Section 2: Judicial Confirmation Process

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WASHINGTON -- Filibusters dominate the headlines, and Republicans and Democrats say the Senate's judicial confirmation process is broken. But a defiant Bush administration is pushing through most of its plan to make the federal bench more conservative.

Two years ago Friday, President Bush announced his first slate of proposed judges. Since then, the White House consistently has refused to surrender to Senate Democrats who have tried to block conservative nominees from lifetime appointments to the bench.

In all, 123 nominees have been approved to the 862-seat judiciary during the past two years. And though Senate filibusters of Washington lawyer Miguel Estrada and Texas judge Priscilla Owen have drawn much attention, the White House has won Senate approval of several other eminent conservatives. They include a leading states' rights advocate, a scholar who has argued against abortion rights, an opponent of the Supreme Court's landmark Miranda ruling that requires police to read suspects their rights, and two controversial former aides to Sen. Strom Thurmond, R-S.C.

Overall, the administration has:

* Preserved a strategy of tightly controlling the selection process, including eliminating the American Bar Association's 50-year role in screening candidates.

* Refused to compromise with Democrats who have pushed for more moderate candidates. After a Senate committee rejected Owen and Mississippi trial judge Charles Pickering, the administration simply nominated them again to the U.S. appeals court that covers Texas, Louisiana and Mississippi.

* Remained focused, even when Democrats took control of the Senate in mid-2001, on finding conservatives who Bush believes would narrowly interpret individual rights and not try to use the courts to solve perceived problems in society. (Republicans now hold a 51-48 edge in the Senate, which has one independent.)

"From the very beginning, the president has emphasized the need for a well-functioning . . . federal judiciary," says Viet Dinh, assistant U.S. attorney general in the Office of Legal Policy. "That emphasis has not wavered."

Two long-pending nominees, Washington lawyer John Roberts and Los Angeles judge Carolyn Kuhl, are scheduled for votes today in the GOP-led Senate Judiciary committee. One question is whether Kuhl -- who as a Reagan administration lawyer sought to reverse Roe vs. Wade, the ruling that legalized abortion nationwide -- will face a filibuster.
"The president has fought and will fight for his nominations," says a senior administration official shepherding nominations. He noted that when Bush announced his first nominees May 9, 2001, he emphasized their significance by presenting them in the White House's historic East Room.

Of those 11 nominees, seven have been confirmed. Roberts, who has Democratic support, could become the eighth. The remaining three are Owen; Estrada, the first Hispanic nominated to the appeals court for the District of Columbia Circuit; and Terrence Boyle, a North Carolina trial judge tapped for an appeals court covering Mid-Atlantic states.

"The president appears to be going for broke," says Barbara Perry, a government professor at Sweet Briar College in Virginia who follows judicial nominations.

Bush's push for a more conservative bench continues amid anticipation of a possible Supreme Court vacancy. Retirement rumors constantly swirl around Chief Justice William Rehnquist, 78, and Justice Sandra Day O'Connor, 73. Both were appointed by GOP presidents and may be inclined to retire while a Republican is in the White House.

The current atmosphere has led some analysts to say that if a high court opening arose, the administration would pick a hard-right nominee and Senate Democrats would consider a filibuster to block the nominee. Stopping a filibuster requires 60 votes, rather than the usual majority of 51.

Democrats have closed ranks to filibuster Estrada, a former clerk to Supreme Court Justice Anthony Kennedy. Some Democrats criticize Estrada for declining to elaborate on his judicial views and call him "ultra far-right." Owen, who is on Texas' Supreme Court, has drawn criticism for opinions against young women seeking to get abortions without telling their parents and for decisions in which she favored business over workers.

For all the wrangling over nominations, Democrats have joined with the GOP to approve 123 of Bush's 184 picks since spring 2001.

Vermont Sen. Patrick Leahy, ranking Democrat on the Judiciary Committee, says Democrats have not been obstructionists. "The president has been a divider and not a uniter with many nominees. We have drawn a line with a few of his most extreme choices."

Last week, the Senate voted 52-41 to approve Jeffrey Sutton, a Columbus, Ohio, lawyer who successfully argued states' rights cases at the U.S. Supreme Court. Advocates for the disabled protested him, saying his work undercut federal anti-bias protections. He joins the appeals court covering Ohio, Kentucky, Michigan and Tennessee.

In November, after the GOP won Senate control, two high-profile nominees were approved for key appeals courts: University of Utah law professor Michael McConnell, known for writings against abortion and for equal government funding of non-religious and religious programs; and former Thurmond aide and trial judge Dennis Shedd, who overcame criticism that he unfairly ruled against workers and consumers.

