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## To “Advice and Consent Delay”: The Role of Interest Groups in the Confirmation of Judges to the Federal Courts of Appeal

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# To “Advice and Consent Delay”: The Role of Interest Groups in the Confirmation of Judges to the Federal Courts of Appeal

Donald E. Campbell\*

## ABSTRACT:

*Political and partisan battles over nominees to the federal courts of appeal have reached unprecedented levels. This article considers the reasons for this change in the process. Using evidence from law and political science, this article proposes that current confirmation struggles are greatly influenced by increased involvement of interest groups in the process. The article tests the role of interest groups through an in-depth examination of George W. Bush’s nomination of Leslie H. Southwick to the Fifth Circuit Court of Appeals. Utilizing the Southwick case study, the article provides evidence of how interest groups impact the confirmation process by designating certain nominees as “controversial.” The article proposes that the “controversial” label impacts how senators and the public view particular nominees and has had a direct and significant impact on the fate of nominees. Specifically, interest groups shift the incentives of individual senators, prompting senators to utilize institutional tools of delay in an effort to defeat nominees. The conclusion is that only structural changes adopted by the Senate as a whole—such as setting strict time limits on addressing nominations, or eliminating the filibuster for judicial nominees— can resolve the politicalization of the confirmation process.*

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## I. INTRODUCTION

In October 2011, Justices Scalia and Breyer appeared before the Senate Judiciary Committee, at a hearing entitled “Considering the Role of Judges Under the Constitution of the United States.”<sup>1</sup> During the course of that hearing, Senator Lindsey Graham (R-SC) bemoaned the fact that during his time in the Senate it had become more difficult to get a nominee through the confirmation process.<sup>2</sup> When Graham asked if either of the Supreme Court Justices believed that the changing nature of the process had a chilling impact on the ability to recruit judicial nominees, both Scalia and Breyer replied that they believed it did.<sup>3</sup> This exchange demonstrates how both the legislative and judicial branches have taken notice of the nature of the current confirmation process. This Article provides an in-depth examination of how the confirmation process currently operates for those nominees considered “controversial” by examining President George W. Bush’s nomination of Leslie H. Southwick to the Fifth Circuit Court of Appeals. The Article’s larger purpose is to formulate an empirical and theoretical framework for how senators evaluate nominees, to understand why the system has evolved into the current partisan-based process, and to propose how the system can be modified to move away from a delay-plagued process.

The Article begins in Part II with an examination of changes in the nature of the confirmation process over time from an essentially deferential patronage-based selection process to a more ideological and partisan process where interest groups have increasingly become involved and influential. Part III sets out the methodology that will be used to examine the confirmation of Leslie H. Southwick to the Fifth Circuit Court of Appeals. Part IV examines in detail the confirmation experience of Southwick, and also includes a theoretical explanation of the involvement of interest groups. The article concludes in Part V with a discussion of how interest group involvement in the confirmation process has resulted in a change in the incentives of senators, and provides some suggestions for modifying the process to change these institutional incentives.

## II. THE RISE OF THE CONTESTED JUDICIAL NOMINEE

The U.S. Constitution divides the task of selecting federal judges between the President and the Senate. The President is charged with nominating judicial officers, while the Senate confirms nominees by providing “advice and consent.”<sup>4</sup> This arrangement was a compromise between large and small states in the Constitutional Convention.<sup>5</sup> Beyond this general division of authority, the Constitution provides no further guidance on what it means for the Senate to provide the required “advice and consent.”<sup>6</sup>

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<sup>1</sup> *Considering the Role of Judges Under the Constitution of the United States Before the Senate Judiciary Committee*, 112th Cong. (2011) [hereinafter *Hearings*] (statement of Senator Lindsey Graham).

<sup>2</sup> *Id.* at 24.

<sup>3</sup> *Id.* at 24-25.

<sup>4</sup> U.S. CONST., art. II, § 2, cl. 2.

<sup>5</sup> The large states favored a strong executive and argued in favor of Presidential selection of judges without legislative approval. The small states, seeking as much influence for individual states as possible, sought to have the Senate alone select judges. See Felix A. Nigro, *Senate Confirmation*, 42 GEO. L.J. 241, 242 (1953).

<sup>6</sup> While the Constitution provides no explicit guidance on what it means to provide “advice and consent,” the drafters of the Constitution attempted to create a judiciary in which judicial independence

The ambiguity of the constitutional division of authority has led to much debate about the nature of input the Senate should have in the process of seating life-tenured judges. Alexander Hamilton stated in *Federalist 76* that the involvement of the Senate would provide “an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.”<sup>7</sup> This quote, among others from the Constitutional Convention, the *Federalist Papers*, and the state ratifying debates, has led some scholars to argue that the Senate’s role should be limited to evaluating a nominee’s objective qualifications.<sup>8</sup> Others, citing the same language, have argued that the obligation to provide “advice and consent” authorizes the Senate to delve deeper than mere qualifications, and justifies inquiry into a nominee’s ideology and judicial philosophy (*i.e.*, how a nominee will decide particular issues if confirmed).<sup>9</sup> Still others have argued that the real test should be a nominee’s “moral instincts” as opposed to judicial philosophy.<sup>10</sup> Such ambiguity and uncertainty has led to shifts in the nature of the Senate’s involvement in the process over time.<sup>11</sup>

Until recently, the debate over the role of the Senate in the confirmation process has focused on confirmation battles of nominees to the United States Supreme Court.<sup>12</sup> The

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was a primary concern. See THE FEDERALIST NO. 78 (Alexander Hamilton). See also Matthew Madden, Note, *Anticipated Judicial Vacancies and the Power to Nominate*, 93 VA. L. REV. 1135, 1139–44 (2007).

<sup>7</sup> THE FEDERALIST NO. 76 (Alexander Hamilton). Hamilton predicted that the President, knowing the Senate would be a check on his nominations, would select individuals based on merit (and not other improper considerations such as favoritism, etc.). Therefore, he states that it is “not very probable that his nomination would often be overruled.” From the Senate side, Hamilton felt that the Senate would confirm a proper selection from the President because there was no way for the Senate to be sure that subsequent nominees would be any more acceptable and they would be hesitant to reject a nominee and “cast a kind of stigma . . . upon the judgment of the chief magistrate . . .”

<sup>8</sup> See Randall R. Rader, *The Independence of the Judiciary: A Critical Aspect of the Confirmation Process*, 77 KY. L.J. 767, 815 (1988) (“the Senate must elect to exercise its check only in those rare instances in history where the President has clearly overstepped the bounds of appropriate discretion in the appointment process”). See also THE FEDERALIST NO. 66 (Alexander Hamilton) (noting that “the Senate, who will merely sanction the choice of the Executive,” would not hesitate to impeach officers the Senate previously confirmed).

<sup>9</sup> In this way the Senate provides what Hamilton describes as an “excellent check” on the executive branch in THE FEDERALIST NO. 76. Richard D. Freer, *Advice? Consent? Senatorial Immaturity and the Judicial Selection Process*, 101 W. VA. L. REV. 495, 502 (1988) (arguing that the Founders envisioned a “bold role” for the Senate in the confirmation process); Albert P. Melone, *The Senate’s Confirmation Role in Supreme Court Nominations and the Politics of Ideology Versus Impartiality*, 75 JUDICATURE 68, 69 (1991) (“it is my view that senators may reasonably inquire into and base their final decision to confirm or reject presidential choices on factors other than the nominees’ personal and professional qualifications. Senators may legitimately ask nominees about their political and judicial ideology . . .”). See also Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1207 (1988) (“a nominee may be rejected on the basis of statesmanship, prudence, common sense, and politics, rather than constitutional right and duty. Therefore, a nominee may be rejected without the Senate having to establish humiliating propositions, such as that the nominee is a dangerous radical”).

<sup>10</sup> Stephen Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185, 1199 (1988).

<sup>11</sup> Marcus E. Hendershot, *From Consent to Advice and Consent: Cyclical Constraints Within the District Court Appointment Process*, 63 POL. RES. Q. 328 (2008).

<sup>12</sup> Geoffrey R. Stone, *Understanding Supreme Court Confirmations*, 2010 SUP. CT. REV. 381 (2010); Jeffrey A. Segal, Albert D. Cover & Charles M. Cameron, *Senate Confirmation of Supreme Court Justices:*

Supreme Court garners such attention because of its uniquely important status—including its discretionary docket and focus on salient policy issues, its infrequent vacancies, and its highly visible nomination and confirmation process. Senators have been particularly interested in exercising their constitutional right of advice and consent when it comes to Supreme Court vacancies. Since George Washington, the confirmation of justices to the Supreme Court has been viewed as the appropriate venue for partisan<sup>13</sup> and institutional fights<sup>14</sup> over the judicial philosophy of the country's highest court.

#### A. Lower Court Nominations as Patronage Positions

Lower federal courts have been viewed differently. Historically these were largely patronage positions doled out by presidents in consultation with (and at times at the direction of) senators of the state where the vacancy occurred.<sup>15</sup> As discussed above, because the Constitution gave no guidance on precisely what it meant to provide “advice” and how much or what type of scrutiny was contemplated by congressional “consent,” a process arose in which senators shifted the power balance of confirmation struggles to the legislative branch.<sup>16</sup> Recognizing that a presidential selection without Senate confirmation dooms the nomination, senators adopted formal and informal rules to protect the rights of senators (and by extension the Senate) to govern approval of nominees. These tools include senatorial courtesy (recently enforced through the use of the “blue slip”), the hold, the filibuster, and the ability to schedule hearings both in the Senate Judiciary Committee and on the floor of the Senate.

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*The Role of Ideology in Senate Confirmation of Supreme Court Justices*, 77 KY. L.J. 485, 487 n.9 (1988) (collecting sources).

<sup>13</sup>See JOHN ANTHONY MALTESE, *THE SELLING OF SUPREME COURT NOMINEES* 26–31 (1995). George Washington's nomination of John Rutledge as Chief Justice failed due to partisan opposition to his speaking out against the Jay Treaty. See also HENRY J. ABRAHAM, *JUSTICES & PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* (2d ed. 1985).

<sup>14</sup> Jeffrey Segal, *Senate Confirmation of Supreme Court Justices: Partisan and Institutional Politics*, 49 J. POL. 998 (1987).

<sup>15</sup> Joseph Harris, *The Courtesy of the Senate*, 67 POL. SCI. Q. 36, 37–38 (1952) (“[T]he custom of permitting the senators of the party in office to select the persons for federal appointment in their own states results in political and often in patronage appointments. The actual selections are frequently made by party leaders rather than by senators, and these federal offices are commonly used to reward party workers or the supporters of the senators. In the past, unqualified persons have often received the necessary political sponsorship and have been appointed.”). See also Roger E. Hartley & Lisa M. Holmes, *Increasing Senate Scrutiny of Lower Federal Court Nominees*, 80 JUDICATURE 274, 277 (1996) (“[P]rior to Carter lower court nominations and confirmations were more routine. Norms of senatorial courtesy in recruitment and confirmations were quite strong and there is some evidence that the Justice Department deferred many lower court nomination decisions to senators.”).

<sup>16</sup> There is some irony in this occurrence. In *Federalist No. 76*, Hamilton states that one justification for placing the appointment power in the hands of the President was to avoid the type of log-rolling that would inevitably occur in the legislative branch. *THE FEDERALIST NO. 76* (Alexander Hamilton). In commenting on why it was a bad idea for the Senate to appoint judges (and other officers), Hamilton notes that “the coalition will commonly turn upon some interested equivalent: ‘Give us the man we wish for this office, and you shall have the one you wish for that.’ . . . And it will rarely happen that the advancement of the public service will be the primary object either of party victories or of party negotiations.” *Id.* The norm of senatorial courtesy that developed in the Senate, which shifted the balance of power in the judicial nomination process to the Senate, proved Hamilton to be prescient.

Historically, the tool providing individual senators the most power is senatorial courtesy, a process in which a senator will defer to the opinions of home-state senators with regard to judicial vacancies in the senator's state, with the expectation that such deference will be reciprocated when vacancies arise in the supporting senator's state:

It is, of course, exceedingly helpful to a senator to be able to reward supporters with good posts in the federal government. Conversely, it is enormously damaging to a senator's prestige if a president of his own party ignores him when it comes to making an appointment from or to the senator's own state. What is even more damaging to a senator's prestige and political power is for the president to appoint to a high federal office someone who is known back home as a political opponent of the senator. It was easy for senators to see that if they joined together against the president to protect their individual interests in appointments, they could to a large degree assure that the president could only make such appointments as would be palatable to them as individuals. Out of such considerations grew the custom of "senatorial courtesy."<sup>17</sup>

Historically, if a senator objected to a President's nomination to a judicial opening in a senator's state,<sup>18</sup> the senator merely needed to state that the nominee was "personally obnoxious" to invoke senatorial courtesy and defeat the nomination.<sup>19</sup> Since the early twentieth century, the norm of senatorial courtesy has been enforced through the blue slip process.<sup>20</sup> The blue slip procedure operates at the level of the Judiciary Committee:

When a judicial nomination is made, the Chair of the Judiciary Committee sends "blue slips" (so called because of the color of the paper used) to the senators of the nominee's home state. If even one senator declines to return the slip, then the nomination is dead in the water, or further action will be extremely difficult, depending on the practice the Committee Chair decides to follow.<sup>21</sup>

While blue slip deference is an informal mechanism that the Chairman of the Judiciary Committee can choose not to follow, there are strong individual and institutional pres-

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<sup>17</sup> HAROLD W. CHASE, *FEDERAL JUDGES: THE APPOINTING PROCESS* 7 (1972).

