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E. Stewart Moritz

University of Akron, moritzes@uakron.edu

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“Statistical Judo”: The Rhetoric of Senate Inaction in the Judicial Appointment Process

*E. Stewart Moritz**

“I don't want to take this time to engage in statistical judo on judicial nominees.”¹

-Senator Orrin Hatch (R-UT)

“We can prove anything with statistics. They can prove anything with statistics; we can prove anything with statistics.”²

-Senator Harry Reid (D-NV)

“Republicans and Democrats can't give you the facts.”³

-Uncle Tupelo

I. INTRODUCTION

Until relatively recently, most legal scholarship on the judicial confirmation process, and indeed most public interest in the subject, has centered on highly public partisan fights over Supreme Court nominations.⁴ There has been plenty to consider on that score, back to the earliest days of the Republic. Famously, George Washington's 1795 nomination of John Rutledge to replace John Jay as Chief Justice was scuttled by partisan politics, despite Rutledge's confirmation for an initial

* Associate Professor, University of Akron School of Law. B.A., Yale; J.D., Vanderbilt. I thank Sarah Cravens, Brant Lee, Molly O'Brien, Elizabeth Reilly, and Tracy Thomas for insightful comments that improved the text and for encouragement that inspired it to be finished. Sincere thanks also to Stephen Burbank, Michael Gerhardt, and Elliot Slotnick for comments on a draft of this piece. Finally, thanks to Maura O'Shea for pretty much everything.

¹ 148 CONG. REC. S121 (daily ed. Jan. 25, 2002) (statement of Sen. Hatch). *See also* 147 CONG. REC. S13116 (daily ed. Dec. 13, 2001) (statement of Sen. Hatch) (“As everyone here knows, I do not like to engage in the typical statistics judo that seems to be intrinsic to this issue.”).

² 147 CONG. REC. S10673 (daily ed. Oct. 15, 2001) (statement of Sen. Reid).

³ UNCLE TUPELO, *We've Been Had, on ANODYNE* (Sire Records 1993). *See also* Noelle Straub, *Judicial Gridlock in Senate: Same Story, Different Setting*, THE HILL, Feb. 27, 2002, at 1 (“With rising concern over the vacancy rate, both Leahy and Hatch, now the ranking members, cite different statistics to bolster their argument that they treated judicial nominees fairly.”).

⁴ *See* SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN I* (Yale 1997) (“The selection of a Supreme Court justice is front-page news But throughout American history we find little such national attention given to the selection of lower federal court judges.”); *cf. id.* at 308-09 (citing mid-1980's nominations of Jefferson B. Sessions III to a district judgeship and Daniel A. Manion to the Seventh Circuit as “the first instance of a major national media campaign to defeat lower-court nominations”).

seat as Associate Justice on the Supreme Court four years earlier.⁵ During the 1800s, fights over Supreme Court nominees were common, and twenty-five of 108 Court nominees were not confirmed.⁶ In 1969 and 1970, two successive nominees to the Court by President Nixon, Clement Haynsworth, Jr. and G. Harrold Carswell, were rejected after highly publicized hearings.⁷ More recently, President Reagan's nomination of Robert Bork and President George H.W. Bush's ("Bush I's") nomination of Justice Clarence Thomas have garnered enormous scholarly and public interest.⁸ In perhaps the starkest example yet of partisan attention paid to Supreme Court nominations, interest groups spent nearly \$2.5 million dollars on television advertising in the latest "campaign" for the confirmation of Samuel Alito to the Court.⁹

However, the confirmation process for the lower courts, and especially the issue of Senate delay in confirming lower-court judges, was not discussed much in the academy or the mainstream media until relatively recently.¹⁰ Significant interest in confirmation delay only arose in the last two years of the Bush I presidency, in 1991 and 1992, when Democrats had control of the Senate, and again in the period following the 1994 elections, when Republicans took back the Senate and moved to block

⁵ See Calvin R. Massey, *Getting There: A Brief History of the Politics of Supreme Court Appointments*, 19 HASTINGS CONST. L.Q. 1, 5 (1991); David A. Strauss & Cass R. Sunstein, *The Senate, The Constitution, and The Confirmation Process*, 101 YALE L.J. 1491, 1500-01 (1992) (discussing the rejection of Rutledge and other Supreme Court nominees due to political considerations). See generally MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS* (2000); Paul A. Freund, *Appointment Of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146 (1988) (examining the historical role of politics in the Supreme Court confirmation process).

⁶ Freund, *supra* note 5, at 1147.

⁷ *Id.* at 1155-56.

⁸ See, e.g., Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164 (1988); Michael J. Gerhardt, *Divided Justice: A Commentary On The Nomination And Confirmation Of Justice Thomas*, 60 GEO. WASH. L. REV. 969 (1992); Calvin R. Massey, *supra* note 5; Glenn Harlan Reynolds, *Taking Advice Seriously: An Immodest Proposal For Reforming The Confirmation Process*, 65 S. CAL. L. REV. 1577 (1992).

⁹ Press Release, Brennan Center for Justice, TV Advertising Data Reveals Group Adopting Different Strategies in Alito Confirmation Battle (Jan. 26, 2006), available at http://www.brennancenter.org/press_detail.asp?key=100&subkey=34246.

¹⁰ See Stephen B. Burbank, *Politics, Privilege & Power: The Senate's Role in the Appointment of Federal Judges*, 86 JUDICATURE 24, 25 (2002) ("[W]hen the Senate considers a nomination to the Supreme Court, it is engaged in an act of obvious national importance, attracting substantial public interest, and its members therefore must be careful at least to seem to act responsibly. Appointments to the lower federal courts have not, for most of our history, engaged remotely similar public interest."); Elliot E. Slotnick, *A Historical Perspective on Federal Judicial Selection*, 86 JUDICATURE 13, 13 (2002) ("Federal judicial selection, at least for the lower courts, has been a relatively invisible focal point for public interest until recent years.").

certain of President Clinton's lower-court judicial nominations.¹¹ Even then, confirmation delays in the Bush I era were seen at the time as at least as much of an executive branch as a Senate problem.¹² And "common knowledge" traced the Republican actions during the Clinton period to the failed Bork nomination and the difficult Clarence Thomas confirmation.¹³ In other words, Republican "inaction" was often seen as retribution for previous actions, rather than as a separate political strategy of the Senate.¹⁴

Still, deliberate Senate delay was a growing background issue among scholars beginning in the early 1990s, and eventually the issue of inaction

¹¹ Pre-1994 commentary specifically addressing the issue of delay seems naïve in today's atmosphere of scorched-earth partisan politics:

Moreover, while the executive branch has as much time as it needs to study a person before appointing her, the Senate has little time to act: once the President has nominated someone to fill a vacancy, the Senate cannot delay its decision for long without appearing irresponsible. Even if the Senate did mobilize its resources, study the nominee, and decide to reject her, it would have to repeat the process all over again with another nominee who was known to the Administration but not to the Senators. In theory, the Senate could establish a duplicate bureaucracy and investigate each nominee to the lower courts as thoroughly as it wished. But the expense, and the political costs of the delay, would be prohibitive.

Strauss & Sunstein, *supra* note 5, at 1508.

¹² An interesting 1989 article by Professor Daniel J. Meador examined delay in the confirmation of federal judges, but focused more on delays in the executive branch nomination process: "Although [from 1979 to 1988 there were] some egregious delays by the Senate, the major delays lie at the pre-nomination stage and have to be laid at the door of the executive authorities." Daniel J. Meador, *Unacceptable Delays in Judicial Appointments*, 6 J.L. & POL. 7-9 (1989). See also Kim Dayton, *Judicial Vacancies and Delay in the Federal Courts: An Empirical Evaluation*, 67 ST. JOHN'S L. REV. 757, 766 n.48 (1993) ("The [Administrative Office of the U.S. Court]'s statistics suggest that, at least in the past decade, most of the time lapse between the occurrence of a vacancy and the confirmation of a new district judge is attributable to the executive branch although the congressional share has increased in the last couple of years."); Editorial, *Delay in Filling Federal Judicial Vacancies*, 74 JUDICATURE 64, 64 (1990) (overlooking intentional delays by the Senate, and instead concluding that "it appears that selection priorities of and criteria used within the DOJ, the Senate and the White House contribute most to prolonging the process").

¹³ See Brannon P. Denning, *Reforming the New Confirmation Process: Replacing "Despise and Resent" With "Advice and Consent"*, 53 ADMIN. L. REV. 1, 11 (2001). See also GERHARDT, *supra* note 5, at 77, 355 n.83 (collecting sources); Peter Grier, *Why Senate Roughs Up Some Cabinet Nominees*, CHRISTIAN SCI. MONITOR, Mar. 19, 1997, at 3 ("Republicans date the coarsening of the confirmation process to Reagan-era nominee Robert Bork, whose chance to sit on the Supreme Court was defeated by a Democratic-controlled Senate in 1987."); Walter Shapiro, *Happy Days Are Here Again, But Not For Liberal Judges*, USA TODAY, May 16, 1997, at 2A ("Gone are the traditions of bipartisan comity in a GOP Senate that still seems bent on exacting vengeance for the rejection of Robert Bork's nomination to the Supreme Court a decade ago.").

¹⁴ Helen Dewar, *Polarized Politics, Confirmation Chaos; Retribution Appears Evident in Nominations Since the Late 1980s*, WASH. POST, May 11, 2003, at A5 ("Republicans believed Democrats had mistreated Supreme Court nominees Robert H. Bork, who was rejected by the Senate in 1987, and Clarence Thomas, who was narrowly confirmed in 1991, both after bitter fights. So they zeroed in on Clinton's nominees.").

in the confirmation process moved to the forefront of public debate. Commentary on the subject began to pick up in the mid-1990s, and this has led to some thoughtful articles on the constitutional obligations of the Senate and Executive.¹⁵ Delay in the confirmation process was a frequent complaint of liberal commentators and senators during the last six years of the Clinton presidency.¹⁶ The issue was quiet during the first months following the election of George W. Bush (“Bush II”) in 2000, largely because the president enjoyed Republican control of the Senate.¹⁷ Senator James Jeffords’s switch from Republican to Independent in May 2001, however, put Democrats in charge of the upper house. Complaints of

¹⁵ See generally GERHARDT, *supra* note 5; GOLDMAN, *supra* note 4; G. Calvin MacKenzie, *The Presidential Appointment Process: Historical Development, Contemporary Operations, Current Issues*, in OBSTACLE COURSE: THE REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON THE PRESIDENTIAL APPOINTMENT PROCESS (1996); G. CALVIN MACKENZIE, *STARTING OVER: THE PRESIDENTIAL APPOINTMENT PROCESS IN 1997* (1998); Sarah A. Binder & Forrest Maltzman, *The Limits of Senatorial Courtesy*, 29 LEGIS. STUD. Q. 1 (2004); Stephen B. Burbank, *Politics, Privilege & Power: The Senate’s Role in the Appointment of Federal Judges*, 86 JUDICATURE 24 (2002); Brannon P. Denning, *The “Blue Slip”: Enforcing the Norms of the Judicial Confirmation Process*, 10 WM. & MARY BILL RTS. J. 75 (2001); Brannon P. Denning, *The Judicial Confirmation Process and the Blue Slip*, 85 JUDICATURE 218 (2002); Denning, *supra* note 13; Michael J. Gerhardt, *Norm Theory and the Future of the Federal Appointments Process*, 50 DUKE L.J. 1687 (2001); Michael J. Gerhardt, *Putting Presidential Performance in the Federal Appointments Process in Perspective*, 47 CASE W. RES. L. REV. 1359 (1997); Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 HARV. J.L. & PUB. POL’Y 467 (1998); Sheldon Goldman, *Assessing the Senate Judicial Confirmation Process: The Index of Obstruction and Delay*, 86 JUDICATURE 251 (2003); Sheldon Goldman & Elliot Slotnick, *Clinton’s First Term Judiciary: Many Bridges to Cross*, 80 JUDICATURE 254 (1997); Sheldon Goldman, Elliot Slotnick, Gerard Gryski & Gary Zuk, *Clinton’s Judges: Summing Up the Legacy*, 84 JUDICATURE 228 (2001); Sheldon Goldman & Elliot Slotnick, *Clinton’s Second Term Judiciary: Picking Judges Under Fire*, 82 JUDICATURE 265 (1999); Sheldon Goldman, *Unpicking Pickering in 2002: Some Thoughts on the Politics of Lower Federal Court Selection and Confirmation*, 36 U.C. DAVIS L. REV. 695 (2003) [hereinafter Goldman, *Unpicking*]; William G. Ross, *The Questioning of Lower Federal Court Nominees During the Senate Confirmation Process*, 10 WM. & MARY BILL RTS. J. 119 (2001); Elliot E. Slotnick, *Federal Judicial Selection in the New Millennium*, 36 U.C. DAVIS L. REV. 587 (2003); Elliot E. Slotnick, *A Historical Perspective on Federal Judicial Selection*, 86 JUDICATURE 13 (2002); Carl Tobias, *Filling the Federal Courts in an Election Year*, 49 SMU L. REV. 309 (1996). Cf. Bob Dylan, *The Times They Are a Changin’*, on THE TIMES THEY ARE A CHANGIN’ (Columbia 1964) (“Come Senators, Congressmen, please heed the call. Don’t stand in the doorway, don’t block up the hall. For he that gets hurt will be he who has stalled—there’s a battle outside and it’s ragin’. It’ll soon shake your windows and rattle your walls, for the times, they are a changin’.”).

¹⁶ See, e.g., Brian Blomquist, *Senate’s Adjournment Leaves Judgeship Nominees in Limbo: Democrats Decry “Miserable Record,”* WASH. TIMES, Oct. 5, 1996, at A3.

¹⁷ The Senate was actually split fifty-fifty, with Republicans chairing committees to reflect the Vice President’s ability to break a tie on any Senate vote. U.S. CONST. art. I, § 3 (“The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.”). See *infra* notes 95-97 and accompanying text. Moreover, given the timing of judicial nominations and confirmation hearings, there is no cause for complaint about Senatorial delay at the start of a new presidential administration, as the first nominations are usually not sent to the Senate until July or August. See *infra* notes 108-110 and accompanying text.

delay surfaced nearly immediately, and continued intermittently for the next year and a half.¹⁸

This article first briefly summarizes the issues that arise in the lower-court judicial confirmation process, and examines how the issues differ from those that arise during the confirmation of Supreme Court justices. The article considers constitutionally-based differences as well as practical differences in Senate and Executive behavior that have developed during more than two centuries of judicial confirmations.

The body of this article offers a chronological history and critique of the rhetoric of both Republican and Democratic senators in discussing lower-court confirmations during the 107th Congress. For reasons discussed below, this congressional session, spanning the years 2001 to 2002, was a particularly interesting one for examining the lower-court nominations process.¹⁹ Much the rhetoric of the 107th Congress relies upon comparisons of then-current nomination success rates to earlier judicial confirmation rates from the Carter, Reagan, Bush I, and Clinton presidencies. Thus, by carefully analyzing the claims of senators concerning judicial appointments during the first Congressional term of Bush II's presidency, the article is able to survey more than twenty years of Senate behavior with respect to lower-court confirmations. In doing so, the article identifies a number of "confirmation process fallacies" that senators have repeatedly relied upon in their efforts to score political points on confirmation issues. It also explains some "confirmation process relevancies"²⁰ in hopes that future debates can be grounded in important considerations rather than trivial and irrelevant ones. Because the lower-

¹⁸ See discussion *infra* note 105 and accompanying text. Following the mid-term elections of 2002, when Republicans narrowly regained control of the Senate, the controversy surrounding lower-court appointments reached perhaps its highest level of national prominence. The Bush II administration made a concerted effort to raise the issue, and there was discussion in the Senate and in the mainstream press about the propriety of "judicial filibusters" and about constitutional options for changing the confirmation process. See, e.g., 148 CONG. REC. S7461 (daily ed. July 29, 2002) (statement of Sen. Specter) ("I have proposed a protocol which would establish a timetable: So many days after a nominee is submitted by the President there ought to be a Judiciary Committee hearing. So many days later there ought to be action by the Judiciary Committee, voted up or down; and, if voted up, so many days later there ought to be floor consideration for confirmation by the entire Senate-with that not being an ironclad schedule."); Brennan Center, *supra* note 9 (citing \$3.3 million in television advertisement spending on "Nuclear Option"). The post-2002 period of controversy is beyond the scope of this article.

¹⁹ See discussion *infra* § III.

²⁰ See Samuel Langhorne Clemens ("Mark Twain"), N. AM. REV., July 10, 1895 ("Conversations consisted mainly of irrelevancies, with here and there a relevancy, a relevancy with an embarrassed look, as not being able to explain how it got there.") (quoted in Oxford English Dictionary Online at http://dictionary.oed.com/cgi/entry/50201986?single=1&query_type=word&queryword=relevancy&first=1&max_to_show=10).

court “confirmation mess”²¹ is sure to return to prominence in the Democrat-controlled Senate that will be constituted in early 2007, and following the 2008 presidential elections and beyond, the author hopes that the article will help establish a baseline for arguments about delays in the confirmation process, particularly when the White House and Senate are held by different political parties.

Finally, the article offers some brief thoughts on which procedural aspects of the current judicial confirmation process likely contribute most to the problem of delay, and whether anything can, or even should, be done to modify those procedures.

II. THE LOWER-COURT CONFIRMATION PROCESS

A. Differences Between the Confirmation of Supreme Court Justices and Lower-Court Judges

The differences between Supreme Court and lower-court confirmations begin with the language of the Constitution. First, lower federal courts may not need to exist at all, since the Constitution only provides for “such inferior Courts as the Congress may from time to time ordain and establish.”²² The history of the United States Circuit Courts provides an illustration of this point. With the passage of the first Judiciary Act in 1789, Congress created thirteen United States District Courts judgeships, along with a six-justice United States Supreme Court,²³ but Congress did not then provide for the appointment of separate Circuit Court judges. Instead, each of three geographically-based circuits was staffed with two “circuit riding” justices of the Supreme Court and a local District Court judge. While the number of District Court judges was gradually increased during the following decade, the first separate United States Circuit Court judgeships, eighteen in number, were not created until 1801.²⁴ And those circuit court positions, established by an outgoing Federalist majority in Congress in an attempt to strengthen the centralized federal government, were abolished the following year by a new Jeffersonian-Republican

²¹ See Stephen Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185 (1988).

