

Unpicking Pickering in 2002: Some Thoughts on the Politics of Lower Federal Court Selection and Confirmation

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On March 14, 2002, the Committee on the Judiciary of the United States Senate voted down the nomination of Judge Charles W. Pickering Sr. for the United States Court of Appeals for the Fifth Circuit. The Committee voted not to approve nor send the nomination to the floor of the Senate.¹ The vote was a straight party-line vote.² It was the culmination of a swirl of advocacy group pressure,³ last minute politicking by the president,⁴ and some heated exchanges between Democratic and Republican senators.⁵ The bitterness continued to spill over onto the Senate floor up until the spring recess and beyond.⁶

Editorial writers had a field day bemoaning what they saw as ideological and partisan bickering over judgeships.⁷ President Bush himself called the situation a "crisis."⁸ And depending upon their

¹ See 148 CONG. REC. D243 (daily ed. Mar. 15, 2002) (summary of Committee actions in Congressional Record) available at <http://thomas.loc.gov/r107/r107d15mr2.html>.

² Michael Petrocelli, *Senate Committee Rejects Pickering: Party-line Confirmation Vote Hands Bush First Defeat on Judicial Nominee*, HOUSTON CHRON., Mar. 15, 2002, at A10.

³ See Neil A. Lewis, *Fight Over Judicial Nominee Resumes*, N.Y. TIMES, Feb. 6, 2002, at A16 (reporting that "Civil rights and abortion rights groups have selected Judge Pickering . . . as their first major target for defeat."); Neil A. Lewis, *Vote on Bush Judicial Nominee is Delayed*, N.Y. TIMES, Mar. 8, 2002, at A17 (noting the criticism by Republican Senator Hatch who "flayed the groups who had criticized Judge Pickering as hostile to civil rights."). See generally Molly McDonough, *Showdown Over the Bench*, 88 A.B.A. J. 22 (2002) (notes that "several of Bush's nominees [are] being targeted for defeat by liberal special-interest groups").

⁴ See Neil A. Lewis, *Bush Makes a Public Appeal For a Federal Court Nominee*, N.Y. TIMES, Mar. 7, 2002, at A18 (quoting President's public remarks in Oval Office urging confirmation of Pickering); *President's Opening Statement*, N.Y. TIMES, Mar. 14, 2002, at A16 (presenting President's March 13, 2002, opening statement at news conference which was devoted to Pickering).

⁵ See Neil A. Lewis, *Vote on Bush Judicial Nominee is Delayed*, N.Y. TIMES, Mar. 8, 2002, at A16 (noting exchanges and tension among senators on Senate Judiciary Committee).

⁶ See Helen Dewar, *Senate Still in Standoff Over Lost Nominee; Lott Plans to Continue Reprisals on Democrats*, WASH. POST, Mar. 25, 2002, at A17; Jesse J. Holland, *Senate Feud Grows Ugly After Vote*, CHI. SUN-TIMES, Mar. 17, 2002, at 4; Neil A. Lewis, *More Battles Loom Over Bush's Nominees for Judgeships*, N.Y. TIMES, Apr. 7, 2002, at 24 (observing that "Neither the White House nor Senate Democrats are giving any quarter in their battle over what kind of judges should sit on the federal bench, and officials on both sides say they expect more confirmation fights in the months ahead."); Neil A. Lewis, *Party Leaders Clash in Capitol Over Pace of Filling Judgeships*, N.Y. TIMES, May 10, 2002, at A29 (quoting different views of Republicans and Democrats); Allison Mitchell, *Lott, Irate Over Judge, Plans to Block Daschle Aide*, N.Y. TIMES, Mar. 16, 2002, at A11 (reporting that "The rancor continued in the Senate today.").

⁷ See, e.g., David S. Broder, *Stop the Party Sniping*, WASH. POST, Mar. 20, 2002, at A33; Editorial, *Judicial Obstruction and Politics*, TAMPA TRIB., Mar. 26, 2002, at 10; Editorial, *Mindless Retribution*, BUFFALO NEWS, Mar. 19, 2002, at B10.

⁸ See Michael Petrocelli, *President Decries Judiciary 'Crisis'; Panel Set to Reject Bush Pick for Court*, HOUSTON CHRON., Mar. 14, 2002, at A16; see also Siobhan Gorman, *The Vacancy 'Crisis'*, NATIONAL J., May 18, 2002, at 1494-5.

political orientation, editorialists apportioned the blame accordingly.⁹ Yet I think it behooves us to step back and more objectively consider both the federal judicial selection process and the confirmation process. This includes the role of ideology in the sense of a nominee's policy views and judicial philosophy. And I suggest that if we do so, the Pickering episode can be viewed as an altogether legitimate manifestation of the messy business of politics in a democracy. In some respects, Pickering provides a model of how confirmation ought to work.

In Part I, I review evidence suggesting that policy views and judicial philosophy played a large role in the selection of judges by Presidents Ronald Reagan and George Bush. Additionally, there are some indications that they continue to be important in George W. Bush's administration. In Part II, I briefly examine the role that policy views and judicial philosophy play in the confirmation process, particularly as concerned the Pickering nomination. Part III compares Judge Pickering to other Bush appeals court nominees in terms of backgrounds and attributes. Part IV considers the problem of obstruction and delay in the recent past and the extent to which it may be continuing into the present. Some relevant data from recent Congresses is presented against which the Pickering nomination is compared. An Index of Obstruction and Delay provides an objective measure of this phenomenon and a basis for comparison of recent Congresses. Part V briefly addresses advocacy group involvement in the confirmation process, again focusing on the Pickering nomination. Part VI offers concluding thoughts and observations.

I. POLICY VIEWS AND JUDICIAL PHILOSOPHY IN THE SELECTION PROCESS

The highly publicized battle over Pickering made transparent the high stakes involved in the selection of judges, and, in particular, appeals court judges. The United States Courts of Appeals are the nation's regional supreme courts, second in authority only to the United States Supreme Court. In more than 99 percent of the cases filed in the appeals courts, they are the end of the legal line.¹⁰ Thus, administrations have

⁹ For examples blaming the Democrats, see Jim Wooten, *Judiciary Can't Evade Political Viciousness*, ATLANTA J. & CONST., Mar. 17, 2002, at D10; Editorial, *Bush Must Fight for his Judgeships*, BOSTON HERALD, Mar. 16, 2002, at 16. For examples blaming the Republicans, see Editorial, *The Politics of Judgeships*, N.Y. TIMES, Mar. 25, 2002, at A20; Editorial, *Unappealing Judges*, BOSTON GLOBE, Mar. 16, 2002, at A18.

¹⁰ Appeals filed in Fiscal 2001 in the twelve regional appeals courts numbered 57,464. See 34 THIRD BRANCH 1 (2002). Some 28,840 were terminated on the merits after oral hearings or submissions on briefs, Table S-1, Annual Report of the Administrative Office of

long recognized that it can make a difference who sits on the federal bench.¹¹

Indeed, the evidence is compelling that the Reagan administration thoroughly vetted the judicial philosophy of potential nominees not only to the appeals courts but the district courts as well.¹² Some examples from the Reagan presidential papers that have recently become available underscore this point as well as other facets of the selection process.