<sup>18</sup> Or a seat on a court of appeal traditionally associated with a particular state.

<sup>19</sup> JOSEPH HARRIS, *THE ADVICE AND CONSENT OF THE SENATE* 215–37 (1953). *See also* Harris, *supra* note 15, at 39 ("An objection to a nominee does not mean that the nominee is actually 'personally obnoxious' to the objecting senator; it frequently involves no animus whatever, but merely indicates that the senator has another candidate.").

<sup>20</sup> Sarah A. Binder, *Where Do Institutions Come From? Exploring the Origins of the Senate Blue Slip*, 21 *STUD. AM. POL. DEV.* 1 (2007) (Blue Slip process became institutionalized in approximately 1913 as a way to determine the home-state Senator's position on a nominee to eliminate uncertainty about the opposition a nominee will receive early in the process).

<sup>21</sup> Brannon P. Denning, *The Judicial Confirmation Process and the Blue Slip*, 85 *JUDICATURE* 218, 220 (2002).

tures to adhere to the process.<sup>22</sup> For example, when Orrin Hatch (R-UT) became Chair of the Judiciary Committee in 2001, he threatened to move forward with the judicial nominees of President George W. Bush despite the opposition of home-state Democratic senators. This caused an uproar among the Democrats—and resulted in threats to block all of Bush’s nominees.<sup>23</sup> The likely showdown was averted when Vermont Senator Jim Jeffords left the Republican Party to become an Independent (caucusing with the Democrats), shifting control of the Senate to the Democrats.<sup>24</sup> In 2003, with Republicans reclaiming control of the Senate, Hatch followed through with his threat to reject blue slip deference—resulting in Democratic filibusters of Bush nominees.<sup>25</sup>

In addition to the tool of senatorial courtesy, while a nomination is pending before the Senate Judiciary Committee, members of the Committee can request a delay of the vote on a nominee, which is traditionally honored. While this request for delay will typically not kill a nomination, it does give additional time for opponents (or supporters) of the nominee to seek additional votes, and indicates that the nominee may face opposition. Once a nominee makes it to the floor of the Senate, any senator may engage in a filibuster of the nominee. To end the filibuster, sixty senators must vote to invoke cloture and end debate. Mustering sixty votes for a filibustered nominee can be a difficult task. Finally, any senator can place a “hold” on a nominee. The hold has historically been a method which allowed additional time for senators to “conduct research, prepare for debate, or accommodate busy schedules.”<sup>26</sup> Today, however, placing a hold can indicate intent of a senator to filibuster, and can essentially kill the nomination.<sup>27</sup>

There are two additional institutional tools available to the majority party in the Senate. The first is at the level of the Judiciary Committee. The Chairman of the Committee has the power to determine which nominations receive hearings and ultimately a vote. Of course, a nominee who receives no vote in the Judiciary Committee does not have an opportunity to reach the floor of the Senate. In addition, the majority leader of the Senate determines if and when a nomination—once out of the Judiciary Committee—will receive a vote on the floor of the Senate. These scheduling powers provide two additional points of delay or defeat for a nomination.

It is understandable that because of the institutional constraints faced by Presidents in getting their nominee confirmed they have an incentive to consult with senators when

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<sup>22</sup> AMY STEIGERWALT, *BATTLE OVER THE BENCH: SENATORS, INTEREST GROUPS, AND LOWER COURT CONFIRMATIONS* 56 (2010) (“[T]he predominant reason for the invocation of senatorial courtesy is institutional. Institutional senatorial courtesy reflects the ongoing struggle between the legislative branch and the executive branch over the power to select judges and over what the Senate’s constitutional advice and consent role truly encompasses. Institutional senatorial courtesy arises when senators believe they have not been adequately consulted about nominations to vacancies in their state, and so senators call on their colleagues to support their institutional claim to the power to select judicial nominees.”).

<sup>23</sup> Thomas B. Edsall, *Democrats Press Bush for Input on Judges*, WASH. POST, Apr. 28, 2001.

<sup>24</sup> John Anthony Maltese, *Confirmation Gridlock: The Federal Judicial Appointments Process Under Bill Clinton and George W. Bush*, 5 J. APP. PRAC. & PROCESS 1, 21–22 (2003).

<sup>25</sup> *Id.* at 25–26.

<sup>26</sup> LAUREN COHEN BELL, *WARRING FACTIONS: INTEREST GROUPS, MONEY, AND THE NEW POLITICS OF SENATE CONFIRMATION* 45 (2002).

<sup>27</sup> *Id.* (“Beginning in the late 1960s, the number of requests for holds began to increase, and today senators use requests to hold legislation hostage, seek revenge, or embarrass political enemies.”).

deciding whom to nominate to ensure that the nominee goes through the confirmation process as smoothly as possible.<sup>28</sup> Therefore, for most of the nation's history, the nomination and confirmation of lower federal court judges has been a negotiation process between the President and home-state senators—with both knowing where the other stood on a nominee—with little outside influence in the process.

### B. The Rise of Interest Group Involvement in the Confirmation Process

In recent times, however, the confirmation process has changed. Presidents have started to see the appointment of lower federal court judges as an opportunity to establish an ideological legacy.<sup>29</sup> Because the Supreme Court decides very few cases, the lower federal courts (and particularly the courts of appeal) have become the courts of last resort for almost all litigants. President Reagan, while not the first President to consider ideology as the primary factor in these lower court judicial appointments, established the trend that all subsequent presidents have followed.<sup>30</sup>

Why the shift from selection based on negotiation and patronage to ideology? Scherer argues that the change has occurred for two primary reasons.<sup>31</sup> First, there has been a shift in the nature of party politics. Under the old party system (through the mid 1960s), the party structure was a loose association of local party activists. These activists were particularly interested in the spoils that successful elections brought, and were not ideological purists who demanded the same from lower court nominees.<sup>32</sup> In addition,

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<sup>28</sup> President Johnson supposedly said when dealing with nominees, that the Senate was divided into “whales” and “minnows” and the key was to negotiate with the few whales, and the President could expect the minnows to fall into line. MARK SILVERSTEIN, *JUDICIOUS CHOICES: THE NEW POLITICS OF SUPREME COURT CONFIRMATIONS* 19 (1994). See also Bryon J. Moraski & Charles R. Shipan, *The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices*, 43 AM. J. POL. SCI. 1069 (1999) (setting out a spatial model indicating how Presidents consider the ideology of the Senate in proposing Supreme Court nominees).

<sup>29</sup> Hartley et al., *supra* note 15.

<sup>30</sup> Prior presidents certainly appreciated the importance of ideology—including Franklin Roosevelt, Lyndon Johnson, and Richard Nixon—but the emphasis on ideology became a lasting and systematic consideration of judicial selection at all levels after the defeat of President Reagan Supreme Court nominee Robert Bork in 1987. Judge Rader notes three unique aspects of the Bork confirmation process: “[F]irst, the abandonment of most self-imposed restraints on the nature and purpose of the inquiries; second, the expansion in terms of length and repetitiveness of the inquiry process; and *third, an element out of the control of the Senate but influenced by the nature of the Senate proceedings, the use of direct political grassroots campaigning and mass media advertising to shape public opinion on the nomination and affect the outcome.*” Rader, *supra* note 8, at 807 (emphasis added). For a discussion of how presidents from Franklin Roosevelt through Ronald Reagan selected judicial nominees, see generally SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* (1997).

<sup>31</sup> It should be noted that an institutional condition leading to an increase in interest group involvement was passage of the Seventeenth Amendment in 1913. This Amendment resulted in senators' constituencies moving from state legislators to the state citizens. Such a change laid the foundation for the interest group involvement that would arise later. See Melone, *supra* note 9, at 73 (“[The passage of the Seventeenth Amendment] may have made senators more sensitive to interest group and grassroots awareness of judicial policymaking”).

<sup>32</sup> NANCY SCHERER, *SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS* 11–12 (2005).

because the parties themselves were heterogeneous (*e.g.*, the divide between Northern and Southern Democrats), an ideological test for nominees was impossible.<sup>33</sup> This began to change in the 1960s as the parties became more homogenous and unwilling to compromise on issues of ideology.<sup>34</sup>

In addition to a change in parties, there was also a shift in the types of cases that federal courts addressed. Whereas prior to the 1950s, the federal courts addressed primarily property and business claims, beginning in the 1950s the Court broadened the types of cases on its agenda, including social issues related to the right to privacy and civil rights and liberties.<sup>35</sup> With the combination of homogenous political parties and a changing federal court docket, activists insisted that lower federal court nominees—who would be interpreting and implementing the new rights adopted by the Supreme Court—be ideologically compatible.<sup>36</sup>

This shift in the nature of judicial selection and confirmation changed the complexion of the process. It meant that nominees who in the past would have been selected on patronage-based qualifications were instead vetted and selected based on their ideological purity, and senators began to oppose certain nominees to “score points” with interest groups and political activists whose interests had prompted them to become involved in the confirmation process.<sup>37</sup> Changes in the party structure and the Supreme Court’s docket coincided with technological changes that modified senatorial incentives. Beginning in the late 1950s, the increasing prevalence of television coverage began to provide junior senators opportunity (and incentive) to go against the norms of deference in the Senate to pursue their own ideological goals.<sup>38</sup> In addition, the rise of interest group involvement prompted individual senators to look outside the Senate body for direction in addressing confirmations.<sup>39</sup>

This partisan-based shift in the confirmation process placed a strain on the institution-protecting norms within the Senate. While opposition senators were willing to defer to patronage-based nominees, they became increasingly unwilling to defer to ideological-

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<sup>33</sup> *Id.* at 12.

<sup>34</sup> *Id.* See also NELSON W. POLSBY & AARON WILDAVSKY, PRESIDENTIAL ELECTIONS: STRATEGIES OF AMERICAN ELECTORAL POLITICS 30–31 (1976) (“Purists consider the stock-in-trade of the politician—compromise and bargaining, conciliating the opposition, bending a little to capture support—to be hypocritical; they prefer a style that relies on the announcement of principles and on moral codes.”).

<sup>35</sup> See generally CHARLES R. EPP, THE RIGHTS REVOLUTION (1998). See also Thomas P. Lewis, *Commentary on Senate Confirmation of Supreme Court Justices*, 77 KY. L. J. 539, 544 (1988) (“If it is perceived that the Court simply reaches results on the basis of what the justices believe is fair—on issues that touch so many of us—without any other basic restraints, it is obvious that constituencies will develop around certain types of nominees and marshal their forces to sway the Senate. The Senate will have less and less choice about the wisdom of thoroughly politicizing the confirmation process.”).

<sup>36</sup> SCHERER, *supra* note 32, at 13–21. See also J. WOODFORD HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS 10 (1981) (“Lower federal courts, their discretion stretched to implement broad decrees, resemble administrative agencies. They oversee great public enterprises in education, housing, and economic development. They also serve as ombudsmen for relief of official abuse. And in the process of enlarging their sphere of influence federal judges have enlarged their political risks.”).

<sup>37</sup> SCHERER, *supra* note 32, at 23. Scherer calls the strategies used to score points with these political activists “elite mobilization strategies.”

<sup>38</sup> BELL, *supra* note 26, at 43.

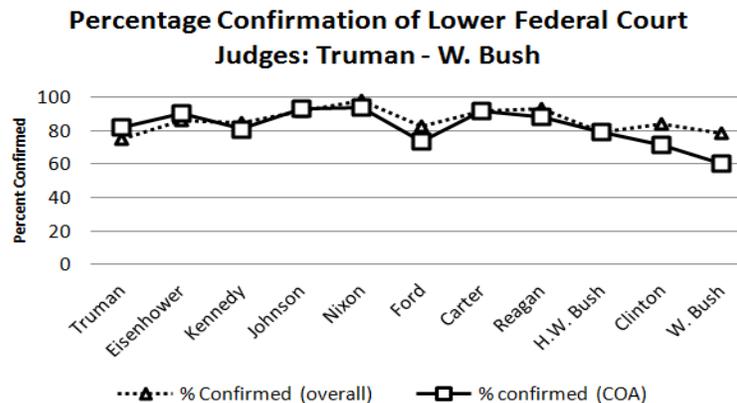
<sup>39</sup> BELL, *supra* note 26, at 44.

ly based nominees.<sup>40</sup> The question is how to observe and measure this changing process with regard to courts of appeal nominees.

### C. Understanding the Change in the Confirmation Process for Court of Appeals Nominees

It is clear that the lower court confirmation process is different from what occurs at the Supreme Court level. While Supreme Court nominees almost always receive a floor vote and can expect to receive varying amounts of opposition, lower court nominees are less likely to make it to the Senate floor for a vote. But those who do make it are overwhelmingly confirmed, often by a voice vote or without any significant opposition.<sup>41</sup> For example, between 1985 and 2004, of the 284 nominations to the federal courts of appeal, 192 received floor votes, *none* of the nominees who made it to the Senate floor were defeated, and 170 were confirmed unanimously or with only one “no” vote.<sup>42</sup> **Figure 1** sets out the percentage of confirmed lower federal court judges for Presidents Truman through George W. Bush, and demonstrates two points. First, the percentage of judicial nominees (both district court and court of appeals nominees) who are ultimately confirmed is very high. Second, although the percentage confirmed remains high, the Table indicates that the trend line begins decreasing during the presidency of George H.W. Bush.

