

THE PRESIDENT'S NOMINEE:

Robert Bork and the Modern Judicial Confirmation Process

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The 1987 battle over the nomination of Judge Robert Bork to the U.S. Supreme Court continues to affect American politics. Bork's failed nomination was the first in over fifteen years, and on its face Bork's troubles did not seem comparable to those Richard Nixon's doomed nominations of Clement Haynsworth and G. Harrold Carswell. The explicitly ideological and partisan struggle over the Bork nomination seemed distinctive. The fight was embittering and seemed to set the tone for, or perhaps simply symbolize, a new era of contested judicial nominations. Rightly or wrongly, it remains a touchstone for modern difficulties and challenges in the confirmation process.

President Reagan's inability to place Bork on the Court still has consequences for the judiciary itself. Lewis Powell's seat that Bork was nominated to fill eventually went to Anthony Kennedy. Of course, Justice Kennedy has long been a pivotal vote on a closely divided Supreme Court, and he continues to serve on the Court over two decades after Bork's defeat. Had Bork filled that seat instead, the current Court would look quite different. Justice Samuel Alito or Chief Justice John Roberts might now be the median justice on the Court instead of Justice Kennedy.

In considering the Bork nomination and what it tells us about modern Supreme Court appointment politics, this article is divided into three parts. The first part begins by considering the opportunities that the president has to place justices on the Court and by doing so to influence the direction of the Court and constitutional law. The second part examines some factors that made the early Senate a much riskier environment than the modern Senate is, while also revealing the extent to which divided government is now the critical variable in the confirmation calculus. The third part focuses on the Bork nomination itself and the division between conservatives and moderates within Republican ranks as the Reagan administration tried to make the most of its opportunity to fill a seat on the Court.

I.

In his classic article on the Supreme Court's relationship to the rest of the political system, the political scientist Robert Dahl echoed the sentiment of the turn-of-the-century fictional bartender Mr. Dooley: The Supreme Court follows the election returns. Mr. Dooley was not very specific about why the Court would do that, but writing in the middle of the twentieth century, Dahl pointed to the mechanism that he thought tied the Court to the electorate. The Court is staffed through a political appointments process. As Dahl pointed out, over the Court's history a new justice is appointed on average every twenty-two months. With those odds in mind, a president might expect to appoint two justices during a single term of office and four justices if reelected. Most presidents might reasonably start

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their administration optimistic about their ability to "tip the balance on a normally divided Court" (Dahl 1957, 284).

Things have changed a bit since Dahl wrote at the dawn of the Warren Court. Recently, there has been some fretting over how long justices serve and conversely how often new vacancies appear on the high bench (Cramton and Carrington 2006; Crowe and Karpowitz 2007). With a half-century distance on Dahl, the numbers have changed a bit. Across American history as a whole, we would now say that on average a vacancy has opened up on the Court every twenty-five months. The historical average is obviously being driven up somewhat by the modern experience, where vacancies have become somewhat more precious. Even thinking in these simple terms, a president could not readily expect to appoint two justices during a single term of office or four during two terms.

One way that Dahl highlighted the frequency of vacancies on the Court was by looking at the interval between appointments to the Court. Table 1 replicates and updates his own findings on this. Taking into account all the successful Supreme Court nominations in American history, the table shows the distribution of appointments by how much time passed between appointments. As Table 1 highlights, the majority of appointments to the Court have come in close succession to one another. In most cases, relatively little time passes before the president is able to place a justice on the Supreme Court. Nearly half of the appointments have come within a year of the preceding one. There have been occasions when the country has gone for relatively long periods without an appointment to the Court—as long as decade—but such occasions are exceedingly rare in American history. It is perhaps

TABLE I:
THE INTERVAL BETWEEN APPOINTMENTS TO THE SUPREME COURT

Intervals in Years	Percent of Total Appointments	Cumulative Percentage
Less than 1	43%	43%
1	23%	66%
2	10%	76%
3	10%	86%
4	7%	93%
5	5%	98%
...
11	2%	100%

NOTE: The table excludes the six appointments made in 1789. It measures by day of nomination to the Senate. The results differ somewhat from Dahl's calculation, presumably due to how appointments were measured. The extreme outliers are between the appointments of Duvall and Thompson in the Jeffersonian era and of Breyer and Roberts in the modern era.

