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## Article

# Judicial Nominations in an Umpireless Game: Trusted Sources, a Complaint, and a Proposal

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Put yourself for a moment in the shoes of a political journalist the day the President announces a new Supreme Court nominee. In all likelihood, you have never heard of the nominee before today. Or if you have, the nominee is just a name to you; you have no familiarity with the career behind the name. Within minutes, maybe even seconds, of the President's announcement of his choice, however, people who *are* familiar with the career in question are flooding your email inbox with documents—some of them substantial in length—that grandly pronounce themselves “reports” on the nominee. These reports present utterly divergent views of a long career composed of judicial opinions, client representations, speeches, and articles on subjects of enormous technical and legal complexity. One set of reports promises that confirmation of the President's choice will push the country once and for all into the abyss; the other set promises just as confidently that the nominee is the second coming of John Marshall. Except the calls you can make in a few hours and the information the White House releases, these reports represent your only significant sources of information.

And you are on a deadline.

A version of this reporting crisis shows up, as well, in an increasing number of lower-court confirmation battles, though it plays out in slower motion. Although in theory, the press has ample time to gather information about nominees between the President's announcement of his choice and the moment at which controversy erupts, newspapers and press organizations

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in general have scaled back their coverage of the lower federal courts. So the reporter will generally neglect the nomination until it becomes controversial. At that point, the reporter—often a congressional correspondent, rather than a legal affairs or a courts reporter—parachutes in to cover the controversy for a few days until the next crisis takes center stage. This reporter has done little or no background research on the nominee and has extremely limited time to do so now. The interest groups, by contrast, have had a lot of time—they, after all, have generated the controversy in question and are generally the only people who have followed it closely. And they just happen to have written these thick-looking reports filled with case citations and quotations. The reporter, who probably does not know much about law, has neither personal insight nor trusted source to whom to turn for an explanation of the dispute.

As a long-time journalist, I would love to describe the press's reaction to this problem in heroic terms, as a kind of triumph of deadline reporting by sophisticated generalist intellectuals over dense subject matter spun by ideologues into edible sound-bites that these reporters nonetheless show the discipline to resist. I cannot do it. The simple truth is that most reporters, most of the time, act exactly as one would predict based on the incentive structure of the situation: they let the interest groups set the terms of the discussion.

Many factors contribute to the rise of interest group power in the confirmation process. In this Article, however, I will discuss only one: the absence of a trusted source of information about the nominees and the controversies surrounding them. The press, more often than not, is badly positioned—institutionally—to play the role of truth cop in this arena. And in the absence of some external truth cop, the press instead tends merely to report on disputed questions, rather than to try to resolve them. One side says that a nominee is “outside the mainstream” or a “liberal activist” and the other side denies the allegation. The press reports both sides and often leaves it at that.

Right now, nobody else is doing much better. The American Bar Association's (ABA) Standing Committee on the Federal Judiciary assesses nominees' qualifications and confronts allegations of misconduct. But it is not well positioned to take on suggestions of ideological extremity; indeed, it explicitly

eschews this task.<sup>1</sup> Yet a candidate's professional qualifications seldom form the basis for opposition to a nomination, in part because the ABA rating typically puts that issue to rest. Few groups that comment on nominees apply remotely similar standards to those of Republican and Democratic presidents, nor do they take the same view of procedural hurdles imposed on nominees by the senators of one party as they do when the senators come from the other party. This hypocrisy is entirely bipartisan. With certain individuals honorably excepted,<sup>2</sup> both sides lack any semblance of intellectual credibility. Meanwhile, the judiciary itself maintains a studied silence on nominations, but for an occasional reference in the Chief Justice's year-end reports. Though many judges are heartsick on the subject, the judiciary routinely comments on legislative proposals that impact its functioning far less than does the confirmation process.<sup>3</sup> The result is that in an area of ever-increasing political contention, no umpire is calling balls and strikes—leaving

