1: THE BATTLES ARE GETTING WORSE

Most of us know the basic mechanics of judicial confirmations. Federal judges are appointed by the president of the United States. The appointments are made with the "advice and consent" of the Senate: the president nominates a judge, and the Senate either confirms or rejects the nomination. The president must take this process into account when deciding whom to nominate. Strong Senate opposition to certain types of nominees will prevent these judges from being nominated in the first place.

It used to be a fairly simple procedure for a judge to get confirmed. From the first Supreme Court nomination in 1789 until 1950, eighty-seven justices were nominated; the time from nomination to confirmation averaged just over eleven days. But this changed dramatically over the next half century. From 1951 through 1976, the average confirmation process increased to more than fifty days, and from 1976 to the present, it has averaged seventy-two days. As of this writing in 2012, the president and a majority of senators are all Democrats; however, it is still possible for the Republican minority to slow or, in a rare case, stop the confirmation process.

While there has been the occasional tussle about nominees in the past, nothing prepared the country for the all-consuming wars that have taken place over the last twenty-five years. The Supreme Court nominations

of Robert Bork in 1987 and Clarence Thomas in 1991 caused the most uproar—and still are frequently mentioned in the media even when there are no pending Supreme Court nominations.[82] Yet vicious, drawn-out, interest-group-based nomination fights in federal courts around the country have become the norm.

Republicans and Democrats alike have complained about the increasingly time-consuming nomination process. And both sides have switched their positions on how long a nominee can be grilled when it suits their political goals. During the Clinton administration, Attorney General Janet Reno accused the Republican-controlled Senate of an "unprecedented slowdown" in confirming new federal judges. During George W. Bush's first term in office, Republicans complained of "inexcusable" delays.[83]

In 2000, with Bill Clinton in the White House, Democrat Senator Charles Schumer of New York was anxious to confirm some Clinton nominees before the November election. Schumer argued for a quick majority vote: "I also plead with my colleagues to move judges with alacrity—vote them up or down. But this delay makes a mockery of the Constitution, makes a mockery of the fact that we are here working, and makes a mockery of the lives of very sincere people who have put themselves forward to be judges and then they hang out there in limbo."[84] By 2005, with a Republican president nominating judges, Schumer's solicitude for judicial nominees in limbo had vanished. Not only did he no longer think judges should automatically get a floor vote, Schumer no longer believed

certain nominees should be confirmed even if a majority of senators supported the candidate: "There's nothing in the Constitution that says that there has to be fifty-one votes for that judge."[85] Yet, by April 2010, with another Democrat in office as president for just over a year, Schumer switched back to his earlier stance and criticized the delays facing Obama's nominees as "unpardonable."[86] Once again he was upset that Republicans were not "let[ting] more nominees through. . . . We're going to stay in as long as it takes, even if it means nights, weekends to get these nominees through."[87]

The late Senator Edward Kennedy of Massachusetts, also a Democrat, similarly flip-flopped. In 1995, Kennedy, a former chairman of the Judiciary Committee, declared: "Senators who believe in fairness will not let a minority of the Senate deny [a judicial nominee] his vote by the entire Senate."[88] In 1998, Kennedy, along with eighteen other Democrats, sought to completely abolish the filibuster for any use, not just for judicial confirmations, where a minority of at least forty-one senators can prevent a vote from taking place.[89] Yet, less than a decade later, under a Republican administration and with Democrats in control of the Senate, he consistently filibustered judicial nominations, voting time after time to deny Bush's judicial nominees a vote.

Of course, such reversals over filibusters have not been limited to Democrats. Republicans were outraged over the filibusters against judicial nominees under George W. Bush, particularly those against his circuit court nominees

such as Miguel Estrada and Priscilla Owen, who were both first nominated in 2001. C. Boyden Gray, a Republican who oversaw judicial nominations during the George H. W. Bush administration, warned: "The Senate Democrats are engaged in an unprecedented filibuster. They have changed rules and broken Senate tradition. Never in our history has the filibuster defeated a judicial nominee."[90] Nevertheless, Republicans changed their tune, and under President Obama in May 2011, forty-two of the forty-seven Senate Republicans successfully voted to filibuster the Democrats' first judicial appointment, circuit court nominee Goodwin Liu.[91, 92] Thus, it was now the Democrats' turn to claim that Republicans had broken precedent. *The Hill* reported: "Democrats . . . said that the standard for filibustering judicial nominees has been lowered significantly as a result of Liu's defeat."[93]

