

What Are The Judiciary's Politics?

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Abstract

What are the politics of the federal judiciary, to the extent that the federal judiciary has politics? Whose interests do federal judges represent? This Essay puts forward five different kinds of politics that characterize the federal judiciary. First, the federal judiciary represents the educated elite. Second, the federal judiciary represents past political majorities. Third, the federal judiciary is more politically balanced than the legislative or executive branches. Fourth, the federal judiciary is organized by regions, and between those regions there is significant diversity. Fifth, to the extent that the judiciary leans one way or the other, it leans toward the opposition party, that is, to the party that does not hold the presidency. With this understanding of the politics of the federal judiciary in mind, this Essay explores the current issues of contention regarding the confirmation process.

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I. INTRODUCTION

I assume that I was invited to speak at this conference about the politics of the judicial confirmation process because I've been through it and come out the other side, relatively unscathed—not that it was smooth or easy.¹ Shortly after I was nominated by George W. Bush, the Senate flipped to the opposite political party.² Throughout my confirmation hearing I was considered to be one of the four most controversial nominees.³ I had a team of New York Times reporters assigned over a period of two weeks to do nothing but investigate my record, including interviewing students about how I taught various controversial questions. It was really scary. My hearing was grueling, lasting an entire day. Nineteen months after nomination, however, I made it through by voice vote.⁴

The process was partisan, through and through. Then, as soon as confirmation was over, I entered a profession where politics is never discussed, where the law is everything, where Democratic judges and Republican judges sit together, not just civilly and cordially, but constructively. Of course, I knew who the Democrats and the Republicans were. It's not as if politics doesn't exist on the court, but it is an entirely different world. The move from nominee to judge is like whiplash. You go from one of the most intensely political environments to one of the most constructively non-political environments in our system. I assume that experience is the reason I was invited to speak today.

Toward the end of this talk I will discuss the confirmation process itself, but what interests me first is the question of the Judiciary's own politics. Many people say, cynically, that judging (especially in the field of constitutional law) is nothing *but* politics by a different name.⁵ Other people, very

1. I was nominated by President George W. Bush to the United States Court of Appeals for the Tenth Circuit in May, 2001, and confirmed in December, 2002. See *Confirmation Hearings on Federal Appointments: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. pt. 5, at 329–753 (2002) [hereinafter *Confirmation Hearings*].

2. See Todd Purdum & Alison Mitchell, *The 2002 Elections: The Senate; Republicans Regain Control of Senate, With a Victory in Missouri*, N.Y. TIMES (Nov. 6, 2002), <http://www.nytimes.com/2002/11/06/us/2002-elections-senate-republicans-regain-control-senate-with-victory-missouri.html>.

3. See *Confirmation Hearings*, *supra* note 1.

4. See Neil A. Lewis, *Democrats Vote No, but Allow Judicial Nominee to Advance*, N.Y. TIMES (Nov. 15, 2002), <http://www.nytimes.com/2002/11/15/us/democrats-vote-no-but-allow-judicial-nominee-to-advance.html>.

5. See Erik Voeten, *Judges as Principled Politicians*, WASH. POST (Feb. 20, 2014), <https://www.washingtonpost.com/news/monkey-cage/wp/2014/02/20/judges-as-principled-politicians/>.

frequently those who are up for confirmation, say: "It's all law. We don't do anything but just follow the law here, Senator."⁶

I do not share the view that law is just politics. That is not my experience. The vast number of cases in the federal courts today are decided dispassionately, objectively, and frequently unanimously.⁷ When decisions are not unanimous, the split is not necessarily along partisan lines. The vast majority of cases are not politicized in the way the press and politicians make them out to be.⁸ Of course, some are—especially those that touch most closely on hot-button, culturally-controversial questions.⁹ Sometimes the courts seem to lose their bearings as a court of law in those cases, but outside those hotly contested culture-war cases there is much more law than politics going on in the courts. I believe that if citizens could listen into the deliberations behind the curtains in most cases, they would be vastly reassured. Despite political pressures, our system still operates, most of the time, according the norms of the rule of law.

But with the caveat that I do not think that politics describes the entire universe of the judicial process, I want to address the question: What is the politics of the Judiciary, to the extent that the Judiciary *has* politics? For all the talk of the politicization of the Judiciary, there is little serious attention to that interesting question. To the extent that judging is political—meaning not governed by legal text and precedent—what politics does the Judiciary actually pursue?

I will put forward five different kinds of politics that characterize the federal judiciary. I confine my remarks to the federal judiciary, leaving out state court judges, whose politics is often more explicit and, in any event, quite different from that of our ostensibly non-political, life-tenured, salary-protected, independent third branch of government.

6. *See id.* (noting that Chief Justice Nominee John G. Roberts Jr. testified during his Senate confirmation hearings: "My job is to call balls and strikes."); *Transcript: Sotomayor Confirmation Hearings, Day 3*, N.Y. TIMES, July 16, 2009, <http://www.nytimes.com/2009/07/15/us/politics/15confirm-text.html> ("[Y]ou just have to look at my record to now that in the cases that I addressed on all issues, I follow the law.").

7. *See* Eric Hamilton, *Politicizing the Supreme Court*, 65 STAN. L. REV. ONLINE 35, 35 (2012) ("[A]lmost half of the cases this Term were decided unanimously, and the Justices' voting pattern split by the political party of the president to whom they owe their appointment in fewer than seven percent of cases.").

8. *See id.*; Michael W. McConnell, *2013 Supreme Court Roundup: Telling a Tale of Two Courts*, FIRST THINGS (Oct. 2013), <https://www.firstthings.com/article/2013/10/2013-supreme-court-roundup>.

9. *See* McConnell, *supra* note 8.

II. EDUCATED ELITE

The first and most obvious is that the federal judiciary represents the educated elite of the United States. Whether they are Democratic appointments or Republican appointments, every federal judge is someone who has succeeded at a high level both academically and professionally.¹⁰ This stands to reason. Judicial appointments are among the most important and long-lasting actions a president takes. Judgeships are highly prestigious and desirable positions. Of course, presidents choose them from among the best. Education is a big part of that.

It goes without saying that all judges went to law school. That fact alone separates them from the vast majority of our fellow citizens. Most of them went to the upper tier of American law schools and performed in the upper ranks of students at those schools.¹¹ Every single member of the current United States Supreme Court attended either Harvard or Yale Law School. Couldn't we use a few from Stanford or Pepperdine?

The federal judiciary has always been richer, older, whiter, maler, more secular, and more prominent and successful than the American population as a whole.¹² In the past few decades, it has become less uniformly white and male (though still not proportionate), but it is no more diverse and representative in terms of educational attainment and professional success than it ever was. This has its advantages. We benefit greatly from having judges who are well educated, competent, and successful. But we should not overlook the fact that the educated elite of America have a different set of opinions and values than the rest of the country—not always, but as a rule. The divide between the educated elite and the rest of the nation, on a wide range of legally relevant issues, is bigger than that between men and women, and possibly bigger than divides based on race or religion.¹³

10. See, e.g., Abby Jackson, *Every Supreme Court Justice Went to Harvard or Yale Law School—Here's Where They Went for Undergrad*, BUS. INSIDER (Feb. 23, 2016 12:23 PM), <http://www.buinsider.com/every-supreme-court-justice-went-to-harvard-or-yale-law-school-heres-where-they-went-for-undergrad-2016-2>.

11. See *Current Members*, SUPREME COURT OF THE UNITED STATES, <https://www.supremecourt.gov/about/biographies.aspx> (last visited Mar. 5, 2018).

12. See Jonathan K. Stubbs, *A Demographic History of Federal Judicial Appointments by Sex and Race: 1789-2016*, 26 BERKELEY LA RAZA L.J. 92, 109–12 (2016).

13. See, e.g., Alec Tyson & Shiva Maniam, *Behind Trump's Victory: Divisions by Race, Gender, Education*, PEW RES. CTR. (Nov. 9, 2016), <http://www.pewresearch.org/fact-tank/2016/11/09/behind-trumps-victory-divisions-by-race-gender-education>.