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1. The ABA Standing Committee on the Federal Judiciary "evaluates the professional qualifications of all nominees to the Supreme Court of the United States, circuit courts of appeals, district courts (including territorial district courts) and the Court of International Trade." American Bar Association, Standing Committee on the Federal Judiciary, <http://www.abanet.org/scfedjud> (last visited Apr. 13, 2009). The Committee states that its goal "is to support and encourage the selection of the best-qualified persons for the federal judiciary," and thus the Committee "restricts its evaluation to issues bearing on professional qualifications and does not consider a nominee's philosophy or ideology." *Id.* Further, the Committee structures its peer-review process "to achieve impartial evaluations of the integrity, professional competence and judicial temperament of nominees for the federal judiciary." *Id.*

2. Senator Arlen Specter, for example, showed approximately the deference to President Clinton's nominees which he demanded of his colleagues for President Bush's.

3. In 2007 and 2008, for example, the Administrative Office of the U.S. Courts issued press releases on such subjects as the use of cameras in the courtrooms, fund appropriations, federal sentencing policies' effect on public confidence in federal courts, and mandatory minimum sentencing laws resulting in decades-long sentences for first-time offenders. Press Release, Admin. Office of the U.S. Courts, Judiciary Makes Case for Fiscal Year 2009 Funding (Mar. 12, 2008), [http://www.uscourts.gov/Press\\_Releases/2008/appropriations.cfm](http://www.uscourts.gov/Press_Releases/2008/appropriations.cfm); Press Release, Admin. Office of the U.S. Courts, Corrosive Effect of Federal Cocaine Sentencing Laws Cited (Feb. 12, 2008), [http://www.uscourts.gov/Press\\_Releases/disparity080208.html](http://www.uscourts.gov/Press_Releases/disparity080208.html); Press Release, Admin. Office of the U.S. Courts, Judicial Conference Opposes Use of Cameras in Federal Trial Courts (Sept. 27, 2007), [http://www.uscourts.gov/Press\\_Releases/cameras092707.html](http://www.uscourts.gov/Press_Releases/cameras092707.html); Press Release, Admin. Office of the U.S. Courts, Mandatory Minimum Terms Result in Harsh Sentencing (June 26, 2007), [http://www.uscourts.gov/Press\\_Releases/sentencing062607.html](http://www.uscourts.gov/Press_Releases/sentencing062607.html).

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the players free to design their own strike zones and move them about whenever convenient.

My purpose in this Article is both to describe the consequences of our umpireless confirmation game and to suggest the establishment of an institutional umpire for it. That is, I mean to propose the deliberate construction of an intellectual counterweight to the ideological interest groups that now dominate the confirmation process, the creation of a trusted source of information about judicial confirmations. This source would present both rigorously non-ideological commentary on nomination battles and empirical data concerning individual nominees, the aggregate treatment of nominees in general by the Senate, and presidential expeditiousness at filling vacant judgeships. The idea is to give the public at large *and* that journalist facing the reporting crisis outlined above somewhere else to turn.

I do not wish to overstate the likely short-term impact of such a project. Many of the fundamental problems driving the confirmation process to ever-greater partisan polarization are structural in nature and will not be ameliorated by the creation of an authoritative, non-ideological voice in the debate. For years to come, judicial nominations will remain a field of active political contest, and as a consequence, unfairness, hypocrisy, and attack politics will necessarily attend it. Because, in judicial confirmations, congressional politics ultimately comes down to a vote *on a human being*—rather than on an issue or on a proposal—it will inevitably carry an ugly sort of personal tinge as well. I do not pretend that an umpire will change this.

My claim, rather, is more modest—that an umpire will discipline the debate, creating a measure of accountability for statements about nominees that are currently presented as *ipse dixits*. The idea is to make it a little harder to lie about nominees or to radically distort their records by having at least one institution that routinely applies the same standards to nominees of both parties, that permits realistic comparisons of senatorial treatment of nominees over time, and that carefully disaggregates issues that our political debate now routinely mashes together. By creating and cultivating such an institutional voice, which I mean to build at the Brookings Institution, I believe we might begin improving a debate that is now largely out of control.