The rhetoric over the delays can be nasty. Bill Clinton maintained that delays over his minority and female nominees exposed not mere political resistance, but racism and sexism on the part of the hesitating senators.[94] President Clinton said that "politics and paybacks" meant that minorities were "twice as likely to be rejected as whites."[95] Further, Democrats charged that during the last two years of the Clinton administration, the "delay of judicial nominations" was "unprecedented" and wholly "political."[96]

The process slowed still further during George W. Bush's administration, especially when the Democrats took control of the Senate. Under Clinton, the average confirmation process for circuit court nominees lasted a

brutal 230 days. During George W. Bush's administration, the process was even more brutal, averaging 362 days. President Barack Obama didn't face as many problems during his first two years in office given the eighteen- to twenty-seat Democratic majority, but the 255 days to confirmation were still longer than the battles Clinton faced.

Brazenly, over the last decade, Democratic senators have not even tried to hide their plans to preemptively oppose virtually all Republican nominees because their ideology is not in line with that of the Democrats. As New York's Charles Schumer put it, "We believe we're protecting America from extremists."[97] As clarification, he pointed to George W. Bush's nominees: "They are almost all pro-life, they are almost all extremely conservative."[98]

Anger against Republicans has continued during the Obama administration, with Patrick Leahy (D-VT) accusing Republicans of "reflexive partisanship, not principled argument."[99] Nan Aron, president of the liberal Alliance for Justice, has complained that nominations have become "more bitter and more partisan than the Clinton years. It is obstructionism across the board."[100]

Perhaps with all these accusations being hurled around, it isn't too surprising that a 2005 Gallup survey found that a majority of adults described both Democratic and Republican Senate leaders as acting like "spoiled children" in their debates over federal judges.[101]

How times have changed. Senators used to recognize that it is a president's prerogative to pick judges who share his philosophy; they would oppose nominees solely based

on a lack of competence, integrity, or judicial temperament. Up through the 1970s, Supreme Court confirmation battles rarely lasted over a month. The current era of one long confirmation battle after another didn't start until the mid-1980s, with William Rehnquist's elevation to chief justice and Antonin Scalia's nomination to be an associate justice. But the battles over ideology really only began with Robert Bork's failed nomination in 1987.

While this book examines the data on federal judgeships, the battle over judges isn't limited to the federal courts. Michael S. Kang and Joanna Shepherd point out in a recent issue of the *New York University Law Review* that state judicial elections have become increasingly contentious over the last couple of decades.[102] In 2000, incumbent state judges were defeated twice as often in either nonpartisan or partisan elections as two decades earlier. That year the reelection rate was 92 percent for nonpartisan judges and 50 percent for partisan judges. By contrast, the reelection rate for members of the U.S. House of Representatives was 98 percent.

Waiting to Be Judges: The Personal Costs

> "Well, what [Deputy White House Chief of Staff Karl Rove] told me is that some of those [potential nominees for the U.S. Supreme Court] took themselves off that list and they would not

allow their names to be considered, because the process has become so vicious and so vitriolic and so bitter that they didn't want to subject themselves or the members of their families to it."[103]
—Dr. James Dobson, founder and chairman emeritus of Focus on the Family, 2005

Neal Conan (Host of NPR's *Talk of the Nation*): As somebody who actually went through this [confirmation] process that we're talking about this afternoon, we were hoping you could put a bit of a human face on it. What's it like?

Lillian BeVier (Professor, University of Virginia): It's awful. I don't think I'd wish it even on my worst enemy. From the beginning to the end, I was sort of in the process for about two years. I was identified as a candidate and told I was going to be nominated . . . toward the very end of 1990; I was finally nominated in October of 1991, and then sort of held in limbo with lots of stuff going on in the background for a year without having a hearing.

