

Weidenbaum Center on the Economy, Government, and Public Policy  
Breakfast Presentation

April 15, 2005

***The Politics of Judicial Nomination***

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Thanks very much for inviting me to come talk with you about judicial selection.

Many folks say that the process of picking federal judges has essentially become broken in Washington D.C. Critics say that partisan politics has infused the process of selecting federal judges. Republicans say that Democrats' filibustering of judicial nominees is unprecedented and perhaps even unconstitutional. Democrats claim that Republicans are, particularly President Bush, nominating a number of nominees who are out of the ideological mainstream and that filibusters are thus appropriate, if not required, for the Democrats to rein in an over-reaching president. As a consequence many critics say that there are tolls on the courts. It now takes months, sometimes even years, to get federal judges confirmed to the bench. As these judgeships remain vacant the performance of the courts is said to suffer.

Now this morning I would like to do a couple of things. I want to first put these claims in some historical perspective. Is this conflict over judges new? Are the tactics new? Is the conflict new more generally?

I believe the tactics in battles over judges are new but the broader context over the shape of the bench is not new. I want to show you a little evidence to put these claims into some perspective. Second, I want to explore some of the potential causes

of conflict over who sits on the federal bench. Then I want to conclude by considering some potential consequences both for the Senate, the public, and for the bench itself in the conflict in the selection of judges.

First — for some historical perspective — is conflict over federal judges new? Well, received wisdom about the process of selecting judges suggests a very cooperative relationship between the President and the senators in selecting and then confirming federal judges for the bench. It has often been said that, historically, presidents simply deferred to the views of senators from the home state of the judgeship from his party when selecting judges who would go on the federal bench. Even to make an appellate court appointment — which of course spans a number of states — a cooperative relationship is said to have taken root quite a long time ago. In contrast, the received wisdom says this partisan fighting over judges is new, that it is a function of the 1990s' polarization of the parties; in particular, the republican peak after Clinton took office in the 1990s.

Now I am going to show you some evidence that suggests that conflict, in fact, is not that new but as we'll see it's taken different shapes in recent years. There are a number of different ways we can think about or go about measuring conflict over the shape of the bench. I am going to run through a couple of them here. The first is trying to get a sense of how long does it take for the President to select someone to be an appointee for the federal bench?

What we are doing here, from the 1940s through the late 1990s, is to see on average for every Congress how much time elapses between a vacancy on the federal bench when a judge either retires or dies in office, or announces retirement and when

the President announces an appointee for the bench. As we can see here there's a number of trends. First of all, again these are averages for every two-year period from the 1940s to the 1990s. The clearest trend, of course, is that the amount of time it takes to select the nominee has gone up. It now takes longer and longer. We're talking about averages here of almost two years. Again, these are vacancies on the federal bench. This is even before a nominee is sent to the Senate for consideration. So clearly the amount of time it's taking for the President to come up with a nominee has increased but also, we'll come back to this a little later, there's a fair amount of variation even within that upward trend. Conflict in terms of how long it takes the President and Senate to settle on a nominee certainly is worse today than it has been but it has been rising steadily with some variation over time. Again, we can come back to this. There are a number of things that might go into extending the amount of time it takes for a president to select a nominee, but it's at least conceivable that there are negotiations going on between the President and home state senators in selecting nominees to make sure that they are going to be confirmable by the Senate.

There are other ways of figuring out how much conflict there is or what is new in this process. This is again from the 1940s through 2000 and again the mean number of days. This is from the point of nomination until the end of the fate of that nominee. I'll come back to this in a moment. This includes nominees who are confirmed but also nominees on whom the Senate never acts. That's typically how nominees die in the Senate; literally that is how the Senate doesn't act. They are very rarely voted down in an actual vote. We are talking here again on average it can take almost a year for the Senate to render a decision which is sometimes a long decision. Again, a rapid

increase in the 1990s but also evidence of conflict earlier in the series as well. This is a more straightforward measure. Again, simply the time from nomination to confirmation on average, every two years for the nominees who are actually confirmed. We're dropping out the folks who were actually never confirmed so you see the numbers drop a little here. Yet we're still talking months it takes for the Senate to act. Again, high levels of delay in the 1990s but again delay actually starting well in the beginning of the 1970s so conflict over the judges is not new. It has been in place at least since we had President Nixon facing off against democratic senators in the 1970s. We can come back to this later if you want as well.