## I. THE PROBLEM

I have watched the problem of the umpireless judicial nominations game up close for many years. In fact, between 1997 and 2006, I was probably the closest thing to an umpire the game had. As the *Washington Post's* editorial writer on legal affairs, I was in a unique position vis-à-vis judicial confirmations. Washington politics is the *Post's* bread and butter, so as the debates over lower-court nominations heated up during the Clinton and Bush administrations, the *Post* devoted a great deal more attention to the subject than did most newspapers. Moreover, the *Post* does not have an ideological editorial page, as does the *New York Times* or the *Wall Street Journal*; my colleagues and I tried very hard to apply the same standards to both administrations and to neither blindly support nor reflexively oppose any nominee. The result was that neither Republicans nor Democrats took our support for granted, and we had the ear of, and unusually strong access to, both sides. We routinely talked to the administration about its nominees, both under Presidents Clinton and Bush. We talked to Senate staffers of both parties about controversial nominees. We also routinely talked to the nominees themselves, many of whom were willing to meet with us, or at least to keep a channel open. And we also talked to sitting judges about their potential colleagues.

This access was one of several respects in which I was probably less vulnerable to the influence of interest groups than are most journalists. Perhaps more important still, I was something of a specialist: I wrote about law and almost nothing else. And as a result, I was able to write about nominations to courts in the broader context of writing about the institutional work product of those same courts. For example, when President Bush nominated Brett Kavanaugh to the D.C. Circuit Court of Appeals, I knew Kavanaugh's career rather well, having written about his work both at the White House and previously at the Office of Independent Counsel Kenneth Starr.<sup>4</sup> I also knew the tangled history of nominations to the court in question, which had not merely seen senators fighting about individual nominees but also taking strong stands about whether to fill certain judgeships at all—and then switching those positions when administrations changed. And, finally, I knew the court itself—its culture and the sort of work that it

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4. Kavanaugh, for example, is quoted several times by name in my book on the Starr investigation. BENJAMIN WITTES, *STARR: A REASSESSMENT* 77, 89, 91, 131, 132 (2002).

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does and does not do. All of this played a big role when it came time for me to write an editorial on Kavanaugh's confirmation. I was in an unusually good position to form a view of my own.

Most reporters do not get that opportunity, and in many cases I did not either. Although I was well positioned relative to almost all other journalists, I was not invulnerable to the interest groups' malign influence all of the time. For example, during the Clinton administration a conservative group attacked a Ninth Circuit nominee, Marsha Berzon, and painted her as an abortion-rights radical. I mentioned this basis for opposition to the nominee in an editorial supporting her<sup>5</sup>—only to find out later to my horror that she had, in fact, no public record on abortion at all. On many occasions I could have used guidance from an authoritative source that had no bias either for or against the nominee in question but which had looked at the issue I was writing about carefully and according to known and consistent standards.

The interest groups can be astonishingly aggressive about filling this void. In the case of one Bush administration nominee, for example, a representative of a liberal interest group opposing the nominee handed me two reports. One was a public document; the other was a "for your eyes only" confidential document in a sealed envelope. I never opened the envelope, so I cannot be sure what it contained. But I presume it contained attacks of a nature more personal or tendentious than the group was willing to engage in publicly.

Part of the problem in the debate over judicial nominations is that political actors in our system contest virtually every significant component of the issue<sup>6</sup>—and most major players in the debate do not have stable positions on the key questions. Is the President entitled to deference from the Senate over a nominee and, if so, how much deference? Is a nominee's ideology legitimate grounds for senatorial opposition and, if so, when? For that matter, what exactly does ideology mean? Americans who follow judicial matters argue over the qualifications of individual nominees, both in absolute terms and relative to one another. They argue over ethical questions. They even argue at

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5. Editorial, *The Paez and Berzon Votes*, WASH. POST, Mar. 3, 2000, at A28 ("Ms. Berzon stands accused of favoring abortion rights and supporting the labor movement.").