**Figure 1.**



The overwhelming percentage of successful nominees may create the perception of a lack of opposition, but this is incongruent with the changing nature of the process, where the political battles over some nominations reach a fevered pitch.<sup>43</sup> This discrepancy has led

<sup>40</sup> STEIGERWALT, *supra* note 22, at 7–8 (“These changes in how presidents approached the selection of lower court nominees subsequently led to a transformation in how the Senate processed these nominations. Senators grew dismayed at the reduction in their power to select nominees, as well as concerned by the increasing political and ideological tenor of the resulting appointments, and they began to screen nominations to the federal bench more carefully.”).

<sup>41</sup> Garland W. Allison, *Delay in Senate Confirmation of Federal Judicial Nominees*, 80 JUDICATURE 8, at 9 (1996).

<sup>42</sup> Nancy Scherer, Brandon Bartels & Amy Steigerwalt, *Sounding the Fire Alarm: The Role of Interest Groups in the Lower Court Confirmation Process*, 70 J. POL. 1026, 1027 (2008).

<sup>43</sup> Allison, *supra* note 41, at \*8; Hartley et al., *supra* note 15, at 277.

scholars to go behind the scenes to discover how opposition impacts lower court nominees. They discovered that the fight over lower court judges most often occurs not in the floor vote—but in pre-floor procedures. Utilizing procedural tools available to them such as senatorial courtesy, holds, and scheduling decisions, senators were *delaying* consideration of nominees they opposed.<sup>44</sup>

Delay can occur between the time of the vacancy and a presidential nomination.<sup>45</sup> It can also occur between the time of the nomination and confirmation.<sup>46</sup> To demonstrate the impact that delay has had on the process, the average number of days for a court of appeals nominee to be confirmed rose from 33.3 days for President Carter's nominees to 305.4 days during the first two years of George W. Bush's first term.<sup>47</sup> This evidence of delay fits into the declining Senate norms discussed above. As senators began to seek increased media exposure and to satisfy special interests, the traditional patronage-based approach—which relied on the norms associated with an ingrained system of seniority in the Senate—began to fail. Taking its place was a politically charged system of delay.<sup>48</sup> Delay is particularly effective at providing an opportunity for attention and extended opposition: “[d]rawing the proceedings out over time permits the opposition to organize, new information to be discovered, the public to be aroused.”<sup>49</sup>

Evidence demonstrating a shift to a longer and more contentious confirmation process for some nominees, while important itself, only presents half the story. After all, not every lower court nominee faces opposition and long delay. To complete the story, it is necessary to delve into the nature of the senatorial opposition. There are a number of reasons that a senator may delay a nominee. Often opposition has nothing to do with the nominee. Instead, a senator may delay a nominee in retaliation for how other nominees were treated, or to gain leverage in a dispute unrelated to the nominee.<sup>50</sup> Opposition based on these factors, while important, is beyond the scope of this article.

This article is particularly interested in those nominees opposed on the basis of the nominee's ideology. This type of opposition—especially by non-home-state senators—is interesting to study because it seems to be illogical when considered in a Mayhewian

<sup>44</sup> Lauren Cohen Bell, *Senatorial Discourtesy: The Senate's Use of Delay to Shape the Federal Judiciary*, 55 POL. RES. Q. 589 (2002); Sarah A. Binder & Forrest Maltzman, *The Limits of Senatorial Courtesy*, 29 LEGIS. STUD. Q. 5 (2004); 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) (delay in confirmation is exacerbated by divided government, nomination in the last year of a president's term, and nominations that occur after the Bork nomination).

<sup>45</sup> Tajuana D. Massie, Thomas G. Hansford & Donald R. Songer, *The Timing of Presidential Nominations to the Lower Federal Courts*, 57 POL. RES. Q. 145 (2004) (finding that presidents delay putting forth judicial nominees to the district courts and courts of appeal when institutional constraints such as control of the Senate make it unlikely the President will be successful in nominating someone that shares the President's policy preferences).

<sup>46</sup> Sarah A. Binder & Forrest Maltzman, *Senatorial Delay in Confirming Federal Judges, 1947-1998*, 46 AM. J. POL. SCI. 190 (2002); David C. Nixon & David L. Goss, *Confirmation Delay for Vacancies on the Circuit Court of Appeals*, 29 AM. POL. RES. 246 (2001).

<sup>47</sup> Sheldon Goldman, *Unpicking Pickering in 2002: Some Thoughts on the Politics of Lower Federal Court Selection and Confirmation*, 36 U.C. DAVIS L. REV. 695, 709, 711 (2003).

<sup>48</sup> BELL, *supra* note 26, at 45.

<sup>49</sup> SILVERSTEIN, *supra* note 28, at 23.

<sup>50</sup> STEIGERWALT, *supra* note 22, at 49-94.

sense: Why would a senator expend resources to oppose a judicial nominee who does not decide cases from the senator's state, and who will not decide cases that involve the senator's constituents?<sup>51</sup> For a senator who is primarily interested in reelection, using scarce resources and political capital to oppose a judicial nominee whose job will not impact the senator's constituents runs counter to the traditional understanding of congressional motivations.<sup>52</sup>

To understand this puzzle, it is useful to consider the decision-making process of a nominee through the lens of the consensus mode of policy decision-making developed by Kingdon.<sup>53</sup> First, when no controversy arises, a senator's inclination is to "vote with the herd" and approve the nominee.<sup>54</sup> This go-along-to-get-along attitude is necessary because of the numerous obligations on senators' time and resources. The lack of opposition indicates to the senator that he or she will face no consequences for an affirmative vote.<sup>55</sup> The response changes, however, when a controversy is triggered in a senator's "field of forces," including the senator's personal attitude about the issue/nominee under consideration and the position of constituents, interest groups, or fellow trusted senators.<sup>56</sup> When a policy becomes controversial, the senator will evaluate how many and which forces in his or her field conflict and, based upon the number and weight of the opposing fields, decide how to proceed.<sup>57</sup>

The study by Scherer and colleagues' study of controversial court of appeals nominees fits nicely into the Kingdon model.<sup>58</sup> They identify the increase in the involvement of interest groups in the process as a justification for a senator opposing a nominee. To put this in the terms of the Kingdon model, interest group involvement causes senators to move from the herd and justifies expressing opposition to a nominee.<sup>59</sup> In interviews with leaders of several interest groups, Scherer and her colleagues found that during the presidency of George W. Bush, liberal interest groups actively researched every nominee to both the federal district court and courts of appeals. When these groups uncovered something they considered problematic (*i.e.*, information indicating that the nominee might vote against the group's policy positions), they would share the information, "first with sympathetic senators on the Judiciary Committee, and later, with sympathetic senators

<sup>51</sup> DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 5 (1974). Mayhew famously hypothesized that members of Congress are "single minded seekers of reelection," and that their actions are taken to further this goal. *Id.* Mayhew proposes three primary activities that members of congress engage in to obtain this goal: advertising, credit claiming, and position taking. *Id.* at 73.

<sup>52</sup> *Id.*

<sup>53</sup> JOHN W. KINGDON, *CONGRESSMEN'S VOTING DECISIONS* 229-41(1973).

<sup>54</sup> *Id.* at 230.

<sup>55</sup> *Id.* ("On final passage of numerous bills, and on some amendments, the congressman simply sees no conflict in his environment at all; he often does not even bother to look further into the matter . . . given the terrific press for time and the competition among various matters for his attention, there is little point to studying matters over which there is no controversy.").

<sup>56</sup> *Id.* at 232.

<sup>57</sup> *Id.* at 234-35.

<sup>58</sup> See Segal et al., *supra* note 12, at 491 (discussing the consensus model in the context of Supreme Court nominees).

<sup>59</sup> The interest groups in this scenario play the role of "opposition entrepreneurs" seeking to prompt Senators to "see controversy and to scrutinize nominees closely." Glen S. Krutz, Richard Fleisher & Jon R. Bond, *From Abe Fortas to Zöe Baird: Why Some Presidential Nominations Fail in the Senate*, 92 AM. POL. SCI. REV. 871, 878 (1998).

throughout the chamber . . . .”<sup>60</sup> Interest groups may also go public with their opposition, writing op-ed pieces and encouraging their members to actively oppose a nominee.

Interest groups thus prompt senators to abandon the presumption-of-confirmation that occurs when they adhere to the norm of senatorial courtesy, and move senators into a defensive mode, more willing to examine (and challenge) a particular nominee. The interest group’s action has been described as sounding a “fire alarm” that senators heed, “because interest groups represent the views of key constituents in the two major parties—constituents who not only care about the make-up of the lower federal courts but who also are the most mobilized voters—senators are reluctant to ignore the views expressed by interest groups.”<sup>61</sup> Add to this the fact that interest groups impact fundraising, and the question of why senators choose to become involved in lower court confirmation battles becomes clearer.<sup>62</sup>

Interest group opposition can have substantive implications for a judicial nominee. When interest groups do not raise the alarm, senators will routinely and relatively quickly confirm a nominee. On the other hand, when an alarm is sounded, the nominee’s chances of confirmation go down significantly: “. . . unopposed nominations experience a 0.85 probability of confirmation, nominees opposed by conservative groups a 0.78 probability of confirmation (a change of 0.07) and nominees opposed by liberal groups a 0.52 probability of confirmation (a change of 0.33).”<sup>63</sup> In short, the presence of interest group opposition can trigger a sympathetic senator to view the nominee as controversial and worth opposing to score points with interest groups and party activists who could impact the senator’s reelection. Once a senator perceives the nominee as controversial, the senator is willing to utilize institutional tools of opposition, delay, or both, resulting in a delay in confirmation or a reduced likelihood of the nominee’s being confirmed.

#### D. The Nature of Interest Group Opposition: Agenda Setting and Framing

The fact that interest group involvement has changed the nature of confirmations raises additional questions. For example, how do interest groups become involved and what impact do they have on the process? During the presidencies of Bill Clinton and George W. Bush, there were 167 individuals nominated to the courts of appeals; only fifty-five (thirty-three percent) were considered “controversial” and actively opposed by interest groups.<sup>64</sup> Furthermore, of those fifty-five, only twenty-five were not confirmed.<sup>65</sup>

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<sup>60</sup>Scherer et al., *supra* note 42, at 1028.

<sup>61</sup>*Id.* at 1029. *See also* Segal et al., *supra* note 12, at 506 (1988) (presenting empirical evidence that ideologically distant senators will play a significant role in the senator’s vote on a Supreme Court nominee only when there is a factor in addition to ideology to trigger opposition such as the fact that “the nominee is of less than sterling quality or the political environment is hostile to the president”).

<sup>62</sup>BELL, *supra* note 26, at 52 (interest group incentives “are both electoral and financial; with their ability to educate and mobilize the grass roots, interest groups make senators’ constituents aware of impending confirmation decisions. PACs frequently use their campaign-financing role to provide incentives to senators who act on the confirmation in the way desired”). *See also* Scherer, *supra* note 32, at 25–26 (2005) (discussing actions that National Organization for Women (NOW) would be willing to take, including contacting donors, to make sure that their opposition to a judicial candidate was made clear).

<sup>63</sup>Scherer et al., *supra* note 42, at 1035.

<sup>64</sup>To identify those nominees who are considered “controversial,” the article uses the convention developed by Scherer et al. A nominee is considered controversial if she is publicly opposed by at

The seemingly low number of judicial nominees opposed by interest groups is a strategic decision. While a group who opposes the policies of the appointing President may believe that all nominees are objectionable, it is not feasible to oppose all nominees for two main reasons. First, groups simply do not have the resources to oppose all nominees (another difference from Supreme Court nominees). Second, senators are only willing to actively oppose a limited number of nominees.<sup>66</sup> This makes the limited number of nominees that interest groups identify as “controversial” a particularly interesting group to analyze.

Those who study the issue of interest group opposition find the groups have varying approaches to determining which nominee to oppose. Some groups have the resources to investigate each nominee. Other groups rely on grassroots members to bring potential issues to the leaders at the national level.<sup>67</sup> Once a group has chosen a nominee to oppose, it must be able to move the issue onto the agenda of senators and the public. Agenda setting—a concept taken from political communication literature—is “the process by which problems become salient as political issues meriting the attention of the polity.”<sup>68</sup> In short, interest groups must make senators believe that a particular nominee is worth parting from the herd and opposing.

Interest groups engage in three activities in hopes of moving a particular nominee onto the agenda. First, they distribute information to a senator’s constituents who are sympathetic to the interest group’s position in an attempt to harden opposition to a nominee.<sup>69</sup> Second, groups coordinate with sympathetic citizens to build grassroots opposition

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least two national interest groups. Active opposition includes op-ed pieces in newspapers as well as press releases and statements opposing a nominee. See Scherer et al., *supra* note 42, at 1032 and Web Appendix D; STEIGERWALT, *supra* note 22, at 199–201.

<sup>65</sup> These calculations were based on individual nominees and not nominations. When the Senate fails to act on a nomination before the end of the Congress, the nomination lapses and is returned to the president pursuant to Senate Rule XXXI. S. COMM. ON RULES AND ADMIN., *STANDING RULES OF THE SENATE*, S. DOC. NO. 110-9, at 16–17 (2007) (Rule XXXI), available at <http://www.rules.senate.gov/public/index.cfm?p=RuleXXXI>. The president must then re-nominate the individual (or nominate someone else). These subsequent re-nominations are not considered in this calculation.

