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COMMENT

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WANT LESS IDEOLOGY ON THE FEDERAL BENCH?  
PAY JUDGES MORE

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## INTRODUCTION

Since 1969 the real value of a federal judge's salary has declined.<sup>1</sup> Meanwhile, profits per partner at prominent law firms have skyrocketed.<sup>2</sup> Chief Justice John Roberts has highlighted this development, along with problems retaining and recruiting federal judges from the private sector, and concluded that Congress's failure to raise judicial pay has "reached the level of a constitutional crisis that threatens to undermine the strength and independence of the federal Judiciary."<sup>3</sup>

This Comment analyzes the crisis that Chief Justice Roberts has identified. In particular, this Comment focuses on the link between judicial pay and ideology. After marshalling data from the judicial confirmation process over the past thirty years, this Comment finds that low judicial pay has helped create a more ideologically polarized bench.

Part I explores Chief Justice Roberts's argument that, as a result of stagnant judicial compensation, the quality and independence of the judiciary are in jeopardy.<sup>4</sup> Part II analyzes the only empirical study to date on the link between pay and performance in the federal judiciary. That study, authored by Professor Scott Baker, concludes that the modern level of judicial pay has not, in any quantifiable sense, affected the quality of the judiciary.<sup>5</sup> However, the study contains evidence that low pay may be undermining the independence of the judiciary by attracting more ideologically driven judges in major markets. Judges from the top five legal markets (Top Five Markets)—New York, Los Angeles, Chicago, San Francisco, and Washington, D.C.<sup>6</sup>—tend to exhibit more partisan voting patterns and citation practices.<sup>7</sup> Thus, the study

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<sup>1</sup> See Chief Justice John G. Roberts, Jr., *2006 Year-End Report on the Federal Judiciary*, THIRD BRANCH (Admin. Office of the U.S. Courts, Wash. D.C.), Jan. 2007, at 1-2 [hereinafter Roberts, *2006 Year-End Report*], available at <http://www.uscourts.gov/ttb/2007-01/2006/index.html> (noting that the real value of a federal district judge's salary has dropped 23.9% since 1969).

<sup>2</sup> See Christopher Zorn et al., *Working Class Judges*, 88 B.U. L. REV. 829, 837 fig.1 (2008) (showing that between 1983 and 2003 average profits per partner at the fifty highest-grossing American law firms more than tripled).

<sup>3</sup> Roberts, *2006 Year-End Report*, *supra* note 1, at 1.

<sup>4</sup> *Id.*

<sup>5</sup> See Scott Baker, *Should We Pay Federal Circuit Judges More?*, 88 B.U. L. REV. 63, 66 (2008) (testing Chief Justice Roberts's claims regarding the salary gap between the judiciary and the private sector by examining the effect of low judicial pay on "quantifiable measures of judicial performance").

<sup>6</sup> See *id.* at 89 (identifying these cities as the "top-five legal markets").

<sup>7</sup> See Zorn et al., *supra* note 2, at 834 & tbl.1 (reexamining Baker's data and finding empirical evidence of greater partisan judicial behavior in Top Five Markets); see also Scott Baker, *Refining the Judicial Salary/Judicial Performance Debate: A Response to Professors*

suggests that judges who, generally speaking, forgo the most income to join the bench may be more ideological than their peers.<sup>8</sup>

Part III presents new data and a model to support the view that the failure to raise judicial pay has, in major markets, created a more ideologically driven judiciary. This Comment focuses on the amount of time it takes a judicial nominee to be confirmed. Over the past thirty years, the Senate has taken significantly longer to confirm nominees from Top Five Markets than those from smaller markets.<sup>9</sup> In other words, the Senate takes longer to confirm the nominees who, on average, pass up the most staggering salaries to become judges.<sup>10</sup> This finding is statistically significant.<sup>11</sup> After controlling for other plausible explanations, this Comment concludes that the best explanation for the longer confirmation times is that, as a result of low judicial pay, nominees from major markets tend to be more ideological than their peers.<sup>12</sup>

One implication is clear: increasing judicial pay in major markets should diminish partisan voting on the bench.<sup>13</sup> To ensure that our judiciary remains fair-minded and independent, Congress should swiftly pass legislation providing robust cost-of-living adjustments for judges in large cities.<sup>14</sup> In addition, Congress should ensure that judi-

*Cross, Czarnezki, Henderson, Marks, and Zorn*, 88 B.U. L. REV. 855, 863-64, 868 (2008) (acknowledging that Baker's data reveal "partisan voting among judges in top-five markets").

<sup>8</sup> See Zorn et al., *supra* note 2, at 835 ("[L]ower judicial salaries in Top Five markets strongly correlate with behavior Baker characterizes as 'ideological' or 'influence-motivated.'"); *id.* at 839 ("In Omaha, the salary disparity between a law firm partner and a federal judge is likely to be a factor of two. But in New York City or Washington, D.C., it could easily be a tenfold gap.").

<sup>9</sup> See *infra* Section III.C (comparing confirmation times for judges from Top Five Markets and small markets).

<sup>10</sup> See *supra* note 8. This Comment assumes that judges from Top Five Markets could have earned considerably more income than their counterparts from smaller markets. This assumption is solidly grounded in regional average-compensation figures, see *infra* Section II.B, but it is not particularized to individual judges.

<sup>11</sup> The results are statistically significant at the  $p \leq 0.05$  level. For a discussion of the varying levels of statistical significance and their meanings, see *infra* note 115.

<sup>12</sup> See *infra* Sections III.D-F (providing a statistical model that, while controlling for a number of alternative explanations, still finds a statistically significant relationship between longer confirmation times and nominees from Top Five Markets).

<sup>13</sup> See Baker, *supra* note 7, at 868 (acknowledging that Zorn et al.'s analysis of Baker's study leads to the conclusion that "higher salaries could diminish partisan voting among judges in top-five markets").

<sup>14</sup> See *id.* (recognizing that these results may support cost-of-living increases); see also KEVIN M. SCOTT, CONG. RESEARCH SERV., JUDICIAL SALARY 30 (2007) ("Federal judges have, since 1891, been paid the same salaries regardless of the location of their chambers or residences.").

cial pay keeps pace with inflation.<sup>15</sup> Finally, in view of the demonstrable effects of low judicial salaries, Congress should seriously consider Chief Justice Roberts's pleas on behalf of his colleagues for a judicial pay raise.

## I. THE CRISIS

Chief Justice Roberts regularly emphasizes the need for an increase in judicial pay.<sup>16</sup> However, he offered his most forceful and comprehensive argument in his *2006 Year-End Report on the Federal Judiciary*. In this report, the Chief Justice focused on just one issue: Congress's perennial failure to raise judicial pay.<sup>17</sup> According to Chief Justice Roberts, this issue has developed into a "constitutional crisis" that "threatens to undermine the strength and independence of the federal Judiciary."<sup>18</sup>

Chief Justice Roberts begins by pointing to the decline in federal judicial salaries. From 1969 to 2006, the average U.S. worker's wage, adjusted for inflation, rose 17.8%.<sup>19</sup> During that same period, inflation-adjusted federal judicial pay declined 23.9%—leaving a 41.7% gap.<sup>20</sup> Indeed, in 1969, a federal district judge earned 21% more than

<sup>15</sup> See Chief Justice John G. Roberts, Jr., *2008 Year-End Report on the Federal Judiciary*, THIRD BRANCH, (Admin. Office of the U.S. Courts, Wash. D.C.), Jan. 2007, at 3 [hereinafter Roberts, *2008 Year-End Report*], available at <http://www.supremecourtus.gov/publicinfo/year-end/2008year-endreport.pdf> (pointing out that Congress has not increased judicial pay to keep pace with inflation).

<sup>16</sup> Chief Justice Roberts has made a plea for a pay raise each year since being appointed and raised to Chief Justice. See Posting of Jess Bravin to WSJ.com Washington Wire, *Chief Justice Roberts's Annual Appeal*, <http://blogs.wsj.com/washwire/2008/12/31/chief-justice-roberts-case-for-a-raise> (Dec. 31, 2008) ("The Supreme Court faces a lot of tough questions, but for Chief Justice John Roberts, one of the hardest comes each December, when he files the Year-End Report on the Federal Judiciary: How will he style his annual appeal for a judicial pay raise?").

<sup>17</sup> Roberts, *2006 Year-End Report*, *supra* note 1, at 1.

<sup>18</sup> *Id.* A chorus of voices in the legal community echoes Chief Justice Roberts's warnings. See Baker, *supra* note 5, at 65 (pointing out that "prominent law school deans, the American Bar Association, and leading members of the corporate bar" have all endorsed Chief Justice Roberts's position). But see Dahlia Lithwick, *O Mighty Crisis*, SLATE, Jan. 2, 2007, <http://www.slate.com/id/2156781> (asserting that many pundits find Chief Justice Roberts's claim, that the current level of judicial pay could precipitate a "constitutional crisis," outrageous).

<sup>19</sup> See Roberts, *2006 Year-End Report*, *supra* note 1, at 2.

<sup>20</sup> *Id.* But see Posting of Ben Winograd to the Wall Street Journal Law Blog, *Judicial Pay—Are Judges Being Selective with the Evidence?*, <http://blogs.wsj.com/law/2007/02/15/judicial-pay-are-judges-being-selective-with-the-evidence/> (Jan. 15, 2007) (pointing out that 1969 stands out as the year when judges received their highest inflation-adjusted wages and that, in reality, judicial pay has only slightly lagged behind its me-

deans at top law schools and 43% more than senior professors at those schools.<sup>21</sup> Today, Chief Justice Roberts writes, federal district judges earn about half what such deans and professors are paid.<sup>22</sup>

There is an even starker contrast between a judge's salary and pay at private law firms. Chief Justice Roberts writes, "Beginning lawyers fresh out of law school in some cities will earn more in their *first year* than the most experienced federal district judges before whom those lawyers hope to practice some day."<sup>23</sup> Indeed, in 2008, a federal district judge earned \$169,300, while a federal circuit judge earned \$179,500.<sup>24</sup> By contrast, a first-year associate at a top firm in one of the largest cities earned around \$160,000.<sup>25</sup> With bonuses, many of these rookie lawyers earned more than the distinguished members of the bench.<sup>26</sup> Moreover, judicial pay pales in comparison to the compensation that partners at top firms receive. In 2008, the average profits per equity partner at the 100 highest-grossing American law firms (the "Am Law 100"), figures that are reported annually in *The American Lawyer*, stood at an astounding \$1.26 million—vastly greater than the salary that federal judges earn.<sup>27</sup>

Chief Justice Roberts argues that this drastic discrepancy in pay between the private and public sectors has created recruitment and retention problems for the federal judiciary. He points out that fewer judges are entering the federal judiciary from the private sector.<sup>28</sup> During the Eisenhower Administration, around sixty-five percent of

dian real value from 1969 to 2006). Regardless, Chief Justice Roberts is certainly correct in pointing out the vast discrepancy between current judicial salaries and the compensation paid to prominent legal professionals in the private sector.

<sup>21</sup> See Roberts, *2006 Year-End Report*, *supra* note 1, at 1.

<sup>22</sup> *Id.* at 2; see also SCOTT, *supra* note 14, at 25 (showing that salaries for the deans and senior professors of the twenty-five highest-ranked law schools have greatly outpaced judicial pay).

<sup>23</sup> Roberts, *2006 Year-End Report*, *supra* note 1, at 2.

<sup>24</sup> See Admin. Office of the U.S. Courts, *Judicial Salaries Since 1968*, <http://www.uscourts.gov/salarychart.pdf> (last visited Jan. 15, 2009).

<sup>25</sup> See generally NAT'L ASS'N FOR LAW PLACEMENT, 2009–2010 NALP DIRECTORY OF LEGAL EMPLOYERS (2009) (providing a directory of legal employers' compensation information).

<sup>26</sup> In 2008, Cravath, Swaine & Moore set the market rate for first-year associate bonuses at \$17,500 for major New York City law firms. See Nate Raymond, *Cravath Announces Reduced Bonuses for Junior Lawyers*, LEGAL INTELLIGENCER, Nov. 4, 2009, at 4, available at 2009 WLNR 22015100. Prior to the economic downturn, in 2007, Cravath had set the market rate at \$35,000. *Id.*

<sup>27</sup> See Aric Press & John O'Connor, *Lessons of the Am Law 100*, AM. LAW., May 2009, at 107.

<sup>28</sup> See Roberts, *2006 Year-End Report*, *supra* note 1, at 2.

federal judges came from private practice.<sup>29</sup> In modern times, less than forty percent come from the practicing bar.<sup>30</sup> Additionally, a greater number of judges are retiring from the bench early to return to private practice.<sup>31</sup> In the 1960s, only a handful of federal judges resigned or retired,<sup>32</sup> but from 1990 to 2005, ninety-two judges stepped down—fifty-nine of them to return to private practice.<sup>33</sup>

Chief Justice Roberts contends that these developments, caused by inadequate judicial pay, undermine two hallmarks of the judiciary: “[W]ithout fair judicial compensation we cannot preserve the *quality* and *independence* of our Judiciary, which is the model for the world.”<sup>34</sup> Chief Justice Roberts argues that the drastic decline in judicial compensation, as compared to the compensation available through other opportunities in the legal profession, will inevitably detract from the *quality* of candidates for the federal bench.<sup>35</sup> The judiciary, according to Chief Justice Roberts, will soon be restricted to “(1) persons so wealthy that they can afford to be indifferent to the level of judicial compensation, or (2) people for whom the judicial salary represents a pay increase.”<sup>36</sup> Either way, he maintains, the judiciary will not be a strong and distinguished group—the type of bulwark this nation has long relied upon to protect the rule of law.<sup>37</sup>

Chief Justice Roberts then explains how inadequate compensation threatens the *independence* of the judiciary. He notes that low judicial pay undermines the viability of life tenure.<sup>38</sup> Without life tenure, Chief Justice Roberts contends, judges will not as easily be able to make the unpopular decisions that upholding the rule of law occasio-

<sup>29</sup> *Id.* But see SCOTT, *supra* note 14, at 6-8 & fig.1 (arguing that the decline in recruitment from the private sector is not quite as steep as Chief Justice Roberts claims).