SOURCE: "Supreme Court Nominations, 1789-present," <http://www.senate.gov/pagelayout/reference/nominations/reverseNominations.htm>

not surprising that recent discussions of judicial terms limits emerged during one of these historical outliers. Even with another half century of experience, Table 1 still reinforces Dahl's point that Supreme Court appointments happen frequently, and most presidents might reasonably expect to have a significant influence on the shape of the Court by adding new justices to the bench.

But from the perspective of an individual president, averages may matter less than the variation. As Dahl (1957, 285) wryly noted, Franklin Roosevelt had "unusually bad luck" in not being able to make an appointment to the Court during his entire first term of office. The consequences of Roosevelt's unusually bad luck for both the country and the political institutions involved were rather severe. Other presidents have had unusually good luck. Eisenhower made five appointments to the Court in two terms; Richard Nixon made four in less than two terms; Taft made six in his two terms as president. History also shows that the timing of vacancies matters. Vacancies near the end of a presidential term have often proven difficult to fill (Whittington 2007). It matters when vacancies occur.

Another way of looking at this is to consider the distribution of Supreme Court appointments across four-year presidential terms of office. Table 2 provides that distribution. The table highlights four-year terms rather than individual presidencies or presidential administrations since the concern is with how appointments are distributed across electoral cycles. Dahl emphasized the average length of time between appointments, but from the perspective of a newly elected president with an uncertain prospect of reelection, what have been the prospects of filling seats on the high bench? The story in Table 2 looks a little different.

TABLE 2:
NUMBER OF SUPREME COURT APPOINTMENTS PER PRESIDENTIAL
TERM

Number of Appointments per Term	Percent of Total Appointments	Cumulative Percentage
0	18%	18%
1	20%	38%
2	32%	70%
3	14%	84%
4	9%	93%
5	5%	98%
6	2%	100%

NOTE: The table excludes the six appointments made in 1789 and includes only nominees who took a seat on the Supreme Court.

SOURCE: "Supreme Court Nominations, 1789-present," <http://www.senate.gov/pagelayout/reference/nominations/reverseNominations.htm>

Nearly a fifth of presidential terms have passed without a single Supreme Court appointment being made. Nearly forty percent of presidential terms have seen one or fewer new Supreme Court justices assume their robes.

Once we take into account the variance in the frequency of Supreme Court appointments, Franklin Roosevelt's first term begins to look a little less like "unusually bad luck." His poor luck was shared by many presidents, including Thomas Jefferson, James Madison, Andrew Johnson, Woodrow Wilson, Calvin Coolidge, and Jimmy Carter. The relatively small interval between appointments that appears in Table 1 in part reflects a clustering that can occur with appointments. The opportunities that Andrew Jackson, Abraham Lincoln, U.S. Grant, Benjamin Harrison, William Howard Taft, and Franklin Roosevelt had to make large number of appointments to the Court in rapid succession drove up the percentage of appointments in the categories at the top of Table 1. But those are not the normal presidential administrations. Those presidents were able to have an outsized influence on the Court. Opportunities that fell to them might well have been denied to others. In some cases, of course, presidents were specifically blocked from being able to make judicial appointments, as was the case with Andrew Johnson who was filling out Abraham Lincoln's second term and had Supreme Court vacancies taken away from him by a hostile Congress. But consider that in a single term of office William Howard Taft was able to make six appointments to the Court, while in the three previous terms William McKinley and Theodore Roosevelt were only able to make a total of four appointments. The distribution of appointments across time is lumpy, and presidents cannot necessarily expect many opportunities to influence the composition of the Court.

Every Supreme Court appointment is precious. Over the long-term, Dahl's point remains true that the elected branches will put their mark on the judiciary through the appointments process. For any individual president, the prospect of a vacancy, or two, in any given term of office remains highly uncertain. Vacancies cannot be taken for granted, and the possibility of influencing the Court through a carefully chosen appointment cannot be taken lightly by an administration that cares about the future of constitutional doctrine.

