APPELLATE JUDICIAL SELECTION DURING THE BUSH ADMINISTRATION: BUSINESS AS USUAL OR A NUCLEAR WINTER?

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INTRODUCTION

With the nomination of John G. Roberts, Jr. to the U.S. Supreme Court, an uneasy equilibrium established by an unprecedented bipartisan agreement among fourteen rank and file senators was maintained in federal judicial selection processes. Prior to the Spring 2005 accord, advice and consent processes had become more acrimonious and divisive than ever before. The divisiveness was most evident when a united Democratic minority used cloture-proof filibusters to block confirmation votes on a targeted group of Bush appeals court nominees. The leadership of the slim Republican Senate majority threatened to invoke the "nuclear option," so named because of the fallout its utilization was likely to provoke, also known as the "constitutional option," the name its supporters preferred. This option would alter Senate procedures to overcome future filibusters and seat judges with the simple majority votes that the Republicans could readily muster.

The agreement was significant for a number of reasons. It was accomplished without the Senate's partisan leadership brokering or even sanctioning the compromise. Just as important, however, was the open-ended nature of the actual agreement reached. The Democratic signatories would abandon the filibustering of selected Bush appellate nominees, specifically Priscilla Owen, Janice Rogers Brown, and William Pryor, while filibustering per se was not eliminated as an option in advice and consent processes. The instances in which filibustering might be considered legitimate were identified as "extraordinary circumstances" where "each signatory must use his or her own

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discretion and judgment in determining whether such circumstances exist."[1] Moreover, the deal was temporary, as it was to extend only through 2006.

The tenuousness of such a deal is manifest. For one, what did it portend for those appellate nominees for whom votes had not explicitly been promised? From the Democratic perspective, it might be difficult to argue that *any* pending or potential nominees activated the "extraordinary circumstances," since they had relinquished the right to filibuster the votes that were pending on Owen, Rogers Brown, and Pryor, previously the poster candidates for opposition. Still, however, lurking in the wings were pending nominees such as D.C. Circuit designate Brett Kavanaugh, a White House staff secretary and former Associate White House Counsel who was well known for his coauthoring of the Starr report and for his investigations into the death of Vince Foster, the Monica Lewinsky affair, Whitewater, and the potential bases for impeaching President Clinton. Kavanaugh was perhaps even more objectionable to the Democrats than those nominees for whom the deal had been brokered.

If Kavanaugh and others, such as Ninth Circuit nominee William Myers, would test the resolve of the bipartisan agreement, then it might also be argued that *any* Supreme Court nominee could, by definition, present an "extraordinary circumstance" resurrecting the Democratic right to filibuster. That test of the agreement was averted by the confirmation of John Roberts, who was not filibustered by the Democrats. Thus, the agreement allowing advice and consent processes to proceed remained uneasily in place. The underlying question remained: How did federal judicial selection processes arrive at this state of affairs, and what does this portend for the future? Examining that question, with a particular focus on the operation of advice and consent processes on Ninth Circuit vacancies, is the focus of the remainder of this Article.

I. ADVICE AND CONSENT: THE HISTORICAL CONTEXT[2]

Federal judicial selection processes for the lower courts have not been focal points for public interest, at least until the recent past. However, the contemporary tensions between the Administration of George W. Bush ("Bush II") and a cohesive and strong Democratic Senate minority and between the Clinton Administration and the Republican-controlled Senate are not completely new phenomena. Significant debate existed at the time of the Constitution's drafting over the balance of power in the roles of the executive and legislative branches in choosing judges. The Virginia Plan lodged selection authority in Congress, while the New Jersey Plan placed the power in the executive.[3]

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1. Charles Babington & Shailagh Murray, *A Last-Minute Deal on Judicial Nominees*, WASH. POST, May 24, 2005, at A1.

2. The discussion that follows relies heavily on Elliot E. Slotnick, *A Historical Perspective on Federal Judicial Selection*, 86 JUDICATURE 13 (2002) [hereinafter Slotnick, *A Historical Perspective*], and Elliot E. Slotnick, *Prologue: Federal Judicial Selection in the New Millennium*, 36 U.C. DAVIS L. REV. 587 (2003) [hereinafter Slotnick, *Prologue*].

3. The Virginia Plan, associated with James Madison and the most populous states, and the New Jersey Plan, associated with the smaller states, were alternative responses to the failures of weak decentralized governance under the Articles of

Presidents have historically accentuated patronage, but not necessarily "policy," in their nominations. This has especially been the case when nominees were initially suggested by or, at minimum, received clearance from senators, particularly those senators from the President's party from the state in which the vacancy existed. The President obtained this clearance in two ways. The first way was through the "senatorial courtesy" exercised by the White House in conferring with the home state senators of the President's political party. This operated to protect interinstitutional prerogatives and the relationship between Presidents and their senatorial partisans. The second method operates purely within the Senate itself through the Judiciary Committee's blue slip system, a committee norm that has worked to ensure that home state senators of *both* parties have input when federal judges who will be seated in their home state are being nominated.[4] Consequently, choosing lower federal court judges, rather than Supreme Court Justices, has been a relatively noncontroversial activity of American Presidents.

Norms, such as senatorial courtesy and the blue slip system, make a good deal of sense from an institutional senatorial perspective. As noted in a classic study of judicial selection processes during the Kennedy Administration:

> [I]t is enormously damaging to a senator's prestige if a president . . . ignores him [or] appoints to a high federal office someone who is known back home as a political opponent . . . . It was easy for the senators to see that if they joined together against the president to protect their individual interests in appointments, they could to a large degree assure that the president could only make such appointments as would be palatable to them as individuals.[5]

Historically, the blue slip system enforced a senatorial courtesy of sorts between the President and minority party home state senators.[6]

Confederation. These plans were the focus of discussion and debate at the Constitutional Convention, with the Virginia Plan championing a strong central government and proportional legislative representation. The New Jersey Plan called for equal legislative representation for the states and a system of governance more in tune with the status quo. For a discussion of the interplay between these two plans and the emergence of the eventual language of the Constitution's Advice and Consent provisions, see SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 5–6 (1997).

4. The blue slip system operates such that each home state senator, regardless of party, is sent a blue slip soliciting their comments on a nominee to be seated in their state. The senator can return the slip, generally voicing their approval of the nominee but, in limited instances, raising concerns. Alternatively, the senator can retain the blue slip, a sign of disapproval that, historically, has worked as a silent veto in the sense that the nomination hearings would not be scheduled absent the returned blue slip. The blue slip system has insured that the views of home state senators of both parties are taken into account in a meaningful way during the nomination process. *See* Sheldon Goldman, Elliot Slotnick, Gerard Gryski & Gary Zuk, *Clinton's Judges: Summing up the Legacy*, 84 JUDICATURE 228 (2001) [hereinafter Goldman et al., *Clinton's Judges*].