<sup>30</sup> See Roberts, *2006 Year-End Report*, *supra* note 1, at 2 (warning that the decline in the percentage of judges drawn from private practice will change the nature of the federal judiciary).

<sup>31</sup> *Id.* at 3.

<sup>32</sup> See Chief Justice John G. Roberts, Jr., *2005 Year-End Report on the Federal Judiciary, THIRD BRANCH*, Jan. 2006, at 2, available at <http://www.uscourts.gov/ttb/jan06/ttb/yearend>.

<sup>33</sup> *Id.*

<sup>34</sup> Roberts, *2006 Year-End Report*, *supra* note 1, at 3 (emphases added).

<sup>35</sup> See *id.* (“The dramatic erosion of judicial compensation will inevitably result in a decline in the quality of persons willing to accept a lifetime appointment as a federal judge.”).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

nally requires.<sup>39</sup> Chief Justice Roberts writes, “If judicial appointment ceases to be the capstone of a distinguished career and instead becomes a stepping stone to a lucrative position in private practice, the Framers’ goal of a truly independent Judiciary will be placed in serious jeopardy.”<sup>40</sup>

This Comment focuses on Chief Justice Roberts’s second concern: that low judicial pay undermines the independence of the judiciary. However, this Comment does not assess whether, as the Chief Justice predicts, judges will become compromised by an ambition to return to private practice. Rather, this Comment evaluates a different threat to the independence of the judiciary: whether low judicial pay attracts more ideologically driven judges. Indeed, a partner at a top firm in a major market must have some meaningful motivation to accept a drastic pay cut—perhaps as high as eighty or ninety percent—to take a seat on the federal bench.<sup>41</sup> Of course, a lawyer may be motivated to accept a nomination for a variety of reasons: prestige, better hours, more interesting work, and so on.<sup>42</sup> This Comment, however, explores the possibility that, as a result of low judicial pay, a nominee’s ideology often supplies more motivation than it otherwise would.

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<sup>39</sup> *Id.*

<sup>40</sup> Michael Luttig and Paul Cassell are two of the most prominent circuit judges who have recently left the bench for lucrative positions in the private sector. See Jerry Markon, *Appeals Court Judge Leaves Life Appointment for Boeing*, WASH. POST, May 11, 2006, at A11 (“Friends of Luttig said yesterday that the financial lure of the Boeing job and the greater ability to pay for his children’s college education—Luttig has a 14-year-old daughter and a 10-year-old son—were key to his resignation.”). Paul Cassell gave similar reasons for his departure from the bench:

I would like to ensure that my children will have the same educational opportunities that I had. How to achieve that within the constraints on current judicial pay is more than a difficult task. My wife and I have concluded that we may not be able to do what we have always planned to do unless I make some changes.

Posting of Peter Lattman to the Wall Street Journal Law Blog, Judge Paul Cassell Resigns, Bemoaning Judicial Pay, <http://blogs.wsj.com/law/2007/09/21/judge-paul-cassell-resigning> (Sept. 21, 2007).

<sup>41</sup> For instance, to accept a position on a federal circuit court, the average equity partner at Kirkland & Ellis, a prominent firm based in Chicago, would have to trade \$2.47 million in profits for a \$179,500 salary. See Susan Beck, *Kirkland Revenue Up 7%, Profits Flat at \$2.47m*, LEGAL WEEK, Mar. 9, 2009, <http://www.legalweek.com/legalweek/news/1169810/kirkland-revenue-profits-flat-usd2-27m#>; see also Zorn et al., *supra* note 2, at 839 (“For 2005, the 90th percentile profits per partner of an Am Law 200 firm headquartered in a Top Five market is \$2 million per year . . . .” (footnotes omitted)).

<sup>42</sup> See Baker, *supra* note 5, at 72 (discussing the nonpecuniary benefits of judgeship and arguing that salary is only “one component of the total compensation package”).

## II. THE LITERATURE

In 2008, Professor Scott Baker published the only empirical analysis to date evaluating the link between the pay and the performance of the federal judiciary.<sup>43</sup> He analyzed whether the current level of pay has, in any quantifiable sense, detracted from the quality of the judiciary's performance. He found that the financial opportunity<sup>44</sup> that a nominee foregoes usually has no bearing on a judge's work ethic<sup>45</sup> or the quality of a judge's opinions.<sup>46</sup> As such, Baker concluded that the current level of pay has not detracted from the judiciary's quality in any measurable sense.<sup>47</sup> This Comment, however, questions whether the current level of pay has affected the level of *partisanship* on the federal bench. With respect to that connection, Baker's data tell a different story.

### A. Baker's Initial Data on Pay and Ideology

Initially, Professor Baker found that the current level of judicial pay has not led to the appointment of more ideological judges.<sup>48</sup> He measured a judge's commitment to ideology in two ways. First, he analyzed a judge's voting patterns in controversial cases.<sup>49</sup> Using data

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<sup>43</sup> *Id.* at 66. There are, of course, inherent limitations in attempting to quantify intangibles such as the quality and independence of the federal judiciary. See Frank B. Cross, *Perhaps We Should Pay Federal Circuit Judges More*, 88 B.U. L. REV. 815, 817 (2008) (questioning whether Professor Baker's wage-economics analysis can properly be used to analyze the federal judiciary). But see Stephen Marks, *A Comment on the Relationship Between Judicial Salary and Judicial Quality*, 88 B.U. L. REV. 843, 843 (2008) (remarking on "the sophistication and creativity of [Baker's] statistical analysis in the face of formidable evidentiary problems"); Zorn et al., *supra* note 2, at 829 (pointing to the "ingenuity of [Baker's] research design" and expressing appreciation for his initiation of an empirical literature on this issue).

<sup>44</sup> Baker measured a judge's opportunity cost as the difference between a judge's salary and his next-best financial opportunity—partnership in a regional law firm. Baker, *supra* note 5, at 78.

<sup>45</sup> Baker measured work ethic by examining dissent rates in controversial cases and how long it takes judges to file published opinions after hearing oral arguments. *Id.* at 98-105.

<sup>46</sup> Baker measured the quality of a judge's opinions by citation count. *Id.* at 105-06 & n.128.

<sup>47</sup> See *id.* at 112 (noting that although low judicial salaries may erect a barrier before the bench for some candidates, plenty of eminently qualified lawyers remain willing to accept a nomination).

<sup>48</sup> See *id.* at 85-97 ("[T]here is little evidence that low judicial salaries result in a judiciary more prone to ideological thinking.").

<sup>49</sup> *Id.* at 86-94. Controversial cases include



from the Chicago Judges Project,<sup>50</sup> he tracked the extent to which Republican-appointed judges voted in a conservative fashion in controversial cases; for Democrat-appointed judges, he measured their tendency to vote for the more liberal outcome.<sup>51</sup> Second, he analyzed a judge's citation practices by examining the extent to which judges nominated by one party would only cite judges nominated by their own party.<sup>52</sup>

Having established a judge's commitment to ideology in these two ways, Baker then compared this figure with the opportunity cost the judge absorbed to take a seat on the federal bench.<sup>53</sup> The opportunity cost for a judicial nominee is the income he would have received from his next-best employment opportunity—partnership at a private law firm—over the rest of his career.<sup>54</sup> Controlling for region and age, Baker calculated the opportunity cost for each of the federal circuit judges nominated between 1974 and 2004.<sup>55</sup> Upon comparing these

[a]bortion, capital punishment, the Americans with Disabilities Act, criminal appeals, takings, the Contracts Clause, affirmative action, Title VII race discrimination cases brought by African-American plaintiffs, sex discrimination, campaign finance, cases in which plaintiffs sought to pierce the corporate veil, industry challenges to environmental regulations, and federalism challenges to congressional enactments under the Commerce Clause.

*Id.* at 86 (internal quotation marks omitted) (quoting Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 311-13 (2004)).

<sup>50</sup> *Id.* The Chicago Judges Project is a compilation of 4958 decisions in the federal circuit courts used in an earlier study on judicial voting patterns. *See id.* Though no longer publicly available, the project's database categorizes the decisions according to a variety of factors and then labels each decision as conservative or liberal. *See* Cass Sunstein, Audio Recording: The Chicago Judges Project (Sept. 16, 2004), transcript available at [http://research.uchicago.edu/highlights/show\\_transcript.php?id=23](http://research.uchicago.edu/highlights/show_transcript.php?id=23).

<sup>51</sup> *See* Baker, *supra* note 5, at 86 ("Although the labels are imprecise, they do track common notions of liberal and conservative jurisprudence. For example, a liberal vote in a sex discrimination case is a vote for the employee; a conservative vote is a vote for the employer.").

<sup>52</sup> *See id.* at 95-97 (noting that judges tend to cite judges from the same political party in "hot button" cases).

<sup>53</sup> *See id.* at 89-97 (considering factors such as age, prior experience, and location to determine a judge's lost opportunity cost).

<sup>54</sup> *Id.* at 78.

<sup>55</sup> The above explanation captures the essence of Professor Baker's opportunity-cost calculation. However, the actual methodology was far more complex:

The lost wages calculation for a person considering the bench consists of eight steps. First, calculate, at the time of the appointment, the number of years the candidate would likely remain at the law firm if they did not take the judgeship. Second, determine the likely law firm compensation for each of those years, considering increasing compensation due to increased seniority in the

opportunity costs with each judge's commitment to ideology, Baker found that the current level of judicial pay has no measurable effect on the extent to which a judge is ideologically disposed in her decisionmaking.<sup>56</sup>

### B. *Criticism and Correction*

Three professors jointly responded to Baker's article, showing that judges from the Top Five Markets—that is, the judges who on average passed up the most lucrative financial opportunities—tend to cast more partisan votes in controversial cases and tend to exhibit more partisan citation practices than their counterparts from smaller markets.<sup>57</sup> In their analysis of Baker's models, Professors Christopher Zorn, William Henderson, and Jason Czarnezki noticed that Baker did not adequately control for the enormous profits per partner in New York, Los Angeles, Chicago, San Francisco, and Washington, D.C.<sup>58</sup> Although Professor Baker had attempted to control for these profits, he relied on profit-per-partner figures from average regional firms around these markets.<sup>59</sup> As the professors put it, however, “[I]f federal judges are truly drawn from ‘the Nation’s very best lawyers,’ it is likely that average compensation figures for regional law firm partnerships understate the potential lost earnings, particularly in the nation’s largest and most lucrative legal markets.”<sup>60</sup> Bearing this in mind, the professors themselves used profits-per-partner figures from the fifty

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firm. Third, estimate how much law firm compensation in general is likely to increase during that time. Fourth, discount the total amount back to present value using the real discount rate. Fifth, estimate the anticipated judicial wage for the number of years of expected service on the bench and discount this amount back to present value. Sixth, to get the net cost of taking the judgeship—the financial sacrifice made—subtract the present value of the anticipated judicial salary from the present value of the lost law firm wages. Seventh, adjust this net sacrifice for geographic cost of living differences, revealing, in effect, the purchasing power of the wages forgone. Finally, place that lost purchasing power into constant dollars, enabling the comparison of the financial sacrifices made by judges appointed at different times.

*Id.* at 79.

<sup>56</sup> *See id.* at 94 (finding that the “empirical evidence suggests that low pay does not lead to the appointment of more partisan judges”).

<sup>57</sup> *See Zorn et al., supra* note 2, at 835 (“[J]udges in Top Five legal markets appear willing to trade pecuniary benefits for some measure of legal or policy influence . . .”).

<sup>58</sup> *See id.* at 830 (“The purpose of this Reply is to qualify Baker’s interpretation of his results, at least with regard to judges located in the ‘Top Five’ legal markets . . .”).

<sup>59</sup> *See Baker, supra* note 5, at 91.

<sup>60</sup> Zorn et al., *supra* note 2, at 836.

highest-grossing American firms, as well as the salaries of leading general-counsel positions, to calculate opportunity costs for nominees from Top Five Markets.<sup>61</sup>

The professors then reran Baker's models and found that judges from Top Five Markets—the judges who passed up the largest potential profits—were, to a statistically relevant degree, more motivated by ideology than their peers from smaller markets. “Specifically,” they wrote, “the lower judicial salaries in Top Five Markets strongly correlate with behavior Baker characterizes as ‘ideological’ or ‘influence-motivated.’”<sup>62</sup>

Professor Baker graciously accepted this criticism and acknowledged that, for judges from Top Five Markets, the low level of judicial pay strongly coincides with an increase in ideologically motivated behavior from the bench.<sup>63</sup> Baker wrote, “Most dramatically, [Professors Zorn, Henderson, and Czarnezki] identify that higher salaries could diminish partisan voting among judges in top-five markets. This result is a welcome refinement to the article.”<sup>64</sup> Nevertheless, Baker maintains that this result does not vindicate proposals for across-the-board increases in federal judicial pay.<sup>65</sup> Rather, he says, it “might be used to support more aggressive [cost-of-living] adjustments for judges in major markets—a proposal Judge Richard Posner has been advocating for a number of years.”<sup>66</sup>

### III. JUDICIAL CONFIRMATION DATA

New data support the view that, in major markets, inadequate compensation tends to attract more partisan nominees to the federal bench. From 1977 to 2008, the Senate has, on average, taken significantly longer to confirm nominees from Top Five Markets—nominees who, generally speaking, pass up the most lucrative financial opportunities to become federal judges. The best explanation for this phe-

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<sup>61</sup> See *id.* at 836-39 (noting that, in 2005, the ninetieth-percentile profits-per-partner of an Am Law 200 firm headquartered in a Top Five Market stood at \$2 million per year, as compared to \$935,000 per year for non-Top Five Markets and \$588,666 per year for a national sample).