²² See U.S. CONST. art III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”). Of course, much has been written about whether Congress could eliminate all federal lower-court jurisdiction, but that argument is well beyond the scope here.

²³ 1 Stat. 73 (Sept. 24, 1789).

²⁴ Judiciary Act of 1801, 2 Stat. 89 (Feb. 13, 1801). President John Adams’ appointments during the waning days of his administration of “midnight judges” to fill the new positions created by the Judiciary Act of 1801 led to the *Marbury v. Madison* litigation, 5 U.S. (1 Cranch) 137 (1803).

majority in Congress.²⁵ No other circuit court judgeship existed until 1855, when the single-judge Circuit Court of California was created,²⁶ and that court was also subsequently abolished, in 1863.²⁷ The country remained without separate circuit court judgeships until 1869, when judges were appointed for each of the nine then-existing federal circuits.²⁸ In 1891, those circuits were replaced by nine new “United States Circuit Courts of Appeals,”²⁹ later renamed the United States Courts of Appeals.³⁰ The combined number of District Court and Court of Appeals positions has risen since then from a total of fifty-six to 830.

In addition to the fact that lower federal courts may not need to exist at all, the constitutionally-required procedure governing appointment and confirmation of lower-court judges is arguably different than that for Supreme Court justices. Article II, Section 2, clause 2 provides that the President

shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and *all other Officers* of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of *such inferior Officers*, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Though there is much debate on this point, one reading of the appointments clause—and I would argue the most persuasive reading—is that “all other Officers” is the referent for “such inferior Officers.” Under this reading of the text, lower-court judges might be nominated by the courts or cabinet heads, rather than the president.³¹ The constitutional

²⁵ Act of Mar. 8, 1802, 2 Stat. 132. In *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803), a Federalist-dominated Supreme Court found the repeal of the Judiciary Act of 1801 constitutional.

²⁶ Act of Mar. 2, 1855, 10 Stat. 631 (“[T]o Establish a Circuit Court of the United States in and for the State of California”).

²⁷ Act of Mar. 3, 1863, 12 Stat. 794 (“[T]o provide Circuit Courts for the Districts of California and Oregon . . .”).

²⁸ Judiciary Act of 1869, 16 Stat. 44 (Apr. 10, 1869).

²⁹ Judiciary Act of 1891, 26 Stat. 826 (Mar. 3, 1891).

³⁰ 62 Stat. 869, 870 (June 25, 1948).

³¹ See Akhil Reed Amar, *A Neo-Federalist View Of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 235 n.103 (1985) (“An argument could be made that lower federal judges might be ‘inferior Officers’ whose appointment could be vested by Congress in other

scheme establishing the federal courts, detailed above, supports this reading of the clause: Congress should have more power over lower-court nominations, and lower-court judges should therefore be considered inferior officers, because Congress has the ability to eliminate the positions altogether under the Constitution. The same cannot be said for positions specifically enumerated in the appointments clause.

The debate at this point is truly academic, however. Whether or not the power to nominate and appoint lower-court judges *must* be held by the president, the president *has* exercised such power since the creation of the lower federal courts in 1789.³² Still, the practice of nominating lower court judges has always differed practically from the Supreme Court nomination process,³³ though the differences have perhaps diminished in recent times.³⁴

Article III judges.”); David S. Law, *Appointing Federal Judges: The President, the Senate, and the Prisoner’s Dilemma*, 26 CARDOZO L. REV. 479, 482 (2005) (“[T]he Appointments Clause confers on Congress the power to determine which offices, apart from those enumerated in the text of the clause itself, require Senate confirmation.”); Burke Shartel, *Federal Judges--Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 485, 499-529 (1930) (laying out the argument for lower-court judges as inferior officers in exhaustive detail); Paul Taylor, *Filling Judicial Vacancies and Strengthening the Separation of Powers Through the Appointments Clause: A Legislative Proposal*, 1 GEO. J.L. & PUB. POL’Y 227 (2003) (arguing that lower-court judges are inferior officers); Larry W. Yackle, *Choosing Judges the Democratic Way*, 69 B.U. L. REV. 273, 323 (1989) (detailing textual reasons why lower-court judges need not be subject to the advice and consent requirement that applies to Supreme Court justices). *But see* Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 YALE L.J. 255, 275 n.103 (1992) (arguing that lower-court judges are not “inferior officers”); Michael Stokes Paulsen, *Straightening Out The Confirmation Mess*, 105 YALE L.J. 549, 565 n.49 (1995) (book review) (same).

³² 1 Stat. 73 (Sept. 24, 1789). The 1789 Judiciary Act made no provisions for appointment of lower-court judges, leaving the default advice and consent procedure in place. *See* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 456 n.1 (1833):

Whether the Judges of the inferior courts of the United States are . . . inferior officers . . . is a point, upon which no solemn judgment has ever been had. The *practical construction* has uniformly been, that they are not such inferior officers. And no act of congress prescribes the mode of their appointment (emphasis added).

Justice Souter has cited this passage for the proposition that inferior court judges are *not* inferior officers under the Constitution. *Weiss v. United States*, 510 U.S. 163, 191 n.7 (1994) (Souter, J., concurring). *See also* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 807 n.232 (1999) (noting this issue without taking a position on the Constitution’s construction). Congress has formalized the respective roles of the Senate and President for lower court judges by statute. *See* 28 U.S.C. § 44(a) (“The President shall appoint, by and with the advice and consent of the Senate, circuit judges for the several circuits”); 28 U.S.C. § 133(a) (“The President shall appoint, by and with the advice and consent of the Senate, district judges for the several judicial districts”).

³³ On the effectiveness of the Supreme Court appointment process, see Shartel, *supra* note 31, at 486:

From the earliest years of the United States, although judicial nomination power has resided in the executive branch, senators have played a major role in giving “advice” to the president on potential judicial nominees within each senator’s home state. The practice may have arisen from the early days in which Supreme Court justices spent the bulk of their time providing lower federal court functions for specific geographic areas. Because seats on the Court became associated with particular regions, the senators from a given region sought to assert a controlling influence in the process for filling that region’s seat.³⁵ Senators also sought influence over other locally-based federal positions.³⁶ The Senate as a whole enforced the practice of giving “advice” to the president by refusing to confirm to federal positions those who were not approved by their home-state senators. As explored more fully below, this practice of “senatorial courtesy” has changed through the years, but its current manifestation is still an important consideration in lower-court appointments.

Especially for District Court judges, until recently the senators for the state in which a vacancy was located provided the president with the names of possible nominees, and the same senators retained informal “veto” power over the final confirmation.³⁷ This was especially true for senators

Presidential appointment of Supreme Court justices, by and with the consent of the Senate, has worked well enough. It is far from clear that a better way of choosing these justices could be found even if the Constitution were to be amended. In making these important appointments both the President and the Senate assume that responsibility which, by the framers of the Constitution, they were intended to assume. The dignity and power of the Supreme Court, the need for ability and fairness in its members, are so deeply appreciated that the President and Senate are apt to scrutinize carefully the qualifications of prospective appointees thereto.

³⁴ See Burbank, *supra* note 10, at 27 (“In any event, the result has been, or so it seems, that more and more nominations to the federal bench are now treated as if they were nominations to the Supreme Court . . .”).

³⁵ Freund, *supra* note 5, at 1148 (“Thus parochialism combined with partisanship to shape appointments to the Court.”).

³⁶ William G. Ross, *The Functions, Roles, and Duties of the Senate in the Supreme Court Appointment Process*, 28 WM. & MARY L. REV. 633, 642 (1987) (“Only three months into its first term, the Senate established the precedent of ‘senatorial courtesy’ by rejecting a highly qualified nominee for a naval position in Savannah because the two senators from Georgia preferred a different candidate.”).

³⁷ Kenneth C. Sears, *The Appointment Of Federal District Judges*, 25 ILL. L. REV. 54, 54-55 (1930) (“It is believed that today for all practical purposes in many if not most instances the senators from each state are really making the nominations to the federal district courts.”). See also Shartel, *supra* note 31, at 488:

Appointments of inferior judges and promotions to the circuit courts of appeal are dictated today by the senators from states where the vacancies exist, at least if they are influential and of the President’s own party; if the senators are

of the president's party.³⁸ Appellate judges followed much the same pattern, though the president has often had a larger role in those appointments. Recently, however, the executive branch has taken a much stronger lead in collecting names of potential lower-court nominees, and in recent decades the Senate has, depending whether the political party of the president controlled that chamber, to a greater or lesser extent followed the president's plan.³⁹

Another way in which Supreme Court and lower court appointments have differed over the years is in the appearance of appointees before the Senate or a Senate committee during the confirmation process. For over one hundred years following the nation's founding, judicial nominees, even nominees for the Supreme Court, did not appear before the Senate.⁴⁰ This changed in 1925 with President Coolidge's nomination of Harlan

members of the opposition party, then naturally the President turns for 'suggestions' to the local chiefs of his own party.

This practice of deferring to home-state Senators with district court nominees is still followed. As one former chairman of the Senate Judiciary Committee has stated: "I can tell you right now that when two Senators from any State fail to return a blue slip for a district court nominee, that is basically the end of that district court nominee." 148 CONG. REC. S2209 (daily ed. Mar. 21, 2002) (statement of Sen. Hatch).

³⁸ Burbank, *supra* note 10, at 26:

With respect to nominations to the federal trial courts, the Senate's role has been dominated by patronage, backed up by the practice of "senatorial courtesy," the so-called "blue slip" system giving a veto power to senators of the president's party from the nominee's state, and during some periods to senators from the other party as well.

³⁹ Henry Paul Monaghan, *The Confirmation Process: Law Or Politics?*, 101 HARV. L. REV. 1202, 1208-09 (1988):

The Senate's actual role in the conformation process depended upon the shifting balance of political power between Congress and the President. The Senate's significant nineteenth-century role reflected the general congressional dominance of that era. Scarcely one hundred years ago, Woodrow Wilson argued that national government was congressional government—more precisely, "government by the chairmen of the Standing Committees of Congress." Wilson put aside the President with the dismissive observation that his "business . . . occasionally great, is usually not much above routine." Although some such model of congressional government could be defended as late as the beginning of the New Deal, modern government is presidential government, at least in its most important aspects. Presidential ascendancy in the appointment process reflects this fact (citations omitted).

⁴⁰ Judge John J. Parker, nominated to the Court by Herbert Hoover in 1930, asked to testify before the Senate Judiciary Committee and was refused. So, too, George Williams in 1874 and John Harlan in 1877. Freund, *supra* note 5, at 1158 n.57, 1161.

Fiske Stone to the Supreme Court.⁴¹ Since the 1939 hearings for Justices Felix Frankfurter and William O. Douglas, nearly every Supreme Court nominee has appeared before the Senate Judiciary Committee.⁴² Hearings for circuit, and now district, court appointees did not come into fashion until the last few decades.⁴³ Even today, certain nominees receive very little consideration before the Judiciary Committee,⁴⁴ though essentially all judicial nominees have at least nominal hearings.

Of course, judicial appointments do not happen in a vacuum. In addition to a stark increase in the number of federal court judges, the number of other officials requiring Senate confirmation has grown tremendously. Plus, since the New Deal many areas of government have become increasingly federalized through expanding numbers of laws and administrative regulations, which increases the number of interactions between the president and the Senate.⁴⁵ Once the judicial nominating process is seen as part of the everyday political process, withholding approval of nominations becomes another tool for the Senate, and individual senators, to use in furthering their political goals. For example, during the 107th Congress, the period under examination in this paper, Republicans held up appropriations bills in an effort to get Democrats to move more swiftly on judicial confirmations.⁴⁶

⁴¹ GERHARDT, *supra* note 5, at 67.

⁴² The exception is California Governor Earl Warren, who was not asked to appear during hearings in 1953 on his nomination to serve as Chief Justice. Freund, *supra* note 5, at 1162.

⁴³ See John Anthony Maltese, *Confirmation Gridlock: The Federal Judicial Appointments Process Under Bill Clinton and George W. Bush*, 5 J. APP. PRAC. & PROCESS 1, 6 (2003) (explaining that, before 1955, even testimony by Supreme Court nominees was rare).

⁴⁴ See generally Honorable Patricia M. Wald, *Random Thoughts on a Random Process: Selecting Appellate Judges*, 6 J.L. & POL. 15 (1989).

⁴⁵ Cf. Calvin R. Massey, *Getting There: A Brief History Of The Politics Of Supreme Court Appointments*, 19 HASTINGS CONST. L.Q. 1, 13 (1991):

The nomination and confirmation process is an iterative dialogue between the President, the Senate, and often the Court. Political and personal realities play a significant role in determining the relative strengths of the voices of the participants in the dialogue. There is nothing historically anachronistic in Senate rejection of Presidential appointees; indeed, the Senate has sometimes dictated the nominee

The [confirmation process] would be improved if both the President and the Senate were to recognize that they must take each other seriously. When the President or the Senate has sought to ignore, spite, humiliate, or exploit the other, acrimony and poor appointments have resulted.

⁴⁶ See Paul Kane, *Bush Pressed On Nominees; GOP Senators Urge Public Push for Judges*, ROLL CALL, Sept. 10, 2001 (“But Senate Republicans say they are ready to do battle for their nominees, with or without a frontal attack by the White House. [Senator] Craig said the GOP is ready to block more appropriations bills if [Senators] Daschle and Leahy don’t live up to their agreement to move more

B. Senate Rules and Norms for the Confirmation of Lower-Court Judges

Several rules of the Senate, both formal and informal, govern the process of confirming lower-court judges following their nomination by the president.⁴⁷ There are many “vetogates” along the way where a nomination can be delayed or derailed.⁴⁸

The formal Senate Rules governing the treatment of judicial nominations are straightforward and do not inform the present discussion.⁴⁹ Senate Rule XXXI sets forth the general procedures for the handling of nominations on the floor, Rule XXV(k) establishes the jurisdiction of the Senate Committee on the Judiciary, and Rule XXVI sets out the general rules of committee procedure. The Judiciary Committee also has its own set of rules, but they are also very simple and not relevant to the important issues concerning nominations.⁵⁰ Far more important than the formal rules of the Senate or Judiciary Committee are informal norms governing the nomination process, including “blue slipping,” holds, filibusters, and the general idea of “senatorial courtesy.”

The first potential vetogates, or potential tools of obstruction, are found in the Judiciary Committee. Judicial nominations are automatically referred to the committee under Senate rules.⁵¹ Several things can happen to derail a nomination at this point.⁵² First, the chairman of the committee

nominees. ‘We don’t want to do that, but that certainly is the right of the minority,’ Craig said. ‘I believe we have the 41 votes to cause certain actions.’”) *But cf.* Alan Gura, *Choosing Better Judges*, 12 AMERICAN ENTERPRISE 25-27 (Mar. 14, 2001) (contending that judicial nominations should not be “horse traded”).

⁴⁷ The same rules apply to the nominations of Supreme Court justices, but those far rarer nominations have a much higher profile and thus their own set of “rules” not applicable here. For example, a Supreme Court nomination would likely never be killed by the Judiciary Committee chairman or even the Majority Leader. The nomination would be sent to Senate for vote. *See infra* note 58 (discussing historic practice with respect to floor votes for Supreme Court nominations).

⁴⁸ Scholars of the legislative process have developed the term “vetogate” (sometimes “veto gate”) to describe any point in the legislative process where, due to constitutional requirements or legislative rules or norms, consent of an individual (e.g., the chairman of a congressional committee) or group (e.g., a congressional committee or either house of Congress) is needed for legislation to pass. If consent is denied, the legislation is effectively “vetoed.” *See* Barry R. Weingast et al., *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 707 n.5 (1992).

⁴⁹ STANDING RULES OF THE SENATE, S. DOC. NO. 106-15, (2d Sess. 2000), available at http://www.senate.gov/legislative/common/briefing/Standing_Rules_Senate.htm.

⁵⁰ S. COMM. ON THE JUDICIARY, RULES OF PROCEDURE, available at http://judiciary.senate.gov/committee_rules.cfm.

⁵¹ STANDING RULES OF THE SENATE, Rule XXV(1)(5), *supra* note 49.

⁵² *See* Nolan McCarty & Rose Razaghian, *Advice and Consent: Senate Responses to Executive Branch Nominations 1885-1996*, 43 AM. J. POL. SCI. 1122, 1125:

can delay setting a hearing date, or can refuse to set one at all.⁵³ A majority of senators on the Judiciary Committee can force the chairman to schedule a hearing,⁵⁴ but this type of compulsion is extraordinary in the Senate.⁵⁵ Because of the principle of unlimited debate, the Senate acts much of the time by unanimous consent. Thus, any aggressive behavior by a senator or group of senators against the chairman is likely to lead to reciprocal actions to punish those senators in the future.

Eventually, of course, enough pressure may be brought to bear on the Chairman to schedule a hearing. Hearings for lower-court nominees were the exception, rather than the rule, until relatively recently.⁵⁶ Now, however, every judicial nominee who will eventually be considered by the Senate as a whole receives a Judiciary Committee hearing first. Following the hearing, the Committee must vote whether to approve the nominee, and if not, whether to nevertheless send the nominee without approval to the full Senate for a confirmation vote. A majority vote of the Judiciary Committee is required to allow the nomination to leave the Committee. In an exceptional case, the Committee might allow a lower-court nomination to go to the full Senate even if the nominee failed to win a majority vote in the Committee, but generally a failure to win approval from Judiciary Committee is the final step for a lower-court nominee. This summary rejection contrasts with the Committee practice concerning nominations of Supreme Court justices, where the Committee traditionally has always sent nominations to the full Senate, even with a negative or evenly divided vote

The use of committees to examine the qualifications for nominations also provides opportunities for recalcitrant Senators to engage in institutional heel dragging Committees and committee chairs have discretion about when or even if to hold hearings. While nominations can be formally discharged from committee, this procedure occurs very infrequently and usually after the process has been long delayed.

⁵³ There is no requirement in either the Senate or Judiciary Committee Rules that the Chairman set or hold a hearing for any judicial nominee.