The school prayer decisions are an illustration.¹⁴ When the Supreme Court handed down its *School Prayer Cases* in the early 1960s, they were massively unpopular.¹⁵ Although disapproval has declined somewhat over the years, the level of support for school prayer still exceeds sixty percent and has historically exceeded sixty-five percent.¹⁶ Yet, school prayer is an issue on which judges, Republican and Democrat alike, are nearly unanimous.¹⁷ The last time the issue came to the Supreme Court, the Court unanimously and summarily reaffirmed the *School Prayer Cases*. There is some disagreement over grey areas like moments of silence or valedictorian addresses,¹⁸ but not about the core historical practice of spoken classroom prayer. And school prayer is not an atypical issue. It is only one of many divides between the highly educated elite and the rest of the nation. Other examples include: capital punishment, abortion, trust in the police, and flag burning.¹⁹

Essentially what we have done, by granting the Judiciary the kind of authority it has to invalidate legislation passed by elected bodies, is to give the educated elite a veto over actions that have been approved politically by the representatives of the American citizenry.²⁰ The Judiciary is not unlike the House of Lords.

I am not saying this is entirely a bad thing. I'm pretty well-educated myself. I guess I'm part of the elite. I also know that our framers considered

14. See *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

15. See Charles C. Haynes, *50 Years Later, How School-Prayer Ruling Changed America*, NEWSEUM INST. (July 29, 2012), <http://www.newseuminstitute.org/2012/07/29/50-years-later-how-school-prayer-ruling-changed-america> ("Public outrage was immediate and widespread. For millions of Americans, the Court had 'kicked God out of the schools.'").

16. See Rebecca Riffkin, *In U.S., Support for Daily Prayer in Schools Dips Slightly*, GALLUP (Sept. 25, 2014), <http://www.gallup.com/poll/177401/support-daily-prayer-schools-dips-slightly.aspx>.

17. See *Schempp*, 374 U.S. at 203 (8–1 decision); *Engel*, 370 U.S. at 421 (8–1 decision).

18. See Mathew D. Staver, *Legal Memorandum on Graduation Prayers in Public Schools*, LIBERTY COUNS., https://www.lc.org/Uploads/files/pdf/Memo_grad_prayer.pdf (last visited Mar. 5, 2018) ("The United States Supreme Court has never ruled that prayer or religious messages are completely banned during public school graduation ceremonies.").

19. See, e.g., Frank Newport & Andrew Dugan, *Partisan Differences Growing on a Number of Issues*, GALLUP (Aug. 3, 2017), <http://news.gallup.com/opinion/polling-matters/215210/partisan-differences-growing-number-issues.aspx>.

20. See Fred Smith, *Supreme Court Gives Itself Power to Invalidate Law*, SFGATE, <http://www.sfgate.com/opinion/article/Supreme-Court-gives-itself-power-to-invalidate-law-3674167.php> (last modified June 30, 2012 12:36 PM) (discussing the Supreme Court's opinion regarding the Affordable Care Act, noting that "[t]his opinion represents the first time the [C]ourt has so evidently given itself the power to invalidate laws because they were not 'proper'").

very seriously the virtues of having a branch of government that would represent the educated elite, what they called the “natural aristocracy.”²¹ Not a hereditary aristocracy—no one at the founding favored that—but an aristocracy of talent, education, judgment, success, wealth, and reputation.²²

Many of the framers spoke in terms of Mixed Regime theory, which they learned from Aristotle and Polybius, and more recently from Blackstone and Montesquieu.²³ Mixed Regime theory is the idealistic vision of the British system, which combined “the One, the Few, and the Many” in a balanced system.²⁴ The “One” was the king, who embodied the energy, dispatch, and unity needed for effective government; the “Many” were represented in the House of Commons, which would embody the common good; the “Few” were represented by the House of Lords, which would bring to the government a more detached, wiser, longer view. The fact that the Lords held their wealth in land, which their sons and grandsons would eventually inherit, was thought to align their self-interest with the long-term welfare of the country; and their wealth and position was thought to give them the leisure and education to be able to evaluate the causes and results of government policies, and thus to counter the more populist and turbulent democratic spirit of the common people.²⁵ Each of the three elements had its characteristic virtues and its corresponding vices. A monarch might wish to become all-powerful; the aristocracy was grasping and contemptuous of the people; and the people were ill-informed, easily manipulated by demagogic leaders, and inclined toward short-sightedness. The theory of the mixed regime is that each of the three elements would balance the others and thus bring its virtues to bear while countering the vices of the other two.²⁶

Mixed Regime theory may or may not sound persuasive to the modern ear, but it was rejected for the American Constitution for the simple, practical

21. See Zvi S. Rosen, *The Irony of Populism: The Republican Shift and the Inevitability of American Aristocracy*, 18 REGENT U.L. REV. 271, 277 (2005) (“The natural aristocracy in the minds of the framers of the American Constitution consisted of men much like themselves—men of education, talent, and wealth. It would thus be men capable of looking beyond the shifting immediate interests of the people, and towards the frequently unpopular but necessary objectives of true statesmanship.”).

22. *Id.* at 276–77.

23. See Steven G. Calabresi et al., *The Rise and Fall of the Separation of Powers*, 106 NW. U.L. REV. 527, 529–36 (2012).

24. *See id.* at 530.

25. *See id.* at 530.

26. *See id.*

reason that we didn't have an aristocracy.²⁷ If you read the records from the federal convention, you will see, though, that many of the founders struggled to devise a way to attain the benefits of a mixed constitution in ways that did not entail a hereditary monarchy or aristocracy.

Their answer was the United States Senate. Many of the framers of the Constitution thought that the Senate would serve as a kind of aristocratic upper house, capable of balancing the more democratic House of Representatives.²⁸ Their elite status would come about from a process of "successive filtration," to use James Madison's term.²⁹ Remember that until the Seventeenth Amendment was passed in 1913, senators were elected by the state legislatures rather than by popular election.³⁰ Madison's idea was that the people would choose the best among themselves for the numerous seats in the state legislatures, and the state legislators would choose the best among themselves for the United States Senate.³¹ Those senators would serve for the amazingly long term of six years, at a time when state legislators usually served for one or maybe two years.³² This filtration process, it was thought, would produce senators with wisdom, foresight, and the ability to stand above populist frenzies and enthusiasms.³³

Well, things have not quite worked out that way, and the American people

27. See *id.* at 533 ("[T]he American Revolution killed off the idea of the Mixed Regime for all time. The American Revolution was premised on the idea that all men are created equal, and it did not permit a hereditary monarchy, aristocracy, or any other distinctions of social class.").

28. See THE FEDERALIST NO. 62 (James Madison) ("The necessity of a senate is not less indicated by the propensity of all single and numerous assemblies to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions. . . . [A] body which is to correct this infirmity ought itself to be free from it, and consequently ought to be less numerous. It ought, moreover, to possess great firmness, and consequently ought to hold its authority by a tenure of considerable duration."); see also 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 136 (Max Farrand ed., 1911) ("In the formation of the Senate we ought to carry it through such a refining process as will assimilate it as near as may be to the House of Lords in England.").

29. See JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 40–41 (Ohio Univ. Press 1989) (noting that Madison "considered the popular election of one branch of the National Legislature as essential to every plan of free Government" but also favored "the policy of refining the popular appointments by successive filtrations").

30. See U.S. CONST. art. I, § 3, cl. 1, *amended* by U.S. CONST. amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, *chosen by the Legislature thereof*, for six Years; and each Senator shall have one vote." (emphasis added)); U.S. CONST. amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, *elected by the people thereof*, for six years; and each Senator shall have one vote." (emphasis added)).

31. See Rosen, *supra* note 21, at 278–79.

32. See U.S. CONST. art. I, § 3, cl. 1, *amended* by U.S. CONST. amend. XVII.

33. See Rosen, *supra* note 21, at 278–79; McInerney, *supra* note 30, at 159.

eliminated this indirect mode of choosing the Senate over a hundred years ago.³⁴ But an argument can be made that the courts have assumed the aristocratic function in our system that was originally expected of the Senate. We can think about the federal judiciary as a House of Lords, giving the educated elite on the Supreme Court and the lower federal judiciary a veto over decisions of the democratic masses, just as the Lords could block improvident measures passed by the Commons.

Whether this is, on balance, good or bad is not something I can judge. It is a little bit of both. I retain enough of my middle-class, fly-over, church-going, public-school, Big Ten university roots to be at least skeptical of the superior wisdom of America's elite. But I can see the logic of a system in which the educated elite are given a thumb on the scale as part of a mixed regime. In any event, it is not surprising that members of the educated elite are disposed to favor a system where people like themselves have a veto power over the masses. That explains why free-wheeling judicial review is more popular among lawyers, law students, and academics than it is among the general population.

