supreme Court*, p. 718.

[71] Carol Leonning, "New Rules For Judges Are Weaker, Critics Say," *Washington Post*, Dec. 17,2004, A31; David Von Drehle, "Scalia Rejects Pleas for Recusal in Cheney Case," *Washington Post*, Feb. 12, 2004, A35; Eileen Sullivan, "Courts Order Review of Judges' Security," *Federal Times*, Mar. 21, 2005, 12; and Keith Perine, "Violence Against Judges Causes Law and Disorder," *CQ Weekly*, June 20, 2005, pp. 1630-1631.

[72] Seth Stern, "A Career as Federal Judge Isn't What It Used to Be," *Christian Science* (continued...)

Justice Rehnquist said judicial pay is a "most pressing issue facing the federal judiciary today," in part because many qualified candidates cannot afford to serve on the bench.[73] Lawmakers recognize this problem but have been reluctant to boost the salaries of federal district judges above their own (currently $162,100).[74]

Advice and Consent - Judicial Nominees

Article II, Section 2, of the Constitution states that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... Judges of the Supreme Court." The founders opposed lodging the power to appoint solely in the executive. They also opposed giving it exclusively to Congress as a whole or to the Senate in particular. The framers compromised and provided that judicial selections required joint action by the President and the Senate. The President has the sole prerogative to nominate, but the power to confirm (or not) is the Senate's. Alexander Hamilton, in the Federalist Papers No. 66, viewed this division of responsibility in stark terms. "There will, of course, be no exertion of CHOICE on the part of the Senate. They may defeat one choice of the Executive and oblige him to make another; but they cannot themselves CHOOSE — they can only ratify or reject the choice he may have made."

Hamilton's view requires some modification, however. Giving two elective institutions a voice in the appointments process necessarily meant that nominees would be subject to a political process. Individual Senators, House Members, interest groups, the American Bar Association (which, since 1952, has rated judicial candidates), the press and media, and even sitting judges all may play a role in influencing both the choice of judicial nominees and Senate action, if any, on these nominees. The fact that federal district and appellate court jurisdictions are geographically based means that Senators from those states (especially if they are of the President's party) commonly have a large say in suggesting judicial candidates to the White House.

Norms and Practices

Extra-constitutional norms and practices shape the confirmation process. President George Washington quickly learned the importance of the newly emerging norm of senatorial courtesy — an informal practice in which Presidents consult home-state Senators before submitting nominees for federal positions in their state. When Washington "failed to seek the advice from the Georgia senate delegation

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[72] (...continued)
Monitor, Jan. 22, 2002, p. 1.

[73] Edward Walsh, "Federal Judicial Pay Called Too Low," *Washington Post*, May 29, 2003, p. A23.

[74] Article III, Section 1, of the Constitution states that the compensation of judges "shall not be diminished during their Continuance in Office."

regarding a nomination for a federal position in Savannah, Washington was forced to withdraw the nomination in favor of the person recommended by the senators."[75]

Related to senatorial courtesy is the blue-slip policy of the Judiciary Committee, which applies only to district and circuit court nominees. It refers to "blue approval papers that senators are asked to submit on nominees for federal judgeships in their states. For the past few years, both home-state senators had to submit a positive blue slip for a nominee to be considered by the Judiciary Committee."[76] Although exceptions and changes have been made to this policy, it does encourage the president to seek the advice of Senators before he submits judicial nominees to the Senate. An array of other Senate practices influences whether any action occurs on judicial nominations, particularly holds (a request by a Senator to his or her party leader to delay floor action on measures or nominations), the committee chair's prerogative of determining whether hearings will be held, and the majority leader's willingness to schedule floor consideration of the nominations.

An unresolved issue is the balance between advice and consent. Presidents often favor consent over advice. The Senate tilts in the other direction. "The [George W. Bush] administration seems to think that 'advice and consent' means 'advise and rubber stamp,'" declared a Senator.[77] Another Senator pointed out that the Senate's constitutional role is limited to advice and consent. "It does not mean advice and obstruction."[78] Adding to the controversy is the lack of agreement on what qualifications are appropriate for service as a federal jurist. The Constitution makes no reference to what Presidents or Senators should consider when exercising their

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[75] Brannon Denning, "The 'Blue Slip:' Enforcing the Norms of the Judicial Confirmation Process," *William and Mary Bill of Rights Journal*, vol. 10 (Dec. 2001), p. 92. See CRS Report RL31989, *Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate*, by Denis Steven Rutkus.

[76] "GOP Move Would Help Judicial Nominees," *Washington Post*, Jan. 24, 2003, p. A25. See Brannon P. Denning, "The Judicial Confirmation Process and the Blue Slip," *Judicature*, vol. 85 (Mar.-Apr. 2002), pp. 218-226 and CRS Report RL32013, *The History of the Blue Slip in the Senate Committee on the Judiciary, 1917-Present*, by Mitchel A. Sollenberger. The blue slip tradition has undergone change over the years. One version of the practice is as follows: "Home-state senators are typically given great deference when it comes to judicial nominations, and negative blue slips from both of a state's senators usually are enough to block a nominee from advancing through the Judiciary Committee." Jennifer Dlouhy, "GOP to Press Votes Every Day This Week on Judges," *CQ Today*, July 29, 2003, p. 6. The Office of Legal Policy of the U.S. Department of Justice defines blue slips this way: "A blue slip is the traditional method of allowing the home state senators of a judicial nominee to express their approval or disapproval. Blue slips are generally given substantial weight by the Judiciary Committee in its consideration of a judicial nominee. The process dates back several decades and is grounded in the tradition of 'senatorial courtesy,' which traces its roots back to the presidency of George Washington." See [http://www.usdoj.gov/olp/judicial] nominations107.htm

[77] Janet Hook, "Democrats Spoiling for Estrada Fight," *Los Angeles Times*, Feb. 6, 2003, p. A10.

[78] *Congressional Record*, daily edition, vol. 149 (Feb. 12, 2003), p. S2233. For further divergent senatorial views on the meaning of "advice and consent," see *Congressional Record*, daily edition, vol. 151, (June 23, 2005), pp. S7204-S7208, S7228-S7231.

respective roles. Apart from the standard qualifications that everyone expects in prospective judges — legal experience, ethical behavior, recognized competence, and so on — an age-old question is whether political or ideological "litmus tests" are appropriate for presidents to use when selecting judicial nominees or for Senators to use when deciding whether to vote for confirmation.[79] What place should a person's legal philosophy or ideology have in the appointments process?

Unsurprisingly, many Presidents search for ideologically compatible nominees to place on the federal bench. The presidency of Ronald Reagan was the first to put in place an institutional apparatus "to ensure that Reagan judicial nominees were compatible with the philosophical and policy orientation of the President."[80] In the opinion of North Carolina law professor Michael Gerhardt, the George W. Bush administration follows this general approach in selecting judicial nominees.

> The people counseling Bush on judicial appointments are convinced that his father erred in appointing some judges, notably David Souter, who has become a reliable vote for the Supreme Court's moderate wing and cast a pivotal vote for reaffirming Roe v. Wade [upholding a woman's right of abortion during the first trimester]. Consequently, Bush's counselors conduct extensive interviews with prospective nominees about their judicial philosophies. Many of the nominees have been active members of the Federalist Society, established in the early 1980s to organize, cultivate and sharpen conservative thinking about the Constitution. Activity within the Federalist Society constitutes an important — and sometimes the only — evidence of a young conservative's ideological commitment.[81]

Since the policy or ideological views of judicial candidates influence presidential nominating decisions, it should not be startling to people that "senators have increasingly openly opposed judicial nominees on policy and judicial

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[79] "Political scientist Henry J. Abraham has identified six characteristics that nominees to the Supreme Court (or to federal appeals and district courts) should possess: absolute personal and professional integrity, a lucid intellect, professional expertise and competence, appropriate professional educational background or training, the capacity to communicate clearly, especially in writing, and demonstrated judicial temperament. Some other criteria presidents have used — for example, geographical and religious ones — have gone by the wayside. In recent years, other criteria, such as race and gender, have emerged. Moreover, the Senators have more explicitly considered the nominee's views about the role of the Court, approaches to adjudication, values that might affect decisionmaking, and specific areas of the law." See Katzmann, *Courts & Congress*, pp. 13-14. Katzmann, a former professor at Georgetown University and a fellow at The Brookings Institution, is a federal appellate judge for the Second Circuit.

[80] Sheldon Goldman, "Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts," *University of Richmond Law Review*, vol. 39 (Mar. 2005), p. 871.

[81] Michael J. Gerhardt, "Here's What Less Experience Gets You," *The Washington Post*, March 2, 2003, pp. B1, B4. In anticipation of a possible 2005 vacancy on the Supreme Court — the last time the Senate confirmed a nominee (Stephen Breyer) was in 1994 — senior White House and administration officials began to interview prospective candidates for a high court vacancy. Needless to say, this process went into overdrive when Justice Sandra Day O'Connor announced her retirement from the Supreme Court. See Joseph Curl, "White House Starts Search for New Justice," *The Washington Times*, June 24, 2005, p. A4.

philosophical grounds."[82] Democratic Senators might contend, for example, that conservative judicial nominees would undermine women's rights or civil rights if confirmed by the Senate. Republican Senators might argue that liberal judicial nominees might be against school prayer or weaken property rights if they won Senate confirmation. Senators also disagree about the proper scope of questioning regarding a nominee's ideology, judicial values, or views on controversial issues or particular court cases.

> Underlying the argument over the proper scope of questions for judicial nominees is a long-running debate over whether senators should weigh a nominee's ideology or confine themselves to vetting his resume and making general judgments about his character.[83]

After President Bush nominated Circuit Court Judge John G. Roberts on July 19, 2005, to replace the retiring Sandra Day O'Connor on the Supreme Court, a Judiciary Democrat noted that there is a higher level of inquiry for Supreme Court nominees than circuit court nominees. "This is a different ball game altogether," he said. "It is no longer, 'I'm going to follow Supreme Court precedent.' You are going to make Supreme Court precedent and do it for a lifetime. There are many different, more important questions that have to be asked."[84] A Judiciary Republican stated, however, that it is "beyond the pale" to ask a nominee how he would rule in a particular case.[85]

With the death of Chief Justice William Rehnquist on September 3, 2005, President Bush withdrew Roberts as O'Connor's replacement and named him instead to succeed Rehnquist as chief justice. (Justice O'Connor agreed to remain on the Supreme Court until her successor is confirmed by the Senate.) Roberts' nomination as chief justice prompted a Democratic leader to say that the "stakes are higher, and the Senate's advice and consent responsibility is even more important."[86]

A former general counsel and staff director of the Senate Judiciary Committee from 1987 to 1992, a period that included the nominations of Robert Bork, Anthony Kennedy, David Souter, and Clarence Thomas to the Supreme Court, spotlighted perhaps the critical issue in questioning nominees to the Supreme Court: "How specific should Members of the Senate Judiciary Committee be when they question a Supreme Court nominee about his or her judicial and constitutional philosophy —

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[82] Goldman, "Judicial Confirmation Wars," p. 871.

