"Inside the Beltway" activists play a crucial role in getting senators re-elected. When they demand that senators fight against objectionable judicial nominees, senators must respond

Given the amount of attention devoted by the Senate in recent years to lower federal court appointments, the political science literature would suggest that this issue must be highly salient with

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the American public; certainly, that is the view when it comes to Supreme Court nominations.[1] In contrast, battling with the president over the appointment of the first black jurist to the Fourth Circuit Court of Appeals, former senator Jesse Helms (R-NC) once quipped, "You go out on the streets of Raleigh...and ask 100 people: 'Do you give a damn who is on the 4th Circuit Court of Appeals?' They'll say: 'What's that? ' ... [Judicial appointments] matter only to politicians and newspaper editors."[2] Public opinion polls would seem to confirm Helms' view. For example, an oft-cited *Washington Post* poll reported that more people could identify Judge Wapner, then host of the television program *The People's Court*, than could identify Chief Justice of the United States William H. Rehnquist.[3]

Considering that the American electorate knows little about the Supreme Court, it would seem problematic to suggest that they are following the Senate's battles over lower federal court judgeships. Why, then, do senators invest so much political capital in the lower federal court confirmation process if their constituents are not paying attention?

Marrying the literatures of voter mobilization and congressional activity, I proffer an explanation of this recent, and important, development in American politics: "elite mobilization." The empirical support for my new explanation comes from in-depth interviews with the leading

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1. Carp and Stidham, THE FEDERAL COURTS (3rd Edition). (Washington, DC: Congressional Quarterly Press, 1998); Perry, A REPRESENTATIVE SUPREME COURT? THE IMPACT OF RACE, RELIGION AND GENDER ON APPOINTMENTS. (New York: Greenwood, 1991).
2. Savage, *Clinton Losing Fight for Black Judge*, L A Times, July 7, 2000, at A1.
3. Caldeira, *Courts and Public Opinion*, in Gates and Johnson (eds) THE AMERICAN COURTS (Washington, D.C.: Congressional Quarterly Press, 1991).

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conservative and liberal political elites engaged in the politics of lower court judgeships. Drawing on these interviews, I demonstrate that, unlike regular voters, there are political activists located on the far-left and far-right of the ideological spectrum who actually care—and care quite deeply—about who sits on the lower federal courts because they see federal court litigation as key to achieving their political objectives.

The interviews also suggest that these Washington elites are acutely aware of the crucial role they play in getting senators re-elected, and how they exploit their mobilization power to influence the judicial confirmation process. In short, the more closely divided the American electorate remains in any given election, the more power these activists wield because they are critical in getting the party base to vote. And so, when these political activists demand that senators stand up and fight against objectionable judicial nominees—demands made even when the activists concede that a nominee is sure to be confirmed—senators must respond; to do otherwise is to risk serious political repercussions at the polls.

Elite mobilization

Elite mobilization rests on two well established principles. First, in order to get re-elected, congressmen strategically target those paying the closest attention to the most salient issues—political elites; they, in turn, mobilize the masses. As Rosenstone and Hansen explain in their work *Mobilization, Participation and Democracy in America*:

> Locked into struggles for political advantage, political leaders mobilize public involvement strategically. They target and time their efforts for maximum effect. They target their efforts on people they know, people who are well positioned in social networks, people who are influential in politics, and people who are likely to participate. They organize their efforts around salient issues, time them to avoid other distractions, calibrate them to impending decisions, and escalate them when outcomes hang in the balance.[4]

Accordingly, the theory begins with the grasstop elites in Washington who represent interest groups dealing with some of the nation's most salient issues—*e.g.*, crime, race, and abortion—and who also believe that positive outcomes in federal court litigation are the best way for them to achieve their desired policy goals. For these activists, then, judicial confirmation votes in the Senate are the most important legislative actions affecting their interests.