For example, a memorandum sent by Reagan's White House Counsel Fred F. Fielding to the members of the joint White House-Justice Department Judicial Selection Committee provided an analysis and recommendation for filling a vacancy on the district court bench of Montana.¹³ The memo reminded the Committee that earlier in the year the Committee had settled on a Montana state judge. Although the

the U.S. Courts, *available at* <http://www.uscourts.gov/judbus2001/tables/s01sep01.pdf>. The U.S. Supreme Court in its 2000-2001 Term summarily decided 124 cases and granted review to 99 others for a total of 223 cases. Some 7500 cases on appeal to the Court were denied, dismissed, or withdrawn. 70 U.S. L. WK. 3060 (2001).

¹¹ Early during the presidency of Richard Nixon, White House staffer Tom Charles Huston, wrote a seven-page memorandum to the president concerning judicial selection. Huston noted: "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."

Huston underlined "In approaching the bench, it is necessary to remember that the decision as to who will make the decisions affects what decisions will be made. That is, the role the judiciary will play in different historical eras depends as much on the type of men who become judges as it does on the constitutional rules which appear to set at least the outer limits of judicial action."

Huston urged that the president "take an active personal interest in appointments to all judicial vacancies . . . to establish precise guidelines as to the type of man he wishes to appoint — his professional competence, his political disposition, his understanding of the judicial function — and establish a White House review procedure to assure that each prospective nominee recommended by the Attorney General meets the guidelines."

Huston concluded by observing that if the President "establishes his criteria and establishes his machinery for insuring that the criteria are met, the appointments he makes will be his, in fact, as in theory." Memorandum for the President, Mar. 25, 1969, Ex FG 50 The Judicial Branch [1969-70] WHCF, Nixon Materials Project. Underlining in original.

Nixon not only read the memo carefully, but he directed it to Deputy Attorney General Kleindienst with a handwritten notation: "RN agrees — Have this analysis in mind in making judicial nominations." Underlining in original on cover memo from Ehrlichman to the Staff Secretary, Mar. 27, 1969, News Summaries (Mar. 1969), Box 30, President's Office Files, Nixon Materials Project.

¹² SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 285-345 (1997).

¹³ Judicial Selection Materials, Dec. 1984 [1 of 5] CF 514, Fielding Files, Ronald Reagan Library, Simi Valley, California.

memo does not mention it, had that judge been confirmed, she would have been the first woman to sit on the Montana district court bench, a bench which as of 2002 continues to be all male. The recommendation was to reconsider her based on "certain concerns raised in the ABA review of her qualifications . . . She is reported to have the highest reversal rate in the state and her temperament appears to be a major concern. . . [She] is a 'clear case' of a candidate likely to receive a 'Not Qualified' ABA rating."¹⁴

The memo went on to discuss three other candidates for the nomination. Charles C. Lovell was seen as a highly qualified lawyer who "has always been an active member of the Republican Party and has served since 1976 on the Montanans for Marlenee Committee; he has been strongly endorsed for this position by [U.S.] Rep. Ron Marlenee. . . His views on crime issues and social policy appear consistent with those of this Administration."¹⁵

The second candidate, Jack D. Shanstrom had previously been elected as a county attorney running on the Republican ticket. Shanstrom had received an interim appointment by Republican Governor Jim Babcock to a state judgeship at the age of 32. He was defeated for reelection some eighteen years later, and was subsequently appointed the first full-time United States Magistrate for the District of Montana. The memo noted:

"As a trial judge, Jack Shanstrom had a consistent reputation for being strong on law enforcement — he has upheld the death penalty, lobbied actively for a 'good faith' amendment to the exclusionary rule, and was rated one of the state's toughest judges in sentencing criminals. Though not regarded as a scholar, his service and experience on the bench are highly regarded by both the judiciary and the bar throughout Montana. . . Although all three leading candidates are clearly conservative, [the Department of] Justice notes that Judge Shanstrom's long track record on the bench makes him the 'safest' nomination in terms of the consistency of his judicial philosophy with that of this Administration."¹⁶

The third candidate was Sam E. Haddon. The memo told that he graduated first in his law school class at the University of Montana and was "the most scholarly and articulate of the judicial candidates considered here. . . [He is] one of the smartest and finest trial lawyers in the state. Haddon has been active in supporting Republican candidates,

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

a very pro-law enforcement NRA member; and he is regarded by his colleagues as conservative.”¹⁷

Although the Reagan Justice Department recommended selecting Shanstrom, the Judicial Selection Committee recommended Lovell, who was nominated and confirmed in 1985. Shanstrom was later nominated to fill another vacancy on the federal district bench by President Bush in early 1990 and was confirmed later that year. President George W. Bush named Haddon in 2001 to the seat made vacant when Lovell assumed senior status. Haddon was confirmed later in the year.

Another example of the Reagan Administration’s rigorous vetting of judicial nominees concerns the filling of a judgeship in Arizona. Senator Barry Goldwater recommended state Judge Robert C. Broomfield for one of two vacancies on the district court. The memo sent by Fielding to the Selection Committee observed that: “He is very well regarded by the legal community, and is praised by the [Justice] Department officials who know him.”¹⁸ The memo also revealed that Supreme Court Justice Sandra Day O’Connor, a former colleague of Judge Broomfield on the Superior Court, “was especially enthusiastic in her endorsement. . . She assured us that Judge Broomfield is ‘right on the button’ philosophically.”¹⁹ Broomfield was chosen and went on the federal bench in 1985.

For the appeals courts there was even more consistent ideological vetting. For example, in scrutinizing candidates for a position on the Tenth Circuit, which was to be filled by a citizen of Colorado, a Fielding memo reported that Colorado Republican Senator Armstrong recommended elevating Federal District Judge John P. Moore. The memo further stated that four members of the House recommended the elevation of Chief U.S. District Judge Sherman G. Finesilver.²⁰ In discussing Moore, the memo reported “[The] Justice [Department] states that a preliminary review of Judge Moore’s reported decisions indicate his judicial philosophy is compatible with the President’s.” Not so with Judge Finesilver, who originally had been appointed by Richard Nixon. The memo stated:

“Justice’s review of Judge Finesilver’s articles and reported

¹⁷ *Id.*

¹⁸ Judicial Selection Materials, Dec. 1984 [5 of 5] CF 514, Fielding Files, Ronald Reagan Library, Simi Valley, California.

¹⁹ *Id.*

²⁰ Judicial Selection Materials, Aug. 1984 [1 of 3] CF 514, Fielding Files, Ronald Reagan Library, Simi Valley, California.

decisions showed that he is a 'hardliner' on crime, but that he is relatively moderate on civil rights issues. . . Justice has expressed particular concerns over Judge Finesilver's analysis of constitutional rights in *Foe v. Vanderhoof*, 389 F. Supp. 947 (D. Colo. 1975). In *Foe*, Judge Finesilver declared unconstitutional a Colorado statute which required parental consent before an unmarried minor could obtain an abortion, and stated that 'the right to privacy as expounded in *Roe* and *Doe* to include a decision to terminate a pregnancy extends to minors,' 389 F. Supp. at 953. Additionally, the judge referred to parents in *Foe* as 'third parties' who should not have 'exclusive control over the activities of minors in this area,' 389 F. Supp. at 956. Based on an analysis of Judge Finesilver's writings, Justice has concluded that he is not a suitable candidate for the Tenth Circuit."²¹

And that was the end of Finesilver's candidacy.