5. HAROLD W. CHASE, FEDERAL JUDGES: THE APPOINTING PROCESS 7 (1972).

6. As noted in a Judiciary Committee staff memorandum written in 1979, "In fact, no hearing has been scheduled on a nominee in the absence of a returned blue slip, thus institutionalizing senatorial courtesy within the committee as an automatic and mechanical

At times, even in the patronage-dominated selection system, clear policy considerations could come into play, though they simply were not the norm. For example, in 1936, Ninth Circuit Roosevelt appointee William Denman wrote bluntly to the President, "The New Deal needs more federal judges."[7] However, prior to the Nixon Administration, policy and/or ideological considerations did not generally hold first place in lower court selection processes in either the President's nominations or the Senate's exercise of advice and consent. Timely confirmation of virtually all presidential nominees was generally a routine and, at times, a pro forma matter. Clearly this orientation based on patronage alone has changed.[8]

The Nixon Administration was the first to place a systematic emphasis on policy considerations in lower court judicial appointments. Its domestic policy agenda stressed law and order and strict construction of the Constitution. This agenda bred concern about judicial staffing as a means for attaining policy goals. The "smoking gun" of the policy implications of judicial selection and their recognition by the President was Nixon's endorsement of a seven-page memorandum written by Thomas Charles Huston, a young White House aide. Huston opined that:

> Perhaps the least considered aspect of Presidential power is the authority to make appointments to the federal bench—not merely to the Supreme Court, but to the Circuit and District benches as well. Through his judicial appointments, a President has the opportunity to influence the course of national affairs for a quarter of a century after he leaves office.[9]

Huston concluded that if the President "establishes *his* criteria and establishes *his* machinery for ensuring that the criteria are met, the appointments that he makes will be *his*, in fact, as in theory."[10] On another memo was a handwritten notation from the President, "RN *agrees*—Have this analysis in mind in making judicial nominations."[11]

II. JUDICIAL SELECTION AND THE CARTER ADMINISTRATION

The existence of the Huston memo would make it easy to point to the Nixon Administration as the beginning of significant movement toward a policy orientation in judicial selection. However, the centralization in judicial selection

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one-member veto over nominees." Memorandum on Senatorial Courtesy from Judiciary Comm. Staff to Chairman Edward M. Kennedy 2 (Jan. 22, 1979), *in Hearing on the Selection and Confirmation of Federal Judges Before the Sen. Comm. on the Judiciary*, 96th Cong. 118–21 (1979).

7. CHASE, *supra* note 5, at 32.

8. GOLDMAN, *supra* note 3, at 14.

9. *Id.* at 205–06 (internal quotation marks omitted) (quoting Memorandum from Thomas Charles Huston to the President 1 (Mar. 25, 1969) (on file with the Nixon Presidential Materials Project)).

10. *Id.* at 206 (quoting Memorandum from Thomas Charles Huston to the President 7 (Mar. 25, 1969) (on file with the Nixon Presidential Materials Project)).

11. *Id.* (quoting Memorandum from John Ehrlichman to the Staff Secretary (Mar. 27, 1969) (on file with the Nixon Presidential Materials Project)).

processes alluded to in the Huston memo was not put into place until the Reagan years. Instead, "the modern era of contentious, politicized[, policy-oriented,] judicial selection politics can best be traced to the Carter administration."[12] During the Carter years, systematic reforms altered both the nature of the questions to which Presidents sought answers from their nominees and the historical norms that governed advice and consent relationships between the executive and the legislature. It is the fallout from such changes that, in 2005, reached potentially "nuclear" dimensions.

The Omnibus Judgeship Act of 1978, in an unprecedented boon to the presidency, created 152 new federal judgeships, 35 of which were at the circuit court level.[13] This Act framed judicial selection during the Carter years. The importance of these new judgeships in the growth of the Ninth Circuit is evident in that fifteen of the new district court seats (12.8%) and ten of the new appellate seats (28.6%) were earmarked for states within that circuit.

Carter took actions that struck at the heart of the status quo in judicial selection politics and processes. At the all-important appellate level, he created the United States Circuit Judge Nominating Commission, composed of thirteen distinct panels corresponding to each of the appellate circuits, with two each for the (old) Fifth Circuit and the Ninth Circuit.[14] The panels, appointed by the President, recommended the five persons best qualified to fill each vacant judgeship. Appellate vacancies, more than those in the district courts, had always been tied more closely to the President than to specific senators because judicial circuits cross multiple state boundaries. Nevertheless, strong traditions of state seats (and state replacement of vacancies) clearly existed for the courts of appeals. Indeed, historically, the overwhelming majority of replacement appointments for appeals court vacancies have gone to the state in which the judge being replaced resided. Thus, senators often had a personal stake in court of appeals appointments, and many viewed Carter's action as an unwarranted inroad on senatorial prerogatives of fairly long standing.

Carter also attempted to intervene in the district court appointment processes. This made matters considerably more controversial, from a senatorial perspective, because these judgeships were even more closely tied to the candidate choices of home state senators of the President's party. Carter sent "a personal longhand letter to every Democratic senator urging them" to follow his appellate court model and to establish state nominating commissions for the designation of potential district court nominees.[15] It is in response to this affront that Senator Lloyd Bentsen was reported to have declared, "I am the merit commission for the State of Texas."[16] Clearly, Carter had "'stirr[ed] the pot' of judicial selection

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12. Slotnick, *Prologue*, *supra* note 2, at 590; *see also* Slotnick, *A Historical Perspective*, *supra* note 2, at 14. For a more detailed and developed accounting of the argument that follows, see generally *id.*; Slotnick, *Prologue*, *supra* note 2.

13. Pub. L. No. 95-486, 92 Stat. 1629.

14. *See* Exec. Order No. 12,059, 43 Fed. Reg. 20,949 (May 11, 1978); Exec. Order No. 11,972, 42 Fed. Reg. 9659 (Feb. 17, 1977).

15. Slotnick, *A Historical Perspective*, *supra* note 2, at 15.

16. *Id.*

processes that raised critical tensions in the balance between executive and legislative [power] that continue . . . today."[17]

In order to understand today's judicial selection environment, it is important to recognize President Carter's policy-oriented motivations for choosing who would sit on the federal bench. Specifically, Carter had a commitment to diversifying the bench along racial and gender lines, a hitherto unheard of motivation in presidential nomination behavior. He also focused on his potential nominees' substantive views—or at least a crucial subset of them.[18]

Carter articulated his concerns about representation in two ways, each of which would prove to be controversial. First, in an Executive Order addressed to the Nominating Commission, the President made a strong and unprecedented push for meaningful affirmative action in judicial selection by stating, "Each panel is encouraged to make special efforts to seek out and identify well qualified women and members of minority groups as potential nominees."[19] He also wrote to each Democratic senator urging that they recruit women and minorities for the new judgeships and other judicial vacancies.[20] In a second Executive Order, the President ordered nominating commissions to ensure that a candidate "possesses and has demonstrated commitment to equal justice under the law."[21] This phrase was not met with great favor in the Senate at the time, particularly by conservative Republicans, who were likely to see it as a euphemism for a mandate to seek out liberal activists for the bench.