[83] Keith Perine, "Democrats Want All the Answers," *CQ Today*, July 21, 2005, p. 30. See CRS Report RL33059, *Proper Scope of Questioning of Supreme Court Nominees: The Current Debate*, by Denis Steven Rutkus.

[84] Ralph Lindeman, "Specter Lays Out Views on Proper Questions To Ask Bush Supreme Court Nominee Roberts," *Daily Report for Executives*, Bureau of National Affairs, July 21, 2005, p. C-2.

[85] Ibid., p. C-1.

[86] Jo Becker, "Democrats Pledge More Intense Scrutiny of Roberts," *Washington Post*, Sept. 6, 2005, p. A6.

and what kind of answers should a nominee provide?"[87] Based on his experience and personal judgment, the former staff director outlined three models of questioning. First, at one end of the spectrum, Senators ask "laser-like questions designed to elicit commitments about specific cases." At the other end of the spectrum, Senators take a narrow approach and foreclose "all questioning of [a nominee's] judicial philosophy." The third approach is where Senators "seek philosophical particularity and the nominee engages in a real dialogue on the critical issues of the day — a national conversation if you will."[88]

Nomination Struggles

Over the past two centuries, approximately 25% of presidential nominations to the Supreme Court have failed to make it to the highest court in the land. "Nominations that failed to be confirmed by the Senate have been disposed of in a variety of ways, including withdrawal by the President, inaction in the [Judiciary Committee], inaction in the Senate, postponement, tabling, rejection on the Senate floor, and filibuster on the Senate floor."[89] Most of the rejections occurred in the 19th century, with President John Tyler holding the record: five of his six nominees were rejected by the Senate. After the Senate turned down John Parker in 1930, no Supreme Court nominee was rejected until the presidency of Lyndon B. Johnson.

In June 1968, Chief Justice Earl Warren informed Johnson of his intention to retire. "Concern that Richard Nixon might win the presidency later that year and get to choose his successor dictated Warren's timing."[90] Johnson nominated his close friend on the court, Associate Justice Abe Fortas, to be the next chief justice. However, when Fortas's alleged ethical violations (accepting private money to teach a college course) came to light, it triggered the first filibuster in the Senate's history on a Supreme Court nomination, which doomed Fortas. (Some lawmakers and others disagree that Fortas was subject to a filibuster.)[91] Cloture could not be

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[87] Jeffrey J. Peck, "Do's and Don'ts for Questioning Nominees To the Supreme Court," *Roll Call*, July 18, 2005, p. 10.

[88] Ibid.

[89] CRS Report RL31171, *Supreme Court Nominations Not Confirmed, 1789-2004*, by Henry B. Hogue.

[90] Richard Baker, "Senate Historical Minute," *The Hill*, October 2, 2002, p. 12. Mr. Baker holds the official post of Senate Historian. The Senate Judiciary Committee sometimes follows the so-called "Thurmond Rule," after the late Senator Strom Thurmond of South Carolina, a former chair of the panel. According to a Judiciary Democrat, the informal Thurmond rule is a "well-established practice that in presidential election years there comes a point when judicial confirmation hearings are not continued without agreement." See Sheldon Goldman, et. al., "W. Bush's Judiciary: The First Term Record," *Judicature*, vol. 88 (May-June 2005), p. 263.

[91] Former GOP Senator Robert Griffin, Mich., who led the opposition to Fortas, stated in a June 2, 2003, letter to Senator John Cornyn, that "four days of debate on a nomination for Chief Justice is hardly a filibuster." He then cited his closing senatorial remarks (*Congressional Record*, vol. 114, Oct. 1, 1968, p. 28930): "When is a filibuster, Mr. President? ... There have been no dilatory quorum calls or other dilatory tactics employed.

(continued...)

invoked to end the bipartisan filibuster and Johnson withdrew his nomination for the chief judgeship. The next year, enmeshed in further ethical controversies, Fortas resigned from the Court under threat of impeachment by the House.[92]

Also in 1969, the Senate rejected President Nixon's nominee to fill the Fortas vacancy, Clement Haynsworth, on the grounds of insensitivity to civil rights issues.[93] A year later another Nixon nominee, Harold Carswell, was rejected because of what opponents characterized as his modest and undistinguished record as a lower court judge.[94] President Ronald Reagan's nomination of conservative Robert Bork to the Supreme Court in 1987 sparked the often-bitter confirmation battles that still continue today. During nationally televised hearings, members of the Judiciary Committee probed Bork's extensive written record to evaluate his constitutional and philosophical beliefs. Bork's nomination came at a time of public concern about the Supreme Court's ideological balance, and because Bork's views were perceived as too conservative and controversial by many Senators (and various outside groups), the Senate rejected the nominee by a 58 to 42 margin. (Bork's nomination fight gave rise to a made-up verb — "to bork" — which means to attack nominees by launching a politically-based campaign against them.)[95]

Controversial, too, was President George Bush's 1991 nomination of Clarence Thomas, who was narrowly approved by the Senate on a 52 to 48 vote. Law professor Anita Hill, who previously worked for Thomas, charged that he had sexually harassed her on the job. The charges and countercharges played out on national television during the Judiciary Committee's hearings. Many watched the

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[91] (...continued)
The speakers who have taken the floor have addressed themselves to the subject before the Senate, and a most interesting and useful discussion has been recorded in the *Congressional Record*." Griffin then implied that Members should exercise restraint in invoking cloture at such an early stage in the debate. The Fortas nomination was also brought to the floor in an election year, which can encourage senatorial opposition from the party not in control of the White House. See, for example, Charles Babington, "Filibuster Precedent? Democrats Point to '68 and Fortas," *Washington Post*, Mar. 18, 2005, p. A3.

[92] "The Fortas Case: Justice's Resignation First Under Impeachment Threat," *Congressional Quarterly Almanac*, vol. XXV (Washington: Congressional Quarterly, Inc., 1970), pp. 136-139. See Robert Shogan, *A Question of Judgment: The Fortas Case and the Struggle for the Supreme Court* (Indianapolis, IN: Bobbs-Merrill, 1972).

[93] John P. Frank, *Clement Haynsworth, the Senate, and the Supreme Court* (Charlottesville, VA: University Press of Virginia, 1991).

[94] Henry J. Abraham, *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton*, New and Revised Edition (New York: Rowman & Littlefield Publishers, Inc., 1999), pp. 11-13.

[95] See Norman Vieira and Leonard Gross, *Supreme Court Appointments: Judge Bork and the Politicization of Senate Confirmations* (Carbondale, IL: Souther Illinois Press, 1998); John Massaro, *Supremely Political: The Role of Ideology and Presidential Management in Unsuccessful Supreme Court Nominations* (Albany, NY: State University of New York Press, 1990); and Mark Gitenstein, *Matters of Principle: An Insider's Account of America's Rejection of Robert Bork's Nomination To the Supreme Court* (New York: Simon & Schuster, 1992).

televised and dramatic testimony of Hill and Thomas, which attracted a large viewing audience.

In 1995, Republicans took control of the Senate and Democrat Bill Clinton was in the White House. More than 60 of Clinton's nominees to Federal courts never received hearings or waited years before any action took place on their nomination.[96] For example, Richard Paez waited four years from his original nomination before he was confirmed to sit on the Ninth Circuit Court of Appeals. The principal GOP methods for frustrating Clinton's judicial nominees were denying them hearings or floor votes.

During the brief period from June 2001 to November 2002 when Democrats held the Senate, they blocked many of President Bush's judicial nominees through holds, blue slips, and other actions. In the 108th and 109th Congresses, with Democrats again in the minority, it was their turn to block many of Bush's controversial nominees. Only this time, since Democrats do not control committees or the floor schedule, "they have been compelled to use the more incendiary weapon of the filibuster to stop the Bush nominees they oppose. But the result has been the same: frustration in the White House and more acrimony in Congress."[97] As one commentator noted, what distinguishes the judicial battles of the Clinton and Bush presidencies from those of earlier eras is that they have come "to resemble political blood feuds, in which each side seeks to avenge the earlier assaults by the other side."[98]

The struggle over who should be a federal judge has intensified. Fierce political, strategic, and tactical conflicts between the parties and branches overlay the

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[96] *Congressional Record*, daily edition, vol. 151 (June 23, 2005), p. S7206. President Clinton's two Supreme Court nominees — Ruth Bader Ginsburg and Stephen Breyer — won easy Senate confirmation, but many of his other selections for the federal bench were delayed or stalled. After President Bush named John G. Roberts, Jr., to replace the retiring Sandra Day O'Connor on the Supreme Court, some people suggested that Ginsburg's confirmation should set the standard for the Senate's consideration of Roberts. Although Ginsburg was an advocate for issues viewed as controversial by many Republicans, she was acknowledged to be, like Roberts, a well-qualified candidate for the Supreme Court. Still, differences between the two nominations — for example, the disparity in the judicial record of the two with Ginsburg having a 12-year record of service as a circuit court judge compared to Roberts' two-year record on the same court — aroused concern among some Democrats. Although the White House has released thousands of documents relating to Roberts' service (1981-1982) as special assistant to Attorney General William French Smith and as a legal adviser (1982-1986) in the Reagan White House, the Bush Administration has refused to release materials from Roberts' service (1989-1993) as principal deputy solicitor general on the grounds that this would have a chilling effect on the free flow of ideas required to develop the government's case in litigation. See David Savage, "Ginsburg Nomination Cited as Example," *Los Angeles Times*, Aug. 18, 2005, p. A9, and Seth Stern, "Roberts' Critics See Hope in Writings," *CQ Today*, Aug. 22, 2005, p. 1.

[97] Ronald Brownstein, "To End Battle Over Judicial Picks, Each Side Must Lay Down Arms," *Los Angeles Times*, Feb. 21, 2005, A8.

[98] Helen Dewar, "Polarized Politics, Confirmation Chaos," *Washington Post*, May 11, 2003, p. A5.

confirmation process for many judicial nominees. A variety of factors contribute to this development, such as intense electoral competition between the parties; narrow majority party control of the Senate (neither party can consistently attract 60 votes to stop filibusters); and the ability of various advocacy groups aligned with each party to bring indirect pressure on Senators by mobilizing their network of activists to support or oppose judicial nominees.

