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## A Survivor's Perspective: Federal Judicial Selection from George Bush to Donald Trump

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A SURVIVOR'S PERSPECTIVE: FEDERAL JUDICIAL  
SELECTION FROM GEORGE BUSH  
TO DONALD TRUMP

*Leslie H. Southwick\**

INTRODUCTION

Where are we, and how did we get here?

Those are not bad questions for seeking a way out of any troubled situation, or for that matter, remaining in a good one. Over recent decades, federal judicial selection controversies are worsening in their frequency and intensity. They distort all three branches of government. My particular concern is with federal judicial selection for judgeships below the Olympian heights of those on the United States Supreme Court, namely, the judges on the twelve regional circuit courts of appeals and the ninety-four district courts.

The depth of partisan acrimony over judicial confirmations has placed us in the infernal regions, and we seem to be continuing our descent. Analyzing how we got there is invariably affected by the biases, or more gently, by the perspectives of the observer. I will try to avoid suggesting blame, but it is my hope to suggest the forces—political, historical, and even jurisprudential—that have propelled the process in the direction we have gone.

There are several possible starting points for a survey. The beginning, i.e., 1789, is well beyond my competence to explore in depth. Nonetheless, I will give a quick historical survey, my point being that current controversies about judges have not displaced a magical time when judicial selection was

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\* The author has been a judge on the United States Court of Appeals for the Fifth Circuit since October 2007, with chambers in Jackson, Mississippi. I thank one of my stellar law clerks, Daniel Fiedler, for research assistance. Judge Kyle Duncan generously agreed to assist on a few points. Ed Whelan of the Ethics and Public Policy Center gave generously of his time in answering questions in my telephone call. Gratitude to Rita Lari with the Senate Judiciary Committee, who was able to find elusive 1992 press releases in the Committee files, and to Gregg Nunziata who pointed me in her direction. Quite diligent in obtaining sources for me were Fifth Circuit librarians Sue Creech, Brent Hightower, Melinda Williams, and Judy Reedy. My sincere thanks to them too.

above the political fray, where legal luminaries were always nominated and then were met with universal approval. Very early, one party's seemingly overweening effort to pack certain courts led to a landmark Supreme Court decision.

A significant consideration for me when deciding the time period to cover, in addition of course to making the task manageable, was that if I am going to write on a topic much written upon already, perhaps it would be beneficial to write from the perspective of someone who for several decades has been tangentially involved with nominations of lower-court federal judges. The thirty-year period I have chosen began with my work at the Department of Justice during the first President Bush's one term. While there in 1989–1993, I was a failed aspirant for one of those judgeships. During the year-long migration from applicant to also-ran, I witnessed the process both as an insider of the administration but as an outsider to most of the events that culminated in the selection. In the George W. Bush administration, 2001–2009, I was selected for the circuit judgeship I now hold, but success took almost all of Bush's eight years. Since then, I have observed closely for new colleagues both in the Fifth Circuit and elsewhere. Such a perspective, though, is admittedly a distorted one. Another distortion that follows from the first is that my personal knowledge causes me to write more about the Fifth Circuit Court of Appeals than about other courts—an emphasis, but not an ignoring of the rest of the country.

What will be discussed are significant nominations of each of the presidencies during the thirty-year period, almost all being circuit court nominations. The reasons I discuss a particular nominee will vary. Some were chosen because they led to new rules for processing nominations. Others became national news stories worth recalling. Still others were the paths that particularly well-known judges took to reach their positions.

Because my experience was as a several-times-frustrated aspirant, and then finally a controversial nominee, I also will discuss when possible the impact of the harshness, or to use an apt if old-fashioned word, the meanness, that is injected in some nominees' confirmation struggles. I will say, after my own journey ended in 2007, what I thought was harsh seems mild compared to some more recent battles. I had protested too much. What I saw as not just unfair criticism but some critics' indifference to the validity of the charges caused me to rely more and more on my Christian faith for keeping the worries of the world in their proper place. I will focus on that aspect when I can in part because this is a law review at a school that at least was founded on faith. In addition, the pointed rejection by some that a judge can be faithful both to his or her religion and to the judicial oath is a dangerous trend but a natural one in the present world. That is too corrosive a view to ignore.

A confession before starting. My experience makes me almost invariably sympathize with a judicial nominee regardless of the controversy or the President who made the selection. I say that even though in recent decades, each political party and its supportive groups have increasingly insisted on the

nomination of judges who will apply their favored analytical principles, ranging from a tight focus on text and original meaning to a belief that the interpretive method must be sufficiently supple to allow reaching the best meaning under current societal standards. In my twelve years on the Fifth Circuit, I have had gifted colleagues join this court. The political process is unnecessarily harsh, but within that reality, the survivors need to become friends by sharing in the common task. Seeing another judge not as evil but as simply being in error are fundamental to serving on an appellate court.

## I. IN THE BEGINNING

I will give a relatively brief background to indicate that though there have been increasing and accelerating controversies about selection of federal judges, the problems have been with us since the first presidency. A 1993 book written by Stanford law librarian J. Myron Jacobstein and University of Texas law librarian Roy M. Mersky, called *The Rejected*, identified twenty-six nominees to the Supreme Court whose confirmations were, well, rejected by actual votes or by being ignored.<sup>1</sup> The book begins with a nomination by the Father of the Country, George Washington, whose stature did not save John Rutledge, his nominee to be Chief Justice.<sup>2</sup> At least some of the votes against confirmation arose from Rutledge's injecting himself into politics by opposing the Jay Treaty with England in a well-publicized speech, which Rutledge gave almost at the same time that the President gave him a recess appointment as Chief Justice in July 1795. When the Senate came back into session in December, confirmation was rejected by a 10–14 vote.<sup>3</sup>

In describing the early decades of selection politics, it is hard to overlook that *Marbury v. Madison* arose from a new President and his political party's outrage over a previous President and his party's "midnight" appointment of numerous new judges, even if the judges involved in that case were only justices of the peace for the District of Columbia and Alexandria, Virginia, serving five-year terms.<sup>4</sup> A Jeffersonian newspaper called the creation of new courts by a Federalist Congress and the immediate filling of the positions by President John Adams, who was in his last weeks in office after being defeated for reelection, "one of the most expensive and extravagant, the most insidious and unnecessary schemes that has been conceived by the Federal party."<sup>5</sup> It was not all that, but the bill was a bit bold. The bolder enactment passed at the same time was the Judiciary Act of 1801, which created six circuit courts with sixteen life-tenured judges who relieved the Supreme Court Justices from their arduous circuit-riding duties that required each Justice to travel by horse, buggy, or boat to one of the six circuits to hear

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1 J. MYRON JACOBSTEIN & ROY M. MERSKY, *THE REJECTED: SKETCHES OF THE 26 MEN NOMINATED FOR THE SUPREME COURT BUT NOT CONFIRMED BY THE SENATE* (1993).

2 *Id.* at 5–10.

3 *Id.* at 8–9.

4 See CLIFF SLOAN & DAVID MCKEAN, *THE GREAT DECISION: JEFFERSON, ADAMS, MARSHALL, AND THE BATTLE FOR THE SUPREME COURT* 53–54 (2009).

5 *Id.* at 56 (quoting the *Aurora*).

appeals.<sup>6</sup> The President quickly nominated and the Senate confirmed a complete battery of judges, but the Act was repealed by the new Jeffersonian Congress.<sup>7</sup> The Supreme Court, perhaps considering discretion the better part of valor, did not disturb Congress's forcibly ending sixteen judges' life tenure while they were still alive.<sup>8</sup>

This early dispute had as much to do with patronage in judicial selection as it did with the likely future rulings of judges. One detailed identification of later controversies over judgeships is a list maintained by the Federal Judicial Center of all nominees for judgeships who did not serve as judges.<sup>9</sup> In the early decades, what that source reveals is that there were more declinations of judgeships after confirmation than there were defeats. President Washington, for example, had two nominees to the Supreme Court decline their appointment in addition to Chief Justice Rutledge's nomination being rejected; Washington also withdrew an additional nomination to the Court.<sup>10</sup> Difficulties of communication in those years certainly played a significant role in that story, with nominations for judgeships occurring without prior communications with the nominees. The list also shows that politically weak presidents, such as John Tyler who served as Vice President only for a month in 1841 and then ascended to the highest office at the death of President William Henry Harrison, had a record of defeats of judicial nominees in the Senate that was abnormal for the times.<sup>11</sup> Some of the failures even to get votes in the Senate were for those nominated very late in a presidency.<sup>12</sup> The first failure of a nominee to the Fifth Circuit, for example, was of U.S. District Judge Edward Billings of New Orleans, who was nominated to the court by the outgoing President in January 1881; a new President had been elected the previous November.<sup>13</sup> Billings never came up for a vote.

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6 See *id.* at 54–55, 170–71.

7 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 188 & n.1 (1922); Jed Glickstein, Note, *After Midnight: The Circuit Judges and the Repeal of the Judiciary Act of 1801*, 24 *YALE J.L. & HUMAN.* 543, 544, 547 (2012). The three judges of the Fifth Circuit (North and South Carolina, and Georgia) appointed by President Adams declined; President Jefferson filled those vacancies in 1801 before the Act's repeal in 1802. *Id.* at 547–49.

8 SLOAN & MCKEAN, *supra* note 4, at 170–71 (discussing *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803)).

9 *Unsuccessful Nominations and Recess Appointments*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/unsuccessful-nominations-and-recess-appointments> (last visited Feb. 15, 2020).

10 *Id.*

11 *Id.*

12 *Id.* See entries for Presidents John Quincy Adams (three of his five failed nominations), William Howard Taft (ten of eighteen failed nominations were made after his defeat in November 1912), and Calvin Coolidge (twelve of nineteen failed nominations made a few weeks before he left office). The list shows that many of Coolidge's late nominees were renominated by his successor and confirmed. *Id.*

13 Billings was nominated by President Hayes on January 24, 1881, *id.*, five weeks before he would leave office on March 4, JOSEPH NATHAN KANE, *FACTS ABOUT THE PRESIDENTS* 132 (3d ed. 1974). The position of circuit court judge, to which Billings was nomi-

One memorable defeat of a Supreme Court nominee occurred ninety years ago. President Hoover's nomination of Fourth Circuit Judge John Parker to be an Associate Justice on the Supreme Court failed by a 39–41 vote in May 1930.<sup>14</sup> He was opposed due to statements he made in his 1920 campaign as a Republican for North Carolina governor when he said he did not want any votes from black citizens, who, though they were at that time usually Republicans, were such a small part of the electorate that Parker wanted to deflect Democratic claims that he was seeking such votes.<sup>15</sup> Labor leaders opposed him for a judicial decision he had made to uphold an injunction against a workers' strike.<sup>16</sup> This is a significant and rare early example of a nominee's being opposed because of rulings he had made as a judge, for his economic views, and for reasons related to civil rights.

Dwight Eisenhower and John Kennedy either served in much different times or they were much different presidents, or both. Eisenhower had only two nominees during his time in office from 1953 to 1961 who were not ultimately confirmed, and President Kennedy had none for his close to three years as President from 1961 to 1963.<sup>17</sup> Neither President Lyndon Johnson from 1963 to 1969 nor President Nixon from 1969 to 1974 had many failed lower-court nominations, but they each had two nominees to the Supreme Court who were not confirmed.<sup>18</sup> Gerald Ford in his less than three years in office had only eleven failed nominees who were not later confirmed; all of them were nominated after March 31 of his last full year in office, and none of them got a floor vote.<sup>19</sup>

The making of political issues out of legal ones got much of its impetus with the Warren Court in the 1960s, including rulings on the rights of criminals and the civil rights of African Americans. Selecting judges who would not be "soft on crime" became a recurring election issue. The defeat of Associate Justice Abe Fortas's proposed promotion to the center seat on the Court in 1968, the agreement of Earl Warren to remain on the Court until after that year's election, and thus the right of whichever presidential candidate won to name the new Chief Justice made judicial selection more of a factor in that election than it had been in the past.<sup>20</sup> Though the new

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nated, existed from 1869 to 1912 and predated the creation of circuit courts of appeals judgeships in 1891. See *The U.S. Circuit Courts and the Federal Judiciary*, FED. JUD. CTR., <https://www.fjc.gov/node/4506> (last visited Feb. 15, 2020) (discussing the circuit courts); *The U.S. Courts of Appeals and the Federal Judiciary*, FED. JUD. CTR., <https://www.fjc.gov/node/6766> (last visited Feb. 15, 2020) (discussing the circuit courts of appeals).

14 See JACOBSTEIN & MERSKY, *supra* note 1, at 113–22.

15 *Id.* at 116–17.

16 *Id.* at 115–16.

17 *Unsuccessful Nominations and Recess Appointments*, *supra* note 9.

18 *Id.* The failed Supreme Court nominations for Johnson were of Abe Fortas and Homer Thornberry. Nixon nominated Clement Haynsworth and G. Harrold Carswell, both of whom were defeated. *Id.*

19 *Id.*

20 See DAVID ALISTAIR YALOF, *PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES* 90–94, 99–100 (1999).

President, Richard M. Nixon, had little trouble with his nomination of Warren Earl Burger to be the new Chief Justice, the 1969 defeat of the eminently qualified Fourth Circuit Judge Clement Haynsworth to be an Associate Justice may have included more than a soupçon of payback for Fortas's troubles.<sup>21</sup>

Democrat Jimmy Carter had great success in selecting judges from 1977 to 1980, not only because he had a Democrat-controlled Congress but also because of passage of the “largest expansion of the federal judiciary in United States history—the Omnibus Judgeship Act of 1978.”<sup>22</sup> Carter filled almost all of the 117 new district and 35 new circuit court of appeals judgeships before he left office in January 1981.<sup>23</sup> Indeed, Carter appointed more federal judges than any prior President, but he did not get an opportunity to name anyone to the Supreme Court.<sup>24</sup>

After campaigning on the promise to select judges by merit, Carter in February 1977 issued an executive order establishing the United States Circuit Judge Nominating Commission to recommend circuit court nominees.<sup>25</sup> The dramatic increase in the number of judges increased the fairness of having a merit-based process. The Commission was composed of thirteen panels, one for most circuits but two for each of the Fifth and Ninth Circuits.<sup>26</sup> The President was more insistent on naming minority and female judges than any prior President, and he had all U.S. senators informed that he wanted such recommendations.<sup>27</sup> Before Carter started filling the new judgeships, 20 of the 525 active judges were black and 6 were women.<sup>28</sup> He would name 37 African Americans and 40 women to circuit and district courts.<sup>29</sup> The 1978 Act gave the Fifth Circuit 11 more judgeships, expanding the court from 15 to 26 positions.<sup>30</sup> Carter's successful female nominees to the (old) Fifth Circuit were Carolyn Randall King of Texas and Phyllis Adele Kravitch of Georgia.<sup>31</sup> Also appointed to that court was African American

21 JOHN P. FRANK, CLEMENT HAYNSWORTH, THE SENATE, AND THE SUPREME COURT 134–35 (1991); YALOF, *supra* note 20, at 100–08.

22 SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 241 (1997) [hereinafter GOLDMAN, PICKING FEDERAL JUDGES]; *see* Act of Oct. 20, 1978, Pub. L. No. 95-486, § 3(a), 92 Stat. 1629, 1632.

23 GOLDMAN, PICKING FEDERAL JUDGES, *supra* note 22, at 242.

24 Sheldon Goldman, *Carter's Judicial Appointments: A Lasting Legacy*, 64 JUDICATURE 344, 344 (1981) [hereinafter Goldman, *Carter's Judicial Appointments*].

25 Susan Carbon, *The U.S. Circuit Judge Nominating Commission: A Comparison of Two of Its Panels*, 62 JUDICATURE 233, 233 (1978).

26 *Id.* at 234.

27 GOLDMAN, PICKING FEDERAL JUDGES, *supra* note 22, at 242–43.

28 *Id.* at 242. To courts of appeals, Carter named 11 women, 8 black men and one black woman, 2 Hispanics, and the first person of Asian ancestry, out of a total of 56 appointments. Sheldon Goldman, *Reorganizing the Judiciary: The First Term Appointments*, 68 JUDICATURE 313, 316 (1985) [hereinafter Goldman, *Reorganizing the Judiciary*].

29 GOLDMAN, PICKING FEDERAL JUDGES, *supra* note 22, at 278.

30 Act of Oct. 20, 1978, Pub. L. No. 95-486, § 3, 92 Stat. 1629, 1632.

31 *U.S. Court of Appeals for the Fifth Circuit: Judges*, FED. JUD. CTR., <https://www.fjc.gov/history/courts/u.s.-court-appeals-fifth-circuit-judges> (last visited Feb. 20, 2020).

Joseph W. Hatchett of Florida, but an African American nominee to the court from Texas, Andrew L. Jefferson, Jr., never received a vote.<sup>32</sup>

Following the Carter administration's explicit focus on identity diversity, the next presidency was far more concerned with judicial philosophy.<sup>33</sup> A significant campaign issue in the 1980 election that dislodged President Carter was judicial selection. Once in office, President Reagan abolished Carter's Nominating Commission.<sup>34</sup> President Reagan nominated Sandra Day O'Connor in 1981 and Antonin Scalia in 1986 to the Supreme Court, and both were confirmed unanimously.<sup>35</sup> Considerably more controversial was the 1986 promotion of Associate Justice William Rehnquist to the Court's center seat. His consistent conservatism on the Court since his arrival in 1971 was ominous to those with sharply different views. Still, he was confirmed by a 65–33 vote.<sup>36</sup> Democrats were even less welcoming to the 1987 nomination of D.C. Circuit Judge Robert Bork and then the announced but soon withdrawn selection of Judge Bork's circuit colleague Douglas Ginsburg.<sup>37</sup> Neither ascended to the high court.<sup>38</sup> Selectee number three for that seat, Ninth Circuit Judge Anthony Kennedy, was unanimously confirmed in early 1988.<sup>39</sup>

Of importance to Fifth Circuit nominations from Texas, the senators from that state, starting with Phil Gramm in 1984, have used a Texas Federal Judiciary Evaluation Committee whose volunteer members interview judges.<sup>40</sup> The goal has been to have a nonpartisan committee.<sup>41</sup> Senators

32 Jack Bass, *Black Judge Marks New Era*, WASH. POST, Aug. 5, 1979, at A1 (describing Hatchett's and Jefferson's nominations); see Lynwood Abram & Allan Turner, *Obituary, Andrew Jefferson, the County's First Black State Judge*, HOUS. CHRON., Dec. 11, 2008, at B2 (stating that Jefferson was nominated but never appointed).

33 The point is all but self-evident, but there were explicit admissions such as when Jonathan C. Rose, head of the Office of Legal Policy, which was a central office in the Justice Department for judicial selection, said, "Philosophy certainly has been a factor with regard to our appointments." Sheldon Goldman, *Reagan's Judicial Appointments at Mid-Term: Shaping the Bench in His Own Image*, 66 JUDICATURE 335, 337 n.2 (1983) (quoting *Reagan's Judicial Selections Draw Differing Assessments*, 41 CONG. Q. WKLY. REP. 83, 83 (1983)).

34 *Id.* at 336.

35 See YALOF, *supra* note 20, at 132–55.

36 See *id.* at 142–55.

37 GOLDMAN, PICKING FEDERAL JUDGES, *supra* note 22, at 316–17. Judge Ginsburg withdrew nine days after being nominated. The most salient controversy arose from the disclosure that he had smoked marijuana a number of times after becoming a professor at the Harvard Law School in the late 1970s. *Id.* at 317. He had been a D.C. Circuit judge for a year.

38 *Id.*

39 *Id.*

40 Much useful history on the Committee has been collected. See, e.g., *A Guide to the Texas Federal Judiciary Evaluation Committee Oral History Project, 1984–2012*, BRISCOE CTR. FOR AM. HIST., <https://legacy.lib.utexas.edu/taro/utcah/03749/03749-P.html> (last visited Feb. 20, 2020).

41 John Council, *Judging Would-Be Judges*, TEX. LAW. (May 6, 2013), <https://www.law.com/texaslawyer/almID/1202598550240/Judging-WouldBeJudges/>.



from some other states may well use similar committees, but other than later noting the use of one in Wisconsin in 2010, I have not tried to identify those.

Throughout this Article, I will rely on research conducted by Professor Sheldon Goldman, who beginning with the Carter administration has been the most diligent researcher and writer on lower-federal-court nominations that my work on the subject has found. In early 1987, with two years left in the Reagan presidency, Goldman's data showed that "[t]he oldest president in U.S. history is appointing the youngest judiciary this country has seen in the 20th century."<sup>42</sup> Among his most spectacular successes of that sort was with the March 1986 confirmation of thirty-two-year-old Sidney Fitzwater to a seat on the U.S. District Court for the Northern District of Texas.<sup>43</sup> Judge Ricardo Hinojosa was barely older when, at age thirty-three, he was confirmed to a seat on the Southern District of Texas in May 1983.<sup>44</sup>

Subordinated was the American Bar Association (ABA) Standing Committee on the Federal Judiciary. Beginning with the Eisenhower administration and continuing through Gerald Ford's presidency, Republican administrations "sounded out the ABA Standing Committee for tentative preliminary ratings of the leading candidates for a specific judgeship. These informal reports could be used by Justice officials in negotiations with senators and other officials" and could influence the selection.<sup>45</sup> Under Reagan, though, it was only when the finalist for nomination was selected was the name given to the ABA for an evaluation. After the full eight years of the Reagan presidency, the "close working relationship between Justice officials and the committee chairperson as had occurred" under earlier Presidents was gone.<sup>46</sup>

Among the toughest battles won was the confirmation of Daniel Manion, the son of a former dean of the Notre Dame Law School, to the Seventh Circuit. The ABA, the Senate Judiciary Committee, and the full Senate were closely divided on Manion, but with the President's active support, he was confirmed on basically a tie vote.<sup>47</sup> Among the many judges Reagan appointed who had a significant impact in the decades ahead were D.C. Circuit judges Robert Bork, Antonin Scalia, James Buckley, and Kenneth Starr; Third Circuit Judge Anthony Scirica; Richard Posner on the Seventh Circuit; and Diarmuid O'Scannlain and Stephen Trott in the Ninth Circuit. He

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42 Sheldon Goldman, *The Age of Judges: Reagan's Second Term Appointees*, A.B.A. J., Oct. 1987, at 94, 94. That author's earliest survey of a President's judicial selections appeared in 1981. Goldman, *Carter's Judicial Appointments*, *supra* note 24.

43 *Fitzwater, Sidney Allen*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/fitzwater-sidney-allen> (last visited Feb. 20, 2020).

44 *Hinojosa, Ricardo H.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/hinojosa-ricardo-h> (last visited Feb. 20, 2020).

45 Goldman, *Reorganizing the Judiciary*, *supra* note 28, at 316.

46 Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318, 320 (1989).

47 GOLDMAN, PICKING FEDERAL JUDGES, *supra* note 22, at 310–12 (explaining that, through procedural maneuvering, Vice President George Bush's breaking of the tie vote became unnecessary).

named eight judges to the Fifth Circuit, some better known than others but for whom I have great respect, one and all.

President Reagan appointed many other judges, both on the Supreme Court and lower courts, but I will close my quick survey of the years before George Bush with a brief description of someone Reagan considered but did not nominate. I do that in part because the story has some flare, but also because it shows just how emotionally difficult it can be for a nominee who is undergoing particularly harsh or seemingly unfair attacks.

In 1982, New Orleans lawyer Ben C. Toledano was recommended by Louisiana's Republican leadership for a vacancy on the Fifth Circuit.<sup>48</sup> Toledano had political baggage that worried the administration, such as belonging to the States' Rights Party of Louisiana in the late 1950s and being paid at one point to travel the state and gauge support for the party.<sup>49</sup> His connection to that party and his general conservatism caused his potential nomination to be opposed by the national organization of the National Association for the Advancement of Colored People (NAACP).<sup>50</sup> The ABA also was poised to give him a low rating.<sup>51</sup> He did, though, have significant local support from African Americans.<sup>52</sup>

Though there were times when Toledano had reason to believe his nomination was likely, in February 1983, he was told that the administration believed it had to look elsewhere.<sup>53</sup> Toledano did not go quietly and sought to reverse the decision.<sup>54</sup> Once he did finally surrender, though, his disappointment was expressed in a classic in judicial selection missives. On April 6, 1983, Toledano wrote Deputy Attorney General Edward Schmults, who is the one who had told Toledano that he should withdraw.<sup>55</sup> Toledano started his letter with deceptive pleasantries:

Thank you for your letter of April 1, 1983, for having never doubted my qualifications to serve as a federal judge, and for continuing to believe that I would be a credit to the bench.<sup>56</sup>

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48 Letter from David C. Treen, Governor of La., to Ronald Reagan, President of the U.S. (May 31, 1982) (on file with the Ronald Reagan Library); Memorandum from Fred F. Fielding, White House Counsel, to Ronald Reagan, President of the U.S. (Dec. 3, 1982) (on file with the Ronald Reagan Library) [hereinafter Memorandum from Fielding to Reagan].

49 See Memorandum from Fielding to Reagan, *supra* note 48.

50 *Id.*

51 *Id.*

52 *Id.*; see Ben C. Toledano, *Judge Not*, NAT'L REV., Aug. 20, 1990, at 33.

53 Toledano recounts being told by DOJ in September 1982 that he should begin withdrawing from his law firm and to expect to be on the bench in January. Toledano, *supra* note 52, at 34.

54 See, e.g., Letter from Ben C. Toledano to Edwin A. Meese III, Counselor to the President (July 13, 1983) (on file with the Ronald Reagan Library).

55 Letter from Ben C. Toledano to Edward C. Schmults, Deputy Att'y Gen. (Apr. 6, 1983), <https://www.reaganlibrary.gov/sites/default/files/digitallibrary/smf/cos/cic-coni/box-22/40-94-6914310-022-005-2016.pdf>.

56 *Id.*

Then the letter made a peculiar, portentous turn:

Because I have had some spare time for scholarship and research during recent months, I have devoted some time to the study of Eunuchry. My prior knowledge of the subject was sketchy at best. Essentially, I was only familiar with the employment of eunuchs as harem attendants and was unaware of their historical involvement in important affairs of state.<sup>57</sup>

After giving some history of eunuchs starting in China in 1122 B.C., Toledano becomes clearer about the significance of his chosen subject:

Eunuchs also functioned as powerful, political advisers in the Persian, Roman, Byzantine and Muslim empires. Eunuchs were always completely dependent upon their rulers whom they served as bodyguards, generals, admirals, diplomats and counselors.

In Italy, boys were castrated in order that they could retain their soprano voices into adulthood. That practice of creating *castrati* continued as late as 1878 when it was ended by Pope Leo XIII. Lord Lansdowne, in 1732, chastised certain "modern writers" when he said that they ". . . like Eunuchs . . . sacrifice their manhood for a Voice and reduce Poetry, like Echo to be nothing but Sound." Surely, that analogy would apply to all who sacrifice their manhood for a voice.

. . . .

You have expressed the hope that I will understand the Administration's position regarding me. Since I have not to date been relieved of my masculinity, I intend to take certain actions. I hope that you and the Administration will show the same understanding of those actions as I have been requested to show for those which you have already taken.<sup>58</sup>

Three weeks after Toledano's letter, White House Counsel Fred Fielding sent Louisiana Governor Dave Treen a letter containing only praise for Toledano but explaining that the decision was final to choose someone else for the vacancy.<sup>59</sup> There was a postscript, though: "I am enclosing a copy of Ben's letter of April 6, 1983 to Ed Schmults in the event you have not seen it."<sup>60</sup> One expects Fielding thought this might end the Governor's insistence that his candidate be nominated.

Other nominees surely are embittered by the experience. Whether ostensible friend or obvious foe becomes the focus of the resentments will vary. To my knowledge, though, there has been no other publicized expression of displeasure that has such striking imagery.

With completion of this brief narrative of a long time period, I next will identify some of the components of the nomination and confirmation process that will be useful as points of comparison among the different presidencies whose stories comprise the principal body of this article.

57 *Id.*

58 *Id.* at 39 (first and second omissions in original).

59 *See, e.g.*, Letter from Fred F. Fielding, Counsel to the President, to David C. Treen, Governor of La. (Apr. 26, 1983), <https://www.reaganlibrary.gov/sites/default/files/digitallibrary/smf/cos/cicconi/box-22/40-94-6914310-022-005-2016.pdf>.

60 *Id.* at 37.

## II. TRENDLINES AND CURVES

The survey of the last thirty years will show some obvious changes, though others are more subtle. Some significant ones are the following.

A Senate controlled by the party opposed to the President can create procedural barriers to nominations, barriers beyond just voting against the nominee. In this time period, barriers were erected in the Senate by the party opposed to the President, then weakened when the Senate majority and the President were allied. The use of the filibuster is one example of this volatility. Rarely employed against judicial nominees until 2003, ten of President George W. Bush's nominees were thwarted at least for a time by the new tactic. Compromises were struck, then new filibuster rules were promulgated. Today, filibusters requiring tedious roll-call votes on most nominees, then another roll call for confirmation, have greatly slowed confirmation.

What in past decades has been almost immediate voting of a nominee out of the Judiciary Committee following a hearing, then at times receiving group voice votes with other nominees on the floor, has become a much more laborious process.

Another Senate process that has varied in its application through the decades is generally referred to as the use of "blue slips."<sup>61</sup> Clearly applicable to nominees for district judges from a state but of relevance to circuit court nominees as well, the two local senators can completely block or at least significantly slow nomination of a prospect whom one or both oppose. How absolute the bar is, and how the disagreement is dealt with by the administration, have varied.