Also critical to the theory is the fact that these Washington elites have access to tens of thousands of grassroots members nationwide. Not only are these grassroots activists most likely to vote, but more importantly, they are the constituents who will be responsible for mobilizing the party's base to get out and vote. Thus, in an age when the electorate is so closely divided, these grass-roots activists are often the key to winning elections. Elites, then, do an effective job at conveying constituency preferences to senators.[5]

The second principle on which elite mobilization rests comes from Mayhew's classic book *Congress: The Electoral Connection.*[6] He argued that congressmen are singularly focused on getting re-elected, and engage in three activities to further this end: position taking, credit claiming, and advertising. Though their efforts to shape the federal judiciary go largely unnoticed by the American public writ large, senators are nonetheless still engaging in important strategic mobilization efforts when they oppose an objectionable judicial candidate. In short, this is simply one of Mayhew's three classic legislative activities designed to mobilize votes—*i.e.*, position taking. Mayhew describes position taking as:

> the public enunciation of a judgmental statement on anything likely to be of interest to political actors. The statement may take the form of a roll call vote. The most important classes of judgmental statements are those prescribing American governmental ends....The congressman as position taker is a speaker rather than a doer. The electoral requirement is not that he make pleasing things happen but that he make pleasing judgmental statements. The position itself is the political commodity.[7]

Though position taking often involves speaking on issues of high salience, senators are nonetheless still engaging in position taking when speaking to a select audience of political elites, as they are regarding the judicial confirmation process. Indeed, as Mayhew recognized, "the most alert watchers are doubtless representatives of attentive interest groups."[8]

In sum, in today's political environment, senators strategically use the lower court confirmation process to mobilize elites who believe that the federal judiciary holds the key to achieving their policy goals. For a senator to defy the demands of these interest groups to block a judicial nominee is to risk having his political base stay home come election day, thus jeopardizing his chance for re-election.

The interviews

Interviews were conducted with individuals located on both the right and left of the ideological spectrum, and who play the most active roles in the politics of judicial nominations.[9] On the left, the following interest group leaders were interviewed: Nan Aron, president of the Alliance for Justice (the "Alliance"), Kim Gandy, president of the National Organization for Women ("NOW"), Elizabeth Cavendish, Legal Director of the National Abortion Rights and Reproductive Action League ("NARAL") and Ralph Neas, former Executive Director of the Leadership Conference on Civil Rights and current Director of People for the American Way ("PFW"). These groups represent dif-

4. Rosenstone and Hansen, Mobilization, Participation And Democracy In America 6-7. (New York: MacMillan, 1993).

5. Caldeira and Wright *Lobbying for Justice: Organized Interests, Supreme Court Nominations and the United States Senate,* 42 Am. J. Pol. Sci. 499-523 (1998).

6. Mayhew, Congress: The Electoral Connection. (New Haven: Yale University Press, 1974).

7. *Id.* at 61-62.

8. *Id.* at 115.

9. Several interviews were conducted jointly with Amy Steigerwalt, a graduate student at the University of California, Berkeley: NOW, NARAL and the Alliance. In addition, due to scheduling difficulties, Ms. Steigerwalt conducted the interviews of PFW and the Conservative Judicial Watchdog by herself and asked questions on my behalf.

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ferent types of interest groups. PFW and NOW are multi-issue civil rights organizations. NARAL is a single issue organization dealing with a woman's right to choose. And the Alliance is an organization that represents other interest groups, and specifically monitors the federal judiciary on those groups' behalf (sometimes referred to as an "umbrella" organization).

On the right, the following individuals were interviewed: Thomas Jipping, former director of the Free Congress Foundation's Judicial Selection Monitoring Project ("JSMP") and current Senior Fellow in Legal Studies at Concerned Women for America ("Concerned Women"), Roger Pilon, director of the Cato Institute's Center for Constitutional Studies ("Cato"); Eugene B. Meyer, President of the Federalist Society; and a senior fellow for a conservative coalition of interest groups that asked not to be named. For clarity's sake, I will refer to the unnamed source as "Conservative Judicial Watchdog." Like the liberals interviewed, the conservatives represent groups with much variation. JSMP is an umbrella organization monitoring the federal judiciary; it represents hundreds of conservative interest groups. Concerned Women is a multi-issue family values interest group. And Cato and the Federalist Society are policy think tanks that comment on the judicial selection process.