Circuit Court Battles

The wrangling over judges has been especially contentious for several circuit court nominees. "The politicization of the judiciary has recently been the most focused, and most virulent, at the appellate, or circuit level," stated federal Judge James Robertson.[99] Four main factors explain this development. First, both parties understand that although the Supreme Court is viewed as the "court of last resort," it only decides about 80 cases each year (two decades ago the number was double that).[100] Today, the 13 "regional appeals courts decide more than 63,000 cases each year."[101] Circuit courts are "playing a more important role in setting law for vast areas of the country. A decision by the 9th Circuit, for example, is binding on nine states, where 19 percent of the nation's population lives."[102] The circuit courts, remarked a law professor, are "the Supreme Courts for their region."[103]

Second, circuit courts, especially the District of Columbia Circuit Court of Appeals, are often recruiting grounds for Supreme Court nominees. For example, three of the nine members of today's Supreme Court — Antonin Scalia, Ruth Bader Ginsburg, and Clarence Thomas — served previously on the D.C. Circuit. (President Bush's Supreme Court nominee, Judge Roberts, sits on this Court.). The D.C. Circuit is also important, as a Senator noted, "because Congress has vested it with exclusive or special jurisdiction over cases involving many environmental, civil rights, consumer protection, and workplace statutes."[104]

Third, the contests over circuit court nominees are perceived by many individuals and organizations as a warmup for the anticipated battles involving Supreme Court vacancies. "I think it's a warm-up for the Supreme Court," remarked C. Boyden Gray, White House Counsel to the first George Bush and head of a group titled Committee for Justice.[105] Conservative and liberal groups have long been prepared for vacancies on the Supreme Court — raising money, crafting strategies,

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[99] James Robertson, "A Cure for What Ails the Judiciary," *Washington Post*, May 27, 2003, p. A19.

[100] Fisher, *American Constitutional Law*, p. 159.

[101] Warren Richey, "Conservatives Near Lock on US Courts," *Christian Science Monitor*, Apr. 14, 2004, p. 10.

[102] Elizabeth Palmer, "Appellate Courts at Center of Fight for Control of Judiciary," *CQ Weekly*, Feb. 23, 2002, p. 534.

[103] Ibid.

[104] *Congressional Record*, daily edition, vol. 151 (June 14, 2005), p. S6429.

[105] Goldman, "W. Bush's Judiciary: The First Term Record," p. 256.

conducting research on likely nominees, joining coalitions with similar goals, and planning public relations campaigns. These groups are ready at a moment's notice to present a liberal or conservative perspective on the President's selection of a candidate to fill a Supreme Court vacancy. Senate leaders, too, prepare for any high court vacancy. "We're discussing a 24-hour plan and a 72-hour plan because there is recognition we need to move quickly right out of the box" once the President names a nominee, said an aide to a Senate leader.[106]

The plans and preparations were activated when President Bush, on July 19, 2005, nominated Judge Roberts to replace the retiring Sandra Day O'Connor on the Supreme Court. Groups on the left (MoveOn.org, for example) and right (Progress for America, for instance) responded quickly to the President's announcement.

> Less than two hours after the announcement ... two White House aligned conservative groups had posted a pro-Roberts Web commercial and launched a new Web site promoting his confirmation — while the liberal activist group MoveOn.org swiftly branded him a "Right Wing Corporate Lawyer."[107]

Finally, the confirmation battles represent a clash between President Bush and Senate Democrats over who will control the ideological balance of power on the courts. President Bush "has been more consistent and insistent than, say, [Gerald R.] Ford or Reagan" in nominating conservatives to the bench, said a law professor.[108] There is little doubt that President Bush has been successful in recasting federal courts in a more conservative direction. For example, when the 108th Congress began in 2003, "49.4 percent of active judges on the lower federal courts were appointed by Republican presidents. By the time Congress adjourned [in December 2004], that figure stood at 52.5 percent."[109] GOP court appointees "now constitute a majority of judges on 10 of the nation's 13 federal appeals courts" with as few as three more judicial confirmations on key courts giving Bush a majority on all but one federal appeals court: the Ninth Circuit in San Francisco. Many congressional Republicans want to split this circuit into several additional court circuits in part, they argue, because its workload is too large and cumbersome.[110]

Worth noting is that the party label of judicial nominees does not mean, for example, that GOP appointees will decide cases in a way that always satisfies

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[106] Janet Hook, "If High Court Vacancy Opens, Activists Are Poised for Battle," *Los Angeles Times*, June 20, 2005, p. A7. See Michael Sandler, "Groups Primed for Court Vacancy," *CQ Today*, June 27, 2005, p. 1.

[107] Jess Bravin and Jeanne Cummings, "Bush Taps Roberts for Supreme Court," *Wall Street Journal*, July 20, 2005, p. A8.

[108] R. Jeffrey Smith, "Judge's Fate Could Turn On 1994 Case," *Washington Post*, Feb. 21, 2003, p. A27.

[109] Gerard Gryski, "Partisan Makeup of the Bench," *Judicature*, vol. 88 (May-June 2005), p. 270.

[110] Richey, "Conservatives Near Lock on US Courts," p. 1. See Jonathan D. Glater, "Lawmakers Trying Again To Divide Ninth Circuit," *New York Times*, June 19, 2005, p. 12.

Republicans.[111] After all, seven of the nine Supreme Court justices and most appeals court judges are GOP appointees, yet many conservative groups rail against an "out of control" judiciary. As two journalists pointed out:

> The [judicial confirmation] fight may have more to do with the *kind* of Republican who joins the courts, in particular the Supreme Court. While Democrats are determined to block judicial nominees they see as conservative ideologues, the Republican leadership pushes for right-leaning judges.[112]

The partisan battles and recriminations over judges play out in both the Judiciary Committee and on the Senate floor. The Judiciary Committee is "polarized to a degree that I've never seen," exclaimed a GOP Senator who sits on the panel.[113] Another Judiciary Republican expressed a comparable view. "I'm very concerned not only about the broken judicial confirmation process, but also how badly it seems to have poisoned relations in the Senate ... and hurt our ability to do other things as well."[114] A Democratic Senator who serves on the Judiciary panel has a different take on why there are problems with the confirmation process. "What's broken is not the Senate confirmation process, it's the White House nominations process. The process isn't working now because President Bush is trying to stack the courts with right-wing extremists."[115]

Republicans deny that they are trying to pack the judiciary with conservative activists. They contend that their nominees are highly qualified professionals who represent the mainstream of judicial thinking. These diverse perspectives are difficult to resolve because, unlike the lawmaking process, opportunities for compromise on controversial judgeship nominations are limited. It is typically a zero-sum game: the President either wins Senate confirmation of his nominee or he loses. Article II of the Constitution does authorize the president to make recess appointments to all judicial levels: district, appellate, and the Supreme Court. President Eisenhower, for example, used his recess authority to name Earl Warren, William Brennan, and Potter Stewart to the Supreme Court.[116]

Needless to say, many Senators become vexed when Presidents use their recess prerogative to circumvent the Senate's advice and consent role. "I want to say this," said a long-time Senator. "I am opposed to judgeship appointments during a recess. I hope that any President will proceed very cautiously and not attempt to take

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[111] See Jason DeParle, "In Battle to Pick Next Justice, Right Says Avoid a Kennedy," *New York Times*, June 27, 2005, p. A1.

[112] Jennifer Dlouhy and Keith Perine, "Judiciary Committee Agenda Disrupted by Partisan Acrimony," *CQ Weekly*, Ap. 19, 2003, p. 945.

[113] Ibid. See Charles Babington and Mike Allen, "Polarized Panel Awaits High Court Nominee," *Washington Post*, July 10, 2005, p. A1, and Kirk Victor, "The Senate Showdown," *National Journal*, July 9, 2005, pp. 2184-2188.

[114] Dewar, "Confirmed Frustration with Judicial Nomination Process," p. A19.

[115] Amy Goldstein and Helen Dewar, "President Criticizes Filibusters," *Washington Post*, May 10, 2003, p. A6.

[116] CRS Report RL31112, *Recess Appointments of Federal Judges*, by Louis Fisher.

advantage of the situation by appointing judgeships during the recess of the Senate."[117]

Other Contemporary Developments

Several other significant points are important to note about the contemporary confirmations process. Most judicial nominations are approved by the Senate, roughly an 85% approval rate for the period extending from the late 1970s to the late 1990s.[118] Another analysis found that recent "presidents have filled the federal bench at roughly the same rate over the past quarter-century — about 45 to 50 new federal judges each year."[119] However, both senatorial parties often present differing views of the other party's role in processing judicial nominations. Democrats sometimes talk about President Clinton's nominees being "pocket filibustered" in the Judiciary Committee, never to see the light of day. Republicans lament what they perceive as a pattern of systematic obstructionism on the floor against several of President Bush's nominations.[120]

In addition to heightened partisanship, recent judicial nominations also confront longer confirmation delays. Sheldon Goldman devised an index of obstruction (no action on a nominee) and delay (it takes more than 180 days from the date of nomination to a Senate floor vote) for district and appeals court nominees from 1977 through 2002, accounting for periods of divided or unified government. He found an increasing pattern of delay and obstruction, especially for circuit court nominees. For example, the "average number of days from the date the nomination was reported [by the Judiciary Committee] to the date of confirmation [by the Senate] ranged from a low of 1.8 days for the 97th Congress [1981-1983] for district court appointees and

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[117] *Congressional Record*, daily edition, vo. 146 (December 15, 2000), p. S11834. In 1960, the Senate passed a resolution (S.Res. 334) to discourage Presidents from using recess appointments for justices of the Supreme Court "except under unusual and urgent circumstances." Opponents of S.Res. 334 argued that the Senate should not interfere with a constitutional prerogative expressly granted to the President. See CRS Report RS22039, *Federal Recess Judges*, by Louis Fisher. Early in 2004, President Bush used his recess authority to name two individuals (Charles Pickering and William Pryor) to circuit courts. The two nominees were controversial and had been blocked from receiving confirmation votes. Senate Democrats were angry at the recess appointments and threatened to stymie all future judicial nominations. On May 24, 2004, the two sides reached a compromise "that allowed for the confirmation of a slate of judicial nominees very late in the congressional session in exchange for no more additional recess appointments." See Goldman, "W. Bush's Judiciary: The First Term Record," p. 264.

[118] Laura Cohen Bell, "Senatorial Discourtesy: The Senate's Use of Delay to Shape the Federal Judiciary," *Political Research Quarterly*, vol. 56, Sept. 2002, p. 593. Also see CRS Report RL31635, *Judicial Nomination Statistics: U.S. District and Circuit Courts, 1977-2002*, by Denis Steven Rutkus and Mitchel A. Sollenberger.