<sup>66</sup> SCHERER, *supra* note 32, at 131 (“[L]iberal activists firmly believe that Democratic senators on the Judiciary Committee will only vote against so many judicial nominees in deference to the president. How many ‘no’ votes each senator has is a huge question mark for these groups. Accordingly, for liberals, yesterday’s confirmation fight directly affects tomorrow’s confirmation fight.”).

<sup>67</sup> SCHERER, *supra* note 32, at 123–26. Scherer notes that the method of investigation varies among Democratic and Republican-leaning groups, with liberal groups performing assessments of each nominee and conservative groups relying on grassroots information. In addition, Scherer notes a difference of defining what constitutes a “controversial” nominee based on the characteristics of the group. For example, some groups such as the conservative Judicial Selection Monitoring Project or the liberal Alliance for Justice evaluate nominees on the basis of the nominee’s “judicial philosophy.” Other, more issue-specific groups, such as National Abortion Rights and Reproductive Action League or Concerned Women for America, evaluate nominees based solely on their position on a single issue (*i.e.*, abortion).

<sup>68</sup> Fay Lomax Cook, Tom R. Tyler, Edward G. Goetz, Margaret T. Gordon, David Protess, Donna R. Leff & Harvey L. Molotch, *Media and Agenda Setting: Effects on the Public, Interest Group Leaders, Policy Makers, and Policy*, 47 *PUB. OPINION Q.* 1, 16–35 (1983).

<sup>69</sup> Gregory A. Caldeira & John R. Wright, *Lobbying for Justice: Organized Interests, Supreme Court Nominations, and the United States Senate*, 42 *AM. J. POL. SCI.* 499, 503 (1998).

(or at least the appearance of grassroots opposition) to a nominee through, for example, e-mail, letter-writing campaigns, or op-ed pieces.<sup>70</sup> Third, groups can provide information directly to a senator about the nominee.<sup>71</sup> Although there is not a consensus, some groups have noted that direct communication with senators may not be the most effective method because the institutional pressure to defer to selected nominees is great.<sup>72</sup> Instead, to move a nominee onto the radar of a senator, they must have active grassroots support:

[T]o have any real impact in influencing the appointment process, it is not enough for elites ‘inside the Beltway’ to voice objections to the nominees – by posting information on their websites, publishing op-ed pieces in leading conservative or liberal media outlets, or lobbying politicians directly. Rather, as everyone interviewed readily conceded, it is absolutely critical that they also get *grass-roots activists* involved in the process – by writing letters, sending e-mails, telephoning their elected representatives, and in some extreme cases, organizing rallies against specific lower court nominees. These grass-roots activities are critical because they send messages to senators that thousands of the most mobilized constituents in their party object to a particular nominee, and that their critical support of that politician in the next election may turn on a senator’s public stance on that nominee.<sup>73</sup>

Mobilizing grassroots opposition to a nominee, while necessary, is not sufficient to achieve a group’s goal of defeating a nominee. Interest groups also must influence how senators think, and get enough senators to adopt their position to defeat the nomination. This influence occurs through framing. Framing is the act of “selecting and highlighting some facets of events or issues, and making connections among them so as to promote a particular interpretation, evaluation, and/or solution.”<sup>74</sup> From a theoretical perspective, it is useful to think of the framing process utilizing the cascading activation model developed by Entman.<sup>75</sup>

The choice of how to frame a nominee is important. Ineffective depictions of nominees will be ignored and result in a waste of time, resources, and possibly goodwill with sympathetic senators. In addition, poorly chosen frames can isolate senators who might

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<sup>70</sup> *Id.* at 503–04.

<sup>71</sup> *Id.* at 504.

<sup>72</sup> As a prominent conservative activist put it: “We [JSMP] don’t do a lot of direct lobbying from us to the senators [in order to get them to vote against a particular nominee]. It wouldn’t be effective . . . I long ago disabused myself of the notion that because Republican senators articulate the right principles that there would be spontaneous combustion. That they’d do what they said they would do. It just doesn’t work. It’s too much of an insider game to just work [at defeating a nominee from] . . . inside the Beltway.” SCHERER, *supra* note 32, at 127.

<sup>73</sup> *Id.* at 126–27 (citations omitted).

<sup>74</sup> ROBERT M. ENTMAN, PROJECTIONS OF POWER 5 (2004).

<sup>75</sup> *Id.*

otherwise support the group's position<sup>76</sup> Entman proposes that the most effective frames will be those which have high cultural resonance and magnitude and which cognitively trigger a preferred "schema."<sup>77</sup> When a schema is triggered, the feeling or ideas in the "knowledge network" associated with the schema come to the mind of the recipient. Depictions that are most effective are those which are culturally resonant—understandable, memorable, and emotionally charged. Magnitude, the prominence and repetition of particular words or phrases, also increases the power of the chosen depiction. The greater the resonance and magnitude, the more likely the frame is to evoke similar emotional associations, thoughts, and feelings.<sup>78</sup> Take, for example, a nominee appointed by a Republican President. If an interest group can convincingly frame the nominee as anti-civil rights or homophobic—culturally congruent frames—they may be able to trigger opposition from sympathetic senators. A Democratic nominee could be depicted as soft on crime or in favor of broad abortion rights. The magnitude of the frame can be increased through the media or through a mobilized grassroots campaign (*e.g.*, through fax or e-mail). On the other hand, a weak frame that does not have a strong cultural resonance may result in no or very little opposition. For example, one might expect opposition based on technical or procedural legal issues not to be a sufficiently strong depiction to trigger senatorial opposition.

The process of bringing a particular schema and knowledge network into play is described as cascading or spreading activation.<sup>79</sup> The goal of interest groups is to trigger particular thoughts and feelings to "activate" the group's base and subsequently to motivate senators to oppose a nominee. This is called a "cascading" activation model because the spread of frames "cascades" down from interest groups to the media, the public, and senators. Because initial depictions are difficult to dislodge, the initial choice of how to frame a nominee and the frames that are (or are not) successful are important aspects of the confirmation process.

Interest groups have a particular advantage in pressing depictions because in this area senators are "satisficers"—willing to make decisions based on less than complete or optimal information.<sup>80</sup> There are two primary reasons for this. First, for all nominees, senators simply do not have the resources or the desire to do an independent investigation into the nominee's background. Second, for nominees who have previously served as judges, the background material is voluminous and nearly impossible for a senator or her staff to read and interpret.<sup>81</sup> Therefore, senators rely on (and are susceptible to) frames

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<sup>76</sup> SCHERER, *supra* note 32, at 128. Scherer gives the example of a controversial nominee who is framed solely on her position on abortion. Such a frame may operate to lose the votes of pro-choice Republican Senators, whereas a broader philosophical frame may have been more effective.

<sup>77</sup> ENTMAN, *supra* note 74, at 7. Schema are "clusters or nodes of connected ideas and feelings stored in memory."

<sup>78</sup> *Id.* at 6.

<sup>79</sup> *Id.* at 7.

<sup>80</sup> See Herbert A. Simon, *Rational Choice and the Structure of the Environment*, 63 PSYCHOLOGICAL REV. 129, 129 (1956) ("organisms adapt well enough to 'satisfice'; they do not in general 'optimize'").

<sup>81</sup> STEIGERWALT, *supra* note 22, at 105. Quoting a Senate staffer: "It's knowing that the groups are doing [research] that we are able to focus our energies on other things. If they didn't, we probably would make an effort, but we have to focus on other things the Committee does . . ."

proposed by interest groups.<sup>82</sup> Senate staffers have described the information provided by interest groups as “easy” and “invaluable.”<sup>83</sup> This is particularly true for senators who are not members of the Judiciary Committee.<sup>84</sup> To put this in terms of the cascading activation model, “what passes between levels of the cascade is not comprehensive understanding but highlights packaged into selective, framed communications. As we go down the levels, the flow of information becomes less and less thorough, and increasingly limited to the selected highlights, processed through schemas, and then passed on in ever-cruder form.”<sup>85</sup> Therefore, interest groups must present their chosen frame in such a concise and understandable manner (without excessive nuance or complexity) that senators can utilize the information to form an opinion on the nominee.

In sum, the turn in the confirmation process from patronage-based to ideology-based consideration has transformed the nature of the process. It has led to an increasingly important role for those groups most interested in the ideological makeup of the federal courts. The groups select certain nominees to oppose and then attempt to move them onto the agenda of senators. The move onto the agenda is not automatic. Groups must use culturally congruent frames and must use them often. Through the use of select depictions, interest groups hope senators will deviate from their tendency to vote to confirm and instead actively work to defeat the targeted nominee—either through a defeat on the floor of the Senate or (equally as effective) by delaying a nominee so that the nominee never receives a vote.

### III. THE METHODOLOGY OF EXAMINING A “CONTROVERSIAL” COURT OF APPEALS NOMINEE

To understand how interest group involvement set out in Part II operates in practice, this article presents a case study of the confirmation of Leslie H. Southwick to the Fifth Circuit Court of Appeals. While it is impossible to generalize from the results, the use of a single case study in this instance is a valid method to test a theoretical framework.<sup>86</sup> The nature of the Southwick confirmation provides an especially good study. Southwick was first nominated to a district court position and passed through the Senate Judiciary Committee with no opposition. It was only after he was subsequently nominated to the Fifth Circuit that his nomination triggered interest group involvement. Second, Southwick’s nomination received a hearing before the Senate Judiciary Committee as well as an ultimately successful floor vote, eliminating the problem faced by some controversial nominees who are delayed and never receive a vote by the full Senate. In addition, all sides agreed that Southwick was a well-qualified nominee, and that opposition to his nomination was based on his perceived ideology. Utilizing the Southwick nomination, this article seeks to answer three questions: (a) What frames were presented by the inter-

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<sup>82</sup> Scherer, *supra* note 42, at 1029. See also Gregory A. Caldeira & John R. Wright, *Lobbying for Justice: Organized Interests, Supreme Court Nominations, and the United States Senate*, 42 AM. J. POL. SCI. 499 (1998) (interest group influence had a distinct impact on Senator voting on the nominations of Bork, Souter, and Thomas to the United States Supreme Court).

<sup>83</sup> STEIGERWALT, *supra* note 22, at 105.

<sup>84</sup> *Id.* at 106–109.

<sup>85</sup> ENTMAN, *supra* note 74, at 12.

<sup>86</sup> ALEXANDER L. GEORGE AND ANDREW BENNETT, CASE STUDIES AND THEORY DEVELOPMENT IN THE SOCIAL SCIENCES 109–24 (2005).

est groups who became involved in the Southwick nomination?; (b) Did the senators who spoke against the nomination adopt the interest group frames?; and finally, (c) What is the impact of this change in the confirmation process?

Content analysis was used to determine the frames that interest groups used to oppose Southwick. Groups that opposed the Southwick nomination were identified through the Congressional Record. Although these groups can no longer testify before the Judiciary Committee, they often submit letters laying out their opposition. Every sentence of each letter of opposition submitted in the record was coded for the nature of the opposition, including the issues or concerns of each interest group.

After identifying the frames proposed by the interest groups, the next step was to examine whether the senators adopted the frames. To make this determination, content analysis was again performed, this time on statements made during the Senate Judiciary Committee. Each statement made by a senator was evaluated to determine whether they adopted the frames proposed by interest groups or whether they modified or even rejected the frames.

#### IV. SOUTHWICK THE NOMINEE: EVALUATING INTEREST GROUP INVOLVEMENT

On May 3, 1979, President Jimmy Carter nominated Henry Politz to a newly created seat on the United States Court of Appeals for the Fifth Circuit.<sup>87</sup> On July 12, 1979, Politz was confirmed by the Senate by a voice vote with no recorded opposition. Twenty years later, on August 10, 1999, Judge Politz took senior status.<sup>88</sup> This provided incoming President George W. Bush the opportunity to name his successor. Bush nominated Charles W. Pickering on May 25, 2001. At the time of the nomination, Pickering was serving as a federal district judge in Mississippi.<sup>89</sup> Pickering's circuit court nomination received a "well qualified" rating from the American Bar Association (ABA), but was immediately opposed by interest groups who accused him of being insensitive on civil rights issues.<sup>90</sup> The Pickering nomination stalled in the Democratic-controlled Senate Judiciary Committee, which voted three times not to move the nomination to the Senate floor.<sup>91</sup>

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<sup>87</sup>The seat was created by the Act of Oct. 20, 1978, Pub. L. No. 95-486, 92 Stat. 1629 (codified as amended at 28 U.S.C. § 44(a)). .

<sup>88</sup>See *History of the Federal Judiciary*, FEDERAL JUDICIAL CENTER, <http://www.fjc.gov/servlet/nGetInfo?jid=1902&cid=999&ctype> (last visited Nov. 18, 2011).

<sup>89</sup>Pickering was nominated to the district court by President George H.W. Bush in 1990 and unani- mously confirmed. *History of the Federal Judiciary*, FEDERAL JUDICIAL CENTER, <http://www.fjc.gov/servlet/nGetInfo?jid=1883&cid=999&ctype=na&instate=na>

<sup>90</sup>Adam Liptak, *Judge Appointed by Bush After Impasse in Senate Retires*, N. Y. TIMES, Dec. 10, 2004, at A-3.

