Judging Ideology: The Polarization of Choosing Judges for the Circuit Courts of Appeals, 1891-2020

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Submitted in partial fulfillment of the
requirements for the degree of
Doctor of Philosophy
under the Executive Committee
in the Graduate School of Arts and Sciences

COLUMBIA UNIVERSITY

2021

Abstract

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This dissertation is motivated by a straightforward question about a drastic change to American politics: why has the process of staffing the circuit courts of appeals, once so agreeable and bipartisan, seemed to have descended into almost complete partisan bitterness? Across the entire time series, these are, after all, the same courts endowed with the same power of judicial review. And when the process of staffing them was harmonious, the courts were nevertheless deciding the fate of major, controversial policies of national importance—such as the New Deal in the 1930s and civil rights in the 1950s—just as they do today. Yes, many other aspects of American politics have changed through the decades. But what could possibly explain such a complete reversal of course?

I argue that this change, toward divisiveness and partisan warfare, is actually about the judiciary itself and the substantive manner by which the nominees are thought of—namely, the entry of *judicial* ideology into the debate through the innovation of circuit judges being evaluated on ideological terms. While taken for granted as central today, *any* ideological assessment of circuit court nominees, and in particular viewing them as having a comprehensive judicial philosophy as opposed to just a position on a singular pressing issue of the day, was almost nonexistent for generations. Its entry into the process was piecemeal and somewhat complicated, but it eventually came to dominate and irrevocably polarize the business of staffing the courts. I argue that this was the key factor that leaves us where we are today.

Broadly speaking, I consider the contributions and particular strengths of my dissertation, relative to previous scholarship, to be threefold. First is my argument and accompanying analyses which put the crucial (and severely understudied) role of judicial ideology front and center. Second, I analyze the entire lifespan of the circuit courts, whereas the previous scholarship looks only at (often relatively brief) subsets of their history. As far as I know, this is the first study to systematically look at all circuit court nominations from the establishment of these courts in 1891 through the modern era. Third, I collect and analyze a great deal of new data. In particular I focus on systematically utilizing extensive archival resources and build two original data sets related to the Senate's public and private evaluation of judicial nominees; and while there is certainly a qualitative aspect to much of this research, I also synthesize and make sense of it with quantitative analysis.

In chapter 1, I explain the puzzle motivating this research, elaborate my argument, and lay out the theoretical, methodological, and data collection contributions of this dissertation. I also review the literature and describe the three existing schools of thought.

In chapter 2, I give an overview of the history of the circuit courts from their founding to the present. In this data-heavy chapter, I examine multiple metrics individually, and using several of these I build a robust composite score of divisiveness for every nominee to the circuit courts, from 1891 through 2020. As far as I know this has never been done before. I find overwhelming evidence that the process has fundamentally changed and become more divisive.

In chapter 3, I dig more deeply into the timing of this change, and begin to explore how and why it happened—and begin my attempt at demonstrating how the evaluation of judicial ideology is central to this change. To do this I examine a massive data source that has never been utilized: the Senate Judiciary Committee hearings for all nominees. With both qualitative and quantitative analysis, I show that the evaluation of nominees has varied widely over time. Prior to 1979, nomi-

nees were evaluated almost exclusively based on their qualifications, with ideology examined only under special circumstances, which I explore in depth. In this time period, ideological scrutiny predicted a contentious confirmation process, providing evidence for my argument that ideological evaluation drove divisiveness. Also in this chapter, I analyze the post-1979 transition to the routine ideological evaluation that permanently altered the confirmation process. I find that Republicans and comprehensive judicial philosophies both played a key role.

In chapter 4, I examine the senators' *private* evaluation of nominees, in part to serve as a check on the validity of my earlier data analysis and also to see if there is any difference between the senators' public and private goals in relation to the judiciary. To do this, I build an original data set of over 1000 internal letters and memoranda from senators, by searching the archival records of nearly every president since Benjamin Harrison as well as over 150 senators. Studying this material qualitatively and quantitatively, the findings here largely align with the analysis of the public committee hearings: for much of history senators were concerned mainly about qualifications, with ideological concern rare and under special circumstances, but eventually ideology came to be the predominant concern which ended the consensual and placid process. This immense historical record also brings to light additional senatorial goals, such as ensuring residents of their own state as well as personal friends obtain judicial appointments.

In chapter 5, I focus in on the post-1979 era and I find that the more ideologically distant a *nominee* is from the Senate, the more divisive the confirmation process is. This provides evidence that the process is defined by ideology related to the nominees, not garden variety polarization of the system.

In chapter 6, I conclude, trying to synthesize all of my findings as well as offer some thoughts on areas of future research.

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Acknowledgments

I owe my thanks to a great many people for their support during this project. Jeff Lax and Justin Phillips provided advice, motivation, and insight every step of the way. They have both been terrific mentors and friends. Abhit Bhandari, Carolyn Chiechi, Bob Erikson, Gerald Gamm, Seth Green, Kolby Hanson, Tim Hoppenworth, Renanah Joyce, Kimuli Kasara, Kim Kehoe, Seonmi Kim, Trish Kirkland, Erik Lin-Greenberg, Amanda Mundt, Sharyn O'Halloran, Charlotte Oliver, Tonya Putnam, Kelly Rader, Tara Slough, Danielle Vonada, Greg Wawro, and Erin York have been excellent colleagues and friends, and I am grateful for their support and encouragement through the years. Nobody has been more supportive and important than my family. I extend my thanks to all of my family, especially Terry and Maureen Carr and Melissa, Matt, and Carter Scherz.

Chapter 1: Introduction

"It is a serious business when you appoint or confirm a circuit judge. If a wife gets a sorry husband she can get rid of him by divorce. If the country gets a sorry President, or a State gets a sorry Senator, or a district gets a sorry Congressman, the people can get rid of him at the next election. But whenever you appoint a Federal judge under our present system, the judge is with you until the last lingering echo of Gabriel's horn trembles into ultimate silence." –Senator Sam Ervin (U.S. Senate Committee on the Judiciary, Sobeloff Hearing, May 21, 1956, 116)

1.1 The Puzzle

Given the small number of cases the Supreme Court actually hears, every year the tribunal of final judgment for tens of thousands of legal disputes is a federal circuit court of appeals. Even in the rare instances when the Supreme Court does accept a case, they are often first argued, framed, and decided by circuit courts—*Adkins, Korematsu, Youngstown, Katz, Tinker, Buckley, Casey, Lopez, Heller,* and *Obergefell* are just a small sample of landmark cases originally decided by a circuit court. And while Supreme Court openings have occurred an average of only once every three years in recent times, the 167-member regional appeals courts experience frequent turnover, allowing for the nomination and confirmation process to unfold several times a year. The dynamics of staffing these consequential and recurrent judgeships appears to have fundamentally changed over the past several decades, becoming far more contentious. Most starkly, the Senate's rejection of

the president's nominees has skyrocketed: every federal circuit court nominee of the 1940s and 50s was eventually confirmed and nearly all the nominees of the 1910s, 20s, 30s, 60s, 70s, and 80s were as well, but by the 1990s less than 60% of nominations were confirmed and in the 21st century often less than 50% were. Even nominees who were eventually confirmed have faced an increasingly hostile passageway to the bench. From the creation of these courts in 1891 through 1975, all but six confirmed nominees were approved by a Senate voice vote, but by the Obama administration the historical pattern was reversed, with over 90% of circuit judges confirmed only after a—often closely divided—roll call vote. The number of days elapsing between nomination and confirmation has increased through the decades (Binder and Maltzman 2009), as has interest group opposition to particular nominees, which, now common, was once rare (Scherer 2005; Steigerwalt 2010).

While this change has been incremental and over the course of many decades, the last few years provide perhaps the most convincing evidence that the earlier, bipartisan, consensus-driven system has completely collapsed – and been replaced by a modern, partisan, hostility-driven system. While a co-partisan Senate did see to it that most of Donald Trump's circuit court nominees were ultimately confirmed, a look at key metrics shows that the process was unprecedented in its contentiousness. He was the first president in history without a circuit judge confirmed by voice vote. His average nominee saw nearly three times the nay votes of any other president's. Only two of his 54 circuit judges were confirmed unanimously, by far the lowest rate of unanimity ever (all other presidents had a majority of their circuit judges confirmed unanimously). In a new breakthrough in contentiousness, Trump is the first president to see a meaningful number of circuit judges confirmed only with party line support—43% or 23 out of 54 of his judges, which is far more than the four circuit judges confirmed as such across all previous presidents combined (one during the Benjamin Harrison administration and three during the Barack Obama administration).

This all amounts to yet another telling in what has become a dominant American narrative:

political polarization reaching new, unremembered heights. While the circuit courts are worthy of study on their own because of the volume of important cases they hear, many with a significant policy impact, studying them is informative beyond this exact venue as it is one account in this sweeping storyline of polarization. Such a study also has the benefit of spanning all three branches of government, as each interacts and plays a crucial role here, leading to a panoramic look into American politics. It is also a deep dive into judicial politics in particular. The circuit courts are the second tier of federal courts and while this study does not directly focus on the apex Supreme Court, it provides a deep look into appellate courts (of which the Supreme Court is one) and bread and butter concerns of judicial politics like judicial philosophy and policy making. This all takes place in an environment of 130 year stability and continuity, at least in terms of institutional status and existence, as it has been since 1891 the same circuit courts empowered with judicial review, nominated by the same presidential office and confirmed (or rebuffed) by the same Senate. All in all, a deep dive into this topic provides a rich environment to explore crucial change in the precise matter of staffing the circuit courts, but also to gain insight into polarization at large, roles each of the three branches play in it, and the importance of appellate judges and judicial review in the United States.

My dissertation explores the dramatic transformations of the process of staffing the circuit courts. When, how, and why did the seemingly harmonious approach toward staffing the circuit courts develop into one marked by acrimony and partisan bitterness? What changed with the political actors, and the nominees and courts themselves, over time to lead to such a revolution in confirmation politics? How have presidents and especially senators used this process to further their vision for the judiciary? In the chapters that follow, I answer these questions with new, original data that previous scholars did not have access to; moreover, I leverage the long time series of these nominations by analyzing them from the inception of these courts in 1891 through

present, whereas previous studies only look at a comparatively small subset of time and ignore several decades. In doing so, I look at existing, competing arguments and try to adjudicate among them, while offering my own argument as well.

1.2 Existing Theories and Literature

1.2.1 An overview of three existing schools of thought

Political scientists have offered explanations for these changes in relation to the circuit courts, and prominent arguments in the literature can be divided into three different accounts or schools of thought for what is driving this. While some of the literature specifically assigns itself to one of these schools, much of it does not even as it seems to lend support to a particular account. Of course not every work fully supports one school over the other two, and simplifying the literature into three schools removes some of the nuance of some of the findings. Nevertheless, like other scholars (Binder and Maltzman 2009, 7-11), I believe using this three category paradigm, at least as a foundation, is a reasonable, clarifying, and fairly comprehensive synthesis of a literature that has often favored interesting empirical findings over broad arguments or theories (Binder and Maltzman 2009, 7; Shomade et al. 2014). As will be explained in greater detail in this section, one line of the literature argues that the process has not actually changed in a profound way since it has *always* been political and the division is simply more public. A second group argues that we indeed have transitioned to a new era, and posit it is the fallout from an epiphanic "big bang" event, such as the Bork nomination, that embittered everyone from that moment forward. A third group also argues that we are in new territory, but sees it as an outgrowth of the broader phenomenon of increased polarization between the parties and disappearing bipartisanship that has increased gradually over time; this literature often also highlights the increasing

tendency of senators to use formal and informal rules to shape the confirmation process. I give simple labels to each of these schools: the "nothing new" or continuity hypothesis, the "big bang" or pivotal moment hypothesis, and the "generic polarization" or evolutionary hypothesis.

1.2.2 The "nothing new" continuity hypothesis

The "nothing new" argument is the most straight forward, contending that the process of staffing the circuit courts has always been political and the contentiousness has not changed much over time. To scholars holding this view, any account that describes a fundamental transformation is misguided. By far the most prominent work associated with this continuity hypothesis is Epstein and Segal (2005). Though most of their evidence is drawn from battles over Supreme Court nominations, they make a broad argument that the process for *all* federal judges has always been contentious and political because the judges "themselves are political" (4). They boldly state that "what has not changed is that" senators, from the founding through the present day, have been "supporting or opposing nominees who help further their own goals, primarily those that serve to advance their chances of reelection, their political party, or their policy interests" (3). Honing in on the circuit courts, they assert, "While battles over nominees to the U.S. circuit courts are now more public and the outcomes less certain, it would be a mistake to conclude that politics, in the form of ideology and partisanship, plays a far greater role in the 2000s than it did in, say, the 1930s" (2). In their account, the bitterness is merely more public because of the growing presence of the media and interest groups, and the authors make clear "we do indeed dispute the idea of an escalating reliance on ideology and partisanship on the part of senators and presidents" (4).

Epstein and Segal (2005) does stand out as *the* work forwarding the "nothing new" viewpoint. Two standout books indirectly lend some support, but only in part. Abraham (2008) and, especially, Goldman (1997) systematically utilize rich archival records to build an understanding of the

factors driving judicial selection throughout American history. However, the authors themselves do not assign themselves to the "nothing new" school (or any school) in the way that Epstein and Segal do, and I include them here because they are important works that do demonstrate there were meaningful consistencies over time. One of the very few scholars to systematically look at circuit court staffing as early as the 1930s, Goldman (1997) uses archival correspondence in a standardized way and finds presidents across time have selected lower court nominees who share their ideological outlook, in order to further a given policy agenda (2-4). He convincingly establishes that policy interest with the lower courts is not something that suddenly arrived recently (and, hence, nothing new), but he also finds important variation and that overall it is actually a very rare concern. In particular, the FDR and Reagan administrations focused on appointing ideologically aligned circuit court judges, but all presidents serving in between those two critical administrations lacked that focus almost completely.[1] He argues policy-motivated nominations occur when "the party system is in flux" and the courts are out of step with the new, emerging order, led by the new president who will then focus on the policy outlook of his judicial nominees (4). But this work would serve to undermine the "nothing new" school, to the extent policy motivation has become a consistent concern recently, contrasted with being only an occasional concern previously. More to the point, he looks at *selection* and doesn't focus much on the Senate or the overall process, and doesn't look at metrics of contentiousness that this dissertation and many other works do.

Abraham (2008) has the great advantage of looking at the entirety of American history, but he focuses almost exclusively on the Supreme Court and not the lower courts. He finds the consistent criteria for presidential selection over time: merit, personal friendship, representation, and—"arguably *the* controlling factor"—political and ideological compatibility (2-3). His historical and case study approach shows the importance of ideological considerations at certain points in early

[1]He finds evidence Eisenhower made five policy motivated circuit court nominations, three each for Kennedy, Johnson, and Carter, one each for Truman and Nixon, and none at all for Ford (78, 130, 172, 208).

American history (for instance, the late 1800s) which other scholars have tended to neglect (109, 114-115, 120-121). Though a rich telling of the history that similarly doesn't find a breaking point leading to a new way of doing things, the work is (1) episodic as opposed to consistent, (2) focused on the president and the complete process with the Senate a distant second, and, setting it apart most crucially, (3) not an examination of the circuit courts. To the extent it looks at overall contention of the process over time, it often highlights the ease of earlier eras, particularly during FDR's tenure (177, 181, 184). Another work that looks outside of the circuit courts corroborates the finding that the ideology of judicial nominees has always mattered, to some degree. Although the time period entirely predates the existence of today's circuit courts, an examination of other lower court nominees from 1789 through 1861 by Gerhardt and Stein (2015) finds that political and ideological concerns were occasionally at play, with some nominees even failing to be confirmed because of their policy positions. Given this finding, they argue the process of recent decades is not distinct from the process of the early Republic in this aspect.

1.2.3 The "big bang" pivotal moment hypothesis

In contrast with the bold version of the "nothing new" argument, other scholars argue that the process actually has changed dramatically, and the change was ushered in by a singular, decisive event. Observers describing this school of thought have termed it the "big bang" theory of judicial selection (Binder and Maltzman 2009, 7). Several scholars occupy this camp, and there is no consensus as to which event so transformed the process. Perhaps the event most immediate in the public consciousness is the 1987 nomination of Robert Bork to the Supreme Court. Political commentators today still cite the importance of his defeat in the Senate, respectively asserting it "changed everything," or was "a turning point in our history," or, even more colorfully, "the original sin of what will follow" (Totenberg 2012; Olson 2019).

Some scholarly work comports with this general characterization of the Bork episode. Most on target in relation to my questions is Martinek et al. (2002). Their empirical analysis, specifically of lower court nominees from 1977 through 1998, finds that the Bork nomination politicized the process for circuit court nominees in particular, and that those nominated after the Bork nomination were treated less favorably by the Senate—namely, their processing time took much longer. Beyond this, several scholarly books that take a case study approach and examine several major 20th century nominations find that Bork was a turning point. Vieira and Gross (1998) conclude that "the fallout from the Bork confirmation battle has not abated... the impact of the Bork precedent has now reached beyond Supreme Court appointments to affect the nomination of judges for all federal courts" (vii). Maveety's (2017) overview of the history of judicial politics sees it as "build[ing] on previous developments," while at the same time particularly important, "The Bork experience is a watershed moment in American politics: nothing about the president appointment power looks the same after Ronald Reagan and Robert Bork" (22). Maltese (1998) adopts at least some moderate version of this viewpoint; in his examination of the "selling of Supreme Court nominees" he finds Bork ushered in large public campaigns against nominees by interest groups, and notes tactics used first against Bork were used to defeat subsequent presidential nominees (7, 92, 144). Elsewhere he has stated Bork's defeat "was a watershed event that unleashed what Stephen Carter has called 'the confirmation mess'" (Binder and Maltzman 2009, 7).

While the Bork nomination and defeat is a popular candidate for the pivotal moment that transformed this process, it is not the only one. Wittes (2009) sees the Bork episode as important, but ultimately downplays it in favor of landmark decisions from the Supreme Court itself, most prominently *Brown*. While taking a broad look at the American judiciary, his data is mostly drawn from hearings for Supreme Court nominees. He sees the more contentious posture from the Senate as stemming from the increase of judicial power and concludes that "the critical shift in the confir-

mation process began with *Brown*" and continued to increase before "culminating in *Roe*" (11, 14, 60). Scherer (2005) posits that a transformation to the American party system—namely, the shift of party activists from patronage driven to issue driven—ushered in the modern, contentious process. Although it is not the discrete event that happened on a specific day in the manner of the Bork nomination and *Brown* opinion, it is still a singular variable that came into being at some point and it has been attributed to this school in the past (Scherer 2005; Binder and Maltzman 2009, 8).

1.2.4 The "generic polarization" evolutionary hypothesis

The third line of scholarship is the "generic polarization" school, which, at its core, argues that the breakdown of the advice and consent process for circuit court nominees is an outgrowth of the broad and general polarization and partisanship that has beset Washington at ever-increasing levels. The scholarship in this category has an initial empirical finding that the process has become markedly more divisive over time, and a conclusion that increased partisan polarization is the key contributing factor. A prominent work promoting this view is Binder and Maltzman (2009). Theirs is among the more empirically grounded scholarship in this field, and they look extensively at circuit court nominations from the 1940s through the early 21st century. Analyzing the increased wait times from nomination to confirmation and the decreased confirmation rates, they conclude that we are now in a new era of breakdown in the nomination and confirmation process, due to the (gradual) increase in polarization of the parties in the Senate and importance of the federal courts (82, 89). While emphasizing the role of party polarization, they also retain a strong focus on how the Senate's institutional rules explains where things stand. They ultimately conclude that presidential and senatorial "partisan pique and the rise of ideological disagreement are necessary, but insufficient" and attributes the breakdown of the process also to the "array of institutional vetoes that senators are increasingly willing to exploit" given their ideological interests (11, 80).

This narrative aligns with the account of Smith (2014) in *The Senate Syndrome*, which takes a holistic look at the upper chamber. He concedes that there is no simple explanation for the increase in contentiousness in the Senate and that there are too many forces at play to have a firm sense of their relative importance, but he argues the best way to think of the situation is as "a parliamentary arms race" with a succession of moves and countermoves that "feed on each other in a nonlinear way" (36, 40).

Primo et al. (2008) also falls squarely in this third camp. Their study identifies the DW-NOMINATE score of each of the judicial confirmation process' key pivots (the home state senators, filibuster pivot, committee median, majority party and chamber medians, and president) for every nomination from 1975 through 2006. They find that as the ideological distance between the anchor pivots—i.e., the two pivots with the most ideological distance, usually the president on one end and the home state senator or majority party median on the other—increases, so does the likelihood of not being confirmed. They find this to be true across their entire time series. Looking at the late 1970s through 90s, Bell (2002) puts several variables on the board as contributing to the discord, but identifies increasing partisanship as a central one. The Bork nomination is mentioned as doing more to increase tension than any single event before or since. I do not see this work as part of the "big bang" school because the research design is not focused on the impact of singular events, and several other variables are studied more extensively and presented as the root causes (3, 36, 44-45, 56). However, this work also lends some support to that competing school.

Most discussions of polarization in any context address the relevance of divided government, and all of the works I discuss in this school identify divided government as contributing to a rockier confirmation process. In fact, Shomade et al. (2014)—the only review article focused squarely on the "lower federal court judicial confirmation fights" scholarship—highlight divided government as one of the two variables analyzed and understood the most thoroughly (161). Because divided

government and increased polarization (at least between the president and the majority member median senator) go hand in hand throughout the entirety of the time series and because they are closely related concepts, I consider the general findings about divided government as closely related to this generic polarization school.

1.2.5 Additional findings

There are additional findings in the literature that don't cleanly belong in one of these three schools and don't necessarily focus on proffering a comprehensive understanding of the change that took place, but nevertheless increase our understanding of the situation. Along with divided government, the one other variable highlighted by Shomade et al. (2014) as being particularly well studied is interest group involvement. Scherer et al. (2008) argue that interest group opposition is driving the confirmation process nowadays. Looking at the nominations from 1985 to 2004, they compare those opposed by interest groups versus those unopposed and find that the opposed take longer to be confirmed and are more likely to fail to be confirmed altogether. Their interviews, with key players in the Senate and various interest groups, corroborate their quantitative findings. Similarly, Holmes (2007), in looking at the Senate hearings for circuit court nominees from 1979 to 2004, finds that nominees are less likely to be confirmed when outsiders testify, regardless of whether it is in opposition or in support. Looking at a similar period of time, Bell (2002) also finds interest groups (as well as the broad increase in polarization, as discussed above) reduces confirmation likelihood, and emphasizes how senators are no longer insulated from the pressure of those groups, or the media (3, 44-45). Steigerwalt (2010) finds that the Senate often lacks information about nominees and the body relies on interest groups to provide information about problematic nominees, but that opposition needs to be substantiated by the nominee's actual record (103-111, 131). She also finds that nominees often have trouble because of broader institutional disputes,

but at the same time zeros in on courts increasingly deciding important issues as the reason for increased contentiousness (2, 56, 83, 87). Massie et al. (2004) find that the norm of senatorial courtesy as well as dwindling time remaining in a presidential term leads to delays.

These explanations certainly capture much truth, but ultimately present an incomplete understanding of the changes to, and current status of, the nomination and confirmation process. Although there are informative and foreshadowing antecedents, we are in distinctly new, untrodden territory. And even though there have been particularly important escalatory moments, what has happened cannot be explained as the aftermath of a single, momentous event. And while the broad increase in polarization contributes to the conflict here, it isn't simply yet another outgrowth of generic polarization. If these explanations are not altogether adequate to explain what has occurred with the circuit courts, how, then, should we think of this turn of events?

1.3 My Argument and Contributions

1.3.1 Overview

I argue that this change, toward divisiveness and partisan warfare, is actually about the judiciary itself and the substantive manner by which the nominees are thought of—namely, the entry of *judicial* ideology into the debate through the innovation of circuit judges being evaluated on ideological terms. While taken for granted as central today, *any* ideological assessment of circuit court nominees, and in particular viewing them as having a comprehensive judicial philosophy as opposed to just a position on a singular pressing issue of the day, was almost nonexistent for generations. Its entry into the process was piecemeal and somewhat complicated, but it eventually came to dominate and irrevocably polarize the business of staffing the courts. I argue that this was the key factor that leaves us where we are today.

Broadly speaking, I consider my dissertation's contributions and strengths relative to previous scholarship to be threefold. First is my argument—stated in the paragraph above and laid out in greater detail in the next several paragraphs—and accompanying analyses which put the crucial (and severely understudied) role of judicial ideology front and center. Second, I analyze the entire lifespan of the circuit courts, whereas the previous scholarship looks only at (often relatively brief) subsets of their history. As far as I know, this is the first study to systematically look at all circuit court nominations from the establishment of these courts in 1891 through the modern era. Third, I collect and analyze a great deal of new data, related to the divisiveness of nominations, the substance of senators' evaluation of judicial nominees, and the ideology of those nominees. In particular I focus on systematically utilizing extensive archival resources; and while there is certainly a qualitative aspect to much of this research, I also try to synthesize and make sense of it with quantitative analysis. Those two final contributions—extensive new data sources from the entire history of the circuit courts—will allow me to not only forward my own arguments and findings, but also adjudicate among previous theories, highlighting the more persuasive findings over the less persuasive. But before I do that, and get more into my data and research design, I will elaborate on my argument regarding the emergence of the evaluation of judicial ideology.

1.3.2 Some assumptions about ideology

I posit that the systematic evaluation of judicial ideology entering the confirmation process was a crucial development which henceforth transformed the operation of advice and consent, and made it bitter. Despite political science universally accepting that judges are ideological actors, the full ramifications of this on the confirmation politics of circuit judges is given little attention and not fully understood. Some assumptions and insights about judges and ideology drive my approach. One is that judges (and judicial nominees) have an ideology or judicial philosophy which can be

placed on a liberal-conservative spectrum and determines the particular votes on the many cases they decide. When I speak of "ideology or judicial philosophy," it is not simply tantamount to a judge's personal policy preferences on matters before them, but instead a broad, encompassing definition and I am open minded to several variables (e.g., personal policy preferences, respect for precedent, notions of whether a legal text is "living" or "dead," and deference to elite or public opinion) coming together to comprise it. In the end, this equates to a body of votes as a judge, and can be estimated and placed on a left-right spectrum. As such, I do not directly enter the longstanding debate on whether a judge's ideology or judicial philosophy or body of votes is best explained by the legal model, attitudinal model, or strategic model. My assumption is simply that such a variable exists, and can be estimated and placed on a left-right scale, given enough information. I see myself as adopting the common and longstanding approach of political scientists that judicial ideology can be boiled down and numerically estimated—in relation to all issues combined, all issues in a single domain (e.g., criminal procedure), or a single issue (e.g., abortion)—while recognizing that it is something of a simplification (Cameron et al. 1990; Martin and Quinn 2002; Kastellec et al. 2010; Cameron et al. 2013; Baum 2017).

Another assumption I adopt is that legislators, including United States senators, also have an ideology that can similarly be conceived of as existing somewhere on a left-right spectrum, and can also be estimated. In turn, senators are more (or less) supportive of policies or nominees that are closer to (further from) them ideologically. The viewpoints that a senator has an ideology that can be measured on a single dimension and that a senator favors or disfavors a judicial nominee commensurate with their respective ideologies are, like my assumptions about judicial ideology in the previous paragraph, embraced in several prominent political science works (Poole and Rosenthal 1985; Erikson et al. 2002; McCarty et al. 2016).

All in all, I think these assumptions provide for a reasonable framework that is fairly simple and

has a lot of support in the existing literature. In summary, I assume judges (and judicial nominees) all have a particular ideology, among many possible ideologies, that can be known, estimated, or at least probed and evaluated, and that political actors (such as senators), who also have ideologies, are more supportive of jurists with an ideology closer to their own. Therefore, I argue, that as the distance between a nominee's and a senator's ideology increases, the senator is more likely to oppose the nominee, and a nominee's ideological distance, from 100 different senators, is what drives the divisiveness of the process.

1.3.3 Ideological evaluation was rare in the past

Looking only at the here and now, this all might sound unremarkable and obvious since *today's* dysfunctional process, after all, is completely dominated by ideological evaluation which clearly exacerbates tension and hard feelings. Therefore, it is easy to take for granted that this is simply the natural posture of this process, and there is not much more to see here. But what if, unlike the present moment, ideology is ignored altogether and simply not part of the political calculus of, say, the senators? Or what if, at most, it is considered only rarely and under specific conditions? A look at the (even relatively recent) past reveals that these "what ifs" are not merely an imagined way of doing things, but how the confirmation process actually unfolded.

Although common today, for decades—even as federal courts were striking down economic regulations in the *Lochner* era, preventing the implementation of the New Deal, enforcing racial integration, and expanding criminal defendant rights—appellate judges were not consistently examined as ideological actors. But once judicial ideology became a durable part of the debate, it becomes a dominant feature that polarized the nomination and confirmation process. So while it may be obvious (though not even empirically tested) that ideological scrutiny of judges leads to acrimony given our polarized political system, what is not obvious (and also not understood empir-

ically) is that political actors were simply not very concerned about judicial ideology, and for generations. Instead, the first—and usually only—question was whether the nominee was objectively qualified. The paradigm of focusing on this single, relatively straight-forward criterion protected the judicial confirmation process from being politicized and devolving into turmoil. Hence reigned the golden (peaceful) age of confirmation politics. Certainly even during this "golden age," ideology came up from time to time, but it was rare, and centered on singular policy issues. What I am trying to argue most clearly is that a feature that exists at all times (judicial ideology) has different ramifications for the process depending on *how* and even *if* it is viewed by the political actors.

1.3.4 The importance of comprehensive judicial philosophies

It was, in particular, an interest in the comprehensive judicial interpretive theories of circuit court nominees that permanently altered the process of staffing these courts. The emergence of overarching judicial philosophies as a political concern was an innovation that came relatively late—a critical change that *routinized* ideological assessment and, in time, increased the divisiveness of the process. Judicial philosophies or broad interpretive theories provide answers to a constellation of policies that are party-polarized and closely disputed in the legislative arena and the public at large. This type of ideological evaluation contrasts with that of an earlier period, when discussions of judicial ideology were rare and almost always single-issue, time-sensitive reactions to larger goings-on. For a number of reasons, the comparatively minimal divisions caused by those rare ideological evaluations on single issues quickly de-escalated.

It is not very difficult to see why being concerned about a judge's interpretive philosophy would be a game-changer that causes and maintains divisiveness. First, judicial philosophies can get at all aspects of judicial decision-making and encompass all issues of the day—and possibly all issues from the past and all to come in the future—in contrast to a single lightning-rod issue of the day,

such as the New Deal, racial integration, or abortion. A nominee evaluated in relation to only one policy matter can be placed on an ideological spectrum, but that placement is based on a relatively small piece of information, compared to a complete interpretive theory. Second, because a comprehensive judicial philosophy is a *standing commitment* to a certain type of decision-making, it is fair game to ask about this philosophy and its policy implications to any nominee, without a need for a relevant nominee-specific or time-specific incident. In other words, since it is something ever present, the suitability of asking about it does not depend on an ideologically charged resume or moment in time. Third, there have been conflicting visions of the appropriate judicial philosophy, with some more associated with the overall ideological leanings of one political party over another. With these politicized modes of interpretation, courts became a major player in sustaining an entire policy agenda. A certain type of judicial nominee, having a judicial interpretive mode that supports the objectives of one party over the other would then be preferred and promoted by the parallel political actors. The paradigm of philosopher judges with a standing mode to approach an array of policy questions is analogous to party membership in a programmatic party. Under these circumstances, installing the right kind of judges is of great importance because it is similar to winning a bitter election, with tremendous spoils: a tribunal (body) of judges (policy makers) who share your views, and happen to be life tenured.

Overarching judicial philosophy came to be important in relation to the circuit courts in the late 1970s into the 1980s. This is not to say that judicial philosophy was a *creation* of this time period; it certainly was not. But judicial philosophy as a *political* concern—most particularly, a focus of senators confirming circuit judges—was new and set the process on a course of escalation. Earlier in time, senators and other political actors evaluating these nominees focused on non-ideological concerns, which protected the process even in polarized Senates when the (unevaluated) ideology of the nominee was in fact out of step with many senators. But the process shifted from being nearly

exclusively about the valence concerns of qualifications, non-ideological scandals, or commitment to benign, imprecise principles of the American creed (such as fairness), to a standing disposition or a *way of being* as a judge that does not enjoy consensus support. This transformed the process.

1.3.5 A somewhat complicated history

This all did not happen overnight. If it was a simple flip of the switch, this would be a more straight forward "before and after" research design and explanation. In reality, the 130 year history is somewhat complicated. This long, rich, and nuanced history warrants a deep dive—especially since it has never been done and there are several data sources that have never been utilized in any manner—and allows many insights to be drawn out of and understood by the historical record. Beyond measuring, for all nominees, the level of divisiveness and ideological evaluation and understanding the relationship between these quantitative measures, as the first systematic empirical look at this I also focus heavily on fully unraveling the stories of timing, the substance of ideological evaluation, and the roles of the respective parties. Broadly speaking I find three distinct periods of time, each a different paradigm of divisiveness and tendency toward ideological evaluation: an original period, a transitionary period, and a modern period. Not only do they each have different rates of divisiveness and ideological evaluation, other factors differ and can be teased out for a richer understanding. One is the *substance* of ideological evaluation, and what role big ticket policy matters (such as civil rights, abortion, the death penalty, and so on) or particular theories about constitutional interpretation had in bringing ideology to the fore. Another is the role of party. Republicans and Democrats have often had uneven roles in polarizing various aspects of American politics; I investigate whether that is the case throughout time in relation to the circuit courts, and also whether there were leading party members in the Senate or White House who were responsible. While the role of party is an essential feature in some of the best examinations of polarization

in American politics at-large, it is underexamined in the context of lower court politics.

The "original period" ran from the establishment of the circuit courts in 1891 through 1978, and saw very little ideological evaluation and even less acrimony during the nomination and confirmation process. This remarkably stable, and placid, way of doing things lasted nearly 90 years and represents a "pre-history" that doesn't exist today. For a very small fraction of nominees, there was some evaluation of ideology during this period. The focus was on big ticket singular policies that were not cleanly divided on party lines and soon became settled in one direction—e.g., labor rights in the 1930s and civil rights in the 1960s—and senators of both parties actively engaged in the evaluation process. Despite their rareness, these antecedents are crucial to understanding how and why the current confirmation process came to dominate. The historical empirical analysis of this original period strongly suggests that particular conditions were needed whenever ideology was evaluated, which prevented the complete breakdown we see today: the ideological forays related to policy matters that were highly salient, mappable to a specific and larger contemporaneous dispute, tied to something particular in a nominee's background, and not partisan-polarized. Given these necessary conditions, ideological assessments were only occasional (though sometimes dramatic) bumps in the road, whereafter ideological assessment disappeared again and the valence concern of qualifications returned to dominate almost completely.

The "transitionary period" saw routine ideological assessment of circuit court nominees for the first time. A majority of nominees were evaluated as such; acrimony reached a discernibly new height, though remained mild compared to the 21st century. This period began in 1979, but its end is harder to define. When precisely the process slipped into the fully acrimonious "modern period" is debatable but it was certainly sometime between 1987 and circa 2000. Unlike 1891 to 1978 when certain major policy matters were of intermittent concern yet none had the staying power to transform the process, starting in 1979 the overarching interpretive theories of the nominees

were asked about regularly by the senators, and this practice stuck. While questions about philosophy were sometimes undergirded by inquiries about particular policies, including newly emerging "culture war" issues, no particular policy matter drove the transition to an ideologically-oriented assessment. This was the only period when the role of partisanship was highly asymmetrical. Republicans were the innovators, who viewed nominees as ideological actors, and rigorously questioned both Democratic and Republican nominees as such. Democrats, for much of this period, largely remained of the previous era, and usually asked nominees only about their qualifications. After several years of this partisan difference, the Bork nomination served as a galvanizing moment when Democrats finally began to consistently see circuit court nominees as ideological in the same way Republicans had been for several years.

After several years of the process slowly getting worse, eventually, by circa 2000, we entered today's "modern period"; ideological concerns are omnipresent and dominate the nomination and confirmation process, and acrimony is at an unprecedentedly high level. The substance of the evaluation is focused on broad judicial philosophy, and several particular hot button issues are often considered as well, with no single one paramount. The inquiries are thoroughly bipartisan, with Republicans and Democrats both fully engaged in scrutinizing the nominees. Much of my dissertation focuses on laying out a prehistory when ideology was rare and acrimony light, a transitional period when ideology became regular and acrimony increased, and a modern period where ideology is dominant and acrimony overwhelming. But this raises another question: if ideological evaluation leads to divisiveness, what led to ideological evaluation?

1.3.6 The rise of ideological evaluation

I argue that this is driven in part by the judicial branch itself, by the type of cases it hears and the way it resolves them. Almost any policy issue could conceivably come before the courts in some

form, but in a given time period only a subset do. Exactly what cases are decided by the courts is important; I posit that the issues the courts are deciding is a key factor leading to the greater concern over ideology. In short, as courts are deciding more and more cases that the political actors (a) actually care about and (b) are polarized on, political actors are more prone to evaluate the nominees' positions. This is not an entirely original idea, as major works assessing circuit court confirmations assert that courts are becoming more important given the issues they decide; but there is little evidence beyond the authors' general sense of American politics or a broad remark about the increased jurisdiction of the courts (Epstein and Segal 2005; Binder and Maltzman 2009; Steigerwalt 2010). Scherer's (2005) analysis goes deeper; by looking at three specific issues before the courts, each in a different time period, she finds that the parties are more divided on the modern issue of abortion than they were on mid-20th century civil rights or early 20th century labor policy, providing evidence that the courts' docket drives polarization in relation to the courts.

Like other junctures in this story, here too there is no single smoking gun and other factors appear to have contributed to the fairly sudden interest in routine ideological scrutiny. In particular, I credit the important role of individual politicians being innovators and seizing an opportunity to advance their more ideological vision of the judiciary, particularly in the Republican Party. The whole political system did not move in tandem, but particular Republican politicians were visionaries, if you will, in foreseeing an explicitly ideological judiciary, and pursued it.

1.3.7 The judiciary front and center

My dissertation keeps the *judicial politics* aspect of this story front and center. The evaluation of judicial ideology and the power of courts uniquely animate much of the partisan warfare we see here, so this fight is really about the judiciary per se. Judicial nominees are not just another innocent bystander caught up in a larger dispute. The dispute here is largely *about them*. Although

the process is fraught with demagoguery from senators and other political actors in a manner that is not always completely sincere, the senators are indeed reacting to the actual nominees and driven by what the courts are actually doing. My data analysis reflects this belief as well. I do not approach the analysis as if a chronically divided Senate is voting on yet another piece of business, with merely an examination of nay votes and confirmation rates on one hand and senatorial ideology and party affiliation on the other. Instead, I gather and analyze metrics related to how judicial nominees are viewed and what they are valued for in the American system over time.

1.4 A Major Research Design Advantage: Using More Data for the Entire Existence of the Circuit Courts

In addition to looking at this problem from a new angle which puts judicial ideology front and center in order to understand specifically how that drives divisiveness, I consider my principal contributions to be looking at (a) the entire history of the circuit courts (b) with new and original data sets. These two features of my research approach, both of which go hand in hand, give me an advantage in understanding what has transpired. In short, I look at much more time with much more data which allows me to make my claims and adjudicate previous claims with much greater certainty. These two features *together* make for something greater than the sum of their parts. A look at the entire history is interesting, but the analysis is superficial if the data is limited. New data is similarly interesting, but the analysis is narrow if the period is short. Both of these together, however, allow for a deep and comprehensive examination of the circuit courts.

Compared to all the previous scholarship, as far as I am aware my analysis of the circuit courts is for the longest period of time by far and the only to systematically examine all nominations to these courts from their founding in 1891 through the modern day. Looking specifically at the past systematic empirical analyses done in a vein similar to my approach (all discussed in the literature

review earlier in this chapter), at the very best they examine a 60 year period, whereas I am able to look at 130 years. A familiar pattern of these past analyses is to identify an earlier tranquil period (some combination of the 50s 60s or 70s) and contrast it with a latter tense period (some combination of the 80s, 90s, or 2000s), and then proffer an explanatory variable such as polarization in the Senate or the Bork nomination. These are valuable and informed contributions, but the whole historical period is particularly important, and maybe even necessary in order to be definitive, in this case as the *when, how,* and *why*—or even *whether*—are the central questions. While polarization or the Bork nomination may look like the driving force during a subset of time, looking at the entire time series will help to verify, or call into doubt, those explanations. This is also a rare instance of being able to study, in a deep systematic way, the entire life cycle of an important federal institution and have a comprehensive understanding of important political science questions regarding it. For a constitutional system that has existed since 1787, these opportunities are few and far between.

The original data I collect and analyze is done systematically and across this entire time series. The first type of new data I utilize is related to the divisiveness of the process. I collect several individual metrics of divisiveness across the entire time series, and also use these to create a composite score for every nomination in the history of the circuit courts which allows me to have a thorough understanding of divisiveness over time. The previous scholarship uses fewer metrics, and in some cases only one metric. In addition to using multiple metrics, being systematic and consistent in the use of data here is important, because there are indeed *episodes* that foreshadow a divisive process. Epstein and Segal (2005) for instance point to some of these in the 1930s to forward their view that the process has always been more or less the same. But a full collection of data reveals that incidents like these in the 1930s comprise only a tiny fraction of the total, and the 1930s, fully understood, was very different from the modern era.

In addition to these several top level metrics of contentiousness, I utilize two original data sets to try to look "under the hood" and understand how exactly the senators evaluate nominees. The first of these is the complete collection of nominee hearings before the Senate Judiciary Committee. This effort is inspired in part by Collins and Ringhand's (2013) book on the hearings for Supreme Court nominees. They examine the content of these hearings—32 from 1939 to modern times. Circuit court hearings constitute a much richer corpus—nearly 600 from 1891 to modern times—and have never been examined this way. The second is a large data set of private senatorial correspondence regarding circuit court nominees, which I collected from several different archives and spans the entire time series. This data has never been used before, but is nevertheless inspired by previous scholarship. Goldman's (1997) book on the factors that drive a president's choices in relation to the circuit courts relies on a data set, built from archives, of presidential correspondence on nominees; I do the same thing at the senatorial level. I collect and analyze both of these to understand how the nominees are evaluated, both publicly (in hearings) and privately (in letters). All of this leaves me, I hope, in a good position to solve the mystery of what has happened to the circuit courts.

1.5 Adjudicating Previous Claims

How do my arguments and analyses using this new data across the full time series, described above and laid out in the ensuing chapters, broadly relate to the existing schools of thought described in the review of the literature? First, as I emphasize throughout, there is no smoking gun here. For a change to the political system that is apparently so dramatic (going from mostly tranquil to mostly bitter), any solitary cause should be relatively easy to identify; instead, the change here is multi-faceted and somewhat elusive. This is unsurprising as any story in American politics that involves (1) several actors (2) across several decades (3) dealing with some of the most important

and fundamental matters in a political system, is unlikely to be explained by a single event—or single argument, data set, or piece of literature. So there are indeed insights and truths in all three schools of thought, and also limitations.

The "nothing new" continuity hypothesis is the boldest and most straightforward, but also the argument with the most modest amount of evidence. Criticism of this is not new, and I join the perspective of previous scholars who have described the hypothesis as "encounter[ing] rough sledding" in light of evidence, to going "way too far," and even being "empirically indefensible" (Binder and Maltzman 2009, 79; Wittes 2009, 18-19). One certainly needs to be careful when assessing this school of thought, especially since historical data can be difficult to decipher across several decades. However, metric after metric demonstrates that we are in a new era of divisiveness. On the other hand, when it comes to the circuit courts the leading work of the "nothing new" school looks only at a single quantitative measure related to contentiousness (confirmation rate from the 1940s onward) and no quantitative measure of the relationship between a nominee's characteristics and the senatorial vote choice (Epstein and Segal 2005). The most that can be said in defense of this outlook is that circuit courts in the past were making important decisions and there were certain nominations that were fraught with political rancor and in key respects look similar to the typical disputed nomination of today. But early occurrences of this sort were very rare—such a tiny fraction of the total that it makes clear we are in a very different, even radically different, era.

The "big bang" school's proffers of a vaunted singular event that revolutionized the confirmation process do not meet that high standard, but these are indeed crucial moments in the evolution of the judicial confirmation process. One enormous benefit of looking at the full time series is the ability to ascertain the *relative* impact of these events. Analyzing shorter subsets of time may make them seem more transformative than they are. The *Brown* opinion caused several nominations relatively soon after the decision to be politicized, and while these were a small taste of what was to

come, the divisive dynamics did not stick. These nomination disputes did not meet several criteria needed for long-term division, and are therefore an illustration of how certain factors can prevent a spiral into all out warfare. The Bork nomination did not change things across the board, but was when Democrats caught up (in relation to the circuit courts) to the Republicans. These were steps in a stepwise process. *Roe*, surprisingly, had a minimal impact at least in the first several years after the decision; eventually it mattered more, but was one policy among many that came to animate confirmation debates.

If things changed but not as a result of a single event, that leaves the "generic polarization" evolutionary hypothesis. Scholarship here is the trickiest to weigh with complete accuracy. Of the existing schools it is the one most closely related to my own arguments, as it contends the new level of divisiveness is a result of the ideological distance between the Senate and the appointing president or between the two parties within the Senate. I am convinced this type of polarization is a key contributor. The logic is compelling: as the parties polarize on their policy and legislative agendas, they also polarize on voting for the judges who review and interpret policies and legislation. There are robust empirical showings in support of this as well (Binder and Maltzman 2009). However, these begin their analysis in the 1940s and 50s and take it through at least the 90s. They begin in an era of low polarization and low divisiveness, and end in an era of high polarization and high divisiveness; polarization appears the likely culprit. But here again the importance of analyzing the complete time series is clear. There were periods of high generic polarization in the past—for example, from the 1890s into the 1920s—and divisiveness in relation to the circuit courts was virtually nonexistent, which strongly suggests there is more to this story. This scholarship focuses too on the importance of institutional features senators are willing to exploit; but most of these features long existed in polarized times without being utilized. Beyond this, even when divisiveness *is* high I try to show, through multiple data sources, that the story here is not just about

run of the mill "polarization is infecting everything." When nominees are opposed (in the distant past, and even in recent years), there is an overwhelming concern with the nominees themselves, and matters related to the judicial function. It is not that a very conservative Republican views all nominees of a Democrat the same due to a general atmosphere of disagreement. Nominees are treated disparately, depending on the *nominee*, not the president. While generic polarization no doubt provides important groundwork for contentiousness, there are other necessary conditions. In particular, I focus on the innovation of evaluating judges as ideological actors.