[119] Sarah Binder, Forrest Maltzman, and Alan Murphy, "History's Verdict," *New York Times*, May 19, 2005, p. A35.

[120] See, for example, *Congressional Record*, daily edition, vol. 151 (June 7, 2005), pp. S6126-S6128.

1.9 days for appeals court nominees to 38.3 days for district court nominees for the 105th Congress [1997-1999] and 68.5 days for appeals court nominees for the 106th [1999-2001]."[121]

A number of reasons account for the delays, especially for the relatively small number of nominees who wait many months or several years for confirmation. Scholars confirm, for instance, that an approaching presidential election, not to mention divided government, usually produces two outcomes: longer delays and more rejections of presidential election-year nominees.[122] Historically, various other factors influence whether a nominee is confirmed quickly or subject to lengthy delays or outright rejection, such as a candidate's race or gender; the position to which a candidate is nominated, especially if it tips the balance of power on the court; the extent of bipartisan support for a nominee; the use of dilatory tactics by Senators; the philosophic outlook of candidates; the extent of presidential consultation with Senators; the likelihood that a candidate might later be nominated to the Supreme Court; and more. President Bush even offered his own plan to speed Senate action on judicial confirmations.[123] Part of his plan, for example, would require the chamber to vote on a judicial nominee within six months of its receipt by the Senate. Sometimes, moreover, the White House is faulted for its slowness in naming candidates to fill judicial vacancies.

A New Judicial Front Opens: The "Nuclear" or "Constitutional" Option

The frustration level over judicial nominees has risen exceptionally high in today's Senate, largely over filibusters against a relatively small number (10 judges blocked, 204 confirmed in the President's first term) of Bush nominations. Senate Republicans contend that lawmakers who cite those numbers are mixing apples and oranges. "When our colleagues on the other side of the aisle talk about the large number of judges that they have approved, they are folding in all of the federal District Court nominees that everybody has always voted for," noted a Senate GOP leader.[124] The correct measure, say Republicans, is the number of circuit court nominees that were blocked during President Bush's first term: 17 of 52, the lowest

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[121] Sheldon Goldman, "Assessing the Senate Judicial Confirmation Process: The Index of Obstruction and Delay," *Judicature*, vol. 86, Mar.-Ap. 2003, p. 252.

[122] Sarah Binder, "The Senate as a Black Hole: Lessons Learned from the Judicial Appointment Experience," *The Brookings Review*, vol. 19, spring 2001, pp. 37-40.

[123] Mike Allen and Amy Goldstein, "Bush Has Plan to Speed Judicial Confirmations," *Washington Post*, Oct. 21, 2002, p. A1. See CRS Report RS21506, *Implications for the Senate of President Bush's Proposal on Judicial Nominations*, by Betsy Palmer.

[124] Daphne Retter, "Senators Do the Math...Then Someone Else Does the Math," *CQ Today*, Apr. 19, 2005, p. 9.

confirmation rate (67%) in modern times. Over his eight years in office, President Clinton's appellate court confirmation rate was 74%.[125]

Perhaps the best example of a circuit court nominee who sparked unusual partisan acrimony was Miguel Estrada. During the 108th Congress, supporters of his nomination said opponents were blocking floor action in the hopes they could find "some damning information" about his record.[126] Opponents said that controversy over the Estrada nomination could have been resolved quickly if the Bush administration had supplied "the memos from the Solicitor's Office [of the Department of Justice] while he worked there and that he wrote and [allowed] more questioning of Estrada" at another round of Judiciary Committee hearings.[127] The administration refused to release the memoranda. Meanwhile, the Senate tried seven times unsuccessfully to invoke cloture (closure of debate) on the nomination. In the end, Estrada withdrew his name from consideration and remained in private law practice. (Interesting, the same Solicitor General disclosure issue has arisen with respect to Roberts's nomination to the Supreme Court. Senate Democrats want documents prepared by Roberts during his service — 1989-1993 — as principal deputy solicitor general.)

Upset at the claimed dilatory tactics, Senate Republicans held hearings on the constitutionality of judicial filibusters; set aside a day (November 12-13, 2003) for the Senate to conduct an around-the-clock debate on the state of the nominations process, with Vice President Dick Cheney presiding to underscore the administration's concern; and the majority leader sponsored a resolution (S.Res. 138) setting forth a "declining vote" procedure — 60 votes required on the first cloture attempt, 57 on the next, 54 on the third attempt, and, finally, 51, or majority cloture — to end judicial filibusters. The Senate took no action on S.Res. 138.

At the start of President Bush's second term, the names of several judicial nominees whom the Democrats filibustered during the 108th Congress were resubmitted to the Senate, further escalating tensions between Senate Democrats and the White House. Mindful that these nominees could be blocked by filibusters, the majority leader considered ways to break such efforts by employing a parliamentary procedure — the so-called "nuclear" or "constitutional" option allowing a simple majority to confirm judicial nominees. (Because the word "nuclear" implies that something catastrophic might occur in the Senate, Republicans prefer to call the procedural maneuver the "constitutional" option to underscore their contestable view that the Constitution requires only a majority vote to confirm judicial nominees, 51 Senators if everyone votes.)

Under Senate Rule XXII, 60 votes are required to invoke cloture and end a filibuster. Many Republicans contend that filibusters impose an unconstitutional super-majority requirement of 60 votes for the confirmation of judges. Judgeships,

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[125] Donald Lambro, "Misleading Filibuster Myths," *Washington Times*, May 23, 2005, p. A18.

[126] Janet Hook, "Democrats Spoiling for Estrada Fight," p. A10.

[127] *Congressional Record*, daily edition, vol. 149 (Feb. 25, 2003), p. S2621.

they say, should be subject to an up-or-down majority vote. Democrats reply that the Constitution authorizes each chamber to "determine the rules of its proceedings," which today means, as already noted, a 60-vote requirement to end a judicial filibuster. If cloture is successfully invoked, then Senators have the right to confirm judges by majority vote.[128] The distinction, then, is that a super-majority vote is necessary to terminate extended *debate* while a simple majority vote is the standard to *confirm* judicial nominees.

A Procedural Scenario

There are various nuclear or constitutional option scenarios, but most involve a ruling by the presiding officer (Vice President Cheney could be in the chair to cast a tie-breaking vote) that could lead to a new Senate precedent requiring only 51 votes to end debate on a judicial nominee. One widely circulated parliamentary plan could proceed as follows:[129]

(1) The majority leader (or a surrogate) would likely ask unanimous consent and, if someone objected, then offer a non-debatable motion to proceed to executive session to consider a judicial nomination viewed as controversial by a number of Senators.

(2) Debate on the nomination would begin and continue for an unspecified but extended period of time.

(3) A cloture motion (or petition) would be filed at some point in the proceedings to end the debate; a cloture motion requires 60 votes to adopt and the vote occurs two calendar days of Senate session after the petition is filed.

(4) Unable to attract the 60 votes, as would be expected on a contentious nomination, the majority leader (or a colleague) would make a point of order that further debate on the nominee is dilatory and must end after a certain number of hours or days.

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[128] CRS Report RL32102, *Constitutionality of a Senate Filibuster of a Judicial Nomination*, by Jay R. Shampansky.

[129] Many Senators are mindful of a scholarly article that lays out how the Senate could adopt new precedents ending judicial filibusters without formally amending Senate Rule XXII. See Martin B. Gold and Dimple Gupta, "The Constitutional Option To Change Senate Rules and Procedures: A Majoritarian Means To Overcome the Filibuster," *Harvard Journal of Law & Public Policy*, vol. 28, (fall 2004), pp. 205-278. Sen. Robert C. Byrd, D-WV, challenged the precedents cited in the Gold-Gupta article. See *Congressional Record*, daily edition (Mar. 20, 2005), pp. S3100-S3103. For further information, see CRS Report RL32684, *Changing Senate Rules: The "Constitutional" or "Nuclear" Option*, by Betsy Palmer; CRS Report RL32843, *'Entrenchment' of Senate Procedure and the 'Nuclear Option' for Change: Possible Proceedings and Their Implications*, by Richard Beth; CRS Report RL32149, *Proposals to Change the Senate Cloture Rule*, by Christopher Davis and Betsy Palmer; and CRS Report RL32874, *Standing Order and Rulemaking Statute: Possible Alternatives to the "Nuclear Option"?*, by Christopher Davis.

(5) The presiding officer (presumably the Vice President) would sustain the point of order, which would establish a new Senate precedent ending judicial filibusters.

(6) A Senator opposed to the chair's decision would likely appeal the ruling of the presiding officer, which is a debatable motion.

(7) However, another Senator would offer a non-debatable motion to table the appeal, which would be voted on immediately and requires a simple majority vote for approval. Tabling the appeal would uphold the presiding officer's ruling and create the most authoritative type of precedent: one established by vote of the Senate. This precedent would be used to stop future judicial filibusters.

Some Implications and Possible Consequences

This yet-to-be-tried maneuver has sparked considerable discussion and controversy. Two overlapping issues — constitutional and procedural — highlight several of the main points in contention. Constitutionally, various lawmakers and analysts who advocate use of the maneuver argue that only a simple majority is required to approve judicial nominees. Their reasoning: the constitutional clause (Article II, Section 2) that deals with "advice and consent" specifies a two-thirds vote to approve treaties but is silent on the number of votes needed to approve judicial nominees. Accordingly, it is reasonable to conclude, they say, that the framers wanted judicial nominees to be approved by a majority, not a super-majority, vote.

Other lawmakers and analysts contest that argument. They stress the Senate's constitutional right to establish its own rules, one of which (Rule XXII) requires 60 votes to end a filibuster.[130] This parliamentary mandate means that Senators are obligated to follow chamber rules to end extended debate on any judicial nominee. Further, as chamber rules stipulate, if there is a filibuster on a proposal to change Senate rules, including Rule XXII, an even higher supermajority threshold is required to end one: two-thirds of the Senators present and voting (or 67 if all 100 Members vote). Rule V of the Senate is also cited by opponents of the nuclear or constitutional option: "The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules."

In a polarized Senate, proponents of up-or-down majority votes on judicial nominees recognize that they cannot attract 67 votes to change Rule XXII, let alone win the 60 votes needed to terminate judicial filibusters on controversial nominees. The parliamentary dilemma faced by those who want to end extended debate on judicial nominees is that they are boxed in by the requirements of the current and continuous rules of the Senate. These inherited or "entrenched" procedures effectively prevent a majority of the Senate from writing new rules to govern and regulate debate on judicial nominees. This practical reality gives rise to the nuclear or constitutional option. It would permit the majority party — by majority vote —

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[130] The Senate and House have established other supermajority requirements by rule, such as the House's suspension of the rules procedure (a two-thirds vote) or the 60-vote requirement in the Senate on certain budget matters.

to adopt a new and binding Senate precedent that would end judicial filibusters. (In the Senate, precedents established in this authoritative manner trump the formal rules of the chamber and are followed in similar procedural circumstances until they are changed or repealed.)