6. The one major component of federal judicial nominations that American political society still does not seriously contest is district court nominations; they rarely provoke major controversy.

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length over what should be purely empirical questions: which President's nominees have fared better and worse in the Senate? Which party has run the confirmation process more or less fairly and expeditiously? I suspect that one of the reasons the debate is so far-flung and undisciplined is the lack of any authoritative voices within it.

Trusted sources matter, and other politically contested fields to one degree or another have them. Economists across the political spectrum, for example, rely on data and reporting from a variety of government agencies.<sup>7</sup> Many of these data categories—the size of the federal deficit, the unemployment rate, the inflation rate, consumer confidence, and durable goods orders, to cite a few examples—are accepted as probative of something important in economic discussion. Trusted sources offer a great range of material and are not limited to data reporting. Their reach extends to analytical work by governmental sources—the State Department's annual human rights reports and investigative reporting by inspectors general, for example—as well as similar work product by non-governmental institutions. While the most obvious of these trusted sources is the press itself, researchers in any number of organizations, universities, or think tanks, and even bloggers, can play the same role. The key is consistent, useful information and analysis delivered in a fashion that disciplines to some degree the combatants in political disputes by adding to the discussion a rigor that neither side can ignore.

No such institution has developed organically with respect to judicial nominations. The only two that even attempt such a role are the ABA and the press, and both are badly positioned for the task. The ABA process, even when it works properly—and it generates a great deal of controversy on its own terms—addresses a series of questions few people are really asking. To some degree, this is a function of the ABA's success; a “well qualified” ABA rating generally makes it unproductive to argue against a nominee's qualifications, and the prospect of the ratings process probably discourages the selection of candidates who do not meet minimal professional standards. As a result, it is quite rare that the stated objections to a particular nominee concern his or her professional qualifications, and when they

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7. See The U.S. Department of Labor Home Page, <http://www.dol.gov> (last visited Apr. 13, 2009) (summarizing a series of common economic metrics such as the Consumer Price Index and Unemployment Rate, at the bottom of the page in the “Latest Numbers” section).

do, those professional qualifications seldom constitute the *real* reason for opposition. They are usually a convenient cover for opposition on some other basis. When we debate whether John Roberts or Samuel Alito is too conservative for the Supreme Court or whether a particular nominee's ethical infractions are disqualifying, the ABA's description of the candidate as "well qualified" is singularly non-responsive to the issue at hand. Even when many Democrats debated whether Judge Kavanaugh was "qualified" for the D.C. Circuit, the debate had a false ring. It was an all-but-open pretext for something else: the fear of another young conservative who had cut his teeth, to a liberal eye, in all the wrong places. Except in truly unusual circumstances, presidents do not nominate people who are frankly unqualified for the federal bench, and when they do, the political system does not need the ABA to point out the deficiency.<sup>8</sup>

The press is a more plausible umpire, for the same reason that it successfully serves that role in other arenas. And at its best, it already plays this role in judicial nominations. For example, when NARAL Pro-Choice America took out a flamboyantly false advertisement about Roberts's advocacy in abortion cases,<sup>9</sup> press attention quickly forced it to pull the ad.<sup>10</sup> That said, I am pessimistic that that the press will take on this role in a systematic fashion with respect to judicial confirmations. The reason, to put it bluntly, is diminishing interest. The press just does not care that much about law. Very few reporters go into the business because of a passion for the law; they become reporters, by and large, with ambitions to cover politics or to investigate wrongdoing in high office. And the allocation of resources within journalistic institutions reflects this bias.

