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Judicial Independence and the Ambiguity of Article III Protections

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Is the federal judiciary truly an independent body? A quick glance at the Constitution would suggest the answer is yes. The Constitution provides for life tenure and a difficult removal process for federal judges that together, as the common wisdom goes, shield federal judges from the shifting winds of the more political branches and the public at large. The author of this essay argues, however, that on a closer examination of the protections provided for by the Constitution, judicial independence might be more mirage than truism. Threats to judicial independence arise not only externally through the actions of the other bodies of the federal government, but just as importantly, from within the judiciary itself. The author focuses on these internal threats to judicial independence.

First, judges are the children of an inherently political process: Judges are nominated by presidents, who by necessity must be political in their selection of judges, and the resulting confirmation process in the Senate is often a delicate, and sometimes brutal, political affair. The author proposes that judicial independence may be best served by divided government checking and balancing itself in the appointment process. Second, judges are often political creatures. They, as with most humans, have their own ideologies and ambitions, and the constitutional structure designed to maximize judicial independence may have the opposite effect of amplifying their political behavior. The author concludes that despite its flaws, Article III's judicial system is still a model system of dispute resolution.

I. INTRODUCTION

All Article III judicial officers—United States Supreme Court justices, court of appeals judges, district court judges, and judges of the Court of International Trade—are selected by the Article II appointment and confirmation process reserved for “officers” of the nation¹ and are granted Article III salary and tenure protections.² These provisions were, and are, considered the source of judicial independence that, in turn, is the hallmark of the judicial office as constructed by the United States Constitution.³ These structural protections were designed to

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¹ Article II empowers the president, “with the Advice and Consent of the Senate” to appoint U.S. Supreme Court justices as well as other “Officers of the United States.” U.S. CONST. art. II, § 2, cl. 2.

² Article III grants to judges life tenure, limits removal to the impeachment process, and promises undiminished salary that is paid from the national treasury. U.S. CONST. art. III, § 1.

³ Consider Hamilton’s arguments in *The Federalist Papers*:

insulate judges from the political process and the attendant pressure to please constituents that would interfere with fair, unbiased decisionmaking. Federal judges can make, and have made, unpopular decisions with very little risk of being run out of office. At the most fundamental level, Article III does create an independent judiciary.

Judicial independence, however, must mean more than freedom from dismissal by Congress, the President, or the citizenry. It should include an independence from the politicization of the other two branches—a neutrality in decisionmaking.⁴ This broader concept of judicial independence is not clearly reflected in the federal judicial structure, even if it is manifested in the individual decisions of judges.⁵

Article III does not ensure an autonomous judiciary because its protections are inherently ambiguous. The very features of the federal judicial system that provide independence from the political process may also allow for great judicial partisanship. Article III relieves judges of the direct demands of popular election and the uncertainty of service at the pleasure of the executive or legislative branch, but Article III exposes the judicial system to external and internal threats to its autonomy. The external threats arise from powers that the Constitution leaves to Congress and the President to control the judiciary's resources and

If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961). "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision of their support." THE FEDERALIST NO. 79, at 472 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 453-55 (1969) (explaining the development of the idea of a judiciary independent from the legislature and the people).

⁴ *Cf.* THE FEDERALIST NO. 78, at 464, 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that life tenure "is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws").

⁵ Many types of judges work in the federal system. For example, under its Article I authority, Congress has empowered administrative law judges and agency-based arbiters to decide disputes. Bankruptcy judges and magistrate judges operate within the Article III judicial system but are not chosen by the Article II appointment process and serve for a term of years. These decisionmakers handle a large and growing caseload, but do not enjoy Article III's protections. The question of the independence of non-Article III federal judges is important but beyond the scope of this article.

structure,⁶ the courts' jurisdiction,⁷ and the enforcement of their rulings.⁸ The internal threats come from the judges themselves: Ideology and ambition can undermine their neutrality.

The internal threats to judicial independence are more subtle but no less potent than the external threats. The constitutional provisions that create the judicial system also expose it to partisanship in its functioning. Article II allows substantial politicization of the means of appointment that, in turn, can produce political judges. Article III affords judges the opportunity to decide cases entirely based upon ideological preferences that are typically aligned with the positions of identifiable parties or groups. Moreover, lower federal court judges often harbor ambition to obtain higher office (including appointment to a higher federal court), and Article III does not restrain judges from using their participation in cases to lobby informally for appointment.

⁶ For example, judges still must worry about Congress refusing to raise their salaries or provide sufficient staff support. Article III promises job security, but some of the most basic characteristics of any employment—compensation, daily workload—are still within the control of the other two branches of government. Congress may not decrease judges' salaries; however, it can refuse to increase salaries leading to a decline in real earnings. *See, e.g.*, Admin. Office of the U.S. Courts, *Judicial Pay Question Arises in Supreme Court Budget Hearing*, THIRD BRANCH, Mar. 2002, at <http://www.uscourts.gov/ttb/mar02ttb/questions.html> (reporting Justice Anthony Kennedy's comment in a Senate hearing that Article III judges felt "frustration and disappointment . . . at having been specifically denied four different COLAS when all other members of the government, save Congress, received it"); Admin. Office of the U.S. Courts, *Insecure About Their Future: Why Some Judges Leave the Bench*, THIRD BRANCH, Feb. 2002, at <http://www.uscourts.gov/ttb/feb02ttb/feb02.html>. State courts have ordered state legislatures to increase salaries in response to inflation. For a discussion, see Adrian Vermeule, *The Constitutional Law of Official Compensation*, 102 COLUM. L. REV. 501 (2002); Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 SUP. CT. REV. 357, 382–87.

⁷ *See* *Sheldon v. Sill*, 49 U.S. 441, 449 (1850) (holding that "having a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers."). An extensive scholarly debate has been waged over the exact nature and bounds of Congressional authority over federal jurisdiction. *See, e.g.*, Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1 (1990); Lawrence Gene Sager, *The Supreme Court 1980 Term, Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981); Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45 (1975); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

⁸ Hamilton emphasized the relative weakness of the judicial branch in the *Federalist Papers*: "[The judiciary] may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

George W. Bush's failed initial nomination of Charles Pickering to fill a vacancy on the Fifth Circuit in the Democrat-controlled 107th Congress offers a good example of the limitations of Article III.⁹ The Pickering nomination was the Bush administration's first outright failure in the judicial appointment process. In his first two years in office, Bush named 101 judges (17 court of appeals, 83 district court, and 1 court of claims judges), or more than 12% of the Article III judiciary.¹⁰ Bush nominated 131 individuals, giving him a 77% success rate.¹¹ Clinton appointed six more lower court judges during his first two years in office, but Clinton enjoyed unified government during the entire period.¹² Bush appointed nearly twice as many district judges as his father, who also faced divided government, appointed in his first two years in office.¹³

⁹ The Senate Judiciary Committee also rejected Bush's nomination of Texas Supreme Court Justice Priscilla Owen to fill another vacancy on the Fifth Circuit. Joan Biskupic, *Democrats Defeat Bush Appeals Court Nominee: Senators Cite Texas Judge's Opinions on Abortion, Workers*, USA TODAY, Sep. 6, 2002, at 7A. With Republicans again in control of the Senate, Bush renominated both Owen and Pickering. Mike Allen & Charles Lane, *President Renominates Miss. Judge, 29 Others*, WASH. POST, Jan. 8, 2003, at A01.

President Clinton also had some difficulties appointing judges to the Fifth Circuit during divided government. Clinton appointed five judges to the circuit in his first term, but none in his second term. When Clinton left office, two of seventeen seats on the Fifth Circuit had been vacant for more than three years and another seat for more than one year. Admin. Office of the U.S. Courts, *Vacancies in the Federal Judiciary*, at <http://www.uscourts.gov/vacancies/judgevacancy.htm#05> (last visited Nov. 19, 2002). For a discussion of Clinton's efforts to name judges to fill these vacancies, see *Statement of Senator Patrick Leahy on Judicial Nominations*, Dec. 11, 2001 at <http://leahy.senate.gov/press/200112/121101b.html> (last visited Feb. 2, 2003).

¹⁰ See U.S. Dep't of Justice Office of Legal Policy, *Judicial Nominations*, at <http://www.usdoj.gov/olp/judicialnominations.htm> (last visited Nov. 20, 2002) (detailing G.W. Bush's nominations); Admin. Office of the U.S. Courts, *Vacancy Summary*, at <http://www.uscourts.gov/vacancies/summary.html> (last visited Nov. 20, 2002) (listing the number of Article III judges). Bush's 101 judicial appointments constitute 12.6% of the 802 active Article III judges. U.S. Senate Committee on the Judiciary, *Nominations Statistics*, at <http://judiciary.senate.gov/nominations.cfm> (current as of Nov. 20, 2002) [hereinafter *Nominations Statistics*].

¹¹ *Nominations Statistics*, *supra* note 10. By comparison, the Democrat-controlled Senate confirmed 90% of Clinton's nominees during Clinton's first two years in office. When Republicans had control during the next two years, Clinton's success rate fell to 70%. Sheldon Goldman et al., *Clinton's Judges: Summing Up the Legacy*, 84 JUDICATURE 228, 233 (2001).

¹² Sheldon Goldman, *Judicial Selection Under Clinton: A Midterm Examination*, 78 JUDICATURE 276, 279 (1995). When Clinton faced a divided government during the second half of his first term, the Senate confirmed only sixty-two of his nominees. Sheldon Goldman & Elliot Slotnick, *Clinton's First Term Judiciary: Many Bridges to Cross*, 80 JUDICATURE 254, 255 (1997).