Another procedural issue deserves mention. It is highlighted by this hypothetical. A proponent of the nuclear option, as mentioned in the above scenario, might raise a point of order and state that debate on a nominee must end immediately or at a certain time. The rationale would be that judicial filibusters prevent the Senate from giving its "advise and consent" as required by the Constitution. Current Senate practices state, however: "Under the precedents of the Senate, the Presiding Officer has no authority to pass upon a constitutional question, but must submit it to the Senate for its decision."[131]

Constitutional points of order are subject to filibusters, which require 60 votes to end under Rule XXII, and they are subject to nondebatable motions to table. Proponents of the nuclear or constitutional option would then confront at least two hurdles. First, they may lack the 60 votes required to end a filibuster on the constitutional point of order. Second, if opponents have the votes to table, this returns the Senate to the status quo ante, the delaying tactics underway before the presiding officer submitted the constitutional point of order to the Senate; and if the motion to table is rejected, any filibuster on the constitutional point of order may continue. Thus, successful use of the nuclear option under this scenario would oblige the presiding officer — on his own initiative and authority — to set aside or ignore Senate precedents and rule in favor of the constitutional point of order. Any appeal of the presiding officer's ruling upholding the constitutional point of order could be tabled by majority vote of the Senate. This procedural scenario would also establish a new Senate precedent ending judicial filibusters.

The point is that an up-or-down vote on judicial nominees, which President Bush and many Senate Republicans insist upon, is prevented by the Senate's current rules and precedents and the majority party's inability in a polarized environment to attract 60 votes. (The Constitution, as Democrats point out, does not require an up-or-down vote on nominees or even that they be voted upon. Likewise, there is no requirement for a committee to vote on a nominee and report the judicial candidate for floor action.) Thus, advocates of the nuclear or constitutional option plan to set aside established procedures — what may be called the "regular order" — and create new practices and precedents by a majority rather than a super-majority vote of the Senate.

As a flexible and adaptable institution, the Senate can change its procedures by out-of-the ordinary means even if doing so creates dismay and discontent among some Senators. A leading Senate opponent of this parliamentary option, and an acknowledged authority on the chamber's rules and precedents, pointed out: the nuclear or constitutional option "has been around a long time; since 1917 in fact, the year the cloture rule was adopted by the U.S. Senate. It required no genius ... to

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[131] Floyd M. Riddick and Alan S. Frumin, *Senate Procedure: Precedents and Practices* (Washington: GPO, 1992), p. 685.

conjure up [this idea]. All that it takes is, one, to have the chair wired. Two, to have a majority of 51 votes to back up the chair's ruling. And three, a [determination] to execute the [procedural maneuver]."[132]

If the nuclear or constitutional option is successfully employed, opponents of the procedural maneuver have indicated they will use all available procedural tools (the "parliamentary fallout") to block and frustrate all but the most essential business of the Senate. When asked about the parliamentary steps opponents could take if the option were employed, former Senate Democratic Leader Tom Daschle, stated:

> The Senate runs on 'unanimous consent.' It takes unanimous consent to stop the reading of bills, the reading of every amendment. On any given day, there are fifteen or twenty amendments and a half-dozen bills that have been signed off for unanimous consent. The vast majority of the work of the Senate is done that way. But any individual senator can insist that every bill be read, every vote be taken, and bring the whole place to a stop.[133]

If the procedural maneuver had been employed, opponents also had a ready-to-use contingency plan. It involved the continuous introduction of "popular initiatives: expanding tax credits for health care, raising the minimum wage, and releasing oil from the strategic petroleum reserve to counter the rising price of gasoline." Three benefits were expected to flow from this strategy.

> First, it would clutter up the Senate calendar, limiting the time [proponents] had for their own priorities. Second, because [opponents of the parliamentary option] would be proposing real legislation, [proponents] would have a harder time casting them as mere obstructionists. Finally, it would put [proponents] on record as voting against measures many Americans support.[134]

Supporters of the nuclear or constitutional option highlight the "tyranny of the minority" that is frustrating Senate confirmation of judicial nominees. Opponents counter that its use would weaken the Senate's ability to check executive power, undermine the chamber's traditional respect for minority prerogatives, heighten partisan acrimony, change the ideological makeup of federal courts, and make the "minority rule" Senate function more like the "majority rule" House. Some Senators also point out that proponents of the nuclear or constitutional option could find themselves in the minority some day and would need the filibuster to protect against the "tyranny of the majority."[135] Any short-term gains in judicial confirmations could produce future costs to their long-term political and institutional interests.

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[132] Center for American Progress, A Special Presentation Broadcast Live On C-SPAN 2, "Going Nuclear: The Threat To Our System of Checks and Balances," Apr. 25, 2005.

[133] Jeffrey Tobin, "Blowing Up the Senate," *The New Yorker*, Mar. 7, 2005, p. 46.

[134] David Corn, "Killing Them Softly," *The Washington Monthly*, vol. 37 (July-Aug. 2005), p. 14.

[135] Charles Hurt, "McCain Irks Republicans over Anti-Filibuster Options," *Washington Times*, Apr. 16, 2005, p. A1.

Negotiations End An Impasse

Cognizant that use of the nuclear or constitutional option could alter the character of the Senate, the chamber's party leaders devoted weeks during early 2005 trying to reconcile their fundamental disagreements over how judicial nominees are to be considered by the Senate. The majority leader, for example, proposed that after 100 hours of debate every nominee should receive an up-or-down vote by the Senate.[136] The minority leader opposed any curb on the right to filibuster unacceptable judicial nominees. The majority leader emphasized that the nuclear or constitutional option would apply only to judicial nominations and that filibusters on legislative measures or executive nominations would continue unchanged. There was no certainty that this promise would bind future Senates or that the procedural maneuver might not be subsequently applied to other measures or matters. Leadership talks broke off on May 16, 2005, with the majority leader indicating that the nuclear or constitutional option would be employed before the Memorial Day recess.[137]

On May 18, the majority leader called up the controversial nomination of Priscilla Owen to be a federal circuit court judge. Her ascent to the court had been blocked for several years by judicial filibusters. With speculation rampant that Chief Justice Rehnquist (suffering from thyroid cancer) would resign relatively soon from the Supreme Court, the majority leader wanted the nuclear or constitutional option in place to ensure that a minority could not filibuster future nominations to fill vacancies on the Supreme Court.

On May 23, the majority leader scheduled an around-the-clock session to demonstrate his commitment to lengthy debate on controversial judicial nominees. A vote to invoke cloture was slated for the next day, but it was expected to fail. The majority leader then would employ the nuclear or constitutional option.[138] However, he never had the chance to execute the procedural maneuver to end judicial filibusters. He was blocked by an accord reached by an ad hoc group of Senators: seven Republicans and seven Democrats.

This bipartisan group of Senators had been meeting away from public view for days trying to come up with a compromise to break the judicial stalemate and avert use of the nuclear or constitutional option. Late in the afternoon of May 23, the 14 Senators signed a memorandum of understanding that ended the looming parliamentary showdown and produced at least a temporary cease-fire over judicial

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[136] "Viewpoint," *Roll Call*, May 17, 2005, p. 4.

[137] Shailagh Murray and Dan Balz, "Democrats, GOP End Talks on Filibusters," *Washington Post*, May 17, 2005, p. A1.

[138] Keith Perine, "Daylong Debate to Set Clock Ticking," *CQ Today*, May 23, 2005, p. 1 and Shailagh Murray and Charles Babington, "Senate Leaders Prepare for Crucial Filibuster Vote," *Washington Post*, May 23, 2005, p. A1.

nominations. The agreement, which was to remain in effect through the end of the 109th Congress, had three fundamental features.[139]

The Bipartisan Agreement: A Memorandum of Understanding

First, the 14 Senators agreed to vote to invoke cloture on three of the five most controversial federal appellate court nominees, virtually assuring the three of Senate approval. Subsequently, all three were approved by the Senate, including Owen (5th Circuit), Janice Rogers Brown (D.C. Circuit), and William Pryor (11th Circuit). The other two — William Myers (9th Circuit) and Henry Saad (6th Circuit) — would face what would likely be unbreakable filibusters. As of September 2005, they have not been confirmed.

Second, the seven Republicans promised not to support "any amendment to or interpretation of the Rules of the Senate that would force a vote on a judicial nomination by means other than unanimous consent or Rule XXII." This feature effectively prevents the majority leader from using the nuclear or constitutional option and protects the minority's right to filibuster. In return, the seven Democrats agreed that judicial nominees "should only be filibustered under extraordinary circumstances, and each signatory must use his or her own discretion and judgment in determining whether such circumstances exist." With 44 Democrats and 1 Independent (a Senator who often votes with the Democrats), this provision of the memorandum sidetracks the minority party's ability to sustain a filibuster. (Forty-one Senators are sufficient to block invocation of cloture.) However, "extraordinary circumstances" is an ambiguous phrase and became a source of some interpretive controversy.

Republicans suggested that Democratic support of three conservative appellate court justices (Owen, Brown, and Pryor) meant that Democrats would find it difficult to filibuster a conservative Supreme Court nominee. The minority leader disagreed. "There's nothing in [the agreement] that prevents us from filibustering somebody that's extreme, whether it's on the district court, on a circuit court or the Supreme Court," he said.[140] One of the GOP signers of the accord observed: "If one of the seven [Democrats] decides to filibuster, and I believe it's not an extraordinary circumstance for the country, then I have retained my rights under this agreement to

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[139] See Keith Perine, "Bipartisan Deal Thwarts Frist's Plan," *CQ Today*, May 24, 2005, p. 1; Charles Babington and Shailagh Murray, "A Last-Minute Deal on Judicial Nominees," *Washington Post*, May 24, 2005, p. A1; Maura Reynolds and Richard Simon, "Senate Deal Reached on Filibusters," *Los Angeles Times*, May 24, 2005, p. A1; and Carl Hulse, "Bipartisan Group In Senate Averts Judge Showdown," *New York Times*, May 24, 2005, p. A1. The seven Republicans who signed the accord were Sens.: John Warner, VA, John McCain, AZ, Mike DeWine, OH, Lindsey Graham, SC, Olympia Snowe, ME, Susan Collins, ME, and Lincoln Chafee, RI. The seven Democrats were: Robert C. Byrd, WVA, Ben Nelson, NB, Mark Pryor, AR, Mary Landrieu, LA, Daniel Inouye, HI, Joseph Lieberman, CT, and Ken Salazar, CO.