Good thing or bad, however, it is a fact of our political life. The federal courts are representative of the educated elite of the country.

III. PAST POLITICAL MAJORITIES

The second point is that the Judiciary represents the past, specifically past political majorities. This stems from the fact that judges are usually in their forties or fifties when they are named to the bench³⁵ and that, because of life tenure, they typically serve for twenty to thirty years.³⁶ A judge named today will likely still be exercising power in 2050, long after Donald Trump is history. The result is a federal judiciary that resembles a layer cake, with judges appointed decades ago making up the bottom layer and more recent appointees rising toward the top. Remnants of past political majorities continue to wield power over a period of decades.

Consider the Justices of the United States Supreme Court. Our current

34. See U.S. CONST. amend. XVII.

35. See Albert Yoon, *Love's Labor's Lost? Judicial Tenure among Federal Court Judges: 1945-2000*, 91 CAL. L. REV. 1029, 1047 (2003) ("The average age at commission has held fairly constant, between fifty and fifty-five years of age, while the average length of tenure has slowly but steadily increased over the last two decades, exceeding twenty years for the past decade.").

36. See *id.*

Court consists of one Justice who was named by Ronald Reagan, one Justice who was named by the first President Bush, two Justices who were named by President Clinton, two Justices who were named by the second President Bush, two Justices who were named by President Obama, and one Justice named by President Trump.³⁷ Mr. Dooley may be right that the Court follows the “illiction returns”—just not the most recent ones.³⁸ Judges represent the majorities in the past who elected the presidents who nominated them and the Senates who confirmed them. This, I think, is one of the most interesting and underappreciated features of our political system.

What difference does this make? It gives stability to the system. It works against presidents who are going to lurch in a very different direction. President Reagan was a transformative president.³⁹ He was hugely restrained by the federal judiciary. President Obama was the next truly transformative president, and he too was seriously restrained by the federal courts.⁴⁰ The list of judicial setbacks for Obama is lengthy. A few examples include: net neutrality, which was struck down several times before a version was ultimately upheld,⁴¹ many of the administration’s global warming initiatives, struck down,⁴² the President’s attempt to make recess appointments in the face of Senate opposition, struck down,⁴³ and, perhaps most conspicuously, his order giving lawful status to millions of undocumented workers who had been here

37. See *Current Members*, SUPREME COURT OF THE UNITED STATES, <https://www.supremecourt.gov/about/biographies.aspx> (last visited Mar. 5, 2018).

38. Forrest Maltzman et al., *Supreme Court Justices Really Do Follow the Election Returns*, 37 PSOnline 839 (Oct. 2004), available at <https://home.gwu.edu/~forrest/fmjusticewageringps.pdf>.

39. See William A. P. Thompson Jr., *Transformative Presidents: A Review of Definitions, Focused on the Reagan Presidency*, 3 INT’L REL. & DIPL. 487, 487 (2015) (“The most significant variable in ranking a President as transformative is the nature of his legacy. Reagan’s legacy resulted from the Tea Party’s adoption of Reagan’s conservative policy proposals, labeled the Reagan Revolution.”).

40. See Ilya Shapiro, *Obama Has Lost in the Supreme Court More Than Any Modern President*, THE FEDERALIST (July 6, 2016), <http://thefederalist.com/2016/07/06/obama-has-lost-in-the-supreme-court-more-than-any-modern-president>.

41. See *U.S. Telecom Ass’n v. FCC*, 825 F.3d 674, 744 (D.C. Cir. 2016); see also Jonathan H. Adler, *Divided D.C. Circuit Upholds FCC ‘Net Neutrality’ Rule*, WASH. POST (June 14, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/06/14/divided-d-c-circuit-upholds-fcc-net-neutrality-rule/>.

42. See *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015); see also Ariana de Vogue et al., *Supreme Court Blocks Obama Climate Change Rules*, CNN POL. (Feb. 10, 2016), <https://www.cnn.com/2016/02/09/politics/supreme-court-obama-epa-climate-change/index.html>.

43. See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2578 (2014); see also Robert Barnes, *Supreme Court Rebukes Obama on Recess Appointments*, WASH. POST (June 26, 2014), https://www.washingtonpost.com/politics/supreme-court-rebuked-obama-on-recess-appointments/2014/06/26/e5e4fefa-e831-11e3-a86b-362fd5443d19_story.html.

for a few years and had children in the United States, struck down.⁴⁴ (Of course, President Obama also had judicial victories, such as in the Obamacare decisions). Already, President Trump has ridden into a buzz saw of judicial resistance. When presidents seek to effect significant change, they invariably encounter judicial resistance from judges representing the political attitudes of an earlier era.

The past has its claim on us. Judges and Justices named in the past—and presumably having viewpoints shaped at that time—sit in judgment over the political decisions of the present. The system works for stability; it works against radical change. The system is deeply conservative, but I want to stress that this is “small-c” conservatism. It is not right-wing, not ideologically conservative. As often as not, the past was more left wing than the present. That was Reagan’s situation, and it may be Trump’s (to the extent that Trump is an ideological conservative). When the past leaned more to the left wing than the present, the effect of the system is to preserve a veto for the liberal progressive majorities of the past, and to restrain the conservative majority now in power.

My tentative opinion is that this feature of the politics of the Judiciary is mostly salutary. Here, I betray my “small-c” conservative distrust of rapid or radical change.

IV. RELATIVE PARTISAN BALANCE

A third characteristic of the politics of the Judiciary is that the Judiciary is more politically balanced than the Legislative Branch, and certainly more so than the Executive. The Executive is inherently controlled by one party or the other, and the Legislative Branch is known to swing from one to the other, sometimes quite dramatically. There was a Democratic lock on the House of Representatives and a filibuster-proof Democratic Senate less than a decade

44. See *United States v. Texas*, 136 S. Ct. 2271, 2272 (2016) (mem.), *aff'g by an equally divided court* 809 F.3d 134 (5th Cir. 2015); see also Adam Liptak & Michael D. Shear, *Supreme Court Tie Blocks Obama Immigration Plan*, N.Y. TIMES (June 23, 2016), <https://www.nytimes.com/2016/06/24/us/supreme-court-immigration-obama-dapa.html>.

ago.⁴⁵ Now, both houses are controlled by the Republicans.⁴⁶ The courts are much closer to 50–50, or rather between 60–40 and 40–60. We often lament the fact that the Supreme Court so often breaks 5–4—about a third of the time liberal and about two-thirds of the time conservative—seeing this as evidence of partisanship.⁴⁷ But, this could as easily be welcomed as an indication of partisan balance.⁴⁸ Would it be better to have a Court that goes one way all the time?

The reason for this partisan balance on the courts is that the American people tend to switch parties for the presidency every eight years.⁴⁹ Within an eight-year term of office, a president names roughly forty percent of the lower federal judiciary and two members of the Supreme Court.⁵⁰ By the end of an eight-year term, that will produce a majority for the president's party.⁵¹ But the majority is always within a fairly narrow range, and then the pendulum begins to swing back the other way when the next president takes office.

45. See Daniel Chaitin, *Filibuster-Proof Majority of Senators Want to Save the Filibuster*, WASH. EXAMINER (Apr. 7, 2017), <http://www.washingtonexaminer.com/filibuster-proof-majority-of-senators-want-to-save-the-filibuster/article/2619730> (“Democrats previously went ‘nuclear’ in 2013, when they controlled the Senate, eliminating the filibuster for [E]xecutive [B]ranch and federal judicial nominees.”).

46. See Mark Z. Barabak & Lisa Mascaro, *Republicans Hold the House and Senate, but Will That End the Washington Gridlock Even with President Trump?*, L.A. TIMES (Nov. 9, 2016), <http://www.latimes.com/politics/la-na-pol-election-congress-control-20161108-story.html>.

47. See Adam Liptak, *The Polarized Court*, N.Y. TIMES (May 10, 2014), <https://www.nytimes.com/2014/05/11/upshot/the-polarized-court.html>.

48. See Robert E. Riggs, *When Every Vote Counts: 5–4 Decisions in the United States Supreme Court, 1900–90*, 21 HOFSTRA L. REV. 667, 706 (1993) (discussing how swing voters help to balance the court).