III. THE REAGAN AND BUSH I JUDICIAL SELECTION APPROACHES

Once the genie of openly avowed policy considerations in judicial selection had been let out of the bottle and the White House's political role in judicial selection increased, it would be difficult to return to the older traditions. Indeed, several additional manifestations of the movement toward centralized White House political control of judicial selection followed during subsequent presidencies. This movement further altered interinstitutional advice and consent roles.[22]

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17. *Id.*

18. *See generally* Elliot E. Slotnick, *Reforms in Judicial Selection: Will They Affect the Senate's Role?* (pts. 1 & 2), 64 JUDICATURE 60, 114 (1980) [hereinafter Slotnick, *Senate's Role*] (elaborating further Jimmy Carter's affirmative action commitment to representation and its impact on judicial selection outcomes).

19. Exec. Order No. 12,059, 43 Fed. Reg. 20,949 (May 11, 1978).

20. GOLDMAN, *supra* note 3, at 244.

21. Exec. Order No. 12,097, 43 Fed. Reg. 52,455 (Nov. 8, 1978).

22. What follows is a brief synopsis of this development. For further elaboration see generally GOLDMAN, *supra* note 3; Sheldon Goldman, *The Bush Imprint on the Judiciary; Carrying on a Tradition*, 74 JUDICATURE 294 (1991) [hereinafter Goldman, *Bush Imprint*]; Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 JUDICATURE 282 (1993); Sheldon Goldman & Elliot Slotnick, *Clinton's First Term Judiciary: Many Bridges to Cross*, 80 JUDICATURE 254 (1997) [hereinafter Goldman & Slotnick, *Clinton's First Term*]; Sheldon Goldman & Elliot Slotnick, *Clinton's Second Term Judiciary: Picking Judges Under Fire*, 82 JUDICATURE 264 (1999) [hereinafter Goldman & Slotnick, *Clinton's Second Term*]; Goldman et al., *Clinton's Judges*, *supra* note 4; Sheldon Goldman, Elliot

For the Reagan Administration, with its clear and strongly defined political ideology, judicial selection emerged as a natural domain in which to further pursue its conservative policy agenda. That point was made in the 1980 Republican party platform, in which, with great specificity, there were pledges to appoint to judgeships those who held "the belief in the decentralization of the federal government and efforts to return decision making power to state and local elected officials" and who would "respect traditional family values and the sanctity of innocent human life."[23] By 1984, the Republicans boasted of the President's success and promised to "continue to appoint . . . federal judges who share our commitment to judicial restraint."[24] In dealing with senatorial relationships, the Administration negotiated with the Republican Senate leadership a process that was designed "to give the administration more discretion," and thus followed in the footsteps of the Carter inroads on senatorial prerogatives.[25]

The Reagan Administration disbanded the U.S. Circuit Judge Nominating Commission.[26] The Administration preferred tight and direct administrative control of nominations under the direction of an Assistant Attorney General in the newly created Office of Legal Policy ("OLP").[27] Simultaneously, a working group chaired by the White House Counsel known as the Federal Judicial Selection Committee was created to receive OLP's nomination recommendations.[28] This formalized the White House's direct role in judicial selection to a heretofore unknown degree.[29]

The implications of this development for judicial selection processes were both clear and substantial. It meant that:

> The highest levels of the White House staff thus played an ongoing, active role in the selection of judges. Legislative, patronage, political, and policy considerations were systematically scrutinized for each judicial nomination to an extent never before seen. This assured policy coordination . . . as well as White House staff supervision of judicial appointments."[30]

The working group "symbolized White House primacy in the selection process and the importance the Reagan administration placed on judicial selection and its central role in furthering the president's agenda."[31] The impact of this process was felt substantively as well as symbolically. "There was a genuine commitment to

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Slotnick, Gerard Gryski, Gary Zuk & Sara Schiavoni, *W. Bush Remaking the Judiciary: Like Father Like Son?*, 86 JUDICATURE 282 (2003) [hereinafter Goldman et al., *W. Bush Remaking*]; Sheldon Goldman, Elliot Slotnick, Gerard Gryski & Sara Schiavoni, *W. Bush's Judiciary: The First Term Record*, 88 JUDICATURE 244 (2005) [hereinafter Goldman et al., *W. Bush's Judiciary*].

23. GOLDMAN, *supra* note 3, at 286, 297.
24. *Id.* at 300 (quoting 42 CONG. Q. WKLY. REP. 2110 (Aug. 25, 1984)).
25. *Id.* at 288–89.
26. *Id.* at 290.
27. *Id.* at 291.
28. *Id.* at 292.
29. *Id.*
30. *Id.*
31. *Id.* at 293.

reverse the course of judicial policymaking through the appointment of those sharing the president's judicial philosophy. That philosophy was consistent with the conservative policy positions of the social agenda; thus, in effect, philosophical screening was ideological screening."[32]

The approach taken by George H.W. Bush's ("Bush I") Administration was primarily to carry on the Reagan tradition. Bush I adopted a somewhat "softer" tone by disbanding the Office of Legal Policy. Despite this structural change, however, Bush I continued to use Reagan's systematic screening processes, with extensive interviewing of candidates to assess their judicial philosophy. Bush I also continued to utilize the President's Committee on Federal Judicial Selection, through which centralized control of selection processes could be assured. Goldman suggests that Bush's use of this Committee accomplished "an even more subtle shift to the White House in terms of the process of determining who is to be nominated."[33]

IV. OBSTRUCTION AND DELAY: JUDICIAL SELECTION UNDER CLINTON AND BUSH II

Judicial selection during the Clinton Administration can best be characterized as a joint endeavor by the Office of Policy Development in the Justice Department and the White House Counsel's office. The Justice Department emphasized the vetting of legal credentials and the White House ran the political facets of the process. The Judicial Selection Group, chaired by the White House Counsel, coordinated judicial selection activity in the Administration, with broad representation going beyond the two primary offices responsible for the selection process.[34]

With a Democratic majority in the Senate during Clinton's first two years in office, more than ninety percent of his nominees were confirmed.[35] The situation changed dramatically through his final six years, which were characterized by divided government and unprecedented obstruction and delay of his nominees. When the Republicans took control of the Senate in the 104th Congress, rougher going for the President could have been predicted for a number of reasons. First, "payback time" was anticipated for the attacks Democrats had mounted on the nominations of both Robert Bork and Clarence Thomas to the Supreme Court. In addition, Robert Dole, Clinton's likely opponent in the 1996 presidential election, was perfectly placed as Senate Majority Leader to make life difficult for the President. Somewhat ironically, the Clinton Administration was an odd adversary, as Clinton emphasized diversity over ideology, with moderation

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32. *Id.* at 307.

33. Goldman, *Bush Imprint*, *supra* note 22, at 297.

34. Beyond the representatives for the White House and Justice Department, judicial-selection teams included, for example, Presidential Assistant Bruce Lindsey, Chief of Staff John Podesta, a representative from the Vice-President's Office, and a representative from the First Lady's Office. *See* Goldman & Slotnick, *Clinton's Second Term*, *supra* note 22, at 266.