The evidence is equally compelling that the Bush, Sr. Administration scrutinized potential judicial nominees in terms of their ideology and judicial philosophy.²² Although the Bush, Sr. presidential papers have yet to be fully opened, there are examples from the already released papers that point up the vetting process. An example is the evaluation of then Federal District Court Judge Jose A. Cabranes' record as a potential Second Circuit nominee. The memo on Cabranes conceded that his "judicial writings are scholarly, reflecting a lucid style and careful attention to detail. He is seldom reversed . . ."²³ Nevertheless the memo asserted "In general . . . Judge Cabranes' academic writings and judicial opinions mark him as a judicial activist with deeply held views regarding the power of the courts to bring about social change."²⁴ The evidence provided in the memo was a speech Cabranes made in a 1982 symposium, in which he defended the federal courts as a forum for protecting individual rights, particularly when state courts do not do the job. In addition, the memo opined, "Some of Judge Cabranes' criminal law decisions reflect a greater solicitude for the rights of criminal

²¹ *Id.*

²² In a television interview C. Boyden Gray, Bush's White House Counsel, noted that the administration was very careful with judicial selection and scrutinized the philosophy of judicial candidates. Interview with Carl Stern, NBC Nightly News, Oct. 5, 1992. An account of an interview with Gray noted that "the President is looking for judges who are not activists. Mr. Gray also said that if Mr. Bush is reelected, he would continue to name judges with a conservative philosophy." Neil A. Lewis, *Biden Warns Bush on Supreme Court Nominations*, N.Y. TIMES, June 26, 1992, at B8.

²³ Lee Liberman Subject Name Files, Box 40964, Cabranes, Jose A. [CF OA/ID 02081], George Bush Library, College Station, Texas.

²⁴ *Id.*

defendants than is found among conservative jurists.”²⁵ Finally, the memo concluded that “[I]n construing the Constitution, Judge Cabranes is willing to look beyond the text and the intent of its Framers.”²⁶ Needless to say, Jose Cabranes was not promoted by the Bush administration. President Bill Clinton, however, did elevate Judge Cabranes to the Second Circuit in 1994.

Another example of ideological vetting for a circuit court post concerned the evaluation of an Idaho state judge, Duff McKee, who was one of four men recommended by Idaho Republican Senator McClure. The memo noted that the Justice Department had asked Judge McKee to submit “his ten favorite opinions.”²⁷ But the memo noted “Three of these are quite problematic.”²⁸ One opinion concerned the counting of time spent on parole decided in favor of the convicted criminal. Another involved Judge McKee’s refusal to apply a “good faith” exception to the exclusionary rule. The third was a finding that allowed a plaintiff to sue in a civil suit. The memo concluded: “These three opinions would likely be sufficient cause for rejecting Judge McKee even if they were part of a random sample of his work. That he selected them from his corpus as three of his favorites seems dispositive.”²⁹ McKee was not nominated.

The evaluation of the candidacy of Federal District Judge Susan H. Black for a vacancy on the Eleventh Circuit had a more positive outcome. Judge Black, a Carter appointee to the district bench, was the subject of a detailed examination of her opinions. The examination revealed:

“[Judge Black’s] extensive record of opinions generally demonstrates a commitment to strict interpretation of both substantive law and rules of procedure. . . In the criminal law area — where she has handled large numbers of death row habeas petitions — Judge Black’s decisions are strict and unsentimental. . . Judge Black’s decisions on the civil side also demonstrate restrained interpretation of constitutional claims, strict application of procedural bars to recovery, and conscientious application of pertinent precedent. . . Judge Black’s opinions do not reveal any discernible tendency towards overly expansive construction of

²⁵ *Id.*

²⁶ *Id.*

²⁷ Counsel’s Office, White House OF 56, Liberman, Lee S., Circuit/Supreme Court Files, Box 40950, Ninth Circuit Court of Appeals [OA/ID 20356] [1], George Bush Library, College Station, Texas.

²⁸ *Id.*

²⁹ *Id.*

asserted rights or judicial legislating.”³⁰

Judge Black was elevated in 1992.

While campaigning for the presidency, President George W. Bush committed himself to naming judges like Justices Antonin Scalia and Clarence Thomas, two of the most conservative justices on the U.S. Supreme Court.³¹ As president, he has stated bluntly that he is looking to appoint “conservatives” to the courts.³² Judge Pickering’s judicial record, no doubt, was thoroughly scrutinized by the Administration and found to be consistent with the Administration’s policy agenda.

The judicial selection process is, of course, a political process with many facets.³³ But the trend has been unmistakably to move away from primarily patronage concerns to concerns about furthering the president’s policy agenda through judicial appointments.³⁴

II. POLICY VIEWS AND JUDICIAL PHILOSOPHY IN THE CONFIRMATION PROCESS

The President nominates but the Senate has the constitutional responsibility to advise and consent. And just as presidents have sought to further their policy agendas through their appointments, so too have senators made determinations about whether a nominee’s views and philosophy are best for the country. Just as the Constitution gives the widest latitude to the President in making appointments to the judiciary, so too does the Constitution impose no restraints on the exercise of the

³⁰ Lee Liberman Subject Name Files, Box 40963, Black, Susan Harrell. [CF OA/ID 02081], George Bush Library, College Station, Texas.

³¹ Elisabeth Bumiller, *Bush Vows to Seek Conservative Judges*, N.Y. TIMES, Mar. 29, 2002, at A24 (noting that in November, 1999, Bush “singled out Justices Antonin Scalia and Clarence M. Thomas, the two most conservative members [of the Supreme Court], as justices whom he held in high regard.”).

³² *Id.*

³³ See generally, HAROLD W. CHASE, *FEDERAL JUDGES: THE APPOINTING PROCESS* (1972); MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* (2000); SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* (1997); NEIL D. MCFEELEY, *APPOINTMENT OF JUDGES: THE JOHNSON PRESIDENCY* (1987); DAVID M. O’BRIEN, *JUDICIAL ROULETTE: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION* (1988).

³⁴ See GOLDMAN, *supra* note 33; Tracy E. George, *Court Fixing*, 43 ARIZ. L. REV. 9, 15-62 (2001) (analyzing background factors including being legal academic and relationship to success of presidential policy agendas on appeals courts); see also Nancy Scherer, *Political Uses of Lower Federal Court Appointments: Mobilizing Elites, Mobilizing Masses*, paper prepared for delivery at the 2002 Annual Meeting of the American Political Science Association.

confirmation power. This has meant, particularly since the 1980s, that senators feel free to oppose judicial nominees on policy and judicial philosophical grounds.³⁵

Given the important role that policy views and judicial philosophy play and have played in the selection process, as illustrated *supra*, it is not surprising that they also have played and continue to play a part in the confirmation process, as demonstrated by the events surrounding the defeat of Pickering in 2002.

By taking a stand against Pickering's nomination, Democratic senators suggested that they were acting out of concern that President George W. Bush, like his father and Ronald Reagan before him, was trying to pack the courts with conservative activists. Such judges, among other concerns, would undermine the rights of women in consultation with their physicians to make medical decisions concerning unwanted pregnancies, weaken the separation of church and state, dilute the rights guaranteed in the Bill of Rights to those accused of crimes, be unsympathetic to the rights of workers and organized labor, eviscerate the laws and regulations meant to protect the environment, and compromise gender and racial equality.³⁶ Pickering's opponents argued

³⁵ See GOLDMAN, *supra* note 33, at 307-19 for examples during the presidency of Ronald Reagan. For examples during the Bush Sr. administration, see Sheldon Goldman, *The Bush Imprint on the Judiciary: Carrying on a Tradition*, 74 JUDICATURE 294, 304-5 (1991); Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 JUDICATURE 282, 291 (1993). For examples during the Clinton administration see Sheldon Goldman, *Judicial Selection Under Clinton: A Midterm Examination*, 78 JUDICATURE 276, 288-89 (1995); Sheldon Goldman & Elliot Slotnick, *Clinton's First Term Judiciary: Many Bridges to Cross*, 80 JUDICATURE 254, 273 (1997); Sheldon Goldman & Elliot Slotnick, *Clinton's Second Term Judiciary: Picking Judges Under Fire*, 82 JUDICATURE 264, 267-73 (1999); Sheldon Goldman, Elliot Slotnick, Gerard Gryski & Gary Zuk, *Clinton's Judges: Summing up the Legacy*, 84 JUDICATURE 228, 231-41 (2001).