49. See Raymond A. Smith, *Is it That Hard for a Party to Hold the White House for Three Terms?*, THE HILL (Apr. 15, 2015 6:00 AM), <http://thehill.com/blogs/pundits-blog/presidential-campaign/238812-is-it-that-hard-for-a-party-to-hold-the-white-house>; *Historic Re-Election Pattern Doesn't Favor Democrats in 2016*, NAT. CONST. CTR. (Jan 25, 2013), <https://constitutioncenter.org/blog/historic-re-election-pattern-doesnt-favor-democrats-in-2016> (“[T]he more immediate trend is that in seven of the last nine elections, voters have decided to switch the party controlling the White House when a candidate (or his successor) had won two prior elections.”).

50. See *Judgeship Appointments by President*, U.S. CTS., <http://www.uscourts.gov/sites/default/files/apptsbypres.pdf> (last visited Mar. 5, 2017); see also Rebecca Wessell, *The Data Behind Appointing a Supreme Court Justice*, VALUE PENGUIN (Mar. 29, 2017), <https://www.valuepenguin.com/2016/02/data-behind-appointing-supreme-court-justice> (indicating the average number of Supreme Court Justices appointed per President is 2.6).

51. See Richard Wolf, *Obama Tilts Federal Judiciary Back Toward Democrats*, USA TODAY (Oct. 31, 2013), <https://www.usatoday.com/story/news/politics/2013/10/31/obama-judges-democrat-republican-senate/3286337> (noting that at the end of George W. Bush's presidency, the federal appeals courts had a majority of Republican appointees, but President Obama's appointees tilted the balance in the Democrats' favor).

This shift between the parties every eight years might be political happenstance. But it has persisted for a long time. In my lifetime, and indeed since World War II, eight-year Republican presidencies have replaced eight-year Democratic presidencies every time, and vice versa. The only exception was when Jimmy Carter failed to be reelected, and the Republicans got twelve years instead of their usual eight. There is no guarantee that this eight-year cycle will continue. Before Eisenhower, there were twenty straight years of Democratic presidents, producing a Supreme Court made up entirely of members of that party.⁵² But there may be deep-seated reasons why the parties tend to alternate in power. Presidencies start out strong, and the president is usually reelected by a larger margin than his initial election.⁵³ But presidencies tend to run out of steam by the end of eight years.⁵⁴ They don't have any interesting ideas anymore. Political parties nominate people like Hillary Clinton at the end of eight years of Obama. The Republicans barely had anybody at all to nominate eight years before that. The American people are attracted by the idea of something new.

I hope this is in fact a deep-seated aspect of American politics, for its effects on the Judiciary if no other reason. It would be difficult to contrive a better system for creating an ideologically-balanced judiciary.

V. REGIONAL DIVERSITY

My fourth point: Within this overall ideological balance, we have regional diversity. The reason for this is that different parts of the country are overwhelmingly aligned with one party or the other. California, for example, produces a majority of the judges on the country's largest circuit court of appeals.⁵⁵ California is a one-party state and has not seen a Republican senator

52. See *Justices 1789 to Present*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/members_text.aspx (last visited Mar. 5, 2018).

53. See, e.g., John Nichols, *For Obama, a Bigger Win Than for Kennedy, Nixon, Carter or Bush*, THE NATION (Nov. 7, 2012), <https://www.thenation.com/article/obama-bigger-win-kennedy-nixon-carter-or-bush> (noting that Reagan and Clinton won their incumbent elections by even larger margins than their first-term elections).

54. See *Which President Had the Best Last Year in Office?*, POLITICO MAG. (Dec. 27, 2015), <http://www.politico.com/magazine/story/2015/12/which-president-had-the-best-last-year-in-office-213465> (noting that "the 'lame duck' mantra has come to infect the fears of outgoing presidents as they face down their final year in office").

55. See *The Judges of this Court in Order of Seniority*, UNITED STATES COURTS FOR THE NINTH CIRCUIT, https://www.ca9.uscourts.gov/content/view_seniority_list.php?pk_id=0000000035 (last visited Mar. 5, 2018).

since Democrat Dianne Feinstein was elected in 1992.⁵⁶ With exceptions, and depending on the “blue slip” policy of the Judiciary Committee at any given time, judges cannot be appointed without the approval of the senator from their state.⁵⁷ As a result, the confirmation of judges in the Ninth Circuit has required Democratic approval no matter who the president has been.⁵⁸ Three of the other eight states in the Ninth Circuit are almost as one-sided.⁵⁹ That is why the Ninth Circuit is the way it is—politically leftwing.

Then there are states like Texas, which accounts for why the Fifth Circuit is the way it is. Other parts of the country, like the Fourth Circuit in which the dominant states—Virginia and North Carolina—are purple states, can go either way. The Fourth Circuit lurched from being the most conservative circuit in the country to being one of the most liberal circuits in the country in just a couple of years.⁶⁰ The Sixth and Seventh Circuits contain a mixture of red and blue states, and the courts are likewise mixed.⁶¹ The First, Second, and Third Circuits are reliably liberal, while the Eighth is reliably conservative.

It is thus a feature of our system that we have regional courts of appeals with different political or partisan flavors. No other federal government institution has this feature. It is almost certainly a good thing. It means that as issues come up around the country and percolate in the different courts, they are decided by courts reflecting different points of view. If most or all of the

56. See John Myers, *Two Democrats Will Face Off for California's U.S. Senate Seat, Marking First Time a Republican Will Not Be in Contention*, L.A. TIMES (June 8, 2016), <http://www.latimes.com/politics/la-pol-ca-senate-primary-election-20160607-snap-story.html>.

57. See Todd Ruger, *Senators Could Lose 'Blue Slip' Input on Circuit Judges*, ROLL CALL (Sept. 11, 2017 11:00 AM), <https://www.rollcall.com/news/politics/senators-blue-slip-judges>.

58. See Allan Smith, *Democrats Fire Back at Republicans Calling for Obscure 'Blue Slip' Process to Be Changed for Trump's Benefit*, BUS. INSIDER (Sept. 23, 2017 9:03 AM), <http://www.businessinsider.com/trump-judges-blue-slip-democrats-2017-9>.

59. See John Yoo, *John Yoo: Ditch the Ninth Circuit? What Trump Gets Right (and Wrong)*, FOX NEWS (May 5, 2017), <http://www.foxnews.com/opinion/2017/05/05/john-yoo-ditch-ninth-circuit-what-trump-gets-right-and-wrong.html> (discussing the extreme divide in the Ninth Circuit and noting that Oregon and Hawaii also have to Democratic senators).

60. See Ann E. Marimow, *There's a Word That No Longer Describes the Federal Appeals Court in Richmond*, WASH. POST (Apr. 13, 2017), https://www.washingtonpost.com/local/public-safety/theres-a-word-that-no-longer-describes-the-federal-appeals-court-in-richmond/2017/04/12/3a82e0c4-193c-11e7-9887-1a5314b56a08_story.html?utm_term=.da5771ad928f.

61. See Sindhu Sundar, *7th Circ. on Brink of Ideological Shift with Posner's Exit*, LAW360 (Sept. 5, 2017 9:46 PM), <https://www.law360.com/articles/960526/7th-circ-on-brink-of-ideological-shift-with-posner-s-exit> (noting the court's “nuanced ideological balance”).

courts of appeals come to a similar position on an issue, we can have reasonable confidence that it is the right answer. In such cases, the Supreme Court is unlikely to grant certiorari, and the consensus will stand.⁶² When the courts of appeal reach different results, it is an indication that the cases present a hard question. The issue will likely go up to the United States Supreme Court for resolution.⁶³ Then the Court will produce a single authoritative answer, but first the deliberation will be enriched by lower court opinions written from different points of view. The process leads, one hopes, to a better considered and more reflective answer than if all the courts of appeals were similar.

VI. COUNTER TO THE PRESIDENT

A final point is that to the extent that the Judiciary leans one way or the other, it leans toward the opposition party, that is, to the party that does not hold the presidency. When a president like Trump or Obama comes into power, a president of the other party has usually just completed eight years of appointments. By the end of Obama's second term, nine of the thirteen courts of appeal had Democratic majorities, with five of those majorities exceeding two-thirds.⁶⁴ It takes time for a new president's appointments to alter the balance in the president's direction. For a large part of a presidency, the president is going to get a skeptical reaction from the courts.