II.

Dahl also simplified things by largely ignoring the details of the appointment process. His focus was on a "national lawmaking majority" or "political coalition." With Progressive and New Deal battles in mind, his basic point was both important and salient—that conservative political parties appointed more conservative justices, and liberal political parties appointed more liberal justices, and when a political party controlled the lawmaking institutions of the national government, it had fairly quickly been able to turn the Court in its favor by appointing its own party faithful to the bench. Dahl could afford to ignore the details of the appointment process—that is, the division between the president and the Senate—but we cannot. Those divisions have consequences now that they did not have at earlier points in American history.

Over the course of American history, twenty-seven presidential nominees to the U.S. Supreme Court have been rejected by the Senate.² That is just under a fifth of the total number of names that presidents have put before the Senate. Dahl happened to be writing during a period of historic success in presidential nominations to the Supreme Court, however. With the notable exception of the dramatic failure of Herbert Hoover's nomination of Judge John Parker to the Court in 1930, the first half of the twentieth century was a period of relatively smooth sailing for Supreme Court appointments. The American experience more generally suggests that presidents often have difficulty getting their choices for the Court through the Senate.

The details of the appointment process might not matter to Dahl's central concern if failures are idiosyncratic. That is ultimately our quarry as well. In what ways might presidents need to worry about the Senate when they do have the opportunity to try to fill a vacancy on the Supreme Court?

TABLE 3:
SUPREME COURT NOMINATIONS BY PARTY CONTROL,
1789-2010

	Divided Government	Unified Government
Number confirmed	18	105
Number not confirmed	8	19
Failure rate (%)	31%	15%
NOTE: Number confirmed includes individuals who declined to serve. President and Senate majority party identity is nominal. For details, see Whittington 2006.		

Divided government has been an uncommon but difficult environment for Supreme Court nominations. Relatively few nominations have been made during periods of explicitly divided government, but these situations account for a high percentage of the failures in presidential nominations to the Supreme Court. A third of all failed Supreme Court nominations have occurred when the president and the Senate are in the hands of different political parties. The failure rate for Supreme Court nominations is twice as high during periods of divided government as it is during periods of unified government. Moreover, the relative success of

² The focus here is on official nominations to the U.S. Senate that are clearly rejected by direct action or deliberate inaction. For details, see Whittington 2006, 410.

unified government has not historically required large, filibuster-proof majorities but has been emerged even with fairly slim partisan majorities.

Looking at the raw numbers, divided government would appear to be bad news for Supreme Court nominees. Unified government would appear to be a much safer environment, though not completely secure. As with the frequency of Supreme Court nominations, however, the historical averages regarding divided and unified government are misleading. There are some important differences over time that have shaped the strategic environment within which presidents make Supreme Court nominations.

Some have argued that the nineteenth-century Senate was a more aggressive gatekeeper than the more modern Senate (Tulis 1997). Certainly it is true that a quarter of the nominees to the Supreme Court prior to 1900 were rejected. By contrast, just under ten percent of the nominees since 1900 have been rejected. Something is different about the early Senate compared to the more modern Senate.

Two differences can be briefly noted here, one relating to the electoral calendar and the other relating to party behavior. The fixed American electoral calendar means that some vacancies may arise near a presidential election, or even during the lame-duck period after a new president has been selected. This window for late-term and lame-duck vacancies and appointments was much larger prior to the adoption of the Twentieth Amendment to the Constitution in 1933, which shortened congressional terms and set the inauguration day at January 20th rather than the traditional date of March 4th. We might expect that Supreme Court nominations made near or after presidential elections would have a more difficult time making it through the Senate confirmation process than nominations made in the middle of the legislative session. As the session nears its end, obstruction becomes a more attractive strategy. The time to move a nominee through the process is limited, and there is a possibility that the opposition can simply wait out the president and hold the vacancy over to the next presidential administration. In the middle of a term, there is no prospect that a vacancy will eventually be filled by a different president. The Senate must ultimately come to terms with the sitting president and the type of nominees that he favors, giving the president a much greater advantage in his dealings with the Senate.