Consider the *Washington Post*, which, as I have said, does as good a job as any media organization in this area. It has a full-time editorial writer assigned to legal affairs. It has a Supreme Court reporter. It has a federal courts reporter who largely covers trials in federal court in Washington. It has part-

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8. See JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* 271–84 (2007) (discussing how conservatives' objections to Harriet Miers's qualifications to serve on the Supreme Court did not await the ABA's judgment). Indeed, conservatives precluded her nomination's going forward even before the ABA had rendered any judgment. *Id.*

9. Linda Greenhouse, *TV Ad Attacking Court Nominee Provokes Furor*, N.Y. TIMES, Aug. 11, 2005, at A1.

10. Sheryl Gay Stolberg, *Abortion Rights Group Plans to Pull Ad on Roberts*, N.Y. TIMES, Aug. 12, 2005, at A14.

time coverage of Maryland federal courts. And it has a reporter covering trials in Northern Virginia—the site of many of the major terrorism cases. And that is it. None of these people—except the editorial writer—handles nominations to the courts they cover. Compare that for a moment to the legion of reporters the *Post* assigns to covering a campaign or the administration and Congress or the local football team. The result is almost inevitably that lower-court nominations will go undercovered and that Supreme Court confirmations will be covered ad hoc by people with no particular expertise or tactile familiarity with what the Court does. And importantly, both will be covered as *political* stories rather than as events in the life of the federal judiciary.

Further, the press—even if it were willing to engage more seriously with confirmation politics—is badly positioned as an institution to engage the substantive debates over nominees. The press can report that Senator Ted Kennedy alleges that a given judge is “outside the mainstream” or that Senator Jon Kyl alleges that a different nominee is a would-be “judicial activist.” And it can also report that senators on the other side of the aisle argue the contrary. The press can report effectively on the mechanics of the fight (which senators are holding up which nominee?) and it can handle quite well the political fight over these procedural fights (is the nuclear option going to be exercised?). But it is singularly lousy at answering the question of whether the substantive allegations underlying the whole eruption are correct.

The reason is two-fold: first, because of the press’s general and honorable posture of evenhandedness between warring political sides, and second, because of the previously mentioned lack of expertise in the substantive law and legal philosophy the parties are contesting. Reporters do not know whether the nominee of the day is an extremist; they would not tell you if they did have a view; and in many cases, that view would not be terribly well informed. Without an overt lapse into subjectivity—a course the press understandably and correctly resists—it is difficult to do more than report whether other people *agree* with Kennedy’s or Kyl’s allegations. With notable individual exceptions, the press is the institution most in need of an umpire; it is not going to serve that function itself.

## II. THE CONSEQUENCES

The absence of a serious umpire has a number of perverse consequences. The most important is that all nomination fights blur together into an indistinct *mélange*. American political elites have the same argument over nominees that present genuinely different issues.

As an example, take three Bush administration nominations to the D.C. Circuit—those of Judge Kavanaugh, Judge Janice Rogers Brown, and the failed nomination of appellate lawyer Miguel Estrada. To the average combatant in the wars over the courts—and the war over the D.C. Circuit is a particularly fierce theater of conflict within the larger fight—these nominations were all of a piece. If you are a liberal, all three nominees were right-wing nominations to the second-highest court in the land, part of a long-term conservative effort to take over the federal courts and position young and minority wingnuts for ultimate elevation to the high court. If you are a conservative, all three were examples of unfair liberal attacks on high-quality conservative nominees whose confirmations should have been no-brainers. I would argue, however, that the issues raised by these three nominations differed enormously and warranted sober, real-time disaggregation from one another.

Ironically—considering his eventual defeat—Estrada presented the simplest case: an assertion of extreme conservatism in the absence of any evidence of it. Estrada had no history of taking public positions either on legal questions (except in client representations) or on public policy matters. Yet Democrats took his lack of a paper trail of writings and his refusal to address certain questions in his confirmation hearing as evidence of their premise, rather than as a lack thereof. The government's refusal to accede to Democrats' astonishing demand for Estrada's memos as a staff lawyer in the Solicitor General's office was presumed to be an effort to hide his extremism as well.<sup>11</sup> In Estrada's case, there simply was no legitimate issue: by all accounts, he was well qualified, and no evidence suggested that he harbored views other than the conventionally conservative ones he professed. On a court whose politics ranges from Judge David Tatel to Judge David Sentelle, there was no non-arbitrary basis on which to reject Estrada.