These interest groups and think tanks were chosen because they represent the organizations most often cited in the press commenting on the judicial confirmation process, on specific nominees and/or on the process in general.[10] To identify these groups, I conducted a series of comprehensive searches in the Lexis/Nexis database of four newspapers, two "liberal" (the *New York Times* and the *Washington Post*) and two "conservative" (the *Washington Times* and the *Wall Street Journal*). The searches were intended to find newspaper reports, op-ed pieces, and editorials mentioning an interest group or policy group in connection with the judicial confirmation process, and published between January 1, 1993 and May 31, 2002. This time frame was chosen so as to capture all confirmation fights during the Bill Clinton and George W. Bush presidencies that had occurred prior to the interviews. The interviews were conducted between June 2002 and August 2002, and all interviews were tape recorded and later transcribed. Each interview lasted between 1/2 hour and 2 hours.

The activists who care

In the 1950s and 1960s, liberal political activists began turning to the federal courts, rather than federal and state legislatures, to achieve policy goals through interest group litigation.[11] This strategy made good sense to these groups, given the liberal bent of the Supreme Court during this period under the leadership of Chief Justice Earl Warren (1954-1969) and a firmly held belief that the elected branches of government, particularly in the South, were not accessible to disadvantaged groups. This prompted Alexander M. Bickel to observe that "all too many federal judges have been induced to view themselves as holding roving commissions as problem solvers, and as charged with a duty to act when majoritarian institutions do not."[12] As the president of Alliance aptly noted, the federal courts became a safe haven for the "discreet and insular minorities" to which the Supreme Court referred in its now famous "footnote four" in *United States v. Carolene Products* (1938) (Aron interview).

By the mid-1970s, perceiving that these liberal activists had successfully bypassed the legislative process and achieved the policy goals they sought through federal court litigation during the Warren Court era, and then later in their landmark abortion victory in *Roe v. Wade* (1973), conservative interest groups were up in arms. As Cato's constitutional scholar explained:

> The clearest example [of liberals' use of the courts] is the abortion case....That is a right to be decided under the general police power that belongs to the states. There is no federal police power. States in the early 1970s were already moving to change their abortion laws....But apparently, they were not moving fast enough, and so feminist organizations went to the Supreme Court to try to obtain there what they were unable to obtain through state legislatures. And the Court gave them what they were looking for by finding a right that was dubiously among our enumerated rights (Pilon interview).

Accordingly, by the 1980s, conservative activists began to co-opt the liberal's litigation strategy—*i.e.*, to use the federal courts to *undo* the substantial gains made by the liberal activists in the previous 20 years, most notably in the areas of abortion rights and affirmative action.[13]

Some liberal activists believe that the litigation strategy of conservative activists in the 1980s was actually driven by the same frustration with the legislative process that the liberal groups had experienced 20-30 years previously. In other words, according to PFW's director, Neas, unable to win conservative victories in the U.S. Congress during the early years of the Reagan administration, conservatives started seeing the federal courts as the key to accomplishing the policy goals they could not achieve through the legislative process, particularly given Reagan's willingness to "pack" the lower court with conservative judges:

> Going into 1981, the Republican right thought that, "wow, we have the presidency, we have the Senate, and we're really going to change things." And I think they were astonished, for example, during the [fight over] extension of the Voting Rights Act. Here was the heart and soul of the civil rights laws, and I'm convinced they thought it was a slam dunk to get either the so-called simple extension, or no Voting Rights Act extension at all. And by simple extension I mean just enacting the current language at that time without addressing a 1980 Supreme

10. The only interest group contacted which did not respond to requests for an interview was the National Association for the Advancement of Colored People. However, as the NAACP's interests are directly aligned with those of PFW, also a civil rights organization, I do not believe this omission will bias my sample.