¹³ See Sheldon Goldman, *The Bush Imprint on the Judiciary: Carrying on a Tradition*, 74 JUDICATURE 294, 295 (1991) (reporting that President George H.W. Bush appointed one Supreme Court justice, eighteen circuit judges, and forty-eight district judges in his first two years as president).

Charles Pickering seemed to the casual observer a near certainty for confirmation to the circuit bench: He had served for twelve years as a district judge in Mississippi, he was rated "well-qualified" by the American Bar Association, his son is a Congressman from a state within the Fifth Circuit, and he is a personal friend of Senator Trent Lott.¹⁴ Bush contemporaneously sought to promote another district judge to the Fifth Circuit, Edith Brown Clement, who was confirmed within two months.¹⁵ But, interest groups and congressional representatives moved against Pickering based on a number of issues, significant among them his record as a district court judge.¹⁶ Judge Pickering's published decisions have been decidedly conservative on civil rights and civil liberties issues.¹⁷ The Senate Judiciary Committee leadership used the nomination as a test of their Democratic colleagues' resolve to block Bush nominees deemed unacceptable by their supporters.¹⁸ The Committee vote was along straight party lines, ten opposed and nine in favor. The nomination died when the membership refused to send Pickering to the full Senate for a vote.

Although only one nomination, the Pickering case offers insights to the potential effects of partisanship on the federal judiciary. Protected by life tenure, District Judge Pickering was free to pen controversial opinions that hewed closely to an identifiable political perspective. His conservative decisions undoubtedly contributed to the Bush Administration's decision to recommend him for the Fifth Circuit, but those decisions ultimately prevented his promotion to a higher court. Ideological appointment battles led to Pickering's defeat.

This article focuses on the internal threats to judicial independence of Article III judges. Part II examines the judicial selection process because it is this process that often leads to the selection of partisan judges and influences the behavior of judges who aspire to promotion to a higher court. In Part II, I argue that divided

¹⁴ See Paul Kane, *Bush Pressed on Nominees: GOP Senators Urge Public Push for Judges*, ROLL CALL, Sept. 10, 2001, at A-1; Neil A. Lewis, *Fight Over Judicial Nominees Resumes*, N.Y. TIMES, Feb. 6, 2002, at A16.

¹⁵ See Fed. Judicial Ctr., *Judges of the United States Courts*, at http://air.fjc.gov/history/judges_frm.html (last visited Feb. 2, 2003).

¹⁶ See, e.g., Alliance for Justice, *Report: The Case Against the Confirmation of Charles W. Pickering, Sr., to the U.S. Court of Appeals for the 5th Circuit* (Jan. 24, 2002), at http://www.allianceforjustice.org/judicial/research_publications/research_documents/pickering_full_report.pdf; Congresswoman Eddie Bernice Johnson, *News Release: Johnson Urges Senate Judiciary Members to Vote Against Pickering Nomination*, Mar. 5, 2002, at <http://www.house.gov/ebjohnson/030502pickeringstatement.htm> (statement by Chair of Congressional Black Caucus).

¹⁷ See, e.g., *Citizens' Right to Vote v. Morgan*, 916 F. Supp. 601 (S.D. Miss. 1996) (ruling that federal courts should allow state courts to resolve voting rights disputes); *Fairley v. Forrest County*, 814 F. Supp. 1327 (S.D. Miss. 1993) (criticizing the one-person one-vote doctrine). Of course, Pickering's ninety-nine published rulings constitute a small fraction of his decisions.

¹⁸ See Neil A. Lewis, *Panel Rejects Bush Nominee for Judgeship*, N.Y. TIMES, Mar. 15, 2002, at A1.

government may be the best protection of judicial independence as it ensures the division of power promised by the Article II appointment process. Part III considers the lack of Article III constraints on judges—and the relative lack of review of judicial decisions—which means that federal judges may pursue their own ideological agenda within certain limitations. The evidence of ideologically motivated judges serving in the federal courts is set forth in Part III. Part IV reviews the effect of the possibility of promotion on judicial behavior. The article concludes in Part V by considering whether the federal judiciary still deserves its status as the benchmark of judicial independence.

II. JUDICIAL SELECTION

The federal bench has 843 Article III judgeships.¹⁹ A judicial vacancy occurs when an active judge takes senior status, resigns, retires, dies, or is impeached, or when a statute creates a new judgeship.²⁰ The President nominates an individual to fill the vacant seat, and the Senate either confirms or rejects, expressly or effectively through inaction, the nominee.²¹ Once appointed, federal judges can only be removed from office by impeachment.²² Therefore, judicial selection is the only formal mechanism for direct control over the individual decisionmakers

¹⁹ Admin. Office of the U.S. Courts, *Vacancy Summary: Authorized Judgeships*, at <http://www.uscourts.gov/vacancies/summary.html> (last visited Nov. 19, 2002).

²⁰ Congress last established new judgeships in 1990. The United States Judicial Conference has asked Congress to add six permanent and four temporary judges to the courts of appeals and twenty-three permanent and twenty-three temporary judges to the district courts as well as converting ten temporary district judgeships to permanent posts. Admin. Office of the U.S. Courts, *Judicial Conference Urges Action on Quiet Crisis of Too Few Judgeships*, THIRD BRANCH, June 2002, at <http://www.uscourts.gov/ttb/june02tb/judgeships.html>.

²¹ Article II dictates that “[the president] shall have Power, by and with the Advice and Consent of the Senate . . . , shall appoint . . . Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.” U.S. CONST. art. II, § 2, cl. 2.

²² Federal judges, who serve during “good Behavior,” may only be removed from office by impeachment for “Treason, Bribery, and other high Crimes and Misdemeanors.” U.S. CONST., art. III, § 1, art. II, § 4. Impeachment is very rare, and conviction even more so, on all levels of the judiciary. Only one justice has been impeached (Samuel Chase in 1804) out of the 108 who have served, and no justices or courts of appeals/circuit judges have been convicted. Fed. Judicial Ctr., *Impeachments of Federal Judges*, at http://air.fjc.gov/history/topics/topics_ji_bdy.html (last visited Oct. 26, 2002) (listing all impeachments including an impeachment and conviction of a U.S. Commerce Court judge in 1913). Eleven district court judges have been impeached, and six have been convicted, out of 2383 judges who have served on the district bench. *Id.*; Fed. Judicial Ctr., *History of the Federal Judiciary*, http://air.fjc.gov/history/judges_frm.html (last visited Feb. 2, 2003) (searchable database that allows user to find all judges satisfying certain criteria including court). In fact, district court judges may seem more at risk for removal than they are because three district court judges were convicted and removed from office in the 1980s.

in the third branch. Not surprisingly, then, the political branches use this opportunity to serve various ends, including party patronage and policy goals. Historically, strategic goals, such as party influence or legislative logrolling, dominated selection, but today policy priorities drive the President's efforts to staff the federal bench as well as the Senate's willingness to confirm.

A. *Presidential Nomination*

Presidents since Washington have been cognizant, to varying degrees, of the import of federal judges to public policy, but this concern was often outweighed by competing pressures to satisfy members of Congress or party activists when choosing judges.²³ Presidents, in fact, look almost entirely to their own party for appointments to the federal bench despite pleas from various quarters for bipartisan—or apolitical—appointment.²⁴ As reflected in Table 1, FDR almost never looked outside the Democratic Party for judicial appointments: Only six of his 192 appointments were not Democrats (or 3%). Gerald Ford's appointment rate of 78% Republicans is the closest to bipartisanship, and Ford, of course, was acting in the shadow of Watergate. Both parties have demonstrated comparable party favoritism: From FDR's first term through Clinton's last, 91% of Democratic appointees have been Democrats and 92% of Republican appointees have been Republicans.

The selection of Supreme Court justices always demanded some degree of presidential attention and allowed greater presidential discretion.²⁵ Presidents, recognizing the policymaking role of justices, have sought to appoint individuals

²³ See generally SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* (1997) (offering a brief review of the lower court appointment process under Presidents Washington through Hoover along with a detailed account of the nomination politics in the administrations of Franklin Roosevelt through Reagan); KERMIT L. HALL, *THE POLITICS OF JUSTICE* (1979).

²⁴ See, e.g., GOLDMAN, *supra* note 23, at 157 (discussing the ABA's push for bipartisan appointments in the 1950s).

²⁵ See generally DAVID ALISTAIR YALOF, *PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES* (1999) (describing post-WWII presidential selection of Supreme Court nominees); see also Montgomery N. Kosma, *Measuring the Influence of Supreme Court Justices*, 27 J. LEGAL STUD. 333, 333, 336 (1998) (drawing an analogy between "a financial manager selecting a capital investment" and "a president choosing a Supreme Court nominee" and developing "an economic model of the nominee as an investment"); Bryon J. Moraski & Charles R. Shipan, *The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices*, 43 AM. J. POL. SCI. 1069 (1999) (examining the conditions under which presidents can make strategic nominations).

President	Democrats Appointed	Republicans Appointed	Other or No Affiliation	Percentage from Own Party
FDR	186	5	1	97%
Truman	117	10	0	92%
Eisenhower	10	166	0	94%
JFK	113	11	1	90%
LBJ	160	9	0	95%
Nixon	15	213	0	93%
Ford	13	51	1	78%
Carter	230	13	15	89%
Reagan	14	344	13	93%
Bush	10	166	11	89%
Clinton	321	23	24	87%

whose politics most closely resemble their own.²⁷ Truman, for example, sought to appoint close, loyal friends to the high court because he believed they would be more likely to defer to his efforts to control the economy.²⁸ Modern presidents have focused on particularly salient issues in their policy agenda, including criminal procedure,²⁹ abortion,³⁰ and civil rights. Various judges have reported

²⁶ District Court and Court of Appeals appointments drawn from GOLDMAN, *supra* note 23, at 277; Sheldon Goldman et al., *Clinton's Judges: Summing Up the Legacy*, 84 JUDICATURE 228, 244 tbl.3, 249 tbl.6 (2001); Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 JUDICATURE 282, 287, 293 (1993). Supreme Court appointments drawn from LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM 318–20 (1996).