The judiciary has been political since the founding and in that sense a fundamental necessary condition has been in place for this process to be very divisive. But the bitterness of the process has changed a great deal, and particular events have indeed moved it in that direction, but the process has been gradual and there are multiple necessary conditions—a single event was not dispositive. Generic polarization is a key piece of this story, but judges themselves matter.

1.6 Why This Matters

The circuit courts are important to study for several reasons. First is their role in the development of law and constitutional governance. Each year they decide tens of thousands of cases that see no further review. Beyond the cases they are the final decision makers on, circuit courts also serve as laboratories that develop legal doctrine that the Supreme Court can choose from and apply nationally (Beim 2017). From a personnel perspective, circuit judges increasingly serve as the pool where future Supreme Court justices are socialized in and drawn from, further augmenting the circuit courts' downstream effects. The nomination and confirmation process of circuit judges also serves as a venue for the president to regularly nominate, and the Senate to regularly evaluate, judicial nominees and let the process unfold of discussing the proper role of all three branches of government.

If, in particular, increased divisiveness overtakes the nomination and confirmation process there are ramifications for the rule of law, the judiciary, as well as the functioning of the other branches of government. Increased contentiousness reduces the general public's confidence in both federal judges and the legitimacy of the courts (Binder and Maltzman 2009). If these battles are solely about ideology and partisan division, the judiciary's center—already hollowing out (Keck 2014; Bartels 2015; Devins and Baum 2019)—will continue to hollow out, leaving one wing of the courts an apparatus of one party and the other wing an apparatus of the other party, further reducing confidence in the neutrality of judges. Moreover, some of the most well-qualified jurists themselves, repelled by the newly brutal confirmation process, may demur upon being offered a nomination, leaving the courts to be staffed more and more by types willing and motivated to withstand ideological warfare, altering the quality and nature of the judiciary and further intensifying its partisanship (Southwick 2013).

The application of the ideological lens in staffing can turn a majority bloc of the judiciary into a formidable bulwark, consistently protecting a constellation of policy outcomes preferred by the judicial majority. Indeed, capturing a majority of seats in a polarized, partisan judiciary may be among the most effective ways to bring about sweeping policy change. To pass federal legislation, the president, a majority of the House of Representatives, and a (most often super) majority of the Senate all need to agree. Because of this, the American federal government is at times beset by gridlock (Krehbiel 2010; Brady and Volden 2005; Binder 2003). On the other hand, in recent years federal courts, with the votes of only a majority of a panel's judges, have issued sweeping national policy related to abortion, guns, campaign finance, voting rights, same sex marriage, the death penalty, and employment discrimination.

Today's polarized process focused on ideology makes capture of the judiciary possible in a way that it doesn't seem to have been in the past. In 1952, Democratic appointees made up all

nine members of the Supreme Court, 83% of the circuit court judges, and a majority on all circuit courts except two. In 1992, Republican appointees made up eight members of the Supreme Court, 70% of the circuit court judges, and a majority on all circuit courts except one. However, the courts of 1952 and 1992 were not fierce bastions of Democratic party liberalism and Republican party conservatism, respectively. This would likely not be the case if today's courts had such overwhelming partisan imbalance. Many of the sitting judges in 1952 and 1992 were confirmed without any evaluation of their ideological outlooks, whereas today's judges are always evaluated as ideological actors.

Finally, if these confirmation wars continue to escalate and mirror the Supreme Court confirmation process, basic government functions may be imperiled under divided government as we reach the next level of dysfunction where judgeships are filled only if the Senate and presidency are controlled by the same party. We perhaps recently saw a glimpse of the future when Senate Republicans refused to consider a Democratic president's Supreme Court nominee for 10 months and some Republican senators openly opined that they were prepared to hold the seat open for an additional four years; and later the Democratic Senate leader rejected as unacceptable all 21 potential nominees listed by the Republican president.

1.7 Outline of Dissertation

1.7.1 Chapter 2

In chapter 2, I give an overview of the history of the circuit courts from their founding to the present. First I look at how, from many perspectives, the circuit courts have become a more prominent and salient aspect of American political life. I then seek to answer one of the main research questions: how, and when, has the divisiveness of the confirmation process changed over time? In

this data-heavy chapter, I examine multiple metrics individually, and using several of these I build a robust composite score of divisiveness for every nominee to the circuit courts, from 1891 through 2020. As far as I know this has never been done before. I find overwhelming evidence that the process has fundamentally changed.

1.7.2 Chapter 3

In chapter 3, I dig more deeply into the timing of this change, and begin to explore how and why it happened—and begin my attempt at demonstrating how the evaluation of judicial ideology is central to this change. To do this I examine a massive data source that has never been utilized: the Senate Judiciary Committee hearings for all nominees. This represents the senators' *public* evaluation of nominees under the Constitution's advice and consent clause. As the first analysis of this rich historical record, I display several descriptive statistics related to them. With both qualitative and quantitative analysis, I show that the evaluation of nominees has varied widely over time. I find two broad eras. Prior to 1979, nominees were evaluated almost exclusively based on their qualifications, with ideology examined only under special circumstances, which I explore in depth. In this time period, ideological scrutiny predicted a contentious confirmation process, providing evidence for my argument that ideological evaluation drove divisiveness. Also in this chapter, I analyze the post-1979 transition to the routine ideological evaluation that permanently altered the confirmation process. I evaluate what role partisanship and particular ideological disputes had in driving this transition, and find that Republicans and comprehensive judicial philosophies both played a key role.

1.7.3 Chapter 4

Chapter 4 is a complement to the previous chapter and allows for a fuller picture of how advice and consent operated across the decades. Here I examine the senators' *private* evaluation of nominees, in part to serve as a check on the validity of my earlier data analysis and also to see if there is any difference between the senators' public and private goals in relation to the judiciary. To do this, I build an original data set of over 1000 internal letters and memoranda from senators, by searching the archival records of nearly every president since Benjamin Harrison as well as over 150 senators. Studying this material qualitatively and quantitatively, the findings here largely align with the analysis of the public committee hearings: for much of history senators were concerned mainly about qualifications, with ideological concern rare and under special circumstances, but eventually ideology came to be the predominant concern which ended the consensual and placid process. This immense historical record also brings to light additional senatorial goals, such as ensuring residents of their own state as well as personal friends obtain judicial appointments.

1.7.4 Chapter 5

Having shown in the previous two chapters that the era of bipartisan agreement in relation to nominees was dominated by senators evaluating mostly qualifications—and that rare ideological evaluation corresponded with divisiveness—and that this paradigm was slowly displaced by an era of ideological scrutiny and contentiousness, in chapter 5 I focus in on this latter post-1979 era to identify the relationship between a nominee's ideology and the divisiveness of their confirmation process. While previous scholarship singles out divided government as well as ideological distance between the president and Senate (or the two political parties) to account for the acrimonious process, almost no attention is given to the ideology of the nominees themselves. Here, I analyze nominee specific ideology measures for the circuit court nominees and examine whether the

Senate's vote is influenced by nominee specific ideology in this era when ideological evaluation is paramount. I find that the more ideologically distant a *nominee* is from the Senate, the more divisive the confirmation process is. This provides evidence that the process is defined by ideology related to the nominees, not garden variety polarization of the system.

1.7.5 Chapter 6

I conclude in chapter 6, trying to synthesize all of my findings as well as offer thoughts on areas of future research.

Chapter 2: The Road to Divisiveness

2.1 The Increasing Prominence of Circuit Courts in American Politics

2.1.1 A growing judiciary

The United States circuit courts of appeals that we know today were not part of the country's original lower court structure established by the Federal Judiciary Act of 1789. They were established over 100 years later by the Judiciary Act of 1891 (commonly known as the Evarts Act). Broken into nine (and over time 12) regional circuits, they "were the first federal courts designed exclusively to hear cases on appeal from trial courts" and were granted jurisdiction over the great majority of such appeals (Federal Judicial Center 2019). This new intermediate level of appellate court was part of an effort to reduce the Supreme Court's high caseload (Federal Judicial Center 2019). This same year the courts were established, the first several nominees were put forth by President Benjamin Harrison and confirmed by the Senate.

Beginning at a modest 19 seats, over time Congress gradually increased the overall number of seats, finally reaching their current 167 in 1990—a whopping 800% growth. Figure 2.1 plots the number of seats over time. As the figure shows, the overall number of seats has always increased, and never decreased. In the several years immediately after their establishment, Congress slowly but surely added seats—never more than two or three per Congress—until hitting 32 in 1905. Nine Congresses then passed without any additions, which was the longest period of stability until

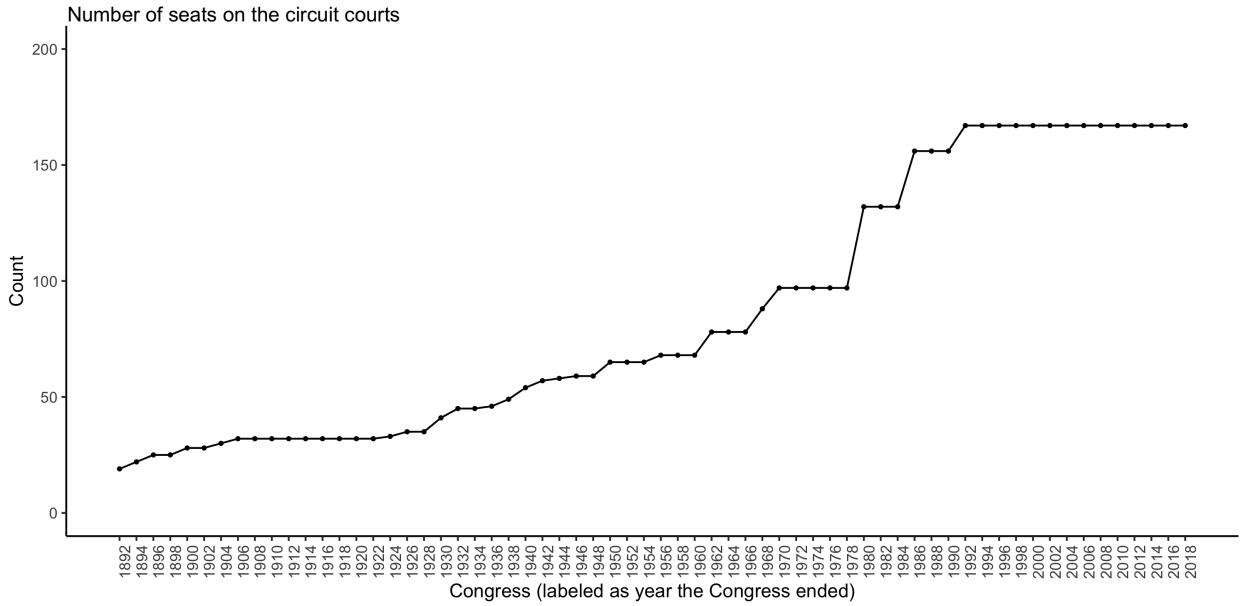

Figure 2.1: The number of seats that comprise the circuit courts of appeals, by Congress. *Source: Calculated by author, underlying data gathered from* History of the Federal Judiciary, *http://www.fjc.gov, web site of the Federal Judicial Center.*

the present. In the 1920s, Congress began adding seats again and by the end of the decade the courts had doubled from their original size. 1930 onward, Congress favored expansions that were frequent (never going more than three Congresses without adding seats) but small (never adding more than 6 seats in a Congress). That changed in 1961 when 10 seats were added, soon followed by another 10 in 1966 and then nine in 1968. Three final increases brought the courts to their current number: the historically large expansion of 35 in 1978, followed by 24 in 1984 and finally 11 in 1990. Since then the size of the courts has remained constant at 167, the longest period of stasis in their history.

2.1.2 More nominations each Congress

This change has made the business of staffing these courts a more regular and prominent piece of presidential and senatorial life. A natural consequence of increasing the number of permanent seats on the circuit court benches is a generally commensurate increase in vacancies needing to be filled at any given time. The logic and math is straightforward. If, by way of example, the average length of service for a circuit judge was 15 years (the normal length of service needed today for a federal judge to retire), on a court system of 32 (the size of the circuit courts for much of the early 20th century) typically there would be around four vacancies to fill per Congress and eight per presidential term. However, on a court of 167 these numbers increase to 22 and 44, respectively.

Although the real data obviously does not look exactly like this clockwork, it does validate the logic. Figure 2.2 plots the actual number of nominations sent by the White House and pending before the Senate for every Congress, with the points plotting the exact number and the smoothed line more clearly illustrating the trend over time. As the figure shows, there are some fairly dramatic fluctuations from one Congress to the next, but, as expected, the unmistakable trend is a notable increase in the number of nominations over time. Prior to 1950, the number of nominations before each Congress was almost always in the single digits. Since 1950, there has almost always been more than ten. And since the late 1970s, there often has been more than 30, and, during one Congress, more than 50. The high water mark came during the Congress that ended in 2002 (59 nominations), followed by the Congresses that ended in 2018 and 1980 (49 nominations each). Despite the overall trend toward increasing nominations, the Congress ending in 2016 saw a modern low of eight nominations. This clear outlier was the first time when the number of nominations was in the single digits since the Congress ending in 1964, which was reeling from the tumult of the Kennedy assassination. This modern low came as the Republican senators, who gained majority control of the Senate for the final two years of the Obama presidency, opted to

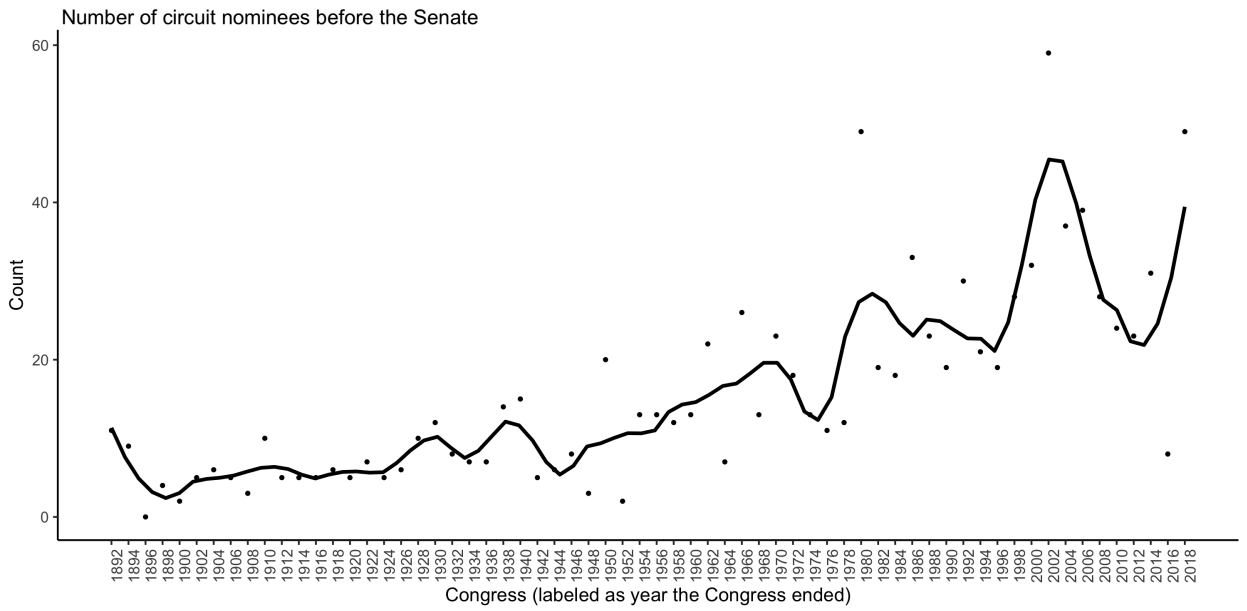

Figure 2.2: The number of circuit court nominees before the Senate, by Congress. *Source: Calculated by author, underlying data gathered from* History of the Federal Judiciary, *http://www.fjc.gov, web site of the Federal Judicial Center.*

bring confirmation of appellate judges to almost a complete halt (only one nominee to the regional courts of appeal ended up actually being confirmed that Congress). With dismal prospects for confirmation success, despite many vacancies, the Obama White House sent few nominees to the Senate.

The increase in nominations each Congress is a result not only of a larger bench needing to be maintained, but also the tendency in recent decades for a Congress to end with the Senate failing to vote on certain nominees. This necessitates yet another nomination in the subsequent Congress. The modern era tendency for the Senate to not vote on nominees will be analyzed and discussed at length throughout this dissertation. For now the point I wish to make is that the president and Senate have had to address, one way or another, more and more nominations over time.

2.1.3 More relevant nominations each Congress

Of course, every nomination is not equally relevant to every member of the Senate (or the interested public for that matter). Nominees from the homestate and the home circuit engender heightened concern. This is in part a simple matter of the nominee's future legal authority. The various regional circuits, whether nine originally or 12 today, all encompass entire states (or the entirety of the District of Columbia) and disputes arising in a particular state naturally fall under the jurisdiction of that specific circuit court. So nominees to the home circuit, regardless of which of the states within the circuit they are from, review legal cases (and policy) within the homestate that other circuits simply do not. Given this, senators have asserted keen interest in the fate of nominees to the home circuit, even if those nominees are not from the senator's specific state. In one example, in a letter to their colleagues in 1956, the senators from North Carolina, South Carolina, and Virginia opposed a nominee from Maryland to the Fourth Circuit, and focused on the fact that their states were within that circuit (Richard B. Russell Collection, Sam Ervin et al. to Senate, July 5, 1956, subgroup C VII I, box 33). In other correspondence related to the same nomination, a senator indicates his heightened interest in investigating the nominee's legal approach because his state falls within that circuit (John L. McClellan Papers, Sam Ervin to McClellan, July 28, 1955, box 144, folder 11).

When there is an opening on the home circuit, it is also a particular opportunity for senators to advocate that a jurist from their homestate (i.e., an actual constituent) be nominated. Senators often see themselves as stewards of nominations from their states and especially enjoy seeing positions filled with preferred candidates from their homestate. Regardless of their exact motivations, the archival record across the time series is replete with evidence on this front (and will be discussed in depth in chapter 4). Today on each circuit at least one sitting judge must be appointed from the residents of each of the circuit's states, and, additionally, specific seats are usually unofficially

designated for a resident from a particular state. However, this was not always the case and jockeying for a home state nominee could be intense. For instance, Vermont waited until 1929 to have a resident on the Second Circuit, after its senators attempted for years to rectify the lack of representation. There were multiple Second Circuit vacancies in the 1920s, and the four Vermont senators who served during that decade wrote substantial correspondence to the president, colleagues, and constituents expressing their hope that a Vermonter would be appointed in light of their lack of representation (Frank L. Greene Papers, William Dillingham and Carroll Page to Warren Harding, April 16, 1921, Dillingham to John Sargent, April 21, 1921, Porter Dale to Greene, May 3, 1927, Dale and Greene to Calvin Coolidge, January 18, 1929, box 38). As one quotation among many, Senator Porter Dale wrote in 1927, "It is well known I have done everything I could to have one of these appointments go to Vermont and I am ready to try again" (Frank L. Greene Papers, Dale to Greene, May 3, 1927, box 38). The archival record is abundant with evidence that senators cared about these nominations and wanted them to go to their states.

Whether out of an interest in the legal jurisdiction the nominee will have over its state or as an opportunity to advocate a homestate nomination or from a general sense of increased responsibility to parochial matters, senators are naturally more interested in nominations to the home circuit. In an attempt to understand the proportion of senators *especially* affected by at least one nomination in a given Congress, figure 2.3 captures how the prevalence of home circuit nominations has evolved over time. The plot shows the proportion of states (i.e., the proportion of senators) in a given Congress where the home circuit sees a nomination to it. For example, in a given Congress if there is a nominee to the Sixth Circuit, all four of its states, which represent 9% of states (or senators) in 1891 and 8% today, would be counted on the plot. Although less relevant, the plot also shows the proportion of circuits (nine in 1891 and 12 today) that saw a nomination in a given Congress, as another measure of how comprehensively the circuit court system is affected by nominations

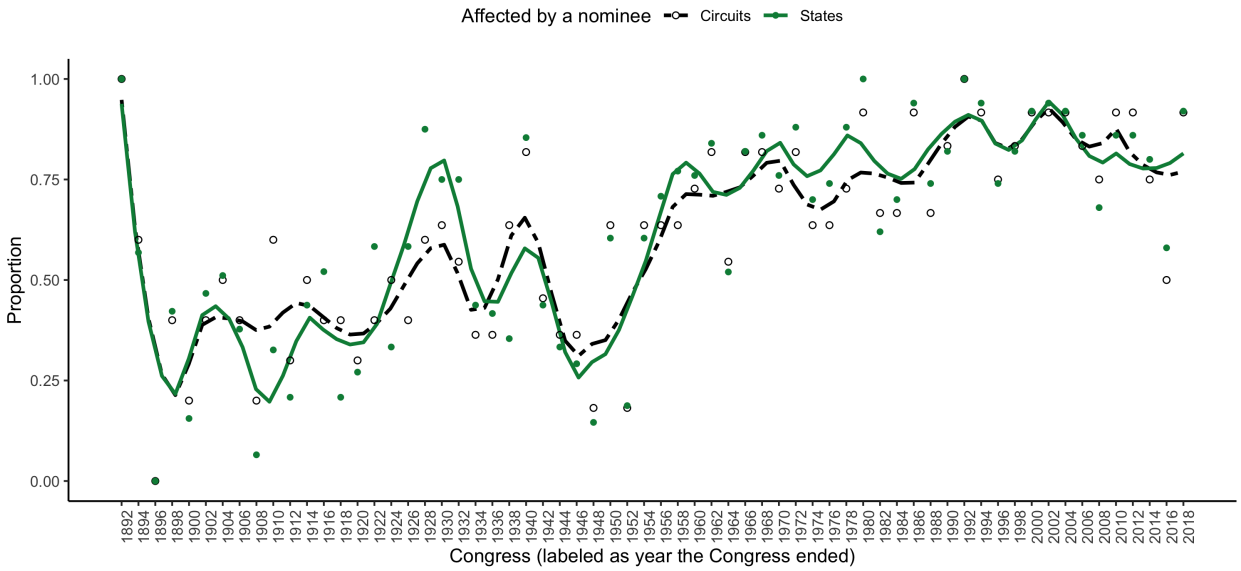

Figure 2.3: The proportion of circuits (dashed line) and corresponding states (solid line) directly affected by nominations, by Congress. *Source: Calculated by author, underlying data gathered from* History of the Federal Judiciary, *http://www.fjc.gov, web site of the Federal Judicial Center.*

over time. These two metrics trend tightly together, but can diverge given the fact that the circuits contain a disparate number of states (the Eighth Circuit contained 13 states in one period while others have only ever contained three) and because the DC Circuit is one of 12 regional circuits yet contains no states. As the figure shows, while the change in proportion can be drastic from one Congress to the next, the trend lines are clear that over time a greater proportion of senators tended to see a home circuit nominee each Congress. Since the mid 1950s, at least 50% of the senators saw a home circuit nominee; prior to this, it was usually around 50% or less. In their first few decades, several circuits went ten years without any nominations (or vacancies), leaving senators without a nominee particularly relevant to them for long stretches. The Fourth Circuit is a more recent and extreme example of a dearth of nominees. Always covering five states, it had only three seats for its first 70 years and went over 15 years in the 1940s and 50s without a vacancy, denying those ten senators the opportunity to encounter a nomination that came from either their state or their circuit. Since then, none of the circuits (aside from the DC) have gone more than three Congresses without a nomination. In short, in recent decades the nominations in a given Congress have mattered more to more senators than in earlier decades.

2.1.4 More and more the Supreme Court pool

The makeup of the circuit courts has seen an uptick in importance as it relates to one of the central concerns of American politics: filling seats on the Supreme Court. Supreme Court nominees are much more likely to be sitting circuit court judges than they once were. Figure 2.4 plots the proportion of each president's Supreme Court nominees that was comprised of sitting circuit court judges, and this shows a drastic change. Although the circuit courts today have been thought to constitute the Supreme Court "farm team" (Toobin 2017) this was clearly not always the case. As Figure 2.4 shows, during the first 60 years of the circuit courts' existence, no president drew more

than a majority of his Supreme Court nominees from their ranks. In fact, several presidents from this era chose none at all, including those who had multiple nominees (e.g., Wilson with three and Cleveland and Harding with four).[2] Franklin Roosevelt, whose long tenure granted him the fortune to make nine nominations to the Supreme Court, only selected one from the circuit courts.

It was not until the 1950s when a president chose more than a majority of his Supreme Court nominees from the ranks of the circuit courts. Eisenhower was the first president to do so, and although this preference was put on hold in the 1960s with Kennedy and Johnson, it began a trend that was picked up again with Nixon and has held ever since. This is to say, prior to 1953, no president chose more than a majority of his high court nominees from the circuit courts, but, since 1969, every president has. Indeed, four modern presidents (Ford, Bush I, Clinton, and Trump) selected all of their nominees from the circuit courts.

Circuit court nominations are more important since this lower court judgeship has become the premier stepping stone to the high court. Unlike the more distant past, in recent decades senators can be almost certain that a select few of the circuit court nominees they are voting on will later be considered for the Supreme Court. In fact, 2006 was the first time when every member of the Supreme Court was elevated as a circuit court judge. On today's court, eight of the nine were. As recently as 1990, a majority of the justices lacked this credential. The Roberts Court is the first in American history to be so overwhelmingly dominated by former circuit court judges.

2.1.5 Senators also believe these nominees are moving to the center stage

All of this data indicates that the filling of circuit court vacancies is increasingly moving to the center of the stage on which American politics plays out. The senators themselves seem to agree. Upon retiring after more than 50 years in politics, Senator Lamar Alexander placed lower court

[2] I only count Cleveland's second term. During his first term the circuit courts of appeals did not yet exist.

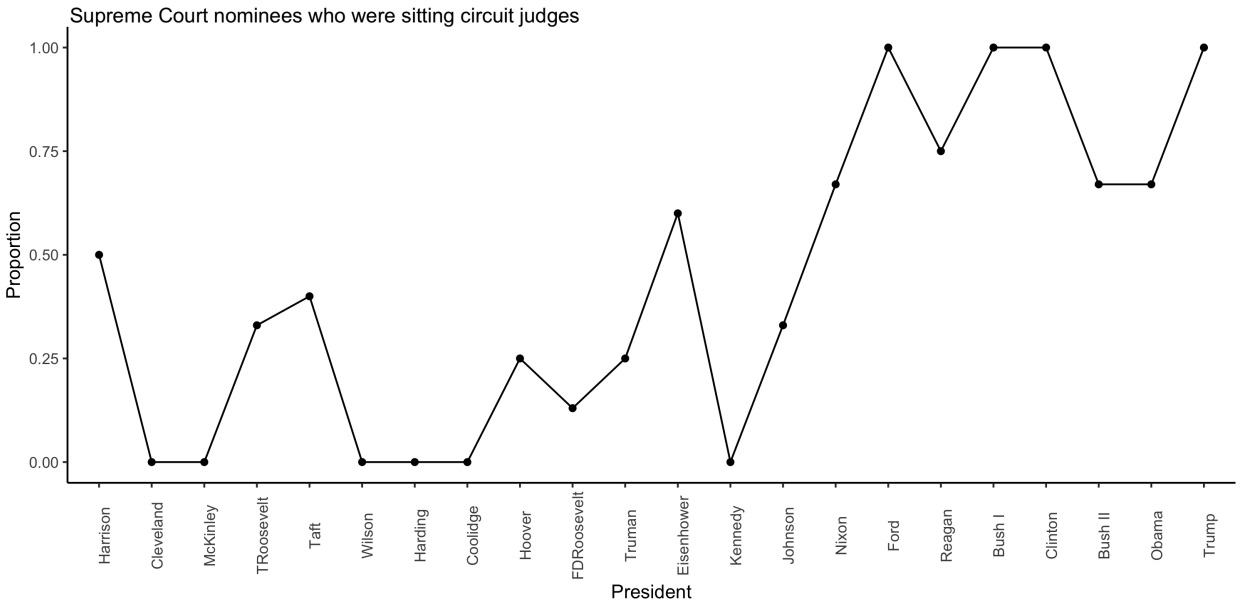

Figure 2.4: The proportion of nominees to the Supreme Court who were sitting circuit court judges, by President. *Source: Calculated by author, underlying data gathered from* History of the Federal Judiciary, *http://www.fjc.gov, web site of the Federal Judicial Center.*

appointments among the small handful of things that defined the Trump presidency. "New form of communication. Supreme Court justices. Conservative judges. Lower taxes. Fewer regulations. Very different behavior," Alexander said (Alexander 2020). His remark is reflective of many additional observations, from senators and others, agreeing that staffing the judiciary was among the most meaningful aspects of the Trump presidential years (Cruz 2019; Kapur 2020; Sherman et al. 2020).

Recent legislative leaders have gone even further, coming surprisingly close to *singling out* judicial appointments as the most important task of Article I and II office holders. Senate Republican leader Mitch McConnell said of filling judgeships, "This is a priority with me. It's one of my top priorities. In fact, you could argue that it is my top priority, in terms of the category of things that have the longest impact on the country" (Berenson 2018). He also called the confirmation of federal judges the "backbone" of what made the 115th "the most productive right-of-center Congress since the Reagan era" (McConnell 2019, 276). A similar sentiment is shared by recent House leadership, despite not having a role in filling judicial vacancies. Former Speaker John Boehner reflected on the most important role of a president, and bluntly said, "At the end of the day, who gets nominated to the federal courts is really the most important thing a President does" (Villa 2021). It's remarkable that modern day Article I leaders view the presidency, and sometimes even themselves, not first and foremost as partners in crafting and passing legislation, but as installers of judges.

Best I can tell, this is a relatively recent phenomenon, but definitely not one that emerged only during the Trump presidency. During an interview in 1997, Senator Strom Thurmond vouched for the paramount importance of staffing the courts. Interviewed in light of becoming the longest serving (nearly 42 years) senator in history, he was asked, "What thing are you most proud of, what accomplishment are you most proud of, in the Senate?" Thurmond responded, "Well, I was

chairman of the Judiciary Committee and we got through more than 400 judges when Reagan was president" (Thurmond 1997).

Other recent Senate leaders have explained the importance of staffing the judiciary. Former Senate Republican Leader Trent Lott commits several detailed pages to the Senate's role in confirming circuit court judges in his memoir (Lott 2005, 286-290). Senate Democratic Leader Harry Reid similarly dedicates a section of his book to judicial confirmation disputes, and asserts the particular importance of the lower courts: "most of the decisions are made by circuit courts anyway, so it could be said that they are the most important judicial nominees of all" (Reid 2008, 197). In the memoir of Senate Democratic Leader Tom Daschle, the senator writes, "everyone should care about the makeup of the federal judiciary" and recounts the "quietly raging... struggle to dramatically reshape the faces and philosophy of the federal judiciary" (Daschle 2003, 206-207).

This is, of course, not a definitive study of all these legislative leader's views on the relative importance of the judiciary, but it is yet another metric that aligns with my broader argument that the circuit courts are rising in political prominence. As the circuit courts bench has increased in size, it has made way for the business of staffing them to be a more regular and prominent feature of American politics and senatorial life. There are more seats to fill, more nominations to deal with, and the batch of nominations each Congress is more likely to affect the development of the law within more states. Moreover, filling the circuit seats is more likely to have a major consequence down the road when filling the more high profile and consequential seats on the Supreme Courts as presidents increasingly draw upon this pool of jurists when choosing who to elevate. The judiciary is becoming more and more important to politicians lately, and staffing it is central, more than ever, to the modern story of American politics.

2.2 Divisiveness Over Time

2.2.1 How to measure divisiveness

In this section I transition to a central question in the literature and one that animates much of my dissertation: has the level of divisiveness in the nomination and confirmation process for circuit court judges fundamentally changed? If so, by what metrics, by how much, and when?

First, there is the question of *how* to measure divisiveness. Individual scholarship that has quantified this has favored analyzing one or two basic metrics across time. The most common is the confirmation rate of nominees in a given Congress or presidency. This is fairly straightforward, and while it does not capture much of the nuance of the process, this measure—whether or not the nominee is confirmed—is ultimately the most important question in many contexts. At the nominee level, this is dichotomous—in a given time period, a nominee is either confirmed or not. The continuous variable of time elapsed from nomination to confirmation has also been used (Binder and Maltzman 2009; Martinek et al. 2002). Scholars have examined periods of time as long as the 1940s through modern times, but not earlier.

Of course, there is no single, definitive metric that completely captures "divisiveness." After all, the confirmation process is a *process* with multiple facets, and ultimate confirmation is only one step (albeit the most important). My strategy to overcome this problem is to utilize multiple data points. Thankfully, there are several objective measures that are quantifiable and can be collected consistently across the entire time series. I first analyze five metrics one by one since 1891: nominee failure, nomination failure, roll call taken, nay votes received, and committee hearing held. I use all five together to calculate a composite divisiveness score for every nominee in circuit court history. I also examine cloture votes over time, as well as party-line votes. Unlike previous examinations of divisiveness, I look at several metrics (examined individually and also

together as a whole), and for the entire time series. Like other sections of my dissertation, I see the two principal strengths here as more data and more time. These two attributes are especially important here, where the goal is to apprehend whether the broad concept of divisiveness has reached new, unprecedented levels. If these metrics are comprehensive and telling, as I believe they are, the conclusion after analyzing them in the following sections is abundantly clear: the process for confirming circuit court judges has undergone a sea change, and a peaceful past has given way to a turbulent and divisive present.

2.2.2 Failed nominees

Figure 2.5 plots the proportion of failed nominees by presidential term, and figure 2.6 plots the count of the same metric. These plots represent individual people (i.e., *nominees*) who were nominated to the circuit courts, but were not confirmed at the completion of the presidential term in which they were nominated. These figures show that, overall, the failure of nominees has increased greatly over time. Nominee failure existed to some degree since the beginning, though was generally much less common in the first half of the time series. Of the 19 presidential terms prior to 1965, seven saw at least one nominee failure while 12 saw none. The sustained stretch from Truman's first full term through Kennedy's term completed by Johnson was the last period of 100% presidential success. Since then, all presidents have had at least one failed nominee. In the early years, Taft and Hoover stand out with unusually high failure rates of 13% and 16%, respectively. However, these relatively high numbers are engendered by just a few failed nominees total—two for Taft and three for Hoover.

Moreover, even these highest percentages from the early years are significantly lower than modern presidential terms, which have always exceeded 20% and averaged 31% since the Bush I presidential term (with the exception of Trump). All time high failure rates of over 40% were

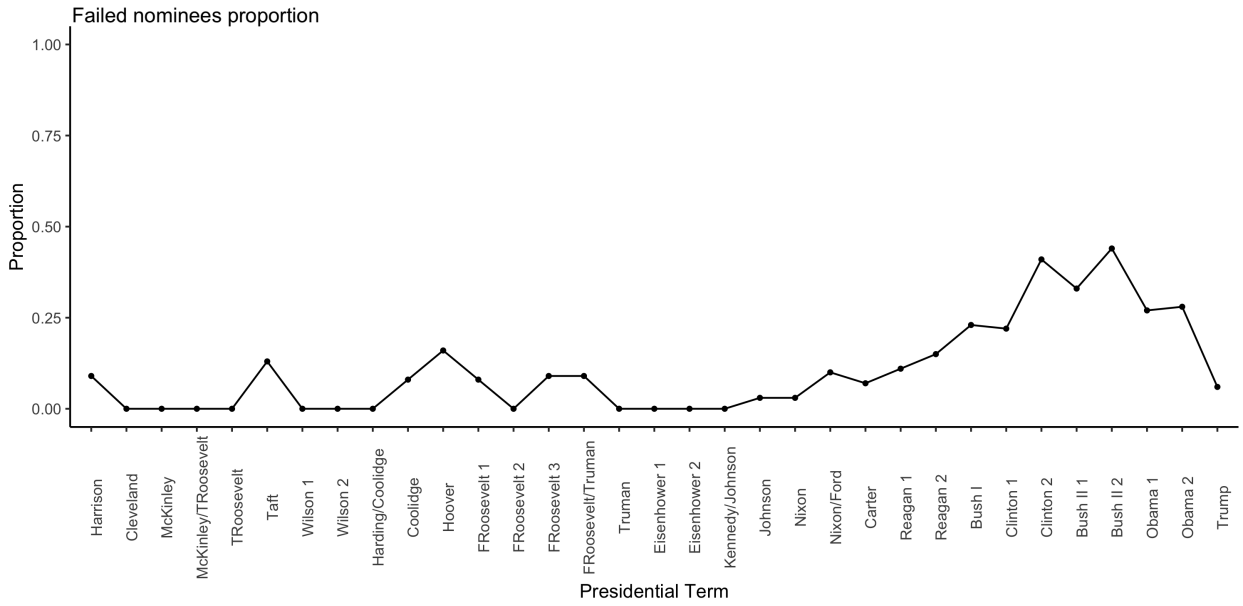

Figure 2.5: The proportion of nominees (i.e., individual people), out of all nominees in a given presidential term, that were unsuccessful in receiving confirmation, even at the end of the presidential term. *Source: Calculated by author, underlying data gathered from* History of the Federal Judiciary, *http://www.fjc.gov, web site of the Federal Judicial Center.*

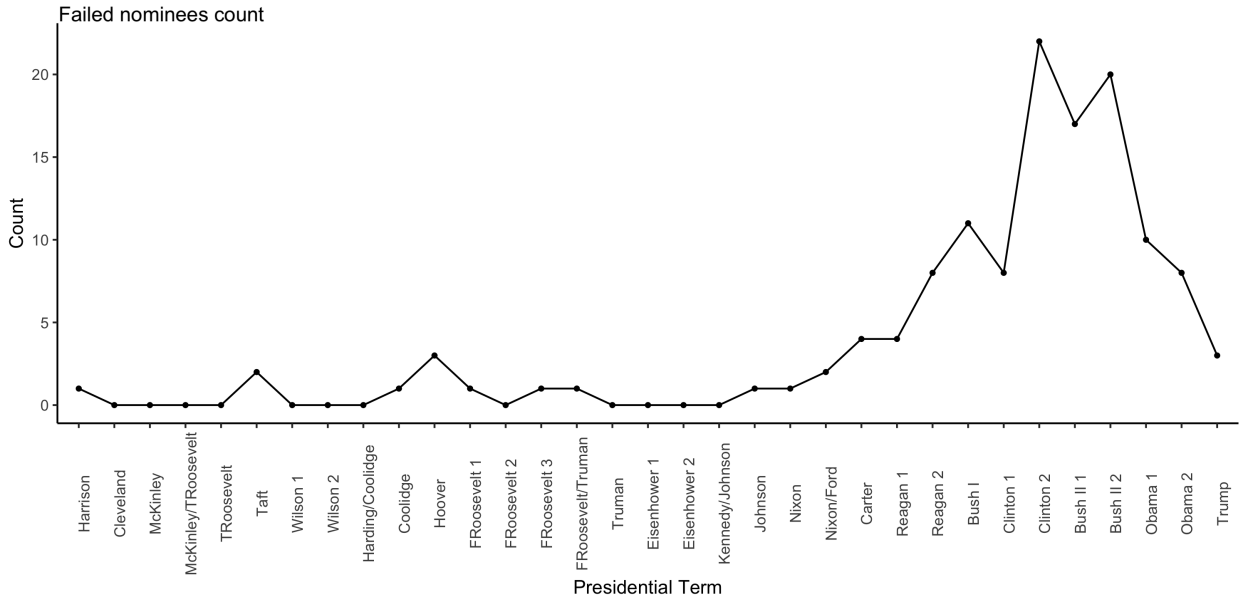

Figure 2.6: The count of nominees (i.e., individual people), out of all nominees in a given presidential term, that were unsuccessful in receiving confirmation, even at the end of the presidential term. *Source: Calculated by author, underlying data gathered from* History of the Federal Judiciary, *http://www.fjc.gov, web site of the Federal Judicial Center.*

experienced during the second terms of both Clinton and Bush II. The Trump failure rate of 6% is actually the lowest since Nixon's first term. On the surface, therefore, it would seem that, after 50 years of nearly unbroken escalation, the Senate and Presidency came to their senses and reverted back to the reasonable era when nearly all nominees would be broadly accepted and confirmed. This instead mostly illustrates the pitfall of only examining a single metric to try to understand the fullness of the confirmation process. Trump's impressive confirmation rate was a function of his party controlling the Senate for all four years of his presidency, coupled with the recent elimination of the judicial filibuster and homestate blue slip veto. Additional metrics give a more complete picture and will show the Trump years to be highly divisive.

Additionally, this top level metric can only tell so much because individual data points *within* the larger set also vary in precisely what they stand for. By this I mean some of these nominees that were never confirmed do not appear to be particularly controversial; instead, they came fairly late in the presidential term and were essentially ignored by the Senate. Taft's two failed nominees and Hoover's final failed nominee all belong in this category. On the other hand, in this same era Hoover's two other failed nominees as well as the failed nominees of Coolidge and FDR were all controversial and failed to be confirmed after lengthy and contentious hearings that attracted the attention of several senators. Nominee failure from active opposition versus the Senate just not getting around to it exists throughout the time series. Recent presidencies had contentious nominees who were actively opposed by senators, such as Kenneth Ryskamp (Bush I), James Ware (Clinton), Miguel Estrada (Bush II), and Goodwin Liu (Obama) as well as nominees that were more or less simply ignored such as John Roberts (Bush I), Elena Kagan (Clinton), Paul Diamond (Bush II), and Steve Six (Obama).

This metric, preferred by the existing literature, is still perhaps the most important data point—at the end of the presidential term, was this person confirmed, regardless of how calm or tumultuous

that process was. This is a body count, so to speak, and quantifies the Senate's *outright* resistance to confirming the presidents' nominees over time. But this is a blunt metric and gives little sense of the experience of nominees who are eventually confirmed. The proceeding metrics look at different angles to see the intensity of divisiveness for nominees that were often ultimately confirmed. These metrics are similarly quantifiable and objective, and can be measured across time in order to help build a comprehensive understanding.

2.2.3 Failed nominations

Distinct from nominee success rate, this section examines *nominations*, which are essentially paperwork sent to the Senate. A single nominee can be nominated multiple times if the earlier nomination is not acted on by the Senate, and these failed nominations are represented on figures 2.7 and 2.8, which plot the proportion and count, respectively, of failed nominations each Congress. For instance, during the presidency of Bush II, Terrence Boyle was nominated six times and never confirmed; those six failed nominations are represented on these plots. During the same presidency, Priscilla Owen was nominated four times before finally being confirmed via the fourth nomination; those three failed nominations are represented on these plots. Many nominees are confirmed with the first nomination, and those are not represented here. Not being confirmed on the first nomination (and sometimes not even on the next several) indicates a less smooth confirmation process overall and also imparts a sense of the duration between original nomination and ultimate confirmation; multiple nominations prolong the confirmation process (if confirmation is ever even realized).