³⁶ At Judge Pickering's second nomination hearing on February 7, 2002, before the Senate Committee on the Judiciary, Democratic Senator Diane Feinstein noted:

"I think it is very hard to overstate the importance of an appointment to the United States Courts of Appeals . . . Many of the issues that we wrestle with as a nation . . . a woman's right to choose, civil rights, the relationship between church and state . . . are essentially decided by the courts."

Senate Comm. on the Judiciary, *Judicial Nominations: Transcript of Proceedings*, Feb. 7, 2002, at 2 (on file at the Senate Judiciary Committee Library).

At the Committee on the Judiciary's March 14, 2002, Committee Business Meeting, which debated and voted on the Pickering nomination, Democratic Senator Charles Schumer stated:

"The Administration is . . . sending up waves of Scalias and Thomases . . . Our courts are in danger of slipping out of balance. We are seeing conservative judicial activism erode Congress's power to enact laws that protect the

that his record as a federal district judge suggested that he would be such a judge who would help push an already conservative Fifth Circuit even further to the right.³⁷

In support of Pickering, Republican senators argued that his record was being misrepresented and mischaracterized.³⁸ Republicans argue that it is not the business of judges to create rights nor go beyond the intent of the framers. Further, they contend that liberal judicial activists conveniently overlook compelling competing values such as states rights and federalism, the right of a fetus to life, the guarantee of the free exercise of religion, the rights of crime victims, the rights of property owners, and the right to be treated fairly and not be discriminated against by ethnic and gender preference programs.³⁹

As for Pickering, his supporters argued that he was well trained in the law, having graduated first in his law school class at the University of Mississippi. They emphasized that he received the highest rating from the American Bar Association's Standing Committee on Federal

environment, women's rights, workers' rights, just to name a few."

Senate Comm. on the Judiciary: Transcript of Proceedings, Mar. 14, 2002 at 59-60 (on file at the Senate Judiciary Committee Library).

In the floor debate over another appeals court nominee, Senator Schumer argued that the Bush nominees "are committed to an ideological agenda which turns the clock back to maybe the 1930s, maybe the 1890s." He declared "I am not going to vote to give the judge a lifetime appointment . . . [with] the power to invalidate the laws passed in this legislative, duly elected body; laws that protect privacy, laws that protect working people, laws that protect women, the environment . . . civil rights." 148 CONG. REC. S7564 (daily ed. July 30, 2002).

³⁷ Senator Charles Schumer at the March 14, 2002, committee meeting said:

"I have no problem voting in favor of very conservative hard right nominees when there is a balance on the other side. The Fifth Circuit is one of the most conservative courts in the country . . . Judge Pickering's confirmation would throw the Fifth Circuit even more out of balance."

Supra note 36, at 59.

³⁸ A report of the March 7 committee business meeting on Pickering noted that Republican Senator Orrin G. Hatch, accused opponents of having "smeared" Judge Pickering and that "the treatment of Judge Pickering was 'a lynching' . . ." Neil A. Lewis, *Vote on Bush Judicial Nominee Is Delayed*, N.Y. TIMES, Mar. 8, 2002, at A16. At the March 14 Committee meeting on Pickering, Senator Hatch gave a detailed defense of the judge's judicial record to counter the "misinformation" being spread about Pickering. *Supra* note 36, at 17. Republican Senator Grassley accused the Democrats of presenting "misleading portrayals of [Pickering's] personal beliefs and judicial rulings." *Id.* at 32.

³⁹ See, e.g., Scherer, *supra* note 34, at 6 ("For right-wing Republican elites, they see the courts as vital in protecting community values; they want judges who support the death penalty, who prioritize the rights of crime victims over the 'technical' civil liberty rights of criminal defendants and who oppose race preferences for minorities" and who oppose abortion.).

Judiciary. They also portrayed him as a man of great personal courage, who in the 1960s openly opposed the Ku Klux Klan, and at great risk to himself and his family cooperated with the FBI by testifying against a Klan leader. Pickering's supporters noted that many in the local African American community in Mississippi supported his elevation to the Fifth Circuit despite opposition from the national civil rights leadership.⁴⁰

III. PICKERING COMPARED TO OTHER BUSH APPEALS COURT NOMINEES

Pickering was in many respects a typical Bush nominee. During the 107th Congress, the President nominated thirty-one individuals to the appeals courts of general jurisdiction.⁴¹ Of the thirty-one:

- * Eighteen (or 58%) were judges at the time of their nominations (including eleven federal district judges). Pickering was serving as U.S. District Judge for the Southern District of Mississippi;

- * Twenty-three (or 74%) had judicial or prosecutorial experience or both in their professional background. Pickering had both types of experience;

- * Twenty (or 65%) received the highest American Bar Association rating of "Well Qualified" (eleven received a unanimous committee rating of Well Qualified and nine received a Well Qualified rating by a majority of the ABA Committee). Pickering received a majority rating of Well Qualified with a minority voting for a Qualified rating;

- * Twenty (or 65%) were white males. Of the remaining eleven, seven were white females, three were African American males, and

⁴⁰ See David Firestone, *Blacks at Home Support a Judge Liberals Assail*, N.Y. TIMES, Feb. 17, 2002, at 16; *Senate Comm. on the Judiciary, Judicial Nominations: Transcript of Proceedings*, Feb. 7, 2002, at 4-9 (defense of Pickering by Republican Senator McConnell, in particular his courage in opposing the Ku Klux Klan).

⁴¹ The data upon which the analyses in this section are based were derived from: the questionnaires completed by the nominees and submitted to the Committee on the Judiciary of the United States Senate; confirmation hearings; standard biographical directories such as THE AMERICAN BENCH (12th ed.), WHO'S WHO (national and regional editions), MARTINDALE-HUBBELL LAW DIRECTORY, and THE JUDICIAL STAFF DIRECTORY; and various newspaper stories and Associated Press dispatches. Some biographical data are from the Justice Department's Office of Legal Policy website, available at <http://www.usdoj.gov/olp/nominations.htm>. Note that American Bar Association ratings for the nominees are posted on the website of the Standing Committee on Federal Judiciary, available at <http://www.abanet.org/scfedjud/home.html>.

one was a Hispanic male. Pickering is a white male. It should be noted that Bush has nominated proportionately more women and minorities to the appeals courts than any previous Republican administration;

* Eighteen (or 58%) had a net worth in excess of one million dollars. Pickering had a net worth in excess of one million. The figures for the Bush nominees set a new record of millionaires nominated to the appeals courts (the previous record was the Clinton appointees of whom 51% were millionaires). The net worth figures, however, indicate that relatively low judicial salaries all but guarantee that only those who can afford to serve on the bench will be candidates for judgeships.⁴²

* Twenty-seven of the thirty (or 90%) for whom there was political party information were Republicans. There were two Democrats and one Independent. Pickering is a Republican.