²⁷ See HERMAN SCHWARTZ, PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION 42–149 (1988) (offering a brief historical account of judicial selection from 1793 through 1980 and a more detailed consideration of Ronald Reagan's successful and failed nominations to the bench, and observing that Reagan was certainly not unique in his effort to alter the constitutional landscape through judicial appointments); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 127 (1993) ("Given the Supreme Court's role as a national policy maker, it would boggle the mind if Presidents did not pay careful attention to the ideology and partisanship of potential nominees."); Goldman, *supra* note 13, at 295–97, 306 (discussing how Reagan and Bush sought to appoint judges to carry out their social agenda, namely, "institutionalizing judicial restraint in matters of governmental civil liberties and civil rights policymaking," just as Roosevelt and Truman aimed to appoint judges to "constitutionaliz[e] the New Deal").

²⁸ See YALOF, *supra* note 25, at ch. 2.

²⁹ Nixon campaigned for the White House by promising to overturn the Warren Court's rulings favorable to broad defendants' rights. He sought law-and-order judges who would do just that. See HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON 9–16, 253–55 (1999); JOHN W. DEAN, THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE NIXON APPOINTMENT THAT REDEFINED THE SUPREME COURT 41 (2001) (examining, based on his own perspective as a White House insider and on a review of Nixon tapes, Nixon's selection of Supreme Court justices and confirming that "[l]aw and order toughness topped the list"). While serving on the

being questioned at length by administration officials, and in some instances by the President himself, about their positions on various substantive matters as well as their general judicial philosophy.³¹ For example, Justice Sandra Day O'Connor reported that President Reagan personally asked her position on abortion, a central issue on Reagan's agenda.³²

Only more recently have presidents turned as much attention to the selection of lower court judges.³³ Franklin Roosevelt was the first to focus on selection of lower court judges, after he concluded that the courts of appeals and district courts were significant in his battle to protect and enforce New Deal legislation.³⁴ FDR

D.C. Circuit, Warren Burger wrote an article favoring a tougher stance on criminal procedure that Nixon both praised and cited in his own campaign. ABRAHAM, *supra*, at 255; DEAN, *supra*, at 12–13. Nixon elevated Burger to the Supreme Court's top spot with his first appointment. Nixon, however, did not focus solely on policy goals in judicial selection. He also wanted to strengthen his political position, hoping for example to build support in the South by selecting a southerner for the Court. ABRAHAM, *supra*, at ch. 3. For a discussion of Nixon's success in appointing justices who would thwart the Warren Court's criminal rights revolution, see Yale Kamisar, *The Warren Court (Was It Really So Defense-Minded?)*, *The Burger Court (Is It Really So Prosecution-Oriented?)*, and *Police Investigatory Practices*, in *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* 62 (Vincent Blasi ed., 1983).

³⁰ See, e.g., Timothy B. Tomasi & Jess A. Velona, Note, *All the President's Men? A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals*, 87 COLUM. L. REV. 766 (1987).

³¹ See, e.g., LAWRENCE BAUM, *THE SUPREME COURT* 44 (5th ed. 1995) (describing how both Harry Blackmun and Sandra Day O'Connor were questioned at length as to their positions on various policy issues by presidential aides prior to nomination); DEAN, *supra* note 29, at 23 (reporting Nixon's private meeting with then-Seventh Circuit Judge Harry Blackmun); GOLDMAN, *supra* note 23, at 296–307 (describing efforts by the Reagan Administration to ensure that lower federal court candidates "shared the administration's judicial philosophy"). *But see* DEAN, *supra* note 29, at 214–19 (recounting the generally bland telephone conversation between Nixon and Lewis Powell prior to Nixon's nomination of Powell).

³² See ABRAHAM, *supra* note 29, at 284; BAUM, *supra* note 31, at 44; DAVID G. SAVAGE, *TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT* 114 (1993) (reporting that O'Connor told Reagan that she was personally opposed to abortion and believed states should have the power to regulate it).

³³ For an examination of nineteenth century nomination practices, see Richard D. Friedman, *The Transformation in Senate Response to Supreme Court Nominations: From Reconstruction to the Taft Administration and Beyond*, 5 CARDOZO L. REV. 1 (1983); Kermit L. Hall, *The Children of the Cabins: The Lower Federal Judiciary, Modernization, and the Political Culture, 1789–1899*, 75 NW. U. L. REV. 423 (1980). One notorious early episode of lower court packing was the Midnight Judges Bill of 1800 in which the lame-duck Federalist President and Congress sought both to broaden the jurisdiction of the district and circuit courts and to fill the newly created circuit judgeships with Federalists in an effort to limit the power of the incoming Jeffersonians. See RICHARD H. FALLON ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 34 (4th ed. 1996).

³⁴ GOLDMAN, *supra* note 23, at 30–31 (explaining that presidents before Franklin Roosevelt did not devote attention to lower court appointments, but F.D.R.'s administration devoted significant resources to nominations); Rayman L. Solomon, *The Politics of*

concluded that the individuals best able to do so were those who had demonstrated their intellectual support of, and belief in, his programs. But, the policy focus waned and presidents returned to a patronage view of district and circuit judgeships. Kennedy and Johnson, for example, expressed an interest in the civil rights positions of lower court candidates, but ultimately made their decisions based on a desire to satisfy certain interests and allies.³⁵

Jimmy Carter, who campaigned as a party outsider, brought the process into the public eye to a far greater extent than any president before or since. While he did not name a single Supreme Court justice, Carter named more trial and intermediate appellate court judges (258) in his single term in office than any prior Administration, due in part to the creation of 152 new Article III judgeships in the Omnibus Judgeship Act of 1978. Carter chose courts of appeal nominees from recommendations made by the U.S. Circuit Judge Nominating Commission, an organization created by Carter and modeled after the merit selection commission he used as Georgia governor.³⁶ He also encouraged senators to create local commissions to vet district court nominees, but he did not go so far as to remove senatorial power over the district court process. Carter claimed that the panels would prevent the influence of party patronage; however, Commission members were chosen in part based on party connections,³⁷ and nearly all of Carter's nominees were Democrats (see Table 1).

Ronald Reagan did the most to orchestrate a judicial selection system that included close involvement of the White House and careful consideration of policy and political goals, particularly for appellate court candidates. Reagan, like

Appointment and the Federal Courts' Role in Regulating America: U.S. Courts of Appeals Judgeships from T.R. to F.D.R., 1984 AM. B. FOUND. RES. J. 285, 342-43.

³⁵ See generally ABRAHAM, *supra* note 29, at 207-22; GOLDMAN, *supra* note 23, at 154-97.

³⁶ Exec. Order No. 11,972, 42 Fed. Reg. 9659 (Feb. 14, 1977), 3 C.F.R. 96 (1978); Exec. Order No. 12,059, 43 Fed. Reg. 20,949 (May 11, 1978), 3 C.F.R. 180 (1979) (establishing U.S. Circuit Judge Nominating Commission). For a discussion of the Commission, see Elliott E. Slotnick, *The U.S. Circuit Judge Nominating Commission*, 1 LAW & POL'Y. Q. 465 (1979). President Reagan, shortly after his inauguration, revoked President Carter's Executive Order of May 11, 1978, thereby terminating the Commission. Exec. Order No. 12,305, 46 Fed. Reg. 25,421 (May 5, 1981), 3 C.F.R. 150 (1982).

³⁷ The panels did not consider party activism as part of the selection process. Elliott E. Slotnick, *What Panelists Are Saying About the Circuit Judge Nominating Commission*, 62 JUDICATURE 320, 322 (1979) (relating panelist survey responses indicating "prior political activity appeared to be [a] relatively unimportant concern[]"); cf. LARRY BERKSON ET AL., A STUDY OF THE U.S. CIRCUIT JUDGE NOMINATING COMMISSION: EXECUTIVE SUMMARY 20 (1979) (reporting that most candidates who responded to their survey indicated they had not been active in party politics during the previous five years). The Justice Department, however, selected many panel members based on their party support. *Id.* at 3 (paraphrasing a "high ranking official involved in selecting panel members" who stated "it was 'very important' to the White House for prospective panelists to have been members of the Democratic Party, active in party causes, and early Carter supporters.").

FDR, viewed the federal judiciary as crucial to his policy proposals and also looked for candidates sharing his judicial philosophy—which reinforced his policy agenda—for appointment to the appellate bench.³⁸ Reagan made a campaign promise to appoint judges reflecting his ideology.³⁹ And, the Administration's selection system largely achieved that end.⁴⁰ Reagan's judicial appointment decisions have had far-reaching political consequences. Studies of Reagan-appointed judges reveal that they utilized their gate-keeping control to close the courthouse doors to disadvantaged plaintiffs (but not advantaged ones).⁴¹ The direct result was to foreclose courts as an avenue of redress for subordinated groups. The indirect result was to limit their access to the political system because such coalitions have little influence with the elected branches. Reagan has not been unique in his efforts to impact policy by way of judicial appointments, but he has been one of the more successful presidents in this regard, aided by six years of a Republican-controlled Senate.