[140] Robin Toner and Richard Stevenson, "Justice Choice Could Rekindle Filibuster Fight," *New York Times*, May 25, 2005, p. A1.

change the rules if I think that's best for the country."[141] In short, the agreement is based on the good faith interpretation of "extraordinary circumstances" by each of the 14 Senators, all of whom have the right to pull out of the accord at any time.[142]

Third, the accord sent a signal to the White House that the President should consult with Senate Democrats and Republicans on prospective judicial candidates. As the memorandum of understanding stated:[143]

> We believe that, under Article II, Section 2, of the United States Constitution, the word "Advice" speaks to consultation between the Senate and the President with regard to the use of the President's power to make nominations. We encourage the Executive branch of government to consult with members of the Senate, both Democratic and Republican, prior to submitting a judicial nomination to the Senate for consideration.
>
> Such a return to the early practices of our government may well serve to reduce the rancor that unfortunately accompanies the advice and consent process in the Senate.
>
> We firmly believe this agreement is consistent with the traditions of the United States Senate that we as Senators seek to uphold.

A GOP Senator who signed the accord pointed out: "The White House might have an easier time winning prompt confirmation if it consulted more with members of the Senate .... There is a feeling that in the past, the Senate was more involved in giving suggestions and signing off on nominations than it is now."[144]

The agreement aroused some consternation inside and outside the Senate, with many wondering whether it would remain in effect for long. "I don't know whether it's something that's here to stay, or just a passing moment," remarked a Democratic Senator.[145] The majority leader, who saw his decision to use the nuclear option circumvented by the accord, stated that the "constitutional option remains on the table.... I will not hesitate to use it" to ensure an up-or-down vote on judicial nominees.[146] The minority leader contends that the nuclear or constitutional option is off the table.

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[141] Maura Reynolds and Richard Simon, "Senate Deal Reached on Filibusters," *Los Angeles Times*, May 24, 2005, p. A8.

[142] *Congressional Record*, daily edition, vol. 151 (June 9, 2005), p. S6343.

[143] Seth Stern, "Deconstructing the Senate's Bipartisan Deal on Judicial Nominations," *CQ Today*, May 25, 2005, p. 31. The terms of the accord can be found in the *Congressional Record*, daily edition, vol. 151 (May 24, 2005), pp. S5830-S5831.

[144] Ronald Brownstein and Janet Hook, "Senate Truce Faces Test of Bush's Next Nomination," *Los Angeles Times*, May 25, 2005, p. A8.

[145] Jim Drinkard and Kathy Kiely, "Compromise May Spread Beyond Filibuster Agreement," *USA Today*, May 25, 2005, p. 2A.

[146] *Congressional Record*, daily edition, vol. 151 (May 24, 2005), p. S5816.

Whether the promise of the agreement will be met is problematic until it is subject to a likely test on a Supreme Court nomination. President Bush may hold the fate of the agreement in his hand. "If the president chooses a polarizing figure for the high court, the seven Democrats would face enormous pressure to support a filibuster — and that would pressure the seven Republicans to reverse direction and back the filibuster ban."[147] (There were early indications that despite Judge Roberts's conservative credentials, he was viewed as a credible and non-polarizing candidate who was unlikely to provoke an "extraordinary circumstance" filibuster.)

Diverse Definitions of "Extraordinary Circumstances"

Unsurprisingly, soon after Justice Sandra Day O'Connor announced on July 1, 2005, that she would retire from the Supreme Court, there was considerable speculation in the press and media about the durability of the bipartisan pact. If President Bush nominated a controversial candidate, someone that many perceive to be out of the ideological mainstream in terms of his or her judicial views, would that amount to "extraordinary circumstances" and trigger a filibuster? Signers of the accord have competing interpretations. Comments from different Senators who signed the memorandum of understanding illustrate the point.[148]

> -"In my mind, extraordinary circumstances would include not only extraordinary personal behavior but also extraordinary ideological positions."
>
> -"A nominee's political ideology is only relevant if it has been shown to cloud their interpretation of the law.... A pattern of irresponsible judgment, where decisions are based on ideology rather than the law, could potentially be 'extraordinary'."
>
> -"Are they going to be activist? Their political philosophy [or ideology] may not bother me at all if they're not going to be an activist."
>
> -"Based on what we've done in the past with [Bush nominees since May 23, 2005], ideological attacks are not an 'extraordinary circumstance'."
>
> -"Extraordinary circumstances means exactly what it says in the agreement. We will use our discretion and our judgment in making that determination."
>
> -"[If] any Member [who signed the accord] considered that another Member was filibustering a judge under a circumstance that was not extraordinary, [then] any Member had the right to pull out of that agreement and to go back and say: I am going to use the constitutional option to change ... the precedent of the Senate."

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[147] Brownsten and Hook, "Senate Faces Test of Bush's Next Nomination," p. A8.

[148] The remarks of these Senators come from these sources: Gail Russell Chaddock, "Senate Pack Shapes High-Court Fight," *Christian Science Monitor*, July 5, 2005, p. 2; Peter Baker and Charles Babington, "Are a Nominee's Views Fair Game?" *Washington Post*, July 6, 2005, pp. A1, A4; *Congressional Record*, daily edition, vol. 151 (June 24, 2005), p. S7372; and *Congressional Record*, daily edition, vol. 151 (June 9, 2005), p. S6343.

President Bush's nomination of Judge Roberts seems unlikely to provoke a filibuster, but many members of the so-called "Gang of 14" want to review his record and wait to hear his testimony (which began on September 12, 2005) before the Judiciary Committee prior to deciding whether extraordinary circumstances emerge from this process. As one member of the group of 14 said of the extraordinary circumstance clause: "You'll know it when you see it."[149] At bottom, a judicial filibuster will succeed only if several Democratic signers of the accord support it and GOP signatories choose not to back the nuclear or constitutional option.

In today's polarized environment, it is simply more difficult for the Senate to provide its advice and consent to judicial candidates viewed as too controversial by a significant number of its members. Everyone understands that once the Senate confirms a judicial nominee, there is no opportunity for later Senates to reverse that decision except through the arduous process of impeachment. The stakes are high in confirming judicial nominees to life-time positions on the federal bench. As two congressional scholars note: "Intense ideological disagreement coupled with the rising importance of a closely balanced federal bench, has brought combatants in the wars of advice and consent to new tactics and new crises, as the two parties struggle to shape the future of the federal courts."[150]

To be sure, the contemporary debate over judicial nominees involves political and philosophical disagreements about the proper role of the courts in interpreting the Constitution and other measures or matters. Many people say they want judges who will not "legislate from the bench." This comment may seem reasonable, but in practice whether "judicial activists" are perceived to have exceeded their authority often depends on whether someone likes or dislikes court decisions on such large issues as "the proper balance between liberty and authority, between the state and the individual."[151]

Summary Observations

Battles over judicial nominations are not a new development. Recall that the decision in *Marbury v. Madison* was triggered by President Thomas Jefferson's directive to Secretary of State James Madison to withhold granting an officially-signed (by President John Adams) judicial commission to Marbury; the impeachment of Supreme Court Justice Samuel Chase in 1804; FDR's unsuccessful "court-packing" plan in 1937; or today's rhetorical salvos against the judiciary in general and specific judicial nominees. A few decades ago it was individual justices like Earl Warren or William O. Douglas who were the targets of verbal attacks and impeachment threats. Today, it appears that many citizens are upset with courts in

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[149] Bravin and Cummings, "Bush Taps Roberts for Supreme Court," p. A8.

[150] Sarah Binder and Forest Maltzmann, "Congress and the Politics of Judicial Appointments," in *Congress Reconsidered*, 8th ed., eds., Lawrence Dodd and Bruce Oppenheimer (Washington: CQ Press, 2005), p. 313.

[151] William H. Rehnquist, *The Supreme Court: How It Was, How It Is* (New York: William Morrow, 1987), p. 387.

general, including the Supreme Court. A poll by the Pew Research Center found that 57% of the people had a favorable of the Supreme Court — down from 70% a decade ago. "The court is taking criticism from both sides of the political spectrum," remarked the director of the Pew Research Center. "Liberals lost regard for the court in 2001 following [its ruling that President Bush had won the 2000 election], and the court lost favor with conservative Republicans, possibly because of their discontent about some big social issues they are focused on."[152]

What seems clear, however, is that today's judicial confirmation process for high profile nominees is often fraught with conflict and contention. (Contentiousness is to be expected, but not wanted is the rancor, bitterness, or name-calling that permeates debate on some nominees.) To be sure, there are earlier examples of federal court nominees being turned down by the Senate or subjected to vigorous public and senatorial debate, such as President Woodrow Wilson's 1916 nomination of Louis Brandeis to the Supreme Court, the first Jew to sit on the high court. Yet bruising confirmation battles seem a more regular and common occurrence today than in the past. People may give different "start times" for the intensive, extensive, and often critical review of judicial nominees' public positions, ideological leanings, legal philosophy, and general views of past court decisions. Pundits may suggest the 1968 Fortas nomination or the 1987 Bork nomination as the period when judicial nominees began to confront a Senate confirmation process marked by greater rigor, more partisanship, and larger interest group involvement. Presidential candidates even raise the issue of judicial appointments during their campaigns.

The exact date for all this is probably less important than suggesting possible explanations as to why the contemporary confirmation process has proven to be difficult and arduous for a number of recent judicial nominees. There are at least six forces or factors that appear to account for much of the delay, defeat, or acrimony that shape the fate of a relatively small number of judicial candidates: wider recognition of the influential role of the judiciary in national governance, heightened partisanship, split party control, larger interest group involvement, legislative-judicial misunderstandings, and constitutional ambiguities.

Wider Recognition of the Judiciary's Influential Role

Policymaking by federal courts, through their interpretations of laws or the Constitution, is a fact of political life which, as mentioned earlier, Alexis de Tocqueville commented upon more than a century ago. Supreme Court Justice Oliver Wendell Holmes remarked in 1917, that he recognized "without hesitation that judges do and must legislate."[153] Judicial lawmaking, then, is inherent in the Court's exercise of judicial review. In the judgment of two Duke University law professors:

> [E]very lawyer knows that judges make law — it's their job. In fact, law students learn in their first semester that almost all tort law (governing accidental injuries), contract law and property law are made by judges. Legislatures did not

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[152] "Public's View of High Court Lower Now," *Washington Times*, June 16, 2005, p. A5

[153] *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917). Cited by Fisher, *American Constitutional Law*, p. 17.