Clearly there was conflict in the late 1950s in part because of Eisenhower facing off against democratic senators in the 1950s. So conflict over judges — yes, it has gotten worse and you can see it in a number of different ways but it is not entirely new. There are trends going on here at least since the 1970s. This is even perhaps more straightforward, confirmation votes rates for district court, trial court and appellate court nominees. Again starting in the late 1940s and working our way through 2004, the dark blue line here are district court nominees which we tended to say are less controversial in part because of the work of the trial courts as compared to the appellate court nominees, compared to the dash line there which again shows confirmation rates for circuit court appointees. Point four here, we're looking at the late Clinton years and early Bush years with under half of the appellate court nominees being confirmed.

Again what we want to note here: the bottom drops out into the 1990s to the last couple of years; however, the process has been breaking down at least since the 1970s and in fact, we've had a little bit of controversy earlier in the century over district court

appointees. That 100% confirmed rate, obviously presidents would like to have that. It's important to remember in this period there were relatively few judges being nominated compared to today where the portions have over 200 nominees submitted to the Senate. Again conflict is not new. It has been going on for some time and there's a fair amount of variability and we'll see in a moment that this is actually a very predictable trend here. Those happen to be presidential election years where in the two years running up to a presidential election in fact the Senate grinds to a halt on appellate court nominees. Again that's not a function of the 1990s. That has been in place at least since the Reagan years, early 1980s.

So conflicts over judges, is it new? Certainly it is not. Democrats under the Bush Administration were not the first to obstruct judges and nor were the Republicans under the Clinton Administration in the mid to late 1990s. We've seen rising as well as variable conflict over judges over the past half-century. Although granted by any measure we are clearly at the most controversial end of the series.

That moves us to our second question, "How do we account for these trends in how the Senate treats judicial nominees?" I'm going to walk through a number of potential explanations. Some of them are electoral in nature. Some of them are more institutional, looking at the ways in which the Senate has structured the process of advise and consent. So we want to figure out first why is the Senate's treatment of nominees so uneven over time and then at the end we want to spend a little more time on why do things seem so rotten in the last couple of years, at least from the perspective of the nominee who presumably wants to see swift confirmation.

So what drives conflict over nominees? First, party controlled government across this long series and across most of those measures clearly matters. In periods of unified party control, where one party controls both the presidency and the Senate, the nomination process works much faster. It takes much quicker for nominees to move through the process and nominees are confirmed at a higher rate. In periods of divided party control, confirmation rates go down and it takes longer for the Senate to confirm nominees. Roughly speaking, across that fifty-year period, 93% of nominees are confirmed in periods of unified control. Roughly 80% are confirmed in periods of divided government. Again it helps to explain why Bush, in fact, got quite a few nominees confirmed particularly after the report leveled. Democrats like to say, "Well look, we're just singling out ten nominees, and in fact over 200 have been confirmed in the last several years." That in part is a function of party control of the presidency and the Senate.

Second, elections matter and I suggested briefly before that the Senate does take longer to confirm nominees in the two years running up to a presidential election. Presidential election year nominees, whether they are submitted in the odd number year or still pending in the even year, are confirmed at lower rates in the run-up to a presidential election. In fact over that entire series nominees are roughly 25% less likely to be confirmed if you happen to be unfortunately pending in the presidential election year. We see this dynamics very clearly in the run-up to the 2000 election. In 2000 there were forty judicial nominees essentially pending before the Senate Judiciary Committee, so forty nominees left in limbo before the end of the Congress. Remember this is the Clinton Administration facing off against a Republican-led Senate Judiciary

Committee. Why were Republicans holding on to these nominees and not wanting to put them through the process? Part of it is driven by presidential election year calculations, right? It made more sense for Republicans to hold onto these vacant judgeships in hopes that Bush would win the November election and thus the new president would have a whole slate of vacancies to fill with nominees of his choice. Again this is not a new phenomenon. Democrats have done it, Republicans have done it and it extends back a good twenty, thirty years throughout the data.