Bill Clinton used his appointments to name liberal to moderate judges who appeared to vote consistently with his "New Democrat" agenda.⁴² Conservatives

³⁸ See GOLDMAN, *supra* note 23, at 307 (concluding, based on a review of available presidential papers, that "at least 75 percent of [Reagan's] appeals court judges were policy-agenda appointments"); SCHWARTZ, *supra* note 27, at 5, 68–69 (describing the "model Reagan [appellate court] nominee" as "a young, intellectually strong academic with little trial or other legal experience, with strongly held ultraconservative views based on an economic model"); Sheldon Goldman, *Reagan's Second Term Judicial Appointments: The Battle at Midway*, 70 JUDICATURE 324, 333 (1987) (positing that the Reagan Administration nominated "scholars [who] had a track record of published works so that their judicial philosophy could be discerned by administration officials").

³⁹ The GOP Platform stated that Reagan intended to appoint conservative judges who held "the highest regard for protecting the rights of law-abiding citizens" and "the belief in the decentralization of federal government and efforts to return decision-making power to state and local elected officials." Gary Fowler, *Judicial Selection Under Reagan and Carter: A Comparison of Their Initial Recommendation Procedures*, 67 JUDICATURE 265, 267 (1984); see also Sheldon Goldman, *Reaganizing the Judiciary: The First Term Appointments*, 68 JUDICATURE 313, 315 (1985).

⁴⁰ Robert A. Carp et al., *The Voting Behavior of Judges Appointed by President Bush*, 76 JUDICATURE 298, 300 tbl.3 (1993) (reporting that Bush appeals court judges as compared to Reagan courts of appeals judges voted in favor of criminal defendants in 20% versus 15% of the cases, in favor of civil rights and liberties claimants in 34% versus 25% of the cases, and in favor of unions and the economically disadvantaged in 44% versus 35% of the cases); Tomasi & Velona, *supra* note 30, at 779 n.66.

⁴¹ See, e.g., C.K. Rowland & Bridget Jeffrey Todd, *Where You Stand Depends on Who Sits: Platform Promises and Judicial Gatekeeping in the Federal District Courts*, 53 J. POL. 175 (1991).

⁴² In the 1996 presidential election, Republican challenger Bob Dole tried to make Clinton's judicial appointments to the lower courts a key issue in his campaign. See, e.g., Harvey Berkman & Claudia MacLachlan, *Don't Judge a Book . . . Clinton's Picks—Not So Liberal*, NAT'L L.J., Oct. 21, 1996, at A1. He shouted to Republican convention delegates in

have criticized Clinton for appointing liberal activist judges, while liberals have questioned whether Clinton's judicial appointments have been as liberal as prior Democratic appointees.⁴³ The first systematic study of circuit and district court decisions by Clinton judges found that they indeed were not as liberal overall as Carter judges primarily because they were more likely to vote for the government in criminal prosecutions.⁴⁴ Clinton's circuit court appointees, however, were as liberal as Carter's in civil rights and liberties cases, and Clinton's circuit and district court appointees were more liberal than Republican appointees in all issue areas.⁴⁵ These appointments reflect Clinton's own centrist perspectives on many issues, his commitment to civil rights, and his tough-on-crime rhetoric.⁴⁶

August 1996, "[f]or those who say that I should not make President Clinton's liberal judicial appointments an issue of this campaign, I have a simple response: I have heard your argument. The motion is denied!" Naftali Bendavid, *GOP Measure Chips Away at Judicial Power, Discretion*, LEGAL TIMES, May 26, 1997, at 1 (quoting Dole's speech but concluding that "[t]he issue never really caught fire during the campaign").

⁴³ See, e.g., David Byrd, *Clinton's Untilting Federal Bench*, 32 NAT'L J. 555 (2000) (describing conservative interest groups' claims as well as liberal groups' laments about Clinton judges);

[T]he Clinton judges are an ideologically bland group. "The Clinton appointments are philosophically moderate," says Nan Aron, the president of the liberal Alliance for Justice, which monitors judicial appointments. "Studies show that they have the same ideological underpinnings as Gerald Ford's appointments. They're less liberal than Jimmy Carter's." [Deputy Attorney General] Jamie Gorelick says, "On choices of judicial candidates, the President has often been more comfortable with the more middle-of-the-road, less doctrinaire candidates."

Jeffrey Toobin, *Clinton's Left-Hand Man*, NEW YORKER, July 21, 1997, at 28, 29–30.

⁴⁴ Ronald Stidham et al., *The Voting Behavior of President Clinton's Judicial Appointees*, 80 JUDICATURE 16, 19, 20 (1996) (reporting that Carter's circuit appointees were much more liberal than Clinton's in criminal justice cases (40% versus 31%) though Clinton circuit judges were still more liberal than Nixon (26%), Ford (20%), Reagan (26%), or Bush (22%) judges in the criminal justice issue area, and that Carter's district court appointees were more liberal than Clinton's in criminal justice cases (38% versus 34%), but again Clinton's appointees were more liberal than Nixon's (30%), Ford's (32%), Reagan's (23%) or Bush's (29%)).

⁴⁵ *Id.* (finding that Carter and Clinton circuit judges were comparably liberal in civil rights and liberties cases (42% versus 41%), an issue area in which the most liberal Republican appointees in these cases, Ford appointees, took a liberal position 35% of the time and the most conservative, Nixon appointees, took a liberal position 29% of the time; and reporting that Clinton district judges were liberal in 48% of all cases compared to Nixon (39%), Ford (44%), Reagan (36%), and Bush (37%) district judges); see also Byrd, *supra* note 43, at 555–56 (describing political science professor Robert Carp's study of 60,000 federal district court opinions that produced findings strikingly parallel to those found for circuit court judges).

⁴⁶ Political scientist Sheldon Goldman, an expert on judicial selection, concludes that, "[f]rom Clinton's perspective, he already has a legacy, and it's a pretty damn good one." Carrie Johnson, *Final Judgment: The President Has Been Criticized by Left and Right. Maybe He Got the Bench He Wanted—And Deserved*, LEGAL TIMES, Mar. 6, 2000, at 10 (quoting Goldman, and also quoting Victoria Radd Rollins, associate counsel to President Clinton from

Sitting judges appointed by a president from the same party may offer an assist to a contemporary president's efforts to influence policy by way of the courts: These judges will time their retirement to ensure that a president from their appointing party will name their replacement. For example, a number of Nixon appointees retired shortly after Reagan was elected as did a number of Carter appointees after Clinton's election.⁴⁷ James Spriggs and Paul Wahlbeck found in a comprehensive event analysis of appeals court retirements that the President's party was statistically significantly related to a judge's retirement decision as well as the timing of her retirement.⁴⁸ Strategic retirements also support the view that a judge's political orientation is related to the party of the President who selects her.

Presidents utilize judicial appointments as one tool to influence substantive policy while in office as well as after they leave office. However, their ability to take full advantage of this mechanism is affected by the work of the other political body with direct power over the process: the Senate.

B. Senatorial Confirmation

The President must work with the Senate to appoint federal judges.⁴⁹ Senators play a role in judicial selection at various stages: choosing nominees, after nomination but before any formal Senate action, during Senate Judiciary Committee hearings, and at the full Senate vote on a candidate. The final stage—full Senate vote—is the most visible, but least frequently used, to influence naming of judges.⁵⁰ Most action takes place earlier in the process, often with the threat of a negative full vote. The Senate has developed various rules and adopted evolving norms over time, yet one feature has remained prominent: Senators

1994 to late 1995, who “ ‘believe[s] the president has been doing exactly what he intended and wanted to accomplish in all these years. He nominated centrist judges who in large part reflect his views on issues, with a deep commitment to representing women and minorities on the bench.’ ”).

⁴⁷ See generally Fed. Judicial Ctr., *Federal Judicial Biographies Database*, at http://air.fjc.gov/history/judges_frm.html (providing the means of constructing groups of judges with common characteristics such as nominating president and date of retirement from active service) (last visited Feb. 2, 2003).

⁴⁸ 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, 588 (1995); see also Deborah J. Barrow & Gary Zuk, *An Institutional Analysis of Turnover in the Lower Federal Courts, 1900–1987*, 52 J. POL. 457 (1990).

⁴⁹ See generally DEBORAH J. BARROW ET AL., *THE FEDERAL JUDICIARY AND INSTITUTIONAL CHANGE* (1996) (offering a history of the roles played by both branches in the appointment process).

⁵⁰ See WALTER F. MURPHY ET AL., *COURTS, JUDGES, AND POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS* 144 (5th ed. 2002) (observing that outright rejection was more common prior to the twentieth century than after, but noting that other tactics, such as delay, have been used to thwart presidential nominations).

frequently use their power over lower court appointments to increase their support among voters, donors, and interest groups.

Senators, particularly from the President's party, have direct influence on the selection of nominees to the lower federal courts through "senatorial courtesy." Courtesy is the President's practice of consulting—with varying degrees of deference—senators from the state with a lower court vacancy.⁵¹ The practice of senatorial courtesy for home-state court nominations was born in the very first Congress and continues today.⁵² Thus, senators hold greater authority than their colleagues when nominations are for seats within their home state. If a home-state senator withholds support, the Senate is far less likely to confirm (though this practice has varied some over time).⁵³ For this reason, the Administration solicits suggestions and support from home-state senators before most court of appeals and district court nominations.⁵⁴ Finally, senators have much greater power over appointments to district courts than to the courts of appeals, and almost no power over appointments to specialized courts or the D.C. Circuit.⁵⁵ From the very beginning, senators appreciated the patronage potential of their Article II role in judicial appointments and have actively used it to reward their supporters.⁵⁶

⁵¹ *Id.* at 139–40.