35. *Id.* at 267.

and widespread consultation the watchwords for his appointment behavior. As Goldman and Slotnick concluded:

> The normal functioning of senate processes . . . may have been trumped in 1996 by presidential politics. . . . 1996 revealed an institution that, initially, was rendered immobile by the politically driven choice of the majority leader/presidential candidate to make judgeships a prime campaign issue while holding the president's nominees (even those endorsed by the Republican-led Judiciary Committee) hostage on the Senate floor.[36]

In the immediate aftermath of his reelection, Clinton did somewhat better on the judgeship front than he had at the end of his first term. Greater resources were expended on moving his nominations, while Chief Justice Rehnquist called attention to the appointments gridlock in his State of the Judiciary Address in 1997.[37] In addition, perhaps there was some backlash against the Republicans for overreaching in obstructing and delaying confirmation of noncontroversial nominees at the end of the President's first term.

Yet any improvement in the President's ability to appoint judges after his reelection was quite short-lived. Obstruction and delay of circuit court nominees in Clinton's second term ranged between seventy-three and eighty-four percent.[38] At various times during the second term, secret "holds" on nominations sought by anonymous Republican senators were honored by Majority Leader Trent Lott to

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36. Goldman & Slotnick, *Clinton's First Term*, *supra* note 22, at 257.

37. As noted by the Chief Justice in a rare reference to appointment politics:

> Judicial vacancies can contribute to a backlog of cases, undue delays in civil cases, and stopgap measures to shift judicial personnel where they are most needed. Vacancies cannot remain at such high levels indefinitely without eroding the quality of justice that traditionally has been associated with the federal Judiciary. . . .
>
> The institutions that have the constitutionally assigned powers of nominating and confirming judicial nominees bear some of the responsibility for the current situation . . . .
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> Whatever the size of the federal Judiciary, the President should nominate candidates with reasonable promptness, and the Senate should act within a reasonable time to confirm or reject them. Some current nominees have been waiting a considerable time for a Senate Judiciary Committee vote or a final floor vote. The Senate confirmed only 17 judges in 1996 and 36 in 1997, well under the 101 judges it confirmed during 1994.
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> The Senate is, of course, very much part of the appointment process for any Article III judge. One nominated by the President is not "appointed" until confirmed by the Senate. The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or vote him down. In the latter case, the President can then send up another nominee.

William H. Rehnquist, *The 1997 Year-End Report of the Federal Judiciary*, THIRD BRANCH, Jan. 1998, Special Issue, at 2–3, *available at* http://www.uscourts.gov/ttb/jan98ttb/January.htm.

38. *See infra* tbl.1.

prevent floor action on nominees who had cleared the Judiciary Committee.[39] Furthermore, hearings were not held on nominees because Chairman Hatch was insistent on Ted Stewart being appointed to a district court vacancy in Utah before he would move any other nominees forward.[40] At times, a circuit-wide approach to blue slip vetoes was implemented for instances in which the home state senators were satisfied with nominees for vacancies in their state. As one Administration official asserted, "[I]t got to the point where as long as there was a Republican senator who wanted to veto [a nomination], [scheduling a hearing or voting on the nominee by the Committee] just wasn't happening."[41]

As Clinton's second term wore on, the White House role loomed even larger relative to the Justice Department in the selection process because "[c]onfirmation, per se, was not going to occur 'automatically' but, rather, required extensive consultation and negotiation, 'political' activities that were more suited to people working out of the White House than the Justice Department."[42] We will examine these processes below, specifically with regard to efforts to fill vacancies on the Ninth Circuit Court of Appeals.

The return of the presidency to the Republicans following the 2000 election also marked a return of judicial selection politics to the forefront of an administration's policy agenda, in sharp contrast to President Clinton's emphasis on accommodation, compromise, and the avoidance of confrontations over judgeships. Nan Aron of the Alliance for Justice stated that for Bush, "'[j]udgeships were both symbolically and actually symbols of presidential power.'"[43]

Structurally, judicial selection processes under Bush II continued to include the Department of Justice and the White House Counsel's Office. The process was run by a joint group, the Judicial Selection Committee, that included the White House Counsel, representatives of the Justice Department's Office of Legal Policy (an office symbolically returning to its identity from the Reagan years), and others.[44] Importantly, throughout the President's first term, the Committee was chaired by the White House Counsel, Alberto Gonzalez.[45] The centrality of the White House in the Bush operation was evident in its approach to consultation with senators. As noted by Assistant Attorney General Viet Dinh, "The outreach to senators . . . [is] done by the White House Counsel's office. . . . The White House Counsel's office handles the contact and consultation to all home state senators, even on circuit courts, and even if the person is from the opposite party."[46] From the Democrats' perspective, meaningful consultation was absent, leading them to oppose several appellate court nominees.

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39. *See* Goldman et al., *Clinton's Judges*, *supra* note 4, at 235.
40. *Id.* at 238–40.
41. *Id.* at 239.
42. *Id.* at 231.
43. Goldman et al., *W. Bush Remaking*, *supra* note 22, at 284.
44. *Id.* at 284–85.
45. *Id.* at 284.
46. *Id.* at 286.

The contentious environment facing George W. Bush in the first year of his presidency flowed from many factors, including his disputed electoral victory and the animus generated by the treatment afforded Clinton's nominees. In addition, the tragic events of 9/11[47] and the Democrats returning to Senate majority status during Bush's first year in office further hindered the Administration's ability to seat federal judges efficiently and without controversy. Obstruction and delay on the circuit courts reached new heights during Bush II's first two years in office. Most notably, even when the Republicans regained the Senate majority following midterm elections, obstruction and delay remained at an unprecedented high level for unified government.

It was in this context that the Republican Senate majority in the 108th Congress altered several rules and norms of Senate procedure such that the only mechanism through which the minority Democrats could affect advice and consent processes was through filibusters. Undaunted, the Democrats did successfully filibuster ten of Bush II's circuit court nominees. These filibusters, in turn, fueled proposals by the Republican leadership to pursue the so-called nuclear option to break them, an eventuality averted, at least for the moment, by the May 18, 2005 bipartisan agreement.

The specific norms and rules alleged to have been violated by the Republicans in the 108th Congress start with alterations in the implementation of the blue slip system. When the Republicans returned to power in 2002, Chairman Hatch first required two nonreturned blue slips, one from each home state senator, rather than only one, to block a nomination hearing.[48] Eventually, distinctions were drawn between the clear applicability of the blue slip system to the district courts and its lessened applicability on the circuit courts, where it would not be dispositive.[49] To the Democrats, this appeared to reinvent history; as one Senate aide opined:

> [The blue slip] certainly applied when Clinton was in the White House to the circuit courts. It has, in my experience, always applied to both district and circuit court nominees. Were blue slips sent out for circuit court nominees? Yes. Well, why would you send them out if they weren't required, they weren't followed?[50]

The Republicans were also alleged to have violated Rule IV of the Judiciary Committee, which allowed for unlimited debate at the Committee level until ten senators, including at least one minority senator, had exhausted their desire to speak.[51] Other rules allegedly violated by the Republicans were the Thurmond Rule, which traditionally brought the curtain down on processing

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47. After 9/11, the Judiciary Committee was preoccupied with legislative matters touching on Homeland Security issues instead of judgeships. In addition, the Senate office building where the Committee meets and hearings are held was, for a time, shut down by a terrorist threat. All of this had an impact on the Committee's focus and efficiency.