<sup>91</sup>CHARLES PICKERING, SUPREME CHAOS: THE POLITICS AND JUDICIAL CONFIRMATION & THE CULTURE WAR 9 (2005). President Bush went public to support the Pickering nomination in March 2002. Appearing at a press conference with Mike Moore, the Democratic Attorney General for Mississippi, former Democratic Governor of Mississippi William Winter, and Frank W. Hunger, former Assistant Attorney General and brother-in-law of former Vice President Al Gore, President Bush said, "I nominated a very good man from Mississippi named Charles Pickering to the appellate bench, and I expect him to be confirmed by the United States Senate. I think the country is tired of people playing politics all the time in Washington. And I believe they're holding this man's nomination up for political purposes. It's not fair, and it's not right." Remarks During a Meeting with Judge Charles W. Pickering, Sr., and an Exchange with Reporters, 2002 PUB. PAPERS 349 (March 6, 2002).

The scene changed after the mid-term elections in 2002, when Republicans took control of the Senate. Republican leaders claimed that the delay in confirming President Bush's nominees was a contributing factor to the Democrats losing control of the Senate. President Bush specifically mentioned the delays while campaigning for Republican candidates and Senator Trent Lott's (R-MS) press secretary said of the delays: "Clearly, it did not help the Democrats' chances of either retaining control or gaining control of the Senate . . . . It backfired completely."<sup>92</sup> Lott himself, the new majority leader, made it clear that confirming Pickering and other pending nominees would be a top priority: "[W]ith the Senate in Republican hands, we will move decisively to confirm Judge Pickering, who unfortunately was bottled up in Democratic partisanship, and we will work on confirming other nominees as soon as possible."<sup>93</sup> The Pickering nomination was subsequently voted out of the Judiciary Committee, but stalled on the floor of the Senate, when Democratic senators filibustered Pickering along with a number of other Bush judicial nominees.<sup>94</sup> President Bush subsequently appointed Pickering to the bench in 2004 through a recess appointment. Before the recess appointment came to an end (and before the nomination went back to the Senate), Pickering asked the President to withdraw his nomination. In discussing his withdrawal, Pickering blamed his defeat on "extreme special interest groups" who were opposed to "any nominee with strong religious convictions who personally disagrees with them on abortion, marriage and references to God at public ceremonies and institutions. These far-left groups cowed Democrat leadership into opposing my nomination."<sup>95</sup>

Bush then nominated Michael B. Wallace on February 8, 2006. Wallace, a lawyer in private practice in Jackson, Mississippi, served as counsel to Trent Lott during the Clinton impeachment. Wallace received a "not qualified" rating from the ABA,<sup>96</sup> and encountered opposition from some of the same groups who opposed the Pickering nomination.<sup>97</sup> Wallace ultimately withdrew his name from consideration for the seat in December 2006, after the Democrats retook control of the Senate in the 2006 mid-term elections.<sup>98</sup> Interest groups on both ends of the ideological spectrum were blamed for the withdrawal of the Wallace nomination. Democrats, citing the nomination of Wallace (among others), argued that the Bush administration "seems intent on heeding the marching orders of the narrow,

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<sup>92</sup> Audrey Hudson, *GOP Set to End Judicial Backlog: Stalled Bush Nominees Face a More Welcoming Senate*, WASH. TIMES, Nov. 12, 2002, at A-1.

<sup>93</sup> *Id.*

<sup>94</sup> Steven G. Calabresi, *Pirates We Be*, WALL ST. J., May 14, 2003, at A-14. Calabresi notes that the use of the filibuster on judicial nominees was an unprecedented move: "Now for the first time in 214 years of American history a minority of senators is seeking to extend the tradition of filibustering from legislation to judicial nominees who they know enjoy support of a majority of the Senate. This is a change of constitutional dimensions and amounts to a kind of *coup d'état*."

<sup>95</sup> Liptak, *supra* note 90.

<sup>96</sup> Gina Holland, *Bush Nominee Receives "Unqualified" Rating From Lawyers Group*, ASSOCIATED PRESS, May 11, 2006.

<sup>97</sup> Editorial, *Help Wanted: Qualified Judges*, N.Y. TIMES, Aug. 15, 2006, at A-18; Cragg Hines, *W Taps Another Throwback for Important Appeals Seat*, HOUSTON CHRON. Feb. 15, 2006, at B-11.

<sup>98</sup> *Judicial Nominee Rated Unqualified*, N.Y. TIMES, May 11, 2006, at A-1; Robin Fitzgerald, *Wallace Withdrawal Opens Space; Bush Can Now Select Another Nominee*, THE SUN HERALD, Dec. 27, 2006, at A-6.

special interest groups on the right and picking fights.”<sup>99</sup> Republicans attacked the ABA as a “liberal interest group” in giving Wallace an unqualified rating.<sup>100</sup> By the time Wallace withdrew, the Politz seat had been vacant for eight years and had been declared a “judicial emergency” by the Federal Judicial Center.

On January 9, 2007, President Bush nominated his third choice for the seat, Leslie H. Southwick. Southwick did not start as a controversial court of appeals nominee. Instead, Southwick began his confirmation path as an uncontroversial district court nominee.<sup>101</sup> Southwick had a distinguished career prior to the nomination. He graduated *cum laude* from Rice University and then went on to the University of Texas Law School. After law school, he clerked for the Chief Judge on the Texas Court of Criminal Appeals and then moved on to clerk for Judge Charles Clark on the Fifth Circuit Court of Appeals. He then practiced law in Jackson, Mississippi; served as Deputy Assistant Attorney General in the Civil Division of the Department of Justice; and was elected to the Mississippi Court of Appeals where he served for twelve years.<sup>102</sup> He also served as a Judge Advocate General in Iraq with the Mississippi Army National Guard, authored a number of scholarly articles, and taught as a professor of law at Mississippi College School of Law. Southwick received a “Judicial Excellence” award from the Mississippi State Bar Association, an award voted on by lawyers. In evaluating Southwick’s qualifications for the district court position, the ABA rated Southwick “well qualified.”

With very little discussion and no debate, the Senate Judiciary Committee reported Southwick’s district court nomination to the full Senate with a positive recommendation.<sup>103</sup> It is likely that Southwick would have easily been confirmed as a district court judge if the nomination had been brought up for a vote. However, before the nomination was acted on, the 2006 mid-term elections gave the Democrats a majority in the Senate. With the Politz seat vacant, Bush withdrew Southwick’s district court nomination and resubmitted his name to the Fifth Circuit seat. The White House, seeking to avoid a fight after the Republican losses in the Senate, believed that Southwick would be an acceptable

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<sup>99</sup> *Judicial Nominations Before the S. Comm. on the Judiciary*, 109th Cong. (Sept. 19, 2006) (statement of Sen. Patrick Leahy).

<sup>100</sup> Edward Whelan, *Lowering the Bar: The Corrupt ABA Judicial Evaluation Process*, WKLY. STAND., June 12, 2006.

<sup>101</sup> 152 CONG. REC. S5515 (daily ed. June 6, 2006).

<sup>102</sup> *History of the Federal Judiciary*, FEDERAL JUDICIAL CENTER, <http://www.fjc.gov/servlet/nGetInfo?jid=3163&cid=999&ctype=na&instate=na> (last visited Nov. 19, 2011).

<sup>103</sup> Ana Radelat, *Judicial Candidate Enjoys Easy Going in Senate Hearing*, GANNETT NEWS SERV., Sept. 20, 2006 (stating that Southwick “enjoyed a quick and cordial confirmation hearing” and that he is “expected to breeze through confirmation”). The fact that Southwick faced no opposition as a district court nominee but faced substantial opposition as a court of appeals nominee provides initial evidence of the importance of interest group opposition. The lack of opposition was likely strategic in two ways. As discussed below, interest groups must make decisions about nominees to actively oppose. Interest groups may choose not to actively oppose a district court nominee because that judge’s decisions are subject to review by an appellate court. Therefore, although not true for individual litigants, interest groups may perceive district court positions as less important or visible than court of appeals positions. Second, evaluating and opposing nominees takes resources and the ability to get the attention of Senators to support interest group opposition. Interest groups might well conclude that there is not a strong enough likelihood of triggering opposition from sympathetic senators to expend the resources necessary to oppose a court of appeals nominee.

(non-controversial) nominee because of his background and his recent uneventful hearing for the district court position.<sup>104</sup>

The White House's prediction proved incorrect. A number of interest groups came out in opposition to the Southwick nomination. These groups included, among others, Lambda Legal, Leadership Conference on Civil Rights, National Association for the Advancement of Colored People (NAACP), Human Rights Campaign, and People for the American Way.<sup>105</sup> As discussed below, these groups focused their opposition primarily on decisions that Southwick joined while a member of the Mississippi Court of Appeals. The three most-cited opinions were *S.B. v. L.W.*;<sup>106</sup> *Richmond v. Department of Health Services*;<sup>107</sup> and *Dubard v. Biloxi HMA*.<sup>108</sup> Because a significant amount of group opposition arose as a result of these cases, it is helpful to discuss these cases in some detail.

The first case, *S.B. v. L.W.*, was a custody dispute regarding whether the mother, who was bisexual, should be awarded custody of the child.<sup>109</sup> In Mississippi, the court must consider several factors to determine what is in the best interest of the child before awarding custody.<sup>110</sup> One of those factors is "moral fitness" of the parents.<sup>111</sup> The Mississippi Court of Appeals determined that the moral fitness factor (along with other factors such as financial and economic stability) weighed in favor of the father and awarded custody to him.<sup>112</sup> Southwick joined both the majority opinion as well as a separate concurring opinion. The concurrence stressed the public policy of the state regarding homosexuality, noting that the state legislature enacted laws: (a) prohibiting homosexuals from

<sup>104</sup> R. Jeffrey Smith, *4 Nominees to Appeals Courts are Dropped; 32 Appointments Re-sent to Senate*, WASH. POST, Jan. 10, 2007, at A-03 (noting that President Bush withdrew four controversial nominees from consideration and that this "abrupt reversal" received praise from the liberal interest groups People for the American Way and Alliance For Justice for seeking "bipartisan consensus"); 153 CONG. REC. S13242 (Oct. 23, 2007) (statement of Sen. Thad Cochran) ([T]he rejection of Pickering and Wallace "made it clear that those judicial nominees were unacceptable. So [Senator Lott, Senator Cochran, and President Bush] put our heads together, we talked about what the other options were, and decided Leslie Southwick was the epitome of someone who had to be acceptable to the Senate.").

<sup>105</sup> A number of groups supported the Southwick nomination. Because this article is interested in the framing of Southwick by groups opposing his nomination, the focus is only on those groups opposing the nomination.

<sup>106</sup> 793 So. 2d 656 (Miss. Ct. App. 2001).

<sup>107</sup> No. 96-CC-00667-COA, 1998 Miss. App. LEXIS 637 (Miss. Ct. App. August 4, 1998), *rev'd*, 745 So. 2d 254 (Miss. 1999).

<sup>108</sup> No. 98-CA-01001-COA, 1999 Miss. App. LEXIS 468 (Miss. Ct. App. July 20, 1999), *rev'd* 778 So. 2d 113 (Miss. 2000).

<sup>109</sup> *S.B.*, 793 So. 2d at 657 (noting that after the divorce, "the mother moved into a house with a woman. The mother testified that she was a bisexual and admitted that her relationship with the woman was intimate").

<sup>110</sup> The factors, which are commonly referred to as the "Albright factors," were first set out collectively in *Albright v. Albright*, 437 So. 2d 1003 (Miss. 1983).

<sup>111</sup> The remaining factors include: (a) age, health, and sex of child; (b) continuity of care prior to separation; (c) best parenting skills and willingness and capacity to provide primary care; (d) employment and responsibilities of employment; (e) physical and mental health and age of parents; (f) emotional ties of parent and child; (g) home, school, and community record of child; (h) preference of child (if of sufficient age); (i) stability of the home environment and employment of parents; and (j) other relevant factors. *Albright*, 437 So. 2d at 1005.

<sup>112</sup> *S.B.*, 793 So. 2d at 657.

adopting; (b) prohibiting recognition of same-sex marriages that take place in other jurisdictions; and (c) criminalizing sodomy.<sup>113</sup> In addition to noting the legislation, the concurrence said:

I do recognize that any adult may choose any activity in which to engage; however, I am also aware that such person is not thereby relieved of the consequences of his or her choice. It is a basic tenet that an individual's exercise of freedom will not also provide an escape of the consequences flowing from the free exercise of such a choice. As with the present situation, the mother may view her decision to participate in a homosexual relationship as an exertion of her perceived right to do so. However, her choice is of significant consequence, . . . in that her rights to custody of her child may be significantly impacted.<sup>114</sup>

The second case, *Richmond v. Mississippi Department of Human Services*,<sup>115</sup> involved the termination of Bonnie Richmond, an employee of the Mississippi Department of Human Services. The facts were that “on May 23, 1994 while in conference with Joyce Johnson . . . and Jerald Everett . . . [Richmond] referred to one of our black employees as ‘a good ole nigger’ and . . . that upon returning to DeSoto County [Richmond] approached this black employee and referred to her using exactly the same words . . . .”<sup>116</sup> Richmond was subsequently fired for the comments and appealed the dismissal to the Mississippi Employee Appeals Board.<sup>117</sup> The Board reversed the MDHS decision and ordered Richmond reinstated, finding that the conduct was not sufficiently egregious to justify termination.<sup>118</sup> The Department then appealed the Board's decision. The case was assigned to the Mississippi Court of Appeals.<sup>119</sup>

In an opinion that Southwick joined but did not write, the Mississippi Court of Appeals upheld the Board's decision to reinstate Richmond.<sup>120</sup> The court's majority stressed the limited nature of its review, and held that the justification given for firing Richmond was the disruption the statement caused within the department, but the court could find no evidence in the record of a disruption.<sup>121</sup> The Mississippi Supreme Court agreed to consider the court of appeals decision and reversed. The supreme court held that “[u]nder the particular circumstances of this case, Bonnie Richmond's use of a racial slur on a single

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<sup>113</sup> *Id.* at 662 (Payne, J. concurring). This opinion was issued prior to the United States Supreme Court decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), which declared Texas' law criminalizing sodomy unconstitutional.