⁵² The Senate rejected George Washington's nomination of a well-qualified candidate for a Georgia district judgeship because Georgia's senators wanted a different person. Washington deferred and nominated the senators' choice the very next day. HAROLD CHASE, *FEDERAL JUDGES: THE APPOINTING PROCESS* 7 (1972) (concluding that "Senators from the First Congress on have recognized that one or two Senators have a much greater stake in a particular appointment than others").

⁵³ *Democratic Position on Judicial Nominations: Need to Resolve Procedural Issues*, May 8, 2001, at <http://www.senate.gov/~leahy/press/200105/010508.html> (describing Senate's "blue slip" procedure whereby a home state senator returns the slip if she supports the nomination, and withholds it if she opposes and questioning then-Chairman Orrin Hatch's representations that the Senate would no longer require that both slips be returned in order to recommend the candidate).

⁵⁴ ASHLYN K. KUERSTEN & DONALD R. SONGER, *DECISIONS ON THE U.S. COURTS OF APPEALS* 70, 72 (2001) (observing that "[h]ome state senators not only identify possible contenders for the federal bench, but they may also have a level of 'residual power'; seats on the courts can be presumed to belong to a senator.")

⁵⁵ See LAWRENCE BAUM, *THE AMERICAN COURTS: PROCESS AND POLICY* 120–21 (2d ed. 1990); ROBERT A. CARP & C.K. ROWLAND, *POLICYMAKING AND POLITICS IN THE FEDERAL DISTRICT COURTS* (1983); NEIL D. MCFEELEY, *APPOINTMENT OF JUDGES, THE JOHNSON PRESIDENCY* (1987); RICHARD J. RICHARDSON & KENNETH N. VINES, *THE POLITICS OF FEDERAL COURTS* (1970).

⁵⁶ See generally ABRAHAM, *supra* note 29; GOLDMAN, *supra* note 23. The dynamics of senators' efforts to reward supporters responded to changes in the job of senator. Thus, senators would be more likely to use appointments to secure support for reelection as more senators sought reelection beginning in the late nineteenth century and were directly elected beginning in 1913.

After the President names his choice for a lower court vacancy, senators can voice their views by using the “blue slip.”⁵⁷ The Chair of the Senate Judiciary Committee sends a memorandum on blue paper to the senators from a nominee’s state, and each senator indicates support or opposition on the sheet and returns it to the Chair.⁵⁸ The blue-slip practice is internal to the Senate itself: The majority party in the Senate will defer to a senator who opposes a nominee from his or her state. When government is divided (the Senate and presidency controlled by different parties), senators can always prevent presidential influence by refusing to approve nominees.

The first visible participation of the Senate occurs at Judiciary Committee hearings. The Senate created a standing Judiciary Committee on December 10, 1816, that has continuously overseen the Senate’s role pursuant to its own rules of procedure.⁵⁹ The Committee began holding confirmation hearings regularly in the 1950s, and senators more and more frequently use these to ask candidates about their judicial philosophy.⁶⁰ The live televised hearings on the ultimately successful nomination of Clarence Thomas to replace Thurgood Marshall were watched by millions of Americans; some likely learned for the first time the details of the federal judicial appointment process.

The last stage for candidates is a full Senate vote. Studies of Senate confirmation votes have found that senators consider both personal political concerns as well as institutional ones.⁶¹ The Senate has rejected 19 of 144 Supreme Court nominees (13.2%).⁶² The most famous recent rejection was of Robert Bork for the vacancy resulting from Justice Lewis Powell’s retirement.⁶³

⁵⁷ See generally Brannon P. Denning, *The Judicial Confirmation Process and the Blue Slip*, 85 JUDICATURE 218 (2002) (detailing the development and nature of the blue-slip practice).

⁵⁸ The Office of Legal Policy is posting the status of blue slips for Bush’s nominees on its website. See Dep’t of Justice Office of Legal Policy, *Blue Slips*, at <http://www.usdoj.gov/olp/blueslips1.htm> (last visited on Oct. 26, 2002).

⁵⁹ U.S. Senate Committee on the Judiciary, *Committee History*, at <http://www.senate.gov/~judiciary/history.cfm> and http://www.senate.gov/~judiciary/information.cfm/committee_rules.cfm (last visited on Nov. 9, 2002).

⁶⁰ See Robert F. Nagel, *Advice, Consent, and Influence*, 84 NW. U. L. REV. 858, 859–60 (1990) (reviewing the historical development of Senate review of Supreme Court nominees and arguing that a norm of active senatorial oversight has developed as was seen most vividly in the Bork hearings).

⁶¹ Charles M. Cameron et al., *Senate Voting on Supreme Court Nominees: A Neoinstitutional Model*, 84 AM. POL. SCI. REV. 525 (1990); Jeffrey A. Segal, *Senate Confirmation of Supreme Court Justices: Partisan and Institutional Politics*, 49 J. POL. 998 (1987).

⁶² ABRAHAM, *supra* note 29, at 28.

⁶³ The only federal court nominee to be rejected by the full Senate since Bork is Ronnie White, the first African-American judge on Missouri’s highest state court, who was nominated by Clinton for the Eastern District of Missouri. Senators expressed concern that White was too

Bork's nomination to the Supreme Court was doomed in part because of his well-known staunch conservatism (reflected in his controversial scholarship and D.C. Circuit opinions) and in part due to timing (the President's party no longer held a Senate majority).⁶⁴ The Democratic-controlled Senate, fueled by interest groups, held highly public and dramatic hearings before voting down the nomination forty-two to fifty-eight.⁶⁵

While the Senate has explicitly rejected a relatively small percentage of judicial nominees, it has prevented the President from naming his first choice or from filling a vacancy at all through tactics other than a negative vote. The Senate has refused to vote on eleven Supreme Court nominees. In addition, 161 court of appeals and 216 district court nominees failed to gain confirmation, most as a result of Senate inaction, a negative Judiciary Committee vote without a full Senate vote, or presidential or candidate withdrawal from consideration.⁶⁶

Even considering all possible senatorial obstacles to appointment, presidents have largely been successful in naming judges. To the extent that presidents have failed, this has been highly correlated with whether the President's party controls

soft on capital crimes, or as Missouri Senator John Ashcroft put it, Judge White has "a tremendous bent toward criminal activity." Editorial, *The Ronnie White Vote*, WASH. POST, Oct. 8, 1999, at A28. Some observers concluded that senators acted on the belief that black judges vote differently from white judges—specifically that blacks on the bench would identify with and be lenient on criminal defendants—rather than on White's voting record. See, e.g., Donna Britt, *Judging A Nominee By the Color of His Skin?*, WASH. POST, Oct. 8, 1999, at B1; Steve Kraske & Kevin Murphy, *White House Rips Rejection of Nominee*, KAN. CITY STAR, Oct. 7, 1999, at A1 (reporting that the Clinton administration as well as leading civil rights groups accused the Senate of racism in rejection); Ben White, *Deepening Rift over Judge Vote, Minorities Confirmed at a Lower Rate*, WASH. POST, Oct. 7, 1999, at A3 (discussing claims of racism during the Senate confirmation process). But see Benjamin Soskis, *On the Hill: White Out*, NEW REPUBLIC, Nov. 1, 1999, at 14 (arguing that "White's rejection wasn't the result of racism but of another potent force: the grimy imperatives of state-level electoral politics").

⁶⁴ *Symposium: The Bork Nomination*, 9 CARDOZO L. REV. 1 (1987); PUB. CITIZEN LITIG. GROUP, *THE JUDICIAL RECORD OF JUDGE ROBERT H. BORK* (1987); SCHWARTZ, *supra* note 27, at 140.

⁶⁵ MURPHY ET AL., *supra* note 50, at 145–46 (attributing the Senate Judiciary Committee's energetic offensive to, among other things, Bork's "years writing and speaking on his vision of the American constitutional system, a vision that was like Reagan's but much more detailed"); Gregory Caldeira & John Wright, *Lobbying For Justice*, 42 AM. J. POL. SCI. 499 (1998) (describing the dramatic increase in interest group participation in judicial nominations since the contentious Bork battle).

⁶⁶ Wendy L. Martinek et al., *To Advise and Consent: The Senate and Lower Federal Court Nominations, 1977–1998*, 64 J. POL. 337, 339 (2002) (reporting numbers through the Clinton administration); *Nominations Statistics*, *supra* note 10 (reporting negative committee votes on two Bush nominees).

the Senate.⁶⁷ The next subsection considers whether partisan tension actually increases the probability of an independent judiciary.

C. Divided Government

What are the effects of divided government on judicial selection? The federal government is divided when one party controls the executive and the other controls the relevant house(s) of the legislature.⁶⁸ Different parties have controlled the two Article II powers in just over half of the last fifty years.⁶⁹ Some scholars have contended that unified government is a prerequisite to legislative action, otherwise the branches will be deadlocked.⁷⁰ However, substantial evidence exists that split party control does not prevent the adoption of major legislative initiatives.⁷¹ Likewise, many have complained that party antagonism between the President and the Senate undermines judicial selection. But, the

⁶⁷ Garland W. Allison, *Delay in Senate Confirmation of Federal Judicial Nominees*, 80 JUDICATURE 8 (1996) (reporting that district court nominees were confirmed 77% of the time when the Senate was controlled by the opposing party compared to 90% of the time when the Senate was controlled by the president's party, and that circuit court nominees were confirmed 72% of the time versus 87% of the time); Jeffrey Segal & Harold Spaeth, *If a Supreme Court Vacancy Occurs, Will the Senate Confirm a Reagan Nominee?*, 69 JUDICATURE 188, 188 (1986) (finding that prior to Reagan, only 59% of Supreme Court nominees were confirmed when the Senate was controlled by the opposing party as compared to 89% when controlled by the president's party).