Another ex-Thurmond aide, Terry Wooten, was approved to a trial court post in South Carolina. University of Utah professor Paul Cassell, an opponent of the Miranda requirement, won a trial court seat in Utah.
The Judiciary Committee is likely to soon reconsider Pickering, who was rejected by the panel when Democrats controlled it. They denounced his views on racial issues and abortion rights. Bush is standing by Pickering. Some Democrats say that could mean another filibuster.
WASHINGTON - Talk of a possible vacancy on the Supreme Court is rising with the arrival of June and the last month of the current term. If there is an opening, however, a nominee's fate may depend on what happens to the filibuster rule in the Senate, now under siege. A filibuster, one of the Senate's most cherished eccentricities, is a debate that can go on and on - a blocking maneuver that works simply because it is so hard to stop in a closely divided Senate. This year, its use against lower court nominations has run on for months.

The continuing slowdown on two conservative nominees is widely regarded as a rehearsal for coming battles if a Supreme Court justice retires and President Bush picks a controversial replacement.

Aware of that prospect, and frustrated by the current filibuster, President Bush last month complained that "we are facing a crisis in the Senate, and therefore a crisis in our judiciary."

But the Democratic leader in the Senate, Tom Daschle of South Dakota, has said there is no crisis and there is nothing wrong with the filibuster rule. "If it ain't broke, don't fix it," he said in May. The precedent for filibustering judicial nominations was set in 1968 when Republican senators thwarted the Democratic nomination of Justice Abe Fortas to become chief justice. The technique was not renewed on judgeships until this year, when Democrats brought it back to try to head off two of Bush's nominees to federal appeals courts - Miguel Estrada and Priscilla Owen.

As the Supreme Court's future is pondered, the filibuster looms large in the background.

The filibuster is now under fierce challenge in all three branches of government. The most drastic form of a challenge would involve a ruling from the Senate chair, occupied for the occasion by Vice President Dick Cheney, that filibusters no longer can be used against judicial nominees - a simple, unmistakable display of power that could leave the Democratic minority with no option but to stall virtually all Senate business.

"It is not called the nuclear option for nothing," said Elliot M. Mincberg, legal director of People for the American Way, a liberal group that supports the current filibustering.

This is not something that either Republican or Democratic senators are actively talking about in public, because it looks drastic in the gentle- mannered Senate. But lobbyists seem preoccupied with it these days.

Supporters of the option, like conservative legal advocate Jay Alan Sekulow of the American Center for Law and Justice, prefer to call it "the constitutional option." They
argue that filibusters aimed at judicial nominations are unconstitutional, and their option would simply restore majority rule on those nominations.

Short of that option, there are other challenges building. The president, reaching deep into the Senate's own affairs, has suggested that the chamber speed up its process on judge nominations. The Senate's own Republican leadership is seeking to weaken the filibuster rule.

The rule is also under assault from a number of conservative activist groups. And among academics, there is a continuing debate whether the filibuster is unconstitutional. The Senate will begin formal study of all of the options on Thursday, when its Rules Committee holds an afternoon hearing.

One conservative group, Judicial Watch - a legal advocacy organization that in nine years of existence has brought suit more than 100 times, mainly against the government - has filed a lawsuit claiming that the filibuster of judgeship nominees is unconstitutional.

Judicial Watch asked the US District Court to strike down the filibuster rule and order the Senate and its officers to let the two pending appeals court nominations come to a final vote - one that would ensure the nominees' confirmation.

In a rare display of agreement on the emotionally charged subject of filibusters, the Senate last month voted unanimously and without debate to defend itself against that lawsuit.

At this point, however, it is unclear what the Senate's defense will be. Some freshman Senate Republicans have talked publicly about pursuing the constitutional claim in court themselves, so there may be some resistance to mounting a legal argument that the issue is none of the courts' business. The Senate Legal Counsel will begin framing a defense shortly.

Each of the several options has its critics, but there is no consensus yet that all of them ultimately will fail.

The new rumbling over the filibuster can be traced to simple numbers: the 100-member Senate is divided 51-49, with Republicans holding control. The filibuster this year has taken that control away from them on at least two court nominations.

Senate Rule 22, the filibuster rule, requires 60 votes, not a majority of 51, to stop a filibuster and let the Senate proceed to a final vote. That means that if 41 senators want to keep a filibuster going, it can't be stopped because 59 opposing votes would not be enough.

Although changing the Senate rules ordinarily would require only a simple majority of 51 votes, a proposed change can itself be filibustered, and another Senate rule says it takes 67 votes (not 60) to end a filibuster against a rule change. That means 34 senators can block a rule change even if 66 want it.

Senate rules would have to be changed to adopt President Bush's suggestion for a more rapid timetable of Senate review of judicial nominees or to approve a Senate GOP leaders' proposal to reduce in steps the votes required to shut off a filibuster, from 60 to 51. Both ideas, if they make it to the Senate floor, would be subject to filibuster.

Thus, two out of three options now being discussed may be in for a seemingly endless struggle. Advocates on opposite sides of the filibuster controversy, like Mineberg and
Sekulow, agreed that the two options suggested by Bush and Senate GOP leaders could be doomed.