An example of especially impassioned home-state opposition was in 1936, when Mississippi Senator Theodore Bilbo objected to confirming District Judge Edwin Holmes to the Fifth Circuit, saying he would "fight him from hell to breakfast."<sup>62</sup> Bilbo's loathing arose from Holmes's sentencing him to thirty days in jail in 1923 (before he was a senator) for failure to appear as a witness in a trial in which a former secretary sought damages claiming the current governor seduced her.<sup>63</sup> The full Senate heard Bilbo out at great length, then confirmed Holmes.<sup>64</sup>

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61 One summary of the history of blue slips, prepared for partisan purposes but containing a detailed chronology, is this: Memorandum from Senate Judiciary Comm. Majority to Members of the News Media, History and Context of the Blue Slip Courtesy (Nov. 2, 2017) [hereinafter History and Context of the Blue Slip Courtesy], *reprinted in* 164 CONG. REC. S2575 (daily ed. May 9, 2018). I will rely on its factual details in this Article.

62 CHESTER M. MORGAN, REDNECK LIBERAL: THEODORE G. BILBO AND THE NEW DEAL 110 (1985) (alteration omitted). The President had nominated Holmes believing both senators approved, but senior Senator Pat Harrison of Mississippi had hidden Bilbo's almost certain opposition. *Id.* at 109.

63 *Id.* at 107–16.

64 *Id.* at 114–15. Senator Bilbo's motion to recommit the nomination to the Judiciary Committee was defeated by a vote of 4–59; Holmes was then confirmed by voice vote. 80 CONG. REC. 4032 (1936).

The arguments opponents use against nominees go through slow adjustments with the issues of the day, but there are constants. Democrats generally use arguments that emphasize civil rights, abortion, and other social issues. As the decades covered by my review pass by, Republicans have increasingly used terms like originalism in interpretation or charged a nominee with being results oriented. President Reagan wanted strict constructionists, those who will “interpret and not create” law. It is clear that Democratic Presidents generally seek ideologically liberal nominees and Republicans seek the opposite. The current administration may have taken such considerations even further by seeking those who have proved themselves able to apply favored jurisprudential doctrines rigorously.

In addition to ideology, some Presidents have been keenly interested in diversity of identity. (No President seems interested in diversity of ideology.) Already mentioned is how Jimmy Carter was the first President to have made diversity a key component in selection. Later Democratic Presidents have done more of that. Republicans have been much less focused on the issue, though George W. Bush had a desire to increase the number of women in the judiciary.

The increasing role of outside groups will be discussed. There are many, and no effort is made to discuss any but the most vocal and well known, like the Alliance for Justice, People for the American Way, American Constitution Society, and the NAACP, who work closely with Democrats, and the Federalist Society, Heritage Foundation, Judicial Crisis Network, and Committee for Justice with Republicans. These and other groups are not all involved in the same way in the process, but they have an impact.

The ABA’s privileged status as an evaluator of potential nominees, i.e., those being considered for nomination but not yet submitted, started well before the period of this Article. Republicans who have felt disserved by some of the ratings have tried with limited success to limit the ABA’s influence, while Democrats have embraced it. Variables through the years have included the timing of the ABA’s evaluations and the willingness of senators to override a bad rating by confirming a nominee unqualified under the ABA’s standards.

### III. GEORGE BUSH, 1989–1993

From 1952 until the present, with what is to happen in 2020 being undecided at this writing, American voters have fairly reliably given one of the two major political parties two terms to see what they could do with the presidency, then were ready to give the other party its turn.<sup>65</sup> There have been two exceptions. One was with Democratic President Carter, who after one term was replaced by Republican Ronald Reagan. The other exception is what happened at the end of Reagan’s eight years. He was succeeded by

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<sup>65</sup> Depending on one’s definition, the defeat of George Bush after only one term might be a third exception, but I consider that just part of the exceptional twelve-year presidency for one party.

another Republican, Vice President George Bush.<sup>66</sup> The Reagan-Bush years would total twelve, then the eight-year alternating would begin again. Judicial selections became much more personal to me during George Bush's term. I had earlier written letters of recommendation or made other contacts for someone else, but I started pursuing my own nomination while serving as a political appointee in the Civil Division of the Department of Justice (DOJ). To be candid, the DOJ position was a result of the spoils system in operation, rewarding my work on the Bush presidential campaigns in Mississippi in both 1980 and 1988.

I start with the process the Bush administration implemented for selecting nominees. The Office of Policy Development became the central DOJ section for judge screening, replacing the Office of Legal Policy that had that function under Reagan.<sup>67</sup> The Office of the Attorney General itself became more significant in judicial selection. Murray Dickman, an assistant to Attorney General Dick Thornburgh who had been part of Thornburgh's staff when he was Pennsylvania Governor, had the principal role in the Attorney General's office.<sup>68</sup> Thornburgh took Dickman with him after resigning as Attorney General in August 1991 to run (unsuccessfully) for the U.S. Senate. His departure caused Civil Rights Division Deputy Assistant Attorney General Barbara Drake to add Dickman's judicial selection duties to her existing ones. Interviews were conducted at DOJ. When I interviewed in 1991 for a Fifth Circuit vacancy, a decade and a half before I was nominated by a different President Bush, the interviews occurred in the Robert F. Kennedy Department of Justice Building on Pennsylvania Avenue. My interviewers were all DOJ officials: Solicitor General Ken Starr; his deputy, a fellow named John Roberts; the soon-to-be head of the Office of Legal Counsel, Tim Flanigan; and Tony Schall, soon to be a Federal Circuit judge.

The White House was still significantly involved though not usually directly with a person being considered. I had some contact with a key participant in the Counsel's office, Lee Liberman Otis. It was reported that the President's Committee on Federal Judicial Selection, chaired by White House Counsel Boyden Gray and consisting both of White House and DOJ officials, would meet weekly to discuss prospects.<sup>69</sup> I did have lunch at the end of my consideration in 1991–1992 with Boyden Gray and Lee Liberman in the White House mess. That meeting was unusual, Liberman told me, but since I was part of the administration, they were willing to do it. The courtesy

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66 Though the election of this President Bush's son in 2000 created the convention of referring to the elder of the two as George H.W. Bush, I do not see the need. Until after his presidency, he was known as George Bush. Only his son will get any initials in this Article.

67 Sheldon Goldman, *The Bush Imprint on the Judiciary: Carrying On a Tradition*, 74 JUDICATURE 294, 295 (1991) [Goldman, *The Bush Imprint on the Judiciary*]. The details in this and the next paragraph all come from my personal recollections and from that Goldman article.

68 *Id.* at 296.

69 *See id.* at 297.

was precipitated by George W. Bush's involving himself late in the process. He performed many roles for his father, including assisting those like myself and Rhesa Barksdale whom he had gotten to know during the 1988 campaign.

This administration also had its disagreements with senators about the process. How much weight to give senators' views on circuit judgeships is a constant point of disagreement between administrations and senators from the states from which new judges are to come. Not long after joining DOJ in August 1989, I heard from Senator Cochran that the administration was insisting on at least three names for a district court vacancy and was seeking to limit the role of senators in circuit court nominations.<sup>70</sup> Similarly, when Ed Meese became Attorney General in 1985, he had sought to make selection of circuit nominees solely for the administration, though senators would continue effectively to choose district court nominees for their states.<sup>71</sup> Such desires always ran up against the fact that senators as a group have final say on confirmation. A key senator, Delaware's Joe Biden, who chaired the Judiciary Committee from 1987 to 1995, wrote President Bush soon after his inauguration about how the Committee would proceed:

The return of a negative blue slip will be a significant factor to be weighed by the committee in its evaluation of a judicial nominee, but it will not preclude consideration of that nominee unless the Administration has not consulted with both home state Senators prior to submitting the nomination to the Senate.<sup>72</sup>

One of the new factors in confirmation much on display during the Bush presidency was the role of outside groups. Professor Goldman called it an "increasing activity of interest groups in the selection process," and named the Alliance for Justice (AFJ), headed by Nan Aron, and the People for the American Way (PFAW), founded by television producer Norman Lear.<sup>73</sup> The AFJ began its Judicial Selection Project in 1985,<sup>74</sup> and it seems to have been significantly involved ever since. To show the variety of tactics these groups employed, I will mention a full-page *New York Times* advertisement PFAW sponsored in October 1992, picturing President Bush and challengers Bill Clinton and Ross Perot, with the caption "Judges: Before You Choose, Think About How They'll Choose."<sup>75</sup> The alarming implication of the brief text was that if Bush were reelected, by the end of his second term Republi-

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70 See *id.* (discussing the insistence for three names for district courts).

71 See Tom Brennan, *Courting the 5th Circuit: Is State in Race?*, CLARION-LEDGER (JACKSON, Miss.), Jan. 13, 1986, at 1A (discussing primarily Senator Thad Cochran's role in Rhesa Barksdale's chances at a nomination).

72 History and Context of the Blue Slip Courtesy, *supra* note 61.

73 Goldman, *The Bush Imprint on the Judiciary*, *supra* note 67, at 296.

74 AMY STEIGERWALT, BATTLE OVER THE BENCH: SENATORS, INTEREST GROUPS, AND LOWER COURT CONFIRMATIONS 11 (2010).

75 People for the Am. Way Action Fund, Advertisement, N.Y. TIMES, Oct. 1, 1992, at A12.

cans would have named ninety percent of all federal judges over that sixteen-year period.<sup>76</sup>

Finally, on process, the role of the ABA has been controversial in every Republican administration in this period. Some Republicans remained incensed that in 1987, Robert Bork was found to be unqualified for the Supreme Court by four members of the ABA committee that evaluated nominees. Despite Bork's undeniable intellect and experience, his well and strongly expressed conservative views caused some on the ABA committee to consider him outside of acceptable legal thought. It took considerable effort by the administration, but the ABA finally agreed to drop overt consideration of a nominee's political or ideological views in making its ratings.<sup>77</sup>

President Bush named two Justices to the Supreme Court. The first, David H. Souter of New Hampshire, initially was appointed by Bush to the First Circuit in April 1990.<sup>78</sup> Little more than two months later, Bush nominated him to the seat vacated by Justice William Brennan.<sup>79</sup> Souter's most formidable promoter was the President's Chief of Staff, former New Hampshire Governor John Sununu.<sup>80</sup> Both Souter and Fifth Circuit Judge Edith Jones were summoned to Washington and separately met with President Bush and others.<sup>81</sup> It was said that Souter's relative lack of a "paper trail" and Judge Jones's five years of conservative opinions and speeches made the former an easier confirmation.<sup>82</sup> Regardless of the reasons, Souter won out. The effect was that between the two finalists, the one chosen was from the Chief of Staff's home state, not the President's.

Ironically, inasmuch as there has never been a Fifth Circuit Court of Appeals judge confirmed to the Supreme Court,<sup>83</sup> the runner-up for the

<sup>76</sup> *Id.*

<sup>77</sup> Goldman, *The Bush Imprint on the Judiciary*, *supra* note 67, at 295.

<sup>78</sup> Souter, *David Hackett*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/souter-david-hackett> (last visited Feb. 20, 2020).

<sup>79</sup> *Id.*

<sup>80</sup> R.W. Apple, Jr., *Bush's Court Choice; Sununu Tells How and Why He Pushed Souter for Court*, N.Y. TIMES, July 25, 1990, at A12.

<sup>81</sup> Carl P. Leubsdorf, *Houstonian Was Runner-Up for Vacancy on High Court*, DALL. MORNING NEWS, July 25, 1990, at 1A.

<sup>82</sup> See David Lauter & Ronald J. Ostrow, *And Then There Were 2 and Finally 1—Souter*, L.A. TIMES, July 25, 1990, at A1. A "senior administration official" said this about Judge Jones: "It was very close . . . She's got to feel good about it. I'm sure she would be very high on any list for a future vacancy." Leubsdorf, *supra* note 81. Unfortunately, new chances for such positions are rare.

<sup>83</sup> My statement of "never" is correct but incomplete. Before circuit courts of appeals were created in 1891, there were trial-level circuit courts and, beginning in 1869, one judge for each of the then nine circuits; when courts of appeals were created, the circuit court judges served on both courts. See *The U.S. Circuit Courts and the Federal Judiciary*, *supra* note 13. The very first Fifth Circuit Court judge, William B. Woods, was elevated to the Supreme Court in 1880. Woods, *William Burnham*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/woods-william-burnham> (last visited Feb. 20, 2020). There also were, eighteen months apart, two thwarted efforts to elevate Fifth Circuit judges. In June 1968, President Johnson sought to name his long-time friend and a former Texas congressman,



next vacancy was another Fifth Circuit judge, Emilio Garza of San Antonio.<sup>84</sup> D.C. Circuit Judge Clarence Thomas was chosen instead. Bush had appointed Thomas to his circuit seat in March 1990<sup>85</sup> and Garza to the Fifth Circuit in May 1991.<sup>86</sup> Not long after Justice Thurgood Marshall announced his retirement, Judge Garza accepted a call to rush to Washington where he met with White House Counsel Boyden Gray but not with Bush.<sup>87</sup> Bush had elevated Judge Souter after just two months as a circuit judge, but Judge Garza did not receive a similarly rapid promotion. Judge Thomas seemed to have the inside track all along, but after being nominated on July 8, 1991, he faced an incredibly personal set of attacks.<sup>88</sup> He persevered and overcame, being confirmed on October 15.<sup>89</sup>

The Texan Bush may have been particularly inclined to consider judges from his home state for the Supreme Court, but he passed over two superb ones.

As to lower courts, Bush appointed 42 judges to the circuit courts of appeals and 148 district judges.<sup>90</sup> There were 11 circuit court nominees who never received a vote; indeed, the second and final Congress of the first Bush's presidency left 55 judicial nominations pending when it adjourned.<sup>91</sup> That number would grow in subsequent administrations, partly one supposes because the final Congress of each of the next three presidencies had a Senate controlled by the opposite political party.

TABLE 1<sup>92</sup>

Congress	Years	Circuit		District	
		Confirmations	Nominations	Confirmations	Nominations
101st	1989–90	22	23	48	50
102nd	1991–92	20	31	100	144

Fifth Circuit Judge Homer Thornberry, to replace Abe Fortas as Associate Justice when Fortas became the Chief Justice; that plan did not work out for either nominee. JACOBSTEIN & MERKSY, *supra* note 1, at 125–37. Then in January 1970, President Nixon nominated Fifth Circuit Judge G. Harrold Carswell after Fourth Circuit Judge Clement Haynsworth failed of confirmation. Carswell failed too. *See id.* at 141–55.

84 *See Garza, Emilio M.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/garza-emilio-m> (last visited Feb. 20, 2020).

85 *Thomas, Clarence*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/thomas-clarence> (last visited Feb. 20, 2020).

86 *Garza, Emilio M.*, *supra* note 84.

87 *See* TIMOTHY M. PHELPS & HELEN WINTERNITZ, *CAPITOL GAMES* 8 (1992); Sharon LaFraniere & Paul Taylor, *Hispanic Judge Interviewed for Marshall's Post*, WASH. POST, July 1, 1991, at A9.

88 *See* CLARENCE THOMAS, *MY GRANDFATHER'S SON: A MEMOIR* 245–66 (2007).

89 *See Thomas, Clarence*, *supra* note 85.

90 BARRY J. McMILLION, CONG. RESEARCH SERV., R45622, *JUDICIAL NOMINATION STATISTICS AND ANALYSIS: U.S. DISTRICT AND CIRCUIT COURTS, 1977–2018*, at 7 tbl.3 (2019).

91 *Unsuccessful Nominations and Recess Appointments*, *supra* note 9.

92 *See McMILLION*, *supra* note 90, at 7 tbl.3.

Among Bush's forty-two successes at the circuit level was another future Supreme Court Justice, namely, Third Circuit Judge Sam Alito who was appointed by Bush's son to the high court in 2006.<sup>93</sup> Another judge appointed by President Bush who would become part of the discussion when Supreme Court vacancies arose in his son's presidency was thirty-six-year-old J. Michael Luttig of Texas.<sup>94</sup> He was confirmed on July 26, 1991, but did not take the oath of office until October 17.<sup>95</sup> The reason for the long delay was that as the head of the Office of Legal Counsel at the Department of Justice, he played a central role in the selection and then confirmation fight over Clarence Thomas, responsibilities Luttig had begun before his own confirmation.<sup>96</sup>

Besides Luttig, another future Bush circuit nominee working at DOJ when I arrived was Michael Boudin. He had started his work as a Deputy Assistant Attorney General in the Antitrust Division in 1987. Bush first named him to a D.C. District judgeship in 1990,<sup>97</sup> but he resigned in January 1992 so he could be with his family in Cambridge, Massachusetts.<sup>98</sup> President Bush recognized the loss to the judiciary and nominated him to the First Circuit in March 1992; he was confirmed in May.<sup>99</sup>

On March 31, 1992, with a Presidential election just over seven months away, the AFJ identified an initial group of eight judicial prospects it believed needed close scrutiny.<sup>100</sup> It said the Judiciary "Committee would take a big step toward meaningful reform of the nomination process by giving deliberate and careful scrutiny to these highly questionable nominees."<sup>101</sup> The AFJ described its objections to each, then said this was the "first of occasional lists to be provided" to highlight "controversial nominees"<sup>102</sup>—or ones it hoped to make controversial.

Edward E. Carnes of Alabama, who was nominated for the Eleventh Circuit on January 27, 1992, deserved immediate scrutiny because his Judiciary Committee hearing was to be held the day after that press

93 *Alito, Samuel A., Jr.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/alito-samuel-jr> (last visited Feb. 20, 2020).

94 President George W. Bush interviewed Judge Luttig prior to selecting John Roberts in 2005. GEORGE W. BUSH, DECISION POINTS 98 (2010).

95 *Luttig, J. Michael*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/luttig-j-michael> (last visited Feb. 20, 2020). Judge Luttig's delay in being sworn in is discussed in *Thomas Role Questioned*, WASH. POST, Oct. 22, 1991, at A19.

96 *See id.*

97 *Boudin, Michael*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/boudin-michael> (last visited Feb. 20, 2020).

98 Matthew Brelis, *Cambridge Man Who Left US Bench Is Named Again*, BOS. GLOBE, Apr. 7, 1992, at 22.

99 *Boudin, Michael*, *supra* note 97.

100 *Accent on the Consent*, 24 NAT'L J. 824 (1992).

101 Press Release, All. for Justice, Organization Faults Bush Court Choices: Senate Begins Hearings Tomorrow (Mar. 31, 1992) (on file with Senate Judiciary Committee) (quoting AFJ executive director Nan Aron).

102 *Id.* A second list will be discussed *infra* note 109 and accompanying text.

release.<sup>103</sup> He began work at the Alabama Attorney General's Office after graduating from Harvard Law School in 1975, and he became chief of the division handling capital punishment cases in 1981, leading him to argue five cases in the Supreme Court.<sup>104</sup> Carnes, age forty-one when nominated, was opposed by the AFJ, the NAACP, some members of the Congressional Black Caucus, and others for his allegedly overzealous advocacy for the death penalty.<sup>105</sup> Extremely helpful to Carnes's cause was the fact that Morris Dees, the director of the Southern Poverty Law Center, knew and respected Carnes and separated himself from his usual allies by urging Carnes's confirmation.<sup>106</sup> Carnes was confirmed on September 9, 1992, by a 62–36 vote.<sup>107</sup>

With a Democrat-majority Senate, Joe Biden as the Chairman of the Senate Judiciary Committee, and an election that November, a central goal of groups such as the AFJ was simply delay. Nan Aron, the head of AFJ, said in early May that she “hope[d] the committee [would] take more time and take the utmost care” in order to scrutinize nominees even more than usual.<sup>108</sup> Delay would keep many nominees from ever being considered at all. That happened to numerous Bush nominees, and surely encouragement from outside groups was not needed.

A few of the AFJ targets were friends from my time at DOJ. It opposed Tenth Circuit nominee Frank Keating, with whom I worked because he was General Counsel at the Department of Housing and Urban Development; he was said to have a “disregard and lack of knowledge of fair housing laws.”<sup>109</sup> Frank had the consolation of being elected Governor of Oklahoma in 1994; three months after being inaugurated, he began his nationally praised response to the deadly bombing in Oklahoma City.<sup>110</sup> By being blocked for a judgeship, Frank was able to serve his home state in this singular manner. One never knows. Another friend opposed by the AFJ was Sixth Circuit nominee John Smietanka, the U.S. Attorney for the Western District of Michigan whom I met because he was on temporary detail to DOJ.<sup>111</sup>

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103 138 CONG. REC. 586 (1992) (Carnes's nomination); 138 CONG. REC. D380 (daily ed. Apr. 1, 1992) (Judiciary Committee concluded hearing on Carnes that day).

104 Carnes, *Edward Earl*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/carnes-edward-earl> (last visited Feb. 20, 2020).

105 Martin Tolchin, *Court Nominee Splits Advocates of Civil Rights*, N.Y. TIMES, June 11, 1992, at A14; see Ronald Smothers, *Court Nominee's Death-Penalty Role Is Debated*, N.Y. TIMES, Mar. 27, 1992, at B16.

106 Ronald Smothers, *Judicial Nomination Sunderes Old Allies*, N.Y. TIMES, Sept. 9, 1992, at A12.

107 Lynne Duke, *Senate Confirms Carnes as U.S. Appellate Judge*, WASH. POST, Sept. 10, 1992, at A27.

108 Tony Mauro, *Death Penalty May Help Kill Nomination*, USA TODAY, May 7, 1992, at 8A.

109 Press Release, All. for Justice, Alliance Calls for Rejection of Judicial Nominees (July 22, 1992) (on file with Senate Judiciary Committee).

110 Dianna Everett, *Keating, Francis Anthony II (1944–)*, OKLA. HIST. SOC'Y, <https://www.okhistory.org/publications/enc/entry.php?entry=KE001> (last visited Apr. 12, 2020).

111 Press Release, All. for Justice, *supra* note 109.

Keating and Smietanka were among eighty-six nominees submitted to the Judiciary Committee (prospective judges, U.S. Attorneys, U.S. Marshals, etc.) who were left unconfirmed when Bush left office; Keating was one of only two who at least had a hearing.<sup>112</sup>

Another AFJ target with whom I occasionally interacted at DOJ was John Roberts, nominated on January 27, 1992.<sup>113</sup> He was the thirty-seven-year-old Principal Deputy Solicitor General, whose remarkable intellect was offset in some opponent's view by his youth and only three years of legal experience outside of government.<sup>114</sup> Another finalist for that nomination was the Civil Division's Assistant Attorney General Stuart Gerson, an excellent Washington, D.C., litigator who was my DOJ boss from 1989 to 1993, then acting Attorney General for the first two months of the Clinton administration.<sup>115</sup> The *Wall Street Journal*, in reporting on Roberts's selection, said it "came as something of a surprise because the administration had been considering several other candidates, all of whom are older and have more experience."<sup>116</sup> One unsympathetic writer, who at least was correct on how opponents characterized Roberts, said President Bush failed to "choose from among numerous conservative and moderate Republicans with substantially more legal or judicial experience," and instead chose someone

with modest legal experience, consisting of a prestigious law school record, judicial clerkships, a few years in a big firm practice, a short stint as Deputy Solicitor General, and, perhaps most notably, "important relationships with influential Bush administration officials, especially among the corps of youthful GOP lawyers who are wielding increasing influence in the federal government."<sup>117</sup>

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112 The 86 Judicial Nominees That Were Left Unconfirmed in the 102d Congress, reprinted in 139 CONG. REC. 24,227-29 (1993) (chart of nominees and the inaction on them, introduced by Sen. Helms).

113 138 CONG. REC. 586 (1992); Press Release, All. for Justice, *supra* note 109.

114 The future Chief Justice was nominated in 1992 on his thirty-seventh birthday, a date easily enough discovered online but also nationally noted by the Senate chaplain in his prayer and by Majority Leader Mitch McConnell at the beginning of that day of the impeachment trial of President Trump in 2020. 166 CONG. REC. S579 (daily ed. Jan. 27, 2020) (prayer of Chaplain Barry C. Black and statement Majority Leader Mitch McConnell).

115 See Daniel Klaidman, *Bush Chooses Deputy SG for D.C. Circuit*, LEGAL TIMES, Dec. 16, 1991, at 1. The article says D.C. District Judge Boudin was also in contention, but as mentioned above, at about that time Boudin was resigning to go home to Boston where he soon became a First Circuit judge. See *supra* text accompanying notes 97-99. Gerson's serving as acting Attorney General is discussed in Gwen Ifill, *Reno Is Confirmed in Top Justice Job*, N.Y. TIMES, Mar. 12, 1993, at A10.

116 *Justice Official to Be Bush's Choice to Fill Thomas's Former Seat*, WALL ST. J., Dec. 18, 1991, at A16.

117 Michael J. Gerhardt, *Divided Justice: A Commentary on the Nomination and Confirmation of Justice Thomas*, 60 GEO. WASH. L. REV. 969, 978 (1992) (quoting Klaidman, *supra* note 115, at 17).

I include this grouchy description of what actually is an imposing record because it highlights the attitude of opponents yet also captures the importance then and later of the network of conservative attorneys, many of them young with impressive credentials, whose commitment to an array of jurisprudential principles motivated them.

The AFJ condemned Roberts's work on Supreme Court arguments "for the gag rule on abortion counseling in federally funded family planning centers and for the legality of blockading abortion clinics."<sup>118</sup> That criticism mirrors the explanation I was given by someone knowledgeable of the obstacles Bush nominees faced, that among the reasons no hearing was scheduled for Roberts was that Judiciary Committee member Howard Metzenbaum of Ohio derided Roberts's work on one or more abortion cases.

Roberts's career has revealed that his nomination was justified by his abilities even if it was premature politically. After President Bush was defeated for reelection, the *Legal Times* newspaper labeled winners and losers in the legal arena as a result of Bill Clinton's victory, tagging Roberts with "loser."<sup>119</sup> It was a fair view at the time. It was wrong, though.

I now turn to President Bush's four appointments to the Fifth Circuit. His first nominations were of Rhesa H. Barksdale of Mississippi and Jacques L. Wiener of Louisiana. Both were nominated on November 17, 1989,<sup>120</sup> and they were confirmed on March 9, 1990.<sup>121</sup> I am particularly familiar with Judge Barksdale's path to the Fifth Circuit, as we were friends in the Jackson legal community and also participated together in the 1988 George Bush presidential campaign.

Beginning in December 1984, Senator Thad Cochran of Mississippi had been promoting Barksdale, first to the Reagan administration and then to that of President Bush.<sup>122</sup> Two new Fifth Circuit seats were created in 1984.<sup>123</sup> Both had been taken by Texans—Edith Jones and Jerry Smith<sup>124</sup>—but Mississippi still was seeking a third seat. When Judge Alvin Rubin of Louisiana took senior status in July 1989, I was told by my DOJ colleague Barbara Drake—who was extensively involved with judicial selection even before Mur-

118 Press Release, All. for Justice, *supra* note 109 (alluding to *Rust v. Sullivan*, 500 U.S. 173 (1991) (so-called gag rule on abortion counseling); and *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) (blockading abortion clinics)). Deputy Solicitor General Roberts is shown on briefs in both cases and orally argued on behalf of the United States as *amicus curiae* supporting petitioners in *Bray*. See *Bray v. Alexandria Women's Health Clinic*, OYEZ, <https://www.oyez.org/cases/1991/90-985> (last visited Apr. 12, 2020).

119 *Loser: John Roberts, Jr.*, LEGAL TIMES, Dec. 28, 1992, at 7.

120 135 CONG. REC. 29,880 (1989).

121 136 CONG. REC. 4149 (1990).

122 See Tom Brennan & Joe Atkins, *Texan Has Edge on Barksdale for Judgeship*, CLARION-LEDGER (JACKSON, MISS.), Mar. 17, 1987, at 1B.

123 Act of July 10, 1984, Pub. L. No. 98-353, § 201(a)(1), 98 Stat. 333, 346.

124 Edith Jones was nominated twice, and Jerry Smith once. The Senate upon receipt of the nominations recorded that each was for one of the new 1984 seats. 130 CONG. REC. 25,681 (1984) (Jones's first nomination); 131 CONG. REC. 3839 (1985) (Jones's second nomination); 133 CONG. REC. 14,383 (1987) (Smith's nomination).

ray Dickman left—that the administration interviewed more people for that seat than for any other. She said that experienced and accomplished litigator Barksdale, a West Point graduate and Vietnam veteran as well as a former clerk for Justice Byron White,<sup>125</sup> came across as the best of the candidates. Senator Bennett Johnston of Louisiana was said to be angry about the administration’s proposing to take the seat from his state, as he had been trying to place one of his candidates in the position.<sup>126</sup> Whether he tried to block Barksdale’s confirmation was not discovered. Louisiana would snatch a Mississippi seat soon enough. Perhaps an unnecessary boost for Barksdale came from George W. Bush’s handwritten note of August 14, 1989, in which he told Boyden Gray that Barksdale “is a very good man—any help would be appreciated. G.W.”<sup>127</sup> In June 1990, Justice Byron White administered the oath in a Jackson ceremony.<sup>128</sup>

As for Senator Johnston, the Reagan administration in 1988 finally acceded to his desire to have Jacques Wiener nominated, but he never came up for a vote.<sup>129</sup> Fortunately, Wiener was renominated by President Bush, and he was confirmed alongside Barksdale.<sup>130</sup>

The President next nominated the person he would consider in 1991 for the Supreme Court, District Judge Emilio Garza of Texas. There was no controversy about Garza, and he was nominated in April and confirmed in May.<sup>131</sup>

The final successful nominee was Harold (Hal) DeMoss, who was Bush’s long-time Houston friend who had resigned from his law firm in 1988 to work full time for Bush’s presidential campaign. At age sixty, he was older than most nominees. He also was not principally a litigator, instead mainly handling real estate and oil and gas matters.<sup>132</sup> He was nominated on June 27, 1991, four days before Clarence Thomas was nominated to the Supreme Court.<sup>133</sup> The tremendous focus by the administration, the Senate, and the country on the controversies of the Thomas nomination likely stalled everyone else, including DeMoss. Once Thomas was confirmed on October 15, DeMoss’s nomination started moving again. He was confirmed on November

125 See *Barksdale, Rhesa Hawkins*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/barksdale-rhesa-hawkins> (last visited Feb. 20, 2020).

