



## A Bias Against the Best and Brightest

By John R. Lott Jr.

*Statistical evidence indicates that qualifications, experience, and potential influence are far greater factors in delaying or rejecting judicial nominees than perceptions of extremism.*

No one is happy with the judicial nomination process. A few years ago, Democrats bitterly complained about the difficulties that President Bill Clinton faced in confirming judges; now Republicans are complaining about the “inexcusable” delays.

As the confirmation process has progressively worsened, one dirty little secret has gone unnoticed: not all nominees have a hard time being confirmed. It is the smartest nominees, who would become the most influential judges—not the most ideological ones—who face the most difficult confirmations.

In the battle over the judicial filibuster, the question has not just been whether or when nominees will be confirmed. A more fundamental question is how nomination battles have affected in heretofore unrecognized ways the types of people who will be on the courts. The rejection rate for presidential nominees to federal circuit courts has risen steadily over the last thirty years—from 9 percent of nominees under Presidents Jimmy Carter and Ronald Reagan to 22 percent under George H. W. Bush, 26 percent under Bill Clinton, and 33 percent under President George W. Bush.

The length of time required to confirm judges has also increased. During the Carter and Reagan administrations, it took fewer than seventy

days on average to confirm a circuit court judge. (About 33 percent of Reagan’s nominees were confirmed within a month.) Under George H. W. Bush, confirmation took ninety-two days on average—something people complained about then—but this figure soared to 230 days under Clinton. In George W. Bush’s first term, the time rose again, to 263 days.

The last Supreme Court nominations, for Ruth Bader Ginsburg in 1993 and Stephen G. Breyer in 1994, did not drag on nearly as long, but Clinton’s problems with circuit nominees did not occur until after Republicans took control of the Senate in 1995. If the lengths of confirmations for the Supreme Court were to increase as much as they have since 1994 for the circuit courts, an early July retirement by Chief Justice William H. Rehnquist would mean that we should not plan on the Senate accomplishing much else for the fall. The battle will likely go on toward the end of October and last weeks longer than even Clarence Thomas’s confirmation fight.

### Achievements—or Handicaps?

The factors that generate the biggest nomination battles are perhaps the most surprising aspect of the confirmation process. Résumé items that usually confer prestige have become more of a millstone than an advantage for those seeking judgeships on the circuit courts. Consider a nominee who attended a top-ten law school, served on the law review, and clerked for the

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Supreme Court. On average, even after accounting for a controversial paper trail and other factors that can cause delays, such a person faced a confirmation process that lasted twice as long as a nominee with none of those qualifications. Similarly, during George W. Bush's first term, circuit court nominees who failed to be confirmed were more likely to have qualifications of this sort than the average circuit court nominee who had been confirmed over the last five administrations or than Bush's own nominees who were confirmed. Greater difficulties for judicial nominees with more impressive credentials are hardly unique to Bush or to Republicans. Over the last five administrations, while the nominees who were confirmed essentially attended the top-ten law schools at the same rate as those who were not confirmed, they had much lower rates of serving on their law reviews or as federal judicial clerks.

Perhaps this is not too surprising: smart, hard-working people will make effective judges who will write influential opinions and change the positions of others on the courts. That is the last thing opponents want in a nominee. Indeed, as it turns out, judicial nominees who later proved to be the most effective judges faced the toughest confirmation battles. The simplest way to quantify a judge's influence is to tally the number of citations of his opinions by other judges and the number of decisions that he produced. After accounting for tenure, each 1-percent increase in citations of a judge's opinions is correlated with an increase in the length of his confirmation process by 3 percent. Based on the data, it appears that fights over nominees such as Robert Bork had much more to do with their influence than their somehow being more extreme than other nominees.

During George W. Bush's first term, a rejected circuit court nominee was more likely to have graduated from a top-ten law school, served on a law review, and held a

judicial clerkship than the average confirmed circuit court nominee over the last five administrations. Bush's rejected nominees also had better records than his nominees who were confirmed. Greater difficulties for judicial nominees with more impressive credentials are hardly unique for Bush or for Republicans. Over the last five administrations, while the nominees who were confirmed essentially attended the top-ten law schools at the

same rate as those who were not confirmed, they had much lower rates of being on their law reviews and serving as federal judicial clerks.

Lengthy confirmation battles with high rejection rates discourage presidents from nominating the very best and brightest judges and, perhaps just as important, discourage the very best judges from accepting nominations.

Contested nominations usually involve bitter personal attacks. The nominees have to put their lives on hold for years (unable to work on cases that might be considered controversial) and cannot respond to the attacks on themselves. Circuit court nominee Henry Saad was recently slandered by Senate Minority Leader Harry Reid's reference to serious but vague "problems" in Saad's "confidential report from the FBI." Other recent nominees have been called everything from racist to extremists.

I have alluded to the fact that some commentators claim that Bush's nominees are just more "extreme" than previous nominees. But survey data suggest the opposite: the *Almanac of the Federal Judiciary*, which surveys lawyers who practice before circuit courts, finds that Bush's judges are viewed as less conservative than judges nominated by Reagan and George H. W. Bush. Neither liberal nor conservative judges took any longer to get through the process than moderates.

Maybe Americans do not want the smartest, most influential people on our courts, but the next time opponents claim that a president's nominees are "extremist," think "smart" instead.

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