Pickering's age at the time of nomination was the only characteristic not typical of the Bush nominees. At 64 he was considerably older than the typical Bush nominee by almost fifteen years (the average age of the thirty-one Bush appeals court nominees at the time of nomination was 49.7 years of age). Pickering's powerful political backing — his friend, Trent Lott, the Senate Minority Leader (who was Majority Leader at the time of Pickering's nomination on May 25, 2001) and his son, a member of Congress (Republican Representative Charles W. Pickering, Jr.) — along with his philosophical and professional credentials no doubt secured his nomination in the first place.⁴³

IV. THE PROBLEM OF OBSTRUCT AND DELAY

Charles Pickering was nominated on May 25, 2001. His first hearing was held the following October 18, some 146 days after his nomination was sent to the Senate. In the interim, partisan control of the Senate shifted from the Republican to the Democratic Party (after Vermont Senator Jim Jeffords left the Republican Party and voted with the

⁴² See *Panel Warned About Inadequate Pay for Federal Judges*, 34 THIRD BRANCH 1 (July 2002) (account of testimony by Chief Justice William H. Rehnquist and Associate Justice Stephen G. Breyer before National Commission on Public Service); see also Linda Greenhouse, *Pay Erodes, Judges Flee, and Relief Is Not at Hand*, N.Y. TIMES, July 17, 2002, at A11.

⁴³ See Neil A. Lewis, *Fight Over Judicial Nominee Resumes*, N.Y. TIMES, Feb. 6, 2002, at A16 (noting "Senator Lott has been unrelenting in his support.").

Democrats to reorganize the Senate). Terrorists attacked the United States on September 11, and deadly anthrax was sent through the U.S. postal service to among other targets, a Senate office building shutting it down. As Table One indicates, 146 days is below the average number of days for nominations to receive hearings during the 105th and 106th Congresses (coinciding with President Bill Clinton's second term) as well as the 107th Congress but considerably above the average number of days from the ten previous Congresses. However, the extraordinary events that intervened undoubtedly contributed to the delay. Democratic senators asked for a second hearing when they learned that there were a large number of unpublished decisions written by Pickering that had not been examined by the Committee. Pickering had this highly unusual second hearing on February 7, 2002. The Committee voted on his nomination on March 14, some 35 days after the second hearing.⁴⁴

The very public battle over Pickering was also unusual because most activity surrounding nominees to the lower federal courts occurs behind the scenes. Since the late 1980s, there has been a tendency for a nominee, opposed on policy or ideological grounds by one or more senators of the party controlling the Senate, to not even have a hearing, leaving such nominations to wither. Table One illustrates this trend. The proportion of Courts of Appeals nominees who received hearings was at a high point during the 95th, 97th, and 99th Congresses at 100 percent when the same party controlled the Senate and White House. It was at a low point at about 47 percent during the 106th Congress (when Democrat Bill Clinton was President and the Republicans controlled the Senate). For the 107th Congress, nineteen nominees to the appeals courts of general jurisdiction (about 61%) had hearings.

⁴⁴ A review of the Legislative and Executive Calendars for the three previous Congresses (104th-106th) revealed only one other instance of a nominee receiving a second hearing. William A. Fletcher, nominated by Bill Clinton to the Ninth Circuit, had his first hearing on December 19, 1995. He was favorably reported to the Senate on May 21, 1996, but the Senate Majority Leader failed to schedule a floor vote. Fletcher was subsequently renominated and another hearing was held on April 29, 1998. Once again he was favorably reported on May 21, 1998, and he was finally confirmed on October 8, 1998. Fletcher's long drawn-out confirmation battle is a particularly egregious example of the obstruct and delay phenomenon.

Table 1
 Courts of Appeals Nominees at the Committee Stage⁴⁵

Congress	Number and Percentage of Nominees Who Received Hearings	Average Number of Days From Time Nomination Received to Date of Hearing	Average Number of Days From Hearing to Date Nomination Reported	Number and Percentage of Nominees Confirmed by Full Senate
95th (1977-78)	12/12 100%	21.2 days	8.9 days	12/12 100%
96th (1979-80)	47/48 97.9%	47.7 days	25.2 days	44/48 91.7%
97th (1981-82)	19/19 100%	25.8 days	6.2 days	19/19 100%
98th (1983-84)	14/15 93.3%	14.8 days	29.7 days	12/15 80.0%
99th (1985-86)	32/32 100%	40.8 days	12.2 days	32/32 100%
100th (1987-88)	17/23 73.9%	90.9 days	41.5 days	15/23 65.2%
101st (1989-90)	18/19 94.7%	63.7 days	14.5 days	18/19 94.7%
102nd (1991-92)	21/30 70.0%	80.8 days	19.6 days	19/30 63.3%
103rd (1993-94)	19/21 90.5%	77.4 days	17 days	18/21 85.7%
104th (1995-96)	14/19 73.7%	79 days	37 days	11/19 57.9%
105th (1997-98)	22/28 78.6%	230.9 days	41.4 days	19/28 67.9%
106th (1999-2000)	15/32 46.9%	235.3 days	52.2 days	13/32 40.6%
107th (2001-2002)	19/31 61.3%	238.4 days	40.6 days	16/31 51.6% ⁴⁶

⁴⁵ Table includes nominations to courts of appeals of general jurisdiction. This means that the U.S. Court of Appeals for the Federal Circuit is excluded. Statistics derived from data reported in Committee on the Judiciary, United States Senate, Legislative and Executive Calendars and other committee documents as well as the Congressional Record. The 100th, 101st, 102nd, 104th, 105th, 106th, and 107th Congresses were in a divided government situation with one party controlling the Senate and the other the presidency.

⁴⁶ If Committee votes on Pickering and Priscilla Owen against confirmation are included, the percentage of nominations acted upon is 58.1%.

The proportion of nominees confirmed has also declined. It is true that Congresses that include a presidential election year (in Table One this was the even numbered Congresses) have a lower proportion of confirmations than Congresses that do not. Nevertheless, the evidence is suggestive of major obstruct and delay tactics for judicial nominations starting with the 100th Congress. Subsequent Congresses, on the whole, show increases in the average number of days from time of nomination to hearing and from the date of the hearing to the date the nomination was reported out of committee and sent to the floor of the Senate and major decreases in the proportion of nominees who received hearings. The obstruct and delay phenomenon is even more apparent with the findings in Table Two. What was typically a routine process once a nomination was favorably reported and sent to the floor of the Senate (i.e. rapid floor consideration with a substantial proportion of nominees confirmed the same day reported or one day after) is now a virtual obstacle course for some nominees. The average number of days from the date the nomination was reported to the date of confirmation ranged from a low of 1.9 days for the 97th Congress to 68.5 days for the 106th. The proportion of nominees who were confirmed the same day reported or one day after plummeted from a high of almost 78 percent in the 101st Congress to the single digits with the 104th through 106th Congresses. The proportion of nominees favorably reported who received confirmation floor votes dipped below the 100 percent level for the first time for two consecutive Congresses — the 104th and 105th.

Judicial selection before the presidency of Ronald Reagan was primarily patronage or partisan as opposed to policy agenda driven.⁴⁷ It was almost inconceivable that a senator not of the President's party would be able to prevent a nominee from having a hearing. One dramatic exception occurred in 1948 when Republicans controlled the Senate with Democrat Harry Truman in the White House. Anticipating winning the presidency, Republicans simply took no action on almost all of the Truman nominees. After Truman was reelected and the Democrats regained control of Congress, those Truman nominees as well as most others breezed through the Senate with virtually no Republican opposition.⁴⁸

⁴⁷ See generally, GOLDMAN, *supra* note 33. One major exception to this generalization was the administration of Franklin D. Roosevelt. See *id.* at 15-64.