126 Mark Ballard, *Latest 5th Circuit Vacancy Renews Tri-State Struggle*, TEX. LAW., Dec. 11, 1989, at 1, 10.

127 Letter from George W. Bush to C. Boyden Gray, White House Counsel (Aug. 14, 1989) (on file with the George Bush Presidential Library).

128 A fuller version of Judge Barksdale’s journey is discussed in my article *The Journey of Rhesa H. Barksdale to the Fifth Circuit: A Friend’s Perspective*, 79 MISS. L.J. 241 (2009).

129 Ballard, *supra* note 126 at 1, 10.

130 *Wiener, Jacques Loeb, Jr.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/wiener-jacques-loeb-jr> (last visited Feb. 20, 2020).

131 *Garza, Emilio M.*, *supra* note 84.

132 See Mark Ballard, *DeMoss on Fast Track to 5th Circuit*, TEX. LAW., Oct. 7, 1991, at 8.

133 *Id.*

27, 1991.<sup>134</sup> DeMoss was one of those few nominees whom the President himself selected without much apparent input from others.

When President Bush left office, there were four unfilled vacancies on the Fifth Circuit. Efforts had been made to fill all of them. The process of naming a successor to Judge Charles Clark of Mississippi, which began immediately upon Clark's July 1991 announcement that he would retire as Chief Judge and from the court on January 15, 1992, resulted in the selection of Michael Wallace of Jackson.<sup>135</sup> Wallace had his controversies, especially his work as a director of the Legal Services Corporation (LSC) from 1984 to 1990, including being chairman at the end of his service. He tried to implement the Reagan Administration reforms to prohibit LSC attorneys from pursuing "political litigation" such as redistricting, from bringing most forms of class actions, from lobbying, and from other matters that, though seeking to address societal harms, would divert sizable portions of the limited funding from the core mission of providing "ordinary services to the poor."<sup>136</sup> The AFJ included Wallace in its close-scrutiny list even though he had not been nominated; it described his efforts to restrain Legal Services as being intended "to undermine the organization's mission to provide legal services to the poor and ensure their access to the courts."<sup>137</sup> Some of those who had opposed the Reagan administration's LSC reforms were, by the time of Wallace's consideration for the Fifth Circuit, prominent in the ABA, and that organization made clear in advance of any nomination that it would not give Wallace a favorable rating.<sup>138</sup> To many, that forecast was evidence that political and ideological criteria were still being applied, as there could be no question of Wallace's intellect, integrity, and appellate experience. No nomination was made.<sup>139</sup>

District Judge Sidney Fitzwater of Dallas had been nominated to one of the other vacancies that was left unfilled at the end of the Bush presidency.<sup>140</sup> Thirty-two years old when appointed as a district judge in 1986, Fitzwater had not aged much when he was nominated for the Fifth Circuit on January 27, 1992.<sup>141</sup> A Texas legal newspaper said that he was "a lightning rod for Democrats," having been opposed in his 1986 district court selection by Senator Ted Kennedy and the Congressional Black Caucus.<sup>142</sup> The con-

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134 *DeMoss, Harold R., Jr.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/demoss-harold-r-jr> (last visited Feb. 20, 2020).

135 LESLIE H. SOUTHWICK, *THE NOMINEE: A POLITICAL AND SPIRITUAL JOURNEY* 42–48 (2014) [hereinafter SOUTHWICK, *THE NOMINEE*].

136 *Confirmation Hearing on the Nominations of Michael Brunson Wallace to Be U.S. Circuit Judge for the Fifth Circuit and Vanessa Lynne Bryant to Be U.S. District Judge for the District of Connecticut, Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 2, 55–56, 70–71 (2006); *Inadmissible: A Lott of Clout*, LEGAL TIMES, Jan. 27, 1992, at 3.

137 Press Release, All. for Justice, *supra* note 101.

138 See SOUTHWICK, *THE NOMINEE*, *supra* note 135, at 48.

139 *Id.*

140 138 CONG. REC. 586 (1992); SOUTHWICK, *THE NOMINEE*, *supra* note 135, at 48.

141 138 CONG. REC. 586 (1992).

142 Mark Ballard, *Bush-Senate Standoff*, TEX. LAW., Feb. 3, 1992, at 4.

troverly in 1992 as in 1986 focused on his posting of signs in voting precincts—at a local judge’s request—during a 1982 election in an effort to reduce voter fraud; some construed the signs as intimidating to minority voters.<sup>143</sup> The AFJ listed him among its initial eight targets, focusing on the 1982 ballot-integrity program and his 1990 order that overturned a \$9 million jury verdict in a fraud and age discrimination case by a former employee against Xerox Corporation—a decision already affirmed on appeal.<sup>144</sup> Having a brilliant intellect, widely praised by the attorneys who appeared before him,<sup>145</sup> but perceived as too conservative by his opponents, Fitzwater had his nomination ignored by the Judiciary Committee.

No nominations were made to two other seats but not for lack of exploration of the possibilities. Ricardo Hinojosa, age forty-one at this point after having become a district judge in South Texas at age thirty-three,<sup>146</sup> was interviewed. He was reluctant, though, to shift from being a trial judge to the much different work of an appellate judge. At my mid-December 1991 lunch with Boyden Gray and others, I was told Ricardo was still trying to decide whether to accept nomination to the Fifth Circuit. Neither he nor anyone else was nominated.

For another vacancy, it was reported in January 1991 that an FBI background check was being conducted on Houston lawyer John O’Neill along with one on Judge Emilio Garza.<sup>147</sup> Garza quickly moved on ahead, but O’Neill never did. O’Neill was forty-three years old and a Vietnam veteran who did not disparage that service. He had gained national publicity in June 1971 on the Dick Cavett television show by condemning the other veteran he was debating—future senator and presidential also-ran John Kerry—for his testimony before a Senate committee in which he claimed widespread commission of atrocities by American soldiers.<sup>148</sup> O’Neill soon thereafter met with President Nixon in the White House, and in 1972 he spoke at the

143 Gordon Hunter, *Swamped 5th Circuit to Get Relief*, TEX. LAW., July 8, 1991, at 10. Judge Fitzwater testified he had been asked to post the signs by another Dallas judge as part of an “officially authorized ballot security program.” Howard Kurtz, *Two Judicial Choices Assailed*, WASH. POST, Feb. 5, 1986, at A4.

144 Press Release, All. for Justice, *supra* note 101. The case was *Layman v. Xerox Corp.*, No. CA3-87-1733-D, 1989 WL 407293 (N.D. Tex. Aug. 11, 1989) (grant of partial summary judgment, leaving for trial claims for fraud and age discrimination; later order granting JNOV not available on Westlaw). The Fifth Circuit implicitly disagreed with the AFJ’s criticisms, as it affirmed after finding there was no evidence either of Xerox’s fraudulent intent or of pretext for the termination. *Layman v. Xerox Corp.*, No. 90-1860, slip op. at 10–15 (5th Cir. July 1, 1991).

145 Tracy Everbach, *Fitzwater Nominated for Appeals Court*, DALL. MORNING NEWS, Jan. 25, 1992, at 33A.

146 See *Hinojosa, Ricardo H.*, *supra* note 44.

147 *Garza, O’Neill in Line for 5th Circuit*, TEX. LAW., Jan. 21, 1991, at 6. The identified vacancy was the one to which Hal DeMoss was nominated five months later. In early February 1992, one report stated that O’Neill was still being considered, and there was another Texas vacancy. See Ballard, *Bush-Senate Standoff*, *supra* note 142.

148 Ralph Blumenthal & Robert F. Worth, *For Kerry’s Chief Accuser, a Flashback to a Political Battle from 1971*, N.Y. TIMES, Aug. 28, 2004, at A10.



Republican National Convention that renominated Nixon.<sup>149</sup> O'Neill later said he wondered if the ABA had obstructed his nomination; in addition, he believed some members of the Senate Judiciary Committee concluded that he lacked "judicial temperament."<sup>150</sup>

#### IV. WILLIAM J. CLINTON, 1993–2001

After twelve years of Republican selection of judges, there was quite a stable of eager aspirants for judgeships for the Democratic administration to consider. Thanks to the slow processing of President Bush's final nominees, there were seventeen vacancies on the circuit courts and ninety on district courts when President Clinton took office.<sup>151</sup> The task was filling up those positions, with the help of a Democrat-controlled Senate and the Judiciary Committee Chairman Joe Biden.

The new administration had to establish its ways and means to make the selections and then shepherd them through. Some of the Republicans' practices were maintained when Clinton assigned significant duties to an Assistant Attorney General, but he reestablished the Office of Legal Policy at DOJ as the place where much of that work was to be done.<sup>152</sup> An Associate White House Counsel was also intimately involved in the process.<sup>153</sup> A joint White House–DOJ committee, chaired by the White House Counsel, met frequently to consider the recommendations from senators and others and to arrange for telephone interviews with some of them.<sup>154</sup>

The ABA had much smoother relations with the Democratic administration than it had with the Reagan and Bush ones. Candidates were not nominated until the evaluations from the ABA were received.<sup>155</sup> Comparing Clinton and his three predecessors, the Clinton judges had the highest ABA ratings, though George Bush's were almost as high.<sup>156</sup>

Demonstrating the effectiveness of the procedures—and the benefit of having a cooperative Senate—in the first two years of Clinton's presidency, 107 of 118 nominees for the district courts were confirmed; so were 19 of 22 nominations to the circuit courts of appeals.

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149 *Id.*

150 *Id.*

151 *Vacancies in the Federal Judiciary*, U.S. COURTS 4 (Jan. 1, 1993), <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/1993/01/vacancies/pdf>.

152 Sheldon Goldman, *Judicial Selection Under Clinton: A Midterm Examination*, 78 JUDICATURE 276, 278 (1995) [hereinafter Goldman, *Judicial Selection Under Clinton*].

153 *Id.*

154 *Id.* at 278–79.

155 Sheldon Goldman et al., *Clinton's Judges: Summing Up the Legacy*, 84 JUDICATURE 228, 230 (2001) [Goldman et al., *Clinton's Judges*].

156 *Id.* at 245.

TABLE 2<sup>157</sup>

Congress	Years	Circuit		District	
		Confirmations	Nominations	Confirmations	Nominations
103rd	1993–94	19	22	107	118
104th	1995–96	11	20	62	85
105th	1997–98	20	30	79	94
106th	1999–2000	15	34	57	83

The Senate's getting the slows and leaving numerous vacancies at the end of a Congress, as happened during Bush's last two years, was about to happen again, though. In Clinton's remaining six years in office, the Republicans controlled the confirmation process with their majorities in the Senate.<sup>158</sup> In Clinton's first Congress, the 103rd, as already recounted, 126 nominees were confirmed and only 14 were left pending when Congress adjourned in late 1994; 10 of those were nominated in late August or later.<sup>159</sup> At the adjournment of the 104th Congress in early 1997, 73 judges had been confirmed and 32 nominees were left unconfirmed.<sup>160</sup> For the 105th, there were 99 judicial confirmations<sup>161</sup> and 25 stranded nominees at the end of the Congress.<sup>162</sup> In Clinton's final two years in office, he had 72 judicial confirmations<sup>163</sup> and left 45 nominees who had not been voted on.<sup>164</sup> As a result, when Clinton's successor began in January 2001, there were 80 vacancies awaiting action,<sup>165</sup> somewhat less than the 109 a Democratic Senate had provided Clinton eight years earlier.<sup>166</sup>

The result of the change of Senate control in 1995 was that those involved with judicial selection had to work more closely with Republican senators to find acceptable nominees. A new Chairman of the Senate Judiciary Committee, Orrin Hatch of Utah, was now in charge.<sup>167</sup> Among

157 See McMillion, *supra* note 90, at 7 tbl.3.

158 *Party Division*, U.S. SENATE, [https://www.senate.gov/pagelayout/history/one\\_item\\_and\\_teasers/partydiv.htm](https://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm) (last visited Feb. 14, 2020). This webpage shows that from January 1995 until June 2001, the Republicans had a majority, which allowed them to control the Judiciary Committee as well. *Id.* The webpage also provides an explanation for the ease with which Clinton's nominees were confirmed in 1993–1995, when the Democrats had fifty-seven senators. *Id.*

159 *Unsuccessful Nominations and Recess Appointments*, *supra* note 9.

160 McMILLION, *supra* note 90, at 7 tbl.3; *Unsuccessful Nominations and Recess Appointments*, *supra* note 9.

161 McMILLION, *supra* note 90, at 7 tbl.3.

162 *Unsuccessful Nominations and Recess Appointments*, *supra* note 9.

163 McMILLION, *supra* note 90, at 7 tbl.3.

164 *Unsuccessful Nominations and Recess Appointments*, *supra* note 9.

165 *Judicial Vacancy List for January 2001*, U.S. COURTS (Jan. 4, 2001), <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2001/01/vacancies/html> (last visited Feb. 20, 2020).

166 *Vacancies in the Federal Judiciary*, *supra* note 151, at 4.

167 Sheldon Goldman & Elliot Slotnick, *Clinton's First Term Judiciary: Many Bridges to Cross*, 80 JUDICATURE 254, 255 (1997).

the matters that would not change was confirmed by Chairman Hatch in a letter to the White House Counsel that he would continue Chairman Biden's policy of not considering nominees with "negative blue slips unless the Administration did not consult with home-state senators."<sup>168</sup>

Diversity of identity was a key focus in judicial selection. During his two terms, Clinton dramatically increased the number of women and certain minorities on federal courts. He appointed 41 men and 20 women to the courts of appeals; of those, there were 45 Caucasians, 8 African Americans, 7 Hispanics, and one Asian American.<sup>169</sup> To district courts, Clinton appointed 219 men and 87 women; those included 229 Caucasians, 53 African Americans, 18 Hispanics, 4 Asian Americans, and one Native American.<sup>170</sup> The singularity of that last appointment causes me to mention that it was of Billy Michael Burrage of Oklahoma, a Choctaw tribal member, appointed in 1994 but who resigned in 2001 to go back to private law practice.<sup>171</sup>

President Clinton had barely begun his first term when Justice Byron White announced his retirement.<sup>172</sup> Both First Circuit Judge Stephen G. Breyer and D.C. Circuit Judge Ruth Bader Ginsburg were considered, but it was Ginsburg who was announced as the selection on June 14, 1993.<sup>173</sup> She was fairly quickly and without much controversy confirmed on August 3 by a vote of 96–3.<sup>174</sup> Such near unanimity in her favor would not last for the rest of her service. One indication is that her allies have embraced the *nom de guerre* of the "Notorious RBG" to suggest that there were some observers who were displeased with her powerful impact on the Court.

Clinton's other selection for the Supreme Court soon followed. Justice Harry Blackmun announced in April 1994 that he would retire at the end of that Court Term.<sup>175</sup> Senate Majority Leader George J. Mitchell of Maine was offered the nomination, but he declined. Little more than a month later, the previous year's runner-up was given the nod when Clinton announced his

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168 History and Context of the Blue Slip Courtesy, *supra* note 61.

169 Goldman et al., *Clinton's Judges*, *supra* note 155, at 249.

170 *Id.* at 244.

171 *Burrage, Michael* | 2016, OKLA. HALL FAME, <https://oklahomahof.com/member-archives/b/burrage-michael-2016> (last visited Feb. 20, 2020). The Federal Judicial Center indicates that two other Native Americans have been appointed as U.S. District Judges: Frank Howell Seay of Oklahoma by Jimmy Carter in 1979 and Diane Joyce Humetewa of Arizona by President Obama in 2014. *American Indian Judges on the Federal Courts*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/search/american-indian> (last visited Feb. 20, 2020). Another, Arvo Mikkanen of Oklahoma, was nominated by President Obama in 2011 but not confirmed, which was explained as a failure of the administration to have consulted with Oklahoma's congressional delegation, even with the one Democrat. Patrick B. McGuigan, *Analysis: As Obama and Coburn Clash over Judicial Nominee Arvo Mikkanen, Supporters Defend Him*, CAPITOLBEATOK (Feb. 9, 2011), <https://capitolbeatok.worldsecure-systems.com/reports/analysis-as-obama-and-coburn-clash-over-judicial-nominee-arvo-mikkanen-supporters-defend-him>.

172 Goldman, *Judicial Selection Under Clinton*, *supra* note 152, at 277.

173 *Id.*

174 *Id.*

175 *Id.* at 278.

selection of Judge Breyer on May 13, 1994.<sup>176</sup> His confirmation was relatively painless and almost as one-sided as was Ginsburg's: on July 29, 1994, Breyer was confirmed by a 87–9 vote.<sup>177</sup>

As mentioned already, President Clinton's success with confirmations slowed considerably after Republicans gained a Senate majority in the 1994 election, and Senator Orrin Hatch of Utah became Judiciary Committee Chairman for the remaining six years of Clinton's presidency.<sup>178</sup> Among the complaints from Democrats once Republicans were in charge was that individual senators were allowed to place secret holds on nominees.<sup>179</sup> On February 25, 1999, the practice of making secret holds was supposed to have been eliminated with an agreement between Majority Leader Trent Lott and Democratic Leader Tom Daschle, which stated in part:

All Members wishing to place a hold on any legislation or executive calendar business shall notify the sponsor of the legislation and the committee of jurisdiction of their concern. Further written notification should be provided to respective leaders stating their intentions regarding their bill or nomination. Holds placed on items by a member of a personal or committee staff will not be honored unless accompanied by a written notification from the objecting Senator by the end of the following business day.<sup>180</sup>

Among the senators claiming that undeclared holds were still being placed and then honored by Senate leadership was Senator Patrick Leahy of Vermont, who said in September 1999 that anonymous senators were being unfair to the judicial nominees: "I am the Ranking Democrat on the committee of jurisdiction for these nominations and have not been shown that courtesy [of notification] by a single Senator obstructing consideration of th[ese] nominations."<sup>181</sup>

Another complaint was specifically directed at Judiciary Chairman Hatch for refusing to hold any confirmation hearings during the first half of 1999.<sup>182</sup> By June 1999, forty-two judicial nominations were pending and there had been no hearings.<sup>183</sup> Senator Hatch was said to be responding to

176 *Id.*

177 *Id.*; Breyer, *Stephen Gerald*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/breyer-stephen-gerald> (last visited Feb. 20, 2020).

178 JOINT COMM. ON PRINTING, 104TH CONG., 1995–1996 OFFICIAL CONGRESSIONAL DIRECTORY 371 (1995); JOINT COMM. ON PRINTING, 105TH CONG., 1997–1998 OFFICIAL CONGRESSIONAL DIRECTORY 387 (1997); JOINT COMM. ON PRINTING, 106TH CONG., 1999–2000 OFFICIAL CONGRESSIONAL DIRECTORY 368 (1999).

179 See 145 CONG. REC. 29,394 (1999).

180 *Id.* at 29,394–95.

181 *Nominations of Q. Todd Dickinson, to Be Commissioner of Patents and Trademarks, Department of Commerce; and John W. Marshall, to Be Director of the U.S. Marshals Service, Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 106th Cong. 10 (1999) (statement of Sen. Patrick J. Leahy).

182 See Sheldon Goldman & Elliot Slotnick, *Clinton's Second Term Judiciary: Picking Judges Under Fire*, 82 JUDICATURE 264, 284 (1999); Joan Biskupic, *Hatch, White House at Impasse on Judgeships*, WASH. POST, Jun. 5, 1999, at A1.

183 Biskupic, *supra* note 182.

two different interests. He wanted the nomination of Ted Stewart, his candidate for a Utah judgeship, and he also was reacting to the criticism from conservatives that he had been too accommodating to Clinton judicial nominations in previous Congresses.<sup>184</sup>

Among those stalled whose situation became a *cause célèbre* among Democrats and their supportive groups was a black Missouri Supreme Court Justice, Ronnie White,<sup>185</sup> who was first nominated in 1998 to be a district judge, given a hearing, voted out of committee,<sup>186</sup> but then was not given a floor vote before adjournment. He was renominated in 1999 and again reported to the floor by the Committee.<sup>187</sup> White's situation paralleled that of other Clinton nominees. Often discussed together were Justice White and two Ninth Circuit nominees, Richard Paez, first nominated in January 1996,<sup>188</sup> and Marsha Berzon, who was nominated in January 1998.<sup>189</sup> Senator Hatch announced on June 15, 1999, that President Clinton had agreed to nominate Stewart; the next day, the first confirmation hearings of the year were held on eight nominees.<sup>190</sup> Not long thereafter, Berzon was reported by the Committee on July 1, and Paez on July 29.<sup>191</sup>

In late July, President Clinton nominated Stewart, who had a hearing two days later but then was stalled by Democrats on the Senate floor with a filibuster.<sup>192</sup> On September 21, 1999, Republicans failed to reach the 60 votes needed to end the filibuster on Stewart, losing by 55–44; later the same day, Republicans returned the favor by blocking cloture on Berzon by a 45–54 vote and on Paez by 45–53.<sup>193</sup> In time, an agreement was reached where Stewart was allowed a vote; Justice White would get voted on the same

184 *Id.*

185 *White, Ronnie Lee*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/white-ronnie-lee> (last visited Feb. 20, 2020).

186 White was reported by the Judiciary Committee on May 21, 1998. SENATE OF THE U.S., 105TH CONG., EXECUTIVE CALENDAR: MAY 22, 1998, at 6 (1998), [https://www.senate.gov/legislative/LIS/executive\\_calendar/1998/05\\_22\\_1998.pdf](https://www.senate.gov/legislative/LIS/executive_calendar/1998/05_22_1998.pdf).

187 White was not again reported by the Committee until July 22, 1999, perhaps an example of the impasse between President and this Committee's chairman. SENATE OF THE U.S., 106TH CONG., EXECUTIVE CALENDAR: JULY 26, 1999, at 5 (1999), [https://www.senate.gov/legislative/LIS/executive\\_calendar/1999/07\\_26\\_1999.pdf](https://www.senate.gov/legislative/LIS/executive_calendar/1999/07_26_1999.pdf); see Stuart Taylor, Jr., *The Shame of the Ronnie White Vote*, 31 NAT'L J. 2949 (1999).

188 *Paez, Richard A.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/paez-richard> (last visited Feb. 20, 2020).

189 *Berzon, Marsha Siegel*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/berzon-marsha-siegel> (last visited Feb. 20, 2020).

190 *Partisan Impasse Blocks Judicial Confirmations for Most of the Year*, CONG. Q. ALMANAC, 18-49, 18-52 (1999).

191 SENATE OF THE U.S., 106TH CONG., EXECUTIVE CALENDAR: SEPT. 8, 1999, at 4 (1999), [https://www.senate.gov/legislative/LIS/executive\\_calendar/1999/09\\_08\\_1999.pdf](https://www.senate.gov/legislative/LIS/executive_calendar/1999/09_08_1999.pdf) (Berzon); *id.* at 5 (Paez).

192 See Goldman et al., *Clinton's Judges*, *supra* note 155, at 240.

193 145 CONG. REC. 22,004 (1999) (Stewart); *id.* at 22,007 (Berzon and Paez); see Neil A. Lewis, *In Odd Turn, Democrats Stall Clinton's Nominees*, N.Y. TIMES, Sept. 22, 1999, at A25.

day as Stewart,<sup>194</sup> and votes on Paez and Berzon would occur by the following March 15.<sup>195</sup> Both Stewart and White received floor votes on October 5, 1999—Stewart was confirmed by a 93–5 vote, but White was defeated by 45–54.<sup>196</sup> The following March 9, the agreement for votes on the controversial Ninth Circuit nominees was honored. Berzon was confirmed by a 64–34 vote, and Paez 59–39.<sup>197</sup>

Showing the pressures on senators of both parties was an article by Thomas L. Jipping of the Free Congress Foundation, a conservative group, published the day before the vote, where he stated that whether Paez and Berzon were confirmed with the Republican votes “may well demonstrate whether Republicans deserve their majority status.”<sup>198</sup> Jipping wrote that Paez had an “aggressively activist judicial philosophy,” while Berzon as a litigator “repeatedly pressed extreme arguments that ignored the plain meaning of statutes and Supreme Court precedent, the very hallmarks of judicial activism.”<sup>199</sup>

The Fifth Circuit’s selections fit into the pattern already described. President Clinton had a fairly easy time of it during his first two years, less success in the next two, and none at all in his second term. Though the premise of the time period for my study is that these are the years in which I was personally involved, my perspective during the Clinton years was far from the action.

Of the four vacancies that had been left unfilled when President Bush left office, two of the positions had previously been held by Texas judges who retired, one by a Mississippian, and the other was a new seat.<sup>200</sup> Bob Krueger was the one Democratic senator from Texas when President Clinton’s term began. In late April, Krueger sent four names to the President: U.S. District Judges Robert Parker of Tyler and George Kazen of Laredo, Corpus Christi lawyer Jorge Rangel, and Court of Criminal Appeals Judge Morris Overstreet, the first African American to be elected to statewide office in Texas history.<sup>201</sup>

194 See David Stout, *Senate Rejects Judge Chosen by President for U.S. Court*, N.Y. TIMES, OCT. 6, 1999, at A18.

195 *The Paez and Berzon Votes*, WASH. POST, Mar. 3, 2000, at A28.

196 145 CONG. REC. 23,940–41 (1999).

197 146 CONG. REC. 2422 (2000).

198 Thomas L. Jipping, *Politics of the Ninth Circuit: Senators Should Reject Judicial Nominees*, WASH. TIMES, Mar. 8, 2000, at A19, *reprinted in* 146 CONG. REC. 2390 (2000). Jipping wrote at greater length about his dismay regarding Senate Republicans’ willingness to confirm some suspect Clinton judicial nominees. See Thomas L. Jipping, *From Least Dangerous Branch to Most Profound Legacy: The High Stakes in Judicial Selection*, 4 TEX. REV. L. & POL. 365, 442–49 (2000).

199 Jipping, *Politics of the Ninth Circuit*, *supra* note 198.

200 Mark Ballard, *New Contenders for 5th Circuit*, TEX. LAW., Sept. 13, 1993, at 10; see *Vacancies in the Federal Judiciary*, *supra* note 151, at 2.

201 Chandler Davidson, *African Americans and Politics*, TEX. ST. HIST. ASS’N (June 9, 2020), <https://tshaonline.org/handbook/online/articles/wmafr>; *Krueger Suggests Four Texans for Appeals Court Posts*, SAN ANTONIO EXPRESS-NEWS, Apr. 30, 1993, at 4B. In January 1993, Krueger had been appointed by Texas Governor Richards to fill the vacancy left when Senator Lloyd Bentsen resigned to become Secretary of the Treasury, but he then

Clinton offered to nominate Rangel in 1993, but Rangel was duty bound to decline. He was the Fifth Circuit representative on the ABA committee that investigated and rated nominees.<sup>202</sup> When accepting that role, members had to agree not to accept any judicial nomination. Though a waiver was requested, the ABA refused. Certainly, the President had the authority to nominate him anyway, but Rangel wrote Clinton on August 20, 1993, explaining he needed to honor the commitment, and withdrew from consideration.<sup>203</sup>

Someone without Senator Krueger's endorsement was Fortunato Pedro (Pete) Benavides, who had met Clinton during the 1992 campaign when Benavides, having been appointed in 1991 by Texas Governor Ann Richards to the Texas Court of Criminal Appeals, was running for a full term on the court and Clinton was campaigning in Texas.<sup>204</sup> As Pete told me, an ally of his who was also assisting the Clinton campaign linked the two candidates together and they became friends. His introduction to Clinton was at a campaign event on the grounds of Scholz Beer Garten in Austin,<sup>205</sup> where a small contingent of Pete's friends got much of the Clinton crowd to cheer "We Want Pete." Clinton had forgotten their earlier quick introduction and asked an aide, "Who's Pete?" Pete thinks most of those cheering did not know, either.

Pete would at times travel on the same private plane when Clinton was campaigning in Texas—including on election night in November. Neither candidate carried Texas, but each would hold federal office fairly soon. Because former Senator Krueger had not included him on the list for the Fifth Circuit, Pete thought he was not being considered. Then "out of the blue," a political friend called to tell Pete he had been chosen. It was reported that the President himself ordered the background check on Benavides that was needed for a nomination, and Clinton let it be known he did not need any other recommendations for that seat.<sup>206</sup> The President was said to be "very fond of him."<sup>207</sup> No surprise there, as Benavides is a gregari-

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was defeated by Republican Kay Bailey Hutchison in June 1993. See *Krueger, Robert Charles (1935-)*, BIOGRAPHICAL DIRECTORY U.S. CONG., <https://bioguideretro.congress.gov/Home/MemberDetails?memIndex=K000333> (last visited Feb. 20, 2020). The senior Democratic U.S. Representative from Texas, Jack Brooks, said he would honor Krueger's recommendations. Ballard, *supra* note 200.