<sup>62</sup> *Id.* at 830.

<sup>63</sup> See Baker, *supra* note 7, at 868.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*; cf. RICHARD A. POSNER, HOW JUDGES THINK 171-72 (2008) (arguing that cost-of-living increases will do more to retain top talent in the federal judiciary than intermittent large raises).

nomenon appears to be that, as a result of inadequate compensation, nominees from Top Five Markets are generally more ideological than their counterparts from smaller markets.

This Part begins with a brief overview of the judicial confirmation process. Next, this Part presents data on circuit court nominations from President Jimmy Carter through President George W. Bush.<sup>67</sup> Specifically, the analysis compares the length of time taken to confirm each nominee from a Top Five Market with the time taken to confirm each nominee from a smaller market. On average, and under every President but one, nominees from Top Five Markets wait significantly longer to be confirmed. This result holds regardless of the relationship between the nominating President and the Senate.

This Part concludes by considering potential explanations for these longer confirmation times. Upon close scrutiny, they cannot be accounted for by (1) mere coincidence, (2) the quality of the nominees, or (3) the influence of the circuits on which the nominees would sit. Rather, the best explanation appears to be that these nominees hold stronger ideological positions than their peers. Inadequate compensation, it seems, attracts more partisan judges.

#### A. Confirmation Process for Circuit Courts

Before examining the data, a brief overview of the confirmation process is in order. Under the Constitution, the process for appointing federal circuit court judges requires presidential nomination and then confirmation by the Senate.<sup>68</sup> The President initiates the process by selecting a potential judge and then submitting that nomination to

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<sup>67</sup> See *infra* Appendix 1 for the entire database. The analysis begins with the Carter presidency for three reasons. First, using this starting point creates a sufficient data set for purposes of statistical significance. Second, including the Carter presidency helps balance the ratio of Democratic to Republican eras (2:3). Finally, a prior analysis of confirmation data focused on 1977 to 2003, and that study provides a useful comparison at certain points. See generally DENIS STEVEN RUTKUS & MITCHEL A. SOLLENBERGER, CONG. RESEARCH SERV., JUDICIAL NOMINATION STATISTICS: U.S. DISTRICT AND CIRCUIT COURTS, 1977–2003 (2004).

<sup>68</sup> The Constitution provides that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.” U.S. CONST. art. II, § 2, cl. 2. The Constitution further provides that the “judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” *Id.* art. III, § 1. The Article III courts that this Comment focuses on are the U.S. courts of appeals, the U.S. district courts, and the U.S. Court of International Trade.

the Senate.<sup>69</sup> Next, the Senate Judiciary Committee holds a hearing on the nomination and votes on whether to report the nomination to the full Senate.<sup>70</sup> If the Committee elects to report the nomination, the entire Senate typically votes by a simple majority to confirm or disapprove the nomination.<sup>71</sup>

A nomination, however, can be defeated at various points before it ever receives a full Senate vote. The Judiciary Committee can thwart the nomination in three ways: (1) by refusing to hold a hearing on the nomination, (2) by declining to vote on whether to report it to the Senate, or (3) by voting against reporting it to the entire Senate.<sup>72</sup> If the nomination survives the Judiciary Committee, the nominee usually receives an up-or-down vote by the full Senate. Under Senate rules, however, Senators opposing the nomination have one last chance to block the vote. They can filibuster the nomination and block the vote, unless three-fifths of the Senate votes to close debate on the nomination.<sup>73</sup> If, for any of these reasons, a nomination fails to receive a full Senate vote, the nomination is either returned to, or withdrawn by, the President.<sup>74</sup>

### B. *The Methodology*

From 1977 to 2008, Presidents Jimmy Carter through George W. Bush successfully appointed 307 circuit court judges.<sup>75</sup> Prior to being nominated, 82 of these judges worked in Top Five Markets, while 225 came from smaller markets.<sup>76</sup> Appendix 1 provides a database for all the judges from Top Five Markets. For each judge, the Appendix notes (1) the nominating President, (2) the circuit to which the judge was nominated, (3) the city the judge had been working in when no-

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<sup>69</sup> See DENIS STEVEN RUTKUS ET AL., CONG. RESEARCH SERV., U.S. CIRCUIT AND DISTRICT COURT NOMINATIONS BY PRESIDENT GEORGE W. BUSH DURING THE 107TH-109TH CONGRESSES 4 (2007) (describing the judicial appointment process).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*; see also Carolyn Lochhead, *Senate Filibuster Showdown Averted*, S.F. CHRON., May 24, 2005, at A1, available at 2005 WLNR 8191182 (describing the compromise Republican and Democrat senators reached to avoid a filibuster for several of George W. Bush's more controversial circuit court nominees).

<sup>74</sup> See RUTKUS ET AL., *supra* note 69, at 4.

<sup>75</sup> See *infra* Appendices 1 & 2.

<sup>76</sup> *Id.* Biographical information for each of these judges was drawn from the Federal Judicial Center's database. Fed. Judicial Ctr., Biographical Directory of Federal Judges, <http://www.fjc.gov/public/home.nsf/hisj> (last visited Jan. 15, 2010).

minated, (4) the Congress during which the judge was confirmed, (5) the nominee's ABA rating, and (6) the number of days each nominee waited to be confirmed. Appendix 2 provides a similar database for all the judges from smaller markets.

The databases measure the length of a judge's confirmation time in two different ways. First, the number of days is calculated from the date of nomination to the date of confirmation within that same congressional session. A simple explanation comes from the 98th Congress:

On August 1, 1984, President Reagan nominated Cynthia Hall to the 9th Circuit. On October 3, 1984, the Senate confirmed Hall. Thus, Hall waited 63 days to be confirmed.<sup>77</sup>

A slightly more complicated case from the 98th Congress involves separate nominations:<sup>78</sup>

On July 13, 1983, President Reagan nominated Ken Starr to the D.C. Circuit.<sup>79</sup> On August 4, 1983, the Senate returned Starr's nomination to the President.<sup>80</sup> On September 13, 1983, President Reagan resubmitted the nomination.<sup>81</sup> On September 20, 1983, the Senate confirmed Starr.<sup>82</sup> Thus, from July 13 to September 20, Starr waited 69 days to be confirmed.

The database refers to this metric as "Time by Congress."

The second way to calculate confirmation time captures the *total* number of days a nominee waited to be confirmed. For most nominees, this total is no different than the figure yielded by the first calculation.<sup>83</sup> However, some nominees were nominated in successive Congresses, creating a much longer delay from nomination to confirmation. For instance, during the 98th Congress,

<sup>77</sup> See Fed. Judicial Ctr., Biographical Directory of Federal Judges: Hall, Cynthia Holcomb, <http://www.fjc.gov/public/home.nsf/hisj> (follow "H" hyperlink; then select "Hall, Cynthia Holcomb" hyperlink) (last visited Jan. 15, 2010). For most nominees, the calculation was similarly straightforward.

<sup>78</sup> The Federal Judicial Center's biographical database does not include information about prior nominations. Information about such nominations was therefore drawn from other sources. See DENIS STEVEN RUTKUS & MAUREEN BEARDEN, CONG. RESEARCH SERV., NOMINATIONS TO ARTICLE III LOWER COURTS BY PRESIDENT GEORGE W. BUSH DURING THE 110TH CONGRESS 9-10 (2008); RUTKUS ET AL., *supra* note 69, at 39-45; KEVIN M. SCOTT, CONG. RESEARCH SERV., RETURNS AND RESUBMISSIONS OF NOMINEES TO THE U.S. COURTS OF APPEALS AND DISTRICT COURTS, 1977-2006 (2007).

<sup>79</sup> SCOTT, *supra* note 78, at 30.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> For instance, Judge Hall's "Total Time" would also be 63 days, and Judge Starr's would also be 69 days.

on August 1, 1984, President Reagan nominated Frank Easterbrook to the Seventh Circuit.<sup>84</sup> On October 18, 1984, the Senate returned the nomination to the President.<sup>85</sup>

Then, during the 99th Congress,

on February 25, 1985, President Reagan resubmitted the nomination.<sup>86</sup> On April 3, 1985, Easterbrook was confirmed.<sup>87</sup> Thus, from August 1, 1984, to April 3, 1985, Easterbrook waited a total of 245 days to be confirmed.

The database refers to this second metric as “Total Time.”

To accurately analyze confirmation-time data, both calculations are necessary. Only the first calculation, “Time by Congress,” can measure discrepancies that could be created by the nature of the confirming Senate.<sup>88</sup> This first metric, however, fails to capture the total delay each nominee endured. Consider again the delay in confirmation for Judge Easterbrook. During the 99th Congress, he was confirmed in 37 days. This figure suggests that he breezed through the confirmation process. In reality, as the second metric, “Total Time,” reveals, Easterbrook waited 245 days. This figure more accurately reflects the battles that took place during his confirmation.<sup>89</sup> Inclusion of the “total time” metric therefore provides a fuller picture of a nominee’s confirmation delay.<sup>90</sup>

<sup>84</sup> SCOTT, *supra* note 78, at 22.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> During years of divided government, when the President is of one party and the majority of the Senate is of another, confirmation times are greatly above average. Indeed, during periods of divided government, it took the average nominee 151 days to be confirmed. By contrast, during periods of united government, it took the average nominee 72 days to be confirmed. Thus, if there were a high concentration of nominees from Top Five Markets during periods of divided government, the discrepancy in confirmation times between large and small markets could largely be explained by this “divided government” effect. This, however, is not the case. *See infra* subsection III.D.2.

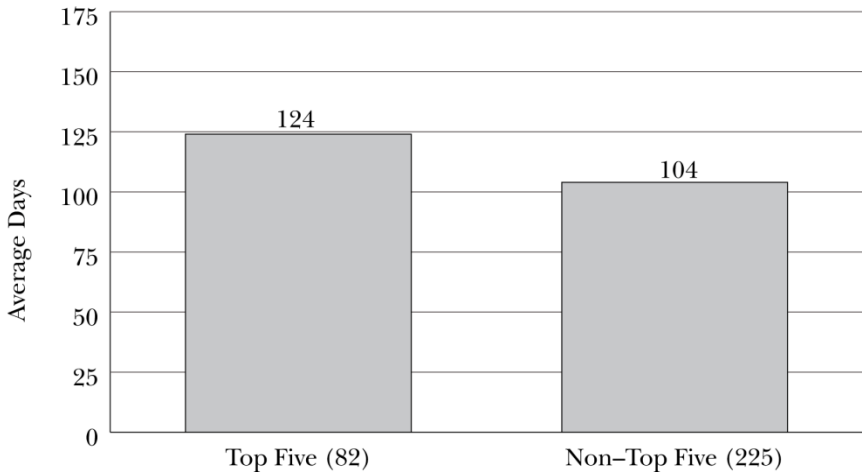
<sup>89</sup> When Easterbrook was nominated, the ABA gave him one of their lowest ratings, “Qualified/Not Qualified.” *See* John R. Lott, Jr., *Pulling Rank*, N.Y. TIMES, Jan. 25, 2006, at A21. Easterbrook now ranks among the most cited federal circuit judges of all time. *See id.* Republicans attribute his ABA rating to his conservative judicial philosophy. *See id.* (arguing that ABA ratings may reflect a liberal bias).

<sup>90</sup> This figure, however, has two drawbacks. First, it potentially includes too much “downtime”—that is, time during which the nomination is not before the Senate. President Reagan waited from October 18, 1984, the day the Senate returned Judge Easterbrook’s nomination, until February 25, 1985, to resubmit the nomination. *See* SCOTT, *supra* note 78, at 22. The longer the delay in resubmission, the more bloated the “Total Time” figure will be. Second, because those nominated in multiple Congresses have such relatively high confirmation times, this figure loses its statistical signi-

### C. The Data

From 1977 to 2008, judges from Top Five Markets waited 19% longer during any single Congress<sup>91</sup> to be confirmed than non-Top Five Market nominees. Top Five Market judges waited, on average, 124 days to be confirmed, while judges from smaller markets waited 104 days.<sup>92</sup>

**Figure 1: Days to Be Confirmed (By Congress)**



When calculated as the *total* number of days a nominee waited before being confirmed, there is an even larger gap. Judges from Top Five Markets waited 28% longer to be confirmed. They waited, on average, 199 days, while judges from smaller markets waited 155 days to be confirmed.<sup>93</sup>

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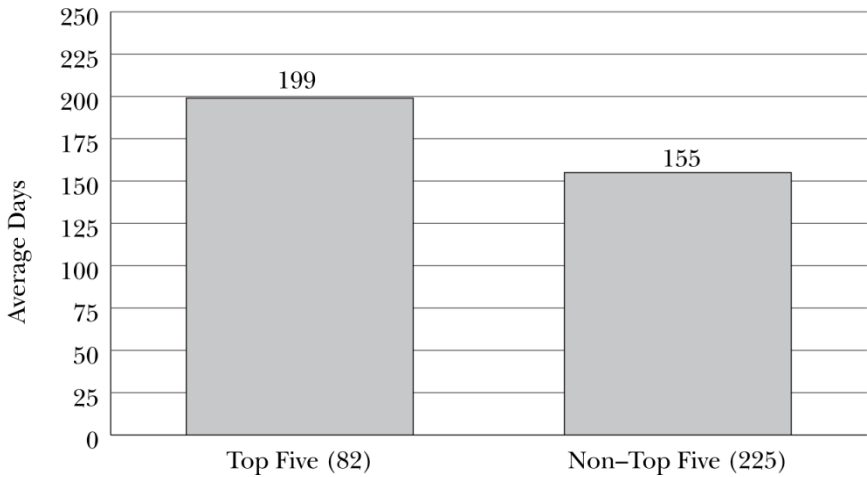
ficance if the sample set is whittled down to too small a size (say, to measure by circuit or by President). Thus, both confirmation-time metrics are necessary.