⁵⁴ See JUDICIARY COMM. RULE IV, *supra* note 50:

BRINGING A MATTER TO A VOTE. The Chairman shall entertain a non-debatable motion to bring a matter before the Committee to a vote. If there is objection to bring the matter to a vote without further debate, a roll call vote of the Committee shall be taken, and debate shall be terminated if the motion to bring the matter to a vote without further debate passes with ten votes in the affirmative, one of which must be cast by the minority.

⁵⁵ See, e.g., Denning, *supra* note 13, at 34 n.146.

⁵⁶ See discussion *supra* notes 40-44 and accompanying text.

of the Committee on the merits of the nomination.⁵⁷ A prominent example of this practice is Clarence Thomas's nomination to the Supreme Court. Although the Democrat-led Judiciary Committee deadlocked over Thomas by a seven to seven vote, the Committee nevertheless voted thirteen to one to send the nomination to the Senate floor,⁵⁸ where, after long hearings, the entire Senate narrowly voted to confirm.

In the case of lower-court judges, in contrast, even when a majority of the Senate is prepared to confirm a nominee, the Judiciary Committee will generally stand by its negative recommendation and refuse to allow the full Senate to vote. This happened on occasion during the 107th Congress, during the seventeen months in which Democrats controlled the Senate following Senator Jeffords's defection from the Republican ranks in May 2001.⁵⁹ During this period, Committee votes on nominations that were not sent to the floor were generally party-line votes which recognized the Democrats' single-vote majority. Interestingly, apparently no nominations were defeated in the Judiciary Committee during the last six years of the Clinton presidency, when Republicans controlled the Judiciary Committee.⁶⁰ Instead, Chairman Orrin Hatch simply did not hold a vote—and often did not even hold hearings—when a nominee did not have support in the Committee.⁶¹

While the chairman of the Judiciary Committee has broad discretion in setting hearing dates and votes for nominations, even if he personally supports a nominee he can be constrained by informal vetogates at the committee level that can prevent nominations from being sent to the floor. For example, the candidate's Judiciary Committee file must be completed.

⁵⁷ See 107 CONG. REC. S7286 (daily ed. June 29, 2001) (statement of Sen. Lott) ("No matter what the vote in committee on a Supreme Court nominee, it is the precedent of the Senate that the individual nominated is given a vote by the whole Senate.") (attaching research memorandum from the Congressional Reference Service); *id.* (statement of Sen. Daschle):

It has been the traditional practice of the Judiciary Committee to report Supreme Court nominees to the Senate floor once the committee has completed its consideration. This has been true even for a number of nominees that were defeated in the Judiciary Committee. Now, Senators Leahy and Hatch have put in writing their intention that consideration of Supreme Court nominees will follow the practices and precedents of the Judiciary Committee and the Senate.

⁵⁸ Neil A. Lewis, *The Thomas Nomination; Judiciary Panel Deadlocks, 7-7, On Thomas Nomination to Court*, N.Y. TIMES, Sept. 28, 1991, at 11.

⁵⁹ See, e.g., 148 CONG. REC. S8280-81 (daily ed. Sept. 5, 2002) (statement of Sen. Sessions) (discussing the defeat in committee of Priscilla Owen's nomination to the Fifth Circuit).

⁶⁰ See discussion of Sen. Lott's and Sen. Hatch's claims, *infra* notes 192-96 and accompanying text.

⁶¹ *Id.*

The Committee sends each nominee a detailed questionnaire to answer, and each nominee must also be screened by the Federal Bureau of Investigation. In addition, from the Eisenhower to the Clinton administrations, the president has always submitted the names of potential nominees to the Standing Committee on Federal Judiciary of the American Bar Association for evaluation and recommendation, and the ABA report has been considered by the Senate Judiciary Committee during the confirmation process.⁶² In March 2001, the Bush II administration rejected this long tradition of ABA advance review of nominees.⁶³ However, since that time Democratic senators have refused to proceed on nominations without ABA evaluations, and this has led to additional delays in the process.⁶⁴

Another committee-level vetogate is the practice of “blue-slipping.”⁶⁵ Since at least the 1950s, the Chairman of the Judiciary Committee has sent blue slips of paper to both of the home-state senators of the nominee. For nominations to the Courts of Appeals, which cover multiple states, the slips go to senators for the state in which the newly-confirmed judge’s chambers would be located. Before scheduling a hearing, the Chairman waits for the senators to return the two blue slips.⁶⁶ If a senator chooses to withhold a blue slip, the nomination is effectively killed. The exact effect of withholding a blue slip has changed over time, because chairmen have given more or less weight to views of senators not of the president’s own party. The blue-slipping procedure has also been the subject of recent proposals for change, and the 107th Congress made a significant modification in the procedure by requiring that slips be made public.⁶⁷

⁶² See ABA Standing Committee on Federal Judiciary website, <http://www.abanet.org/scfedjud/home.html>.

⁶³ Neil Lewis & David Johnston, *Bush Would Sever Law Group’s Role in Screening Judges*, N.Y. TIMES, March 17, 2001, at A1; Neil Lewis, *White House Ends Bar Association’s Role in Screening Federal Judges*, N.Y. TIMES, March 23, 2001, at A13; Mark Preston, *Specter Seeks A.B.A. Role in Nominations*, ROLL CALL, May 3, 2001 (discussing the reinstatement of “ABA’s role of vetting District Court nominees”).

⁶⁴ See *infra* notes 167-68 and accompanying text.

⁶⁵ Two exceptional articles on blue-slipping are Brannon P. Denning, *The “Blue Slip”*: *Enforcing the Norms of the Judicial Confirmation Process*, 10 WM. & MARY BILL RTS. J. 75 (2001), and Elliot E. Slotnick, *The Changing Role of the Senate Judiciary Committee in Judicial Selection*, 62 JUDICATURE 502 (1979).

⁶⁶ Interestingly, the blue slips of paper actually have instructions stating that if a slip is not returned within a week detailing a Senator’s concerns about a nominee, it will be assumed that the Senator has no objection to the nominee. Slotnick, *supra* note 65, at 505. In practice, however, a Chairman will not schedule hearings without the return of both blue slips.

⁶⁷ Sen. Patrick Leahy, Chairman of the Judiciary Committee, and Sen. Orrin Hatch, Ranking Minority Member, announced the change in a “Dear Colleague” letter to the body of the Senate:

Similar in effect to the blue-slip process is the more general procedure by which any senator may request a “hold” on consideration of any matter scheduled to come before the Senate or a committee. The procedure arose from situations in which senators foresaw their absence during an important vote and would ask the majority leader—either directly or, if a member of the minority caucus, by asking the minority leader—to “hold” the vote until the senator returned.⁶⁸ Due to the tradition of unlimited debate in the Senate, and the concomitant ability to filibuster, such requests for holds have generally been honored.

Because senatorial holds involve often informal, oral communication between an individual senator and his caucus leader, little is known about the early use of this practice. However, it is clear that in recent times this procedure has frequently been used to derail judicial nominations. Large numbers of nominees have languished under anonymous holds, with only the majority or minority leader knowing why the hold had been placed or how it might be removed.⁶⁹ There has been pressure on leaders of both parties to make all anonymous holds public, including those on judicial nominations.⁷⁰ Of course, even if anonymous holds are disallowed, senators might still use public holds to delay consideration of nominations.⁷¹

Holds are particularly interesting because senators sometimes use them even if the “holding” senator favors a particular nominee. The hold might

DEAR COLLEAGUE: We write as Chairman and Ranking Republican Member of the Judiciary Committee to inform you of a change in Committee practice with respect to nominations. The “blue slips” that the Committee has traditionally sent to home State Senators to ask their views on nominees to be U.S. Attorneys, U.S. Marshals and federal judges, will be treated as public information.

We both believe that such openness in the confirmation process will benefit the Judiciary Committee and the Senate as a whole. Further, it is our intention that this policy of openness with regard to “blue slips” and the blue slip process continue in the future, regardless of who is Chairman or which party is in the majority in the Senate.

Therefore, we write to inform you that the Chairman of the Judiciary Committee, with the full support of the former Chairman and Ranking Republican Member, is exercising his authority to declare that the blue slip process shall no longer be designated or treated as Committee confidential.

107 CONG. REC. S7285 (daily ed. June 29, 2001).

⁶⁸ Denning, *supra* note 65, at 20-1 & n.95.

⁶⁹ Cf. 148 CONG. REC. S278 (daily ed. Feb. 4, 2002) (statement of Sen. Leahy) (“I am encouraged that this confirmation today was not delayed by extended, unexplained, anonymous holds on the Senate Executive Calendar, the type of hold that characterized so much of the previous 6-1/2 years.”).

⁷⁰ See, e.g., 152 Cong. Rec. S1872-S1881 (daily ed. Mar. 8, 2006) (discussing Amendment No. 2944 to the Legislative Transparency and Accountability Act of 2006).

⁷¹ See examples *infra* note 224.

be placed in an attempt to get another senator, or even the president, to act on an entirely different legislative matter. Action on nominations, like action on any matter pending before a legislative body, is subject to the constant applications and counter-applications of political pressure that mark our form of government, particularly in the Senate due to its tradition of unlimited debate.

Even if a nomination passes to the full Senate, it may not immediately come up for vote. First, the Majority Leader, on his own initiative or pursuant to a hold, could refuse to schedule a vote of the full Senate. And, while the Majority Leader of the Senate has a great deal of power over the confirmation process once it reaches the Senate floor, a determined minority can temporarily or even indefinitely delay action on any Senate decision by filibuster or threat of filibuster.⁷² Currently, debate on any matter before the Senate may not be cut off without a cloture vote by sixty senators,⁷³ and a filibuster threat is generally enough to cause the majority leader to defer consideration of a matter that needs to come before the full Senate.⁷⁴

Where no vote is scheduled by the end of a session of Congress or any other period for which the Senate recesses for more than thirty days, the nomination is by rule “returned” to the president, and no further action can be taken on the nominee unless the president renominates the candidate.⁷⁵ However, the Senate generally agrees by unanimous consent to suspend this rule and extend the nominations beyond the major summer and winter breaks of a given Congress.⁷⁶

⁷² For an exhaustive discussion of all aspects of the filibuster, see generally Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181 (1997).

⁷³ STANDING RULES OF THE SENATE, Rule XXII, *supra* note 49.

⁷⁴ Republicans forced cloture votes on filibustered judicial nominees during the 108th Congress, but Democrats were able to sustain the filibusters. *See, e.g.*, 150 CONG. REC. S11463-4 (daily ed. Nov. 18, 2004).

⁷⁵ STANDING RULES OF THE SENATE, Rule XXXI(6), *supra* note 49:

Nominations neither confirmed nor rejected during the session at which they are made shall not be acted upon at any succeeding session without being again made to the Senate by the President; and if the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President, and shall not again be considered unless they shall again be made to the Senate by the President.

See also McCarty & Razaghian, *supra* note 52, at 1125 (“Under the Senate’s standing rule 38(6), nominations that have not been confirmed or rejected expire during any Senate recess exceeding thirty days. These nominations therefore fail unless the president formally resubmits them.”).

⁷⁶ An exception to the general retention of nominees over Congressional recesses came in the summer of 2001. 147 CONG. REC. S8888-91 (daily ed. Aug. 3, 2001).

Finally, even after a successful vote of confirmation, in theory any senator who voted to confirm a judicial nominee might afterwards make a motion for reconsideration.⁷⁷ In practice, though, this rule does not usually have any effect, as such a motion is immediately made and “laid on the table” following each successful confirmation vote.⁷⁸

With this brief overview of Senate processes for handling lower-court judicial nominations, we now turn to the core of this article, evaluating the rhetoric used by senators when characterizing delay in lower-court confirmations.

III. LIES, DAMN LIES, AND STATISTICS OF THE 107TH CONGRESS⁷⁹

President George W. Bush’s first two years in office, from 2001 to 2002, the period of the 107th Congress, are an interesting time period for which to examine the political maneuverings that suffuse the debate over lower-court judicial nominations. First, the 2000 presidential election was tightly contested. Bush, the Republican candidate, lost the national popular vote to Democratic candidate Al Gore by some 340,000 votes yet won in the Electoral College by a vote of 271 to 266.⁸⁰ The Electoral

⁷⁷ STANDING RULES OF THE SENATE, Rule XXIII(1), *supra* note 49.

⁷⁸ But see Sheldon Goldman, *Reagan’s Second Term Judicial Appointments: The Battle At Midway*, 70 JUDICATURE 324, 336 (1987), for a good story of a motion to reconsider being used strategically by Senator Robert Byrd in 1986 to delay the confirmation of Seventh Circuit nominee Daniel A. Manion.

⁷⁹ MARK TWAIN, MARK TWAIN’S AUTOBIOGRAPHY 246 (1924) (“There are three kinds of lies: lies, damned lies, and statistics” (attributing quotation to Benjamin Disraeli)). See also 148 CONG. REC. S3527 (daily ed. Apr. 30, 2002) (statement of Sen. Specter):

[I]n my Senate tenure we have had three situations where the White House and the Senate were controlled by different parties. When there is debate about what has happened [with judicial appointments] and how long the nominations have taken, although I have been here and followed the situation closely, I get lost in the statistics. I think the American people do too.

148 CONG. REC. S3548 (daily ed. Apr. 30, 2002) (statement of Sen. Reid):

I have always been very dubious of numbers because even as one who did not have a degree in engineering or did not do much in the way of math in high school or college, I can still do a lot of things with numbers. We can manipulate numbers—you know that is easy to do. We can have all kinds of numbers games.

148 CONG. REC. S4113 (daily ed. May 9, 2002) (statement of Sen. Lott) (“I have learned over the years that when you are talking about judges and judicial nominations each side will have their statistics about what happened in the Clinton years, what happened in the Reagan years, and what happens right now.”).

⁸⁰ Editorial, *The Case for the Electoral College*, N.Y. TIMES, Dec. 19, 2000, at A34.

College victory, however, came only after a divided United States Supreme Court on December 12 ordered the state of Florida to cease a state-court-ordered recount, leaving Bush with a 537-vote margin in Florida and therefore that state's twenty-five Electoral College votes.⁸¹ With such a narrowly elected president, and thus less of a presidential mandate, the chances were greater that Senate preferences would strongly influence the judicial selection process.⁸²

Second, the even political division of the country illustrated by the presidential election was also reflected in the composition of the Senate following the 2000 elections, with Republicans and Democrats divided fifty to fifty for the first time in the history of the Senate.⁸³ Because the newly-elected Vice President, Dick Cheney, could break any tie vote in his role as President of the Senate, the Senate by unanimous consent allowed Republicans to chair all Senate committees,⁸⁴ although the membership of each committee was evenly split between the parties.⁸⁵ As with the country's close decision on the choice of president, the evenly divided Senate would likely serve to bring into focus any debates over judicial nominations.

The 107th Congress is also a fruitful era to study judicial nominations because the nine justices of the Supreme Court had in 2000 been together for over six and one-half years, a very long time between Supreme Court vacancies.⁸⁶ Many pundits believed that one or more seats on the Court would need to be filled during Bush's term as president, and commentators predicted that both parties would treat early lower-court nomination battles as a "warm up" for the Supreme Court confirmation fights that would follow if a justice retired or passed away.⁸⁷

⁸¹ R.W. Apple, Jr., *The 43rd President: News Analysis; Now, Lifting the Clouds*, N.Y. TIMES, Dec. 14, 2000, at A1.

⁸² Neil A. Lewis, *Hurdles to Agenda*, N.Y. TIMES, Jan. 2, 2001, at A10 (As Senator Leahy predicted during the 107th Congressional session, "I think the closeness of the election and the ill will engendered by the Supreme Court is going to make it difficult for the new administration to make some clear ideological stamp on the courts.")

⁸³ 147 CONG. REC. S1 (daily ed. Jan. 3, 2001); 147 CONG. REC. S29 (daily ed. Jan. 5, 2001). There had been a 48-48 division of the Senate in 1953.

⁸⁴ S. Res. 7, 107th Cong., 147 CONG. REC. S8 (daily ed. Jan. 3, 2001).

⁸⁵ S. Res. 8, 107th Cong., 147 CONG. REC. S48 (daily ed. Jan. 5, 2001); *see also* 147 CONG. REC. S53-S54 (daily ed. Jan. 8, 2001).

⁸⁶ Ultimately, no vacancy occurred until Chief Justice William Rehnquist's death in September 2005.

⁸⁷ 148 CONG. REC. S1234 (daily ed. Feb. 27, 2002) (statement of Sen. Specter) ("[O]ne never knows—but in looking at the proceedings as to Judge Pickering, this may be a warm-up for the next Supreme Court nomination."); *cf.* Robin Toner, *Interest Groups Set for Battle on a Supreme Court Vacancy*, N.Y. TIMES, Apr. 21, 2001, at A1 (quoting an activist who characterized the fight over John

Finally, the balance of the Senate swung back to the Democrats when Vermont Republican Jim Jeffords renounced his party membership on May 24, 2001, and became the Senate's lone independent. With the Senate now split 50-49-1 in favor of the Democrats, with whom Jeffords agreed to caucus, committees were reformed with Democratic majorities and chairpersons. Thus, the 107th Congress provides the rare opportunity to look at judicial appointments when the president's party and the opposition party each had control of the Senate advise-and-consent apparatus for at least some period of time.

In telling the story of judicial nominations in the 107th Congress, this paper focuses on arguments made by senators of both parties that purport to be based on numerical comparisons between the Senate's past and present timeliness with respect to judicial confirmations. The next section points out a number of "confirmation process fallacies" repeatedly invoked by senators in their efforts to score political points from issues that arise during the confirmation process. The article also identifies "confirmation process relevancies"⁸⁸ in hopes that future debates about delay in the judicial confirmation process can be grounded in meaningful statistics rather than the trivial and irrelevant.