> create these rules; judges did, and they continue to do so when they revise the rules from time to time.
>
> Indeed, one of the most fundamental doctrines of America law — the authority of courts to declare laws unconstitutional — is entirely made by judges. Nowhere does the text of the Constitution mention the power of judicial review, and it may fairly be debated whether the framers of the Constitution intended to create such a power.
>
> Supreme Court justices must interpret broadly worded provisions of the Constitution and decide the meaning of vague terms that protect "liberty" or prevent government from the "establishment of religion" or from imposing "cruel and unsual punishment."[154]

It is unclear whether the general public views judges as lawmakers. What is clear is the presence of many more active players — pressure groups, a 24-7 media, pollsters, and others — engaged in discussing and influencing the judicial confirmation process. The confirmation process is not a distant or "inside the Beltway" activity, as it once was. Attentive constituents and many others all understand that judges have the authority to decide consequential questions involving criminal law, reapportionment, church-state relations, presidential elections, federalism, war powers, and many other areas. Understandably, many people today are getting engaged in fighting for or against the confirmation of judicial nominees.

Further, important judicial decisions are often decided by narrow margins. Small wonder that would-be justices, especially for the Supreme Court, are usually subjected to intense Senate and public scrutiny. Would Judge Roberts, for example, seek to overrule *Roe v. Wade* (1973) if placed on the Supreme Court?[155] Will Roberts favor restraints on Congress's lawmaking prerogatives in favor of states' rights? What is Judge Roberts' approach to deciding civil rights cases or interpreting the commerce clause of the Constitution? Most citizens may be unable to recognize Roberts or name many of the Supreme Court justices, but they do understand the key role of the judiciary — in conjunction with other public and private actors and institutions — in shaping American society.

Heightened Partisanship

There has been by many measures an increase of partisanship in the Senate reflected, in part, by the ideological chasm between the two parties. The two Senate parties, as journalist David Broder noted, are "more cohesive internally and further apart from each other philosophically."[156] Good indicators of heightened partisanship are the large number of party-line votes (a majority of Democrats facing off against a majority of Republicans) and the increase in party cohesion (the philosophical

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[154] Erwin Chemerinsky and Catherine Fish, "Judges Do Make Law — It's Their Job," *USA Today*, Aug. 24, 2005, p. 11A.

[155] *Roe v. Wade*, 410 U.S. 113 (1973).

[156] David S. Broder, "Don't Bet on Bipartisan Niceties," *Washington Post*, Jan. 1, 2003, p. A19.

agreement in both parties) on these votes. Only once in the past half-century [in 1995] has the percentage of party-line votes exceeded that for 2005. In 1995, when Republicans won control of both chambers for the first time in 40 years, the percentage of Senate party-line votes was 68.8%; ten years later it was 68.6%.[157] As for party unity in 2005, Senate Republicans have an average score of 91% compared to an 89% average for Senate Democrats.[158] Judiciary Committee Democrats and Republicans have also found themselves aligned against each other in disputatious confirmation meetings.[159]

What all this means is that in a generally narrowly divided Senate with few centrists, it is quite difficult to forge sufficient consensus to win approval of judicial nominations, especially when Senators are not reluctant to employ an array of parliamentary devices (filibusters, holds, etc.) to achieve their objectives. In the judgment of one Senator, "The whole Congress has become far more polarized and partisan so it makes it difficult to reach bipartisan agreements. The more significant the issue, the more partisan it becomes."[160] Intense electoral competition between the two parties adds a further partisan dimension to Senate proceedings.

Split Party Control

Split party control of the Senate and White House may make it more difficult for Presidents to win approval of their judicial nominees and contribute to confirmation delays. The chair of the Judiciary Committee, for example, may be ideologically out-of-sync with the President and view unfavorably some judicial nominees submitted by the White House. Some scholars suggest that the evidence is not clear-cut as to whether there is much difference between unified and divided government in the approval of judicial nominations.[161]

On the other hand, judgeship confirmation statistics compiled during periods of unified and divided government from the presidencies of Jimmy Carter through the first three years of George W. Bush's administration indicate a general pattern of higher confirmation success rates during periods of unified compared to divided government.[162] There is also little doubt that divided government "contributed to the

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[157] Gregory Giroux, "If History Is Any Judge, Parties Will Be At Loggerheads Over Court Nominee," *CQ Today*, July 5, 2005, p. 18 The time period in 2005 was as of the July 4 recess.

[158] Ibid.

[159] In the judgment of a journalist, "No panel in Congress can match the Judiciary Committee's recent record for partisanship, finger-pointing and road-blocking, not to mention computer espionage and hearing-room vulgarity." See David Von Drehle, "Roberts Is Defined by His Calm," *Washington Post*, Aug. 28, 2005, p. A10.

[160] Elizabeth Shogren, "Will Welfare Go Way of Health Reform," *Los Angeles Times*, August 10, 1995, p. A18.

[161] Morris Fiorina, *Divided Government*, 2nd ed. (Boston: Allyn and Bacon, 1996), pp. 95-99.

[162] CRS Report RL31635, *Judicial Nomination Statistics: U.S. District and Circuit Courts, 1977-2003*, by Denis Steven Rutkus and Mitchel A. Sollenberger.

rise in length and intensity of the [confirmation] hearings."[163] Presidents may seek out non-controversial judicial nominees to facilitate their approval by a less-than-friendly Senate.

Whether the government is divided or unified, the approach of presidential elections — as noted earlier — does produce confirmation delays. The minority party in the Senate is often keen on postponing approval of judicial candidates in the hope or expectation that their party's candidate will win the White House in the November election. A classic case, as noted earlier, involved President Lyndon Johnson's selection of Supreme Court Justice Fortas to replace the retiring Earl Warren as Chief Justice. On the same day (June 26, 1968) that Johnson nominated Fortas, Republicans released a statement saying the next Chief Justice should be chosen by "the newly elected president of the United States, after the people have expressed themselves in the November elections. We will, therefore, because of the above principle, and with absolutely no reflection on any individuals involved, vote against confirming any Supreme Court nominations of the incumbent president."[164]

Larger Interest Group Role

Given that federal judges have life-time tenure and make decisions on important social, economic, and political issues, it is understandable that interest groups are actively involved in the judicial confirmation process. Interest groups (labor unions, for example) presented testimony for the first time in 1930 against President Hebert Hoover's unsuccessful nomination of John Parker to the Supreme Court.[165] From active participation in only a small number of judicial confirmations, interest group involvement — public and private — grew steadily over time as groups recognized the increasing importance of courts and the judges appointed to them.

> In 1957, for example, [William J.] Brennan was questioned for a total of three hours, over two days of hearings (with *no* interest group testimony before the full committee). Twelve years later, the Senate Judiciary Committee quizzed Thurgood Marshall, a politically controversial nominee, for about seven hours (with only *one* interest group representative testifying). In 1987, Robert Bork answered questions for thirty hours over four and a half days; the hearings themselves lasted for twelve days, including eighty-seven hours of testimony taken from 112 witnesses (with some 86 representing interest groups).[166]

Groups of all ideological stripes — many aligned with either major party — are actively engaged in lobbying for or against Supreme Court, circuit court, and district court nominees. A conservative group, for instance, urged their Senate allies: "Block

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[163] Katzmann, *Courts & Congress*, p. 19.

[164] Michael Sandler, "Timing, Political Climate Have Shaped Supreme Court Nomination Battles," *CQ Today*, July 5, 2005, p. 9.

[165] Lauren Cohen Bell, *Warring Factions: Interest Groups, Money, and the New Politics of Senate Confirmation* (Columbus, OH: Ohio State University Press, 2002), p. 32. Worth noting is that a year earlier, in 1929, the Senate ended its practice of debating executive nominations in closed session.

[166] Katzmann, *Courts & Congress*, pp. 19-20.

most Clinton appointees, regardless of ideology, so as to deny Clinton his appointments and save the slots for a Republican president to fill."[167] Various groups, as mentioned earlier, are mobilizing armies of supporters, running radio and television ads, and raising large sums of money to battle for or against Bush's nomination of Judge Roberts to serve on the Supreme Court. (Many individuals expect Roberts to be confirmed and to vote in generally the same way as one of his mentors, the late Chief Justice Rehnquist. Various groups and lawmakers indicate that the successor to replace Justice O'Connor, a swing vote on the court, might trigger a confirmation battle. As a Judiciary member said during the several days of hearings on Judge Roberts: "This is just a warm-up for the next fight."[168])

The conservative Progress for America has raised $18 million to win Senate approval of Bush's choice for the high court. The liberal People for the American Way also has raised millions to challenge Roberts' nomination. Moreover, for the first time the U.S. Chamber of Commerce and the National Association of Manufacturers (NAM) will be activating their network of allies and grass-roots supporters. "We can't sit on the sidelines with the third branch of government" making so many decisions affecting business, said the NAM head.[169] Both organizations have endorsed Roberts.[170]

> That's not all. This will be the first Supreme Court confirmation battle in 11 years — which means it will be the first such battle of the Internet age, with its legion of bloggers, and the first of the new age of media polarization — with phalanxes of partisan commentators on competing all-news cable channels.[171]

Interest groups have also created "computerized war rooms and telephone calling strategies in an effort to exert the most pressure on wavering senators."[172]

These groups, in short, are important actors in the confirmation process: either slowing down, expediting, or encouraging the approval or rejection of selected court nominees. Today's confirmation battles bear the hallmarks of an electoral campaign. As a political scientist noted:

> The transformation of the Supreme Court appointment process into a mechanism similar to that of an electoral campaign has occurred because of the

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[167] Bell, *Warring Factions*, p. 109. See Bob Davis and Robert S. Greenberger, "Objection! Two Old Foes Plot Tactics in Battle Over Judgeships; Neas and Gray Shape a Clash Growing More Vitriolic As November Vote Nears; Prelude to a High-Court Fight," *Wall Street Journal*, Mar. 2, 2004, p. A1.

[168] Jonathan Allen, "Roberts Hearing Begins," *The Hill*, Sept. 13, 2005, p. 9.

[169] Tom Hamburger, "Process Won't Be Business as Usual," *Los Angeles Times*, July 2, 2005, p. A10.

[170] Jim VandeHei, "Group Defends Roberts's Voting Record," *Washington Post*, August 25, 2005, p. A3.

[171] Doyle McManus, "High Noon for High Court," *Los Angeles Times*, July 3, 2005, p. A11.

[172] John Cranford and Adriel Bettelheim, "Nomination Battle Lines Harden," *CQ Weekly*, July 4, 2005, p. 1815.