11. Pacelle, THE ROLE OF THE SUPREME COURT IN AMERICAN POLITICS. (Boulder, CO: Westview Press, 2002); Silverstein, JUDICIOUS CHOICES: THE NEW POLITICS OF SUPREME COURT CONFIRMATIONS. (New York: W.W. Norton & Co, 1996).

12. Bickel, THE SUPREME COURT AND THE IDEA OF PROGRESS 134. (New York: Harper and Row, 1970).

13. Epstein, CONSERVATIVES IN COURT. (Knoxville: University of Tennessee Press, 1985).

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Court case [*City of Mobile v. Bolden*] that had dramatically weakened the Voting Rights Act. And what happened is that the Leadership Conference on Civil Rights led a national legislative campaign with strong bipartisan support that rejected the Reagan-Ed Meese-William Bradford Reynolds-William French Smith position, [the vote going] 85-8 in the Senate, and 389-24 in the House. And all of a sudden that commenced a string of victories [for the left] that lasted 12 years (Neas interview).

And, the president of NOW contends that the conservatives' desire to bypass the legislative process continues today: "they want us essentially to get down to one branch of government where basically the judicial branch does everything and it doesn't matter what Congress does because these right wing judges, if they don't like them [congressional statutes], they throw them out and that's the end of that" (Gandy interview).

Activists shift focus

Beginning with Reagan's re-election in 1984, interest groups began to focus more on the politics of lower court judgeships.[14] When asked why, the interest group leaders cited four different reasons. First, there are so few opportunities to affect Supreme Court appointments in the modern political era. Consider that there has not been a single Supreme Court vacancy in nine years. In contrast, a president names hundreds of judges to the lower federal courts in each four-year term.

Second, with the Rehnquist Court hearing about half the number of cases that the Burger Court did, activists began to recognize that, as a practical matter, the lower federal courts today serve as the final arbiter of more than 99 percent of all federal court litigation; in other words, important policy is being made every day in the lower federal courts. According to Elizabeth Cavendish, Legal Director of NARAL, today it is the *lower* federal courts where all important legal issues in the pro-choice/ pro-life debate are being decided:

There's a real recognition that lower court judges hold vast power over women's reproductive lives and right now the composition of the Supreme Court is stable, and so there isn't an immediate threat to overturn *Roe [v. Wade]*, but what is an underappreciated phenomenon, is how much chipping away there has been at...a woman's right to choose. *Casey [v. Planned Parenthood]*, in 1992,...empowered lower court judges because it established an undue burden standard. So it took the courts' focus away from strict scrutiny—which has been called fatal in fact to abortion restrictions—to an undue burden standard, which is obviously a mushier standard, and more fact dependent and subject to the interpretations of district and court of appeals judges (Cavendish interview).

Third, in an apparent attempt to reduce uncertainty about the way Supreme Court nominees are likely to vote once becoming a justice, presidents have increasingly turned to the courts of appeals in searching for Supreme Court candidates. Indeed, seven of the nine current justices were elevated from the federal appellate courts. Gandy, Aron, and Neas all specifically referred to the courts of appeals as the "farm team" for the Supreme Court. And so, for these litigation-oriented liberal interest groups—and those conservative groups that oppose them—having the "right" kind of judges seated on the appellate courts ensures the "right" kind of judges on the Supreme Court.

Fourth, according to liberal activists, presidents, starting with Ronald Reagan, began a trend of appointing lower federal court judges, who enjoy life tenure, at much younger ages. While less than 3 percent of Eisenhower, Kennedy, Johnson, and Carter appellate judges appointed were under age 40, 10 percent of Reagan's court of appeals appointments were in their 30s.[15] As Gandy, president of NOW, explained of the pre-Reagan era: "back [then]... the idea was not that you appointed somebody at 35....Ford and Carter were appointing people who were in their late 50s. A [judicial appointment] was to cap your career." In short, because presidents are appointing younger federal court judges, that means less turnover occurs when there is a change of party in the White House, and consequently, fewer appointments for the new administration.