⁴⁸ *Id.* at 81.

Table 2
Courts of Appeals Nominees on the Senate Floor⁴⁹

Congress	Average Number of Days From Date Nomination Reported to Date of Confirmation	Proportion of Nominees Reported Who Were Confirmed the Same Day Reported or One Day After	Percentage of Nominations Reported that were Confirmed
95th (1977-78)	3.2 days	25.0%	100%
96th (1979-80)	5.2 days	34.1%	100%
97th (1981-82)	1.9 days	52.6%	100%
98th (1983-84)	21.3 days	13.3%	91.7%
99th (1985-86)	13.3 days	40.6%	100%
100th (1987-88)	21.5 days	33.3%	88.2%
101st (1989-90)	2.5 days	77.8%	100%
102nd (1991-92)	14.4 days	63.2%	100%
103rd (1993-94)	6.7 days	38.9%	100%
104th (1995-96)	33.5 days	8.3%	84.6%
105th (1997-98)	40.7 days	5.3%	95.0%
106th (1999-2000)	68.5 days	7.7%	100%
107th (2001-2002)	26.4 days	18.8%	100%

⁴⁹ Table includes nominations to courts of appeals of general jurisdiction. This means that the U.S. Court of Appeals for the Federal Circuit is excluded. Statistics derived from data reported in Committee on the Judiciary, United States Senate, Legislative and Executive Calendars and other committee documents as well as the Congressional Record. The 100th, 101st, 102nd, 104th, 105th, 106th, and 107th Congresses were in a divided government situation with one party controlling the Senate and the other the presidency.

When the Senate Judiciary Committee holds no hearings and takes no action on judicial nominations, it fails its constitutional responsibility to advise and consent. Similarly, when the Committee and the Majority Leader slow down the confirmation process, that too represents a failure to advise and consent. During Republican control of the Senate during the Clinton presidency, some nominees waited years before finally being confirmed.⁵⁰ Many nominees to the appeals courts and district courts never had hearings in the first place.⁵¹ At the end of the Clinton presidency, nineteen nominations to the appeals courts (including two who had hearings) were not acted upon by the Senate, and those positions were vacant at the beginning of the Bush presidency.⁵²

⁵⁰ For the Courts of Appeals, during the last six years of Bill Clinton's presidency when the Republicans controlled the Senate, eight nominees took more than one year from nomination to confirmation. Marsha Berzon was first nominated on January 27, 1998 and confirmed March 9, 2000; Ronald Gould was first nominated on November 8, 1997 and confirmed on November 17, 1999; Richard Paez was first nominated on January 25, 1996 and confirmed on March 9, 2000; William Fletcher was first nominated on April 25, 1995 and confirmed on October 8, 1998; Eric Clay was first nominated on March 6, 1996 and confirmed on July 31, 1997; Merrick Garland was first nominated on September 5, 1995 and confirmed on March 19, 1997; Margaret McKeown was first nominated on March 29, 1996 and confirmed on March 27, 1998; and Sonia Sotomayer was first nominated on June 25, 1997 and confirmed on October 2, 1998.

⁵¹ Table One offers the data for the courts of appeals. For the district courts, those who received no hearings numbered 16 of 85 nominees (18.9%) during the 104th Congress, 9 of the 94 nominees (9.6%) during the 105th Congress, and 23 of 83 nominated (27.7%) during the 106th Congress. For statistical studies of lower federal court confirmation delay, see Garland W. Allison, *Delay in the Senate Confirmation of Federal Judicial Nominees*, 80 JUDICATURE 8 (1996); Sarah A. Binder & Forrest Maltzman, *Senatorial Delay in Confirming Federal Judges, 1947-98*, 46 AM. J. POL. SCI. 190 (2002); Sheldon Goldman, *The Judicial Confirmation Crisis and the Clinton Presidency*, 28 PRESIDENTIAL STUD. Q. 838 (1998); Roger E. Hartley, *Senate Delay of Minority Judicial Nominees*, 84 JUDICATURE 191 (2001); Roger E. Hartley & Lisa M. Holmes, *Increasing Senate Scrutiny of Lower Federal Court Nominees*, 80 JUDICATURE 274 (1997); Roger E. Hartley & Lisa M. Holmes, *The Increasing Senate Scrutiny of Lower Federal Court Nominees*, 117 POL. SCI. Q. 259 (2002); Wendy L. Martinek, Mark Kemper, & Steven R. Van Winkle, *To Advise and Consent: The Senate and Lower Federal Court Nominations, 1977-1998*, 64 J. POL. 337 (2002); David Nixon & David Goss, *Confirmation Delay for Vacancies on the Circuit Courts of Appeals*, 29 AM. POL. RES. 246 (2001); Scot Schraufnagel, *The Decline of Comity in Congress and Delay in the Confirmation of Federal Judges, 1977-2000*, (Apr. 2002), (unpublished paper presented at Annual Meeting of Midwest Political Science Association, on file with author).

⁵² This proved to be a source of great friction between the parties in the Senate. The Democrats fumed that Republican senators had for several years obstructed consideration of Clinton nominees to some circuits and were now trying to benefit from their obstructionist tactics. For example, Senator Leahy noted on the Senate floor: "Large numbers of vacancies continue to exist on many Courts of Appeals, in large measure because the recent Republican majority was not willing to hold hearings or vote on more than half — 56 percent — of President Clinton's Courts of Appeals nominees in 1999 and 2000 and was not willing to confirm a single judge to the Courts of Appeals during the 1996

It is true that under Democratic Senate control from 1987 through 1992, some Reagan and Bush nominees to the appeals courts never had hearings. However, those who did, as seen in Table One, were for the most part promptly given committee and confirmation votes. Not so with Republican control of the Senate in the second half of the 1990s, where obstruct and delay tactics were taken to much greater levels.

Table 3 presents an objective summary indicator of obstruct and delay from the Congresses during the Carter through the Clinton administrations — with for the first two years of the second Bush Administration. The Index of Obstruction and Delay is determined by the number of nominees for whom no action was taken by the Senate added to the nominees for whom the confirmation process lasted more than 180 days divided by the total number of nominees. The Index thus ranges from 0.0000 which indicates an absence of obstruction and delay to 1.0000 which indicates the maximum level of obstruction and delay. Table 3 shows low levels of obstruction and delay until the 100th Congress (Republican Ronald Reagan was president with Democrats having regained control of the Senate for the first time during his presidency). The Index dropped dramatically with the first Congress with President George H. Bush, although the Democrats still controlled the Senate. In the Congress that overlapped with the 1992 presidential election year, however, the Index rose, but not to the level of the 100th Congress. But starting with the 104th Congress, the Index climbed setting new high levels through the 106th and 107th Congresses. Also, in *every* even numbered Congress, which always overlaps a presidential election year, the Index was higher than the previous non-presidential year Congress.

Beginning with the 104th Congress, the obstruct and delay phenomenon became so serious a problem that Chief Justice William H. Rehnquist publicly urged the Senate to act promptly on the Clinton nominees.⁵³ The Republican leadership nevertheless continued the slow

session." 148 CONG. REC. S7017 (daily ed. July 18, 2002). At a business meeting of the Judiciary Committee, Republican Senator Kyle observed: "... [W]e never pass up the opportunity to bring out the point that in the view of some on this committee there was unfairness in the treatment of Clinton judges, and perhaps there was." *Senate Comm. on the Judiciary: Transcript of Proceedings*, March 14, 2002 at 65 (statement of Senator Kyle, Member, Senate Comm. on the Judiciary).