A. 107th Congress, 1st Session (2001)

The Fall 2000 Congressional elections resulted in a Democratic Party net gain of four seats in the Senate, leaving that body split evenly between the Democrats and Republicans. The first session of the 107th Congress convened on January 3, 2001, with outgoing Vice President Al Gore taking the chair in his capacity as Senate President.⁸⁹ Because the new Republican president and vice president would not be sworn in until January 20, 2001, Senate committees were chaired by Democrats until noon on that date, with Republican chairs named to then take over, reflecting the ability of the Vice President to break any ties on the floor of the Senate following the new administration's inauguration.⁹⁰

Discussions continued in early January 2001 between Trent Lott and Tom Daschle—the Republican and Democratic leaders of the Senate, respectively—over the exact membership and rules that would govern the Senate committees following the Republican takeover. On January 5, the

Ashcroft's 2001 nomination for Attorney General as "a very conscious practice run"). See generally Michael J. Gerhardt, *Judicial Selection As War*, 36 U.C. DAVIS L. REV. 667 (2003).

⁸⁸ See Twain, *supra* note 20.

⁸⁹ 147 CONG. REC. S1 (daily ed. Jan. 3, 2001).

⁹⁰ S. Res. 7, 107th Cong., 147 CONG. REC. S7 (daily ed. Jan. 3, 2001).

leaders finally reached an agreement which provided for committees split evenly between the parties but chaired by Republicans.⁹¹ The Judiciary Committee was to be chaired, as it had been during the final six years of the Clinton presidency, by Republican Orrin Hatch of Utah.

The initial work of any Judiciary Committee following an election that produces a new administration is to confirm certain important executive-branch officials, such as the Attorney General, the Solicitor General, and various assistants and deputies within the Justice Department. On January 29, 2001, Bush II sent over his nomination of former Senator John Ashcroft to be Attorney General. This selection was followed by the March 13 nomination of Theodore Olson to be Solicitor General, Larry D. Thompson's nomination for Deputy Attorney General on March 22, and the nominations of a handful of Assistant Attorneys General through the end of April.

Bush II sent his first judicial nominations to the Senate, for eleven circuit court positions, on May 9, 2001.⁹² By June 22nd he had made

⁹¹ S. Res. 8, 107th Cong., 147 CONG. REC. S41-S42 (daily ed. Jan. 5, 2001). In pertinent part, the agreement specified the following:

Sec. 1. All Senate committees would be "composed equally of members of both parties" appointed by the respective leaders and would have equal budgets and office space. Committee Chairs would have the right to place on the full committee's agenda "any Legislative or Executive Calendar item which has not been reported because of a tie vote" in a subcommittee.

Sec. 2. If the composition of the Senate changed so that one party gained a majority, "then each committee ratio shall be adjusted to reflect the ratio of the parties in the Senate, and the provisions of this resolution shall have no further effect, except that the members appointed by the two Leaders, pursuant to this resolution, shall no longer be members of the committees, and the committee chairmanships shall be held by the party which has attained a majority of the whole number of Senators."

Sec. 3. If a committee did not report out an item or nomination because of a tie vote, then either of the leaders could make a motion to discharge, which would be voted on under limited debate rules. If the discharge motion succeeded, the original item or nomination would be placed immediately on the appropriate Senate calendar. Cloture motions (to cut off unlimited debate) were prohibited "on an amendable item during its first 12 hours of Senate debate." Also, both leaders would "seek to attain an equal balance of the interests of the two parties when scheduling and debating . . ."

⁹² Note that references made throughout the remainder of the article are to nominations to the United States District Courts and the United States Courts of Appeal, including the Federal Circuit. Not included are nominations to the Territorial Courts, the Court of Federal Claims, the Court of International Trade, the Tax Court, or the Court of Appeals for Veterans Claims. Any unsourced numerical claims or statistics are derived from an appointments dataset kept by the author, based on materials from an electronic database kept by the United States Senate Library, cross-checked and supplemented with data from the Congressional Record and from a dataset maintained by the Federal

another fifteen nominations, eight of which were for appellate judgeships. Compared to the past, this was a torrid pace for the nomination of federal judges, and in particular judges of the Courts of Appeals. For example, President Reagan nominated his first judges on July 1, 1981, and did not reach eleven circuit court nominations until a year after he entered office, by which time he had also made thirty-six district court nominations. Bush I sent his first new lower-court nominees to the Senate on August 4, 1989,⁹³ and did not reach eleven circuit court nominees until fifteen months after taking office, by which time he had made a total of forty nominations. President Clinton sent his first judicial nomination to the Senate in August 1993, and his eleventh circuit court nomination the following March. Clinton had nominated a total of sixty-nine lower-court judges by that date. In contrast, by approximately the same point in his presidency, March 21, 2002, Bush II had nominated ninety-seven judges, and twenty-nine had been to the Courts of Appeals.

Following Bush II's early nominations, the Republican-led Judiciary Committee noticed its first hearing for judicial nominees for May 23, 2001, the day before Senator Jeffords left the Republican Party and became an independent.⁹⁴ However, the hearing was postponed by request of Committee Democrats,⁹⁵ and it was not immediately rescheduled following the change to Democratic control of the Senate. After Jeffords's switch, much committee business in the Senate came to a halt while party leaders worked on a new organizing resolution.⁹⁶ This process took some time.⁹⁷

Judicial Center, entitled HISTORY OF THE FEDERAL JUDICIARY. See website of the Federal Judicial Center, <http://www.fjc.gov>.

⁹³ On February 28, 1990, Bush I renominated four Reagan nominees who had not been confirmed at the end of the prior congress. While technically nominees of Bush I, their early nominations reflect the fact that they had already been selected by the previous administration, and therefore the August 4 nominees more accurately represent the "first" Bush I nominees. If the February 28, 1989, nominees are counted, the eleventh Bush I nominee to the Court of Appeals was made on February 20, 1990, when a total of thirty-five lower-court judges had been nominated.

⁹⁴ 147 CONG. REC. D502 (daily ed. May 23, 2001) (hearings on the nominations of Deborah L. Cook and Jeffrey S. Sutton, each to be a United States Circuit Judge for the Sixth Circuit, and the nomination of John G. Roberts, Jr. to be United States Circuit Judge for the District of Columbia Circuit).

⁹⁵ *Confirmation Hearing on Federal Appointments: Hearing Before the Senate Comm. on the Judiciary*, 108th Cong. 3 (2003) (statement of Sen. Hatch).

⁹⁶ Some committees were able to meet and confirm executive branch nominees, but the Judiciary Committee did not meet for the purposes of judicial hearings. Cf. 148 CONG. REC. S2937, S2937 (statement of Sen. Hatch).

⁹⁷ See Paul Kane, *Lott's Push for Judges Imperils Partisan Truce*, ROLL CALL, Oct. 4, 2001 ("Leahy has taken an almost personal offense to Republicans who have questioned his pace in confirming judges. He wasn't able to hold any judicial nomination hearings until early July, after the GOP had put up a four-week fight over the reorganization of committees when Democrats claimed the majority in early June.").

Under the terms of the original organizing resolutions of the 107th Senate,⁹⁸ if one party gained the majority at any time during either the 2001 or 2002 congressional session, committee chairmanships went to that party and all committees reverted to their previous memberships from the 106th Congress.⁹⁹ Because the Republicans had majorities on all committees during the 106th Congress, immediately after the Jeffords switch the Senate had Democratic chairs of committees with Republican majorities. And because the organization of the Senate is established by unanimous consent, the Republicans had the ability to hold up any further reorganization in order to get some concessions.¹⁰⁰

Republican senators demanded concessions over judicial confirmations because they were concerned that the newly-Democratic-controlled Judiciary Committee would use its power to hold up appointments.¹⁰¹

⁹⁸ S. Res. 7, 107th Cong., 147 CONG. REC. S7 (daily ed. Jan. 3, 2001); S. Res. 8, 107th Cong., 147 CONG. REC. S48 (daily ed. Jan. 5, 2001).

⁹⁹ S. Res. 8, 107th Cong., 147 CONG. REC. S48 (daily ed. Jan. 5, 2001) (In the event of one party gaining a majority, "the [committee] members appointed by the two Leaders, pursuant to this resolution, shall no longer be members of the committees, and the committee chairmanships shall be held by the party which has attained a majority of the whole number of Senators.").

¹⁰⁰ See Dave Boyer, *Senate GOP to Make Push to Help Bush's Judge Picks; Hopes to Gain Leverage From Brief Committee Majority*, WASH. TIMES, Jun. 5, 2001, at A1:

Republicans want a guarantee that Mr. Bush's current and future nominees will be brought up for floor votes. And they believe an unusual feature of the midterm power shift gives the GOP added leverage: Until both parties agree to a reorganization, Democrats will chair committees with Republican majorities And 11 freshman senators who received their committee assignments this year, including Democrat Hillary Rodham Clinton of New York, would be left without any such posts for the time being. "It's completely wild," said a former Senate Republican leadership aide. "They're not going to get this resolved this week. If you think that at noon Wednesday Hillary will have a committee assignment, you're under an illusion."

See also 147 CONG. REC. 7993 (daily ed. July 20, 2001) (statement of Sen. Leahy) ("I sent out official notice of the Committee's first hearing on judicial nominations within 10 minutes after Majority Leader Daschle announced that an agreement had been reached on reorganization. The hearing was held the day after Committee membership assignments were completed earlier this month."). But see 147 CONG. REC. 7994 (daily ed. July 20, 2001) (statement of Sen. Hatch) (arguing that Sen. Leahy should have held nominations hearings during the reorganization period, when they would have had Republican majorities: "[I]t appears that the decision not to hold hearings on nominees was simply a calculated tactic to delay President Bush's nominees.").

¹⁰¹ See Noelle Straub, *Senate Agrees to Floor Vote on Impasse*, THE HILL, June 20, 2001. See also Paul Kane, *Chairman Says Fight Over Reorganization is Delaying Progress*, ROLL CALL, June 25, 2001:

Democrats are hoping to pin the blame on Senate Republicans who are holding out for a better deal on the committee resolution in their negotiations with Majority Leader Thomas Daschle (D-S.D.). "We could have had four or five or six [judicial nomination] hearings already if we hadn't had this," Leahy said of

While there were no formal rule changes in response to the Republican concerns, incoming Democratic Judiciary Committee chair Senator Patrick Leahy did assuage some fears by placing a “Dear Colleague” letter in the Congressional Record. In the letter, also signed by Senator Orrin Hatch, the ranking Republican member of the Judiciary Committee, Senator Leahy agreed that the “blue slip” process would no longer be confidential, and also that any Supreme Court nominees would be sent from the Committee to the floor of the Senate for consideration, even if they were opposed by a majority of the Judiciary Committee.¹⁰² With these two important agreements in place, the Senate on June 29, 2001, was able to pass by unanimous consent a resolution providing for the reorganization of Senate committees with Democratic majorities.¹⁰³

The Judiciary Committee met under Democratic control for the first time on July 11, 2001.¹⁰⁴ Almost immediately, Republicans began complaining about the slow pace of judicial confirmations. On July 16, Senator Kyl of Arizona, though claiming that he did not “want to point any fingers in the spirit of bipartisanship which I am invoking here today,” noted that no lower-court judges had yet been confirmed even though the Senate was “past the midway point of this year.”¹⁰⁵ Two days later, Senator Sessions of Alabama complained that only three judges had come out of the Judiciary Committee in seven months.¹⁰⁶ Around this time, Republicans also directed criticism at the Judiciary Committee’s failure to move forward on executive-branch nominations, as well.¹⁰⁷

the negotiations. He added in reference to Bush: “His own party is blocking him from [us] holding nomination hearings.” Republicans, however, contend that Democratic statements regarding GOP nominations since retaking the majority have left them with no other strategy than to risk a short-term logjam for the long-term benefit of securing the safest route for Bush’s judges.

¹⁰² 147 CONG. REC. S7285 (daily ed. June 29, 2001) (reproducing the full text of Leahy’s letter).

¹⁰³ Sen. R. 120, 107th Cong., 147 CONG. REC. S7285-86 (daily ed. June 29, 2001).

¹⁰⁴ 147 CONG. REC. D 684 (daily ed. July 11, 2001) (The hearing was for Roger L. Gregory, nominated to be United States Circuit Judge for the Fourth Circuit, and Richard F. Cebull and Sam E. Haddon, each nominated to be a United States District Judge for the District of Montana. These were not controversial nominees: Gregory was originally a Clinton nominee and had been renominated by Bush II in a gesture of bipartisanship, and Cebull and Haddon had enthusiastic bipartisan support from their home-state senators, Burns (Rep.) and Baucus (Dem.).) *See* 147 CONG. REC. S7994 (daily ed. July 20, 2001) (statement of Sen. Baucus).

¹⁰⁵ 147 CONG. REC. S7664 (daily ed. July 16, 2001) (statement of Sen. Kyl).

¹⁰⁶ 147 CONG. REC. S7890 (daily ed. July 18, 2001) (statement of Sen. Sessions).

¹⁰⁷ *See, e.g.*, 147 CONG. REC. S8037 (daily ed. July 23, 2001) (statement of Sen. Craig referring to the June 5, 2001, nomination of John Walters to be the Nation’s drug czar) (“The Judiciary Committee does not appear to be functioning well. We have had changes in chairmanships, but the new chairman has had plenty of time. Just send out a notice, bring down the gavel, listen to this man and question this man about what he will do . . .”).

Although true as far as they went, the Kyl and Sessions criticisms in July 2001 were misleading. As discussed above, in the previous three administrations no judicial nominations had even been sent to the Senate until July or August, sixth months after each president took office. The first Judiciary Committee hearing during Reagan's first term was on July 14,¹⁰⁸ the first Judiciary Committee hearing for Bush I was not until September 26,¹⁰⁹ and Clinton's first hearing for judicial nominees in 1993 was not until September 23.¹¹⁰ Especially given Jeffords's defection from the Republican Party and the more than month-long reorganization of the Senate during June and July, it was unremarkable that little in the way of judicial confirmation activity had taken place in mid-July 2001 at either the committee or full Senate level.¹¹¹ Thus we have the first of our paradigmatic false arguments ("fallacies") about delay in the judicial confirmation process:

1. Fallacy #1 ("Dog Days")

Failing to take into consideration that the main business of lower-court judicial confirmations during the first year of a new presidency does not take place until late fall.

Senator Kyl stepped up the pressure on the Democratic-led Judiciary Committee the following week. On July 23, 2001, he noted that there were 108 vacancies in the federal courts, which was "about 45 or so more than there were at the end of the Clinton administration."¹¹² Kyl also quoted Democratic senators who had complained of delay during the Clinton administration, when Republicans controlled the Judiciary Committee. For example, Kyl noted that Senator Daschle had claimed in March 2000 that a "failure to fill [open judicial] vacancies is straining our Federal court system and delaying justice for people all across this country." According

¹⁰⁸ *Confirmation of Federal Judges (Part 1): Hearings on the Selection and Confirmation of Federal Judges Before the S. Comm. On the Judiciary*, 97th Cong. 1 (1981).

¹⁰⁹ *Confirmation Hearings on Federal Appointments (Part 1): Hearings on Appointments to the Federal Judiciary Before the S. Comm. On the Judiciary*, 101st Cong. 1 (1989).

¹¹⁰ *Confirmation Hearings on Federal Appointments (Part 1): Hearings on Confirmations of Appointments to the Federal Judiciary Before the S. Comm. On the Judiciary*, 103d Cong. 1 (1993).

¹¹¹ Senator Hatch argued that the Judiciary Committee could have met under Democratic control prior to the agreement of June 29, 1989. See 147 CONG. REC. S10544 (daily ed. Oct. 11, 2001) (statement of Sen. Hatch). Given the highly contentious nature of judicial confirmation hearings, and especially those anticipated over several high-profile conservative nominees sent to the Senate by President Bush in May 2001, it is highly unlikely the Democrats would have been content to chair a Judiciary Committee with a majority-Republican membership.

¹¹² 147 CONG. REC. S8034 (daily ed. July 23, 2001) (statement of Sen. Kyl).

to Kyl, “When [Daschle] made that statement, there were 76 vacancies, 29 of which were categorized as ‘judicial emergencies.’ Today there are 108 vacancies, 40 of which are classified as ‘judicial emergencies.’”¹¹³

Senator Daschle was actually incorrect when he claimed only seventy-six vacancies—there were eighty-five unfilled judicial positions in the lower federal courts at the time he made his statement—but the more important point is that Senator Kyl’s comparisons were not particularly revealing because they compared vacancies during different time periods of the two administrations. March 2000, when Daschle commented on vacancies, was the beginning of the last year of Clinton’s two-term presidency, whereas July 2001, when Kyl criticized the vacancies left over from Clinton’s era, came at the very start of confirmations for Bush II’s judges. A more apt comparison for judicial vacancy numbers in July 2001—Bush II’s first year—would have been to July of Clinton’s first year. For example, during the entire month of July 1993 there were 117 vacancies on the lower federal courts, a number which grew to 125 before the first four Clinton judges were confirmed on September 30, 2003.¹¹⁴ Moreover, the 117 vacancies in July 1993 represented 14.4% of the 811 positions in the federal judiciary, whereas the 108 vacancies in July 2001 represented only 13% of the then-existing 830 judicial positions.¹¹⁵ Kyl’s inapt comparison in July 2001 is an example of our second confirmation-delay fallacy:

2. Fallacy #2 (“Time Out”)

Comparing the number of judicial vacancies during a given time period in one administration to the number of vacancies in another administration during a non-analogous time period.

Kyl’s claim of “45 or so more” vacancies in July 2001 than at the end of the Clinton administration was also simply wrong. In fact, there were seventy-three vacancies on Election Day 2000, and eighty-one vacancies by the official end of the Clinton presidency, January 20, 2001—a

¹¹³ *Id.* at S8034-35. Daschle’s original statement is found at 146 CONG. REC. S1255 (daily ed. Mar. 8, 2000) (statement of Sen. Daschle).

¹¹⁴ Democrats controlled the Senate during Clinton’s first two years, so partisanship cannot be much blamed for any slowness in pace. The larger point is that institutional issues inevitably lead to a growth in vacancies in the period immediately following a presidential election.

¹¹⁵ The judiciary was expanded from 811 with the addition of nine positions on January 1, 1999, Pub. L. No. 106-113, 113 Stat. 1501 (codified as amended at 28 U.S.C. § 133 (1999)), and another 10 positions on January 1, 2000, Pub. L. No. 106-553, 114 Stat. 2762 (codified as amended at 28 U.S.C. § 133 (2000)).

difference of twenty-seven vacancies from the 108 open judicial seats in July 2001.