<sup>114</sup> *Id.* at 663 (Payne, J. concurring).

<sup>115</sup> *Richmond v. Miss. Dep't of Human Servs.*, No. 96-CC-00667-COA, 1998 Miss. App. LEXIS 637 (Miss. Ct. App. Aug. 4, 1998).

<sup>116</sup> *Id.* at \*5-6 (internal quotation marks omitted).

<sup>117</sup> *Id.* at \*1-2.

<sup>118</sup> *Id.* at \*1.

<sup>119</sup> Under the Mississippi system, a case is originally appealed to the Mississippi Supreme Court, and the court then assigns certain cases to the Mississippi Court of Appeals. MISS. CODE ANN. § 9-4-3(1) (West 2011) (“The Court of Appeals shall have the power to determine or otherwise dispose of any appeal or other proceeding assigned to it by the Supreme Court.”).

<sup>120</sup> *Richmond*, 1998 Miss. App. LEXIS 637, at \*1.

<sup>121</sup> *Id.* at \*16-17.

occasion does not rise to the level of creating a hostile work environment, and therefore does not warrant dismissal of her from employment with DHS. However, we remand this matter back to the Employee Appeals Board for the imposition of a lesser penalty, or to make detailed findings on the record why no penalty should be imposed.”<sup>122</sup>

The final case is *Dubard v. Biloxi HMA*. The *Dubard* case involved an employee who sued a prospective employer for withdrawing a job offer after the employee failed a drug test that was a condition of employment.<sup>123</sup> The Mississippi Court of Appeals, over a dissent by Judge Southwick, determined that the employee presented enough facts regarding breach of an employment contract or the possible right to equitable relief that it was inappropriate to dismiss the case on summary judgment.<sup>124</sup> Southwick’s dissent argued that Mississippi is an employment-at-will state and that *Dubard*’s claim would fail for that reason: “I find that employment at will, for whatever flaws a specific application may cause, is not only the law of Mississippi but it provides the best balance of the competing interests in the normal employment situation.”<sup>125</sup> After the court of appeals’ decision, the employer sought review by the Mississippi Supreme Court. The Court agreed to hear the case, reversed the court of appeals and (adopting the position taken by Southwick in dissent), dismissed the employee’s claim.<sup>126</sup>

These cases provide context as to how various interest groups framed their opposition to Southwick. Importantly, the cases were not utilized to discuss legal process (*e.g.*, the proper standard of review for agency decisions). Instead, each of these cases were cited for a broader principle or frame. For example, *S.B.* was presented to demonstrate opposition to gay rights, *Richmond* was presented as evidence of Southwick’s insensitivity to civil rights, and *Dubard* was cited as proof that Southwick favored business interests over employees. To demonstrate this use of case-as-frame, **Figure 2** provides a breakdown of the nature of the opposition to Southwick by national interest groups.

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<sup>122</sup> *Richmond v. Miss. Dep't of Human Serv.*, 745 So. 2d 254, 258 (Miss. 1999).

<sup>123</sup> *Dubard v. Biloxi H.M.A.*, No. 1998-CA-01001-COA, 1999 Miss. App. LEXIS 468, at \*2-5 (Miss. Ct. App. Jul. 20, 1999).

<sup>124</sup> *Id.* at \*11.

<sup>125</sup> *Id.* at \*16 (Southwick, P.J., dissenting).

<sup>126</sup> *Dubard v. Biloxi H.M.A.*, 778 So. 2d 113 (Miss. 2000).

**Figure 2. Issues Identified by Interest Groups**  
(percentage of sentences discussing)

	<b>Gay Rights</b> ( <i>S.B. v. L.W.</i> )	<b>Civil Rights</b> ( <i>Richmond v. Dept of Health Services</i> )	<b>Pro-Business; Ruling in Favor of Employers</b> ( <i>Dubard v. HMA</i> )	<b>Lack of Diversity on Bench</b>	<b>Ruling Against Personal Injury Plaintiffs</b>	<b>Other</b> <sup>127</sup>
<b>National Gay and Lesbian Task Force</b>	71.4%	--	--	--	--	28.6%
<b>NAACP (national chapter)</b>	--	47.8%	--	26.1%	--	26.1%
<b>People for the American Way</b>	26%	33.8%	12%	1.4%	--	26.8%
<b>Human Rights Campaign</b>	92.6%	--	--	--	--	7.4%
<b>Community Rights Counsel et al</b> <sup>128</sup>	--	--	--	--	84.2%	15.8%
<b>International Union</b> <sup>129</sup>	--	20%	50%	--	--	20%
<b>National Council of Jewish Women</b>	9.1%	54.5%	--	9.1%	--	27.3%
<b>National Employment Lawyers Association</b>	--	48%	36%	--	--	16%
<b>National Partnership for Women &amp; Families</b>	15.6%	71.9%	9.4%	--	--	15.6%
<b>Leadership Conference on Civil Rights</b>	13.8%	55.2%	17.2%	--	--	13.8
<b>National Organization for Women</b>	--	12.5%	12.5%	--	--	75%
<b>Jewish Alliance for Law and Social Action</b>	16.7%	33.3%	--	--	--	50%
<b>Legal Momentum</b>	33.3%	38.9%	--	--	5.6%	22.2%

<sup>127</sup> This column includes other either miscellaneous or neutral statements. For example, a number of letters include, as the first few sentences, introductory or background information about their organizations, which are coded as "other" (even if they note that the organization opposes the nomination). In addition, some groups commented that the record was incomplete, citing to the need for unpublished records. These statements were also included in this column.

<sup>128</sup> This letter was filed jointly by the Community Rights Counsel; Earthjustice; Friends of the Earth; Sierra Club; Endangered Habitats League; Louisiana Bayoukeeper, Inc.; Louisiana Environmental Action Network; San Francisco Baykeeper; Texas Campaign for the Environment; and Valley Watch, Inc.

<sup>129</sup> This letter was filed jointly by the International Union and United Automobile, Aerospace & Agricultural Implement Workers of America.

These frames are consistent with the first level of the cascading activation model of framing. Interest groups attempted to trigger specific ideological cognitive schema and associate them with Southwick. Frames adopted against Southwick—especially race and sexual identity—have particularly strong cultural resonance. Also, note that interest groups tended to reiterate the same opposition frames, thereby increasing the magnitude of the frames. Based on interest group frames, if confirmed, Southwick's decisions could be expected: (a) with regard to civil rights, to oppose civil rights plaintiffs; (b) with regard to employer/employee relations, to oppose the employee; (c) in civil litigation, to favor the defendant over the plaintiff; and (d) in criminal prosecutions, to favor the government over the criminal defendant.

It should be noted that the Southwick nomination provided a unique, non-ideological opposition. Groups, such as the NAACP, cited the lack of diversity on the Fifth Circuit as a reason for opposing Southwick. Derrick Johnson, President of the Mississippi Chapter of the NAACP, set out this line of opposition:

[T]he Southwick nomination does nothing to ameliorate the egregious problem with the lack of diversity on Mississippi's federal bench. Mississippi has the highest African-American population of any state (36%). Yet there has never been an African-American appointed to represent Mississippi on the Fifth Circuit . . . President Bush has made ten nominations to the federal bench in Mississippi—district and appellate. None were African American. This is extremely disturbing to many Mississippians, who believe the State should be fairly represented on the federal bench.<sup>130</sup>

While this presents a frame based on race, it is not directed explicitly at Southwick's perceived ideology or decision-making.

As discussed in Part II (D), merely framing a nominee is a necessary, but not sufficient, condition for interest group success. If the frames are not sufficiently culturally congruent or they lack sufficient magnitude, the frame will fail to modify senators' presumption-of-confirmation behavior. For frames to be effective, they must move the opposed nominee (Southwick) onto the senator's agenda, and must prompt senators to adopt the group's preferred frame. To determine the success of interest groups in agenda setting and framing in the Southwick context, the next step is to evaluate what occurred in the senators' expressed opposition to the nomination.

The hearing on the Southwick nomination was held on May 10, 2007, before the Senate Judiciary Committee.<sup>131</sup> The hearing was chaired by Senator Sheldon Whitehouse (D-RI). Other members of the Judiciary Committee who were present included Edward Kennedy (D-Mass), Russell Feingold (D-Wis), Richard Durbin (D-Ill), Orrin Hatch (R-Utah), Sam Brownback (R-Kan), and Tom Coburn (R-Okl). Chair of the Committee, Patrick Leahy (D-Vt), was not present at the hearing but submitted comments for the record. The hearings began with Southwick's introduction and statements of support from both

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<sup>130</sup> 153 CONG. REC. S13245 (Oct. 23, 3007) (Letter from Derrick Johnson to Sens. Patrick Leahy and Arlen Specter).

<sup>131</sup> *Nominations of Leslie Southwick, to Be Circuit Judge for the Fifth Circuit; Janet T. Neff, to be District Judge for the Western District of Michigan; and Liam O'Grady, to be District Judge for the Eastern District of Virginia Before the S. Comm. on the Judiciary*, 110th Cong. (2007).

Mississippi senators, Thad Cochran and Trent Lott.<sup>132</sup> They both stressed Southwick’s qualifications and background and encouraged a quick confirmation.

After a short introductory statement by Southwick, Senator Whitehouse began the questioning. He first asked a question about Southwick’s position on the separation of powers and the court’s role in it. After a short answer (“I believe separation of powers [is] vital. It’s part of how this country is structured, how this country’s government has been organized.”),<sup>133</sup> Whitehouse then asked about the *S.B. v. L.W.* decision: “There has been some controversy about a decision that you did not author, but signed onto, both in the main opinion and the concurring opinion, *S.B. v. L.W.* that involved a woman who was gay and who was seeking custody of her daughter. Because that has been a matter of some controversy, I looked at the decision myself.”<sup>134</sup> He questioned the use of the phrase “homosexual lifestyle” in the opinion—noting that it was derogatory—and stated that a gay person coming before a judge who had joined in an opinion using that term may feel that they could not get a fair hearing.<sup>135</sup> Southwick responded that he joined the concurring opinion in the case because he felt it emphasized the legislative position at that time on gay rights issues. He also noted that some of the analysis would be different now, after the Supreme Court’s decision in *Lawrence v. Texas*. Southwick sought to assure the Senator that all who appeared before his court would receive a fair hearing and be treated with respect.<sup>136</sup>

The next Democratic senator to question Southwick was Senator Feingold. Feingold began his questioning with the *Richmond* case and the statement in the opinion that the decision to fire the employee was “not motivated by racial hatred or animosity.”<sup>137</sup> Southwick responded: “To me, that case was about the review standard and the deference that is given to administrative agencies. It was a tough case.”<sup>138</sup> Senator Feingold then moved to *S.B.* The Senator and nominee had the following exchange that provides some insight into the type of questions that were raised regarding the case:

**Senator Feingold:** Do you believe that one of the consequences of having a same-sex relationship should be to risk losing custody of your own child?

**Southwick:** I think, if the law I’m supposed to apply says that, then my hands are tied. If you’re talking to me generally as a policy matter, I don’t think that’s my realm. But I will say . . . the legal landscape in 2001 was *Bowers v. Hardwick*, which says there was no privacy interest, liberty interest in even private homosexual relations. In 2003, there became such a recognized right and that changes the analysis, at least, and may well change the outcome.

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<sup>132</sup> *Id.* at 3–5 (statements of Sens. Thad Cochran and Trent Lott).

<sup>133</sup> *Id.* at 45 (statement of Leslie Southwick).

<sup>134</sup> *Id.* (statement of Sen. Sheldon Whitehouse).

<sup>135</sup> *Id.* at 46 (statement of Sen. Sheldon Whitehouse).

<sup>136</sup> *Id.* at 46–47 (statement of Leslie Southwick).

<sup>137</sup> *Id.* at 51–52 (statement of Sen. Feingold).

<sup>138</sup> *Id.* at 52 (statement of Leslie Southwick).

**Senator Feingold:** Do you believe that gay, lesbian, bisexual and transgendered Americans are entitled to equal protection of the laws?