48. Goldman et al., *W. Bush's Judiciary*, *supra* note 22, at 262.

49. *Id.*

50. *Id.* (quotation marks omitted).

51. *Id.*; *see also* U.S. SEN. COMM. ON THE JUDICIARY R.P. IV, *available at* http://judiciary.senate.gov/committee_rules.cfm.

judicial nominations when the end of a presidential term approached, and finally, the Committee norm against scheduling multiple controversial appellate nominee hearings at the same session.[52] In sum, "[v]iewed collectively . . . alterations in these rules, norms, and traditions all work to lessen the ability of the minority party in the Senate to exercise an effective check on appointment of judges by the President and their confirmation by a friendly Senate majority."[53] Under such circumstances, the Democrats resorted to the filibuster.

Table 1 – Index of Obstruction and Delay

Congress	All Appeals Courts	Appeals Courts Ninth Circuit Removed	Ninth Circuit Index
95th (1977–78) Carter/Dem	0.0000 (0/12)	0.0000 (0/10)	0.0000 (0/2)
96th (1979–80) Carter/Dem	0.0682 (3/44)	0.0645 (2/31)	0.0796 (1/13)
97th (1981–82) Reagan/Rep	0.0000 (0/19)	0.0000 (0/19)	0.0000 (0/0)
98th (1983–84) Reagan/Rep	0.1429 (1/7)	0.1667 (1/6)	0.0000 (0/1)
99th (1985–86) Reagan/Rep	0.0690 (2/29)	0.0800 (2/25)	0.0000 (0/4)
*100th (1987–88) Reagan/Dem	0.4762 (10/21)	0.4118 (7/17)	0.7500 (3/4)
*101st (1989–90) H.W. Bush/Dem	0.0625 (1/16)	0.0769 (1/13)	0.0000 (0/3)
*102nd (1991–92) H.W. Bush/Dem	0.5000 (14/28)	0.5185 (14/27)	0.0000 (0/1)
103rd (1993–94) Clinton/Dem	0.0625 (1/16)	0.0667 (1/15)	0.0000 (0/1)
*104th (1995–96) Clinton/Rep	0.5263 (10/19)	0.4286 (6/14)	0.8000 (4/5)
*105th (1997–98) Clinton/Rep	0.7308 (19/26)	0.6471 (11/17)	0.8889 (8/9)
*106th (1999–2000) Clinton/Rep	0.7931 (23/29)	0.7619 (16/21)	0.8750 (7/8)
*107th (2001–02) W. Bush/Dem	0.8387 (26/31)	0.8214 (23/28)	1.0000 (3/3)
*108th (2003–04) W. Bush/Rep	0.6176 (21/34)	0.6333 (19/30)	0.5000 (2/4)

* Divided Government

52. Goldman et al., *W. Bush's Judiciary*, *supra* note 22, at 263.
53. *Id.* at 262.

This history can be documented through a simple metric, the Index of Obstruction and Delay, which Sheldon Goldman has calculated for congressional sessions dating back to the Carter Administration. "The Index is determined by the number of nominees who remained unconfirmed at the end of the Congress, added to the number for whom the confirmation process took more than 180 days, which is then divided by the total number of nominees for that Congress."[54] Goldman's index for the circuit courts for the Carter Administration and the first three congressional sessions of Reagan's two terms in office, ranging from 0.00 to 0.14, shows negligible obstruction and delay. Dramatic levels of obstruction and delay, however, are revealed at the circuit level in the 100th Congress (0.48), Reagan's last and his first with a Democratic Senate majority, and the 102nd Congress (0.50), Bush I's last congressional session, which also harbored a Democratic Senate majority.[55]

When Bill Clinton was elected President, with a Democratic Senate, the index fell to 0.06 for the appellate courts, but it then mushroomed to successive unprecedented heights (0.53, 0.69, and 0.79) in the three remaining Republican-controlled congressional sessions of his presidency. With Bush II returning the presidency to the Republicans and the Democrats taking control of the Senate five months into the 107th Congress, the index reached its highest calculated point for the circuit courts (0.84) and, further underscoring the ascendancy of divisive appellate court advice and processes, fell to a still robust and record level for unified government (0.65) in the 108th Congress when the Republicans again enjoyed a Senate majority. As Goldman concluded, "It appears that obstruction and delay are becoming more common . . . and what once was a relatively civilized and functional process has increasingly become an unpleasant, prolonged, and perhaps dysfunctional process."[56]

V. JUDICIAL SELECTION AND THE NINTH CIRCUIT

Systematic changes in federal judicial selection processes resulted in greater centralization of authority in the presidency, particularly in the White House Counsel's Office. This centralization was largely at the expense of home state senators and the Justice Department in the generation and vetting of judgeship candidates. Parallel changes have occurred in the increasing role of ideology and a policy orientation in judicial selection at the expense of the dominance of patronage. Institutional dynamics in executive–legislative relationships have shifted perceptively. At one time, presidential nominating authority was tempered by the wishes of home state senators of both parties through the operation of senatorial courtesy and the blue slip system, and senators cherished an institutional prerogative in judicial selection that spanned across both sides of the aisle vis-à-vis the presidency. We now witness a presidentially

54. Sheldon Goldman, *Judicial Confirmation Wars: Ideology and The Battle for the Federal Courts*, 39 U. RICH. L. REV. 871, 896 (2005) [hereinafter Goldman, *Confirmation Wars*].

55. See Table One for a presentation of the index of Obstruction and Delay on the courts of appeals generally and, specifically, for the Ninth Circuit since 1977 and the Carter presidency.

56. Goldman, *Confirmation Wars*, *supra* note 54, at 898.

centered system with highly partisan and divisive senatorial coalitions aligned with or in opposition to the President's judicial selection pursuits. At its worst, as evidenced through much of the Clinton years and Bush II's first term, the consequences are divisive, contrarian selection processes with unprecedented confirmation obstruction and delay.