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11. See WITTES, *supra* note †, at 32.

By contrast, the Democrats had a case to make against Judge Brown. Unlike Estrada, she had a record of eccentric views, having given speeches in which she seemed to embrace the Supreme Court's long-abandoned *Lochner*-era doctrines.<sup>12</sup> Additionally, there was at least some reason to believe that these views were not simply academic musings, for she had also written opinions as a California Supreme Court justice that seemed closely linked, thematically, to these writings.<sup>13</sup> Given how decisively the American legal culture has turned from the *Lochner*-era solicitude for precluding regulation based on substantive due process, there is clearly a mainstream view on this subject—about which conventional judicial conservatism and conventional judicial liberalism agree, but against which Judge Brown had positioned herself in dissent.

That fact poses, in my view, a legitimate and non-trivial question for senators: how tolerant should they be in the confirmation process of qualified nominees who take substantive positions which are both eccentric and yielding of outcomes to which the senators expect to object? While Judge Brown's performance on the bench so far has by no means borne out Democratic anxieties, this is not a question on which all reasonable senators will agree. In other words, whereas the record could not reasonably support a "no" vote on Estrada, it could on Judge Brown.

Judge Kavanaugh presented the most complicated case, in part because everyone knew that Republican senators certainly would have opposed the mirror-image Democratic nominee. He had a glittery resume, but it was also an overtly political resume. He was young (though not the youngest appointee to

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12. See Janice Rogers Brown, Assoc. Justice, Cal. Sup. Ct., Speech at the Federalist Society, University of Chicago Law School: "A Whiter Shade of Pale": Sense and Nonsense—The Pursuit of Perfection in Law and Politics (Apr. 20, 2000), available at [http://www.constitution.org/col/jrb/00420\\_jrb\\_fedsoc.htm](http://www.constitution.org/col/jrb/00420_jrb_fedsoc.htm) ("[U]ntil last term the Supreme Court held out the promising possibility of a revival of what might be called *Lochnerism*-lite . . . [which] offered a principled but pragmatic means-end standard of scrutiny under the takings clause.").

13. See *Santa Monica Beach, Ltd. v. Super. Ct.*, 968 P.2d 993, 1040 (Cal. 1999) (Brown, J., dissenting) ("[I]n the aftermath of *Lochner*, . . . the federal high court . . . relegate[d] economic rights to a decidedly inferior status. This has resulted in a judicial review not merely deferential but actually nonexistent. The rational basis test—a standard of review which allows legislative action to stand if the court can hypothesize any perfunctory justification for it—is as bad in its own way as substantive due process. Neither approach finds support in the constitutional text.").

the court in modern history);<sup>14</sup> he was a White House lawyer (and Republicans had opposed Elena Kagan's confirmation, in part, on the basis that she had served in Bill Clinton's White House counsel's office);<sup>15</sup> and he had been nominated to the long-controversial twelfth seat on the court (which Republicans had argued during the Clinton administration against filling, citing the court's scanty workload).<sup>16</sup> Judge Kavanaugh, in other words, was a politically provocative choice, one whom the President could not have sent to the Senate without expecting to ruffle feathers. At the same time, he had never advocated judicial doctrines other than those of a traditional jurisprudential conservative, so no ideological case against him existed. And there was every reason to imagine him as a wholly capable jurist.