In practice, late-term appointments were much more common early in American history than they have been more recently. The last lame-duck nomination, for example, occurred in 1892, when Republican President Benjamin Harrison tried to fill a vacancy on the Supreme Court after he had been defeated by Democrat Grover Cleveland. Harrison was eventually successful, but only after negotiating with the Democratic minority to nominate one of their own to fill the seat, former Democratic Senator Howell Jackson, who had been appointed to the federal circuit court during Cleveland's first term as president (Friedman 1983, 40). In total, presidents have made nineteen Supreme Court nominations within six months of an upcoming presidential election or after an election. All but two of those came before 1900. On the whole, they have distinctly higher failure rates than other nominations. Upwards of half of those nominations have failed to be confirmed, compared to just over ten percent of nominations made at other points during

the presidential term (Whittington 2006, 417). These few nominations have an outsized effect on our image of the nineteenth-century Senate as a bulwark against presidential choices to fill judicial vacancies. The nineteenth-century Senate's track record for rejecting presidential nominees for the Court is inflated by these historically unusual late-term appointments.

Party behavior as it relates to Supreme Court nominations has not been entirely uniform across American history either. Table 3 calls our attention to the relatively large failure rate of Supreme Court nominees during periods of divided government. But it is also notable how many failures, in absolute terms, have occurred during unified government. In the nineteenth century, presidents quite often had difficulty getting Supreme Court nominees past their own co-partisans in the Senate. That experience is (mostly) reflective of features of politics that are unlikely to be prominent today. During periods of party instability and fragmentation, some presidents were only nominally members of the same political party as the Senate majority, and the government was unified in name only. President John Tyler may have been a kind of Whig, but the Whig leadership in Congress regarded him as an apostate and a pretender to the office of chief executive (Morgan 1954). Tyler was also persistent. He had six nominations rejected by the Whig Senate in rapid succession, before finally winning confirmation for a respected Whig jurist after a Democrat won the presidential election of 1844. In other cases, senators of the same party were willing to send the president back to the well in making a Supreme Court nomination if the original nominee offended party interests or factional cohesion. Republican senators used the nomination of Ebenezer Hoar to the Supreme Court by President Grant as an opportunity to extract payback for Hoar's civil service crusade while attorney general (Warren 1922, 3:223-229).

These additional factors in the historic experience with Supreme Court confirmations are summarized in Table 4. The table highlights that the appointments process was much riskier prior to 1900 than it has been since 1900. Nonetheless, there have been some notable shifts over time in the appointments process. Late-term nominations have always been exceedingly risky, and they were once quite common. They have virtually disappeared from modern politics. The resignation of Chief Justice Charles Evans Hughes to accept the 1916 Republican nomination for the presidency and the resignation of Chief Justice Earl Warren on the eve of the 1968 election in an ill-fated attempt to prevent Richard Nixon from choosing his successor are the only modern exceptions and emphasize their exceptional nature. Nominations now come in the middle of presidential terms. As Table 4 highlights, it was once the case that during the middle of their terms, presidents had to fear the Senate when it was controlled by their own party but not when it was controlled by the opposite party. The sole exception during divided government was when the lame duck Whig Senate rejected the nomination of the hated Roger Taney to be associate justice out of spite. Andrew Jackson only needed to wait a few months to try again. (As it happened, the position of chief justice opened up during the interval.) By contrast, a quarter of the nominees made during divided government in the middle of a presidential term have gone down in defeat since the turn of the twentieth century. No matter what else could be said about

TABLE 4:
SUPREME COURT NOMINATIONS BY TIMING AND PARTY CONTROL,
1789-2010

	Divided Government		Unified Government	
	Late-Term	Not Late-Term	Late-Term	Not Late-Term
<i>Pre-1900</i>				
Number Confirmed	0	6	8	50
Number Not Confirmed	4	1	5	11
<i>Post-1900</i>				
Number Confirmed	0	12	1	46
Number Not Confirmed	0	3	1	2
NOTE: "Late-Term" nominations include all nominations made within six months of a presidential election or after the election. For details, see Whittington 2006.				

those failed nominees, they certainly were not as politically polarizing as Roger Taney in 1835. Even as modern nominations have become riskier during divided government, they have become easier during periods of united government. Since 1900, only John Parker and Harriet Miers have failed to win confirmation when sent to a same-party Senate in the middle of a presidential term.