And so, during Reagan's presidency, liberal interest groups began to target nominees to the lower federal courts. Then, with a change of party in the White House, conservative interest groups began to challenge lower court nominees; however, there was a marked increase in the number of nominees challenged by conservative interest groups during Clinton's eight years in office compared to the number challenged by liberal interest groups in eight years of the Reagan-H. Bush presidencies. While liberal inter-

14. Silverstein, *supra* n. 11; *see also* Goldman, PICKING FEDERAL COURT JUDGES. (New Haven, CT: Yale University Press, 1997).

15. Schwartz, PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION 60. (New York: Charles Scribners' Sons, 1988).

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est groups launched public confirmation fights against five Reagan-H. Bush nominees to the courts of appeals, conservative interest groups launched 16 public nomination fights against Clinton nominees to the courts of appeals.[16] And, with another change of party in the White House has come an escalation of lower court challenges. In only two years of the W. Bush presidency, liberal interest groups launched 12 public confirmation fights against court of appeals nominees.[17]

Targeting nominees

As an initial matter, I asked the interest group and think tank leaders what activities they engage in when a president they support is in the White House, and is presumably nominating judicial candidates they support. In other words, what do conservative groups do now while W. Bush is president, and what did liberal groups do when Clinton was president?

Conservative think tank leaders all stressed that they do not take positions on individual nominees during Democratic administrations or Republican administrations (Pilon, Meyer interviews). Thus, a change of administration, they claim, has little to no impact on their activities concerning judicial appointments. This is true even of the Federalist Society, which was reportedly going to assume the American Bar Association's traditional role of rating all judicial nominees early in W. Bush's presidency:[18]

> [Before W. Bush was elected] We had been trying to present information and facts about the ABA. And then the ABA was going to be taken out of the process by this administration. I suppose that, because we had been writing about this function, and in Washington everyone wants to be involved in things like selecting judges, [people thought we were taking over the ABA's role]. We're not a position-taking organization. It's a totally different thing than the sort of things that we do and it's not something we aspired to (Meyer interview).

In contrast, interest groups on the left and right go through drastic role reversals when there is a change of party in the White House. During the Clinton administration, conservatives were on the attack—seeking to defeat Democratic judicial nominees—while liberal groups played defense—defending the records of Clinton nominees under siege and keeping "score" in terms of how many minority and female judges Clinton had appointed (Aron, Gandy interviews). With few exceptions,[19] Clinton nominees were deemed acceptable to liberal interest groups (Aron, Cavendish interviews). Some liberals did, however, express disappointment that Clinton chose mostly moderates for the bench, rather than trying to balance 12 years of conservative Republican appointments with truly liberal judges (Aron, Gandy interviews).

Once W. Bush was elected, conservatives moved into the defensive position, while liberals went on the offensive (Jipping interview). As the Conservative Judicial Watchdog explained:

> In the Clinton administration we would have [sent information to senators] more often....What we are doing now [is]... trying to press for what our side would say is fair treatment for someone like Priscilla Owen getting the floor vote. Saying, "Senator Biden, you are on record as saying the Constitution requires the Senate, the full Senate and not the Judiciary Committee, to advise and consent." Trying to raise these points. How effective that is—that's another story.

In short, if there is to be a confirmation battle, it is the out-of-power interest groups who put the nominee in play, and the in-power groups then respond. The in-power groups do not, however, engage in activity on behalf of a nominee who is not being targeted by opposing groups (Aron, Gandy, Jipping interviews).