That is what has brought on talk of the third option. It would work this way: Republicans would raise a parliamentary point that Rule 22 does not apply at all to judicial nominations, and so a majority of 51 prevails.
WASHINGTON -- The White House gave a "thanks, but no thanks" reply Wednesday to an offer from Senate Democrats to consult with the president before he nominates any justices to the Supreme Court. President Bush's top legal advisor left no doubt that the choice -- when or if there is one -- will be the president's alone.

"If a Supreme Court vacancy arises during his presidency, President Bush will nominate an individual of high integrity, intellect and experience," White House Counsel Alberto R. Gonzales said in a letter to Senate Democrats.

Then "the Senate will have an opportunity to assess the president's nominee and ... to vote up or down," he added.

White House Press Secretary Ari Fleischer also dismissed the Democrats' offer as a "novel new approach" to choosing Supreme Court justices.

In the last week, several Democrats have written Bush to say that he could avoid a battle over the Supreme Court by talking with them about a consensus nominee.

"I stand ready to work with you to help select a nominee or nominees to the Supreme Court," Sen. Patrick J. Leahy (D-Vt.), the ranking Democrat on the Judiciary Committee, said in a June 11 letter to Bush.

He noted that Senate Judiciary Committee Chairman Orrin G. Hatch (R-Utah) has taken credit for advising President Clinton to select Ruth Bader Ginsburg and Stephen G. Breyer for the high court.

"Meaningful bipartisan consultation in advance of any Supreme Court nomination" would prevent a "divisive confirmation fight," said Senate Minority Leader Tom Daschle (D-S.D.) on Tuesday.

Sen. Charles E. Schumer (D-N.Y.), another Judiciary Committee member, offered Bush a few possible nominees, including Republican Sen. Arlen Specter (R-Pa.).

Republican leaders and conservative scholars say they are taken aback by the Democrats' claim to have a role in the nomination process.

"I am astounded by those letters. Does Charles Schumer think he is the president?" asked law professor John Eastman.

A former clerk to Supreme Court Justice Clarence Thomas, Eastman teaches at Chapman University Law School in Orange and recently advised Senate Republicans on the constitutionality of filibusters. "The president has the sole power to nominate, and
only then does the Senate give its advice and consent," Eastman said.

Sen. John Cornyn (R-Texas), the newest Republican on the Judiciary Committee, also urged Bush to ignore the Democrats. "Few things would politicize our judiciary more than to hand over control of the process for selecting Supreme Court justices to individual members of the Senate," Cornyn said. "Presidents, not politicians, nominate justices."

The debate about the Senate's role in confirming judges is an old one, and it tends to flare up when Supreme Court seats are at stake. At the moment, there is speculation that one or more of the justices will retire this month at the end of the court's current term.

The Constitution says the president "shall nominate, and by and with the advice and consent of the Senate, shall appoint ... judges of the Supreme Court."

On Wednesday, Sen. Barbara Boxer (D-Calif.) cited this "advice and consent" clause in describing judicial appointments as "a 50-50 deal."

She added: "The president, in this process, is not more important than the Senate, and the Senate's not more important. They have to work together."

Boxer and other Democrats base their view on historians who say that early drafts of the Constitution gave the Senate the power to appoint officials. The final version of the Constitution, though, made it clear that the power to nominate judges and other officials rests with the president.

Liberal and conservative activists are gearing up for an all-out battle, and the Senate Judiciary Committee has cleared its calendar for possible hearings this summer.

But none of the justices has hinted at retirement; instead, they have spoken of their plans for the fall session.

Fleischer dismissed the talk of any Supreme Court nomination as "idle chatter."
WASHINGTON - As the clock ticks down to a possible retirement on the Supreme Court, partisans on all sides are gearing up for what promises to be the bloodiest confirmation battle in a dozen years.

Republicans have already met in the conference room of a D.C. law firm to brainstorm a campaign on behalf of any nominee. Senate Judiciary Committee staffers are at the ready. And leaders of liberal groups are canceling vacations and charting plans for the opposition fight.

"We've been preparing for this moment, really, since the day Bush was elected, or chosen," says Kate Michelman, president of NARAL Pro-Choice America and a veteran of battles over Robert Bork in 1987 and Clarence Thomas in 1991.

When the court term ends later this month, it is still highly possible that neither Chief Justice William Rehnquist nor Justice Sandra Day O'Connor - the subjects of most retirement rumors - will step down. But that has not stopped the speculation, nor has it slowed the preparation throughout Washington in the event that President Bush gets to fill the first Supreme Court vacancy in nine years.