Conan: Now, I assume that the day you're nominated for a seat on the federal bench—I mean, this has got to be one of the great days of your life.

BeVier: Well, you'd think it would be. . . . I suppose it would be if you end up getting confirmed and you believe that you can make a contribution on the bench. If you're nominated—at least my experience was you're nominated and you go through what is a long period of uncertainty and scrutiny and quite a bit of behind-the-scenes politicking in which you, as a person, actually are not so much the focus, but you become sort of a pawn in somebody else's political game. And then when it turns out you don't even get a hearing, you don't have a chance to defend yourself against, you know, the sort of whispered complaints or the kinds of things that perhaps the interest groups have been telling the senators about you. You don't have a chance to make your case in public. You never do have a chance to make your case in public if you don't have a hearing. It turns out to have been sort of awful because you can't really have a clear-your-name day.

> Jeffrey Rosen (Professor, George Washington University): I'm so glad we heard from Professor Lillian BeVier because she's a really good example of a respected academic, conservative certainly, but so intelligent and careful in her scholarship that any system that really took seriously excellence would have confirmed her eagerly. And I was almost going to ask her—instead, I'll just raise my fear that as a result of this process, excellent nominees may be deterred from going up.[104]
>
> —*Talk of the Nation*, September 9, 2002

Nominees who get caught up in the turmoil pay a price, especially if they fail to get confirmed. Their reputations are damaged, their families are hurt, and their careers are put in jeopardy. The damage isn't just limited to those nominated for the Supreme Court; even those nominated for lower-level positions have had their reputations damaged. Charles W. Pickering, Sr., whom President George W. Bush nominated to a circuit judgeship, cited the turmoil suffered by his family even after he withdrew himself from further consideration. He had been called a racist on the basis of an inference drawn from a single case.[105] "The bitter fight over judicial confirmations threatens the quality and the independence of the judiciary," he said. "[It] reduces the pool of nominees willing to offer themselves for service on the bench."[106]

Pickering explained: "I did not enjoy what I went through. Had I known in advance what was going to happen, I doubt if I would have gone far with it. But once the fight started, I could not step down or withdraw. To do so would have given some credibility to the charge."[107] Eventually, however, a Democratic filibuster made it clear that Pickering would not be confirmed, and he had no option but to withdraw his nomination.

Pickering's withdrawal is hardly unusual. The current problems facing circuit court nominees started during the last two years of Ronald Reagan's last term as president, when the Democrats regained control of the Senate. Take the experience of Bernard Siegan, one of the first nominees to encounter these drawn-out, bitter, personally destructive confirmation battles. Siegan was a Reagan nominee to the Ninth Circuit Court of Appeals. Few people outside of academia knew of him before his nomination. Siegan, a professor at the University of San Diego Law School, had authored several nationally recognized academic books on property and zoning laws, and his 1980 book *Economic Liberties and the Constitution* received much praise.[108] Siegan had an impressive record: graduate of the University of Chicago Law School, associate editor of the *University of Chicago Law Review*, recipient of an extremely competitive law and economics fellowship at the University of Chicago, successful private practice attorney for twenty-nine years, and legal consultant for the Department of Housing and Urban Development.

Yet, despite those qualifications, Siegan is one of the

few circuit court nominees who failed to reach the Senate floor because of a negative vote in the Judiciary Committee.[109] Most failed nominations either make it out of committee to languish as they wait for a Senate vote or never even make it to a Judiciary Committee hearing. Siegan related to me that he found the process, which spanned almost two years, quite "unpleasant."[110] He went on: "I did not suffer professionally. But you don't want to waste that much time. . . . There were so many critical stories and so much interest. I wanted the chance to talk about the attacks. I was being attacked but I wasn't able to talk about it. Even years later, every now and then you meet someone who [will] ask, 'What kind of a terrible person are you?' You meet someone who would have been persuaded by all the horrible things that they had read about. Sometimes it made no difference what I said [to them]."

According to Siegan, attackers would remark, "How could Reagan have appointed such a stupid guy?" He complains that it was "unpleasant to be before the committee and be badgered." Even his sixteen-year-old son ran into problems: "Some of his friends would say that they knew about what a bad guy his dad was."