As the figures show, this metric has been somewhat erratic over the years, but over time there is a clear trend toward more failed nominations. In the early decades, the nomination failure rates of 40% or higher in the Congresses ending in 1912, 1928, and 1932 all stand out as particularly high,

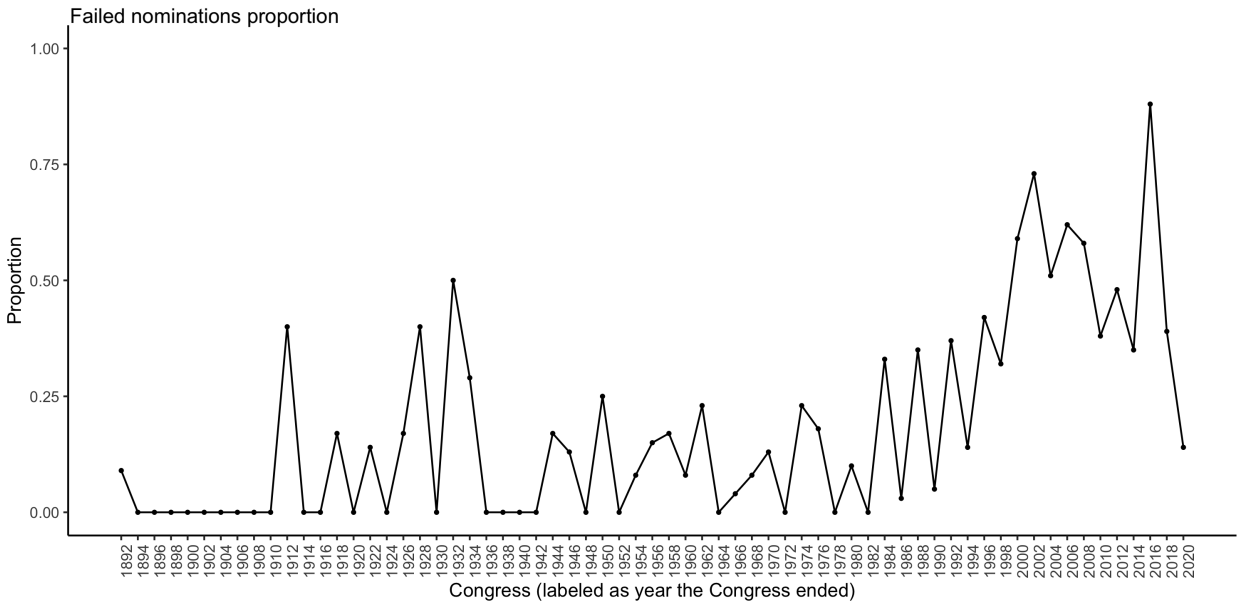

Figure 2.7: The proportion of nominations, out of all nominations in a given Congress, that were unsuccessful. The individual (i.e., nominee) receiving the nomination may have been successfully confirmed through a new, later nomination. *Source: Calculated by author, underlying data gathered from* History of the Federal Judiciary, *http://www.fjc.gov, web site of the Federal Judicial Center.*

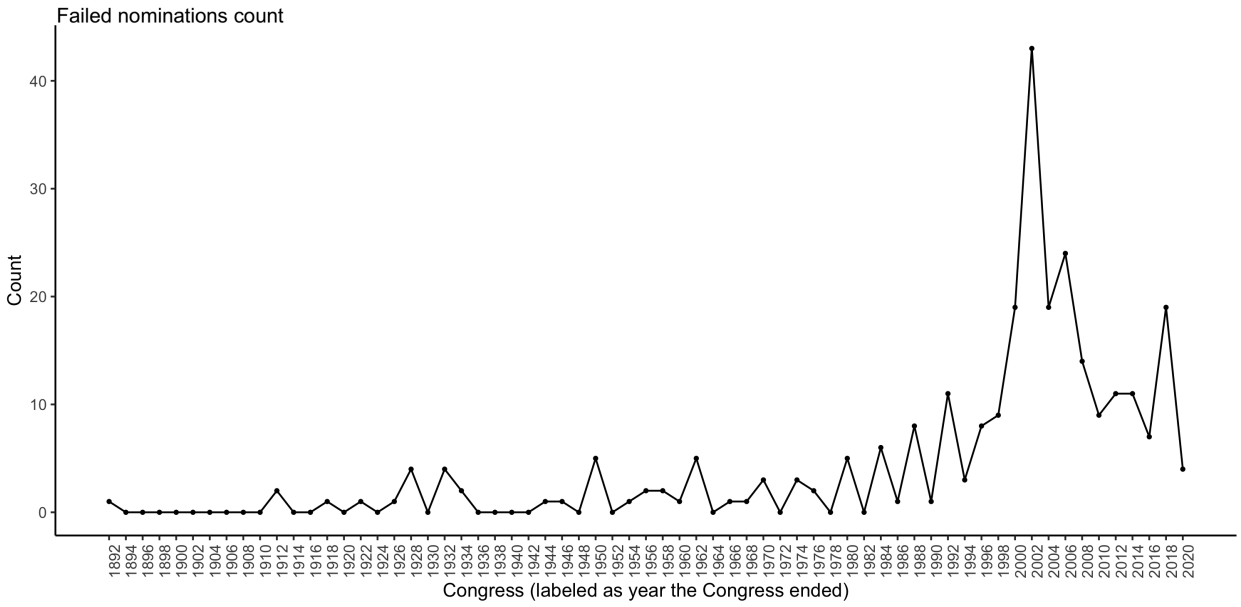

Figure 2.8: The count of nominations, out of all nominations in a given Congress, that were unsuccessful. The individual (i.e., nominee) receiving the nomination may have been successfully confirmed through a new, later nomination. *Source: Calculated by author, underlying data gathered from* History of the Federal Judiciary, *http://www.fjc.gov, web site of the Federal Judicial Center.*

but those are driven by only a handful of nomination failures those Congresses (two, four, and four, respectively) as the total number of nominations those Congresses was 10 or less. Sticking with proportions, the Congress ending in 2000 saw a new high of 59% failure, then increasing to the fairly astronomical 73% the next Congress, and reaching a historical high of 88% in the Congress ending in 2016. Across time the failure rate on average is higher in the Congress during the last two years of a presidency—21% versus 16%.

While the first Congress during the Trump presidency is right in line with the high number of failed nominations in other Congresses, the second Congress has a curiously low proportion of failed nominations (14%, which had not been seen since the early 1990s). Given the high level of opposition the nominees this Congress faced (as we will see in the next sections), the high nomination success rate here again stems more from the copartisan control of the Senate, and the absence of the judicial filibuster and blue slip veto—not a return to a more bipartisan and agreeable approach.

2.2.4 Roll call votes and nay votes

Even when nominations successfully culminate with a confirmation, some processes are bumpier than others. Like the earlier discussion of nominees and nominations, a comprehensive look at Senate confirmation votes shows that they have become *significantly* more divisive over time. On figure 2.9, the dotted line shows the proportion of circuit court nominees that received roll call votes (as opposed to voice votes) and the solid line shows the proportion that received at least one nay (as opposed to none) in their confirmation vote.[3]

[3] All circuit court nominees who actually received an up or down vote by the Senate were confirmed, with only one exception. Wallace McCamant was defeated in 1926 after a vote in the Senate. He is represented in the failed nominee and failed nomination plots earlier, but is not represented in these figures. These figures display nominees who were ultimately confirmed; were they to display all nominees, the only difference would be the inclusion of the McCamant data point.

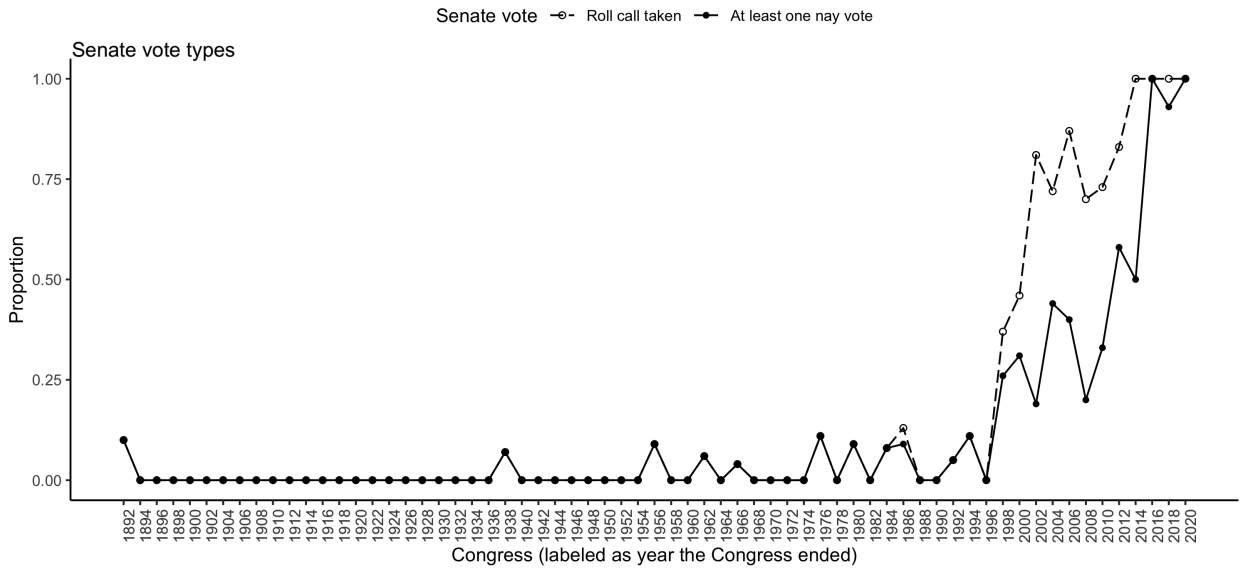

Figure 2.9: The proportion of confirmed nominees in a given Congress that received a roll call (as opposed to voice) vote as well as the proportion that received at least one nay vote. *Source: Calculated by author, underlying data gathered from* History of the Federal Judiciary, *http://www.fjc.gov, web site of the Federal Judicial Center.*

These metrics represent two of the most drastic increases in divisiveness over time. As the figure shows, both metrics have existed to some degree since the beginning. A nominee in 1892 received a roll call and was confirmed by a one vote margin. In the ensuing decades, the occurrence of roll calls and nays were highly intermittent, and rare. In the 1980s, they became regular (occurring most Congresses) yet remained rare (only around 10% of nominees in a given Congress). These more divisive votes really began to take off in the late 1990s (at a rate double what it had been in the 1980s), and continued to skyrocket throughout the 21st century. From the Congress ending in 1998 to the one ending in 2014, roll calls would often be taken yet produce no nay votes. In the last three Congresses these metrics have largely converged, with 100% of nominees subject to a roll call and, at a minimum, 93% of nominees receiving a nay vote. After generations of almost all nominees being confirmed on a voice vote with no recorded nay, in recent years the complete opposite is true with virtually all nominees receiving nay votes after a roll call.

2.2.5 The number of nay votes over time

Figure 2.10 adds further dimension to the extent of opposition to nominees that were ultimately confirmed by plotting the average number of nay votes the circuit court nominees received each Congress. As the figure shows, by this metric divisiveness has increased drastically. For much of the circuit court history, the average number of nay votes each Congress was negligible. Not until the late 1970s did this metric begin to regularly hit merely single digits. It wasn't until the 21st century when this average hit double digits. By this metric, the Congresses ending in 2018 and 2020 far eclipsed any previous period. These two most recent Congresses saw average nays of 35 and 38, respectively—more than double the average in any previous Congresses.

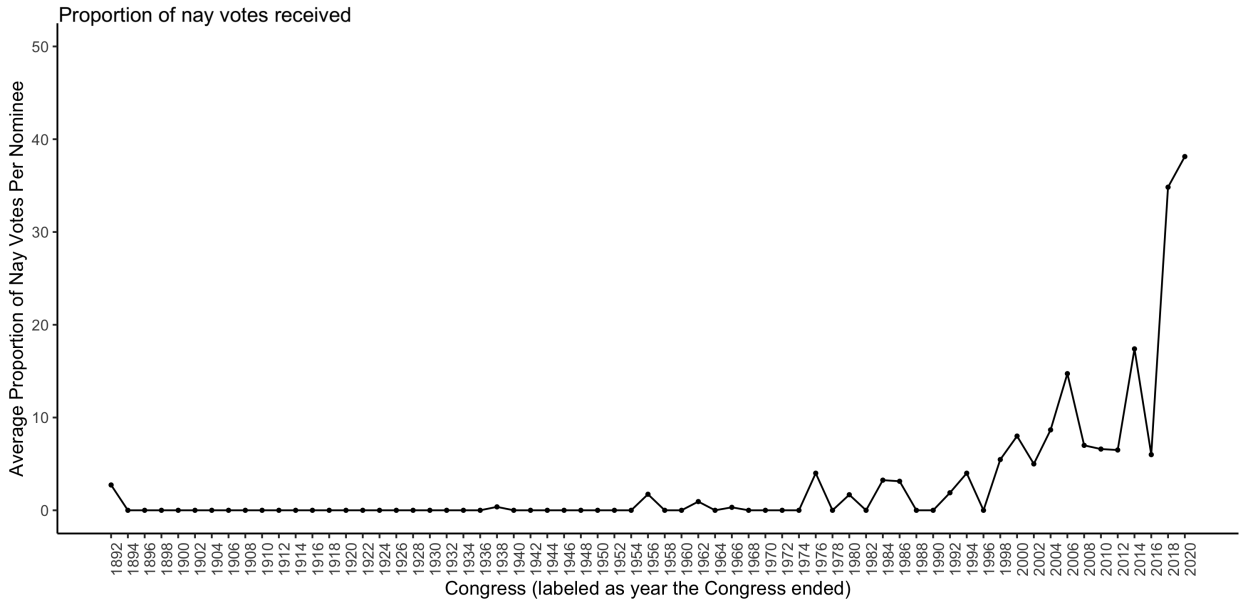

Figure 2.10: The average proportion of nay votes received by all confirmed nominees, by Congress. *Source: Calculated by author, underlying data gathered from* History of the Federal Judiciary, *http://www.fjc.gov, web site of the Federal Judicial Center.*

2.2.6 Committee hearings

For the last several decades, prior to any confirmation vote for a circuit court nominee, a public hearings before the Senate Judiciary Committee has always been held for that nominee. Such a procedure allows senators on the committee the opportunity to make their own statements, hear favorable and adverse evidence, and question and evaluate the nominee. Figure 2.11 plots the proportion of successfully confirmed nominees who were subjected to a committee hearing each Congress. These hearings are covered extensively in the next chapter, but figure 2.11 has some key takeaways. While a prerequisite of a successful confirmation for the last 50 years, as the figure shows, this metric has varied widely over time. Hearings were a possibility from the beginning; one of Benjamin Harrison's nominees was subject to a hearing in 1892. But for the remainder of the 19th century and first several decades of the 20th century, there were no hearings for confirmed

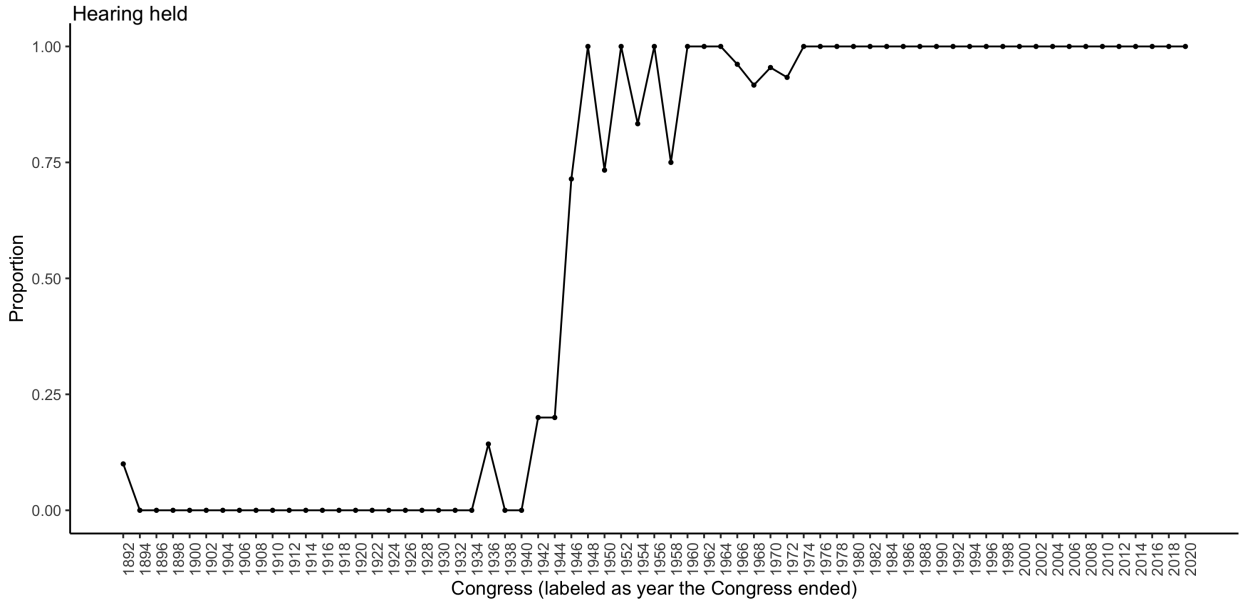

Figure 2.11: The proportion of confirmed nominees subjected to a Senate Judiciary Committee Hearing, by Congress. *Source: Calculated by author based on archival research discussed in Chapter 3.*

nominees (there were hearings for controversial nominees who were ultimately rejected by the Senate, but these are not plotted in the figure). Confirmed nominees were subject to hearings in the 1930s and 1940s, but they did not become universal as they are today until the 1970s. As late as the 1940s and 1950s, in some Congresses 25% of nominees were confirmed without a hearing. In the late 1960s and early 1970s, a handful of nominees were still confirmed without a hearing. Depending on the nominee, these hearings do vary substantially in length and substance—from a few minutes of nothing but praise to several days with intense opposition. While figure 2.11 does not capture such nuance, it does identify the top-level metric of those nominees subjected to the rigors of being evaluated at a public hearing before the Senate Judiciary Committee, as opposed to being confirmed without this hurdle.

2.2.7 Cloture votes

Another metric of divisiveness that can be examined over time is the cloture vote, which is a Senate procedure to place a time limit on how long something can be debated and hence compel a final vote. Cloture is used to overcome a filibuster, which is a somewhat abstruse concept. To be clear, in general the two do not always go hand in hand. In theory, a cloture vote is not necessarily attempted to overcome all "filibusters," and, conversely, cloture can be invoked even if there is not a "filibuster." But, as Congressional Research Service analysis explains, cloture votes are a justifiable proxy for filibusters in the context of nominations: "If cloture cannot serve directly as a measure of filibusters, however, neither can any other specific procedural action. A filibuster is a matter of intent; any proceedings on the floor might constitute part of a filibuster if they are undertaken with the purpose of blocking or delaying a vote. Yet any of the procedural actions that might be used to delay or block a vote might also be used as part of a normal course of consideration leading without difficulty to a final decision. As a result, filibusters cannot simply be identified by explicit or uniform criteria, and there is no commonly accepted set of criteria for doing so" (Beth et al. 2013, 3).

The period when there could have been a need for cloture votes on judicial nominees ran from 1949, when the Senate changed its rules and allowed cloture to be moved on nominations, until November 2013, when the Senate reinterpreted the Senate rule and lowered the vote needed to invoke cloture from three-fifths to a simple majority (Beth et al. 2013). Given the dearth of failed nominees and the unanimity by which nearly all circuit court nominees were confirmed for generations, it is doubtful that there were prolonged judicial filibusters from 1891 through 1949 or prolonged judicial filibusters that were not subject to a cloture vote after 1949. Aligning with this, at least one scholar has identified that the first circuit court filibuster ever was in 1980 with the nomination of Stephen Breyer to the First Circuit (Stone 2011)—also the first circuit court

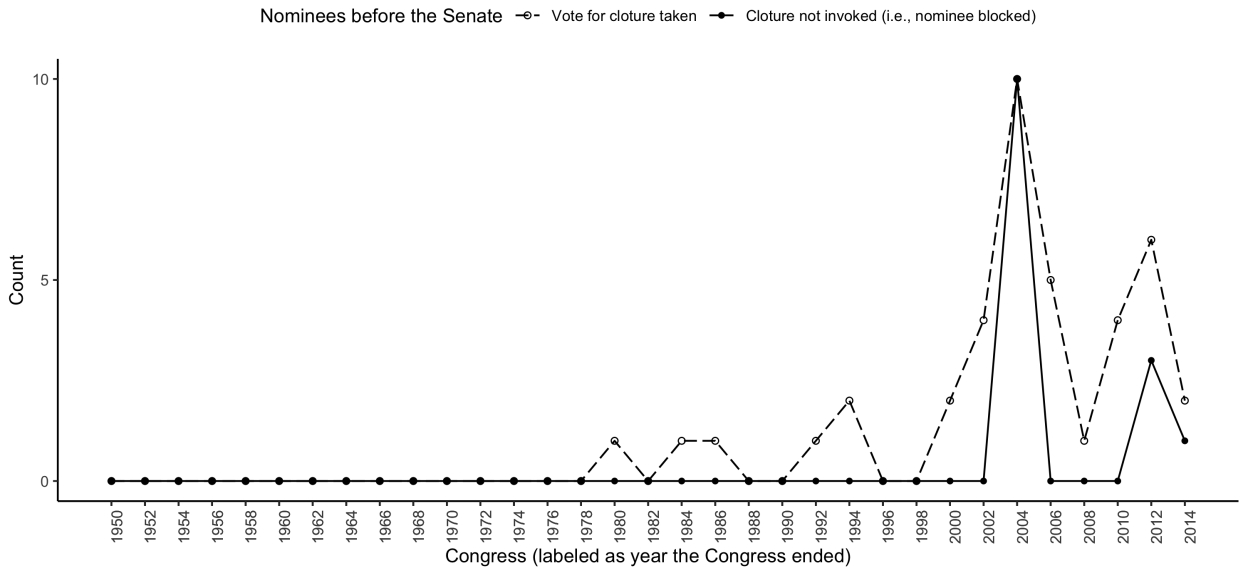

Figure 2.12: The number of nominees in a given Congress where a vote for cloture was taken (dashed line) and the number where that vote for cloture was unsuccessful—i.e., the nominee was blocked (solid line). *Source: Beth et al. 2013.*

nominee to receive a cloture vote. This was a modest beginning for what would become a bulwark against confirming nominees: the Breyer filibuster was only a two senator operation, was broken, and Breyer was confirmed to the circuit court where he served for 14 years before ascending to the Supreme Court (Lammi 1980).

Figure 2.12 plots the number of nominees that received a cloture vote over time (dashed line) as well as the number of nominees where the cloture vote was unsuccessful—i.e., the nomination was successfully blocked or filibustered through the end of the Congress (solid line). As the figure shows, a cloture vote first became necessary during the Carter presidency, and continued to be occasionally necessary during the Reagan, Bush I, and Clinton presidencies. However, cloture votes skyrocketed during the Bush II presidency, and the 108th Congress was the first time circuit court nominees were actually successfully blocked because those cloture votes failed. This unprecedented state of affairs carried into the Obama presidency, until a rule change in 2013 made it impossible.

2.2.8 Party-line votes

While the overwhelming majority of circuit court nominees were confirmed with the support of at least one senator not belonging to the president's party, some have been confirmed solely with the support of copartisan senators. Figure 2.13 plots the proportion of circuit court nominees each Congress that were confirmed only with the support of same-party senators. The plot is a stark illustration of how the American political system continues to innovate toward new forms of divisiveness. There have been only 27 circuit court judges confirmed by a party-line in all of American history, and 23 of them were Trump judges and three others were Obama judges. 63% of the confirmed judges from the most recent Congress (the 116th) were confirmed by party-line, an unthinkably high number for most of American history.

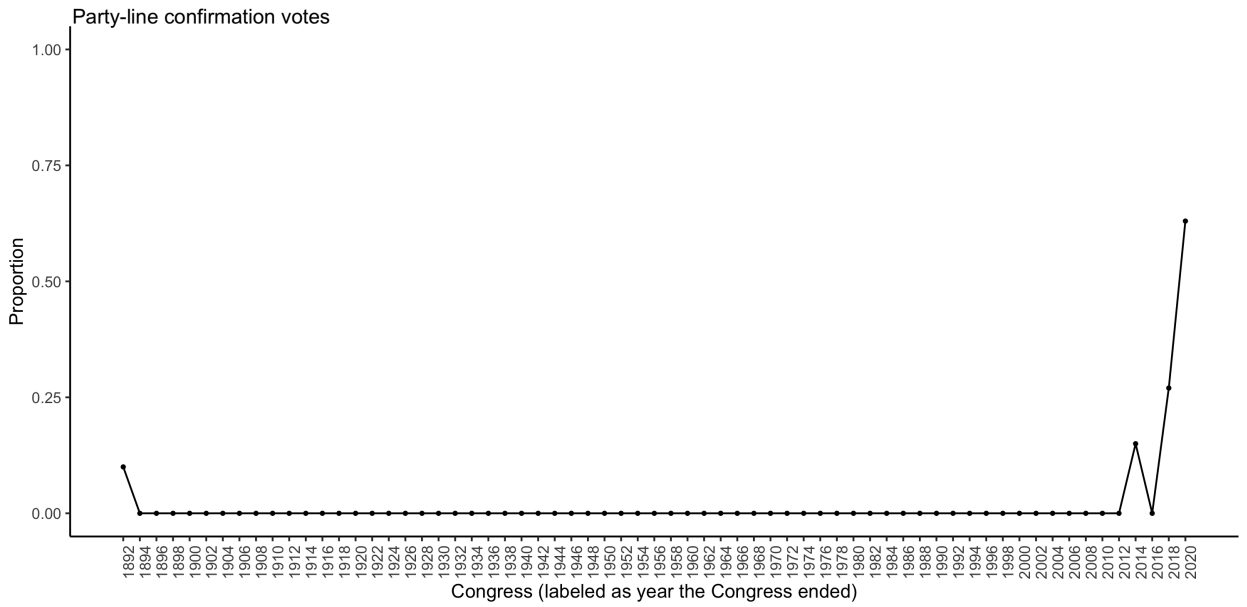

Figure 2.13: Proportion of nominees confirmed on a party-line vote (i.e., only with the support of copartisan senators) by Congress. *Source: Calculated by author, underlying data gathered from Lewis et al. 2021.*

2.2.9 An aggregate and individualized score of nominee controversy

Having shown that the confirmation process for circuit court nominees has become increasingly divisive across several metrics, in this section I synthesize the core metrics from above into a composite divisiveness score for every nominee to the circuit courts from 1891 through 2020. In order to calculate this score, I consider whether or not a nominee had (a) a prior failed nomination (figure 2.8), (b) a roll call vote (figure 2.9), (c) at least one nay vote (figure 2.9), or (d) a hearing (figure 2.11). I assign a nominee one point for each of these attributes, for a possible total score of 0, 1, 2, 3, or 4 for every confirmed nominee. For all nominees who were (e) not confirmed (figure 2.6), I assign a score of 5. Therefore, a nominee who was confirmed after a process that included (a), (b), (c), and (d) would score a relatively high 4; but a nominee who failed to be confirmed (e) would score a still higher 5, as failure to be confirmed is the most divisive and undesirable outcome possible.[4]

This scoring of how divisive the process was for each nominee is blunt to be sure, but it is nevertheless the most comprehensive that I am aware of. It has the advantage of incorporating five key features of the confirmation process that are objective and quantifiable across the entire 130 year time series, where other assessments of divisiveness just utilize one or two of these metrics. These scores can also be averaged in different ways in order to compare how divisive the confirmation process was for some groups of nominees compared to others.

Figure 2.14 does just this for every president's group of circuit court nominees. As the plot shows, there has been a dramatic increase in the divisiveness average per president over time. For the first 50 years of the circuit courts, divisiveness was low with some presidents even having an average score of zero. Harrison, Taft, and Hoover nominees stand out as having higher average

[4]I do not include cloture votes in this score because they were only a possibility during a subset of the time series (1949 to 2013), nor do I include party-line confirmation votes because of their almost complete newness. The inclusion of these metrics would reinforce the finding that the process has become more divisive than ever in recent years.

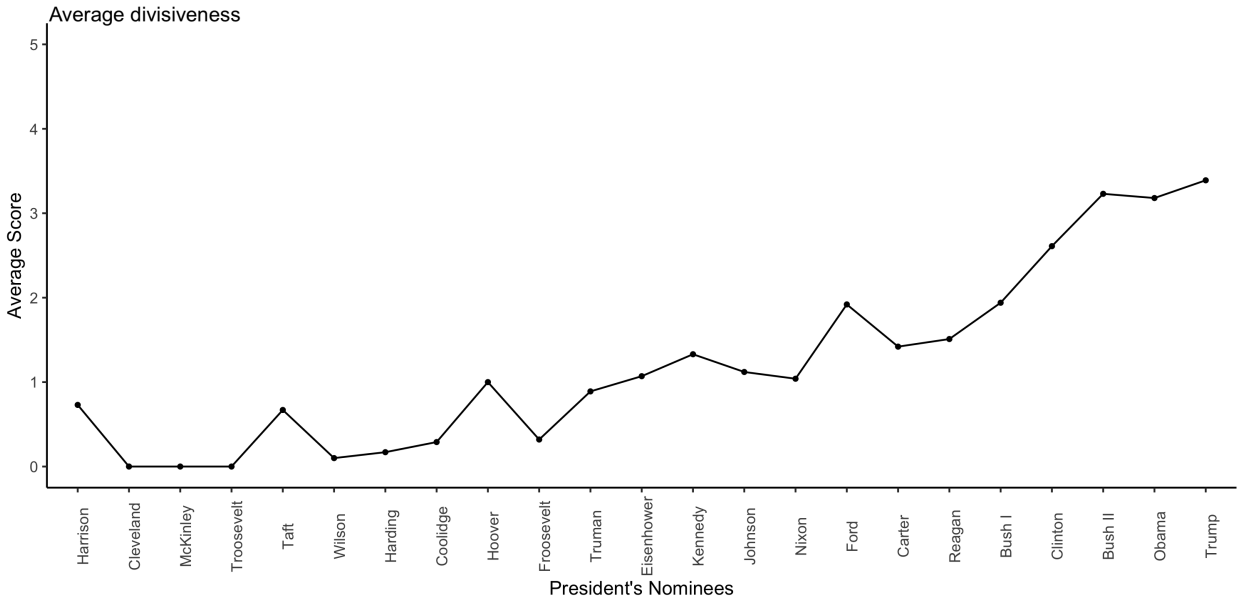

Figure 2.14: Average divisiveness score of each president's circuit court nominees. Scores calculated based on number of failed nominees, failed nominations, roll call votes, roll call votes with a nay, and hearings held. *Source: Calculated by author.*

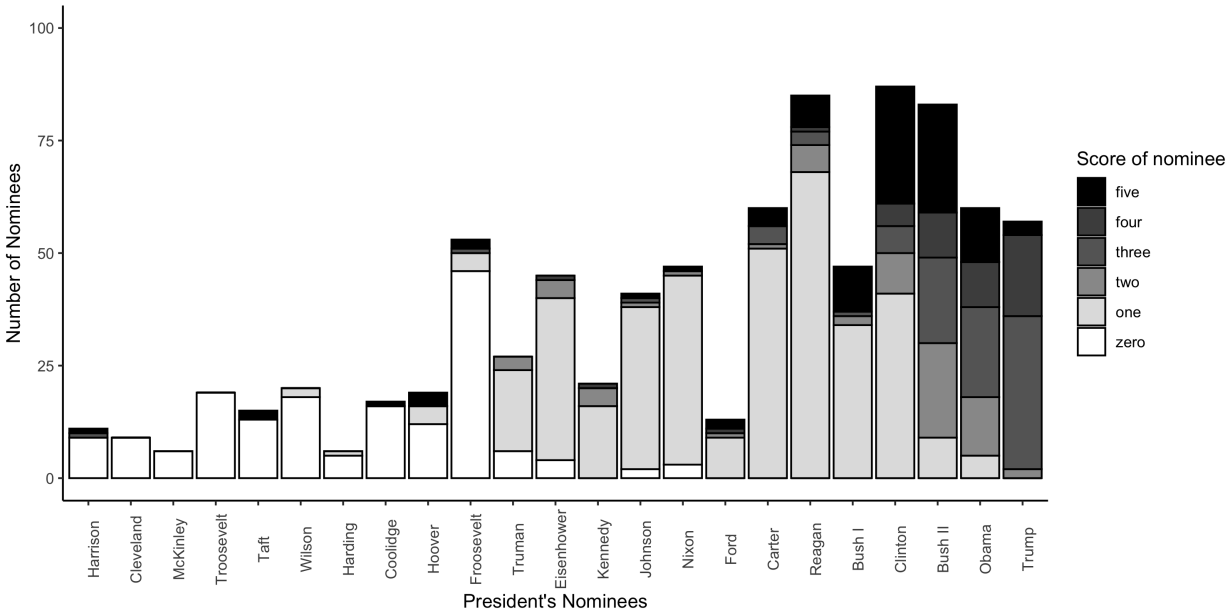

Figure 2.15: Barplot of divisiveness scores of each president's circuit court nominees. Scores calculated based on number of failed nominees, failed nominations, roll call votes, roll call votes with a nay, and hearings held. *Source: Calculated by author.*

scores in this early period—but this is largely driven by them having some failed nominees among a small pool of total nominees, and their overall scores are very low by modern standards. Truman through Nixon nominees all have similar average scores (around 1) that are somewhat higher than all the presidents that came before them (with the exception of Hoover). After them, the trajectory increases about half a point and the next three presidents—Ford, Carter, and Reagan—have similar nominee average scores, which are higher than all the presidents before them. Divisiveness then increases during Bush I about half a point, increases again during Clinton around another half a point, and increases yet another half a point during Bush II. There it plateaus, and Bush II, Obama, and Trump nominees, on average, all experience similar levels of divisiveness (scores of more than 3). The nominees of these three presidents experienced the highest levels of divisiveness in history, and at levels that dwarf earlier eras. In summary, divisiveness has greatly increased over time and it has been a fairly gradual increase. Figure 2.15 is a barplot showing the number of each president's nominees that receive a particular divisiveness score; most presidents have a mix of nominee score types.

2.3 Revisiting the Three Schools of Thought

These multiple metrics of divisiveness, either taken individually or as a whole, do not appear to convincingly align with any of the three existing models that explain how to best understand the nomination and confirmation process over time. The "nothing new" continuity hypothesis predicts consistency over time, but there has been dramatic change. Divisiveness has greatly increased by every metric, and, in turn, by a synthesis of metrics. Divisiveness has been far greater the last 25 years or so than at any previous point in time, and is astronomically higher compared to the early decades of the circuit courts. There just doesn't seem to be compelling evidence for the "nothing new" continuity hypothesis.

The "big bang" pivotal moment hypothesis predicts a sudden increase in divisiveness, but the metrics show the increase to have been gradual. While I do not discount—in fact, in the chapters to follow I occasionally embrace—the relevance of important moments, these metrics cast serious doubt on a straight-forward "before and after" explanation. 1954's *Brown* decision does not appear to affect the divisiveness metrics. 1987's Bork nomination and defeat does appear to precede an uptick in divisiveness, but the immediate increase was modest (divisiveness *gradually* increased over the course of several Congresses and presidential terms) and divisiveness already increased somewhat even before Bork.

The "generic polarization" evolutionary hypothesis predicts an increase in divisiveness as polarization increases. Looking only at the 1940s onward, as this scholarship does, makes for an excellent (overall) fit: divisiveness increases just as polarization does, so the immediate face value of this hypothesis seems high. However, this theory becomes less convincing the further back in time the analysis extends. In fact, the inclusion of the first 50 years of the circuit court history—from the 1890s to the 1930s—appears to outright contradict the face validity of this hypothesis. Going backward in time from the 1940s, divisiveness continues to decrease; however, as figure 2.16 shows, the polarization trend in the Senate reverses course and *increases*. In fact, Senate polarization for the first 40 years (1891-1930) of the circuit courts was about as high as the most recent 25 years (1995-2020), yet the divisiveness of the confirmation process went in the opposite directions. Polarization may well be a necessary condition for divisiveness, but it does not appear sufficient. In the chapters to follow, I examine the role judicial ideology played in making the process divisive.

Figure 2.16: Senate polarization: the difference between the DW-NOMINATE means of Democratic senators and Republican senators, by Congress. *Source: Lewis et al. 2021.*

Chapter 3: The Senators' Public Goals When Staffing Courts

3.1 An Overview of the Findings and Data

3.1.1 Understanding the significance of ideology to the confirmation process over time

The last chapter showed how far removed the relatively calm nomination and confirmation process of the past is from our polarized and divisive present. In this chapter I begin to empirically assess my hypothesis that the ideology of judicial nominees—and even the mere evaluation of their ideology—is a key driver of this change. To do so, I measure and understand the prevalence, substance, and consequences of ideological evaluation by systematically analyzing all the nominee hearings before the Senate Judiciary Committee, which has never been done before.

In this chapter I have four broad tasks and sets of findings. (1) As the first study and systematic analysis of these hearings ever, I lay out some of their basic features across time (e.g., their frequency and who attended). (2) I then examine what their purpose has been (i.e., exactly what the senators were evaluating over time). To do this, I read and code each hearing for content to determine what the substantive focus of the hearings was over time. I discuss at length the long period of time when the focus was just on nominee qualifications. I also specifically hone in on ideology in order to identify the prevalence of ideological evaluation over time, and determine that it varied significantly. I find two broad eras. (3) The first ran from 1891 through 1978, and ideological evaluation was rare. I examine these rare instances of ideological evaluation both qualitatively and

quantitatively to understand the circumstances in which it arose; I find that it occurred only under special circumstances, which I delineate. Moreover, I find that in this period (when divisiveness was also rare), ideological evaluation predicted a divisive process. (4) The second era ran from 1979 through the modern day, and ideological evaluation became routine (no longer occurring only under the set of special circumstances needed in the earlier era). In chapter 5, I quantitatively analyze the relationship between ideology and divisiveness in this latter era; but in this chapter, I analyze the transition to this new paradigm, with particular attention to how partisanship and particular ideological disputes drove the transition. I find that Republicans took the lead, and that Democrats caught up only later, and that a concern with comprehensive judicial philosophy, not any singular policy issue(s), was the principal concern. (5) Having identified when this change toward regular ideological evaluation took place, in the concluding section I revisit divisiveness over time and broadly compare these two eras on this score; I find them to differ significantly.

I take the fact patterns and findings in (2), (3), (4), and (5) as initial evidence that ideological evaluation varied greatly over time, that its latter day prevalence is one of the greatest changes to the process, and that it drove the sea change toward divisiveness. Once the evaluation of judicial ideology (in the form of party-polarized, overarching judicial philosophies that implied a standing commitment to a number of ideological positions) became routine, a framework existed for a consistently divisive process. At the very least, it has been a necessary condition for divisiveness.

3.1.2 The Senate hearings as a data source

The hearings before the Senate Judiciary Committee are a particularly effective data set for this analysis as they are the structured, public setting where the nominees are evaluated, and existed the entire time series to some degree and were basically routine the last 80 years. Though these hearings are the formal means for senators to examine judicial nominees, scholars have given them

very little attention. In fact, despite being the most open and interactive step in the confirmation process, the hearings for circuit court nominees from past eras are obscure and have never been fully collected and analyzed.

Previous scholarship has used some of these hearings, especially from the 1980s and later, as anecdotal evidence that the confirmation process has become particularly acrimonious for certain nominees (Scherer 2005). Additionally, Holmes (2007) finds, in an analysis from 1979 to the modern day, that third party testimony at a hearing decreases the chance of confirmation. However, the origin, purpose, and evolution of these hearings have gone unexplored.

Although 1979 is the year circuit court hearing transcripts started being published and made readily available for public use as a matter of course, these hearings were held as far back as 1892. The 87 years of hearings prior to 1979 are something of an academic mystery. Although they are more difficult to obtain, thankfully the hearings from 1892 through 1978 were transcribed and a transcript can be obtained from archival resources. In addition to adding 87 years of data, in this section I will code them in a systematic manner for substance which has not been done for the circuit court hearings. Collins and Ringhand (2013), for example, demonstrate the value of examining hearings for judicial nominees. They write a full book about hearings for the Supreme Court, examining the history, process, and content, and conclude that the hearings "provide a democratic forum for the discussion and ratification of constitutional change" (2).

Circuit court hearings don't have the same gravity as those for the Supreme Court, but they are appealing to study because, occurring frequently, they provide a regular opportunity for senators to exercise oversight on the appellate sector of the American judiciary and to hone an agenda in relation to it. The transcripts are a rich data source, documenting a 130 year record of senatorial oversight and interaction with the nominees, third party witnesses, and each other as they staff the federal benches throughout the country. They shed light on the process and substance of advice

and consent, and in turn the larger question of how senators were assessing these nominees and what drove them to such extreme polarization.

I utilized the *CIS Congressional Committee Hearings Index* and the *CIS Index to Unpublished US Senate Committee Hearings* in order to identify all nominations that had hearings. I then obtained the transcripts of all these hearings from archival sources (mostly through Proquest). In order to verify that the *CIS* indices are exhaustive, I spent several weeks at the National Archives and Records Administration (NARA) in Washington, D.C. searching the Senate's official individual files on these nominees and also consulted NARA staff; I also searched Proquest extensively. While I found a variety of documentation related to nominees not listed in the *CIS* hearing indices, I did not find any hearing transcripts for them nor any evidence that they had actual hearings, with only one exception.[5] Below I analyze this entire universe of circuit court hearings.

3.2 Basic Features of the Hearings: When They Took Place and Who Was Involved

3.2.1 Frequency and nominee attendance

As the first wholesale examination of these hearings, I first answer preliminary nuts and bolts questions about the hearings, such as when they began, how often they occurred, and who took part in them. Of the 791 individuals nominated to the circuit courts of appeals from their creation in 1891 through 2016, 554 received a hearing before the Senate Judiciary Committee. Figure 3.1 plots the frequency of the hearings over time by the count of nominees who received them and figure 3.2 plots the frequency by proportion of nominees receiving them. As the figures show, the

[5] Although I cannot be certain that I have a transcript for every hearing in the early 20th century, my data collection efforts were diligent and very extensive and relied on the official records of the Senate. I ultimately identified circuit court hearings at a rate similar to the hearings that existed for Supreme Court nominees (this number for the Supreme Court is a known and well documented historical data point).

amount of hearings, measured either by sheer number or proportion, has varied substantially over time.

Hearings began right after the creation of the circuit courts. The first was in 1892 for the controversial nomination of William Woods, one of the nominees in the initial wave of circuit court nominees sent to the Senate by Benjamin Harrison. But in the ensuing years, hearings were rare events reserved for problematic nominees. There was an uptick in hearings in the 1930s, when six were held. As the figures show, they gradually increased from then and became basically routine by the end of the 1950s. In these early years of routine hearings, they were often sleepy affairs where the nominee didn't even necessarily speak, in stark contrast with today's hearings where the nominee must appear and usually contend with pointed questioning related to philosophy and policy.

Figures 3.1 and 3.2 also show the attendance of the nominees themselves. For several years this varied and many nominees did not appear at their own hearings, but by 1960 the nominee was expected to appear. The only exception since then was Bryan Simpson, who was excused from appearing in 1966 because he was recovering from surgery, but this was the last hearing where the nominee's absence was tolerated.

Hearings were most common in the late 1950s through early 1980s, when the overwhelming majority of nominees received one. This contrasts with the early decades prior to the 1930s when hearings were rare, as well as recent decades since the late 1980s when the rate has fluctuated greatly by Congress, hovering as low as 50% at times. In the early period, the absence of a hearing meant likely confirmation. In recent decades, a hearing is a prerequisite for confirmation; denial of a hearing is a senatorial tool to put off a nomination and ultimately prevent confirmation.

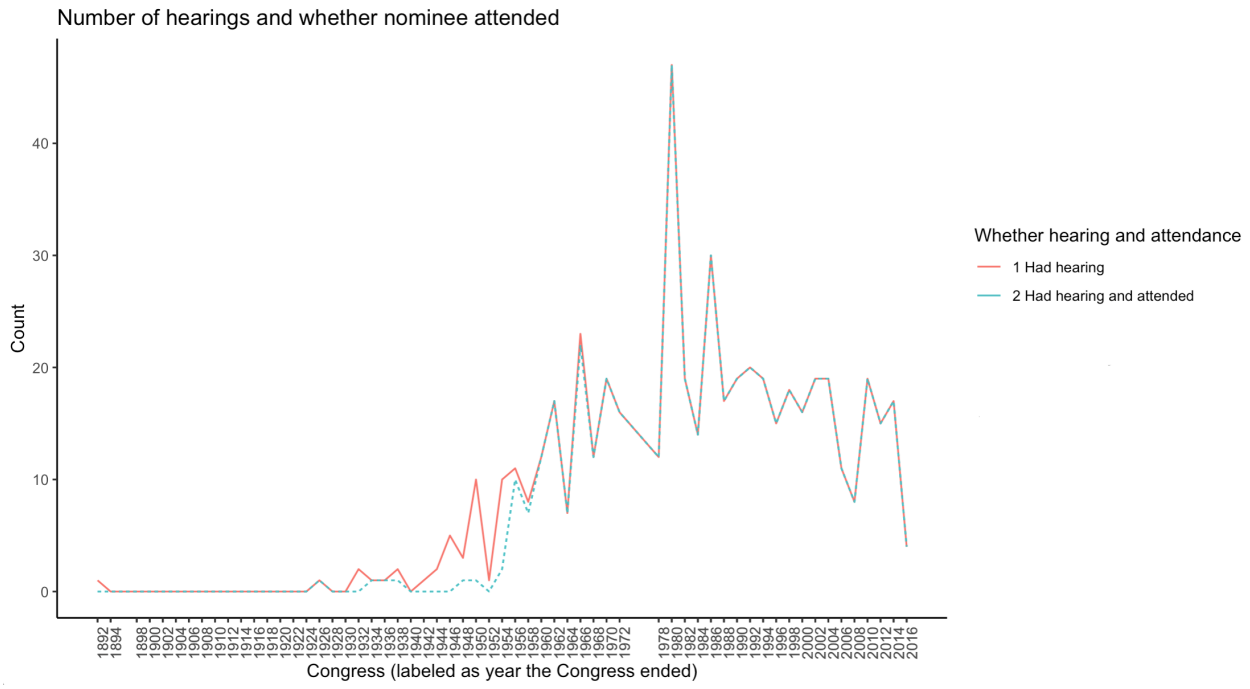

Figure 3.1: Number of nominees that had hearing and whether nominee attended, by Congress. *Source: Calculated by author by reading transcripts.*

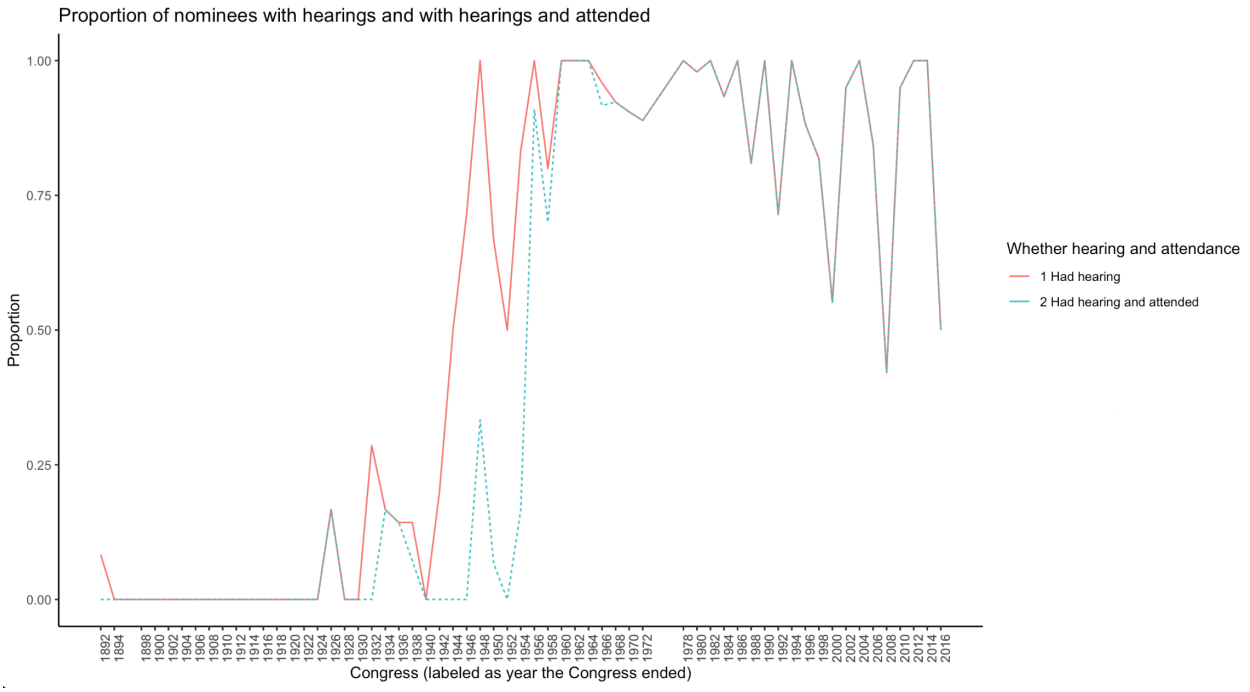

Figure 3.2: Proportion of nominees that had hearing and whether nominee attended, by Congress. *Source: Calculated by author by reading transcripts.*

3.2.2 Additional attendees: senators and outside witnesses

In addition to the nominees themselves, other participants in the hearings included senators on the Judiciary Committee, and, sometimes, outside witnesses. The chairman of the committee, or in his or her absence another member of the committee, always ran the hearings. Whoever was chairing the meeting often asked questions of the nominees and of outside witnesses, as did other senators on the committee. On rare occasions the committee's full membership of senators was on hand, but usually it was a subset and occasionally only a single senator (often the chairman) was present. Figure 3.3 plots the average number of these senators present at circuit court hearings by Congress.[6] As the figure shows, broadly speaking the number of senators participating in hearings over time has remained fairly stable, and over time an average of between three and four senators appeared. Early in the time series, when there were few hearings and a single one had a greater effect on the average, sees some of the highest and lowest averages. The number dips in the late 60s into the 80s, but has risen in more recent decades. Throughout history, homestate senators would often introduce nominees. Those senators simply providing introductions—and not on the committee and not asking questions—are not included in this count.