Divided government has become a crucial factor affecting judicial nominations. This was not always the case. Presidents had difficulty from the opposition party when they tried to make nominations near the end of their terms, but traditionally the opposition did not resist the president's choice for the Supreme Court when the president was staying in place. Modern appointment politics is distinctly different. The focus is more ideological and, as a consequence, more partisan. The opposition party is now concerned with playing the spoiler on ideological grounds and negotiating with a sitting president for a better nominee, just as the allied party once did on factional and patronage grounds.

III.

The Reagan administration came into office in 1981 anticipating the possibility of vacancies on the Supreme Court and hoping to make the most of them. Planning started early and was unusual in the extent to which judicial philosophy was prioritized over other political and personal goals. Unlike many other presidents, Reagan did not look to personal acquaintances and friends as his primary pool for potential nominees, nor did he identify strong preferences for particular demographic characteristics in his nominees. He opened the door for his subordinates to canvass the options to identify the best candidates who would carry the administration's constitutional views into the Supreme Court.

President Jimmy Carter had been shut out from making an appointment to the Supreme Court. The Reagan administration was given an immediate opportunity to influence the Court when Justice Potter Stewart sent word soon after the inauguration that he planned to retire. The job of identifying a nominee was divided between the White House and the Justice Department. The Justice Department took the lead in conducting the research on the nominees, meaning that Attorney General William French Smith's ultimate choice of Judge Sandra Day O'Connor would likely dominate the deliberations of the White House Counsel's office. Chief Justice Warren Burger had called O'Connor to the attention of both the Justice Department and the White House, catapulting her to the top of the list of female candidates (Yalof 1999, 135-36).

Robert Bork was on the White House short-list in 1981. When Edwin Meese became attorney general, the process for considering judicial nominees was revamped, and Bork was placed on the Justice Department's short-list for any Supreme Court vacancy. The Justice Department gave little attention to issues of confirmability when assessing candidates and regarded Bork and Antonin Scalia as equally attractive. In 1986, the White House pushed Scalia over Bork in part to avoid adding to a confirmation fight that was already expected for William Rehnquist (Yalof 1999, 150-54).

Bork had missed his chance at being nominated in 1986 in part because of concerns that the combination of him and Rehnquist would be hard to push through the Senate. In 1986, the Republicans controlled the Senate. The Democrats managed to hold up Rehnquist's appointment to be Chief Justice, and they cast a historically large number of votes against his appointment, but in the end they had little chance of derailing his confirmation. History suggested that the biggest risk the White House faced in 1986 was division within its own party. If the administration could avoid a revolt from its own ranks, then it should expect to win confirmation for its nominees during periods of unified government. In a narrowly divided Senate, the Republicans lost only two senators on the Rehnquist vote (Charles Mathias and Lowell Weicker), while picking up sixteen Democratic votes.

The situation was quite different when Justice Powell retired in 1987. Bork was still on the short-list and favored by both Justice Department and White House officials as a strong advocate for the administration's conservative constitutional philosophy. The president personally indicated that he wanted Bork to be in the

mix for the Powell vacancy (Wermiel, Seib, and Birnbaum 1987, 24). But the Republicans had lost control of the Senate in the 1986 midterm elections, and Reagan's personal clout had been damaged by the Iran-Contra scandal that emerged in the fall of 1986. If there was reason to be concerned about his confirmability in 1986, it should have been significantly heightened in 1987. The administration no longer had to hold its own party. Administration officials now had to win over the other party, or at least a significant component of it.