Siegan was not alone in his experience. When discussing his 114-day confirmation battle, former Supreme Court nominee Robert Bork told me: "The main effect [of Bork's confirmation process on his kids] was that they got disgusted with Washington."[111] He also spoke of how it has affected him personally: "I'm viewed as much more controversial than previously. Some institutions, I don't

want to name them, that would invite me to give a commencement address, and many did, would be afraid of the reaction from some people there. You have to understand how different academia is." He noted that "[Although] you can never be sure what people would do when they actually get a nomination, some [potential nominees] say offhand that they wouldn't want to go through the process that I went through." Even though Bork had much more of a platform from which he could respond to attacks than did other nominees, he was also concerned that "as a sitting federal judge, [he] could not publicly respond [to the] public campaign of miseducation" that was being directed against him.[112]

Bork mentioned to me that opposition to judicial nominees can arise specifically because of their strengths over other contenders. This can be seen for non-judicial nominations as well. Bork pointed to John Bolton's battle in April and May of 2005 to be confirmed as ambassador to the United Nations. "Bolton is a victim of that, [the] fear that he would be too effective, that he simply would do too good of a job." Of course, the notion of personal destruction holds true here, too. Bolton was accused of everything from abusing employees to altering intelligence to fit his personal biases. As part of the Senate's negotiation to end the judicial filibuster, Senator Joseph Biden (D-DE) attempted to allow the vote on Bolton in exchange for denying votes on a few Republican circuit court nominees. One Democratic Senate staffer was quoted as saying, "But nothing came of it, and that's a good

thing. There are quite a few people here who want to see Bolton squirm."[113]

Merely the threat of having to endure a battle deters some candidates from accepting a nomination in the first place. After Siegan eventually withdrew, he said, "I don't know if I would want to do it again."[114] Even Justice David Souter, who underwent a relatively mild confirmation process to the Supreme Court before being confirmed, and whose nomination was the seventh fastest of the nine nominations since 1986, told Senator Warren Rudman (R-NH), his friend and sponsor, "If I had known how vicious this process is, I wouldn't have let you propose my nomination."[115]

Potential nominees have heard the same stories. Two Republican law school professors who were friends and colleagues of mine told me privately that they had been approached early on in the George W. Bush presidency to be judges, but turned down nominations to circuit courts because they had seen how vicious the battles had been for others.

Drawing out the confirmation process leaves judgeships vacant, and this in turn adds to the workload of other judges and often results in piles of undecided cases.[116] And the longer the confirmation process, the more likely a nominee will withdraw his candidacy. While waiting to be confirmed, judicial nominees must put their law practice and any other business commitments on hold. As described in detail earlier in Chapter 1, nominees are also often attacked personally, yet they are expected to keep their responses

muted. This expectation works in favor of the opponents, as no matter how unfounded a rumor, if it is circulated long enough, at least some people will believe it.

While we may not be able to objectively measure these personal costs, they are no doubt very important. And the greater the personal costs, the more likely it is that a greater fraction of the potential nominees will simply refuse being nominated in the first place. Unfortunately, there are no publicly available records on those who have been queried by an administration as to whether they are willing to accept a nomination. Any measure of confirmation rates thus underestimates the difficulty that the president has in getting his nominees confirmed. The nominees whom I interviewed complained that the personal costs had been significant, and many would not go through the process again if they had the chance. Given how public these confirmation battles are, there is no hiding this process from other potential nominees.

Well-known anecdotes illustrate the pain of confirmations. Take the case of Supreme Court Justice Samuel Alito's wife, Martha-Ann, who broke down in tears and left the hearing room as Democratic charges that Alito was a bigot were recounted.[117] To try to fill in the details on personal costs, I called a dozen exceptionally bright circuit court nominees who were not confirmed from the past four administrations: seven Republican and five Democratic nominees. Only seven nominees would talk to me in depth, and only four—Bernie Siegan, Robert Raymar, Lillian BeVier, and Charles Pickering—were

willing to go on the record.[118] I also tried talking to current judges who had gone through difficult confirmations, but they were reticent to publicly discuss their confirmations, preferring instead to concentrate on what they were able to accomplish since being on the court. Yet there is one rather public exception to this rule: Supreme Court Justice Clarence Thomas, who discussed his confirmation hearing in his memoir, *My Grandfather's Son*.