202 *Overstreet, Rangel End 5th Circuit Bids*, TEX. LAW., Sept. 6, 1993, at 46.

203 *Id.*; Letter from Jorge C. Rangel to Bill Clinton, President of the U.S. (Aug. 20, 1993) (on file with author).

204 *Clinton, Brooks Differ on Judge Nominee*, DALL. MORNING NEWS, Nov. 18, 1993, at 28A.

205 The Scholz watering hole is an Austin favorite for University of Texas students and everyone else. The campaign event was held on March 8, two days before the Texas primary. Bruce Hight, *Minorities Wooed by Clinton on Texas Visit*, AUSTIN AM.-STATESMAN, Mar. 9, 1992, at A1.

206 *Clinton, Brooks Differ on Judge Nominee*, *supra* note 204.

207 R.G. Ratcliffe, *Lawmaker's Tip a Curve to Clinton*, HOUS. CHRON., Nov. 18, 1993, at A29.

ous and humorous, indeed, a charming man, including being a superb appellate judge.

Louisiana had two Democratic senators—Bennett Johnston and John Breaux—and they sought two of the vacancies, in part to make up for the one lost to Mississippi in 1990 when Rhesa Barksdale replaced a former Louisiana judge. Their recommendations were of Justice James L. Dennis, who had served on Louisiana’s supreme court since 1976, and Carl Stewart, a state court of appeals judge since 1991.<sup>208</sup> My understanding of these recommendations, based on conversations with knowledgeable individuals, is that the two senators had for a while been supporting Justice Dennis for a vacancy when one became available. More of a surprise was Stewart’s selection. He had no strong connections with any of the decisionmakers, though he and Senator Johnston knew each other as both were from Shreveport. Stewart also had a friendly relationship with the senator’s chief of staff, Jim Oakes. More importantly, Stewart had an excellent reputation from his six years as a state trial judge and three years on the court of appeals. Of significance due to President Clinton’s desire to diversify the federal bench, Stewart was the only African American serving as a state intermediate appeals court judge outside of New Orleans.

After Clinton’s election, state Democratic Party Chairman James Brady (who himself became a U.S. District Judge in 2000)<sup>209</sup> called Stewart to ask about his interest in a district court seat. The interest was there, but after some period of time, Brady called again to say the seat was going to someone else. A few weeks after that disappointing news, Senator Johnston’s chief of staff, Jim Oakes, called Stewart to ask about his willingness to pursue a Fifth Circuit seat. Stewart was willing. A few days later, Brady called Stewart to say both senators would recommend him. The rest followed fairly quickly.

Judge Stewart had few of the connections or prior political work that many of us had that helped our selection. He considers his nomination to have been providential. It certainly was for the Fifth Circuit.

For Louisiana to get two nominations, it had to wrest a seat from one of the other states. Mississippi with its two GOP senators was not well positioned to hold the Charles Clark seat, but the senators did their best to block Justice Dennis’s confirmation.<sup>210</sup> It was reported that two Mississippians being considered were Justice Fred Banks, who had been NAACP counsel in the state, then was a trial judge before beginning his service as the second African American on the state supreme court in 1991; also in the speculation was the

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208 Steve Cannizaro, *Two Recommended to Appellate Court; Pair Await OK from Clinton*, TIMES-PICAYUNE (New Orleans, La.), Apr. 24, 1993, at A27; see Ballard, *supra* note 200. See also Courtland Milloy, *A Way to Judge How Far We’ve Come*, WASH. POST, May 22, 1994, at B1 (regarding Judge Stewart, by a high school classmate).

209 Bruce Alpert, *Former Head of La. Democrats Finally Confirmed to Judgeship*, TIMES-PICAYUNE (New Orleans, La.), May 25, 2000, at A8.

210 Bruce Alpert, *Breaux Champions La. Court Nominee*, TIMES-PICAYUNE (New Orleans, La.), June 24, 1995, at B1



acting dean of the University of Mississippi Law School, Carolyn Ellis Staton.<sup>211</sup>

Weighing these and other recommendations, Clinton on January 27, 1994, nominated Texans Benavides and Parker, along with Carl Stewart of Louisiana.<sup>212</sup> The Clark seat from Mississippi remained without a nominee until June 8, 1994, with the selection of Louisiana Supreme Court Justice Jim Dennis.<sup>213</sup> The first three nominees were all confirmed by mid-June,<sup>214</sup> but opposition to Dennis that one writer said had not been publicly explained prevented Dennis's confirmation before Congress adjourned in late 1994.<sup>215</sup>

Republicans gained a majority in the Senate in the 1994 election, but that did not alter Clinton's course. He sent Dennis's name back to the Senate on January 31, 1995.<sup>216</sup> Senators Cochran and Lott of Mississippi made it difficult for Dennis, arguing that the seat belonged to their state and that Justice Dennis had "a record of court activism" as a state judge, but after Dennis was reported favorably by the Judiciary Committee, those senators failed on September 28, 1995, by a 46-54 vote to have his nomination recommitment to the Committee.<sup>217</sup> Dennis was then confirmed by voice vote.

In his second term, Clinton nominated three Fifth Circuit judges and engaged in a lengthy negotiation over a possible fourth nomination, but there were no confirmations. On July 24, 1997, Jorge Rangel was finally nominated,<sup>218</sup> as it had been over a year since he had left the ABA committee where his service had disqualified him four years earlier. Besides his leadership in the ABA, Rangel was actively involved in South Texas community affairs and in the Democratic Party, such as for the presidential campaigns in Texas of Michael Dukakis in 1988 and Bill Clinton in 1992.<sup>219</sup> Republicans remained angry about the treatment the ABA committee had given nominees of Presidents Reagan and Bush, and, unfortunately, Rangel personified the committee. Rangel's old ABA committee rated him well qualified. It did not matter. Neither of the Texas senators, Phil Gramm or Kay Bailey Hutchi-

211 Ballard, *supra* note 200.

212 140 CONG. REC. 437 (1994).

213 *Id.* at 12,295.

214 *Id.* at 9617 (Benavides and Stewart); *id.* at 12,984 (Parker).

215 Bruce Alpert, *Politics Gets in Way of Nomination*, TIMES-PICAYUNE (New Orleans, La.), Oct. 30, 1994, at B1.

216 141 CONG. REC. 3016 (1995).

217 *Id.* at 26,787-94 (remarks of Senators Cochran and Lott opposing Dennis's nomination); *id.* at 26,797 (vote); Dennis Camire, *Miss. Snubbed in Court Appointment*, CLARION-LEDGER (Jackson, Miss.), Sept. 30, 1995, at 13A.

218 143 CONG. REC. 15,649 (1997); Kathy Lewis, *Texas Lawyer Nominated for Federal Court*, DALL. MORNING NEWS, July 25, 1997, at 12D.

219 Libby Averyt, *Three's a Charm*, TEX. LAW., Aug. 4, 1997, at 1. The "three" in the title refers to his declination in 1993 to Clinton's offer to nominate him to the Fifth Circuit, his consideration in 1995 for a district court judgeship, and now the Fifth Circuit nod. *See id.* The third time for Rangel would not be charmed, either.

son, supported him, and he never was scheduled for a hearing.<sup>220</sup> Upon the adjournment of Congress, ending his chances that year, Rangel wrote the President on October 22, 1998, requesting his name not be resubmitted.<sup>221</sup>

No replacement name was submitted until September 16, 1999, when Clinton nominated Enrique Moreno.<sup>222</sup> Born in 1955 in Chihuahua City, Mexico, where his father worked in a copper-smelting plant, he came with his family to El Paso a year later.<sup>223</sup> An excellent student in local schools, Moreno attended college and law school at Harvard, then practiced law in El Paso.<sup>224</sup> The ABA unanimously rated Moreno as well qualified. Nonetheless, he never had a Committee hearing and therefore never was reported to the full Senate. Senator Gramm said Moreno was “a fine man and a good lawyer,” but “I don’t believe he is a great lawyer, and I don’t believe he is ready to serve on the Fifth Circuit Court.”<sup>225</sup> Gramm expressed a willingness to consider him for a trial judgeship, but not for the appellate court.<sup>226</sup>

President Clinton’s final Fifth Circuit nomination was of Baton Rouge lawyer H. Alston Johnson III, which was made on April 22, 1999.<sup>227</sup> As it was said in those days, Johnson was a “Friend of Bill” from college days, whose long association had gained Johnson at least one night’s sleep in a White House bed during the Clinton years.<sup>228</sup> He also was a superb lawyer in one of the best firms in Louisiana.<sup>229</sup> The Republicans were not in any rush, but they were conducting hearings. Johnson was never scheduled for one, though. A particular problem for Johnson was that Senate Majority Leader Trent Lott was trying to make a deal with Clinton to nominate a Mississippian, Robert Galloway, to the final vacancy on the Fifth Circuit, with both Johnson and the Mississippian then to be confirmed.<sup>230</sup> The administration

220 See Carol Christian, *Clinton Blasts Texas Senators for Opposing Judge Appointment*, HOUS. CHRON., May 7, 2000, at A16.

221 Letter from Jorge C. Rangel to Bill Clinton, President of the U.S. (Oct. 22, 1998), reprinted in 149 CONG. REC. 12,983 (2003).

222 See SOUTHWICK, THE NOMINEE, *supra* note 135, at 70.

223 S.C. Gwynne, *Judge Not*, TEX. MONTHLY, Nov. 2000, at 146, 149.

224 *Id.* at 150.

225 *Id.* at 148.

226 *Id.* at 148–49.

227 145 CONG. REC. 7298 (1999).

228 Joe Gyan, Jr., *BR Lawyer Nominated for 5th Circuit Spot*, ADVOCATE (Baton Rouge, La.), May 1, 1999, at IBS (reporting that Johnson said he and Clinton had been friends since they were Boys State delegates in 1963); Jonathan Tilove, *Few in Louisiana Have Close Ties to Obama*, TIMES-PICAYUNE (New Orleans, La.), Nov. 24, 2008, at 1 (“Johnson was a frequent overnight guest at the White House . . .”). In September 2000, the President released a list of 404 guests who had spent the night in the White House since July 1999, the date that Hillary Clinton began running for the U.S. Senate; Alston Johnson was named in the group identified simply as friends. *White House Overnight Guests Listed*, CTR. FOR PUB. INTEGRITY (Sept. 22, 2000), <https://publicintegrity.org/politics/white-house-overnight-guests-listed>.

229 See SOUTHWICK, THE NOMINEE, *supra* note 135, at 70.

230 *Id.* at 73.

offered to nominate Senator Lott's candidate in exchange for confirmations of four other nominees; that price was too high for Lott.<sup>231</sup>

## V. GEORGE W. BUSH, 2001–2009

TABLE 3<sup>232</sup>

Congress	Years	Circuit		District	
		Confirmations	Nominations	Confirmations	Nominations
107th	2001–02	17	32	83	98
108th	2003–04	18	34	85	94
109th	2005–06	16	28	35	65
110th	2007–08	10	23	58	79

As mentioned earlier, when Bill Clinton left office, there were eighty judicial vacancies waiting for President George W. Bush. There was one more prospective vacancy that received national attention. That is because President Clinton held a White House ceremony on December 27, 2000, three weeks before leaving office, to announce he was making a recess appointment of Roger Gregory to the Fourth Circuit, making him the first African American judge on that court.<sup>233</sup> Presidential appointments made during a recess of Congress expire at the end of the next session of Congress.<sup>234</sup> Gregory had not been waiting particularly long since his nomination by Clinton on June 30, 2000,<sup>235</sup> at least not compared to many nominees. On January 3, 2001, Clinton renominated eight individuals whose nominations to circuit courts had lapsed when the previous Congress adjourned.<sup>236</sup> Thus, facing the new President were eighty vacancies with some holdover nominees and a recess appointment.

231 Galloway is a lawyer in Gulfport, Mississippi. Joan McKinney, *Sen. Breaux Hopes to Meet Clinton on 5th Circuit Nominee*, ADVOCATE (Baton Rouge, La.), July 12, 2000, at 14A.

232 McMILLION, *supra* note 90, at 7 tbl.3.

233 Associated Press, *Judge Seated in Recess Action*, WASH. TIMES, Dec. 28, 2000, at A3; *see Gregory, Roger L.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/gregory-roger-l> (last visited Feb. 20, 2020).

234 U.S. CONST. art. II, § 2, cl. 3.

235 *Gregory, Roger L.*, *supra* note 233.

236 *Clinton Renews Judgeship Battle*, L.A. TIMES, Jan. 4, 2001, at A20. A list of the eight appears in DENIS STEVEN RUTKUS, CONG. RESEARCH SERV., JUDICIAL NOMINATIONS BY PRESIDENT CLINTON DURING THE 103RD–106TH CONGRESSES 13 (2006), <https://fas.org/sgp/crs/misc/98-510.pdf>.

The CRS report shows Clinton made only one other recess appointment as his presidency drew to a close, that of Sarah L. Wilson, who was first nominated to the Court of Federal Claims only on January 3, 2001, then received a recess appointment on January 19, the day before Bush's inauguration. *Id.* at 32–33. Wilson had been in the White House Counsel's Office since 1998, perhaps indicating the basis for the almost unique appointment. *U.S. Court of Federal Claims: Wilson, Sarah Lynn*, FED. JUD. CTR., <https://www.fjc.gov/node/7101> (last visited Feb. 20, 2020). When I was interviewed by Associate

George W. Bush's administration would make appointment of judges a priority. To identify the proper nominees, the President employed the White House Counsel's Office, headed for the first four years by his friend, former Texas Supreme Court Justice Alberto Gonzales.<sup>237</sup> Associate White House Counsel Brett Kavanaugh was also a key participant in the process. At the Department of Justice, the Office of Legal Policy was again at the forefront.<sup>238</sup> A Judicial Selection Committee, consisting of personnel from both the White House and DOJ, met regularly to consider vacancies and candidates.<sup>239</sup> I encountered that Committee on occasion during my slow, unsteady, but ultimately successful (barely) pursuit of selection for the Fifth Circuit.

My knowledge of some of what the Committee was doing was acquired from a Mississippi friend, Chris Henick, whose extraordinary political savvy explains why he was at the beginning of the administration the Principal Deputy Assistant to the President in Karl Rove's office. In February 2001, Chris told me he had just been at a Judicial Selection Committee meeting involving Attorney General John Ashcroft, White House Counsel Gonzales, his deputy Tim Flanigan whom I had known in the first President Bush's administration, several associate White House counsels, Karl Rove, and his deputy Henick.<sup>240</sup> Those meetings in the first few months were developing the initial list of nominees. Whether formally on the Committee or not, Nick Calio, Assistant to the President for Legislative Affairs, and Jack Howard, Deputy Assistant to the President and Deputy Director of the White House Office of Legislative Affairs, helped structure how decisions that were made were then processed—which senators needed to be contacted, for example. Among other vacancies, there was a need to discuss some on the Fifth Circuit. Thus, my keen interest in the Committee.

On March 22, six weeks before the first nominations were made, White House Counsel Gonzales sent a letter to Democratic Senators Leahy and Chuck Schumer announcing that the administration would send nominations to the Senate without first having notified the ABA and received their evaluation.<sup>241</sup> The evaluations would still be done, as the

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White House Counsel Noel Francisco in February 2001 for my long-shot effort to be nominated that year, he asked about her because she and I had been in the Federal Programs Branch at DOJ together. That suggests she was being given some consideration for a nomination by President Bush, but it did not happen. By the way, my opinion was favorable.

237 Sheldon Goldman et al., [George] W. Bush *Remaking the Judiciary: Like Father Like Son?*, 86 JUDICATURE 282, 284 (2003) [hereinafter Goldman et al., *Bush Remaking the Judiciary*].

238 *Id.*

239 *Id.*

240 There is further discussion of the Committee and its membership as the authors understood it at the end of Bush's first term. Sheldon Goldman et al., [George] W. Bush's *Judiciary: The First Term Record*, 88 JUDICATURE 244, 246 (2005) [hereinafter Goldman et al., *Bush's Judiciary*].

241 See Audrey Hudson, *Democrats, to Avenge ABA, Threaten Judgeship Nominees*, WASH. TIMES, Mar. 27, 2001, at A1.

administration could not bar such review. The Democratic response was immediate, which included a threat to delay all nominations until the ABA had a chance to conduct its usual evaluation.<sup>242</sup> The ABA in defending its objectivity referred to the “[h]eated rhetoric” that it said brought no light on the function of the ABA committee that performed the evaluation.<sup>243</sup> There did seem to be overheated rhetoric over what in effect was just a matter of delaying the ABA’s evaluations, not ending them. Associate White House Counsel Brett Kavanaugh said that

[t]he President felt it was unfair and unwise to give one outside group preferential access to the process, particularly when there are a number of bar associations that we hear from and the ABA had this preferred role, which seemed unwise. It was not a suggestion that the ABA shouldn’t be rating judges. In fact, the President has touted on numerous occasions the fact that the ABA has rated people like Justice Owen well qualified, unanimously.<sup>244</sup>

The President himself was focused on judicial selection.<sup>245</sup> A good indication of that was the ceremony President Bush held in the East Room of the White House on May 9, 2001.<sup>246</sup> In three rows on small risers stood eleven nominees, including two first nominated by President Clinton—Roger Gregory for the Fourth Circuit and Barrington Parker for the Second. Also there were Joy Clement and Priscilla Owen, both of whom I would later join on the Fifth Circuit; John Roberts and Miguel Estrada, D.C. Circuit; Terrence Boyle and Dennis Shedd, Fourth Circuit; Deborah Cook and Jeffrey Sutton, Sixth Circuit; and Michael McConnell, Tenth Circuit.<sup>247</sup>

Initially, there were to be fourteen nominations, but the President withheld three because of political objections: California’s two Democratic senators objected to naming Republican Congressman Chris Cox and Los Angeles County Superior Court Judge Carolyn Kuhl to the Ninth Circuit, while Maryland’s senators opposed Peter Keisler’s nomination to the Fourth Circuit.<sup>248</sup> Democrats had been threatening to block all nominees in the Senate,<sup>249</sup> which was divided 50–50 with Vice President Dick Cheney needed to break the tie that allowed Republicans to chair each committee. Judiciary Chairman Hatch said the President was “trying to make sure that this first batch, there are no gripes about.”<sup>250</sup> It soon became evident, though, that there were plenty of gripes about some of the remaining eleven.

242 Audrey Hudson, *Democrats Want ABA to Vet Judges*, WASH. TIMES, Mar. 28, 2001, at A4.

243 Special Report to ABA Members from Martha W. Barnett, President, Am. Bar Ass’n (n.d.) (on file with author).

244 Goldman et al., *Bush Remaking the Judiciary*, *supra* note 237, at 290.

245 *Id.* at 284.

246 See Joseph Curl, *Bush Sends Nominees in ‘Good Faith,’* WASH. TIMES, May 10, 2001, at A1.

247 See *id.*

248 Audrey Hudson, *Bush Holds Nominees Back to End Stalemate*, WASH. TIMES, May 9, 2001, at A1.

249 *Id.*

250 *Id.*

Even before these first nominations were made, Democrats had begun discussing how to address what many of them perceived as an effort by Republicans, who were drawing inspiration as well as personnel from the Federalist Society and similar groups, to select unsuitably conservative judges. The administration's decision in March to end the ABA's evaluation of potential nominees and have them performed after nomination likely added to the alarm. In the last weekend of April, before any nominations had been made, forty-two of the fifty Democratic senators attended a retreat in Farmington, Pennsylvania, to agree on a strategy to resist confirmation of judicial nominees to the extent possible.<sup>251</sup> There is some evidence that preliminary discussion occurred of an idea that was not implemented until the next Congress, namely, insisting on roll-call votes on a large percentage of nominees.<sup>252</sup>

Some of the measures did not need to be implemented yet because on June 6, a month after the first nominations, one of the fifty Republicans, Jim Jeffords of Vermont, decided he would become an independent and caucus with the Democrats.<sup>253</sup> Senator Lott later wrote about how both parties in the 50–50 Senate were trying to convince a few from the other side to switch, but only Jeffords did so.<sup>254</sup> The switch allowed the Democrats to reorganize the Senate. Democratic Senator Pat Leahy became Chairman of the Judiciary Committee.

One agreement the new Democratic majority entered with Republicans was to allow former Chairmen Biden's and then Hatch's blue slip process to continue, in which a home-state senator's failure to return a blue slip would not block a hearing on a nominee from the senator's own state except when the administration had not consulted with the senator.<sup>255</sup> There was some evidence, though, that Senator Leahy did not apply that exception and barred review of a nominee unless both blue slips were returned, both during the rest of the Congress for 2001–2002 and when he was again chairman in 2007–2015.<sup>256</sup> Senate Democrats also waited for ABA evaluations before allowing hearings on nominees.

Senator Hatch returned to his blue-slip policy when he was chairman from 2003 to 2005.<sup>257</sup> Republican Senator Arlen Specter chaired the Committee from 2005 to 2007, and though he did not as other chairmen set out his policy in a letter to the White House, his practice seemed to be that fail-

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251 Neil A. Lewis, *Washington Talk; Democrats Ready for Judicial Fight*, N.Y. TIMES, May 1, 2001, at A19.

252 See Thomas Jipping, *A Party Switch That Triggered a Confirmation Landslide*, HERITAGE FOUND. (June 10, 2019), <https://www.heritage.org/courts/commentary/party-switch-triggered-confirmation-landslide>.

253 Alison Mitchell, *It's Official: Democrats Rule Senate; G.O.P. Rues Day*, N.Y. TIMES, June 6, 2001, at A27.

254 See, e.g., TRENT LOTT, *HERDING CATS: A LIFE IN POLITICS* 212 (2005).

255 See Dave Boyer, *Senate Concurs on Reorganization*, WASH. TIMES, June 30, 2001, at A4; History and Context of the Blue Slip Courtesy, *supra* note 61.

256 History and Context of the Blue Slip Courtesy, *supra* note 61.

257 *Id.*

ure to return a “blue slip killed a nomination for district court judges, but not necessarily for circuit court judges.”<sup>258</sup>

The result was that of the eleven on the East Room risers, only the two whom Clinton had first nominated—Gregory and Parker—along with Joy Clement on the Fifth Circuit were confirmed by the end of the first year of President Bush’s first term. Only Michael McConnell and Dennis Shedd were confirmed in 2002. During the eighteen months that the Democrats controlled the Senate in Bush’s first term, sixteen nominations to circuit judgeships were confirmed and fifteen were not.<sup>259</sup> The less contentious district court nominations showed markedly better success, with eighty-three confirmations to fifteen nominees who were left to hope for a better day.<sup>260</sup>

The 2002 elections brought a better day for Republicans, winning a 51–49 majority in the Senate; the GOP majority would increase to 55–45 after the 2004 reelection of President Bush, then be eliminated when the 2006 election put Republicans in a 49–51 minority.<sup>261</sup> Those majorities allowed Deborah Cook, John Roberts, and Jeffrey Sutton finally to be confirmed in 2003.<sup>262</sup> It took more than just gaining a GOP majority to allow confirmation of Priscilla Owen, finally in 2005.<sup>263</sup> I will discuss her later. Of that initial eleven, only Miguel Estrada and Terrence Boyle<sup>264</sup> were never confirmed.

There were many controversies during the Bush years over judges. Of primary importance, of course, the President in 2005 nominated both John Roberts as Chief Justice and Sam Alito as an Associate Justice.<sup>265</sup> Before choosing Roberts as the successor to Sandra Day O’Connor, he met five possibilities in the White House, including Fifth Circuit Judge Joy Clement.<sup>266</sup> Less than two months later, Chief Justice Rehnquist’s death caused the President to shift Roberts to that post. For O’Connor’s seat, the President considered both White House Counsel Harriet Miers and the just-confirmed Fifth Circuit Judge Priscilla Owen.<sup>267</sup> He announced Miers as the choice, but she

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258 *Id.*

259 Goldman et al., *Bush Remaking the Judiciary*, *supra* note 237, at 306.

260 *Id.* at 303.

261 *Party Division*, *supra* note 158.

262 *Biographical Directory of Article III Federal Judges, 1789–Present*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/search/advanced-search> (last visited Feb. 20, 2020) (using the following “Advanced Search Criteria”: U.S. Courts of Appeals, President George W. Bush, and confirmation date between 2003-01-01 and 2005-01-01).

263 *See Owen, Priscilla Richman*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/owen-priscilla-richman> (last visited Feb. 20, 2020).

264 U.S. District Judge Terrence Boyle of North Carolina was first nominated in 2001, then renominated several times, but was not nominated again at the start of the new Congress in January 2007. One description of the objections was civil rights groups accused him “of hostility to minority rights.” R. Jeffrey Smith, *4 Nominees to Appeals Courts Are Dropped*, WASH. POST, Jan. 10, 2007, at A3.

265 *See BUSH, DECISION POINTS*, *supra* note 94, at 96–102.

266 *Id.* at 97–98.

267 *See id.* at 101.

withdrew three weeks later due to criticism from conservatives, causing him then to nominate Judge Alito.<sup>268</sup> Yet again, a President Bush had twice considered promoting a Fifth Circuit judge to the Supreme Court but demurred.

A fair identification of many of the prominent, impressive conservatives nominated by President Bush, several of whom had struggles to survive confirmation, was offered by Professor Goldman in 2009: “Among the many examples [of all-star conservative judges] are Janice Rogers Brown, Jay Bybee, Brett Kavanaugh, Michael McConnell, Priscilla Owen, Jeffrey Sutton, and William Pryor.”<sup>269</sup> Other prospective circuit court all-stars who were blocked include Washington, D.C., litigator Miguel Estrada, Department of Defense General Counsel William James Haynes II,<sup>270</sup> and California Superior Court Judge Carolyn Kuhl.<sup>271</sup> One of the circuit nominees definitely in the stellar group was Peter Keisler, whom I also had the honor to get to know. Only some of those can be discussed here.

One of the all-stars, Brett Kavanaugh, relinquished his intimate involvement in the process of judicial selection when he was nominated to the D.C. Circuit on July 25, 2003, and his position on the Judicial Selection Committee was taken by Dabney Friedrich,<sup>272</sup> now a D.C. district judge. Kavanaugh did not have a hearing until April 27, 2004.<sup>273</sup> He was questioned for three and a half hours, or perhaps, he was present while lengthy comments were made and some questions were asked.<sup>274</sup> He was asked about his knowledge of how Democratic memos were obtained from a Judiciary Committee com-

268 See *id.* at 102.

269 Sheldon Goldman et al., [*George*] *W. Bush's Judicial Legacy: Mission Accomplished*, 92 JUDICATURE 258, 260 (2009) [hereinafter Goldman et al., *Bush's Judicial Legacy*].

270 William J. (Jim) Haynes II of Virginia was nominated to the Fourth Circuit first in 2003 and several later times but never got a floor vote due in part to “opposition from Democrats and some Republicans for his role in the drafting of controversial interrogation techniques and detention policies for suspected terrorists.” Mark Hansen, *Logjam*, A.B.A. J., June 2008, at 39, 42. In January 2007, President Bush publicly withdrew four nominations, including Haynes's. Smith, *supra* note 264. The *Wall Street Journal* editorialized that in its view, Haynes's “transgression in the days following the 9/11 attacks was to do his job with too much determination to protect the country.” Editorial, *The Haynes Disgrace*, WALL ST. J., Jan. 10, 2007, at A16.

271 Judge Carolyn Kuhl was nominated three times by President Bush, received a well-qualified ABA rating, but was dogged by opponents for work she had done in the Reagan Department of Justice in high-ranking positions of Deputy Solicitor General, Deputy Assistant Attorney General in the Civil Division, and Special Assistant to Attorney General William French Smith. Among other controversies, she worked on a brief urging that *Roe v. Wade* was constitutionally suspect and should be overturned. She withdrew in December 2004. Christopher Miles, *Cases and Controversies: George W. Bush's Appeals Court Nominations*, 2 INQUIRIES J., no. 6, 2010, <http://www.inquiriesjournal.com/articles/255/cases-and-controversies-george-w-bushs-appeals-court-nominations>.

272 149 CONG. REC. 19,656 (2003); Goldman et al., *Bush's Judiciary*, *supra* note 240, at 246.

273 150 CONG. REC. D408 (daily ed. Apr. 27, 2004).

274 See Charles Hurt, *Another Judicial Pick in Cross Fire*, WASH. TIMES, Apr. 28, 2004, at A3.



puter server.<sup>275</sup> To show the prosecutorial nature of some of the Democrats, he was cautioned repeatedly about remembering that he was under oath.<sup>276</sup> Kavanaugh's prominent past significant governmental roles were the basis for Democratic objections, including his being "an architect of the administration's judicial nomination strategy" and assisting Independent Counsel Kenneth Starr in the impeachment of President Clinton.<sup>277</sup>

Kavanaugh got no vote that year, was renominated on February 14, 2005, and then when that nomination lapsed without a vote, was nominated again on January 25, 2006.<sup>278</sup> On May 9, 2006, Kavanaugh had another Judiciary Committee hearing where Democrats highlighted that the ABA had changed his rating from well qualified when he was first nominated, to qualified because of the ABA's reevaluation of his experience and objectivity.<sup>279</sup> Democrats also criticized his experience by arguing his legal work so far had primarily been political.<sup>280</sup> There also were questions about his participation in development of the policies while on the White House staff for domestic spying and torture of detainees.<sup>281</sup> Kavanaugh was voted out of committee on a party-line vote of 10–8.<sup>282</sup> On the floor, Kavanaugh survived a vote on cloture by a 67–30 vote, then was confirmed on May 26 by a 57–36 vote.<sup>283</sup>

Another nominee who generated conservative enthusiasm for his appointment at least equal to that for Kavanaugh was Peter Keisler, who lives in Maryland. He would have been a nominee to the Fourth Circuit in 2001, probably in time to make the number of East Room riser riders an even dozen, except for objections from Maryland's two Democratic senators.<sup>284</sup> When he was not nominated at that time, the *Washington Post* stated that he has, "by most anyone's account, a fabulous resume: as a White House aide, U.S. Supreme Court clerk and partner at an enormous and well-respected law firm."<sup>285</sup> One of his political burdens was that he was a founder of the conservative legal group that had proven to be so influential, the Federalist Society. Like Miguel Estrada and others, he was seen as a potential Supreme

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275 See *id.*

276 *Id.*

277 Neil A. Lewis, *Bush Tries Again on Court Choices Stalled in Senate*, N.Y. TIMES, Dec. 24, 2004, at A1, A14.

278 See *Kavanaugh, Brett M.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/kavanaugh-brett-m> (last visited Feb. 20, 2020).