The White House had the advantage of being able to nominate other individuals who shared its philosophy to the vacancy, minimizing the value to the Senate of obstructing any single nominee. But if the Democrats doubted the resolve of the White House to keep up the fight, or if they regarded a given nominee as uniquely unsuitable, then obstruction could still work to their advantage. Just as Robert Bork was almost uniquely attractive to members of the conservative legal movement, he was a particular lightning rod to interest groups of the legal left. Keeping him off the Court might well have been valuable to activists on the left even if the president were ultimately successful in appointing a similarly conservative justice to fill the vacancy. If there was no "similar justice," then fighting the nomination becomes all the more worthwhile. If the bullpen of plausible conservative nominees was sufficiently thin, then Reagan might be forced to move to a more moderate nominee simply because he had exhausted his list, even laying aside any desire on the administration's part to compromise and seek out a more confirmable nominee. In fact, the internal candidate lists do not suggest that the administration had many potential nominees in mind who would have been the functional equivalent to Scalia or Bork. Once those names were exhausted, compromises had to be made. Any other selection was unlikely to be fully satisfying to conservative goals (Yalof 1999, 156-57). Just as Richard Nixon found few attractive candidates who could meet his optimal political criteria for Supreme Court nominations (e.g., sitting Republican Southern judges) in the late 1960s, so Reagan found few well-credentialed conservatives suitable for promotion to the Supreme Court in the 1980s. For Democrats in the Senate, defeating Bork would almost necessarily mean moving down the list to someone like Anthony Kennedy.

White House personnel had also undergone significant changes since Bork was passed over in favor of Scalia in 1986. By the time of the Powell vacancy in 1987, the White House had a new counsel, Arthur Culyhouse, and chief of staff, former Senate majority leader Howard Baker, both of whom would be closely involved in any Supreme Court appointment. The White House now put more consideration into problems of confirmability, including the possibility that a long confirmation fight would distract political resources that might have been needed elsewhere late in the president's second term and after the Iran-Contra scandal. The administration committed to nominating Bork, but the decision was not as straightforward as it would have seemed in 1986.

For conservatives inside and outside the administration, Baker's hesitation and tentativeness about the Bork nomination indicated a lack of commitment (Evans and Novak 1987). Baker certainly did not hide his view that Bork was a "controversial" nominee who would have a hard time being confirmed (Anonymous

3 July 1987; Anonymous 6 July 1987). Conservatives accused Baker of preferring more moderate goals for the Court. They thought he should challenge the Senate and rally conservatives behind the appointment. As conservatives quickly recognized, the Bork confirmation was going to be a political battle, and they preferred to put pressure on senators to support their nominee just as liberal groups were putting pressure on senators to oppose the nominee. Free Congress Foundation president Paul Weyrich complained that Baker just did not "understand the national coalition that put Reagan in office. The price is a presidency without punch" (Gerstenzang and Fritz 1987).

The White House recognized that they needed to sell the nominee to the Democratic majority if they were going to be successful. Not unreasonably, they assumed conservatives and Republicans would eventually support the nominee. But Republicans no longer controlled the Senate. Mobilizing conservatives would be unlikely to secure a majority vote either in the Judiciary Committee or on the chamber floor. The pivotal votes were held by more moderate Democrats.

Baker thought the administration needed to vet the names of some potential nominees with the Senate, and Baker and Meese visited several senators with a list in hand. Baker portrayed these visits as a process of genuine consultation and an effort to get feedback. Some Democratic senators viewed these visits as pro forma announcements that Bork would be the nominee. In either case, the administration quickly decided to move forward with Bork, and nothing that the senators had said was regarded as decisive in indicating that he could not be confirmed (Yalof 1999, 159-60; Vieira and Gross 1998, 11).