"We have a fully staffed nominations unit and are preparing for a potential retirement in addition to working on filling the empty spaces on the federal bench," says Margarita Tapia, spokeswoman for Judiciary Committee Chairman Orrin Hatch, R-Utah. Other senators say they have not beefed up their staffs yet, but some vacancies have been filled with veterans of past nomination wars - such as Sen. Edward Kennedy's, D-Mass., new committee counsel Jim Flug, who first worked with Kennedy in the 1960s.

Outside government, the first tangible sign that war councils are convening came on May 22, when about two dozen highly placed Republicans gathered at the offices of Jones Day overlooking the Capitol.

The three-hour session brought together in one room GOP executive-branch veterans of earlier nomination wars over Bork and Thomas, as well as key point people who hold the same positions today. Several Republican Senate staffers were also present.

"It was a collective sharing of memories about what happened then," says attendee C. Boyden Gray, a partner at Wilmer, Cutler & Pickering who was White House counsel when the first President Bush nominated Thomas.

Gray heads the Committee for Justice, a group that presses for confirmation of Bush judicial nominees. "The purpose was to inform the current people so they don't have to reinvent the wheel," he says.

According to several people who were present, Gray was joined at the meeting by
Charles Cooper, former assistant attorney general for legal counsel; Michael Carvin, former deputy assistant attorney general for legal counsel, and Lee Liberman Otis, former assistant White House counsel and a founder of the Federalist Society who was a key player in Thomas' confirmation fight in 1991.

Cooper is now a partner at Cooper & Kirk, Carvin is a partner at Jones Day, and Otis is general counsel of the Department of Energy.

"This was a meeting of a group of conservatives engaged in nomination fights in the past or the present who are concerned that we don't have another Borking," says a GOP Senate aide who was not present but heard about the meeting in detail.

Gray says ideological issues and the makeup of the Supreme Court didn't come up at the session, which was totally devoted to practical nitty-gritty issues.

"We told them, 'Here's what to do if there is a vacancy,'" Gray says. "Where to have the war room, things like that."

Says another lawyer who was present but requested anonymity: "No specific decisions were made at the meeting. It was simply about what to expect and how to prepare yourselves for it. An older generation of experienced hands were passing on their insights to the current generation in the executive branch and on the Hill."

Among the topics that participants say were discussed were the importance of developing a press strategy and the need to respond quickly to themes and issues raised by Democrats regarding a nominee.

Several sources confirm that Associate White House Counsel Brett Kavanaugh, who has been working on judicial nominations since the start of the administration, was one of the current officials at the meeting. Kavanaugh declines comment, as do Cooper and Carvin. Otis was traveling and unavailable for comment.

One lawyer who was at the May meeting says a follow-up session has not been scheduled, but the GOP Senate aide says he wouldn't be surprised if one is held later this month.

John Nowacki, a conservative strategist who declined to say whether he attended the meeting, said Bush supporters are anticipating all-out war. "No matter who is nominated, what we've seen so far with the lower court nominees will pale in comparison," says Nowacki, director of legal policy at the Free Congress Foundation, whose predecessors were also active during the Bork and Thomas battles.

Nowacki says his group will defend Bush nominees and also hopes to win public support in the ongoing debate over the role of filibusters in blocking judicial nominations. That issue, currently the subject of Senate maneuvering, could come to the fore if Democrats threaten to filibuster a high court nominee.

"Americans have a sense of fairness, and they will want to know why the Democrats don't want an up or down vote," says Nowacki.

ITCHING FOR A FIGHT

For their part, liberal groups that are likely to oppose a Bush nominee have yet to convene a mass meeting on Supreme Court nomination strategy, but work is under way.
researching the backgrounds of potential nominees.

Nan Aron, longtime president of the umbrella group Alliance for Justice, still holds out hope that no vacancy will occur.

"Does the administration really want a big fight a year before the election?" asks Aron, whose group is the lead liberal umbrella group on judicial nominations. "It certainly didn't help the first President Bush that Clarence Thomas was fought over the year before his re-election campaign."

Aron also says that if there is a vacancy, liberal opposition to a Bush nominee is not automatic. "I'm very serious about that," she says.

But when asked about White House counsel Alberto Gonzales – usually viewed as the most politically palatable possibility for Democrats – Aron answers without hesitation.

"We would mount a fight on Gonzales," Aron says. The target would not be Gonzales' record on the Texas Supreme Court, but rather his work as White House counsel and his advocacy of administration policies on civil liberties, judicial nominations, and other issues. "We can and will prevail" against Gonzales or any other nominee that is opposed by a broad coalition, Aron says.

A grass-roots campaign on a Bush nominee will look substantially different from the ones mounted against Bork and Thomas, says NARAL's Michelman.

Through its e-mail network, Michelman says, her organization can quickly contact 750,000 people. "This capacity to mobilize, to educate, to inform, and to activate, is enormously powerful," she notes.

Michelman says she has already laid the groundwork with senators who favor the right to choose.