279 Keith Perine, *Kavanaugh Verdict Up to the Senate*, CONG. Q. WKLY. REP., May 15, 2006, at 1341; Andy Sullivan, *US Court Nominee Says Didn't Know of Torture, Spying*, REUTERS, May 9, 2006.

280 Charles Hurt, *Democrats Signal Filibuster on Bush Judicial Nominee*, WASH. TIMES, May 12, 2006, at A4.

281 Sullivan, *supra* note 279.

282 Perine, *supra* note 279.

283 Keith Perine, *Senate Backs Kavanaugh for D.C. Circuit*, CONG. Q. WKLY. REP., May 29, 2006, at 1486.

284 See Neil A. Lewis, *Bush to Nominate 11 to Judgeships Today*, N.Y. TIMES, May 9, 2001, at A24.

285 Brooke A. Masters, *Judgeship Hinges on Politics, Practice*, WASH. POST, May 13, 2001, at C5.

Court Justice. With an impasse continuing with Maryland senators, President Bush nominated Keisler to the D.C. Circuit on June 29, 2006, and the friendly Judiciary Committee gave him a hearing on August 1.<sup>286</sup> Republicans knew an election was coming they could lose. Democrats knew that too. Democratic Senator Chuck Schumer said that “we are trying to break the land speed record” with Keisler’s hearing, and fellow Democratic member of the Judiciary Committee, Pat Leahy, stated that all Democrats opposed giving Keisler so quick a hearing.<sup>287</sup> There was no vote that year, and the President renominated him on January 9, 2007, the same day I was nominated for the Fifth Circuit.<sup>288</sup>

By then, Keisler was the Assistant Attorney General for the Civil Division. There I often talked with him during my many trips to meet with senators, where Peter was a kind, sympathetic, and wise counsel to me as we both went through a difficult year. Unjustly, I made more progress than he did, and he never was given a vote.

Good examples of the impact of outside groups, both pro and con, were the confirmation difficulties of District Judge Charles Pickering of Mississippi and District Judge Brooks Smith of Pennsylvania, both nominated for elevation to their respective circuits . . . though district judges do not necessarily view circuit judges as being more elevated. Both judges were targeted by some of the same outside groups, and both had the Bush administration and local supporters rally to their defense. The result was complete success for Judge Smith but only a recess appointment for Judge Pickering. What follows is a little about each battle, well explained in separate books written about those travails.<sup>289</sup>

A January 31, 2001, press release from Mississippi’s two Republican senators, Thad Cochran and Trent Lott, revealed that Charles Pickering was their choice for a Fifth Circuit seat that would allow the state again to have three judges after it lost one to Louisiana in 1995.<sup>290</sup> The President’s initial list of judges did not include Pickering, which kept him from receiving an invitation to the East Room for the nationally televised announcement of May 9. His nomination followed in only two weeks, though.<sup>291</sup> Judiciary Committee Chairman Pat Leahy’s pace for scheduling hearings on nominees was measured, but Judge Pickering and four district judge nominees had hearings on October 18. No public opposition had appeared until the day before the

286 See 152 CONG. REC. 13,597 (2006) (nomination); *id.* at 16,704 (hearing).

287 *Confirmation Hearings on Federal Appointments: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 137, 189, 372 (2007).

288 153 CONG. REC. 488 (2007).

289 See generally JEFFREY LORD, *THE BORKING REBELLION* (2005) (explaining Judge Smith’s confirmation journey); CHARLES PICKERING, SR., *A PRICE TOO HIGH: THE JUDICIARY IN JEOPARDY* (2007) [hereinafter PICKERING, *PRICE TOO HIGH*]; CHARLES PICKERING, SR., *SUPREME CHAOS: THE POLITICS OF JUDICIAL CONFIRMATION & THE CULTURE WAR* (2005).

290 See Beverly Pettigrew Kraft, *Pickering Pick for 5th Circuit*, CLARION-LEDGER (Jackson, Miss.), Feb. 1, 2001, at 1A.

291 Ana Radelat, *Pickering Nominated for Federal Post*, CLARION-LEDGER (Jackson, Miss.), May 26, 2001, at 1A.

hearing, when the People for the American Way (PFAW), Alliance for Justice, and many other groups sent a joint email condemning Judge Pickering.<sup>292</sup> The hearing itself was not overly contentious, but the quite unusual step was taken by Democratic Senator Chuck Schumer of announcing there would have to be a second hearing for the judge so a closer review of some of his opinions could be made.<sup>293</sup> The question of what to do with all the late-breaking opposition apparently needed more time to answer.

A series of increasingly voluminous requests for past opinions led to the Committee's finally asking for all of District Judge Pickering's prior opinions. Most of those were unpublished; collecting them was a laborious undertaking.<sup>294</sup> On January 24, 2002, the PFAW released a twenty-five-page report that accused him of "insensitivity and hostility toward key principles protecting the civil and constitutional rights of minorities, women, and all Americans."<sup>295</sup>

A second hearing was finally held on February 7, and it was an ordeal for Judge Pickering. It was called the "most contentious hearing held on any of President Bush's judicial nominees,"<sup>296</sup> though it was still quite early in the administration. There were four hours of questions,<sup>297</sup> extraordinary for any judicial nominee other than one to the Supreme Court. Questions suggested he was an unreconstructed Southerner, based in part on his relationship in his active political years with candidates opposed to integration.<sup>298</sup> Only a few of his past opinions, some identified by PFAW, were the subject of questions. Favorable testimony highlighted how in 1967, County Attorney Pickering's testimony against Klan violence had resulted in threats on his life.<sup>299</sup> The *Legal Times* had a front-page, lengthy, and supportive story, its content suggested by the title: "Judge's Record: What Was Left Out."<sup>300</sup> I am far from an unbiased observer, and indeed, this good man's travails ultimately benefited me by leaving the seat open, but it appears Judge Pickering was targeted because he could be; some opponents in good faith and others who were not drew on Mississippi's difficult past and used it as a cudgel against someone who had been honorable.

On March 6, a week before the Judiciary Committee would vote, President Bush had an Oval Office meeting with Judge Pickering, showing his

292 PICKERING, PRICE TOO HIGH, *supra* note 289, at 6–7.

293 *Id.* at 7.

294 *Id.* at 10–11.

295 PEOPLE FOR THE AM. WAY, REPORT OF PEOPLE FOR THE AMERICAN WAY OPPOSING THE CONFIRMATION OF CHARLES W. PICKERING, SR. TO THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT 2 (2002), [http://files.pfaw.org.s3-website-us-east-1.amazonaws.com/pfaw\\_files/file\\_53.pdf](http://files.pfaw.org.s3-website-us-east-1.amazonaws.com/pfaw_files/file_53.pdf).

296 Ana Radelat, *Pickering Hearing Contentious*, CLARION-LEDGER (Jackson, Miss.), Feb. 8, 2002, at 1A.

297 PICKERING, PRICE TOO HIGH, *supra* note 289, at 85.

298 Neil A. Lewis, *Judicial Confirmation Hearing Evokes Civil Rights Struggle*, N.Y. TIMES, Feb. 8, 2002, at A16.

299 *Id.*

300 Jonathan Groner, *Judge's Record: What Was Left Out*, LEGAL TIMES, Feb. 4, 2002, at 1.

vigorous support and accusing Democrats of “holding this man’s nomination up for political purposes, and it’s not fair, and it’s not right.”<sup>301</sup> Also supportively present in the Oval Office were Mississippi’s Democratic Attorney General Mike Moore and other Democrats like former Congressman Sonny Montgomery.<sup>302</sup> The vote on March 14 had all ten Democrats voting against Pickering and the nine Republicans in favor.<sup>303</sup> Poignantly, the wife of another judicial nominee who in my view was subjected to unfair criticisms, Justice Clarence Thomas’s wife Virginia, wrote a *Wall Street Journal* column that was published on the day of the vote; she told Judge Pickering that he too was “a pawn in a much larger battle,” and thanked him for his service.<sup>304</sup>

Judge Pickering did not withdraw. After the Republicans regained a Senate majority in the 2002 midterm elections, President Bush renominated Pickering on January 7, 2003.<sup>305</sup> A failed Clinton nominee to the Fifth Circuit, Jorge Rangel of Texas, defended Judge Pickering and said he should be confirmed.<sup>306</sup> On October 2, the Judiciary Committee reported Pickering to the floor on a 10–9 vote, without a new hearing being held.<sup>307</sup> Confirmation did not follow in the majority Republican Senate because he was one of ten circuit court nominees whom Democrats blocked with a filibuster. His defeat occurred on October 30, where he received fifty-four of the sixty votes he needed to invoke cloture and end the filibuster; forty-three opposed cloture.<sup>308</sup>

About two weeks later, Pickering’s good friend and sponsor, Senator Trent Lott, publicly suggested that the President give Judge Pickering a recess appointment that would allow him to serve temporarily.<sup>309</sup> That is what the President did on January 16, 2004.<sup>310</sup> The appointment did not reflect an abandonment of the effort to have him confirmed, though. Final efforts occurred on the December day that Congress adjourned, which is when the appointment would expire, efforts that included the judge’s son Congressman Charles W. (Chip) Pickering, Jr., going on the floor of the Sen-

301 Bill Sammon, *Bush Marshals Backers for Pickering*, WASH. TIMES, Mar. 7, 2002, at A3.

302 PICKERING, PRICE TOO HIGH, *supra* note 289, at 92–93.

303 Ana Radelat, *Senate Panel KOs Pickering*, CLARION-LEDGER (Jackson, Miss.), Mar. 15, 2002, at 1A.

304 Virginia Thomas, *To Judge Pickering: They Can’t Take Away Your Honor*, WALL ST. J., Mar. 14, 2002, at A18.

305 Ana Radelat, *Pickering Gets 2nd Chance*, CLARION-LEDGER (Jackson, Miss.), Jan. 8, 2003, at 1A.

306 Associated Press, *Nominee Who Lost Supports Pickering*, WASH. TIMES, Apr. 26, 2003, at A2.

307 Ana Radelat, *2nd Vote by Panel OKs Pickering Bid*, CLARION-LEDGER (Jackson, Miss.), Oct. 3, 2003, at 1A.

308 149 CONG. REC 26,556 (2003).

309 Ana Radelat, *Lott: Bush Could Put Pickering on Court*, CLARION-LEDGER (Jackson, Miss.), Nov. 13, 2003, at 1A.

310 Ana Radelat & Andy Kanengiser, *Bush Sidesteps Dems*, CLARION-LEDGER (Jackson, Miss.), Jan. 17, 2004, at 1A.

ate to urge justice for his dad.<sup>311</sup> There was no new vote. President Bush offered to renominate him in the new Congress, which would have a larger Republican majority, but the judge and his wife decided it was time for him to retire from confirmation battles and from judging.<sup>312</sup>

A later start but earlier finish than Pickering's for a confirmation struggle was the experience of District Judge Brooks Smith of Pittsburgh. He was nominated to the Third Circuit on September 10, 2001, which started a difficult one-year path to a final Senate vote.<sup>313</sup> Opposition arose from the Alliance for Justice, People for the American Way, the National Organization for Women, and others. Jeffrey Lord was a participant in the struggle and the author of a book detailing what occurred.<sup>314</sup> He described District Judge Smith as a moderate, highly respected judge, who was transformed into an unethical, sexist, extremist judge with occasional anti-Catholicism inclinations.<sup>315</sup>

Lord's book, from an energetic supporter's perspective, of course, describes small episodes that in his view were distorted and magnified into allegedly disqualifying events. For example, as a small boy, Smith had joined an all-male hunting and fishing club, essentially a father-son group. He remained a member into his judgeship. Opponents argued that the club was also used for professional purposes, which if true would create a problem under the judiciary's ethical rules, but apparently the only evidence was a one-time meeting of some doctors.<sup>316</sup>

Among Smith's biggest problems was that he had given a speech in 1993 criticizing Senator Joe Biden, who was Chairman of the Judiciary Committee that year and was still on the Committee in 2002. Smith's speech in what I am sure was a professional manner explained objections to part of a Biden initiative, the Violence Against Women Act, based on what Smith called "principled federalism."<sup>317</sup> Such criticism, even when constructive, can easily be recast as dismissive and hateful.

There were other examples of opponents seemingly transforming benign events into charges of disqualifying conduct. In reaction, a group of supporters, many of them women who resented the criticism that Smith was insensitive to female victims of violence, organized to defend him. They called themselves the Phalanx, arising from a Pittsburgh newspaper's description of them as they sat in the audience at Smith's February 2002 Judiciary Committee hearing.<sup>318</sup> Some were members of the National Organization

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311 PICKERING, PRICE TOO HIGH, *supra* note 289, at 212–13.

312 *Id.* at 212.

313 Smith, *D[avid] Brooks*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/smith-david-brooks> (last visited Feb. 20, 2020).

314 LORD, *supra* note 289.

315 Jeffrey Lord, *Forum: Remember Judge Brooks Smith*, PITTSBURGH POST-GAZETTE (July 24, 2005), <https://www.post-gazette.com/Op-Ed/2005/07/24/Forum-Remember-Judge-Brooks-Smith/stories/200507240281>.

316 LORD, *supra* note 289, at 158–67.

317 *Id.* at 133.

318 *Id.* at 138.

for Women, and many were lawyers. They had press conferences and met with senators, sent emails and otherwise worked their personal and professional networks in order to publicize what they saw as the truth about Smith.<sup>319</sup> When the Judiciary Committee finally voted on May 23, 2002, the vote was 12–7, with Joe Biden voting in favor.<sup>320</sup> Confirmation came on July 31, with a solid 64–35 total.<sup>321</sup>

For the Fifth Circuit during his two terms, President Bush submitted eight nominations. I have already discussed Joy Clement, who was one of the three easy circuit judge confirmations in 2001. Certainly not easy or even successful was Judge Pickering’s ordeal. Judge Jennifer Elrod and Catharina Haynes were nominated in 2007 and both confirmed with a minimum of controversy in October 2007 and April 2008.<sup>322</sup> District Judge Ed Prado of San Antonio also had a relatively easy path, nominated on February 6, 2003, and confirmed on May 1.<sup>323</sup> Before Judge Prado’s nomination, though, “several prominent Texas lawyers and judges” were urging selection of District Judge Sidney Fitzwater of Dallas for that seat, thereby giving him a second chance as had been received by several other nominees of the first President Bush who got mired in 1992 election-year politics.<sup>324</sup> Prado was nominated instead. The remaining three Fifth Circuit nominees were controversial and their journeys slow, with only two of them reaching the destination. They were Priscilla Owen of Texas and two nominees from Mississippi, Mike Wallace and, well, me.

Justice Owen of the Texas Supreme Court was on the first riser in the East Room in May 2001, adjacent to Miguel Estrada and just in front of John Roberts.<sup>325</sup> Justice Owen received a unanimous well-qualified rating from the ABA,<sup>326</sup> but she never got out of the Judiciary Committee. Opponents charged that she was a conservative activist on the Texas Supreme Court.<sup>327</sup> When she finally received a Judiciary Committee hearing on July 23, 2002, over a year after her May 2001 nomination, Justice Owen was questioned closely about a 2000 decision in which she allegedly misapplied a Texas statute to require that moral and religious considerations be explained to those

319 See, e.g., *id.* at 174–180.

320 Edward Walsh, *Court Choice Cleared with Democrats’ Help*, WASH. POST, May 24, 2002, at A6.

321 148 CONG. REC. 15,447 (2002).

322 See *Elrod, Jennifer Walker*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/elrod-jennifer-walker> (last visited Feb. 20, 2020); *Haynes, Catharina*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/haynes-catharina> (last visited Feb. 20, 2020).

323 *Prado, Edward Charles*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/prado-edward-charles> (last visited Feb. 20, 2020).

324 John Council, *Approaching the Bench?*, TEX. LAW., Nov. 18, 2002, at 1, 16.

325 Among the many published photos of the event is one in Curl, *supra* note 246.

326 148 CONG. REC. 16,193–94 (2002).

327 Jonathan Groner, *Owen Faces Abortion, Judicial Activism Questions at Hearing*, TEX. LAW., July 29, 2002, at 10.

contemplating abortion.<sup>328</sup> Democrats challenged her on another opinion arising out of the same case, handed down four months later, in which Justice Owen strongly disagreed with the majority on the court, one of whom was Justice Alberto Gonzales, who was then White House Counsel under President Bush.<sup>329</sup> The National Abortion Rights Action League opposed her, as did other liberal groups.<sup>330</sup> On September 5, 2002, the Judiciary Committee refused to report her to the floor by a 10–9 vote along party lines.<sup>331</sup> President Bush said that “Washington is a tough and ugly town at times. Treating a fine woman this way is bad for the country; it’s bad for our bench.”<sup>332</sup>

President Bush renominated Justice Owen on January 7, 2003.<sup>333</sup> She had a second Judiciary Committee hearing on March 13, then was reported favorably by the Republican majority with a straight party-line vote of 10–9 on March 27.<sup>334</sup> Democrats, having lost their Senate majority, unleashed the filibuster, which was a rarely used procedural mechanism for nominations. Judge Pickering was stopped by failure of a cloture vote, and so were many others. Justice Owen as well as Pickering were among ten circuit court nominees stopped in that Congress by the requirement that sixty favorable votes be gained, not fifty-one. On May 1, 2003, cloture on Owen failed on a 52–44 vote.<sup>335</sup> A week later, the vote was 52–45.<sup>336</sup> Then on July 29, the vote was 53–43.<sup>337</sup> The most intense of the proceedings prior to a cloture vote was a debate that started on Wednesday, November 12, 2003, and continued until Friday. For forty hours, there was praise and criticism of nominees, of each political party, of the impropriety of filibustering judges and the necessity of it, and of so many other features of the standard judicial controversies.<sup>338</sup> The debate was on three stalled nominees: Justice Owen for the Fifth Circuit, California Superior Court Judge Carolyn B. Kuhl for the Ninth Circuit, and California Supreme Court Justice Janice Rogers Brown for the D.C. Circuit. Cloture was defeated on all three.<sup>339</sup>

328 *Id.* (referring to *In re Jane Doe*, 19 S.W.3d 249, 260, 264 (Tex. 2000) (Owen, J., concurring)).

329 *See In re Jane Doe*, 19 S.W.3d 346, 383 (Tex. 2000) (Owen, J., dissenting).

330 *See Groner*, *supra* note 327.

331 Neil A. Lewis, *Democrats Reject Bush Pick in Battle over Court Balance*, N.Y. TIMES, Sept. 6, 2002, at A1.

332 Chuck Lindell, *Senators Reject Owen for Appeals Court Seat*, AUSTIN AM.-STATESMAN, Sept. 6, 2002, at A1.

333 *Owen*, Priscilla Richman, *supra* note 263.

334 Julie Mason, *Owen’s Approval Far from Certain After 2nd Hearing*, Hous. CHRON., Mar. 14, 2003, at A14; Michelle Mittelstadt, *Split Senate Panel Backs Owen’s Nomination*, DALL. MORNING NEWS, Mar. 28, 2003, at 3A.

335 149 CONG. REC. 10,323 (2003).

336 *Id.* at 10,811.

337 *Id.* at 20,017.

338 *See* David A. Yalof, *It’s the Supreme Court, Stupid*, ATLANTA J.-CONST., Nov. 16, 2003, at D1 (describing a “nearly 40-hour talkathon”).

339 149 CONG. REC. 28,605 (2003) (noting the start of executive session on nominations); *id.* at 28,858 (noting the cloture vote on Owen, 53–42); *id.* at 28,864 (noting the

Filibusters had become the norm in the Congress for the second half of President Bush's first term, where Democrats identified ten nominees worthy of the procedure.<sup>340</sup> None of the nominees were able to get the sixty votes needed to invoke cloture. In addition to Justice Owen, several other judges were brought up for cloture votes multiple times. Justice Owen's four cloture votes were surpassed by seven for Miguel Estrada.<sup>341</sup> Estrada was a forty-one-year-old immigrant from Honduras, who arrived in the United States when he was seventeen. Knowing little English then, five years later he was an honors graduate of Columbia, then similarly excelled at Harvard Law School.<sup>342</sup> Not that many years later, he was one of those in the East Room, watching the President describe why he should become a circuit judge. His story was inspirational.

In 2003, some elements of Estrada's difficulties were disclosed when the *Wall Street Journal* published the first two of several documents discovered on a shared computer server used by the Judiciary Committee.<sup>343</sup> The memos were from November 2001,<sup>344</sup> when the Democrats had a Senate majority and were slowly allowing some of Bush's nominees hearings and votes. One memo stated that eight liberal groups were urging postponing action on Bush's nominees until more time had passed after the outrages of September 11 and "(presumably) the public will be more tolerant of partisan dissent."<sup>345</sup> One of the memos focused on Miguel Estrada. He was considered to be "especially dangerous, because he has a minimal paper trail, he is Latino, and the White House seems to be grooming him for a Supreme Court appointment"; Priscilla Owen, Carolyn Kuhl, and Jeffery Sutton were other targets.<sup>346</sup>

Additional Democratic memos taken from the shared server were publicized later, but the basic point is that there was widespread opposition to these judges, with outside groups investigating backgrounds, propagating information, and urging action, or, actually, inaction. The lengthy impasse caused Estrada to withdraw in September 2003, writing the President of his appreciation for "offering me the opportunity to serve my adopted country," but stating that after over two years of the distractions of the process, the "time has come" to abandon the quest.<sup>347</sup>

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cloture vote on Kuhl, 53–43); *id.* at 28,866 (noting the cloture vote on Brown, 53–43); *id.* at 28,872 (noting the end of executive session on judges).

340 See Sheldon Goldman et al., *Picking Judges in a Time of Turmoil: [George] W. Bush's Judiciary During the 109th Congress*, 90 JUDICATURE 252, 264–65 (2007).

341 SOUTHWICK, THE NOMINEE, *supra* note 135, at 96.

342 *Id.* at 95–96.

343 Eric Morath, *Durbin Seeks Investigation into Alleged Leak of His Memos to Paper*, ST. LOUIS POST-DISPATCH, NOV. 18, 2003, at A5; Editorial, *Sheriff Durbin*, WALL ST. J., NOV. 18, 2003, at A20.

344 Morath, *supra* note 343.

345 *Id.*

346 *Id.*

347 Jan Crawford Greenburg, *Embattled Judicial Nominee Withdraws*, CHI. TRIB., SEPT. 5, 2003, at 1.



Alabama Attorney General Bill Pryor was another nominee whose formidable intellect and proven conservative philosophy made him a target of Democratic opposition. Among the objections to him, as described by a home-state newspaper, was that he was “too biased in his Christian viewpoints to serve as a federal appeals judge.”<sup>348</sup> Pryor was open about his Roman Catholic faith, and he insisted that faith required him to respect other religious groups as well: “I have said this nation was founded on the Christian perspective of the nature of man, that we derive our rights from God, not from government.”<sup>349</sup>

At Attorney General Pryor’s June 2003 Judiciary Committee hearing, Democratic Senator Chuck Schumer of New York, in his introductory remarks, summarized objections and reminded those present of his criticisms of other nominees:

On States’ rights and women’s rights [Pryor] looks a lot like Jeffrey Sutton and D. Brook Smith. On choice and privacy he looks a lot like Priscilla Owen and Carolyn Kuhl. On gay rights he looks a lot like Timothy Tymkovich. On separation of church and State, he looks a lot like J. Leon Holmes and Michael McConnell. The list goes on. In a way, unfortunately, General Pryor’s views seem to be an unfortunate stitching together of the worst parts of the most troubling judges we have seen thus far.<sup>350</sup>

From my perspective, I will say Schumer placed Pryor in good company. Senator Schumer soon quoted what opponents almost always quoted, that Pryor had described *Roe v. Wade* as “a creation out of thin air of a constitutional right to murder an unborn child,” that “he opposes abortion even in the cases of rape or incest, and would limit the right to choose to narrow circumstances where a woman’s life is at stake,” and that Pryor said *Roe* was “the worst abomination in the history of constitutional law.”<sup>351</sup> In the later questioning, Schumer asked if Pryor still believed that about *Roe*; Pryor stood up for where his integrity took him and said simply, “I do.”<sup>352</sup>

First nominated to the Eleventh Circuit in April 2003, Pryor was subject to unsuccessful cloture votes in July and November.<sup>353</sup> The President overrode the Senate’s intransigence, temporarily at least, by giving Pryor a recess appointment early in the new year. Of all the judges stalled by filibusters, only two were given recess appointments—District Judge Pickering and Attorney General Pryor. White House Counsel for the first President Bush, Boyden Gray, explained this way:

348 Josh Kelley, *Pryor Fights Charges of Bias*, BIRMINGHAM POST-HERALD, Dec. 6, 2003, at 3.

349 *Id.*

350 *Confirmation Hearing on the Nominations of William H. Pryor, Jr. to Be Circuit Judge for the Eleventh Circuit and Diane M. Stuart to Be Director, Violence Against Women Office, Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 11 (2003).

351 *Id.* at 12.

352 *Id.* at 73.

353 149 CONG. REC. 8953 (2003) (nomination); *id.* at 20,398 (noting that cloture failed by a 53–44 vote in July); *id.* at 27,950 (noting that cloture failed by a 51–43 vote in November).

Pickering wasn't going to stay on the bench much longer anyway, given the delay and given his age. So it was a way [of] giving him a promotion at the end of his career. . . . Pryor was going to be leaving his post [as Attorney General] anyway and was in transition and was willing to accept it. . . . But nobody else, I think, would take it. Why would Priscilla Owen or Carolyn Kuhl or Janice Rogers Brown, sitting judges on a state supreme court, give up their seats for 18 months?<sup>354</sup>

To remind, a recess appointment lasts until the end of the *next* session of Congress that begins after the appointment. Boyden Gray's explanation sheds light on why Judge Pickering was appointed on January 16, 2004, just four days before the next session of Congress began on January 20.<sup>355</sup> That timing meant that his appointment would expire at adjournment at the end of 2004. Attorney General Pryor, though, was appointed just a few weeks later on February 20, after the 2004 session had begun.<sup>356</sup> His appointment would last until the end of the *next* session, meaning the one that would not begin until January 2005.

The Republican Senate leadership decided to try to force a change in the rules, where by a simple majority vote of the Senate, the sixty-vote threshold for cloture would be eliminated. The rules change, which was called either the "constitutional" or the "nuclear" option depending on one's viewpoint, was scheduled for a Senate vote on May 23, 2005.<sup>357</sup> Instead, seven Senators from each party, later dubbed the "Gang of 14," announced an agreement that applied to their actions for the rest of that Congress (without suggesting it was a longer-term solution). The Democrats agreed to support cloture to end filibusters on Bush's future judicial nominees absent undefined "extraordinary circumstances."<sup>358</sup> The Republicans agreed not to vote to change the rules that would have eliminated requiring sixty votes for cloture on judicial nominees.<sup>359</sup> The agreement also identified circuit court nominees for whom the seven Democrats would support cloture—Priscilla Owen, Janice Rogers Brown, and Bill Pryor—and named two other nominees as not being covered by the agreement—Sixth Circuit nominee Henry Saad and Ninth Circuit nominee William Myers.<sup>360</sup> There was no mention of two other blocked nominees, Richard A. Griffin and David W. McKeague for the Sixth Circuit, but that was because Democrats independent of the "gang" had already agreed to allow them through.<sup>361</sup>

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354 Goldman et al., *Bush's Judiciary*, *supra* note 240, at 265 (first alteration and omissions in original).

355 *Pickering*, Charles Willis, Sr., FED. JUD. CTR., <https://www.fjc.gov/history/judges/pickering-charles-willis-sr> (last visited Feb. 20, 2020); *see* 150 CONG. REC. 1 (2004).

356 *Pryor*, William Holcombe, Jr., FED. JUD. CTR., <https://www.fjc.gov/history/judges/pryor-william-holcombe-jr> (last visited Feb. 20, 2020)

357 *See* Maura Reynolds & Richard Simon, *Senate Deal Reached on Filibusters*, L.A. TIMES, May 24, 2005, at A1.