⁶⁸ MORRIS FIORINA, *DIVIDED GOVERNMENT* (2d ed. 1996); James A. Thurber, *Representation, Accountability, and Efficiency in Divided Party Control of Government*, 24 PS: POL. SCI. & POL. 653, 653 (1991).

⁶⁹ The Senate and president were divided from 1955 to 1961, 1969 to 1977, 1987 to 1993, from 1995 to January 20, 2001, and June 6, 2001 to January 6, 2003. United States Senate, *Senate Statistics*, at http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm (last visited Feb. 2, 2003); see also Internet Public Library, *POTUS: Presidents of the United States*, at <http://www.ipl.org/div/potus/> (last visited Feb. 2, 2003).

⁷⁰ See, e.g., Sean Kelly, *Divided We Govern: A Reassessment*, 25 POLITY 475 (1993) (presenting empirical evidence that divided governments are statistically significantly less likely to pass major legislation); Glenn Harlan Reynolds, *Taking Advice Seriously: An Immodest Proposal for Reforming the Confirmation Process*, 65 S. CAL. L. REV. 1577, 1581-82 (1992) (arguing that although the Framers "undoubtedly intended the process of selection and confirmation by the political branches as a check upon potential judicial tyrants, [they] almost certainly did not intend the process to be as heavily politicized and partisan as it has become."); James L. Sundquist, *Needed: A Political Theory for the New Era of Coalition Government in the United States*, 103 POL. SCI. Q. 613, 616-24 (1988-89) (criticizing divided government as inefficient and reckless).

⁷¹ See, e.g., DAVID R. MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946-1990* ch. 4 (1991); see also FIORINA, *supra* note 68, at 158-77 (reviewing various studies).

conflict between a divided Senate and president may increase the probability of relatively nonpartisan judges.⁷²

Divided government enhances the role of divided authority in judicial appointment. The constitutional separation of powers between the legislature and the executive together with split party control of the two branches acts as a check on abuse of power by one branch and encourages compromise. Neither branch wishes to take the blame for gridlock, thus each must demonstrate some effort to reach outcomes. In the appointment of judges, the effect is to induce presidents to seek senatorial input prior to nomination and to encourage senators to move quickly and favorably on judges named after this input.

Political scientist Nancy Scherer has challenged the idea that divided government undermines the ability of the President to choose lower court judges who match his ideology.⁷³ She examined search and seizure, race discrimination, and federalism decisions of circuit judges appointed by Reagan and Clinton in which a dissent was filed or that reversed the lower court.⁷⁴ During the period of her study (1994–1998), she found that divided government was not statistically significantly related to the ideological direction of the judges' votes.⁷⁵

I found different results in an examination of en banc decisions in the Fourth and Eighth circuits. Unlike Scherer's study, mine does not control for other factors influencing decisions. But, my data have the advantage of including more presidential appointments and more issue areas. Twenty-seven Fourth Circuit and eighteen Eighth Circuit judges participated in at least ten en banc decisions within their respective circuits from 1956 through 1996.⁷⁶ Eighteen were appointed during divided government.⁷⁷ The party of the appointing president was not a statistically significant explanation for the votes of thirteen of those eighteen judges. By contrast, the President's party was significant for twenty-four out of

⁷² Senator Paul Simon, in an article emphasizing the importance of the Senate in judicial selection, hypothesized that divided government may produce moderate candidates. Paul Simon, *The Senate's Role in Judicial Appointments*, 70 JUDICATURE 55, 58 (1986); see also Charles Black, *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L.J. 657 (1970).

⁷³ Nancy Scherer, *Who Drives the Ideological Makeup of the Lower Federal Courts in a Divided Government?*, 35 LAW & SOC'Y REV. 191 (2001).

⁷⁴ She also included district judges sitting by designation. *Id.* at 195.

⁷⁵ *Id.* at 207–14.

⁷⁶ For a full discussion of Fourth Circuit decisions and the data from which the Fourth Circuit results are drawn, see Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635 (1998).

⁷⁷ Eleven of the Fourth Circuit judges were appointed during divided government (Eisenhower named three, Nixon four, and George H.W. Bush four) as were seven of the Eighth Circuit judges (Nixon appointed two, Ford one, Reagan one, and Bush three). Fed. Judicial Ctr., *Judges of the United States Courts*, at http://air.fjc.gov/history/judges_frm.html (last visited Feb. 2, 2003).

twenty-seven judges appointed during unified government. The table below sets forth these results.

		Appointing Government		Total
		Divided	Unified	
Presidential Party	Significant	5	24	29
	Not Significant	13	3	16
Total		18	27	45

Note: Table includes only those judges who participated in at least ten en banc decisions during the period of study. Presidential party was considered a statistically significant explanation of judges' votes if $p < .05$ in a bivariate logistic regression.

While many factors may account for the unexplained judges,⁷⁸ unified government is highly correlated with the ability of presidents to name judges who match their policy views on a consistent basis in this set of cases. And this result is intuitive. When the President's party controls the Senate, the Administration may meet privately with Senate leaders to negotiate over nominees thereby ensuring the selection of judges who most closely match the ruling party's perspectives as well as their rapid confirmation. Moreover, unified government limits the role of opposing interest groups in judicial selection by denying them access to key decisionmakers and curtailing the public portion of the Article II process.⁷⁹

Divided government has been blamed for a slowdown in the appointment of judges to such a degree that the judicial system is threatened.⁸⁰ Several highly publicized disputes are cited in support of this view; however, the full range of evidence supports only a weaker claim.⁸¹ As more members of the Judiciary

⁷⁸ For the en banc cases in this study, the party of the president failed to explain the decisions of all three Eisenhower appointments to the Fourth Circuit. No Eisenhower appointees were in the Eighth Circuit data.

⁷⁹ See Gregory A. Caldeira & John R. Wright, *Lobbying for Justice: The Rise of Organized Conflict in the Politics of Federal Judgeships*, in CONTEMPLATING COURTS 44, 51–59, 65 (Lee Epstein ed., 1995) (analyzing the increased involvement of interest groups in judicial appointments and the effects of divided government generally as well as under certain presidents).

⁸⁰ Task Force on Fed. Judicial Selection, *Justice Held Hostage: Politics and Selecting Federal Judges: The Report of the Citizens for Independent Courts*, in UNCERTAIN JUSTICE: POLITICS AND AMERICA'S COURTS 1, 21–25 (2000).

⁸¹ FIORINA, *supra* note 68, at 97 (observing that “[i]nclusive of Justice Thomas, Presidents have named twenty-four justices since World War II, nine in unified government years and

Committee are from the opposing party, judicial nominees are less likely to be confirmed and take longer to wend their way through the process as reflected in Table 3.

Table 3. The Effect of Divided Government on Average Number of Days to Final Senate Action on District and Circuit Court Nominees, 1977–1998			
	Successful Nominees	Unsuccessful Nominees	All Nominees
Unified Government	59 (674)	103 (66)	63
Divided Government	121 (444)	238 (135)	148

Source: Based on data reported in Task Force on Federal Judicial Selection, *supra* note 80, at 60 tbl.12 (prepared by the Michigan State University Program for Law and Judicial Politics and Wendy Martinek under the direction of Harold Spaeth).

Note: "Final Senate Action" is confirmation for successful nominees and for unsuccessful nominees is rejection, withdrawal, or return to the President at the end of a congressional term without decision. The figure in parentheses is the number of nominees in each category. Renominations are included.

An extensive study by political scientists Wendy Martinek, Mark Kemper, and Steven Van Winkle, however, indicates that other factors have nearly as much influence (or more) on the time it takes for the Senate to decide on district and circuit nominees as relative party in power.⁸² As an initial matter, presidents must wait longer for Senate action on nominees submitted in later years of their term in office⁸³ or made in their second term as compared to their first term.⁸⁴ The Senate also moves more slowly on district court designees when presidential approval is low or the Judiciary Committee is controlled by the other party.⁸⁵ Divided government was not a statistically significant factor in the length of time

fifteen in divided years. Four nominations offered during times of divided control were unsuccessful . . . , as compared to two offered during times of unified control . . .").

⁸² Martinek et al., *supra* note 66.

⁸³ A comparison of the average number of days between nomination and final Senate action (defined as confirmation, return of nomination, or withdrawal) for each half of a presidential term: Carter (38 versus 90), Reagan I (32 versus 38), Reagan II (45 versus 144), Bush (78 versus 138), Clinton I (83 versus 159), and Clinton II (201 versus more than 247 days). See Task Force on Fed. Judicial Selection, *supra* note 80, at 40–41 tbl.1 (reporting figures for Carter through the first half of Clinton II); Sheldon Goldman et al., *supra* note 11, at 235 (reporting that the average number of days between nomination and holding a hearing for confirmed judges was 247 days in Clinton's last two years and that many Clinton nominees waited for longer than that period without any Senate action).

⁸⁴ Martinek et al., note 66, at 354 tbl.6 (reporting the results of a duration analysis that includes multiple independent variables); *id.* at 356 fig.5 (representing the relationship between presidential year and term and confirmation duration).

⁸⁵ *Id.* at 354 tbl. 6.

to decision on circuit candidates. Nominee characteristics also affect confirmation duration: Higher ABA ratings decrease the length of time for circuit and district nominees, while minority status, but not gender, increases the length of time for district nominees.

Divided government is not a panacea for the problems of political appointments. First, Scherer's study casts doubt on the long-held belief that the Senate can temper an opposing president's efforts to name partisan judges. Her work certainly requires a further examination of the appointments of other presidents during divided government and the decisions of more judges. Second, divided government may demand greater resources in judicial selection than is merited by any resulting moderation in judicial behavior. As the next section explains, life-tenured judges may inevitably reach decisions based on the political perspectives that brought them to the attention of elected officials.