Virtually all seven nominees were concerned about being drawn into the political debate over the confirmation process, though I made it clear that I was not interested in settling old partisan scores, nor did I believe that the data showed that either political party had completely clean hands. I simply wanted to understand the personal costs the nominees and their families experienced as a result of the nomination process.

Consider the case of Robert Raymar. In June 1998, President Clinton nominated Raymar, a successful lawyer, to the U.S. Court of Appeals for the Third Circuit. For the next eighteen months—the remainder of that Congress—the Senate essentially ignored Raymar's nomination. Raymar never received a hearing, let alone confirmation. He was not even interviewed by the Senate Judiciary Committee.[119]

At Yale Law School he had been an editor of the *Yale Law Journal*, and he had an impressive résumé that is associated with only the brightest nominees. He had clerked for Judge Leonard Garth on the Third Circuit and had worked as the deputy attorney general for New Jersey.

At the same time, he noted: "I went to law school with Bill and Hillary Clinton. There was no mystery that I was a friend of the Clintons."[120]

Though his life was in limbo for eighteen months, Raymar believes that he was fortunate compared with other nominees who he recognized had to live with much deeper scars from the personal attacks; his nomination was stalled from the beginning solely due to the Senate's opposition to Clinton in the aftermath of the Monica Lewinsky scandal. Although he does not think that he would have been subject to personal attacks, he said, "If [one] is not going to be confirmed, it is better not to have a negative hearing. At least if someone is going to do a Google search on your name they aren't going to come up with 4,000 negative hits."[121]

Lillian BeVier told a similar story. George H. W. Bush nominated her to the Fourth Circuit in 1991. She had graduated from Stanford at the top of her class, worked as an editor for the *Stanford Law Review*, and received multiple distinguished awards. Despite assurances from Senator Joseph Biden and others, she also never received a hearing.

BeVier told me that she was "surprised at how exercised [she] can get about it after twelve years" and lamented that she "really felt sandbagged by the process."[122] Her complaints were echoed in my conversations with others. Among the problems I heard were: "You can't answer objections and concerns that are raised" and "[It] just puts your life on hold, you don't know what to work on, and

you don't have a sense of what your future will be." I also heard complaints about the "very extensive" forms that had to be filled out, including financial disclosure forms, from the American Bar Association (ABA) and the Federal Bureau of Investigation (FBI).[123]

The most difficult problems arose from how the attacks affected what others thought about the nominee. According to BeVier, "People normally don't tell you what they are thinking, but in one case [someone] raised [his] concerns [based on charges made during the confirmation process]. I found the comments so insulting, just stunned by what [that person] thought was happening."[124]

Charles Pickering's experience is worth exploring further. Nominated to the U.S. Court of Appeals for the Fifth Circuit early in Bush's first term in 2001, a decision on his nomination was delayed for more than three years. Pickering had graduated first in his class at the University of Mississippi Law School and served on the law review. He was elected to the Mississippi State Senate and was appointed to the U.S. District Court for Mississippi by George H. W. Bush. He was still serving as a district court judge when George W. Bush nominated him to a higher court.

Pickering spent much of his life working for racial equality. For example, in 1967, unlike many other Southern county prosecutors who "looked the other way," Pickering testified against an "imperial wizard" of the KKK, in a case where the Klan leader had been accused of firebombing the home of a civil rights worker.[125] Despite

his record, he was subjected to an endless barrage of attacks from Democrats accusing him of racism. The prime "proof" of racism involved a case where Judge Pickering supposedly gave a white man convicted of a cross burning an inappropriately short two-year prison sentence. Senator Charles Schumer accused Pickering of "help[ing] a man who burnt a cross." But Pickering's explanation, broadcast on CBS's *60 Minutes*, proved that the issue was much more complicated: "Pickering said this was the worst case of disproportionate sentencing he'd ever seen, especially since the real ringleader (who didn't go to prison) had attacked the same house before."[126] Pickering felt that the prosecution had made a plea bargain with the wrong defendant, leaving the most-guilty defendant, indeed the "ring leader," with a misdemeanor and no jail time.[127]