How do the out-of-power groups ultimately make a decision about whom to target? Not surprisingly, with hundreds of judicial vacancies on the lower federal courts in each presidential term, those interviewed concede that they lack the resources to try to defeat every lower court nominee named by a president of the opposing party (Jipping, Gandy, Aron, Cavendish interviews). Instead, there is unanimous agreement that they must choose their battles carefully.

In order to make that decision, groups must first conduct research on the nominees' backgrounds. While some groups conduct research on each and every nominee in trying to reach a decision, including district court nominees—NOW, for example—most of the liberal groups initiate research only on court of appeals nominees and those district court nominees who are brought to their attention as being particularly troublesome candidates.

Similarly, grassroots members of these organizations might bring information to the attention of the grasstop activist in Washington (Gandy interview). In fact, Gandy stated that grassroots members of NOW have even gone so far as to telephone in "anonymous" tips on where important information might be found to use against nominees who oppose NOW's civil rights agenda (Gandy interview). As a practical matter, then, confirmation battles are fought almost exclusively on court of appeals nominees; district court nominees will be investigated and targeted only in extreme cases (Aron, Gandy interview).

Conservative groups did not appear to be quite as systematic about their research efforts. Jipping, when he was with the leading conservative umbrella group, JSMP, claimed to initiate investigations of Clinton nominees only when a problematic candidate was brought to his attention—a

16. Caldeira, Hojnacki & Wright, *The Lobbying Activities of Organized Interests in Federal Judicial Nominations*, 62 J. POL. 51, 60 (2000); Scherer and Steigerwalt (2003). "Tracking Trouble: What Makes a Court of Appeals Nominee Objectionable to Interest Groups?" unpublished paper presented at the 2003 Annual Midwest Political Science Association Conference.

17. Scherer and Steigerwalt, *supra* n. 16.

18. Lewis and Johnston, *Bush Would Sever Law Group's Role in Screening Judges*, NY Times, Mar 17, 2001, at A1.

19. The exceptions were those instances when Clinton would nominate a candidate favored by a conservative senator as part of a deal to secure confirmation of a nominee favored by Clinton who had been held up at the committee level. These "log roll" nominees include Barbara Durham, nominated to the Ninth Circuit to satisfy Senator Slade Gorton (R-Wa) in exchange for confirmation of William Fletcher to the Ninth Circuit, and Ted Stewart, nominated to the District Court in Utah to satisfy Senator Orrin Hatch (R-Ut) in exchange for confirmation of Richard Paez and Marsha Berzon to the Ninth Circuit.

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more passive strategy than that practiced by the liberal interest groups:

How those nominees were brought to our attention [happens] in a variety of ways. Sometimes...Senate staffers...would call and say [check out] so and so. Sometimes it would be a grassroots activist in a state where there was an active discussion [about] a prominent lawyer being considered for a judgeship, and [the grassroots activist] had a lot of information (Jipping interview).

Initiating a campaign

Once having done the research on a nominee, the organizations must decide whether to initiate a campaign against that judicial candidate. That decision, on both the left and the right, seems to turn on several factors. First and foremost are considerations about the nominee's political ideology or judicial philosophy. Whether the group focuses on judicial philosophy as opposed to political ideology seems to turn on whether the organization is an umbrella organization or think tank—*e.g.*, JSMP, the Alliance, Cato, and the Federalist Society—or is an issue-oriented membership group—*e.g.*, NARAL, PFW, NOW, and Concerned Women. Another way to look at it is this: is judicial selection all that this activist must be concerned with—certainly the case at JSMP and the Alliance—or is there a greater cause beyond judicial selection with which the political elite must be concerned —*e.g.*, the right to choose at NARAL, or the right to life at Concerned Women?