Now, I hope that skepticism does not mean partisan opposition. I do fear, looking at a handful of recent lower court opinions, that the Judiciary may not be immune to the meme that Donald Trump is not a legitimate president and is not entitled to the usual presumption of good faith decision-making. I hope that isn't so, but in our hyper-partisan times, it could be. Even so, Trump faces only a more intense version of something every president faces from courts that were appointed by his predecessors. Here, I'm referring more to the lower courts than to the Supreme Court. The Supreme Court changes more slowly than the lower courts, but the lower courts are where a great deal of the executive action review takes place.

62. See Mark Walsh, *Should the Supreme Court Select Some Cases by Chance?*, ABA J. (June 2017), http://www.abajournal.com/magazine/article/random_review_Scotus ("The only cert petitions [the law clerks] are likely to recommend will be those presenting clear splits in authority among federal appeals courts or those in which a federal or state statute has been struck down.")

63. See *id.*

64. Lawrence Hurley, *Obama's Judges Leave Liberal Imprint on U.S. Law*, REUTERS (Aug. 25, 2016 10:12 PM), <http://www.reuters.com/article/us-usa-court-obama/obamas-judges-leave-liberal-imprint-on-u-s-law-idUSKCN1110BC>.

Because of this statistical reality, the courts have emerged as the most important check and balance in our system. This would have been a surprise to the framers of the Constitution, who had a much more law-like, legalistic, non-political view of the judicial role.⁶⁵ But, whether we are talking about Trump or Obama—or even Bush, Clinton, or Reagan—much of the resistance to executive action now comes from the courts rather than Congress.⁶⁶ The reason, I think, is not just that courts have become more political and more assertive, though that is possibly true. An equally important reason is that Congress has become much less effective as an institution. A variety of changes in the way Congress works, including the filibuster, have made it very difficult for Congress to respond effectively to presidential actions.⁶⁷ Just think back to the ineffectual flailing-about of the Republican-controlled Congress in the final years of the Obama Administration.⁶⁸ The checks and balances within Congress are so powerful that it is difficult to get anything done; and if Congress can't get anything done, then the president can get away with a lot more.⁶⁹

The increasing partisanship within Congress exacerbates the problem. By “partisanship” in this context, I mean the tendency of members of Congress to vote with presidents of their party rather than with the institutional interests of the Legislative Branch.⁷⁰ For example, surely members of Congress have noticed that recent presidents have thumbed their nose at the War Powers Resolution (let alone the Declare War Clause of the Constitution),⁷¹ Congress's

65. See Eric Hamilton, *Politicizing the Supreme Court*, 65 STAN. L. REV. ONLINE 35, 35–37 (2012).

66. See Erica Newland, *Executive Orders in Court*, 124 YALE L.J. 2026, 2062–69 (2015).

67. See Thomas E. Mann, *The Negative Impact of the Use of Filibusters and Holds*, BROOKINGS (June 23, 2010), <https://www.brookings.edu/testimonies/the-negative-impact-of-the-use-of-filibusters-and-holds>.

68. See Drew DeSilver, *Congress Still on Track to be Among Least Productive in Recent History*, PEW RES. CTR. (Sept. 23, 2014), <http://www.pewresearch.org/fact-tank/2014/09/23/congress-still-on-track-to-be-among-least-productive-in-recent-history>.

69. See, e.g., Clyde Wayne Crews Jr., *Obama's Legacy: An Abundance of Executive Actions*, FORBES (Jan. 10, 2016), <https://www.forbes.com/sites/waynecrews/2016/01/10/this-inventory-of-obamas-dozens-of-executive-actions-frames-his-final-state-of-the-union-address/> (discussing Obama's flux of executive orders in his final year).

70. See Aaron Bycoffe, *Tracking Congress in the Age of Trump*, FIVETHIRTYEIGHT, <https://projects.fivethirtyeight.com/congress-trump-score> (last updated Feb. 15, 2018).

71. See, e.g., Bruce Ackerman, *Unilateral Rocket Man*, SLATE (Sept. 21, 2017 12:06 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/09/donald_trump_is_ignoring_his_duty_under_the_war_powers_act_to_consult_congress.html.

constitutionally-entrusted control over appropriations,⁷² enforcement of congressional subpoenas and information demands,⁷³ and their obligation to enforce laws passed by Congress,⁷⁴ among others. These transgressions force members of Congress to choose between standing up for legislative prerogatives and defending the actions of a president of their party. Our framers expected “the interest of the man,” referring to the members of Congress, to be “connected with the constitutional rights of the place,” meaning the institutional interests of the Legislative Branch.⁷⁵ More often in recent times the interests of the man (or woman) are aligned with his or her party, and “the place” be damned. The politics of the moment matter more than the long-term effects on congressional authority. As long as the president retains the loyalty of one-third of either chamber, or forty percent of the Senate, he can block legislative efforts to bring him under control.⁷⁶

I always worry that as I get older, I imagine that in my youth things were much better. But there really was a time, and I remember that time, when leading members of Congress from both parties cared about the institutional prerogatives of Congress vis-a-vis the Executive and would stand up to the president, even of their own party, when they believed he was overstepping his role. In my first-year constitutional law course, I assign the students to read the 1986 House Judiciary Committee report responding to President Reagan’s order refusing to comply with an act of Congress that he believed to be unconstitutional.⁷⁷ The Committee report unanimously denounced the idea that a president has authority to do such a thing.⁷⁸ Even the Republican members signed on.⁷⁹ That was another age—an age when institutional structure

72. See, e.g., Thomas Kaplan, *Trump Signs Budget Deal to Raise Spending and Reopen Government*, N.Y. TIMES (Feb. 8, 2018), <https://www.nytimes.com/2018/02/08/us/politics/congress-budget-deal-vote.html>.

73. See, e.g., Terrence Hunt, *Bush White House Refuses to Answer Congressional Subpoenas*, ABC NEWS (June 29, 2007), <http://abcnews.go.com/TheLaw/Politics/wireStory?id=3325551>.

74. See, e.g., Elizabeth Slattery, *Obama Can't Rewrite the Law*, WASH. POST (Jan. 13, 2016), <https://www.washingtonpost.com/news/in-theory/wp/2016/01/13/obama-cant-rewrite-the-law/>.

75. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

76. See *The Presidential Veto and Congressional Veto Override Process*, NAT'L ARCHIVES, <https://www.archives.gov/files/legislative/resources/education/veto/background.pdf> (last visited Mar. 5, 2018) (“Congress can override a veto by passing the act by a two-thirds vote in both the House and the Senate.”).

77. See H.R. REP. NO. 99-138, at 1–2 (1985).

78. *Id.* at 38.

79. *Id.* at 43.

mattered to members of Congress more than partisan loyalties. Today, Presidents refuse to enforce laws of undoubted constitutionality, and are cheered by co-partisans who agree with them on policy grounds.

If Congress is not going to provide much of a check and balance against the President, who will? The most likely candidates are the courts, and especially the lower federal courts. The large majority of the judges were named by the opposing political party, and they are protected by life tenure. Roosevelt, Reagan, and Obama all experienced significant resistance from the courts to their initiatives, and six months into the Trump administration that resistance approaches gale force.

VII. SUMMARY

To the extent courts have politics, what politics does it have? Most of what the courts do, I think, is solidly grounded in law, as it should be. I don't want you to think my position is that courts are just political bodies—that would be a gross mischaracterization. But, to the extent that courts *have* politics, it is a politics of the educated elite—an American version of the House of Lords. It is a politics that gives weight to the opinions of the past and thus has a small-c conservative, stability bias. The federal courts are consistently more bipartisan in their composition than any other institution of government. They exhibit regional diversity, and they tend to tilt against the party that occupies the presidency at any moment, thus serving, perhaps, as the most important check and balance in the system.

If I have described this correctly, then there is some good and some bad in the politics of the Judiciary. But, weighing good against bad, it is not a bad system overall. Maybe we should expend less energy bemoaning the fact that the Judicial Branch has politics and be more appreciative of the nature of the politics that it has. This requires a step back from our own particular partisan attachments. It is disarmingly easy and satisfying to rail against a politicized judiciary when court decisions strike us as not quite right under the law and favor the ideology of the other side. I've done it myself. I will likely do it again. But, when you take a step back and think of the overall system, there is much to appreciate—much that is the accident of time rather than the plan of the founders.