358 *Id.*

359 *Id.*

360 *Id.*

361 *Id.*

Justice Owen got a cloture vote the next day, winning 81–18, then confirmed by a lesser margin, 55–43.<sup>362</sup> Cloture and confirmation followed over the next two weeks for Janice Rogers Brown, Bill Pryor (well before his recess appointment expired), Richard Griffin, and David McKeague.<sup>363</sup>

Not the victims of successful filibusters are the final two nominees I will discuss. The first is Mike Wallace, nominated on February 8, 2006, to the seat Judge Pickering vacated in December 2004.<sup>364</sup> His prospective nomination in 1992 had been poorly received by the ABA, and when Wallace was being considered in 2005–2006, it was expected that he would be criticized by Democrats and many of the same groups who opposed Judge Pickering.<sup>365</sup> Wallace was a fifty-four-year-old Jackson lawyer,<sup>366</sup> a former law clerk for Justice Rehnquist, and the principal legal adviser to Senate Majority Leader Trent Lott during the relatively recent impeachment trial of President Clinton.<sup>367</sup> Wallace was an experienced, talented, aggressive litigator—as good ones usually are. His conservative legal philosophy was well developed. Some disclosure here: Wallace and I competed, and I never finished ahead of him, for selection to the Fifth Circuit several times, beginning when Bush the father was President. Whatever arguable justifications there may have been for my nomination at any of those times, I will acknowledge that only he would have been one of the all-star conservative judges that both Bush administrations wanted to nominate whenever possible.

Civil rights groups opposed him, though Wallace had the support of Reuben Anderson, the first African American justice on the Mississippi Supreme Court.<sup>368</sup> The ABA acknowledged his superb credentials, saying he had the “highest professional competence” and was a “brilliant lawyer” with “impeccable” integrity to serve as a judge.<sup>369</sup> Nonetheless, the ABA found him to be unqualified, a ridiculous rating were Wallace judged by his professional skills and integrity, but it was justified by the ABA on the basis that he lacked judicial temperament.<sup>370</sup> Wallace was stoutly defended by, among others, Ed Whelan of the Ethics and Public Policy Center, who called the criticisms “not credible whatsoever.”<sup>371</sup>

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362 SOUTHWICK, *THE NOMINEE*, *supra* note 135, at 114.

363 *Id.*

364 152 CONG. REC. 1210 (2006).

365 Ana Radelat, *GOP Chairman Says He's Not Top Pick for Court*, CLARION-LEDGER (Jackson, Miss.), Apr. 23, 2005, at B1. For Wallace's difficulties with the ABA in 1992, *see supra* note 138 and accompanying text.

366 Ana Radelat, *Bush Picks Jackson Lawyer*, CLARION-LEDGER (Jackson, Miss.), Feb. 9, 2006, at 1B.

367 LOTT, *supra* note 254, at 179.

368 *See* SOUTHWICK, *THE NOMINEE*, *supra* note 135, at 133.

369 Jerry Mitchell, *Panel Says Lawyer Unqualified to be Judge*, CLARION-LEDGER (Jackson, Miss.), Aug. 1, 2006, at 1B.

370 *Id.*

371 Edward Whelan, *Not Credible "Whatsoever,"* NAT'L REV. (Jan. 10, 2007) (capitalization altered) (internal quotation marks omitted), <https://www.nationalreview.com/2007/01/not-credible-whatsoever-edward-whelan/>.

Wallace's hearing in the Republican-led Judiciary Committee was on September 26, 2006.<sup>372</sup> Several witnesses were there to support and to criticize. It was all for naught, and no vote was ever taken by the Committee in the short time left before a recess for the election. The 2006 midterm elections eliminated the Republican Senate majority, which doomed Wallace's chances had he been renominated. Just before Christmas, he announced that he would send a letter to the President withdrawing from future consideration.<sup>373</sup> Was it finally my turn?

The idea that the third time can be the charm seemed applicable to me, for a while. Never particularly in the hunt in 2001 because Majority Leader Lott was insisting on Pickering, then more of a possibility after Pickering withdrew but still passed over because Mike Wallace reasonably seemed the better judicial prospect, I was finally nominated on January 9, 2007, without interviewing again and apparently without meaningful consideration given by the administration to others. Having a senior senator like Thad Cochran strongly urging my selection certainly helped. That his help was not more effective sooner is an indication of the effort by both Bush administrations, and certainly under the current administration as will be discussed later, to subordinate political ties and emphasize which nominee will likely be the kind of judge that all the procedures in place are trying to find.

I had my difficulties, to say the least. As already acknowledged, I was sufficiently self-absorbed to write a book on the experience, subtitled *A Political and Spiritual Journey*. My effort to explain the nomination and confirmation difficulties of others in this Article has enough subjectivity that I am loath to narrate my own journey in much detail. I will say that for each of the white male George W. Bush Fifth Circuit nominees from Mississippi, the NAACP stated their opposition on various merits grounds but also insisted that it was time for an African American to be named. Consistent with that record, several leaders of state civil rights groups wrote both senators not long after my nomination, stating:

“Despite requests from many Mississippians that he nominate a black judge or lawyer to the U.S. Court of Appeals for the Fifth Circuit, the President recently declined to do so.” They were referring to my selection. “However, there is still an opportunity to rectify the larger situation . . . by recommending one of the many qualified black lawyers or judges” . . .<sup>374</sup>

for the district court vacancy to which I had been nominated in June 2006 but never received a floor vote. The requested method of rectifying did not occur, and indeed a new nomination for the district judgeships was not made until after my confirmation.

Over time, reasons were identified to oppose me. As happened to Charles Pickering in 2001, the public announcement of the reasons to

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372 See 152 CONG. REC. 19,754 (2006).

373 Sid Salter, *Judicial Hopeful Steps Aside*, CLARION-LEDGER (Jackson, Miss.), Dec. 23, 2006, at 1A.

374 SOUTHWICK, THE NOMINEE, *supra* note 135, at 149 (first omission in original).

oppose me did was not made until the week of my hearing in May. As the weeks passed, the reasons were reduced to two opinions I joined that had been written by other judges on the Mississippi Court of Appeals on which I had served from 1995 to 2006, one dealing with race and the other with gay rights.<sup>375</sup> From my perspective, these were consciously strained readings used as excuses to oppose me for unstated political reasons. That would be what any nominee thinks. For a better perspective, I will quote and summarize comments by the biennial writers on judicial selections whose work I have used throughout my writing labors. They did not embrace the idea that the charges were baseless. Professor Goldman and his colleagues wrote a lengthy section on my confirmation in the 2009 article summarizing all of Bush's judges. The first mention comes in a sentence that begins with "the administration had its fair share of unanticipated successes," then as one of three examples refers to "the seating of an extremely controversial nominee, Leslie Southwick, on the U.S. Court of Appeals for the 5th Circuit, while strong allegations of racism swirled around him."<sup>376</sup> That sentence did contain what became my introductory title in news stories, "controversial," though these authors adding "extremely." Their referring to "strong allegations" implies to me that they largely agreed with my opponents.

In what may be the longest segment in the 2009 article on any Bush circuit court nominee, with the heading simply of "The Southwick confirmation," the authors give the "greater explanation" that is needed for "the successful confirmation of Leslie Southwick to the 5th Circuit."<sup>377</sup> One supporter, the Committee for Justice's Curt Levey, was quoted as saying:

The only case in which I . . . regretted that [the group was not more proactive early] . . . was with Southwick, where we probably could have done more early on. But I just thought that the charges there were just so . . . trumped up that they're not going to get all of the Democrats to buy in.<sup>378</sup>

Condemnatory was Nan Aron and the Alliance for Justice. She stated my success was "the big nomination of the past few years" that was "just stunning to see, for the Democrats, for that to occur."<sup>379</sup>

To express the disgust some had about my confirmation, the authors quote an aide to a Democratic senator on the Judiciary Committee, who said that the "civil rights community is still very upset about Southwick, with good reason."<sup>380</sup> Further, that aide said the groups on the left were "very upset about it, [yet] groups on the right were upset that they even had to sweat for it."<sup>381</sup>

That last line illustrates the diametrically different views about so many confirmation struggles, mine and others. This example is that when a

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375 *Id.* at 152–61.

376 Goldman et al., *Bush's Judicial Legacy*, *supra* note 269, at 266.

377 *Id.* at 267–69.

378 *Id.* at 268 (omissions in original).

379 *Id.*

380 *Id.* at 269.

381 *Id.*

Republican is naming the judge, opponents see a conservative zealot, or a racist, or some other unworthy nominee, while supporters look at the same evidence and do not see any basis for objection at all.

Compared to the other presidencies covered by this Article, my review of the George W. Bush administration's successes and failures has been lopsided in length, and no doubt, one-sided in its partialities. Enough. On to the next presidency.

## VI. BARACK OBAMA, 2009–2017

President Barack Obama won the Presidency in 2008 by a solid margin and brought with him a 59–41 margin in the United States Senate.<sup>382</sup> Democrats would retain a majority for the next two election cycles, but then see the Republicans reach fifty-four seats in the 2014 election.<sup>383</sup> Still, for six of this President's eight years in office, the Senate was led by a Democratic Majority Leader, Harry Reid of Nevada, and Democrat Pat Leahy chaired the Judiciary Committee.

There were Democratic anxieties about the slow early pace of the administration's selection of judges. Neither the President nor some of his principal advisers seemed to place getting their kind of judges on the courts at as high a priority as passing legislation such as what became the Affordable Care Act.<sup>384</sup> As one observer stated, "the legislative agenda being pursued was so aggressive that it simply drowned out other stuff," a point concurred in by Curt Levey, a conservative participant in judicial battles.<sup>385</sup> The President's first Chief of Staff, Rahm Emanuel, was seen as a particular impediment, as he "did not view the judiciary as an institution that could facilitate the administration's agenda nor assure its legacy."<sup>386</sup>

In selecting judges, the Assistant Attorney General for the Office of Legal Policy performed professional evaluations of contenders, then sent a memo to the White House; it was the White House Counsel's Office that then made such decisions as which senators to contact, which possibilities would encounter confirmation difficulties, and which possibilities should be dropped.<sup>387</sup> Counsel's Office would send a decision memo to President Obama identifying multiple vacant seats and candidates, and the President would respond positively, negatively, or indicate he wanted to discuss.<sup>388</sup>

382 *Party Division*, *supra* note 158 (111th Congress, 2009–2011).

383 *Id.* Democrats controlled the Senate by a margin of 53–47 in the 112th Congress (2011–2013) and by a margin of 55–45 in the 113th Congress (2013–2015), but saw the Republicans take a majority of 54–46 in the 114th Congress (2015–2017). *Id.*

384 Sheldon Goldman et al., *Obama's Judiciary at Midterm: The Confirmation Drama Continues*, 94 JUDICATURE 262, 273 (2011) [hereinafter Goldman et al., *Obama's Judiciary at Midterm*].

385 *Id.*

386 *Id.*

387 *See id.* at 264.

388 *Id.*

During the second two years of President Obama's first term, a greater emphasis was placed on judicial selection, partly explained by some as resulting from the departure of Chief of Staff Emanuel.<sup>389</sup> Nan Aron said she had "seen a marked change in the last two years" in the President's focus on judges in part because he "has now heard from numerous individuals at meetings he attends, fundraisers, events that he participates in around the country."<sup>390</sup> Showing one way in which outside groups can shape the agenda, Aron said that what the AEJ had "worked really hard at doing is making sure that when he is out and about that there are individuals in the room, particularly lawyers . . . who will raise the issue. I believe that he has gotten the message that judgeships are important . . . ."<sup>391</sup>

I will briefly discuss what my story counterintuitively treats as a lesser court. President Obama had an opportunity to name three Justices for the Supreme Court. One of those opportunities was missed, thanks to a Republican Senate's opposition. Presidential candidate Obama had indicated what his focus would be if given an opportunity to name Supreme Court Justices. In a July 2007 speech to a Planned Parenthood audience, he flippantly referred to Chief Justice Roberts, whose confirmation he had opposed: "When Roberts came up and everybody was saying, 'You know, he's very smart and he's seems a very decent man and he loves his wife. [Laughter] You know, he's good to his dog. [laughter] He's so well qualified.'"<sup>392</sup> Candidate Obama thought such smart people would agree on ninety-five percent of the cases, "[b]ut it's those five percent of the cases that really count. And in those five percent of the cases, what you've got to look at is—what is in the justice's heart. What's their broader vision of what America should be."<sup>393</sup>

That campaign language was much discussed when Justice David Souter announced on May 1, 2009, that he would retire at the end of that Court Term. Named by Republican George Bush in 1990, Souter announced his decision to retire just three months after the departure from the White House of that President's son, surely finding the new President more likely to name a compatible successor.<sup>394</sup> President Obama made clear that the concept of empathy was not just rhetoric for the campaign trail. Those who seem to have been finalists were Judge Diane Wood of the Seventh Circuit (a University of Texas Law School classmate of mine), Solicitor General Elena Kagan, Homeland Security Secretary Janet Napolitano, and Sonia Sotomayor

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389 Sheldon Goldman et al., *Obama's First Term Judiciary: Picking Judges in the Minefield of Obstructionism*, 97 JUDICATURE 7, 11 (2013) [hereinafter Goldman et al., *Obama's First Term Judiciary*].

390 *Id.*

391 *Id.* (first omission in original).

392 Senator Barack Obama, Remarks Before Planned Parenthood Action Fund (July 17, 2007), <https://sites.google.com/site/lauraetch/barackobamabeforeplannedparenthoodaction> (alterations in original).

393 *Id.*; see Peter Slevin, *Obama Makes Empathy a Requirement for Court*, WASH. POST, May 13, 2009, at A3.

394 See Mark Sherman, *U.S. Supreme Court, Obama Seeks a 'Reality'-Based Justice for Panel*, HOUS. CHRON., May 2, 2009, at A1.

of the Second Circuit. On May 26, the President announced that Judge Sotomayor would be nominated.<sup>395</sup> There were some criticisms based on Judge Sotomayor's past statements and writings, but it was clear that confirmation would come. It did, on August 6, 2009, by a 68–31 vote.<sup>396</sup>

Eight months later, another Republican-appointed Justice, John Paul Stevens, announced he would retire at the end of the term.<sup>397</sup> It appears that in addition to the also-rans for the previous nomination, D.C. Circuit Judge Merrick Garland and Ninth Circuit Judge Sidney Thomas were considered.<sup>398</sup> Solicitor General Kagan was selected, in part because she was seen as less ideological than other potential nominees, useful in an increasingly politicized climate resulting from the intensity of the struggle over the Affordable Care Act and other Obama initiatives.<sup>399</sup> Kagan was confirmed on August 5, 2010, by a 63–37 vote.<sup>400</sup>

The third vacancy arose in the final year of President Obama's second term. The unexpected death of Justice Scalia on February 13, 2016, a presidential election year, while on a hunting trip in west Texas was a shock, dismaying his many friends but, in the ways of Washington, quickly raising political concerns about having such a passionate, articulate, admired conservative leader on the Court replaced by an Obama-nominated judge.<sup>401</sup> Justice Scalia was the member of the Court assigned to the Fifth Circuit. He always attended and seemed to enjoy the annual Fifth Circuit judicial conferences where he humorously went over the Supreme Court's affirmances and more numerous reversals of Fifth Circuit opinions since the previous annual meeting. He said his summary was our "report card."

Senate Majority Leader Mitch McConnell, within an hour of news of Scalia's death reaching him, issued a statement that the Senate would not confirm a new Justice until the November elections allowed the people to "have a voice in the selection" when they elected a new President.<sup>402</sup> D.C. Circuit Judge Merrick Garland was nominated by President Obama on March 16, 2016,<sup>403</sup> but he neither received a hearing nor, of course, was he confirmed.

Among those urging that Judge Garland receive a hearing and vote were Miguel Estrada and Peter Keisler; Estrada favored a hearing and vote, while Keisler in addition urged Garland's confirmation.<sup>404</sup> Their related treat-

395 Goldman et al., *Obama's Judiciary at Midterm*, *supra* note 384, at 275.

396 *Id.* at 276.

397 *Id.* at 276–77.

398 *Id.* at 277.

399 *Id.* at 277–78.

400 *Id.* at 278.

401 See Elliot Slotnick et al., *Obama's Judicial Legacy: The Final Chapter*, 5 J.L. & CTS. 363, 363–64 (2017).

402 Paul Kane, *High Court Vacancy Raises the Stakes in Senate Elections*, WASH. POST, Feb. 15, 2016, at A3.

403 162 CONG. REC. S1551 (daily ed. Mar. 16, 2016).

404 Paul Kane, *Meet the Chorus of Legal Conservatives Supporting Garland's Nomination*, WASH. POST, Apr. 8, 2016, at A5.



ment by Democrats eight years earlier made them intimately aware of the injustices of being forced to twist slowly in the wind. The fact the wind was now blowing in the opposite direction did not alter the sense of unfairness. Many words have already been written on Judge Garland's failure to receive a vote, and I will not add further to the total.

Successes and failures for other courts, by the numbers, were these:

TABLE 4<sup>405</sup>

Congress	Years	Circuit		District	
		Confirmations	Nominations	Confirmations	Nominations
111th	2009–10	16	25	44	78
112th	2011–12	14	25	97	127
113th	2013–14	23	26	109	123
114th	2015–16	2	9	18	61

Even before Obama took office, Republicans were urging the new administration to extend an olive branch after the difficulties Democrats gave many of George W. Bush's nominees in the just-completed Congress, the suggestion being that Obama follow Bush's example of nominating two of his predecessor's blocked circuit nominees, Barrington Parker and Roger Gregory.<sup>406</sup> The *Wall Street Journal's* editorial board recommended the nomination of Peter Keisler for the D.C. Circuit Court of Appeals, and Steve Matthews and Robert Conrad for the Fourth Circuit, all of whom had been nominated by George W. Bush but had been stalled in the Senate.<sup>407</sup> No Bush circuit court nominee, though, was resubmitted.<sup>408</sup>

Obama's first circuit nominee may have received heightened scrutiny in this environment because he was first. He was Indiana U.S. District Chief Judge David Hamilton, nominated for the Seventh Circuit.<sup>409</sup> No East Room ceremony for him, only a simple announcement. Senior Republican Senator Richard Lugar of Indiana supported him, and Democrats professed surprise

405 McMILLION, *supra* note 90, at 7 tbl.3.

406 See, e.g., Editorial, *Obama's Judges and the Senate*, WALL ST. J., Nov. 29, 2008, at A12.

407 *Id.* Conrad faced criticisms that, like some directed at Bill Pryor, were uncomfortably close to condemning expressions of his Catholic faith. See AM. CTR. FOR LAW & JUSTICE, NOMINATION OF ROBERT J. CONRAD, JR., TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT 10–13 (2007), [http://media.aclj.org/pdf/nominee-to-the-us-court-of-appeals-for-the-fourth-circuit-robert-j-conrad-jr\\_020508.pdf](http://media.aclj.org/pdf/nominee-to-the-us-court-of-appeals-for-the-fourth-circuit-robert-j-conrad-jr_020508.pdf).

408 Chief District Judge Marco Hernandez, nominated by George W. Bush on July 23, 2008, but not confirmed in that Congress, apparently was the only Bush nominee resubmitted by Obama. That did not occur until July 14, 2010. *Hernandez, Marco Antonio*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/hernandez-marco-antonio> (last visited Apr. 13, 2020). Hernandez's 2011 confirmation was said to be the first of an Obama nominee of someone first nominated by George W. Bush. Charles Pope, *Senate Unanimously Approves Marco Hernandez to Be Federal Judge*, OREGONLIVE (Feb. 7, 2011), [https://www.oregonlive.com/politics/2011/02/senate\\_unanimously\\_approves\\_ma.html](https://www.oregonlive.com/politics/2011/02/senate_unanimously_approves_ma.html).

409 Goldman et al., *Obama's Judiciary at Midterm*, *supra* note 384, at 282.

that there would be any controversy.<sup>410</sup> There certainly was, though. Alabama Senator and future Attorney General Jeff Sessions was one of those who criticized Judge Hamilton for having prohibited referring to Jesus in a prayer in the Indiana legislature but allowing prayers to Allah; the judge had reasoned that “Allah” was a nonsectarian word; the senator and other critics also condemned the judge’s blocking of an informed-consent abortion law.<sup>411</sup> His defense was, right or wrong, he was doing his best to apply controlling law from his higher authority. Nominated on March 17, 2009, after fifteen years as a district judge, Hamilton was confirmed on November 19.<sup>412</sup>

An even more contentious and less successful nomination was of thirty-nine-year-old Stanford Law Professor Goodwin Liu. He was nominated on February 24, 2010, and had a Judiciary Committee hearing on April 16.<sup>413</sup> Liu was reported to the floor by the Committee on May 13<sup>414</sup> by a vote of 12–7 over Republicans’ objections that the *Washington Post* summarized as arising from Liu’s “long paper trail of [writings espousing] liberal positions, including strongly criticizing the Supreme Court nominations of Chief Justice John G. Roberts Jr. and Justice Samuel A. Alito Jr., and endorsing gay marriage and affirmative action.”<sup>415</sup> Nan Aron said of President Obama’s judicial nominees in his first Congress that only Professor Liu was sufficiently liberal to be considered outside of the “ideological ‘safety zone,’” in the mold of the more prominent, and controversial, Republican nominees in the past who would engage in serious ideological battle once on the court.<sup>416</sup>

At the end of the 2010 congressional session, the Senate’s Democratic leadership tried to put a package of nominations together that Republicans could support from the thirty-eight who had been voted out of Committee and were waiting for floor votes.<sup>417</sup> Half were confirmed at the end of the session; Liu was not among them.<sup>418</sup>

Liu was renominated on January 5, 2011, had a second hearing on March 2, then was voted to the floor on April 7.<sup>419</sup> This time the Committee vote was only 10–8, as the 2010 midterm elections had reduced the

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410 *Id.* at 282–83.

411 Kara Rowland, *GOP Weighs Its Own Judicial Filibuster*, WASH. TIMES, Nov. 17, 2009, at A1.

412 *Hamilton, David Frank*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/hamilton-david-frank> (last visited Mar. 1, 2020).

413 156 CONG. REC. 1754 (2010) (nomination); 156 CONG. REC. D399 (daily ed. Apr. 16, 2010) (hearing).

414 156 CONG. REC. 8198 (2010).

415 Perry Bacon, Jr., *Appeals Court Nomination Advances*, WASH. POST, May 14, 2010, at A14.

416 Goldman et al., *Obama’s Judiciary at Midterm*, *supra* note 384, at 272.

417 See Abby Phillip, *GOP: Liu, Others Too Liberal*, POLITICO, Dec. 15, 2010, at 3.

418 Stephen Dinan, *Obama Trails Bush on Judicial Confirmations*, WASH. TIMES, Dec. 27, 2010, at A1.

419 157 CONG. REC. 72 (2011) (renomination); 157 CONG. REC. D176 (daily ed. Mar. 2, 2011) (hearing); 157 CONG. REC. D376 (daily ed. Apr. 7, 2011) (voted to floor).

Democratic majority in the entire Senate and in each committee.<sup>420</sup> On the floor, by a 52–43 vote with 60 needed, Republicans on May 19 blocked cloture in the first successful filibuster of a judicial nominee since Democrats defeated twenty cloture votes of President George W. Bush’s nominees in 2003–2004.<sup>421</sup> On May 25, Professor Liu sent a letter to the President, saying he was deeply honored by his nomination, but in light of the previous week’s cloture vote, he asked that his nomination be withdrawn.<sup>422</sup>

Other filibusters followed. Among them was of New York attorney Caitlin Halligan, nominated to the D.C. Circuit. She was first nominated in September 2010, renominated at the start of the next Congress in January 2011, had a Judiciary Committee hearing in early February, and was voted out of Committee on March 10.<sup>423</sup> She had been questioned at her hearing about a 2004 New York Bar Association report arguing that indefinite detention of enemy combatants during wartime was unconstitutional, a controversial argument this soon after 9/11.<sup>424</sup> Halligan testified she had been unaware of being shown as a signatory to that report; Ed Whelan, the president of the Ethics and Public Policy Center who follows judicial selection matters closely and writes about them (and to be candid, was remarkably supportive of me in 2007, eloquently I think), was skeptical and suggested that the Committee should look further into the facts.<sup>425</sup> Republican Senator Mitch McConnell described his party’s opposition to Halligan as arising from the perception that she was an activist who would use a judicial position to advance a social agenda; the charge was based on her actions as New York’s solicitor general in arguing that gun manufacturers could be held legally responsible for crimes committed with guns.<sup>426</sup> Cloture was defeated by a 54–45 vote on December 6, 2011.<sup>427</sup>

Two months after Obama took office, the Republican Senate caucus wrote to warn the President that they would do their best to block confirmations of judges unless home-state Republican senators were consulted.<sup>428</sup> Democratic Senator Pat Leahy chaired the Judiciary Committee for all but the final two years of this presidency. He required the

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420 See Sean Lengell, *Obama Faces Fight in Choice for Judge*, WASH. TIMES, Apr. 7, 2011, at A1.

421 Meredith Shiner, *Senate GOP Filibusters Liu*, POLITICO, May 19, 2011, at 4.

422 Bob Egelko, *Blocked by GOP, Liu Gives Up on Federal Judgeship*, S.F. CHRON., May 26, 2011, at C2.

423 156 CONG. REC. 17,355 (2010) (nomination); 157 CONG. REC. 72 (2011) (renomination); 157 CONG. REC. D68 (daily ed. Feb. 2, 2011) (hearing); 157 CONG. REC. D221 (daily ed. Mar. 10, 2011) (voted out of committee).

424 Editorial, *Detain This Judicial Nominee*, WASH. TIMES, Feb. 10, 2011, at B2.

425 *Id.*

426 Charlie Savage & Raymond Hernandez, *Filibuster by Senate Republicans Blocks Confirmation of Judicial Nominee*, N.Y. TIMES, Dec. 6, 2011, at A16.

427 157 CONG. REC. D1317 (daily ed. Dec. 6, 2011); Savage & Hernandez, *supra* note 426.

428 Goldman et al., *Obama’s Judiciary at Midterm*, *supra* note 384, at 267.

return of both blue slips before allowing a hearing.<sup>429</sup> An unusual example of the effects of that policy occurred after the July 2010 nomination of University of Wisconsin Professor Victoria Nourse to the Seventh Circuit.<sup>430</sup> The two Democratic senators from Wisconsin used a Federal Nominating Commission to make recommendations, and Professor Nourse was one of four of its suggestions that the senators sent to the President.<sup>431</sup> She never got a hearing at that late point in the year, and her nomination lapsed.

Nourse's nomination was resubmitted on the first day of the new Congress in January 2011.<sup>432</sup> Unfortunately for the good professor, arriving in the Senate that same day was Republican Ron Johnson, who in November 2010 defeated one of the Democratic senators who had recommended Nourse. Johnson refused to return his blue slip, explaining that "Victoria Nourse really has very little connection to the state of Wisconsin, and nobody in the legal community in Wisconsin knows anything about her."<sup>433</sup> She had been on the Wisconsin faculty for seventeen years, moving there after being a professor at Emory for two years; she also had been a visiting professor at Georgetown, Yale, New York University, and the University of Maryland, and served at DOJ and on the Senate Judiciary Committee staff.<sup>434</sup> She could never be a native, and she was not a member of the Wisconsin Bar or admitted to practice in the state,<sup>435</sup> but she had made a substantial commitment to Wisconsin by that point.

Nourse is far from the only nominee who encountered senatorial resistance due to deficiencies in home-state ties. In 2017, Louisiana Senator John Kennedy slowed the progress of a Trump nominee to the Fifth Circuit by delaying return of his blue slip.<sup>436</sup> Kyle Duncan's geographical liability was the opposite of Professor Nourse's—he was born, raised, and educated in Louisiana where he would serve, but most (but not all) of his professional

429 History and Context of the Blue Slip Courtesy, *supra* note 61.

430 156 CONG. REC. 13,055 (2010). I like and respect Professor Nourse as a result of our work together on a legal committee beginning in 2016, but I have endeavored to write a balanced account. Potentially affecting that balance—unconsciously, spectrally even—is that we both are descended from Rebecca Nurse/Nourse, the last person to be hanged in Salem as a witch in 1692.

431 Adam Korbitz, *President Nominates Victoria Nourse to Seventh Circuit U.S. Court of Appeals*, ST. BAR WIS. (July 15, 2010), <https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=2&Issue=14&ArticleID=8620>.

432 157 CONG. REC. 72 (2011).

433 Craig Gilbert, *Ron Johnson 'Filibuster' of Nourse Nomination to Federal Bench Draws Fire*, MILWAUKEE J. SENTINEL (July 18, 2011), <http://archive.jsonline.com/newswatch/125741928.html>.

434 S. COMM. ON THE JUDICIARY, QUESTIONNAIRE FOR JUDICIAL NOMINEES: VICTORIA NOURSE 2–6 (2010), <https://www.judiciary.senate.gov/imo/media/doc/VictoriaNourse-PublicQuestionnaireUpdate.pdf> (showing Nourse's employment, bar memberships, and court admissions).