With a coalition of liberal interest groups and prominent liberal senators like Ted Kennedy coming out in strong opposition to the Bork nomination, Baker and the White House chose a more low-key approach to winning over enough Democratic votes to secure confirmation. White House officials remained convinced that most Democratic senators would not let ideological disagreements prevent them from voting in favor of a qualified judicial nominee. Senators had once indicated as much about Bork himself, but were quickly backing off such statements now that the nomination was becoming a reality (Yalof 1999, 158). The White House brought in lobbyist Tom Korologos to help sell the nomination. As he emphasized, "the votes they needed were from the moderates" (Vieira and Gross 1998, 36). In order to win those votes, the White House thought, Bork needed to be packaged as a mature, mainstream jurist, not as a conservative intellectual. Baker, for example, went to the NAACP convention to urge the organization not to commit itself to defeating the nomination (Cottman 1987). The goal was to defuse the opposition and convince moderates that they had no reasonable basis for opposing the nomination. Rather than contributing to making the Bork confirmation debate an ideological battle with Bork positioned with as a conservative firebrand poised to overthrow swaths of established precedents—as many conservative activists wanted—Baker hoped to reframe the discussion in more traditional terms as about legal qualifications (Annis 2007, 221). If moderates could be dissuaded from joining in an ideological vote, then the White House could afford to lose more the more liberal senators and still win a majority in a Democratic Senate.

The effort was unsuccessful. The public campaign against Bork had framed him as an extremist. Liberal interest groups had put substantial pressure on wavering senators to vote against the nominee. The president had just lost support in the 1986 elections and had little leverage with which to persuade the newly elected Democrats or moderate Republicans (Annis 2007, 222-25). In particular, the president had just lost ground in the South, where he had actively campaigned against the southern Democratic senators whose votes were now pivotal to the Bork confirmation (Annis 2007, 223). Those senators owed a greater debt to their African-American constituents who were now being mobilized by the NAACP and others against Bork than to conservative groups who had favored Republican candidates in the 1986 elections (Wermiel, Seib, and Birnbaum 1987, 24). Going into the nomination, the administration worried most that Bork would primarily suffer from old scandals, such as his involvement in the firing of the Watergate special prosecutor. In the end, the opposition was content to focus on ideological disagreements. They built the case that that was enough to oppose a Supreme Court nominee. They had already developed that argument when blocking some of the Reagan administration's nominations to the lower courts. Some individuals, they contended, were simply too far out of the mainstream to be confirmable. That argument was now applied to Robert Bork, despite his earlier success in being appointed to the federal circuit court. In the end, the White House had to fall back to the confirmable Anthony Kennedy, the candidate favored by Howard Baker all along (Ostrow and Gerstenzang 1987).

The idea that some individuals are too far out of the mainstream to be confirmable and that senators should take into account ideology when casting their votes on judicial nominees is now commonplace. It was not readily predictable that so many senators would act on that view when Bork was nominated. Such developments were underway, but the Bork confirmation battle solidified them and made them much more visible. It is now routine for nominees like Alito and Roberts to lose a large number of votes from the other party. If those same nominations were made during a period of divided government, it seems likely that they would be defeated.

IV.

Presidents cannot take their opportunities to make appointments to the Supreme Court for granted. Although some presidents have been able to significantly reshape the Court through the appointments process, many others have had relatively little influence on the Court. Vacancies do not appear regularly, and when they do appear, presidents are not always able to use them to shift the direction of the Court.

One constraint on the ability of presidents to influence the Court is the participation of the Senate in the confirmation process. Across its history, the Senate has often rejected presidential nominees to the Supreme Court, but many of those rejections now appear idiosyncratic or driven by political considerations of little long-term interest. The emergence of the close ideological examination of judicial nominees by the modern Senate is a noteworthy and historically distinctive

phenomenon. It is only in the modern era that successful Supreme Court nominees routinely receive large numbers of negative votes from their ideological opponents. It is only in the modern era that divided government poses serious threats to Supreme Court nominees in the middle of the presidential administration. The ideological polarization of the parties and the surrounding interest groups focused on the judiciary has increased the odds of Bork-like fights. As White House Chief of Staff, Howard Baker tried to dampen the political fires so that the debate over the Bork nomination could take place on the neutral ground of legal credentials and intellectual qualifications. Neither side of the political divide was interested in limiting the terms of the debate.

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