<sup>91</sup> As discussed *supra* Section III.B, the “Time by Congress” calculation measures the time from first nomination to a successful confirmation during that Congress. This is the only calculation for nearly all of the judges included in the Appendices.

<sup>92</sup> See *infra* Appendices 1 & 2.

<sup>93</sup> See *id.*



**Figure 2: Days to Be Confirmed (Total Time)**

#### D. *Potential Objections*

This discrepancy in confirmation times would be meaningless if Presidents had disproportionately selected nominees from Top Five Markets during (1) recent presidencies or (2) periods of divided government.<sup>94</sup> During both of these periods, the Senate took much longer than average to confirm all nominees.<sup>95</sup> Remarkably, though, for each of these periods, the percentage of nominees from Top Five Markets is almost exactly the same as it is in comparison to the entire sample.<sup>96</sup> Moreover, during each of these periods, nominees from Top Five Markets consistently waited longer than their counterparts to be confirmed.<sup>97</sup> Thus, these longer confirmation times are not due to the nominating President or the makeup of the confirming Senate. Rather, some other explanation must be found.<sup>98</sup>

<sup>94</sup> “Recent presidencies,” for the purposes of this analysis, refers to the presidencies of Bill Clinton and George W. Bush. “Divided governments” occur when one party controls the presidency, but the other party controls the Senate.

<sup>95</sup> See *infra* subsections III.D.1-2.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> See *infra* Section III.E.

### 1. The Presidency Objection

From 1977 to 2008, average confirmation times increased dramatically.<sup>99</sup> Nominees from the Clinton and W. Bush presidencies took far longer (an average of 163 days) to be confirmed than nominees from the Carter, Reagan, and H.W. Bush years (an average of 72 days).<sup>100</sup> A discrepancy between Top Five Market and non-Top Five Market nominees would be easily explained if nominees from Top Five Markets were disproportionately represented by Clinton or W. Bush nominees.

**Table 1: All Confirmed Judges and Confirmation Times**

<b>President</b>	<b>Judges</b>	<b>Average Days (By Congress)</b>
<b>Carter</b>	56	71
<b>Reagan</b>	83	62
<b>H.W. Bush</b>	42	93
<b>Clinton</b>	65	155
<b>W. Bush</b>	61	173
<b>Total Judges: 307</b>		<b>Average: 109</b>

Top Five Market nominees, however, make up almost exactly the same proportion of Clinton-W. Bush nominees as the entire 1977-2008 sample set. From 1977 to 2008, Presidents Carter through W. Bush appointed 307 judges, 82 of whom came from Top Five Markets.<sup>101</sup> Thus, 27% of the overall sample set comprises judges from Top Five Markets. Out of the 126 judges Presidents Clinton and W. Bush appointed, 35 came from Top Five Markets, accounting for 28% of those nominated during recent presidencies.<sup>102</sup> Thus, judges from Top Five Markets did not disproportionately join the bench during recent presidencies.

<sup>99</sup> See *infra* Table 1.

<sup>100</sup> See *id.*

<sup>101</sup> See *infra* Appendices 1 & 2.

<sup>102</sup> See *infra* Table 2.

**Table 2: Judges from Top Five Markets  
Nominated by Each President**

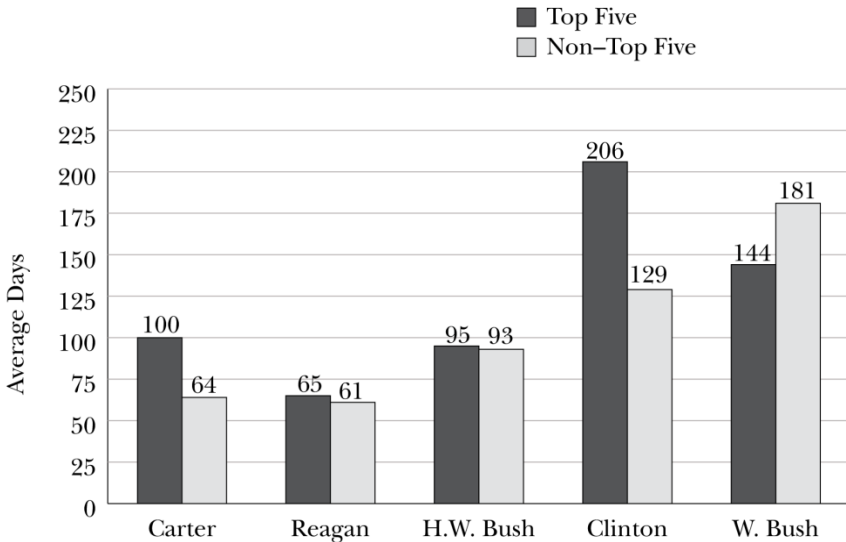
<b>President</b>	<b>Judges from Top Five Markets</b>	<b>Total Judges</b>
<b>Carter</b>	11	56
<b>Reagan</b>	25	83
<b>H.W. Bush</b>	11	42
<b>Clinton</b>	22	65
<b>W. Bush</b>	13	61

In addition, the Senate has consistently—for every President except George W. Bush—taken longer to confirm nominees from Top Five Markets. Using the “By Congress” calculation, which measures the time from the first nomination to a successful confirmation within that same Congress, it took nominees 56% longer (under Carter), 7% longer (under Reagan), 2% longer (under H.W. Bush), and 60% longer (under Clinton) to be confirmed than judges from non-Top Five Markets.<sup>103</sup> W. Bush’s nominees were the exception: his nominees from Top Five Markets were confirmed 26% faster than nominees from non-Top Five Markets.<sup>104</sup>

<sup>103</sup> See *infra* Figure 3.

<sup>104</sup> George W. Bush’s appointees may be anomalous simply because, during the 107th Congress (a period of divided government), he successfully appointed seventeen judges who averaged 210 days to be confirmed (by far, the highest average for his nominees), but only one of these judges came from a Top Five Market. See David G. Savage, *Senate Ends Its Term with 72 Bush Judicial Nominees Affirmed*, L.A. TIMES, Nov. 21, 2002, at 17, available at 2002 WLNR 12407129 (describing the ideological battle in the 107th Congress over W. Bush’s nominations).

**Figure 3: Days to Be Confirmed During Each Presidency  
(By Congress)**

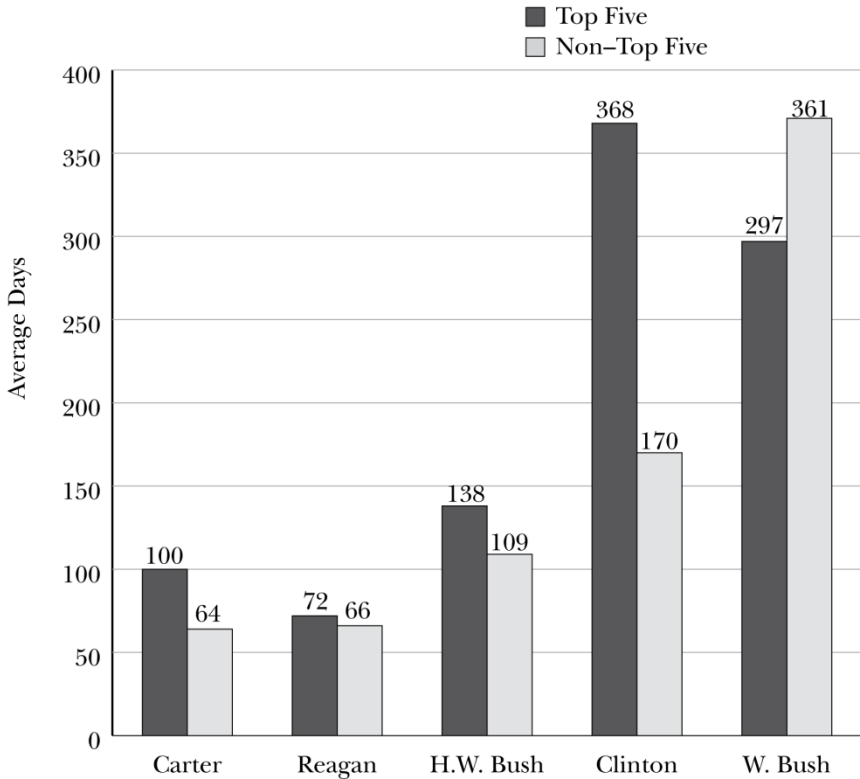


When the confirmation period is calculated as the *total* number of days a nominee waited to be confirmed, as opposed to days within a single Congress, the differences become even greater. Top Five Market nominees waited 56% longer under Carter, 9% longer under Reagan, 27% longer under H.W. Bush, and 116% longer under Clinton.<sup>105</sup> Again, W. Bush's nominees were the lone outliers, as his nominees from large markets were confirmed 22% faster.<sup>106</sup>

<sup>105</sup> One of Clinton's Top Five Market nominees, Richard A. Paez, was nominated without confirmation in the 104th and 105th Congresses. See SCOTT, *supra* note 78, at 27. He was finally confirmed in the 106th Congress, ending a 1513 day wait for confirmation. See *id.* That partially explains the drastic difference between Top Five Market and non-Top Five Market nominees during the Clinton presidency, although even excluding Paez's delay during the 104th and 105th Congresses, Clinton's Top Five Market nominees still waited 86% longer than non-Top Five Market nominees. The data set includes his total time, though, just as it includes the total time of three non-Top Five Market nominees from the W. Bush presidency who were similarly nominated in three successive Congresses. Thus, their effects on the overall totals serve to essentially cancel each other out. In addition, as discussed *infra* at subsection III.E.1, the overall averages are statistically significant (as the calculation for statistical significance accounts for the potential for outliers to skew the analysis). For more on statistical significance, see *infra* note 115.

<sup>106</sup> The "Total Time" data set does not include the total time from initial nomination to confirmation for three of President George W. Bush's appointees whose confirmation processes were anomalous: John G. Roberts, Helene White, and Roger Gre-

**Figure 4: Days to Be Confirmed During Each Presidency (Total Time)**



Thus, the general pattern holds over time. Nominees from Top Five Markets consistently, except under George W. Bush, endured longer delays before confirmation. More importantly, Top Five Market nominees were not disproportionately nominated during recent presidencies. Accordingly, the “presidency objection” fails to explain the significance of the longer confirmation times experienced by nominees from Top Five Markets.

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gory. President George H.W. Bush initially nominated Chief Justice Roberts, and President Bill Clinton initially nominated White and Gregory. See SCOTT, *supra* note 78, at 23, 29, 31. Given that their delays in confirmation spanned numerous years across presidencies controlled by different parties, their “Total Time” calculation does not begin with their initial nomination. Rather, their “Total Time” calculation begins with the first time President George W. Bush nominated them.

## 2. The “Divided Government” Objection

During years of divided government, when one party controls the presidency but the other party controls the Senate, confirmation times are also sharply inflated. During such periods, it took the average nominee 151 days to be confirmed.<sup>107</sup> By contrast, during periods of united government, it took the average nominee just 78 days to be confirmed.<sup>108</sup> Thus, a disproportionate number of nominations from Top Five Markets during periods of divided government could account for the discrepancy in confirmation times for large- and small-market nominees.

**Table 3: Averages Days to Confirmation in Divided Governments (All Nominees)**

<b>Divided Congress</b>	<b>Confirmed Nominees</b>	<b>Average Days (By Congress)</b>
<b>100th</b>	17	119
<b>101st</b>	22	79
<b>102nd</b>	20	109
<b>104th</b>	11	129
<b>105th</b>	20	167
<b>106th</b>	15	224
<b>107th</b>	17	266
<b>110th</b>	10	135
	<b>Total Nominees: 132</b>	<b>Average: 151</b>

However, nominees from Top Five Markets were selected in almost exactly the same proportion during times of divided government as they were for the entire sample period. Out of the entire sample set (307 judges), Top Five Market nominees make up 27% (82 judges). Out of judges confirmed during divided governments (132), judges from Top Five Markets account for 26% (35).<sup>109</sup>

<sup>107</sup> See *infra* Table 3. These averages were based on the “Time by Congress” calculation because that is the only calculation that could capture a discrepancy based on the makeup of the confirming Senate.

<sup>108</sup> For the entire sample set, the average confirmation delay is 109 days. See *supra* Figure 1 (calculating days to be confirmed by Congress).

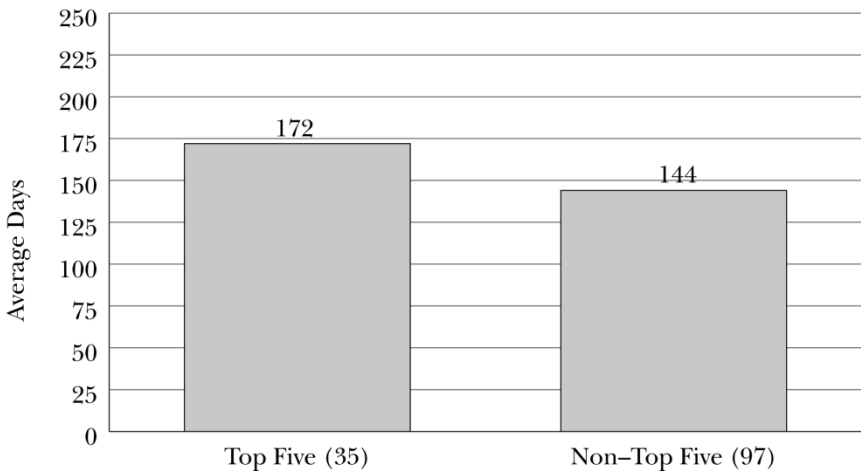
<sup>109</sup> See *supra* Table 3; *infra* Table 4.