435 *Id.*

436 Charlie Savage, *Trump Is Rapidly Reshaping the Judiciary. Here's How.*, N.Y. TIMES, NOV. 11, 2017, at 1A.

career was elsewhere.<sup>437</sup> The Senator dramatized that Louisianans had asked him: “So how come you’re picking a Washington lawyer—what am I, chopped liver?”<sup>438</sup> Duncan’s lawyering in Washington included being general counsel for the Becket Fund for Religious Liberty, where he was lead counsel on the Hobby Lobby case upholding the religious rights of a closely held corporation.<sup>439</sup> Senator Kennedy finally agreed to a hearing being held prior to his deciding whether to support Duncan; hearing held, Kennedy voted for him.<sup>440</sup>

As to Nourse, a July 2011 letter to the Judiciary Committee signed by fifty-three professors asserted that “[t]ypically new senators have no power to countermand completed presidential nominations” through a retroactive veto;<sup>441</sup> further, this “nominee of sterling credentials, who has served her country under Republicans and Democrats . . . should not be subject to unending delay.”<sup>442</sup> Ed Whelan, an opponent of blue slips, saw the history of blue slips differently. He wrote there was a “policy that Democrats extracted from then-chairman Specter in the Bush 43 years—which gave individual senators an effective veto even over federal appellate judgeships associated with their states.”<sup>443</sup> There was “strict adherence to the blue slip’s dictates established by Democratic Senator Patrick Leahy,” Professor Goldman and coauthors wrote, “even in the face of strong opposition from within his own party.”<sup>444</sup> That adherence meant that when Senator Johnson refused to return his blue slip, Chairman Leahy would not schedule a hearing on the Nourse nomination. When the 2011 session was ending in December, senators agreed to waive the rule that would return nominations to the

437 *Duncan*, Stuart Kyle, FED. JUD. CTR., <https://www.fjc.gov/history/judges/duncan-stuart-kyle> (last visited Apr. 13, 2020). Duncan had a Fifth Circuit clerkship in Louisiana in 1997–98, and he was appellate chief in the Louisiana Attorney General’s office from 2008 to 2012, but the rest of his career was spent outside of Louisiana. *Id.*

438 Bryn Stole, *Sen. John Kennedy Votes Against Trump Judge Nominee*, ADVOCATE (Nov. 28, 2017), [https://www.theadvocate.com/baton\\_rouge/news/politics/article\\_278b8122-d4a0-11e7-9a09-87d90d1df9de.html](https://www.theadvocate.com/baton_rouge/news/politics/article_278b8122-d4a0-11e7-9a09-87d90d1df9de.html).

439 *Burwell v. Hobby Lobby Store, Inc.*, 573 U.S. 682 (2014). Paul Clement argued the case in the Supreme Court, but with utmost respect for him, I think Duncan would have been splendid as well.

440 164 CONG. REC. S2371–72 (daily ed. Apr. 24, 2018) (Duncan’s confirmation by vote of 50–47, with Kennedy in favor); Editorial, *A Blue Slip—Not a Franken Veto*, WALL ST. J., NOV. 18, 2007, at A12.

441 Craig Gilbert, *Johnson Move Assailed*, MILWAUKEE J. SENTINEL, July 19, 2011, at A3.

442 Editorial, *Step Aside, Senator*, MILWAUKEE J. SENTINEL, July 20, 2011, at A14.

443 Ed Whelan, *The Blue-Slip Privilege and Seventh Circuit Nominee Victoria Nourse*, NAT’L REV. (July 25, 2011) (emphasis omitted), <https://www.nationalreview.com/bench-memos/blue-slip-privilege-and-seventh-circuit-nominee-victoria-nourse-ed-whelan/>. A 2017 Judiciary Committee memorandum stated that though Specter’s policy was never formally announced, he seemed to recognize flexibility with circuit nominees. See History and Context of the Blue Slip Courtesy, *supra* note 61.

444 Slotnick et al., *supra* note 401, at 373.

President that had not yet been acted upon, but the agreement excluded Professor Nourse and only a few others.<sup>445</sup>

In a January 18, 2012, letter to the President, Professor Nourse withdrew from further consideration and quoted Chief Justice Roberts: “The system is broken.”<sup>446</sup> In 2016, President Obama nominated Donald K. Schott, a lawyer in private practice in Madison, but he never received a vote.<sup>447</sup>

I will jump beyond the Obama Presidency to discuss how this vacancy finally was filled. In May 2018, a confirmation vote was scheduled for the third nominee to the seat. Senator Johnson spoke on the Senate floor to praise President Trump’s nominee, Michael Brennan, and to defend Johnson’s use of the blue-slip process as strictly enforced by Chairman Leahy, now relaxed with a Republican chairman.<sup>448</sup> Democratic Leader Chuck Schumer reminded his listeners that Brennan had not received a blue slip from Senator Tammy Baldwin of Wisconsin; accordingly, “the vote today will be a slap in the face to the custom of senatorial courtesies.”<sup>449</sup> That day, cloture was imposed; the next, Brennan was confirmed.<sup>450</sup>

This description of filling a Seventh Circuit vacancy is lengthy because it is offered as a comparator to the eight years it took for a roll-call vote on confirmation for a Fifth Circuit judge—from Pickering to Wallace to me. For each it took three nominees and eight years before there was a confirmation. In each, though from opposite political sides in the two cases, the delays were criticized and defended. I offer no judgment other than to suggest that not all that much changes in the culture of confirmations.

Now, back to the Obama years. In 2012, with a presidential election at the end of the year, Republican senators slowed the consideration of judicial nominations.<sup>451</sup> On June 13, Republicans declared that no more circuit nominees would be confirmed until after the election.<sup>452</sup> Democratic Senator Pat Leahy recognized the tradition of stopping confirmations in an election year but argued the barrier should not be raised until September.<sup>453</sup>

445 157 CONG. REC. D1384 (daily ed. Dec. 17, 2011).

446 *Regional Newswatch*, MILWAUKEE J. SENTINEL, Jan. 20, 2012, at B2.

447 162 CONG. REC. S75 (daily ed. Jan. 12, 2016) (nomination); 162 CONG. REC. S7181, S7183 (daily ed. Jan. 3, 2017) (nomination returned to President); Ed Treleven, *City Lawyer Nominated for Spot on Appeals Court*, WIS. ST. J., Jan. 13, 2016, at A3

448 164 CONG. REC. S2574–78 (daily ed. May 9, 2018) (statement of Sen. Johnson and introduction of Judiciary Committee memorandum on blue slips).

449 *Id.* at S2558 (statement of Sen. Schumer). Democratic Senator Baldwin of Wisconsin opposed Brennan. Craig Gilbert, *Lawyer Fills Oldest Vacancy on U.S. Court of Appeals*, MILWAUKEE J. SENTINEL, May 11, 2018, at A5.

450 164 CONG. REC. S2565 (daily ed. May 9, 2018) (cloture voted on Brennan by 49–47); 164 CONG. REC. S2607 (May 10, 2018) (Brennan confirmed by a 49–46 vote).

451 See Manu Raju, *Reid Files Cloture on Stalled Judicial Nominations*, POLITICO, Mar. 13, 2012, at 3.

452 John Stanton, *GOP Begins Judge Blockade*, ROLL CALL (June 13, 2012), <https://www.rollcall.com/2012/06/13/gop-begins-judge-blockade/>.

453 Manu Raju, *GOP: Appeals Court Nominees Iced Until After Election*, POLITICO, June 15, 2012, at 3.

Consistent with that announcement, the last circuit judge nominee to be confirmed that year had received his vote two days earlier, Andrew David Hurwitz for the Ninth Circuit.<sup>454</sup>

In the 2012 election, President Obama did prevail, and the Democratic Senate majority slightly increased.<sup>455</sup> Early in the session, Democrats made their first rules change and limited the postcloture debate time on district court nominees to two hours, not thirty (the change was operative only for that Congress).<sup>456</sup> A particular prize for judicial selection in the new Congress was to fill three seats on the powerful D.C. Circuit. Arguments had been made by each party in the past, depending on which party controlled nominations, that the workload of the court did not justify filling those seats.<sup>457</sup> Nominations had earlier been made to those seats, with Caitlin Halligan's first nomination being in September 2010, Srikanth Srinivasan's first in June 2012, and then renominations of both Halligan and Srinivasan occurring at the beginning of the new Congress in January 2013.<sup>458</sup> Srinivasan was at the time the Principal Deputy Solicitor General at DOJ. He is an amiable, even charming man whose legal work had not been on controversial social issues. Sri was praised by Republicans and Democrats alike at his April Judiciary Committee hearing, unanimously reported by Committee, then unanimously confirmed in May 2013.<sup>459</sup>

Caitlin Halligan's nomination was not abandoned after the failed December 2011 cloture vote. She was renominated for the D.C. Circuit in June 2012, then again in January 2013.<sup>460</sup> After other procedural steps, she came up for another cloture vote on March 6, which was again defeated, this time by a vote of 51–41.<sup>461</sup> President Obama withdrew her nomination.<sup>462</sup>

After these struggles and several defeats in filling D.C. Circuit seats, the Obama administration put together a winning strategy that started with the simultaneous submission of nominations to three vacancies on the court on June 4, 2013: Patricia Ann Millett, Robert L. Wilkins, and Cornelia Pillard.<sup>463</sup>

454 *Biographical Directory of Article III Federal Judges, 1789–Present*, *supra* note 262 (using “Advanced Search Criteria” function for circuit judge confirmations in 2012 after June 1).

455 *See Party Division*, *supra* note 158. In the 112th Congress (2011–2013), Democrats controlled the Senate by a margin of 53–47, and in the 113th Congress (2013–2015), by 55–45. *Id.*

456 Goldman et al., *Obama's First Term Judiciary*, *supra* note 389, at 29. The reduction of postcloture debate on district court judges to two hours “expires at the end of the 113th Congress.” VALERIE HEITSHUSEN, CONG. RESEARCH SERV., R43331, MAJORITY CLOTURE FOR NOMINATIONS: IMPLICATIONS AND THE “NUCLEAR” PROCEEDINGS 3 (2013).

457 *See, e.g.*, Adam J. White, *The Regulatory Court*, WKLY. STANDARD, Aug. 26, 2013, at 20, 25.

458 158 CONG. REC. 8837 (2012); 159 CONG. REC. 18 (2013).

459 159 CONG. REC. D497 (daily ed. May 23, 2013); *see* Carl Tobias, *Filling the D.C. Circuit Vacancies*, 91 IND. L.J. 121, 128–29 (2015).

460 158 CONG. REC. D588 (daily ed. June 11, 2012); 159 CONG. REC. 77 (2013).

461 159 CONG. REC. 2419 (2013).

462 *Id.* at 4713.

463 *Id.* at 7896.

The venue for demonstrating the President's emphasis on judges was not in the East Room this time; instead, the gathering was shifted to the Rose Garden.<sup>464</sup> Millett had worked in the Justice Department in both the Clinton and the second Bush's administrations, then for the last few years had an appellate practice in the District of Columbia.<sup>465</sup> Wilkins had been a D.C. district judge since May 2010 and before that was in private practice.<sup>466</sup> Pillard was a Georgetown Law professor and had worked in the Justice Department during the Clinton administration.<sup>467</sup> One basis for Republican objections to Pillard was that she had worked both at the ACLU and the NAACP Legal Defense and Educational Fund, "two well-known liberal organizations," as the *New York Times* put it.<sup>468</sup>

Republicans objected that there was no need for the vacancies to be filled at all and additionally argued about Pillard's alleged radicalism in her views on women's rights.<sup>469</sup> Each nominee was reported out of the Judiciary Committee by 10–8 votes, Millet first on August 1, 2013, Pillard next on September 19, and Wilkins last on October 31.<sup>470</sup> Motions for cloture were defeated for all three.<sup>471</sup> With these significant vacancies as the impetus, Democrats on November 21, 2013, detonated the "nuclear option" and voted on eliminating the need for a supermajority of sixty votes to invoke cloture on judicial nominees.<sup>472</sup> Republicans had considered doing so in 2005, but the "Gang of 14" had caused both sides to step back. No stepping back this time. The vote was fifty-two to forty-eight, with three Democrats joining all Republicans in opposing; hereafter, a simple majority would be sufficient to invoke cloture to end a filibuster on any judicial nominee except for the Supreme Court.<sup>473</sup> All three nominees were then confirmed.<sup>474</sup>

Perhaps one consideration for Democrats in making the rules change was that the President's party regularly loses its congressional majority in the final midterm election of a two-term president. That is just what happened in November 2014, when Republicans took a 54–46 majority.<sup>475</sup> The

464 Michael D. Shear & Jeremy W. Peters, *Judicial Picks Set the Stage for a Battle in the Senate*, N.Y. TIMES, June 4, 2013, at A12.

465 Millett, *Patricia Ann*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/millett-patricia-ann> (last visited Mar. 1, 2020).

466 Wilkins, *Robert Leon*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/wilkins-robert-leon> (last visited Mar. 1, 2020).

467 Pillard, *Cornelia Thayer Livingston*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/pillard-cornelia-thayer-livingston> (last visited Mar. 1, 2020).

468 Shear & Peters, *supra* note 464.

469 See Tobias, *supra* note 459, at 130–33.

470 *Id.* at 131 n.95, 132 n.109, 133 n.117.

471 *Id.* at 131–33.

472 Paul Kane, *Senate Eliminates Filibusters on Most Nominees*, WASH. POST, NOV. 22, 2013, at A1.

473 Bruce Alpert, *Senate Votes to Limit Use of Filibuster*, TIMES-PICAYUNE (New Orleans, La.), NOV. 22, 2013, at A11.

474 159 CONG. REC. 18,365 (2013) (Millett); *id.* at 18,522 (Pillard); 160 CONG. REC. 501–02 (2014) (Wilkins).

475 *Party Division*, *supra* note 158.



incoming majority leader stated privately even before the start of the new Congress that Republicans were unlikely to change the cloture rules back.<sup>476</sup> They never did. As Table 4 shows, the loss of the Senate led to confirmation of only two of Obama's nine circuit court nominees in the 2015–16 Congress and only eighteen of sixty-one district court nominees.<sup>477</sup> There also was that nominee to the Supreme Court left without a vote. One confirmation that did occur, rectifying in his supporters' minds a Republican injustice, was that of Ronnie White to a district judgeship in Missouri in 2014.<sup>478</sup>

To conclude my review of the Obama years will be a discussion of the three nominations he made to the Fifth Circuit. The first was of Mississippi Supreme Court Justice James Graves to fill the vacancy left by Judge Rhesa Barksdale taking senior status.<sup>479</sup> Graves was the second African American to serve on his state's high court; his confirmation would make him only the second African American to serve on the Fifth Circuit as presently constituted (Floridian Joseph Hatchett was appointed in 1979, two years before the Circuit was split). He was nominated on June 10, 2010, and received a hearing on September 29.<sup>480</sup> Whatever criticisms there may have been were muted. On December 1, the Committee by voice vote reported him to the floor,<sup>481</sup> but the Senate adjourned for the year without his nomination being further considered. Renominated on January 5, 2011, Graves was confirmed unanimously on February 14.<sup>482</sup>

The next nominee was to fill a Louisiana vacancy created when Jacques Wiener took senior status. The one Democratic senator from the state, Mary Landrieu, submitted four recommendations to the President in January 2011, but the administration started the vetting process on a Tulane Law School professor who was not on the senator's list, Stephen Griffin.<sup>483</sup> Whatever the difficulties may have been for the professor, on May 9, 2011, President Obama nominated Assistant United States Attorney (AUSA) Stephen Higginson.<sup>484</sup> A native of Massachusetts and a graduate of Yale Law, Higginson clerked for Supreme Court Justice Byron White, then was an

476 Manu Raju, *GOP Unlikely to Reverse 'Nuclear Option,'* POLITICO (Dec. 3, 2014), <https://www.politico.com/story/2014/12/gop-senate-filibuster-113308>.

477 See *supra* Table 4.

478 White, *Ronnie Lee*, *supra* note 185.

479 See *Graves, James Earl, Jr.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/graves-james-earl-jr> (last visited Mar. 1, 2020).

480 156 CONG. REC. 10,468 (2010) (nomination); 156 CONG. REC. D1039 (daily ed. Sept. 29, 2010) (hearing).

481 See Jimmie E. Gates, *Miss. Judge Awaits Confirmation*, CLARION-LEDGER (Jackson, Miss.), Dec. 2, 2010, at 1A.

482 157 CONG. REC. 72 (2011) (renomination); 157 CONG. REC. D108 (daily ed. Feb. 14, 2011) (confirmation).

483 Bruce Alpert, *Tulane Law Professor Being Vetted for Possible Federal Appeals Court Appointment*, TIMES-PICAYUNE (Apr. 5, 2011), [https://www.nola.com/news/politics/article\\_9101492a-6cfd-5c25-9cda-77c60b198a41.html](https://www.nola.com/news/politics/article_9101492a-6cfd-5c25-9cda-77c60b198a41.html).

484 157 CONG. REC. 6867 (2011).

AUSA in Boston.<sup>485</sup> His marriage to a gifted New Orleanian architect moved him to her city. There were no objections to his confirmation, which moved along smartly from a hearing on June 8, to being reported out of Committee by voice vote on July 14, to confirmation on Halloween on a vote of 88–0.<sup>486</sup>

President Obama's final Fifth Circuit nominee was another federal prosecutor and former United States Supreme Court clerk, Gregg Costa of Houston—who clerked for Chief Justice Rehnquist.<sup>487</sup> In 2014, Costa was nominated to a seat vacated almost two years earlier by Judge Pete Benavides on February 3, 2012.<sup>488</sup> At least two facts contributed to that lengthy delay. First was that a presidential election would occur at the end of 2012. The other reality is the laborious process the Texas senators follow to make recommendations on judges, as they use a large, bipartisan committee that considers most of those who express interest.<sup>489</sup> In December 2013, there was a report that the senators' committee was considering three district judge possibilities for the elevation, Costa, Marina Garcia Marmolejo, and Xavier Rodriguez.<sup>490</sup> Finally, only nineteen months after being confirmed as a district judge, Costa was nominated for the circuit judgeship on January 6, 2014.<sup>491</sup> His hearing came quickly, on February 25.<sup>492</sup> Among the pleasantries that reflected the tone of the hearing, the senator who chaired it, former comedian Al Franken of Minnesota, said he always thought it odd that one of the Fifth Circuit's most historic judges, whose name was given to the New Orleans courthouse, was John *Minor* Wisdom. Costa responded that Wisdom certainly was "great judge name." Franken continued, "Minor Wisdom is just odd," Franken said. "I don't know why." Fellow Committee member John Cornyn offered a reason: "It's a sign of judicial humility."<sup>493</sup> Costa was reported favorably to the floor on March 27.<sup>494</sup> It was still

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485 Press Release, White House, President Obama Announces Intent to Nominate Stephen Higginson to Serve on United States Court of Appeals (May 5, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/05/05/president-obama-announces-intent-nominate-stephen-higginson-serve-united>.

486 157 CONG. REC. D614 (daily ed. June 8, 2011) (hearing); 157 CONG. REC. D781 (daily ed. July 14, 2011) (report out of Committee); 157 CONG. REC. D1153 (daily ed. Oct. 31, 2011) (confirmation).

487 *Costa, Gregg Jeffrey*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/costa-gregg-jeffrey> (last visited Mar. 2, 2020).

488 *Benavides, Fortunato Pedro*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/benavides-fortunato-pedro> (last visited Mar. 2, 2020).

489 See John Council, *Help Wanted: Who Will Fill 5th Circuit Vacancies?*, TEX. LAW. (Mar. 18, 2013), <https://www.law.com/texaslawyer/almID/1202592198118/Help+Wanted+Who+Will+Fill+5th+Circuit+Vacancies%3Fmcode=0&curindex=0&curpage=4/>.

490 John Council, *Then There Were Three: Committee Looking at Trio of Texans for Fifth Circuit Spots*, TEX. LAW. (Dec. 9, 2013), <https://www.law.com/texaslawyer/almID/1202630936066&thepage=1/>.

491 160 CONG. REC. 33 (2014).

492 John Council, *Gregg Costa's Judiciary Committee Hearing Held*, TEX. LAW., Mar. 3, 2014, at 4.

493 *Id.*

494 160 CONG. REC. D326 (daily ed. Mar. 27, 2014).

necessary for him to go through the cloture process, which succeeded by a 58–36 vote on May 15; confirmation followed five days later, 97–0.<sup>495</sup>

## VII. DONALD J. TRUMP, 2017

My discussion here will not focus much on specific nominees. The new judges have barely settled in, and how many more there will be—a few more months’ worth from the time of this writing or four more years—is unknown. Certainly, the extraordinary significance of judicial selection in this administration is clear, and the near-term success after three years in office is stunning. The longer-term success of having even more judges in office for an extended time depends on the November 2020 election.

My focus is on some process points. How are the selection decisions being made, and how are the Senate and other actors contributing to or attempting to blunt the selection and confirmation of these judges? Discussed as well will be limitations on blue slips for both district and circuit nominees, the emphasis on selecting those with proven judicial philosophies, and the rejecting of more traditional considerations. There will be some other matters too. First, the numbers:

TABLE 5<sup>496</sup>

Congress	Years	Circuit		District	
		Confirmations	Nominations	Confirmations	Nominations
115th	2017–18	30	43	53	112

Bringing those confirmation totals through, March 11, 2020, there have been 51 circuit court judges and 138 district court judges confirmed during the Trump presidency.<sup>497</sup> Oh yes—also, two Supreme Court Justices. Neil Gorsuch and Brett Kavanaugh faced substantially different controversies, but both were confirmed by similarly close votes.<sup>498</sup> It is evident that the Senate will keep making confirmations a priority. Majority Leader Mitch McConnell in December 2019 repeated what he previously said was his motto: “[L]eave no vacancy behind.”<sup>499</sup> As this Article has discussed, in recent presidencies, the number of vacancies left behind has been significant. That is unlikely to

495 160 CONG. REC. D512 (daily ed. May 15, 2014) (cloture); 160 CONG. REC. D527 (daily ed. May 20, 2014) (confirmation).

496 See McMillion, *supra* note 90, at 7 tbl.3.

497 *Biographical Directory of Article III Federal Judges, 1789–Present*, *supra* note 262 (using “Advanced Search Criteria” function for circuit or district confirmations since 2020-03-27).

498 Gorsuch was confirmed by a vote of 54–45, and Kavanaugh by 50–48. Donald F. McGahn II, *A Brief History of Judicial Appointments from the Last 50 Years Through the Trump Administration*, 60 WM & MARY L. REV. ONLINE 105, 125 (2019).

499 Interview by Hugh Hewitt with Mitch McConnell, Senate Majority Leader (Dec. 18, 2019), <https://www.hughhewitt.com/senate-majority-leader-mitch-mcconnell-3/> [hereinafter Hugh Hewitt Interview].

be the case at the end of this Congress unless as the result of barriers erected by a viral pandemic.

Ed Whelan of the Ethics and Public Policy Center in Washington is a keen observer of judicial selections. He made an important point to me in a recent telephone call of the importance of the Federalist Society's influence since its founding in 1982.<sup>500</sup> The group has been exceptionally significant in encouraging the development of conservatives widely dispersed in government, in law schools as professors and students alike, in groups like his own, and elsewhere. One description that seems to capture its distinctiveness and a secret to its effectiveness is this:

It's a remarkably successful example of what political scientists call a "political epistemic community"—"an interconnected network of experts with policy-relevant knowledge who share certain beliefs and work to actively transmit and translate those beliefs into policy" . . . .<sup>501</sup>

Though still greatly outnumbered in the professoriate, Whelan believed that conservatism as a movement has matured such that there are now a substantial number of lawyers who have been exposed to and been convinced of the correctness of key conservative legal concepts and who apply them in their work for various causes, or when serving in state solicitor general offices or in federal legal positions or elsewhere. Thus, there are lawyers throughout the country who are available for judgeships who have thought deeply about foundational questions in the law and accepted a viewpoint. Whelan is surely right when he suggests not all will come to the same conclusions, but they will all use some of the same tools.

My introduction to the Federalist Society came when I was at the Civil Division of DOJ in 1989. Civil Division Assistant Attorney General Stuart Gerson was an active member. I attended Federalist luncheon meetings with him at a local Chinese restaurant. This was not (only) indoctrination, as many luncheons had provocative debates. As is the Society's goal, the dialogs caused me to think more seriously about legal fundamentals. In February 2001, when I was making my first of three tries at a Fifth Circuit nomination, Senator Thad Cochran urged me to talk with Leonard Leo, the Society's executive vice president. Leo was willing to meet immediately, as the White House was about to choose a nominee for the relevant Fifth Circuit seat. Both Leo and Shara Haden, one of the Society's division directors, were encouraging. Leo said he would help me get fully considered by the White House; the rest was up to me. Though the Federalist Society through the

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<sup>500</sup> Telephone Interview with Ed Whelan, President, Ethics & Pub. Policy Ctr. (Feb. 12, 2020).

<sup>501</sup> David Montgomery, *Conquerors of the Courts*, WASH. POST MAG., Jan. 2, 2019, 12, 17 (quoting AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION 10–11 (2015)). The *Conquerors of the Courts* article contains a delightful alteration of Howard Chandler Christy's 1940 painting of the signing of the Constitution, in which faces of current politicians, Justices, and even Leonard Leo are superimposed on the faces of signers of the Constitution.

years likely never had me as its preference, and I never met with Leo again, perhaps it never strenuously objected to me either.

Leo was instrumental in 2017 in developing a list of prospective Supreme Court nominees from whom the names of President Trump's two nominees were taken, Neil Gorsuch and Brett Kavanaugh.<sup>502</sup> The conservative columnist Fred Barnes wrote about Leo's influence over the broader GOP effort to reshape the judiciary, giving credit to White House Counsel Don McGahn and also Leo, whom he called McGahn's "outside adviser," for the successes in selecting judicial nominees, and to Mitch McConnell for getting them confirmed.<sup>503</sup> The selection process became centralized in the White House Counsel Office with "near absolute authority."<sup>504</sup> The Office of Legal Policy at the Justice Department provides a supporting role, primarily in performing background checks on prospective nominees.<sup>505</sup>

What this process seeks are nominees in the mold of Justice Scalia, which is quite a mold. McGahn in 2017 said that means originalists and textualists are wanted who are willing to do the difficult work on "hard or risky cases" that would require courage to take a principled and unpopular stance.<sup>506</sup> Leo describes preferred nominees as those willing to question existing doctrine and correct past jurisprudential errors.<sup>507</sup> Another description of the kind of nominees being sought came from Ilya Shapiro, the director of the Cato Institute's Constitutional Studies Center. He states that recent Republican administrations have increasingly wanted "textualists and originalists, not simply . . . people who have a loyalty to the Republican party or are more on the right than on the left."<sup>508</sup> That demand for only enhanced conservatives as judges was echoed by Carrie Severino of the Judicial Crisis Network: "The important thing when choosing judges is not whether one has an R or D after his or her name, but what their approach to the Constitution is. Attention to judicial philosophy has been a real hallmark of judicial nominations" for President Trump; "judges who are going to interpret the Constitution and the law according to their text" are needed.<sup>509</sup>

An example of the insistence on the right kind of judges has been in the extremely slow process—unique for this administration—of filling a vacancy

502 Robert O'Harrow, Jr. & Shawn Boburg, *The Activist Behind the Push to Reshape U.S. Courts*, WASH. POST, May 22, 2019, at A1.

503 Fred Barnes, *Reshaping the Judiciary*, WASH. EXAMINER, June 4, 2019, at 10, 11.

504 *Id.* at 14 (quoting Jason Zengerle, *How the Trump Administration Is Remaking the Courts*, N.Y. TIMES (Aug. 22, 2018), <https://www.nytimes.com/2018/08/22/magazine/trump-remaking-courts-judiciary.html>).

505 Telephone Conversation with Office of Legal Policy Attorney (Mar. 6, 2020).

506 Barnes, *supra* note 503, at 14.

507 Ellis Kim, *Making Waves: Trump's Judges Court Controversy in Early Legal Writings*, NAT'L L.J. (May 31, 2019), <https://www.law.com/nationallawjournal/2019/05/31/making-waves/>.

508 *Id.*

509 Melissa Quinn, *Trump's Chance to Remake Liberal Courts*, WASH. EXAMINER (Jan. 18, 2019), <https://www.washingtonexaminer.com/news/trumps-chance-to-remake-liberal-courts>.

on the Fifth Circuit. In March 2017, two months after Trump's inauguration, Fifth Circuit Judge Grady Jolly of Mississippi announced he would take senior status on his eightieth birthday in October.<sup>510</sup> The senators recommended District Judges Dan Jordan and Sul Ozerden to the administration; Republican Governor Bryant recommended Jack Wilson, a young attorney he had appointed to the state Court of Appeals; also said to be in contention was state Supreme Court Justice James Maxwell.<sup>511</sup> Other voices were heard recommending nonjudges who had credentials that made them seem more likely to engage in the form of analysis consistent with the preferred legal principles. A few lawyers from other states were recommended.

Each of the District Judges had in his thousands of rulings one that became the subject of criticism, though doubtless each thought he had been following the required law.<sup>512</sup> For two and a half years in this rapid confirmation environment, the vacancy has remained. In late February 2020, it was the only circuit vacancy after 51 confirmations under this President.<sup>513</sup> Even before District Judge Ozerden of Gulfport was nominated, he had been criticized by a writer for the Judicial Crisis Network who writes often and often well on judicial selection.<sup>514</sup> The cross Ozerden carried was a decision he made in *Catholic Diocese of Biloxi v. Sebelius*, a challenge to the Affordable Care Act that Ozerden dismissed as not being ripe.<sup>515</sup> Ozerden was nominated on June 24, 2019,<sup>516</sup> over two years after Judge Jolly's announcement, had a hearing in which Republican Senator Ted Cruz questioned him sharply, responded ably, had both Senator Cruz and another Republican, Josh

510 Bracey Harris & Geoff Pender, *Trump to Appoint New Judge for Miss.*, CLARION-LEDGER (Jackson, Miss.), Mar. 11, 2017, at 1A.

511 See Jimmie E. Gates, *Who Will Be Trump's First Judicial Miss. Appointment?*, CLARION-LEDGER (Jackson, Miss.), June 27, 2018, at 3A. The article lists the names. From personal knowledge, I have added which public official recommended three of the prospects.