Some of the large number of vacancies at the beginning of the Clinton and Bush II administrations probably reflects the fact that many life-tenured judges retire or take senior status after the White House switches parties due to a presidential election.¹¹⁶ For example, following twelve years of Republican presidency from 1981 to 1992, thirty-three judges left office in the one-year period beginning in October 1992. Nineteen of those judges had been appointed by Democratic presidents. Similarly, following eight years of the Clinton administration, forty-five judges left office in the year beginning in October 2000, of whom thirty-four had been appointed by Republicans. Even if there is no political reason for the timing of these judicial retirements, the important point here is that due to institutional behavior in the Senate and the executive branch, many judicial vacancies will necessarily arise between the time that the Senate stops considering judicial nominees—no later than the summer of an election year—and the time when the Judiciary Committee begins its work on the judicial nominees of a new administration, generally no earlier than late summer or fall of the next year. This observation gives us the first of our paradigmatic truisms (“relevancies”) about delay in the judicial confirmation process:

3. Relevancy #1 (“Retirement Plan”)

Large numbers of vacancies arise during the time period between the summer of a presidential election year and the fall of the first year of a new administration, particularly when the parties of the incoming and outgoing presidents differ.

In the weeks following Senator Kyl’s and Senator Sessions’s critical statements about the supposed slow pace of confirmation hearings under the Democratic Senate, the new chairman of the Judiciary Committee,

¹¹⁶ See Deborah J. Barrow & Gary Zuk, *An Institutional Analysis of Turnover in the Lower Federal Courts, 1900–1987*, 52 J. POL. 457, 464-72 (1990); David C. Nixon & J. David Haskin, *Judicial Retirement Strategies: The Judge’s Role in Influencing Party Control of the Appellate Courts*, 28 AM. POL. Q. 458, 484-85 (2000) (“To the extent that politics matters, it is primarily in the efforts of judges to delay retirement in the waning months of an opposing party president’s administration, hoping for a change in White House control.”); James F. Spriggs II & Paul J. Wahlbeck, *Calling It Quits: Strategic Retirement on the Federal Courts of Appeals, 1893-1991*, 48 POL. RES. Q. 573 (1995). Then again, a recent provocative article suggests that retirement rates are more closely related to pension vesting than to any political considerations. Albert Yoon, *Pensions, Politics, and Judicial Tenure: An Empirical Study of Federal Judges, 1869–2002*, 8 AM. L. & ECON. REV. 143 (2006).

Democrat Patrick Leahy of Vermont, began to answer his critics.¹¹⁷ Unfortunately, Leahy's claims about delay were also off the mark. After detailing the delays caused by the changeover in Senate control in June, Leahy continued:

Now consider the progress we have made on judicial nominations in [the context of those delays]. There were no hearings on judicial nominations and no judges confirmed in the first half of the year [2001] with a Republican majority. The first hearing I chaired on July 11 was one more than all the hearings that had been held involving judges in the first half of the year. The first judicial nomination who the Senate confirmed last Friday was more than all the judges confirmed in the first half of the year.¹¹⁸

But this claim of superior pace in the judicial confirmation process was as out-of-context as the Kyl and Sessions comments of only a few days before and was, indeed, just a version of the Dog Days fallacy, which reflects the fact that little happens in the process until the first September of a new presidency. As explained above, the failure of the Republican-led Judiciary Committee to hold hearings during the first half of 2001 was dictated not by any unusual procrastination by Republican Committee Chairman Hatch, but rather by the regular timing cycle of judicial nominations that follow a presidential election in which the White House changes hands.

Leahy also compared the number of appellate judges confirmed during the first year of the Bush I administration (five) and the number confirmed during the first year of Clinton's presidency (three) with the single appellate judge that the current Senate had just confirmed, and observed that his committee had already held hearings for two additional Court of Appeals nominees.¹¹⁹ However, Leahy failed to note that the confirmed judge was Roger Gregory, originally a Clinton nominee and recess

¹¹⁷ The tenor of the July 2001 debate over judicial appointments is well-illustrated by the following excerpt from Senator Leahy: "In spite of the progress we have been making during the few weeks since the Senate was allowed to reorganize . . . on Monday our Republican colleagues took to the Senate floor to change the tone of Senate debate on nominations into a bitterly partisan one. That was most unfortunate." 147 CONG. REC. S8339 (daily ed. July 27, 2001).

¹¹⁸ 147 CONG. REC. S8340 (daily ed. July 27, 2001) (statement of Sen. Leahy). *See also* 147 CONG. REC. S10681 (daily ed. Oct. 15, 2001) (statement of Sen. Reid) (to same effect).

¹¹⁹ 147 CONG. REC. S8340 (daily ed. July 27, 2001) (statement of Sen. Leahy).

appointment to the Fourth Circuit, who was only renominated by Bush II as a gesture of bipartisan cooperation at the time of an evenly-divided Senate.¹²⁰

Leahy also claimed that his Judiciary Committee's performance thus far in 2001 compared favorably to the appellate confirmations of 1996, when, according to Leahy, a Republican-led Senate failed to confirm even one of Clinton's Court of Appeals nominees.¹²¹ While the Senate's record of obstruction in 1996 was indeed extraordinary, as discussed further below, that year is not a good benchmark for comparisons with the first half of 2001. Leahy's argument is a more particularized version of the Time Out fallacy, in which one compares the number of judicial vacancies during a given period of time in one administration to the number of vacancies in another administration during a non-analogous time period. The years in which presidential elections take place, such as 1988, 1992, 1996, and 2000, have at least in recent history been markedly slower than other years for judicial confirmations.¹²² The obvious reason for this relative inaction is that Senators in opposition to the sitting president wish to hold judicial seats open on the chance that a president of their party will be able to fill them in a new administration.¹²³ Thus the second confirmation-delay relevancy:

4. Relevancy #2 ("Four Corners")

Within a president's four-year term, the year leading up to the next presidential election (the fourth year) is markedly slower than other years for judicial confirmations.

As discussed above, the first year following a presidential election typically has different institutional problems that lead to delay in confirmations, but such years are not easily comparable to years in which a presidential election takes place.

¹²⁰ See *supra* note 104.

¹²¹ 147 CONG. REC. S8340 (daily ed. July 27, 2001) (statement of Sen. Leahy). Leahy was wrong about this. A. Wallace Tashima and Sidney R. Thomas were both confirmed to the United States Court of Appeals for the Ninth Circuit on January 2, 1996. 142 CONG. REC. S19344 (daily ed. Jan. 2, 1996).

¹²² See Goldman, *Unpicking*, *supra* note 15, at 710 ("It is true that Congresses that include a presidential election year . . . have a lower proportion of confirmations than Congresses that do not.")

¹²³ See, e.g., 148 CONG. REC. S7452 (daily ed. July 29, 2002) (statement of Sen. Leahy) (quoting Prof. Kent Markus during the confirmations in 1996) ("The fact was, a decision had been made to hold the vacancies and see who won the presidential election. With a Bush win, all those seats could go to Bush rather than Clinton nominees.").

Leahy was on firmer ground in discussing Bush II's nominations to positions designated as "judicial emergencies" by the Administrative Office of the U.S. Courts.¹²⁴ Leahy was correct in his claim that the president had not yet nominated a single judge to fill one of the twenty-three judicial emergency positions in the District Courts.¹²⁵ By July 27, 2001, Bush II had nominated twenty-nine judges, but twenty had been to the Courts of Appeals, and none of the nine District Court nominees were for emergency positions.¹²⁶ While twelve of the twenty appellate nominations were for judicial emergencies, Leahy was right in noting that "many of these emergency vacancies became emergency vacancies and were perpetuated as emergency vacancies by the Republican majority's refusal to act on President Clinton's nomination[s] over the last 6 years."¹²⁷ Indeed, fifteen of the eighteen Court of Appeals judicial emergency positions in July 2001 had lingered unfilled from at least one year and in some cases up to eight years during the Clinton administration.¹²⁸ This is of course a product of the Four Corners relevancy.

The following week, on August 2, 2001, Chairman Leahy and the Ranking Minority member of the Judiciary Committee, Senator Orrin Hatch, exchanged barbs regarding the number of hearings held and the number of judges confirmed during the month of July 2001, as compared

¹²⁴ For the Judicial Conference definition of "judicial emergency" positions, see Revised Definition for Judicial Emergencies, available at <http://www.uscourts.gov/vacancies/080801/emergencies.htm>.

¹²⁵ 147 CONG. REC. S8340 (July 27, 2001). There were actually twenty-two District Court judicial emergencies. See <http://www.uscourts.gov/vacancies/070201/emergencies2.htm> (data for July 2, 2001).

¹²⁶ The eighteen judicial emergencies for the Courts of Appeals were for the Second, Third, Fourth (four), Fifth (three), Sixth (four), Eighth, Ninth (three), and Eleventh Circuits. See *id.* These figures did not reflect that Judge Gregory had been confirmed to the 4th Circuit on July 20, 2001. 147 CONG. REC. S8340 (daily ed. July 27, 2001)(statement of Sen. Leahy).

¹²⁷ *Id.* at S8340-41.

¹²⁸ See also 147 CONG. REC. S8341 (daily ed. July 27, 2001) (statement of Sen. Leahy) ("I remind my colleagues of their failure to grant a hearing or Committee or Senate consideration to the following: Robert Cindrich to the Third Circuit; Judge James A. Beaty, Jr. and Judge James A. Wynn, Jr. to the Fourth Circuit; Jorge Rangel, Enrique Moreno and H. Alston Johnson to the Fifth Circuit; Judge Helene White, Kathleen McCree-Lewis and Kent Marcus to the Sixth Circuit; Bonnie Campbell to the Eighth Circuit; James Duffy and Barry Goode to the Ninth Circuit. Those were 12 Court [sic] of Appeals nominees to 10 vacancies who could have gone a long way toward reducing the level of judicial emergencies around the country."). On several occasions, Senator Leahy remarked on the irony of the Republican rush to fill judicial positions that had been held over from the Clinton presidency. See, e.g., 147 CONG. REC. S10684 (daily ed. Oct. 15, 2001) (statement of Sen. Leahy):

It is a little bit like the young person who is before the court. He is there for murdering his parents and he says, Your Honor, you have to have mercy on me. I am an orphan. Well, this is the same thing. Republicans spent 2, 3, 4, 5, 6 years creating enormous judicial vacancies and then they come in and say we have to fill these judicial vacancies.

to the months of July during each of the previous six years.¹²⁹ These types of comparisons make no sense at all. During the first year of a new presidential administration very little, if anything, happens with regard to judicial nominations by the end of July.¹³⁰ There is really no basis for comparing committee action during the first year of a new presidency to activity during other years, when more nominations have been made and time has passed to allow committee investigation and action.

Senator Hatch's August 2 claims also illustrate the futility of comparing activity from the first year of a presidency to years other than the first year in that or any other presidency. Employing this Time Out fallacy, Hatch argued that the number of judges confirmed by the Democratic-majority Senate in July 2001—four—did not match up favorably to the numbers confirmed in July months between 1995 and 2000, when Republicans controlled the Senate—eleven, sixteen, three, six, four, and five, respectively.¹³¹ The problem with Hatch's argument is that these numbers ignore the length of time that the Judiciary Committee would have had to consider nominees by July of a given year. For example, because the White House changed hands in 2001, no nominations were made that year until early May, giving the Senate little time to consider them by July. In contrast, when the Senate confirmed sixteen judges in July 1996, all but one of those judges had been nominated by May of that year. In fact, nine of the sixteen had been nominated the year before. Likewise, the three judges confirmed in July 1997 had all been pending as nominees for over a year. And only one of the six judges confirmed in July 1998 had been nominated as late as May of that year.¹³²

Senator Leahy's comparison between the two Judiciary Committee nomination hearings of July 2001 with the number of nomination hearings held each month during Republican control of the Senate, from 1995 to 2000, also suffers from the Time Out fallacy, in that it compares statistics from non-analogous time periods of separate administrations.¹³³ The dates

¹²⁹ See 147 CONG. REC. S8691-92 (daily ed. Aug. 2, 2001) (statements of Sens. Leahy and Hatch).

¹³⁰ See *supra* notes 108-11 and accompanying text.

¹³¹ 147 CONG. REC. S8692 (daily ed. Aug. 2, 2001) (statement of Sen. Hatch). These numbers are mostly correct. Although no judges were confirmed in July 1995, nine judges were confirmed on June 30 of that year.

¹³² Federal Judicial Center, *supra* note 92.

¹³³ Senator Leahy argued that:

During the more than 6 years in which the Senate Republican majority scheduled confirmation hearings, there were 34 months with no hearing at all, 30 months with only one hearing and only 12 times in almost six and one-half years did the

of Judiciary Committee hearings depend on myriad factors that affect the scheduling of all Senate floor and committee actions; the timing of the hearings does *not* depend on whether it is July.¹³⁴ Moreover, the timing and number of hearings do not speak to the ultimate question of the number of judges confirmed by the full Senate. Thus a particular version of the Time Out fallacy, often invoked by Senator Leahy:

5. Fallacy #3 (“Hearing Test”)

Making arguments based solely on the number of Judiciary Committee hearings held, or hearings held during any particular time period, or the number of nominees appearing at each hearing.

Because of the Senate’s August recess and the terrorist attacks of September 11, 2001, arguments over the pace of judicial confirmations subsided for a time.¹³⁵ They resumed in October 2001, however, as Republicans moved to bring the pace of judicial nominations back into national focus. Republican senators did so by working to block or slow down the appropriations process in order to get agreements with the Democratic majority on the proper pace of judicial confirmation hearings.¹³⁶ Senator Leahy took to the floor to answer the challenges. Leahy’s main argument was that the pace of judicial confirmations in the 107th Congress compared favorably to the pace of confirmations during the

Judiciary Committee hold as many as two hearings involving judicial nominations in a month.

147 CONG. REC. S8691-92 (daily ed. Aug. 2, 2001) (statement of Sen. Leahy).

¹³⁴ Cf. 147 CONG. REC. S10544 (daily ed. Oct. 11, 2001) (statement of Sen. Hatch) (“I disagree with the whole idea that such a statistic [the number of months of his chairmanship of the Judiciary Committee during the Clinton administration with no hearings] could be relevant to any analysis of whether the Senate is performing its constitutional advice and consent function sufficiently.”); see also Stephan B. Burbank, *Politics, Privilege & Power*, 86 JUDICATURE 24, 27 (“An apparently unprecedented number of nominees never made it to a Judiciary Committee hearing and/or to the floor during the Clinton presidency, however, with the result that statistics based on those who were the subject of such hearings, or of a vote in the full Senate, are misleading if not meaningless.”).

¹³⁵ See Paul Kane, *Key Agency Nominees Will Receive Rapid Senate Action; Agreement Does Not Include Judicial Candidates*, ROLL CALL, September 17, 2001 (“Republican Policy Committee Chairman Larry Craig (R-Idaho) agreed that the goodwill on agency nominations is ‘different’ from lifetime positions on the federal bench, but predicted that judicial fights will not reach anywhere near the level of partisanship that had been building over the past few months.”).

¹³⁶ See Paul Kane, *Lott’s Push for Judges Imperils Partisan Truce*, ROLL CALL, October 4, 2001 (“Revisiting a pre-September 11 strategy, Senate Republicans plan to block and delay the appropriations process until they get solid guarantees that the Democratic majority will begin to confirm more judicial nominees The move appears to have at least the tacit blessing of the White House.”); Donald Lambro, “GOP ‘Hardball’ Ploy Aims to Fill Benches; Action Demanded on Bush Nominees,” WASH. TIMES, Oct. 17, 2001, at A10.

first years of the Bush I and Clinton presidencies. Leahy noted that during the first year of the Bush I administration, 1989, “the fourth Court of Appeals nominee [of five total] was not confirmed until November 8,” and that “the Senate never confirmed a fourth Court of Appeals nominee” during Clinton’s first year, 1993.¹³⁷ In contrast, in 2001 the Senate was confirming its fourth appellate nominee on October 4, and would confirm a fifth by the year’s end.¹³⁸

These assertions were correct but did not tell the full story. What most concerned Republicans was not the absolute number of appellate judges confirmed, but rather the number of appellate judges nominated but not yet confirmed. True, by mid-October 2001 four Court of Appeals judges had been confirmed, but another twenty-one of Bush II’s appellate nominees had not.¹³⁹ In contrast, only one of Clinton’s appellate nominees had not been confirmed by mid-October 1993, and all five of Bush I’s nominees that had been named by mid-October 1989 were confirmed that year.¹⁴⁰

In responding to Senator Leahy’s remarks, on October 11, 1989 Senator Hatch made this point about the number of judges that had been nominated by Bush II but not yet confirmed. He argued that “[m]ost of the statistics show that the judges who were nominated in the first year of a President, up to August 1st, basically went through.”¹⁴¹ Minority Leader Trent Lott referred explicitly to the Bush II appellate court nominees:

But here is what really does concern me. Of the judges whose names were submitted as far back as May and June, of that group of circuit judges, which included 19 of them, and including Judge Gregory, who clearly is a Democratic nominee, only 3 have been confirmed. One more has been reported. And there has been 1 hearing, leaving 14 of the 19 circuit judges’ names submitted in May or early June.¹⁴²

¹³⁷ 147 CONG. REC. S10539 (daily ed. Oct. 11, 2001).

¹³⁸ *Id.*

¹³⁹ Recall that Bush II nominated far more Court of Appeals judges, and far more quickly, than had previous administrations. *See* 147 CONG. REC. S10543 (daily ed. Oct. 11, 2001) (statement of Sen. Hatch) (“There are currently twenty-one of President Bush’s circuit court nominees pending in committee and who will be left at the end of his first year if the committee does not act soon.”). *See supra* notes 92-93 and accompanying text.

¹⁴⁰ Three other appellate judges were named by Bush I following mid-October 1989, and all were confirmed by early March 1990.

¹⁴¹ 147 CONG. REC. S10541 (daily ed. Oct. 11, 2001).