**Southwick:** Well, I think everyone is entitled to be treated fairly. If you are talking about, as a fundamental right, I think the law is evolving as to where the fundamental rights regarding gay relationship exist. And I will apply the law rationally, reasonably, and the fairest reasoning and reading that I can make of the precedents that control.<sup>139</sup>

At the end of this exchange, Feingold asked Southwick if he would disassociate himself from either the *Richmond* or *S.B.* opinions. Southwick responded: “Stand by them. I believe the *Richmond* opinion was correct. I didn’t write it. I joined the concurrence . . . . If you say I’m endorsing everything in an opinion that I did not write every word, every phrase, I do not.”<sup>140</sup>

After Feingold, Senator Kennedy questioned Southwick about the *Richmond* case as well, and whether Southwick would write a separate opinion in the case if he could go back. Southwick replied that he applied the law as he interpreted it and that he would not change his approach to the case.<sup>141</sup>

Senator Durbin followed Kennedy. His questioning was wide ranging—beginning with questions regarding the Federalist Society and whether Southwick could “point to an example . . . where you really stepped out and subjected yourself to criticism for taking an unpopular view on behalf of the dispossessed.”<sup>142</sup> He also addressed the lack of minority representation on the Fifth Circuit:

It is my understanding that President Bush has submitted 10 nominees for the Federal bench in Mississippi, 7 at the District level, 3 at the Fifth Circuit, and not one has been African American. Mississippi being a state with more than a third of the population African-American, you can understand why the African-American population feels that this is a recurring pattern which does not indicate an effort to find balance on the court when it comes to racial composition, or even to give African-Americans a chance in this situation. But having said that, I believe you have the right to be judged on your own merits in terms of your own nomination . . . .<sup>143</sup>

Durbin then asked about the *Richmond* case explicitly and queried whether Southwick could understand why some would consider the decision a sign of insensitivity. Southwick responded that he could understand the aversion to the use of the word and that “there is no worst word.”<sup>144</sup>

The Republicans on the Committee spoke in favor of Southwick. It would be expected that these senators would seek to either negate the frames raised by Democratic senators or attempt to reframe the debate surrounding the nomination. That is exactly

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<sup>139</sup> *Id.* at 53–54.

<sup>140</sup> *Id.* at 54 (statement of Leslie Southwick).

<sup>141</sup> *Id.* at 55–56 (statement of Sen. Edward Kennedy).

<sup>142</sup> *Id.* at 59 (statement of Sen. Richard Durbin).

<sup>143</sup> *Id.* at 57–58 (statement of Sen. Richard Durbin).

<sup>144</sup> *Id.* at 60 (statement of Leslie Southwick).

what happened. Senator Hatch, attempting to shift the frame from ideological issues to competence, stressed Southwick's "well qualified" rating by the ABA:

The ABA says that [well qualified] means that you have qualities such as, and I'm quoting here from their published criteria, "compassion, open-mindedness, freedom from bias, and commitment to equal justice under law." Now, no one has ever, to my knowledge, accused the ABA of having a conservative bias. So when the most exhaustive evaluation of your record shows that you are open-minded, free from bias, and committed to equal justice, I am baffled by some of the more far-left groups who look at just a few cases and consider only the result of those few cases, and then pronounce that you are controversial and your record is troubling, or that you favor certain interests over others.<sup>145</sup>

Senator Hatch also attempted to shift the frame from that of a nominee constantly opposing a particular ideological viewpoint, to frame Southwick as a nominee who had been involved in approximately 7000 opinions while serving on the Mississippi Court of Appeals and who had separately authored between 800 and 850 opinions, with interest groups picking very few of those to inappropriately characterize how Southwick would decide cases.<sup>146</sup>

This overview of Southwick's hearing before the Senate Judiciary Committee provides empirical support for the model set out in Part II. Every Democratic senator who spoke overwhelmingly adopted the arguments and concerns of interest groups in their questioning. The hearing demonstrated that with regard to the Southwick nomination, not only did interest groups sound the "fire alarm" with regard to the nomination, but they also successfully framed and activated opposition to the nomination.

After the Judiciary Committee hearing, there was no certainty that the nomination would be successfully voted out of Committee to the floor of the Senate. In fact, the Committee vote occurred on August 2, 2007—more than three months after the hearing and seven months after Southwick's nomination. Interest groups opposing the confirmation moved their opposition to the media. This is consistent with the cascading activation model. Media coverage reinforces the interest group's preferred frames and, because the media provides additional voices to the fray, it also increases the frame's magnitude.

*The New York Times* published an editorial opposing the nomination on June 5, 2007, quoting the position of the Mississippi Magnolia Bar Association (an organization of African-American Mississippi lawyers): "We question whether Judge Southwick will properly enforce the law when it comes to the rights of those who are unpopular and who are marginalized by the political process."<sup>147</sup> The editorial then discussed the *Richmond* case and claimed that the opinion demonstrated a "thorough lack of understanding of the odious impact of such language." Chiding Southwick for joining the *S.B.* concurrence, the editorial goes on to say: "[I]t would be hard for a black person with a discrimination case, or a gay person with a family law issue, to have any confidence that Judge Southwick would treat them fairly . . . . Judge Southwick's judicial record also shows the usual

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<sup>145</sup> *Id.* at 47–48 (statement of Sen. Orrin Hatch).

<sup>146</sup> *Id.* at 47 (statement of Sen. Orrin Hatch).

<sup>147</sup> Editorial, *An Unacceptable Nominee*, N.Y. TIMES, June 5, 2007, at A-1.

pattern of President Bush's judicial nominees: insensitivity toward workers, consumers and people injured by corporations."<sup>148</sup> *The Washington Post* also ran an article on June 10, 2007, opposing the Southwick nomination—relying explicitly on information provided by groups such as the Alliance for Justice and People for the American Way to question Southwick's "problematic record on civil rights that strongly suggested he may lack the commitment to social justice progress."<sup>149</sup>

The August 7 vote in the Judiciary Committee was tense and uncertain, a far cry from the consensus decision that occurs without such opposition. In fact, when asked the day before the hearing whether the Southwick nomination would be voted out of the Judiciary Committee, Chair of the Committee Patrick Leahy said: "I have no idea."<sup>150</sup> Southwick was ultimately voted out of the Committee by a vote of 10–9—with Senator Diane Feinstein (D-Cal) breaking with her Democratic colleagues to cast the deciding vote in favor of Southwick. Before casting her vote, Senator Feinstein read a prepared statement. She said that she had lengthy conversations with Southwick and received a written response to the *Richmond* decision. She concluded: "What emerged was an appreciation on my part that Judge Southwick is a qualified, circumspect person . . . . I don't believe he's a racist. I don't believe I'm a racist. I believe he made a mistake."<sup>151</sup> She also said that her decision was based on the fact that the decisions in question were not written by Southwick.<sup>152</sup> Finally, she noted that the ABA had given Southwick its highest rating, and that the seat was determined to be a "judicial emergency" by the Federal Judicial Conference.<sup>153</sup>

Feinstein's Judiciary Committee vote brought instant condemnation from interest groups that had opposed the Southwick nomination. Nan Aron, president of Alliance for Justice, said: "[The vote on Southwick] was a test of whether Democrats were up to the task of applying scrutiny to Bush's judicial nominees."<sup>154</sup> Becky Dansky of the National Gay and Lesbian Task Force said that gay and lesbian Californians "are not going to be silent about [the Feinstein vote]."<sup>155</sup> A letter to the editor in the *San Francisco Chronicle*, citing the position of the Human Rights Campaign, says Feinstein "again showed her true colors when she broke from her party . . . and cast the tie-breaking vote in favor of the nomination of Leslie Southwick . . . ." <sup>156</sup> As discussed in Part II (C), senators run a potential electoral risk when they ignore the positions of interest groups. These statements provide direct evidence of why senators are susceptible to the frames of interest groups that can motivate the senator's base. Failure to adhere to the frames can, at a minimum, result in bad press and, at the worst, compromise possible reelection.

After the vote in the Judiciary Committee, the nomination moved to the full Senate, and was placed on the calendar for October 24, 2007. On the floor it faced two significant veto points. The first was the possibility of a filibuster. In order to end debate on the nom-

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<sup>148</sup> *Id.*

<sup>149</sup> Robert Barnes & Michael Abramowitz, *Conservatives Worry About Court Vacancies*, WASH. POST, June 10, 2007, at A4.

<sup>150</sup> Erin P. Billings, *Southwick May Eke Out Win Today*, ROLL CALL, Aug. 2, 2007.

<sup>151</sup> 153 CONG. REC. S13249-51 (Oct. 23, 2007).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> Bob Egelko, *Feinstein Draws Fire Over Vote for Judge*, SAN FRANCISCO CHRON., Aug. 4, 2007, at B-1.

<sup>155</sup> *Id.*

<sup>156</sup> Letter to the Editor, SAN FRANCISCO CHRON., Aug. 7, 2007, at D-10.

ination, a motion was brought to the floor to end cloture. Debate on the cloture motion takes up twenty-seven pages of the Congressional Record. The debate centered on the same arguments and cases that were examined in the Judiciary Committee hearings. For example, every senator who spoke against the nomination cited or referenced the *Richmond* case. In addition, seventy-one percent (five out of seven) of senators mentioned the *S.B. v. L.W.* case. Only one senator mentioned the *Dubard* case in expressing opposition.

Importantly, while the same frames were utilized in the debate, how these frames were utilized varied. Recall that the cascading activation model predicts that as the frames flow/cascade down from interest groups to the public/media, to the senators, how the frame is perceived and used will become more blunted and less nuanced. In the confirmation context, another layer can be added to the levels of the cascade—whether the senator is a member of the Judiciary Committee.

Members of the Judiciary Committee tended to demonstrate a more nuanced understanding of the cases and arguments utilized against the nomination. On the other hand, senators who were not members of the Committee tended to utilize more absolute statements. For example, Senator Boxer stated (after referencing the facts of the *Richmond* and *S.B.* cases but never mentioning them by name): “I am deeply disappointed that President Bush has once again attempted to fill the Fifth Circuit vacancy with a nominee holding views far to the right of most Americans . . . .”<sup>157</sup> Senator Menendez stated that he opposed Southwick because of his “long and consistent history of insensitivity toward discrimination and of siding with the powerful against the powerless . . . .”<sup>158</sup> He went on to say: “He will be the type of judge who consistently rules in favor of big business and corporate interests at the expense of workers’ rights and consumer rights . . . . What I do know is that he interprets the law in a way that is not blind to color, blind to race, in fact, focuses on these factors and sides against them.”<sup>159</sup> Senator Reid stated: “As a member of the Mississippi State appellate court, Judge Southwick joined decisions that demonstrate insensitivity to, and disinterest in, the cause of civil rights.”<sup>160</sup> Finally, Senator Clinton stated: “His tenure as a judge on the Mississippi Court of Appeals reveals a record that fails to honor the principles of equality and justice and demonstrates a disregard for civil rights.”<sup>161</sup>

The point here is not that this type of blunt opposition is insincere, but that it is the result of information received from and filtered through interest groups. It is satisficing by these senators and results in a particular view of a nominee that is shaped strongly by interest group frames. On the other hand, members of the Judiciary Committee, while still adopting interest group frames, have the opportunity to explore nuance with the nominee, which tends to be reflected in debates.

When the vote was taken on the cloture motion, it passed by a margin of 62 to 35, with twelve Democrats voting in favor of ending debate.<sup>162</sup> After the vote on the cloture motion, the next step was to vote on the nomination itself (another potential veto point). Southwick was ultimately confirmed by a vote of 59 to 38.<sup>163</sup>

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<sup>157</sup> 153 CONG. REC. S13242 (Oct. 23, 2007).

<sup>158</sup> 153 CONG. REC. S13274 (Oct. 24, 2007).

<sup>159</sup> *Id.*

<sup>160</sup> 153 CONG. REC. S13299 (Oct. 24, 2007).

<sup>161</sup> 153 CONG. REC. S13300 (Oct. 24, 2007).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

In sum, the influence of interest groups on the trajectory of the confirmation of Southwick is undeniable. The uncontroversial district court nominee became a highly controversial court of appeals nominee, because interest groups became involved in the process. Not only did the interest groups delay the confirmation, but their frames also dictated the terms of the debate. These frames were particularly strong for those senators who were not members of the Judiciary Committee.

## V. EVALUATING INTEREST GROUP INVOLVEMENT IN THE CONFIRMATION PROCESS

The confirmation battle over the nomination of Leslie Southwick provides a glimpse into the current confirmation process for court of appeals judges. This article confirms the increasingly important role interest groups play. These groups determine which nominees will be deemed controversial and shape the debate surrounding these nominees by selecting the frames through which opposed nominees will be evaluated.

The case study has a larger importance as well. The study exposes trends that will continue to impact the confirmation process for the foreseeable future. It is important to note that these trends are institutional and not partisan. As such, the influence of interest groups on the confirmation process will hold regardless of the party holding the Senate majority.<sup>164</sup>

The most important impact of interest group involvement is at the level of individual senators. Consider the Senate of the 1950s versus the Senate of today. The historic Senate was an “encapsulated men’s club” in which norms, such as senatorial courtesy and apprenticeship, were respected and followed.<sup>165</sup> As one scholar succinctly put it, in the Senate of the 1950s, “the unwritten but well-understood rules of conduct virtually guaranteed that such potentially polarizing issues as the appointment of judges would not be permitted to disrupt the orderly flow of Senate business.”<sup>166</sup> Senators were willing to abide by the Senate “folkway” of senatorial courtesy and forego individual institutional rights because they collectively believed that individual members would be better off abiding by the norms.<sup>167</sup>

Recall that the senatorial courtesy norm calls for non-home-state senators to defer to the opinion of a home-state senator regarding a judicial nominee. Such deference is exercised with the expectation that senators will respect the non-home-state senator’s

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<sup>164</sup> See Editorial, *Breaking Faith: A Politically Driven Filibuster of a Sound Judicial Nominee*, N.Y. TIMES, May 23, 2011, at A22 (discussing Republican filibuster of President Obama’s nomination of Goodwin Liu to the Ninth Circuit Court of Appeals).

<sup>165</sup> BARBARA SINCLAIR, *THE TRANSFORMATION OF THE U.S. SENATE 1* (1989) (quoting Nelson W. Polsby, *Transformation of the American Political System 1950-1980*, paper delivered to the annual meeting of the American Political Science Association (1981)).

<sup>166</sup> SILVERSTEIN, *supra* note 28, at 132.