Third, ideology or policy views of senators and potential judges seem to matter. In particular, ideological disagreement between the two parties seems to matter. We know of course from journalists and others that the two parties have become more polarized in recent years, which is to say that Democrats in the caucus and the Senate are more liberal. Republicans tend to be more conservative in recent years. We can see this more generally, and I'll explain in a second what exactly this is. We can see this trend toward what we call the disappearance of the purple sector, which is pretty startling over the past forty years or so.

These numbers are based on voting behavior by both House and Senate up here and essentially if we look at this whole range of roll call votes by a legislator we can roughly say whether they are closer to the middle of the chamber or closer to the medium member/middle member of their own caucus. Then we can count up how many people look to be these moderates, how many look to be close to the center of their own party and we can take it as a percentage of the chamber over two years.

Sure enough as journalists have suggested, the center has largely disappeared as the two congressional parties in the chambers. So in the 1960s, roughly thirty to

forty percent of the chamber fit this view of moderates. These would be conservative Democrats or more moderate or liberal Republicans. Today we're down below ten percent in terms of the quantity or percentage of legislators who truly fit this more moderate mill label. Of course, when we are talking under ten in the Senate we're talking about captible numbers of senators. When we say, five percent of the Senate is moderate; we can name them, right? Specter goes in and out depending on Frist sitting on his tail, but Collins, Dole, Snowe, McCain, Chafee — the roaming northeastern liberal — moderate Republicans.

The broader point here is that there are true ideological differences between the two political parties and as it turns out if you look at the data on how long it takes nominees to be confirmed as well as whether or not they are confirmed, over time we do see that the more polarized the President is from the opposing party in the Senate, the longer it takes for the process to work. We'll come back a little later about polarization to see why in fact it might matter more in recent years.

I also want to take a little time to talk about some institutional forces that may encourage or enable opponents of the President to slow down the process and to derail judicial nominees. So this falls under the general category of the rules of the game for advise and consent.

The first one I want to talk about is the practice of a blue slip. What is a blue slip? Well, when the president selects a nominee to go to the federal bench it gets sent to the Senate. The Senate then refers the nominee to the Judicial Committee. The counsel for the Committee then takes this blue piece of paper and sends two out, one to each of the home state senators for the nomination. So when there's an 8<sup>th</sup> Circuit

appointment for a Missouri seat, Senator Bond and Senator Talent get this blue piece of paper. The Committee is essentially asking the home state senators — remember these senators need not be on the actual Judiciary Committee — but the home state senators are asked their opinion. Do you support or do you oppose the President's nominee and there's a space for writing a comment. If you approve the nominee, typically senators check off "I support" and send it right on back to the chair. If you are opposed for some reason or you have other concerns, or perhaps you have some unrelated concerns but you want some attention, well maybe you might not send back your blue slip quite so fast. You could hold onto your blue slip, delaying the process.

The practice has been that the chairman of the committee usually defers to the views of the home state senators as expressed in the "blue slips." Different chairmen use "blue slips" differently but in large they've been treated roughly like a veto power by home state senators. Again there's nothing in the Constitution.

When we talk about that the home state senator should have this type of veto power, but in fact the Senate has created this "Blue slip" process. Senators from either political party — you don't need not to be simply from the President's party to have an influence, to be able to hold what we call a negative or hold a "Blue slip." We can see over time "Blue slips" have been exploited pretty much by ideological foes of the president when they disagree with an appointment to a bench within their state. The classical example is typically Jesse Helms, Senator from North Carolina, who when Clinton would submit the names of nominees to the 4<sup>th</sup> circuit and Helms did not want to see these particular nominees put on the bench, he would withhold a "Blue slip."

We can see that trend overall in the data in terms of how long it takes nominees to move through the process. We see that ideological outliers by more extreme home state senators tend to hold on to “Blue slips” to make the confirmation process rougher if not to derail nominees more generally. Rules in committee matter but clearly rules of the floor matter under the Senate’s Rule 22, the cloture of the Filibuster Rule to debate judicial nominees and it takes sixty votes to cut off what otherwise appears to be a filibuster of judicial nominations. That is of course at the heart of the debate over the so-called nuclear option that I’ll come back to at the end — which simply refers to the method by which Republicans want to ban filibusters against judicial nominees.