⁵³ The Chief Justice first noted his concern in his 1997 annual State of the Judiciary report. *See*, 30 THIRD BRANCH 1 (1998). This has been one of the Chief Justice's themes in subsequent State of the Judiciary messages. *See, e.g.*, Linda Greenhouse, *Rehnquist Sees a Loss of Prospective Judges*, N.Y. TIMES, Jan. 1, 2002 at A14 ("On the pace of confirmation for judicial nominees, Chief Justice Rehnquist noted that in past years, he had criticized a

pace.

Table 3⁵⁴

Index of Obstruction and Delay in the Senate Processing of Courts of Appeals Nominees

Congress	Index
95th (1977-78)	0.0000
96th (1979-80)	0.1250
97th (1981-82)	0.0000
98th (1983-84)	0.2667
99th (1985-86)	0.0625
100th (1987-88)	0.5217
101st (1989-90)	0.0526
102nd (1991-92)	0.4333
103rd (1993-94)	0.1429
104th (1995-96)	0.5263
105th (1997-98)	0.6786
106th (1999-2000)	0.8125
107th (2001-2002)	0.8387

Republican-controlled Senate for delays in considering President Bill Clinton's nominees. 'Now the political situation is exactly the reverse, but the same situation obtains,' he said, noting that the Senate confirmed 28 judges during 2001 and adjourned without acting on 37 nominations. 'The Senate is not, of course, obliged to confirm any particular nominee,' he said. 'But it ought to act on each nominee and to do so within a reasonable time.'')

⁵⁴ Index is calculated as the number of nominations unconfirmed plus the number of nominations that took over 180 days from nomination to confirmation. It ranges from 0.0000 which indicates the complete absence of obstruction and/or delay to 1.0000 which indicates complete obstruction and/or delay. The Index is only for nominations to courts of appeals of general jurisdiction. This means that the U.S. Court of Appeals for the Federal Circuit is excluded. Statistics derived from data reported in Committee on the Judiciary, United States Senate, Legislative and Executive Calendars and other committee documents as well as the Congressional Record. The 100th, 101st, 102nd, 104th, 105th, 106th, and 107th Congresses were in a divided government situation with one party controlling the Senate and the other the presidency.

With the tables turned and Democrats controlling the Senate of the 107th Congress and a Republican in the White House, the Democrats appeared to be acting similar to the Republicans during the last six years of the Clinton presidency.⁵⁵ Ideology or policy concerns on the part of one or more Democratic senators seemed to be responsible for a number of appeals court nominees not receiving hearings. Additionally, there was the special case of the Sixth Circuit nominees from Michigan who were being held up by the Democratic senators from Michigan. The senators were trying to force the Administration to name at least one of the Clinton nominees from Michigan, whom the Republicans had for years prevented from even having hearings.⁵⁶

To his credit, Senator Patrick Leahy, as chair of the Senate Judiciary Committee, moved rapidly on the less controversial nominees. He conducted hearings during the August 2001 recess, and soon after September 11, 2001, and during the anthrax scare that closed down a Senate office building. All thirty-six district court nominees nominated in 2001 had hearings. Of the sixty-two nominated in 2002, forty-seven had hearings (about 76%). Of the appeals court nominees to courts of general jurisdiction nominated in 2001, eighteen of twenty-eight (64 percent) had hearings. Of the three nominated in 2002, one had a hearing. Only a few of the controversial nominees, such as Pickering, had hearings. The figures for the 107th Congress show no improvement over the two previous Congresses in the average number of days it took for courts of appeals nominees to have hearings. But there was an improvement from the 106th Congress in the average number of days to have the nomination reported. Once reported, the nominations took fewer days on average to be voted on by the full Senate than had been the case for the three previous Congresses. The Index of Obstruction and Delay for appeals court nominees was, however, higher for the 107th Congress than for the 106th. Indeed, it was the highest of all the Congresses reported in Table 3. However, the Index of Obstruction and Delay for the *district* courts for the 107th Congress was lower than that

⁵⁵ Senator Orrin Hatch assailed the Democrats while playing down the record under the Republican control of the Senate. *See, e.g.*, Senator Hatch's remarks at the July 11, 2002, business meeting of the committee: "Some try to blame Republicans for the current vacancy crisis. That is pure bunk . . . I know that some try to justify wholesale delays as payback for the past. That is just sleight of hand . . . I can understand why some people on the committee are irritated with Republicans because there were Republicans who threw roadblocks up to judges. But I wasn't one of them . . ." *Senate Comm. on the Judiciary, Transcript of Proceedings*, July 11, 2002 at 9-11.

⁵⁶ *See* Jeffrey Hadden, *Politics Holds Justice Hostage*, DETROIT NEWS, Nov. 25, 2001 at 15A, 20A and Editorial at 16A.

for the three previous Congresses under Republican control.⁵⁷

The Democratic and Republican leadership seem to have difficulty agreeing on a simple common-sense proposition: Regardless of the party controlling the Senate and presidency, all nominees should have hearings and votes by the Senate Judiciary Committee. Further, when reported out of Committee, all nominees should be placed promptly on the Senate calendar for full Senate debate and vote. Hearings allow opponents to state their case and supporters to offer rebuttals. Because the Senate works by the committee system, it is reasonable to argue that a vote by the Committee not to send a nomination to the floor of the Senate fulfills the advise and consent requirement of the Constitution. But by not holding hearings and votes in committee, or by delaying floor action when nominations are sent to the floor, the Senate has been engaged in obstruct and delay, not advise and consent. This was done in an unprecedented way by then Senate Majority Leader Trent Lott when he apparently honored holds placed on Clinton nominees by some Republican senators. Obstruct and delay is unfair to nominees who are in confirmation limbo. Most importantly, it is dysfunctional for the judicial branch of government, which requires a full complement of judges to do its work.

Unlike other Bush nominees to the appeals courts who waited for at least nine months to be scheduled for a hearing or who never received a hearing, Pickering had hearings on October 18, 2001 (about five months after his nomination) and then again on February 7, 2002. The highly unusual second hearing was held to consider unresolved questions concerning scores of Pickering's unpublished decisions as a U.S. District judge for the Southern District of Mississippi. Pickering has been serving on the district bench since his appointment by the first President Bush in 1990. Republicans could well have believed that the call for the second hearing was but a manifestation of the obstruct and delay phenomenon. The weeks between the hearings gave Pickering's opponents additional opportunity to mobilize their forces. This points up another facet of the changing selection and confirmation processes —

⁵⁷ The Index for the 107th Congress for district court nominees was 0.3265, down from 0.4819 for the 106th, 0.4787 for the 105th, and 0.3765 for the 104th Congresses (but higher than the .1017 for the 103rd Congress, the only Congress Democrat Bill Clinton had with his party in control). Even Senator Orrin Hatch, the ranking Republican member of the committee, conceded in a public comment aimed at Senator Leahy: "I admit . . . you have done a pretty good job on the district court nominees . . ." See *supra* note 55, at 7. Senator Leahy at another business meeting emphasized: "I am trying to get virtually all of them [nominees] to have hearings and votes." *Senate Comm. on the Judiciary, Transcript of Proceedings*, Mar. 7, 2002, at 37.

the involvement of advocacy or interest groups.