"We have made it clear we expect pro-choice senators to filibuster any nominee who does not view the right to choose as a fundamental constitutional right," says Michelman. "Merely stating that Roe v. Wade is settled law is not good enough."

Ralph Neas, president of People for the American Way, also says the filibuster option is part of the arsenal that opponents will use if necessary. Since 60 votes are needed to end a filibuster, opponents would need only 41 senators to block a nominee.

"But we have a good shot at 51 votes too," says Neas, who was a key player in prior battles as head of the Leadership Conference on Civil Rights. Neas says he and his family took a vacation in January in anticipation of the time demands a nomination battle will create for him this summer. Grass-roots mobilization will be crucial to win, Neas says, and his 600,000 members are ready to form the core of a "progressive army" of millions.

NEW FACES ON THE LEFT

Not all the leaders of the likely opposition are veterans of the Bork and Thomas battles. Aron expects that labor and disabilities rights groups will be more visible. Most of all, Aron predicts that environmental groups - minor players in the confirmation battles over Bork and Thomas - will be important new combatants.

"There's a level of awareness in the environmental community about the threat involved in judicial nominations that was not
there even two years ago," says Douglas Kendall, executive director of the Community Rights Counsel, an environmental and land use group that has focused on judicial nominees for years.

Environmental issues are the subject of only a few Supreme Court cases per term, and the court's track record is mixed. But the potency of environmental laws can rise or fall on a wide range of Supreme Court rulings on issues of standing, the commerce clause, takings, 11th Amendment and the separation of powers, Kendall notes.

Kendall's group and Earthjustice - formerly the Sierra Club Legal Defense Fund - have formed an alliance to beef up environmental groups' research and advocacy in anticipation of a Supreme Court vacancy.

They, like others, are building files on the most-mentioned potential nominees, and they have been active on lower court nominees. A substantial number of senators opposing Miguel Estrada for the D.C. Circuit U.S. Court of Appeals have cited environmental concerns among others. Estrada's nomination, approved by the Senate Judiciary Committee, has been shut down by a months-long filibuster.

"We generated tens of thousands of messages into senators" on Estrada and other nominees, says Glenn Sugameli, senior legislative counsel with Earthjustice. For a Supreme Court nominee, he says, "We're talking about research, media, education, lobbying, outreach, networking, all of it. It will be a very high-profile issue for the national environmental community."

At least one other familiar face from past nomination battles has not gotten energized yet. Harvard Law School professor Laurence Tribe, who advised Senate Democrats on constitutional issues before the Bork and Thomas hearings, said in an e-mail last week, "I'm thinking as little about this as I can manage and am resisting requests to become involved. When the time comes, I suspect the force will become irresistible and I will get drawn in. But not without protest. For some reason, I'm feeling fatalistic about things this time around."

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IDEOLOGY AND THE SELECTION OF FEDERAL JUDGES

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Erwin Chemerinsky

II. Ideology Always Has Mattered in Judicial Selection

The debate over whether ideology should matter in the judicial selection process has been about whether it is appropriate for the United States Senate to consider the views of the prospective judge during the confirmation process. No one seems to deny that it is completely appropriate for the President to consider ideology in making appointments. Presidents, of course, always have done so. Every President has appointed primarily, if not almost exclusively, individuals from the President's political party. Ever since George Washington, Presidents have looked to ideology in making judicial picks. Some Presidents are more ideological than others; not surprisingly, these Presidents focus more on ideology in their judicial nominations. President Franklin Roosevelt, for example, wanted judges who would uphold his "New Deal" programs and President Ronald Reagan emphasized selecting conservative jurists.

Senates always have done the same, using ideology as a basis for evaluating presidential nominees for the federal bench.

Early in American history, President George Washington appointed John Rutledge to be the second Chief Justice of the United States. Rutledge was impeccably qualified; he already had been confirmed by the Senate as an Associate Justice (although he never actually sat in that capacity). The Senate rejected Rutledge for the position as Chief Justice because of its disagreement with Rutledge's views on the United States treaty with Great Britain.

During the nineteenth century, the Senate rejected twenty-one presidential nominations for the United States Supreme Court. The vast majority of these individuals were defeated because of Senate disagreement with their ideology. Professor Grover Rees explains that "during the nineteenth century only four Supreme Court Justices were rejected on the ground that they lacked the requisite credentials, whereas seventeen were rejected for political or philosophical reasons."

During the twentieth century, nominees for the Supreme Court also were rejected solely because of their ideology. In 1930, a federal court of appeals judge, John Parker, was denied a seat on the high Court because of his anti-labor, anti-civil rights views. In 1970, the Senate rejected United States Court of
Appeals judge Clement Haynsworth largely because of his anti-union views. The Senate then rejected President Nixon's next pick for the Supreme Court, federal court of appeals judge Harold Carswell.