Such attacks, according to Pickering, are difficult because "you have to depend upon someone else to defend you. It is difficult enough for you to remember events about your own life ten to fifteen years ago, but you can't really depend upon someone else to know everything that they would have to know to properly respond in every instance. Senators are just too busy to find out everything that they have to know."[128]

Pickering says that the attacks have real consequences for most nominees: "With some, you can't get back your reputation. Their minds are closed. Who wants to hear your story after so long? It is old news after the confirmation process is over. Speaking out also takes a lot of time. Just traveling around and talking to people takes a lot out

of you."[129] The hardest part, said Pickering, is how much the attacks hurt and disrupt the families of the nominees.

In addition to the toll on their loved ones, Raymar, BeVier, and Pickering all complained about the paperwork and information requests. Pickering told me, "You have to produce so many documents. It just depletes you and drains you."[130] Senators who opposed Pickering just kept coming back with more and more demands for papers, and he lamented that fulfilling those requests just made it so that he could not get anything else done. Raymar also objected to the amount of paperwork: "The paperwork was a pain, and someone could provide a real service fixing this. The White House wants paperwork. The [attorney general] wants paperwork. The Senate wants paperwork. They would all ask the same questions in different ways so that you couldn't use the answers for one form for another. There was also a lack of clarity in the paperwork."[131]

The paperwork burden is greatest for the nominees with the most accomplishments. As Raymar pointed out: "People who have done more, written more, spoken more, have a much more difficult time. You have more things to explain, more possible misstatements. Sensibilities have changed over time. . . . I had questions from the White House about a footnote in a paper from law school. I can't even remember some recent events, let alone relatively minor events from law school."[132]

Clarence Thomas's autobiography reveals how even in victory the battle to get on the Supreme Court left

scars still felt sixteen years later.[133] During his confirmation, Thomas made a searing charge about the message his hearings sent to other blacks: "A high-tech lynching for uppity blacks who in any way deign to think for themselves. . . . You will be lynched, destroyed, caricatured by a committee of the U.S. Senate rather than hung from a tree."[134] Thomas's book illustrates the pain he felt during his five days of testimony and throughout the rest of the hearings by referencing one of the most powerful books on racism towards blacks in American literature:[135]

> Somewhere in the back of my mind, I must have been thinking of *To Kill a Mockingbird*, in which Atticus Finch, a small-town southern lawyer, defends Tom Robinson, a black man on trial for the rape of a white woman. He was lucky to have had a trial at all—Atticus had already helped him escape a lynch mob's rope. The evidence presented at the trial shows that Tom's accuser had lured him into her house, then kissed him, after which he fled. The case against him is laughably flimsy, but in the Deep South you didn't need a strong case to send a black man to the gallows, and it is already clear that Tom will be convicted when Atticus goes before the jury to make his closing argument.

Thomas went from having a "spotless" reputation with no accusations of personal impropriety to facing charges of sexual harassment that will dog him through history.[136] He describes how his mother lost more than thirty pounds as a result of the stress and worry, and a reporter would go on to claim that his mother wasn't being honest about the number of children that she had.[137] Years later Thomas is still bothered by people who he says directly lied to his face during the process, such as a smiling and seemingly friendly then-Senator Joe Biden promising to ask one type of question so as to lower his guard and then instead asking something completely different involving a quote that was falsely attributed to Thomas.[138]

One liberal critically reviewing *My Grandfather's Son* reacted to Thomas's discussion of his confirmation this way: "And far from being dispassionate and detached, he is filled with burning rage against the Democrats who—in his mind—did him wrong, and [he is] determined to use any opportunity that comes his way to strike against them without mercy."[139] Apparently, a position on the Supreme Court is so important that no accusation seems out of bounds.

Does the judicial confirmation process accomplish anything positive besides bruising the reputations of nominees? Are the battles over judges necessary to prevent unqualified nominees—or nominees with truly extremist positions—from getting on the courts? Or, do these battles deter high-quality potential nominees from daring

to go through the confirmation process? The answers to these questions will be explored in the chapters to come.