VIII. IMPLICATIONS FOR THE CONFIRMATION PROCESS

With this understanding of the politics of the Judiciary, we can think more clearly about current issues of contention regarding the confirmation process. In recent months, argument has exploded on the twin topics of the filibuster of judicial nominations and the Senate's ability to defeat nominations by the tactic of delay, without even a vote or sometimes even a hearing on the nominee.⁸⁰ These two issues came together in the nomination of Neil Gorsuch to the Supreme Court. He could not have been named if the Republican-controlled Senate had not declined to hold hearings or a vote on President Obama's nominee, D.C. Circuit Judge Merrick Garland, a widely-respected jurist who surely would have been confirmed had he been given a fair shot.⁸¹ Gorsuch most likely would not have been confirmed if the Republican-controlled Senate had not employed the so-called "nuclear option" to end partisan filibusters of Supreme Court nominees.⁸² Both actions enraged Democrats, causing some to charge that Justice Gorsuch's Supreme Court seat was "stolen."⁸³

Though cloaked in high-minded rhetoric about fairness and legality, this discussion has been awash in partisan hypocrisy on both sides. Democrats were for the filibuster until it was used against them.⁸⁴ Republicans were against the filibuster until it came their time to use it. Both sides use delay to defeat judicial nominees when they control the Senate. Merrick Garland was the first Supreme Court nominee to be defeated this way, but it has happened to scores of lower court nominees of both parties.⁸⁵ Republicans turned a deaf ear to Democratic complaints about their treatment of Garland because Democrats—including Vice President Biden—had openly stated they would do the same to any last-year Supreme Court nominee by President George H. W.

80. See Jeffrey Toobin, *Can Merrick Garland Kill the Filibuster?*, NEW YORKER (Mar. 25, 2016), <https://www.newyorker.com/news/daily-comment/can-merrick-garland-kill-the-filibuster> (explaining the ways Congress can stop a Supreme Court nominee).

81. See *id.*

82. See *id.*

83. See Steve Benen, *With Gorsuch Confirmed, McConnell Gets Away with Stealing a Seat*, MSNBC (Apr. 7, 2017 1:01 PM), <http://www.msnbc.com/Rachel-maddow-show/Gorsuch-confirmed-mcconnell-gets-away-stealing-seat>.

84. See Thomas Sowell, *Supreme Hypocrisy*, NAT'L REV. (Mar. 29, 2016 4:00 AM), <http://www.nationalreview.com/article/433345/judicial-nominee-confirmation-hearings-bipartisan-hypocrisy>.

85. See Sheldon Goldman, *Assessing the Senate Judicial Confirmation Process: Index of Obstruction and Delay*, 86 JUDICATURE 251 (2003).

Bush, back in 1992.⁸⁶ Each time these tactics are used, the ox being gored screams as if it were the first ox that ever lived.

The filibuster and delay are the principal tactics used by the party opposite to the president to defeat worthy nominees.⁸⁷ If the opposition party controls the Senate, the tactic of choice is delay. All the opponents of a nomination have to do is nothing, and the nomination can go nowhere. If they can run out the clock on the administration, as they typically can and do in the final year of the administration, the seat will remain open for the next president, who is likely to be of their party.⁸⁸ This happened to John Roberts in 1992⁸⁹ and to Merrick Garland in 2017.⁹⁰

The delay tactic works only when the party opposed to the president controls the Senate because the majority party runs the Judiciary Committee and it schedules votes.

Unlike the filibuster, which has sincere (even if misguided) defenders, I am not aware of anyone who has propounded a principled defense of the tactic of delay. A Senate majority opposite to the president can defeat any nominee it wishes to defeat, by the open and transparent means of a negative vote. Senators must then defend their negative votes to their constituents. Delay accomplishes the same end without the openness or transparency, and without putting senators in the majority to the necessity of defending their votes. (What reasons would Republican senators have been able to give for voting against Merrick Garland to the Supreme Court?)

When the party opposite to the president is in the minority in the Senate, the filibuster becomes their favored tactic, assuming the filibuster is permitted under the rules, because with the filibuster, all it takes is forty-one votes to defeat a nominee.⁹¹ There has been a filibuster-proof Senate majority for only

86. See Julie Hirschfeld Davis, *Joe Biden Argued for Delaying Supreme Court Picks in 1992*, N.Y. TIMES (Feb. 22, 2016), <https://www.nytimes.com/2016/02/23/us/politics/joe-biden-argued-for-delaying-supreme-court-picks-in-1992.html>.

87. See, e.g., Carl Hulse, *Democrats Perfect Art of Delay While Republicans Fume Over Trump Nominees*, N.Y. TIMES (July 17, 2017), <https://www.nytimes.com/2017/07/17/us/politics/senate-democrats-art-of-delay-trump-nominees.html>.

88. See *id.*; see also Benen, *supra* note 85.

89. See Neil A. Lewis, *Waiting for Clinton, Democrats Hold Up Court Confirmations*, N.Y. TIMES (Sept. 1, 1992), <http://www.nytimes.com/1992/09/01/us/waiting-for-clinton-democrats-hold-up-court-confirmations.html>.

90. See Karoun Demirjian, *Republicans Refuse to Budge Following Garland Nomination to Supreme Court*, WASH. POST (Mar. 16, 2016), <https://www.washingtonpost.com/news/powerpost/wp/2016/03/16/republicans-refuse-to-budge-following-garland-nomination-to-supreme-court/>.

91. See Charlie Savage, *The Senate Filibuster, Explained*, N.Y. TIMES (Apr. 3, 2017), <https://www>

one brief period in modern history, between the landslide election of 2008 and the death of Senator Kennedy and his subsequent replacement by Republican Scott Brown.⁹²

Two arguments are commonly made in favor of the judicial filibuster. The arguments are not ideological—they are neither liberal nor conservative, Republican nor Democrat. They are opportunistic rather than ideological. The arguments are trotted out with predictable regularity and self-righteous vehemence by whichever party is in the minority in the Senate. It does not matter that the same senator may have been making exactly the opposite argument a year or two before when minority and majority were switched. It is argued, first, that the filibuster is a time-honored Senate tradition which should not be changed,⁹³ and it is argued, second, that a super-majority vote requirement encourages better and more moderate judicial appointments.⁹⁴ Neither argument is persuasive.

Although the rules of the Senate did not expressly distinguish between judicial filibusters and any others, the minority party did not use the filibuster as a partisan tactic for lower court nominees until 2003, when the Democratic minority began blocking President George W. Bush's judicial nominations.⁹⁵ The Republican majority considered nipping the tactic in the bud by a point of order—dubbed by Democrats “the nuclear option,” a nickname that has stuck—but the tactic was rescued by a compromise brokered by a group of fourteen moderate senators of both parties to preserve the filibuster but reserve it for what that group would agree were special cases.⁹⁶ The Republican minority then used the filibuster under President Obama, without the gang of

nytimes.com/2017/04/03/us/politics/filibuster-supreme-court-neil-gorsuch.html.

92. See David Welna, *Democrats Ponder Loss of Filibuster-Proof Majority*, NPR (Jan. 21, 2010 4:00 AM), <https://www.npr.org/templates/story/story.php?storyId=122799603>.

93. See Sarah A. Binder & Steven S. Smith, *Filibusters a Great American Tradition*, BROOKINGS (May 25, 2003), <https://www.brookings.edu/opinions/filibusters-a-great-american-tradition>.

94. See Catherine Fisk & Erwin Chemerinsky, *In Defense of Filibustering Judicial Nominations*, 26 CARDOZO L. REV. 331, 342–43 (2005) (“The real effect of the filibuster is to push nominees for the federal judicial bench more to the middle.”); John O. McGinnis & Michael B. Rappaport, *In Praise of Supreme Court Filibusters: A View from Beyond Partisanship*, NAT’L REV. (June 25, 2009 8:00 AM), <https://www.nationalreview.com/2009/06/praise-supreme-court-filibusters-john-o-mcginnis-michael-b-rappaport>.

95. See Ed Whelan, *Don't Bring Back the Judicial Filibuster*, NAT’L REV. (Nov. 5, 2014 9:00 AM), <http://www.nationalreview.com/article/392048/dont-bring-back-judicial-filibuster-ed-whelan>.