<sup>167</sup> Donald R. Matthews, *The Folkways of the United States Senate: Conformity to Group Norms and Legislative Effectiveness*, 53 AM. POL. SCI. REV. 1064, 1064 (1959) (defining Senate “folkways” as “unwritten but generally accepted and informally enforced norms of conduct in the chamber”). See also SINCLAIR, *supra* note 165, at 21. Sinclair equates the decision by individual senators to forego their institutional powers and abide by norms as fitting into a prisoner’s dilemma game theoretic model: “Conformity involved some cost to the individual, but by and large, if everyone conformed, everyone was better off. Widespread conformity with the norms provided direct benefits to senators in terms of their individual goals. The norms may also have contributed to the institution’s ability to perform its functions, but in no case did mutual cooperation have only an institutional payoff.”

choice of nominee when a vacancy occurs in that senator's state. This norm continued as long as the cost of conforming to the norm was less than the cost of not conforming.<sup>168</sup> With the introduction of interest groups into the process, the calculus changed. Now the costs that interest groups can impose are perceived to be greater than the benefit received from adhering to the senatorial courtesy norm. As a result, the norm gives way, and senators begin to exercise their individual institutional powers. It is thus not surprising that senators have been willing to delay and filibuster judicial nominees that would historically have gone through unopposed with the support of home-state senators (*e.g.*, Southwick).

Senators recognize the implications of rejecting senatorial courtesy. In the Southwick debate, Senator Hatch noted the "tradition" of respecting the opinion of the home-state senators and urged senators not to "veer from that path."<sup>169</sup> Senator Lott noted the reasons for adhering to the norm: "Home State Senators are uniquely positioned to know the personalities, qualifications, and reputations of the nominees from their state. The fact that this traditional courtesy is being ignored should be cause for concern for every Senator in this Chamber."<sup>170</sup>

This is not to say that the loss of the norm of senatorial courtesy is a negative development. Opening the judicial confirmation process to debate is certainly more democratic than a nominee being selected in an efficient, closed system in which patronage is the primary consideration.<sup>171</sup> Outside involvement can expose legitimate concerns about a nominee that might not otherwise be brought to light.<sup>172</sup> In addition, with the increasing importance of the federal courts in interpreting and determining issues of public policy, a more vigorous debate over individual nominees can and should be expected.<sup>173</sup> As one scholar noted: "[I]t is practically impossible to distinguish between judicial contributions to the governmental process and legislative contributions. It is accordingly perfectly logical to demand that judicial personnel be subjected to the same test of fitness as legislative personnel."<sup>174</sup>

The problem, however, as demonstrated by the Southwick case, is twofold. First, the involvement of interest groups may not lead to more substantive debate. Instead, es-

<sup>168</sup> SINCLAIR, *supra* note 165, at 22.

<sup>169</sup> 153 CONG. REC. S13289 (Oct. 24, 2007) (statement of Sen. Orrin Hatch).

<sup>170</sup> 153 CONG. REC. S13253 (Oct. 23, 2007) (statement of Sen. Trent Lott).

<sup>171</sup> In discussing the appointment process to agencies during the Nixon presidency, Ronald Moe notes that active senatorial involvement serves the purpose of "keeping communications open between the two branches of government" and serves as a reminder to the President of the Senate's involvement in the process. Ronald C. Moe, *Senate Confirmation of Executive Appointments: The Nixon Era*, 32 PROC. ACAD. POL. SCI. 141, 152 (1975).

<sup>172</sup> Nina Totenberg, *The Confirmation Process and the Public: To Know or Not to Know*, 101 HARV. L. REV. 1213 (1988) (discussing the role of the press and groups such as the ABA in identifying issues with Supreme Court nominees that would not have been revealed otherwise).

<sup>173</sup> This belief that the changing role of the federal judiciary justifies a more intrusive inquiry is not new. In 1934, Professor Kenneth C. Cole observed: "The net result of these developments [*i.e.*, the changing role of federal courts] is substantial identity between the sort of considerations to which particular legislators address themselves in dealing with public questions, and the considerations particular judges act upon. This means that the Senate should not be deprived of a substantial voice in the selection of judicial personnel." Kenneth C. Cole, *Judicial Affairs: The Role of the Senate in the Confirmation of Judicial Nominations*, 28 AM. POL. SCI. REV. 875, 893 (1934).

<sup>174</sup> *Id.* at 892.

pecially for senators who are not members of the Senate Judiciary Committee, the debate consists largely of un-nuanced characterizations of a nominee's positions that mimic interest group frames. Second, the individualistic nature of the Senate provides individual senators numerous opportunities to delay (and possibly defeat) a nominee who would otherwise have majority support in the Senate if granted a vote, raising concerns about the undemocratic nature of the process.

So what does the changing nature of the process portend for the future of confirmations? It means that regardless of the fact that both Democratic and Republican senators give lip service to the need to change the politicized nature of the system, nothing will change as long as satisfying interest groups provides a greater electoral benefit than not opposing or delaying a nominee.<sup>175</sup> If the process is to be modified—to alleviate delay or to change the nature of the debate—the Senate as a whole must act to alter the rules of how nominees to lower federal courts are handled.<sup>176</sup> This will require adopting a process that respects the power of individual senators and at the same time modifies the process to limit the current number of veto points. In other words, the process should be structured so that the Senate acts through a structured evaluative process as opposed to a politicized free-for-all process. For example, the Senate could impose enforceable time limits for a nominee to receive a hearing and vote in the Judiciary Committee. It could do the same once a nominee reaches the floor of the Senate. A final possibility is the so-called “nuclear option,” which would end the ability of senators to filibuster judicial nominees who reach the floor of the Senate. None of these changes impacts the ability of a senator to inquire into a nominee's position on issues or to oppose a nominee based on political or personal grounds. However, changes such as this would provide procedural certainty to the process and ultimately ensure an up-or-down vote on the nominee.

The fact that members believe they obtain more benefits from exercising their individual power as a senator than in achieving consensus, means that agreements such as that reached by the “Gang of 14” during the George W. Bush administration will not and cannot hold. The “Gang of 14” arose when Democrats filibustered certain President Bush nominees based on their perceived conservative ideology, and fourteen senators (seven from each party) broke the filibuster and agreed in the future to only filibuster judicial nominees under “extraordinary circumstances.”<sup>177</sup> Because interest group pressure will trump such informal agreements in the current political environment, they are doomed to fail. The only way that agreements to determine the substantive qualifications of a nominee will be successful is if an objective (and likely largely administrative) method for determining what is meant by a “qualified” nominee, and a method of enforcing the

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<sup>175</sup> Senator Jon Kyl recognized this fact in discussing the Southwick nomination: “I suggest today's vote is a watershed. If Senate Democrats decide to filibuster Judge Southwick today, a clearly qualified nominee, they should not be surprised if they see similar treatment for Democratic nominees. This cannot be a one-sided standard. So this isn't just a vote about Judge Southwick; it is about the future of the judicial nomination process. If Leslie Southwick cannot get an up-or-down vote, then I suspect no Senator should expect a future Democratic or Republican president to be able to count on their nominees not to be treated in the same fashion. Any little bit of controversy could be created to create the kind of hurdles Judge Southwick is facing today.” 153 CONG. REC. S13280 (Oct. 24, 2007).

<sup>176</sup> This recommendation does not include consideration of Supreme Court Justices. Because of the rare and visible nature of the debate over these positions, such institutional changes are largely unnecessary.

<sup>177</sup> Republican senators had threatened to eliminate the filibuster for judicial nominees—what Senator Trent Lott called the “nuclear option.”

agreement against recalcitrant senators, is adopted. These types of evidence-limiting rules are very unlikely because they would significantly limit the power of an individual senator. Unsurprisingly, the “Gang of 14” agreement has not held in the Obama Administration.<sup>178</sup>

If institutional rules are not put in place with regard to judicial nominees, it is very likely that the confirmation process will devolve into tit-for-tat political fights over nominations which harm both the Senate and the federal courts. This is precisely what appears to be happening. When questions arise about delay in confirmation of judicial nominees, the common response is to focus on how nominees were treated under prior administrations.<sup>179</sup> There is an inevitable race to the bottom aspect to this approach, where each successive change in administration justifies acting on fewer nominees because of the actions of prior administrations. If interest group involvement continues to increase and senators are pressured to oppose more nominees, the problem will be exacerbated. In addition, with the increasing homogeneity and partisanship of both parties, there is a decreasing number of “partisan non-conformists” or those “moderate and cross-pressured members . . . who have policy preferences outside the ideological mainstream of their party.”<sup>180</sup> This means that not only will “Gang of 14”-type agreements not hold, they are less likely to arise in the future because of the decreasing moderates in both parties.

Such battles have substantive negative impacts on the judiciary. The obvious implication of delayed and defeated nominees is a reduction in the number of judges sitting on a court to hear and decide cases. This can increase the time it takes to have a case resolved, impacting both those parties litigating before federal courts as well as the judges (and staff members) operating under increased workloads.<sup>181</sup> Indirectly, the nature of the process can also impact the individuals who are willing to be considered for a judicial position. The most qualified candidates may be hesitant to accept a nomination, knowing how contentious the process has become. In fact, Justice Scalia has been outspoken in his belief that the current confirmation process has negatively impacted the makeup of the courts of appeal.<sup>182</sup> Because of the increasing caseload in the federal courts and the fact that federal judges serve for life, the consequences of a highly politicized and uncertain confirmation process can have a long-term impact on the federal courts.

<sup>178</sup> See Editorial, *Judicial Filibuster: Not so ‘Extraordinary’ After All*, BALT. SUN, Dec. 8, 2011, at A-18 (“Remember the ‘Gang of 14’? That was the bipartisan group of senators who six years ago agreed not to filibuster judicial nominees except under ‘extraordinary circumstances.’ Well, looks like some people have decided to redefine ‘extraordinary’ to include ‘politically convenient.’”); see also Editorial, *supra* note 164.

<sup>179</sup> STEIGERWALT, *supra* note 22, at 56-65 (discussing the prevalence of the “retaliatory” use of senatorial courtesies).

<sup>180</sup> Richard Fleisher & John R. Bond, *The Shrinking Middle in the U.S. Congress*, 34 BRIT. J. POL. SCI. 429, 429-30 (2004).

<sup>181</sup> Chief Justice John Roberts addressed this concern in his 2010 Year-End Report on the Federal Judiciary: “Over many years . . . a persistent problem has developed in the process of filling judicial vacancies. Each political party has found it easy to turn on a dime from decrying to defending the blocking of judicial nominations, depending on their changing political fortunes. This has created acute difficulties for some judicial districts. Sitting judges in those districts have been burdened with extraordinary caseloads . . . There remains an urgent need for the political branches to find a long-term solution to this recurring problem.” John G. Roberts, Jr., *2010 Year-End Report on the Federal Judiciary* 7-8 (Dec. 31, 2010) <http://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx>.

<sup>182</sup> *Hearings*, *supra* note 1, at 25, 36 (statement of Justice Antonin Scalia).

## VI. CONCLUSION

Trent Lott, who spoke about the impact of interest groups after the Southwick confirmation debate, commented that “America didn’t elect advocacy groups to anything.”<sup>183</sup> The findings of this article indicate that while this may be true, interest groups have recently assumed a significant role in the confirmation process. These groups determine which court of appeals nominees will see opposition, and propose frames that senators adopt in debating a nominee. Their influence shifts the incentive calculus inside the Senate, causing senators to abandon the norm of senatorial courtesy for a more partisan process.

If the current confirmation process was born of the increase in interest group involvement and the shifting of senators’ preferences, what can be done to prompt change? The answer is that change must come from within the Senate itself. Because the current preference structure will lead senators to exercise their institutional powers of delay in an attempt to defeat a nominee, the only certain method to change this process is to adopt rules and procedures that limit senators’ power to obstruct nominees. The current system will inevitably lead to more partisan battles over nominees, which will ultimately have an impact not only on a growing Senate stalemate over confirmation of federal judges, but also on an understaffed court whose integrity has been compromised by bruising partisan confirmation fights. As Senator Hatch aptly put it while discussing the confirmation of Supreme Court justices: “political involvement in the selection of judges is a two-edged sword whose backswing has the potential to injure the prestige and independence of the Court as much as or more than its thrusts have the chance to reshape jurisprudential directions.”<sup>184</sup> In other words, while confirmation-as-political-battle may be to the short-term advantage of senators, the long-term damage to the institutional integrity of the judiciary could be the unintended yet alarming consequence.

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<sup>183</sup> Trent Lott, *A Vote for Statesmanship*, TIMES STONE CNTY. S. MISS., Nov. 1, 2007, at A4, <http://www.timesstonecounty.com/PDF/2007/11-01-07//page4a.pdf>.

<sup>184</sup> Orrin G. Hatch, *Book Review: Save The Court from What?*, 99 HARV. L. REV. 1347, 1352 (1986). See also Richard D. Freidman, *Tribal Myths: Ideology and the Confirmation of Supreme Court Nominees*, 95 YALE L. J. 1283, 1317 (1986) (“Extended debates, both within the Senate and beyond, concerning recent decisions and the political philosophy of a nominee cannot help but diminish the Court’s reputation as an independent institution and impress upon the public—and indeed on the Court itself—a political perception of its role.”); Rader, *supra* note 8, at 814 (“[I]f nominations [are] to be decided on the basis of what the public can be made to believe about a nominee’s judicial philosophy, the notion of a federal judiciary detached from influences of public opinion and political pressure may be affected.”).