In 1987, the Senate rejected Robert Bork, even though he had impeccable professional qualifications and unquestioned ability. Bork was rejected because of his unduly restrictive views of constitutional law, including rejecting constitutional protection of a right to privacy, limiting freedom of speech to political expression, and denying protection for women under equal protection. The defeat of Robert Bork was in line with a tradition as old as the republic itself.

Those who contend that ideology should play no role in judicial selection are arguing for a radical change from how the process has worked from the earliest days of the nation. Never has the selection or confirmation process focused solely on whether the candidate has sufficient professional credentials.

There is a widespread sense that the focus on ideology has increased in recent years. Indeed, this symposium, and others like it, are a response to this concern. There are several explanations for why there is intense focus on ideology at this point in American history. First, the demise in a belief in formalism by the general public encourages a focus on ideology. People increasingly have come to recognize that law is not mechanical, that judges often have great discretion in deciding cases. People realize that how judges rule on questions like abortion and affirmative action and the death penalty and countless other issues is a reflection of the individual jurist's views. Bush v. Gore simply reinforced the widespread belief that the political views of judges often determine how they vote in important cases. Thus, Democratic voters want Democratic Senators to block conservative nominees and Republican voters want Republican Senators to block liberal nominees. This creates a political incentive for Senators to do so, and means that they certainly do not risk alienating their core constituency by using ideology in evaluating nominees.

Second, the lack of "party government" in recent years explains the increased focus on ideology. During the last six years of the Clinton presidency, the Republicans controlled the Senate. During at least the first two years of the current Bush presidency, the Democrats have controlled the Senate. If the Senate is of the same political party as the President, there obviously will be many fewer fights over judicial nominations. Certainly, confirmation battles are still possible, such as through filibusters, or if the President lacks support from a faction of his own party. But the reality is that confirmation fights are usually a product of the Senate and the President being from different political parties.

Finally, confirmation fights occur when there is the perception of deep ideological divisions over issues likely to be decided by the courts. Now, for example, conservatives and liberals deeply disagree over countless issues: the appropriate method of constitutional interpretation; the desirable scope of Congress' power and the judicial role in limiting it; the content of individual rights, such as privacy. It is widely recognized that the outcome of cases concerning these questions will be determined by who is on the bench. Therefore, senators know, and voters recognize, that the confirmation process is enormously important in deciding the content of the law. Interest groups on both sides of the ideological divide have strong reasons for making judicial confirmation a
high priority because they know what is at stake in who occupies the federal bench.

III. Ideology Should Be Considered in the Judicial Selection and Confirmation Process

Of course, the above description is not a normative defense of the desirability of considering ideology in evaluating judicial nominees. Normatively, there are many reasons why ideology should be considered in the judicial selection process.

First, most simply and most importantly, ideology should be considered because ideology matters. Judges are not fungible; a person's ideology influences how he or she will vote on important issues. It is appropriate for an evaluator—the President, the Senate, the voters in states with judicial elections—to pay careful attention to the likely consequences of an individual's presence on the court.

This seems so obvious as to hardly require elaboration. Imagine that the President appoints someone who turns out to be an active member of the Ku Klux Klan or the American Nazi Party and repeatedly has expressed racist or anti-Semitic views. Assume that the individual has impeccable professional qualifications: a degree from a prestigious university, years of experience in high level law practice, and a strong record of bar service. I would think that virtually everyone would agree that the nominee should be rejected. If I am correct in this assumption, then everyone agrees that ideology should matter and the only issue is what views should be a basis for excluding a person from holding judicial office.

On the Supreme Court, the decisions in a large proportion of cases are a product of the judges' views. The federalism decisions of recent years—limiting the scope of Congress' powers under the commerce clause and section five of the Fourteenth Amendment, reviving the Tenth Amendment as a limit on federal power, and the expansion of sovereign immunity—almost all have been 5-4 rulings that reflect the ideology of the Justices.12 Beyond the obvious controversial issues, like abortion, affirmative action, and the death penalty, virtually all cases about individual liberties and civil rights are a product of who is on the bench. Criminal procedure cases often require balancing the government's interests in law enforcement against the rights of individuals; this balancing will reflect the individual Justice's views. Decisions in statutory cases, too, are a result of the ideology of the Justices. Frequently, in statutory civil rights cases, the Court is split exactly along ideological lines.

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Second, the Senate should use ideology precisely because the President uses it. Republicans, who today are arguing for the Senate to approve nominations without regard to their views, are being disingenuous when there is a President who is basing his picks so much on ideology. Under the Constitution, the Senate should not be a rubber-stamp and should not treat judicial selection as a presidential prerogative. The Senate owes no duty of deference to the president and, as explained above, never has shown such deference through American history.