Live witnesses speaking for or against the nominee at the hearing have also regularly appeared over time. All the earliest hearings had outside witnesses. This continued to be a common occurrence over the decades, and witnesses included leaders of bar organizations, other prominent attorneys, representatives of ideological interest groups, and even sitting judges and elected politicians (outside of the Senate). Important third party witness testimony will be elaborated upon in later sections of this chapter, but figure 3.4 gives a broad sense of this phenomenon by showing

[6] I calculate this number with reference to the clerk's listing of senators present at the beginning of the hearing transcripts, augmented by any additional senator who asked a question during the hearing but for whatever reason was not listed in the attendance at the beginning. The attendance record protocol over the decades can be difficult to ascertain but appears to be fairly rigorous; in light of this, figure 3.3 presents estimates.

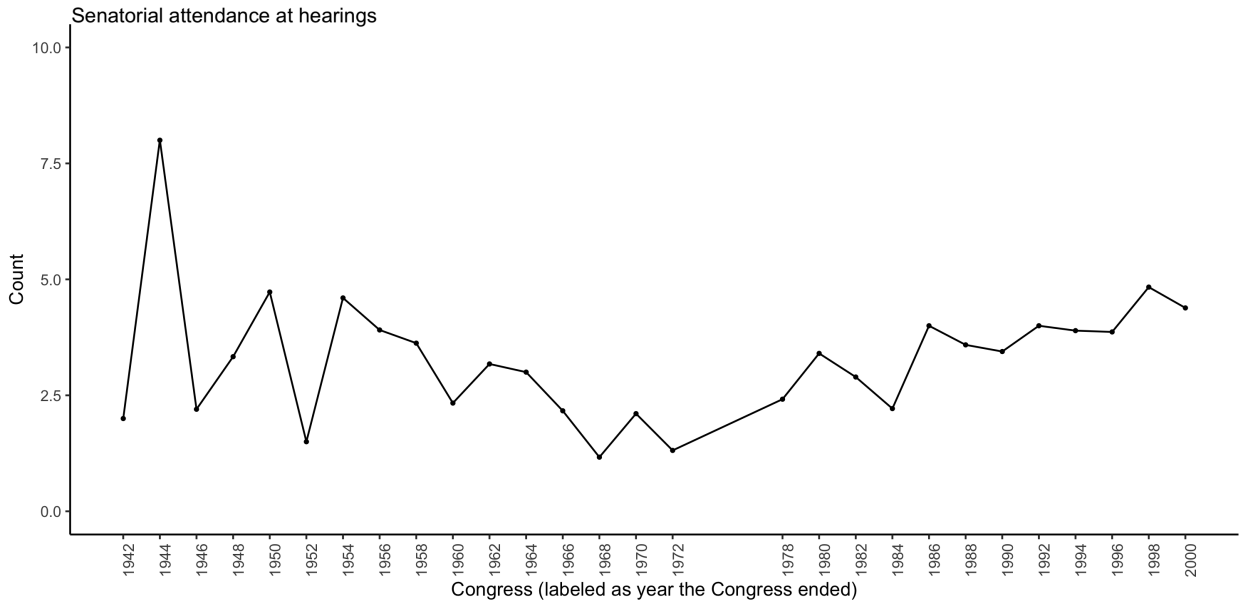

Figure 3.3: The average number of senators of the Judiciary Committee appearing at circuit court hearings, by Congress. *Source: Calculated by author by reading transcripts.*

the proportion of nominee hearings over time with a third party witness. They were very common in the past, but third party witnesses have been extremely rare in more recent years—and when they do appear they tend to be members of the House of Representatives. Third parties still provide substantial input, but in documentary, not live, form. The committee record in recent decades is a voracious storehouse of supportive and oppositional documentation, mainly from ideological interest groups.

3.2.3 The length of hearings

The length of these hearings can vary tremendously. Some have lasted several days, and others no more than a few minutes. Variation in hearing length existed during all eras, but mid-century in particular saw stark disparities as the Judiciary Committee held both especially short and especially long hearings. Several hearings in the 1940s and 1950s lasted only a few minutes, consisting of

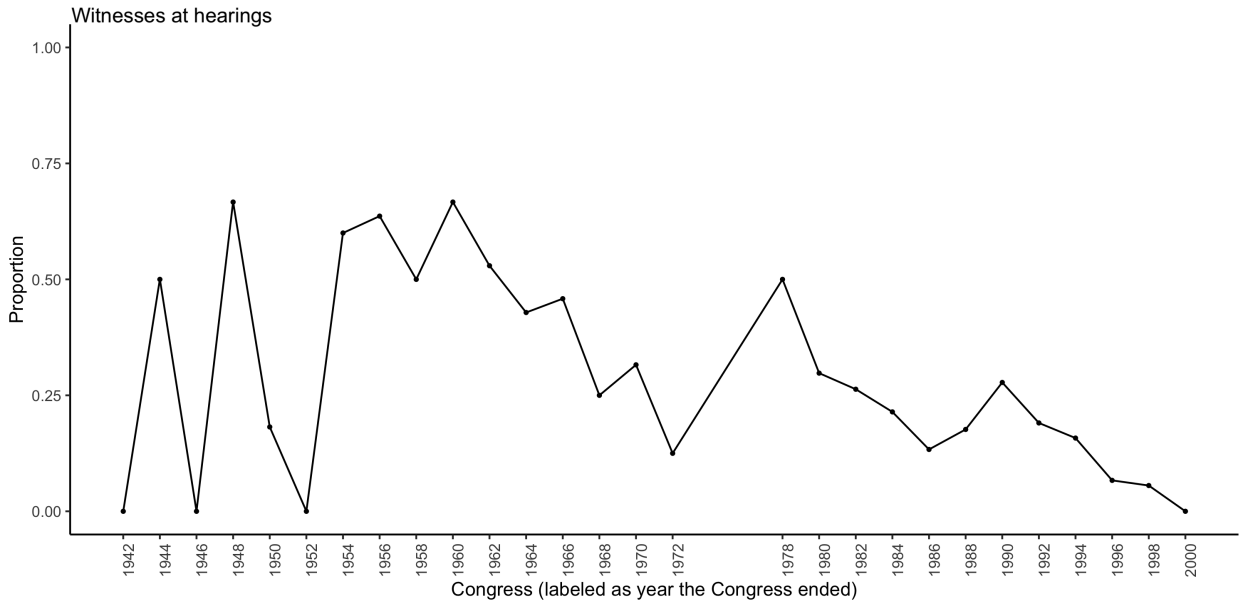

Figure 3.4: The proportion of circuit court hearings where the testimony of a live third party witness was heard, by Congress. *Source: Calculated by author by reading transcripts.*

mostly just a few short statements of approval from senators and perhaps one or two very brief questions to the nominee. A handful of extreme outliers in this period ostensibly lasted under a minute (e.g., Prettyman 1945 and Duffy 1949). On the other hand, senators around this time were also willing to hold hearings for circuit court nominees that lasted days on end. For example, the hearings for Simon Sobeloff (1956) and Thurgood Marshall (1962), both questioned extensively about their civil rights records among other matters, spanned seven and six days, respectively. In the 1930s, the hearings for James Wilkerson and Frank Norcross both took place over the course of more than ten days. Over time the Senate moved away from circuit court hearings of such fluctuating lengths, and in recent decades there are neither these very short nor very long hearings.

Figure 3.5 plots the average length for all hearings by Congress, which I estimated with the hearing transcript page count.[7] Only hearings actually held are represented on the plot, so a metric

[7]This represents only an approximation of length. The page count can vary for reasons unrelated to the actual

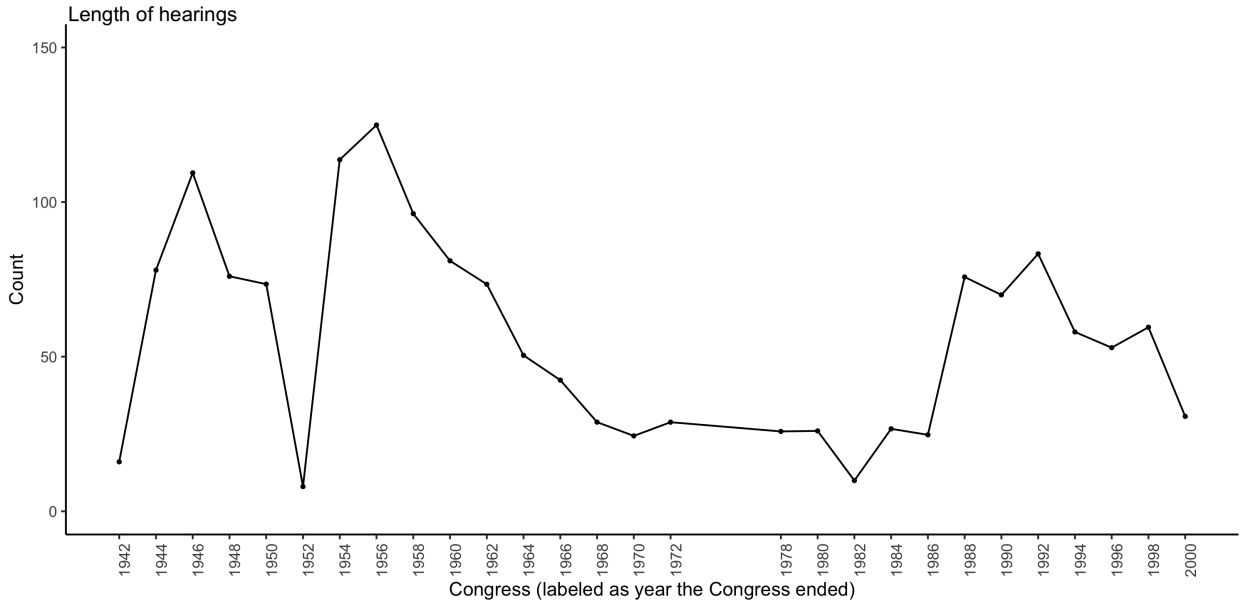

Figure 3.5: Average page count of circuit court hearing transcripts, by Congress. *Source: Calculated by author.*

of zero is not added for a nominee who didn't receive a hearing; they simply aren't represented on the plot. The plot shows that average length has varied across Congresses, and there are some broad trends to note. At points in the 1940s and 50s, average length was the highest. This is in part due to the Judiciary Committee tolerating long testimony from outside witnesses, including from those with only a tenuous connection to the merits of the nominee, and also surely a result of many confirmed nominees not receiving a hearing, which probably would have been short and uneventful and therefore driven the average length down. Hearings were historically short from

length, such as transcript formatting and how much supplementary material is interspersed. Two different transcript font sizes and spacing conventions are used throughout history; one style, on average, contains around half as many words per page so I scale these hearings to twice as many pages when calculating page count for a more accurate measure. Another complication is that sometimes nominees have their hearings held together—often circuit court judges mixed with district court judges (who aren't evaluated in this dissertation), with senators jumping from nominee to nominee in their questions or asking all nominees the same question at once with blended responses. When this occurs, I divide the transcript's pages by the total number of nominees handled at that hearing in order to calculate the relevant nominee's hearing length. Given this, the measurement plotted on figure 3.5 is somewhat imprecise, but the purpose is to give a broad sense of length over time, and this particular metric is not used in analysis going forward.

the late 60s through the late 80s as every confirmed nominee received a hearing. In recent decades, hearings have generally been twice as long compared to this immediately preceding norm. The actual substance of these hearings varied widely and is far more important, and that will be the focus of the remainder of this chapter.

3.3 The Content of the Hearings

3.3.1 Coding process: assigning each hearing to one of five categories

My main purpose is to understand what the senators focused in on and were actually assessing when it comes to circuit court nominees. In order to ascertain this, I look to the substantive *content* of the hearings. Therefore, far more than the basic features discussed in the previous section, this substantive content is the focus of the remainder of this chapter. By substantive content, I mean what is actually talked about at the hearings—in particular, what exactly the senators are asking the nominees themselves as well as other witnesses testifying about the nominees.

To learn this, I systematically code each hearing based on its content by reading each transcript and noting the topic and content of the senators' questions to both the nominees themselves as well as all third party witnesses (I also read the responses to the senators' questions, in order to fully understand what was being probed). This process entailed reading 533 hearing transcripts across 791 nominees from 1891 through 2016.[8] The substance of this questioning differs profoundly across nominees.

I coded every hearing as belonging to one of five categories, which I devised as a compre-

[8]Out of 791 nominees from 1891 through 2016, 554 had hearings; however, 21 of these transcripts (all from the 1973 to 1976 time period) are unavailable given the rules of government record keeping for this type of document from that era. Those 21 hearings will eventually be made public; they are under seal because of the time period in which they fall, not because of the sensitivity of those individual hearings. Accounting for this missing data, the following analyses entail 533 hearings.

hensive representation of the five types of hearing experiences that actually took place. These categories, described in turn in numbered paragraphs below, represent a ratcheting up. The first category is when there was no hearing. The second category is when there was a hearing with questions about the nominee's background or qualifications *at most*. I also want to capture the variation among hearings that get beyond these very basic questions. The third category is when, beyond any questions about background and qualifications, the minor claims of a "disgruntled individual" are also addressed. The fourth category is when, beyond any questions about background and qualifications or the claims of a disgruntled individual, a legitimate "scandal" involving the nominee was inquired about. The fifth category is when, beyond any questions about background and qualifications or the claims of a disgruntled individual or concerns stemming from a scandal, there are inquiries into the nominee's ideology or policy positions. Given this hierarchical construction, for example a hearing where ideology was asked about would simply be coded in category five without further detail, even though there would inevitably be the typical questions about qualifications and perhaps questions about claims stemming from a disgruntled individual or scandal.

My primary objective through coding is to know the role ideology has played in the confirmation process. Therefore, far and away, my focus is on whether or not a hearing contained any discussion of ideology, and this is the most important distinction I draw through the coding process. However, I do want to understand what non-ideological hearing processes looked like, especially since this is heretofore unknown and this is the first study of these hearings. So I do distinguish among the possible non-ideological processes—no hearing, qualifications and background questions only, claims of a disgruntled individual (with the typical questions about qualifications), and the legitimacy of a scandal (with questions about qualifications and possibly the claims of a disgruntled individual). While distracting in some ways, fine-grained categories allow for a richer tracking over time and I am able to distinguish how each nominee in circuit court history was

evaluated by coding each to one (and only one) of five categories.

1. *No hearing* (237 or 31%). Several nominees have had no hearing. This group includes some nominees who were ultimately confirmed, as well as many who never were.

2. *Background, Qualifications, and Basic Judicial Functions, Only* (162 or 21%). A large number of hearings have no substantial inquiry, and any questions are about the nominee's background and experience or basic judicial functions such as how to manage a docket. For some of these hearings, the nominee does not even appear; the chairman may adjourn the hearing in minutes, simply noting the nominee engenders no objection and enjoys the support of homestate senators and the bar. When the nominee does appear, the level of questioning ranges from no to many questions across a few senators. Witnesses representing the state bar often appear and give laudatory comments in support of the nominee. There are no questions on judicial philosophy or policy, and no allegations of impropriety are raised; hearings with those features are coded to one of the three following categories. The categories that follow almost always include questions about the nominee's background and experience, but also contain an added element.

3. *Disgruntled individual* (11 or 1%). A handful of hearings are marked by the objections of a "disgruntled individual" appearing as a witness and alleging some sort of misdeed that no one else appears to take with any seriousness. The witnesses usually have some sort of direct involvement with the nominees as a litigant or client, and complains of the handling of trusts, bankruptcies, business receiverships, or murder convictions, for example. They often allege fraud and conspiracy on a grand scale. The keynotes of this category's hearings are that the complaint comes from just one or two people, relates to a personal matter, and is dismissed by senators without much concern. Although these hearings sound similar in some ways to the scandals that define the next category, in practice they are almost always easy to distinguish.

4. *Scandal* (14 or 2%). Hearings in this category are marked by a full-blown "scandal," with

a problem that attracts the serious attention and concern of senators or some other element of what could be described as the establishment. The scandals as such range from grave matters that suggest criminal behavior, like large-scale vote fraud or financial impropriety, to the more mundane like whether the seat should be filled by the resident of another state. I categorized any close calls as belonging to this category as opposed to the previous, which is meant only for allegations that appear to be viewed as frivolous.

5. *Ideological evaluation* (346 or 45%). The final category, and the one of greatest interest, is comprised of all hearings where the nominee, or a third party witness appearing in support or opposition, are asked questions about policy matters or ideologically-charged philosophy. These range from questions about particular policy domains such as labor law, civil rights, abortion, and guns to broad theories of decision-making like textualism and the weight of personal views and precedent. These types of hearing range from containing only a single ideological question answered with a one sentence answer, to several days of aggressive ideological questions from multiple senators requiring extensive response.

3.3.2 An overview of the content of hearings over time

Figures 3.6 and 3.7 plot the count and proportion, respectively, of hearings (or nominees) belonging to each of these five categories. As the figures show, there are some stark differences over time in how advice and consent is executed at the hearing stage. Taking each category in turn, no hearings were common from the 1890s and into the 1950s as nominees were often confirmed without a hearing. No hearing has become a fairly common option again since the 1990s as the Senate regularly denies nominees a hearing and confirmation. Background and qualifications only hearings were common in the 1940s through 70s, relative to that extremely rare in the 80s and 90s, and nonexistent in the 21st century. Disgruntled individual hearings were always a minor

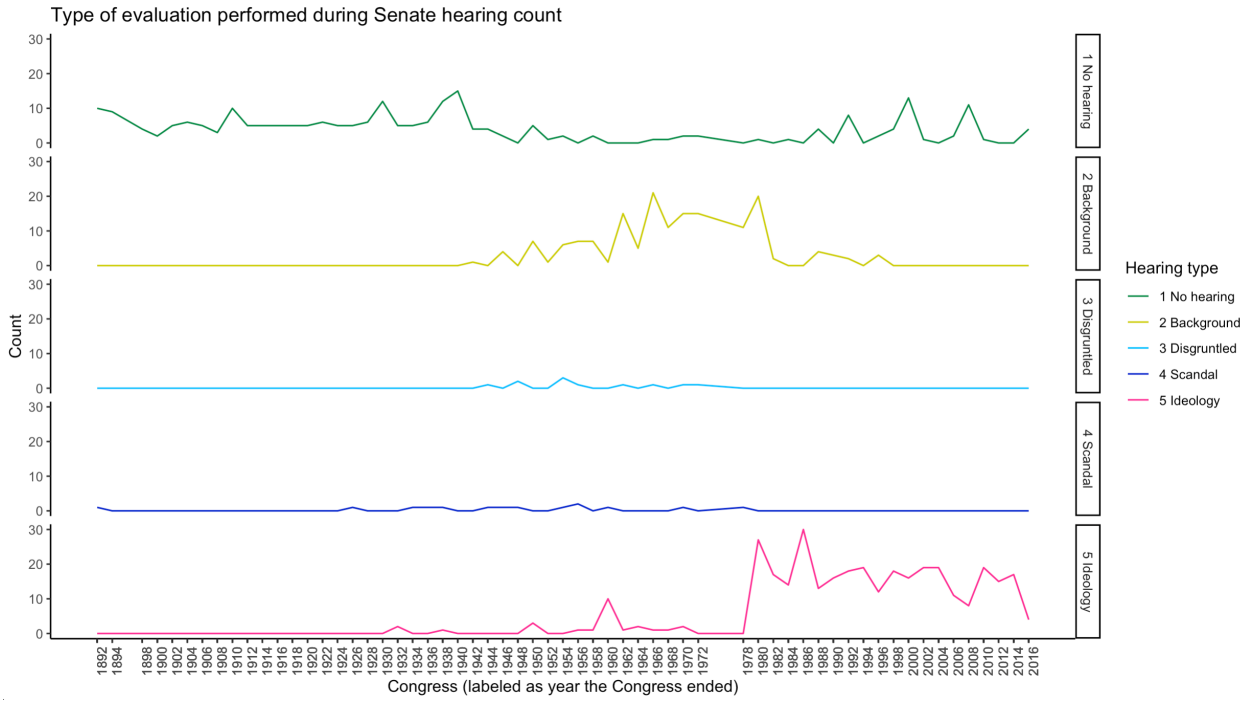

Figure 3.6: The count of nominees with one of five different hearing processes, by Congress from 1892 through 2016: no hearing, background only, disgruntled individual, scandal, and ideological. *Source: Calculated by author by reading and coding transcripts.*

phenomenon, but saw something of a heyday in the 1940s and 50s with a handful of hearings of that type; they occurred on rare occasions after that, but went completely extinct in the early 70s. The first hearing in 1892 addressed a scandal related to the nominee, and from the 1920s through 70s they were a consistent, though relatively rare, type of hearing. Ideological hearings came to prominence in the late 1970s and have dominated since the 80s; however, they were a persistent feature (at a much lower level) starting in the 1930s.

Removing some of this detail of figure 3.7, figure 3.8 is meant to illustrate fundamental trends across time in a clean fashion and hone in on the prevalence of ideological evaluation. The figure distinguishes those hearings that were ideological from those that simply were not, removing the more granular information in relation to non-ideological hearings (e.g., whether or not a non-

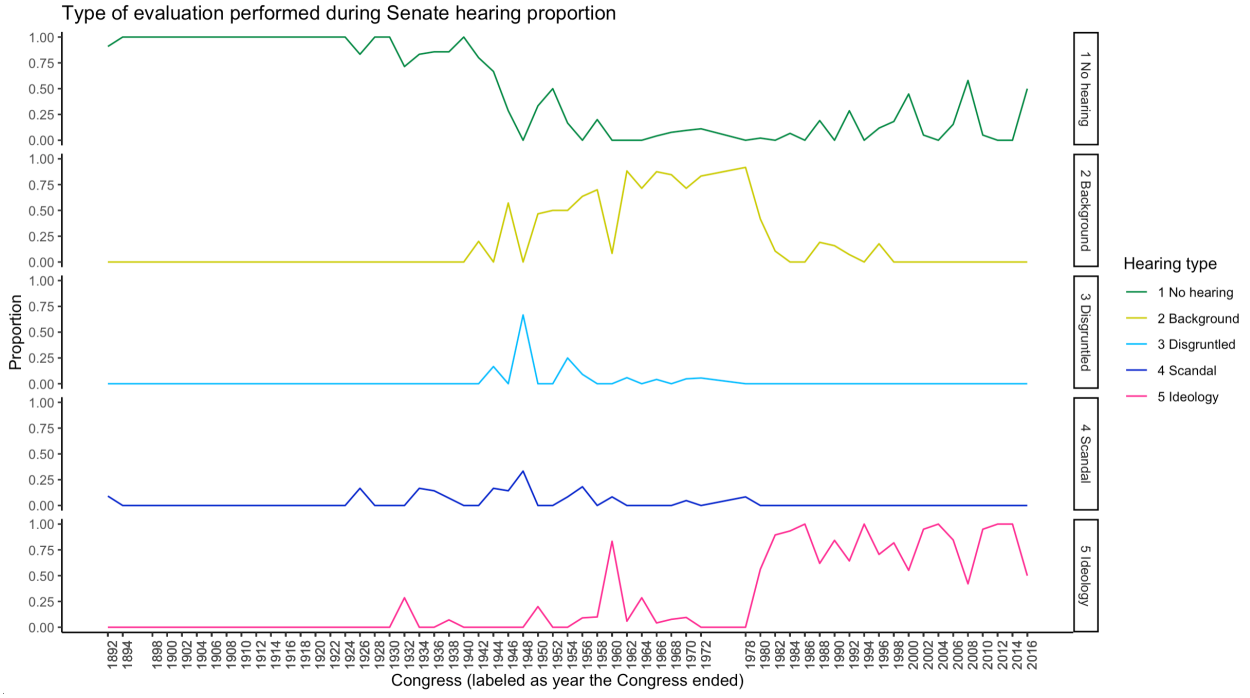

Figure 3.7: The proportion of nominees with one of five different hearing processes, by Congress from 1892 through 2016: no hearing, background only, disgruntled individual, scandal, and ideological. Each nominee belongs to only one category. *Source: Calculated by author by reading and coding transcripts.*

ideological hearing assessed a scandal). The higher line plots the total proportion of nominees with *any* hearing and the lower line the total proportion with an *ideological* hearing; the difference between these lines, therefore, represents the proportion of nominees with a hearing that was non-ideological. The difference between the higher line and the top of the y-axis represents the proportion of nominees without a hearing. As the lower line on figure 3.8 shows, the prevalence of ideological evaluation has changed over time—at first absent, then occasional, and finally universal.

Three general paradigms of nominee evaluation norms rather clearly emerge when examining figure 3.8. The first, which ran from the 1890s into the 1930s, saw hearings only rarely; any hearings tended to focus on a potential scandal, and did not involve ideological assessment. The second, which ran from the 30s until the late 70s, saw regular hearings that were usually devoid of any ideological evaluation—however, a small, important minority of hearings did involve ideological assessment during this period. The third came about in the late 70s and 80s as ideological assessment became a universal and dominant feature of the evaluation process.

In the remainder of this section, I briefly analyze the period of limited hearings. Then, also in this section, I more thoroughly analyze the subsequent period's typical approach to evaluating circuit court nominees, which I term "quality control." In the next section, I comprehensively examine the instances of ideological evaluation—and what caused them and the consequences of them—during this pre-1979 period when this type of hearing was atypical. Then, in the subsequent section of this chapter, I explore the period which began in 1979 after ideological evaluation quickly skyrocketed and then became the norm.

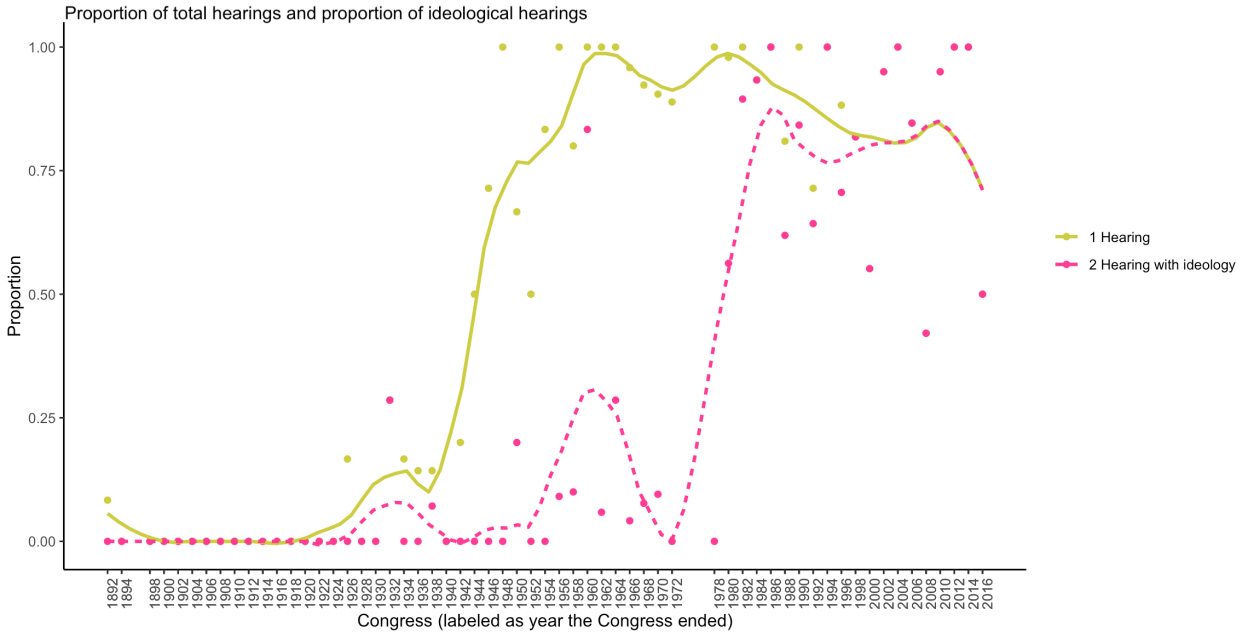

Figure 3.8: The proportion of nominees that had a hearing of any type (lighter yellow line) and the proportion of nominees that had a hearing with an ideological component (darker pink line), by Congress from 1892 through 2016. *Source: Calculated by author by reading and coding transcripts.*

3.3.3 No hearings, punctuated by scandal

From 1891 through the 1930s, a hearing was a warning that the nominee was the subject of some sort of scandal or squabble that the Senate took seriously. The first hearing occurred in 1892, right after the circuit courts of appeal were created, for the nomination of William Woods because of his alleged role in an election counting scandal in Indiana. He was later confirmed by a narrow one vote margin roll call in the Senate. A 1926 nomination by Calvin Coolidge led to the hearing room becoming active again due to another allegation of voting malfeasance. Nominee Wallace McCamant, six years earlier as a delegate at the 1920 Republican convention, while supporting Coolidge, also expressed his refusal to support Senator Hiram Johnson of California. This stated opposition came to haunt the nominee as at the hearing he was subjected to extensive and technocratic allegations that he violated convention rules. The hearing included dramatic one on one exchanges between the nominee and Johnson, who was still a sitting senator. Despite being a lengthy hearing centered on an intraparty feud there were no questions posed to the nominee about his policy preferences or judicial philosophy.

Other examples of hearings during this time deal with the improper handling of a bankruptcy (Norcross 1934), and showing favoritism in the liquidation of a bank and abusing judicial contempt power as a state judge (Holmes 1936). Three nominees during this period (MacKintosh 1932, Wilkerson 1932, and Edgerton 1937) were subject to ideological evaluation, but they are discussed in a subsequent section. In summary, hearings during this pre-modern period were rare, and held when the nominee engendered controversy.

3.3.4 Quality control

Throughout the 40s and into the 50s, hearings for circuit court nominees became more and more commonplace, and by the end of the 1950s hearings were virtually universal. These years marked

the beginning of a new paradigm in confirmation politics: the hearing as a routine tool, used mostly (though not exclusively) to ensure the nominees were qualified and enjoyed establishment support. This approach prevailed with remarkable resilience for several decades, dominating from the beginning of the 40s until the end of the 70s.

While this represented a turning point in protocol, it did not necessarily mark a major break in terms of the aggressiveness with which the nominees were evaluated. The focus was squarely on whether the nominee was *qualified*, a standard that essentially every nominee met. The senators sought to ensure these qualifications, but the evaluation process was by no means exacting and the overwhelming number of hearings were brief and easy going. The 1941 hearing for Sherman Minton to the Seventh Circuit merely amounted to senators Alexander Wiley and Carl Hatch going back and forth for several minutes about Minton's impressive qualifications and their relationship with him, as Minton himself was a former senator. A few years later, four circuit nominees all received hearings that were less substantive. Their hearings were all on the same day and, all combined, lasted only minutes. The nominees themselves did not appear, and only two senators were present. One by one, Senator McCarran stated the nominee's name and the position he would assume, and then asked the committee room, "Is there any objection? The Chair hears none" (U.S. Senate Committee on the Judiciary, Nominations Hearing, September 19, 1945, 30). Three were confirmed by voice vote less than a week later; the fourth, also confirmed by voice vote, had to wait only three weeks.

These routinized hearings gained a *bit* more substance as the Truman years proceeded. Almost like clockwork, the chair of the committee would note that the homestate senators, state bar, and American Bar Association all approve of the nominee, though that was the end of the hearing after only a few minutes and no appearance by the nominee (Pickett 1949, Bazelon 1950, Swaim 1950, Staley 1950, Hartigan 1950, Rives 1951, Medina 1951). The only additional substance is

the occasional brief praise from a senator; for example, "[He] is one of the outstanding citizens of the State... I am sure that there would be no objection" (U.S. Senate Committee on the Judiciary, Pickett Hearing, October 5, 1949) and "I think it is one of the finest judicial appointments that has been made in many years" (U.S. Senate Committee on the Judiciary, Medina Hearing, June 19, 1951, 2-3).

This quality control approach continued to be the dominant style of hearing as the 1950s marched on and the Eisenhower years commenced. Nominees appeared, but still sometimes didn't utter a word (Fee 1954, Lemmon 1954) or weren't asked any questions but simply invited to give a statement. These were sometimes only a few thankful sentences (1955 Waterman, Barnes 1956). Others simply confirmed that the curriculum vitae in the committee's records was correct (1958 Matthes). Senatorial praise got lengthier; homestate senators usually appeared and offered a few paragraphs commending the nominee's qualifications, dwelling on experience and noting support from the community.

When the nominees were questioned, it was straight-forward and focused on ability and work ethic: judicial experience, time as a lawyer, military service, and even how much vacation time they typically take (Parkinson 1957). Inquiries regarding past jobs did include partisan positions (e.g., chairman of the state party), but there was no discussion of policy positioning; and questions about legal experience sometimes address what categories of law the nominees dealt with (e.g., criminal), but there is no discussion of their ideological values in relation to the categories. Forays into the mechanics of the judicial process are about matters such as effective management of congested dockets (O'Sullivan 1960). Third party witnesses that appear before the committee to push for the nominee's confirmation became common, and included sitting judges and other prominent members of the bar.

This style of quality-based assessment became *even more* prevalent in the 1961 to 1978 pe-

riod, when over 85% of the hearings fell into this category. As the 1960s progressed, even as politics became more divisive and the Warren Court increasingly liberal, the overwhelming majority of circuit court hearings stayed as friendly as ever. Like a well oiled-machine, they were almost always kicked off with the chairman noting the nominee enjoyed the support of the (1) homestate senators, (2) state bar, and (3) ABA. The 1965 hearing of Fifth Circuit nominee Homer Thornberry, later nominated to the Supreme Court, started this way. The only question posed to him by the senators was what year he started as a district judge. Thornberry then thanked the committee, said he would do his best, and jokingly invited Senator Dirksen to Texas. Senator Eastland then concluded the hearing: "You are getting off mighty light... The hearing is adjourned" (U.S. Senate Committee on the Judiciary, Thornberry Hearing, June 29, 1965, 9).

"Mighty light" wasn't special treatment—it was standard practice. Little continued to be demanded of the nominees themselves at their hearings. Looking at those 85% of the hearings from 1961 through 1978 that only probed background and qualifications, more than 40% had no questions from senators, aside from asking the nominee to verify that the written resume was correct. The remaining 60% were more substantial in that the nominee was asked at least one substantive question, but these were modest questions about their legal experience. For instance, nominees who were currently serving as district judges could usually count on some inquiry about that experience, but the senators give the impression they are pleased to see the experience and are merely highlighting the keynote of the nominee's resume. The (full) line of questioning posed to Edward Tamm in 1965 illustrates this, as well as the overall brevity of the typical question and answer portion (when question and answer portions even existed):

> The Chairman. Is that biography correct, Judge Tamm?
> Judge Tamm. It is accurate and delightfully brief, Senator.
> The Chairman. How long have you been United States District Judge?
> Judge Tamm. Seventeen years.
> The Chairman. Thank you.

> Judge Tamm. Thank you.
> Senator Mansfield. Thank you.
> Senator Metcalf. Thank you (U.S. Senate Committee on the Judiciary, Tamm Hearing, March 11, 1965, 5).

Other times the senators did dig a little deeper with the nominees who were sitting district judges, taking the opportunity to gather information about the judicial apparatus (e.g., the busyness of dockets), while noting they were not questioning the efficiency of the nominee. The party affiliation of the nominee was rarely mentioned, but, when it was, it continued to be a matter of friendly banter devoid of any policy discussion (Freedman 1964). Occasionally the committee probed more extensively into a nominee's qualifications. When Edward McEntee, nominated to the First Circuit, was rated unqualified by the ABA, his hearing had witnesses to discuss his objective qualifications. In the end, the nominee was confirmed after homestate senator John Pastore delivered a lengthy and vigorous defense, and the senator declared to the committee: "My name, my reputation is on the line on this nomination... If this man is repudiated, I shall be" (U.S. Senate Committee on the Judiciary, McEntee Hearing, August 26, 1965, 56). But this was a rare moment of drama in assessing the qualifications of the nominees of the 1960s. Minor change came in 1970, when the senators began routinely asking whether the nominee was an officer or director of a profit making company. This generic conflict of interest statement was inspired by controversies related to contemporaneous Supreme Court nominees, and did not alter the tone or intensity of the hearings. In fact, this formulaic conflicts of interest question is often the only query to the nominees. Although nearly 40 years passes from the 1940s to the late 1970s, the usual tenor and substance for the vast majority of circuit court hearings are remarkably constant.

To be clear, these "objective qualifications only" hearings dominated, but they weren't the only type. While, from 1940 through 1978, 75% of hearings fell into this category of only addressing background, qualifications, or the most basic judicial functions, exceptions to this model did occur

intermittently. Other hearings saw senatorial concerns raised in relation to some sort of scandal, or at least the objections of a "disgruntled individual." Those two types of hearings are discussed in the two subsections immediately below. The third type—ideological or policy-evaluation hearings—receives a much fuller treatment in the next section.

3.3.4.1 Reviewing scandals

A second type of hearing during this 1940 to 1978 period remained focused on objective qualifications, but entailed the added element of senators questioning the nominee regarding some (often mini-) scandal. In this period, only eight hearings out of nearly 200 fall into this category. So—while substantively unique and an illustration of a different evaluative lens the Senate at times applied—they are ultimately more a (somewhat) interesting set of anecdotes than anything, and they are not a focus of mine (whereas the preceding paragraphs about the brief hearings that so dominated this era is a focus).

The scandals in question at this handful of hearings are devoid of any ideological underpinnings and can be explained rather fully in brief terms: if as a sitting judge the nominee inappropriately ran in a political primary to curry favor for a circuit court nomination (Allred 1943), whether the former judge has the right to reclaim his seat because he departed to fight in the war (Kalodner 1946), should the nominee be a resident of a different and more deserving state (Allred 1943, Collett 1947), the proper means of seizing financial assets (Danaher 1954), whether a cargo receipt was fraudulently altered (Brown 1955), the firing of former employees (Burger 1955), a former law partner alleging insufficient professional ethics (Castle 1958), the relationship with an infamous lobbyist (Ross 1970), and the nominee's minor children donating to a political campaign (Merritt 1977). While all these matters were flagged by some segment of the legal or political establishment and appeared to have captured the genuine interest of the senators, the senatorial inquiry was

generally forgiving and all of these nominees except one were eventually confirmed by voice vote. Beyond the substantive difference of a scandal being analyzed, the main differences were that these hearings tended to last much longer and the nominee often faced extensive and detailed questioning.

3.3.4.2 Listening to disgruntled individuals

A third, separate but related, type of hearing does not rise to the definition of even a mini-scandal, yet still has an added element beyond basic questions about qualifications. Hearings of this type center around a lone wolf individual outside of the legal and political establishment who has an idiosyncratic grievance with the nominee, and appears before the committee as a witness. Similarly, this type of hearing is relatively very rare (11 total) and is not a focus of mine; they are presented as a matter of due diligence and to comprehensively understand how the Senate approached their advice and consent role during this era. These "disgruntled individuals" often make an eccentric impression, and sometimes allege a widespread conspiracy that no one appears to take seriously.

Nevertheless, the committee's toleration for live citizen input was very high and these witnesses are given an opportunity by the senators to provide free flowing testimony, and they are often afforded amazing courtesy as the senators listen. This type of hearing, which in relation to circuit court nominees originated in 1943 and makes its last stand in 1971, underscores a bygone golden age of citizen oversight at the Senate committee, where one could simply come off the street into the public hearing room and be heard without any foreknowledge on the part of the senators. The testimony takes up several pages of transcript; the senators usually ask at least a few questions of the witness, and in one case the committee listened to a rambling 45 minutes of oppositional testimony as the chairman tried to focus the witness toward a coherent statement of his objections (Seitz 1966).

The precise objection of these witnesses can sometimes be difficult to apprehend, but center on the handling of a business receivership (Lee 1943, Stephens 1948), a bankruptcy (Hincks 1948), a trust (Tuttle 1954), a murder charge (Proctor 1948, Whittaker 1956), a disbarred attorney (Schnackenberg 1954), and imprecise allegations of wholesale fraud (Swygert 1961, Seitz 1966, Miller 1970, Mansfield 1971). Taking the openness of the process even one step further, the nominee almost always directly responded to the complaint and sometimes engaged in a colloquy with the hostile witness. In the handful of cases where the nominee himself did not address the allegations, pro-nominee witnesses did. Although not the most profound phenomenon to take place, these episodes do illustrate the heyday of direct citizen involvement in the decision-making process for judicial nominees, so long as one could make the trip to Washington, D.C.

3.3.4.3 Placid hearings belied memorable careers to follow

It is worth emphasizing that not all of these judges who had brief non-ideological hearings disappeared into chambers seldom to be thought of again, even though their perfunctory hearings seemed to suggest that would happen. In some cases, their uneventful hearings were in vivid contrast to their judicial careers. David Bazelon became one of the most prominent and controversial jurists of his generation, a staunch liberal who battled more conservative colleagues on the DC Circuit and advocated Warren Court liberalism even as it fell out of favor with the Supreme Court of the 1970s. His 1950 hearing, at which he did not appear, lasted just a few minutes and the only topic of discussion was the nominee's broad support from the legal establishment. Several of his contemporaries on the DC Circuit, later assessed to be conservative (Lamb 1976), saw similarly bland hearings (Miller 1945, Prettyman 1945, Danaher 1953, Bastian 1954, and Tamm 1965). Nominees to the Fifth Circuit, once containing most southern states and hearing important civil rights cases, had similar experiences. Ben Cameron's hearing in 1955 was purely laudatory,

and he was presented with a single (rhetorical) question. He would be a segregationist once on the circuit court. Three pro-civil rights colleagues appointed around the same time saw similarly uneventful hearings (Rives 1951, Tuttle 1954, and Brown 1955).

Ten Supreme Court nominees had an earlier hearing as a circuit court nominee between 1940 and 1978. At these hearings, there was virtually nothing to suggest the meaty constitutional decisions that would one day become synonymous with their names. Only one—future justice Blackmun—was asked a (brief) question about ideology. Seven had hearings that were simple, brief, and focused simply on assuring their objective qualifications. One (Whittaker) faced the concerns of a "disgruntled individual" about a murder charge, while another (Burger) faced a more legitimate scandal about his role in firing Department of Justice employees (though the senators were sympathetic to Burger's position and he was confirmed by a voice vote).

In fact, *all but one* of the nominees from 1940 through 1978 who had hearings that were marked only by quality assessment or the evaluation of complaints from citizens or even a more widely acknowledged scandal, ended up being confirmed, and by a voice vote. There is only one additional type of hearing—the ideological assessment.

3.4 1891 to 1978: Ideology as a Rare Distinction

While 1891 to 1978 was overwhelmingly dominated by an evaluation of qualifications only, there were (rare) instances of ideological evaluation. In this 88 year span of nominees (i.e., all those prior to 1979) there were only 26 who experienced some sort of ideological scrutiny at their hearing. This section seeks to draw insight from examining these 26 exceptions—which in some ways foreshadow the modern era that came about in the late 1970s when routine ideological assessment first emerged, and later hardened. Here I first perform a quantitative analysis to understand what variables predict these 26 instances of ideological evaluation. Then I look at all of these instances

qualitatively for a clearer understanding of the conditions in which they arose. Finally—after having this quantitative and qualitative understanding of the conditions that favored ideological evaluation in the first place—I explore, quantitatively, what role this presence of ideological evaluation had in driving confirmation process *divisiveness*.

3.4.1 A quantitative look at ideological evaluation, 1978 and earlier

Here I take a broad quantitative look across 88 years in order to understand some of the factors that lead to these rare instances of ideological scrutiny. With nearly 100 years of historical data and 26 instances of ideological evaluation, I do not assert that a handful—albeit an important handful—of variables that can be consistently measured across time will lead to a complete understanding of why ideological evaluation (dependent variable) occurs.

That being said, in regression analyses I am able to measure and include the most important variables related to institutional partisanship and polarization that we would expect to lead to a more rigorous, ideologically-focused process. Whether the nomination occurred under divided government (i.e., when the Senate and presidency were controlled by different parties), the ideological distance between the average Democrat and average Republican in the Senate (measured by DW-NOMINATE scores), and the ideological distance between the Senate mean and the president (also measured by DW-NOMINATE scores) all serve as independent variables. I also include covariates: previous federal court experience to capture those nominees with particularly prominent experience and records, the year of nomination for any temporal effect, and which of the circuit courts the nominee was nominated to. Beyond these regression models and their specifications, I am able to augment this with qualitative analysis. All in all, I believe this allows me to assess tricky historical data in a thorough way.