**Table 4: Judges Nominated from Top Five Markets in Divided Governments**

Divided Congress	Top Five Market Nominees	All Nominees
100th	3	17
101st	6	22
102nd	5	20
104th	2	11
105th	7	20
106th	8	15
107th	3	17
110th	1	10
	<b>Total: 35</b>	<b>Total: 132</b>

Moreover, during these periods of divided government, nominees from Top Five Markets waited 19% longer to be confirmed than their counterparts from smaller markets. Nominees from Top Five Markets waited, on average, 172 days to be confirmed, while their counterparts from smaller markets waited 144 days.<sup>110</sup> This 19% difference is exactly the same discrepancy between major- and minor-market confirmation times found across the entire sample set.<sup>111</sup>

**Figure 5: Days to Be Confirmed During Divided Governments (By Congress)**



<sup>110</sup> See *infra* Figure 5.

<sup>111</sup> See *supra* Figure 1.

The “divided government” objection cannot explain the phenomenon of longer confirmation times for judges from Top Five Markets.

Thus, while the data reliably show that nominees from Top Five Markets wait longer to be confirmed, this phenomenon is not due to the Presidents who nominated them, nor is it due to the makeup of the Senate that considered their nominations.<sup>112</sup> Rather, as the following Section discusses, the discrepancy may be explained by factors specific to these nominees.

### E. *Why the Longer Confirmation Times?*

This Comment sets out to investigate whether inadequate compensation tends to attract more ideologically driven judges to the federal bench. Specifically, this Comment focuses on judges from Top Five Markets—the judges who, on average, passed up the largest profit differentials to become judges. According to the lone prior study on judicial pay and performance, these judges are more partisan while on the bench.<sup>113</sup> The new data reveal that these same judges wait considerably longer to be confirmed. Taken together, these factors strongly suggest that these nominees are in fact more ideological than their peers. For a lawyer deeply committed to ideology, the chance to exert influence through the federal judiciary might make the decision to forego a large salary for the federal bench far more attractive to her than it would be to her less ideological colleagues. Therefore, low judicial pay in major markets might attract more ideological nominees to the federal bench.

However, before reaching that conclusion, other plausible explanations must be considered.<sup>114</sup> There seem to be three remaining

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<sup>112</sup> The data also show a spike in confirmation time for all nominees during the final Congress under each President (except for the final Congress under George W. Bush). Thus, if nominees from Top Five Markets were overly concentrated during each President’s final Congress, the discrepancy in confirmation delays could be discounted. But this potential explanation would almost completely overlap with the “divided government” objection because, for four of the five Presidents, their last Congresses were periods of divided government. As those data reveal, nominees were not disproportionately stacked during these last Congresses, and the difference in delay between nominees from large and small markets during these periods is similar to the difference across the entire sample set.

<sup>113</sup> See Baker, *supra* note 7, at 863-68 (discussing evidence suggesting that judges from Top Five Markets are more ideological than their peers).

<sup>114</sup> As with any regression, it is conceivable that an explanation beyond those considered in this Comment could be the cause of these longer confirmation times. Al-



plausible explanations for longer confirmation times for nominees from Top Five Markets: (1) mere coincidence, (2) their low quality, or (3) the greater influence of the circuits on which the nominees will sit. Each will be considered in turn.

### 1. Coincidence

One must allow for the possibility that delay experienced by Top Five Market nominees is mere coincidence. The reasons one nominee from a Top Five Market experienced a long delay to be confirmed could have been completely unrelated to the long delay another Top Five Market nominee endured. Under such a supposition, if the past five Presidents had simply chosen different individuals, the average confirmation periods would be different, and perhaps, the argument goes, the discrepancies in confirmation times would disappear.

Statistical analysis, however, rejects coincidence as an explanation for this phenomenon.<sup>115</sup> The average days to confirmation for Top Five Market nominees, calculated as “Time by Congress,” exceeds the average for small-market nominees at a 95% confidence level.<sup>116</sup> The

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though it is impossible to preclude this possibility, I have examined what I believe to be the most facially persuasive explanations.

<sup>115</sup> The findings here are statistically significant. Most professional journals report the results of a statistical test in terms of its level of significance. When data lead to an inference (here, that nominees from Top Five Markets wait longer to be confirmed than their peers from smaller markets), the level of significance measures that inference’s reliability. A test for statistical significance employs the mean and variance of the sample to predict consistency if the process of drawing samples and computing confidence intervals were repeated. In this instance we examine whether the mean for large-market nominees would exceed the mean for small-market nominees 90%, 95%, or 99% of the time. See LYMAN OTT, AN INTRODUCTION TO STATISTICAL METHODS AND DATA ANALYSIS 97-101, 123 (2d ed. 1984) (noting that inferences that reach the 95% confidence level have reached the “magic level” for statistical significance in most academic journals). The judicial data set compiled here, of course, includes *all* the judges appointed from 1977 to 2008 rather than a sample.

<sup>116</sup> For the “Time by Congress” calculation for Top Five Market nominees, the mean is 124.2073, the variance is 10439.1293, and the standard deviation is 102.1721; for non-Top Five Market nominees, the mean is 104.0311, the variance is 7718.8963, and the standard deviation is 87.8572. To test the null hypothesis that the average number of days to confirmation for Top Five Market nominees is not equal to its counterpart for non-Top Five Market nominees, these numbers were plugged into a basic *t*-stat formula, yielding a *t*-value of 1.7117. See DAVID G. KLEINBAUM ET AL., APPLIED REGRESSION ANALYSIS AND OTHER MULTIVARIABLE METHODS 19-20 (Alexander Kugushev ed., 3d ed. 1998) (describing the *t*-distribution methodology). The relevant critical values are  $t_{.1} = 1.2816$  (representing the 90% confidence level);  $t_{.05} = 1.64485$  (95% confidence); and  $t_{.01} = 2.326$  (99% confidence). *Id.* The “Time by Congress” *t*-statistic is above the “magic” 95% level for statistical significance. See OTT, *supra* note 115, at 123.

same calculation for “Total Time” yields a slightly less robust result; nevertheless, the average delay for Top Five Market nominees exceeds the average delay for small-market nominees at a 90% confidence level.<sup>117</sup> The delays that Top Five Market nominees endure are therefore statistically significant, and the chance that they can be explained by coincidence is exceedingly slim.

## 2. Low Quality

If nominees from Top Five Markets were, generally speaking, considerably less qualified across the board than their peers, this would also explain the discrepancy in confirmation times. Nothing, however, supports this view. Indeed, there is no good reason to think that lawyers from major cities—the lawyers most handsomely rewarded by the market—would be, on average, far less qualified than lawyers from smaller cities.

Two sets of data support this response. One data set evaluates the judges’ quality at the time of nomination; the other analyzes the judges’ performance while on the bench.

First, ABA ratings of nominee quality suggest that nominees from Top Five Markets are roughly as qualified as their peers.<sup>118</sup> The ABA’s Standing Committee on the Federal Judiciary evaluates every nominee to the federal bench and then releases a rating based on the nominee’s integrity, professional competence, and judicial temperament.<sup>119</sup> Ratings from 1989 to 2008 are available in the public domain. During this period, the ABA’s data show nominees from Top Five Markets (46 nominees) to be virtually indistinguishable from nominees from smaller markets (122 nominees).<sup>120</sup> Assigning the ABA ratings a nu-

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<sup>117</sup> For the “Total Time” calculation, for Top Five Market nominees, the mean is 199.4268, the variance is 73894.2477, and the standard deviation is 271.835; for non-Top Five Market nominees, the mean is 151.5111, the variance is 45767.1706, and the standard deviation is 213.9326. The “Total Time” average yielded a *t*-value of 1.6187. This value falls comfortably above the 90% confidence level and nearly reaches the 95% level. See *supra* note 116 (presenting the relevant *t*-statistics).

<sup>118</sup> ABA ratings have their flaws. See *supra* note 89 (describing potential bias in ABA ratings). They do, however, provide a rough measure for approximating nominee quality and should therefore be considered.

<sup>119</sup> See AM. BAR ASS’N, STANDING COMMITTEE ON THE FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 3-8 (2007), available at [http://www.abanet.org/scfedjud/federal\\_judiciary09.pdf](http://www.abanet.org/scfedjud/federal_judiciary09.pdf) (describing the Standing Committee’s procedure for evaluating and rating judicial nominees).

<sup>120</sup> See Am. Bar Ass’n, Ratings of Article III Judicial Nominees, <http://www.abanet.org/scfedjud/ratings.html> (last visited Jan. 15, 2010) (providing a list of

merical value on a scale of 1-5 (where 1 means “Well Qualified” and 5 means “Not Qualified”),<sup>121</sup> judges from Top Five Markets averaged 1.91, while judges from smaller markets averaged 1.82. Both sets of nominees averaged a rating of slightly better than “Well Qualified/Qualified,” and the 2.4% difference between the two groups cannot explain the substantial disparity in confirmation delays.

Second, Professor Baker’s data on judicial performance show that judges from Top Five Markets are at least as effective as their counterparts from smaller markets.<sup>122</sup> After measuring the speed with which judges churned out opinions, the strength of those opinions (as measured by citation count), and the numbers of dissents filed, Baker found that the level of compensation foregone “does not impact voting patterns, citation practices, the speed of controversial case disposition, or opinion quality.”<sup>123</sup> To be sure, any attempt to quantify judicial performance has its shortcomings. But to the extent that performance can be quantified, judges from Top Five Markets have proven at least as capable as their peers in smaller markets.

Thus, empirical data, supported by common sense, refute the view that judges from Top Five Markets are far less qualified than their peers. Therefore, the longer confirmation times that Top Five Market nominees endure cannot be attributed to their abilities.

### 3. Circuit Influence

The final competing explanation for the longer confirmation times that nominees from Top Five Markets experience considers the influence of the circuits on which these nominees will most likely sit. These nominees generally sit on circuit courts in or near their home markets.<sup>124</sup> These circuits, one might argue, are some of the most in-

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judicial nominees and their ratings from the 101st through 111th Congresses); *infra* Appendices 1 & 2.

<sup>121</sup> From 1 to 5 the categories were: “Well Qualified,” “Well Qualified/Qualified,” “Qualified,” “Qualified/Not Qualified,” and “Not Qualified.” This is the framework that the ABA has used since 1991. The available ABA ratings, however, date back to 1989. See Am. Bar Ass’n, *supra* note 120. From 1989 to 1990, the ABA also rated some nominees as “Exceptionally Well Qualified.” See *id.* Nominees receiving that rating are viewed, in this analysis, as though they received the ABA’s current highest score, “Well Qualified.”

<sup>122</sup> Baker, *supra* note 5, at 112.

<sup>123</sup> *Id.* Analyzing Baker’s models, Professors Zorn, Henderson, and Czarnecki found that judges from Top Five Markets actually write opinions more quickly than their peers. Zorn et al., *supra* note 2, at 834-35.

<sup>124</sup> For instance, most nominees from New York City sit on the Second Circuit. Indeed, of the 82 nominees from Top Five Markets, 63 (77%) were confirmed to cir-

fluent.<sup>125</sup> Therefore, the explanation goes, senators will put up the strongest fight against the nominees that will sit on these influential circuits.

On its face, this explanation seems plausible. Previous studies rank circuit court influence by the average number of outside citations each judge from a circuit receives.<sup>126</sup> On this view, the Seventh and Second Circuits are two of the most influential. The Seventh Circuit, which draws heavily from Chicago, ranks first in outside citations. The Second Circuit, which draws heavily from New York City, ranks third.<sup>127</sup> The confirmation times for these judges, according to the circuit-influence theory, should be relatively long. By contrast, the Ninth and D.C. Circuits rank among the least influential according to citation count.<sup>128</sup> The Ninth Circuit, which draws mostly from San Francisco and Los Angeles, ranks tenth.<sup>129</sup> The D.C. Circuit, which draws mostly from the District of Columbia, ranks twelfth (out of thir-

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cuits having chambers in the city where the nominee had worked. *See infra* Appendix 1.

<sup>125</sup> It is debatable which circuits, if any, are more influential than the others. Each of the circuit courts has the same status under the Constitution, regardless of location. *See* U.S. CONST. art. III, § 1 (providing, in part, that the “judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish”); *see also, e.g.*, Julia Turner, *What’s So Important About the Washington, D.C., Circuit Court of Appeals?*, SLATE, Feb. 7, 2003, <http://www.slate.com/id/2078310> (arguing that there is no reason to think that the D.C. Circuit is more influential than any of the other twelve courts of appeals). One promising way of measuring circuit influence, however, is by citation analysis. *See* William M. Landes et al., *Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges*, 27 J. LEGAL STUD. 271, 302-05 (ranking circuit court influence by the average number of outside citations each judge from a circuit receives). As imperfect as this metric may be, this Comment relies on it to test the “circuit influence” hypothesis.

<sup>126</sup> *See* Landes et al., *supra* note 125, at 304 tbl.3 (employing this methodology to rank circuit court influence).