¹⁴² *Id.* at S10542. Following up on earlier comments, Senator Hatch elaborated:

President Clinton nominated 32 judges before October 31, 1993, his first year in office. Twenty-eight were confirmed that year. That’s an 88 percent

This was really the rub with respect to judicial nominations during Bush II's first year—how should the Senate have reacted to such an unprecedented flood of nominations, in particular the flood of Court of Appeals nominations?¹⁴³ This issue is important because the nominations process, at least in this respect, may have been permanently changed from the slower nominations pace of presidents before Bush II. If future presidents send early nominations to the Senate we will likely again see that the current system, particularly if the Senate insists on ABA review of the nominations before consideration in the Judiciary Committee,¹⁴⁴ does not work particularly well to provide speedy confirmations.

6. Relevancy #3 (“Future Shock”)

If a large number of lower-court judicial nominations are made early in the first term of future administrations, we should not expect to see speedy confirmations without changes in the current system of Senate review.

Other arguments made during the fall of 2001 about the statistics of judicial confirmation rates were flawed. Senator Hatch persisted in comparing the then-current vacancy rate in the federal judiciary, 108 of 830 (13.0%), with vacancy rates at the *end* of the 104th, 105th, and 106th Congresses, which were 7.7%, 5.9%, and 7.9%, respectively.¹⁴⁵ This is an example of the Time Out fallacy—comparing statistics from non-

confirmation rate. It's similar to the confirmation rate during the first year of President G.H.W. Bush's presidency— 89 percent—and compares to President Reagan's 100 percent rate of confirmation for nominees sent to the Senate before October 31, 1981. Compare these rates to where we are under President Bush and Chairman Leahy. President Bush has nominated 59 judicial nominees. Only eight have been confirmed—including the two the Senate confirmed tonight. That's a rate of 13.5 percent.

Id. at S10544. Of course, the Democrats still had some time left in 2001. The Senate ended up confirming twenty-eight lower-court judges by the end of the year.

¹⁴³ On the great number of early Bush II nominations, *see* 147 CONG. REC. S10682 (daily ed. Oct. 15, 2001) (statement of Sen. Kyl) (“It is important to point out that, probably more than any of the last four Presidents, [Bush II] has acted with alacrity to fill vacancies.”). *See also* 148 CONG. REC. S1697 (daily ed. Mar. 8, 2002) (statement of Sen. Smith):

It is unfair to compare the first years of the second Bush administration and the Clinton administration by looking only at the mere number of nominees confirmed. This approach fails to take into account the fact that President Bush chose to nominate 24 more circuit court nominees than President Clinton did. We can get lost in the numbers, and I don't want to go through it.

¹⁴⁴ *See supra* notes 62-64 and accompanying text.

¹⁴⁵ *See also* 147 CONG. REC. S10679 (daily ed. Oct. 15, 2001) (statement of Sen. Kyl).

analogous time periods of separate administrations. More apt might have been a comparison to mid-October vacancies during the Reagan, Bush I, and Clinton presidencies: 115 of 642 (17.9%), 57 of 731 (7.8%), and 122 of 811 (11.7%), respectively. Another favorite Hatch argument was comparing the total number of judges confirmed under Presidents Reagan and Clinton:

The bottom line of the [Hatch] Chairmanship is that the Senate confirmed essentially the same number of judges for President Clinton as it did for President Reagan—only 5 fewer. This proves the Republicans were fair—especially because it was a six-year Republican controlled Senate that confirmed 382 Reagan nominees, and a six-year Republican controlled Senate that confirmed 377 Clinton nominees.¹⁴⁶

When other facts are considered, Hatch's simple numerical comparison does not prove that the Republican Senate was fair to Clinton. For example, other commentators have ably shown ways in which levels of obstruction have grown over the last twenty-five years, including during Senator Hatch's time as Chair of the Judiciary Committee.¹⁴⁷ Moreover, when Reagan began his presidency in 1981, there were 642 lower-court judicial positions in total, a number that rose to 731 at the end of his second term, for an average of 695 positions during his time in office.¹⁴⁸ For Clinton, the number went from 811 to 830, an average of 815 positions. Thus, Reagan's 382 confirmations represented 55.0% of the judiciary, as compared to 46.3% for Clinton. Filling a comparable percentage of positions would have given Clinton 448 nominations.

¹⁴⁶ 147 CONG. REC. S10544 (daily ed. Oct. 11, 2001).

¹⁴⁷ A particularly excellent analysis of the increasing level of obstruction is presented by Professor Sheldon Goldman in *Unpicking*, *supra* note 15, and *Assessing the Senate Judicial Confirmation Process: The Index of Obstruction and Delay*, *supra* note 15. Also note that 123 of 377 of the judges confirmed during the Clinton administration—nearly two thirds—were confirmed during the first two years, when Democrats controlled the Senate.

¹⁴⁸ From the start of Reagan's first term, there were 642 lower-court judicial positions until April 1982, when the twelve Federal Circuit judges were added. Act of April 2, 1982, 96 Stat. 25. That number remained constant until July 1984, when the total number of positions rose to 731. Act of July 10, 1984, 98 Stat. 333. President Clinton's presidency began with 811 judicial positions. Judicial appropriation acts added nine district court judges for 1999, Pub. L. No. 106-113, 113 Stat. 1501 (codified as amended at 28 U.S.C. § 133 (1999)), and another ten positions for 2000, Pub. L. No. 106-553, 114 Stat. 2762 (codified as amended at 28 U.S.C. § 133 (2000)).

7. Fallacy #4 (“Absolute Value”)

Asserting that the total number of judges confirmed during a presidency is a true measure of Judiciary Committee fairness and effectiveness.

As the Republicans continued to stall appropriations bills through mid-October 2001 in order to force Democrats to move faster on judicial nominations, many senators from both sides of the aisle made speeches on the judicial confirmation process. The senators’ arguments generally echoed those made by Senators Leahy and Hatch, the current and former chair of the Judiciary Committee and thus the two leaders most closely associated with nominations.

A few new statistics were tossed into the mix. A common Republican claim, made in one instance by Senator George Allen of Virginia on October 16, 2001, was that only eight Bush II judges had been confirmed thus far—“nowhere near the 28 judges confirmed during Clinton’s first year, nor the 16 confirmed during Bush I’s first year.”¹⁴⁹ As with some of the other arguments discussed above, this argument fails to take into account the cycles of a given year’s confirmations, evidencing the Dog Days and Time Out fallacies. Of the twenty-seven first-year Clinton appointees, only four were approved prior to October 20, 1993. The four Bush I judges confirmed before October 25, 1989, were all renominations of Reagan appointees that had not gone through. All eleven of Bush I’s new nominees were confirmed between late October and the end of the year. President Reagan had an unusually high number of judges—twelve—confirmed prior to October of his first year in office,¹⁵⁰ but the other twenty-eight of his first-year judicial appointees were confirmed after October 25, 1981. The fair test for end-of-the-year statistical comparisons of the type Senator Allen made in October 2001 would be the end of the year.¹⁵¹ As it turns out, as discussed below, Leahy was able to get twenty-eight nominees confirmed by the end of 2001.¹⁵²

¹⁴⁹ 147 CONG. REC. S10761 (daily ed. Oct. 16, 2001). In fact, only fifteen lower-court judges were confirmed in 1989, Bush I’s first year in office. There were twenty-seven lower-court confirmations during Clinton’s first year; the Supreme Court confirmation of Justice Ruth Bader Ginsburg on August 3, 1993, brought the total number of judges to twenty-eight.

¹⁵⁰ Ten of those were confirmed in September.

¹⁵¹ Senator Reid picked up on the first-year timing issue—that most first-year nominations are not approved until late in the year—and made good arguments on that basis. See 147 CONG. REC. S10832-33 (daily ed. Oct. 18, 2001). He also added a few of the specious Leahy arguments, detailed above, for good measure. *Id.*

¹⁵² Given the Senate reorganization, the September 11 terrorist attacks, and the anthrax attacks on Senator Daschle’s and Leahy’s offices in November, it was a solid achievement to exceed in 2001 the number of judges confirmed in 1993 for Clinton by a Democrat-majority Senate, as far as this type of

Allen also claimed that the 108 vacancies of mid-October 2001 (thirteen percent of the judiciary) were “the highest [number] in modern history, except for the extraordinary event in December of 1990 when Congress created 85 [sic] new positions and, therefore, there were 85 vacancies all at once.”¹⁵³ However, there were 108 or more vacancies (peaking at 124 of 642, or 19.3% of the judiciary) for the entire period between March 14 and November 18, 1981, when Republicans controlled the White House and the Senate. When seventy-seven new positions were added to the judiciary on July 10, 1984, the number of vacancies hit 124 and did not fall below 108 until over a year later, on July 22, 1984. Congress did add eighty positions in December 1990, raising vacancies to 113, but the maximum vacancies still reached 138 of 811 (17%) before eventually falling below 108 in April of 1992, nearly a year and a half later. Vacancies exceeded 108 during the Clinton administration from April 2, 1993, to November 24, 1993, peaking at 123 before nineteen judges were confirmed on November 22 and November 24, with Democrats controlling the Senate. Vacancies again hit and exceeded 108 from December 1993 to March 1994.

As the Democrats confirmed more judges in the days following October 15, 2001,¹⁵⁴ Senate Republicans perhaps realized that they had made an error in arguing, as Senator Allen had, that President Bush would not get an identical number of lower-court nominees confirmed—twenty-seven—as did President Clinton in his first year. Because Bush II had nominated many more judges in his first year than previous presidents, it was not the absolute number of judges confirmed that really mattered to Republicans, but rather the percentage of judges—and particularly appellate judges—who received confirmation. For example, in late October 2001 Arlen Specter put a resolution before the Senate urging the body to confirm before the end of that year all judges who had been nominated by President

comparison goes. See Noelle Straub, *Judicial Gridlock in Senate: Same Story, Different Setting*, THE HILL, Feb. 27, 2001, at 1:

Michael Gerhardt, law professor at the College of William and Mary and author of *The Federal Appointments Process*, noted that the Senate Judiciary Committee faced an unprecedented situation in the past year. Democrats suddenly took control of the Senate in June and Vermont’s Patrick Leahy (D) replaced Utah’s Orrin Hatch (R) as chairman, and the panel had to expedite antiterrorism legislation after Sept. 11.

¹⁵³ 147 CONG. REC. S10761 (daily ed. Oct. 16, 2001). Congress actually added eighty positions, not eighty-five.

¹⁵⁴ Four District Court judges were confirmed on October 23, 2001. See 147 CONG. REC. S10868-71 (daily ed. Oct. 23, 2001).

Bush before the start of the Senate's August recess.¹⁵⁵ Specter argued that this expedited confirmation timeline would be appropriate because 100% of Reagan's and Bush I's pre-recess judges had been confirmed by the end of their first years in office, and 93% of Clinton's had been confirmed in his first year.¹⁵⁶ Specter's proposed resolution concluded:

It is the sense of the Senate that (1) prior to the end of the first session of the 107th Congress, the Committee on the Judiciary shall hold hearings on, and the Committee on the Judiciary and the full Senate shall have votes on, at a minimum, the judicial nominations sent to the Senate by the President prior to August 4, 2001, and (2) the standard for approving pre-August recess judicial nominations for past administrations should be the standard for this and future administrations regardless of political party.¹⁵⁷

It is the second clause in the Specter resolution that may prove interesting to future Congresses. As discussed above,¹⁵⁸ given the intense partisanship that has developed over lower-court judicial positions, particular those to the Courts of Appeals,¹⁵⁹ first-year presidents may in the future seek confirmation of more early judicial nominees than was the practice prior to Bush II. If a number of those early nominations are to the appellate courts, and are perceived by an opposition-led Senate to be immoderate in political or judicial ideology, it is hard to imagine a Senate considering and confirming the nominees prior to the end-of-year recess. This would be a particularly interesting issue if a Democrat were to win the

¹⁵⁵ 147 CONG. REC. S10927 (daily ed. Oct. 24, 2001). The resolution was in the form of an amendment to an appropriations bill, and was immediately ruled non-germane on a point of order from Senator Reid. *Id.* at S10928. *See also* 147 CONG. REC. S12121 (daily ed. Nov. 29, 2001) (statement of Sen. Hatch) (focusing on unconfirmed appellate nominees). Bush II had nominated forty-four judges before the August recess of 2001; half of the nominees were to the Courts of Appeals.

¹⁵⁶ *Id.* at S10927.

¹⁵⁷ *Id.*

¹⁵⁸ *See supra* notes 145-46 and accompanying text (discussing the "Future Shock" relevancy).

¹⁵⁹ Regarding the importance of the lower courts, see 147 CONG. REC. S13666 (daily ed. Dec. 19, 2001) (statement of Sen. Kennedy):

Lifetime appointments are at stake. The need for careful review is important not just for Supreme Court nominees but for nominees to the lower Federal courts as well. These courts hold immense power. Many important legal issues in this country are decided at the Court of Appeals level, since the Supreme Court decides fewer than 100 cases per year.

presidency in 2008 and make early nominations to a Republican Senate with a Judiciary Committee headed by Senator Specter.¹⁶⁰

The first session of the 107th Congress ended in December 2001 with, if anything, starker divisions between Republicans and Democrats over judicial nominations compared with earlier months in the year. The arguments made by both parties remained essentially the same, and although the Democrats confirmed more lower-court judges for Bush II in 2001 than they did for Clinton in 1993, almost all of the nominees regarded as “controversial” by the Democrats were left without hearings or votes, awaiting the second session of the 107th Congress, which began in January 2002.

B. 107th Congress, 2nd Session (2002)

Bush II sent twenty-four nominations, all for District Court positions, to the Senate in January 2002,¹⁶¹ and partisan skirmishing over judicial confirmations began in earnest in the Second Session of the 107th Congress. Leading the way were Patrick Leahy, Chairman of the Senate Committee on the Judiciary, and Orrin Hatch, the Committee’s Ranking Minority Member. And once again much of the rhetoric focused on statistics regarding delay.

Leahy reported on the status of judicial nominations on January 25, 2002. He began with typical arguments containing versions of the Dog Days,¹⁶² Time Out,¹⁶³ Hearing Test,¹⁶⁴ and Absolute Value¹⁶⁵ fallacies. But Leahy also made some more relevant arguments. He noted that fifty of

¹⁶⁰ See also 148 CONG. REC. S1233, S1235 (daily ed. Feb. 27, 2002) (statement of Sen. Specter):

I think we ought to declare a truce and sign an armistice agreement that we are not going to have a repetition of what happened when we had a Democrat in the White House and Republicans in control of the Judiciary Committee We ought to declare this truce and ought to sign this armistice so we take partisan politics out of the confirmation process of Federal judges.

¹⁶¹ 148 CONG. REC. S49 (daily ed. Jan. 23, 2002). None by Reagan in January; eleven by Bush I; nine by Clinton.

¹⁶² See, e.g., 148 CONG. REC. S118 (daily ed. Jan. 25, 2002) (“Last session we had less than 6 months.”).

¹⁶³ See, e.g., *id.* (“By contrast, when my friends on the other side of the aisle took charge of the Senate in January 1995, until the majority shifted last summer, judicial vacancies rose from 65 to more than 100, an increase of almost 60 percent.”).

¹⁶⁴ See, e.g., *id.* at S119.

¹⁶⁵ See, e.g., *id.* at S118 (“In just 5 months we went on to confirm 28 additional judges, as I have said, more than five times the number the White House predicted we would confirm. Think of that, Mr. President—five times what the White House was telling the American people we would confirm.”).

Clinton's lower-court nominees received neither a hearing nor committee vote when the Republicans controlled the Senate from 1995 to 2000, and even some nominations that led to confirmations had been delayed by years.¹⁶⁶

Leahy also gave two plausible arguments for why unilateral action by the Bush II administration had caused delays in the 107th Congress's confirmation process. First, the administration ended the practice of having the American Bar Association review candidates for federal judgeship prior to their nominations. ABA review started with the Eisenhower administration and continued uninterrupted for nearly fifty years through the Clinton administration, but a rising chorus of conservative critics urged the Bush II administration to drop the practice.¹⁶⁷ The Democrat-led Senate Judiciary Committee, however, decided to keep the ABA involved, and asked for reviews post-nomination. The time needed for the ABA to complete the reviews generally delayed consideration of the candidates by the Senate for six to eight weeks.¹⁶⁸

Second, Leahy accused the Bush II administration of "disregarding . . . the longstanding practice that encouraged consultation with home-state senators, both Republicans and Democrats."¹⁶⁹ Leahy was perhaps overstating the "longstanding" influence that opposition senators have had over judicial nominations in their states, however. While it was apparently the practice of the Republican-led Judiciary Committee during the Clinton administration to allow a single withheld "blue slip" from a home-state senator to prevent consideration of a nominee, even from a senator not of the president's party, commentators have reported that the practice was not so strictly implemented in prior Congresses.¹⁷⁰

¹⁶⁶ *Id.* at S119. Sheldon Goldman puts the number of Clinton nominees without hearings at seventy-six, and counts a total of one hundred lower-court Clinton nominees who were not confirmed during Republican control of the Senate. Goldman, *Assessing*, *supra* note 15, at 252-53. Professor Goldman's numbers treat "renomination" in subsequent Congresses as separate nominations. See *infra* note 195.

¹⁶⁷ Lewis & Johnston, *supra* note 63. Perhaps ironically, the ABA Standing Committee on the Federal Judiciary had been criticized in earlier times as favoring traditionally successful older white males as judicial candidates. See Arthur J. Paone & Robert Ira Reis, *Effective Enforcement of Federal Nondiscrimination Provisions in the Hiring of Lawyers*, 40 S. CAL. L. REV. 615, 616 n.5 (1967) (noting that the Committee "usually recommends only the 'Wall Street' type lawyer for Federal judgeships"); Elliot E. Slotnick, *The ABA Standing Committee on Federal Judiciary: A Contemporary Assessment—Part 2*, 66 JUDICATURE 385 (1982).

¹⁶⁸ 148 CONG. REC. S119 (daily ed. Jan. 25, 2002) (statement of Sen. Leahy).

¹⁶⁹ *Id.*

¹⁷⁰ See Denning, *Blue Slip*, *supra* note 15, at 76-87.

1. Relevancy #4 (“Kind of Blue”)

The effect given by the Senate Judiciary Committee chairman to the withholding of a “blue slip” by one or both home-state senators can determine the success or failure of any particular lower-court judicial nominee.