For conservative elites at umbrella groups or think tanks, they want to focus the judicial selection debate on a nominee's philosophical view of the role of the judiciary in American government. Specifically, this involves a debate about "judicial activism" versus "judicial restraint"—a debate begun in the early 1980s by the founders of the Federalist Society, and then taken up by several high-ranking officials in the Reagan administration, including former Attorney General Edwin Meese (Cavendish interview). Jipping, who led an umbrella organization while at JSMP, explained the debate as follows:

An activist judge is one who believes he has the authority to change or make the law....A restrained judge takes the law, either a statute or constitutional provision, as he finds it with the meaning it already has. Meaning is given to law by the lawmaker, not by judges (Jipping interview).

To conservatives, an "activist" judge is one that not only recognizes rights allegedly not contained in the Constitution, but also, one that "finds power by refusing to hold the federal government to its enumerated powers" (Pilon interview). In other words, these conservatives want neither the federal courts to find rights that they believe are not found in the Constitution, nor Congress to find power not found in the Constitution (Pilon interview).

Interest groups on the left and right go through drastic role reversals when there is a change in the White House.

The director of the Federalist Society would frame the debate somewhat differently. Fearing that the term "activist" can—and indeed has been—used by the left to attack the Rehnquist Court's penchant for overturning congressional legislation deemed to violate principles of federalism, Meyer frames the debate about judicial philosophy as whether or not a judge will employ a "textualist" interpretation of the Constitution—*i.e.*, seeking only to interpret the meaning of the actual text of the document as written:

The proper question to ask in our view is not "is this judicial activism," because that is vague. The proper question would be, "is the Court interpreting the text and meaning of the Constitution." If it is, and they're doing the best they can do...[even if] their judgment might be off, [then] there's not a structural problem. If the Court is saying, "gee, we don't like the direction policy is going in this country" [or] "we want to change the direction of policy"...that's not a proper role for the courts.

On the left, Aron's umbrella group, the Alliance, also tries to steer the debate away from specific political issues; when asked about what makes a nominee objectionable to her organization, she tries to focus the issue on whether the president is nominating candidates who will be "open minded" once taking the bench, and who view the courts as accessible to all groups:

We want fair judges with an open mind....We don't expect that they'll agree with us every time. We do expect that judges will at least listen to the evidence presented to them with an open mind and give an aggrieved plaintiff, a group of discriminated women, or people of color, the same opportunity that they will the corporations....We want judges who will bring experience from having done pro bono work, not your corporate [lawyer] type. Lawyers who know what it's like to be poor or represent someone who is poor and who has a difficult time getting to the court....[T]he most important question to be asked of a nominee is: what is the nominee's view of the role the courts play in American society today? Is it a view of the courts that they should be open and accessible to unrepresented people (Aron interview)?

However, *all* of the political elites who focus on judicial philosophy readily concede that their approach to judicial selection is at odds with the issue-oriented focus advocated by leaders of membership organizations, such as NARAL and Concerned Women—indeed, these two groups are almost singularly interested in whether a judge supports or opposes *Roe*—as well as the membership organizations' grassroots activ-

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ists at the local level:

The basic principle which I articulate [about judicial activism], nonetheless is not the common way of understanding and talking about judicial appointments out there in grassroots land. Unfortunately, even on the conservative side, the way that [appointments are discussed] most often is in terms of issues. Are they pro-gun? Are they anti-this? Are they pro-that?...What that means is some constituency groups that are focused on certain issues where that issue agenda is impacted by the judiciary, say the abortion issue or the gun issue...they'll be very interested in [a judicial nomination], but they'll be interested in it from that issue kind of perspective....So we get questions like, "well, what's his position on guns?" If [the nominee] didn't have a position on their issue, then they weren't interested in being involved. It's a bedeviling problem (Jipping interview).

It is impossible, however, for the umbrella groups to ignore the issue-oriented approach advocated by the grassroots organizations. That is because, in order for their message to have any real impact in influencing the appointment process, it is not enough for elites "inside the Beltway" to voice objections to nominees—by posting information on their web sites, publishing op-ed pieces in leading conservative or liberal media outlets, or lobbying politicians directly. Rather, as everyone interviewed readily conceded, it is absolutely critical that they also get *grassroots activists* involved in the process—by writing letters, sending e-mails and telephoning their senators; in some extreme cases, even organizing rallies against specific lower court nominees (Jipping, Cavendish, Aron, and Gandy interviews).