<sup>127</sup> *Id.*

<sup>128</sup> The Federal Circuit actually ranks last in outside-citation count, but it is not included here, because of its specialized patent-case docket. The low ranking of the D.C. Circuit could be viewed with skepticism, as the D.C. Circuit’s docket includes a large number of administrative appeals that are generally not heard as frequently in other circuits. Indeed, many view the D.C. Circuit as the most influential. *But see* Turner, *supra* note 125 (questioning the widely held view that the D.C. Circuit is the most influential among the circuits). It is worth noting, however, that the delay for nominees to the D.C. Circuit is a middling 103 days. The average delay for the entire sample set is 109 days. This average delay for nominees to the D.C. Circuit is inconsistent with the circuit-influence theory and reinforces the view that circuit influence is a nebulous concept that—to the extent that its effects can be measured—seems to have no impact on confirmation delays.

<sup>129</sup> *See* Landes et al., *supra* note 125, at 304 tbl.3.

teen).<sup>130</sup> Nominees to these less-influential circuits, according to the circuit-influence theory, should be confirmed much faster than average.

On close examination of the data, however, the circuit-influence explanation collapses. Across the entire sample set, nominees to the Seventh Circuit get confirmed fastest.<sup>131</sup> Meanwhile, nominees to the Ninth Circuit take the longest to be confirmed.<sup>132</sup> From a circuit-influence perspective, it makes no sense for nominees to the most influential circuit (the Seventh) to have the shortest confirmation times, while nominees to one of the least influential circuits (the Ninth) have the longest. These contradictory results suggest that the influence of the circuit has little bearing on the confirmation process.<sup>133</sup>

However, even if circuit influence somehow still affects confirmation times,<sup>134</sup> the circuits to which nominees from Top Five Markets were overwhelmingly nominated to (the Seventh, Second, Ninth, and D.C.) lie on both ends of the influence spectrum. The 23 Top Five Market nominees to the influential Seventh and Second Circuits should inflate the average confirmation times, while the 38 Top Five Market nominees to the less-influential Ninth and D.C. Circuits should deflate the average times.<sup>135</sup> Thus, even if circuits have some effect, this counterbalancing renders the circuit-influence theory useless in explaining the longer confirmation times for nominees from Top Five Markets.<sup>136</sup>

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<sup>130</sup> *Id.*

<sup>131</sup> *See infra* Table 5.

<sup>132</sup> *Id.*

<sup>133</sup> In addition, there are theoretical difficulties in trying to link circuit influence to longer confirmation times over the past thirty years. The most influential circuits are influential, in large part, because of the judges who now sit on them. *See* Landes et al., *supra* note 125, at 302 (noting that the Seventh Circuit boasts five of the ten most cited circuit court judges). Thus, it is not the most influential judges' confirmation times that would have been affected by circuit influence but rather the confirmation times of nominees to that circuit in the future.

<sup>134</sup> There is some support for this view. For instance, the Second Circuit ranks third in citation count and its nominees have the third-longest confirmation times. *See infra* Table 5.

<sup>135</sup> *See id.*

<sup>136</sup> Importantly, there are no outlier circuit averages here. The average-days figures are all fairly well clustered around the mean. This suggests there is little circuit influence on confirmation times.

**Table 5: Circuit Influence and Confirmation Times**

<b>Rank (By Citation Count)</b>	<b>Circuit</b>	<b>All Nominees' Average Days (By Congress)</b>	<b>Nominees from Top Five Markets</b>
<b>1</b>	7th	83	8
<b>2</b>	1st	84	1
<b>3</b>	2nd	113	15
<b>4</b>	8th	127	0
<b>5</b>	5th	95	0
<b>6</b>	3rd	108	3
<b>7</b>	4th	101	2
<b>8</b>	10th	115	1
<b>9</b>	6th	111	1
<b>10</b>	9th	128	22
<b>11</b>	11th	109	0
<b>12</b>	D.C.	103	16

#### 4. Ideology

The best explanation for why nominees from Top Five Markets experience longer confirmation times is that these nominees tend to hold stronger ideological views than their peers. In modern confirmation battles, the extent to which a nominee is “too conservative” or “too liberal” often plays a major role in the level of opposition that the nominee encounters.<sup>137</sup> Thus, a nominee’s commitment to ideology is a facially plausible explanation for longer confirmation times.

There are, however, as previously discussed, four other conceivable explanations for a nominee’s longer confirmation time: (1) the era when nominated; (2) the partisan makeup of the government when nominated; (3) the nominee’s quality; and (4) circuit influence. As shown above, none of these explanations, standing alone, can ac-

<sup>137</sup> See, e.g., Shailagh Murray, *Judgeship Deal Called into Question: Party-Line Split Raises Possibility of Filibuster Again*, WASH. POST, May 26, 2005, at A7 (discussing attempts by Democratic Senators to block some of George W. Bush’s most conservative circuit court nominees); Charlie Savage, *Appeals Courts Pushed to Right by Bush Choices: Trend Reagan Started*, N.Y. TIMES, Oct. 29, 2008, at A1 (describing the “conservative anchors” President George W. Bush nominated to the appellate courts, including Judges Michael W. McConnell, Jeffrey S. Sutton, Brett M. Kavanaugh, and Janice Rogers Brown—all of whom experienced longer-than-usual confirmation delays).

count for the longer confirmation times nominees from Top Five Markets endure.<sup>138</sup>

Moreover, even when considering these factors together, nominees from Top Five Markets still experience longer delays. Indeed, we can construct a model showing<sup>139</sup> that—even after controlling for these explanations as far as possible<sup>140</sup>—nominees from Top Five Markets still experience confirmation times longer than those of their non-Top Five Market peers. The model is a linear regression that analyzes whether a nominee’s city affects her confirmation time, even after controlling for the combined effect of (1) the nominee’s ABA rating, (2) the Congressional term when confirmed, and (3) the partisan relationship between the nominating President and confirming Senate.<sup>141</sup> As expected, the model reveals that all three of these factors have a highly significant effect on the nominee’s confirmation time.<sup>142</sup>

<sup>138</sup> See *supra* subsections III.D-E.3 (analyzing the merits of each of these explanations individually).

<sup>139</sup> The model demonstrates this point at a statistically significant level. For a complete discussion of statistical significance, see *supra* note 115.

<sup>140</sup> Circuit influence is left out of the model because as argued in the previous section, it is too nebulous a concept to be quantified. Even when it is quantified by citation count, the influence of the circuit seems to have no effect on the length of confirmation times. A second limitation is that the model only considers judges confirmed from 1988 through 2008, because the ABA only began rating nominee quality in 1988.

<sup>141</sup> The model can be written as

$$y = \beta_0 + \beta_1x_1 + \beta_2x_2 + \beta_3x_3 + \beta_4x_4.$$

where the independent variable,  $y$ , represents days to confirmation (measured as “Time by Congress”);  $x_1$ ,  $x_2$ ,  $x_3$ , and  $x_4$  represent, respectively: city (a binary variable—1 for a Top Five Market city, 0 otherwise), congressional term (numerical, capturing changes across time; ten Congresses included), ABA rating (on a scale from 1 to 5), and the partisan relationship between the nominating President and confirming Senate (binary—1 for different parties, 0 otherwise). The coefficients and their standard errors are as follows:

	$\beta_{\text{city}}$	$\beta_{\text{Congress}}$	$\beta_{\text{ABA}}$	$\beta_{\text{partisan}}$	$\beta_0$
<b>Coefficient</b>	23.6042	12.78371	12.74724	55.91529	-1266
<b><math>\sigma</math></b>	16.43234	2.707281	7.676876	16.55985	288.1468

<sup>142</sup> The coefficients on the binary variables for congressional term ( $\beta_2$ ) and divided governments ( $\beta_1$ ) are statistically significant at the 99% level. Their  $t$ -values are 4.721974 and 3.376559, respectively, beyond the critical value of 2.326. See *supra* notes 115-116 (explaining the relevant  $t$ -statistics and the threshold for statistical significance). The coefficient on the binary variable for ABA rating ( $\beta_3$ ) is statistically significant at the 95% level. Its  $t$ -value is 1.660472, above the critical value of 1.64485. *Id.* These results simply mean that in the year the nominee was confirmed, the partisan

But even after controlling for these factors, the nominee's city still has a statistically significant effect on confirmation time.<sup>143</sup> Thus, the model confirms that, for some reason other than the alternative explanations already considered, nominees from Top Five Markets experience longer confirmation times than their peers.

I posit that the only remaining persuasive explanation for this delay is that nominees from Top Five Markets tend to be more ideological than their peers. This explanation rests on the obvious connection between strong ideological views and tougher confirmation proceedings.<sup>144</sup> Moreover, it effectively accounts for why nominees from major markets, in particular, would experience longer confirmation delays. In short, nominees from major markets pass up enormous sums of money to become judges, and so they often need some *additional* motivation to join the federal bench. Strong ideological views would provide that motivation and explain the longer confirmation times these nominees endure.

This explanation is grounded in more than theory; it also has empirical support. The lone existing study on the link between judicial pay and performance reveals that judges from Top Five Markets are more ideological while on the bench.<sup>145</sup> The citation practices of these judges and their votes in controversial cases reflect a heightened level of commitment to ideology.<sup>146</sup> As such, it seems that nominees from Top Five Markets really are more ideological than their peers. That is the story that the prior data tell, and it seems to be the judgment of the Senators considering their nominations—a judgment that may be more reliable than any rough empirical attempt to quantify a judge's level of commitment to ideology.<sup>147</sup>

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relationship between the nominating President and confirming Senate, and the nominee's quality all tend, on their own, to increase a nominee's delay in confirmation.

<sup>143</sup>  $\beta_1$ , the coefficient on the binary variable for city, is statistically significant at the 90% level. Its *t*-value is 1.436448, above the critical value of 1.2816. *Id.* As expected, the city variable holds less explanatory power than the other three factors. Crucially, though, it remains statistically significant, even in a model that includes the more obvious reasons for confirmation delay.

<sup>144</sup> See, e.g., Savage, *supra* note 137 (noting that Democrats blocked the confirmation of several conservative W. Bush nominees for years).

<sup>145</sup> See Baker, *supra* note 7, at 868 (noting that the data reveal more "partisan voting among judges in top-five markets").

<sup>146</sup> See Baker, *supra* note 5, at 85-86 (tracking, for instance, the extent to which Democrat-appointed judges voted for liberal outcomes in controversial cases and cited fellow Democrat appointees).

<sup>147</sup> See *id.* at 85 ("Measuring judicial ideology is a tricky business."). In addition to confirmation delay, though, there is another possible proxy for nominee ideology: the



### F. *Causation*

Given that nominees from Top Five Markets are more ideological than their peers, finding a causal link between low pay and these judges' increased ideology requires just one small inferential step. The data show that judges who, on average, passed up the greatest financial opportunities to leave the private sector tend to be more committed to ideology than their peers.<sup>148</sup> This strongly suggests that the large discrepancy in pay between the private sector and the judiciary in Top Five Markets tends to attract more ideological nominees to the bench. In the absence of some other compelling explanation, one should read the data in this light.

There is no other compelling explanation.<sup>149</sup> Rather, basic economics and human nature tell the tale: In small markets, most highly qualified lawyers will gladly take a significant, but manageable, pay cut for the numerous nonpecuniary benefits the judiciary offers (such as prestige, influence, and a more leisurely workload). In major markets, however, where the salary cut might be as high as ninety percent, the decision to make the switch becomes more difficult. For lawyers deeply committed to ideology, the chance to exert so much influence at so high a level makes the position far more attractive than it might be to their less ideological colleagues. As such, low judicial pay in major markets tends to attract more ideological nominees to the federal bench. That, at least, is the most persuasive account supported by the data.

### CONCLUSION

In today's legal market, a first-year associate working at a top firm in a major city stands a good chance of earning as much as a federal judge. Such comparatively low judicial pay has not detracted from the quality of the judiciary. But it has, in major markets, tended to attract

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Senate voting record on each nominee. A project that would compile that information, and compare it to this data, would be a welcome addition to this field.

<sup>148</sup> Based on earnings figures in Top Five Markets, this Comment assumes that judges from Top Five Markets could have earned considerably more in these markets than their counterparts from smaller markets could have earned. This assumption, however, is not particularized to individual judges.

<sup>149</sup> Perhaps one might hypothesize that all people in Top Five Markets are, by a substantial margin, more partisan than the rest of the country. But there is no compelling reason to think that people who live in Top Five Markets are inherently significantly more ideological—on both sides of the political spectrum—than people from the rest of the country.

more ideologically driven judges to the federal bench. As such, higher judicial pay could, at least in major markets, diminish partisanship in the federal judiciary.

The first step toward ameliorating the problems caused by low judicial pay in major markets is simple. Federal judges across the nation are paid the same regardless of the location of their chambers or residences.<sup>150</sup> By contrast, General Schedule federal employees who work in major markets receive salaries that are adjusted upward to account for the higher costs of living in these cities.<sup>151</sup> Adopting this solution for federal judges is, in the words of Judge Posner, “long overdue.”<sup>152</sup> By providing robust cost of living increases for judges in major markets, Congress would, first, be acknowledging the reality that living in places like New York, Chicago, and Los Angeles is substantially more expensive than living elsewhere in the country. Second, Congress would be taking an important step toward undermining partisanship in the federal judiciary.<sup>153</sup>

The second recommendation is just as simple. Congress should ensure that judicial pay keeps pace with inflation. Congress provides an annual cost-of-living increase for every other federal employee—including, in 2008, themselves.<sup>154</sup> However, Congress provides no such incremental raise for judges. In fact, over the years, Congress has let the real value of a federal judge’s salary decline.<sup>155</sup> In his latest plea for a judicial pay raise, Chief Justice Roberts emphasized,

I suspect many are tired of hearing it, and I know I am tired of saying it, but I must make this plea again—Congress must provide judicial compensation that keeps pace with inflation. Judges knew what the pay was when they answered the call of public service. But they did not know that Congress would steadily erode that pay in real terms by repeatedly failing over the years to provide even cost-of-living increases.<sup>156</sup>

Finally, with a new appreciation for the consequences that follow from low judicial pay, Congress should continue to diligently consider

<sup>150</sup> See SCOTT, *supra* note 14, at 30.