Tables 3.1 (OLS) and 3.2 (logit) present the results of the regressions. Both offer similar find-

Table 3.1: OLS Regression Analysis of All Nominees 1978 and Earlier, Predictors of Ideological Evaluation

	Dependent variable:	
	Nominee Ideologically Scrutinized	
	(1)	(2)
Divided Government	0.18^{***}	0.17^{***}
	(0.04)	(0.04)
Senate Party Polar	-0.30^{**}	-0.11
	(0.14)	(0.21)
Senate Pres Polar	-0.34^{**}	-0.38^{***}
	(0.14)	(0.14)
Fed Court Experience		-0.04
		(0.03)
Year		0.001
		(0.001)
1st Circuit		0.10
		(0.08)
2nd Circuit		0.11
		(0.08)
3rd Circuit		0.08
		(0.07)
4th Circuit		0.12
		(0.08)
5th Circuit		0.09
		(0.07)
6th Circuit		0.16^{**}
		(0.07)
7th Circuit		0.11
		(0.07)
8th Circuit		0.06
		(0.07)
9th Circuit		0.08
		(0.07)
DC Circuit		0.13^{*}
		(0.07)
Constant	0.32^{***}	-2.30
	(0.10)	(1.92)
Observations	360	360
R^2	0.08	0.10
Adjusted R^2	0.07	0.06
Residual Std. Error	0.25 (df = 356)	0.26 (df = 344)
F Statistic	9.72^{***} (df = 3; 356)	2.61^{***} (df = 15; 344)
Note:		*p<0.1; **p<0.05; ***p<0.01

Table 3.2: Logit Regression Analysis of All Nominees 1978 and Earlier, Predictors of Ideological Evaluation

	Dependent variable:	
	Nominee Ideologically Scrutinized	
	(1)	(2)
Divided Government	1.84***	1.90***
	(0.50)	(0.55)
Senate Party Polar	−6.05**	−2.73
	(3.03)	(4.09)
Senate Pres Polar	−3.32*	−5.12**
	(1.83)	(2.06)
Fed Court Experience		−0.62
		(0.46)
Year		0.03**
		(0.02)
1st Circuit		16.52
		(1,433.45)
2nd Circuit		16.42
		(1,433.45)
3rd Circuit		16.25
		(1,433.45)
4th Circuit		16.51
		(1,433.45)
5th Circuit		16.13
		(1,433.45)
6th Circuit		17.34
		(1,433.45)
7th Circuit		16.38
		(1,433.45)
8th Circuit		15.29
		(1,433.45)
9th Circuit		16.01
		(1,433.45)
DC Circuit		16.97
		(1,433.45)
Constant	1.37	−84.12
	(1.80)	(1,433.88)
Observations	360	360
Log Likelihood	−84.14	−76.91
Akaike Inf. Crit.	176.28	185.82
Note:		*p<0.1; **p<0.05; ***p<0.01

ings. With ideological scrutiny (i.e., evaluation) as the dependent variable, just controlling for institutional variables related to partisanship and polarization shows all three to be statistically significant. Divided government predicts ideological scrutiny, while polarization between the parties in the Senate and between the Senate and the president predicts a lack of ideological scrutiny. Adding federal court experience, the year of nomination, and the relevant circuit court as covariates shows similar results. For both the OLS and logistic models, divided government remains statistically significant and predicts ideological scrutiny, but ideological distance between the Senate and president is now the only independent variable that is statistically significant and predicts a lack of ideological scrutiny. The OLS regression analysis additionally finds that nominations to the Sixth and DC circuits predict divisiveness and are statistically significant, while the logistic regression shows the same for nominations made in a more recent year. All in all, this broad quantitative analysis suggests that divided government is a strong contender for leading to ideological evaluation. This is not surprising, as previous literature has argued divided government affects the tenor of the confirmation process (Shomade et al. 2014).

3.4.2 A qualitative look at ideological evaluation, 1978 and earlier

Qualitative analysis can draw out insights impossible to see in a broad quantitative analysis. And with only 26 instances of ideological scrutiny across 88 years, such a qualitative analysis is manageable and can be systematic and comprehensive, as opposed to focused on a small proportion of favored incidents. In addition to knowing the conditions under which ideological evaluation appeared prior to 1979, understanding these incidents also allows us to understand precisely how they differed from the post-1978 ideology-as-routine paradigm. These early forays into ideological assessment all had common features that led them to recede with subsequent nominees.

All instances of ideological scrutiny in the first 88 years of the circuit courts (1891-1978) had

to do with policies or philosophical ideas that were:

1.) *Highly* salient;

2.) Mappable, with remarkable elegance, to a contemporaneous dispute that involved more prominent political or judicial figures;

3.) Yet tied directly to the nominee, given nominee-specific background and experience (with the exception of one year, 1959);

4.) Not partisan-polarized.

These instances of ideology coming to the fore can be thought of as five distinct moments: 1932 and labor law, 1937 and Court packing and the New Deal, 1950 and McCarthyism, 1959 and the conflict with the Supreme Court, and intermittent instances in the aftermath of *Brown v. Board* almost always related to race. All of these pre-1979 ideological flare ups soon dissipated and there was a return to business as usual. Yet when there is a flare up, those remarkably consistent qualities appear again and again across decades. Below I discuss these five moments, and how each meet the conditions laid out above.

3.4.2.1 1932: labor law

1932 was a significant year in an elected branch's approach to the courts, as it saw the first Senate hearings that sought to assess the ideological fitness of circuit court nominees. The nominations of James Wilkerson and William MacKinstosh, made during the final full year of the Hoover administration, each had extensive hearings. The nominees themselves did not attend, but both supportive and oppositional witnesses did and they were questioned at length by senators. The overwhelming focus of the senators and third party witnesses was whether the nominees were anti-labor in the course of their legal careers.

Like the other ideological hearings in the pre-1979 era, these hearings here met the four cri-

teria above. First, labor law was one of the most salient policy matters that year as the nation was in the grip of the Great Depression. Only weeks before the two-day MacKintosh hearings and in the midst of the Wilkerson hearings (which dragged on for 13 days across several months), the Senate passed the Norris-LaGuardia Act, which, among other pro-labor provisions, specifically limited judicial injunctions that restrained labor. Scholarly compendiums consider it "landmark" and "major" (Stathis 2014; Landsberg 2004). The connection between these nominees and the larger legislative effort is made clear at the hearings. For example, Senator Dill declared, while inquiring about Wilkerson's use of injunctions, "There should not be any need for the Norris bill now in the Senate, but it has been forced on us because of the tyrannical use of injunctions" (U.S. Senate Committee on the Judiciary, Wilkerson Hearing, February 12, 1932, 100). The same legislation is also referenced several times during the MacKintosh hearings (U.S. Senate Committee on the Judiciary, MacKintosh Hearing, March 18-19, 1932, 2, 7, 24).

While these nominees became implicated in a highly salient policy dispute involving particular events larger than themselves, at the same time the inquiries raised were connected directly to the nominees' specific backgrounds. Senators and witnesses alike engaged in extensive and detailed discussions of the nominees' judicial opinions (Wilkerson served as a district judge and MacKintosh as a state supreme court justice) and records as attorneys, with particular focus on their pursuit of injunctions. Interspersed among the lengthy review of labor matters are stray remarks about other issues, such as prohibition, and broader reflections on the constitutional system, most poignantly in Senator Blaine's remark that in calm times the Constitution "is of very little consequence... a rather academic thing... a rather abstract thing" but in more uncertain times "the guarantees of the Constitution are our only protection" (U.S. Senate Committee on the Judiciary, MacKintosh Hearing, March 18-19, 1932, 17, 28). But these are merely asides during the thorough and focused examination into the nominees' positions on labor matters. Finally, this first ever

investigation by the Senate Judiciary Committee into the ideological leanings of circuit court nominees was entirely bipartisan. The Norris-LaGaurdia Act, which seemed to animate much of the hearings' discussions, passed the Senate in an overwhelming and bipartisan manner: every senator voted for it, except five Republicans (Lewis et al. 2021). At the hearings for both nominees, Democratic and Republican senators alike engaged in ideological questioning. Overall, four Democratic (Bratton of NM, Dill of WA, Lewis of IL, and Walsh of MT) and six Republican (Blaine of WI, Borah of ID, Glenn of IL, Jones of WA, Robinson of IN, and Schall of MN) senators participated in this type of questioning.

3.4.2.2 1937: The New Deal and Court Packing

This new type of hearing quickly subsided with Franklin Roosevelt's landslide presidential victory in 1932, and all of the new president's early circuit court nominees were confirmed with ease. This changed somewhat in 1937, in the aftermath of FDR's notorious court packing plan. Despite unified Democratic government and bipartisan passage of much of FDR's New Deal legislation, during his first term the Supreme Court boldly used its power of judicial review to invalidate much of the FDR agenda, sometimes unanimously but often by a five justice majority of conservatives placed on the Court mostly by Republican presidents and Republican senates from the Fourth Party System. One of the most momentous confrontations between the Supreme Court and the Presidency in the nation's history, FDR's proposal would have led to a new, additional justice being appointed for every sitting justice over 70 (with a maximum of six added justices permissible). Given the age of the sitting justices at the time, six new justices would have been added. The president's extraordinary court proposal was announced only days after he was inaugurated for his second term by winning over 60% of the popular vote and carrying 523 (out of 531) electoral votes. This massive victory was bolstered by the Democratic Party's equally impressive victory in

Congress: Democrats held over 75% of the seats in both the House and the Senate.

Proposed in this promising environment in February 1937, the plan was dead by summer. This episode has long captured the attention of academics and court watchers alike and the historical timeline involves several moving parts. Historians conclude there were moments the legislation seemed as if it might succeed, but ultimately failed for several reasons: Chief Justice Hughes' letter refuting FDR's claims about the Court's inability to complete its work, new cases that ruled in favor of the New Deal, the retirement of Justice Willis Van Devanter, the death of Senate majority leader Joseph Robinson, and bipartisan respect for the Court as an institution as well as alarm over the concentration of presidential power (Leuchtenburg 1996; Simon 2012).

Despite the enormity of this months' long controversy, it explicitly found its way into the process of evaluating circuit court nominees in only a single instance and in only a mild manner. Henry Edgerton, a nominee to the D.C. Circuit, was pointedly asked about the power of judicial review during his hearing in December 1937, after the court packing debate was over:

> Senator Burke: We are interested primarily in having you tell us your view, on this matter of judicial review, or, to put it another way, whether this country, in your opinion, would be better off if we had legislative supremacy.
> Mr. Edgerton: I shall be glad to answer the question. I confess that seems an academic question since there is no proposal, as far as I know, for discarding the present system.
> Senator Burke: I would not be so sure of that...
> Senator Van Nuys: Have you been reading some speeches during the last few months along that line?...
> Senator Borah: I assume that you believe at the present time that judicial review does exist under our present system.
> Mr. Edgerton: Most decidedly so, and most legitimately so
> (U.S. Senate Committee on the Judiciary, Edgerton Hearing, December 4, 1937, 3-4).

This episode succeeds spectacularly in meeting the four criteria for ideology seeping into the evaluation of circuit court nominees. First, the questioning was prompted by the much larger controversy of the Supreme Court's exercise of judicial review and the elected branches response to it. Second, it is difficult to overstate the salience of this controversy. The issue consumed the attention

of columnists and elected officials, and constituents inundated members of Congress with letters (Leuchtenburg 1996, 134-135). Historian William Leuchtenburg goes as far to conclude that the court packing proposal "generated an intensity of response unmatched by any legislative controversy of [the 20th century], save perhaps the League of Nations episode" (Leuchtenburg 1996, 134).

Third, the questioning was prompted by the nominee's unique background. Edgerton was not randomly chosen for more philosophical questioning. Not only did he work for the administration in the Department of Justice, he wrote a law review article calling attention to the line of cases where the high Court exercised judicial review, and goes as far to argue "it's hard to see why, apart from convention," certain people would "share that enthusiasm" in judicial review, and openly wonders what cases are so valuable as to outweigh *Dred Scott* and various *Lochner* era cases (U.S. Senate Committee on the Judiciary, Edgerton Hearing, December 4, 1937, 86-87). More to the point, he supported the Court expansion, and by one account "was appointed because he was the only one who spoke out in favor of the court packing plan toward the end" (Richey 1995, 145).

Finally, this was a thoroughly bipartisan affair, both in the questioning at the hearing itself as well as the underlying dispute. New Deal legislation received bipartisan support in the Congress. However, the court packing bill received bipartisan opposition. Republican opposition was universal in the Senate (Leuchtenburg 1996, 140). The huge Democratic majority there, however, splintered. Trouble for the plan came from several sectors of the Democratic caucus. Freshmen swept in with the 1936 landslide remained uncommitted, whereas established southern conservatives opposed it outright. Party regulars, such as Tom Connally of Texas and Joseph O'Mahoney of Wyoming, also opposed it, as did prominent liberal Burton Wheeler of Montana, whose aggressive opposition may have been particularly detrimental to the plan's success (Simon 2012, 319-320; Leuchtenburg 1996, 137, 139). The precise views of the Chairman of the Senate Judiciary Com-

mittee are difficult to ascertain at each point of the saga, but at some point he covertly opposed the legislation, and his Democratic-controlled committee at one point issued a report stating, "It is a measure which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America" (Leuchtenburg 1996, 145; Simon 2012, 333, 339). As for Edgerton's hearing, senators from both parties questioned the nominee about his ideological outlook.

3.4.2.3 1950: McCarthyism and leftist politics

Ideological hearings were absent for 13 years, but were reignited again with three nominees, all of whom had a hearing on the same day in April 1950. These three nominees were questioned on communism and left-leaning labor policy, which were prominent political issues at the time. Notably, these were the first judicial nominees taken up in the wake of Joseph McCarthy's February speech of that year which launched him to notoriety; in this early stage of the McCarthy saga, the senator still enjoyed a fair amount of support. Whether ideological hearings, dormant for 13 years, were reawakened by the larger McCarthy effort per se is disputable, but the content and timing of the hearings is certainly suggestive.

Communism and labor policy were domestic concerns of high importance at this point in American politics. Therefore, even removing McCarthy from the picture (despite the intriguing timing of these hearings, right after his famous speech), the scrutiny of judicial ideology here still meets the criteria of being connected to larger events and highly salient policy disputes, whether or not they be direct reactions to McCarthy.

Additionally, all three nominees meet the criteria of having personal and specific connections to the policy matters about which they were asked by a bipartisan group of senators. The most protracted of the three hearings was for William Hastie, who was the first Black nominee to, and

judge on, a federal circuit court. On the opening day of the multi-day hearing, Senator Wiley (R-WI) noted there was an allegation that the nominee "was a leftist or had a tendency toward Communism" and wanted to know whether he was "sympathetic to Communistic ideals." Other senators expressed a similar interest, and Senator McCarran (D-NV) directly asked the nominee whether he was ever part of a communist organization. Hastie was also extensively questioned about his relationship to the NAACP, as well as his affiliation with various organizations on the left (U.S. Senate Committee on the Judiciary, Hastie Hearing, April 1, 1950, 5-6, 16). The hearing of the second nominee, Charles Fahy, was much more subdued. Senators from both parties wondered whether the nominee was "too liberal," prompted by a specific allegation from a minority of the lawyers on the nominee's State Bar Commission that he was indeed "too liberal" (U.S. Senate Committee on the Judiciary, Fahy Hearing, April 1, 1950, 2-4). While it is not clear what was precisely meant by this because there was no elaboration during the hearing, homestate newspaper coverage at the time similarly describes him as a liberal and as evidence point to his successful defense of the pro-labor Wagner Act before the Supreme Court (Hay 1949).

The hearing for the third nominee, George T. Washington, was the most focused on a singular issue. He was questioned about his role during the debate and subsequent implementation of the Labor Management Relations Act of 1947 (i.e., Taft-Hartley), which places certain restrictions on labor unions. The nominee had an intimate relationship with the legislation: it was debated when he was working for the Truman administration, and the nominee was communicating about it and assisting with President Truman's veto message. The senatorial inquiry was a bipartisan process. While the ideological questioning was conspicuously led by Senator Donnell (R-MO), there was supplementary inquiry from three Democratic senators: McCarran (NV), O'Conor (MD), and Kefauver (TN). Taft-Hartley itself was also strongly bipartisan. In the Senate, half of the Democrats voted in favor as did all Republicans except three. Democratic President Harry Truman vetoed the

legislation, but it was overridden in a similarly bipartisan roll call (Lewis et al. 2021). In an era when labor policy was a prominent concern, Taft-Hartley was particularly salient, and universally regarded as landmark legislation. It was among the foremost priorities of the 80th Congress and it altered labor law drastically (Caughey 2018, 95-96; Bowen 2011, 49). In his comprehensive look at all the major legislation in US history, Stathis concludes Taft-Hartley is the "most significant piece of domestic legislation approved" in the 80th Congress; other compendiums similarly consider it significant (Stathis 2014, 278; Landsberg 2004, 213).

3.4.2.4 1950s and 60s: intermittent ideological inquiry in reaction to the Warren Court, almost always about race

Ideological hearings did not resume again until the aftermath of the Supreme Court's historic *Brown v. Board of Education* ruling that held state mandated racially segregated schools violated the Constitution. From 1956 through 1969, seven circuit court nominees had hearings that focused on their views on civil rights. An additional two had hearings that broached a different ideological issue, all of them connected to opinions being issued by the Supreme Court at that time. These hearings meet the four criteria of ideological hearings in this early era.

Civil rights during this period was highly salient, and the questioning of the nominees could be connected to a number of events of far greater prominence than the judicial decision making of circuit court judges. The political importance of the *Brown* decision in particular is without dispute. Scholars conclude *Brown* "profoundly affected national thinking" and "blazed the trail," while another observer goes so far as to opine that it "may be the most important political, social, and legal event in America's twentieth century history" (Powe 2000, 27; Rosenberg 1993, 39-40). For the remainder of its existence, the Warren Court revisited civil rights regularly, examples including: how *Brown* would be implemented (1955), the desegregation of graduate schools

(1956), the desegregation of public transport (1956), the delay of school desegregation (1958), sit-ins (1961, 1966), school segregation again (1963, 1964), public accommodations (1964), the constitutionality of the Civil Rights Act (1964), race and jury selection (1965), housing practices (1967), interracial marriage (1967), and picketing in response to racial discrimination (1968). Beyond the Supreme Court itself, civil rights received increased attention with federal legislation and national events such as the Montgomery Bus Boycott (1955-1956), Little Rock Nine (1957), Freedom Rides (1961), Birmingham Movement (1963), March on Washington (1963), Civil Rights Act (1964), Voting Rights Act (1965), and Selma to Montgomery Marches (1965) (Powe 2000).

It was a salient issue connected to many much more political events, but the nominees who were ideologically scrutinized during hearings were chosen with care. All seven questioned about civil rights had experiences closely connecting them, in some way, to the larger civil rights debate. The first nominee chosen for scrutiny was Simon Sobeloff in 1956. The sitting solicitor general, he defended civil rights precedents and, in 1955, argued before the Supreme Court in the case known as *Brown II*, which addressed implementing the Court's desegregation ruling from the year prior. Pro-segregation senators aggressively opposed him during his hearing, and he was asked by senators of all viewpoints about his role in landmark civil rights cases. Sobeloff was asked about more general principles such as judicial policy-making, defending the Constitution, and following precedent, but it was within the context of deciphering his approach toward civil rights and Senator O'Mahoney summarized the source of opposition at the hearing: "Mr. Sobeloff, it is quite apparent that most, if not all, of the opposition which has been expressed against you at this hearing arises from the fact that you were Solicitor General of the United States at the time the Supreme Court heard the arguments in the so-called desegregation case" (U.S. Senate Committee on the Judiciary, Sobeloff Hearing, May 5, 1956, 102).

Sobeloff's hearing was a weighty affair that lasted several days and saw senators engaging in

exchanges about slavery at the founding and the origins of the Civil War. The other hearing in this group with as much substance was Thurgood Marshall's in 1962. Marshall was a prominent civil rights leader who argued several important cases before the Supreme Court, including *Brown* itself. He was also only the second Black nominee to the circuit courts. At his hearing, Marshall was asked in depth questions about his affiliation with the NAACP and involvement in various civil rights litigation. The questioning related to the NAACP was so exhaustive that more sympathetic senators questioned its relevance.

Other nominees had hearings less extensive and civil rights connections less prominent, but across the board the nominees selected for ideological scrutiny had backgrounds with a special connection to civil rights policy: membership in organizations supporting desegregation (Wisdom 1957), drafting bills to oppose *Brown* while working for the governor of Tennessee (Phillips 1963), supporting segregation as the governor of Mississippi (Coleman 1965), writing the presidentially commissioned Kerner Report on the cause of the 1967 riots (Kerner 1968), and involvement in segregation litigation as a lawyer (Clark 1969). The questions during the hearing for each nominee were not generic inquiries about civil rights, but instead about specific civil rights oriented experience in the individual's background.

Taken as a whole, the ideological scrutiny of civil rights views at these hearings was a fully bipartisan process. Those with extensive hearings, like Sobeloff (8 days) and Marshall (6 days), were asked about their views by several senators, Democratic (both northern and southern) and Republican alike. Coleman was also asked about his views by senators from both parties, whereas Wisdom and Clark were only asked by Democrats and Phillips and Kerner were only asked by Republicans. The principle opposition to civil rights in this era were southern Democrats, and the senators who signed the "Southern Manifesto" condemning *Brown*, voted against the Civil Rights Act of 1964, or voted against the Voting Rights Act of 1965 were almost exclusively Democrats

from the south, joined by just a handful of Republicans. On the other hand, nonsouthern Democrats were some of the strongest supporters of civil rights, and the 1964 election pitted Lyndon Johnson, the Democrat who signed the Civil Rights Act of 1964 into law, against Barry Goldwater, the Arizona senator who voted against it. In conclusion, the ideological debates around civil rights in the 1950s and 60s, which seeped into only a handful of circuit court nominee debates, did not separate along a straight forward partisan divide.

Two additional nominees were asked about ideological matters, one about labor radicalism (in 1963) and the other about criminal procedure (in 1966). Like civil rights, both issues were highly salient and connected to larger political events, and the nominee specific behavior prompted the questioning. While communism as a domestic concern before the courts had died down by the time of the 1963 hearing for George Edwards, the nation was nevertheless still in the midst of the Cold War, and one year earlier the Supreme Court decided a case about loyalty oaths for professors (*Baggett v. Bullitt)*, and one year before that a case that involved whether the NAACP was infiltrated by Communists (*Gibson v. Florida Legislative Investigation Committee*) (Powe 2000, 155, 220-221, 310). Senators from both parties asked the nominee about his involvement in left-wing causes and organizations in the 1930s, and even the socialism of his late father. In 1966, Senator Hart (D-Michigan) asked nominee Spottswood Robinson about his decision as a district court judge to permit a convicted criminal out on bond who, while on bond, assaulted people. This (brief) questioning was prompted by a specific ruling the nominee made as a lower court judge, and political interest in the Warren Court's criminal procedure rulings reached an apex around this time. Only months prior, the Supreme Court issued its opinion in *Miranda v. Arizona*, which ruled the police must give a person in custody notice of certain rights. Powe concludes this was the Warren Court's "most controversial criminal procedure decision hands down" and perhaps its most controversial altogether; empirical political science measures similarly rate this decision as

salient (Powe 2000, 394, 399; Clark et al. 2015; Epstein and Segal).

3.4.2.5 1959: The "Oath"

The one moment when ideological hearings did not meet all four criteria I laid out for this pre-1979 period was a series of 11 hearings in 1959. Even here they still fulfill three of the four; however, the ideological assessment here was not nominee-specific, so that final criterion was not met. These 11 nominees were all asked—and in each case unprompted by anything peculiar in their backgrounds and in no way tailored to the unique nominee—whether they understood that their judicial oath demands adhering to the Constitution, including the provision that "all legislative powers herein granted shall be vested in a Congress." The inquiring senator then went on to ask whether the nominee understands that this oath bounds the nominee "not to participate knowingly in any decision designed to alter the meaning of the Constitution itself or of any law as passed by the Congress." I code this as ideological because it gets at the function of judges, in contrast to legislators, in the American system; also, as the ensuing paragraphs will show, the historical record is clear that this question about the judicial oath had the intention of getting at judicial interpretive approach and ideology.

Importantly, this episode did not alter circuit court confirmation politics in any permanent way going forward because this question about the judicial oath and its implications met the other three criteria that marked ideological inquiries of this era. For one, this question was directly mappable to a much larger (and highly salient) dispute, which prompted C. Herman Pritchett to write an entire book about it entitled *Congress versus the Supreme Court* (Pritchett 1961). As Pritchett explains, there were notable efforts by Congress to curb the Supreme Court in the 85th and 86th Congresses in reaction to a line of decisions the Court handed down between 1955 and 1958 limiting efforts to protect internal security against subversion. In addition to this, Pritchett adds, "In the minds of

many members of Congress, this drive on the Court was also motivated by opposition to the 1954 ruling... [on] racial segregation" (vii). Moreover, in 1958, in *Cooper v. Aaron*, the Supreme Court revisited the meaning of *Brown v. Board of Education* and rejected efforts to delay its order to desegregate schools (17). As Pritchett summarizes:

> Thus it was because certain decisions of the Warren Court, in defending basic libertarian values, controverted strongly entrenched localistic interests and strongly held anti-communist views, that the attack on the Court burgeoned into one of such great proportions. Opponents of the segregation decision alone could not have achieved this result. Nor could the opposition to the Court based on its efforts to keep the anti-communist drive within the bounds of the Bill of Rights, standing alone, have achieved such success. It was the simultaneity of these affronts which results in the program of massive retaliation against the Court (17).

The historical record is clear that the "oath" question was a direct result of this larger conflict (between the Supreme Court and Congress) on highly salient issues (national security as it relates to communism, as well as racial segregation). Asking this question of circuit court nominees came amidst several more assertive congressional proposals, such as eliminating life tenure and requiring unanimous decisions. The most "direct and serious" of these proposals was the one to withdraw the Supreme Court's jurisdiction in several areas (Pritchett 1961, 31). Contemporaneous newspaper articles verify that this oath question during lower court hearings was the result of a compromise, devised by Senator O'Mahoney (D-WY), to head off that far more consequential policy (Judge Nominee Takes Oath 1958).

This period of ideological hearing questioning met a third criterion: it was not partisan polarized. Broadly speaking, the court curbing initiatives overlaying the inquiry at the hearings were pushed by two elements in Congress: (1) southern Democrats upset over the high Court's desegregation efforts, and (2) southern Democrats joined with some northern Republicans in opposition to the Supreme Court's national security rulings (Dilliard 1961). The Senate roll calls on the votes that sought to limit the Supreme Court's power during this time reveal bipartisan coalitions: 27 Democrats and 14 Republicans were always pro-Supreme Court, 18 Democrats and 21 Repub-

licans were always anti-Supreme Court, and the remaining senators had mixed voting records (Dilliard 1961). Confounding any sort of clean partisan division even further is the observation that during this controversy, "Southern Democrats were of course the most vitriolic opponents of the Court, but the non-southern Democratic majority supplied the principal leadership in defense of the Court" (Pritchett 1961), 126). Looking narrowly at the asking of the "oath" question itself at the hearings shows that was also bipartisan. Of the 11 nominees who were asked it, seven were asked by Republicans, three were asked by southern Democrats, and one was asked by a northern Democrat; the policy of asking this question in the first place was devised by another northern Democrat. The partisan dynamics here call into question my earlier quantitative finding that divided government per se drives ideological evaluation. All 11 of these nominees were evaluated under divided government, but the evaluation of President Eisenhower's nominees was led by a mix of copartisans and crosspartisans, and opposed by a different contingent of copartisans and crosspartisans. It appears, therefore, that these nominees just happened to be evaluated under divided government, not that divided government drove the evaluation.

Because this broad and generic ideological question at the hearings was (and could be in the future) asked of anyone without being tethered to anything in a nominee's background, this episode had greater potential than any other up until that point to permanently alter the confirmation process of circuit judges going forward by putting divisive ideological concerns front and center. In this sense, 1959 was a remarkable and unprecedented moment in circuit nomination history (not to be seen again, and for the second time only, until 1979). However, this was still inspired by (1) a larger political controversy (2) that was highly salient and (3) not partisan polarized. Hence, once that contemporaneous controversy blew over, the ideological "oath" question vanished as suddenly as it appeared.

3.4.3 The effect of ideological evaluation in the pre-1979 era

As we have seen after an in depth analysis, this 88 year period was uniquely unconcerned with evaluating the ideology of circuit court nominees. In 1979 ideological evaluation would become common and, soon after, universal. It's because these two periods are so different on this score—so much so as to represent two different paradigms—that I take them in turn. Before moving to an in depth analysis of this second paradigm, in this subsection I try to better understand, quantitatively, the effect of judicial ideology on the divisiveness of the circuit court confirmation process—which is a central research question of mine—in the pre-1979 era. Focusing within this era, I leverage the 26 instances of ideological evaluation as well as other variables in a regression analysis to understand what created divisiveness in this era when it was very low.

Table 3.3 displays regression analysis results where the independent variable of primary interest is ideological scrutiny of a nominee and the dependent variable is the divisiveness score of a nominee's confirmation process (as measured in the previous chapter).[9] Yet again we are dealing with history, and I do not pretend that I have captured in this model every possible variable leading to divisiveness. But if we narrow the ambition and accept the assumption that the potential variables affecting this are measured accurately and are as follows, the model entails them and is complete: partisanship (divided government), ideological polarization (the DW-NOMINATE distance between the Democrats and Republicans in the Senate, and between the Senate and the president), nominee background and record (experience as a federal judge), the time period (year), and whether the nomination is to a problematic court (circuit court). These are the identical independent variables used in earlier regression analyses displayed in tables 3.1 and 3.2 where ideological

[9]The statistical significance and direction of the independent variable of interest (ideological scrutiny) remain the same if the dependent variable (divisiveness) is measured in two additional, different ways: (1) the same divisiveness score but eliminating from that equation whether a nominee had a hearing and (2) a dichotomous measure of divisiveness based on whether a nay vote was received or the nomination failed altogether.

Table 3.3: OLS Regression Analysis of All Nominees 1978 and Earlier, Ideological Scrutiny Predicting Nominee Divisiveness (Measured on 5-Point Scale)

	Dependent variable:		
	Divisiveness of Nominee's Confirmation Process		
	(1)	(2)	(3)
Ideological Scrutiny	1.06^{***}	0.93^{***}	0.88^{***}
	(0.19)	(0.20)	(0.19)
Divided Government		0.04	-0.06
		(0.16)	(0.15)
Senate Party Polar		-1.76^{***}	0.79
		(0.51)	(0.75)
Senate Pres Polar		0.44	-0.04
		(0.51)	(0.52)
Fed Court Experience			0.02
			(0.10)
Year			0.02^{***}
			(0.003)
1st Circuit			0.01
			(0.31)
2nd Circuit			0.04
			(0.27)
3rd Circuit			-0.05
			(0.27)
4th Circuit			-0.04
			(0.30)
5th Circuit			0.05
			(0.26)
6th Circuit			-0.17
			(0.27)
7th Circuit			0.38
			(0.27)
8th Circuit			-0.07
			(0.27)
9th Circuit			0.13
			(0.26)
DC Circuit			0.09
			(0.27)
Constant	0.65^{***}	1.54^{***}	-30.17^{***}
	(0.05)	(0.38)	(6.94)
Observations	360	360	360
R^2	0.08	0.12	0.19
Adjusted R^2	0.08	0.11	0.15
Residual Std. Error	0.96 (df = 358)	0.94 (df = 355)	0.92 (df = 343)
F Statistic	30.17^{***} (df = 1; 358)	12.38^{***} (df = 4; 355)	4.98^{***} (df = 16; 343)
Note:			*p<0.1; **p<0.05; ***p<0.01

scrutiny itself was the dependent variable. Here, ideological scrutiny is an independent variable and divisiveness the dependent variable. The results of this OLS regression are displayed in table 3.3. The predictor of interest (ideological scrutiny) is statistically significant in every specification of the model. Of particular interest is the third specification, where the top confounding variables are accounted for. The independent variables that capture partisanship and ideological position are not statistically significant. In addition to ideological scrutiny, year of nomination is the only independent variable that is statistically significant: the more recent in time the nominee is, the more likely a divisive process. These results support the overarching argument of my dissertation that judicial ideology—in fact, the mere evaluation of it—plays a central role in driving divisiveness. Divisiveness appears to be related to the judicial nominees themselves, and not a mere outgrowth of the partisan and ideological makeup of the institutions.

3.5 1979 to the Present Day: Ideology Emerges as the Dominant Force

3.5.1 The (partial) routinization of ideology in the late 1970s: philosophical Republicans and single-issue Democrats

The overall quietness of this pre-1979 period did little to suggest the interest in constitutional interpretation that was to overtake the nomination and confirmation process of circuit court judges in the years that followed. The 96th Congress (1979-1980) was a transitionary period that saw several new components: chairman Ted Kennedy, additional judgeships (35 seats were added to the circuit courts by legislation in 1978), and independent state commissions vetting nominees to an unprecedented degree. Most significantly of all, this Congress marked the beginning of regular senatorial inquiry into judicial ideology. The birth, in this Congress, of sustained ideological scrutiny deserves special attention.

Senators inquired into the ideology of half of the 47 nominees who received hearings that Congress (23 were asked, and 24 were not). There was near parity in partisan interest in ideology: Democrats asked 18 nominees ideological questions and Republicans asked 13 nominees (10 nominees were only asked such questions by Democrats, 5 only by Republicans, and 8 by both). Despite the partisan similarity in the overall numbers, even in this early period when senators were just finding their footing, there was a fundamental difference in partisan approach.

3.5.1.1 Philosophical Republicans

With nominee after nominee, Republican senators raised judicial decision making concepts that got at the nominees' overarching philosophy when deciding a case involving *any* issue. Over 90% of the nominees probed about ideology by Republican senators were asked their attitude toward one of the components, all related but somewhat distinct, of the trinity that the GOP senators found illegitimate: (1) legislating or policymaking from the bench, (2) "activism," and (3) elevating personal conscience over the intent of law writers. Crucially, these concepts were never couched in relation to specific issues, or specific issue domains, but instead were asked in such a way as to apply to all issues and get at the very heart of the judicial decision making process.

Republican senators on the Judiciary Committee forwarded this ideological agenda in relation to the lower courts. Senator Paul Laxalt (R-NV) in particular was an early leader on this front. During the joint hearing for three nominees (Samuel Johnson, Nathaniel Jones, and Albert Tate), he states there are "a few philosophical areas I just wanted to touch on" and proceeds to express concern about judges who "seek to legislate rather than judge" and asks each nominee to reassure the committee they will instead "take the law as you find it" (U.S. Senate Committee on the Judiciary, Nomination Hearings, September 21, 1979, 430). Later in the same Congress, he asks a fourth nominee whether the role of a judge is equivalent to "that of a legislator or politician or social ac-

tivist" (U.S. Senate Committee on the Judiciary, Cudahy Hearing, July 30, 1979, 320). Laxalt was joined by colleague Alan Simpson (R-WY), who asks a fifth nominee (Andrew Jefferson) about judicial activism, and more extensively questions a sixth nominee (Arthur Alarcon) not only about judicial activism but also what the nominee would do if law "interpreted according to the intent of Congress... offended your own conscience" (U.S. Senate Committee on the Judiciary, Alarcon Hearing, October 2, 1979, 454). Orrin Hatch (R-UT) asks a seventh nominee (Harry Edwards) how he would decide a matter if his personal conscience conflicted with case law. An eighth nominee (Harry Pregerson) was questioned more extensively, with Simpson asking him a line of questions about what power is reserved to the legislature, and the proper approach should legislative intent "offended your own conscience" or the law be inconsistent with the "values of contemporary society" (U.S. Senate Committee on the Judiciary, Pregerson Hearing, October 2, 1979, 450).

The ideological questioning of these nominees is relatively brief, but it represents a wholly new phenomenon, and one that stuck. Prior to 1979, with only one year as an exception (1959), assessing these judicial nominees with an ideological lens was rare, and four criteria were always met. The questions were tied to the (1) nominee's background, yet mappable to a (2) specific, larger—and (3) highly salient—political controversy, and asked by (4) senators from both parties. These four criteria, which structured the (limited) ideological assessments of the previous 88 years, were now abandoned. The middle tier of the federal judiciary began to matter in and of itself, and on its own terms: there was no need for a compelling nominee or a larger, highly salient political event; and, as will be detailed in the coming paragraphs, there was a difference in partisan approach.

Naturally, when there was an obvious opportunity to do so, Republicans did sometimes connect their philosophical questions to the nominee's background. While there was no attempt to do so with the eight nominees previously described, with five additional nominees there was an explicit

reference to the nominee's past actions during ideological questioning. Frank Johnson and Dolores Sloviter are both asked to articulate their view of judicial policymaking in light of their past comments. Patricia Wald's outlook when an attorney is questioned as being "activist" with a "tendency to elevate matters into grand constitutional principles" (U.S. Senate Committee on the Judiciary, Wald Hearing, June 18, 1979, 234). Finally, Abner Mikva is asked about his liberal record as a Congressman, and Cornelia Kennedy's criminal and civil rights opinions as a federal district judge are lightly probed.

From the beginning, when Republicans brought up judicial ideology, they were focused not on a single issue, but instead on a single type of judge who would rule correctly across all issues. When Republicans ask about a specific issue or issue domain, it is in addition to and separate and apart from asking about philosophy in general, and no one policy area is prioritized. Indeed, the lack of Republican focus on any given issue is striking, and only one policy area (criminal law) is brought up at more than one hearing (three total) in the 1979-1980 Congress. The five other specific issues broached appear only one time each: affirmative action (Edwards), bussing (Mikva), civil rights (Kennedy), gun control (Mikva), and "the traditional family structure" (Wald). Cornelia Kennedy was the only nominee not asked about overall judicial philosophy, but instead only specific issues (criminal and civil rights law). An outlier for a Carter nominee, Kennedy was seen as conservative and upon nomination was opposed by liberal civil rights and criminal defense groups; later, Ronald Reagan considered her for the Supreme Court (Abraham 2008).

Among Republican senators of the 1979-1980 Congress, the importance of assessing judicial philosophy was tied to the overall importance and power of the federal judiciary. During one hearing, Laxalt, speaking in sweeping terms, declared that the confirmation of judges was "the most important function being presently discharged by the judiciary committee" and that the lower court judges being considered during this time "will probably have more impact on the next decade

or two in this country than all the senators combined" (U.S. Senate Committee on the Judiciary, Nominations Hearings, September 21, 1979, 430).

3.5.1.2 Single issue Democrats

The approach of the Democratic senators is different in many respects. Unlike Republicans, who emphasize overarching judicial philosophy untethered to specific issues or specific nominee experience, when Democratic senators evaluated ideology they were seldom concerned with any sort of general philosophy and they were diligent in grounding their policy-oriented questions upon an individual nominee's experience. Of the 47 circuit court nominees of the 96th Congress, Democratic senators made ideological inquiries of 17. The type of ideological questions asked of these 17 nominees fall into four broad categories. Ten nominees were asked only about civil rights; four were asked solely about a different singular area (i.e., criminal law or federalism); three were tepidly asked simply whether legal advocates could go on to serve as judges; two (and only two) were asked ideological questions of a broader scope.

The dominant ideological agenda the Democratic senators had for the courts during this period was ensuring nominee commitment to civil rights. This manifests itself in three different ways among the 10 nominees asked about it. The focus with a majority of the nominees and the topic of the most extensive questions is civil rights for African Americans. A second set of nominees was asked about gender equality, and a third set about civil rights in a broad sense. Democratic senators asked six nominees about their position on civil rights for African Americans. Here the senators were careful to connect the line of questioning to each nominee's background—making the inquiries a background check as much as an ideological agenda for the courts at large. Senator Ted Kennedy (D-MA) asked nominee, and then general counsel to the NAACP, Nathaniel Jones what role his "civil rights efforts in the areas of school desegregation, housing, [and] employment"

would play in his transition from an advocate to a jurist (U.S. Senate Committee on the Judiciary, Jones Hearing, September 21, 1979, 429). Robert Anderson and Albert Henderson were asked by Howell Helfin (D-AL) their attitude toward discrimination claims and commitment to civil rights, and these questions are firmly rooted in the context of the nominees being members of clubs with discriminatory membership policies.

Three additional nominees were asked about Black civil rights in light of their records as federal district court judges. Kennedy notes that, as a lower court judge, nominee Frank Johnson ordered the desegregation of schools, airports, and other facilities, and has been both "applauded" and "decried" for that. The senator then asks, "What sort of guidelines should a judge follow in determining the propriety of... intervention into State affairs?" (U.S. Senate Committee on the Judiciary, Johnson Hearing, May 16, 1979, 101). Kennedy also references and praises the nominee's decision making on the district court in his introductory comments, as do senators Heflin and Stewart (D-AL). In contrast, when Republican Senator Simpson asks the same nominee about judicial ideology, there is no reference to his time as a judge. Another nominee, Bailey Brown, was asked by Senator DeConcini (D-NM) what progress has been made in civil rights in the last 25 years and what the major civil rights battles of the 1980s will be. These questions are prefaced by DeConcini's discussion of the nominee's 18 year record on the federal bench deciding civil rights cases. Finally, Senator Metzenbaum (D-OH), prompted by the nominee's long case history on the district court, extensively questioned Cornelia Kennedy on civil rights, criminal procedure, and the intersection of the two.

Beyond these six nominees are four additional nominees asked about different aspects of the civil rights sphere. In this period when female nominees were rare, Democratic senators noted the records of Ruth Bader Ginsburg and Phyllis Kravitch as attorneys litigating gender discrimination cases and asked for their reflections. Metzenbaum asks Ginsburg, "What motivated you... to place

yourself on the firing line with respect to equal rights for men and women?" and whether she would be "an impartial, nonpartisan jurist" in light of it (U.S. Senate Committee on the Judiciary, Ginsburg Hearing, June 4, 1980, 348, 350). At Kravtich's hearing, she is prompted to talk about her record in this area after Senator Kennedy notes her advocacy. Like the nominees questioned about Black civil rights, the questions to Ginsburg and Kravitch are tied to their past activities; moreover, the questions posed are fairly cursory and do not delve into the nominees' views on the law.

Finally, nominees Jerome Farris and Cecil Poole are each asked about equal rights in a broad sense by Senator Baucus (D-MT), and, notably, without any apparent impetus for it in their background. These two hearings may be the closest to the Republican approach: asking about a legal concept (here it is "equal justice") without any clear motivating factor from the nominees' histories. However, unlike Republican questions, Baucus' questioning is qualified to apply to a particular subset of legal disputes (protections for minorities), and it is not even clear that Baucus is forwarding a particular agenda for the courts. While some of this questioning indicates his sympathy with the concept, he also raises a countervailing concern: "Is it possible for a judge to go too far in promoting equal justice. Is it possible for a judge to compromise his impartiality?" (U.S. Senate Committee on the Judiciary, Poole Hearing, November 14, 1979, 686). By apparently narrowing the concept of "equal justice" to a particular subset of legal disputes and seeming to suggest a degree of moderation in pursuing it, Baucus is a contrast to his Republican colleagues who present their ideological guidepost (the rejection of judicial policymaking, activism, and personal conscience over the intent of the lawmakers) as applicable to all legal disputes, and to be followed with devotion.

A series of additional nominees are briefly asked about a singular issue (federalism or criminal law), usually tied to their unique experience. Senator Heflin notes nominee Joseph Hatch-

ett is a justice of the Florida Supreme Court and asks whether federal courts are deciding cases more appropriately handled by state courts. Nominees Stephen Reinhardt and Andrew Jefferson, each faced allegations of being unfriendly to the police, and Democratic senators briefly probed the matter. Finally, Amalya Kearse is asked about criminal law in a very broad and sedate manner ("How do you feel about this area [criminal jurisprudence] of extraordinarily important litigation?"), and, representing an exception, no connection to her background is drawn (U.S. Senate Committee on the Judiciary, Kearse Hearing, June 7, 1979, 126). Two nominees, both to the DC Circuit, are asked about more controversial issues by Democratic senators during more extensive hearings. Mikva, a sitting Congressman, is asked about gun control in particular, as his extensive record as a politician is alluded to. Several issues are briefly raised at Wald's hearing, including abortion, family law, and the Equal Rights Amendment.

3.5.1.3 An indication of what's to come

During the turning point years of 1979 and 1980, the political parties moved in tandem, but differently. Far more than representing just the behavior of two particular years, these initial moves set the table for the years to follow. Republican scrutiny, initially focusing on judicial philosophy and without regard to a nominee's experience, was fine-tuned going forward. In contrast, Democratic scrutiny—initially much less focused than Republican efforts, and concentrated on connecting any question to the particular nominee—did not progress at all, and in fact almost completely ceased for several years.

3.5.2 The early 1980s: ideology as a routine, dominant, and partisan feature

While the late 1970s saw the birth of ideological concern and represented an early period of senators exploring how to approach the subject, by 1981 the era of viewing judicial nominations in

an ideological light was in full swing and the difference in approach between the two parties was stark. While 1979-1980 represented a joint, though asymmetrical, effort of the parties, by 1981 the effort was one-sided with Republican senators taking great interest in judicial ideology, while it was at best a rare afterthought to Democrats. In the last two years of the Carter presidency, Republican ideological probing of nominees was in its infancy with only some nominees questioned about judicial philosophy. This quickly matured, and, starting in 1981 and lasting throughout the Reagan presidency, Republican senators made ideological queries of virtually all nominees to the circuit courts. Moreover, their lines of questioning became more robust and sophisticated: pointed discussions of textualism, the tenets of originalism, and core constitutional provisions were common. In the last two years of the Carter presidency, Democrats began to ask nominees about policy matters, with questions about civil rights predominating. By 1981 this effort to probe into the ideology of judicial nominees was almost totally lifeless.