III. IDEOLOGICAL DECISIONMAKING

Federal judges face few limitations on their ability to act in a partisan fashion. The Constitution's structural protections insulate judges from the electoral process, but they do little to constrain judges. In fact, Article III allows individuals to defer entirely to ideological preferences—simply personal ones, rather than populist ones. The most meaningful restriction on judges is the authority of those above them in the judicial hierarchy. But, today, the likelihood of meaningful review by a higher court is so low that the threat of reversal seems a weak restraint on lower courts.⁸⁶

Federal judges are therefore free to maximize their goals or preferences (or at least try to do so).⁸⁷ Judicial preferences likely include a desire to issue opinions

⁸⁶ The federal judicial system is a distorted pyramid today: the district courts terminated nearly 600,000 cases in the October 2000 term compared to 28,840 merit terminations in the circuit courts, and 197 terminations in the Supreme Court (82 in full opinions and 115 in memoranda). Admin. Office of the U.S. Courts, *Judicial Business of the United States Courts 2001*, tbls.A-1, B-1, C-1, C-2, at <http://www.uscourts.gov/judbus2001/contents.html> (last visited Feb. 2, 2003). Even if a district court's ruling is reviewed by the court of appeals, it is likely to be *affirmed*: more than 90% are affirmed. *Id.* at B-5. And, circuit judges know that even though the Supreme Court is more likely to reverse than affirm, the Court agrees to hear fewer than 4% of paid petitions seeking review. *Supreme Court, 2000 Term: The Statistics*, 115 HARV. L. REV. 539, 546 (2001).

⁸⁷ See generally LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998) (offering and testing a strategic actor model of justices); Sheldon Goldman, *Backgrounds, Attitudes and the Voting Behavior of Judges: A Comment on Joel Grossman's Social Backgrounds and Judicial Decisions*, 31 J. POL. 214 (1969) (considering possible explanations for lower court judges' decisions); Richard A. Posner, *What Do Judges and Justices Seek to Maximize? (The Same Things Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993) (providing a rational choice theory of judicial behavior). But see Chris Guthrie et al., *Inside the*

that are well thought of by peers, affirmed by higher courts, and followed by other courts. Hence, judges would seek to issue decisions that are consistent with widely accepted legal doctrine and stare decisis. Of course, the law often grants judges a fair degree of discretion to reach more than one conclusion.⁸⁸ Judges with greater freedom are less constrained by legal doctrine. The lower the court in the judicial hierarchy and the fewer the limits on its caseload, the less autonomous the judge. District courts are the lowest tier of the federal judicial system and hear the largest number of cases. Not surprisingly, then, district court studies have found that legal factors account for most district court rulings, although a small group of close cases are sensitive to extralegal factors.⁸⁹ Because a greater percentage of courts of appeals decisions, and nearly all Supreme Court cases, allow leeway, studies demonstrate that the law provides only a partial account of appellate rulings.⁹⁰

Judges, in exercising their discretion, will want to issue a decision consistent with their personal normative conceptions of public policy and rights. The ideological direction (“liberal” or “conservative”) of the party of a judge’s appointing president is a strong predictor of the case votes of justices on the Supreme Court⁹¹ and judges on Courts of Appeals.⁹² Democratic judges are more

Judicial Mind, 86 CORNELL L. REV. 777 (2001) (demonstrating experimentally that cognitive illusions can prevent judges from reaching rational decisions).

⁸⁸ Task Force on Fed. Judicial Selection, *supra* note 80, at 15 (observing that “[i]n our postrealist age, we know that legal materials may well be somewhat indeterminate or conflicting, and that judges often invoke background normative notions in deciding how to rule”).

⁸⁹ ROBERT A. CARP & C. K. ROWLAND, POLICYMAKING AND POLITICS IN THE FEDERAL DISTRICT COURTS 165 (1983) (arguing, based on extensive empirical research, that for close cases or those presenting new issues, non-legal factors explain district court outcomes); Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 281 (1995) (concluding that in most *district* court cases “the law—not the judge—dominates the outcomes. Judges may treat most cases as ones in which political interests are irrelevant or cannot change the outcome. In the select few cases that are appealed or lead to published opinions, individual judges have a greater role in shaping outcomes.”); Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1465–70 (1998).

⁹⁰ See generally Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323 (1992); Jeffrey A. Segal, *Predicting Supreme Court Cases Probabilistically: The Search and Seizure Cases, 1962–1981*, 78 AM. POL. SCI. REV. 891 (1984); Donald R. Songer & Susan Haire, *Integrating Alternative Approaches to the Study of Judicial Voting: Obscenity Cases in the U.S. Courts of Appeals*, 36 AM. J. POL. SCI. 963 (1992).

⁹¹ See, e.g., STUART S. NAGEL, THE LEGAL PROCESS FROM A BEHAVIORAL PERSPECTIVE (1969); JOHN D. SPRAGUE, VOTING PATTERNS OF THE UNITED STATES SUPREME COURT: CASES IN FEDERALISM 1889–1959 (1968) (examining voting blocs using algorithm pairing justices who vote together); George & Epstein, *supra* note 90, at 329–30 (finding that “the addition of Republican appointees enhanced the Court’s propensity toward a law-and-order stance”); Stuart

likely than Republican judges to cast a liberal vote in cases where they have some decisionmaking discretion.⁹³ For example, in the areas of civil rights and liberties, Democratic judges generally seek to extend those freedoms, Republicans to limit. In the realm of economic regulation, Democratic jurists favor an enhanced governmental role in the economy and tend to uphold legislation that benefits working people or the economic underdog, while Republicans oppose an increase in government intervention and tend to favor business. In criminal cases, Democratic judges generally are more sympathetic to criminal defendants, while Republicans tend to favor prosecution and law enforcement. The categorizations are admittedly broad and cannot account for the complexity of relative ideological positions. Yet, they reveal that the ideology of the appointing president is consistently correlated with judicial rulings, and that the relationship is stronger for the higher (and more powerful) courts. Thus, the nonelected judiciary behaves

S. Nagel, *Political Party Affiliation and Judges' Decisions*, 55 AM. POL. SCI. REV. 843 (1961); C. Neal Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946-1978*, 75 AM. POL. SCI. REV. 355 (1981) (demonstrating that the ideology of the appointing president had a strong influence on justices' decisions in civil liberties, civil rights and economic cases).

⁹² See, e.g., James J. Brudney et al., *Judicial Hostility Toward Labor Unions?: Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675, 1715 tbl.II (1999) (finding that Democratic circuit court appointees were much more likely than Republican appointees to favor unions); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2175-76 (1998); George, *supra* note 76, at 1678-86 (demonstrating that the majority of Fourth Circuit judges participating in en banc cases between 1962 and 1996 voted their sincere policy preferences as measured by the party of their appointing president); Jon Gottschall, *Reagan's Appointments to the U.S. Courts of Appeals: The Continuation of a Judicial Revolution*, 70 JUDICATURE 48, 54 (1986) (finding that Reagan appointees to the circuit bench were more conservative than Democratic appointees and comparably conservative when compared to previous Republican appointees); Stidham et al., *supra* note 44, at 17, 20 (finding that Clinton appointees were more liberal than Republican appointees but less than Carter appointees); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1719 (1997); cf. Susan Brodie Haire et al., *Attorney Expertise, Litigant Success, and Judicial Decisionmaking in the U.S. Courts of Appeals*, 33 LAW & SOC'Y REV. 667, 679-80, 681 Table 4 (1999) (utilizing an ideological classification scale where circuit judges "appointed by a conservative ideology-conscious president [were] coded -1 . . . , those appointed by a president who was not ideology conscious [were] coded 0 . . . , and those appointed by liberal ideology-conscious presidents [were] coded +1 . . ." and concluding that ideology was significantly related to products liability decisions).

⁹³ For examples of data sets utilizing these distinctions between liberal and conservative judicial behavior, see Donald R. Songer, *United States Courts of Appeals Database Phase 1, 1925-1988* (1998), at <http://www.icpsr.umich.edu/index.html> (last visited Feb. 2, 2003) (subscription site); Harold J. Spaeth, *United States Supreme Court Judicial Database, 1953-1997 Terms* (1999), at <http://www.icpsr.umich.edu/index.html> (last visited Feb. 2, 2003) (subscription site); Nagel, *Political Party Affiliation and Judges' Decisions*, *supra* note 91, at 845.

similarly to the elected branches, although the degree of partisanship is certainly less.

Judges in some instances behave consistently with the overt policy statements of presidents. The effect should not be as strong for lower court judges as Supreme Court justices.⁹⁴ But, a relationship between appointing president and district judge behavior is clear. Nixon, for example, wanted assurances that nominees would take a law-and-order stance and support business interests. Nixon trial judges are significantly more conservative on economic matters and defendants' rights than their predecessors.⁹⁵ Reagan appointees are even more conservative than Nixon as well as Carter judges on criminal issues.⁹⁶ And, the relationship is more than simply a party relationship: The particular policy goals of a president are reflected in the decisions of his appointees.⁹⁷

IV. DESIRE FOR PROMOTION

It would be surprising if federal judges, individuals who have undoubtedly been driven by ambition nearly all of their lives, stopped striving for greater levels of achievement once appointed. Even Supreme Court justices have been known to have ambition for other offices. James Byrnes left the Court in 1942 and Arthur Goldberg in 1964 for executive branch posts.⁹⁸ Other justices did not leave the Court but were known to be interested in the possibility: Both Justices William O. Douglas and Hugo Black, as well as others undoubtedly, expressed an interest in

⁹⁴ CARP & ROWLAND, *supra* note 89, at 165.