<sup>151</sup> See *id.*

<sup>152</sup> POSNER, *supra* note 66, at 172.

<sup>153</sup> See *supra* note 124 (pointing out that 77% of judges from Top Five Markets have been appointed to a judicial seat in their home city).

<sup>154</sup> See Roberts, 2008 *Year-End Report*, *supra* note 15, at 3 (“Congress failed, once again, to provide judges an annual cost-of-living increase this year, even though it provided one to every other federal employee, including every member of Congress.”).

<sup>155</sup> See Roberts, 2006 *Year-End Report*, *supra* note 1, at 2 (noting that judicial pay, adjusted for inflation, has declined twenty-nine percent since 1969).

<sup>156</sup> See Roberts, 2008 *Year-End Report*, *supra* note 15, at 3.

the calls by Chief Justice Roberts, the ABA, and top law school deans for an across-the-board pay raise for federal judges.<sup>157</sup> The data presented here show that the greater the profits foregone, the more ideological the judge tends to be. For the moment, this phenomenon seems limited to judges from Top Five Markets—the judges who pass up the most staggering profit differentials to become judges. However, if law-firm profits continue to surge ahead while judicial pay continues to lag behind, nearly every potential nominee to the bench will be in the same situation that potential nominees from Top Five Markets currently find themselves in. One wonders whether, over time, more judges will be attracted to the federal bench for the opportunity to indoctrinate. This result could not be more contrary to the Founders' vision. As Alexander Hamilton put it, “[t]he independence of the judges once destroyed, the constitution is gone, it is a dead letter; it is a vapor which the breath of faction in a moment may dissipate.”<sup>158</sup>

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<sup>157</sup> See Baker, *supra* note 5, at 64-65 & nn.1-5 (noting that “prominent law school deans, the American Bar Association, and leading members of the corporate bar” have endorsed Chief Justice Roberts’s statements on judicial pay).

<sup>158</sup> Roberts, *2006 Year-End Report*, *supra* note 1, at 3 (quoting Alexander Hamilton, *The Examination*, COM. ADVERTISER (New York), Feb. 26, 1802, as reprinted in XXV THE PAPERS OF ALEXANDER HAMILTON 525 (Harold C. Syrett ed., 1977)).

APPENDIX 1: JUDGES FROM TOP FIVE MARKETS

Judge	President	Circuit	City	Congress	Days (By Congress)	Days (Total)	Prior Nominating Congress	ABA Rating
Alarcon, Arthur L.	Carter	9	LA	96	64	64		
Altimari, Frank X.	Reagan	2	NY	99	54	54		
Archer, Glenn Leroy Jr.	Reagan	Fed.	DC	99	61	61		
Bea, Carlos	W. Bush	9	SF	108	171	171		4
Berzon, Marsha S.	Clinton	9	SF	106	407	772	105	2
Boggs, Danny Julian	Reagan	6	DC	99	84	84		
Bork, Robert H.	Reagan	D.C.	DC	97	63	63		
Boudin, Michael	H.W. Bush	1	DC	102	62	62		1
Brown, Janice R.	W. Bush	D.C.	SF	109	114	684	108	4
Bryson, William C.	Clinton	Fed.	DC	103	98	98		1
Buckley, James L.	Reagan	D.C.	NY	99	62	62		
Chertoff, Michael	W. Bush	3	DC	108	96	96		1
Clevenger, Raymond C.	H.W. Bush	Fed.	DC	101	93	93		3
Cudahy, Richard D.	Carter	7	DC	96	126	126		
Dyk, Timothy B.	Clinton	Fed.	DC	106	443	784	105	3
Easterbrook, Frank H.	Reagan	7	CHI	99	37	208	98	
Fernandez, Ferdinand F.	H.W. Bush	9	LA	101	79	244	100	1
Fisher, Raymond	Clinton	9	LA	106	204	204		1
Flaum, Joel M.	Reagan	7	CHI	98	20	20		
Fletcher, William A.	Clinton	9	SF	105	274	1262	104	1
Fuentes, Julio M.	Clinton	3	NY	106	365	365		4
Gajarsa, Arthur J.	Clinton	Fed.	DC	105	205	469	104	3
Garland, Merrick B.	Clinton	D.C.	DC	105	71	561	104	1
Ginsburg, Douglas H.	Reagan	D.C.	DC	99	15	15		
Ginsburg, Ruth Badler	Carter	D.C.	NY	96	65	65		
Gorsuch, Neil M.	W. Bush	10	DC	109	71	71		1
Hall, Cynthia H.	Reagan	9	LA	98	63	63		
Ikuta, Sandra S.	W. Bush	9	LA	109	131	131		1
Jacobs, Dennis G.	H.W. Bush	2	NY	102	193	193		3
Katzmann, Robert A.	Clinton	2	DC	106	128	128		1
Kavanaugh, Brett M.	W. Bush	D.C.	DC	109	431	1036	108	2

Judge	President	Circuit	City	Congress	Days (By Congress)	Days (Total)	Prior Nominating Congress	ABA Rating
Kearse, Amalya L.	Carter	2	NY	96	47	47		
Kozinski, Alex	Reagan	9	DC	99	155	155		
Leval, Pierre Nelson	Clinton	2	NY	103	73	73		1
Linn, Richard	Clinton	Fed.	DC	106	52	52		3
Livingston, Debra A.	W. Bush	2	NY	110	120	315	109	1
Luttig, J. Michael	H.W. Bush	4	DC	102	94	94		4
Mahoney, John D.	Reagan	2	NY	99	48	48		
Mayer, Haldane R.	Reagan	Fed.	DC	100	128	128		
Michel, Paul R.	Reagan	Fed.	DC	100	72	72		
Mikva, Abner J.	Carter	D.C.	CHI	96	119	119		
Moore, Kimberly A.	W. Bush	Fed.	DC	109	110	110		3
Nelson, Dorothy W.	Carter	9	LA	96	82	82		
Newman, Pauline	Reagan	Fed.	NY	98	28	28		
Noonan, John T., Jr.	Reagan	9	SF	99	61	61		
Norris, William A.	Carter	9	LA	96	112	112		
Paez, Richard A.	Clinton	9	LA	106	407	1505	104, 105	2
Parker, Barrington D., Jr.	W. Bush	2	NY	107	155	155		1
Pierce, Lawrence W.	Reagan	2	NY	97	71	71		
Plager, S. Jay	H.W. Bush	Fed.	DC	101	57	57		2
Poole, Cecil F.	Carter	9	SF	96	46	46		
Posner, Richard A.	Reagan	7	CHI	97	28	28		
Pratt, George C.	Reagan	2	NY	97	53	53		
Prost, Sharon	W. Bush	Fed.	DC	107	123	123		4
Pregerson, Harry	Carter	9	LA	96	64	64		
Raggi, Reena	W. Bush	2	NY	107	142	142		1
Reinhardt, Stephen R.	Carter	9	LA	96	286	286		
Ripple, Kenneth F.	Reagan	7	DC	99	32	32		
Roberts, John G., Jr.	W. Bush	D.C.	DC	108	121	729	107	1
Rogers, Judith Ann	Clinton	D.C.	DC	103	113	113		1
Rovner, Ilana Kara	H.W. Bush	7	CHI	102	41	41		1
Rymer, Pamela Ann	H.W. Bush	9	LA	101	79	387	100	1
Sack, Robert D.	Clinton	2	NY	105	221	221		3

Judge	President	Circuit	City	Congress	Days (By Congress)	Days (Total)	Prior Nominating Congress	ABA Rating
Sarokin, H. Lee	Clinton	3	NY	103	152	152		1
Scalia, Antonin	Reagan	D.C.	CHI	97	21	21		
Schall, Alvin Anthony	H.W. Bush	Fed.	DC	102	162	162		2
Silberman, Laurence H.	Reagan	D.C.	DC	99	44	44		
Smith, Milan D., Jr.	W. Bush	9	LA	109	91	91		2
Sneeden, Emory M.	Reagan	4	DC	98	64	64		
Sotomayor, Sonia	Clinton	2	NY	105	464	464		2
Starr, Kenneth W.	Reagan	D.C.	DC	98	69	69		
Straub, Chester J.	Clinton	2	NY	105	110	110		3
Tashima, Atsushi Wallace	Clinton	9	LA	104	271	271		1
Tatel, David	Clinton	D.C.	DC	103	108	108		1
Thomas, Clarence	H.W. Bush	D.C.	DC	101	127	127		3
Trott, Stephen S.	Reagan	9	LA	100	230	230		
Wald, Patricia M.	Carter	D.C.	DC	96	85	85		
Walker, John Mercer, Jr.	H.W. Bush	2	NY	101	61	61		1
Wardlaw, Kim McLane	Clinton	9	LA	105	185	185		3
Wiggins, Charles E.	Reagan	9	SF	98	63	63		
Williams, Ann C.	Clinton	7	CHI	106	97	97		1
Wood, Diane Pamela	Clinton	7	DC	104	91	91		1
<b>Average Days:</b>					124.207317	199.4268		

APPENDIX 2: JUDGES FROM NON-TOP FIVE MARKETS

Judge	President	Circuit	City	Congress	Days (by Congress)	Days (Total)	Prior Nominating Congress	ABA Rating
Agee, Steven G.	W. Bush	4	Minor	110	68	68		1
Alito, Samuel A., Jr.	H.W. Bush	3	Minor	101	66	66		1
Ambro, Thomas L.	Clinton	3	Minor	106	135	135		2
Anderson, R. Lanier, III	Carter	5	Minor	96	85	85		
Anderson, Stephen H.	Reagan	10	Minor	99	85	85		
Arnold, Morris S.	H.W. Bush	8	Minor	102	197	197		2
Arnold, Richard S.	Carter	8	Minor	96	63	63		
Baldock, Bobby R.	Reagan	10	Minor	99	70	70		
Barkett, Rosemary	Clinton	11	Minor	103	202	202		1
Barksdale, Rhessa H.	H.W. Bush	5	Minor	101	112	112		2
Barry, Maryanne T.	Clinton	3	Minor	106	88	88		1
Batchelder, Alice M.	H.W. Bush	6	Minor	102	168	168		3
Beam, C. Arlen	Reagan	8	Minor	100	128	128		
Becker, Edward R.	Reagan	3	Minor	97	17	17		
Beezer, Robert R.	Reagan	9	Minor	98	25	25		
Benavides, Fortunato P.	Clinton	5	Minor	103	99	99		2
Benton, William D.	W. Bush	8	Minor	108	133	133		1
Birch, Stanley F., Jr.	H.W. Bush	11	Minor	101	50	50		3
Bissel, Jean G.	Reagan	Fed	Minor	98	15	15		
Black, Susan H.	H.W. Bush	11	Minor	102	154	154		1
Boochever, Robert	Carter	9	Minor	96	27	27		
Bowman, Pasco M., II	Reagan	8	Minor	98	55	55		
Bownes, Hugh H.	Carter	1	Minor	95	18	18		
Breyer, Stephen G.	Carter	1	Minor	96	26	26		
Briscoe, Mary B.	Clinton	10	Minor	104	72	72		1
Brorby, Wade	Reagan	10	Minor	100	193	193		
Brown, Bailey	Carter	6	Minor	96	194	194		
Brunetti, Melvin T.	Reagan	9	Minor	99	36	180	98	
Bybee, Jay S.	W. Bush	9	Minor	108	65	295	107	2
Bye, Kermit E.	Clinton	8	Minor	106	308	308		2
Cabranes, Jose A.	Clinton	2	Minor	103	77	77		1

Judge	President	Circuit	City	Congress	Days (by Congress)	Days (Total)	Prior Nominating Congress	ABA Rating
Calabresi, Guido	Clinton	2	Minor	103	159	159		2
Callahan, Consuelo M.	W. Bush	9	Minor	108	99	99		2
Canby, William C., Jr.	Carter	9	Minor	96	49	49		
Cardamone, Richard J.	Reagan	2	Minor	97	28	28		
Carnes, Edward E.	H.W. Bush	11	Minor	102	226	226		3
Chagares, Michael A.	W. Bush	3	Minor	109	69	69		1
Chapman, Robert F.	Reagan	4	Minor	97	62	62		
Clark, Thomas A.	Carter	5	Minor	96	64	64		
Clay, Eric L.	Clinton	6	Minor	105	205	512	104	1
Clement, Edith Brown	W. Bush	5	Minor	107	188	188		2
Clifton, Richard R.	W. Bush	9	Minor	107	391	391		3
Coffey, John L.	Reagan	7	Minor	97	27	27		
Cole, R. Guy, Jr.	Clinton	6	Minor	104	176	176		1
Colloton, Steven M.	W. Bush	8	Minor	108	204	204		3
Contie, Leroy J., Jr.	Reagan	6	Minor	97	37	37		
Cook, Deborah L.	W. Bush	6	Minor	108	118	726	107	3
Cowen, Robert E.	Reagan	3	Minor	100	91	91		
Cox, Emmett R.	Reagan	11	Minor	100	118	118		
Cyr, Conrad K.	H.W. Bush	1	Minor	101	81	81		1
Daughtrey, Martha C.	Clinton	6	Minor	103	106	106		1
Davis, W. Eugene	Reagan	5	Minor	98	14	14		
DeMoss, Harold R., Jr.	H.W. Bush	5	Minor	102	153	153		3
Dennis, James L.	Clinton	5	Minor	104	240	477	103	3
Dubina, Joel F.	H.W. Bush	11	Minor	101	113	113		2
Duhe, John Malcolm, Jr.	Reagan	5	Minor	100	109	109		
Duncan, Allyson K.	W. Bush	4	Minor	108	80	80		1
Ebel, David M.	Reagan	10	Minor	100	123	123		
Edmondson, James L.	Reagan	11	Minor	99	34	34		
Edwards, Harry T.	Carter	D.C.	Minor	96	76	76		
Elrod, Jennifer W.	W. Bush	5	Minor	110	189	189		3
Ervin, Samuel James, III	Carter	4	Minor	96	49	49		
Eshbach, Jesse E.	Reagan	7	Minor	97	35	35		