Finally, ideology should be considered because the judicial selection process is the key majoritarian check on an

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anti-majoritarian institution. Once confirmed, federal judges have life tenure. A crucial democratic check is the process of determining who will hold these appointments. A great deal of constitutional scholarship in the last quarter of a century has focused on what Professor Alexander Bickel termed the "counter-majoritarian difficulty"--the exercise of substantial power by unelected judges who can invalidate the decisions of elected officials. The most significant majoritarian check is at the nomination and confirmation stage. Selection by the President and confirmation by the Senate properly exists to have majoritarian control over the composition of the federal courts.

Opponents to the use of ideology in the judicial selection process must sustain one of two arguments: either that an individual's ideology is unlikely to affect his or her decisions on the bench, or that even if ideology will influence decisions, it should not be examined because disadvantages to such consideration will outweigh any advantage.

The former argument, that a person's ideology is unlikely to affect performance in office, is impossible to sustain. Unless one believes in truly mechanistic judging, it is clear that judges possess discretion and that the exercise of discretion is strongly influenced by an individual's preexisting ideological beliefs. In cases involving questions of constitutional or statutory interpretation, the language of the document and the intent of the drafters often will be unclear. Judges have to decide the meaning, and this often will be a product of their views. Many cases, especially in constitutional law, require a balancing of interests. The relative weight assigned to the respective claims often turns on the judge's values. Given the reality of judicial decision making, it is impossible to claim that a judge's ideology will not impact his or her decisions.

Opposition to considering ideology must be based on the latter argument: that even though ideology matters, it is undesirable to consider it. One argument is that having the Senate consider ideology will undermine judicial independence. Professor Stephen Carter makes this argument:

[I]f a nominee's ideas fall within the very broad range of judicial views that are not radical in any nontrivial sense--and Robert Bork has as much right to that middle ground as any other nominee in recent decades--the Senate enacts a terrible threat to the independence of the judiciary if a substantive review of the nominee's legal theories brings about a rejection.15

But Professor Carter never explains why judicial independence requires blindness to ideology during the confirmation or selection of a federal judge. Judicial independence means that a judge should feel free to decide cases according to his or her view of the law and not in response to popular pressure. As such, Article III's assurance of life tenure and its protection against a reduction in salaries, provide independence. Judges are free to decide each case according to their conscience and best judgment; they need not worry that their rulings will cause them to be ousted from office. Professor Carter never justifies why this is insufficient to protect judicial independence. He subtly shifts the definition of independence from autonomy while in office to autonomy from scrutiny before taking office. But he does not explain why the latter, freedom from evaluation before ascending to the bench, is a

prerequisite for judicial independence in the former, far more meaningful sense.

Another argument against considering ideology is that it will deadlock the selection process—liberals will block conservatives and vice versa. The reality is that this is a risk only when the Senate and the President are from different political parties. Even then, every Senate—including the Republican Senate during the Clinton years and the Democratic Senate today—has approved a large number of presidential nominations for the federal bench. There have been times when a number of nominations have been rejected, such as the Senate defeating every pick for the Supreme Court by President Tyler and rejecting two nominations in a row by President Nixon. But in over 200 years of history, deadlocks have been rare.

Most importantly, at times like now, when the Senate and the President are controlled by different parties, the solution to deadlocks is in the President's hands: nominate individuals who will be acceptable to the Senate. Presidents will have to select more moderate individuals than if the Senate was controlled by their political party. President Clinton undoubtedly was forced to select less liberal, more moderate judges, because the Senate was Republican-controlled for the last six years of his presidency. President Bush would be far more successful in getting his nominations through the Senate if he chose less conservative individuals. The President has the prerogative to pick conservatives like Charles Pickering, Priscilla Owens, Carolyn Kuhl, and Miguel Estrada, but he should expect resistance in a Democratic Senate that would not be there if Bush selected more moderate nominees. When President Bush has picked moderates for the federal courts of appeals, they have sailed through the confirmation process. For example, the Senate quickly confirmed Bush's selections of Reena Raggi for the Second Circuit and Harrison Hartz for the Tenth Circuit.

Finally, some suggest that using ideology is undesirable because it will encourage judges to base their rulings on ideology. The argument is that ideology has to be hidden from the process to limit the likelihood that once on the bench judges will base their decisions on ideology. This argument is based on numerous unsupportable assumptions: it assumes that it is possible for judges to decide cases apart from their views and ideology; it assumes that judges do not already often decide cases because of their views and ideology; it assumes that considering ideology in the selection process will increase this in deciding cases. All of these are simply false. Long ago, the Legal Realists exploded the myth of formalistic value-neutral judging. Having the judicial confirmation process recognize the demise of formalism won't change a thing in how judges behave on the bench.