In his opening remarks during the Senate debate on January 25, 2002, Senator Hatch began with the Absolute Value fallacy¹⁷¹ and added the Time Out fallacy,¹⁷² but he also brought up several important issues. First, he argued that more nominees were “left hanging” without a vote (fifty-four) at the end of the Bush I presidency, when Democrats controlled the Senate, than were pending without a vote (forty-one) at the end of the Clinton presidency, when Republicans controlled the Senate.¹⁷³ Second, Hatch brought up the increasingly important point, first raised the previous year, that twenty-three of Bush II’s twenty-nine nominees to the Courts of Appeals had yet to be confirmed.¹⁷⁴ He also announced a goal of the confirmation of at least one hundred judges in 2002, the number confirmed in 1994, during Clinton’s second year in office.¹⁷⁵

Senator Hatch’s statistic of nominees “left hanging” without a vote is one possible measure of Senate obstruction of a president’s judicial nominees. However, Hatch’s statistic leaves out a large category of nominees who also do not receive Senate votes—those whose names are withdrawn during the course of the administration and are thus no longer pending at the end of a presidency. A better measure of obstruction would also take into account these withdrawn judges. For example, Reagan

¹⁷¹ 148 CONG. REC. S117, S121 (daily ed. Jan. 25, 2002) (“[T]he overall record makes clear that we were fair.”).

¹⁷² *Id.* at S124-25. Hatch quoted approvingly from Chief Justice Rehnquist’s 2001 year-end report on the federal judiciary, comparing the eighty-two vacancies on the federal courts at the beginning of 1998 with the ninety-nine vacancies at the beginning of 2002. Of course, the Clinton administration had been appointing judges for five years by 1998, and had overcome some of the delays inherent in the first year of an administration. A fairer comparison for January 2002 might have been the beginning of the second year for Clinton, January 1994 (112 vacancies), or even January 1982 (ninety-four vacancies), the beginning of the second year of the Reagan Administration. Bush I only faced sixty vacancies at the start of his second year, 1990, but he had begun his presidential term with a remarkably low thirty-nine vacancies at the start of 1989.

¹⁷³ *Id.* at S121. Hatch further argued that, given that some of the nominations in each administration were made too late to be acted upon by the Senate, the effective numbers left pending were forty-eight for Bush I and thirty-two for Clinton.

¹⁷⁴ *Id.* at S125. *See also* 148 CONG. REC. S117, S127 (daily ed. Jan. 25, 2002) (statement of Sen. Nickles) (“The percentage of district court judges has been a good percentage for the number who were nominated through the summer On circuit court judges, the record is not quite so good. We have confirmed six. President Bush has nominated 29.”).

¹⁷⁵ *Id.* at S124.

appointed 373 lower-court judges in his eight years in office; only twenty-six of his nominees were not voted on in the Senate.¹⁷⁶ Bush I appointed 184, and did not get votes on fifty-three others.¹⁷⁷ Clinton appointed 365 lower-court judges and did not receive votes on sixty-nine others.¹⁷⁸

On February 4, 2002, Leahy revisited claims that suffered from the Dog Days and Time Out fallacies.¹⁷⁹ He also spelled out a broader role for the Senate in advising on potential nominees.¹⁸⁰ Leahy chose to emphasize statistics for trial court nominees, tacit evidence that he recognized that appellate nominees would be the battleground during the upcoming year.¹⁸¹

Hatch's rejoinder to Leahy's speech was also a re-airing of past claims, with the Absolute Value,¹⁸² Dog Days,¹⁸³ and Time Out¹⁸⁴ fallacies given prominence. Hatch again focused on delays in circuit court nominations. He also defended the Bush II administration's work with home-state senators in the nomination process¹⁸⁵ and noted that some of the Clinton nominees that had been held up for long periods of time lacked home-state senatorial support.¹⁸⁶

Both Leahy and Hatch returned to their basic judicial-confirmation "stump speeches" on February 11.¹⁸⁷ However, Hatch's speech of March

¹⁷⁶ At some point in the process, nominations are made too late in the election cycle to be acted upon by the Senate. Using a date of July 1 as a cutoff does not change the numbers very much. Only one of the failed Reagan nominations was made after July 1, 1988. Six additional Reagan nominees were eventually confirmed after renomination during the Bush I administration. *See supra* note 93.

¹⁷⁷ Ten of the failed Bush I nominations were made after July 1, 1992.

¹⁷⁸ Thirteen of the failed Clinton nominations were made after July 1, 2000.

¹⁷⁹ 148 CONG. REC. S276- (daily ed. Feb. 4, 2002). Leahy inserted a similar speech the next day. *See* 148 CONG. REC. S319-20 (daily ed. Feb. 5, 2002).

¹⁸⁰ 148 CONG. REC. S278 (daily ed. Feb. 4, 2002) ("The most progress can be made most quickly if the White House would begin working with home-State Senators to identify fair-minded, nonideological, consensus nominees to fill these court vacancies.").

¹⁸¹ *Id.* ("In the last 5 months of last year, the Senate confirmed a higher percentage of the President's trial court nominees, 22 out of 36, than a Republican majority had confirmed in the first session of either of the last two Congresses with a Democratic President.").

¹⁸² 148 CONG. REC. S341 (daily ed. Feb. 5, 2002).

¹⁸³ *Id.* at S341.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ 148 CONG. REC. S582-83 (daily ed. Feb. 11, 2002). Leahy repeated his basic claims on February 15, February 26, and March 12. *See* 148 CONG. REC. S1738 (daily ed. Mar. 12, 2002); 148 CONG. REC. S1138 (daily ed. Feb. 26, 2002); 148 CONG. REC. S894 (daily ed. Feb. 15, 2002). Different versions of the basic Leahy speech can also be found at 148 CONG. REC. S3338-40 (daily ed. Apr. 25, 2002); 148 CONG. REC. S3143 (daily ed. Apr. 23, 2002); 148 CONG. REC. S2932-33 (daily ed. Apr. 18, 2002); 148 CONG. REC. S2758 (daily ed. Apr. 17, 2002); 148 CONG. REC. S2661-62 (daily ed. Apr. 15, 2002); 148 CONG. REC. S2200 (Mar. 21, 2002); 148 CONG. REC. S1998 (daily ed. Mar. 18, 2002). Hatch was less repetitive, but occasionally restated his basic points. *See* 148 CONG. REC. S7456 (daily ed. July 29, 2002); 148 CONG. REC. S7019 (daily ed. July 18, 2002); 148 CONG. REC.

12 was much more pointed, focusing exclusively on the circuit courts, and it signaled a new push from Republicans on judicial nominations. Senator Hatch's emphasis coincided with the Judiciary Committee's hearing on the nomination of Judge Thomas Pickering to the United States Court of Appeals for the Fifth Circuit. Hatch argued that there were currently thirty-one vacancies on the Courts of Appeals ("far higher than the Republicans ever let it reach"), while there had never been more than twenty-one at the end of any year in President Clinton's first term. He also pointed out that circuit court vacancies totaled only eighteen, fourteen, and twenty-five at the end of the 104th, 105th, and 106th Congresses, respectively.¹⁸⁸ And he argued that eight of sixteen positions on the Sixth Circuit, and four of twelve on the D.C. Circuit, sat vacant despite pending nominations.

Hatch's points were mostly well-taken. The thirty-one vacancies in the circuit courts were a high number relative to other times, although twenty-five of the vacancies had been inherited from the Clinton administration. However, the story of the Sixth Circuit and D.C. Circuit vacancies was perhaps more complex than Hatch represented. Four of the Sixth Circuit vacancies had been unfilled for at least the entire last year of the Clinton administration, 2000, and one had been open since May 1, 1995.¹⁸⁹ Similarly, two of the D.C. Circuit vacancies had existed since August 1996 and November 1999. Moreover, during the Clinton administration, some Republicans had objected to filling the two D.C. Circuit vacancies because, in their estimation, the court did not need more than ten judges.¹⁹⁰

Following the party-line defeat of Thomas Pickering's Fifth Circuit nomination in the Senate Judiciary Committee on March 14, 2002,¹⁹¹ Senate Republicans determined to highlight what they perceived as breakdowns in the judicial nomination process. Senator Trent Lott, the

S6794 (daily ed. July 15, 2002); 148 CONG. REC. S2936-37 (daily ed. Apr. 18, 2002); 148 CONG. REC. S2201 (daily ed. Mar. 21, 2002).

¹⁸⁸ 148 CONG. REC. S1739 (daily ed. Mar. 12, 2002).

¹⁸⁹ See *Ghosts Of Nominations Past: Setting The Record Straight: Hearing Before the Subcomm. on Admin. Oversight of the Courts of the S. Comm. on the Judiciary*, 107th Cong. 18-22 (2002) (testimony of Kent Markus, Professor, Capital University Law School).

¹⁹⁰ Amy Goldstein & Neely Tucker, *Bush Plans To Add 2 Judges to Key Court; Senate GOP for Years Blocked Filling All Seats*, WASH. POST, Dec. 15, 2002, at A01; Sandra Torry & Toni Locy, *In Rocky Session, Judge of U.S. Appeals Court for D.C. Confirmed*, WASH. POST, Mar. 20, 1997, at A14 ("Sen. Jeff Sessions (R-Ala.), a conservative elected to the Senate in November [argued] that it would be a 'rip-off' of taxpayers to allow the court to have more than 10 judges.").

¹⁹¹ The Committee voted ten to nine against the nomination and ten to nine against sending the nomination to the floor without a recommendation. Helen Dewar & Amy Goldstein, *Appeals Court Choice Rejected; Senate Panel Hands Bush 1st Defeat on Judicial Nomination*, WASH. POST, Mar. 15, 2002, at A01.

Senate Minority Leader and Pickering's main supporter, attributed the nominee's defeat in part to Democrats' desire for payback for slow judicial confirmations during the Clinton administration.¹⁹² Lott echoed a frequently-made Republican claim about the Clinton years: "[T]he Judiciary Committee under the Republicans didn't kill a single nominee during the Clinton years in the committee. We did defeat one of them, but we first reported him out of the committee and then defeated him on the floor with a recorded vote."¹⁹³

Lott was understandably upset over the defeat of the nomination of a close friend, but it is hard to believe he could make this claim with a straight face. The Judiciary Committee during the 104th to 106th Congresses—the last six years of Clinton's presidency—may not have killed a Clinton nominee by *vote* of the committee, but the Committee nonetheless frequently defeated nominees by the arguably less commendable method of simply not giving the nominee a hearing or vote.¹⁹⁴ According to Professor Sheldon Goldman's calculations, during the final six years of the Clinton administration, while Senator Hatch chaired the Judiciary Committee, twenty-eight of seventy-nine appellate nominees received no hearings, along with forty-eight of the 262 district court nominees.¹⁹⁵

¹⁹² 148 CONG. REC. S1916 (daily ed. Mar., 2002) (statement of Sen. Lott) ("This is a 'We will show you; you didn't always move our nominees' payback."); *see also id.* at S1923-24 (statement of Sen. Kyl) ("There is also a very significant undercurrent of retribution.")

¹⁹³ *Id.* at S1916. Hatch has made the same argument many times. *See, e.g.*, 148 CONG. REC. S2201 (daily ed. Mar. 21, 2002) ("[D]uring the 6 years that Republicans controlled the Senate during the Clinton administration, not once was one of his judicial nominations killed by a committee vote."); *see also* 147 CONG. REC. S10763 (daily ed. Oct. 16, 2001) (statement of Sen. Sessions). Senator Lott also offered a "Sense of the Senate" resolution which recited many Republican claims regarding judicial nominations. *Id.* at S1917.

¹⁹⁴ *See generally supra* notes 47-78 and accompanying text (discussing the veto-gates that can kill nominations—committee inaction, holds, and blue slips).

¹⁹⁵ Goldman, *Unpicking, supra* note 15, at 709, 712. *See also* 148 CONG. REC. S1924 (daily ed. Mar. 14, 2002) (statement of Sen. Kyl) ("Only one judge was defeated on the floor of the Senate, and I do not think any were defeated in the committee, as Judge Pickering was today. But there were some judges who did not get a hearing. Maybe there were too many."). Professor Goldman counts people nominated for the same judicial vacancy in more than one Congress as separate nominations. Senator Hatch generally counts the same such multiple nominations as single nominations only, so he claims that fewer nominees failed to receive hearings. *See, e.g.*, 148 CONG. REC. S1920 (daily ed. Mar. 14, 2002). The consideration of persons nominated for the same position in successive Congresses is a difficult issue, because it also affects the number of days that a nominee is "pending" before the Senate. When complaining of delay in the process, both parties generally count from the date of the first nomination to the date of the final action—even if in another Congress and thus technically a different nomination—in calculating how long the Senate took to consider a particular nominee.

2. Fallacy #5 (“Killing Floor”)

Failure to acknowledge nominations that never received a hearing or vote at the committee level when tallying the number of nominations “defeated” in a particular Congress.

On March 14, Senator Hatch also offered a comprehensive defense of his Committee’s performance during the final six years of the Clinton administration. He specifically addressed the large number of nominees who had received no hearings:

There were only 68 Article III Judicial nominees who were nominated by President Clinton, in all of his 8 years, who did not get confirmed. Of those, 3 were left at the end of the 103rd Congress, when the Democrats controlled the Senate. That leaves 65. Of those, 12 were withdrawn by the President, leaving 53. Nine were nominated too late for the Congress and committee to act on them or they were lacking paperwork. That leaves 44. Now, 17 of those lacked home state support, which was often the result of a lack of consultation with home State Senators. There was no way to confirm them without ignoring the senatorial courtesy that we afford to home State Senators in the nomination process. That left 27. One nominee was defeated on the floor, which leaves only 26 remaining nominees.¹⁹⁶

Hatch’s numbers here are in large measure correct,¹⁹⁷ and his narration provides nuanced insight into how the Judiciary Committee considers judicial nominations and demonstrates how difficult it is to compare nomination statistics from different time periods. As discussed above, a nomination can fail for any number of reasons, not all of which are the “fault” of the Judiciary Committee or its chairman. Hatch does not spell

¹⁹⁶ 148 CONG. REC. S1919 (daily ed. Mar. 14, 2002). And this coming from the same Senator with an avowed antipathy for “statistical judo!” See *supra* note 1 (citing “statistical judo”).

¹⁹⁷ The Senate library nominations database shows sixty-nine Clinton judicial nominations not acted upon, five of which were from the 103rd Congress, 1993 to 1994. Eighteen of the sixty-nine failed nominees were nominated in at least two sessions of Congress, so Democratic lawmakers sometimes claim a greater number of failed nominations. Twenty-two of the sixty-nine were circuit court nominees, and nine of those were nominated in multiple Congresses. Because blue slips and holds were private during the Hatch years, Hatch’s claims cannot be evaluated in their entirety.

out when a nomination would be made “too late” to be considered, but looking back over previous election years we see successful nominations in presidential election years as late as September 28, 1984; August 3, 1988; September 17, 1992; June 6, 1996; July 21, 2000; and July 22, 2004.

Hatch also returned to arguments he had made previously¹⁹⁸ comparing the Clinton confirmation record with that of the Bush I administration: “So the argument that this all began because the Republicans were unfair to Clinton nominees is simply untrue. We were not. I was more fair to Clinton in confirming nominees than the Democrats were to President George H.W. Bush.”¹⁹⁹ While many Democrats would take exception with any argument that Hatch was fair to Clinton nominees, his point about Democrats stalling with Bush I’s nominees is important. As Professor Goldman has shown, significant obstruction and delay in the judicial confirmation process actually first appeared during 1988 and 1992, both presidential election years when Republicans controlled the White House and Democrats controlled the Senate. As Goldman explains, “But with the situation reversed with a Democrat in the White House and the Republicans in control of the Senate, the evidence clearly shows that the Republicans ratcheted up obstruction and delay, with all-time records [of nomination delays] for the district and appeals courts”²⁰⁰

Hatch concluded with versions of the Dog Days and Time Out fallacies.²⁰¹ Arguing specifically about the circuit courts, he claimed:

Taking numbers by the end of each Congress, a Republican-controlled Senate has never-ever-left as many circuit court vacancies as currently exist today. At the end of the 104th Congress, the number was 18. At the end of the 105th Congress, that number was 14, and even at the end of the 106th Congress, a Presidential election year, that number was only 25. Today there are 31 vacancies in the circuit courts.²⁰²

If Hatch had waited until the end of 2002, a more appropriate date for comparison, he would have found that the number of circuit court vacancies had declined to twenty-five. But, importantly, twelve of those

¹⁹⁸ See *supra* notes 162-70 (discussing January 25, 2002).

¹⁹⁹ 148 CONG. REC. S1920 (daily ed. Mar. 14, 2002).

²⁰⁰ Goldman, *Assessing*, *supra* note 15 at 256-57.

²⁰¹ 148 CONG. REC. S1920 (daily ed. Mar. 14, 2002).

²⁰² *Id.*

spots had been vacant for at least one year under Clinton and were thus particularly difficult for some Democrats to accept being filled with Republican nominees. As Senator Leahy argued, “This is a case of the arsonist coming forward and saying: We need a better fire department around here. Look at all these buildings that are burning down. All these vacancies were there because Republicans refused to hold hearings on the Court of Appeals nominees.”²⁰³ In comparison, at the end of 1994, with Democrats in both the White House and Senate, there were fifteen appellate vacancies, only five of which were held over from Bush I.

Senator Mitch McConnell, a Republican from Kentucky, took a new tack in late March 2002, arguing that nominees for the Sixth Circuit had been pending for too long without votes. He pointed to one judge pending for ninety-three days; three for 134 days; another for 164 days; and two more for “an incredible 317 days” each.²⁰⁴ While 317 days, or even ninety-three, might seem like a long time to those uninitiated in the vagaries of the judicial confirmation process, McConnell’s comment only invited Democratic reminders of the much longer wait times that many Clinton nominees faced before ultimate action—confirmation, rejection, or return to the President—under the Republican-led Senate. Indeed, Senator Leahy had the numbers at hand: “I think of Helene White [a 1997 Clinton nominee to the Sixth Circuit]. She waited 1,454 days. I do not recall a single Member of the Republican Party saying should she not at least have a hearing; even if we vote her down, should she not at least have a hearing. She did not even have a hearing or a vote in the committee; 1,454 days, not a word.”²⁰⁵

²⁰³ 148 CONG. REC. S2759 (daily ed. Apr. 17, 2002) (statement of Sen. Leahy); *see also* 148 CONG. REC. S2206 (daily ed. Mar. 21, 2002) (statement of Sen. Schumer):

Well, a problem cannot be created and then the complaint made that someone else is not solving it fast enough. That is the height of unfairness. That is the height of sophistry Do not make the argument about vacancies that you have created unless you are prepared to make this a partnership to fill those vacancies.