These three nominees should have presented very different issues to the Senate and to the political culture at large. But you would lose all that difference in either the *New York Times* or *Wall Street Journal* editorials about the three cases. Both newspapers utterly conflated the three cases according to their own preexisting political viewpoints. The *Times*, for example, described Estrada as an "unacceptable nominee" with a "scant paper trail but a reputation for taking extreme positions on important legal questions."<sup>17</sup> Because Estrada "stonewalled when he was asked at his confirmation hearings . . . to address concerns about his views" the *Times* urged the Senate to reject his nomination.<sup>18</sup> Another *Times* editorial described Judge Brown as "an archconservative justice on the California Supreme Court" who had "declared war on the mainstream legal values that most Americans hold dear."<sup>19</sup> Yet another editorial described Judge Kavanaugh as an "unqualified" nominee who

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14. 152 CONG. REC. S5308 (daily ed. May 26, 2006) (statement of Sen. Sessions) (referring to Judges Harry Edwards, Douglas Ginsburg, and Kenneth Starr, all of whom were younger than Judge Kavanaugh when they were appointed to the D.C. Circuit court).

15. News coverage of Kagan's nomination was almost nonexistent and focused on her being nominated to a seat which Republicans did not mean to fill. That said, objections to confirming a "Clinton White House lawyer" cropped up more than once in my reporting on the subject at the time.

16. Al Kamen, *Hunting for an Unlikely Appeals Judge*, WASH. POST, May 24, 1999, In the Loop, at A23.

17. Editorial, *An Unacceptable Nominee*, N.Y. TIMES, Jan. 29, 2003, at A24.

18. *Id.*

19. Editorial, *Out of the Mainstream, Again*, N.Y. TIMES, Oct. 25, 2003, at A18.

“does not have the legal background appropriate for such a lofty appointment” having, instead, “a résumé that screams political partisanship.”<sup>20</sup> Kavanaugh’s nomination, the paper said, was a sop to the conservative base by a President sinking in the polls.<sup>21</sup> By contrast, the *Journal* treated all three as obvious calls for confirmation.<sup>22</sup> While at the *Post*, we tried to disaggregate these issues—we supported Estrada vociferously and Judge Kavanaugh more cautiously, while opposing Judge Brown—we were swimming against a considerable tide. The average news consumer could be forgiven for seeing only minimal distinctions between nominees who warranted very different debates, different both from one another and different from what they got.

Even as the absence of a strong institutional umpire masks important differences between nominees and thereby inhibits sophisticated debate over those nominees, it also encourages debate over things that should not be debatable. Fights over whether the Judiciary Committee moved more judges under Senator Patrick Leahy’s leadership than under Senator Orrin Hatch’s, over whether President Clinton’s nominees fared better in the Senate than President Bush’s did, and over which nominees received the roughest treatment at the Senate’s hands are now a mainstay of the nominations wars. Both sides routinely abuse data, using whatever measures are most convenient at any given time.<sup>23</sup> Yet these are questions with correct and incorrect answers—matters on which consistency of data use is not the hobgoblin of little minds. Data on judicial nominations over many decades are available—if sometimes difficult to dig out and assess comparatively—and one could easily track the Senate’s progress on confirmations across administrations and across senatorial control by both parties using consistent metrics. Yet nobody does so in a manner that informs in real time a pressing political debate.

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20. Editorial, *An Unqualified Judicial Nominee*, N.Y. TIMES, May 3, 2006, at A24.

21. *Id.*

22. See Op-Ed., *Brown Gets Borked*, WALL ST. J., Oct. 30, 2003, at A16; Op-Ed., *The Next Filibuster?*, WALL ST. J., May 4, 2006, at A14.

23. See, for example, Hatch’s and Leahy’s many dueling statements on the subject, in which each claims to have run the committee as a model of efficiency and fairness, while accusing the other of falling far short of the mark. 154 CONG. REC. S3045 (daily ed. Apr. 16, 2008) (statement of Sen. Hatch); 153 CONG. REC. S1729 (daily ed. Mar. 7, 2008) (statement of Sen. Leahy).