This pattern is all the more amazing given the partisan dynamics. The first five years of the Reagan presidency ends with Democrats barely asking the crosspartisan president's nominees about the ideological or policy considerations that might go into judicial decision-making, while Republican senators constantly (and sometimes extensively) sought ideological assurances from the nominees, despite coming from a copartisan president with a known commitment to the same judicial vision. Republican senators persisted in asking about constitutional principles, and from various angles. Democratic senators did not put forth an alternative vision for judicial decision-making, articulate their own framing of shared values, or even parrot their Republican colleagues. They were—almost always—simply silent.

Of the 50 circuit court nominees who received Senate hearings during Reagan's first five years, Republican senators directly asked 94% about their ideological outlook. In contrast, Democrats only asked 8%.

3.5.2.1 Passive Democrats

Of these 50 nominees, Democrats did not ask many *non*-ideological questions, either. Senator Heflin (D-AL) announces he has questions for nominee Emory Sneeden, but this just amounts to a couple of jokes and then several lines of praise. Senator Simon (D-IL) tended to be more substantive; he asked several nominees whether they felt Senate or presidential staff asked them any improper questions, and whether during their careers they complied with the ABA canon to take pro bono work. Notable exceptions to these mundane Democratic inquiries were Alex Kozinski (extensively questioned about allegations he created a hostile work environment as a supervisor) and J. Harvie Wilkinson (questioned at length about intemperate lobbying, especially to the ABA, on behalf of his own nomination). But, for the most part, Democrats were either absent from the hearings or present but asked no questions.

However, they did single out four nominees to ask ideological questions. The Democratic approach in relation to these four nominees was the same as it was during the Carter years: the ideological questions posed were tied to something peculiar about the nominees themselves, and the questions centered on a singular issue or incident, disconnected from a comprehensive judicial philosophy. This ideological questioning from Democrats was also, in every case, brief. Baldock was asked about an allegation from the ACLU that he was "death on wheels for civil liberties" (U.S. Senate Committee on the Judiciary, Baldock Hearing, October 30, 1985, 667). Buckley was asked whether he could fairly approach abortion cases, given his record on that issue. Similarly, Bork was asked about Supreme Court jurisdiction being stripped, and the question was prompted by the nominee's previous statements in relation to the Human Life Amendment. Finally, and perhaps least salient, Kozinski was asked about allegations that he was nonresponsive to whistle-blowers.

Of these 50 nominees, only three received any nay votes in the Senate. Two are part of the

select group of four who received ideological questioning from Democratic senators: Kozinski (confirmed 54-43) and Buckley (84-11). The third nominee to engender nay votes was Wilkinson, who he was opposed by several groups critical of the conservative stances he took during his career across many issues. However, Democrats did not question him about any of that, instead choosing to repeatedly ask about the nature of his lobbying for his own nomination. Bork and Baldock, as well as every other nominee, were confirmed by voice vote. In summary, Democrats rarely asked about ideology during this period, and when they did they always tied it to a nominee's background. This is reflective of the Democratic approach in earlier years, except the propensity to ask these types of questions declined: in the 1981 to 1985 period 8% of nominees were asked such questions, whereas in the 1979-1980 period 36% were .

3.5.2.2 Assertive Republicans

While Democratic efforts to evaluate judicial ideology regressed during these years, Republican efforts flourished. In fact, the main enterprise of GOP senators at the hearings was questioning virtually all nominees, regardless of background, on matters that got to the very heart of how appellate judges decide questions of constitutional or statutory interpretation. Republican senators stuck with their previously articulated trinity (activism, legislating/policymaking, and personal conscience over the intent of lawmakers). But they significantly expanded upon that list, and in general became more sophisticated and specific. Their questions are too varied and extensive to provide a detailed in-text summary, but figure 3.9 shows the various ideological concepts Republican senators asked about and how many nominees were asked about them. 47 of the 50 nominees were asked about at least one ideological concept or domain, and many of them were asked about more than one. These categories are obviously related and bleed into each other at times, but I identified (and show on figure 3.9) nine categories of ideological questions, and simply use the

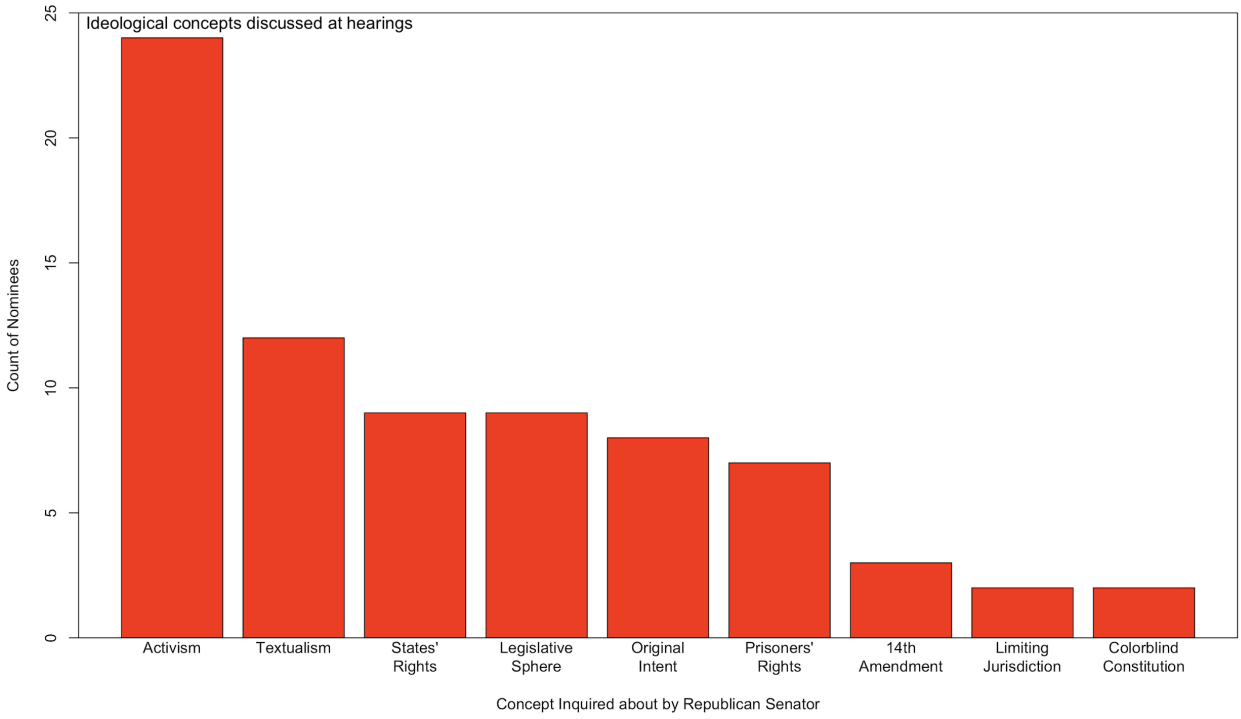

Figure 3.9: Particular ideological concepts Republican senators asked about at hearings, 1981 to 1985, by the number of circuit court nominees asked. *Source: Calculated by author by reading and coding transcripts.*

lexicon and framing of the senators, although I made some effort to simplify categories at the expense of capturing every linguistic nuance (e.g., there are a few ways senators asked about the importance of text and language in judicial decision making, and these types of questions are simply categorized under "textualism"). Topics that were only asked about with one nominee (e.g., pornography, class action lawsuits, and the rights of unions) are not represented on the figure.

As figure 3.9 shows, Republicans continued to overwhelmingly prioritize asking about broad, catch-all judicial philosophies applicable to every issue; there is no evidence they were motivated by a singular issue or handful of issues. Instead, during the hearings, they demonstrate a broad vision for the courts, quite unlike their Democratic counterparts. Moreover, the questions are never justified as being provoked by something about the nominee's background or experience. As the

figure shows, "activism" continued to be a principal way in which Republicans broached ideology with the nominees. While a nebulous term, it is often brought up as a means to get nominees talking about their judicial philosophy. Several nominees are simply asked, "What does judicial activism mean to you?" or their general thoughts on the subject, and these presented opportunities for a nominee to explain how they approach decision making (e.g., Bork 1982, Wellford 1982, Bowman 1983, and Davis 1983). Other times the questioning senator gave particular substance to what an activist judiciary looks like: "to make decisions not properly within the scope of their authority," (e.g., Hill 1984), "to impose itself upon other institutions" (Silberman 1985), or "to employ the individual plaintiff as a vehicle for the imposition of far reaching orders" (Thompson 1985). Other times activism is equated with judges intruding upon the legislative sphere, but that type of question was often asked in a precise way without mentioning the concept of activism (nine nominees received such questions, as figure 3.9 shows).

These years saw a more keen focus on textualism and concepts associated with originalism than during the 1979-1980 period during the Carter presidency. Several nominees were probed on textualism with the question "Do you believe the Constitution says what it means and means what it says?" (e.g., Posner 1981, Coffey 1982, Wiggins 1984). Nominee Melvin Brunetti is asked about Thomas Jefferson's appeal to "Let us not make it a blank paper by construction." Tenets specifically associated with modern day originalism were also presented to the nominees; for example, several were asked whether it is appropriate to decide a case on a basis other than "the intent of the framers of legislation or constitutional provisions" (Fagg 1982, Starr 1983, Torruella 1984, Ripple 1985). Thurmond in particular, compared to his Republican counterparts, couched questions in originalist terms. He was the senatorial leader for this philosophy during the hearings of the early 1980s, predating the Supreme Court confirmation hearings for Antonin Scalia and Robert Bork later in the decade.

The length of exchanges between Republican senator and nominee varied, but some were questioned extensively. Frank Easterbrook, for example, was asked about states' rights, judicial activism, substantive due process, precedent, and the colorblind Constitution. Charles Wiggins, another example, was asked about the power reserved to the legislative sphere, judicial activism, states' rights, conflicts with personal conscience, and textualism.

The Republican consistency and thoroughness is all the more vivid because of the Democratic near-silence. Even their four previously described mentions of ideology were modest and did not challenge the broad set of values the Republican senators were laying out in their lines of questions. In the absence of Democratic resistance, the first pushback to GOP judicial principles comes, amazingly, from a (liberal) Republican senator. Senator Mathias (R-MD), during the 1985 hearing for Carol Los Mansmann, mustered the first defense of judicial activism, inviting the nominee to "look at the other side of the coin of judicial activism" and pointing out the courts' legislative redistricting decisions. To the extent there was a debate about judicial philosophy among the senators at these hearings, it occurred *within* the Republican party.

3.5.3 The Bork nomination and beyond: Democrats catch up

The Supreme Court nomination of Robert Bork in 1987 was not the beginning of the judicial wars, but an important inflection point. The Bork nomination was the turning point when modern day Democratic senators caught up to Republican colleagues in focusing in on judicial ideology for circuit court nominees. Much has been made of the ramifications of Bork's nomination, and subsequent rejection, on American politics (Totenberg 2012; Olson 2019; Maltese 1998; Vieira and Gross 1998; Maveety 2017). Here I focus on its apparent before and after effect on the focused issue of circuit court nominations.

Democratic concern with ideology accelerated somewhat in the lead up to his nomination. Of

the 18 hearings in 1986 and 1987 that took place before the Bork nomination, Republicans asked ideological questions of 15, whereas Democrats asked five. Republicans continue to be concerned about broad philosophy and ask all nominees about it; Democrats inch in that direction with questions to certain nominees (e.g., Edmondson 1986) about broad legal concepts (civil liberties and the 1st Amendment) without any apparent connection to it in the nominee's background. After the Bork nomination, the Democrats became on par with Republicans in their concern about ideology during the circuit court hearings. Of the 51 hearings that were held post-Bork in the 1987 through 1992 period, 41 were asked ideological questions by Democratic senators whereas 28 were asked by Republican senators. Going forward, senators of both parties continued to regularly ask circuit court nominees these types of questions.

Graphically displaying much of this chapter, figures 3.10 and 3.11 plot the nominees as to whether they were asked an ideological question at their hearing and the party affiliation of the senator asking. The only difference between the two figures is that 3.10 plots the proportion of nominees and 3.11 the count. The figures begin in 1977, and the first two years on the plots capture the tail end of the long era, discussed earlier, when non-ideological, qualifications-focused assessment dominated. As such and as the figures show, in these two years no nominees were asked any ideological hearings at their hearings. This era ended in the turning point years of 1979 and 1980; it was then that about half the nominees were asked ideological questions with the parties doing so in roughly equal measure, though the substance of the question differed between the two parties. Then, as the figures show, in 1981 began several years of utter Republican domination; Republicans asked virtually all, and Democrats virtually no, nominees about their ideological outlook.

This asymmetry began to wane in 1986, and dissipated in 1987. At this point, coinciding with the Bork nomination, the parties reached parity in the rate in which they ideologically questioned

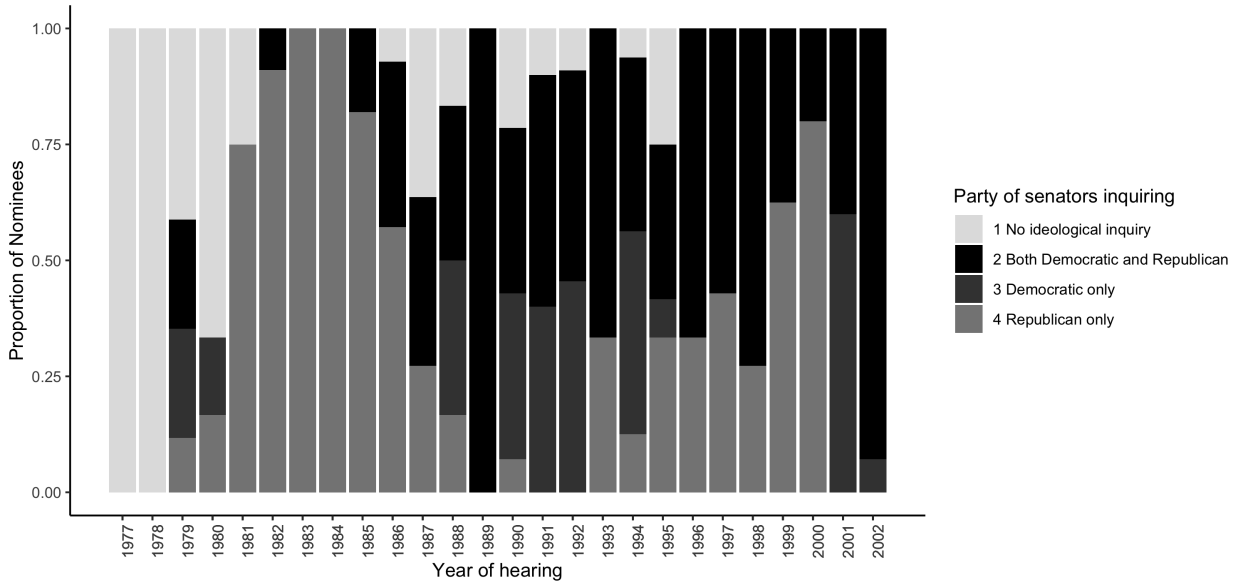

Figure 3.10: The proportion of circuit court nominees, by year, asked an ideological question at their hearing and the partisanship of the asking senator. *Source: Calculated by author by reading and coding transcripts.*

nominees and nearly all nominees were asked such questions (and usually without a connection drawn to the nominee's own background that Democrats seemed to almost always require in the past). While a small minority of nominees were not asked about ideology at certain points still in the 90s, by the end of the decade all were and it was a fully bipartisan effort (as figures 3.10 and 3.11 show). Senators of both parties asked varied questions related to how the nominees interpreted: the Constitution in broad terms, particular constitutional provisions, and specific policy matters the courts dealt with regularly such as abortion, the death penalty, and civil rights law. The parties continued to differ in the substance of their questions, albeit in a more subtle way. Democrats opted to make commitment to precedent their most common (though not only) question about broad judicial ideology, while Republicans rarely asked about judicial philosophy from this angle.

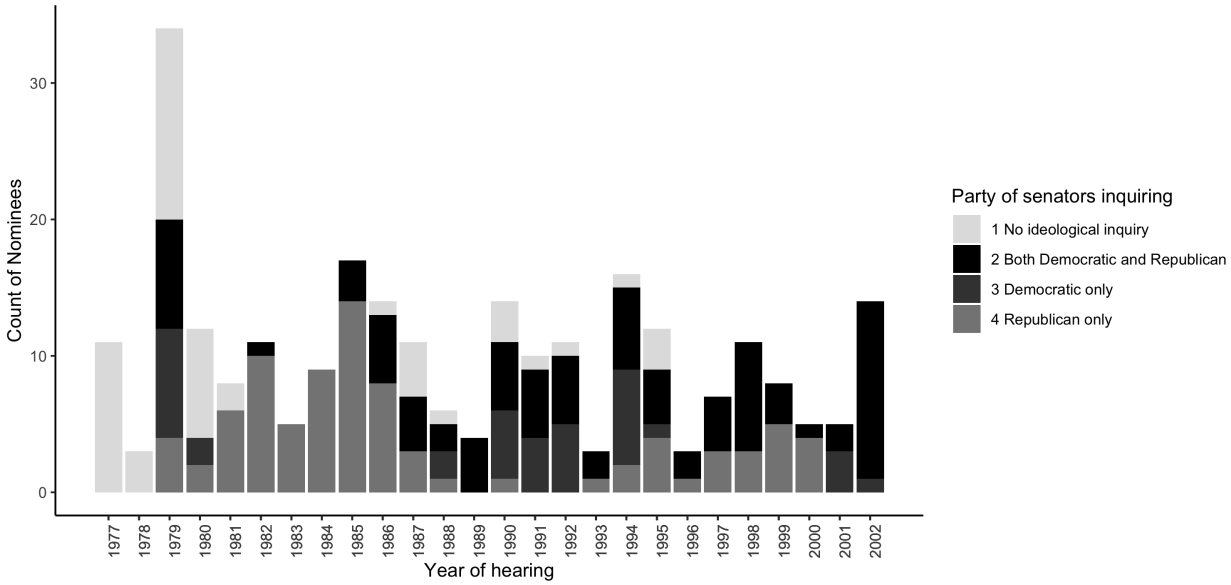

Figure 3.11: The number of circuit court nominees, by year, asked an ideological question at their hearing and the partisanship of the asking senator. *Source: Calculated by author by reading and coding transcripts.*

3.6 Comparing Non-Ideological and Ideological Eras

Before moving to the next chapter, here I provide a broad comparison of the largely non-ideological era of 1978 and earlier with the largely ideological era of 1979 and later. In an attempt to draw out some broad takeaways related to ideology and divisiveness from 130 years of historical data, table 3.4 lays out five different periods of time (with their corresponding levels of ideological evaluation and the partisanship of the senators who engaged in it) and three metrics of divisiveness in that period: the average of the overall divisiveness score for a nominee, the proportion of nominees not confirmed, and the average number of nay votes per confirmed nominee. The first two periods listed, both in bold, are simply the entire non-ideological era and the entire ideological era (this latter era is broken into four more detailed subperiods beneath it). As the figure shows, the era

Time Period, Level of Ideological Evaluation, Party of Senators Participating	Average Divisiveness Score	Proportion of Nominees Not Confirmed	Average Nay Votes for Confirmed
1891-1978 **Rare Ideological Evaluation** **Both Parties Participating**	0.77	0.03	0.29
1979-2020 **Routine Ideological Evaluation** **Both Parties Participating**	2.50	0.18	9.30
1979-1980 Common Ideological Evaluation Both Parties Participating	1.52	0.08	1.68
1981-1986 Routine Ideological Evaluation Only Republicans Participating	1.28	0.02	2.21
1987-1995 Routine Ideological Evaluation Both Parties Participating	1.88	0.19	1.33
1996-2020 Universal Ideological Evaluation Both Parties Participating	3.23	0.24	16.7

Table 3.4: Different periods of time based on the level of ideological evaluation and the partisan affiliation of the evaluating senators, and the corresponding level of divisiveness during those periods. *Source: Calculated by author.*

when ideological evaluation was rare is much less divisive across all three metrics when compared with the era when ideological evaluation became routine.

I put these metrics on the table in order to observe that the pattern is exactly as expected if ideological evaluation drove divisiveness. Compared with the earlier non-ideological paradigm, the 1979 and later era saw, on average, a three times larger overall divisiveness score, a six times larger proportion of not confirmed nominees, and a 32 times larger share of nay votes per nominee. While not proof, figure 3.4 is suggestive and does demonstrate that ideological evaluation and divisiveness go hand in hand. In this chapter, the more compelling evidence that judicial ideology drives divisiveness is the earlier analysis that looks *within* the pre-1979 non-ideological paradigm.

The regression analysis results in figure 3.3 discussed earlier show that ideological evaluation predicts divisiveness in this mostly tranquil period. In chapter 5, I explore the role judicial ideology plays in driving divisiveness by looking within the often tumultuous period of 1979 and later

There are some additional key takeaways of this chapter. The hearings before the Judiciary Committee proved to be a rich and varied data source. They could be long or short, and involve extensive questioning by the entire committee or just brief well wishes from the chairman with no other comment. Hearings varied over time and could assess different concerns about nominees, from brief affirmation of qualifications to prolonged investigation into a scandal; some hearings even centered on the fantastical allegations from surprise witnesses claiming to be wronged by the nominee. As for ideology, from 1891 through 1978 it was extremely rare for senators to evaluate a nominee's. Out of nearly 400 nominees in this era, only 26 were ideologically evaluated at their hearing. There is some quantitative evidence that divided government led to this uncommon type of evaluation, but the qualitative analysis is more compelling. This qualitative evidence shows that these 26, occurring intermittently across the decades, fall into five different groupings and involved ideological concerns that were highly salient, mappable to a larger event, linked to something in the nominee's background, and of bipartisan concern. These nominations, as a group, were more divisive than the others from this era.

Eventually ideology became a prominent feature of the senatorial evaluation process. As for timing, it clearly emerged in 1979-1980; in that single Congress nearly as many nominees were ideologically evaluated as in all previous Congresses. As the 1980s progressed, ideological assessment became nearly universal; by the end of 90s, it was universal. As for the role of party, at first both engaged in equal measure, but then for several years it was only Republicans who partook in such evaluation. Republicans were particularly important to the emergence of ideological evaluation because they pursued it so vigorously and did not let even copartisan nominees off the

hook; they asked pointed and extensive ideological questions, and laid down guideposts of how a proper judge thinks. Democrats asked about singular issues or (more commonly) avoided ideology altogether, until the Bork nomination when they caught up. As for the policy issues animating ideological evaluation, there is no evidence that it was motivated by a single issue such as abortion; an array of policies animated this, as did—and even more so—an interest in broad judicial interpretive philosophy.

Chapter 4: The Senators' Private Goals When Staffing Courts

4.1 The Private Senatorial Decision Making Process: Introduction to a New Data Set and an Overview of the Findings

In the quest to understand the politics of confirming circuit court judges over time, and in particular the increased divisiveness and the role judicial ideology has in driving that, the Senate confirmation hearings discussed in the previous chapter, for the reasons discussed there, are particularly valuable. However, they are just one data source representing one (albeit climactic and critical) moment in the confirmation process. Since the research questions here are tricky historical matters that span over 100 years and can only be answered outside of an experimental setting using observational data, preferably more evidence would be brought to the table. Ideally, this additional evidence would not only be capable of authenticating my earlier findings, but also provide some new dimension to understanding the changes we have seen over time.

In order to accomplish this, in this chapter I utilize a large, original data set that I built of the senators' private correspondence regarding individual circuit court vacancies. The data set draws upon nearly the entire universe of senatorial manuscript collections stored around the country, and is comprised of hundreds of private letters and memos of individual senators expressing their views and evaluation process in relation to specific circuit court nominations from the administrations of Woodrow Wilson through George W. Bush. With this new data set, I focus in on ideology and my

core questions surrounding its impact on the divisiveness of the confirmation process; but given that this is the first time a large corpus of new data is being examined, I also take a step back and briefly discuss the other, broader factors that are driving the senatorial decision process.

This data complements the previous chapter especially well. That chapter examined the formal and public senatorial decision-making process, but in this chapter I look at the personal and non-public correspondence of the senators. These together will allow for a holistic understanding of what determines the senators' decision-making in relation to circuit court vacancies. I am able to check both sides (public and private) of the same coin (senatorial assessment of circuit court nominees), and certain core findings will enjoy this broad supporting evidence. Therefore, the overall analysis and conclusions do not depend on a single data source, type of evaluation, or stage in the process. One needs to be especially careful when extrapolating from archival data, but I mollify these concerns by collecting an enormous amount of it and also undergirding it with the hearings data.

Findings in the previous chapter are particularly important to the validity of my overall argument, and in this chapter I further hone in on some key findings and provide additional evidence for their validity. In particular, a lot rides on my conclusion that the ideological evaluation of judicial nominees was rare prior to 1979 and that this permitted a non-divisive nomination and confirmation process during that era, quite unlike today. Exploring this finding and performing additional analyses in that chapter led to my conclusion that judicial ideology and the evaluation of judicial ideology was a key contributor to revolutionizing the politics of staffing the circuit courts. Given this, the worst case scenario would be that there was indeed widespread ideological scrutiny during this period that I simply failed to identify and take into account because of a lack of due diligence.

This huge archival data set allows me to perform this due diligence and see if the evidence here is consistent with my earlier findings that ideological scrutiny during the first 88 years of the

circuit courts' existence was rare—and that when it arose it was in relation to peculiar major issues of the day, and then receded again. Moreover, this new archival evidence can lend credence to, or instead call into question, key findings related to partisanship and policy issues once ideological evaluation became routine: during most of the Reagan years Republican senators were focused on judicial ideology and Democrats were not, and the focus was on broad judicial philosophy not any particular issues. To a degree, I am also able to use the archival material to assess whether the ideology of the nominees drove contentiousness, and not, as others forward, a unique "big bang" event or a generically polarized environment. In short, as the previous chapter laid out the broad and fairly comprehensive outline by looking at the formal mechanism of senatorial review, this chapter will confirm that outline and provide some detail, especially for periods of time and issues for which the hearings are less informative.

In this chapter, I have four additional sections, all of which are focused on this new archival data set and the insights drawn out of it. (1) I introduce the new data set. This type of data has numerous unique advantages, which I list and discuss. The collection process itself was extremely systematic as well as exhaustive as possible—built from over 100 onsite archival collections across over 70 institutions. The data set contains discrete, codable material on over 300 different nominations and over 700 nomination-senator pairs from the 1910s into the 21st century. (2) As the first look at this data, I initially take a holistic approach and see what the data tells us about the senatorial evaluation process in a very broad sense. As seen last chapter, qualifications and ideology are both important factors. Additional senatorial concerns related to the role of the nominee's homestate, personal relationships, race and gender, and partisan affiliation also appear throughout the time series. None of these new factors appear to play a dominant role in any era, however. (3) I then transition to focusing on ideology, first before 1979. The extensive archival record indicates that ideological evaluation is indeed extremely rare in this period, alleviating my principal concern

that it may have been widespread but simply not discussed at the hearings for some reason. Simply put, the vast majority of nominees just aren't evaluated as ideological actors. The limited instances where it does occur are often for nominations already identified in the previous chapter. Archival correspondence indicates nominee ideology drives senatorial opposition in many cases. (4) Looking at ideology in 1979 and later, the archival record confirms that Republicans took the lead on ideological evaluation starting in the 1980s, and that they were motivated by broad philosophy. However, abortion and overt conservatism had a somewhat more prominent role than the hearings from the 1980s would suggest. Finally, I briefly discuss the array of policy matters animating ideological evaluation most recently.

4.2 Archival Material as a Data Source: Concept, Benefits, Collection Process, and State of the Data Set

4.2.1 What the data looks like

While this data set is original and collected from scratch, it is inspired by previous archival work done in relation to the circuit courts. Far and away the most prominent and systematic is the long-standing research agenda of Goldman focusing on *presidential* selection of nominees, particularly his book looking at the motivations of FDR through Reagan in picking lower court judges. Using a data set of internal presidential correspondence and memoranda drawn from the archived papers of these presidents, he determines (when there is documentation) how many of a president's lower court nominations were motivated by a personal agenda (appoint friends or associates), a partisan agenda (appoint to shore up political support for the party), or a policy agenda (appoint those who share the administration's policy or ideological goals) (Goldman 1997, 3-4).

My efforts relate to the *senators'* evaluation processes during this long history, not the presi-

dential level selection. When a research design utilizes archival material, the exact data brought to bear can be amorphous. I avoid that here by having clear inclusion standards. My data is senatorial correspondence, in the form of a private letter or internal memo, about filling particular vacancies on the circuit courts. Correspondence that is just about a senator's thoughts on the judiciary at large or about sitting judges is not included: all documentation pertains to the actual process of filling a vacancy and was written contemporaneously, either relatively soon before[10] or, occasionally, right after the vacancy was filled. Sometimes the correspondence is about filling the judgeship in general without reference to any particular individual who might be nominated, but almost always there is reference to particular jurists who may fill the vacancy. More often than not the correspondence is about the individual the president actually nominated for the vacancy, but one-fourth of the correspondence is about some potential nominee who was never actually nominated.

The correspondence is from senators[11] to (a) the president or White House staff, (b) fellow senators, (c) constituents, or (d) members of the same senator's office (i.e., internal office correspondence or memoranda). The large majority of the correspondence in the data set is to the White House or fellow senators and hence communication among political elites. The overwhelming majority of correspondence is initiated by the senator, though sometimes the correspondence is in response to a letter. When the correspondence is responsive, it is usually to a constituent. When I speak of constituents, this often includes the archetype—the average voter who writes in to the senator to express views and then receive a response—but this also includes more high-profile constituents, such as known associates of the senator, legal elites, and, on occasion, political actors

[10] As vacancies are sometimes anticipated or remain open for a few years (especially in recent decades), occasionally a letter about filling a vacancy is dated a few years before it is actually filled.

[11] On rare occasions the letter is signed by staff of the senator but written at the behest of senator. Of course, no doubt much of the correspondence signed by the senator himself or herself was written by a staff member at the direction of the senator; however, there is actually only limited indication in the archival record that staff as opposed to the senator wrote the correspondence.

such as sitting judges, House members, and governors.[12] Some letters are a few pages and internal memos within the senator's office can be several pages, but because this correspondence is from senators and most often to fellow senators or presidents—and is meant to actually be read—the overwhelming majority of the correspondence is only one page.

As such, this correspondence offers a succinct data point. It is also codable. Almost always the senator mentions at least one variable about the actual (or potential) nominee (or nominees) the senator is considering as he or she goes through the process of filling the vacancy. The nominee's qualifications, ideology, homestate, personal relationships, race or gender, and party affiliation are the six factors mentioned, with relative frequency, in the data set. Commonly, multiple nominee traits are mentioned in a single correspondence. For example, the senator could note the relevance of the nominee's homestate, qualifications, and ideology in one letter. Only rarely (6% of the data set correspondence) does the senator mention none of those five factors. Letters of this sort are essentially void of substantive content about the assessment process; most often, these types of letters are to a president or fellow senator and simply note support or opposition without explanation, or to a constituent with assurance the nominee will be evaluated carefully without any explication of the substance of that evaluation process.

In total there are well over 1000 pieces of correspondence in the data set. But the unit of analysis isn't necessarily a single letter. Instead, it is the full collection (in this case in the form of a combined PDF) of all the correspondence I have from a single senator about a particular vacancy. In some cases, this is a single letter, in other cases it is dozens of letters to a variety of people about several potential nominees to that vacancy. Therefore, I speak of nomination-senator pairs (i.e., vacancy-senator pairs) and consider that the unit of analysis throughout much of this chapter: in

[12]Individuals who are not, strictly speaking, constituents because they are not residents of the senator's state are also included in this category. I term anyone not affiliated with the Senate or the White House as a constituent for simplicity. In any case, "constituent" communication from individuals outside of the state is very rare.

a senator's *collection* of correspondence about a single vacancy, what is the senator saying and evaluating across all correspondence. I also use a different concept of the unit of analysis at times: simply all the senatorial correspondence about a given vacancy, not distinguishing among senators. I make clear which concept is operative for any given analysis below. Because this is archival data, the unit of analysis is relevant from a conceptual, organizational, and structural standpoint. It is less relevant from a technical or data science perspective; for instance, no regressions will be run using this data.

All of this data together presents an unprecedented opportunity to see what the senators were looking to get out of circuit court vacancies, or at least what nominee traits they were evaluating, in their private correspondence. Previous scholarship finds, as does the data analysis in this dissertation, that senators play an active, determinative, and sometimes even dominant role in the process of staffing the courts (Goldman 1997; Steigerwalt 2010; Southwick 2013). Yet there is little systematic and empirically-grounded analysis of senatorial objectives. With this data, I will test the hypothesis that ideological or policy concerns were uncommon in non-divisive eras. I will also test the hypotheses that Republicans led the transition to an ideology-centric evaluation of circuit court nominees, and that no singular policy concern was behind this move. These are all important in answering the central question of how and why the process has become so divisive.

4.2.2 How it complements the hearing analysis while adding additional dimension

The hearings evaluated in the previous chapter have the advantage of being an institutionally standardized public evaluation moment that was preserved; this allows for broad comparisons across time. The use of the archival data set in this chapter is much stronger because of the foundation of the more complete hearing data set. Both of these together are greater than the sum of their parts. Using only one would be going out on a limb and trusting a single aspect of senatorial evaluation

(public or private) to be the definitive memorialization of that process. Having both of these data sets is critical should there be a norm in certain eras of simply not discussing ideology during the hearing, even while it is considered in public; or if, having assessed ideology in private before the hearing, senators see no need to further pursue the matter during the hearings. In short, having both data sets hedges against the possibility that I am overlooking anything.

The private correspondence is neither a better nor worse data source than the public hearing, but it does offer a different angle of the evaluation process. For one, it does seem to offer a more candid medium for senatorial expressions. In one correspondence, a nominee is deemed "not the brightest" (Alan K. Simpson Papers, Dick to Alan Simpson, February 24, 1994, box 331, folder 1). In another, a senator admits that "on account of the Labor boys laying down on" him he will have to vote against a nominee (Herbert Hoover Papers, Memorandum, April 16, 1932, President's Subject File, box 218). In other examples of candor one would not expect in a public forum, in private correspondence the partisan activity of a nominee's spouse appears relevant to the evaluation process; elsewhere, the state of residence appears to be the number one criterion in supporting a nominee (Ronald Reagan Papers, Larry Pressler to Reagan, December 21, 1982, FG052, box 26). More generally, the medium of private correspondence appears particularly conducive to discussing the relevance of personal relationships, partisan affiliation, and dogged preference for a homestate nominee; all of these are virtually absent from discussion at public hearings, but appear many times in private correspondence.

The private correspondence does have some outright advantages, particularly related to individuals not prominently part of the analysis heretofore. First, I have archival correspondence on over 50 nominations that did not have a hearing before the Senate Judiciary Committee. While these nominees were not scrutinized in public at a hearing, I can now understand how they were examined in private. Just as there are additional nominations that now have written senatorial word

about them, there are new senators whose perspective is heard. Almost always, the only senators active at the Senate Judiciary Committee hearings are the senators serving on that committee. At points in the time series, the number of senators serving on the committee is under ten, and it is never more than the low twenties. All senators, however, can write private correspondence about the nominees, and many of the letters are from senators not serving on that committee. Moreover, since the correspondence is often prior to a presidential nomination being made, senators write about prospective nominees for the vacancy—not just the nominee ultimately chosen. Of the nearly 750 senator-nominee pairs, over 200 are about individuals who were never nominated. In general, the evaluation is more about the vacancy in a broader sense, and not simply reactive to the nominee who ends up before the Senate; in private correspondence, senators often consider a broad array of nominees and advocate for favored jurists who have not yet been nominated.

On the whole, in archival correspondence, the senators interact with a wider array of personalities and political actors versus the hearings, where the senator's attention is focused on asking the nominee questions or, more rarely, engaging in brief colloquies with colleagues serving on the committee. In private correspondence, the focal point is not questioning the nominee him or herself but instead communicating with presidents, senators, and constituents about that nominee or other potential nominees. Unlike those highly visible and public data points, archival correspondence reveals the internal, nonpublic decision-making process of senators as they staff the courts. In this hazy past, it is best to have as much data as possible in order to understand what was going on.

4.2.3 Minimizing the limitation of archival data

A limitation of this type of data is that it is impossible to know and collect the entire universe of it, unlike the hearings and other types of data. Some of the private correspondence, maybe even a significant amount, remains unfound and neglected. Therefore, I cannot confidently say, for instance,

for every single decade or every single president the number of nominees who were ideologically scrutinized in private correspondence. It is simply not feasible to capture the complete universe of data, or even know the extent of it.

There are countervailing factors that minimize this limitation, however. As previously explained, this data and attendant findings are paired with the findings stemming from other data sources in the previous chapter. As explained in the subsections below, the archival data collection has been systematic and extensive, represented by dozens of archives and hundreds of nominees. Moreover, there is no reason to think that correspondence that addresses nominee ideology is less likely to have been preserved or found. And while archival preservation can be spotty, there are some periods with particularly good coverage; the Reagan Library, for instance, appears to have assiduously preserved and assembled together senatorial correspondence about Reagan nominees. Finally, my principal goal is not to know what happened in a tight period of time or with a highly specific set of nominees, but instead to get a broad sense across long stretches of time.

While there are perils in collecting historical data and unique challenges in extrapolating from archival data, the alternative would be to ignore these rich resources altogether. Instead of insisting on the impossibly comprehensive, my strategy is to use the data set to answer questions that can actually be solved by it and build a very large data set—as close to exhaustive as possible. Below I describe the details of that process.

4.2.4 The data collection process

The mechanics of building this data set of archival correspondence from senators about filling circuit court vacancies entailed tapping into three broad types of archival or manuscript collections. First, and most prominently, are the various collections of the senators themselves. All taken together, these collections are the most germane for my purposes, and the bulk of the data set is

comprised of correspondence from these collections. But, numbering in the hundreds and scattered across the country, these collections are the most difficult to comprehensively collect from. Second are the collections of the presidents. These collections, especially from Herbert Hoover onward, are far better preserved and organized, and more vast, than the typical senator's collection. While these are centered around White House documents, there does tend to be a fair amount of correspondence from senators and overall they are a valuable resource. Third are the permanent records of the Senate Judiciary Committee itself, housed at the National Archives in Washington, D.C. Occasionally the individual nomination files contain senatorial correspondence about them, and the unique asset of this collection is its wide coverage of nominations from the early 20th century.

Virtually all of the material across all of these collections is available only in paper form onsite at the archive. In a dissertation that sees one of its central contributions as first time analysis of originally collected data, the efforts related to the material used in this chapter were by far the most time intensive. It was a multi-year collection effort, possible because of the extra time I was allowed to dedicate to it as well as the generosity of travel grants. While this material can be expensive to get to and time consuming to go through, the benefit is the acquisition of valuable data—particularly related to the internal, nonpublic deliberative process and strategy of senators—much of which literally does not exist anywhere else. Moreover, many of the individual documents have never been gathered (or, in a handful of recently opened or obscure collections, even seen) by a researcher.

4.2.4.1 Senatorial papers

The core of my data collection comes from the archived papers of senators—as far as I can tell a largely neglected, and even forgotten, resource. Some senatorial papers seemingly have not been

accessed by a researcher in years.[13] Most 20th century senators bequeathed their professional papers to archival, manuscript, or special collection libraries (these terms are used interchangeably throughout). The apparent neglect stems in part from their disparate content and locations. Furthermore, taken together their size is vast. Using them in any unified manner requires significant effort, and any purpose for them must be tightly tailored in order to be feasible; if not, any attempt to gather data will become overwhelmed with literally millions of pages of documentation.

My approach was to be as structured, systematic, and exhaustive as possible. I first identified every senator who has served at some point during 1891 through 2012.[14] This resulted in a list of nearly 900 senators, or the complete universe of senatorial manuscript collections that (a) may exist and (b) may have material related to the selection process for circuit court nominees.

Identifying which of all these 900 senators actually had their papers preserved and where they are located may have been impossible if not for the online version of the "Biographical Directory of the United States Congress," which lists basic biographical facts for all individuals who ever served in Congress, including if and where their papers are preserved. I searched all 900 senators using this directory. Slightly more than half of these senators have no collection, a very small collection (less than 10 feet), or a collection that so far is not open to the public (either because of terms set by the donating senator or because archivists have not yet processed the material). None of these senators were considered further.

This left 428 senators that have a sizeable (i.e., more than ten feet) manuscript collection that is open to the public. Senators of the 1890s and first half of the 1900s fall into this category,

[13] I base this observation on interactions with archivists as I accessed senatorial papers around the country. In one case, it took a library several days to locate a collection donated a generation ago because they did not know where it was and the exact location it was indexed to be stored ceased to exist long ago. For other collections I accessed, it was the librarian's belief that I was the first person requesting the finding aid in several years. Some collections, on the other hand, are accessed regularly.

[14] I did not consider senators who served less than two years, nor did I consider senators who were serving in public office as late as 2012. Active politicians almost never archive their papers.

but senators of the second half of the 20th century are far more likely to have these collections preserved and they tend to be larger than their predecessors. Where these papers end up is at the discretion of the senator. Manuscript or special collections libraries at universities are common repositories for senatorial collections. A state's flagship public university often attracts the papers of the state's senators, though small colleges will sometimes have a senatorial collection or two as well. State and local historical societies are also common storehouses.

From here, I set out to identify which of these 428 collections might actually contain material that should be incorporated into my data set. Exactly what is preserved in these collections is up to the individual senator, and the collections' size and content, as well as its organizational elegance, vary drastically. While identifying the location of these 428 collections may well have been impossible without the "Biographical Directory," having sufficient knowledge of the collections' contents in order to utilize them would definitely be impossible without finding aids. Simply put, this project is only feasible because of the existence of these, the creation of which has long been standard protocol when manuscript collections are made public. The finding aid describes the contents of every box in the archival collection. For senatorial collections, the quality and detail of these can vary substantially. At worst, an entire box is given a one word description; a small fraction had finding aids that made utilizing the collections simply untenable—e.g., hundreds of boxes only labeled with the year the documents are from. At best, nearly every document in the collection is listed by name. Both of these styles are very rare, and most finding aids falls somewhere near the middle of these two extremes. Most of the finding aids are readily available online; many were not, but were eventually sent to me by librarians.

I depended totally on these finding aids to determine which of these collections were worthy of further investigation. I searched each of them for every variation and abbreviation of the words "court," "judge," "judicial," "judiciary," "nomination," and "appointment." 235 collections did not

contain these words or when they did their context made clear the material was not—or extremely unlikely to be—related to the filling of circuit court vacancies. For the remaining 193 collections, the finding aids indicated that they may contain relevant material. In order to effectively prioritize accessing and actually gathering documentation from the collections, I categorized each into one of three categories based on their likelihood of containing this relevant documentation suitable to be incorporated into the data set—excellent, good, and possible. Broadly speaking, finding aids for "possible" collections indicated there was material about judicial nominations but not necessarily to the circuit courts, for "good" the material was clearly about circuit court nominations, and for "excellent" the material was clearly about circuit court nominations and there was a great deal of it.[15] Given the lack of detail, the finding aids usually provide leads to be pursued as opposed to assurances of a particular document. Sometimes the underlying documents are original letters that literally don't exist anywhere else, while other times it is a stack of brittle newspaper clippings from major newspapers that can easily be found online. Categorizing collections into the three categories was part art, part science and was informed by interpreting so many different finding aids for this project.

Figure 4.1 plots the number of collections belonging to each category, and then within each category (a) how many collections were searched for this project with data actually found and incorporated into the data set, (b) how many were searched yet no data was found, and (c) how many went unsearched. As the plot shows, 12 were categorized as excellent, 10 of which were searched (all by me) and all of which contained data; 57 were categorized as good, 45 of which were searched (27 by me) and 40 of which contained data; 124 were categorized as possible, 103 of which were searched (35 by me) and 42 contained data. Across all categories, 158 collections

[15]By great deal, I typically mean material that appears to be related to 20 or more different circuit court vacancies and is copious for several. This is not always straightforward. A single listing on a finding aid could represent hundreds of pages of valuable data; several listings on a finding aid could represent a few pages of irrelevant documents.

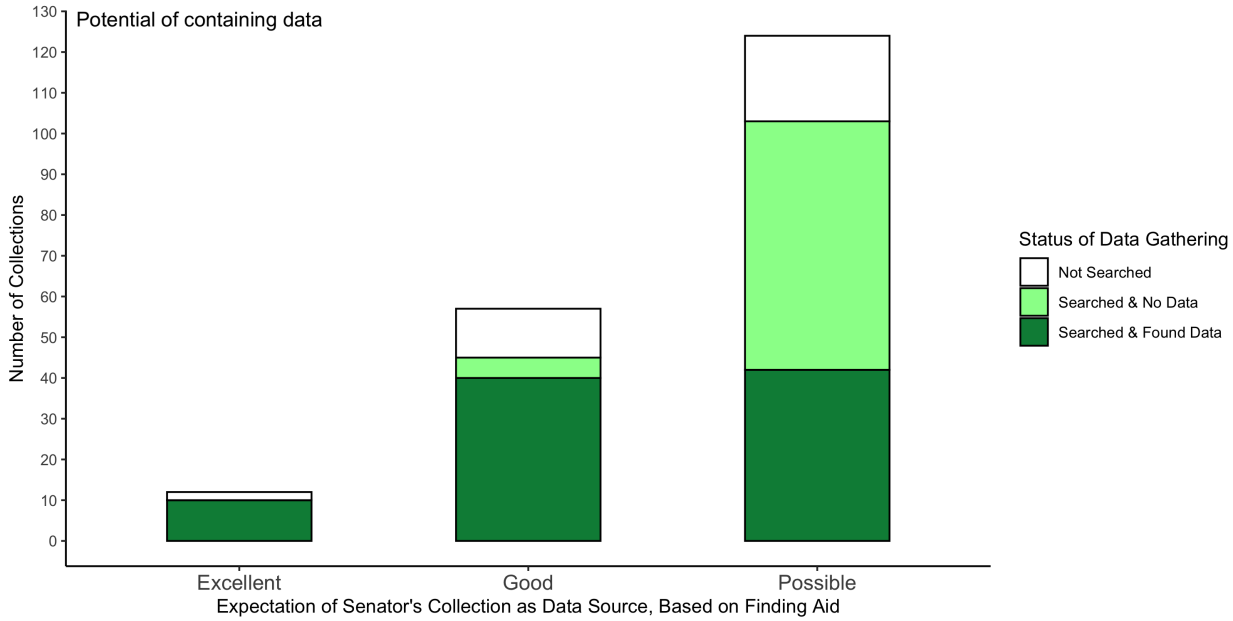

Figure 4.1: The potential for a senator's collection containing data, based on the finding aid, and the subsequent result from data collection efforts. *Source: Calculated by author.*

were searched (72 by me) and data was taken from 92. The ante hoc categorizations appear to be very accurate. 100% of the searched "excellent" collections ended up containing data, 89% of the searched "good" collections, and 41% of the searched "possible" collections.