Judge	President	Circuit	City	Congress	Days (by Congress)	Days (Total)	Prior Nominating Congress	ABA Rating
Evans, Terence T.	Clinton	7	Minor	104	108	108		2
Fagg, George G.	Reagan	8	Minor	97	9	9		
Farris, Joseph J.	Carter	9	Minor	96	76	76		
Ferguson, Warren J.	Carter	9	Minor	96	59	59		
Fisher, D. Michael	W. Bush	3	Minor	108	222	222		2
Fletcher, Betty B.	Carter	9	Minor	96	76	76		
Garwood, William L.	Reagan	5	Minor	97	34	34		
Garza, Emilio M.	H.W. Bush	5	Minor	102	43	43		3
Garza, Reynaldo G.	Carter	5	Minor	96	73	73		
Gibbons, Julia S.	W. Bush	6	Minor	107	293	293		2
Gibson, John R.	Reagan	8	Minor	97	30	30		
Gilman, Ronald L.	Clinton	6	Minor	105	113	113		1
Gould, Ronald M.	Clinton	9	Minor	106	295	739	105	2
Graber, Susan	Clinton	9	Minor	105	230	230		1
Greenberg, Morton I.	Reagan	3	Minor	100	37	37		
Gregory, Roger L.	W. Bush	4	Minor	107	72	72		3
Griffin, Richard A.	W. Bush	6	Minor	109	115	1079	107, 108	2
Griffith, Thomas B.	W. Bush	D.C.	Minor	109	120	400	108	4
Gruender, Raymond W.	W. Bush	8	Minor	108	234	234		3
Guy, Ralph B., Jr.	Reagan	6	Minor	99	85	85		
Hall, Peter W.	W. Bush	2	Minor	108	198	198		1
Hamilton, Clyde H.	H.W. Bush	4	Minor	102	36	36		2
Hansen, David R.	H.W. Bush	8	Minor	102	138	138		1
Hardiman, Thomas M.	W. Bush	3	Minor	110	65	65		1
Hartz, Harris L.	W. Bush	10	Minor	107	168	168		2
Hatchett, Joseph W.	Carter	5	Minor	96	56	56		
Hawkins, Michael D.	Clinton	9	Minor	103	63	63		1
Haynes, Catharina	W. Bush	5	Minor	110	268	268		1
Henderson, Albert J.	Carter	5	Minor	96	85	85		
Henderson, Karen L.	H.W. Bush	D.C.	Minor	101	51	51		1
Henry, Robert H.	Clinton	10	Minor	103	86	86		2
Higginbotham, A. Leon, Jr.	Carter	3	Minor	95	18	18		
Higginbotham, Patrick E.	Reagan	5	Minor	97	26	26		

Judge	President	Circuit	City	Congress	Days (by Congress)	Days (Total)	Prior Nominating Congress	ABA Rating
Hill, Robert M.	Reagan	5	Minor	98	11	11		
Holmes, Jerome A.	W. Bush	10	Minor	109	82	82		3
Howard, Jeffrey R.	W. Bush	1	Minor	107	264	264		4
Hug, Procter R., Jr.	Carter	9	Minor	95	17	17		
Hull, Frank M.	Clinton	11	Minor	105	78	78		1
Hutchinson, William D.	Reagan	3	Minor	100	40	40		
Johnson, Frank Minis, Jr.	Carter	5	Minor	96	78	78		
Johnson, Samuel D., Jr.	Carter	5	Minor	96	55	55		
Jolly, E. Grady	Reagan	5	Minor	97	26	26		
Jones, Edith H.	Reagan	5	Minor	99	35	198	98	
Jones, Nathaniel R.	Carter	6	Minor	96	37	37		
Jordan, Kent A.	W. Bush	3	Minor	109	163	163		1
Kanne, Michael S.	Reagan	7	Minor	100	106	106		
Keith, Damon J.	Carter	6	Minor	95	22	22		
Kelly, John D.	Clinton	8	Minor	105	185	185		3
Kelly, Paul J., Jr.	H.W. Bush	10	Minor	102	141	141		1
Kennedy, Cornelia G.	Carter	6	Minor	96	169	169		
Kethledge, Raymond M.	W. Bush	6	Minor	110	97	727		2
King, Carolyn D.	Carter	5	Minor	96	73	73		
King, Robert B.	Clinton	4	Minor	105	106	106		2
Kleinfeld, Andrew J.	H.W. Bush	9	Minor	102	112	112		4
Kravitch, Phyllis A.	Carter	5	Minor	96	61	61		
Krupansky, Robert B.	Reagan	6	Minor	97	35	35		
Leavy, Edward	Reagan	9	Minor	100	46	46		
Lewis, Timothy K.	H.W. Bush	3	Minor	102	21	21		2
Lipez, Kermit V.	Clinton	1	Minor	105	164	164		2
Logan, James K.	Carter	10	Minor	95	41	41		
Loken, James B.	H.W. Bush	8	Minor	101	32	32		2
Lourie, Alan D.	H.W. Bush	Fed.	Minor	101	71	71		2
Lucero, Carlos F.	Clinton	10	Minor	104	99	99		1
Lynch, Sandra L.	Clinton	1	Minor	104	65	185	103	1
Magill, Frank J.	Reagan	8	Minor	99	41	41		
Manion, Daniel A.	Reagan	7	Minor	99	125	125		

Judge	President	Circuit	City	Congress	Days (by Congress)	Days (Total)	Prior Nominating Congress	ABA Rating
Mansmann, Carol L.	Reagan	3	Minor	99	27	27		
Marcus, Stanley	Clinton	11	Minor	105	43	43		2
Martin, Boyce F., Jr.	Carter	6	Minor	96	112	112		
McConnell, Michael W.	W. Bush	10	Minor	107	555	555		1
McKay, Monroe G.	Carter	10	Minor	95	27	27		
McKeague, David W.	W. Bush	6	Minor	109	115	1309	107, 108, 109	1
McKee, Theodore A.	Clinton	3	Minor	103	78	78		4
McKeown, M. Margaret	Clinton	9	Minor	105	56	728	104	1
McLaughlin, Joseph M.	H.W. Bush	2	Minor	101	94	94		1
McMillian, Theodore	Carter	8	Minor	95	50	50		
Melloy, Michael J.	W. Bush	8	Minor	107	216	216		1
Merritt, Gilbert S., Jr.	Carter	6	Minor	95	65	65		
Michael, M. Blane	Clinton	4	Minor	103	55	55		1
Milburn, Herbert T.	Reagan	6	Minor	98	27	27		
Miner, Roger J.	Reagan	2	Minor	99	27	27		
Moore, Karen N.	Clinton	6	Minor	104	59	191	103	2
Motz, Diana J. G.	Clinton	4	Minor	103	139	139		1
Murnaghan, Francis D., Jr.	Carter	4	Minor	96	65	65		
Murphy, Diana E.	Clinton	8	Minor	103	71	71		1
Murphy, Michael R.	Clinton	10	Minor	104	17	17		1
Neilson, Susan B.	W. Bush	6	Minor	109	255	1449	107, 108, 109	1
Nelson, David A.	Reagan	6	Minor	99	37	37		
Nelson, Thomas G.	H.W. Bush	9	Minor	101	86	86		2
Newman, Jon O.	Carter	2	Minor	96	50	50		
Niemeyer, Paul V.	H.W. Bush	4	Minor	101	94	94		1
Norris, Alan E.	Reagan	6	Minor	99	45	45		
Nygaard, Richard L.	Reagan	3	Minor	100	142	142		
O'Brien, Terrence L.	W. Bush	10	Minor	107	256	256		2
O'Scannlain, Diarmuid F.	Reagan	9	Minor	99	45	45		
Owen, Priscilla R.	W. Bush	5	Minor	109	100	1477	107, 108, 109	1
Parker, Fred I.	Clinton	2	Minor	103	43	43		1
Parker, Robert M.	Clinton	5	Minor	103	139	139		2

Judge	President	Circuit	City	Congress	Days (by Congress)	Days (Total)	Prior Nominating Congress	ABA Rating
Phillips, James D., Jr.	Carter	4	Minor	95	22	22		
Politz, Henry A.	Carter	5	Minor	96	70	70		
Pooler, Rosemary S.	Clinton	2	Minor	105	208	208		3
Porfilio, John C.	Reagan	10	Minor	99	28	28		
Prado, Edward C.	W. Bush	5	Minor	108	84	84		1
Pryor, William H., Jr.	W. Bush	11	Minor	109	115	792	108	4
Rader, Randall R.	H.W. Bush	Fed.	Minor	101	52	52		3
Randolph, Arthur R.	H.W. Bush	D.C.	Minor	101	66	66		2
Rawlinson, Johnnie B.	Clinton	9	Minor	106	150	150		3
Reavley, Thomas M.	Carter	5	Minor	96	56	56		
Rendell, Marjorie O.	Clinton	3	Minor	105	262	262		1
Riley, William J.	W. Bush	8	Minor	107	71	71		1
Rogers, John M.	W. Bush	6	Minor	107	330	330		3
Roth, Jane R.	H.W. Bush	3	Minor	102	42	42		2
Rubin, Alvin B.	Carter	5	Minor	95	31	31		
Ryan, James L.	Reagan	6	Minor	99	37	37		
Schroeder, Mary M.	Carter	9	Minor	96	145	145		
Scirica, Anthony J.	Reagan	3	Minor	100	40	40		
Selya, Bruce M.	Reagan	1	Minor	99	12	12		
Sentelle, David B.	Reagan	D.C.	Minor	100	219	219		
Seymour, Stephanie K.	Carter	10	Minor	96	64	64		
Shedd, Dennis W.	W. Bush	4	Minor	107	559	559		2
Shepherd, Bobby E.	W. Bush	8	Minor	109	63	63		1
Siler, Eugene E., Jr.	H.W. Bush	6	Minor	102	85	85		1
Silverman, Barry G.	Clinton	9	Minor	105	81	81		3
Skopil, Otto R., Jr.	Carter	9	Minor	96	103	103		
Sloviter, Dolores K.	Carter	3	Minor	96	76	76		
Smith, D. Brooks	W. Bush	3	Minor	107	324	324		1
Smith, Jerry E.	Reagan	5	Minor	100	200	200		
Smith, Lavenski R.	W. Bush	8	Minor	107	417	417		3
Smith, N. Randy	W. Bush	9	Minor	110	30	426		1
Souter, D.	H.W. Bush	1	Minor	101	93	93		1
Southwick, Leslie	W. Bush	5	Minor	110	288	288		1

Judge	President	Circuit	City	Congress	Days (by Congress)	Days (Total)	Prior Nominating Congress	ABA Rating
Sprouse, James M.	Carter	4	Minor	96	68	68		
Stahl, Norman H.	H.W. Bush	1	Minor	102	78	78		1
Stapleton, Walter K.	Reagan	3	Minor	99	7	7		
Stewart, Carl E.	Clinton	5	Minor	103	99	99		2
Suhrheinrich, Richard F.	H.W. Bush	6	Minor	101	71	71		4
Sutton, Jeffrey S.	W. Bush	6	Minor	108	112	720	107	2
Sykes, Diane S.	W. Bush	7	Minor	108	223	223		2
Tacha, Deane R.	Reagan	10	Minor	99	46	46		
Tallman, Richard C.	Clinton	9	Minor	106	217	217		2
Tang, Thomas	Carter	9	Minor	95	39	39		
Tate, Albert, Jr.	Carter	5	Minor	96	65	65		
Thomas, Sidney R.	Clinton	9	Minor	104	167	167		1
Thompson, David R.	Reagan	9	Minor	99	70	70		
Tinder, John D.	W. Bush	7	Minor	110	154	154		1
Torruella, Juan R.	Reagan	1	Minor	98	63	63		
Traxler, William B., Jr.	Clinton	4	Minor	105	80	80		1
Tymkovich, Timothy M.	W. Bush	10	Minor	108	84	574	107	4
Van Antwerpen, Franklin S.	W. Bush	3	Minor	108	181	181		1
Vance, Robert S.	Carter	5	Minor	95	41	41		
Wellford, Harry W.	Reagan	6	Minor	97	24	24		
Wesley, Richard C.	W. Bush	2	Minor	108	98	98		1
White, Helene N.	W. Bush	6	Minor	110	70	70		2
Wiener, Jacques L., Jr.	H.W. Bush	5	Minor	101	112	620	100	1
Wilkins, William W.	Reagan	4	Minor	99	10	10		
Wilkinson, James H., III	Reagan	4	Minor	98	272	272		
Williams, Jerre Stockton	Carter	5	Minor	96	65	65		
Williams, Karen J.	H.W. Bush	4	Minor	102	31	31		2
Williams, Stephen F.	Reagan	D.C.	Minor	99	114	114		
Wilson, Charles R.	Clinton	11	Minor	106	64	64		2
Winter, Ralph K., Jr.	Reagan	2	Minor	97	21	21		
Wollman, Roger L.	Reagan	8	Minor	99	24	24		

Average Days: 104.03111 154.5867