## III. A VERY MODEST PROPOSAL

As I noted at the outset, I do not pretend that the creation of a trusted source of information about judicial nominees and nominations would magically bring about a cease-fire in the wars over the courts. The problems afflicting the modern confirmation process have their roots in the big, tectonic shifts in American politics that have taken place over the past five decades—the movement of the political parties away from patronage institutions and towards more regional, ideological organs, the rise in judicial power, and the consequently increased anxiety over the gateways to a major new power center.<sup>24</sup> These forces are real and, as long as they persist, Americans will—and probably should—fight tenaciously over their judges. The goal of the project I envision, rather, is to add a measure of accountability to a debate that currently has none and to give the public an institution to which it can turn for fair-minded and methodologically consistent treatment of a subject that plays an ever-growing role in our political discourse.

What would such a project—which my colleague Russell Wheeler and I mean to undertake at the Brookings Institution beginning in the new administration—look like in practice? First, it would not take a position for or against the confirmation of individual nominees, nor would it take positions on the substantive questions of judicial philosophy that underlie a large percentage of the controversies surrounding judges. Its purpose would, rather, be purely informative and analytical.

Second, it would actively address, rather than shy away from, the areas of actual political dispute concerning any particular nominee. If she is universally acknowledged to be qualified but alleged to be ideologically menacing, for example, it would address the substance of the allegations that *are* made against her, not the professional qualifications to which everyone accedes.

Third, it would strive to provide readers with all of the information they need to know in order to make an informed judgment about a given nominee, as well as all of the information they need in order to assess the integrity of the confirmation process more generally.

Bringing these principles down to earth involves the creation of a dynamic web presence composed of three distinct elements. The first is a rigorous set of statistical data that tracks

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24. See WITTES, *supra* note †, at 15–36.

both the individual treatment of each nominee and the aggregate treatment of nominees in general: how long did it take for the Senate to confirm a given nominee? How long did it take it to confirm the average nominee to circuit and district court vacancies under a given President or under the leadership of a given party in the Senate? What are the confirmation rates of circuit and district court nominees under different presidents? How has the treatment of nominees changed based on probative metrics? Does the change correlate with a particular party's control either of the Senate or the presidency or is it a non-partisan effect? These are questions for which a continuous flow of constantly updated data would provide a great deal of insight.

The second component is basic biographical information about each nominee, as well as a comprehensive set of links to news stories, interest group reports, ABA ratings, Senate hearing and debate transcripts, and other public record material. Readers should have access through this web site, in short, to any significant statement made about, or reporting on, a nominee.

The third and most difficult component is an ongoing evaluation of controversies that arise over the course of a nomination. This discussion, which would amount to a kind of blog for each nominee, would remain relatively idle in the context of non-controversial confirmations but could become quite extensive in Supreme Court nominations or in the harder-fought appeals court—and even district court—nominations. The goal is to provide readers with a lens through which to filter the ideological noise, one that can dismiss trivial controversies and provide guidance for thinking about the more serious ones. To be effective, it would have to analyze controversies quickly, so that the press and the public have somewhere to go that will both provide analytically rigorous commentary and do so in a fashion responsive to the news cycle. To be credible it would have to show consistency in approach over time and the use of sound analytical criteria irrespective of party control of either the executive or legislative branches.

## CONCLUSION

The last several years have seen a variety of different categories of nomination flaps. They have involved nominees against whom the opposition could generate no coherent case. They have involved nominees of both parties who were undoub-

tedly qualified yet about whom the opposite party—given their differences with the nominee—would understandably harbor anxiety. And they have involved a small number of people against whom opponents could muster nontrivial ethical complaints or could argue lacked the minimal qualifications necessary to serve on the bench. Our political system lacks, however, an effective mechanism for figuring out and informing the public which nominees belong in which box. That failure means that every controversial nominee tends to end up in all boxes at once; supporters find themselves unable to acknowledge truths that might justify no-votes by senators, while opponents feel obliged to allege far more than they can prove both about the substance of the nominee's views and about the person's career and ethics. The press and public's reliance on the interest groups as intellectual filters in this debate makes a more rigorous sorting all but impossible. It is time to offer a more serious alternative.