Naturally, I prioritized personally visiting and searching the collections deemed "excellent," followed by those deemed "good." These "excellent" collections included the large collections of former Senate Judiciary Committee chairmen William Borah (R-ID), George Norris (NE), James Eastland (D-MS), Strom Thurmond (R-SC), and Arlen Specter (R-PA).[16] I was able to visit the collections of other long-serving senators with massive collections that fall into this category: Warren Magnuson (D-WA), Walter Mondale (D-MN), Fritz Hollings (D-SC), Charles Mathias (R-MD) and Daniel Patrick Moynihan (D-NY). I spent at least a day with each of these collections,

[16]The senatorial papers of more recent chairmen such as Ted Kennedy, Joe Biden, and Orrin Hatch were not yet available to researchers.

and multiple days for most. Those categorized "good" that I visited in person are too numerous to discuss individually, but those senators represent a broad mix of geography and era served. The many "possible" collections were visited opportunistically, when the collection happened to be geographically accessible or when I was already at the archive to search superior collections.

To illustrate how archival institutions were utilized to build this data set, table 4.1 lists all that were searched for data (88 in total). When the institution is listed in italics, I visited it in person and searched the relevant senatorial collections myself (26 in total). When it is in bold, data was actually found either myself (when in italics) or by a librarian (not in italics) and digitized and made part of the data set (60 in total). Not every institution listed should be thought of as making a similar contribution. Some—such as the Library of Congress, University of Georgia, University of Vermont, and University of Wyoming, among others—housed several relevant collections with a lot of material. Others—like Clemson and the University of Pittsburgh—housed a singular collection. Since they seemed to make for particularly productive visits, I went in person to these locations and many other. Visits lasted anywhere from a couple days to multiple days a week across several weeks (e.g., the Library of Congress). When I could not visit the archives listed on table 4.1 in person, the librarian or archivist searched it for me. This was only possible when the collection did not require extensive searching, and they agreed because I was looking for a specific type of document (senatorial correspondence about circuit court nominations and vacancies). While the geographic and institutional spread of collections was a great hindrance when the collections there were large and needed to be visited, it became a strength when attempting to get documentation remotely through the help of librarians; the need for assistance was spread across institutions and therefore kept low enough that I usually received some assistance.

Archives Utilized (in italics personally visited, in bold data utilized)
AL: **University of Alabama**, Alabama Department of Archives and History
AZ: University of Arizona
AR: **Ouachita Baptist University**
CA: ***Hoover Institution***, ***University of California (Berkeley)***
CO: **University of Colorado**, **University of Denver**
CT: ***University of Connecticut***, **Yale**
DE: **University of Delaware**
FL: ***University of Florida***, **Florida State University**
GA: ***University of Georgia***
HI: **University of Hawaii**
ID: **University of Idaho**, Boise State University, Idaho State Historical Society
IL: ***Southern Illinois University***, Abraham Lincoln Library
IN: Hanover College, Indiana University
IA: University of Iowa
KY: **University of Kentucky**
LA: **Louisiana State University**, **University of Louisiana**, Nicholls State University
ME: **Bates College**, **Bowdoin College**, **University of Maine**
MD: ***Johns Hopkins University***, *University of Maryland*
MA: ***Massachusetts Historical Society***
MI: ***Univ. of Mich. (Ann Arbor)***, Central Mich. University, Univ. of Mich. (Flint)
MN: ***Minnesota Historical Society***
MS: ***Univ. of Mississippi***, **Mississippi State University**, **Univ. of S. Mississippi**
MO: ***Missouri Historical Society***
MT: **University of Montana**, Montana Historical Society
NE: **Nebraska State Historical Society**
NV: **University of Nevada (Las Vegas)**, **University of Nevada (Reno)**
NH: University of New Hampshire
NM: University of New Mexico
NY: *Columbia University*, Cornell, St. John's University
NC: ***University of North Carolina***, **East Carolina University**, Duke
ND: **University of North Dakota**
OH: **Ohio Hist. Society**, **Ohio State University**, Western Reserve Hist. Society
OK: **University of Oklahoma**
OR: ***Oregon Historical Society***, **Willamette University**
PA: ***Penn State***, ***University of Pittsburgh***, Bryn Mawr, Carnegie Mellon
RI: **University of Rhode Island**
SC: ***Clemson***, ***University of South Carolina***, College of Charleston
SD: **SD State University**, **University of SD**, Dakota Wesleyan University
TN **Middle Tennessee State University**, **University of Tennessee**
TX: **Texas State Library**
UT: ***University of Utah***, **Utah Historical Society**, Brigham Young University
VT: ***University of Vermont***
VA: *George Mason University*
WA: ***University of Washington***, **Washington State Archives**
WV: **Shepherd University**, **West Virginia State Archives**
WI: University of Wisconsin
WY: ***University of Wyoming***
Washington, DC: ***Library of Congress***, Georgetown

Table 4.1: Total number of archives searched in order to build the data set.

4.2.4.2 Presidential papers

More than the typical senator, the papers of individual presidents have been carefully preserved. Every president from Hoover through Bush II has had their massive collection of papers housed at a library dedicated specially for their presidency. Based on a complete review of the detailed finding aids, all 13 of these presidential collections have some material dedicated to circuit court nominations. In fact, in the course of building this data set I discovered that presidential collections tended to be above average data sources as they contain correspondence between the White House and various senators. The Hoover Library was able to provide me with all the relevant material electronically, but the remaining libraries required an in person visit to acquire the documentation. Of these 12 presidential libraries, I was able to visit eight: Kennedy, Nixon, Ford, Carter, Reagan, Bush I, Clinton, and Bush II. All contained valuable documentation made part of the data set.

In addition to those more substantial and well-utilized collections, the papers of the earlier presidents involved in staffing the circuit courts (Benjamin Harrison through Calvin Coolidge) are also preserved. All these collections are digitized and available online (with the exception of Harding), making them far more accessible than the collections of presidents who came later, which are not available online. I searched all of these online presidential collections. While the collections are substantial and uniquely accessible, the archival efforts to organize and propagate them are minimal compared to the later presidents with their own libraries. On the whole the finding aids for the early presidents are significantly less detailed, which makes finding material related to circuit court judges less possible; moreover, there are indications that relevant material tends not to exist in these collections in the first place. However, given their accessibility, I inspected the papers of Harrison, Cleveland, McKinley, Roosevelt, Taft, Wilson, and Coolidge. Valuable data was located in the Wilson and Coolidge papers.

4.2.4.3 Nomination papers at the National Archives and Records Administration

Finally, I visited the National Archives in Washington, D.C. multiple times a week over several weeks in order to search the Senate Judiciary Committee's official records which are housed there. Several nominations across circuit court history have their own individual files there, though these are usually not as comprehensive as hoped, often containing only limited material and no senatorial correspondence of the type I sought. This collection does, however, have a unique breadth across time, covering several decades. Much of the records from recent decades are under seal, but the material from the first half of circuit court history is fully open. This collection provided valuable documentation for some early nominations where the senatorial and presidential collections were lacking; and in other cases this collection offered some assurance that there was no valuable documentation to be found.

4.2.5 The extent of the dataset

In the end, with 169 individual collections searched (86 by me personally) and 96 institutions searched (35 by me personally) the collection of data became much more extensive than I initially anticipated—because of the time I was able to spend on it, the generosity of travel grants, and the remote assistance of librarians and archivists. At the end of this data collection process, in total I collected well over 1000 private letters from senators about filling particular circuit court vacancies. Many of these letters are from the same senator about the same vacancy, so I structure the data not as a lineup of singular letters, but instead bundles of letters representing nomination-senator or vacancy-senator pairs. That is, all letters together from a given senator about filling a particular vacancy is considered one unit of analysis in order to see in total what that senator was saying and evaluating about that vacancy. In addition to this, I also keep track of simply the number of nominations or vacancies that I have any senatorial correspondence on, whether it be

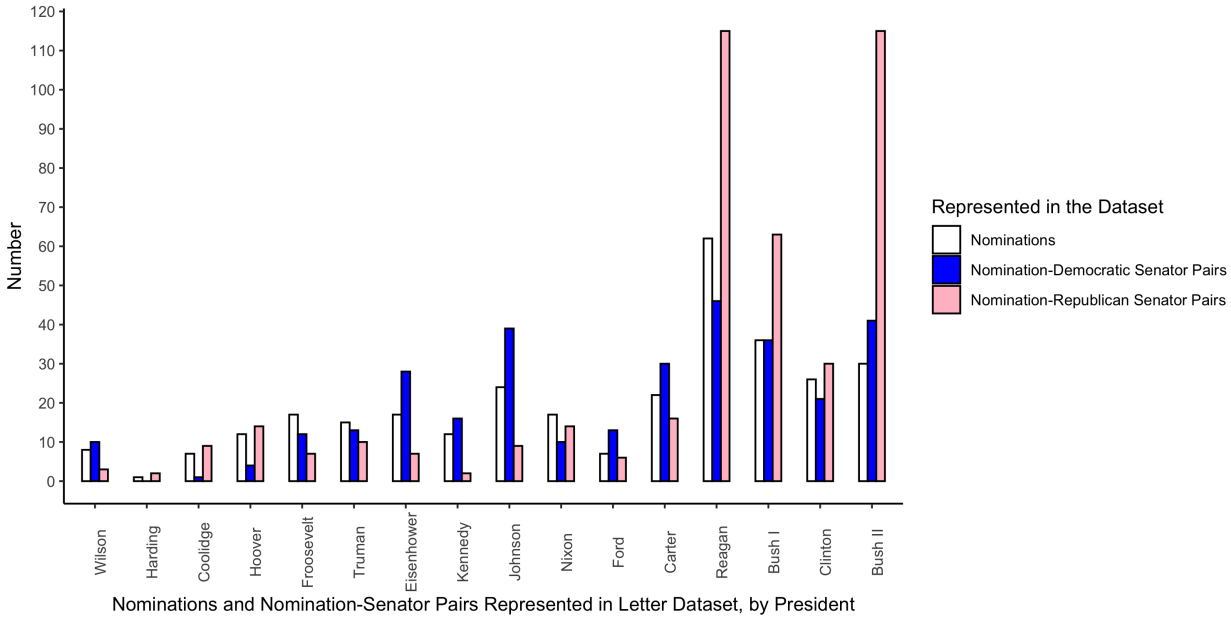

Figure 4.2: The number of nominations written about by a senator in a letter in the data set, and the number of nomination-senator pairs in the data set (broken down by senator partisanship), shown by president. *Source: Calculated by author.*

letters from only one senator or 100.

Figure 4.2 plots the number of nominations or vacancies (whether written about by one or 100 senators) represented in the data set as well as the number of nomination-senator (i.e., vacancy-senator) pairs represented, by president. The nomination-senator pairs are broken down by the party affiliation of the senator. As the plot shows, there are always more nomination-senator pairs than nominations because for a nomination to be represented in the data set there must be at least one senator writing about it (i.e., one nomination-senator pair); many times multiple senators write about the same vacancy. In total, there are 313 nominations and 740 nomination-senator pairs represented in the data set. Coverage across presidents varies, with more recent presidents generally experiencing more senatorial documentation related to their nominees. Every president from Hoover onward has at least ten nominations represented (except Ford). Reagan is the best rep-

resented president at 62 nominations, but Johnson, Carter, Bush I, Clinton, and Bush II all have over 20. Senators of both parties are well represented: in total, there are 320 nomination-senator pairs with Democratic senators and 420 with Republican senators. While not shown on the plot, no single senator or single circuit court comes close to dominating the data set, and senators from every state and nominations from every circuit are represented.

4.3 What the Senators Were Assessing in Private: An Overview of the Goals When Evaluating Judicial Nominees

Having built this large archival data set, I then proceeded to systematically read all the correspondence by a particular senator about a particular vacancy (i.e., I read the correspondence for each nomination-senator pair one by one). As I did so, I coded each nomination-senator pair's collection of letters for content. This presents an uncommon opportunity to identify the factors senators might consider as they evaluate circuit court vacancies. I began my reading and coding with an open mind as to what might be discussed; based on the data I eventually arrived at the six nominee traits repeatedly discussed: objective qualifications related to ability, ideology, homestate, personal relationships, race or gender, and party affiliation. This scheme is mostly prompted by the data itself, but is aligned with Goldman's work on presidential correspondence where he consistently codes most of these (Goldman 1997).

Figure 4.3 plots the proportion of nomination-senator pairs where the senator in question discusses each of these six nominee features. While the nature of the archival data makes it such that the prevalence of the discussion of these features cannot be tightly tracked across time, figure 4.3 provides a broad overview of the entire time series. There is very wide variation in the rate that each of these six features are discussed by the senators: qualifications 80% of the time, ideology 40%, homestate 18%, personal relationships 11%, race or gender 10%, and party affiliation 6%.

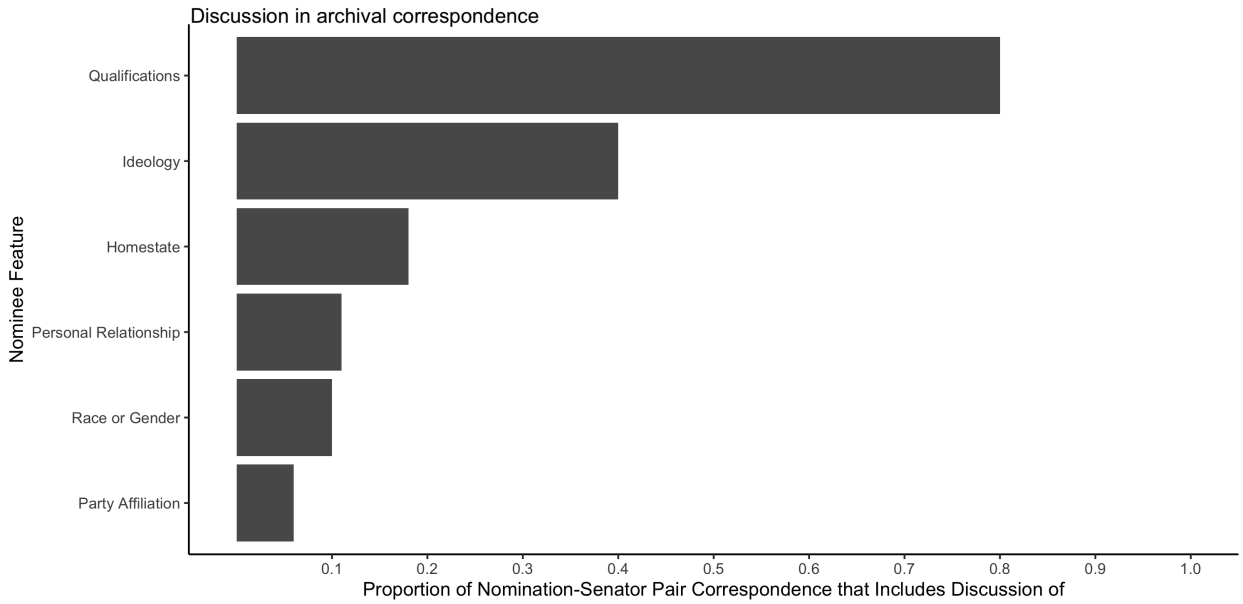

Figure 4.3: The proportion of nomination-senator pairs in archival data set that includes a discussion of certain nominee features. *Source: Calculated by author by reading and coding data set.*

Most of the time, more than one of these features is discussed. Only 6% did not include discussion of any of these; in those cases, the senator tended to state either support, opposition, or the promise of a fair evaluation without reference to any particular nominee feature. The senators corresponded with a wide variety of political actors: 44% of the nomination-senator pairs involved correspondence to the White House, 31% to a fellow senator, 22% to constituents, and 9% internally within the same senatorial office (this adds to greater than 100% because a senator may correspond with several people about a single nomination).[17] 81% of the time the senator initiated correspondence, and 19% of the time they were only responding.

To clarify, while these features were discussed when talking about and evaluating the nomi-

[17]To avoid redundancy and make the data collection process manageable, I did not collect every constituent letter for the same nomination-senator pair when the letter added no additional information about what the senator was evaluating.

nees, it is not always clear what role they play in motivating the senator's decision. Claims of that exactitude are often beyond the ken of this data. Sometimes the senator makes clear that a nominee feature is dispositive, but the most that can be said in general is that they are being weighed. Although focused primarily on ideology, since this is the first look at this data and it is an open question as to what senators were looking for with circuit court nominees, I address qualifications, homestate representation, personal relationships, race and gender, and party affiliation for the remainder of this section. In the subsequent sections I discuss the role of ideology.

4.3.1 Qualifications

As shown in the previous chapter, qualifications were often a focus of the confirmation process, and here too, in private senatorial correspondence, qualifications were usually evaluated and extolled. In fact, this is the most prominent consistency in the archival record across time. Despite the political nature and politicization of the judiciary, senators in all eras were focused on the objective qualifications of judicial nominees and seemed to be dedicated to the perpetuation of a high caliber judiciary.

A sample of terminology senators used to discuss nominee legal ability from the 1910s through 2000s, with all ten decades represented, include: splendid, excellent, one of the ablest, competent, sterling, high grade, well prepared, outstanding, first class, distinguished, well-rounded, gifted, impeccable, profound, accomplished, and bright. Qualifications related to character and integrity were also sometimes discussed. Highlighting impressive experience was typically done to credential a nominee. Other times, discussion of qualifications was neutral, with senators simply stating that they assess qualifications throughout the process, that they seek high caliber nominees, or the like. Only extremely rarely is the assessment outright critical—internal office memos, for example, describe one nominee as having "absolutely no experience in the practice of law," while

another is "not the brightest" (Gary Hart Papers, Rick to Hart, August 1, 1984, box 149, folder 11; Alan K. Simpson Papers, Dick to Simpson, February 24, 1994, box 331, folder 1). Even when talking about other factors like ideology or party affiliation, qualifications are almost always mentioned, indicating senators have long pursued well qualified judicial nominees. 590 senators across 273 vacancies wrote about nominee qualifications for the circuit courts.

4.3.2 Homestate representation

Representation of various states on the circuit courts is a recurrent theme, and is behind (albeit distantly) only qualifications and ideology in the rate that it is mentioned in the archival record. Naturally, senators fight for residents from their own state to be appointed. In earlier decades when there were fewer seats on the circuit courts and states often weren't represented on them at given moments, noting this and using it as the reason a homestate resident should get the appointment was a go-to for senators. When more than one state in the same circuit was without representation at the moment, there could be discussion around which state has had to wait the longest. The increase in the size of the circuit courts over time alleviated this, though it lasted into the 1980s. In particular, the South Dakota senators, in a series of letters in the early 80s, advocated for a homestate appointment by pointing out the state had not had one since 1960. In modern years, every state is represented on the circuit courts.

In those cases when all states are already represented on the court, the justification the senator most often provides for the homestate receiving the appointment boils down to the population of the states, or the percentage of filings from the states, relative to the proportion of the sitting judges that hail from each state. Sometimes there are vague warnings that another state "could dominate" the circuit should it get the appointment. A claim of a unique legal system, such as particular reliance on common law (Florida) or the Napoleonic Code (Louisiana), is also warrant to insist

on a same-state denizen. Often times, one gets the sense that senators just offer up fairly tenuous arguments in an ad hoc manner if the fact pattern supports that their state should get the circuit court appointment in question: the state is the only one in the circuit with copartisan senators and governor, the state supported the president in the last election, the state does have sitting judges but they are all crosspartisan appointees, the state is growing, the competitor state in the circuit has representation on the Supreme Court, and the competitor states have a high number of senior judges on the circuit court.

Though discussed only in about one-fifth of senator-nominee pairs in the data set, when the state of residence is mentioned it is often the focal point of the senator. After recommending several specific Louisiana jurists to President Roosevelt for appointment to the 5th Circuit, the two senators cheerfully conclude their letter that they will submit more names if all of those are objected to. Senatorial focus on the homestate can also explicitly preclude the senator from considering a non-resident. In many cases, state residence is the only nominee feature even discussed. Senators can be honest brokers on occasion, acknowledging their state is adequately represented and that the vacancy belongs to another state. 136 senators across 99 vacancies wrote about state representation and the circuit courts.

4.3.3 Personal relationships

Taking parochial concerns one step further, senators occasionally express interest in nominating an individual with whom they have a personal relationship. Archival correspondence exchanged privately, relative to a hearing held publicly, has heightened potential to reveal instances of senators writing about placing friends on the bench, given the perceived imprudence of letting a personal friendship factor into who receives a lifetime position on an independent judiciary. While a friendship between senator and nominee can be acknowledged in public, private letters to fellow senators

or the White House, or an internal memo, provide a more candid forum.

85 senators across 73 vacancies, representing all ten decades from the 1910s to the 2000s, have referenced a personal relationship when discussing filling a circuit court vacancy. There is certainly some range for these types of relationships. Some are described as childhood friends, law school roommates, and even surrogate family. Others are the employees of the senator. Most often the nominee is simply described as a close personal friend. On the outer limit of this category, sometimes the nominee is simply described as a friend or someone the senator has personally known for years. It is impossible to know how generous senators were with these expressions, and some may have used the label "friend" loosely. However, there is no evidence for that and I code in this category all references to personally knowing the nominee on some sort of intimate level beyond mere acquaintance or familiarity.

4.3.4 Race and gender

In the data set, the first mention of race comes in 1950 with the nomination of William Hastie, who would be confirmed later that year and serve as the first Black circuit court judge. Senator Donnell (R-MO) assured a constituent that the Judiciary Committee "will not be influenced by any prejudice on account of race" (Forrest C. Donnell Papers, Donnell to Sidney Redmond, July 1, 1950, folder 7646). On the other hand, segregationist Senator Russell (D-GA) claimed to a constituent that a majority of the Senate will support Hastie "for fear that they will be accused of racial prejudice... [t]his is a very sad state of affairs!" (Richard B. Russell Collection, Russell to Stephen Brown, August 11, 1950, subgroup C VII I, box 33). Gender is first mentioned in 1964, when Senator Eastland (D-MS) advocated to President Johnson that federal District Court Judge Burnita Matthews be nominated to the DC Circuit: "There are no ladies now on this Bench and I think this would be a very fine opportunity to recognize the feminine sex with this appointment"

(James O. Eastland Collection, Eastland to Johnson, April 6, 1964, series 1, subseries 22, box 7). Beyond these moments, discussion of race or gender is exceedingly rare until the Carter administration, when senators sometimes cited the administration's preference for racially diverse nominees and more female jurists. Similar discussions intermittently occur into the early 21st century when the data set ends, but overall it is a rare phenomenon. 69 senators across 19 vacancies mention race or gender, with the overwhelming majority of these senators (i.e., 49) writing in relation to the Miguel Estrada nomination of 2001.

4.3.5 Party affiliation

Party affiliation is also mentioned only rarely. While race and gender are discussed in the data set only in the second half of the time series (1950 and later), party affiliation, unsurprisingly, is discussed from the very beginning. Many letters simply note the partisan affiliation of potential nominees; calling them a "life-long" Democrat or Republican is a favored terminology throughout the time series. Others lay out the potential nominee's actual electoral efforts for the party. In 1919, Senator Harris (D-GA) lamented that jurists "who helped to carry Georgia on the President's request... are to be ignored" (Woodrow Wilson Papers, Harris to Joseph Tumulty, November 25, 1919, reel 221, 132E). In 1938, Senator Hill (D-AL) explained that potential nominee (and future circuit judge) Leon McCord provided "services to the Democratic Party... [and] spoke all over Alabama" on behalf of Franklin Roosevelt's election while also supporting him at the convention (Lister Hill Papers, Hill to James Roosevelt, April 4, 1938, box 89, folder 99). These types of statements continue throughout the time series. Another example occurred in 1985, when Senator Specter (R-PA), in recommending a nominee to President Reagan, noted the nominee's support for the Reagan-Bush election and reelection, as well as the Republican gubernatorial and senatorial tickets in Pennsylvania throughout the years.

When the partisan credentials of a possible nominee seem minimal because he has been a sitting judge for several years, in 1969 Senator Thurmond (R-SC) points to the nominee's wife: "Mrs. Clark, however, has taken an extremely active part in Republican campaigns and served as co-chairman for the Nixon-Agnew Campaign in Orange County" (Richard M. Nixon Papers, Thurmond to Nixon, June 4, 1969, FG 52, box 1). Another time the possible relevance of partisanship is acknowledged even as it is seemingly conceded that the nominee is not particularly strong on that front. Senator Anderson (D-NM) noted of a potential nominee in 1961: "Somewhere along the line people may ask Oliver Seth what he has done for the Democratic Party to deserve a nomination to a high position by a Democratic President. That may embarrass him a little, but he does have high qualifications professionally" (Clinton P. Anderson Papers, Anderson to Robert McKee, March 15, 1961, box 198). Seth, nevertheless, received the appointment and went on to serve 34 years on the circuit court.

While certainly none of this represents corruption, some of these instances of partisan loyalty and involvement are unlikely to be highlighted in any public forum. These internal communications are useful, therefore, in showcasing this additional, though relatively slight, dimension to the confirmation process. 40 senators across 33 vacancies broached the subject of party affiliation in filling seats on the circuit court. In discussions of partisan affiliation of this type, no connection is made to the party's policies, ideology, or platform. All of these ideological discussions are analyzed in the next section below.

4.4 Ideological Evaluation in the Archival Record prior to 1979

4.4.1 Initial assumptions and overview of new archival findings

My conclusion that the ideological evaluation of judicial nominees was rare prior to 1979 and that this allowed for a non-divisive nomination and confirmation process during that era is a central finding and core supporting evidence for my broader argument that judicial ideology and the evaluation of judicial ideology was a key contributor to revolutionizing the politics of staffing the circuit courts. In the previous chapter, I analyzed the formal mechanism of senatorial review (the Senate hearings), and this revealed that senators evaluated judicial nominees in ideological terms rarely and only under very specific conditions prior to 1979. Out of nearly 400 nominees, only 26 were ideologically evaluated at a public hearing in this period. I found that this (rare) ideological evaluation predicted a divisive process.

While I believe the hearings are systematic enough and a sufficiently key moment in the evaluation process to establish and defend these findings, ideally corroborating evidence would be presented. In short, I want to be sure of these findings and cover the possibility that for some reason ideology wasn't evaluated at the hearings (despite it seemingly being the ideal format) while at the same time it was widespread outside of the hearings, particularly in private. In light of these concerns, in this section I use the data set of archival senatorial correspondence to further investigate these questions. While I don't purport that this data set can be used to tightly track the rate of ideological evaluation over time in the way I do with hearings, it is large enough and systematic enough for some broad understanding of long eras (e.g., before 1979 versus 1979 and later).

The archival data set confirms that the ideological evaluation of circuit court nominees was exceedingly rare prior to 1979. Despite extensive data collection, I found evidence for only 19 nominations experiencing ideological scrutiny during this period. Moreover, ten of these 19 nominations

Time Period	Proportion of Nominations Ideologically Evaluated	Proportion of Nomination-Senator Pairs with Ideological Evaluation
1891-1978	.13	.20
1979-2020	.53	.50
1979-1989	.50	.48

Table 4.2: The proportion of nominations and nomination-senator pairs represented in the archival record that include senators evaluating or discussing ideology. *Source: Calculated by author by reading and coding data set.*

saw the same substantive type of ideological scrutiny already seen at the hearings—demonstrating that there is significant overlap and harmony between two distinct senatorial processes (the public and the private). Eight of the nominations were those also ideologically evaluated at their hearings. I take the high degree of matching despite only few observations of ideologically evaluated nominees in each data set to be an indication that both data sources are a good barometer of when ideology came to the fore during the confirmation process.

The lack of ideological evaluation in the archival record prior to 1979 is in contrast with the years 1979 and later. Prior to 1979, 13% of nominations represented in the archival data set (19 out of 144) and 20% of nomination-senator pairs represented (48 out of 238) saw ideological scrutiny. The rate of ideological scrutiny of nominations quadruples in the 1979 and later period: 53% of nominations represented (89 out of 168) and 50% of nomination-senator pairs represented (249 out of 502). These higher rates are not driven just by the most recent years. The rate is similarly high if the analysis is limited to the first ten years of this new, ideological era. From 1979 through 1989, 50% of nominations represented (40 out of 80) and 48% of nomination-senator pairs (97 out of 201) were ideologically evaluated. Figure 4.2 summarizes these rates of ideological scrutiny in the archival record across time.

While it is tricky to make sweeping statements given the imprecision of the data universe, the

data collection efforts on my part were so extensive that I believe it is fair to conclude that if there was regular ideological evaluation prior to 1979 it would have, at lease in significant part, been unearthed. In the following subsections, I make one final case for the comprehensive nature of the archival evidence, and then discuss the rare moments of ideological evaluation in this era. While analyzing these is informative, the key insight is not so much that a handful of exceptional nominations were looked at with ideology in mind. The historical record is crystal clear on that front—through hearings, archival letters, and contemporary press accounts—and this is in a sense no surprise to the modern reader. The insight is that hundreds of nominations from the same era—who were to be deciding legal disputes with major policy consequences for the rest of their working lives—simply were not.

4.4.1.1 Findings hold in the face of both a breadth and depth of evidence

While this archival data, inherently, cannot be complete, the data set is vast and these findings hold in the face of both a breadth and depth of evidence in the pre-1979 period. From 1913 through 1978, there is senatorial correspondence related to nearly 150 different vacancies and this represents nearly 250 nominee-senator pairs. There are several hundred pieces of senatorial correspondence in total from this period. Nominees of all 12 presidencies from Wilson through Carter are represented, as are nominees to each of the circuit courts. Senators write about the nominees in a wide range of contexts: to presidents, to fellow senators, to staff, to constituents—both copartisans and crosspartisans, both the ideologically aligned and opposed. Over a third of these vacancies with archival coverage had no Judiciary Committee hearings, so this data source offers documentation of the substance of the senatorial evaluation process where there was none before.

Beyond this *breadth*, there are data points of significant *depth*; at times, the documentation of

a senator writing about and auditing a single vacancy is very copious and allows for an extremely thorough investigation of a senator's thoughts and concerns related to a judicial vacancy. Even for nominee-senator pairs with such in-depth records, judicial ideology, most often, is never broached. Here are some examples. In 1933, at the dawn of the FDR revolution and in the midst of unprecedented federal governmental action, Senator Thomas (D-OK) wrote dozens of letters related to filling a vacancy on the Tenth Circuit; none of them address judicial ideology or policy decisions in the slightest. Interestingly, the dozens of letters from a diverse array of constituents are similarly devoid of the subject. In 1940, famed Senator George Norris of Nebraska wrote a long letter pertaining to filling a circuit court vacancy. He does find the time to offer intriguing thoughts on the effect of weather on governance (after "a wicked, blistering summer" his colleagues' "vitality is sapped and destroyed... [and] they are not, in truth, fit to do business") as well as somber asides a year into World War II ("the world has gone crazy"), but he does not say anything about the ideological outlook of the judicial nominee in question (George W. Norris Papers, Norris to Elmer Thomas, October 10, 1940, box 343). In 1962 Senator Anderson (D-NM) wrote over 100 pages of correspondence about filling another vacancy on the Tenth Circuit, and while qualifications, party affiliation, and personal relationships are all discussed at various points, ideology never is (Clinton P. Anderson Papers, file "Circuit Court of Appeals for 10th Circuit," box 198, file 230.02). In 1978, the final year of this largely non-ideological era, Senator Mathias (R-MD) sent the chairman of the Judiciary Committee "a list of questions that I would like to be asked, in my name, of all judicial nominees." These 20 questions offer several pointed inquiries into conflict of interest and experience, but none are about a judge's ideological approach or the ideological implications of judicial decisions (Charles Mathias Papers, Mathias to James Eastland, April 11, 1978, box 120). In short, the data set is wide and deep in the pre-1979 era, yet ideological scrutiny remains very uncommon.

4.4.2 Reaffirming previously identified instances of ideology

Today, a circuit court confirmation process devoid of ideological investigation of the nominee would be remarkable. However, for several generations the *presence* of this was remarkable. Of the 19 pre-1979 ideological nominations in the archival data set, ten are related to the ideological scrutiny already identified in the previous chapter. In that chapter, five distinct moments of ideological scrutiny were identified across 26 nominees: first, 1932 and labor law; second, 1937 and Court packing and the New Deal; third, 1950 and McCarthyism and leftist politics; fourth, 1959 and the conflict with the Supreme Court; and fifth, reaction to the *Brown* decision and the Warren Court, mostly related to race. Showing impressive congruence, all five of these moments are represented in the archival record. I briefly describe in turn how these five moments appear in the archival record.

First, in 1932, Senator Schall (R-MN) communicated to the Hoover White House that he would vote against James Wilkerson "on account of the Labor boys" (Herbert Hoover Papers, Memorandum, April 16, 1932, President's Subject File, box 218). Similarly, Senator Norris (R-NE) reviewed the record of injunctions that made the nominee controversial (George W. Norris Papers, John Robertson to Sumner Slichter, April 23, 1932, box 197). Second, in 1938 in the aftermath of the failed Court packing plan, Senator Hill (D-AL) commended nominee Leon McCord's "memorable fight for the Supreme Court Reorganization Bill" (Lister Hill Papers, Hill to James Roosevelt, April 4, 1938, box 89, folder 99). Third, in April 1950 Senators Donnell (R-MO) and Russell (D-GA), in separate correspondence to their own constituents, both indicated their review of the alleged communist ties of William Hastie. That same month, Donnell also expressed interest in nominee George T. Washington's relationship to the Taft-Hartley Act. Fourth, Senator McCarthy (D-MN) noted to a constituent that nominee to the Eighth Circuit Harry Blackmun "will affect the interpretation of the Constitution itself and have direct bearing on the civil rights of cit-

izens" (Eugene McCarthy Papers, McCarthy to Michael Doherty, September 17, 1950, box 59). Blackmun was among the nominees asked in 1959 the "oath" question, the routine question that contentious year about the general power and role of the courts.

The fifth category saw the highest level of private correspondence. The civil rights records of multiple nominees were discussed in private. These records were often the express reason senators opposed the nominees. The 1956 nomination of Simon Sobeloff, who saw one of the most contentious confirmation hearings of his era with days of hearings packed with senators debating civil rights and the American founding, prompted several southern Democrats to write about the nominee's understanding of the role of the courts in formulating policy, and this was the basis of their hesitation or outright opposition to the nomination. To a constituent, northern Democrat Senator O'Mahoney (D-WY) lamented that the nominee became controversial "because of prejudices which are aroused by emotional issues like... the Supreme Court finding that segregation of school children" is a violation of the Constitution (Joseph C. O'Mahoney Papers, O'Mahoney to Mildred Zahradnicek, July 20, 1956, box 164). The nomination of John Wisdom the next year saw similar scrutiny. Senator Johnston (D-SC) assured a constituent of his "very careful study" of the nominee's integration activities, while Senator Long (D-LA) more bluntly told his constituents, "I would be happy to see the President nominate to this Court a devoted believer in racial segregation" (Olin D. Johnston Papers, Johnston to T. D. Keels, April 23, 1957, box 60; Russell B. Long Papers, Long to Mr. and Mrs. P. N. Lingenfelter, May 17, 1957, box 76). Senator Eastland (D-MS), chairman of the Judiciary Committee, approached the matter more strategically: "Any Judge that we put on the Fifth Circuit Court of Appeals is a calculated risk... The alternatives to Judge Wisdom were horrible to contemplate" (James O. Eastland Collection, Eastland to Edmond Collins, July 3, 1957, series 1, subseries 22, box 51). In 1962, Senator Eastland expressed dissatisfaction with nominee Skelly Wright's civil rights record, but then concluded, again strategically, "there is

some advantage in getting this Judge out of Louisiana" (James O. Eastland Collection, Eastland to James Ware, April 4, 1962, series 1, subseries 22, box 52). The following year, senators, both Republican and Democratic, expressed concern or outright opposition to nominee George Edwards due to his past labor radicalism, just as the issue was raised at his public hearing. Finally, later that decade, several senators privately wrote expressing interest in nominee James Coleman's civil rights record, including five northern Democrats and two Republicans in a joint letter to the Senate Judiciary Committee Chairman. This record was pointed to as the basis for either support or opposition among senators.

All of these nominees experienced this same scrutiny at their public hearings, with the exception of Leon McCord and Skelly Wright. However, the scrutiny these two received was very similar to that experienced by other nominees at their hearings about the same issues (Court packing and civil rights in the aftermath of *Brown*, respectively). That the data confirm each other suggests that both are capturing those meaningful instances of ideological evaluation, not stray comments; these moments really were when ideology mattered. The patterned data adds confidence that both of these data sources are meaningfully capturing the senatorial process, and provides assurance that the data is also accurately reflecting those many nominations that did not see ideological evaluation.

4.4.3 Genuinely new moments of ideology

The data sets are not perfectly aligned, however, and there are a modest number of genuinely new episodes of ideological evaluation discovered in the archival record. These appear in three categories across nine nominations: two nominations in 1920 evaluated for whether they align with President Wilson and not his foe (and fellow Democrat) Senator Bailey of Texas, three nominations in 1947-48 after the Republicans finally retook the Senate majority, and four nominations

across 1970-78 representing disparate blips that cannot be easily categorized. All three of these are intriguing cases, but in each case the focus on ideology quickly disappeared from the historical record and they remain anomalies not altering the overall tenor of senatorial evaluation in this era.

In 1920, the Democratic senators from Texas, in a series of correspondence, assure the copartisan Wilson administration that their preferred nominee for either of the two openings on the Fifth Circuit is not affiliated with rogue Democrat Joseph Bailey, himself a former senator from Texas and still active in politics. To separate the potential nominee from Bailey, the senators tell the White House that their nominee is "opposing the Bailey movement in Texas" (Woodrow Wilson Papers, Morris Sheppard and Charles Culberson to Wilson, April 24, 1920, reel 221, 132E). To support this claim they further state their nominee "is an enthusiastic supporter of the League of Nations and of your policies along all lines," and in a separate letter one of the senators also references the potential nominee's position on child labor (Woodrow Wilson Papers, Morris Sheppard and Charles Culberson to Wilson, April 24, 1920, Sheppard to Joseph Tumulty, December 20, 1919, Reel 221, 132E). Bailey himself, on the other hand, opposed both the League of Nations and child labor regulations (Acheson 1932). This whole episode appears to be more motivated by assuring a nominee is not affiliated in any way with an infamous and wayward ex-senator causing disruption for the Democratic party in Texas than about how the judge will actually rule on the bench, but it stands out as a rare moment when senators saw ideology as relevant to the circuit court selection process.

Among the most intriguing evidence found in the archives was a series of three letters regarding three separate nominees across 1947-48. In each letter, Senate Judiciary Chairman Wiley (R-WI) used identical language asking representatives of the American Bar Association for "any comments that you may care to make... respecting... Nominee's political philosophy—not necessarily the nominee's partisan politics but the nominee's political philosophy in the broader terms of a

belief in our Constitutional system, etc" (U.S. Senate Records of the Committee on the Judiciary, Wiley to Tappan Gregory, February 4, 1948, nomination file of Harold Stephens, Wiley to Kenneth Parkinson, February 4, 1948, nomination file of James Proctor, and Wiley to John Buchanan, May 1, 1947, nomination file of John Caskie Collet). This is an (anomalous) instance of a senator being concerned about circuit court nominee ideology in a seemingly standardized way, and without apparent reference to anything special about the nominee or a larger political dispute; such evaluations are wholly absent from the public hearings. Frankly, concern that this sort of evaluation would be *common* during the process of senators examining nominees behind closed doors is largely what motivated the building and analysis of the archival data set in the first place. These three instances surely refute a blanket assertion that from 1891 to 1978 there is no evidence of evaluating circuit court nominees' overall ideology in a way unconnected to the nominee's own background or some larger and highly salient singular dispute.

However, this episode is only a subtle tremor in a stable historical record. Admittedly, the brief appearance of this type of evaluation in the late 1940s is curious given what is now known from the data in this chapter and last; but if one's perspective is grounded in modern politics, this evaluation should be consistent and widespread, not strikingly rare. As for *why* it appeared here for these three nominations, it is difficult to ignore the role of divided government. These three (John Collet, James Proctor, and Harold Stephens) were the only circuit court nominations made during the 80th Congress. Commencing in 1947, it was the first time the Republicans had control of the Senate since the early weeks of 1933 and the only two year period Republicans had the majority during the 20 years of Democratic presidencies from 1933 through 1953. Out of 80 circuit court nominees in this period, these were the only three made during divided government and the only three with evidence of this type of senatorial evaluation. This episode does offer one data point in support of divided government leading to ideological scrutiny. The takeaway is that this type of

evaluation did occur, has the capacity to register in the historical record, and was exceedingly rare (just not wholly absent).

Finally, there were four blips in the 1970s that don't amount to any coherent story. In 1970, Senator McClellan (D-AR) evaluated nominee William Miller's decision (as a lower court judge) in a criminal procedure case that was reminiscent of one which Justice Abe Fortas was vigorously questioned about two years earlier during his failed Chief Justice nomination. In separate correspondence, Senator Baker (R-TN) referenced the nominee's opinions in reapportionment as well as desegregation cases. That same year, a different nominee, Donald Ross, is written about in a joint letter by Senators Hruska and Curtis, Republicans of Nebraska. They write to a colleague that the nominee "is of that more careful and sound political philosophy that all three of us consider so vital to our judicial system" (John L. McClellan Papers, Hruska and Curtis to McClellan, October 7, 1970, box 474, folder 25). Notably, this nominee was filling the seat held by Harry Blackmun, who had just ascended to the Supreme Court. The ordeal of filling that seat on the Supreme Court—Blackmun was Nixon's third choice after two earlier nominees failed, based in part on the Senate's concern about their ideology—was undoubtedly fresh in the minds of the senators. Five years later in 1975, Senator Weicker (R-CT), in a letter to a colleague, said of nominee Thomas Meskill, "He is conservative" (Edward W. Brooke Papers, Weicker to James Abourezk, April 18, 1975, box 461). As a sitting governor, Meskill was an outlier for a circuit court nominee and saw opposition based on his qualifications and the actions he took as governor. Finally, during the process of filling a vacancy in 1978 Senator Helms (R-NC) references an earlier busing decision of one potential nominee, and protests that potential nominees for the vacancy were apparently asked about abortion and the Equal Rights Amendment. I do not mean to dismiss these completely, but they form no coherent effort to bring ideology to the fore; they are rare ripples in the first nine years of the 1970s, unlike the consistent waves to come in the next decade.

4.5 Ideology from 1979 to the Modern Day

In the previous chapter I found that 1979 to 1980 was a crucial turning point when circuit court nominees were regularly scrutinized as ideological actors by the senators of both parties. I also found that at the start of the Reagan presidency, ideological evaluation became *routine*—virtually every nominee was ideologically scrutinized. However the partisan story became one-sided with Republicans asking nearly all nominees about ideology and Democrats asking nearly none; and the focus was on broad philosophy, no one policy issue. With the Bork nomination in 1987, the parties reached parity in the rate they asked nominees about ideology and a broad mix of policy matters relevant to modern politics were discussed. By the late 90s, ideological scrutiny became universal. Below I briefly discuss what light the archival data shines on these conclusions; here again, the two data sources are generally aligned.

4.5.1 The end of the Carter presidency into the Reagan years

Two years is too tight a time period with too few nominees represented for any broad conclusions from the archival record. However, this record provides particular insight on the six nominees where private correspondence addresses their ideology: Bailey Brown, Cornelia Kennedy, Abner Mikva, Stephen Reinhardt, Patricia Wald, and Ruth Bader Ginsburg. Showing a very clean alignment with the hearings data, all six of these nominees were asked about ideology during their hearings, and about the same particular policy areas as well. Due to this clean alignment, it is not necessary to redo the thorough discussion in the last chapter using the more comprehensive data set. In short, the archival data adds little new but also does not undermine the conclusions regarding this period in the previous chapter. The nominees are the same as are the policies scrutinized. Just as the hearings showed the process to be bipartisan, it is bipartisan here as well: seven Democratic

senators evaluated ideology across three of these nominees and ten Republican senators evaluated ideology across all six of these nominees.

There is also evidence that this ideological scrutiny is affiliated with a divisive process. Only four of Carter's circuit court nominees received nay votes in the Senate. Notably, three of these are among the select six where the archival record shows ideology was examined. Additionally, new issues appear for the first time in the archival record during this crucial period. The bread and butter culture war issues of gun rights and abortion rights are evaluated during the nomination of Abner Mikva in 1979.[18] Correspondence from the office of Senator Wallop (R-WY), evaluating both of these issues, provides insight as to why these considerations did not yet determine the senatorial vote choice: "To deny him appointment because of his position on several controversial issues would not be a victory for impartiality on the federal bench, but would stain the selection process by making these nominations a tug-o'-war between special interest groups" (Malcolm Wallop Papers, Scott to Wallop, August 29, 1979, box 38).