V. ADVOCACY GROUP INVOLVEMENT

Interest groups have long participated in the legislative process,⁵⁸ but they were rarely involved in federal judgeship nominations and then primarily with nominations to the Supreme Court.⁵⁹ But as American politics has become more ideological,⁶⁰ and as federal judges have become recognized as important players in the field of public policy, interest groups have become regularly involved. Over the past two decades, advocacy groups have tried to influence judicial selection by the president and have monitored nominations, lobbying allies in the Senate to block objectionable nominees. They have even used such nominees as the subject of fund-raising appeals for the groups.⁶¹

The politics involved in judicial nominations at times resembles the contest over contentious legislation in Congress. In effect, filling judgeships has become part of the democratic process, with all the strengths and weaknesses of democracy.

The advocacy groups feed press releases to the media.⁶² There is an unfortunate tendency to demonize or at least mischaracterize the qualities of the controversial nominees. Conservative groups and their allies in the Senate did this in the 1990s with Clinton judicial nominees.⁶³

⁵⁸ See ARTHUR F. BENTLEY, *THE PROCESS OF GOVERNMENT* 268-69 (Peter H. Odegard ed., 1967) (1908); see also DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION* 352-94 (1951).

⁵⁹ See A. L. TODD, *JUSTICE ON TRIAL: THE CASE OF LOUIS D. BRANDEIS* 69-262 (1964) (describing confirmation battle over Louis Brandeis to Supreme Court and involvement of American Bar Association, organized labor, and other interests); see also JOHN A. MALTESE, *THE SELLING OF SUPREME COURT NOMINEES* 52-85 (1995); JOHN MASSARO, *SUPREME POLITICAL: THE ROLE OF IDEOLOGY AND PRESIDENTIAL MANAGEMENT IN UNSUCCESSFUL SUPREME COURT NOMINATIONS* (1990); MARK SILVERSTEIN, *JUDICIOUS CHOICES: THE NEW POLITICS OF SUPREME COURT CONFIRMATIONS* 164 (1994); GEORGE L. WATSON & JOHN A. STOOKEY, *SHAPING AMERICA: THE POLITICS OF SUPREME COURT APPOINTMENTS* (1995); DAVID A. YALOF, *PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES* (1999).

⁶⁰ See JOHN H. ALDRICH, *WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA* 287-95 (1995).

⁶¹ See, e.g., Fundraising Letter from People for the American Way, one of the major liberal groups opposing Pickering (Apr. 5, 2002) reprinted in 148 CONG. REC. S7551, at 7559 (daily ed. July 30, 2002).

⁶² See, e.g., Press Release, National Organization for Women (May 23, 2002) reprinted in 148 CONG. REC. S7551, at 7560 (daily ed. July 30, 2002).

⁶³ See generally, Scherer, *supra* note 34; Roy B. Flemming, Michael C. MacLeod, & Jeffery Talbert, *Witnesses at the Confirmations? The Appearance of Organized Interests at Senate Hearings of Federal Judicial Appointments, 1945-1992*, 51 POL. RES. Q. 617 (1998); Lauren M.

Similarly, liberals and their senatorial allies have done this with some Bush nominees. Some of the opposition to Pickering, for example, initially implied that he is racist, rather than simply criticizing his judicial record.⁶⁴

VI. CONCLUSION

It has been said, I think correctly, that the contest over Pickering was but a dress rehearsal for the coming battle over a Bush Supreme Court nomination — if that nominee has a record similar to Pickering's.⁶⁵ Civil rights and civil liberties groups, along with labor, environmental, and other liberal advocacy groups, have put President Bush on notice as to what to expect if he tries to name a conservative activist to the high court — and if he pushes such nominees to the lower courts.⁶⁶

As partisan and ideological debate as the Pickering episode generated during the 107th Congress, it was after all out in the open for the public to weigh the merits of the arguments and the weight of the evidence produced by both sides. This, I suggest, is healthy for a democracy even as the democratic process is contentious. Judicial nominations,

Cohen, *Missing in Action: Interest Groups and Federal Judicial Appointments*, 82 JUDICATURE 119 (1998).

⁶⁴ See Editorial, *An Unworthy Judicial Nomination*, N.Y. TIMES, Feb. 24, 2002, at 12 ("Mr. Pickering's critics have implied that he is a racist. . . We believe that Mr. Pickering bears no animus toward blacks and that charges of racism have no place in this debate.").

⁶⁵ See, e.g., *Senate Comm. on the Judiciary, Transcript of Proceedings*, March 7, 2002 at 16 (statement of Sen. Specter: "I am concerned . . . that what we have here with Judge Pickering is a warm-up for a later confirmation battle on the Supreme Court.").

⁶⁶ The Democratic majority gave further notice to the President of their intention to reject those they perceive as extremists when they failed to approve the nomination of Priscilla R. Owen to the Fifth Circuit on September 5, 2002, and also voted not to report the nomination out of committee. For an extensive review of the controversy surrounding Owen, see David Pasztor, *Texas Jurist Sailing into U.S. Senate Storm*, AUSTIN AM. STATESMAN, July 14, 2002, at A1. Two other highly controversial appeals court nominees had hearings in September 2002. Michael W. McConnell, nominated to the Tenth Circuit and Miguel Estrada to the District of Columbia Circuit. McConnell's hearing was held on September 18 and Estrada's on September 26. The McConnell controversy is discussed in M.E. Sprengelmeyer, *Battle Brewing over Bush Nominee*, ROCKY MOUNTAIN NEWS, Sept. 17, 2002, at 4A. McConnell, however, was confirmed on November 15, 2002. The Estrada controversy is summarized in Charles Lane, *Nominee for Court Faces Two Battles*, WASH. POST, Sept. 24, 2002, at A1. Estrada's nomination was not voted on by the Committee and technically died at the end of the 107th Congress. Dennis W. Shedd, a controversial nominee to the Fourth Circuit had a hearing on June 27, 2002, was voted out of committee on November 14, and confirmed on November 19, 2002, by a vote of 55:44. Democrats could have successfully filibustered but chose not to in deference to retiring Senator Strom Thurmond, who had sponsored Shedd. See ASSOCIATED PRESS, *Senate Oks Shedd for Appeals Court*, Nov. 20, 2002.

particularly to the appellate bench, have tended to reflect the President's policy agenda. The debate over Pickering dramatized this. Just as the President took into account Pickering's judicial views and philosophy, so, too, did the Senate Judiciary Committee.

By holding hearings and advising the president that Pickering was considered too conservative by a majority of the Senate Judiciary Committee, the Senate, acting through the Committee, fulfilled its constitutional obligation. The President was now free to make another nomination. The system worked. When nominations are held up, the system is not working nearly as well. A wise President will aim for ideologically moderate nominees — a formula that surely is a prescription for success not only with the lower federal courts but the Supreme Court when the opportunity arises. This may be the most important lesson of the Pickering episode, but one which may not be heeded given the symbiotic relationship between advocacy groups and politicians⁶⁷ and the results of the 2002 Congressional elections. That election returned control of the Senate to Republican hands and raised the possibility that stalled and even Committee-rejected nominees such as Pickering would be resubmitted, as indeed they were — thus ensuring major battles with uncertain results.⁶⁸

⁶⁷ See Scherer, *supra* note 34.

⁶⁸ See Elisabeth Bumiller, *After G.O.P. Sweep, Bush Makes Security Department and Tax Cut Top Priorities*, N.Y. TIMES, Nov. 8, 2002, at A20 ("The president said he wanted to see his federal judge nominees who have been defeated, delayed or blocked by the Senate get 'a fair hearing and get approved.' He added that he would push the Senate Judiciary Committee . . . to approve Priscilla R. Owen . . . and Charles W. Pickering Sr. . . . for appeals court posts.").