96. See Ryan T. Becker, Comment, *The Other Nuclear Option: Adopting a Constitutional Amendment to Furnish a Lasting Solution to the Troubled Judicial Confirmation Process*, 111 PENN ST. L. REV. 981, 988 (2007) (“Just when it looked like the only option for the Republicans was to ‘go nuclear,’ at the eleventh hour, a compromise was reached among fourteen Senators—seven Democrats

fourteen to confine it to special cases.⁹⁷ Most significantly, they blocked three Obama nominees to the all-important Court of Appeals for the D.C. Circuit.⁹⁸ The Democrats could not live with that, and so they employed the very nuclear option they had so strenuously opposed when the shoe was on the other foot.⁹⁹ The filibuster for district court and appellate judicial nominees was thus in use for only ten years. Ten years does not constitute a time-honored tradition.

The partisan use of the filibuster for Supreme Court nominees is even less of a hallowed tradition.¹⁰⁰ The first Supreme Court nominee ever to be actually filibustered—meaning that the nominee enjoyed majority support but was blocked because of the need for a supermajority—was Neil Gorsuch.¹⁰¹ This shows just how new the practice of filibustering judicial nominees is. The confirmation battle over Clarence Thomas was the most bitter and contentious successful nomination fight in recent history, and he was confirmed with only fifty-two votes and without anyone suggesting the use of a filibuster.¹⁰² The nomination of Abe Fortas as Chief Justice was filibustered in 1968, but he lacked majority support—probably because of bipartisan awareness of the ethical issues that soon became public and forced his resignation from the Court.¹⁰³ There were abortive attempts to filibuster John Roberts and Samuel Alito, but these attempts did not get enough support to make a difference.¹⁰⁴

and seven Republicans—that avoided the rule change.”).

97. See Paul Kane, *Reid, Democrats Trigger ‘Nuclear’ Option; Eliminate Most Filibusters on Nominees*, WASH. POST (Nov. 21, 2013), https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe852b6-11e3-9fe0-fd2ca728e67c_story.html.

98. See *id.*

99. See *id.*

100. See Arthur L. Rizer III, *The Filibuster of Judicial Nominations: Constitutional Crisis or Politics as Usual?*, 32 PEPP. L. REV. 847, 856 (2005) (“It has not been but for the last few years that the country has seen the filibuster tactic used to assail judicial nominees.”).

101. See Ed O’Keefe & Sean Sullivan, *Senate Republicans Go ‘Nuclear,’ Pave the Way for Gorsuch Confirmation to Supreme Court*, WASH. POST (Apr. 6, 2017), https://www.washingtonpost.com/powerpost/senate-poised-for-historic-clash-over-supreme-court-nominee-neil-gorsuch/2017/04/06/40295376-1aba-11e7-855e-4824bbb5d748_story.html.

102. See R. W. Apple Jr., *The Thomas Confirmation; Senate Confirms Thomas, 52–48, Ending Week of Bitter Battle; ‘Time for Healing,’ Judge Says*, N.Y. TIMES (Oct. 16, 1991), <http://www.nytimes.com/1991/10/16/us/thomas-confirmation-senate-confirms-thomas-52-48-ending-week-bitter-battle-time.html>.

103. See John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL’Y 181, 218–23 (2003) (arguing that the nomination of Fortas as Chief Justice was defeated not because of a filibuster, but because he could not gain the support of fifty-one senators due to ethical concerns, which later lead to his resignation as an Associate Justice).

104. See Sheryl Gay Stolberg, *Filibuster on Supreme Court Nominee Appears Unlikely*, N.Y. TIMES

Thus, the time between the first partisan filibuster of a Supreme Court Justice and the vote to end the practice was about a week.¹⁰⁵

In my opinion, the real injury to longstanding tradition would have occurred if the judicial filibuster had become entrenched. Under circumstances of modern partisan division, it would be the rare nominee to a significant position who could muster sixty votes in the Senate, considering that Neil Gorsuch could not, and he was an entirely mainstream nominee.¹⁰⁶ There was a very real danger that no vacancy on the Supreme Court—and probably soon the appellate courts—could be filled. The likely result is that presidents would have to fill vacancies by means of recess appointments; meaning that our Judiciary, rather than being life-tenured and independent, would be filled with short-term judges whose future prospects would depend on the political popularity of their decisions.¹⁰⁷ That would be a catastrophe. In my opinion, the nation was fortunate that Majority Leader Harry Reid got impatient and eliminated the lower court filibuster,¹⁰⁸ and fortunate that the Garland-Gorsuch imbroglio created such an intractable mess that Majority Leader McConnell did the same with the Supreme Court filibuster.¹⁰⁹

The second argument for the judicial filibuster is that it eliminates the

(July 21, 2005), <https://www.nytimes.com/2005/07/21/politics/politicsspecial1/filibuster-on-supreme-court-nominee-appears.html> (reporting that “Democrats emerged from a meeting of swing senators to say they did not envision their party trying to block the nomination” of John Roberts); *Anti-Alito Filibuster Soundly Defeated*, CNN (Jan. 30, 2006 7:56 PM), <http://www.cnn.com/2006/politics/01/30/alito> (stating that twenty-four Democrats sought to filibuster Justice Alito’s nomination, but were rejected by a bipartisan majority).

105. See Matt Flegenheimer, *Democrats’ Vow to Filibuster Ensures Bitter Fight Over Gorsuch*, N.Y. TIMES (Apr. 3, 2017), <https://www.nytimes.com/2017/04/03/us/politics/senate-democrats-appear-poised-to-filibuster-gorsuch-nomination.html> (noting that Senate Democrats obtained enough votes to filibuster Gorsuch on Monday, April 3); O’Keefe & Sullivan, *supra* note 103 (stating that Republicans overcame the filibuster on Thursday, April 6th).

106. See Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, N.Y. TIMES (Apr. 7, 2017), <https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html> (stating that fifty-four senators voted to confirm Gorsuch while forty-five senators voted against his confirmation).

107. See Rizer III, *supra* note 102, at 877–78 (“In accordance with the Recess Appointment Clause, the President is authorized to make appointments to vacant offices when the Senate is in recess. . . . Recently, many have argued, and the President has complied in a limited sense, that the President should use this approach as an end-run around the Senate entirely and appoint his filibustered nominees.”).

108. See Kane, *supra* note 99 (quoting Senator Reid’s statements that “[t]he American people believe the Senate is broken, and I believe the American people are right,” and “[i]t’s time to get the Senate working again”).

109. See O’Keefe & Sullivan, *supra* note 103 (noting the Senate Republicans’ decision to end the filibuster against Gorsuch).

more extreme and less qualified candidates.¹¹⁰ The theory is that because nominees need to gain at least a few votes from the opposite party, Presidents will choose to nominate judges of a more moderate bent.¹¹¹ Unfortunately, there is no evidence that the filibuster was targeted at more extreme nominees or that it had the salutary effect claimed for it. To the contrary, the party opposed to the president has an incentive to devote its energies to defeating young and especially capable nominees who are likely to be influential and who might be plausible Supreme Court nominees in the future—particularly non-white and female Republican nominees—presumably because of the politics.¹¹²

The most frequent and successful use of the judicial filibuster was under George W. Bush. I do not think a fair-minded person would say that the victims of the filibuster in that period were the most extreme nominees. Among the first to be defeated via filibuster was Judge Carolyn Kuhl, a distinguished Superior Court judge in Los Angeles, who was overwhelmingly endorsed by the California Bar Association.¹¹³ Kuhl was the second woman to serve as Deputy Solicitor General of the United States, and it is believed that she was blocked because she had been part of the legal team who had represented President Reagan's views on *Roe v. Wade* to the United States Supreme Court.¹¹⁴ A second Bush nominee successfully blocked by the filibuster was Miguel Estrada, one of the nation's leading appellate lawyers, who had who served with distinction in the Solicitor General's office under President Clinton for five years.¹¹⁵ Many people think he was blocked because he is a conservative Republican Hispanic with such ability that he would have made a strong nominee to the Supreme Court.¹¹⁶

110. See Fisk & Chemerinsky, *supra* note 96, at 342–43.

111. See *id.* at 343 (“[T]he Senate blocks the most extreme nominees from being confirmed and the President is given a strong incentive to pick more from the middle.”).