For many reasons, the Ninth Circuit can serve as perhaps the most graphic example of such dysfunctional judicial selection processes. Considerable focus has been placed on the circuit because it has been rife with appointment opportunities. A strikingly disproportionate ten of the thirty-five appeals court vacancies created in the Omnibus Judgeship Act of 1978,[57] 28.6%, were awarded to the Ninth Circuit. Carter's appointment opportunities have continued to be enjoyed by subsequent presidencies. From the beginning of the Carter Administration in 1977 through the end of George W. Bush's first term in office, there have been 364 presidential nominations submitted for the U.S. Courts of Appeals, and fully 64 of them, 17.6%, were Ninth Circuit nominations.[58]

Closely related to the numerous appointment opportunities is the large size of the circuit itself. The Ninth Circuit is the biggest in the nation, with 28 seats out of 179 authorized judgeships (15.6%) on the courts of appeals.[59] The next largest circuit, the Fifth, has 17 authorized judgeships, not even two-thirds the Ninth Circuit's size.[60] The circuit's physical size also feeds its prominence in judicial-selection politics. The Ninth "encompasses the largest geographic expanse, extending from the Arctic Circle to the border of Mexico and from Montana to Guam. The appeals court includes 15 federal districts . . . [and] addresses the most substantial and most complex docket . . . ."[61]

Political realities and political perceptions also coalesce to establish the Ninth Circuit as a hotly contested locale for appointing judges. In 1978, the thirteen judges on the court included five appointed by Democratic presidents and eight appointed by Republicans. The partisan balance on the court was altered in 1979 because of the Omnibus Judgeship Act. As a result of the Act, there were fifteen appointees of Democrats and the same eight Republican appointees. A semblance of partisan balance returned to the court during Reagan's second term and continued through the presidency of Bush I, with slight Republican appointee majorities also lasting through the first five years of the Clinton Administration. A slight Democratic-appointed majority (fourteen to twelve) took hold in Clinton's sixth year and, by the end of Clinton's second term, eighteen Democratic appointees were counterbalanced by only seven judges appointed by Republicans (one-quarter of the total). This imbalance continued through Bush II's first term,

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57. Pub. L. No. 95-486, 92 Stat. 1629.

58. Goldman, *Confirmation Wars*, *supra* note 54, at 905 tbl.2.

59. Judgeship Analysis Staff, Admin. Office of the U.S. Courts, Courts of Appeals, Additional Authorized Judgeships, http://www.uscourts.gov/history/authorized_appeals.pdf. The data used in this table was compiled from the field research of Professor Sheldon Goldman and graciously shared with the Author.

60. *Id.*

61. Carl Tobias, *Filling the Federal Appellate Openings on the 9th Circuit*, 19 REV. LITIG. 233, 233 (2000).

and, as of the summer of 2005, the circuit had three Carter and thirteen Clinton appointees of twenty-four judges (two-thirds). Only the Second Circuit could join the Ninth in having a majority of appointees named by Democrats.[62] This partisan imbalance has, without question, had an impact on the obstruction and delay of Ninth Circuit nominees. Democrats have tried to protect their partisan control while Republicans tried to, at worst, maintain the status quo during the Clinton years, while seeking to make partisan advances during the first term of Bush II.

Closely related to political realities are political perceptions. Here, the circuit's prominence becomes even more manifest. For many, the perception persists that the circuit is the incarnation of liberal judicial activism running amuck. "For many conservatives, the words '9th Circuit' mean more than just a federal appeals court in California. The words embody everything they think is wrong with liberal activism, West Coast politics and the judges who tried to take God out of the Pledge of Allegiance."[63] Senator Orrin Hatch has referred to the circuit as "the most notoriously liberal federal court in the United States," with "[r]esult-oriented and ideology-driven decisions [that] are perfect examples of why the Ninth Circuit desperately needs good, constitutionalist judges."[64] *L.A. Times* reporter Charlotte Allen has observed, "The 9th Circuit is famous for its loopy, ultra-liberal rulings that run against the grain of other federal courts and are often overturned by the Supreme Court."[65] And the late Chief Justice Rehnquist has characterized it as a court that "at times seems to be in combat with the Supreme Court."[66] Indeed, even in an article debunking "The Myth of the Liberal Ninth Circuit," Professor Erwin Chemerinsky was nevertheless quick to concede that "[t]he popular image of the Ninth Circuit, often expressed in the news media, is that it is a far left court that is reversed more often than any other circuit in the country."[67]

The result of these factors is a court that will inevitably be a prime focal point for divisive judicial selection politics. This is borne out by an analysis of obstruction and delay of Ninth Circuit nominees juxtaposed with the amount of obstruction and delay for the other courts of appeals. Table One reveals that during the lengthy period starting with the 95th Congress in 1977 and extending through the 108th Congress in 2004, the overall indexed measure of obstruction and delay across all appellate nominations outside the Ninth Circuit was 0.3773, with 103 out

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62. The Ninth Circuit's appointments history is documented by Susan Haire. *See* Susan B. Haire, *Judicial Selection and Decisionmaking in the Ninth Circuit*, 48 ARIZ. L. REV. 267 (2006); *see also* tbl.1.

63. Kelley Beaucar Vlahos, *Future of 9th Circuit Under Review*, FOXNEWS.COM, Nov. 24, 2004, http://www.foxnews.com/story/0,2933,139436,00.htm.

64. *Judicial Nominations: Hearing on the Nomination of William Myers for the United States Court of Appeals for the Ninth Circuit Before Sen. Comm. on the Judiciary*, 108th Cong. (2004) (statement of Sen. Orrin Hatch, Chairman, S. Comm. on the Judiciary).

65. *Pledge of Allegiance; "Under God": An "Injury" with Almost No Victims*, L.A. TIMES, Oct. 5, 2003, at M3.

66. Neil A. Lewis, *A Court Becomes a Model of Conservative Pursuits*, N.Y. TIMES, May 24, 1999, at A1.

67. Erwin Chemerinsky, *The Myth of the Liberal Ninth Circuit*, 37 LOY. L.A. L. REV. 1, 1 (2003).

of 273 nominations suffering from obstruction and delay. Viewing Ninth Circuit nominations alone creates a more robust index measure of 0.4828, with nearly half of all nominees (28 of 58) experiencing obstruction and delay over a prolonged period of nearly three decades. More to the point, breaking down this lengthy timeframe into three periods graphically demonstrates a dramatic overall increase in obstruction and delay and, in particular, the pivotal role of the Ninth Circuit in this regard during the most recent period of unprecedented obstruction and delay.

In the first period, corresponding to unified government during the Carter Administration and the first six years of the Reagan presidency, obstruction and delay was negligible, registering 0.0549 for all non-Ninth Circuit appellate nominations (5 of 91) and a virtually identical 0.0500 (1 of 20) for those to the Ninth Circuit. During the second period, corresponding to the last two years of the Reagan Administration and Bush I's term of office, all with divided government, and the first two years of the Clinton Administration, now with unified government, the obstruction and delay phenomenon began to accelerate to a significant and heretofore unprecedented degree. Approximately one-third of non-Ninth Circuit appellate nominees (0.3194, 23 of 72) and, symmetrically, one-third of nominees to the Ninth Circuit (0.3333, 3 of 9) suffered from such delayed nomination processing.

The most recent period corresponds to the six years of divided government in the Clinton Administration and Bush II's first term, which saw two years of divided government and two years with a slight Republican majority and strong unified Democratic opposition. During this period, the alterations in processes reached full fruition and, consequently, obstruction and delay reached new heights. Ninth Circuit appointment processes led the way. Thus, across the circuit courts as a whole, excluding the Ninth Circuit, nearly two-thirds of the nominees (0.6364, 70 of 110) experienced obstruction and delay and, for the Ninth Circuit, remarkably, more than eighty percent (0.8276, 24 of 29) were treated in this manner.