512 Dan Jordan's case concerned whether a 2012 state statute could be applied to close the only abortion clinic in Mississippi; he needed to make several rulings through the years in the case, which generally favored the clinic. See Campbell Robertson, *Judge Prevents Closing of Mississippi's Sole Abortion Clinic*, N.Y. TIMES (Apr. 15, 2013), <https://www.nytimes.com/2013/04/16/us/ruling-prevents-closing-of-mississippis-only-abortion-clinic.html>; see, e.g., *Jackson Women's Health Org. v. Currier*, 878 F. Supp. 2d 714 (S.D. Miss. 2012), *aff'd*, 760 F.3d 448 (5th Cir. 2014), *cert. denied*, 136 S.Ct. 2536 (2016) (mem.).

513 Carrie Campbell Severino, *Judicial-Nominations Update*, NAT'L REV. (Feb. 20, 2020), <https://www.nationalreview.com/bench-memos/judicial-nominations-update-federal-judicial-nominations/>.

514 See, e.g., Carrie Campbell Severino, *Conservatives Voice Concerns Over Potential Fifth Circuit Nominee*, NAT'L REV. (Aug. 21, 2018), <https://www.nationalreview.com/bench-memos/conservatives-voice-concerns-over-potential-fifth-circuit-nominee/>.

515 See Catholic Diocese of Biloxi, Inc. v. Sebelius, No. 1:12-cv-00158, 2012 WL 6831407, at \*8 (S.D. Miss. Dec. 20, 2012). Among the published accounts identifying that opinion as key to the opposition is Marianne Levine, *Ted Cruz Questions Conservative Credentials of Trump Judicial Nominee*, POLITICO (July 17, 2019), <https://www.politico.com/story/2019/07/17/cruz-slams-trump-judicial-nominee-1418037>.

516 165 CONG. REC. S4473 (daily ed. June 24, 2019).

Hawley, announce they would vote against him, and received no Committee vote before Congress adjourned in late 2019.<sup>517</sup>

There are well-intentioned people involved in the criticisms of Judge Ozerden, and simple politics, and ambitions to substitute a different nominee even from other states, and whatever else should be added to the list. The earlier discussion here described the search for principled lawyers who know and accept the analysis required of textualists and originalists, who perhaps through writings or teaching or working on specific categories of cases have shown their immersion in such concepts. This emphasis also means that some of the more traditional credentials that once had been key, are now secondary. Sul Ozerden is a solid, respected judge, smart, quite capable of doing the work of a Fifth Circuit judge in a commendable manner. He also has the avid support of the current United States senators from his state and of the former Senate Majority Leader Trent Lott.<sup>518</sup> In the current environment, it seems such facts are not nearly as important as they once were. Even with such support, it may have taken the departure of White House Counsel Don McGahn in October 2018 and the influence of Ozerden's good friend Mick Mulvaney, who became acting White House Chief of Staff in late December 2018, finally to permit Ozerden's nomination in June 2019.<sup>519</sup> Such support could take him no further. After Ozerden's nomination lapsed at the end of the 2019 congressional session, Mulvaney may have been able to keep the prospects for renomination faintly alive. If so, such aid vanished with Mulvaney's departure in early March 2020.<sup>520</sup>

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517 165 CONG. REC. D863 (daily ed. July 17, 2019) (hearing); Burgess Everett, *Senate Judiciary Shelves Vote on Trump Judicial Pick After Conservative Opposition*, POLITICO (Sept. 26, 2019), <https://www.politico.com/story/2019/09/26/josh-hawley-judicial-nominee-1513793>; Burgess Everett et al., *Ted Cruz Will Oppose Trump's Judicial Nominee*, POLITICO (Sept. 12, 2019), <https://www.politico.com/story/2019/09/12/ted-cruz-halil-sul-ozerden-nomination-1492305>; Levine, *supra* note 515. Ozerden's nomination was returned to the President when Congress adjourned. 166 CONG. REC. S9–10 (daily ed. Jan. 3, 2020).

518 Giacomo Bologna, *Trump's Pick of Mississippi's Judge Faces GOP Opposition*, CLARION-LEDGER (Jackson, Miss.), Sept. 27, 2019, at 1A; Marianne LeVine, *Republican Senators May Sink Another Trump Judicial Nominee*, POLITICO, July 17, 2019, at 1.

519 Michael S. Schmidt & Maggie Haberman, *McGahn, Top Lawyer for President Steps Down from Post*, N.Y. TIMES, Oct. 18, 2018, at A13 (McGahn's exit); Maggie Haberman & Sheryl Gay Stolberg, *Trump Digs In, Dimming Hope of Budget Deal*, N.Y. TIMES, Dec. 31, 2018, at A1 (Mulvaney is new acting chief of staff); Eliana Johnson & Marianne Levine, *Mulvaney Pushed Judicial Nominee over Objections of White House Lawyers*, POLITICO (June 13, 2019), <https://www.politico.com/story/2019/06/13/mulvaney-halil-suleyman-fifth-circuit-1362794> (reporting that Mulvaney was a groomsman at Ozerden's wedding and allegedly had been urging McGahn to agree to Ozerden's nomination beginning in the summer of 2018).

520 Seung Min Kim & Josh Dawsey, *Rep. Meadows Chosen to Be White House Chief of Staff*, WASH. POST (Mar. 7, 2020), at A1. Even before the March 6 announcement of Mulvaney's departure, interviews for a new nominee had been scheduled. Mississippi Court of Appeals Judge Cory T. Wilson and United States Attorney Mike Hurst informed me of their March 9 and March 6 interviews at the White House. Wilson's selection for the vacancy was announced the week of March 30. Gabriel Rubin, *Washington Wire*, WALL ST. J., April 4–5,

One view of why such favorable factors did not matter overmuch in this case was given by Cato’s Ilya Shapiro, who blogged that Judge Ozerden was “a Bush-style nom[inee]—both Bushes had solid appointments, but plenty of weak ones—not a Trump-style one. Originalist and textualists can and should do better in Mississippi.”<sup>521</sup> As a Bush-style nominee surely on the weak side, I am glad not to have to face confirmation today. For current nominees, there is a risk of significant opposition absent evidence that the nominee is committed to and will apply the doctrines that are central to this understanding of the judicial role. Throughout the period of this Article, perceptions of how a judge will decide cases have been central to one party’s contesting the other’s nominees; what is new is strong intraparty opposition even after a nomination is made if the nominee seemingly lacks analytical fidelity.

Another part of the current environment is that both Senator McConnell and the administration are candid that they wish to increase the number of vacancies by having Republican-appointed judges who are eligible for senior status to go ahead and take that step. In the McConnell interview I just mentioned, Hugh Hewitt, a political analyst, law professor at Chapman University, and president of the Richard Nixon Foundation, asked whether McConnell’s motto about leaving no vacancy behind was “actually a message to judges who are eligible for senior status. If they take retirement, you’ll get their nominee confirmed before the end of this term? [McConnell]: Absolutely.”<sup>522</sup>

His interviewer had made the same point earlier in the year:

I believe these judges who are so eligible should announce their intention to take senior status—and soon. The rules have finally changed, and judges eligible for this choice thus have it in their power to guarantee that their successors will be superbly qualified.<sup>523</sup>

Ed Whelan is another significant legal analyst and commentator who, beginning in early 2019, has urged the same.<sup>524</sup>

The administration itself has apparently encouraged some judges to take senior status. Evidence of that came a few months after Don McGahn resigned as White House Counsel in October 2018;<sup>525</sup> when he told the

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2020, at A4. Interviewed earlier and apparently quite strongly considered was Mississippi Supreme Court Justice Josiah Coleman, the son of former state Court of Appeals Judge Tom Coleman and grandson of former Governor and Fifth Circuit Chief Judge J.P. Coleman. Sid Salter, *Candidate Josiah Coleman Walks in Distinguished Shadow*, MOBILE REGISTER, July 1, 2012, at A15.

521 Ilya Shapiro (@ishapiro), TWITTER (June 13, 2019, 8:42 AM).

522 Hugh Hewitt Interview, *supra* note 499.

523 Hugh Hewitt, Opinion, *A Plea to ‘Senior’ Judges*, WASH. POST (Mar. 29, 2019), <https://www.washingtonpost.com/opinions/2019/03/29/plea-senior-judges/>.

524 Ed Whelan, *Taking Senior Status—Part 1*, NAT’L REV. (Apr. 12, 2019), <https://www.nationalreview.com/bench-memos/taking-senior-status-part-1/>; Ed Whelan, *Taking Senior Status—Part 2*, NAT’L REV. (Apr. 12, 2019), <https://www.nationalreview.com/bench-memos/taking-senior-status-part-2/>.

525 Schmidt & Haberman, *supra* note 519.



Houston chapter of the Federalist Society that circuit judges should retire in order to create more vacancies.<sup>526</sup> Further, a South Texas College of Law professor, Josh Blackman, who is a widely followed commentator, has recommended retirements.<sup>527</sup> Professor Blackman wrote in advance of the possible loss of a Republican Senate majority in the 2018 midterms, which did not happen; at least partially because of the risks presented by the 2020 elections, Majority Leader McConnell has personally contacted eligible judges “to sound them out on their plans and assure them that they would have worthy successors.”<sup>528</sup> A similar report by columnist Fred Barnes in March 2020 was that Senators McConnell, Grassley, and Graham together decided to urge retirements and had themselves talked to many of the eligible judges.<sup>529</sup>

As to my personal knowledge, I will borrow from the worn-out joke about whether someone believed in infant baptism: “Believe in it? I’ve seen it.” My answer to whether I believe senior-eligible judges are in fact being urged to do the right thing and make room for the kind of exceptional judges being selected now is: Believe in it? I’ve seen it . . . or, at least, heard it. I just did not find it a sufficiently encouraging idea in my case. It was my impression that the person urging me and the individual who talked to another colleague were prompted from Washington. I did not ask, though.

The extraordinary success in getting nominations made and confirmations achieved results from several factors. Just making it a priority, which allegedly President Obama did not do in his first two years in office, makes a difference. Further, the ability of senators to stop confirmations by withholding blue slips has seen significant erosion. The Judiciary chairman for the first two years of Trump’s term, Charles Grassley of Iowa, stated on the Senate floor in November 2017 that he would “honor the blue-slip process[,] but that there are always exceptions,” particularly that they would not be honored in such a way to allow home state lawmakers “veto power over a nominee.”<sup>530</sup> Not long after Lindsey Graham of South Carolina became Judiciary Committee chairman in January 2019, he stated he would uphold blue slips for nominees to district courts, but senators’ rights to veto circuit judge

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526 The meeting occurred on March 15, 2019. *Reflections on White House Counsel Tenure*, FEDERALIST SOC’Y, <https://fedsoc.org/events/reflections-on-white-house-counsel-tenure> (last visited Apr. 14, 2020). After talking to several attendees who agreed that some comment like that was made, I contacted Mr. McGahn. He confirmed mentioning his personal view that many who are senior-eligible should exercise that option. McGahn also wrote me, though, that he would be happy to see certain judges serve forever. Email from Don McGahn to author (Mar. 10, 2020). I should have asked for names.

527 Josh Blackman, *A Better Way to Give Trump More Judgeships to Fill*, NAT’L REV. (Dec. 18, 2017), <https://www.nationalreview.com/2017/12/trump-courts-republican-appointed-judges-should-take-senior-status/>.

528 Carl Hulse, *McConnell’s Pitch to Veteran Judges: Please Quit*, N.Y. TIMES, Mar. 17, 2020, at A1.

529 Fred Barnes, *The GOP’s Senior Strategy*, WASH. EXAMINER, Mar. 17, 2020, at 55.

530 Carl Tobias, *Senate Blue Slips and Senate Regular Order*, 37 YALE L. & POL’Y REV. INTER ALIA 1, 19 (2018) (alteration in original) (quoting 163 CONG. REC. S7285 (daily ed. Nov. 16, 2017)).

nominees would be curtailed; he would try “to forge agreements between senators and the White House as often as possible” but would allow votes if agreement failed.<sup>531</sup> The Senate majority’s willingness to override home-state senators’ objections is particularly important in solidly Democratic states. For example, judicial vacancies in some states of the Ninth Circuit would be impossible to fill with strong conservatives if blue-slip vetoes were invariably upheld. An example of the willingness to ignore home-state senators occurred in May 2019, when Californian Kenneth Lee was confirmed to the Ninth Circuit even though neither of his home-state senators returned her blue slip; Lee was said to be the fifth appeals court judge confirmed without home-state senator approval.<sup>532</sup> According to at least one report, the first in history was the confirmation in March 2019 of Eric Miller of Washington to the Ninth Circuit.<sup>533</sup> Regardless of whether that was the first, it has not been the last.

Something else powerfully important to Republican success has been the elimination of the filibuster as an effective option. The Democrats took the step of employing the nuclear option, which may not have actually infuriated Republicans all that much in 2013 when it happened. Though it hurt Republicans’ interests at the time, the more foresighted, or the more experienced, senators realized it would likely help their cause after the next shift in political fortunes. Thus, the Republicans can move their confirmation train by means of simple majority rule, and that is exactly what they have engineered.

Speeding things further was a less radioactive change Republicans made in April 2019.<sup>534</sup> Not affected by the Democrats’ elimination of the supermajority for cloture was that after debate is cut off, senators are entitled to thirty hours of debate. The 2019 rule change reduced that to two hours for all district court nominees but left it in place for circuit nominees, a change that replicated a temporary shortening for district judges that Democrats forced over Republican opposition in 2013.<sup>535</sup>

A troubling development in recent years is that a nominee’s religious views are becoming the focal point of opposition. I mentioned in my discussion of Bill Pryor’s confirmation that his acceptance of Roman Catholic teachings on abortion was one way in which his suitability for a judgeship was questioned. As Ed Whelan of the Ethics and Public Policy Center put it to me in our recent conversation, it is fair to examine nominees for whether any commitments they have, faith-based or some ideological fervor, will affect

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531 Alex Swoyer & Stephen Dinan, *Lindsey Graham Says ‘Blue Slips’ Won’t Derail Trump Appeals Court Picks*, WASH. TIMES (Feb. 7, 2019), <https://www.washingtontimes.com/news/2019/feb/7/lindsey-graham-blue-slips-wont-derail-trump-picks/>.

532 Jordain Carney, *Senate Confirms Controversial 9th Circuit Pick Without Blue Slips*, HILL, (May 5, 2019), <https://thehill.com/blogs/floor-action/senate/443910-senate-confirms-controversial-ninth-circuit-pick-without-blue-slips>.

533 Gary Martin, *Senate GOP Breaks Century-Old Tradition for Circuit Court Nominees*, LAS VEGAS REV.-J., Mar. 4, 2019, at A1.

534 Carl Hulse, *A ‘Nuclear’ Tit for Tat with No End in Sight*, N.Y. TIMES, Apr. 5, 2019, at A14.

535 *Id.* For the 2013 temporary change, see *supra* note 456 and accompanying text.

their legal reasoning. When those questioning nominees sharply on religious faith do not similarly question those with obvious ideological beliefs that are potentially also quite powerful, Whelan suggested it can appear that Christian faith is being singled out as particularly disqualifying. Maybe that is because God will seem harder to deny than lesser forces.

At least two nominees of the current administration drew quite focused questions about their religious faith. One was Brian Buescher, nominated to be a district judge in Nebraska. His active participation in the Catholic layman's group, the Knights of Columbus, was the subject of intense questioning by two Judiciary Committee members, Kamala Harris and Mazie Hirono, at his November 2018 hearing. The Knights of Columbus allegedly took "extreme positions," specifically, the group accepted the teachings of the Catholic Church on abortion and same-sex marriage.<sup>536</sup> The senators rhetorically asked whether the nominee, if confirmed, would resign from the extremist group. The senators placing their criticisms on one group in the church may have been intended to avoid acknowledging that the same argument would apply to being a faithful Catholic at all.

At an earlier Judiciary Committee hearing held in September 2017, Senator Dianne Feinstein had some exchanges with a Seventh Circuit nominee, then-Professor Amy Coney Barrett of Notre Dame Law School. Senator Feinstein stated that "when you read your speeches, the conclusion one draws is that the dogma lives loudly within you, and that's of concern when you come to big issues that large numbers of people have fought for years in this country."<sup>537</sup> I need immediately to add that I urge my family to think of this senator as Saint Dianne. In my difficult confirmation battle in 2007, she was the only and the indispensable Democrat to vote for me in Committee, thus surprising almost everyone that I would survive to battle again in the full Senate. As to the Senator's just-quoted statement, my shame as a Catholic is that I am not guilty of the same charge. With my sense of Senator Feinstein's good heart, I take her question to be less disparaging of that faith than it might sound. Her issue could be whether as a judge, Barrett would allow the law to control when it clashed with her beliefs. It is a fair question to all people of faith, though the question does need to be asked respectfully. Because of my admiration for and debt to Senator Feinstein, I accept that despite the phrasing of her statement, she would not mean any disrespect for religion.

My last example of a nominee's faith being of consequence at a Judiciary Committee hearing involves no public challenge from a senator. Instead, it portrays the inner peace that faith provided a nominee. My new colleague Kyle Duncan recently described to me his careful preparation for his hearing. Before it was to begin at 10:00 a.m., he attended Mass at the Catholic

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536 Alexandra DeSanctis, *Senate Confirms Buescher as District Judge, Despite Democratic Objections to Knights of Columbus Membership*, NAT'L REV. (July 24, 2019), <https://www.nationalreview.com/corner/senate-confirms-buescher-as-district-judge-despite-democratic-objections-to-knights-of-columbus-membership/>.

537 Editorial, *Democrats and Dogma*, WALL ST. J., Sept. 8, 2017, at A16.

Church on Capitol Hill. He had notes in his pocket he would study one more time after church. The readings for that day included verses encouraging the faithful not to be anxious for words when interrogated: “[M]ake up your mind not to worry beforehand how you will defend yourselves. For I will give you words and wisdom that none of your adversaries will be able to resist or contradict.”<sup>538</sup> When he left church and walked towards the Senate office building for his hearing, he threw his notes away. That depth of faith is rare.

In any discussion of the impact on judging of a commitment to faith, particularly that drawn from the Roman Catholic Church, the late Antonin Scalia surely comes to mind. Few people in public office so well modeled muscular Christianity. After Scalia’s death, one of his sons, Christopher J. Scalia, along with Ed Whelan, collected speeches and other writings by Justice Scalia in their book entitled *On Faith: Lessons from an American Believer*. The first entry in the book is a speech Scalia gave several times, and I heard one of the iterations in Jackson, Mississippi, in 1996. His subject was Christian as cretin, a play on words about how the modern world can consider the devout to be feeble-minded.<sup>539</sup> One of the most moving parts of the book is a discussion by a former law clerk, Patrick Schiltz, of how this amazingly intelligent man, marvelous stylist in his writings, engaging conversationalist, embraced the basic tents of his Catholicism.<sup>540</sup> Among those beliefs is that the bread and wine of Communion are literally transformed into the body and blood of Christ. This law clerk, seeing the Justice’s actions at Mass, “head bowed, eyes closed, hands tightly clasped,” then his intensity when the priest says the words at the occasion of the transubstantiation, had no doubt of Scalia’s fervor for his faith.<sup>541</sup> If so faithful a man can serve so splendidly as a judge, then it can be done.

A chapter in Scalia and Whelan’s book contains a speech by the Justice on the ways in which belief should affect a vocation.<sup>542</sup> Among his points was that whatever the vocation, we are called to perform our duties “*honestly and perfectly*.”<sup>543</sup> The perfection to which we strive in a judicial vocation is to apply legal principles, not religious ones. Not all governmental actions inconsistent with Christian policy preferences are unconstitutional or illegal, and not all actions supportive of faith are constitutionally or legally mandated.<sup>544</sup> If one of a judge’s deeply held beliefs is inconsistent with law as the judge understands it, it is for the judge to follow the law as perfectly as possi-

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538 *Luke* 21:14–15 (NIV).

539 Antonin Scalia, *Not to the Wise—The Christian as Cretin*, in *ON FAITH: LESSONS FROM AN AMERICAN BELIEVER* 13 (Christopher J. Scalia & Edward Whelan eds., 2019).

540 Patrick J. Schiltz, *Really Present*, in *ON FAITH: LESSONS FROM AN AMERICAN BELIEVER*, *supra* note 539, at 85, 85–87.

541 *Id.* at 86.

542 Antonin Scalia, *Faith and Work—How Belief Affects Vocation*, in *ON FAITH: LESSONS FROM AN AMERICAN BELIEVER*, *supra* note 539, at 75.

543 *Id.* at 81.

544 *Id.* at 79.

ble despite the conflict.<sup>545</sup> The alternatives to me (not part of the Justice's speech), are recusal or resignation, not interpreting the law imperfectly.

To close my discussion of what has occurred so far in the Trump presidency will be a brief review of the new Fifth Circuit judges. As a sign of the increasingly contentious nature of circuit nominations, all my colleagues required roll-call votes first on cloture and then for confirmation; on confirmation, two received no Democratic votes, a third received one, another received three, and only a district judge being considered for elevation received a landslide with thirteen.<sup>546</sup> First was Texas Supreme Court Justice Don Willett, whose broader fame likely flowed from his humorous, insightful, and frequent use of Twitter that caused the Texas House of Representatives to name him the "Tweeter Laureate,"<sup>547</sup> but the reason for his selection for the Fifth Circuit was the quality of his judicial work. Next was Jim Ho, another Texan, who was a highly respected appellate litigator who had appeared frequently in the Fifth Circuit and also at the Supreme Court. For a Louisiana seat, something of an impasse existed between at least one of the state's senators and the administration over the selection.<sup>548</sup> The impasse was broken by the graciousness of Joy Clement's taking senior status and creating a second vacancy. That allowed Kurt Engelhardt, who had served as a district judge since 2001, and Kyle Duncan both to be nominated.<sup>549</sup> Kyle had been a litigator in the Texas and Louisiana attorneys general offices and for the Beckett Fund for Religious Liberty, and also a law professor at Ole Miss, thus having significant legal experience in all three states of the Circuit. Finally, Andy Oldham, an experienced appellate lawyer who was then serving as general counsel to Texas Governor Greg Abbott, was named.<sup>550</sup> Able and congenial colleagues, all.

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545 *Id.* at 83–84.

546 Don Willett and Andy Oldham received no Democratic votes. Kyle Duncan had one Democrat vote in favor; Jim Ho had three. Kurt Engelhardt's admired service for seventeen years as a district judge may have allowed him to get thirteen Democratic votes. The votes and partisan identification can be found by date at *Roll Call Tables*, U.S. SENATE, [https://www.senate.gov/legislative/common/generic/roll\\_call\\_lists.htm](https://www.senate.gov/legislative/common/generic/roll_call_lists.htm) (last visited Apr. 14, 2020). Judges Willett and Ho were confirmed on December 13 and 14, 2017, respectively. Judges Duncan, Engelhardt, and Oldham were confirmed, respectively, on April 24, May 9, and July 18, 2018.

547 Chuck Lindell, *Trump Eyes Willett for Scalia Successor*, AUSTIN AM.-STATESMAN, May 19, 2016, at A1; Jonathan H. Adler, *Four for the 5th Circuit (and Other New Judicial Nominations)*, WASH. POST. (Sept. 28, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/09/28/four-for-the-5th-circuit-and-other-new-judicial-nominations/>.

548 See Bryn Stole, *Federal Fifth Circuit Nominee from Louisiana to Get Hearing, Despite Lack of Endorsement from Sen. John Kennedy*, ADVOCATE (Nov. 16, 2017), [https://www.theadvocate.com/baton\\_rouge/news/politics/article\\_402f06cc-cb1d-11e7-b626-672aa4e29e69.html](https://www.theadvocate.com/baton_rouge/news/politics/article_402f06cc-cb1d-11e7-b626-672aa4e29e69.html).

549 Drew Broach, *Meet the Newest Judge Nominees for New Orleans Federal Courts*, TIMES-PICAYUNE (Sept. 29, 2017), [https://www.nola.com/nation\\_world/article\\_d8e4631f-1c69-5d19-9e3d-0626f91db93d.html](https://www.nola.com/nation_world/article_d8e4631f-1c69-5d19-9e3d-0626f91db93d.html).

550 Alyson Ward, *Another Texan Tapped for 5th Circuit Court*, HOUS. CHRON., Feb. 13, 2018, at A12.

## CONCLUSION

Much has happened in thirty years. A summary follows.

### A. *Blue Slips*

Throughout these years, the Senate for all of its political rancor has retained enough of its traditions that it still honors, most of the time, a home-state senator's objections to a federal judge who would be appointed to serve in that state. There is no absolute veto on circuit judges, though there seems largely to be on district judges. Still, to return to my earlier example of the Ninth Circuit, the fact that a large number of those circuit judges will reside in California makes it imperative in light of this administration's goals to reshape the courts that California senators' objections sometimes be overridden, and that has happened.

### B. *Senate Rules*

The rules applicable to processing nominations have been revised several times in the period of this study. Filibusters against judicial nominees were so rare until 2003 as almost to be unthinkable. Two years later, use of the next procedural device was so unthinkable as to acquire the label of the "nuclear option." Though enough senators from each party in 2005 pulled their colleagues back from pushing the nuclear button, by 2013 Democrats were learning to love the bomb. Republicans are happy now too and have set off some smaller nuclear devices of their own.

### C. *Traditions Abandoned*

One the traditions intended to avoid gridlock is the waiver of cumbersome rules by unanimous consent. Democrats have under Trump, though, required a high percentage of roll-call votes both for cloture and for the actual confirmation. What in past decades has been almost immediate voting of a nominee out of Committee following a hearing, then at times receiving group voice votes with other nominees on the floor, has become a much more laborious process. Republicans demanded roll-call votes under Obama, also to delay. The longer each confirmation takes, the fewer confirmations there will be. Finally, for a circuit court nominee to receive no votes from across the aisle has become quite common.

### D. *Issues Raised*

What criticisms will be lodged against a nominee, what questions the person will be asked in a Senate hearing or as follow-ups, change as the most salient political issues of the day also change. Just to take an example from earlier than my survey, I would imagine judicial nominees did not use to get asked about abortion. Since *Roe v. Wade*, though, such questions are frequent. Nominees were being challenged on their views on civil rights as long ago as when President Hoover's nomination of Fourth Circuit Judge John

Parker to the Supreme Court was derailed. Still, it would be many more decades until a nominee's position on civil rights would be a significant factor for either party.

As to religion as an issue for close scrutiny, it is legitimate to examine whether a potential judge would be unwilling to follow controlling law because of personal beliefs counter to that law. A superseding commitment to an ideology, to certain litigants, or to religious faith may validly be explored insofar as it alters legal reasoning. There is a difference, though, between exploring whether life-affecting religious beliefs that do not conform to the modern world will alter legal reasoning of a judge and disparaging those beliefs as extreme.

#### *E. Diversity of Identity*

In addition to ideology, some presidents have been keenly interested in diversity of identity. Already mentioned is how Jimmy Carter was the first president to have made that kind of diversity a key component in selection. Later Democratic Presidents have done more of that, but Republicans have been much less focused on the issue. The current administration has shown little interest in identity selections.

#### *F. Outside Groups*

There are many groups, and I have not sought to discuss any but the most vocal and well known. A sampling of significant ones includes the Alliance for Justice, People for the American Way, American Constitution Society, and the NAACP who work closely with Democrats, and the Federalist Society, Heritage Foundation, Judicial Crisis Network, and Committee for Justice with Republicans. These and other groups are not all involved in the same way in the process, but they have an impact. The Federalist Society's significance in the current administration, though, is unique.

The American Bar Association's privileged status as an evaluator of potential nominees has been the subject of much controversy. Republicans at times have tried to alter the ABA's ability to screen individuals before nomination, but the evaluations still get done. Relatedly, a recent proposed ethics opinion by the United States Judicial Conference, which has oversight authority for the courts, concludes that both the conservative Federalist Society and its liberal counterpart, the American Constitution Society, are sufficiently involved in advocacy efforts to affect public policy that federal judges should not be members of either.<sup>551</sup> That same proposal distinguishes the ABA and says judges properly can become members. Reaction to the proposal has been strong, in which defenders of the Federalist Society argue that it is not involved in public advocacy nor does it file amicus briefs, but instead its

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551 Editorial, *Judicial Political Mischief*, WALL ST. J., Jan. 22, 2020, at A16.

focus is on education, including debates in which liberals and conservative share the platform.<sup>552</sup>

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This laborious trek through the nomination and confirmation terrain, peaks and valleys, cool, comforting lakes, and, at times, some hot desert, has been personal at times. The review has caused me to relive some of my own travails and again to sympathize for the even worse travails of friends and acquaintances. Nonetheless, as I wrote in the conclusion to my book, *The Nominee*, and as I expect many nominees feel, we learn from painful experiences. My sense was that I was refined in the fire of the controversies that engulfed me. I had the benefit of success to avoid anger or bitterness. All who are involved as target, attacker, defender, or impartial observer might usefully contemplate that what we see depends on where we stand, that fairness is a subjective concept that is affected by all in our past that has got us to our present.

The truth of Aleksandr Solzhenitsyn's words in *The Gulag Archipelago* are to me a comfort and a goad, that "the line separating good and evil passes not through states, . . . nor between political parties either—but right through every human heart—and through all human hearts."<sup>553</sup> That being true, at least minor humility by all involved in the confirmation contests would be justified.

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552 *Id.*

553 2 ALEKSANDR SOLZHENITSYN, *THE GULAG ARCHIPELAGO* 615 (Thomas P. Whitney trans., Harper & Row 1973).