112. See Nicole Asmussen, *Female and Minority Judicial Nominees: President's Delight and Senators' Dismay?*, 36 LEGIS. STUD. Q. 591, 592 (2011) (noting that “various tactics have been used in previous congresses to thwart nominations, and the numbers attest to their disproportionate damage to female and minority nominees”).

113. See Nick Anderson, *Democrats in Senate Block Bush Nominee*, L.A. TIMES (Aug. 1, 2003), <http://articles.latimes.com/2003/aug/01/nation/na-judges1>.

114. See Vera Haller, *Woman Judicial Pick Opposed by Pro-Choice Groups*, WOMEN'S NEWS (June 29, 2001), <https://womensnews.org/2001/06/woman-judicial-pick-opposed-pro-choice-groups>.

115. See *Estrada Withdraws as Judicial Nominee*, CNN (Sept. 4, 2003 11:09 PM), <http://www.cnn.com/2003/allpolitics/09/04/estrada.withdraws>.

116. See *id.* (“Estrada's supporters charged that the Democrats were unfairly blocking a well-qualified candidate because of his conservative views and because they did not want to give Bush credit

The only judicial nominee of President Obama who was successfully blocked by the use of the filibuster was Goodwin Liu.¹¹⁷ Goodwin Liu, now a justice on the California Supreme Court, was a young professor on the faculty of the University of California-Berkeley School of Law, with a brilliant (though decidedly liberal) reputation.¹¹⁸ If we were selecting judges for intellectual distinction and promise, without regard to politics, Liu would be high on any Democratic president's list.¹¹⁹ After Obama's reelection, Republican senators were starting to use the filibuster to block more and more nominees, which led the Democrats to use the "nuclear option" and return to a mere majority vote.¹²⁰

Opposition senators do not target the worst of a president's nominees; these can usually be defeated by ordinary means. Filibusters and extraordinary delay are most often reserved for the smartest, the youngest, and the most capable.

In my opinion, therefore, we are better off without the judicial filibuster. The best guarantee of a capable and balanced Judiciary is for the presidency to shift from party to party every eight years, and for presidents of both parties to name the best possible judges from their point of view. The result is a Judicial Branch of quality as well as diverse views. Giving the minority party in the Senate a veto does not noticeably improve the quality of the Judiciary.

IX. WHERE DO WE STAND AND WHERE ARE WE HEADED?

As of today, the judicial filibuster has been eliminated, and we can be confident it will not be resurrected.¹²¹ Why would the Senate majority restore the minority's ability to block some of the most important appointments a

for nominating a Hispanic.”).

117. See Carl Hulse, *G.O.P. Blocks Judicial Nominee in a Sign of Battles to Come*, N.Y. TIMES (May 19, 2011), <http://www.nytimes.com/2011/05/20/us/politics/20congress.html>.

118. See Maura Dolan, *Goodwin Liu Confirmed to California Supreme Court*, L.A. TIMES (Sept. 1, 2011), <http://articles.latimes.com/2011/sep/01/local/la-me-0901-goodwin-liu-20110901>.

119. See Hulse, *supra* note 119 (“Democrats lauded Mr. Liu’s credentials and accused Republicans of blocking his confirmation for ideological and political reasons.”).

120. See Ted Barrett, *Do Democrats Regret the ‘Nuclear Option’ Now That Trump Will be President*, CNN (Nov. 18, 2016), <http://www.cnn.com/2016/11/18/politics/democrats-nuclear-option-donald-trump/index.html>.

121. See Matt Flegenheimer, *Senate Republicans Deploy ‘Nuclear Option’ to Clear Path for Gorsuch*, N.Y. TIMES (Apr. 6, 2017), <https://www.nytimes.com/2017/04/06/us/politics/neil-gorsuch-supreme-court-senate.html>.

president ever makes? But the ability of the Senate majority to block nominees by delay remains as potent as ever.¹²² To be sure, we have not seen the power of delay exercised recently, because the presidency and the Senate majority are in the hands of the same party. But delay was used to great effect by the Republicans in the final years of the Obama administration, as it had been by the Democrats under Bush, the Republicans under Clinton, and the Democrats under Reagan.¹²³ If I could somehow wave a magic wand and eliminate this tactic, I would do so. In my opinion, nominees from both parties should be given a relatively prompt hearing and an up-or-down vote.

That, incidentally, was the system proposed by James Madison at the Constitutional Convention.¹²⁴ Madison proposed that judicial nominees be confirmed unless within a certain period of time the Senate *disapproved* by an affirmative vote.¹²⁵ If that amendment had been adopted, Merrick Garland would be on the Supreme Court today.¹²⁶ And that same rule would apply to the nominee of a Republican president.

Madison's reform is not possible without a constitutional amendment, as indeed he proposed.¹²⁷ But we could accomplish something similar by custom, or by adoption of a new Senate rule: the majority could promise to give

122. See Michael J. Gerhardt & Richard W. Painter, *Majority Rule and the Future of Judicial Selection*, 2017 WIS. L. REV. 263, 271 (“[A]ny individual senator within the majority, particularly any on the Judiciary Committee, may place a hold on a nomination or take advantage of the blue slip process, which allows a senator within the majority to defeat any nomination to a judgeship within his or her own state by simply choosing not to return the blue slip form.”).

123. See Sheldon Goldman, *Tracking Obstruction and Delay in U.S. Senate Confirmations of Judges to the Federal Courts*, SCHOLARS STRATEGY NETWORK (July 2013), <http://www.scholarsstratnetwork.org/brief/tracking-obstruction-and-delay-us-senate-confirmations-judges-federal-courts>.

124. See James I. Wallner, *The Foundations of Advice & Consent: Original Intent & the Judicial Filibuster*, 31 J.L. & POL. 297, 309–10 (2016) (noting that Madison’s proposal “created a presumption of deference to the President’s choice on the part of the Senate by requiring action on the President’s nominations in order to reject them”).

125. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 38 (Max Farrand ed., 1911). Initially, Madison proposed that disapproval require a supermajority, but he backed away from that suggestion. See *id.* (“Judges shall be nominated by the Executive and such nomination shall become an appointment if not disagreed to . . . by two thirds of the [Senate.]”); see also Wallner, *supra* note 126, at 309–10 (“Madison acknowledged that he was ‘not anxious that [two-thirds] should be necessary to disagree to a nomination’ and that, therefore, he was willing to modify his original proposal in order to eliminate the higher threshold requirement.” (quoting *id.* at 82)).

126. See Gerhardt & Painter, *supra* note 124, at 272 (“In Judge Garland’s case, no one questioned his credentials or qualifications, and his defeat undoubtedly will go down as not only a transparently political act on the part of the majority but also as a precedent upholding a majority’s entitlement to paralyze the Supreme Court selection process until or unless a president to its liking comes into office.”).

127. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 127, at 38.

every nominee a hearing within a certain period of time and a floor vote within a certain period of time after that, and enforce the rule by allowing a discharge petition after that period of time. This would, in my opinion, be desirable. But the prospects for either party doing this when it is in the majority are vanishingly small. It would make sense only if the current majority could obtain credible assurance that the other party would do the same when it takes power. Unfortunately, there is no mechanism for getting that kind of assurance, and neither party is likely to engage in what it would regard as unilateral self-disarmament. Behind the veil of ignorance, both sides might agree that the denial of a hearing and a vote to a qualified judicial nominee is indefensible, but senators do not act behind a veil of ignorance. Each party uses the power it has today, while it has it, confident that the other party would do the same or worse. If the Democrats were to gain a Senate majority in the off-year election of 2018, who can doubt that many if not all of President Trump's judicial nominations would be denied hearings and floor votes—even though Trump's judicial selections have been perhaps his most praiseworthy actions in office?

Our federal judiciary is a national treasure. It is the guarantor of the rule of law and the preserver of our constitutional system. No other country has a judiciary of comparable intellectual quality and dogged independence. In recent decades, the confirmation process has become a political football, with each side justifying its tactics by the claim that it is protecting the people from the extremism of the other side. In fact, our system needs no such protection. As long as the presidency shifts from party to party every eight years, the system is self-regulating. That does not mean we have a judiciary immune to politics. No such thing exists. But the politics is of a largely benign or at least neutral variety, favoring the educated elite, restraining rapid change, with relative partisan balance and regional diversity and a slant against the party in power. Let's not mess it up.