Finally senators are allowed to put what’s known as a “hold” on any type of measure or nomination. What is a “hold”? A hold is simply a very anonymous way of preventing a majority leader from calling out the nomination on the floor. Much of the Senate works by unanimous consent and that creates an opening for senators to withhold consent. Holds are tough to get a handle on. Senators aren’t wild about having a written record of holds for the rest of us political scientists to poke our noses into so we’re left to rely on particularly what judicial staff will tell me. And staff will tell me, particularly democratic staff tell me, that much of what happened to those judicial nominees from the Clinton Administration, the ones that didn’t come to the floor, perhaps the ones that came out of committee or never made it out of committee, Republican senators were placing “holds” on these nominees. Again, it’s obstruction, but of a different sort than a filibuster, right? Filibusters are very, very visible ways that require coordination of a caucus to hold it together. “Holds” are just as obstructive but

essentially they are all but invisible. It's a very costless way for a senator to hold up action on a president's nominee.

These forces together, I think, help explain why we've had slowdowns and why presidential nominees have a tough time working their way through the Senate confirmation process. But it doesn't really explain why things have gotten so rough for nominees in the last couple of years, in particular, the last three or four years. So what remains to be explained, well why have things gotten so out of hand? Why do things seem so polarized in the Senate today? Here I want to highlight just a couple of trends that should get you thinking about why the two parties take the stances that they do about the President's judicial appointments.

First, judicial appointments are no longer salient just to the home state senators from the President's party, nor to just the home state senators where the judgeship will be located. Judgeships have become increasingly important to both the political parties in particular to the activist base of both the Democrats on the left and the Republican conservatives on the right. The media therefore pays more attention to these nominees and not surprisingly "blue slips" are beginning to lose their weight. That is, Senator Hatch — and we'll see what Senator Specter does — but Senator Hatch for the last several years has been less willing to defer to the views of the democratic home state senators. Why? This is largely because of the rising salience of these judgeships. It seems Republicans seem less inclined to allow home state views to command what happens or direct what happens to judicial nominees.

The Senate itself is paying more attention to nominations. Before the 1990s there really were no recorded votes on judicial nominations. Recorded votes for

confirmation were exceedingly rare. In 1997 the Republican Conference in part, I think, put pressure on Hatch, who was the chair of the Judiciary Committee, made a move within that conference to say we're going to require recorded votes on judicial nominations on the Senate floor. There wasn't a rule change or anything like that. This was simply a position of the Republican Conference to put everybody, really, on notice that more attention is going to be paid to these potential judges, and you are going to have to have a recorded vote either way, up or down on judicial nominees. Before the 1990s, rarely votes on confirmation, after the 1990s almost systematically public votes on confirmation. Again, in part reflecting the rising salience of these judgeships but also driving the rising salience of these judgeships as well. Clearly presidents are paying more attention to nominees as we've seen with President Bush on the campaign trail in both 2002 and 2004.

First, judgeships seem to be becoming more important but why does everybody care so much about these judges? To some extent largely pushed by the rising or increasing partisan polarization that I showed you earlier, the two parties just have very different views about who should be sitting on the federal bench and these types of ideological disagreements encourage senators to exploit the rules of the game whether they are blue slips, holds, or filibusters as a way to tame or rein in the ideological tenure of particularly these circuit court benches as we have seen most carefully or most targeted with filibusters by democrats in the last several years.

I don't think that's enough to explain why there's such conflict. I think we also have to realize that the federal courts themselves have become more prominent in the shaping of public policy and public law. Courts are increasingly involved in the

interpretation and enforcement of federal law. Particularly as the Supreme Court in recent years has limited its docket, these appellate courts really became almost the court of last resort for most motions and files going through the federal court system. Right? And if these appellate court judgeships are less likely to have their decisions reviewed by the Supreme Court again it raises the importance of who sits on the federal bench and particularly on the appellate court bench.

Third, when the Democrats lost control of the Senate in the 2002 elections the federal courts, as it turns out, were near evenly balanced between appointees from republican presidents and appointees from democratic presidents. The numbers were 398 democratic appointed judges on the federal bench and 400 republican appointed judges on the federal bench. I think the parties understand this. There are plenty of interest groups who kept doing these numbers to make it clear to senators what are the stakes when you're putting new judges into the federal bench. Again, Democrats had lost control of the Senate. They distrusted the policy views of many of the nominees coming from the Bush Administration and they understand the close balance of the sort.