Beyond these aggregate figures, individual instances of obstruction and delay on the Ninth Circuit during this period demonstrate clearly that advice and consent processes did not resemble business as usual. For example, three Ninth Circuit nominees from California, William Fletcher, Richard Paez, and Marsha Berzon, had the united support of their state's Democratic senators, Diane Feinstein and Barbara Boxer, yet each suffered lengthy obstruction and delay. Sarah Wilson, who worked on nominations during the Clinton Administration, pointed out that, to get these nominees confirmed, "extraordinary measures" were necessary that "took the form . . . of negotiation and compromise."[68]

Fletcher, a Berkeley law professor, was originally nominated by Clinton on April 25, 1995. His ultimate confirmation occurred nearly three-and-a-half years later.[69] His greatest "sins" may have been his close personal ties to Clinton and his having been a Rhodes Scholar, a Yale Law School classmate of both Bill

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68. Sarah Wilson, *Appellate Judicial Appointments During the Clinton Presidency: An Inside Perspective*, 5 J. APP. PRAC. & PROCESS 29, 43 (2003).

69. *Id.* at 45.

and Hillary Clinton, and the co-chair of Clinton's California campaign.[70] The public reason given for opposition to Fletcher, however, had to do with the candidate's mother, liberal Ninth Circuit Judge Betty Fletcher, who sat on the bench in Washington State.[71] Some opponents argued that Fletcher's nomination would violate an anti-nepotism statute that, to most observers, would seem to apply only to administrative and other "inferior" positions on the court, not to serving as a fellow judge.[72] A negotiated compromise was reached, avoiding a battle over the statute's meaning:

> Republicans offered to proceed with William Fletcher's nomination on two independent conditions: first, that his mother take senior status, and second, that the President nominate for her seat a candidate suggested by Slade Gorton of Washington. The plan, referred to by at least one newspaper as a scheme to "throw mama from the bench," would enable Republicans to balance Fletcher's appointment with a Republican appointee and ensure the retirement of one of the circuit's most liberal members.[73]

Even with the deal, election-year politics featuring Robert Dole's Senate leadership coupled with his presidential candidacy kept all of Clinton's appellate nominees from reaching the Senate floor in 1996.[74] Only after Clinton's reelection, Fletcher's renomination, a second Judiciary Committee hearing, and the President's commitment to the nomination of Senator Gorton's candidate, Washington State Supreme Court Justice Barbara Durham, did Fletcher get sent to the Senate floor for his judicial confirmation.[75] The negotiations surrounding Fletcher's nomination did not end with his seating, as Justice Durham withdrew her Ninth Circuit candidacy, and controversy ensued over who would identify a replacement.[76] Senator Gorton continued to assert that the seat was his to fill, and the Administration delayed making a nomination, ultimately agreeing to Gorton's substitute candidate, Richard Tallman, who was nominated a full year after Fletcher's confirmation on May 24, 2000.

Two other California nominees, Paez and Berzon, also had home state senatorial support but with roads to confirmation that were at least as rocky as Fletcher's. Paez, nominated by Bill Clinton from the district court bench on January 25, 1996, was not confirmed until more than four years later.[77] Berzon's initial nomination occurred on January 27, 1998, but she would be confirmed on the same day as Paez, more than two years later.[78] Indeed, the nature of opposition to both nominees was similar as well. Paez had, prior to becoming a judge, represented indigents in poverty law cases and then worked for the Legal Aid

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70. *Id.* at 43.
71. *Id.*
72. *Id.* at 44.
73. *Id.* at 44–45.
74. *Id.* at 45.
75. *Id.*
76. Tobias, *supra* note 61, at 250.
77. Goldman et al., *Clinton's Judges*, *supra* note 4, at 240.
78. *Id.*

Foundation of Los Angeles.[79] Berzon's past included service as Associate General Council for the AFL-CIO, as well as board membership and the vice-presidency of the Northern California ACLU chapter.[80] In both instances, the nominees were opposed for their perceived liberalism and likely judicial activism.[81]

Just as the obstruction and delay of Fletcher's confirmation was extended by the external circumstances of electoral politics, Paez and Berzon's nominations were also held hostage to Senate leadership politics going beyond the targeted opposition their candidacies engendered. Specifically, Judiciary Committee Chair Orrin Hatch insisted that a conservative Republican, Ted Stewart, be given a district court appointment in Utah.[82] Stewart was opposed by Democrats and environmentalists, yet Hatch refused to schedule nomination hearings, including ones for Paez and Berzon, without Stewart's nomination.[83] Ninth Circuit nominees, in particular, also faced slow going because of ongoing debate then, as now, about splitting the circuit.[84]

The eventual floor votes on Paez and Berzon and their confirmations were part of a complex agreement in which Hatch promised to move their nominations in due course if the White House would nominate Stewart.[85] "Stewart, nominated on July 27, 1999, had his hearing two days later and was confirmed . . . a little more than two months after his nomination."[86] Approximately five months later, filibusters on the Paez and Berzon nominations were broken, and they were confirmed by divisive votes of 59–39 and 64–34, respectively.[87] Bemoaning the necessity for such a negotiated settlement, "Nan Aron of the Alliance for Justice [opined that] Stewart was 'totally unqualified for the federal bench. . . . [The Administration] got Paez and Berzon basically. Why should that have been the trade? Paez and Berzon were so eminently qualified.'"[88]

The Fletcher, Paez, and Berzon confirmations demonstrate that, even with strong home state senatorial support, highly charged partisan judicial selection politics may alter what, in an earlier day, would have been routine nominations. In Fletcher's case, the Clinton Administration went so far as to make a "trade," filling a vacancy in California with its choice (Fletcher) in exchange for Slade Gorton getting his choice (Durham/Tallman) for a Washington vacancy on the circuit. Republican muscle was also felt in other Ninth Circuit nominations when Arizona and Washington senators "contended that they must be involved in suggesting persons for vacancies in their respective states and even claimed they were entitled to proffer the recommendations."[89] This, too, delayed Ninth Circuit nominations until the desires of Arizona Senators Kyl and McCain were satisfied by the

79. *Id.* at 235–36.
80. *Id.* at 232–33.
81. *See id.* at 232–36.
82. Goldman & Slotnick, *Clinton's Second Term*, *supra* note 22, at 284.
83. *Id.*
84. Tobias, *supra* note 61, at 240.
85. Goldman et al., *Clinton's Judges*, *supra* note 4, at 240.
86. *Id.*
87. *Id.* at 233, 236.
88. *Id.* at 240.
89. Tobias, *supra* note 61, at 245.

nomination of Barry Silverman to an Arizona seat and Senator Gorton was satisfied by the nomination of Ronald Gould to a Washington vacancy.[90]