In summary, the argument for considering ideology in judicial selection is simple: people should care about the decisions likely to come from a court on important issues; the ideological composition of the court will determine those decisions; and the appropriate place for majoritarian influences in the judicial process is at the selection stage.
I. The Framers of the Constitution Assigned to the President the Pre-Eminent Role in Appointing Judges

B. The Framers Envisioned a Narrow Role for the Senate in the Confirmation Process

Of course, there is more to the appointment power than the power to nominate, and the Senate unquestionably has a role to play in the confirmation phase of the appointment process. But the role envisioned by the framers was as a check on improper appointments by the President, one that would not undermine the President's ultimate responsibility for the appointments he made. As James Iredell, later a Justice of the Supreme Court, noted during the North Carolina Ratification Convention: "[a]s to offices, the Senate has no other influence but a restraint on improper appointments . . . . This, in effect, is but a restriction on the President."

The degree to which the founders viewed the power of appointment as being vested solely in the President can be gauged by the fact that John Adams objected even to the Senate's limited confirmation role, contending that it "lessens the responsibility of the president." To Adams, the President should be solely responsible for his choices, and should alone pay the price for choosing unfit nominees. Under the current system, Adams complained, "Who can censure [the President] without censuring the senate. . .?"
The appointment power is, Adams wrote, an "executive matter[,]" which should be left entirely to "the management of the executive." James Wilson echoed this view: "The person who nominates or makes appointments to offices, should be known. His own office, his own character, his own fortune should be responsible. He should be alike unfettered and unsheltered by counselors."

The Senate's confirmation power therefore acts as a relatively minor check on the President's authority. It exists only to prevent the President from selecting a nominee who "does not possess due qualifications for office." Essentially, the Senate's confirmation power exists to prevent the President from being swayed by nepotism or mere political opportunism. Assessing a candidate's "qualifications for office" did not give the Senate grounds for imposing an ideological litmus on the President's nominees, at least where the questioned ideology did not prevent a judge from fulfilling his oath of office.

C. Ideology Was Not Considered a Proper Reason for Refusing Confirmation, as Long
as It Did Not Prevent the Nominee From Fulfilling the Judicial Oath

In the founders' view, then, the Senate's power in the confirmation of judicial appointees was extremely limited. It existed primarily, if not solely, to prevent the President from exercising his power in an improper manner. Ideology—at least ideology of the kind that is unrelated to a candidate's ability to fulfill his oath of office—simply had no place in the Senate's decision.

II. The Current State of the Confirmation Power

A. Why Ideology Matters to the Left

Despite the original understanding of the Senate's limited role in the confirmation process, and despite the lessons learned from these early historical flirtations with the use of political ideology as a criteria for judicial confirmation, the Senate today appears bent on using its limited confirmation power to impose ideological litmus tests on presidential nominees. In this way, the Senate seems to be arrogating to itself the nomination as well as the confirmation power.

The Senate's expanded use of its confirmation power should perhaps come as no surprise. As a result of the growing role of the judiciary, the Senate's part in the nomination process has become a powerful political tool. And, like any powerful political tool, it is the subject of a strenuous competition among interest groups every time the President seeks to fill a judicial vacancy. Nevertheless, it is a tool that poses grave dangers to our constitutional system of government. In its current manifestation, the Senate's ideological use of the confirmation power threatens the separation of powers in three ways. First, it undermines the responsibility for appointments given to the President. Second, it demands of judicial nominees a commitment to a role not appropriate to the courts. Third, and, perhaps most importantly, the Senate's ideological use of the confirmation power threatens the separation of powers by threatening the independence of the judiciary itself.

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B. The Dangerous Tactics of Today's Judicial Confirmation Process

One of the most disturbing manifestations of the new process is the growing tendency of the Senate to refuse even to hold hearings for nominees. This practice suggests not that the nominees are too far outside the ideological mainstream to be confirmed, but rather that the Senators fear to vote down the nominees on ideological grounds, precisely because they are not outside the ideological mainstream.

Even those who argue that the Senate should take a large role in molding the judiciary must acknowledge that blocking nominations by refusing to hold hearings is an inappropriate tactic. The Senate has the power to advise and consent to a President's nominees. The refusal to hold hearings at all is not advice or consent; it is political blackmail which perpetuates the critical number of vacancies on the federal bench. In fact, as one author has noted, senatorial inaction is contrary to a resolution passed by the very first Senate in 1789. "When nominations shall be made in writing by the President of the United States to the Senate, a future day shall be assigned, unless the Senate unanimously direct otherwise, for taking them into consideration . . . and the
Senators shall signify their assent or dissent by answering, viva voce, ay or no."

Moreover, the current strategy of delay that appears to be the mainstay of the present Senate Judiciary Committee threatens to intrude upon the Executive's powers, in violation of core separation of powers principles. Improper attempts to impose ideological litmus tests by voting down the President's nominees could be countered by re-nomination of like-minded individuals, but the outright refusal to hold hearings, or to refer nominees to the floor of the Senate for a vote, deprives the President of even this remedial power. Such a tactic eventually forces the President to accede to demands to nominate individuals more to the liking of individual Senators. The delay tactics appear designed, then, to transfer the nomination power from the President to the Senate, a result that the founders greatly feared.

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