What did they do? Well, they made scrutiny of judges a very high priority in the democratic caucus and they carefully hand picked nominees of who they were filibustering starting in 2000, 2003. How did they select these nominees? They essentially went through the list of nominees and came up really with the ones whose judicial opinions would be most egregious to the activists' base of the Democratic Party. What does that mean? It means pro-choice groups of the Democratic Party. It means environmental groups and civil rights groups in the Democratic Party. Right? The Democrats didn't want to blatantly filibuster everybody even though there may be

concerns about many of them. They wanted to filibuster the ones who they could make a public case against the potential policy views of these new federal judges. What did Republicans do in response? Apparently the Republican staff started sneaking into democratic computers and looking for their strategy memos and that wound them up in a little legal problem. They also ended up on the editorial page of the *Wall Street Journal*. That did not help their legal problems any.

But more generally, what did Republicans do? Senator Frist started to advocate nuclear options in other ways of doing away with judicial filibusters, essentially threatening to wage the Senate version of nuclear war. Just in a nutshell, what is that? Essentially it's changing the precedents of the Senate rules. It would be changing precedents by majority vote. In a way that essentially undercuts the letter of Rule 22 Filibuster and Cloture in the Senate which so far has only let Democrats dig in their heels further counter to their response that many Republicans might have wanted which was that the Democrats back down from their filibusters. I should say that this is ongoing despite the best efforts of, it seems to be, Chairman Specter of the Senate Judiciary Committee who seems to want to resolve problems in part for his other policy agenda for the Judiciary Committee. I do think at times he's being undercut by other Republicans and at times potentially by the President by re-nominating judicial nominees that Specter really wanted to avoid. We can come back to the politics of the nuclear option if you like.

I just want to conclude with a couple of thoughts about the potential consequences of all this. What does it matter that we have conflict over federal judges? What does it matter that it takes so long to get nominees confirmed to the bench? I'm

now putting together some evidence that suggests that these vacant judgeships in fact can harm the performance of the federal bench and particularly the appellate courts and the appellate system. If we look at performance measure for the courts over a thirty-year period or so we can in fact see that the courts with longer and more vacancies tend to do worse in these measures. What are these measures? They are things like what percentage of these dockets do the judges get through in their circuit? How many are left in limbo? What's the backlog of cases? How long does it take to go from the filing of briefs to the actual rendering of decision by judges on that bench?

Courts with more and longer vacancies do worse. They have higher backlogs and it takes them longer to complete actions. 2002, just for example, the 6<sup>th</sup> Circuit for a long time has had a high vacancy rate peaking at 2002 with 25% of the bench being vacant with 16 appellate court judges, so four were vacant. It turned out to be the slowest of the 12 appellate courts that year even though it had the fourth smallest workload of all 12 appellate courts. So for instance a possibility, I think a strong possibility, that vacant judgeships are causing problems for the bench. I should say some senators have argued otherwise. That when Clinton judges were being kept off the bench, while his appellate court nominees were not being confirmed, many Republican senators said smaller courts are better. They're more collegial. They're better at decision-making. I thought maybe there's something to that but if in fact you look at statistics and again the decision making size of their work load it doesn't seem to be the case.

Second, there is at least a possibility that public confidence in the courts may decline. This is tougher to get a handle on because it is relatively limited at the national

level of public polling. Specifically limited about nomination size and so forth. Certainly talking to appellate court judges they raise these concerns to you — that there is a danger when people see the politics behind the selection of judges for people's confidence in the legitimacy of the independence of judges.

Finally, the Senate clearly is under stress. This is not good for the institution of the Senate. This is a legislative body where trust and the ability to work across party lines are pretty essential to the place working. Now don't think for a minute that if Democrats regained control of the Senate and we have a Democratic president that Republicans are going to back down from using these tactics. Lindsay Graham, Republican from South Carolina who is fairly conservative in his policy views but pretty moderate in his temperament in dealing with senators and with Democrats said, "If you don't think Republicans are going to answer in kind, you're naïve." He ended his comments the other day: "Payback is hell." So again this is not simply a case of Republicans versus Democrats in this narrow two, three-year period. Today's debate reflects a longer history of conflict over the shape of the courts and the courts' role in making public law in the United States.