See also id. at S3549 (daily ed. Apr. 30, 2002) (statement of Sen. Reid) (comparing Republicans to the perpetrator of matricide and patricide who asks his sentencing judge for leniency on account of his status as an orphan).

²⁰⁴ 148 CONG. REC. S2205 (daily ed. Mar. 21, 2002) (“Jeffrey Sutton and Deborah Cook were nominated an incredible 317 days ago with no hearings on any of these nominees.”). Sutton and Cook were two of Bush II’s first nominations, made on May 9, 2001. Those nominations were returned to the President under the provisions of Senate Rule XXXI, paragraph 6, *supra* note 50, on August 3, 2001, due to the Senate’s summer recess. Bush then renominated the candidates on September 4, 2001, and the nominations were held over rather than returned during the winter break of 2001-2002.

²⁰⁵ 148 CONG. REC. S2215 (daily ed. Mar. 21, 2002). He continued:

Perhaps chastened,²⁰⁶ McConnell came back the next month with a new argument, albeit one afflicted by the Dog Days and Time Out fallacies. His argument was simple: “[A]t least eighty-six percent of circuit court nominees from the administration of President Jimmy Carter through President Bill Clinton got a full Senate vote,”²⁰⁷ but only seven of twenty-nine Bush II circuit court nominees had received votes thus far in the 107th Congress. The problem, of course, was that the Congress still had more than eight months to run. Reagan got nineteen appellate judges confirmed in his first Congress, but ten of them were confirmed from March to December of his second year in office. Bush I had twenty-two appellate judges confirmed in his first Congress, but seventeen were confirmed between March and December of his second year in office. For Clinton, sixteen of the nineteen appellate judges confirmed during his first Congress were confirmed from March to December of his second year in office. Ten more Bush II appellate nominees, of the thirty-one he nominated during his first Congress, were ultimately confirmed in 2002. Though still not as many or as high a percentage of appellate judges were confirmed for Bush II as for his predecessors, the circuit-court confirmation numbers from Bush II’s first Congress ended up substantially greater than those suggested by McConnell’s premature argument.

Senator Leahy’s comments on April 25, 2001, show his continued focus on aggressively raising what this article characterizes as the Dog Days and Time Out fallacies:

I look at the other qualified nominees we had to wait for. There was another one, Fifth Circuit. H. Alston Johnson waited 602 days, no hearing. There was James Duffy, Ninth Circuit, 546 days, no hearing. And Kathleen McCree Lewis, extraordinarily competent attorney, daughter of one of the most respected solicitors general ever in this country, she waited 455 days and never received a hearing. There was Kent Markus of the Sixth Circuit who waited 309 days under the Republicans and never got a hearing. And Robert Cindrich of the Third Circuit who never received a hearing in over 300 days.

Then there were the nominations that were held up without a hearing such as Judge James Beaty who waited 1,033 days, no hearing. James Wynn, Fourth Circuit, 497 days, no hearing. Enrique Moreno, Fifth Circuit, waited 455 days, never got a hearing. Jorge Rangel, the Fifth Circuit, 454 days, never received a hearing.

Allen Snyder, the D.C. Circuit; now I will give them credit, he waited 449 days and finally did get a hearing. Of course, they never brought it to a vote in the committee, but he did receive a hearing. He and Bonnie Campbell, the former Iowa Attorney General had hearings but never were on the Committee agenda for a vote.

²⁰⁶ Though not too much; McConnell made essentially the same argument about delay on April 16, 2002. 148 CONG. REC. S2692 (daily ed. Apr. 16, 2002).

²⁰⁷ 148 CONG. REC. S2601 (daily ed. Apr. 11, 2002).

With today's votes, the total number of Federal judges confirmed since the change in Senate majority will now be 50. As our action today demonstrates, again, we are moving to confirm President Bush's nominees at a faster pace than the nominees of prior presidents. It took almost 14 months for the Senate to confirm 50 judicial nominees for the Reagan administration. It took more than 15 months for the Senate to confirm 50 judicial nominees for the Clinton administration. And it took nearly 18 months for the Senate to confirm 50 judicial nominees for the George H.W. Bush administration.²⁰⁸

Because of the Senate changeover in mid-2001, Leahy simply did not count the first seven months of that year. But, as shown above, very few judges, if any, would have been confirmed in the early months of the Bush II presidency regardless of party control in the Senate. If the full fifteen months of the 107th Congress are counted, one sees from Leahy's own numbers that in April 2002 the Senate was on an average pace for confirmation of Bush II's first fifty judges.²⁰⁹

As May 9, 2002, the first anniversary of Bush II's first eleven circuit court judge nominations, approached, the Republicans began to more aggressively make judicial confirmations an issue. At the end of April, Senator Hatch laid out the new battle plan:

The most important measure of performance should be how we are handling the most important courts: the Circuit Court of Appeals. Let's compare the treatment of President Bush's first 11 circuit court nominees to the first 11 of previous presidents [After nearly 365 days]

²⁰⁸ 148 CONG. REC. S3418 (daily ed. Apr. 25, 2002).

²⁰⁹ Leahy repeated this fallacy throughout the remainder of the 107th Congress. See 148 CONG. REC. S11522 (daily ed. Nov. 19, 2002); 148 CONG. REC. S11306-S11308 (daily ed. Nov. 18, 2002); 148 CONG. REC. S11206 (daily ed. Nov. 15, 2002); 148 CONG. REC. S11047 (daily ed. Nov. 14, 2002); 148 CONG. REC. S10344-S10347 (daily ed. Oct. 10, 2002); 148 CONG. REC. S9975-S9977 (daily ed. Oct. 4, 2002); 148 CONG. REC. S9896-S9897 (daily ed. Oct. 3, 2002); 148 CONG. REC. S8958 (daily ed. Sept. 20, 2002); 148 CONG. REC. S8664 (daily ed. Sept. 17, 2002); 148 CONG. REC. S8588 (daily ed. Sept. 13, 2002); 148 CONG. REC. S8511 (daily ed. Sept. 12, 2002); 148 CONG. REC. S8448 (daily ed. Sept. 10, 2002); 148 CONG. REC. S7808, S7813 (daily ed. Aug. 1, 2002); 148 CONG. REC. S7452-S7457 (daily ed. July 29, 2002); 148 CONG. REC. S7397 (daily ed. July 26, 2002); 148 CONG. REC. S7017-S7019 (daily ed. July 18, 2002); 148 CONG. REC. S6795 (daily ed. July 15, 2002) (explaining that the two-month delay since the most recent confirmation was due to disagreement between administration and Senate leadership over appointments to bipartisan boards and commissions); 148 CONG. REC. S3522 (daily ed. Apr. 30, 2002).

only 3 of the President's first 11 nominees are confirmed. Is this what the Democratic leadership considers a record-breaking pace? It may be record-breaking, all right, but not the record they're talking about. They are confirming with the velocity of molasses.²¹⁰

Hatch unfavorably compared this 2001 record to that of the first eleven circuit court nominees for Reagan, Bush I, and Clinton, all of whom had been confirmed within a year of nomination.²¹¹ This was true, though as explained above the first eleven circuit court nominations of these earlier presidents were made over an extended period of time, extending into the second years of their administrations, rather than in one block at the very beginning of "confirmation season."²¹²

Senator Reid countered Senator Hatch by noting that five of the eleven vacancies which Bush II sought to fill were for positions that had been unfilled for at least a year or more during the Clinton administration.²¹³ This was true, and Reid perhaps even undersold his point. In fact, eight of the eleven Bush II nominations were to positions that had been vacant since 1999 or earlier, with one stretching all the way back to 1990, during the Bush I administration. But Reid did not tell the full story: many of the vacancies filled by Clinton's first eleven appointments had also been held unfilled for over a year at the end of the Bush I administration. This is a function of the Four Corners relevancy, which is embraced by each party during different time periods depending on who controls the political branches.

Finally, on May 9, 2002, the Republicans fully opened their offensive on judicial nominations. Speaking for the Republicans on the Senate floor were Senators Hatch, Thompson, Voinovich, Grassley, Frist, Hutchinson, Hutchison, DeWine, Allard, Lott, McConnell, Brownback, Nickles, Santorum, and Kyl.²¹⁴ Senator Hatch set out the main arguments for the Republicans. He dragged out his familiar Absolute Value fallacy and repeated his arguments about the number of nominees pending without a

²¹⁰ 148 CONG. REC. S3528-29 (daily ed. Apr. 30, 2002). *See also id.* at S3545 (statement of Sen. Kyl).

²¹¹ *Id.* at S3528.

²¹² *See supra* notes 92-93 and accompanying text.

²¹³ 148 CONG. REC. S3549 (daily ed. May 9, 2002).

²¹⁴ *See id.* at S4089-S4132 (daily ed. May 9, 2002). Senators Leahy, Reid, Durbin, and Feingold answered on behalf of the Democrats, using arguments substantially similar to those made and discussed before.

vote at the end of the Bush I and Clinton presidencies.²¹⁵ He again compared confirmation results for the first eleven circuit court nominees under the past four administrations.²¹⁶ Finally, Hatch introduced a new argument comparing the success of the first hundred judicial nominees under the past few administrations: Clinton, ninety-seven of one hundred confirmed in an average of ninety-three days; Bush I, ninety-five of one hundred confirmed in an average of seventy-eight days; Reagan, ninety-seven of one hundred in an average of thirty-six days. Bush II, only fifty-two of one hundred confirmed in an average of 150 days so far.²¹⁷

Senator Leahy in July 2002 showed the other way to interpret these numbers, essentially by invoking a variation of the Future Shock relevancy: while the Reagan and Bush I judges were confirmed at a high rate and relatively quickly following their nominations, the hundredth judge for each president was not nominated or confirmed until well within their third year in office.²¹⁸ In other words, Bush II had nominated many more judges far more quickly than his Republican predecessors. However, Leahy did not mention that Clinton had gotten his first hundred judges considered by late September of his second year in office, in 1994.

As the 107th Congress drew to a close, Republicans were finally in a position to make comparisons based on the success of judicial nominees over the entire two-year period. The focus was again on appellate court nominees. On October 3, 2002, Senator McConnell laid out the relevant statistics:

[In 1981-1982] President Reagan submitted 20 nominations for the circuit court, and 19 of them were confirmed—95 percent. President Reagan, of course, had a Republican Senate during those 2 years. President George Bush in his first 2 years, when his party did not control the Senate . . . submitted 23 circuit court nominations, and 22 of them were confirmed—96-percent With regard to President Clinton in his first 2 years, a period during which his party did control the Senate, he submitted 22 circuit court nominations, and 19 were confirmed. That is an 86-percent confirmation rate Then we look at the first 2 years of the presidency of

²¹⁵ See discussion *supra* note 171 and accompanying text.

²¹⁶ See discussion *supra* notes 211-12 and accompanying text.

²¹⁷ 148 CONG. REC. S4094 (daily ed. May 9, 2002).

²¹⁸ *Id.* at S6704 (daily ed. July 12, 2002).

George W. Bush, which is now coming to a conclusion. We are near the end now where the statistics actually mean something. President George W. Bush has submitted 32 circuit court nominations to the Senate, and only 14 have been confirmed, which is 44 percent. Forty-four percent. This is the worst record in anybody's memory of confirming circuit court nominations of a President in his first 2 years.²¹⁹

Ultimately, only seventeen of the Bush II circuit court nominations during the 107th Congress were confirmed within that two-year period. Fifteen other nominations were returned to the president at the end of the session. The district court statistics were much better, with eighty-three of ninety-eight nominees (84.7%) confirmed, but this percentage was still not as good as other presidents had done in their first two years, though Reagan and Clinton had benefited from Senates controlled by their own parties.²²⁰ During the Clinton years that Republicans controlled the Senate, district court nominees fared worse than they did under Bush II, but for perhaps the most comparable period,²²¹ the 105th Congress (1997-98), the numbers were essentially the same, with seventy-nine of ninety-four nominees (84.0%) confirmed.²²²

IV. RESOLVING THE "PROBLEM?"

Though this article has focused on categorizing and evaluating Senate rhetoric on judicial confirmation statistics in the 107th Congress, I will also offer a few normative thoughts on some of the Senate's institutional practices that contribute to delay in the nomination and confirmation process. First, the Constitution arguably neither requires nor prohibits much in the way of formal or informal Senate procedure with respect to the

²¹⁹ 148 CONG. REC. S9863-64 (daily ed. Oct. 3, 2002).

²²⁰ Goldman, *Assessing*, *supra* note 15, at 253. Statistics for the approval rates of presidents' district court nominees during their first Congress are as follows: Reagan, sixty-eight of sixty-nine (98.6%); Bush I, forty-eight of fifty (96%); Clinton, 107 of 118 (90.7%). *Id.*

²²¹ The period was comparable because it followed a presidential election year. Thus many nominations had been held up for months prior to resumption of activity by the Judiciary Committee. On the other hand, the comparison is not entirely apposite because the Judiciary Committee in 1997 would have had completed files for many of the re-nominated Clinton judicial candidates.

²²² Goldman, *Assessing*, *supra* note 15, at 253. For the 104th Congress, the record of district court nominees was sixty-two of eighty-five (72.9%), and for the 106th (leading up to the 2000 election), the record of district court nominees was fifty-seven of eighty-three (68.7%). *Id.*

judicial confirmation process.²²³ Instead, the contours of the process are deliberately left for the political branches to determine.

Even so, the Senate could make procedural changes that would make the judicial confirmation process more democratically legitimate. In particular, individual actions that prevent collective action on nominations should be much more limited than in current practice. Specific examples of individual tactics subject to misuse include: the blue-slip, especially when it is anonymous, and when it is treated by the Judiciary Committee chairman as an absolute bar on Committee consideration of a nominee; the hold, when implemented for other than the traditional reason of delaying Senate action for a brief period in order to give a Senator a chance to study an issue or to ensure a senator's presence during a vote;²²⁴ or any other extended delays unilaterally imposed by the Judiciary Committee chairman or Majority Leader. On the other hand, a filibuster of a judicial nominee by the minority party in the Senate might be appropriate in narrow cases.²²⁵

A regime that disallows individual disruptions of the judicial appointments process, while preserving the right to filibuster, would force the president to appoint more broadly-acceptable judges. When the opposition party controls the Senate, all but the most controversial nominees would get quick votes because the institutional individual delay mechanisms that favor the majority would be prohibited. If the Senate majority leadership cannot marshal votes within its own caucus to defeat the nominees of an opposition president, the leadership should not be allowed to reach that result through non-public procedures. When the president's party controls the Senate, all but the most mainstream nominees should get quick votes, subject only to filibuster of the most controversial nominees. Such a filibuster would require a public and

²²³ A great deal of interesting scholarship has been produced on this issue—far too much to cover here. See, e.g., Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 *YALE L.J.* 657 (1970). For present purposes, it is enough that “advice and consent” is not defined in the Constitution, and that actions by the first Senate showed an original understanding that included Senate rejection of a federal executive appointee on parochial grounds. See *supra* note 31. If anything, Senate power with respect to lifetime-tenured judges should arguably be greater. See also U.S. CONST. art I, § 5, cl. 2 (“Each House may determine the Rules of its Proceedings . . .”).

²²⁴ For example, separate actions by Senators Byrd and Inhofe holding all judicial appointments to protest particular recess appointments, and actions by Michigan senators to hold all of Bush II's Sixth Circuit nominees. Cf. 148 *CONG. REC.* S278 (daily ed. Feb. 4, 2002) (statement of Sen. Leahy) (“I am encouraged that this confirmation today was not delayed by extended, unexplained, anonymous holds on the Senate Executive Calendar, the type of hold that characterized so much of the previous 6-1/2 years.”).

²²⁵ Defining precisely what cases are appropriate for filibuster is impossible in the abstract, and is appropriately left to the political process. As writers have observed in other contexts, sunlight is the best disinfectant. Forcing a public filibuster allows public pressure to be applied in a way that it cannot be when individual holds are allowed.

concerted effort by forty or more senators, not an individually-instigated backroom deal.

There is obviously a great deal of play in defining what is “mainstream” or which judicial nominees are “controversial,” but such issues will be appropriately worked out in the very public political process of debating and voting on nominees. By restricting individual contumaciousness, the confirmation process would be much more transparent, and it would be easier to make a valid campaign issue out of either party’s failure to confirm judges. Moreover, senatorial debate could focus on the merits of individual judges and might be less susceptible to the fallacies pointed out in this article. When individual senators are not able to subvert the confirmation process in private, moderate nominees who enjoy the support of a Senate majority—even when the nomination has been made by an opposition president—will not be easily blocked.

The problem with this and other proposals for reform is that they require implementation by the majority party at the very time that it has gained control of the Senate’s advice-and-consent apparatus. A determined Judiciary Committee chairman could effect blue-slip reform, through an extension of the agreement that Hatch and Leahy memorialized in the Congressional Record in June 2001, but modification of the hold procedure would require the actions of the Majority Leader. Formalizing any agreement through Senate Rule or statute could make the agreement binding on future Senates.

V. CONCLUSION

The 107th Congress, covering the years 2001 and 2002, was a particularly interesting period with respect to the increasingly contentious battleground of lower-court judicial nominations. In arguing about the progress—or lack thereof—of judicial confirmations, during this time senators on both sides of the political aisle frequently made statistics-laden comparisons to the Senate’s confirmations performance in previous Congresses. This article has shown that the majority of these numerical comparisons, made by both Democrats and Republicans, suffered from an identifiable set of fallacies. Awareness of these fallacies by participants in the confirmations process, in addition to critics, scholars, the media and the public at large, may serve to steer future argument away from irrelevant numerical comparisons and toward more legitimate and merit-based consideration of judicial nominees.