Moving to the Reagan era, there is little need to show that ideological evaluation became routine. That was showed again and again by analyzing the hearings. On this point, nevertheless, the archival record only provides support. Of the 62 nominations with archival correspondence during the Reagan presidency, 31 are evaluated by at least one senator for ideology, a much higher rate than any previous presidency. The partisan story told during the hearing analysis also holds: from 1981 through 1986, there are 57 Republican nomination-senator pairs with ideological evaluation and only 12 Democratic. While those six years prior to Bork saw Republicans evaluating ideology nearly five times more often than Democrats, the six years post-Bork, by way of comparison, sees something closer to parity in the archival record. From 1987 through 1992, there are 34 Republican nomination-senator pairs with ideological evaluation and 18 Democratic.

[18] As mentioned earlier, Senator Jesse Helms did discuss abortion in a letter in 1977. However, there he writes that consideration of those policies during the Carter White House's selection process is improper.

For understanding the specific aspect of ideology that was evaluated during these years, on one hand the archival correspondence during the Reagan years is frankly far less rich than the hearings. Discussion of broad legal philosophy is frequent, but in general it is less deep. Often the senators address it in only a line or two before moving on, while the hearings offer an opportunity for lengthy exchange (sometimes lasting hours) regarding judicial philosophy with the nominees themselves. But here again, in archival letters, evidence indicates that Republicans have a bold agenda for the courts; they do not see the third branch as relevant only for a single issue or a discrete set of issues. Of the 30 different nominations during the Reagan presidency for which Republican senators write about and discuss nominee ideology, 26 are discussions with reference to some broad judicial philosophy. The philosophical concepts of judicial restraint, judicial activism, and judges interpreting not making the law each come up in relation to at least five vacancies. Occasionally, judicial philosophy is simply described as being compatible with the Reagan administration, and other times just "conservative" without additional detail. Surprisingly, the core tenet of originalism—that constitutional provisions be interpreted with reference to the original meaning or intent of the framers—is mentioned only once.

On the other hand, in two ways the archival correspondence adds clarity that the hearings fail to capture. First, in correspondence senators often describe judicial philosophy simply as "conservative" as opposed to describing an interpretive approach (e.g., judicial restraint) that does not have a left-right component on its face. Nine out of the 30 vacancies ideologically evaluated by Republicans use the more overt "conservative" adage. While applied to one-third of the cases in the archival record, it is a term virtually not mentioned in relation to the nominees during the hearings, suggesting that Republican senators are often more blunt and explicit in their private evaluation of judicial ideology. Second, abortion appears far more frequently in archival correspondence than it does during the hearings among Republican senators. While the policy is virtually impossible

to ignore in any prolonged and substantive discussion of modern judicial politics, Republican broached the policy at only one nominee hearing during the Reagan years. In contrast, in the archival correspondence, abortion is mentioned in relation to nine vacancies. Both of these patterns suggest that a nominee's position on abortion and, also, whether they were "conservative" were more relevant to GOP senators' evaluation process than the public hearings suggest. However, both records make clear the overwhelming Republican focus in relation to ideology was evaluating judicial philosophy in a broad sense. Singular issues beyond abortion are addressed by Republicans during this period, but only rarely: the exclusionary rule three times, civil rights two times, and the Ten Commandments, the First Amendment, the discrimination of women, and guns once each.

Archival correspondence indicates Democrats were peculiarly absent from ideologically evaluating circuit court nominees during the Reagan years, prior to the 1987 Bork nomination. From 1981 through 1986, Democratic senators did so for only four nominations. Three were similarly evaluated by Democrats during the public hearings. The fourth, J. Harvie Wilkinson, was described as "extremely conservative" in a memo written by Senator Gary Hart's office, but even this is only in passing in four pages of memos more focused on allegations Wilkinson lobbied for the appointment and lacked sufficient experience (Gary Hart Papers, Rick to Hart, August 1, 1984, Rick to Hart, August 8, 1984, box 149, folder 11). In short, the archival record does nothing to undermine the finding that Democrats, prior to Bork's nomination, simply did not ideologically evaluate the judicial nominees of their Republican opponent in the White House.

4.5.2 Post-Bork into the modern day

From 1987 through the modern era the archival record continues to show a 50% rate of ideological evaluation for nominations. The partisan pattern is now more equitable: Republican senators ideologically evaluate 42 nominations while Democratic senators ideologically evaluate 22. Sen-

ators of both parties regularly address how "liberal" or "conservative" a nominee is overall. A very broad mix of particular issues familiar to observers of American politics also appear in the archival record during this period: abortion, affirmative action, civil rights, class action, criminal sentencing, the death penalty, the environment, gay rights, immigration, terrorism, unions, and voting rights, among others. The terminology surrounding ideology becomes increasingly wrought, fitting in with modern terms of debate: several nominees are described as extreme.

Chapter 5: Ideology in the Modern Era

5.1 Moving from the Non-Ideological Past to the Ideological Present

5.1.1 Overview

So far in each chapter I have examined the entire time series of the circuit courts, and often dedicated much of the analysis to the pre-1979 era, which is a crucial period in order to understand how and why the level of divisiveness in staffing these courts has changed so drastically over time. In this chapter, however, I focus squarely on the modern era, from 1979 to 2020. I began this dissertation with the argument that judicial ideology is a key reason that the process of confirming circuit judges has become so acrimonious over time, and in the ensuing chapters—after measuring the rate of divisiveness across the time series—I focused in large part on the emergence, rate, and content of ideological evaluation from 1891 into the 21st century. I established as convincingly as I could that ideological evaluation was exceedingly rare prior to 1979; that when it was evaluated it was only under particular circumstances and in relation to only a handful of issues; that the rare moments of ideological evaluation in that era predicted divisiveness; that the transition to routine evaluation was largely led by Republicans though Democrats joined later; that the initial focus in the early years of regular ideological evaluation was broad interpretive theories; and that eventually every nominee became ideologically scrutinized and that examining nominees with respect to broad judicial philosophy as well as an array of specific policy issues relevant to American politics

was common. In this chapter I finally move past those points and that pre-1979 era.

To forward my larger argument that judicial ideology is a key driver in making the confirmation process more divisive, it was not necessary to measure the individual ideology of those nominees that came before 1979. Systematic analysis of data related to both the public and private senatorial evaluation process demonstrated that, in that period, ideological evaluation was so rare that evaluation alone was a key distinction. Since the overwhelming majority of nominees were not ideologically evaluated to begin with, there is little basis to believe that nominee-level ideology should systematically impact the level of divisiveness experienced by the hundreds of nominees in this period whose ideology was not even being evaluated. In previous chapters, qualitative and quantitative analyses, including regression analysis, showed that the straightforward metric of simply being ideologically evaluated predicted a more divisive process. After much analysis, a simple story can be told of that era: ideological evaluation was extremely rare, divisiveness was extremely rare, and the former predicted the latter. In short, a key insight learned from the previous chapters is that there is no need to measure the ideology for the hundreds of nominees before 1979. The tremendous practical and conceptual hurdle of assigning individual ideological scores to each nominee across the 88 years from 1891 to 1978 is averted since merely being ideologically evaluated is a notable and impactful distinction.

This changes with time, however—and in a surprisingly clear cut way considering that historical data is often rife with substantial ambiguity. In 1979 senatorial evaluation of nominee ideology became routine though pursued mostly by only one political party, in 1987 it continued to be routine but now pursued by both parties, and in 1996 it finally became universal. Therefore, in this modern era it is no longer feasible to estimate the effect of judicial ideology on the confirmation process merely by distinguishing those who were ideologically evaluated from those who were not. This presents a new challenge; in the modern era there is a need to measure the ideology of

each nominee in order to know judicial ideology's effect on the divisiveness of the confirmation process.

While the need for measures of ideology for hundreds of nominees from the last four decades is a methodological challenge, on the positive side this era of ubiquitous senatorial evaluation of ideology provides a new, unprecedented chance to understand the role judicial ideology has in the divisiveness of the confirmation process—and provide another piece of evidence for my overarching argument. Specifically, the last 40 years presents an opportunity to further, and most directly, test the hypothesis that judicial ideology is driving the massive change toward divisiveness. Evidence should show that, other factors being equal, the distance between the ideology of the *nominees themselves* and the ideology of the Senate should affect divisiveness. Namely, divisiveness should increase as this distance increases with relatively more extreme nominees. Having laid necessary context and historical foundation in the previous chapters, the task here is more straightforward and focused on how a nominee's own ideology impacts the divisiveness of his or her confirmation process in this modern, ideological age. The most significant, and once even prohibitive, obstacle is measuring individual nominee ideology at the time of nomination; however, innovations in the measurement of judicial ideology that emerged only recently allows for this.

From the late 1970s through today, the rate of ideological evaluation has been very high and divisiveness has often been very high as well. While on its face, this fact pattern is encouraging for my broader argument about judicial ideology, in this chapter I offer the far more compelling finding that the more ideologically extreme a nominee is in relation to the Senate, the more likely he or she is to face a divisive confirmation process.

I have four broad tasks for this chapter. (1) Beyond briefly laying out the vision and plan for this chapter, in this section I discuss, in light of the findings in earlier chapters, what period of time might be considered modern for the purpose of analyzing the impact nominee ideology

has on divisiveness. I ultimately settle on 1979 onward, though later periods are also justifiable; subsequent analysis examines different subperiods and shows that the findings are fundamentally the same regardless of what post-1979 period is examined. (2) I evaluate how judicial ideology has been measured and utilized in the past, and that, among the options, the recently devised DIME scores are ideal for the analyses in this chapter. There are some limitations that come with this data, but these are quite minor and the main takeaway is that only very recent and impressive innovations in measuring judicial ideology allow me to tackle the fundamental question of what influence it has on the confirmation process. (3) I then quantitatively analyze the relationship between nominee-specific ideology and the divisiveness of the confirmation process. I find those more extreme nominees that are more ideologically distant from the Senate face a more contentious processes. This is the empirical core of this chapter, and provides support for my overall argument that judicial ideology plays a key role in driving divisiveness.

5.1.2 Defining the dawn of the modern era

To test the effect of nominee-specific ideology on the divisiveness of the confirmation process, I identify when senators began to routinely evaluate nominee ideology and then hone in on that era for the subsequent analysis. As the analyses in previous chapters showed, this was a stepwise process, and there were two watershed years as well as a third and final year that was a more subtle turning point: 1979, 1987, and 1996. Although ideology was occasionally present to some degree for generations, through 1978 it was exceedingly rare. Out of hundreds of nominees in this early era, only 26 were ideologically evaluated during their hearings and only 19 in archival correspondence.

1979 is indisputably a turning point year of historical significance in the story of the circuit courts. Senators began regularly scrutinizing the ideology of circuit court nominees; there were

more nominees ideologically scrutinized at their hearings during the two year 1979 and 1980 period than there were for decades prior combined. This only escalated in the 1980s, and the Reagan years saw the dawn of routine ideological assessment—nearly all nominees were ideologically scrutinized. However, this was largely a Republican enterprise; counterintuitively, copartisan senators were the ones evaluating the ideology of the president's nominees while the crosspartisan Democrats sat mostly silently, though they did ideologically evaluate a handful of nominees. 1979 is the most valid cut point for the modern era if one accepts this significant partisan asymmetry and is satisfied with Democratic senators ideologically analyzing only a handful of the Republican president's nominees for six straight years.

In 1987, this partisan difference disappeared and only at this point is it indisputable that ideological evaluation is front and center: going forward, nearly every nominee was ideologically evaluated and senators from both parties were regular participants. 1996 saw another escalation, though at this point the change was relatively minor. In this year, ideological evaluation became truly universal, as *all* nominees from this year and forward were ideologically evaluated. However, in the years immediately prior to this, the rate of ideological evaluation was already so high (often over 90%) that the escalation in 1996 was actually fairly small. With the most recent Supreme Court vacancy a full two years earlier, and none on the horizon (indeed the country would wait another nine years before a vacancy finally materialized), the Dole presidential campaign made an issue of circuit court nominations, which may have been the impetus for that final push toward ideological evaluation during 100% of nominee hearings. Interestingly, this final push in the late 1990s coincides with an uptick in divisiveness as measured in chapter 2.

Given that it is not totally obvious what year (1979 or 1987) should mark the beginning of nominee-specific ideology having widespread purchase during the confirmation process, I ultimately favor looking at it from multiple angles. In the analyses to follow I examine the entire 1979

to 2020 period, as well as the 1979 to 1986 and 1987 to 2020 periods separately. All these concerns being laid out, in the end nominee ideology has an effect in each era examined individually, as well as the whole era together, though, as expected, nominee ideology appears to have a clearer effect in the later period. The 100% rate of ideological evaluation arriving in 1996 surely removes any doubts regarding the purchase of nominee ideology; however, in the years leading up to this, the rate is already so high and so bipartisan, viewing this year as the dawn of modern ideological evaluation is too stringent a standard.

5.2 Measuring Judicial Ideology

5.2.1 An overview of judicial ideology

Scholars have long demonstrated the importance of measuring and accounting for judicial ideology in order to understand the central questions of judicial politics, as well as political science more broadly. Judicial ideology has been utilized frequently in prominent studies related to the Supreme Court. Scholars have found that ideology affects the justices' final votes on the merits (Segal and Spaeth 2002), bargaining with their colleagues over changes to legal doctrine (Epstein and Knight 1997), opinion assignment and the amount of effort that must be exerted to craft a high quality opinion (Lax and Cameron 2007; Lax and Rader 2015) and decisions to strike down a statute apparently favored by the current Congress (Segal and Spaeth 2002). Judicial ideology is also evaluated in order to understand what drives a senator's vote choice for Supreme Court nominee confirmations (Kastellec et al. 2010; Kastellec et al. 2015).

Judicial ideology measurements, a key component of foundational theoretical and empirical judicial politics scholarship, are well developed at the Supreme Court level, given its apex status, manageable number of jurists throughout history, and voting rules that lend themselves well

to inference (Segal and Cover 1989; Martin and Quinn 2002; Bailey 2007; Bonica and Sen 2021). These scores are developed less well at the circuit court level, in part because of the high number of nominees that need to be assigned a score. Broadly speaking, ideology of circuit court judges is measured in two different ways: using "ex ante" data (information before confirmation, historically based on only a proxy) or "ex post" data (information after confirmation, usually votes in cases). Since I am focused on the judicial nominees during the nomination and confirmation process, I require ex ante scores that measure judicial ideology prior to confirmation.

The longstanding ex ante ideology scores for circuit court nominees rely on the imprecise proxy of the ideology of politicians involved in the appointment. Developed by Giles, Hettinger, and Peppers (2001), the judicial nominee is assigned, as his or her own ideology, the DW-NOMINATE score of the appointing president, a homestate senator, or the combination of both homestate senators. While offering a measure of circuit court ideology in an era when this was lacking, these scores are rather crude approximations. The methodology assumes, for instance, that over 20 circuit court appointments of Ronald Reagan were all ideological clones of him and each other; the remainder simply are assumed to equate with the ideology of their homestate senator(s). Given the bluntness of these scores and since I am interested in senatorial roll call voting with respect to nominees, I need ex ante scores that are (a) derived independently of the presidents' and homestate senators' ideologies and (b) offer greater precision. While valuable measures for other contexts, since I am trying to estimate the effect that nominee ideology has on the Senate's vote choice, to depend on measurements of the senators themselves to estimate the nominees' ideologies would be regrettable. Recent innovations in the measurement of ideology, however, have led to the creation of ideological measures that are an excellent fit for my purposes. Termed DIME scores, these ideological scores were only recently developed by Bonica (2014) and have since been calculated for a wide variety of political actors, including federal judges by Bonica and Sen (2017). They are

calculated based on actual nominee behavior, and are available for nearly all circuit court nominees from 1979 through 2020.

5.2.2 The data I use: DIME scores and nay votes

To measure nominee specific judicial ideology for the analyses in the next section, I use these DIME scores. They are based on the campaign donations of the nominees themselves (prior to their ascensions to the bench) and as such, "DIME scores provide a means to measure judicial ideology based on judges' revealed preferences" and the "logic behind contribution-based measures is that campaign contributions provide a costly and therefore informative signal about a donor's ideology" (Bonica and Sen 2021, 105). When campaign contribution data is not available for the judges themselves, DIME scores are imputed based on the DIME scores of a judge's law clerks (Bonica et al. 2017). The scores place the nominees on the same left-right continuum and represent a wide range of values reminiscent of DW-NOMINATE scores for members of Congress. The data availability lines up particularly well for my purposes: DIME scores are available for the vast majority of circuit court nominees across the entire 1979 through 2020 time period.

The principal limitation of DIME scores is that they are often unavailable for failed nominees; however, they are available for nearly every confirmed nominee from 1979 through 2020. In this same time period, nay votes provide a rich measure of divisiveness. In fact, they become a regular feature of the confirmation process only around this time. In the two year 1979-1980 period, four nominees received nay votes; in the entire 87 year period prior to that, only six nominees did. Not only are nay votes indisputably a measure of confirmation process divisiveness that is tractable and straightforward to measure, there is wide variation in the number of nay votes that nominees have received—from 0, to numbering in the 10s, 20s, 30s, and 40s, all the way to 50 with the Vice President breaking the tie. While many nominees from the 1979 to 2020 era did not receive nay

votes during their confirmation vote, one-third did. Beyond their own virtues, it is hard to think of a superior alternative measure of divisiveness in the post-1978 era. The 5-point composite score was a valuable measure for earlier eras when nay votes were exceedingly rare, but has less relevance in the modern era when nay votes are common and offer the benefits that come with a consistently measured metric across all nominees and does not require researcher judgment on how to weight various factors in order to calculate a divisiveness variable.

5.3 Nominee Ideology Predicts the Senate Vote Choice

Now with nominee-specific measures of both ideology and divisiveness, in this section I quantitatively and systematically analyze the effect of judicial ideology on the divisiveness of the confirmation process in the period from 1979 to 2020. In previous chapters, some evidence was already offered indicating that ideology led to a more divisive process during this period. For instance, in archival correspondence senators sometimes noted their opposition to nominees in light of their evaluation of nominee ideology. Likewise, after being subject to a lengthy hearing that involved evaluation of ideology, nominees often received nay votes. Here I move beyond these more blunt observations that ideology engendered divisiveness in specific instances to a more rigorous estimation of the effect of nominee ideology across over 350 nominees and over the course of over 40 years.

My broad argument is that judicial ideology is a key contributor to revolutionizing the nomination and confirmation process toward divisiveness. Once nominee ideology becomes routinely evaluated for nominees, this nominee ideology matters to senators and should have an impact on the divisiveness of the confirmation process. More ideologically extreme nominees that are ideologically distant from the Senate should experience a more hostile reception from the Senate. This argument views individual nominees and judicial ideology as central to the story; in con-

trast to previous works which emphasize the role of broader polarization (when the Democrats and Republicans in the Senate are more ideologically distant, a nominee is more likely to face a contentious confirmation process) or a singular event (in the years after the Bork rejection as opposed to the years before the Bork rejection, a nominee is more likely to face a contentious confirmation process), and do not consider the role of nominee specific ideology. While I believe these works offer valid explanations and findings, they do not provide the entire story. In particular, these explanations—focused on the institutional setting or the moment in time a nominee happens to be nominated—are far removed from the nominees themselves as well as the concept of judicial decision making and judicial ideology, long fundamental variables in judicial politics. I argue the nominees themselves and their ideology matter a great deal and should be put front and center in order to fully understand what has transpired over the decades. My hypothesis is that once the ideology of circuit court nominees became regularly evaluated, senators will oppose more ideologically extreme nominees that are more ideologically distant from the Senate. Empirical support for this hypothesis would indicate that judicial ideology systematically drives confirmation politics, and offers an explanation for the increased divisiveness we see today.

In order to test this hypothesis, I perform regression analyses, the results of which are displayed in figure 5.1. The units of analysis are the 362 circuit court nominees from 1979 through 2020 for which the DIME scores of their ideology are available. The dependent variable is the number of nay votes the nominee received. The independent variable of primary interest is the nominee's ideological distance from the Senate, measured by the absolute value of the difference between the nominee's DIME score and the mean DW-NOMINATE score of the Senate at the time of nomination.[19] As the results in figure 5.1 show, the nominee's ideological distance from the

[19]I also operationalized this independent variable as simply the absolute value of the nominee's DIME score in order to capture nominee ideological extremeness without reference to the ideology of the Senate at the time. The results were similar in all model specifications, and this independent variable was always statistically significant and predicted divisiveness as measured by nay votes.

Table 5.1: OLS Regression Analysis of Nominees 1979 through 2020, Nominee Ideological Extremism Predicting Confirmation Divisiveness (Measured by Nay Votes Received)

	Dependent variable:			
	Nay Votes Nominee Received			
	(1)	(2)	(3)	(4)
Nominee Ideology	7.88***	6.66***	6.16***	5.98***
	(2.39)	(1.80)	(1.83)	(1.89)
Divided Government		−4.46***	−3.39**	−3.22**
		(1.37)	(1.47)	(1.48)
Senate Party Polar		132.35***	165.46***	156.75***
		(8.47)	(24.57)	(24.80)
Senate Pres Polar		24.09***	23.47***	23.86***
		(5.81)	(5.81)	(5.92)
Fed Court Experience			−2.04	−2.01
			(1.40)	(1.44)
Year			−0.22	−0.16
			(0.14)	(0.15)
11th Circuit				5.34
				(3.49)
1st Circuit				4.60
				(4.03)
2nd Circuit				2.69
				(3.19)
3rd Circuit				6.06*
				(3.19)
4th Circuit				4.27
				(3.30)
5th Circuit				5.21*
				(3.01)
6th Circuit				6.22**
				(3.06)
7th Circuit				6.77*
				(3.61)
8th Circuit				0.01
				(3.43)
9th Circuit				6.75**
				(2.78)
DC Circuit				9.40***
				(3.26)
Constant	2.92	−96.49***	325.23	211.58
	(1.86)	(7.06)	(272.37)	(275.02)
Observations	362	362	362	362
R^2	0.03	0.46	0.47	0.49
Adjusted R^2	0.03	0.45	0.46	0.46
Note:				*p<0.1; **p<0.05; ***p<0.01

Senate is statistically significant and predicts nay votes (i.e., divisiveness) across the four model specifications. Specification (1) includes only this measure of nominee ideology as it relates to the Senate. Specification (2) adds core institutional variables related to partisanship and polarization: divided government, ideological polarization in the Senate (measured by the distance between the two party means' DW-NOMINATE score), and ideological polarization between the Senate and president (measured by the distance between the Senate mean's and president's DW-NOMINATE scores). All three of these independent variables are statistically significant. The two core institutional variables related to ideological polarization play a role in divisiveness, just as previous literature has found: as polarization increases, so do nay votes. Controlling for other factors, divided government predicts a lack of nay votes. Specification (3) adds federal court experience (to capture nominee experience and record) as well as year of nomination to capture any temporal effect, but neither are statistically significant. Specification (4) adds, as an independent variable, which of the 12 courts the nomination was made to. Several circuit courts (the 3rd, 5th, 6th, 7th, 9th, and DC) are associated with increased divisiveness. In particular, it comes as little surprise that being a nominee to the DC Circuit predicts a more divisive process. Beyond its prime location and important case load, that court has become the pool from which Supreme Court nominees are most likely to be drawn: for the last 40 years, of the 15 announced nominees who were sitting circuit court judges, a majority were on the DC Circuit.[20]

The regression analyses in figure 5.1 show that nominee ideology predicts divisiveness when examining the entire 1979 through 2020 period. However, given that there is some question as to when the ideology of nominees gained widespread purchase among senators (with both 1979 and

[20]I also use the nominee's 5-point divisiveness score as the dependent variable and run the models specified in figure 5.1. I believe this measure is less relevant in the post-1979 era when nay votes became common. Moreover, the need to capture the divisiveness of failed nominees is not relevant since those nominees lack DIME scores and cannot be included in the analysis. In any event, in all model specifications, nominee ideological distance from the Senate predicts divisiveness. In specifications (1) and (2) it is statistically significant and in specifications (3) and (4) it is approaching statistical significance with p-values of .12 and .15, respectively.

Table 5.2: OLS Regression Analysis of All Nominees 1979 through 2020, Nominees Before 1987 Separated from Nominees in 1987 and Later, Nominee Ideological Extremism Predicting Confirmation Divisiveness (Measured by Nay Votes Received)

	Dependent variable:					
	Nay Votes Nominee Received					
	(1979-86)	(1987-20)	(1979-86)	(1987-20)	(1979-86)	(1987-20)
Nominee Ideology	4.05**	9.53***	4.32**	7.04***	3.84*	6.89***
	(1.88)	(3.43)	(1.92)	(2.55)	(2.08)	(2.56)
Senate Party Polar			174.59	159.53***	−192.77	172.63***
			(203.10)	(11.05)	(342.80)	(32.10)
Senate Pres Polar			−13.96	35.20***	1.08	34.21***
			(23.15)	(7.63)	(25.54)	(7.72)
Fed court Experience					−1.01	−1.97
					(1.85)	(1.86)
Year					1.22	−0.14
					(0.99)	(0.24)
Constant	−0.71	4.32	−98.43	−123.91***	−2,311.87	143.23
	(1.48)	(2.67)	(110.23)	(9.68)	(1,798.91)	(465.38)
Observations	106	256	106	256	106	256
R^2	0.04	0.03	0.05	0.47	0.07	0.47
Adjusted R^2	0.03	0.03	0.03	0.46	0.03	0.46
Note:						*p<0.1; **p<0.05; ***p<0.01

1987 being justifiable cut points), figure 5.2 presents additional regression analyses that separate the nominees of 1979 to 1986 from those of 1987 to 2020, in order to see if the findings hold in both eras and, in particular, assure that the findings in figure 5.1 that pool both periods of time are not being driven by the post 1987 era. Due to more limited observations in the early period, certain independent variables cannot be added to this analysis. These relatively modest omissions are divided government, for which there was no variation in the 1979 through 1986 period, as well as which of the 12 circuit courts a nomination was made to. Figure 5.2 shows that, when each period of time is analyzed individually, across all model specifications nominee ideology still predicts divisiveness.

The results presented in figures 5.1 and 5.2 provide strong empirical evidence that judicial

ideology plays an important role in driving divisiveness. Beyond this regression analysis, the hearings and internal correspondence in the post-1979 era, as discussed in previous chapters, are full of evidence again and again that senators were evaluating and reacting to nominee specific ideology on a routine basis—not just reacting to nominees based on generic polarization at the time or viewing some key event, such as the Bork nomination, as the north star directing their posture towards judicial nominations going forward. That documentary evidence also undermines assertions that there is "nothing new" in the history of circuit court nominations and confirmations: both routine ideological evaluation and high levels of divisiveness are very new. In short, these regression analyses are backed up by the comprehensive textual data that has been systematically analyzed in previous chapters.

Chapter 6: Conclusion

6.1 Initial Motivation

This dissertation was motivated by a straightforward question about a drastic change to American politics: why has the process of staffing the circuit courts of appeals, once so agreeable and bipartisan, seemed to have descended into almost complete partisan bitterness? Across the entire time series, these are, after all, the same courts endowed with the same power of judicial review. And when the process of staffing them was harmonious, the courts were nevertheless deciding the fate of major, controversial policies of national importance—such as the New Deal in the 1930s and civil rights in the 1950s—just as they do today. Yes, many other aspects of American politics have of course changed over the decades. But what could possibly explain such a complete reversal of course?

As someone who studies judicial politics, my first assumption was that any explanation would be centered around the judiciary and the nominees themselves. How did they, or the evaluation of them, change? Regardless of the answer, I assumed factors related to *them* would be front and center. Instead, the scholarship—while no doubt offering valuable contributions to our understanding of the situation—often lacks a focus on the judicial nominees or concepts related to the judiciary. Instead, circuit court nominees are frequently presented as incidental victims in some larger battle—facing an acrimonious confirmation process nowadays as a result of the increasing

generic polarization in Congress which is infecting all of American politics, or because of some singular event larger than them that altered the trajectory and set the table for divisiveness going forward.

In writing about this topic myself in this dissertation, my goal was to focus on the judicial nominees and how they are evaluated. I focused on judicial ideology and the role that plays in this story, because to me that utterly dominates debates surrounding judicial confirmation today. Since there was a lack of focus on it throughout the courts' long history in the existing literature, it was also an area where a contribution could be made. And since judicial ideology determines how judges decide cases and affect policy, it is central to judicial politics and, more broadly, why the judiciary matters to politicians and the public at large. Perhaps my toleration for discussion and analysis of the judiciary is too skewed, but important existing literature tackling this question seemed to take much of the judicial politics out of the equation and the narrative centered on another tale of dysfunctional, polarized Washington disagreeing yet again—and the actual subject and content of that disagreement was often secondary.

While there are a lot of variables in the 130 year story of the circuit courts, instead of focusing again on the longstanding institutional variables of congressional polarization and divided government that previous scholarship aptly addressed, I tried to identify, measure, and understand how judicial ideology matters over the course of this history. I set out to show that judicial ideology, and even just the evaluation of it, are key explanatory variables to why this process changed so much and became so divisive.

In addition to focusing on judicial ideology and forwarding the argument that it has had a significant impact here, there were two other major openings to make a contribution in understanding the mystery of why this process has become so divisive. The first is related to the number of years analyzed. As far as I am aware, this is the first study of the entire history of the circuit courts,

from 1891 until the modern era. Far more than just completeness for the sake of completeness, analyzing the entire time series is particularly valuable here. Other scholars look only at a subset of the time series. Since during any subset of time divisiveness will be increasing (or simply flat), identifying a favored explanatory variable that is increasing in the same time period, but not necessarily directly affecting the change in divisiveness, is a real risk. For instance, looking only at subsets of time allows for a strong case to be made for polarization or Bork driven explanations, but both of these accounts falter somewhat when examining the entire time series. An explanatory variable that trends with divisiveness for the entire 130 year history has a much more compelling case for it.

The second major opening was related to data. There was a real opportunity to understand how senators are actually evaluating nominees, and move beyond core institutional variables like polarization and divided government. I utilized two large, original data sets, one related to the senators' public evaluation of nominees and another to their private evaluation, to understand the goals the senators had in relation to these courts across time. The data connects to the senators, but pertains to their direct examination of nominees—keeping judicial nominees and judicial politics front and center in this story.

6.2 Key Findings and the Triumph of Ideology

Moving beyond my motivations to what I actually found, in chapter 2, I focused on the central descriptive question motivating this literature. When, by what measures, and to what degree has the process of staffing circuit courts become more divisive? I examined a long list of metrics in order to have as comprehensive and accurate an understanding as possible: failed nominees, failed nominations, roll call votes, nay votes, cloture votes, party line votes, and confirmation hearing held. I then aggregated most of these measures into a composite score of divisiveness for each circuit

court nominee from 1891 through 2020. Though there was some variation in divisiveness across the first 80 years, this score was mostly stable but with a modest overall increase. Divisiveness increased in the 1970s, more throughout the 80s, and more again throughout the 90s, before peaking then plateauing around the year 2000. However, by some metrics, such as nay votes and party line votes, the process is far more divisive now than it was only five years ago. Regardless, by any measure, the last 20 years have been far and away the most divisive in circuit court history. After analyses in these chapters, there is no doubt in my mind that the process has radically changed; it is simply much more divisive by every measure available. In that chapter, I also showed that by many measures the circuit courts are becoming more important to senatorial and political life—for instance, senators need to deal with vacancies more and more as the courts have grown and circuit courts are now the principal pool from where Supreme Court justices are chosen, which wasn't always the case.

I tried to understand why the change to divisiveness took place by focusing in on the senators' evaluation of ideology. In chapters 3 and 4, I analyzed two original data sets, the Senate Judiciary Committee hearings of the nominees (i.e., the senators' public evaluation of nominees) and the senators' archival correspondence about filling these vacancies (i.e., the senators' private evaluation of nominees). I first focused on the rate of the evaluation of judicial ideology over time. Both of these very large corpuses of data demonstrated that senatorial evaluation of judicial ideology was actually extremely rare for most of history. For generations, when the process was startlingly non-divisive, senators just weren't interested in evaluating nominee ideology. It was not necessarily the case that nominees were being passed through the Senate with ease and speed because they were all consensus moderates—deeply liberal and deeply conservative jurists who much of the Senate differed from substantially made it onto the bench at this time—but because they weren't being evaluated in the first place. Senators were usually focused solely on objective qualifications from

1891 through 1979. These overall trends were highly suggestive—from 1891 to 1979 ideological evaluation was low and divisiveness was low, and from 1979 to 2020 ideological evaluation was high and divisiveness was mostly high—but I also applied more rigorous tests to the data.

Namely, I found that in those instances and periods of time when ideology did have purchase, it predicted a more divisive process. With regression analyses in chapter 3, I found that, from 1891 to 1979, those rare moments of ideological evaluation predicted a more divisive process. This was supplemented by systematic qualitative analysis that found in those rare moments when ideology was considered in this era, it was only under highly specific circumstances: the policy being scrutinized was highly salient, connected to a political controversy larger than the circuit courts, bipartisan, and, almost always, tied to something specific in a nominee's background. These criteria protected the process from turning into one of routine ideological evaluation that may have transformed the process toward divisiveness in this era. In chapter 5, I focused on the 1979 to 2020 era when ideological evaluation became pervasive, and found that nominee specific ideology drove divisiveness: the greater the distance between the ideology of the nominee and the ideology of the Senate, the greater the divisiveness of the confirmation process. In summary, judicial ideology was central to revolutionizing the process.

There is also a clear partisan story. Republicans led the change to focusing on ideological evaluation and asked about a constellation of judicial decision making concepts that the proper judge uses. At the same time, in the 1970s and 80s, Democrats not only asked about ideology much less but were focused on singular issues and were sure to tie any question to a relevant fact in the nominee's background. Republicans asked about philosophy without worrying about grounding their questions in background—it was enough for them that the individual was getting a lifetime seat on the federal bench with the awesome power of judicial review of any law interpreted to be in violation of the Constitution. There just isn't the evidence to support that a single issue

animated the transition to routine evaluation of nominee ideology.

In addition to using these two new, large data sets to test hypotheses related to divisiveness and ideology, the data also presented an opportunity for a holistic look at the evaluation of circuit court judges over time. In chapters 3 and 4, I found that in addition to ideology, senators considered qualifications, state of residence, personal relationships, race and gender, and party affiliation at various points throughout history.

6.3 How These Findings Relate to the Three Existing Schools

This is a story of judicial politics. The senators are evaluating the nominees and what they will do on the bench. They are not simply reflexively reacting given the fallout of a catastrophic event, nor are they just behaving as increasingly hostile partisans toward judicial nominees because overall polarization has increased. And there certainly has been a dramatic increase in divisiveness. Nevertheless, this is an area where all three previous schools of scholarship provide keen insights.

While there is plenty new, and the extreme version of the "nothing new" school is easy to take issue with, it has been valuable fodder for future research and the major works that came after have used it as something of a reference point. While chapter 2 shows how much this process has changed, the "nothing new" school does alleviate the most basic fear that all of these metrics simply aren't comparable across time. Failed nominees, failed nominations, roll call votes, nay votes, party line votes, and extensive committee hearings all occurred in relation to the circuit courts in the 1890s, right at the founding, setting a precedent for these options from the very beginning. These antecedents provide extra assurance that there is enough institutional continuity across time for valid comparisons. Ideological evaluation has also occurred across history, and is nothing new, and has always predicted divisiveness—but it was done at a drastically lower rate.

While I do not believe a singular event explains the massive change in divisiveness, the "big

bang" school identified key events driving this story. The *Brown* decision in 1954 explains many of those early episodes of ideological evaluation and divisiveness, but it did not permanently alter the confirmation process. Questions in relation to *Brown* subsided well before the process became consistently divisive, but it does explain much of the (rare) divisiveness in the 1950s and 60s. The Bork nomination and defeat in 1987 similarly did not singularly transform the process, but it was the year when Democrats started asking about ideology in relation to the circuit courts, which was indeed a crucial development in the permanent alteration of the nomination and confirmation process.

"Generic polarization" explains much of the last few decades of what has occurred with the circuit courts, and may well be a necessary condition to the divisiveness we see today. But it doesn't explain everything; the evaluation of ideology, and, more recently, nominee specific ideology matter too. Moreover, generic polarization does very little to explain the variation *within* the less polarized era of the 1940s through 1970s: yes, fewer overall nominees face a contentious process compared to later years, but little explanation is given for those exceptions that do in fact face divisiveness. Perhaps most problematic of all, this school of thought does not offer an explanation for the long stretch of high polarization in the 1890s to 1920s which saw very little divisiveness. Polarization is perhaps best thought of as a necessary condition as well as an explanatory variable—though not the only one—for recent times, but arguments centered on it lose sight of the fact that the Senate and the larger body politic do care about individual judicial nominees and they are analyzed as individuals with meaningful variation based on nominee specific features.

6.4 Explaining the Emergence of the Evaluation of Ideology

In this dissertation, judicial ideology (or the evaluation of judicial ideology) was mainly offered as an explanatory variable. Showing the relationship between judicial ideology and the divisiveness

of the confirmation process is what I consider to be a principal contribution here. At this point, however, I take a step back to summarize what caused judicial ideology to be evaluated and matter to senators in the first place. I first discuss the evidence offered in this dissertation, and then discuss more preliminary evidence worthy of additional research.

As offered throughout the dissertation, there is some evidence that ideological evaluation tended to occur and come to be important during periods of divided government. For instance, regression analyses in chapter 3 showed that divided government predicted instances of ideological evaluation. This was buttressed by some archival evidence in chapter 4—for instance, one of the few moments of ideological evaluation identified during the first 60 years of the circuit courts occurred during the 80th Congress (1947-1948), the first moment of divided government in 14 years. Later, regular ideological evaluation of circuit court nominees emerged in 1979, and while both the Senate and presidency were in Democratic control, that Congress did see the largest number of Senate seats in Republican hands during a Democratic president in nearly 30 years. In 1987, ideological evaluation became routine for both parties for the first time; this coincided with a period of divided government, and was the first time in ten years when Democrats controlled the Senate during a Republican presidency. Looking at this in the most panoramic fashion, divided government was twice as frequent from 1979 to 2020, when ideological evaluation was common, compared to 1891 through 1978. Of course, there were long periods of divided government when ideology generally did not matter much—particularly during the Eisenhower, Nixon, and Ford administrations—and I am not claiming that divided government simply caused ideological evaluation, but instead am offering that divided government, all of history considered, appears to provide a framework where concern with judicial ideology had an opportunity to emerge and flourish.

There is also a clear partisan story here, with evidence that Republican initiative was a crucial reason ideology came to matter so much. Republicans, as discussed in chapters 3 and 4, were more

sophisticated and far more persistent in asking nominees about ideology in the late 1970s and into the 80s. When ideological evaluation of circuit court nominees became nearly universal for the first time in history in 1981, it coincided with the Republican Party arguably being more powerful than it had been than at any point since the 1920s. GOP senators were focused on broad judicial philosophies, not singular issues. The rise of routine ideological scrutiny also arose during a period when Republicans, on multiple fronts, were investing in the intellectual development of comprehensive judicial philosophies. Republican senators were forwarding these theories at both public hearings as well as in private correspondence. Other scholarship finds that the Reagan administration similarly engaged in this exercise, independent of Republican senators (Goldman 1997). Around this same time, in 1982, the Federalist Society was founded by, as the organization itself describes, "a group of conservatives and libertarians dedicated to reforming the current legal order" and advancing conservative interpretive theories (Federalist Society 2020). This was clearly a period of intellectual activity among Republicans regarding judicial philosophy, which then came to the fore during the confirmation process for circuit court judges.

Individual agency on the part of innovative, enterprising senators cannot be easily dismissed either. Particular senators stand out as forcing the issue of judicial ideology as their colleagues remain silent time and again. Senator Paul Laxalt (R-NV) in the late 1970s and Senator Strom Thurmond (R-SC) throughout the 1980s actively scrutinized nominee ideology during hearings as most colleagues remained focused on qualifications. Intriguingly, 1979 was when the 20 year tenure of Senator James Eastland (D-MS) as chairman of the Senate Judiciary Committee came to an end. While his colleagues had the volition to ask their own ideological questions during the committee hearings he often presided over, it is curious that such questions were exceedingly rare during his chairmanship. They became common immediately after his departure, suggesting that norms and personalities can play a role in changing politics, however difficult this is to know and

measure.

Chapter 3 offered, after an examination of the entire historical record of committee hearings, the conditions under which ideology rose to the fore and was scrutinized, those rare moments it was, before 1979. The evaluations were always related to a specific and highly salient issue, were connected to a larger and specific political controversy, were bipartisan, and were, almost always, tied to something specific in the nominee's background. This evaluation only occurred in relation to five broad issues and episodes; the bipartisan nature of the evaluation and the underlying issues is conspicuous in light of the many partisan issues we see in today's politics. This brings us to the issues that courts decide, and how that selection of issues may encourage ideological scrutiny.

A full treatment of this question is well beyond the scope of this dissertation, but it appears as though the expansion of the justiciable policy space, and whether the parties are polarized on those policies, play a role in the increase of ideological evaluation during the confirmation process. As more policies are decided by courts (i.e., justiciable), the ideology of judicial nominees is increasingly going to be scrutinized, especially when those policies are partisan polarized. Prior to 1979, senators were not evaluating judicial ideology in relation to partisan policies. That may well be because the courts were just not deciding many of these types of issues in that era. Ideological evaluation appeared focused on what the courts were focused on, and those handful of policy questions were bipartisan. Things have changed since then.

Major issues decided by the courts in more recent decades appear to have often only recently emerged as political matters. Moreover, they are partisan polarized. For example, in a comprehensive look at over 1700 state party platforms, abortion and gay rights did not appear in the platforms of both parties until the 1970s and not in a majority of each party's set of state parties until the 1980s; the rate of position taking continued to increase and in the 21st century an overwhelming majority of Democratic (Republican) parties took the liberal (conservative) position on these is-

sues (Carr, Gamm, and Phillips 2016). These two premier issues have been justiciable in prominent ways only since the 1970s and 1980s, respectively. Analysis of these platforms can be extended to identify the size of the justiciable policy space—what proportion of landmark decisions are about an issue parties care about—and the extent of polarization on those issues. The logic is that as a greater proportion of the salient cases of the day decided by the courts implicate policy issues that the parties (represented by the Democratic and Republican platforms) (a) care about and (b) are divided on, the contemporaneous political actors will emphasize the evaluation of and place importance on judicial ideology. In short, in periods where the justiciable policy space that politicians disagree on is large, the nomination and confirmation process for circuit court judges will be dominated by examination of ideology.

Analysis earlier in this dissertation found that prior to 1979 senators evaluated only five issues across five periods of time—1932 with labor law, 1937 with the New Deal and Court packing, 1950 with McCarthysim and leftist politics, 1959 with the dispute over the Supreme Court, and the 1950s and 60 with the aftermath of the *Brown* opinion—and that the parties were not polarized in relation to those issues. Looking at just some of the policies senators evaluated in hearings and private correspondence in 1979 and later reveals a very different list, largely associated with partisan polarization: abortion, gay rights, family law, guns, affirmative action, flag burning, the death penalty, environmental law, immigration law, religious displays, and the Affordable Care Act. Analysis of the platforms to see how many of these issues and others the parties care about and are polarized on, in conjunction with understanding the rate at which courts are deciding these issues (by some measure like landmark cases at the Supreme Court), would put these initial thoughts on stronger empirical footing. Judicial philosophies, emerging as a political concern at the circuit court level in the late 1970s and early 1980s, play a special role as they often allow for preferred outcomes on a whole range of policy disputes. This section presents largely fodder for

future research; I consider my primary contribution to be offering evidence as to how ideology and the evaluation of it affects the divisiveness of the confirmation process.

6.5 Ramifications and Future Research

The political branches have acknowledged the ideological nature of the circuit courts and their profound influence on policy. Historically, this was not the case and it allowed for broad protection from politicization: the Senate mostly made sure the nominees were qualified and therefore was not evaluating them as ideological actors, even as they were voting as such on the bench. The political branches are now, in a crucial sense, doing their jobs. As they confirm or reject judicial nominees they are evaluating them based on what they will be doing when on the bench—deciding important policy matters for the country. This scrutiny is not without downsides. As ideological scrutiny has become omnipresent in this polarized environment, a hollowing out of the center will continue and judges will themselves reflect the stark polarization of the political branches and represent two competing ideological camps. To borrow a term from the Supreme Court itself, there will be less "play in the joints" in how policy disputes before the courts might be decided and which judges might rule a certain way. This in turn reduces confidence in the judiciary and the rule of law (Binder and Maltzman 2009). In the future, understanding the historical evaluation of judicial ideology at other levels of the judiciary would be informative. Study of the district courts would illuminate whether the same process has begun to take place there as well. The analysis in this dissertation suggests that Supreme Court nominees may not have been seen as ideological actors for long stretches of time as well, protecting it too from divisiveness in certain eras. Systematic identification of the cases the courts decide over time, the proportion that the political branches actually care about, and the extent of polarization on those policies would lead to a clearer understanding of why a concern with evaluating ideology emerges.

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Appendix A: Data Sources

As cited throughout the dissertation, a significant amount of raw data was gathered from *History of the Federal Judiciary*, http://www.fjc.gov, web site of the Federal Judicial Center. This was an indispensable resource of historical data related to the circuit courts. Data related to Senate roll calls and Senate polarization was gathered from *Voteview: Congressional Roll-Call Votes Database,* https://voteview.com. Hearing transcripts analyzed in chapter 3 were gathered from *ProQuest Congressional,* http://www.congressional.proquest.com. Other archival resources were gathered from onsite paper archives throughout the country, as summarized on table 4.1 and discussed and cited throughout chapter 4.

Appendix B: Data Availability

All data used in this dissertation has been retained by the author and can be made available to the reader by contacting the author at matthew.a.carr@columbia.edu. Data gathered from *History of the Federal Judiciary*, http://www.fjc.gov, web site of the Federal Judicial Center and *Voteview: Congressional Roll-Call Votes Database,* https://voteview.com, are also publicly available on those web sites. The committee hearings analyzed in chapter 3 gathered from *ProQuest Congressional* are also available at http://www.proquest.com. Material gathered from archival resources and used in this dissertation, as delineated in chapter 4 as well as the bibliography, will eventually be made available online, as permitted.