These grassroots activities are critical because, taken together, they send a message to senators that *thousands* of the *most mobilized constituents* in their party object to a particular nominee, and that their critical support of that politician in the next election may turn on the senator's public stance on that nominee. For example, on the conservative side, Jipping stated:

We don't do a lot of direct lobbying from us to the senators [in order to get them to vote against a particular nominee]. It wouldn't be effective....I long ago disabused myself of the notion that because Republican senators articulate the right principles that there would be spontaneous combustion. That they'd do what they said they would do. It just doesn't work. It's too much of an insider game to just work [at defeating a nominee from]...inside the Beltway. You have to get your constituents involved....The structure we were building [at JSMP] was a grassroots [structure]. That's the approach JSMP took from the beginning (Jipping interview).

In fact, discussing his move from JSMP—an umbrella group affiliated with a network of conservative grassroots organizations—to Concerned Women, a membership group with its own grassroots activists dedicated to conservative family values, Jipping highlighted the enormous benefits to working more directly with people at the grassroots level because of the electoral power they wield over senators:

[Concerned Women] is a membership organization, as opposed to just a think tank like [JSMP]. You don't want to do things just hoping people will use them. Here [at Concerned Women], you can do things and put them directly to your members. For example, we had...our members participating in rallies supporting Miguel Estrada's nomination [to the District of Columbia Circuit]. We can go directly to our state leaders, give them some information, and in a couple of days, they can get rallied....The impact that grass roots citizens can have on the political process, whether that be through lobbying or elections, is more direct than any organization (Jipping interview).

Similarly, on the Democratic side, Gandy explained that, "there are only so many pressure points you have with members of Congress and it mostly boils down to the people who can vote for them or who can give them money" (Gandy interview). Cavendish of NARAL concurs:

I think...NARAL is really powerful because we're a grassroots organization. There are some other groups that [are] very well-respected...like the National Law Center...and their research is considered really solid and a lot of senators listen to them a lot. But I think NARAL brings the grassroots component to the table and when we're [involved there is] the threat of grassroots backlash, the positive carrot of possible grassroots contributors....Just the political oomph. Because they [senators] know we mobilize people at election time (Cavendish interview).

How, then, are these two very different approaches to framing the judicial selection debate ultimately reconciled? Grass-top elites advocating a philosophical approach must walk a fine line; their rhetoric cannot be solely focused on lofty ideals about judicial philosophy or they will risk alienating grass-roots activists—so critical to the process. Accordingly, the Washington elites' public pronouncements on specific nominees almost always reference judicial candidates' political ideologies and the way these nominees can be expected to vote in controversial cases before them. In other words, Jipping would label a Clinton nominee an "activist" based on specific decisions the nominee had made on hot-button issues such as crime or race.

For example, in objecting to Rosemary Barkett, nominated by Clinton to the Eleventh Circuit, Jipping stated: "Judge Barkett's record reveals views far outside the mainstream as well as aggressive judicial activism....Judge Barkett's empathy for convicted killers often leads her to vote to keep them from receiving the just punishment for their crimes."[20] Such approach allows him to stay true to his philosophical standards for judicial selection, and at the same time signal conservative activists that a nominee has taken issue positions hostile to their conservative policy preferences.

There is, however, a risk at basing a confirmation fight on specific issue positions. In fact, this is exactly why some "inside the Beltway" elites would prefer to keep the debate about judicial nominees on the philosophical level, so as not to alienate potential votes in the Senate. For example, Jipping very much wants to avoid turning all judicial confirmation debates on W. Bush nominees into one about abortion so as not to lose pro-choice Republican senators' votes in close confirmation battles:

Let's say that you have a Supreme Court nominee, and all the pro-life groups are

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