⁹⁵ C. K. Rowland & Robert A. Carp, *Presidential Effects on Federal District Court Policy Decisions: Economic Liberalism, 1960–1977*, 64 SOC. SCI. Q. 386 (1983); C. K. Rowland & Robert A. Carp, *The Relative Effects of Maturation, Time Period, and Appointing President on District Judges' Policy Choices*, 5 POL. BEHAV. 109 (1983); C. K. Rowland et al., *Judges' Policy Choices and the Value Basis of Judicial Appointments: A Comparison of Support for Criminal Defendants Among Nixon, Johnson, and Kennedy Appointees to the Federal District Courts*, 46 J. POL. 886 (1984).

⁹⁶ C.K. Rowland et al., *Presidential Effects on Criminal Justice Policy in the Lower Federal Courts: The Reagan Judges*, 22 LAW & SOC'Y REV. 191 (1988).

⁹⁷ KEVIN L. LYLES, *THE GATEKEEPERS: FEDERAL DISTRICT COURTS IN THE POLITICAL PROCESS* (1997); Steve Alumbaugh & C. K. Rowland, *The Links Between Platform-Based Appointment Criteria and Trial Judges' Abortion Judgments*, 74 JUDICATURE 153 (1990); Randall D. Lloyd, *Separating Partisanship from Party in Judicial Research: Reapportionment in the U.S. District Courts*, 89 AM. POL. SCI. REV. 413 (1995); Rowland & Todd, *supra* note 41.

⁹⁸ For detailed biographical information about every federal judge, see Fed. Judicial Ctr., *Judges of the United States Courts*, at <http://www.fjc.gov/history/home.nsf> (last visited Feb. 2, 2003).

the presidency/vice-presidency.⁹⁹ Lower court judges likely aspire to appointment to a higher court, and this desire may affect their decisions.

Presidents have on occasion named individuals to the court of appeals or district court as a preliminary step in their ultimate appointment to a higher court. Presidents may do this to increase the likelihood that a person will be confirmed for the higher—and more influential—post. A political insider may be more palatable to the Senate if he or she has demonstrated moderation during service on a lower court. Presidents may also use the lesser appointment as a way to confirm the judicial behavior of a nominee before promoting him or her to a more valuable position. David Yalof, in his study of executive branch judicial nomination politics, concludes that lower courts can serve as a “proving ground” for potential Supreme Court nominees.¹⁰⁰

During most of their existence, the courts of appeals have provided a significant number of Supreme Court justices.¹⁰¹ In the past fifty years, thirteen of twenty-one justices previously served on the circuit bench. Seven of the current justices came from the circuits. Appeals court judges may know the odds of high court appointment are long, but many undoubtedly aspire to it (knowing that they have beaten the odds in their appointment to one of the few circuit seats). And, these judges know that the Supreme Court nomination and confirmation processes will include a close consideration of their judicial record by the Executive, the Senate, and increasing numbers of interest groups.¹⁰² Herbert Hoover’s 1930 Supreme Court nomination of Fourth Circuit Chief Judge John Parker was derailed in part by labor groups that took issue with a Parker opinion

⁹⁹ RICHARD DAVIS, *DECISIONS AND IMAGES: THE SUPREME COURT AND THE PRESS* 128 (1994) (arguing that O’Connor was interested in the vice-presidency); Lawrence Baum, *Recruitment and the Motivations of Supreme Court Justices*, in *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES* 202, 204 (Cornell W. Clayton & Howard Gillman eds., 1999).

¹⁰⁰ YALOF, *supra* note 25, at 14.

¹⁰¹ Daniel Klerman, *Nonpromotion and Judicial Independence*, 72 S. CAL. L. REV. 455, 461 (1999) (reporting that since 1940 at least 40% of Supreme Court nominations have been appeals court judges). The Evarts Act of 1891 created the circuit courts of appeals, but they looked very different from today’s circuits because they lacked sufficient judges to fill a three-judge panel (relying instead on judges from the district courts to assist) and they heard only a small number of cases and were the final word in an even smaller number. The increase in the number of circuit judges in 1911 and the expansion of the Supreme Court’s certiorari power in 1925, along with a rise in caseload, produced the modern courts of appeals. Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213, 221–26 (1999).

¹⁰² For example, Ford’s aides carefully read every circuit opinion of the two finalists for the seat vacated by Douglas—circuit judges Arlin Adams and John Paul Stevens—and recommended Stevens over Adams. ABRAHAM, *supra* note 29, at 274–75. Stevens’ decisions from the High Court have been markedly more liberal than his Republican supporters expected based on his circuit rulings.

upholding yellow-dog contracts.¹⁰³ Parker's subsequent fifteen years on the Fourth Circuit were marked by more moderate decisions that earned him respect in Democratic as well as Republican circles, prompting the Truman Administration to reconsider (but ultimately reject) Parker for a Supreme Court vacancy.¹⁰⁴

District judges comprised between 40 and 60% of court of appeals appointments in the last century.¹⁰⁵ Because there are almost four times as many district judges as circuit judges, the likelihood that any individual district judge would be promoted is relatively low, estimated by one study to be 6% during the Nineties.¹⁰⁶ Yet, anecdotal evidence as well as empirical studies of judicial behavior suggest that many district judges aspire to promotion to the courts of appeals.¹⁰⁷ Those who aspire may limit their behavior to prevent a possible challenge to their promotion or to appeal to those with the power to ensure promotion.¹⁰⁸

Judges who hope to be promoted have reason to believe that their rulings, at least in visible cases, will affect their chances of success.¹⁰⁹ For example, the Senate never confirmed Clinton's nomination of North Carolina District Judge James A. Beaty, Jr., to the Fourth Circuit bench despite the fact that Clinton nominated him twice and Beaty would have been the first African-American to sit on the circuit. One factor cited by senators opposed to Beaty's elevation was his decision, while a designated district judge on a Fourth Circuit panel, to sign on to

¹⁰³ The decision was *United Mine Workers of Am. v. Red Jacket Consol. Coal & Coke Co.*, 18 F.2d 839 (1927). See ABRAHAM, *supra* note 29, at 30–31 (observing that civil rights groups also opposed Parker based on evidence that he was a racist); Richard L. Watson, Jr., *The Defeat of Judge Parker: A Study in Pressure Groups and Politics*, 50 MISS. VALLEY HIST. REV. 213 (1963).

¹⁰⁴ ABRAHAM, *supra* note 29, at 31 (noting that following his rejection, Parker issued numerous pro-civil rights rulings); YALOF, *supra* note 25, at 23–24 & n.18. See generally WILLIAM C. BURRIS, *DUTY AND THE LAW: JUDGE JOHN J. PARKER AND THE CONSTITUTION* (1987).

¹⁰⁵ Klerman, *supra* note 101, at 460.

¹⁰⁶ *Id.* at 461.

¹⁰⁷ *Id.* at 463 (observing that “[l]awyers are often heard to say that a particular ruling reflects the fact that the judge is ‘gunning for the circuit’” and that “[w]hile the average probability of promotion is relatively low, particular judges may perceive it as higher.”); see also Mark A. Cohen, *Explaining Judicial Behavior or What’s “Unconstitutional” About the Sentencing Commission?*, 7 J.L. ECON. & ORG. 183, 188–89 (1991); RICHARD A. POSNER, *OVERCOMING LAW* 111–12 (1995).

¹⁰⁸ *Cf.* Cohen, *supra* note 107, at 192–95 (finding that federal judges who were more likely to be promoted were also more likely to vote to uphold the Federal Sentencing Guidelines and to impose harsher penalties in antitrust cases).

¹⁰⁹ See, e.g., GOLDMAN, *supra* note 23, at 305–06 (detailing conservative interest group challenges to the elevation of District Judge Joel Flaum to the Seventh Circuit based on his rulings in class action suits and other “bleeding heart” behavior).

a unanimous panel ruling that granted a habeas petition.¹¹⁰ And, as discussed earlier, Bush nominee Pickering was challenged based in part on his decisions on the district bench, and Hoover nominee Parker based on one appeals court opinion. More than 250 published district court opinions written by one, ultimately successful, nominee to the Seventh Circuit were reviewed by the Administration prior to his nomination.¹¹¹

V. CONCLUSION

Judicial election critics denounce the partisanship that results, indeed is required for election; however, life tenure does not ensure nonpartisanship. As already discussed, presidents nominate individuals with ties and support from within the president's party while senators seek to serve their own constituents or ideals in confirming nominees. Judicial selection accordingly is inherently political and not strictly merit-based. Politicized selection is likely to produce relatively more political decisionmakers, and it does. Moreover, the autonomy of federal judges as well as their personal ambition may also prevent them from reaching decisions free from bias. Voters do not determine the tenure of federal judges; nevertheless, Article III jurists may behave in partisan ways that call into question the value of insulation from the democratic process.

Yet, Article III protections may offer the best means of selecting relatively impartial and competent judges. Article III creates the aura of legitimacy that is crucial to the success of adjudication. In addition, other factors, such as interest group monitoring, collegial courts, and workload, may ensure outcomes that remain within an acceptable range of possible decisions, thereby limiting the effects of partisanship. Finally, the current system creates countervailing pressures that may do the most to limit the role of ideology. The federal judicial system has its flaws, but no other human dispute resolution system is obviously better.

¹¹⁰ Debra Baker, *Waiting and Wondering*, A.B.A. J., Feb. 1999, at 52.

¹¹¹ GOLDMAN, *supra* note 23, at 306.