Advice and consent politics remained quite divisive through the first term of Bush II, with a slight Democratic majority through most of the 107th Congress and a somewhat larger Republican majority in the 108th Congress facing a strongly united Democratic opposition. Initially, there was a nomination that never ultimately occurred when, at the onset of the Bush presidency, Christopher Cox was seen as the Administration's likely choice for a California Ninth Circuit seat. But Cox was also seen as likely to encounter blue slip problems with both Democratic California Senators Feinstein and Boxer. When the President publicly presented his first eleven nominees to the circuit courts in an unusual ceremony underscoring the prominence and importance of these appointments, Cox was not among them.[91] In the group, however, were Roger Gregory, to whom Clinton had given a recess appointment to the Fourth Circuit, and Barrington Parker, Jr., also a Democrat (Second Circuit).[92] Perhaps Cox's absence from the group, coupled with the presence of Gregory and Parker, was meant as an olive branch offered by the Administration to Democrats who, undoubtedly, felt wounded by the treatment afforded Clinton's nominees. Perhaps Cox simply required even more resources to put forward than did others in the original group of eleven,[93] which also included Miguel Estrada (D.C. Circuit), Dennis Shedd (4th Circuit), Priscilla Owen (5th Circuit), Deborah Cook (6th Circuit), Jeffrey Sutton (6th Circuit), Michael McConnell (10th Circuit), Terrence Boyle (4th Circuit), and John Roberts, Jr. (D.C. Circuit). At least in those other instances, blue slip difficulties of the California kind were not an issue. When it became evident that the confirmation processes for virtually all of these nominees, save for Gregory and Parker, would be contentious, despite the tactical olive branch, the Administration pushed ahead on June 22, 2001, with the Ninth Circuit nomination of Carolyn Kuhl from California.[94]

Kuhl, a California Superior Court Judge, was a lightning rod for opposition from the moment of her nomination.[95] She attracted criticism for her work in the Reagan Justice Department, where she had argued in support of a tax exempt status for Bob Jones University despite its history of racial discrimination and, more generally, for her perceived positions on women's rights and reproductive freedom, equal opportunity, and the rights of workers and

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90. *Id.* at 245–46.

91. Press Release, The White House, Remarks by the President During Federal Judicial Appointees Announcement (May 9, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/05/20010509-3.html.

92. Amy Goldstein, *Bush Will Nominate 11 for U.S. Judgeships; Key Conservatives Among Candidates for Appeals Court*, WASH. POST, May 9, 2001, at A1.

93. *See id.*

94. Press Release, The White House, Nominations Sent to the Senate (June 22, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/06/20010622-3.html.

95. David G. Savage & Henry Weinstein, *Nominee Motivates Foes, Allies: A Conservative L.A. Superior Court Judge in Line to Sit on the Court of Appeals Finds Herself the Latest Lightning Rod in the Federal Judicial War*, L.A. TIMES, May 8, 2003, at 1.

consumers.[96] During the 107th Congress, Senator Barbara Boxer did not return her blue slip on Kuhl, while Diane Feinstein indicated that she would also withhold her blue slip vote.[97] With the "traditional" operation of the Senate's norms and rules holding sway, no Committee action occurred on the Kuhl nomination.

Things changed dramatically with Bush II's renomination of Kuhl at the beginning of the now-Republican 108th Senate. Once again, Senator Boxer did not return her blue slip, and Senator Feinstein announced that she was "reserving judgment." Absent Boxer's blue slip, and with Feinstein's ambiguous advice, Senator Orrin Hatch nevertheless held a hearing, and Kuhl's nomination was reported out of committee along party lines.[98] She became one of ten Bush II appellate nominees subjected to Democratic filibusters and inaction through the remainder of the 108th congressional session. As noteworthy as the filibuster, however, was the fact that a hearing was held for Kuhl, and she was brought to the Senate floor absent the home state blue slips that, in a more traditional Senate advice and consent environment, would have stalled her candidacy.[99] Kuhl never took the bench, as she declined renomination in the 109th Congress.

A third, ongoing, Bush II Ninth Circuit scenario involves William Myers, a nominee from Idaho with support from home state Republican Senators Craig and Crapo.[100] Opposition to Myers stems largely from perceptions of his positions on environmental issues.[101] With strong blue slip support and widespread Republican backing, a hearing was held for Myers, and he was reported out of committee with a vote along partisan lines. Myers' nomination, like Kuhl's, was the target of a successful Democratic filibuster.[102] Unlike Kuhl, however, he was renominated in the 109th Congress.[103] Further, he was not pushed through as one of the three nominees (Owen, Pryor, and Rogers Brown) who were confirmed as part of the agreement to avoid the imposition of the nuclear option by the Republicans.[104] It remains to be seen whether William Myers's Ninth Circuit candidacy is deemed an "extraordinary circumstance" by a sufficient number of Democrats to bring about a filibuster that would return the threat of the nuclear option back to center stage in confirmation politics.

CONCLUSION

In this Article, I have traced the evolution of a traditional patronage-oriented, judicial-selection process into a much more presidentially driven and

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96. *Id.*

97. *Id.*

98. Charles Hurt, *GOP Eyes Defying Tradition for Judicial Pick*, WASH. TIMES, May 19, 2003, at A4.

99. Nick Anderson, *Democrats in Senate Block Bush Nominee*, L.A. TIMES, Aug. 1, 2003, at 24.

100. *See* Editorial, *GOP Should Forget Attempt to Water Down Filibuster*, IDAHO STATESMAN, Apr. 27, 2005, at 6.

101. *Id.*

102. *See* Jill Zuckman, *Filibuster Deals Surprises Leadership: 14 Senators Broker Agreement Allowing Votes on Judicial Picks*, CHI. TRIBUNE, May 24, 2005, at 1.

103. *See id.*

104. *Id.*

often policy-oriented process in which the institutional prerogatives of the Senate as a whole are trumped by partisan divisiveness. Senate coalitions have formed along partisan lines in support of or in opposition to the selection program of the President. Unprecedented obstruction and delay resulted from such a system in the last six years of the Clinton Administration and during the Bush II Administration.

The emergence of strong and unprecedented obstruction and delay under the present unified government has been accompanied by alterations in Senate norms and rules to benefit the Republican majority. Meanwhile, the minority Democrats have resorted to the filibuster to block candidates who, under the traditional operation of the Senate's rules and norms, generally would not have reached the Senate floor.

The Ninth Circuit has been a prominent player in these developments for a number of reasons: the circuit's size, numerous vacancies, the current partisan and perceived ideological imbalance of the circuit, and the actual identity of some Ninth Circuit nominees.

With the agreement reached by fourteen moderate senators, seven Democrats and seven Republicans, which avoided a resort to the nuclear option in the 109th Congress and retained a Democratic right to filibuster under "extraordinary circumstances," the conclusion of the evolution of judicial selection processes is yet to be written. And, with the pending nomination of William Myers, the Ninth Circuit will remain at the center of the resolution of current judicial selection controversies. If, indeed, the Democrats choose to mount a filibuster on the Myers candidacy, labeling his nomination an "extraordinary circumstance," we can expect the uneasy truce brokered at the beginning of the congressional session to be tested, and the threat of a nuclear winter resurrected with the Ninth Circuit at ground zero.