> introduction of new, powerful players — the news media, interest groups, and public opinion. These forces now shape the system of judicial selection in a way unknown a half century ago.[173]

All sides in any confirmation battle recognize the importance of framing the public debate their way and responding quickly to the claims and charges of the opposition. Needless to say, many groups will use a Supreme Court vacancy to raise cash for their lobbying efforts.[174] Further, because opposing groups have raised so much money to contest Roberts' candidacy, it seems certain that there will be some political fireworks associated with his confirmation. "No matter who got nominated, there is just a lot of money waiting to talk," noted Notre Dame law professor Richard Garnett.[175]

Legislative-Judicial Misunderstandings

Friction between the legislative and judicial branches is inevitable in our separation of powers and checks and balances system. One scholar suggests that currently there is an "antagonistic relationship" between Congress and the courts, with some people complaining about an "imperial judiciary."[176] Many reasons account for this view — controversial court decisions or judicial actions that strike down congressional enactments, for example — but there is another that may be overlooked. Inter-branch tension may result from misunderstandings about the values and incentives of the legislative and judicial worlds. A communications and understanding gap may produce hostile attitudes and responses toward the judiciary among some on Capitol Hill. A House chairman, for example, wrote a five-page letter to a circuit court judge chastising him for giving a drug courier a lighter sentence than what he believed was required under a drug statute.[177]

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[173] Richard Davis, *Electing Judges: Fixing the Supreme Court Nomination Process* (New York: Oxford University Press, 2005), p. 7.

[174] Thomas B. Edsall, "Vacancy Starts a Fundraising Race," *Washington Post*, July 5, 2005, p. A4.

[175] Ronald Brownstein, "A Fight, Maybe, but Not a Battle," *Los Angeles Times*, July 20, 2005, p. A9. See Mark Memmott, "It's Quite a Fight, and Some of It's About Nominee," *USA Today*, Aug. 19, 2005, p. 4A. One television ad against Roberts, declared false by Factcheck.org, a nonpartisan project of the Annenberg Public Policy Center at the University of Pennsylvania, was soon taken off the air. Dan Balz, "Roberts Ad Highlights Volatility of Abortion Issue," *Washington Post*, August 14, 2005, p. A4. Subsequently, the ad was revamped and aired "with a broader, more abstract approach to opposing" Judge Roberts. See David Kirkpatrick, "Abortion Rights Group Revamps Anti-Roberts Ad," *New York Times*, August 27, 2005, p. A11.

[176] David M. O'Brien, "How the Republican War over 'Judicial Activism' Has Cost Congress," in eds. Colton Campbell and John Stack, *Congress Confronts the Court* (Lanham, Md.: Rowman & Littlefield, 2001), p. 69. See Keith Perine, "'Heightened Tensions' Fray Judicial-Legislative Relations," *CQ Weekly*, September 18, 2004, pp. 2148-2153, and CRS Report RL32935, *Congressional Oversight of Judges and Justices*, by Elizabeth Bazan and Morton Rosenberg.

[177] Jim Snyder, "Briefly," *The Hill*, July 12, 2005, p. 3.

More attention, in brief, might be given to devising creative channels of communication which could foster greater awareness and understanding of the interests and roles of Congress and the judiciary. For example, in the wake of a number of attacks on the judiciary and in a highly unusual event, "all nine Supreme Court justices broke bread with Congressional leaders ... in a small private meeting that appears to have had no agenda other than creating better relations between the two branches of federal government."[178] The leaders in attendance at the luncheon included the top four party leaders of the House and Senate as well as leaders of the House and Senate Judiciary Committees. A bipartisan congressional caucus was formed recently with the goal of "improving the relationship between the legislative and judicial branches."[179] As one its co-leaders explained:

> Why does it matter if the Congress and the courts are at war? Because if the separation of powers has eroded and an independent judiciary is impaired, decisions become increasingly politicized. Public confidence in the rule of law erodes and people begin taking the law into their own hands. 174 years ago, Supreme Court Chief Justice John Marshall warned: "The greatest scourge an angry heaven ever inflicted upon an ungrateful and sinning people was an arrogant, a corrupt, or a dependent judiciary."[180]

The bottom line: "If the executive and legislative branches were to cease regular communication, the breakdown of government would be considered likely. The absence of such communication between the judiciary and Congress should give equal cause for concern."[181]

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[178] Paul Kane and Erin P. Billings, "Justices Host Hill Leaders," *Roll Call*, June 22, 2005, p. 1.

[179] *Congressional Record*, daily edition, vol. 151 (Apr. 14, 2005), pp. H2083-H2084.

[180] *Congressional Record*, daily edition, vol. 151 (Sept. 8, 2005), p. H7793. It is worth noting that Chief Justice Rehnquist met with the bipartisan members of the informal House caucus. Chief Justice Rehnquist also met informally with the Senate Democratic Policy Committee. See *Congressional Record*, daily edition, vol. 151 (Sept. 6, 2005), p. S9609.

[181] Robert Katzmann, "The Underlying Concerns," in ed., Katzmann, *Judges and Legislators: Toward Institutional Comity*, p. 10. This book suggests various ways for the legislative and judicial branches to interact. D.C. Circuit Court Judge Abner J. Mikva, who also served in the House of Representatives before he became a judge, stated: "It would be nice if there were greater dialogue between the legislative and judicial branches as to legislative intent, not as to constitutionality and not as to policy decisions but as to the question of what happens when Congress passes a law and the court interprets it. Frequently, the Congress never gets back to the subject matter so members don't get a chance to say the courts have misinterpreted what Congress wanted them to do. So it would be nice if there were some formal system that would allow the Congress to review legislative interpretations of the courts and say, 'No, this isn't what we meant at all. Here is what we meant.' But I see no way to do this and still maintain separation of powers." See "Abner J. Mikva; On Leaving Capitol Hill for the Bench," *New York Times*, May 12, 1983, p. B8.

Constitutional Ambiguities

The Constitution splits and intermingles presidential and senatorial authority in several specific areas, including judicial nominations. The founders granted the Senate and President shared responsibility for judicial nominations, but they never elaborated the specific roles of each branch. Scholars and others have long debated the meaning of "advice and consent." Is the President to exercise predominance in this area or are both branches expected to be full and equal partners in the confirmation process? Both sides can find numerous statements from the framers and others to bolster their point of view.

Senators from opposite parties sometimes have divergent views of what the word "advice" means in the Constitution (Article II). One Senator, for example, stresses that the President should consult in advance with lawmakers before he selects a "consensus" candidate. "Presidents who have listened to the Senate's advice and selected [highly qualified, consensus] candidates have had no problem obtaining Senate consent," he said.[182] Another Senator noted that President Clinton consulted with key Senators on his two Supreme Court nominees (Stephen Breyer and Ruth Bader Ginsburg), who were easily approved by the Senate. He added:

> That is not the only time advice has been sought. In 1869, President Grant appointed [Edwin M. Stanton] to the Supreme Court in response to a petition from a majority of the Senate and the House. In 1932, President Hoover presented Senator William Borah, the influential chairman of the Senate Foreign Relations Committee, with a list of candidates he was considering to replace Justice Oliver Wendell Holmes. Borah persuaded Hoover to move the name of the eventual nominee, Benjamin Cardozo, from the bottom of the list to the top, and Cardozo was speedily and unanimously confirmed.[183]

Still another Senator underscored that the Senate is not a co-nominator of judicial candidates, citing the Constitution's language that the president alone nominates. "Although consultation, in theory, may or may not be a good idea," he said, "there is no constitutional requirement or Senate tradition that obligates the

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[182] *Congressional Record*, daily edition, vol. 151 (June 23, 2005), p. S7205. This Senator also highlighted the advisory process already in place for federal district judicial nominations. "In selecting district judge nominees in our States, the White House sends us the list of persons being considered seriously, and asks for our comments on each, as well as our suggestions for additional names to consider. When they have narrowed down the list, they share the short list with us, so that we can give our final advice as to which ones are best and which ones would raise problems. Almost always, our advice is considered and respected. As a result, most District Judges go through the confirmation process quietly and expeditiously, and obtain the consent of the Senate." p. S7206.

[183] Ibid., p. S7208. One account stated that the Senate confirmed Cardozo's appointment to the Supreme Court in 10 seconds without any debate or a roll call vote. See Abraham, *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton*, p. 154. Also see per the Stanton nomination, Charles Warren, *The Supreme Court in United States History*, vol. two (Boston: Little, Brown, 1926), pp. 504-506. For the record, Stanton died four days after being nominated, and thus was not confirmed by the Senate.

President, or anyone in the executive branch, to consult with individual Senators, let alone the Senate as an institution." Further, "Senators should behave in a manner that is both respectful and deserving of such a special [consultative] role in the Supreme Court nomination process, if they expect the administration to meet them halfway."[184] He added that President Bush "engaged in unprecedented consultation before his nomination of Judge John G. Roberts, Jr., meeting with 70 senators during his decisionmaking process."[185] A Democratic Senator had a different view of the Bush administration's consultative process. "They called up about 60 senators. There was a lot of quantity, but not much quality in terms of an actual dialogue. They didn't have a real back-and-forth with us."[186]

To conclude, a famous presidential scholar wrote that the Constitution is "an invitation to struggle for the privilege of directing American foreign policy."[187] If the reference to "directing American foreign policy" is substituted with "shaping the composition of the federal judiciary," Corwin's statement would apply equally well to struggles between the Senate and White House over the selection and approval of federal judges.

Our tripartite system of governance has stood the test of time for over 200 years. Part of the explanation for this achievement is that each branch of government contributes something unique to the policymaking process. The President can act with dispatch, provide unity and a national perspective to policymaking, and command from administrative entities policy, political, procedural, and legal expertise on all matters under the sun. Congress is an open and accessible institution capable of representing and responding to the diverse views and interests of a complex polity. The Supreme Court and lower federal courts protect individual and minority rights, check legislative and executive authority, adjudicate disputes between the states and federal government, and, more generally, uphold such values as fairness and equality under the law. The dynamic and evolving interplay of the three branches — conspicuously present in the judicial confirmation process — means that "all three institutions are able to expose weaknesses, hold excesses in check, and gradually forge a consensus on constitutional values."[188]

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[184] Ibid., p. S7228. See Carl Hulse, "Democrats Seek Greater Voice in Nomination, Telling Bush It Would Ease Process," *New York Times*, July 10, 2005, p. 16 and Paul Kane, "Bush Initiates Talks With Deal Signers," *Roll Call*, July 11, 2005, p. 1.

[185] "Consultation a Moving Target for Dems," *The Hill*, July 26, 2005, p. 22.

[186] Deborah Solomon, "Judicial Opinion," *New York Times Magazine*, July 31, 2005, p. 13.

[187] Edward S. Corwin, *The President: Office and Powers, 1787-1957*, 4th ed. (New York: New York University Press, 1957), p. 171.

[188] Louis Fisher, "Congressional Checks on the Judiciary," in eds. Campbell and Stack, *Congress Confronts the Court*, p. 35.